INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

PUBLIC JOINT STOCK COMPANY MOBILE TELESYSTEMS

v.

TURKMENISTAN

(ICSID CASE NO. ARB(AF)/18/4)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated June 14, 2023.

Meg Kinnear
Secretary-General

Washington, D.C., June 14, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

PUBLIC JOINT STOCK COMPANY MOBILE TELESYSTEMS

Claimant

and

TURKMENISTAN

Respondent

ICSID Case No. ARB(AF)/18/4

AWARD

Members of the Tribunal
Professor Dr. Siegfried H. Elsing, President
Dr. Paolo Michele Patocchi, Arbitrator
Mr. John M. Townsend, Arbitrator

Secretary of the Tribunal
Mr. Alex B. Kaplan

Date of dispatch to the Parties: 14 June 2023

REPRESENTATION OF THE PARTIES

Representing Public Joint Stock Company Mobile TeleSystems:

Dr. Johannes Koepp
Dr. Alejandro Escobar
Ms. Valeriya Kirsey
Mr. David Turner
Mr. Laurence Ridgway
Baker Botts (UK) LLP
41 Lothbury
London EC2R 7HF
United Kingdom

Representing Turkmenistan:

Ms. Miriam K. Harwood
Mr. Ali Gursel
Mr. John Branson
Ms. Zeynep Gunday Sakarya
Ms. Bahar Charyyeva
Mr. Carlos Guzman Plascencia
Ms. Isabel Manfredonia
Mr. Mekan Karayev
Squire Patton Boggs (US) LLP
1211 Avenue of the Americas, 26th Floor
New York, NY 10036
United States of America

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Arbitration (Additional Facility) Rules 2006
BIT	Agreement between the Government of the Russian Federation and the Government of Turkmenistan on the Promotion and Reciprocal Protection of Investments, which entered ito force on 23 August 2010
C-[#]	Claimant's Exhibit
Cl. Cost Submission	Claimant's Costs Submission dated 9 December 2022
Cl. License Submission	Claimant's Submissions on the "3+2+3+2" Provision of MTS-TM's License dated 30 June 2022
Cl. Mem.	Claimant's Memorial on the Merits dated 29 March 2019
Cl. Opening	Claimant's Opening Presentation dated 2 May 2022
Cl. PHB	Claimant's Post-Hearing Brief dated 26 August 2022
Cl. Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 22 July 2020
Cl. Reply PHB	Claimant's Post-Hearing Brief dated 30 September 2022
Cl. Sur-Reply PHB	Claimant's Sur-Reply Post-Hearing Brief dated 17 October 2022
CL-[#]	Claimant's Legal Authority
CMC&M	Curtis, Mallet-Prevost, Colt & Mosle LLP
FET	Fair and Equitable Treatment
FPS	Full Protection
Hearing	Hearing on Jurisdiction and the Merits held 2-13 May 2022

Hearing Transcript	Hearing on Jurisdiction and the Merits held 2-13 May 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles	International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)
MoC	Ministry of Communications
MFN	Most-Favoured-Nation
MTS	Claimant Public Joint Stock Company Mobile TeleSystems
MTS-TM	MTS-Turkmenistan
NT	National Treatment
R-[#]	Respondent's Exhibit
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits and Objection to Jurisdiction dated 22 November 2019
Resp. Costs Submission	Respondent's Statement of Costs dated 9 December 2022
Resp. License Submission	Turkmenistan's Response to the Tribunal's Question regarding the "Note" on MTS' 26 July 2012 License
Resp. Opening	Respondent's Opening Presentation dated 2 May 2022
Resp. PHB	Respondent's Post-Hearing Brief dated 26 August 2022
Resp. Rej.	Respondent's Rejoinder Rejoinder on the Merits and Reply on Jurisdiction dated 18 December 2020

Resp. Reply PHB	Respondent's Post-Hearing Brief dated 30 September 2022
Resp. Sur-Reply PHB	Respondent's Sur-Reply Post-Hearing Brief dated 27 October 2022
RL-[#]	Respondent's Legal Authority
SPB	Squire Patton Boggs
TMT	Turkmenistani Manat, the currency of Turkmenistan
Tribunal	Arbitral tribunal constituted on 18 December 2018
VPN	Virtual Private Network

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Government of the Russian Federation and the Government of Turkmenistan on the Promotion and Reciprocal Protection of Investments (the "BIT"), which was signed on 25 March 2009 and entered into force on 23 August 2010, and the ICSID Additional Facility Rules.

2. The Claimant is Public Joint Stock Company Mobile TeleSystems ("MTS" or the "Claimant"), a company registered under the laws of the Russian Federation.

3. The Respondent is Turkmenistan ("Turkmenistan" or the "Respondent").

4. The Claimant and the Respondent are collectively referred to as the "Parties". The Parties' representatives and their addresses are listed above on page (i).

5. This dispute concerns the Claimant's claims that the Respondent mistreated the Claimant's investment during its operation in the Turkmenistan telecommunications market between 2012 and 2017 and wrongfully shut down the Claimant's operations in September 2017 in violation of the BIT.

II. PROCEDURAL HISTORY

6. On 27 July 2018, ICSID received an electronic version of the Request for Arbitration from MTS against Turkmenistan, including Exhibits C-0001 to C-0028 (the "Request"). ICSID also received hard copies of the Request on 1 August 2018, and the prescribed lodging fee.

7. On 10 August 2018, pursuant to Article 4 of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID ("Arbitration Rules"), the Acting Secretary-General approved access to the Additional Facility. In addition, in accordance with Article 4 of the Arbitration Rules, the Acting Secretary-General registered the Request and notified the Parties of the Registration. In the Notice of Registration, pursuant to Article 5(e) of the Arbitration Rules, the Acting Secretary-General invited the Parties to proceed to constitute a tribunal as soon as possible.

8. On 16 October 2018, further to the Claimant's request that the Tribunal in this case be constituted pursuant to the formula provided by Articles 6(1) and 9 of the Arbitration Rules, the Secretary-General informed the Respondent, pursuant to Rule Article 6(1) of the Arbitration Rules, that the Tribunal in the case was to be constituted pursuant to Article 9 of the Arbitration Rules. In accordance with this provision, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each Party and the third, who shall be the President of the Tribunal, appointed by agreement of the Parties.

9. On 24 October 2018, the Claimant appointed Dr. Paolo Michele Patocchi, a national of Switzerland, as arbitrator in this case pursuant to Article 9 of the Arbitration Rules. On 31 October 2018, Dr. Patocchi accepted his appointment.

10. On 8 November 2018, the Respondent appointed Mr. John M. Townsend, a national of the United States, as arbitrator in this case pursuant to Article 9 of the Arbitration Rules. On 13 November 2018, Mr. Townsend accepted his appointment.

11. By email of 24 October 2018 and letter of 8 November 2018, the Parties had advised the Secretariat that they would agree on a method for the appointment of the President of the Tribunal after the co-arbitrators were appointed. On 8 November 2018, the co-arbitrators having accepted their appointments, ICSID invited the Parties to agree on the method for the appointment of the President of the Tribunal.

12. On 16 November 2018, ICSID acknowledged receipt of a letter from the Claimant proposing the method for the appointment of the presiding arbitrator and an email from the Respondent confirming its agreement to the Claimant's proposed method.

13. By letter dated 29 November 2018, the Claimant communicated the Parties' agreement to extend the time limit for the co-arbitrators to select the President of the Tribunal.

14. On 13 December 2018, Mr. Townsend and Dr. Patocchi agreed to nominate Professor Siegfried H. Elsing, a national of Germany, as President of the Tribunal in accordance with the method for appointment agreement upon between the Parties.

15. Mr. Townsend and Dr. Patocchi further made disclosures concerning their prior contacts with Professor Elsing.

16. On 18 December 2018, following nomination by his co-arbitrators, Professor Elsing accepted his appointment as presiding arbitrator.

17. On the same date, the Secretary-General, pursuant to Article 13(1) of the ICSID Arbitration Additional Facility Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date and the proceeding to have begun. The Tribunal is thus composed of Professor Elsing, President, appointed by his co-arbitrators; Dr. Patocchi appointed by the Claimant; and Mr. Townsend, appointed by the Respondent. Ms. Martina Polasek, Deputy Secretary-General, ICSID, was designated to serve as Secretary of the Tribunal.

18. On 12 January 2019, taking into account the Claimant's letter of 3 January 2019, the Respondent's e-mail of 7 January 2019, the Claimant's e-mail of 8 January 2019 and the Respondent's letter of 10 January 2019, the Tribunal decided to hold the first session in-person in Paris on 29 January 2019.

19. The Respondent was initially represented by Curtis, Mallet-Prevost, Colt & Mosle LLP ("CMC&M"). On 27 January 2019, the Respondent presented a power of attorney appointing Squire Patton Boggs ("SPB") as its co-counsel. Ms. Harwood, the Respondent's lead counsel, had changed firms and was now a partner at SPB, effective as of 22 January 2019.

20. On 28 January 2019, the Claimant requested the Tribunal to disallow the presence of Ms. Harwood at the first session to be held in Paris, France, on 29 January 2019, due to a potential conflict of interest involving her new firm.

21. On 28 January 2019, the Tribunal, after having heard the Parties, permitted Ms. Harwood to attend the first session due to the short notice of the Claimant's request and the nature of the matters to be discussed at such conference.

22. On 29 January 2019, the Tribunal held a first session in Paris.

23. During the first session, Ms. Harwood informed the Tribunal that she was now a partner at SPB and that her colleagues, Mr. Ali Gursel and Ms. Bahar Charyyeva, planned to transfer to SPB as well. The Claimant did not object to SPB participating in the conference but reserved its right to apply for disqualification of SPB.

24. The Tribunal in its letter of 2 February 2019 granted the Claimant a time limit until 28 February 2019 to apply for the disqualification of SPB as counsel and granted the Respondent 30 days from the receipt of the Claimant's application to comment on such application. In addition, the Tribunal directed SPB to establish an ethical wall immediately.

25. On 5 February 2019, the Respondent informed the Tribunal that, in accordance with its instructions at the first session held on 29 January 2019, SPB had "immediately notified all personnel worldwide of the ethical wall established to prevent the sharing or disclosure of confidential information or documents, if any, that may have been obtained in the course of the prior representation concluded in 2013 involving certain entities referred to in Claimant's letter to the Tribunal dated 28 January 2019. This has been implemented as a precautionary measure, without prejudice to SPB's position on the matters raised in Claimant's letter".

26. On 22 February 2019, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, inter alia, that the applicable Arbitration Rules would be the ICSID Arbitration (Additional Facility) Rules in force as of 10 April 2006, the Rules of Procedure contained in Procedural Order No. 1 and the procedural rulings of the Tribunal taken in accordance with Section 5 of Procedural Order No. 1. The procedural language was decided to be English and the place of proceeding was recorded as Stockholm, Sweden. Procedural Order No. 1 also set out the agreed procedural timetable for the Merits phase of the proceedings.

27. Procedural Order No. 1 further listed as counsel of record for the Claimant – Mr. Jay Alexander, Dr. Johannes Koepp, Dr. Alejandro Escobar and Ms. Valeriya Kirsey of Baker Botts (UK) LLP and for the Respondent – Mr. Ali Gursel, Ms. Bahar Charyyeva of Curtis, Mallet-Prevost, Colt & Mosle LLP and Ms. Miriam Harwood of Squire Patton Boggs LLP.

SPB's representation was recorded without prejudice to the Claimant's reservation of rights with respect to the involvement of SPB in this arbitration.

28. On 26 February 2019, the Claimant requested an extension of time for the application to disqualify SPB until 14 March 2019, which the Tribunal granted by email on 27 February 2019.

29. On 6 March 2019, ICSID requested the Parties to confirm if they wished the October 2020 hearing to be held at the seat of arbitration in Stockholm.

30. On 11 March 2019, further to the Tribunal's instructions, the Respondent filed a submission rejecting the Claimant's request that SPB resign from the case.

31. On 14 March 2019, the Claimant filed its application to disqualify SPB.

32. On 17 March 2019, ICSID Secretary-General informed the Parties that Ms. Leah Waithira Njoroge, Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal in replacement of Ms. Polasek.

33. On 19 March 2019, the Claimant communicated its preference for the hearing to be held in London.

34. On 20 March 2019, the Respondent informed the Tribunal that all of the Respondent's counsel were now affiliated with SPB.

35. On 29 March 2019, the Claimant filed a request for an urgent order concerning the Parties' confidentiality obligations ("Confidentiality Request"). The Claimant was due to file its Memorial on the same day and intended to "exhibit certain documents which are not public and are of a highly commercially sensitive nature in that they contain Claimant's proprietary information".[1]

[1] Claimant's letter of 29 March 2019.

36. On 29 March 2019, the Respondent informed the Tribunal that it was not in a position to comment on the Confidentiality Request immediately because it was awaiting instructions from its client.

37. Owing to the short notice of the Confidentiality Request and the Respondent not being able to comment on the Confidentiality Request before the time limit for Claimant's Memorial expired, likewise on 29 March 2019, the Tribunal directed the Claimant to proceed with providing its Memorial and related documents on the current schedule. Documents that required special treatment were directed to be placed in a separate folder which were directed to be clearly labelled as containing confidential documents. The Tribunal directed the Respondent to keep such documents separate and not to disseminate them outside the law firm of the Respondent's counsel until the Tribunal had the opportunity to rule on the Claimant's Confidentiality Request.

38. On 29 March 2019, the Claimant filed its Memorial on the Merits ("Cl. Mem.") including:

- Fact Exhibits C-0001 through C-0300, C-0302 through C-0355;
- Expert Report of Annette Bohr with Exhibits AB-0001 to AB-0076 ("Bohr Report");
- Expert Report of Laura Hardin with Annexes 1 to 5, Appendices 1 to 19 and Exhibits LH-0001 to LH-0011, LH-0013 to LH-0025, LH-0027 to LH-0047, LH-0049 to LH-0095, LH-0097 to LH-0143, LH-00145 to LH-0152 ("Hardin Report"); and
- Legal Authorities CL-0001 through CL-0133.

Out of 355 Fact Exhibits, 275 were marked "Confidential" and placed in a separate folder on Box (ICSID's file sharing platform) as per the Tribunal's instructions.

39. On 2 April 2019, the Respondent informed the Tribunal that it would adhere to the Tribunal's instructions of 29 March 2019 and revert with its response to the Claimant's application by no later than 5 April 2019.

40. On 5 April 2019, the Respondent filed observations on the Claimant's request of 29 March 2019, on the confidentiality of documents objecting to "Claimant's Application and respectfully request(ing) that it be denied" on the ground that the Claimant's Confidentiality Request had no basis or justification and was overbroad and untenable.

41. On 7 April 2019, the Tribunal granted the Claimant a time limit until 9 April 2019 to file a response to the Respondent's letter of 5 April 2019 on the confidentiality of documents.

42. On 8 April 2019, the Respondent requested that the hearing be held at the seat of the arbitration in Stockholm.

43. On 9 April 2019, the Claimant filed its response to the Respondent's letter of 5 April 2019.

44. On 12 April 2019, the Tribunal granted an extension of time for the Respondent's response to the Disqualification Request until 25 April 2019.

45. On 12 April 2019, the Respondent forwarded a letter from the Ministry of Justice of Turkmenistan revoking the power of attorney previously granted to CMC&M and confirmed that CMC&M no longer represented Turkmenistan in this arbitration.

46. On 15 April 2019, the Respondent filed observations on the Claimant's response of 9 April 2019 on the confidentiality of documents.

47. On 22 April 2019, the Tribunal gave preliminary directions to the Parties as follows:

> 1. Respondent was currently permitted to share Confidential Documents with any official of the Respondent who was assisting with this arbitration.
>
> 2. All time limits between the counter-memorial and the hearing will be postponed by two weeks. The procedural calendar will be amended accordingly and transmitted to the Parties by separate email.

3. The Tribunal appreciates the cooperation of the Parties and encourages them, to the extent possible, to find mutually acceptable solutions to any further procedural issues before requesting a decision of the Tribunal.

48. On 23 April 2019, the procedural calendar was amended recording that all time limits between the counter-memorial and the hearing were postponed by two weeks and transmitted to the Parties by separate email.

49. On 25 April 2019, the Respondent filed its Opposition to the Claimant's Application for Disqualification of the Respondent's Counsel, together with the Legal Expert Opinion of Professor Roy D. Simon, Jr.

50. Noting the Claimant's message of 25 April 2019, advising it that it intended to approach the Respondent to attempt to reach a mutually agreed solution relating to the treatment of confidential documents, the Tribunal, on 27 April 2019, invited the Parties to update it on their negotiations by 9 May 2019 and invited them to consider Article 3.13 of the IBA Rules in their discussions. After being granted an extension of time, the Claimant filed its letter to the Tribunal on 24 May 2019 informing the Tribunal that the Parties had not come to an agreement.

51. On 24 May 2019, the Claimant also filed its reply to the Respondent's Opposition to the Claimant's Application for Disqualification of the Respondent's Counsel.

52. On 14 June 2019, the Respondent filed observations on the Claimant's response of 24 May 2019 on the proposal for disqualification which was followed by further submissions by both the Claimant and the Respondent on 19 June 2019.

53. On 14 June 2019, the Respondent also filed observations on the Claimant's response of 24 May 2019 on confidentiality of documents.

54. On 3 July 2019, the Tribunal issued a procedural order on confidentiality of documents. The Tribunal denied the Claimant's Confidentiality Request of 29 March 2019 in its entirety and rescinded its interim orders of 29 March 2019 and 22 April 2019 concerning the disclosure of Confidential Documents.

55. On 9 August 2019, the Tribunal dismissed the Claimant's Application that SPB be disqualified as the Respondent's counsel ("Non-Disqualification Decision"). The Tribunal further decided that:

> 2. Respondent was ordered to maintain the ethical wall between the attorneys working on the present arbitration and SPB, firmwide. The ethical wall shall prohibit access to any of the electronic or hard copy case files from the [redacted] Respondent was ordered to provide a detailed description of the ethical wall and all implemented measures by and no later than 30 days from the date of this Order. The Tribunal reserved ordering additional measures.
>
> 3. Respondent was ordered to provide affidavits of the attorneys working on the present dispute that they have not received any confidential information about the [redacted] and will, for the duration of this arbitration, refrain from having any contact with the attorneys who worked on the [redacted] by and no later than 30 days from the date of this Order.
>
> 4. Respondent's request that Claimant be precluded from aggravating this dispute further by re-litigating its Application in any other forum, should MTS not be satisfied with the Tribunal's decision, was dismissed.
>
> 5. The decision on the costs of the Tribunal and of the Parties that were incurred with this Application will be determined in the Award together with the overall costs of the proceedings.

56. On 6 September 2019, pursuant to the Tribunal's instructions, the Respondent filed the Affidavit of Charles E. Talisman, Assistant General Counsel of SPB providing a description of the Ethical Wall measures implemented at SPB in connection with this matter and Affidavits of Miriam K. Harwood, Zeynep Gunday Sakarya, Carlos Guzman Plascencia, Markian Stadnyk, Ali R. Gursel, Bahar Charyyeva, Gurbanmuhammet Berdiyev, Ahmed Hojayev, Elena Malevich, Eveli Lume, Eva Cibulkova, Jakub Kamenicky of SPB working on this arbitration confirming compliance with the Tribunal's

Non-Disqualification Decision regarding confidentiality and adherence to the ethical wall restrictions.

57. On 24 September 2019, the Claimant filed a letter objecting that the affidavits submitted by the Respondent's attorneys on 6 September 2019 were not compliant with the Tribunal's Non-Disqualification Decision.

58. On 27 September 2019, the Tribunal invited the Respondent to comment on the Claimant's letter of 24 September 2019 by 4 October 2019.

59. In response to the Tribunal's invite, on 4 October 2019, the Respondent submitted its comments on the Claimant's letter of 24 September 2019.

60. On 17 October 2019, the Tribunal issued its Decision on Consistency of the Affidavits filed by the Respondent pursuant to the Arbitral Tribunal's Decision of 9 August 2019 ("Decision on Consistency of the Affidavits"). By its Decision on Consistency of the Affidavits, the Tribunal made the following order:

    a. The Tribunal found that the affidavits submitted by SPB on 6 September 2019 were consistent with its Non-Disqualification Decision.

    b. Claimant's request that SPB re-file the required affidavits with the phrase "at SPB concerning that case and/or the MTS Arbitration" removed, was dismissed.

    c. Respondent was ordered to arrange to courier to the President of the Tribunal the original hard copies of the affidavits submitted by Respondent's Counsel electronically on 6 September 2019, by 25 October 2019.

61. On 25 October 2019, the Respondent confirmed that, in accordance with the Tribunal's Decision on Consistency of the Affidavits, hard copies of original, executed and notarized attorney affidavits have been sent by courier to the President of the Tribunal, at the address of the Orrick law firm in Düsseldorf, Germany set forth in Section 13.4 of Procedural Order No. 1.

62. On 23 November 2019, the Respondent filed its Counter-Memorial on the Merits and Objection to Jurisdiction ("Resp. C-Mem."), including:

- Response Expert Report of Christian M. Dippon, Ph.D., with Exhibits CD-0001 through CD0060 ("Dippon Report");

- Fact Exhibits R-0001 through R-0200; and
- Legal Authorities RL-0001 through RL-0172.

63. Pursuant to the Procedural Timetable of 22 February 2019, as amended on 6 December 2019 and 6 February 2020, on 10 February 2020, each Party submitted its Document Production Requests ("DPR") setting out in particular the objections raised to the requests made by the other Party.

64. On 19 March 2020, the Tribunal issued Procedural Order No. 2 with Annexes I and II, including the Tribunal's decisions on the Parties' Document Production disputes. The Parties were ordered to produce the respective documents by 1 April 2020.

65. On 1 April 2020, the Parties submitted letters to the Arbitral Tribunal summarizing the status of their document exchanges or confirming, as ordered, that all responsive documents had been produced.

66. On 23 April 2020, the Claimant submitted a request for further document production orders ("Application for Further Production") accompanied by Annex I containing a table of document production requests to be re-visited by the Tribunal. In its application, the Claimant requested that the Tribunal make the following orders:

(a) that Turkmenistan must produce all documents within its possession, custody or control responsive to each of the DPRs granted by the Tribunal (with the exception of DPRs 1, 7 and 51, in respect of which MTS makes no further request), including the documents specifically identified in relation to each DPR in Annex I;

(b) that Turkmenistan must produce all documents within its possession, custody or control responsive to DPR 13, including the documents specifically identified in relation to DPR 13 in Annex I;

(c) that if Turkmenistan was withholding any responsive documents on grounds of privilege, it must produce a privilege log detailing the specific documents and the specific grounds for asserting privilege;

(d) that Turkmenistan must provide further particulars of the steps it has taken to search for responsive documents with respect to each of the DPRs (with the exception of DPRs 1, 7 and 51, in respect of which MTS makes no further request); and

(e) that, in the event Turkmenistan continued to fail to produce documents responsive to each of the DPRs granted by the Tribunal (with the exception of DPRs 1, 7 and 51, in respect of which MTS makes no further request), the Tribunal was entitled to draw appropriate adverse inferences against Turkmenistan.[2]

67. On 24 April 2020, the Tribunal invited the Respondent to comment on the Claimant's Application for Further Production.

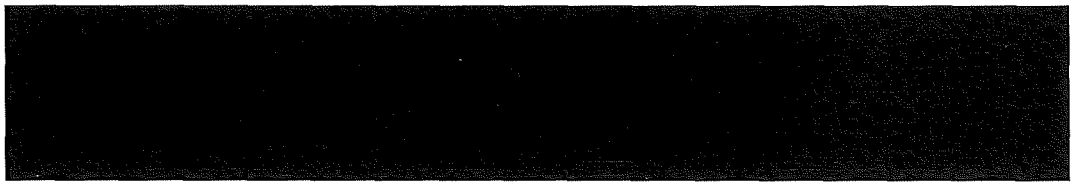
68. On 30 April 2020, the Respondent submitted its observations on the Claimant's Application for Further Production. In its observations, the Respondent requested that the Tribunal deny the Claimants' Application for Further Production and submitted that it "requests not only denial of Claimant's Application, but an award of costs for the expense that it has incurred as a result [of Claimant's "Pattern of Harassment]".[3]

[2] Respondent's letter of 23 April 2020.
[3] Respondent's letter of 30 April 2020.

69. On 6 May 2020, the Respondent filed its Comments to Annex I to the Claimant's Application for Further Production of 23 April 2020.

70. On 14 May 2020, the Tribunal issued Procedural Order No. 3 concerning the Claimant's Application for Further Production.

71. On 23 July 2020, the Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction ("Cl. Reply"), including:



- Expert Report of David Thomas with Exhibits DT-0001 through DT-0263 ("Thomas Report");
- Reply Expert Report of Annette Bohr, with Exhibits AB-077 to AB-0147 ("Bohr Report II");
- Second Expert Report of Laura Hardin, with Exhibits A&M-153 through A&M-236 ("Hardin Report II");
- Fact Exhibits C-0356 through C-0629; and
- Legal Authorities CL-0134 through CL-0218.

72. On 18 December 2020, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction ("Resp. Rej"), including:

- Second Expert Report of Christian M. Dippon, Ph.D., with Exhibits CD-0061 to CD-0119 and Appendices 1 to 26 ("Second Dippon Report");
- Legal Authorities RL-0173 to RL-0221; and
- Fact Exhibits R-0201 to R-0268.

73. On 27 January 2021, the Claimant filed two applications (i) an Application to Obtain Further Documents and for Leave to File Further Expert Reports on Quantum (the "Quantum Application"); and (ii) an Application for Production of Original Hard-Copy Documents for Inspection (the "Inspection Application").

74. On 19 February 2021, the Respondent submitted Responses to the Quantum Application (the "Response to Quantum") and to the Inspection Application (the "Response to Inspection").

75. By its letter of 19 February 2021, the Claimant stated that, in light of the COVID-19 pandemic, it appeared unlikely that it would be possible to hold an in-person hearing in Stockholm by July and suggested that the Parties and the Tribunal give consideration to possible alternative arrangements for the hearing.

76. On 24 February 2021, the Claimant submitted its Replies to the Respondent's Opposition to the Quantum Application and to the Inspection Application (the "Reply to Quantum" and "Reply to Inspection").

77. In response to the Tribunal's invitation, on 25 February 2021, the Respondent submitted its observations on the Claimant's letter of 19 February 2021. In its letter, the Respondent stated that it welcomed further discussion of alternative dates and/or locations, and specifically invited the Claimant to indicate its availability after 15 October 2021, as well as input from the Tribunal as to its ability to accommodate the Parties, in the event that an in-person hearing could not be held in July 2021, either in Stockholm or another location.

78. On 1 March 2021, the Respondent submitted its Rejoinders to the Claimant's Reply to the Respondent's Opposition to the Quantum Application and to the Inspection Application (the "Rejoinder to Quantum" and "Rejoinder to Inspection").

79. Also, on 1 March 2021, the Claimant wrote with reference to the Respondent's letter of 25 February 2021 and the Claimant's letter of 19 February 2021, asking the Tribunal to indicate whether it could be available for a hearing at any time in November or December 2021.

80. On 2 March 2021, in response to the Claimant's request of 1 March 2021, the Tribunal confirmed its availability to convene the hearing on 6-17 December 2021.

81. On 9 March 2021, the Claimant indicated that the Claimant and its representatives were available on 6-17 December 2021, and was willing to agree to vacate the July 2021 dates and postpone the hearing until 6-17 December 2021, on the understanding that, if it proved impossible for any reason to hold an in-person hearing in December 2021, the Parties and the Tribunal would reconsider holding a virtual hearing at that time in order to ensure that the hearing would not be further delayed until 2022.

82. On 11 March 2021, the Respondent confirmed that it would be available for an in-person hearing on 6-17 December 2021, and that it agreed to vacate the July 2021 hearing dates. The Respondent also emphasized in the same correspondence that, notwithstanding this rescheduling of the July 2021 hearing, the Parties should not engage in further submissions prior to the new hearing dates, including a third round of expert reports or additional production of documentary evidence, and that the Claimant's pending applications should be denied.

83. By its letter of 16 March 2021, the Tribunal confirmed that it vacated the hearing dates of 5-16 July 2021 and the case management conference scheduled for 7 April 2021, and invited the Parties to confer and submit their respective views where they were unable to agree, by 23 March 2021. In particular, the Parties were invited to indicate whether they were open to considering Washington, D.C., or Paris as a venue for the hearing. Also, the Tribunal informed the Parties that the ICSID Secretariat, on the Tribunal's instructions,

made a tentative booking of the facilities at the ICSID Hearing Centre in Washington, D.C., while maintaining the arrangements in Stockholm with revised dates.

84. On 19 March 2021, the Parties informed the Tribunal that the Parties had agreed to extend the deadline for the notification of witnesses and experts for cross-examination until 31 August 2021 and to reschedule the Pre-Hearing Conference to sometime in September 2021.

85. With reference to the Parties' correspondence of 19 March 2021, on 23 March 2021, the Tribunal approved the agreed modifications to the procedural timetable and the deadline for notification of witnesses and experts for cross-examination was accordingly extended to 31 August 2021. Further, the Tribunal confirmed its availability to convene the Pre-Hearing Conference on either 29 or 30 September 2021, and invited the Parties to indicate their availability on those dates.

86. On 23 March 2021, the Tribunal issued Procedural Order No. 4 concerning the Claimant's Quantum Application and Inspection Application. In this Order, the Tribunal stated that it was not convinced that an order for the production of the requested documents was necessary; however, out of utmost precaution, the Tribunal recommended that the Respondent should preserve the originals of these documents in case an inspection of any of them should become necessary at a later stage of the proceeding.

87. Also, on 23 March 2021, the Claimant informed the Tribunal that the Parties had conferred as requested in the Tribunal's letter of 16 March 2021, but they had been unable to reach an agreement. The Claimant further stated that it was open, in principle, to considering alternative hearing venues other than Stockholm; however, Washington D.C. was not the Claimant's preferred option due to the increased costs associated with holding the hearing in the U.S. as well as the difficulties for Russian citizens in obtaining U.S. entry visas.

88. On 24 March 2021, the Respondent confirmed that it was open to Washington D.C. or Paris as a hearing venue, and indicated its preference for Washington D.C. as between Washington D.C., Paris, and Stockholm.

89. In response to the Tribunal's invitation of 23 March 2021, on 26 March 2021, the Claimant informed the Tribunal that it would be unavailable for a Pre-Hearing Conference during the working day (U.K. time) on 29 or 30 September 2021, but it would be available on those days after 7 pm U.K. time. On 29 March 2021, the Respondent confirmed its availability for a Pre-Hearing Conference on 29 September 2021 at 7 pm U.K. time.

90. On 8 September 2021, the Tribunal confirmed that, because of the increasing complications and concerns caused by the COVID-19 pandemic, the hearing scheduled for 6-17 December 2021 would proceed virtually by video conference.

91. Pursuant to Section 19.1 of Procedural Order No. 1, a pre-hearing organizational meeting between the Parties and the Tribunal was held by videoconference on 29 September 2021 (the "Pre-Hearing Conference"), to discuss any procedural, administrative, and logistical matters in preparation for the Hearing. Participating were:

Tribunal:

Professor Dr. Siegfried H. Elsing	President
Dr. Paolo Michele Patocchi	Arbitrator
Mr. John M. Townsend	Arbitrator

ICSID Secretariat:

Ms. Leah W. Njoroge	Secretary of the Tribunal

For the Claimant:

Dr. Johannes Koepp	Baker Botts (UK) LLP
Mr. Jay Alexander	Baker Botts (UK) LLP
Mr. David Turner	Baker Botts (UK) LLP
Ms. Valeriya Kirsey	Baker Botts (UK) LLP
Ms. Izabella Kharlamova	Baker Botts (UK) LLP

For the Respondent:

Ms. Miriam Harwood	Squire Patton Boggs (US) LLP
Mr. Ali Gursel	Squire Patton Boggs (US) LLP
Mr. John Branson	Squire Patton Boggs (US) LLP
Ms. Zeynep Gunday Sakarya	Squire Patton Boggs (US) LLP
Mr. Carlos Guzman Plascencia	Squire Patton Boggs (US) LLP

92. During the Pre-Hearing Conference, the Parties and the Tribunal discussed draft Procedural Order No. 5 circulated to the Parties on 16 September 2021. An audio recording of the Pre-Hearing Conference was made and deposited in the archives of ICSID, and it was made available to the Members of the Tribunal and the Parties on 30 September 2021.

93. On 29 September 2021, during the Pre-Hearing Conference, the Respondent raised an objection concerning the format of the hearing, stating that it considered that a virtual hearing was inappropriate in light of the importance and complexity of the present case. The Tribunal answered that its decision had been made reluctantly in light of the health risks and complications caused by the COVID-19 pandemic and the Parties' inability to agree on a venue in the course of an exchange of correspondence conducted over several months. After further deliberation, the Tribunal maintained its decision to proceed with the Hearing virtually by videoconference.

94. On 15 October 2021, the Tribunal issued Procedural Order No. 5. which set out the procedural rules that would govern the conduct of the hearing. Inter alia, paragraph 29 of Procedural Order No. 5 directed the Claimant to provide, to the Respondent only, an advance copy of the PowerPoint presentation that its expert witness Mr. Thomas proposed to use at the Hearing.

95. On 5 November 2021, the Respondent submitted two letters seeking orders from the Tribunal concerning (i) Mr. Thomas's demonstratives, arguing inter alia that the slides contained a new damages model; and that Mr. Thomas should not give evidence at the hearing and, in the alternative, requesting that the hearing dates be vacated, should the Tribunal admit Mr. Thomas's slides; and (ii) the Respondent's objections to the Claimant's request to submit new exhibits and legal authorities into the record. At the Tribunal's invitation, the Claimant submitted its responses to the Respondent's 5 November 2021 letters on 10 November 2021.

96. By letter dated 15 November 2021, the Tribunal, in relation to Mr. Thomas's slides, stated that these demonstratives should not be an expert report "in disguise", that the Tribunal accepted the Claimant's representations in its letter dated 10 November 2021 that Mr. Thomas did not seek to introduce a new model at the hearing and that his presentation

was directed at critiquing the new model put forward by Dr. Dippon. The Tribunal ruled that, based on that understanding, Mr. Thomas might make his presentation at the hearing and reserved its right to admit or request further input from the Parties on quantum issues after the hearing if it emerged that the demonstratives contained new evidence. The Tribunal also ruled that it did not consider that the admission of Mr. Thomas's presentation required any change in the hearing dates, as the Respondent had been provided an advance copy of that presentation giving the Respondent the opportunity to prepare for Mr. Thomas's cross-examination well in advance.

97. By letter dated 16 November 2021, the Respondent wrote to the Tribunal submitting that it could not proceed with the hearing for various reasons, inter alia because Mr. Thomas's presentation contained new evidence, and that it objected to the virtual format of the hearing. The Respondent requested the Tribunal to vacate the hearing dates and reschedule an in-person hearing within three months after consultations with the Parties.

98. In its letter dated 18 November 2021, submitted at the Tribunal's invitation, the Claimant argued that the Respondent had not provided any basis for the Tribunal to revisit its decision concerning the hearing and submitted that there was nothing in the ICSID Additional Facility Rules and Swedish law that prevented the Tribunal from ruling that the hearing proceed virtually.

99. On 19 November 2021, the Tribunal decided that the hearing would proceed virtually by video conference as scheduled. The Tribunal considered that the issue had been previously discussed with the Parties and determined in its past rulings of 8 September and 15 November 2021. The Tribunal agreed with the Claimant that nothing in the ICSID Additional Facility Rules, Swedish law and the Tribunal's own orders prevented it from deciding that the hearing proceed virtually. As to the allegation that Mr. Thomas's slides contained new evidence, the Tribunal noted that it had not yet seen the slides and could not determine whether they contained new evidence. The Tribunal offered to sit additional hearing days if it emerged at the hearing that there was new evidence to which the Respondent could not adequately respond and reiterated its decision that responses to any new material on quantum could be addressed in post-hearing submissions.

100. On 22 November 2021, the Respondent wrote again that it declined to proceed with the hearing due to the circumstances explained in its 16 November 2021 letter, *i.e.*, the alleged new evidence contained in Mr. Thomas's slides among others. The Respondent invoked Article 48 of the ICSID Arbitration (Additional Facility) Rules on default by a party and requested that the Tribunal grant a period of grace and reschedule the hearing in three months. The Respondent added that "it fully intends to appear and present its case in this proceeding".

101. On 24 November 2021, the Claimant submitted a response to the Respondent's 22 November 2021 letter, arguing that the Respondent had not satisfied the requirements of Article 48 of the ICSID Arbitration (Additional Facility) Rules. According to the Claimant, an Article 48 situation applies only where the non-cooperating party has failed to "appear or to present its case at any stage of the proceeding". The Claimant explained that while the Respondent declared that it "declines to participate in the Hearing", the Respondent had not yet "failed to appear or present its case at a hearing". The Claimant asked the Tribunal to dismiss the Respondent's Article 48 application, or, in the alternative, order the postponement of only the examination of quantum experts. The Claimant also requested that, should the Tribunal grant the Respondent's application, then the hearing should be rescheduled at the earliest opportunity in early or mid-2022, that the Respondent should not be entitled to any further period of grace under Article 48 and that the Respondent pay the Claimant's fees and expenses incurred between 29 September 2021 and the date on which the Tribunal ordered the hearing dates to be vacated.

102. On 25 November 2021, the Tribunal issued the following directions to the Parties: (i) the Tribunal would convene a Case Management Conference ("CMC") by videoconference on 29 November 2021 with the Parties starting at 12:30 pm EST/6:30 pm CET; (ii) the Respondent was directed to inform the Tribunal and the Claimant by 9 am EST/3 pm CET on 29 November 2021, whether it would participate in the hearing should the Tribunal decide to proceed with the hearing only for the examination of fact witnesses, and postpone the examination of experts until 2022; (iii) if the Respondent indicated that it would not participate in the hearing, the Claimant was invited to confirm before the commencement of the CMC whether it made a request in accordance with Article 48(1) of the ICSID

Arbitration (Additional Facility) Rules; and (iv) the Tribunal informed the Parties that the weeks of 2 and 9 May 2022 had become available for a hearing and that each Party was invited to inform the Tribunal by 9 am EST/3 pm CET on 29 November 2021, if there was any insurmountable obstacle to its participation on those weeks either in (1) the continuation of the hearing, for examination of expert witnesses, should the examination of fact witnesses take place during the December dates, or (2) a full hearing, if it would not be possible to continue with any portion of the hearing on the December dates.

103. By letter dated 29 November 2021, the Respondent informed the Tribunal that it "cannot proceed with the December hearing". The Respondent also informed the Tribunal that it could not proceed with the separate examination of fact witnesses during the December hearing dates and postpone the examination of the quantum experts. According to the Respondent, the merits and quantum issues in this case are "inextricably intertwined" and separating these issues would result in the Respondent's inability to present the case fully to the Tribunal. The Respondent indicated its availability to participate in a hearing on the weeks of 2 and 9 May 2022.

104. On 29 November 2021, the Claimant submitted a letter requesting the Tribunal to proceed under Article 48(1) of the ICSID Arbitration (Additional Facility) Rules "on the basis that the Respondent has unequivocally signalled that it intends to default by failing to attend" the hearing. The Claimant reiterated its request that the Tribunal deny the Respondent's request for a period of grace under Article 48(2) of the ICSID Arbitration (Additional Facility) Rules. In the alternative, the Claimant submitted that if the Tribunal were to grant the Respondent a period of grace, it should rule that the Respondent was not entitled to a further period of grace if it subsequently refused to participate in the rescheduled hearing. The Claimant indicated that its expert, Ms. Hardin, would not be available during the May 2022 dates proposed by the Tribunal due to a conflict.

105. Pursuant to the Tribunal's directions of 25 November 2021, a CMC between the Parties and the Tribunal was held by videoconference on 29 November 2021 at 12:30 pm EST (the "29 November CMC"). Participating in the 29 November CMC were:

Tribunal:

Professor Dr. Siegfried H. Elsing	President
Dr. Paolo Michele Patocchi	Arbitrator
Mr. John M. Townsend	Arbitrator

ICSID Secretariat:

Ms. Leah W. Njoroge	Secretary of the Tribunal

For the Claimant:

Dr. Johannes Koepp	Baker Botts (UK) LLP
Mr. Jay Alexander	Baker Botts (UK) LLP
Ms. Valeriya Kirsey	Baker Botts (UK) LLP
Mr. David Turner	Baker Botts (UK) LLP
[redacted]	

For the Respondent:

Ms. Miriam Harwood	Squire Patton Boggs (US) LLP
Mr. Ali Gursel	Squire Patton Boggs (US) LLP
Mr. John Branson	Squire Patton Boggs (US) LLP
Ms. Zeynep Gunday Sakarya	Squire Patton Boggs (US) LLP
Mr. Carlos Guzman Plascencia	Squire Patton Boggs (US) LLP

106. An audio recording of the 29 November CMC was made and deposited in the archives of ICSID, and it was made available to the Members of the Tribunal and the Parties on 30 November 2021.

107. The Tribunal discussed with the Parties the status of the Hearing based on their submissions concerning Article 48 of the ICSID Arbitration (Additional Facility) Rules and their indications of availability for a rescheduled hearing in May 2022. The Tribunal also discussed with the Parties the issue of Mr. Thomas's presentation. The Respondent, after being asked by the Tribunal, clearly confirmed that it would not appear at the hearing in December 2021, whereupon the Claimant made a request according to Article 48(1) of the ICSID Arbitration (Additional Facility) Rules.

108. In the course of the 29 November CMC, the Tribunal fixed another CMC on 7 December 2021, starting at 10 am EST, to discuss the Parties' proposals for finding arrangements to accommodate the examination of Ms. Hardin during the May 2022 dates. This was confirmed by the Tribunal in a message of 29 November 2021.

109. Pursuant to the Tribunal's directions of 29 November 2021, another CMC between the Parties and the Tribunal was held by videoconference on 7 December 2021, at 10 am EST (the "7 December CMC"). Participating in the 7 December CMC were:

Tribunal:

Professor Dr. Siegfried H. Elsing	President
Dr. Paolo Michele Patocchi	Arbitrator
Mr. John M. Townsend	Arbitrator

ICSID Secretariat:

Ms. Leah W. Njoroge	Secretary of the Tribunal

For the Claimant:

Dr. Johannes Koepp	Baker Botts (UK) LLP
Mr. Jay Alexander	Baker Botts (UK) LLP
Ms. Valeriya Kirsey	Baker Botts (UK) LLP
Mr. David Turner	Baker Botts (UK) LLP

For the Respondent:

Ms. Miriam Harwood	Squire Patton Boggs (US) LLP
Mr. Ali Gursel	Squire Patton Boggs (US) LLP
Mr. John Branson	Squire Patton Boggs (US) LLP
Ms. Zeynep Gunday Sakarya	Squire Patton Boggs (US) LLP
Mr. Carlos Guzman Plascencia	Squire Patton Boggs (US) LLP

110. An audio recording of the 7 December CMC was made and deposited in the archives of ICSID, and it was made available to the Members of the Tribunal and the Parties on 7 December 2021.

111. The Tribunal and the Parties discussed proposals to accommodate Ms. Hardin's testimony on the May 2022 dates among other procedural items relating to the organization of the hearing in May 2022.

112. On 15 December 2021, the Tribunal issued Procedural Order No. 6, by which the Tribunal (i) confirmed that the hearing was postponed by operation of Article 48(2) of the ICSID Arbitration (Additional Facility) Rules and the Respondent was hereby put on notice that the Tribunal would not entertain a further request from it for postponement of the hearing dates rescheduled in accordance with this provision; (ii) directed the Claimant's expert,

Mr. Thomas, and the Respondent's expert, Dr. Dippon, to submit their slides together with a summary of what in their presentations was new since their last expert reports by 15 January 2022 and 31 January 2022 respectively; and (iii) fixed 2-13 May 2022 for the Hearing, directed the Parties to submit a revised detailed hearing schedule by 17 December 2021, and a joint proposal concerning a venue for an in-person hearing by 31 January 2022. Further, the Tribunal directed that it would convene a CMC on 25 February 2022 to discuss with the Parties the format of the hearing and a Pre-Hearing Conference on 5 April 2022 to discuss any outstanding procedural matters related to the Hearing. The Tribunal reiterated that the hearing would proceed virtually by videoconference, should the public health conditions make it impossible or imprudent to proceed in person.

113. Pursuant to the Tribunal's directions in Procedural Order No. 6, on 4 January 2022, the Parties submitted two hearing schedules, one to be used in the event of a virtual hearing and the other to be used for an in-person hearing.

114. By the Parties' correspondence of 1 and 2 February 2022, the Parties advised the Tribunal that they had "mutually identified Istanbul, Turkey and Lausanne, Switzerland as alternative venues [for an in-person hearing]". The Parties advised that they were not aware of obstacles for either Party's counsel, representatives, witnesses, or experts to travel to Istanbul, Turkey; however, with respect to Lausanne, Switzerland, each Party might have members of their delegation who must request a visa and/or obtain a "special necessity" entry permission due to the type of COVID vaccine they had received.

115. On 5 February 2022, the Tribunal advised the Parties that it was prepared to proceed with the Hearing in person in Lausanne, Switzerland, and that it had instructed ICSID to place an enquiry with the Hotel Beau-Rivage Palace, the venue identified by the Parties, to confirm the dates and logistical arrangements for the Hearing.

116. On 15 February 2022, the Parties advised the Tribunal that they were in the process of exploring the availability of Swiss visas and entry permission under the "special necessity" exception for their witnesses and client representatives and proposed that the Tribunal consider Istanbul as an alternative venue in the event that it would not be possible to convene the hearing in Lausanne.

117. On 19 February 2022, the Tribunal rejected the Parties' proposal of Istanbul as an alternative hearing venue and ruled that, in the event that the Hearing could not proceed in person in Lausanne (*e.g.*, because the hearing venue in Lausanne became unavailable or because participants were unable to attend in person), the hearing would proceed remotely on Zoom. On the same date, the Parties reiterated their request for the Tribunal to reconsider Istanbul as an alternative Hearing venue due to difficulties in obtaining Swiss visas for members of their delegations.

118. On 22 February 2022, in response to the Parties' request that the Tribunal reconsider Istanbul as an alternative hearing venue, the Tribunal reiterated its previous rulings of 5-19 February 2022, confirming that the Hearing would proceed in person in Lausanne and that the alternative to the in-person hearing would be a hearing by video conference on Zoom. The Tribunal invited the Parties to confirm the reservation at the Hotel Beau-Rivage Palace by 23 February 2022.

119. By its communication of 23 February 2022, the Claimant confirmed its agreement to proceed with the in-person Hearing in Lausanne, Switzerland, as directed by the Tribunal. On the same date, the Respondent advised that it could not commit to the reservation at the Hotel Beau-Rivage Palace given the uncertainties with securing visas for its witnesses, Party representatives, and Ashgabat-based counsel.

120. On 15 March 2022, the Respondent requested clarifications from the Claimant, specifically enquiring whether the Claimant had been affected by sanctions against Russia and whether it faced difficulties that would prevent the Claimant's participation in the forthcoming hearing as a result of the events in Russia and Ukraine, including obtaining visas, travelling to Switzerland for an in-person Hearing, and whether MTS would be able to pay for its travel costs, counsel fees, and any advances on costs to ICSID that may be required for the hearing or for the remainder of this proceeding.

121. On 16 March 2022, the Claimant submitted a response to the Respondent's request for clarifications, confirming that the Claimant had not been affected by sanctions against Russia and that Baker Botts LLP continued to represent MTS. The Claimant stated that, in light of recent events in Russia and Ukraine, the physical attendance of its witnesses and

client representatives at the Hearing in Switzerland was "very unlikely" and proposed that the Tribunal, counsel and experts meet in person for the Hearing while the witnesses connect remotely.

122. On 17 March 2022, in response to the Parties' correspondence of 15 and 16 March 2022, the Tribunal informed the Parties that it was not opposed to the Claimant's proposal that the Hearing be conducted in a hybrid format with counsel and experts attending physically and fact witnesses connecting remotely, provided that any fact witness who could travel to Switzerland would not be precluded from appearing in person. The Tribunal instructed the Parties to confirm reservations at the Hotel Beau-Rivage Palace by 17 March 2022, in light of the urgency.

123. On 18 March 2022, the Respondent inquired as to the availability of ICSID's facilities in Washington, D.C., on the dates of the hearing, in order to avoid the high cost of renting the hotel venue in Lausanne, since the issue the Claimant had previously identified as an obstacle to a hearing in the U.S. – i.e., the inability of the Claimant's Russian witnesses to obtain U.S. visas would be moot given the Claimant's proposal that all fact witnesses testify remotely. ICSID confirmed the availability of its Washington, D.C., facilities on the hearing dates. However, the Claimant objected to holding the hearing in Washington, D.C. The Tribunal reiterated its decision to conduct the hearing in Lausanne.

124. On 18 March 2022, each Party confirmed its agreement with the proposal that the hearing be conducted on the basis that the Tribunal, counsel, and the experts would attend in person and fact witnesses might testify remotely, provided that any fact witnesses who were able travel to Switzerland would not be precluded from appearing in person. The Respondent confirmed that its counsel and experts would attend the hearing in Lausanne and that it would confer with the Claimant regarding the attendance of each Party's fact witnesses.

125. On 31 March 2022, the Respondent asked the Claimant whether its witnesses or Party representatives had obtained Swiss visas to attend the Hearing in person in Lausanne. On 1 April 2022, the Claimant advised that it had not obtained Swiss visas for its witnesses or Party representatives. The Claimant further advised that it was still "in the process of submitting visa applications with the Swiss consulate in Moscow for its

witnesses/representatives who do not currently have a Schengen visa, and applications for entry permits (i.e., exemptions from the Swiss COVID vaccination requirements) for those who do…" and that "it is obviously not possible to predict whether the Swiss authorities will grant these visas/ entry permits". The Respondent has also continued its efforts to obtain Swiss visas for its Turkmenistan-based witnesses and Party representatives, has not yet obtained the visas, and cannot predict if its efforts will be successful.

126. Pursuant to Section 19.1 of Procedural Order No. 1, a Pre-Hearing Conference between the Parties and the Tribunal was held by videoconference on 5 April 2022 to discuss any procedural, administrative, and logistical matters in preparation for the Hearing. Participating were:

Tribunal:

Professor Dr. Siegfried H. Elsing	President
Dr. Paolo Michele Patocchi	Arbitrator
Mr. John M. Townsend	Arbitrator

ICSID Secretariat:

Ms. Leah W. Njoroge	Secretary of the Tribunal
Mr. Alex B. Kaplan	ICSID Counsel
Ms. Ekaterina Minina	ICSID Paralegal

For the Claimant:

Dr. Johannes Koepp	Baker Botts (UK) LLP
Ms. Valeriya Kirsey	Baker Botts (UK) LLP
Mr. David Turner	Baker Botts (UK) LLP
Mr. Laurence Ridgway	Baker Botts (UK) LLP
Mr. Maros Hodor	Baker Botts (UK) LLP

For the Respondent:

Ms. Miriam Harwood	Squire Patton Boggs (US) LLP
Mr. John Branson	Squire Patton Boggs (US) LLP
Ms. Zeynep Gunday Sakarya	Squire Patton Boggs (US) LLP
Mr. Carlos Guzman Plascencia	Squire Patton Boggs (US) LLP
Ms. Maleeha Khan	Squire Patton Boggs (US) LLP

127. During the Pre-Hearing Conference, the Parties and the Tribunal discussed the draft Procedural Order 7 circulated to the Parties on 29 March 2022.

128. An audio recording of the Pre-Hearing Conference was made and deposited in the archives of ICSID, and it was made available to the Members of the Tribunal and the Parties on 6 April 2022.

129. On 8 April 2022, the Tribunal issued Procedural Order No. 7 concerning organization of the hybrid hearing.

130. A hearing on jurisdiction and the merits was held in Lausanne from 2 May 2022 to 13 May 2022 (the "Hearing"). The following persons were present at the Hearing:

Tribunal:

Professor Dr. Siegfried H. Elsing	President
Dr. Paolo Michele Patocchi	Arbitrator
Mr. John M. Townsend	Arbitrator

ICSID Secretariat:

Mr. Alex B. Kaplan	Secretary of the Tribunal

For the Claimant:

Dr. Johannes Koepp	Baker Botts
Ms. Valeriya Kirsey	Baker Botts
Mr. David Turner	Baker Botts
Mr. Laurence Ridgway	Baker Botts
Ms. Olga Zujeva	Baker Botts
Mr. Maros Hodor	Baker Botts
[redacted]	

For the Respondent:

Ms. Miriam K. Harwood	Squire Patton Boggs
Mr. Ali R. Gursel	Squire Patton Boggs
Mr. John D. Branson	Squire Patton Boggs
Ms. Zeynep Gunday Sakarya	Squire Patton Boggs
Ms. Bahar Charyyeva	Squire Patton Boggs
Mr. Carlos Guzman Plascencia	Squire Patton Boggs
Mr. Timothy O'Shannassy	Squire Patton Boggs
Ms. Maleeha Khan	Squire Patton Boggs
Ms. Isabel Manfredonia	Squire Patton Boggs
Ms. Olha Martynevych	Squire Patton Boggs
Mr. Mekan Karayev	Squire Patton Boggs

Ms. Hesel Toyjanova	Squire Patton Boggs
Ms. Tamara Theriot	Squire Patton Boggs
Ms. Selbi Hojaeva	Squire Patton Boggs
[redacted]	

Court Reporter:

Ms. Anne-Marie Stallard

Interpreters:

Mr. Khan Sergei Mikheyev	English-Russian interpreter
Ms. Irina van Erkel-Korotkova	English-Russian interpreter
Ms. Helena Bayliss	English-Russian interpreter
Mr. Khan Didar Hojayev	English-Turkmen interpreter
Mr. Khan Ilmurat Bashimov	English-Turkmen interpreter
Mr. Khan Naz Nazar	Claimant's Turkmen language interpreter

131. During the Hearing, the following persons were examined:

On behalf of the Claimant:

[redacted]

Ms. Laura Hardin	Damages expert
Mr. Matthew Turk	Assistant to the damages expert
Mr. David Thomas	Industry expert
Mr. Sean Kennedy	Assistant to the industry expert

On behalf of the Respondent:

[redacted]

Mr. Christian M. Dippon	Expert
Mr. Dirk van Leeuwen	Expert

132. By its letter of 1 June 2022, the Tribunal recapitulated the contemplated post-hearing submissions and procedures. On 8 June 2022, the Claimant's experts, Ms. Hardin and

Mr. Thomas, submitted their respective "Summary of Post-Hearing Corrections" ("Harding Post-Hearing Corrections" and "Thomas Post-Hearing Corrections"). On 30 June 2022, the Claimant submitted its "Submissions on the "3+2+3+2" Provision of MTS-TM's License" ("Cl. License Submission") and the Respondent submitted its "Response to the Tribunal's Question regarding the 'Note' on MTS' July 26, 2012 License" ("Resp. License Submission").

133. By email correspondence of 5 and 20 July 2022, the Parties submitted their agreed corrections to the transcript and the translations, as applicable. They also submitted certain disagreements to the translations, but on the invitation of the Tribunal, the Parties were able to reduce the disagreements to three.

134. The Parties filed simultaneous post-hearing briefs on 26 August 2022 ("Cl. PHB" and Resp. PHB"), and simultaneous Reply post-hearing briefs ("Cl. Reply PHB" and "Resp. Reply PHB") on 30 September 2022. The Claimant submitted its Sur-Reply on 17 October 2022 ("Cl. Sur-Reply PHB") and the Respondent submitted its Sur-Reply on 27 October 2022 ("Resp. Sur-Reply PHB").

135. The Parties filed their submissions on costs on 9 December 2022.

136. The proceeding was closed on 13 April 2023.

III. FACTUAL BACKGROUND

137. This dispute concerns the Claimant's claims that the Respondent mistreated the Claimant's investment during its operation in the Turkmenistan telecommunications market between 2012 and 2017, and wrongfully shut down the Claimant's operations in September 2017 in violation of the BIT.

138. The Claimant MTS was established in Moscow, Russia, as a closed joint stock company in 1993 and later became a public company after an IPO on the New York Stock Exchange in 2000.[4] MTS provides telecommunication and digital services in Russia and the Commonwealth of Independent States, including Belarus (2002-), Ukraine (2003-),

[4] Cl. Mem., ¶ 36.

Uzbekistan (2004-2016), and Armenia (2007-).[5] Since late 1996, its majority shareholder is Public Joint Stock Financial Corporation Sistema, a Moscow-based financial group.[6]

139. MTS conducted business in Turkmenistan during two periods: from 2005 to 2010, it operated through acquisition of Barash Communications Technologies, Inc. ("BCTI") and, from 2012 to 2017, through MTS-Turkmenistan, its Turkmen subsidiary ("MTS-TM").[7]

140. Turkmentelecom is a State telecommunications provider wholly owned by Turkmenistan's Ministry of Communications ("MoC" or "MOC").[8] As the State telephone operator, Turkmentelecom controlled access to the fixed-line and other telecommunications infrastructure in Turkmenistan.[9] Altyn Asyr Cellular Communications enterprise ("Altyn Asyr") is a 100%-owned subsidiary of Turkmentelecom, established 2004 to provide mobile telecommunication services.[10] The State Inspectorate for Supervision of the Radio Frequency Spectrum ("Radio Frequency Authority") is a legal entity organized under Turkmen law and a State organ under the Ministry of Communications.[11]

A. MTS' OPERATION IN TURKMENISTAN THROUGH BCTI

(1) BCTI's business in Turkmenistan in 1994-2005

141. BCTI was established in 1994 under the laws of Texas, United States, by the Barash family.[12] BCTI provided mobile telecommunication services in Turkmenistan through a local branch.[13]

142. BCTI entered into an agreement dated 22 April 1994 with the Government of Turkmenistan (Agreement between the Government of Turkmenistan and Barash Communication Technologies, Inc. on the Development of Cellular Radiotelephone

[5] Cl. Mem., ¶¶ 35-37.
[6] Cl. Mem., ¶¶ 35-37.
[7] Cl. Mem., ¶ 38.
[8] RfA, ¶ 19; Cl. Reply, ¶ 141.
[9] Cl. Mem., ¶105.
[10] RfA, ¶ 5; Cl. Reply, ¶ 141.
[11] Resp. C-Mem., ¶ 304.
[12] Cl. Mem., ¶ 97.
[13] [redacted]

Communications in Turkmenistan, 22 April 1994, "1994 Agreement").[14] The 1994 Agreement was authorized by a Presidential Decree.[15]

143. Under the 1994 Agreement, BCTI was granted "the exclusive right to design, develop and operate all types of cellular radiotelephone communication in the territory of Turkmenistan for a period of 10 years".[16]

144. Under Article 5 of the 1994 Agreement, the profit was to be distributed between BCTI and the Turkmen Ministry of Communications, [redacted][17]

145. The term of the 1994 Agreement was "20 years with a possibility of extension by a further 20 years".[18] BCTI could sell or assign its rights and obligations under the 1994 Agreement to third parties.[19]

146. For the operation of the mobile telecommunications network, BCTI obtained several licenses from the Ministry of Communications of Turkmenistan and radio frequency permits.[20] As a private operator, BCTI needed to have an interconnection agreement with Turkmentelecom to use its fixed lines for incoming and outgoing traffic.[21]

147. In 2004, around the time when BCTI's exclusivity under the 1994 Agreement expired, Turkmentelecom established a new subsidiary named Altyn Asyr as its own mobile provider.[22]

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[14] Cl. Mem., ¶ 99-102; Agreement between the Government of Turkmenistan and Barash Communication Technologies, Inc. on the Development of Cellular Communications in Turkmenistan, 22 April 1994 (the "1994 Agreement"), Exhibit C-0003.
[15] Decree of the President of Turkmenistan No. 1680, 9 March 1994, Exhibit C-0030.
[16] 1994 Agreement, Clauses 3.7 and 8.1, Exhibit C-0003; Cl. Mem. ¶ 100-101; Resp. C-Mem. ¶ 74.
[17] 1994 Agreement, Clause 5.1, Exhibit C-0003; Resp. C-Mem. ¶ 75.
[18] 1994 Agreement, Clause 8.1, Exhibit C-0003; Cl. Mem. ¶ 99; Resp. C-Mem. ¶ 74.
[19] 1994 Agreement, Clause 9.1, Exhibit C-0003; Cl. Mem. ¶ 102.
[20] Cl. Mem., ¶ 98; License No. 5-A from the Ministry to BCTI for mobile telephone and paging services, 15 February 1995, Exhibit C-0032; License No. 33 from the Ministry to BCTI for terrestrial satellite stations, 6 January 1996, Exhibit C-0033; License No. 67 from the Ministry to BCTI for the provision of mobile and paging services (supplementing License No. 33), 19 July 1999, Exhibit C-0034; License No. 164 from the Ministry to BCTI for mobile telephone and paging services, 22 July 2004, Exhibit C-0038.
[21] Cl. Mem., ¶ 105.
[22] Cl. Mem., ¶¶ 105-106; TMCell website, "*History of 'Altyn Asyr' company*", accessed on 31 November 2018, Exhibit C-0345.

148. When MTS entered the telecommunications market in Turkmenistan in 2005, BCTI was the largest and the only private mobile telecommunications provider in Turkmenistan.[23] At the time, BCTI had network coverage in Ashgabat and Turkmenbashi, [redacted][24]

(2) MTS' acquisition of BCTI in 2005

149. MTS first entered the Turkmen telecommunications market in 2005 when it acquired shares in BCTI.[25]

150. On 24 June 2005, MTS entered into a sale and purchase agreement to acquire BCTI for [redacted] in two steps.[26] Pursuant to the agreement, on 27 June 2005, MTS acquired a 51% controlling stake in BCTI, and was expected to acquire the remaining 49% on 31 October 2005.

a. Suspension of BCTI services on 28 June 2005

151. The Turkmenistan Government was not informed of this transaction by MTS or BCTI when MTS acquired a 51% controlling stake in BCTI. Instead, it became aware of this transaction on 27 June 2005, from MTS' press report.[27] The next day, on 28 June 2005, Turkmentelecom sent a letter to BCTI cancelling "the Contract to provide lines for incoming and outgoing cellular communications traffic".[28] The Claimant underlines that as a result, BCTI's principal telecommunications license was withdrawn, BCTI's interconnection agreements with Turkmenistan were terminated, and BCTI was switched off from its network and the network for fixed local and international lines.[29]

152. The letter of 28 June 2005 did not state any reasons and simply referred to the minutes of a meeting held on the previous day. The Parties provide different explanations for this

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[23] RfA, ¶ 18; Cl. Mem., ¶ 97.
[24] RfA, ¶ 18.
[25] Cl. Mem., ¶ 109; Resp. C-Mem., ¶ 73.
[26] SPA between Mikhail Barash, Alla Barash and OJSC Mobile Telesystems Relating to Barash Communication Technologies Inc., 24 June 2005, Clause 1.2, Exhibit C-0004; Cl. Mem., ¶ 109; Resp. C-Mem., ¶ 77.
[27] Resp. C-Mem., ¶ 77.
[28] Letter No. 984 from Turkmentelecom to BCTI, 28 June 2005, Exhibit C-0043; Cl. Mem., ¶ 113; Resp. C-Mem., ¶ 78.
[29] Cl. Mem., ¶ 113; [redacted] ¶ 26; [redacted]

incident. The Respondent stated that MTS' acquisition of BCTI had been done without any notice or discussions with the Government, and highlighted that this was merely a "temporary suspension".[30] The Claimant contended that this shutdown occurred because senior officials in the Turkmenistan Government were offended by MTS' entry into the market, notwithstanding the absence of any requirement of notification or approval for MTS to acquire BCTI.[31]

b. Meeting (2 July 2005) between MTS and the Ministry of Communications

153. On 2 July 2005, a meeting was held in Ashgabat between MTS representatives and the Ministry of Communications of Turkmenistan to discuss the situation regarding MTS' acquisition of BCTI.[32] The Deputy Chairman of the Cabinet of Ministers and the Minister of Communications, as well as the General Director of Turkmentelecom were present in this meeting.[33]

154. In the minutes of this meeting, the Respondent emphasizes MTS' representatives "admitted their mistake in not informing the Ministry of the upcoming acquisition". As to [redacted] whereby Mr. Barash, the Chairman of BCTI, had not obtained approval from the Government of Turkmenistan, MTS' representatives stated that "if this was a mistake, it had been unintentional".[34]

155. During the meeting, three options proposed by the Turkmenistan authorities were discussed: i) "a joint venture or a participation with 50%-50% profit distribution"; ii) "operation in accordance with the old agreement and added supplements and the sharing of profit: 70% to the Ministry of Communication of Turkmenistan, and 30% to [MTS]"; or iii) "to abandon their share and leave".[35]

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[30] Resp. C-Mem., ¶ 78.
[31] Cl. Mem., ¶¶ 114-115.
[32] Resp. C-Mem., ¶ 79.
[33] Cl. Mem., ¶ 116; Minutes of Meeting between Turkmen Authorities and MTS in Ashgabat in July 2005, Exhibit C-0044.
[34] Resp. C-Mem., ¶ 79; Exhibit C-0044, p. 1-2.
[35] Cl. Mem., ¶ 116; Exhibit C-0044, p. 2-3.

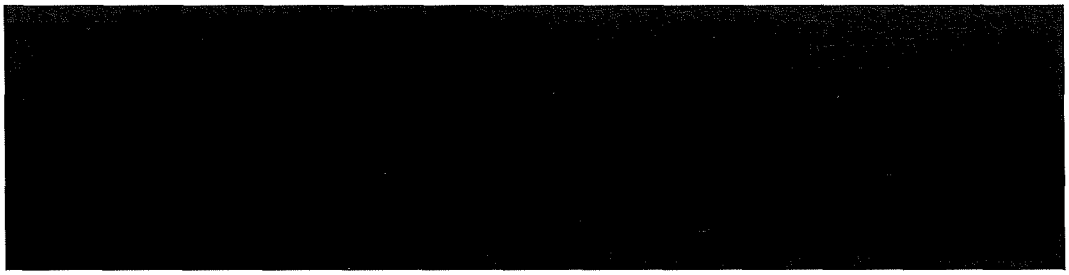
156. The Claimant states that none of the above options were acceptable to MTS because of the obligations owed to foreign investors.[36]

c. Memorandum of Understanding dated 4 July 2005

157. On 4 July 2005, MTS and the Ministry of Communications entered into a Memorandum of Understanding setting forth "understanding of their future cooperation concerning the development of the business of BCTI in the cellular communications market in Turkmenistan" ("MOU").[37]

158. In the MOU, MTS and the Ministry of Communications agreed as follows:

i. MTS would take all necessary actions to increase its shareholding in BCTI to 100% within 30 days of the signature of the MOU;



iv. the Ministry would provide assistance in BCTI rebranding under the MTS trademark;

v. the Ministry would assume an obligation "to take all necessary actions including, without limitation, appropriate written instructions to Turkmentelecom and the Ashgabat City Telephone Network (Ashgabat GTS) in order to provide BCTI [...] with the legal and technical capacity to carry out the provision of cellular communication services in Turkmenistan without any restrictions [...] on conditions not worse than those granted to BCTI as of 26 June 2005";

[36] Cl. Mem., ¶ 117.
[37] Cl. Mem., ¶ 119; Resp. C-Mem., ¶ 81; Memorandum of Understanding between the Ministry to Communications of Turkmenistan and MTS (the "MOU"), 4 July 2005, Exhibit C-0045.

vi. the Ministry would provide assistance to BCTI and MTS in converting MTS' portion of the net profit from the business of BCTI from manat to U.S. dollars at a conversion rate acceptable to MTS;

vii. the MOU contained significant matters of understanding between the parties that would be reflected in final legally binding agreements including (a) an agreement with the Ministry detailing the conditions set forth in the MOU, (b) an agreement with Turkmentelecom, (c) an agreement with Turkmen Post, (d) an agreement with Ashgabat City Telephone Network and (e) an agreement with the State Inspection for Control of the Usage of the Radio Frequency Spectrum ("the Documentation"), which would determine inter alia (a) the issuance of BCTI's license for cellular communication services in Turkmenistan for the longest period acceptable under the laws and regulations of Turkmenistan, in any event for at least 3 years; (b) the Ministry of Communications' provision of a technical capacity (capabilities for interconnection, inter-network interaction, channel lease, additional frequencies, and the right to lease premises for the installation of BCTI equipment) to provide communication services at a quality level reasonably acceptable to MTS; "[...] the term of such Documentation shall be no less than 5 years with a possibility for subsequent renewal";

viii. the Parties would make reasonable efforts to prepare the above agreements within 30 days of the signing date of the MOU;

ix. MTS would notify the Ministry of Communications in writing any intention to assign its shareholding in BCTI to any third party 60 days prior to such assignment;

x. MTS would make every effort to inform the Ministry on an annual basis of BCTI's investment program and of the implementation progress.[38]

159. Shortly after the agreement in principle on the terms of the MOU had been reached at the meeting in early July, BCTI's network capabilities were restored and the mobile phones started working again.[39]

(3) 2005 Agreement between MTS, BCTI, and the Ministry of Communications

160. In October 2005, MTS acquired the remaining 49% shareholding in BCTI and began negotiations with the Ministry of Communications to finalize the agreement that was contemplated in the MOU.[40] On 5 November 2005, MTS, BCTI, and the Ministry of Communications entered into an agreement setting out the rights and obligations of the parties ("2005 Agreement").[41]

161. The Ministry of Communications, as the body responsible for the State administration of Turkmenistan's communication system, was authorized by Presidential Decree No. 7604 to sign the 2005 Agreement.[42]

162. Under the 2005 Agreement, BCTI's profit in Turkmenistan [redacted] because MTS had convinced the Turkmenistan officials that MTS required a greater share of profits to develop cellular communications in Turkmenistan.[44]

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[38] Cl. Mem ¶ 119; Resp. C-Mem. ¶ 81; Memorandum of Understanding between the Ministry to Communications of Turkmenistan and MTS (the "MOU"), 4 July 2005, Exhibit C-0045.
[39] Cl. Mem., ¶ 121; [redacted] ¶¶ 45-46.
[40] Cl. Mem., ¶ 123.
[41] Cl. Mem., ¶ 123; Agreement between MTS, Barash Communication Technologies, Inc. and the Ministry, 5 November 2005 (the "2005 Agreement"), Exhibit C-0005.
[42] 2005 Agreement, Preamble, Exhibit C-0005; Decree of the President of Turkmenistan No. 7604, 5 November 2005, Exhibit C-0046; Cl. Mem., ¶ 127; Resp. C-Mem., ¶ 82.
[43] 2005 Agreement, Clause 1, Exhibit C-0005; Cl. Mem. ¶ 124; Resp. C-Mem., ¶ 83.
[44] [redacted] Exhibit C-0125; Cl. Mem., ¶ 124; Resp. C-Mem., ¶ 83.

163. Under Clause 5 of the 2005 Agreement, the Ministry of Communication was to "ensure and provide BCTI with legal, tax and technical conditions of operation in the cellular communications market of Turkmenistan, including, without limitation, the allocation of additional frequencies [...] for the expansion of interconnection and inter-network interaction with the public network in Turkmenistan, that may not and shall not be worse than the most favourable conditions provided to any other cellular operators in Turkmenistan".[45]

164. Furthermore, the Ministry of Communications was obligated to ensure that BCTI could lease premises for equipment, as well as to provide electronic power and other utilities (Clause 15).[46] In addition, upon written request, the Ministry of Communications was to "issue all necessary permits, consents, and certificates, or provide a reasoned refusal in writing, for the unhindered importation into Turkmenistan of any equipment certified [...] and required for BCTI's activity in Turkmenistan".[47]

165. BCTI's existing rights to use radio frequency resources, numbering, and equipment providing interconnection to the public network were affirmed (Clause 14), as well as BCTI's existing licenses and rights to conduct cellular communication services under those licenses (Clause 27).[48] Upon the expiry of these licenses, the Ministry of Communications was to issue to MTS new licenses to perform the same activities with a term not less than the maximum period permitted under applicable laws (Clause 28).[49]

166. Under Clause 16 of the 2005 Agreement, the parties agreed that BCTI had the "full and unlimited right [...] to independently (without any interference by the Ministry of Communications) develop, establish and implement its rate policy".[50]

167. Under Clause 19 of the 2005 Agreement, the Ministry of Communications promised to ensure that agreements contemplated by the MOU would be signed between BCTI and

[45] 2005 Agreement, Clause 5, Exhibit C-0005; Cl. Mem., ¶ 125(a).
[46] 2005 Agreement, Clause 15, Exhibit C-0005; Cl. Mem., ¶ 125(b).
[47] 2005 Agreement, Clause 22, Exhibit C-0005; Cl. Mem., ¶ 125(d).
[48] 2005 Agreement, Clauses 14, 27, Exhibit C-0005; Cl. Mem., ¶ 125.
[49] 2005 Agreement, Clause 28, Exhibit C-0005; Cl. Mem., ¶ 125(c).
[50] 2005 Agreement, Clause 16, Exhibit C-0005; Resp. C-Mem., ¶ 84.

enterprises of the Ministry of Communications of Turkmenistan—Turkmentelecom, Ashgabat GTS, Radio Frequency Authority, and Altyn Asyr.[51]

168. The term of the 2005 Agreement was 5 years under Clause 32. Clause 32 stated as follows:

> This Agreement shall continue for 5 (five) years from its Effective Date. Upon the expiration of such five-year term, this Agreement will be automatically extended for a term additionally determined by the Parties provided that the following conditions are met:
>
> > (a) BCTI has fulfilled all conditions of this Agreement assiduously and in good faith, and the Ministry of Communications or other Governmental bodies have no reasonable and documented claims regarding BCTI's activity in Turkmenistan, or, if such claims have arisen, BCTI has eliminated the cause of such claims;
> >
> > (b) no later than 6 (six) months before the end of the term hereof BCTI has submitted a written request to the Ministry of Communications expressing its desire to extend this Agreement for a subsequent term;
> >
> > (c) the Ministry of Communications has received permission from the Government of Turkmenistan to enter into an agreement to extend the term of this Agreement.[52]

(4) BCTI's Interconnection Agreements and Licenses

169. As contemplated in Clause 19 of the 2005 Agreement, BCTI entered into interconnection agreements with Turkmentelecom ("2005 Turkmentelecom Agreement") and with Altyn

[51] 2005 Agreement, Clause 19, Exhibit C-0005; Cl. Mem., ¶ 125(c); Resp. C-Mem., ¶ 87.
[52] 2005 Agreement, Clause 32, Exhibit C-0005; Cl. Mem., ¶ 126; Resp. C-Mem., ¶¶ 85-86.

Asyr ("2005 Altyn Asyr Agreement").[53] Both agreements had a term of five years which was open to extension.[54]

170. BCTI also received various licenses during the term of the 2005 Agreement, for cellular and paging services, terrestrial satellite services, leasing communication channels, leasing of circuits for services of 2G data transmission, and leasing of circuits for services of 3G data transmission.[55]

(5) BCTI's Telecommunication Operations in 2005-2010

171. After the execution of the 2005 Agreement, BCTI's cellular services expanded. As of October 2010, it had grown to [redacted][56] The Claimant highlights that the Ministry of Communications and Turkmentelecom supported MTS and BCTI with licenses, permits, and leases "*[w]henever things were not moving swiftly*".[57]

172. During most of the term of the 2005 Agreement, BCTI provided 2G services.[58] In February 2010, Altyn Asyr began to provide 3G mobile cellular services.[59] For the rollout of 3G mobile services, on 15 July 2010, BCTI received permission from the Ministry of Communications to use radio frequencies for testing the 3G network.[60] On 23 October

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[53] Interconnection Agreement between Turkmentelecom and BCTI, 1 January 2006, Exhibit C-0047; Interconnection Agreement between Altyn Asyr and BCTI, 1 January 2006, Exhibit C-0048; Resp. C-Mem., ¶ 87.
[54] Interconnection Agreement between Turkmentelecom and BCTI, 1 January 2006, Clause 11.1, Exhibit C-0047; Interconnection Agreement between Altyn Asyr and BCTI, 1 January 2006, Clause 8.1, Exhibit C-0048; Resp. C-Mem., ¶ 88.
[55] License No. 164 from the Ministry to BCTI for mobile telephone and paging services, 31 January 2006, Exhibit C-0049; License No. 355 from the Ministry to BCTI for mobile telephone and paging service, 1 January 2009, Exhibit C-0068; License No. 354 from the Ministry to BCTI for terrestrial satellite services, 14 November 2008, Exhibit C-0067; License No. 362 from the Ministry to BCTI for leasing communications channels, 22 January 2010, Exhibit C-0070; License No. 1-20-21-6 from the Ministry to BCTI for leasing communications channels, 1 October 2010, Exhibit C-0092; License No. 1-20-21-9 from the Ministry to BCTI for leasing communications channels (the "3G License"), 23 October 2010, Exhibit C-0094; Cl. Mem., ¶ 131(c).
[56] Cl. Mem., ¶ 133; MTS 20-F filing with the U.S. SEC for the year 2010, 17 June 2011, pp. 42, 66, 80, 132, 135, 198-199, Exhibit C-0119; Resp. C-Mem., ¶ 133; [redacted]
[57] Cl. Mem., ¶ 132.
[58] Resp. C-Mem., ¶ 89.
[59] Resp. C-Mem., ¶ 90; MTS 2010 20-F, p. 80, Exhibit A&M-0008; [redacted]
[60] Letter No. 1927 from the Ministry to BCTI, 15 July 2010, Exhibit C-0081; Cl. Mem. ¶ 143(a).

2010, BCTI was assigned radio frequencies for standard 3G services.[61] On the same day, BCTI received a license for 2G and 3G services "in the city of Ashgabat and the provinces of Ahal, Lebap, Balkan, Mary and Daşoguz" valid until 22 January 2013.[62] In November 2010, BCTI was providing 3G services in Ashgabat and the international airport.[63]

173. As for BCTI's profits, according to the Respondent, by the end of the term of the 2005 Agreement, BCTI and MTS [redacted][64] MTS underscored that only a very small percentage [redacted] of MTS' share of profits was repatriated and the remaining profits were reinvested in developing the business.[65]

(6) End of BCTI's operations in 2010

174. On 26 April 2010, [redacted], formally requested an extension of the 2005 Agreement "*under the same terms*".[66] In response, on 17 June 2010, the Ministry of Communications sent a letter with a proposal enclosed.[67]

175. The Ministry of Communications' letter of 17 June 2010 proposed several changes to the terms under the 2005 Agreement, including the following:

i. [redacted] was to be remitted to the Ministry (Clause 1);

[61] Letter No. 3194 from the Ministry to BCTI, 23 October 2010, Exhibit C-0095; [redacted]; Cl. Mem. ¶ 143(b).
[62] The 3G License, 23 October 2010, Exhibit C-0094; Cl. Mem., ¶ 143(c).
[63] Resp. C-Mem., ¶¶ 90, 137; Dippon Report, ¶ 33; Hardin Report, ¶ 263.
[64] Resp. C-Mem., ¶ 94; [redacted]
[65] Cl. Mem., ¶ 136; Letter No. 02-00/1275 from MTS to the President of Turkmenistan, 2 November 2010, Exhibit C-0099; Letter No. 02-00/0699 from MTS to the President of Turkmenistan, 25 June 2010, Exhibit C-0078.
[66] Cl. Mem., ¶ 139; Resp. C-Mem., ¶ 95; Letter No. 04/009i from MTS and BCTI to the Ministry, 26 April 2010, Exhibit C-0074.
[67] Letter No. 1551 from the Ministry to MTS and BCTI, 17 June 2010, Exhibit C-0077; Letter No. 1551 from [redacted].

ii. BCTI's tariff policy was to be subject to all requirements under the legislation of Turkmenistan and to certain exceptions (Clause 14); and

iii. All disputes were to be referred to the Court of Arbitration (Arbitrazh) in Turkmenistan pursuant to the legislation of Turkmenistan (Clause 26).[68]

176. On 8 July 2010, without making comments on the Ministry's proposal of 17 June 2010, MTS asked for the extension of the 2005 Agreement again "on the same terms for a successive period of time".[69] On 18 July 2010, the Ministry of Communications sent another letter with a draft proposal attached, requesting a response by "not later than July 26, 2010".[70]

177. On 26 July 2010, the Ministry of Communications sent a letter to BCTI stating that the Ministry "consider[ed] it appropriate to terminate" the Interconnection Agreement between Altyn Asyr and BCTI dated 1 January 2006.[71] On 28 July 2010, Turkmentelecom sent a letter with a draft proposal to amend the terms of the Interconnection Agreement between Turkmentelecom and BCTI dated 1 January 2006.[72] On 16 August 2010, noting that no comments were received on the draft proposal of 28 July and warning BCTI of the termination of the Interconnection Agreement, Turkmentelecom asked for a response as soon as possible.[73] On 24 and 26 October 2010, Mr. Melamed (President and CEO of MTS' majority shareholder Sistema from May 2008 until March 2011) met with the President of Turkmenistan and discussed progress and opportunities to develop their partnership.[74]

[68] Cl. Mem., ¶¶ 140-141; Resp. C-Mem., ¶¶ 96-97.
[69] Letter No. 02.1/1908 from BCTI to the Ministry, 8 July 2010, Exhibit C-0080; Letter No. 02.1/1908 [redacted]; Cl. Mem., ¶ 141; Resp. C-Mem., ¶ 99.
[70] Letter No. 1958 from [redacted] Resp. C-Mem., ¶ 99.
[71] Cl. Mem., ¶ 142; Resp. C-Mem., ¶ 99; Letter No. 1980 from the Ministry to BCTI, 26 July 2010, Exhibit C-0082.
[72] Letter No. 673 from Turkmentelecom to BCTI, 28 July 2010, Exhibit C-0083; Cl. Mem., ¶ 142.
[73] Letter No. 734 from Turkmentelecom to BCTI, 16 August 2010, Exhibit C-0085; Cl. Mem., ¶ 142.
[74] Cl. Mem., ¶ 144. *See* Press reports on the meeting between Sistema CEO Mr. Melamed and the President of Turkmenistan, 26 October 2010, Exhibit C-0096.

178. On 29 October 2010, the Ministry of Communications [redacted] that the 2005 Agreement would expire on 5 November 2010, noting that the legal basis for BCTI's activities in Turkmenistan would expire as well.[75]

179. On 1 November 2010, [redacted] sent a letter to the Minister of Communications attaching a draft Agreement between the Ministry of Communications, MTS, BCTI, and MTS-TM (a subsidiary of BCTI) for the review of the Ministry.[76] In the draft, [redacted] and BCTI's full and absolute right to set tariffs or charges in the 2005 Agreement was unchanged.[77] In the draft, disputes were to be referred to arbitration under ICC Arbitration Rules and the governing law was the law of England and Wales.[78]

180. On 16 November 2010, the Ministry of Communications wrote to BCTI regarding the expiry of the 2005 Agreement and requested BCTI to terminate operations in the Turkmenistan cellular communications market and to provide the schedule regarding the dismantling of communications equipment.[79] In late November, Turkmentelecom, Ashgabat Telephone Network, and Altyn Asyr respectively informed BCTI of the termination of their agreements with BCTI and stated that digital flows and digital ports would be switched off by 31 December 2010.[80] On 2 December 2010, the Radio Frequency

[75] Cl. Mem., ¶ 145; Resp. C-Mem., ¶ 100; Letter No. 3247 from the Ministry to MTS, 29 October 2010, Exhibit C-0097.

[76] Letter No. 10/2783 from BCTI to the Ministry, 1 November 2010, Exhibit C-0098; Cl. Mem. ¶ 146; Resp. C-Mem., ¶ 100.

[77] Letter No. 10/2783 from BCTI to the Ministry, 1 November 2010, Clauses 1, 15, Exhibit C-0098.

[78] Letter No. 10/2783 from BCTI to the Ministry, 1 November 2010, Clauses 33-34, Exhibit C-0098.

[79] Letter No. 3427 from the Ministry to BCTI, 16 November 2010, Exhibit C-0101; Letter No. 3427 from [redacted] Cl. Mem., ¶ 148; Resp. C-Mem., ¶ 100.

[80] Cl. Mem., ¶ 149; Letter No. 1035 from Turkmentelecom to BCTI, 26 November 2010, Exhibit C-0102; Letter No. 813 from Ashgabat Telephone Network to BCTI, 27 November 2010, Exhibit C-0103; Letter No. 1084 from Altyn Asyr to BCTI, 29 November 2010, Exhibit C-0104.

Authority sent a letter to BCTI terminating the agreement "For the Use of the Radio Frequency Spectrum" dated 18 October 2010.[81]

181. On 15 December 2010, the Ministry of Communications informed BCTI that its license would be suspended for one month from 21 December 2010.[82] The next day, BCTI filed a complaint with the Ministry of Economy and Development, but on 21 December 2010, BCTI received a notice stating that "the Ministry of Economy and Development of Turkmenistan does not have sufficient grounds to rescind the decision of the Ministry of Communication of Turkmenistan on termination of your license".[83] On 17 December 2010, BCTI filed a claim in the Commercial (Arbitrazh) Court of Turkmenistan to challenge the Turkmenistan Government's decision to suspend its licenses, to no avail.[84]

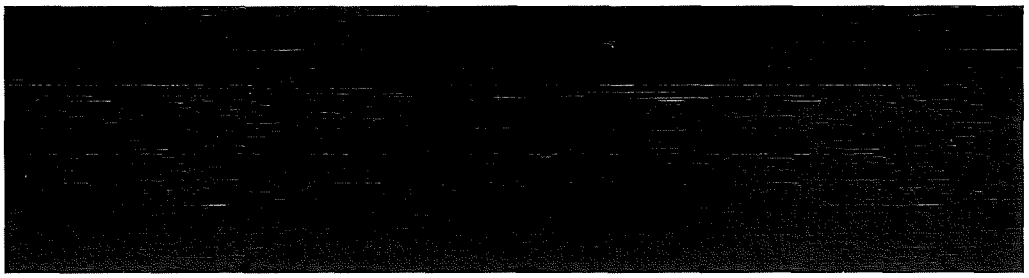
182. On 21 December 2010, BCTI ceased to operate its telecommunications network and began to settle claims with its customers.[85]

B. ARBITRATIONS AND COURT PROCEEDINGS IN 2010-2011

183. On or about 20 December 2010, MTS and BCTI [redacted] and in 2011 filed another arbitration under the ICSID Additional Facility Rules as follows:

[redacted]

[81] Cl. Mem., ¶ 150; Letter No. 883 from the Frequency Authority (SICURFS) to BCTI, 2 December 2010, Exhibit C-0105.
[82] Cl. Mem., ¶¶ 151-152; Minutes No. 109 of the Meeting of the Working Group on Licensing of the Ministry of Communications of Turkmenistan attached to letter No. 3648, 15 December 2010, p. 4, Exhibit C-0006.
[83] Cl. Mem., ¶ 154; [redacted] Letter No. 17/3854 from the Ministry of Economy and Development of Turkmenistan to BCTI, 21 December 2010, Exhibit C-0113.
[84] Cl. Mem., ¶ 155. *See also* Statement of Claim No. 10/3312 filed by BCTI against the Ministry to the Arbitrazh Court of Turkmenistan, 17 December 2010, Exhibit C-0110; Cassation Appeal No. 10/3372 filed by BCTI with the Supreme Arbitrazh Court of Turkmenistan, 21 December 2010, Exhibit C-0111; Cassation Decision of the Supreme Arbitrazh Court of Turkmenistan, 13 January 2011, Exhibit C-0115; Decision of the Supreme Court of Turkmenistan, 16 March 2011, Exhibit C-0117.
[85] Cl. Mem., ¶ 156; Resp. C-Mem., ¶ 102.
[86] [redacted]



iv. an arbitration by MTS against Turkmenistan under the ICSID Additional Facility Rules alleging violations of the Russia-Turkmenistan BIT.[89]

184. [redacted] [90] The arbitration under the ICSID Additional Facility Rules was commenced in September 2011, when a tribunal was constituted, but the dispute was settled before the submission of the memorial.[91] On 25 January and 13 March 2012, MTS also initiated injunction proceedings before the Moscow Arbitrazh Court.[92]

C. THE 2012 SETTLEMENT AGREEMENT AND THE 2012 AGREEMENT AND FURTHER AGREEMENTS

(1) The 2012 Agreement

185. In July 2012, the parties [redacted] reached agreement after negotiations to settle the disputes pending in those proceedings and to allow MTS to resume business operations in the Turkmenistan cellular telecommunications market.[93]

[89] ICSID Case No. ARB(AF)/11/4, *OJSC Mobile TeleSystems v. Turkmenistan*; Resp. C-Mem., ¶ 105; Cl. Mem., ¶ 160.
[90] Resp. C-Mem., ¶ 107, FN 210.
[91] Resp. C-Mem., ¶ 107, FN 210.
[92] Moscow Arbitrazh (Commercial) Court Case No. A40-20915/12-52215, *OJSC "MTS" and Barash Communication Technologies Inc. v. Ministry of Communication of Turkmenistan and the State of Turkmenistan*; Moscow Ninth Arbitrazh Court of Appeals Case No. 09AP-8085/2012-GK, *OJSC "MTS" and Barash Communication Technologies Inc. v. Ministry of Communication of Turkmenistan and the State of Turkmenistan*; Resp. C-Mem., ¶ 106.
[93] Cl. Mem., ¶ 161; Resp. C-Mem., ¶ 110.

186. According to the Claimant, during these negotiations, Turkmen officials (including the Minister of Communications) assured that MTS-TM "would be able to operate in Turkmenistan for a long-term period and without discriminatory treatment" and "not to worry about the possibility of another shut-down".[94]

187. On 24 May 2012, MTS and Turkmentelecom entered into the "Agreement Between State Electro-Communication Company Turkmentelecom and OJSC Mobile Telesystems On the Conditions of Operation of MTS-Turkmenistan, a Subsidiary of MTS, in the Cellular Telecommunications Market of Turkmenistan" (the "2012 Agreement").[95] It is the Claimant's case that the Minister and Deputy-Minister, the in-house lawyer of the Ministry of Communications, and other Turkmen Government officials were involved in the negotiations of the 2012 Agreement.[96] Under Presidential Decree No. 12307 of 13 May 2012, Turkmentelecom was authorized to conclude the 2012 Agreement.[97]

188. The 2012 Agreement stated that MTS-TM (the Turkmen subsidiary of MTS) would have to pay [redacted] to Turkmentelecom (Clause 1).[98] According to the Claimant, during the negotiations of the 2012 Agreement, the Ministry of Communications insisted that the [redacted] share of the profit be paid from MTS-TM to Turkmentelecom.[99]

189. For the provision of technical resources, Turkmentelecom undertook to provide and ensure that MTS-TM "is provided with all necessary legal and technical conditions of operation in the cellular communication market of Turkmenistan". Specifically, Clause 3 stated as follows:

> 3. During the term of this Agreement, Turkmentelecom shall provide and ensure that the Operator [MTS-TM] is provided with all necessary legal and technical conditions of operation in the cellular communication market of Turkmenistan, including without limitation, additional technical resources for the expansion of

[94] Cl. Reply, ¶ 341(a); [redacted] Cl. Mem., ¶ 162.
[95] Resp. C-Mem., ¶ 111; Agreement between MTS and Turkmentelecom, 24 May 2012 (the "2012 Agreement"), Exhibit C-0008.
[96] Cl. Mem., ¶ 164; [redacted]
[97] Resp. C-Mem., ¶ 112; Decree of the President No. 12307, 13 May 2012, Exhibit C-0009; Cl. Mem., ¶ 167.
[98] 2012 Agreement, Clause 1, Exhibit C-0008; Cl. Mem., ¶ 163; Resp. C-Mem., ¶ 113.
[99] Cl. Mem., ¶¶ 166, 168; [redacted]

inter-connection and inter-network interaction with the public network on the territory of Turkmenistan, which technical resources cannot and shall not be worse than the most favourable conditions provided to any other cellular telecommunications operator in the territory of Turkmenistan.

Turkmentelecom undertakes to solicit in a timely manner and in accordance with the applicable laws of Turkmenistan the provision to [MTS-TM] of all necessary communication frequencies and other communication resources. Where [MTS-TM] requests from Turkmentelecom any additional technical resources (including points of connection, communication channels, ports and/or any other resources) for the purposes of connecting to, expanding and/or developing the public communication network in Turkmenistan, such resources shall be provided to the extent that they fall within the documented scope of technical capabilities, and shall be of the quality, characteristics and quantity necessary at that stage of [MTS-TM]'s activity in Turkmenistan for [MTS-TM] to provide uninterrupted transmission of cellular traffic with a failure rate not exceeding 1%.[100]

190. In addition, Turkmentelecom promised to ensure that MTS-TM would be provided with "premises and locations required to install and operate equipment and technical facilities used in its cellular communications activities" and with "electric power and other utilities and services in accordance with [MTS-TM's] actual needs"(Clause 10).[101] This obligation of Turkmentelecom was subject to "the applicable laws of Turkmenistan, at the written request of [MTS-TM] and to the extent of its [Turkmentelecom's] capabilities".[102]

191. Under the 2012 Agreement, MTS-TM retained a full and unlimited right to independently develop, establish and implement its tariff policy for the duration of the agreement (Clause 11). In addition, subject to the applicable laws of Turkmenistan, MTS and MTS-TM had the unrestricted right, to define and implement programs connected with the development of MTS-TM's activities in Turkmenistan (Clause 17).[103] If necessary, MTS-

[100] 2012 Agreement, Clause 3, Exhibit C-0008; Cl. Mem., ¶ 169; Resp. C-Mem., ¶ 118.
[101] 2012 Agreement, Clause 10, Exhibit C-0008; Cl. Mem., ¶ 169(d).
[102] 2012 Agreement, Clause 10, Exhibit C-0008.
[103] 2012 Agreement, Clauses 11, 17, Exhibit C-0008; Resp. C-Mem., ¶ 116; Cl. Mem., ¶ 169(e).

TM was to inform Turkmentelecom of the ongoing programs and the status of their implementation (Clause 17).[104]

192. The term of the 2012 Agreement was 5 years (Clause 18). Clause 18 stated as follows:

> 18. The term of this Agreement shall be for 5 (five) years from the Effective Date. Upon the expiration of the five-year term, this Agreement may be extended for a further five-year term on the satisfaction of the following conditions:
>
> (a) Not later than 6 (six) months prior to the end of the term of this Agreement MTS has sent to Turkmentelecom a written request stating its intention to extend this Agreement for a further five-year term;
>
> (b) [MTS-TM] has complied with the applicable laws of Turkmenistan and, as at the date of MTS sending the written request stating its intention to extend this Agreement, the Government bodies of Turkmenistan do not have any claims against [MTS-TM] which have been affirmed by a decision of a court of Turkmenistan, such decision having entered into force, or where such claims had existed, they have been eliminated as at the date of MTS sending the written request referred to in Clause 18(a) above;
>
> (c) MTS has complied with the terms of this Agreement and, as at the time of MTS sending the written request stating its intention to extend this Agreement, the Government bodies of Turkmenistan do not have any claims against MTS which have been affirmed by an award of a court authorised by this Agreement, such an award having entered into force, or where such an award had existed, it has been eliminated/satisfied as at the date of MTS sending the written request referred to in Clause 18(a) above.
>
> Turkmentelecom shall, not later than 1 (one) month following the receipt of the written request from MTS referred to in Clause 18(a) above, provide a

[104] 2012 Agreement, Clauses 17, Exhibit C-0008.

response to MTS concerning the extension or non-extension of the Agreement for another five-year term.

This Agreement may be extended 1 time (once) and, in any event, the aggregate term of this Agreement shall not exceed 10 (ten) years.

This Agreement can be terminated by mutual consent of the Parties at any time.[105]

193. Emphasis was placed by the Respondent on the fact that during the negotiations of the 2012 Agreement, MTS had proposed language for the automatic extension of the contract but this was not accepted.[106] The Claimant asserts that MTS received assurances from Turkmen officials on several occasions that the 2012 Agreement would be extended beyond its 5-year term.[107]

194. The 2012 Agreement was governed by English law (Clause 19) and any dispute under the 2012 Agreement was to be submitted to arbitration under the LCIA Rules (Clause 20).[108]

195. The entry into force of the 2012 Agreement was conditioned on the withdrawal of all pending claims and demands in the arbitration proceedings of 2010-2011.[109] Accordingly, the 2012 Agreement came into effect on 28 September 2012.[110]

(2) The 2012 Settlement Agreement

196. On 25 July 2012, the 2012 Settlement Agreement was executed between MTS and BCTI on the one hand, and Turkmenistan, the Ministry of Communications of Turkmenistan, Turkmentelecom and Altyn Asyr on the other hand.[111] Under this agreement, the parties agreed to irrevocably withdraw and discontinue the pending arbitration and court

[105] 2012 Agreement, Clause 18, Exhibit C-0008.
[106] Resp. C-Mem., ¶¶120-121; [redacted]
[107] Cl. Mem., ¶¶ 172, 176-177, 281-283.
[108] 2012 Agreement, Clauses 19, 20, Exhibit C-0008.
[109] 2012 Agreement, Clauses 13(b), 18, 23-24, Exhibit C-0008; Resp. C-Mem., ¶ 123; Cl. Mem., ¶ 171.
[110] Cl. Mem., ¶ 171.
[111] Settlement Agreement between MTS, Turkmenistan, the Ministry, Turkmentelecom and Altyn Asyr, 25 July 2021 (the "Settlement Agreement"), Exhibit C-0007; Cl. Mem. ¶¶ 173-174; Resp. C-Mem., ¶¶ 124-128.

proceedings and fully and forever release each other from all claims, counterclaims, obligations or liabilities from actions or events before 25 July 2012.[112]

197. Under Clause 2(c) of the 2012 Settlement Agreement, in the event of a breach or violation after 25 July 2012 by Turkmenistan, the Ministry of Communications of Turkmenistan, Turkmentelecom and Altyn Asyr of any agreement with MTS, BCTI, and/or MTS-TM or of the Russian-Turkmenistan BIT (2010), nothing in the Settlement Agreement shall be "construed as prohibiting [MTS and/or BCTI] from taking into account the nature and structure of its investment in Turkmenistan prior to the Effective Date in the calculation of damages claimed for such breach or violation".[113]

198. Under the 2012 Settlement, any disputes under the agreement were to be governed by the laws of England and Wales (Clause 7) and submitted to arbitration under the LCIA Rules (Clause 8).[114]

(3) MTS-TM's Interconnection Agreements

199. To resume operations in Turkmenistan, MTS-TM entered into agreements with Turkmentelecom, Ashgabat City Telephone Network, and Altyn Asyr respectively for interconnection services and mobile networks interaction.[115]

200. On 9 June 2012, MTS-TM and Turkmentelecom entered into the agreement on interconnection and interworking of telecommunication networks (the "2012 Turkmentelecom Agreement").[116] On 18 June 2012, MTS-TM entered into the agreement on interconnection and interworking of telecommunication networks with Ashgabat City Telephone Network (the "2012 Ashgabat City Telephone Network Agreement").[117] On the

[112] Settlement Agreement, Clauses 2, 3, Exhibit C-0007; Resp. C-Mem., ¶¶ 125-128.
[113] Settlement Agreement, Clause 2(c), Exhibit C-0007; Cl. Mem., ¶ 174.
[114] Settlement Agreement, Clauses 7-8, Exhibit C-0007; Resp. C-Mem., ¶ 129.
[115] Cl. Mem., ¶ 175; Resp. C-Mem., ¶ 130; Cl. Reply, ¶ 246.
[116] Interconnection and Interworking Agreement between MTS-TM and Turkmentelecom No. 0013/06-3, 9 June 2012, Exhibit C-0130.
[117] Interconnection and Interworking Agreement between MTS-TM and Ashgabat Telephone Network No. 0021/06, 18 June 2012, Exhibit C-0131.

same day, MTS-TM and Altyn Asyr executed the agreement on mobile networks interaction (the "2012 Altyn Asyr Agreement").[118]

201. All three agreements contained the same provision on the term and extension of the agreement:

> This Agreement becomes effective starting from the moment of its signing by the Parties and remains in effect for 5 (five) years. Upon the expiration of this Agreement, its term may be extended for another 5 (five) year term absent a notification terminating this Agreement from any of the parties, which notification should be sent at least 6 (six) months prior to the expiration of this Agreement.
>
> [...]
>
> This Agreement may be extended once, and in any event an aggregate total term of this Agreement shall not exceed 10 (ten) years.[119]

202. Another common provision in the above three agreements concerned the governing law and dispute resolution. Any disputes under these agreements were to be governed by the laws of Turkmenistan and referred to courts of Turkmenistan.[120]

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[118] Agreement between MTS-TM and Altyn Asyr on Interconnection and Interaction of Mobile Networks No. 0021/06-1, 18 June 2012, Exhibit C-0132.

[119] Interconnection and Interworking Agreement between MTS-TM and Turkmentelecom No. 0013/06-3, 9 June 2012, Clause 11, Exhibit C-0130; Interconnection and Interworking Agreement between MTS-TM and Ashgabat Telephone Network No. 0021/06, 18 June 2012, Clause 10.1, Exhibit C-0131; Agreement between MTS-TM and Altyn Asyr on Interconnection and Interaction of Mobile Networks No. 0021/06-1, 18 June 2012, Clause 8.1, Exhibit C-0132; Resp. C-Mem., ¶ 131.

[120] Interconnection and Interworking Agreement between MTS-TM and Turkmentelecom No. 0013/06-3, 9 June 2012, Clauses 10.1, 10.3, Exhibit C-0130; Interconnection and Interworking Agreement between MTS-TM and Ashgabat Telephone Network No. 0021/06, 18 June 2012, Clause 11.2, Exhibit C-0131; Agreement between MTS-TM and Altyn Asyr on Interconnection and Interaction of Mobile Networks No. 0021/06-1, 18 June 2012, Clauses 7.1, 7.3, Exhibit C-0132; Resp. C-Mem., ¶131.

(4) The Radio Frequency Spectrum Agreement

203. On 25 July 2012, MTS-TM and the Radio Frequency Authority executed the 'Agreement with the State Inspection for Control of the Usage of the Radio Frequency Spectrum' (the "2012 Radio Frequency Spectrum Agreement").[121]

204. With respect to the rates for the use of radio frequency spectrum, the 2012 Radio Frequency Spectrum Agreement provided as follows:

> 3.1 Settlements with the User shall be made pursuant to the approved Fee Schedule. The rates applying to the User hereunder shall be no worse than those applicable to any other mobile network operator within Turkmenistan, whether State (with State participation) or private (commercial).[122]

205. Under the 2012 Frequency Spectrum Agreement, the term and termination of the agreement was stated as follows:

> 6.1 This Agreement shall come into force after its signing by the Parties and shall continue in full force and effect for a term of five (5) years.
>
> 6.2 On expiry of its effective term this Agreement may be extended for a further term, provided that the User is granted radio frequencies in accordance with Turkmenistan law, and no party has given a notice to terminate this Agreement, which shall be given no later than six months prior to expiry of the effective term of this Agreement.[123]

206. Under this agreement, the governing law was Turkmenistan law and the dispute was to be referred to the Turkmenistan Commercial Court.[124]

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[121] Agreement No. 521/0038/07 between MTS-TM and the Frequency Authority (SICURFS) on the Usage of Radio Frequency Spectrum, 25 July 2012, Exhibit C-0137; Resp. C-Mem. ¶130(iv); Cl. Mem., ¶ 176.
[122] Agreement No. 521/0038/07 between MTS-TM and the Frequency Authority (SICURFS) on the Usage of Radio Frequency Spectrum, 25 July 2012, Clause 3.1, Exhibit C-0137.
[123] Agreement No. 521/0038/07 between MTS-TM and the Frequency Authority (SICURFS) on the Usage of Radio Frequency Spectrum, 25 July 2012, Clauses 6.1, 6.2, Exhibit C-0137.
[124] Agreement No. 521/0038/07 between MTS-TM and the Frequency Authority (SICURFS) on the Usage of Radio Frequency Spectrum, 25 July 2012, Clause 7.2, Exhibit C-0137; Resp. C-Mem., ¶131.

(5) The License

207. On 26 July 2012, the Ministry of Communications issued MTS-TM a license to provide cellular telecommunication services, valid for 3 years (the "License").[125] The Claimant underscores the note at the back of the license, which reads:

> **Note:** This license is issued by Ministry of Communications of Turkmenistan for 3 years starting from the date if [sic] issue and will be prolonged as per legislation of Turkmenistan for 2, 3 and 2 years on sequence, totally not longer than for 10 years.[126]

208. On 26 July 2015, the Ministry of Communications renewed this license for another 3 years, until 26 July 2018.[127] It is the Claimant's case that around that time, the Claimant was informed by the Ministry of Communications that "in the future" this license would be renewed as a matter of course so long as MTS-TM's details (such as the registered address, legal form, etc.) were unchanged.[128]

(6) The Leases

209. To use data channels and rent premises to locate infrastructure and equipment, MTS also executed no less than 21 lease agreements with regional telecommunication companies in Turkmenistan.[129]

D. MTS-TM'S TELECOMMUNICATIONS OPERATIONS IN 2012-2017

(1) MTS-TM's operations in 2012-2017

210. On 31 August 2012, MTS-TM switched on its network and resumed services for former subscribers who still had their SIM cards, as it was unable to sell new SIM cards until

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[125] License No. 1-20-21-40 granted to MTS-TM, 26 July 2012, Exhibit C-0010; Cl. Mem., ¶ 176.
[126] License No. 1-20-21-40 granted to MTS-TM, 26 July 2012, Exhibit C-0010; Cl. Mem., ¶ 177.
[127] Cl. Reply, ¶ 341(d); License No. 1-20-21-40 reissued to MTS-TM on 26 July 2015, Exhibit C-0014.
[128] Cl. Reply, ¶ 341(e); Email from [redacted] 25 July 2015, p.3, Exhibit C-0189.
[129] Cl. Mem., ¶ 178; List of Lease Termination Notices in 2017, Exhibit C-0324[redacted], ¶ 76.

October.[130] On 1 October 2012, MTS rolled out its mobile telecommunication services.[131] However, it almost immediately encountered difficulties.

a. Altyn Asyr's Interconnection channel

211. On 3 July 2012, MTS-TM wrote to Altyn Asyr regarding a delay in the allocation of interconnecting channels between the two networks.[132] On 5 October 2012, MTS-TM requested Altyn Asyr to take immediate steps, as traffic losses reached 9-10% due to insufficient interconnecting channels.[133] According to the Claimant, the situation became worse leading to dropped calls and messages, but MTS-TM's continued requests went ignored.[134]

b. Data Channel

(a) Data Channel capacity

212. According to the Claimant, until May 2016, MTS-TM was allocated no more than [redacted] of external data channel capacity.[135] On the insufficient external data channel capacity, MTS-TM raised concerns to Turkmentelecom several times.[136]

213. The Respondent stated that Turkmentelecom technical capacity to provide communication channels was limited, and was provided in compliance with the 2012 Turkmentelecom Agreement.[137]

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[130] Resp. C-Mem., ¶132; Cl. Mem., ¶ 183.
[131] Resp. C-Mem., ¶132; [redacted].
[132] Cl. Mem., ¶¶ 225-227; Letter from MTS-TM to Altyn Asyr, 3 July 2012, Exhibit C-0133.
[133] Letter No. 794/10 from MTS-TM to Turkmentelecom 5 October 2012, Exhibit C-0141.
[134] Cl. Mem., ¶¶ 230-231; Letter No. 02.1/0081 from MTS-TM to Altyn Asyr, 14 January 2016, Exhibit C-0203; Letter No. 02.6/2601 from MTS-TM to Altyn Asyr, 24 August 2016, Exhibit C-0239.
[135] Cl. Reply, ¶ 377.
[136] Cl. Mem., ¶ 198; Cl. Reply, ¶ 378; Letter No. 591/09 from MTS-TM to Turkmentelecom, 5 September 2012, Exhibit C-0140; Letter No. 02.1/2846 from MTS-TM to Turkmentelecom, 3 December 2015, Exhibit C- 0196; Letter No. 02.1/0613 from MTS-TM to Turkmentelecom, 18 March 2016, Exhibit C-0214; Letter No. 04.2/1394 from MTS-TM to Turkmentelecom, 16 May 2016, Exhibit C-0223; Letter No. 02.1/0054 from MTS-TM to Turkmentelecom, 8 January 2016, Exhibit C-0201.
[137] Resp. C-Mem, ¶¶ 151- 157.

214. In December 2014, Turkmentelecom notified a decrease in MTS-TM's external channel capacity to [redacted].[138] In its response of 24 December 2014, MTS-TM referred to Clause 5.2 of the 2012 Turkmentelecom Agreement on "equal replacement of the relevant Technical Facilities".[139]

215. The Claimant submits that unlike MTS-TM, Altyn Asyr was receiving higher external data channel capacity from Turkmentelecom.[140] The Claimant underlines that, since April 2014, Turkmenistan had granted Altyn Asyr access to apparently unrestricted external data channel capacity [redacted].[141]

216. MTS-TM raised this issue to Turkmentelecom several times in 2015, and wrote to Turkmentelecom that this could affect the profit payments to Turkmenistan.[142] However, according to the Claimant, this did not resolve the issue of unequal data channel capacity.[143]

217. According to the Respondent, Altyn Asyr also requested additional data channel capacity many times and Turkmentelecom denied these as well due to insufficient technical capabilities.[144]

(b) Temporary capacity increase from Additional Agreement No. 8

218. On 31 January 2017, MTS-TM obtained increased external data capacity of 1 Gbit/s by entering into Additional Agreement No. 8 to 2012 Turkmentelecom Agreement, in exchange for assistance to Turkmentelecom with hard currency payments in U.S.

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[138] Cl. Mem., ¶ 200.
[139] Interconnection and Interworking Agreement between MTS-TM and Turkmentelecom No.0013/06-3, 9 June 2012, Clause 5.2, Exhibit C-0130.
[140] Cl. Mem., ¶¶ 201-203.
[141] Agreement between Altyn Asyr and Turkmentelecom for lease of "Turkmenistan Online" data channel, 1 April 2014, Exhibit C-0373; Cl. Reply, ¶ 377.
[142] Cl. Mem., ¶¶ 204, 206; Letter No. 02.1/0578 from MTS-TM to Turkmentelecom, 17 February 2015, Exhibit C-0183; Letter No. 02.1/0657 from MTS-TM to Turkmentelecom, 27 February 2015, Exhibit C-0185; Letter No. 03/1436 from MTS-TM to Turkmentelecom, 28 May 2015, Exhibit C-0188; Letter No. 02.1/2846 from MTS-TM to Turkmentelecom, 3 December 2015, Exhibit C-0196.
[143] Cl. Mem., ¶ 207.
[144] Resp. C-Mem., ¶ 494; Letter from Turkmentelecom to Altyn Asyr No. 459/1, 14 May 2012, Exhibit R-0061; Letter from Turkmentelecom to Altyn Asyr No. 618/1, 22 June 2012, Exhibit R-0062; Letter from Turkmentelecom to Altyn Asyr No. 304, 10 February 2014, Exhibit R-0063; Letter from Turkmentelecom to Altyn Asyr No. 502, 19 March 2014, Exhibit R-0064.

dollars.[145] According to the Claimant, this led to a temporary growth in profitability until Additional Agreement No. 8 expired in June 2017.[146]

(c) Data Channel quality

219. From early March 2016 to the end of April 2016, MTS-TM faced a significant drop in service quality, during which Altyn Asyr had no problems with its channels.[147]

220. On 25 June 2016, a data channel breakdown occurred which directly impacted both MTS-TM and Altyn Asyr.[148] According to the Claimant, MTS-TM partially recovered on 29 June 2016 but continued to suffer throughout 2016, but Altyn Asyr's services fully recovered by 6 July 2016.[149]

c. Prices for the Lease of Data Channels

221. According to the Claimant, payments for the lease of data channels comprised a substantial portion of MTS-TM's operations costs.[150] The Respondent attributes Turkmentelecom's increase of prices in 2015 and 2017 to higher rates on intercity data channels.[151]

222. On 8 September 2015, the MoC notified both MTS-TM and Altyn Asyr that prices would be increased by 30% from 1 October 2015.[152]

223. On 31 May 2017, a decision was made at a meeting of the Ministry of Communications' Technical and Economic Council to increase the lease prices of intercity data channels by

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[145] Additional Agreement No. 8 to the Interconnection and Interworking Agreement between MTS-TM and Turkmentelecom, 31 January 2017, Exhibit C-0257; Cl. Mem., ¶¶ 217-218; Cl. Reply, ¶ 341(n).
[146] Cl. Mem., ¶ 219.
[147] Cl. Mem., ¶¶ 209-210.
[148] Cl. Mem., ¶ 212.
[149] Letter No. 02.1/1810 from MTS-TM to Turkmentelecom, 7 July 2016, Exhibit C-0229; [redacted] Cl. Mem., ¶¶ 213-214.
[150] Cl. Mem., ¶ 222.
[151] Resp. C-Mem., ¶¶ 176-178.
[152] Cl. Mem., ¶ 222(c); Resp. C-Mem., ¶177; Letter No. 1990 from Turkmentelecom to Altyn Asyr, 8 September 2015, Exhibit. R-0100; Letter No. 1989 from Turkmentelecom to MTS-TM, 8 September 2015, Exhibit R-0101.

100% from 1 July 2017.[153] The next day, on 1 June 2017, Turkmentelecom notified MTS-TM of the increase in prices.[154]

d. Access to 4G frequencies

224. In February 2010, Altyn Asyr began to provide 3G services.[155] According to the Claimant, in September 2013, the Ministry of Communications issued Altyn Asyr a 4G license.[156] In January 2014, Altyn Asyr was offering 4G LTE services.[157]

225. In 2012, MTS-TM applied for the allocation of 4G frequencies, but its application was denied for insufficient documentation, according to the Respondent.[158] MTS-TM started to expand its 3G network in 2014, but according to the Claimant it was challenged by limited data channel capacity.[159]

e. Access to VPN for Data roaming services

226. According to the Claimant, MTS-TM was not granted access to a VPN for data roaming services, whereas Altyn Asyr was granted access to a VPN channel in 2015.[160] On 12 November 2015, MTS-TM raised this issue both with Turkmentelecom and the Minister of Communications (in copy), requesting VPN access to provide roaming services.[161]

f. Import Permits

227. According to the Claimant, there were multiple delays in issuing import permits for MTS-TM's key equipment.[162] In 2015 and 2016, MTS-TM applied for multiple import permits

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[153] Cl. Reply, ¶¶ 412(a), 414-418; Protocol No. 01/05 of meeting of the Technical and Economic Council attended by the Ministry and Turkmentelecom, 31 May 2017, Exhibit C-0568.
[154] Cl. Mem., ¶¶ 222(d), 304.
[155] Resp. C-Mem., ¶ 137.
[156] Cl. Mem., ¶ 239.
[157] Resp. C-Mem., ¶ 138.
[158] Resp. C-Mem., ¶ 140; Letter No. 2501 from Ministry of Communication to MTS-TM, 12 November 2012, Exhibit R-0058; Letter No. 735/09 from MTS-TM to Minister of Communications, 27 September 2012, Exhibit R-0059.
[159] Cl. Reply, ¶ 353(c); [redacted]
[160] Cl. Mem., ¶ 244; Cl. Reply, ¶ 6(e); Resp. C-Mem., ¶ 600.
[161] Letter No. 06.6/2636 from MTS-TM to Turkmentelecom and the Ministry, 12 November 2015, Exhibit C-0012.
[162] Cl. Reply, ¶ 6(d).

to import and install new infrastructure, including 3G base stations.[163] After repeated requests, MTS-TM received an import permit for the certain equipment six months later, in April 2016.[164] In contrast, Altyn Asyr's application for an import permit of certain equipment for 4G/LTE services was granted within a week.[165] MTS-TM raised this issue with the Ministry of Communications and Turkmentelecom in 2016 and 2017.[166]

228. According to the Respondent, MTS-TM obtained a total of 13 permits, i.e., all the import permits it requested in 2012-2017.[167] The Respondent further notes that applying for a preliminary import permit could have accelerated the process.[168]

g. Miscellaneous

229. In addition to the above, the Claimant and the Respondent disagree on the following facts:

- Restrictions on advertising: The Parties disagree as to whether Turkmenistan authorities prevented MTS-TM from advertising in prime locations or on television;[169]

- State and corporate clients: The Claimant alleges that MTS-TM was not permitted to serve corporate clients.[170] The Respondent disputes this allegation and submits that MTS-TM had more State and corporate subscribers than Altyn Asyr;[171]

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[163] Cl. Mem., ¶ 252; Cl. Reply, ¶ 353(b); Letter No. 02.3/1922 from MTS-TM to the Ministry, 7 August 2015, Exhibit C-0190; Letter No. 02.3/2029 from MTS-TM to the Ministry, 25 August 2015, Exhibit C-0191; Letter No. 02.1/2376 from MTS-TM to the Ministry, 14 October 2015, Exhibit C-0193; Letter No. 02.1/0369 from MTSTM to the Ministry, 8 February 2016, Exhibit C-0205; Letter No. 02.1/0427 from MTS-TM to the Ministry, 12 February 2016, Exhibit C-0208.
[164] Cl. Mem., ¶ 253.
[165] Letter No. 1721 from Altyn Asyr to the Ministry, 27 November 2012, Exhibit C-0394; Cl. Reply, FN 188.
[166] Cl. Reply, ¶ 373; Letter No. 02.1/2908 from MTS-TM to the Ministry, 10 November 2016, Exhibit C-0248; Letter No. 02.1/1357 from MTS-TM to the Ministry, 22 June 2017, Exhibit C-0274; Letter No. 02.1/1358 from MTS-TM to Turkmentelecom, 22 June 2017, Exhibit C-0275.
[167] Resp. C-Mem., ¶ 72 and FN 129; [redacted]
[168] Resp. C-Mem., ¶¶ 192-193.
[169] Cl. Mem., ¶¶ 260-263; Resp. C-Mem., ¶¶ 210-212.
[170] Cl. Mem., ¶¶ 264, 268; [redacted]
[171] Resp. C-Mem., ¶¶ 216, 218, 598; Letter No. 018/142 from MTS-TM to Radio Frequency Service, 2 October 2017, Exhibit R-0053.

- Sale of Handsets: The Parties disagree as to whether it is proven that the Ministry of Economy and Development deleted authorization for MTS-TM to sell handsets by amending MTS-TM's corporate charter;[172]

- MTS-TM's prices: The Parties disagree as to whether MTS-TM was told by Turkmen authorities "not to offer more attractive tariffs than Altyn Asyr", and whether the process of prior approvals from the Ministry of Communications restricted MTS-TM's rights to determine its own prices;[173]

- Currency conversion: The Parties disagree as to whether the difficulties and delays in currency conversion were a *de facto* restriction or a country-wide economic situation.[174]

(2) Termination of MTS-TM's operations in 2017

a. The 2012 Agreement

230. On 4 May 2016, concerned with the decrease in profit payments, Turkmentelecom sent a letter to MTS-TM, requesting a financial plan and economic indicators for the 2nd, 3rd, and 4th quarter of 2016.[175] In response, on 16 May 2016, MTS-TM attributed the decrease in profit to several factors, including higher leasing costs of channels from Turkmentelecom and insufficient internet capacity.[176]

231. On 14 November 2016, MTS-TM formally asked Turkmentelecom for an extension of the 2012 Agreement.[177] In response, Turkmentelecom sent a letter on 22 December 2016, stating that it considered the 2012 Agreement to be "economically disadvantageous" and would consider "if the Agreement should be extended for another five-year term".[178] On

[172] Cl. Mem., ¶¶ 246-248; Resp. C-Mem., ¶ 208.
[173] Cl. Mem., ¶¶ 270-273; Resp. C-Mem., ¶¶ 221-225.
[174] Cl. Mem., ¶¶ 274-279; Resp. C-Mem., ¶¶ 226-227.
[175] Letter No. 785 from Turkmentelecom to MTS-TM, 4 May 2016, Exhibit C-0017; Resp. C-Mem., ¶231.
[176] Letter No. 04.2/1394 from MTS-TM to Turkmentelecom, 16 May 2016, Exhibit C-0223; Cl. Mem., ¶286; Resp. C-Mem., ¶ 231.
[177] Letter No. 04/0010i from MTS to Turkmentelecom, 14 November 2016, Exhibit C-0015; Cl. Mem., ¶ 284; Resp. C-Mem., ¶ 232.
[178] Letter No. 2492 from Turkmentelecom to MTS, 22 December 2016, Exhibit C-0016; Resp. C-Mem., ¶ 232; Cl. Mem., ¶ 285.

the same day, the Ministry of Communications sent a letter to MTS-TM regarding its operating license, expressing dissatisfaction with the modernization of MTS-TM's services.[179]

232. According to the Claimant, during meetings in December 2016 and January 2017 with the Ministry of Communications and Turkmentelecom, MTS representatives were assured that MTS-TM could continue to operate in Turkmenistan after September 2017, and the delay in decision to extend the 2012 Agreement was only due to the process of seeking approval from the Cabinet of Ministers.[180]

233. However, on 23 May 2017, the Minister of Communications informed MTS-TM that the 2012 Agreement would not be renewed.[181]

234. The Claimant highlights that when they met again on 25 May 2017, the Minister demanded that MTS-TM agree to "voluntarily" terminate the 2012 Agreement.[182] The Claimant also submits that the next day, at a further meeting, the Minister said that Turkmentelecom could extend the 2012 Agreement "if MTS agreed to pay [redacted] to Turkmentelecom".[183]

235. On 31 May 2017, another meeting was held between the representatives of MTS, MTS-TM, the Minister of Communications, and Turkmentelecom.[184] The Claimant and the Respondent have different accounts of what was discussed at this meeting – MTS-TM representatives did not sign the minutes of this meeting.[185] The Claimant states that the minutes were inaccurate, whereas the Respondent submits that this was because MTS representatives said they had no legal authority to sign.[186] According to the Claimant, the Minister mentioned that a new Turkmen mobile operator was about to enter the market and told MTS and MTS-TM that any further discussions should be held with

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[179] Letter No. 3115 from the Ministry to MTS-TM, 22 December 2016, Exhibit C-0018; Cl. Mem., ¶ 287.
[180] Cl. Mem., ¶¶ 289, 292; Cl. Reply, ¶ 341(l); [redacted]
[181] Email from [redacted], 23 May 2017, Exhibit C-0260; [redacted]; Cl. Mem., ¶ 295; Resp. C-Mem., ¶ 233.
[182] [redacted] Cl. Reply, ¶ 207(e).
[183] [redacted]; Cl. Reply, ¶¶ 207(f), 394-395.
[184] Cl. Mem., ¶ 302; Resp. C-Mem., ¶ 234.
[185] Cl. Mem., ¶ 303, FN 532; Minutes of Meeting between MTS and Turkmentelecom, 31 May 2017, Exhibit C-0262
[186] Cl. Mem., ¶ 303, FN 532; [redacted] Resp. C-Mem., ¶ 237.

Turkmentelecom.[187] According to the Respondent, Turkmentelecom expressed concerns about MTS-TM's performance at the meeting, but MTS-TM did not address these concerns nor did it provide any future development plans to ensure the extension of the 2012 Agreement.[188] The Claimant denies that the submission of a development and investment plan was a condition for the extension of the 2012 Agreement.[189]

236. According to the Claimant, after the Minister left the meeting, [redacted][191]

237. On 2 June 2017, according to the Claimant, during a meeting with Turkmentelecom, [redacted][192] The Claimant stated that MTS and MTS-TM could not accept this proposal.[193] [redacted][194]

238. On 30 June 2017, Turkmentelecom notified MTS by letter that the 2012 Agreement would not be extended and therefore would expire on 28 September 2017.[195]

239. On 13 July 2017, [redacted] wrote on behalf of MTS-TM to the Minister of Communications and Turkmentelecom, offering to constructively discuss possible alternative ways for MTS-TM to carry out its business.[196] On 23 August 2017, however, Turkmentelecom sent another letter advising that the 2012 Agreement as well as

[187] Cl. Mem., ¶ 302; [redacted]
[188] [redacted] Resp. C-Mem., ¶¶ 234-235.
[189] Cl. Reply, ¶¶ 383-385.
[190] Cl. Mem., ¶ 303; Cl. Reply, ¶ 399(d); [redacted]
[191] [redacted] Resp. C-Mem., ¶ 236.
[192] [redacted] Cl. Mem., ¶ 305.
[193] Cl. Mem., ¶305; Cl. Reply, ¶ 430(a).
[194] [redacted] Resp. C-Mem., ¶ 236.
[195] Letter No. 1440 from Turkmentelecom to MTS, 30 June 2017, Exhibit C-0020; Cl. Mem., ¶ 311; Cl. Reply, ¶ 207(h).
[196] Cl. Mem., ¶ 313.

other agreements between MTS-TM and Turkmentelecom would expire on 28 September 2017.[197]

b. Termination of the Interconnection Agreements

240. On 17 July 2017, MTS-TM wrote to Turkmentelecom to request a five-year extension of the 2012 Turkmentelecom Agreement.[198] In July 2017, MTS-TM signed an addendum to the 2012 Turkmentelecom Agreement that the agreement "shall be extended until 28 September 2017", under protest and while expressly reserving all of its rights.[199]

241. In August 2017, MTS-TM signed a similar addendum to the 2012 Ashgabat City Telephone Network Agreement that the agreement "shall be extended until 28 September 2017", under protest and while expressly reserving all of its rights.[200]

242. On 28 September 2017, Turkmentelecom informed MTS-TM that it terminated the 2012 Turkmentelecom Agreement.[201] On the same day, Ashgabat City Telephone Network announced the termination of the 2012 Ashgabat City Telephone Network Agreement.[202]

c. The Radio Frequency Spectrum Agreement

243. According to the Claimant, until 25 January 2017 (six months before the date of expiry), neither party gave notice to terminate the Radio Frequency Spectrum Agreement.[203]

244. On 5 June 2017, MTS-TM sent a letter to the Radio Frequency Authority requesting the extension of the validity period of previously assigned radio frequencies in accordance with

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[197] Letter No. 1923 from Turkmentelecom to MTS and MTS-TM, 23 August 2017, Exhibit C-0023; Cl. Mem., ¶ 319.
[198] Letter No. 1682 from Turkmentelecom to MTS-TM, 21 July 2017, p. 1, Exhibit C-0288; Cl. Reply, ¶ 268.
[199] Letter No. 02.1/0765 from MTS-TM to Turkmentelecom, 27 July 2017, Exhibit C-0294; Letter No. 04/00011i from MTS to the Ministry, the Frequency Authority (SICURFS) and Turkmentelecom, 26 July 2017, Exhibit C-0292; Cl. Mem., ¶¶ 315-317; Cl. Reply, ¶ 270.
[200] Letter No. 1184 from Ashgabat Telephone Network to MTS-TM, 1 August 2017, Exhibit C-0295; Letter No. 04/00011i from MTS to the Ministry, the Frequency Authority (SICURFS) and Turkmentelecom, 26 July 2017, Exhibit C-0292; Cl. Mem., ¶¶ 315-317; Cl. Reply, ¶ 270.
[201] Letter No. 1680 from Turkmentelecom to MTS-TM, 21 July 2017, Exhibit C-0287; Cl. Reply, ¶ 272(a).
[202] Cl. Reply, ¶¶ 9(f), 77(l), 272(b); [redacted].
[203] Cl. Reply, ¶ 251.

the License.[204] On 12 June 2017, MTS-TM asked Turkmentelecom for assistance in having MTS-TM's frequency permits extended.[205]

245. On 21 July 2017, [redacted], conveyed the decision of the Interdepartmental Commission on Radio Frequencies that the previously assigned radio frequencies would be valid until 28 September 2017.[206]

246. On 27 July 2017, MTS-TM signed an addendum to Clause 6 of the Radio Frequency Spectrum Agreement stipulating that the agreement "shall be valid until September 28, 2017", under protest and while expressly reserving all of its rights.[207] On 2 August 2017, the Radio Frequency Authority sent a letter to MTS-TM stating that the Radio Frequency Spectrum Agreement would expire on 28 September 2017, referring to the execution of the addendum.[208]

247. On 15 August 2017, Turkmentelecom sent a letter to MTS-TM, stating that "the allocation period [of radio frequencies] was established in accordance with the term of the [2012] Agreement (until September 28, 2017)".[209] On 28 September 2017, [redacted] sent a letter to t[redacted] confirming that the previously allocated radio frequencies would be valid until 28 September 2017.[210]

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[204] Letter No. 02.1/1222 from MTS-TM to the Ministry, 5 June 2017, Exhibit C-0265; Cl. Mem., ¶ 306; Cl. Reply, ¶ 254.
[205] Letter No. 02.1/1269 from MTS-TM to Turkmentelecom, 12 June 2017, Exhibit C-0269; Cl. Mem., ¶ 306.
[206] Letter No. 1886 from the Ministry to MTS-TM, 21 July 2017, Exhibit C-0289; Cl. Reply, ¶ 253.
[207] Letter No. 04/00011i from MTS to the Ministry, the Frequency Authority (SICURFS), Turkmentelecom, 26 July 2017, Exhibit C-0292; Letter No. 02.1/0764 from MTS-TM to the Frequency Authority (SICURFS), 27 July 2017, p. 3, Exhibit C-0293; Cl. Reply, ¶¶ 253-254.
[208] Letter No. 737 from the Frequency Authority (SICURFS) to MTS-TM and MTS, 2 August 2017, Exhibit C-0296; Cl. Reply, ¶ 253.
[209] Letter No. 1851 from Turkmentelecom to MTS, 15 August 2017, Exhibit C-0302; Cl. Reply, ¶ 260.
[210] Letter No. 2616 [redacted] 28 September 2017, Exhibit C-0602; Cl. Reply, ¶ 258(e).

d. The Leases

248. On 17 August 2016, MTS-TM sought a 10-year extension of 390 leases of State property until 2026.[211]

249. On 16 August 2017, [redacted] sent a letter to [redacted] advising that "*all of the lease-related contractual obligations*" would terminate effective 28 September 2017 and asking that this be communicated to the regional (velayat) entities.[212] In late August 2017, numerous lease agreements between MTS-TM and regional telecommunication companies were terminated.[213]

e. Aftermath

250. On 5 October 2017, the Radio Frequency Authority sent a letter to MTS-TM regarding the allegedly unauthorised use of the previously allocated radio frequency beyond 28 September 2017.[214]

251. After 29 September 2017, MTS-TM began winding up its operations.[215] According to the Claimant, this process was complicated by a tax audit.[216] According to the Respondent, the dismantling of MTS-TM's equipment did not begin until the end of 2018.[217] In 2019, meetings were held between MTS-TM and Turkmentelecom to facilitate the dismantling process.[218]

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[211] Letter No. 10/2428 from MTS-TM to the State Committee of Turkmenistan for Environmental Protection and Land Resources, 17 August 2016, Exhibit C-0236; Cl. Mem., ¶ 612(a); Cl. Reply, ¶ 353(d).
[212] Letter No. 2201 from the Ministry to the Turkmen Ministry of Economy, 16 August 2017, Exhibit C-0382; Cl. Reply, ¶ 443.
[213] List of Lease Termination Notices in 2017, Exhibit C-0324.
[214] Letter No. 927 from the Frequency Authority (SICURFS) to MTS-TM, 5 October 2017, Exhibit C-0325.
[215] Cl. Mem., ¶ 336.
[216] Cl. Mem., ¶ 337; Letter No. 24/Min-294 from Ministry of Finance and Economy of Turkmenistan to MTS-TM, 12 January 2019, Exhibit C-0352.
[217] Resp. C-Mem., ¶ 246. *See, e.g.,* Letter No. 1338 from ACT to MTS-TM, 3 November 2018, Exhibit R-0126.
[218] Resp. C-Mem., ¶ 247; Letter No. 01/0001 from MTS-TM to Turkmentelecom, 2 January 2019, Exhibit R-0132; Letter No. 76 from Turkmentelecom to MTS-TM, 9 January 2019, Exhibit R-0133; Minutes of Meeting Between Turkmentelecom and MTS-TM, 5 February 2019, Exhibit R-0134.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

252. In its Reply dated 22 July 2020, the Claimant requested that the Tribunal issue an Award:

(a) declaring that the Tribunal has jurisdiction over this dispute;

(b) declaring that the Respondent has breached Articles 3(2), 3(3), 4(1), 4(2), 5(1) and 7 of the BIT;

(c) ordering the Respondent to pay to the Claimant full compensation for the Claimant's damages sustained as a result of the Respondent's breaches of the BIT, including:

i. the Historical Damages, in the amount no less than [redacted] and

ii. the Valuation Damages corresponding to the lost investment value of MTS-TM, in the amount no less than [redacted]

plus a gross-up of any taxes that may be imposed by the Respondent on or affecting such compensation and post-award interest as appropriate;

(d) ordering the Respondent to pay to the Claimant all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and all of the Claimant's legal costs associated with this proceeding, including attorneys' fees and experts' fees and expenses, plus interest thereon;

(e) granting pre-award interest at the U.S. 5-year Treasury rate + country risk premium, compounded annually, on all of the above compensatory damages from the last date of computation of damages to the date of the Award;

(f) granting post-award interest at the U.S. 5-year Treasury rate + country risk premium, compounded annually, on all of the amounts awarded from the date of the Award to the date of payment; and

(g) ordering such other or further relief as may be appropriate under the applicable law or to which the Claimant may otherwise be justly entitled.[219]

253. In its Post-Hearing Brief dated 26 August 2022, the Claimant restated its request for relief as follows:

> As a result of the Respondent's actions and breaches of the BIT described above, the Claimant respectfully requests that the Tribunal issue an Award:
>
> - declaring that the Tribunal has jurisdiction over this dispute;
> - declaring that the Respondent has breached Articles 3(2), 3(3), 4(1), 4(2), 5(1) and 7 of the BIT;
> - ordering the Respondent to pay to the Claimant full compensation for the Claimant's damages sustained as a result of the Respondent's breaches of the BIT, including:
>
> i. the Historical Damages, in the amount of [redacted]
>
> ii. ii. the Valuation Damages, corresponding to the lost investment value of MTS-TM, in the amount of [redacted] and
>
> iii. the Stranded Cash, in the amount of [redacted]
>
> plus gross up of any taxes that may be imposed by the Respondent on or affecting such compensation and post-award interest as appropriate;
>
> - ordering the Respondent to pay to the Claimant all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and all of the Claimant's legal costs associated with this proceeding, including attorneys' fees and expenses and experts' fees and expenses, plus interest thereon;
> - granting pre-award interest at the U.S. 5-year median Treasury rate + annual country risk premium (or, alternatively, the U.S. 5-year median Treasury rate + 4%), compounded annually, on all of the above amounts awarded from 28 September 2017 to the date of the Award (or at any other rate or for any other time period that the Tribunal considers appropriate in the circumstances);

[219] Cl. Reply, ¶ 1104.

- granting post-award interest at the U.S. 5-year median Treasury rate + annual country risk premium (or, alternatively, the U.S. 5-year median Treasury rate + 4%), compounded annually, on all of the amounts awarded from the date of the Award to the date the Award is paid in full (or at any other rate that the Tribunal considers appropriate in the circumstances);

- dismissing the Respondent's counterclaim for moral damages; and

- ordering such other or further relief as may be appropriate under the applicable law or to which the Claimant may otherwise be justly entitled.[220]

254. For its part, the Respondent, in its Rejoinder dated 18 December 2020, submitted the following request for relief:

> For the reasons set forth above, Respondent respectfully requests the Tribunal to:
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> - decline jurisdiction in the present case;
>
> - to the extent that the Tribunal proceeds to examine the merits of the case, dismiss Claimant's claims in their entirety;
>
> - to the extent that the Tribunal proceeds to examine the issue of quantum, find that no compensation is due to Claimant;
>
> - order Claimant to pay the totality of costs relating to this arbitration, including fees and expenses of the Members of the Tribunal, Respondent's counsel and expert, and all other amounts incurred by Respondent in its defense; and
>
> - order Claimant to pay moral damages to Respondent in the amount of [redacted][221]

255. The Respondent, in its Post-Hearing Brief dated 26 August 2022, requested:

> that the Tribunal dismiss this case in its entirety, for lack of jurisdiction or, alternatively, on the merits. Respondent further requests that MTS pay all costs incurred by Respondent in connection with this arbitration, including, but not

[220] Cl. PHB, ¶ 88.
[221] Resp. Rej., ¶ 605.

limited to, legal fees and expenses, administrative costs of ICSID, and all other amounts incurred by Respondent in this case.[222]

256. In its Reply Post-Hearing Brief, the Respondent requested:

> that the Tribunal dismiss this case in its entirety, for lack of jurisdiction or, alternatively, on the merits. Respondent further requests that MTS pay all costs incurred by Respondent in connection with this arbitration, including, but not limited to, legal fees and expenses, administrative costs of ICSID, and all other amounts incurred by the Respondent in this case.[223]

V. JURISDICTION

A. THE RESPONDENT'S OBJECTIONS TO JURISDICTION

(1) The claims asserted are contractual breaches rather than treaty violations

257. The Respondent contends that this Tribunal has no jurisdiction under the BIT and that MTS' claims must be dismissed for lack of jurisdiction.[224] It says that the claims brought by the Claimant in this arbitration are "contract claims, not treaty violations" and that the BIT "does not confer jurisdiction over claims arising out of contracts".[225]

258. The Respondent argues that investment treaty tribunals have jurisdiction only over treaty claims and, absent an express provision in the treaty granting them jurisdiction over contract disputes, they cannot adjudicate contract-based claims. The Respondent cites *Joy Mining*: where the evidence shows that all of the claims are contractual, a finding that a tribunal lacks jurisdiction is justified; *Robert Azinian v. United Mexican States*: investment treaty arbitration is not intended to "substitute for contractually agreed dispute resolution

[222] Resp. PHB, ¶ 157.
[223] Resp. Reply PHB, ¶ 93.
[224] Resp. Rej., ¶ 29; Resp. C-Mem., ¶ 270.
[225] Resp. Rej., ¶¶ 29, 31.

mechanisms [...] nor [...] elevate [...] ordinary transactions with public authorities into potential international disputes".[226]

259. The Respondent underscores that the applicable BIT does not contain a provision that would provide the Tribunal with jurisdiction over disputes arising out of contracts and does not contain an "umbrella clause" or any "specific undertaking" provision "that could even arguably encompass breaches of a state's own contractual obligations".[227] According to the Respondent, the claims at issue in this arbitration "relate solely to the vindication of [the Claimant's] rights under the contracts, chiefly the 2012 Agreement"[228] and "in particular, the purported right to an extension for another five-year term"[229] and as such are contract claims not subject to the BIT.

260. The Respondent asserts that MTS' claims arise out of "the existence, validity, legality, performance and/or expiration of the 2012 Agreement and ancillary contracts" and as such, they are not violations of the BIT.[230] In particular, the Claimant's "focus on the 2012 Agreement, the Radio Frequency Spectrum and the Interconnection Agreements" in its submissions indicates that the essential nature of its claims is contractual.[231] As examples, the Respondent refers to: (i) allegations made by MTS that the 2012 Agreement was invalid due to one of its terms, i.e., [redacted]; (ii) allegedly inadequate channels allocated to the Claimant under the 2012 Agreement and the Turkmentelecom Interconnection Agreement; (iii) the expiration of the 2012 Agreement and other MTS contracts being a breach of the terms of these contracts; and (iv) the alleged non-compliance by Turkmentelecom with its undertakings under the 2012 Agreement "to provide MTS-TM with the 'legal and technical conditions of operation,' communication frequencies, channels and premises for the installation of equipment".[232] Additionally, the Respondent argues that MTS' claim of expropriation itself "arises from the alleged

[226] Resp. C-Mem., ¶ 248 and ¶ 249, referring to *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶¶ 75, 82, Exhibit RL-0007; *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB (AF)/97/2 (NAFTA), Award, 1 November 1999, ¶ 87, Exhibit RL-0010.
[227] Resp. C-Mem., ¶ 248; Resp. Rej., ¶ 31; Hearing Transcript, Day 1, 188:9; Resp. Opening, p. 84.
[228] Resp. C-Mem., ¶ 260.
[229] Resp. C-Mem., ¶ 250.
[230] Resp. Rej., ¶¶ 39, 45.
[231] Resp. Rej., ¶¶ 39, 43, 45.
[232] Resp. Rej., ¶ 46.

invalidity, non-performance, and/or expiration" of the 2012 Agreement and ancillary contracts and thus "must be dismissed for lack of jurisdiction".[233]

261. In the Respondent's view, the claims consist of contract disputes repackaged and labelled as treaty claims. The Respondent argues that it is not enough that the Claimant has attempted to characterize its claims as breaches of the BIT and the Tribunal "is not bound by [the Claimant's] labelling". It is rather for the Tribunal to "determine the nature of the disputes objectively".[234]

262. According to the Respondent, to demonstrate that claims fall prima facie under the BIT for purposes of jurisdiction, labelling the claims as treaty claims by the Claimants alone, is not enough and would reduce the "inquiry to jurisdiction and competence ... to naught".[235] A treaty claim has to stand on its own and a contention that a violation of a contract "constitutes in turn and by another name (figuring in the treaty) a treaty violation, [...] does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim".[236] *Vivendi II* stated "[...] where 'the fundamental basis of the claim' is the contract, however [] many more layers of claims one tops it with, it remains a contract claim, which has to be settled according to the terms of the contract and in the forum chosen in that contract".[237]

263. Investment treaty tribunals must act as a "gatekeeper" to determine "the genuine legal basis of [...] claim[s]" and "[t]he claimant's own characterization of the legal foundation of its claims cannot be determinative".[238] The Respondent quotes Professor Douglas for the proposition that: "it is the duty of the tribunal to ensure that the [...] boundaries [of its jurisdiction delineated by consent of the parties] are respected" and there is "no

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[233] Resp. Rej., ¶ 52.
[234] Resp. C-Mem., ¶ 261.
[235] Resp. C-Mem., ¶ 261, quoting *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 50, Exhibit RL-0006.
[236] Resp. C-Mem., ¶ 262, quoting *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Concurring Opinion of Arbitrator Georges Abi-Saab, 19 December 2008, ¶ 5, Exhibit RL-0022.
[237] Resp. C-Mem., ¶ 262, quoting *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Concurring Opinion of Arbitrator Georges Abi-Saab, 19 December 2008, ¶ 5, Exhibit RL-0022.
[238] Resp. C-Mem., ¶ 263, quoting Zachary Douglas, The International Law of Investment Claims (Cambridge University Press 2009), p. 264, Exhibit RL-0012.

corresponding duty upon the claimant to respect these boundaries in formulating its claims for the purposes of invoking the jurisdiction of an investment treaty tribunal".[239]

264. Other arbitral tribunals have declined jurisdiction in similar situations "over claims that were grounded in contractual rights and obligations, despite invocations of would-be treaty breaches by the claimant" (*Hamester*: tribunal found that alleged treaty violations "[...] 'however skillfully repackaged,' were in essence contract claims" as "they were all 'inextricably linked' to the claimant's contract with a State entity";[240] *Joy Mining*: the tribunal found that the existence of evidence that all claims are contractual justified its finding that the tribunal lacked jurisdiction[241]).

265. Accordingly, the Respondent contends, the Tribunal must engage in an objective determination of the essential nature of each claim and is not bound by the Claimant's characterization of the claims as breaches of the BIT.[242]

266. The Respondent addresses MTS' treaty claims in turn.

267. First, according to the Respondent, MTS' allegation that the Respondent unlawfully expropriated its investment on the day the 2012 Agreement expired, "arises from the natural expiration of the 2012 Agreement [and] is based on the [Respondent's] allegedly wrongful refusal to renew [it]".[243] It is noteworthy for the Respondent that, when MTS gave notice of its claim, its formal notice invoked the dispute resolution provision of the 2012 Agreement in addition to the Settlement Agreement.[244] For the Respondent, the argument made by MTS that the 2012 Agreement "was not a legal condition for MTS to operate in Turkmenistan" and its expiration was not a proper legal basis for terminating MTS' operations, is absurd and regardless of this theory, the Respondent maintains that

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[239] Resp. C-Mem., ¶ 263, quoting Zachary Douglas, The International Law of Investment Claims (Cambridge University Press 2009), p. 264, Exhibit RL-0012.
[240] Resp. C-Mem., ¶ 264, quoting *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 329, Exhibit CL-0068.
[241] Resp. C-Mem., ¶ 265, quoting *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, ¶¶ 72, 82, Exhibit RL-0007.
[242] Res p. C-Mem., ¶ 261; Resp. Rej., ¶ 40.
[243] Resp. Rej., ¶ 48.
[244] Resp. Rej., ¶ 48.

MTS' claim for expropriation is still based "on the invalidity or illegality of the 2012 Agreement".[245]

268. Second, according to the Respondent, MTS' FET claim also essentially stems from the 2012 Agreement and the ancillary contracts. The Respondent points out that MTS itself alleges that the Respondent breached Article 4(1) of the BIT, the FET clause, by "reneging on its specific undertakings in the contractual arrangements with MTS" and identifies specific provisions in the 2012 Agreement that the Respondent allegedly breached which thus constitute the "essential basis" of this claim.[246]

269. Third, the Respondent argues that MTS' claim for violation of national treatment is based on the same facts as its FET claim, being "inextricably linked to the determination of the contractual issues".[247]

270. Fourth, regarding MTS' argument that the Respondent breached its obligation to provide "all necessary approvals", the Respondent contends that this claim stems from the undertaking in the 2012 Agreement to provide MTS with "all necessary legal and technical conditions of operation" and is thus also an alleged contractual breach.[248]

271. Fifth, the Respondent also contends that MTS' allegation of breach of Turkmenistan's duty to accord full protection to MTS' investment, is a contractual claim based on Turkmentelecom's decision not to renew the 2012 Agreement.[249] Accordingly, the Respondent takes the position that all of MTS' alleged treaty claims are "artificially repackaged" breach of contract claims.[250]

(2) The contracts provide dispute resolution provisions which must be honoured

272. Moreover, the Respondent argues, investment treaty tribunals cannot accept jurisdiction where a contract provides for a different dispute resolution forum, and were they to do so,

[245] Resp. Rej., ¶ 49.
[246] Resp. Rej., ¶ 54.
[247] Resp. Rej. ,¶ 61.
[248] Resp. Rej., ¶ 62.
[249] Resp. Rej., ¶ 63, 64.
[250] Resp. Rej., ¶ 66.

such tribunals would "subvert th[e] contractual certainty to the detriment of one of the parties" rather than "give effect to the collective will of the parties and the principle of *pacta sunt servanda*".[251] By including an exclusive jurisdiction clause in a contract, "there cannot be any doubt that [the investor] can renounce the right to arbitrate contract claims in a treaty forum".[252] Accordingly, the Respondent contends that the "Tribunal must respect the forum selection clauses of all of the contracts at issue in this case".[253]

273. The Respondent argues this is supported by decisions of other investment arbitration tribunals.[254] For example the "*ad hoc* Committee in *Vivendi v. Argentina* stated: '[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.'"[255] Also, in *SGS v. Philippines*, the tribunal "underscored the need to give effect to the contractual choice of forum: "[...] Tribunal agrees [...] that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself" as this would give investors "the hidden capacity to bring contractual claims to BIT arbitration", a result that "was [not] contemplated by States in concluding generic investment protection agreements".[256]

274. In the present case, the Respondent argues, a different dispute resolution forum is provided for in the 2012 Agreement and the ancillary agreements which were "painstakingly negotiated".[257] In the 2012 Agreement, "MTS and Turkmentelecom specifically agreed that disputes arising out of the 2012 Agreement would be subject to LCIA arbitration in London, governed by English law".[258] Regarding MTS' ancillary agreements with

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[251] Resp. C-Mem., ¶ 253, quoting Zachary Douglas, The International Law of Investment Claims (Cambridge University Press 2009), p. 364 et seq., Exhibit RL-0012.
[252] Resp. C-Mem., ¶ 254, quoting James Crawford, *Treaty and Contract in Investment Arbitration*, 6(1) Transnational Dispute Management (2009), p. 13, Exhibit RL-0013.
[253] Resp. C-Mem., ¶ 258.
[254] Resp. C-Mem., ¶ 256.
[255] Resp. C-Mem., ¶ 256, quoting *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 98, Exhibit RL-0019.
[256] Resp. C-Mem., ¶ 257, quoting *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 134, Exhibit RL-0020.
[257] Resp. Rej., ¶¶ 33, 34.
[258] Resp. Rej., ¶ 33.

Turkmentelecom and Altyn Asyr, they provide that disputes are to be resolved in the courts of Turkmenistan under the Turkmen law.[259] To the Respondent it is clear that any claims arising under the ancillary agreements should be submitted to the domestic courts as other tribunals have held that "when a claimant has agreed to settle its contractual disputes in the domestic courts, international tribunals have no jurisdiction over these matters".[260]

275. Finally, the Respondent argues that the dispute resolution clauses in the 2012 Agreement and the ancillary agreements are both *lex specialis* (since the contracts were specifically agreed by MTS and its Turkmen counterparts) and *lex posterior* (since the contracts were specifically agreed after the BIT entered into force). As such, in the Respondent's view, "any claims arising under those contracts should be submitted to the contractually agreed forum".[261]

276. Accordingly, the Respondent submits that the "Tribunal must respect the forum selection clauses of all the contracts at issue in this case" as investment treaty arbitration is not intended to "resolve commercial contractual disputes, nor to substitute for contractually agreed dispute resolution mechanisms".[262]

B. THE CLAIMANT'S POSITION RELATING TO JURISDICTION

277. The Claimant argues that the Tribunal has jurisdiction over all of its claims pursuant to the BIT irrespective of the fact that such claims arise from a contractual investment framework. The Claimant maintains that its claims are "for breaches of [its] legal rights as a foreign investor under the BIT", rather than claims for breach of contract. None of its BIT claims, it says, "depends upon the assertion of any contractual right".[263]

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[259] Resp. Rej., ¶ 34.
[260] Resp. C-Mem., ¶ 256, referring to *Woodruff Case*, American/Venezuelan Claims Commission, Award, 1903, 9 Reports of International Arbitral Awards 213 (1903), p. 223, Exhibit RL-0016; *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, Mexico-U.S. General Claims Commission, Award, 31 March 1926, 4 Reports of International Arbitral Awards 26 (1926), p. 33, Exhibit RL-0017.
[261] Resp. Rej., ¶ 35.
[262] Resp. C-Mem., ¶ 258; Resp. Rej., ¶ 37.
[263] Cl. Reply, ¶¶ 80, 82, 83, 103.

(1) The Tribunal has jurisdiction over all claims

278. Although the Claimant agrees with Turkmenistan that "[a]bsent an express provision in the operative treaty, investment tribunals [...] only possess jurisdiction over treaty claims, and cannot adjudicate contract disputes", the Claimant contends that this does not mean that every treaty claim arising out of a contractual investment framework "is a contract dispute in disguise".[264]

279. The Claimant asserts that an investment framework can commonly include contractual agreements such as "concessions, licenses, permits or other regulatory approvals by the State, particularly in a highly regulated sector such as telecommunications".[265] In the Claimant's view, "the fact that its claims arise out of an investment framework that included a number of contractual agreements does not turn its treaty claims into contract claims".[266] If that were true, most investor-State claims would be defeated at their inception.[267]

280. The Claimant relies on decisions of other investment tribunals and academic commentators which have adopted the view that treaty claims have a distinct legal basis from contract claims and may be asserted regardless of the existence of any contractual rights.[268] Thus the Claimant adopts the view of Professor Christoph Schreuer that the two standards are different and "it does not follow that because a breach of contract is involved there cannot be a breach of international law" and of the UNCITRAL Secretariat that "[c]ontract and treaty obligations [...] provide discrete bases for a substantive claim [...] but a single measure from a host State can give rise to a contract and a treaty claim".[269]

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[264] Cl. Reply, ¶ 83; Resp. C-Mem., ¶248.
[265] Cl. Reply, ¶¶ 82, 84.
[266] Cl. Reply, ¶ 82.
[267] Cl. Reply, ¶ 102.
[268] Cl. Reply, ¶¶ 102, 91(g), (h), referring to *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 166–167, Exhibit RL-0024; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶ 144, 145, Exhibit CL-0144.
[269] Cl. Reply, ¶¶ 84, 85, quoting Christoph Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered*, International Investment Law and Arbitration: Leading Cases from the ICSID (Cameron May 2005), pp. 293, 295, Exhibit CL-0136; United Nations General Assembly, United Nations

281. Further, the Claimant argues that, because the legal basis for treaty and contract claims is different, when it comes to treaty claims, "an investor is not bound by the forum selection in any relevant contracts".[270] As stated by Professor Schreuer: "[A] forum selection clause contained in a contract between the investor and the host State does not affect the competence of a tribunal, based on a BIT" since, although both proceedings may arise from the same facts, they are based on different causes of action.[271]

282. In rejecting Turkmenistan's argument that the Claimant must pursue its claims in the fora provided in the 2012 Agreement and the ancillary agreements, rather than before this Tribunal, the Claimant contends that Turkmenistan's reliance on *Vivendi I* "destroys" Turkmenistan's position.[272] The Claimant asserts that Turkmenistan failed to note that in the *Vivendi I* annulment proceedings, the *ad hoc* committee annulled that tribunal's "ruling that the investor had to pursue its claims in contract" holding that "the existence of an exclusive jurisdiction clause in a contract [...] cannot operate as a bar to the application of the treaty standard" and "[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty".[273]

283. Furthermore, the Claimant asserts that numerous tribunals in other investment treaty arbitrations have relied on the *Vivendi I ad hoc* committee's decision as a basis to dismiss jurisdictional objections similar to the objection asserted by Turkmenistan in the present case.[274] In this context, the Claimant refers to decisions by arbitral tribunals dismissing respondents' jurisdictional objections.[275] In addition, according to the Claimant, there is

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Commission on International Trade Law, Forty-Seventh Session, Note by the Secretariat: Planned and Possible Future Work – Part II, Addendum: Possible Future Work in Arbitration – Concurrent Proceedings, document A/CN.9/816, ¶ 7, Exhibit CL-0137.

[270] Cl. Reply, ¶ 84.

[271] Cl. Reply, ¶ 84; C. Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered", International Investment Law and Arbitration: Leading Cases from the ICSID (Cameron May 2005), pp. 293, 295, Exhibit CL-0136.

[272] Cl. Reply, ¶ 86; Resp. C-Mem., ¶256; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 98, Exhibit RL-0019.

[273] Cl. Reply, ¶¶ 87, 88; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶ 101–103, Exhibit RL-0019.

[274] Cl. Reply, ¶ 91.

[275] Cl. Reply, ¶ 91, referring to *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶¶ 79, 95, Exhibit CL-0140; *Siemens v. Argentina*, ICSID Case No. ARB/02/8,

"abundant precedent" where arbitral tribunals have found "denial, revocation or expropriation of contractual rights" to violate investment treaty protections.[276] In particular, the Claimant refers to *Garanti Koza v. Turkmenistan*, where the tribunal rejected Turkmenistan's jurisdictional objection because the claimant "asserted multiple claims under the BIT" and all that was required for that tribunal to consider treaty claims brought by the claimant was "for one of the ... claims to arise under the BIT".[277] The Claimant also argues that Turkmenistan's reliance on *SGS v. Philippines* is inapposite since there the tribunal was interpreting an umbrella clause and in fact found that it did have jurisdiction, finding that only the "determination of the exact amount owed by the Philippines under the contract first had to be determined by the Philippines courts".[278]

284. The Claimant further contends that the multiple cases cited by Turkmenistan do not support its contention that "disputes arising out of an investment framework involving contracts between the investor and the host State are contract disputes in disguise"[279] (e.g., *Hamester v. Ghana*: where a tribunal must consider contract matters to rule on the treaty claims "it exercises treaty not contract jurisdiction"; *El Paso v. Argentina*: where a "State interferes with contractual rights by a unilateral act [...] in such a way that the State's action can be analysed as a violation of the [...] BIT, [a tribunal] has jurisdiction over all the claims of

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Decision on Jurisdiction, 3 August 2004, ¶ 180, Exhibit CL-0028; *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, ¶¶ 92, 112-113, Exhibit CL-0033; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, ¶124, Exhibit CL-0141; *Amco Asia Corporation and others v. Republic of Indonesia*, Award on Jurisdiction, 25 September 1983, 23 I.L.M. 351 (1984), ¶ 38, Exhibit CL-0142; *EDF International S.A. v. Republic of Hungary*, UNCITRAL, Award, 3 December 2014, ¶ 282, cited in Swiss Federal Supreme Court Decision 4A_34/2015 on Set-Aside of Award, 6 October 2015, p. 8, Exhibit CL-0143; *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 139,148, 166–167, Exhibit RL-0024; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶ 139, Exhibit CL-0144; *CMC Muratori Cementisti CMC di Ravenna SOC Coop and Ors v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award, 24 October 2019, ¶ 220, Exhibit CL-0145.

[276] Cl. Reply, ¶ 92, citing various cases.

[277] Cl. Reply, ¶ 93, 94, quoting *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶¶ 246, 247, Exhibit CL-0116.

[278] Cl. Reply, ¶¶95, 96, referring to Resp. C-Mem. ¶ 257 and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, Exhibit RL-0020.

[279] Cl. Reply, ¶ 97.

the foreign investor, including the claims arising from a violation of its contractual rights").[280]

285. Finally, the Claimant refers to *Lotus v. Turkmenistan*, where the claimant's claims were for "[u]npaid amounts under the contract" and there were no claims pled that were distinct from contractual claims. Even in this case, where the tribunal found it had no jurisdiction because it was not shown "why the alleged contractual breaches should, or could, be considered to be, in themselves, breaches of the BIT", the tribunal observed this does not mean "that non-payment can never constitute a breach of a treaty standard".[281]

(2) The Claimant's claims are BIT claims, not breach of contract claims

286. For the Claimant, it is clear that its claims are treaty rather than contract claims as they arise from "Turkmenistan's internationally wrongful conduct in violation of the BIT".[282] The Claimant argues that each of the allegedly wrongful measures it lists violates the BIT as each involves Turkmenistan's "exercise of sovereign powers [...] and/or a discriminatory 'non-commercial act' by Turkmenistan and its State organs".[283]

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[280] Cl. Reply, ¶ 97, quoting *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 322, Exhibit CL-0068; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 84, Exhibit RL-0005.

[281] Cl. Reply, ¶¶ 99, 100, relying on *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, ¶¶ 170, 171, Exhibit CL-0151.

[282] Cl. Reply, ¶¶ 103, 104.

[283] Cl. Reply, ¶¶ 104, 105. Claimant alleges that the following actions by Turkmenistan are internationally wrongful acts:

(a) the imposition of the extra-legal Profit Charge as a condition of MTS-TM's operations in Turkmenistan, without any basis under Turkmen or international law;

(b) the arbitrary and discriminatory exercise of Turkmenistan's sovereign regulatory authority over MTS-TM's operations between 2012 and 2017, including:

i. denying MTS-TM access to the same external data channel capacity as Altyn Asyr;

ii. denying MTS-TM the same data channel quality as Altyn Asyr;

iii. imposing extortionate tariffs on MTS-TM for the lease of data channels;

iv. denying MTS-TM access to 4G frequencies;

v. unreasonably delaying and denying import permits for MTS-TM to import key equipment;

vi. revoking MTS-TM's authorisation to sell handsets under its corporate charter;

vii. denying MTS-TM access to a VPN to provide data roaming services;

viii. denying MTS-TM the ability to advertise in prime locations and on TV and radio; and

ix. denying MTS-TM the ability to set its own tariffs;

287. According to the Claimant, Turkmenistan identifies only two grounds in support of its position that the claims are "contract claims in disguise" both of which are unmeritorious in the Claimant's view.[284] As characterized by the Claimant, the *first* ground argued by Turkmenistan is that the Claimant's expropriation claim arises from the nonrenewal of the 2012 Agreement, which is a contractual act, and the *second* ground is that the Claimant's legitimate expectation argument is based on "express written undertakings" contained in the 2012 Agreement.[285]

288. The Claimant rejects both grounds. Rejecting the *first* ground, the Claimant argues that its expropriation claim is not based on an entitlement to an extension of the 2012 Agreement according to its terms since in the Claimant's view, the "2012 Agreement was not a legal condition for [the Claimant] to operate in Turkmenistan" and its expiry was not a legal basis for shutting down and allegedly expropriating the Claimant's operations.[286] In addition, the Claimant had a legitimate expectation that the 2012 Agreement would be extended and Turkmenistan's refusal to do so was "arbitrary, capricious, and discriminatory".[287] As to the termination of the ancillary agreements, the Claimant alleges that "[t]he Turkmen Parties were not motivated by any commercial considerations but acted upon the directions of the Turkmen Government" and their conduct was also "arbitrary, discriminatory and carried out for 'governmental rather than commercial reasons.'"[288]

(c) doubling MTS-TM's tariffs for the lease of intercity data channels from 1 July 2017, with the intention and effect of rendering MTS-TM's continued operations unprofitable;

(d) arbitrarily and for non-commercial reasons refusing to extend MTS-TM's Radio Spectrum Frequency Agreement and Interconnection Agreements with Turkmentelecom and the Ashgabat Telephone Network, forcing MTS-TM to amend these contracts to terminate prematurely on 28 September 2017 (on threat of MTS-TM's operations being shut down even earlier);

(e) interfering in MTS-TM's relationships with its service providers and its own employees, with the intention and effect of rendering MTS-TM's continued operations impossible;

(f) exercising its police powers to forcibly shut down MTS-TM's operations on 29 September 2017 without any reasonable basis; and

(g) imposing draconian currency conversion controls affecting MTS-TM's ability to freely transfer funds relating to its investment out of Turkmenistan.

[284] Cl. Reply, ¶ 106.
[285] Cl. Reply, ¶ 106.
[286] Cl. Reply, ¶ 107.
[287] Cl. Reply, ¶ 108.
[288] Cl. Reply, ¶ 109.

289. Rejecting the *second* ground, the Claimant contends that just because Turkmentelecom's alleged "express written undertakings" to the Claimant were conveyed in the 2012 Agreement, this does not "convert [the Claimant's] claim into contract claims in disguise".[289] In the Claimant's view, such written recording "makes [the representations] all the more clear and certain".[290] Additionally, the Claimant's expectation of "fair and non-discriminatory treatment" was also based on the alleged express guarantees contained in Turkmenistan's statutory framework, including the Turkmen Constitution, the Law on Foreign Investments, the Law on Investment Activities, the Law on Communications and the Law on Licensing.[291]

290. Finally, the Claimant asserts that its claims are not breach of contract claims because the 2012 Agreement was not a legal condition for the Claimant to operate in Turkmenistan and as such is legally irrelevant. Its expiration was not a legal basis upon which Turkmenistan could have shut down the Claimant's operations.[292]

291. In sum, the Claimant asserts that Turkmenistan failed to prove that the claims brought in this arbitration are "contract claims masquerading as treaty claims".[293]

C. THE TRIBUNAL'S ANALYSIS AND CONCLUSION ON THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

292. The Tribunal finds that it has jurisdiction over all claims asserted by the Claimant in this arbitration to the extent that these claims are treaty claims. The Respondent's jurisdictional objections are therefore dismissed.

293. The Claimant alleges breaches of its rights as a foreign investor under the BIT rather than claims for breach of contract. The claims as put forward by the Claimant arise pursuant to the BIT irrespective of the fact that they may also arise from a contractual investment framework.

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[289] Cl. Reply, ¶ 112.
[290] Cl. Reply, ¶ 113.
[291] Cl. Reply, ¶ 114.
[292] Cl. Reply, ¶¶ 101, 107.
[293] Cl. Reply, ¶ 116.

294. The Tribunal observes, as a general matter, that a State's conduct can give rise to both types of claims, i.e., breaches of contract and treaty violations.

295. In this dispute, the Claimant does not complain of mere contractual breaches, but rather blames Turkmenistan for violating MTS' rights under the BIT. Whether Turkmenistan has actually breached any of the Claimant's rights under the BIT is a question pertaining to the merits, not jurisdiction.

296. Thus, the conduct of the Respondent in the performance of its contractual relationships with the Claimant can at the same time constitute an internationally wrongful act.

297. Both the Claimant's 2017 Shutdown Claims, alleging expropriation as well as breaches of further standards under the BIT (such as fair and equitable treatment, full protection and security, national treatment, and necessary approvals), and the Claimant's Historical Breaches Claims, alleging various breaches under the BIT (such as fair and equitable treatment, national treatment, full protection and security, necessary approvals as well as free transfer) during the period 2012-2017,[294] are clearly treaty claims, not contract claims.

298. Whatever merit each of those claims may have, each is stated as a claim arising under the BIT, not under a contract. This Tribunal has no jurisdiction to adjudicate whatever contract claims the Claimant may have and will not attempt to do so.

299. All that is required to confer on this Tribunal jurisdiction to entertain the Claimant's treaty claims is for one of the Claimant's claims to arise under the BIT. The Claimant's claims all concern alleged breaches of the Respondent's obligations under the BIT in relation to an investment of the Claimant.

300. As far as the Respondent argues that contract claims are subject to the contractually agreed fora, the Tribunal finds that the Claimant's claims are treaty claims rather than contract claims. The Tribunal further finds that the fact that the 2012 Agreement provides for

[294] *See* Claimant's Opening, p. 18; Cl. PHB, ¶¶ 10, et seq. (Shutdown Claims), 38, 40, 44, 48, 51, 56, 59, 62, 65, 68, 71 (Historical Breaches Claims).

resolution of disputes arising under that contract by LCIA arbitration does not deprive this Tribunal of jurisdiction over alleged claims pleaded and arising under the BIT.

D. ON THE APPLICABILITY OF THE BIT AND THE ADDITIONAL FACILITY RULES

(1) The Parties' positions

301. This dispute is submitted to ICSID arbitration pursuant to Article 9 of the BIT. In Article 9.2(b), the Contracting Parties to the BIT—the Russian Federation and Turkmenistan—agreed that a dispute may be submitted to ICSID under the Additional Facility Arbitration Rules if the ICSID Convention has not entered into force for one or both of the Contracting Parties.[295]

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[295] Cl. Mem., ¶ 338; BIT, Article 9, Exhibit C-0001. Article 9 of the BIT provides as follows:

> 1. Disputes between a Contracting Party and an investor of the other Contracting Party arising in relation to the investments by such investor in the territory of the former Contracting Party, including but not limited to disputes relating to the amount, terms or procedure of payment of compensation and indemnification for losses pursuant to Article 5 and Article 6 of this Agreement or relating to the procedure for payments envisioned in Article 7 of this Agreement, shall be settled, if possible, through negotiation.
>
> 2. If a dispute cannot be settled through negotiations within six months of the date of a written request from either party to the dispute for its settlement through negotiation, the dispute may be referred for resolution, at the discretion of the investor, to:
>
> (a) a competent court of the Contracting Party in the territory of which the investments were made;
>
> (b) the International Centre for the Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965 for settlement of disputes pursuant to the provisions of such Convention (provided that the Convention has entered into force for both Contracting Parties) or pursuant to the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes (if the Convention has not entered into force for one or both of the Contracting Parties);
>
> (c) an ad hoc arbitral tribunal appointed and functioning pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> 3. The arbitral award rendered in a dispute pursuant to this Article shall be final and binding on both parties to the dispute. Each Contracting Party provides in its territory for enforcement of such award in accordance with its legislation. (Exhibit C-0001).

Article 2(a) of the Additional Facility Arbitration Rules provides as follows:

> The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:
>
> (2) (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; [...].

302. The Claimant submits that the Tribunal has jurisdiction over this arbitration pursuant to the BIT. According to the Claimant, the present dispute submitted to arbitration is a "legal dispute arising directly out of an investment that is not within the jurisdiction of the Centre"[296] because the Claimant in this arbitration is a national of the Russian Federation and the Russian Federation is not a Contracting State to the ICSID Convention.[297] It is a "legal dispute", as it concerns alleged breaches by the Respondent of its legal obligations in connection with the Claimant's investments and the Respondent's alleged obligations to compensate the Claimant for such breaches "under the BIT and international law", and it arises "directly out of" investments made by the Claimant in the territory of the Respondent.[298]

303. The Claimant further contends that this Tribunal has jurisdiction over its claims because the Claimant is (i) "a qualifying investor within the meaning of the BIT"; (ii) "has made a qualifying investment in the territory of Turkmenistan within the meaning of the BIT"; and (iii) both Parties "consented to submit the dispute to arbitration under the ICSID Additional Facility Rules pursuant to the terms of the BIT".[299]

304. First, the Claimant asserts that it is "a qualifying investor" within the meaning of Article 1(a) of the BIT,[300] because MTS is a company "incorporated and constituted pursuant to the legislation of the Russian Federation" which is a Contracting Party to the BIT and the Claimant "owns, directly and indirectly, all of the shares in MTS-TM, a company organized under the laws of Turkmenistan".[301]

305. Second, the Claimant contends that it made a "qualifying investment" in Turkmenistan within the meaning of Article 1(b) of the BIT[302] and within Article 2(a) of the Additional

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[296] Cl. Mem., ¶ 340.
[297] Cl. Mem., ¶ 340.
[298] Cl. Mem., ¶¶ 348, 349.
[299] Cl. Mem., ¶ 341.
[300] Article 1(a) of the BIT provides: "For the purposes of this Agreement the following concepts shall mean: (a) 'investor': any physical person that is a national of a Contracting Party pursuant to its legislation; any legal entity incorporated or constituted pursuant to the legislation of a Contracting Party". (Exhibit C-0001).
[301] Cl. Mem., ¶ 342.
[302] Article 1(b) of the BIT provides:

Facility Rules. That investment consists of shares in MTS-TM, rights to licenses, permits, land-use, property and other rights derived from contracts, capital contributions, funds and intellectual property rights. The Claimant says that the Respondent "expressly acknowledged" that the Claimant made an investment.[303]

306. Third, the Claimant points out that the Parties consented to submit the dispute to arbitration under the ICSID Additional Facility Rules with Turkmenistan's consent expressed in Article 9 of the BIT and MTS having expressed its consent by filing a request for arbitration with the Centre on 27 July 2018.[304]

307. The Respondent has not objected to the Claimant's assertions that it is an investor under the BIT, that it has made an investment in Turkmenistan within the meaning of the BIT and that both Parties have consented to submit their dispute to arbitration under the ICSID Additional Facility Rules in accordance with the terms of the BIT.

(2) Tribunal's analysis and conclusions

308. The Tribunal finds that the Claimant is indeed an investor within the meaning of Article 1(a) of the BIT. It is undisputed that MTS is a company incorporated and constituted pursuant to the legislation of the Russian Federation.

309. The Claimant has also made an investment in Turkmenistan within the meaning of Article 1(b) of the BIT. It is undisputed that the Claimant owns, directly and indirectly, all shares in MTS-TM, a company organized under the laws of Turkmenistan.

(b) "investments" – all types of objects of civil rights which are invested by an investor of one Contracting Party in the territory of the other Contracting Party pursuant to the legislation of the latter Contracting Party and, in particular, but not exclusively: movable and immovable property and also property rights and other rights of monetary value; shares, contributions and other forms of participatory interest in the capital of commercial organisations, and also bonds; claims on funds invested to create economic value, or claims under agreements having economic value and relating to investments; exclusive rights to objects of intellectual property (copyright, patents, industrial designs, models, trademarks or service marks, technology, commercially valuable information and know-how); rights to conduct business granted pursuant to the legislation of the Contracting Parties or pursuant to agreements concluded in accordance with the legislation of the Contracting Parties including, in particular, rights in relation to the exploration, development, extraction and exploitation of natural resources.

[303] Cl. Mem., ¶¶ 344-346.
[304] Cl. Mem., ¶ 347.

310. Finally, the Tribunal finds that the Parties have consented to submit the dispute to arbitration under the ICSID Additional Facility Rules: the Respondent's consent is expressed in the standing offer contained in Article 9 of the BIT, whilst the Claimant gave its consent to submit the dispute to arbitration by filing its Request for Arbitration on 27 July 2018.

311. As regards the application of the Additional Facility Rules, the Tribunal notes that no objection has been made by the Respondent in that respect. In any event, the Tribunal finds that the Additional Facility Rules are applicable to this case as the present dispute is a "legal dispute arising directly out of an investment that is not within the jurisdiction of the Centre" within the meaning of Article 2 (a) of the Additional Facility Rules. The present dispute is a legal dispute concerning alleged breaches of the Respondent's legal obligations vis-à-vis the Claimant. The dispute also arises out of the Claimant's investment in Turkmenistan. The dispute is not within the jurisdiction of the Centre because, although Turkmenistan is a Contracting State to the ICSID Convention, the Russian Federation is not.

312. In sum, the Tribunal finds that the Claimant is an investor that made an investment in Turkmenistan, and the Parties have consented to submit the dispute to arbitration under the ICSID Additional Facility Rules.

VI. ATTRIBUTION

A. THE PARTIES' POSITIONS

(1) The Claimant's Position

313. The Claimant, in response to the Respondent's assertion that MTS has failed to make a prima facie showing that the alleged measures were taken by MTS' Turkmen counterparties in the exercise of sovereign authority, argues that its claims are "based upon internationally wrongful sovereign acts, not breaches of contract".[305] According to the Claimant, the conduct of its Turkmen counterparties can rise to the level of internationally

[305] Cl. Reply, ¶ 121.

wrongful acts and this arbitration is the proper forum to assess whether the actions of the Turkmen parties "engage Turkmenistan's responsibility under the BIT" as such an evaluation "must be carried out under international law".[306]

314. The Claimant further argues that Turkmenistan is responsible under the BIT as it directly and unlawfully interfered with the Claimant's contractual arrangements by (i) imposing the 2012 Agreement as a condition for the Claimant to resume its operation in Turkmenistan in 2012 and (ii) directing the Turkmen parties to terminate their contracts with the Claimant as a punishment for the Claimant's refusal to agree to a higher profit charge in 2017.[307] Additionally, the Claimant contends that the allegedly wrongful acts of Turkmentelecom and Altyn Asyr are "attributable to Turkmenistan", because Turkmentelecom "exercised elements of governmental authority" and "acted under the direction and control of Turkmenistan".[308]

315. In the Claimant's view, both Turkmentelecom and Altyn Asyr are State-owned entities and are fully integrated with and controlled by the Ministry of Communications and "perform strategic functions for Turkmenistan".[309] They are "de facto" agents of the Ministry of Communications under the functional test as they engage in activities that are not normally carried out by private businesses, sharing senior management and finances with the Ministry.[310]

316. MTS' case as to Turkmentelecom is rested, first, on the basis that in Turkmenistan actions of all Government bodies, agencies and State-owned enterprises "follow [...] from the very top of the Government, via informal verbal instructions"; State-owned enterprises lack any decision-making autonomy and governmental interference in the negotiation of contracts is a frequent occurrence.[311] MTS then argues more specifically that both Turkmentelecom and Altyn Asyr are used as instruments of State action in the fulfilment of a core governmental task which is the development and operation of telecommunications services

[306] Cl. Reply, ¶ 126.
[307] Cl. Reply, ¶¶ 127, 129.
[308] Cl. Reply, ¶¶ 133, 134.
[309] Cl. Reply, ¶¶ 140, 145, 156.
[310] Cl. Reply, ¶¶ 156-158.
[311] Cl. Mem., ¶¶ 436, 437(a), 442.

in accordance with State policies.[312] It concludes that Turkmentelecom was a mere instrumentality of the Turkmen Government in the 2012 Agreement, the Ministry of Communications being the genuine decision-maker, as shown by the role played by the Deputy Minister of Communications in the negotiations.[313] Emphasis is placed by MTS on the fact that [redacted] also served as General Director of Turkmentelecom in 2011-2012.[314] According to MTS, the role of the Ministry was similarly evident when the Ministry interfered with the extension of the 2012 Agreement, by a contrived message of dissatisfaction with MTS-TM's operations in 2006, repeatedly reassuring MTS-TM's representatives that the extension would be granted, requesting that MTS-TM enter into an additional agreement with Turkmentelecom with a view to providing hard cash to the Government in consideration for an increase in external data capacity and, finally, announcing in May 2017 that the 2012 Agreement would not be renewed unless MTS-TM agreed to pay an extortionate profit charge.[315] Turkmentelecom was, the Claimant says, in fact fully accountable to the Government for the exercise of its functions and mirrored the action of Government bodies: only Turkmentelecom was entitled to allocate data channels, thereby exercising regulatory and supervisory powers over MTS-TM; Turkmentelecom took part in a joint team with the Ministry to carry out an inspection regarding compliance with licensing requirements (9 out of 11 inspectors were from Turkmentelecom);[316] Turkmentelecom and the Ministry simultaneously wrote to MTS-TM on 22 December 2016 to raise unwarranted complaints regarding MTS-TM's performance[317] and the extortionate demands made by the Ministry were often echoed by those made by Turkmentelecom's representatives.[318] MTS further relies on Article 7 of the Regulations on the Ministry of Communications to contend that Turkmentelecom is "directly subordinate to the Ministry".[319]

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[312] Cl. Mem., ¶¶ 438, 439.
[313] Cl. Mem., ¶ 439.
[314] Cl. Mem., ¶¶ 440, 146; [redacted]
[315] Cl. Mem., ¶ 441.
[316] Cl. Mem., ¶¶ 443(a), 427, FN 723.
[317] Cl. Mem., ¶¶ 443(b).
[318] Cl. Mem., ¶¶ 443(c).
[319] Cl. Reply, ¶ 142(d); Resolution of the President of Turkmenistan No. 1711 "On Approval of the Regulations on the Ministry of Communication of Turkmenistan", 16 March 1994, Article 7, Exhibit C-0031.

317. MTS' case as to Altyn Asyr is based inter alia on the characterization of Altyn Asyr as a subordinate enterprise according to Altyn Asyr's Charter;[320] on the fact that Altyn Asyr is owned by 10% by the Ministry of Communications and by 89% by Turkmentelecom which therefore exercise 99% of the voting rights;[321] on the fact that Altyn Asyr is a unit of Turkmentelecom acting under Turkmentelecom's "direct subordination";[322] despite the official claim that Altyn Asyr has capacity to enter into contracts with third parties, the Ministry has purchased equipment for Altyn Asyr for hundreds of millions of dollars;[323] the General Director, the Supervisory Board and the Inspection Committee of Altyn Asyr are appointed by the General Meeting of Shareholders.[324] Emphasis was laid by the Claimant on the "revolving door" existing between the Ministry of Communications on the one hand, Turkmentelecom and Altyn Asyr on the other: [redacted] the General Director of Turkmentelecom (until March 2012), also served as Deputy Minister of Communications; [redacted] has served in particular as a Deputy Director of Turkmentelecom (from May to August 2008), as a Director of Altyn Asyr (from August 2008 to March 2012), as a General Director of Turkmentelecom (from March 2012 to January 2019) in the period until 2017; and [redacted] served as a Director of Altyn Asyr (until October 2013) and then became Deputy Minister of Communications (until at least May 2017); all of which was intended to maintain strict control by the Ministry of Communications.[325] The Turkmen Government tightly controls the finances of both Turkmentelecom and Altyn Asyr; reliance is placed by MTS on the fact that the Respondent has failed to produce in particular any financial statements of Turkmentelecom and on the fact that the sole document produced by the Respondent shows that Turkmentelecom's planned profit for 2017 was to be transferred to the State Budget.[326] In the light of the State's ownership of Turkmentelecom,

[320] Cl. Reply, ¶ 141; Corporate Charter of Closed Joint Stock Company "Altyn Asyr", 30 January 2013, Exhibit R-0139; Charter of Cellular Communications Enterprise "Altyn Asyr" of State Telecommunication Company "Turkmentelecom", 2004, R-0140.
[321] Cl. Reply, ¶ 147(a); Corporate Charter of Closed Joint Stock Company "Altyn Asyr", 30 January 2013, Exhibit R-0139.
[322] Cl. Reply, ¶ 143(g).
[323] Cl. Reply, ¶ 144.
[324] Cl. Reply, ¶ 147 (a), (b) and (d).
[325] Cl. Reply, ¶ 148.
[326] Cl. Reply, ¶¶ 150-151; Protocol No. 01/05 of meeting of the Technical and Economic Council attended by the Ministry and Turkmentelecom, 31 May 2017, Exhibit C-0568.

the integration of Turkmentelecom into the Ministry of Communications and the control by the Ministry over Turkmentelecom, with direct instructions given to Turkmentelecom, Turkmentelecom must be regarded as a de facto State organ.[327] In addition, Turkmenistan carries out activities which are not usually carried out by private business and/or strategic functions for the existence of the State. Turkmentelecom plays a direct role in implementing the President of Turkmenistan's National Program under the supervision of the Ministry of Communications which determines the tariff rates; Turkmentelecom's role includes allocating and distributing data channel capacity in Turkmenistan, so much so that the Respondent admitted that internet access in Turkmenistan is entirely dependent on Turkmentelecom; Turkmentelecom is a de facto agent of the Ministry of Communications and Turkmentelecom's conduct is attributable to Turkmenistan under Article 4 of the ILC Draft Articles on State Responsibility ("ILC Articles").[328]

318. In addition, the Claimant argues that Turkmentelecom's conduct towards MTS and MTS-TM was carried out pursuant to delegated governmental authority within the meaning of Article 5 of the ILC Articles and in pursuit of the policy objectives of the Turkmen State in the telecommunications sector; in particular, Turkmentelecom was responsible for implementing the President of Turkmenistan's National Program "Strategy for the Economic, Political and Cultural Development of Turkmenistan for the Period of Up To 2020" under the supervision of the Ministry of Communications, as acknowledged by [redacted][329] The Claimant contends that Turkmentelecom exercised delegated governmental authority in entering into the 2012 Agreement and in controlling access to data channel capacity. As to the 2012 Agreement, it was entered into by Turkmentelecom pursuant to specific governmental authority granted by the President of Turkmenistan under Decree No. 12307 of 13 May 2012 "with the view of fulfilling tasks defined in the National Program of Social and Economic Development of Turkmenistan in 2011-2030" and the execution of the Decree was to have been supervised by the senior Turkmen Government officials mentioned in Article 3 of the Decree; the presence of the profit charge (i.e., a payment to the Government, as admitted

[327] Cl. Reply, ¶ 154.
[328] Cl. Reply, ¶¶ 156-158.
[329] Cl. Reply, ¶¶ 159-164; [redacted]

by the Respondent) and a number of other contract terms in the 2012 Agreement (notably Clauses 6, 7, and 8) seek to implement sovereign communications policy, thereby showing that Turkmentelecom acted as an agent of the State and stood in the shoes of the Ministry of Communications when it signed the 2012 Agreement.[330]

319. As to the control, allocation and withholding of data channel capacity, the Claimant says that the Respondent admitted that access to internet depends entirely on Turkmentelecom, which therefore acts as the de facto State regulator of access to data channel resources. The Respondent itself considers this to be a public resource since data access is otherwise regulated directly by the Ministry of Communications.[331]

320. No evidence was produced by the Respondent to show that Altyn Asyr operates under different principles than Turkmentelecom.[332]

321. Moreover, and in any event, the Claimant says that Turkmentelecom acted in all its dealings with MTS and MTS-TM at the direction and under the control of the Turkmen Government, and in particular the Ministry of Communications, within the meaning of Article 8 of the ILC Articles,[333] as shown in particular by (i) Turkmentelecom's entry into the 2012 Agreement;[334] (ii) Turkmentelecom's termination of its Interconnection Agreement with MTS-TM in 2017;[335] (iii) Turkmentelecom's coordination and termination of MTS-TM's leases of State property in 2017;[336] and (iv) Turkmentelecom's refusal to extend the term of the 2012 Agreement beyond September 2017.[337]

322. Accordingly, the Claimant takes the position that it was at the direction of the Turkmen Government, and the Ministry of Communications in particular, that the 2012 Agreement was not extended and that this action is therefore attributable to Turkmenistan.[338]

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[330] Cl. Reply, ¶¶ 169-181, quoting from Ruling of the President of Turkmenistan No. 12307, 13 May 2012, Preamble, Exhibit C-0009.
[331] Cl. Reply, ¶¶ 182-185.
[332] Cl. Reply, ¶¶ 152-153.
[333] Cl. Reply, ¶¶ 186-208.
[334] Cl. Reply, ¶¶ 199-200.
[335] Cl. Reply, ¶¶ 201-204.
[336] Cl. Reply, ¶¶ 205-206.
[337] Cl. Reply, ¶¶ 207-208.
[338] Cl. Reply, ¶ 208.

(2) The Respondent's Position

323. In the Respondent's view, MTS failed to establish, even on a prima facie basis, that the actions complained of were taken by Turkmenistan in the exercise of its sovereign authority.[339] The Respondent argues, *first*, that the State of Turkmenistan is not a party to the contracts giving rise to MTS' claims; *second*, that Turkmentelecom, a State-owned enterprise, having a legal personality separate from Turkmenistan, was acting as MTS' contracting party under the 2012 Agreement and was not exercising any sovereign powers; and *third*, that MTS has failed to show that Turkmenistan acted "beyond the scope of its role as supervising authority in relation to the project" and that it interfered with MTS' operations.[340]

324. In any event, the Respondent says, Turkmentelecom is not a "State regulator", contrary to the Claimant's allegations; this was confirmed by [redacted] Regulatory functions are vested primarily with the Ministry of Communications, which allocates radio frequencies and issues communications licenses; this is also the reason for which representatives of the said Ministry attended negotiations with MTS.[341] The fact that Turkmentelecom allocated data channels to MTS-TM "has nothing to do with any regulatory function".[342] MTS' allegation that Turkmentelecom's actions "mirrored" the Government's actions is similarly without foundation.[343]

325. Finally, the Respondent says, MTS' allegations relating to Altyn Asyr's conduct and the attribution of such conduct to the State are in part irrelevant, insofar as they concern events that occurred in 2010, and in part unsubstantiated, insofar as they concern concerted action of the Ministry and Altyn Asyr to the detriment of MTS.[344]

326. Accordingly, in the Respondent's view, MTS has failed to make even a prima facie showing that the alleged measures were taken by MTS' Turkmen counterparties in the

[339] Resp. Rej., ¶ 67.
[340] Resp. Rej., ¶¶ 68-73.
[341] Resp. C-Mem., ¶¶ 336, 347.
[342] Resp. C-Mem., ¶¶ 336, 346.
[343] Resp. C-Mem., ¶¶ 349, 350.
[344] Resp. C-Mem., ¶ 353.

exercise of sovereign authority and their actions are therefore not attributable to the Respondent under the BIT.[345] First, MTS' claims arise under contracts to which the State of Turkmenistan is not a party.[346] Second, most of the actions of which MTS complains were taken by Turkmentelecom acting as MTS-TM's contracting party, and that is relevant in particular in relation to the non-renewal of the 2012 Agreement.[347] The fact that Turkmentelecom is entrusted with the public interest mission of satisfying all telecommunications demands of Turkmenistan or the fact that the conclusion of the 2012 Agreement was authorized "[w]ith the view of fulfilling tasks defined in the National Program of Social and Economic Development of Turkmenistan in 2011-2030" does not transform Turkmentelecom's conduct as a party acting under a contract into sovereign acts potentially giving rise to State liability for breach of a treaty.[348] Third, MTS has failed to establish, even prima facie, that Turkmenistan somehow interfered in MTS' operations by acting beyond the scope of its rule as supervising authority in relation to the project as contemplated by Clause 8 of the 2012 Agreement.[349]

B. TRIBUNAL'S ANALYSIS

327. The Tribunal will now turn to the question whether Turkmenistan's and Altyn Asyr's conduct as alleged by the Claimant is attributable to Turkmenistan.

328. The Tribunal observes that the Claimant's claims are presented as falling into two broad categories: the 2017 Shutdown Claims and the Historical Breaches Claims.[350] Under the Shutdown Claims, the Claimant relies on conduct by the Ministry of Communications, the Cabinet of Ministers, Turkmentelecom, and the Frequency Authority.[351] In the context of the Historical Breaches Claims, the Claimant refers to conduct by the Ministry of

[345] Resp. Rej., ¶ 73.
[346] Resp. Rej., ¶ 68.
[347] Resp. Rej., ¶ 69.
[348] Resp. Rej., ¶ 70.
[349] Resp. Rej., ¶ 71; 2012 Agreement, Clause 8, Exhibit C-0008.
[350] *See* below, Section VII. B. and C.
[351] Cl. Opening, p. 18.

Communications, Turkmentelecom, the Ministry of National Security, the Ministry of Economy, the Cabinet of Ministers, the Central Bank, and Altyn Asyr.[352]

329. The relevant standard for attribution can be found in the ILC Articles. Article 4 of the ILC Articles[353] deals with conduct of State organs and provides for a structural attribution test of acts of de jure or de facto organs of the State. Articles 5 of the ILC Articles[354] deals with conduct by persons or entities that are not State organs, but that are empowered by the law of the State to exercise elements of governmental authority and includes a functional test on attribution. Finally, Article 8 of the ILC Articles[355] deals with acts by persons acting under the instructions, or under the direction and the control of, a State and provides for a control-based test.

330. Insofar as the Claimant relies on the conduct of State organs and/or State agencies (the Ministry of Communications, the Cabinet of Ministers, the Ministry of National Security, the Ministry of Economy, the Cabinet of Ministers, the Central Bank, and the Frequency Authority), these can be considered (de jure) State organs whose conduct is attributable to Turkmenistan in accordance with Article 4 of the ILC Articles.

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[352] Cl. Opening, p. 18.

[353] Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission (the "ILC Articles"), Exhibit C-0018, Article 4 provides:

> Conduct of organs of a State
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> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

[354] ILC Articles, Exhibit C-0018, Article 5 provides:

> Conduct of persons or entities exercising elements of governmental authority
>
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

[355] ILC Articles, Exhibit C-0018, Article 8 provides:

> Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

331. What remains to be considered is the question whether the conduct of Turkmentelecom and Altyn Asyr is attributable to Turkmenistan. Whether the acts of Turkmentelecom and Altyn Asyr (as formally independent State-owned entities) may be attributed to Turkmenistan appears in fact to be the only relevant and contested issue regarding attribution.[356]

(1) Turkmentelecom

332. As regards Turkmentelecom, the Tribunal finds that Turkmentelecom is a de facto State organ (Article 4 of the ILC Articles), which fulfils governmental functions (Article 5 of the ILC Articles).

333. The Tribunal finds that there are several aspects to be considered in establishing whether Turkmentelecom's conduct can be attributed to the Respondent.

334. Historically, Turkmentelecom's predecessor was the Department of Intercity Communications at the Ashgabat Telegraph and Telephone Station of the Ministry of Communications, later named State Communications Company Turkmentelecom.[357] Turkmentelecom was established in 1993 according to Order No. 49 of the Ministry of Communications as "State Telecommunication Company 'Turkmentelecom' of Ministry of Communication of Turkmenistan".[358] According to its Charter, Turkmentelecom reports directly to the Ministry of Communications.[359] Always according to its Charter, the General Director of Turkmentelecom is appointed and may be released by the Ministry of Communications.[360] The annual profit plan is set and approved by the Ministry of Communications. Turkmentelecom holds itself out as part of the Ministry of Communications, including in its official letterhead, which mentions the Ministry of

[356] Claimant's Opening, p. 22, 26.
[357] [redacted]
[358] Charter of State Telecommunication Company "Turkmentelecom" of Ministry of Communication of Turkmenistan, 27 December 2005 ("Charter of Turkmentelecom"), Article 1.1, Exhibit R-0138.
[359] Charter of Turkmentelecom, Article 1.2, Exhibit R-0138.
[360] Charter of Turkmentelecom, Arts. 13.2 and 13.3, Exhibit R-0138.

Communications upfront and sets out the Ministry's emblem.[361] Turkmentelecom shares the same corporate headquarters in Ashgabat as the Ministry of Communications.[362]

335. The Ministry of Communications referred to Turkmentelecom as a "subordinate enterprise" in a draft agreement sent to MTS and BCTI.[363] In the presidential decree authorizing Turkmentelecom to enter into the 2012 Agreement, Turkmentelecom is named "Turkmentelecom of the Ministry of Communications" which suggests that Turkmentelecom is a part of the MoC.[364]

336. In the negotiations for continuing operations in Turkmenistan in 2017, Turkmenistan was represented (jointly) by the MoC and Turkmentelecom. Furthermore, in making the decision not to extend the 2012 Agreement, Turkmentelecom stated that it took into account not only the amount of profit payments but also the public interest, in particular MTS-TM's alleged failure to provide sufficient mobile coverage in rural areas and to offer new communication services.[365]

337. The Tribunal therefore finds that Turkmentelecom is a de facto State organ empowered to carry out and that actually carries out executive functions in the field of telecommunications in Turkmenistan, effectively as a department of the Ministry of Communications, and is for that purpose acting as a de facto organ of the State (Article 4 of the ILC Articles).

338. In any event, even if Turkmentelecom were not found to be a de facto State organ, the Tribunal finds that Turkmentelecom also exercises elements of governmental authority (Article 5 of the ILC Articles) in the telecommunications sector, in particular by controlling and allocating data channel capacity, which is a public resource. Furthermore, the 2012

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[361] *See* for example Letter No. 984 from Turkmentelecom to BCTI, 28 June 2005, Exhibit C-0043.
[362] The address is 88, Archabil Avenue, Ashgabat. *See* Charter of Turkmentelecom, paragraph 1.9 as amended, p. 13, Exhibit R-0138, and, for instance, Letter No. 2501 from Ministry of Communication to MTS-TM, 12 November 2012, Exhibit R-0058. [redacted] confirmed in cross-examination that the Ministry of Communications and Turkmentelecom share the same building (Hearing Transcript, Day 7, 20:15).
[363] Letter No. 1551 from the Ministry to MTS and BCTI (enclosing new draft contract), 17 June 2010, Exhibit C-0077.
[364] Ruling of the President of Turkmenistan No. 12307 "On the development of cellular communication in Turkmenistan", 13 May 2012, Exhibit C-0009.
[365] Letter No. 2492 from Turkmentelecom to MTS, 22 December 2016, Exhibit C-0016.

Agreement was entered into by Turkmentelecom pursuant to specific governmental authority granted by presidential decree.

339. Whether, for the purposes of Article 8 of the ILC Articles, the specific alleged acts were effectively performed as a result of the Ministry of Communications' instructions, direction or control does not require further analysis, given that the Tribunal has already found that Turkmentelecom's acts are attributable according to both Article 4 and Article 5 of the ILC Articles.

340. Therefore, Turkmentelecom's conduct in dealing with the Claimant is attributable to the Respondent.

(2) Altyn Asyr

341. The Tribunal observes, as a preliminary point, that Altyn Asyr plays only a minor role as an alleged "State actor" in the Claimant's claims. The only alleged breach involving actions of Altyn Asyr concerns the alleged refusal of Altyn Asyr to provide sufficient interconnection channels.[366]

342. Altyn Asyr, as a closed joint stock company, is the State-owned mobile operator in Turkmenistan. It is a legal entity separate from the State. Unlike its parent Turkmentelecom, which was formerly a department of the Ministry of Communications, and which carries out regulatory functions in the telecommunications sector, Altyn Asyr is first and foremost a commercial company and a competitor in the telecommunications market. Attribution of its acts and omissions is therefore less obvious than in case of Turkmentelecom.

343. The Claimant argues the following aspects to be particularly relevant with regard to attribution of Altyn Asyr's acts and omissions:[367] Altyn Asyr was established and is owned 99% (directly and indirectly) by the MoC.[368] The general director of Altyn Asyr is

[366] *See* for example, Cl. Opening, p. 18; [redacted] ¶ 30(e).
[367] Cl. Opening, p. 22 and 26.
[368] Cl. Opening, p. 22, referring to Corporate Charter of Closed Joint Stock Company "Altyn Asyr", 30 January 2013, Exhibit R-0139.

appointed by the MoC, Turkmentelecom, and a State-owned bank and the supervisory board is appointed by the MoC and comprises officials from the MoC, Turkmentelecom, and a State-owned bank.[369] The annual profit plan of Altyn Asyr is set and approved by the MoC.[370] The Claimant further argues that the profits of Altyn Asyr have been spent on presidential "vanity projects" (golf courses, theme parks, etc.).[371]

344. The Tribunal observes that Altyn Asyr acts as a commercial company and as a competitor in the telecommunications market, and does not, as its principal goal, exercise regulatory functions. Whilst Turkmentelecom also may act in the form of a private company, the Tribunal finds that Turkmentelecom's direct subordination to the MoC and its exercise of regulatory/governmental functions is clearer and much more prominent than is the case for Altyn Asyr. The fact alone that the Ministry of Communications and Turkmentelecom may have a certain general control over Altyn Asyr, following from Altyn Asyr's ownership structure, without any further indication of an integration into or a direct subordination of Altyn Asyr under the Ministry of Communications, does not turn Altyn Asyr into a (de facto) State organ. The Tribunal is therefore not satisfied that MTS has discharged its burden of proof in relation to the contention that Altyn Asyr is a (de facto) State organ within the meaning of Article 4 of the ILC Articles. Likewise, there is insufficient evidence to find that Altyn Asyr exercises governmental authority (Article 5 of the ILC Articles). In particular, the Claimant failed to state which elements of governmental authority (if any) were/are (allegedly) exercised by Altyn Asyr.

345. Finally, as regards the question whether Altyn Asyr acted on the instructions of, or under the direction or control of Turkmenistan (Article 8 of the ILC Articles), the Tribunal observes that State ownership of an enterprise may be evidence of "general control", but the existence of a separate corporate entity may also create a presumption to the contrary. Rather, prima facie, the conduct of carrying out activities of a separate corporate entity may not be attributable to the State. State ownership is of course relevant, particularly if

[369] Cl. Opening, p. 22, referring to Corporate Charter of Closed Joint Stock Company "Altyn Asyr", 30 January 2013, Exhibit R-0139; Meeting Minutes No. 37a of Supervisory Board of Altyn Asyr, 6 April 2016, R-0162.
[370] Cl. Opening, p. 22, referring to Approved profit plan for Altyn Asyr for 2017, Exhibit C-0598.
[371] Cl. Opening, p. 22, referring to Meeting Minutes No. 37a of Supervisory Board of Altyn Asyr, 6 April 2016, Exhibit R-0162.

the State is the sole or a majority shareholder, but in this context, it is neither sufficient nor necessary to establish general control. A State may own a company but allow it to act independently in the pursuit of its business. Thus, the Tribunal considers establishing "general control" as a sole or majority shareholder to be only a first step. For the conduct to be attributable under Article 8 of the ILC Articles, the Claimant must also establish "specific control", namely that the specific acts alleged (and not the general operation of the company) were effectively performed as a result of the State's instructions, direction or control; whether or not that is an act that can be attributed to the Respondent will be examined more closely in the context of the Interconnection Claim.[372]

(3) Conclusion on Attribution

346. Turkmentelecom's conduct relied upon by the Claimant is attributable to the Respondent.

347. Whether Altyn Asyr's acts complained of in this case can be attributed to the Respondent will be finally decided in the context of the relevant claim ("Interconnection Claim").[373]

VII. LIABILITY

A. THE RELEVANT STANDARDS OF PROTECTION UNDER THE BIT

348. The Tribunal will first provide an overview of the Parties' positions on the relevant standards of protection under the BIT before analysing the Parties' contentions bearing on liability.

349. The Tribunal has carefully taken note of the Parties' positions regarding the different standards of protection under the BIT on which the Claimant relies. The Tribunal does not need to decide on issues of law in the abstract. Only if and to the extent these issues become relevant in the context of the Claimant's specific claims will the Tribunal need to consider these issues further. The Tribunal therefore limits its comments on these standards to some

[372] *See* Section VII. C. (8) below.
[373] *See* Section VII. C. (8) below.

general observations, reserving more detailed analysis for its discussion of the specific breaches alleged by the Claimant.

(1) Fair and Equitable Treatment (FET)

a. The Claimant's Position

350. The Claimant argues that the Respondent breached the fair and equitable treatment ("FET") obligation set forth in Article 4(1) of the BIT.[374] This provision states:

> Each Contracting Party shall ensure in its territory fair and equitable treatment of investments and returns of investors of the other Contracting Party relating to ownership, use and disposal of such investments and returns.

351. The Claimant argues that the FET standard is breached by:

- frustrating an investor's legitimate expectations,[375]
- by acting in an arbitrary, capricious, and discriminatory manner (including by acting in a manner contrary to the principle of legality),[376]
- by acting in an inconsistent and non-transparent manner, and by failing to accord administrative due process, [377] and
- by failing to act in good faith towards the foreign investor.[378]

352. The Claimant submits that the FET obligation requires the host State to protect the legitimate expectations of foreign investors and that this is a central element of FET which requires the host State to uphold undertakings, commitments, assurances and representations made to an investor and upon which the investor relied when making its initial investment or deciding on the expansion of an existing one.[379] According to the

[374] Exhibit C-0001, Article 4(1).
[375] Cl. Mem., ¶¶473, et seq.
[376] Cl. Mem., ¶¶ 494, et seq.
[377] Cl. Mem., ¶¶ 519, et seq.
[378] Cl. Mem., ¶¶ 526, et seq.
[379] Cl. Mem., ¶ 473.

Claimant, legitimate expectations can arise either as a result of specific commitments undertaken by the State towards the investor, or can also find their source in the investor's reliance on the stability of the general legal framework of the host State.[380] Thus, in the Claimant's view, the host State's specific commitments, its regulatory framework designed to induce investment, and its conduct at the time of the investment are all factors that may give rise to legitimate expectations upon which the investor may reasonably rely in making its investment.

353. For the Claimant, actions or omissions by the host State which frustrate the investor's legitimate expectations amount to a breach of the FET standard.[381] The Claimant submits that situations which constitute a breach of the foreign investor's legitimate expectations include a failure to uphold repeated promises made to investors, interference with contractual arrangements, including through forced amendments; and dismantlement of the legal framework aimed at attracting the foreign investments.[382]

354. The Claimant further contends that the FET standard prohibits the host State from acting in an arbitrary, capricious or discriminatory manner.[383] According to the Claimant, the FET standard also requires the State to act in a manner that is not "arbitrary, grossly unfair, unjust, idiosyncratic, [or] discriminatory".[384]

355. The Claimant argues that the principle of non-discrimination also plays a role in the analysis of State measures in light of the FET standard and that discrimination is a significant element in determining whether the standard of fair and equitable treatment has been breached. The Claimant adds that discriminatory treatment is also prohibited under the national treatment provision in Article 4(2) of the BIT.[385]

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[380] Cl. Mem., ¶ 475.
[381] Cl. Mem., ¶ 478.
[382] Cl. Mem., ¶ 479.
[383] Cl. Mem., ¶¶ 494 et seq.
[384] Cl. Mem., ¶ 494, quoting *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶609, Exhibit CL-0053.
[385] Cl. Mem., ¶ 501.

356. The Claimant maintains that the prohibition of arbitrariness and discrimination is an essential principle of the rule of law.[386] Thus, the Claimant argues that "[t]he corollary of the prohibition against arbitrary State action is the principle of legality", which includes an obligation to apply domestic law. The Claimant concedes, however, that not every breach of domestic law would amount to a breach of the FET standard; only a qualified violation of domestic law would breach that standard.[387]

357. The Claimant further argues that the FET standard prohibits the host State from acting inconsistently, non-transparently, and in violation of due process.[388] According to the Claimant, the requirements of transparency, consistency, and due process are fundamental elements of the rule of law and are, therefore, constituent principles of the FET standard.[389] In the Claimant's view, a breach of FET would result from the failure of the host State to accord the investor due process of law.[390]

358. Furthermore, the Claimant identifies the duty of good faith, being an expression and "part of the *bona fide* principle recognized in international law", as an essential element of the rule of law and as another component of the FET standard.[391]

359. The Claimant contends that Turkmenistan relies on the argument that the FET standard under Article 4(1) of the BIT should be limited by the Tribunal to the minimum standard of treatment under customary international law. The Claimant takes the view that the FET standard under Article 4(1) of the BIT is an "autonomous" standard, not limited to the minimum standard of treatment under customary international law.[392] The Claimant argues that it is clear from the language of Article 4(1) that the autonomous treaty standard of "fair and equitable treatment" applies, not the minimum standard of treatment under customary international law. The Claimant maintains that Article 4(1) is not qualified by any reference to "the minimum standard of treatment", or to "customary international law", or even to

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[386] Cl. Mem., ¶ 495.
[387] Cl. Mem., ¶¶ 499, et seq.
[388] Cl. Mem., ¶¶ 519, et seq.
[389] Cl. Mem., ¶ 519.
[390] Cl. Mem., ¶ 521.
[391] Cl. Mem., ¶¶ 526, et seq, quoting *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶153, Exhibit CL-0022.
[392] Cl. Reply, ¶¶ 482, et seq.

"treatment in accordance with international law", i.e., by any of the forms of language sometimes used by States when they wish to limit the scope of FET protection to the minimum standard of treatment.[393] The Claimant states it is the Respondent that bears the burden of proving that the language of Article 4(1) should be interpreted to mean something other than what it says.[394]

360. The Claimant takes the view that, even if the Tribunal were to accept the Respondent's argument regarding the minimum standard of treatment, the Respondent would still have breached its FET obligations under the BIT, arguing that the Respondent's mistreatment of the Claimant's investment was so egregious and so blatantly unfair and so evidently discriminatory that it fell short of even the minimum standard of treatment under customary international law.[395]

b. The Respondent's Position

361. The Respondent argues that the Claimant distorts the FET standard.[396] The Respondent submits that the Parties disagree about the basic parameters of the FET standard to be applied in this case and that FET as protected by the BIT is equivalent to the international minimum standard of treatment in customary international law. According to the Respondent there is no justification for departing from the customary international law approach, especially since the Claimant can point to no evidence that Russia and Turkmenistan contemplated a broader meaning for the FET standard.[397]

362. The Respondent states that FET was historically understood to be the same as the minimum standard of treatment,[398] and that the practice of many States reflects the view that FET continues to be synonymous with the international minimum standard.[399] The Respondent submits that, in 2001, the three State parties to NAFTA issued a joint interpretative note confirming that they intended the FET to reflect the minimum standard treatment required

[393] Cl. Reply, ¶ 484.
[394] Cl. Reply, ¶ 485.
[395] Cl. Reply, ¶ 482.
[396] Resp. C-Mem., ¶¶ 435, et seq.
[397] Resp. C-Mem., ¶ 436.
[398] Resp. C-Mem., ¶ 437.
[399] Resp. C-Mem., ¶ 438.

by customary international law. The Respondent states that many countries have adjusted their BIT practice in the wake of unjustifiably expansive interpretations by arbitral tribunals, to clarify that FET is intended to correspond to the minimum standard.[400] The Respondent explains that the content of the minimum standard was famously set forth in *Neer v. Mexico*, which is widely recognized as the authoritative articulation of the minimum standard under customary international law:[401]

> [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[402]

363. The Respondent submits that any inquiry into an alleged breach of FET must take into account that a reasonable investor should be expected to have investigated the host State and its laws, and to have negotiated for any contractual provisions or other assurances it believes necessary to secure against excessive business risk. In the same vein, when an investor agrees to the terms of a contract, it must be deemed to have known and accepted the risks inherent in the contractual framework and the applicable regulatory environment.[403] The due diligence and expectations of an investor will differ depending on whether it decides to invest in an advanced or a transitional economy. Where an investor, like MTS, decides to return to a country in which it has previously conducted business activities, its expectations should be informed by its prior experiences as well as by the terms on which it re-entered that country.[404] If the investor fails to carry out sufficient due diligence before it enters into a sector and jurisdiction, it assumes the associated risks and cannot then turn against the State to seek compensation if those risks materialize.[405]

364. The Respondent maintains that the FET standard is not an amorphous point of entry for any complaint that an investor has against a host State or the investor's contractual

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[400] Resp. C-Mem., ¶ 438.
[401] Resp. C-Mem., ¶ 439.
[402] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, General Claims Commission, Opinion, 15 October 1926, Reports of International Arbitral Awards, United Nations (2006), p. 61-62, Exhibit RL-0082.
[403] Resp. C-Mem., ¶ 443.
[404] Resp. C-Mem., ¶ 444.
[405] Resp. C-Mem., ¶ 445.

counterparties in the host State. Rather, it requires a balanced analysis of the State's conduct and that of the investor, especially at the time when an investor entered into the country. It is not enough that a claimant should find itself in an unfortunate position as a result of its dealings with a respondent.[406]

365. As regards legitimate expectations,[407] the Respondent argues that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of the international minimum standard. In other words, the FET standard does not protect legitimate expectations without more. According to the Respondent, not every expectation of an investor is protected; rather an expectation must be recognised and protected in international law.[408]

366. The Respondent argues that, as far as the Claimant seeks to base its legitimate expectations on the stability of the general legal framework of Turkmenistan or on the terms of licenses issued by Turkmenistan and contracts concluded with Turkmen counterparties, a failure to observe these alleged expectations could not have caused a breach of FET, because legal and business stability is not part of the FET standard and expectations under commercial contracts are not protected under international law.[409]

367. Absent a specific and unambiguous promise or guarantee on the part of the State at the time the investment is made – for example, in the form of a stabilization clause – the Respondent contends that an investor can have no legitimate expectation that the regulatory framework applicable to its investment will not change.[410] The Respondent submits that legitimate expectations are only relevant to an FET claim if (a) the investor reasonably relied on a specific and unambiguous promise or guarantee by the State, (b) that reliance is assessed according to an objective standard, and (c) the State acted contrary to the specific and unambiguous promise.[411] The Respondent further argues that, in the context of a contractual relationship, an investor's expectations are shaped by that relationship, and the

[406] Resp. C-Mem., ¶ 446.
[407] Resp. C-Mem., ¶¶ 449, et seq.
[408] Resp. C-Mem., ¶ 449.
[409] Resp. C-Mem., ¶ 450.
[410] Resp. C-Mem., ¶ 451.
[411] Resp. C-Mem., ¶ 452.

investor will be subject to the law applicable to the contract and the jurisdiction of the contractually-agreed upon dispute resolution forum. Such an investor must accept the risks inherent in such a relationship and should expect, according to the Respondent, that its counterparty can exercise its contractual rights. From this, it follows that mere non-performance of a contract is outside the scope of the FET standard.[412] In short, the Respondent contends, contractual breaches, not involving unilateral sovereign interference with contractual rights, are not violative of the FET standard.[413]

368. Insofar as the Claimant alleges arbitrary, capricious, and discriminatory conduct and a lack of administrative due process, the Respondent argues that neither would amount to a breach of the FET standard. To establish a breach of FET because of an absence of due process or arbitrariness (which the Respondent defines as a wilful disregard of due process of law[414]), the Claimant must show at least a lack of due process leading to an outcome which offends judicial propriety.[415] The Respondent emphasizes that the concepts of arbitrariness and due process as a part of FET do not convert any and every failure on the part of the host State to comply strictly with the requirements of its laws or regulations into a breach of international law.[416] Thus, an ordinary failure to comply with a law or a contract is not sufficient for a finding of arbitrariness.[417]

369. According to the Respondent, allegations regarding breaches of fair and equitable treatment by governmental bodies and administrative agencies need to be examined against the yardstick of a denial of justice, which is a component of the international minimum standard of treatment.[418] The test for establishing an administrative denial of justice is an administrative irregularity that is enough to shock a sense of judicial propriety.[419] The

[412] Resp. C-Mem., ¶ 454.
[413] Resp. C-Mem., ¶ 456.
[414] Resp. C-Mem., ¶ 462.
[415] Resp. C-Mem., ¶ 459.
[416] Resp. C-Mem., ¶ 460.
[417] Resp. C-Mem., ¶ 463.
[418] Resp. C-Mem., ¶ 467.
[419] Resp. C-Mem., ¶ 468.

Respondent adds that a denial of justice claim requires exhaustion of local remedies as a threshold substantive requirement.[420]

370. Insofar as the Claimant refers to consistency and transparency in the context of FET, the Respondent argues that transparency, standing alone, is not a requirement of customary international law and thus does not form part of the FET standard. The mere fact that aspects of a State's legislative or regulatory framework are complex, the Respondent says, or may give rise to a level of uncertainty or ambiguity, a characteristic shared by most complex regulatory environments, cannot constitute a violation of international law. Very few countries can claim to be fully transparent in their regulatory decision-making and implementation process. An inflexible and unrealistic approach to these issues would in effect transfer the risk of operating in a developing country environment from an investor to the host State.[421] The Respondent submits that the same applies to an alleged obligation of consistency that is also not a requirement of customary international law and that so far has not been accepted as part of the content of fair and equitable treatment with a sufficient degree of support.[422]

371. Regarding the Claimant's reference to good faith in the context of FET, the Respondent argues that good faith is a well-established principle of public international law, but it is of no assistance in interpreting the standard of fair and equitable treatment. The Respondent submits that no tribunal has ever found a breach of the fair and equitable treatment standard by relying solely upon the principle of good faith. Under international law, the standard of proof for allegations of bad faith is demanding, requiring malicious intent to cause harm.[423]

372. In its Rejoinder, the Respondent argues that the FET standard remains a high bar,[424] and confirms its view that FET is equivalent to the minimum standard of treatment rather than an autonomous standard that goes beyond the minimum standard of treatment of customary international law.[425] And even if the Tribunal were to apply an autonomous FET standard,

[420] Resp. C-Mem., ¶ 469.
[421] Resp. C-Mem., ¶ 476.
[422] Resp. C-Mem., ¶ 477.
[423] Resp. C-Mem., ¶ 478.
[424] Resp. Rej., ¶¶ 238, et seq.
[425] Resp. Rej., ¶ 238.

the Respondent says, the threshold for finding a violation of that standard would be a high one.[426] The Respondent argues that an inquiry into breaches of FET has to take into account the due diligence made and the risks accepted by a foreign investor in entering (re-entering in this case) a particular investment environment. When an investor agrees to the terms of a contract, it must be deemed to have known and accepted the risks inherent in the contractual framework. The Respondent contends that the due diligence and expectations of an investor will differ depending on whether the investor decides to invest in an advanced economy or in a transitional economy, in particular one in which it has operated in the past.[427] The Respondent states that the Claimant agrees that no State should be held to a perfect standard of consistency and transparency, and that there should be some further margin of appreciation for developing countries such as Turkmenistan.[428]

c. The Tribunal's Analysis

373. As regards the FET standard, the Tribunal is not convinced by the Respondent's argument that the FET standard is identical with the minimum standard of treatment in customary international law. The Tribunal finds that if the parties to a treaty want to refer to customary international law, one would assume that they will refer to it as such rather than using the term "fair and equitable treatment" of investments, as the Parties to the BIT did in Article 4(1). The Tribunal further accepts that certain sub-categories of the FET, such as the protection of the investor's legitimate expectations, fair procedure and due process, non-discrimination and non-arbitrariness as well as the protection of the good faith principle (as an expression of the principle of good faith under international law), form in principle part of the FET standard.

374. Whether the FET standard represents a high threshold (as argued by the Respondent) or not cannot be answered in the abstract and largely depends on the specific facts of the case, in particular on whether MTS has discharged its burden in relation to the alleged breaches.

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[426] Resp. Rej., ¶¶ 247, et seq.
[427] Resp. Rej., ¶ 249.
[428] Resp. Rej., ¶ 250.

(2) National Treatment (NT)

a. The Claimant's Position

375. The Claimant argues that Turkmenistan has also breached its National Treatment ("NT") obligation under Article 4(2) of the BIT. Article 4(2) of the BIT provides:

> Treatment specified in paragraph 1 of this Article shall be not less favourable than treatment accorded by the Contracting Party to investments and returns of investors who are its own nationals or to investments and returns of investors of any third State, whichever is more favourable in the investor's view.[429]

376. The Claimant states that this provision of the treaty contains an NT obligation as well as an Most-Favoured-Nation (MFN) obligation and argues that NT and MFN provisions address nationality-based discrimination by requiring that foreign investors and investments receive no less favourable treatment than nationals or investments of the host State or third-party States. The Claimant states that both clauses protect foreign investments and returns from discriminatory treatment that puts them at a disadvantage compared to local investors, or investors-nationals of a third State.[430]

377. As regards the NT obligation, the Claimant takes the view that the treatment of foreign investors must not only be "fair and equitable", but it must also be at least at a level playing field with the treatment of domestic investors (i.e., "not less favourable than treatment accorded [...] to investments and returns of investors who are its own nationals").[431] Thus, the Claimant argues that the purpose of the national treatment obligation is to prohibit nationality-based discrimination by the host State between the host States' investors and investments and those of the other party to the BIT and to provide a level playing field between the foreign investor and the local competitor.[432]

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[429] BIT, Article 4(2), Exhibit C-0001.
[430] Cl. Mem., ¶ 533.
[431] Cl. Mem., ¶ 535.
[432] Cl. Mem., ¶ 536, referring to A. Newcombe and L. Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International 2009), pp. 150-151, Exhibit CL-0064.

378. The Claimant explains that the NT standard sets a floor (treatment that is "not less favourable"), rather than a ceiling and therefore does not preclude the application of standards that are more favourable to foreign investors than those that apply to domestic operators.[433] The Claimant further submits that the NT standard is a relative standard: it is defined by reference to treatment of other investments in a comparable setting.[434]

379. The Claimant further maintains that the impact of a measure on an investment is the relevant factor and that proof of discriminatory intent or motive is not required to trigger responsibility for breach of the NT standard. According to the Claimant, it is sufficient to show that the treatment accorded by the host State was less favourable to the foreign investor than to domestic investors in like circumstances. The Claimant adds that, where discriminatory intent is proved, it is relevant and may be sufficient to establish less favourable treatment.[435] In the Claimant's view, the NT standard under the BIT is consistent with Turkmenistan's obligations under Turkmen law and the 2012 Agreement.[436]

b. The Respondent's Position

380. As regards the legal standard of National Treatment, the Respondent argues that a State Party's obligations under BIT Article 4(2) are specifically limited to FET, which is the "[t]reatment specified in paragraph 1 of this Article". Thus, this claim is largely duplicative of the Claimant's FET claim.[437] The Respondent notes that Article 4(3) of the BIT contains a reservation of rights by which the State Parties to the BIT – Russia and Turkmenistan – allowed themselves the right to "apply or introduce" exceptions from national treatment,

[433] Cl. Mem., ¶ 538.
[434] Cl. Mem., ¶ 539.
[435] Cl. Mem., ¶ 541.
[436] Cl. Mem., ¶ 542.
[437] Resp. C-Mem., ¶ 561.

so long as the treatment is not applied on a discriminatory basis when compared to the treatment of investors of a third State.[438] Article 4(3) provides:

> Each Contracting Party shall reserve the right to apply and introduce, in accordance with its legislation, exceptions from the national treatment envisioned in paragraph 2 of this Article with regard to investments and returns of investors of the other Contracting Party, provided that such exceptions are not applied or introduced on a discriminatory basis when compared to the treatment of investments and returns of investors of any third State.[439]

381. The Respondent argues that this exception is a significant limitation on the State's obligation to provide "no less favorable" treatment to foreign investors than to nationals. It is a general reservation of the right to accord preferential treatment to national investors, not limited to any prescribed list of exclusions. The only limitations on this reservation of right for the State to accord more favourable treatment to nationals is to do so on a basis that does not discriminate as compared to investors of a third State, and to do so in accordance with its own laws.[440] Even if the Claimant could prove preferential treatment, there would still be no liability under the BIT, due to the reservation of rights contained in Article 4(3).[441] In order to sustain its claim, MTS would first have to establish that all of the elements generally required to determine a violation of national treatment obligations are met and then – even if it could do so – that the "exception" to national treatment was not permitted under Article 4(3). That would require that the treatment alleged to discriminate against MTS be compared to the treatment of nationals of a third State. In the present case, since there was and is no investor in the cellular communications market from a third State, no such claim would be viable.[442]

382. The Respondent submits that Article 4(2)'s express reference to "the treatment specified in Article 4(1)" precludes the Claimant from making the same discrimination claims on

[438] Resp. C-Mem., ¶ 562.
[439] BIT, Article 4(3), Exhibit C-0001.
[440] Resp. C-Mem., ¶ 563.
[441] Resp. C-Mem., ¶ 566.
[442] Resp. C-Mem., ¶ 567.

two distinct legal grounds, FET and national treatment, thus avoiding the stringent requirements of the national treatment standard.[443]

383. The Respondent argues that the Parties seem to be in general agreement as to the content of the national treatment standard. First, it is common ground between the Parties that Article 4(2) of the BIT protects against discrimination based on nationality. Second, it is undisputed that a comparative factual analysis must be conducted to compare the treatment of the foreign investor with that of Turkmen nationals in like circumstances.[444] Accordingly, the test for determining the Claimant's claim under Article 4(2) of the BIT requires satisfying all three of the following: (i) The Claimant must prove that MTS was in like circumstances with Altyn Asyr, the national telecom operator; (ii) MTS must demonstrate that it received less favourable treatment from the State in respect of its investment, as compared to the treatment granted to Altyn Asyr; and (iii) The Claimant must prove that no exception is allowed under Article 4(3) of the BIT.[445]

c. The Tribunal's Analysis

384. As regards the NT standard the Tribunal limits its analysis at this point to the observation that both Parties seem to agree that, to show discrimination against a foreign investor requires a showing that foreign and domestic investors are in like circumstances but are treated differently. As rightly observed by both Parties, there is an overlap with the FET standard which also covers instances of discrimination, due in part by the reference back to Article 4(1) of the BIT in Article 4(2) of the BIT.

[443] Resp. Rej., ¶ 358.
[444] Resp. Rej., ¶ 359.
[445] Resp. Rej., ¶ 360.

(3) All Necessary Approvals

a. The Claimant's Position

385. The Claimant argues that the Respondent has further breached its obligation under Article 3(2) of the BIT to issue "all necessary approvals".[446] Article 3(2) of the BIT provides as follows:

> Each Contracting Party shall, pursuant to its legislation, issue all necessary approvals for the realization of permitted investments by investors of the other Contracting Party.[447]

386. The Claimant argues that Article 3(2) of the BIT confers an "ancillary right" upon the investor, once its investment has been admitted. The right thus conferred upon the investor is to receive the necessary approvals for the realization of its permitted investment. The Claimant believes this to be an obligation on the host State, as indicated by the mandatory wording in Article 3(2) ("shall [...] issue all necessary approvals [...]").[448] The Claimant states that the term "approvals" in Article 3(2) of the BIT is sufficiently broad to encompass a wide range of Government-issued decisions, including authorizations, permits, licenses, consents, visas, and any other decisions signifying green light given by the Government.[449]

387. The Claimant argues that, even if the Tribunal were to attribute a narrower meaning to the term "approvals" in Article 3(2), MTS would be entitled to rely on the MFN clause in Article 4(2) of the BIT to import more broadly-worded provisions from other investment treaties entered into by Turkmenistan.[450] In that context the Claimant takes the view that the normal effect of an MFN clause in a BIT is to widen the rights of the investor. The MFN clause serves, in particular, to import broader substantive protection standards, e.g., to clarify the meaning of words used in the basic treaty, or to import protection provisions

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[446] Cl. Mem., ¶ 552.
[447] BIT, Article 3(2), Exhibit C-0001.
[448] Cl. Mem., ¶ 554.
[449] Cl. Mem., ¶ 557.
[450] Cl. Mem., ¶ 558, et seq. Article 4(2) of the BIT provides:

> Treatment specified in paragraph 1 of this Article shall be not less favourable than treatment accorded by the Contracting Party to investments and returns of investors who are its own nationals or to investments and returns of investors of any third State, whichever is more favourable in the investor's view.

which are absent in the basic treaty. In essence, the effect of an MFN clause is "to raise the level of protection".[451]

388. The Claimant also takes the view that the assurance in Article 3(2) of the BIT that the necessary approvals will be granted is consistent with Clause 3.1 of the 2012 Agreement, which requires Turkmentelecom to provide MTS with "all necessary legal and technical conditions of operation in the cellular communication market of Turkmenistan" including "additional technical resources".[452]

b. The Respondent's Position

389. Insofar as the Respondent refers to "all necessary approvals" in Article 3(2) of the BIT the Respondent argues that the Claimant cannot import provisions from other BITs to justify a wider understanding of the word "approvals". The MFN clause of the Russia-Turkmenistan BIT provides no basis for importation of substantive standards of treatment from other treaties.[453] Article 4(2) protects against discriminatory treatment – specifically and exclusively with respect to the FET obligation set forth in Article 4(1) of the BIT – as compared to the treatment accorded to nationals of a third State.[454] The express limitation of the MFN obligation to FET obligations defeats the Claimant's claim that it can "import" better standards on unrelated issues such as the "approvals" protections supposedly provided in other treaties.[455]

c. The Tribunal's Analysis

390. As regards "all necessary approvals" in Article 3(2) of the BIT the Tribunal accepts the Respondent's argument that the Claimant cannot import provisions from other BITs to justify a wider understanding of the word "approvals". The MFN clause of the Russia-Turkmenistan BIT specifically and exclusively applies to the FET obligation set forth in Article 4(1) of the BIT and therefore does not apply to other issues such as "necessary

[451] Cl. Mem., ¶ 559.
[452] Cl. Mem., ¶ 562, referring to 2012 Agreement, Exhibit C-0008.
[453] Resp. C-Mem., ¶¶ 610, et seq.
[454] Resp. C-Mem., ¶ 612.
[455] Resp. C-Mem., ¶ 613.

approvals" contained in other provisions such as Article 3(2). The Claimant has not, in any event, identified a third-State treaty with Turkmenistan that contains more favourable terms.

(4) Full Protection (FPS)

a. The Claimant's Position

391. The Claimant contends that the Respondent has failed to accord full protection ("FPS") to MTS' investment and returns.[456] Article 3(3) of the BIT provides as follows:

> Each Contracting Party shall guarantee in the territory of its state and in accordance with its legislation full protection of investments and returns of investors of the other Contracting Party.[457]

392. The Claimant argues that Article 3(3) captures not only "investments", but also specifically "returns of investors", which includes amounts yielded by investments and, in particular, profit, dividends, interest, royalties, licensing and other remuneration. The Claimant maintains that, although the wording of this provision ("full protection") differs somewhat from the more common wording found in other BITs (i.e., "full protection and security") the variation of language does not make a significant difference in the level of protection a host State is to provide.[458]

393. The Claimant takes the view that the full protection obligation requires the host State to exercise reasonable care to protect covered investments; unlike most other investment treaty provisions, this provision requires the host State "to protect investment against injurious action by private parties as well as by the State".[459] The Claimant argues that, traditionally, the full protection and security guarantee protected the physical integrity of investments against interference by use of force,[460] but that this traditional view has

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[456] Cl. Mem., ¶ 567.
[457] BIT, Article 3(3), Exhibit C-0001.
[458] Cl. Mem., ¶ 569.
[459] Cl. Mem., ¶ 570, quoting United Nations Conference on Trade and Development. International Investment Agreements: Key Issues, UNCTAD/ITE/IIT/2004/10, Vol. I, 2004, p. 136, Exhibit CL-0029.
[460] Cl. Mem., ¶ 571.

evolved towards a broader standard not only including physical security, but also entailing an obligation to provide a stable business environment.[461] Thus, the Claimant argues that the "full protection" standard in Article 3(3) of the BIT is properly understood as extending to the protection of the stability and physical, commercial, and legal environment of MTS' investment and returns, as well as protection against harassment (whether or not physical in nature). The Claimant submits that the broader interpretation is supported, inter alia, by the use of the word "full" protection in Article 3(3) and the definitions of investment and of returns under Article 1(b) and (c) of the BIT which include tangible and intangible assets.[462]

b. The Respondent's Position

394. Insofar as the Claimant relies on the "full protection" standard in Article 3(3) of the BIT, the Respondent argues that the standard as proposed by the Claimant is incorrect.[463] The Respondent argues that this obligation is one of conduct, rather than one of result, and requires only that the State exercise due diligence in affording protection to foreign investments and does not subject States to strict liability for any loss suffered by an investor. The essential question is whether the State exercised due diligence to the extent reasonable under the circumstances.[464] The Respondent further argues that limiting the full protection standard to physical intrusions is necessary in order to maintain the distinction between this standard and other standards of treatment, particularly FET, and to prevent a blurring of these standards that would render them meaningless.[465]

c. The Tribunal's Analysis

395. The Tribunal observes that the FPS standard is traditionally concerned with the physical safety of investments. The Tribunal finds that an interpretation of "full protection" in Article 3(3) BIT that goes beyond situations of physical safety and applies to stability of the business and legal framework of an investment would unnecessarily blur the boundaries

[461] Cl. Mem., ¶ 572.
[462] Cl. Mem., ¶ 574.
[463] Resp. C-Mem., ¶¶ 630, et seq.
[464] Resp. C-Mem., ¶ 630.
[465] Resp. C-Mem., ¶ 632.

between the FPS and FET standards. Hence, the Tribunal finds that the full protection afforded by the BIT is limited to situations in which the physical safety of the investment is concerned, none of which is alleged to arise in this case.

(5) Transfer of Funds

a. The Claimant's Position

396. The Claimant claims that it has suffered from restrictions on conversion of manat into hard currency imposed by the Turkmen authorities and that Turkmenistan has an obligation under Article 7 of the BIT to guarantee unrestricted "transfer of funds" related to MTS' investments in the territory of Turkmenistan.[466] Article 7 of the BIT provides:

> 1. Each Contracting Party shall guarantee investors of the other Contracting Party, following their performance of all taxation and other liabilities envisioned by the legislation of the former Contracting Party, the unrestricted transfer abroad of funds related to their investments and in particular, but not exclusively:
>
> (a) initial and additional capital used to carry out or expand investments;
>
> (b) returns;
>
> (c) funds paid to redeem loans and credit recognized by both Contracting Parties as investments, and accrued interest;
>
> (d) funds received by the investor in relation to the full or partial liquidation or sale of investments;
>
> (e) funds received by the investor as compensation and indemnification for losses pursuant to Article 5 and Article 6 of this Agreement;

[466] Cl. Mem., ¶ 578.

(f) salary and other remuneration received by the investor and nationals of the other Contracting Party allowed to work in the territory of the former Contracting Party in relation to investments.

2. Transfer of the funds specified in paragraph 1 of this Article shall be executed without delay in any freely convertible currency at the discretion of the investor at the market exchange rate applicable on the date of the transfer pursuant to the legislation of the Contracting Party in the territory of which the investments were made.[467]

397. The Claimant submits that the free transfer principle is aimed at measures that would restrict the possibility to transfer, such as currency control restrictions or other measures taken by the host State which effectively imprison the investors' funds, typically in the host State.[468]

398. Thus, subject only to compliance by MTS and MTS-TM with tax obligations, Article 7 guarantees (i) the "unrestricted transfer" of MTS' funds related to its investments, (ii) without delay, (iii) in any freely convertible currency at MTS' discretion, and (iv) at the market exchange rate applicable on the date of the transfer pursuant to the Turkmen legislation.[469]

b. The Respondent's Position

399. As regards the "transfer of funds" under Article 7 of the BIT, the Respondent argues that the Claimant's claim regarding currency conversion is duplicative of its other allegations, such as FET.[470]

400. The Respondent argues that the Claimant's theory under this latter provision of the Treaty appears to be that "subject only to compliance by MTS with tax obligations", it enjoyed the unrestricted right to transfer a wide range of amounts at whatever it claims to be the

[467] BIT, Article 7, Exhibit C-0001.
[468] Cl. Mem., ¶ 580.
[469] Cl. Mem., ¶ 582.
[470] Resp. C-Mem., ¶ 637.

market exchange rate, and that for the Claimant this alleged right was breached by restrictions on conversions of manats into US$ allegedly imposed in early 2016.[471]

401. The Respondent contends that Article 7 does not grant the Claimant the right to exchange its manat for whichever foreign currency it should wish to obtain, in whatever amounts it desires. It only provides that the "transfer abroad" of certain "funds related to [...] investments" will not be impeded. The Claimant has not identified any obstacles to the transfer of its money abroad per se. Rather, it appears to be complaining about the lack of US$ within Turkmenistan. Article 7 cannot be construed to guarantee the presence of sufficient US$ (or Euros, or Japanese yen, or pounds sterling) within Turkmenistan, but rather to govern the process by which such funds are transferred outside of the country.[472]

402. The Respondent further submits that, apart from quantifying the "stranded" dividends in broad terms, the Claimant has made no effort to identify the types of transactions that it alleges were prevented or rendered more difficult by Turkmenistan's alleged restrictions. Relying on *Continental Casualty Company v. Argentine Republic*, the Respondent argues that "transfers related to an investment" under Article 7 does not include "merely a change of type, location and currency as part of an investor's existing investment [...] in order to protect them from the impending devaluation".[473]

403. The Respondent adds that Article 7 of the BIT does not guarantee MTS an absolute right to repatriate its profits. Rather, the Respondent has a sovereign right to implement legitimate and justified restrictions on the free convertibility of currency.[474]

c. The Tribunal's Analysis

404. As regards the "transfer of funds" the Tribunal observes that Article 7 of the BIT on the "transfer of funds" does not grant the right to exchange manats into any specific currency, but is rather concerned with the process of transferring funds out of the host State.

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[471] Resp. C-Mem., ¶ 637.
[472] Resp. C-Mem., ¶ 653.
[473] Resp. C-Mem., ¶ 658, quoting *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 241, Exhibit RL-0139.
[474] Resp. Rej., ¶ 446.

(6) Expropriation

a. The Claimant's Position

405. The Claimant submits that the "forced shutdown of MTS' operations in Turkmenistan" was an unlawful expropriation which violated Article 5 of the BIT. Article 5 of the BIT provides:

> 1. Investments by investors of one Contracting Party made in the territory of the other Contracting Party and the returns of such investors shall not be directly or indirectly expropriated, nationalised or subjected to measures having effect equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation"), except for cases where expropriation is carried out in the public interest, on a non-discriminatory basis, in accordance with the procedure established by the legislation of the latter Contracting Party, and is accompanied by the payment of prompt, adequate and effective compensation.
>
> 2. The compensation specified in paragraph 1 of this Article shall amount to the market value of the expropriated investments and returns, calculated at the date directly preceding either the expropriation date, or the date when the impending expropriation became public knowledge, whichever is the earlier. Compensation shall be paid without delay in a freely convertible currency and, pursuant to Article 7 of this Agreement, shall be freely transferred abroad from the territory of the Contracting Party in which the investments were made. From the date of expropriation to the date of payment of compensation, interest shall be accrued at a commercial market-based interest rate, which shall not be lower than the six-month LIBOR rate in US dollars.[475]

406. The Claimant argues that Article 5(1) of the BIT also applies to measures the effect of which is equivalent to expropriation.[476] Article 5(1) of the BIT expressly contemplates that expropriation includes not only the direct taking of the foreign investment, but also indirect

[475] BIT, Article 5, Exhibit C-0001.
[476] Cl. Mem., ¶¶ 594, et seq.

expropriation, i.e., "measures having effect equivalent to expropriation or nationalization".[477] Thus, in the event of an indirect expropriation, the investor formally retains ownership of the investment but loses the ability to reap the economic benefits of that investment.[478] The Claimant maintains that that the denial of a necessary license or permit for arbitrary or improper reasons may constitute an indirect expropriation if the result is the loss of the value of the investment.[479]

b. The Respondent's Position

407. As regards the Claimant's expropriation claim under Article 5 of the BIT, the Respondent argues that it is a fundamental principle that only property rights that exist and are enforceable pursuant to the law or contract under which they were created, may be expropriated: "Conceptually, property can only be expropriated if it exists. If a right was never acquired or has been otherwise extinguished under local law, it cannot be expropriated".[480] In order to determine the existence and nature of the alleged rights at issue, the Tribunal must consider the underlying law and instruments under which the rights were supposedly created. Here, that means the terms of the 2012 Agreement, governed by English law, and the framework of law and regulations applicable to the telecommunications sector in Turkmenistan.[481]

c. The Tribunal's Analysis

408. As regards expropriation, the Tribunal notes that there is not much debate between the Parties regarding the general concept of indirect expropriation under the BIT. Thus, the Tribunal limits itself to the general observation that a (property) right can only be expropriated if it exists; if a right was never acquired or has been extinguished, it cannot be expropriated either directly or indirectly.

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[477] Cl. Mem., ¶ 594.
[478] Cl. Mem., ¶ 598.
[479] Cl. Reply, ¶ 356.
[480] Resp. C-Mem., ¶ 356, quoting A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International 2009), ¶ 7.19, Exhibit CL-0064.
[481] Resp. C-Mem., ¶ 360.

409. The Claimant's claims are presented in two separate parts: the 2017 Shutdown Claims (B.) and the Historical Breaches Claims (C.). The Tribunal will deal with each of them in turn.

B. THE CLAIMANT'S 2017 SHUTDOWN CLAIMS

410. The Claimant's 2017 Shutdown Claims consist of a "Primary Case" and an "Alternative Case".[482]

411. On each case, the Claimant seeks to recover for the loss of its investment in MTS-TM as a result of the shutdown of its operations in 2017, which in the Claimant's view constituted an unlawful expropriation in violation of Article 5(1) of the BIT. In addition to constituting an unlawful expropriation, the Claimant argues that the 2017 shutdown of MTS-TM was equally a breach of (i) the Respondent's fair and equitable treatment ("FET") obligations under Article 4(1) of the BIT, (ii) the Respondent's national treatment ("NT") obligations under Article 4(2) of the BIT, (iii) the Respondent's full protection and security ("FPS") obligations under Article 3(3) of the BIT, and (iv) the Respondent's obligation to provide "all necessary approvals for the realisation of permitted investments" under Article 3(2) of the BIT.[483]

412. Under its "Primary Case" the Claimant argues that the Respondent expropriated the Claimant's investment in Turkmenistan when it shut down MTS-TM's network on 29 September 2017 on the basis that MTS no longer had the right to operate in Turkmenistan following the expiry of the 2012 Agreement.[484] The Claimant argues that the 2012 Agreement was not a legal prerequisite for MTS-TM to operate (or continue operating) in Turkmenistan and that the Respondent had no right to shut down MTS' operations on the basis that the 2012 Agreement had expired.[485] The Claimant further submits that the 2012 Agreement was illegal (and therefore invalid) on the basis that the profit charge was illegal and that MTS was coerced into agreeing to it. In the Claimant's view, its license was a sufficient legal basis for its operations in Turkmenistan. At the time of the 2017 shutdown, the Claimant says, MTS-TM was in possession of a valid license with a commitment from

[482] Cl. PHB, ¶ 10, ¶¶ 13, et seq., ¶¶ 27, et seq.
[483] Cl. PHB, ¶ 11.
[484] Cl. PHB, ¶ 10.
[485] Cl. PHB, ¶ 10; Cl. Reply PHB, ¶ 6.

the MoC to a minimum 10-year operating term. MTS' right to further operate in Turkmenistan was, it says, expropriated by the Respondent (along with the value of MTS' business) when it shut down MTS-TM's network on 29 September 2017 on the basis that this was justified by the expiry of the 2012 Agreement.[486]

413. Under its "Alternative Case", the Claimant claims that, even if the 2012 Agreement was a legal prerequisite for MTS' operations in Turkmenistan (quod non), the Respondent breached the BIT by refusing to extend the 2012 Agreement beyond September 2017 (i) in violation of the Claimant's legitimate expectation of renewal of the 2012 Agreement, and (ii) without any reasonable justification.[487]

(1) The Parties' Positions

a. The Claimant's Position

Primary Case

414. In the "Primary Case" of its 2017 Shutdown Claims,[488] the Claimant submits that the Respondent has never been able to explain how the 2012 Agreement can be both a legal prerequisite to MTS' operations in Turkmenistan and a freely-negotiated commercial agreement with a private party.[489] In the Claimant's view, the 2012 Agreement was neither a legal prerequisite nor a freely-negotiated commercial agreement.[490]

415. According to the Claimant, the 2012 Agreement was no more than a vehicle for the Respondent to impose an extra-legal profit tax on MTS, and the only clause that had any substantive effect was the first clause imposing a [redacted].[491]

416. The Claimant submits that the Respondent's argument whereby MTS-TM had no right to conduct any operations in the country as a cellular communications services provider

[486] Cl. PHB, ¶ 10.
[487] Cl. PHB, ¶ 27.
[488] Cl. PHB, ¶¶ 13, et seq.
[489] Cl. PHB, ¶ 13.
[490] Cl. PHB, ¶ 14.
[491] Cl. PHB, ¶ 14.

without the 2012 Agreement has no basis.[492] The Claimant contends that the 2012 Agreement was not only devoid of any legal basis under the laws of Turkmenistan, but also violated (i) the BIT (which requires Turkmenistan to admit foreign investments in accordance with its legislation), (ii) the Constitution of Turkmenistan (which provides that taxes and other mandatory payments to the Turkmen Government must be determined in accordance with law), and (iii) Turkmen domestic law (including the Law on Foreign Investments, which guarantees foreign investors' right to freely use their income and profits after payment of taxes and other obligatory charges provided for by the laws of Turkmenistan).[493] As the 2012 Agreement had no basis in Turkmen law, then it cannot have been a legal prerequisite for MTS' operations.[494]

417. As regards the Respondent's argument that the 2012 Agreement was a "framework agreement" without which MTS-TM had no right to access State resources, the Claimant argues that the 2012 Agreement was not a legal or practical requirement for the provision of any State resources to MTS-TM. MTS-TM applied for, contracted for, and paid for all of the resources it required to operate its network independently of the 2012 Agreement, in most cases not even from Turkmentelecom. The Respondent's repeated, self-serving reference to agreements such as the Radio Frequency Agreement and the Interconnection Agreements as "ancillary agreements" to the 2012 Agreement is wrong. Not only were these agreements not legally conditioned in any way upon the existence of the 2012 Agreement, but not one of them even mentioned the 2012 Agreement. That the 2012 Agreement was not a "framework agreement" required for MTS-TM to access State resources is conclusively established by the fact that Altyn Asyr obtained licenses and access to all the State resources it required without ever being required to enter into an agreement equivalent to the 2012 Agreement.[495] MTS-TM lost its access to State resources in September 2017 not because the 2012 Agreement expired, but because the Respondent took them away on the wrongful basis that MTS-TM had no legal entitlement to operate in Turkmenistan without the 2012 Agreement. According to the Claimant, this conduct was

[492] Cl. PHB, ¶ 15.
[493] Cl. PHB, ¶ 16.
[494] Cl. PHB, ¶ 15.
[495] Cl. Reply PHB, ¶ 8.

expropriatory, as well as a breach of the FET, NT and FPS standards, and a breach of the Respondent's obligation to provide the Claimant with "all necessary approvals" for the realisation of its investment.[496]

418. Moreover, the Claimant takes the view that the 2012 Agreement was illegal (and therefore invalid) due to coercion and because the profit charge was itself illegal. The Claimant argues that Turkmenistan coerced MTS into signing the 2012 Agreement and that cannot transform the 2012 Agreement into a lawful prerequisite for MTS to operate (or continue operating) in Turkmenistan. According to the Claimant, the Respondent cannot rely on the proposition that an investor can be estopped from challenging the illegality of a State's conduct under a BIT.[497] Even if such were the case (quod non), the elements of estoppel under international law are not met in this case because MTS did not "freely" enter into the 2012 Agreement.[498] The Claimant contends that in circumstances where it is common ground that MTS was given no choice by the Respondent but to sign the 2012 Agreement if it wished to return to Turkmenistan, it is unclear how the Respondent can still claim that MTS "freely" entered into the 2012 Agreement and is estopped from denying the legality of said Agreement.[499] The Claimant denies the Respondent's assertion that the Claimant has "failed to satisfy the high standard of proving economic duress and causation under English law".[500] The Claimant rebuts that it has never made any claim that the 2012 Agreement was void for economic duress under English law, and that it is the Claimant's case that the Respondent's insistence on profit-sharing as a condition of the Claimant's operations in Turkmenistan violated international law (i.e., the BIT) as well as Turkmen law.[501]

419. As regards the Respondent's argument that the Claimant "is precluded from asserting the unlawfulness of the Respondent's insistence on profit-sharing as a condition of MTS's operations 'by virtue of the fact that it waived any claims against Turkmenistan arising from events that occurred prior to the Effective Date of the Settlement Agreement', on the

[496] Cl. Reply PHB, ¶ 9.
[497] Cl. PHB, ¶ 18.
[498] Cl. PHB, ¶ 19.
[499] Cl. PHB, ¶ 20.
[500] Cl. Sur-Reply PHB, p. 1.
[501] Cl. Sur-Reply PHB, p. 1.

basis that the 2012 Agreement was negotiated prior to the signing of the Settlement Agreement", the Claimant argues that MTS is not making any claim arising from the negotiation of the 2012 Agreement. The Claimant states that its claims "arise (a) in relation to the 2017 shutdown, from the Respondent's unlawful insistence in 2017 on an extension of the 2012 Agreement as a condition of MTS' continued operations in Turkmenistan, and (b) in relation to the Profit Charge as an Unlawful Measure, on the Respondent's unlawful extraction of [redacted] in 2012. According to the Claimant, neither of these acts occurred prior to the effective date of the Settlement Agreement as the 2012 Agreement did not even enter into force until 28 September 2012, months *after* the effective date of the Settlement Agreement (25 July 2012). The Claimant states that, before that time, it had no justiciable claim against the Respondent that was capable of being waived.[502]

420. With regard to the Respondent's argument that the Claimant's witnesses confirmed the significance of, and need to extend, the 2012 Agreement and recognized that an extension of the 2012 Agreement was necessary to continue their operations in Turkmenistan, the Claimant replies that this is false and that the evidence of the Claimant's witnesses has been clear and consistent to the effect that they never understood the 2012 Agreement to be a prerequisite for MTS' operations in Turkmenistan. The Claimant also rejects the Respondent's point that the Respondent "did not say that the 2012 Agreement 'had no basis in Turkmen law' at the hearing", pointing out that the Respondent's counsel did expressly state at the Hearing that "it would be nice if the law said, 'You have to have this particular framework agreement', but it's not established in the law". The Claimant further asserts that the Respondent does not cite any Turkmen law establishing a legal obligation on mobile network operators to enter into a profit-sharing agreement as a condition of their operations.[503]

421. In the Claimant's view, its license was a sufficient legal basis for its operations in Turkmenistan.[504] The Ministry of Communications granted MTS-TM a first license (No. 1-

[502] Cl. Sur-Reply PHB, p. 1.
[503] Cl. Sur-Reply PHB, p. 1.
[504] Cl. PHB, ¶ 10.

20-21-40) on 26 July 2012 for a period ending on 26 July 2015,[505] and then renewed the license for a period ending on 26 July 2018.[506] At the time of the 2017 shutdown, MTS-TM was therefore in possession of a valid operating license with a commitment from the Ministry of Communications to a minimum 10-year operating term. MTS-TM's right to operate pursuant to its license – an intangible property right protected under both Turkmen law and the BIT – was expropriated by the Respondent (along with the value of MTS-TM's business) when it shut down MTS-TM's network on 29 September 2017 on the wrongful basis that this was justified by the expiry of the 2012 Agreement.[507]

422. The Claimant argues that the "3+2+3+2" wording on the back of the license issued in 2012 was a legally binding agreement[508] guaranteeing a 10-year operating period.[509] The Respondent argues that MTS-TM's license "does not purport to override the terms of the 2012 Agreement or any of the ancillary agreements, which established the rights, conditions of operations and technical resources that MTS required".[510] The Claimant replies that, as in most jurisdictions, under Turkmen law it is an operator's license, not a profit-sharing agreement with a State-owned entity, that constitutes the permission granted to the operator to carry out a licensable type of business activities.[511] As far as the Respondent argues that the "3+2+3+2" phrase on the back of the license does not contain mandatory language, the Claimant disagrees and argues that this provision, properly translated from the original Turkmen, states that MTS-TM's license "shall be subsequently extended for 2, 3 and 2 years". The Claimant further argues that the Respondent cannot explain how its translation of that phrase ("is to be") is capable of actually meaning "may be".[512] As regards the Respondent's view that the "3+2+3+2" does not constitute an agreement, the Claimant disagrees, arguing that the provision was proposed by the Ministry of Communications itself, it was negotiated between the parties' lawyers and was printed

[505] License No. 1-20-21-40 granted to MTS-TM, 26 July 2012, Exhibit C-0010.
[506] License No. 1-20-21-40 reissued to MTS-TM, 26 July 2015 (reissued on 12 April 2016), Exhibit C-0014.
[507] Cl. PHB, ¶¶ 10, 17.
[508] Cl. License Submission, ¶¶ 3, et seq.
[509] Cl. License Submission, ¶¶ 5, et seq.
[510] Cl. Reply PHB, ¶ 7.
[511] Cl. Reply PHB, ¶ 7(a).
[512] Cl. Reply PHB, ¶ 7(b).

on the back of MTS-TM's license; it was signed and sealed by [redacted], separately from the front page of the license.[513]

423. The Claimant takes the view that the expiry of the 2012 Agreement did not deprive MTS-TM of the "technical means" it required to operate in Turkmenistan. The Claimant rejects the idea that the 2012 Agreement constituted the "contractual framework" under which Turkmentelecom provided MTS-TM with "critical infrastructure" controlled by the Turkmen State that MTS-TM required to operate its network,[514] and argues that the 2012 Agreement did not form the basis for providing any technical resources to MTS-TM.[515] According to the Claimant, none of the "technical means" required by MTS-TM to operate its network were provided pursuant to the 2012 Agreement and most of them were mostly not even under the control of Turkmentelecom: access to radio frequencies was controlled by the Interdepartmental Commission on Radio Frequencies; access to data channel was governed by the separate Interconnection Agreement with Turkmentelecom, interconnections were controlled by the interconnection agreements with Altyn Asyr, Turkmentelecom and Ashgabat Telephone Network; leases of State property for hosting base stations was also not governed by the 2012 Agreement but by separate lease agreements.[516]

424. The Claimant further maintains that the Respondent's claim that MTS-TM lost the right to access any of these technical resources upon the expiry of the 2012 Agreement is false as the expiry of the 2012 Agreement did not give the Respondent a lawful basis to revoke MTS-TM's contractual rights under the separate frequency, interconnection and lease agreements, given that the validity of these agreements was not conditioned on the existence of the 2012 Agreement. The Claimant also argues that even if MTS-TM had not held a vested contractual right in September 2017 to a five-year extension of its Radio Frequency Spectrum Agreement, its Interconnection Agreements and its leases of State property (quod non), it was incumbent upon Turkmenistan to ensure that MTS-TM could reasonably access the State resources it required to operate for the duration of its license,

[513] Cl. Reply PHB, ¶ 7(c).
[514] Cl. PHB, ¶ 22.
[515] Cl. PHB, ¶ 23.
[516] Cl. PHB, ¶ 23.

both as a matter of fair and equitable treatment and because Article 3(2) of the BIT expressly requires Turkmenistan to provide "all necessary approvals for the realisation of permitted investments".[517]

Alternative Case

425. Under its "Alternative Case" the Claimant argues that Turkmenistan's refusal to extend the 2012 Agreement was arbitrary, unreasoned and unjustified.[518] The Claimant argues that, even if the 2012 Agreement were a legal prerequisite for MTS' operations in Turkmenistan (quod non), the Respondent breached the BIT by refusing to extend it beyond September 2017 (i) in violation of MTS' legitimate expectations, and (ii) without any reasonable justification. The Claimant further submits that Turkmenistan's refusal to extend the 2012 Agreement was based on an improper motive (i.e., financial extortion).[519]

426. With respect to the Respondent's alleged violation of the Claimant's legitimate expectation to be allowed to operate in Turkmenistan for a period of at least ten years, the Claimant refers to acts and assurances given by the Ministry of Communications, including (i) the "3+2+3+2" license formula; (ii) the extension of MTS-TM's license until July 2018, i.e., beyond the expiry of the 2012 Agreement; (iii) the granting of radio frequencies to MTS-TM beyond 2017; and (iv) express assurances given to MTS-TM by [redacted] both during the settlement negotiations in 2011 and in late 2016 / early 2017, that the 2012 Agreement would be renewed.[520]

427. The Claimant submits that it is well-established in international case law that a State's refusal to grant or extend a necessary license or permit for arbitrary, unjustified or improper reasons may constitute an indirect expropriation if the result of such refusal is the loss of the investor's investment. Thus, if the 2012 Agreement were to be considered a legal prerequisite for MTS-TM's operations in Turkmenistan (quod non), then the Respondent expropriated MTS' investment in violation of Article 5(1) of the BIT by refusing to extend the 2012 Agreement beyond September 2017 without any reasonable justification, and in

[517] Cl. PHB, ¶ 25.
[518] Cl. PHB, ¶¶ 27, et seq.
[519] Cl. PHB, ¶ 27.
[520] Cl. PHB, ¶ 27, FN 104.

violation of MTS' legitimate expectation to operate in Turkmenistan for a period of at least 10 years, and at the same time the Respondent breached the FET, NT, "all necessary approvals" and FPS standards under Articles 4(1), 4(2), 3(2) and 3(3) of the BIT.[521]

b. The Respondent's Position

428. The Respondent argues that the Claimant had no right or expectation to renew the 2012 Agreement for a second five-year term or to continue operating in Turkmenistan after its expiration.[522]

429. The Respondent states that the evidence shows that MTS had no right or expectation to renew the 2012 Agreement for a second 5-year term in 2017, and certainly not to continue operating in Turkmenistan in perpetuity.[523]

430. The Respondent submits that the express terms of the 2012 Agreement regarding duration and renewal are clear and were the result of negotiation.[524] The 2012 Agreement was extensively negotiated by the parties, with almost 20 drafts exchanged over the course of at least ten months, from August 2011 to the time when it was finally signed on 24 May 2012. The final version of the contract includes a provision on its duration and a possibility of its renewal in Clause 18.[525] The Respondent states that in the original drafts of the contract, MTS had attempted to obtain a longer term, first proposing 20 years, and then 10 years, as well as proposing mandatory language of extension, specifically, the phrase "shall be extended". The Respondent submits that the Claimant failed to obtain such terms and that the parties expressly agreed to a 5-year term. Rather than including mandatory language of extension as MTS sought, Clause 18 contains the permissive language "may be extended".[526] There can be no dispute that the 2012 Agreement only provides for a 5-year term, and that it does not provide for mandatory renewal.[527] The Claimant understood that Clause 18 provided Turkmentelecom complete discretion regarding the extension or

[521] Cl. PHB, ¶ 31.
[522] Resp. PHB, ¶¶ 5, et seq.
[523] Resp. PHB, ¶ 5.
[524] Resp. PHB, ¶¶ 6, et seq.
[525] Resp. PHB, ¶ 6.
[526] Resp. PHB ¶ 7.
[527] Resp. PHB ¶ 8

non-extension of the Agreement. MTS' contemporaneous public filing with the U.S. Securities and Exchange Commission (SEC) reported that the 2012 Agreement was to expire in five years and did not assert that there was an automatic right to extend or that MTS could continue operating in Turkmenistan after the 5-year term. The Respondent contends that Turkmentelecom had an absolute right to decide not to renew the 2012 Agreement. Moreover, MTS has never established that the decision not to extend that contract was arbitrary or lacking any reasons.[528] The Respondent cites several reasons for the non-renewal of the 2012 Agreement, such as the need to develop the telephone and cellular communication in rural areas in Turkmenistan, the need for all operators to take part in the communication development program, the fact that the Claimant did not roll out any new technology and that the profit payments under the 2012 Agreement had declined and failed to meet expectations.[529]

431. The Respondent argues that the Claimant's contention that it was economically coerced into signing the 2012 Agreement is untenable. First, the Respondent submits that it is undisputed that the 2012 Agreement was heavily and freely negotiated by the parties, over at least 10 months, with counsel on both sides, and that the Claimant was assisted by experienced international counsel in 2012, just as it was when it acquired BCTI's rights under the 1994 Agreement and entered into the 2005 Agreement.[530] Second, the Respondent asserts that the profit-sharing terms in the 2012 Agreement were not new to the Claimant as the Claimant had always operated under profit-sharing terms in its prior agreements, since it first entered Turkmenistan in 2005.[531] Third, the Respondent contends that just as with the 2012 Agreement, after performing the 2005 Agreement for its full 5-year term, the Claimant itself sought to renew it on the same terms, including profit-sharing.[532] Fourth, the Respondent maintains that the Claimant never complained that the profit-sharing terms of the 2005 and the 2012 Agreements were "illegal" in any way, either when they were being negotiated or during the entire course of their performance, nor did the Claimant make any such argument in the 2011 arbitrations. The Respondent states that,

[528] Resp. PHB, ¶¶ 9-10.
[529] Resp. PHB, ¶ 10.
[530] Resp. Reply PHB, ¶ 9.
[531] Resp. Reply PHB, ¶ 10.
[532] Resp. Reply PHB, ¶ 11.

contrary to the instructions the Claimant gave to its quantum expert in this arbitration, it instructed the same expert in the 2011 arbitrations, Ms. Laura Hardin, to give full force and effect to the profit-sharing terms of the 2005 Agreement, deducting the [redacted] that MTS owed to Turkmenistan in her calculations. The Respondent further argues that, if the Tribunal accepted the Claimant's premise that the 2012 Agreement was unlawful ab initio, MTS would have no right to bring claims under the BIT for damages arising out of an illegal contractual arrangement, and the Tribunal would have to dismiss the claims on that basis alone.[533]

432. As regards the "note" on the back of the 2012 license on which the Claimant relies, the Respondent argues that this does not override all of the Claimant's signed, written contracts nor does it entitle the Claimant to operate in Turkmenistan for ten years. The note on the back of the license that Claimant obtained from the Ministry of Communications in July 2012 did not give the Claimant legitimate expectations of continuing to operate after the 2012 Agreement expired. There is no documentary evidence supporting the Claimant's interpretation of the note; neither its literal meaning nor the context of the parties' negotiations support the Claimant's argument that the note was a legally binding commitment to guarantee the Claimant ten years of operations in Turkmenistan.[534] The entire documentary record contradicts that argument. On its face, the plain meaning of the note does not purport to override the terms of the 2012 Agreement or any of the ancillary agreements (Interconnection Agreements and Radio Frequency Agreement), which established the rights, conditions of operations and technical resources that MTS required in order to conduct operations as a cellular services provider in Turkmenistan. It is undisputed that the license was issued in the Turkmen language only, and that the note on the back of the license was also written in Turkmen only. The Respondent's certified English translation of the Turkmen text of the note states: "is to be extended according to the procedure set forth by the legislation of Turkmenistan". The Respondent submits that

[533] Resp. Reply PHB, ¶ 12.
[534] Resp. PHB, ¶ 13.

this is not mandatory language.[535] Consequently, the note does not constitute an agreement as the Claimant contends.[536]

433. The Respondent argues that there is no dispute that, under all translations of the note, the text expressly states that any extensions of the license would be made according to Turkmen law and procedure. Under the Turkmen Law on Licensing, MTS had to maintain the technical resources and means necessary to carry out the licensed activity – resources and means that were afforded to MTS by virtue of the 2012 Agreement, and the ancillary agreements. Once those contracts expired, MTS no longer possessed the means necessary to carry out the licensed activities. The license alone was useless. The express language of the note – which qualifies the possibility of renewal by the phrase "according to the procedure set forth by the legislation of Turkmenistan" – undercuts the Claimant's theory that the note superseded the carefully negotiated 5-year term of the 2012 Agreement and guaranteed MTS the right to operate in Turkmenistan for 10 years.[537]

434. The Respondent submits that the Claimant's contemporaneous behaviour also undercuts its argument. The Claimant cannot explain why it applied for a 3-year license in 2015, when the supposedly "binding" agreement provided only for a two-year renewal after the first three years ("3+2+3+2"). Apparently, neither MTS nor the Ministry felt compelled to comply with the "formula" in the note on the 2012 license, and there is no reference to the note, the formula, or to any further extensions on the license that was issued to the Claimant in 2015.[538]

435. The Respondent maintains that the note simply could not supersede the terms of the extensively negotiated 2012 Agreement and ancillary agreements. Rather, the note indicated that the license would run in parallel with the Claimant's contractual framework. The purpose of having two "3+2" combinations was to mimic the initial 5-year term of the 2012 Agreement and the possibility of a subsequent 5-year term. At the Hearing, the Respondent's witness [redacted] in the period from

[535] Resp. PHB, ¶ 14.
[536] Resp. PHB, ¶ 17.
[537] Resp. PHB, ¶ 18.
[538] Resp. PHB, ¶ 19.

February 2012 to January 2019, explained that the note was included on the back of the 2012 license as a way to assuage the Claimant that it would be able to renew and maintain communications licenses for the entire 5-year duration of the 2012 Agreement – given the fact that the Law on Licensing only provided for a maximum 3-year duration for licenses – and that the same procedure would apply if the 2012 Agreement was renewed for another five years.[539]

436. The Respondent takes the view that the residual term of the 2015 License did not afford the Claimant greater rights than it had under the 2012 Agreement and ancillary agreements and had no practical effect after its contracts expired. Contrary to the Claimant's contentions, the license issued to MTS in July 2015, standing alone, did not constitute a "protected property right" that was expropriated when its contracts expired and it ceased operations in September 2017.[540] At the Hearing, Mr. Townsend asked whether the cessation of activity ten months before the license expired amounted to a taking of some right from the Claimant.[541] The Respondent's answer was no. The Respondent submits that MTS ceased activities at the end of September 2017, because the contractual framework under which it conducted operations as a cellular services provider in Turkmenistan expired. The 3-year communications license issued to MTS in July 2015 was not a stand-alone right, it was rather one part of a bundle of rights that depended on the other parts to be functional. It could only be effective in conjunction with the rights conferred by the 2012 Agreement, the Interconnection Agreements with Turkmentelecom, Altyn Asyr and ACT, and the Radio Frequency Agreement under which frequencies were allocated to the Claimant. In this framework, the communications license functioned as an integral part of the overall investment, an indivisible whole. The 2012 Agreement and the ancillary agreements were indispensable to the Claimant's operations. The Respondent concludes that the Claimant did not have any investment capable of expropriation following the expiration of its contracts in September 2017.[542]

[539] Resp. PHB, ¶ 20.
[540] Resp. PHB, ¶ 21.
[541] Hearing Transcript, Day 1, 274:3-11.
[542] Resp. PHB, ¶ 21.

437. The Respondent explains that the 2012 Agreement was the framework agreement – the replacement for the 2005 Agreement under which MTS previously operated in Turkmenistan from 2005-2010 – without which MTS was not entitled to operate in Turkmenistan. The very title of the 2012 Agreement refers to the "Conditions of Operation [...] in the Cellular Telecommunications Market of Turkmenistan".[543] The 2012 Agreement and the ancillary agreements provided the "technical base" and "technical means" that allowed MTS to obtain, and to maintain, a functional license. Once these Agreements expired, MTS-TM could not conduct the cellular communications services that were the subject of the communications license.[544] MTS' license was one right in a bundle of rights – a bundle that was an "indivisible whole". According to the Respondent, possessing one stick in a bundle of rights is not enough.[545]

438. The Respondent submits that MTS-TM's business plans show that the Claimant always understood it had only a 5-year time horizon for its operations in Turkmenistan, as expressly set forth in the 2012 Agreement, and did not believe that it had a right nor any expectation that it would continue operating after the expiration of that contract. MTS-TM, on instructions from MTS' global Board of Directors, carefully calibrated its investments to adhere to this 5-year time frame, with the expressly stated objective – seen over and over again in its own documents – that it must recover its investment in Turkmenistan within five years and maximize its profits in that period. The Respondent asserts that this strategy permeated every decision that MTS-TM made during the course of its operations from 2012-2017, including the decision not to invest in updated technology that could have more fully realized the potential of business in Turkmenistan over the long term, but would not have provided the requisite short-term return.[546]

439. The Respondent contends that MTS-TM's business plans also show that MTS-TM established its level of investment at the outset of operations in 2012, immediately after its successful relaunch of operations – in a favourable environment, untainted by any of the purportedly wrongful conduct that MTS alleges occurred in later years – and that it carried

[543] Resp. PHB, ¶ 23.
[544] Resp. PHB, ¶ 27.
[545] Resp. PHB, ¶ 28.
[546] Resp. PHB, ¶ 29.

out that level of investment for the following five years, achieving its financial goals and obtaining an overall [redacted] The record thus also contradicts MTS' allegations that it was impeded by wrongful measures during the course of its operations in 2012-2017.[547]

440. The Respondent argues that, as part of its primary "2017 Shutdown" claim, the Claimant attacks the 2012 Agreement in two ways: first, it argues that the 2012 Agreement was not a "legal prerequisite" to its operations in Turkmenistan and, second, it argues that none of the "technical means" required to operate its network in the country were provided pursuant to the 2012 Agreement, but rather through the ancillary agreements with Turkmentelecom, Altyn Asyr, Ashgabat Telephone Network, the Interdepartmental Commission on Radio Frequencies and Turkmentelecom's regional affiliates. The Respondent submits that there can be no question that the 2012 Agreement was the primary legal basis setting the terms and conditions under which MTS was permitted to operate as a cellular services operator in Turkmenistan, and that it was the basis on which MTS was provided with the technical means required for such operations. The Respondent asserts that the Claimant's own counsel acknowledged contemporaneously that the 2012 Agreement provided the legal guarantees that MTS will receive all the critical technical resources they require.[548]

441. The Respondent maintains that the evidence establishes that the Claimant fully understood that the 2012 Agreement was the necessary framework agreement for its operations in Turkmenistan, without which it could not operate.[549] The Respondent contends that the Claimant's attempt to disavow the 2012 Agreement contradicts the evidentiary record, its own prior statements and its own conduct in Turkmenistan.[550] Thus the Respondent argues that it is undisputed that

- MTS always operated throughout its entire history in Turkmenistan pursuant to a framework agreement, starting in 2005, when it acquired the rights of BCTI (which had also operated under a framework agreement for its entire history

[547] Resp. PHB, ¶ 30.
[548] Resp. Reply PHB, ¶ 2.
[549] Resp. Reply PHB, ¶ 2.
[550] Resp. Reply PHB, ¶ 3.

from 1994-2005), when it entered into the 2005 Agreement, and again under the 2012 Agreement.[551]

- Each time that its framework agreements expired, first in 2010 and then in 2017, the Claimant sought to extend those agreements on the same terms and conditions, knowing that it could not continue operating in the country without them. The Respondent takes the view that the Claimant would not have sought to extend the 2012 Agreement if it had believed it was unnecessary.[552]

- The Claimant's own admissions in the 2010 Arbitrations demonstrate its understanding that the "framework" for its operations was established in the 2005 Agreement – just as BCTI's 1994 Agreement, which the Claimant acquired in 2005, had established the "framework" for BCTI's operations in Turkmenistan. The Respondent submits that the terms and conditions of the 2012 Agreement, and the system of ancillary agreements associated with it, were carried over from and were nearly identical to the 2005 Agreement.[553]

- In its contemporaneous, public filings with the U.S. Securities and Exchange Commission in 2012, the Claimant itself described the 2012 Agreement as the agreement regarding its terms of operation in Turkmenistan, which had been signed with Turkmentelecom, acting in accordance with a decree issued by the President of Turkmenistan.[554]

- The preamble of 2012 Agreement defines the latter as setting forth the "Conditions of Operation of MTS-Turkmenistan [...] In The Cellular Telecommunications Market of Turkmenistan".[555]

- The Claimant's witnesses confirmed the significance of, and need to extend, the 2012 Agreement, which they were "hoping" would be renewed on the same

[551] Resp. Reply PHB, ¶ 2.
[552] Resp. Reply PHB, ¶ 2.
[553] Resp. Reply PHB, ¶ 2.
[554] Resp. Reply PHB, ¶ 2.
[555] Resp. Reply PHB, ¶ 2.

terms and conditions in 2017, and they recognized that an extension for another 5-year term was not a mere "formality", but rather was necessary to continue their operations in Turkmenistan.[556]

442. The Respondent submits that the Claimant's further contention that the 2012 Agreement is "without legal basis" also lacks merit. The Respondent asserts that it did not say that the 2012 Agreement "had no basis in Turkmen law" at the Hearing, nor did it "admit that it could not produce any legal basis for the 2012 Agreement" as alleged by the Claimant.[557] The Respondent asserts that the 2012 Agreement is grounded in Turkmen law, and was entered pursuant to and in accordance with several Turkmen legal instruments, which are in the record. The Respondent further restates the following points:

- The Claimant acknowledges that the 2012 Agreement was specifically authorized by Presidential Decree, which authorized Turkmentelecom to conclude an agreement with MTS on the terms and conditions of activity of MTS-TM. The prior framework agreement under which MTS operated, the 2005 Agreement, was likewise authorized by a Presidential Decree.[558]

- Pursuant to its charter, issued under Turkmen law, Turkmentelecom is "primarily tasked with satisfying all the telecommunication demands of Turkmenistan in accordance with the national plans for the development of the communications sector, which is overseen by the MOC [...] includ[ing] cellular communications", and it entered into the 2012 Agreement in accordance with its capacities under its charter.[559]

- In particular, Turkmentelecom's charter provides that Turkmentelecom has the right to enter into contracts with legal entities and natural persons.[560]

[556] Resp. Reply PHB, ¶ 2.
[557] Resp. Reply PHB, ¶ 4.
[558] Resp. Reply PHB, ¶ 4.
[559] Resp. Reply PHB, ¶ 4.
[560] Resp. Reply PHB, ¶ 4.

- The Turkmen Civil Code further states that legal entities, including those formed by the State, such as Turkmentelecom, may participate in relations of civil law on general grounds.[561]

443. The Respondent concludes that Turkmentelecom contracted with MTS-TM in accordance with Turkmen law, pursuant to its own charter, the Turkmen Civil Code, and the Presidential Decree, to further its tasks of satisfying the telecommunications needs of Turkmenistan.[562]

444. The Respondent submits that the Claimant's theory according to which contract terms cannot be "legal" unless they are specifically required in legislation, is absurd. According to the Respondent there is no merit to that theory, and the Claimant has never supported it with any legal authorities, whether domestic or international. The Respondent takes the view that parties to a commercial agreement are free to agree to whatever commercial terms they want, including profit-sharing, and MTS operated under those agreed terms from the very beginning of its activities in Turkmenistan in 2005, as did its predecessor BCTI. The Respondent submits that the Claimant's lawyer in 2005, [redacted] confirmed that the 2005 Agreement, including profit-sharing, was "certainly not" illegal nor did it violate Turkmen law. The Respondent argues that both the 2012 Agreement and its profit-sharing terms were in full compliance with Turkmen law, legal instruments and the Constitution.[563]

445. With regards to the Claimant's illegality and estoppel arguments, the Respondent argues in its Sur-Reply PHB that the Claimant has completely backpedalled, stating that the Claimant "does not assert that the 2012 Agreement was an 'illegal' contract in the sense that it was procured by some unlawful means" and that "MTS is not making any claim arising from the negotiation of the 2012 Agreement". The Respondent asserts that the Claimant curiously argues that it is not estopped from claiming that the Respondent unlawfully extracted [redacted] following the resumption of MTS' operations. The Respondent takes that view that the Claimant's new admission that it does

[561] Resp. Reply PHB, ¶ 4.
[562] Resp. Reply PHB, ¶ 4.
[563] Resp. Sur-Reply PHB, ¶ 6.

not claim wrongful conduct with respect to the negotiations of the 2012 Agreement precludes its argument that it was economically coerced into entering that contract or that the Respondent unlawfully imposed profit-sharing.[564]

446. The Respondent further submits that the Claimant's argument that the 2012 Agreement did not form the basis of (or provide the consideration for) the provision of any technical resources to MTS-TM is incorrect. The Respondent asserts that the Claimant's own counsel acknowledged at the time the 2012 Agreement was negotiated and signed, that agreement provided MTS with the "legal guarantees" required in order for MTS to receive the "critical technical resources" necessary for its operations in Turkmenistan.[565]

447. According to the Respondent, the Parties expressly recognized and understood that the 2012 Agreement was the pre-requisite for MTS' operations in Turkmenistan, setting forth the terms and conditions of its operations, including the "legal guarantees" and basis on which Turkmentelecom and other Turkmen entities would provide MTS with the technical resources for its operations in the country. The Respondent points out that the Claimant itself relied upon and repeatedly invoked the 2012 Agreement throughout its operations in 2012-2017 to request and obtain the resources it needed, and that the Claimant has repeatedly affirmed the significance of Clause 3 of the 2012 Agreement, pointing out that "[u]nder the 2012 Agreement, Turkmenistan expressly committed to providing MTS-TM with the 'technical conditions of operation' and 'all necessary legal and technical resources'".[566]

448. The Respondent submits in its Reply PHB that the Claimant, as part of its alternative "2017 Shutdown" claim, states that even if the 2012 Agreement were a legal prerequisite for MTS' operations in Turkmenistan the refusal to extend it beyond September 2017 was not justified and violated its legitimate expectations. The Respondent responds to that argument as follows: (i) the 2012 Agreement provided for a 5-year term without mandatory extension; (ii) MTS knew full well that Turkmentelecom was not "obliged" to renew the 2012 Agreement for a second 5-year term in 2017; (iii) the "Note" on the back of MTS'

[564] Resp. Sur-Reply PHB, ¶ 7.
[565] Resp. Reply PHB, ¶ 5.
[566] Resp. Reply PHB, ¶ 6.

first license in 2012 (which was not repeated on the second license, issued in 2015) did not supersede the terms of the 2012 Agreement and ancillary agreements nor did it guarantee MTS ten years of operations in the country; (iv) MTS' contemporaneous business plans and financial information demonstrate that MTS carefully planned and carried out its investments with the knowledge and expectation that it had only a 5-year term under the 2012 Agreement, with the goal of completely recovering its investment in that 5-year time period and realizing a profit, which it succeeded in doing; and (v) Turkmentelecom's reasons for not renewing in 2017 were valid and known to MTS.[567]

(2) The Tribunal's Analysis

449. As regards the Claimant's 2017 Shutdown Claims, the Tribunal will analyse the Claimant's Primary (a.) and Alternative (b.) case in turn. None of these claims is successful. As a consequence, the 2017 Shutdown Claims have to be dismissed.

a. Primary case

450. By way of reminder, under its primary case the Claimant argues that the Respondent expropriated the Claimant's investment in Turkmenistan when it shut down MTS-TM's network on 29 September 2017 on the basis that MTS no longer had the right to operate in Turkmenistan following the expiry of the 2012 Agreement. It is the Claimant's argument that the 2012 Agreement was not a legal prerequisite for MTS-TM to operate (or continue operating) in Turkmenistan and that the Respondent had no right to shut down MTS-TM's operations on the basis that the 2012 Agreement had expired. The Claimant further submits that the 2012 Agreement was illegal (and therefore invalid) due to economic coercion and due to an illegal profit charge. In the Claimant's view, its license was a sufficient legal basis for its operations in Turkmenistan. At the time of the 2017 shutdown, MTS says that it was in possession of a valid license with a commitment from the Ministry of Communications to a minimum 10-year operating term from 2012. Thus, it is the Claimant's case that MTS' right to further operate in Turkmenistan was expropriated by

[567] Resp. Reply PHB, ¶ 7.

the Respondent (along with the value of MTS' business) when it shut down MTS-TM's network in September 2017.[568]

(a) Legality/validity of the 2012 Agreement

451. As an initial point, the Tribunal finds that the 2012 Agreement was neither invalid nor illegal.

452. In the Tribunal's view, and contrary to the Claimant's assertion, there is no evidence that the Claimant was coerced into signing the 2012 Agreement. Rather, it is undisputed that it was the Claimant who sought an extension of the 2005 Agreement at the end of its 5-year-term.

453. Furthermore, it was the Claimant which, in 2010, had commenced arbitrations following the non-renewal of the 2005 Agreement, the settlement of which led to the 2012 Agreement.[569] There is no evidence that the Claimant was unable to bargain. In any event, the Tribunal observes that the Claimant had operated before 2012 under similar profit-sharing arrangements. The conclusion of the 2012 Agreement with a [redacted] is not, in such circumstances, an indication of coercion by the Respondent.[570]

454. The Tribunal is not convinced that, under these circumstances, the 2012 Agreement was not freely negotiated or that the Claimant was forced by the Respondent to conclude the 2012 Agreement.

455. The Tribunal finds that the "profit charge" (as the Claimant defines it) or the "profit sharing terms" (as the Respondent defines them) contained in Clause 1 of the 2012 Agreement is not in itself illegal and did not render the 2012 Agreement illegal or invalid.

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[568] Cl. PHB, ¶¶ 10 et seq.
[569] *See* Sections III. B. and C. (1) and (2) above.
[570] *See* Sections III. B. and C. (1) and (2) above.

456. As convincingly explained by the Respondent's expert, Dr. Dippon, profit-sharing or some kind of charge for granting a concession to operate in the telecommunication services industry is quite common in the global telecommunications world.[571]

457. As far as the Claimant argues that the 2012 Agreement was "without legal basis" the Tribunal finds that the 2012 Agreement is sufficiently grounded in Turkmen law. Like the 2005 Agreement before it, the 2012 Agreement was specifically authorized by a Presidential Decree (No. 12307, dated 13 May 2012) "authorizing [Turkmentelecom] to conclude an agreement with [MTS] on the terms and conditions of activity of [MTS-TM]".[572] According to its charter, as summarized by Turkmentelecom's former [redacted] Turkmentelecom is "primarily tasked with satisfying all the telecommunication demands of Turkmenistan in accordance with the national plans for the development of the communications sector, which is overseen by the MOC".[573] Turkmentelecom's charter, in Article 3.1.2, provides that Turkmentelecom has the right to "[e]nter into contracts with legal entities and natural persons". The Turkmen Civil Code states in Article 48(2) that legal entities, including those formed by the State, such as Turkmentelecom, may "participate in relations of civil law on general grounds"; Article 1(2) provides that "[i]ndividuals and legal entities are free to establish their rights and obligations based on a contract".[574] These provisions are consistent with the universally held view that the freedom of contract applies to States and State entities. This is nothing unusual. The Tribunal is therefore satisfied that, when Turkmentelecom entered into the 2012 Agreement, it did so in accordance with its capacities under its charter and in accordance with the Turkmen Law.

458. Moreover, the Tribunal is not convinced by, and sees no legal basis for, the Claimant's argument that freely negotiated contractual terms such as Clause 1 of the 2012 Agreement cannot be lawful unless they are specifically mentioned in or required by legislation. In the Tribunal's view, parties to a commercial agreement are in principle free to agree to

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[571] Dippon Report, ¶¶ 74, et seq.
[572] Ruling of the President of Turkmenistan No. 12307 "On the development of cellular communication in Turkmenistan", 13 May 2012, Exhibit C-0009.
[573] [redacted]; *See* Charter of Turkmentelecom, in particular Articles 1.4, 2.1, 3.2, Exhibit R-0138.
[574] Charter of Turkmentelecom, in particular Article 3.1, Exhibit R-0138; Civil Code of Turkmenistan, Articles 1(2), 48(2) Exhibit R-0206.

whatever commercial terms they want, including profit-sharing, unless such the terms are contrary to a legal prohibition (which does not exist here). This is what MTS and Turkmentelecom did by negotiating and concluding the 2012 Agreement.

459. The Tribunal does not share the Claimant's view that the profit charge was discriminatory because Altyn Asyr did not operate under a profit-sharing agreement like Clause 1 of the 2012 Agreement. The Tribunal finds that Altyn Asyr, as a wholly State-owned company, and MTS, as a privately-owned company, are not similarly situated and that the Claimant's discrimination argument therefore fails. More particularly, all of the [redacted] (and not just a [redacted] of a wholly State-owned business like Altyn Asyr belong, in principle, to the State. Therefore, the Tribunal does not find that the profit-sharing under the 2012 Agreement can be regarded as discriminatory.

460. It is further undisputed that the Claimant, in the past, had always operated in Turkmenistan under contracts with profit-sharing terms. Thus, the 1994 Agreement, which the Claimant acquired from BCTI in 2005, obligated the Claimant to pay [redacted] of its profits,[575] whereas the 2005 Agreement contained a [redacted] profit charge.[576] It is also undisputed that the Claimant never challenged the legality or validity of these contractual arrangements prior to this arbitration.

461. Furthermore, the Claimant's external legal counsel during the 2005 negotiations, Mr. [redacted], testified that there was no concern at the time that the 1994 and 2005 Agreements were illegal. [redacted] lso confirmed during his testimony at the Hearing that the Claimant had performed legal due diligence and that MTS received advice from local Turkmen counsel. He recalled no concern about the 2012 Agreement being illegal, although he had no specific recollection as to the profit charge. [redacted] testified:

> Q. Did MTS perform commercial and legal due diligence on BCTI's operation in Turkmenistan?

[575] 1994 Agreement, Clause 5.1, Exhibit C-0003.
[576] 2005 Agreement, Clause 1, Exhibit C-0005.

A. We certainly conducted legal diligence. On the commercial side, I didn't see it myself, but it would have been done. Because even back in those days, it was practice to put together a diligence package and presentation for the MTS board before they signed off on deals, which would have included the technical commercial piece, alongside the legal analysis.

Q. Did MTS hire local counsel in Turkmenistan to advise and assist in the transaction?

A. Yes, this I can't recall. I was thinking about this when I put the witness statement together.

Sometimes we, [redacted], sourced and subcontracted to local lawyers. On other occasions, MTS had their own contacts and dealt with local counsel themselves.

I have a feeling with Turkmenistan it was -- as I'm sure all the folks here will not be surprised to hear, it was a challenge in 2004/2005 to find sophisticated M&A lawyers; or any lawyers, actually. And I think MTS would have sourced expertise through contacts, which sometimes involved academic lawyers, people that were -- this could well have been a lawyer in Ashgabat who was a professor of law, or similar. I can't recall.

But certainly someone did, because I do recall we were all comfortable with the legal analysis on the notification and change of control point.

Q. So do you remember seeing any due diligence report from Turkmen lawyers?

A. I don't recall, which is why -- which is why I think MTS dealt with them directly internally.[577]

and

[577] Hearing Transcript, Day 4, 145:16 – 146:21.

Q. The contract also provided for MTS to pay [redacted] of its net profits to the Government; correct?

A. Correct.

Q. The profit-sharing term was not based on any law enforced in Turkmenistan; correct?

A. To my knowledge, correct, yes.

Q. And you didn't think that was illegal; correct?

A. For sure not.

Q. So that's why you advised your client to go forward with the transaction; correct?

A. Yes. We wouldn't have proceeded if we thought there was material illegality involved in the investment, in any jurisdiction.[578]

and

THE PRESIDENT: [...] Was there any concern raised that perhaps the existence of the agreement, the 2005 Agreement, would somehow violate Turkmen law, because the operation agreement as such is not based on any statutory Turkmen requirement? Did that come to your mind, or was it a concern?

So the question: "Why the hell do we need that agreement? We could apply for a license and the license would be granted as a matter of Turkmen law".

A. Well, I can't recall the detail of the discussions, forgive me. You know, it's 17 years ago.

[578] Hearing Transcript, Day 4, 147:19 – 148:5.

THE PRESIDENT: No, no, we understand. And I have to say, given the time span that has passed, you have a fairly good recollection.

A. Certainly I don't -- I certainly don't recall any discussions or material concern that by signing the agreement we were breaching Turkmen law. We would have definitely -- MTS were always very -- being a New York-listed entity, always very, very sensitive to being on the right side of the line whenever we did transactions, especially in other countries. So we would not have signed the agreement if we had any concerns around the legality of the terms in it.

I think we knew when we went down there, following the switch-off, we're going to have to renegotiate the 1994 Agreement. We're not going to come out of this with the 1994 Agreement just intact and everyone shaking hands. And so the November 2005 Agreement was a necessary, enforced through circumstances, renegotiation of the 1994 Agreement.

THE PRESIDENT: As a matter of commercial -- and perhaps even legal -- reality, you were concerned to protect your client: nothing illegal, as you said.

A. Yes.[579]

462. In the Tribunal's view, the profit-sharing terms of the 2012 Agreement were, during several months of negotiations with counsel on both sides, freely negotiated between the Claimant and the Respondent. The Tribunal notes that it was the Claimant that actively sought the extension of the 2005 Agreement (including the profit charge) at the end of the 5-year term of the 2005 Agreement. It is undisputed that all of the (nearly 20) drafts exchanged between the Parties of the 2012 Agreement, which included drafts submitted by the Claimant, contained a profit charge. Thus, the Claimant itself did not question the validity of the profit-sharing terms in 2012, and its own draft proposals of the 2012 Agreement provided for a profit share. Rather, it was the Claimant's goal in the negotiations of the 2012 Agreement to [redacted] as submitted by the Claimant's witness

[579] Hearing Transcript, Day 4, 175:14– 176:21.

[redacted][580] rather than deleting/avoiding the profit charge as being an illegal term. In the end, a [redacted] (contained in Clause 1 of the 2012 Agreement) was agreed. And it was the Claimant that, in 2017, wanted to renew the 2012 Agreement and on the "same terms"[581] as submitted by the Claimant's witness [redacted] which obviously included the profit share.

463. In sum, the Tribunal finds that the Claimant has failed to discharge its burden of proof in relation to the alleged invalidity or illegality of the 2012 Agreement and/or the profit-charge. The Tribunal finds that the 2012 Agreement was neither illegal nor invalid due to coercion or due to the profit-sharing arrangement contained in Clause 1.

464. Furthermore, even if the 2012 Agreement had been illegal or invalid (based on coercion into the 2012 Agreement and/or an illegality of the profit-sharing arrangement in Clause 1), quod non, the Claimant would be estopped from invoking these grounds.

465. The Claimant itself proposed drafts of the 2012 Agreement which included a profit charge. It was the Claimant that requested an extension of the 2012 Agreement (including profit-sharing) and argues that it had an expectation that the 2012 Agreement would be extended on the "same terms and conditions". The "same terms and conditions" obviously included the profit charge in Clause 1 of the 2012 Agreement, about which the Claimant now complains. Thus, the Tribunal finds that the Claimant's argument regarding the illegality/invalidity of the 2012 Agreement amounts to contradictory behaviour contrary to good faith (venire contra factum proprium).

(b) Status of the 2012 Agreement / The 2012 Agreement was the framework for the Claimant's operations in Turkmenistan

466. The 2012 Agreement, in its very title, refers to the "Conditions of Operation [...] in the Cellular Telecommunications Market of Turkmenistan". Furthermore, the 2012 Agreement is expressly referred to in its preamble as an "agreement on the conditions of operation of business enterprise MTS Turkmenistan [...] in the cellular communications market of

[redacted]

Turkmenistan".[582] Thus, it must have been clear to both sides, including the Claimant, that this was the central agreement which formed the fundamental basis and prerequisite for the Claimant's operations in Turkmenistan. The time and effort that both parties put into the negotiation of the 2012 Agreement supports this conclusion.

467. The Tribunal notes that the 2012 Agreement not only included a profit charge/a profit-sharing arrangement as the only substantial obligation (as argued by the Claimant) contained in Clause 1, but also included several other provisions concerning the Claimant's operations in Turkmenistan, setting forth rights and obligations for both parties. Examples of such provisions include Clause 2 (Turkmentelecom has the right to receive from MTS any information concerning its operations in Turkmenistan), Clause 3 (Turkmentelecom shall provide and ensure that MTS is provided with all necessary legal and technical conditions of operation in the cellular communication market of Turkmenistan), Clause 4 (Upon request, Turkmentelecom shall solicit from the Government bodies and/or State enterprises the provision of technical equipment to MTS), Clause 5 (MTS undertakes to provide services in accordance with license and applicable laws), Clause 10 (Turkmentelecom to ensure that MTS is provided with leased premises for MTS' base stations), Clause 11 (MTS' right to establish its own tariff policy), Clause 16 (MTS' right to develop and optimize its network in Turkmenistan) and Clause 18 regarding the term of the 2012 Agreement.

468. It was only after the conclusion of the 2012 Agreement in May 2012 (and in implementation of such agreement) that the ancillary agreements (interconnection agreements[583] and radio frequency agreement[584]) were concluded and the operating license was issued: the Interconnection Agreement with Turkmentelecom dated 9 June 2012,[585]

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[582] 2012 Agreement, Exhibit C-0008.
[583] Interconnection and Interworking Agreement No. 0013/06-3 between MTS-TM and Turkmentelecom, 9 June 2012, Exhibit C-0130, Interconnection and Interworking Agreement No. 0021/06 between MTS-TM and Ashgabat Telephone Network, 18 June 2012, Exhibit C-0131, and Agreement No. 0021/06-1 between MTS-TM and Altyn Asyr on Interconnection and Interaction of Mobile Networks, 18 June 2012, Exhibit C-0132.
[584] Agreement No. 521/0038/07 between MTS-TM and the Frequency Authority (SICURFS) on the Usage of Radio Frequency Spectrum, 25 July 2012, Exhibit C-0137.
[585] Interconnection and Interworking Agreement No. 0013/06-3 between MTS-TM and Turkmentelecom, 9 June 2012, Exhibit C-0130.

the Interconnection Agreement with Ashgabat Telephone Network dated 18 June 2012,[586] the Interconnection Agreement with Altyn Asyr,[587] and the Radio Frequency Agreement with the Frequency Authority dated 25 July 2012.[588] All of the ancillary agreements had five-year terms and thus ran in parallel with the 2012 Agreement; hence the terms of the ancillary agreements all expired in 2017. This confirms the Tribunal's understanding that the 2012 Agreement was in fact the framework for the Claimant's operations in Turkmenistan and that the ancillary agreements were adjusted to fit, complement and implement that framework.

469. This also applies to the operating license. Only after the 2012 Agreement and the ancillary agreements were in place, two months after the conclusion of the 2012 Agreement, was such license[589] issued.

470. It is therefore unsurprising that, [redacted][590] The same system or structure of a main agreement (the then 2005 Agreement) plus ancillary agreements associated with it plus a license, was carried over from the 2005 to the 2012 Agreement.

471. Thus, the Claimant always operated in Turkmenistan under a framework agreement: first when the Claimant acquired the rights of BCTI (including the 1994 Agreement), then when the Claimant entered into the 2005 Agreement, and again in 2012, when the Claimant entered into the 2012 Agreement. Each time when the term of those framework agreements expired, the Claimant requested the extension of those agreements: in 2010, the Claimant requested the extension of the 2005 Agreement, and in 2017, the Claimant requested the

[586] Interconnection and Interworking Agreement No. 0021/06 between MTS-TM and Ashgabat Telephone Network, 18 June 2012, Exhibit C-0131.
[587] Agreement No. 0021/06-1 between MTS-TM and Altyn Asyr on Interconnection and Interaction of Mobile Networks, 18 June 2012, Exhibit C-0132.
[588] Agreement No. 521/0038/07 between MTS-TM and the Frequency Authority (SICURFS) on the Usage of Radio Frequency Spectrum, 25 July 2012, Exhibit C-0137.
[589] License No. 1-20-21-40 granted to MTS-TM, 26 July 2012, Exhibit C-0010.
[590] [redacted]

extension of the 2012 Agreement. The Tribunal is convinced that the Claimant would not have requested the extension of the 2012 Agreement if the Claimant had believed that the 2012 Agreement was not a necessary requirement for its operations in Turkmenistan.

472. Also, in the Claimant's own filings with the U.S. Securities and Exchange Commission in 2012, the Claimant confirmed the central importance of the 2012 Agreement and referred to it as "the agreement regarding our terms of operation in Turkmenistan".[591] Furthermore, during the negotiation of the 2012 Agreement, the Claimant's counsel expressed its understanding that the 2012 Agreement would provide the Claimant with the legal guarantees needed to receive all the critical technical resources.[592]

473. In its Memorial, the Claimant itself describes Turkmentelecom's obligations under the 2012 Agreement as including the obligation to provide MTS with all necessary resources, and that Turkmentelecom would solicit the provision to the Operator [i.e. MTS] of all necessary communication frequencies and other communication resources and provide additional technical resources and equipment.[593] The Claimant further referred to Turkmentelecom's undertaking under the 2012 Agreement to "solicit from the government bodies and/or state enterprises of Turkmenistan the provision to the Operator of any additional numbering, additional technical equipment for the connection to the public network of Turkmenistan and/or any other technical equipment and resources necessary for the Operator to conduct and develop its activities in Turkmenistan".[594] In its Reply, the Claimant submits that "Turkmenistan expressly promised MTS under the 2012 Agreement that it would treat MTS-TM fairly, committing, inter alia, to provide all necessary legal and technical resources to MTS-TM on a non-discriminatory basis".[595] It is also undisputed

[591] MTS 2012 US SEC Form 20-F, p. 51, Exhibit A&M-0014.
[592] Email from [redacted] 30 May 2012, p. 1, Exhibit R-0158: [MTS' Counsel]: "2. [...] the 2012 MTS-TurkmenTelecom Agreement is itself not yet in force. Indeed, your clients insist (by way of your proposed Side Letter) that it should not enter into force until the Settlement Agreement is signed. Accordingly, our clients do not have any legal guarantees that they will receive all the critical technical resources they require as part of the settlement. [Respondent's Counsel:] The legal guarantees your client negotiated in respect of these matters are contained in Clauses 3, 4, 10 and 16 of the new commercial agreement [...]".
[593] Cl. Mem., ¶ 169.
[594] Cl. Mem., ¶ 169, quoting 2012 Agreement, Clause 4, Exhibit C-0008.
[595] Cl. Reply, ¶ 499.

that the Claimant, during its operations in 2012-2017, requested relevant resources under the 2012 Agreement.

474. The 2012 Agreement was the necessary legal framework for the Claimant's operations without which the Claimant could not operate, and the Tribunal is convinced that the Claimant accepted and understood that.

(c) The operating license alone did not permit MTS to continue operating in Turkmenistan

475. The Tribunal finds that the operating license alone was insufficient for MTS to continue operating after the expiry of the 2012 Agreement. Hence, the operating license did not permit the Claimant to continue operating in Turkmenistan after the expiry of the 2012 Agreement.

476. Contrary to the Claimant's view, the license issued to MTS in July 2015 with a term until July 2018 (as extended),[596] standing alone, did not constitute a protected property right that was expropriated when the 2012 Agreement and the ancillary contracts ended and the Claimant ceased operations in September 2017.

477. The reason for the lack of synchronism between the duration of the 2012 Agreement and of the 2015 license is, as the Respondent's witness [redacted] convincingly explains, that domestic legislation provides for a three-year renewal of the license. When MTS requested a three-year renewal after the three-year license granted in 2012 expired, the administration followed that law,[597] even though it disrupted the synchronism between the duration of the license (three plus three years = six years, i.e., until 2018) and the duration of the 2012 Agreement (five years until 2017).

478. Contrary to the Claimant's contention, the 2015 license did not confer a protected property right that was expropriated when the Claimant ceased operations in September 2017. The Claimant's activities ceased at the end of September 2017, because the contractual framework under which it conducted operations as a cellular services provider in

[596] License No. 1-20-21-40 reissued to MTS-TM on 26 July 2015, Exhibit C-0014.
[597] [redacted].

Turkmenistan expired. The Tribunal concurs with the Respondent that the 3-year license issued to the Claimant in July 2015 was not a stand-alone right, but rather one part of a bundle of rights that depended on the other parts to be functional. It could only be effective within the framework of the 2012 Agreement, the Interconnection Agreement with Turkmentelecom, with Altyn Asyr and with ACT, and the Radio Frequency Agreement; these contracts together conferred the rights and the technical means necessary for MTS' operation upon MTS. The 2012 Agreement and the ancillary agreements were essential to the Claimant's operations and the operating license only functioned within that framework. Without that framework, the operating license was useless. As a consequence, the Claimant did not retain any investment capable of expropriation following the expiration of its contracts in September 2017.

479. Turkmen law on licensing required license holders to be technically capable of providing services.[598] Upon the expiry of the ancillary agreements in parallel with the 2012 Agreement, MTS-TM's technical capability for providing services, and thus meeting the requirement for the continued validity of the license, was no longer present. In the Tribunal's view, a license alone is useless without the technical means to operate. Furthermore, the license alone did not give the Claimant a right to require the Respondent to provide the technical means to operate in Turkmenistan. The latter was provided for in the 2012 Agreement, which had expired in 2017 in accordance with its terms.

480. Article 11(3) of the Law of Turkmenistan "On Licensing of Certain Types of Activities" requires, under the heading "Licensing Requirements and Conditions", that

> The licensing regulations shall provide that the licensee must comply with:
> [...]
>
> 3) ensure compliance of buildings, structures, equipment and other technical means with the special conditions set for licensees in the instances where it is necessary

[598] Law of Turkmenistan No. 202-III "On Licensing of Certain Types of Activities" (as amended), Article 11, C-0064.

for the carrying out of certain types of activities;

[...].[599]

481. The licensing requirements and conditions imposed on the license applicant when a license is issued are contained in Articles 24 et seq. of the "Regulations on Licensing of Activities in Communications Area".[600] Article 24(6) provides as follows:

> 24. The licensing requirements and conditions imposed on the license applicant when a license is issued are the following:
>
> [...]
>
> 6) Availability of material and technical base that is sufficient for the performance of work, provision of services that are part of the licensed types of activities;
>
> [...].

482. At the Hearing, the Respondent's witness [redacted] further explained this aspect as follows:

> Q. And did MTS have this when it applied for its license, these underlying requirements and conditions?

[599] Law of Turkmenistan No. 202-III "On Licensing of Certain Types of Activities" (as amended), 25 June 2008, Exhibit C-0064; Article 11 reads as follows:

> Article 11. Licensing Requirements and Conditions
> The licensing regulations shall provide that the licensee must comply with:
> 1) laws of Turkmenistan and environmental, sanitary and epidemiological, hygiene, and fire safety rules and regulations;
> 2) qualification requirements set for licensees;
> 3) ensure compliance of buildings, structures, equipment and other technical means with the special conditions set for licensees in the instances where it is necessary for the carrying out of certain types of activities;
> 4) internal control regulations for combating the legalization of illicit earnings and the financing of terrorism.

[600] Resolution of the President of Turkmenistan No. 11266 "On Approval of Regulations on Licensing of Activities in Communications Area" (as amended), 17 September 2010, Exhibit C-0090.

A. When MTS applied for a license, the material and technical base had to be there for the application and if one of the points were to be missing, the issue would remain open.

Q. So you're saying that it did have these underlying conditions we just spoke of?

A. At the time of the application, they already had a signed agreement with Turkmentelecom for interconnection, Interconnection Agreement. They applied for the frequencies allocation, they had been allocated, by the way, and that was in line with the applicable legislation. Without at least one of them, the license wouldn't have been granted.[601]

483. Regarding the dependency of the license on the necessary framework, [redacted] stated in his testimony:

THE PRESIDENT: Now, my question to you is, the second licence was not under any condition; it was for three years' period. What was the basis of the cancellation of this licence, 10 months prior to the expiration? That is my question to you.

A. Mr President, the licence was not terminated or cancelled. It was valid until 28th July, if I remember correctly, 2018. 28th or 26th July. I may be wrong. It was never revoked. So they had a licence for three years.

The 2012 Agreement expired in September and without that agreement, MTS simply could not continue operating on the basis of just a licence, because the Interconnection Agreement, a Frequency Agreement and all of that is the basis for any licence, and this is why [redacted] knew and was asking for the agreement to be extended.[602]

484. The 2012 Agreement and the ancillary agreements provided the "technical base" and "technical means" that allowed MTS to obtain and to maintain a functional license. Once

[601] Hearing Transcript, Day 8, 185:25 – 186:13.
[602] Hearing Transcript, Day 8, 199:4 – 20.

these agreements expired, MTS-TM could not conduct the cellular communications services that were the subject of the communications license.

485. Hence, the license did not give the Claimant the right to continue operating beyond the expiry of the 2012 Agreement. Therefore, the residual term of the 2015 license until July 2018 did not grant the Claimant more rights than it had under the 2012 Agreement and the ancillary agreements. Again, the license alone was useless without these agreements. Thus, even if the residual term of the license had been unlawfully taken away by the Respondent, the value of it would have been worthless.

486. The Tribunal further finds that the "3+2+3+2" wording on the back of the 2012 license[603] does not lead to a different conclusion.[604]

487. The Tribunal notes that the Parties are in disagreement on whether the "3+2+3+2" wording on the back of the 2012 license gave the Claimant the right to a renewed operating license for an aggregate period of ten years.

488. In the Tribunal's view, even assuming that the "3+2+3+2" wording on the back of the 2012 license was a valid agreement that gave the Claimant the right or legitimate expectation to a renewed license with an aggregate term of ten years (quod non), this would not have given the Claimant the right or legitimate expectation to continue operating without the necessary framework, i.e., without the 2012 Agreement and without the ancillary agreements. Thus, in the Tribunal's view, it does not make a difference whether the Claimant's operating license had a residual term of 10 months or 5 years and 10 months:

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[603] License No. 1-20-21-40 granted to MTS-TM, 26 July 2012, Exhibit C-0010.

[604] According to the Claimant, the wording on the back of the 2012 license, which is in Turkmen language, has to be translated as follows (*See* Claimant's License Submission, 30 June 2022, ¶ 1): "This license was issued by the Ministry of Communications of Turkmenistan to be valid for a period of 3 years from the date of issue of the original and in accordance with the legislation of Turkmenistan shall be subsequently extended for 2, 3 and 2 years, not exceeding a total of 10 years".

According to the Respondent, the wording on the back of the 2012 license, which is in Turkmen language, has to be translated as follows (*See* Respondent's License Submission dated 30 June 2022, Annex 1, ¶ 3): "Note: This original copy of License was issued by the Ministry of Communications of Turkmenistan for a period of 3 years starting from the date of actual issuance and is to be extended according to the procedure set forth by the legislation of Turkmenistan consecutively for 2, 3 and 2 years, for a total period of no longer than 10 years".

A license alone without the necessary legal and technical framework was useless and did not give the Claimant the right or expectation to continue operating in Turkmenistan.

489. Furthermore, as both Parties agree, according to the "3+2+3+2" wording on the back of the 2012 license, any extension of the license would only be in accordance with the "legislation of Turkmenistan", which means that any renewal would be subject to a (renewed) examination of the requirements for granting a license. Therefore, irrespective of whether the "3+2+3+2" wording constitutes a binding agreement or not, any extension of the license was, even according to the wording on the back of the 2012 license, not a mere automatic formality, but rather was subject to Turkmen legislation and therefore subject to review of the licensing requirements, which could have ended with the refusal to grant or to renew the license.[605] And without the technical means to carry out its operations in Turkmenistan the Claimant had no right or expectation to a renewed or newly granted license.

490. Therefore, the license expired in July 2018 without any right or legitimate expectation to a renewal/extension thereafter.

491. Furthermore, even though, following the Tribunal's reasoning above, it is not decisive for the Tribunal's finding, the Tribunal notes that the "3+2+3+2" language did not constitute an agreement or even a guarantee to have a license with a ten-year-duration as argued by the Claimant. The maximum of ten years ("3+2+3+2") contemplated in the note on the back of the 2012 license was obviously to align the possible maximum duration of the license with the possible maximum duration of the 2012 Agreement, subject to the legislation of Turkmenistan, i.e., subject to a renewed application for a license and a renewed review of the licensing requirement. This, however, does not constitute an

[605] This is also explained by the Respondent's witness [redacted], who points out that in accordance with Turkmen legislation every renewal of the license would be subject to a renewed application and a renewed review of the licensing requirements: "First, the wording of the note itself explicitly refers to a 'prolongation as per legislation of Turkmenistan.' This confirms that each renewal of the license required the resubmission of an application and issuance of a renewed license in line with the relevant Turkmen laws. It follows that each application for renewal of a license had to be reviewed by the MOC, which verified, based on the submitted documents, the fulfillment of the licensing requirements and conditions. Provided these were not satisfied, the Licensing Committee was entitled to dismiss the application".

agreement or a "guarantee" to be provided with a license with an (aggregate) ten-year duration.

492. It is undisputed that, under Turkmen law, the maximum term of a license is three years and that an extension requires a review of all necessary requirements (e.g., necessary technical conditions). Hence, already from the outset, under these conditions there could not be any expectation or right of having a license granted "in perpetuity". In addition, as mentioned before, even a license "in perpetuity" would have been dependent on the necessary framework without which even an unlimited license would be useless.

(d) Conclusion on Primary Case

493. Therefore, the Tribunal finds that the Claimant's Primary Case fails.

494. The 2012 Agreement was valid and binding as a matter of Turkmen law. It was, moreover, the framework for MTS' operations in the telecommunications market in Turkmenistan; MTS-TM could not have operated in Turkmenistan solely pursuant to a license. The license could not have been extended without the 2012 Agreement being in force, so that MTS had no right that could have been expropriated by Turkmenistan at the time the 2012 Agreement expired.

495. Consequently, at the end of the 5-year-term there was no right of the Claimant that could have been taken/expropriated (Article 5(1) of the BIT) or otherwise be violated by the Respondent. In view of this finding, the Tribunal finds that there is no basis for assuming a violation of the further standards under the BIT, such as FET (Article 4(1)), FPS (Article 3(3)), All Necessary Approvals (Article 3(2)).

b. Alternative Case

496. Under its alternative case the Claimant argues that, even if the 2012 Agreement was a legal prerequisite for its operations in Turkmenistan, the Respondent breached the BIT by refusing to the extend the 2012 Agreement beyond September 2017 (i) in violation of the Claimant's legitimate expectation of a renewal of 2012 Agreement, and (ii) without any reasonable justification.

(a) The Respondent's refusal to extend the 2012 Agreement did not violate the Claimant's legitimate expectations

497. The Tribunal finds that the Respondent's refusal to extend the 2012 Agreement did not violate the Claimant's legitimate expectations. In fact, the Tribunal finds the Claimant had no right or legitimate expectation of renewal of the 2012 Agreement beyond its 5-year term.

498. The final version of the 2012 Agreement deals with duration and the possibility of renewal in Clause 18, which provides as follows:

> The term of this Agreement shall be for 5 (five) years from the Effective Date. Upon the expiration of the five-year term this Agreement may be extended for a further five-year term on the satisfaction of the following conditions:
>
> [...].[606]

499. In view of the clear and unambiguous language of Clause 18, the Tribunal finds that the 2012 Agreement only provides for a 5-year term without mandatory renewal. Witness testimony and contemporary documentation show that the Claimant understood that Turkmentelecom "was not obliged" to extend the 2012 Agreement.

500. One of the Claimant's witnesses, [redacted] acknowledged that the final version of the 2012 Agreement does not contain mandatory renewal language:

> Q. But in the end, the 2012 Agreement did not guarantee ten years of operations to MTS-TM; correct?
>
> A. If we are discussing this modal verb "shall be extended", then indeed the final draft reads differently.
>
> Q. Do you know how it reads, the final draft?

[606] 2012 Agreement, Exhibit C-0008, Clause 18.

A. If I'm not mistaken, it says "may be extended"; at least that's perhaps the meaning.[607]

501. MTS itself acknowledged that the Claimant had no right or legitimate expectation to renew the 2012 Agreement for a second 5-year term in 2017, and certainly not to continue operating in Turkmenistan in perpetuity, in an internal, contemporaneous document "On prolongation of an agreement on the terms of MTS activity on Turkmenistan market"[608] in June 2017:

> On 14 November 2016, pursuant to the terms of clause 18 of the Agreement (at least 6 months prior to its expiration) PJSC "MTS" sent a written request to STC "Turkmentelecom" with a proposal to extend the Agreement on the same terms for a 5-year term, as was envisaged by the Agreement. We hoped that the Agreement on the Terms of Activity would be extended due to the absence of MTS-Turkmenistan violations and open claims from state controlling bodies of Turkmenistan and STC "Turkmentelecom", although STC "Turkmentelecom" was not obliged to extend it.[609]

502. When questioned about this language at the Hearing, the Claimant's witness [redacted] confirmed that the renewal provision of Clause 18 of the 2012 Agreement does not contain mandatory language:

> [T]he agreement did not contain a provision on a mandatory extension by Turkmentelecom, and that's why we were waiting for an answer as to whether this was going to take place or not.[610]

503. [redacted] confirmed his above testimony when questioned by the President of the Tribunal about the same issue:

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[607] Hearing Transcript, Day 3, 34:15-22.
[608] MTS internal report on extension of the 2012 Agreement, 5 June 2017, Exhibit C-0458.
[609] MTS internal report on extension of the 2012 Agreement, 5 June 2017, p. 1 et seq. [of the PDF], Exhibit C-0458; for same language see also MTS internal report on extension of the 2012 Agreement, 27 September 2017, p. 1, et seq.[of the PDF], Exhibit C-0528.
[610] Hearing Transcript, Day 2, 174:2-6.

Q. [Y]ou also agreed that while there was hope that the agreement would be extended, STC Turkmentelecom was not obliged to extend it [...] you agreed with that?

A. The agreement did not have a strict legal obligation. It didn't have a clause that stated Turkmentelecom was obliged to extend the agreement for a further period of time, as far as I understand.[611]

504. The testimony of [redacted] also makes clear that the Claimant did not regard the extension of the 2012 Agreement as a mere formality:

Q. Okay. Let's look at another letter. If you could pull up tab 25, this is Exhibit C-18. It's a letter from the Ministry of Communications to MTS-TM, dated December 22nd 2016. I see you're there. If you look at the third paragraph, this says that: "... 'MTS-[TM]' has not been carrying out modernization works on existing communication [channels], has not introduced new communication services, the most advanced technologies for providing mobile coverage in populated areas of our country are not being introduced, the revenues received are systematically reduced, as well as the quality of cellular communication services in your network does not improve, for which reason the Ministry of Communication of Turkmenistan expresses its great dissatisfaction". Do you see that?

A. Yes, of course.

Q. After receiving these letters, did you still think that applying for the extension was only going to be a formality?

A. I said from the very beginning: we didn't believe that this application would be just a formality. Of course, this letter raised questions on our part. In our reply letter, which we already discussed, I commented on the complaints that the Ministry expressed in this letter.

[611] Hearing Transcript, Day 2, 181:19 – 182:2.

> Furthermore, after receiving this letter, we had a personal meeting with [redacted] and myself, meeting with the Minister to sum up the work of the company in 2016, and to discuss the plans for 2017.[612]

505. The Tribunal notes that the duration and renewal of the 2005 Agreement were already disputed issues between the Parties in the 2010 arbitrations. As a consequence and rather unsurprisingly, the duration and conditions for renewal of the 2012 Agreement were intensely negotiated between the Parties, as is demonstrated by the negotiation history. During these negotiations, the Claimant proposed a longer term of the 2012 Agreement (fifteen years plus an automatic extension for five years[613]), but the Respondent did not agree to a longer term.

506. In the contract negotiations for the 2012 Agreement, the Parties agreed on a 5-year term without a mandatory or automatic extension. Thus, the renewal term in Clause 18 of the 2012 Agreement only provides that the latter "may be extended" (for another 5 years) rather than e.g., "shall" be extended, as had been proposed in one of the Claimant's drafts of the 2012 Agreement.[614] All the Claimant could do was to seek the renewal of the agreement, which was entirely in the hands of the Respondent. In accordance with the terms of the 2012 Agreement, the Respondent was under no obligation to grant a renewal. Thus, the Claimant may have had a unilateral hope for renewal, but it did not have a legitimate expectation nor indeed a right to renewal.

507. When the 2012 Agreement was about to expire, the Claimant sought to extend this agreement for another five years, but this request was lawfully denied.

508. The Tribunal is convinced that MTS understood that Clause 18 provided Turkmentelecom full discretion regarding the extension or non-extension of the 2012 Agreement. Thus, the Claimant reported to the U.S. Securities and Exchange Commission that the 2012

[612] Hearing Transcript, Day 2, 168:15– 169:22.
[613] Draft 2012 Agreement by MTS, 19 August 2011, Clause 46, Exhibit R-0201.
[614] Draft 2012 Agreement by MTS, 17 November 2011, Clause 18, Exhibit R-0210.

Agreement has a five-year term and "could be extended for next five years provided certain terms and conditions are satisfied":

> As a result of negotiations with the Turkmenistan government and ministries on May 24, 2012 MTS and state-owned telecom operator Turkmentelekom, acting in accordance with a decree issued by the President of Turkmenistan, signed the agreement regarding our terms of operations in Turkmenistan (the "Agreement"). The Agreement has five year term and could be extended for next five years provided certain terms and conditions are satisfied. Under this Agreement MTS-Turkmenistan will pay Turkmentelekom monthly an amount calculated as [redacted] in Turkmenistan based on accounting rules of Turkmenistan.[615]

509. Thereby the Claimant made it clear that there was no automatic right to renewal and that the Claimant had no right to continue operating in Turkmenistan after the expiry of the 2012 Agreement's 5-year term unless the said Agreement was renewed.

510. In light of the fact that the Claimant had no right to or legitimate expectation of a renewal of the 2012 Agreement and given that the Respondent had full discretion to renew or not to renew the 2012 Agreement, the Tribunal has no need to review the reasons given by the Respondent for its decision not to renew the 2012 Agreement. The Respondent's witness [redacted] testified at the Hearing about the reasons for the non-renewal of the 2012 Agreement, including the need to develop the telephone and cellular communication in rural areas,[616] the lack of new technology[617] and the lack of a development plan.[618] [redacted] testified at the Hearing that the profit payments under the 2012 Agreement had declined and failed to meet expectations.[619] To the extent it may be relevant, therefore, the Respondent's decision not to renew the 2012 Agreement cannot be regarded as lacking any reasons. As to the reasons invoked by the Respondent, the Tribunal finds that they are not arbitrary, particularly in the light of the Tribunal's finding that the Respondent did not discriminate against MTS in the period 2012-2017 and that MTS failed

[615] MTS 2012 US SEC Form 20-F, p. 51, Exhibit A&M-0014.
[616] Hearing Transcript, Day 8, 117:18-22.
[617] Hearing Transcript, Day 8, 116:13-25.
[618] Hearing Transcript, Day 8, 123:1-5.
[619] Hearing Transcript, Day 7, 132:16-24.

to discharge its burden of proof in relation to the allegation that it was unable to develop its network in Turkmenistan in that period as planned due to the Respondent's discrimination.

(b) The Claimant's contemporaneous business plan was designed to

511. That the Claimant was fully aware that the 2012 Agreement had a 5-year term without a right to or a legitimate expectation of an automatic renewal is further confirmed by the Claimant's business plan for its operations in Turkmenistan,

512. The Claimant's business plan shows that the Claimant understood that it only had a 5-year term for its operations in Turkmenistan, in line with the term of the 2012 Agreement, and that the Claimant did not believe that it had a right or a legitimate expectation to continue operating after the expiry of the 2012 Agreement. Thus,

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513. Thus, the first budget that the Claimant developed was reported in a Presentation on the Status of Business Development in Turkmenistan from November 2012. In that presentation, the Claimant's financial strategy was described as follows:

620 MTS Presentation on Status of Business Development in Turkmenistan, 26 November 2012, p. 4, Exhibit C-0142;

621 MTS Presentation on Status of Business Development in Turkmenistan, 26 November 2012, p. 4, Exhibit C-0142.

[redacted]

514. The Claimant's business plan meant a [redacted]

515. This is confirmed by the Claimant's witness [redacted][625]

516. The Tribunal notes that, at the time that the November 2012 and December 2012 budgets and business plans were being developed, none of the allegedly wrongful measures had taken place. Thus, these business plans constitute clear evidence of the Claimant's investment strategy and financial objectives, "untainted" by the Respondent's allegedly wrongful conduct. In addition, these business plans were made after experiencing a "successful" restart of MTS-TM's operations in September 2012. This was confirmed by [redacted] who testified that:

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[622] MTS Presentation on Status of Business Development in Turkmenistan, 26 November 2012, p. 5 Exhibit C-0142.
[623] MTS Presentation on Status of Business Development in Turkmenistan, 26 November 2012, p. 5 Exhibit C-0142.
[624] Materials for MTS Board Meeting on 19 December 2012, Presentation on the Status of Business Development in Turkmenistan and Uzbekistan in 2012, p. 11, Exhibit C-0476.
[625] [redacted]

> [...] both presentations that were made in November and December 2012 were given two to three months following a successful launch [...] [MTS had] very good expectations in terms of the business further on.[626]

517. [redacted] further explained that the November and December 2012 business plans reflected the positive business environment MTS-TM found when it returned to the Turkmen market:

> In November/December 2012, we had quite positive dynamics in the performance indicators. And based on those positive dynamics, we built our forecasts regarding future and expected development of the company.[627]

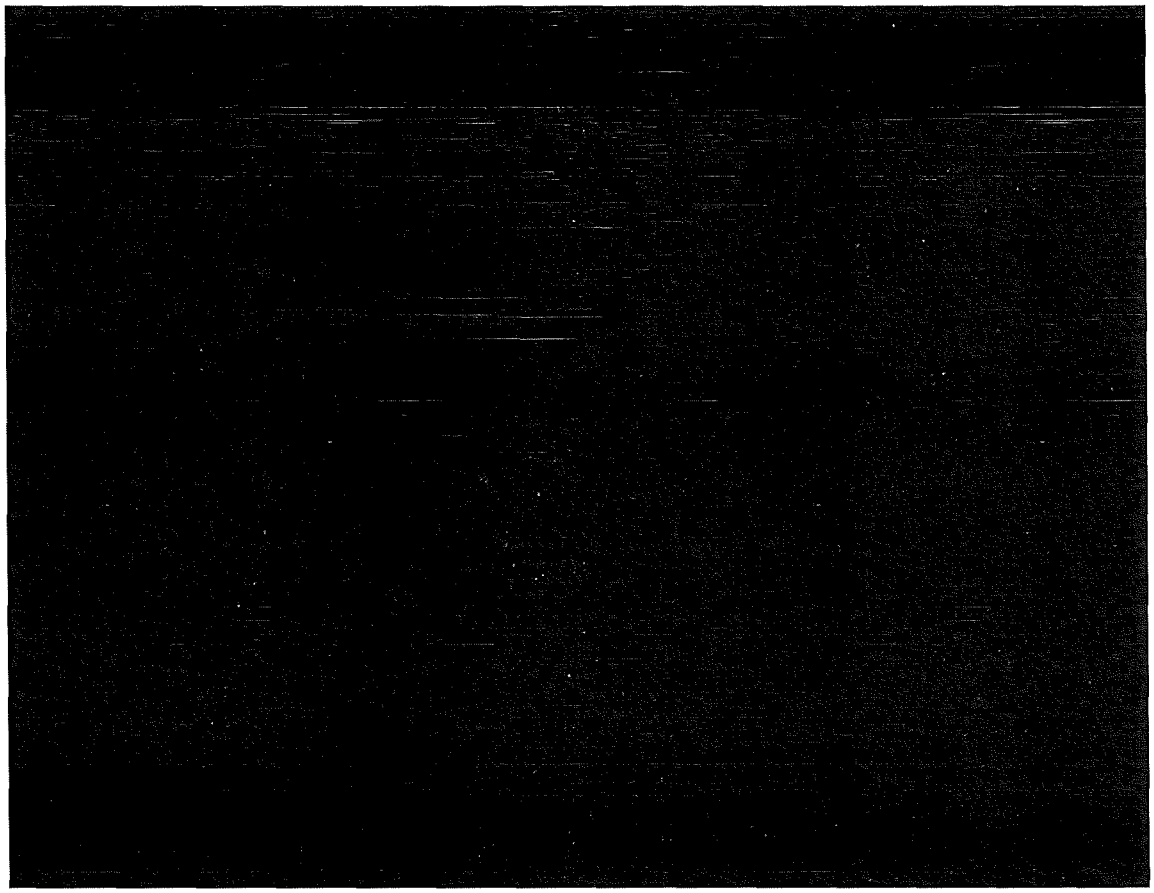
518. In a similar vein, [redacted] agreed with a statement by [redacted] according to which MTS experienced a successful re-entry into the Turkmen market in September 2012 with favourable conditions throughout the following year:

> Q. Are you aware that [redacted] said in his second witness statement (paragraph 28) that: "The period from September 2012 to the end of 2013 had ... been relatively successful for MTS-TM"? [...]
>
> A. I don't know what he said exactly, but I agree with his assessment.[628]

519. In this positive environment, [redacted]

520. [redacted]

[626] Hearing Transcript, Day 2, 109:24 – 110:4.
[627] Hearing Transcript, Day 2, 111:1– 5.
[628] Hearing Transcript, Day 4, 66:20-26.

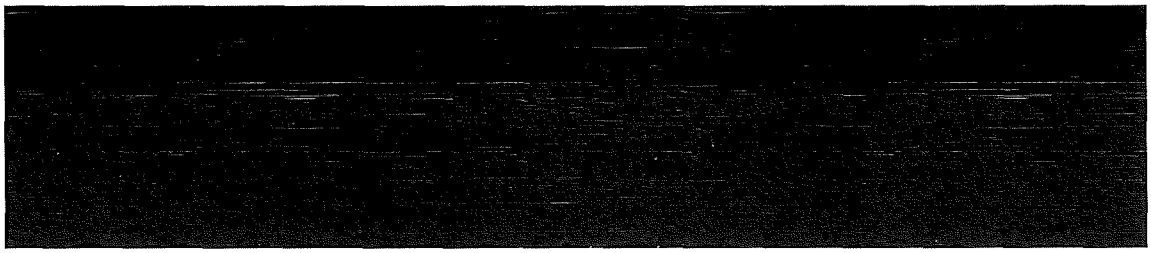


521. As the Claimant's expert, Ms. Hardin, explained in her testimony during the Hearing, there is a critical and direct connection between the amount of CAPEX a company is willing to invest and the revenue and profits it can expect to generate from that investment:

> My next slide deals with CAPEX, capital expenditures, and these are investments that a company makes in long-term assets. And capital expenditures are important because they represent the company's ability to generate profits and to grow in the future. On the other side, they reduce cash that is available for distribution to shareholders, so there's always a balancing act [...].[630]

522. According to Ms. Hardin's calculations, the Claimant [redacted]

[629] Hearing Transcript, Day 3, 129:26 – 131:3.
[630] Hearing Transcript, Day 5, 20:10-17.
[631] MTS Actual Financial Statements, pp. 70, 92, 115, 137, 154, 159, 160, Exhibit A&M-79.



523. Therefore, the Tribunal is convinced that the Claimant made a deliberate business decision, implemented over the years of the five-year operation in Turkmenistan, [redacted] [633]

524. In sum, [redacted] This clearly confirms the Tribunal's view that the Claimant understood that its operations in Turkmenistan depended on the 2012 Agreement and that it had no right or legitimate expectation of renewal of that contract.

(c) Relevance of communication license

525. Furthermore, the Tribunal finds that the license did not give the Claimant a right or legitimate expectation of renewal of the 2012 Agreement either.

526. Under its Alternative Case the Claimant argues, based on the – correct – assumption that its operation in Turkmenistan was conditioned upon the 2012 Agreement, that the non-renewal of the 2012 Agreement breached the Claimant's legitimate expectations.

527. As found by the Tribunal above,[634] the 2012 Agreement was the framework under which the Claimant operated in Turkmenistan. The license alone without that framework and without the technical means to operate in Turkmenistan was not sufficient for the Claimant

[632] MTS 2012 Financial worldwide, p. 6, Exhibit R-0213.
[633] MTS Actual Financial Statements, pp. 70, 91, 114, 137, 154, 159, 160, Exhibit A&M-79.
[634] *See* above Section VII.B.(2) a.(b).

to operate in Turkmenistan and did not give the Claimant any right or expectation to continue operating in Turkmenistan.[635]

(d) Refusal to renew the 2012 Agreement not without justification

528. Insofar as the Claimant complains that the Respondent has rejected the Claimant's request for a renewal of the 2012 Agreement without any reasonable justification, the Tribunal finds that the Claimant's lack of any right to a renewal of the 2012 Agreement was sufficient for the Respondent to deny the Claimant's application for a renewal. Hence, as already stated above,[636] the Tribunal is not convinced that the Respondent had to justify its decision not to renew the 2012 Agreement. Nevertheless, to the extent it may be relevant, the Tribunal is not convinced that the reasons given by the Respondent (insufficient payments by MTS and insufficient investments into the telecommunications infrastructure) are not sufficient for the Respondent's decision not to renew the 2012 Agreement. As already stated above, the Tribunal also finds that the reasons invoked by the Respondent are not arbitrary. [637]

(e) Conclusion on Alternative Case

529. The Claimant had no right or legitimate expectation of renewal of the 2012 Agreement. The Claimant only had a right of limited duration under the 2012 Agreement that expired at the end of the five-year term of the 2012 Agreement.

530. Given that the Claimant had no legitimate expectation of renewal of the 2012 Agreement as the framework of its operation in Turkmenistan, there was no vested legal right capable of being expropriated after the expiration of the 2012 Agreement.

531. As a consequence, the Claimant's Alternative Case Claim fails.

532. In sum, the Claimant's 2017 Shutdown Claims fail in their entirety and must be denied.

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[635] *See* above Section VII.B.(2) a.(c).
[636] *See* paragraph 510 above.
[637] *See* paragraph 510 above.

C. THE CLAIMANT'S HISTORICAL BREACHES CLAIMS

533. Under its "Historical Breaches Claims", the Claimant complains of eleven allegedly unlawful measures imposed by Turkmenistan during the five-year term (2012 – 2017) of the 2012 Agreement which are alleged to have adversely interfered with the Claimant's operations. [638]

(1) Profit Charge / Profit-Sharing Claim

534. Under this claim, the Claimant argues that the "imposition of the profit charge" contained in Clause 1 of the 2012 Agreement was unlawful, unfair, arbitrary and discriminatory.

a. The Claimant's Position

535. The Claimant argues that the Respondent, under the 2012 Agreement, imposed a profit charge on MTS-TM between 2012–2017 without any lawful basis which constitutes a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), and (iii) the FPS standard (Article 3(3) BIT).[639]

536. The Claimant takes the view that "[t]he imposition of the Profit Charge on MTS-TM breached the FET standard because it was unfair, arbitrary, unlawful and discriminatory". The Claimant argues that there was no basis under Turkmen law for requiring MTS-TM to pay [redacted] to Turkmentelecom as a condition of its operations, which in itself renders the imposition of the profit charge unfair, arbitrary and unlawful.[640]

537. The Claimant submits that the Respondent's argument that the profit charge derived its validity from the parties' agreement, ignores the fact that MTS did not voluntarily give up [redacted] to Turkmentelecom. The profit charge was not "freely negotiated" in the exercise of the parties' freedom of contract. It was an arbitrary and extra-legal requirement imposed by the Respondent as a conditio sine qua non. The Claimant was given no choice

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[638] The Claimant's list of "five key unlawful measures" (Claimant's PHB I, Annex 1) does not include several claims (relating to sale of handsets, VPN, Interconnections with Altyn Asyr, tariff-setting, conversion). In its Sur Reply, p. 1, the Claimant states that it has not dropped these claims. Hence, they are included in the analysis.
[639] Cl. PHB, ¶ 38.
[640] Cl. PHB, ¶ 38.

but to accept the profit charge if it wished to operate in Turkmenistan. When the Claimant refused to submit to the Respondent's demands for a higher profit charge in 2010 and 2017, its operations were shut down each time.[641]

538. The Claimant also takes the view that the imposition of the profit charge on MTS-TM was unlawful (and thus in further violation of the FET standard) because it violated the Respondent's legal obligations under the BIT, its Constitution, and its domestic law.[642]

539. In its Reply PHB, the Claimant submits that, for the avoidance of doubt, the Claimant does not assert that the 2012 Agreement was an "illegal" contract in the sense that it was procured by some unlawful means. However, the Claimant argues that the Respondent has no answer for how its imposition of the profit-sharing obligation on MTS as a condition of its operations in Turkmenistan did not breach its own legal obligations under the BIT, the Turkmen Constitution, and the Turkmen Law on Foreign Investments.[643]

540. The Claimant submits that Article 3(1) of the BIT requires Turkmenistan to admit foreign investments "in accordance with its legislation". The Claimant argues that Turkmen legislation does not establish a profit-sharing requirement as a condition of admission. On the contrary, Article 21(2) of the Turkmen Law on Foreign Investments specifically guarantees that "[f]oreign investors [...] may, after payment of taxes and other obligatory charges provided for by the laws of Turkmenistan, freely use their income and profits in the territory of Turkmenistan".[644]

541. The Claimant takes the view that Article 135 of the Turkmen Constitution further prohibits the imposition of any taxes, fees or other mandatory payments to the Turkmen Government that are not "determined by law". The Claimant submits that, while the Respondent has argued that the profit charge was not a payment to the Turkmen Government, this is

[641] Cl. PHB, ¶ 38.
[642] Cl. PHB, ¶ 38.
[643] Cl. Reply PHB, ¶ 11.
[644] Cl. PHB, ¶ 38, quoting Turkmen Law on Foreign Investments, 3 March 2008, Article 21(2), Exhibit C-0060.

unsustainable given that Turkmentelecom (as the recipient of the profit charge) forms part of the Ministry of Communications.[645]

542. As regards the Respondent's argument that the Claimant cannot complain about the imposition of the profit charge because it agreed to it, the Claimant replies that this argument is flawed, both factually and legally. The Claimant submits that it is common ground that MTS was given no choice but to accept the imposition of the profit charge if it wished to return to the Turkmen market and [redacted] The Respondent's counsel openly admitted at the Hearing that MTS would have been unable to "resume activities in Turkmenistan" unless it entered into the 2012 Agreement, and that the only "alternative to signing the 2012 Agreement and resuming operations" was "[p]ursuing its litigation". The Claimant takes the view that legally the elements of estoppel under international law are plainly not met in the present case, and there is no precedent, commentary or academic writing indicating that an investor can be estopped from asserting a State's violation of its legal obligations under a BIT in any event.[646]

543. With regards to the Respondent's argument that if the profit-sharing obligation was unlawful, that would also mean that MTS is not entitled to invoke the benefits of the Russia-Turkmenistan BIT because its investment was illegal, the Claimant submits that an investor is not deprived of the protection of a BIT because the State has acted unlawfully. According to the Claimant that would completely undermine the purpose of the BIT. The relevant legal obligations that were breached by the imposition of the profit-sharing requirement on the Claimant are Turkmenistan's obligations – i.e., to admit investments in accordance with its legislation, not to impose taxes and other mandatory payments to the Government without legal basis, and to protect foreign investors' right to freely use their after-tax profits. The Claimant cannot be held responsible for Turkmenistan's breaches of its legal obligations towards the Claimant.[647]

544. The Claimant maintains that the profit charge was also discriminatory (and thus in further violation of the FET standard) because it was imposed on foreign-owned MTS-TM as a

[645] Cl. PHB, ¶ 38.
[646] Cl. Reply PHB, ¶ 13.
[647] Cl. Reply PHB, ¶ 12.

condition of its operations but not on domestic operator Altyn Asyr. The Claimant asserts that the Law on Communications and the Law on Licensing both require Turkmenistan to apply the same terms and conditions to foreign operators as to domestic operators.[648] The Claimant argues that the Respondent's claim that the profit charge was not discriminatory because Altyn Asyr also made annual payments to Turkmentelecom by way of dividends is an effective admission that the profit charge was imposed on MTS-TM because, as a foreign-owned company, the Respondent could not lawfully extract a share of its post-tax profits as it could from Altyn Asyr. MTS-TM made distributions of dividends to its own shareholder, MTS, but the amount available for it to distribute was reduced as a result of having to pay [redacted] to Turkmentelecom. The lack of equivalence between a voluntary distribution of dividends and a mandatory profit tax is in the Claimant's view highlighted by the fact that Altyn Asyr chose to distribute as little as [redacted] to Turkmentelecom in some years, while MTS-TM had no choice but to hand over [redacted] to Turkmentelecom year after year. Altyn Asyr was thus able to retain significantly more of its own earnings – [redacted] in some years – to invest in its network or to spend on other purposes.[649]

545. The Claimant argues that the Respondent's argument that "all of [Altyn Asyr's] profits belonged to the state [...] 100%" is a reversal of the Respondent's previous position that Altyn Asyr is a financially independent company whose "profits remain at its disposal".[650] According to the Claimant, Altyn Asyr elected to distribute only part of its profits to its shareholders by way of dividends (as little as [redacted] in some years), deferred the payment of dividends until later years, and was free to spend the rest on other projects (golf courses, amusement parks, etc.), while MTS-TM was given no choice but to hand over a mandatory [redacted] to the State every year.[651]

546. The Claimant further argues that the imposition of the profit charge on MTS-TM breached the NT standard because, owing to the profit charge, the Respondent treated MTS-TM and Altyn Asyr differently without any reasonable justification. The Respondent has argued

[648] Cl. PHB, ¶ 38, referring to Law on Communications, Exhibit C-0073; Law on Licensing, Exhibit C-0064.
[649] Cl. PHB, ¶ 38.
[650] Cl. Sur-Reply PHB, ¶ 19.
[651] Cl. Sur-Reply PHB, p. 1.

that MTS-TM and Altyn Asyr were not in "like circumstances" for the purposes of the NT standard because Altyn Asyr is State-owned and had a "social focus of activities", whereas MTS' operations were "solely profit motivated". The Claimant submits that this argument is illogical. MTS-TM and Altyn Asyr were direct (and exclusive) competitors. Altyn Asyr did not operate altruistically, as the Respondent suggests. [redacted] admitted that the Ministry of Communications set data channel tariffs in order to ensure that Altyn Asyr and Turkmentelecom met their planned income targets, which form part of the State budget.[652]

547. According to the Claimant, the fact that MTS-TM was a foreign-owned commercial operator and Altyn Asyr a domestic State-owned operator is precisely why their differential treatment violates the NT standard. That Altyn Asyr operated under certain (vaguely defined) social development goals cannot explain why MTS-TM alone was subject to an [redacted][653]

548. As regards causation and damages, the Claimant alleges that the loss caused to MTS by the Respondent's unlawful imposition of the profit charge is clear, as MTS-TM should never have been forced to pay [redacted] to Turkmentelecom without any legal basis and in violation of both the BIT and Turkmenistan's domestic laws and Constitution.[654]

549. The Claimant argues that it paid around [redacted] to Turkmentelecom pursuant to the profit charge between 2012 and 2017. In the counterfactual world, the causative impact of the profit charge (and thus the share of damages attributable to this measure) becomes much greater as MTS becomes more profitable (through the removal of the other unlawful measures).[655]

[652] Cl. PHB, ¶ 38.
[653] Cl. PHB, ¶ 38.
[654] Cl. PHB, ¶ 38.
[655] Cl. PHB, ¶ 39.

b. The Respondent's Position

550. The Respondent characterises MTS' allegation that the profit-sharing terms of the 2012 Agreement were illegal and constituted a violation of Articles 4(1), 4(2) and 3(3) of the BIT as frivolous and absurd.[656]

551. The Respondent submits that MTS had always operated in Turkmenistan under contracts that had profit-sharing terms. According to the Respondent, this was true in the contract that it acquired in 2005 from its predecessor, BCTI, in a private commercial transaction of which Turkmenistan was not aware until after MTS and BCTI had negotiated, executed, and publicly announced the deal. BCTI was the first cellular communications provider ever to operate in Turkmenistan, and its contract, entered into in 1994, required it to pay [redacted] of profits from its operations in Turkmenistan to the Government. MTS purchased BCTI's rights and obligations under that contract, including the profit-sharing terms.[657] The Respondent emphasizes that in the same year, 2005, MTS entered into its own contract with Turkmenistan, on terms reducing the profit-sharing payment to [redacted]. The lawyer retained by the Claimant at the time the Claimant entered the Turkmenistan market in 2005, and its witness in this arbitration, Mr. [redacted] counseled MTS during the 2005 transactions. At the Hearing, questioned as to whether the profit-sharing terms in either BCTI's 1994 Agreement or MTS' 2005 Agreement were illegal, [redacted] replied that this was certainly not the case.[658] [redacted] did not recall any discussions or material concern that by signing the agreement in 2005, MTS or the MoC, the Turkmen parties on the other side, were doing something that was in violation of their own law. [redacted] confirmed that MTS made a "commercial" decision to enter into the 2005 Agreement, after considering various inputs, including the profit-share percentages, and a possible joint venture with Turkmenistan.[659]

552. The Respondent submits that [redacted] testified that both [redacted] and the Claimant understood that the absence of a specific law requiring profit-sharing did not

[656] Resp. PHB, ¶ 70.
[657] Resp. PHB, ¶ 71.
[658] Resp. PHB, ¶ 72; Resp. Reply PHB, ¶ 16.
[659] Resp. PHB, ¶ 72.

make the profit-sharing terms of its contract illegal. The Respondent states that [redacted] was clear in his testimony that the Claimant would not have proceeded with the purchase of BCTI "if there was material illegality involved in the investment" and that [redacted] also confirmed that the Claimant consulted Turkmen counsel in the course of its analysis and drafting of the 2005 Agreement.[660]

553. The Respondent asserts that the Claimant admits that the profit-sharing terms agreed in the 2012 Agreement, under which MTS-TM would pay [redacted] to Turkmentelecom, were a continuation of the same terms under which MTS had operated under the 2005 Agreement during the period 2005-2010. The Respondent adds that, at the time that it decided to enter into the 2012 Agreement, the Claimant was advised by another international law firm, [redacted] which represented it in the multiple arbitrations that the Claimant brought against Turkmenistan after the 2005 Agreement was not renewed and in the negotiations for the terms and conditions of its resumption of operations in Turkmenistan.[661]

554. The Respondent emphasizes that, contrary to the Claimant's contention, there can be no argument that MTS was coerced into agreeing to the profit-sharing terms of the 2012 Agreement. If anything, the Respondent says, it was the Claimant that was using the arbitrations brought against the Respondent after the expiry of the 2005 Agreement as leverage against the Respondent to lead the Respondent to initiate negotiations for its re-entry. The Claimant itself had demanded to renew the 2005 Agreement in 2010 on the same terms, including profit-sharing, and it again demanded to renew the 2012 Agreement in 2017 on the same terms, including profit-sharing. The Respondent submits that there is no evidence that the Claimant ever previously suggested or complained that the profit-sharing terms were illegal. If that were the case, that would mean that all of the Claimant's operations in Turkmenistan from the beginning of its entry into the market in 2005-2010, and again from 2012-2017, were conducted under "illegal" contracts. That would also

[660] Resp. Reply PHB, ¶ 18.
[661] Resp. PHB, ¶ 73.

mean that MTS is not entitled to invoke the benefits of the Russia-Turkmenistan BIT, because its investment would have been illegal ab initio.[662]

555. The Respondent submits that, at the Hearing, MTS' witness, [redacted], confirmed that when MTS' Board of Directors approved the 2012 Agreement and the return to the Turkmen market, "MTS did not disclose its belief that the 2012 Agreement or the profit-sharing arrangement therein were illegal or the result of unlawful correction" to any of its shareholders or in its disclosures to the U.S. Securities and Exchange Commission. This is consistent with [redacted] recollection, as he confirmed that, in his experience with MTS, its public disclosures under the U.S. securities laws were always "true and complete". The Respondent contends, in summary, that the Claimant's allegation that the profit-sharing terms were unlawful or coerced has always been an absurd, counterfactual claim that is entirely without merit.[663]

556. The Respondent further submits that the Claimant's allegations that the profit charge was discriminatory because Altyn Asyr did not have a profit-sharing agreement is meritless, as the Claimant's own counsel acknowledged that all of Altyn Asyr's profits belonged to the State.[664] The Respondent contends that the Claimant has never disputed that it was fully aware of the structure of Altyn Asyr's ownership and the differences with respect to profit-sharing when it made the informed decision – after 10 months of negotiation – to return to the Turkmen market in 2012.[665] The Respondent adds that, although Altyn Asyr is a separate legal entity, the State is its ultimate shareholder (with Turkmentelecom, also a State-owned entity), and the State is entitled to distribution of Altyn Asyr's profits as it may direct, and that Altyn Asyr paid profits as dividends to its shareholders, Turkmentelecom and the Ministry of Communications.[666]

557. In the Respondent's view the Claimant's argument is based on the absurd premise that an investor may enter into a contract forming the basis for its investment in a host State, with full knowledge and understanding of the terms and conditions under which it would

[662] Resp. PHB, ¶ 74.
[663] Resp. PHB, ¶ 75.
[664] Resp. Reply PHB, ¶ 19.
[665] Resp. Reply PHB, ¶ 19; Resp. Sur-Reply PHB, ¶ 9.
[666] Resp. Sur-Reply PHB, ¶ 9.

operate, proceed to operate under those agreed conditions for the entire term of the contract, and then later claim that the contract was illegal and violated its rights from the beginning.[667]

558. As to quantum/damages, the Respondent submits that the Claimant's experts, Ms. Hardin and Mr. Thomas, failed to provide a credible quantification of this alleged wrongful conduct. All of Ms. Hardin's models simply assume liability on all of the measures complained of by MTS. Ms. Hardin only quantifies the effect of profit-sharing in the "but for" world, where cash flows are calculated on the basis of counter-factual assumptions, such as a [redacted] and other corrections for other wrongful acts. Mr. Thomas' model is likewise unreliable. He acknowledged that his and Ms. Hardin's calculation of the effect of profit-sharing were incompatible, and that an accurate model would require "harmonis[ation]" so that his calculations "are more appropriately attached to the final version of the measures". The Respondent argues that the Claimant has failed to offer a damages figure for the actual effect of the profit-sharing terms under real world circumstances and that accordingly, also for this reason, no damages can be awarded.[668]

c. The Tribunal's Analysis

559. It is the Claimant's case that the "imposition of the profit charge" contained in Clause 1 of the 2012 Agreement was unlawful, unfair, arbitrary and discriminatory.

560. The Tribunal has already found, in the context of the Claimant's Shutdown Claims, that the profit charge/profit-sharing under Clause 1 of the 2012 Agreement was not unlawful.[669]

561. The Claimant's Profit Charge Claim is denied.

562. Clause 1 of the 2012 Agreement was freely negotiated between the Claimant and Turkmentelecom and it was for the parties to decide if and under which terms they wanted to enter into an agreement. The sharing of profits was neither unfair nor arbitrary. Furthermore, as already stated, it is an almost global standard practice that States charge

[667] Resp. Reply PHB, ¶ 20.
[668] Resp. PHB, ¶ 76.
[669] *See* Section VII.B.(2) above.

companies for the opportunity to participate in the State's telecommunications market. Profit-sharing is not uncommon in the telecommunications sector.[670]

563. The Tribunal is not convinced by the Claimant's argument that freely negotiated contractual terms like Clause 1 of the 2012 Agreement cannot be lawful unless they are specifically mentioned or required by legislation. In the Tribunal's view, parties to a commercial agreement are in principle free to agree to whatever commercial terms they want, such as Clause 1, including profit-sharing, unless a term is contrary to a legal prohibition (which was not the case here). This is what MTS and Turkmentelecom did by negotiating and concluding the 2012 Agreement.

564. Moreover, the Tribunal does not share the Claimant's view that the profit charge was discriminatory because Altyn Asyr did not operate under a profit-sharing agreement as contained in Clause 1 of the 2012 Agreement.[671] The Tribunal finds that Altyn Asyr, as a wholly State-owned company, and MTS-TM, as a privately-owned company, were not similarly situated and that the Claimant's discrimination argument fails. More particularly, all of the [redacted] (and not just a [redacted] thereof) of a wholly State-owned business like Altyn Asyr belong, in principle, to the State.[672] Therefore, the Tribunal does not find that the profit-sharing provision of the 2012 Agreement was discriminatory.

565. In addition, the Tribunal finds that the Claimant is estopped from relying on the alleged unlawfulness of the 2012 Agreement. The Claimant, with the support of counsel, freely negotiated and agreed to the 2012 Agreement (including profit-sharing) while aware of Altyn Asyr's existing ownership structure, which has not changed since Claimant's return to the Turkmen market in 2012. The Claimant then performed the 2012 Agreement and, at the end of the contract's term, requested the renewal of the 2012 Agreement (including profit-sharing). The Claimant therefore acts in a contradictory manner contrary to good

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[670] *See* Section VII.B.(2) a. above; *see* also Dippon Report, ¶¶ 74, et seq.
[671] *See* Section VII.B.(2) a. above.
[672] The Tribunal notes that, in the context of attribution, the Claimant itself has argued, relying on the witness statement of [redacted], that Altyn Asyr has no independent budget or funding, that it must be assumed that its finances are comingled with those of the State and that Altyn Asyr's revenues are transferred to the State budget, [redacted]

faith (*venire contra factum proprium*) if the Claimant now contends that the same 2012 Agreement was unlawful as well as unfair, arbitrary and discriminatory.

566. In sum, the Claimant's Profit Charge Claim fails. The profit charge agreed between the contracting parties is neither unlawful nor unfair, arbitrary or discriminatory. As a consequence, the Tribunal finds no breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), or (iii) the FPS standard (Article 3(3) BIT) in connection with that charge.

(2) Data Channel Capacity Claim

567. Under the Data Channel Capacity Claim, the Claimant argues that it received insufficient data channel capacity to conduct its business due to the Respondent's refusal to provide adequate data channel capacity. More particularly, the Claimant argues that Turkmentelecom, when allocating external data channel capacity, gave much greater capacity to Altyn Asyr than to MTS, which in the Claimant's view was unfair, arbitrary and discriminatory.

a. The Claimant's Position

568. The Claimant argues that the Respondent's allocation of external data channel capacity between MTS-TM and Altyn Asyr constitutes a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), (iii) the "all necessary approvals" standard (Article 3(2) BIT), and (iv) the FPS standard (Article 3(3) BIT).[673]

569. The Claimant takes the view that the Respondent's allocation of external data channel capacity breached the FET standard because it was unfair, arbitrary, non-transparent and discriminatory. The Claimant submits that Turkmentelecom, exercising a monopoly power over the distribution of external data channel capacity in Turkmenistan, consistently gave much greater capacity to its own operator Altyn Asyr (by a factor of up to at least six times), despite MTS-TM's countless pleas for access to more capacity.[674]

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[673] Cl. PHB, ¶ 40.
[674] Cl. PHB, ¶ 40.

570. The Claimant complains that Turkmentelecom had excess capacity at times that it did not allocate, but that every time Turkmenistan obtained additional external data capacity it gave vastly more to Altyn Asyr than to MTS-TM. The Respondent's argument that it allocated external data capacity according to the two operators' respective needs is incorrect, the Claimant says, because Turkmentelecom never requested any information from MTS-TM or Altyn Asyr (such as current and projected active subscriber numbers, average per-user data consumption, etc.) that it would have required to properly assess the operators' respective data capacity needs. In reality, the only information Turkmentelecom had concerning MTS-TM's needs was its countless pleas for access to greater data capacity, both oral and written – the vast majority of which Turkmentelecom simply ignored. When MTS-TM was finally given access to [redacted] its data traffic grew by [redacted] evidencing the strong pent-up demand for data usage from its subscribers. When MTS-TM was given access to [redacted], its per-user data consumption quickly rose again.[675]

571. The Claimant refers to the Respondent's argument that the Claimant's witnesses tried to create an entirely new and fictitious narrative based on undocumented oral requests for additional external data channel capacity. [redacted] and was told that while the Respondent was "unable to give us this capacity for internet connection, [...] by the first quarter of 2013, we would be able to receive the channels that we had asked for" once they had "revamp[ed] and modernise[d] their servers". That is why MTS wrote to Turkmentelecom in March and April 2013 requesting [redacted][676]

572. As regards the Respondent's argument that it had no spare data channel capacity because [redacted] was allocated in 2016 to the Ashgabat Telephone Network for provision of broadband services, the Claimant replies that, even if true (the Claimant notes that this is not stated anywhere in Exhibit CD-0082), the previously undisclosed allocation of [redacted] to the ATN cannot explain similar irregularities in Exhibit CD-0082 for the years

[675] Cl. PHB, ¶ 40.
[676] Cl. Sur-Reply PHB, p. 2.

2013, 2014 and 2015 (the Claimant submits that [redacted] admitted in cross-examination that if the figures in Exhibit CD-0082 were correct, they would show that the Respondent did in fact have spare capacity).[677]

573. Regarding the Respondent's argument that MTS-TM had received sufficient data channel capacity by 2016 (on the basis that MTS' [redacted][678]

574. The Claimant contends that it was impossible for Turkmentelecom to have allocated external data channel capacity fairly, because it never asked MTS-TM about its present or future data capacity requirements. In response to the Respondent's rebuttal that the Ministry of Communications had the capability to monitor each providers' utilization in real time, the Claimant asserts that there is no evidence that the Ministry had the capability to (or actually did) monitor MTS-TM and Altyn Asyr's data requirements in "real time".[679]

575. The Claimant submits that MTS-TM did not deserve less data capacity because its data traffic was low; according to the Claimant its data traffic was low because it needed more capacity. In the Claimant's view the Respondent's refusal to provide MTS-TM with sufficient external data channel capacity was also unfair and discriminatory because it prevented MTS-TM from expanding its 3G network to all regions of Turkmenistan, as it was aiming to do as early as mid-2013, and prevented it from launching a 4G network entirely. [redacted] confirmed in cross-examination that anything less than [redacted] of external data channel capacity (i.e., [redacted], just over six months before the shutdown) "wouldn't be enough" to operate

[677] Cl. Sur-Reply PHB, p. 2.
[678] Cl. Sur-Reply PHB, p. 2.
[679] Cl. Sur-Reply PHB, p. 2.

a nationwide 3G network in Turkmenistan, let alone to consider launching a 4G network.[680] As far as the Respondent states that Mr. Thomas acknowledged an "obvious flaw" in assuming a 1:1 data capacity allocation between MTS-TM and Altyn Asyr, as this would result in MTS-TM's network being better resourced than Altyn Asyr's, the Claimant argues that Mr. Thomas said only this was "possible". The Claimant adds that in the "but-for" world, it is likely Altyn Asyr's network would have carried less data traffic due to increased competition from MTS-TM.[681]

576. In the Claimant's opinion, the Respondent's argument that Altyn Asyr had more active data subscribers than MTS-TM, and had more data traffic on its network than MTS-TM and therefore deserved more channel capacity, inherently treats MTS-TM unfairly, because it penalises MTS-TM for starting from a lower base than Altyn Asyr in 2012.[682] In other words, allocating capacity according to operators' existing usage rather than their projected future needs would effectively lock MTS-TM in at a permanently lower capacity (because with limited data capacity, MTS-TM would be unable to grow its data subscribers or its data traffic), and would thus impose a permanent competitive disadvantage on MTS-TM.[683]

577. The Claimant also contends that the Respondent's allocation of data channel capacity breached the NT standard because, for the reasons explained above, it treated MTS-TM and Altyn Asyr differently without any reasonable justification.[684]

578. The Claimant takes the view that the refusal to provide sufficient external data channel capacity to MTS-TM breached the "all necessary approvals" standard because MTS required access to sufficient data capacity "for the realisation of [its] permitted investmen[t]". Without sufficient data capacity MTS was unable to develop and expand its network and provide full 3G and 4G services to its subscribers.[685]

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[680] Cl. PHB, ¶ 40.
[681] Cl. Sur-Reply PHB, p. 3.
[682] Cl. Reply PHB, ¶¶14, 15.
[683] Cl. Reply PHB, ¶15.
[684] Cl. PHB, ¶ 40.
[685] Cl. PHB, ¶ 40.

579. According to the Claimant, the Respondent's allocation of external data channel capacity breached the FPS standard because the Respondent failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field.[686]

580. As regards causation, the Claimant argues that there is ample evidence in the record showing that MTS-TM was harmed by the Respondent's refusal to provide it with sufficient external data channel capacity.[687]

b. The Respondent's Position

581. The Respondent argues that it has shown, in the written pleadings and through the testimony of both Parties' experts during the Hearing, that Turkmentelecom allocated to MTS-TM a more favourable amount of data capacity than was allocated to Altyn Asyr at all relevant times. The Respondent submits that, during the Hearing, Mr. Thomas admitted that Altyn Asyr's network was always more congested than MTS-TM's network, meaning that MTS-TM was able to offer its customers faster service and better quality than Altyn Asyr.[688]

582. The Respondent argues that both the Claimant and the Respondent agreed in their written pleadings that the key factor determining an operator's data capacity requirements is not the raw number of subscribers on a network, but the number and size of data users on the network – in particular, the number of smartphones, as opposed to more basic feature mobile phones.[689] Thus, not all data subscribers are alike. MTS' network was primarily 2G and thus its subscribers used less data.[690] At the Hearing, Mr. Thomas attempted to revise his opinion, arguing that, based on the total number of subscribers, MTS was denied a fair allocation of data, stating that Altyn Asyr had 5 to 6 times more capacity than MTS but it only had [redacted] the number of data subscribers.[691] [redacted]

[686] Cl. PHB, ¶ 40.
[687] Cl. PHB, ¶ 41.
[688] Resp. PHB, ¶ 78.
[689] Resp. PHB, ¶ 79.
[690] Resp. Sur-Reply PHB, ¶ 13.
[691] Resp. PHB, ¶ 79.

[redacted] The Respondent concludes that, as a consequence, the key test is not to compare the number of data subscribers, but to compare how much data those subscribers are using (defined as "data traffic").[692]

583. The Respondent argues that the Claimant, without any documentary support, claims that MTS-TM made "countless" requests to the Ministry of Communications for additional data capacity and that the Ministry made "oral promises" to provide it.[693] As regards MTS-TM's submission that it made countless pleas for access to more capacity, the Respondent argues that the record shows that MTS-TM made a total of nine requests, all between March/April 2013 and March 2016, and that this is hardly a "countless" number.[694] Both Parties acknowledge that, before restarting operations, MTS-TM and Turkmentelecom agreed that MTS would be provided with [redacted] Thus, according to the Respondent, it is now undisputed that MTS-TM did not make any request for additional data capacity until March/April 2013, and its second request was not made until 11 months later, in February 2014.[695]

584. As regards alleged oral promises for more capacity, the Respondent maintains that MTS' witnesses tried to create a new and fictitious narrative based on undocumented "oral" requests and promises. The Respondent submits that, at the Hearing, [redacted] The Respondent submits that [redacted] new recollection is unconvincing, given that in two lengthy witness statements he never disclosed or alleged that MTS made any oral requests or received any oral promises for more data capacity. The Claimant's new argument fails to explain [redacted]

[692] Resp. PHB, ¶ 80.
[693] Resp. Reply PHB, ¶ 21.
[694] Resp. Reply PHB, ¶ 22; Resp. Sur-Reply PHB, ¶ 10.
[695] Resp. Reply PHB, ¶ 22.

[redacted]

MTS further fails to explain how the Ministry of Communications would have provided MTS-TM with [redacted], when Mr. Thomas' Report confirms that Turkmenistan only had [redacted] available for the entire country in 2013. [redacted][696]

585. With regards to the Claimant's argument that the Ministry of Communications withheld data capacity from MTS-TM notwithstanding that Turkmenistan increased its external data capacity over time, the Respondent submits that it is misguided and misleading, that Turkmenistan did not have the additional capacity to give to MTS-TM, and that there is nothing wrongful about that fact.[697] The Respondent states that both experts agree that Turkmenistan increased its total external data capacity for the entire country over time, from 0.93 Gbits in 2013 to 2.64 Gbits in 2014 and then 7.49 Gbits in 2015. Turkmenistan was only able to "significantly increase" its external data capacity in 2016 and 2017 – reaching 10.8 Gbits for the first time in 2016 and then 21.22 Gbits in 2017. During this period, Turkmenistan allocated significant amounts of its new external data capacity to developing its broadband network, which is the primary access to internet by all devices other than mobile phones. The Respondent argues that the Claimant was aware of the Respondent's investment in broadband and nevertheless ignored this fact in favour of the allegation that the Ministry of Communications withheld up to [redacted] of alleged spare capacity.[698] The Respondent also takes the view that the Claimant's allegations that Turkmenistan withheld spare capacity in 2016 and 2017 are irrelevant, because MTS-TM received significant and sufficient increases in its capacity in both of those years, which was confirmed by [redacted]

[696] Resp. Reply PHB, ¶ 23.
[697] Resp. Reply PHB, ¶ 24; Resp. Sur-Reply PHB, ¶¶ 10, 12.
[698] Resp. Reply PHB, ¶ 24.

[redacted]

586. The Respondent argues that the Claimant is wrong in asserting that there is no evidence in the record that MTS-TM and Altyn Asyr's data requirements were monitored in real time as a metric for allocating capacity to operators, and that the Claimant's own exhibit shows that Turkmentelecom monitored MTS' traffic in 2014, since Turkmentelecom complained that [redacted][701]

587. The Respondent contends that this claim must also fail, because MTS applies an erroneous standard of public international law, claiming entitlement to treatment better than Altyn Asyr, not treatment that was "fair and equitable".[702] The Claimant's claim hinges on the argument that the only fair allocation of data would be a literally equal, 1:1 bit allocation as between MTS-TM and Altyn Asyr – regardless of their different needs, capabilities and circumstances.[703] Restated simply, no article of the BIT entitles MTS to treatment more favourable than its competitors. Turkmenistan is not required to allocate its limited national resources "equally" in absolute terms, between unequal commercial actors.[704] The Respondent asserts that Mr. Thomas acknowledged that "in the real world" MTS-TM's network "would be significantly better" than Altyn Asyr's if it were allocated the same capacity.[705]

c. The Tribunal's Analysis

588. The Claimant essentially argues that Turkmentelecom inadequately allocated external data channel capacity to MTS and consistently gave much greater capacity to Altyn Asyr than

[699] Resp. Reply PHB, ¶ 25.
[700] Resp. Reply PHB, ¶ 25; Resp. Sur-Reply PHB, ¶ 11.
[701] Resp. Sur-Reply PHB, ¶ 13.
[702] Resp. Reply PHB, ¶ 21.
[703] Resp. Reply PHB, ¶ 26.
[704] Resp. Reply PHB, ¶ 28.
[705] Resp. Sur-Reply PHB, ¶ 15.

to MTS, which in the Claimant's view created an uneven playing field and was unfair, arbitrary and discriminatory.

589. The Claimant's Data Channel Capacity Claim is denied.

(a) The Claimant was not entitled to an equal (1:1) allocation of data capacity

590. The Tribunal finds that the Claimant's Data Channel Capacity Claim, which in essence is a claim for discrimination against MTS vis-à-vis Altyn Asyr, cannot be based on the proposition that the amount of data channel capacity allocated to Altyn Asyr and MTS was not the same.

591. The Claimant's claim is first based on the proposition that a fair and non-discriminatory allocation of capacity would have been an equal (i.e., 1 Mbit : 1 Mbit) allocation between MTS and Altyn Asyr. This approach, however, fails to take into account the individual situations of each company, in particular the size and the technological development of MTS-TM and Altyn Asyr. MTS-TM [redacted][706] Hence, it is undisputed that Altyn Asyr had a more technologically advanced network than MTS, which required more data channel capacity. In other words, MTS and Altyn Asyr were not similarly situated in terms of technological development and in terms of their resulting data channel capacity requirements.

592. Given that Altyn Asyr carried substantially more bits of traffic than MTS-TM [redacted], an "equal" (1 Mbit : 1 Mbit) allocation of data channel capacity would have put MTS-TM in a better (rather than an equal) position. In the Tribunal's view, this would not have been a fair and non-discriminatory allocation of data capacity. In order to prove its claim, it is therefore

[706] Respondent's Opening, p. 196 and 198.

insufficient for MTS to focus only on the absolute amounts of data channel capacity that were allocated to MTS-TM and to Altyn Asyr.

593. Also, the contractual instruments do not support the Claimant's contention that a fair allocation can only be an equal (1:1) allocation of data channel capacity. As regards requests for additional resources, the 2012 Agreement,[707] in Clause 3, provides that:

> [...] such resources shall be provided to the extent they fall within the documented scope of technical capabilities, and shall be of the quality, characteristics and quantity necessary at that stage of the Operator's activity in Turkmenistan [...].

594. Thus, the 2012 Agreement refers to "resources [...] of the quantity necessary at that stage of the Operator's activity in Turkmenistan" rather than to an equal (in absolute terms) allocation amongst market participants. A "quantity necessary" is a quantity that takes into account the individual situation, in particular, the size and the technological development of each company.

595. In the Interconnection Agreement between Turkmentelecom and MTS-TM,[708] the Claimant accepted that it would start its Turkmenistan operations anew in 2012 with an external capacity of [redacted][709] Thus, the Claimant itself agreed to an initial allocation that gave it [redacted]

596. Thus the relevant test is not the absolute amount of capacity distributed between operators. What is relevant is the necessary amount of data capacity which is defined by the amount of traffic in a network. The amount of traffic does not necessarily coincide with the number of subscribers a network has, because in a technologically advanced network (with 3G and 4G technology) subscribers require more capacity and cause more data traffic than in networks with a less developed technological status.

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[707] 2012 Agreement, Clause 2, Exhibit C-0008.
[708] Interconnection and Interworking Agreement No. 0013/06-3 between MTS-TM and Turkmentelecom, 9 June 2012, Schedule No. 3, Exhibit C-0130.
[709] Second Dippon Report, ¶ 99, table 4.

597. In his testimony, the Respondent's expert, Mr. Thomas, confirmed that not all subscribers are equal and, in particular, that [redacted]

> Q. [...] Because the issue really is, and I think you know this: all data subscribers are not equal, are they?
>
> A. No.
>
> Q. And so if we look at this chart, we see that the traffic on Altyn Asyr's network [redacted]
>
> A. Yes.
>
> Q. [redacted]
>
> A. Yes.
>
> Q. Okay. And so that means that Altyn Asyr's network was more congested than MTS's network; correct? There was more traffic crossing Altyn Asyr's bridge than MTS's bridge?
>
> A. It had a far larger bridge. So you would have to do the calculation by available capacity to make that statement.
>
> Q. [redacted]
>
> A. Yes.

Q. [redacted]

Q. And it often is, because you have more traffic crossing that bridge in central London; right?

A. Yes.

Q. And it's the same analogy with data traffic; right?

A. I follow your argument.

Q. Okay. So you agree with me that at all times between 2012 and 2017 [redacted]

A. Yes, it did.[710]

598. Mr. Thomas also confirmed that having more traffic on one network leads to a slower service for the customers:

Q. [redacted]

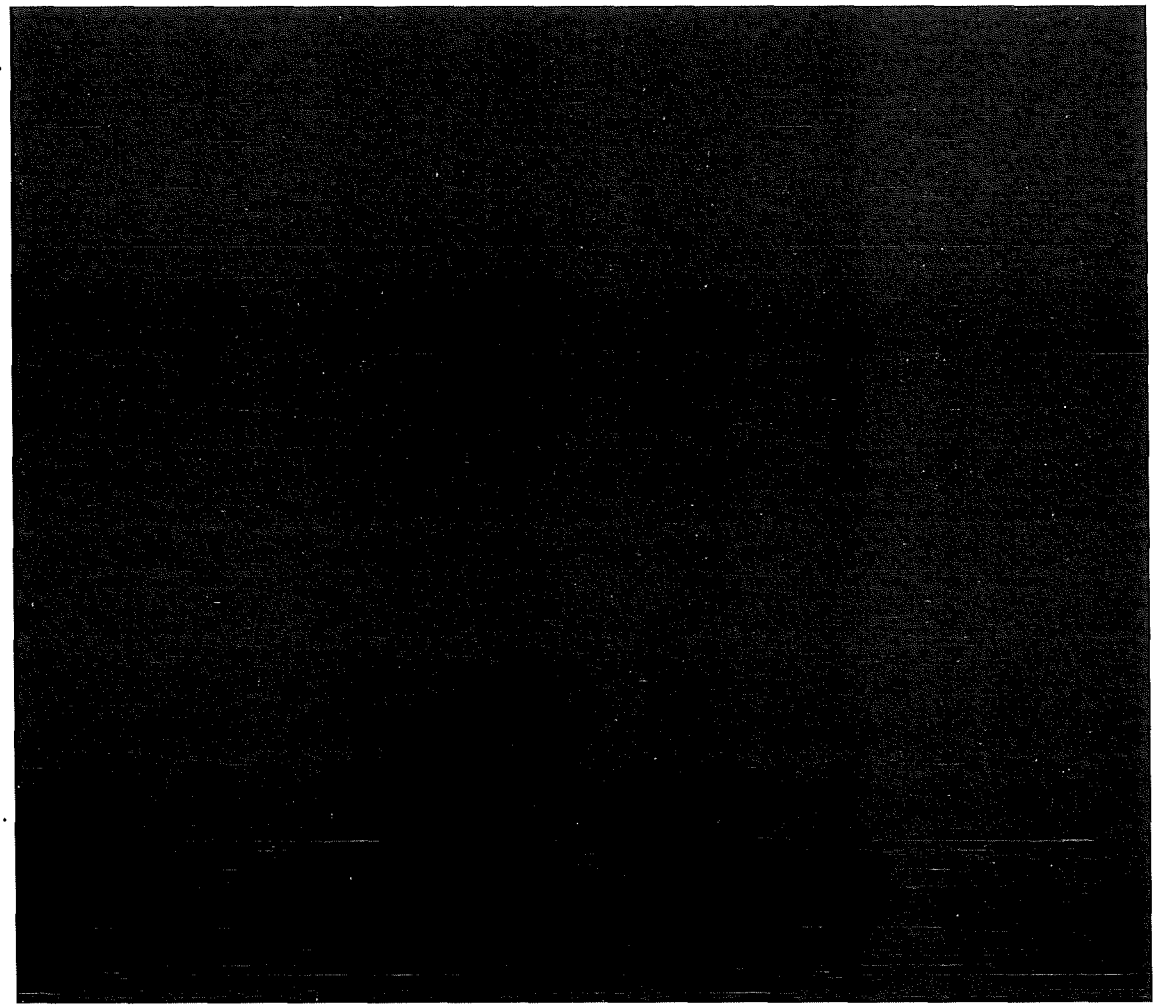
[redacted][711]

599. Thus, the relevant standard applied by MTS for its claim (i.e., only an equal (1:1) allocation of data capacity in absolute terms is a fair and non-discriminatory allocation) is flawed. Neither the Treaty nor the 2012 Agreement nor the Interconnection Agreement between MTS and Turkmentelecom guarantees the allocation of data capacity equal (1:1) to Altyn

[710] Hearing Transcript, Day 9, 122:2 – 123:14.
[711] Hearing Transcript, Day 9, 129:23– 130:3.

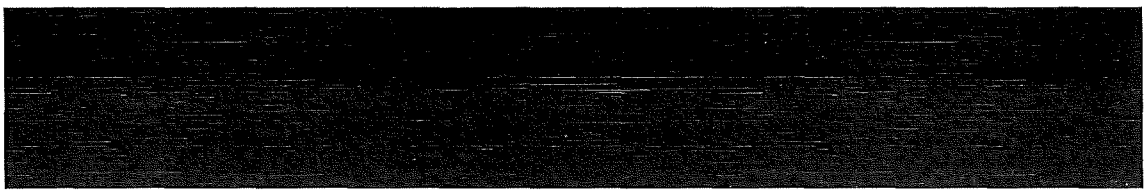
Asyr without due regard to the actual needs and circumstances of the respective operators. A comparison of the absolute numbers of data channel capacity allocated to MTS-TM and Altyn Asyr is therefore insufficient to prove MTS' claim. The observation that the two parties did not receive equal allocation is therefore not proof of unfair or discriminatory treatment. Instead, fair and non-discriminatory treatment only requires that similarly situated providers receive the same access to infrastructure. Hence, the Claimant's case is flawed to the extent it is based on the proposition that the data channel capacity was not the same for MTS-TM and Altyn Asyr. They were not in the same position in all relevant respects.

600.



601.

[712] *See* Resp. Opening, pp.196 and 198.
[713] *See* Section VII.B.(2) b.(b) above.
[714] Interconnection and Interworking Agreement No. 0013/06-3 between MTS-TM and Turkmentelecom, 9 June 2012, Exhibit C-0130.



602. As demonstrated by the Respondent's expert, Dr. Dippon, in every year between 2012 and 2017,

(b) The different allocation of data capacity between MTS and Altyn Asyr does not violate the Claimant's rights

603. MTS further claims that the difference in data capacity allocation between MTS and Altyn Asyr, i.e., that "Turkmentelecom [...] consistently gave much greater capacity to its own operator, Altyn Asyr",[717] amounts to discrimination and unfair and arbitrary treatment even if MTS had not been entitled to the same data capacity allocation as Altyn Asyr. In view of the evidence recalled above, the Tribunal is not convinced that the actual allocation of data capacity was unfair, arbitrary or discriminatory. The fact that Altyn Asyr received more capacity than MTS does not serve as proof that the allocation of data capacity was inappropriate. More particularly, in view of the evidence that Altyn Asyr, the Tribunal is not convinced that the difference in data capacity between Altyn Asyr and MTS was inappropriate and violated the Claimant's rights. This is despite the fact that there is no clear evidence regarding the principles that were followed by Turkmentelecom when allocating data capacity. The director general of Turkmentelecom, was not able to explain clearly the considerations on which the allocation of data channel

[715] Second Dippon Report, ¶¶ 99, et seq.
[716] Second Dippon Report, ¶ ES5.
[717] Cl. PHB, ¶ 40.

capacity between Altyn Asyr and MTS had been made. As to the factors relevant to a fair allocation of data capacity and MTS' requests for additional capacity, [redacted] was not able to say more than, [redacted][719]

604. One might have expected the Director General of Turkmentelecom to be ready and willing to explain that the allocation of data channel capacity between Altyn Asyr and MTS had been made based on objective and reasonable considerations. [redacted] The Respondent's argument therefore boils down to the assertion that the data channel capacity that MTS was allocated from time to time was sufficient and appropriate for MTS' needs, thereby avoiding any discussion of how Turkmentelecom applied relevant principles and criteria. However, despite this lack of explanation on the part of Turkmentelecom, in view of the evidence on the actual allocation of data capacity to Altyn Asyr and MTS [redacted], the Tribunal is not convinced that the allocation of data capacity to MTS was unfair, arbitrary, or discriminatory or in any way inappropriate.

605. In sum, the Tribunal finds no evidence that the allocation of data channel capacity to MTS was unfair and discriminatory. There is no clear evidence that Altyn Asyr received a disproportionate or inappropriate amount of the available data channel capacity. Furthermore, there is no evidence that the amount of data channel capacity received by MTS-TM was inappropriately low. The evidence rather suggests that MTS-TM received a proportionally larger allocation of data channel capacity that its competitor Altyn Asyr [redacted]

[718] Hearing Transcript, Day 7, 110:21 and 111:2-3.
[719] Hearing Transcript, Day 7, 114:3-8.

606. Thus, the allocation of data channel capacity was not unfair, discriminatory, or arbitrary. As a consequence, the Tribunal finds no breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), and (iii) the FPS standard (Article 3(3) BIT) in connection with such allocation.

(3) Data Channel Quality Claim

a. The Claimant's Position

607. The Claimant argues that the Respondent's failure to provide MTS-TM data channels of sufficient quality constitutes a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), and (iii) the FPS standard (Article 3(3) BIT).[720]

608. The Claimant takes the view that the Respondent's failure to provide data channels of sufficient quality to MTS-TM breached the FET standard because it was unfair, non-transparent and discriminatory. The Claimant contends that the Respondent has no credible answer for why MTS-TM suffered prolonged outages that Altyn Asyr did not. As regards the Respondent's argument that MTS-TM and Altyn Asyr suffered equivalent disruptions, the Claimant argues that it has never denied that at the outset of the June – December 2016 outage, both MTS-TM and Altyn Asyr's networks were affected.[721] The Respondent's counsel omitted to explain, however, that service on Altyn Asyr's network was restored by early July 2016, whereas MTS-TM continued to face severe disruptions for the next six months. There is no evidence, moreover, that Altyn Asyr's network was affected at all by the March – April 2016 and May – September 2017 outages.[722] The Claimant further argues that Turkmenistan's failure to provide data channels of sufficient quality to MTS-TM was not limited to the three aforementioned instances (two in 2016 and one in 2017), but rather was a permanent problem between 2013 and 2017.[723]

609. The Claimant disagrees with the Respondent's statement that Mr. Thomas testified that Altyn Asyr's network also had prolonged quality issues during periods in which MTS-TM

[720] Cl. PHB, ¶ 44.
[721] Cl. PHB, ¶ 44.
[722] Cl. PHB, ¶ 44; Cl. Reply PHB, 21.
[723] Cl. PHB, ¶ 44.

had none, or significantly lesser, quality disruptions. According to the Claimant, Mr. Thomas testified only that Exhibit C-0229 shows that [redacted][724]

610. The Claimant denies that its claim that data quality issues were a "permanent problem" for MTS-TM is a new claim, as contended by the Respondent. The Claimant submits that it has been clear throughout its submissions and in its witness evidence that disruptions affected MTS-TM's network throughout its operations. [redacted][725]

611. As regards the Respondent's argument that there is no evidence that [redacted][726]

[724] Cl. Sur-Reply PHB, p. 3.
[725] Cl. Sur-Reply PHB, p. 3.
[726] Cl. Reply PHB, ¶ 23.

612. The Claimant submits that the Respondent's failure to provide data channels of sufficient quality to MTS-TM breached the NT standard because, for the reasons explained above, it treated MTS-TM and Altyn Asyr differently without any reasonable justification. According to the Claimant, the Respondent's failure to provide data channels of sufficient quality to MTS-TM also breached the FPS standard because the Respondent failed to protect MTS-TM's legal right (as established, inter alia, by Article 4(1) of the Turkmen Law on Communications) to compete with Altyn Asyr on a level playing field.[727]

b. The Respondent's Position

613. The Respondent argues that MTS' allegations rest entirely on anecdotal evidence of three so-called "major instances of external data quality" disturbances that MTS-TM allegedly experienced in 2016 and 2017. However, the Claimant failed to establish that these quality issues were discriminatory or unfair compared to the data quality that Altyn Asyr's subscribers experienced.[728]

614. The Respondent submits that, despite the fact that Mr. Thomas was instructed to review only three discrete periods of data quality complaints that had a purported impact on MTS-TM, the Claimant now alleges in its post-hearing brief that quality disruptions were "a permanent problem" but has failed to prove this new claim.[729]

615. The Respondent submits that there is simply no evidence that MTS suffered quality issues different or greater than Altyn Asyr. [redacted]

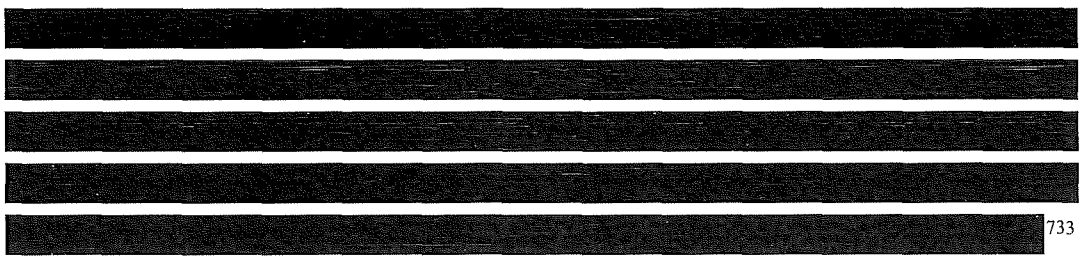
[727] Cl. PHB, ¶ 44.
[728] Resp. PHB, ¶ 93.
[729] Resp. Reply PHB, ¶ 35.
[730] Resp. PHB, ¶ 94.

[redacted][731]

616. The Respondent states that the Claimant, in its Sur-Reply PHB, on the one hand denies that Altyn Asyr's network also had prolonged quality issues during periods in which MTS-TM had none or significantly lesser quality disruptions, but at the same time admits that Altyn Asyr's network had more problems than MTS-TM in June 2016. The Respondent also submits that the Claimant ignores the Respondent's discussion of MTS-TM's letters to the Ministry of Communications in the following "six months" (July-December 2016) which demonstrate that Altyn Asyr continued to suffer significant quality issues. As for the Claimant's criticism that the Respondent only "refer[s] to a single snapshot from late June/early July 2016" to show that Altyn Asyr suffered similar quality problems, the Respondent argues that the Claimant itself focused solely on snapshots of three discrete periods of quality issues in 2016 and 2017.[732]

617. The Respondent states that the Claimant's attempt to explain [redacted]

[731] Resp. Reply PHB, ¶ 36.
[732] Resp. Sur-Reply PHB, ¶ 16.


[733]

618. The Respondent submits that the Claimant's complaint regarding data quality is nothing but an expression of general dissatisfaction with Turkmentelecom's contractual performance – not a discrimination claim under the BIT.[734] The Respondent further submits that Mr. Thomas has not offered any evidence that the allegedly poor data channel quality caused damage to MTS' business.[735]

c. The Tribunal's Analysis

619. The Claimant argues that the Respondent unfairly and discriminatorily failed to provide MTS-TM data channels of sufficient quality.

620. The Claimant's Data Channel Quality Claim is denied. There is no evidence that the Respondent acted in an unfair or discriminatory manner in relation to MTS.

621. First, whilst it is undisputed that the Claimant experienced quality issues, it is undisputed that Altyn Asyr was also affected by quality problems. When asked about data quality issues encountered by MTS-TM as compared to Altyn Asyr in June 2016, the Claimant's expert, Mr Thomas, acknowledged that Altyn Asyr had encountered more severe quality issues during that period:

> Q. And you can see how well [MTS'] network is operating between June 7th and June 25th; right?
>
> A. Yes.

[733] Resp. Reply PHB, ¶ 37.
[734] Resp. PHB, ¶ 95.
[735] Resp. PHB, ¶ 96.

Q. That's demonstrably better than Altyn Asyr's during the same time on the last slide; right?

A. Yes.

[...]

Q. So if you were advising Altyn Asyr, wouldn't you complain about the data quality for the first 25 days of that month, not MTS?

A. If I were Altyn Asyr and I had those sorts of problems, I would be concerned, yes.[736]

622. Thus, the Tribunal is convinced that quality issues, such as outages, affected, in principle, both operators, MTS-TM and Altyn Asyr.

623. Second, in the Tribunal's view, it is not unusual that an operator may suffer from quality problems and network outages, both of which are common in the telecommunications industry and occur on even the best networks.[737] That is why it is unsurprising that the parties to the Interconnection Agreement between MTS and Turkmentelecom included a [redacted].[738] This clearly shows that the Claimant understood that quality problems could well arise during operations. It is further undisputed that MTS-TM [redacted] from Turkmentelecom [redacted] for the disruptions it complains about.[739] That is [redacted] the Claimant has specifically [redacted]

[736] Hearing Transcript, Day 9, 178:6-20.
[737] Second Dippon Report, ¶ ES7.
[738] [redacted]:
[redacted]
[739] *See* Summary Presentation of Christian M. Dippon of 13 May 2022 ("Dippon Presentation"), p. 17: "The evidence shows that MTS-TM applied for and received [...] discounts".

[redacted]. To that extent, the Claimant was made whole by Turkmentelecom.

624. Third, there is no evidence that the Respondent acted in an unfair or discriminatory way vis-à-vis the Claimant with regard to data channel quality. The Tribunal finds that the unplanned and unintended technical outages that affected both operators (MTS-TM and Altyn Asyr) do not constitute unfair and discriminatory treatment by the Respondent. There is no further evidence, e.g., that the outages affecting MTS were arranged on purpose or that repairs affecting MTS were deliberately carried out too slowly, etc. The Claimant, in any event, does not point to such evidence. The fact that MTS-TM may (or may not) have experienced more outages that Altyn Asyr in itself does not suffice to demonstrate unfair or discriminatory treatment.

625. Finally, there is no evidence that the alleged quality problems had any impact on MTS-TM's operations.

626. [redacted]

627. [redacted]

[740] Thomas Report, ¶ 7.146.
[741] Second Dippon Report, ¶¶ 119 (with table 5), 121.
[742] Hearing Transcript, Day 9, 161:9–12.

628. [redacted]

629. [redacted]

630. In sum, the Tribunal finds no evidence of discriminatory or unfair treatment of MTS-TM. A certain level of outages or quality problems normally needs to be taken into account (not only in Turkmenistan) and does not represent a violation of the Claimant's treaty rights. Furthermore, the parties to [redacted] Finally, both operators, including Altyn Asyr, were affected by quality issues and hence there is no evidence that MTS suffered a competitive disadvantage.

631. Consequently, since the Tribunal finds no evidence of the unfair or discriminatory behaviour alleged by the Claimant, the Tribunal finds that this claim has to be denied.

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[743] Hearing Transcript, Day 9, 167:19–21.

[744] [redacted] to Materials for MTS-TM Board Meeting on 22 September 2016, Presentation on MTS-TM Budget Performance for Q2 2016 and 1st half of 2016, 22 September 2016, slide 3, Exhibit C-0243.

[745] Materials for MTS-TM Board Meeting on 22 September 2016, Presentation on MTS-TM Budget Performance for Q2 2016 and 1st half of 2016, 22 September 2016, slide 3, Exhibit C-0243: [redacted]

(4) Data Channel Tariffs Claim

a. The Claimant's Position

632. The Claimant contends that the Respondent's imposition of exorbitant and discriminatory tariffs on MTS-TM for the lease of both domestic and external data channels constitutes a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), and (iii) the FPS standard (Article 3(3) BIT).[746]

633. According to the Claimant, the data channel tariffs imposed on MTS-TM breached the FET standard because they were unfair, arbitrary, non-transparent and discriminatory (and, ultimately, expropriatory). The tariffs imposed by Turkmenistan acting through the Ministry of Communications to lease domestic data channels were exorbitant and bore no relationship to Turkmentelecom's costs in providing these channels. The Claimant submits that it is a fundamental departure from generally accepted global practices that the tariffs for domestic data channels were set by the Ministry of Communications not to cover Turkmentelecom's costs, but rather (i) to subsidise the provision of unrelated services (e.g., landline telephones), and (ii) to ensure that Turkmentelecom generated its planned revenues for the State budget.[747]

634. The Claimant further argues that, in addition to being unfair, arbitrary and non-transparent, the tariffs for domestic data channels imposed on MTS-TM were also discriminatory (and thus in further violation of the FET standard). The Claimant submits that Altyn Asyr was granted [redacted] that was not made available to MTS-TM. Furthermore, in September 2015, at the same time as the Ministry of Communications raised tariffs for domestic data channels by 30%, it established a [redacted] that only Altyn Asyr qualified for – thereby compensating Altyn Asyr for the [redacted] The Claimant states that, given Turkmentelecom's refusal to grant MTS-TM sufficient external data channel capacity, it would not have made commercial sense for MTS-TM to lease the amount of domestic data channel capacity required to qualify for the discount. The

[746] Cl. PHB, ¶ 48.
[747] Cl. PHB, ¶ 48.

Claimant says it could not afford to use those discounts because it was unable to lease the required number of channels. According to the Claimant, by 2017, Altyn Asyr was enjoying a [redacted], while MTS-TM was receiving a discount of 0%. Given that only Altyn Asyr could qualify for the discounts, that meant that the discounts served to limit Altyn Asyr's costs, while ensuring that only MTS-TM paid the full increased tariff. The Claimant argues that the Respondent has made no attempt to justify the excessively high tariffs set by the Ministry of Communications or to explain [redacted] testimony that by 2017, Altyn Asyr was paying [redacted] as MTS-TM to access [redacted] channel capacity.[748]

635. The Claimant disputes the Respondent's assertions that the same tariffs and discounts for domestic data channels applied equally to both MTS-TM and Altyn Asyr, and that MTS-TM's inability to benefit from the discounts enjoyed by Altyn Asyr was due to its own commercial decision not to lease sufficient domestic data channels from Turkmentelecom. The Claimant refers in this respect to the testimony of [redacted] who explained that it would have been commercially irrational for MTS-TM to have leased the domestic data channel capacity required to reach the discount threshold when its external data channel capacity was so restricted. [redacted][749] The Claimant contends that the discriminatory nature of the discounts is further highlighted by the fact that they were originally offered only to Altyn Asyr, before the Respondent apparently realised the obviousness of this discriminatory treatment and amended the discounts to make them facially, but not economically, available to both operators.[750]

[748] Cl. PHB, ¶ 48.
[749] A velayat is an administrative division of Turkmenistan.
[750] Cl. Reply PHB, ¶ 25.

636. The Claimant further submits that the tariffs imposed on MTS-TM to lease external data channels (which, as [redacted] confirmed during cross-examination, were also set by the Ministry of Communications) were equally unfair, arbitrary, non-transparent and discriminatory. While the Respondent's wholesale cost of purchasing external internet capacity from abroad [redacted], the tariffs imposed on MTS-TM to lease external data channel capacity remained unchanged over this entire period. [redacted][751] According to the Claimant, in addition to being unfair and arbitrary, the tariffs were also discriminatory, as Altyn Asyr was paying just [redacted] external data channel capacity as MTS-TM (using better quality data channels).[752]

637. With regard to the 2017 data channel tariff increase, the Claimant also argues that this was designed to maintain Turkmentelecom's profitability.[753] [redacted][754]

638. Lastly, the Claimant submits that the data channel tariffs imposed on MTS-TM also breached the NT standard, because they treated MTS-TM and Altyn Asyr differently without any reasonable justification. The Claimant also contends that the data channel tariffs imposed on MTS-TM breached the FPS standard because the Respondent failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field.[755]

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[751] Cl. PHB, ¶ 48.
[752] Cl. PHB, ¶ 48; Cl. Reply PHB, ¶ 26.
[753] Cl. PHB, ¶ 48.
[754] Cl. Sur-Reply PHB, p. 3
[755] Cl. PHB, ¶ 48.

b. The Respondent's Position

639. The Respondent submits that the data channel tariff rates apply to both operators, Altyn Asyr and MTS-TM, and were therefore not discriminatory.[756]

640. As regards discounts, the Respondent argues that the Claimant was fully informed that there was a discount matrix that varied depending on the volume of leased channels, and that the Claimant's inability to obtain those discounts was due to its own commercial and technical decisions.[757] Therefore, it was the Claimant's own business strategy – and not any discriminatory conduct by the Respondent – that prevented it from benefitting from the discounts available to both operators. [redacted][758]

641. The Respondent says that MTS' allegation that the data channel prices in Turkmenistan are high by international standards is based on irrelevant international benchmarks for submarine cables and is also based solely on three price points from Belarus and Uzbekistan, which are also irrelevant.[759]

642. The Respondent submits that the BIT does not require State-owned entities to operate as non-profit enterprises, so the fact that Turkmentelecom made a profit is irrelevant.[760] In the Respondent's view, the BIT does not prohibit Turkmentelecom from making a profit in its activities in Turkmenistan, or reinvesting that profit into development of landline broadband services in the country.[761] With regard to the Claimant's allegation that the 2017

[756] Resp. PHB, ¶ 99.
[757] Resp. PHB, ¶ 99.
[758] Resp. Reply PHB, ¶ 41.
[759] Resp. PHB, ¶ 100.
[760] Resp. Reply PHB, ¶ 38.
[761] Resp. Reply PHB, ¶ 39.

tariff increase was implemented to maintain Turkmentelecom's level of profitability, the Respondent explains that Turkmentelecom planned to generate a profit in 2017, but the profit decreased year on year, and the projected profit excluded capital expenditures which the projected profit would not have been enough to cover.[762] Insofar as the Claimant argues that capital expenditures have nothing to do with Turkmentelecom's overall profitability, the Respondent replies that CAPEX obviously affects profitability and that Ms. Hardin's own calculation of lost profits deducts CAPEX from the Claimant's projected revenues.[763] The Respondent further asserts that there is nothing contradictory about [redacted] testimony that increasing tariffs was necessary to maintain Turkmentelecom's profitability in 2017, when Turkmentelecom's projected net profits would not have been enough to cover expected capital expenditures.[764]

643. The Respondent further asserts that there is no generally accepted global practice of setting channel prices based exclusively on direct costs relating to those channels.[765]

644. The Respondent states that the Claimant has also failed to establish the quantum of this claim. None of Ms. Hardin's models quantifies the individual impact of data channel prices. Mr. Thomas also fails to provide any reasonable analysis of his allocator's quantification of this claim, and his indicative weights in the allocator are unreliable.[766]

c. The Tribunal's Analysis

645. The Claimant complains that the imposition of tariffs by the Respondent for the lease of data channels was unfair, arbitrary and discriminatory and that Turkmentelecom charged MTS-TM exorbitant prices for channel capacity.

646. The Claimant's Channel Tariff Claim is denied.

647. There is no evidence of a discriminatory imposition of tariffs or of excessive tariff rates.

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[762] Resp. Reply PHB, ¶ 40.
[763] Resp. Sur-Reply PHB, ¶ 17.
[764] Resp. Sur-Reply PHB, ¶ 17.
[765] Resp. Reply PHB, ¶ 38.
[766] Resp. PHB, ¶ 101.

648. The Tribunal notes that there were two price changes during the 2012-2017 period.[767] The first price change occurred in October 2015, when the Respondent created a separate tariff for mobile wireless access to communication channels. The second price change occurred in July 2017. In both instances MTS-TM and Altyn Asyr were subject to the same price schedules.[768]

649. This was acknowledged by the Claimant's witness, [redacted] who confirmed in his testimony that the same tariff rates applied to both operators:

> Q. [...] Take a look at paragraph 62 of your second witness statement. Here you acknowledge that the same tariff rates apply to both operators; right?
>
> A. Yes, so in my witness statement I did mention that. [...].[769]

650. As regards the tariff increase on 1 October 2015, this was, strictly speaking, not a tariff increase but the introduction of a new category of tariff for cellular operators which did not exist before.[770] In September 2015, Altyn Asyr and MTS were notified about the new policy and neither entity complained about the new tariff policy; in October 2015, the new tariff policy came into effect. The new tariff rates were, on average, 30-33% higher than the rates for the previous categories.[771]

651. By letters dated 1 June 2017, MTS and Altyn Asyr were notified by Turkmentelecom about the tariff increase taking effect from 1 July 2017 onwards.[772] The new tariff, again, equally applied to both Altyn Asyr and MTS. The increased tariff remained in force (and thus applicable to Altyn Asyr) long after MTS had left the market in Turkmenistan in 2017.

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[767] *See* Thomas Report, ¶ 9.18, Figure 9-3.
[768] Second Dippon Report, ¶ ES6; [redacted]
[769] Hearing Transcript, Day 2, 114:19-22.
[770] [redacted]
[771] [redacted]
[772] *See* Letter No. 1244 from Turkmentelecom to MTS-TM, 1 June 2017, Exhibit C-0263, and Letter No. 1243 from Turkmentelecom to Altyn Asyr, 1 June 2017, Exhibit R-0102.

652. Moreover, given that MTS stopped operating in Turkmenistan at the end of September 2017, i.e., 90 days after the 2017 price increase, it seems unlikely that the price increase could have had a substantial negative impact on MTS' operations in Turkmenistan.

653. Contrary to the Claimant's argument, there is no evidence of a connection between the 2017 price increase and the course of contract negotiations and the Claimant's unwillingness to accept Turkmentelecom's terms of future cooperation that were allegedly discussed during a meeting which took place on 31 May 2017.[773] Given that a new tariff policy takes some time to be prepared and to be put into effect, the Tribunal is not convinced that such a price increase was implemented literally overnight, given that on 1 June 2017 notifications were sent to both operators, MTS and Altyn Asyr.[774] Moreover, the new tariff applied equally to Altyn Asyr, which excludes the hypothesis that MTS was specifically targeted by the new tariff.[775]

654. As regards the availability of discounts on channel prices, the Tribunal notes that discounts for bulk services were generally available to both operators, i.e., to MTS and Altyn Asyr, if the respective operator leased channels in a certain amount to other users. Although the Claimant alleges that MTS was excluded from discounts on intercity data channels, [redacted] testified that MTS was informed that there was a discount matrix that was applied depending on the volume of leased channels:

> Q. You said [...]:
>
> "We know that there was a discount matrix that was applied depending on the volume of [redacted] ..."
>
> And then you said (page 67, lines 6 to 8):

[773] *See* Cl. Mem., ¶ 304.
[774] *See* Letter No. 1244 from Turkmentelecom to MTS-TM, 1 June 2017, Exhibit C-0263, and Letter No. 1243 from Turkmentelecom to Altyn Asyr, 1 June 2017, Exhibit R-0102. *See* also [redacted] ¶ 31, on the internal approval process for that price increase.
[775] The new tariff continued to apply to Altyn Asyr after MTS had left the Turkmen market in 2017.

"Specifically, to obtain a [redacted]

And then you discussed [redacted] that was supposedly provided; right? You said all that on direct examination.

A. Yes, I confirm that.[776]

655. Furthermore, it appears from [redacted] testimony that the Claimant's inability to obtain those discounts was due to its own commercial and technical decisions, [redacted]

656. Indeed, the Claimant confirms that it decided not to "lease the amount of domestic data channel capacity required to qualify for the discount" because it "would not have made commercial sense".[779]

657. Hence, the Tribunal finds that it was first and foremost owing to MTS' own commercial decision that MTS was not in a position to benefit from those discounts.

658. As regards the Claimant's argument that due to the Respondent's (alleged) refusal to grant sufficient data channel it would not have made commercial sense for MTS to lease the number of data channels required to qualify for the discount, the Tribunal has already stated

[776] Hearing Transcript, Day 2, 115:13-23.
[777] Hearing Transcript, Day 2, 115:10-12.
[778] Hearing Transcript, Day 2, 116:4-9.
[779] Cl. PHB, ¶ 48.

above in the context of the Claimant's Data Channel Capacity Claim that there is no evidence that MTS received a disproportionately low amount of data channel capacity.[780]

659. In addition, [redacted][781]

660. In light of this evidence the Tribunal is not convinced that MTS was specifically excluded from receiving discounts.

661. Over and above that, the Tribunal finds that there is insufficient evidence that the tariffs were exorbitant.

662. The Tribunal is not convinced that the channel lease prices were excessive or that MTS was unaware of the general level of these prices when it re-entered the Turkmen market. Rather to the contrary, MTS explicitly agreed to them when negotiating and agreeing to the Interconnection Agreement with Turkmentelecom in 2012.[782]

663. The Tribunal notes that Mr. Thomas only examined three price points (two from Belarus and one from Uzbekistan) to reach the conclusion that channel prices in Turkmenistan were unreasonably high and not reflective of common international practice.[783] The Tribunal concurs with the Respondent's expert, Dr. Dippon, that no trend or conclusion can be drawn from a sample of three prices only.[784]

664. In addition, the Tribunal finds that the fact that Turkmentelecom may have made a profit on the lease of data channels is irrelevant. The BIT does not require State-owned entities to operate as non-profit enterprises. Thus, there is nothing wrong in Turkmentelecom using

[780] *See* Section VII.C.(2) c. above.
[781] Hearing Transcript, Day 6, 87:9-11.
[782] Second Dippon Report, ¶ 111.
[783] Thomas Report, ¶¶ 8.34, 8.36, 8.39, Figure 8-4.
[784] Second Dippon Report, ¶ 108.

its revenues/profits to invest and to develop its infrastructure, such as landline services in the country.

665. Furthermore, the tariffs applied equally to MTS and Altyn Asyr, so that they gave no competitive advantage to Altyn Asyr over MTS.

666. There is no evidence of discriminatory or of excessive, unfair tariffs imposed on MTS. Tariffs were equally applied to all operators; thus, it appears that Altyn Asyr was not treated more favourably than MTS.

667. In sum, the Respondent's setting of tariffs has not been shown to have been unfair, arbitrary or discriminatory and there is insufficient evidence of exorbitant tariffs. Hence, there is no showing of any breach by the Respondent under the Treaty in connection with these tariffs.

(5) Import Permits Claim

668. Under this claim the Claimant argues that the Respondent during the 2015 – 2017 period unjustifiably delayed und refused the Claimant's applications for import permits and that such refusals were unfair, arbitrary and discriminatory. According to the Claimant, these applications related to the import of base stations, radio relay links and other electronic equipment.[785]

a. The Claimant's Position

669. The Claimant submits that the Respondent's unjustified delays in dealing with, and refusals of, MTS-TM's applications for import permits constitute a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), (iii) the "all necessary approvals" standard (Article 3(2) BIT), and (iv) the FPS standard (Article 3(3) BIT).[786]

670. The Claimant takes the view that the said unjustified delays and refusals breached the FET standard because they were unfair, arbitrary, non-transparent and discriminatory. The Claimant argues that the Respondent has put forward no explanation or justification for its

[785] Cl. Sur-Reply PHB, p. 4.
[786] Cl. PHB, ¶ 51.

repeated obstruction of MTS-TM's attempts to import equipment into Turkmenistan. The Claimant contends that the Respondent's conduct was also discriminatory (and thus in further violation of the FET standard) as Altyn Asyr never had a single application for an import permit rejected and has not encountered any significant problems with import of its equipment. The Claimant argues that the Respondent failed to treat MTS-TM and Altyn Asyr equally with respect to applications for import permits.[787]

671. Insofar as the Respondent states that all of the Claimant's applications in 2012, 2013 and 2014 were properly processed, the Claimant argues that 17 of its requests to Turkmentelecom for permits to deliver and install new equipment were denied in 2012 and 2013 alone,[788] which caused MTS-TM to fall behind its investment and development schedule even at this early juncture, impacting in particular MTS-TM's ability to develop its 3G network.[789] The Claimant also denies the Respondent's statement that the Claimant has confirmed that every single one of MTS-TM's import permit applications made during the entire 5-year term of the 2012 Agreement was approved; the Claimant submits that three of its applications were rejected without any explanation.[790]

672. Insofar as the Respondent states that the Claimant should have known that it was likely to have difficulties obtaining import permits because BCTI experienced certain delays in obtaining import permits in 2007, the Claimant submits that the earlier treatment of BCTI does not give the Respondent any justification years later to ignore its duties under the BIT (which was not even in force in 2007). In the Claimant's view the Respondent has never presented any serious attempt to justify its arbitrary and discriminatory treatment of MTS-TM with respect to import permits.[791]

673. The Claimant states that the Respondent's unjustified delays in dealing with, and refusals of, MTS-TM's applications for import permits breached the NT standard because they treated MTS-TM and Altyn Asyr differently without any reasonable justification. The Respondent also breached the "all necessary approvals" standard because MTS required

[787] Cl. PHB, ¶ 51.
[788] Cl. Reply PHB, ¶ 28; Cl. Sur-Reply PHB, p. 4.
[789] Cl. Reply PHB, ¶ 28.
[790] Cl. Sur-Reply PHB, p. 4.
[791] Cl. Sur-Reply PHB, p. 4.

these import permits for the realisation of its permitted investment. Finally, the Claimant takes the view that the said unjustified delays and refusals breached the FPS standard because the Respondent failed (i) to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field, and (ii) to protect MTS-TM's legal right to obtain import permits for its equipment in accordance with proper legal process.[792]

b. The Respondent's Position

674. The Respondent underscores that the Claimant's complaints are limited to only four permits, all of which were submitted in late 2015-2016, and all of which were – like all other import permit applications MTS-TM made during the 5-year term of the 2012 Agreement – ultimately approved. According to the Respondent, all of MTS' applications in 2012, 2013 and 2014 were properly processed.[793]

675. The Respondent asserts that the delay in processing these four permit applications in 2015 and 2016 had no material impact on MTS-TM's operations under the 2012 Agreement or on its ability to develop its network in Turkmenistan during that time.[794]

676. The Respondent states that the Claimant's expert, Mr. Thomas, acknowledged that MTS-TM's own logistics schedule for new equipment (from contracting with the manufacturer to testing and commissioning) meant that there was at least a 10-month lag time between the import of equipment and its commissioning to active use in its operations,[795] and that MTS cannot establish that the delay of four permits in late 2015-2016 negatively impacted its operations in Turkmenistan.[796] None of the equipment requested in the delayed permits would have been utilized until the very late stages of MTS-TM's operations in Turkmenistan – in late 2016 and 2017,[797] four years after MTS-TM launched operations

[792] Cl. PHB, ¶51.
[793] Resp. PHB, ¶ 110; Resp. Reply PHB, ¶ 50; Resp. Sur-Reply PHB, ¶ 20.
[794] Resp. Reply PHB, ¶ 51.
[795] Resp. PHB, ¶111; Resp. Reply PHB, ¶ 51.
[796] Resp. PHB, ¶ 111; Resp. Reply PHB, ¶ 51; Resp. Sur-Reply PHB, ¶ 20.
[797] Resp. PHB, ¶ 112; Resp. Reply PHB, ¶ 51.

[redacted][798]

677. The Respondent further argues that the record demonstrates that, before MTS decided to re-enter the Turkmen market in 2012, it knew and expressed the opinion that there were regulatory difficulties relating to import permits in Turkmenistan, and that it believed this to be the result of low budgets. The Respondent maintains that an investor is not entitled to a perfect regulatory environment in a host State and that this principle is especially relevant when the investor is aware of the particular concerns relating to that environment before making its investment and when the Claimant expected a degree of inefficiency in the permitting process when it made its decision to enter the Turkmen market.[799]

678. In the Respondent's view, it is impossible to reconcile the allegation that these permits negatively impacted MTS-TM with the contradictory testimony of MTS' own witness [redacted][800]

679. The Respondent further argues that none of Ms. Hardin's models quantifies the individual impact of the alleged delays in permits, nor does Mr. Thomas' allocator. Moreover, there is no evidence that MTS-TM suffered any harm.[801]

680. The Respondent submits that the Claimant's attempts to re-focus its claim on two of the delayed applications relating to "radio relay links" and domestic permits for installation of equipment fails as the Claimant has never attempted to prove or quantify the impact of these issues. Also in this context, the Respondent asserts that at no time did Mr. Thomas calculate the effect of any purported delay of radio relay links or installation permits as he only purported to calculate the damage caused by the delay in the import permits of base stations. For this reason alone, the belatedly revised claim must also fail.[802]

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[798] Resp. PHB, ¶112.
[799] Resp. Reply PHB, ¶ 52.
[800] Resp. PHB, ¶113.
[801] Resp. PHB, ¶114.
[802] Resp. Reply PHB, ¶ 53.

c. The Tribunal's Analysis

681. The Claimant's Import Permits Claim argues that Respondent unjustifiably delayed the processing of and/or refused the Claimant's applications for import permits, which delays and refusals were unfair, arbitrary and discriminatory in the Claimant's view.

682. The Claimant's Import Permits Claim is denied.

683. There is insufficient evidence to show that any delay in granting a minor number of applications may actually have had an impact on MTS' operations.

684. The Tribunal notes that all of Claimant's applications for import permits were granted. Hence there was no "refusal" to grant any import permit.

685. As regards the alleged delays in the application process, the Claimant's witness, [redacted] identified only four import permits applied for in 2016 that were materially delayed out of 30 permits applied for between 2012 and 2017, all of which were granted.[803]

686. The Tribunal is unable to conclude that the delays in 2016 in approving permits for import of equipment had any material impact on MTS' operations or put MTS at a competitive disadvantage.

687. There is a considerable time span between an application for an import permit for new equipment and the delivery and commissioning of such equipment into active use in operations. Due to this time lag between obtaining a license for the import of equipment and its commissioning, none of the equipment requested in the delayed permits would have been put into service until late 2016 or 2017. Thus, it is unlikely that any of the equipment that was the subject of the delayed permits would have been utilized before the very late stages of MTS' operations in Turkmenistan, thereby reducing the potential impact of those delays.

803 [redacted]

688. The Tribunal has seen no evidence of any material impact of the alleged delays on the Claimant's operations in Turkmenistan.

689. The Tribunal notes that neither Ms. Hardin nor Mr. Thomas addressed this claim in their expert reports.

690. None of Ms. Hardin's models quantifies the impact of the individual measures, such as the impact of the alleged delays regarding import permits. At the Hearing Ms. Hardin confirmed that she did not quantify the impact of the individual measures:

> Q. Okay. But if it's not in your report, then we can't -- the Tribunal can't tell how you quantify that, can we?
>
> A. Well, I don't quantify the individual measures.[804]

691. Mr. Thomas did not include this claim his first expert report. At the Hearing he testified that he was not asked to look at the issue of import permits:

> Q. In your July 2020 report there's no mention of import permits, is there?
>
> A. No, I wasn't asked to look at import permits specifically.[805]

692. As regards Mr. Thomas' allocator tool, Mr. Thomas described it in this testimony as "hardly scientific".[806] He also testified that his methodology was not prepared "with the degree of precision that you would like in these circumstances" and that his goal was "to provide the Tribunal with something that allows them to do anything other than a binary decision":

> Q. Right, so then how can we simply trust that we are going to take an allocation that you have given from one and simply apply it blanket to Ms Hardin's model? It clearly doesn't work, or it would have worked with profit-sharing, wouldn't it?

[804] Hearing Transcript, Day 5, 116:3-6.
[805] Hearing Transcript, Day 9, 145:25-146:2.
[806] Hearing Transcript, Day 9, 92:18-24.

A. Well, I go back to what I said in my original report, which is it is very difficult to produce something with the degree of precision that you would ideally like in these circumstances. That's not the world we're living in. What I'm trying to do is to provide the Tribunal with something that allows them to do anything other than a binary decision as to whether all the measures are in or all the measures are out.[807]

693. Therefore, the Tribunal is not convinced that Mr. Thomas' allocator tool provides sufficient evidence of the impact of the permit delays that are the subject of this claim (or of the other historical claims).

694. The Tribunal also finds no evidence that the Claimant lost any competitive advantage or incurred other harm because of any import permit delays. In order to show a claim-specific impact, the Claimant would have to show that the Respondent prevented the Claimant from deploying certain infrastructure at a specific period in time that in turn decreased its competitiveness relative to Altyn Asyr; the Claimant would also have to provide data as to how customers reacted to such delays.[808] The Claimant has provided no such evidence.

695. As consequence, the Claimant's claim based on import permit delays is dismissed.

(6) Access to VPN Claim

696. Under this claim, the Claimant complains that it could not obtain the infrastructure that would have enabled it to provide international data roaming services to its subscribers. The Claimant argues that the Respondent ignored numerous of the Claimant's requests to access a VPN to provide data roaming services without any justification, while Altyn Asyr was (allegedly) provided access to VPN channels. MTS deems this unfair and discriminatory.

a. The Claimant's Position

697. The Claimant argues that the Respondent's refusal to allow MTS-TM to access a VPN constituted a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard

[807] Hearing Transcript, Day 9, 83:25-84:11.
[808] *See* Second Dippon Report, ¶¶ 158-160.

(Article 4(2) BIT), (iii) the "all necessary approvals" standard (Article 3(2) BIT), and (iv) the FPS standard (Article 3(3) BIT).[809]

698. The Claimant states that the Respondent's refusal to allow MTS-TM to access a VPN breached the FET standard because it was unfair, arbitrary, non-transparent and discriminatory. According to the Claimant, the Respondent ignored MTS-TM's numerous requests to access a VPN without any reason or justification. MTS-TM's only alternative to using a VPN for data roaming was to provide direct connection, point to point. But at that time it was very difficult to implement this technologically, and MTS-TM did not receive permission for that either. The Respondent's refusal to allow MTS-TM to access a VPN was also discriminatory (and thus in further violation of the FET standard), because Altyn Asyr was permitted to access a VPN while MTS-TM was not.[810]

699. The Claimant acknowledges that [redacted] from Altyn Asyr explained that Altyn Asyr did not use a VPN, but used other protocols, without stating what these secure protocols were.[811] What matters is that access to secure network protocols within its data channel is exactly what MTS-TM requested from Turkmentelecom (and was denied) as early as July 2012. [redacted][813]

700. In the Claimant's view, the Respondent's refusal to allow MTS-TM to access a VPN also breached the NT standard, because the Respondent treated MTS-TM and Altyn Asyr differently without any reasonable justification. It also breached the "all necessary approvals" standard because MTS required access to a VPN for the realisation of its investment. Finally, the Respondent's refusal to grant MTS-TM access to a VPN breached

[809] Cl. PHB, ¶ 56.
[810] Cl. PHB, ¶ 56.
[811] Cl. Reply PHB, ¶ 31; Cl. Sur-Reply PHB, p. 4.
[812] Cl. Sur-Reply PHB, p. 4.
[813] Cl. Reply PHB, ¶ 32; Cl. Sur-Reply PHB, p. 4.

the FPS standard, because the Respondent failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field. According to the Claimant MTS-TM was harmed by the Respondent's refusal to allow it to access a VPN.[814]

b. The Respondent's Position

701. The Respondent notes that the Claimant alleges that MTS-TM was denied access to VPN to provide data roaming while Altyn Asyr was allegedly provided such access. The [redacted][815] Following the resumption of its operations in September 2012, MTS-TM did not request access to VPN (or any alternatives for data roaming) until 2015.[816] In any event, MTS could have provided roaming services by direct connection, point to point, which renders this claim moot.[817] Thus, the Respondent submits that MTS' [redacted] agreed that MTS-TM could have obtained without Turkmentelecom a similar "direct connection, point to point".[818] With regard to the Claimant's argument that it was not possible for MTS-TM to provide data roaming via alternatives to VPN, because MTS-TM did not get permission for those either, the Respondent argues that there is no evidence that MTS-TM requested permission to provide VPN through any alternative means.[819]

702. In relation to the Claimant's allegation that Altyn Asyr arranged access to VPN, [redacted] the former Director of Altyn Asyr, clearly explained that Altyn Asyr did not use VPN, but that it established connections through other protocols.[820] The Respondent submits that, in its Reply and Sur-Reply PHBs, MTS does not deny that Altyn Asyr did not use VPN.[821]

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[814] Cl. PHB, ¶ 56.
[815] Resp. PHB, ¶ 107.
[816] Resp. Sur-Reply PHB, ¶ 19.
[817] Resp. PHB, ¶ 107.
[818] Resp. Reply PHB, ¶ 48.
[819] Resp. Sur-Reply PHB, ¶ 19.
[820] Resp. Reply PHB, ¶ 47.
[821] Resp. Sur-Reply PHB, ¶ 19.

703. The Respondent argues that none of Ms. Hardin's models quantifies the individual impact of the VPN data roaming claim and that Mr. Thomas also fails to prove any reasonable analysis of his allocator's quantification of this claim, and his indicative weights in the allocator are unreliable. Moreover, there is no evidence of damage to MTS from this alleged measure.[822] Thus, the Respondent submits that Mr. Thomas agreed that there was no evidence to establish any impact on MTS due to its inability to offer VPN data roaming. Mr. Thomas allocated a random percentage of [redacted] without any explanation or justification for using these dissimilar markets as benchmarks for hypothetical VPN revenues in Turkmenistan. The Respondent submits that Mr. Thomas' lack of analysis and factual support renders this claim totally unsubstantiated.[823]

c. The Tribunal's Analysis

704. The Claimant's Access to VPN Claim complains that the Claimant could not obtain the infrastructure that would have enabled it to provide international data roaming to its subscribers, which the Claimant deems unfair and discriminatory.

705. The Claimant's Access to VPN Claim is denied.

706. The Tribunal finds insufficient evidence to support this claim. To establish the claim-specific impact of its VPN claim, the Claimant would need to demonstrate that it lost profits or market share from subscribers that intended to use VPN services provided by MTS as the result of some act or omission of the Respondent. The Claimant would also need to demonstrate how much international incoming traffic was lost due to the absence of a VPN.[824] The Claimant has provided no such evidence.

707. Ms. Hardin does not quantify the individual impact of the VPN Claim.

708. Mr. Thomas' allocator's indicative weight is not fully reliable. Mr. Thomas himself stated at the Hearing that his methodology was not prepared "with the degree of precision that

[822] Resp. PHB, ¶ 108.
[823] Resp. Reply PHB, ¶ 49.
[824] Second Dippon Report, ¶163.

you would like in these circumstances" and that his goal was "to provide the Tribunal with something that allows them to do anything other than a binary decision [...]".[825]

709. Furthermore, Mr. Thomas' allocator assumes that MTS' revenues [redacted] These markets are hardly comparable.[826]

710. Lastly, it is undisputed that Altyn Asyr did not use VPN during the period from 2012 until 2017, which means that in practice MTS did not suffer any competitive disadvantage vis-à-vis Altyn Asyr.

711. The Tribunal notes that the Claimant's list of "five key unlawful measures" (Annex I to the Claimant's PHB) does not include the VPN Claim.

712. In sum, the Tribunal finds that there is insufficient evidence to support this claim.

(7) Sale of Handsets Claim

713. Under this claim, the Claimant alleges a discriminatory and unfair prohibition against its sale of handsets. The Claimant argues that the Respondent removed the Claimant's right to sell handsets from its charter in 2015, and that such removal was unfair and discriminatory and breached the Claimant's right to all necessary approvals for the realisation of its investment.

a. The Claimant's Position

714. The Claimant argues that the Respondent's removal of MTS-TM's right to sell handsets constitutes a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard

[825] Hearing Transcript, Day 9, 83:25-84:11.
[826] Second Dippon Report, ¶ 132.

(Article 4(2) BIT), (iii) the "all necessary approvals" standard (Article 3(2) BIT), and (iv) the FPS standard (Article 3(3) BIT).[827]

715. The Claimant takes the view that the Respondent's removal of the right to sell handsets from MTS-TM's charter breached the FET standard, because it was unfair, arbitrary, non-transparent and discriminatory. The Claimant asserts that the Respondent has provided no explanation, let alone justification, for removing MTS-TM's right to sell handsets in 2015, and that such conduct is the definition of arbitrariness and non-transparency.[828]

716. At the conclusion of the Parties' opening submissions on Day 1 of the Hearing, the President of the Tribunal asked the Respondent's counsel to provide an explanation on Day 2 for why MTS-TM's right to sell handsets was removed from its charter. The Respondent was unable to do so. The Claimant takes the view that the Respondent's removal of MTS-TM's right to sell handsets was also discriminatory (and thus in further violation of the FET standard), because Altyn Asyr continued at all times to be authorised to sell handsets. The Respondent has repeatedly argued that removing MTS-TM's right to sell handsets could not have deprived MTS-TM of a competitive advantage over Altyn Asyr because Altyn Asyr never exercised its right to sell handsets. However, the Claimant says, it is precisely because MTS-TM had begun selling handsets while Altyn Asyr had not that removing MTS-TM's right to do so deprived it of a competitive advantage.[829]

717. The Claimant submits that the Respondent originally claimed that "retail sales" may have been omitted unintentionally by the Ministry of Economy from MTS-TM's 2015 charter, whilst it now claims that the Ministry of Economy parsed through the list and determined that handset sales were not relevant to MTS' activities.[830] The Claimant asserts that this new explanation follows the inability of the Respondent's counsel to explain to the Tribunal why MTS' right to sell handsets was removed, and is disproved by the evidence which shows that no reason was identified (even internally) for the Ministry's decision.[831] The Claimant asserts that the Ministry rejected the Claimant's appeal against its decision

[827] Cl. PHB, ¶ 59.
[828] Cl. PHB, ¶ 59.
[829] Cl. PHB, ¶ 59.
[830] Cl. Sur-Reply PHB, p. 3.
[831] Cl. Sur-Reply PHB, p. 4.

in January 2017 without providing any reasons whatsoever. This shows, in the Claimant's view, that this was not an administrative oversight, but rather a deliberate decision to restrict MTS-TM's activities.[832]

718. Insofar as the Respondent argues that the Claimant did not pursue administrative remedies under Turkmen law when the new charter was issued in March 2015, the Claimant replies, in its Sur-Reply, that this is false and that the only remedy it had against the Ministry's decision to remove MTS-TM's right to sell handsets was to refile its application, which MTS-TM did in 2016.[833]

719. The Claimant further contends that the Respondent's removal of MTS-TM's right to sell handsets also breached the NT standard, because the Respondent treated MTS-TM and Altyn Asyr differently without any reasonable justification. The Respondent's removal of MTS-TM's right to sell handsets also breached the "all necessary approvals" standard, because the ability to sell handsets is important to a telecoms operator. The Claimant also argues a breach of the FPS standard, because the Respondent (i) failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field, and (ii) failed to protect MTS-TM's legal right to sell handsets by arbitrarily depriving it of the authorisation to do so.[834]

b. The Respondent's Position

720. The Respondent asserts that the Ministry of Economy did not unilaterally intervene and remove permission for "handset sales" from MTS-TM's charter in 2015 and that MTS-TM's original charter of 2008 contained no reference to "handset sales".[835] As to the background of this claim, the Respondent submits that the 2008 charter contained a list of [redacted] which included a non-specific reference to "retail sales in non-specialized shops" and "retail sale in specialized shops". In the beginning of 2015, MTS-TM applied to re-register its charter to introduce changes to its shareholders, capitalization, shareholders' rights and powers of board of directors. The application also included an

[832] Cl. Reply PHB, ¶ 29.
[833] Cl. Sur-Reply PHB, p. 4.
[834] Cl. PHB, ¶ 59.
[835] Resp. Reply PHB, ¶ 42.

expansive list activities, [redacted][837]

721. The Respondent says that the Ministry of Economy granted MTS' request for re-registration of its shareholders, capitalization, shareholders' rights, and powers of the board of directors, and it included a truncated list of activities [redacted] Therefore, the Ministry of Economy determined which items on the list appeared relevant to MTS' activities in the telecommunications sector and which did not. It ultimately issued the new charter in March 2015 with a list [redacted] that were clearly and specifically related to MTS' activities, such as [redacted].[838] The Respondent states that there is no evidence that MTS provided any explanations [redacted], or that it considered the "retail sale" items any more important or relevant than [redacted][839]

722. As regards the Claimant's complaints that it was no longer able to sell handsets after the re-registration in March 2015, the Respondent argues that there is no evidence in the record suggesting that the Ministry of Economy even realized that MTS had been selling handsets, or that it omitted the "retail sales" item intentionally and with the purpose of precluding handset sales, or that MTS ever explained why it included that item in the list [redacted] There is no evidence of wrongful conduct or malicious intent, or disregard for the law. The

[836] Resp. PHB, ¶ 103.
[837] Resp. Reply PHB, ¶ 42.
[838] Resp. PHB, ¶ 104; Resp. Reply PHB, ¶ 43.
[839] Resp. Reply PHB, ¶ 43.

Ministry of Economy made a comparative analysis of additional requested types of activities and of the activities carried out in Turkmenistan, noting that the types of activities are sufficient for the activities carried out by MTS.[840] In its Sur-Reply PHB, the Respondent asserts that the Claimant now admits that it did not appeal the revised March 2015 charter, contrary to its prior allegations, and that the Claimant does not deny that there are no letters of complaint where it brought this issue to the attention of Turkmentelecom, the Ministry of Communications, or any other Turkmen entity. The Respondent contends that the Claimant's reference to a new application for a revised charter at the end of 2016 does nothing to explain its inactivity, failure to complain, and failure to avail itself of any remedies for nearly two years.[841]

723. The Respondent submits that MTS did not complain or pursue any administrative means of challenging the registration, or even to inquire as to whether a mistake had been made in the list. Thus, MTS did not pursue its administrative remedies under Turkmen law when the new charter was issued in March 2015. There is no evidence that it even notified Turkmentelecom or the Ministry of Communications about the new charter in 2015 or that it voiced any complaints about it. The Respondent further asserts that the only document in the record referring to the Claimant's inability to sell handsets is nearly a year later, in MTS' May 2016 letter to Turkmentelecom explaining various reasons that profit payments had decreased, in which it refers to "discontinued trading operations involving sale of handsets". The Respondent states that MTS did not even complain about the omission of its right to sell handsets from its charter in this letter.[842]

724. The Respondent submits that the Claimant in its post-hearing brief refers to a purported "appeal" concerning the charter in 2017, but it appears that MTS-TM actually filed an "application to amend its corporate charter" for a second time in late 2016. The Respondent asserts that MTS never referred to this application as an "appeal" before its post-hearing brief. Moreover, MTS has failed to provide the application that it supposedly filed in 2016, including any list of activities it may have submitted in connection with the requested

[840] Resp. PHB, ¶ 105.
[841] Resp. Sur-Reply PHB, ¶ 18.
[842] Resp. PHB, ¶ 105; Resp. Reply PHB, ¶ 44.

amendment. Thus, there is no basis to understand or assess the document referred to in the Claimant's PHB, which states that "the types of activities of Economy Society [MTS] are sufficient for the activities carried out by it". In any event, contrary to MTS' allegation that "no reason was identified" for the decision, the document contains a rational observation as to the sufficiency of the activities in MTS' charter. The Respondent again asserts there is no documentary evidence of any kind showing that MTS ever attempted to explain why "retail sales" or "handset sales" were necessary for its operations or should be included in its charter, either in 2015 or 2017.[843]

725. As regards the Claimant's argument that it suffered discrimination because Altyn Asyr continued at all times to be authorized to sell handsets, the Respondent asserts that the Claimant omits the critical facts that (i) Altyn Asyr never sold handsets; and (ii) Altyn Asyr did not request re-registration of its charter as MTS did in 2015. In any event, considering that [redacted] This is hardly an issue that impeded MTS' activities or impaired its investment.[844]

726. The Respondent argues that none of Ms. Hardin's models quantifies the individual impact of the alleged inability to sell handsets after 2015 and that Mr. Thomas also fails to prove any reasonable analysis of his allocator's quantification of this claim, and his indicative weights in the allocator are clearly unreliable. There is no evidence of damage to MTS from this alleged measure.[845]

c. The Tribunal's Analysis

727. The Claimant argues that the Respondent deprived the Claimant of the right to sell handsets in 2015, which was unfair and discriminatory and breached the Claimant's right to all necessary approvals for the realisation of its investment.

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[843] Resp. Reply PHB, ¶ 45.
[844] Resp. Reply PHB, ¶ 46.
[845] Resp. PHB, ¶ 106.

728. The Claimant's Sale of Handsets Claim is denied.

729. It is undisputed that in the beginning of 2015, MTS-TM applied to re-register its charter in order to introduce changes regarding its shareholders, capitalization, shareholders' rights and the powers of board of directors. The application included a list [redacted] of activities, including "retail sale".[846] MTS-TM's old charter from 2008 included a list [redacted], amongst them also "retail sale".[847] The Ministry of Economy granted the application but reduced the long list [redacted][848] because many of the activities which appeared on the Claimant's application were unrelated to the provision of telecommunication services. In the list of [redacted] "retail sale" was not included. Thus, the final list established by the Ministry[849] (Exhibit C-0544) does not include the retail sale activities which were included in the Claimant's application.

730. The Claimant did not take issue with this removal with the Ministry. Hence there is no evidence that the Claimant ever complained (or even only made an informal inquiry) about the decision by the Ministry of Economy and Development. There is also no hint in the record that the Ministry was (made) aware of MTS' handset sales or that the Ministry acted with the intent to preclude handset sales. Neither the Ministry of Communications nor Turkmentelecom was informed about this issue at the time. The only written communication in the record that mentions handsets is a letter to Turkmentelecom from May 2016, i.e., a year later, in which MTS explains why its profit share payments have declined.[850]

731. As regards Altyn Asyr, it appears uncontradicted that Altyn Asyr's permitted activities included the possibility to sell handsets. However, it is equally uncontradicted that Altyn Asyr never engaged in selling handsets between 2012 and 2017; hence the loss of the right to sell handsets did not have any actual impact on MTS' competitive position vis-à-vis

[846] Charter of MTS-TM as submitted for re-registration in 2015, Article 3.2.4, No. 59 and 61, Exhibit C-0543.
[847] Charter of MTS-TM in 2008, Article 3.2.4., No. 13 and 14, Exhibit C-0542.
[848] Charter of MTS-TM in 2015 as registered, 25 March 2015, Article 3.2.4, Exhibit C-0544.
[849] Charter of MTS-TM in 2015 as registered, 25 March 2015, Exhibit C-0544.
[850] Letter No. 04.2/1394 from MTS-TM to Turkmentelecom, 16 May 2016, Exhibit C-0223.

Altyn Asyr.[851] Furthermore, MTS-TM's subscribers had access to handsets through independent handset retailers.

732. Moreover, the Tribunal finds no evidence of any impact of the inability to sell handsets on MTS-TM's operations in Turkmenistan.[852]

733. The Claimant's expert, Ms. Hardin, does not quantify the individual impact of the Handset Claim (any more than any other of the individual claims).

734. The Claimant's other expert, Mr. Thomas, states in his presentation to the Tribunal of May 2022 ("Thomas Presentation") "[t]o be conservative, I do not assume any increased revenue directly from the sale of handsets".[853] Furthermore, the Tribunal is not convinced that Mr. Thomas' indicative weights contained in his allocator tool can be regarded as fully reliable. Mr. Thomas himself stated at the Hearing that his methodology of was not prepared "with the degree of precision that you would like in these circumstances" and that his goal was "to provide the Tribunal with something that allows them to do anything other than a binary decision [...]".[854]

735. In sum, the Tribunal finds that this is a de minimis claim for which there is insufficient evidence. As a consequence, the claim is denied.

(8) Interconnection Claim

736. Under this claim, the Claimant argues that the Respondent (through Altyn Asyr) did not provide sufficient interconnections between MTS-TM's and Altyn Asyr's networks. More particularly, the Claimant argues that it did not have sufficient voice interconnections with Altyn Asyr's network, which had a large impact on MTS-TM's subscribers.

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[851] See also Second Dippon Report, ¶¶ ES9, 161.
[852] *See* Second Dippon Report, ¶¶ ES9, 162.
[853] Thomas Presentation, p. 36.
[854] Hearing Transcript, Day 9, 83:25-84:11.

a. The Claimant's Position

737. The Claimant alleges that the Respondent's unjustified refusal to provide sufficient interconnections between MTS-TM and Altyn Asyr's networks constituted a breach of (i) the FET standard (Article 4(1) BIT), (ii) the "all necessary approvals" standard (Article 3(2) BIT), and (iii) the FPS standard (Article 3(3) BIT).[855]

738. The Claimant argues that the Respondent's unjustified refusal to provide sufficient interconnections between MTS-TM's and Altyn Asyr's networks breached the FET standard because it was unfair and arbitrary. The Claimant states that Altyn Asyr could have provided more interconnection channels had it wished to, but instead chose to ignore MTS-TM's many letters pleading for Altyn Asyr's cooperation in establishing additional channels. [redacted] Given that there was no commercial reason for Altyn Asyr's refusal to provide additional channels, it is clear to the Claimant that this conduct formed part of the broader State-orchestrated campaign against MTS.[856]

739. The Claimant takes the view that the Respondent's refusal to provide sufficient interconnections between MTS-TM and Altyn Asyr's networks breached the "all necessary approvals" standard because MTS required these interconnections for the realisation of its investment. Altyn Asyr's failure to provide adequate interconnection channels had a serious impact on the quality of services that MTS-TM was able to provide to its subscribers, and resulted in loss of revenue and a higher rate of churn of subscribers away from the MTS-TM network.[857]

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[855] Cl. PHB, ¶ 62.
[856] Cl. PHB, ¶ 62.
[857] Cl. PHB, ¶ 62.

740. According to the Claimant, the Respondent's refusal to provide sufficient interconnections between MTS-TM and Altyn Asyr's networks breached the FPS standard because the Respondent failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field.[858]

b. The Respondent's Position

741. The Respondent denies that insufficient voice interconnections between MTS and Altyn Asyr's networks had an "outsized impact on MTS' subscribers". The Respondent submits that the evidence shows that any interconnection problems had a greater effect on Altyn Asyr, and that the "certificates of reconciliation" between calls of each operator's subscribers show that more Altyn Asyr subscribers called MTS subscribers than vice versa. In other words, it is more likely that calls from Altyn Asyr subscribers were dropped. The Respondent submits that there is simply no evidence in the record that supports this claim. The Claimant's expert, Mr. Thomas, testified that MTS provided him with all of the evidence of the case before he decided which claims to include in his expert report; the Respondent submits that he did not include the interconnection claim in his report because it did not have any impact on MTS-TM's operations.[859]

742. The Respondent argues that the interconnection channels were provided pursuant to a commercial contract (with its own dispute resolution clause) directly between MTS-TM and Altyn Asyr, so that this claim is an attempt to elevate a routine contract claim into a BIT claim.[860]

743. With regard to the Claimant's allegation [redacted]

[858] Cl. PHB, ¶ 62.
[859] Resp. PHB, ¶ 123.
[860] Resp. Reply PHB, ¶ 60.

[redacted] The Respondent asserts that Altyn Asyr had no interest or benefit in denying MTS-TM interconnection channels.[861]

744. The Respondent points out that none of Ms. Hardin's models quantifies the individual impact of the alleged interconnection issues and that Mr. Thomas also fails to prove any reasonable analysis of his allocator's quantification of this claim, and his indicative weights in the allocator are unreliable. Moreover, there is no evidence that MTS suffered any harm. As noted, Mr. Thomas did not even deem this claim worthy of discussion in his Report. For his allocator, Mr. Thomas assumed without evidence that 10 percent of these customers would choose to leave the network impacting MTS' subscriber base. But there is no evidence that interconnection problems caused subscriber loss to MTS. Indeed, Mr. Thomas recognized that subscribers did not have a great deal of other opportunities to go to.[862] Mr. Thomas confirmed that he was not provided with any new evidence between his July 2020 report (where did not address the interconnection claim) and his latest January 2022 Supplemental Report. The Respondent concludes that the Claimant failed to meet its burden of proof.[863]

c. The Tribunal's Analysis

745. The Claimant's Interconnection Claim argues that the Respondent did not provide sufficient interconnections between MTS-TM's and Altyn Asyr's networks. More particularly, the Claimant argues that it did not have sufficient voice interconnections with Altyn Asyr's network, which had a large impact on its subscribers.

746. The Claimant's Interconnection Claim is denied.

747. As an initial point, because the only acts alleged in connection with this claim are acts of Altyn Asyr, the Tribunal returns to the question whether Altyn Asyr's acts can be attributed to the Respondent.[864]

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[861] Resp. Reply PHB, ¶ 60.
[862] Resp. PHB, ¶ 124.
[863] Resp. Reply PHB, ¶ 61.
[864] *See* Section VI. B. (2) and (3) above.

748. The Tribunal finds that the interconnection claim must be denied for lack of attribution.

749. After the Tribunal's rejection of attribution as to Altyn Asyr under Articles 4 and 5 ILC Articles,[865] what remains to be examined is whether Altyn Asyr acted on the instructions of, or under the direction or control of, Turkmenistan under Article 8 ILC Articles. The Tribunal finds that the acts or omissions of Altyn Asyr complained of (refusal or failure to provide sufficient interconnection channels) cannot be attributed to the Respondent according to Article 8 ILC Articles.

750. The Tribunal observes that State ownership of an enterprise, such as the indirect State ownership of Altyn Asyr, may be evidence of general control over an enterprise, particularly if the State is the sole or a majority shareholder. On the other hand, the existence of a separate corporate entity, such as Altyn Asyr, may create a presumption to the contrary that activities of such a separate corporate entity is not attributable to the State. The Tribunal observes that a State may own a company but may still allow it to act independently in the pursuit of its business. Thus, establishing general control as a sole or majority shareholder is only a first step in establishing attribution. For the company's conduct to be attributable under Article 8 ILC Articles, the Claimant must also establish "specific control", namely that the specific alleged acts (and not just the general operation of the company) were effectively performed as a result of the State's instructions, direction or control.

751. The Tribunal cannot exclude that Altyn Asyr, as a State-owned company, was acting under the general control of the Ministry of Communications (and to a lesser degree also of Turkmentelecom). However, in order to establish attribution under Article 8 ILC Articles, the Claimant would need to demonstrate, as required by Article 8, that Altyn Asyr was "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" the Claimant complains of in this case. It is the Claimant's argument that the Respondent has breached the BIT because Altyn Asyr refused to provide sufficient interconnection channels between MTS and Altyn Asyr's networks. The Tribunal, however, has seen no evidence that Altyn Asyr, when providing (allegedly insufficient)

[865] *See* Section VI. B. (2) above.

interconnection channels to MTS under the Interconnection Agreement between MTS and Altyn Asyr acted on the instructions of, or under the direction or control of the Respondent, particularly of the Ministry of Communications and/or Turkmentelecom.

752. Thus, even though Altyn Asyr, as a State-owned entity, may have been legally under the general control of its owner, this is, in the Tribunal's view, insufficient to prove that Altyn Asyr, when distributing (allegedly insufficient) interconnection channels between MTS and Altyn Asyr, acted on the instructions or under the direction or control of the Ministry of Communication or Turkmentelecom. As a consequence, the acts or omissions complained of with regard to Altyn Asyr (refusal to provide sufficient interconnection channels) cannot be attributed to the Respondent according to Article 8 ILC Articles, and this claim must be dismissed.

(9) Tariff-Setting Claim

753. Under this claim, the Claimant argues that the Respondent restricted the Claimant's ability to set tariffs by preventing it from increasing or reducing tariffs to respond to the market.

a. The Claimant's Position

754. The Claimant takes the view that the Respondent's restrictions on MTS-TM's ability to set its own tariffs constituted a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), and (iii) the FPS standard (Article 3(3) BIT).[866]

755. The Claimant submits that the Respondent's restrictions on MTS-TM's ability to set its own tariffs breached the FET standard because they were unfair, arbitrary, non-transparent and discriminatory. According to the Claimant, shortly after the restart of operations in 2012, the Minister of Communications informed MTS that it was not allowed to set low tariffs, because that would affect Altyn Asyr's customer base. The Claimant also alleges that, in 2015, the Respondent prevented MTS-TM from raising its tariffs to compensate for the change that year in Turkmenistan's official fixed exchange rate. The Claimant contends that the Respondent has never expressly denied that it limited MTS-TM's ability to set its

[866] Cl. PHB, ¶ 65.

own tariffs and that these restrictions on MTS-TM's ability to set its own prices constituted an unfair and arbitrary restriction on MTS-TM's commercial freedom. The restrictions were also discriminatory, according to the Claimant, because the Respondent has never suggested that Altyn Asyr was subject to any such restrictions.[867]

756. The Claimant further asserts that the Respondent's restrictions on MTS-TM's ability to set its own tariffs breached the NT standard because they treated MTS-TM and Altyn Asyr differently without any reasonable justification. According to the Claimant the said restrictions also breached the FPS standard because Respondent (i) failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field, and (ii) failed to protect MTS-TM's legal right to set its own tariffs.[868]

b. The Respondent's Position

757. The Respondent denies that MTS-TM was prevented from increasing or reducing its tariffs to respond to the market.[869]

758. The Respondent submits that there is no evidence on the record supporting the claim that MTS-TM was prevented from increasing or reducing its tariffs to respond to the market, and in particular, that MTS-TM was not allowed to increase its tariffs in 2015, after Turkmenistan's devaluation of the manat.[870] The Respondent submits that Mr. Thomas acknowledges that he did not know how much of a constraint there was in the actual world.[871] [redacted]

[867] Cl. PHB, ¶ 65.
[868] Cl. PHB, ¶ 65.
[869] Resp. Reply PHB, ¶ 54.
[870] Resp. PHB, ¶ 115.
[871] Resp. PHB, ¶ 115; Resp. Reply PHB, ¶ 54.

[redacted][872]

759. The Respondent submits that none of Ms. Hardin's models quantifies the individual impact of the tariff claim, nor does Mr. Thomas' allocator.[873] In the Respondent's view there is no evidence that MTS-TM suffered any harm. Mr. Thomas did not discuss this measure in his expert report and for his allocator, he recognized that he did not have the information to be able to do a deep-dive forensically on what the impact was. He further noted that he saw no specific evidence that he could point to. The Respondent argues that his assessment is nothing but an unexplained assumption and that this unproven and meritless claim should be rejected.[874]

c. The Tribunal's Analysis

760. The Claimant argues that the Respondent restricted the Claimant's ability to set tariffs by preventing it from increasing or reducing tariffs to respond to the market.

761. The Claimant's Tariff-Setting Claim is denied.

762. The Tribunal finds that there is insufficient evidence to show that MTS was not free to set tariffs in the cellular market.[875]

763. As regards the impact of this claim on MTS' operations, the Tribunal notes that Ms. Hardin does not quantify the impact of any individual claim, such as this tariff-setting claim.

764. The Claimant's other expert, Mr. Thomas, does not discuss this measure in his first report. Regarding this claim he submitted at the Hearing in his presentation that he "assumes[s] a [redacted] without these restrictions".[876] However, he also testified at the Hearing that he did not have enough information to make a deeper forensic

[872] Resp. PHB, ¶ 115.
[873] Resp. PHB, ¶ 116.
[874] Resp. PHB, ¶ 116; Resp. Reply PHB, ¶ 54.
[875] [redacted]
[876] Thomas Presentation, p. 36.

analysis of what the impact of the measure was. He also could not point to any specific evidence:

> (Slide 36) The last few measures I'll deal with here. I'm not going to spend a great deal of time on them, but they all run through the model as describes here. Tariff setting and advertising, I haven't got the information to be able to do a deep-dive forensically on what the impact was, so I've given them a fairly low rating.[877]

765. The Tribunal finds that, in the absence any specific evidence supporting this claim or demonstrating that the conduct alleged had any impact on the Claimant, this claim has to be denied.

(10) Advertising Claim

766. Under this claim, the Claimant asserts that the Respondent unduly restricted the Claimant's ability to advertise and market its services in a way that was unfair and discriminatory.

a. The Claimant's Position

767. The Claimant argues that the Respondent's restrictions on MTS-TM's ability to advertise and market its services constituted a breach of (i) the FET standard (Article 4(1) BIT), (ii) the NT standard (Article 4(2) BIT), (iii) the "all necessary approvals" standard (Article 3(2) BIT), and (iv) the FPS standard (Article 3(3) BIT).[878]

768. The Claimant states that the Respondent's restrictions on MTS-TM's ability to advertise breached the FET standard because they were unfair, arbitrary, non-transparent and discriminatory. The Claimant submits that MTS-TM was unable to place its advertising in premium locations occupied by Altyn Asyr, and that MTS-TM was not able to advertise on television, whilst Altyn Asyr had no difficulties in this regard. The Claimant alleges that the Respondent has never denied the existence of these informal restrictions on MTS-TM's ability to advertise and that the Respondent also sought to deter corporate clients (in particular, State-owned corporate clients) from joining MTS-TM's network, which too

[877] Hearing Transcript, Day 9, 38:22-39:2.
[878] Cl. PHB, ¶ 68.

constituted an unfair, arbitrary and non-transparent restriction on MTS-TM ability to compete freely with Altyn Asyr.[879]

769. The Claimant argues that the Respondent's restrictions on MTS-TM's ability to advertise and market its services breached the NT standard because MTS-TM and Altyn Asyr were treated differently without any reasonable justification. The Respondent's restrictions also breached the "all necessary approvals" standard because MTS required the ability to advertise for the realisation of its permitted investment. The restrictions also constituted a breach of the FPS standard because the Respondent (i) failed to protect MTS-TM's legal right to compete with Altyn Asyr on a level playing field, and (ii) failed to protect MTS-TM's legal right to advertise in Turkmenistan.[880]

770. The Claimant maintains that MTS-TM was harmed by the Respondent's restrictions on MTS-TM's ability to advertise and market its services. As early as November 2012, MTS-TM noted that Altyn Asyr was using "administrative leverage" to gain an unfair advantage over MTS-TM. MTS-TM repeatedly recorded in subsequent annual strategy presentations that it was subject to "administrative restrictions on the placement of outdoor advertising", while Altyn Asyr's advertising "occup[ied] the most efficient places". [redacted][881]

b. The Respondent's Position

771. The Respondent submits that there is no evidence of State interference with MTS-TM's ability to advertise on TV and radio and to erect billboards in prominent locations. The Respondent submits that [redacted] confirmed at the Hearing that there were no formal written bans and that MTS' complaint is that, while MTS-TM had outside commercial advertising, Altyn Asyr had more of it and that MTS-TM had problems in

[879] Cl. PHB, ¶ 68.
[880] Cl. PHB, ¶ 68.
[881] Cl. PHB, ¶ 69.

placing advertising. The Respondent takes the view that this does not amount to a breach of the BIT.[882]

772. The Respondent maintains that none of Ms. Hardin's models quantifies the individual impact of the advertising claim and that Mr. Thomas also fails to prove any reasonable analysis of his allocator's quantification of this claim, and his indicative weights in the allocator are unreliable. The Respondent further submits that there is no evidence that MTS-TM suffered any harm and that Mr. Thomas did not discuss this measure in his first report.[883] The Respondent submits that Mr. Thomas stated that for his allocator he recognized that he did not have the information to be able to do a deep-dive forensically on what the impact was,[884] and that the confirmed at the Hearing that he had seen no evidence relating to this claim and did not conduct any analysis.[885] The Respondent takes the view that the Claimant cannot discharge its burden of proof on this claim given that its own expert placed "very little weight" on the claim concerning advertising, lacking evidence and any causation analysis. The Respondent states that the Tribunal should not seriously consider claims that MTS and its own expert did not consider worth seriously pursuing.[886]

c. The Tribunal's Analysis

773. The Claimant's Advertising Claim argues that the Respondent unduly restricted the Claimant's ability to advertise and market its services. In the Claimant's view this was unfair and discriminatory.

774. The Claimant's Advertising Claim is denied.

775. The Tribunal finds that the Claimant has provided insufficient evidence of the Respondent's alleged interference and of the alleged impact on MTS' operations.

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[882] Resp. PHB, ¶ 117.
[883] Resp. PHB, ¶ 118.
[884] Resp. PHB, ¶ 118.
[885] Resp. Reply PHB, ¶ 55.
[886] Resp. Reply PHB, ¶ 56.

776. [redacted][889] The Tribunal is not convinced that this constitutes sufficient evidence of discriminatory treatment of MTS by the Respondent.

777. Furthermore, there is insufficient evidence of any impact on MTS-TM's operations.

778. The Tribunal notes that this claim is not included in the Claimant's "five key unlawful measures" as listed in the Appendix of the Claimant's PHB.

779. The Claimant's expert, Ms Hardin, does not quantify the impact of the individual claims, such as the Claimant's advertising claim.

780. The Claimant's other expert, Mr. Thomas, did not include this claim in his first report and testified that he had no evidence and that he placed very little weight on this claim:

> Q. [...] the word "advertising" isn't even mentioned in your July 2020 report, is it?
>
> A. No.
>
> Q. And is this another one where we have [still today] no evidence?
>
> A. Yes.
>
> Q. And you don't know -- and it's another one where [your calculation] starts in 2012?
>
> A. Yes.
>
> Q. And you don't know when it actually started?

[887] Hearing Transcript, Day 3, 78:16-17.
[888] Hearing Transcript, Day 3, 78:20-22.
[889] Hearing Transcript, Day 3, 80:1-3.

A. No, and therefore [...] I place very little weight on [this claim].[890]

781. Furthermore, the Tribunal is not convinced that Mr. Thomas' indicative weights contained in his allocator can be regarded as fully reliable. Mr. Thomas himself stated at the Hearing that his allocator was not prepared "with the degree of precision that you would like in these circumstances" and that his goal was "to provide the Tribunal with something that allows them to do anything other than a binary decision [...]".[891]

782. In his presentation at the Hearing Mr. Thomas "assumes [redacted] without these restrictions".[892] However, at the Hearing, Mr. Thomas also submitted in his presentation that he did not have enough information to be able "to do a deep-dive forensically on what the impact was". ("Tariff setting and advertising, I haven't got the information to be able to do a deep-dive forensically on what the impact was, so I've given them a fairly low rating"[893]). Hence it remains unclear whether MTS suffered any harm at all.

783. The Claimant has not discharged its burden of proof with regard to this claim and the claim is therefore denied.

(11) Currency Conversion Claim

784. Under this claim, the Claimant alleges that the Respondent imposed unfair limits on the Claimant's export of profits from Turkmenistan. The Claimant argues that the Respondent failed to permit the Claimant to freely convert TMT into US$ in order to repatriate its investment returns. The Claimant contends that it has been unable to transfer any funds out of Turkmenistan since 2019.

a. The Claimant's Position

785. The Claimant argues that the Respondent's failure to permit MTS to freely convert TMT into US$ in order to repatriate its investment returns constituted a breach of (i) the free

[890] Hearing Transcript, Day 9, 96:15-26.
[891] Hearing Transcript, Day 9, 83:25-84:11.
[892] Thomas Presentation, p. 36.
[893] Hearing Transcript, Day 9, 38:25-39:2.

transfer of proceeds standard (Article 7 BIT), (ii) the FET standard (Article 4(1) BIT), (iii) the "all necessary approvals" standard (Article 3(2) BIT), and (iv) the FPS standard (Article 3(3) BIT).[894]

786. The Claimant submits that the Respondent's failure to permit MTS to freely convert TMT into US$ breached the free transfer standard because it failed to uphold MTS' right to the "unrestricted transfer abroad of funds related to [its] investment".[895]

787. The Claimant alleges that the Respondent has also tried to suggest (inconsistently) that the Turkmen Government was not responsible for the restrictions in converting TMT into US$, blaming this instead on macroeconomic conditions or a shortage of US$ at local Turkmen banks.[896]

788. The Claimant submits that it is a matter of public record, based on an order issued by the Central Bank of Turkmenistan in January 2016, that Turkmen banks have refused to sell U.S. dollars since then. The Claimant further argues that the Respondent's expert, Dr. Dippon, acknowledged in his first report that it is well documented within the economic literature that, if a country wants to maintain a fixed currency exchange rate, as in the case of Turkmenistan, then it must institute restrictions on foreign currency transfers, and that Dr. Dippon further referred to Turkmenistan's policy decisions of maintaining its fixed exchange rate and foreign currency transfer restrictions. Dr. Dippon's description of the currency exchange restrictions as being the result of "Turkmenistan's policy decisions" is also consistent with the views of foreign governments and independent observers, who have explained that the Turkmen Government strictly controls foreign exchange flows and the conversion to hard currency of the local currency, the manat (TMT) is increasingly difficult.[897]

789. The Claimant states that the Respondent has also argued that it has not breached Article 7 because MTS' ability to repatriate its investment returns has only been delayed, rather than banned; the Claimant takes the view that the Respondent ignores the fact that Article 7

[894] Cl. PHB, ¶ 71.
[895] Cl. PHB, ¶ 71.
[896] Cl. PHB, ¶ 71.
[897] Cl. PHB, ¶ 71.

does not prohibit only undue or absolute restrictions on free transfer of proceeds, as some such BIT provisions do, but requires the Respondent to guarantee to MTS the "unrestricted transfer abroad of funds related to [its] investment [...] without delay in any freely convertible currency". In any event, to claim that MTS' repatriation of its investment proceeds has merely been "delayed" is to understate the scale of the issue. [redacted][898]

790. As regards the Respondent's argument that the Claimant has never stated that it does not still have access to its funds in Turkmenistan, the Claimant replies that this is true, but irrelevant. What is relevant is the Respondent's failure to uphold MTS' right under the BIT to the "unrestricted transfer abroad of funds related to its investment". In order to guard against any risk of double-counting (even though Turkmenistan has presented no evidence that the Claimant will ever be able to repatriate its trapped funds), the Claimant offered to assign its rights to the trapped funds to the Respondent upon receipt of the compensation granted by the Tribunal.[899]

791. As regards the Respondent's assertion that there is no documentary evidence in the record showing how much of MTS' funds remain trapped in Turkmenistan, the Claimant argues that Exhibit C-0533, [redacted][900]

792. The Claimant further argues that the Respondent's failure to allow MTS to repatriate its investment returns breached the FET standard because it was unfair and arbitrary. The Claimant alleges that the currency control restrictions imposed by Turkmenistan have

[898] Cl. PHB, ¶ 71.
[899] Cl. Reply PHB, ¶ 36.
[900] Cl. Reply PHB, ¶ 37.

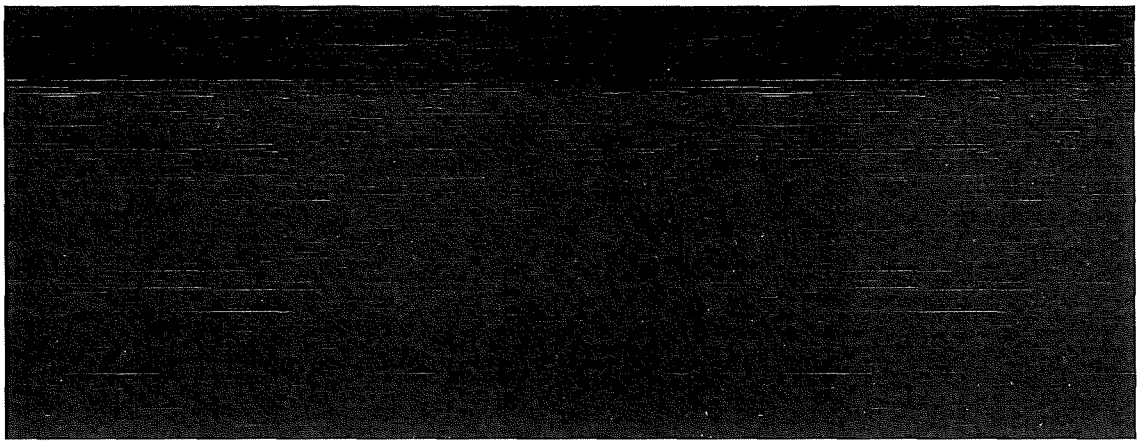
prevented MTS from accessing its investment returns without any reasonable justification, which constitutes per se unfair and arbitrary treatment of MTS as a foreign investor.[901]

793. The Claimant maintains that the Respondent's failure to allow MTS to repatriate its investment returns breached the "all necessary approvals" standard because MTS required this "for the realisation of [its] permitted investmen[t]", as MTS' inability to convert TMT into US$ has prevented it for a number of years now from accessing the full returns on its investment. The Claimant also argues that the Respondent's failure to allow MTS to repatriate its investment returns breached the FPS standard because the Respondent failed to protect MTS' legal right to convert and repatriate dividends, and thereby failed to guarantee the protection of MTS' investment returns.[902]

794. The Claimant argues, [redacted][903]

795. The Claimant refers to [redacted]

[901] Cl. PHB, ¶ 71.
[902] Cl. PHB, ¶ 71.
[903] Cl. PHB, ¶ 72.



b. The Respondent's Position

796. The Respondent observes that MTS does not claim that it does not have access to its funds in Turkmenistan. By reference to the testimony of [redacted], the Respondent explains that MTS has [redacted] According to the Respondent, MTS complains about a delay in the conversion of manats into U.S. dollars, but that all companies in Turkmenistan who work with foreign markets face those challenges.[905]

797. The Respondent submits that there is, in any event, no documentary evidence in the record to support the Claimant's claim and that the Claimant has never submitted any bank account statements in order to prove which if any, funds were "trapped" in Turkmenistan.[906] Not even the Respondent's experts, Ms. Hardin and Mr. Thomas, claim to have seen any financial documents supporting the Claimant's claim;[907] they testified they were not provided with any documents supporting this claim.[908] The Respondent notes that in its PHB, the Claimant confirms that there is no documentary support for this claim,

[904] Cl. Sur-Reply PHB, p. 4.
[905] Resp. PHB, ¶ 119.
[906] Resp. PHB, ¶ 120.
[907] Resp. PHB, ¶ 120.
[908] Resp. Reply PHB, ¶ 57.

which rests entirely [redacted] with Ms. Hardin and his testimony at the Hearing.[909]

798. Thus, the Respondent argues that the Claimant has failed to prove its currency conversion claims under Articles 3, 4, & 7 of the BIT. The Respondent submits that the factual predicate of this claim requires establishing the existence of "stranded cash" held in Turkmen manats in Turkmenistan banks. The Respondent asserts that it should not be difficult for MTS to establish this basic factual predicate, which should be easily demonstrated simply by providing bank account records, but the Claimant has never provided a single bank account record establishing the existence of a single manat stranded in Turkmenistan. [910] The Respondent contends that the quantum the Claimant seeks in its claim is an accounting fiction which does not represent actual currency that is "stranded" or "trapped" in Turkmenistan.[911]

799. The Respondent submits [redacted]914

800. With regard to Ms. Hardin's update [redacted]

[909] Resp. Reply PHB, ¶ 58.
[910] Resp. Reply PHB, ¶ 57.
[911] Resp. Reply PHB, ¶ 58.
[912] Resp. Reply PHB, ¶ 58.
[913] Resp. Reply PHB, ¶ 58; Resp. Sur-Reply PHB, ¶ 21.
[914] Resp. Sur-Reply PHB, ¶ 21.

[redacted][916] The Respondent reasserts that the purportedly trapped dividends, to which Ms. Hardin refers, are merely an accounting fiction for which no actual provision in the accounts exists.[917] The Respondent takes the view that the cash MTS spent on its expenses in Turkmenistan is not "trapped" in the country.[918]

801. Referring to its expert, Dr. Dippon, the Respondent argues that pre-judgment interest is probably the only suitable remedy for this claim. The Respondent argues that MTS has not offered any such calculation and it has not even offered to surrender its manats accounts to avoid double compensation.[919]

802. In its Reply PHB, the Respondent asserts [redacted][920]

c. The Tribunal's Analysis

803. The Claimant's Currency Conversion Claim alleges that the Respondent imposed unfair limits on the Claimant's export of profits from Turkmenistan. The Claimant argues that the

[915] Resp. PHB, ¶ 121.
[916] Resp. PHB, ¶ 122.
[917] Resp. PHB, ¶ 121.
[918] Resp. PHB, ¶ 122.
[919] Resp. PHB, ¶ 122.
[920] Resp. Reply PHB, ¶ 59.

Respondent failed to permit the Claimant to freely convert TMT into US$ in order to repatriate its investment returns. The Claimant maintains that it has been unable to transfer any funds out of Turkmenistan since 2019.

804. The Claimant's Currency Conversion Claim is denied.

805. Insofar as the Claimant complains of restrictions in converting TMT into US$, the Tribunal has already stated that Article 7 of the BIT on the "transfer of funds" does not grant the right to exchange manats into any specific currency, but is rather concerned with the process of transferring funds out of the host State.[921]

806. The Tribunal also finds that there is insufficient evidence that the Claimant actually has "stranded cash" in Turkmenistan's banks. The Claimant's claim therefore fails for lack of proof. More particularly, the Tribunal finds no documentary evidence – no bank account statements in particular – which would show and provide proof of the amount of money that is (allegedly) currently held in bank account(s) in Turkmenistan.

807. The Tribunal finds no documentary evidence in the record to support the Claimant's Currency Conversion claim. MTS has never produced bank account statements to prove what, if any, funds were "trapped" in Turkmenistan. Hence, the most basic evidence to prove the existence of cash in Turkmen bank accounts is absent. The Claimant's expert, Ms. Hardin, testified that she does not recall seeing any financial documents supporting the Claimant's claim:

> Q: But where does the information in table come from?
>
> A: Well, it was supported by discussions with [redacted]
>
> Q: Okay. And again I'm going to ask you the same question: did you put your eyes on the financial documents?
>
> A: I don't recall. There were documents that I saw, but I don't recall that.

[921] *See* Section VII.A.(5) c above.

Q: And to the best of your knowledge, there are no financial documents in the record, whether or not you have seen them?

A: Not that I know of.[922]

808. The Claimant's other expert, Mr. Thomas, also testified that he has not seen any underlying documents supporting this claim:

Q. Okay. And [Ms. Hardin] also testified that she actually had not seen any of the underlying documents to support any of the existence of stranded cash; do you recall that testimony?

A. Again, not the detail of it. But I know it was covered.

Q. And that's fine. Have you seen any underlying documents?

A. No, I wasn't asked to. I have taken simply the output of Ms Hardin's model and put it into the allocation tool.[923]

809. Thus, this claim rests on [redacted] with Ms. Hardin and his testimony at the Hearing. In the Tribunal's view, this evidence is insufficient [redacted]

810. Insofar as the Claimant refers to its own financial statements in Exhibit C-0533, [redacted] the Tribunal finds that this is not a primary source and, in the Tribunal's view, is neither sufficient nor current. Again, if there is any cash remaining in Turkmenistan, there should be direct evidence in the form of current bank account statements to show its existence and amount.

811. After the Hearing, Ms. Hardin submitted Post-Hearing Corrections with an update on the currency conversion claim, which now allege – in case the Shutdown Claims are granted –

[922] Hearing Transcript, Day 5, 155:3-15.
[923] Hearing Transcript, Day 9, 97:25-98:9.

[redacted]

812. However, even on Ms. Hardin's own account, [redacted] Furthermore, the allegedly trapped dividends which MTS claims seem to be merely an accounting entry for which no support was presented.

813. In sum, the Claimant has failed to prove its currency conversion claims under Articles 3, 4 and 7 of the BIT. The factual predicate of the Claimant's currency conversion claim requires establishing the existence of "stranded cash" held in Turkmen manats in Turkmenistan's banks. This should be easily accomplished by providing bank account records. Yet the Claimant has never provided any bank account statement establishing the existence of any manats stranded in Turkmenistan. At the Hearing, both Ms. Hardin and Mr. Thomas confirmed that they had not been provided with any documents to support this claim.

814. In addition, the Tribunal notes t[redacted]

[924] Hardin Post-Hearing Corrections, ¶ 13(i).
[925] Hardin Post-Hearing Corrections, ¶ 13(ii).
[926] Hardin's Post-Hearing Corrections, ¶ 12: "[redacted].
[927] [redacted]

[redacted]

815. [redacted] this would not be equivalent to "lost cash" or "lost profits". Hence, a full award of the "stranded cash" as requested by the Claimant[928] would lead to double compensation if the "stranded" amount is finally repatriated. Therefore, the Tribunal finds that Mr. Thomas is wrong when he states that "[t]he impact of the currency conversion measure is the value of the cash that was stranded in Turkmenistan that MTS-TM could not repatriate".[929] The Tribunal rather agrees with the Respondent's expert, Dr. Dippon, who submits that the currency conversion claim has no impact on MTS' profits as it does not represent lost profits from hindered business operations.[930] A restriction on transfer of funds constitutes a requirement that MTS' profits remain in Turkmenistan until a repatriation is possible. The Claimant has also not offered to surrender the "stranded" Turkmen manats in order to avoid double compensation if the alleged cash amount is finally transferred.

816. Therefore, Claimant has failed to prove its Currency Conversion Claim. The Tribunal finds that there is no reliable evidence to establish the existence of any stranded cash in Turkmenistan, and certainly not the amounts that the Claimant has asked for. This claim is accordingly dismissed.

D. THE TRIBUNAL'S CONCLUSION ON LIABILITY

817. The Claimant's 2017 Shutdown Claims and its Historical Breaches Claims are denied.

818. The Tribunal, having rejected all of the Claimant's claims, finds no merit in the aggregation of these claims. Hence, Claimant's 2017 Shutdown Claims and its Historical Breaches Claims as a whole are dismissed.

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[928] *See* Hardin's Post-Hearing Corrections, ¶ 13.
[929] Thomas Presentation, p. 36.
[930] Dippon Presentation, p. 41; Second Dippon Report, ¶ 164.

819. The Claimant's case on liability is rejected.

VIII. DAMAGES

820. Given that the Tribunal has rejected the Claimant's case on liability, the Tribunal has no occasion to consider the Claimant's claims for damages.

IX. COSTS

A. THE CLAIMANT'S COST SUBMISSION

821. In its Costs Submission, the Claimant argues that the Tribunal should order the Respondent to reimburse MTS for its legal, expert and other costs and to pay all of the fees and expenses of the members of the Tribunal, together with the expenses and charges of ICSID.[931]

822. The Claimant points out that Article 58(1) of the ICSID Additional Facility Rules[932] does not provide any express guidance as to how the Tribunal should determine the allocation of costs between the Parties.[933] Therefore, the Claimant takes the view that the Respondent should be ordered to bear the costs on the basis of the "costs follow the event" rule, as the prevailing approach to costs allocation under Swedish law and an increasingly common practice among modern investment treaty tribunals.[934]

823. According to the Claimant, the majority of modern investment treaty tribunals, including ICSID tribunals, are adopting some form of "costs follow the event" or "loser pays" approach. The Claimant further submits that adopting such an approach is particularly appropriate here, as the present case is an ICSID Additional Facility Rules proceeding. Accordingly, the applicable procedural law (the lex arbitri), including with respect to the allocation of costs, is not public international law but Swedish law. The Claimant further argues that Swedish procedural law applies a general rule that "costs follow the event", and

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[931] Cl. Costs Submission, ¶ 2.
[932] Article 58(1) of the ICSID Additional Facility Rules provides that: "Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne".
[933] Cl. Costs Submission, ¶ 2.
[934] Cl. Costs Submission, ¶¶ 2, 3 et seq.

Swedish legal scholars and commentators confirm that consistent with this general rule, the default approach in Swedish arbitral practice is that "costs follow the event".[935]

824. The Claimant argues that the Respondent's "serious and repeated misconduct throughout this arbitration" further supports the application of cost-shifting.[936] Accordingly, even if MTS is not successful in all of its claims, the Claimant says that the Tribunal should nevertheless order the Respondent to pay a reasonable share of MTS' costs (and the majority of the arbitration costs) in order to recognise and sanction the Respondent's misconduct.[937] Thus, the Claimant maintains that, regardless of the outcome of the case, the Tribunal should order the Respondent to pay a reasonable share of MTS' costs, as well as the majority of the arbitration costs.[938]

825. The Claimant maintains that it is entitled to recover all of its costs and expenses totalling [redacted][939]

826. The Claimant's cost claim comprises the following individual items:[940]

(a) The Claimant's ICSID registration fee and its share of the advances on costs, in the total amount of [redacted][941]

(b) Legal professional fees and expenses of the Claimant's external counsel, Baker Botts, in the total amount of [redacted][942]

This amount includes [redacted]

[935] Cl. Costs Submission, ¶ 3.
[936] Cl. Costs Submission, ¶¶ 7, 9(a)-(h).
[937] Cl. Costs Submission, ¶ 7.
[938] Cl. Costs Submission, ¶ 10.
[939] Cl. Costs Submission, ¶ 11, Appendix, Table 1.
[940] Cl. Costs Submission, ¶ 11.
[941] Cl. Costs Submission, ¶ 11(a).
[942] Cl. Costs Submission, ¶ 11(b).

[redacted][943]

(c) Fees and expenses of the Claimant's experts in the arbitration in the total amount of

[redacted][944]

[redacted][945]

(d) The Claimant's costs and expenses [redacted] in the total amount of

[redacted][946]

[redacted][947]

(e) The Claimant's in-house legal costs incurred for the purposes of this arbitration in the total amount of

[redacted][948]

[redacted]

[943] Cl. Costs Submission, ¶ 11(b).
[944] Cl. Costs Submission, ¶ 11(c).
[945] Cl. Costs Submission, ¶ 11(c).
[946] Cl. Costs Submission, ¶ 11(d).
[947] Cl. Costs Submission, ¶ 11(d).
[948] Cl. Costs Submission, ¶ 11(e).

[redacted][949]

827. The Claimant further argues that, based on Section 42 of the Swedish Arbitration Act,[950] it is entitled to post-award interest on its costs; accordingly, MTS respectfully requests that the Tribunal order the Respondent to pay post-award interest on the costs awarded to the Claimant, applying the post-award interest rate set out in paragraphs 87 and 88 of the Claimant's Post-Hearing Brief, from the date of the award until payment in full is made by the Respondent.[951]

B. THE RESPONDENT'S COST SUBMISSION

828. In its submission on costs, the Respondent claims the reimbursement of costs and expenses of these proceedings, including the Respondent's legal fees and expenses totalling [redacted], broken down as follows:[952]

[redacted]

829. The Respondent takes the view that an award on costs requiring the Claimant to compensate the Respondent for the full amount of its legal fees and expenses is warranted.[953]

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[949] Cl. Costs Submission, ¶ 11(e).
[950] Section 42 of the Swedish Arbitration Act provides as follows: "Unless otherwise agreed by the parties, the arbitrators may, upon request by a party, order the opposing party to pay compensation for the party's costs and determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The arbitrators' order may also include interest, if a party has so requested".
[951] Cl. Costs Submission, ¶ 12.
[952] Resp. Costs Submission, ¶ 1.
[953] Resp. Costs Submission, ¶ 2.

830. The Respondent further argues that the Claimant's conduct in pursuing frivolous claims, and its history of aggressive, bad faith and obstructive tactics are all factors to be taken into account in the apportionment of costs.[954] The Respondent alleges that these tactics caused enormous financial burden to Turkmenistan, with needless escalation of costs, for which MTS must be held accountable.[955]

831. As regards the standards for awarding costs,[956] the Respondent argues that under Article 58(1) of the ICSID Facility Arbitration Rules the Tribunal has the power to assess and apportion all or part of the fees and expenses incurred by the parties in connection with the proceeding, including legal fees, expert fees, ICSID costs, and other expenses.[957]

832. The Respondent submits that the conduct of the parties is a factor that ICSID tribunals should consider in allocating costs as recognized in the recent 2022 amendments to the ICSID Arbitration Rules.[958] The Respondent also refers to Rule 62(1)(b) of the 2022 ICSID Additional Facility Arbitration Rules[959] as well as arbitral jurisprudence[960] regarding the relevance of the conduct of the parties for the allocation of costs.

833. The Respondent argues that the circumstances of this case warrant an award of costs against the Claimant.[961]

834. The Respondent "respectfully requests that the Tribunal award it the entirety of its legal fees, expert fees, and all other costs and expenses incurred in this arbitration, in the amount

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[954] Resp. Costs Submission, ¶ 2.
[955] Resp. Costs Submission, ¶¶ 2(i)-(viii), 3, Section II(A)-(F).
[956] Resp. Costs Submission, ¶¶ 4, et seq.
[957] Resp. Costs Submission, ¶ 4.
[958] Resp. Costs Submission, ¶ 5.
[959] Rule 61(1) of the 2022 ICSID Additional Facility Arbitration Rules provides:

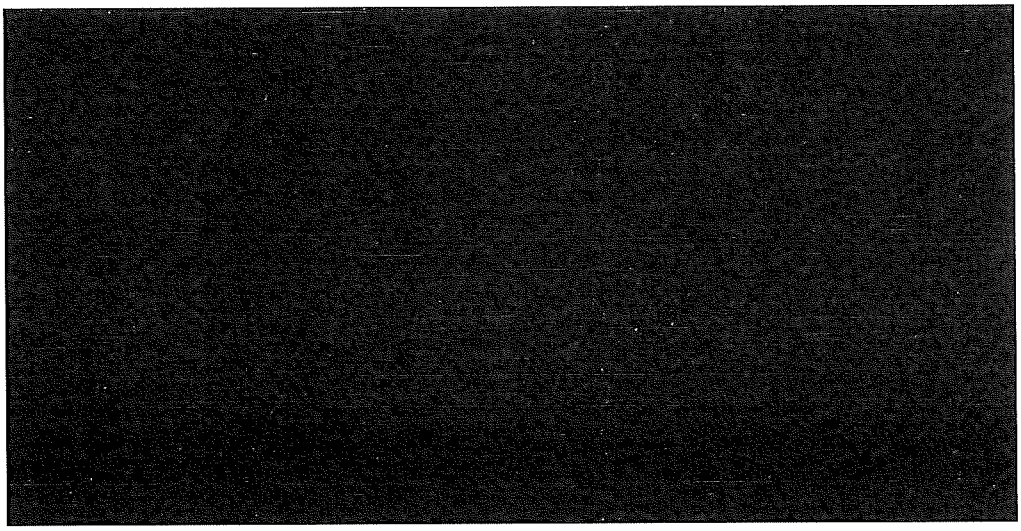
> (1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:
> (a) the outcome of the proceeding or any part of it;
> (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal;
> (c) the complexity of the issues; and
> (d) the reasonableness of the costs claimed.

[960] Resp. Costs Submission, ¶¶ 6, et seq.
[961] Resp. Costs Submission, ¶ 11.

of [redacted], plus interest at a reasonable commercial rate accruing from the date of the award until the date of payment".[962]

C. THE TRIBUNAL'S AND ICSID'S FEES AND EXPENSES

835. The fees and expenses of the Tribunal, ICSID's administrative fees and expenses, amount to (in US$):



D. THE TRIBUNAL'S DECISION ON COSTS

836. Article 58 (1) of the ICSID Facility Arbitration Rules, to which both Parties refer, gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate. Article 58 (1) provides:

> Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of ICSID and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

[962] Resp. Costs Submission, ¶ 31.

837. The Tribunal agrees with the Claimant that costs are properly allocated on the basis of the "costs follow the event" rule.

838. Given that the Respondent has prevailed in this case, the costs have, in principle, to be borne by the Claimant.

839. The Tribunal finds, however, that some adjustment is appropriate to take account of the fact that the Claimant has prevailed on jurisdiction. The Claimant has also largely prevailed on attribution.

840. The Tribunal notes that each side argues that its costs were increased by the other side's conduct. After having reviewed the Parties' allegations, the Tribunal finds some basis for complaint by each Party, but insufficient reason to give this aspect any impact on the allocation of costs between the Parties.

841. Taking the above into account, the Tribunal finds that the Claimant should bear the entire costs of the arbitration, including the Tribunal Members' fees and expenses, ICSID's administrative fees, and other direct expenses. These are itemized in paragraph 835, above, and total [redacted] The Claimant shall therefore reimburse the Respondent for its share of such fees and expenses in the amount of [redacted]

842. The Tribunal also finds that the Claimant should reimburse the Respondent for 80 percent of the Respondent's legal fees and expenses. The Respondent has calculated its total legal fees and expenses as [redacted], which includes [redacted] of arbitral costs. Thus, the total of Respondent's legal fees and expenses (not including arbitral costs) is [redacted]. Claimant is directed to pay the Respondent [redacted]

843. As regards interest, the Respondent requests interests on its costs at a "reasonable commercial rate accruing from the date of the award until the date of payment".[963]

844. The Tribunal finds it appropriate that no interest should be due on the amount payable to the Respondent if payment of the amounts ordered is made by the Claimant within 60 days from the date of this Award. If payment is not made by that date, the Claimant shall pay

[963] Resp. Costs Submission, ¶ 31.

interest at the rate proposed by the Claimant itself in its prayer for relief, i.e., the U.S. 5-year median Treasury rate + 4%, compounded annually, on all of the amounts awarded from the date of the Award to the date the Award is paid in full.[964]

X. AWARD

845. For the reasons set forth above, the Tribunal decides as follows:

(1) The Tribunal has jurisdiction to hear the claims brought by the Claimant.

(2) The Claimant's claims are dismissed.

(3) The Claimant is ordered to reimburse the Respondent for its entire share of the costs of arbitration in the amount of [redacted]

(4) The Claimant is ordered to pay the Respondent 80 percent of the Respondent's legal fees and expenses, in the amount of [redacted]

(5) No interest shall be due if the Claimant makes payment of the above amounts within 60 days of the date of the Award. If the Claimant fails to make payment by that date, the Claimant is ordered to pay interest on the amounts payable to the Respondent at the the U.S. 5-year median Treasury rate + 4%, compounded annually, on all of the amounts awarded from the date of the Award to the date the Award is paid in full.

[964] Cl. PHB, ¶ 88.

Dr. Paolo Michele Patocchi
Arbitrator

Date: 13 JUN 2023

Mr. John M. Townsend
Arbitrator

Date:

Professor Dr. Siegfried H. Elsing
President of the Tribunal

Date:

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