

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

In the proceeding between

**KILIÇ İNŞAAT İTHALAT İHRACAT SANAYİ VE TİCARET ANONİM ŞİRKETİ**

Claimant

and

**TURKMENISTAN**

Respondent

**ICSID Case No. ARB/10/1**

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**AWARD**

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*Members of the Tribunal:*

Mr J. William Rowley QC (President)  
Professor William W. Park  
Professor Philippe Sands QC

*Secretary of the Tribunal:*

Ms Mairée Uran Bidegain

**Representing Claimant**

Robert Volterra  
Chris Stephen  
Tihomir Mak  
Bernhard Meier  
Volterra Fietta

Yasemin Çetinel  
Ayca Aydin  
Çetinel Law Firm

**Representing Respondent**

Peter M. Wolrich  
Ali R Gürsel  
Miriam K. Harwood  
Gabriela Alvarez Avila  
Claudia Frutos-Peterson  
Jennifer Morrison  
Zeynep Gunday  
Diora Ziyaeva

Gülperi Yörüker  
Sibel Yurtuttan  
Alev Gürel  
Berin Hickmet

Gürel Yörüker Law Offices

Curtis, Mallet-Prevost,  
Colt & Mosle LLP

*Date of dispatch to the Parties: 2 July 2013*

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## 1. INTRODUCTION

### 1.1 Scope of Award

1.1.1 This Award determines the single jurisdictional question that was agreed to be addressed following the Tribunal’s Decision on 7 May 2012 (the “**7 May 2012 Decision**”)<sup>1</sup> on Article VII.2 of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments which entered into force on 13 March 1997 (referred to, indistinctively as “**BIT**”, “**Turkey-Turkmenistan BIT**”, or “**Treaty**”). It concerns the effect, in this case, of Claimant’s failure to comply with the requirement for recourse by it to the courts of Turkmenistan before instituting these arbitration proceedings.

### 1.2 Procedural Background

1.2.1 On 30 December 2009, Claimant, Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi (also referred to as “**Kılıç**”), a company with registered offices in Istanbul, Turkey, filed a Request for Arbitration (“**Request**”) before the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) alleging breaches by Respondent (referred to indistinctively as “**Turkmenistan**” or “**Respondent**”) of the BIT.

1.2.2 The Request was registered by the Secretary-General of ICSID (the “Secretary-General”) on 19 January 2010, in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).

1.2.3 Claimant and Respondent are hereinafter collectively referred to as the “**parties**”. The parties’ respective representatives are listed above.

#### *The First Tribunal*

1.2.4 On 20 March 2010, Claimant informed the Centre that, pursuant to Rule 2(3) of the Centre’s Rule of Procedure for Arbitration Proceedings, it elected to have a tribunal

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<sup>1</sup> The 7 May 2012 Decision dealt with authentic versions/accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2.

constituted in accordance with Article 37(2)(b) of the ICSID Convention. The Centre acknowledged Claimant's election by letter dated 22 March 2010, and the parties proceeded with the appointment of the arbitrators.

- 1.2.5 On 7 December 2010, a tribunal ("**First Tribunal**") was constituted, comprising Professor William W. Park (USA), appointed by Claimant, Professor Philippe Sands QC (UK/France), appointed by Respondent, and Professor Emmanuel Gaillard (France), appointed as its President by the Chairman of the Administrative Council of ICSID, in accordance with Article 38 of the ICSID Convention. Ms Aïssatou Diop, ICSID, was designated to serve as Secretary of the Tribunal.
- 1.2.6 On 31 January 2011, the First Tribunal held a first session, alone without the parties, by telephone-conference, in order to meet the time limit for the Tribunal's first session set forth under Rule 13(1) of the Centre's Rules of Procedure for Arbitration Proceedings.

### *Objections to Jurisdiction*

- 1.2.7 On 11 February 2011, having been made aware of Respondent's objections to jurisdiction and proposal that these proceedings be bifurcated as between jurisdiction and merits, the First Tribunal invited the parties to provide submissions on the issue of the bifurcation of these proceedings.
- 1.2.8 On 22 February 2011, Respondent wrote to the First Tribunal setting out its brief submission on the nature of (but not justifications for) its objections to jurisdiction, as requested in the Tribunal's letter of 11 February 2011.
- 1.2.9 On 2 March 2011, Claimant wrote to the First Tribunal setting out its response to the First Tribunal's letter of 11 February 2011, and to Respondent's submission of 22 February 2011.

### *First Meeting*

- 1.2.10 On 14 March 2011, the First Tribunal held a procedural consultation with the parties ("**First Meeting**") by telephone-conference at 12:00 p.m., Washington, D.C. time.

1.2.11 During the course of the First Meeting, the parties confirmed, *inter alia*, that:

- (a) the rules applicable to this arbitration are the ICSID Rules of Procedure for Arbitration Proceedings as amended as of 10 April 2006 (“**Rules**”);
- (b) the First Tribunal had been constituted in accordance with the ICSID Convention and the Rules;
- (c) the proceedings would be held in Paris, France; and
- (d) the language of the proceedings would be English.

1.2.12 As regards the written and oral procedures to be adopted in the arbitration, after hearing each party’s oral presentation, the First Tribunal decided that:

- (a) Respondent would have three weeks to elaborate on the nature of each of the five grounds on which it based its objections to jurisdiction;
- (b) Claimant would have three weeks thereafter to respond;
- (c) in their respective submissions, each party was to provide alternative procedural calendars, one with bifurcation and one without; and
- (d) the First Tribunal would then decide on bifurcation.

#### ***The Parties’ Further Comments on Jurisdiction***

1.2.13 On 4 April 2011, Respondent provided further observations on the issue of bifurcation of the proceedings and the nature of its objections to jurisdiction, as directed by the Tribunal during the First Meeting.

1.2.14 On 25 April 2011, Claimant provided further observations on the issue of bifurcation of the proceedings and set out its response to Respondent’s letter of 4 April 2011, as directed by the Tribunal during the First Meeting.

### *The Second Tribunal*

- 1.2.15 On 2 May 2011, Professor Gaillard resigned from the Tribunal. On 3 May 2011, the Secretary-General notified the parties of the vacancy on the First Tribunal and suspended the proceeding in accordance with Rule 10(2).
- 1.2.16 On 24 May 2011, the First Tribunal was reconstituted (“**Tribunal**”), with Professor Park and Professor Sands continuing, and with the appointment, by the Chairman of the Administrative Council of ICSID, of Mr J. William Rowley QC (Canada), as its President. In accordance with Rule 12, the proceeding resumed on that same date.
- 1.2.17 On 24 August 2011, the Secretary-General announced to the parties and the Tribunal that Ms Diop would take a temporary leave of absence, and that Ms Mairée Uran Bidegain had been designated to serve as Secretary of the Tribunal during her absence. On 10 January 2012, the Secretary-General informed the parties and the Tribunal that Ms Mairée Uran Bidegain would continue serving as Secretary of the Tribunal on a permanent basis.

### *Decision on Bifurcation and Early Determination of BIT Issues*

- 1.2.18 On 30 June 2011, having considered the parties’ submissions on bifurcation, the Tribunal issued a reasoned decision on bifurcation, declining to direct bifurcation of the proceedings. In reaching this decision, the Tribunal made it clear that it had in no way pre-judged the outcome of any of the jurisdictional objections raised, that Respondent was fully entitled to maintain such objections as it considered appropriate, and that they would be addressed as joined to the merits of the dispute in the manner envisaged by Article 41 of the ICSID Convention. However, having regard to the parties’ differences concerning Article VII.2 of the BIT, and the significance of that issue, the Tribunal considered it would be appropriate, at an early stage, to determine:
- (a) the number of authentic versions of the BIT; and
  - (b) to the extent there are authentic version(s) of the BIT in languages other than English - accurate translations into English of any authentic version(s) of the BIT.

- 1.2.19 Mindful of the need for early resolution of these issues in order to avoid unnecessary cost and argument later in the proceedings, the Tribunal also indicated that it wished to explore further the meaning and effect of Article VII.2 of the BIT.
- 1.2.20 Having also considered the parties' respective proposed timetables, and bearing in mind that the case was registered with the Centre some 15 months earlier, the Tribunal established the timetable for the case, fixing all procedural steps up to and including the production of a hearing bundle on 29 October 2012. The hearing date was to be fixed at a later date.
- 1.2.21 As regards its questions concerning Article VII.2 of the BIT, referred to at 1.2.18-19 above ("**BIT Issues**"), the timetable provided for two rounds of simultaneous written submissions as follows:
- (a) by 1 August 2011, submissions on what constitutes authentic versions/accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2, together with documentary testimonial or expert evidence relied upon; and
  - (b) by 15 August 2011, simultaneous reply submissions on what constitutes authentic versions/accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2, together with documentary, testimonial or expert evidence relied upon.

### *Subsequent Procedural Matters*

- 1.2.22 On 13 July 2011, Claimant requested that the procedural calendar be extended by an additional step, to allow it to file a Rejoinder on Jurisdiction if Respondent submits its objections to jurisdiction with its Counter-Memorial on the Merits (making that pleading Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction).
- 1.2.23 On the same date, the Tribunal invited Respondent to submit its comments, if any, on Claimant's request by 18 July 2011, which Respondent provided in due course.
- 1.2.24 On 1 August 2011, the parties exchanged written submissions on the BIT Issues. Claimant's submission was supported by an email to Claimant from Mrs Zergul



Özbîlgiç, a report from Mr Fuat Kasimcan and an expert report from Professor Yusuf Çalışkan. Respondent's submission was supported by a legal opinion from Dr Emre Öktem and Dr Mehmet Karlı.

1.2.25 On 15 August 2011, the parties exchanged written reply submissions on the BIT Issues. Claimant's submission was supported by a report from Mr Ibrahim Uslu. Respondent's submission was supported by a second legal opinion from Dr Öktem and Dr Karlı and an expert report from Professor Jaklin Kornfilt.

1.2.26 On 8 September 2011, following consultation with the parties, and with their agreement, the Tribunal fixed the dates of 14-18 January 2013 for the oral hearing on the merits and jurisdiction - the hearing to take place at the World Bank's facilities in Paris, France.

1.2.27 On the same date, the Tribunal advised the parties that, unless they were content that the BIT Issues should be decided on the papers, the Tribunal considered that a one-day, in-person, oral hearing would be of assistance, to be attended by counsel and the parties' legal experts.

1.2.28 The Tribunal also advised the parties that, having considered the parties' submissions regarding Claimant's application to add a final (fifth) Memorial/pleading four weeks after Respondent's Rejoinder Memorial, it was not, for the moment, disposed to add the requested fifth memorial. The Tribunal noted that this was not a case in which jurisdictional objections would appear suddenly in the Counter-Memorial (Claimant having already been made aware of Respondent's jurisdictional objections through two sets of written exchanges). In these circumstances, the Tribunal noted that Claimant would be in a position to deal initially with Respondent's objections, to the extent that it wished, in its Memorial. However, should it turn out that any new objections were raised for the first time in Respondent's Counter-Memorial, the matter could be revisited.

1.2.29 On 15 September 2011, the parties commented on the Tribunal's suggestion to hold a one-day hearing on the BIT Issues.

1.2.30 On 23 September 2011, having considered the parties' comments, the Tribunal fixed 17 January 2012 for a one-day hearing in London, United Kingdom, on the BIT Issues. At the same time, it confirmed Paris, France, as the place for the substantive

hearing on 14-18 January 2013. The parties were also invited to discuss, with a view to agreeing, a proposal on the approach to/time allocation for the hearing on the BIT Issues.

- 1.2.31 Having been advised shortly thereafter of Mr Volterra's unavailability on 17 January 2012, and having confirmed the availability of all counsel, and their experts, on 20 January 2012, the Tribunal requested the parties to block 20 January 2012 for the BIT Issues hearing.
- 1.2.32 On 3 October 2011, Claimant wrote to the Centre stating that Mr Fatih Serbest had been dismissed as counsel of record for Claimant in the case.
- 1.2.33 On 4 October 2011, the Tribunal advised the parties that the hearing on BIT Issues in London, United Kingdom, was confirmed for 20 January 2012, starting at 10:00 a.m.
- 1.2.34 On that same date, Claimant advised the Centre that it had appointed Ms Yasemin Çetinel to act on its behalf as its legal representative along with Volterra Fietta (which firm had been on record from the start) in these proceedings.
- 1.2.35 On 24 October 2011, Claimant advised the Centre that the parties had agreed to amend the pleading schedule set out in the Tribunal's Procedural Order No. 1 of 30 June 2011, which agreement, amongst other things, would lead to a new hearing date - June 2013 being suggested. The parties requested the Tribunal to endorse this agreed schedule. Respondent agreed with the content of Claimant's communication on 25 October 2011.
- 1.2.36 On 4 November 2011, the Tribunal advised the parties that it was in general agreement with the new proposed timetable and confirmed its availability for a five-day hearing in Paris, France, commencing on 17 June 2013. The parties were also advised that their proposed new schedule was problematic with respect to the timetable for disclosure of documents. The parties were therefore requested to propose a slight adjustment. Once a new proposal had been agreed, the Tribunal indicated it would be pleased to consider it for endorsement.
- 1.2.37 By correspondence dated 2 November 2011, 25 November 2011 and 30 November 2011, the parties provided their proposals for the conduct of the 20 January 2012 BIT Issues hearing. Respondent proposed, *inter alia*, that the hearing should focus on

what the experts had to say. It favoured expert conferencing with the parties' legal experts, and suggested that its linguistic expert, Professor Kornfilt, attend for examination and subsequent questioning by Claimant. Claimant indicated that it did not require any of Respondent's experts to attend the hearing to be cross-examined and thus did not see the need for them to attend. Claimant also noted that Respondent had declined to request that Claimant make available any of its experts for cross-examination.

- 1.2.38 On 11 December 2011, the Tribunal advised the parties, *inter alia*, that it continued to feel that it would be helpful for the parties' legal experts to attend the hearing to enable the members of the Tribunal to raise questions directly with them. Accordingly, the Tribunal invited the parties to arrange for the attendance of their respective legal experts at the 20 January 2012 hearing. Since neither party had notified the other that it required the other parties' expert(s) for cross-examination, the Tribunal proposed that the legal experts appear together, to respond to such questions as the Tribunal might have. Counsel for the parties would then have the opportunity to ask questions arising from the answers given to the Tribunal's questions. Respondent was also invited to have its linguistic expert available by video-conference facility, against the event the Tribunal had questions.
- 1.2.39 On 13 December 2011, Respondent advised the Tribunal that it objected to the attendance of Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu, stating that the Tribunal had only required the legal experts to attend and these experts did not fit in such category, and that the appearance of these three officials of the Government of the Republic of Turkey, would contravene Article 27 of the ICSID Convention.
- 1.2.40 On 19 December 2011, following further correspondence with the parties relating to the conduct of the 20 January 2012 hearing, the Tribunal advised that there would be an opportunity for counsel to make brief opening statements, following which the experts were requested to be available for questions (there would be no need for introductory statements, or testimony in chief), following which there would be an opportunity for counsel to make brief closing statements.
- 1.2.41 As regards Respondent's objection to the attendance of Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu, based on Article 27 of the Convention, the Tribunal clarified that, when it issued its 11 December 2011 invitation, it principally had in mind the attendance

(for Claimant) of Professor Çalışkan. Nevertheless, it advised that it did not consider Respondent's objection to be well founded and that, if Claimant wished them to attend, they might do so. If they did, and should the Tribunal question any of them, counsel would be given the opportunity to ask follow-up questions.

1.2.42 On 23 December 2011, following further correspondence from the parties in which *inter alia*, Claimant did not state that it wished Mr Kasimcan, Mrs Özbilgiç and Mr Uslu to attend, the Tribunal confirmed that it did not feel that the attendance of the three officials would be sufficiently helpful as to warrant their travel to London, United Kingdom.

1.2.43 On that same date, Claimant advised the Tribunal that the parties had agreed to a further amendment of the pleading schedule. Whilst the proposed amendment would not affect the 20 January 2012 BIT Issues hearing, it would affect the planned merits/jurisdictional hearing of 14-18 June 2013. Amongst other things, a new hearing date was suggested for October 2013.

1.2.44 On 5 January 2012, following a number of exchanges between the Tribunal and the parties on the proposed new schedule, the Tribunal advised the parties that it would be sensible to discuss these matters in person, and to fix a new schedule that worked for all concerned during the hearing in London, United Kingdom, on 20 January 2012.

1.2.45 On 17 January 2012, Claimant wrote to the Centre, denying Respondent's assertion that the Turkish version of the BIT published on the Turkish Undersecretariat of the Treasury's website states that Turkish is one of the authentic languages in which the BIT was executed. A copy of the Turkish version of the BIT as downloaded from the website was attached.

1.2.46 On the same day, Respondent wrote to the Centre:

- (a) providing a revised certified translation into English of the authentic Russian version of the BIT (Exhibit R-1 (revised)), with a letter from the translators explaining the reason for the submission of the revised translation; and

- (b) advising that the Turkish version of the BIT that was on the Under-Secretariat's website in early August 2011 had indeed listed Turkish as an authentic language of the BIT.

### *The 20 January 2012 Hearing*

- 1.2.47 The BIT Issues hearing was held, as scheduled, in London on 20 January 2012, at the IDRC, 70 Fleet Street, London, EC4Y 1EU, United Kingdom (referred to indistinctively as “**January 2012 hearing**” or “**BIT Issues hearing**”). The January 2012 hearing was recorded and transcribed.
- 1.2.48 At the January 2012 hearing, the Tribunal heard oral testimony from the following expert presented by Claimant:
- (a) Professor Yusuf Çalışkan
- 1.2.49 The Tribunal also heard oral testimony from the following experts presented by Respondent:
- (a) Dr Emre Öktem
  - (b) Dr Mehmet Karlı
  - (c) Dr Jaklin Kornfilt
- 1.2.50 In the light of the parties' prior agreement and the Tribunal's directions, the available time at the January 2012 hearing was divided roughly equally.
- 1.2.51 Following the January 2012 hearing, the members of the Tribunal deliberated by various means of communications including a meeting in London, United Kingdom, on 20 January 2012 and by a telephone-conference thereafter. In reaching its conclusions in the Decision that was to follow, the Tribunal took into account all pleadings, documents, testimony, expert opinions and oral submissions filed or made to that point in the case.
- 1.2.52 In its 7 May 2012 Decision, for reasons set out therein, the Tribunal determined that:

- (a) there are two authentic versions of the BIT, being the English and Russian versions, both signed in Ashkabat, Turkmenistan, on 2 May 1992;
- (b) the translation into English of the Russian version of the BIT that is found in Exhibit R-1 (revised) is to be treated as accurate;
- (c) the meaning and effect of Article VII.2 of the BIT is that a concerned investor is required to submit its dispute to the courts of the Contracting Party with which a dispute has arisen, and must not have received a final award within one year from the date of submission of its case to the local courts, before it can institute arbitration proceedings in one of the fora in the manner permitted by Article VII.2; and
- (d) a decision on costs was deferred to a later stage of the arbitration.

1.2.53 The Tribunal also noted the apparent agreement of the parties that a decision should be made on jurisdiction, insofar as it relates to the meaning and effect of Article VII.2, as soon as reasonably possible in the event the Tribunal was to determine that prior recourse to the courts of Turkmenistan was mandatory under Article VII.2.

1.2.54 However, because the parties had not yet provided submissions on the effect of non-compliance with the provisions of Article VII.2 of the BIT, assuming it to require mandatory recourse to the courts of Turkmenistan in the present case, the Tribunal invited the parties to make submissions, within 10 days of the receipt of the 7 May 2012 Decision, as to whether they wished to have an opportunity to make written/oral submissions with respect to the consequences to be drawn from Claimant's non-compliance with the mandatory provisions of Article VII.2. In the event that the parties wished to do so, the Tribunal indicated that it would fix a timetable for further submissions on that point.

1.2.55 On 17 May 2012, each of the parties made proposals in response to the Tribunal's invitation (set out in paragraph 9.29 of its 7 May 2012 Decision) to comment on the opportunity to make written/oral submissions regarding the consequences to be drawn from Claimant's non-compliance with the mandatory provisions of Article VII.2.

- 1.2.56 In light of Claimant's confirmation that it wished to make a written submission on the effect of its decision not to submit its dispute to the courts of Turkmenistan, on 23 May 2012, the Tribunal invited the parties to confer to determine whether a jointly proposed approach and timetable for the determination of the Tribunal's jurisdiction in these circumstances could be agreed.
- 1.2.57 On 1 June 2012, the parties responded to the Tribunal's request of 23 May 2012. Claimant stated that "there remain a range of *prima facie* bases for the jurisdiction of the Centre that have been before the Tribunal and the Respondent for a considerable period of time. These apply notwithstanding the Tribunal's decision on Article VII.2 of the BIT" and that the Tribunal should "... reconsider its last communication to the Parties and prepare a procedural order consistent with the ICSID Convention and arbitral rules, the procedural rights of the Claimant and its own obligations." Respondent indicated that, should Claimant wish to make further submissions on the jurisdictional issue associated with its non-compliance with the provisions of Article VII.2, it would reply to any such submissions in accordance with an appropriate procedure to be agreed upon.
- 1.2.58 On 16 June 2012, the Tribunal took note of the views expressed by the parties on 1 June 2012. It also noted that, during the January 2012 hearing, both parties took the position that the jurisdictional effect of Claimant's admitted non-compliance with the mandatory provisions of Article VII.2 (which could be determinative of the Tribunal's jurisdiction in this case) called for an appropriately speedy determination. The Tribunal therefore again invited the parties to consult with a view to proposing an agreed process and timetable for addressing the single jurisdictional question of the effect in this case of the requirement for prior recourse to the courts of Turkmenistan. The parties were requested to revert to the Tribunal by close of business, London time, on 29 June 2012.
- 1.2.59 On 29 June 2012, the parties wrote separately to the Tribunal. The parties did not share a common view. Respondent set out a proposal and timetable for submissions on the question. Claimant did not set out a proposal.
- 1.2.60 On 5 July 2012, having considered the parties' submissions of 17 May 2012, 1 June 2012 and 29 June 2012, the Tribunal proposed a first timetable which it considered would provide the parties with a full and fair opportunity to address the single

jurisdictional question. In light of the parties' prior commitments, the following timetable was finally adopted by the Tribunal on 6 July 2012 and further confirmed and amended on 16 July 2012:

- (a) 6 August 2012: Respondent's Memorial;
- (b) 3 September 2012: Claimant's Counter-Memorial;
- (c) 1 October 2012: Respondent's Reply;
- (d) 29 October 2012: Claimant's Rejoinder; and
- (e) 7 December 2012: one day oral hearing in London, United Kingdom (with the afternoon and early evening of 6 December 2012 to be held against possible need).

1.2.61 On 18 July 2012, following further correspondence with the parties, and Respondent's agreement to file its Memorial one week earlier than the date contemplated in the Tribunal's timetable (*i.e.*, on 30 July 2012 instead of 6 August 2012), Claimant was given four weeks from 30 July 2012 to file its Counter-Memorial (*i.e.*, on 27 August 2012) and each party was given five weeks sequentially thereafter to file its second pleading (*i.e.*, Respondent's Reply on 1 October 2012 and Claimant's Rejoinder on 5 November 2012).

1.2.62 On 30 July 2012, Respondent filed its Memorial on the Effects of Claimant's Non-Compliance with Article VII.2 of the Turkey-Turkmenistan BIT ("**Respondent's Memorial**").

1.2.63 On 27 August 2012, Claimant filed its Counter-Memorial With Respect to the Consequences to be Drawn from the Tribunal's Ruling of Article VII.2 of the BIT ("**Claimant's Counter-Memorial**"), together with a witness statement from Mr Osman Arslan, dated 27 August 2012.

1.2.64 On 1 October 2012, Respondent filed its Reply Memorial on the Effects of Claimant's Non-Compliance with the Mandatory Provisions of Article VII.2 of the BIT ("**Respondent's Reply Memorial**").



- 1.2.65 On 5 November 2012, Claimant filed its Rejoinder with Respect to the Consequences to be Drawn from the Tribunal’s Ruling on Article VII.2 (“**Claimant’s Rejoinder**”), together with a second witness statement from Mr Osman Arslan, dated 1 November 2012.
- 1.2.66 On 13 November 2012, the Tribunal wrote to the parties suggesting a timetable for the 7 December 2012 oral hearing (“**December 2012 hearing**”) and requesting the parties’ comments on the Tribunal’s proposed approach to the day, to be received not later than Monday, 19 November 2012.
- 1.2.67 On 20 November 2012, neither of the parties having suggested a different approach or timetable for the December 2012 hearing, the Tribunal confirmed that the hearing would commence at 9:00 a.m., on 7 December 2012, at the IDRC, 70 Fleet Street, London, United Kingdom, as well as the proposed timetable for the hearing.

### *The December 2012 Hearing*

- 1.2.68 The December 2012 hearing, dealing with the single question of the jurisdictional effect of the requirement for prior recourse to the courts of Turkmenistan, was held, as scheduled, in London at the IDRC, 70 Fleet Street, London, EC4Y 1EU, United Kingdom. No oral testimony was taken and the hearing was limited to oral submissions from the parties and responses from the parties to the Tribunal’s questions.
- 1.2.69 In the light of the parties’ prior agreement, and at the Tribunal’s directions, the available time at the December 2012 hearing was divided roughly equally.
- 1.2.70 At the close of the hearing, the Tribunal offered the parties the opportunity to file a 10-page submission on “the ability of this Tribunal to suspend these proceedings in the event that it would determine that the MFN provision does not encompass dispute resolution, and in the event it would determine that recourse to the Turkmenistan courts would not be futile.”<sup>2</sup>
- 1.2.71 On 21 December 2012, each of the parties filed short post-hearing briefs.

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<sup>2</sup> Transcript of 7 December 2012 hearing, p. 192/13-17.

- 1.2.72 On 8 January 2013, each of the parties filed its claim for costs.
- 1.2.73 On 18 January 2013, each of the parties commented on the other's claim for costs.
- 1.2.74 Following the December 2012 hearing, the members of the Tribunal deliberated by various means of communications, including a meeting in London, United Kingdom on 7 December 2012 and by telephone-conference thereafter. In reaching its conclusions in this Award, the Tribunal has taken into account the 7 May 2012 Decision, all pleadings, documents, testimony and oral submissions filed or made respecting or which relate to the single jurisdictional question.
- 1.2.75 The 7 May 2012 Decision is incorporated in this Award as Annex A, and constitutes an integral part thereof.
- 1.2.76 Throughout the course of these proceedings, the Tribunal has been greatly assisted by the submissions of counsel, who, in turn, were helped by many others whose names do not appear in the transcriptions of the hearings. It is, therefore, appropriate at the beginning of this Award to record our appreciation of the excellent efforts which counsel for the disputing parties have brought to bear during these proceedings, together with their respective assistants and other advisers.

## **2. FACTS**

### **2.1 The Tribunal's Approach to the Facts**

- 2.1.1 A review of disputing parties' submissions, witness statements and documentary exhibits indicates, for present purposes, that, with few exceptions, the facts out of which this dispute arises are either agreed, or not seriously disputed. Put another way, most of the differences between the parties relate to the parties' different approaches to the proper construction of the BIT and the state of Respondent's court system.
- 2.1.2 We set out below a summary of the facts most relevant to the single jurisdictional question dealt with in this Award – either as agreed, not disputed or determined by the Tribunal.

## 2.2 Background

- 2.2.1 The BIT was signed on 2 May 1992 in Ashgabat, the capital of Turkmenistan, and entered into force on 13 March 1997.
- 2.2.2 Kiliç is a Turkish construction company which has been operating since 1979 in Turkey. It has operated in Turkmenistan since approximately November 1994.
- 2.2.3 Respondent has indicated that Claimant's standing as an "investor" will be put in issue as a matter of jurisdiction, if required, at a later stage of these proceedings. For the purpose of this Award, however, such standing is assumed.
- 2.2.4 From 1994 onwards, Kiliç entered into a number of building contracts in connection with projects in the Turkmen cities of Mary, Dashoguz and Ashgabat. Without seeking to be all inclusive, the parties to the relevant contracts were, Kiliç (or one of its affiliated companies) and various municipal governors, and other state officials.
- 2.2.5 During the course of construction of the various projects, issues arose between the contracting parties as to their respective performance under the relevant contracts.
- 2.2.6 During the course of 2009, Claimant wrote a number of letters to municipal and state officials in relation to the Dashoguz and Ashgabat, Turkmenistan based projects, seeking to resolve certain issues which had arisen in relation to those projects.<sup>3</sup>
- 2.2.7 Claimant said that its concerns in relation to the various contractual issues that had arisen were not resolved as a result of its various letters and, on 30 December 2009, it filed its Request with ICSID.
- 2.2.8 Without considering whether Claimant's Amicable Settlement Letters constituted notification in writing of disputes as required under Article VII.1, it is common ground that Respondent did not submit, or seek to submit its concerns/disputes to the courts of Turkmenistan prior to filing its Request.
- 2.2.9 Claimant did not file testamentary evidence seeking to explain why it chose not to submit its disputes to the courts of Turkmenistan.

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<sup>3</sup> This correspondence is described by Claimant as "Amicable Settlement Letters," *see*: Request, Annex E.

### **3. RESPONDENT’S CASE**

#### **3.1 Summary**

3.1.1 Respondent contends that under VII.2 of the BIT, an investor’s right to submit a dispute to international arbitration is subject to the condition that the dispute must first be submitted to the national courts of the host state, and that a decision has not been rendered within one year. This is said to be an essential element of Turkmenistan’s consent to international arbitration under the Treaty. As such, this constitutes a jurisdictional requirement. Respondent notes that it is uncontested, that Claimant did not bring the present dispute before the national courts of Turkmenistan. Claimant’s failure to comply with the mandatory provisions of Article VII.2 of the BIT thus deprives both ICSID and the Tribunal of jurisdiction. Respondent maintains that the Treaty’s most-favoured nation provisions (“MFN”) do not apply to its dispute resolution provisions. Thus, Claimant cannot use the dispute resolution provisions from other qualifying BITs to displace the requirement for prior recourse.

#### **3.2 Failure to Comply with Article VII.2 Conditions Deprives the Tribunal of Jurisdiction**

3.2.1 Respondent points out that it is a general principle of international law that international courts and tribunals may exercise jurisdiction over a state only with its consent – indeed, international arbitration is always premised on the parties’ consent to arbitrate. For ICSID to have jurisdiction over an investor’s claim, there must be an agreement to arbitrate between the host state and the foreign investor.

3.2.2 Article 25 of the ICSID Convention provides, in pertinent part that:

*“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”*

3.2.3 Article 26 of the ICSID Convention provides that Contracting States may expressly require the exhaustion of local administrative or judicial remedies as a condition of its

consent to arbitration under the Convention. In line with Article 26, Turkey and Turkmenistan expressly conditioned their consent to arbitration by providing for a mandatory mechanism requiring: first, a six-month period of settlement negotiations; then the submission of the dispute to national courts; and only thereafter, submission to an international tribunal if the national courts have not rendered a decision within one year. This is said to indicate that the Contracting Parties to the BIT did not intend for automatic, direct recourse to international arbitration.

- 3.2.4 For an arbitration agreement to exist, Respondent asserts that the investor must accept the host state's standing offer under the same terms and conditions. As stated by Christoph Schreuer:

*“[i]f the terms of acceptance do not correspond with the terms of the offer there is no perfected consent.”*<sup>4</sup>

- 3.2.5 Respondent notes that Professor Schreuer's analysis has been adopted by the *Wintershall* and *ICS* tribunals.<sup>5</sup>

- 3.2.6 In *Wintershall*, the tribunal considered Argentina's consent to ICSID arbitration was “conditioned upon” a claimant first submitting the dispute to the courts of Argentina.

*“The eighteen-month requirement of a proceeding before local courts (stipulated in Article 10(2)) is an essential preliminary step to the institution of ICSID Arbitration, under the Argentina-Germany BIT; it constitutes an integral part of the “standing offer” (“consent”) of the Host State, which must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration for resolving its dispute with the Host State under the concerned BIT.”*<sup>6</sup>  
(Respondent's emphasis)

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<sup>4</sup> Christoph Schreuer, *Consent to Arbitration*, UNCTAD Course on Dispute Settlement, International Centre for the Settlement of Investment Disputes, Module 2.3, Exhibit (“**Exh.**”) RL-14, p. 30.

<sup>5</sup> *Wintershall v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) (“*Wintershall*”), Exh. RL-5, ¶¶ 116, 127 & 160.2 and, *ICS Inspection and Control Services Limited (United Kingdom) and The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012) (“*ICS*”), Exh. RL-18, ¶¶ 270 & 272.

<sup>6</sup> *Wintershall*, Exh. RL-5, ¶ 160.(2).

3.2.7 The *Wintershall* tribunal further stated:

*“... a local-remedies rule may be lawfully provided for in the BIT – under the first part of Article 26; once so provided, as in Article 10(2), it becomes a condition of Argentina’s “consent” – which is, in effect, Argentina’s “offer” to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions inter alia of Article 10(2); an investor (like the Claimant) can accept the “offer” only as so conditioned.”<sup>7</sup> (Respondent’s emphasis)*

3.2.8 The *ICS* tribunal, in discussing the effects of the claimant’s non-compliance with the mandatory provisions of the UK-Argentina BIT requiring that the dispute be first submitted to the Courts of Argentina for a period of 18 months prior to commencing arbitration, noted that “[t]he formation of the agreement to arbitrate occurs through the acceptance by the investor of the standing offer to arbitrate found in the relevant investment treaty”<sup>8</sup> and that “[a]t the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms.”<sup>9</sup>

3.2.9 Having determined that the requirement to submit the dispute to the national courts of Argentina was mandatory, the *ICS* tribunal dealt with the distinction between admissibility and jurisdiction in the following terms:

*“The above determination that the prior submission of the investment dispute to the Argentine courts is mandatory still leaves the Tribunal faced with the question of what effect is to be given to non-compliance with this requirement. That question, in turn, depends on whether compliance with Article 8(1) is properly considered to be a question of jurisdiction, admissibility, or procedure. In particular, it is the line between jurisdiction and admissibility that is important.*

[...]

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<sup>7</sup> *Id.*, ¶ 116.

<sup>8</sup> *ICS*, Exh. RL-18, ¶ 270.

<sup>9</sup> *Id.*, ¶ 272.

[...] [t]he failure to respect the pre-condition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute. Not only has the Respondent specifically conditioned its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty have expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before a recourse to international arbitration is initiated. The Tribunal is simply not empowered to disregard these limits on its jurisdiction."<sup>10</sup> (Respondent's emphasis)

3.2.10 In the present case, Respondent argues that its offer to arbitrate was expressly conditioned on a qualifying investor's prior compliance with the mandatory provisions of Article VII.2. By choosing to forgo prior recourse to the courts of Turkmenistan, Claimant undoubtedly went beyond the limits of Turkmenistan's offer to arbitrate, as a result of which, there is no perfected consent to ICSID arbitration, no agreement to arbitrate and, therefore, no ICSID jurisdiction to hear the merits of this case.

3.2.11 In addition to *Wintershall* and *ICS*, Respondent relies on the decisions in *DRC v. Rwanda*, *Murphy Exploration v. Ecuador*, *Burlington Resources v. Ecuador* and *Enron v. Argentina* in support of its basic proposition.<sup>11</sup>

3.2.12 In the *Enron* case, Respondent points out that even though Enron had complied with the mandatory waiting period provided for in the US-Argentina BIT, the *Enron* tribunal nevertheless noted that:

*"[s]uch requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would*

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<sup>10</sup> *ICS*, Exh. RL-18, ¶¶ 252, 262 (internal citations omitted).

<sup>11</sup> See *Wintershall*, Exh. RL-5, ¶¶ 160; *ICS*, Exh. RL-18, ¶¶ 52, 262; *Armed Activities on the Territory of the Congo* (New Application: 2002), (*Democratic Republic of the Congo v. Rwanda*) Jurisdiction and Admissibility, Judgment / I.C.J. Case Reports 2006, Exh. RL-21, ¶ 88; *Murphy Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010), Exh. RL-6, ¶¶ 56-57; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), Exh. RL-7, ¶ 315; and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) ("*Enron*"), Exh. RL-8, ¶ 88.

result in a determination of lack of jurisdiction.”<sup>12</sup> (Respondent’s emphasis)

3.2.13 Respondent notes finally that the BIT’s requirement for prior recourse to the national courts of the host state as a pre-condition to resorting to international arbitration is an expression of the host state’s sovereignty. Here, Turkey and Turkmenistan unequivocally agreed to give local courts the opportunity, within one year of resolving the dispute. This type of provision, which finds justification in strong policy considerations, is both classic and reasonable.

### **3.3 Article VII.2’s Mandatory Requirements are not Over-Ridden by Article II.2’s MFN Provisions**

3.3.1 Respondent submits that Claimant’s attempt to create Turkmenistan’s consent to submit this dispute to ICSID by operation of the MFN clause included in Article II.2 of the BIT cannot succeed.

3.3.2 Respondent first maintains that for an investor to assert a claim for denial of MFN treatment, it must accept the state’s standing offer of international arbitration in accordance with the conditions of the basic treaty. Thus, as an investor wishing to raise an MFN claim under the BIT lacks standing to do so until it has fulfilled the domestic courts proviso of Article VII.2.

3.3.3 Respondent relies on Zachary Douglas’ 2010 article, “*The MFN Clause in Investment Arbitration: Treaty Interpretations off the Rails*” in which Douglas makes the case for a negative answer to the question of whether an MFN clause in a basic treaty (“**Basic Treaty**”) can be relied upon by an investor to expand the jurisdiction of an international tribunal established in accordance with the jurisdiction provisions in the basic treaty by incorporating the more favourable “treatment” reflected in the jurisdictional provisions in a third treaty (“**Comparator Treaty**”).

3.3.4 Douglas considers that for an investor to assert a claim for MFN treatment, it must first accept the state’s standing offer to arbitrate in accordance with the terms of the Basic Treaty. Douglas points out that for a claimant to assert a right to more favourable treatment by claiming through the MFN clause in the Basic Treaty:

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<sup>12</sup> *Enron*, Exh. RL-8, ¶ 88.



*“It can only do so by instituting arbitration proceedings and thus by accepting the terms of the standing offer of arbitration in the basic treaty. At that point an arbitration agreement between the claimant and the host state comes into existence. And the existence of that arbitration agreement is critical to the viability of the arbitration regime envisaged by the investment treaty.”*<sup>13</sup>

3.3.5 In the recent *Daimler* award, the tribunal raised the question of “when, chronologically speaking, does an aggrieved investor acquire standing to raise an MFN claim before an investor-State arbitral tribunal under [the Basic Treaty’s arbitral clause]?”<sup>14</sup>

3.3.6 The *Daimler* tribunal’s answer to its own question was that, for an MFN clause to operate, the claimant had first to satisfy the necessary condition precedent for Argentina’s consent to international arbitration to exist. In pertinent part, it concluded:

*“To put it more concretely, since the Claimant has not yet satisfied the necessary condition precedent to Argentina’s consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the tribunal with the necessary jurisdiction. (emphasis in original)*

[...]

*Argentina’s consent to international arbitration is contained within the same instrument as the MFN guarantees giving rise to some of the Claimant’s jurisdictional arguments. But the physical location (external instrument versus within the same treaty) of a State’s consent to a particular type of dispute resolution does not eviscerate the requirement, stressed by the ICJ, that the State must have consented to*

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<sup>13</sup> Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 *JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT* 97 (2011), Exh. RL-25, p. 107 (emphasis added by Respondent).

<sup>14</sup> *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) (“*Daimler*”), Exh. RL-28, ¶ 199.

*the particular type of dispute settlement in question before the claimant may raise any MFN claims before the designated forum. According to this logic, the Claimant may not yet have standing to raise any MFN arguments at all before the Tribunal.”<sup>15</sup> (Respondent’s emphasis of last sentence)*

The tribunal concluded:

*“[t]he Claimant does not yet have standing to assert its claims under the German-Argentine BIT, because it has not yet satisfied the Treaty’s Article 10 conditions precedent to invoke international arbitration. As such, the Tribunal lacks jurisdiction at present to entertain the Claimant’s MFN or any other claim.”<sup>16</sup>*

3.3.7 Respondent concludes, on this point, that Claimant’s deliberate choice not to comply with the Article VII.2 precondition to Turkmenistan’s consent to ICSID arbitration results in there being no perfected consent to ICSID arbitration, and therefore no jurisdiction of the Tribunal to entertain any of the Claimant’s claims, including its MFN claim.

### ***The BIT’s MFN Clause Does Not Cover Dispute Resolution Provisions***

3.3.8 In the event that the Tribunal were to find that it has jurisdiction to consider Claimant’s MFN-based right of immediate access to ICSID arbitration, Respondent contends that the Article II.2 MFN clause cannot operate to displace mandatory prerequisites to Turkmenistan’s consent in the absence of the BIT parties having explicitly so agreed.

3.3.9 Respondent refers to the two distinct approaches in the different decisions rendered on the application of MFN clauses to dispute resolution provisions (“**DRPs**”) – the first beginning with *Maffezini* (which proceeds on the basis that DRPs fall within the scope of an MFN clause in a BIT, unless the contrary is plainly demonstrated);<sup>17</sup> the second,

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<sup>15</sup> *Id.*, ¶¶ 200-204.

<sup>16</sup> *Id.*, ¶ 281.

<sup>17</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) (“*Maffezini*”), Exh. CL-18.

beginning with *Salini*,<sup>18</sup> followed by *Plama*<sup>19</sup> and others, (to ... the effect that “Contracting States cannot be presumed to have agreed that these provisions could be displaced by incorporating DRPs from other treaties negotiated by the host state with a different party and in an entirely different context”).<sup>20</sup>

3.3.10 In *Plama*, the tribunal rejected the claimant’s attempt to broaden the scope of jurisdiction of the Basic Treaty by operation of the MFN clause contained in Bulgaria’s BIT with Finland, holding that:

*“[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”*<sup>21</sup>

3.3.11 The *Plama* tribunal expressly criticised and refused to follow *Maffezini* on the point. It went on to state:

*“[D]ispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.”*<sup>22</sup>

3.3.12 Respondent argues that the *Maffezini* line of decisions, relied upon by Claimant, has been strongly criticised. In any event, the *Maffezini* holding is said not to support Claimant’s case.

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<sup>18</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004) (“*Salini*”), Exh. RL-31.

<sup>19</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (8 February 2005) (“*Plama*”), Exh. RL-9.

<sup>20</sup> Respondent’s Reply Memorial, ¶ 20 (citing *Plama* ¶ 207).

<sup>21</sup> *Plama* Exh. RL-9, ¶ 223. As highlighted by Respondent, “the tribunal in *Plama* noted that as a ‘reaction’ to the ‘expansive interpretation made in the *Maffezini* case,’ a number of States subsequently negotiated specific exclusionary language in their treaties so as to avoid similar interpretations.” Respondent’s Reply Memorial, FN 42 (citing to *Plama* ¶ 203).

<sup>22</sup> *Plama*, Exh. RL-9, ¶ 207.

- 3.3.13 Respondent points out that the *Maffezini* tribunal based its reasoning on the broad MFN clause that was contained in the BIT at issue in that case, which expressly applied to “all matters subject to this Agreement.”<sup>23</sup> The MFN clause in the present case does not cover “all matters subject to” the BIT.
- 3.3.14 Respondent draws attention to the *Maffezini* tribunal’s expression of caution against over-extending MFN clauses, which “should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question,” including conditions requiring “exhaustion of local remedies,” which it recognised could lead to “disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions ...”<sup>24</sup>
- 3.3.15 Arguing that the *Maffezini* line of decisions have been strongly criticised by both scholars and tribunals, Respondent points to Douglas’ observation that: “[t]he *Maffezini* decision represents a point of departure from the existing conception of the function of MFN clauses in international law,”<sup>25</sup> and that investment treaty tribunals which have followed this approach “have attempted to convert the fiction of automatic incorporation into a reality by pretending that the terms of their own jurisdiction in the basic treaty are rewritten before the commencement of proceedings by reference to the provisions of a third treaty. The claimant/investor is not making a claim for MFN treatment but is rather being permitted to enforce this fiction. This is contrary to general principle and authority ...”<sup>26</sup>
- 3.3.16 Commenting on the *Siemens* decision, on which Claimant relies heavily in its Counter-Memorial, Respondent notes that the tribunal there adopted the *Maffezini* approach without even analysing the nature of the dispute settlement clause in the Basic Treaty. Indeed, the *Siemens* tribunal went so far as to state that “the purpose of

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<sup>23</sup> *Maffezini*, Exh. CL-18, ¶ 53.

<sup>24</sup> *Id.*, ¶¶ 62-63.

<sup>25</sup> Douglas, *The MFN Clause in Investment Arbitration*, n. 13, Exh. RL-25, p. 102.

<sup>26</sup> *Id.*, p. 108.

the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted.”<sup>27</sup> (Respondent’s emphasis)

3.3.17 Respondent also points out that Professor Bello Janeiro, co-arbitrator appointed by Argentina in the *Siemens* case, subsequently sat as co-arbitrator in the *Daimler* case which reached the opposite conclusion. In that case, Professor Janeiro submitted a concurring opinion in which he subscribed fully to the conclusion that an MFN clause could not over-ride the mandatory requirement of first submitting the dispute to the local courts of the host state. He also explained his change of view on the question since the *Siemens* decision.

3.3.18 In summary, Respondent submits that it cannot be presumed that DRPs and, *a fortiori*, mandatory prerequisites to the state’s consent to ICSID arbitration fall within the scope of an MFN clause included in a BIT, unless the contrary is plainly demonstrated. Finding otherwise, it is said, would negate the basic international law principle that a State’s consent to arbitrate must be clear and unequivocal. Here there is no clear and unequivocal intention to apply MFN clause to dispute resolution matters.

3.3.19 Respondent contends that Article II does not encompass the DRPs which are found in Article VII.2. Article II provides, in pertinent part:

*“1. Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations.*

*2. Each party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.*

[...]

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<sup>27</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction (3 August 2004) (“*Siemens*”), Exh. CL-15, ¶ 106.

4. *The provisions of this Article shall have no effect in relation to the following agreements entered into by either of the Parties.*

(a) *relating to any existing or future customs unions, regional economic organization or similar international agreements.*

(b) *relating wholly or mainly to taxation.*”<sup>28</sup>

3.3.20 Respondent observes that the Tribunal, in interpreting the BIT and specifically Article II, must apply the 1969 Vienna Convention on the Law of Treaties (“VCLT”), according to which the starting point is the text of the treaty itself.

3.3.21 As set forth in Article 31.1 of the VCLT, “[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.”

3.3.22 Respondent points out that the text of Article II does not, directly or by reference, refer to dispute resolution matters. In light of the *Plama* line of decisions, and consistent with the principle that the requirement that the state consent be clear and unequivocal, the absence of any explicit reference to DRPs in the text of Article II.2 excludes that the DRPs found in Article VII.2 fall within the scope of the MFN clause.

3.3.23 Respondent points out that each of the tribunals in *Plama*, *Wintershall*, *Salini* and *Telenor*<sup>29</sup> observed that the language of the MFN clause in *Maffezini* was broad referring to “all matters subject to this Agreement” which was not true of the MFN clause in their cases.

3.3.24 Likewise, in the *Suez-InterAgua*s<sup>30</sup> and *Gas Natural*<sup>31</sup> cases on which Claimant is relying, the MFN clause in question also referred to “all matters governed” by the

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<sup>28</sup> BIT, Article II, Exhs. C-1, R-2.

<sup>29</sup> *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006), Exh. RL-32.

<sup>30</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales de Agua S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) (“*Suez-InterAgua*s”), Exh. CL-17, ¶¶ 53,63; see also, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Ltd. v The Argentine Republic, UNCITRAL*, Decision on Jurisdiction (3 August 2006) (“*Suez-AWG*”), Exh. CL-16.

relevant BIT. In the latter case, the clause reads: “[i]n all matters governed by the present BIT”. In *Suez-AWG*, the clause of the Argentine-Spain BIT also contains the words “in all matters governed by this Agreement.”<sup>32</sup> Similarly, in *Impregilo*, the majority relied on a broad MFN clause that extended its scope to “all other matters regulated by this Agreement” to justify importation of dispute settlement provisions from another BIT.<sup>33</sup> The *Impregilo* tribunal also noted the cases that had interpreted such broad MFN language similarly.<sup>34</sup>

3.3.25 By contrast, Respondent points to the fact that the MFN clause in the BIT does not contain the phrase “all matters” found in *Maffezini* and the other cases which take its line. Accordingly, even under the *Maffezini* approach, the MFN clause here would still not support importation of dispute resolution clauses from other BITs.

3.3.26 Respondent also asserts that the word “treatment” does not encompass dispute resolution matters. It points out that the Treaty does not define the term “treatment”, and says that Claimant’s interpretation of Article II.2 rests on the mere assertion that it refers broadly to “treatment” and that “... dispute resolution before a neutral forum, such as the present Tribunal, clearly falls within that ‘treatment’.”<sup>35</sup>

### ***Principle of Contemporaneity***

3.3.27 Respondent contends that, to appreciate whether Turkey and Turkmenistan intended the term “treatment” to cover the BIT’s DRPs, including the Article VII.2 precondition to the Contracting Parties’ consent to ICSID, the Tribunal must apply the classical rule of interpretation known as the Principle of Contemporaneity, which requires that the meaning and scope of a term be ascertained at the time when the Contracting Parties negotiated the Treaty.

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<sup>31</sup> *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) (“*Gas Natural*”), Exh. CL-19.

<sup>32</sup> *Suez-AWG*, Exh. CL-16, ¶ 53.

<sup>33</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) (“*Impregilo*”), Exh. CL-39, ¶ 12.

<sup>34</sup> *Id.* ¶¶ 104-105.

<sup>35</sup> Respondent’s Reply Memorial, ¶ 9; Claimant’s Counter-Memorial, ¶ 8.

- 3.3.28 At that time, in the early 1990's, Respondent says that scholars and arbitral tribunals, inspired by international commercial arbitration, insisted on the autonomy of the arbitration clause. As noted by the *Daimler* tribunal, "[t]reaty-based questions concerning the relation of MFN clauses to international investor-state dispute resolution mechanisms had not yet arisen and remained entirely unexplored."<sup>36</sup>
- 3.3.29 Respondent also refers to the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment, particularly Part III, devoted to "treatment", in which the prevailing view within the Development Committee of the World Bank, was that "treatment" was meant to cover principles of conduct applicable to the state hosting the foreign investment, with a view to safeguarding the investment from any discriminatory or unfair and inequitable practices within the host state's territory.
- 3.3.30 Respondent argues that the discussion of the word "treatment" in Part III covers fair and equitable treatment, treatment as favourable as that afforded to national investors in similar circumstances, full protection and security, non-discriminatory treatment, the prompt issuance of necessary licenses and permits, authorisations for the employment of key personnel, the free transfer of revenues earned by or related to the investment, the reinvestment of the proceeds of the investment within the territory of the host states, and finally, the prevention and control of corrupt business practices and the promotion of accountability and transparency in dealing with foreign investors.
- 3.3.31 Nothing in the World Bank Guidelines discussion of "treatment" alludes to the international – as opposed to domestic – settlement of disputes. To the extent that the Guidelines refer to international settlement of investor-state disputes, they do so only once and in an entirely separate and final section, which suggest that "treatment" and international dispute settlement were viewed at the time as separate issues.
- 3.3.32 Respondent refers to the fact that in both the *ICS* and *Daimler* cases the tribunals relied on the World Bank Guidelines to elaborate the meaning of the word "treatment" included in the MFN provisions of the Argentine-Germany BIT and found that, at the time of the conclusion of the BIT – which is contemporaneous with negotiation of the BIT – the term "treatment" was likely to refer to the host state's

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<sup>36</sup> *Daimler*, Exh. RL-28, ¶ 221.



direct treatment of the investment, and not to the conduct of any international arbitration arising out of that investment.

3.3.33 Further, Respondent says that, Claimant having not adduced any evidence to suggest that either Turkey or Turkmenistan maintained a different definition of treatment in the early 1990's, the only evidence presently on the record regarding the interpretation of the word "treatment" leads to the conclusion that it was meant by both Contracting Parties at the time of the conclusion of the BIT to refer to the host state's direct treatment of investment and not to the conduct of any international arbitration arising out of treatment.

#### ***The Exceptions to the MFN Clause do not Support Claimant's Position***

3.3.34 Respondent contends that Claimant's argument, based on the maxim *expressio unius est exclusio alterius* is without merit. This is because the exceptions found in Article II.4, which exclude from the scope of Article II, treatment in connection with "any existing or future customs unions, regional economic organization or similar international agreements,"<sup>37</sup> as well as international agreements "relating wholly or mainly to taxation,"<sup>38</sup> deal exclusively with the Contracting Parties' direct treatment of foreign investment.

#### ***Ejusdem Generis Principle Applies***

3.3.35 Respondent argues that the *ejusdem generis* principle limits the scope of the MFN clause to the subject matter to which such MFN clause refers. Thus, the nature of the exceptions corroborates the conclusion that the word "treatment" refers to the substantive rights accorded to foreign investors.

3.3.36 It is true that the exceptions do not suggest any exclusion of dispute resolution matters. However, it is equally true that the Contracting Parties may not be taken to have excluded DRPs, because they never imagined that DRPs could be covered by the MFN provision in the first place.

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<sup>37</sup> BIT, Article II.4 (a), Exhs. C-1; R-2.

<sup>38</sup> *Id.*, Article II.4 (b).

3.3.37 For example, with regard to the exceptions to the MFN clause included in the Germany-Argentina BIT, the *Daimler* tribunal said:

*“The present Tribunal does not, however, view the presence of these exceptions as an indication that the State Parties intended to include the Treaty’s international investor-State dispute resolution provisions within the scope of its MFN commitments.*

[...]

*[I]t cannot be denied that all of the typical exceptions to MFN treatment observed in international investment treaties (at least in treaties concluded prior to the advent of the Maffezini decision) deal exclusively with the contracting States’ direct treatment of foreign investments, never with the international resolution of investor State disputes arising out of that treatment. Overlooking the obvious differences between rights and remedies would seem to push the principle *expressio unius est exclusio alterius* too far. One cannot use the principle to prove the non-existence of apples based upon the existence of oranges. [...] Indeed, it seems more likely that the Contracting State Parties, acting as they were prior to Maffezini, did not explicitly exclude international investor-State dispute resolution provisions from the scope of the MFN clauses simply because they never considered such an invocation of the clause to be possible.”<sup>39</sup> (Respondent’s emphasis)*

3.3.38 In sum, Respondent argues that it is generally accepted that the *expressio unius est exclusio alterius* argument is not conclusive as to the scope of an MFN clause. As stated by the *ICS* tribunal, such an argument “may apply with equal force in either direction and only serves to confirm a prior conclusion about the effect of the MFN.”<sup>40</sup> In this case, rather than supporting Claimant’s unsubstantiated assertion that “dispute resolution before a neutral forum, such as the present Tribunal, clearly falls within [the] ‘treatment’”<sup>41</sup> of the BIT’s MFN clause, Respondent submits that the

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<sup>39</sup> *Daimler*, Exh. RL-28, ¶¶ 238-239 (internal citation omitted).

<sup>40</sup> *ICS*, Exh. RL-18, ¶ 313.

<sup>41</sup> Claimant’s Counter-Memorial, ¶ 8.

nature of these exceptions further confirms its position that, at the time of the conclusion of the Treaty, the term “treatment” was meant to refer to the host state’s direct treatment of investment, to the exclusion of international dispute settlement arising out of such “treatment”.

***Principle of Effectiveness Invalidates Claimant’s Interpretation of MFN Clause***

3.3.39 Respondent says that it is an established principle of international law, that treaties must be interpreted in the light of the principle of effectiveness of all their provisions.<sup>42</sup> However, Claimant’s interpretation of Article II.2 would make Article VII.2 *ab initio no effet utile*.

3.3.40 This is said to be illustrated by the fact that, when the BIT was entered into on 2 May 1992, Turkey had entered into 22 BITs with other countries, a number of which did not contain any requirement for the prior submission to the local courts of the host state.

3.3.41 In these circumstances, if Claimant’s interpretation of Article II.2 were to be accepted, Article VII.2 of the BIT would have been ineffectual, *ab initio*, as any Turkmen investor could have disregarded its prior recourse requirements at will from the moment the Treaty entered into force.

3.3.42 More importantly, “the prior recourse requirement of Article VII.2 of the Treaty would not have been reciprocal *ab initio* since Turkish investors in Turkmenistan would be bound to first submit their dispute to the Turkmen local courts [before initiating arbitration], while Turkmen investors in Turkey would not be required to submit their dispute to the Turkish courts.”<sup>43</sup>

3.3.43 Because it would make no sense for state parties to international treaties consciously to enter into non-reciprocal obligations, this confirms that, at the time of the signature of the BIT, Turkey and Turkmenistan did not – and could not – imagine that the Article VII.2’s mandatory requirement for prior submission of any dispute to the local courts of the host state could be over-ridden by operation of the MFN clause.

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<sup>42</sup> *VCLT*, Exh. RL-1, Article 31.

<sup>43</sup> Respondent’s Reply Memorial, ¶ 51.

***DRPs of Switzerland – Turkmenistan BIT are not “More Favourable” Than Those of the BIT***

3.3.44 Respondent argues that Turkish and Swiss investors (*i.e.*, the investors covered by the Comparator Treaty relied on by Claimant) are not in “similar situations” within the meaning of Article II.2. And, as explained by the UNCTAD, “the treatment afforded by a host State to foreign investors can only be appropriately compared if they are in objectively similar situations.”<sup>44</sup>

3.3.45 Article II.2 of the BIT expressly provides that the comparison must be made between the treatments respectively provided to foreign investors “in similar situations”:

*“Each party shall accord to these investments, once they are established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.”<sup>45</sup> (Respondent’s emphasis)*

3.3.46 Respondent notes that on 1 May 2002, there were 596 registered Turkish individuals or entities operating in Turkmenistan, but that only about 15 Swiss investors were currently active there.<sup>46</sup>

3.3.47 Further, Turkish investors in Turkmenistan are mainly operating in the construction field, individually or through small to medium-sized companies,<sup>47</sup> whereas Swiss

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<sup>44</sup> UNCTAD *Most-Favoured Nation Treatment*, p. 26, Exh. CL-1.

<sup>45</sup> BIT, Article II.2, Exhs. C-1; R-2.

<sup>46</sup> [A]s of 1 May 2002, 1708 foreign legal entities ... including 596 Turkish legal entities ... have been registered by the State in Turkmenistan.” In other words, 35% of all foreign investors in Turkmenistan are Turkish. See Letter from Mr Byashimmurat Hojamammedov, Ministry of Economy and Development of Turkmenistan, to the Ministry of Justice of Turkmenistan, dated 2 May 2012, Exh. R-16. See also, Embassy of Switzerland in Baku (Azerbaijan), *Turkmenistan Annual Report 2011*. The latest annual report of the Embassy of Switzerland in Baku on Turkmenistan, published on the OSEC (Centre of Expertise for Swiss Foreign Trade) website, describes both bilateral trade relationships and direct investments as “not very extensive,” specifying that only “around fifteen Swiss companies are present in Turkmenistan,” ¶ 3.2, Exh. R-17.

<sup>47</sup> Compilation of Articles Regarding Turkish Investors in the Construction Sector, see, e.g., *Türk şirketleri, Türkmenistan’da 3 milyar dolarlık proje üstlendi (Turkish Companies Undertook Projects Worth 3 Billion Dollars in Turkmenistan)*, *DUNYA NEWSPAPER* (21 June 2012), Exh. R-18.

investors seek to operate in the oil and gas and investment sectors, through larger entities.<sup>48</sup>

3.3.48 Respondent argues that while direct access to international arbitration may be seen by state parties to BITs as particularly adapted to high-stakes oil & gas or investment disputes, involving long-term contracts with a few major oil and banking companies, the same is not necessarily true for smaller construction disputes, involving smaller construction companies operating in much greater numbers. As such, Turkish and Swiss investors cannot be considered to be in “similar situations” within the meaning of Article II.2.

3.3.49 Respondent further argues that Claimant did not run the objective comparison required for the application of Article II.2. According to the UNCTAD, “a comparison and an objective test of less favourable treatment are required in order to assess the violation of a MFN treatment clause.”<sup>49</sup>

3.3.50 This position was followed in *Daimler*, where the tribunal there emphasised the need to apply an objective standard of comparison and refused to “endorse the Claimant’s proposed use of the MFN clause unless it could determine that the dispute resolution provisions of Article 10 of the German-Argentine BIT (the ‘Basic Treaty’) are objectively less favourable than those of Article X of the Chilean-Argentine BIT (‘the Comparator Treaty’).”<sup>50</sup>

3.3.51 Respondent argues that Claimant’s assertion that the direct access to ICSID arbitration offered under the Swiss-Turkmenistan BIT is “undeniably more favourable” than the dispute settlement mechanism provided for in the BIT is not sufficient to establish that the dispute resolution mechanism found in Article VII.2 is “objectively less favourable” than the one provided in Article VIII of the Switzerland-Turkmenistan BIT.

3.3.52 As the *ICS* tribunal found:

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<sup>48</sup> Turkmenistan and Switzerland have recently discussed “the possibilities of inter-state cooperation on a number of key areas, including the fuel-energy sector, the economy and investment and tourism, where Switzerland has rich experience.” *See*: Turkmen President to Discuss Cooperation Issues in Switzerland (16 July 2012), Exh. R-19.

<sup>49</sup> UNCTAD “Most-Favoured-Nation Treatment,” Exh. CL-1, p. 24.

<sup>50</sup> *Daimler*, Exh. RL-28, ¶ 244.

*“Although there are costs and delay involved in litigating before the Argentine courts if this fails to achieve a resolution, in many circumstances, this may be more favourable than direct access to international arbitration after only six months of amicable negotiations. The Tribunal therefore does not find that Lithuanian investors are necessarily accorded more favourable treatment as compared to the UK investor in Argentina. Accepting that ‘access to international arbitration has been a fundamental and constant desideratum for investment protection’ does not change this result.”<sup>51</sup> (Respondent’s emphasis)*

***Direct Access to ICSID Arbitration by Means of the MFN Clause Creates a New Dispute Resolution Mechanism***

3.3.53 Respondent says that Claimant’s argument, that its contended for use of the MFN provision does not create a new dispute resolution mechanism for the BIT, is invalidated by a simple comparison of the dispute resolution mechanism in the BIT and that in the Comparator BIT.

***Object and Purpose of the BIT Cannot Defeat Contracting Parties’ Choice for Disputes First to be Submitted to Local Courts***

3.3.54 Respondent maintains that Claimant’s assertions - that “denying the Claimant direct access to international arbitration would thwart the object and purpose of the BIT”<sup>52</sup> as “direct access to international arbitration is an important element of the protection afforded to investors”<sup>53</sup> - cannot prevail over the text of Article VII.2.

3.3.55 As was pointed out by the *Daimler* tribunal, BITs “strike a delicate balance among their various internal policy considerations.”<sup>54</sup> And, as the *Telenor* tribunal held, a tribunal’s task is “not to displace, by reference to general policy considerations

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<sup>51</sup> *ICS*, Exh. RL-18, ¶ 323.

<sup>52</sup> Claimant’s Counter-Memorial, Title III.C, p. 22.

<sup>53</sup> Claimant’s Counter-Memorial, ¶ 50.

<sup>54</sup> *Daimler*, Exh. RL-28, ¶ 164.

concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.”<sup>55</sup>

3.3.56 Faced with the argument that compliance with the 18-month prior recourse requirement provided under the Germany-Argentina BIT would defeat the purpose of the BIT, the *Wintershall* tribunal concluded that:

*“Undoubtedly, the promotion and protection of investment is an object or purpose of the BIT but that promotion and protection in the Argentina-Germany BIT is to be ‘on the basis of an agreement’ (i.e. on the basis of the terms of the Treaty – the BIT): which could not possibly exclude the provisions of Article 10(2). If the object and purpose had been to have an immediate unrestricted direct access to ICSID arbitration, then inclusion of Article 10(2) would have been otiose and superfluous. Therefore, the assumption and assertion made in this proceeding (and in some decisions of ICSID Tribunals as well), that since the object and purpose of a BIT is to protect and promote investments, unrestricted direct access to ICSID must be presumed, is contrary to the text (and context) of this BIT, i.e., the Argentina-Germany BIT.”<sup>56</sup> (emphasis in original)*

### **3.4 Prior Recourse to Courts of Turkmenistan Not Unavailable or Obviously Futile**

3.4.1 With respect to Claimant’s futility argument,<sup>57</sup> Respondent states that this Tribunal must find that recourse to Turkmenistan courts was unavailable or “obviously futile” at the time it should have been taken. This is said to be a very stringent test that has been defined as requiring that the local remedy in question be “patently unavailable”<sup>58</sup> or “completely ineffective”.<sup>59</sup>

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<sup>55</sup> *Telenor*, Exh. RL-32, ¶ 95.

<sup>56</sup> *Wintershall*, Exh. RL-5, ¶ 155. See also the *Daimler* tribunals’ finding to the same effect that “... the exact wording of dispute resolution clauses plays a key role, as such clauses are one of the privileged places where the imbalances between the interests of both parties are often precisely defined as a result of the treaty’s negotiation process.”, Exh. RL-28, ¶ 161.

<sup>57</sup> In its Counter-Memorial, Claimant argues that requiring it to seek redress in Respondent’s courts would be both ineffective and otiose. See Counter-Memorial, Section III.B, ¶¶ 38-48.

<sup>58</sup> *ICS*, Exh. RL-18, ¶ 269.

<sup>59</sup> *Id.*

3.4.2 Respondent asserts that few investor-state decisions provide guidance for the application of the futility test to the mandatory requirement to submit a dispute to the local courts of the host state.<sup>60</sup>

3.4.3 In *ICS*, where the tribunal rejected the claimant’s argument that the mandatory 18-month prior recourse requirement would have been futile, the tribunal held:

*“This is not a case of obvious futility, where the relief sought is patently unavailable within the Argentine legal system. There is an open and legitimate debate between the Parties’ experts as to availability of remedies within the Argentine legal system which may have resolved the dispute within 18 months. Therefore, in the absence of even a cursory attempt by the Claimant, the Tribunal simply cannot conclude that recourse to the Argentine courts would have been completely ineffective at resolving the dispute.”<sup>61</sup> (Respondent’s emphasis)*

3.4.4 Respondent notes that the “obvious futility” test applied by the *ICS* tribunal was inspired from international jurisprudence dealing with the international law rule of exhaustion of local remedies. However, this is not comparable to the present case, in which the obligation to go first to the local courts arises out of the mandatory provision of the BIT, and where Claimant has not taken a single procedural step in Turkmenistan.

3.4.5 As the *Maffezini* tribunal pointed out, Article X(3)(a) of the Spain-Argentina BIT “does not require the exhaustion of domestic remedies as that concept is understood under international law.”<sup>62</sup>

3.4.6 In any event, and as the *Wintershall* tribunal made clear, Article 44 of the ILC Draft Articles on State Responsibility was a “stipulation of international law applicable between States or State entities,”<sup>63</sup> which is irrelevant in the investor-state context.

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<sup>60</sup> See *ICS*, Exh. RL-18. See also, *Abaclat and Others v. Argentine Republic (formerly Giovanna A. Beccara and Others v. The Argentine Republic)*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (“*Abaclat*”), Exh. CL-32.

<sup>61</sup> *ICS*, Exh. RL-18, ¶ 269 (internal citations omitted).

<sup>62</sup> *Maffezini*, Exh. CL-18, ¶ 28. See also, *Siemens*, Exh. CL-15, ¶ 104, and *Gas Natural*, Exh. CL-19, ¶ 30.

<sup>63</sup> *Wintershall*, Exh. RL-5, ¶ 126.



3.4.7 In any event, Respondent contends that the international law rule of exhaustion of all available local remedies presupposes that the claim has at least been brought before the competent local courts, which is not the case here. Here, Claimant has chosen not to submit its dispute to the competent local courts in Turkmenistan and has not taken a single procedural step there prior to submitting this dispute to ICSID.

***Proper Recourse was Available in Turkmenistan***

3.4.8 Respondent says that the competent Turkmen court to hear Claimant’s dispute in this case was the Arbitrazh Court of Turkmenistan. Although the legal text governing proceedings before this court guarantee Claimant’s right to legal assistance and timely proceedings, Claimant deliberately chose not to submit this dispute to that court.

3.4.9 The Arbitrazh Court has jurisdiction to hear disputes arising out of economic or managerial relations, and most disputes relating to business activities fall within its jurisdiction. The Arbitrazh Court also has exclusive jurisdiction to hear cases involving a foreign, natural or legal person. Moreover, the 2009 Law on Courts states that the Arbitrazh Court is competent to resolve “matters arising out of international treaties of Turkmenistan.”<sup>64</sup>

3.4.10 The Arbitrazh Procedural Code of Turkmenistan (“**APC**”)<sup>65</sup> which, *inter alia*, governs the timing of proceedings, requires that the court must, within five days of receipt, either accept or decline a Statement of Claim. The court then has a maximum of one month to prepare for the hearing, and it must resolve a dispute within two months after a Statement of Claim is filed. If one of the parties is located outside of Turkmenistan, as is the case here, this period can be extended by up to three months. Under exceptional circumstances this period can be extended by up to a six months maximum.

3.4.11 The APC is further said to provide for specific guarantees relating to the independence of judges and fair trial in Arbitrazh proceedings. Moreover, interference in the work of the judges of the Arbitrazh Court is prohibited, and its proceedings are governed by adversarial principles and the principle of equality of

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<sup>64</sup> Law of Courts of Turkmenistan of 15 August 2009 (“**Law of Courts**”), Exh. RL-40, Article 34 (7).

<sup>65</sup> Exh. RL-39.

parties before the law and the court. Except in limited cases, proceedings are to be held in public and the court's judgements are announced publicly.

***Available Recourse before Respondent's Courts was not "Obviously Futile"***

- 3.4.12 Respondent asserts that Claimant's futility analysis is limited to broad statements that the Turkmen judiciary lacks independence and that the Turkmen authorities would have a particular aversion to Turkish investors.
- 3.4.13 Claimant's description of the Turkmen political and judicial system is said to be inaccurate and to ignore Turkmenistan's recent improvements of its institutions in the legal and judicial sphere.
- 3.4.14 Respondent argues that the new 2008 Constitution sets forth the principles of independence of judges, guarantees their immunity and prohibits any interference in their work. It also provides that justice is dispensed on the basis of equality and due process. Cases are heard by full benches, trials are public and the right to legal assistance is recognised at all stages of the proceedings.
- 3.4.15 The 2009 Law on Courts, which in some cases goes beyond the provisions of the Constitution, sets out the principle of independence of judges and prohibits any interference in their work, under criminal and administrative penalty. The law also excludes accountability of a judge before state authority or other entities with regard to the cases that he/she handles. The 2009 law also provides basic guarantees of fair trial and due process.
- 3.4.16 Respondent points out that these judicial reforms, which were supported by the German Federal Ministry of Economic Cooperation and Development, have been accompanied by several campaigns of legal training of Turkmen judges.<sup>66</sup>
- 3.4.17 In these circumstances, Claimant's broad statements regarding the lack of independence of the Turkmen judiciary do not constitute sufficient evidence of the "patent unavailability" or "complete ineffectiveness" of available recourse before the Arbitrazh Court required for the futility test to be met in this case.

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<sup>66</sup> Respondent's Reply, ¶ 97.

3.4.18 Respondent's recognised improvements of its legal and judicial system, notably propelled by the need to secure foreign investment, further invalidate Claimant's conclusion.

***Allegations of "Ill-Treatment" of Turkish Investors is False***

3.4.19 Respondent notes that Claimant relies on two witness statements of Mr Osman Arslan, one of its project managers, and further refers to Mr Omar Faruk Bozbey, a Turkish investor in Turkmenistan, who submitted claims in certain UN Human Rights Committee proceedings. However, rather than proving any lack of independence of the Turkmen judiciary, or any "particular aversion" to Turkish investors, Respondent says that the cases of Messrs Bozbey and Arslan prove a different and more logical reality.

3.4.20 Respondent maintains that the Mary City Court judgement that sentenced Mr Arslan, and the trial transcript, tell a very different story from Claimant's allegation that Mr Arslan was imprisoned "without due process."<sup>67</sup>

3.4.21 The relevant facts are that, after three collapses of scaffolding on 28 June, 13 October and 1 November 2008, at Claimant's Mary City main mosque construction project (for which Mr Arslan was the Chief Engineer), causing severe injury to no less than 19, and the death of one worker, Mr Arslan was charged with gross violations of Turkmen legal provisions on labour protection, construction norms and occupational safety.

3.4.22 His case was heard less than seven months after the last accident by three judges of the Mary City Court in Turkmenistan.

3.4.23 Contrary to what Mr Arslan claims in his witness statement, Respondent points to the record, which indicates that he received a copy of his indictment and fully familiarised himself with it. It is also said to show that he was assisted by an attorney, had the benefit of an interpreter and chose freely to plead guilty after listening to the presiding judge read the indictment and explain its content. Both Mr Arslan and his attorney were given the opportunity to object at each stage of the trial, and his

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<sup>67</sup> Exh. R-42 and Exh. R-43.

attorney pleaded extenuating circumstances, which were taken into account in the decision. In addition, Mr Arslan made his own statement, expressed regret and asked the judges to “take into account extenuating circumstances”.

- 3.4.24 Mr Arslan was found guilty of violating Article 151 of the Criminal Code of Turkmenistan, which sanctions “accidents resulting from the violation of the safety regulations by an individual ... entrusted with ... compliance with work safety regulations where his negligence causes harm to the health of another person.”<sup>68</sup>
- 3.4.25 Respondent says that Mr Arslan recognised his liability for not having applied these basic rules, and stated that he “failed to assign a corresponding foreman who would be supervising K. Komekov’s work at the workplace” and also “failed to designate a supervising employee and no one was put in charge of ensuring the correct use by the workers of the structure used in the execution of the works at height (scaffolding) from which K. Komekov fell, and also of the proper installation of the bottom part and covering sheets.”<sup>69</sup>
- 3.4.26 Respondent points out that Claimant, at its own initiative, paid for all hospital and other medical expenses incurred by its employee as a result of the accidents and paid indemnification of 627,200,000 manats to Mr Komekov’s heirs, which is clear evidence of Claimant’s and Mr Arslan’s admission of liability in that case.
- 3.4.27 Respondent draws the Tribunal’s attention to the fact that the Mary City Court relied on numerous witnesses and documentary evidence in support of its decision. All of which provided consistent accounts of the tragic events that occurred on the three days in question.
- 3.4.28 Finally, Respondent argues that Mr Arslan’s two-year sentence of imprisonment was reasonable in the light of the serious nature of the charges, and the fact that the accidents not only caused severe injuries to numerous of Claimant’s employees, but also resulted in the death of one of them. In reaching its conclusion, the Mary City Court took into account extenuating circumstances, including the fact that Mr Arslan admitted his guilt, was being convicted for the first time, and expressed his regret over criminal acts.

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<sup>68</sup> Indictment of Mr Osman Arslan, 16 May 2009, Exh. R-44, pp. 17-19 (of the English translation).

<sup>69</sup> *Id.*, Exh. R-44, p. 5.

- 3.4.29 In sum, Respondent says that nothing in the procedure, the legal basis of the decision or the factual support for that decision and the sentence supports Claimant’s allegation that Mr Arslan was subject to any “ill-treatment”.
- 3.4.30 With respect to Mr Bozbey’s claim before the UN Human Rights Committee, regarding arbitrary arrest and detention and discrimination, Respondent notes that the Human Rights Committee found them to be “unsubstantiated”.<sup>70</sup> The Committee also noted that Mr Bozbey had also been convicted in accordance with the domestic legislation of Turkmenistan and did not condemn or otherwise criticise his criminal conviction.
- 3.4.31 While the Committee did consider that Mr Bozbey’s allegations, that the trial was conducted in Turkmen without a Turkmen interpreter and his description of prison conditions, amounted to a violation of the ICCR, Respondent notes that, contrary to Mr Bozbey’s allegation and the ICCR proceedings, court documents indicate that Mr Bozbey was in fact provided with a Turkmen interpreter, and was represented by counsel. Moreover, Mr Bozbey’s own *curriculum vitae* lists Turkmen as one of his languages.
- 3.4.32 Respondent also points out that after the UN Committee communicated its views to Turkmenistan, the state launched an investigation of the alleged violations and produced a series of reports describing their findings. These reports established that Mr Bozbey was imprisoned with sanitary facilities, was provided with adequate food and water and often received parcels of food from relatives. He also had access to medical services and facilities, received several visits by family members and that his personal file did not record any complaints regarding his condition of imprisonment. The one report which recognised that prison facilities in the country are over-crowded also described the actions undertaken by the State to correct this deficiency.
- 3.4.33 Respondent also points to the recently (February 2012) signed bilateral agreement between Turkey and Turkmenistan on Legal Assistance in Civil and Criminal Matters (“**Legal Assistance Agreement**”).<sup>71</sup>

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<sup>70</sup> Respondent’s Reply, ¶ 133; Claimant’s Counter-Memorial, ¶ 46.

<sup>71</sup> Agreement on the Legal Assistance in Civil and Criminal Matters between Turkmenistan and the Republic of Turkey, dated 29 February 2012, Exh. R-54, Chapter II, sections 1, 3 and 4.

3.4.34 Respondent says that this Legal Assistance Agreement confirms Turkey's and Turkmenistan's mutual acceptance and respect of their respective court proceedings and shows that Turkey does not consider today that proceedings before Turkmenistan's courts are futile.

3.4.35 Finally, Respondent points out that this case is the first investor-state arbitration Turkmenistan is facing under a BIT that has a mandatory recourse to local courts provision. For a process to be found to be futile, Respondent submits that it must first be given a chance to work. Here, Respondent states that Claimant cannot point to a single foreign investor who went to the Turkmen courts and who was denied due process or received unfair treatment. There is simply no past record of decisions and therefore no "repetition of a uniform line of decisions adverse to the alien" which, according to Claimant's legal authorities, would support the admission of a futility argument in this case.<sup>72</sup>

3.4.36 Respondent says that it has not yet had the opportunity to show the international community how it would handle investment cases brought to its courts pursuant to a prior recourse requirement under the BIT. However, its desire to stimulate and secure foreign investment gives it a genuine interest in affording fair and effective local remedies to foreign investors operating in Turkmenistan.

### **3.5 Post-Hearing Submissions**

3.5.1 In response to the Tribunal's request that the parties set out their positions on the ability of the Tribunal to suspend these proceedings, in the event that the Tribunal concludes that the MFN provision does not encompass the DRPs, and that recourse to the Turkmen courts would not have been futile, Respondent submitted that it had demonstrated clearly that the Article VII.2 requirement of prior recourse to the local courts was a precondition to the Contracting Parties' consent to ICSID arbitration and constitutes a jurisdictional requirement.

3.5.2 Respondent referred to Article 26 of the ICSID Convention which states plainly that treaty provisions requiring prior recourse to local courts are conditions to the State's consent to arbitrate and, therefore, to the jurisdiction of ICSID and the Tribunal.

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<sup>72</sup> Amerasinghe, *Local Remedies in International Law* (Cambridge University Press) (2004), Exh. CL-28, chapter 8, pp. 206-207.

3.5.3 In pertinent part, Article 26 provides:

*“... A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.” (Respondent’s emphasis)*

3.5.4 Respondent points to the supportive conclusions to this effect by the tribunals in *ICS, Wintershall, Impregilo* and to *dicta* in *Maffezini*.

3.5.5 Respondent submits that there is nothing in the ordinary meaning of Article VII.2 of the BIT that would lead one to view the mandatory requirement of prior recourse to local courts as a mere matter of “admissibility”.

3.5.6 Since Claimant’s admitted failure to comply with Article VII.2 deprives the Tribunal of jurisdiction, Respondent submits that the Tribunal simply has no power to suspend these proceedings.

### **3.6 Conclusion**

3.6.1 In summary, this Tribunal is said to lack jurisdiction to hear the merits of this dispute due to Claimant’s failure to comply with the mandatory requirement of prior submission of the dispute to Turkmenistan’s courts under Article VII.2 of the BIT. As a result, Respondent requests this Tribunal to render an Award holding that it has no jurisdiction to hear the merits of the disputes and ordering Claimant to pay all costs related to this phase of the arbitration.

## **4. CLAIMANT’S CASE**

### **4.1 Summary**

4.1.1 Claimant’s overall position is that the Tribunal’s 7 May 2012 Decision has no effect on the jurisdictional issues in this case for two principal reasons. First, the Tribunal has jurisdiction over this dispute by virtue of the BIT’s MFN clause. Second, even if the BIT did not include Article II, mandatory prior recourse to Respondent’s courts by Claimant under Article VII.2 of the BIT would be ineffective and otiose.

## 4.2 Jurisdiction is Provided by Operation of the BIT's MFN Provision

4.2.1 Claimant says that the Tribunal has jurisdiction by virtue of the MFN clause contained in Article II.2 of the BIT which reads:

*“Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.”*<sup>73</sup>

4.2.2 When the Contracting Parties entered into the BIT, Claimant maintains it thereby acquired the rights which fall within the scope of the subject-matter of Article II.2, and Respondent agreed unconditionally to accord Claimant those rights.

### ***Claimant's Right to Choose International Arbitration is Not Subject to a Mandatory Recourse Precondition***

4.2.3 Claimant argues that the consent of the BIT's Contracting Parties to arbitrate before this Tribunal has been established by virtue of Article II of the BIT and Article 8 of the Agreement on the Promotion and reciprocal Protection of Investments entered into by Respondent and Switzerland on 15 May 2008 (“**Switzerland-Turkmenistan BIT**”). Respondent agreed to Article II.2 unconditionally, and cannot seek to import conditions from Article VII.2, the dispute resolution section of the BIT, into Article II.2.

4.2.4 Claimant asserts that dispute resolution before a neutral forum, such as the Tribunal, clearly falls within the scope of “treatment” and, thus, the protection offered unconditionally by Respondent to investments made by Turkish investors under the BIT.<sup>74</sup>

4.2.5 In the result, Article II.2 permits Claimant to rely upon DRPs contained in other BITs concluded by Respondent, to the extent that they provide more favourable treatment to investors than those included in the BIT.

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<sup>73</sup> BIT, Art. II.2, Exhs. C-1, R-2.

<sup>74</sup> Respondent has not put in issue at this stage Claimant's status as a qualifying Turkish investor in Turkmenistan, and it is assumed for the purposes of this Award.



4.2.6 As explained by Professor Schreuer in his Commentary on the ICSID Convention:

*“... an MFN clause [...] is intended to endow its beneficiary with rights that are additional to the rights contained in the basic treaty. The meaning of an MFN clause is that whoever is entitled to rely on it be granted rights accruing from a third party treaty even if these rights clearly go beyond the basic treaty.”<sup>75</sup>*

***The MFN Provision Entitles Claimant to Benefit from the Procedural Guarantees Contained in the Switzerland-Turkmenistan BIT***

4.2.7 Claimant relies on Article 8 of the Switzerland-Turkmenistan BIT which provides for direct recourse to international arbitration.<sup>76</sup>

4.2.8 Article 8 of that treaty provides:

**“Article 8**

***Disputes between a Contracting party and an investor of the other Contracting Party***

*(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned.*

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<sup>75</sup> Christopher Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press) (2009), Exh. CL-4, Article 25, ¶ 577. See also, United Nations Conference on Trade and Development, “Most-Favored-Nation Treatment” in *UNCTAD Series on Issues in International Investment Agreements II* (2010), Exh.CL-1, p. 45 (in most MFN treatment claims, tribunals have been directly applying the allegedly better treatment as opposed to finding a violation and compensating for the damage created by its violation.”). Gaillard, “*Establishing Jurisdiction Through a Most-Favored-Nation Clause*”, 233(105) *NEW YORK LAW JOURNAL* (June 2005), Exh. CL-5, p.1 (“Under an MFN clause, the beneficiary of the clause is entitled to a more favorable treatment that is accorded by the state parties to the treaty to the nationals of a third country. The clause contained in what is defined as the ‘basic treaty,’ which governs the rights of the beneficiary of the MFN clause. The more favorable treatment is found in “third-party treaty”) and Schill, “*Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*” in 27(2) *BERKELEY JOURNAL OF INTERNATIONAL LAW* (2009), Exh. CL-6, p. 504 (“An investor covered by a BIT with an MFG clause can [...] invoke the benefits granted to third-party nationals by another BIT of the host State and import them into its relationship with the host State”).

<sup>76</sup> Agreement between the Swiss Federal Council and the Government of Turkmenistan on the Promotion and Reciprocal Protection of Investments (15 May 2008), Exh. C-2.

*(2) If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute for settlement to:*

*(b) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on 18 March 1965 (hereinafter the “Convention of Washington”); or*

*(b) an ad hoc-arbitral [sic] tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).*

*(3) Each Contracting Party hereby consents to the submission of an investment dispute to international conciliation or arbitration.*

*(4) The Contracting Party which is party to the dispute shall at no time whatsoever during the procedures assert as a defence its immunity or the fact that the investor has received a compensation [sic] under an insurance contract covering the whole or part of the incurred damage.*

*(5) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the arbitral award.*

*(6) The arbitral award shall be final and binding for the parties to the dispute and shall be executed according to national law.”*

4.2.9 In accordance with the Tribunal’s 7 May 2012 Decision, Claimant notes that claims made against Respondent relating to a Turkish investment first need to be submitted to Turkmenistan’s courts before they can be submitted to an ICSID tribunal. By contrast, disputes between Swiss nationals and Respondent about investments made by Swiss investors in Turkmenistan do not first need to be submitted to Turkmenistan’s courts.

- 4.2.10 It follows, argues Claimant, that investments made by Swiss investors in Turkmenistan are treated more favourably than investments made by Turkish investors in Turkmenistan. Therefore, the MFN clause in the BIT enables Claimant to have direct access to ICSID arbitration, without the additional requirement that it first submit its dispute to Respondent's courts.
- 4.2.11 Claimant asserts that it is "almost common knowledge" that the right to submit a claim before an independent arbitral tribunal, rather than the courts of the host state, is indeed a fundamental basis of investment protection principles. In these circumstances, it should not be difficult to conclude that the direct recourse to an independent forum for the resolution of the disputes between an investor and the host state is a more favourable treatment than the conditional recourse to such forum.
- 4.2.12 To the extent that Respondent relies on the Tribunal's interpretation of Article VII.2, to argue that Turkmenistan's consent to arbitrate is conditioned by Claimant's prior recourse to its courts, Claimant says that the Tribunal's interpretation of Article VII.2 has no bearing on the effectiveness of other international obligations of Respondent, including those assumed under BIT's MFN clause.
- 4.2.13 Claimant contends that awards, decisions of international courts and tribunals and commentaries are consistent on the point that a state should not be allowed to apply procedural requirements to some foreign investors and not to others. It says, in such circumstances, that "the prevailing view seems to be the one that allows the investor to by-pass ... [the] procedural requirement."<sup>77</sup>
- 4.2.14 As recognised by the *Maffezini* tribunal, direct access to international arbitration is a crucial element of the protection afforded to foreign investments under BITs:

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<sup>77</sup> Guido S. Tawil, "Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration" in Binder, Kriebaum, Reinisch, Wittich, *INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* (Oxford University Press) (2009), Exh. CL-8, p. 13; see also Dolzer, Schreuer, *Principles of International Investment Law* (Oxford University Press) (2008), Exh. CL-9, pp. 254-255; Schill, "Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses" in 27(2) *BERKELEY JOURNAL OF INTERNATIONAL LAW* (2009), Exh. CL-6, pp. 530-3 and 566; and Paparinskis, "MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?" in 26 *ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL* (2011), Exh. CL-10, p. 28.

“... there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors.”<sup>78</sup>

4.2.15 Claimant relies on similar holdings by tribunals in *Gas Natural, Siemens, Suez-InterAguas, Suez-AWG* and *Hochtief*.<sup>79</sup>

4.2.16 Amongst others, Claimant points to the decision by the *Telefónica* tribunal, which had to decide whether the MFN treatment could free a Spanish investor from the obligation of resorting to the Argentinean courts before commencing an ICSID arbitration. That tribunal emphasised this principle:

*“The issue here is not, however, the extension of ICSID arbitration beyond what is provided for in the Argentina-Spain BIT by virtue of the reference to another BIT under the MFN clause. The issue is whether submission of the dispute to ICSID under the BIT may be exempted from the precondition of submitting the claim to the domestic courts of the host State, thanks to the application of the MFN clause [...] [T]he Tribunal considers that this requirement pertains to the ‘treatment’ that Argentina applies, ‘within its territory’ to Spanish investors wishing to complain before an ICSID arbitral tribunal about a breach of some substantive provision of the BIT in respect of their investment in Argentina. Therefore, such a requirement falls within the purview of the MFN clause [...] It follows that if such a requirement is not applied to Chilean (and other foreign) investors by Argentina under the respective BITs, then this requirement properly is inapplicable to Spanish investors.”*<sup>80</sup>

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<sup>78</sup> *Maffezini*, Exh. CL-18, ¶ 54.

<sup>79</sup> Claimant’s Counter-Memorial, ¶¶ 55 and 56.

<sup>80</sup> *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006), Exh. CL-11, ¶ 102. See also *Hochtief Aktiengesellschaft v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (“*Hochtief*”), Exh. CL-12, ¶ 81 (“[The MFN Treatment] is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.”) and *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006), (“*National Grid*”), Exh. CL-13, ¶ 92 (“It is evident that some claimants may have tried to extend and MFN clause beyond appropriate limits. For example, the situation in *Plama* involving an attempt to create consent to ICSID arbitration when none existed was foreseen in the possible exceptions to the operation of the MFN clause in *Maffezini*. But cases like *Plama* do

- 4.2.17 Claimant adopts the reasoning applied by the *Siemens* tribunal which allowed *Siemens* to rely on the dispute settlement provisions of the Chile-Argentina (Comparator) BIT based on the MFN clause based in the (Basic) Germany-Argentina BIT.
- 4.2.18 In that case, Argentina objected to the jurisdiction of the tribunal on the basis of the dispute settlement provisions in the Germany-Argentina BIT, which *prima facie* obliged *Siemens* to submit its dispute to the Argentinean courts for a period of 18 months before initiating arbitration proceedings. Although *Siemens* invoked the MFN clause of the Germany-Argentina BIT, to import the arguably more favourable dispute resolution provisions of the Chile-Argentina BIT, Argentina contended that settlement of disputes was not part of the protection accorded to investors, and thus not covered by the MFN's standard.
- 4.2.19 There, as does Claimant here, *Siemens* argued that the MFN clause was broadly worded, simply referring to "treatment". The MFN clause also contained certain exclusions relating to customs or economic unions, and of free trade areas. Claimant draws attention to the *Siemens* tribunal's conclusion that "the need for exceptions confirms the generality of the meaning of treatment ... rather than setting limits beyond what is said in the exceptions."<sup>81</sup>
- 4.2.20 Claimant says that the same reasoning applies in this case. The fact that the Contracting Parties agreed, in Article II.4, to exclude applications of the MFN clause in relation to "any existing or future customs unions, regional economic organization or similar international agreements" and to "taxation" confirms that all other procedural and substantive protections were intended to be covered by the MFN clause.
- 4.2.21 Claimant argues that this is a straightforward application of the principle *expressio unius est exclusio alterius*.
- 4.2.22 Claimant refers to the tribunal's decision in *National Grid*, another Argentinean case, which held that, since dispute resolution was not listed among the exceptions to the

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not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.")

<sup>81</sup> *Siemens*, Exh. CL-15, ¶ 85.

application of the relevant MFN clause, it implicitly fell within the scope of the MFN clause.<sup>82</sup>

4.2.23 As regards Respondent's argument that the Article II.4 exceptions deal with the direct treatment of foreign investments, which shows that the word "treatment" refers to the substantive rights accorded to the foreign investors as opposed to dispute resolution provisions in the treaty, Claimant relies on Judge Brower's dissent in *Daimler* in which he affirmed that international agreements may contain dispute settlement provisions and for this reason we may not conclude that the list of exceptions contain only substantive rights.

4.2.24 Claimant also says that in none of the BITs signed by Turkmenistan is there any clear exclusion of DRPs from the scope of MFN treatment. On the other hand, Turkey is said to have a practice of indicating specifically if it intends to exclude the DRPs from the scope of the MFN clause.

4.2.25 Claimant refers to Turkey's 2011 BIT with Azerbaijan, Article III.5 (c) of which reads:

*"Paragraphs (1) and (2) of this Article shall not apply in respect of dispute settlement provisions between an investor and the hosting Contracting Party laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory."*<sup>83</sup>

4.2.26 Claimant also points to BITs between Turkey and the UK and Turkmenistan and the UK as being confirmatory of this point. Article 3.3 of the Turkmenistan-UK BIT states that:

*"For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of*

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<sup>82</sup> The tribunal in *National Grid* referred explicitly to this principle, citing Bernhardt's Encyclopedia of Public International Law, which confirms that "[b]y its nature, the unconditional [MFN] clause, unless otherwise agreed, attracts all favors extended on whatever grounds by the granting State to the third State." *National Grid*, Exh. CL-13, ¶ 82 and FN 67.

<sup>83</sup> Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments, done in Izmir, 25 October 2011, Exh. C-28.

*Articles 1 to 11 of this Agreement [including DRP of Article VIII].”<sup>84</sup>*  
(Claimant’s emphasis)

4.2.27 As regards Respondent’s argument based on the absence of the term “all matters” to conclude on a narrow scope of MFN treatment, Claimant says that none of the BITs concluded by Turkey or Turkmenistan contain the “all matters” language. This proves that those parties, not only in terms of their present BIT, but in their complete BIT practice consider the word “treatment” is necessarily broad enough to guarantee MFN treatment to DRPs.

4.2.28 Claimant again relies on Judge Brower’s dissenting opinion in the *Daimler* case, dealing with the scope of the definition of “treatment”, where he states:

*“In this connection, the Award does not address adequately the fact that at least nine prior awards, either through detailed analysis or by necessary implication, have concluded that ‘treatment’ is broad enough to include dispute settlement ...”<sup>85</sup>*

***The BIT’s MFN Provision Does Not Create a New Dispute Resolution Mechanism for the BIT***

4.2.29 Claimant says that a proper understanding of Article II.2 does not require the Tribunal to consider whether it is providing for a dispute resolution mechanism that was not agreed upon or contemplated by the Contracting Parties to the BIT.

4.2.30 This is because the Contracting Parties already contemplated that disputes with Turkish investors could be resolved by an ICSID arbitration tribunal. The existence of Article II.2 means that Respondent has agreed, unconditionally, to put no additional hurdles to impede access to ICSID by Turkish nationals than there is in place for Swiss nationals to access ICSID. Were it to reach a different conclusion, Claimant says that the Tribunal would be allowing Respondent to accord Turkish

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<sup>84</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, 9 February 1995, Exh. C-7, Art. 3.3; Claimant’s Rejoinder, ¶ 108.

<sup>85</sup> Dissenting Opinion of Judge Charles N. Brower in *Daimler v. Argentine Republic* (ICSID Case No. ARB/05/1) (15 August 2012), Exh. CL-38, ¶ 18.

nationals a treatment inferior to that which it accords to Swiss nationals, in violation of its obligations under the BIT.

***Ejusdem Generis does not Preclude the Import of Dispute Resolution Procedures from Another BIT***

4.2.31 Claimant accepts that in accordance with the *ejusdem generis* principle, an MFN provision may only attract the rights conferred by other treaties which belong to the same matter or class of matter as to which clause itself relates.<sup>86</sup> In this case, however, because the BIT and the Switzerland-Turkmenistan BIT provide substantial protection to investments and also contain similar DRPs, they belong to the same class of matter.<sup>87</sup> It follows, says Claimant, that if a more favourable dispute resolution method is provided to an investor of a third state, Turkish or Turkmen investors may and should benefit from these provisions in accordance with the MFN treatment.

4.2.32 As regards Respondent's argument that the Contracting Parties' intention was to exclude DRPs from the scope of the MFN provision, Claimant says that Respondent submits no clear evidence to prove such argument. To the contrary, in the BIT, the Contracting Parties are said clearly to have intended to include DRPs in the MFN provision, since they did not limit the scope of the latter with any additional wording including territorial implications.<sup>88</sup>

***Principle of Contemporaneity not Determinative***

4.2.33 With respect to Respondent's citation of the World Bank Guidelines on the Treatment of Foreign Direct Investments of 1992, to explain that the word "treatment" does not cover dispute resolution provisions, Claimant refers to the *Daimler* tribunal's conclusion that this document is an instrument of soft law, and does not "purport to shed any direct light on the meaning of the word 'treatment' as used in the German-

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<sup>86</sup> Claimant's Rejoinder, ¶ 67.

<sup>87</sup> *Id.*

<sup>88</sup> By contrast in *Daimler*, the tribunal concluded that such limitation of the MFN treatment with an additional term of "[investment] in its territory" proves that the parties excluded dispute resolution provisions from the scope of the MFN provision. Claimant's Rejoinder, ¶ 79.



Argentine BIT's MFN clauses"; "it is not of a sufficient weight to be outcome determinative."<sup>89</sup>

### ***Respondent's "Ineffectiveness" Argument***

4.2.34 Claimant argues that the Contracting Parties' agreement to give investors a choice to claim their rights before local courts or international arbitration is useful, regardless of any MFN rights, for Turkish and Turkmen investors who may prefer to claim their rights before local courts instead of arbitral tribunals.

### ***Alleged Differences in Nature/Size of Swiss and Turkish Investors are Irrelevant***

4.2.35 Claimant submits that Respondent's claim that Swiss and Turkish investors are not comparable in nature and size, and therefore that investment protection level afforded should be different, is without merit.

4.2.36 Both Swiss and Turkish companies that invest in Turkmenistan qualify as "investors" under international investment law principles. The size and nature of their commercial activities and of their investments is irrelevant and does not change the fact that there is an investment by an investor.

4.2.37 Claimant argues that it would be entirely inappropriate to attribute different levels of investment protection for different kinds and sizes of investments in a host country.

4.2.38 In any event, Claimant refers not only to the Swiss-Turkmenistan BIT but several others. In addition to the Swiss-Turkmenistan BIT, the provisions of each of the German-Turkmenistan, UAE-Turkmenistan and Pakistan-Turkmenistan BITs establish more favourable treatment for Claimant than those found in Article VII.2 of the BIT.<sup>90</sup> Like the Swiss-Turkmenistan BIT, they also serve as a basis for the purposes of the MFN protection to be granted to Claimant's right for arbitration.

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<sup>89</sup> *Daimler*, Exh. RL-28, ¶ 224.

<sup>90</sup> None of the referenced comparator BITs require reference to Respondent's local courts prior to the initiation of arbitration proceedings. See Claimant's Rejoinder, ¶¶ 124-28.

### 4.3 Mandatory Recourse to Turkmenistan's Courts would be Ineffective and Otiose

4.3.1 Claimant says that it is well established under international law that the requirement to exhaust local remedies should be disregarded when, in reality, no remedy is available and any attempt at exhaustion would be futile. In the circumstances of this case, the requirement for prior recourse to the courts of Turkmenistan ought not to be enforced by the Tribunal.

4.3.2 Claimant refers to the Commentary to the International Law Commission's Articles on State Responsibility ("**ILC Commentary**"), Article 44 of which provides that:

*"Only those local remedies which are 'available and effective' have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case."<sup>91</sup>*  
(Claimant's emphasis)

4.3.3 Thus, the requirement to exhaust or pursue local remedies is flexible, not rigid or absolute. In the words of Sir Hersch Lauterpacht:

*"For the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it."<sup>92</sup>* (Claimant's emphasis)

4.3.4 Claimant argues that the mandatory recourse requirement found in Article VII.2 is analogous to the rule of exhaustion of local remedies. As expressed by the ICS tribunal:

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<sup>91</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), Exh. CL-25, Article 44, ¶ 5. See also, Paulsson, *Denial of Justice in International Law* (Cambridge University Press) (2010), Exh. CL-26, pp. 113-116 and 130; International Law Commission, *Third Report on Diplomatic Protection*, UN Doc. A/CN.4/523 (7 March 2002), Exh. CL-27, pp. 5-17.

<sup>92</sup> *Case of Certain Norwegian Loans* (France v. Norway), International Court of Justice, Separate Opinion of Judge Sir Hersch Lauterpacht (6 July 1957), Exh. CL-23, p. 39.

*“[T]he 18-month litigation prerequisite is not a requirement of exhaustion of local remedies in the technical sense. It cannot, however, be presumed that the prerequisite does not share many of the same rationales behind the local remedies rule.”*<sup>93</sup>

### ***Turkmenistan Lacks an Independent Judiciary***

4.3.5 Claimant asserts that Turkmenistan’s judges and prosecutors are appointed to short periods in office, directly and personally by the President and refers to the United Nations Human Rights Committee’s concern at the lack of an independent judiciary in Turkmenistan.<sup>94</sup>

4.3.6 Claimant also refers to Transparency International’s ranking of Turkmenistan as 177<sup>th</sup> out of 183 surveyed country on its Corruption Perception Index for 2011 and to disparaging remarks made by Turkmenistan’s President Berdimuhamedow about Turkish foreign investors:

*“It would be good if they could deliver the project. But regarding the other dishonourable men, the Turkish companies, it seems they are going to just take our money and not complete the job properly. All of them should be subject to the internal investigation process as an internal security issue and a careful inspection of them should be carried out. I did not know whether they have finished the job or not, but as I have said previously, they should be companies which work honourably. Have you understood? Sit, now!”*<sup>95</sup>

4.3.7 Claimant argues that this statement confirms that any requirement by the Tribunal that Claimant resort to Respondent’s courts would serve no purpose as it would not provide for an effective resolution of the dispute or a fair result.

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<sup>93</sup> ICS, Exh. RL-18, ¶ 261.

<sup>94</sup> United Nations Human Rights Committee “*Consideration of reports submitted by States parties under article 40 of the Covenant*– Concluding observations of the Human Rights Committee on Turkmenistan”, Advance unedited version (March 2012), Exh. C-9, ¶ 13.

<sup>95</sup> Transcript of the video recording “President Gurbanguly Berdimuhamedow addressing government officials II” (00:47 – 01:35), Exh. C-13.

***Those Who Choose to Oppose the Government or State Organs in Local Courts are Ill-Treated***

4.3.8 Claimant says that the inadvisability of mandating recourse to Respondent's courts is underlined by Turkmenistan's treatment of those who choose or must choose to be adverse to the government or its organs.

4.3.9 According to Human Rights Watch:

*"[t]he government [of Turkmenistan] threatens, harasses, and imprisons those who openly investigate abuses or question its policies, however modestly."*<sup>96</sup>

4.3.10 Claimant exhibits and relies upon excerpts of a report prepared by the UN's Human Rights Committee on a complaint by Mr Omar Faruk Bozbey, a Turkish investor in Turkmenistan, on a complaint submitted by him to the UN Human Rights Committee.<sup>97</sup> Bozbey's claim was that he was charged with economic offences when he refused to pay a bribe, detained, held in degrading and humiliating conditions and subjected to court proceedings conducted in the Turkmen language which he did not understand.

4.3.11 Claimant also says that it has experienced firsthand such acts by Respondent, and relies on the statement of Mr Osman Arslan, one of Kiliç's project managers in Turkmenistan, relating to charges he faced in connection with several occupational accidents at a Kiliç work site in Mary, Turkmenistan.

4.3.12 Finally, Claimant contends in its submissions that it was unable to find a single Turkmen lawyer who was willing to testify against the government of Turkmenistan. It is said that, on each occasion the refusal was followed by the same explanation: a fear for the security of the lawyer and his/her family of reprisals by Respondent. Claimant also submits it has communicated about this with other investors with claims against Respondent and understands that its experience is universal.<sup>98</sup>

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<sup>96</sup> Human Rights Watch, *Submission on Turkmenistan to the UN Human Rights Committee* (14 March 2012), p. 1, Exh. C-14.

<sup>97</sup> *Omar Faruk Bozbey v. Turkmenistan*, Communication No. 1530/2006, U.N. Doc. CCPR/C/100/D/1530/2006 (2010), Exh. C-16, p. 3.

<sup>98</sup> The Tribunal notes that these factual assertions are made in the form of submissions of counsel. However, no witness statement or documentary evidence is provided in support.

4.3.13 As regards Respondent's assertion that the 2009 Law on Courts enables the trial of matters arising out of international treaties of Turkmenistan before the Arbitrazh Court, Claimant says that Respondent, not having previously included the resolution of such matters within the jurisdiction of the Arbitrazh Court, this constitutes a blatant attempt to deprive investors from bringing their claims before ICSID or any other mechanism by amending the Arbitrazh Procedural Code in 2009.

4.3.14 Claimant further argues that it is not in a position to verify whether it is a fact that the Arbitrazh Court was actually able to try the matters arising out of Turkmenistan's international treaties as a result of the 2009 amendment.<sup>99</sup>

4.3.15 As regards Respondent's references to provisions of the Turkmenistan Constitution and the APC and the 2009 Law on Courts as a guarantee to due process, Claimant argues that such rules contain procedural defects. Moreover, enactment of these rules and legislation is not a guarantee of due process.<sup>100</sup>

4.3.16 Claimant suggests that references in "Wikileaks cables" introduced by Respondent are confirmatory:

*"It remains to be seen whether the provisions of the new laws are just window dressing intended to give appearance of genuine reform, or whether current practices change in a positive direction as a result of the laws' implementation.*

*Although the statement in the law that judges are independent gives hope for some improvements to the legal system, implementation will be a challenge as old habits and practices die hard. Given the top-down structure of decision-making in Turkmenistan, it is hard to imagine that judges would make decisions based solely on facts of a case, especially if a state interest is involved. Influence and bribery will also remain powerful forces. Still, the first step in introducing better practices is creating the proper legal framework, followed by the long-term task of*

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<sup>99</sup> Claimant's Rejoinder, ¶ 148.

<sup>100</sup> See also, ILC Commentary, Article 44, ¶ 5, Exh. CL-25.

*implementation through education and enforcement that could eventually lead to judicial independence.”<sup>101</sup> (Claimant’s emphasis)*

4.3.17 Claimant also says that Respondent’s argument that the 2009 Law of Courts attempted to provide independence of judges is invalidated by the UN Report of the Committee Against Torture which states:

*“The Committee is deeply concerned at the ineffective functioning of justice system, apparently caused in part by the lack of independence of the procuracy and judiciary, as was noted by the Secretary-General in 2006 (A/61/489, para. 46). The Committee regrets that responsibility for the appointment and promotion of judges rests with the President, which jeopardizes the independence of the judiciary.”<sup>102</sup> (Claimant’s emphasis)*

4.3.18 In short, Claimant argues that Respondent’s assertion of improvement of the judiciary has not been substantiated.

4.3.19 In summary, Claimant says that the evidentiary record reveals:

- (a) reports of a severe lack of promotion and protection of human rights, the rule of law, due process and fair trials in Turkmenistan;
- (b) any positive developments in terms of Turkmenistan’s judiciary have only recently been initiated and are at an initial level;
- (c) to the extent that there have been such developments, they have been organised and initiated by foreign institutions; and
- (d) such attempts as have been reported have been ineffectual.

4.3.20 Claimant therefore says it has established that recourse to the local courts of Respondent was unavailable and would have been futile at the time the dispute arose.

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<sup>101</sup>Cable ref. 09ASHGABAT1080 “Turkmenistan: A Step Towards Establishing an Independent Judiciary,” Exh. C-34, pp. 1-3.

<sup>102</sup>UN Committee Against Torture, *Consideration of reports submitted by State parties under article 19 of the Convention - Concluding Observations of the Committee Against Torture*” (15 June 2011), Exh. C-17, p. 4.

4.3.21 Claimant, and possibly other Turkish investors, who have taken their disputes against Turkmenistan before ICSID tribunals will be utterly deprived of their right to fair trial and due process before an independent and impartial tribunal should this tribunal render a decision that it has no jurisdiction to hear this dispute.

***Denying Claimant Direct Access to ICSID Arbitration Would Thwart the Object and Purpose of the BIT***

4.3.22 Claimant submits that the object and purpose of the BIT is the promotion and protection of investments. A crucial component in the effectiveness of that protection is said to be access to fair and efficient means of dispute settlement.

4.3.23 In light of the condition of Turkmenistan's court system, insistence upon resort by Claimant to the courts of Turkmenistan would offer no reasonable possibility of bringing a fair resolution to this dispute. Thus, depriving the Claimant of direct access to international arbitration, it is said, would clearly be contrary to the object and purpose of the BIT.

***Revisitation of Tribunal's Finding on Meaning and Effect of Article VII.2***

4.3.24 Finally, in its Rejoinder, Claimant revisits the question of whether Article VII.2 calls for mandatory recourse to Respondent's courts, again drawing attention to the cover note of the presentation to the Turkish parliament which is said to establish the optional right for the investors to choose to submit disputes before the local courts.<sup>103</sup> Claimant makes these assertions to counter Respondent's arguments that mandatory recourse is a precondition to Respondent's Consent to Arbitrate. The Tribunal notes that this question was decided finally in its May 2012 Decision.

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<sup>103</sup> Claimant's Rejoinder, ¶¶ 16-25.

## 4.4 Post-Hearing Submissions

- 4.4.1 In its post-hearing submissions, Claimant dealt with the Tribunal’s question concerning its ability to suspend these proceedings – the admissibility v. jurisdiction question.<sup>104</sup>
- 4.4.2 Claimant reasserts its proposition that at the time it accepted Respondent’s offer to arbitrate, there was a valid and unconditional consent to arbitrate. It thus maintains that its failure to refer its disputes to Respondent’s courts goes only to the admissibility of its claims, and not to the jurisdiction of the Tribunal.<sup>105</sup>
- 4.4.3 Referring to cases such as *Bayinder*, *Ethyl*, *Alps Finance*, *Abaclat* and *Western NIS*, Claimant submits that investment treaty jurisprudence has mostly treated requirements for notice, negotiation periods, and prior local litigation as admissibility requirements that may be perfected at a later stage in the proceedings, after the application initiating arbitration proceedings has been filed.
- 4.4.4 Claimant accepts that a tribunal which has “no jurisdiction cannot do anything but reject the claim because of a lack of jurisdiction.”<sup>106</sup> Nevertheless, it contends that a defect which is perfectible affords a tribunal the discretion to suspend a hearing in order to allow a claimant to “perfect” the dispute and make the claim admissible.<sup>107</sup>

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<sup>104</sup>The question of admissibility v. jurisdiction had not been raised directly in the parties’ written exchanges prior to the December 2012 hearing. It was only then that Claimant’s counsel argued that non-compliance with Article VII.2’s prior recourse requirement should be seen as a matter of “ripeness” or “admissibility” of Claimant’s claim, and not as a matter of jurisdiction. *See* Transcript of 7 December 2012 hearing, pp. 78/12 – 84/10, 178-9-17.

<sup>105</sup>Claimant’s Post-Hearing Brief, ¶¶ 4-5.

<sup>106</sup>Claimant’s Post-Hearing Brief, ¶ 19.

<sup>107</sup>*Id.*



## **5. TRIBUNAL'S APPROACH TO THE SINGLE JURISDICTIONAL ISSUE**

### **5.1 Issues to be Addressed**

5.1.1 The Tribunal considers that there are three principal substantive questions to be addressed in relation to the single jurisdictional question that is now before the Tribunal. They are:

- (a) is Article VII.2's requirement for prior recourse to the courts of Turkmenistan a condition of Turkmenistan's consent to ICSID arbitration;
- (b) does the BIT's Article II.2 MFN provision encompass the BIT's DRPs contained in Article VII.2, so as to permit Claimant to rely on the DRPs of the Switzerland-Turkmenistan BIT; and
- (c) in the event that Claimant is not exempted from the mandatory prior recourse provisions of Article VII.2 by reason of the operation of Article II.2 MFN provision, is it otherwise exempted because compliance with the provisions of Article VII.2 would have been ineffective or futile?

### **5.2 Applicable Principles of Treaty Interpretation**

5.2.1 The parties accept that meaning and scope of the relevant provisions of the ICSID Convention and the BIT are to be understood/interpreted in accordance with the rules of interpretation set out in the relevant articles of the VCLT.

5.2.2 Articles 31 and 32 of VCLT provide as follows:

*"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 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 to 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.”*

5.2.3 Article 31(1) of the VCLT comprises three separate principles, as noted in the International Law Commission’s Commentary to its Final Draft Articles:

*“the first - interpretation in good faith – both directly from the rule pacta sunt servanda. The second principle is the very essence of the*

*textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of the term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. These principles have repeatedly been affirmed by the Court [i.e., the ICJ].”<sup>108</sup>*

- 5.2.4 As to the second of these principles (interpretation in accordance with the ordinary meaning of a term), various commentators have noted that this is not merely an exercise in uncovering the mere literal meaning of a term.<sup>109</sup>
- 5.2.5 As to the third principle of Article 31(1), the Special Rapporteur of the International Law Commission noted that “the ‘ordinary meaning’ of terms cannot be properly determined without reference to their context and to the objects and purposes of the treaty.”<sup>110</sup>
- 5.2.6 Article 31(1) envisages the ordinary meaning to be given to the terms of a treaty in their context. Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty, *i.e.*, its text including its preamble and annexes and the other means mentioned in Articles 31(2) and 31(3).<sup>111</sup>

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<sup>108</sup> *Yearbook of the International Law Commission*, Vol. II, Commentary to Draft article 27 (1966), ¶. 12, (Article 31(1) of the VCLT was previously 27(1) of the draft convention).

<sup>109</sup> *See, e.g.*, Anthony Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> ed. (1984), p. 121; Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 114.

<sup>110</sup> 1964 Report of the International Law Commission: *Yearbook of the International Law Commission* (1966), Vol. II at p. 95.

<sup>111</sup> Mark E. Villiger, “*Commentary on the 1969 Vienna Convention on the Law of Treaties*” (Martinus Nijhoss publishers, 2009), p. 427, ¶ 10, Exh. RL-2.

## 6. ARTICLE VII.2 AS A CONDITION PRECEDENT TO CONSENT TO ARBITRATE

### 6.1 Tribunal's Sources of Jurisdiction

6.1.1 Under ICSID, for an ICSID tribunal such as this to have jurisdiction, there must be a written agreement to arbitrate (*i.e.*, an agreement to submit a dispute to ICSID arbitration) between the host state and the foreign investor.

6.1.2 Article 25 of the ICSID Convention provides, in pertinent part, that:

*“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”* (Tribunal's emphasis)

6.1.3 Article 25 confirms the basic principle, that recourse to ICSID arbitration rests on written consent. In this case, to the extent that such written agreement to arbitrate exists, it is made up of: (a) Respondent's written offer to arbitrate (which is found in the provisions of Article VII.2 of the BIT); and (b) Claimant's written acceptance of that offer (which is found in its Request dated 15 December 2009).<sup>112</sup>

6.1.4 The relevant provisions of Article VII of the BIT, as set out in the authentic English version of the Treaty, provide that:

*“1. Disputes between one of the Parties and one investor of the other Party, in connection with his investment, shall be notified in writing, including a [sic] detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.*

*2. If these disputes [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:*

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<sup>112</sup>In its Post-Hearing Brief, Claimant explicitly stated that: “Claimant in this case accepted the offer and the mechanism provided in the BIT by submitting our claim to this Tribunal. That provides the Tribunal with the necessary jurisdiction” (¶ 7).

(a) the International Center (sic) for Settlement of Investment Disputes (ICSID) ...

(b) ...

(c) ... ,

provided that [if] the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.” (Tribunal’s emphasis)

6.1.5 The word “if”, which is found in the last paragraph of Article VII.2 in the text of the Treaty, quoted above, has been bracketed because of the Tribunal’s 7 May 2012 Decision that, properly construed, the provisions of Article VII.2 are to be read as if it were not included.

6.1.6 It follows from the Tribunal’s construction of Article VII.2 that the meaning and effect of that provision of the BIT is that a concerned investor (in this case, Claimant) is required to submit its dispute to the courts of the Contracting Party (in this case, Turkmenistan) with which a dispute has arisen. Further, the claimant must not have received a final award within one year from the date of submission of its case to the local courts, before it can institute arbitration proceedings in one of the three ways permitted by the Article.

6.1.7 The first question therefore is whether compliance by Claimant with the requirement for mandatory prior recourse to Respondent’s courts is a precondition to ICSID arbitration and the Tribunal’s jurisdiction.

## **6.2 Conditional Offer to Arbitrate**

6.2.1 It is a fundamental principle that an agreement is formed by offer and acceptance. But for an agreement to result, there must be acceptance of the offer *as made*. It follows that an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into existence through a qualifying investor’s acceptance of a host state’s standing offer as made (*i.e.*, under its terms and conditions).

6.2.2 The Tribunal agrees with Professor Schreuer's view that the investor may accept or not accept the offer as it stands in the BIT, but it cannot alter it unilaterally:

*“where ICSID’s jurisdiction is based on an offer made by one party, subsequently accepted by the other, the party’s consent is only to the extent that offer and acceptance coincide. ... It is evident that the investor’s acceptance may not validly go beyond the limits of the host State’s offer. Therefore, any limitation contained in the legislation or treaty would apply irrespective of the terms of the investor’s acceptance. If the terms of acceptance do not correspond with the terms of the offer there is no perfected consent.”*<sup>113</sup> (Tribunal’s emphasis)

6.2.3 There is no dispute between the parties that states which wish to agree to ICSID arbitration are free to impose conditions that inform their consent to arbitrate.

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<sup>113</sup>Christoph Schreuer, *Consent to Arbitration*, UNCTAD COURSE ON DISPUTE SETTLEMENT, INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, Module 2.3, p. 30, Exh. RL-14. See also Nouredine Gara, *Les nouveaux instruments du consentement à l’arbitrage CIRDI*, in *OU VA LE DROIT DE L’INVESTISSEMENT ? DESORDRE NORMATIF ET RECHERCHE D’EQUILIBRE – ACTES DU COLLOQUE ORGANISE A TUNIS LES 3 ET 4 MARS 2006* (Pédone 2007), p. 50: (“*Si le consentement de l’Etat à l’arbitrage est consigné dans le traité, celui de l’investisseur doit se manifester ultérieurement, suite à la naissance du différend qui l’oppose à l’Etat. C’est uniquement à ce moment que l’investisseur manifeste son acceptation de l’offre d’arbitrage faite par l’Etat. Cette acceptation ne peut se réaliser et produire ses effets que sous la condition de se conformer aux conditions exigées par le traité qui lui sert de support.*”). (“If the State’s consent to arbitration is included in the treaty, the investor’s consent must be expressed subsequently, after the dispute against the State has arisen. It is only at this time that the investor expresses its acceptance of the arbitration offer made by the State. Such acceptance can materialize and be effective only if it complies with the requirements of the treaty that serves as a support thereto.” (Respondent’s translation)) Exh. RL-19. See also *Republic of Ecuador v. Chevron Corporation, Texaco Petroleum Company* (US Court of Appeals for the Second Circuit, 17 March, 2011), pp. 12-13 (“... the BIT merely creates a framework through which foreign investors, such as Chevron, can initiate arbitration against parties to the Treaty. In the end, however, this proves to be a distinction without difference, since Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate. [...] All that is necessary to form an agreement to arbitrate is for one party to be a BIT signatory and the other to consent to arbitration of an investment dispute in accordance with the Treaty’s terms. In effect, Ecuador’s accession to the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor’s written demand for arbitration completes the “agreement in writing” to submit the dispute to arbitration.”) (emphasis added) Exh. RL-20; see also, Paul C. Szasz, *The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J.L. & Econ. Dev. 23 (1970-1971), p. 29 (“The related point to be observed when consent is expressed in diverse instruments, is the extent to which these overlap – for it is only in the area of coincidence that the consent is both effective and irrevocable.”), Exh. RL-16; Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins, Borzu Sabahi, *INVESTOR-STATE ARBITRATION* (Oxford University Press 2008), p. 220-221 (“Today, states typically provide their consent to submit future investment disputes to arbitration through bilateral investment treaties (BITs), multilateral treaties, or the state’s own domestic legislation. Expression of consent by a state, however, is insufficient to bestow jurisdiction on a tribunal; ‘the investor must perform some reciprocal act to perfect the consent’. Consent of a government in a law or a treaty is merely an *offer* to agree to arbitration, rather than a full contractual *compromis* as one would find in an investment contract. The government’s unilateral offer is consummated as a binding obligation to arbitrate only with the investor’s acceptance of that offer.”), Exh. RL-15.

6.2.4 Article 26 of the ICSID Convention provides that:

*“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”* (Tribunal’s emphasis)

6.2.5 Although this provision refers to the “exhaustion” of local remedies, the principle of imposing conditions to consent applies, *a fortiori*, to agreed provisions which require something other than full “exhaustion of local or administrative remedies” - namely to provisions requiring the prior submission of the dispute to the local courts for a specified period of time as a condition precedent to arbitration, but falling short of a requirement to exhaust local remedies.

6.2.6 Article VII of the BIT expressly articulates a multi-layered, sequential dispute resolution system providing for a sequence of separate dispute resolution procedures through which a dispute will escalate, if not resolved, in the former step. The Tribunal views the inclusion of such a multi-tiered system of dispute resolution in Article VII of the BIT to be in accordance with the provisions of Article 26 of the ICSID Convention.

6.2.7 While the Contracting Parties in this case did not require the exhaustion of local administrative or judicial remedies as a condition of their consent to ICSID arbitration, they did require that disputes between one of the Contracting Parties and an investor of the other Contracting Party:

- (a) be notified in writing, including detailed information, by the investor to the recipient Party of the investment;
- (b) that the investor and the concerned Contracting Party endeavour to settle these disputes by consultations and negotiations in good faith over a period of six months;
- (c) failing settlement, that the dispute be brought before the courts of justice of the Contracting Party that is a party to the dispute, and

(d) that a final award not be rendered within one year.<sup>114</sup>

6.2.8 The ordinary meaning of phrases such as “shall be notified in writing ...” and “shall endeavour to settle ...” points to a mandatory requirement. Similarly, where, as in the present case, a right to arbitrate is granted, “provided that, [if] the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute, and a final award has not been rendered within one year,”<sup>115</sup> the exercise of such a right is conditional upon certain requirements having been met.

6.2.9 The adoption of language which requires that a series of steps *shall* be taken, and which provide for a right to arbitrate, *provided that* another step has been taken, is an obvious construction of a condition precedent.<sup>116</sup> Indeed, a number of reputed dictionaries offer a definition of “provided” (followed by “that”) to indicate a meaning of “on the condition or understanding (that)”.<sup>117</sup> When such conditions are set out in the DRPs of a BIT (*as conditions of the Contracting Parties’ offer to arbitrate*), which are the very source of an ICSID tribunal’s jurisdiction, compliance with them constitutes a jurisdictional requirement, in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised.<sup>118</sup>

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<sup>114</sup> See BIT, Exhs. C-1 and R-2, Article VII. 1-2.

<sup>115</sup> *Id.*, Art. VII. 2

<sup>116</sup> Mr Arthur Marriott QC, who appeared briefly as a member of Claimant’s counsel team towards the end of the December 2012 hearing, argued, for the first time, that compliance with the prior recourse requirement was not a condition precedent to the Tribunal’s jurisdiction, but a condition subsequent, compliance with which went only to the admissibility of Claimant’s claims. The condition subsequent argument was not developed in Claimant’s Post-Hearing Brief. Rather than referring to a “condition subsequent”, Claimant there argued that there was an effective consent to arbitration by both parties. Claimant asserted that the resulting agreement by the parties to settle their dispute by arbitration was not conditioned “to the occurrence of specific events or to fulfill specific requirements.” The local litigation requirement was said to go only to the procedural admissibility of the claim, and not to the jurisdiction of the Tribunal. Claimant’s admissibility arguments are dealt with at ¶ 6.3 below.

<sup>117</sup> See the *Concise Oxford Dictionary, New Edition for the 1990s*: “Provided (followed by that): on the condition or understanding that”; *The Free Dictionary*: “Provided: on the condition or understanding that”; *Free Merriam-Webster Dictionary*: “Provided: on the condition that”; *McMillan Dictionary*: “Provided that: only if a particular thing is done”; and *Oxford Dictionary*: “Proviso: a condition or qualification attached to an agreement or a statement”.

<sup>118</sup> Professor Park considers that Claimant’s failure to comply with Article VII.2’s local litigation proviso goes not to the Tribunal’s jurisdiction, but only to the admissibility of Claimant’s claims. His views are set out in his Separate Opinion which is appended to this Award.



### 6.3 Jurisdiction and Admissibility Distinguished

6.3.1 In its initial written submissions on the single jurisdictional question, Claimant did not appear to dispute the conditionality of Respondent's offer to arbitrate. It contended that the Tribunal had jurisdiction over this dispute solely by virtue of the operation BIT's MFN provisions.

6.3.2 However, during the course of the December 2012 hearing, counsel for Claimant invoked the *Abaclat* case to support an argument that compliance with Article VII.2 was an issue that went to the admissibility of a claim, rather than to the jurisdiction of this Tribunal. The *Abaclat* tribunal held, by majority, that:

*“the negotiation and 18 months litigation requirement relate to the conditions for implementation of Argentina’s consent to ICSID jurisdiction and arbitration and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim.”*<sup>119</sup> (Tribunal’s emphasis)

6.3.3 Claimant thus maintained that if the Tribunal concluded that: (a) it could not base its jurisdiction on the operation of the BIT's MFN provision; and (b) Claimant was not exempted from compliance with Article VII.2 by reason of futility, the Tribunal should suspend the proceedings pending Claimant's compliance. This argument was premised on the grounds that jurisdiction existed but its exercise was inadmissible, as certain requirements had not been met.<sup>120</sup>

6.3.4 The Tribunal considers that, to the extent that it was seeking to make a general proposition that went beyond the terms of the BIT at issue in that case, the majority in *Abaclat* fell into legal error. This is because Article 26 of the ICSID Convention explicitly recognises that a Contracting State may impose conditions on its consent to arbitration under the ICSID Convention, in a manner that determines the conditions in which jurisdiction may be said to exist and be capable of being exercised (without

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<sup>119</sup> *Abaclat*, Exh. CL-32, ¶ 496.

<sup>120</sup> See Transcript of 7 December 2012 hearing, pp. 79/4 – 83/21 and 172/22 – 173/6; Claimant's Post-Hearing Brief, ¶¶ 3-9.

prejudice to any issue as to admissibility). This point was made with considerable force in the dissenting opinion of Professor Georges Abi-Saab in the *Abaclat* case, where he stated that the “legal recharacterization” of the majority was “conceptually wrong”:

*“It adopts an extremely narrow, in fact partial, concept of jurisdiction, limiting it to the ambit within which jurisdiction is exercised. But, as explained above (para.10 ff), jurisdiction is first and foremost a power, the legal power to exercise the judicial or arbitral function. Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence.”*

6.3.5 As the *Daimler* tribunal explained, the distinction between jurisdiction and admissibility may be ill-suited to the context of treaty-based international jurisdiction:

*“In the domestic context, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. They do not expand [or provide the basis for] the jurisdiction of domestic courts. Rather, they serve to streamline courts’ dockets by striking out matters which, though within the jurisdiction of the courts, are for one reason or another not appropriate for adjudication at the particular time or in the particular manner in question.*

*All BIT-based dispute resolution provisions, on the other hand, are by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties’ consent, much in the same way in which legislative acts confer*

*jurisdiction upon domestic courts.”*<sup>121</sup> (Tribunal’s emphasis and added bracketed phase)

- 6.3.6 Claimant also sought to rely on the decision of the ICSID tribunal in the *Western NIS* case (comprised of Rodrigo Oreamuno, Michael Pryles and Jan Paulsson), which ordered the suspension of proceedings, the claimant there having failed to give to the respondent proper notice of the dispute in terms required by the BIT in question.<sup>122</sup>
- 6.3.7 It appears to the Tribunal, however, that that case was different and distinguishable. The *Western NIS* decision simply involved the failure of a claimant to give notice of its claim in terms required by the BIT. It did not concern a failure to comply with a requirement for any degree of prior recourse to local courts of the host state. Indeed, the BIT in question in *Western NIS* contained no such requirement.
- 6.3.8 In this regard, it is notable that Mr Paulsson, who was one of the arbitrators in *Western NIS*, has expressed the view that requirements of the kind arising in the present case go to the jurisdiction of a treaty tribunal and are not a matter of admissibility:

*“If an ephemeral arbitral tribunal is established under a treaty which contains requirements as to ... their prior exhaustion of local remedies, the claims as such are perhaps subject to no impediment but the forum seized is lacking one of the elements required to give it life in the first place. For such a tribunal these are matters of jurisdiction.”*<sup>123</sup> (Tribunal’s emphasis, except “claims” where emphasis is original)

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<sup>121</sup> *Daimler*, Exh. RL-28, ¶¶ 192-3 (internal citation omitted).

<sup>122</sup> See Transcript of the 7 December 2012 hearing, p.164/12 – 166/20 discussing *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order (16 March 2006), (“*Western NIS*”), 2006, ¶¶ 5-7 (“Proper notice is an important element of the State’s consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations. Proper notice of the present claim was not given. This conclusion does not, in and of itself, affect the Tribunal’s jurisdiction. The Claimant should be given an opportunity to remedy the deficient notice. On the other hand, the proceedings should not be indefinitely suspended.”).

<sup>123</sup> Jan Paulsson, *Jurisdiction and Admissibility*, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005), p. 616, n. 47. Paulsson was comparing the broad consent given by state parties to ICJ jurisdiction with the narrower consent BIT state parties, such as here, often give to arbitral tribunals.

6.3.9 As noted above, Claimant’s short submission made at the conclusion of the December 2012 hearing, that the requirement of prior recourse constituted a “condition subsequent”, was not pursued as such in its Post-Hearing Brief.

6.3.10 Claimant’s subsequent contention, that the Contracting Parties’ consent and offer to arbitrate, as made in Article VII of the BIT, was unconditional, appears to have been based on a proposition that a state’s offer to resolve disputes by arbitration can be accepted by an investor of the other party “even before a dispute arises, *let alone before any procedural steps anticipated in any BIT*”<sup>124</sup> (Tribunal’s emphasis). Thus, Claimant argued that “Procedural conditions like notification, a negotiation period or recourse to local courts are “*arbitral preconditions*” which do not have an effect on the jurisdiction of this Tribunal.<sup>125</sup> (Tribunal’s emphasis)

6.3.11 The Tribunal identifies two fundamental difficulties with this argument, with regard to the facts of the present case.

6.3.12 First, having regard to the language of Article VII as a whole, it is far easier to see it as containing a conditional offer to arbitrate (given the inclusion of the words “shall” and “provided that”), rather than an unconditional offer to arbitrate. In this regard, the conditions that inform that offer comprise five elements that must be met:

- (a) the dispute must have been notified in writing (Article VII.1);
- (b) the investor and the concerned Party must, as far as possible, have endeavoured to settle the dispute by consultation and negotiations in good faith (Article VII.1);
- (c) six months must have passed from the date of notification in writing (Article VII.2);
- (d) the investor must have brought the dispute before the courts of justice of the Party that is a party to the dispute (Article VII.2); and
- (e) the courts of justice must not have rendered a final award within one year (Article VII.2).

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<sup>124</sup> Claimant’s Post-Hearing Brief, ¶ 4.

<sup>125</sup> *Id.*, ¶ 8.

6.3.13 Second, Claimant's argument ignores the fact that an ICSID tribunal's jurisdiction is defined by the disputing parties' written consent/agreement and that, in this case, Respondent's consent/offer to arbitrate was conditioned, *inter alia*, on Claimant having previously brought the dispute before Respondent's courts and a final award not having been rendered within one year from the institution of the local court proceedings.

6.3.14 Thus, when it accepted Respondent's conditional offer to arbitrate disputes in connection with its investments before an ICSID Tribunal,<sup>126</sup> in order for the necessary consent/agreement in writing to result, the offer must have been accepted on the basis of, and having regard to, the conditions explicitly set out in the BIT.

6.3.15 For these reasons, and on the basis of the factual record, the Tribunal concludes that the requirements set forth in Article VII.2 are to be treated as conditions, and that the failure to meet those conditions goes to the existence of the Tribunal's jurisdiction, and are not to be treated as issues of admissibility.

#### **6.4 Suspension of Proceedings or Rejection of Claimant's Case**

6.4.1 Turning to Claimant's alternative claim, that these proceedings be suspended, it is common ground that a tribunal that has no jurisdiction has no alternative but to decline to address the claim. Claimant makes the point in its Post-Hearing Brief that:

*"A tribunal having no jurisdiction cannot do anything but reject the claim because of a lack of jurisdiction. However, a tribunal may act differently in a situation where, as in the present case, an admissibility requirement has not yet been satisfied. As noted above, arbitral tribunals who have treated this issue as a matter of admissibility have emphasized that non-compliance with the waiting requirement was a 'perfectible defect'. Thus, a defect which is perfectible affords the*

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<sup>126</sup> Initially, Claimant took the position (*See* Request, ¶ 100) that it agreed/gave its consent to ICSID arbitration when it gave notice of its dispute(s) in its letter of 26 March 2009. Subsequently, in its Post-Hearing Brief, Claimant stated specifically that, "in this case [it] accepted the offer and the mechanisms provided in the BIT by submitting [its] claim to this Tribunal (see Claimant's Post-Hearing Brief, ¶7). The relevant point, however, is not so much when Claimant accepted Respondent's offer, but that it could only accept the offer as made.

*arbitral tribunal the discretion to suspend a hearing in order for a claimant to ‘perfect’ the dispute and make the claim admissible.”<sup>127</sup>*

*“Tribunals possess far greater flexibility in dealing with admissibility requirements, where they consider that an admissibility requirement is contrary to good faith, or is futile and would not change the outcome, then they would have discretion not to impose the admissibility requirement.”<sup>128</sup>(Tribunal’s emphasis)*

6.4.2 The Claimant has therefore recognised that if the conditions set forth in Article VII.2 are to be treated as going to the existence of a jurisdictional basis, as is the case, it is not open to a Tribunal to suspend the proceedings. In short, the conditions for jurisdiction not having been met, the Tribunal has no jurisdiction to suspend the proceedings. It follows that Claimant’s alternative claim, that these proceedings be suspended, is not one that can be accepted.

## **6.5 Separate Opinion on Jurisdiction/Admissibility**

6.5.1 In his Separate Opinion, our colleague Professor Park concludes, like the majority, that the wording of Article VII.1 imposes jurisdictional preconditions requiring notice of a dispute and an endeavour to settle by negotiation. He departs from the majority, however, in finding that Article VII.2’s requirements for local litigation and “no-judgment-within-a-year” are not conditions precedent and go only to “ripeness” and the admissibility of the claim, as opposed to the jurisdiction of the Tribunal.

6.5.2 The majority of the Tribunal (the “Majority”) has carefully considered these points, and exchanged views on these matters during the course of deliberations. Having considered each of the points raised in the Separate Opinion, the Majority is satisfied that it has adopted the correct conclusion, namely that the procedural steps set out in Article VII of the BIT constitute fundamental jurisdictional conditions to the Contracting Parties’ offers to arbitrate disputes with investors of the other Party. The Majority is not persuaded that they are merely conditions for the implementation of a consent that has already been given.

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<sup>127</sup> Claimant’s Post-Hearing Brief, ¶ 19 (internal citations omitted).

<sup>128</sup> Claimant’s Post-Hearing Brief, ¶ 20.

- 6.5.3 The Majority has difficulty in identifying any qualitative aspect of the language of Article VII.2 that make its conditions inherently different from the conditions set out in Article VII.1, in such a way as to point to a need to treat them differently. On its face, the text of Article VII as a whole indicates that, *a priori*, the five conditions it sets out should be treated in the same manner. There is no extrinsic evidence before the Tribunal that the Contracting Parties to the BIT, Turkey and Turkmenistan, intended the conditions set out in VII.1, on the one hand, and those set out in VII.2, on the other, to be treated as being qualitatively different.
- 6.5.4 Professor Park suggests that construing the local litigation proviso as a condition to jurisdiction would defeat key purposes of the BIT because a swift (*i.e.*, in less than one year) but unfair judgment by a Contracting Party's domestic court would insulate a potentially discriminatory taking from arbitration. The Majority does not see why this should be the case. Just as a requirement to exhaust local remedies may be disregarded when it can be shown that no remedy is available, or an attempt at exhaustion would be futile, an ICSID tribunal that was presented with evidence that a respondent's domestic court had decided unfairly against a claimant investor, albeit within one year, could nevertheless exercise jurisdiction assuming that other conditions had been met. In other words, the mere fact that domestic proceedings had been initiated, and they had been unfairly concluded within a year, would not of itself be a bar to jurisdiction.

## **6.6 Preliminary Conclusion on Jurisdiction**

- 6.6.1 For the reasons set out above, and subject to a finding of jurisdiction as the result of the operation of Article II.2, the Majority concludes that neither it, nor the Centre, has jurisdiction over this arbitration, due to the Claimant's failure to comply with the mandatory requirement of prior submission of the dispute to Turkmenistan's courts under Article VII.2 of the BIT. In the absence of jurisdiction, the Tribunal has no power to suspend these proceedings even if it was minded to do so.

## **7. DOES ARTICLE II.2'S MFN "TREATMENT" ENCOMPASS ARTICLE VII.2'S DISPUTE RESOLUTION PROVISIONS**

### **7.1 The BIT's MFN Provisions**

7.1.1 The BIT's relevant MFN provision is found in Article II.2 and provides:

*"Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."* (Tribunal's emphasis)

7.1.2 Claimant's case for jurisdiction, based on the operation of the MFN clause, is that Article VII's DRPs constitute "treatment" for the purposes of Article II.2. Claimant says this is so because Article II is drafted "in a broad manner", and the Article VII's DRPs "clearly falls within that "treatment ..."<sup>129</sup> Claimant's MFN arguments were notably lacking in an analysis of the text of Article II.2 in the context of the Treaty as a whole. Instead, reliance was placed on the conclusions of other tribunals that the word "treatment", referred to in the MFN clauses that they were concerned with, encompassed the DRPs of those treaties.

7.1.3 The Tribunal considers that whatever the merits (or otherwise) of the various authorities referred to by Claimant, they were concerned with different - and differently worded - provisions of other BITs. They cannot therefore be dispositive. The necessary starting point for an understanding of the meaning of the word "treatment" that is found in Article II.2, and of the scope of the application of the MFN clause, is necessarily premised on an understanding of context, and how that provision fits into the BIT as a whole.

### **7.2 The Structure of the BIT**

7.2.1 The BIT comprises a Preamble and nine Articles, each of which sets out particular terms of the Contracting Parties' agreement.

7.2.2 The Preamble describes the objects and purposes of the Treaty. Article I sets out a series of agreed definitions. Article II deals with the Promotion and Protection of

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<sup>129</sup> Claimant's Counter-Memorial, ¶ 8; Claimant's Rejoinder ¶ 47.



Investment; Article III, with Expropriation/Compensation; Article IV, with Repatriation and Transfer; Article V, with Subrogation; and Article VI, deals with Delegation. Articles VII and VIII deal with the settlement of disputes: Article VII, with Settlement of Dispute Between One Party and Investors of the Other Party, and Article VIII, with Settlement of Disputes Between the Parties. Finally, Article IX, deals with Entering into Force.

### **7.3 Treaty Structure Distinguishes Rights from Remedies**

- 7.3.1 A careful reading of the BIT indicates that the grant of *substantive rights* in relation to *investments* is established by the provisions of Articles II-VI, *whereas procedures (or modalities) for resolving disputes* in relation to the protection of those substantive rights are addressed in Article VII (and, in relation to disputes between the Contracting Parties in Article VIII).
- 7.3.2 Article II grants two MFN rights. The first MFN right, in Article II.1, requires the Contracting Parties to *permit investments*, and associated activities, to be made or carried out in their territories, on a basis that is no less favourable than that accorded to investments of investors of any third country. The second MFN right, in Article II.2, requires each Contracting Party to *accord to these investments*, once established, *treatment no less favourable* than that accorded to its own investors, or to the investors of any third country.
- 7.3.3 In addition to creating MFN rights, Article II grants *rights of entry* to nationals of either Party, for the purposes of establishing investments, and *rights to engage managerial and technical personnel of their choice* in relation to relevant investments (Article II.3).
- 7.3.4 Article III.1 grants *rights of protection against expropriation*. Article III.2 sets out *compensation rights* in relation to expropriation, and Article III.3 provides for *MFN treatment of investors whose investments suffer losses* in the territory of the other Contracting Party *owing to war, insurrections, civil disturbances* or other similar events.
- 7.3.5 Article IV.1 requires each Contracting Party to *permit the free transfer of funds, related to investments*, in and out of its territory.

7.3.6 Article V provides for the *recognition* by a Contracting Party of *an insurer's right of subjugation in relation to an investment* made by an investor of another Party.

7.3.7 Article VI provides that the *BIT shall not derogate from the obligations* of either of the Contracting Parties *found in other laws or instruments* “that entitle investments or associated activities to treatment more favourable than that accorded by this Agreement in like situations.”

7.3.8 Articles VII and VIII, by contrast, are basically dispute settlement clauses. They set out the available procedures for the resolution of disputes between investors and the Contracting Parties, and between the Contracting Parties themselves. The dispute settlement clauses record:

(a) in the case of Article VII, the Contracting Parties' conditioned offer to arbitrate investment disputes (arising out of alleged breaches of rights created under Articles II-VI); and

(b) in the case of Article VIII, the Contracting Parties' agreement to arbitrate disputes as between themselves concerning the interpretation and application of the BIT.

7.3.9 The text of the Treaty indicates that its drafters recognised a distinction between *substantive rights* in relation to investments, and *remedial procedures* in relation to those rights. The substantive rights in relation to *investments* are found in Articles II-VI of the Treaty, and the procedures for the resolution of *disputes* in relation to those rights are set out in Article VII. This distinction suggests strongly that the “treatment” of “investments” for which MFN rights were granted was intended to refer only to the scope of the *substantive rights* identified and adopted in Articles II-VI.

#### **7.4 Principle of Effectiveness Invalidates Claimant's Interpretation of Scope of MFN Clause**

7.4.1 The textually and contextually suggested limitation to the scope of application of Article II.2's MFN treatment of investments to the *substantive rights* provided in Articles II-VI is confirmed by the circumstances prevailing at the time of the conclusion of the BIT (*i.e.*, when it was negotiated and adopted on 2 May 1992).

- 7.4.2 At that time, Turkey had already agreed 22 BITs with other countries. A number of these contained no requirement for the prior submission of investment disputes to the local courts of the host state, unlike the present BIT.
- 7.4.3 That being the case, the Tribunal notes Respondent's contention that if Claimant's interpretation of Article II.2 were to be accepted as correct, Article VII.2's carefully crafted jurisdictional preconditions of the Contracting Parties' offer to arbitrate disputes would have been without any effect from the moment this BIT was adopted. This is because any Turkmen investor in Turkey could have disregarded the BIT's prior recourse requirement from the moment the BIT entered into force.
- 7.4.4 Accordingly, the established international law principle, that treaties must be interpreted in the light of the principle of effectiveness of all their provisions, stands against Claimant's interpretation of the scope of Article II.2.<sup>130</sup>

## **7.5 Claimant's Case Leads to Non-Reciprocal Obligations**

- 7.5.1 Of equal relevance is the fact that, if Claimant's interpretation of Article II.2 were to be accepted, the prior recourse requirement of Article VII.2 would not have been reciprocal, *ab initio*. This is because Turkish investors in Turkmenistan would have been bound to submit their disputes to the Turkmen local courts before initiating arbitration in the absence of any other Turkmenistan BIT's not requiring recourse to local courts, while Turkmen investors in Turkey would not first be required to submit their disputes to the Turkish courts.
- 7.5.2 The Tribunal agrees with Respondent that it is not immediately apparent why the Contracting Parties to this BIT would have consciously decided to enter into non-reciprocal obligations in relation to so central an element of the BIT.
- 7.5.3 These further points confirm the Tribunal's view that, at the time of the signature of the BIT, Turkey and Turkmenistan did not intend that Article VII.2's mandatory requirement for prior submission of any dispute to the local courts of the host State should be over-ridden by the operation of Article II.2 MFN clause.

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<sup>130</sup>Malgosia Fitzmaurice & Panos Merkouris, *Canons of Treaty Interpretation: Selected Case Studies From The World Trade Organization and The North American Free Trade Agreement* in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES; 30 YEARS ON, Martinus Nijhoff (2010) Publishers, pp. 179 - 83.

## 7.6 The Decisions of Other Tribunals are to be Distinguished

- 7.6.1 Each party drew attention to the decisions of other ICSID and investor-state tribunals in which claimants sought to use the relevant treaty's MFN clause to "borrow" dispute resolution provisions from another treaty which did not contain the pre-condition to arbitration that the claimant in question was alleged to have ignored.<sup>131</sup>
- 7.6.2 These decisions are not binding authority, and none can be regarded as dispositive for this Tribunal. It is required to make its determination based on the interpretation of the BIT, the factual record before it, and the arguments advanced by the parties.
- 7.6.3 Nevertheless, the disputing parties were entitled to adopt, as part of their arguments, the legal reasoning of other tribunals as part of their cases. For this reason, the Tribunal deals below with the cases relied on by Claimant.

### *No Scope for Presumptions*

- 7.6.4 The Tribunal does not intend, in this Award, to enter into a general doctrinal debate about whether BIT DRPs should (or should not) be *presumed* to fall within the scope of MFN clauses.
- 7.6.5 The relevant provisions of the VCLT which concern the interpretation of treaties do not indicate that there is to be a *presumption* one way or the other as to the reach of an MFN clause. That depends on the ordinary meaning of the words used in their context and having regard to the objects and purposes of the relevant treaty. Thus, the Tribunal will not address further Claimant's contention that, *unless excluded* from the scope of the MFN clause, a treaty's DRPs should be *presumed* to be encompassed by it, because of the breadth of the definition of "treatment".

### *Cases Relied on by Claimant*

- 7.6.6 Claimant relied on the ten cases in which tribunals concluded that the MFN clauses in question were referable to the DRPs of the particular treaty under review. These (and their relevant BITs) were: *Maffezini* (Arg.-Spain BIT), *Suez-InterAguas* (Arg.-Spain

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<sup>131</sup> At the date of this Award, the Tribunal is aware of 22 such decisions: 11 favour Claimant's position; 11 favour Respondent's.

BIT), *Siemens* (Arg.-Germany BIT), *Gas Natural* (Arg.-Spain BIT), *Telefónica* (Arg.-Spain BIT), *National Grid* (Arg.-UK BIT), *Suez-AWG* (Arg.-Spain BIT), *RosInvest* (UK-Russia BIT), *Impregilo* (Arg.-Italy BIT), and *Hochtief* (Arg.-Germany BIT).

7.6.7 The Tribunal was not referred to the recent decision on jurisdiction by the ICSID tribunal in the *Teinver* case, which was issued on 21 December 2012.<sup>132</sup> The *Teinver* tribunal concluded that *Teinver* could rely on the Article IV.2 MFN clause in the Argentina-Spain BIT to make use of the dispute resolution provisions contained in Article 13 of the Australia-Argentina BIT. Had this decision been issued prior to the December 2012 hearing, Claimant would presumably have relied upon it. Even though it does not bear on the Tribunal's conclusion on this point, it will be dealt with here for the sake of completeness.<sup>133</sup>

7.6.8 The 11 decisions are discussed below in groupings based on the BITs they deal with. Before turning to the details, the fundamental point to be made regarding each of the BITs which were the subject of these decisions is that the wording of the relevant MFN clause is much broader than that found in the BIT here in issue.

7.6.9 The *Argentina-Spain BIT Provisions*: Six of the 11 cases dealt with Article 4(2) of the Argentina-Spain BIT. While the unofficial translation used in the six decisions varied slightly from case to case, it is apparent that Article 4(2) contains wording to the effect that: “*in all matters subject to this agreement*, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country” (Tribunal's emphasis); or, “*in all matters governed by the present Agreement*, such treatment shall not be less favourable than that accorded by each Party to investments made in its territory by investors of Third States.” (Tribunal's emphasis) Based on the plain meaning of such wording, the Tribunal can understand a decision that Article 4(2)'s MFN provisions encompass the BIT's DRPs is apparently supported by the text (but expresses no view on whether it, faced with the same language, would have reached the same conclusion).

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<sup>132</sup>*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) (“**Teinver**”).

<sup>133</sup>Because it has had no bearing whatever on the outcome, the Tribunal did not request the parties to comment on the decision for the purposes of this Award.

7.6.10 The *Argentina-Germany BIT Provisions*: The relevant wording of the Argentina-Germany BIT, which was considered in two of the 11 cases - *Siemens* and *Hochtief* - was also considerably broader than that of Article II.2 of the BIT.

7.6.11 The unofficial translation used by the *Siemens* tribunal provides that:

*“3(1) neither Contracting Party shall subject investments in its territory by or with the participation of nationals or companies of the other Contracting Party to treatment less favourable than its accords to investments of its own nationals or companies or to investments of nationals or companies by any third State.*

*(2) neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State”.* (Tribunals’ emphasis)

7.6.12 The Argentina-Germany BIT also includes an important “Ad Article 3” which provides, in pertinent part, that:

*“(a) The following shall, more particularly, but no exclusively, be deemed “activity” within the meaning of Article 3, paragraph 2: the management, utilization, use and enjoyment of an investment ...”*  
(Tribunal’s emphasis)

7.6.13 Although the language of the Argentina-Germany BIT is not as broad as that of the Argentina-Spain BIT, the guarantee of most favoured nation “treatment” to *investors’ activities which extends to the management of their investments* appears on its face to be broader in scope than Article II.2. The resolution of disputes relating to investments is an everyday aspect of an investor’s management of its investments. That being the case, the Tribunal understands why the DRPs of the Argentina-Germany BIT might reasonably be seen to fall within the scope of the treaty’s MFN clause (but again expresses no view on whether it, faced with the same language, would have reached the same conclusion).

7.6.14 *The Argentina-UK and the UK-Russia BIT Provisions*: The Argentina-UK BIT, which was considered by the *National Grid* tribunal, and the UK-Russia BIT, which was considered by the *RosInvest* tribunal, each contain identical language, which is of similar scope to the Argentina-Germany BIT. In both, Article 3(2) provides that:

*“Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatments less favourable than that which it accords to its own investors or to investors of any third State. The extension of MFN rights to provisions relating to management, maintenance and use of investments.” (Tribunal’s emphasis)*

Again, on its face the text seems broad enough to encompass the two treaties’ dispute resolution provisions (but again this Tribunal expresses no view on whether it, faced with the same language, would have reached the same conclusion).

7.6.15 *The Argentina-Italy BIT Provisions*: Finally, Article 3 of the Argentina-Italy BIT, considered by the *Impregilo* tribunal, is of similar breadth to that found in the Argentina-Spain BIT. Article 3.1 provide that:

*“each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments, and to all other matters regulated by this agreement, a treatment that is no less favourable than that accorded to its own investors or investors from third-party countries.” (Tribunal’s emphasis)*

7.6.16 Such wording is, in the words of the *Teinver* tribunal, “unambiguously inclusive”, and can be seen to support the conclusion by that tribunal that it encompassed the regulation of dispute resolution by the DRP’s contained in the treaty (but again the Tribunal expresses no view on whether it, faced with the same language, would have reached the same conclusion).

7.6.17 Having regard to the textually broader scope of the MFN clauses in each of these cases, compared with that of Article II.2, the Tribunal finds the legal reasoning set out

in these decisions to be inapplicable to an understanding and interpretation of the wording of the BIT.

## **7.7 The Principle of *Expressio Unius Est Exclusio Alterius***

7.7.1 Claimant argues that the inclusion of Article VII's DRPs within the scope of Article II.2's MFN provisions is confirmed by a straightforward application of the principle of *expressio unius est exclusio alterius* to the "explicit exclusions" listed in Article II.4.

7.7.2 The Tribunal considers that this view is not correct, for several reasons.

7.7.3 First, in relation to exclusions, the operation of the *expressio unius ...* maxim, means that if a treaty provision expressly excludes the application of a treaty term (here Article II.2) to one thing (*e.g.*, the articles of another identified treaty), then other things *in the same class* of whatever was excluded (*e.g.*, the articles of other treaties which were not identified) are, logically to be included in the application of the treaty term.

7.7.4 Thus, for Article VII to have been encompassed in the scope of Article II.2 by reason of an exclusion found in Article II.4, the exclusion might have been expected to be formulated in terms such as "[t]he provisions of this Article shall not apply in relation to the provisions of Articles VI and VIII of this Treaty."

7.7.5 Had it done so, it might logically have been concluded that the provisions of Article II were intended by the Contracting Parties to include (*i.e.*, to apply to) the non-excluded Articles of the Treaty.

7.7.6 The difficulty for Claimant here is that Article II.4 did not use such a formulation. Rather, on its most favourable interpretation for Claimant, it excluded the application of Article II's MFN provisions to the treatment of an investor's investments found in certain *other treaties or agreements*.

7.7.7 The fact that the Contracting Parties chose to limit the application of Article II's MFN rights in relation to certain other treaties/agreements, which may have treated qualifying investments more favourable than they are treated in the BIT, would not appear to have any relevance for the question of whether the DRPs found in Article



VII.2 can properly be interpreted as the “treatment of investments” and therefore as coming within the scope of Article II.2.

## **7.8 The Parties’ Subsequent Specific Inclusions and Exclusions of DRPs from MFN Clauses in Other BITs**

- 7.8.1 Claimant relies on Turkey’s BIT with Azerbaijan (in which the contracting parties specifically *excluded* the application of that treaty’s MFN provision to its DRPs) to show that it was the *practice* of Turkey “to indicate expressly in case it intends to exclude the DRP from the scope of the MFN clause.”<sup>134</sup> However, the BIT in question makes no such showing.
- 7.8.2 Moreover, a single treaty, concluded approximately twenty years after the execution of the BIT here in issue, and three years after the commencement of this arbitration, cannot qualify as an example of the generality of Turkey’s *practice* in 2012, or indicate a basis for concluding that an alternative approach taken in 2012 should be relied upon to conclude that Turkey intended a different approach in 1992.
- 7.8.3 The Tribunal considers it to be unlikely that either party turned its mind explicitly – in 1992 – to the question of whether the MFN clause encompassed DRPs. Indeed, having regard to the state of international law at the time, and the absence of judicial or arbitral authority for the proposition that an MFN clause could ever cover a DRP, the better view is that the Contracting Parties proceeded on the basis that that MFN clauses did *not* encompass a DRP.
- 7.8.4 Since 1992 arbitral practice has changed, initiated by the award in *Maffezini*, which has been followed in some subsequent cases but also criticised in others, and in academic and other authorities. Since the *Maffezini* decision, states have, on occasion, adopted a new practice, and this appears to be what Turkey did in 2012.
- 7.8.5 Claimant also points to other treaties such as Turkey-UK BIT and the Turkmenistan-UK BIT to prove that these contracting “parties always considered the DRP are covered by MFN treatment”. The Turkmenistan-UK BIT is said to provide in its relevant MFN clauses that:

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<sup>134</sup> Claimant’s Rejoinder, ¶ 107.

“... the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement (including DRP of Article VIII).”<sup>135</sup> (Claimant’s emphasis)

7.8.6 Such an argument on the part of the Claimant is not persuasive.

7.8.7 First, neither of the BITs identified by Claimant includes a clause such as set out or described in paragraph 108 of Claimant’s Rejoinder.

7.8.8 Second, even if Turkey or Turkmenistan had included such a clause in a BIT with another Contracting Party, to the extent that this would establish anything, it would be no more than that Turkey and Turkmenistan (and their respective Contracting Parties) went out of their way in those BITs to express the view that they wanted the relevant MFN provisions to encompass and apply to the DRPs of those BITs.

7.8.9 Thus, rather than supporting Claimant’s case, any such wording of the MFN clauses in such BITs would tend to confirm that Article II.2’s MFN provisions were not intended to apply to Article VII.2’s DRPs.

7.8.10 This is consistent too with the view expressed by Professor Zachary Douglas, namely that an MFN clause in a basic investment treaty “does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.”<sup>136</sup>

## **7.9 Conclusion on the Scope of the MFN Clause**

7.9.1 For the reasons set out above, the Tribunal concludes that Article II.2’s MFN provision does not encompass or apply to the BIT’s DRPs so as to permit Claimant to rely on the DRP’s of the Switzerland-Turkmenistan BIT. This, therefore, confirms its conclusion above, that neither it, nor the Centre has jurisdiction over this arbitration, unless Claimant is excused from mandatory prior recourse to Respondent’s courts by reason of its futility argument.

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<sup>135</sup> Claimant’s Rejoinder, ¶ 108.

<sup>136</sup> Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), Rule 43, pp. 344 *et seq.*

## **8. IS CLAIMANT EXCUSED FROM PRIOR MANDATORY RECOURSE TO RESPONDENT'S COURTS**

### **8.1 Would Mandatory Recourse have been Futile**

- 8.1.1 The Claimant argues that it is exempted from compliance with the provisions of Article VII.2, because prior recourse to Respondent's courts would have been ineffective and futile. The argument is based by analogy on the principle that the international law requirement to exhaust local remedies may be disregarded when, in reality, no remedy is available or any attempt at exhaustion would be futile.
- 8.1.2 It is true that Claimant's counsel took the position, *by way of submissions*, that Claimant: (a) was unable to find a single Turkmen lawyer who was willing to testify against Respondent; and (b) communicated with other investors with claims against Respondent and understands that its experience is universal.
- 8.1.3 But, this is not compelling "evidence" of futility, if indeed it can be said to constitute evidence at all in support of the proposition on which Claimant relies. Moreover, the submission is not on point.
- 8.1.4 A tribunal cannot properly come to a conclusion that an investor is not required to comply with mandatory prior recourse to a state's courts unless a clear case has been made out, based on sufficient and "best" evidence, that recourse is not available to the state's court or, if available, the investor would not have been treated fairly before those courts.
- 8.1.5 Claimant has tendered no evidence – whether in the form of a witness or expertise – to support its assertion. Nor has Claimant sought to offer any explanation or account as to its failure to tender such evidence.
- 8.1.6 The Tribunal considers that - irrespective of whether Turkmen lawyers were or were not unwilling to testify "against the Government of Turkmenistan" because of "a fear for the security of the person and family of the Turkmen lawyer from reprisals by the Government of the Respondent"<sup>137</sup> - the point does not go to the issue that falls to be addressed, namely:

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<sup>137</sup> Claimant's Counter-Memorial, ¶ 48.

- (a) whether, under Turkmen law, recourse to the Turkmen courts was available in principle to Turkish investors at the relevant time in relation to disputes arising under the BIT; and
- (b) if available in principle, whether an attempt to exercise the right of recourse would have been futile or ineffective because of particular failings in/of Respondent's courts/judiciary/administration of justice.

8.1.7 As Respondent points out, the "futility" test relied upon by Claimant was inspired by international jurisprudence dealing with the international law rule of exhaustion of local remedies. However, Article VII.2 of the BIT does not require the exhaustion of local remedies as the concept is understood under international law. It simply requires an investor with a dispute to take the matter to the host state's courts and not to have received a final award within one year.

8.1.8 Here, despite its obligation to do so, Claimant has elected not to submit its dispute to the competent local courts in Turkmenistan prior to turning to ICSID arbitration. It has apparently not taken a single procedural step there prior to submitting this dispute to ICSID. Nor has Claimant offered any explanation as to what, if anything, it did to investigate prior recourse to Respondent's courts before it initiated these proceedings, or to conclude that it had no need to provide any account as to why it had not had recourse to the local courts.

8.1.9 Claimant's failure to lead sufficient evidence on these points is all but fatal having regard to the onus it bears to show that prior recourse would have been ineffective or futile.

8.1.10 Claimant's futility analysis is based principally on broad statements and third party studies/reports, to the effect that the Turkmen judiciary lacks independence, and that the Turkmen authorities would have had a particular aversion to Turkish investors. The Tribunal considers, however, that if a party to proceedings such as these is to make a futility argument, it has the onus of showing that recourse to the Contracting State's courts would be futile or ineffective, and that requires the tendering of probative evidence that goes to the specificity of the issue in dispute. It is not enough to make generalised allegations about the insufficiency of a state's legal system. Against the backdrop of relevant Turkmen laws introduced into the record by

Respondent, such material as has been relied upon by Claimant cannot constitute sufficient evidence of unavailability or ineffectiveness.

- 8.1.11 Respondent points to the 2008 Turkmen Constitution, which sets forth the principle of independence of judges, guarantees their immunity and prohibits any interference in their work. It also provides that justice is to be dispensed on the basis of equality and due process. Cases are heard by full benches, trials are public and the right to legal assistance is recognised at all stages of the proceedings.
- 8.1.12 Similarly, the 2009 Law on Courts (“**Law on Courts**”) sets out the principle of independence of judges and prohibits any interference in their work, under criminal and administrative penalty.<sup>138</sup> The Law on Courts also excludes accountability of a judge before state authorities, and other entities, with regard to the cases that he or she handles. The same law also provides guarantees of fair trial and due process.
- 8.1.13 Respondent also refers to the legal text governing proceedings before the Arbitrazh Court of Turkmenistan, which indicates that it is the competent Turkmen court to hear Claimant’s BIT disputes.
- 8.1.14 Claimant does not dispute that the Arbitrazh Court has jurisdiction to hear disputes arising out of international treaties of Turkmenistan. It simply says that it was unable to verify the effect of the Law on Courts.<sup>139</sup> Moreover, Claimant does not contest that the Arbitrazh Procedural Code (“**APC**”) provides strict timeframes for the court to resolve disputes. The APC also has similar provisions to those found in the Law of Courts and the 2008 Constitution, regarding guarantees of independence of judges and fair trials in Arbitrazh proceedings.
- 8.1.15 Claimant says that “the recent improvement of judiciary has not been substantiated by the Respondent.” It is true that Respondent has not lead evidence of a track record of proceedings before the Arbitrazh Court involving investment disputes brought against Respondent. Although this is explained on the basis that there have been none, the more important point is that the onus is not on Respondent to prove the availability and efficacy of its court systems to manage investor related disputes. Rather, the onus

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<sup>138</sup> See Law on Courts of Turkmenistan (15 August 2009), Excerpts, Exh. RL-40.

<sup>139</sup> Claimant’s Rejoinder, ¶ 148; see Arbitrazh Procedural Code of Turkmenistan, Excerpts, Exh. RL-39.

is on Claimant to show, on sufficient evidence, that such recourse is unavailable or would be futile *in respect of the matters at issue in this case*, including in relation to this party and to the matters in dispute.

8.1.16 Claimant's only testamentary evidence which was seemingly intended to address this point, is found in two witness statements of Mr Osman Arslan. However, to the Tribunal's mind, Mr Arslan's evidence was not directed to the availability and efficacy of the Turkmen judicial system to handle investor-state disputes.

8.1.17 It is not in issue that the proceedings against Mr Arslan, and which are the subject of his testimony, arose out of the collapse of scaffolding at Claimant's Mary City mosque project. Nor is it contested that the collapse resulted in severe injury to a number of workers and the death of one worker. It is also by no means clear that the proceedings against Mr Arslan were improper, that he was ill-treated or that he was denied due process. But even assuming some deficiencies, Mr Arslan's evidence of what happened in these proceedings does not touch on the availability or efficacy of a dispute between an investor and the state in proceedings before the Arbitrazh Court.

8.1.18 Similarly, Claimant's reliance on Mr Bozbey's claim before the UN Human Rights Committee, based on allegations that he was subjected to arbitrary arrest, improper detention and discrimination, is not on point (assuming it even to be compelling).

8.1.19 Although of Turkish nationality, there is no suggestion that Mr Bozbey has any relationship with Kiliç. It is thus difficult to see how his complaints about the criminal proceedings that were brought against him, even if justified, are relevant to Kiliç's complaints about the unavailability of or futility in having recourse to Respondent's courts over its BIT claims.

8.1.20 Moreover, Claimant's arguments, which are based on his complaints, are not assisted by the UN Human Rights Committee's finding that they had not been substantiated. The Committee also noted that Mr Bozbey had been convicted in accordance with domestic legislation of Turkmenistan and did not condemn or otherwise criticise his criminal conviction.

8.1.21 In these circumstances, based on the evidentiary record, the Tribunal is unable to conclude that it would have been ineffective or futile for Claimant to have sought to

comply with Article VII.2's requirement for prior recourse to the courts of Turkmenistan. Accordingly, Claimant was not exempted from their application.

## 9. COSTS

### 9.1 Parties' Claims for Costs

9.1.1 At the close of the 7 December 2012 hearing, the parties were requested to provide the Tribunal "... with [their] cost claims, assuming [they] are both claiming costs in the event of success ..."<sup>140</sup>

9.1.2 On 8 January 2013, in response to the Tribunal's request, each of the parties submitted statements of costs, as requested.

9.1.3 Claimant sought an award of cost in the amount of US \$1,788,386, based upon:

<b>Cost Item</b>	<b>Amount US \$</b>
Volterra Fietta Services (Fees and Costs)	535,790
Çetinel Services	701,860
Other Lawyers (Mr Fatih Serbest, Mr Niyazi Seyhan and Ms Mahnaz Malik)	288,074
Legal Opinion Costs	5,000
Miscellaneous Expenses	32,662
ICSID Fees	225,000
<b>Total</b>	<b>1,788,386</b>

9.1.4 Respondent sought an award of costs in the amount of US \$4,227,583, based upon:

<b>Cost Item</b>	<b>Amount US \$</b>
Legal fees - Curtis, Mallet-Prevost, Colt & Mosle LLP and Gürel Yörüker Law Offices	3,837,977
Disbursements (including \$225,000 payments to ICSID and Respondent's experts)	389,606
<b>Total</b>	<b>4,227,583</b>

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<sup>140</sup> Transcript of 7 December 2012 hearing, p. 192/20-25.

9.1.5 On 18 January 2013, as invited, Claimant submitted comments on Respondent's claim for costs.

9.1.6 Claimant took the position that:

- (a) Respondent had failed to provide any detailed information on its claimed expenses or a breakdown of its fee claims, which were said to be excessive in nature;
- (b) Respondent should provide a detailed breakdown of the fees and information on the expenses incurred in order to enable it to review them, and comment and/or object; and, in any event;
- (c) Respondent's costs were not incurred due to the acts of Claimant.

9.1.7 Respondent had no comment to make on Claimant's cost submission, save to maintain that costs should be awarded to it.

## **9.2 Tribunal's Decision on Costs**

9.2.1 ICSID Convention Article 61(2) requires a tribunal, except as the parties otherwise agree, to assess the expenses incurred by the parties in conjunction with the proceedings, and to decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision is required to form part of any award.

9.2.2 Rule 28 (2) of the ICSID Arbitration Rules, which governs the costs of proceedings, provides that:

*“Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the Parties and the*



*Secretary-General to provide additional information concerning the costs of the proceeding.”*

- 9.2.3 The Secretary of the Tribunal has advised the Tribunal that the costs of the arbitration, which include, *inter alia*, the arbitrators’ fees, the expenses of the Tribunal, the Secretariat’s administrative fees and the charges for the use of the facilities of the Centre, at the time of the Award, amount to US \$618.176.40.<sup>141</sup>
- 9.2.4 In this case, each of the parties has asked the Tribunal to exercise discretion in its favour under Article 61.
- 9.2.5 Article 61(2) provides the Tribunal with a wide discretion on how the costs of an arbitration should be borne. For the reasons discussed below, the Majority concludes that Claimant should bear its own costs together with 50% of Respondent’s reasonable costs, in relation to the second phase of these proceedings as set out in paragraph 9.2.9 below.
- 9.2.6 Claimant asserted far-reaching claims in these proceedings which it must have expected Respondent to take seriously and to defend accordingly. The Tribunal accepts that the meaning and effect (*i.e.*, the optionality) of Article VII.2 was an unsettled question at the time Claimant filed its Request, and that the meaning and effect of that requirement was most certainly not clear. Nevertheless, it appears that Claimant seems to have disregarded entirely the possibility that Article VII.2 might require it to refer its claims to the Turkmen courts prior to initiating ICSID arbitration proceedings. After the meaning of Article VII.2 had been decided by the Tribunal, Claimant offered no explanation for its decision not to seek to comply with the provisions of Article VII.2. Nor, on the evidence, would it appear that Claimant gave any consideration to compliance with Article VII.2’s prior recourse requirements before it filed its Request. Indeed, it is not evident from the Request that Claimant even complied fully with Article VII.2’s notice of dispute requirements in respect of all aspects of the dispute that was submitted to the Tribunal, or that it sought their

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<sup>141</sup>The total costs of the proceeding as provided herein are actual as of the day of dispatch of the Award. It does not include the courier services expenses to be incurred for sending the certified copies of the Award as well as the printing and binding costs. Therefore, these costs will be subject to a slight variation. Upon the financial closure of the case, ICSID will provide a final financial statement reflecting the final costs. Such statement will be notified to the Parties within 90 days from the date of dispatch of the Award.

settlement “by consultations and negotiations” as required by the clear language of Article VII.2.

9.2.7 In these circumstances, the Majority considers that it would be unreasonable to direct that each party should be required to bear all of its own costs of the proceedings to date. Claimant exercised a right to bring these proceedings, but it did so on the basis of an expectation that there would be potentially serious challenges to jurisdiction or admissibility. The Majority considers that Claimant should accordingly bear some of the consequences of its actions by reimbursing Respondent for 50% of the reasonable costs it incurred in responding to Claimant’s case leading to the dismissal of these proceedings for want of jurisdiction. As regards an assessment of the reasonableness of Respondent’s costs, Respondent has provided a statement of the totality of the time spent by its legal team (13,415 hours), together with a short-form list of tasks on which that time was spent. This limited description of how Respondent’s costs were incurred is not sufficient to enable the Tribunal to assess which costs were expended in relation to different phases of the case, whether all of its costs are reasonable and were reasonably incurred. This can come as no surprise to Respondent as, at the conclusion of the December 2012 hearing, the parties were directed to provide sufficient detail for the Tribunal to consider whether their costs were reasonably incurred.<sup>142</sup>

9.2.8 However, the Majority considers that an expenditure of 13,415 hours is very extensive by any reasonable standard, having regard to the relatively limited and discrete issues briefed and addressed in the totality of these proceedings to date.

9.2.9 Based on the information available to it, including Claimant’s claim for costs, and having regard to the nature of the written and oral submissions to date, and the need for only two separate days of oral hearings (one for each phase of the case), the Majority determines that Respondent’s legal cost and disbursement<sup>143</sup> in an amount of US \$2,001,291.50 are reasonably to be attributed to the costs of the proceedings leading to this Award (the other half to be treated as being attributable to the costs of

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<sup>142</sup> Transcript of 7 December 2012 hearing, p. 192/21-25.

<sup>143</sup> This figure excludes disbursements to ICSID of US \$225,000, which are referred to in paragraph 9.2.10 below.

the proceedings leading to the Decision of 7 May 2012), and that 50% of such costs should be reimbursed by Claimant.

9.2.10 In addition, Claimant shall be liable to pay to Respondent a proportion of the fees and expenses of the members of the Tribunal, and of the administrative fees and the charges for the use of the facilities of ICSID as finally notified by the Centre. Having regard to the consideration that the meaning and effect of Article VII.2 was an open question, the Majority considers that it would be appropriate for the Parties to share the costs of the Tribunal and the Centre incurred in the proceedings leading to the Decision of 7 May 2012. As regards the costs of the Tribunal and the Centre incurred in the proceedings leading to this Award, the Majority considers that it would be reasonable for the Claimant to pay 75% of these costs, and for the Respondent to pay 25%.

## **10. DISPOSITIVE PART**

### **10.1 Tribunal's Award**

10.1.1 For the reasons stated above the Tribunal DECLARES, ORDERS and AWARDS that:

- (a) the requirement to comply with Article VII.2 of the BIT, and to have prior recourse to the Turkmen courts, constitutes a precondition to the existence of the Tribunal's jurisdiction;
- (b) Claimant's failure to give effect to that requirement means that the Tribunal does not have jurisdiction over the dispute submitted to arbitration;
- (c) all Claimant's claims are dismissed in their entirety, for lack of jurisdiction; and
- (d) Claimant shall pay to Respondent forthwith US \$1,000,645.75 to indemnify it for 50% of its reasonable legal costs and disbursements of the proceedings leading to this Award, as identified in 9.2.9 above, and shall indemnify it forthwith for 75% of the costs of the Tribunal and the Centre incurred following the Decision of 7 May 2012 in the proceedings leading to the Award, these being, the fees and expenses of the members of the Tribunal, and the administrative fees and charges for the use of the facilities of the Centre, as identified in 9.2.10 above.

The Arbitral Tribunal:

*William W. Park*

Prof. William W. Park  
Arbitrator

Date: *21 June 2013*

*Separate Opinion*

*Philippe Sands*

Prof. Philippe Sands QC  
Arbitrator

Date: *15 June 2013*

*William Rowley*

Mr. William Rowley QC  
President of the Tribunal  
Date:

*25 June 2013*

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

In the proceeding between

**KILIÇ İNŞAAT İTHALAT İHRACAT SANAYİ VE TİCARET ANONİM ŞİRKETİ**

Claimant

and

**TURKMENISTAN**

Respondent

**ICSID Case No. ARB/10/1**

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**SEPARATE OPINION OF PROFESSOR WILLIAM W. PARK**

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## Kılıç İnfaat İthalat İhracat Sanayi ve Ticaret Anonim Sirketi

v.

Turkmenistan

## Separate Opinion of William W. Park

## I. Background

1. With respect to certain construction projects in Turkmenistan, Claimant in December 2009 filed a Request for Arbitration pursuant to the Agreement between Turkey and Turkmenistan Concerning Reciprocal Promotion and Protection of Investments (the “BIT”).
2. In pertinent part, Article VII appears below.
  - (1) Disputes between one of the Parties and one investor of the other Party, in connection with his investment, shall be notified in writing, including a [sic] detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.
  - (2) If these disputes [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to [choice of ICSID, UNCITRAL or ICC] provided that, if [sic] the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and [sic] a final award has not been rendered within one year.
3. The first subsection uses the mandatory “shall” to impose jurisdictional preconditions requiring notice of the dispute and an endeavor to settle the dispute by negotiation. If settlement proves elusive during a period of six months from notice, the second subsection says that disputes “can be” submitted to arbitration, which will go forward if host states have not given final judgment in a year.
4. The Request for Arbitration met the six-month waiting period with respect to four construction projects. However, the “no-judgment-within-a-year” proviso has not been fulfilled. As an initial matter, therefore, the Tribunal had to consider whether the “no-judgment-within-a-year” proviso was optional or mandatory.
5. An option to litigate would say that disputes can be arbitrated “provided that if the investor has brought litigation, a final award has not been rendered within one year.” A mandatory text would say that disputes can be arbitrated “provided that the investor has brought litigation **and** a final award has not been rendered within one year.”
6. The English version of the BIT combines “if” (optional) with “and” (mandatory) as follows: “Disputes can be submitted [to arbitration] provided that, if the investor has brought the dispute [local courts] **and** a final award has not been rendered within one year.” The Russian text connects the proviso only to ICC arbitration, arguably making it irrelevant to ICSID proceedings. The Tribunal’s task was complicated by arguments invoking treaty texts in Turkish and Turkmen.
7. Earlier in the proceedings, this Tribunal came to a view that English and Russian, but not Turkish or Turkmen, were authentic treaty texts. Rightly or wrongly, that ruling also said the “no-judgment-within-a-year” proviso was mandatory. The word “if” was read out of the treaty, in part due to linguistics testimony suggesting pleonastic Russian usage of “provided that” (при условии) and “if” (если) to translate as “on condition that” an investor files litigation.
8. Now the Award says the “no-judgment-in-a-year” proviso precludes arbitral authority. After three years, the Parties return to where they started. Claimant bears costs despite the undisputedly defective wording of Article VII. Such conclusions run counter to the BIT terms and purpose. The proper course would be to put proceedings into abeyance for a reasonable time to permit filing local litigation. If a timely judgment proves acceptable to the investor, proceedings end. If the investor remains aggrieved, arbitration resumes for claims falling within the scope of the BIT.

## II. Consent to Arbitration

9. Article VII says that a dispute can be submitted to arbitration if not settled through negotiation “within six months following the date of the written notification.” When Claimant consented to arbitrate by its Request of 15 December 2009, the host state’s standing offer to arbitrate was met, as to the four relevant projects, according to the terms of that offer, including the notice/settlement period.
10. Notice of disputes may be given either independently or in connection with local litigation. Claimant elected the former, sending notices and then waiting the requisite six months. Notice was given in early 2009 as follows: (i) sports stadium, by letters of 10 & 16 January, 13 & 16 February, 25 May and 3 June; (ii) Agriculture University, by letter of 16 February; (iii) schools, by letters of 5, 16 & 23 January, 13 & 16 February, and 15 April; and (iv) Ashgabat residential/commercial buildings, by letters of 26 March and 5 & 6 June.
11. The notices contain information on geological surveys, iron foundations, bitumen isolation, payment terms, penalty percentages and contract identification. In some instances the notices refer to “Turkmenistan Fortification Law Court” demonstrating hopes of local court resolution.
12. These letters meet the treaty requirements for content as well as for timing. Article VII requires “detailed information” about the dispute, but not legal theories derived from treaty provisions, which might reveal themselves only after host state reaction to the notices.

## III. Six Months Means Six Months

13. The BIT says disputes “can be” submitted to arbitration if not settled within six months from notice.
14. Interpreting the “no-judgment-within-a-year” proviso as a jurisdictional precondition creates a pathology in which the same sentence purports to permit an investor to commence arbitration six months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point.
15. Perhaps a special jurisdictional predicate, divorced from the six-month waiting period, might arguably impose itself if the “no-judgment-within-a-year” proviso depended on an event other than notice of the same dispute which serves as the starting gun for the right to arbitrate.
16. Such is not the case. The English text consistently uses the same term “dispute” for all purposes. The Russian displays the same consistency, using “конфликт” (“conflict”) regardless of whether relief is sought before courts or arbitrators.

## IV. Arbitration of BIT Violations

17. Interpreting the “no-judgment-within-a-year” proviso as a precondition to arbitral authority means that investors remain without arbitral recourse if denial of treaty rights comes through swift court action. The treaty’s standing offer to arbitrate cannot be accepted because judgment arrives within a year.
18. Consequently, no arbitral tribunal with any jurisdictional legitimacy can hear claims of treaty violations such as uncompensated expropriation or denial of justice.
19. Nothing in the BIT gives even a hint of intent to limit recourse to arbitration for treaty-based claims. Article VII contains the broadest of language, providing arbitration for all “disputes ... in connection with” an investor’s investment.
20. Reading any treaty in a way that defeats its goals, should normally be avoided when a more reasonable construction presents itself. Article 31 of the Vienna Convention on the Law of Treaties directs interpretation of treaties 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” which in this case include promotion of “a stable framework for investment.”



21. To construe the proviso as a jurisdictional precondition creates anything but such a “stable framework” for investment. If arbitration begins before litigation, as in the present case, the claim is dismissed. Yet if litigation precedes arbitration, the claim can be defeated by a swift judgment, since the deemed jurisdictional precondition, the court’s failure to reach decision in a year, cannot be satisfied due to the judgment having arrived before the twelfth month.
22. The Award predicts that arbitrators faced with rapid denial of treaty rights will nevertheless hear claims in certain cases. If so, the proviso takes a chameleon-like character barring arbitral authority in certain instances but not others. If the investor in the current proceedings files a second arbitration following a swift judgment denying treaty rights, the claim can be heard only if a new tribunal treats the proviso as something other than the *ab initio* jurisdictional precondition asserted in the Award.
23. By contrast, no conflict arises between treaty objectives and the proviso when the “no-judgment-within-a-year” rule receives its normal reading as a procedural requirement not reaching the level of jurisdictional precondition. An arbitral tribunal can be constituted with authority to hear complaints about treaty violations through quick but incorrect decisions.

V. The Wording of Article VII

24. In Article VII, neither the English nor the Russian version gives any hint of merging or amalgamating the jurisdictional quality of the first subsection (mandating that disputes “shall” be notified and negotiated) into the permissive second subsection (providing that disputes “can be” submitted to arbitration if not settled within six months).
25. The treaty language and purpose support reading the “no-judgment-in-a-year” proviso as a clause designed to give local courts a chance to resolve disputes whether or not arbitration has already begun.
26. Neither magic nor mystery attaches to procedural steps that fail to reach the level of preconditions to the creation of arbitral authority.
27. Procedural flaws that may be cured during the arbitration are often characterized by reference to notions such as ripeness, *recevabilité* or admissibility. Such terms derive not from technical treaty definition, but from usage as convenient labels to describe steps to be taken either before or after constitution of a tribunal, even if they must be met prior to merits being addressed.
28. These distinctions remain commonplace. Arbitrators often confirm jurisdiction, but proceed to the merits only “provided that” Terms of Reference are signed, deposits lodged, and/or settlement mechanisms satisfied. Such requirements may be met after exercise of a right to arbitrate.
29. Few requirements introduced by “provided that” possess an intrinsically jurisdictional quality. Instead, the meaning of a proviso depends on the drafters’ intent as evidenced by context, structure and wording, construed in light of all related factors.
30. The present interpretative exercise might yield a different conclusion had the treaty employed other language, such as a statement saying “investors are entitled to arbitrate only after going to local courts.” Instead, the BIT says that disputes “can be submitted” to arbitration six months after notice. Considered in the context of the totality of Article VII, the “no-judgment-within-a-year” proviso cannot be construed as a precondition to arbitral authority without ignoring the ordinary meaning of the BIT’s terms in light of its purpose to allow submission of disputes to arbitration after a six-month notice period.



William W. Park  
20 May 2013

# Annex A

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

**KILIÇ İNŞAAT İTHALAT  
İHRACAT SANAYİ VE TİCARET  
ANONİM ŞİRKETİ**

**Claimant**

**and**

**TURKMENISTAN**

**Respondent**

**ICSID Case No. ARB/10/1**

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**DECISION ON ARTICLE VII.2 OF THE  
TURKEY-TURKMENISTAN BILATERAL INVESTMENT TREATY**

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*Members of the Tribunal:*

Professor William W. Park  
Professor Philippe Sands QC  
Mr J. William Rowley QC (President)

*Secretary of the Tribunal:* Ms Mairée Uran-Bidegain

**Representing Claimant**

Robert Volterra  
Sameer Sattar  
Chris Stephen  
Tihomir Mak  
Bernhard Meier

Volterra Fietta

Yasemin Çetinel  
Çetinel Law Firm

**Representing Respondent**

Peter M. Wolrich  
Ali R Gürsel  
Miriam K. Harwood  
Gabriela Alvarez Avila  
Claudia Frutos-Peterson  
Jennifer Morrison  
Zeynep Gunday  
Diora Ziyaeva

Curtis, Mallet-Prevost, Colt  
& Mosle LLP

Gülperi Yörüker  
Sibel Yurtuttan  
Alev Gürel  
Berin Hickmet

Gürel Yörüker Law Offices

*Date of dispatch to the Parties: 7 May 2012*

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## **1. INTRODUCTION**

- 1.1 On 30 December 2009, Claimant, Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi (also referred to as “Kilic”), a company with registered offices in Istanbul, Turkey, filed a Request for Arbitration (“Request”) before the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) alleging breaches by Respondent, Turkmenistan (referred to indistinctively as “Turkmenistan” or “Respondent”) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, which entered into force on 13 March 1997 (“BIT”).
- 1.2 The Request was registered by the Secretary-General of ICSID on 19 January 2010, in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).
- 1.3 Claimant and Respondent are hereinafter collectively referred to as the “parties.” The parties’ respective representatives and their addresses are listed above.

### ***The First Tribunal***

- 1.4 On 20 March, 2010, Claimant informed the Centre that pursuant to Rule 2(3) of the Centre’s Rule of Procedure for Arbitration Proceedings, it elected to have the Tribunal constituted in accordance with Article 37(2)(b) of the ICSID Convention. The Centre acknowledged Claimant’s election by letter dated 22 March 2010, and the parties proceeded with the appointment of the arbitrators.
- 1.5 On 7 December 2010, a tribunal (“First Tribunal”) was constituted, comprising Professor William W. Park (USA), appointed by Claimant, Professor Philippe Sands QC (UK/France), appointed by Respondent, and Professor Emmanuel Gaillard (France), appointed as its President by the Chairman of the Administrative Council of ICSID, in accordance with Article 38 of the ICSID Convention. Ms. Aïssatou Diop, ICSID, was designated to serve as Secretary of the Tribunal.
- 1.6 On 8 December 2010, the Centre requested each party to make an initial advance payment of US\$ 100,000.00 to cover the costs of the proceedings in the first three to six months of the case. The Centre received the payment from the parties in due course.

1.7 On 31 January 2011, the First Tribunal held a first session, alone without the parties, by telephone-conference, in order to meet the time limit for the Tribunal's first session set forth under Rule 13(1) of the Centre's Rules of Procedure for Arbitration Proceedings.

### ***Objections to Jurisdiction***

1.8 On 11 February 2011, having been made aware of Respondent's objections to jurisdiction and proposal that these proceedings be bifurcated as between jurisdiction and merits, the First Tribunal invited the parties to provide submissions on the issue of the bifurcation of these proceedings.

1.9 On 22 February 2011, Respondent wrote to the First Tribunal setting out its brief submission on the nature of (but not justifications for) its objections to jurisdiction, as Requested in the Tribunal's letter of 11 February 2011.

1.10 On 2 March 2011, Claimant wrote to the First Tribunal setting out its response to the First Tribunal's letter of 11 February 2011, and to Respondent's submission of 22 February 2011.

### ***First Meeting***

1.11 On 14 March 2011, the First Tribunal held a procedural consultation with the parties ("First Meeting") by teleconference at 12:00 p.m., Washington, D.C. time.

1.12 During the course of the First Meeting, the parties confirmed, *inter alia*, that:

- (a) the rules applicable to this arbitration are the ICSID Rules of Procedure for Arbitration Proceedings as amended as of 10 April 2006 ("**Rules**");
- (b) the First Tribunal had been constituted in accordance with the ICSID Convention and the Rules;
- (c) the proceedings would be held in Paris; and
- (d) the language of the proceedings would be in English.

1.13 As regards the written and oral procedures to be adopted in the arbitration, after hearing each party's oral presentation, the First Tribunal decided that:

- (a) Respondent would have three weeks to elaborate on the nature of each of the five grounds on which it based its objections to jurisdiction;
- (b) Claimant would have three weeks thereafter to respond;
- (c) in their respective submissions, each party was to provide alternative procedural calendars, one with bifurcation and one without; and
- (d) the First Tribunal would then decide on bifurcation.

#### ***The Parties' Further Comments on Jurisdiction***

1.14 On 4 April 2011, Respondent provided further observations on the issue of bifurcation of the proceedings and the nature of its objections to jurisdiction, as directed by the Tribunal during the First Meeting.

1.15 On 25 April 2011, Claimant provided further observations on the issue of bifurcation of the proceedings and set out its response to Respondent's letter of 4 April 2011, as directed by the Tribunal during the First Meeting.

#### ***The Second Tribunal***

1.16 On 2 May 2011, Professor Gaillard resigned from the Tribunal. On 3 May 2011, the Secretary-General notified the parties of the vacancy on the First Tribunal and suspended the proceeding in accordance with Rule 10(2).

1.17 On 24 May 2011, the First Tribunal was reconstituted ("Tribunal"), with Professor Park and Professor Sands continuing, and with the appointment, by the Chairman of the Administrative Council of ICSID, of Mr J. William Rowley QC, as its President. In accordance with Rule 12, the proceeding resumed on that same date.

1.18 On 24 August 2011, the Secretary General announced to the parties and the Tribunal that Ms. Diop would take a temporary leave of absence and that Ms. Mairée Uran Bidegain, had been designated to serve as Secretary of the Tribunal during her absence. On 10 January 2012, the Secretary-General of ICSID informed the parties and the Tribunal that Ms. Mairée Uran Bidegain would continue serving as Secretary of the Tribunal on a permanent basis.

### *Decision on Bifurcation and Early Determination of BIT Issues*

1.19 On 30 June 2011, having considered the parties' submissions on bifurcation, the Tribunal issued a reasoned decision on bifurcation, declining to direct bifurcation of the proceedings. In reaching this decision, the Tribunal made it clear that it had in no way pre-judged the outcome of any of the jurisdictional objections raised, that Respondent was fully entitled to maintain such objections as it considered appropriate, and that they would be addressed as joined to the merits of the dispute in the manner envisaged by Article 41 of the ICSID Convention. However, having regard to the parties' differences concerning Article VII.2 of the BIT, and the significance of that issue, the Tribunal considered it would be appropriate, at an early stage, to determine:

- (a) the number of authentic versions of the BIT; and
- (b) to the extent there are authentic version(s) of the BIT in languages other than English - accurate translations into English of any authentic version(s) of the BIT.

Mindful of the need for early resolution of these issues in order to avoid unnecessary cost and argument later in the proceedings, the Tribunal also indicated that it wished to explore further the meaning and effect of Article VII.2 of the BIT.

1.20 Having also considered the parties' respective proposed timetables, and bearing in mind that the case was registered with the Centre some 15 months earlier, the Tribunal established the timetable for the case, fixing all procedural steps up to and including the production of a hearing bundle on 29 October 2012. The hearing date was to be fixed at a later date.

1.21 As regards its questions concerning Article VII.2 of the BIT, referred to at 1.19 above ("BIT Issues"), the timetable provided for two rounds of simultaneous written submissions as follows:

- (a) by 1 August 2011, submissions on what constitutes authentic versions / accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2, together with documentary testimonial or expert evidence relied upon; and



- (b) by 15 August 2011, simultaneous reply submissions on what constitutes authentic versions / accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2, together with documentary, testimonial or expert evidence relied upon.

### ***Subsequent Procedural Matters***

- 1.22 On 13 July 2011, Claimant requested that the procedural calendar be extended by an additional step, to allow it to file a Rejoinder on Jurisdiction if Respondent submits its objections to jurisdiction with its Counter-Memorial on the Merits (making that pleading Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction).
- 1.23 On the same date, the Tribunal invited Respondent to submit its comments, if any, on Claimant's request by 18 July 2011, which Respondent provided in due course.
- 1.24 On 1 August 2011, the parties exchanged written submissions on the BIT Issues. Claimant's submission was supported by an email to Claimant from Mrs. Özbîlgiç, a report from Mr. Fuat Kasimcan and an expert report from Professor Yusuf Çalişkan. Respondent's submission was supported by a legal opinion by Dr. Emre Öktem and Dr. Mehmet Karli.
- 1.25 On 15 August 2011, the parties exchanged written reply submissions on the BIT Issues. Claimant's submission was supported by a report from Mr Ibrahim Uslu. Respondent's submission was supported by a second legal opinion from Dr. Öktem and Dr. Karli and an expert report from Professor Jacklin Kornfilt.
- 1.26 On 8 September 2011, following consultation with the parties, and with their agreement, the Tribunal fixed the dates of 14-18 January 2013 for the oral hearing on the merits and jurisdiction - the hearing to take place at the World Bank's facilities in Paris.
- 1.27 On the same date, the Tribunal advised the parties that, unless they were content that the BIT Issues should be decided on the papers, the Tribunal considered that a one-day, in-person, oral hearing would be of assistance, to be attended by counsel and the parties' legal experts.

- 1.28 The Tribunal also advised the parties that, having considered the parties' submissions regarding Claimant's application to add a final (fifth) Memorial/pleading four weeks after Respondent's Rejoinder Memorial, it was not, for the moment, disposed to add the requested fifth memorial. The Tribunal noted that this was not a case in which jurisdictional objections would appear suddenly in the Counter-Memorial (Claimant having already been made aware of Respondent's jurisdictional objections through two sets of written exchanges). In these circumstances, the Tribunal noted that Claimant would be in a position to deal initially with Respondent's objections, to the extent that it wished, in its Memorial. However, should it turn out that any new objections were raised for the first time in Respondent's Counter-Memorial, the matter could be revisited.
- 1.29 On 15 September 2011, the parties commented on the Tribunal's suggestion to hold a one-day hearing on the BIT Issues.
- 1.30 On 23 September 2011, having considered the parties' comments, the Tribunal fixed 17 January 2012 for a one-day hearing in London on the BIT Issues. At the same time, it confirmed Paris as the place for the substantive hearing on 14-18 January 2013. The parties were also invited to discuss, with a view to agreeing, a proposal on the approach to/time allocation for the hearing on the BIT Issues.
- 1.31 Having been advised shortly thereafter of Mr Volterra's unavailability on 17 January 2012, and having confirmed the availability of all counsel, and their experts, on 20 January 2012, the Tribunal requested the parties to block 20 January 2012 for the BIT Issues hearing.
- 1.32 On 3 October 2011, Claimant wrote to the Centre stating that Mr Fatih Serbest had been dismissed as counsel of record for Claimant in the case.
- 1.33 On 4 October 2011, the Tribunal advised the parties that the hearing on BIT Issues in London was confirmed for 20 January 2012, starting at 10:00 a.m.
- 1.34 On that same date, Claimant advised the Centre that it had appointed Ms Yasemin Çetinel to act on its behalf as its legal representative along with Volterra Fietta (which firm had been on record from the start) in these proceedings.

- 1.35 On 24 October 2011, Claimant advised the Centre that the parties had agreed to amend the pleading schedule set out in the Tribunal's Procedural Order No. 1 of 30 June 2011, which agreement, amongst other things, would lead to a new hearing date-June 2013 being suggested. The parties requested the Tribunal to endorse this agreed schedule. Respondent agreed with the content of Claimant's communication on 25 October 2011.
- 1.36 On 4 November 2011, the Tribunal advised the parties that it was in general agreement with the new proposed timetable and confirmed its availability for a five-day hearing in Paris, commencing on 17 June 2013. The parties were also advised that their proposed new schedule was problematic with respect to the timetable for disclosure of documents. The parties were therefore requested to propose a slight adjustment. Once a new proposal had been agreed, the Tribunal indicated it would be pleased to consider it for endorsement.
- 1.37 On 23 November 2011, the Centre requested Claimant to make a second advance payment of US \$125,040.00 and Respondent to make a second advance payment of US \$125,000.00.
- 1.38 By correspondence dated 2 November 2011, 25 November 2011 and 30 November 2011, the parties provided their proposals for the conduct of the 20 January 2012 BIT Issues hearing. Respondent proposed, *inter alia*, that the hearing should focus on what the experts had to say. It favoured expert conferencing with the parties' legal experts, and suggested that its linguistic expert, Professor Kornfilt, attend for examination and subsequent questioning by Claimant. Claimant indicated that it did not require any of Respondent's experts to attend the hearing to be cross-examined and thus did not see the need for them to attend. Claimant also noted that Respondent had declined to Request that Claimant make available any of its experts for cross examination.
- 1.39 On 11 December 2011, the Tribunal advised the parties, *inter alia*, that it continued to feel that it would be helpful for the parties' legal experts to attend the hearing to enable the members of the Tribunal to raise questions directly with them. Accordingly, the Tribunal invited the parties to arrange for the attendance of their respective legal experts at the 20 January 2012 hearing. Since neither party had notified the other that it required the other parties' expert(s) for cross-examination, the

Tribunal proposed that the legal experts appear together, to respond to such questions as the Tribunal might have. Counsel for the parties would then have the opportunity to ask questions arising from the answers given to the Tribunal's questions. Respondent was also invited to have its linguistic expert available by video-conference facility, against the event the Tribunal had questions.

- 1.40 On 13 December 2011, Respondent advised the Tribunal that it objected to the attendance of Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu, stating that the Tribunal had only required the legal experts to attend and these experts did not fit in such category, and that the appearance of these three officials of the Government of the Republic of Turkey, would contravene Article 27 of the ICSID Convention.
- 1.41 On 19 December 2011, following further correspondence with the parties relating to the conduct of the 20 January 2012 hearing, the Tribunal advised that there would be an opportunity for counsel to make brief opening statements, following which the experts were requested to be available for questions (there would be no need for introductory statements, or testimony in chief), following which there would be an opportunity for counsel to make brief closing statements.
- 1.42 As regards Respondent's objection to the attendance of Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu, based on Article 27 of the Convention, the Tribunal clarified that, when it issued its 11 December 2011 invitation, it principally had in mind the attendance (for Claimant) of Professor Caliskan. Nevertheless, it advised that it did not consider Respondent's objection to be well founded and that, if Claimant wished them to attend, they might do so. If they did, and should the Tribunal question any of them, counsel would be given the opportunity to ask follow-on questions.
- 1.43 On 23 December 2011, following further correspondence from the parties in which *inter alia*, Claimant did not state that it wished Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu to attend, the Tribunal confirmed that it did not feel that the attendance of the three officials would be sufficiently helpful as to warrant their travel to London.
- 1.44 On that same date, Claimant advised the Tribunal that the parties had agreed to a further amendment of the pleading schedule. Whilst the proposed amendment would not affect the 20 January 2012 BIT Issues hearing, it would affect the planned

merits/jurisdictional hearing of 14-18 June 2013. Amongst other things, a new hearing date was suggested for October 2013.

- 1.45 On 3 January 2012, neither party having made the second advance payment that had been requested on 23 November 2011, the Centre followed up with the parties.
- 1.46 On 4 January 2012, Respondent's counsel advised that Respondent's second advance payment would be made by the next week at the latest.
- 1.47 On 5 January 2012, Claimant's counsel advised that Claimant expected to make its second advance payment within 30 days.
- 1.48 On the same day, following a number of exchanges between the Tribunal and the parties on the proposed new schedule, the Tribunal advised the parties that it would be sensible to discuss these matters in person, and to fix a new schedule that worked for all concerned during the hearing in London on 20 January 2012.
- 1.49 On 17 January 2012, Claimant wrote to the Centre, denying Respondent's assertion (see Section 4, Respondent's Case) that the Turkish version of the BIT published on the Turkish Undersecretariat of the Treasury's website states that Turkish is one of the authentic languages in which the BIT was executed. A copy of the Turkish version of the BIT as downloaded from the website was attached.
- 1.50 On the same day, Respondent wrote to the Centre:
  - (a) providing a revised certified translation into English of the authentic Russian version of the BIT (Exhibit R-1 (revised)), with a letter from the translators explaining the reason for the submission of the revised translation; and
  - (b) advising that the Turkish version of the BIT that was on the Undersecretariat's website in early August 2011 had indeed listed Turkish as an authentic language of the BIT.

### *The 20 January 2012 Hearing*

1.51 The BIT Issues hearing was held, as scheduled, in London on 20 January 2012 at the IDRC, 70 Fleet Street, London, EC4Y 1EU, United Kingdom. The hearing was recorded and transcribed.

1.52 At the hearing, the Tribunal heard oral testimony from the following experts presented by Claimant:

(a) Professor Yusuf Çalişkan

1.53 The Tribunal also heard oral testimony from the following experts presented by Respondent:

(a) Dr. Emre Öktem

(b) Dr. Mehmet Karli

(c) Dr. Jaklin Kornfilt

1.54 In the light of the parties' prior agreement and the Tribunal's directions, the available time at the hearing was divided roughly equally.

1.55 During the course of the hearing, and having regard to the revised English translation of the Russian version of Article VII.2 that had been filed on 17 January 2012, counsel for Respondent invited the Tribunal to appoint a qualified Russian expert translator to provide a further translation of Article VII.2.<sup>1</sup> When questioned about Respondent's invitation, Claimant's counsel suggested that such a course would be highly unusual and advised that Claimant had no desire for further expenditures for such a translation. However, Claimant's counsel also advised that this was "not an informed response".<sup>2</sup>

1.56 At the conclusion of the hearing, when the question of the payment of the second advances and the future scheduling were discussed, the Tribunal was advised that:

(a) Claimant would be in a position to make its payment within 30 days;

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<sup>1</sup> Transcript of 20 January 2012 Hearing, pp. 167/21 - 168/11.

<sup>2</sup> *Id.* at p. 184/8 - 184/24.

- (b) Respondent had now made payment of the requested second advance;  
and
- (c) because the decision on the BIT Issues had the potential to be dispositive of the Tribunal's jurisdiction, the parties were agreed that the Tribunal should decide the BIT Issues prior to considering a new timetable based on the parties' proposed amendment of the previously settled pleading schedule.

- 1.57 On 10 February 2012, Respondent wrote to the Tribunal, noting that Claimant had not paid its share and requesting that the funds it had disbursed be exclusively used for payment of expenses already incurred in connection with the 20 January 2012 hearing.
- 1.58 On 13 February 2012, the Centre informed the parties of Claimant's default in the payment of the second advance requested from it. Claimant was requested to confirm that it intended to and would make such payment by 20 February 2012.
- 1.59 On 20 February 2012, Claimant informed the Centre that it had paid its share of the second advance payment.
- 1.60 On 22 February 2012, the Centre advised the parties that, because of the Tribunal's continuing uncertainty as to the accuracy of the two English translations tendered by Respondent of Article VII.2 of the authentic Russian language version of the BIT, and the possible relevance of the English translation of Article VII.2 of the Turkish language version of the BIT published in the Turkish Official Gazette on 15 January 1995, it proposed to request two independent and qualified expert translators to provide it with English language translations of the relevant texts.
- 1.61 The parties were provided with the names and credentials of the translators that had been identified, together with the text of the Tribunal's proposed instructions to them. The parties were asked to comment by 1 March 2012 on the instructions the Tribunal proposed to issue to the expert translators.
- 1.62 On 27 February 2012, Respondent confirmed that it was content with the Tribunal's proposal to instruct independent expert translators. It proposed that a further question

be asked to the Russian-English translator and raised a question as to the potential suitability of the Turkish-English translator.

- 1.63 On 28 February 2012, Claimant advised the Tribunal “that it does not agree to the Tribunal taking up the Respondent’s proposal on this point” (*i.e.*, the appointment by the Tribunal of an independent translator(s)).
- 1.64 On 6 March 2012, having regard to the absence of agreement of the parties to the Tribunal’s retainer of/instructions to independent translators, the Tribunal advised the parties that it would proceed by analysing the BIT Issues on the existing record of the evidence and argument before it. The Tribunal reserved the right to instruct an independent expert in the event that it considered it necessary to do so.
- 1.65 Following the hearing, the members of the Tribunal deliberated by various means of communications including a meeting in London, United Kingdom, on 20 January 2012 and by a teleconference thereafter. In reaching its conclusions in this Decision, the Tribunal has taken into account all pleadings, documents, testimony, expert opinions and oral submissions filed or made so far in this case.

## **2. THE FACTS**

- 2.1 A review of disputing parties’ submissions, witness statements, expert reports and the oral testimony given at the hearing indicates that, with few exceptions, the factual matrix of the negotiation and conclusion of the BIT is either agreed or not seriously disputed.<sup>3</sup> Put another way, most of the differences between the parties as regards the BIT issues have to do with: (a) the proper construction of the concluding statement in the Russian version of the BIT which provides “[e]xecuted on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and the Russian language” - *i.e.*, the number of authentic versions of the BIT; (b) the accurate English translation of the authentic Russian version of Article VII.2 of the BIT; and, (c) the parties’ competing visions as to the proper construction (meaning and effect) of Article VII.2 of the BIT.

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<sup>3</sup> The parties differed on whether an English or a Turkish text was used in the negotiations, but, in the end, and given the absence of clear evidence, nothing turned on this point.



- 2.2 In particular, Claimant construes Article VII.2 of the BIT to mean that “recourse to the domestic courts of the Respondent prior to seeking dispute resolution through international arbitration is only an optional choice for the investor, not a compulsory requirement”.<sup>4</sup>
- 2.3 Respondent construes Article VII.2 of the BIT to require “prior submission of a dispute to national courts as a condition precedent to the commencement of international arbitration against Turkmenistan”.<sup>5</sup>
- 2.4 We set out in detail below a summary of the facts most relevant to a determination of the BIT Issues - either as agreed, not disputed or determined by the Tribunal.

### ***Signing of the BIT***

- 2.5 The BIT was signed on 2 May 1992 in Ashgabat, the capital of Turkmenistan.
- 2.6 It is common ground that the parties signed both an English language version and a Russian language version of the BIT at that time. It is common ground that both are authentic versions of the BIT.
- 2.7 Neither of the parties produced signed copies of the BIT in any other language, and the Tribunal concludes on the basis of the evidence before it that the BIT was signed only in its English and Russian versions.
- 2.8 The authentic English version of the BIT provides that the Treaty was:

*“DONE at Ashghbat on the day of May 2, 1992 in two authentic copies in Russian and English.”*<sup>6</sup>

- 2.9 The authentic Russian version of the BIT (translated into English) states:

*“Executed on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and Russian languages.”*<sup>7</sup>

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<sup>4</sup> Claimant’s Submission of 1 August 2011, para 21.

<sup>5</sup> Respondent’s Submission of 1 August 2011, para. 55.

<sup>6</sup> Request for Arbitration, Annex D; Exhibit R-2 (hereinafter all references to the English version of the BIT will be deemed references to these two identical documents submitted by Claimant and Respondent, respectively).

**Article VII.2 of the BIT**

2.10 The text of Article VII.2 that appears in the English version of the BIT provides, in pertinent part as follows:

*“2. If these disputes (sic) cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:*

*(a) ...*

*(b) ...*

*(c) ...*

*provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.”*

2.11 The text of Article VII.2 that appears in the Russian version of the BIT (translated literally into English) provides, in pertinent part, as follows:

*“2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investors choice to*

*(a) ...*

*(b) ....*

*(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that, if the concerned investor submitted the conflict to the court of the Party,*

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<sup>7</sup> Exhibit R-1; Exhibit R-1 (revised).

*that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.”<sup>8</sup>*

### ***Context of the BIT and Circumstances of its Conclusions***

- 2.12 The BIT was signed shortly after Turkmenistan established its independence as a sovereign state, after many years as part of the Soviet Union.
- 2.13 Turkey was one of the first countries to recognise the newly-declared independence of the four former Turkic Republics - Turkmenistan, Kyrgyzstan, Uzbekistan and Kazakhstan - in November and December 1991, and to establish diplomatic relations with them, which was accomplished by early 1992.
- 2.14 Between 1991 and 1993, approximately 1,200 delegations of Turkish government representatives visited these new states and, during the same period, Turkey signed more than 140 treaties with them.
- 2.15 It was against this background that the Prime Minister of Turkey at the time, Suleyman Demirel, conducted an eight-day tour of the Turkic States beginning on 27 April 1992.
- 2.16 During this tour, *inter-alia*, Turkey signed BITs with each of the four Turkic States within a five-day period, *i.e.*, between 28 April 1992 and 2 May 1992.
- 2.17 The Turkey-Kyrgyzstan BIT was signed on 28 April 1992. This bilateral investment treaty, which is stated to be “DONE ... in two authentic copies in English”, contains exactly the same Article VII.2 provisions as are found in the English language version of the BIT.
- 2.18 The Turkey-Uzbekistan BIT was also signed on 28 April 1992. This treaty is also stated to be “DONE at Tashkent on the day of 28/4/1992 in two authentic copies in English”. Article VII.2 of the English version of the Turkey-Uzbekistan BIT is exactly the same as Article VII.2 of the English version of the BIT.

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<sup>8</sup>*Id.*

2.19 The Turkey-Kazakhstan BIT was signed on 1 May 1992. It provides that it was “DONE at Alma Ata on the day of 1 May 1992 in two authentic copies each in Turkish, Kazak (sic), English and Russian.” The text of Article VII.2 of the English and Turkish versions of the Turkey-Kazakh BIT are identical to the texts of the authentic English version of the BIT and the “official” Turkish version of the BIT that was published in the Turkish Official Gazette on 15 January 1995.<sup>9</sup>

### ***Turkish Ratification of the BIT***

2.20 Turkey ratified its investment treaties with the four Turkick States using its ordinary procedures of ratification, culminating in their publication in the Official Gazette on 15 January 1995.

2.21 The first step in the ratification involved sending the four treaties, together with their respective draft Laws of Approbation to the Turkish Parliament in 1993.

2.22 The letter which submitted the BIT to the Turkish Parliament included, *inter alia*, explanatory notes on the treaty’s text. The following description was provided for Article VII:

*“Article 7 - This article regulates the resolution of investment disputes which may arise between a Party and an investor of the other Party. According to the procedure which has been foreseen, the Parties will first try to resolve the dispute by way of negotiations, in the event the dispute is not resolved within 6 months, provided that the access to local judicial bodies remains open, the right to proceed to international arbitration may be used. In addition, if the investor has brought the dispute before local judicial bodies and the final decision is obtained, it will not be possible for the investor to proceed to international arbitration; however, in the event that no final decision is obtained within 1 year and that both of the Parties have signed these treaties, the dispute may be brought before*

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<sup>9</sup> Exhibit EO/MK-6.

*International Centre for Settlement of Investment Disputes (ICSID) ...”*

*The purpose of the last paragraph is to avoid the repetition of discussion of the disputes which were finally resolved by local courts, before international bodies.”<sup>10</sup>*

- 2.23 The four Laws of Approbation (for the Turkick States’ BITs) were published in the Official Gazette in September 1994.
- 2.24 The Turkish Council of Ministers adopted ratification decrees for the four treaties at the end of 1994 and during the first days of 1995. In the case of the BIT, and as noted above, the respective ratification decree was published in the Official Gazette, dated 15 January 1995, which also included both the authentic English text and an “official” Turkish text.
- 2.25 The “official” Turkish text of Article VII as published in the Official Gazette is set out, in pertinent part, below in certified English translation:

*“2. In the event that these disputes cannot be settled within six months following the date of the written notification stated in paragraph 1 above, such dispute can be submitted to the below stated International Judicial Authorities as per the decision of the investor; provided that the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and that a decision has not been rendered within one year:*

(a) ...

(b) ...

(c) ...”.<sup>11</sup>

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<sup>10</sup> Exhibit EO/MK-15, p. 3.

<sup>11</sup> Exhibit R-3. The English translation of the Turkish text was provided by Respondent. However, Claimant does not dispute the translation, nor did it provide an alternative translation. (In its letter concerning bifurcation dated 25 April 2011, Claimant provided what appears to be an incorrect Turkish text of Article VII.2, translated into English.

### 3. CLAIMANT'S CASE

#### *Number of Authentic Versions of the BIT*

3.1 Claimant contends that there are only two authentic versions of the BIT; the English and Russian language versions. These are said to be the only versions of the BIT that were signed by the Contracting States. Claimant argues that both expressly state that there are only two authentic copies.<sup>12</sup>

3.2 The authentic English version of the BIT provides that the treaty was:

*“DONE at Ashgabat on the day of May 2, 1992 in two authentic copies in Russian and English.”*

3.3 By contrast, Claimant initially alleged that the authentic Russian version of the BIT (translated into English) states:

*“it is comprised on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and the Russian language.”<sup>13</sup>*

3.4 Claimant asserts that the English version of the BIT clearly identifies the two authentic copies as the Russian and English versions. Although the authentic Russian version refers to two authentic copies in four languages, Claimant argues that the two authentic copies referred to in the Russian version are the signed Russian and English versions.

3.5 Claimant further argues that no signed versions of the BIT exist in Turkish or Turkmen. However, it maintains that, in order to satisfy national constitutional law

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Respondent pointed out this error in its submission on the BIT Issues dated 1 August 2011. Claimant did not seek to refute Respondent's position on this point).

<sup>12</sup> Respondent has produced two copies of the Turkish text, under Exhibits R-3 and EO/MK-6 and Exhibits R-4 and EO/MK -37, neither of which is signed. No copy of the Turkmen text was produced - Respondent advising that none could be found.

<sup>13</sup> Although a dispute developed as to the accurate Russian-English translation of BIT Article VII.2, the parties eventually agreed on the translation of this clause. Claimant provided this translation in its 1 August 2011 submission but appeared to have abandoned it in its 15 August 2011 submission, when it instead referred to Respondent's submitted translation using the word “Executed on...”. See Claimant's Submission of 15 August 2011 ¶ 7, citing Respondent's submitted translation. The English translations of the Russian version submitted under Exhibits R-1 or R-1 (revised), do not include the word “comprise” but instead “Executed on...”.

requirements, both Turkey and Turkmenistan were required to produce “official” translations of the (or one of the) authentic version(s) of the BIT for publication in their respective Official Gazettes. The relevant laws of the two countries make it clear that these “official” translations are not authentic versions of the BIT.

- 3.6 Article 3.1(2) of Turkey’s Law No. 244 (unofficially translated into English by Claimant, but not contested by Respondent) states:

*“The Turkish text of which is the subject of international treaty ratification or accession is published in the Official Gazette with one of the specified authentic language or languages of the treaty as an attachment to the Decree of the Council of Ministers pursuant to the above paragraph.”<sup>14</sup>*

- 3.7 Article 24.3 of the Law of Turkmenistan on the International Treaties of Turkmenistan (unofficially translated into English by Claimant, but not contested by Respondent) states:

*“The international agreements of Turkmenistan, whose authentic texts are comprised in the foreign languages, are published on one of these languages with the official translation into the Turkmen language.”<sup>15</sup>*

- 3.8 Claimant notes that Respondent accepts that the English and Russian language versions of the BIT are both authentic.

- 3.9 Claimant relies on a report made to it of Mr Ibrahim Uslu, General Manager of the General Directorate of Foreign Trade of the Undersecretariat of Treasury of Turkey <sup>16</sup> (“**Undersecretariat**”), who states in his report, *inter alia*, that;

*“Normally, Bilateral Investment Treaty negotiations are conducted in English. ... English is used in the drafting stage*

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<sup>14</sup> Claimant’s Submission of 1 August 2011, para. 7.

<sup>15</sup> *Id.* at para. 9.

<sup>16</sup> Claimant says that the role of the Undersecretariat is to conduct procedures and negotiations concerning the agreements to be concluded with foreign countries in relation to the bilateral encouragement and protection of investments.

*and in the abridgement stage as this enables parties to see more clearly whether as a result of negotiations they reached a compromise on the issues. Then, in the signature stage, this English draft agreement ... is translated into the languages of the Contracting Parties and the Agreement is signed in the languages of the Contracting Parties, along with English. In the Bilateral Investment Treaty between Turkmenistan and Turkey, however, the observed procedure could not be applied .... In this BIT, the English draft text of the agreement was used by the Turkish side and the Russian translation was made in Turkmenistan and these texts were signed by the Contracting Parties. The translated Turkish text, however, was prepared in Turkey to fulfil the procedural requirements of the approval stage. In this context, the Turkish text is not the authentic text of the agreement, but it is the official translation made according to the approval procedure.”*

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*“In order for Turkish language version to be authentic, the Contracting Parties should sign the translated Turkish text ... The publication of the unsigned translated text in the Official Gazette shall not constitute as evidence that it is an authentic version of the BIT.”*

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*“There is no signed version of the Turkish Text for the Turkmenistan-Turkey BIT.”*

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- 3.10 Claimant contends that Respondent’s claim that there exists an authentic Turkmen version of the BIT is undermined by its own, unexplained concession that no copy of such a text can be found.



- 3.11 It also rejects Respondent's contention that the Undersecretariat's website "declares Turkish as one of the authentic languages of the BIT".<sup>17</sup> Although, Claimant did not provide an English language translation of the Turkish version of the BIT as published in the Official Gazette in either of its BIT Issues submissions, it wrote to the Tribunal on 17 January 2012, to point out what it described as a material error contained in Respondent's 1 August 2011 submission. It stated that the Turkish version of the BIT that had been filed by Respondent (which was described as having been published on the Undersecretariat's website and which was said to state that Turkish is one of the authentic languages in which the BIT was executed) "is not a version of the Turkish BIT that is actually published on the website in question."<sup>18</sup>
- 3.12 Claimant further advised that the Turkish version of the BIT that is published on the website clearly states that "there are only two authentic languages in which the BIT was executed; English and Russian."<sup>19</sup> A notarised copy of the Turkish version of the BIT as downloaded from the website was provided.

***Accurate Translation into English of Authentic Versions of the BIT***

- 3.13 The English language version of the BIT upon which Claimant relies is not questioned by either party.
- 3.14 Claimant did not provide an English language translation of the Russian version of the Treaty. It accepts the translation of the Russian text tendered by Respondent with its submission, 1 August 2011, i.e., as set out in R-1. It does not accept the accuracy of Respondent's revised translation of the Russian text, as set out in R-1 (revised).
- 3.15 As noted above, Claimant does not accept the Turkish version of the Treaty to be authentic. Nevertheless, it contends that: (a) Respondent relies upon an inaccurate, unverified and non-authoritative Turkish-language version of the BIT (*i.e.*, the Turkish version said to have been found on the Undersecretariat's website - see paragraph 19 of Respondent's 1 August 2011 submission (Exhibits R-4 and EO/MK-

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<sup>17</sup> Claimant's Submission of 15 August 2011, para 9, citing to Respondent's Submission of 1 August 2011, para 21.

<sup>18</sup> Letter from Claimant to the Tribunal dated 17 January 2012, p. 1

<sup>19</sup> *Id.*

37)); and (b) the English translation of the BIT published in Turkey's Official Gazette (Exhibits R-3 and EO/MK-6) is erroneous.

3.16 In support of the latter point, Claimant refers to the Turkey-Latvia BIT which has exactly the same dispute settlement provision as found in Article VII.2 of the BIT and which was authenticated in 1997 in three languages (Turkish, Latvian and English), each of which is stated to be equally authentic.

3.17 Claimant points to the fact that, although the English language versions of Article VII.2 in the two treaties are identical, the authentic Turkish language version of the Turkey-Latvia BIT states clearly that an investor has an option or discretionary power to bring a dispute to the courts of the host state.

3.18 Claimant maintains that because the Turkish version of the relevant provision of this treaty is authentic, this shows that a translation mistake was made when the same authentic English language version of Article VII.2 of the BIT was translated into Turkish for publication in the Official Gazette.

### ***Meaning and Effect of Article VII.2***

3.19 Claimant argues that the meaning and effect of Article VII.2 as found in the two authentic copies of the BIT is plain; that the investor has the option to pursue resolution of the dispute before Turkmenistan's domestic courts, but that it is not required to do so before resorting to ICSID arbitration. If it chooses to exercise that option, it is unable to initiate international arbitration proceedings before the expiry of one year.

3.20 In support of its interpretation of Article VII.2, Claimant relies on the ordinary meaning of the words used, a letter from Mr Fuat Kasimcan, Head of Department of the Turkish Ministry of Economy of the Undersecretariat, dated 22 July 2011, which confirms the optionality of the text, and an email from Mrs Zergul Özbilgiç, of the Undersecretariat of Foreign Trade, dated 7 July 2011, to the same effect.

3.21 Claimant also points to the decision of the *Rumeli* tribunal which, having considered Article VII of the Turkey-Kazakhstan BIT (which used precisely the same language as the BIT), concluded:

*“317. By contrast with the Turkish version, the English and Russian versions of the Treaty do not require a prior submission of the dispute to local courts before initiation of arbitration proceedings before ICSID. The Arbitral Tribunal considers therefore that no such requirement had to be fulfilled by Claimants before starting this arbitration.”<sup>20</sup>*

3.22 In addition, Claimant points to the *Sistem* decision which considered the same language as that contained in Article VII.2 of the BIT and, it is said, concluded that resort to local remedies was not a mandatory precondition to ICSID arbitration. That tribunal held:

*“106. The Respondent takes the view that the words ‘provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year’ in Article VII(2) apply only to Article VII(2)(c). The Tribunal need take no position on the question because Sistem has not instituted any proceedings in the national courts against the Kryrgyz Republic.”<sup>21</sup>*

3.23 Claimant refers to the undisputed authentic English version of the BIT which states:

*“... provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.”*

3.24 Claimant contends that Respondent’s own certified translation of the authentic Russian version, which accompanied its 1 August 2011 submission, contains a formulation which is identical in its meaning:

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<sup>20</sup> *Rumeli Telecom A.S. and Telsim Mobile Telekomik A.S.Y.O.N. Hizmetleri A.S. v Republic of Kazakstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 317.

<sup>21</sup> *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v Kryrgyz Republic* (ICSID Case No. ARB (AF)/06/1), Decision on Jurisdiction dated 13 September 2007, para. 106.

*“... on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.”*

- 3.25 Claimant points out that if either one of the conditional clauses “provided that” or “if” were removed from the provisions,<sup>22</sup> it would be clear that the investor had to pursue local remedies. Thus, the presence of “if” in both the English and Russian authentic versions confirms that the Contracting States deliberately adopted the actual formulation of the clause. Claimant describes as “self-serving” Respondent’s original argument that the word “if” is merely intended to emphasise the strength of the preceding conditions. Moreover, such an interpretation deprives the second conditional word of any meaning. Claimant contended that Respondent’s revised translation was to be rejected because it constituted an interpretation rather than a translation of the text.
- 3.26 As regards Respondent’s argument that, even if the authentic English and Russian versions of the BIT may plausibly be interpreted in the manner suggested above, this “may be the result of a mistake in translation”, Claimant says that Respondent’s speculative contention, that the BIT was originally negotiated and drafted in Turkish, and only later translated into English and Russian, is central to this argument.
- 3.27 Claimant points out that this speculation is directly contrary to the statements by Mr Kasimcan and Mr Uslu that the first/original version of the BIT was in English. It was subsequently translated into Russian in Turkmenistan; it was signed in English and Russian, and, only later, translated into Turkish.

#### **4. RESPONDENT’S CASE**

##### ***Number of Authentic Versions of the BIT***

- 4.1 By way of relevant background, Respondent points out that Turkey was one of the first countries to recognise the newly-declared independence of the four former Turkic Republics (Turkmenistan, Kyrgyzstan, Uzbekistan and Kazakhstan) in

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<sup>22</sup> In the Russian translation, “on the condition that” or “if”.

November and December 1991. Between 1991 and 1993 Turkey signed more than 140 treaties with them.

- 4.2 Respondent says that, given the political circumstances and Turkey's strong interest in establishing its relationships with these countries, speed appears to have been a primary concern. Thus, it says that it is not surprising that accuracy in the documents sometimes suffered in the process.
- 4.3 Respondent asserts that Turkey was the driving force in the process of negotiating BITs with the former republics. It argues that this is reflected in the fact that Turkey's BITs with the Turkic States contain almost identical language: this demonstrates that Turkey undoubtedly drafted the texts of the treaties that were used in each case.
- 4.4 Turkmenistan contends that the determination of the authentic versions of the BIT gives rise to questions of interpretation due to the different language versions of the BIT, and that such issues of interpretation are to be resolved by applying the principles set forth in the Vienna Convention on the Law of Treaties ("VCLT").
- 4.5 Article 31 of the VCLT, which contains the general rule on treaty interpretation, requires that treaties 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 light of its object and purpose".
- 4.6 In cases where the text set forth in Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 permits consideration of supplementary means of interpretation, such as the preparatory works of the treaty and the circumstances of its conclusion, to confirm or determine the meaning.
- 4.7 Respondent points out that the VCLT contains a provision devoted entirely to interpretation issues which arise when treaties are executed in different languages. Article 33 provides:

*"Interpretation of treaties authenticated in two or more languages*

*1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,*

*unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*

*2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*

*3. The terms of the treaty are presumed to have the same meaning in each authentic text.*

*4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.<sup>23</sup>*

- 4.8 Respondent argues that the BIT was done in four languages: Turkish, English, Russian and Turkmen, each of which is authentic.
- 4.9 “Authentication” is defined in Article 10 of the VCLT and includes signature by the state parties, or any other procedure provided for in the treaty or agreed to by the State Parties.
- 4.10 Respondent’s case focuses on the Russian, English and Turkish versions of the BIT. Respondent says that the Russian version is authentic by virtue of the fact that it was executed by the Parties and also because it expressly refers to “authentic copies in the Turkish, Turkmen, English and Russian language”.<sup>24</sup>
- 4.11 The English version of the BIT is authentic by virtue of the fact that it was executed by the Parties and states that English as well as Russian are authentic languages. However, it argues that Claimant’s reliance on its construction of the English version is untenable, given that it recognises that the Russian version as authentic, and the

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<sup>23</sup> Vienna Convention on the Law of Treaties, art. 33, May 23, 1969, 1155 U.N.T.S. 331.

<sup>24</sup> Respondent’s Submission 1 August 2011, para. 17, citing Exhibit R-1.

Russian version recognises the Turkish version as authentic. In addition, Respondent argues that since English is a language that is foreign to both Turkmenistan and Turkey, it is unlikely that the English version best reflects the intent of the parties. Rather, it is contended that the Turkish version was undoubtedly the original text that was discussed in negotiations and agreed by the Parties.<sup>25</sup>

4.12 The Turkish version of the BIT is said to be authentic by reason of the fact that the Russian version expressly refers to the Turkish version as one of the “authentic copies”. It thus qualifies as authentic by reason of Article 33(2) of the VCLT, because it was designated as such by the Contracting Parties to the treaty. In addition, the Turkish version of the treaty found on the Undersecretariat’s website in early July 2011 is reported by Öktem and Karli to list Turkish, Russian and English as authentic languages.<sup>26</sup>

4.13 Relying on Dr. Öktem and Dr. Karli, Respondent also argues that Turkey has designated Turkish as an authentic language for every investment treaty which it has entered into, except where English has been designated as the sole authentic language and, thus, that there are no Turkish BITs in which the language of the other State is designated as authentic, but Turkish is not so designated.

4.14 Respondent rejects Claimant’s suggestion that the Russian version of the BIT “expressly state[s] that there are only two authentic versions of the BIT,” one in Russian and one in English.<sup>27</sup> Respondent argues that the phrase “two authentic copies” in the Russian version means that the BIT was executed “... in two authentic physical copies each of the Turkish, Turkmen, English and Russian versions”.<sup>28</sup> Providing for two copies in each language would permit each of the two parties to

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<sup>25</sup> Dr. Öktem and Dr. Karli argue that the Turkish version was the model text supplied by Turkey for the BITs that were simultaneously being negotiated with the four Turkic States. The Turkish version of all those treaties are virtually identical versions. Thus, given the linguistic similarity between Turkish and Turkmen, it is most probable that the BIT between Turkey and Turkmenistan was negotiated in Turkish and thus the Turkish version is the original text negotiated and agreed by the parties.

<sup>26</sup> In its letter to the Tribunal of 17 January 2012, in response to Claimant’s letter of the same date, Respondent accepts that the Turkish version of the BIT that is currently on the Turkish government’s website does not refer to an authentic version of the BIT in English. It leaves it to “the appreciation of the Tribunal” as to why the Turkish government changed the Turkish version on its website following Respondent’s filing of its 15 August 2011 submissions.

<sup>27</sup> Respondent’s Submission of 15 August 2011, para 19, citing to Claimant’s submission of 1 August 2011, para. 3.

<sup>28</sup> Respondent’s Submission of 15 August 2011, para. 19.

have an executed copy in each of the four languages, which makes simple good sense. Moreover, while there is no indication of priority in the text of the BIT, Turkish comes first, and it would seem highly implausible that an inauthentic language would be mentioned first. Finally, Respondent contends that the use of the word “copy” in each of the treaties relied on by Claimant, refers not to the number of official versions or languages of the treaties, but rather to the number of physical copies made of each of these official versions in each of its official languages.

***Accurate Translations into English of Authentic Versions of the BIT***

4.15 Respondent submitted certified English translations of the Russian (an initial and a revised version) and Turkish texts of the BIT. It notes that a Turkmen version of the BIT could not be found.

4.16 The “official” Turkish version of the BIT, as published in the Official Gazette on 15 January 1995 (in certified English translation), provides:

*“2. In the event that these disputes cannot be settled within six months following the date of the written notification stated in paragraph 1 above, such dispute can be submitted to the below stated International Judicial Authorities as per the decision of the investor; provided that the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and that a decision has not been rendered within one year:*

*(a) ...*

*(b) ...*

*(c) ...”<sup>29</sup>*

4.17 Respondent says that Claimant provided an incorrect Turkish text of Article VII.2 in its letter concerning bifurcation dated 25 April 2011, which it translated in pertinent part as follows:

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<sup>29</sup> Exhibit R-3.



*“... if the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and if a decision has not been rendered within one year.”<sup>30</sup>*

4.18 The first certified English translation of the Russian version of the BIT proposed by Respondent (R-1) reads in pertinent part as follows:

*“2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor’s choice to*

*(a) ...*

*(b) ...*

*(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.”*

4.19 The second certified English translation of the Russian version of Article VII-2 of the BIT proposed by Respondent (R-1 (revised), which was filed on 17 January 2012), reads in pertinent part:

*“2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor’s choice to*

*(a) ....*

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<sup>30</sup> Respondent’s Submission of 1 August 2011, para. 28.

(b) ...

(c) *The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*”

4.20 The only change made to the initial translation - the removal of the word “if” following the words “on the condition that,” in sub-paragraph (c), - was explained by the translators in their covering letter to counsel for Respondent in the following terms:

*“Please be advised that in our translation dated July 30, 2011 into English of the Russian version of the Turkey-Turkmenistan BIT, we translated to the best of the translator’s knowledge and ability, the following segment of Article VII.2 of the BIT:*

*[Russian text of pertinent part of VII.2 (c)]*

*into English as follows:*

*‘on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.’*

*The above translation is a literal translation of the words in Russian in the order in which they appear in the Russian text. However, it does not accurately reflect the meaning of the Russian version of this segment of Article VII.2 of the BIT. The correct meaning of the above quoted text of the Russian version of the BIT is:*

*‘on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict,*

*and a final arbitral award on compensation of damages has not been rendered within one year.'*

*This is because the phrase '...[ Russian text ] ...', which literally reads word-by word in Russian '... on the condition that, if' is used in order to make the sentence conditional but should correctly be translated as '... on the condition that' to properly convey the meaning. The 'if' in the Russian text is part of the correct syntax needed in Russian to create the conditional, but it does not create a second or separate conditional. In fact, the complete phrase ' ... [Russian text] ...' is used in Russian as a single expression to mean 'on the condition that' or 'if'.*

*We are therefore providing you with a revised translation in which that change, and only that change, has been made."*

### ***Meaning and Effect of Article VII.2***

- 4.21 Respondent contends that where there are textual differences in treaties done in multiple languages, the VCTL (Article 33) requires that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."<sup>31</sup> Turkmenistan maintains that, notwithstanding the different phrasing of Article VII.2 in each of the English, Russian and Turkish versions of the treaty, a clear intention can be gleaned that the parties contemplated submission of a dispute to international arbitration only after the investor had submitted it to the national courts of the host state, and a period of one year had been allowed for a decision.
- 4.22 This interpretation is said to accord with the "ordinary meaning" of the text of Article VII.2. The Phrase "provided that" used in the Turkish and English versions and the phrase "on the condition that" used in the Russian version, clearly means that submission to national courts and the allowance of a one year period for a decision is a condition that has to be fulfilled before recourse to international arbitration. The different placement of the conditional phrase, either at the head or at the conclusion of

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<sup>31</sup> See Respondent's Submission of 15 August 2011, para. 24.

Article VII.2, is a difference in form rather than substance, and does not change the meaning of the provision.

- 4.23 The addition of the word “if” in the English version is said, most likely, to have been a syntactical error, made when the original Turkish text was being translated. Its inclusion in the Russian version, as explained by the translators, is part of the correct syntax to create a condition and does not create a second or separate conditional. In neither case, does it change the meaning of the clause, but rather emphasises and strengthens the prior conditional phrase “provided that” / “on the condition that”.
- 4.24 Such a good faith interpretation of the ordinary meaning of the text of Article VII.2 is said to be consistent with the treaty’s context.
- 4.25 Respondent maintains that its construction of the Russian and English texts is supported by the clear (and mandatory) text of Article VII.2 that is contained in the Turkish version. Assuming the Turkish text to be authentic, Respondent asserts that only its construction of the English and Russian texts can be reconciled with the Turkish. Should the Tribunal conclude that only the English and Russian texts are authentic, the ambiguity or obscurity of the English text permits the Tribunal to consider supplementary means of interpretation. These include the “official” Turkish version of Article VII.2 as published in the Official Gazette (which is agreed to be mandatory) to confirm its contention as to the meaning of the authentic version of the BIT.
- 4.26 With respect to Mr Kasimcan’s letter and Mrs Özbîlgiç’s email supporting Claimant’s interpretation of Article VII of the BIT, Respondent argues that neither should be given weight. This is because the interpretation by only one party to a treaty is not binding or authoritative. Only a corresponding endorsement of that view by Turkmenistan would constitute an authoritative interpretation as evidence of the intention of the parties to the BIT.
- 4.27 Respondent finally relies on the principle of *in dubio mitius*, which posits that, in the case of doubt, treaty obligations must be interpreted restrictively, in deference to the sovereignty of states. Respecting a provision that requires prior submission of a dispute to national courts before a state can be subjected to the jurisdiction of an international arbitration is the correct application of this principle.

## **5. TRIBUNAL'S APPROACH TO THE BIT ISSUES**

- 5.1 The Tribunal starts its analysis by outlining the applicable rules for the establishment of the authentic and definitive text of a treaty, the general rules of treaty interpretation, when supplementary means of interpretation may be employed, and the applicable rules for the interpretation of treaties authenticated in two or more languages.
- 5.2 The Tribunal then deals separately with the three principal substantive issues that require to be determined:
- (a) the number of authentic versions of the BIT;
  - (b) the accurate translation into English of any authentic version of the BIT done in a language other than English; and
  - (c) the meaning and effect of Article VII.2 of the BIT

## **6. AUTHENTICATION AND INTERPRETATION PRINCIPLES APPLICABLE TO THE BIT**

- 6.1 The VCLT establishes the analytical framework, guidelines and rules for the determination of the authenticity of the text of treaties and the interpretation of such texts.
- 6.2 Turkmenistan has been a signatory to the VCLT since 2 February 1996.<sup>32</sup> Accordingly, the VCLT is applicable to Turkmenistan.
- 6.3 Turkey is not a signatory to the VCLT. However, customary international law is part of the applicable law in Turkey.<sup>33</sup> Accordingly, the Tribunal proceeds on the basis that the provisions of the VCLT that reflect customary international law are to be treated as part of the Turkish legal system and are applicable to Turkey.

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<sup>32</sup> See Vienna Convention on the Laws of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Multilateral Treaties Deposited with the Secretary General, XXIII - 1, 2.

<sup>33</sup> Öktem & Karli, Legal Opinion on the 1992 Turkey-Turkmenistan BIT, Part III.2.b. This is not contested by Claimant.

6.4 Articles 31 through 33 of the VCLT provide for the rules of interpretation of international treaties, and the case law of the International Court of Justice (“ICJ”) confirms that these articles reflect customary international law.<sup>34</sup>

6.5 In these circumstances, there being no suggestion by Claimant that the Tribunal ought not to have regard to the principles and rules established by the VCLT, where appropriate its relevant provisions are referred to and used by the Tribunal in its analysis of the three substantive questions below.

## 7. NUMBER OF AUTHENTIC VERSIONS OF THE BIT

### *Ordinary Meaning of the Texts*

7.1 It is common ground that both the English and Russian versions of the BIT were signed by the parties on 2 May 1992, and may thus be regarded as authentic versions of the BIT by reason of Article 10(b) of the VCLT.<sup>35</sup>

7.2 Respondent’s case for the authenticity of the Turkish version of the treaty rests on the fact that the Russian version of the BIT expressly refers to the Turkish version as one of the “authentic copies”. It is therefore said to qualify as authentic by reason of Article 33(2) of the VCLT, because it was designated as such by the Contracting Parties to the treaty.

7.3 Article 33 of the VCLT provides:

*“Interpretation of treaties authenticated in two or more languages*

*1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,*

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<sup>34</sup> For example the ICJ applied Articles 31 and 32 even in cases when one or both parties were not parties to the Convention, on the grounds that these articles reflect customary international law. See *Sovereignty Over Pulau Litigan and Pulau Sipidan, (Indonesia v. Malaysia)*, 2002 I.C.J. Rep. 625 (December 17), ¶37. See also, *Kasikili / Sedudu Island (Botswana / Namibia)* 1999 I.C.J. Rep., 1045 (December 13), ¶325 and *LaGrand (Germany v U.S.)*, 2001, I.C.J. Rep. 466 (June 27), ¶101, where the ICJ established that the rules contained in Article 33 also reflected customary international law.

<sup>35</sup> Article 10 of the VCLT provides that: “*The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature add referendum, or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.*”

*unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*

*2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*

*3. The terms of the treaty are presumed to have the same meaning in each authentic text.*

*4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”*

7.4 Claimant asserts that an initial difficulty with Respondent’s case on this point is that the authentic English version of the BIT provides that the treaty was:

*“DONE at Ashkabat on the day of May 2, 1992 in two authentic copies in Russian and English”. (emphasis added)*

7.5 Moreover, the Russian text also refers to two authentic copies, albeit in four languages.

7.6 Respondent seeks to explain the apparent difference in the number of authentic versions of the treaty, as referred to in the English and Russian versions, on the basis that the number of “copies” in each of the treaties refers not to the number of authentic languages or versions of the treaty, but rather to the number of physical copies made of each of the authentic versions in each of its authentic languages.

7.7 In the result, for Respondent, the phrase “two authentic copies” in the Russian version means that the BIT was executed “in two authentic physical copies *each* of the Turkish, Turkmen, English and Russian versions”.

- 7.8 The Tribunal notes, however, that Respondent was unable to produce signed copies of either the Turkish or Turkmen versions of the treaty which it argues were signed by the parties. This suggests that, even if Turkish or Turkmen versions of the BIT were available in Ashgabat on 2 May 1992, they were not executed by the parties. In any event, no such copies are part of the record and there is therefore no evidence to indicate that such versions were actually signed by the parties.
- 7.9 Had a Turkish version existed and been signed at that time, one would expect it to have been published in its executed format in the Turkish Official Gazette. However, this did not occur. Moreover, Mr Uslu who is the General Manager of the Undersecretariat (the role of which is to conduct procedures and negotiations concerning such treaties) stated in his report, submitted by Claimant, that “[t]here is no signed version of the Turkish text for the Turkmenistan-Turkey BIT.” He also explained that during the negotiations of the BIT, an English draft of the text was used by the Turkish side during the negotiations and that the Russian translation was made in Turkmenistan before the English and Russian versions were signed.
- 7.10 The Tribunal further notes that, even if it could be said that the Turkish version of the text should be considered as authentic, on the basis that the authentic Russian version of the treaty so provides or that the parties had so agreed (*i.e.*, pursuant to Article 33 (2) of the VCLT), the question would then turn to the identification of such an authentic text. There is no evidence before the Tribunal as to which, if any, particular Turkish version of the text the Contracting Parties might have been referring to in the Russian version of the BIT.<sup>36</sup>
- 7.11 Finally, Respondent has not produced any copy even of an unsigned version of the allegedly authentic Turkmen version, stating that it has been unable to locate any copy. In the Tribunal’s view this confirms that the evidence points to a conclusion that it is highly unlikely that any Turkmen version was actually ever signed.

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<sup>36</sup> The closest thing to a Turkish version of the BIT that seems, on the evidence before us, to have existed at the time is the Turkish version of the Turkey-Kazakhstan BIT that was signed on 1 May 1992. There is also Mr Uslu’s evidence that the translated Turkish text of the BIT was prepared in Turkey to fulfill the procedural requirements of the approval stage.



### ***Supplementary Means of Interpretation***

7.12 Article 32 of the VCLT provides that:

*“Recourse may be had to supplementary means of interpretation, including preparatory works 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”*

7.13 Here, the ordinary meaning of the text of the Russian version of the BIT concerning the number of authentic languages of the treaty appears to the Tribunal to qualify as “ambiguous or obscure”. The Tribunal may therefore look at the circumstances of the conclusion of the BIT for assistance on the number of its authentic versions.

7.14 The circumstances surrounding the conclusion of the BIT include its drafting, execution and adoption. As noted above, the evidence points strongly to the fact that it was only signed in its English and Russian language versions.

7.15 A conclusion that there are only two authentic texts of the BIT - English and Russian - is further supported by the application of the provisions of Article 33(1) and (4) which provide that:

*“1. Where a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*

...

*4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of*

*Article 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted”:*

7.16 Had the Tribunal concluded that it was unable to remove the difference of meaning in the English and Russian text by the application of Articles 31 and 32, it would have reached the same conclusion based on the application of Article 33(4) on the basis that the identification of only the English and Russian texts as authentic is an approach that “best reconciles” the divergent texts in the Russian and English versions of the BIT.

## **8. ACCURATE TRANSLATIONS INTO ENGLISH OF AUTHENTIC VERSIONS OF THE BIT**

8.1 Having concluded that the only authentic version of the BIT in a language other than English is the Russian version, the next issue concerns the identification of an accurate translation of the Russian version into English.

8.2 One reason for translating the text of the Russian version of the BIT into English is to enable the non-Russian speaking Tribunal to construe properly the Russian text. Had the Tribunal been composed of Russian speakers, such a translation may not have been required. In such circumstances, the Tribunal would have looked to the ordinary meaning to be given to the terms of the Russian version of the treaty in their context and in the light of its object and purpose as required by Article 31(1) of the VCLT. This indicates the importance of the role of an accurate translation in these circumstances, and the need to identify an appropriate translator.

8.3 Until Respondent filed R-1 (revised) - on 17 January 2012, there was no disagreement as to the accurate translation into English of the Russian text. It was agreed that the certified translation made by Language Innovations, LLC, dated 30 July 2001, was an accurate translation from Russian into English of Article VII.2.

8.4 A first point may be made that the Tribunal does not accept the proposition made by counsel for Claimant in his closing address, following the receipt of the revised translation, that the parties are still in agreement about the Russian-English translation of Article VII.2. All that was, and is now, agreed is that Respondent’s initial

translation of the Russian text constituted a word-for-word, literal, translation of the Russian words used in the text of the treaty.

- 8.5 However, accurate translation of, for example, a sentence in one language into another, requires something more than a literal and word-for-word translation of each and every word employed in the text that is being translated.
- 8.6 The first definition of the verb “translate” found in the Oxford Concise Dictionary, 7<sup>th</sup> ed. is “[t]o express the sense of (word, sentence ...) in or into another language”.
- 8.7 Similarly, Collins Pocket Dictionary, Canadian edition, defines translate as to “[t]urn from one language into another; interpret”.
- 8.8 The Tribunal thus considers it to be necessary and proper for a translation to convey accurately the complete sense of the Russian text when it is translated into English.
- 8.9 In its letter of 17 January 2012, Respondent’s translator explains that the literal translation it provided in the form of R-1 does not accurately reflect the meaning of the Russian version of this segment of Article VII.2 of the BIT (*see* para. 4.20 above). The translator goes on to state that the correct meaning (or sense) of the Russian text is conveyed properly by a translation which removes the word “if” from the second line of sub-paragraph (c). This is because the inclusion of the word “if” in the Russian text, while part of the correct syntax required in Russian to create the conditional, does not operate to create a second or separate conditional, as the original translation into English (R-1) provided.
- 8.10 The Tribunal is cognizant of the fact that the revised translation was produced only three days before the 20 January 2012 hearing. Equally, however, it recognizes that Respondent offered a plausible explanation for the reasons and timing of the revision. Moreover, Claimant did not object at that time to its introduction. Nor did Claimant request the opportunity, or time, to provide a translation from another expert, or request the attendance of Respondent’s translator at the hearing (or at a later date) for cross-examination.
- 8.11 The matter of the revised translation was addressed by counsel for each of the parties during their closing arguments.

8.12 Counsel for Respondent explained that Respondent had not submitted the revised translation lightly. It did so, he said, only after asking six Russian-speakers in his office, who knew nothing about the case, to read the relevant passage in Russian and to advise whether resort to local courts prior to arbitration was mandatory or optional. All, he said, advised that it was mandatory. He concluded:

*“Now, I am not asking you to believe that; I can’t put anything in evidence here. But what I am asking you to do is the following: either to rely upon and accept what the translator in this sworn statement says, that this now gives you the accurate meaning, this mandatory meaning in the Russian; or, if you don’t believe that or don’t feel that that’s sufficient, I would ask you to go out and get a Tribunal-appointed Russian expert to read that, and I tell you in ten minutes or less they will tell you that this language in Russian is mandatory.*

*We are prepared to agree in advance: go ahead and do that, and see what that comes up with. And I predict - - I mean, I would be very surprised if there were any other result, because we asked so many different people and they all, without any hesitation, said that this is clearly mandatory language”.*<sup>37</sup>

8.13 In his closing speech, counsel for Claimant dealt briefly with the revised translation of the Russian BIT in terms set out below, but did not address Respondent’s invitation to the Tribunal to retain its own expert:

*“The Tribunal will have noted that the parties were in agreement on the translation and interpretation of that treaty until a number of days ago.*

*I want to emphasise for the Tribunal that the parties are still in agreement about the translation; what they do not agree about is the interpretation because the translated words say what they say, and there appears to be - - and I’ve heard nothing from the*

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<sup>37</sup> Transcript, *supra* note 1 p.167/21 - 168/11.

*respondent's side to the contrary - - there appears to be agreement that the translation ends up with the English words as the parties have been using up until the most recent submission on the point by the respondent. The difference now is not translation but interpretation, and that's a meaningful distinction I would put to the Tribunal.*"<sup>38</sup>

8.14 However, when asked for his own position on Respondent's proposition that the Tribunal appoint a Russian language expert, Mr Volterra on behalf of Claimant replied that:

*"I think that would be highly unusual. It would be a strange thing to do just in relation to the Russian text, and not the English text, and not the various Turkish texts. The Claimant has no desire to have further expenditures, and thinks it would be sufficient to have the pleadings of the parties on this point. And I say that, Mr President, without having had any time to do more than read the letter sent by the respondent. I've been out of the country and doing other things, so this is not an informed response."*<sup>39</sup>

8.15 The Tribunal indicated to counsel for Claimant that it might come back to him, and give him additional time to consider the matter.

8.16 Following the hearing, on 22 February 2012, the Tribunal wrote to the parties to advise that having regard to: (a) the continuing uncertainty as to the accuracy of the translations into English of the Russian text of Article VII.2; and (b) the possible relevance of the translation into English of the Turkish version of Article VII.2 (as published in the Official Gazette), the Tribunal had decided to request two independent and qualified expert translators to provide it with English language translations of the relevant texts. The parties were provided with CVs for the proposed experts as well as the proposed instructions they were to receive. The Tribunal further advised that the parties would be given a reasonable opportunity to

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<sup>38</sup> *Id.* at pp. 173/5 – 174/4.

<sup>39</sup> *Id.* at p. 184/13- 24.

comment on such translations once they were in hand, and that the Tribunal would welcome comments, if any, on the Tribunal's intended instructions and on the choice of translators.

8.17 On 27 February 2012, counsel for Respondent responded to the Tribunal with the proposal that the Tribunal's translator also be asked the following question:

*“Does the Russian phrase, ‘pri uslovii, esli’, when used in a sentence create a double conditional or is it a construct that is used to create a single conditional the way either the words ‘on the condition that’, or the word ‘if’ create in the English language?”*

8.18 Respondent's counsel had no comment or objection with respect to the proposed Russian translator, but raised a question concerning the proposed Turkish translator.

8.19 On 28 February 2012, counsel for Claimant responded to the Tribunal. With respect to the proposed retainer of a Russian expert by the Tribunal, counsel wrote:

*“The Claimant reiterates for the avoidance of doubt that it does not agree to the Tribunal taking up the Respondent's proposal on this point.”*

He continued:

*“If the Tribunal insists on taking up the Respondent's proposal, as appears to be the case, the Claimant has the following observations:*

1. *the Respondent alone should pay for this exercise;*  
  
*....*
4. *the Claimant objects to the Respondent's request that the Russian-English translator be asked not only to provide the translation of the text of Article 7 (2) of the BIT but also to give an opinion on, or make an interpretation in relation to, certain Russian words. It is notable that the Respondent does not seek to pretend*

*that what it is asking for is a translation. It goes without saying that opinions and interpretations are not translations. It would not be appropriate in relation to the stated objective of the Tribunal in this exercise for the Tribunal to accede to the Respondent's request."*

- 8.20 Having regard to the responses of the parties to the Tribunal's proposal to instruct independent translators, including Claimant's objection, the Tribunal advised the parties that it would, for the time being, proceed to decide the BIT Issues on the present record, whilst reserving the right to instruct independent translators if considered necessary.
- 8.21 In proceeding on this basis, the Tribunal notes that the revised translation provided by Respondent provides additional evidence before the Tribunal on the Russian sense (*i.e.*, the accurate translation into English of the Russian) of the Russian text version of Article VII.2.
- 8.22 Accordingly, based on the explanation provided by Respondent's translators for the revisions of their original translation (which it accepts as reasonable), the Tribunal concludes that the accurate translation of the authentic Russian text of Article VII.2 of the BIT for present purposes (*i.e.*, the one that conveys its true sense in Russian) is that set out in R-1 (revised). That is to say, a translation that has the word "if" removed from the second line of sub-paragraph (c). In the view of the Tribunal, this more accurately conveys in the English language the sense of the Russian text.
- 8.23 The remaining task for the Tribunal (addressed in the next Section below) is therefore to determine the meaning and effect of the authentic Russian and English texts of the BIT, having regard to the applicable provisions of the VCLT and, of course, the submissions of the parties.

## **9. MEANING AND EFFECT OF ARTICLE VII.2 OF THE BIT**

- 9.1 The competing positions of the parties on the meaning and effect of Article VII.2 of the BIT are: for Claimant, the provision is to be interpreted as meaning that the prior submission of the dispute to local courts before the initiation of arbitration proceedings is optional; for Respondent, the provision means that the prior

submission of the dispute to local courts before the initiation of arbitration proceedings is mandatory.

- 9.2 These positions require to be assessed by consideration of the Russian and English texts of Article VII. 2, being the only two authentic versions of the text of the BIT.

### ***The Russian Text***

- 9.3 Looking first at the Russian text, in what the Tribunal has found to be its accurate English translation (R-1 revised), no difficulties appear to arise. There is only one ordinary meaning of the relevant words found in sub-paragraph (c) (“..., on the condition that the concerned investor submitted the conflict to the court of the Party, that is a party to the conflict, and a final award of compensation of damages has not been rendered within one year.”). The ordinary meaning of these words in their context and in the light of the object and purpose of the treaty requires the submission of the dispute to local courts prior to the initiation of arbitration proceedings, whether before ICSID, “ad hoc” (in accordance with the UNCITRAL Rules), or before the ICC Court of Arbitration in Paris.

### ***The English Text***

- 9.4 Turning to the authentic English version of Article VII.2, Claimant seeks support for its position (*i.e.*, that the plain meaning of the words is to provide an option to the investor either to pursue resolution before the Respondent’s domestic courts or to proceed straight to arbitration) from statements made by Mr Kasimcan and Mrs Özbîlgiç and the decisions of the *Rumeli* and *Sistem* tribunals.
- 9.5 The Tribunal finds that neither the statements nor the decisions are dispositive or persuasive.
- 9.6 Mrs Özbîlgiç’s email to Claimant of 7 July 2011, states that:

*“... it is not true to translate the Turkish Text as if it mean the Mandatory requirement to apply local Turkmen courts, because it clearly states ‘IF the investor has gone to the local court but the decision could not be rendered within 1 year then he can apply to international arbitration’”.*



9.7 The difficulty with this statement, which limits its value, is that the certified English translation of the “official” Turkish text (Exhibit R-3, provided by Respondent and not contested by Claimant) does not contain the word “if”. The absence of the word “if” has the effect of making mandatory the requirement of recourse “to the judicial court of the host Party”. The text provides in relevant part:

*“In the event that these disputes cannot be settled within six months following ... such dispute can be submitted to the below stated International Judicial Authorities as per the decision of the investor; provided that the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and that a decision has not been rendered within one year.”*

9.8 Mr Kasimcan’s report of 22 July 2011 also contains the same approach with respect to the accurate text of the Turkish version of the BIT, writing in the word “if”. For this reason the Tribunal finds the view there expressed to lack persuasive authority.

9.9 As regard prior arbitral awards, the Tribunal considers that the *Rumeli* decision is also unpersuasive.<sup>40</sup> The *Rumeli* tribunal concluded that the English and Russian versions of the Turkey-Kazakhstan BIT did not require a prior submission of the dispute to local courts. However, the tribunal in that case simply states this in conclusory terms: it provides no analysis or reasoning in support of that conclusion. Moreover, the tribunal’s reasoning in that case seems to have disregarded the Turkish text, which in that case was authentic, and plainly imposed a mandatory requirement to have recourse to the local courts.<sup>41</sup> It is not immediately apparent to the Tribunal in the present case that the *Rumeli* tribunal’s reliance on the English and Russian versions alone is consistent with the requirements of Articles 33(1) and (4) of the VCLT. It may be that the *Rumeli* tribunal had a reasoned basis for excluding the Turkish text, but it does not appear to have set out that reasoning in its award.

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<sup>40</sup> Mr Stephen, counsel for Claimant, rightly agreed that the reasoning in *Rumeli* was not entirely helpful. See Transcript, *supra* note 1, p. 73/5 - 10.

<sup>41</sup> The Tribunal rejects Claimant’s argument that the “official” Turkish version of the BIT was mistranslated. The Tribunal reaches this conclusion having regard to the mandatory Russian text of the BIT and because of the identity of the “official” Turkish text with the authentic Turkish text in the Turkey-Kazakhstan BIT.

9.10 With respect to the award in the *Sistem* case, where the tribunal concluded that a claimant is not obliged to seek local remedies prior to turning to arbitration, the Tribunal in the present case does not see a sufficient basis in the *Sistem* award to support the proposition for which Claimant argues in the present case.

9.11 The relevant parts of the *Sistem* award provide:

*“The Respondent takes the view that the words ‘provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year’ in Article VII.2(2) apply only to Article VII.2(2)(c)[of the BIT].”*<sup>42</sup>

The Tribunal then concludes that it:

*“take[s] no position on the question because Sistem has not instituted any proceedings in the national courts against the Krygyz Republic.”*

9.12 A difficulty with reliance on the conclusion of that tribunal in the present case is that the *Sistem* tribunal’s latter statement makes little sense when taken on its own. It may be that what the tribunal meant to say “because *Sistem* has not brought a case to the ICC.”<sup>43</sup>

9.13 If this is right, the *Sistem* decision is of little persuasive value. It appears from the account of the *Sistem* case that the respondent there did not raise the same argument as the Respondent in the present case. It appears from the award that the *Sistem* tribunal did not consider the question that is before this Tribunal and disposed of the matter on a different basis, having regard to the different arguments of the parties.

### ***Meaning of the English Version is Ambiguous and/or Obscure***

9.14 Respondent describes the English text as grammatically awkward, and says that the phrasing is mangled and non-sensical. The Tribunal agrees that the phrasing of the

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<sup>42</sup> *Sistem*, *supra* note 21, para 106.

<sup>43</sup> Article VII.2(2)(c) of the relevant BIT relates to the submission of disputes to the ICC Court of Arbitration in Paris.

English is grammatically incorrect. Not only is it inelegant, as was conceded by Claimant, but the pertinent part of Article VII.2 contains a single word which does not immediately appear that it ought to be present, and would not be present if the text had been drafted by a native speaker. There are two different single words that might be removed: the word “if” could be removed (after which the relevant text would read “provided that, the investor concerned has brought the dispute before the courts ... and a final award has not been rendered in one year.”), or the word “and” could be removed (after which the relevant text would read “provided that, if the investor concerned has brought the dispute before the courts ... a final award has not been rendered in one year.”). On either approach, the removal of one of those two words (but not both) would give the phrase grammatical coherence. An issue that arises is which, if any, of the two words might be removed.

9.15 Professor Kornfilt, expert on linguistics, testified with considerable clarity and persuasiveness, that one would normally not expect two conditionals together (“provided that” followed by “if”), which is the only way one gets to an “optional” text. On the other hand, the conjunctive, “and”, has no business in any text, unless the local court provision is mandatory.

9.16 When questioned by Professor Park as to whether any linguistic principle would suggest the removal of one of the extra words in preference to the other, Professor Kornfilt said that while she might not be able to formulate a principle she felt that:

*“leaving out the “if” would be preferable to leaving out the “and”, because there is already a bit of text, namely the “provided that”, which is a conditional ... just the way “if” is also a conditional.*

*So this is why I would tend to, I would lean towards a solution towards well-formedness that would leave out the “if” and retain the “provided that” as the only conditional, and leave in the “and”, therefore, as under the two options you gave me.”<sup>44</sup>*

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<sup>44</sup> Transcript, *supra* note 1 p. 154/9-18.

Her evidence has not been challenged by Claimant.<sup>45</sup>

9.17 In the event, the Tribunal concludes that attempting to interpret the relevant English text in accordance with Article 31 of the VCLT leaves its meaning ambiguous or obscure. In these circumstances, it is appropriate for the Tribunal to consider supplementary means of interpretation as permitted under Article 32 of the VCLT.

### ***Supplementary Means of Interpretation***

9.18 One supplementary means of interpretation is to consider the circumstances of the conclusion of the BIT. The circumstances include the process relating to the negotiation, conclusion and signing of the BIT in Ashgabat on 2 May 1992, as well as events leading up to its ratification.<sup>46</sup>

9.19 Amongst these circumstances, the Tribunal notes that Turkey entered into four treaties with the Turkick States within a very short period of time, namely five days, in late April / early May 1992. Each of these four treaties included authentic English versions, and each such version includes substantially identical provisions as those that are to be found in Article VII.2 of the BIT. In addition, the authentic Turkish text of the Turkey-Kazakhstan BIT, which was entered into just one day before the BIT, contains substantially identical terms (*i.e.*, requiring mandatory recourse to the local courts) as those found in the official Turkish text of the BIT that was published in Turkey's Official Gazette on 15 January 1995.<sup>47</sup>

9.20 The Tribunal is bound to note a convergence on a mandatory recourse to the local courts in: (a) the authentic Russian text of the BIT (R-1, revised); (b) the authentic Turkish text of the Turkey-Kazakhstan BIT, which employs the same text as Article VII.2 of the BIT; and (c) the official English-Turkish translation of Article VII of the BIT that was published in Turkey's Official Gazette. Against that, the only text that can be said to point against the mandatory recourse to the local courts is the authentic text of the English version of the BIT.

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<sup>45</sup> Although Professor Kornfilt was speaking here about the English version of the Russian text, as translated literally, her testimony applies equally to the authentic English text of Article VII.2.

<sup>46</sup> Transcript, *supra* note 1 pp. 137/5 - 138/19.

<sup>47</sup> The Turkish legal experts for both parties agree on this point.

9.21 These circumstances surrounding the conclusion of the BIT lead the Tribunal to conclude that the better view is that the English language version of Article VII.2 is properly to be interpreted as requiring mandatory recourse to the local courts.<sup>48</sup> This view best reconciles the interpretation of the texts, having regard to the circumstances surrounding their adoption. The contrary view does not appear to find support in other circumstances surrounding the conclusion of the BIT.

***Only a Mandatory Meaning Reconciles the Two Authentic Texts***

9.22 To the extent that it might not be possible to resolve the possible difference in meaning of the English and Russian text through the application of Articles 31 and 32, the Tribunal can, in accordance with the principles reflected in Article 33(4) of the VCLT, adopt the meaning which would best reconcile the two texts.

9.23 To the extent that this had been necessary – and the Tribunal concludes that it is not – the Tribunal would have had no hesitation in concluding that the ambiguity of the English text could only be reconciled with the clearly mandatory Russian text by the determination that the English text also required a mandatory recourse to the local courts. This follows, because what is plainly mandatory cannot be optional, but what may either be mandatory or optional, can be seen as mandatory.

***The Effect of a Mandatory Text***

9.24 In each of its written submissions on the BIT Issues, Respondent reserved its rights to develop further its jurisdictional arguments. However, at the 20 January hearing, in its opening and closing submissions, counsel for Respondent formally requested the Tribunal to dismiss the case in its entirety for lack of jurisdiction if it concluded that pursuant to Article VII.2, as properly construed, a prior submission of the dispute to local courts was mandatory before ICSID arbitration proceedings could properly be instituted.

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<sup>48</sup> The Tribunal does not disregard Exhibit EO/MK-15, the Council of Ministers' letter to the Turkish Parliament, which described Article VII in terms which support the meaning of the relevant text as being optional. However, such a memorandum describing the draft Law on the Approbation of the Approval of the BIT is trumped by the subsequent publication in the Official Gazette of the "official" Turkish translation of the authentic English version of the BIT in terms which are unquestionably mandatory.

9.25 Counsel for Claimant responded to this request in his closing submissions. After noting certain complaints Claimant had previously made in relation to the proceedings prior to the hearing, he observed:

*“... [T]here was a formal request put forward by the [R]espondent that the Tribunal promptly dismiss for lack of jurisdiction the claim of the claimant after this hearing.*

*... But what is the Tribunal going to do now? There is an issue before it [the Tribunal] which could be dispositive on the jurisdictional basis of the case. Is the Tribunal going to wait until 2013 or 2014 to decide upon it, and waste all of our time and money? Obviously, not. Well, I hope it’s not going to choose to waste all of our time and money.*

*So what does it have to do? Well, obviously it has to render a decision on this point and obviously, as we are going to discuss in a little while, that’s going to have an effect on the schedule for the pleadings, because I don’t want to advise my client that it should proceed with drafting a memorial in a case in which during the course of the writing or shortly thereafter there is going to be a decision that will conclude that there is no jurisdiction of this Tribunal”.*<sup>49</sup>

9.26 Subject to the procedural concerns that Claimant has raised, it appears to agree with Respondent that a decision on jurisdiction should be made at this stage, insofar as it relates to the meaning and effect of Article VII.2.

9.27 In this regard, the Tribunal notes that on its own case Claimant has not treated Article VII.2 as imposing a mandatory requirement to have recourse to the local courts of Turkmenistan, and states in its written submissions that it “has chosen not to pursue domestic remedies, instead exercising its rights to commence the current proceedings”.<sup>50</sup> There is therefore no dispute that Claimant has not had recourse to

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<sup>49</sup> Transcript, *supra* note 1, pp. 178/1-4 - 179/2-17.

<sup>50</sup> Claimant’s Submission, 1 August 2011, para. 14.

the local courts. Moreover, Claimant has stated that its decision not to have recourse to the local was one that it has chosen, and although it has not provided reasons for the exercise of such choice, it has not argued that recourse to the local courts was not available.

9.28 Nevertheless, and notwithstanding the parties' apparent consensus that the Tribunal should, if it is able to do so, provide a definitive ruling on its jurisdiction, the Tribunal notes that the parties have not yet provided submissions on the effect of non-compliance with the provisions of Article VII.2 of the BIT, assuming it to require mandatory recourse to the courts of Turkmenistan in the present case.

9.29 In these circumstances, the Tribunal invites the parties to make submissions, within 10 days of the receipt of this Decision, as to whether they wish to have an opportunity to make written/oral submissions with respect to the consequences to be drawn from Claimant's non-compliance with the mandatory provisions of Article VII.2.

9.30 In the event that the parties wish to do so, the Tribunal will fix a timetable for further submissions on that point.

9.31 In the event that the parties do not wish to do so, and are content for the Tribunal to determine its jurisdiction on the basis of Claimant's admitted non-compliance with the provisions of Article VII.2, the Tribunal will supplement this Decision and issue an Award dismissing jurisdiction.

## **10. COSTS**

10.1 At this stage, the Tribunal takes due note of the parties' positions and requests with respect to costs. The Tribunal reserves this question for decision at a later stage along with the issuance of an Award.

## 11. THE TRIBUNAL'S OPERATIVE DECISION

11.1 For the foregoing reasons, the Tribunal unanimously **DECIDES AND DECLARES** that:

- (a) there are two authentic versions of the BIT, being the English and Russian versions, both signed in Ashkabat on 2 May 1992;
- (b) the translation into English of the Russian version of the BIT that is found in Exhibit R-1 (revised) is to be treated as accurate;
- (c) the meaning and effect of Article VII.2 of the BIT is that a concerned investor is required to submit its dispute to the courts of the Contracting Party with which a dispute has arisen, and must not have received a final award within one year from the date of submission of its case to the local courts, before it can institute arbitration proceedings in one of the fora in the manner permitted by Article VII.2.
- (d) the decision on costs is deferred to a later stage of the arbitration.

[Signed]

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Prof.W.W. Park  
Arbitrator

[Signed]

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Prof. Philippe Sands QC  
Arbitrator

[Signed]

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Mr William Rowley QC  
President