INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

İÇKALE İNŞAAT LIMITED ŞIRKETI

Claimant

and

TURKMENISTAN

Respondent

(ICSID Case No. ARB/10/24)

AWARD

Members of the Tribunal
Dr Veijo Heiskanen, President of the Tribunal
Ms Carolyn B. Lamm, Arbitrator
Prof. Philippe Sands QC, Arbitrator

Secretary of the Tribunal
Mr Paul-Jean Le Cannu

Date of dispatch to the Parties:
8 March 2016

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PARTIALLY DISSENTING OPINION OF PROFESSOR PHILIPPE SANDS QC

FREQUENTLY USED ABBREVIATIONS, ACRONYMS AND DEFINED TERMS

Abadan Kindergarten Contract	Contract No. AWH-I 12 for Design and "Turn-Key" Construction of a Kindergarten Building for 160 Children in Abadan Town between the Governorship of Ahal Province and İçkale dated 20 November 2007 (Exhibit R-434)
Abadan School Contract	Contract No. AWH-I 11 for Design and "Turn-Key" Construction of a School Building for 600 Students in Abadan Town between the Governorship of Ahal Province and İçkale dated 20 November 2007 (Exhibit R-423)
Arbitration Court	Arbitration Court of Turkmenistan (also referred to as the "TAC")
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Ashgabat Cinema Contract	Contract No. TNG-I 16 for Design and "Turn-Key" Construction of a Cinema Building in Ashgabat between TNGS and İçkale dated 23 July 2008 (Exhibit R-260)
Ashgabat Kindergarten Contract	Contract No. TNG-I 02 for Design and "Turn-Key" Construction of a Kindergarten Building for 160 Children on Andaliba (1958) street in Ashgabat between TNGS and İçkale dated 12 March 2007 (Exhibit R-80)
Avaza Canal Contract	Contract No. TNGIZ-I 13 for Design and "Turn-Key" Construction of a 3.5 km-long Canal in the National Tourist Zone "Avaza" in the City of Turkmenbashi between the Turkmenbashi Oil Processing Complex and İçkale dated 22 November 2007 (Exhibit R-441)
Avaza Hotel Contract	Contract No. TNG-I 01 for Design and "Turn-Key" Construction of a Luxury Hotel with Capacity for 220 Guests in Avaza in the City of Turkmenbashi between the TNGS and İçkale dated 12 March 2007 (Exhibit R-2)
Babarap Projects Contract	Contract No. TNG-I 08 for Design and "Turn-Key" Construction of the Facilities in Ruhabat District between TNGS and İçkale dated 12 September 2007 (Exhibit R-154)
BIT	Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 (also referred to as the "Treaty" or the "Turkey-Turkmenistan BIT")

Centre	International Centre for Settlement of Investment Disputes (also referred to as "ICSID")
Claimant	İçkale İnşaat Limited Şirketi ("İçkale")
Claimant's Memorial	Claimant's Memorial on the Merits
Claimant's Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction
Contracting Parties	The Turkmen State organs and State entities with which the Claimant concluded the Contracts
Contracts	The thirteen construction contracts concluded between the Claimant and the Contracting Parties
Dayhanbank	State Commercial Bank of Turkmenistan "Dayhanbank"
Dayhanbank Contract	Contract No. DB-I 06 for Design and "Turn-Key" Construction of a 12-Story 72-Apartment Luxury and Improved Design Residential Building on Bitarap Turkmenistan Avenue in Ashgabat between Dayhanbank and İçkale dated 6 July 2007 (Exhibit R-381)
EPC	Engineering, Procurement and Construction
FET	Fair and equitable treatment
FPS	Full protection and security
Hearing	The Hearing on Jurisdiction and Merits which took place between 9 and 20 March 2015 in Paris
ICC	International Chamber of Commerce
İçkale	İçkale İnşaat Limited Şirketi (also referred to as the "Claimant")
ICSID	International Centre for Settlement of Investment Disputes (also referred to as the "Centre")
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ILC Articles	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts

Kılıç	*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1
Kılıç Annulment Decision	*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015
Kılıç Award	*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013 (Exhibit RA-314)
Kılıç Decision on Article VII(2)	*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012 (Exhibit RA-5)
Kipchak Cultural Center Contract	Contract No. TNG-I 10 for Design and "Turn-Key" Construction of a Cultural Center in Kipchak Village in Ruhabat District between TNGS and İçkale dated 27 August 2007 (Exhibit R-238)
Kipchak Hotel Contract	Contract No. TNG-I 09 for Design and "Turn-Key" Construction of a Hotel for 50 Guests in Kipchak Villages in Ruhabat District between TNGS and İçkale dated 27 August 2007 (Exhibit R-204)
Kipchak School Contract	Contract No. TNG-I 05 for Design and "Turn-Key" Construction of a School Building for 400 Students in Kipchak Village in Ruhabat District between TNGS and İçkale dated 8 June 2007 (Exhibit R-112)
MFN	Most-favored nation
Ministry of Construction	Ministry of Construction and Materials Industry of Turkmenistan
Ministry of Economy Contract	Contract No. TYMM-I 03 for Design and "Turn-Key" Construction of Two 12-Story 36-Apartment (72 Apartments in Total) Luxury and Improved Design Residential Buildings on Bitarap Turkmenistan Avenue in Ashgabat between the Ministry of Economy and Finance of Turkmenistan and İçkale dated 28 March 2007 (Exhibit R-269)
Parties	Claimant and Respondent
PHB	Post-Hearing Brief

Projects	The projects to which the Contracts relate
Respondent	Turkmenistan
Respondent's Counter-Memorial	Respondent's Objections to Jurisdiction and Counter-Memorial on the Merits
Respondent's Rejoinder	Respondent's Rejoinder on the Merits
Respondent's Reply Memorial on Jurisdiction	Respondent's Reply Memorial on its Objections to Jurisdiction
Ruhiyet Mansion Contract	Contract No. LB-I 04 for Design and "Turn-Key" Construction of Ruhiyet Convention Center for 3000 Persons in Turkmenabat Town between the Governorship of Lebap Province and İçkale dated 27 March 2007 (Exhibit R-337)
Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (Exhibit RA-36)
Sehil	*Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, 13 February 2015 (Exhibit RA-451)
State Expert Review	Central Office of State Expert Review, a subdivision of the Ministry of Construction and Materials Industry of Turkmenistan
State Fund	State Fund for the Development of the Oil and Gas Industry and Mineral Resources
Supreme Chamber of Control	Turkmen State authority charged with the supervision of construction projects
TAC	Arbitration Court of Turkmenistan (also referred to as the "Arbitration Court")
TNGS	State-Owned Enterprise "Turkmenneftegazstroy"
Treaty or Turkey-Turkmenistan BIT	Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 (also referred to as the "BIT")

UNCITRAL	United Nations Commission for International Trade Law
Vienna Convention	Vienna Convention on the Law of Treaties dated 23 May 1969

1 INTRODUCTION

1. This arbitration concerns a dispute between İçkale İnşaat Limited Şirketi ("**İçkale**" or the "**Claimant**"), a company incorporated under the laws of the Republic of Turkey, and Turkmenistan ("**Turkmenistan**" or the "**Respondent,**" the Claimant and the Respondent being hereafter collectively referred to as the "**Parties**").

2. The dispute was submitted by the Claimant to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 (the "**BIT**," the "**Turkey-Turkmenistan BIT**" or the "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

3. The dispute arises out of a series of thirteen construction contracts (the "**Contracts**") concluded by the Claimant with various Turkmen State organs and State entities during the period from March 2007 to July 2008, and the alleged governmental interference with the performance of the Contracts, in breach of the BIT.

4. The Claimant bases its claims on various measures taken by Turkmen State organs which, *inter alia*, increased without compensation the Claimant's scope of the works; abolished the State Fund for the Development of the Oil and Gas Industry and Mineral Resources (the "**State Fund**") which was supposed to finance the works, resulting in substantial delays in progress payments made under the Contracts; changed financial terms of the Contracts; blocked bank accounts for non-payment of value-added tax; imposed unfair penalties; terminated the still ongoing Contracts without valid justification; initiated judicial proceedings without notice and participation, resulting in fines and confiscation of machinery and equipment; refused to pay retention amounts; discriminated against the Claimant in favor of Polimeks, another Turkish contractor which, like the Claimant, had been awarded a contract for half of one of the projects; and encashed letters of guarantee without justification.

5. The Claimant contends that Article VII(2) of the BIT provides it with the option to proceed to international arbitration or to refer the dispute to the Turkmen courts, and that it has chosen to exercise the option of international arbitration, invoking the State's consent to arbitrate disputes arising under the BIT. According to the Claimant, it made several investments in Turkmenistan, including establishing a branch, bringing valuable know-how, machinery and equipment to the construction projects, securing multi-million dollar letters of guarantee, and executing the construction projects. The Claimant claims a total of over USD 537 million and EUR 26.7 million in compensation for the loss and damage it allegedly sustained as a result of the Respondent's conduct. These amounts include the Claimant's claim for compensation for "consequential damages, loss of reputation, goodwill, creditworthiness and business opportunities," in the amount of USD 475.3 million.

6. The Respondent disputes the Tribunal's jurisdiction over the claims on several grounds, including on the basis that the Claimant has failed to comply with the domestic litigation requirement in Article VII(2) of the BIT prior to the submission of the claim to international arbitration, that it has not made any investment in Turkmenistan within the meaning of the ICSID Convention and the BIT, and that in any event its claims should be characterized as contract claims rather than treaty claims.

7. The Respondent also denies that the Claimant's claims have any merit. According to the Respondent, this arbitration is merely an attempt by the Claimant to blame Turkmenistan for its own failure to perform under the Contracts. The Respondent contends that the Claimant did not have the managerial, technical, human and financial resources to execute the significant works it had undertaken pursuant to the thirteen Contracts which it had concluded, with one exception, over a short half-year period spanning from March to November 2007, and which all provided for completion of the works in a period of two years or less.

2 PROCEDURAL HISTORY

8. The Claimant submitted its Request for Arbitration to the Centre on 10 November 2010. After further correspondence between ICSID and the Parties, the Secretary-General of ICSID (the "**Secretary-General**") registered the Request for Arbitration on 20 December 2010, pursuant to Article 36(3) of the ICSID Convention.

9. By letter dated 24 February 2011, the Claimant informed the Secretary-General that the Parties had been unable to reach an agreement on the method of constitution of the Arbitral Tribunal and requested that the Tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention. Accordingly, the Tribunal was to consist of three arbitrators, one arbitrator appointed by each Party and the third, who would be President of the Tribunal, appointed by agreement of the Parties. In the letter, Claimant informed the Centre that it appointed Ms Carolyn B. Lamm, a national of the United States of America, as arbitrator.

10. On 10 March 2011, the Centre informed the Parties that Ms Lamm had accepted her appointment and circulated her declaration and statement to the Parties.

11. By letter dated 22 March 2011, the Claimant requested that the Chairman of the Administrative Council (the "**Chairman**") appoint the arbitrators not yet appointed pursuant to Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") and Article 38 of the ICSID Convention.

12. By letter of the same date, the Centre informed the Parties that the Chairman would use his best efforts to comply with the Claimant's request within 30 days of its receipt, in accordance with Rule 4(4) of the ICSID Arbitration Rules and Article 38 of the ICSID Convention. The Centre also informed the Parties that before the Chairman proceeded to make an appointment, both Parties would be consulted as far as possible. The Parties were further reminded that, until completion of the appointment process under Article 38 of the ICSID Convention, it remained possible for the Respondent to appoint an arbitrator and for the Parties to agree on a President of the Tribunal in accordance with Article 37(2)(b) of the ICSID Convention.

13. By letter dated 23 March 2011, the Respondent informed the Centre that it appointed Mr Fali S. Nariman, a national of India, as arbitrator in this case and proposed that the Parties agree to discuss and appoint the President of the Tribunal by the agreement of the Parties within 30 days from the Claimant's acceptance of its proposal.

14. By another letter of the same date, the Respondent requested that Ms Lamm provide additional information regarding her statement of 10 March 2011.

15. On 25 March 2011, the Centre informed the Parties that Mr Nariman had accepted his appointment and circulated his declaration and personal profile.

16. On 28 March 2011, Ms Lamm furnished additional information in response to the Respondent's request of 23 March 2011.

17. By letter dated 29 March 2011, the Claimant reiterated its request that the Chairman appoint an arbitrator to serve as the President of the Tribunal.

18. By letter dated 1 April 2011, the Respondent informed the Centre that it intended to propose, upon the constitution of the Tribunal, the disqualification of Ms Lamm pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

19. By letter dated 11 April 2011, the Parties were invited to consider and agree on any of the three proposed candidates to serve as the President of the Tribunal and provide their response by completing a ballot form.

20. By letter dated 19 April 2011, upon receipt of the Parties' ballot forms, the Centre informed the Parties that there was no agreement between them on any of the candidates proposed by the Centre for the appointment of the President of the Tribunal. The Centre further informed the Parties that it would proceed with the appointment in accordance with Articles 38 and 40(1) of the ICSID Convention.

21. On 29 April 2011, the Centre indicated to the Parties its intention to propose to the Chairman the appointment of Dr Veijo Heiskanen, a national of Finland, as the President of the Tribunal, and that it would proceed with Dr Heiskanen's appointment absent any compelling objection from either Party by 6 May 2011.

22. By letter dated 11 May 2011, the Secretary-General notified the Parties that Dr Heiskanen had accepted his appointment as the President of the Tribunal, and that pursuant to Rule 6 of the ICSID Arbitration Rules, the Tribunal was deemed to have been constituted, and the proceedings to have begun, as of that date. Dr Heiskanen's declaration was circulated to the Parties with the letter. By the same letter, Mr Paul-Jean Le Cannu, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

23. On 22 July 2011, the Tribunal held a first session with the Parties at the World Bank's office in Paris. At the session, the Parties confirmed, *inter alia*, that the Tribunal had been properly constituted and the declarations of its Members had been distributed in accordance with the ICSID Convention and the ICSID Arbitration Rules. The Respondent stated that it would not propose the disqualification of Ms Lamm. The final Minutes of the First Session were circulated to the Parties on 8 August 2011.

24. In accordance with the Tribunal's directions, the Respondent filed on 5 August 2011 a request to bifurcate the proceedings to address its objections to jurisdiction as a preliminary matter.

25. On 19 August 2011, the Claimant filed its observations on the Respondent's request for bifurcation.

26. By letter of 31 August 2011, the Tribunal informed the Parties of its decision to decline to order bifurcation of the proceedings. The Tribunal also advised the Parties that a reasoned decision would be circulated to them in due course.

27. On 9 September 2011, the Tribunal issued Procedural Order No. 1, which recorded its reasoned decision on the Respondent's request to bifurcate the proceedings.

28. On 1 November 2011, the President of the Tribunal circulated a statement to the Parties concerning his appointment as arbitrator in another ICSID case.

29. On 1 March 2012, the Claimant filed its Memorial on the Merits.

30. On 7 March 2012, Ms Lamm circulated a statement to the Parties concerning her law firm's involvement in other ICSID cases.

31. On 16 May 2012, the Respondent requested that the Tribunal suspend the current procedural calendar in this arbitration and consider as a preliminary matter the issue of the meaning and effect of Article VII(2) of the Turkey-Turkmenistan BIT. The Respondent's request was prompted by a decision rendered on 7 May 2012 by another ICSID tribunal in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* ("***Kılıç* Decision on Article VII(2)**"), in which the tribunal found that Article VII(2) of the Turkey-Turkmenistan BIT requires an investor to first submit its claims to the courts of the host State, and to allow a one-year period for the court to render its decision, before the investor can initiate arbitration proceedings in one of the fora set out in Article VII(2) of the BIT, including ICSID.[1]

32. By letter of 25 May 2012, the Claimant submitted comments on the Respondent's application of 16 May 2012, requesting that the Tribunal decline the Respondent's requests.

33. On 28 June 2012, the Tribunal issued Procedural Order No. 2 in which it rejected Respondent's request of 16 May 2012. The Tribunal noted that while it was not persuaded that addressing the meaning and effect of Article VII(2) of the BIT as a preliminary matter would serve the interests of due process or procedural efficiency, it recognized the importance of the issue and directed the Parties to address "all aspects of the issue" in their upcoming memorials, including in particular the following:

> *"a. the various language versions of the BIT, including the existence of a Turkmen version of the BIT;*
>
> *b. the authenticity of the various language versions of the BIT;*
>
> *c. the accuracy of the English translations of each of the authentic versions of the BIT;*
>
> *d. the negotiating history of the BIT, including* travaux préparatoires, *if any; the Parties are invited to produce witness testimony as appropriate;*
>
> *e. the rules of treaty interpretation applicable to the BIT, including the issue of whether the fact that the treaty creates rights for third party beneficiaries (private investors) affects in any way the interpretation of the treaty; and*

[1] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012, Exhibit RA-5.

f. *whether the objection put forward by Respondent on the basis of its interpretation of Article VII(2) of the BIT raises an issue of jurisdiction or an issue of admissibility*."

34. On 3 November 2012, the Respondent filed its Objections to Jurisdiction and Counter-Memorial on the Merits.

35. On 18 December 2012, the Respondent wrote to the Tribunal to express concerns arising out of views expressed in an amicus brief filed before the United States Supreme Court in *BG Group PLC v. The Republic of Argentina* and to which Ms Lamm had subscribed. The Respondent indicated that it would welcome Ms Lamm's response to the letter. By letter of 21 December 2012, Ms Lamm submitted comments on the concerns expressed by the Respondent in its letter of 18 December 2012. By letter of 9 January 2013, the Respondent submitted comments on Ms Lamm's letter of 21 December 2012. The Respondent stated, *inter alia*, that:

> *"At this time, however, in reliance upon Ms. Lamm's assurances, Respondent seeks no further action from the Tribunal with regard to Ms. Lamm's continued participation as an arbitrator. Turkmenistan reserves all of its rights, remedies, defenses and objections in regard to this Arbitration, including with respect to the matters raised in its letter of December 18, 2012."*

36. On 7 February 2013, the Tribunal issued Procedural Order No. 3 in which it decided on the Parties' document requests as set out in the Redfern Schedules filed on 23 January 2013.[2]

37. On 22 April 2013, the Claimant filed a Reply on the Merits and Counter-Memorial on Jurisdiction.

38. On 15 July 2013, the Respondent filed its Reply Memorial on Its Objections to Jurisdiction.

39. On 29 July 2013, the Respondent filed a Rejoinder on the Merits.

40. By letter of 15 August 2013, Counsel for the Respondent informed the Tribunal that they had been "in discussions with [their] client regarding the financial arrangements for the proceedings in this and other pending cases and [that they were] still awaiting decisions in

[2] On 8 February 2013, the Tribunal issued a minor correction to the 7 February version of Procedural Order No. 3.

that regard." Counsel stated that "under the circumstances, [they would] not be able to proceed with the hearing on the dates presently scheduled" and requested a postponement of the hearing, which had been scheduled to take place from 7 through 18 October 2013.

41. By letter of 19 August 2013, the Tribunal invited the Respondent to further elaborate on the basis of its request by 20 August 2013. In particular, the Respondent was requested to elaborate on the "financial arrangements" that it invoked in support of its request. The Claimant was invited to comment on the Respondent's further and more detailed request by 22 August 2013.

42. On 19 August 2013, the Claimant filed a Rejoinder on Jurisdiction.

43. By letter of 20 August 2013, the Respondent provided further information on the basis of its request for postponement of the hearing. By letter of 21 August 2013, the Claimant submitted comments on the Respondent's request. The Claimant requested that the Tribunal "(i) apply the relevant rules of Article 42 of the Arbitration Rules, (ii) notify Respondent of its default and Claimant's request on the continuance of the proceedings, [and] (iii) ask Respondent to determine its final position on the continuance of the proceedings and to suggest a new date for the hearings by 2 September 2013."

44. By letter of 23 August 2013, the Respondent submitted comments on the Claimant's request, arguing that it should be denied.

45. On 26 August 2013, the Tribunal issued Procedural Order No. 4 in which it noted that the situation did not fall within ICSID Arbitration Rule 42 and decided *inter alia* to grant the Respondent's request that the hearing on jurisdiction and the merits scheduled to be held in October 2013 be postponed to a later date. The Tribunal requested that the Respondent confirm, by 25 September 2013, that the financial issues that it was currently facing were resolved, and that it intended to participate in the proceedings, including the hearing, and to discharge its financial obligations.

46. By letter of 30 August 2013, the Tribunal proposed new hearing dates. By letter of 4 September 2013, the Claimant submitted comments on the Tribunal's proposed hearing

dates and requested earlier dates for the hearing. By letter of 9 September 2013, the Tribunal proposed additional hearing dates.

47. By letter of 25 September 2013, the Respondent confirmed its intention to participate in the proceedings and in the hearing and to discharge the financial obligations connected therewith. The Respondent confirmed that it would confer with counsel for the Claimant with respect to the new hearing dates proposed by the Tribunal.

48. In a further exchange of correspondence on 30 August, 9 and 25 September, and 4 and 9 October 2013, the Parties and the Tribunal agreed to hold the hearing from 12 to 23 May 2014 in Paris.

49. On 14 January 2014, the Claimant wrote to the Tribunal "to seek [its] advice regarding the need to make available to Respondent certain potentially voluminous documentation related to the 13 construction projects at issue in this arbitration [the so-called "Vouched Documents"]." On 27 January 2014, the Respondent submitted comments on the Claimant's letter of 14 January 2014. By letter of 29 January 2014, the Tribunal informed the Parties that, in the absence of a formal request for a ruling, it had taken note of the Claimant's letter and determined that no decision was required in the matter. By letter of 2 February 2014, the Claimant submitted clarifications as to the nature of the advice it was seeking from the Tribunal. By email of 4 February 2014, the Tribunal took note of the Claimant's letter. By letter of the same date, the Respondent requested that the Tribunal issue a ruling precluding the Claimant from producing the "Vouched Documents" or any other documents at such an allegedly late stage. Alternatively, the Respondent requested a ruling (i) affording the Respondent adequate time and opportunity to review the newly submitted evidence and to respond in a written submission; (ii) adjourning the hearing; and (iii) ordering the Claimant to pay the costs incurred by the Respondent in undertaking this additional round of document review and filing. By letter of 5 February 2014, the Claimant asked that the Tribunal reject the Respondent's requests of 4 February 2014. By letter of 14 February 2014, the Tribunal informed the Parties that:

> *"[…] the issue concerns the production of documents between the Parties, and that neither Party has yet offered to produce them as evidence in these proceedings. In these circumstances, the Tribunal considers that it is not in a position to preclude*

the Claimant from offering the documents to the Respondent for review if it so wishes; however, it will be similarly for the Respondent to decide whether it wishes to review or indeed receive them.

The Tribunal's ruling is without prejudice to its decision as to the legal consequences, if any, of the Claimant's failure to produce the documents earlier and/or the Respondent's decision as to how it chooses to deal with the documents. The Tribunal will take a view on these issues, as appropriate, if either Party offers to produce any of the documents in question as evidence at a later stage of the arbitration."

50. By letter dated 4 March 2014, the Secretary-General informed the Parties that Mr James Claxton, ICSID Legal Counsel, would replace Mr Le Cannu as Secretary of the Tribunal.

51. By letter of 12 March 2014, the Respondent requested a ruling precluding the Claimant from introducing documents produced on 28 February 2014 into evidence or, in the alternative, bifurcating the proceedings so that only the jurisdictional objections would be heard at the May 2014 hearing.

52. By letter of 17 March 2014, the Claimant objected to the Respondent's proposals in its letter of 12 March 2014. The Claimant proposed that the hearing proceed as planned. As to the documents produced on 28 February 2014, the Claimant proposed that the Respondent have the option of filing a post-hearing brief addressing its issues with the documents to be followed by a reply by the Claimant and a hearing if the Tribunal considered it advisable.

53. By letter of 17 March 2014, the Respondent rejected the Claimant's proposals in its letter of 17 March 2014 and repeated its request for bifurcation of the proceedings.

54. By letter of 18 March 2014, the Claimant commented on the Respondent's letter of 17 March 2014 and proposed that the proceedings be bifurcated so that jurisdictional objections and liability would be heard at the May 2014 hearing, whereas quantum would he heard at a later hearing. The Respondent accepted this proposal by email of the same day.

55. By letter of 20 March 2014, the Tribunal noted the agreement of the Parties that jurisdictional objections and liability would be heard at the May 2014 hearing, whereas quantum would be heard at a later hearing. The Tribunal invited the Parties to attempt to reach agreement about the date and length of the hearing on quantum.

56. By letter dated 26 March 2014, the Centre informed the Parties that Mr Nariman would not be able to attend in person the hearing scheduled to be held from 14 through 24 May 2014 due to a serious illness in his immediate family, and that the Centre was in the process of making arrangements for Mr Nariman to join the scheduled hearing by videoconference, subject to any comments from the Parties.

57. By letter dated 27 March 2014, the Respondent objected to the Centre's proposed arrangements to conduct the scheduled hearing with Mr Nariman attending by videoconference. By letter dated 28 March 2014, the Claimant indicated that it consented to the proposed arrangements, but objected to any further postponement of the hearing.

58. By letter dated 2 April 2014, the Centre informed the Parties that Mr Nariman had resigned from his appointment as arbitrator in this case due to his wife's ill-health and his inability to travel abroad as a result. The Centre further informed the Parties that Dr Heiskanen and Ms Lamm had consented to Mr Nariman's resignation, in accordance with Arbitration Rule 8(2), and that the proceeding would remain suspended until the vacancy created by the resignation had been filled pursuant to ICSID Arbitration Rule 10(2). The Respondent was invited to promptly appoint a new arbitrator.

59. On 28 April 2014, the Respondent informed the Secretary-General that it appointed Professor Philippe Sands QC, a national of the United Kingdom and France, to replace Mr Nariman.

60. By letter dated 30 April 2014, the Claimant requested that Professor Sands decline to accept his appointment, on the basis that Professor Sands had previously been appointed by Turkmenistan to serve on the tribunal in the *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* case ("***Kılıç***"), which had issued two decisions on the interpretation of Article VII(2) of the Turkey-Turkmenistan BIT, the same provision the interpretation of which was also at issue in this case.[3] By letter of the same date, the Respondent provided observations on the Claimant's request.

[3] *Kılıç* Decision on Article VII(2), Exhibit RA-5; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, Exhibit RA-314 ("***Kılıç* Award**").

61. On 12 May 2014, the Centre informed the Parties that Professor Sands had accepted his appointment and circulated copies of Professor Sands' declaration, statement and *curriculum vitae* pursuant to ICSID Arbitration Rule 6(2). The Centre confirmed that the vacancy created in the Tribunal following the resignation of Mr Nariman on 2 April 2014 had thus been filled, and the Tribunal was reconstituted. In accordance with ICSID Arbitration Rule 12, the proceeding resumed on that date from the point it had reached at the time the vacancy occurred.

62. On 16 May 2014, the Claimant filed a proposal for disqualification of Professor Sands. The proceeding was suspended in accordance with ICSID Arbitration Rule 9(6).

63. By letter of 17 May 2014, the Respondent filed a proposal for disqualification of Ms Lamm and communicated its understanding that the disqualification proposal of Professor Sands and the disqualification proposal of Ms Lamm would be decided by the Chairman in accordance with Article 58 of the ICSID Convention.

64. By letter of 19 May 2014, the Secretariat invited the Parties to agree to treat the disqualification proposal of Professor Sands and the disqualification proposal of Ms Lamm as a single proposal to disqualify the majority of the Tribunal, which would be decided by the Chairman in accordance with Article 58 of the ICSID Convention.

65. By email of 20 May 2014, the Claimant informed the Secretariat that it did not agree to treat the disqualification proposal of Professor Sands and the disqualification proposal of Ms Lamm as a single proposal to disqualify the majority of the Tribunal. The Secretariat accordingly communicated to the Parties that Dr Heiskanen and Ms Lamm would decide the proposal for the disqualification of Professor Sands under Article 58 of the ICSID Convention and Arbitration Rule 9(2).

66. By letter dated 22 May 2014, the Secretariat communicated to the Parties on behalf of Dr Heiskanen and Ms Lamm the schedule for written submissions on the Claimant's proposal to disqualify Professor Sands.

67. By email of 23 May 2014, the Parties requested changes to the schedule of written submissions. The Secretariat confirmed the agreement of Dr Heiskanen and Ms Lamm to the changes to the schedule by email of the same day.

68. On 2 June 2014, the Respondent filed its observations on the Claimant's proposal for the disqualification of Professor Sands.

69. By letter dated 4 June 2014, Professor Sands provided a statement on the proposal for his disqualification pursuant to ICSID Arbitration Rule 9(3).

70. On 11 June 2014, the Claimant filed its observations on its proposal for the disqualification of Professor Sands. By letter of the same date, the Respondent confirmed that it had no further comment on the proposal.

71. On 11 July 2014, Dr Heiskanen and Ms Lamm rendered their decision declining the Claimant's proposal. The proceeding was resumed pursuant to Arbitration Rule 9(6).

72. Following exchanges of correspondence between the Parties, the Tribunal informed the Parties on 21 July 2014 that the hearing would be held from 9-20 March 2015 and that it intended to hear evidence relating to all aspects of the case, including jurisdiction, liability, and quantum.

73. A pre-hearing organizational meeting took place by telephone conference on 21 January 2015.

74. By letter dated 29 January 2015, the Tribunal circulated a summary of the items agreed during the pre-hearing organizational meeting, as well as directions from the Tribunal on items that were not agreed by the Parties. In the letter, the Tribunal confirmed *inter alia* that there would be post-hearing briefs.

75. A hearing on jurisdiction and the merits took place at the World Bank's office in Paris from 9 to 20 March 2015 (the "**Hearing**"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the Hearing were:

For the Claimant:

Prof. Ata Sakmar	Sakmar Hukuk Bürosu
Ms Mine Sakmar	Sakmar Hukuk Bürosu
Mr Turgut Aycan Özcan	Sakmar Hukuk Bürosu
Mr William Kirtley	Dugué & Kirtley AARPI
Dr Gregor Grubhofer	Baier Rechtsanwälte KG
Mr Müge Gül	Sakmar Hukuk Bürosu
Mr Timuçin Demir	Sakmar Hukuk Bürosu
Ms Amina Hassani	Dugué & Kirtley AARPI

For the Respondent:

Mr Ali R. Gürsel	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Miriam K. Harwood	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Kate Brown de Vejar	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Ruslan Galkanov	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Simon Batifort	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Zeynep Gunday	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr J. Benton Heath	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Maria Ongoren	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Diora Ziyaeva	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Katiria Calderon	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Catherine Ruiz-Mendes	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Merdan Hanov	Turkmenistan Ministry of Justice

76. The following persons were examined:

On behalf of the Claimant:

Jurisdiction witnesses:

Ms Zergül Özbilgiç	Deputy General Director of the General Directorate of Incentive Implementation and Foreign Investment, Turkish Ministry of Economy
Ms Patricia Palmer	King's College London
Mr Peter Barber	Treaty Interpreter

Fact witnesses:

Mr Ozan İçkale	Turkish
Mr Burak Kılıçer	Turkish
Mr Ruhi Çilek	Turkish
Mr Ahmet Uyar	Turkish
Mr Abdullatif Özbek	Turkish

Expert witnesses on construction matters and quantum:

Mr Gökhan Almaci	Mazars
Mr Ekrem Kaya	Hill International
Mr Damian Paul Wilkinson	Hill International
Mr Michel Berger	CEM Enterprise

On behalf of the Respondent:

Jurisdiction witnesses:

Professor Jaklin Kornfilt	Syracuse University
Professor Boris Gasparov	Columbia University
Professor Georgia Green	University of Illinois

Fact witnesses:

Mr Annamuhammet Imamberdiyev	Russian
Mr Bayramberdi Kurbannazarov	Russian
Mr Murad Ashirovich Nepesov	Russian
Mr Çetin Zor	Turkish
Mr Özay Yakak	Turkish

Expert witnesses on construction matters and quantum:

Mr Reza Nikain	Marsh Risk Consulting
Mr Abdul Sirshar Qureshi	Pricewaterhouse Coopers

77. On the last day of the Hearing, the Tribunal communicated to the Parties a number of issues that it had identified in the course of the arbitration, and invited the Parties to address these issues in their post-hearing briefs. The Tribunal also invited the Parties to confirm their agreement on the number of rounds of post-hearing submissions. The Claimant stated that subject to further internal consultation it would prefer to have one round of post-hearing briefs, whereas the Respondent indicated that it preferred to have two rounds.

78. By letter of 22 March 2015, the Secretariat communicated to the Parties, on behalf of the Tribunal, a summary of the outstanding issues and agreements reached at the Hearing. The Tribunal directed the Claimant to circulate a list of exhibit numbers that corresponded to the videos relied on at the Hearing for which transcripts were provided, invited the Respondent to comment on the transcripts of the videos by 3 April 2015, and indicated that the Claimant may produce evidence in response to the Respondent's exhibits filed as R-554 and R-555 at the Hearing by the same date. By the same letter, the Claimant was invited to indicate by 27 March 2015 whether it wished to have a second round of post-hearing briefs, and the Parties were directed to file, pursuant to their agreement, statements of costs (*i.e.*, a list of costs without legal argument) by 19 June 2015.

79. By letter dated 25 March 2015, the Claimant provided information concerning exhibit numbers corresponding to the videos shown at the Hearing.

80. By letter dated 27 March 2015, the Claimant indicated that a second round of post-hearing briefs would be unnecessary and proposed that the final submission deal with the Parties' statements of cost only.

81. By email dated 1 April 2015, the Respondent requested that two rounds of post-hearing briefs be scheduled.

82. By email dated 2 April 2015, the Tribunal decided that one round of post-hearing briefs would be sufficient, but indicated that it remained open "to grant, upon a reasoned request by either Party, an opportunity for such Party to comment on a specific point raised in the other Party's post-hearing submission."

83. By email dated 2 April 2015, the Respondent requested that the "Claimant provide (i) the raw footage from which the various excerpts of videos submitted by Claimant were taken; (ii) separate transcripts for each video excerpt submitted into the record as an exhibit by Claimant; and (iii) source information for the videos, including the website address from which Claimant obtained them and the date on which it was accessed." The Respondent also reiterated its request that "the 3 April deadline for a separate submission on this matter

either be extended or dispensed with, in which case the Respondent will include all of its comments about the videos and Claimant's submissions in the post-hearing brief."

84. By a separate email dated 2 April 2015, the Respondent provided a point of clarification regarding its earlier request of the same date.

85. By email dated 3 April 2015, the Tribunal provided its ruling on the Respondent's request of April 2, 2015 as follows:

> *"(1) The Claimant is requested to produce, to the Respondent only, the raw video footage from which the various excerpts of videos submitted by the Claimant were taken, by 10 April 2015;*
>
> *(2) The Claimant is requested to produce, by the same date, separate transcripts for each video that is already on record as an exhibit, together with the source information (including the website address from which the videos were obtained) and the date of access for such videos; and*
>
> *(3) The Respondent is invited to make any comments it may wish to make on the materials produced within a week of their delivery, and to produce its version of the transcript if it so wishes."*

86. In accordance with the Tribunal's direction of 22 March 2015, the Claimant produced evidence (Exhibits C-221 through C-227) on 3 April 2015 in response to the Respondent's exhibits filed as R-554 and R-555 at the Hearing (renumbered by the Respondent as Exhibits R-569 and R-570 due to a numbering error). The Claimant further requested from the Tribunal an order for the Respondent to produce certain documents as specified in paragraph 9 of the Claimant's submission of 3 April 2015, and reserved its rights to comment on Exhibits R-569 and R-570, and the Respondent's contentions about them, in its post-hearing brief.

87. In accordance with the Tribunal's direction of 3 April 2015, the Claimant produced raw video footage to the Respondent via ICSID's BOX server and separate transcripts for the video footages (Exhibits C-106, C-112, C-115, C-118, C-119, C-126, C-127, C-130, C-136, C-149, C-150, C-151, C-156, C-161, C-170, C-172, C-174, submitted with the Claimant's

Reply on the Merits and Counter-Memorial on Jurisdiction dated 22 April 2013), together with the source information, on 10 April 2015.

88. By letter dated 14 April 2015, the Respondent submitted comments on the Claimant's submission of 3 April 2015.

89. By email of 17 April 2015, the Respondent requested an extension to submit its comments on the Claimant's submissions of 10 April 2015.

90. By email of the same date, the Claimant provided its comments on the Respondent's request for an extension.

91. By email dated 20 April 2015, the Tribunal ruled on the Claimant's request that the Tribunal order the Respondent to produce certain documents as specified in paragraph 9 of its submission of 3 April 2015 as follows:

> *"1. The Claimant's request that the Tribunal order the Respondent to produce the Annex, referred to at p. 1 of "Report No. 259" (Exhibit C-224), is denied; and*
>
> *2. The Respondent is ordered to produce the complete tender documentation package for the ten of the thirteen contracts at issue in this case for which such documentation is available as soon as possible but not later than Thursday, 23 April 2015."*

92. By the same email, the Tribunal invited the Respondent to submit its comments on the Claimant's submissions of 10 April 2015 as soon as possible but no later than Wednesday, 22 April 2015. The Tribunal also invited the Parties to confer on whether the deadline for the post-hearing briefs should be extended, and to inform the Tribunal of any agreement reached by Monday, 27 April 2015.

93. By letter dated 22 April 2015, the Respondent submitted its comments on the Claimant's submissions of 10 April 2015.

94. In accordance with the Tribunal's ruling of 20 April 2015, the Respondent produced the tender documentation package for ten of the thirteen contracts at issue in this case (Exhibits R-571 through R-577) on 23 April 2015.

95. By email dated 27 April 2015, the Claimant indicated that the Parties had reached an agreement to extend the deadline for the post-hearing briefs by two weeks, until 29 May 2015.

96. By letter of the same date, the Claimant provided its observations on the Respondent's submission of 23 April 2015.

97. By letter of 30 April 2015, the Secretary-General of ICSID informed the Parties and the Tribunal that Mr Paul Jean Le Cannu would replace Mr James Claxton as Secretary of the Tribunal as of that date.

98. On 18 May 2015, the Claimant requested, on behalf of both Parties, that the deadline for the submission of post-hearing briefs be extended until 5 June 2015, in view of the time required to make corrections to the hearing transcript.

99. On 20 May 2015, the Parties were advised that the Tribunal had agreed to the requested extension of time, but that it did not envisage granting any further extensions.

100. The Parties filed simultaneous post-hearing briefs on 5 June 2015.

101. On 25 June 2015, the Respondent submitted a reasoned request for an opportunity to comment on the Claimant's post-hearing brief.

102. On 26 June 2015, the Parties filed their statements on cost.

103. On 30 June 2015, the Claimant submitted its comments on the Respondent's request of 25 June 2015.

104. On 2 July 2015, the Respondent submitted further comments in support of its request of 25 June 2015. By separate letter of the same day, the Respondent objected to the Claimant's cost submission of 26 June 2015, arguing that contrary to the Tribunal's directions, the submission contained legal argument, which should be disregarded.

105. On 6 July 2015, the Tribunal communicated its decision that the Claimant's cost submission would be disregarded insofar as it contained legal argument, contrary to the agreement reached by the Parties at the Hearing and communicated by the Tribunal to the Parties on 22 March 2015. The ruling also applied to the Respondent's letter of 2 July 2015, insofar as it sought to reply to the Claimant's legal argument.

106. On 7 July 2015, the Tribunal issued its rulings on the remaining issues in dispute, dismissing in part and granting in part the Respondent's request for an opportunity to comment on the Claimant's post-hearing brief.

107. On 14 July 2015, the Respondent submitted its comments on the issues identified in the Tribunal's ruling of 7 July 2015.

108. On 22 July 2015, the Respondent requested leave to submit the decision of the *ad hoc* annulment committee in *Kılıç* (the "***Kılıç* Annulment Decision**"), which had been rendered on 14 July 2015.[4] The Respondent indicated that it would be prepared to file a short submission on the decision if the Tribunal would find it helpful.

109. On 27 July 2015, the Claimant indicated that it had no objection to including the decision of the *ad hoc* annulment committee into the record. The Claimant also stated that in its view the Tribunal need not receive comments from either Party on the decision.

110. By letter of 4 January 2016, the Tribunal informed the Parties that it had decided to admit the *Kılıç* Annulment Decision into the record, but did not find it necessary to seek further

[4] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015.

input from the Parties. The Tribunal also advised the Parties that the proceeding was declared closed as of that date in accordance with Rule 38(1) of the ICSID Arbitration Rules.

3 SUMMARY OF THE PARTIES' CONTENTIONS

111. This section sets out a summary of the Parties' contentions on the facts and their requests for relief, as pleaded in the course of the proceedings. The Tribunal's findings on the relevant facts, including disputed facts, are set out in the context of its decisions on the relevant issues in Sections 7 to 8 below. The Parties' positions and the Tribunal's determination on jurisdictional and other preliminary issues are set out in Section 4 to 6 below.

3.1 The Claimant's case

3.1.1 The Claimant's contentions

112. The Claimant is a limited liability company incorporated in 1982 under the laws of the Republic of Turkey. Its main activity is the design, development and implementation of real estate development and infrastructure projects commissioned by both private and public sector entities. The projects carried out by the Claimant include dam projects, drinking water conveyance and sewage system projects, and hotel and residential building projects.

113. The Claimant's first project outside Turkey was in Turkmenistan, where it opened a branch office in 2004. During the period from 2004 to 2009, the Claimant concluded a total of fifteen contracts for various projects in Turkmenistan, of which the thirteen set out in the table below, with a total value of approximately USD 250 million, are at issue in the present arbitration (defined above as the "**Contracts**" or, when referring to the works, the "**Projects**"). These Contracts related to a number of public construction projects, which formed part of a plan by the President of Turkmenistan to develop Turkmenistan's infrastructure, including to promote tourism, with the aim of bringing the country into a "golden age."

Table 1: Contracts at issue in this arbitration

Contract	**Contract No.**	**Date**	**Exhibit**
Avaza Hotel Contract	TNG-I 01	12 March 2007	R-2

Ashgabat Kindergarten Contract	TNG-I 02	12 March 2007	R-80
Kipchak School Contract	TNG-I 05	8 June 2007	R-112
Babarap Projects Contract	TNG-I 08	7 September 2007	R-154
Kipchak Hotel Contract	TNG-I 09	27 August 2007	R-204
Kipchak Cultural Center Contract	TNG-I 10	27 August 2007	R-238
Ashgabat Cinema Contract	TNG-I 16	23 July 2008	R-260
Ruhiyet Mansion Contract	LB-I 04	27 March 2007	R-337
Ministry of Economy Contract	TYMM-I 03	28 March 2007	R-269
Dayhanbank Contract	DB-I 06	6 July 2007	R-381
Abadan School Contract	AWH-I 11	20 November 2007	R-423
Abadan Kindergarten Contract	AWH-I 12	20 November 2007	R-434
Avaza Canal Contract	TNGIZ-I 13	22 November 2007	R-441

114. The Claimant concluded the Contracts with various Contracting Parties of which three were State organs, namely the Governorship of Lebap Province, the Governorship of Ahal Province, and the Ministry of Economy and Finance. The other Contracting Parties, namely the State-Owned Enterprise "Turkmenneftegazstroy," the State Commercial Bank "Dayhanbank," and the Turkmenbashi Oil Processing Complex, are, according to the Claimant, entities which are under the control of the Respondent. The Claimant alleges in particular that these Contracting Parties are owned entirely by the Respondent, that their directors are appointed by the President of Turkmenistan, that they must seek the authorization of the Respondent to take actions such as terminating or amending contracts, that their chairmen are personally responsible to the President, and that they acted under the direct instructions of State organs when amending the Contracts or applying delay penalties.

115. The Contracts were awarded to the Claimant on the basis of Presidential Decrees which form the legal basis for the Claimant's investments in Turkmenistan, and which set out the main terms and conditions of the Contracts, such as their value, duration, and the entities responsible for financing and implementing the Contracts. The Presidential Decrees awarding ten of the Claimant's thirteen Contracts, as well as the Contracts themselves,

provided in particular that payments would be financed by the State Fund, which was funded by the State's oil and gas revenues. The Claimant argues that it considered the State Fund as an important insurance on which it relied in expanding its operations in Turkmenistan. The State Fund was, however, abolished in 2008, shortly after Gurbanguly Berdimuhamedov, the second post-independence President of Turkmenistan, came into power.

116. The Claimant alleges that it completed its works under six of the Contracts, as well as a portion of an additional contract relating to several projects, with a combined value of approximately USD 150 million. The Contracts which the Claimant alleges it completed are the Avaza Hotel Contract, the Ashgabat Kindergarten Contract, the Ruhiyet Mansion Contract, the Ministry of Economy Contract, the Kipchak School Contract, the Kipchak Hotel Contract, and the portion of the Babarap Projects Contract relating to the construction of a school. It further argues that, due to the actions and omissions of the Respondent, it was unable to complete the remaining six Contracts, namely the Dayhanbank Contract, the Kipchak Cultural Center Contract, the Abadan School Contract, the Abadan Kindergarten Contract, the Ashgabat Cinema Contract, the Avaza Canal Contract, and the remaining portions of the Babarap Projects Contract.

117. According to the Claimant, the organs of the Respondent, including the President of Turkmenistan, the Cabinet of Ministers, the Supreme Chamber of Control, and the Central Bank, repeatedly intervened in the Projects, preventing it from completing the works under several of the Contracts, and causing significant damage to the Claimant. As a result of the Respondent's actions and omissions, the Claimant alleges that it is no longer a viable construction company, as it is unable to obtain the credit and bank guarantees which it needs to conduct its business.

118. The Claimant alleges in particular that the President of Turkmenistan personally supervised, and interfered directly in, the Projects, for instance by issuing instructions not to respect the terms of the Claimant's Contracts and not to make payments, and by arbitrarily setting completion dates. According to the Claimant, the Contracting Parties were merely an

appendage of the President, which the President controlled through threats and intimidation of his subordinates.

119. The Claimant complains in this arbitration of a wide-range of actions and omissions of the Respondent, which are summarized in turn below.

120. First, the Claimant argues that the Respondent, through the Central Office of State Expert Review (the "**State Expert Review**"), increased the scope of the works to be performed by the Claimant under many of the Contracts by 7% to 68%, purportedly in order to ensure compliance with Turkmen construction laws and regulations.

121. The Claimant alleges that the technical specifications for the design and construction of the Projects, which were part of the tender documentation, set out the total construction area in square meters of each of the Projects, and were reviewed by the Ministry of Construction and Materials Industry of Turkmenistan (the "**Ministry of Construction**") prior to being issued. The Ministry of Construction further reviewed the Contracts, which also indicate the total surface area of the works, before they were signed, as did other organs of the Respondent.

122. However, after the Contracts were signed and the Claimant had received the advance payments, purchased materials and equipment, and mobilized personnel, the State Expert Review, which had to approve the Claimant's draft technical drawings, required significant increases in the total construction area in respect of ten of the Contracts, purportedly to comply with applicable norms and regulations. For instance, the Avaza Hotel Contract provided for an area of 19,440 m^2, but the total area of the final drawings after implementation of the State Expert Review's comments was 16% higher, namely 22,558 m^2.

123. The Claimant alleges that it received assurances from the Contracting Parties and the Council of Ministers that it would be paid for the additional work imposed by the State Expert Review. However, the President ultimately refused to provide additional

compensation, and the Contracting Parties subsequently threatened to unilaterally lower the contract prices if the Claimant continued to pursue the issue.

124. Second, the Claimant argues that the Respondent delayed progress payments under the Contracts, in particular following the abolition of the State Fund by the new President in 2008. It argues that progress payments under the Contracts stopped being paid on time as of mid-2007, shortly after President Berdimuhamedov came to power. However, the problem allegedly became more serious after the State Fund was abolished. The Claimant contends that pursuant to the Procedure for the Use of Financial Resources annexed to Presidential Decree No. 9477, under which the State Fund was abolished, all further payments under the Contracts were subject to the approval of the President and of the Cabinet of Ministers. It alleges that as of the abolition of the State Fund, the Respondent began intervening directly in the payments made to the Claimant, delaying and even blocking payments under ten of its Contracts. It contends, for instance, that under the Kipchak Cultural Centre Contract, several progress payments were made between 32 and 114 days late, and that no payment was made at all in respect of one of its Certificates of Work Performance. Similarly, as of October 2008, the Respondent made payments under certificates of work performance issued under the Avaza Canal Contract between 41 and 106 days late, and did not make any payments at all in respect of two such certificates. As a result of the delays and non-payment, the Claimant alleges that, by the end of the third quarter of 2008, it was financing the construction Projects entirely on its own.

125. The Claimant further contends that it continued working on the Avaza Canal Project for seven months without payment, on the basis of verbal representations from the Cabinet of Ministers that the President would allocate USD 400 million to the Avaza projects. However, it ultimately never received payment for some of the works.

126. Third, the Claimant argues that in respect of the seven Projects it completed, the Respondent prevented the completion of the contractual handover procedure, allegedly in order to prevent the payment of the 5% retention amounts which the Claimant was owed under the Contract at the end of the warranty maintenance period.

127. The Claimant contends in particular that the Respondent began operating the facilities it had completed even though no handover certificates had been signed. In accordance with the Contracts, the handover certificates were to be signed by the State Acceptance Committees, which were composed of representatives of various public agencies as well as representatives of the Contracting Parties. While the representatives of the Contracting Parties on the State Acceptance Committees generally signed the handover certificates, other officials, including from the Ministry of Construction, did not, preventing them from being issued, and blocking the payment of the 5% retention amounts.

128. The Claimant contends that the President of Turkmenistan himself ordered that the 5% retention amounts should not be paid, and threatened to imprison his subordinates if they took any actions leading to such payments. The Claimant further contests the Respondent's contentions that handover certificates were not issued due to defects in the Claimant's works, or to the Claimant's failure to submit the necessary documents. For instance, it argues that the subcontract and progress reports on which the Respondent relies to argue that it had to retain a subcontractor to complete unfinished works on the Avaza Hotel Project are fabricated. The Claimant further contends that the fact that the facilities were operated by the Respondent demonstrates that the Respondent's allegations are not credible, and that any defects that were identified on certain Projects, such as the Kipchak School and Babarap School Projects, were cured.

129. Fourth, the Claimant contends that the Respondent unfairly imposed delay penalties under six of the Contracts, even though delays in the Projects were almost exclusively attributable to the Respondent.

130. The Respondent allegedly caused delays by imposing a significant increase in the scope of the Claimant's works, by making progress payments late or not at all, and through failures by its authorities to register some of the Contracts in a timely manner, which prevented the Claimant from beginning the execution of certain Projects for several months. These delays were not, however, taken into account by the Respondent in imposing delay penalties against the Claimant.

131. According to the Claimant, the President of Turkmenistan set arbitrary completion dates for the Projects and instructed the Supreme Chamber of Control to conduct a review of whether or not to grant time extensions on more than a hundred ongoing construction projects. On the basis of the Supreme Chamber of Control's one-day review, the Claimant was then forced, pursuant to the instructions of the Council of Ministers, to conclude with the relevant Contracting Parties addenda to several of its Contracts, which, although they granted extensions for its works, provided that it would not be released from paying delay penalties. It also contends that it was forced to sign certificates in which it recognized its liability for delay penalties.

132. The Claimant alleges that it was forced to sign these documents in order to avoid the termination by the Respondent of its Contracts, to ensure payment for the works it had performed and to avoid serious repercussions such as those endured by other investors who had sought to contest acts of the Turkmen State before the Turkmen courts, including imprisonment of company officers.

133. The Claimant further argues that delay penalties were unjustly imposed against it under some of its Contracts by the Arbitration Court of Turkmenistan (the "**Arbitration Court**" or the "**TAC**") in proceedings that had been initiated by the General Prosecutor of Turkmenistan, allegedly on the instructions of the President. It contends that it was not notified of, or represented in, the proceedings, and that the Arbitration Court disregarded its entitlement to an extension of time for its works as a result of delays caused by the Respondent, in particular the Respondent's delays in making progress payments. It further argues that, in respect of some Contracts, for instance the Babarap Projects Contract and the Avaza Canal Contract, the Arbitration Court imposed delay penalties even though the Contracts had been terminated prior to their original completion dates. In the proceedings concerning the Kipchak Cultural Center Contract, the Arbitration Court also allegedly failed to take into account its own decision as to the termination of the Contract, and the Contracting Party's own admission that the Claimant had completed 40% of the works but only received payment for 17% of the works.

134. On the basis of its orders that the Claimant pay delay penalties, the Arbitration Court also ordered the attachment and sale of part of the Claimant's machinery and equipment in Turkmenistan. For instance, in March 2010, the Arbitration Court issued a decision enforcing a previous decision imposing delay penalties on the Claimant under the Avaza Canal Contract, on the basis of which 23 items of its machinery and equipment were attached and sold.

135. Fifth, the Claimant argues that the Respondent unfairly terminated seven of the Claimant's Contracts.

136. The Claimant contends that the termination of its Contracts was subject to a three-step procedure, according to which the Contracting Party first sent a notice of termination to the Claimant while requesting authorization from the Cabinet of Ministers. Upon receiving the authorization, the Contracting Party then applied to the TAC for a termination order, and finally a Presidential Decree was issued. The Claimant alleges that the actions of both the Contracting Parties, acting with the approval of the Cabinet of the Ministers, and of the TAC in terminating its seven Contracts, were in bad faith.

137. In particular, the Claimant alleges that the relevant Contracting Parties, with the approval of the Cabinet of Ministers, initiated the termination of the Claimant's seven outstanding Contracts within a one-month period starting in August 2009. In doing so, they failed to take into account the various delays caused by the Respondent, as a result of which the Claimant was entitled to extensions of time. For instance, under the Kipchak Cultural Center Contract, the Claimant was entitled to nearly two years worth of extensions of time due to the Respondent's late registration of the Contract, delays in progress payments, and a 68% increase in the construction area imposed by the State Expert Review.

138. The Claimant also complains that decisions by the TAC terminating the seven Contracts did not take into account the Claimant's entitlement to extensions, and that it was not notified of the TAC proceedings and therefore deprived of its fundamental right to defend itself. The Claimant further alleges that the individuals who appeared on its behalf in some of the proceedings were not authorized to represent it, and that the power of attorney documents

on which the Respondent relies in this respect are forged. It also argues that in one instance, the TAC terminated one of its Contracts, namely the Babarap Projects Contract, even though the Contracting Party had not even requested the TAC to do so in the statement of claim it submitted to the Court.

139. Sixth, the Claimant alleges that at the end of 2009, the Respondent abusively attempted to encash the full USD 40 million value of the guarantees provided by the Claimant under three of its Contracts, namely the Babarap Projects Contract, the Avaza Canal Contract, and the Ashgabat Cinema Contract. The Claimant argues that the Central Bank of Turkmenistan encashed the full amounts of the guarantees despite being informed by the Contracting Parties themselves that certain amounts should have been deducted from the guarantees to reflect the fact that part of the advance payments received by the Claimant had already been repaid in the form of works performed. The Claimant further argues that the guarantees should not, in any event, have been encashed by the Respondent, as the relevant Contracts had been wrongly terminated.

140. Seventh, the Claimant alleges that the Respondent's tax authorities frequently blocked its accounts on the basis that it had failed to make certain VAT payments. Given that many of the Claimant's progress payments were paid late, the VAT payments relating to those progress payments were also delayed. However, pursuant to a Turkmen regulation, the payment of taxes accrued from the performance of the Contracts was the responsibility of the Contracting Parties, and therefore the blocking of the Claimant's accounts was unjustified.

141. Eighth, the Claimant contends that it was discriminated against in favor of Polimeks, another Turkish contractor which, like the Claimant, had been awarded a contract for half of the Avaza Canal Project. It suggests that Polimeks secured the more favorable treatment as a result of a special relationship with the President of Turkmenistan, which was allegedly developed or maintained by means of expensive gifts.

142. The Claimant contends in particular that Polimeks' contract contained more favorable financing terms than the Claimant's, as Polimeks was entitled to payment of a larger share

of the value of materials and equipment prior to their importation, which granted it an unfair advantage. In addition, after the State Fund was abolished, the Claimant argues that it was pressured to sign an amendment to its contract which shifted onto the Claimant the burden of financing imported materials and equipment until their shipment. However, the financing terms in Polimeks' contract were not similarly amended.

143. The Claimant further alleges that Polimeks was paid for its works by the relevant Contracting Party, that its contract was not terminated, and that it was not required to pay delay penalties, even though it had been unable to complete its works according to schedule. In addition, after the Claimant's contract for the Avaza Canal Project was terminated, the Respondent assigned the Claimant's works to Polimeks to complete, and allowed Polimeks to use its materials and equipment.

144. Ninth, after the Claimant was allegedly forced to leave its construction sites in August and September 2009, following the Contracting Parties' terminations of its remaining Contracts, the Respondent knowingly permitted the illegal use by the Contracting Parties and other contractors of the Claimant's equipment and materials, including equipment and materials which had not been attached by the TAC. The Claimant disputes the Respondent's allegations that its employees had rented or sold the equipment and materials to pay the Claimant's debts, and in particular argues that an alleged "Rent Protocol" with Polimeks relied on by the Respondent is a fabrication.

145. The Claimant also argues that the Supreme Court of Turkmenistan requested the Customs Service to prevent it from removing all of its equipment and materials from Turkmenistan. As a result, the Claimant has been indefinitely prevented from re-exporting even the equipment and materials which had not been attached by the TAC.

146. Tenth, the Claimant contends that the Respondent's security forces harassed its workers and personnel. It alleges in particular that, without valid reasons, members of its personnel were banned from leaving Turkmenistan, that their passports were confiscated, that they were unjustly detained, and that their houses were raided by the Turkmen police without any legal grounds, with the aim of coercing and threatening them. The Claimant also argues that upon

the termination of its remaining Contracts, the visas of its personnel were revoked, depriving it of an opportunity to liquidate its business and facilities in Turkmenistan.

147. Finally, the Claimant contends that its inability to collect progress payments from the Respondent, and the encashment of its bank guarantees, led a Turkish bank to revoke an offer for a long term credit to finance the construction of a hydroelectric plant, the Kemah Dam, by a related company, İçkale Enerji, making it impossible for the Claimant to initiate the project. In addition, the Respondent's actions led Turkish banks to recall their loans, and made it impossible for the Claimant to obtain bank guarantees for any new projects which would have allowed it to pay off its loans. As a result, the Claimant was forced to sell its license to build the Kemah Dam, and its shares in İçkale Enerji. In doing so, the Claimant alleges that it lost the substantial profits which İçkale Enerji expected to earn from the Kemah Dam project, for which it seeks compensation.

3.1.2 The Claimant's request for relief

148. In its Post-Hearing Brief, the Claimant requests that the Tribunal determine that:

> "*(i) The Tribunal has full jurisdiction to hear this arbitration case;*
>
> *(ii) Respondent failed to provide fair and equitable treatment to Claimant and Claimant's investments in violation of Article II (1) (2) and Article VI of the Turkey – Turkmenistan BIT;*
>
> *(iii) Respondent failed to provide full protection and security to Claimant and Claimant's investments in violation of Article II (1) (2) and Article VI of the Turkey – Turkmenistan BIT;*
>
> *(iv) Respondent failed to observe its obligations entered into with regard to investments of Claimant in violation of Article II (1) (2) and Article VI of the Turkey – Turkmenistan BIT and on the basis of Article 2(2) of UK-Turkmenistan BIT;*
>
> *(v) Respondent unlawfully expropriated the contractual rights of Claimant arising from its Construction Contracts in violation of Article III of the Turkey – Turkmenistan BIT;*

(vi) *Respondent unduly confiscated the machineries and equipment of Claimant in violation of Article III of the Turkey – Turkmenistan BIT;*

(vii) *Respondent failed to observe its statutory obligations to guarantee the legal protection of the rights and interests of Claimant prescribed under the Foreign Investment Law of Turkmenistan and violated the General Principles of International Law;*

(viii) *Respondent shall pay to Claimant the amount of USD 62,067,030.33 plus the amount of EUR 26,678,407.26 in damages;*

(ix) *Respondent shall pay to Claimant USD 475,289,500 for its consequential damages, loss of reputation, goodwill, creditworthiness and business opportunities;*

(x) *Respondent shall pay to Claimant interest at a rate of 6-month LIBOR plus 2 percentage points per year, compounded yearly on the amounts awarded in USD from the date of maturity indicated by Claimant or determined otherwise by the Tribunal until full payment is made;*

(xi) *Respondent shall pay to Claimant interest at a rate of 6-month EURIBOR plus 2 percentage points per year, compounded yearly on the amounts awarded in EUR from the date of maturity to be determined by the Tribunal until full payment is made;*

(xii) *Respondent's claims shall be dismissed in their entirety; and*

(xiii) *Respondent shall pay the total costs in connection with this Arbitration, including Claimant's legal fees and costs incurred in these proceedings."*[5]

3.2 The Respondent's case

3.2.1 The Respondent's contentions

149. The Respondent, Turkmenistan, is a sovereign State, in the territory of which the Claimant's various Projects were located. The Respondent contends that since it gained independence in 1991, Turkmenistan has worked to modernize the country, and has attracted large numbers of investors in the process, in particular from Turkey. Of the 1,661 registered foreign

[5] Claimant's PHB, para. 508.

investors in Turkmenistan as at the end of 2013, 31% were Turkish. In addition, of the 733 construction projects which were awarded by the Respondent between 2007 and 2013, a majority, namely 568, were awarded to Turkish contractors.

150. The Respondent takes the position that the claims in this arbitration represent an attempt by the Claimant to blame Turkmenistan for its own failures under the Contracts. The Respondent contends that the Claimant did not have the managerial, technical, human, and financial resources to execute the significant works it had undertaken pursuant to the thirteen Contracts which it had concluded, with one exception, over a short half-year period spanning from March to November 2007, and which all provided for completion of the works in a period of two years or less. The Claimant failed to execute its Projects despite receiving significant advance payments, as well as considerable amounts in progress payments. As a result of these payments, the Claimant, starting from the end of 2007, at all times had a net cash position of at least USD 30 million for the Projects.

151. According to the Respondent, between March 2007, when it concluded the first of the Contracts, and September 2009, when it left Turkmenistan, the Claimant completed only approximately 40% of the works it had undertaken to perform. The Respondent argues that the Claimant "failed completely to execute all but two of its thirteen projects in Turkmenistan in accordance with its contractual undertakings."[6] Ultimately, the Contracting Parties lost patience with the Claimant, and terminated the Contracts which remained to be completed.

152. With respect to each of the individual Contracts at issue, the Respondent makes, *inter alia*, the following allegations:

- **Avaza Canal Contract**: The Respondent alleges that the Claimant was required to complete its works under the Avaza Canal Contract, the largest of the Contracts at issue in this arbitration, with a value of approximately USD 120 million, by October 2009. However, by the time the Contract was terminated by the Contracting Party in August

[6] Hearing Transcript, Day 2, p. 35:16-19.

2009, shortly before the completion date, the Claimant had performed works representing only approximately 20% to 28% of the contract price.

The Respondent contests the Claimant's allegations that its failure to perform was caused by delayed payments resulting from the abolition of the State Fund. It contends that by the time the Contract was terminated in August 2009, the Claimant had received approximately USD 47.3 million in advance and progress payments, representing approximately 40% of the contract price. In addition, the State Fund was abolished well before the Claimant submitted its first progress report in July 2008, in respect of which it received payment without delay.

The Respondent further argues that the Claimant was required to implement at its own costs any instructions by the State Expert Review to add support piles for the bridges which formed part of the Project in order to comply with the relevant construction norms, and to widen the canal to allow for boating in accordance with the technical specifications.

- **Avaza Hotel Contract**: The Claimant's works under the Avaza Hotel Contract, which was concluded in March 2007, were to be completed by May 2008. However, by the end of 2007, the Claimant had completed works representing only approximately 17% of the contract price. According to the Respondent, the Claimant was therefore well behind schedule even before the State Fund was abolished in February 2008. In addition, even after February 2008, progress payments were made in a timely manner, with few exceptions.

  Upon the request of the Claimant, the completion date under the Avaza Hotel Contract was extended until June 2009, however the Claimant still was unable to finish the Project. Indeed, the Respondent alleges that the Contracting Party was required to retain other contractors to correct a number of significant defects, including in respect of the sewage disposal system, desalination unit, boiler room equipment, fire protection system, and rainwater leaks in the rooms. As a result, the State Acceptance Committee did not issue a certificate of handover, and the 5% retention was not paid to the Claimant.

The Respondent further contests the Claimant's allegations that it was required to perform additional works on the Project, arguing that it has not shown any relevant instructions from the State Expert Review, or any evidence that it performed such works.

- **Ashgabat Cinema Contract**: The Claimant's works under the Ashgabat Cinema Contract, which was concluded in July 2008 and registered in September 2008, were to be completed by December 2009. However, according to the Respondent, the Claimant performed almost no work on the Project. By September 2009, when the Contract was terminated, the Claimant had not submitted any progress reports for performed works. Accordingly, no progress payments could have been delayed. In addition, the works that the Claimant did complete were defective. In particular, the Claimant used a type of cement which was not in accordance with the construction norms for the seismic zone in which the cinema was to be built. The Respondent also contests the Claimant's allegation that it was required to perform additional works on the Project. It further argues that, while the registration of the annexes to the Contract were delayed, the delay was caused by the Claimant's repeated failure to submit the relevant information for the annexes.

- **Abadan School and Kindergarten Contracts**: The Claimant's works under the two contracts, which were concluded in November 2007, were to be completed by August 2008. The Respondent contends that by the original August 2008 completion date for the Abadan School and Kindergarten Projects, the Claimant had completed only about 8% and 9% of the works, respectively. The Claimant obtained an extension until September 2009, however, by the time the extended completion date was reached, it had still only completed 14% and 11% of the works, respectively. The Respondent further contests that the Claimant's works were delayed by poor weather, arguing that the Claimant first raised the issue more than a year after the alleged weather events, and did not invoke the force majeure clause in the Contract.

- **Dayhanbank Contract**: The Claimant's works under the Dayhanbank Contract, which was concluded in July 2007, were to be completed by February 2009. However, by the

original completion date, the Claimant had only performed 41% of the works. While the Claimant was granted an extension, it also failed to meet the extended completion date. The Respondent further alleges that by the fall of 2009, when the Contracting Party terminated the Contract, the Claimant had abandoned the site, and had not completed any work for six months.

- **Kipchak Cultural Centre Contract**: The Respondent contends that the Kipchak Cultural Centre Contract, which was concluded in August 2007, was, contrary to the Claimant's allegations, registered approximately two months later. It further alleges that, after completing less than 20% of the works by April 2008, and not performing any further works for the rest of 2008, the Claimant failed to meet the original December 2008 completion date. The Claimant also subsequently failed to make any serious efforts to meet an extended completion date of September 2009, which it had requested in March 2009. Indeed, according to the Respondent, the Claimant did not submit any progress reports after the extension was granted, and, by the time the Contract was terminated in September 2009, had completed significantly less than the 40% of the works which it alleges it completed.

- **Kipchak School Contract**: The Respondent contends that the Claimant failed to meet the original December 2008 completion deadline under the Kipchak School Contract, which was concluded in June 2007, or the extended March 2009 deadline, as a result of its slow progress. It further alleges that in February 2009, the Contracting Party identified a number of defects, including problems with waterproofing, fire protection, and cracks, which were never addressed. As a result, no handover certificate could be issued.

- **Kipchak Hotel Contract**: According to the Respondent, although the Claimant initially made steady progress on its works under the Kipchak Hotel Contract, which was concluded in August 2007, its works slowed after June 2008, and it failed to meet the December 2008 completion date. Although the Parties extended the completion date to

March 2009, the Claimant never finished the works, and failed to address a number of defects it was requested to rectify. As a result, no handover certificate could be issued.

- **Ministry of Economy Contract**: The Respondent takes the position that, due to the slow progress of the Claimant's works under the Ministry of Economy Contract, which was concluded in March 2007, the Claimant failed to meet the original October 2008 completion date, even though its progress payment were paid on time. The Claimant also failed to meet an extended July 2009 deadline. Its last progress report of June 2009 shows that it completed only 90% of the works, and it abandoned the Project with almost a tenth of the works left incomplete. The Respondent further contends that the Claimant has not shown that it was required to perform any additional works, and that the Contracting Party had in fact agreed to reduce the scope of the Claimant's works when it granted it an extension of the completion date.

- **Babarap Projects Contract**: The Babarap Projects consisted of several facilities, namely a school, a kindergarten, a health center, a commercial center, an administrative building, and a cultural center. The completion date for the facilities under the Babarap Projects Contract, which was concluded in September 2007, was September 2009, although the Claimant's slow progress and defects in its works led to an extension until February 2010. However, the Claimant did not make any progress on the kindergarten, commercial center, administrative building, and cultural center, and the Contracting Party ultimately terminated the Contract and imposed delay penalties. The Respondent contests the Claimant's allegations that its lack of progress was attributable to delayed progress payments and force majeure, arguing that the progress payments were made in a timely manner, and that the Claimant never submitted a notice of force majeure. It also argues that the works that were completed by the Claimant were plagued by numerous defects which prevented the State Acceptance Committee from issuing a handover certificate.

- **Ashgabat Kindergarten Contract**: The Respondent contends that the Ashgabat Kindergarten Project was completed in large part in 2008, and agrees that the Claimant

is entitled to receive the 5% retention amount. However, when the warranty period under the Ashgabat Kindergarten Contract ended, the Claimant never submitted a final invoice for the payment of the 5% retention amount. The Respondent further alleges that there is no basis for the Claimant's allegation that it was required to perform additional works for which it was entitled to payment.

- **Ruhiyet Mansion Contract**: The Respondent alleges that, like the Ashgabat Kindergarten Project, the Ruhiyet Mansion Project was completed in large part in 2008, although the Claimant failed to complete the works by the October 2008 completion date. The Respondent alleges that it has been unable to determine, on the basis of its records, whether the Claimant completed the handover procedure under the Ruhiyet Mansion Contract, triggering the warranty period, and therefore whether it is entitled to the payment of the 5% retention amount. It also contests that the Claimant was required to perform additional works for which it was entitled to payment, and argues that any payment delays were not caused by the abolition of the State Fund, as the State Fund never made any payments under the Ruhiyet Mansion Contract.

153. In response to the Claimant's allegations concerning delays in progress payments and the abolishment of the State Fund, the Respondent contends that an analysis of the various Projects shows that most progress payments were made in a timely manner, and that the Claimant's failure to complete its works was not attributable to the delayed payment or non-payment of progress payments. In addition, according to the Respondent, neither the Contracts nor the presidential decrees awarding them contain any assurances that the State Fund, which was abolished as part of a reorganization of the manner in which the State financed contracts, would be maintained. It further contends that, contrary to the Claimant's allegations, the Presidential Decree abolishing the State Fund did not put in place a mechanism according to which the President and the Chairman of the Cabinet of Ministers were required to authorize any payments made under the hundreds of contracts concluded by State-owned entities or agencies. The Decree merely required that the contracts pursuant to which payments are made must be authorized by a presidential decree.

154. With respect to the delay penalties imposed on the Claimant, the Respondent contends that the delays on the Projects were attributable to the Claimant, and therefore that delay penalties were properly imposed. It goes on to argue that the Claimant admitted its liability for delay penalties by signing addenda to several of its Contracts according to which the completion dates were extended, while providing that the Claimant would not be released from paying delay penalties. In addition, in respect of the Avaza Hotel Contract, the Kipchak School Contract and the Kipchak Hotel Contract, the Claimant signed delay penalty certificates setting out the amounts of delay penalties for which it was liable, and then deducted those amounts from its invoices. The Respondent further contests that the Claimant was forced to sign these addenda and certificates, and that the Turkmen State was involved in the imposition of delay penalties.

155. The termination of seven of the Claimant's Contracts was, according to the Respondent, justified in view of the Claimant's delays. In any event, State authorities, and in particular the President of Turkmenistan and the Cabinet of Ministers, were not responsible for the decisions to terminate the Contracts. The approvals of the terminations by the Cabinet of Ministers were, according to the Respondent, merely a legal formality deriving from the fact that the Contracts had been authorized by a Presidential Decree. It was the Contracting Parties that took the decisions to terminate the Contracts.

156. The Respondent further contests the Claimant's allegations regarding the proceedings in the context of which the TAC issued decisions imposing delay penalties and terminating several of the Contracts. In particular, the Respondent argues that the Claimant was notified of the various proceedings, and that in some of the proceedings, it was represented by what appeared to be duly authorized representatives with valid powers of attorney.

157. With respect to the Claimant's allegations that the Central Bank of Turkmenistan improperly encashed the full amounts of the Claimant's advance payment guarantees under three of the terminated Contracts, namely the Babarap Projects Contract, the Avaza Canal Contract, and the Ashgabat Cinema Contract, the Respondent counters that it was appropriate to encash the guarantees given that the Claimant had failed to perform works of a value anywhere close to the amount of the advance payments it received. The Respondent further contends

that the issue of the encashment of the full USD 40 million value of the guarantees, despite the fact that the Claimant was allegedly entitled to a USD 2 million deduction for works it had completed, which was the subject of Austrian court proceedings, has been settled by the Contracting Parties' provision of waivers for the USD 2 million amount. Finally, the role of the Central Bank of Turkmenistan, on which the Claimant apparently relies to argue that the Turkmen State was responsible for the encashment of the guarantees, was, according to the Respondent, limited to verifying that the signatures on the Contracting Parties' demands were authentic.

158. On the issue of the freezing of the Claimant's bank accounts by the Turkmen tax authorities, the Respondent takes the position that although the Contracting Parties under some of the Contracts had undertaken to pay VAT directly to the tax authorities, the Claimant remained liable for the payments under Turkmen tax law. Therefore, the tax authorities were entitled to take measures against the Claimant if the Contracting Parties failed to make the VAT payments in a timely manner.

159. The Respondent further argues that the Claimant prevented the completion of the handover procedure under several of its Contracts. It contends in particular that the Claimant failed to remedy defects identified by the Contracting Parties and the State Acceptance Committees. In these circumstances, the State Acceptance Committees, which included representatives of the Ministry of Construction and Fire Safety Administration officials, could not issue a handover certificate, and the Contracting Parties were required to retain other contractors to remedy the Claimant's defects. The Respondent further argues that the Claimant's allegations that the Turkmen State, and in particular the President, sought to prevent the payment of the 5% retention amounts, are unsupported and lack credibility.

160. As to the Claimant's allegations that it was required to perform additional works without payment, the Respondent contends that the Contracts were lump-sum Engineering, Procurement and Construction ("**EPC**") Contracts, which required the Claimant to design the facilities to be built in accordance with the technical specifications and the applicable norms and regulations. The Respondent argues that the technical specifications that formed part of the tender documentation contained only basic outlines of the Projects with minimal

information, including the project's purpose and a general total area. It was the Respondent's obligation to ensure that its designs complied with the applicable norms and regulations, compliance with which was verified by the State Expert Review.

161. In addition, the Respondent argues that had the Claimant been requested to perform works which it considered to be beyond its scope of works under the Contracts, it should have proposed an amendment to the contract price in accordance with the mechanism set out under the Contracts. However, the Claimant never proposed any such amendments.

162. As to the Claimant's allegation that it was discriminated against in favor of Polimeks, the Respondent argues that while there were variations in the financing terms for equipment under the Claimant's and Polimeks' contracts for the Avaza Canal Project, Polimeks' terms were not more favorable. In particular, it contends that the Claimant's allegations are based on a miscalculation of the amounts to which it was entitled under the financing terms in its Contract. The Respondent further contends that, as was the case for the Claimant, some of Polimeks' progress payments were paid late, but that this did not have an impact on its performance under its contract.

163. The Respondent also argues that the Claimant's personnel who remained in Turkmenistan after its high-level management left the country rented out and sold materials which the Claimant had left behind in an effort to pay unpaid debts to the Claimant's various subcontractors and suppliers. The Claimant's allegations that these agreements were fabrications, or concluded by individuals who did not have the authority to sign on behalf of the Claimant, are unsupported and lack credibility. The Respondent was also not aware of these transactions, which were between the Claimant and other contractors, at the time.

164. According to the Respondent, the Claimant also abandoned much of its machinery and equipment by failing to make any effort to remove it following the termination of its Contracts. The Respondent further contends that the Claimant has not adduced any evidence that the machinery and equipment remained in Turkmenistan, under the possession and ownership of the Claimant, or as to its condition.

165. Finally, the Respondent contests the Claimant's allegations that members of its personnel were harassed by Turkmen security forces and were subjected to travel bans, arguing that the Claimant has not produced any documentary evidence in support. In addition, the Respondent maintains that under Turkmen law, and under the Contracts, its authorities were entitled to revoke the visas of the Claimant's international employees upon termination of the Contracts.

3.2.2 The Respondent's request for relief

166. In its Post-Hearing Brief, the Respondent requests that "this case should be dismissed for lack of jurisdiction, or, if jurisdiction is sustained, all claims should be dismissed on the merits, and Claimant should be ordered to pay Respondent's costs incurred in this Arbitration."[7]

[7] Respondent's PHB, para. 255.

4 THE INTERPRETATION OF ARTICLE VII(2) OF THE TURKEY-TURKMENISTAN BIT

167. The Parties disagree on the interpretation of Article VII(2) of the BIT, which forms part of the investor-State dispute resolution clause in the Treaty. The Respondent argues that the provision sets out a mandatory domestic litigation requirement, whereas the Claimant contends that the provision gives the foreign investor an option either to submit the dispute to local courts or to proceed directly to international arbitration. The Parties' divergent positions reflect the less than felicitous drafting of the English version of the clause, as well as the fact that the English version of the Treaty provides that it was done "in two authentic copies in Russian and English,"[8] whereas the Russian version states that it was executed "in two authentic copies in the Turkish, Turkmen, English, Russian languages."[9] While there is no dispute between the Parties that only the English and Russian versions were executed, and that no Turkmen version of the Treaty was ever prepared, or at least that none has been found, they disagree on the translation of the Russian version of the clause, as well as on the relevance of the Turkish version.

168. The English version of Article VII(2) of the BIT reads as follows:

> "2. *If these d[i]sputes [i.e., disputes between one of the State parties to the Treaty and an investor of the other State party] cannot be settled in this way [i.e., by negotiation] 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) The International Center for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States', (in case both Parties become signatories of this Convention.)*
>
> *(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), (in case both parties are members of U.N.)*

[8] English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply). The exhibits produced by the Claimant with its various submissions were not numbered continuously; accordingly references to the Claimant's exhibits in this Award specify the submission.

[9] Russian version of the Turkey-Turkmenistan BIT (with Respondent's translation into English), Exhibit RA-1.

(c) the Court of Arbitration of the Paris In[t]ernational Chamber of Commerce,

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."[10]

169. The dispute is focused on the interpretation of the "provided that, if" clause at the end of the provision, with those three words emphasized in the above quotation. According to the Respondent, the clause means that the submission of the dispute before the local courts is a mandatory requirement: an investor may proceed to international arbitration only if the dispute has first been submitted to local courts, and the courts have not rendered a final decision within one year. By contrast, the Claimant reads the clause to mean that the submission of the dispute is only an option: the investor may first submit the dispute to local courts, but it does not have to; it may also proceed directly to international arbitration.

170. The Parties have advanced extensive legal argument and submitted extensive expert evidence on the meaning and effect of Article VII(2), and the Claimant has also produced a witness of fact, Ms Zergul Özbilgiç, who appeared for examination at the Hearing. The Parties have also addressed the findings of other arbitral tribunals on the meaning and effect of Article VII(2), including, in particular, the decisions of the tribunals in *Kılıç* and *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* ("***Sehil***").[11]

4.1 The Respondent's position

171. The Respondent argues that Article VII(2) of the BIT contains a mandatory domestic litigation requirement which the Claimant did not satisfy, and therefore the Tribunal should dismiss this arbitration for lack of jurisdiction. According to the Respondent, Article VII(2) provides that an investor may only submit a dispute to arbitration under the BIT if it has first submitted it to the domestic courts of the host State, and the domestic courts have not

[10] English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply) (emphasis added).

[11] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, 13 Feb. 2015, Exhibit RA-451.

rendered a decision within one year. The condition is "an essential element of the State's consent to international arbitration under the Treaty," and is therefore a "jurisdictional pre-requisite."[12]

172. The Respondent argues that the mandatory nature of the domestic litigation requirement is apparent from all three versions of the BIT, namely the Russian, Turkish, and English versions.

173. As to the Russian version of the BIT, the Respondent relies on the following translation:

> "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) The International Center for Settlement of Investment Conflicts, set up in accordance with the 'Convention for Settlement of Investment Conflicts between States and Nationals of Other States', in case both Parties signed this Convention;*
>
> *(b) '*ad hoc*', established in accordance with the Arbitration procedural rules of the United Nations Commission for International Trade Law, in case the Parties are members of U.N.;*
>
> *(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*."[13]

174. According to the Respondent, the key phrase in the Russian text of Article VII(2) is "*pri uslovii, esli*," which means "on the condition that" or "provided that." The Claimant's translation of "*pri uslovii, esli*" as "provided that, if" is an inaccurate and misguided mechanical translation. Although "*esli*" alone can be translated as "if," it does not have an independent syntactic function in the phrase "*pri uslovii, esli*," which is a compound conjunction. The phrase is rather "a single conditional expression that clearly conveys a

[12] Respondent's Counter-Memorial, paras. 267, 286.

[13] Russian version of the Turkey-Turkmenistan BIT (with Respondent's translation into English), Exhibit RA-1 (emphasis added).

mandatory condition."[14] In support of its position, the Respondent relies on the Expert Linguistics Opinion of Professor Gasparov.[15]

175. The Respondent also refers to the Turkish version of the BIT, which, in its view, clearly imposes a mandatory domestic litigation requirement and constitutes an "authentic" version of the BIT under the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), as the Russian version refers to "authentic copies" in Turkish and Turkmen. According to the Respondent, the Turkish version must have been the original version of the BIT, which is reflected in the fact that it is clear and contains no grammatical, syntactical or typographical errors. It is not plausible that the Turkish version was only prepared at the time of ratification, as alleged by the Claimant.

176. Finally, the Respondent argues that the English version of Article VII(2) of the BIT does not have an ordinary meaning, as the "if" in the phrase "provided that, if …" adds a "second, redundant conditional word" that creates a sentence with a nonsensical grammatical structure given the absence of a "corresponding 'then' to complete an 'if, then' construction:"[16]

> "2. *If these d[i]sputes 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) The International Center for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States', (in case both Parties become signatories of this Convention.)*
>
> *(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), (in case both parties are members of U.N.)*
>
> *(c) the Court of Arbitration of the Paris In[t]ernational Chamber of Commerce,*

[14] Respondent's Reply on Jurisdiction, para. 31.

[15] The Respondent also produced an expert opinion from Prof. Glad, but subsequently withdrew it as Prof. Glad was not available for examination at the Hearing (see the Respondent's letter to the Tribunal dated 6 Feb. 2015).

[16] Respondent's Counter-Memorial, para. 302.

> *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*."[17]

177. The Respondent argues that the wording of the English version of Article VII(2) BIT indicates that an error was made in translating the BIT from Russian to English, as the Russian equivalent of "provided that" would, if translated literally, have a "double conditional formulation that does not make sense in English."[18] According to the Respondent, the Claimant's position that the English version was the original version is purely speculative.

178. Based on its assessment of the various versions of the BIT, the Respondent contends that the ordinary meaning and good faith interpretation of Article VII(2) of the BIT under Article 31 of the Vienna Convention is that the State Parties intended to include a mandatory domestic litigation requirement. This is also the meaning that "best reconciles the texts, having regard to the object and purpose of the Treaty" pursuant to Article 33(4) of the Vienna Convention.

179. According to the Respondent, it is irrelevant whether the Russian and Turkish versions of the BIT were translated from the English version. The Tribunal should rather interpret the texts based on their ordinary meanings, which are clear in the Russian and Turkish texts. The English version, which is unclear, must be interpreted in good faith consistently with the Russian and Turkish texts. The Respondent argues that, even if the Turkish version is deemed not to be authentic, it is nevertheless a supplementary means of interpretation under Article 32 of the Vienna Convention, which supports the conclusion that Article VII(2) of the BIT imposes a mandatory domestic litigation requirement. In any event, the letters from the Turkish government dated 3 December 2012 and 26 May 2011, which the Claimant relies on in support of its position that the English version of the BIT was the "'first agreed version' from which all the other translations originated"[19] are not credible and do not

[17] English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply) (emphasis added).

[18] Respondent's Counter-Memorial, para. 303.

[19] Claimant's Reply, para. 51, referring to the Letter from the Ministry of Economy of Turkey to Sakmar Law Office dated 3 Dec. 2012, Exhibit C-095 (Reply); Letter from the Undersecretariat of Foreign Trade of the Prime Ministry

constitute "preparatory work" within the meaning of Article 32 of the Vienna Convention, as they were created for the purposes of pending arbitrations.

180. The Respondent finally argues that any doubt as to the interpretation of Article VII(2) of the BIT has been dispelled by the award in the *Kılıç* case, in which the tribunal found that the provision imposes a mandatory domestic litigation requirement and, as a result, dismissed the claimant's case for lack of jurisdiction.[20] Other cases relied on by the Claimant, namely *Rumeli v. Kazakhstan*[21] and *Sistem v. Kyrgyzstan*,[22] which dealt with provisions similar to Article VII(2) of the BIT, according to the Respondent provide no meaningful guidance to this Tribunal, as they only dealt with the provisions in a cursory and unpersuasive manner.

181. The Respondent also challenges the Claimant's reliance on the jurisdictional decision in the *Sehil* case, which was issued shortly before the Hearing, and in which the tribunal found that Article VII(2) of the BIT provided that domestic litigation was optional. According to the Respondent, the two conflicting decisions relating to the same provision, *Kılıç* and *Sehil*, highlight the need for a proper application of the rules of treaty interpretation. The Respondent argues that the *Sehil* tribunal misunderstood the expert evidence of Professor Gasparov in particular, and "apparently inferred, erroneously, that a 'tautological' structure indicates ambiguity,"[23] and that the tribunal "improperly accorded superiority to the English version" of the Treaty over the Russian version.[24] The Respondent also contends that "[t]he *Sehil* tribunal's view that it would not be 'fair and equitable' to require submission to local courts as a precondition to international arbitration cannot be squared with Article 26 [of the ICSID Convention] or with all the treaties and decisions that have required precisely that."[25]

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of Turkey to Bozbey İnşaat San. Tic. Ltd. Şti. dated 26 May 2011, Exhibit C-096 (Reply) (the Respondent produced its own translation of the letter at Exhibit R-521).

[20] Exhibit RA-5.

[21] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16.

[22] *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1.

[23] Respondent's PHB, para. 17.

[24] Respondent's PHB, para. 54.

[25] Respondent's PHB, para. 26.

4.2 The Claimant's position

182. The Claimant argues, in response, that Article VII(2) of the BIT does not impose a mandatory domestic litigation requirement, but rather constitutes a type of fork-in-the-road clause. According to the Claimant, the provision sets out that resorting to the local courts of the host State is optional, but that if an investor chooses that option, it can only subsequently submit the dispute to arbitration if the local courts have not rendered a decision within a year.

183. The Claimant argues that, contrary to the Respondent's position, there is no authentic Turkish version of the BIT because the Turkish version was not executed by both Parties and was prepared unilaterally after ratification, for publication in the Official Gazette of Turkey. According to the Claimant, the BIT was executed only in English and Russian. The State Parties did not execute the Turkish or Turkmen versions, and did not agree to their authenticity at a later date; Turkmenistan has also failed to provide any evidence that it acquiesced or accepted the Turkish version of the BIT. The Claimant argues that there was a lack of agreement between the State parties as to any version other than the English and Russian versions. The reference in the Russian version to "authentic copies" in Turkish and Turkmen cannot elevate the Turkish text to the status of an authentic version, as it did not exist at the time the BIT was executed. In addition, relying on the testimony of Ms Özbilgiç, an official with the Turkish Ministry of Economy who was involved in the drafting of the BIT, the Claimant argues that the Government of Turkey provided the draft BIT in English to Turkmenistan, and that the Russian version was translated from the English version, which does not mention the Turkish version.

184. Like the Russian version, the Turkish version was also inaccurately translated from the English version. However, it was translated only after the BIT was concluded, and merely in order to comply with Turkish procedural requirements for ratification, including publication in the Official Gazette. The Claimant relies in this respect on the testimony of

Ms Özbilgiç, and on a letter from the Turkish Undersecretariat of Foreign Trade of 26 May 2011.[26]

185. As to the English version of the BIT, the Claimant argues that the only ordinary meaning that can be attributed to Article VII(2) of the BIT pursuant to Article 31 of the Vienna Convention, and the only good faith interpretation of the provision, is that it does not impose a domestic litigation requirement. Rather, it only provides that if the investor has submitted the dispute to the domestic courts and a decision is rendered within a year, it can no longer resort to arbitration.

186. According to the Claimant, this interpretation is confirmed by the supplementary means of interpretation contemplated in Article 32 of the Vienna Convention.

187. In particular, the Claimant alleges that the draft of the English version of the BIT was prepared by Turkey with the intention of granting investors a right to apply directly to arbitration, and was accepted without modification by Turkmenistan. The Claimant relies in this respect on the testimony of Ms Özbilgiç, as well as on explanation provided by the Office of the Prime Minister of Turkey to the Turkish Parliament in the context of the ratification of the BIT, which indicated that investors could resort to arbitration directly, without having to submit the dispute to the domestic courts of the host State.[27] The Claimant contends that this document, together with the parliamentary records,[28] constitutes "preparatory work" within the meaning of Article 32 of the Vienna Convention.

188. The Claimant also contends that the Russian version of Article VII(2) of the BIT, when interpreted in good faith, and in accordance with its ordinary meaning, provides that investors may resort directly to arbitration without first submitting a dispute to the domestic

[26] Letter from the Undersecretariat of Foreign Trade of the Prime Ministry of Turkey to Bozbey İnşaat San. Tic. Ltd. Şti. dated 26 May 2011, Exhibit C-096 (Reply) (the Respondent produced its own translation of the letter at Exhibit R-521).

[27] Draft law on ratification of the BIT executed by and between Turkey and Turkmenistan, including its reasoning and the reports of the Ministry of Foreign Affairs and the Planning and Budget Commissions, Exhibit C-093 (Reply).

[28] Minutes of the meeting of the Turkish Parliament about the Draft Law on Approval of the Turkey-Turkmenistan BIT dated 15 Sept. 1994, Exhibit C-092 (Reply).

courts of the host State, and confirms the optional nature of the investor's choice to resort to local courts.

189. The Claimant relies on a different translation of the Russian version of Article VII(2) than the Respondent (see paragraph 173 above), which contains the wording "on the condition that, if …" instead of only "on the condition that:"

> "2. *If these 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, as the investor may choose, to:*
>
> *(a) The International Centre for Settlement of Investment Disputes (ICSID), established in accordance with the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States', if both the Parties have signed the Convention;*
>
> *(b) An ad hoc court, established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), if the Parties are members of the UN;*
>
> *(c) The Arbitration Court of the Paris-based 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*."[29]

190. According to the Claimant, the Russian version is ambiguous and grammatically incorrect, as it contains two commas in the phrase "*pri uslovii, esli*," indicating that it was merely a poor, literal translation of the English version.[30] In support of its allegation, the Claimant relies on a letter from the Turkish Ministry of Economy dated 3 December 2012,[31] and the testimony of Ms Özbilgiç. According to the Claimant, the Respondent's translation of the Russian version, which omits a comma and the term "if" from the phrase "on the condition that, if … ," constitutes an attempt to rewrite the authentic Russian version of the BIT to deviate from its literal translation of the original English version.

[29] Declaration of Mr Makarov dated 7 Aug. 2013, para. 3.

[30] The Claimant relies in this respect on the Opinions of its translation experts Messrs Kozyrev (paras. 1, 6) and Barber (para. 19).

[31] Letter from the Ministry of Economy of Turkey to Sakmar Law Office dated 3 Dec. 2012, Exhibit C-095 (Reply).

191. The Claimant further argues that, even if there is a difference between the Russian and English versions, the meaning that best reconciles the texts in accordance with Article 33(4) of the Vienna Convention is the meaning in the English version granting the investor the option of proceeding directly to international arbitration. According to the Claimant, Turkey had a clear interest in guaranteeing that its investors could have access to arbitration without having to first resort to the local courts, and Turkmenistan did not conduct any serious negotiations on this provision.

192. The Claimant also contends that other bilateral investment treaties concluded by Turkey and Turkmenistan show that it was both States' policy not to require prior recourse to the host State's domestic courts before an investor could initiate arbitration. In support of its argument, the Claimant points to the fact that of the 76 treaties concluded by Turkey, fifteen contain "virtually the same exception as exists here,"[32] and that the Turkish versions of ten of these expressly allow for direct recourse to arbitration unless the investor has already brought the dispute to the domestic courts of the host State and the courts have not rendered a decision within one year. Turkey's remaining 61 treaties, as well as all of Turkmenistan's other treaties, to the extent that they are publicly available, do not impose any restriction at all on the right of an investor to resort to arbitration.

193. Finally, the Claimant argues that the *Kılıç* decision does not have any precedential value. According to the Claimant, the tribunal in that case reached its conclusions under "extraordinary circumstances"[33] as it did not have the benefit of the evidence on record in this arbitration, in particular of a linguistic expert opinion showing that the Russian version of Article VII(2) was an erroneous translation from the English version, or of the evidence of a witness who was involved in the preparation of the BIT.

194. The Claimant relies heavily on the *Sehil* decision, which as noted above was issued just a few weeks before the Hearing. According to the Claimant, the *Sehil* tribunal's decision confirms its position that Article VII(2) of the BIT provides for "an option allowing investors

[32] Claimant's Reply, para. 112 (emphasis omitted).

[33] Claimant's Rejoinder on Jurisdiction, para. 14.

to bring their disputes in international arbitration venues or in the local courts of host States."[34] The Claimant stresses, in particular, that the *Sehil* tribunal specifically concluded that the terms "*pri uslovii, esli*" in the Russian version of the Treaty "should also be considered as ambiguous."[35]

4.3 The Tribunal's analysis

195. The issue before the Tribunal is one of treaty interpretation. The Parties agree that the relevant rules of treaty interpretation are reflected in the Vienna Convention, specifically in Articles 31 through 33. Article 31 sets out the "general rule" of treaty interpretation, whereas Article 32 provides for supplementary means of interpretation which may be applied, "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) [l]eaves the meaning ambiguous or obscure; or (b) [l]eads to a result which is manifestly absurd or unreasonable." Article 33, in turn, deals with the interpretation of treaties authenticated in two or more languages.

196. According to the English version of the BIT, the Treaty was done "in two authentic copies in Russian and English."[36] However, the Russian version provides that the Treaty was "[e]xecuted in two authentic copies in the Turkish, Turkmen, English and Russian languages."[37] As noted above, neither Party disputes that no Turkmen version was ever prepared, and in any event no such version has been found or made available to the Tribunal. However, the Parties disagree on when exactly the Turkish version was prepared, and on whether it should be considered "authentic." Both Parties have also presented argument and evidence on the meaning and effect of the Turkish version in the course of the arbitration.

197. One issue that is undisputed is that the Russian version is an authentic version, and that it was available to both Parties at the time of the signature of the BIT, since that version was signed. However, the Parties disagree on how the Russian version should be translated into

[34] Claimant's PHB, para. 87.

[35] Claimant's PHB, para. 88 (emphasis omitted).

[36] English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

[37] Russian version of the Turkey-Turkmenistan BIT (with Respondent's translation into English), Exhibit RA-1.

English; this disagreement is amplified by the Parties' differing views on how the English version should be interpreted, in particular whether the relevant Russian version of the clause "*pri uslovii, esli*" should be translated as "provided that" or "provided that, if." The Respondent argues that the former translation is the accurate one, whereas the Claimant relies on the latter translation. The differing translations then lead the Respondent to argue that domestic litigation is mandatory also according to the Russian version, whereas the Claimant argues that the Russian translation is literally the same as the English version and also incorporates an optional clause.

198. The Tribunal considers that the first step in the process of establishing the meaning of Article VII(2) of the BIT is to consider the general rule of treaty interpretation as set out in Article 31 of the Vienna Convention. Article 31 provides:

> "*1. A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*

4. A special meaning shall be given to a term if it is established that the parties so intended."[38]

199. When read in its context, and in accordance with the ordinary meaning of its terms, it is evident that Article VII(2) of the BIT is drafted in a manner that effectively leaves its meaning, in particular the meaning of the clause "provided that, if" unclear or obscure. While the two conditions in the beginning of the sentence ("provided that" and "if") suggest that the phrase would include a "then" clause setting out the consequence, there is no such consequence but rather an additional or parallel condition relating only to the "provided that" phrase (but not to the "if") in the beginning of the sentence. In effect, the clause can be read in either of the following two "corrected" ways, both of which would have the effect of eliminating the lack of clarity:

> *(1) "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;" or*
>
> *(2) "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*."

200. The first reading, which suggests that the domestic litigation route is merely an option, and not mandatory, is effectively that adopted by the Claimant. The second reading, which indicates that the domestic litigation requirement is mandatory, is that adopted by the Respondent.

201. The evidence of the Parties' experts, which was also tested at the Hearing, establishes that the lack of clarity can linguistically be understood either as a semantic or syntactic (or grammatical) error in the drafting or construction of the clause, likely because it had been drafted by non-native speakers of English. Dr Patricia Palmer, who testified for the Claimant, preferred a syntactic "edit" of the problem, that is, the elimination of the word "and" as redundant as this would do least violence to the text and arguably preserve the

[38] VCLT, 23 May 1969, Exhibit RA-18.

intended (semantic) meaning of its drafter.[39] Professor Jaklin Kornfilt, who testified for the Respondent, preferred a semantic correction, namely a reading that eliminated one of the two conditionals ("provided that" or "if") in the beginning of the sentence rather than the word "and;" according to her, this would be more "loyal, closer to the text" as there are two conditionals but only one "and," and would thus better preserve the syntactic integrity of the clause.[40]

202. However, while the Tribunal finds the linguistic analysis helpful, it principally assists it in better understanding the linguistic source (if not the factual cause) of the lack of clarity in the clause, without fully resolving the issue of interpretation. The task of the Tribunal is not to "correct" the text of the Treaty; it must take the clause, as drafted and agreed to by the Parties, and then interpret it as such, as drafted and agreed, in accordance with the relevant rules of treaty interpretation. These rules include the general rule of treaty interpretation set out in Article 31 of the Vienna Convention; however, as noted above, the application of this rule leaves the meaning of Article VII(2), in particular of the "provided that, if" clause unclear, or obscure: the clause combines elements of what can be construed as two conflicting intentions as to its meaning, namely the double conditional in the beginning of the clause ("provided that, if") suggesting that the word "and" later in the sentence is a typographical or drafting error, or alternatively, the word "and" in the middle of the clause suggesting that the double conditional in the beginning of the sentence is a typographical or drafting error.

203. In accordance with the established rules of treaty interpretation, the Tribunal must therefore have recourse to supplementary means of interpretation to determine the meaning of Article VII(2) of the BIT; according to Article 32 of the Vienna Convention, such supplementary

[39] Expert Linguistics Opinion of Patricia Palmer dated 18 August 2013, paras. 8-9; Hearing Transcript, Day 3, pp. 234:11-235:3, 243:6-244:14 (stating that her preference would be "to suppress the 'and,' and replace it with a comma, because it's the most minimal intervention").

[40] Hearing Transcript, Day 3, pp. 221:20-224:4. Prof. Georgia Green, who also testified for the Respondent, was further of the view that the "provided that, if" clause was "incomplete and not grammatically well-formed, and consequently does not determine or project or support any specific interpretation at all." Accordingly, from a linguistic perspective, the clause is in her view "meaningless;" Expert Linguistics Opinion of Prof. Georgia M. Green dated 11 July 2013, para. 7.

means of interpretation apply, *inter alia*, "when the interpretation according to Article 31 […] [l]eaves the meaning ambiguous or obscure."[41] Article 32 ("Supplementary Means of Treaty Interpretation") of the Vienna Convention provides:

> "*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*."

204. According to Article 32, the supplementary means of interpretation that the Tribunal may resort to include "the preparatory work of the treaty" and "the circumstances of its conclusion." In the present case, there is very limited evidence of any preparatory works, however the Parties have made extensive reference to the circumstances of the conclusion of the Treaty, including the other investment treaties concluded by the two State parties to the Treaty during the relevant period. The Parties have also made extensive reference to the Turkish version of the BIT, which was prepared at the time of its ratification, and to the accompanying note to the Turkish Parliament. They disagree, however, as to whether the Turkish version should be considered as an "authentic" version of the BIT, or at least as part of "the circumstances of its conclusion" under Article 32 of the Vienna Convention, which is the position of the Respondent, or whether it is simply irrelevant, which appears to be the position adopted by the Claimant. Accordingly, in order to properly characterize the status of the Turkish version of the BIT, the Tribunal must first decide whether it can be considered an "authentic" version of the BIT. The issue arises because of the difference between the English and the Russian version of the BIT. The English version provides that the Treaty was done "in two authentic copies in Russian and English,"[42] whereas the Russian text

[41] In the Tribunal's view, the "provided that, if" clause can be said to be "obscure" rather than "ambiguous" in the sense that the two conflicting meanings of the clause are not apparent on the face of the clause – which they would be if the clause was ambiguous; they are disclosed only once one attempts to correct the awkward structure of the clause.

[42] English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

provides that the Treaty was executed "in two authentic copies in the Turkish, Turkmen, English and Russian languages."[43]

205. The relevant rules of treaty interpretation applicable to this issue can be found in Article 33 ("Interpretation of Treaties Authenticated in Two or More Languages") of the Vienna Convention. According to Article 33(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." In the present case, there are no provisions in the BIT or agreement between the Parties that either of the two versions, English and Russian, should prevail in case of divergence. Accordingly, both versions must be considered as being equally authoritative. In the circumstances, the Tribunal is required to apply the rule set forth in Article 33(4) of the Vienna Convention:

> "*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.*"

206. The first step in the process is therefore to determine whether the "difference of meaning" between the English and the Russian version can be removed by the application of Article 31 and 32. The Tribunal notes, in this connection, that the Russian version is awkwardly worded in the sense that, like the English version, it refers to "two authentic copies," but then lists four different languages. This suggests that there is a drafting error in the text, which in theory could be corrected, similarly to the correction that could be made to the "provided that, if" clause, either by eliminating the word "two," or by eliminating two of the languages, that is, Turkish and Turkmen.[44] This would leave only English and Russian, which would in turn make the two language versions consistent. However, as noted above, this is not a method available under the rules of treaty interpretation; the Tribunal must interpret the Treaty as drafted and agreed by the Parties. Consequently, as the application

[43] Russian version of the Turkey-Turkmenistan BIT (with Respondent's translation into English), Exhibit RA-1.

[44] In other words, the Russian version of the language clause could either read: "Executed on May 2, 1992 in two authentic copies in the ~~Turkish, Turkmen,~~ English and Russian languages," or "Executed on May 2, 1992 in ~~two~~ authentic copies in the Turkish, Turkmen, English and Russian languages."

of the general rule of treaty interpretation in Article 31 leaves the meaning of the language clause obscure, the Tribunal must have recourse to supplementary means of treaty interpretation, which include the "preparatory work of the treaty and the circumstances of its conclusion."

207. The Tribunal is prepared to accept the evidence of Ms Özbilgiç that the Turkish version of the Treaty was only prepared in the context of the ratification of the Treaty by Turkish Parliament. The Turkish version was not "done" or "executed" on 2 May 1992 in Ashgabat, together with the English and Russian versions.[45] The Respondent argues that nonetheless, even if the Turkish version was not executed at the time, it may be deemed an authentic version because it was designated as such by the State parties to the Treaty. The Tribunal is unable to agree with this argument as the reference to the Turkish version as an "authentic" version is only to be found in the Russian version; there is no such designation in the English version of the Treaty. In the circumstances, the reference to Turkish as an "authentic" copy in the Russian version of the BIT cannot be deemed evidence of the State parties' agreement; on the contrary, it is precisely the discrepancy between the English and the Russian versions on this point that raises the issue of interpretation.

208. There is no evidence before the Tribunal, contemporaneous or otherwise, that the State parties ever intended that the Turkish version prepared after the adoption of the English and Russian texts should be deemed authentic. In the circumstances, as the application of Articles 31 and 32 of the Vienna Convention fails to remove the difference between the English and the Russian versions, the Tribunal must adopt the meaning "which best reconciles the texts, having regard to the object and purpose of the treaty." The Tribunal finds, applying this rule, that the meaning that best reconciles the two texts is that only the English and the Russian version of the Treaty are to be considered authentic; it is only these two versions that are mentioned in both the English and the Russian version of the BIT. This interpretation is also supported by Article 10 of the Vienna Convention, which provides that, if a treaty does not provide for any specific procedure for authentication, the signed or

[45] The Tribunal notes that the reference to Ashgabat is only made in the English version of the language clause; there is no mention of Ashgabat in the Russian version.

initialed version of the treaty shall be considered authentic. It follows that the Turkish version cannot be considered an authentic version of the Treaty. However, this does not mean that it is irrelevant as it may nonetheless be considered to form a "supplementary means of interpretation," and possibly part of the "circumstances of [the] conclusion" of the BIT, within the meaning of Article 32 of the Vienna Convention.

209. Having determined that only the English and Russian versions of the BIT may be considered authentic versions, the Tribunal will now turn to the interpretation of the "provided that, if" clause, in light of the supplementary means of treaty interpretation set out in Article 32 of the BIT, which include "the preparatory work of the treaty" and "the circumstances of its conclusion."[46] As noted above, the Turkish version of the BIT may be considered in this context as a "supplementary means of interpretation."

210. As noted above, there is no dispute between the Parties that the preparatory works of the Treaty are extremely limited. There are no prior drafts of the Treaty, or minutes of meetings between the State parties when the Treaty was negotiated. The only relevant evidence is the witness statement and oral evidence of Ms Özbilgiç, who participated in the preparation of the draft BIT as a junior legal counsel (as she then was) at the Turkish Ministry of Foreign Affairs.[47] However, while the Tribunal finds Ms Özbilgiç's evidence helpful in understanding the way in which Turkey prepared for investment treaty negotiations, her evidence sheds little light on the States' common intentions, in particular as regards the interpretation of Article VII(2), as she did not attend any of the meetings in which the Treaty was agreed and signed. Although Ms Özbilgiç stated that the Republic of Turkey had the

[46] Ms Lamm dissents from the reasoning in paragraphs 210-230, which reflect the views of the majority of the Tribunal. See Partially Dissenting Opinion of Ms Lamm.

[47] The Tribunal has also taken note of the Letter from the Undersecretariat of Foreign Trade of the Prime Ministry of Turkey to Bozbey İnşaat San. Tic. Ltd. Şti. dated 26 May 2011, Exhibit C-096 (Reply), and of the Letter from the Ministry of Economy of Turkey to Sakmar Law Office dated 3 Dec. 2012, Exhibit C-095 (Reply). The former letter expresses a view on how Article VII(2) of the BIT should be interpreted, whereas the latter states that the English version of the BIT "is based on the English text of the draft agreement which was prepared previously by our country," that the draft was submitted to Turkmen authorities in March 1992 in Moscow by the Turkish Consulate, and that the Russian version "was translated from the English version on which the parties agreed into Russian shortly before signing the agreement." While these statements do not appear to contradict the evidence on record, they are not contemporaneous, were not submitted in the form of a witness statement and were not tested at the hearing. Consequently, the Tribunal considers them as relevant information rather than as evidence.

general policy of promoting foreign investment and supporting the protection of investments of Turkish investors abroad, the Tribunal is unable to draw any firm conclusions from such policy regarding the interpretation of Article VII(2) of the Treaty. As noted above, investment treaties, including the present one, are by their nature reciprocal arrangements, involving a trade-off between achieving the highest possible level of protection of the State's own investors in the territory of the other State party while seeking to avoid unnecessary international litigation and minimizing the risk of having to defend against unjustified or illegitimate claims by investors of the other State party. When negotiating the BIT, the Republic of Turkey must be assumed to have considered both sides of this trade-off. The Tribunal cannot assume, in the absence of any reliable documentary or other contemporaneous evidence, that Turkey was merely interested in maximizing the protection of its own investors in Turkmenistan, and was without concern as to its potential exposure to claims from Turkmen investors, keeping in mind that the Treaty was concluded for an initial period of ten years and would continue to be in force thereafter unless terminated by either party.[48] The Tribunal therefore is unable to adopt an interpretation of Article VII(2) of the BIT, and in particular of the "provided that, if" clause, that would effectively favor Turkish investors in case of any ambiguity or obscurity.

211. The Tribunal next turns to considering the circumstances of conclusion of the Treaty. As noted above, the Turkish version of the BIT has been argued to be considered in this context.

212. The Respondent in particular relies on the Turkish version of the BIT to support its reading of the mandatory nature of the "provided that, if" clause. According to the English translation of the Turkish version provided by the Respondent, Article VII(2) provides that recourse may be had to international arbitration, "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."[49] The Respondent argues that the mandatory Turkish version shows that Turkey had

[48] See Art. IX(1) and (2) of the Treaty.

[49] Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Protection and Promotion of Investments, dated 2 May 1992 (Turkish text published in the Turkish Official Gazette No. 22172 of 15 Jan. 1995, and Certified English Translation), Exhibit RA-3.

no policy of favoring international arbitration over local court proceedings, and that this should be taken into account in the interpretation of the "provided that, if" clause.

213. The Claimant does not dispute that the Turkish version employs mandatory language. However, it argues that the mandatory language results from an inaccurate translation from the authentic English version, and points out that the explanatory note accompanying the Treaty when it was submitted to the Turkish Parliament explains in clear terms that the clause was intended to be optional. The note states, in relevant part:

> "*Article 7- This Article regulates the procedure on settlement of the disputes which may arise between one Party and the investor of the other Party. As per the procedure prescribed under this Article, the dispute first shall be tried to resolve amicably. If the dispute cannot be resolved within six months, provided that the right for resorting to the local courts is reserved, the dispute may be submitted to the international arbitration.*
>
> *On the other hand, if the investor has brought the dispute to the local courts of the host state and a final decision is rendered by the local court then the right to submit the dispute to the international arbitration can not be used. However, if a final decision is not rendered within 1 year by the local court and provided that the Parties are party to the relevant conventions, the respective dispute may be submitted to International Centre for the Settlement of the Investment Disputes (ICSID) or the Arbitration Tribunal to be formed in accordance with the UNCITRAL Arbitration Rules or the Arbitration Court of Paris International Chamber of Commerce.*
>
> *The purpose of the last paragraph is to prevent the discussion of the disputes before an international institution, which were settled with a final decision rendered by the local courts*."[50]

214. The Claimant argues that the "provided that, if" clause "should be, in fact, […] considered as a fork in [the] road clause, which forces the investors to make a choice between the application to the international arbitration or to the local courts of the host State."[51]

215. Having considered both the Turkish version of Article VII(2) of the BIT as well as the accompanying explanatory note, the Tribunal notes that there is an apparent contradiction

[50] Draft law on ratification of the BIT executed by and between Turkey and Turkmenistan, including its reasoning and the reports of the Ministry of Foreign Affairs and the Planning and Budget Commissions, Exhibit C-093 (Reply).

[51] Claimant's Rejoinder on Jurisdiction, para. 89.

between the two documents. The former indicates that the domestic litigation requirement is mandatory, whereas the latter suggests that the requirement is optional. In the circumstances, even assuming the Turkish version of the BIT and the explanatory note were to be considered to form part of the "circumstances of [the] conclusion" of the Treaty, this evidence is inconclusive and does not allow the Tribunal to determine the meaning of Article VII(2) of the BIT.

216. In addition to the Turkish version of the BIT and the explanatory note, the Parties have also sought to rely on the other investment treaties concluded by both Turkey and Turkmenistan during the relevant period in support of their respective positions. According to the Claimant, other investment treaties concluded by Turkey at the time employed a language which is similar or identical to Article VII(2) of the Turkey-Turkmenistan BIT, including its treaties with Kazakhstan, Kyrgyzstan and Uzbekistan, which were all concluded within a few days and indeed during the same trip of the Prime Minister of Turkey.

217. The Respondent argues, in response, that "Turkey has entered into at least a dozen BITs that require prior submission to local courts before permitting recourse to international arbitration," and that even if there were no other such treaties, "that would not prove that the mandatory text of the Turkey-Turkmenistan BIT is not mandatory."[52] According to the Respondent, a review of Turkey's BITs entered into both before and after the Treaty shows that Turkey had no policy against mandatory local court requirements, and that the result of such a review is therefore inconclusive. It contends that "[e]ach treaty must be considered and enforced according to its own terms."[53]

218. The Tribunal has carefully reviewed the argument and evidence relied upon by the Parties, and concludes that the evidence relating to the preparation of the other investment treaties concluded by Turkey and Turkmenistan during the relevant period does not allow it to draw any firm conclusions as to the interpretation of Article VII(2) of the BIT. The Tribunal notes, for instance, that the Turkish translations of the English version of the relevant

[52] Respondent's Reply on Jurisdiction, para. 90.

[53] Respondent's PHB, para. 42.

clauses, even when using the same language as in the Turkey-Turkmenistan BIT, are not always consistent, and there also appear to be differences between the different authentic versions. Nor have the Parties conducted a systematic analysis of each of the authentic versions of the various BITs, but have mainly argued in terms of the English versions. In any event, based on the evidence before it, neither Turkey nor Turkmenistan appears to have had a clear, or at least consistent policy regarding the resolution of investor-State disputes that could be taken into account in the interpretation of the "provided that, if" clause in the Turkey-Turkmenistan BIT as a supplementary means of interpretation. The Tribunal concludes that the application of Article 32 of the Vienna Convention does not allow it to determine conclusively the meaning of Article VII(2) of the BIT.

219. The Tribunal will therefore next turn to the interpretation of the Russian version of the BIT. As noted above, the Parties disagree on this issue, the Respondent arguing that the Russian version of Article VII(2) uses language that is clearly mandatory on its face, whereas the Claimant argues that the Russian version of the provision can be translated in a manner that is literally the same as the English version.

220. As noted above, both Parties have provided expert evidence in support of their positions. The Tribunal notes that, of the Claimant's three Russian language experts, two were not called for cross-examination at the Hearing, namely Mr Alexander Makarov and Mr Konstantin Kozyrev, whereas Mr Peter Barber and the Respondent's experts Professor Boris Gasparov and Professor Georgia Green were called and subjected to cross-examination as well as questioning by the Tribunal. The Tribunal has considered the totality of the evidence, including the declarations of Mr Makarov and Mr Kozyrev, in reaching its conclusions.

221. The Tribunal notes that the statements of Mr Makarov are short and limited to providing a literal translation of the Russian version of Article VII(2), without any further substantive analysis. Mr Kozyrev does provide comments on the translation of the "provided that, if" clause, noting that the use of a comma in the Russian version of the Treaty is grammatically incorrect, as it is not correct to put a comma after "*esli*" in the phrase "*pri uslovii*, *esli*," and

that the use of the comma "makes the meaning of the whole sentence ambiguous."[54] Mr Kozyrev concludes that, should the "*pri uslovii, esli*," clause be considered mandatory, it would only apply to the option of submitting a dispute to the Court of Arbitration of the International Chamber of Commerce (the "**ICC**"), but not to the ICSID and UNCITRAL options.[55] The Tribunal notes that, although the Claimant refers to Mr Kozyrev's position, it has not adopted this position in the arbitration.[56] Mr Kozyrev also opines that the Russian version is a translation from the English version of the Treaty.

222. Mr Barber is a professional translator and reviser, and, in this capacity, expressed a view on both the English and the Russian version of Article VII(2) of the BIT. He stressed in his written opinion and at the Hearing that he took a "practical" approach to the issue. He states in his written opinion that he has to "discard" the "other opinions […] in favour of [his] more pragmatic and practical assessment." He goes on to state that "the original English, despite being awkwardly worded," introduces a proviso that is optional and not mandatory, and that the Russian translation also reflects this meaning.[57] According to Mr Barber, it is only the "second – interpretative – back-translation" relied on by the Respondent that has "confused the picture."[58] At the Hearing, Mr Barber confirmed that he had been instructed that the Russian version had been translated from the English one, and that he had taken this understanding as a basis of his analysis.[59]

223. Professor Gasparov submitted two opinions in the course of the arbitration, and he was also questioned on his evidence at the hearing. Professor Gasparov testified that the expression "*pri uslovii, esli*" is, in his opinion, "absolutely clear" and "unambiguously clear."[60] He

[54] Declaration of Mr Kozyrev dated 9 Aug. 2013, para. 6.

[55] Declaration of Mr Kozyrev dated 9 Aug. 2013, para. 6.

[56] See, e.g., Claimant's Rejoinder on Jurisdiction, paras. 106, 109 and 111-121 (arguing that the meaning of the English and Russian versions of Article VII(2) of the BIT is the same).

[57] Opinion of Mr Barber dated 18 Aug. 2013, p. 8.

[58] Opinion of Mr Barber dated 18 Aug. 2013, p. 8.

[59] Hearing Transcript, Day 4, p. 23:2-13, pp. 24:23-25:1.

[60] Hearing Transcript, Day 4, p. 105:15-21.

explained that while the expression is tautological, this is because it is idiomatic, and there are many expressions in any language that are idiomatic but grammatically correct because they have become a way of expression and the formal tautology has become irrelevant.[61] There is no ambiguity whatsoever as to the meaning of "*pri uslovii, esli*" it must be translated into English as "provided that," and not "provided that, if." According to Professor Gasparov, the latter would be a literal translation, but it does not convey the idiomatic meaning of the phrase.

224. The Tribunal has carefully reviewed the Parties' expert evidence, including both the expert opinions and the oral evidence that unfolded at the Hearing. The Tribunal has decided to accept Professor Gasparov's evidence on the proper translation of the Russian expression "*pri uslovii, esli*." Professor Gasparov's evidence, on which he was cross-examined by the Claimant and also extensively questioned by the Tribunal, was reliable and compelling. The Claimant's expert Mr Barber approached his task more pragmatically, as a translator or a reviser, and based on his understanding that the Russian text was a translation from the English version. However, there is no contemporaneous evidence before the Tribunal that this is the case, and in any event, both the English and the Russian versions are authentic versions of the Treaty, and their meaning must be established independently. Accordingly, the Tribunal accepts that the terms "*pri uslovii, esli*" must be translated into English as "provided that." It follows that the Russian version of Article VII(2) of the BIT has a mandatory meaning: it means that an investor, whether a Turkish or a Turkmen investor, may initiate international arbitration proceedings by choosing one of the three procedural options (ICSID, UNCITRAL or ICC), provided that the investor concerned has brought the dispute before the courts of justice of the Party that is party to the dispute and a final award has not been rendered within one year.

225. The Tribunal notes, in this context, that there is a further difference between the English and the Russian versions of Article VII(2) of the BIT, which was noted by Mr Kozyrev, one of the Claimant's Russian language experts, but was not pursued by the Claimant in the course

[61] Prof. Gasparov referred to the French question "*Qu'est-ce que c'est*" as an example of a tautological but grammatically correct and unambiguous expression: Hearing Transcript, Day 4, pp. 106:17-107:1.

of the arbitration. The difference is that the "*pri uslovii, esli*" clause in the Russian version is formatted in such a way that it forms part of Article VII(2)(c) of the Treaty and, unlike the English version, is not separated out from sub-paragraphs (a), (b) and (c) setting out the three arbitration options.[62] The question therefore arises whether, because of the formatting, the "*pri uslovii, esli*" clause should be interpreted so as to apply only to the ICC option, but not to the ICSID and UNCITRAL options.

226. The Tribunal does not consider this to be the persuasive or proper interpretation. As noted above, in accordance with Article 31(1) of the Vienna Convention, a treaty shall as a general rule 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." While formatting may be considered part of the "context" of a treaty, the Tribunal considers that, if read in the broader context of Article VII(2) of the BIT as a whole, the "*pri uslovii, esli*" clause cannot be read, in good faith, so as to apply only to the ICC option, and indeed neither Party argues that this would be the case.[63] The Tribunal notes that the application of Article 33(3) of the Vienna Convention, which provides that "[t]he terms of the treaty shall be presumed to have the same meaning in each authentic text," would in any event lead to the same conclusion. As the terms of the English and Russian version of Article VII(2) are the same (setting aside the issue of the translation into English of the terms "*pri uslovii, esli*," which is not relevant for the purpose of determining whether the clause beginning with these terms applies to all three arbitration options or only the last one), it cannot be concluded that the difference in formatting alone should lead to a different interpretation.

227. The remaining task for the Tribunal is to consider the meaning of the two authentic texts of the Treaty, English and Russian. As determined above, the two meanings of the "provided

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[62] For instance, the English translation of the Russian version of Art. VII(2)(c) of the BIT submitted by the Respondent at Exhibit RA-1, is formatted as follows:

> "*(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 a year*."

[63] See *supra* paras. 171-194. The Tribunal notes that the *Sehil* tribunal similarly found that "it makes no sense for the proviso, however it is understood, to apply to ICC arbitration and not to ICSID and ad hoc arbitration." (*Sehil*, Exhibit RA-451, para. 233.)

that, if" clause of the Treaty diverge: the meaning of the English version remains obscure, while the Russian version is clear and unambiguous. Consequently, as the Treaty does not establish which language version prevails in case of divergence, the relevant rule of treaty interpretation to address the divergence is set forth in Article 33(4) of the Vienna Convention. According to this provision, "when a comparison of authentic texts discloses a difference in 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."

228. The Tribunal notes that the application of Articles 31 and 32 of the Vienna Convention does not remove the difference in meaning between the English and the Russian versions of Article VII(2) of the BIT; as determined above, the application of Article 31 leaves the meaning of the English version of the provision obscure, and the application of Article 32 fails to remove the difference, whereas the Russian version, as translated above, is clear and unambiguous and does not require recourse to supplementary means of interpretation. In these circumstances, the meaning that best reconciles the English and the Russian version is the meaning ascribed above to the Russian version; it is evident that an obscure meaning must give way to a clear and unambiguous meaning. The object and purpose of the Treaty, to which regard must be had under Article 33(4) of the Vienna Convention, cannot alter this conclusion; indeed, it is evident that both a mandatory and a non-mandatory reading of the "provided that, if" clause would be compatible with the promotion of economic co-operation and development, more effective utilization of economic resources, and the promotion and protection of foreign investment, which according to the Preamble of the BIT constitute its object and purpose. The choice between the two readings depends entirely on what the State parties consider to be the appropriate dispute resolution procedure. The Tribunal concludes, by majority, that the "provided that, if" clause in Article VII(2) of the BIT must be interpreted so as to require recourse to domestic courts before international arbitration proceedings may be commenced.

229. The Tribunal notes that other treaty tribunals have reached divergent decisions on the interpretation of Article VII(2) of the BIT. For instance, the *Kılıç* tribunal concluded that

the domestic litigation requirement in the provision is mandatory, whereas the *Sehil* tribunal found that it is optional. The Parties have relied in their submissions on the earlier decisions, in particular the decisions of the *Kılıç* and *Sehil* tribunals, and the Tribunal has carefully considered the relevant parts of their reasoning. The Tribunal notes that each of the two tribunals took its decision on the basis of the evidence and argument before them, which differed from that which was available to this Tribunal, and reached different conclusions. Consistent with its mandate, which is limited to resolving the dispute submitted to it, this Tribunal must also base its decision on the argument and evidence before it, which includes the decisions of the *Kılıç* and *Sehil* tribunals. In this connection, the Tribunal notes that it has attempted to ensure that the record before it is as complete as possible. As summarized in Section 2 above, the Tribunal in Procedural Order No. 2 dated 28 June 2012 directed the Parties to address "all aspects of the issue" in their submissions, including "the various language versions of the BIT, including the existence of a Turkmen version of the BIT; […] the authenticity of the various language versions of the BIT; […] the accuracy of the English translations of each of the authentic versions of the BIT; […] the negotiating history of the BIT, including *travaux préparatoires*, if any; […]." The Parties were also invited to produce witness testimony, as appropriate, and to address the applicable rules of treaty interpretation. In this connection, the Tribunal merely notes that the *Sehil* tribunal, which concluded on the basis of the evidence before it that both the English and Russian version of Article VII(2) were ambiguous, also saw "little logic in requiring investors simultaneously to negotiate for six months *and* to go to local courts for a year from the same start date."[64] According to the *Sehil* tribunal,

> *"[a] better, much more plausible interpretation that would avoid this logical hurdle and be consistent with the permissive language of Article VII(2)'s chapeau, is that only investors who choose to go to local courts first will have to wait for a year prior to initiating international arbitration proceedings (in the absence of a final decision within the one-year period). By contrast, investors who choose directly to initiate international arbitration proceedings will only have to negotiate for six months after the notice of dispute prior to going to arbitration."*[65]

[64] *Sehil*, Exhibit RA-451, para. 238. (Emphasis in original.)

[65] *Sehil*, Exhibit RA-451, para. 239. (Emphasis in original.)

230. With respect, the Tribunal is unable to agree with this reasoning. The logic, or the effect, of Article VII(2) of the BIT, as interpreted above, is to establish a time-limited priority for domestic litigation in relation to international arbitration as a method of dispute resolution, in the event that the dispute cannot be settled during the six-month negotiation (or "cooling-off") period. The one-year period for domestic litigation starts from the end date of the six-month negotiation period, not from the start date of the negotiation period. If there is no "final award" during this one-year period, the investor may proceed to international arbitration. Certainly the State parties could have agreed to make domestic litigation merely an alternative to international arbitration, but this is not what they agreed in Article VII(2) of the BIT, properly interpreted.

231. Finally, the Tribunal notes that, while its decision resolves the issue of interpretation of Article VII(2) of the BIT, this is not necessarily the end of the matter as it leaves open the question of the legal nature of the domestic litigation requirement in Article VII(2) of the Treaty. This is an issue that the Tribunal in Procedural Order No. 1 also specifically requested the Parties to address in their submissions, and it is the issue to which the Tribunal will turn next.

5 JURISDICTION AND ADMISSIBILITY

232. The Respondent advances several preliminary objections that it characterizes as objections to jurisdiction. First, it argues that Article VII(2) of the BIT contains a domestic litigation requirement which the Claimant has failed to comply with. Second, it argues that the Claimant has not made any "investment" in Turkmenistan within the meaning of Article 25 of the ICSID Convention or Article I(2) of the BIT. Third, it argues that the Claimant's claims are not treaty claims but contract claims which are subject to the dispute settlement provisions of the relevant Contracts, all of which provide for recourse to the Arbitration Court of Turkmenistan, and thus fall outside the jurisdiction of the Tribunal.

233. The Tribunal addresses each of the Respondent's objections in turn below.

5.1 The legal nature of the domestic litigation requirement in Article VII(2) of the BIT

234. The Respondent's first objection is that Article VII(2) of the BIT contains a domestic litigation requirement which the Claimant failed to comply with, and that accordingly the Tribunal lacks jurisdiction. The Claimant contests that Article VII(2) of the BIT sets out a mandatory domestic litigation requirement and argues that, in any event, it should not be held to the domestic litigation requirement as resorting to Turkmen courts would have been futile. The Claimant further submits, in the alternative, that it is entitled to rely on the most-favored nation ("**MFN**") clause in Article II(2) of the BIT to circumvent it.

235. The Tribunal has reached above, by majority, the conclusion that Article VII(2) of the BIT indeed establishes a "mandatory" domestic litigation requirement in the sense that the language of the provision, properly interpreted, requires the investor to submit the dispute first to local courts, and only if no decision is reached within a year, the investor may refer its claim to international arbitration. However, as also noted above, this conclusion is distinct from – and leaves open – the question of the legal nature of this requirement.

236. The Tribunal recalls that in Procedural Order No. 2 dated 28 June 2012, it invited the Parties to address, *inter alia*, the question of "whether the objection put forward by Respondent on the basis of its interpretation of Article VII(2) of the BIT raises an issue of jurisdiction or an

issue of admissibility." The Claimant did not mention the issue either in its Memorial or in its Reply; however, the Respondent addressed the issue in detail in its Counter-Memorial. The Respondent argued, citing *Daimler v. Argentina*, that "[i]n the present case, Turkmenistan's offer to arbitrate was expressly conditioned upon the investor's compliance with the mandatory provisions of Article VII(2)."[66] The condition is therefore a "jurisdictional pre-requisite."[67]

237. The Tribunal also raised the question of the legal nature of the requirement upon the completion of the Hearing, requesting that the Parties address it in their post-hearing submissions.

238. The Claimant in its post-hearing submission addressed the issue briefly, stating that "the investor's choice of one of the two legal remedies prescribed under Article VII(2) raises a jurisdictional issue" and "is not an admissibility issue."[68] The Respondent, on the other hand, addressed the issue *in extenso* in its post-hearing submission. The Respondent reiterated its argument that Article VII(2) constitutes "a condition to Turkmenistan's offer to submit itself to the jurisdiction of an international tribunal to arbitrate investor-State disputes under the Treaty."[69] According to the Respondent, this was also the conclusion reached by the *Kılıç* tribunal. The Respondent also noted that the Claimant had never contested the Respondent's position.

239. Both Parties have therefore taken the position that compliance with Article VII(2) of the BIT is an issue of jurisdiction rather than admissibility. The question arises whether the Tribunal is bound by the Parties' shared legal position. After a careful consideration of the applicable legal framework, the Tribunal concludes that it is not. The Tribunal refers in this connection, in particular, to Article 41 of the ICSID Convention and Rule 41(2) of the ICSID Arbitration Rules. Article 41 of the ICSID Convention establishes that the "[t]he Tribunal shall be the

[66] Respondent's Counter-Memorial, para. 286.

[67] Respondent's Counter-Memorial, para. 286.

[68] Claimant's PHB, para. 57.

[69] Respondent's PHB, para. 66.

judge of its own competence," and Rule 41(2) of the ICSID Arbitration Rules provides, importantly, that "[t]he Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence." The Tribunal considers that these two provisions provide it with the authority to decide independently, within its *Kompetenz-Kompetenz*, and without being bound by the Parties' legal positions, as to whether the objection raised by the Respondent under Article VII(2) of the BIT constitutes an objection to jurisdiction or an objection to admissibility. Indeed, if this were not the case, and if the Tribunal were to be considered bound by the legal argument of the Parties, the Tribunal might have to reach a decision that it does not consider to be legally correct. This cannot be the proper reading of the Tribunal's authority under Article 41 of the ICSID Convention and Rule 41(2) of the ICSID Arbitration Rules; the Tribunal must have the authority to take a decision that it deems correct, so long as it has given the Parties an opportunity to argue the issue it has raised. As set out above, this is what the Tribunal has done in the present case.

240. The Tribunal has carefully considered the Parties' positions on the issue, in particular that of the Respondent, which has set out its position in a more elaborate manner than the Claimant. The Tribunal decides, by majority, that Article VII(2) of the Treaty does not constitute "a condition to Turkmenistan's offer to submit itself to the jurisdiction of an international tribunal to arbitrate investor-State disputes under the Treaty," as argued by the Respondent.[70] Properly characterized, the domestic litigation requirement is not a condition to the State parties' consent to arbitrate under the Treaty. The consent of the two State parties to arbitrate, as set out in Article VII of the Treaty,[71] is unconditional; apart from the ratification requirement in Article IX of the Treaty, which applies to the Treaty as a whole and not only to Article VII, the Treaty does not establish any conditions precedent for the

[70] Professor Sands dissents from the reasoning in paragraphs 240-247, which reflect the views of the majority of the Tribunal. See Partially Dissenting Opinion of Professor Sands.

[71] Unlike many other investment treaties, the Treaty does not specifically provide that the State parties consent to arbitrate, but such consent is implicit in the *chapeau* of Art. VII(2), which provides that, if a dispute between one of the State parties and an investor of the other party cannot be settled by negotiation, it "can be submitted, as the investor may choose, to [ICSID, ad hoc arbitration under the UNCITRAL Rules, or ICC arbitration]." (English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).)

State parties' consent to take effect before the Treaty enters into force upon its ratification pursuant to Article IX.[72] Apart from the requirement of ratification, which applied to the Treaty as a whole, there were no further conditions precedent for the entry into force of the Treaty, including its Article VII(2), and accordingly the State parties' consent to arbitrate became effective, unconditionally, when the Treaty entered into force. It is another matter that the scope of their consent to arbitrate is not unlimited under the Treaty, but extends only so far as delimited by the Treaty, specifically in Article IX (which delimits the scope of the State parties' consent in terms of time),[73] Article I(1) (which delimits the scope of their consent in terms of person),[74] and Article I(2) (which delimits the scope of their consent in terms of subject matter).[75]

241. In the Tribunal's view, the proper way to characterize Article VII of the BIT is that it is a dispute resolution clause which, apart from establishing the consent of the State parties to arbitrate, sets out the procedure that an investor must follow, or the steps it must take, before it can invoke the consent to arbitrate given by a State party to the Treaty. First, the investor must notify the State party to the dispute in writing of the dispute that has arisen between them and seek to settle the dispute by consultation and negotiation; this procedural step is set out in Article VII(1). If the dispute cannot be settled in this way within six months from the date of notification, the investor may choose to submit the dispute to international

[72] According to Article IX(1) of the BIT, the Treaty "shall enter into force on the date on which the exchange of instruments of ratification has been completed."

[73] According to Art. IX of the BIT, the Treaty enters into force on the date on which the exchange of instruments of ratification has been completed, and remains in force a period of ten years; it will continue to be in force thereafter unless terminated by either Party by written notice. The Treaty applies to investments existing at the time of entry into force, as well as to investments that were made or acquired prior to the date of termination for a period of ten years from the date of termination. Consequently, in terms of time, the Treaty (and the jurisdiction *ratione temporis* of an arbitral tribunal constituted in accordance with Art. VII of the Treaty) is open-ended so long as it is in force: it applies to investments made prior to its entry into force, as well as to any investment made thereafter.

[74] According to Art. I(1), the Treaty applies to natural persons who are nationals of either State party to the Treaty according to the its applicable law, as well as to "corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party." Accordingly, the jurisdiction *ratione personae* of an arbitral tribunal constituted under Art. VII (read together with Art. VII(1) of the BIT) is limited to claims brought by persons so defined against the other State party.

[75] Art. VII(1) of the Treaty applies to disputes arising "in connection with [the investor's] investment," as defined in Art. I(2) of the Treaty. Accordingly, the jurisdiction *ratione materiae* of an arbitral tribunal constituted under Art. VII of the Treaty is limited to investment disputes (disputes arising "in connection with" an investment).

arbitration pursuant to Article VII(2) of the Treaty, "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." The Tribunal has decided above that this prior step is in principle mandatory, and accordingly, before the investor can submit the dispute to international arbitration, it must take the additional step of submitting the dispute to local courts.[76] If no final judgment has been rendered within a period of one year, the investor may proceed to arbitration.

242. When conceptualized in these terms, it is plain that the "provided that, if" clause does not constitute a jurisdictional requirement that delimits the scope of consent of the State parties to arbitrate; it sets out the procedure, or the step to be taken, in the event the dispute cannot be settled by way of negotiations between the parties, and thus constitutes a procedural rather than a jurisdictional requirement. The provision does not concern the issue of whether the State parties have given their consent to arbitrate – they have – but rather the issue of *how* that consent is to be invoked by a foreign investor; as an issue of "how" rather than "whether," it must be considered a matter of procedure and not as an element of the State parties' consent. Consequently, any objection raised on the basis of alleged non-compliance by an investor with any of the required procedural steps must be characterized as an objection to the admissibility of the claim rather than as an objection to the tribunal's jurisdiction. A claim that has not been first submitted to local courts may be said to be inadmissible before an international tribunal on grounds that it is not yet ripe for such submission as all the required procedural steps have not yet been taken.

243. On this issue, the Tribunal's decision diverges from the approach adopted in the *Kılıç* Award, in which the majority of the tribunal took the view that the domestic litigation requirement constitutes a condition precedent to the State parties' consent to arbitrate and is therefore an issue of jurisdiction.[77] The majority of the *Kılıç* tribunal characterized the

[76] Ms Lamm dissents from this sentence to the extent that reference is made to the selection of local courts being in principle mandatory. See Partially Dissenting Opinion of Ms Lamm.

[77] *Kılıç* Award, Exhibit RA-314. Prof. William W. Park issued a Separate Opinion, taking the view that Art. VII(2) raised an issue of "ripeness, *recevabilité* or admissibility" rather than jurisdiction; see Separate Opinion of Professor William W. Park, 20 May 2013, para. 27.

dispute resolution clause in Article VII of the BIT as the State parties' "standing offer" to arbitrate, which then had to be "accepted" by the investor. In the view of the *Kılıç* majority, an arbitration agreement therefore could come into existence only "through a qualifying investor's acceptance of a host state's standing offer as made (*i.e.*, under its terms and conditions)."[78] The majority referred, in support of its reasoning, to Article 26 of the ICSID Convention, which provides, *inter alia*, that "[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention." Citing Professor Schreuer's article "Consent to Arbitration," Professor Georges Abi-Saab's dissenting opinion in *Abaclat and others v. Argentine Republic* and the *Daimler v. Argentine Republic* decision, the majority concluded 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."[79]

244. With the greatest respect to the distinguished majority of the *Kılıç* tribunal, this Tribunal is unable to agree with the *Kılıç* tribunal's characterization of the issue. The BIT is not a contract; it is a treaty concluded by two States, and consequently the arbitration agreement concluded between one of the State parties and an investor of the other State party is not an arbitration agreement concluded on the basis of privity of contract, that is, on the basis of an "offer" and "acceptance." On the contrary, the State's consent, which is addressed to an anonymous class of foreign investors meeting the relevant nationality requirements, and not specifically to any particular foreign investor, is expressed in a binding manner even before any dispute has arisen, whereas the investor's consent is usually – including in the present case – expressed only after the dispute has arisen, often with a considerable time interval (in the present case, over eighteen years).[80] While it is common and often harmless to somewhat loosely refer to dispute resolution clauses such as Article VII of the BIT as provisions containing the State parties' "standing offer" to arbitrate, this is in fact conceptually inaccurate and legally incorrect; Article VII rather contains the State parties' "consent" to

[78] *Kılıç* Award, para. 6.2.1.

[79] *Kılıç* Award, para. 6.3.15.

[80] Request for Arbitration, para. 7 and Exhibit C-7 to the Request for Arbitration.

arbitrate, which is binding on the State as such, without any further "perfecting," as a unilateral undertaking *vis-à-vis* a class of foreign investors. Such consent can be invoked by a qualified investor once it has complied with and taken the procedural steps set out in the provision, as analyzed above in paragraph 241. While it is possible to refer, loosely speaking, to each of these steps as a "condition" to the State parties' consent to arbitrate, this is conceptually misleading as compliance with these procedural steps is not a "condition precedent" to the State parties' consent to arbitrate. The State's consent has been given in Article VII, and it became effective, and as such unconditional, as soon as the Treaty entered into force; there is nothing conditional about it. It is another matter that, in order for the investor to be in a position to invoke the State's consent to arbitrate in Article VII, it must first take the procedural steps set out in that Article. An investor taking these steps in order to be able to invoke the State's consent does not affect the consent itself in any way; it only affects the investor's right to invoke it. In other words, Article VII *regulates* the procedure for invoking consent; it does not *condition* the State's consent. If anything, it rather "conditions" the investor's right to invoke the State's consent. The *Kılıç* majority appears to have based its approach on a contractual analogy which, as noted above, is both conceptually inaccurate and legally incorrect. An arbitration agreement included in a contract and an arbitration agreement construed on the basis of a unilateral consent of the State, as expressed in an investment treaty, and the investor's subsequent invocation of that consent after the dispute has arisen, are two very different types of agreements. While the former is based on privity, the latter is construed after the fact, once the dispute has arisen, and therefore effectively constitutes a hybrid between an arbitration agreement based on privity and an arbitration agreement based on a *compromis*.

245. The Tribunal is mindful of the fact that the distinction between jurisdiction and admissibility is often a fine one, and reasonable arbitrators may reasonably disagree on how it should be made and in particular, on how it should be applied in a particular case.[81] In the circumstances, the Tribunal does not consider it necessary to seek to address, or to

[81] Thus the *Kılıç* annulment committee noted, when declining to annul the *Kılıç* Award, that a determination of whether a particular objection constitutes an objection to jurisdiction or admissibility is not a basis for annulment: "Faced with the same question, other tribunals have decided differently on questions of jurisdiction and admissibility; it is not for the Committee to favor one or the other of these positions." (*Kılıç* Annulment Decision, para. 166.)

distinguish on the facts (which would not be even possible, given the issue is one of characterization and as such a matter of law rather than one of application of a legal category to the facts of the case), all the legal authorities cited by the *Kılıç* tribunal in support of its reasoning, or the authorities cited by the Respondent in support of its own position. It merely notes that that there are two strands of investment treaty jurisprudence on the issue, one of which it considers more persuasive.[82] The Tribunal limits itself to quoting one authority, with which it broadly agrees (even though it addresses the issue from the perspective of finality of the award rather than from the perspective of characterization):

> "*[T]he nub of the classification problem is whether the success of the objection necessarily negates consent to the forum. Our lodestar takes the form of a question: is the objecting party taking aim at the tribunal or at the claim? […] Following the lodestar will make it easy to classify objections in many cases, and should make it* easier *in all. Timeliness issues, or conditions precedent such as participating in a conciliation attempt, pose no problem. […] To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:*
>
> - *If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.*
>
> - *If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final*."[83]

246. In the present case, the Respondent's objection that the Claimant has failed to comply with the domestic litigation requirement is an objection to admissibility in the sense that, if successful, the claim could "not be heard at all (or at least not yet)," *i.e.*, until the Claimant has taken the necessary procedural steps and complied with the domestic litigation requirement. Conversely, the Respondent's objection could not be an objection to

[82] Indeed, the Tribunal does not consider it appropriate to engage in a detailed analysis of these two strands of jurisprudence, other than those cited in *Kılıç* (which are before it), as all of the relevant jurisprudence is not before it: the Respondent mainly cited jurisprudence supporting its position, whereas the Claimant cited none.

[83] Jan Paulsson, Jurisdiction and Admissibility, in Gerald Aksen et al, *Global Reflections on International Law, Commerce and Dispute Resolution*, pp. 616-17 (cited in *Kılıç* Award, Exhibit RA-314, para. 6.3.8) (emphasis in original).

jurisdiction since, if successful, it would not have prevented the Claimant from re-submitting the claim to another tribunal established under the BIT, once it had complied with the domestic litigation requirement. In other words, the issue is not whether the claim falls within the scope of the Treaty, but whether the proper procedure has been followed to submit the claim to a tribunal established under the Treaty.[84]

247. The Tribunal concludes by a majority that the "provided that, if" clause establishes a procedural requirement that relates to the admissibility of the claim rather than the Tribunal's jurisdiction.

5.2 Are the Claimant's claims inadmissible for failure to comply with the domestic litigation requirement in Article VII(2) of the BIT?

248. Having determined that Article VII(2) of the BIT sets out an admissibility requirement, the Tribunal must consider whether the Claimant's claims are admissible. In this connection, the Tribunal notes that there is no dispute between the Parties, and the Claimant does not deny that it never submitted the dispute to the Turkmen courts. Indeed, the Claimant argues that doing so would have been futile. In accordance with its decision above, the Tribunal will consider this issue, and the Parties' arguments, as ones pertaining to the admissibility of the claims rather than to the issue of jurisdiction.

5.2.1 The Claimant's position

249. The Claimant takes the view that even if Article VII(2) of the BIT is found to impose a mandatory domestic litigation requirement, it should not be held to the requirement as recourse to the Turkmen courts would have been futile.

[84] Mr Paulsson's further point as to whether decisions on admissibility should be reviewable is essentially a matter of interpretation of Art. 52(1)(b) of the ICSID Convention (manifest excess of powers). This issue is not relevant for the purposes of the present decision, and the Tribunal merely notes that "finality" for purposes of reviewability is not the same issue as "finality" in terms of whether the same claim may be submitted to another treaty tribunal once the admissibility requirements have been met. If there is no jurisdiction (*i.e.*, if the claim does not fall within the scope of the treaty), it cannot; if the claim is merely inadmissible, it can be.

250. It argues first that it is well-established in international law that a claimant does not need to comply with a domestic litigation requirement if doing so would be futile, and relies in this respect on the 1903 *Selwyn Case*.[85] According to the Claimant, this "futility exception" should be applied in the present case "regardless of its relevancy with the exhaustion of local remedies principle derived from […] customary international law," and in particular in light of the "serious risk" the Claimant would face under Article VII(2) of the BIT of losing its right to resort to arbitration if it submits the dispute to the domestic Turkmen courts and they issue a final decision within a year.[86] On this basis, the Claimant distinguishes the present case from the *Emilio Augustín Maffezini v. Kingdom of Spain* and *Siemens A.G. v. Argentine Republic* decisions relied upon by the Respondent, which dealt with provisions allowing investors to resort to arbitration after complying with a domestic litigation requirement, even if the domestic courts render a decision.

251. The Claimant contends that resorting to the Turkmen courts would be futile, as they lack independence and are influenced by the Turkmen Government. In support of its position, it relies on reports and other documents from various international sources, including the United States Department of State and the United Nations Human Rights Committee.[87] It also relies on the testimony of another Turkish investor in Turkmenistan, Mr Hüseyin Arıcan, who alleges that he was prosecuted and imprisoned by the Turkmen authorities in retaliation for a lawsuit he initiated before the Turkmen courts contesting a tax fine, which itself was allegedly rejected without the judges considering the arguments or evidence submitted.

252. The Claimant also argues that its own experiences, and those of other Turkish investors, show that Turkmen courts do not conduct proceedings in a fair manner. During the period

[85] Reports of International Arbitral Awards, *Selwyn Case*, 1903, Volume IX, p. 385, Exhibit CA-094 (Reply).

[86] Claimant's Rejoinder on Jurisdiction, para. 177.

[87] United Nations Human Rights Committee, Consideration of reports submitted by State parties under Article 40 of the International Covenant on Civil and Political Rights – Concluding observations on Turkmenistan (advance unedited version), Exhibit CA-077 (Reply); US Department of State, 2010 Investment Climate Statements – Turkmenistan, Exhibit C-011 (Rejoinder on Jurisdiction); US Department of State, Cable ref. 09ASHGABAT1080 from the Ashgabat Embassy to the US Department of State dated 27 Aug. 2009, Exhibit C-012 (Rejoinder on Jurisdiction); BTI 2012 – Turkmenistan Country Report, Exhibit C-013 (Rejoinder on Jurisdiction); Freedom House, Turkmenistan Country Report of 2010, Exhibit C-014 (Rejoinder on Jurisdiction).

from 2009 to 2010, the Contracting Parties and, in some instances, the General Prosecutor of Turkmenistan, initiated several proceedings against the Claimant before the TAC, for termination of some of the Contracts and collection of delay penalties. All of these proceedings, a total of twelve, were completed within a period of less than a month. The Claimant summarizes these proceedings in the form of the following tables:[88]

Project Name	**Statement of Claim for the Termination of the Construction Contract**	**Exhibit No.**	**Decision of Arbitration Court of Turkmenistan**	**Exhibit No.**	**The Time Period between the Statement of Claim and the Decision Date**
Kipchak Cultural Center Project (TNG-I 10)	8 October 2009	AI-65 (Respondent's Counter Memorial on the Merits)	21 October 2009	R-203 (Respondent's Counter Memorial on the Merits)	**13 days**
Babarap Projects (TNG-I 08)	8 October 2009	R-500 (Respondent's Counter Memorial on the Merits)	21 October 2009	R-203 (Respondent's Counter Memorial on the Merits)	**13 days**
Ashgabat Cinema Project (TNG-I 16)	8 October 2009	R-499 (Respondent's Counter Memorial on the Merits)	21 October 2009	R-203 (Respondent's Counter Memorial on the Merits)	**13 days**
Avaza Canal Project (TNGIZ-I 13)	2 November 2009	R-501 (Respondent's Counter Memorial on the Merits)	26 November 2009	R-480 (Respondent's Counter Memorial on the Merits)	**24 days**
Dayhanbank Project (DB-I 06)	11 November 2009	C-175 (Claimant's Reply on the Merits)	24 November 2009	R-421 (Respondent's Counter Memorial on the Merits)	**13 days**

[88] Claimant's Rejoinder on Jurisdiction, para. 199.

Abadan Kindergarten and School Projects (AWH-I 11/ 12)	19 March 2010	SQ-35 (Respondent's Counter Memorial on the Merits)	1 April 2010	SQ-35 (Respondent's Counter Memorial on the Merits)	**12 days**

Project Name	**Statement of Claim for Delay Penalty Amounts**	**Exhibit No.**	**Decision of Arbitration Court of Turkmenistan**	**Exhibit No.**	**The Time Period between the Statement of Claim and the Decision Date**
Abadan Kindergarten and School Projects (AWH-I 11/12)	12 September 2009	C-147 (Claimant's Reply on the Merits)	5 October 2009	SQ-36 (Respondent's Counter Memorial on the Merits)	**23 days**
Avaza Canal Project (TNGIZ-I 13)	2 November 2009	R-501 (Respondent's Counter Memorial on the Merits)	26 November 2009	R-480 (Respondent's Counter Memorial on the Merits)	**24 days**
Dayhanbank Project (DB-I 06)	11 November 2009	C-175 (Claimant's Reply on the Merits)	24 November 2009	R-421 (Respondent's Counter Memorial on the Merits)	**13 days**
Kipchak Cultural Center (TNG-I 10)	16 February 2010	AI-67 (Respondent's Counter Memorial on the Merits)	10 March 2010	AI-68 (Respondent's Counter Memorial on the Merits)	**24 days**
Babarap Projects (TNG-I 08)	1 April 2010	R-502 (Claimant's Reply on the Merits)	22 April 2010	AI-89 (Respondent's Counter Memorial on the Merits)	**21 days**
Ashgabat Cinema Project (TNG-I 16)	9 April 2010	R-503 (Respondent's Counter Memorial on the Merits)	22 April 2010	AI-89 (Respondent's Counter Memorial on the Merits)	**13 days**

253. The Claimant argues that, had it submitted its claims to Turkmen courts, decisions would have been rendered within a year, and it would have lost its right to submit the dispute to arbitration under the BIT.

5.2.2 The Respondent's position

254. The Respondent counters that the domestic litigation requirement in Article VII(2) of the BIT cannot be avoided on the basis of the alleged futility of resorting to the Turkmen courts.

255. First, it argues that the BIT does not provide for a futility exception. The exception relied on by the Claimant originates from a rule of exhaustion of local remedies in customary international law on diplomatic protection. The BIT, however, does not require exhaustion of local remedies, and is a *lex specialis* which displaces inconsistent rules of customary international law. Importing the futility exception would amount to re-writing the BIT, and thus "would constitute an error of law and a manifest excess of powers [by the Tribunal]."[89]

256. Second, the Respondent contends that even if a futility exception could be applied under the BIT, the test for futility that should be applied is the "very stringent" test of "'unavailability' or 'obvious futility,'" which requires that a domestic remedy be "'patently unavailable' or 'completely ineffective.'"[90] As part of this test, the Claimant must specifically show the futility of resorting to the Turkmen courts "for the specific purpose of resolving 'disputes arising under the […] BIT.'"[91]

257. According to the Respondent, this test would not be met in the present case. It contends that the Claimant's description of the Turkmen legal system as lacking independence is inaccurate and based on generalized allegations. In particular, it argues that it does not take into account considerable improvements that have been made since the country's independence, and that the principle of judicial independence and the rights to a fair trial and due process are set out in the Arbitrazh Procedural Code, the Turkmen Law on Courts,

[89] Respondent's Reply on Jurisdiction, para. 183.

[90] Respondent's Reply on Jurisdiction, para. 193.

[91] Respondent's Reply on Jurisdiction, para. 219.

and the Turkmen Constitution.[92] The Respondent also points to a 2012 mutual legal assistance treaty between Turkey and Turkmenistan, which, in its view, constitutes an affirmation by Turkey of the legitimacy of legal proceedings in Turkmenistan.[93]

258. With respect to the Claimant's allegations that it experienced denials of justice before the Turkmen courts, the Respondent argues that they are not supported by the evidence. In particular, it refers to evidence allegedly showing that the representatives acting on behalf of the Claimant were, contrary to its assertions, authorized to do so by the Claimant.[94]

259. Finally, the Respondent argues that the Claimant's failure to even attempt to submit the present dispute to the Turkmen courts is fatal to its futility argument.

5.2.3 The Tribunal's analysis

260. The Claimant raises a variety of arguments in support of its contention that the submission of the dispute to Turkmen courts would have been "futile," including the alleged unfairness of the proceedings and lack of independence of Turkmen courts. The Tribunal has considered the Claimant's allegations and evidence, but is unable to accept its argument in the broad terms it has been presented, including for lack of adequate evidence.[95] In any event, the Tribunal agrees with the Respondent that the BIT does not provide for any "futility exception" to the local litigation requirement in Article VII(2) of the BIT. Any claim arising out of the alleged inadequacy of the local legal system would have to be pursued as a denial of justice claim, which does allow a party to dispense with the requirement to exhaust local remedies in circumstances in which recourse to such remedies would be demonstrably futile.

[92] Art. 5, Arbitrazh Procedural Code of Turkmenistan (excerpt, with English translation), Exhibit RA-371; Arts. 4-12, Law on Courts of Turkmenistan dated 15 Aug. 2009 (with English translation), Exhibit RA-372; Arts. 101 to 108, Constitution of Turkmenistan dated 26 Sept. 2008 (excerpt, with English translation), RA-373.

[93] Agreement on Legal Assistance in Civil and Criminal Matters between Turkmenistan and the Republic of Turkey dated 29 Feb. 2012, Exhibit RA-192.

[94] See e.g. Power of Attorney authorizing Ataev O. to represent İçkale dated 1 Sept. 2009 (with English translation), Exhibit R-539; Power of Attorney authorizing Mutalimov R. to represent İçkale dated 1 Nov. 2009 (with English translation), Exhibit R-540.

[95] Ms Lamm dissents in part from the reasoning in this paragraph. See Partially Dissenting Opinion of Ms Lamm.

However, the Claimant has not even attempted to submit the dispute to local courts. There can be no denial of justice where there has been no legal process in the first place.

261. The Tribunal also agrees with the Respondent that the local litigation requirement in the BIT is not a reflection or incorporation of a rule of customary international law, but rather a *lex specialis*, a treaty provision specifically agreed by the State parties to the Treaty. However, while the Tribunal has held above that Article VII(2) must be interpreted so as to contain a domestic litigation requirement, it has also determined that this requirement is not a jurisdictional requirement but relates to the admissibility of the claim. As a result, the consequences of the Claimant's non-compliance with the domestic litigation requirement must be determined in light of the procedural nature of the requirement.

262. In this connection, the Tribunal notes that local court proceedings have indeed been conducted in the context of the present dispute, as summarized above.[96] Moreover, although the proceedings were brought by the Contracting Parties (and, in some instances, the General Prosecutor's Office of Turkmenistan)[97] and not by the Claimant, the fact remains that essential aspects of the dispute have in fact been submitted to and litigated before the Turkmen courts, with the result that seven out of the thirteen contracts at issue in this arbitration, including all those that were still ongoing at the time, were terminated (or their termination was upheld). The Tribunal also notes that all of these proceedings have been completed, and indeed they were all completed within a few weeks from their filing. While it is unclear, in light of the evidence before the Tribunal, whether the Claimant failed to effectively participate in some of these proceedings because it was not properly notified, or because it did not have sufficient time to prepare its defense, or for other reasons, the Tribunal finds that it would be inappropriate, in the circumstances, to require that the Claimant subsequently commence further court proceedings under the relevant Contracts,

[96] Professor Sands dissents from the reasoning in paragraphs 262-263, which reflect the views of the majority of the Tribunal. See Partially Dissenting Opinion of Professor Sands.

[97] See Decision of the Arbitration Court of Turkmenistan in Case No. 51 dated 1 Apr. 2010 (with English translation), Exhibit SQ-35; Decision of the Arbitration Court of Turkmenistan regarding penalty fees under Contract No. TNG-I 10 dated 10 Mar. 2010 (with English translation), Exhibit AI-68; Decision of the Arbitration Court of Turkmenistan regarding penalty fees under Contracts No. TNG-I 08 and TNG-I 16 dated 22 Apr. 2010 (with English translation), Exhibit AI-89.

seeking relief thereunder and/or under the Treaty, given that the Contracts at issue had already been terminated by Turkmen courts. In other words, the subject matter, or the fundamental basis, of the dispute had already been litigated "before the courts of justice of the Party that is a party to the dispute."[98]

263. In light of the above, the Tribunal concludes that it would not be appropriate now to require that the Claimant first submit the present dispute to local courts, given that the Contracting Parties and/or the General Prosecutor have already had recourse to the local courts, and given that all of the still ongoing contracts have been terminated by Turkmen courts. Consequently, the Tribunal finds that the Claimant's claims must be considered admissible in the circumstances. This finding is without prejudice to the Tribunal's determination as to whether the Claimant's claims should be characterized as treaty claims or contract claims, which is a separate issue and will be addressed in Section 5.4 below.

264. In view of this finding, the Tribunal need not consider the Claimant's argument that it should be allowed to rely on the MFN clause in Article II(2) of the BIT to circumvent the domestic litigation requirement.

5.3 Has the Claimant made an "investment" within the meaning of Article 25 of the ICSID Convention and Article I(2) of the BIT?

5.3.1 The Respondent's position

265. The Respondent contends that the Claimant must meet the "double keyhole" test of showing that it has made an "investment" under both Article 25 of the ICSID Convention and Article I(2) of the BIT, and that it has failed to satisfy either part of the test.

5.3.1.1 Article 25 of the ICSID Convention

266. According to the Respondent, the criteria set out by the tribunal in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* ("***Salini***")[99] "constitute cumulative

[98] Art. VII(2) of the BIT.

[99] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, Exhibit RA-36, para. 52.

requirements or 'essential characteristics' that must be present for an 'investment' to qualify as such under Article 25 of the ICSID Convention."[100] Therefore, in order to show that it has made an "investment" under Article 25 of the ICSID Convention, the Claimant must show (1) that it took on an investment risk; (2) that it made a contribution to Turkmenistan; (3) that its alleged investment was of a certain minimum duration; and (4) that its alleged investment made a contribution to Turkmenistan's economic development.

267. The Respondent argues that the Claimant's activities in Turkmenistan do not meet any of these criteria.

268. First, the Claimant did not take on any investment risk, as its compensation under the Contracts did not depend even in part on the operation of the facilities they related to. The Contracts were therefore "free-standing"[101] construction contracts, lacking any investment risk on the part of the Claimant. The various risks which the Claimant alleges it undertook under the Contracts, such as the risk of accident or damage to property, unspecified risks relating to the duration of the Contracts, the risk that the Respondent's authorities would unilaterally alter or terminate the Contract, or the risk of expropriation of the Claimant's machinery and equipment, are all ordinary commercial, legal, or political risks which do not qualify as investment risks under the *Salini* test.

269. Second, the Claimant did not make any contributions to Turkmenistan, as "free-standing" construction contracts of the kind concluded by the Claimant "do not entail contributions."[102] In particular, "the mere allocation of resources [such as employees and equipment] to the performance of contractual obligations does not constitute a contribution."[103] In addition, the Claimant did not make any contribution of "know-how," as there was no "actual transfer of intellectual property or technology to the host State."[104]

[100] Respondent's Reply on Jurisdiction, para. 267.

[101] Respondent's Reply on Jurisdiction, para. 270.

[102] Respondent's Reply on Jurisdiction, para. 281.

[103] Respondent's Reply on Jurisdiction, para. 277.

[104] Respondent's Reply on Jurisdiction, para. 278.

Contrary to the Claimant's arguments, the advance payments under the Contracts, as well as the bank guarantees it had to provide, also did not constitute contributions.

270. Third, the Respondent contends that, in assessing whether the minimum duration for an investment under the *Salini* test, which is "2 to 5 years,"[105] is met in this case, the Tribunal should take into account the contractually specified durations of the Contracts, which were all under two years, with the exception of one which had a duration of exactly two years. Even taking into account warranties and extensions, the durations of all the Contracts were under four years, and therefore fell into what the Respondent considers to be the "gray area" under the *Salini* test.[106] If it takes into account these longer "total" durations, the Tribunal should in any event assess the duration criterion of the *Salini* test in light of the other criteria to reveal the "true nature of the operation,"[107] and find that the duration criterion has not been met.

271. Fourth, the Respondent argues that the Claimant's activities did not contribute to Turkmenistan's economic development, as they did not have the "productive purposes" or provide the "large-scale benefits" to the development of the host State mentioned in the objectives of the World Bank and the Operational Regulations of the Multilateral Investment Guarantee Agency, which should both "inform the meaning of the notion of contribution to the host State's development" under the *Salini* test.[108] The Respondent further alleges that Mr İçkale recognized in his witness statement that the Claimant's activities did not contribute to Turkmenistan's economic development.[109]

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[105] *Salini*, Exhibit RA-36, para. 54.

[106] Respondent's Counter-Memorial, para. 360; Respondent's Reply on Jurisdiction, para. 284.

[107] Respondent's Reply on Jurisdiction, para. 285, quoting Bruno Poulain, "L'investissement international: définition ou définitions", in Philippe Kahn and Thomas W. Wälde, eds., *New Aspects of International Investment Law*, 2007, Exhibit RA-54, para. 8.

[108] Respondent's Counter-Memorial, paras. 362-366, referring to Omar E. Garcia-Bolivar, "Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach", 2(1) Trade Law & Development 145 (2010), Exhibit RA-70, p. 155; Multilateral Investment Guarantee Agency Operational Regulations, amended through 4 Feb. 2011, Exhibit RA-71, para. 3.04.

[109] Witness Statement of Ozan İçkale, p. 13.

5.3.1.2 Article I(2) of the BIT

272. The Respondent further argues that the Claimant has failed to show that it has made an "investment" within the meaning of Article I(2) of the BIT, which defines the term as "any type of assets," of which it sets out various examples.[110]

273. In particular, the Claimant's claims for money and the value of contractual performance do not constitute investments under Article I(2)(ii) of the BIT, which refers to "returns reinvested, claims to money or any other rights to legitimate performance having a financial value related to an investment." First, such claims do not constitute "assets" within the meaning of the *chapeau* of Article I(2) of the BIT. According to the Respondent, the term "assets" refers to property rights, and does not include "every thing of economic value" as alleged by the Claimant.[111] Second, the Claimant cannot show that such claims are "related to an investment."

274. In addition, contrary to the Claimant's arguments, its "designs, projects, technical drawings and processes and know-how" do not constitute investments under Article I(2)(iv) of the BIT, which refers to "copyright, industrial and intellectual property rights, such as patents, licenses, industrial designs, technical processes; as well as trademarks, so-called 'goodwill', know-how and other similar rights […]."[112] Payment for these elements was included in the price of the Contracts, and therefore form part of the Claimant's claims for money and the value of performance, which do not constitute an investment. Furthermore, "know-how" under the BIT "refers to protected knowledge, such as trade secrets, that has economic value and may be subject to legal protection or licensing regimes," and not to any skills that the Claimant's employees may have.[113]

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[110] Respondent's Counter-Memorial, para. 373, referring to the Respondent's English translation of the Russian version of the BIT at Exhibit RA-1.

[111] Respondent's Reply on Jurisdiction, para. 289, referring to Claimant's Reply, para. 181.

[112] Respondent's Counter-Memorial, paras. 385-386, referring to the Claimant's Letter to the Tribunal dated 19 Aug. 2011, Exhibit R-486, p. 8, and the Respondent's English translation of the Russian version of the BIT at Exhibit RA-1.

[113] Respondent's Reply on Jurisdiction, para. 298.

275. Finally, according to the Respondent, the Claimant does not have a "business concession […] conferred by law or by contract" within the meaning of Article I(2)(v) of the BIT, which requires the delegation of public functions to an investor, and an involvement on the part of the investor in the operation of a public service or the exploitation of natural resources. The Contracts do not entail the exercise of public functions, even though they were awarded by means of Presidential Decrees. The Claimant also was not involved in the operation of the facilities it built.

5.3.2 The Claimant's position

276. The Claimant argues that it has made an investment within the meaning of both Article 25(1) of the ICSID Convention and Article I(2) of the BIT.

5.3.2.1 Article 25 of the ICSID Convention

277. The Claimant takes the position that the criteria in the *Salini* test should not be applied as strict jurisdictional requirements. It argues that in most of the relevant ICSID jurisprudence, the criteria were used merely as "typical characteristics" or features of an investment. Indeed, the ICSID Convention does not contain a definition of the term, and the *travaux préparatoires* show that the attempts to include a fixed definition in the Convention failed.

278. The Claimant further argues that, in any event, the criteria in the *Salini* test are met in the present case.

279. First, it contends that neither the ICSID Convention nor the *Salini* test specify the type of risk that must be assumed by an investor, and that it is well established in ICSID jurisprudence that construction contracts, including those which do not involve the operation of the constructed facilities by the contractor, are considered to be investments. The Claimant alleges that it assumed a number of major risks in relation to the Projects, including the risks of unilateral alteration or termination of the Contracts by the Turkmen authorities, or of expropriation of its machinery and equipment. Other risks it assumed include the risks of extensions of time, increases in labor costs, accidents or damage to property, problems relating to the coordination of different projects, and the one year defect liability periods.

280. Second, the Claimant argues that it made substantial contributions, including by providing the know-how of its designers, engineers, and builders, mobilizing its employees and equipment and machinery, establishing a branch and opening bank accounts in Turkmenistan, and providing first demand bank guarantees in consideration for advance payments. It contends that it is well established in ICSID jurisprudence that contributions "made in money, in kind and in industry" by construction contractors constitute substantial contributions.

281. Third, with respect to duration, the Claimant argues that the Tribunal should take into account the full duration of the Contracts, including the warranty periods, which vary from 26 to 36 months. As a result, the Contracts meet the two to five year minimum requirement set out in the *Salini* test.

282. Fourth, according to the Claimant, the Contracts relate to important infrastructure projects which the Respondent itself considered to be vital contributions to its economy, and many ICSID tribunals have found that major construction projects constitute contributions to the host State's economic development. The Claimant further notes that, in any event, the necessity and appropriateness of a requirement of a contribution to the host State's economic development has been questioned by several ICSID tribunals.

5.3.2.2 Article I(2) of the BIT

283. According to the Claimant, the notion of "investment" under Article I(2) of the BIT is defined broadly, as the provision refers to "every kind of asset."[114]

284. The Claimant argues in particular that a number of its claims constitute "claims to money or any other rights to legitimate performance having financial value related to an investment" within the meaning of Article I(2) of the BIT, namely its claims for:

> "*(i) payment for the major construction works, (ii) payment of the cost of additional works undertaken upon the request of Respondent, (iii) compensation for losses incurred as a result of delays attributable to Respondent, (iv) payment of interest and banking*

[114] The Claimant relies on the wording of the provision in the English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

commissions accrued on the loans which were taken out due to delayed payments during the execution of the Construction Contracts, (v) damages and losses for the wrongful encashment by Respondent of several bank guarantees, and (vi) the return of its machinery and equipment that were illegally confiscated […] ."[115]

285. Contrary to the Respondent's position, these claims are "related to an investment" as they are "directly related to [the Claimant's] undertaken construction projects, which were registered as investment projects in Turkmenistan pursuant to the relevant Presidential Decrees awarding these projects to Claimant."[116]

286. In addition, the Claimant contends that its "contribution in terms of [know-how], equipment and qualified personnel," as well as its designs and technical drawings, amount to investments under Article I(2)(iv) of the BIT.[117] It argues that its designs and drawings "are components of construction works assumed by Claimant," and are therefore "industrial and intellectual property rights."[118] It further alleges that "[d]esigners, engineers and builders are […] key sources of technical expertise and know-how."[119]

287. Finally, the Claimant contends that business concessions within the meaning of Article I(2)(v) of the BIT were conferred on the Claimant through the Contracts and the Presidential Decrees by which the Contracts were awarded to the Claimant. According to the Claimant, "any concession granted by the law or [by] contract that entitles the investor to carry out any activity, which creates an economic value in the host states should be considered as a business concession."[120] The Claimant also disputes the Respondent's assertion that it had not taken on a public function, arguing that the Projects "directly served the development of [the] Turkmenistan economy and [the] Turkmen people's social and economic welfare."[121]

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[115] Claimant's Rejoinder on Jurisdiction, para. 248.

[116] Claimant's Rejoinder on Jurisdiction, para. 247 (emphasis omitted).

[117] Claimant's Rejoinder on Jurisdiction, paras. 249-252.

[118] Claimant's Rejoinder on Jurisdiction, para. 249 (emphasis omitted).

[119] Claimant's Rejoinder on Jurisdiction, para. 250 (emphasis omitted).

[120] Claimant's Reply, para. 196.

[121] Claimant's Rejoinder on Jurisdiction, para. 254.

288. The Claimant further appears to argue that the Contracts should be considered to be business concessions given that they were registered as investments pursuant to Article 19(3) of the Turkmen Foreign Investment Law of 2008, which provides that investors shall enjoy "concessions established by this Law" upon registration.[122]

5.3.3 The Tribunal's analysis

289. The Tribunal notes that, for purposes of its jurisdiction *ratione materiae* over the dispute, it must be satisfied that the Claimant has made an "investment" within the meaning of Article 25 of the ICSID Convention and Article I(2) of the BIT. The Tribunal agrees with the Parties that the *Salini* tribunal's decision provides a useful starting point in this determination. The relevant passage in the *Salini* tribunal's decision is worth quoting:

> "*The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction […]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.*
>
> *In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.*"[123]

290. The Tribunal agrees that the three criteria identified by the *Salini* tribunal – contribution of capital, certain duration and assumption of risk – are not independent or free-standing criteria but interdependent in the sense that a commitment of capital to a business venture – "contribution" of capital – implies, in itself, a certain duration for the contribution in question and a risk of loss of the capital contributed. Such a venture need not be incorporated, although it may be, and indeed participation in an incorporated business venture is expressly mentioned in the BIT as the first example in a non-exhaustive list of what may constitute an "investment" under the BIT.[124] The required capital contribution

[122] Turkmen Foreign Investment Law of 2008, Exhibit C-108 (Reply).

[123] *Salini*, Exhibit RA-36, para. 52.

[124] Art. I(2)(i) of the BIT (listing "shares, stocks or any other form of participation in companies" as examples of the types of assets an investment may cover; see English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply)).

may be made in different forms, including in the form of any of the assets listed in Article I(2) of the BIT.

291. The Tribunal is less convinced that contribution to the economic development of the host State should be considered an element of the definition of investment, either under Article 25 of the ICSID Convention or Article I(2) of the BIT. While the Preamble of the ICSID Convention does mention "the need for international cooperation for economic development, and the role of private international investment therein" as one of the aims of the Convention, it cannot be inferred from this general aim that each and every private foreign investment must, on its own, make a significant or even measurable contribution to the economic development of the economy of the host State. Such contribution – which should not be confused with the contribution of capital to a business venture, which is part and indeed forms the core of the definition of "investment" – is rather the role of foreign private investment as a whole, or in aggregate, which is indeed what the Preamble provides, when read with care ("the role of private international investment therein," *i.e.*, in the economic development of the host State). The Preamble does not refer to any particular individual investment; it refers to the *activity* of private international investment as a whole.

292. The Tribunal notes that it is undisputed in the present case that the Claimant opened a branch office in Turkmenistan in 2004 and subsequently, during the period between 2005 and 2009, engaged in fifteen construction projects in the country. The Claimant alleges that the total value of these projects, including the Projects at issue in this arbitration, amounted to over USD 160 million and EUR 147 million. The Claimant also alleges that it imported machinery and equipment into Turkmenistan with a total value of approximately USD 14 million. The Respondent does not appear to specifically dispute these amounts, however the Tribunal's determination of whether an investment has been made in the present case does not turn on the precise value of the Contracts or the amount of the Claimant's expenditures, but rather on whether the Claimant made a capital contribution to the venture in question.

293. The Tribunal finds that the Claimant effectively established a business venture in Turkmenistan in 2004, by way of opening a branch office and engaging in a series of

substantial construction projects. Although the Claimant's business venture in Turkmenistan was not incorporated, it certainly could have been, in view of its duration and the number and the scale of the projects, and the need for their management and coordination. The evidence also shows that the Claimant has committed significant assets of its own, in the form of money, machinery and equipment, to perform the Projects. In the circumstances, the Tribunal does not find it appropriate to consider each of the Contracts concluded by the Claimant individually when determining whether the Claimant has made an "investment" in Turkmenistan; they form part of a whole, which is the Claimant's business venture in Turkmenistan. In view of the scale, duration and number of the projects, and the commitment of capital by the Claimant in their performance, the Tribunal concludes that the Claimant must be considered to have made an "investment" in Turkmenistan within the meaning of both Article 25 of the ICSID Convention and Article I(2) of the BIT.

5.4 Are the Claimant's claims treaty claims or contract claims?

5.4.1 The Respondent's position

294. The Respondent argues that it is widely recognized that tribunals constituted under investment treaties do not have jurisdiction over purely contractual claims, unless expressly provided for. In the present case, the claims advanced by the Claimant "do not truly constitute violations [of the BIT]," but rather "stem from differences over the contracting parties' interpretation and enforcement of their rights and obligations under the terms of the [C]ontracts,"[125] and therefore should be submitted to the Arbitration Court, in accordance with the dispute resolution provisions of the Contracts.

295. The Respondent contends that the Tribunal, in deciding whether it has jurisdiction, cannot rely on the Claimant's characterization of its claims, but must objectively assess whether the "fundamental basis of the claims" is the BIT or the Contracts.[126] Given that the merits have been fully briefed in this case, the Claimant is not entitled to any deference or benefit of the

[125] Respondent's Reply on Jurisdiction, paras. 231, 233.

[126] Respondent's Reply on Jurisdiction, para. 236.

doubt as to the basis of its claims, and the Tribunal may look to all of the evidence and pleadings submitted by the Parties, including as to the merits.

296. According to the Respondent, the Tribunal must assess whether it has jurisdiction over each claim individually.

297. It argues first that many of the Claimant's claims are "patently contractual disputes on their face,"[127] including the Claimant's claims (1) that it is entitled to compensation for additional work which the State Expert Review and other regulatory authorities required it to perform, which depends on whether or not the Claimant bore the risk of regulatory requirements under the Contracts; (2) that delay penalties were improperly applied against it, which would have to be decided on the basis of the contractual provisions on penalties; (3) that the Contracting Parties began operating certain facilities before handover under the Contracts, which would have to be decided in accordance with the relevant contractual provisions; (4) that certain Contracts were wrongfully terminated, which depends on whether the terminations were justified under the Contracts; (5) that the Contracting Parties improperly called on bank guarantees, which depends on the relevant terms of the Contracts and of the guarantees; (6) that the amendment of the contractual financing provisions was imposed on the Claimant, which should be addressed in the contractually agreed forum; and (7) that the Claimant's equipment in Turkmenistan was attached or blocked in Turkmenistan as a result of attachment proceedings initiated by the Contracting Parties to recoup unpaid delay penalties, which depends on whether the penalties imposed were justified under the Contracts.

298. Other claims advanced by the Claimant, do not, in the Respondent's view, find "any support in fact or law," and merely "purport to implicate sovereign authority," such that they should be "dismissed as frivolous."[128]

299. First, the Claimant's claims that the President's approval was required for every payment made to it after the abolishment of the State Fund, leading to delays in payment, and that it was entitled to expect that the State Fund would be replaced by a similar fund, have no basis

[127] Respondent's Reply on Jurisdiction, para. 244.

[128] Respondent's Reply on Jurisdiction, para. 245.

as there was never any such requirement for presidential approval or any obligation to replace the State Fund. Second, the Claimant's claim that the Tax Office improperly froze its accounts is unsupported by any evidence that the Tax Office committed any improper acts or violated the Tax Code, or that the Claimant suffered any adverse effects. Third, the Claimant's claims that it was not notified or allowed to defend itself in several hearings before the Turkmen courts are false, as it was represented by authorized representatives. Fourth, the Claimant's claims that its employees were harassed by the Turkmen authorities are unsupported by documentary evidence. Fifth, the Claimant has failed to show that any late registration by the Turkmen authorities of the annexes to the Contracts was caused by a sovereign act or omission, and not the Claimant's own oversight.

300. Finally, the Respondent argues that the Tribunal should give effect to the forum selection clauses in the Contracts, which require the submission of disputes arising from the Contracts to the Turkmen courts. The Tribunal should therefore decline jurisdiction over claims arising from the Contracts.

5.4.2 The Claimant's position

301. In response to the Respondent's objection as to the nature of the claims in this arbitration, the Claimant argues that "[t]here is well established doctrine and [investment arbitration] case law in which tribunals held that a claim should not be deprived of treaty protections just because it relates to an investment made on the basis of a contract," or because an alleged breach of a treaty also amounts to a breach of contract.[129] The Claimant further argues that the Tribunal should, for the purposes of jurisdiction, defer to the Claimant's own characterization of its claims.

302. According to the Claimant, its claims "directly arise from the acts and omissions of [the] Respondent which resulted in unjust state intervention and violated the BIT."[130] The Respondent "directly intervened" in the Claimant's projects "through its various State

[129] Claimant's Reply, paras. 256-257, referring *inter alia* to Christoph Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered", in Todd Weiler, *International Investment Law and Arbitration* (2005), Exhibit CA-082 (Reply), p. 295.

[130] Claimant's Reply, para. 210.

authorities," and actions taken by the Contracting Parties were in fact "triggered by way of instructions given by various State Authorities."[131]

303. In particular, the Claimant argues that:

- The Respondent intervened in the Claimant's investments by abolishing the State Fund, which was responsible for making payments under the Contracts, by means of a Presidential Decree,[132] and by requiring subsequent payments to be individually authorized by the President of Turkmenistan;

- After the abolition of the State Fund, the Respondent forced the Claimant to agree to less favorable payment terms under the Contracts, which had serious financial consequences for the Claimant; the Claimant was, in this respect, discriminated against, as another contractor on the Avaza Canal Project continued to benefit from an unchanged payment mechanism;

- The Respondent's regulatory authorities delayed in approving and registering the Technical Annexes to the Contracts, which prevented the Claimant from completing the Projects on time;

- The State Expert Review demanded additional works outside the scope of the Contracts, namely an increase in the surface areas of some of the Projects and a change of the site of one of the Projects. In respect of the Avaza Canal Project, the State Expert Review also demanded additional machinery and equipment, additional piles, and an increase in the width of the canal;

- The President of Turkmenistan, acting through the Council of Ministers, decided on the Claimant's requests for extensions of time, which were "useless and not in favour

[131] Claimant's Rejoinder on Jurisdiction, paras. 264-265.

[132] Decree of the President of Turkmenistan No. 9477 with enclosures, dated 8 Feb. 2008, Exhibit R-482.

of Claimant."[133] In addition, despite the extensions of time granted, the Claimant was charged with delay penalties on the instructions of the Council of Ministers;

- The Contracting Parties in some Projects took possession of the works and transferred them to the State authorities for which they were built before the State Acceptance Committee had signed the handover minutes, as required by the handover procedure under the Contracts. In addition, the State Acceptance Committee abused its power by failing to sign the handover minutes even though the works were completed, preventing the Claimant from receiving the relevant progress payments;

- The Contracting Parties' unjust termination of some of the Contracts was in fact instructed by the Cabinet of Ministers;

- The Respondent "unduly encashed"[134] the advance payment guarantees provided by the Claimant under the Contracts;

- The Claimant's machinery and equipment was confiscated by the Respondent on the basis of unjust decisions by the Turkmen courts imposing delay penalties against the Claimant;

- The blocking of the Claimant's bank accounts by the Turkmen tax authorities due to a failure to make the required VAT payments in relation to the Contracts was contrary to a Regulation of the Cabinet of Ministers which provided that the Contracting Parties were solely responsible for making those payments; and that

- The Turkmen authorities coerced and harassed the Claimant's employees through arbitrary measures and threats, including unjust detention, raids by the Turkmen police, and the termination of travel visas and work permits.

304. The Claimant's various claims are each summarized in more detail in Section 7 and 8 below on the merits.

[133] Claimant's Rejoinder on Jurisdiction, para. 273.

[134] Claimant's Rejoinder on Jurisdiction, para. 273.

305. The Claimant also appears to argue that actions by the State authorities of the Respondent which are in breach of the Presidential Decrees by which the Projects were awarded to the Claimant amount to breaches of the BIT.

5.4.3 The Tribunal's analysis

306. The Tribunal notes that its jurisdiction is limited to claims arising under the Turkey-Turkmenistan BIT and does not extend to claims arising under the Contracts, which each contain a dispute resolution clause referring all disputes arising thereunder to the Arbitration Court of Turkmenistan.[135] The issue on which the Parties disagree is whether any of the Claimant's claims may be characterized as treaty claims, *i.e.*, claims arising under the Treaty, or whether they should rather be characterized as contract claims which, as such, fall within the jurisdiction of the Arbitration Court under the terms of the Contracts.

307. The Tribunal further notes that the Claimant has brought the present arbitration against the State of Turkmenistan and not the Contracting Parties. Moreover, while it is undisputed that some of the Contracting Parties are themselves State organs (specifically, the Ministry of Economy and Finance, Ahal province, and Lepab province) and all of them may be considered State entities in the broad sense of this term as they are owned and/or controlled by the State, the Claimant's claims are not directed against the Contracting Parties but against various State organs, in particular the President of Turkmenistan, the Cabinet of Ministers, the Supreme Chamber of Control and the Central Bank, which allegedly repeatedly intervened in the performance of the Contracts. The Claimant specifically confirmed this at the Hearing.[136]

308. In these circumstances, the issue of whether the Claimant's claims amount to treaty claims or contract claims does not arise as an issue of legal principle; it could only arise, as such, if the Claimant complained of breaches of the Treaty that had allegedly been committed by the Contracting Parties. The Tribunal will analyze the Claimant's claims accordingly, as

[135] For instance, Art. 3.3 of the Avaza Canal Contract, Exhibit R-441, provides as follows: "Should the parties fail to reach an agreement [through amicable negotiations], disputes shall be referred to the Arbitration Court of Turkmenistan, the decision of which shall be binding upon both parties."

[136] Hearing Transcript, Day 1, pp. 122:16-21, 193:4-194.

claims directed against various State organs and not the Contracting Parties, even in instances in which the Contracting Party is a State organ. To the extent that the issue arises as to whether a particular claim is directed against a Contracting Party or a third party State organ, or is properly to be treated as a claim under a contract rather than under the BIT, the Tribunal will consider as necessary whether the claim in question constitutes, in substance, a treaty claim or a contract claim in that specific context.

309. In this connection, the Tribunal also notes that the Contracts provided that various State organs would play a role in the approval and performance of the Contracts. Thus, the Contracts specifically provided that they were concluded pursuant to a decree of the President of Turkmenistan, as their conclusion required approval by the President.[137] Each of the Contracts also envisaged that they would enter into force from the date of their registration with the State Commodity and Raw Materials Exchange of Turkmenistan, and in some instances also with the Ministry of Economy and Finance, which are both State organs.[138] They also provided that the design and construction documentation (the "Working Project") would be approved by the State Expert Review, or "Expertiza,"[139] and that the handover for operation would be approved by the State Acceptance Committee.[140]

310. Consequently, as the Contracts themselves envisaged that certain State organs would be involved in the performance of the Contracts, such involvement cannot, without more, be considered evidence of illegitimate State interference. The Claimant must prove that the State organs in question went beyond the role envisaged for them in the Contracts, and that their conduct amounted to a breach of the Treaty. The Tribunal will consider these issues as necessary together with the merits of the Claimant's claims.

[137] See, e.g., the Preamble of the Avaza Canal Contract, Exhibit R-441, which states that the Contract was concluded "[i]n order to implement the Decree of the President of Turkmenistan No. 9129 dated October 21, 2007."

[138] See, e.g., Art. 5.1 of the Avaza Canal Contract, Exhibit R-441.

[139] See, e.g., Art. 6.1, 16.2.2, and Annex A/1, Art. 20 of the Avaza Canal Contract, Exhibit R-441.

[140] See. e.g., Art. 20.2 of the Avaza Canal Contract, Exhibit R-441.

6 AVAILABILITY OF THE SUBSTANTIVE PROTECTION STANDARDS INVOKED BY THE CLAIMANT

311. The Claimant advances claims under the BIT alleging breaches of various substantive protection standards, including the protections available under the fair and equitable treatment ("**FET**"), full protection and security ("**FPS**"), non-discrimination and umbrella clause standards, as well as protection against unlawful expropriation. The Respondent argues, however, that with the exception of protection against unlawful expropriation, the BIT does not contain any of these protection standards, and therefore the Claimant cannot invoke them.

312. In response, the Claimant advances a number of theories on the basis of which it alleges it can invoke the FET, FPS, non-discrimination, and umbrella clause standards. First, it argues that it can invoke these standards by operation of the MFN clause in Article II of the BIT and the non-derogation clause in Article VI of the BIT. Second, it argues that the Preamble of the BIT gives rise to an FET obligation which is binding on the Respondent. Finally, it contends that it can invoke the FET, FPS, non-discrimination, and umbrella clause protections on the basis of Turkmenistan's "international customary practice" of granting these protections to foreign investors.

313. The Tribunal addresses each of the Claimant's arguments in turn below.

6.1 Can the Claimant invoke the FET, FPS, non-discrimination, and umbrella clause protections through the MFN clause in Article II of the BIT or the non-derogation clause in Article VI of the BIT?

6.1.1 The Claimant's position

314. The Claimant argues that, by operation of the MFN clause in Article II of the BIT and the non-derogation clause in Article VI of the BIT, it can rely on the FET, FPS, non-discrimination and umbrella clause protections set out in other bilateral investment treaties

concluded by Turkmenistan, including those with Egypt,[141] Bahrain,[142] and the United Kingdom.[143]

315. According to the Claimant, the term "treatment" in Articles II and VI of the BIT, when interpreted in good faith under Article 31 of the Vienna Convention, should be understood to cover at least the substantive protections provided to other foreign investors. In support of its position, the Claimant relies on the tribunal's *prima facie* determination on the issue in *Bayındır v. Pakistan*,[144] as well as in *Rumeli v. Kazakhstan*, in which the tribunal accepted an agreement by the parties that the FET standard could be imported from another bilateral investment treaty on the basis of an MFN clause.[145] It further argues that any matters, including substantive protections, which are not expressly excluded from the scope of the MFN clause in Article II(4) of the BIT, should be considered to be within its scope.

316. The Claimant also asserts that there is no legal basis for the Respondent's argument that an attempt to import an umbrella clause through an MFN clause would be impermissible because it would constitute a dramatic expansion of the State's obligations. It argues that the various cases relied on by the Respondent are inapposite, as they only address the issue of whether a contractual claim can be elevated to an investment claim. The Claimant relies instead on *EDF v. Argentina*, in which the tribunal allowed the claimants to invoke an MFN

[141] Art. 3, Agreement between the Republic of Turkmenistan and the Arab Republic of Egypt Concerning the Reciprocal Promotion and Protection of Investment dated 23 May 1995, Exhibit C-078 (Reply).

[142] Art. 2.2, Agreement between the Republic of Turkmenistan and the Kingdom of Bahrain Concerning the Reciprocal Promotion and Protection of Investment dated 9 Feb. 2011, Exhibit C-077 (Reply).

[143] Art. 2(2), Agreement between the Republic of Turkmenistan and the United Kingdom of Great Britain and Northern Ireland concerning the Reciprocal Promotion and Protection of Investment dated 15 June 1999, Exhibit C-084 (Reply).

[144] *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 Nov. 2005, Exhibit CA-004 (Reply), paras. 230-232.

[145] *Rumeli Telecom A.S. and Telsim Mobile Telekominikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Exhibit CA-002 (Reply), paras. 591-592.

clause to rely on the umbrella clauses in two other bilateral investment treaties concluded by the host State.[146]

317. In response to the question raised by the Tribunal after the Hearing as to the interpretation and application of the term "similar situations" in Article II(2) of the BIT, and its impact on the meaning and effect of the provision, the Claimant argues that "the application of the 'similar situation' test in practice works differently depending on what claimants are seeking from the MFN clause."[147] According to the Claimant, in situations in which claimants have merely invoked the MFN clause to attract the benefits of substantive protections available under other investment treaties between the host State and third States, "tribunals have been satisfied with the fact that claimant qualifies as an 'investor' under the basic treaty and have not gone into actually comparing the investor with another foreign investor from a third country."[148]

6.1.2 The Respondent's position

318. The Respondent disputes that the Claimant can rely on either Article II or Article VI of the BIT to import substantive protections from other bilateral investment treaties.

319. The Respondent argues in particular that Article VI of the BIT is not a type of supplementary MFN clause, as the Claimant appears to contend, but rather a non-derogation clause aimed at managing conflicts between treaties. It cannot be read to impose any additional substantive obligations on the host State.

320. As to the MFN clause in Article II of the BIT, the Respondent takes the position that it was not designed or intended to import substantive protections from other bilateral investment treaties.

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[146] Claimant's Reply, para. 349, referring to *EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, Exhibit CA-096 (Reply), paras. 925-934.

[147] Claimant's PHB, para. 99 (emphasis omitted).

[148] Claimant's PHB, para. 100 (emphasis omitted).

321. According to the Respondent, in order to show a breach of the MFN clause, the Claimant must demonstrate two elements, namely (1) that more favorable treatment was accorded to investments of nationals or investors from countries other than Turkey; and (2) that these investments were in a "similar situation" to the Claimant's investments in Turkmenistan. The Respondent contends that the Claimant would have to identify "an actual investment of an actual investor, in an actual 'similar situation,' who is actually receiving the allegedly more favorable treatment."[149] In other words, the purpose of Article II(2) is to "address actual measures taken by the host State vis-à-vis the investments."[150] According to the Respondent, the relevant factors to be taken into account in such a comparative, fact-based analysis of investments of investors that are in "like circumstances" are "(i) whether the investors are similarly situated, in like circumstances; (ii) whether the treatment accorded to the host State's national or third State's national was in fact more favorable than that of the [C]laimant; (iii) whether the difference was based on or caused by nationality; and (iv) whether there was an objective, rational basis or policy justifying the difference in treatment."[151]

322. Had the State parties intended to allow the importation of substantive protections through the MFN clause, they would not have included the "in similar situations" requirement and instead would have included broader language, such as a reference to "all matters" or an express reference to "treaty obligations," as contained in the MFN clause at issue in the *Ambatielos* case or that contained in the Energy Charter Treaty.[152]

323. The Respondent further argues that even if the MFN clause in Article II of the BIT could be used to import provisions from other treaties, it cannot be used to import substantive protections which are "completely absent" from the BIT.[153] In support of its position, the Respondent relies *inter alia* on the award in *Hochtief v. Argentina*, in which the tribunal

[149] Respondent's Rejoinder, para. 89.

[150] Respondent's PHB, para. 81.

[151] Respondent's PHB, para. 80.

[152] *Ambatielos Case* (Greece v United Kingdom), Judgment, 19 May 1953, International Court of Justice Reports 10 (1953), Exhibit RA-121, p. 19; Art. 10(1), Energy Charter Treaty, 17 Dec. 1994, Exhibit RA-416.

[153] Respondent's Rejoinder, para. 94.

determined that the MFN clause at issue in that case was applicable only to the exercise of rights which already existed under the treaty in which the clause was contained.[154] It also argues that the tribunal's findings in the *Bayındır v. Pakistan* case relied on by the Claimant have not been followed in subsequent arbitral awards. In addition, contrary to the Claimant's position, the carve-outs listed in Article II(4) of the BIT relating to customs unions and taxation agreements do not constitute an exhaustive list of exclusions that permit the application of MFN treatment to everything else. Citing the *Kılıç* decision, the Respondent argues that the limitations in Article II(4) of the BIT "are addressed toward specific third-party agreements" and are not relevant for the interpretation of the term "treatment" in the MFN clause.[155]

324. According to the Respondent, importing an umbrella clause through the MFN clause would be a particularly dramatic expansion of the State's consent to arbitration in the BIT, as umbrella clauses can substantially expand the scope of application of an investment treaty. Relying in particular on *Noble Ventures v. Romania*,[156] the Respondent argues that arbitral tribunals have therefore taken a cautious approach to such clauses, requiring that the wording of a treaty show a clear intention to conclude an umbrella clause. This cautious approach should apply with even greater force to attempts to import such clauses through MFN clauses. Relying *inter alia* on *Salini v. Jordan*,[157] the Respondent adds that arbitral tribunals have generally declined to import provisions by means of an MFN clause that significantly extends the scope of their jurisdiction to issues not covered by the applicable arbitration clause.

325. The Respondent further contends that the Claimant has not identified an applicable treaty standard on which it can rely. Instead of relying on a single treaty that it deems to be "most favorable," the Claimant relies on a patchwork of treaties which would not represent

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[154] Respondent's Rejoinder, para. 95, referring to *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 Oct. 2011, Exhibit RA-418, para. 81.

[155] Respondent's Rejoinder, para. 99, referring to *Kılıç* Award, Exhibit RA-314, paras. 7.7.6-7.7.7.

[156] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005, Exhibit RA-092, para. 55.

[157] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 Jan. 2006, Exhibit RA-41, para. 117.

treatment granted to investors from any specific country. In any event, the treaties relied on by the Claimant do not provide a "more favorable" standard of treatment. In particular, Turkmenistan's bilateral investment treaty with the United Kingdom does not provide investors with recourse to ICSID arbitration in the absence of a separate agreement of the parties,[158] its treaty with Egypt only provides for UNCITRAL arbitration,[159] and its treaty with Bahrain, which was signed only in 2011 after this arbitration was initiated, states that it does not apply to disputes arising before its entry into force.[160]

6.1.3 The Tribunal's analysis

326. The Claimant seeks to import the FET, FPS, non-discrimination and umbrella clause protections from other investment treaties concluded by Turkmenistan with third States on the basis of Article II(2) and Article VI of the BIT. Article II(2) of the BIT, which forms part of a broader provision headed "Promotion and Protection of Investments," provides as follows:

> "*Each Party shall accord to these investments [i.e., investments permitted into its territory pursuant to Article II(1)], 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*."[161]

327. The provision thus establishes a requirement of both national treatment ("investments of its investors") and MFN treatment ("investments of investors of any third country"). In support of its argument that it may rely on substantive protection standards not specifically included in the BIT, the Claimant relies on the MFN treatment clause. The Respondent argues that the MFN clause does not allow such "importation," and that in any event the scope of application of the clause is limited to "similar situations." According to the Respondent, this limitation makes it clear that the determination of whether the investor is entitled to rely

[158] Art. 8(2), Agreement between the Republic of Turkmenistan and the United Kingdom of Great Britain and Northern Ireland concerning the Reciprocal Promotion and Protection of Investment dated 15 June 1999, Exhibit C-084 (Reply).

[159] Art. 9(2), Agreement between the Republic of Turkmenistan and the Arab Republic of Egypt Concerning the Reciprocal Promotion and Protection of Investment dated 23 May 1995, Exhibit C-078 (Reply).

[160] Art. 8, Agreement between the Republic of Turkmenistan and the Kingdom of Bahrain Concerning the Reciprocal Promotion and Protection of Investment dated 9 Feb. 2011, Exhibit C-077 (Reply).

[161] See English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

on the MFN clause requires a comparative, fact-based analysis of investments of investors that are in "like circumstances."

328. The Tribunal has carefully considered the meaning and effect of the MFN clause in Article II(2) of the BIT, in light of the general rule of treaty interpretation in Article 31 of the Vienna Convention. The ordinary meaning of the terms of the MFN clause, when read in their context and in light of the object and purpose of the Treaty, suggests that each State party to the Treaty agreed to treat investments made in its territory by investors of the other State party in a manner that is no less favorable than the treatment they accord in similar situations to investments by investors of any third State. Thus the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State. However, this obligation exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in "a similar situation." Conversely, the MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a "similar situation" to that of the investments of investors of third States; in such a situation, there is *de facto* no discrimination.

329. The terms "treatment accorded in similar situations" therefore suggest that the MFN treatment obligation requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less favorable than that accorded to investments of the investors of any third State. It follows that, given the limitation of the scope of application of the MFN clause to "similar situations," it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to "treatment accorded in similar situations," without effectively denying any meaning to the terms "similar situations." Investors cannot be said

to be in a "similar situation" merely because they have invested in a particular State; indeed, if the terms "in similar situations" were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause "treatment no less favourable than that accorded in similar situations […] to investments of investors of any third country" and "treatment no less favourable than that accorded […] to investments of investors of any third country." Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect.

330. As noted above, the Claimant also argues that any matters, including substantive protections, which are not expressly excluded from the scope of the MFN clause in Article II(4) of the BIT, should be considered to be within in its scope. The Tribunal is unable to agree with this argument. Article II(4) of the BIT merely confirms that the provisions of Article II do not have any effect on any agreements relating to customs unions or taxation.[162]

331. Nor is the Tribunal able to agree with the Claimant's argument that it can rely on Article VI ("Derogation") of the BIT to import substantive investment protection standards included in other investment treaties concluded by Turkmenistan.[163] Article VI does not address MFN treatment; it merely confirms that the BIT does not derogate from any other laws, regulations, administrative practices or procedures or adjudicatory decisions, international law obligations or investment agreements or authorizations that entitle investments of investors of either State party to "treatment more favorable than that accorded by this Agreement in like situations."[164] The provision does not entitle investors of either State

[162] According to Art. II(4), "[t]he 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."

[163] According to Art. VI, the BIT "shall not derogate from: (a) laws and regulations, administrative practices or procedures or administrative or adjudicatory decisions of either Party, (b) in[t]ernational legal obligations, or (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favourable than that accorded by this Agreement in like situations."

[164] See the English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

party to invoke such more favorable treatment accorded in other legal instruments, decisions, or practices; it merely confirms that they are preserved and not derogated from by the BIT.

332. The Tribunal concludes that the Claimant's argument that it is entitled to import substantive standards of protection not included in the Treaty from other investment treaties concluded by Turkmenistan, and to rely on such standards of protection in the present arbitration, must be rejected. When including the terms "similar situations" in Article II(2) of the BIT, the State parties must be considered to have agreed to restrict the scope of the MFN clause so as to cover discriminatory treatment between investments of investors of one of the State parties and those of investors of third States, insofar as such investments may be said to be in a factually similar situation. Nor do Article II(4) or Article VI of the BIT create any such entitlement. The Claimant is therefore only entitled to invoke those investment protection standards specifically included in the BIT. These standards include the entitlement to MFN treatment "in similar situations."

6.2 Does the Preamble of the BIT give rise to a binding FET obligation?

6.2.1 The Claimant's position

333. The Claimant argues that the Preamble of the BIT, according to which the Treaty was concluded on the basis of the State parties "agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources,"[165] imposes an FET obligation on the Respondent.

334. The Claimant further argues that it is entitled to invoke the FET standard on the basis of a passage in an explanatory note on Article II of the BIT in Turkey's Draft Law on Ratification of the BIT, which states that "[e]ach Party undertakes to provide fair and equitable treatment in its territory for the investments of the other Party's investor."[166] According to the

[165] See the English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

[166] Draft Law on Ratification of the BIT executed by and between Turkey and Turkmenistan including its Reasoning and the Reports of the Ministry of Foreign Affairs and the Planning and Budget Commissions (1/618) Turkish Grand National Assembly (Parliament) (O. Number 675), Exhibit C-093 (Reply).

Claimant, this passage "clearly indicates that [FET] is a binding obligation for both Contracting States."[167]

6.2.2 The Respondent's position

335. The Respondent takes the position that it is evident on the face of the BIT that the State parties chose not to include an FET obligation. According to the Respondent, the fact that FET is mentioned in the Preamble as being "desirable," but was then left out of the BIT's "obligatory clauses," demonstrates that the State parties "deliberately chose not to include it as a binding obligation."[168] It goes on to argue that while preambles provide context for interpreting the ordinary meaning of the treaty, they are hortatory provisions and do not create any binding legal commitments.

336. The Respondent further argues that the statement in the Explanatory Note accompanying the Turkish Draft Law on Ratification of the BIT that there is an FET obligation in Article II of the BIT is erroneous, and that it is undisputed that there is no such obligation in Article II. In any event, the Draft Law on Approval of Ratification of the BIT is in essence a unilateral statement by one of the State parties and cannot be used to read such an obligation into the Treaty.

6.2.3 The Tribunal's analysis

337. It is well-established in international law, including in the jurisprudence of investment treaty tribunals, that preambles to treaties are not an operative part of the treaty and do not create binding legal obligations which are capable of giving rise to a distinct cause of action.[169] While a preamble may, in certain circumstances, be relied upon in treaty interpretation as part of the context of the treaty and for the purposes of ascertaining its object and purpose, it cannot be relied upon as a source of independent or free-standing legal rights or

[167] Claimant's Reply, para. 306 (emphasis omitted).

[168] Respondent's Counter-Memorial, para. 427.

[169] See e.g. *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, Exhibit RA-104, para. 258; *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 Sept. 2008, Exhibit RA-105, para. 33; Makane Moïse Mbengue, "Preamble", in Rüdiger Wolfrum, ed., *Max Planck Encylopedia of Public International Law* (2008), Exhibit RA-99.

obligations. Accordingly, the Tribunal rejects the Claimant's argument that the reference in the Preamble to the BIT to "fair and equitable treatment of investment [being] desirable" creates a binding legal obligation on which the Claimant is entitled to rely to found a claim.

6.3 Can the Claimant invoke the FET, FPS, non-discrimination and umbrella clause protections on the basis of Turkmenistan's alleged "international customary practice"?

6.3.1 The Parties' positions

338. The Claimant takes the position that it can invoke the FET, FPS, non-discrimination, and umbrella clause protections as they have become "an international customary norm for Turkmenistan."[170] It identifies eight bilateral investment treaties concluded by Turkmenistan between 1994 and 2011, after the conclusion of the BIT with Turkey, all of which contain the FET standard and some of which also contain FPS, non-discrimination and umbrella clause standards.[171] Relying on *UPS v. Canada* and *Merrill & Ring v. Canada*, the Claimant argues that these treaties "are the obvious facts proving that [these protections] became an international customary norm for Turkmenistan through its State practice derived from these [t]reaties."[172]

339. The Respondent counters that the Claimant provides "no intelligible basis"[173] for arguing that the Respondent's customary international law obligations include FET, FPS, and umbrella clause protections. According to the Respondent, there is "no such thing as an 'international customary norm for Turkmenistan' that emerges solely through one State's BIT practice."[174] In addition, Turkmenistan's treaty practice is in any event not consistent, general and repetitive. For instance, of the eight treaties relied on by the Claimant, only three contain an umbrella clause. Turkmenistan also does not have any bilateral investment

[170] Claimant's Reply, para. 327 (emphasis omitted).

[171] Claimant's Reply, paras. 317-326, referring to Turkmenistan's bilateral investment treaties with France (Exhibit C-079 (Reply)), Pakistan (Exhibit C-081 (Reply)), the United Kingdom (Exhibit C-084 (Reply)), Egypt (Exhibit C-078 (Reply)), Germany (Exhibit C-080 (Reply)), the UAE (Exhibit C-083 (Reply)), Switzerland (Exhibit C-082 (Reply)), and Bahrain (Exhibit C-077 (Reply)).

[172] Claimant's Reply, para. 327, relying on *United Parcel Service of America v. Government of Canada*, Award on Jurisdiction, 22 Nov. 2002, Exhibit CA-106 (Reply), paras. 84-86; *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, 31 Mar. 2010, Exhibit CA-034 (Reply), paras. 193-210.

[173] Respondent's Rejoinder, para. 79.

[174] Respondent's Rejoinder, para. 79.

treaties with most of the world's countries, indicating that it never intended to be generally bound by the protections invoked by the Claimant.

340. The Respondent further argues that the Claimant has not in any event requested the Tribunal to find that the Respondent has breached customary international law, and that it could not do so under the BIT.

6.3.2 The Tribunal's analysis

341. The Tribunal finds no merit, legal or otherwise, in the Claimant's argument that it is entitled to invoke the FET, FPS, non-discrimination, and umbrella clause protections on the basis that they have become "an international customary norm for Turkmenistan." In any event, even assuming the FET, FPS, non-discrimination, and umbrella clause standards were to be considered as part of customary international law (and not only the customary international law of, or applicable to, Turkmenistan), which is an argument neither Party has made, there is no basis in the BIT for the Tribunal to apply any investment protection standards other than those specifically included in the BIT. The State parties' consent to arbitrate in Article VII of the BIT only covers disputes arising out of an alleged breach of these specific standards.

7 THE CLAIMANT'S EXPROPRIATION CLAIMS

7.1 Did the Respondent unlawfully expropriate the Claimant's contractual rights?

7.1.1 The Claimant's position

342. The Claimant argues that the termination of some of the Contracts, "through the instructions of [the] Cabinet of Ministers and the Decisions of the [TAC],"[175] amounts to an expropriation of its contractual rights, in breach of Article III of the BIT.

343. According to the Claimant, its contractual rights qualify as investments under Article I(2)(ii) of the BIT, which refers to "claims to money or any other rights to legitimate performance having financial value related to an investment," and under Article I(2)(v), which refers to "business concessions conferred by law or by contract."[176]

344. The Claimant argues in particular that the Ashgabat Cinema Contract, the Babarap Projects Contract, and the Kipchak Cultural Center Contract were terminated by the Contracting Parties on the instructions of the Cabinet of Ministers, as the Contracting Parties were required to obtain the authorization of the Cabinet of Ministers for the terminations. The Claimant relies in this respect on various letters in which the Contracting Parties sought the authorization of the Cabinet of Ministers to terminate contracts, or in which the Cabinet of Ministers granted such authorization.[177] According to the Claimant, the Cabinet of Ministers instructed the Contracting Parties to terminate the Contracts even though it was aware of the various problems the Claimant had encountered, including the late or non-payment of the progress payments it was owed, the Claimant's entitlement to time extensions, and the State Expert Review's requests that the volume of the works be increased.

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[175] Claimant's Reply, para. 1122.

[176] See English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply). At the Hearing, the Claimant referred to its expropriation claim as a claim for expropration of "claims to money" (Hearing Transcript, Day 1, pp. 207:5-207:11).

[177] See Letter from TNGS to Cabinet of Ministers dated 25 Aug. 2009, Exhibit C-134 (Reply); Letter from Cabinet of Ministers to TNGS dated 26 Aug. 2009, Exhibit C-135 (Reply).

345. The Claimant further argues that the Arbitration Court's decisions terminating the Avaza Canal Contract, Babarap Projects Contract, Kipchak Cultural Center Contract, Ashgabat Cinema Contract, Dayhanbank Contract, Abadan School Contract, and Abadan Kindergarten Contract, were "manifestly unjust"[178] and a denial of justice. According to the Claimant, the Arbitration Court "obviously disregarded the explicit facts which were in favor of Claimant and the contractual rights of Claimant, instead rejecting all claims of the representative of Claimant without stating any reason."[179] The Claimant contends that the decisions therefore constitute an expropriation of its contractual rights.

7.1.2 The Respondent's position

346. The Respondent disputes that the Claimant's contractual rights were expropriated as a result of the termination of a number of the Contracts.

347. The Respondent first argues that the termination decisions were not "taken pursuant to sovereign authority,"[180] but were rather taken by the Contracting Parties on the basis of delays and failures to comply with the Work Performance Schedules. The Claimant has not adduced any evidence that the Contracts were terminated on the instructions of the Cabinet of Ministers. The Respondent further argues that any knowledge of, or approval by, the Cabinet of Ministers of the Contracting Parties' decisions to terminate the Contracts "cannot transform those commercial acts into sovereign interference."[181] Indeed, as confirmed by the *Bayındır v. Pakistan* case, the mere involvement of a high-level official does not transform a commercial act into an exercise of sovereign authority.

348. With respect to the Claimant's arguments that the decisions of the Arbitration Court terminating certain Contracts amounted to expropriation, the Respondent contends that the

[178] Claimant's Reply, para. 1133.

[179] Claimant's Reply, para. 1134.

[180] Respondent's Rejoinder, para. 305.

[181] Respondent's Rejoinder, para. 306.

"only relevant question is whether these decisions amounted to a denial of justice."[182] The Respondent argues, however, that the Claimant is unable to establish any denial of justice.

349. The Respondent further argues that, in any event, the decisions to terminate certain Contracts "did not substantially deprive [the] Claimant of the economic substance of its projects."[183] According to the Respondent, the decisions did not give rise to a substantial decrease in the value of the Claimant's investment, as it received substantial payments under most of the terminated Contracts. As a result, the decisions cannot amount to expropriation.

7.1.3 The Tribunal's analysis

350. The Claimant's claim relating to the alleged expropriation of its contractual rights rests on two arguments: first, that the Contracting Parties terminated the seven Contracts at issue upon the instructions of the Cabinet of Ministers, and second, that the termination decisions were upheld by the Arbitration Court. The Claimant's case appears to be that the conduct of the Cabinet of Ministers and the Arbitration Court independently amounted to expropriation.

351. The relevant evidence before the Tribunal includes the letter of Mr Durdiyev, Chairman of the State-Owned Enterprise "Turkmenneftegazstroy" ("**TNGS**"), to Mr Hojamuhammedov, Deputy Chairman of the Cabinet of Ministers dated 25 August 2009,[184] and the reply letter of Mr Hojamuhammedov dated 26 August 2009.[185] The former letter states that the Contractor (*i.e.*, İçkale) "acts very slowly in executing constructing works" under the relevant Contracts (namely the Babarap Projects Contract (TNG-I 8) and the Ashgabat Cinema Contract (TNG-I 16)), that TNGS had previously "sent warnings to [the] Contractor several times regarding the issue," and that no action had been taken by the Contractor to accelerate the works. TNGS therefore requested the Cabinet of Minister's authorization to

[182] Respondent's Rejoinder, para. 308.

[183] Respondent's Rejoinder, para. 309.

[184] Letter from TNGS to Cabinet of Ministers dated 25 Aug. 2009, Exhibit C-134 (Reply).

[185] Letter from Cabinet of Ministers to TNGS dated 26 Aug. 2009, Exhibit C-135 (Reply).

terminate the relevant Contracts. The authorization was provided by the Cabinet of Ministers in a brief letter the next day.[186]

352. The Tribunal is unable to conclude on the basis of this limited evidence, which relates only to two of the seven Contracts at issue, that TNGS, the Contracting Party, acted upon the instructions of the Cabinet of Ministers, or that the latter impermissibly intervened in the performance of the Contracts.[187] On the contrary, the evidence shows that it was TNGS that initiated the termination and sought the Cabinet of Minister's authorization, which it obtained. Moreover, the reasons for the termination invoked by TNGS were not unrelated to the performance by the Claimant of its obligations under the terms of the Contracts; on the contrary, the termination was based on İçkale's alleged non-performance under the relevant Contracts. While the relevant Contracts did not envisage that any such authorization was required for termination, the Tribunal is unable to conclude, on the basis of the limited evidence before it, that the Cabinet of Minister impermissibly interfered in the performance of the Contracts.

353. In its Post-Hearing Brief, the Claimant also referred to a meeting that took place in early July 2009 between Mr İçkale and the Respondent's Minister of Construction, Mr Durduliyev, and to a further meeting that took place a few days later between Mr İçkale and Mr Hojamuhammedov, Deputy Chairman of the Cabinet of Ministers. According to the Claimant, Mr İçkale's account of these meetings in his witness statement shows that it was not the Contracting Authorities but the Cabinet of Ministers that decided to terminate the Contracts. Mr İçkale states that he raised the issue of payment delays at the meetings, but was told that he had to complete the pending projects on time, and that there would be no further extensions. According to Mr İçkale, if the works were not sped up, Mr Hojamuhammedov stated that he would "erase" the company from Turkmenistan.[188]

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[186] Letter from Cabinet of Ministers to TNGS dated 26 Aug. 2009, Exhibit C-135 (Reply).

[187] The Claimant also refers to a letter in which Dayhanbank informs İçkale of the termination of the Dayhanbank Contract "upon approval of the Cabinet of Ministers of Turkmenistan, the Central Bank of Turkmenistan and the Ministry of Construction of Turkmenistan." (Letter from Dayhanbank to İçkale dated 23 Sept. 2009, Exhibit BK-05.) The letter does not, however, indicate that the Dayhanbank acted on the instructions of the Cabinet of Ministers, or that the latter impermissibly intervened in the performance of the Contracts.

[188] Witness Statement of Mr İçkale, pp. 14-15.

354. Mr İçkale's account of the two meetings falls short of establishing that it was the Cabinet of Ministers that initiated the termination of the Contracts, or that the Cabinet of Ministers otherwise impermissibly interfered in the performance of the Contracts. The account merely shows that the Cabinet of Ministers was concerned about the progress being made by the Claimant on the Projects, a concern which is a contractual issue and not evidence of impermissible governmental interference amounting to expropriation of contractual rights.

355. Finally, to the extent that the Claimant alleges that the proceedings before the Arbitration Court amounted to denial of justice, the Tribunal notes that, as determined above, its jurisdiction under the Treaty does not extend to claims for breach of the FET standard. On the basis of the evidence before it, the Tribunal is also unable to find that the decisions of the Arbitration Court, upholding the termination by the Contracting Parties of the seven Contracts at issue, amounted in and of themselves to an expropriation of the Claimant's contractual rights. The decisions merely upheld the termination of the relevant Contracts by the Contracting Parties. While such terminations may or may not have been justified under the terms of the Contracts, the Claimant does not allege that the conduct of the Contracting Parties themselves amounted to a breach of the Treaty, including expropriation.[189]

7.2 Did the Respondent unlawfully expropriate the Claimant's machinery and equipment?

7.2.1 The Claimant's position

356. The Claimant contends that the Respondent breached Article III of the BIT through decisions of the Arbitration Court of Turkmenistan, which it alleges unjustly attached and ordered the sale, or otherwise prevented the Claimant's further use of, its machinery and equipment, and by a letter issued by the Turkmen Supreme Court to the State Customs Service prohibiting the removal from the country of all of the Claimant's machinery and equipment.

357. The Claimant argues that the Arbitration Court ordered the attachment and sale of the Claimant's machinery and equipment to enforce decisions it had rendered in connection with the imposition of delay penalties which amounted to denials of justice. The Claimant in

[189] See paragraph 307 above. See also the Claimant's PHB, paras. 361, 363 and 364.

particular relies on the Arbitration Court's decision on attachment dated 18 March 2010, enforcing a 26 November 2009 decision on the imposition of delay penalties and taxes in relation to the Avaza Canal Project.[190] On the basis of the decision, 23 items of the Claimant's machinery and equipment were allegedly attached and sold.[191] It also relies on similar attachment decisions by the Arbitration Court enforcing decisions imposing delay penalties under the Babarap Projects Contract, the Ashgabat Cinema Contract, and the Kipchak Cultural Center Contract.[192] According to the Claimant, since the underlying decisions on the imposition of delay penalties amount to denials of justice, the attachment decisions constitute unjust actions that are "tantamount to unlawful expropriation."[193]

358. The Claimant further argues that, as a result of an indefinite prohibition imposed by the Turkmen Supreme Court preventing the exportation of the Claimant's machinery and equipment, the Claimant has been unable to export and use its remaining machinery and equipment. It alleges that the Supreme Court issued its prohibition in the form of a letter dated 9 June 2010 to the State Customs Service directing that the Custom Service locate all of the Claimant's machinery and materials and prevent it from being removed from Turkmenistan.[194] According to the Claimant, the total value of its machinery and equipment (approximately USD 13.9 million without VAT) is far higher than the amounts of delay penalties (approximately USD 2.8 million) which have been enforced against it through the

[190] Decision of the Arbitration Court of Turkmenistan dated 18 Mar. 2010 with respect to enforcement proceedings over the machinery and equipment of the Claimant, Exhibit C-64 (Memorial); Decision of the Arbitration Court of Turkmenistan on Termination of Contract No. TNGIZ-I 13 dated 26 Nov. 2009, Exhibit R-480.

[191] See Summary of Records Regarding Attachment and Sale of İçkale Machinery and Equipment, Exhibit R-516.

[192] The Claimant relies on the following attachment decisions: Decision of the Arbitration Court of Turkmenistan regarding Penalty Fees under Contract No. TNG-I 10 dated 10 Mar. 2010, Exhibit AI-68; Ruling of the Arbitration Court of Turkmenistan on Changing the Method of Execution of the Court Decision regarding Contract No. TNG-I 10 dated 6 Sept. 2010, Exhibit AI-71; Decision of the Arbitration Court of Turkmenistan regarding Penalty Fees under Contracts Nos. TNG-I 08 and TNG-I 16 dated 22 Apr. 2010, Exhibit AI-89; Ruling of the Arbitration Court of Turkmenistan on Changing the Method of Execution of the Court Decision regarding Contracts Nos. TNGI-I 08 and TNG-I 16 dated 6 Sept. 2010, Exhibit AI-90.

[193] Claimant's Reply, para. 1100.

[194] Letter from the Supreme Court of Turkmenistan to the State Customs Service dated 9 June 2010, Exhibit C-63 (Memorial).

Arbitration Court's attachment decisions. However, despite the Claimant's efforts,[195] the Supreme Court has not lifted the prohibition, and in failing to do so, has acted in a manner that lacks transparency. The prohibition therefore amounts to an unlawful expropriation.

359. In response to the Respondent's argument that the Claimant has not convincingly identified the machinery and equipment which was allegedly taken from it, the Claimant contends that it had submitted documents showing the machinery and equipment which it had imported into Turkmenistan,[196] all of which was allegedly confiscated by the Respondent. It goes on to argue that it was deprived of the opportunity to "identify in detail" the machinery and equipment on its various construction sites, as it was prevented from entering some of them.[197]

7.2.2 The Respondent's position

360. The Respondent disputes that either the Arbitration Court's decisions on attachment of the Claimant's machinery and equipment, or the prohibition imposed by the Turkmen Supreme Court on the removal of the machinery and equipment from the country, amount to an expropriation.

361. First, the Respondent notes that the Claimant does not dispute that a seizure ordered by a domestic court will not normally qualify as a taking, and argues that that the decisions of the Arbitration Court imposing delay penalties which underpin the Court's attachment decisions do not amount to denials of justice. Indeed, the Claimant has not shown that the Arbitration Court's decisions were "so insubstantial, or so bereft of a basis in law, that the judgements were in effect arbitrary or malicious,"[198] and it has also failed to seek appellate review of the decisions.

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[195] See Letter from the Ashgabat Embassy Office of the Commercial Counselor of the Republic of Turkey to the Ministry of Economy of the Republic of Turkey dated 8 Jan. 2013, Exhibit C-184 (Reply).

[196] Documents regarding the temporary importation of machinery and equipment, Exhibit C-67 (Memorial).

[197] Claimant's Reply, para. 1088, relying in particular on Report by İçkale Representatives dated 8 Sept. 2009, Exhibit C-59 (Memorial); Letter from Dayhanbank to İçkale dated 9 Jan. 2010, Exhibit C-181 (Reply).

[198] Respondent's Rejoinder, para. 290, quoting *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (NAFTA), Award, 1 Nov. 1999, Exhibit RA-33, para. 105.

362. Second, the Respondent argues that the request by the Supreme Court in its letter dated 9 June 2010 to the State Customs Service to prevent the removal of the Claimant's machinery and equipment from Turkmenistan arose out of the same proceedings in which the Contracting Parties sought to enforce delay penalties against the Claimant. Therefore, the Claimant's allegations that the request amounts to an expropriation must fail for the same reasons as its allegations that the Court's attachment decisions amount to an expropriation. The Respondent further argues that the Claimant did not make any effort to remove its machinery and equipment in the ten months between the Supreme Court's letter and the termination of the relevant Contracts, and first inquired about doing so only in January 2013,[199] after it had received the Respondent's Counter-Memorial.

363. The Respondent also contends that, in any event, the Claimant has not adduced any evidence that the machinery or equipment "remained in Turkmenistan under Claimant's ownership and possession and in good operating condition at the time of the alleged taking."[200] The customs documents and internal invoices that the Claimant relies on do not show whether the machinery and equipment was ever delivered, and whether it was subsequently removed or damaged.[201] In addition, the evidence shows that after 2009 the Claimant's remaining representatives disposed of some of the machinery and equipment.

7.2.3 The Tribunal's analysis

364. The Tribunal has carefully reviewed the evidence relied upon by the Claimant in support of its claim of expropriation of its equipment and machinery in order to determine whether it establishes (1) that the equipment and machinery which was allegedly expropriated has been properly identified; (2) that the equipment and machinery in question has been taken as a result of the decisions of the Arbitration Court and the Supreme Court's directive to the

[199] Letter from the Ashgabat Embassy Office of the Commercial Counselor of the Republic of Turkey to the Ministry of Economy of the Republic of Turkey dated 8 Jan. 2013, Exhibit C-184 (Reply).

[200] Respondent's Rejoinder, para. 296.

[201] Documents regarding the temporary importation of machinery and equipment, Exhibit C-67 (Memorial).

Customs Service; and (3) that such conduct amounts to an unlawful expropriation under Article III of the BIT.[202]

365. The Claimant relies *inter alia* on the evidence of Mr Uyar and Mr Cilek. Mr Uyar worked in the Claimant's logistics department from June 2008 until the end of January 2010, and his job was to secure materials for the Projects. He states in his witness statement that as of August 2009 "they" did not allow the Claimant's employees to enter the construction sites and to access machinery and equipment.[203] It is not clear from Mr Uyar's statement who "they" were, but it appears from the context that Mr Uyar is referring to the Contracting Parties. Mr Cilek, who worked as an assistant to the General Manager of İçkale from 2003 until September 2009, similarly states in his witness statement that in August 2009, after the Contracts had been terminated, İçkale's staff was not allowed to enter the construction sites.[204]

366. Neither Mr Uyar nor Mr Cilek was questioned at the hearing on their evidence relating to the alleged expropriation of İçkale's machinery and equipment.

367. The Claimant also relies in support of its claim on documentary evidence, including:

- Documentation listing equipment and machinery imported by the Claimant to Turkmenistan;[205]

- A notification dated 25 August 2009 from TNGS to İçkale terminating the Babarap Projects Contract and ordering the removal of all personnel from the construction site;[206]

[202] According to Art. III, "[i]nvestments shall not be expropriated, nationalized or subject directly or indirectly, to measures of similar effect except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement."

[203] Witness Statement of Mr Uyar, p. 1.

[204] Witness Statement of Mr Cilek, p. 3.

[205] Documents regarding the temporary importation of machinery and equipment, Exhibit C-67 (Memorial).

[206] Letter from TNGS to İçkale regarding termination of Babarap Projects Contract dated 25 Aug, 2009, Exhibit C-179 (Reply).

- A notification dated 25 August 2009 from TNGS to İçkale terminating the Ashgabat Cinema Contract and ordering removal of all personnel from the construction site;[207]

- A letter dated 4 September 2009 from İçkale (Mr Özbek) to the Deputy Prime Minister of Turkmenistan objecting to the termination by TNGS of the Babarap Projects Contract, Kipchak Cultural Center Contract, and Ashgabat Cinema Contract, the termination by the Turkmenbashi Oil Processing Complex of the Avaza Canal Contract, and the refusal to allow İçkale's employees to access the construction sites;[208]

- A report dated 8 September 2009 from İçkale employees confirming that TNGS had terminated three of the Contracts, namely the Babarap Projects Contract, Kipchak Cultural Center Contract, and Ashgabat Cinema Contract, and did not allow İçkale employees to access the site;[209]

- A letter dated 8 September 2009 from İçkale (Mr Özbek) to the Vice Chairman of the Cabinet of Ministers objecting to and challenging the legality of the termination of the Babarap Projects Contract;[210]

- A letter dated 8 September 2009 from İçkale (Mr Özbek) to TNGS (Mr Nazarov) objecting to and challenging the legality of the termination of the Babarap Projects Contract;[211]

[207] Letter from TNGS to İçkale regarding termination of Ashgabat Cinema Contract dated 25 Aug. 2009, Exhibit C-215 (Reply).

[208] Letter from İçkale to the Deputy Prime Minister of Turkmenistan dated 4 Sept. 2009, Exhibit C-65 (Memorial).

[209] Report by İçkale Representatives dated 8 Sept. 2009, Exhibit C-59 (Memorial).

[210] Letter from İçkale to the Vice Chairman of the Cabinet of Ministers dated 8 Sept. 2009, Exhibit C-60 (Memorial).

[211] Letter from İçkale to TNGS (Mr Nazarov) dated 8 Sept. 2009, Exhibit C-61 (Memorial).

- A letter dated 8 September 2009 from İçkale (Mr Özbek) to TNGS (Mr Durdiyev) of TNGS objecting to and challenging the legality of the termination of the Babarap Projects Contract;[212]

- The decisions of the Arbitration Court dated 19 March 2010 relating to the enforcement of the Court's decision dated 27 November 2009 regarding the machinery and equipment of İçkale;[213]

- A letter dated 9 June 2010 from the Supreme Court to the State Customs Service requesting that the Customs Service identify and locate İçkale's equipment and materials, take inventory of the equipment, and prevent the Claimant from removing equipment and materials from Turkmenistan;[214]

- A letter from Dayhanbank to İçkale dated 9 January 2010 stating that, since İçkale had not complied with the decision of the Arbitration Court concerning the termination of the Dayhanbank Contract, the Contracting Party would complete the works "with the available material, machinery and equipment, [and] inventory stock [on the] construction site;"[215]

- A letter from the Turkish Embassy in Turkmenistan to the Ministry of Economy of the Republic of Turkey dated 8 January 2010 stating that İçkale had left Turkmenistan "after several issues they had with employer administration," and that the return of machinery and equipment "became impossible;"[216]

[212] Letter from İçkale to TNGS (Mr Durdiyev) dated 8 Sept. 2009, Exhibit C-62 (Memorial).

[213] Decision of the Arbitration Court of Turkmenistan dated 18 Mar. 2010 with respect to enforcement proceedings over the machinery and equipment of the Claimant, Exhibit C-64 (Memorial).

[214] Letter from the Supreme Court of Turkmenistan to the State Customs Service dated 9 June 2010, Exhibit C-63 (Memorial).

[215] Letter from Dayhanbank to İçkale dated 9 Jan. 2010, Exhibit C-181 (Reply).

[216] Letter from the Ashgabat Embassy Office of the Commercial Counselor of the Republic of Turkey to the Ministry of Economy of the Republic of Turkey dated 8 Jan. 2013, Exhibit C-184 (Reply).

- Several decisions rendered by the Court of Balkan State in 2010 relating to the auctioning of İçkale's equipment and machinery to satisfy its debt to TNGS arising out of the Arbitration Court's decision dated 26 November 2009.[217]

368. As noted above, the Claimant does not allege that the Contracting Parties breached the Treaty; it contends that the alleged breaches occurred as a result of intervention by State organs that were not parties to the Contracts. The Claimant must therefore demonstrate that at least some if not all of the equipment and machinery was taken by State organs, or that the takings are otherwise attributable to the State, and that such conduct amounted to an unlawful expropriation under Article III of the BIT. As summarized above, the evidence relied upon by the Claimant consists, *inter alia*, of termination notices sent by the Contracting Parties to the Claimant; decisions of the Arbitration Court enforcing its earlier decisions on delay penalties by way of attaching the machinery and equipment of İçkale; a request from the Supreme Court to the State Customs Service that the Claimant be prevented from removing equipment and materials from Turkmenistan; and decisions of the Court of Balkan State relating to the auctioning of İçkale's machinery to satisfy its debt to TNGS, for the purpose of enforcing the Arbitration Court's earlier decision.

369. The Tribunal is unable to agree that the termination of the Contracts by the Contracting Parties or the decisions of the Arbitration Court amount to a direct or indirect expropriation of the Claimant's machinery and equipment, within the meaning of Article III of the BIT. As already determined above in the context of the Claimant's claim for expropriation of its contractual rights, there is no evidence before the Tribunal that the termination of the seven Contracts relating to ongoing projects was based on instructions from the Cabinet of Ministers. On the contrary, the evidence on record suggests that the Contracts were terminated by the Contracting Parties at their own initiative. The Claimant does not allege that the conduct of the Contracting Parties was in any way wrongful under the Treaty, or that it amounted to expropriation. Nor is the Tribunal able to accept that the decisions of the Arbitration Court to attach İçkale's machinery and equipment, for the purposes of enforcing its earlier decisions regarding delay penalties, amount to an unlawful

[217] Decisions of the Turkmen courts concerning the auction of İçkale's equipment and machinery, Exhibit C-66 (Memorial).

expropriation. These decisions cannot be assessed independently of the Arbitration Court's earlier decisions regarding delay penalties, or the Contracting Parties' even earlier decisions to impose delay penalties (which the Claimant does not allege to have amounted to expropriation) and therefore cannot, on their own, be considered wrongful or expropriatory.

370. There is some evidence that suggests that the Claimant's machinery and equipment may have been taken without justification. This evidence includes the letter from Dayhanbank to İçkale dated 9 January 2010 stating that since İçkale had not complied with a decision of the Arbitration Court, the employer would complete the works "with the available material, machinery and equipment, [and] inventory stock [on the] construction site."[218] However, while State-owned, Dayhanbank is an entity separate from the State and cannot be considered as a State organ capable of exercising governmental authority, or *puissance publique*, and indeed the Claimant does not appear to allege that Dayhanbank's conduct, without more, amounted to expropriation. Nor is there sufficient evidence before the Tribunal that would allow it to determine which machinery and equipment was at issue, or that would demonstrate that Dayhanbank's conduct could in any way be considered attributable to the State.

371. The directive dated 9 June 2010 from the Supreme Court to the State Customs Service requesting that the Custom Service identify and locate İçkale's equipment and materials, take inventory of the equipment, and prevent the Claimant from removing equipment and materials from Turkmenistan, also suggests that the Claimant's machinery and equipment may have been taken without justification.[219] The directive applies, on its face, to all "equipment and materials" of the Claimant, and there is no evidence before the Tribunal that the Supreme Court ever lifted the ban. Consequently, the issue arises as to whether the directive went beyond what would have been necessary for the purpose of recovering the delay penalties that the Contracting Parties were entitled to pursuant to the Arbitration Court's decisions, and thus potentially excessive. In this connection, the Tribunal notes that,

[218] Letter from Dayhanbank to İçkale dated 9 Jan. 2010, Exhibit C-181 (Reply), p. 2.

[219] Ms Lamm dissents from the reasoning in paragraphs 371-376, which reflect the views of the majority of the Tribunal. See Partially Dissenting Opinion of Ms Lamm.

based on the Claimant's expert evidence, the total value of the Claimant's machinery and equipment amounts to USD 13,990,000 (without VAT),[220] whereas the total of the delay penalties imposed on the Claimant amounts to approximately USD 2,812,786, plus a further USD 419,112 imposed on the Claimant in connection with the Abadan School Contract and the Abadan Kindergarten School Contract, although the Claimant does not appear to mention this latter amount in the context of its expropriation claim. It therefore appears that the total value of the Claimant's assets substantially exceeded the total amount of the delay penalties imposed on the Claimant, which suggests that the Supreme Court's directive may have been expropriatory.

372. However, the Tribunal notes that the Respondent's expert, Mr Abdul Sirshar Qureshi of PricewaterhouseCoopers, raises a number of criticisms of the Claimant's valuation of its machinery and equipment, including that:

- The cost method applied by the Claimant's valuation experts assumes that the value of the assets at the alleged expropriation date was equal to their original acquisition price, and that no adjustment had been made for depreciation;
- No third party evidence has been produced for 18 of the 95 assets; the alleged value of these 18 assets, totaling USD 1.3 million, was nonetheless included in the claim;
- A further 23 assets, which had been acquired for USD 3.131 million, were not purchased by the Claimant but by third parties, and appear to have been leased or rented to the Claimant;
- Based on inter-company invoices, some of the assets were sold by the Claimant to its Turkmen branch at prices that were, in total, approximately USD 1.8 million higher than the prices reflected on the original supplier invoices;
- The Claimant's experts appear to have double counted some of the assets, resulting in an overstatement of the claim by USD 23,000;

[220] Mazars Report, paras. 121-22. The claim appears to be for the amount excluding the VAT; see Second Mazars Report, Appendix D. See also Second Expert Report of Abdul Sirshar Qureshi, pp. 39-40.

- The Claimant's experts have not considered insurance arrangements; and

- There are indications that at least some of the allegedly confiscated assets were used by the Claimant after the date of their alleged confiscation.

373. The Tribunal agrees, with one exception, with these criticisms of the Claimant's valuation of the machinery and equipment. First, the Tribunal agrees that an adjustment for depreciation is justified and indeed required under Article III(2) of the BIT, which provides that compensation for expropriation "shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known." In this connection, the Tribunal notes that the Claimant's expert Mr Gökhan Almaci testified at the Hearing, when questioned by the Tribunal, that the depreciated value of the assets was approximately USD 10 million; the Tribunal will revert to this assessment below. Second, the Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account the prices of inter-company transfers of some of the machinery and equipment, which were USD 1.8 million higher than the prices at which they were acquired from third parties. Third, the Claimant has not commented on, and therefore appears to accept, that there has been double counting of some of the assets in the amount of USD 23,000. Fourth, the evidence on record also suggests that some of the assets were transferred by the Claimant's employees to third parties after their alleged confiscation. Mr Qureshi noted that there was insufficient evidence available to determine whether the assets which were transferred were identical to those included in the claim; however, the Tribunal considers that they must have been as the Claimant argues that all of its machinery and equipment was confiscated. Mr Qureshi estimated that the value of these assets amounted to approximately USD 1.2 million, and the Claimant has not offered any alternative valuation. Finally, neither the Claimant nor its experts have commented on Mr Qureshi's argument that insurance arrangements should have been considered as the evidence indicates that the lease agreements concluded by the Claimant for some of the machinery and equipment required it to insure the leased assets for their full value.[221] The value of these assets when acquired amounted to approximately USD

[221] Exhibits M-035 and SQ-44 to SQ-47.

2.6 million.[222] In the absence any response on this point from the Claimant, the Tribunal considers that the Claimant must be assumed to have recovered the value of these assets from insurance. It follows that, even if the evidence suggests that the Claimant was required under the relevant lease contracts to pay, and argues that it did pay, the value of the leased machinery and equipment to the lessors in the event it failed to return them,[223] the evidence indicates that the Claimant would have been able to recover these payments from the insurance.

374. The Tribunal does not accept one of the adjustments proposed by the Respondent's experts which relates to third party evidence. The Claimant explains that the invoices at issue were over ten years old, and that it was therefore not required to retain them under Turkish law. The Tribunal finds this explanation plausible.

375. If the adjustments accepted by the Tribunal are taken into account, the difference between the real value of all of the Claimant's machinery and equipment and the delay penalties is reduced to USD 1,564,214,[224] or USD 1,145,102[225] if the delay penalties incurred in connection with the two Abadan projects are taken into account. However, this is not the end of the matter since, as noted above, the Claimant's quantification of the depreciated value of the assets (approximately USD 10 million, as opposed to the acquisition value of USD 13.990 million) is based merely on the oral evidence of the Claimant's expert given at the Hearing and not supported by any calculations that could be commented upon by the Respondent or reviewed by the Tribunal. Indeed, the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci.[226] The Tribunal therefore cannot accept that this amount

[222] In addition, the claim includes the amount of USD 631,000 (EUR 400,000) relating to a concrete paving machine that appears to have been rented rather than leased by the Claimant. See Second Expert Report of Abdul Sirshar Qureshi, p. 41. It does not appear from the evidence that this item was insured.

[223] Claimant's PHB, para. 459, Debt Liquidation Contract, Exhibit C-212 (Reply), p. 3; Financial Leasing Contract, Exhibit SQ-44.

[224] 10,000,000 – (2,812,786 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,564,214.

[225] 10,000,000 – (2,812,786 + 419,112 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,145,102.

[226] The evidence suggests that some of the assets had been purchased already in 2000, and that the portion of the assets that were more than four years old at the time of the alleged confiscation amounted to approximately USD 6.3 million. See Second Expert Report of Abdul Sirshar Qureshi, p. 40.

represents the real value of the Claimant's machinery and equipment at the time of their alleged confiscation. Consequently, the Tribunal finds that that the Claimant has failed to prove that the Supreme Court's directive was excessive and as such expropriatory.

376. The Tribunal concludes by majority that the Supreme Court's directive does not amount to an expropriation of the Claimant's machinery and equipment. Accordingly, the Claimant's claim stands to be dismissed.

7.3 Did the Respondent unlawfully expropriate the Claimant's ownership rights over the facilities it was building by operating them without having followed the applicable handover procedures?

7.3.1 The Parties' positions

377. The Claimant also argues that the Respondent unlawfully expropriated its ownership rights over its works by starting to operate the facilities built by the Claimant without first completing the contractual handover procedure.

378. The Claimant contends that under Article 3, paragraph 4 of the Turkmen "Regulation About Preparation of Construction Contracting Agreements," annexed to the Construction Norms of the Republic of Turkmenistan (SNT 1.06.01-06),[227] a contractor retains the ownership of the works until they are accepted by the customer. Therefore, in accordance with the handover procedure set out in Article 20.2 of the Contracts, the Claimant retained ownership over the facilities it built until they were accepted by the State Acceptance Committee through the execution of a Handover Certificate.

379. The Claimant contends that the Respondent systematically began operating the facilities built by the Claimant without completing the contractual handover procedure. In doing so, the Respondent unlawfully expropriated the Claimant's "immovable properties."[228]

380. The Respondent takes the position that the Claimant has not alleged any State action in respect of the alleged failure to comply with the contractual handover procedures, and that

[227] Construction Norms of the Republic of Turkmenistan (SNT 1.06.01-06), Exhibit C-148 (Reply).

[228] Claimant's Reply, para. 1143 (emphasis omitted).

any alleged breach of the procedure is a contractual matter that must be settled with the Contracting Parties in accordance with the contractual dispute resolution provisions.

381. In addition, the Respondent argues that the Contracting Parties complied with the handover procedures, but the handover of the facilities was not certified by the State Acceptance Committee as "serious defects were discovered."[229]

382. Finally, the Respondent adds that, in any event, the Claimant has not identified any "ownership rights" in the works performed under the Contracts which could be expropriated. According to the Respondent, the Turkmen "Regulation About Preparation of Construction Contracting Agreements" on which the Claimant relies only states that it is possible that construction contracts may grant such ownership rights, but does not itself confer any property rights.

7.3.2 The Tribunal's analysis

383. The Tribunal notes that this claim is not mentioned in the Claimant's Post-Hearing Brief, and it is therefore not clear whether it is still being pursued. In any event, the claim is without merit. First, the Claimant has not made any attempt to demonstrate that the alleged failure to comply with the handover procedures is attributable to the State rather than the Contracting Parties, and second, and in any event, according to the Turkmen "Regulation About Preparation of Construction Contracting Agreements," the parties to a construction contract may agree that ownership of the works rests with the contractor. The Claimant does not allege that there is any provision to that effect in the Contracts, and it appears that there are no such provisions. Accordingly, the claim does not have any basis in the Contracts and must be dismissed, even assuming that the facts as alleged by the Claimant were established, and that the alleged failure was attributable to the State.

[229] Respondent's Rejoinder, para. 312.

8 THE CLAIMANT'S OTHER CLAIMS

8.1 The Claimant's claim for discrimination

384. The Claimant contends that the Respondent has failed to comply with the non-impairment provision in Article 2(2) of the United Kingdom-Turkmenistan BIT, which protects *inter alia* against discrimination. The Claimant seeks to import this standard of protection by way of the MFN clause in Article II(2) of the Turkey-Turkmenistan BIT. However, as determined above, such importation is not possible under Article II(2) of the BIT. Consequently, the Claimant's claim for non-discrimination, insofar as it is based on Article 2(2) of the United Kingdom-Turkmenistan BIT, has no legal basis.

385. The Tribunal notes that the Claimant has not pursued a claim under the MFN clause in Article II(2) of the Turkey-Turkmenistan BIT which, properly interpreted, does contain a substantive standard of protection against discrimination. As determined above, this provision requires each State party to accord to the investments of investors of the other State party "treatment no less favourable than that accorded in similar situations […] to investments of investors of any third country […]."[230]

386. The Tribunal notes that in any event, had the Claimant indeed pursued a claim under the MFN clause, such a claim could not have been successful. The Claimant's discrimination claim is essentially based on the argument that Polimeks, another Turkish contractor involved in construction projects in Turkmenistan, including the Avaza Canal project, was treated by the Respondent more favorably than the Claimant. According to the Claimant, "to the best of Claimant's knowledge Respondent did not exercise any of the unlawful and illegal acts and omissions it undertook against Claimant towards Polimeks, who was in a similar situation with Claimant."[231] In particular, the Claimant alleges that the whole Avaza Canal project, which was the largest of the Projects, was transferred to Polimeks after the Claimant's contract with TNGS had been terminated, and that the Claimant was treated in a discriminatory manner.

[230] See English version of the Turkey-Turkmenistan BIT, Exhibit C-001 (Reply).

[231] Claimant's Memorial, para. 239.

387. The problem with this claim would have been, had it in fact been pursued under the Treaty rather than the imported provision in Article 2(2) of the United Kingdom-Turkmenistan BIT, that the MFN clause in Article II(2) of the BIT only requires the State parties to accord "treatment no less favourable than that accorded in similar situations […] to investments of investors of any third country […]." However, as Polimeks is a Turkish investor and not an investor of a third country, the Claimant's discrimination claim would have failed on this *prima facie* basis.

388. The Claimant appears to be fully aware of the legal position, as it notes that the non-discrimination standard it is relying on in support of its claim "is different from [the] MFN clause [in the BIT]" in that it does not require it to show discrimination in respect of an investor from a different country.[232] In this connection, the Tribunal notes that the Claimant acknowledges that it has "made a detailed research whether there are foreign construction companies other than Turkish companies which had brought its investment disputes with Turkmenistan to international arbitration, [but that] it did not come across with any publically available information in this respect."[233]

8.2 The Claimant's claims under the Turkmen Foreign Investment Law

8.2.1 The Parties' positions

389. The Claimant contends that, in breach of Articles 19(1) and 19(5) of the Turkmen Foreign Investment Law of 2008, the Respondent "intervened" in the Claimant's activities "by way of various unlawful acts and transactions carried out by its regulatory authorities,"[234] in particular by way of

> *"[…] (i) abolishment of [the] State Fund without appointing any alternative entity or fund; (ii) postponing the procedural process for the effectiveness of the contracts (iii) amending the financial and technical terms of the contracts, and (iv) pressurizing the Contracting [Parties] not to pay the progress payments to [the] Claimant […]*"[235]

[232] Claimant's PHB, para. 110.

[233] Claimant's PHB, para. 112.

[234] Claimant's Memorial, para. 310.

[235] Claimant's Memorial, para. 310 (emphasis omitted).

390. The Claimant further appears to argue that the Respondent breached Article 19(5) of the Foreign Investment Law by requiring, through the State Expert Review, increases in the volume of the works under the Contracts. The Claimant contends that, in doing so, the State Expert Review "exceeded its discretion" under Article 7(1) of the Law,[236] which sets out that an "[i]nvestment project with foreign investments shall be subject to mandatory state expertise, including with regard to observing seismic stability standards, fire- and explosion safety, environmental and sanitary requirements."[237]

391. The Claimant argues that Article 29 of the Foreign Investment Law, which provides *inter alia* that, absent a contrary agreement of the parties, disputes in connection with foreign investment shall be submitted to the Arbitration Court,[238] is irrelevant to the present case as its claims "merely rely on violation of the BIT due to the internationally wrongful acts of Respondent."[239]

392. Finally, in its Post-Hearing Brief, the Claimant argues that the guarantees provided by the Respondent in the Foreign Investment Law of 1992, which was in force at the time it made the investment, "create[d] a legitimate expectation on the side of the investors," and that the Respondent had "prejudiced" the Claimant's legitimate expectations.[240] This violated the FET obligation arising from the BIT.

393. The Respondent notes in this respect that it appears that the Claimant is not asserting any claims of breach of the Foreign Investment Law. It argues that the Claimant could not in any event bring any such claims in this arbitration, as Article 29 of the Foreign Investment Law provides for the submission of disputes to the Arbitration Court.

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[236] Claimant's Reply, para. 1065.

[237] Turkmen Foreign Investment Law of 2008, Exhibit C-108 (Reply).

[238] Turkmen Foreign Investment Law of 2008, Exhibit C-108 (Reply).

[239] Claimant's Reply, para. 1067 (emphasis omitted).

[240] Claimant's PHB, paras. 508, 514.

394. The Respondent also argues that the Claimant has failed to establish any unlawful conduct on the part of the Respondent. In addition, it contends that Article 7 of the Foreign Investment Law does not restrict the State Expert Review to seismic stability standards, fire and explosion safety, and ecological and sanitary requirements, as is apparent from its wording. The second paragraph of Article 7 also "makes clear that the Foreign Investment Law in no way modifies or restricts the normal procedure of [the] State Expert Review."[241]

8.2.2 The Tribunal's analysis

395. The Tribunal notes that it is not entirely clear whether the Claimant wishes to rely on the Respondent's alleged breach of Turkmenistan's Foreign Investment Law of 2008 as an independent cause of action, or whether it is merely making a supporting argument for its FET claims. Given that the Claimant has requested in its prayer for relief that the Tribunal specifically determine that the Respondent has "failed to observe its statutory obligations to guarantee the legal protection of the rights and interests of Claimant prescribed under the Foreign Investment Law of Turkmenistan,"[242] the Tribunal considers that the Claimant pursues an independent cause of action.

396. The Tribunal notes that the BIT does not create any cause of action based on an alleged breach of domestic investment protection laws. Nor does Turkmenistan's Foreign Investment Law of 2008 create jurisdiction for a treaty tribunal to resolve such claims; on the contrary, according to Article 29 of the Foreign Investment Law of 2008, "[a]ny disputes arisen with regard to foreign investments on the territory of Turkmenistan, shall be settled amicably or by consideration in Arachy Kazyet of Turkmenistan or upon agreement of the parties – by Arbitration."[243]

397. Article 22(4) of the Foreign Investment Law of 1992 further provides:

> "*Disputes arising from non-fulfilment or not adequate fulfilment of obligations related to investment activities between Turkmenistan and foreign states shall be*

[241] Respondent's Rejoinder, para. 317.

[242] Claimant's PHB, para. 508.

[243] Turkmen Foreign Investment Law of 2008, Exhibit C-108 (Reply).

settled by means of negotiations, or in Law courts determined by inter-state treaties (agreements)."[244]

398. After the hearing, the Tribunal raised a question about the relevance, if any, of Article 22(4) in the context of the present proceedings. The Claimant argued that Turkmenistan, "by making reference to this inter-state treaty between Turkey and Turkmenistan, also gave another consent under its Foreign Investment Law for the settlement of […] investment disputes through […] international arbitration."[245] The Respondent submitted, in turn, that Article 22(4) is not relevant to this case; the provision "deals only with disputes 'between Turkmenistan and foreign states' and does not encompass investor-State disputes."[246] The Respondent notes that the Claimant has not invoked Article 22(4), nor alleged any violations of the 1992 law; it has only referred to the 2008 law, which contains a differently worded dispute resolution clause.

399. The Tribunal is unable to find any basis allowing it to exercise jurisdiction in Article 22(4) of the Foreign Investment Law of 1992, even assuming the Claimant's reference to it in its Post-Hearing Brief could be understood as a claim on the basis of the Law. First, it is unclear from the wording of Article 22(4) whether it refers to resolution of disputes between States, or between States and foreign investors. Second, even assuming it did cover the latter type of disputes, the mere reference to settlement of disputes arising under inter-State treaties "in Law courts determined" by such treaties cannot be read as an expression of consent by Turkmenistan to arbitrate claims arising under the Law before such "Law courts." The Claimant's claim is therefore dismissed.

8.3 The Claimant's claims under "general principles of international law"

8.3.1 The Parties' positions

400. The Claimant argues that the Respondent breached general principles of international law. In particular, it contends that by failing to implement the protections under the Foreign Investment Law, the Respondent breached the principle of the rule of law. It also argues

[244] Turkmen Foreign Investment Law of 1992, Exhibit CA-53 (Memorial).

[245] Claimant's PHB, para. 71.

[246] Respondent's PHB, para. 242.

that the breaches of the Foreign Investment Law by organs of the Respondent were intentional, and therefore amounted to a breach of the principle of good faith, which is a general principle of law. Finally, the Claimant contends that "since the application of delay penalties and terminations were realized as a result of unfair pressure of Respondent, such interference also constitutes a violation of *Nemo auditor propriam turpitudinem allegans*."[247]

401. The Respondent takes the position that the Claimant has failed to advance any coherent explanation of its claims under general principles of international law. In particular, according to the Respondent, the Claimant has failed to provide any legal standard that would form the basis for a claim. In addition, according to the Respondent, the complaints which the Claimant attempts to advance as claims under general principles of international law have already been shown to be devoid of any merit in the context of its other claims.

8.3.2 The Tribunal's analysis

402. The Claimant has not attempted to articulate any basis in the BIT for its claims of breaches of general principles of international law, and indeed it is not clear whether the Claimant's arguments are independent or free-standing claims, or whether they are merely intended to support its other claims. Given that the Claimant requests in its prayer for relief that the Tribunal determine that the Respondent has "violated the General Principles of International Law,"[248] the Tribunal must conclude that the Claimant's claims are indeed independent claims and not merely supporting arguments. However, there is no basis for the claims in the BIT, which does not create any cause of action under general principles of international law. The claims must therefore be dismissed.

[247] Claimant's Memorial, para. 311.

[248] Claimant's PHB, para. 508.

9 COSTS

9.1 The Parties' positions

403. The Parties agreed at the Hearing that they would each submit a statement of costs, instead of a full-fledged cost submission with supporting argument. As noted above in Section 2, the Respondent objected to the Claimant's cost submission on the basis that it contained legal argument, contrary to the Parties' agreement at the Hearing, as confirmed by the Tribunal. The Tribunal subsequently decided that both the Claimant's cost submission and the Respondent's objection would be disregarded insofar as they contained legal argument.

404. According to the Claimant's Statement of Costs, its legal fees amounted to USD 291,636 and EUR 676,650. In accordance with the engagement letter between the Claimant and its legal counsel, the Claimant also sought compensation for an additional fee of EUR 250,000 and a success fee equal to 5% of the amount recovered. The fees of the Claimant's experts amount to EUR 677,467, and the costs of legal counsel, experts and witnesses to USD 118,731 and EUR 72,657. The Claimant also claims compensation, in the amount of USD 95,161, in relation to costs it incurred in defending bank guarantee claims before the Turkish courts, and EUR 185,303 in relation to costs it incurred in the Austrian courts for the same reason. The Claimant also claims for various disbursements in the amount of USD 77,056 and EUR 1,575. The Claimant's total costs amount to USD 1,066,148 and EUR 1,615,652.

405. The Respondent's fees and expenses, for which it seeks recovery, are summarized in the following table:

CATEGORY	AMOUNT (USD)
Arbitral Fees and Expenses	525,000
Legal Fees	7,100,000
Expert Fees	1,327,400
Other Expenses	310,203
Total	**9,262,603**

406. The Respondent seeks recovery of all of the above fees and expenses.

9.2 The Tribunal's analysis

407. The relevant rules covering the award of costs of the proceedings can be found in Chapter VI of the ICSID Convention, and in particular in Article 61(2) of the Convention, which provides:

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

408. The Tribunal notes that Article 61(2) of the Convention does not prescribe any particular approach to the allocation of costs and provides the Tribunal with a considerable degree of discretion in making costs awards.

409. Exercising its discretion, and noting that both Parties seek recovery of their fees and costs and thus agree with the "costs follow the event" principle, the Tribunal considers it appropriate to follow this principle and award costs to the prevailing party.[249] However, in view of the substantially disparate amounts spent by the Parties in the course of the proceedings, and keeping mind that the Hearing originally scheduled for October 2013 was postponed at the Respondent's request only a few weeks before the hearing (see paragraphs 40-48, *supra*), which resulted in a substantial delay in the proceedings and the associated additional costs, the Tribunal finds it appropriate, by a majority, that the Claimant be ordered to reimburse not more than 20% of the Respondent's costs of arbitration, i.e., USD 1,747,521.[250]

[249] Ms Lamm dissents from the reasoning in this paragraph, which reflects the views of the majority of the Tribunal. See Partially Dissenting Opinion of Ms Lamm.

[250] (7,100,000 + 1,327,400 + 310,203) x 0.2 = 1,747,520.6.

410. The Tribunal finds that it is also fair and appropriate that the Parties bear and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities, the exact amount of which shall be subsequently notified in writing to the Parties by the Centre.[251]

[251] The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices have been received and the account is final.

10 AWARD

411. For the reasons set out above, the Tribunal decides as follows:

a. The Claimant's claims fall within the Tribunal's jurisdiction and are admissible;

b. The Claimant has made an "investment" within the meaning of Article 25 of the ICSID Convention and Article I(2) of the Turkey-Turkmenistan Bilateral Investment Treaty;

c. The Respondent's objection to the Claimant's claims on the basis that they are contract claims rather than treaty claims is considered together with the merits;

d. The Claimant's claims are dismissed in their entirety for lack of merit;

e. The Claimant shall pay the Respondent the amount of USD 1,747,521 as reimbursement of the Respondent's legal and expert fees and expenses;

f. The Parties shall bear and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities; and

g. All other claims and requests for relief by either Party are dismissed.

Ms Carolyn B. Lamm
Arbitrator
Date: March 7, 2016

Prof. Philippe Sands QC
Arbitrator
Date: 1 March 2016

Dr Veijo Heiskanen
President of the Tribunal
Date: 29/2/2016

Partially Dissenting Opinion

in

İçkale İnşaat Limited Şirketi v. Turkmenistan

(ICSID Case No. ARB/10/24)

I am in agreement with the Tribunal's Award except as noted below:

1. Section 4: The Interpretation of Article VII(2) of the Turkey-Turkmenistan BIT

1. I address here specifically the Tribunal's analysis beginning at paragraph 210 of the Award.

2. I disagree in part with the assumptions of the majority in paragraph 210. I found credible and persuasive the testimony of Ms. Özbilgiç, then a member of the staff of the Turkish Government agency (Directorate of Incentive Implementation and Foreign Investment, Turkish Ministry of the Economy) with responsibility for investment treaties. Ms. Ozbilgic worked on the draft of the Turkey-Turkmenistan BIT. Her testimony may be considered under Article 31 of the Vienna Convention as part of the preparatory work of the treaty and circumstances of its conclusion. Ms. Özbilgiç's testimony, together with the official explanatory note prepared by the Government of Turkey during its ratification of the Turkey-Turkmenistan BIT[1] and the subsequent letter of the Secretariat of the Treasury,[2] were all consistent and persuasive. While allowing for the majority's view that this documentary evidence is only information that is "relevant," I regard it as confirmatory of Ms. Özbilgiç's testimony, which even the majority found to be "helpful in understanding the way in which Turkey prepared for investment treaty negotiations."[3] The testimony and documents, taken together with the clear language of the chapeau of

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[1] Exh. C-93 (Reply).

[2] Exh. C-96 (Reply).

[3] Award, para. 210 & n. 47.

Article VII(2), evidence the contracting States' intent to provide an option to foreign investors to choose whether to go to international arbitration or to host State courts. Neither party provided evidence of any interest to the contrary. Indeed, Turkmenistan offered no evidence of anything related to the negotiating history or any circumstances of the conclusion of the Treaty, and the Turkish investor provided direct evidence that Turkey intended to provide the investor an option to choose the forum in the event of a dispute and that this was a significant interest of Turkey at the time.

3. Further, the plain language of the chapeau of Article VII(2) ("the dispute can be submitted as the investor may choose") providing that it is the investor's option is deprived of meaning if one attributes a mandatory reading to the "provided that, if" language in a subsidiary clause. The testimony of Ms. Özbilgiç and documentary evidence assist in the interpretation of the "provided that, if" clause in Article VII(2) of the BIT. Indeed, my view in this regard is confirmed by the failure of Turkmenistan to provide any contemporaneous evidence to support its current interpretation of Article VII(2) of the BIT, including of its own treaty practice, or any contemporaneous evidence of any circumstance demonstrating its interest in imposing a mandatory requirement to go first to the Turkmen courts. It is most revealing that Turkmenistan did not require this in any other treaty that it entered into before or after concluding this treaty.[4]

4. Investment treaty tribunals commonly consider the parties' contemporaneous practice in concluding investment treaties as a reflection of the parties' general policies relating to such treaties, and thus as part of the circumstances of the conclusion of a treaty, in order to confirm the interpretation of its provisions. *See, e.g., KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013), para. 123 ("the Tribunal's reading of the treaty language is further strengthened if one bears in mind that in twenty-four Kazakh BITs the Respondent has agreed to the same test as in the present one … while in ten other BITs it has added a requirement …."); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), para. 195 ("treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a

[4] *See* Exh. C-103 (Reply) (chart of BITs concluded by Turkmenistan).

treaty's text at the time it was entered into"); *id.*, para. 196 (taking into account, as a circumstance of the conclusion of the Bulgaria-Cyprus BIT, that, '[a]t that time, Bulgaria was under a communist regime that favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions"); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), n. 147 (referring to BITs entered by Argentina with third States as relevant to confirm whether Argentina had a "policy" with respect to the provision at issue, and emphasizing the importance of "contemporaneity" in the interpretation of a treaty: "it must be construed as at the time it was entered into."); *see also National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006), paras. 84-85 (considering the treaty practice of the parties to the UK-Argentina BIT in interpreting that BIT's MFN clause); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 Oct. 2005), para. 293 ("Most relevant to an assessment of state practice possibly bearing on the 1992 Bolivia-Netherlands BIT are those BITs which were negotiated contemporaneously in the early 1990s."); *id.*, paras. 294-314 (analyzing the Dutch and Bolivian investment treaty practice). Hence the relevance of the other Turkmen treaty practice, all of which permits the choice of the forum for international arbitration without any mandatory reference to Turkmen courts, and complete paucity of any evidence to the contrary is compelling.

5. With respect to paragraph 217-218 of the Award, I agree with the majority to the extent that, in view of the evidence before the Tribunal, neither Turkey nor Turkmenistan appears to have had a clear policy requiring the resolution of investor-State disputes before local courts. As noted above, no such requirement is found in any of Turkmenistan's BITs, and neither Party presented evidence that could be taken into account in the interpretation of the "provided that, if" clause in the Turkey-Turkmenistan BIT as a supplementary means of interpretation. I diverge, however, and find that the absence in any other Turkmen treaty and/or any provision in Turkmenistan's foreign investment law requiring mandatory reference of international disputes to the Turkmen courts should be taken into account in assessing whether the treaty language of Article VII(2) provides an optional approach.

6. With respect to paragraphs 220-226 of the Award, I do not accept Professor Gasparov's evidence as dispositive on the proper translation of the Russian expression "*pri uslovii, esli*". Professor Gasparov's testimony referred to translation of a term by a native Russian speaker who was writing in Russian. Respondent chose not to call the Claimant's opposing Russian language expert whose declaration affirmed that the phrase could have been translated from the awkward English version of the treaty submitted by the native Turkish speakers.[5] I regard the evidence provided by Ms. Özbilgiç that the Russian version was likely translated from the English version supplied by the Government of Turkey significant.[6] In the absence of any evidence whatsoever presented by Turkmenistan that the Russian version of the BIT was translated by a native Russian speaker, rather than someone to whom Russian may have been a third or fourth language in the Turkish Embassy or Turkmen Embassy in Moscow or in Ashgabat translating the English drafted by a native Turkish speaker, indeed the evidence supports the view that the Russian version was translated by a non-native Russian speaker. Hence, I did not find persuasive Professor Gasparov's evidence on the proper translation in classical Russian as to the meaning of that term in the treaty. I found more persuasive of the actual circumstances at the time of the execution of the BIT the testimony of Ms. Özbilgiç and Mr. Kozyrev that the clause "*pri uslovii, esli*" likely was translated by a non-native Russian speaker from the English version of the treaty (drafted by a native Turkish speaker) and was meant to convey the same optional meaning "provided that if".

7. With respect to paragraph 228 of the Award, again, I disagree with the majority. A fundamental rule of treaty interpretation is that meaning must be afforded to provide meaning to the entire clause: *ut res magis valeat quam pereat*, *i.e.*, each word of a clause must be given meaning, and a proper interpretation cannot leave words meaningless,[7] a

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[5] *See* Declaration of Mr. Kozyrev dated 9 Aug. 2013, para. 6 (concluding that the flawed grammar and ambiguity of the Russian text most likely resulted from a literal and inaccurate translation from the English text).

[6] *See* Witness Statement of Ms. Özbilgiç dated 17 Aug. 2013, para. 5 ("The English authentic version of the BIT which was signed between Turkey and Turkmenistan ('the Contracting Parties') is the text prepared by Turkey. The Authentic Russian version of the BIT was translated from the authentic English version only after the Contracting Parties had agreed upon the terms of the English version."); Hearing Transcript, Day 3, pp. 96:22-100:25 (Cross-Examination of Ms. Özbilgiç).

[7] *See Eureko B.V. v. Republic of Poland*, Partial Award dated 19 Aug. 2005, para. 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than

principle the Tribunal recognizes elsewhere in the Award.[8] Under Article VII(2) of the BIT, the chapeau clearly provides the option to the investor to select a method of dispute resolution ("the dispute can be submitted as the investor may choose"). To give meaning to the investor's option to select among the international arbitral fora ICSID, UNCITRAL or ICC, the selection of the local courts must provide an additional option (*i.e.*, the investor has the choice of the three types of international arbitration mentioned **or** to select host state courts). If the investor selects the local courts then there is a one year hiatus for the local courts to decide and only after that time may the investor invoke the international arbitral option (as described below there could be a different option depending on the relevance of the formatting). The investor's option provided in the chapeau cannot be deprived of any meaning by interpreting a subsidiary clause as effectively depriving the investor of any choice. I accordingly disagree with paragraph 225 of the Award.

8. With respect to paragraphs 227 and 228 of the Award, I disagree, as the Tribunal cannot conclude that the Russian version is "clear and unambiguous" choosing it as the more reliable version and at the same time minimize as a matter of treaty interpretation the difference in formatting in the Russian version of the BIT (compare the quotes of the text in paragraphs 176 and 189 of the Award), which is formatted in such a way that the clause "*pri uslovii, esli*" forms part of the ICC option. It is undeniable that Article VII(2) provides "the dispute can be submitted as the investor may choose" from one of three options for international arbitration: (a) ICSID, (b) UNCITRAL, or (c) ICC. If the formatting from the Russian version is given meaning then that reference to Turkmen courts modifies only the ICC option, the alleged ambiguity or obscurity that concerns the majority is removed as it provides the investor the choice that the chapeau envisions and does not mandate the investor proceed first to host State courts unless the investor prefers

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meaningless. [T]reaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective."); *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013, para. 593 ("Treaty provisions should not be construed in a way that takes away from them all useful effect (*ut res magis valeat quam pereat*)."); OPPENHEIM'S INTERNATIONAL LAW 1280-81 (R. Jennings & A. Watts eds., 9th ed. 1996) ("The parties are assumed to intend provisions of a treaty to have a certain effect, and not to be meaningless: the maxim is ut res magis valeat quam pereat. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.").

[8] Award, para. 329.

the ICC option. The formatting therefore is significant in the Russian version in that it in fact confirms the optional reading of the clause as a whole. Under Article 31 of the Vienna Convention, the "provided that, if" clause in my view should be interpreted in good faith such that the plain language in the chapeau of Article VII(2) as to the investor's option must have a meaning.

9. Accordingly, the formatting would include the "*pri uslovii, esli*" clause as part of and only applicable to the ICC option, but not to the ICSID or UNCITRAL options. This approach provides full meaning to all parts of Article VII(2), requiring the investor to proceed first to Turkmen courts only if the investor rejects ICSID and UNCITRAL arbitration.

10. I similarly disagree with paragraph 228 of the Award, where the majority of the Tribunal notes that the meaning of the "provided that, if" clause in the English and Russian texts of the Treaty diverges: according to the majority, the meaning of the English version remains obscure, and the Russian version is clear and unambiguous. On the basis of the evidence before the Tribunal as to the circumstances surrounding the preparation and execution of the BIT, other treaty practice of both State parties and the language experts presented by both sides, I disagree. To the contrary, the English and Russian versions of Article VII (2) when read together in their entirety (beginning with the chapeau language of the clause) provide an optional choice between international arbitration and the local courts in the context of this dispute: an investor who chose ICSID without first going to Turkmen courts. According to the English text (with its formatting), the investor may select among three international arbitral fora or local courts: but if the investor selects the local courts option, and the local courts do not render a decision within one year, then the investor may still choose international arbitration. According to the Russian text with its formatting, the investor may choose among two international arbitral fora; if the investor chooses local courts, it may subsequently choose only ICC arbitration.[9] I agree with the

[9] *See* Declaration of Mr. Kozyrev dated 9 Aug. 2013, para. 6 ("Even if the Russian text is not grammatically correct, should the provision including the phrase *pri uslovii, esli* be considered mandatory, it will bring an obligation to the investor to recourse to the local courts of the host State only if it chooses to apply to the Court of Arbitration of the Paris International Chamber of Commerce."); Award, para. 225. In this regard, I disagree with the majority's view as reflected in paragraph 226 of the Award.

majority's observation in paragraph 229 of the Award that the Tribunal is limited to resolving the dispute submitted to it on the basis of the evidence before it. The optional reading of the clause is a consistent one with respect to the dispute presented here: the investor chose ICSID arbitration—not the local courts—as its first choice which is permitted under the plain language of either version. While the formatting is different in the English and the Russian language versions, this is irrelevant to the present dispute because the investor selected ICSID arbitration and in both the English and Russian versions read optionally this selection is permissible without resort to the local courts. The Tribunal need not go further to resolve potential ambiguity or obscurity issues that may arise if an investor in another dispute wishes to choose the local courts and/or ICC arbitration.

11. Further, I disagree with the majority's conclusion in paragraph 230 of the Award. I agree that the State parties may make a choice to impose a mandatory domestic court litigation precondition to international arbitration, but I regard the State parties to the Turkey-Turkmenistan BIT as having made the choice in this instance to provide the investor with the option to go to international arbitration or to local courts. I agree with the interpretation of the *Sehil* tribunal (including the portion of its decision quoted in paragraph 229 of the Award).

12. I disagree with paragraph 241 of the Award to the extent that reference is made to the selection of local courts as "in principle mandatory"; as stated above, it is optional. I agree with the remainder of paragraph 241. I also disagree with paragraph 260 to the extent that the majority finds it is unable to accept Claimant's allegations and evidence as proof that any resort to the Turkmen courts would have been futile. To the contrary, in my view, Claimant demonstrated it suffered a denial of justice by the Turkmen courts in the proceedings before the Turkmen courts initiated by Turkmenistan.[10] Thus it would have been futile to impose a requirement for further recourse to Turkmen courts. I, however, agree with the majority that the BIT simply does not include a provision that

[10] *See* Claimant's Memorial on the Merits, paras. 224-234; Witness Statement of Ahmet Uyar, at 2; Claimant's Reply, paras. 127-31, 836-40, 851-58, 868-73, 883-89, 899-902; Claimant's Rejoinder on Jurisdiction, paras. 197-208; Claimant's Post-Hearing Brief, paras. 90-92; Witness Statement of Abdullatif Özbek; Witness Statement of Ozan İçkale, at 14-16.

permits Claimant to recover for a lack of fair and equitable treatment or a denial of justice, but that does not preclude consideration of such a denial of justice for purposes of considering the futility of requiring a claimant to proceed to local courts.

13. Further, I disagree with paragraph 260 to the extent the majority's analysis stops with the lack of a futility exception in the express language of Article VII. I do not regard the lack of express language in Article VII(2) of the BIT permitting a finding of futility as dispositive. Under established customary international law, which under Article 31 of the Vienna Convention is to be "taken into account, together with the context" in interpreting the BIT to the extent it provides "relevant rules of international law applicable in the relations between the parties," Claimant is not required to pursue recourse to local courts that is demonstrably futile.[11]

14. In the context of the facts, treaty language, treaty practice and evidence in this particular case, I agree with the remainder of the Award regarding the interpretation of Article VII(2).

2. Section 7: The Claimant's Expropriation Claims

15. I dissent with respect to paragraphs 371-376 of the Award. Specifically, with respect to paragraph 371 of the Award, I regard the Supreme Court's directive dated 9 June 2010 to the State Customs Service as going beyond what was necessary to recover the delay penalties to which the contracting parties were entitled pursuant to the Arbitration Court's decisions. Based upon the evidence in the record and for the reasons set forth below, I

[11] *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013, para. 599 ("It appears to be generally accepted in international law that obligations requiring an individual to approach a State's local courts before a claim may be taken to the international plane do not apply unconditionally. . . . This exception to the local to the local remedies rule, the so-called *futility* rule, is now universally recognized in the law of diplomatic protection. It is set out in Art. 15(a) of the Draft Articles of the International Law Commission on Diplomatic Protection of 2006 . . . in the following manner: 'Local remedies do not need to be exhausted where [. . .] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."); *see id.*, para. 600 ("Art. 8(3) of the Argentina-Italy BIT does not mention or refer to such [futility] exception. This is not the end of the matter, however. According to the general rules of treaty interpretation as codified in Art. 31 of the VCLT, it is required that when interpreting a treaty provision 'any relevant rules of international law applicable in the relations between the parties' shall be 'taken into account, together with the context' (Art. 31 para. 3 lit. c of the VCLT). The term 'relevant rules of international law' also includes pertinent customary international law.") (internal references omitted).

disagree with the majority and conclude that the Supreme Court's directive was in fact excessive and thus expropriatory, because it resulted in the seizure of all of Claimant's machinery and equipment in Turkmenistan, significantly in excess of any penalties. The combined value of this machinery and equipment, which was deployed by Claimant to perform its investment, far exceeded any reasonable delay penalty that could have been imposed by the Supreme Court.

16. As a preliminary matter, Claimant contends that the Arbitration Court greatly inflated the amount of delay penalties, which resulted in unjust and premature fines upon Claimant.[12] The evidence in the record supports a discrepancy as to the amount of any legitimate penalties. Specifically, Claimant explained that the Arbitration Court failed to consider the "actual events causing a delay" and "did not evaluate a possible responsibility of the Respondent for the delay."[13] In its Decision dated 18 March 2010 regarding the Avaza Canal Contract (TNGIZ-I 13), the Arbitration Court ruled that some of Claimant's property was to be attached and sold in order to collect a delay penalty of EUR 228,520 and governmental tax of 1,625,582 Manat (USD 587,380).[14] In reaching this decision, the Arbitration Court, however, did not take into account that Respondent had contributed to the delay in construction by failing to make progress payments on time or, in some instances, failing to make them at all and, furthermore, that the Contract was terminated by Respondent's Contracting Authority on 27 August 2009, prior to the scheduled completion date of 10 October 2009.[15]

17. Despite the significant evidence in the record questioning the amount of the delay penalties,[16] the majority accepted the amount of the delay penalties as alleged by

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[12] Claimant's Post-Hearing Brief, paras. 449-453.

[13] Claimant's Post-Hearing Brief, para. 449.

[14] Claimant's Post-Hearing Brief, para. 450; *see* Exh. C-64 (Memorial) (Decision of Turkmenistan Arbitration Court dated 18 Mar. 2010 with respect to enforcement proceedings over the machinery and equipment of Claimant).

[15] Claimant's Post-Hearing Brief, para. 451; Claimant's Reply, paras. 1092-1094.

[16] *See* Claimant's Reply, paras. 678-733 (referencing the evidence); *id.*, para.1101 (stating that the "Arbitration Court allowed for the recovery of erroneously imposed penalties of 1,650,825 USD for the Contract Nos. TNG-1 08 (Babarap Project) and TNG-I 16 (Ashgabat Cinema Project)."); *see also* Exh. C-64 (Memorial) (Decision of Turkmenistan Arbitration Court dated 18 Mar. 2010 with respect to enforcement proceedings over the machinery and equipment of Claimant).

Respondent (USD 2,812,786).[17] I disagree with the majority's approach. A review of the record shows that Claimant provided sufficient evidence detailing the amount of the inflation of the penalties (USD 1,650,825), and that should be taken into account to reduce them to USD 1,161,961.[18]

18. According to Claimant's expert Mr. Almaci of Mazars, the total value of the machinery and equipment that Respondent is alleged to have expropriated amounted to USD 13,990,000 (without VAT).[19] Claimant submitted evidence, in the form of a list, showing the valuation of the equipment and machinery imported by it, which Respondent subsequently confiscated.[20] In this context, the Tribunal notes in paragraph 373 of the Award that Respondent's expert Mr. Qureshi had offered certain criticisms of Mr. Almaci's valuation, including that the latter had failed to account for the depreciation of the equipment and machinery.[21] The Tribunal further observes in paragraph 373 of its Award that Mr. Almaci testified at the Hearing that the depreciated value of the assets amounted to approximately USD 10 million. I disagree further with the majority's rejection of the testimony of Claimant's expert and the majority's reference to the number in the Second Expert Report of Mr. Qureshi reducing the value of the machinery by USD 6.3 million to USD 7,690,000.[22]

19. In further considering this issue, the Tribunal considered whether any offsets should be applied to the USD 10 million in determining whether Claimant was entitled to any damages. I agree with the majority's application of three offsets, as delineated in paragraph 372 of the Award, relating to: Claimant's inter-company transfers totaling USD 1.8 million; double-counting of some of the assets amounting to USD 23,000; and

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[17] Award, para. 371 (concluding, without taking into account Claimant's evidence, that the total delay penalties imposed upon Claimants was approximately USD 2,812,786).

[18] USD 2,812,786 – USD 1,650,825 = USD 1,161,961. *See* Claimant's Reply, para. 1101.

[19] Mazars Report, paras. 121-122.

[20] Exh. C-67 (Memorial) (documents indicating the temporary importation to Turkmenistan); *see also* Claimant's Reply, para. 1082.

[21] Respondent's Post-Hearing Brief, para. 195.

[22] *See* Award, para. 375 & n. 225.

transfer of some assets, valued at approximately USD 1.2 million, to third parties, after their alleged confiscation.

20. I disagree however, with the majority's application of the fourth offset, relating to Claimant's assumed insurance arrangements. In paragraph 373 of the Award, the majority notes that Claimant has not commented on Respondent's (unsubstantiated) assertion that Claimant's insurance arrangements for the leased assets should be taken into account when determining the actual valuation of the machinery. The majority assumes that Claimant would have been able to recover any payments it made to the lessors for the leased assets from its insurance arrangements and Claimant's silence is essentially acquiescence in this. I note however, that Claimant's evidence establishes that it was obligated to pay the value of the leased machinery and equipment to its lessors.[23] Furthermore, as the Award recognizes in footnotes 220, 221 and 222, only some of the equipment was leased, with the rest being rented or owned by Claimant, and only some of the lease agreements required insurance coverage. There is no evidence in the record showing that Claimant was reimbursed through an insurance policy for *any* of the machinery and equipment leased from third parties. Respondent thus failed to satisfy its evidential burden to support its assertion that insurance recovery should be taken into account.[24] For these reasons, I disagree with the majority, and cannot conclude by inference or otherwise, that Claimant was reimbursed by insurance for machinery and equipment leased from third parties.

21. To the extent the majority had any doubt at the conclusion of the Hearing as to whether Claimant's evidence was sufficient with respect to the depreciation and insurance issues, the issues could have been included among the questions put to the parties for post-hearing briefing.[25] The Tribunal's summary of outstanding issues that was

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[23] *See* Exh. C-212 to Claimant's Reply.

[24] *See Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award dated 25 Aug. 2014, para. 8.8 (finding that the principle of *onus probandi incumbit actori*, according to which a party asserting certain facts must establish the existence of such facts, "applies to the assertions of fact both by the Applicant and the Respondent.") (quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. Reports, p. 14 (20 Apr. 2010), para. 162).

[25] *See* ICSID Convention, Art. 43 ("… the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence …."); ICSID Arbitration Rule 34(2)(a) ("The Tribunal

communicated to the parties after the Hearing did not include the depreciation or insurance issues.

22. I also do not agree with paragraph 375 of the Award. Contrary to an international tribunal's remit to conduct an "overall assessment of the accumulated evidence,"[26] the majority assessed the evidence without balanced consideration of both sides. Fundamentally, as described above, I do not agree with the amount of the delay penalties, as the majority did accepting Respondent's allegations, as USD 2.8 million. This ignored all of Claimant's evidence. In my opinion, for the reasons reflected in paragraphs 16-17 above, the legitimate penalties are at most USD 1,161,961.

23. The real value of all of the Claimants machinery and equipment (*i.e.*, USD 10 million), accounting for the various deductions noted in paragraph 373 of the Award, amounts to USD 6,977,000[27] or, if using USD 13,990,000, to USD 10,973,000.[28] The gap between the amount of the penalties (USD 1,161,961; *see* para. 17 above) and the value of the equipment seized is significant—at least USD 5,815,039[29] or at most USD 9,805,039.[30] Even use of the alternative number from Mr. Qureshi's Second Report results in a valuation results in a gap of USD 3,505,039.[31] The majority however does not accept the various expert reports and import documentation as sufficient and concludes it could not determine the real value of the Claimant's machinery. This imposes too high a standard of proof in my view. The Claimant's evidence when viewed in its totality and weighed against Respondent's rebuttal in my view was sufficient. I therefore conclude that

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may, if it deems necessary at any stage of the proceeding: (a) call up upon the parties to produce documents, witnesses and experts …."); *see also The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 181 ("The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, … whether it would like to see further evidence of any particular kind on any issue arising in the case ….").

[26] *The Rompetrol Group N.V. v.Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 178.

[27] *See* Award, n. 223: USD 10,000,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 6,977,000.

[28] *See* Award, n. 224: USD 13,990,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 10,967,000.

[29] USD 6,977,000 – USD 1,161,961 = USD 5,815,039.

[30] USD 10,967,000 – USD 1,161,961 = USD 9,805,039.

[31] *See* Award, n. 225: USD 13,990,000 – USD 6,300,000 = USD 7,690,000; USD 7,690,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 4,667,000; USD 4,667,000 – USD 1,161,961 = USD 3,505,039.

Claimant has demonstrated that the Supreme Court's directive was excessive and thus expropriatory. This is not a relatively limited discrepancy.

24. Most fundamentally, given that the Supreme Court's directive to the Customs Service was in fact excessive, the resulting expropriation of the machinery and equipment occurred without due process, was discriminatory and not in the public interest. Thus, the directive of the Supreme Court and the actions of the Customs Service prohibiting Claimant to export its machinery and equipment did in fact violate Article III of the BIT. Furthermore, in the context of USD 10 million (the claim for the machinery and equipment), the amount of the discrepancy is USD 5.8 or USD 9.8 million (or at a minimum USD 3.5 million), which is either 58% or 98% of the entire imported value. Both sums are substantial within the circumstances of this dispute.[32]

25. A violation of a treaty results in State responsibility.[33] Turkmenistan's violation of the Treaty is sufficient to support the imposition of State responsibility for the breach of Article III and thus damages according to Article III(2). This clearly is not a violation without consequence. Damages in the amount of the excess should be imposed in the amount of USD 5,815,039.00.

3. Section 9: Costs

26. In Section 9.2 of the Award, I disagree specifically with the majority's analysis in paragraph 409. In my view, in exercising it discretion under Article 61(2) of the Convention, the Tribunal is required to weigh the reasonableness of a claim for costs, taking into account a number of factors including the importance of the matter to the Parties, the amount in dispute, the amount and extent of factual and expert evidence

[32] Other investment tribunals have awarded lower amounts. *See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002, paras. 172, 178 (awarding a total amount of USD 2,190,430 in compensation for expropriation, which included a distinct amount of compensation of USD 477,718 for the taking of a ship); *SwemBalt AB v. Republic of Latvia*, Award dated 23 Oct. 2000, paras. 40-41 (awarding a total amount of USD 2,506,258 for expropriation for the taking of a ship and various pieces of construction equipment).

[33] *See Chórzow Factory case (Merits), Germany v. Poland*, Judgment dated 13 Sept. 1928, PCIJ Series A, Vol. 17, at 47 ("The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.").

produced, the conduct of the Parties during the proceeding, and whether the work required efforts across multiple jurisdictions, extensive arrangements for travel and/or translation work. In considering these various factors in context in this case, the amount in dispute is USD 537,356,530.33 plus EUR 26,678,407.26 plus interest,[34] and the matter is of significant importance to the Claimant. Claimant allegedly has been deprived of significant value of its investment and performance on thirteen construction contracts in Respondent's territory.

27. Further, Claimant was deprived of its machinery and equipment in the amount of USD 5.8 million (at a minimum) due to the excessive seizure of the machinery and equipment by the Supreme Court's directive due to limited delay penalties. At a minimum, this amount should be offset against the Respondent's costs. The Tribunal in its discretion is balancing here the interests of both sides and this cannot be ignored.

28. Moreover, Respondent insisted on and raised preliminary objections seeking bifurcation on an issue of jurisdiction after the *Kilic* Decision on Jurisdiction was rendered.[35] Respondent's request protracted the proceeding, and it was denied.[36] Moreover, the Tribunal ultimately rejected Respondent's jurisdictional objections.[37] Thus a portion of the expense must be attributed to an issue Claimant prevailed on: Jurisdiction. In such circumstances, even the "costs follows the event" approach is subject to modification considering that the proceedings in this case have consisted of not one single event, but rather of several events with different outcomes.[38] Further, Respondent delayed the hearing on the merits while it organized its finances as noted in paragraphs 40-44 of the Award. In the context of Respondent's procedural conduct, it significantly increased pre-merits issues that Claimants and the Tribunal were required to consider and decide. Moreover, the proceedings involved translations of documents and proceedings in three

[34] *See* Claimant's Post-Hearing Brief, para. 508.

[35] *See* Award, para. 31.

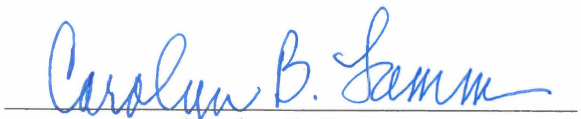
[36] *See* Award, para. 33.

[37] *See* Award, paras. 263, 293, 411.

[38] *See, e.g., The Rompetrol Group N.V. v.Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 298 (applying a modified "costs follow the event" approach and concluding that the arbitration costs should be borne equally by the parties and that each party should bear its own costs).

languages including Turkish, Russian and English, which similarly caused additional costs which the parties should bear equally. In the context of the facts in this proceeding as to the conduct of the parties, I do not agree that Claimant should bear 20% of Respondent's costs. In the context of this proceeding, it is unjustified. Both parties should bear their own costs.

Date: 23 February 2016



Carolyn B. Lamm
Arbitrator

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

İÇKALE İNŞAAT LIMITED ŞIRKETI

Claimant

and

TURKMENISTAN

Respondent

(ICSID Case No. ARB/10/24)

PARTIALLY DISSENTING OPINION

PROFESSOR PHILIPPE SANDS QC

1. I am in general agreement with the final outcome of these proceedings, as reflected in an Award and reasoning that rejects the entirety of the claims put forward by the Claimant in these proceedings. I am comfortable with much of the Tribunal's approach as regards the interpretation and application of the Turkey-Turkmenistan Bilateral Investment Treaty, in particular the conclusion that its Article VII(2) is properly to be interpreted as requiring prior recourse to the domestic courts of the relevant party before international arbitration proceedings are brought (Award, para. 228).

2. Regrettably, I disagree with the approach adopted by the majority on two matters that relate to the interpretation and application of the Article VII(2) treaty requirement: *first*, the majority's conclusion that Article VII(2) is to be interpreted and applied as a provision that goes to the admissibility of the claim brought, as opposed to the existence of the jurisdiction of the forum that has been seized; and *second*, the majority's finding that on the facts of this case the requirements of Article VII(2) were not a bar to the admissibility of the claims, despite the fact the Claimant had no prior recourse to the national courts.

Jurisdiction/Admissibility

3. With regard to the question of whether the obligation set forth in Article VII(2) to have prior recourse to national courts is a jurisdictional requirement or goes to the admissibility of a claim, I disagree with the reasons and conclusions as set out in paragraphs 240-247 of the Award. In my view, that requirement of Article VII(2) is an obligation that goes to the existence of the jurisdiction of the Tribunal.

4. This is the same issue that was before another ICSID arbitral tribunal on which I sat, in the case of *Kılıç*.[1] That Tribunal decided, by a majority, that Article VII(2) imposed a mandatory requirement of recourse to the national courts as a jurisdictional prerequisite to having access to an ICSID Tribunal. In accepting appointment to this Tribunal, following a challenge made by the Claimant, I made clear that I would treat this issue with an open mind, and this I have done. The arguments of the parties in this case were different from those put forward in the earlier case: in this case, both parties agreed with the finding of the majority in the *Kılıç* case, a point noted by the majority (see paras. 238-9 of the Award: "Both Parties have … taken the position that compliance with Article VII(2) of the BIT is an issue of jurisdiction rather than admissibility").

5. The only argument to the contrary has been put forward by the majority. I agree that an arbitral tribunal is not bound by the shared views of the parties, on a matter that goes to the question of whether the Tribunal has jurisdiction to decide a case. However, I am not

[1] ICSID Case No. ARB/10/1, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, Award (2 July 2013).

persuaded by the arguments put forward by the majority in departing from the commonly held views of the parties.

6. The majority view is somewhat minimalist in its approach. *First*, it asserts that the relevant provision of Article VII(2) is not a jurisdictional requirement because it merely "sets out the procedure, or the step to be taken, in the event the dispute cannot be settled", and is accordingly to be treated as addressing an "issue of *how* … consent is to be invoked by a foreign investor … rather than 'whether'" (Award, para. 242). No authority is provided for the proposition that a procedure that the drafters of a BIT have required a potential claimant to take is not such as to create an obligation that goes to the existence of a jurisdiction. Moreover, none of the authorities that adopt a different view to the majority in this case on this point – see e.g. the leading authority of *Wintershall Aktiengesellschaft v. Argentine Republic*[2] - is addressed or distinguished.

7. *Second*, the majority takes issue with the approach of the majority in *Kılıç* on the basis that the finding was premised on "a contractual analogy which … is both conceptually inaccurate and legally incorrect": the "BIT is not a contract", the majority in this case concludes (Award, para. 244). Yet the majority in *Kılıç* did not assert that a BIT was a contract, or was to be treated as a contract: the agreement to which reference is made in that decision is to the existence of an offer by the State (as reflected in the BIT) and the acceptance by the investor (of the offer made in the BIT) (*Kılıç*, paras. 6.2.1-2). The contractual analogy to which the majority in *Kılıç* referred did not go to the manner of interpreting Article VII(2), as asserted.

8. Rather, the heart of the *Kılıç* decision is the reference to Article 26 of the ICSID Convention (at paras. 6.2.4 *et seq*.), and its use in interpreting the condition that Turkey and Turkmenistan incorporated into their BIT. Article 26 provides that

[2] ICSID Case No. ARB/04/14, Award (8 December 2008) (Nariman, Torres Bernárdez, Bernardini); see also Pierre-Marie Dupuy, 'Preconditions to Arbitration and Consent of States to ICSID Jurisdiction', in Meg Kinnear et al. (Eds), *Building International Investment Law: The First 50 Years of ICSID* (2015), at 219-236.

"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." (emphasis added)

This language appears to make clear that in providing its consent for ICSID jurisdiction, a Contracting State to the ICSID Convention (such as Turkmenistan or Turkey) is free to attach as a condition the requirement that a claimant shall have prior recourse to a local judicial remedy. As set out in Article 26 – which is to be found in Chapter II of the ICSID Convention, entitled "Jurisdiction of the Centre" – the *Kılıç* tribunal found that a condition of this kind forms part of the very existence of the jurisdiction of the forum that is seized, not the exercise of a jurisdiction that has been found to exist. Chapter II of the ICSID Convention is concerned with matters of jurisdiction, not admissibility: indeed, the word "admissibility" is not to be found in that Chapter, or indeed in the Convention. Yet the majority in this case is curiously silent about Chapter II of the ICSID Convention and its Article 26, and offers no explanation as to how it justifies an alternative interpretation or reading of Article 26 and the surrounding provisions.

9. *Third*, the majority states that it sees no need to distinguish the facts of the present case from others, or the legal authorities cited by the *Kılıç* Tribunal, or the legal authorities invoked by the Parties (Award, para. 245). Indeed, it is unfortunate that the majority cites not a single authority in support of its conclusion, instead making the point by assertion that the distinction between jurisdiction and admissibility is a fine one and that "reasonable arbitrators may reasonably disagree". Reasonable arbitrators may indeed reasonably disagree, but the nature of the disagreement is more easily comprehended – and the possibility of its resolution more likely – if it is accompanied by reasoning that cites to existing authorities.

10. *Fourth*, and relatedly, the one authority on which the majority places considerable reliance is an article by Jan Paulsson, entitled 'Jurisdiction and Admissibility', published in 2005 and cited by the majority in *Kılıç* in support of its conclusion (Award, para. 245). The majority melds together three selected passages from pages 616 and 617 of Mr Paulsson's article, but the act of melding seems to have misconstrued what the author

intended. The majority omits the significant words of the text that incorporates footnote 47, a footnote in which Mr Paulsson expresses his view that

> "If an ephemeral arbitral tribunal is established under a treaty which contains requirements as to the nationality of private claimants, or 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." (emphasis added)

Contrary to the view expressed by the majority, the plain meaning of pages 616 and 617 of the article, when read as a whole, appears to point clearly in favour of the conclusion that an "ephemeral tribunal" such as this one will have no jurisdiction where a requirement to have recourse to national remedies has not been met.

11. For these reasons, and in the absence of any other arguments put forward by the majority, I agree with the view put forward by both parties: the absence of prior recourse to the national courts of Turkmenistan means that this Tribunal is without jurisdiction.

Recourse to the Turkmen courts

12. Having concluded that Article VII(2) goes to the admissibility of a claim, rather than the jurisdiction of the arbitral tribunal, the majority concludes that the Claimant's claims are not inadmissible for a failure to comply with the domestic litigation requirement in Article VII(2) of the BIT. This is notwithstanding the undisputed fact that the Claimant never submitted the dispute it has brought to this Tribunal to the courts of Turkmenistan.

13. The majority concludes that "it would not be appropriate now to require that the Claimant first submit the present dispute to local courts" (Award, para. 263). To reach that conclusion, it takes the view that local court proceedings have already been conducted in the context of the present dispute, as summarized at paragraph 252 of the Award, and that "essential aspects of the dispute have in fact been submitted to and litigated before the Turkmen courts, with the result that seven out of the thirteen contracts at issue in this arbitration, including all those that were still ongoing at the time, were terminated (or their termination was upheld)" (Award, para. 262). The majority notes that the proceedings were brought by the Turkmen authorities and not the Claimant, that seven

out of the thirteen contracts at issue in this arbitration were considered to be terminated, and that it is "unclear" why the Claimant failed to participate effectively in the proceedings. Notwithstanding these points, the majority concludes that "the subject matter, or the fundamental basis, of the dispute had already been litigated 'before the courts of justice of the Party that is a party to the dispute'", as required by Article VII(2) (Award, para. 262).

14. The approach taken by the majority is troubling. On its face, Article VII(2) makes clear that two requirements are to be met: (1) the claim is to be brought to the national courts by the "investor concerned", and (2) the claim there brought is presumably the one that relates to "the dispute" that is also before the ICSID arbitral tribunal. On its face neither of these requirements has been met in the present case: *first*, the Claimant has never brought any claim to any national court in Turkmenistan; and *second*, the claims brought to the national courts by other parties (in relation to some of the thirteen contracts) had as their essential cause of action a breach of the relevant underlying contract, and did not not concern any allegation of a violation of the BIT. A *third*, and rather obvious and related point, is that six of the thirteen contracts appear never to have been raised before any national court in Turkmenistan, not for breach of contract or any other cause of action.

15. In these circumstances, on the basis of the evidence that is before this Tribunal, and the arguments raised by the majority, I am unable to agree with the conclusion that the requirement set forth in Article VII(2) has been complied with. It is not here a matter of taking an excessively formalistic view of the facts or the law, but ensuring that the intentions of the drafters of the BIT – in effect the legislature, in international legal terms – in imposing an obligation are fully respected by the arbitral tribunal – in effect the judiciary, in international legal terms - deals thoroughly and completely with the legislated obligations they have put in place in the BIT. The function of an arbitral tribunal is to establish the fact and then interpret and apply the law to those facts, not to decide what is (or is not) "appropriate". The drafters of the BIT imposed a reasonably clear obligation, namely that the investor must first take the dispute that it wishes to take to arbitration to the national courts, and in circumstances in which that has plainly

not happened it is difficult to see the basis upon which an arbitral tribunal could then be free to dispense with the obligation. This is all the more so where the Tribunal has ruled that "the BIT does not provide for any "futility exception" to the local litigation requirement in Article VII(2) of the BIT", and has not been persuaded that it would have been futile to bring the case to the Turkmen courts (Award, para. 260).

16. This aspect of the case touches upon a related matter. The dispute that has given rise to these proceedings is, in my view, manifestly about obligations arising under thirteen contracts between the Claimant and Turkmenistan, and whether or not those obligations have been complied with, on both sides. The BIT in issue does not provide for the jurisdiction of an ICSID tribunal over mere contractual disputes. One of the more striking aspects of the case is the failure of the Claimant to have recourse to the dispute settlement mechanism set forth in those contracts, which mandated recourse exclusively to the national courts, coupled with its failure to keep decent records. Having made its choice, the Claimant can hardly be surprised at the obstacles it has faced before an ICSID tribunal. When the parties to a contract have agreed on a national forum for the resolution of disputes relating to that contract, and that national forum is by-passed, they can hardly expect matters that appear to be essentially of a contractual nature will easily be treated as breaches of treaty (and ones requiring proof of the unlawful exercise of *puissance publique*). This is all the more so where the evidential record on which the claim is brought is as flimsy and inadequate as the one before this Tribunal. The ICSID system is not, and was never intended to be, an insurance against mere contractual failures.

Professor Philippe Sands QC

10 February 2016