

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

In the arbitration proceeding between

**GARANTI KOZA LLP
(CLAIMANT)**

AND

**TURKMENISTAN
(RESPONDENT)**

ICSID CASE NO. ARB/11/20

AWARD

Rendered by an Arbitral Tribunal composed of:

John M. Townsend, President
George Constantine Lambrou, Arbitrator
Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal:

Marco Tulio Montañés-Rumayor

Date of dispatch to the Parties: December 19, 2016

REPRESENTATION OF THE PARTIES

The Claimant has been represented in this arbitration by:

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Ms. Elodie Dulac
King & Spalding
Singapore

Mr. Tevfik Gur
Mr. Serkan Yildirim
Ms. Gülcin Köker
Gür Law Firm
Istanbul, Turkey

The Respondent has been represented in this arbitration by:

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Turkmenistan Ministry of Justice

Mr. Ali R. Gürsel
Ms. Jennifer Morrison Ersin
Ms. Zeynep Gunday
Ms. Svetlana Evliya
Ms. Gulnara Kalmbach
Curtis, Mallet-Prevost, Colt & Mosle LLP
Istanbul, Turkey

Ms. Miriam K. Harwood
Ms. Christina Trahanas
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July 3, 2013

APPENDIX B: **Dissenting Opinion of Professor Boisson de Chazournes on the**
Objection to Jurisdiction for Lack of Consent, July 3, 2013

TABLE OF ABBREVIATIONS

| | |
|------------------|--|
| BIT | Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments which entered into force on February 9, 1995 |
| C-__ | Claimant's Exhibit [number] |
| C-Mem. | Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated February 28, 2014 |
| CL-__ | Claimant's Legal Authority [number] |
| Cl. PHB | Claimant's Post-Hearing Brief, dated October 14, 2015 |
| Contract | Contract between Garanti Koza and TAY, dated March 18, 2008 |
| Decree | Decree of the President of Turkmenistan No. 9429, dated January 27, 2008 |
| ER | Expert Report |
| Exh. | Exhibit |
| FET | Fair and equitable treatment |
| Garanti Koza | Claimant Garanti Koza LLP |
| GKI | Garanti Koza Insaat, Turkish parent company of Garanti Koza LLP |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated March 18, 1965 |
| ICSID Rules | ICSID Rules of Procedure for Arbitration Proceedings, effective April 10, 2006 |
| Mem. | Claimant's Memorial on the Merits, dated September 24, 2013 |
| MFN | Most favored nation |
| National Plan | National Plan for Developing Turkmenistan Economically, Politically, and Culturally |

| | |
|----------------------------|--|
| R-__ | Respondent's Exhibit [number] |
| Rej. | Respondent's Rejoinder on the Merits and Reply on Jurisdiction, dated April 10, 2015 |
| Reply | Claimant's Counter-Memorial on Jurisdiction and Reply Memorial on the Merits, dated October 13, 2014 |
| RL-__ | Respondent's Legal Authority [number] |
| Rsp. PHB | Respondent's Post-Hearing Brief, dated October 14, 2015 |
| Tribunal's Questions | Questions of the Tribunal to the Parties, dated July 30, 2015 |
| TAY | State Concern "Turkmenavtoyollary" |
| Tr. ___, 2015 p. _ | Transcript of Hearing on the Merits and on the Respondent's additional objections to jurisdiction held on June 8 -12, 2015, followed by date and page number |
| Closing Tr. ___, 2015 p. _ | Transcript of Hearing on Closing Arguments held on December 14, 2015, followed by page number |
| VCLT | Vienna Convention on the Law of Treaties |
| WS-1 | First Witness Statement |
| WS-2 | Second Witness Statement |

I. INTRODUCTION

1. This arbitration was commenced by a Request for Arbitration dated May 18, 2011 (the “Request”), in accordance with the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated March 18, 1965 (the “ICSID Convention”), and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, which entered into force on February 9, 1995 (the “BIT”). The Secretary-General of ICSID registered the Claimant’s Request on July 20, 2011.

2. The Claimant is Garanti Koza LLP, a limited liability partnership established in the United Kingdom (the “Claimant” or “Garanti Koza”).¹ The Claimant is partly owned by Garanti Koza Insaat (“GKI”), a Turkish company, and the Claimant’s executives working on the project that is the subject of this arbitration were Turkish nationals.²

3. The Respondent is Turkmenistan (the “Respondent” or “Turkmenistan”).

4. The claims asserted in this arbitration arise out of the interactions between the Claimant and the Respondent in connection with (a) a contract dated March 18, 2008 between Garanti Koza and Turkmenistan’s State Concern “Turkmenavtoyollary” (“TAY”) for the planning and construction of 28 highway bridges in Turkmenistan, and (b) a Presidential Decree awarding the Claimant the construction project provided for in that contract for the lump sum price of USD 100 million.³

¹ C-236 (Registration).

² Mem. ¶¶ 16, 19.

³ Mem. ¶ 2.

5. The Claimant asserts that it made an investment in Turkmenistan in connection with its contract with TAY and the execution of its obligations under it, and that Turkmenistan expropriated that investment and otherwise breached its obligations under the BIT.⁴ As a result, the Claimant argues that it is entitled to an award declaring that Turkmenistan has breached the BIT in multiple respects and awarding it compensation for the breaches.⁵

6. The Respondent argues (a) that the Tribunal does not have jurisdiction to hear the Claimant's claims, (b) that in any event those claims are inadmissible, (c) that the acts complained of cannot be attributed to Turkmenistan, (d) that none of the Claimant's substantive claims has merit, and (e) that the damages requested are unsupported and overstated.⁶

II. THE TRIBUNAL

7. On September 26, 2011, the Claimant appointed Mr. George Constantine Lambrou, a Greek national, as an arbitrator in this case.

8. On October 18, 2011, the Respondent appointed Professor Laurence Boisson de Chazournes, a French and Swiss national, as an arbitrator in this case.

9. On April 10, 2012, Mr. John M. Townsend, a national of the United States, was appointed as the President of the Tribunal by the Chairman of the ICSID Administrative Council.

10. Mr. Marco Tulio Montañés-Rumayor, Legal Counsel to ICSID, acted as Secretary to the Tribunal. Mr. Jan Dunin-Wasowicz served for a time as Assistant to the President.

11. The Tribunal was formally constituted in accordance with Articles 37(2)(b) and 38 of the ICSID Convention on April 13, 2012.

⁴ Mem. ¶¶ 3-4, 23, 27.

⁵ Reply ¶ 450.

⁶ C-Mem. ¶¶ 4-5.

III. PROCEDURAL HISTORY

A. First Session

12. After postponements made at the request of the Parties, the First Session of the Tribunal with the Parties was held in Washington, D.C. on October 19, 2012. Procedural Order No. 1, dated December 21, 2012, records the agreements reached and directions given during that session.

13. At the First Session, the Parties confirmed that the Tribunal was properly constituted and that neither Party had any objection to the appointment of any member of the Tribunal.⁷

14. Also at the First Session, the Parties agreed, without prejudice to the Respondent's objections to jurisdiction, that this proceeding would be conducted in accordance with the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules") in force as of April 10, 2006, at the seat of the Centre in Washington, D.C.⁸

B. Confidentiality

15. On November 2, 2012, the Respondent applied to the Tribunal for a confidentiality order. The Claimant opposed that application on November 16, 2012. The Tribunal ruled in Procedural Order No. 2, dated December 21, 2012, that no confidentiality order in the terms applied for was required or justified on the facts as then shown. The Tribunal directed in Procedural Order No. 2, in accordance with Article 3.13 of the IBA Rules on the Taking of Evidence in International Arbitration, that any document produced by one Party to the other, not already in the public domain, should be kept confidential by the Party receiving it and should be used only in connection with this arbitration.

⁷ Procedural Order No. 1, ¶ 2.1.

⁸ Procedural Order No. 1, ¶¶ 4.1, 9.1.

C. The Objection to Jurisdiction for Lack of Consent

16. At the First Session on October 19, 2012, it was agreed pursuant to ICSID Rule 41(4) that the Respondent's first objection to jurisdiction (the "Objection to Jurisdiction for Lack of Consent") would be considered as a preliminary matter on an accelerated schedule, while the Respondent's second objection to jurisdiction (that most of the claims brought by the Claimant are contractual in nature) would be considered together with the merits of the dispute, if the Tribunal were to reach the merits.

17. Following full written submissions concerning the Objection to Jurisdiction for Lack of Consent, a hearing was held at the seat of the Centre in Washington, D.C. on March 11, 2013, to hear argument on that objection to jurisdiction.

18. On July 3, 2013, the Tribunal issued its Decision on the Objection to Jurisdiction for Lack of Consent. A copy of that decision, which is incorporated into and forms a part of this Award, is appended to this Award as Appendix A. By a majority, the Tribunal found that the Respondent had consented to jurisdiction under the ICSID Convention and the ICSID Rules.

19. Professor Boisson de Chazournes wrote a Dissenting Opinion, which is appended to this Award as Appendix B.

D. Proceedings on the Merits and Additional Objections to Jurisdiction

20. On July 17, 2013, the Tribunal held a telephone conference with the Parties to discuss the merits phase of this proceeding. Procedural Order No. 3, dated July 19, 2013, records the results of that conference, including a schedule for submissions on the merits and on the Respondent's additional objections to jurisdiction. Procedural Order No. 3 set the date for the hearing on the merits and on the Respondent's additional objections to jurisdiction as November 17-21, 2014.

21. The Claimant's Memorial on the Merits was submitted, in accordance with the schedule established by Procedural Order No. 3, on September 24, 2013. At the same time, the Claimant submitted the First Witness Statement of Mr. Mustafa Buyuksandalyaci.

22. On the application of the Respondent, the date for delivery of its counter-memorial on the merits and memorial on jurisdiction, set at January 24, 2014 by Procedural Order No. 3, was extended to February 10, 2014 in Procedural Order No. 4, dated January 22, 2014, and was further extended to February 28, 2014 in Procedural Order No. 5, dated February 10, 2014. Both Procedural Order No. 4 and Procedural Order No. 5 adjusted other dates to reflect these extensions, but preserved the November 17-21, 2014 dates for the hearing on the merits and on the additional objections to jurisdiction.

23. The Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction was submitted on February 28, 2014. At the same time, the Respondent submitted the First Witness Statement of Ashr Alalyk-Ogly Sarybayev, the First Witness Statement of Gochmurat Allamuradov, the first Witness Statement of Murat Ashirovich Nepesov, the First Expert Report (on delay) of Anthony J, Morgan of PwC, and the Expert Report (on valuation) of Irina Novikova and Mark Hannye of PwC.

24. In the course of exchanging documents, a controversy emerged concerning documents located at the factory and site office established by Garanti Koza in Turkmenistan and later attached and sealed by the Government of Turkmenistan. On April 21, 2014, the Secretary forwarded to the Tribunal Redfern Schedules in which each Party argued its position with respect to those documents. In Procedural Order No. 6, dated April 29, 2014, the Tribunal encouraged the Parties to confer promptly with a view (a) to agreeing on a set of instructions pursuant to which an officer of the Respondent would be authorized to conduct a visit to the site to collect documents;

and (b) to agreeing on a timetable for collection and distribution of such documents that would be consistent with the timetable established by Procedural Order No. 5.⁹

25. The Parties eventually reported to the Tribunal that they had attempted to reach agreement as directed in Procedural Order No. 6, but had been unable to do so. Each of the Parties consequently submitted proposed instructions to the Tribunal on May 9, 2014, and submitted comments on the instructions proposed by the adverse Party on May 15, 2014. In Procedural Order No. 7, dated May 20, 2014, the Tribunal issued directions for dealing with the documents at the Claimant's factory and site in Turkmenistan.

26. After the documents in Turkmenistan were collected pursuant to the Tribunal's instructions, the Parties reported to the Tribunal that a further revision of the timetable would be needed. Accordingly, after consultation with the Parties, the Tribunal issued Procedural Order No. 8 on July 18, 2014, revising the timetable and re-scheduling the hearing on the merits and on the Respondent's additional objections to jurisdiction to take place on June 8-12, 2015.

27. The Claimant submitted its Counter-Memorial on Jurisdiction and Reply Memorial on the Merits on October 13, 2014. At the same time, the Claimant submitted the Second Witness Statement of Mustafa Buyuksandalyaci, the Expert Report (on valuation) of Richard Boulton, and the Expert Report (on delay) of Amit Garg.

28. The Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction on April 10, 2015. At the same time, the Respondent submitted the Second Witness Statement of Murat Nepesov, the Second Witness Statement of Gochmurat Allamuradov, the Second Witness Statement of Ashyr Sarybayev, the Witness Statement of Toylymyrat Mammedurdyev, the

⁹ Procedural Order No. 6, ¶ 8.

Witness Statement of Irina Balakley, the Expert Report (on valuation) of Mr. Sirshar Qureshi of PwC, and the Second Expert Report (on delay) of Mr. Morgan of PwC.

29. In accordance with the revised schedule established by Procedural Order No. 10, dated March 16, 2015,¹⁰ a pre-hearing telephone conference was held between the Tribunal and the Parties on May 5, 2015. The agreements reached and directions given during that conference were recorded in Procedural Order No. 11, dated May 15, 2015.

E. Hearing on the Merits and Additional Objections to Jurisdiction

30. The hearing on the merits and on the Respondent's additional objections to jurisdiction was held at the World Bank's offices in Washington, D.C. on June 8 through 12, 2015 (the "Hearing"). On the first day of the Hearing, the Tribunal heard opening statements from counsel for each Party. In addition to the witnesses listed below, the following persons attended:

a. Representing the Claimant:

Mr. John Savage
Ms. Elodie Dulac
King & Spalding
Singapore

Mr. Serkan Yildirim
Mr. Bariscan Akin
Ms. Gülcin Köker
Gür Law Firm
Istanbul, Turkey

Mr. Murat Isikustun
Mr. Ata Alkis
Mr. Turgut Demiroglu
Garanti Koza LLP

¹⁰ Procedural Order No. 9 is discussed at paragraph 42, below.

b. Representing the Respondent:

Ms. Alevtina Yakubova
Turkmenistan Ministry of Justice

Mr. Ali R. Gürsel
Ms. Jennifer Morrison Ersin
Ms. Zeynep Gunday
Ms. Svetlana Evliya
Ms. Gulnara Kalmbach
Curtis, Mallet-Prevost, Colt & Mosle LLP
Istanbul, Turkey

Ms. Miriam K. Harwood
Ms. Christina Trahanas
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New York, New York, United States of America

Ms. Bahar Charyyeva
Curtis, Mallet-Prevost, Colt & Mosle LLP
Ashgabat, Turkmenistan

31. The following fact witnesses appeared and were examined at the Hearing:

- a. Mr. Buyuksandalyaci (testifying in Turkish), for Garanti Koza;
- b. Mr. Sarybayev (testifying in Russian), for Turkmenistan;
- c. Ms. Balakley (testifying in Russian), for Turkmenistan;
- d. Mr. Nepesov (testifying in Russian), for Turkmenistan;
- e. Mr. Mammetdurdyev (testifying in Turkmen), for Turkmenistan; and
- f. Mr. Allamuradov (testifying in Turkmen), for Turkmenistan.

32. In addition, the following expert witnesses appeared:

- a. Mr. Garg (the Claimant's delay expert);
- b. Mr. Morgan (the Respondent's delay expert);

- c. Mr. Boulton (the Claimant's damages expert); and
- d. Mr. Qureshi (the Respondent's damages expert).

33. Each expert witness first made a presentation to the Tribunal, and then was cross examined by the adverse Party. Following the testimony of each pair of experts, first the delay experts and then the damages experts, the Tribunal examined the two experts in each field together, giving each an opportunity to comment on the testimony of the other, and providing counsel for each Party an opportunity to follow up on the Tribunal's questions.

F. Post-Hearing Proceedings

34. Toward the end of the Hearing, the Parties and the Tribunal conferred and agreed that there would be no closing arguments at that time. Rather, the Parties agreed to submit post-hearing briefs simultaneously, after receiving from the Tribunal a list of questions that the Tribunal asked the Parties to address in their post-hearing submissions ("Post-Hearing Briefs" or "PHBs"). Procedural Order No. 12, dated July 2, 2015, set the date for delivery of these submissions at September 10, 2015, and scheduled a final hearing for oral argument for December 14, 2015.

35. On July 30, 2015, the Tribunal provided a list of questions to the Parties ("Tribunal's Questions"). After receiving the Tribunal's Questions, the Parties requested, and the Tribunal approved, an extension of time to make their post-hearing submissions until October 9, 2015. That date was subsequently extended at the joint request of the Parties to October 14, 2015.

36. Following the Hearing, the Parties conferred and agreed upon a number of corrections to the transcript of the Hearing and to the translations of both questions and answers. Each of the Parties then addressed correspondence to the Tribunal concerning the points of disagreement. After the Tribunal considered that correspondence, the Secretary issued the following direction to the Parties:

The Tribunal has received: (1) the Respondent's Errata Sheet on the Points of Difference Between Respondent and Claimant, together with the Claimant's Comments on the same; and (2) the Respondent's Corrections to the Turkish, Russian, and Turkmen Translations of Questions Posed in English, together with the Claimant's Comments on those.

All of the corrections proposed by the Respondent and accepted by the Claimant are accepted by the Tribunal.

The Tribunal reserves decision on the points of disagreement until such time as it concludes that any question of substance turns on the parties' differing understandings. In this connection, the Tribunal invites the parties to draw the Tribunal's attention, in their post-hearing submissions, to any disagreement about transcription or translation that could affect a significant point at issue in this arbitration.

37. The Parties submitted their Post-Hearing Briefs simultaneously on October 14, 2015. No issues concerning the translation at the Hearing were raised in either brief.

38. On December 14, 2015, as provided in Procedural Order No. 12, the Tribunal held a hearing in Washington, D.C. to hear closing arguments from the Parties ("Hearing on Closing")

39. On January 8, 2016, the Claimant submitted to the Tribunal comments on new exhibits, numbered R-98 through R-105, introduced by the Respondent at the Hearing on Closing on December 14, 2015. On February 5, 2016, the Respondent sent the Tribunal its response to the Claimant's comments on those exhibits.

40. On January 22, 2016, also as provided in Procedural Order No. 12, the Parties submitted their respective applications concerning costs. On February 5 and 6, 2016, each Party submitted its comments on the other Party's costs application.

41. On March 23, 2016, the Respondent wrote to the Tribunal to bring to the Tribunal's attention a recent award in an ICSID arbitration entitled *İçkale İnşaat Limited Şirketi v.*

Turkmenistan (ICSID Case No. ARB/10/24) (the “İçkale Award”), and to request leave to add that award to the record in this case.

42. Earlier, on September 24, 2014, the Claimant had brought to the Tribunal’s attention a recently reported but unpublished award rendered on August 12, 2014, in an ICSID arbitration entitled *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9) (the “Adem Dogan Award”) and had asked the Tribunal to require the Respondent to provide a copy of that award. The Tribunal had declined to order the Adem Dogan Award produced, explaining in Procedural Order No. 9 that a decision “in a proceeding brought pursuant to a different bi-lateral investment treaty, by a different claimant, engaged in a different industry, concerning the actions of the Respondent during a different time period” was not likely to “be of material assistance to [the] consideration of whether the Respondent’s conduct towards this Claimant was or was not consistent with its obligations under the BIT between Turkmenistan and the United Kingdom.”¹¹

43. In Procedural Order No. 13, dated 13 April 2016, the Tribunal gave the Respondent a choice with regard to the İçkale Award based on its reasoning with respect to the Adem Dogan Award:

The Respondent is requested to advise the Tribunal by 25 April 2016 whether it will voluntarily submit a copy of the Adem Dogan Award. If it agrees to do so, then both the Adem Dogan Award and the İçkale Award will be added to the legal authorities submitted by the parties in this arbitration. If the Respondent does not agree to submit a copy of the Adem Dogan Award by that date, then its application to submit the İçkale Award will be denied.¹²

The Respondent declined to produce the Adem Dogan Award, so the İçkale Award was not admitted.

¹¹ Procedural Order No. 9, ¶ 9.

¹² Procedural Order No. 13, ¶ 12.

44. On November 25, 2016, the Tribunal declared the proceedings closed in accordance with ICSID Rule 38(1).

IV. FACTUAL BACKGROUND OF THE DISPUTE

A. Turkmenistan's Highway Bridge Project

45. On May 21, 2007, the President of Turkmenistan issued Presidential Decree No. 8626. That decree directed the then Ministry of Automobile Transportation and Highways to renew certain roads, as well as to build new ones, as part of the “National Plan for Developing Turkmenistan Economically, Politically, and Culturally” (the “National Plan”).¹³

46. On August 26, 2007, the Ministry of Automobile Transportation and Highways was liquidated by a further Presidential Decree (No. PP-4834) and was replaced by two entities, the Ministry of Road Transport and the State Concern “Turkmenavtoyollary.”¹⁴ The latter entity, referred to by the initials TAY, was established on September 10, 2007, to be “responsible for the design, renovation, and construction of the highways connecting the major administrative cities of Turkmenistan.”¹⁵ Presidential Decree No. 8941 provides that the implementation of the decree creating TAY was to be supervised by the Vice Chairman of the Cabinet of Ministers.¹⁶

47. One part of the National Plan was to be the improvement of the highway between the cities of Mary and Turkmenabad, in order to “enhance Turkmenistan’s role as a significant Euro-Asian transport corridor.”¹⁷ That highway is “located on the European route E60 which links the cities

¹³ Mem. ¶ 23; *see* C-Mem. ¶ 31.

¹⁴ C-Mem. ¶ 34.

¹⁵ C-Mem. ¶ 34.

¹⁶ C-18, Presidential Decree No. 8941 (“Implementation of this order must be supervised by G. Ashyrov, the vice chairman of the Cabinet of Ministers of Turkmenistan”); Mem. ¶ 24; Buyuksandalyaci WS-1 ¶¶ 13, 27.

¹⁷ C-Mem. ¶ 33.

of Brest, France and Irkeshtam, Kyrgyzstan.”¹⁸ The map below illustrates the position of the road between Mary and Turkmenabad.¹⁹



48. In the fall of 2007, TAY conducted a tender process for the construction of 119 highway bridges. Most of the new bridges were to be double spans carrying two lanes in each direction, to replace existing single-span bridges carrying one lane of traffic in each direction. The tender ultimately resulted in the award of three different contracts.²⁰

49. Mr. Buyuksandalyaci, the General Manager of Garanti Koza, testified that Garanti Koza was established as an English limited liability partnership in April 2007, “for the purpose of

¹⁸ C-Mem. ¶ 33.

¹⁹ C-Mem., n. 51: “Mary, the capital city of the Mary Province, and Turkmenabad, the capital of the Lebap Province, are among the largest cities of industry and trade in Turkmenistan.”

²⁰ C-Mem. ¶¶ 35-36; see Cl. PHB ¶ 4.

undertaking the construction project in dispute in this arbitration, in Turkmenistan.”²¹ As of May 2007, Garanti Koza had three partners: Garanti Koza Insaat Sanayi ve Ticaret S.A. (“GKI”), a major Turkish construction company, which owned 45% of the partnership; IP Consult (International) Limited, which also owned 45%; and Mr. Fuat Turgut Demiroglu, who owned 10%.²² Garanti Koza submitted a bid in response to TAY’s tender.²³

50. In an award announced on December 11, 2007, Garanti Koza was awarded a contract to build 28 of the 119 bridges, all of which were along the Mary-Turkmenabad highway.²⁴ At the same time, the Turkish company Net Yapi was awarded a contract to build 90 bridges, and the Ukrainian company Altcom was awarded a contract to build a single, 1.6 kilometer bridge.²⁵

51. Garanti Koza’s initial bid for the 28-bridge project was USD 105.11 million, including VAT. It subsequently revised its bid to an even USD 100 million, including VAT, and TAY accepted that bid.²⁶

52. The Parties disagree as to why the 119-bridge project was divided into separate projects. Mr. Buyuksandalyaci states that it was because the “Turkmen Government did not have the capacity to complete the necessary prerequisites for such a big project at once.”²⁷ Mr. Sarybayev, who was the Chairman of TAY from 2007 until 2012, takes issue with that statement, and states that, “In fact, Garanti Koza had originally submitted a tender for the 118 bridges.” During post-

²¹ Buyuksandalyaci WS-1, ¶ 12.

²² C-145 (Limited Liability Partnership Agreement, May 7, 2007).

²³ Buyuksandalyaci WS-1, ¶ 15.

²⁴ Mem. ¶ 27; Buyuksandalyaci WS-1, ¶ 17.

²⁵ C-Mem. ¶ 36.

²⁶ Sarybayev WS-1, ¶ 11.

²⁷ Buyuksandalyaci WS-1, ¶ 16.

tender negotiations, he said, “the Turkish company Net Yapi submitted a revised bid with a lower price proposal than all other bidders for 90 of the bridges.”²⁸

B. The Presidential Decree

53. The award of the contract to Garanti Koza was approved by the President of Turkmenistan in Decree No. 9429 (the “Decree”).²⁹ The Decree, in its entirety, reads as follows in translation:

DECREE OF TURKMENISTAN’S PRESIDENT

January 27th, 2008 No. 9429,
Ashgabat city

On concluding contracts on designing and construction of bridges along Turkmenistan’s highways, by “Turkmenavtoyollary” state concern

With purpose of implementing the obligations imposed on highway construction industry as foreseen in National Plan “Main Strategy of Developing Turkmenistan Economically, Politically and Culturally until 2020”, and implementing the Decree of Turkmenistan’s President dated 21st May of 2007 and numbered 8626, I decree as follows:

1. The resolution of “Turkmenavtoyollary” State Concern, stated in 2nd protocol dated 11th December of 2007, on announcing the “Garanti Koza LLP” company (UK) as the winner of the international tender on designing and construction of bridges along Turkmenistan’s highways, should be approved.
2. “Turkmenavtoyollary” State Concern should be allowed to conclude contract with total value of 100,000,000 (one hundred million) USD when the tax is included for the added value, with “Garanti Koza LLP” company (UK) on designing and construction of 28 bridges (hereafter bridges) indicated in the annex of this decree, along Mary-Turkmenabad highway. The construction of the bridges must begin in February of 2008 and ready bridges must be delivered in October of 2008.
3. Turkmenistan’s Ministry of Economy and Finance must provide the financing of the designing and construction of bridges, at the expense of centralized state investments.
4. Turkmenistan’s Central Bank:
should be allowed to conduct the conversion of money amounts of “Turkmenavtoyollary” State Concern in mantas to free convertible foreign currency by official exchange rate, in order to finance the construction of bridges,
should be allowed to pay the 20% of the value of the contract excluding the taxes for the added amount, i.e. 17,391,304 (seventeen million three hundred ninety one thousand three hundred and four) USD advance payment to “Garanti Koza LLP” company (UK) via bank transfer to first degree European bank upon delivery of the return guarantee of the advance payment.
All expenses related with the guarantee letter are paid by UK “Garanti Koza LLP” company.

²⁸ Sarybayev WS-1, ¶ 13. Mr. Sarybayev is currently employed as a consultant to Net Yapi’s parent company. Id. ¶ 7.

²⁹ C-17; Sarybayev WS-1, ¶ 11.

5. Turkmenistan's Ministry of Energy and Industry must ensure construction and renewal of external conducting lines and structures of electricity provision for illuminating the bridges by its own means.

6. "Turkmenavtoyollary" State Concern, Turkmenistan's Ministry of Water Resources, and other related ministries and state institutions must ensure removal of the bridges that they have currently by its own means.

7. "Turkmenavtoyollary" State Concern must deliver the bridges to Turkmenistan's Ministry of Water Resources in accordance with the annex of this decree after completion of the construction of the bridges.

8. Turkmenistan's Ministry of Economy and Finance, Turkmenistan's State Commodity and Raw Material Exchange, Turkmenistan's Ministry of Construction and Construction Materials Industry and Turkmenistan's State Customs Service must draw up necessary documents for implementing the contract mentioned in 2nd section of this decree.

9. Turkmenistan's Ministry of Construction and Construction Materials Industry must supervise the implementation of regulating requirements for ensuring the reliability and earthquake safety of bridges and separate installation parts, and the quality of the used construction means, and must supervise the implementation of the works foreseen in design documents.

10. The implementation of this decree must be supervised by Vice Chairman of the Cabinet of Ministers of Turkmenistan N. Shagulyyev, Turkmenistan's Minister of Economy and Finance H. Geldimyradov, Turkmenistan's Minister of Water Resources M. Akmammedov, Chairman of "Turkmenavtoyollary" State Concern A. Sarybayev, Chairman of the Directorate of Turkmenistan's Central Bank G. Abilov and Chairman of Turkmenistan's Supreme Supervision Department T. Japarov.

Turkmenistan's President (seal)
Gurbanguly Berdimuhamedov³⁰

54. Mr. Buyuksandalyaci testified that, following the Decree, he negotiated a contract with Mr. Sarybayev, the Chairman of TAY.³¹ Mr. Sarybayev confirmed that he led the negotiations on behalf of TAY, but disagreed about the sequence of events.³² Mr. Sarybayev testified that "a Presidential Decree follows the process of the negotiation of the principal terms of a contract between a contractor and a governmental entity, such as the contract price and the completion date, rather than precede it."³³

³⁰ C-17; quoted at Mem. ¶ 28.

³¹ Buyuksandalyaci WS-1, ¶¶ 20-21.

³² Sarybayev WS-1, ¶ 9.

³³ Sarybayev WS-1, ¶ 17.

55. Mr. Sarybayev describes how negotiations between Garanti Koza and TAY led to agreement on a reduction in price from USD 105.11 million to USD 100 million on January 26, 2008, and how the USD 100 million price agreed upon is reflected in the Decree, which is dated the following day, January 27, 2008.³⁴ The contract recites that “This Contract is concluded on the basis of Decree of the President Of Turkmenistan No. 9429 dated on 27th of January, 2008.”³⁵ After the Decree was signed, Mr. Sarybayev says, “we negotiated those terms of the Contract that had not already been negotiated.”³⁶

C. The Contract Between TAY and Garanti Koza

56. The contract between TAY and Garanti Koza (the “Contract”) is captioned “CONTRACT No. 01/2008” and is dated March 18, 2008.³⁷ Mr. Buyuksandalyaci and Mr. Sarybayev agree that they signed the Contract on that date.³⁸

57. The Contract is written in two languages, Russian and English, which appear side-by-side in two columns.³⁹ The two parties to the Contract are TAY, identified as “Owner,” and Garanti Koza, identified as “Contractor.”⁴⁰ “Owner” is further defined in the Contract as “State Concern ‘Turkmenavtoyollary’ acting on behalf of Turkmenistan Government [...]”⁴¹

58. The Contract consists of (a) the Contract proper, consisting of three pages containing six paragraphs, (b) the Contract Conditions, consisting of a further 22 pages containing 21 articles, (c) Schedule A, consisting of Schedules A-1 through A-6, and (d) Schedule B, consisting of Schedules

³⁴ Sarybayev WS-1, ¶ 18; C-017.

³⁵ C-021, p. 1.

³⁶ Sarybayev WS-1, ¶ 19.

³⁷ C-021.

³⁸ Buyuksandalyaci WS-1, ¶ 23; Sarybayev WS-1, ¶ 19.

³⁹ C-021, ¶ 5, which states that the “Prevailing Language of the Contract is Russian.”

⁴⁰ C-021, p. 3.

⁴¹ C-021, Contract Conditions ¶ 1.1(a).

B-1 through B-3.⁴² Also included in the version of the Contract submitted by the Respondent (Exhibit R-18), but not in the version submitted by the Claimant (Exhibit C-021), are Additional Agreement No. 1, dated May 1, 2008, and Additional Agreement No. 2, dated June 27, 2008.⁴³

59. The Contract obligates Garanti Koza to design and build “28 highway bridges and overpasses on the reconstructed highway of the 1st technical category ‘Mary-Turkmenabad’ in the timeframe and in a way as set forth in the Contract Conditions.”⁴⁴ The Contract Conditions require, among other provisions, that the Contractor comply with Turkmenistan law:

Contractor shall follow all the applicable Laws that are in effect on the territory of Turkmenistan. Owner shall assist Contractor in understanding Turkmenistan laws and regulations.⁴⁵

60. According to Article 21 of the Contract Conditions, controversies or arguments between Owner and Contractor are to be submitted to “Arachy Kaziyet of Turkmenistan,” an institution referred to by the Parties as the “Arbitration Court” of Turkmenistan, by which is meant the commercial court.⁴⁶ The same article further specifies that, “if the parties are not satisfied with verdict of Arachy Kaziyet of Turkmenistan, parties have a right to turn to Arbitrage tribunal in Hague (Netherlands).”⁴⁷

61. The Contract imposes a deadline. The Contract Conditions require the Contractor to begin works and complete them in accordance with Schedule A-5 of the contract.⁴⁸ They further provide that “All the construction works of bridges and overpasses shall be completed in the month of October of 2008 according to” the Decree.⁴⁹ In other words, the Contractor is required to complete

⁴² C-021.

⁴³ R-18.

⁴⁴ C-021, ¶ 3.

⁴⁵ C-021, Contract Conditions ¶ 4.18.

⁴⁶ C-021, Contract Conditions ¶ 21.1; C-Mem. ¶ 277; Reply ¶ 269.

⁴⁷ C-021, Contract Conditions ¶ 21.1.

⁴⁸ C-021, Contract Conditions ¶ 7.1.

⁴⁹ C-021, Contract Conditions ¶ 7.2.

the process of designing and building the 28 bridges in seven and a half months. The Contractor is required to “report to Owner in written form if there is a possibility that design or progress of works on structure construction slows down or interrupts.”⁵⁰

62. The terms of payment established by the Contract are central to the Claimant’s claim. The Contract states that the “Total Contract Price” is one hundred million U.S. dollars.⁵¹ It further describes the “stated price” as “a lump sum final turn key price,” and goes on to say that “variations and additions . . . shall not affect Total Contract Price and Terms of Payment.”⁵² The “Total Contract Price” of USD 100 million is further divided, however, into the “Contract Price,” the amount actually to be paid to the Contractor, which was USD 86,956,521.74, and the Value Added Tax associated with that amount, which was USD 13,043,478.26.⁵³ Most of the operative provisions of the Contract relate to the Contract Price, not the Total Contract Price.

63. The Contract Conditions provide for progress payments to “be made as the work progresses and after presentation of monthly Progress Payment Certificate according to Schedule B-2 and confirmed by” TAY.⁵⁴ They further provide that “Monthly Progress payments to Contractor by Owner shall be **based on percentage progress amounts**,” which amounts “shall be taken into consideration as **percentage progress criteria** as per Schedule B-2.”⁵⁵

64. Schedule B-2 to the Contract is captioned “Terms of Payment.” Both the Contract Conditions and Schedule B-2 provide for an advance payment of 20% of the “Contract Price” (which, as noted above, was USD 86,956,521.74, excluding VAT), which equaled USD

⁵⁰ C-021, Contract Conditions ¶ 7.3.
⁵¹ C-021, ¶ 4; *see* Contract Conditions ¶ 10.1.
⁵² C-021, Contract Conditions ¶ 10.2.
⁵³ C-021, ¶ 4.
⁵⁴ C-021, Contract Conditions ¶ 10.3.
⁵⁵ C-021, Contract Conditions ¶ 10.3 (emphasis added).

17,391,304.35. The Contract requires that the advance be paid against an “Advance Payment Guarantee,” and for further payments to be made against certificates from the contractor that a specified percentage of the work has been completed.⁵⁶

65. Schedule B-2 provides that:

100% of the price of the listed works mentioned in Schedule B-1 will be paid (taking in account 20% for reimbursement of Advance Payment) **proportionally for each bridge to the actually done Construction Works** for each month.⁵⁷

Schedule B-1 contains a breakdown of the Contract Price among the 28 bridges and, for each bridge, the percentage allocated to each stage of completion. The Contract specifies the form of the Monthly Progress Certificate to be prepared by the Contractor and provided to the Owner. That form, Exhibit B-3, requires the Contractor to calculate the percentage of actual progress on each bridge in submitting each invoice.⁵⁸

66. Schedule B-2 specifically links the bank guarantee to the progress payments to be made to Garanti Koza:

The amount of the Advance Payment Guarantee shall be diminished proportionally and in the amount of 20% for each payment item, in accordance with all and each of the payment items, listed above, to the CONTRACTOR under the Contract with respect to [sic] with respect to the progress of Works.⁵⁹

67. Schedule B-2 further provides that, after the advance payment, against specified documentation:

- 5.72% of the “Total Contract Price” will be paid for Mobilization Works;
- 5.72% of the “Total Contract Price” will be paid for Design and Ground Survey Works;

⁵⁶ C-021, ¶ 6 and Schedule B-2, ¶¶ B.1, C.4.

⁵⁷ C-021, Schedule B-2, ¶ C. 3 (emphasis added).

⁵⁸ C-021, Schedule B-2, ¶ C. 3, and Schedule B-3.

⁵⁹ C-021, Schedule B-2, p. 2 (emphasis added).

- 100% of the prices listed in Schedule B-1 will be paid for each bridge “to the actually done Construction Works for each month.”⁶⁰

Schedule B-2 also provides for a 5% retention to be paid following completion of the project.⁶¹

68. Schedule B-1 lists each of the 28 bridges, specifies a “Total Price” for each bridge, and then assigns a percentage to each stage of construction. For example, the total price assigned to bridge number 62, the first one listed on Schedule B-1, is USD 7,765,217.48. Schedule B-1 specifies that 0.32% of that price will be paid for “Excavation works,” 0.42% for “Filling and compaction works,” 6.62% for “Pile works,” etc.⁶² The sum of the Total Price given in Schedule B-1 for all 28 bridges is the Contract Price of USD 86,956,521.75, not the Total Contract Price of USD 100 million.

69. The provisions of Schedules B-1 and B-2 summarized in the two preceding paragraphs are difficult to reconcile. “Total Contract Price,” the term used in Schedule B-2, is defined as USD 100 million.⁶³ The bridge-by-bridge percentages in Schedule B-1 that are referenced in Schedule B-2, including the 5.72% for Mobilization Works and the 5.72% for Design and Ground Survey, are applied to figures that add up to the “Contract Price” of USD 86,956,521.75.

70. The Contract provides that it comes into effect upon payment to the contractor of the Advance Payment of USD 17,391,304.00 “against Bank Guarantee Letter.”⁶⁴ The Contract Conditions expand on this provision as follows:

Owner pays Contractor an advance payment in amount of 20% of the total Contract price excluding VAT which is 17.391.304,00 (seventeen million three hundred ninety-one thousands three hundred and four) US Dollars **against the Bank Guarantee** on advance payment given by a first class European bank in order to reimburse of Advance Payment,

⁶⁰ C-021, Schedule B-2, ¶¶ C-1 through C-3.

⁶¹ C-021, Schedule B-2, ¶ C.4.

⁶² C-021, Schedule B-1, p. 1.

⁶³ C-021, ¶ 4; *see* Contract Conditions ¶ 10.1.

⁶⁴ C-021, ¶ 6.

acceptable by the Owner's Bank. Due to time frames imposed by exchange conversion procedures Contractor is advised by Owner to submit this Bank Guarantee latest by 20th day of the month, after which payment of the advance amount shall be made available for Contractor on the fifth (5) day of the next month.⁶⁵

71. The Contract goes on to specify that:

Advance Payment Guarantee shall be automatically and proportionally reduced by 20% of 100 percent (100%) of the commercial value of executed works upon submission of Progress Payment Certificate signed by the Parties and presented by Contractor.⁶⁶

72. Reading the payment terms of the Contract together, they provide for payment by TAY to the Contractor of a 20% advance (presumably calculated on the Contract Price, since the amount specified as the Advance Payment equals 20% of the Contract Price, not the Total Contract Price) against an Advance Payment Guarantee. The 80% balance of the Contract Price, minus a 5% retention, is then to be paid in instalments corresponding to the percentage of the work completed on each bridge and documented by the contractor, and the bank guarantee is to be reduced in proportion to each payment. There is no mention in the Contract of any requirement to document Garanti Koza's costs or profit margins as a condition of payment of any invoice, nor is there any specification of how long the bank guarantee was to remain in effect.

D. Garanti Koza's Initial Mobilization

73. Garanti Koza states that it "commenced work in preparation for the project before the signature of the Contract, as a gesture of good faith and based on the approval given by the Turkmen President."⁶⁷ Immediately after the signature of the Contract on March 18, 2008, "Garanti Koza started mobilisation work," including construction of a precast factory in Mary, entry into a know-how agreement with GKI, installation of a concrete plant and a weigh scale,

⁶⁵ C-021, Contract Conditions, Art. 10.3 (emphasis added). Although "Bank Guarantee" is capitalized, that term is not included among the definitions in Article 1 of the Contract ("Definitions and Interpretation").

⁶⁶ C-021, Contract Conditions, Art. 10.3.

⁶⁷ Mem. ¶ 44.

import of equipment from Turkey and elsewhere, and construction of a dormitory for workers and an office in Ashgabat.⁶⁸

74. Mr. Buyuksandalyaci explained that “Mobilisation included the following steps:

- building a 6,000 square meter movable pre-cast factory near the city of Mary. Garanti Koza concluded a contract with Garanti Koza Insaat for the construction of the factory. The factory was used to manufacture the beams and piles to build the bridges. The factory used an advanced steam curing process which allowed Garanti Koza to manufacture piles and beams of stronger quality and more quickly, by improving the drying system;
- installing a concrete plant, with a computerised mixing system;
- installing a weight scale for trucks;
- importing equipment, which included two cranes able to lift 120 tons each, a high-quality cast imported from Germany, excavators, bulldozers, generators, trucks, concrete mixers and pile drivers; and
- construction of a dormitory and facilities for workers, and the establishment of an office in Ashgabat.”⁶⁹

75. The Know-How Contract (dated March 24, 2008) that Garanti Koza entered into with GKI was the subject of some controversy.⁷⁰ The Claimant states that the know-how in question was “advanced technology to produce pre-stressed beams and piles.”⁷¹ The Respondent points out that there is no mention of any need to acquire know-how in the Contract, or in Garanti Koza’s business plan or its financial statements, and that Garanti Koza’s possession of the know-how needed to produce beams and piles was implicit in its bid to TAY.⁷² It adds that the Know-How Contract itself does not specify what the know-how consists of; indeed, the Respondent says, the Know-How Contract appears to have been downloaded from a model on the internet.⁷³ The Respondent argues that the know-how contract was simply a pretense for transferring USD 12 million, two-

⁶⁸ Mem. ¶ 47.

⁶⁹ Buyuksandalyaci WS-1, ¶ 32.

⁷⁰ C-36 (The Know-How Contract).

⁷¹ Reply ¶ 174.

⁷² Rsp. PHB ¶¶ 101-103.

⁷³ Rsp. PHB ¶ 101; R-72.

thirds of the Advance Payment, to GKI, and that this transfer was the root cause of Garanti Koza's constant complaint that it was short of cash.⁷⁴

76. When questioned at the hearing as to whether either of them had seen any documentation of the value of the know-how that was the subject of the Know-How Contract between Garanti Koza and GKI, both the Claimant's and the Respondent's experts answered "I haven't."⁷⁵ Nor was there any evidence that the know-how was unique or proprietary. When Mr. Buyuksandalyaci was asked at the Hearing whether Net Yapi, Garanti Koza's competitor which was building other bridges in Turkmenistan, was using the same technology as Garanti Koza, Mr. Buyuksandalyaci responded "Yes, of course, they were using the same technology."⁷⁶

77. Although Garanti Koza maintains that it commenced off-site preparations, it did not commence on-site construction immediately after the Contract was signed. The Claimant blames this delay on TAY, which it says "handed over a number of sites with delay and failed completely to hand over four of the 28 sites."⁷⁷ The Respondent takes issue with that assertion, and argues that:

19 of 28 sites were accepted by a contractor by April 12, 2008, 25 days after the Contract was signed and at least five months before Garanti Koza was in a position to begin bridge construction by drilling piles into the ground. It was not in a position to begin construction not because of any act of TAY but because it did not produce a single pile needed to begin bridge production until July 2008 and did not bring a pile-driving machine to the construction site until September 2008.⁷⁸

78. The Claimant also claims to have been delayed in commencing construction of the bridges by TAY's failures to provide technical information and to remove the existing bridges and to clear

⁷⁴ Rsp. PHB ¶¶ 104-108.

⁷⁵ Tr. June 12, 2015, p. 1323.

⁷⁶ Tr. June 9, 2015, pp. 500-501.

⁷⁷ Mem. ¶ 52.

⁷⁸ C-Mem. ¶ 52, citing Exh. GA-1; PwC Delay Report, ¶¶ 3.23-3.29; Sarybayev WS-1, ¶ 34-35; Allamuradov WS-1, ¶ 26.

debris from the bridge sites before handing them over.⁷⁹ The Respondent, for its part, argues that “there was no delay in the handover of technical data or bridge sites caused by TAY.”⁸⁰

E. The Bank Guarantee and the Advance Payment

79. On April 8, 2008, three weeks after signing the Contract, Garanti Koza says that it sent TAY a bank guarantee in the amount of USD 17,391,304, corresponding to 20% of the Contract Price (not including VAT) of USD 86,956,521.75.⁸¹ Mr. Buyuksandalyaci explained that “We had to give a guarantee in order to get the Advance Payment.”⁸² The Claimant argues, however, that “Turkmenistan, including Turkmen Highways and the Central Bank, required amendments to the bank guarantee, which it had no entitlement to do under the Contract, which resulted in a delay of several weeks in its issuance.”⁸³ The Claimant asserts that it “had no choice but to comply,” and sent a revised bank guarantee on April 26, 2008, “which in turned delayed the payment of the Advance Payment.”⁸⁴ The Claimant asserts that the Central Bank delayed approval of the guarantee until May 31, 2008, which in turn delayed the payment of the Advance Payment until July 7, 2008, because of the timing restrictions related to exchange conversion procedures.⁸⁵

80. The Respondent counters that “Claimant’s assertion that the proposed Bank Guarantee was sent to TAY on April 8, 2008 is simply untrue.”⁸⁶ The Respondent argues that the documents “show that Garanti Koza did not submit its proposed Bank Guarantee to the Central Bank of

⁷⁹ Mem. ¶¶ 54-58; Buyuksandalyaci WS-1, ¶ 36.

⁸⁰ C-Mem. ¶ 55, citing Sarybayev WS-1, ¶ 34; Allamuradov WS-1, ¶ 26.

⁸¹ Mem. ¶ 45; C-28.

⁸² Tr. June 9, 2015, p. 372.

⁸³ Mem. ¶ 45.

⁸⁴ Mem. ¶ 45.

⁸⁵ Mem. ¶¶ 45-46. See paragraphs 70-71 above, quoting from Section 10.3 of the Contract Conditions.

⁸⁶ C-Mem. ¶ 66.

Turkmenistan before April 30, 2008, 43 days after the Contract was signed.⁸⁷ The Respondent's version of the chronology is as follows:

April 26, 2008: Claimant sent its proposed Bank Guarantee to TAY;

April 30, 2008: Raiffeisen Bank, the issuer of the Bank Guarantee, sent a proposed Bank Guarantee to the Central Bank of Turkmenistan, i.e., "the Owner's Bank;"

May 12, 2008: The Central Bank of Turkmenistan sent its comments on the proposed Bank Guarantee;

May 16, 2008: Raiffeisen Bank sent Amendment No. 1 to the proposed Bank Guarantee;

May 26, 2008: Raiffeisen Bank sent Amendment No. 2 to the proposed Bank Guarantee;

July 7, 2008: The Advance Payment was made to Claimant.⁸⁸

81. The Respondent makes the point that the "Advance Payment was in effect a loan to be used to fund legitimate Project expenses."⁸⁹ It points out that Turkmen law requires a contractor to furnish a bank guarantee to secure an advance payment.⁹⁰ The Respondent further stresses that the making of the Advance Payment was conditioned by the Contract "upon the delivery by Claimant of a 'Bank Guarantee on advance payment given by a first class European bank in order to reimburse the Advance payment acceptable by the Owner's bank.'"⁹¹ The "Owner's bank" was the Central Bank of Turkmenistan.⁹² Any delay, the Respondent argues, was attributable to the Claimant's failure to provide a compliant guarantee.⁹³

82. Because of currency exchange controls, TAY's bank had to receive the documentation supporting a payment by the 20th of any month in order for payment to be made by the 5th day of

⁸⁷ C-Mem. ¶ 66, citing C-28, Garanti Koza's Bank Guarantee dated April 8, 2008; C-29, Letter No. 272 dated April 26, 2008 from Garanti Koza to Turkmen Highways; C-31, Letter No. 1020 dated December 17, 2008 from Garanti Koza to Turkmen Highways.

⁸⁸ C-Mem. ¶ 64.

⁸⁹ Rej. ¶ 138.

⁹⁰ Rsp. PHB ¶ 153.

⁹¹ C-Mem. ¶ 58, quoting R-18, Contract Conditions, Article 10.3(1) (emphasis in C-Mem.).

⁹² C-Mem. ¶ 68, citing R-18, Additional Agreement No. 2.

⁹³ C-Mem. ¶ 73.

the following month.⁹⁴ Because the final amendment to the bank guarantee was sent after the 20th of May, payment could not be made in June. The advance payment of USD 17,391,304 was made to Garanti Koza on July 7, 2008.⁹⁵

83. The Advance Payment of 20% of the value of the Contract was roughly equal to the 21% percentage of the “construction by length” (that is, the percentage of the total length of all the bridges contracted for) which the Claimant’s expert testified that the Claimant had completed by the time it stopped work.⁹⁶ Considerable attention was therefore devoted during the Hearing to what happened to the Advance Payment. The Claimant states that “Half of the Advance Payment Garanti Koza received was blocked as a cash guarantee by Raiffeisen Bank [the bank that provided the bank guarantee] and the rest was used for mobilisation work.”⁹⁷ Mr. Buyuksandalyaci testified that all of the money was “used in relation to the job that needed to be done for the 28 bridges.”⁹⁸

The Claimant explained further:

The Advance Payment was used to finance the Project, for mobilisation at the outset and, after February 2009, when the second half was released, to pay its debts and finance further works until June 2009 (including, without limitation, paying for design works, procurement of equipment and materials, salaries of employees – over 600 of them at the pick [sic] of the Project).⁹⁹

84. The Respondent has a very different view. It contends that GKI siphoned away the Advance Payment to meet its own cash needs, leaving Garanti Koza with insufficient cash resources to devote to the project in Turkmenistan:

As the bank statement shows, by July 31, 2008, i.e. 20 days after the Advance Payment was received, the balance of Garanti Koza’s bank account was only USD 3,818.20. Thus, nearly all of the USD 17.4 million in Advance Payment funds was entirely gone. Over

⁹⁴ C-21, Art. 10.3.

⁹⁵ R-43; Sarybayev WS-1, ¶ 22.

⁹⁶ Amit Garg Hearing Presentation, slide 3.

⁹⁷ Cl. PHB ¶ 84.

⁹⁸ Tr. June 9, 2015, p. 338; Cl. PHB ¶ 85.

⁹⁹ Cl. PHB ¶ 86.

USD 7 million went to the Turkish parent, Garanti Koza Insaat, within the first 4 days after the Advance Payment was received.¹⁰⁰

85. The Respondent thus argues that GKI's demands were the reason for the "cash squeeze" that the Claimant complained about. It states that "the amount of money Claimant received from TAY was always more than the amount of works Claimant performed." This is confirmed, the Respondent argues, by the Claimant's offer, at the time the bank guarantee expired, to "simply apply the outstanding amount of the Advance Payment to its progress certificates."¹⁰¹

F. The Initial Invoices and the Smeta Problem

86. On April 30, 2008, six weeks after signature of the Contract, Garanti Koza sent TAY its first invoice for a progress payment, covering work on design, exploration, and mobilization.¹⁰² Following the Contract provisions and templates governing progress payments, the invoice sought payment from TAY of a percentage of the Contract Price.

87. Schedule B-1 of the Contract specified that 5.72% of the price agreed for each of the 28 bridges would be attributed to "mobilization works," and that another 5.72% would be attributable to design and ground survey.¹⁰³ In its April 30, 2008 invoice, Garanti Koza applied for the full 5.72% of the price of each bridge for "mobilization works," and for 1.89% (out of the allocated 5.72%) of the price of each bridge for "design and ground survey." The invoice thus claimed, in total, 7.61% of the price of each bridge and of the total Contract Price, for a total of USD 6,615,304.33.

88. TAY rejected Garanti Koza's payment application, not because the work had not been done, and not because the application did not comply with the Contract, but rather because the

¹⁰⁰ Rsp. PHB ¶ 96, citing C-142 (Bank Statement).

¹⁰¹ Rsp. PHB ¶ 98.

¹⁰² Mem. ¶ 62; C-72.

¹⁰³ C-021, Schedule B-1.

application was not prepared in accordance with “CMETA,” which is pronounced and also sometimes spelled “Smeta.”¹⁰⁴ Mr. Buyuksandalyaci explained:

In April 2008, Garanti Koza submitted its first progress payment certificate in keeping with the lump sum pricing provided for in the Presidential Decree and the Contract. To my surprise, this was rejected by Turkmenavtoyollary. I was told by the Control Department of Turkmenavtoyollary that the Ministry of Finance and the Central Bank would not approve payment claims unless they were submitted using detailed cost itemisation pricing based on what is known as “CMETA” (also spelled “SMETA”), instead of lump sum pricing.¹⁰⁵

Mr. Sarybayev of TAY confirmed at the Hearing that Garanti Koza’s payment application was rejected “because there was no SMETA.”¹⁰⁶

89. The Tribunal heard extensive testimony about Smeta in the course of this arbitration. The Parties are in broad agreement about what Smeta is, but whether and how Smeta was applicable to the Contract was vigorously disputed. In broad terms, Smeta is a method, developed under the Soviet Union and still in use in some former Soviet republics, for predicting the cost of engineering and construction work and then for assessing the value of such work as it is done. Mr. Buyuksandalyaci gave the following explanation of his understanding of what Smeta means:

CMETA is a Russian standard unit pricing structure under which the work is valued by applying fixed prices or rates to the quantities of work done (for instance labour and material), as well as overheads and the profit margin. This is commonly referred to in the construction industry as a “schedule of rates”. The prices or rates to be applied to each unit of each item of work are fixed by the Turkmen Ministry of Construction and State Commodity and Raw Material Exchange. In other words, they are fixed unilaterally by Turkmenistan, without reference to the particular contract or the work involved on a particular project.¹⁰⁷

90. The term Smeta is used in Turkmenistan to describe both a contractor’s forecast of the expected costs of materials and labor for a project, and also to describe the process by which a contractor certifies on an invoice what part of the forecast work has been done and what part of

¹⁰⁴ Compare Mem. ¶ 64 with C-Mem. ¶ 74.

¹⁰⁵ Buyuksandalyaci WS-1, ¶ 45.

¹⁰⁶ Tr. June 10, 2015, p. 696.

¹⁰⁷ Buyuksandalyaci WS-1, ¶ 45.

the forecast costs have been incurred, so that he can be paid for that work. Mr. Nepesov, the Acting Head of the Central Office of State Expert Review, a subdivision of Turkmenistan's Ministry of Construction, described how Smeta works in Turkmenistan:¹⁰⁸

Submission of a detailed project smeta is required of all local and foreign contractors performing government contracts in Turkmenistan. The contractor initially prepares and obtains approval from the State Expert Review of its detailed smeta, a detailed cost breakdown of the materials and labor that it plans to use, before the contract's signing or a few months after. The owner of the project monitors the contractor's expenses by checking the contractor's subsequent progress payment certificates against its approved smeta. The purpose of this reporting mechanism is to ensure that the contractor's forecasted costs and expenses are reasonable in light of the work to be performed and that the contractor does not exceed its budget. The smeta system allows incremental payments to the contractor based on the percentages of its completed works.¹⁰⁹

91. Thus the Smeta system, as described by Mr. Nepesov, provides a method of holding a contractor to his cost estimate for a project by requiring the contractor to certify how much of a detailed forecast of the work to be performed and expenses to be incurred have been completed or expended in order to get paid. Mr. Buyuksandalyaci described it at the Hearing as "a progress payment system, based on unit prices."¹¹⁰

92. The difficulty with Smeta, from Garanti Koza's point of view, was that Garanti Koza had contracted for payment based on the percentages completed of a lump sum price, rather than payment in accordance with Smeta. As Mr. Buyuksandalyaci put it:

The imposition of CMETA by Turkmenistan was totally contrary to the Presidential Decree and the Contract, which did not mention CMETA or any schedule or rates pricing. Rather, the Presidential Decree and the Contract provided for a fixed lump sum price payable by progress payments based on percentage of work completed. This is significantly different from CMETA. Under the lump sum pricing, Garanti Koza was assured of progress payments based on the percentage of work completed at the time of each progress claim.¹¹¹

¹⁰⁸ Nepesov WS-1, ¶ 2.

¹⁰⁹ Nepesov WS-1, ¶ 37.

¹¹⁰ Tr. June 9, 2015, p. 441.

¹¹¹ Buyuksandalyaci WS-1, ¶ 46.

We know very well how to work with this SMETA [...]. We wanted to work on a percentage-based progress system, and that was our condition with respect to signing a contract. But unfortunately this was not respected.¹¹²

93. The Respondent disagrees that the Contract was inconsistent with the Smeta requirement:

On the contrary, lump sum contracts are standard practice for construction projects in Turkmenistan, yet the smeta requirements are also the standard practice, as all contractors know.

[...]

The fact is that smeta must be prepared for all construction contracts in Turkmenistan and this requirement does indeed coexist with, and is applied every day to, lump sum contracts. Claimant's reference to Article 10.3 of the Contract, which refers to payments based on the percentage of work performed, does not conflict with the smeta system. Progress payment certificates based on smetas are prepared based on the percentage of works completed by contractors. Indeed, Form 2, the certificate of works actually performed that is part of every progress payment certificate, includes an indication of the percentage of works.¹¹³

94. Mr. Nepesov explained his view of how the Contract between TAY and Garanti Koza required the use of Smeta:

If you were to read the Contract thoroughly, it says "based on reports of work performed." A report on work performed implies Form 2, that is how it is known in my country, which is essentially a list of work performed, the unit measurement—the unit of measurement and the price. And that is all in the Contract. I do not remember which schedule to the Contract.

Perhaps Schedule Number B-2 [...].

The Contractors fill out Form 2, which is a Progress Payment Certificates [sic] and provides to the Owner, the Owner compares it to the Projects, to the SMETA, and in accordance with the SMETA determines the amount that is to be paid.¹¹⁴

95. Mr. Sarybayev, speaking for the "Owner," agreed:

Form 2 is the monthly work performed by the Contractor. Well, it shows how much they have done and there is a special form for that. They make the calculation, and derive the amount which shows how much has been done within the month. Based on Form 2, then Form 3 is prepared. We take the final amount from Form 2 and enter it into Form 3, which has its own rules of completion.¹¹⁵

¹¹² Tr. June 9, 2015, p. 442.

¹¹³ Rsp. PHB ¶¶ 36-37.

¹¹⁴ Tr. June 11, 2015, pp. 811, 828-829; Rsp. PHB ¶ 28.

¹¹⁵ Rsp. PHB ¶ 29.

96. The difficulty arose principally because the Smeta reporting system requires a contractor to certify how much he has paid for each item of material or work for which he is submitting an invoice. Such a system could be expected to work reasonably well with a cost-plus contract, in which the owner and the contractor have agreed that the contractor will do the work for his cost plus a fixed margin or percentage. Even with a cost-plus contract, however, the Smeta system applied in Turkmenistan limits the profit margin that may be claimed on any item of work to 6%, plus an additional 8% that may be claimed on account of administrative expenses.¹¹⁶ It thus effectively limits a contractor who reports his costs truthfully to a 14% profit margin (including overhead), regardless of what the owner may have agreed to pay.

97. It is also more difficult and time consuming to submit invoices that conform to Smeta than invoices calculated simply from the percentage of completion of a task to which the parties have assigned an agreed value. Mr. Nepesov testified that the preparation and submission of a Smeta can take from three to six months, depending on the complexity and size of the project.¹¹⁷ Ms. Balakley, an engineer-economist who worked for Garanti Koza for a few months in 2008, testified that Smetas are normally prepared by a “smeta specialist,” whose duties would normally include the following:

- i) preparation of smeta documentation and progress payment certificates; ii) checking the volumes of completed construction works against approved project and smeta documentation, as well as the construction norms and regulations; iii) recording of the completed construction works and providing assistance in drafting of the reporting documentation regarding progress of work as per the schedule; iv) participation in discussions and meetings regarding the changes in project decisions arising in the course of construction works; v) examination of reasons for delays and poor quality of construction works; and vi) revision of smeta documentation in light of changes in volumes of works within the range of project price; etc.¹¹⁸

¹¹⁶ Nepesov WS-1, ¶ 40.

¹¹⁷ Tr. June 11, 2015, p. 814.

¹¹⁸ Balakley WS, ¶ 8.

98. The Smeta system is administered in Turkmenistan by the State Expert Review.¹¹⁹ Mr. Nepesov, who was in charge of the State Expert Review, explained in his first witness statement that “neither the State Expert Review, nor any other agency has the task of verifying whether the contractor actually pays the prices listed in its foreign currency smeta for its cost items.”¹²⁰ Contractors “who are experienced in Turkmenistan,” he suggests, deal with this artificial limit on profit margin by the way they report costs, because “there is no control mechanism in place in Turkmenistan.”¹²¹ As Mr. Nepesov explained:

An expense listed on a contractor’s invoice may reflect a higher cost than what a contractor actually paid for a certain material. For example, a subsidiary of the contractor may purchase 10 tons of construction steel for 5,000 USD and re-sell it to the contractor for 6,000 USD. The contractor may then report the steel’s cost as 6,000 USD to the owner of the project. The State Expert Review’s only task is to check that 6,000 USD is within the price range provided in its price indexes, not the check whether the actual cost of this item to the contractor was 6,000 USD.

In this example, the contractor would then add 6% to 6,000 USD and be entitled to a payment of 6,360 USD for an actual cost of 5,000 USD. Therefore, in reality, no contractor is limited to a 6% profit margin.¹²²

99. Mr. Nepesov explained that a contractor would normally prepare a “less-detailed SMETA” shortly after the signing of a contract, providing “some general breakdown on costs and the budget.”¹²³ The Expert Review Board would then review that Smeta, and approve it on the condition that the contractor would submit a detailed Smeta within three to six months.¹²⁴ He testified that:

In accordance with Turkmen legislation or legislation of any country, no construction can be done without a project document, without project documentation. And a component, an essential component of project documentation would be SMETA. Everybody has to have a SMETA.¹²⁵

¹¹⁹ Nepesov WS-1, ¶ 37.

¹²⁰ Nepesov WS-1, ¶ 41.

¹²¹ Nepesov WS-1, ¶¶ 41, 43. The Respondent introduced considerable evidence of Mr. Buyuksandalyaci’s experience in Turkmenistan and with Smeta. E.g. Rsp. PHB ¶ 31.

¹²² Nepesov WS-1, ¶¶ 41-42.

¹²³ Tr. June 11, 2015, p. 798.

¹²⁴ Tr. June 11, 2015, p. 798.

¹²⁵ Tr. June 11, 2015, p. 799.

He added: “The function of the State Review Board is the review of project documentation.”¹²⁶

100. The Respondent argues that “smeta does not serve the purpose of changing the contract price, it serves the purpose of justifying and then monitoring it. The Presidential Decree allocated the maximum total amount of USD100 million including VAT and USD87 million excluding VAT for Garanti Koza’s Project based on the price initially negotiated and agreed between Garanti Koza and TAY. Garanti Koza had to simply prepare a breakdown of that total amount of the contract price, in order to obtain payment based on the volumes of work it had actually carried out as per its smeta.”¹²⁷

101. At the Hearing, the Tribunal questioned Mr. Nepesov about his explanation of how Smeta can require a contractor to use fixed prices and fixed percentages and still be consistent with an agreement to pay a lump sum price, in instalments, for a project:

PRESIDENT TOWNSEND: Mr. Nepesov, [...] I’m going to ask you to assume that a Government Ministry of Turkmenistan wants a structure built. It doesn’t matter what kind of structure, but wants a structure built, and negotiates a contract with a foreign contractor to build that structure for a fixed price of USD 10 million. [...] Let’s assume that that fixed price is to be paid at the completion of the Project. And let’s assume that the Contractor tells the Ministry in the negotiations, that the Contractor tells the Ministry very directly, “We expect to make a 25 percent profit on this Project,” and let’s assume the Ministry says, “That’s okay. We’re going to pay you USD 10 million.’ And let’s assume that the Contractor builds the Project and says, “Here it is. Please pay us our USD 10 million.”

Do I understand it correctly--here I’m going to ask you to explain whether I have understood or misunderstood how the law works in Turkmenistan. Do I understand it correctly that the Ministry cannot pay the Contractor the USD 10 million unless the Contractor presents a SMETA which represents that its profit is only 6 percent? Have I understood that correctly?

THE WITNESS: No. I don't think so. [...] But if you announce at the [start] it’s going to be 20 or 25 percent, I don’t think they would give you that profit margin anywhere.

PRESIDENT TOWNSEND: Assume they do. Assume that the Ministry agrees to pay the 10 million knowing that I expect a profit margin of 25 percent, and I succeed and I build the Project, and it only costs me 7 1/2 million to do it. As I understand what you’re telling me, I cannot get paid unless I submit what amounts to false data to the Government. Have I understood that correctly?

¹²⁶ Tr. June 11, 2015, p. 808.

¹²⁷ Rej. ¶ 129.

THE WITNESS: No, it's not quite so, not quite so. Everything is verified. Well, of course, I can buy--I can buy some products with discounts. Of course we cannot verify the factual, the actual price. It's very difficult. It's very challenging to verify the actual price.

PRESIDENT TOWNSEND: Okay. You can't verify it, but you're telling me that I have to falsify it in order to get paid. Do I understand that correctly?

THE WITNESS: Well, I'm having difficulty answering this, Mr. Chairman.

PRESIDENT TOWNSEND: Well, are you having difficulty because you find the answer awkward or because you don't understand the question?

THE WITNESS: The former most likely.¹²⁸

102. The Contract, as the Claimant argues vigorously, contains no direct reference to Smeta.¹²⁹ Indeed, Mr. Nepesov testified that the form of certificate for payment provided for in the Contract was not the form required by the Ministry of Finance of Turkmenistan.¹³⁰ When Garanti Koza's April 30, 2008 application for payment was rejected for failure to comply with Smeta, Mr. Buyuksandalyaci testified that he "objected to this change of pricing," but that he only did so "verbally in my conversations with the Vice-President and the Chairman of Turkmenavtoyollary," because he "knew that a formal letter stating that Turkmenavtoyollary and the Ministry of Construction were in breach of the Presidential Decree and the Contract would damage the working relationship and would be counterproductive." His objections, he said, were unavailing.¹³¹

103. Turkmenistan argues that the Contract is governed by Turkmen law, and that Smeta is required by Turkmen law, so there was no need to refer specifically to Smeta in the Contract.¹³² The Respondent argues that Smeta "is a mandatory reporting mechanism that applies to all construction projects in Turkmenistan regardless of whether the corresponding contract is of a lump sum or any other nature. In order to start receiving payments for its performed works, Garanti

¹²⁸ Tr. June 11, 2015, pp. 869-872.

¹²⁹ See Tr. June 11, 2015, p. 826.

¹³⁰ Tr. June 11, 2015, pp. 829-830.

¹³¹ Buyuksandalyaci WS-1, ¶ 47.

¹³² Rej. ¶ 113.

Koza had no choice but to prepare its smeta, it knew so, and yet failed to do so.”¹³³ Mr. Nepesov testified that:

[T]he word “SMETA” does not have to be said as such. It is implied. There is a law. There is a legal rule that must be complied with. You do not have to have a direct reference to a SMETA in the payments – in the terms of payment or any other section of a contract. It is implied.¹³⁴

Mr. Buyuksandalyaci observed at the Hearing that “seven Ministries approved this Contract. [...] So couldn’t at least one of these Ministries say that our Contract is against the rules, laws of Turkmenistan? None of them made such a comment.”¹³⁵

104. Although it claims that it was “coerced” by Turkmenistan to do so, Garanti Koza revised its first invoice to comply with Smeta.¹³⁶ This took some time, so that the “Smeta” version of the invoice originally issued on April 30, 2008 was not issued by Garanti Koza to TAY until November 1, 2008. That invoice was paid by TAY on December 17, 2008.¹³⁷

105. In addition to delaying its invoicing process, Garanti Koza asserts that the requirement that it use Smeta forced it to reduce the amounts invoiced in the above certificates of payment by about 30%, for a total of USD 4,408,056.¹³⁸ The Respondent disputes that the use of Smeta has any effect on the price paid for a project.¹³⁹ However, Mr. Nepesov effectively conceded that there is a relationship between the use of Smeta and the prices that can be charged, when he testified at the Hearing that “before a customer or an owner pays USD 10 for an amount of work that can effectively be done for USD 2, that particular effort as provided for in the SMETA should be subject to review. And, once the SMETA is subject to review, if there is an amount of work in it

¹³³ Rej. ¶ 124.

¹³⁴ Tr. June 11, 2015, pp. 825-826.

¹³⁵ Tr. June 9, 2015, pp. 485.

¹³⁶ Mem. ¶¶ 67-68, 74.

¹³⁷ Mem. ¶ 69; C-64, C-77, C-78.

¹³⁸ Mem. ¶ 74.

¹³⁹ C-Mem. ¶ 74.

that's listed that is to be paid for USD 10; whereas, it can be effectively done for USD 2, that particular SMETA will not pass the review."¹⁴⁰

G. Performance Delays

106. Both the Contract and the Presidential Decree called for Garanti Koza to complete its work in October of 2008.¹⁴¹ Work at the bridge sites had been planned to commence on May 1, 2008, but work actually began on July 25, 2008.¹⁴² As will emerge below, Garanti Koza never completed all of the work, and significant portions of it had not been completed by October 2008. The Parties agree on those facts, but disagree strenuously about the reasons for them.

107. Garanti Koza attributes the project delays principally to delays on the part of TAY in making the payments to Garanti Koza called for under the Contract. As explained in the preceding sections, there were initially two elements to the payment delays. First, disagreement concerning the bank guarantee that the Contract required Garanti Koza to provide continued through April and May of 2008, with the result that TAY's Advance Payment to Garanti Koza was not made until July 7, 2008.¹⁴³ Second, disagreements concerning whether Garanti Koza's progress payment invoices were required to comply with Smeta delayed payment of Garanti Koza's first progress payment invoice, which was initially submitted on April 30, 2008, was revised to comply with Smeta and re-submitted on November 1, 2008, and was paid on December 17, 2008. The Respondent counters that the Advance Payment would have been paid in April if the Claimant had had an acceptable bank guarantee in place at the time of the signing of the Contract, and that the

¹⁴⁰ Tr. June 11, 2015, pp. 824-825; *see also* Tr. June 10, 2015, pp. 692-693.

¹⁴¹ C-21, Art. 7.2; Schedule A-5; C-17 (Presidential Decree).

¹⁴² Buyuksandalyaci WS-2, ¶ 60; Garg ER, ¶¶ 7.2.1; 8.3.1; C-189.

¹⁴³ Section IV.E, above.

Claimant should have known that its invoices for progress payments were required to comply with Smeta, and would have been paid months earlier if they had been Smeta-compliant.¹⁴⁴

108. Garanti Koza asserts that, notwithstanding these payment delays, it started work immediately after the signature of the Contract. Specifically, it hired workers and built a dormitory and other facilities for them, built a moveable precast factory in the town of Mary to produce beams and piles to build the bridges, entered into a know-how agreement with GKI, installed a concrete plant and a weight scale, imported heavy equipment and machinery, purchased cement, sand, and stone, and submitted bridge designs to TAY and the Ministry of Construction for approval.¹⁴⁵

109. The Claimant asserts that the Respondent further delayed the project by delaying or failing to hand over to the Claimant the sites on which the bridges were to be built,¹⁴⁶ by failing to demolish existing bridges that needed to be removed,¹⁴⁷ and failing to provide geological, topographical, and other technical information called for by the Contract.¹⁴⁸

110. The Respondent, for its part, denies that there was any delay in the handover of bridge sites or technical data to the Claimant.¹⁴⁹ A letter from TAY to Garanti Koza dated July 24, 2008, complaining about the delay in performance, states that:

At present time, the initial data and technical specifications in relation to all bridges, and the act of [land] allocation in relation to 19 bridges have been officially provided by the owner in order to perform the design works for the construction of the aforesaid bridges.

However, Garanti Koza LLP falls behind the schedule [. . .].¹⁵⁰

¹⁴⁴ C-Mem. ¶¶ 56-73; 74; 85; 90.

¹⁴⁵ Mem. ¶¶ 47-49.

¹⁴⁶ Mem. ¶ 52.

¹⁴⁷ Mem. ¶ 54.

¹⁴⁸ Mem. ¶ 56.

¹⁴⁹ C-Mem. ¶¶ 49-55.

¹⁵⁰ Exh. AS-19.

111. The Respondent asserts that “Claimant was late at each stage of the project, in particular, with starting work on the actual bridges.”¹⁵¹ For months, the Respondent argues, “Claimant did nothing but construct a pile and beam production facility that seemed three to four times larger than the needs of Claimant’s project.”¹⁵² That decision, the Respondent argues, “is one of the examples of its gross mismanagement of this project.”¹⁵³

112. TAY’s impatience with the lack of progress was so great that its chairman and other officers met with Turkey’s ambassador to Turkmenistan and other officials on August 8, 2008, to express their concern. The minutes of that meeting reflect TAY’s statement to the ambassador that “no bridge construction works were carried out or accepted as of this day.”¹⁵⁴ The minutes also record that: “At the meeting the Ambassador of Turkey to Turkmenistan had a conversation with M. Buyuksandalyaci over the cell phone with the General Director of Garanti Koza LLP and asked him when he would return to Turkmenistan.”¹⁵⁵ Mr. Sarybayev argues that the fact that Mr. Buyuksandalyaci was “out of the country for nearly two months” during the summer of 2008, returning only in September before leaving Turkmenistan for good at the end of the year, is evidence that “Garanti Koza did not care about completing the project on time.”¹⁵⁶

113. Another factor that delayed progress was that at least three of the bridges that Garanti Koza was supposed to build – bridges 63, 68, and 88 – required steel beams that were not available in Turkmenistan and that could not be produced in Garanti Koza’s factory there. Neither of the delay experts put forward by the Parties could say at the Hearing where these beams were to have come

¹⁵¹ C-Mem. ¶ 144.

¹⁵² C-Mem. ¶ 146; Sarybayev WS-1, ¶ 33.

¹⁵³ C-Mem. ¶ 150.

¹⁵⁴ Exh. AS-37.

¹⁵⁵ Exh. AS-37.

¹⁵⁶ Sarybayev WS-1, ¶¶ 31, 38.

from.¹⁵⁷ The Respondent argues that Garanti Koza “had not taken any steps to source the beams necessary to construct these bridges, much less to actually construct the bridges.”¹⁵⁸ The Claimant’s response to the Tribunal’s written question asking where the Claimant would have obtained these beams was that “Garanti Koza was to procure them in Kazakhstan [...] and transport them by railway to Turkmenistan.”¹⁵⁹ Garanti Koza says that it had initiated the procurement process when it had to leave Turkmenistan,¹⁶⁰ but that is effectively an admission that it was a long way from having procured those beams when it stopped work.

114. The Claimant attributes part of the delay in starting work to the transportation difficulties that delayed delivery of the piling rig that was required to drive the piles on which most of the bridges were designed to rest.¹⁶¹ It had been agreed in the Contract that the bridges were to be built on piles.¹⁶² Driving piles required a specialized machine that could not be procured in Turkmenistan, and that Garanti Koza arranged to obtain from Turkey.¹⁶³

115. The machine was shipped from Turkey to Turkmenistan via Georgia, where it was delayed in transit by the outbreak of hostilities between Georgia and Russia in the summer of 2008.¹⁶⁴ The pile-driving rig finally cleared customs in Turkmenistan on September 19, 2008, and piling work commenced on September 24, 2008.¹⁶⁵ The Respondent asserts that Garanti Koza was “late in

¹⁵⁷ Tr. June 12, 2015, pp. 1069-1070; Rsp. PHB ¶ 133.

¹⁵⁸ Rsp. PHB ¶ 134.

¹⁵⁹ Tribunal’s Questions, Question 28; Cl. PHB ¶ 105.

¹⁶⁰ Cl. PHB ¶ 105.

¹⁶¹ Garg ER, ¶¶ 7.1.1-7.1.3.

¹⁶² R-18 (Contract), Schedule A-1 (Technical Requirements). There is no English translation of Schedule A-1 in the copy of the Contract submitted by the Claimant (C-21). See also Garg ER, ¶ 7.2.1.

¹⁶³ Buyuksandalyaci WS-2, ¶ 60.

¹⁶⁴ Buyuksandalyaci WS-2, ¶ 61; Garg ER, ¶ 7.3.2.

¹⁶⁵ Buyuksandalyaci WS-2, ¶ 61; Garg ER, ¶¶ 7.3.3-7.4.1.

ordering, transporting, and making operational its piling rig,” and that this “delay alone would have made the completion of the project, even with some reasonable delay, impossible.”¹⁶⁶

116. On December 18, 2008, Garanti Koza advised TAY that it had completed one-half of 15 bridges, numbers 72 to 86.¹⁶⁷ The bridge project contemplated building pairs of bridges at each of the 28 sites, each carrying two lanes of traffic, so that, upon completion of the project, there would be two lanes operating in one direction on one of the bridges and two lanes operating in the other direction on the twin of that bridge. The completion of half of 15 bridges meant that one two-lane bridge was open at each of 15 sites, each carrying one lane of traffic in each direction. Garanti Koza informed TAY, however, that it had ceased piling work on December 4, 2008, asserting that it had been prevented from progressing further by late demolition of pre-existing structures, delayed provision of technical information, and delayed hand-overs of bridge sites.¹⁶⁸

117. Mr. Sarybayev testified that: “Towards the end of 2008, once we realized that Garanti Koza was not going to make it by the completion date stipulated in the Contract, we agreed to extend the project deadline until November 2009. In order for this extension to become valid, we needed to conclude a relevant additional agreement to the Contract and register it with the same agencies that registered the initial version of the Contract. Despite all our attempts, Garanti Koza failed to sign it.”¹⁶⁹

118. Mr. Buyuksandalyaci takes issue with Mr. Sarybayev’s statement that the deadline was not extended. He testified that “The project deadline was extended until November 1, 2009 further to a Turkmenistan Presidential Decree which extended completion deadlines for several projects,

¹⁶⁶ Rej. ¶ 150.

¹⁶⁷ C-112; Garg ER, ¶ 7.4.1.

¹⁶⁸ Garg ER, ¶ 7.4.1.

¹⁶⁹ Sarybayev WS-1, ¶ 39.

including this one, by one year. I was informed of this Turkmenistan Presidential Decree by Turkmenavtoyollary.”¹⁷⁰ Mr. Buyuksandalyaci gave no document reference for this statement, but the Claimant submitted a letter from TAY to Garanti Koza dated November 12, 2009, that stated:

According to the proposal of the competent authority of Turkmenistan, period of construction works actually prolonged till the November 2009, but unfortunately this period have been breached by you.¹⁷¹

Another letter from TAY to Garanti Koza, dated December 31, 2009, stated:

Upon the proposal made by the competent authorities of Turkmenistan, the date of commissioning was actually moved to November 1, 2009, but even this date was not observed by “Garanti Koza LLP”.¹⁷²

Those letters would seem to document that the deadline was in fact extended to November 1, 2009.

119. The Respondent argues that the “Claimant seems to have dropped its argument that the completion date was extended to November 1, 2009 by consent of the relevant Turkmen authority,” and that “Garanti Koza did not accept the offer to extend the completion date of the Project because it was not in its interest.”¹⁷³ Mr. Buyuksandalyaci, for his part, attributes the failure to agree to an amendment to the Contract extending the deadline to TAY’s insistence on “wholly unacceptable” wording attributing the delays to Garanti Koza.¹⁷⁴

H. Payment of the First Three Invoices

120. Garanti Koza’s first Smeta-compliant invoice was paid by TAY on December 17, 2008. Both the second and the third Smeta-compliant invoices were paid on January 29, 2009. Garanti Koza issued five subsequent certificates of payment drafted to comply with Smeta between

¹⁷⁰ Buyuksandalyaci WS-2, ¶ 65.

¹⁷¹ C-96.

¹⁷² C-90.

¹⁷³ Rej. ¶ 160.

¹⁷⁴ Buyuksandalyaci WS-2, ¶ 65.

January 5, 2009 and April 28, 2009, all of which were approved by TAY, but none of which was paid.¹⁷⁵

121. The record of invoices for progress payments approved by TAY, and payments of three such invoices (after deducting 20% for the Advance Payment), is shown in the table below.¹⁷⁶

| Certificate of Payment Number and Date | Amount Invoiced, excluding VAT (USD) | Deduction (20%) for Advance Payment (USD) | Amount Paid, after 20% deduction for Advance Payment (USD) | Date of Payment |
|---|---|--|---|------------------------|
| 1. November 1, 2008 | 6,968,347 | 1,393,669 | 5,574,678 | December 17, 2008 |
| 2. December 3, 2008 | 3,119,159 | 623,832 | 2,495,327 | January 29, 2009 |
| 3. December 12, 2008 | 2,309,228 | 461,846 | 1,847,382 | January 29, 2009 |
| 4. January 5, 2009 | 1,200,288 | | Approved/not paid | |
| 5. February 4, 2009 | 1,076,121 | | Approved/not paid | |
| 6. March 2, 2009 | 867,236 | | Approved/not paid | |
| 7. April 7, 2009 | 393,051 | | Approved/not paid | |
| 8. April 28, 2009 | 362,483 | | Approved/not paid | |
| TOTALS: | 16,295,913 | 2,479,347 | 9,917,387 | |

The deceleration of progress on the bridges is evident from the declining amounts for which payment was sought.

¹⁷⁵ Mem. ¶ 69; C-64, C-77, C-78.

¹⁷⁶ See Mem. ¶¶ 69-72, 228; First PwC Valuation Report, Table 3.

I. Expiration of the Bank Guarantee

122. Garanti Koza's fourth certificate of payment, dated January 5, 2009, was not paid by TAY. The reason for non-payment was not that it was not compliant with Smeta, nor that the work certified had not been performed, but rather because the bank guarantee provided by Garanti Koza to TAY expired on February 2, 2009 and was not renewed.¹⁷⁷ As of February 2, 2009, the Respondent asserts, the "Claimant had only amortized about 16.9% of the Advance Payment and still owed close to USD15 million to TAY by its own calculations."¹⁷⁸

123. As explained above (Section IV.E), Garanti Koza had provided the bank guarantee in May 2008 to secure repayment of the advance of USD 17,391,304 paid by TAY to Garanti Koza in July 2008.¹⁷⁹ The Contract provided for 20% of each progress payment made by TAY to Garanti Koza to be reduced by 20%, which was allocated to repayment of the advance payment.¹⁸⁰ Thus, until the advance payment was fully repaid, the bank guarantee provided assurance to TAY that Garanti Koza would not simply pocket the advance and disappear. As shown in the table in paragraph 121, only USD 2,479,347 of the advance payment of USD 17,391,304 had been earned at the time the bank guarantee expired.

124. When the bank guarantee was originally provided to TAY, in May 2008, Garanti Koza was supposed to complete its work under the Contract by the end of October 2008. If Garanti Koza had done so, it would have been of no consequence that the guarantee expired in February 2009. However, when February 2009 arrived with the work only partially completed, Garanti Koza and TAY took radically different positions. TAY's position, as explained by Mr. Sarybayev, was that

¹⁷⁷ Tr. June 9, 2015, p. 421; Sarybayev WS-1, ¶¶ 41-43; Exh. AS-40.

¹⁷⁸ Rej. ¶ 143, citing Mem. ¶ 75 and First PwC Report ¶ 55, Table 3.

¹⁷⁹ See C-Mem. ¶ 111.

¹⁸⁰ C-021, Article 10.3.

it would exert itself (as it did) to pay Garanti Koza's second and third invoices by the end of January, because it knew that it would be unable to pay invoices after the bank guarantee expired on February 2.¹⁸¹ Garanti Koza's position was that it was "under no contractual or other obligation to renew the Guarantee,"¹⁸² and that TAY's obligation to pay its invoices was not conditioned on the bank guarantee remaining in effect.¹⁸³

125. Mr. Sarybayev conceded at the Hearing that the Contract does not, in so many words, require that the bank guarantee remain in effect in order for progress payments to be made.¹⁸⁴ The Respondent nevertheless takes the position that the structure of the Contract, by providing for a deduction of 20% from each progress payment until the advance was repaid, effectively demonstrates that the parties understood that the guarantee would have to remain in effect for the life of the project – which was in any event expected by both parties to be shorter than the life of the guarantee.¹⁸⁵

126. The Claimant gives three reasons why it did not renew the bank guarantee. First, it says that it was under no obligation to do so. Second, it says that "it was reasonable for Garanti Koza to opt not to renew in light of its deteriorating relationship with Turkmenistan." And third, it says that it "offered Turkmenistan alternatives to the renewal of the Bank Guarantee, such as giving the factory and equipment as collateral."¹⁸⁶

127. In the event, the Claimant says, "Turkmenistan was inflexible. It rejected all alternatives, did not propose any other alternatives and tried to coerce Garanti Koza to renew the Bank

¹⁸¹ Sarybayev WS-1, ¶¶ 41-43; *see* C-Mem. ¶¶ 105-106, 126.

¹⁸² Garanti Koza's Closing Presentation, slide 49.

¹⁸³ Reply ¶¶ 110-112.

¹⁸⁴ Tr. June 10, 2015, p. 618.

¹⁸⁵ C-Mem. ¶ 128.

¹⁸⁶ Reply ¶ 113; *see* C-103, C-104.

Guarantee by refusing to pay for the works done up to the end of March 2009 and approved by it under Certificates No. 4 to 8.”¹⁸⁷ The Respondent agrees that it insisted that Garanti Koza had to have a valid bank guarantee in place in order to receive progress payments. The Respondent observes that it would have been imprudent to proceed otherwise with “a paper company with no real equity, with no employees and with no activity or transactions conducted by it.”¹⁸⁸

J. Non-Payment of Five Additional Approved Invoices

128. The upshot after the expiration of the bank guarantee was that the Claimant’s progress payment invoices after the first three remained unpaid, even though five more progress payments (represented by invoices 4 through 8) were approved by TAY (see table at paragraph 121). According to Mr. Sarybayev, it was not TAY that was unwilling to pay the approved progress payments, but rather the Central Bank. Mr. Sarybayev testified:

THE WITNESS: The Bank Guarantee in Turkmenistan and under current legislation is required for the period of construction for the entire period. When the Bank Guarantee expires, up to that, the Bank does not conduct any operations. The Advance Payment is then depreciated by the end of the Project, and it will be zero, so the bank -- or by the time of the expiration, it should be zero. So the Bank Guarantee is then null and void.

ARBITRATOR LAMBROU: Was any attempt made by Turkmenautoyollari to make further payments after expiration of the Bank Guarantee?

THE WITNESS: Yes, there was an attempt. We tried to pay them, based on the Progress Payment Certificates, based on promises from Mr. Buyuksandalyaci. I personally tried to convince the Bank that we should go ahead and make the payment, but they would not go ahead and make the payment.¹⁸⁹

129. Nevertheless, the Claimant remained in possession of the Advance Payment, which had been only partially amortized. Twenty percent of the first three progress payments (USD 2,479,347) had been applied to reduce the amount of the Advance Payment,¹⁹⁰ but that left USD 14,911,957 of the Advance Payment (USD 17,391,304 - 2,479,347 = USD 14,911,957) in Garanti

¹⁸⁷ Reply ¶ 113.

¹⁸⁸ C-Mem. ¶ 120.

¹⁸⁹ Tr. June 10, 2015, p. 729-730.

¹⁹⁰ Mem. ¶ 228.

Koza's hands. Since the approved but unpaid progress payments (invoices 4 through 8) added up only to USD 3,899,179, Garanti Koza was still well ahead as of the date of the last approved invoice, April 28, 2009.¹⁹¹

K. Suspension of Work

130. By the end of March 2009, according to Mr. Garg, the Claimant's delay expert, the Claimant "had completed 21 bridges in one direction, was progressing Bridge No. 71 in both directions and could start work on Bridge No. 89."¹⁹² Around that time, however, the same expert stated that "the progress of the works started to slow down eventually coming to a standstill. Production of piles effectively stopped at the end of March 2009, with production 63% complete."¹⁹³

131. After April 2009, some additional work on the bridges was achieved, but progress gradually came to a halt. As Mr. Garg explained:

From April 2009 onwards, the Claimant continued to work on Bridge No. 71, and by 31 May 2009 had also progressed works on the second halves of Bridges No. 72, 73, 74, and 75. The Claimant had also substantially completed piling works for one half of Bridge No. 89 by this date. As of this date, the Claimant had completed approximately 29% of the construction by length of all the bridges excluding Bridge No. 63 & No. 88.¹⁹⁴

The Respondent asserts that Garanti Koza had effectively abandoned the project by May of 2009.¹⁹⁵ It is clear from the evidence that work had effectively ceased by the middle of 2009.

132. Overall, the Claimant claims to have "completed the construction of 21 bridges one-way", which TAY has subsequently opened to traffic, and also claims to have completed both directions on one of the large bridges, Number 71.¹⁹⁶ Mr. Garg estimates that: "Based on the total length of

¹⁹¹ See Mem. p. 75; C-Mem. ¶ 114.

¹⁹² Garg ER, ¶ 8.4.2.

¹⁹³ Garg ER, ¶ 8.4.6.

¹⁹⁴ Garg ER, ¶ 8.4.7.

¹⁹⁵ Rej. ¶ 156.

¹⁹⁶ Mem. ¶ 87.

all bridges [not excluding Bridges Nos. 63 and 88], the Claimant had completed approximately 21% of the construction by length.”¹⁹⁷

133. The Claimant also asserts that “Turkmenistan had no complaints about the quality of Garanti Koza’s work.”¹⁹⁸

L. Post-Suspension Invoices

134. In the eight days between August 5 and August 13, 2009, Garanti Koza issued five additional invoices, totaling USD 10,236,855 (excluding VAT and after subtracting 20% for the Advance Payment), as follows:

| Certificate of Payment No. | Gross Earned Amount (excl. 15% VAT) (USD) | 20% Advance Payment Deduction (USD) | Payment Due (Net of Advance Payment Deduction) (USD) |
|-----------------------------------|--|--|---|
| No. 9 | 4,808,282 | 961,656 | 3,846,625 |
| No. 10 | 1,177,781 | 235,556 | 942,225 |
| No. 11 | 5,183,435 | 1,036,687 | 4,146,748 |
| No. 12 | 995,478 | 796,383 | 199,096 |
| No. 13 | 1,377,701 | 275,540 | 1,102,161 |
| Total | | | 10,236,855 |

These invoices were neither approved nor paid by TAY.¹⁹⁹

135. By August 13, 2009, by the Claimant’s calculation, TAY owed the Claimant a total (excluding VAT) of USD 13,953,486. At the same time, the Claimant continued to hold an

¹⁹⁷ Garg ER, ¶ 8.4.7.

¹⁹⁸ Mem. ¶ 88.

¹⁹⁹ Mem. ¶¶ 228-229; see First PwC Valuation Report, Table 3.

unapplied balance of the Advance Payment that it calculates as USD 11,423,586. The net that the Claimant believes it is owed for work done as of August 2009 is thus USD 2,529,900.²⁰⁰

136. The Respondent's view of the same facts as of the end of 2009 appears in a letter dated December 31, 2009, from TAY to Garanti Koza. In that letter, TAY takes the position that Garanti Koza had by that date performed 18.74% of the work called for by the Contract, corresponding to a value of USD 18,750,301.04. Out of that amount, TAY said, USD 9,917,387.48 was paid to Garanti Koza, and USD 3,259,182.78 was deducted for the Advance Payment. That left, TAY said, an unpaid balance owed to Garanti Koza but held in the Central Bank of Turkmenistan of USD 3,119,343.69 and an unsettled balance of the Advance Payment paid to but not earned by Garanti Koza of USD 14,132,121.22.²⁰¹

M. Withdrawal of Garanti Koza from Turkmenistan

137. The Claimant asserts that, beginning in the fall of 2009, "Turkmenistan embarked on a more intensive harassment campaign against Garanti Koza."²⁰² First, the Claimant says, TAY "threatened to terminate the Contract."²⁰³ Indeed, on November 12, 2009, TAY sent Garanti Koza a letter complaining that Garanti Koza had not "executed your obligations" and stating that:

Taking into consideration all of the cases, Company "Garanti Koza LLP" over a long period of time do not accept any steps on improvement of the existing situation and there is no any guarantee on continuation of construction works and execution of Contract, therefore State Concern "Turkmenavtoyollary" is obliged to use Article 11 "Legal assets and authorities" and Article 17 "Cancellation of the Contact".²⁰⁴

²⁰⁰ Mem. ¶¶ 229-230. This amount does not include the Claimant's claims for the loss of its factory and equipment, lost profits, lost opportunity, or interest.

²⁰¹ C-90.

²⁰² Mem. ¶ 89.

²⁰³ Mem. ¶ 90.

²⁰⁴ C-96; C-Mem. ¶ 171.

138. Then, the Claimant says, the Turkmen tax administration conducted a tax inspection and announced it would fine Garanti Koza for tax infractions.²⁰⁵ The Respondent states, however, that:

[T]he Turkmen tax authorities did not take further steps to recover Garanti Koza's tax indebtedness and fines, revealed during the December 2009 Tax Audit. The amount of approximately USD1.3 million comprising of the unpaid taxes and the accumulated penalties revealed by the Tax Audit in December 2009 still remains unrecovered as of today.²⁰⁶

139. The end of Garanti Koza's activities in Turkmenistan came early the following year. As narrated by Mr. Buyuksandalyaci:

In the first week of February 2010, I was informed by one of Garanti Koza's employees in Turkmenistan that a committee comprising representatives of Turkmenavtoyollary, the Ministry of Construction and Turkmenistan's Supreme Supervision Agency came to Garanti Koza's factory in Mary, accompanied by police and military forces. This committee told our remaining employees on site not to touch anything or take anything with them. The committee conducted an inventory and valuation of the equipment and material at the factory. It requested that one of our employees on site sign the inventory and valuation. A copy of the committee's minutes, dated February 4, 2010, containing the inventory and valuation, was provided to one of our employees. After completing the inventory, the committee asked our employees to leave the site of the factory and took it over. We arranged for our remaining Turkish employees to fly back to Turkey the next day.²⁰⁷

140. The Respondent denies that its actions at Garanti Koza's factory on February 4, 2010 amounted to a seizure of Garanti Koza's assets. The Respondent describes the incident as an "inventory of assets" that was conducted as part of an "inspection carried out by the Supreme Control Chamber of Turkmenistan."²⁰⁸ That inspection had nothing to do with the tax dispute, the Respondent says, but "was a consequence of Garanti Koza's failure to perform its obligations under the Contract."²⁰⁹

²⁰⁵ Mem. ¶ 91.

²⁰⁶ C-Mem. ¶ 167, citing R-63 (Letter No. 171/11 from the Main Tax Service to Turkmenavtoyollary dated January 20, 2014 regarding the tax indebtedness of Garanti Koza as of January 20, 2014).

²⁰⁷ Buyuksandalyaci WS-1, ¶ 73, citing C-38 (Turkmenistan's Minutes of Valuation).

²⁰⁸ The Supreme Control Chamber, Respondent explains, "exercises audit and supervisory functions over the implementation of projects financed from public funds." C-Mem. ¶ 165; R-62.

²⁰⁹ C-Mem. ¶¶ 163-164.

N. Events After Withdrawal

141. Shortly after the factory visit and the subsequent departure from the country of Garanti Koza's remaining personnel, TAY "exercised its Article 17 right to unilaterally terminate the Contract" on February 22, 2010.²¹⁰ According to the Respondent, the termination took effect on March 24, 2010, 30 days after the notice was given.²¹¹

142. On the same day that it sent its notice of termination, February 22, 2010, TAY asked the Prosecutor General of Turkmenistan to commence a lawsuit against Garanti Koza in the "Arbitration Court" of Turkmenistan.²¹² The next day, on February 23, 2010, the Arbitration Court entered an order attaching Garanti Koza's assets "as a provisional measure granting TAY security for amounts owing to it by Garanti Koza."²¹³ Those assets were valued "by the Forensic Experts of the Ministry of Internal Affairs" at USD 11,610,881,²¹⁴ a valuation that the Claimant challenges as inaccurate.²¹⁵

143. The Arbitration Court wound up the case swiftly. In a decision dated March 12, 2010, the Arbitration Court awarded TAY a "delay penalty" of USD 3 million, amounting to 3% of the value of the Contract, and a judgment for USD 10,999,830.26, which the Respondent describes as "the unutilized advance payment," excluding the amounts owed by TAY to Garanti Koza, plus "state duties."²¹⁶ The Court further permitted TAY to enforce its judgment against the proceeds from

²¹⁰ C-Mem. ¶ 172; R-1.

²¹¹ C-Mem. ¶ 172.

²¹² As explained above, the "Arbitration Court" of Turkmenistan is not an arbitration tribunal, but is rather a civil court that deals primarily with commercial matters.

²¹³ C-Mem. ¶ 176.

²¹⁴ C-Mem. ¶ 176.

²¹⁵ Mem. ¶ 95.

²¹⁶ C-Mem. ¶ 175.

sales of Garanti Koza's assets, although the Respondent states that TAY has so far "elected not to seek the enforcement of the Decision of the Arbitration Court."²¹⁷

144. The Respondent states that the Arbitrazh Procedural Code does not require the presence or consent of the defendant when attaching its assets as security for a claim. According to the Respondent, the Arbitrazh Procedural Code stipulates that courts will consider an application for security within five days, without informing the respondent and other participants of the case. The Respondent also stresses that the Arbitrazh and Civil Procedural Codes also do not require any notification relating to enforcement of the decision. Thus, Respondent says, Garanti Koza was not notified of the rulings and orders concerning attachment of its assets as a security measure for TAY's claim until the Decision of the Arbitrazh Court dated March 12, 2010, was communicated to Garanti Koza by letter of the Arbitrazh Court No. 196/1- 33 dated March 15, 2010.²¹⁸

145. The Respondent also states that Garanti Koza's production facility was never transferred to Net Yapi or to any other party and the facility remains untouched since Garanti Koza abandoned the Project in May-June 2009. The facility does remain under an attachment order, but TAY has not sought enforcement of the order, first because it was still hopeful that Garanti Koza would return to complete the Project, and later because TAY chose to wait for the determination of the claims in this ICSID Arbitration.²¹⁹ The Respondent contends that the Claimant has never alleged that Garanti Koza's production facility was transferred to Net Yapi, and that did not in fact occur. At the Hearing, Counsel for the Claimant questioned Mr. Sarybayev as to why the Supreme Control Chamber recommended that the construction works, not the production facility, be handed

²¹⁷ C-Mem. ¶ 176.

²¹⁸ Rsp. PHB ¶ 144.

²¹⁹ Rsp. PHB ¶¶ 149-150.

over to Net Yapi.²²⁰ There was no mention of the production facility being transferred to anyone in the Minutes of Inventory created as part of an inspection carried out by the Supreme Control Chamber on February 4, 2010.²²¹ Nevertheless, Mr. Sarybayev testified at the Hearing:

THE WITNESS: For 28 bridges, if we gave the Contract over to Net Yapi, then at the end of the Project, they would give the production base; that is, they – or production facilities to the balance sheet of Turkmen Highways.

ARBITRATOR LAMBROU: Is that the production facility which was originally built by Garanti Koza?

THE WITNESS: Yes.²²²

146. Mr. Buyuksandalyaci describes the delay penalty as a “punitive sanction,” characterizing TAY’s approach to delays as “outrageous,” because “[TAY] caused the delays and by its own admission, the completion date had been extended by Turkmen authorities until November 1, 2009.”²²³ He also states that the Arbitration Court summoned Garanti Koza on February 23, 2010, to attend a trial commencing on February 26, 2010, which it “was not possible for Garanti Koza to attend on such short notice.” He adds that “no Turkmen lawyer would represent Garanti Koza against the Government,” and that Garanti Koza did not receive any information on the outcome of the court proceedings.²²⁴ The Claimant argues that it would have been both futile and dangerous for Garanti Koza to appear at the court.²²⁵

147. It was only on January 3, 2011, Mr. Buyuksandalyaci says, that TAY sent a letter to Garanti Koza’s London office informing Garanti Koza of the termination of the Contract.²²⁶ That letter, the Claimant asserts, claimed that it was Garanti Koza, rather than TAY, which had unilaterally

²²⁰ Tr. June 10, 2015, p. 702.

²²¹ Rsp. PHB ¶ 151.

²²² Tr. June 10, 2015, pp. 730-731.

²²³ Buyuksandalyaci WS-1, ¶ 78.

²²⁴ Buyuksandalyaci WS-1, ¶ 79.

²²⁵ Mem. ¶ 104.

²²⁶ Buyuksandalyaci WS-1, ¶ 81; C-93.

terminated the Contract.²²⁷ The Claimant points out that this letter was inconsistent with TAY's letter of February 10, 2010, which stated that TAY was terminating the Contract.²²⁸

V. APPLICABLE LAW

148. It is common ground that the law applicable to the present dispute is contained in the BIT and the ICSID Convention. Where these treaties are silent on a relevant issue, such issue is subject to customary international law, unless the treaties refer to municipal law or the parties agree to do so.

149. In interpreting the BIT and other treaty language, the applicable rules of interpretation are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). The Tribunal cites to the decisions of other tribunals in other investment treaty cases where such decisions help to explain a point, to clarify a concept of international law, or to illustrate how similar issues have been resolved in other cases, but the Tribunal is not in any way bound by such decisions.²²⁹

150. The interpretation of the Contract is governed by the law of Turkmenistan.²³⁰

VI. THE JURISDICTION OF THE TRIBUNAL

151. As described in Part III.C above, the Respondent agreed at the First Session with the Tribunal to divide its objections to jurisdiction into two parts. The first part, the Respondent's Objection to Jurisdiction for Lack of Consent, was raised as a preliminary matter and was considered in the Tribunal's Decision on the Objection to Jurisdiction for Lack of Consent, dated

²²⁷ Mem. ¶ 106.

²²⁸ Reply ¶ 150.

²²⁹ See RL-88, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶ 76 [hereinafter: *Bayindir v. Pakistan*].

²³⁰ C-021, Contract Conditions Art. 2.2.

July 3, 2013, which is attached to and incorporated into this Award as Appendix A. Professor Boisson de Chazourne’s dissent from that decision is attached to this Award as Appendix B.

152. The Tribunal now turns to the Respondent’s remaining objections to jurisdiction, which were raised in the context of the proceeding on the merits.

A. The Respondent’s Additional Contentions as to Jurisdiction

153. The Respondent argues that the Claimant bears the burden of proof, by the preponderance of evidence, that this Tribunal has jurisdiction over the present dispute pursuant to the instruments under which it has brought its claims. Thus, even though it is Turkmenistan that raises the objections to the jurisdiction of this Tribunal, the Respondent argues that the burden of proof still lies with the Claimant to demonstrate that the jurisdictional requirements of both Article 25 of the ICSID Convention and Article 8 of the BIT are satisfied.²³¹

1. The Respondent denies that the Claimant made an investment

154. The Respondent asserts that, for the Tribunal to have jurisdiction over the present dispute, the dispute must arise out of an “investment” within the meanings of both Article 25 of the ICSID Convention and Article 1(a) of the BIT. The Respondent considers that this so-called “double keyhole” test has been applied by numerous ICSID tribunals and requires this Tribunal to determine, in order to decide whether the Tribunal has the competence to consider the merits of the claim: (a) whether the dispute arises out of an investment within the meaning of the Convention; and, if so, (b) whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration in the BIT, and specifically in the pertinent definitions contained in Article 1 of the BIT.²³²

²³¹ Rej. ¶¶ 185-186.

²³² C-Mem. ¶ 180; Rej. ¶ 188.

155. The Respondent argues that the Claimant has failed at each step and that the Claimant does not have an “investment” within the meaning of either Article 25 of the ICSID Convention or of Article 1(a) of the BIT. Accordingly, the Respondent asserts, the Tribunal has no jurisdiction over the present case.

a. The Respondent denies that the Claimant had an investment under the ICSID Convention

156. The Respondent stresses that, when evaluating its competence to entertain a dispute submitted to it, an arbitral tribunal sitting pursuant to the ICSID Convention must first discern whether the case as presented falls within the jurisdictional requirements set out in the Convention.²³³ Article 25 of the ICSID Convention defines the Centre’s jurisdiction as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

157. The Respondent argues that, although the term “investment” was left undefined by the drafters of the ICSID Convention, the drafting history leaves no doubt that “it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction no matter how far-reaching the parties’ consent might be.”²³⁴ Referring in particular to the award in *Alpha v. Ukraine*²³⁵ and the annulment committee’s decision in *Malaysian Salvors v. Malaysia*,²³⁶ the Respondent underlines that several arbitral tribunals have also indicated that ICSID jurisdiction does not extend to mere commercial agreements.

²³³ C-Mem. ¶ 182.

²³⁴ C-Mem. ¶ 183; RL-80, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press, 2nd edition, 2010), p. 117, ¶ 122. [hereinafter: *Schreuer, The ICSID Convention*].

²³⁵ CL-57, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, ¶ 314 [hereinafter: *Alpha v. Ukraine*].

²³⁶ RL-81, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, April 16, 2009, ¶ 69 [hereinafter: *MHS v. Malaysia*].

158. The Respondent emphasizes that some ICSID tribunals have identified a number of objective criteria that should each be met before a transaction can be considered an investment. The Respondent considers that these objective criteria form a test – the *Salini* test – that has become a widely accepted method to determine whether a claimant’s activities gave rise to a protected investment under Article 25 of the ICSID Convention.²³⁷ These objective factors are: (a) the investor’s participation in the risks of the project; (b) a substantial contribution; (c) a certain duration; and (d) a contribution to the host State’s economic development.²³⁸

159. According to the Respondent, the Claimant’s activities do not satisfy any of these four conditions and are at best a simple commercial transaction falling outside the scope of ICSID jurisdiction. For purposes of argument, the Respondent assumes that the Claimant contends that the assets that it claims constitute an investment under the BIT also constitute an investment under the ICSID Convention. Those are i) claims to money under the Contract; ii) movable property in the form of a factory and equipment; and iii) know-how.²³⁹ However, the Respondent contends that none of these alleged assets passes the *Salini* test and none could possibly be considered an investment under the ICSID Convention. Therefore, the Respondent argues, it is clear that the Claimant’s activities in Turkmenistan did not give rise to an investment within the meaning of the ICSID Convention.

160. First, referring to scholarly commentary and various arbitral awards such as those in *Romak v. Uzbekistan*²⁴⁰ and in *Italy v. Cuba*²⁴¹, the Respondent explains that the Claimant’s alleged

²³⁷ See RL-85, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001 [hereinafter: *Salini v. Morocco*].

²³⁸ C-Mem. ¶ 182; Rej. ¶ 203.

²³⁹ C-Mem. ¶ 188.

²⁴⁰ RL-93, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, November 26, 2009, ¶ 222 [hereinafter: *Romak v. Uzbekistan*].

²⁴¹ RL-102, *Italian Republic v. Republic of Cuba*, Ad hoc Arbitration, Final Award, January 1, 2008, ¶ 198.

investment was not characterized by any element of risk. According to the Respondent, “Construction contracts in which the entrepreneur’s revenues do not depend on the profitability of the delivered project are not characterized by investment risk.”²⁴² The Respondent argues that there are two categories of international construction contracts: (i) “free-standing international civil engineering contracts,” such as the contract at issue in the present case; and (ii) contracts which are part of a “network of activities with an entrepreneurial purpose,” such as concession or build-operate-transfer (“BOT”) contracts. Citing various commentators,²⁴³ the Respondent asserts that free-standing construction contracts are not affected by investment risk, because the entrepreneur’s compensation is not a function of the financial results of the delivered project. As such, they are best analyzed as contracts of sale, not investments.²⁴⁴

161. The Respondent concludes that, in the present case, the Contract was a free-standing construction contract which lacked investment risk. It was not part of an economic venture in which the Claimant would derive all or part of its revenues from the operation of the delivered works. The Claimant’s compensation under the Contract did not depend upon the commercial success or failure of the bridges it was to construct. Indeed these are not toll bridges and are not and were never intended to be a commercial venture. Rather, the bridges were effectively a product purchased by a party, TAY in this case, that bought bridges from a supplier of that product, Garanti Koza. Thus, Respondent says, the Contract is best analyzed as a sales contract: The Claimant sold materials, designs, and construction services in exchange for a fixed price to be paid by TAY.²⁴⁵

²⁴² C-Mem. ¶ 194.

²⁴³ RL-101, Sébastien Manciaux, *Actualité de la notion d’investissement international*, in LA PROCEDURE ARBITRALE RELATIVE AUX INVESTISSEMENTS INTERNATIONAUX (Anthemis 2010), ¶ 39 [hereinafter: *Manciaux*].

²⁴⁴ C-Mem. ¶ 196.

²⁴⁵ C-Mem. ¶ 200.

162. Second, the Respondent contends that the Claimant cannot point to any contribution it made that could possibly give rise to an investment. Rather, the Claimant's activities amounted to nothing more than an allocation of resources needed to perform its obligations under the Contract. In the Respondent's view, the allocation of resources required for the performance of contractual obligations does not amount to an actual contribution to the host State. Furthermore, the Respondent stresses that the Claimant's receipt of an Advance Payment shows that it did not make a contribution.²⁴⁶ Referring to scholars²⁴⁷ and to arbitral jurisprudence,²⁴⁸ the Respondent argues that the structure of the Claimant's compensation under the Contract, which consisted of an Advance Payment and progress payments, shows that the contribution element is absent.

163. As to movable property, the Respondent argues that this property was equipment employed by Garanti Koza to perform its obligations under the Contract, nothing more, and thus constitutes part of the resources mobilized by Garanti Koza to perform (or not perform) its obligations under the Contract. The equipment, which according to the Respondent does not even appear to have been owned by the Claimant, was brought into Turkmenistan for purposes of performing the project and with the intent of being repatriated at the end of the project.²⁴⁹ Therefore, in the Respondent's view, it cannot be considered a contribution giving rise to an investment.

164. Similarly, the Respondent argues that the Claimant's contention that it acquired know-how required "to operate the precast plant" only further serves to undermine its claim of investment.

²⁴⁶ C-Mem. ¶ 194.

²⁴⁷ RL-101, *Manciaux*, ¶ 32; RL-100, Farouk Yala, *The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?*, 22(2) *Journal of International Arbitration Law* 105 (2005), p. 110; RL-103, Kathigamar V. S. K. Nathan, *Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention*, 12(1) *Journal of International Arbitration* 27 (1995), p. 44.

²⁴⁸ RL-104, *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal*, ICSID Case No. ARB/82/1, Award, February 28, 1988, ¶ 4.50; RL-87, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, ¶ 44 [hereinafter: *Joy Mining v. Egypt*].

²⁴⁹ C-Mem. ¶ 208.

The sole purpose of the Contract was the design and construction of bridges and overpasses. To the extent any know-how was required to construct the bridges and operate the plant and thus to perform the Contract, payment for it was included in the price of the Contract. Moreover, under the express terms of the Contract, the Claimant was required to remove the plant at the end of the Contract. According to the Respondent, no transfer of know-how was contemplated under the Contract or any other agreement between the Claimant and TAY, much less between the Claimant and the Respondent. Thus, the Respondent asserts that TAY was no more a purchaser or a recipient of know-how than anyone who buys a product from a producer is a purchaser of know-how for the manufacture of that product. In sum, the Respondent concludes that the contention that the Claimant had to acquire the know-how to do the exact thing which it was hired to do cannot in any way be construed as a contribution giving rise to an investment under the Convention.²⁵⁰

165. Third, referring to *Salini v. Morocco*, the Respondent argues that the minimum duration of an investment must be “from 2 to 5 years”.²⁵¹ The Respondent argues that, in the present case, it is clear that the duration of the purported investment fell well under the acceptable range. In fact, the construction period provided for in the Contract was less than one year. Thus, the period in which Garanti Koza contractually committed to build and deliver the bridges did not satisfy the duration element. Even taking into account the warranty period in the Contract, the duration of the project remained under two years. Given this short duration, the Respondent asserts that it is clear that the Contract does not satisfy the minimum duration condition necessary to be considered an investment.²⁵²

²⁵⁰ C-Mem. ¶ 209; Rej.¶ 246.

²⁵¹ RL-85, *Salini v. Morocco*, ¶ 54.

²⁵² C-Mem. ¶ 211.

166. Fourth, and finally, the Respondent argues that various tribunals²⁵³ have found a contribution to the host State's development to be a condition for finding an "investment." The Respondent contends that the Claimant did not actually complete any of the bridges and instead left most in a half-finished or completely unfinished state and did not even start five of them.²⁵⁴ The Claimant thus not only failed to deliver the benefits contemplated under the Contract, in the Respondent's view, but it also disrupted the flow of traffic on one of Turkmenistan's major arteries. According to the Respondent, "it is thus the height of irony for Claimant to argue that it should be credited with satisfying the requirement of contributing to Turkmenistan's development on this dismal record."²⁵⁵

167. For these reasons, the Respondent concludes that the Claimant's activities under the Contract do not qualify as an "investment" for purposes of Article 25 of the ICSID Convention. Even if they did, however, the Respondent argues that jurisdiction would still be lacking, since the Claimant's activities under the Contract do not qualify as "investments" under the UK-Turkmenistan BIT.

b. The Respondent denies that the Claimant had an investment within the meaning of the UK-Turkmenistan BIT

168. In the Respondent's view, the term "investment" as used in Article 1(a) of the BIT must be interpreted according to its ordinary meaning, in its context and in light of its object and purpose.²⁵⁶ The Respondent points to the Preamble of the BIT, which states that its purpose is "to create favourable conditions for greater investment by nationals and companies of one Contracting Party

²⁵³ RL-85, *Salini v. Morocco*, ¶ 52; RL-87, *Joy Mining v. Egypt*, ¶ 53; RL-90, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARAB/99/7, Decision on the Application for Annulment of the Award, November 1, 2008, ¶ 27.

²⁵⁴ Rsp. PHB ¶ 183-186

²⁵⁵ C-Mem. ¶ 217.

²⁵⁶ See VCLT Art. 31.1.

into the territory of the other Contracting Party” with the objective of increasing prosperity in both Contracting Parties, i.e. the United Kingdom and Turkmenistan. The requirement that a qualifying investment in Turkmenistan (i.e. “one Contracting Party”) be “of” or “by” a national of the United Kingdom (i.e. “the other Contracting Party”) is repeated throughout the BIT.²⁵⁷

169. Thus, the Respondent argues that, in order for jurisdiction to exist under the BIT, it is necessary for the Claimant to prove that there is an “investment” by a “national or company” of the UK. This, the Respondent argues, in turn requires evidence establishing that the claimed investment was actually made by the investors claiming protection under the BIT. The Respondent argues (a) that there was no investment within the meaning of the BIT in this case, and (b) even if one could find that such an investment existed, that investment was not made by Garanti Koza.

170. The Respondent considers that there has been no investment within the meaning of the BIT, because, as concluded by various arbitral tribunals, in particular in *KT Asia v. Kazakhstan*²⁵⁸, *Romak v. Uzbekistan*²⁵⁹ and *Italy v. Cuba*²⁶⁰, an investment must entail a contribution, duration, and risk. These conditions are identical to the first three conditions set out in the *Salini* test. The Respondent argues that the Claimant’s contentions that it made an investment under the treaty via (a) claims to money under the Contract; (b) movable property in the form of a factory and equipment; and (c) know-how, have no merit and fall far short of meeting the requisite conditions of contribution, duration, and risk.

²⁵⁷ C-Mem. ¶ 219.

²⁵⁸ RL-113, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, October 17, 2013, ¶¶ 165-166 [hereinafter: *KT Asia v. Kazakhstan*].

²⁵⁹ RL-93, *Romak v. Uzbekistan*, ¶ 206.

²⁶⁰ RL-115, *Italian Republic v. Republic of Cuba*, Ad Hoc Arbitration, Interim Award, March 15, 2005, ¶ 78 [hereinafter: *Italy v. Cuba*].

171. Moreover, the Respondent argues that, even if the Claimant could somehow show that its activities amounted to an investment, such investment cannot be considered an investment “of” Garanti Koza, the Claimant in this case.²⁶¹ In the Respondent’s view, the BIT relates only to investments *by* nationals or companies of Contracting Parties. Thus, in order to establish that it has made an investment, the Claimant would need to show not only that an investment was made, but it would also have to show that it, i.e. Garanti Koza, was the entity who actively made that investment. The Respondent points out that this necessity has been analyzed at length in several recent cases, and in particular, in *Standard Chartered Bank v. Tanzania*²⁶², *KT Asia v. Kazakhstan*²⁶³ and *Caratube v. Kazakhstan*.²⁶⁴ It asserts that, in the present case, it is clear (a) that in order to fall within the consent to arbitration contained in the BIT the purported investment must have been made by the claimant-investor, and (b) that no such investment was made by the Claimant.

172. The Respondent bases its contention that the UK-Turkmenistan BIT requires an active investment by an investor on the dispute resolution clause of the BIT in Article 8(1). That provision reads:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.²⁶⁵

²⁶¹ C-Mem. ¶ 228.

²⁶² RL-112, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶ 225.

²⁶³ RL-113, *KT Asia v. Kazakhstan*, ¶ 219 and ¶ 223.

²⁶⁴ RL-117, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, ¶ 457.

²⁶⁵ BIT, Art. 8(1).

173. The Respondent argues that it is clear from the text of the BIT that it requires an active link between the purported investor and the purported investment. Where, as in the present case, that link is missing and the purported investor did not play and could not have played an active role in the alleged investment, the Respondent asserts, the BIT does not apply, the Contracting Parties have not consented to arbitration to cover a dispute arising from such an alleged investment, and there is therefore no jurisdiction.²⁶⁶

174. The Respondent also argues that, if any investment was made in this case, it was not made by Garanti Koza, the only Claimant.²⁶⁷ According to the Respondent, Garanti Koza undertook no actions and made no investments of its own accord; rather, the bid was submitted and the tender was won entirely on the basis of the reputation and track record of Garanti Koza İnşaat (GKI), its Turkish parent company. It was representatives of GKI, the Respondent argues, who found out about the opportunity, visited Turkmenistan to gather information on the tender, and ultimately submitted the bid. They presented themselves not as representatives of Garanti Koza, an unknown English company, but rather as representatives of GKI, an experienced and well-known Turkish construction company.

175. The Respondent further argues that, other than the Contract itself and the “curious” know-how agreement, no records or evidence of the existence of employees, assets, or contracts of Garanti Koza have been submitted by the Claimant or can be seen from its limited public filings in the UK. The name of the Claimant’s only witness, Mr. Buyuksandalyaci, appears nowhere in the public filings of Garanti Koza. Mr. Buyuksandalyaci signed the Contract and its amendments, not in his alleged capacity as the General Manager of Garanti Koza, but rather as its “authorized

²⁶⁶ C-Mem. ¶ 240.

²⁶⁷ Rsp. PHB ¶ 176-181.

representative.” The Respondent considers that Claimant has presented no evidence that Garanti Koza ever hired or paid any employees. Rather, it argues, most, if not all, of Garanti Koza’s purported personnel were paid by and understood themselves to be working for GKI.

176. The Respondent asserts that no one at Garanti Koza had decision-making power for the company. Rather all decisions for Garanti Koza were taken by the board of directors of GKI. According to the Respondent, “In fact, from the documents available it appears that Garanti Koza is a passive, paper, company and nothing more. The numbers listed on its letterhead are Turkish, not British. The website address listed on its website is the Turkish website of Garanti Koza İnşaat. The physical address, while it is British, curiously happens to be the same as that of the company’s accountants.”

177. For these reasons, the Respondent argues that Garanti Koza did not actively make an investment within the meaning of the BIT or of the ICSID Convention. Failure to make an investment within the meaning of either treaty, in the Respondent’s view, requires that the Claimant’s claims be dismissed for lack of jurisdiction.²⁶⁸

2. The Respondent argues that the Claimant’s claims allege a breach of contract rather than a treaty violation

178. The Respondent’s second principal objection to jurisdiction is that the fundamental character of the claims asserted in this arbitration is that of a contractual dispute between Garanti Koza and TAY, not a violation by Turkmenistan of its obligations under the BIT.²⁶⁹ In the words of the Respondent, “the litany of complaints asserted by Claimant – alleged failures to handover sites and information; alleged payment delays; alleged changes to payment terms, wrongful termination of contract due to delays, attachment of assets to satisfy amounts owed – all of these

²⁶⁸ C-Mem. ¶ 241-249; Rej. ¶ 273-274.

²⁶⁹ Rsp. PHB ¶ 2.

are classic by-products of construction projects gone wrong, where each side blames the other for the failure to complete and deliver the final product contemplated by the parties.”²⁷⁰

179. The Respondent contends that the proper forum for determination of these contractual disputes is the Arbitrazh Court of Turkmenistan, which is the forum designated for disputes arising out of the Contract. In disregard of this contractual commitment, the Respondent argues, Garanti Koza brought an ICSID arbitration against Turkmenistan, despite the fact that the State is not a party to the Contract at issue in this case.²⁷¹ The Respondent asserts that the BIT does not afford jurisdiction over contractual claims. No matter how the Claimant tries to “dress up” its claims with allegations of State action, the Respondent argues, the essential basis of the claims is obviously contractual.²⁷²

180. The Respondent argues that the dispute resolution clause of the BIT limits claims to disputes arising from the BIT, and does not extend to “purely contract” matters. Tribunals have jurisdiction only over treaty claims, the Respondent continues, and cannot entertain purely contractual claims which do not amount to claims for violations of the BIT.²⁷³ Referring to several arbitral precedents,²⁷⁴ and to the Concurring Opinion of Professor Abi-Saab in *TSA Spectrum*,²⁷⁵ the Respondent contends that this rule is consistent with the generally accepted principle that investor-State arbitration was not intended to “elevate[] a multitude of ordinary transactions with

²⁷⁰ C-Mem. ¶ 250.

²⁷¹ C-Mem. ¶ 251.

²⁷² C-Mem. ¶ 252.

²⁷³ C-Mem. ¶ 255.

²⁷⁴ RL-124, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, ¶ 103 [hereinafter: *Malicorp v. Egypt*]; RL-120, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶ 50 [hereinafter: *Pan American v. Argentina*].

²⁷⁵ RL-125, *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, December 19, 2008, Concurring Opinion, ¶ 5.

public authorities into potential international disputes.”²⁷⁶ The Respondent considers that, in the present proceedings, the alleged treaty breaches “necessarily pass by or posit a contract violation as a fundamental element of or premise of its cause of action.”²⁷⁷

181. The Respondent argues that the Umbrella Clause in the BIT does not transform generic contract claims into treaty claims.²⁷⁸ Contractual claims remain contract claims, the Respondent argues, regardless of the presence of an umbrella clause in the underlying BIT.²⁷⁹ The Respondent points to numerous tribunals that have expressed concern about the negative consequences that would follow from giving umbrella clauses the power to transform a dispute in the manner the Claimant suggests and which for that reason have declined to follow the authorities upon which the Claimant relies.²⁸⁰

182. Indeed, the Respondent argues, without a determination that the Contract was breached by Turkmenistan, Garanti Koza cannot make out a *prima facie* showing of a treaty claim.²⁸¹ It follows, the Respondent argues, that the Claimant can advance no viable treaty claim, because each of its claims necessarily posits that the alleged conduct was in violation of the Contract.²⁸²

183. The Respondent also argues that, where the basis of a claim is contractual, a tribunal must honor a forum selection clause in a contract. Thus, even if the dispute resolution clause of a BIT

²⁷⁶ C-Mem. ¶ 256; RL-123, *Robert Azinian and others v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999, ¶ 87; RL-124, *Malicorp v. Egypt*, ¶ 103.

²⁷⁷ C-Mem. ¶ 259.

²⁷⁸ Rsp. PHB ¶ 5.

²⁷⁹ C-Mem. ¶ 261; Closing Tr. December 14, 2015, pp. 1521-1523.

²⁸⁰ RL-119, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, ¶ 82; RL-120, *Pan American v. Argentina*, ¶ 110; RL-118, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, August 6, 2003, ¶ 168 [hereinafter: *SGS v. Pakistan*]; RL-87, *Joy Mining v. Egypt*, ¶ 81; Rsp. PHB ¶ 8-11.

²⁸¹ C-Mem. ¶ 267.

²⁸² C-Mem. ¶ 268.

grants jurisdiction over contract-based claims, forum-selection clauses (and other provisions) of individual agreements remain enforceable. According to the Respondent, “A different solution would run roughshod over the clear text of the contract reflecting the will of the parties, in total disregard of the principles of party autonomy and *pacta sunt servanda*. It would render ‘inutile’ or without effect the contractual stipulation on the choice of forum, giving to a jurisdictional clause in a BIT the effect of superseding all choice of forum contractual stipulations between parties to a dispute, once one of them invokes the jurisdictional clause of the BIT.”²⁸³

B. The Claimant’s Responses to the Additional Jurisdictional Objections

184. In its Counter-Memorial on Jurisdiction and Reply Memorial on the Merits, the Claimant responds to the two jurisdictional objections raised by the Respondent in conjunction with the merits: (1) that the Claimant did not make an investment in Turkmenistan within the meaning of the ICSID Convention and the BIT; and (2) that the Claimant’s claims are contractual, not claims arising under the treaty.²⁸⁴ Garanti Koza asserts that it made an investment within the meaning of both Article 25(1) of the ICSID Convention and the BIT, that its claims arise under the BIT, and that the Tribunal, therefore, has jurisdiction over the present dispute.

1. The Claimant affirms that it made an investment

185. Garanti Koza asserts that Turkmenistan’s approach – which examines separately against the elements of the so-called *Salini* test each component of the Claimant’s claims, namely (i) claims to money under the Contract, (ii) movable property and (iii) know-how, to conclude that none of the Claimant’s activities in Turkmenistan qualify as “investment” under the ICSID Convention – is incorrect.

²⁸³ C-Mem. ¶ 269, quoting RL-125. See also C-Mem. ¶ 277; Rej. ¶ 288.

²⁸⁴ Claimant’s Counter-Memorial on Jurisdiction and Reply Memorial on the Merits is cited in this Award as “Reply”.

186. The Claimant cites prior cases²⁸⁵ to show that investment treaty tribunals have adopted a holistic approach to determine the existence of an investment under the ICSID Convention. The various components of which investments are typically comprised must be viewed collectively. The Claimant concludes that “the Tribunal therefore need not reach a determination on whether each of the components of Garanti Koza’s investment would constitute a stand-alone investment. Garanti Koza’s investment in Turkmenistan, when viewed holistically, clearly qualifies as an ‘investment.’”²⁸⁶

a. The Claimant affirms that it had an investment under the ICSID Convention

i. The *Salini* test should not apply

187. The Claimant questions whether the *Salini* test should be applied, even in the ICSID context, to determine if an operation qualifies as an “investment” under Article 25(1) of the ICSID Convention.

188. The Claimant relies on the award in *Inmaris v. Ukraine* to assert that a subjective approach to the definition of “investment” under Article 25(1) of the Convention, with reference to the definition in the BIT, is more consistent with the fact that the drafters of the ICSID Convention intentionally left the term “investment” undefined in Article 25(1) than a more restrictive definition through the imposition of criteria, and is, therefore, preferable.²⁸⁷

²⁸⁵ *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1; CL-86, *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4; CL-87, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28; RL-87, *Joy Mining v. Egypt*; RL-293, *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7 [hereinafter: *Saipem v. Bangladesh*]; *Mytilineos Holdings SA v. The State Union of Serbia and Montenegro and Republic of Serbia*, UNCITRAL.

²⁸⁶ Reply ¶ 164.

²⁸⁷ Reply ¶¶ 177-178.

ii. Alternatively, the *Salini* test is satisfied

189. The Claimant nevertheless argues in the alternative that, if the Tribunal opts to apply the *Salini* test, it should follow the ICSID cases that view the test as a set of flexible and liberal characteristics, as opposed to imposing jurisdictional conditions all of which have to be met for an asset to qualify as an investment. The Claimant asserts that, in any event, its investment fulfils the criteria of the *Salini* test.

190. As a starting point, the Claimant submits that ICSID tribunals have consistently accepted that construction contracts and related operations qualify as “investments” under Article 25(1) of the Convention, meeting the *Salini* test where required. The Claimant further states that Turkmenistan has not provided any example of an investment treaty decision to the opposite effect, and there is to the Claimant’s knowledge no such case. *Garanti Koza* refers to *Pantechniki v. Albania* as an example of ICSID tribunals’ approach to the application of the *Salini* test and the definition of investment and to the most recent (2009) edition of Christoph Schreuer’s treatise to support the above. The Claimant, therefore, considers that Turkmenistan’s submission, that *Garanti Koza*’s investment is a mere contract for the sale of goods and services, is misplaced.

191. The Claimant further argues that the alleged components of the *Salini* test, i.e. (a) the investor’s participation in the risks of the project, (b) a substantial contribution, (c) a certain duration, and (d) a contribution to the host State’s economic development, are all met in this case.

192. Risk. Garanti Koza relies on case law,²⁸⁸ independent reports on the investment climate in Turkmenistan,²⁸⁹ and academic commentaries²⁹⁰ to support its position that, in the present case, a risk existed and it was multifold. The risk included the poor business environment in Turkmenistan and the fact that, because the lump sum price was fixed, Garanti Koza bore the risk of variations in the works, the risk of a potential increase in the cost of labour and raw material, and the risk of any accident or damage to property during the performance of the work. The fact that Turkmenistan had paid an Advance Payment does not, according to the Claimant, impact the existence of a risk, as noted by the tribunal in *Saipem v. Bangladesh*.

193. Contribution. The Claimant submits that it is disputed whether the “contribution” criterion should be included in the *Salini* test.²⁹¹ Garanti Koza repeats that investment treaty tribunals assessing whether construction contracts met the “contribution” criterion have all answered the question positively. By way of examples in support of this submission, the Claimant refers to *Salini v. Morocco*, *Jan de Nul v. Egypt*, *Bayindir v. Pakistan*, and *Saipem v. Bangladesh*. The Claimant points out that, in the latter case, the tribunal stressed that the contribution can be in kind and in industry, not only in money, while the origin of the funds is irrelevant.

194. Garanti Koza submits that it made contributions similar to the ones identified in the case law, namely contributions in money, kind and industry. These included building a production factory, providing the necessary equipment and personnel, providing the necessary know-how

²⁸⁸ RL-85, *Salini v. Morocco*; CL-94, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21; RL-88, *Bayindir v. Pakistan*; RL-293, RL-293, *Saipem v. Bangladesh*.

²⁸⁹ World Bank, US State Department and other independent reports –Mem., ¶ 8-18.

²⁹⁰ RL-80, Schreuer, *The ICSID Convention*, p. 141; RL-99, Bruno Poulain, “L’investissement international: définition ou définitions?” in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* (Kahn and T. Waelde eds., Martinus Nijhoff, 2007)

²⁹¹ Reply ¶ 212.

relating to the factory, purchasing raw material, paying the workforce, and providing a bank guarantee to Turkmenistan.

195. The Claimant argues that, in any event, Garanti Koza's investment involved the construction of bridges and overpasses on a Turkmen highway and was part of the implementation of the National Plan launched by the Turkmen government for the renovation of Turkmen infrastructure. Tribunals deciding cases relating to infrastructure projects, such as *Salini v. Morocco* and *Bayindir v. Pakistan*, have been prompt to regard such investments as contributing to the host state's development.

196. Duration. Garanti Koza submits that Turkmenistan's approach is flawed in that it treats the criterion of duration as a jurisdictional one. Even if that criterion was not met, it would not be decisive, as all the other criteria are met. The Claimant calculates the Project's duration, including warranty period, at about two years and seven months. The duration criterion is therefore, to the extent required, met in this case. The Claimant supports the basis of its calculation of the duration of the Project on the findings in *Bayindir v. Pakistan* and *Saipem v. Bangladesh*.

b. The Claimant affirms that it had an investment within the meaning of the BIT

i. Garanti Koza made the investment

197. In response to the Respondent's contention that the Claimant's investment does not qualify as an investment under the BIT, because the investment was not made by Garanti Koza itself, but by its parent company, GKI, Garanti Koza responds, first, by distinguishing this dispute from those in *Standard Chartered Bank v. Tanzania*, *KT Asia v. Kazakhstan*, and *Caratube v. Kazakhstan*, on which Turkmenistan relies to argue that "an investment must be actively invested by the claimant

in order to fall within the ambit of the treaty and consequently within the jurisdiction of the tribunal.”²⁹² Garanti Koza asserts that Turkmenistan’s argument should be rejected because:

- a. The *Standard Chartered Bank* Award (which, the Claimant submits, has limited authoritative value) focused its analysis on the wording of the applicable BIT. That wording is different from that in the UK-Turkmenistan BIT. The latter refers to an investment “of,” as opposed to an investment “made,” by the investor. The “investment made” wording was at the core of the tribunal’s reasoning in *Standard Chartered*, so the reasoning in that case is not transposable to this one.
- b. The facts are distinct: *Standard Chartered Bank v. Tanzania* involved an indirect investment in Tanzania by a UK company, through several layers of subsidiaries. Garanti Koza instead made a direct investment in Turkmenistan.
- c. Unlike the situation presented in the *Standard Chartered* case, Garanti Koza took all the steps in the life of the investment and was an active, as opposed to a passive investor.
- d. The paragraphs of *KT Asia v. Kazakhstan* and *Caratube v. Kazakhstan* relied on by Turkmenistan refer to the application of the *Salini* test and the existence of an investment and are, therefore, irrelevant to the *ownership* of the investment.

198. Second, Garanti Koza argues that it was Garanti Koza, and not GKI, that made the investment in Turkmenistan. The facts relied upon by the Claimant are:²⁹³

- a. None of Turkmenistan’s three fact witnesses argued that GKI, as opposed to Garanti Koza, was the investor.

²⁹² Reply ¶ 166.

²⁹³ Reply ¶ 168.

- b. The Contract was entered into between Turkmenistan and Garanti Koza and was approved by more than nine Turkmen Government Authorities.
- c. The Presidential Decree names Garanti Koza and not GKI.
- d. Turkmenistan registered the Project under the name of Garanti Koza, not GKI.
- e. All the equipment was either owned or leased by Garanti Koza, showing that Garanti Koza was an active investor.
- f. Garanti Koza, not GKI, opened a branch and a bank account in Turkmenistan for the purposes of the Project.
- g. Turkmenistan's Central Bank paid the amounts due under Garanti Koza's Certificates of Payment to a bank account in the name of Garanti Koza, not GKI. The location of the bank account in Turkey is irrelevant; Turkmenistan took no issue with this arrangement at the time and even signed Amendment No.1 to the Contract to agree that payment should be made to that bank account.
- h. Turkmen Tax Authorities audited Garanti Koza's accounts and never alleged that Garanti Koza was not the actual investor in Turkmenistan.
- i. The court proceedings commenced by the Turkmen prosecutor at the request of Turkmen Highways and the resulting decisions were all against Garanti Koza, not GKI.
- j. Garanti Koza, not GKI, entered into contracts with subcontractors, such as Net Yapi and Turkmencement.
- k. Unpaid creditors of Garanti Koza (which itself was not being paid by Turkmenistan) commenced suits against Garanti Koza, not GKI, before Turkmen

courts, as seen in the documents relating to these proceedings produced by Turkmenistan.

- l. Unpaid employees commenced suits against Garanti Koza, not GKI, before Turkmen courts, showing that Garanti Koza was their employer.
- m. Turkmenistan's submission that "*it also appears that no one in Garanti Koza had decision making power for the company*" is incorrect. Garanti Koza is a limited liability company, consisting of three partners; Garanti Koza Insaat, which owns 45%, IP (International) Consult Ltd., which also owned 45% until it was replaced by one of its affiliates (Eurasia Motors), and Mr. Turgut, who owns 10%. Important decisions, such as entering into the Contract, the Factory Agreement and the Know-How Agreement, were made after discussion and with the agreement of all three partners.
- n. The Know-How Agreement provided for the know-how needed and used for the Project, which included advanced technology not available at that time in Turkmenistan. The Know-How Agreement was approved by all three partners of Garanti Koza. It is severe for Turkmenistan, the Claimant argues, "to basically accuse Garanti Koza of fraud and to state that '*the only other explanation for this curious contract [i.e. the Know-How Agreement] is that it is a mechanism to divert funds to Garanti Koza Insaat.*'"

199. Third, in response to Turkmenistan's submissions on Garanti Koza's public financial statements on file in the UK, the Claimant states that its accountant in the UK had, perhaps inaccurately, advised Garanti Koza that there was no need to file full information about the

company's employees, assets, or contracts. Those financial statements are in any event immaterial, in light of the above facts.²⁹⁴

200. Finally, Garanti Koza asserts that arbitral tribunals have consistently accepted that investments made by special-purpose vehicles qualify for protection under investment treaties, in the absence of language to the contrary in the treaty. The BIT does not contain any language excluding investments by special-purpose vehicles from its scope. To read such language into the text of the treaty would be contrary to Article 31 of the VCLT.²⁹⁵

ii. Garanti Koza's investment within the meaning of the BIT

201. The Claimant asserts that the application of the *Salini* test to the definition of "investment" under the BIT has been rejected by the majority of arbitral tribunals and is irreconcilable with Article 31 of the VCLT.²⁹⁶ The Claimant argues that investment treaty tribunals, such as the tribunal in *Bayindir v. Pakistan*, have generally concluded that construction contracts constitute investments under the applicable BITs.

202. In line with that case law, Garanti Koza submits that it has made an investment, falling within the definition of "investment" in Article 1 of the BIT. Garanti Koza's activities in Turkmenistan involve: (a) the Contract, i.e. "claims to money or to any performance under contract having a financial value;"²⁹⁷ (b) a factory, which, since it is prefabricated and can be disassembled, is "movable" property;²⁹⁸ (c) equipment, also "movable" property;²⁹⁹ and (d) the Know-How

²⁹⁴ Reply ¶ 169.

²⁹⁵ Reply ¶ 170.

²⁹⁶ Reply ¶ 171.

²⁹⁷ BIT Art. 1(a)(iii).

²⁹⁸ BIT Art. 1(a)(i).

²⁹⁹ BIT Art. 1(a)(i).

Contract, i.e. “technical processes and know-how;”³⁰⁰ all of which constitute “assets” falling within the non-exhaustive list of assets qualifying as an “investment” in Article 1(a) of the BIT.

2. The Claimant denies that its claims allege a breach of contract rather than a treaty violation

203. The Claimant asserts that Turkmenistan errs in arguing that Garanti Koza’s claims are “purely contractual.”³⁰¹ Garanti Koza’s causes of action arise out of provisions of the BIT and not of the Contract.

204. According to the Claimant, the case law relied upon by Turkmenistan does not support its argument. In each of *SGS v. Pakistan*, *El Paso v. Argentina*, *Pan American v. Argentina*, *Hamester v. Ghana*, *Abaclat v. Argentina* and *Malicorp v. Egypt*, the tribunals found that they had jurisdiction to consider treaty claims where the dispute arose, at least in part, out of an underlying contract. The existence of an underlying Contract, as part of the factual matrix, thus does not preclude the Tribunal’s jurisdiction. To establish the Tribunal’s jurisdiction, Garanti Koza argues, it need only make out a prima facie case that the claims stated fall within the purview of the substantive protections of the BIT. The Claimant further relies on *Salini v. Morocco* and *Azurix v. Argentina* in support of this position.

205. Garanti Koza further submits that there is no basis for Turkmenistan to seek to introduce a new condition for the Tribunal to have jurisdiction – that the “treaty claim must be “self-standing.” Such an additional condition appears to have no basis other than the Concurring Opinion of Arbitrator Abi-Saab in *TSA v. Argentina*; it lacks any other support in the abundant case law.

³⁰⁰ BIT Art. 1(a)(iv).

³⁰¹ Reply ¶ 218.

3. The Claimant affirms that the Tribunal has jurisdiction over Garanti Koza’s umbrella clause claim

206. The Claimant takes issue with the Respondent’s argument that an umbrella clause “does not transform generic contract claims into treaty claims” and that the Tribunal therefore has no jurisdiction over the Claimant’s umbrella clause claim. The Claimant asserts that the majority of tribunals and commentators have accepted the “elevating” effect of umbrella clauses, applying their ordinary meaning in accordance with Article 31 of the VCLT.

a. Turkmenistan’s reading is inconsistent with the origins of the umbrella clause

207. Garanti Koza asserts that the origins of the umbrella clause make it clear that its effect is precisely what Turkmenistan claims it is not: to elevate contractual breaches into treaty breaches.³⁰² The Claimant relies on analyses on the origins of the umbrella clause by A.C. Sinclair, J. Wong, E. Gaillard, the Shawcross Draft Convention on Investments Abroad, and the OECD Draft Convention on the Protection of Foreign Property.³⁰³

b. Turkmenistan’s contention is contrary to arbitral jurisprudence

208. Garanti Koza submits that, contrary to Turkmenistan’s argument that an umbrella clause “does not transform generic contract claims into treaty claims,” the vast majority of arbitral tribunals have ruled that the effect of an umbrella clause is precisely to elevate contractual claims into treaty claims.

209. The *SGS v. Pakistan* award under the Switzerland-Pakistan BIT, on which Turkmenistan relies, has been widely and heavily criticised, including by the Swiss Government and the tribunals in *SGS v. Philippines* and *Eureko v. Poland*.³⁰⁴ Similarly, the few other decisions relied upon by

³⁰² Reply ¶ 237.

³⁰³ Reply ¶¶ 231-236.

³⁰⁴ Reply ¶¶ 239-243.

Turkmenistan, i.e. *Joy Mining v. Egypt*, *El Paso*, *Pan American Energy v. Argentina*, and *Toto v. Lebanon*, depend upon a restrictive interpretation of the umbrella clause.³⁰⁵ Such a restrictive interpretation has been rejected by most tribunals, including those in *Noble Ventures v. Romania*, *LG&E v. Argentina*, *SGS v. Paraguay*, and *EDF v. Argentina*.³⁰⁶

210. The Claimant submits that the correct approach is to apply a plain-and-ordinary-meaning interpretation to the BIT that gives effect to the umbrella clause. The plain language of the umbrella clause does not differentiate between undertakings of a commercial nature and those of a sovereign nature. “Any obligation” means just that, and a different reading would require serious justification to be consistent with the VCLT. In any event, the distinction between “commercial” and “sovereign” obligations and breaches is irrelevant in this case, as Turkmenistan breached its obligations through sovereign, not commercial actions.³⁰⁷

c. Authoritative commentators have rejected the restrictive interpretation of umbrella clauses urged by Turkmenistan

211. The Claimant lists a number of analyses by authoritative commentators that, it argues, confirm its submission that an umbrella clause elevates contractual breaches to treaty claims and, therefore, that the Tribunal has jurisdiction to determine the Claimant’s claims under the umbrella clause of the BIT.³⁰⁸ It quotes Stanimir Alexandrov’s statement that: “the very purpose and the effect of an umbrella clause in an investment treaty is to transform breaches of obligations the State has undertaken with respect to the foreign investor and its investment, including contractual obligations, into treaty breaches.”³⁰⁹

³⁰⁵ Reply ¶¶ 244-245.

³⁰⁶ Reply ¶¶ 246-249.

³⁰⁷ Reply ¶¶ 252-255.

³⁰⁸ Reply ¶¶ 256-261.

³⁰⁹ Reply ¶ 261, *quoting* Stanimir A. Alexandrov, “Breaches of Contracts and Breaches of Treaty – The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS*

4. The Claimant affirms that Turkmenistan is a party to the Contract

212. Turkmenistan argues it is not a party to the Contract and that, “if a foreign investor’s contract is not with the central government of the State, then the conduct complained of must meet the traditional tests for internationally wrongful acts in order to incur international responsibility.”³¹⁰ Garanti Koza argues that Turkmenistan’s position is irreconcilable with Article 1.1(a) of the Contract Conditions. That article provides that: “Owner means State Concern ‘Turkmenavtoyollary’ acting on behalf of Turkmenistan Government and includes its own representatives and successors.”³¹¹

213. In any event, (i) the Claimant argues that its claims are for breaches of BIT provisions, so that whether or not Turkmenistan was a party to the Contract is not determinative of the Tribunal’s jurisdiction, and (ii) the Claimant’s claims relate to a multitude of instances of misconduct by various organs of Turkmenistan and are not limited to breaches of the Contract by TAY.³¹²

214. The Claimant disagrees with Turkmenistan’s submission that Turkmen Highways was acting as a private party in a purely commercial capacity. The Claimant advances the following arguments to rebut that conclusion.³¹³

- a. The Contract implemented, in part, the National Plan of Turkmenistan and a Presidential Decree for the renovation of Turkmenistan’s infrastructure.
- b. In Turkmenistan, the Contract and the Project were considered to create an “administrative law relation” and not to be of a commercial nature. This appears from the law relied upon and the procedure followed by Turkmenistan before the general prosecutor and the Turkmen courts. The procedure Turkmenistan followed for the

v. Philippines,” *Journal of World Investment & Trade*, Volume 5, No. 4, August 2004 (hereinafter: *Alexandrov*), p. 556.

³¹⁰ Reply ¶ 263.

³¹¹ Reply ¶ 264.

³¹² Reply ¶ 267.

³¹³ Tr. June 8, 2015, pp. 90-93.

- termination of the Contract, through the involvement of the Supreme Control Chamber (which deals with public funds), indicates that neither Turkmen Highways nor Turkmenistan was acting as a private party in a purely commercial relationship.
- c. The Contract was approved by several Turkmen Government Authorities, while the Presidential Decree lists over ten governmental bodies involved in the performance of the Contract.
 - d. The Presidential Decree states that the Project is to be financed from the State budget. The few invoices of Garanti Koza that were paid were paid by the Central Bank of Turkmenistan.
 - e. Mr. Nepesov, called by Turkmenistan as a fact witness, referred in his First Witness Statement to “public law works” and “governmental contracts.”

215. The Claimant argues that the test for resolving a sovereign-or-commercial question, where provisions of a treaty are breached, is whether the Host State reasonably acted as an ordinary contracting party or went beyond that.³¹⁴ The Claimant submits that Turkmenistan went beyond acting as an ordinary contracting party, with the most indicative example of such conduct being the imposition of the Smeta.

216. In response to Turkmenistan’s further objection to the Tribunal’s jurisdiction on the basis of the forum selection clause in the Contract, the Claimant argues that the forum selection clause in the Contract is not an exclusive one. The Claimant asserts that case law³¹⁵ supports its position that, even if the forum selection clause in the Contract were exclusive, a cause of action under a treaty is not subject to an exclusive jurisdiction clause in an underlying contract, regardless of whether the treaty claims relate to contractual issues. Garanti Koza argues that the authorities cited by Turkmenistan deal with purely contractual disputes and are thus irrelevant to claims under a

³¹⁴ Closing Tr. December 14, 2015, p. 1447, lines 8-12.

³¹⁵ CL-44, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

BIT. The jurisdiction of the Tribunal is not affected, the Claimant argues, by the forum selection clause in the Contract.³¹⁶

217. For these reasons, the Claimant asserts, the Tribunal should conclude that the Claimant actively made an investment within the meaning of the ICSID Convention and the BIT, and that its claims arise under the BIT and are not purely contractual. Garanti Koza therefore invites the Tribunal to reject both of the Respondent's objections to jurisdiction and to confirm its jurisdiction to hear this arbitration.

C. The Tribunal's Analysis Concerning Jurisdiction

218. For the reasons stated below, the Tribunal rejects the Respondent's additional objections to the Tribunal's jurisdiction.

1. The Claimant is an investor

219. The BIT contains no definition of "investor." Rather, its substantive provisions provide various protections to "investments of nationals or companies of the other Contracting Party."³¹⁷ The meaning of "investments" will be considered in the next section of this Award; we focus first on "companies."

220. Article 1(d) of the BIT defines "companies" to mean: "in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom [...]." The Claimant, Garanti Koza LLP, was registered as a limited liability partnership with the Registrar of Companies for England and Wales on April 24, 2007, with a registered address at 45 Welbeck Street, London W1G 8DZ, U.K.³¹⁸ The Respondent has not argued that a limited liability partnership is not a corporation, firm, or association within the

³¹⁶ Reply ¶¶ 269-274.

³¹⁷ BIT Art. 2(2); *see also* BIT Arts. 3, 4, 5.

³¹⁸ R-92.

meaning of Article 1(d) of the BIT. The Claimant is accordingly a “company” of the United Kingdom within the meaning of that article.

221. The Respondent argues that, while Garanti Koza may have been an English company, it served merely as a façade for its Turkish parent GKI, which was the entity that actually provided personnel and material for the project in Turkmenistan and which would not qualify as a company of the United Kingdom. This argument finds some support in the Claimant’s own papers, which charge, for example, that the investment climate in Turkmenistan “has proved to be particularly unwelcoming, especially for *investors of Turkish origin*,”³¹⁹ and that it “has become particularly hostile for *Turkish investors*.”³²⁰

222. However, the BIT requires only that Garanti Koza be incorporated somewhere in the United Kingdom in order to bring its investments within the protection of the treaty. The BIT contains no denial-of-benefits clause that would require that a U.K. investor have actual operations in the U.K. And the weight of the evidence shows that Turkmenistan knew and accepted that it was dealing with an English company.

223. To begin with, the Contract identifies TAY’s counterparty as “‘Garanti Koza LLP’ Company (England).”³²¹ The Presidential Decree authorizing TAY to enter into the Contract similarly refers to the winner of the bid as “‘Garanti Koza LLP’ company (UK)” and refers to its UK nationality in three places.³²² Turkmenistan’s Ministry of Economy and Development entered the project on the “Single State Registry of Investment Projects” under the name of: “Contractor:

³¹⁹ Mem. ¶ 8 (emphasis added).

³²⁰ Mem. ¶ 16 (emphasis added).

³²¹ C-21, p. 1. *See* Rsp. PHB ¶ 23 (“The Contract is a commercial contract concluded between two legal entities, Garanti Koza and TAY.”)

³²² C-17, p. 1.

‘Garanti Koza LLP’ company (UK).”³²³ Contracts with subcontractors were entered into by Garanti Koza, not GKI.³²⁴ The Central Bank of Turkmenistan made payments under the Contract to an account in the name of Garanti Koza.³²⁵ The tax authorities of Turkmenistan audited the accounts of Garanti Koza, not GKI.³²⁶ And court judgments in proceedings commenced by unpaid employees were entered against Garanti Koza, not GKI.³²⁷

224. GKI may well have seconded personnel to Garanti Koza and provided the construction expertise needed to build the bridges called for by the Contract, but that was not concealed from TAY or anyone else in Turkmenistan. Indeed, Garanti Koza emphasized GKI’s experience and expertise in bidding for the project. Garanti Koza’s marketing brochure described GKI’s history since 1948, beginning with “Established in Ankara as Garanti Insaat Ltd., as a subsidiary of Garanti Bankasi.”³²⁸ Among the prior projects listed in that brochure was “Mary-Uchi Highway Bridges, Turkmenistan,” which must have been a project familiar to the Respondent. In addition, while GKI is often referred to by the Respondent as Garanti Koza’s “parent,” GKI appears to have owned only 45% of Garanti Koza.³²⁹

225. The Tribunal concludes that: (a) Garanti Koza, as a U.K. company, meets the nationality requirement of the BIT; and (b) Garanti Koza is the investor whose claim to have made an investment in Turkmenistan (out of which the present dispute arises) is to be tested.

³²³ C-23.

³²⁴ E.g. Exh. AS-35.

³²⁵ E.g. Payment Order No. 6, July 4, 2008, R-50.

³²⁶ E.g. C-115.

³²⁷ E.g. Exh. AS-34.

³²⁸ C-14.

³²⁹ C-145 (Limited Liability Partnership Agreement).

2. The Claimant made an investment in Turkmenistan

226. The Claimant brings this proceeding under Article 8 of the BIT, which permits an investor of one Contracting Party (in this case, the United Kingdom) to refer to arbitration a dispute with the other Contracting Party (in this case, Turkmenistan) “concerning an obligation of the latter under this Agreement in relation to an investment of the former.”³³⁰

227. We therefore turn to whether the Claimant made an investment in Turkmenistan. That inquiry will take us, first, to whether Claimant made an investment as that term is defined in Article 1 of the BIT. Second, it will take us to whether the Claimant’s claim arises out of an investment as that term is used in Article 25 of the ICSID Convention. The Respondent argues that the Claimant can meet neither standard; the Claimant argues that it meets both. The Claimant, it is well established, “has the burden of demonstrating that its claims fall within the Tribunal’s jurisdiction.”³³¹

a. The Claimant made an “investment” under the BIT

228. Article 1(a) of the BIT defines “investment” to mean “every kind of asset,” and provides a list, which is stated to be not exclusive, to illustrate what is included in that term. That list includes the following types of assets, all of which, the Claimant argues, are descriptive of some aspect of its investment in Turkmenistan:

- “Moveable and immovable property and any other property rights such as mortgages, liens, or pledges;”
- “Claims to money or to any performance under contract having a financial value;” and

³³⁰ BIT Art. 8(1). See Decision on the Objection to Jurisdiction for Lack of Consent, Appendix A.

³³¹ RL-88, *Bayindir v. Pakistan*, ¶ 192.

- “Intellectual property rights, goodwill, technical processes, and know-how.”³³²

229. Unlike some treaties, the BIT does not specify any particular relationship between the claimant and the investment necessary for the treaty to apply and for jurisdiction to attach. Following VCLT Article 31, the Tribunal therefore considers the “ordinary meaning” of the treaty terms, in their context and in the light of the object and purpose of the BIT.

230. Although the Respondent argues that, to meet the definition in the BIT, an investment must have been “actively made” by the claimant, that argument finds no support in the ordinary meaning of the words used in Article 1 of the BIT. Rather, the Respondent attempts to tie this requirement to the wording of Article 8 of the BIT, and specifically to its requirement that disputes submitted to arbitration must concern “an obligation of the [state party] under this Agreement in relation to an investment of the [claimant].”³³³

231. The Respondent’s attempt to read into the language of the BIT a condition that an investment have been “actively made” by the Claimant appears to have been imported from the award in *Standard Chartered Bank v. Tanzania*.³³⁴ In that decision, the tribunal concluded, from what appears to this Tribunal to have been a somewhat strained reading of the words “of,” “by,” and “made” in the U.K.-Tanzania BIT, that “the text of the BIT reveals that the treaty protects investments ‘made’ by an investor in some active way, rather than simple passive ownership.” Nothing in the reasoning of that award leads this Tribunal to read into the BIT before us a requirement that an investment must have been “actively made.”

³³² BIT Art. 1(a).

³³³ BIT Art. 8(1).

³³⁴ RL-112.

232. In any event, Garanti Koza's investment appears to this Tribunal to have been "actively made" as that term was used in *Standard Chartered Bank*, in that it was not merely held by a passive investor. While we understand the Respondent's claim that Garanti Koza was merely the façade behind which GKI contracted with Turkmenistan, we have already rejected that characterization of the facts before us. Garanti Koza used personnel, experience, and technology provided by GKI, but it appears to this Tribunal that Garanti Koza negotiated a contract to build bridges for TAY in Turkmenistan, put resources into the country, and actually built a number of bridges.

233. Garanti Koza's performance came to an end before it completed its assignment, and Garanti Koza is open to criticism for how long even that performance took, but it is clear from the record before this Tribunal that Garanti Koza engaged in the actual building of highway bridges in the territory of one of the Contracting Parties to the BIT. The tribunal in *Bayindir v. Pakistan* observed that "The construction of a highway is more than construction in the traditional sense;" it "implies substantial resources during significant periods of time" and "clearly qualifies as an investment."³³⁵ The same is true of the construction of bridges. Garanti Koza's performance may have fallen short, but it was not a mere passive investor.

234. Garanti Koza made an investment of equipment and material resources – moveable property – while carrying out in Turkmenistan at least a portion of the obligations it undertook to perform under a contract having a financial value – USD 100 million in gross value. For what it is worth, Garanti Koza devoted activity to making that investment, for as long as its efforts continued, and it left behind a number of bridges that are being used by the Respondent today.

³³⁵ RL-88, *Bayindir v. Pakistan*, ¶ 128, quoting *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, September 27, 2001, ¶ 101.

The Tribunal therefore concludes that Garanti Koza made an investment in Turkmenistan within the meaning of Article 1 of the BIT.

b. The claims arise out of an investment as required by Article 25 of the ICSID Convention

235. Since this arbitration was brought at ICSID under the ICSID Rules,³³⁶ the Claimant also has the obligation to show that the present dispute arises “directly out of” its investment, as required by Article 25 of the ICSID Convention.

236. It is notorious that the drafters of the ICSID Convention chose not to include a definition of the term “investment” in the text of the Convention.³³⁷ That term was examined by the tribunal in *Fedax v. Venezuela*, the first ICSID case in which jurisdiction was objected to on the grounds that the asset held by the claimant (in that case, six promissory notes) did not qualify as an investment. The *Fedax* tribunal found that the Convention “provided a broad framework for the definition of investment,” and contemplated a “very broad meaning” for that term.³³⁸

237. In that context, the *Fedax* tribunal examined and listed the “basic features of an investment,”³³⁹ but it did not hold that all, or indeed any, of these features must be present in every case. Indeed, the *Fedax* tribunal had little difficulty in concluding that the promissory notes at issue in that case (which hardly manifested all the features on the list) qualified as “investments”

³³⁶ See Decision on the Objection to Jurisdiction for Lack of Consent, Appendix A to this Award, ¶¶ 96-97.

³³⁷ Antonio R. Parra, THE HISTORY OF ICSID (Oxford 2012), pp. 80-81, 276-277. Mr. Parra says that Aaron Broches, the General Counsel of the World Bank who was the driving force behind the ICSID Convention and who became the first Secretary General of ICSID, once observed that, “while it might be difficult to define ‘investment,’ an investment was in fact readily recognizable.” *The History of ICSID*, n. 110. See also RL-108, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997, ¶ 191 [hereinafter: *Fedax v. Venezuela*]; CL-76, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, February 12, 2010, ¶ 92 [hereinafter: *SGS v. Paraguay*].

³³⁸ RL-108, *Fedax v. Venezuela*, ¶ 191,195.

³³⁹ RL-108, *Fedax v. Venezuela*, ¶ 199, citing Christoph H. Schreuer, *Commentary on the ICSID Convention*, 11 Foreign Investment Law Journal, 316, 372 (1996).

for purposes of the ICSID Convention, observing that the notes were intended for international circulation, and, when endorsed to a foreign holder, constituted an investment.³⁴⁰

238. A number of later decisions in investment treaty arbitrations, following the lead of the decision in *Salini v. Morocco*, treated the *Fedax* list of features that may characterize an investment, as the Respondent asks us to do in this case, as a test that a particular claimant's asset must pass to be recognized as an investment within the reach of the ICSID Convention.³⁴¹ This is commonly referred to, including by both the Claimant and the Respondent, as the *Salini* test.³⁴²

239. No such test seems to this Tribunal to be called for in this case. Certainly, the term "investment" as used in the ICSID Convention must have some meaning, even if the Convention itself does not define it. But, as the tribunal in *Enron v. Argentina* explained, "As the ICSID Convention did not attempt to define 'investment,' this task was left largely to the parties to bilateral investment treaties or other expressions of consent." As the ad hoc annulment committee observed in *Malaysia Historical Salvors*:

It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution.³⁴³

240. "It would go too far," the tribunal in *SGS v. Paraguay* suggested, "to suggest that any definition of investment agreed by states in a BIT [...] must constitute an 'investment' for purposes of Article 25(1)."³⁴⁴ Rather, that tribunal sensibly adopted the approach of the tribunal in *BIVAC*,

³⁴⁰ RL-108, *Fedax v. Venezuela*, ¶ 198.

³⁴¹ E.g. RL-85, *Salini v. Morocco*; RL-87, *Joy Mining v. Egypt*; RL-93, *Romak v. Uzbekistan*, ¶ 180 and ¶ 207.

³⁴² E.g. C-Mem. ¶ 182.

³⁴³ RL-81, *MHS v. Malaysia*, ¶ 73.

³⁴⁴ CL-76, *SGS v. Paraguay*, ¶ 93.

by defining the relevant question as whether “the definition [of investment] in the BIT exceed[s] what is permissible under the Convention.”³⁴⁵

241. The *Generation Ukraine* tribunal observed that, while the ICSID Convention did not define “investment,” it permits Contracting Parties to agree on a definition in a separate legal instrument, such as the BIT.³⁴⁶ This Tribunal has determined that Garanti Koza had an investment in Turkmenistan within the meaning of the term “investment” as defined in the BIT. Neither the nature of the Claimant’s investment itself nor the definition of “investment” in the BIT “exceed[s] what is permissible under the Convention”³⁴⁷ or is “absurd or patently incompatible with [the] object and purpose” of the ICSID Convention.³⁴⁸ Garanti Koza’s investment is accordingly readily recognizable as an investment permissible under the Convention.

242. The Tribunal therefore concludes that the Claimant’s burden of showing that its investment that is the subject of this arbitration falls within the meaning of “investment” as used in the ICSID Convention as well as in the BIT is satisfied by the Tribunal’s conclusion that the Claimant’s investment comes within the definition of “investment” in the BIT and that nothing about that definition or the Claimant’s investment itself exceeds what is permissible under the ICSID Convention or is incompatible with its purpose. Article 8 of the BIT (as interpreted in the

³⁴⁵ CL-76, *SGS v. Paraguay*, ¶ 94, quoting RL-132, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, May 29, 2009, ¶ 94 [hereinafter: *BIVAC v. Paraguay*]. The *Enron* tribunal similarly recognized that there must be “a limit to this discretion of the parties because they could not validly define as investment in connection with the Convention something absurd or entirely incompatible with its object and purpose.” *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 42 [hereinafter: *Enron v. Argentina*].

³⁴⁶ RL-159, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 8.2.

³⁴⁷ CL-76, *SGS v. Paraguay*, ¶ 94, quoting RL-132, *BIVAC v. Paraguay*, ¶ 94.

³⁴⁸ VCLT Art. 32(b) provides, in pertinent part: “Recourse may be had to supplementary means of interpretation [...] to determine the meaning when the interpretation according to article 31 [...] (b) Leads to a result which is manifestly absurd or unreasonable.” See *Enron v. Argentina*, ¶ 42.

Tribunal's Decision on the Objection to Jurisdiction for Lack of Consent)³⁴⁹ therefore entitles the Claimant to demand arbitration of a dispute arising directly out of its investment before an ICSID tribunal.

3. The claims arise under the BIT

243. The Respondent's final objection to jurisdiction is that the Respondent believes that the Claimant's claims arise under the Contract, rather than under the BIT, and that its claims are therefore subject to the clause in the Contract requiring disputes to be submitted to the Arbitration Court of Turkmenistan. This objection is effectively a challenge to the sufficiency of the Claimant's "umbrella clause" claim under the obligations provision of Article 2(2) of the BIT.

244. If, indeed, the Claimant's claims amounted merely to claims for breach of contract, the Tribunal would agree with the Respondent that such claims would be beyond the jurisdiction of an ICSID tribunal and also that they would be subject to the forum-selection clause in the Contract. If, on the other hand, as the Claimant argues, the Claimant's claims are for breaches of the BIT arising out of the Claimant's investment in Turkmenistan, this Tribunal has jurisdiction to hear them. The *Bayindir* tribunal observed that "the fact that a State may be exercising a contractual right or remedy does not of itself exclude the possibility of a treaty breach."³⁵⁰ Rather, that tribunal explained, "treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts," and "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty."³⁵¹

³⁴⁹ Appendix A to this Award.

³⁵⁰ RL-88, *Bayindir v. Pakistan*, ¶ 157.

³⁵¹ RL-88, *Bayindir v. Pakistan*, ¶¶ 148, 167. The tribunal in *SGS v. Pakistan* noted that "the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders." RL-118, *SGS v. Pakistan*, ¶ 147.

245. The fact that the Contract provides for resolution of disputes arising under the Contract in the Arbitration Court of Turkmenistan does not deprive this Tribunal of jurisdiction over claims pleaded and arising under the BIT. As the ad hoc committee in *Vivendi I* observed: “A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”³⁵² The tribunal in *SGS v. Paraguay* explained that “this rule applies with equal force in the context of an umbrella clause.”³⁵³

246. The answer to this objection to the jurisdiction of the Tribunal is that the Claimant has asserted multiple claims under the BIT. In addition to its umbrella clause claim, the Claimant also asserts claims for direct and indirect expropriation, for denial of fair and equitable treatment, for unreasonable and discriminatory measures, and for denial of full protection and security. Whatever merit each of those claims may have, each is stated as a claim arising under the BIT, not under the Contract. This Tribunal has no jurisdiction to adjudicate whatever contract claims the Claimant may have, and will not attempt to do so.

247. All that is required to confer on this Tribunal jurisdiction to consider the Claimant’s treaty claims is for one of the Claimant’s claims to arise under the BIT. The Tribunal finds that the Claimant’s claims for direct and indirect expropriation, for denial of fair and equitable treatment, for unreasonable and discriminatory measures, and for denial of full protection and security all concern “obligation[s] of [the Respondent] under [the BIT] in relation to an investment of the [Claimant].”³⁵⁴ The Tribunal also finds that the Claimant has asserted an umbrella clause claim that is pleaded as a breach of the obligation imposed on the Respondent by the BIT to “observe

³⁵² RL-131, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶ 103 [hereinafter: *Vivendi v. Argentina – Annulment*].

³⁵³ CL-76, *SGS v. Paraguay*, ¶ 142.

³⁵⁴ BIT Art. 8(1).

any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”³⁵⁵ These claims are sufficient to invoke the jurisdiction of the Tribunal. The Respondent’s additional objections to the Tribunal’s jurisdiction are overruled, and the Tribunal now turns to the merits of the claims asserted.

VII. OVERVIEW OF THE CLAIMS AND DEFENSES OF THE PARTIES

A. The Claimant’s Claims

248. The Claimant submits that the law to be applied to the dispute is the BIT, as supplemented by international law. The basis of this argument is Article 42(1) of the ICSID Convention, which directs the Tribunal to look first at any rules of law agreed by the parties in order to determine the governing law in an ICSID arbitration. That agreed choice of law, according to the Claimant, is the BIT.³⁵⁶

249. The Claimant asserts that Turkmenistan violated its obligations under the BIT in five respects. First, it claims that Turkmenistan unlawfully expropriated the Claimant’s investment. Second, it claims that the Respondent failed to treat the Claimant’s investment fairly and equitably. Third, it claims that Turkmenistan violated its duty to observe the obligations into which it entered with regard to the Claimant’s investment. Fourth, it claims that Turkmenistan’s unreasonable, unjustified, and arbitrary measures impaired the management, maintenance, use, enjoyment, and disposal of the Claimant’s investment. And fifth, it claims that the Respondent violated its obligation to provide full protection and security to the Claimant’s investment.

250. The Claimant seeks compensation for losses it claims to have suffered as a result of Turkmenistan’s violations of its obligations to the Claimant under the BIT in relation to the

³⁵⁵ BIT Art. 2(2).

³⁵⁶ Reply, ¶¶ 278-279.

Claimant's investments in Turkmenistan.³⁵⁷ Specifically, it seeks lost profits, compound interest, costs, and a declaration from the Tribunal that no refund of the Advance Payment is due to Turkmenistan.

1. The unlawful expropriation claims

251. The Claimant's expropriation claim relies on Article 5(1) of the BIT, which reads as follows:³⁵⁸

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable.

252. The Claimant relies on Article 5 with respect to both its claim of direct expropriation and its claim of indirect expropriation. Indirect expropriation, Claimant says, is described by the provision of Article 5 dealing with "measures having effect equivalent to nationalization or expropriation."³⁵⁹ The alleged expropriation (direct and indirect) was unlawful, according to the Claimant, because Article 5 prohibits any measure of expropriation that is: (a) not for a public purpose related to the internal needs of Turkmenistan, (b) not non-discriminatory, and (c) not paid for by prompt, adequate, and effective compensation representing the genuine value of the expropriated investment.³⁶⁰ The Claimant asserts that the Respondent's expropriation was not for a public purpose, and was not compensated. It further asserts that the expropriation was contrary to a specific commitment in the form of the Presidential Decree and the Contract.³⁶¹

³⁵⁷ Mem. ¶ 117.

³⁵⁸ Mem. ¶ 125.

³⁵⁹ Mem. ¶ 127.

³⁶⁰ Mem. ¶ 153.

³⁶¹ Mem. ¶ 154-160; Reply ¶ 323-325.

a. The direct expropriation claim

253. The Claimant claims that Turkmenistan directly expropriated its investment when it “seized” the Claimant’s factory and terminated the Contract in February 2010. It refers to Yves Fortier’s definition of direct expropriation as “the compulsory transfer of title to property to the State or a third party, or the outright seizure of property by the State.”³⁶²

254. Claimant claims direct expropriation of its contractual rights, which it argues that international law and investment treaty tribunals have consistently recognized may be expropriated. It relies for this point on the awards in *Vivendi v Argentina*,³⁶³ *Starrett Housing*,³⁶⁴ *Phillips Petroleum Co. v. Iran*,³⁶⁵ *Wena v. Egypt*,³⁶⁶ and *Eureko v. Poland*.³⁶⁷

255. The Claimant bases its claim of direct expropriation principally on three events attributed to the Respondent:

- a. The “seizure” of the Claimant’s factory, sale of its equipment,³⁶⁸ and the expulsion of its employees from the factory site on February 4, 2010, by a committee comprising representatives of Turkmen Highways, the Ministry of Construction, the Ministry of Internal Affairs, the Turkmen Intelligence Agency, a prosecutor/district attorney and other government personnel.³⁶⁹

³⁶² Mem. ¶ 150; CL-61, L.Yves Fortier, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19:2 ICSID Review- Foreign Investment Law Journal, p. 297, (Fall 2004).

³⁶³ CL-44, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20 2007, ¶ 7.5.4 [hereinafter: *Vivendi v. Argentina - Award*]

³⁶⁴ CL-45, *Starrett Housing Corp v. Iran*, December 19, 1983, 4 Iran-U.S. Claims Tribunal, p. 156,

³⁶⁵ CL-46, Iran-U.S. Claims Tribunal, Award No. 425-9-2, June 29, 1989, ¶ 76

³⁶⁶ CL-47, *Wena Hotels Limited, v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, ¶ 105.

³⁶⁷ CL-48, *Eureko B.V. v. Republic of Poland*, Ad hoc-UNCITRAL, Partial Award, August 19, 2005 [hereinafter: *Eureko v. Poland*].

³⁶⁸ Tr. June 8, 2015, p. 74, lines 10-11.

³⁶⁹ Mem. ¶¶ 151-152; C-Mem, ¶¶ 89 -107.

- b. The termination of the Contract by a letter from TAY dated February 22, 2010, thereby causing the alienation of the Claimant's contractual rights.³⁷⁰
- c. The wrongful judgments of the Turkmen courts obtained by the public prosecutor in March and May 2010 at the request of TAY.³⁷¹

b. The indirect expropriation claim

256. The Claimant claims that Turkmenistan indirectly expropriated the Claimant's investment by "creeping" expropriation. Such indirect expropriation is, according to the Claimant, widely understood as interference with an investment that "substantially deprives the investor of the use or enjoyment of its investment, even if the legal and beneficial title of the asset remains with the investor."³⁷² The test, according to the Claimant, is the *effect* of the measures on the investor's property – whether the effect of the State's measure is to deprive the investor "in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."³⁷³

257. Specifically, the Claimant claims that indirect expropriation occurred when Turkmenistan deprived the Claimant of the use, enjoyment, and economic benefits of its investment without paying fair compensation.³⁷⁴ This creeping expropriation is described as a "series of acts and omissions starting in the spring of 2008 which made it increasingly difficult for Garanti Koza to continue work on the Project, ultimately depriving Garanti Koza of its entire investment."³⁷⁵

³⁷⁰ *Ibid.*

³⁷¹ Reply ¶ 319.

³⁷² Mem. ¶ 133; CL-51, Lucy Reed, J Paulsson & N Blackaby, GUIDE TO ICSID ARBITRATION (2ND. Edition, Kluwer Law International 2010), p. 87.

³⁷³ Mem. ¶ 134; CL-54, *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB (AF)/97/1, Award, August 30, 2000, ¶ 103.

³⁷⁴ Mem. ¶ 128.

³⁷⁵ Mem. ¶ 132.

258. In this regard, the Claimant makes specific reference to the following acts. Even if each of these acts might not individually be an act of expropriation, taken together, the Claimant argues, they result in a creeping expropriation.³⁷⁶

- a. The Respondent's repudiation of the Project's lump sum pricing and the imposition of itemized cost pricing;
- b. The Respondent's failure to pay sums due to Garanti Koza;
- c. The Respondent's wrongful imposition of a delay penalty;³⁷⁷ and
- d. Turkmenistan's failure to notify the Claimant of the measures taken.

c. The indirect MFN/due process expropriation claim

259. The Claimant also seeks to use Article 3 of the BIT, the MFN clause,³⁷⁸ to import into the BIT elements of the expropriation provisions of two other treaties: Article 5 of the France – Turkmenistan BIT and Article 6 of the United Arab Emirates –Turkmenistan BIT.³⁷⁹

260. The Claimant argues that Article 5 of the BIT, read together, through the MFN clause, with Article 5 of the France –Turkmenistan BIT and Article 6 of the UAE –Turkmenistan BIT, imposes additional conditions to lawful expropriation: (1) that the expropriation not be contrary to a specific commitment, and (2) that it be in accordance with due process of law.

261. The Claimant submits that Turkmenistan, by imposing a delay penalty in excess of USD 2 million without involving Garanti Koza in the process, breached both of these conditions.

³⁷⁶ Reply ¶ 315.

³⁷⁷ Mem. ¶ 141.

³⁷⁸ Tr. June 8, 2015, p. 65, lines 1-13.

³⁷⁹ Closing Tr. December 14, 2015, p. 1396, lines 14-18.

262. The Claimant accepts that, if the Tribunal finds that the Respondent breached Article 5 of the BIT, the Tribunal need not examine or determine the Claimant’s alternative MFN-based grounds.³⁸⁰

2. The FET claim

263. The Claimant asserts that Turkmenistan failed to treat the Claimant’s investment fairly and equitably in accordance with Article 2(2) of the BIT, which requires that “Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment.”³⁸¹

264. The BIT does not define “fair and equitable” treatment (“FET”), so the Claimant invites the Tribunal to determine “whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.”³⁸² The Claimant notes that the Vienna Convention requires that the FET provision of Article 2(2) of the BIT be interpreted in good faith, in accordance with ordinary meaning to be given to its terms in their context, and in light of the object and purpose of the treaty.³⁸³

265. The object and purpose of the BIT, in the Claimant’s submission, may be inferred from the preamble. The preamble of the BIT refers to the parties’ intent “to create favourable conditions for greater investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party” in order to “stimulat[e] individual business initiative and ... increase prosperity in the territory of both Contracting Parties.”³⁸⁴ According to the Claimant, the FET

³⁸⁰ Closing Tr. December 14, 2015, p. 1400, lines 16-19.

³⁸¹ Mem. ¶ 161.

³⁸² Mem. ¶ 162; CL-66, F.A. Mann, “British Treaties for the Promotion and Protection of Investments”, the *British Year Book of International Law*, Volume 52, (1981), pp. 241-244.

³⁸³ Mem. ¶ 163.

³⁸⁴ Mem. ¶ 165.

standard prescribed in the BIT, in light of the preamble, should be understood as treatment that “does at least not deter foreign capital by providing disincentives to foreign investors.”³⁸⁵

266. The Claimant asserts that the FET standard is an objective one:³⁸⁶ an autonomous standard of treatment pursuant to a specific textual formulation in the context of the object and purpose of the BIT, and which is not equivalent or limited to the international minimum standard under customary international law.³⁸⁷ According to the Claimant, this FET standard imposes on the host state the following obligations:

- a. An obligation to act in a constant manner, free of ambiguity, to avoid arbitrary action, not to frustrate the investor’s legitimate expectations, and to provide a stable and predictable legal and business environment for the investment;³⁸⁸
- b. An obligation to “do no harm,” to cooperate with the investor, and to act proportionally;³⁸⁹
- c. An obligation not to coerce or harass the investment;³⁹⁰
- d. An obligation to act transparently;³⁹¹ and
- e. An obligation to act in good faith.³⁹²

³⁸⁵ Mem. ¶ 165; CL-70, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006. ¶¶ 298-99 [hereinafter: *Saluka v. Czech Republic*].

³⁸⁶ Mem. ¶ 166, citing CL-44, *Vivendi v. Argentina – Award*, ¶ 7.4.12; CL-73, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, ¶ 186 [hereinafter: *Occidental v. Ecuador*].

³⁸⁷ Reply ¶ 333.

³⁸⁸ Mem. ¶ 170; CL-59, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154 [hereinafter: *Tecmed v. Mexico*]; CL-57, *Alpha v. Ukraine*, ¶ 420.

³⁸⁹ Mem. ¶ 172; CL-44, *Vivendi v. Argentina - Award*, ¶ 7.4.39.

³⁹⁰ Mem. ¶ 174; CL-68, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶¶ 136-138 [hereinafter: *LG&E v. Argentina*]; CL-44, *Vivendi v. Argentina - Award*, ¶¶ 7.4.19 and 7.4.31-3.

³⁹¹ Mem. ¶ 175; CL-67, UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on issues in international investment agreements, 1999, p. 51; CL-59, *Tecmed v. Mexico*, ¶ 143.

³⁹² Mem. ¶ 176; CL-63, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 450; CL-68, *LG&E v. Argentina*; ¶ 129; CL-73, *Occidental v. Ecuador*, ¶¶ 183-186; CL-70, *Saluka v. Czech Republic*, ¶ 407; CL-59, *Tecmed v. Mexico*, ¶ 124.

267. The Claimant asserts that Turkmenistan violated the FET standard by:
- a. Frustrating Garanti Koza's legitimate expectations by changing the price it would receive for the project and thus the return on its investment, which was the most critical element underlying its decision to invest. This was a result of the change from a lump sum price of USD 100 million set out in the Contract and the Presidential Decree, to be paid in percentage instalments as work was completed, to a different pricing and invoicing mechanism using a Smeta-based system requiring costs to be itemized. The Claimant's legitimate expectations were further frustrated by Turkmenistan's failure to make monthly progress payments. Such actions constituted inconsistent conduct by Turkmenistan and resulted in a lack of stability of the legal framework for the investment.
 - b. Actively doing harm to the investment and failing to cooperate. The fines for delay and termination of the Contract were disproportionate to any delay, and in any event an extension of the completion date was mandated under the Contract and ordered by the Turkmen President.
 - c. Turkmenistan coerced Garanti Koza into applying a pricing and invoicing regime different from the lump sum pricing set out in the Presidential Decree and the Contract and pressured Garanti Koza to continue work while not making payments which were owed.
 - d. Turkmenistan harassed Garanti Koza by: (i) imposing a delay penalty and terminating the Contract in May 2009 and February 2010; (ii) applying to the Chief Prosecutor to start proceedings against Garanti Koza in February 2010; (iii) seizing Garanti Koza's factory in February 2010; (iv) acts by the Chief Prosecutor

endorsing Turkmen Highways' February 22, 2010 application and filing suit with the Turkmen courts within a day of that application; and (v) the imposition of a fine in February 2010 by the tax administration.³⁹³

268. The Claimant asserts that its investment was not treated with transparency. Garanti Koza did not receive any information about or notice of (a) the seizure of the factory other than the February 4, 2010 minutes, (b) the status and outcome of the proceedings by the tax administration or the Chief Prosecutor's action before the Turkmen courts, (c) the sale of part of its equipment by Turkmenistan, (d) Smeta being mandatory under Turkmen law, during the parties' negotiations leading to the Contract, and (e) the court proceedings in Turkmenistan brought by employees and subcontractors against Garanti Koza.³⁹⁴

269. The Claimant asserts that Turkmenistan's pricing policy in construction contracts was arbitrary, in that it was "without concern for what is fair or right."³⁹⁵ The Claimant further asserts that Turkmenistan did not act in good faith for all of the reasons above,³⁹⁶ and because of the manner in which it terminated the Contract.³⁹⁷

270. Finally, the Claimant argues that, even if each of the acts described in this section may not individually have resulted in a breach of the fair and equitable treatment provision in the BIT, all of these acts taken together do result in such a breach.³⁹⁸

³⁹³ Mem. ¶ 180.

³⁹⁴ Closing Tr. December 14, 2015, p. 1419.

³⁹⁵ Closing Tr. December 14, 2015, p. 1421.

³⁹⁶ Mem. ¶ 359.

³⁹⁷ Reply ¶ 365.

³⁹⁸ Closing Tr. December 14, 2015, p. 1406, lines 14-20.

3. The umbrella clause

271. The Claimant claims that Turkmenistan breached the so called “umbrella clause” found at Article 2(2) of the BIT, which provides that: “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.” The Claimant says that Turkmenistan’s obligations include obligations under the Contract between Claimant and TAY.³⁹⁹ In support of its contention that TAY entered into the Contract on behalf of Turkmenistan, the Claimant makes reference to, among other things, the statement in Article 1.2(a) of the Contract that the Contract is entered into by TAY on behalf of the Government of Turkmenistan.⁴⁰⁰

272. The effect of the umbrella clause, according to the Claimant, is to elevate breaches of contracts with the government into treaty breaches.⁴⁰¹ Failures to carry out the obligations undertaken in the Presidential Decree also constitute breaches of the Umbrella Clause,⁴⁰² according to the Claimant, irrespective of whether the Decree was a unilateral undertaking.⁴⁰³ The Decree made specific commitments directed at a specific investor.

273. The Claimant claims Turkmenistan breached the Umbrella Clause in six ways:

- a. First, Turkmenistan failed to pay the Claimant the price of construction works under the Presidential Decree and the Contract in the specified timeframe and manner,⁴⁰⁴ by:
 - i. Imposing Smeta in breach of (a) Paragraph 2 of the Presidential Decree; (b) Article 4 of the Contract; (c) Article 10 of the Contract Conditions; and (d) Schedule B-2 (Terms of Payment) of the Contract.

³⁹⁹ Cl. PHB ¶ 10-22.

⁴⁰⁰ Cl. PHB ¶ 11.

⁴⁰¹ Mem. ¶¶ 183, 185.

⁴⁰² Mem. ¶ 189.

⁴⁰³ Reply ¶ 373.

⁴⁰⁴ Mem. ¶ 191.

- ii. Failing on or after January 29, 2009, to make monthly payments, in breach of (a) Article 10 of the Contract; and (b) Schedule B-2 of the Contract.
- b. Second, the delay penalty violated Article 7(4) of the Contract, which requires Turkmenistan to extend the completion date in case it “*fails to make payments and fulfil its financial responsibilities... or allows delays in providing land, maps and diagrams.*”⁴⁰⁵ The delay penalty was also contrary to the agreed extension of completion until November 1, 2009.
- c. Third, termination of the Contract by Turkmenistan was contrary to Article 17.1 of the Contract, because (i) having repudiated the core provisions on price, the Respondent cannot be allowed to invoke Article 17.1; and (ii) contrary to Article 17.1, Turkmenistan has not paid Garanti Koza “for the amount of completed works including executed work, imported material and equipment and concluded purchases, demobilization of Contractor and repatriation of employees.”⁴⁰⁶
- d. Fourth, Turkmenistan violated Article 3.7 of the Contract by not handing over the sites promptly. Article 3.7 requires Turkmenistan to “acquire and provide legal and physical handing over of the Site to the Contractor.”⁴⁰⁷
- e. Fifth, the Claimant claims that Turkmenistan violated paragraph 6 of the Presidential Decree, which required various ministries to “ensure the removal of various bridges.” It also violated Schedule A-3 (14) of the Contract, in which TAY undertook the obligation to arrange with various ministries and departments to demolish existing bridges and clear the sites of debris.⁴⁰⁸

⁴⁰⁵ Mem. ¶ 192.

⁴⁰⁶ Mem. ¶ 193.

⁴⁰⁷ Mem. ¶ 194.

⁴⁰⁸ Mem. ¶ 195.

f. Sixth, Article 3.7 of the Contract states that the “Owner shall provide all necessary technical information and data for designing and construction of bridges from local authorities of Turkmenistan.” Schedule A-3(2) of the Contract required that final topographical plans about the sites be provided. The Claimant claims breach of these provisions.⁴⁰⁹

4. Unreasonable and discriminatory measures and MFN clause

274. Article 2(2) of the BIT provides that “Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.”

275. The Claimant claims that Turkmenistan breached Article 2(2) and Article 3 (MFN Clause) of the BIT by: (a) imposing Smeta⁴¹⁰ and the delay penalty, (b) terminating the Contract,⁴¹¹ (c) actions by the tax authorities, and (d) seizure of Garanti Koza’s factory and equipment.⁴¹² These actions, the Claimant says, were unreasonable, unjustified and arbitrary.

276. Further, the Claimant claims that Turkmenistan’s acts and omissions separately and cumulatively violated Article 2(3) of the United Arab Emirates–Turkmenistan BIT and Article 4 (1) of the Switzerland–Turkmenistan BIT (both imported by the MFN Clause), both of which provisions obligate the Respondent not to impair by unreasonable or arbitrary measure the management maintenance, use, enjoyment or disposal of investments.⁴¹³

⁴⁰⁹ Mem. ¶ 196.

⁴¹⁰ Mem. ¶ 207.

⁴¹¹ Mem. ¶ 208.

⁴¹² Mem. ¶ 210.

⁴¹³ Reply ¶ 390.

5. Full protection and security

277. The Claimant also claims that Article 2(2) of the BIT imposes on Turkmenistan an obligation to provide full protection and security, meaning both physical and legal security, to the investments of UK investors. It claims that, by failing to treat the investment fairly and equitably, creating an unstable legal environment, subjecting the investment to “harassment,” and permitting the expropriation of the investment, it failed in that obligation.⁴¹⁴ The Claimant does not accept that such protection is limited to protection from actions by third parties, as argued by Turkmenistan.

B. The Respondent’s Responses

278. In its Counter-memorial,⁴¹⁵ its Rejoinder,⁴¹⁶ and its Post-Hearing Brief,⁴¹⁷ the Respondent asks the Tribunal: (a) to the extent that the Tribunal proceeds to examine the merits of the case, to dismiss the Claimant’s claims in their entirety; and (b) to the extent that the Tribunal proceeds to examine the issue of quantum, to find that no compensation is due to the Claimant. The Respondent also asks the Tribunal to order the Claimant to pay the totality of the costs relating to this Arbitration.

279. The Respondent argues that any investment arbitration tribunal is charged with more than figuring out whether the rights of an investor have been violated. The Respondent submits that such tribunals are also charged with protecting the rights of states that sign BITs, particularly from the kind of abuse that Turkmenistan has, in its view, suffered in recent years at the hands of Turkish

⁴¹⁴ Mem. ¶ 217.

⁴¹⁵ C-Mem. ¶ 557.

⁴¹⁶ Rej. ¶ 536.

⁴¹⁷ Rsp. PHB ¶ 205.

claimants. The Respondent asks that the Tribunal make a finding that Turkmenistan has not violated the BIT, even if it finds that it has no jurisdiction over the dispute.⁴¹⁸

1. Issues of State responsibility and attribution

280. The Respondent asserts that Turkmenistan is not a party to the Contract upon which all of the Claimant's claims are based. It denies the Claimant's statements suggesting that Turkmenistan had obligations under the Contract.

281. The Respondent also points to a lack of consistency in the presentation of the Claimant's claims which shows that the Claimant itself is not clear about whether the actions in dispute are attributable to Turkmenistan. In some instances 'Turkmenistan' and 'Turkmen Highways' are used interchangeably in the Claimant's Memorial on the Merits. For example:

- The statement "Turkmenistan's Failure to Hand over Sites" is followed by "Under the Contract Turkmen Highways was required to hand over the sites" and "Turkmen Highways failed to comply with its obligation."
- "Turkmenistan's Failure to Demolish Existing Bridges" is followed by "fundamental obligation of Turkmen Highways under the Presidential Decree and the Contract was to remove the existing bridges and clear debris."
- The Claimant argues that, "given Turkmenistan's misconduct towards Garanti Koza and its growing hostility towards Turkish investors more broadly, Garanti Koza had every expectation that if it issued a letter of guarantee again, Turkmen Highways would immediately call on the guarantee."⁴¹⁹

⁴¹⁸ Closing Tr. December 14, 2015 pp. 1597-1598.

⁴¹⁹ C-Mem. ¶ 279.

The Respondent thus argues that, while the Claimant refrains from alleging that the Respondent is a party to the Contract, the Claimant's case in fact rests on the assumption that the Respondent is somehow answerable for the contractual obligations of Garanti Koza's contracting partner, TAY.

282. The Respondent considers that international law differentiates between a State's responsibility for violations of contractual undertakings given to foreign nationals by the State itself and a State's responsibility for interference with contractual undertakings to which it is not a party. The Respondent argues that this distinction is widely recognized in the literature on international responsibility relating to contracts, which generally concludes that, if a foreign investor's contract is not with the central government of the State, the conduct complained of must meet the traditional tests for internationally wrongful acts in order to incur international responsibility.⁴²⁰

283. The Respondent contends that the Contract in dispute is not with the central government of Turkmenistan. Rather, it is with a State-owned entity acting in its commercial capacity and within Turkmenistan's internal legal order, rather than within the international legal order.⁴²¹ Accordingly, the Respondent argues, a breach of the Contract concluded by Turkmen Highways cannot per se give rise to the responsibility of the Turkmen State under international law.⁴²²

284. The Respondent argues that, if the true nature of Garanti Koza's claims is that its contractual partner failed to honor its obligations under the Contract, then no question of the State's

⁴²⁰ RL-144, Pierre Mayer, *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*, 113 *Journal du Droit International* 5 (1986), p. 29 [hereinafter: *Mayer*]; RL-145, Louis B. Sohn and R. R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *American Journal of International Law* 545 (1961), pp. 566-567.

⁴²¹ Rsp. PHB ¶ 67-72.

⁴²² C-Mem. ¶ 287.

international responsibility arises and the proper forum for obtaining redress is the Arbitrazh Court of Turkmenistan. If, however, Garanti Koza's complaint is that Turkmenistan, or some organ or agency or the Turkmen government, unjustly or improperly annulled, modified, or otherwise interfered with the Contract, then, the Respondent argues, alleging breach of contract is neither a sufficient nor proper basis for complaint. Rather, the question is whether the State's conduct violates its obligations under the BIT in such a way as to give rise to the State's international responsibility.⁴²³

285. The Respondent asserts that the Claimant has failed to establish that the acts and omissions of which it complains were taken in the exercise of sovereign power, referring to the International Law Commission's Articles on State Responsibility ("ILC Draft Articles on State Responsibility"), specifically Article 8.⁴²⁴ The Respondent argues that the Claimant has not shown direct intervention by the Turkmen State or even any substantial "advice" to TAY with regard to TAY's decisions to make contractual payments, apply penalties, or terminate the Contract. The Respondent argues that accepting the Claimant's version of events would require the Tribunal to believe that every late payment, every delay penalty, every action by the regulatory authorities was choreographed to torment the Claimant, notwithstanding that the State's only interest was in the timely completion of the bridge project, and further to believe that the Claimant's failure to complete the works resulted, not from its own failings, but from acts and omissions attributable to the Respondent State as a Sovereign.⁴²⁵

286. In order to attribute responsibility to Turkmenistan, the Respondent argues that Garanti Koza must establish that the conduct of TAY was unjustified under the terms of the Contract and

⁴²³ C-Mem. ¶ 288-289.

⁴²⁴ C-Mem. ¶ 290; Rej. ¶ 301.

⁴²⁵ Rej. ¶ 304.

applicable law, that such conduct was attributable to the Respondent State, and that the State's conduct violated its obligations under the BIT or constituted internationally wrongful acts under international law. The Respondent submits that the Claimant has failed to discharge its burden to make such a showing.⁴²⁶

2. Issues of applicable law

287. The Respondent contends that the proper approach to identifying the applicable rules of law, pursuant to Article 42(1) of the ICSID Convention rests upon the principle that different issues can arise in the context of a single investment dispute and that a tribunal has the power to apply different rules of law to those different issues depending upon their proper characterization.⁴²⁷ According to the Respondent, this interpretation is confirmed by both scholarly commentary⁴²⁸ and arbitral precedent.⁴²⁹

288. In the Respondent's view, if an issue in dispute relates to the existence or scope of a contractual obligation, or a party's performance under a contract, that issue has to be determined by the law governing the contract. In the present dispute, the Contract contains an express choice of law clause, providing that "This Contract obeys the acting legislation of Turkmenistan."⁴³⁰ Therefore, the Respondent considers that the Law of Turkmenistan should be applied to determine

⁴²⁶ C-Mem. ¶ 296.

⁴²⁷ C-Mem. ¶ 298.

⁴²⁸ RL-116, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press, 2009), p. 40; RL-147, Christoph Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, (forthcoming), available at: www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf, p. 21.

⁴²⁹ RL-148, *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶ 76; RL-149, *EnCana Corporation v. Republic of Ecuador*, LCIA Case UN3481, Award, February 3, 2006, ¶ 184; CL-71, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, ¶ 223; RL-156, *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, ¶¶ 21-22.

⁴³⁰ C-021, Contract Conditions, Art. 2.2.

the nature and scope of parties' rights, obligations, and performance under the Contract.⁴³¹ Since the Claimant asserts a variety of alleged violations of its rights under the Contract, for the Tribunal to assess whether there is a breach of the BIT, it must first establish, with reference to and in accordance with Turkmen law, whether the rights claimed by the Claimant existed under the Contract, and if so, their scope and content.⁴³² In particular, the Respondent argues, the Tribunal must answer the following questions under Turkmen law:⁴³³

- Was the Claimant actually entitled to a particular payment?
- Had the Claimant fulfilled its corresponding contractual obligations?
- Was the imposition of a delay penalty appropriate in the circumstances?
- Were there valid grounds for contract termination and were the procedures for termination properly carried out?

3. Issues of liability

289. The Respondent argues that, even if the Tribunal determines that it has jurisdiction (which the Respondent denies) and even if the Tribunal decides to consider that TAY's acts are attributable to Turkmenistan (which the Respondent also denies), the Tribunal should nevertheless find that all of the Claimant's claims are meritless.⁴³⁴

290. According to the Respondent, it is universally understood that the party who has the burden of proof is the party alleging the affirmative of an issue, consistent with the established principle: *actori incumbit probatio*. Thus, the party who submits a claim has the burden of proving the facts it alleges in support of its claim. The ultimate burden of proof never shifts from one party to the

⁴³¹ Rsp. PHB ¶ 35.

⁴³² C-Mem. ¶ 304.

⁴³³ C-Mem. ¶ 307.

⁴³⁴ C-Mem. ¶ 311-312.

other, the Respondent argues, but rests throughout the case with the party asserting claims and can only be discharged once the Tribunal has found that such party has proved its claims.⁴³⁵ In other words, the Claimant has to prove the factual basis of each of its claims and the Tribunal should decide, in consideration of the evidence presented by both Parties, whether the Claimant has discharged its burden of proof.⁴³⁶ The Respondent submits that the evidence clearly shows that the Claimant has failed to meet its burden in this case.

a. The umbrella clause

291. The Respondent asserts that the Claimant cannot circumvent its own contractual obligations via the umbrella clause; that the Claimant has not identified any commitment owed to it within the meaning of the umbrella clause and therefore Claimant's claims do not fall within the meaning of the umbrella clause; and that in any case neither Turkmenistan nor TAY breached any obligation owed to Garanti Koza.

292. *First*, the Respondent argues that Garanti Koza's umbrella clause argument fails on its premise, because an umbrella clause such as the one in the UK-Turkmenistan BIT does not internationalize simple contract claims and does not elevate such claims to treaty status. The Respondent asserts that an umbrella clause cannot transform ordinary contract claims into treaty claims. For example, in the *EDF* case relied upon by the Claimant, the Respondent states that the tribunal did not find that an umbrella clause elevates all contract claims into treaty claims; rather,

⁴³⁵ Rej. ¶ 314. The Respondent explains that, by contrast, the burden of producing evidence, a separate and distinct concept, refers to the obligation of each party to produce evidence in support of its arguments as a case progresses. The burden of producing evidence may shift back and forth between the parties according to the nature and strength of the evidence produced by each party in support of the arguments it submits. However, the fact that the burden of producing evidence may shift does not affect the fact that the burden of proof remains on the party asserting the claims.

⁴³⁶ Rej. ¶ 317.

the tribunal found that only a serious repudiation of a concession agreement could give rise to a treaty violation.⁴³⁷

293. The Respondent argues that a State is not necessarily liable under an umbrella clause for breaches of a contract between an investor and a state entity even if the alleged breaches are of such magnitude as to fall under the umbrella clause. Each of the claims must, in the Respondent's submission, pass by the Contract if it is to succeed, and Garanti Koza has made no showing that TAY, much less Turkmenistan, violated the Contract, much less that it did so to such "magnitude" as to give rise to a Treaty claim. Rather, the Respondent urges, TAY's actions vis-à-vis the Contract were those that any party to a contract would have taken in the face of material breaches and non-performance of a contractual counter-party. Without a determination that the Contract was wrongfully terminated, Garanti Koza cannot make out a *prima facie* showing of a Treaty claim.⁴³⁸

294. The Respondent contends further that, even if the Tribunal were to find that the umbrella clause internationalizes the Contract, it must then find that the parties have a mutual obligation to observe their obligations under the Contract. In other words, the Tribunal cannot allow Garanti Koza to use the umbrella clause to attempt to enforce part of the Contract while ignoring those parts that it holds in disfavor, namely the dispute resolution provisions of the Contract.

295. *Second*, the Respondent argues that, in order for an obligation to come within the umbrella clause, the host State must have entered into some commitment with specific reference to an investment, and that commitment must create some entitlement on the part of the investor to some specific performance by the State. The consensual element is vital, and derives from the language

⁴³⁷ C-Mem. ¶ 317.

⁴³⁸ C-Mem. ¶¶ 318-319.

“entered into,” which is present in many umbrella clauses, including Article 2(2) of the BIT. The Respondent quotes the *ad hoc* Annulment Committee in the *CMS v. Argentina* case: “In speaking of ‘any obligations it may have entered into with regard to investments’, it seems clear that [the umbrella clause] is concerned with consensual obligations arising independently from the BIT itself. ... Further, they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.”⁴³⁹ The Respondent argues that unilateral legislative or executive acts lack this consensual characteristic, and therefore do not create the type of obligation that is encompassed by an umbrella clause.⁴⁴⁰

296. The Claimant’s argument that Presidential Decree No. 9429 specifically represents such a commitment demonstrates, in the Respondent’s view, a fundamental misunderstanding of the nature of that decree. Presidential Decree No. 9429 did not create a specific obligation towards the Claimant, the Respondent argues, but rather permitted TAY to enter into a contract with the Claimant, and set out the main provisions of the contract, including the total contract price and completion date of the project. It did not modify, much less set those terms.⁴⁴¹ Orders and decrees issued by the President are not intended to amend or revoke the Constitution and laws of Turkmenistan, the Respondent asserts, but rather are a method of implementing those laws. Furthermore, The Law on Normative Legal Acts explicitly provides that decrees of a distinctive and organizational nature issued by the President for purposes of resolving specific ongoing matters, such as Presidential Decree No. 9429, do not constitute normative legal acts.⁴⁴²

⁴³⁹ RL-140, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007, ¶ 95.

⁴⁴⁰ C-Mem. ¶ 322.

⁴⁴¹ C-Mem. ¶ 328.

⁴⁴² C-Mem. ¶ 327.

297. Further, the Respondent explains that the Presidential Decree did not, as the Claimant contends, predetermine the contract price, but rather allocated a maximum budget from public funds, in the amount equal to the total value of the Contract as agreed by the parties to the Contract. Indeed the tender documents provided to Garanti Koza specifically state that no agreement is reached until the Contract is signed.

298. The Respondent argues, citing Mr. Sarybayev's testimony, that the Claimant misunderstands the Presidential Decree's connection to the contract price. Mr. Buyuksandalyaci, in paragraph 20 of his Witness Statement, reverses (according to the Respondent) the chronological sequence of the negotiation of the principal contract terms and the issuance of a Presidential Decree. Contrary to Mr. Buyuksandalyaci's statement, Mr. Sarybayev testified that "a Presidential Decree follows the process of the negotiation of the principal terms of a contract between a contractor and a governmental entity, such as the contract price and the completion date, rather than precede it."⁴⁴³ The Respondent concludes that the Decree does not create any specific obligations owed by Turkmenistan to Garanti Koza, and therefore that Garanti Koza cannot base an umbrella clause claim on the Decree.

299. *Third*, the Respondent considers that the Claimant cannot use the Umbrella Clause to circumvent its contractual obligations. The Respondent argues that the legal effect of this clause is not, as Garanti Koza wishes the Tribunal to believe, on the one hand to elevate all claims under the Contract to Treaty claims, and on the other hand to provide a means for it to escape its obligations under the Contract and specifically its obligation to adhere to the forum selection clause.⁴⁴⁴ Commenting on the *SGS v. Philippines* case,⁴⁴⁵ the Respondent emphasizes that,

⁴⁴³ Sarabayev WS-1, ¶ 17.

⁴⁴⁴ C-Mem. ¶ 333.

⁴⁴⁵ RL-127, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No.

although the tribunal in that case did find that the umbrella clause could have the effect of bringing some contract claims under the treaty, it also found that the purpose of the umbrella clause is to “help secure the rule of law in relation to investment protection,” and held that, even if SGS’ contract claims could be stated as treaty claims via the umbrella clause, they could not be considered by a treaty tribunal, because doing so would violate the binding forum-selection clause in the contract.⁴⁴⁶

300. The Respondent argues that, although the Claimant claims that Turkmenistan breached a number of obligations to the Claimant, all of these claims arise from the Contract, to which Turkmenistan is not a party. TAY is the counter-party to the Contract. The Respondent accordingly analyzes whether TAY breached any obligation it owed to Garanti Koza, and concludes that TAY did not.

301. The Respondent asserts that Garanti Koza was paid in full for the work it actually performed. Progress Payment Certificates 1-3 were paid, and subsequent invoices were not paid because Garanti Koza failed to renew the bank guarantee. The Respondent takes issue with Garanti Koza’s complaint that the first three payments were delayed because TAY was unable to make payments without Garanti Koza’s smeta documentation being in place. This was not, the Respondent argues, a breach on the part of TAY, but rather a result of Garanti Koza’s failure to have its Smeta documentation in place before submitting its Progress Payment Certificates, and thus a failure by Garanti Koza to meet its own obligations under the Contract and the laws of Turkmenistan.⁴⁴⁷

ARB/02/6.

⁴⁴⁶ C-Mem. ¶ 333.

⁴⁴⁷ C-Mem. ¶ 338-340.

302. The Respondent argues that the Claimant's contention that the requirement that Garanti Koza prepare and submit Smeta documentation somehow changed the terms of the Contract is wrong.⁴⁴⁸ First, the Respondent argues that Mr. Nepesov and Mr. Sarybayev explained that the submission of Smeta documentation was required by the Contract and by the law for all projects financed from the State budget; it was not a requirement imposed after the execution of the Contract.⁴⁴⁹ Second, Smeta is an accounting mechanism put in place to ensure that the price paid for materials and other inputs used in public contracts bears some relationship to reality. The Respondent considers that "an honest contractor, who performs the work it contracted to do, should have no problem earning the total value of a contract."⁴⁵⁰

303. The Respondent rejects the Claimant's complaint that TAY (and by extension Turkmenistan) breached an obligation by enforcing the delay penalty provision of the Contract. The Respondent's view is that the Claimant was woefully delinquent in completing its obligations under the Contract, and that TAY exercised its right to impose a delay penalty under the exact circumstances that the delay penalty clause in the Contract was intended to cover. The Respondent argues that it was the Claimant that breached its Contract obligations, and that the Claimant's claim of a breach by TAY represents "a failed effort to shift the focus away from its own failure to meet its own contractual obligations" and "its own inability and apparent unwillingness to perform."⁴⁵¹

304. The Respondent denies that TAY's termination of the Contract was wrongful. Rather, the Respondent says, TAY had every right to terminate the Contract, and it exercised that right after careful consideration and after providing Garanti Koza ample time and opportunity to perform.

⁴⁴⁸ Nepesov WS-1, ¶¶ 17-19; Sarybayev WS-1, ¶ 28.

⁴⁴⁹ Rsp. PHB ¶ 31-32.

⁴⁵⁰ C-Mem. ¶ 342.

⁴⁵¹ C-Mem. ¶ 348-349.

Mr. Sarybayev testified that “at some point, [TAY] realized that Garanti Koza’s performance was so inadequate that, left on its own, it was not going to be able to complete its project for years after the October 2008 deadline.”⁴⁵² Under such circumstances, the Respondent argues, TAY’s exercise of its contractual right to terminate cannot be seen as a breach of an obligation owed by TAY to Garanti Koza; rather it was the predictable result of Garanti Koza’s breach of the obligations it owed to TAY, its dismal performance, and its abandonment of the project.⁴⁵³

b. The claims of expropriation

305. The Respondent contends that the exact nature of the Claimant’s expropriation claim is unclear, but that it appears to arise (a) from measures taken by TAY to encourage the Claimant to perform its obligations under the Contract, (b) from the termination of the Contract, and (c) from the attachment of equipment that followed the Claimant’s failure to meet its contractual obligations.⁴⁵⁴

306. The Respondent further argues that, although the Claimant asserts that know-how was expropriated from it, the Claimant never defines what know-how was taken, nor does it explain how any such taking could have occurred when there were no trade secrets and no know-how was transferred to TAY, much less taken by Turkmenistan.⁴⁵⁵

307. The Respondent also argues that the Claimant has not made it clear upon which Treaty provision the Claimant bases its claim of expropriation. To the extent that the Claimant relies on the Treaty’s MFN clause, the Respondent describes the Claimant’s expropriation claims as “a Frankenstein-like concoction created from expropriation clauses in at least three different

⁴⁵² Sarybayev WS-1, ¶ 15.

⁴⁵³ C-Mem. ¶ 358.

⁴⁵⁴ C-Mem. ¶ 359.

⁴⁵⁵ C-Mem. ¶ 360.

treaties.”⁴⁵⁶ While the Respondent concedes that an MFN clause may allow a claimant to import an obligation from one treaty to another, it argues that the claimant must pick one standard from one treaty and cannot, as Garanti Koza attempts to do, meld its favorite bits and pieces from various treaties into one, in effect creating an obligation which the State never consented to in any treaty.

308. Such an effort to use Article 3 of the BIT to piece together an entirely new obligation from multiple treaties is, the Respondent argues, improper. First, the Respondent asserts, while the Claimant has the burden of identifying treatment that is more favorable, its Memorial contains quotations from multiple treaties between Turkmenistan and other states without ever identifying which of those treaties it considers to be more favorable or why they should be considered more favorable.⁴⁵⁷ The Respondent suggests that the Claimant is attempting to create a “sui generis mechanism” of treaty rights for itself, which does not “correspond to any real situation under any treaty,” and that Article 3 of the BIT cannot be read to permit such an “absurd result.”⁴⁵⁸

309. The Respondent contends that a claim of expropriation requires that the claimant prove that a state actor has engaged in behavior that is not available to an ordinary private party to a contract. The Respondent quotes the award in *Vanessa Ventures*, which stated that “it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt” for there to be an expropriation. In the words of the Respondent, “The breach of a contract, much less the exercise of legitimate termination rights under a contract by a state actor, does not

⁴⁵⁶ C-Mem. ¶ 361.

⁴⁵⁷ C-Mem. ¶ 363. For its expropriation claim, the Claimant refers to the France-Turkmenistan BIT and the United Arab Emirates-Turkmenistan BIT. In support of its claim for arbitrary treatment, the Claimant refers to the UAE-Turkmenistan BIT and the Switzerland-Turkmenistan BIT.

⁴⁵⁸ C-Mem. ¶ 366.

amount to expropriation as a matter of international law. A state cannot be deemed to have expropriated an investor's property simply by exercising its own rights under an agreement."⁴⁵⁹

310. Turning to the Claimant's specific claims of expropriation, the Respondent takes issue, *first*, with the Claimant's contention that it should have been exempt from complying with the Smeta requirements which are applicable to every other contractor in Turkmenistan, because doing so deprived it of the value of its rights under the Contract. The Respondent insists that Smeta is a reporting procedure that does not affect the value of the Contract, not, as the Claimant would have it, a mechanism by which TAY attempted to cheat the Claimant out of progress payments. Smeta, the Respondent says, is nothing more than documentation required by all contractors that must be submitted prior to their submission of invoices in order to receive progress payments.⁴⁶⁰ As indicated by Mr. Sarybayev, "I have not heard of any project that did not require submission of Smeta, as it is used as a reporting mechanism for all construction projects financed from public funds."⁴⁶¹ The Respondent argues that Garanti Koza is no different from any other contractor and had a legal and contractual obligation to submit a detailed project Smeta in order to receive payment.

311. The Respondent claims that, had Garanti Koza performed its obligations in a timely way and had it prepared its Smeta before submitting its Project Payment Certificate No. 1, it would have received payment within 45 days, as provided in the Contract. When the Claimant did prepare its Smeta, its Progress Payment Certificates were paid in a timely manner. The Respondent argues that Garanti Koza received payment for Progress Payment Certificate No. 1 in December 2008,

⁴⁵⁹ C-Mem. ¶ 377.

⁴⁶⁰ C-Mem. ¶ 384.

⁴⁶¹ Sarybayev WS-1, ¶ 28.

not because of any state action, but because of Garanti Koza's delay in complying with its obligations. This demonstrates, the Respondent says, that no finding of expropriation can be based on TAY's refusal to make progress payments until the Smeta was in place.

312. *Second*, the Respondent asserts that TAY's imposition of a delay penalty was proper. When Garanti Koza's performance fell woefully behind, the Respondent says, TAY had no choice but to exercise its contractual right to impose delay penalties. Since the Contract provided a clear right to do so, the Respondent argues, the imposition of the delay penalties cannot amount to an expropriation.⁴⁶² Moreover, the Respondent disputes that the imposition of the delay penalty can be considered an act of the State.⁴⁶³

313. *Third*, the Respondent disputes that Turkmenistan expropriated the Claimant's rights under the Contract when TAY exercised its termination rights. Article 17 of the Contract, which was negotiated and signed by Garanti Koza, provides the Owner (TAY) with a unilateral right of termination. When Garanti Koza abandoned the project and refused to complete the project despite the pleas of TAY that it do so, the Respondent argues, TAY had no choice but to exercise its termination rights. The Respondent asserts that TAY acted as any rational commercial party to a contract would have done when faced with a counter-party who refuses to perform its contractual obligations; its action was certainly not state action.

314. The Respondent applies the same reasoning to the Claimant's contention that the attachment of the factory and equipment used by Garanti Koza on leased land in Turkmenistan amounted to an expropriation. The Respondent argues that the factory and equipment were

⁴⁶² Article 8.1 of the Contract (R-18) provides: "In case if the Contractor does not ensure the completion of the facility's construction within the time period stipulated by Article 7 of the present terms of the Contract, the Contractor pays the Owner a compensatory fee for the established omission (penalty for failure to comply with the Contract) for each day of delay from the date of project completion."

⁴⁶³ C-Mem. ¶ 390.

attached by the court on the basis of a petition from TAY, after the Claimant's refusal to pay the delay penalty it owed to TAY. In the words of the Respondent, "The attachment did not take place as a result of some political vendetta or secret conspiracy as Claimant insinuates. Rather, TAY acting as any debtor is allowed to do under Turkmen law, and as creditors around the world are allowed to do, petitioned the court to attach the assets it assumed belonged to Garanti Koza in an effort to satisfy the amounts owed to it."⁴⁶⁴

315. The Respondent submits that there are no grounds to find expropriation in this case. However, if TAY's actions could be construed as an expropriation attributable to Turkmenistan, the Respondent submits that the expropriation must also be found to have been lawful, because it was undertaken for a public purpose against adequate compensation. The Respondent reasons that the Contract at issue in this case concerned the re-construction of 28 bridges and overpasses on one of the most major highway arteries in Turkmenistan; Garanti Koza's failure to fulfill its obligations disrupted the flow of traffic and led to greatly increased road danger.⁴⁶⁵ Thus, the Respondent says, after Garanti Koza failed to extend the Contract, left Turkmenistan and abandoned the project, TAY had no choice but to terminate the Contract.

c. The claim of denial of fair and equitable treatment

316. The Respondent argues that the current and prevailing view is that the threshold for violating the fair and equitable treatment ("FET") standard is a high one, and that a State's conduct must indeed be grievous to attract the reprobation of international law. The Respondent considers that the Claimant bases its FET claim on the same set of alleged harms upon which it bases its other claims: delayed progress payments arising from the Claimant's failure to submit the proper

⁴⁶⁴ C-Mem. ¶ 401.

⁴⁶⁵ C-Mem. ¶¶ 405-406.

documentation required for TAY to make those payments, in particular Smeta documentation; TAY's imposition of a delay penalty; the attachment of Garanti Koza's assets in Turkmenistan; tax proceedings arising from Garanti Koza's failure to file and pay its taxes; the termination of the Contract by TAY as a result of Garanti Koza's nonperformance and finally, Garanti Koza's allegation that TAY was an uncooperative partner.⁴⁶⁶ The Respondent contends that these claims can be divided into two categories: (1) those that have no basis in fact; and (2) those for which the Claimant has misconstrued the facts and misapplied the law in its effort to contend that Turkmenistan breached its FET obligations.

317. With regard to Garanti Koza's claim that Turkmenistan's actions breached legitimate expectations of Garanti Koza, the Respondent notes, first, that this case arises out of a contract between Garanti Koza and TAY, so that the Claimant's legitimate expectations must be limited to what that contract provided. In the words of the Respondent, "A contractor can have no legitimate expectation that it will be paid before complying with the terms of payment. Nor can a contractor have a legitimate expectation that the counter-party to the contract will not exercise its contractual right to impose a delay penalty when the contractor fails to perform its obligations and to subsequently exercise its contractual termination rights when the contractor abandons the project."⁴⁶⁷ For the same reasons, the Respondent argues, the conduct of TAY and Turkmenistan in enforcing, respectively, the Contract and the law, cannot be considered to be disproportionate or in bad faith. The Respondent also urges that, in evaluating the Claimant's claim, the Tribunal should take into account the Claimant's multiple material breaches of the Contract.⁴⁶⁸

⁴⁶⁶ C-Mem. ¶ 434.

⁴⁶⁷ C-Mem. ¶ 440.

⁴⁶⁸ Rsp. PHB ¶ 129-132.

318. Next, the Respondent argues that, even if a duty of transparency is considered part of the FET obligation (which it denies), such an obligation could be breached only by conduct that is grossly unfair and that involves a complete lack of candor. According to the Respondent, the record of this case is replete with evidence of TAY's candor: letters from TAY to Garanti Koza entreating it to perform its obligations under the Contract, outlining the deficiencies of Garanti Koza's performance, and informing it of the consequences of non-performance -- the delay penalty and termination. The Respondent asserts that the parties were in near constant communication until Mr. Buyuksandalyaci left Turkmenistan and refused to communicate further with TAY.⁴⁶⁹

319. The Respondent concludes that "it is clear that when one considers the context of this case, a Contract in which the Contractor failed to perform its obligations and abandoned the project owing significant sums to the project owner and the respective actions of the parties combined with the fact that there is no action even complained of that was taken with *puissance publique*, one must conclude that Turkmenistan did not violate its FET obligation."

d. The claim of arbitrary and unreasonable treatment

320. The Respondent contends that the Claimant's claim that it was subjected to arbitrary and unreasonable treatment again attempts to use the Treaty's MFN clause to manufacture an obligation to which Turkmenistan never agreed in any treaty. Indeed, the Respondent says that the Claimant again fails to cite to any single treaty standard upon which it relies, but instead seems to apply three separate standards.⁴⁷⁰

321. The Respondent points out that Smeta is neither a pricing mechanism nor arbitrary. In its view, it is all the more difficult to understand this allegation when the contract price was the price

⁴⁶⁹ C-Mem. ¶ 443.

⁴⁷⁰ C-Mem. ¶ 447.

the Claimant agreed to itself, and the Claimant is not even able to articulate or quantify how the payments it received were in any way different from what it would have been entitled to under any other calculation.

322. Likewise, the Respondent asserts that the imposition of the delay penalty and the termination of the Contract by TAY were rational responses taken by a commercial party to a contract in the face of nonperformance by the counter-party to that contract, and cannot be construed as arbitrary or unreasonable state action. The attachment of assets for unpaid debts and the imposition of tax penalties for unpaid taxes are also rational responses and cannot be considered arbitrary.

323. Finally, the Respondent stresses that TAY did not arbitrarily deny Garanti Koza an extension; rather, it recognized that the project was significantly delayed and explored the option of an extension in hopes of motivating Garanti Koza to actually perform its obligations with the minimum possible delay. The fact that TAY could not continue to make progress payments in the absence of a valid bank guarantee, while Garanti Koza kept the balance of the Advance Payment, is entirely reasonable in the Respondent's view, given Garanti Koza's track record of nonperformance and the legal and contractual requirement that such a bank guarantee be in place.

e. The obligation of full security and protection

324. According to the Respondent, full protection and security is an obligation of conduct rather than one of result, and requires only that a State exercise due diligence in affording protection to foreign investments. It does not subject States to strict liability for any loss suffered by a claimant, and it certainly does not indemnify investors for their own negligence, poor performance,

misconduct or bad luck. In the Respondent's view, the essential question is whether the State exercised due diligence to the extent "reasonable under the circumstances."⁴⁷¹

325. The Respondent argues that, to prevail on a claim of denial of full security and protection, a claimant must do more than simply allege that it was harmed by an "unstable legal environment," and the Claimant has not done so. For the Respondent, it is clear that the Claimant has not met its burden to show that Turkmenistan breached its FPS obligation.⁴⁷²

VIII. THE TRIBUNAL'S ANALYSIS CONCERNING THE MERITS

326. As a preliminary matter, the Tribunal notes that both Parties have advanced general allegations about the other or others similarly situated. The Claimant has made broad allegations that Turkmenistan presents an unfavorable, indeed hostile, investment environment for Turkish investors.⁴⁷³ And the Respondent has made similarly broad allegations about the behavior of Turkish companies working in Turkmenistan.⁴⁷⁴ Neither side established the relevance of these allegations to this dispute or to any claimed breach of the BIT or advanced convincing evidence to support them. The Tribunal has accordingly given no weight to these allegations in arriving at its conclusions, and sees no need to address them in this award.

327. All of the substantive claims asserted by the Claimant, and all of the defenses raised by the Respondent, involve the same sequence of events in Turkmenistan between the beginning of 2008 and the end of 2010. Each act by the Respondent about which the Claimant complains is alleged to violate multiple provisions of the BIT. Since all of those claims find their way by one route or

⁴⁷¹ C-Mem. ¶ 457.

⁴⁷² C-Mem. ¶ 464.

⁴⁷³ E.g., Mem.¶¶ 8-16. This allegation sits somewhat oddly with the Claimant's claim to be a U.K. investor.

⁴⁷⁴ C-Mem. ¶ 25.

another to the Contract between Garanti Koza and TAY, the Tribunal will commence its analysis with the Claimant's umbrella clause claim.

A. The Claim that the Respondent Failed to Observe Its Obligations

328. Article 2(2) of the BIT requires each Contracting Party to “observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.” Such treaty provisions are commonly referred to as “umbrella clauses,” because they bring contractual and other commitments under the protective umbrella of a bi-lateral investment treaty.⁴⁷⁵

329. There has been some debate among tribunals in investment arbitrations, described in scholarly detail by the tribunal in *Eureko v. Poland*,⁴⁷⁶ about the meaning of umbrella clauses and the extent to which they may elevate breaches of a contract to which a State (or an organ or territorial division of a state) is a party to breaches of a treaty. As explained by the *Eureko* tribunal, applying the direction of VCLT Article 31.1 to interpret a treaty “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:”

The plain meaning -- the “ordinary meaning” -- of a provision prescribing that a State “shall observe any obligations it may have entered into” with regard to certain foreign investments is not obscure. The phrase, “shall observe” is imperative and categorical. “Any” obligations is capacious; it means not only obligations of a certain type, but “any” - that is to say, all - obligations entered into with regard to investments of investors of the other Contracting Party.⁴⁷⁷

330. There is nevertheless some tension built into the broad sweep of the umbrella clause in the BIT. At one extreme, as the Respondent argues, a breach of a purely commercial contract should

⁴⁷⁵ Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2nd ed. 2012), p. 106.

⁴⁷⁶ CL-48, *Eureko v. Poland*, ¶¶ 244-259.

⁴⁷⁷ CL-48, *Eureko v. Poland*, ¶ 246.

not become an international wrong within the reach of an investment treaty simply because one party to the contract could be considered an organ of the state. A failure by a government agency to pay for a box of pencils delivered pursuant to an agreement to provide office supplies, for example, would not come within the reach of Article 2(2), because it would have nothing to do with an investment. But an act of an organ of a state that results in the breach of a contractual obligation *relating to an investment* of a national or company of the other state party to the BIT does seem to this Tribunal to come within the reach of that article, especially where the immediate cause of the breach is an action by an organ of the state other than the agency that is the party to the agreement. This is the situation presented by the facts of this case.

1. The applicable law

331. The Tribunal agrees with the Respondent that different issues of law can arise from the same set of facts and that the Tribunal has the power to apply different rules of law to different issues.⁴⁷⁸ To the extent that the question presented to the Tribunal is whether a particular obligation was *created* by the Contract between Garanti Koza and TAY, the Tribunal applies Turkmen law (to the best of its ability) to determine the existence and dimensions of the obligation, because the parties to the Contract agreed that the Contract would be governed by Turkmen law.⁴⁷⁹

As the tribunal in *Emmis International Holding v. Hungary* explained:

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.⁴⁸⁰

⁴⁷⁸ C-Mem. ¶ 298.

⁴⁷⁹ R-18, Contract Conditions, Art. 2.2. In the original, bi-lingual version of the Contract, this article reads (in English): “This Contract obeys the acting Legislation of Turkmenistan.” In the Respondent’s translation prepared for this arbitration (also part of R-18), the same provision reads: “This contract is governed by current legislation of Turkmenistan.”

⁴⁸⁰ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014, ¶ 162.

The Tribunal notes in this connection, however, that neither Party identified any instance in which the interpretation of any provision of the Contract other than the Contract's silence with regard to Smeta turned on any peculiarity of Turkmen law.

332. At the same time, whether a particular action by Turkmenistan or one of its state organs constituted or caused a failure “to observe any obligation [Turkmenistan] may have entered into with regard to investments”⁴⁸¹ of Garanti Koza is a question of international law that arises under the BIT. As the ad hoc committee in *Vivendi v. Argentina* put it, “whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.”⁴⁸² Whether an obligation created by the BIT has been breached falls to be decided by the Tribunal as a matter of international law.

2. Turkmenistan's obligations to the Claimant

333. The Contract between Garanti Koza and TAY called for Garanti Koza to build 28 pairs of highway bridges in Turkmenistan. Garanti Koza succeeded in building one-half of each of what would have been 21 pairs of those bridges, and had commenced work on two more when its work came to a halt.⁴⁸³ Performing the work up to that point, as the Tribunal has already determined in its ruling on jurisdiction,⁴⁸⁴ required an investment in Turkmenistan on the part of Garanti Koza. It also involved obligations undertaken by Turkmenistan.

334. The award of the Contract to Garanti Koza was approved by the President of Turkmenistan in a presidential decree, Decree No. 9429 (the “Decree”), devoted entirely to that subject.⁴⁸⁵ That Decree refers to and authorizes nine other organs of the State in addition to TAY to take steps to

⁴⁸¹ BIT Art. 2(2).

⁴⁸² RL-131, *Vivendi v. Argentina – Annulment*, ¶ 96.

⁴⁸³ See paragraphs 130-132 above.

⁴⁸⁴ See paragraphs 234, 241 above.

⁴⁸⁵ C-17.

implement the Contract and the Decree: The Cabinet of Ministers, the Ministry of Economy and Finance, the Central Bank, the Ministry of Energy and Industry, the Ministry of Water Resources, the State Commodity and Raw Material Exchange, the Ministry of Construction, and the Customs Service.⁴⁸⁶

335. The connection between the Contract and the Government of Turkmenistan appears on the face of the Contract. TAY is identified in the Contract as “Owner.”⁴⁸⁷ “Owner” is in turn defined as “State Concern ‘Turkmenavtoyollary’ acting on behalf of Turkmenistan Government.”⁴⁸⁸ The Contract also provides that it “is concluded on the basis of Decree of the President of Turkmenistan No. 9429,” and that it comes into effect after its registration with the Turkmen Ministry of Economy and Development.⁴⁸⁹ These provisions of the Contract confirm that the acts of TAY in furtherance of the Contract were attributable to Turkmenistan. Road and bridge construction is in any event a core function of government. An entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of the State.⁴⁹⁰

336. The Contract spells out a number of obligations undertaken by TAY. Principal among them is the obligation to pay Garanti Koza for its work, in two ways.

- a. First, TAY agreed to provide Garanti Koza an advance payment of 20% of the “Contract Price” (USD 86,956,521.74, excluding VAT), which equaled USD 17,391,304.35, subject to the provision by Garanti Koza of a bank guarantee of that amount, and subject to Garanti Koza’s agreement to reduce each progress payment

⁴⁸⁶ C-17.

⁴⁸⁷ C-021, pp. 1, 3.

⁴⁸⁸ C-021, Contract Conditions ¶ 1.1(a).

⁴⁸⁹ C-021, pp. 1-2.

⁴⁹⁰ See James Crawford, *Report of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts*, Art. 5, comment 1; CL-48, *Eureko v. Poland*, ¶ 132.

invoice by 20% until the advance payment was fully earned at the completion of the work.

- b. Second, TAY agreed to make progress payments against certificates from Garanti Koza that a specified percentage of the work had been completed.⁴⁹¹ Such progress payments were to be for the percentage of the Contract Price corresponding to the percentage of the work completed, minus the portion already paid for by the advance payment.

337. Garanti Koza claims breaches of both of these obligations:

- a. As to the bank guarantee, Garanti Koza claims that TAY (and, according to Garanti Koza, also Turkmenistan) breached its obligations under the Contract, first by delaying approval of the guarantee, and then also by refusing to continue to make progress payments after the guarantee expired.
- b. As to the progress payments, Garanti Koza claims that Turkmenistan's insistence that Garanti Koza's invoices for progress payments conform to Smeta caused TAY to breach its obligations to pay for the project on a fixed price basis, with each progress payment based proportionally on the percentage of the work performed.⁴⁹²

3. Turkmenistan's alleged breaches of its obligations

338. The Tribunal disagrees with Garanti Koza as to the first alleged breach, and finds no breach by Turkmenistan of its obligations under the BIT with regard to TAY's undertakings with respect to the advance payment and the bank guarantee. But the Tribunal agrees with Garanti Koza that Turkmenistan breached its obligations under the BIT with regard to the second item, when multiple

⁴⁹¹ C-021, ¶ 6 and Schedule B-2, ¶¶ B.1, C.4.

⁴⁹² C-021, Schedule B-2, ¶ C. 3.

agencies of the State insisted that Garanti Koza's progress payment invoices to TAY must conform to Smeta.

a. The Advance Payment and the bank guarantee

339. Taking the bank guarantee first, the Tribunal agrees with the Respondent that Garanti Koza's obligation to provide the bank guarantee was the reciprocal of TAY's obligation to provide the advance payment.⁴⁹³ TAY undertook to advance 20% of the lump sum amount agreed upon before it had been earned, providing Garanti Koza with the cash needed to finance the initial stages of the project. The bank guarantee protected TAY against the risk that Garanti Koza would simply pocket the advance payment and then not do the work. If the guarantee had been provided immediately after the signing, the advance would have been paid in April or May rather than in July, and the work might well have been started that much earlier. If the work had been started earlier, it might have been completed before the guarantee expired.

340. As it was, as described above, the bank guarantee was not accepted by the Central Bank until May 26, 2008, and the advance payment was consequently not made until July 7, 2008.⁴⁹⁴ The bank guarantee expired on February 2, 2009, after which no further progress payments were made.⁴⁹⁵ Garanti Koza was at that point still in possession, by its own calculation, of USD 11,423,586 of the Advance Payment that had not yet been applied to any invoice.⁴⁹⁶

341. The delay in paying the Advance Payment was attributable to the delay in providing the bank guarantee. It was Garanti Koza's obligation under the Contract to provide a "Bank Guarantee

⁴⁹³ The Contract provided that "The amount of the Advance Payment Guarantee shall be diminished proportionally and in the amount of 20% for each payment item, in accordance with all and each of the payment items, listed above, to the CONTRACTOR under the Contract with respect to the progress of Works." C-021, Schedule B-2, p. 2.

⁴⁹⁴ See paragraphs 79-82 above.

⁴⁹⁵ See paragraphs 122-127 above.

⁴⁹⁶ See paragraphs 135-136, above.

for the return of the advance payment issued by a first class European bank and acceptable by the Owner's bank."⁴⁹⁷ Had the bank guarantee that Garanti Koza initially provided in April 2008 been accepted, the Advance Payment would not have been delayed. Nothing in the evidence put before the Tribunal suggests that the Central Bank of Turkmenistan (the "Owner's Bank") was unreasonable in its demands concerning the bank guarantee.

342. Had all gone according to plan, the expiration of the bank guarantee would have caused no disruption, because the project would have been complete by the time it expired. The work was not complete at that point, however. Indeed, after receiving Garanti Koza's letter of December 18, 2008 informing TAY that Garanti Koza had ceased piling work, TAY would have had a reasonable basis to be concerned that it would be imprudent to continue to make progress payments with no bank guarantee in place.

343. TAY was directed by the Central Bank to stop paying Garanti Koza's progress payment invoices after the expiration of the guarantee on February 2, 2009. The effects of this cessation of payments could have been remedied if Garanti Koza had made arrangements with Raiffeisen Bank to extend the bank guarantee for the balance of the advanced payment, or had provided an acceptable replacement guarantee from another bank covering the amount of the Advance Payment which remained. The weight of the evidence suggests that the Central Bank would have permitted TAY to resume payment of Garanti Koza's invoices, especially the five that were approved but not paid between January 5 and April 28, 2009, if a bank guarantee had been in place.

344. Garanti Koza does not argue that it would have been impossible for it to renew the bank guarantee, but rather argues that it was under no contractual obligation to do so and that "it was

⁴⁹⁷ R-18, Contract Conditions, Art. 10.3(1).

reasonable for Garanti Koza to opt not to renew in light of its deteriorating relationship with Turkmenistan.”⁴⁹⁸ That argument itself supports the inference that Garanti Koza made a deliberate decision not to renew or replace the bank guarantee.

345. It is a question of contract law that this Tribunal need not decide whether the suspension of payments after the expiration of the bank guarantee was or was not a breach by TAY of any of its obligations to Garanti Koza under the contract. It is sufficient for this Tribunal to find, as it does, that any loss suffered by Garanti Koza in connection with the insistence by the Central Bank and TAY that Garanti Koza keep the bank guarantee in place as a condition of continuing to receive progress payments was avoidable. Garanti Koza made a commercial decision not to extend or replace the bank guarantee to cover the balance of the Advance Payment that it held. Given the unexpected circumstance in which both parties found themselves, that decision was the primary cause of any losses it suffered. Since Garanti Koza’s commercial decision was the primary cause of its own loss, the Tribunal declines to award compensation for the cessation of payments after the expiration of the bank guarantee.

b. The insistence on Smeta

346. The Tribunal finds, however, that Turkmenistan failed to observe its obligations to Garanti Koza with regard to TAY’s obligation to make progress payments to Garanti Koza against invoices prepared in the manner specified in the Contract. This failure deprived Garanti Koza of the benefit of its bargain with TAY, and also contributed significantly to the delay of the project. The various manifestations of this failure to observe the contractual provisions for progress payments all involved the insistence by multiple organs of the Government of Turkmenistan that progress

⁴⁹⁸ Reply ¶ 113; *see* C-103, C-104.

payment invoices be prepared in accordance with Smeta, rather than in accordance with the express terms of the Contract. The result was to deprive the Claimant of a substantial portion of the value of its investment in Turkmenistan.

347. The Tribunal does not base this finding on a conclusion that TAY intentionally breached its contract with Garanti Koza with respect to the form of the invoices. Indeed, the Tribunal's impression is that TAY would have been willing to pay Garanti Koza's first invoice in the form in which it was initially presented on April 30, 2008. Rather, it appears to the Tribunal that TAY was prevented from making payments as provided by the Contract by the combined efforts of Turkmenistan's Central Office of State Expert Review, its Ministry of Finance, and its Central Bank.⁴⁹⁹ These three entities are indisputably state organs of Turkmenistan.

348. The insistence of these government agencies on the use of Smeta represented a refusal on their part, and a consequent failure on the part of Turkmenistan, to respect the contractual obligations undertaken to Garanti Koza by TAY "on behalf of Turkmenistan Government"⁵⁰⁰ concerning the terms of payment. As detailed above, the Contract called for Garanti Koza to do the work required on a lump-sum basis.⁵⁰¹ Twenty percent of the lump sum was to have been, and indeed was, paid in advance as the Advance Payment, secured by the bank guarantee. The Contract clearly provided for the remainder to be paid in instalments, each instalment corresponding to the percentage of the work done at the time of each progress payment, minus 20% of each progress payment until the Advance Payment was amortized. Specifically:

⁴⁹⁹ See Buyuksandalyaci WS-1, ¶ 45 ("I was told by the Control Department of Turkmenavtoyollary that the Ministry of Finance and the Central Bank would not approve payment claims unless they were submitted using detailed cost itemisation pricing based on what is known as "CMETA" (also spelled "SMETA"), instead of lump sum pricing.")

⁵⁰⁰ C-021, Contract Conditions ¶ 1.1(a).

⁵⁰¹ See paragraph 62, above.

a. The Contract Conditions provide that “Monthly Progress payments to Contractor by Owner shall be based on *percentage progress amounts*,” and further provides that those amounts “shall be taken into consideration as percentage progress criteria as per Schedule B-2.”⁵⁰²

b. Schedule B-2 then provides that:

“100% of the price of the listed works mentioned in Schedule B-1 will be paid (taking into account 20% for reimbursement of Advance Payment) proportionally for each bridge to the actually done Construction Works for each month.”⁵⁰³

c. And the Contract provisions relating to the Advance Payment required that further payments were to be made against certificates from the contractor that a specified *percentage* of the work has been completed.⁵⁰⁴

349. The insistence on the use of Smeta was a departure from these express terms of the Contract, and Garanti Koza was prejudiced by that departure in three ways.

a. First, as Ms. Balakley’s testimony made clear, complying with Smeta is a burdensome and time-consuming process.⁵⁰⁵

b. Second, the insistence on compliance with Smeta contributed significantly to the delay of the project: Garanti Koza’s first Smeta-compliant invoice was not submitted until November 1, 2008, six months after the submission of Garanti Koza’s original, Contract-compliant invoice on April 30, 2008.⁵⁰⁶

⁵⁰² C-021, Contract Conditions ¶ 10.3 (emphasis added).

⁵⁰³ C-021, Schedule B-2, ¶ C. 3 (emphasis added).

⁵⁰⁴ C-021, par. 6 and Schedule B-2, ¶¶ B.1, C.4.

⁵⁰⁵ See paragraph 97, above.

⁵⁰⁶ See paragraph 104, above.

- c. Third, and most troubling to the Tribunal, the evidence at the Hearing made it abundantly clear that Garanti Koza could not both comply with Smeta and submit accurate invoices for the full Contract Price that TAY had agreed to pay. This is because Smeta requires that an invoice amount be built up from cost figures, plus a fixed profit margin. The only way to make invoices add up to an amount equal to an agreed lump-sum price that provided a higher margin would be, at a minimum, to manipulate the cost figures.⁵⁰⁷

350. Garanti Koza presented convincing evidence at the Hearing that, from its point of view, the Contract provisions for payment on a lump sum basis were an important, indeed perhaps the most important, condition of the Contract. Both the lump sum price and the corresponding provisions for progress payments calculated as a percentage of that lump sum were unquestionably terms of the Contract that TAY agreed to. And both the Contract itself and the agreed lump-sum value of the Contract were specifically approved in a Presidential Decree signed by Turkmenistan's President.⁵⁰⁸

351. The Respondent insists that the Contract is governed by Turkmen law, and that Smeta is required by Turkmen law, so that Garanti Koza should have known that compliance with Smeta would be required. The Tribunal is not convinced by this argument, for three reasons:

- a. First, Mr. Buyuksandalyaci testified that he understood that Smeta is normally required in Turkmenistan, and that it was precisely to avoid the Smeta system that Garanti Koza bargained for, and understood that TAY had agreed to, a lump sum

⁵⁰⁷ See paragraphs 96-101, above.

⁵⁰⁸ The Decree is quoted in full at paragraph 53, above.

price, with progress payments tied to the percentage of work completed rather than the costs of goods and labor.⁵⁰⁹

- b. Second, the evidence advanced by the Respondent that Turkmen law requires the use of Smeta in all cases was neither clear nor convincing.⁵¹⁰
- c. Third, and most important to this Tribunal, a tribunal constituted under international law should not undertake to require compliance by a contractor with a provision of national law (assuming that the national law in fact contains such a provision) that would effectively require a contractor to be less than completely honest as a condition of compliance with that provision.⁵¹¹

352. The insistence on the use of Smeta represented a failure or refusal by multiple organs of Turkmenistan's government to observe the obligations undertaken by TAY in the Contract with respect to how Garanti Koza would be paid. The Tribunal has already found that the Contract relates to an investment by the Claimant in Turkmenistan. The obligations in the Contract were undertaken by TAY, which not only is an agency of Turkmenistan, but which, according to the Contract, was "acting *on behalf and under instructions of the Government of Turkmenistan*" when it signed the Contract,⁵¹² and which stated in the Contract that the Contract was concluded "on the basis of the Presidential Decree of Turkmenistan No. 9429 dated January 27, 2008."⁵¹³ It is not necessary to find TAY to be an organ of the State in order to conclude that the obligations it undertook in the Contract were obligations entered into on behalf of Turkmenistan with regard to Garanti Koza's investment in Turkmenistan within the meaning of Article 2(2) of the BIT.

⁵⁰⁹ Tr. June 9, 2015, pp. 440-442.

⁵¹⁰ See paragraphs 103, 302, 310 above.

⁵¹¹ See paragraphs 98, 101 above.

⁵¹² R-18, Contract Conditions, Art. 1.1(a) (emphasis added).

⁵¹³ R-18, Contract p. 1.

353. The Turkmenistan government agencies responsible for insisting, in disregard of the obligations undertaken by TAY in the Contract, that Garanti Koza submit invoices in accordance with Smeta clearly were organs of the State. The Office of State Expert Review is a subdivision of Turkmenistan's Ministry of Construction.⁵¹⁴ The Ministry of Finance is itself a government ministry. And Turkmenistan's Central Bank is equally obviously an organ of the State.⁵¹⁵

354. The Tribunal accordingly concludes that TAY's undertaking to Garanti Koza to pay progress payment invoices based on the percentage completed of the lump-sum price of the Contract was an obligation entered into by TAY on behalf of Turkmenistan with regard to an investment in Turkmenistan of a UK company. The Tribunal further concludes that the Government of Turkmenistan, acting through its Office of State Expert Review, Ministry of Finance, and Central Bank, failed to observe and caused TAY to breach that obligation, in violation of Article 2(2) of the BIT.

4. The causal relationship between Turkmenistan's breach and the Claimant's injury

355. We now turn to what consequences followed from this breach on the part of Turkmenistan of its obligations under the BIT. The most obvious consequence of this breach was that Garanti Koza's first invoice was not accepted until November 1, 2008, rather than shortly after April 30, 2008. This had the effect of delaying the payment of Garanti Koza's progress payment invoices by about six months.

356. However, it is not at all clear that the insistence on Smeta delayed the entire project by six months. If Garanti Koza had been more prompt in providing an acceptable bank guarantee, the Advance Payment would have been made earlier than July 2008, and Garanti Koza would have

⁵¹⁴ Nepesov WS-1, ¶ 2. *See* paragraph 98, above.

⁵¹⁵ *See* paragraph 88, above.

had adequate funding from the time the Advance Payment was made. Thus, while the insistence on Smeta caused some delay to the project, that delay was in significant part concurrent with delays attributable to Garanti Koza, including the delay in obtaining the bank guarantee.

357. Other factors also caused delay to the project. These included:

- a. Garanti Koza's slow start in commencing construction.⁵¹⁶ Garanti Koza blames the slow start on Turkmenistan's failures to hand over the sites on which the bridges were to be built, TAY's failures to provide technical information, and the failure to clear debris from the sites. However, the Tribunal does not find Garanti Koza's efforts to blame the slow commencement of construction on these alleged failures on the part of TAY or other agents of Turkmenistan to be supported by the evidence in the record.
- b. The delayed arrival of the pile driving machine, which did not arrive in Turkmenistan until September 2008.⁵¹⁷ Garanti Koza blames the delayed arrival of this equipment on military hostilities that slowed the machine's transit through Georgia, while the Respondent counters that the machine would have arrived earlier if Garanti Koza had ordered it earlier.⁵¹⁸ This delay was certainly not the fault of Turkmenistan. The Tribunal concludes from the evidence before it that military hostilities complicated the delivery of the piling rig, but that the delay might have been shorter, had Garanti Koza commenced the process of getting the machine to Turkmenistan earlier.

⁵¹⁶ See paragraphs 106-113, above.

⁵¹⁷ See paragraphs 114-115, above.

⁵¹⁸ See paragraph 115, above.

c. The delay in procuring the steel beams needed for the three longer bridges.⁵¹⁹

358. Both sides agree that some sort of agreement was reached to extend the project deadline from October 2008 to November 2009, although they disagree as to when and how that was done and whether that agreement was ever reduced to writing.⁵²⁰ As of the beginning of December 2008, work was progressing, payments were being made, and Garanti Koza advised TAY that it had completed half of its bridges.⁵²¹ After Garanti Koza – for unexplained reasons – suspended piling on December 4, work slowed dramatically in the winter of 2009, and then finally stopped by the summer.⁵²² No satisfactory explanation for the loss of momentum after early December was advanced by either side. Since it was Garanti Koza’s obligation to complete the project, however, and the Tribunal finds Garanti Koza’s efforts to blame the delays (other than those caused by the insistence on Smeta) on Turkmenistan unconvincing, a significant portion of the responsibility for not completing the project must rest with Garanti Koza.

359. The Tribunal therefore concludes that Turkmenistan’s breach of its obligations under Article 2 of the BIT by its insistence on Smeta, although a contributing factor, was by no means the only cause of the failure of Garanti Koza’s project in Turkmenistan. We will return to assessing the various causes of that failure in considering the Claimant’s claim for damages.

B. The Claims of Expropriation

360. The Claimant advances two claims under Article 5(1) of the BIT, one for direct expropriation and one for indirect or “creeping” expropriation. The claim of direct expropriation alleges that TAY’s termination of the Contract, the seizure of the Claimant’s factory in

⁵¹⁹ See paragraph 113, above.

⁵²⁰ See paragraphs 117-119, above.

⁵²¹ See paragraph 116, above.

⁵²² See paragraphs 130-131, above.

Turkmenistan, and the judgment of the Turkmen court all amounted to takings of the Claimant's investment without compensation.⁵²³ The claim of indirect expropriation focuses on the cumulative effect of the repudiation of the lump sum payment obligation and the insistence on Smeta, on the refusal of TAY to pay Garanti Koza's invoices after the first three, and on the imposition of the delay penalty.⁵²⁴

361. All of these claims involve the same series of events. It appears to the Tribunal, based on the testimony and evidence introduced in this arbitration and summarized in Part IV of this Award, that the chain of causation linking these events can be summarized as follows:

- a. The actions of the Turkmen courts and the seizure of the Claimant's factory resulted from the termination of the Contract.
- b. The termination of the Contract resulted from Garanti Koza's failure to complete the work called for by the Contract.
- c. Garanti Koza failed to complete the work called for by the Contract because (i) its work on the project had fallen behind schedule; and (ii) Garanti Koza stopped work and abandoned the project.
- d. Garanti Koza's work fell behind schedule for at least four reasons:
 - i. First, because Garanti Koza got a late start in commencing work;
 - ii. Second, because of the delay in bringing the pile driving rig to Turkmenistan;
 - iii. Third, because of the delay in sourcing the steel beams; and

⁵²³ See paragraphs 253-255 above.

⁵²⁴ See paragraphs 256-258 above.

- iv. Fourth, because Turkmenistan's insistence on the use of Smeta in the progress payment invoices had delayed submission of those invoices.
- e. Garanti Koza eventually stopped work and abandoned the project because TAY stopped paying Garanti Koza's progress payment invoices.
- f. TAY stopped paying the progress payment invoices because the bank guarantee had expired.

362. With this chain of causation in mind, we look first at the claim of direct expropriation and then at the claim of indirect expropriation.

1. The direct expropriation claim

363. Garanti Koza focuses its claim of direct expropriation on two acts. First, it alleges that, on February 4, 2010:

[A] committee comprising representatives of Turkmen Highways, the Ministry of Construction, the Ministry of Internal Affairs, the Turkmen intelligence Agency, a prosecutor/district attorney, as well as other Government personnel, seized Garanti Koza's factory and all the equipment, machinery and material it contained. This committee expelled Garanti Koza's remaining employees from the factory site.⁵²⁵

Second, it alleges that, by letter of February 22, 2010, TAY "unilaterally and wrongfully terminated the Contract."⁵²⁶

364. The evidence submitted to the Tribunal does not support a claim for direct expropriation. The evidence does indeed show that Garanti Koza's factory and equipment remaining in Turkmenistan after it abandoned its work on TAY's project in mid-2009 were seized by the Turkmen courts in 2010, but the evidence also supports the Respondent's argument that the actions

⁵²⁵ Mem. ¶ 151.

⁵²⁶ Mem. ¶ 151.

of those courts followed as a matter of normal legal process under Turkmen law from Garanti Koza's default under the Contract.⁵²⁷

365. A seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process. Actions by state courts to enforce contract rights, including rights to terminate a contract, have generally not been held by investment arbitration tribunals to amount to expropriation, regardless of whether the state or an instrument of the state is the contract party enforcing its rights. The *Impregilo* tribunal observed that, when a state entity terminates a contract, the decisive factor is “whether the reasons given for the termination constituted a legally valid ground for termination according to the provisions of the [...] Contract.”⁵²⁸ Or as the tribunal in *Middle East Cement* put it, “normally a seizure and auction ordered by the national courts do not qualify as a taking” unless “they are not taken ‘under due process of law.’”⁵²⁹

366. The series of events that led to the proceedings in the Turkmen courts and the attachment and seizure of Garanti Koza's property followed the causal sequence outlined in paragraph 361 above. In the view of the Tribunal, the termination of the Contract and the subsequent actions by the Turkmen courts were largely either the result of choices made by Garanti Koza, including the decision not to seek an extension or renewal of the bank guarantee, or were caused by circumstances within its control. The actions of the Turkmen courts in enforcing TAY's rights

⁵²⁷ See C-Mem. ¶¶ 375-378.

⁵²⁸ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶ 278.

⁵²⁹ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶ 139.

under the contract thus appear to the Tribunal to have met the test articulated in *Impregilo*, which appears to this Tribunal to be the correct test.

367. To the extent that the insistence by agencies of Turkmenistan on the use of Smeta contributed to the delays that afflicted the bridge project and to the ultimate failure of Garanti Koza to complete the project and the consequent termination of the Contract, those actions have already been found by the Tribunal to have breached Turkmenistan's obligations under Article 2 of the BIT. The Tribunal concludes that those actions were too remote from the takings alleged to have amounted to a direct expropriation to consider them breaches of Article 5 of the BIT. Even if they were considered to have contributed to a breach of Article 5, any compensation for such a breach would merely duplicate the compensation due for the breach of Article 2.

368. The Claimant alleges that the process followed by the Turkmen authorities was harassing and unfair, pointing to the following sequence of events:

- a. In December 2009, the Turkmen tax administration conducted a tax inspection of Garanti Koza and announced on December 21, 2009, that it was imposing a fine of approximately USD 1 million for tax violations related to VAT. Garanti Koza states that it does not understand the reasons for this assessment and suspects that it was a use by Turkmenistan of "its tax and court apparatus to harass foreign investors."⁵³⁰
- b. On December 31, 2009, TAY asked Garanti Koza to return the unapplied balance of the Advance Payment, USD 14,132,121.22.⁵³¹

⁵³⁰ Mem. ¶ 91; Buyuksandalyaci WS-1, ¶¶ 71-72.

⁵³¹ Mem. ¶ 92; C-90.

- c. In early February 2010, Garanti Koza says that representatives of TAY, the Ministry of Construction, the Supreme Supervision Agency, accompanied by police and military forces, came to Garanti Koza's factory in Mary, conducted an inventory, and instructed Garanti Koza's employees to leave the office.⁵³² Given that "Garanti Koza arranged for its Turkish employees to fly back to Turkey the next day,"⁵³³ and the allegation that, as a result of this visit, the factory and its contents have been held by Turkmenistan since February 4, 2010,⁵³⁴ the Tribunal finds it difficult to understand why Garanti Koza claims to have "little information" about this event.⁵³⁵ In any event, little information about it was provided to the Tribunal.
- d. On February 8, 2010, the Turkmenistan tax administration issued a notice of fines and penalties on Garanti Koza.⁵³⁶
- e. On February 9, 2010, TAY asserted a claim against Garanti Koza for USD 3 million for the delay in the completion of the works, based on the original completion deadline of October 2008.⁵³⁷
- f. On February 20, 2010, TAY wrote to the Chief Prosecutor to ask that he bring suit against Garanti Koza to terminate the Contract.⁵³⁸
- g. On February 22, 2010, TAY unilaterally terminated the Contract.⁵³⁹

⁵³² Mem. ¶ 94.

⁵³³ Mem. ¶ 94; Buyuksandalyaci WS-1, ¶ 73.

⁵³⁴ Mem. ¶ 94.

⁵³⁵ Mem. ¶ 94.

⁵³⁶ Mem. ¶ 98; C-115.

⁵³⁷ Mem. ¶ 99; C-91.

⁵³⁸ Mem. ¶ 101; C-92.

⁵³⁹ Mem. ¶ 102; C-117.

- h. The same day, the Chief Prosecutor filed an application with the “Arbitration court of the Supreme Court of Turkmenistan” to obtain termination of the Contract. That court summoned Garanti Koza on February 23 to appear before it on February 26, 2010. Garanti Koza states that it did not appear on that date, because it would have been “futile – and dangerous.”⁵⁴⁰

369. Garanti Koza does not allege that it has actually paid any of the tax or delay assessments referred to in the preceding paragraphs. Rather, the assessments appear to be put forward in an attempt to show that the conduct of the Turkmen authorities was improper and that it deprived Garanti Koza of procedural fairness. Garanti Koza does not allege, and in any event has not introduced evidence to demonstrate, that the proceedings described represented a departure from normal legal process in Turkmenistan. Whether or not these measures were wrongful thus seems to turn on which party was or was not in breach of the Contract, which has already been addressed in connection with Article 2 of the BIT.

2. The indirect expropriation claim

370. Garanti Koza’s claim of creeping expropriation is basically the same claim as the direct expropriation claim and fails for the same reason. While the direct expropriation claim focuses on the seizure of Garanti Koza’s assets after TAY’s imposition of the delay penalty and the termination of the Contract, the indirect expropriation claim is described as a “series of acts and omissions starting in the spring of 2008 which made it increasingly difficult for Garanti Koza to continue work on the Project, ultimately depriving Garanti Koza of its entire investment.”⁵⁴¹

⁵⁴⁰ Mem. ¶¶ 102-104.

⁵⁴¹ Mem. ¶ 132.

371. The “series of acts and omissions” alleged by the Claimant to support its claim of indirect expropriation are the same acts and omissions alleged to support its claim of direct expropriation. With the exception of the insistence by Turkmenistan on the use of Smeta (which the Tribunal has already addressed), those acts and omissions were either acts of Garanti Koza itself or followed as a consequence of actions taken or choices made by Garanti Koza. None of them, in the view of the Tribunal, amounted to a breach of Article 5 of the BIT.

3. The Claimant’s attempt to import the expropriation clause of other treaties via the MFN clause

372. In addition to relying on Article 5 of the BIT, Garanti Koza seeks to rely on Article 5 of the France-Turkmenistan BIT and Article 6 of the United Arab Emirates-Turkmenistan BIT, both of which it seeks to import through the most-favored-nation (“MFN”) clause contained in Article 3 of the United Kingdom-Turkmenistan BIT. Article 3(1) of the BIT provides that neither Contracting Party shall, in its territory, subject investments of nationals and companies of the other Contracting Party to treatment less favorable than that which it affords to investments of nationals or companies of any third state. Article 3(2) provides the same protection to nationals and companies of each Contracting Party as regards their management, maintenance, use, enjoyment, or disposal of their investments.

373. According to Garanti Koza, Article 5 of the France-Turkmenistan BIT contains one additional condition not found in Article 5 of the BIT that would make a direct or an indirect expropriation unlawful: Under the France-Turkmenistan BIT, an expropriation must not be contrary to a specific commitment of the host state.⁵⁴²

⁵⁴² Mem. ¶ 126.

374. Similarly, according to Garanti Koza, Article 6 of the United Arab Emirates-Turkmenistan requires that an expropriation “(d) does not violate any specific provision or contractual stability or expropriation contained in an investment agreement between the natural and juridical persons concerned and the party making the expropriation,” and also requires that an expropriation be “accomplished under due procedures of law.”⁵⁴³

375. Garanti Koza’s MFN claim presents two significant difficulties:

- a. First, Garanti Koza appears to seek to mix provisions of different treaties to create a custom-made treaty provision that does not appear in any treaty entered into by the Respondent.
- b. Second, Garanti Koza has not demonstrated that the treatment that it or its investment would have been accorded under either the France-Turkmenistan BIT or the United Arab Emirates-Turkmenistan BIT would in fact have been more favorable to it than the treatment resulting from the application of the UK-Turkmenistan BIT.

376. Aside from these obstacles, the Tribunal concludes that neither the provisions of the France-Turkmenistan BIT nor the provisions of the United Arab Emirates-Turkmenistan BIT would benefit Garanti Koza if either or both were imported by operation of the MFN clause in the BIT. Even if the Tribunal had found that an expropriation had taken place, a finding with respect to whether the expropriation had been contrary to a commitment of Turkmenistan would simply duplicate the findings the Tribunal has already made in connection with the application of the umbrella clause of the BIT. Similarly, a finding that the expropriation had been made without due

⁵⁴³ Mem. ¶ 126.

process would duplicate the findings made in the next section of this Award concerning the claim of denial of fair and equitable treatment.

377. In addition, the importation of those clauses from the France-Turkmenistan BIT or the United Arab Emirates-Turkmenistan BIT by way of the MFN clause, even if Article 3(1) of the BIT could be read to produce such a result, would not change the Tribunal's conclusion that the Claimant has failed to show that an expropriation took place at all.

378. The Tribunal accordingly declines to apply the MFN provision of the BIT to make the expropriation provisions of the France-Turkmenistan BIT or the United Arab Emirates-Turkmenistan BIT available to Garanti Koza.

C. The Claim of Denial of Fair and Equitable Treatment

379. Article 2(2) of the BIT requires that "Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment." The BIT, like most BITs, does not attempt to define the concept of fair and equitable treatment, and tribunals appointed to decide disputes arising under BITs have struggled to formulate a definition. The tribunal in *Mondev* spoke for many when it observed that a "judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."⁵⁴⁴

380. It is easier to find agreement about what the function of the fair and equitable treatment standard is than about its content. Unlike the concepts of national treatment and most-favored-nation protection, which call for comparison to the treatment provided to investors of other nationalities, the standard of fair and equitable treatment "is an absolute standard that provides a

⁵⁴⁴ CL-8, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 118 [hereinafter: *Mondev v. USA*]. See also RL-186, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 99 ("the standard is to some extent a flexible one which must be adapted to the circumstances of each case").

fixed reference point.”⁵⁴⁵ It “helps to ensure that there is at least a minimum level of protection, derived from fairness and equity, for the investor concerned.”⁵⁴⁶

381. In evaluating whether the actions of a state’s courts and other agencies have breached the standard of fair and equitable treatment, tribunals have focused on such questions as “whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome;”⁵⁴⁷ whether there has been “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety;”⁵⁴⁸ and whether there has been “inconsistency of action between two arms of the same government *vis-à-vis* the same investor,” that is, has the government acted coherently and applied its policies consistently.⁵⁴⁹

1. Turkmenistan’s actions before work was suspended

382. The Tribunal concludes that Turkmenistan’s insistence that Garanti Koza’s progress payment invoices conform to Smeta was a breach of Turkmenistan’s obligation to treat Garanti Koza’s investment in Turkmenistan fairly and equitably. The inconsistency of behavior between one agency of the Turkmenistan Government, which had agreed to a system of payment based on the percentage of work completed, and other arms of the same Government that insisted that payment could only be made against invoices built up from costs, plus a limited profit margin, as

⁵⁴⁵ Christoph H. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, J. World Inv. & Trade, vol. 6, p. 367 (2005).

⁵⁴⁶ UNCTAD, *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements, p. 16, n. 1 (1999).

⁵⁴⁷ CL-8, *Mondev v. USA*, ¶ 127.

⁵⁴⁸ RL-280, *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, April 10, 2001, ¶¶ 105-118. Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), International Court of Justice, Judgment, July 20, 1989, ICJ Reports 1989, p. 15.

⁵⁴⁹ CL-69, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 163.

required to conform to Smeta, would alone have been sufficient to call into question whether the Claimant had been treated fairly and equitably.

383. More important to this Tribunal, however, Turkmenistan's insistence on Smeta invoicing effectively forced Garanti Koza to choose between submitting accurate invoices, and consequently accepting less compensation than it had bargained for, or manipulating its invoices in order to receive the full compensation that TAY had agreed to pay. The Tribunal considers that using governmental power to put an investor in such a situation is so fundamentally unfair as to amount by itself to a denial of fair and equitable treatment.

384. The Tribunal has nevertheless already found that this same behavior represented a failure by Turkmenistan to observe the obligations to Garanti Koza undertaken by TAY in the Contract in breach of the umbrella clause of the BIT. The same conduct of the Respondent has thus been found to have breached Article 2(2) in two different respects. This finding increases the confidence of the Tribunal that Turkmenistan has indeed breached its obligations to Garanti Koza under the BIT, but – as will be seen in the section of this Award dealing with relief and compensation – does not mean that Garanti Koza is entitled to more than one recovery for the same injury.

2. The actions of Turkmenistan's courts after work was suspended

385. Garanti Koza's complaint that Turkmenistan's behavior after termination of the Contract breached its duty to treat U.K. investors fairly and equitably essentially duplicates its claims of direct and indirect expropriation, and fails for the same reason. The Tribunal has already found that Turkmenistan's insistence that progress payment invoices be prepared in accordance with Smeta breached its obligations under the BIT, but it has also found that breach to have been only a contributing cause to the failure of Garanti Koza's project. Ultimately, that project failed because Garanti Koza stopped work. Garanti Koza stopped work because it stopped receiving payment.

And Garanti Koza stopped receiving payment, not because of Turkmenistan's insistence that invoices be prepared in accordance with Smeta, but because the bank guarantee had expired.

386. Garanti Koza complains about the tax assessments made by the Turkmenistan authorities in December 2009, but it does not claim to have paid any of those assessments, and it has not demonstrated that any consequence followed from them. The Tribunal thus has no basis for concluding that those assessments were or were not breaches of Turkmenistan's duty to treat Garanti Koza's investment fairly and equitably. Since the Claimant bears the burden of demonstrating a breach of the BIT, the Tribunal declines to base any finding of a breach on the acts of the tax authorities.

387. The actions of the other Turkmenistan authorities in and following February 2010 have been discussed in connection with the claim of expropriation. With the possible exception of the USD 3 million penalty for late performance, Garanti Koza has failed to show that any of these actions departed from normal procedures under Turkmenistan law, or that Turkmenistan law in this respect represents such a fundamental departure from international norms as to put Turkmenistan in breach of its obligation of fair and equitable treatment.

388. The Tribunal is troubled by the award of the USD 3 million delay penalty in March 2010. Garanti Koza complains that the penalty was improperly calculated from November 1, 2008, even though the completion date had been extended to November 1, 2009.⁵⁵⁰ Mr. Buyuksandalyaci asserts that notice of the court proceedings at which the penalty was imposed was too short to permit Garanti Koza to defend itself, and in any event that no Turkmenistan lawyer would represent Garanti Koza against the Government.⁵⁵¹

⁵⁵⁰ Mem. ¶ 179; *see* paragraphs 117-119, above.

⁵⁵¹ Buyuksandalyaci WS-1, ¶¶ 78-79.

389. Garanti Koza does not allege that it ever paid the USD 3 million delay penalty, so there has been no showing that it has actually been injured by its imposition. Nevertheless, the Tribunal is finds several elements of the procedure by which the delay penalty was imposed troubling. These are: (a) the calculation of the penalty from October 2008 rather than November 2009; (b) the absence of Garanti Koza from the court proceedings; and (c) the speed with which those proceedings were conducted. The Respondent denies that the deadline for completion of the project was extended,⁵⁵² but the Tribunal finds the correspondence from TAY, quoted at paragraph 118 above, was sufficient to allow Garanti Koza to believe that the deadline had been extended, and the Respondent does not deny that the delay penalty was based in part on the original completion date of October 2008.⁵⁵³

390. Despite these concerns, the fact remains that Garanti Koza has not paid the USD 3 million delay penalty, so the Tribunal declines to find any breach of the BIT in connection with the assessment of that penalty. However, the Tribunal will decline to credit the Respondent with any part of the unpaid delay penalty in calculating the compensation due to Garanti Koza as a result of Turkmenistan's breach of its duty to respect the obligations undertaken to Garanti Koza and its breach of its duty to accord Garanti Koza fair and equitable treatment in connection with the insistence on Smeta.

D. The Claim of Denial of Full Protection and Security

391. Article 2(2) of the BIT provides that investments of each Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party. Tribunals in investment treaty arbitrations have divided over whether such an obligation should be read simply to require

⁵⁵² Rej. ¶ 160.

⁵⁵³ C-Mem. ¶ 134.

host governments to take responsibility for the physical security of investments protected by the BIT, or should be read more broadly to encompass protection against harassment falling short of physical harm or seizure.⁵⁵⁴

392. This Tribunal does not need to attempt to resolve the varying approaches to this standard. First, Garanti Koza's claims concerning the acts of Turkmenistan alleged to have breached this obligation, to which it devotes a single paragraph in its Memorial on the Merits, are the same acts already considered in connection with its umbrella clause, expropriation, and FET claims.⁵⁵⁵ Second, the Claimant does not refer to this claim in its Post-Hearing Brief, confirming that the Claimant itself must consider the claim duplicative of its other claimed breaches of the BIT.

393. For largely the same reasons, the Tribunal rejects the Claimant's effort to use the MFN clause of the BIT to import the obligations of Turkmenistan under Article 2(3) of the United Arab Emirates–Turkmenistan BIT and Article 4(1) of the Switzerland–Turkmenistan BIT. The Claimant argues that those provisions obligate the Respondent not to impair by unreasonable or arbitrary measures the management, maintenance, use, enjoyment, or disposal of investments.⁵⁵⁶ So does the BIT. The Claimant fails to explain how the obligations of Turkmenistan under the United Arab Emirates–Turkmenistan BIT and the Switzerland–Turkmenistan BIT would provide more favorable treatment to the Claimant or its investment than the parallel obligations of the BIT under which this claim is brought.

394. The Tribunal considers that this claim adds nothing to the other claims already considered, and accordingly rejects it.

⁵⁵⁴ Compare CL-70, *Saluka v. Czech Republic*, ¶ 484 (“to protect more specifically the physical integrity of an investment”) with CL-44, *Vivendi v. Argentina – Award*, ¶ 7.4.15-17 (an investment “could be subject to harassment without being physically harmed or seized”).

⁵⁵⁵ Mem. ¶ 217.

⁵⁵⁶ Reply ¶ 390.

E. The Claim that the Management, Maintenance, Use, Enjoyment, or Disposal of the Claimant's Investment Was Subjected to Unreasonable or Discriminatory Measures

395. Article 2(2) of the BIT provides that neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, or disposal of investments in its territory of companies of the other Contracting Party.

396. Garanti Koza asserts that Turkmenistan breached this obligation by (a) "imposing a different pricing method" than Garanti Koza had been led to expect when the Contract was negotiated, thus coercing it into accepting a change to its bargain, (b) imposing the delay penalty, and (c) terminating the Contract.⁵⁵⁷

397. The Tribunal has already found that the actions of Turkmenistan in insisting that progress payment invoices conform to Smeta breached Turkmenistan's obligations under the umbrella clause and represented a denial of fair and equitable treatment. It has also already addressed the imposition of the delay penalty and concluded that, because Garanti Koza has not paid that penalty, no action on the Tribunal's part is required other than to decline to give it any effect in its calculations. Garanti Koza's allegations that these same actions subjected its management, maintenance, use, enjoyment, and disposal of its investment to unreasonable measures adds nothing to the breaches of the BIT already found by the Tribunal.

398. The termination of the Contract, the Tribunal has also already found, resulted from a sequence of events precipitated primarily by Garanti Koza's cessation of work after its decision not to renew its bank guarantee led to the cessation of progress payments. The Tribunal does not

⁵⁵⁷ Mem. ¶¶ 206-208.

find the termination to have been an unreasonable measure, and Garanti Koza presented no evidence to support the allegation that it was discriminatory.

399. This claim of a breach of Article 2(2) of the BIT thus adds nothing to Garanti Koza's case and is accordingly rejected as either unsubstantiated or duplicative of the other claims considered.

F. Summary of Findings as to Liability

400. For the reasons explained in Section VIII.A of this Award, the Tribunal finds that Turkmenistan's insistence on the use of Smeta in submitting progress payment invoices breached its obligations under Article 2(2) of the BIT to observe the obligations entered into with Garanti Koza by TAY with respect to the method of payment under the Contract. For the reasons explained in Section VIII.C, the Tribunal also finds that the same insistence on the use of Smeta breached Turkmenistan's obligation under Article 2(2) of the BIT to provide fair and equitable treatment to the Claimant's investments in Turkmenistan.

401. For the reasons also explained in Section VIII.C, the Tribunal finds the process by which the USD 3 million delay penalty was imposed on Garanti Koza in March 2010 to be troubling, but also concludes that, because that penalty was not paid, no action on the part of the Tribunal is required with regard to that penalty other than to give it no effect in making the Tribunal's calculations.

402. As explained in the remaining portions of Part VIII of this Award, the Tribunal rejects all of the Claimant's other allegations of breaches of the BIT, and finds that Turkmenistan's conduct with regard to the Claimant and its investments did not amount to expropriation (direct or indirect), or deny the Claimant fair and equitable treatment except as stated immediately above, or deny the Claimant full protection and security, or subject the management, use, enjoyment, or disposal of the Claimant's investments to unreasonable or discriminatory measures.

IX. RELIEF AND COMPENSATION

403. The Tribunal has found, as explained in detail above, that Turkmenistan breached its obligations under Article 2(2) of the BIT by requiring Garanti Koza to submit progress payment invoices that conformed to Smeta, in disregard of the obligations undertaken to Garanti Koza by TAY in the Contract and in breach of Turkmenistan's duty to accord Garanti Koza's investment fair and equitable treatment. The Tribunal turns now to the appropriate relief and compensation following from those breaches.

A. Damages Sought by Garanti Koza

404. Garanti Koza seeks USD 46.1 million in damages in this arbitration. Although the figures have evolved over the course of the proceeding, the claim presented to the Tribunal during closing argument sought the following amounts:

| | |
|--------------------|---------------------------------|
| Loss of Profits : | USD 14.0 million |
| Loss of Factory: | USD 8.9 million |
| Loss of Equipment: | USD 10.3 million |
| Loss of Know-how: | USD 12.0 million |
| Total: | USD 46.1 million ⁵⁵⁸ |

B. Turkmenistan's Damages Calculation

405. The Respondent's figures also evolved over the course of the proceeding, an evolution complicated by the substitution of one expert on quantum for another between the Respondent's first and second submissions.⁵⁵⁹ By the time of closing argument, the Respondent's position was

⁵⁵⁸ Garanti Koza's Closing Presentation, slide 102.

⁵⁵⁹ See Closing Tr. December 14, 2015, pp. 1349-1351.

that Garanti Koza had been overpaid for its work on the project, and indeed owed Turkmenistan USD 13.6 million, on the following calculation:

| | |
|----------------------------|-----------------------------------|
| Overpayment under Contract | (USD 9.3 million) |
| Delay penalty: | (USD 3 million) |
| Tax penalty: | (USD 1.3 million) |
| Total: | (USD 13.6 million) ⁵⁶⁰ |

C. The Tribunal's Calculation of Compensation

406. The Tribunal does not feel that it is necessary for it to review all of the arguments advanced by each Party concerning the quantum of injury that each claims to have suffered or the relief appropriate for each breach of the BIT. It suffices for purposes of this award to explain the conclusions it has reached concerning the claims, and the particular figures, put forward by each side during closing argument. We start with the figures put forward by the Respondent.

1. Turkmenistan's claimed tax penalty

407. The Respondent does not seek any monetary recovery in this proceeding other than its costs. Rather, it asks that the case should be dismissed for lack of jurisdiction, or, if jurisdiction is sustained, that all claims should be dismissed on the merits.⁵⁶¹

408. Nevertheless, the Respondent asks the Tribunal to take into account, in its calculations, the tax penalty imposed on Garanti Koza by the tax authorities of Turkmenistan.⁵⁶² The Tribunal declines to do so. The Respondent made no effort to prove in this proceeding that tax payments were due from Garanti Koza, and the Tribunal declines to enforce an assessment for which no basis has been shown.

⁵⁶⁰ Respondent's Closing Presentation, slide 10.

⁵⁶¹ Rsp. PHB ¶ 205.

⁵⁶² Respondent's Closing Presentation, slide 10.

2. Turkmenistan's claimed delay penalty

409. The Tribunal similarly declines to give any weight in its calculations to the delay penalty of USD 3 million assessed by the courts of Turkmenistan against Garanti Koza. First, as explained above, the Tribunal is troubled by the assessment of a delay penalty based on the original target completion date of October 2008, rather than the extended target completion date of November 1, 2009, and by the summary nature of the proceedings in which the penalty was imposed and the very short notice given to Garanti Koza of those proceedings.

410. In addition, the delay penalty suffers from the same lack of foundation as the tax penalty. Indeed, the Respondent concedes that “the statement of claim for USD 3,000,000 is not in the record” in this proceeding.⁵⁶³ The Respondent’s attempt to assess that penalty in this proceeding, to the extent of offsetting it against Garanti Koza’s claims, thus also fails for lack of any proof of any proper basis for the penalty.

411. For these reasons, the Tribunal concludes that it should decline to recognize the delay penalty in making its calculations. Since Garanti Koza does not claim to have actually paid the penalty, no further relief on this account is indicated.

3. Turkmenistan's claimed overpayment

412. Turkmenistan’s claim that Garanti Koza was overpaid for its work under the Contract will be considered below in connection with Garanti Koza’s claim that it was not paid enough for that work.

4. Garanti Koza's claim for loss of know-how

413. The Tribunal propounded a series of written questions to the parties after the Hearing on the merits and prior to the hearing for closing argument. The Tribunals’ Question No. 24 was

⁵⁶³ Rsp. PHB ¶ 141.

“Where in the record is the evidence of the value of the know-how or other intellectual property licensed by Garanti Koza?”⁵⁶⁴

414. Turkmenistan’s response to Question 24 was direct: it said that “There is no credible evidence in the record to support Claimant’s allegation that it acquired ‘know-how’ for use in the project valued at USD 12 million, from its Turkish parent company.”⁵⁶⁵ In addition, the Respondent argues, “To the extent that any ‘know-how’ was required to construct the concrete beams and piles for the bridges, or to operate the factory to produce them, the cost of that know-how was already reflected in the Contract price.”⁵⁶⁶

415. Garanti Koza did not organize its Post-Hearing Brief to correspond to the Tribunal’s Questions. The only response to Question 24 that the Tribunal was able to identify consisted of the discussion of the know-how claim at paragraphs 212-217 of the Claimant’s Post-Hearing Brief. That discussion acknowledges that the USD 12 million valuation placed on the know-how by Mr. Boulton, the Claimant’s quantum expert, was based only on the contract entered into between Garanti Koza and its parent.⁵⁶⁷ That contract neither specifies what the know-how is nor the method used to value it.⁵⁶⁸

416. Indeed, in adopting that valuation, Mr. Boulton acknowledged that he was unable to describe the know-how or to identify anything confidential or proprietary about it.⁵⁶⁹ Mr. Boulton nevertheless insisted that the know-how must have had value, even if Garanti Koza’s competitors

⁵⁶⁴ Tribunal’s Questions, No. 24.

⁵⁶⁵ Rsp. PHB ¶ 100.

⁵⁶⁶ Rsp. PHB ¶ 102.

⁵⁶⁷ Indeed, in his report, Mr. Boulton simply states that he was “instructed that the full USD 12 million is due to GKI in respect of the know-how.” Boulton ER, ¶ 6.7.4.

⁵⁶⁸ C-36 (Know-How Contract).

⁵⁶⁹ Tr. June 12, 2015, p. 1323.

might have similar or equivalent know-how,⁵⁷⁰ as Mr. Buyuksandalyaci had conceded that they did.⁵⁷¹

417. The Tribunal finds no credible basis in the record for assigning any value to this know-how and therefore assigns no value to it.

418. Having rejected the Claimant's expropriation claims, the Tribunal also finds no legal basis for awarding any relief with respect to the know-how.

419. These conclusions make it unnecessary for the Tribunal to rule on the Respondent's request that the Tribunal draw a negative inference from the Claimant's alleged failure to produce documents to support the arms-length nature of the know-how contract or the value of the know-how.⁵⁷²

5. Garanti Koza's claim for loss of factory and equipment

420. Garanti Koza claims USD 10.3 million for the loss of equipment taken by or lost to Turkmenistan.⁵⁷³ Much of this equipment was leased by Garanti Koza from GKI.⁵⁷⁴ At the Hearing, Mr. Boulton put a value on Garanti Koza's factory equipment of USD 2.2 million after depreciation.⁵⁷⁵ Mr. Boulton adds USD 1.8 million for the value of the "cast," the steel and wood framework into which concrete was poured to fabricate piles and beams.

421. Mr. Qureshi, the Respondent's quantum expert, put a value of zero on Garanti Koza's equipment, because he felt that the evidence of value relied on by Mr. Boulton was insufficiently

⁵⁷⁰ Boulton ER, ¶ 6.7.10; Tr. June 12, 2015, pp. 1220-1221; Cl. PHB ¶ 216.

⁵⁷¹ Tr. June 9, 2015, pp. 500-501.

⁵⁷² Rsp. PHB ¶¶ 203-204.

⁵⁷³ In its opening Memorial, Garanti Koza claimed USD11 million. Mem. ¶ 235.

⁵⁷⁴ Boulton ER, ¶ 5.2.2.

⁵⁷⁵ Boulton Hearing Presentation, slides (unnumbered). In his report, Mr. Boulton had valued the equipment at USD2.6 million. Boulton ER, ¶ 6.3.5.

supported.⁵⁷⁶ He also notes that paragraph 4.14 of the Contract provides that, after completion of the project, Garanti Koza was to remove the plant and all other structures. Mr. Qureshi accepted a value of USD 1.5 million for the cast.⁵⁷⁷

422. In addition, Garanti Koza claims USD 8.9 million for the loss of its factory in Turkmenistan.

423. The Tribunal rejects these claims for loss of factory and equipment. Garanti Koza has not established that its loss of the factory and equipment resulted from any breach of the BIT by Turkmenistan. For the reasons explained above, the Tribunal has rejected Garanti Koza's claims for direct and indirect expropriation of the factory and equipment as well as its other claims of breach related to these assets.

424. The Tribunal finds no causal connection between the two claims accepted by the Tribunal – the Claimant's umbrella clause claim and its FET claim – and the loss of the factory and equipment. The claims for the loss of the factory and equipment thus fail for lack of a causal connection to any breach of the BIT by Turkmenistan.

6. The competing claims for loss of profit and overpayment

425. Garanti Koza claims USD 14 million in lost profits that it would have received under the Contract but for Turkmenistan's breaches of the BIT. Turkmenistan, while denying any breaches, asserts that Garanti Koza was overpaid by USD 9.3 million for the work it actually performed. We therefore commence with an inquiry into whether the compensation already paid to Garanti Koza by TAY fell short of or exceeded what was due to Garanti Koza for the work that had been completed before it abandoned the project.

⁵⁷⁶ Qureshi Hearing Presentation, slide 18.

⁵⁷⁷ Qureshi Hearing Presentation, slide 18.

426. It is common ground that Garanti Koza received two sorts of payments from TAY, an Advance Payment and three progress payments, in the following amounts:

Advance Payment: USD 17,391,304

Progress payments, after
deducting 20% for
reimbursement of Advance: USD 9,917,387

Total received: USD 27,308,691,578

427. The parties disagree about the amount of work actually completed by Garanti Koza. The Claimant claims to have completed 34.31% of the USD 86,956,522 value of the project by the time work stopped in June 2009.⁵⁷⁹ The Respondent disputes that figure, and asserts that only 20.7% of the project was completed.⁵⁸⁰

428. The Tribunal would have great difficulty resolving the disagreement between the Parties and their respective experts concerning the retrospective evaluations of the percentage of work completed. Instead of attempting to do so, the Tribunal turns to the contemporaneous evidence on the subject, consisting of Garanti Koza's 13 progress payment certificates submitted to TAY.⁵⁸¹ The Tribunal is well aware that, of those 13 certificates and the accompanying invoices, only the first three were paid by TAY, and only those first three and the next five were approved, while the last five were submitted after work had ceased and were not approved by TAY.⁵⁸² Nevertheless, these invoices seem to the Tribunal to be the only available contemporaneous evidence of the work actually performed by Garanti Koza.

⁵⁷⁸ See Boulton ER, ¶ 4.1.4; Respondent's Closing Presentation, slide 7.

⁵⁷⁹ Claimant's Closing Presentation slide 79.

⁵⁸⁰ Respondent's Closing Presentation, slide 7.

⁵⁸¹ Mem. ¶ 228.

⁵⁸² See above at paragraphs 120, 133.

429. The 13 invoices submitted by Garanti Koza to TAY collectively claim that the value of the work performed by Garanti Koza was USD 29,838,591. Subtracting from that figure the USD 27,308,691 actually paid by TAY to Garanti Koza (the sum of the Advance Payment and the amounts paid on the first three invoices) leaves a difference of USD 2,529,900.⁵⁸³ That difference represents the amount of work that Garanti Koza documented (albeit partially after the fact) having performed and for which it has not been paid.

430. That amount, USD 2,529,900, added to the unapplied portion of the Advance Payment already in the possession of Garanti Koza, seems to the Tribunal to be the appropriate amount of compensation to award Garanti Koza for Turkmenistan's failure to observe the obligations undertaken to Garanti Koza with respect to the calculation of progress payments by insisting on the use of Smeta and its parallel breach of its duty to accord fair and equitable treatment to Garanti Koza's investment in Turkmenistan. By disregarding the USD 3 million delay penalty, the same calculation takes into account the Tribunal's concerns about the process by which that penalty was imposed.

431. This USD 2,529,900 is considerably less than the amount – USD 4,408,056 – by which Garanti Koza claims that it had to reduce the amounts of its invoices to TAY because of the requirement that it use Smeta.⁵⁸⁴ But the insistence on Smeta, while it was a substantial contributing cause, was not the sole cause of Garanti Koza's inability to complete the bridge project and the termination of the Contract, and the Tribunal declines to award a greater amount of compensation for this breach.

⁵⁸³ Mem. ¶ 230; Cl. PHB ¶ 87.

⁵⁸⁴ Mem. ¶ 74.

432. Garanti Koza also seeks an award of the lost profits it expected to earn on the Contract if it had taken the project to completion. The Tribunal declines to make any such award. As explained in more detail above, Garanti Koza appears to the Tribunal to have brought the failure of the project largely on itself, by its slow start, the pile driving rig and steel beam delays, and most important, its decision not to seek an extension of the bank guarantee. There is already a substantial element of profit built into Garanti Koza's calculation of the value of the work completed, and that seems to the Tribunal sufficient compensation for the specific breaches of the BIT found by the Tribunal.

433. The Tribunal accordingly directs Turkmenistan to pay compensation to Garanti Koza for its breaches of Article 2 of the BIT in the amount of USD 2,529,900.

D. Interest

434. Turkmenistan should pay interest on the USD 2,529,900 awarded in the previous section from August 13, 2009, the date of the last invoice submitted by Garanti Koza to TAY, until the date of payment.

435. Such interest shall be paid at the rate of two percent (2%) per year. The Contract provides for payment of interest on any sum due under the Contract at 0.1% per day, "but not to exceed 3% in total."⁵⁸⁵ The interest awarded in this Award is not interest on any sum due under the Contract, but the Tribunal nevertheless considers paragraph 11.2 of the Contract Conditions to be indicative of an understanding between the Parties concerning the maximum rate of interest to be paid on sums owed by one to the other. The Tribunal is also conscious that current market interest rates, such as the U.S. dollar one-year LIBOR rate, have ranged roughly between 0.7% and 2% since 2009. The Tribunal adopts the upper end of that range, 2%, as the appropriate rate for this Award.

⁵⁸⁵ C-021, Contract Conditions ¶ 11.2.

The Tribunal considers 2% to be both a fair rate for the period and also within the understanding of the Parties concerning interest rates as expressed in the Contract.

436. Since paragraph 11.2 of the Contract Conditions provides for simple interest, the Tribunal denies the Claimant's request that the interest awarded be compounded twice a year.

E. The Declarations Requested

437. In addition to compensation, Garanti Koza asks the Tribunal to make three declarations:⁵⁸⁶

- a. a declaration that the dispute is within the jurisdiction of the ICSID Convention and within the competence of this Tribunal;
- b. a declaration that Turkmenistan has breached the United Kingdom-Turkmenistan BIT, and specifically (1) its obligation under Article 5 not to unlawfully expropriate Garanti Koza's investment; (2) its obligation under Article 2(2) of the BIT to treat Garanti Koza's investment fairly and equitably; (3) its obligation under Article 2(2) of the BIT to observe any obligation it entered into with regard to Garanti Koza's investment; (4) its obligation under Article 2(2) not to impair the management, use, enjoyment, and disposal of Garanti Koza's investment; and (5) its obligation under Article 2(2) to provide Garanti Koza's investment with full protection and security; and
- c. a declaration that Garanti Koza has properly offset the balance of the Advance Payment against the gross amount owing, with the result that none of the Advance Payment is due to Turkmenistan.

⁵⁸⁶ Cl. PHB ¶ 220.

438. The Tribunal grants the first request, and declares that this dispute is within the jurisdiction of the ICSID Convention and within the competence of this Tribunal.

439. The Tribunal grants the second request in part, and declares that Turkmenistan has breached the BIT, and specifically: (1) its obligation under Article 2(2) of the BIT to observe any obligation it entered into with regard to Garanti Koza's investment; and (2) its obligation under Article 2(2) of the BIT to treat Garanti Koza's investment fairly and equitably. The Tribunal does not find that Turkmenistan has breached the BIT in the other respects claimed by the Claimant and thus declines to make the additional declarations requested.

440. In response to the third request, the Tribunal declares that the award of compensation made by the Tribunal applies the balance of the Advance Payment held by Garanti Koza to the work completed, with the result that no refund of the Advance Payment is due to TAY by Garanti Koza.

441. The Respondent asks the Tribunal to make a finding that it has not violated its obligations under the BIT.⁵⁸⁷ In view of the Tribunal's findings to the contrary, that request is denied.

X. COSTS

442. Each Party has asked for an award of its costs in this arbitration.⁵⁸⁸

A. The Claimant's Costs Application

443. In its Costs Submission dated January 22, 2016, Garanti Koza asked for the following items of costs:

⁵⁸⁷ Closing Tr. December 14, 2015, pp. 1597-1598.

⁵⁸⁸ Cl. PHB ¶ 220; Rsp. PHB ¶ 205.

- a. Fees paid to ICSID on account of registration fees, administration, and the fees and expenses of the arbitrators: USD 725,000.
- b. Costs of legal representation, consisting of:
 - i. Fixed fee of King & Spalding;
 - ii. Success premium of King & Spalding;
 - iii. Fixed fee of the GUR law firm;
 - iv. Success premium of the GUR law firm;
- c. Travel, accommodation, and other expenses;
- d. Witness and expert costs; and
- e. Miscellaneous expenses.

B. The Respondent's Costs Application

444. In its costs submission dated January 22, 2016, Turkmenistan asks for the following items of costs:

- a. Fees paid to ICSID on account of administration and the fees and expenses of the arbitrators, which now amount to USD 700,000;
- b. Costs of legal representation, consisting of the fees of Curtis, Mallet-Prevost, Colt & Mosle LLP and of Gurel Yoruker Law Offices; and
- c. Expert fees and expenses.

C. The Respondent's Objection to Claimant's Costs Application

445. By letter dated February 5, 2016, the Respondent objected to that portion of the Claimant's costs application that asked for a "success premium" for the Claimant's law firms in addition to the fees already paid to those firms.

446. The Claimant's costs submission itemizes, but does not explain, certain "success premiums" that the Claimant appears to have agreed to pay the law firms representing it in this arbitration. Some of these success fees are stated to be fixed amounts, and some are expressed in terms of a percentage of any recovery at specified levels of recovery.

447. The Respondent submits that no "success premium" should be included in any award of costs. The Respondent argues that such premiums are not "expenses incurred by the parties in connection with the proceedings" within the meaning of the ICSID Convention.⁵⁸⁹ Respondent cites and quotes Professor Hanotiau to the effect that success fees "are not properly defense costs."⁵⁹⁰

448. In view of the Tribunal's decision on costs, below, the Tribunal need not address this disagreement concerning success fees.

D. The Tribunal's Decision on Costs

449. Garanti Koza is the prevailing party in this arbitration, in that the Tribunal requires Turkmenistan to make a payment to Garanti Koza as compensation for breaches on the part of Turkmenistan of certain obligations under the BIT, specifically the obligations to observe the obligations entered into with Garanti Koza with regard to its investment in Turkmenistan and to provide that investment fair and equitable treatment.

⁵⁸⁹ See ICSID Convention Art. 61(2).

⁵⁹⁰ Bernard Hanotiau, The Parties' Costs of Arbitration, in EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION 213 (Dossier of the ICC Institute of World Business Law 2006), p. 219.

450. Garanti Koza did not, however, prevail on all of its claims. Garanti Koza did prevail on the objection to jurisdiction for lack of consent, in ruling on which the Tribunal reserved the question of costs until the end of the arbitration proceeding, and on the jurisdictional issues considered in this award. However, the Tribunal rejected Garanti Koza's claims of expropriation (direct and indirect), its claim that Turkmenistan subjected it to unreasonable and discriminatory measures, and its claim that Turkmenistan failed to provide its investment with full protection and security. Moreover, Garanti Koza is awarded only about five percent of the compensation it sought. The Tribunal considers it appropriate to take the degree to which Garanti Koza prevailed into consideration, along with the fact that it prevailed, in ruling on the Parties' competing applications for costs.

451. In accordance with Article 61(2) of the ICSID Convention and ICSID Rule 47(1)(j), the Tribunal rules that the Respondent should pay one-half of the costs paid to ICSID by Garanti Koza in this arbitration, but that each Party should bear its own costs of legal representation.

452. The Respondent is therefore directed to pay Garanti Koza USD 362,500 in reimbursement of one-half of the payments made by Garanti Koza to ICSID on account of registration fees, administration, and the fees and expenses of the arbitrators. Garanti Koza's application for reimbursement of its legal fees and expenses is denied. Each party should bear its own costs of legal representation.

XI. AWARD

453. For the reasons set forth above, the Tribunal makes the following Award:

- a. For the reasons stated in Part VI.C of this Award and in the Tribunal's Decision on the Objection to Jurisdiction for Lack of Consent dated July 3, 2013, which is incorporated into and forms a part of this Award, the Tribunal finds that it has jurisdiction over the claims before it.⁵⁹¹
- b. The Tribunal declares that Turkmenistan has breached the BIT as explained in the body of this Award, and specifically: (1) its obligation under Article 2(2) of the BIT to observe any obligation it entered into with regard to Garanti Koza's investment; and (2) its obligation under Article 2(2) of the BIT to treat Garanti Koza's investment fairly and equitably.
- c. The Respondent is directed to pay compensation to the Claimant Garanti Koza LLP for its breaches of the BIT in the amount of USD 2,529,900.
- d. The Respondent is directed to pay simple interest on the above amount at the rate of two percent (2%) per year from August 13, 2009 until the date of payment.
- e. The Respondent is directed to pay costs to the Claimant of USD 362,500 in reimbursement of one-half of the payments made by Garanti Koza to ICSID on account of registration fees, administration, and the fees and expenses of the arbitrators.
- f. All other requests for relief by both the Claimant and the Respondent are dismissed.

⁵⁹¹ The Tribunal's Decision on the Objection to Jurisdiction for Lack of Consent is attached to this Award as Appendix A. Professor Boisson de Chazournes' dissent to that decision is attached as Appendix B.

[signed]

George Constantine Lambrou
Arbitrator

[signed]

Laurence Boisson de Chazournes
Arbitrator

[signed]

John M. Townsend
President of the Tribunal

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

In the arbitration proceeding between

GARANTI KOZA LLP

(CLAIMANT)

AND

TURKMENISTAN

(RESPONDENT)

ICSID CASE No. ARB/11/20

APPENDIX A TO THE AWARD

DECISION ON THE OBJECTION TO JURISDICTION FOR LACK OF CONSENT

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

IN THE PROCEEDING BETWEEN

GARANTI KOZA LLP
(Claimant)

and

TURKMENISTAN
(Respondent)

(ICSID Case No. ARB/11/20)

**DECISION ON
THE OBJECTION TO JURISDICTION
FOR LACK OF CONSENT**

Tribunal

John M. Townsend, President
George Constantine Lambrou, Arbitrator
Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal

Marco Tulio Montañés-Rumayor

Representing the Claimant

Mr. Tefvik Gur
Mr. Serkan Yildirim
Ms. Gülcin Köker
GUR law firm

Mr. John Savage
Ms. Elodie Dulac
King & Spalding LLP

Representing the Respondent

Mr. Peter Wolrich
Mr. Ali R. Gürsel
Ms. Claudia Frutos-Peterson
Ms. Sabrina Ainouz
Curtis, Mallet-Prevost, Colt & Mosle LLP

Ms. Gülperi Yörüker
Ms. Berin Hikmet
Gürel Yörüker Law Offices

Date: July 3, 2013

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| BIT | Bilateral Investment Treaty |
| Claimant's Counter-Memorial | Counter-Memorial on the Objection to Jurisdiction for Lack of Consent of January 11, 2013 |
| Decision | Decision of the Tribunal on the Objection to Jurisdiction for Lack of Consent |
| ECT | Energy Charter Treaty of 1994 |
| Garanti Koza or the Claimant | Garanti Koza LLP |
| ICC Arbitration | Arbitration conducted under the Rules of the International Chamber of Commerce |
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| ICSID Arbitration | Arbitration conducted under the ICSID Rules |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965 |
| ICSID Rules | ICSID Rules of Procedure for Arbitration Proceedings |
| MFN | Most Favored Nation |
| Request | Request for Arbitration of May 18, 2011 |
| Respondent's Memorial | Memorial on the Objection to Jurisdiction for Lack of Consent of November 30, 2012 |
| Respondent's Reply | Reply on the Objection to Jurisdiction for Lack of Consent of February 22, 2013 |
| Switzerland-Turkmenistan BIT or Switzerland BIT | Accord entre le Conseil federal suisse et le Gouvernement du Turkménistan concernant la promotion et la protection réciproque des investissements |
| Turkmenistan or the Respondent | Turkmenistan |

| | |
|--|---|
| U.K.-Turkmenistan BIT or U.K. BIT or the BIT | Agreement for the Promotion and Protection of Investments concluded between the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Arbitration | Arbitration conducted under the UNCITRAL Rules |
| UNCITRAL Rules | Arbitration Rules of the United Nations Commission on International Trade Law |
| Vienna Convention | Vienna Convention on the Law of Treaties of 1969 |

I. BACKGROUND

A. The Dispute

1. The Claimant, Garanti Koza LLP (“Garanti Koza” or the “Claimant”), a limited liability company incorporated in the United Kingdom, submitted a Request for Arbitration (the “Request”) dated May 18, 2011 to the Secretary-General of the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”) on May 19, 2011. In that Request, Garanti Koza demanded institution of arbitration proceedings against Turkmenistan (“Turkmenistan” or the “Respondent”) under the terms of a bi-lateral investment treaty (a “BIT”) entitled Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments which entered into force on February 9, 1995 (the “U.K.-Turkmenistan BIT” or “U.K. BIT” or “the BIT”). Garanti Koza supplemented its Request by letters dated July 4, 11, 13 and 19, 2011. The Secretary-General of ICSID registered the Claimant’s Request on July 20, 2011.

2. According to the Claimant’s Request for Arbitration:

The present dispute arises out of the investments on the 28 highway bridges and overpasses in Turkmenistan. A contract regarding the investments in Turkmenistan numbered 01/2008 and dated 18.03.2008 for the lump sum price of USD 100.000.000 (“Contract”) was entered into by and between State Concern Turkmenautoyollari as the owner and Garanti Koza LLP as the contractor for the execution of the projection, construction, and installation works of 28 highway bridges and overpasses.

* * *

(1) In breach of its obligations, by using the state power, the Respondent has avoided to make the payments it has undertook to pay, tried to change the contract regarding the investment which is established as a lump sum price contract into unit price contract, made requests which contradict with its rights and obligations, tried to change the terms and conditions of the Contract to the favor of the Respondent and tried to prevent the

continuation of the works in various ways, thus did not fulfill its obligations.

(2) Garanti Koza LLP suffered losses and damages as a consequence of the Respondent's intention to confiscate the assets and investments of Garanti Koza LLP by not performing its related obligations and attempt to undermine the investment.¹

3. The Respondent summarizes the dispute between the parties in somewhat different terms:

On March 18, 2008, Garanti Koza LLP, a U.K.-registered entity controlled by the Turkish company Garanti Koza Insaat Sanayi ve Tikaret A.S., and Turkmenavtoyollary, the highway authority, concluded a construction contract for the design and construction of 28 highway bridges and overpasses on the Mary-Turkmenabad highway in Turkmenistan (the "Contract"). In 2009, Garanti Koza LLP suspended all the works under the Contract with Turkmenavtoyollary. The parties to the Contract exchanged their views on the dispute related to the performance of the Contract by correspondence and in person, but this did not result in a resolution of the dispute. On February 22, 2010, Turkmenavtoyollary invoked termination of the Contract under Article 17 of the Contract Conditions, in view of the Contractor's failure to complete the work on time and failure to resume works for a prolonged period of time.²

B. The Tribunal

4. The Arbitral Tribunal was constituted in accordance with Articles 37(2)(b) and 38 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"):

- The Claimant appointed Mr. George Constantine Lambrou of Athens, Greece as an arbitrator on September 26, 2011. Mr. Lambrou accepted his appointment on October 7, 2011.

¹ Request for Arbitration, p. 3.

² Respondent's Memorial, ¶3.

- The Respondent appointed Professor Laurence Boisson de Chazournes of Geneva, Switzerland as an arbitrator on October 18, 2011. Prof. Boisson de Chazournes accepted her appointment on October 26, 2011.
- The Chairman of the ICSID Administrative Council appointed Mr. John M. Townsend of Washington, D.C., U.S.A., as President of the Tribunal on April 10, 2012. Mr. Townsend accepted his appointment on April 13, 2012.

Mr. Marco Tulio Montañés-Rumayor, Legal Counsel to ICSID, was appointed to act as Secretary to the Tribunal.

5. The Tribunal was formally constituted on April 13, 2012. The members of the Tribunal submitted their signed declarations in accordance with Rule 6(2) of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Rules”) and copies of those declarations were distributed to the parties by the Secretary.³

6. After postponements made at the request of the parties, a first session of the Tribunal with the parties was held in Washington, D.C. on October 19, 2012 (the “First Session”). At the First Session, the parties confirmed that the Tribunal was properly constituted and that neither party had any objection to the appointment of any member of the Tribunal.⁴

C. Objections to Jurisdiction

7. In response to a request for comments on a proposed agenda for the First Session, the Respondent informed the Tribunal that the “Respondent has objections to jurisdiction that are separate and distinct from the merits and warrant bifurcation.”⁵ In response to a request from the Tribunal for a more specific description of its objections to jurisdiction, the Respondent sent a

³ Procedural Order No. 1, ¶¶2.1, 2.2.

⁴ Procedural Order No. 1, ¶2.1.

letter to the Tribunal on September 5, 2012 specifying two grounds upon which it objected to jurisdiction:

Respondent hereby informs the Tribunal that it intends to assert jurisdictional objections on the following grounds: (i) Turkmenistan did not consent to ICSID jurisdiction under the Agreement between the United Kingdom and Turkmenistan for the Protection and Promotion of Investments (“U.K.-Turkmenistan BIT”) and (ii) most of the claims brought by Claimant are contractual in nature and therefore not within the jurisdiction of this Tribunal.

First, the Tribunal does not have jurisdiction to decide the merits of this dispute due to the lack of Turkmenistan’s consent to ICSID arbitration under Article 8 of the UK-Turkmenistan BIT. The BIT specifically requires that in order for a dispute to be submitted to ICSID, an agreement to ICSID arbitration between the investor and the BIT’s Contracting Party must exist. Respondent respectfully submits that in the absence of Turkmenistan’s consent to submit this dispute to ICSID, this Tribunal does not have jurisdiction over the claims brought by Claimant.

Claimant has attempted to import into the UK-Turkmenistan BIT an alleged consent by Turkmenistan to ICSID arbitration contained in another BIT. Claimant’s reliance on Article 3 of the UK-Turkmenistan BIT to bypass the essential requirement of the State’s consent to ICSID arbitration is to no avail. That consent cannot be imported from a different BIT when Turkmenistan manifestly did not give such consent in the basic BIT. As is clear from the wording of Article 8 of the UK Turkmenistan BIT, the Contracting Parties expressly agreed that there could be no ICSID arbitration of a dispute in the absence of a specific agreement between the investor and the Contracting Party to submit the dispute to ICSID.

Secondly, it is clear that most of Claimant’s claims are contractual in nature. They arise under the Contract concluded between Garanti Koza LLP and Turkmenavtoyollary, by which the Claimant agreed to resolve disputes “of any kind” pursuant to the dispute-resolution mechanism of Article 21 of the Contract Conditions. The dispute-resolution mechanism agreed to by the Claimant provided for the jurisdiction of the Arbitration Court of Turkmenistan, with a possibility of subsequent submission of the dispute to an arbitral tribunal in The Hague. The Claimant has invoked the mechanism under the BIT in order to avoid the dispute resolution mechanism provided for in the Contract, as Turkmenistan will show.⁶

(Footnote continued from previous page)

⁵ Comments of the Respondent on the proposed agenda for the First Session, June 25, 2012.

⁶ Letter from Counsel for the Respondent to the Tribunal, September 5, 2012 (emphasis in original).

8. At the First Session on October 19, 2012, the parties agreed, without prejudice to the Respondent's objections to jurisdiction, that this proceeding would be conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006, at the seat of the Centre in Washington, D.C.⁷

9. Also at the First Session, it was agreed pursuant to ICSID Rule 41(4) that the Respondent's first objection to jurisdiction (that Turkmenistan did not consent to ICSID jurisdiction) would be considered as a preliminary matter on an accelerated schedule, while the Respondent's second objection to jurisdiction (that most of the claims brought by the Claimant are contractual in nature) would be considered together with the merits of the dispute, if the Tribunal were to reach the merits. Pursuant to the schedule established at the First Session and incorporated into Procedural Order No. 1,⁸ the Respondent submitted its Memorial on the Objection to Jurisdiction for Lack of Consent ("Respondent's Memorial") on November 30, 2012. The Claimant submitted its Counter-Memorial on the Objection to Jurisdiction for Lack of Consent ("Claimant's Counter-Memorial") on January 11, 2013. And the Respondent submitted its Reply on the Objection to Jurisdiction for Lack of Consent ("Respondent's Reply") on February 22, 2013. The Claimant waived its right to submit a rejoinder in the interest of compressing the schedule.⁹

⁷ Procedural Order No. 1, ¶¶4.1, 9.1.

⁸ Procedural Order No. 1, ¶12.1.

⁹ Procedural Order No. 1, ¶ 12.1.

10. On March 11, 2013, a hearing was held at the seat of the Centre in Washington, D.C., to hear argument on the Respondent's Objection to Jurisdiction for Lack of Consent. The following persons attended that hearing:

For the Claimant:

Mr. John Savage, King & Spalding LLP
Ms. Elodie Dulac, King & Spalding LLP
Mr. Serkan Yildirim, GUR Law Firm
Ms. Gülcin Köker, GUR Law Firm
Mr. Murat Isikustun, Vice President Finance and Administration, Garanti Koza LLP

For the Respondent:

Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Ali R. Gursel, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Sabrina A. Ainouz, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Ali Topalogu, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gülperi Yörüker, Yurttutan Gurel Yörüker
Ms. Berin Hikmet, Yurttutan Gurel Yörüker

The Tribunal:

Mr. John M. Townsend, President
Professor Laurence Boisson de Chazournes, Arbitrator
Mr. George Constantine Lambrou, Arbitrator

ICSID Secretariat:

Mr. Marco Tulio Montañés-Rumayor, Secretary of the Tribunal

Mr. William Prewett, court reporter, also attended the hearing and made a transcript of the proceedings.¹⁰

11. At the conclusion of the hearing on March 11, 2013, the Tribunal took the Respondent's Objection to Jurisdiction for Lack of Consent under advisement.

¹⁰ That transcript is cited in this Decision as "Hearing Tr. ___."

12. This Decision on the Objection to Jurisdiction for Lack of Consent (the “Decision”) sets forth an analysis of the issues presented by the Respondent’s first objection to jurisdiction and the reasons for which a majority of the members of the Tribunal ultimately rejects that objection and concludes that the Tribunal has jurisdiction to hear this dispute. Professor Boisson de Chazournes disagrees with the analysis set forth in this Decision and with the conclusions reached by the majority, for reasons explained in her Dissenting Opinion (the “Dissenting Opinion”).

II. ANALYSIS

A. The Objection to Jurisdiction for Lack of Consent

13. The parties’ respective positions as to whether Turkmenistan has consented to participate in an arbitration conducted under the ICSID Rules (“ICSID Arbitration”) for the purpose of resolving the claims advanced against it by the Claimant may be summarized very simply at the outset. The arguments advanced by each party in support of its position are more complex, and will be considered in the body of this Decision.

14. The Respondent’s first objection to the jurisdiction of the Tribunal, which is the only one to be addressed in this Decision,¹¹ may be stated in the most summary form as follows:¹²

- Turkmenistan has not consented or agreed, in the U.K.-Turkmenistan BIT or otherwise, to participate with this Claimant in an ICSID Arbitration.

¹¹ The Respondent’s second objection to the jurisdiction of this Tribunal was expressly reserved. Respondent’s Memorial, ¶¶1, 72.

¹² See Respondent’s Memorial, ¶¶6-7.

- Rather, the U.K.-Turkmenistan BIT contains Turkmenistan’s consent only to participate in international arbitration under the Rules (“UNCITRAL Rules”) of the United Nations Commission on International Trade Law (“UNCITRAL” and “UNCITRAL Arbitration”), unless Turkmenistan agrees with a claimant to refer a specific claim to ICSID Arbitration, which it has not done in this case.¹³
- Turkmenistan’s consent to submit this dispute to ICSID Arbitration may not be created by operation of the most favored nation (“MFN”) clause of the U.K.-Turkmenistan BIT.
- This ICSID Tribunal therefore lacks jurisdiction to hear the Claimant’s claims.

15. The Claimant’s argument that this Tribunal does have jurisdiction may be stated in equally summary form as follows:¹⁴

- The MFN clause of the U.K.-Turkmenistan BIT assures the Claimant of treatment no less favorable than Turkmenistan accords to nationals or companies of any third State.
- Turkmenistan has consented, in its BITs with Switzerland, France, Turkey, and India, and in the Energy Charter Treaty (“ECT”), to either ICSID Arbitration or UNCITRAL Arbitration, at the election of the investor, with nationals or companies of those States.
- A treaty that consents to ICSID Arbitration is more favorable to an investor than one that does not, or, alternatively, a treaty that provides a choice between UNCITRAL Arbitration and ICSID Arbitration is more favorable to an investor than one that does not.
- Therefore, Turkmenistan’s consent to ICSID Arbitration is established by operation of the MFN clause of the U.K.-Turkmenistan BIT.

¹³ The U.K.-Turkmenistan BIT provides for the application of the UNCITRAL Rules “as then in force.” BIT, Art. 8(2). The current UNCITRAL Rules came into effect on August 15, 2010, after the date of the Claimant’s notification of the dispute to Turkmenistan, but before the date of the Request for Arbitration.

¹⁴ See Claimant’s Counter-Memorial, ¶¶2-3.

B. The U.K.-Turkmenistan BIT

16. The starting point for deciding whether this ICSID Tribunal has jurisdiction to hear the dispute between the Claimant and the Respondent is the text of the BIT under which the claim is brought. As the tribunal in *Daimler v. Argentina* explained:

BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.¹⁵

17. Article 8 of the U.K.-Turkmenistan BIT deals with “Settlement of Disputes between an Investor and a Host State.” It provides:

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.¹⁶

(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between

¹⁵ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of August 22, 2012 (hereinafter “*Daimler v. Argentina*”) ¶164.

¹⁶ The bracketed word “[months]” does not appear in the text of Article 8(1) of the U.K.-Turkmenistan BIT published by the United Kingdom in its Treaty Series No. 47 (2003), which was submitted by the Claimant (with its Request for Arbitration) and also by the Respondent (with its Memorial on Jurisdiction) as Exhibits C-4, and R-4, respectively, and used by both parties. The Tribunal has supplied the word, because the text makes no sense without it and it appears to have been inadvertently omitted. The context in which Article 8(1) appears also supports that reading, because of the appearance of the phrase “four months” in the final sentence of Article 8(2). The signature page of the BIT states that it was done in the English and Russian languages, with a text in the Turkmen language to be certified in due course, and that the English text would prevail in case of divergence. No other version of the BIT was submitted by either party.

States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

- (b) the Court of Arbitration of the International Chamber of Commerce; or
- (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

18. Garanti Koza sent the Notification of the dispute required by Article 8(1) of the U.K.-Turkmenistan BIT to the Government of Turkmenistan on June 25, 2010.¹⁷

19. Article 3 of the U.K.-Turkmenistan BIT deals with “National Treatment and Most-favoured-nation Provisions” and provides:

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

¹⁷ Respondent’s Memorial, ¶4.

20. It is common ground between the parties that the U.K.-Turkmenistan BIT, including Articles 3 and 8 of the BIT, is to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“Vienna Convention”).¹⁸ That is, the U.K.-Turkmenistan BIT is to “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.”¹⁹ Supplementary means of interpretation are to be resorted to only as permitted by Article 32 of the Vienna Convention.

C. The Requirement of State Consent to Arbitration

21. “[Q]uestions concerning the consent of the parties to jurisdiction, in the context of a BIT arbitration, are generally governed by international law.”²⁰ Few propositions are as well established in international law as that “a State may not be compelled to submit its disputes to arbitration without its consent.”²¹ The tribunal in *Teinver v. Argentina* called it a “fundamental requirement” that “a State Party consent to jurisdiction.”²² It is equally accepted that a State’s consent is not to be presumed, but must be established by an express declaration or by actions that demonstrate consent.²³

22. Some arbitration tribunals have followed *Plama v. Bulgaria* in grafting onto the requirement that the State must consent to arbitration the corollary that the State’s consent must

¹⁸ Hearing Tr. 28, 101. The Vienna Convention entered into force on January 27, 1980. See United Nations, *Treaty Series*, vol. 1155, p. 331.

¹⁹ VIENNA CONVENTION, Article 31.1.

²⁰ Christopher F. Dugan, et al., *Investor-State Arbitration*, 208 (2008).

²¹ *Ambatielos Case* (Greece v. United Kingdom) Merits: Obligation to Arbitrate, Judgment of May 19, 1953 (I.C.J.REPORTS 1953) p. 19; See also, *Status of Eastern Carelia*, Advisory Opinion of July 23, 1923 (P.C.I.J. SERIES B, No. 5) p. 27 (“Il est bien établi en droit international qu’aucun Etat ne saurait être obligé de soumettre ses différends avec les autres Etats soit à la médiation, soit à l’arbitrage, soit enfin à n’importe quel procédé de solution pacifique, sans son consentement”).

²² *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction of December 21, 2012 (hereinafter “*Teinver v. Argentina*”) ¶176.

²³ *Daimler v. Argentina* ¶175.

be “clear and unambiguous.”²⁴ This Tribunal finds no basis in the Vienna Convention for imposing such a standard onto the interpretation of the terms of a treaty.²⁵ Rather, this Tribunal agrees with the tribunal in *Suez and Interagua v. Argentina* “that dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.”²⁶

23. Judge Higgins explained in the *Oil Platforms Case*:

It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses... The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses; they are judicial decisions like any other.²⁷

The same point was made by the tribunal in *National Grid v. Argentina*:

As regards the intention of the parties, the approach of the Vienna Convention and the ICJ is that “what matters is the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties.” The convention does not establish a different rule of interpretation for different clauses. The same rule of

²⁴ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005 (hereinafter “*Plama v. Bulgaria*”) ¶198. The tribunal in *Plama v. Bulgaria* cited no authority for this proposition, although it called it a “well-established principle.” *Id.* See also *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of September 13, 2006 (hereinafter “*Telenor v. Hungary*”) ¶90; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award of August 21, 2006 (hereinafter “*Berschader v. Russia*”) ¶181; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of December 8, 2008 (hereinafter “*Wintershall v. Argentina*”) ¶167.

²⁵ As noted above, the parties are in agreement that the Tribunal should interpret the U.K.-Turkmenistan BIT in accordance with the Vienna Convention.

²⁶ *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 (formerly *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales del Agua, S.A.*), Decision on Jurisdiction of May 16, 2006 (hereinafter “*Suez and Interagua v. Argentina*”) ¶64. See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002 ¶43; *Suez, Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction of August 3, 2006 (hereinafter “*Suez and Vivendi v. Argentina*”) ¶65; *Austrian Airlines v. The Slovak Republic*, UNCITRAL Case, Award of October 9, 2009 (hereinafter “*Austrian Airlines v. Slovakia*”) ¶120. See also Hearing Tr. 102.

²⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of December 12, 1996, Separate Opinion of Judge Higgins (I.C.J. REPORTS, 1996), p. 857, ¶ 35.

interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.²⁸

The tribunal in *Austrian Airlines v. Slovakia* agreed:

[T]he Tribunal does not consider that provisions that embody a State's consent to arbitration must be strictly interpreted. This view, which was adopted by the tribunals in *Plama v. Bulgaria*, *Telenor v. Hungary*, *Bershadar v. Russia* and *Wintershall v. Argentina*, is not an accurate reflection of international law on this matter.²⁹

D. Has Turkmenistan Consented to Arbitration?

24. We confront in this case the question whether Turkmenistan has consented to participate in ICSID Arbitration with the Claimant. Under the ICSID Convention, to which specific reference is made in Article 8(2) of the U.K.-Turkmenistan BIT, a consent to ICSID Arbitration must be expressed in writing:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State * * * and a national of another Contracting State, which the parties to the dispute consent *in writing* to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.³⁰

But neither the ICSID Convention nor any other authority of which this Tribunal is aware requires that the State's consent to arbitration be expressed in a particular form or in a single article, or even in a single instrument or treaty.³¹

25. In examining the text and structure of the U.K.-Turkmenistan BIT, the majority of the Tribunal approaches the question of whether Turkmenistan has consented to participate in

²⁸ *National Grid plc v. Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction of June 20, 2006 (hereinafter "*National Grid v. Argentina*") ¶80.

²⁹ *Austrian Airlines v. Slovakia* ¶119.

³⁰ ICSID CONVENTION Article 25(1) (emphasis added).

³¹ C. Schreuer, UNCTAD COURSE ON DISPUTE SETTLEMENT – INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE, 2.3 CONSENT TO ARBITRATION (United Nations, 2003) p. 5 ("Under the Convention, consent must be in writing. But there is no particular form in which this must be done"); *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections of March 20, 2009 (hereinafter "*Renta 4 v. Russia*") ¶82 ("There is no rule that the entirety of arbitration agreements must be contained in a single article of an instrument.").

ICSID Arbitration in two steps, corresponding to the organization of the relevant article of the U.K.-Turkmenistan BIT, Article 8. Because Article 8(1) deals with Turkmenistan's consent to participate in international arbitration with U.K. investors and the conditions attached to that consent, and Article 8(2) deals with the arbitration systems that may be used if the conditions of Article 8(1) are met, we look first at whether Turkmenistan has consented to participate in international arbitration at all, and second at whether it has agreed to ICSID Arbitration.

26. The answer to whether Turkmenistan has consented to participate in *any* kind of arbitration with a U.K. claimant such as Garanti Koza may be found in Article 8(1) of the U.K.-Turkmenistan BIT. Article 8(1) provides:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled *shall*, after a period of four [months] from written notification of a claim, *be submitted to international arbitration* if the national or company concerned so wishes.³²

27. In Article 8(1), Turkmenistan consents to participate in international arbitration to resolve disputes with U.K. investors, subject only to three conditions, all of which are met in this case:

- a. The first condition is that the investor "so wishes." It is uncontested that the investor in this case wishes to submit its claim to international arbitration.
- b. The second condition is that the dispute shall not have been settled within four months of written notification of the claim. It is also uncontested that the Claimant's claim was not settled within four months of written notification of the claim to Turkmenistan.
- c. The third condition is that the dispute must concern an obligation of Turkmenistan under the U.K.-Turkmenistan BIT. The Respondent has advised the Tribunal that it will argue,

³² U.K.-TURKMENISTAN BIT Art. 8(1) (emphasis added).

if this arbitration reaches the merits, that most of the Claimant’s claims are contractual in nature, and therefore do not arise under the BIT.³³ For purposes of determining whether we have jurisdiction to hear the claims, however, we accept (for this purpose only) the Claimant’s pleading that its claims arise under the BIT, because the question of whether the Claimant has actually stated a claim under the BIT has been reserved for the merits phase of the proceeding.³⁴

28. Article 8(1) provides that a claim that meets the three conditions specified in that article “*shall . . . be submitted to international arbitration.*”³⁵ The use of the auxiliary verb “shall” makes that statement mandatory. As the tribunal in *Wintershall v. Argentina* put it, “[t]he use of the word ‘shall’ [...] is itself indicative of an ‘obligation’ – not simply a choice or option. The word ‘shall’ in treaty terminology means that what is provided for is legally binding.”³⁶

29. Article 8(1) thus appears to a majority of the Tribunal to establish unequivocally Turkmenistan’s consent to submit disputes with U.K. investors to international arbitration. That consent satisfies the fundamental condition that the State must have consented to participate in arbitration before it may be required to do so. What Professor Stern calls the *ratione voluntatis* is thus established with regard to Turkmenistan’s participation in international arbitration with a U.K. investor.³⁷ Turkmenistan has consented to arbitrate disputes with U.K. investors arising out of the U.K.-Turkmenistan BIT.

30. Article 8(1) does not, however, tell us whether Turkmenistan has agreed to participate in ICSID Arbitration with a U.K. investor, because Article 8(1) contains no

³³ Letter from Counsel for the Respondent to the Tribunal, September 5, 2012.

³⁴ Procedural Order No. 1, ¶12.2.

³⁵ U.K.-TURKMENISTAN BIT Art. 8(1) (emphasis added).

³⁶ *Wintershall v. Argentina* ¶119 (emphasis in original).

³⁷ See *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern ¶78.

information about *what kind* of international arbitration Turkmenistan has consented to engage in. As the particular BIT before us is structured, the State Parties' consent to participate in international arbitration is expressed in the first section of Article 8, while the type of arbitration to which a dispute may be referred is dealt with in the second section of Article 8. To find what kind of arbitration an investor may avail itself of, we must look at Article 8(2).

E. What Kind of Arbitration?

31. While the Dissenting Opinion finds that “[c]onsent to arbitration is specifically dealt with in Article 8(2) when a foreign investor envisages having recourse to a specific arbitration venue,”³⁸ in addition to Article 8(1), we find in Article 8(2) only a menu of options concerning the arbitration process, and a default selection. Consent, as explained in the preceding section, is granted in Article 8(1) of the U.K.-Turkmenistan BIT. Article 8(2) begins “Where the dispute is referred to international arbitration,” indicating that Article 8(2) only comes into play after the determination has been made, under the provisions of Article 8(1), to refer the dispute to arbitration.

32. Article 8(2) of the U.K.-Turkmenistan BIT (quoted in full in paragraph 17, above) addresses specifically the kinds of arbitration available to a U.K. investor who wishes to take advantage of the offer of international arbitration made by Turkmenistan in Article 8(1). It does so in two steps. The first part of Article 8(2) identifies three types of arbitration to which an investor with a claim *and* Turkmenistan together “*may agree* to refer the dispute” (emphasis added). These are:

- (a) ICSID Arbitration;
- (b) Arbitration under the auspices of the Court of Arbitration of the International Chamber of Commerce (“ICC Arbitration”); or

³⁸ Dissenting Opinion ¶22.

(c) UNCITRAL Arbitration.

33. The second part of Article 8(2) provides that, if “there is no agreement to one of the above alternative procedures” after four months, “the dispute *shall* at the request in writing of the [investor] be submitted to arbitration under” the UNCITRAL Rules.³⁹

34. The Respondent argues that Article 8(2) is modeled on the “alternative” version of Article 8 of the 1991 U.K. Model BIT, which was in effect when the U.K.-Turkmenistan BIT was signed in 1995.⁴⁰ The “preferred” version of Article 8 in the U.K. Model BIT, in contrast, provided that “[e]ach Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes” any legal dispute with an investor of the other party.⁴¹ The Respondent argues that the selection of the alternative version, rather than the preferred version, reflects a choice by the parties to the BIT *not* to agree to ICSID Arbitration.⁴²

35. The Claimant counters that the U.K.-Turkmenistan BIT does not exclude ICSID Arbitration, either in the text of Article 8 or in the exclusions from the scope of the MFN clause listed in Article 7.⁴³ Indeed, the Claimant argues, Article 8 identifies ICSID Arbitration as one possible alternative that may under certain conditions be available to investors.⁴⁴

36. If the Tribunal found Article 8(2) to be ambiguous or obscure, Article 32 of the Vienna Convention would permit us to consider supplementary means of interpretation, and the model BIT from which the parties evidently derived the text of Article 8(2) would be among the “circumstances of [the] conclusion” of the U.K.-Turkmenistan BIT that could be considered in

³⁹ U.K.-TURKMENISTAN BIT Art. 8(2) (emphasis added).

⁴⁰ Respondent’s Memorial, pp. 14-15; Hearing Tr. 11-12.

⁴¹ Respondent’s Memorial, p. 15.

⁴² Respondent’s Memorial, pp. 15-16; Respondent’s Reply, p. 29.

⁴³ Hearing Tr. 98-100, 105.

⁴⁴ *Id.*

interpreting that article.⁴⁵ But the Tribunal finds no ambiguity in Article 8(2). The ordinary meaning of the words of that article is that Turkmenistan expressed in the BIT its willingness to consider three possible kinds of arbitration whenever it was notified by a U.K. investor of a claim under the BIT -- ICSID Arbitration, ICC Arbitration, and UNCITRAL Arbitration. Article 8(2) is equally clear that the fall-back option, failing a case-specific agreement to use one of the first two kinds of arbitration, is UNCITRAL Arbitration. Vattel's First Maxim ("It is not allowable to interpret what has no need of interpretation") counsels that we accept that these words mean what they say.⁴⁶

37. The ordinary meaning of Article 8 is thus that Turkmenistan consented in Article 8(1) to submit disputes with a U.K. investor arising under the U.K.-Turkmenistan BIT to international arbitration. However, unless Turkmenistan reaches an agreement with such an investor to submit a particular dispute to either ICSID or ICC arbitration, Article 8(2) restricts the investor to submitting the dispute to UNCITRAL arbitration.⁴⁷ On the latter point, the majority agrees with the Dissenting Opinion, although we reach that conclusion by a different route.

38. Within the four corners of Article 8 of the U.K.-Turkmenistan BIT, therefore, the majority of the Tribunal finds that Turkmenistan has consented to international arbitration with

⁴⁵ VIENNA CONVENTION Art. 32.

⁴⁶ Emer Vattel, *The Law of Nations* (1758; Liberty Fund edition 2008) §263. Of course, Article 32 of the Vienna Convention would allow the model BIT to be used for the purpose of confirming the ordinary meaning of these words.

⁴⁷ The tribunal in *Biwater* reached a similar conclusion interpreting a similarly-phrased treaty provision. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008 (hereinafter "*Biwater v. Tanzania*") ¶331. The *Biwater* tribunal relied in part on the statement of Dolzer & Stevens that:

"A handful of BITs provide . . . that investment disputes "shall" be submitted to ICSID arbitration but only if there is a subsequent agreement to that effect between the disputing parties. . . . Under none of these provisions, however, would the investor have an immediate right to resort to ICSID arbitration. Such right would in each case depend upon the granting by the host State of the required "assent" or consent."

Dolzer & Stevens, *Bilateral Investment Treaties*, pp. 132-134. See Respondent's Memorial, ¶¶37-40.

U.K. investors, but not to ICSID Arbitration. Turkmenistan has simply expressed its willingness to consider ICSID arbitration as one of three options, and only on a case by case basis. The Respondent states that the Claimant “never obtained or even sought Turkmenistan’s agreement to refer [this] dispute to ICSID arbitration, as required under Article 8(2),”⁴⁸ and the Claimant does not take issue with that statement.⁴⁹

39. Nevertheless, Article 8 may not be interpreted in isolation from the other provisions of the U.K.-Turkmenistan BIT, because the BIT must be read as a whole. The Claimant rests its argument that this ICSID Tribunal has jurisdiction to hear this arbitration squarely on the proposition that Turkmenistan has consented to ICSID Arbitration of disputes with investors of third states, specifically investors of Switzerland, France, Turkey, and India in Turkmenistan’s BITs with those states, and in the ECT, to which Turkmenistan is a party.⁵⁰ The Claimant argues that it is entitled “to import the more favourable dispute resolution provisions” of those treaties into the U.K.-Turkmenistan BIT by operation of the MFN clause in Article 3 of the BIT, because Turkmenistan’s consent to ICSID Arbitration with Swiss, French, Turkish, and Indian investors, and in the ECT, provides more favorable treatment to those investors and to claimants under the ECT than Article 8 provides to U.K. investors.⁵¹ We therefore turn to Article 3 of the BIT and whether it may be used for that purpose.

⁴⁸ Respondent’s Memorial, ¶4.

⁴⁹ The Respondent also notes that the Claimant sent a letter to ICSID, after the ICSID Secretariat raised questions about the request for arbitration and before the Secretariat had registered that request, in which the Claimant asked the Secretary General “to ask the Respondent Turkmenistan to confirm its consent to the arbitration proceedings to be held before ICSID.” Respondent’s Memorial, ¶29.

⁵⁰ Claimant’s Counter-Memorial, ¶¶61-63; Hearing Tr. 109.

⁵¹ Claimant’s Counter-Memorial, p. 13.

F. The Most Favored Nation Clause

1. MFN Clauses and Arbitration Provisions

40. This Tribunal is well aware that, in embarking on the consideration of whether the MFN clause of a BIT may be used to vary the terms of the investor-state arbitration article of the same BIT, we are venturing into a fiercely contested no-man's land in international law. The issues of textual interpretation, legal theory, and public policy that this question presents have been ably and exhaustively explored by more than twenty tribunals, and have been expounded in decisions and dissents authored by some of the most eminent authorities on international law and investment arbitration.⁵²

41. By this Tribunal's count, there is a fairly even split between the number of tribunals that have applied the MFN clause of a BIT to vary its dispute resolution provisions,⁵³ and the number that have declined to do so.⁵⁴ We recognize that decisions of other arbitral

⁵² Compare, e.g., *Renta 4 v. Russia*, Award on Preliminary Objections (by Majority) and Separate Opinion of Judge Charles N. Brower, with *Impregilo v. Argentina*, Award (by Majority) and Concurring and Dissenting Opinion of Professor Brigitte Stern.

⁵³ Tribunals applying an MFN clause for this purpose include those in: *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction of January 25, 2000 (hereinafter "*Maffezini v. Spain*") ¶¶54-64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of May 25, 2004 (hereinafter "*MTD Chile S.A. v. Chile*") ¶¶100-104; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004 (hereinafter "*Siemens v. Argentina*") ¶¶102-105; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción of June 10, 2005 (hereinafter "*Camuzzi v. Argentina*") ¶¶16-17; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005 (hereinafter "*Gas Natural v. Argentina*") ¶¶29-31; *Suez and Interagua v. Argentina* ¶¶52-66; *National Grid v. Argentina* ¶¶79-94; *Suez and Vivendi v. Argentina* ¶¶52-68; *RosInvestCo U.K. Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of October 1, 2007 (hereinafter "*RosInvestCo v. Russia*") ¶¶124-139; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award of June 21, 2011 (hereinafter "*Impregilo v. Argentina*") ¶¶79-108; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction of October 24, 2011 (hereinafter "*Hochtief v. Argentina*") ¶¶59-75; *Teinver v. Argentina* ¶¶59-186.

⁵⁴ Tribunals refusing to apply an MFN clause for this purpose include those in: *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003 (hereinafter "*Tecmed v. Mexico*") ¶¶69-74; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 9, 2004 (hereinafter "*Salini v. Jordan*") ¶¶103-119; *Plama v. Bulgaria* ¶¶183-227; *Berschader v. Russia* ¶¶159-206; *Telenor v. Hungary* ¶¶90-101; *Wintershall v. Argentina* ¶¶160-167; *Renta 4 v. Russia* ¶¶77-119; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of June 19, 2009 ¶¶199-216;

(Footnote continued on next page)

tribunals, interpreting other BITs, have no binding authority on this Tribunal. But we have found the analysis in many of these awards helpful in framing the question before us, and indeed both parties have relied on these decisions in making their arguments. And the fact that so many arbitrators with such a collective wealth of experience in international law and investment arbitration have been unable to reach a consensus on the subject certainly counsels caution in approaching it.⁵⁵

42. Fortunately, perhaps, the present case does not require this Tribunal to take a position on the policy issues implicated in deciding whether an MFN clause *ought to be* applied to the investor-state arbitration article of a BIT. As Dolzer and Schreuer have observed, “much will depend on the wording of the particular MFN clause.”⁵⁶ In the BIT before us, we find the answer to whether the MFN clause (Article 3) should be applied to the investor-state arbitration article (Article 8) in the specific language of Article 3(3) of the U.K.-Turkmenistan BIT. That article reads:

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above **shall apply** to the provisions of Articles 1 to 11 of this Agreement.⁵⁷

Article 8 of the BIT, of course, is among “the provisions of Articles 1 to 11” to which Article 3(3) states that the MFN provisions of Articles 3(1) and 3(2) shall apply. As noted above (¶28), the use of the word “shall” makes that statement mandatory.

43. Both parties agree that Article 3(3) of the U.K.-Turkmenistan BIT has its origin in the 1991 U.K. Model BIT.⁵⁸ Both parties also agree that, of the more than twenty tribunals to

(Footnote continued from previous page)

Austrian Airlines v. Slovakia ¶¶92-140; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction of February 10, 2012 (hereinafter “*ICS v. Argentina*”) ¶¶274-313; *Daimler v. Argentina* ¶¶205-278.

⁵⁵ See *Renta 4 v. Russia* ¶94 (“What can be said with confidence is that a *jurisprudence constante* of general applicability is not yet firmly established.”).

⁵⁶ R. Dolzer and C. Schreuer, *Principles of International Investment Law*, p. 257 (Oxford 2008).

⁵⁷ U.K.-TURKMENISTAN BIT Art. 3(3) (emphasis added).

have considered the effect of an MFN clause on the investor-state arbitration article of a BIT, this Tribunal is the first to be called upon to interpret an MFN clause containing the language of Article 3(3).⁵⁹

44. The language of the U.K. Model BIT adopted in Article 3(3) of the U.K.-Turkmenistan BIT has not escaped previous attention, however. It has been held up for comparison by arbitrators faced with different wording in other BITs as an example of how State parties to a BIT *could* make it clear that the MFN clause applies to the investor-state arbitration provision, if they chose to do so. For example, the *Plama v. Bulgaria* tribunal stated:

Rather, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed. This is, for example, the case with the U.K. Model BIT, which provides in its Article 3(3):

For avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

Articles 8 and 9 of the U.K. Model BIT provide for dispute settlement. The drafters of the U.K. Model BIT rightly noted that there could be doubt and expressly neutralized that doubt.⁶⁰

45. Professor Stern, in her thorough exposition of “why, in principle, an MFN clause cannot import, in part or *in toto*, a dispute settlement mechanism from a third party BIT into the BIT which is the basic treaty applicable to the dispute,” explicitly carved out of her discussion treaties with the language found in Article 3(3) of the U.K. Model BIT:

Naturally, an important *caveat* has to be presented here. The interpretation of the MFN clause is only necessary when the intention of the parties concerning its applicability or inapplicability to the dispute

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⁵⁸ Claimant’s Counter-Memorial, p. 14; Respondent’s Reply, p. 30; Hearing Tr. 12, 16.

⁵⁹ Hearing Tr. 72; Claimant’s Counter-Memorial, ¶68.

⁶⁰ *Plama v. Bulgaria* ¶204; to the same effect see *Berschader v. Russia* ¶179. See also E. Gaillard, “Establishing Jurisdiction through a Most-Favored-Nation Clause,” *New York Law Journal*, July 2, 2005, p. 9, Exhibit CL-22 (“Equally, when the contracting parties have expressly included dispute settlement arrangements in the scope of an MFN clause, such intention must be given effect.”).

settlement mechanism is not expressly stated or clearly ascertained. It is quite evident that if there is an MFN clause expressly including the dispute settlement procedures or expressly excluding them, there is no need for an interpretation.

There are indeed cases where the parties expressly state that the MFN clause applies to the dispute settlement mechanism. This has been done, for example, by the drafters of the U.K. Model BIT, who have provided in Article 3(3) that “for avoidance of doubt” MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.⁶¹

46. The Respondent points out that neither the *Plama v. Bulgaria* tribunal, nor Professor Stern in the dissent discussed above, was called upon to consider the implications of the parties to a BIT having selected the alternative version of Article 8 of the U.K. Model BIT in preference to the preferred version of that article.⁶² The selection of the alternative version, rather than the preferred version, is indeed suggestive of a reluctance to agree in advance to ICSID Arbitration. But as we have already stated, we do not find the meaning of Article 8 of the U.K.-Turkmenistan BIT to be uncertain, and the choice of one version of Article 8 in preference to another does not appear to us to provide any sound basis for failing to apply Article 3(3).

2. Does an MFN Clause Create Rights?

47. The Respondent argues that rights which do not exist under the basic treaty cannot be created by operation of an MFN clause, but that MFN clauses are rather designed only to improve the implementation of rights already granted under the basic treaty through “the importation of more favourable conditions of exercise of such rights.”⁶³

48. The Claimant argues that the use of an MFN clause to establish the State’s consent to ICSID Arbitration is simply a particular example of using an MFN clause to import

⁶¹ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern ¶¶17-18.

⁶² Hearing Tr. 66-67, 163-164.

⁶³ Respondent’s Reply, ¶21.

into a treaty a right that the treaty does not otherwise provide.⁶⁴ The Claimant quotes Professor Schreuer to this effect:

The argument that the MFN clause is inapplicable in cases where the basic treaty limits or refrains from *granting consent*, since the parties' intention in that respect is clear, is not convincing. An MFN clause is not a rule of interpretation that comes into play only where the wording of the basic treaty leaves room for doubt. It is intended to endow its beneficiary with *rights that are additional to the rights contained in the basic treaty*. The meaning of an MFN clause is that whoever is entitled to rely on it be granted rights accruing from a third party treaty even if these rights clearly go beyond the basic treaty.⁶⁵

49. The majority of the Tribunal finds it unnecessary to try to resolve whether rights may be created by an MFN clause, although Professor Schreuer is persuasive and other tribunals have had no difficulty in extending rights via an MFN clause.⁶⁶ First, to the extent that access to international arbitration may be considered a “right” of a complaining investor, such access is already accorded to U.K. investors under Article 8(1) of the U.K.-Turkmenistan BIT, so there is no need to resort to the MFN clause to create it. Second, the MFN clause of the particular BIT before us frames the question in terms of “treatment,” not of “rights.” We are therefore concerned only with whether Turkmenistan has accorded to investors of third states, or their investments, treatment more favorable than it accords to U.K. investors or their investments.

3. General vs. Specific Language

50. The Respondent argues that the MFN clause of the U.K.-Turkmenistan BIT should not be applied to Article 8, because the “general” language of Article 3(3) to the effect that paragraphs (1) and (2) of Article 3 “shall apply to the provisions of Articles 1 to 11” should

⁶⁴ Claimant’s Counter-Memorial, ¶38.

⁶⁵ See C. Schreuer et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2nd ed., 2009, p. 248 (Exhibit C-19)(emphasis added); Claimant’s Counter-Memorial, ¶38.

⁶⁶ E.g. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of August 27, 2009 ¶¶ 157-160.

give way to the more “specific” language of Article 8 about the availability only of UNCITRAL Arbitration unless there is a case-specific agreement to a different form of arbitration.⁶⁷

51. That the MFN clause is broadly worded, while the dispute resolution clause is by comparison specific, does not appear to the majority of this Tribunal to bar the application of one to the other. It is in the nature of MFN clauses to be general, because such clauses are intended to apply to a variety of provisions of numerous treaties that may be more or less favorable to the person or entity protected by the MFN clause than the corresponding clause of the base treaty. Indeed, Article 3(3) states that the MFN clauses of the BIT are to be applied to eleven articles of that treaty, each of which might be compared with similar provisions in other BITs entered into by the U.K. or Turkmenistan, some of which did not exist at the time the U.K. –Turkmenistan BIT was entered into. As the UNCTAD paper on *Most-Favoured-Nation Treatment* observes, “[t]he treatment refers to all measures applying specifically to foreign investors (investment-specific measures) or to measures of general application that regulate the economic and business activity of the investor and his investment throughout the duration of the investment.”⁶⁸ In the words of the *Siemens v. Argentina* tribunal, “In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted.”⁶⁹

4. *Effet Utile*

52. Nor is the majority of the Tribunal convinced by the Respondent’s argument that application of the MFN clause to the dispute resolution provision of the BIT would deprive the

⁶⁷ Respondent’s Reply, ¶¶ 30-31.

⁶⁸ UNCTAD, MOST-FAVORED-NATION TREATMENT (UNCTAD Series on Issues in International Investment Agreements II 2010) (“UNCTAD MFN Paper”), p. 16.

⁶⁹ *Siemens v. Argentina* ¶106. See *RosInvestCo v. Russia* ¶131 (“While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.”).

latter of *effet utile*.⁷⁰ This would occur, the Respondent argues, because, when the U.K.-Turkmenistan BIT was signed in 1995, the U.K. was already a party to other treaties that provided for ICSID Arbitration. If the MFN clause can be used as the Claimant seeks to use it, the Respondent argues, Article 8(2) would have been a nullity from inception, because the MFN clause could always have displaced its provisions in favor of a clause from a treaty providing for ICSID Arbitration.⁷¹

53. The Claimant responds that no *Turkmenistan* BIT had entered into force in 1995 other than the China-Turkmenistan BIT, which did not provide for ICSID Arbitration.⁷² The China BIT was Turkmenistan's first to enter into force, and the U.K. BIT was Turkmenistan's second, according to UNCTAD's list of BITs to which Turkmenistan is a party.⁷³ There was thus no more favorable Turkmenistan treaty in force at the time the U.K.-Turkmenistan BIT became effective. The Respondent argues that some U.K. treaties that provided for ICSID Arbitration *did* precede the U.K.-Turkmenistan BIT: The U.K.-Barbados BIT entered into effect in 1993, the U.K.-Peru BIT in 1994, the U.K.-Belarus BIT in 1994.⁷⁴ The existence of those treaties may have made the effect of Article 3(3) on the United Kingdom uncertain, but it had no effect on the impact of that article on Turkmenistan. The Claimant also points out that, in any event, an investor always has the right to avail itself of Article 8(2) if it is content with UNCITRAL Arbitration.⁷⁵

54. In this connection, it seems significant to the majority of the Tribunal that it is in the nature of an MFN clause to be used to displace a treaty provision deemed less favorable in

⁷⁰ Hearing Tr. 30-31.

⁷¹ Hearing Tr. 30-33.

⁷² Hearing Tr. 144-145.

⁷³ Exhibit CL-44 (UNCTAD list of Turkmenistan BITs).

⁷⁴ Hearing Tr. 165-166.

⁷⁵ Hearing Tr. 146.

favor of another clause, from another treaty, deemed more favorable. The MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty. Certainly, the principle of *ejusdem generis* restricts the application of an MFN clause to the displacement of clauses dealing with the same subject matter in other treaties of the same nature.⁷⁶ But that principle is not offended by the use of an MFN clause to displace a provision from the dispute resolution article of one bilateral investment treaty with a corresponding provision from the dispute resolution article of another bilateral investment treaty signed by the same State.

5. Contemporaneity

55. The Respondent argues that the principle of “contemporaneity” prevents application of the MFN clause to the dispute resolution provisions of the BIT.⁷⁷ That principle, the Respondent argues, requires the Tribunal to look at the situation of the State parties at the time the U.K.-Turkmenistan BIT was executed, in 1995, and to determine whether the State parties could have contemplated “even the possibility of importing consent via an MFN clause from another treaty.”⁷⁸ Prior to the *Maffezini v. Spain* decision in 2000, the Respondent argues, such an idea was “utterly unheard of.”⁷⁹

56. The Claimant responds that, where the words of a treaty are not ambiguous, there is no occasion under the Vienna Convention to look beyond the terms of the treaty to discern the intentions of the parties. To the extent that contemporaneity is relevant, the Claimant adds, the Bahrain-Turkmenistan BIT, signed in 2011, contains an MFN clause that applies broadly to the

⁷⁶ See *Draft Articles on Most-Favoured-Nation Clauses, with Commentaries*, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, p. 30, ¶¶10-11 (hereinafter “*ILC Draft Articles on MFN Clauses*”).

⁷⁷ Hearing Tr. 50.

⁷⁸ Hearing Tr. 51.

⁷⁹ *Id.* Of course, under this line of reasoning, the *Maffezini v. Spain* case could not have been decided as it was, because no previous decision under a BIT had applied an MFN clause to the investor-state arbitration article.

dispute resolution provision,⁸⁰ so there is no reason to believe that *Maffezini v. Spain* and the intervening decisions following *Maffezini v. Spain* had any effect on Turkmenistan's treaty practice.⁸¹

57. The majority of the Tribunal concludes that the principle of contemporaneity does not bar the application of Article 3 to Article 8. The best indication of the intentions of the State parties to the U.K.-Turkmenistan BIT is the text of the treaty they signed. Article 3(3) provides unequivocally that Article 3 "shall apply" to Article 8. Whatever the authors of the text may have foreseen, their intentions, as expressed in the text of the treaty, seem to this Tribunal to be clear.⁸²

6. Interpretation of Article 3(3)

58. The wording of Article 3(3) indisputably presents some interpretive difficulties. For example, Article 7 of the U.K.-Turkmenistan BIT, headed "Exceptions," carves out of the MFN treatment provided by the BIT the benefits that may be provided by any existing or future customs union or taxation treaty or legislation.⁸³ Yet Article 7 is one of the articles included in "Articles 1 to 11," to which the MFN clause is made applicable by Article 3(3). It would be challenging to apply a guarantee of most favored nation treatment to an article enumerating the exceptions to most favored nation treatment, but fortunately this Tribunal is not called upon to do so. While recognizing the difficulty of applying Article 3 to all of the first eleven articles of the BIT, we are confronted in this case only with how to apply it to Article 8.

59. Article 3(3) of the U.K.-Turkmenistan BIT states that the treatment provided for in Articles 3(1) and 3(2) *shall apply* to a range of articles that includes Article 8. The treatment

⁸⁰ The Bahrain BIT (Exhibit CL-43) provides that "Unless specifically excepted, [MFN] treatment provided for in Article 3.1 and 3.2 herein shall apply to the whole of this Agreement."

⁸¹ Hearing Tr. 150-152.

⁸² See *Renta 4 v. Russia* ¶118 ("The Treaty must be taken as it is written.").

⁸³ See Hearing Tr. 208-210.

provided for in Articles 3(1) and 3(2) includes most favored nation treatment. As noted above (¶ 28), the words “shall apply” appear to the majority of this Tribunal to be intended to *require* the application of the one to the other, not merely to permit it. These terms of the BIT, like all terms of a treaty, are to be given effect.

60. The Dissenting Opinion reads into the U.K.-Turkmenistan BIT two conditions that neither side has advanced and that the majority of the Tribunal is unable to find in the text of the treaty. First, the Dissenting Opinion would require Articles 3 and 8 of the BIT to be applied in a particular sequence. As the Dissenting Opinion sees it, “to give effect to the MFN clause contained in Article 3(3), the foreign investor must first be in a *dispute settlement relationship* with the host state.”⁸⁴ Under this reasoning, an investor’s right to MFN treatment under Article 3 does not come into being until the investor has commenced an arbitration proceeding under Article 8. It necessarily follows, if that is the case, that an investor cannot commence an ICSID Arbitration or an ICC Arbitration unless the state has specifically agreed to do so. The second condition that the Dissenting Opinion reads into the BIT follows logically from the first: “[i]n that sense, the application of Article 3(3) of the U.K.-Turkmenistan BIT is *subordinated* or *conditioned* to the prior application of Article 8(2) [...]”⁸⁵

61. The majority of the Tribunal finds no basis in the U.K.-Turkmenistan BIT for conditioning the rights enjoyed by an investor under the BIT on the temporal sequence in which the investor asserts those rights. A U.K. investor with an investment in Turkmenistan enjoys rights under the BIT simply by virtue of having made that investment.⁸⁶ No action on the investor’s part other than the making of the investment is required to vest the investor with those rights. And the protection of the MFN clause applies to such an investor from the moment that

⁸⁴ Dissenting Opinion ¶40 (emphasis in original).

⁸⁵ *Id.* ¶41.

the host State accords more favorable treatment to an investor from a third state. As the International Law Commission puts it:

The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause * * * arises at the moment when the relevant treatment is extended by the granting State to a third state or to persons or things in the same relationship with that third State.⁸⁷

Dolzer and Schreuer explain:

“The [MFN] clause may not have any practical significance if the state concerned fails to grant any relevant benefit to a third party. However, *as soon as* the state does confer a relevant benefit, it is automatically extended to the state that benefits from the MFN clause.”⁸⁸

62. The protection of the U.K.-Turkmenistan BIT includes the access to international arbitration to which the sovereign parties consented in Article 8(1), and also the right to treatment no less favorable than that accorded to nationals of third countries provided by Article 3. Nothing in the text of the treaty requires an investor to commence an arbitration before claiming its rights under the MFN clause, or subordinates the MFN clause to the investor-state arbitration provision. To the contrary, the BIT provides that the MFN clause “shall apply” to the investor-state arbitration article. The majority of the Tribunal therefore concludes that nothing in the BIT prevents an investor from simultaneously invoking the right to international arbitration provided by the BIT and invoking the MFN clause to obtain the benefit of a more favorable arbitration process provided by another treaty to nationals or companies of a third country.

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⁸⁶ Indeed, the BIT provides that “the term ‘investment’ includes all investments, whether made before or after the date of entry into force of this Agreement.” U.K.-TURKMENISTAN BIT Art. 1(a).

⁸⁷ *ILC Draft Articles on MFN Clauses*, Article 20(1) (2005). The Switzerland-Turkmenistan BIT entered into force in April 2009.

⁸⁸ R. Dolzer and C. Schreuer, *Principles of International Investment Law*, p. 186 (Oxford 2008) (emphasis added).

63. All of the words of a treaty are to be interpreted together, in good faith and in the context of the object and purpose of the treaty.⁸⁹ The object and purpose of the U.K.-Turkmenistan BIT, as expressed in its preamble, is “to create favourable conditions for greater investment.”⁹⁰ Assuring a prospective investor that neither he nor his investment will be subjected to treatment less favorable than the treatment accorded to investors from third countries and their investments, insofar as the process available to resolve any disputes with the host country that may arise under the BIT is concerned, certainly seems to create a favorable condition for investment by the investor so protected. The *RosInvestCo v. Russia* tribunal explained that “the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his ‘use’ and ‘enjoyment,’ procedural options of obvious and great significance.”⁹¹ As the *Hochtief v. Argentina* tribunal observed, “the right to enforcement is an essential component of [the] property rights.”⁹²

64. The majority of this Tribunal is therefore satisfied that the ordinary meaning of the words of Article 3(3) of the U.K.-Turkmenistan BIT, read in light of the object and purpose of the BIT, requires that the MFN clause be applied to Article 8, the investor-state arbitration provision. We turn next to what consequences follow from so applying those terms, or, as the Respondent phrases it, “how Article 8 and Article 3 work together.”⁹³

⁸⁹ See VIENNA CONVENTION, Art. 31.1.

⁹⁰ U.K.-TURKMENISTAN BIT, Preamble.

⁹¹ *RosInvestCo v. Russia* ¶130 (emphasis in original). The *RosInvestCo* case was brought under the rules of the Stockholm Chamber.

⁹² *Hochtief v. Argentina* ¶67.

⁹³ Hearing Tr. 158.

G. Application of the MFN Clause to the Arbitration Article

65. Article 3 of the U.K.-Turkmenistan BIT contains two most-favored-nation protections, one applicable to nationals or companies of the other contracting party, and one applicable to the investments of such nationals or companies:

- **Article 3(1)** of the BIT contains Turkmenistan’s undertaking not to “subject investments or returns of nationals or companies of the [U.K.] to treatment less favourable than that which it accords * * * to investments or returns of nationals or companies of any third state;” and
- **Article 3(2)** of the BIT contains Turkmenistan’s undertaking not to “subject nationals or companies of the [U.K.], as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords * * * to nationals or companies of any third state.”

66. The Claimant invokes the protection of both Article 3(1) and Article 3(2).⁹⁴ While the Claimant asks the Tribunal to apply those MFN clauses to give it the benefit of the dispute resolution clauses of Turkmenistan’s BITs with Switzerland, France, Turkey, and India, and the ECT, the Claimant focuses on the Switzerland-Turkmenistan BIT.⁹⁵ Following the Claimant’s example, the Tribunal will therefore focus on the Switzerland-Turkmenistan BIT as containing the provisions that the Claimant deems more favorable.⁹⁶ Our resolution of the issue

⁹⁴ Hearing Tr. 107.

⁹⁵ See Claimant’s Counter-Memorial, ¶59. The Switzerland, France, and Turkey BITs with Turkmenistan all condition the offer of ICSID Arbitration on the contracting parties to the BIT being parties to the ICSID Convention, but all of the States concerned are now parties to that Convention.

⁹⁶ The dispute resolution provisions of Turkmenistan’s BITs with Switzerland, France, and Turkey, insofar as the Claimant seeks to rely upon them, are substantially identical. *Compare* Accord entre le Conseil federal suisse et le Gouvernement du Turkménistan concernant la promotion et la protection réciproque des investissements (the “Switzerland-Turkmenistan BIT”) (date of entry into force: April 2, 2009), Exhibit CL-24; Accord entre le Gouvernement de la République Française et le Gouvernement du Turkmenistan sur l’encouragement et la protection réciproque des investissements (entry into force: May 2, 1996), Exhibit CL-28; Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments (Footnote continued on next page)

before us on the basis of the provisions of the Switzerland-Turkmenistan BIT makes examination of the other treaties relied upon by the Claimant unnecessary.

67. The discussion in the preceding section of this Decision explains the conclusion of the majority of the Tribunal that Article 3(3) of the U.K.-Turkmenistan BIT *requires* the Tribunal to apply Articles 3(1) and 3(2) of the BIT to Article 8. Two questions nevertheless remain:

- First, is there something different about the selection of a particular system of arbitration and the rules that accompany it, as opposed to the interposition of a condition, such as a waiting period, that permits the application of an MFN clause to the latter, but not to the former?
- And, second, do the provisions of Article 8 of the BIT provide “less favourable” treatment to U.K. investors (as regards their management, maintenance, use, enjoyment or disposal of their investments), or to their investments, than the corresponding articles of the Switzerland-Turkmenistan BIT provide to Swiss investors, or their investments?

1. May Consent to ICSID Arbitration Be Provided Via an MFN Clause?

68. The provision of the Switzerland-Turkmenistan BIT on which the Claimant relies is Article 8 of that treaty, which provides:

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned.
2. If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute for settlement to:

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(entry into force: March 13, 1997), Exhibit CL-25. Turkmenistan’s BIT with India and the ECT contain more complex provisions.

- (a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965; or
 - b) an ad hoc-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
3. Each Contracting Party hereby consents to the submission of an investment dispute to conciliation or international arbitration.⁹⁷

69. Specifically, the Claimant seeks to apply the MFN provisions of Articles 3(1) and 3(2) of the U.K.-Turkmenistan BIT to give it the benefit of what it considers to be the more favorable treatment accorded by Turkmenistan to Swiss investors in Article 8(2) of the Switzerland-Turkmenistan BIT, insofar as a Swiss investor may choose to submit a dispute that cannot be resolved within six months of consultations with Turkmenistan either to ICSID Arbitration or to UNCITRAL Arbitration. As the Dissenting Opinion puts it, “because of the MFN provision contained in Article 3 of the U.K.-Turkmenistan BIT and its application to dispute settlement issues, a foreign investor of British nationality can invoke more favourable dispute settlement provisions embodied in other BITs concluded by Turkmenistan.”⁹⁸

⁹⁷ Claimant’s Counter-Memorial, ¶59; Exhibit CL-24 (Unofficial translation). The French original of Article 8 reads: “(1) Afin de trouver une solution aux différends relatifs à des investissements entre une Partie Contractante et un investisseur de l’autre Partie Contractante, des consultations auront lieu entre les parties concernées. (2) Si ces consultations n’apportent pas de solution dans les six mois à compter de la demande de les engager, l’investisseur pourra soumettre le différend pour règlement: (a) au Centre international pour le règlement des différends relatifs aux investissements (CIRDI), institué par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d’autres Etats ouverte à la signature à Washington le 18 mars 1965, ou (b) à un tribunal arbitral ad hoc qui, à moins que les parties au différend n’en disposent autrement, sera constitué conformément au règlement d’arbitrage de la Commission des Nations Unies pour le droit commercial international(CNUDCI). (3) Chaque Partie Contractante donne son consentement à la soumission à la conciliation ou à l’arbitrage internationaux de tout différend relatif à un investissement”).

⁹⁸ Dissenting Opinion ¶38.

70. The Respondent argues that, while an MFN clause may possibly be used to overcome a qualifying condition, such as a waiting period, in the dispute resolution clause of a BIT, as was the case in *Maffezini v. Spain*, it may not be used to “import” the State’s “consent to a different arbitration system” from one treaty into another.⁹⁹ The Respondent cites statements from both *Maffezini v. Spain* and *Plama v. Bulgaria* to this effect:

[I]f the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the [MFN] clause in order to refer the dispute to a different system of arbitration . . . because these very specific provisions reflect the precise will of the contracting parties.¹⁰⁰

It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, . . . their agreement to most favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.¹⁰¹

71. Indeed, the Respondent argues that, because no investor has previously tried to use an MFN clause for that purpose, this Tribunal would be the first tribunal to do so if we were to agree with the Claimant.¹⁰²

72. The Claimant takes issue with the proposition that no tribunal has ever used an MFN clause to import consent to ICSID Arbitration from one instrument to another by pointing out that this is effectively what the tribunal did in *C.S.O.B. v. Slovakia*.¹⁰³ In that case, The Czech and Slovak Republics, prior to their separation, had signed a BIT that gave an investor of

⁹⁹ Respondent’s Memorial, ¶57; Hearing Tr. 58.

¹⁰⁰ *Maffezini v. Spain* ¶63.

¹⁰¹ *Plama v. Bulgaria* ¶209.

¹⁰² Hearing Tr. 59-61.

¹⁰³ *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999 (hereinafter “*C.S.O.B. v. Slovakia*”).

one State the right to elect ICSID Arbitration of a dispute with the other State, but the Slovak Republic argued that the BIT had never entered into force as between the State parties.¹⁰⁴ The tribunal found that “the uncertainties relating to the entry into force of the BIT prevent that instrument from providing a sound basis upon which to found the parties’ consent to ICSID jurisdiction.”¹⁰⁵ However, the parties to the *C.S.O.B. v. Slovakia* arbitration had signed a “Consolidation Agreement” which made reference to the BIT, and the tribunal found that:

In the absence of a separate dispute resolution provision, the reference to the BIT satisfies the requirement that international arbitration, as specified in its Article 8, is the agreed dispute resolution mechanism.¹⁰⁶

73. While the facts of *C.S.O.B. v. Slovakia* are unique, the majority of this Tribunal is inclined to agree with the Claimant that importation of a provision for ICSID Arbitration from one treaty to another by operation of the MFN clause of a treaty should not be considered conceptually more difficult than the incorporation by reference into a contract of a provision for ICSID Arbitration from a treaty that has not entered into force. In either case, the consent to ICSID Arbitration is written in one instrument and imported into another by virtue of a provision in the latter instrument to which the State has agreed. The State has expressed its consent to ICSID Arbitration, in writing, in one instrument, and has agreed in a second instrument to look, under certain conditions, to the terms of the first instrument. Whether looking to the terms of the first instrument is accomplished by means of an incorporation by reference or an MFN clause does not appear to be a material distinction.

74. The Dissenting Opinion finds *C.S.O.B. v. Slovakia* inapposite, because the agreement containing the reference to the draft BIT in *C.S.O.B. v. Slovakia* was signed by both parties to the arbitration, thus supplying a separate agreement to ICSID arbitration (by virtue of

¹⁰⁴ *C.S.O.B. v. Slovakia* ¶4.

¹⁰⁵ *Id.* ¶43.

¹⁰⁶ *Id.* ¶54.

the incorporation by reference) between the host state and the claimant. We would agree with this distinction, if the purpose of looking to the Switzerland-Turkmenistan BIT was to supply the missing case-specific consent to submit this particular dispute to ICSID Arbitration required by Article 8(2) of the U.K.-Turkmenistan BIT. But the MFN provision of the U.K.-Turkmenistan BIT effectively replaces Article 8(2) of the U.K.-Turkmenistan BIT with Article 8(2) of the Switzerland-Turkmenistan BIT, which requires no such case-specific consent. In the U.K. BIT, the sovereign parties agreed that their respective investors would have the benefits of more favorable provisions of other provisions in other treaties, and specified in Article 3(3) that the investor-state provisions of the BIT were included within the ambit of this protection. Once the requirements of Article 8(2) of the U.K. BIT are displaced by those of Article 8(2) of the Switzerland BIT, it is sufficient that the investor have complied with the requirements of that provision of the Switzerland BIT.

75. In any event, the essential consent of the State -- the consent to resolve disputes with U.K. investors by means of international arbitration -- does not in this case need to be imported by operation of the MFN clause, because that consent is contained in Article 8(1) of the BIT. The consent of Switzerland and Turkmenistan to submit disputes between each of them and investors of the other to international arbitration is similarly contained in a separate paragraph of the Switzerland-Turkmenistan BIT, Article 8(3) of that treaty. There is no need for the Claimant to seek to import that consent into the U.K.-Turkmenistan BIT, because Article 8(1) of the U.K. BIT already achieves the same result.

76. The only provision of the Switzerland-Turkmenistan BIT to which the Claimant needs the MFN clause to apply is the provision of Article 8(2) of the Switzerland BIT that provides a Swiss investor a choice between ICSID Arbitration and UNCITRAL Arbitration, which the Claimant argues to be more favorable than the corresponding provision of Article 8(2)

of the U.K.-Turkmenistan BIT, which restricts a U.K. investor to UNCITRAL Arbitration. Such an application to Article 8(2) is consistent with the International Law Commission’s observation that the beneficiary of an MFN clause not only has “an ‘either/or’ choice, but might also be in a position to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned.”¹⁰⁷

77. The Respondent argues that Article 8(2) requires a specific agreement between the Claimant and Turkmenistan to submit a dispute to ICSID Arbitration. Article 3, the Respondent argues, is an agreement between Turkmenistan and the United Kingdom, and cannot satisfy the requirement of an agreement between the Claimant and Turkmenistan.¹⁰⁸ But, as noted above, the effect of the MFN clause is not *to satisfy* the requirements of Article 8(2), but *to replace* those requirements with a more favorable provision from another treaty, in this case Article 8(2) of the Switzerland-Turkmenistan BIT, which does not require a separate agreement between the Claimant and Turkmenistan in order to commence an ICSID Arbitration. We adopt the observation of the *Renta 4 v. Russia* tribunal that:

It is not convincing for a State to argue in general terms that it accepted a particular “system of arbitration” with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses.¹⁰⁹

78. The Dissenting Opinion asserts that “[i]t would involve a forum shopping attitude,” “running against the fundamental principles of international adjudication,” to bypass the consent requirement.¹¹⁰ But the consent requirement is not bypassed by this interpretation: Turkmenistan consented to international arbitration in Article 8(1) of the U.K.-Turkmenistan BIT, and the State Parties to the BIT opened the door to a search by a U.K. investor for more

¹⁰⁷ *ILC Draft Articles on MFN Clauses*, Article 19, Comment 9 (2005).

¹⁰⁸ Hearing Tr. 159-161.

¹⁰⁹ *Renta 4 v. Russia* ¶92.

¹¹⁰ Dissenting Opinion ¶63.

favorable terms in treaties entered into by Turkmenistan with other states by choosing to make the MFN clause of the BIT applicable to the investor-state arbitration provisions. It is the State Parties to the BIT, not the present Tribunal, that decided that the MFN clause should apply to the investor-state arbitration article. As Professor Schreuer explains in the passage quoted above (paragraph 48), the rights provided by MFN clauses are *additional to* the rights provided in the basic BIT.¹¹¹

79. The majority of the Tribunal concludes that, where Turkmenistan: (a) has expressly consented in the basic U.K.-Turkmenistan BIT to submit investment disputes with U.K. investors to international arbitration, (b) has provided in the same BIT that U.K. investors and their investments will not be subjected to treatment less favorable than that accorded to investors of other States or their investments, (c) has expressly provided that the MFN treatment so accorded “shall apply” to the dispute resolution provision of the BIT, and (d) has provided investors of third States, specifically Switzerland, with an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration, there is no reason why Turkmenistan’s consent to ICSID Arbitration in its BIT with Switzerland may not be relied upon by a U.K. investor, *if* the provision for ICSID Arbitration or an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration provides treatment more favorable to the investor than the treatment provided by the base treaty.

2. Does the U.K.-Turkmenistan BIT Provide Less Favorable Treatment than the Switzerland-Turkmenistan BIT?

80. We turn next to whether the treatment accorded by Turkmenistan to Swiss investors and their investments is more favorable than the treatment accorded to U.K. investors and their investments by the U.K.-Turkmenistan BIT insofar as the type of arbitration made

¹¹¹ C. Schreuer et al., *The ICSID Convention – A Commentary*, p. 248.

available is concerned. The Claimant describes “whether the treatment [the Claimant] seek[s] to incorporate is more favorable than the treatment in the basic treaty” as “the only legitimate question” that this Tribunal has to answer.¹¹²

81. The dispute resolution provisions of the U.K.-Turkmenistan BIT differ in two principal respects from those of the BIT between Turkmenistan and Switzerland:

- The U.K.-Turkmenistan BIT requires a waiting period of four months, while the Switzerland-Turkmenistan BIT requires a waiting period of six months.
- The U.K.-Turkmenistan BIT permits an investor making a claim to commence an arbitration only under the UNCITRAL Rules, unless Turkmenistan agrees on a case-by-case basis to ICSID or ICC arbitration, while the Switzerland BIT provides an investor a free choice between ICSID Arbitration and UNCITRAL Arbitration.

82. Neither party has argued that the difference between the four-month waiting period under the U.K.-Turkmenistan BIT and the six-month waiting period under the Switzerland-Turkmenistan BIT has any significance. In any event, more than six months elapsed between the Claimant’s Notification of its claim to Turkmenistan on June 25, 2010 and the filing of its Request for Arbitration on May 19, 2011, so the Claimant has satisfied the waiting requirement under either treaty.

83. The Claimant argues that Article 8 of the Switzerland-Turkmenistan BIT contains “more favourable dispute resolution provisions than that found in” the U.K.-Turkmenistan BIT,¹¹³ for two reasons:

- (a) a treaty that provides the State’s consent to ICSID Arbitration is more favorable to an investor than one that does not;¹¹⁴

¹¹² Hearing Tr. 111.

¹¹³ Claimant’s Counter-Memorial, ¶58.

(b) and, in any event, a treaty that provides an investor the choice between ICSID Arbitration and UNCITRAL Arbitration is more favorable to an investor than one that provides no choice.¹¹⁵

84. The Respondent argues that, to prevail, the Claimant must establish that ICSID Arbitration is objectively more favorable than UNCITRAL Arbitration, not merely that the Claimant prefers it.¹¹⁶ The Respondent also argues that no arbitral tribunal has ever reached the conclusion urged by the Claimant.¹¹⁷

85. The Claimant disputes that there is any basis in international law for the “objective” standard advocated by the Respondent.¹¹⁸ Rather, the Claimant argues that the Tribunal should defer to the Claimant’s view that ICSID Arbitration is more favorable than UNCITRAL Arbitration, because “we know what is best for us, especially if the tribunal thinks that objectively it may be more difficult to assess whether one treatment is more favorable than another.”¹¹⁹

86. Even if the Tribunal adopts an “objective” standard, the Claimant argues, it should find that ICSID Arbitration is more favorable to investors than UNCITRAL Arbitration, because (a) ICSID Arbitration is institutional arbitration, (b) ICSID is specialized in investor-State disputes, (c) ICSID Arbitration is insulated from interference by courts at the seat of the arbitration, (d) a decision in favor of jurisdiction may not be challenged until after the final

(Footnote continued from previous page)

¹¹⁴ *Id.* ¶95.

¹¹⁵ *Id.* ¶96.

¹¹⁶ The Respondent relies on the UNCTAD MFN Paper and *Daimler v. Argentina* for the proposition that the determination of whether one treaty provision is more or less favorable than another must derive “from an objective appreciation of the text of the treaty,” and not “from the subjective perceptions of individual claimants.” Hearing Tr. 70-71, quoting *Daimler v. Argentina* ¶¶245-246. See Respondent’s Memorial, ¶65; Respondent’s Reply, ¶¶74-75.

¹¹⁷ Hearing Tr. 72.

¹¹⁸ Hearing Tr. 112-113.

¹¹⁹ Hearing Tr. 111-112.

award, (e) local courts are not involved in enforcement or review of ICSID awards, and (f) there is no uncertainty about the seat of arbitration, as there is in UNCITRAL Arbitration.¹²⁰

87. The Respondent, in arguing that ICSID Arbitration is not objectively more favorable than UNCITRAL Arbitration, points to the risk of annulment of awards in ICSID Arbitration and to the availability of the New York Convention to enforce UNCITRAL awards.¹²¹ Principally, however, the Respondent relies on studies by commentators who have reviewed the features of each system and have concluded that neither system is inherently better than the other.¹²²

88. The UNCTAD MFN Paper defines the appropriate standard for applying an MFN clause differently from the formulation put forward by either party, but in terms that this Tribunal finds pertinent. “The MFN Treatment provision,” the UNCTAD MFN Paper states, “is a relative standard, which means that it implies a comparative test.” MFN treatment, that paper continues, “requires a comparison as well as the finding of more favourable treatment granted to investors of a given nationality as opposed to the investors covered by the basic treaty.” But a finding of an alleged breach “calls not only for the finding of an objective difference in treatment

¹²⁰ Hearing Tr. 115-116.

¹²¹ Respondent’s Reply, ¶¶76-81; Hearing Tr. 73. The Respondent informed the Tribunal that, of five currently pending cases against Turkmenistan brought under BITs that provide the claimant with a choice between ICSID Arbitration and UNCITRAL Arbitration, three were brought at ICSID and two under the UNCITRAL Rules. Hearing Tr. 169. These figures would appear to weigh against describing either system as inherently and objectively more favorable to an investor than the other.

¹²² Respondent’s Reply, ¶¶82-84; Hearing Tr. 74; See Freya Baetens, *Enforcement of Arbitral Awards: “To ICSID or Not to ICSID” Is Not the Question*, in I.A. Laird, T.J. Weiler, eds., *Investment Treaty Arbitration and International Law*, Vol. 5, (Juris 2012) (), p. 212; Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg, ed., *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Vol. 14* (Kluwer Law International 2009) (“Verhoosel, *Annulment and Enforcement Review of Treaty Awards*”); Stephen Jagusch and Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern in THE BACKLASH AGAINST INVESTMENT ARBITRATION* (Michael Waibel, Asha Kaushal, et al., eds., 2010, p. 109 (“These systems are similar on many levels, but they also diverge in certain fundamental areas. Neither system is perfect, particularly in relation to transparency and the review of awards.”), p. 314 (“Jagusch & Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration*”); Respondent’s Reply, ¶¶78-84.

between two foreign investors, but also for a competitive disadvantage directly stemming from this difference in the treatment.”¹²³

89. The Tribunal finds itself in agreement with the Respondent that ICSID Arbitration cannot be described as objectively more favorable to investors than UNCITRAL Arbitration. Each system has its advantages and disadvantages, as the comparisons made by both parties illustrate. ICSID does indeed offer the advantages of administration by experienced professionals on behalf of a specialized institution. It also offers the considerable advantage of freedom from interference by courts at the seat of the arbitration, the perils of which are illustrated by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *The Republic of Argentina v. BG Group plc.*¹²⁴ But at least one learned commentator has applauded the role of national courts “in annulment proceedings where indeed they have come to provide, with few exceptions, a guarantee of stability and legal certainty not always found in some recent decisions of ICSID annulment committees.”¹²⁵ ICSID Arbitration has also been criticized for the overuse by unsuccessful parties of the annulment procedure provided by Chapter VII of the ICSID Rules,¹²⁶ and some parties favor the greater flexibility offered by the UNCITRAL Rules.

90. Acknowledging the difficulty of establishing that ICSID Arbitration is objectively more favorable to an investor than UNCITRAL Arbitration for all purposes, the Claimant’s

¹²³ UNCTAD MFN Paper, pp. 23-24.

¹²⁴ 665 F.3d 1363 (D.C. Cir. 2012). The United States Supreme Court granted BG Group’s petition for a writ of certiorari to review that decision on June 10, 2013. 2013 WL 2459615 (Mem).

¹²⁵ Francisco Orrego Vicuña, “Reports of [Maffezini’s] demise have been greatly exaggerated,” *Journal of International Dispute Settlement* Vol. 3, No. 2, p. 308 (2012).

¹²⁶ See Jagusch & Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration*; Verhoosel, *Annulment and Enforcement Review of Treaty Awards*.

principal argument is that it is more favorable to have a choice between the two than not to have a choice.¹²⁷ This argument finds support in the decisions of other tribunals.

91. In *Impregilo v. Argentina*, for example, the tribunal concluded, in the context of a choice between resorting to domestic courts and international arbitration, that “a system that gives a choice is more favorable to the investor than a system that gives no choice.”¹²⁸ The *Hochtief v. Argentina* tribunal agreed: “whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice.”¹²⁹ Similarly, the tribunal in *Renta 4 v. Russia*, while ultimately declining to apply the MFN clause of the particular BIT before it to the arbitration clause, because of the specific language of that treaty, stated that, “[h]aving options may be thought to be more ‘favoured’ for MFN purposes than not having them.”¹³⁰ And in the specific context of a choice between ICSID Arbitration and *ad hoc* arbitration (such as UNCITRAL Arbitration), the *Plama v. Bulgaria* tribunal stated that, “[t]he Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice.”¹³¹

92. The Respondent characterizes the “choice” argument as bootstrapping, reasoning that if one system is not objectively more favorable than the other, having a choice between the systems cannot be more favorable than accepting the system selected in the base treaty.¹³² As noted above, the Tribunal agrees that neither ICSID Arbitration nor UNCITRAL Arbitration may

¹²⁷ Hearing Tr. 113.

¹²⁸ *Impregilo v. Argentina* ¶101.

¹²⁹ *Hochtief v. Argentina* ¶100.

¹³⁰ *Renta 4 v. Russia* ¶92.

¹³¹ *Plama v. Bulgaria* ¶208.

¹³² Hearing Tr. 79.

be described as objectively more favorable than the other. At the same time, however, those two systems of arbitration are indisputably different from each other.¹³³

93. Article 3(2) of the U.K.-Turkmenistan BIT contains Turkmenistan's undertaking not to subject U.K. companies, as regards their management, use, enjoyment, and disposal of their investments in the territory of Turkmenistan, "to treatment less favourable" than it accords to companies of any third state. Article 3(3) of the BIT explicitly makes that undertaking applicable to the dispute resolution provisions of the BIT set forth in Article 8.

94. Where BIT "A" provides an investor with the option of selecting, as between two different systems of arbitration, the one that appears to that investor most favorable to the presentation of the particular claim that investor wishes to pursue with regard to an investment protected by the BIT, and BIT "B" restricts investors covered by that treaty to bringing a claim under only one of those systems of arbitration unless the State concerned agrees to the use of another system for the particular dispute, it appears to the majority of this Tribunal that investors under BIT "A" have been accorded more favorable treatment, as regards their management, use, enjoyment, and disposal of their investments, than investors under BIT "B." Indeed, depending on the circumstances, investors making a claim under BIT "B" may be said to be at a competitive disadvantage compared to investors claiming under BIT "A."

95. Turkmenistan accords to Swiss investors a choice between bringing a claim under Turkmenistan's BIT with Switzerland in an ICSID Arbitration and bringing such a claim in an UNCITRAL Arbitration. The tribunal in *National Grid v. Argentina* found that Argentina's agreement in its BIT with the United States that investors could resort to arbitration without first resorting to the Argentine courts was an aspect of its "treatment" of investors subject to the MFN

¹³³ Indeed, if there were no difference between them, the Tribunal would probably not have been called upon to decide the present Objection to Jurisdiction for Lack of Consent.

clause of the Argentina-U.K. BIT.¹³⁴ The restriction imposed by Turkmenistan on U.K. investors, insofar as the U.K.-Turkmenistan BIT limits them to bringing claims under the BIT only in an UNCITRAL Arbitration, is similarly a form of treatment, and is less favorable than the treatment accorded by Turkmenistan to Swiss investors.

96. The Claimant, as a U.K. investor, is thus entitled by the MFN provisions of Article 3 of the U.K.-Turkmenistan BIT to avail itself of the more favorable treatment accorded by Turkmenistan to investors of Switzerland under Turkmenistan's BIT with that country, and specifically to avail itself of the provision of that BIT in which Turkmenistan agrees to resolve disputes with Swiss investors in an ICSID Arbitration or an UNCITRAL Arbitration, at the election of the investor. The Claimant here has availed itself of that more favorable treatment by commencing an ICSID Arbitration. In light of this finding, it is not necessary to consider Turkmenistan's BITs with France, Turkey, and India, nor the ECT.

97. The majority of the Tribunal therefore finds, without prejudice to the Respondent's second objection to jurisdiction (which it reserves for the next stage of this proceeding), that it has jurisdiction, as an ICSID tribunal, to hear the Claimant's claims.

¹³⁴ *National Grid v. Argentina* ¶93. See also *RosInvestCo v. Russia* ¶130 (“the submission to arbitration forms a highly relevant part of the corresponding protection for the investor”).

III. COSTS

98. Both parties have asked for an award of costs. The Respondent has asked for all costs related to this arbitration, including its legal fees.¹³⁵ The Claimant has asked for all costs associated with the Respondent's Objection to Jurisdiction for Lack of Consent.¹³⁶

99. The Tribunal reserves all questions of costs until the conclusion of this proceeding.

¹³⁵ Respondent's Memorial, ¶71.

¹³⁶ Claimant's Counter-Memorial, ¶105(ii).

IV. DECISION

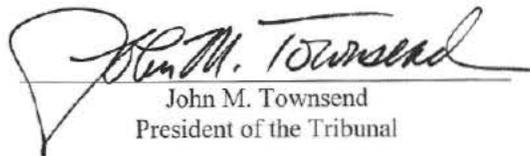
100. For the reasons set forth above, the Tribunal decides as follows:
- a. The Respondent's Objection to Jurisdiction for Lack of Consent is rejected.
 - b. The Tribunal will proceed to a consideration of the merits of the Claimant's claim, to which it will join the Respondent's second objection to jurisdiction, on a schedule to be established after consultation with the parties.
 - c. All questions of costs are reserved.



George Constantine Lambrou
Arbitrator



Laurence Boisson de Chazournes
Arbitrator
(with the attached Dissenting Opinion)



John M. Townsend
President of the Tribunal

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

In the arbitration proceeding between

GARANTI KOZA LLP

(CLAIMANT)

AND

TURKMENISTAN

(RESPONDENT)

ICSID CASE NO. ARB/11/20

APPENDIX B TO THE AWARD

**DISSENTING OPINION OF PROFESSOR BOISSON DE CHAZOURNES
ON THE OBJECTION TO JURISDICTION FOR LACK OF CONSENT**

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

IN THE PROCEEDING BETWEEN

GARANTI KOZA LLP
(Claimant)

and

TURKMENISTAN
(Respondent)

(ICSID Case No. ARB/11/20)

DISSENTING OPINION

By
Laurence Boisson de Chazournes
Arbitrator

Date: 3 July 2013

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Dissenting Opinion

Introduction

1. From the outset, I would like to point out that the present Dissenting Opinion does not have the objective of dealing with the effect of most-favoured-nation (hereinafter “MFN”) clauses on investment arbitration provisions of bilateral investment treaties (“BITs”), and more specifically their effect on dispute settlement provisions. The applicable treaty *in casu* – the 1995 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments (hereinafter, the “U.K.-Turkmenistan BIT”) – deals explicitly with this issue.
2. My Dissenting Opinion deals with the Respondent’s first objection to jurisdiction in the present case, i.e. the objection for lack of consent. Throughout the jurisdictional phase and during exchanges with my esteemed colleagues, I have always kept in mind the need to preserve the exact balance of rights and obligations negotiated in the U.K.-Turkmenistan BIT. Such a concern stems from the desire to ensure that the rights and legal interests of *both* disputing parties are unaltered.¹
3. I have reflected at length on whether it is possible to support the decision of the majority (hereinafter “the Decision”). However, the importance of the issues as I see them is such that I have felt impelled to dissent, in particular from the finding of my colleagues that the Tribunal “has jurisdiction, as an ICSID tribunal, to hear the Claimant’s claims”.² I cannot agree with the reasoning and arguments on which this finding is based. The reasons for my dissent are set forth below.
4. The objective of my Dissenting Opinion is to determine the conditions for resorting to

¹ Recently, the International Court of Justice (ICJ) recalled the necessity and importance not to “alter the limits of a [court]’s judicial function”, see *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, para. 46, available at www.icj-cij.org.

² *The Decision*, para. 97.

ICSID arbitration under Article 8 of the U.K.-Turkmenistan BIT, and whether or not consent to ICSID arbitration can be *established* via the MFN clause contained in Article 3(3) of the same BIT. There is no doubt that these are the two provisions at stake at the present stage of the proceedings and that form the real legal dispute between the parties. A tribunal has a duty “to isolate the real issue in the case”.³

5. It is crucial to stress from the outset a fundamental legal safeguard governing the issue of consent before international courts and tribunals, in general, and ICSID tribunals in particular: consent to jurisdiction in international adjudication must always be *established*. First, this is a necessary prerequisite to the exercise of the international judicial function. The principle of *compétence de la compétence* as defined under general international law, and under Article 41 of the ICSID Convention, empowers an arbitral tribunal or any other international court to determine *proprio motu* the extent and limits of its jurisdiction. At the same time, the principle of *compétence de la compétence* requires an arbitral tribunal or any other international court to *establish* the extent and limits of its jurisdiction objectively, i.e., on the basis of the title of jurisdiction that is conferred to the said tribunal, and not to go beyond it.
6. The trust and confidence in third-party adjudication is dependent on the respect by international courts and tribunals of the limits to the jurisdiction conferred upon them. Tribunals should not create a *de facto* system of compulsory jurisdiction, which in the present stage of positive international law remains the exception. The international legal order still rests largely on a system of facultative jurisdiction, and because of that essential characteristic, a tribunal should never attempt to impose its jurisdiction and adjudicate the merits of a dispute when the parties have not consented to its jurisdiction. The ICSID arbitration system is not an exception to that approach. BITs were never concluded by sovereign states with the idea that a third-party adjudicator would then empower himself or herself with the authority to embark on ‘consent shopping’.

³ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29: “[...] it is the Court’s duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions”.

7. The MFN clause regardless of its formulation in a BIT does not vest such authority in a tribunal. The interpretation of MFN clauses is *mutatis mutandis* subject to the principle of consent⁴ as enshrined both in general international law as well as in treaty law (the ICSID Convention in the context of the present dispute). It would create a dangerous precedent to formulate new approaches that go against these fundamental rules and principles of international adjudication.⁵
8. Despite the repetitive use of the verb “import” by both the Claimant and the Respondent, the Tribunal should not be misled and consider that the question in the present arbitration is whether consent can be *imported* from one treaty to another treaty. I consider that the real question that the Tribunal should address first and foremost is whether consent to ICSID arbitration is or is not *established* under the U.K.-Turkmenistan BIT. Indeed, such consent exists or does not exist, and cannot be based on presumptions. Lack of consent cannot be remedied by the so-called ‘import’ of consent. As indicated by the International Court of Justice (ICJ), the jurisdiction of international courts and tribunals, including ICSID tribunals, “is based on the consent of the parties and is confined to the extent accepted by them”.⁶ Well-established principles governing the interpretation of titles of jurisdiction as formulated by the ICJ should guide the interpretation of dispute settlement provisions under the ICSID Convention and BITs.⁷

⁴ See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para 59: “the Tribunal finds no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the Argentina-Spain BIT” (hereinafter “*Interagua v. Argentina*”).

⁵ See, e.g., Ch. De Visscher, *Theory and Reality in Public International Law*, Princeton, New Jersey, 1968, pp. 395-396: “The judge is not asked to penetrate the intimate designs of the contracting parties; he is expected to discover by the means at his disposal that part of their intentions that external signs reveal. Now the words freely chosen by the parties are par excellence or at least primarily the instrument of this externalization. This, in turn, is a security factor. The security that the treaty affords the contracting parties is measured by its capacity to withstand pressures that might be brought to promote changes. Of this fundamental contractual guarantee the text, the common work of the parties, is the essential instrument [...] What the Court does not allow is that in the course of interpretation the text should be prematurely eclipsed by a teleological scrutiny that might distort its meaning. Such precipitate reasoning may result in sacrificing respect for the text to subjective considerations.”

⁶ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, I.C.J. Reports 2006, p. 39, para. 88; See also *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, I.C.J. Reports 2008, p. 204, para. 62.

⁷ It is well recognized that the drafters of the ICSID Convention heavily relied on the Statute and Rules of the ICJ when negotiating the ICSID Convention. See, e.g., G. Kaufmann-Kohler, “Foreword” in A. R. Parra, *The History of ICSID*, Oxford University Press, Oxford, 2012, p. viii. See also, A. R. Parra, *ibid.*, pp. 51-53.

9. The present Dissenting Opinion will avoid repeating the positions of the Respondent and the Claimant that have been already presented exhaustively in their respective written submissions and during the hearing. I will first describe briefly the approach to interpretation that should guide the Tribunal in light of the customary rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (hereinafter, the "VCLT")⁸ (I). Second, I will interpret Article 8 of the U.K.-Turkmenistan BIT (II). At that level, the aim will be to analyze the relationship between Article 8(1) and Article 8(2) of the U.K.-Turkmenistan BIT as well as to demonstrate that the real issue in the present dispute is whether consent can be established under Article 8(2) rather than on Article 8(1), as the majority has incorrectly tried to put it. Afterwards, I will focus on the ordinary meaning of Article 3(3) under the customary rules of treaty interpretation (III). Subsequently, I will briefly deal with the formal requirement(s) governing consent under Article 25(1) of the ICSID Convention, which are essential for the proper functioning of ICSID and other arbitral mechanisms (IV). Finally, assuming that the MFN clause of Article 3(3) of the U.K.-Turkmenistan BIT finds application in the present dispute, I will enquire whether the MFN clause permits the Tribunal to find jurisdiction on the basis of another BIT (or other BITs) to

⁸ Article 31 ("General rule of interpretation") reads as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

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

Article 32 ("Supplementary means of interpretation") states:

"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."

which Turkmenistan is a party, if consent to ICSID jurisdiction is not given or established under Article 8(2) of the U.K.-Turkmenistan BIT (V).

I. Which guidance is offered by the customary rules of treaty interpretation as codified in the VCLT?

10. Under the customary rules of treaty interpretation, the Tribunal should essentially be guided by the general rule of interpretation contained in Article 31 of the VCLT when interpreting the scope of consent under Article 8 and the meaning of Article 3(3) of the U.K.-Turkmenistan BIT.⁹ The stated general rule of interpretation can be summarized as follows: the text must always be taken as the starting point.¹⁰ As such, no doctrine of restrictive or extensive interpretation of the text of the treaty should prevail.¹¹ Interpretation of the text should be based on an “*ex ante* neutral approach”.¹²
11. As explained by an arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA), the rule of interpretation under Article 31 of the VCLT “should be viewed as forming an *integral whole*, the constituent elements of which cannot be separated”.¹³ The same tribunal also explained that “all the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means”.¹⁴ But most importantly, the tribunal, following the practice of the ICJ in that respect, emphasized the following point:

[T]he “text of the treaty” is a notion distinct from, and broader than, the notion of “terms”. Relying on the text does not mean relying solely, or

⁹ See, e.g., *Romak S.A. (Switzerland) and the Republic of Uzbekistan*, Award of 26 November 2009, paras. 169, 172 and 241.

¹⁰ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 21-22, para. 41; Permanent Court of Arbitration, *In the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between The Kingdom of Belgium and The Kingdom of The Netherlands*, Award of the Arbitral Tribunal, 24 May 2005, para. 47.

¹¹ *Austrian Airlines v. Slovak Republic*, UNCITRAL Case, Award of 20 October 2009, paras. 119-121 (*hereinafter* “*Austrian Airlines v. Slovakia*”); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2001, para. 43.

¹² *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 171 (*hereinafter* “*Daimler v. Argentina*”).

¹³ Permanent Court of Arbitration, *Case concerning the Auditing Accounts between the Kingdom of The Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides*, Arbitral Award of 12 March 2004, para. 62 (emphasis added).

¹⁴ *Id.* .

mainly, on the ordinary meaning of the terms. Such a solution would effectively ignore the references to good faith, the context, and the object and purpose of the treaty. The ordinary meaning of the terms is even itself determined as a function of the context, object and purpose of the treaty. Lastly, as paragraph 2 of Article 31 of the Vienna Convention provides, the text of the treaty (including the preamble and annexes) is itself part of the context for the purposes of interpretation.¹⁵

12. It appears from the above quoted paragraph that the interpretation of the ordinary terms of a provision such as Article 8 of the U.K.-Turkmenistan BIT must take into account the *whole text* of the U.K.-Turkmenistan BIT and not be limited to the terms embodied in Article 8. The same logic applies to the interpretation of Article 3(3) of the U.K.-Turkmenistan BIT. The interpretation of the terms of Article 3(3) must take into account the *whole text* of the U.K.-Turkmenistan BIT and, thus, be read in light of Article 8 of the U.K.-Turkmenistan BIT. It is not possible under customary rules of treaty interpretation, as reflected in Article 31 of the VCLT, to isolate the interpretation of Article 8 from the interpretation of Article 3(3) or vice versa.¹⁶ The proper interpretation must give meaning and effect to *both* provisions, and not be an interpretation that would exclude one provision and render it meaningless while conferring a broad meaning and effect on the other provision.¹⁷ The “terms” of Article 3 of the U.K.-Turkmenistan BIT, and in particular of Article 3(3), do not have a legal existence of their own that would compel this Tribunal to ignore the context of the BIT and its object and purpose. As a result, the “terms” of Article 3(3) cannot be used to completely override another provision of the

¹⁵ *Id.* at para. 63.

¹⁶ The fact that both parties have not advanced this approach to interpretation is no reason not to apply it, since it is a normal approach to treaty interpretation that the Tribunal can and should apply. Moreover, the legal maxim *jura novit curia* applies. As stressed by the International Court of Justice (ICJ) in the *Fisheries jurisdiction cases*, for instance, “[...] an international judicial organ, is deemed to take judicial notice of international law and is therefore required [...] to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute” (see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment*, I.C.J. Reports 1974, p. 181, para. 18).

¹⁷ See, e.g., *United States – Standards for Reformulated and Conventional Gasoline*: “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”, Report of the WTO Appellate Body, adopted 20 May 1996, WT/DS2/AB/R, p. 23. This statement is quoted with approval in *Japan – Taxes on Alcoholic Beverages*, report of the WTO Appellate Body, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 and in *Brazil – Export Financing Programme for Aircraft*, Report of the WTO Appellate Body, adopted 20 August 1999, WT/DS46/AB/R, footnote 110. See also, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement – Decision by the Arbitrators*, 28 August 2000, footnote 17: “We therefore read these provisions as a whole and give a useful meaning to all, in application of the principle of effective interpretation (*ut res magis valeat quam pereat*)”.

U.K.-Turkmenistan BIT, including Article 8.

13. As a general rule, if after an examination of the terms of Article 8 and/or of Article 3(3), their meaning remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, recourse can be had to supplementary means of treaty interpretation (Article 32 of the VCLT) such as the *preparatory work* or the *circumstances* of the conclusion of the BIT.¹⁸ The supplementary means can also be referred to in order to confirm the interpretation of the ordinary meaning of the texts of Article 8 and/or of Article 3(3) of the U.K.-Turkmenistan BIT under Article 31 of the VCLT.¹⁹ In the context of the present Dissenting Opinion, supplementary means of treaty interpretation will be referred to in order to confirm, in particular, the interpretation of the ordinary meaning of the text of Article 8 of the U.K.-Turkmenistan BIT.

II. Interpretation of Article 8 of the U.K.-Turkmenistan BIT in light of the customary rules of treaty interpretation

A. Relationship between Article 8(1) and Article 8(2) of the U.K.-Turkmenistan BIT

14. Article 8(1) is inseparable of Article 8(2). Article 8(1) reads as follows:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.

¹⁸ “ [...] the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words”, see *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.

¹⁹ See also, *Air Services Agreement of 27 March 1946 between the United States of America and France*, Award of 9 December 1978, *United Nations Reports of International Arbitral Awards*, vol. 14, p. 434, para. 44, p. 440, para. 66, p. 441, para. 69; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 27-28, para. 55; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, I.C.J. Reports 1995*, p. 21, para. 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 653, para. 53; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections*, Judgment of 1 April 2011, para. 142.

15. Article 8(2) of the BIT reads as follows:

Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

16. The majority has persisted in considering that Article 8(1) deals with “Turkmenistan’s consent to participate in international arbitration with U.K. investors and the conditions attached to that consent”²⁰, and that Article 8(2) deals with “the arbitration systems that may be used if the conditions of Article 8(1) are met”.²¹ Contrary to the interpretation of the majority, Article 8 of the U.K.-Turkmenistan BIT does not divide the question of consent to participate in ICSID Arbitration into two parts. Elementary rules of treaty interpretation invite to interpret Article 8 as *a whole* and not as composed of segmented and fragmented provisions as the majority has chosen to do. The whole mechanism of Article 8 relates to consent to international arbitration. Article 8(1) does not invite the Tribunal to look first at whether the host state has consented to participate in international arbitration at all (under Article 8(1)), and second, at whether it has agreed to ICSID arbitration (under Article 8(2)). Such an approach is not grounded in a proper application

²⁰ *The Decision*, para. 25.

²¹ *Id.*

of the customary rules of treaty interpretation because it would deprive Article 8(1) of its real function and make Article 8(2) redundant.

17. Article 8(1) formulates the rule according to which if, after a period of four months, no amicable settlement can be reached between the foreign investor and the host state, the former can submit the dispute to international arbitration. The majority considers that consent is granted in Article 8(1).²²
18. The legal purpose of Article 8(1) is to fix pre-conditions or what is commonly referred to as ‘conditions precedent’ to international arbitration, i.e., negotiations during four months. There lies the *ratio legis* of Article 8(1). It is meant to govern the pre-conditions of consent to arbitration under Article 8 of the U.K.-Turkmenistan BIT. In other words, Article 8(1) contains, subject to the condition of four months of negotiations, consent in principle to international arbitration, and such consent in principle must still be read in light of the further specific conditions governing consent to arbitration by virtue of Article 8(2).
19. Articles 8(1) and 8(2) are two sides of the same coin. The coin – Article 8 – encompasses the provisions governing consent to international arbitration under the U.K.-Turkmenistan BIT. One side of the coin – Article 8(1) – shows the general pre-condition(s) under which a foreign investor can initiate international arbitration against the host state; the other side – Article 8(2) – fixes the strict conditions under which the foreign investor can pursue one specific venue of international arbitration (e.g., ICSID arbitration) rather than another (e.g. UNCITRAL arbitration).
20. I find it difficult to subscribe to the point of view of the majority according to which “Article 8(2) [is] only a menu of options concerning the arbitration process, and a default selection”.²³ As Article 8(1), Article 8(2) also embodies consent to international arbitration. Chronologically and logically, Article 8(2) becomes mandatorily applicable after it is proved (or has been proven that) that the requirement of negotiations during

²² *Id.* at para. 31.

²³ *Id.*

four months has been fulfilled under Article 8(1). This is where the analysis of Article 8(1) should stop and where the analysis under Article 8(2) should start. The majority has chosen to focus on Article 8(1) in order to justify its approach and to find jurisdiction in the present case. With all due respect for my colleagues, I believe that the Decision has used Article 8(1) as a means to achieve an end that it could not easily achieve by acknowledging that consent to arbitration is contained in Article 8(2). The focus should have been on Article 8(2), which is the true subject-matter of the dispute at this jurisdictional phase. The objection to the jurisdiction of the Tribunal that was raised by the Respondent is an objection for lack of consent under Article 8(2). Nothing less, nothing more. The remainder of my opinion will thus only deal with Article 8(2). I will now analyze the position of the majority according to which Article 8(2) does not encompass consent to arbitration.

B. The ordinary meaning of Article 8(2) of the U.K.-Turkmenistan BIT

21. The majority states in its Decision that because Article 8(2) begins with “Where the dispute is referred to international arbitration,” this indicates that “Article 8(2) only comes into play after the determination has been made, under the provisions of Article 8(1), to refer the dispute to arbitration”.²⁴ The position of the majority shows a misperception of the ordinary meaning of the terms contained in Article 8(2). The phrase “Where the dispute is referred to international arbitration,” does not imply at all that Article 8(2) does not deal with consent to arbitration. The said phrase relates specifically to the *initiation of international arbitration* under the U.K.-Turkmenistan BIT and simply confirms that under Article 8(2) – like in many other BITs – it is the foreign investor that initiates investment arbitration. In this respect, there is a cause-and-effect relationship between the last part of Article 8(1) (“disputes shall [...] be submitted to international arbitration if the *national or company concerned so wishes*”) and the beginning of Article 8(2) (“Where the dispute is referred to international arbitration”). In other words, if the foreign investor ‘wishes’, he can choose (to initiate) international arbitration to settle his dispute with the host state. **However** – and this is where I strongly disagree with the

²⁴ *Id.*

majority – the power of initiation (or choice to have recourse to investment arbitration) is not tantamount to consent to arbitration. The initiation of investment arbitration by the foreign investor in a specific arbitration forum is still conditioned to the consent from the host state under Article 8(2) of the U.K.-Turkmenistan BIT. That is why Article 8(2), next to the preceding paragraph of that article, also covers without any doubt, consent to international arbitration.

22. The wording of Article 8(2) is clear and confirms that consent to arbitration is specifically dealt with in Article 8(2) when a foreign investor envisages having recourse to a specific arbitration venue. Article 8(2) states that “the national or company and the Contracting Party concerned in the dispute *may agree* to refer the dispute *either* to the International Centre for the Settlement of Investment Disputes [...] *or* the Court of Arbitration of the International Chamber of Commerce or an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement **or** established under the Arbitration Rules of the United Nations Commission on International Trade Law” (emphasis added). The phrase “may agree to refer the dispute” demonstrates that Article 8(2) governs consent to arbitration when it comes to specific venues of arbitration. A similar wording can be found in Article 36(1) of the Statute of the International Court of Justice (ICJ). Article 36(1) provides that “The jurisdiction of the Court comprises all cases *which the parties refer to it*”. This provision is found in the part of the Statute dealing with the jurisdiction of the ICJ, i.e. the part governing ways of *consenting* to the jurisdiction of the Court. Why would a provision which affords the parties the possibility to agree to refer the dispute to the ICJ be considered a provision dealing with consent to jurisdiction while, on the other hand, a provision affording the possibility to agree to refer disputes to arbitration under the U.K.-Turkmenistan BIT, would not be qualified as relating to consent to arbitration?
23. Let us have a closer look at the mechanism of Article 8(2) of the U.K.-Turkmenistan BIT. Article 8(2) offers, three options to settle a dispute between a foreign investor and a host state arising out of the said BIT. The dispute can be settled under ICSID arbitration (*option 1*), ICC arbitration (*option 2*) or UNCITRAL arbitration (*option 3*).

24. However, for one of these options to be used by a foreign investor *both* the foreign investor and the host state must have *previously agreed* to refer the dispute to one of those three fora. The conditions for such previous agreement will vary depending upon which of the dispute settlement procedures is selected. Article 8(2) clearly states that in order to refer the dispute to international arbitration, “the national or company *and* the Contracting Party” concerned by the investment dispute “*may agree*” to settle the dispute under one of the above-identified options (italics added). Therefore, ICSID arbitration under the ordinary meaning of Article 8(2) of the U.K.-Turkmenistan BIT can only be used by the foreign investor if it has *mutually* agreed with the respondent state to do so.
25. It cannot be assumed that ‘and’ means ‘or’ in the context of Article 8(2) of the U.K.-Turkmenistan BIT. Nothing suggests that the Tribunal should depart from the ordinary meaning of the word ‘and’ which means ‘together with’ or ‘along with’ – i.e., the foreign investor ‘together with’ the state concerned. Moreover, the expression ‘may agree’ implies that the foreign investor is not granted with “an immediate right to resort to ICSID arbitration”²⁵ under Article 8(2) of the U.K.-Turkmenistan BIT. Assent of *both* the foreign investor and the host state concerned is necessary for ICSID arbitration to be triggered. A similar wording (“*as may be mutually agreed by the parties*”) in the context of a national investment legislation has been interpreted as meaning that a “subsequent agreement between the parties is *required*”²⁶ for ICSID arbitration to be initiated by a foreign investor.
26. This reading of Article 8(2) is confirmed by the fact that Article 8(2) itself provides that, “if after a period of four months from written notification of the claim *there is no agreement*” (italics added) to use one of the three options “the dispute *shall* at the request in writing of the national or company concerned be submitted to arbitration” (italics added) under the UNCITRAL Arbitration Rules. Such wording clearly indicates that a mutual agreement is needed for ICSID arbitration to be initiated by the foreign investor. When an agreement cannot be reached between the foreign investor and the state

²⁵ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 331 (*hereinafter* “*Biwater v. Tanzania*”).

²⁶ *Id.* at para. 329 (emphasis added).

concerned, *only* arbitration under UNCITRAL Arbitration Rules can be used by the foreign investor, *not ICSID arbitration or ICC arbitration*. The verb ‘shall’ illustrates that rationale. It shows that the only type of arbitration for which a subsequent or mutual agreement between the foreign investor and the state concerned is not needed under Article 8(2) – after four months of notification of the claim – is UNCITRAL *ad hoc* arbitration. Article 8(2) is clear in its literal meaning and its intended effect.²⁷

27. If the language of Article 8(2) of the U.K.-Turkmenistan BIT were not to be interpreted in the light of its ordinary meaning, there would be a risk of depriving the final part of Article 8(2) (“if after a period of four months ... under the Arbitration Rules of the United Nations Commission on International Trade Law”) of its *effet utile* (*ut res magis valeat quam pereat*). This principle of effectiveness must be taken into account when interpreting a BIT or specific provision(s) of a BIT under Article 31 of the VCLT. Not only has the ICJ acknowledged that “the principle of effectiveness [...] has an important role in the law of treaties”²⁸, but also some arbitral tribunals have recognized that “[i]t 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 meaningless”.²⁹
28. As indicated above (see para. 13 of the present Opinion), the ordinary meaning of Article 8(2) of the U.K.-Turkmenistan BIT can be *confirmed* by taking into account the circumstances of the conclusion of the U.K.-Turkmenistan BIT. This method of treaty interpretation is based on Article 32 of the VCLT, which also reflects customary international law.

²⁷ In the same sense, see *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

²⁸ *Fisheries Jurisdiction (Spain v. Canada), I.C.J. Reports 1998*, p. 455, para. 52. See also, *Advisory opinion of 21 June 1971 on the Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), ICJ Reports 1971*, p. 35, para. 66; *Border and transborder armed actions (Nicaragua v. Honduras), Judgment of 20 December 1988, ICJ Reports 1998*, p. 89, para. 46. See also, H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, Cambridge, 1982, pp. 227-230.

²⁹ *Eureko BV v. Republic of Poland*, Partial Award (by Majority) of 19 August 2005, para. 248; See also, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of 27 July 2006, para. 132 and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 November 2004, para. 95.

29. The U.K.-Turkmenistan BIT was negotiated and concluded following the adoption of the 1991 U.K. Model BIT.³⁰ The said Model BIT set forth two approaches to Article 8. One approach called the ‘preferred’ version of Article 8 contained a direct consent to ICSID arbitration without the need of a prior agreement between the foreign investor and the host state (“Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes...”). The other approach, named the ‘alternative’ version, required a subsequent agreement by the parties to submit their dispute to ICSID. Article 8(2) of the U.K.-Turkmenistan BIT embodies the ‘alternative’ version. If a different interpretation were adopted, this would obviously change the nature of the intent of Turkmenistan and the U.K. It would also go against the ordinary meaning of Article 8(2) as it appears from the text of the provision itself as well as the circumstances of the conclusion of the U.K.-Turkmenistan BIT.
30. The circumstances of the adoption of the U.K.-Turkmenistan BIT confirm the intent of the Parties and the ordinary meaning to be given to Article 8(2) of the U.K.-Turkmenistan BIT in light of its context and object and purpose. Both U.K. and Turkmenistan have made the choice to opt for the ‘alternative’ version and that choice has to be given full effect by the Tribunal in the present case. Putting aside their choice (i.e., for the ‘alternative version’) would be tantamount to imposing on them an approach other than the one they negotiated and agreed to be bound by. However, restrictions to the sovereignty of states cannot be presumed – even through the application of an MFN clause.³¹ When states consent to the jurisdiction of an international court or tribunal, such as ICSID tribunals, they agree to restrict their sovereignty in a specific context. This is one of the very *raison d’être* of international adjudication: the acceptance by states to relinquish part of their sovereignty and submit to the judgment of third-party

³⁰ See Ex. R-7, 1991 U.K. Model BIT, International Investment Instruments: A Compendium, UNCTAD/DTCI/30 (Vol. III).

³¹ See *Daimler v. Argentina*, Award of 22 August 2012, para. 168: “all international treaties – whether bilateral, plurilateral or multilateral – are essentially expressions of the contracting states’ consent to be bound by particular legal norms. They encapsulate voluntarily accepted restraints upon the universally recognized principle of state sovereignty. Consent is therefore the cornerstone of all international treaty commitments, at least insofar as those commitments exceed the minimum requirements of customary international law. *The primacy of the principle of consent runs through all types of treaty commitments entered into by states. There is no distinction between substantive treatment provisions, MFN clauses, dispute resolution clauses, or otherwise. All are equally valid and equally binding to the full extent of the contracting State parties’ consent*” (emphasis added).

adjudicators. Therefore, consent to ICSID arbitration in a case such as this cannot be construed, when in reality a state has not consented to ICSID arbitration, but has instead opted for the approach of the ‘alternative’ U.K. model of BITs which excludes ICSID arbitration unless consented to by both parties.

31. The tribunal in *Daimler v. Argentina* has particularly insisted on the aforementioned aspects and its cautious approach deserves to be quoted here:

[...] as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care *not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.*³²

Thus, the choice of the ‘alternative’ model should govern the understanding and interpretation of the scope of application of Article 3(3) of the U.K.-Turkmenistan BIT.

32. The U.K. would not have adopted two models of BITs if it had considered that the two models would lead to the same result. Moreover, the U.K.’s BIT treaty practice is quite varied with respect to its dispute settlement commitments. This stresses the importance of the choices made by the negotiators in each specific case.
33. The disputes which have been brought in the context of BITs concluded by the U.K. with other countries always followed the arbitration procedures as foreseen in the concerned BITs. A most recent example is *Oxus Gold v. Uzbekistan*. The dispute arose out of the U.K.-Uzbekistan BIT which also encompasses the ‘alternative’ version of the U.K. Model BIT. The Claimant accordingly brought the dispute under the UNCITRAL Arbitration Rules, as there was no agreement between the two parties to bring the dispute to another forum, such as ICSID.³³

³² *Daimler v. Argentina*, Award of 22 August 2012, paras. 164 (emphasis added).

³³ *In the Matter of arbitration under the UNCITRAL between Oxus Gold PLC v. Republic of Uzbekistan, The State Committee of Uzbekistan for geology & mineral resources, and Na voi Mining & Metallurgical Kombinat*, Notice of Arbitration, Oral hearings, Claimant, p.154.

34. Having thus clarified aspects of the interpretation of Article 8(2) of the U.K.-Turkmenistan BIT under Articles 31 and 32 of the VCLT, the present opinion turns to establishing the ordinary meaning of Article 3(3) of the U.K.-Turkmenistan BIT.

III. The ordinary meaning of Article 3(3) of the U.K.-Turkmenistan BIT in light of the customary rules of treaty interpretation

35. Article 3 of the U.K.-Turkmenistan BIT reads as follows:

Article 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

36. Article 3 encompasses the national treatment obligation and the most-favoured nation (MFN) principle. As such, Article 3 reflects a common substantive standard that is found in the vast majority of BITs. What differentiates Article 3 from many provisions of BITs dealing with the national treatment obligation and the MFN principle is that it addresses specifically and explicitly the scope of its application within the U.K.-Turkmenistan BIT. Indeed, Article 3(3) of the said BIT specifies:

For the avoidance of doubt it is confirmed that the *treatment* provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement. (italics added)

37. During the last decade, much controversy has arisen with respect to MFN provisions contained in BITs. One of the major aspects of this controversy before investment arbitral tribunals is whether MFN provisions apply to dispute settlement provisions of BITs. The U.K.-Turkmenistan BIT clearly prevents such a controversy from arising before an

arbitral tribunal that has jurisdiction to deal with disputes under the said BIT. Indeed, the wording of Article 3(3) of the U.K.-Turkmenistan BIT shows that the MFN principle applies to dispute settlement provisions of the U.K.-Turkmenistan BIT, thus including Article 8(2) of the U.K.-Turkmenistan BIT.

38. It is not within the ambit of the present dissenting opinion to give a detailed analysis of MFN provisions and their meaning under general international law. It is sufficient to recall that the function of an MFN provision is to guarantee balanced and coherent treaty relations between the members of the international community. More specifically, what an MFN provision allows in the context of BITs is the following: to *extend* treatment of foreign investors that is more favourable under a BIT to treatment of foreign investors that is less favourable under other BITs. Therefore, because of the MFN provision contained in Article 3 of the U.K.-Turkmenistan BIT and its application to dispute settlement issues, a foreign investor of British nationality can invoke more favourable dispute settlement provisions embodied in other BITs concluded by Turkmenistan. Since Article 3(3) is part of a *whole*, i.e., the U.K.-Turkmenistan BIT, it is necessary to read and interpret its terms in light of the other provisions of the BIT (the context of the BIT) and, especially, Article 8(2).
39. The issue in the present dispute is the relationship between Article 3(3) and Article 8(2) of the U.K.-Turkmenistan BIT. As previously explained, the interpretation of the ordinary meaning of Article 3(3) cannot be isolated from the mechanism set forth in Article 8(2) (see paragraph 12 above). This approach was also adopted by the tribunal in *Austrian Airlines v. Slovakia*. Indeed, when dealing with the MFN clause contained in Article 3(1) of the Austria-Slovakia BIT, the tribunal found that it “must therefore look to the context of Article 3(1) as well as to the other elements relevant for its interpretation. Starting with the context, Article 3(1) must be viewed for present purposes in combination with Article 3(2) as well as with the treaty provision that deal with dispute settlement, i.e. Articles 8 and 4(4) and 4(5)”.³⁴ The tribunal even went further and specified that “[w]hat the Tribunal must examine is whether the Treaty provides for

³⁴ *Austrian Airlines v. Slovak Republic*, UNCITRAL Case, Award of 9 October 2009, para. 127.

exceptions to the application of the MFN clause, and more specifically, whether the provisions governing access to arbitration under the Treaty are to be regarded as a limitation to the scope of the MFN clause”.³⁵ In my view, there is, thus, no doubt that the relationship between Article 3(3) and Article 8(2) of the U.K.-Turkmenistan BIT is one that should have been dealt with by the majority in the present instance.

40. *Relationship between Article 3(3) and Article 8(2)*. To give effect to the MFN clause contained in Article 3(3), the foreign investor must first be in a *dispute settlement relationship* with the host state. A problem of *treatment* can only arise when the foreign investor is treated in a certain way while entertaining a specific relationship with the host state. If there is no relationship between the host state and the foreign investor, the question of more or less favourable treatment is not at stake and thus, the MFN principle does not apply. The so-called ‘choice’ that supposedly derives from an MFN provision and which has been extensively used by the majority to justify its approach *in casu*, does not come into play if a problem of treatment cannot be identified under the U.K.-Turkmenistan BIT.
41. In other words, the so-called ‘right’ to a more favourable treatment under Article 3(3) of the U.K.-Turkmenistan BIT can only be exercised if the foreign investor and the host state are subject to a dispute settlement relationship under one of the dispute settlement options that are provided in Article 8(2) of the U.K.-Turkmenistan BIT. In that sense, the application of Article 3(3) of the U.K.-Turkmenistan BIT is *subordinated* or *conditioned* to the prior application of Article 8(2) of the U.K.-Turkmenistan BIT.
42. As indicated above (see para. 23), Article 8(2) of the U.K.-Turkmenistan BIT offers three options to settle a dispute between a foreign investor and a state arising out of the said BIT. The dispute can be settled under the ICSID Convention (*option 1*), or by the ICC Court of Arbitration (*option 2*), or else under UNCITRAL arbitration (*option 3*). For the Claimant to benefit from more favourable treatment under other BITs concluded by Turkmenistan, one of these options of dispute settlement must first be deemed applicable. For an option to be deemed applicable, *prior and strict compliance with the conditions*

³⁵ *Austrian Airlines v. Slovakia*, UNCITRAL Case, Award of 9 October 2009, para. 131.

prescribed by Article 8(2) of the U.K.-Turkmenistan BIT is necessary.

43. Option 1 – ICSID arbitration – is only deemed applicable under Article 8(2) of the U.K.-Turkmenistan BIT if the foreign investor has *mutually* agreed with the respondent state to have recourse to ICSID arbitration. As long as such a mutual agreement is not established, an issue of treatment – and even less of MFN – does not arise under Option 1 (ICSID arbitration). The MFN principle can, thus, only apply with respect to ICSID arbitration if there is a mutual agreement between the foreign investor and the host state to settle the investment dispute through ICSID arbitration. If such a mutual agreement is established, then Article 3(3) of the U.K.-Turkmenistan BIT applies and a claimant in a dispute may be in a position to invoke more favourable ICSID arbitration provisions contained in other BITs concluded by Turkmenistan. In the absence of a mutual agreement to ICSID arbitration, a claimant will not be in a position to invoke more favourable treatment under Article 3(3) of the U.K.-Turkmenistan BIT with respect to ICSID arbitration under other BITs concluded by Turkmenistan.³⁶
44. Here, there is simply no issue of treatment under ICSID arbitration that arises, since ICSID arbitration is deemed inexistent in the absence of a mutual agreement. This is the reasonable ordinary meaning that can be given to Article 3(3) of the U.K.-Turkmenistan BIT under customary rules of treaty interpretation. This gives *effet utile* to the wording of *both* Article 3(3) and Article 8(2) of the U.K.-Turkmenistan BIT.³⁷ In this context, attention can be given to the approach of the *Tza Yap Shum v. Peru* tribunal, which went in the direction of both conferring full *effet utile* to the wording of a dispute settlement clause in a BIT and reading treaties as a whole (rather than as mere assemblage of

³⁶ It might be argued, and indeed is argued by Claimant, that in the present case "treatment" is established at least at the minimum level of the UNCITRAL rules without consent of Turkmenistan. On the basis of that "treatment", Claimant could seek the ICSID level of treatment – assuming that, for the sake of argument, it is more favourable than UNCITRAL treatment. As I have demonstrated above, this cannot be achieved within the framework of the U.K.-Turkmenistan BIT, as it would circumvent the precondition of mutual consent for ICSID arbitration. As to the argument that this could be based on another BIT in which Turkmenistan would have consented to ICSID arbitration without the need for mutual agreement, this question is dealt with in detail in Chapter V below.

³⁷ As explained by the International Court of Justice (ICJ): "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes [...] a meaning which would be contrary to their letter and spirit"; see *Interpretation of Peace Treaties (second phase)*, *Advisory Opinion: I.C. J. Reports 1950*, p. 229.

separate provisions).³⁸

45. Let us now turn to the formal requirement(s) that govern consent under Article 25(1) of the ICSID Convention.

IV. The formal requirement(s) governing consent under Article 25(1) of the ICSID Convention

46. Consent is a necessary prerequisite for ICSID arbitration.³⁹ It is the “cornerstone” of ICSID jurisdiction. Without consent, no ICSID arbitration can take place.
47. Article 25 of the ICSID Convention requires that the parties to the dispute “consent in writing” to submit that dispute to the Centre. Under Article 25, consent in writing is thus necessary, but the text does not give any further indication about either the manner or timing of such consent or the way in which it must be interpreted. There is no requirement that such consent be contained in a single article of a treaty or in a single treaty.⁴⁰ Consent to ICSID arbitration can be identified in a treaty, in a national investment law or in a contract. Nevertheless, an idea of implicit consent is not admissible in the ICSID system. Whatever the instrument in which consent to ICSID arbitration is embodied, consent must be given in writing.
48. The ICSID Convention is crystal-clear. Consent is a prerequisite and if it is not established, no jurisdiction can be exercised by an ICSID tribunal. There is no need to embark on a discussion whether consent must be “clear and unambiguous,”⁴¹ or whether dispute settlement provisions or so-called compromissory clauses must be interpreted in a

³⁸ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction of 19 June 2009, para. 216 (hereinafter “*Tza Yap Shum v. Peru*”).

³⁹ See preamble of the ICSID Convention: “Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration [...]”.

⁴⁰ *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 55 (hereinafter “*C.S.O.B. v. Slovakia*”). See also, *Renta 4 v. Russia*, SCC Case No. Arbitration V (024/2007), Award on Preliminary Objections, 20 March 2009, para. 82.

⁴¹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 198 (hereinafter “*Plama v. Bulgaria*”). See, e.g. *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 90; *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award of 21 August 2006, para. 181; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 167 (hereinafter “*Wintershall v. Argentina*”).

restrictive or liberal manner.⁴² Indeed, as stressed by Judge Rosalyn Higgins, “[i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses,” and there is no doubt that the ICJ “has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses; they are judicial decisions like any other”.⁴³

49. Nevertheless – and I consider that this is what should have guided the majority in the present dispute – the ICJ has been constant and strict in recalling that its jurisdiction “is based on the consent of States *under the conditions expressed* [in the relevant treaties]” (emphasis added).⁴⁴ The same rationale applies to the jurisdiction of ICSID tribunals under the ICSID Convention. The ICJ has also been consistent in recalling that the consent allowing for the Court to assume jurisdiction “must be *certain*”.⁴⁵ The same principle applies for consent to ICSID arbitration. Lastly, the ICJ has consistently emphasized that “whatever the basis of consent, the attitude of the respondent State must be capable of being regarded as ‘*an unequivocal indication of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable’ manner*’” (emphasis added).⁴⁶ Once again, the same rationale applies to consent to ICSID arbitration. These are the parameters that the Tribunal in the present case should take into account. The tribunal in *National Grid v. Argentina* did not go in a different direction when it stated

⁴² *Interagua v. Argentina*, Decision on Jurisdiction of 16 May 2006, para. 64. See also, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 43; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Ltd.*, UNCITRAL Case, Decision on Jurisdiction of 3 August 2006, para. 65; *Austrian Airlines v. Slovakia*, UNCITRAL Case, Award of 9 October 2009, para. 20.

⁴³ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 12 December 1996, Separate Opinion of Judge Higgins, *I.C.J. Reports 1996*, p. 857, para. 35.

⁴⁴ *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, *I.C.J. Reports*, 2008, p. 203, para. 60.

⁴⁵ *Id.* at p. 204, para. 62.

⁴⁶ *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, *I.C.J. Reports*, 2008, p. 203, para. 62 (emphasis added); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 18; see also *Corfu Channel (United Kingdom v. Albania)*, *Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 620-621, para. 40; *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 24; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 113-114; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, *Judgment, I.C.J. Reports 1954*, p. 30

that “what matters is the intention of the parties *as expressed in the text*”.⁴⁷

50. No international court or tribunal, including ICSID tribunals, has challenged or contested those fundamental characteristics of consent to jurisdiction. The *RosInvest v. Russia* award – which remains a unique case with respect to the interpretation and application of the MFN clause – did not go as far as saying that consent to arbitration under a specific forum could be imported from one BIT to another BIT when consent to that specific arbitration forum under the latter had not been established.⁴⁸
51. *In casu*, it is clear that no mutual agreement *in writing* was reached between Garanti Koza and Turkmenistan to submit the dispute to ICSID arbitration. As explained above, no consent to ICSID arbitration can be found under Article 8(2) of the U.K.-Turkmenistan BIT. Since consent to ICSID arbitration cannot be identified, Article 3.3 on MFN treatment is not applicable.⁴⁹ The fact that Article 8(1) of the U.K.-Turkmenistan BIT refers to “international arbitration” cannot be invoked to circumvent Article 8(2). It also cannot be invoked to deduce a so-called ‘choice’ of the foreign investor under Article 3(3) to circumvent Article 8(2) and to decide which international arbitration procedure would be more favourable.
52. However, and in light of the arguments presented by the Claimant (as accepted by the majority), let us assume that the MFN clause contained in Article 3(3) of the U.K.-Turkmenistan BIT is applicable. It remains to be determined whether consent to ICSID arbitration could allegedly be established in the present case through the operation of the MFN clause, despite the absence of consent under Article 8(2) of the U.K.-Turkmenistan BIT. In other words, the issue is whether consent to ICSID arbitration can be established from an MFN clause read together with an ICSID arbitration clause contained in another treaty, that neither finds direct application in the present case nor has been precisely identified by the Claimant in its request for arbitration.

⁴⁷ *National Grid P.L.C. v. Argentine Republic*, UNCITRAL Case, Award of 3 November 2008, para. 80 (*hereinafter* “*National Grid v. Argentina*”).

⁴⁸ *RosInvestCo. U.K. v. Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007, paras. 128-130 (*hereinafter* “*Ros Invest v. Russia*”).

⁴⁹ F. Orrego-Vicuña, “Reports of (Maffezini’s) demise have been greatly exaggerated”, *Journal of International Dispute Settlement*, vol. 3, n° 2, 2012, p. 302.

V. Would the MFN clause of Article 3(3) of the U.K.-Turkmenistan BIT permit the Tribunal to find jurisdiction on the basis of another BIT regardless of the absence of consent to ICSID arbitration under Article 8(2) of the U.K.-Turkmenistan BIT?

53. Both the Respondent and the Claimant cited several authorities to support their arguments against or in favour of finding consent to ICSID arbitration through the MFN clause embodied in Article 3(3) of the U.K.-Turkmenistan BIT.

54. Article 3(3), in its relevant part, reads as follows:

For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

Article 8 of the BIT is the investor-state dispute resolution provision. As it falls within Articles 1 to 11 of the BIT, it is thus covered by the MFN clause of Article 3. However, does it provide a foreign investor with a right to ‘import’ from other Turkmenistan investment treaties a “more favourable treatment” with respect to dispute resolution, *including the arbitration forum?*

55. From the Claimant’s standpoint, consent to ICSID arbitration can be provided by an MFN clause read together with the dispute resolution clause of another investment treaty concluded by the host state. This is a novel approach. Indeed, the Claimant is not suggesting that the MFN clause contained in Article 3(3) of the U.K Turkmenistan BIT would allow for less stringent conditions for recourse to international arbitration in a specific forum. What the Claimant is suggesting is that the said MFN clause authorizes a foreign investor to import consent to ICSID arbitration from any other treaty to which Turkmenistan has consented to ICSID arbitration. More than raising issues of interpretation, this argument relates to the very foundations of the system of ICSID arbitration. In other words, can an MFN clause serve as a basis to establish consent to ICSID arbitration when such consent was not given in the treaty embodying the said MFN clause?

56. At the outset, one could question the admissibility *per se* of the claim. The Claimant has

made no real ‘offer to arbitrate’ under ICSID⁵⁰ and, thus, no ‘meeting of the minds’ about arbitration under ICSID between the foreign investor and the host state under ICSID was even possible.

57. Neither the interpretation of the U.K.-Turkmenistan BIT nor investment law practice can lead one to think that the MFN clause contained in Article 3(3) of the U.K-Turkmenistan BIT allows the Tribunal to endorse a reasoning according to which it is possible for an MFN clause to incorporate by reference an agreement to arbitrate from another treaty if it was not *prima facie* the intention of the Parties to the BIT.
58. The Claimant refers, *inter alia*, to the dissenting opinion of Brigitte Stern in *Impregilo v. Argentina* in support of its argument. If this opinion is examined in its entirety, it will show that the dissenting opinion does not state what the Claimant believes it states. The Claimant makes reference to the following passages of the dissenting opinion:

Naturally, an important *caveat* has to be presented here. The interpretation of the MFN clause is only necessary when the intention of the parties concerning its applicability or inapplicability to the dispute settlement mechanism is not expressly stated or clearly ascertained. It is quite evident that if there is an MFN clause expressly including the dispute settlement procedures or expressly excluding them, there is no need for an interpretation.

[...]

There are indeed cases where the parties expressly state that the MFN clause applies to the dispute settlement mechanism. This has been done, for example, by the drafters of the U.K. Model BIT, who have provided in Article 3(3) that “for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision”.⁵¹

59. However, in Brigitte Stern’s dissenting opinion, the main contention was that the MFN could not apply to the conditions of access to dispute settlement (as the condition *ratione voluntatis* could not be modified). *The question of the extension of the scope of a right was not discussed.* Brigitte Stern emphasized that if the conditions surrounding the

⁵⁰ It is important to stress that the Claimant asked the Tribunal to apply more favourable dispute resolution clauses of Turkmenistan’s BITs with Switzerland, France, Turkey, and India, and the ECT. However, the Claimant did not specify which BIT had to be applied in the present instance and, most of all, did not even mention those BITs in its request of arbitration.

⁵¹ *Impregilo S.p.A. v. Argentina Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern of 21 June 2011, paras. 17-18 (hereinafter “Impregilo v. Argentina”).*

consent as required in the basic treaty were not met, no right to arbitration exists and therefore no right can be modified by the MFN clause, and in particular the scope of the right to arbitrate. On the question of whether or not the MFN clause applies to dispute settlement provisions in a BIT, Brigitte Stern stated clearly:

[It] cannot change the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* [...] it must be equally true that an MFN clause cannot change the condition *ratione voluntatis*, which is a qualifying condition for the enjoyment of the jurisdictional rights open for the protection of substantial rights.

[...]

In other words, before a provision relating to the dispute settlement mechanism can be imported into the basic treaty, the right to international arbitration – here ICSID arbitration – has to be capable of coming into existence for the foreign investor under the basic treaty, in other words the existence of this right is conditioned on the fulfillment of all the necessary conditions for such jurisdiction, the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* as well as a supplementary condition relating to the scope of the State’s consent to such jurisdiction, the condition *ratione voluntatis*.

[...]

As long as the qualifying conditions expressed by the State in order to give its consent are not fulfilled, there is no consent, in other words no access of the foreign investor to the jurisdictional treatment granted by ICSID arbitration. An MFN clause cannot enlarge the scope of the basic treaty’s right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the conditions provided for in the basic treaty.⁵²

60. The same concerns were already addressed by the *Maffezini v. Spain* tribunal. The reasoning of the *Maffezini v. Spain* tribunal is worth noting as the tribunal acted in assuming that the MFN provision should find application with respect to dispute settlement, i.e., as if the concerned treaty contained a provision similar to Article 3(3) of the U.K.-Turkmenistan BIT. The tribunal stressed that “there are some important limits that ought to be kept in mind”⁵³ when dealing with an MFN clause. As stated by the same tribunal, one of those limits is that an MFN clause cannot provide for a particular arbitration forum (e.g., ICSID), if this option was not foreseen, or not initially permitted without the prior fulfillment of conditions in the treaty incorporating the said MFN

⁵² *Id.* at paras. 78-80.

⁵³ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, para. 62 (hereinafter “*Maffezini v. Spain*”).

clause.⁵⁴ In other words, the *Maffezini v. Spain* tribunal concluded that one system of arbitration cannot be replaced by another. Noting the potential disruption of the international arbitral system, the *Maffezini v. Spain* tribunal held:

[Third,] if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, *in order to refer the dispute to a different system of arbitration.*⁵⁵

In paraphrasing the *Maffezini v. Spain* decision, it could be said that if the agreement provides for a particular arbitration forum, such as UNCITRAL, this option cannot be changed by invoking the clause in order to refer the dispute to a different system of arbitration, such as ICSID.

61. In line with what the *Maffezini v. Spain* tribunal held, no investment award or decision has since then decided that an MFN provision would allow the import of consent to ICSID arbitration from another treaty. This possibility cannot even be deduced from the *RosInvest v. Russia* award. The role of the MFN clause is not to substitute for a lack of consent, but to ensure that the consent given is implemented in the most favourable manner to the individual investor entitled to protection, as compared to the treatment given to other such individuals in treaties with third countries.⁵⁶ The *National Grid v. Argentina* tribunal correctly noted that an MFN clause is not a basis for creating consent to ICSID arbitration when none exists.⁵⁷
62. In conclusion, the MFN clause embodied in Article 3(3) of the U.K.-Turkmenistan BIT cannot bypass the requirement of consent to ICSID arbitration. This is undeniable. If the requirement of consent to ICSID arbitration, as stipulated in Article 8 of the U.K.-Turkmenistan BIT, as well as in the ICSID Convention itself, could easily be put aside because of the interplay of MFN clauses, there would be a threat to the entire system of investor-state arbitration. BITs providing for ICSID jurisdiction should abide by the ICSID Convention. Article 8(2) of the U.K.-Turkmenistan BIT stresses this point when it

⁵⁴ *Id.* at paras. 62-63.

⁵⁵ *Id.* at para. 63.

⁵⁶ F. Orrego-Vicuña, “Reports of (Maffezini’s) demise have been greatly exaggerated”, *Journal of International Dispute Settlement*, vol. 3, n° 2, 2012, p. 303.

⁵⁷ *National Grid v. Argentina*, UNCITRAL Case, Decision on Jurisdiction of 20 June 2006, para. 92.

provides for the need to “having regard to the provisions, where applicable of the Convention on the Settlement of Investment Disputes between States and Nationals of other States [...]”.

63. Granting Article 3(3) of the U.K.-Turkmenistan BIT such extensive effect as to allow for consent to ICSID through incorporation by reference in the frame of a treaty that does not allow this, would have the effect of “replac[ing] a procedure specifically negotiated by parties with an entirely different mechanism”⁵⁸ or “system of arbitration”.⁵⁹ It would involve a forum-shopping attitude that bypasses the consent requirement of the Respondent while running against the fundamental principles of international adjudication.
64. The literal and ordinary meaning of Article 8(2) has to be given full effect to determine whether or not consent to ICSID arbitration exists. Any other interpretation would lead to an artificial construction. Under Article 8(2) of the U.K.-Turkmenistan BIT, consent to ICSID arbitration can *only* derive from a mutual agreement between the foreign investor and the host state. If there is no such mutual agreement, then there is no consent to ICSID arbitration. No attempt to establish consent to ICSID arbitration under an MFN clause is possible, since it will have the perverse effect of replacing *actual* non-consent by *virtual* consent. That would go against the fundamental pillars of the law of treaties (principle of consent, *pacta sunt servanda*, etc.) as well as against the pillars of the ICSID system.
65. The Claimant contends that “there is no obstacle of ‘form’ preventing a tribunal from finding that Turkmenistan has consented to arbitration through an MFN clause, provided the text of the clause allows for the incorporation by reference of an arbitration agreement”.⁶⁰ Rather than mere obstacle(s) of form, there are ‘procedural’ and ‘substantive’ impediments that would definitely preclude the Tribunal from granting to Article 3(3) of the U.K.-Turkmenistan BIT an effect that it does not and was never supposed to produce in the context of the said BIT. The *ejusdem generis* rule – which is

⁵⁸ *Plama v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, para. 209.

⁵⁹ *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 176.

⁶⁰ Counter-Memorial on Jurisdiction, para. 39.

considered a general principle of international law⁶¹ – dictates such a cautious attitude.

66. As explained by the International Law Commission (ILC) in its *Commentary on the Draft Articles on MFN Clauses*:

No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter. The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. *Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.* Thus the rule follows clearly from the general principles of treaty interpretation. *States cannot be regarded as being bound beyond the obligations they have undertaken.*⁶²

67. The subject-matter of Article 8(2) of the U.K.-Turkmenistan BIT sets forth non-consent to ICSID arbitration if there is no specific agreement between the parties.⁶³ The subject-matter of the dispute settlement clauses embodied in other BITs concluded by Turkmenistan and allegedly – albeit without relying specifically on one of them – invoked by the Claimant provides for consent to ICSID arbitration. In accordance with the *ejusdem generis* rule, the MFN clause under Article 3(3) of the U.K.-Turkmenistan BIT cannot be interpreted as allowing to “attract rights [to ICSID arbitration] conferred by other treaties” (i.e., the automatic right to resort to ICSID arbitration) when the subject-matter – not to say the very object and purpose – of the U.K.-Turkmenistan BIT

⁶¹ Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, p. 27. See also Report of the International Law Commission Study Group on MFN: “The Study Group affirmed the general understanding that the source of the right to MFN treatment was the basic treaty and not the third-party treaty; MFN clauses were not an exception to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning MFN seemed to be how the scope of the right to MFN treatment was to be determined, *that is to say what expressly or impliedly fell “within the limits of the subject-matter of the clause”*” (italics added). See *The Most-Favoured-Nation-Clause*, Report of the International Law Commission (26 April–3 June and 4 July–12 August 2011), General Assembly Official Records, Sixty-third session, A/66/10, p. 287, para. 355, available at: <http://untreaty.un.org/ilc/reports/2011/2011report.htm>.

⁶² *Draft Articles on Most-Favoured-Nation Clauses, with Commentaries*, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, p. 30, paras. 10-11 (emphasis added).

⁶³ *Daimler v. Argentina*, Award of 22 August 2012, para. 175. The tribunal considers that non-consent to ICSID arbitration is the *default rule* and that consent to ICSID arbitration is the *exception*.

is exactly to deny such rights to ICSID arbitration in the absence of mutual agreement.⁶⁴

68. The absence of a mutual agreement to ICSID arbitration is the main impediment for this Tribunal to exercise its jurisdiction. It is this absence of a mutual agreement that prevents the ‘import’ of ICSID arbitration into a treaty that does not provide for ICSID arbitration. In this context, there is a need to address the misleading parallel that the Claimant – followed in this regard by the majority in the present instance – has attempted to draw between this dispute and *C.S.O.B. v. Slovakia*. According to the Claimant, incorporation by reference of an ICSID arbitration provision from one treaty to another by operation of an MFN clause is similar to incorporation into a contract by reference to an ICSID arbitration provision contained in a treaty that has not entered into force.⁶⁵
69. In contrast to what the majority claims, *C.S.O.B. v. Slovakia* is neither about the applicability of an MFN provision to the dispute settlement provisions of a BIT nor about the possibility to ‘import’ consent to ICSID arbitration or to ‘create’ consent to ICSID arbitration when such consent is not established. The *C.S.O.B. v. Slovakia* decision confirms that, without consent to ICSID arbitration, no jurisdiction can be exercised by an ICSID tribunal. In *C.S.O.B. v. Slovakia*, the tribunal found that there was consent to ICSID arbitration,⁶⁶ because the so-called ‘Consolidation Agreement’ concluded between the Claimant and the Slovak Republic made explicit reference to the BIT concluded between the Czech Republic and the Slovak Republic, which in turn embodied consent to ICSID arbitration. Thus, both the foreign investor and the host state *agreed* (by virtue of the ‘Consolidation Agreement’) that disputes would be submitted to ICSID

⁶⁴ See also a similar point of view in the *Anglo-Iranian Oil Company* case, where the Court, dealing with an issue of MFN, stated: “In order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most favoured-nation clause is the basic treaty upon which the U.K. must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*”, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 109.

⁶⁵ Claimant’s Counter-Memorial, paras. 31-32.

⁶⁶ *C.S.O.B. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 59.

regardless of the ratification or entry into force of the BIT.⁶⁷ To put it simply, there was a *mutual agreement* between the foreign investor and the host state to have recourse to ICSID arbitration. Such mutual agreement is exactly what is lacking in the present case. There is *no mutual agreement* between the Claimant and Turkmenistan to have recourse to ICSID arbitration as required by Article 8(2) of the U.K.-Turkmenistan BIT.

70. The *C.S.O.B. v. Slovakia* decision cannot be used to justify the ‘importation’ of consent to ICSID arbitration in a BIT that only provides for such consent under very specific conditions. Had there not been a mutual agreement to have recourse to ICSID arbitration (i.e., the absence of an investment contract explicitly incorporating the BIT between the Czech Republic and the Slovak Republic), the *C.S.O.B. v. Slovakia* tribunal would have found that it had no jurisdiction.⁶⁸ This is the approach that should have been retained by the majority in the present case. An MFN clause in a BIT – even written in the same terms as Article 3(3) of the U.K.-Turkmenistan BIT – does not constitute consent to ICSID arbitration and does not imply incorporation of consent to ICSID arbitration by reference. An investment agreement or contract such as the ‘Consolidation Agreement’ in *C.S.O.B. v. Slovakia* is a proper means of establishing consent to ICSID arbitration. An MFN clause is not; it has neither the object and purpose nor the function of establishing jurisdiction. To use by analogy the language of the *C.S.O.B. v. Slovakia* tribunal, an MFN clause is not a “form of acceptance”⁶⁹ through which “ICSID jurisdiction can be satisfied”.⁷⁰

⁶⁷ *Id.* at paras. 52-54.

⁶⁸ *Id.* at para. 55.

⁶⁹ *Id.* at para. 44.

⁷⁰ *Id.*

Conclusions

71. In light of the aforementioned points, I conclude as follows:

- i) Article 8(2) of the U.K.-Turkmenistan BIT does not provide for ICSID arbitration in the absence of a mutual agreement between the foreign investor and the host state;
- ii) There is no mutual agreement in writing between this Claimant and Turkmenistan to resort to ICSID arbitration. As such, the requirement of consent in writing under Article 25(1) of the ICSID Convention is not met;
- iii) The MFN clause under Article 3(3) does not apply with respect to ICSID arbitration when the conditions to have recourse to ICSID arbitration under Article 8(2) of the U.K.-Turkmenistan BIT are not fulfilled. As a matter of fact, Article 8(2) explicitly states that the requirements of the ICSID Convention have to be fulfilled;
- iv) Without mutual agreement between the Claimant and the Respondent, only UNCITRAL ad hoc arbitration is available to the Claimant under Article 8(2) of the U.K.-Turkmenistan BIT, and not ICSID arbitration;
- v) The MFN clause contained in Article 3(3) of the U.K.-Turkmenistan BIT cannot be interpreted as allowing the ‘import’ of consent to ICSID arbitration to a treaty regime that does not contain such consent;
- vi) No tribunal has concluded that an MFN clause could be used to ‘import’ consent to ICSID arbitration or to international arbitration;⁷¹

⁷¹ Not even the *RosInvest v. Russia* tribunal. See, *RosInvest v. Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007.

- vii) Arbitral tribunals have exercised great caution when alluding to the possibility of importing consent through an MFN clause.⁷² The commentaries dealing with U.K. Model BITs has never envisaged the plausibility of this scenario.⁷³

In the light of the above, I do not reach the question of how the MFN clause should be applied because in my view, it is not even applicable in the present case.



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⁷² See *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, paras. 62-63; *Plama v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, para. 207; *RosInvest. v. Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007, paras. 129-130. See also, with more general terms, *National Grid v. Argentina*, UNCITRAL Case, Decision on Jurisdiction of 20 June 2006, para. 92.

⁷³ See Ch. Brown, and A. Sheppard, in Ch. Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, Oxford, 2013, pp. 727-730; see also, J. Harrison, “The Protection of Foreign Investment” (United Kingdom National Report), XVIII International Congress of Comparative Law Washington, 2010, Section IV. A, p. 8.