

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MUHAMMET ÇAP

BANKRUPT SEHIL İNŞAAT ENDUSTRI VE TİCARET LTD. STİ.

CLAIMANTS

and

TURKMENISTAN

RESPONDENT

ICSID Case No ARB/12/6

AWARD

Members of the Tribunal

Professor Julian D.M. Lew QC, President
Professor Laurence Boisson de Chazournes
Professor Bernard Hanotiau

Secretary of the Tribunal

Ms Ella Rosenberg

Assistant to the Tribunal

Dr Crina Baltag

Date: 4 May 2021

REPRESENTATION OF THE PARTIES

Representing Mr Muhammet Çap:

Dr Hamid Gharavi
Ms Ceyda Cenziger (until February 2020)
Ms Sophia von Dewall
Derains & Gharavi AARPI
25, rue Balzac
75008 Paris
France

Representing Sehil İnşaat Endustri
ve Ticaret Ltd. Sti.:

Mr Ahmet Emin Yıldız
Hükümet Yanı Avukatlar St., No 5
Onur Business Center, Floor 3, Tekirdağ
Turkey
and
Mr Egemen Egemenoglu
Egemenoglu Law Firm
Vadistanbul Bulvar Azerbaycan Cad.
1B Blok No:56 Kat 25 34418
İstanbul
Turkey
and
Mr Akin Alcitepe
Offit Kurman
1325 G Street, NW
Suite 500
Washington, D.C. 20004
United States of America

Representing Respondent:

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

TABLE OF CONTENTS

I. PROCEDURAL HISTORY	1
1. Filing of the Request for Arbitration	1
2. The constitution of the Tribunal	1
3. The first session of the Tribunal and bifurcation of the proceedings	3
4. Parties' submissions and hearing on jurisdiction	4
Respondent's first application regarding third party funding	10
5. Respondent's Request for Reconsideration of the Decision on Jurisdiction.....	12
6. Respondent's Second Request for the Disclosure of Claimants' Third-Party Funding Agreement and Security for Costs	14
7. Procedural Calendar, Document Production and Visas and Safe entry into Turkmenistan	19
8. Submissions on the Merits	20
9. The Filing of Respondent's Rejoinder and the Primetals Expert Report	23
10. Hearing on Jurisdiction and the Merits	32
11. The Bankruptcy of Claimant Sehil.....	36
12. Organization of a further hearing on closing arguments	44
13. Respondent's Proposal to disqualify Professor Bernard Hanotiau	46
14. The Parties' Requests for Provisional Measures	47
15. Hearing on Closing Arguments.....	57
16. Payment of Advances by the Parties	60
17. The filing of the Parties' Post- Hearing Briefs.....	62
II. FACTUAL BACKGROUND	69
1. History of Parties' Business Relationship.....	70
2. Claimants' Claims against Respondent.....	72
3. Respondent's Defense to Claimants' claims and Counterclaims	75
III. ISSUES TO BE DETERMINED AND PARTIES' POSITIONS.....	80
1. Do Claimants' claims arise out of an "investment" within the meaning of (1.1) Article 25 of the ICSID Convention and (1.2) Article I(2) of the BIT?	80
(1.1) Article 25 of the ICSID Convention	80
(a) Respondent's Position.....	80

(b) Claimants' Position.....	84
(1.2) Article I(2) of the BIT.....	89
(a) Respondent's Position.....	89
(b) Claimants' Position.....	91
2. Are Claimants the owners of the asserted claims?.....	93
(a) Respondent's Position.....	93
(b) Claimants' Position.....	95
3. Has the Tribunal jurisdiction over Claimants' claims for breach of customary international law and Turkmenistan's foreign investment laws?	96
(a) Respondent's Position.....	96
(b) Claimants' Position.....	97
4. Are Claimants' claims (i) Treaty claims that fall within the jurisdiction of this Tribunal or (ii) contractual disputes which do not?.....	98
(a) Respondent's Position.....	98
(b) Claimants' Position.....	103
5. Has the Tribunal jurisdiction over Respondent's counterclaims and whether they are admissible?.....	111
(a) Respondent's Position.....	111
(b) Claimants' Position.....	115
6. What law is applicable to the claims arising out of the Disputed Contracts?	121
(a) Claimants' Position.....	121
(b) Respondent's Position.....	122
7. Which party has the burden of proof and what is the effect of the lack of evidence presented to the Tribunal?.....	124
(a) Claimants' Position.....	124
(b) Respondent's Position.....	126
8. When is a State responsible for contracts entered into by State entities?	130
(a) Claimants' Position.....	130
(b) Respondent's Position.....	134
9. Does the Most Favored Nation clause in the BIT give rights to Claimants to full protection and security, non-discrimination/non-impairment of investments, and the right to make claims under specific umbrella clauses?	138
(a) Claimants' Position.....	138
(b) Respondent's Position.....	143

10. Does the wording “fair and equitable treatment of investment is desirable” in the preamble of the BIT impose an obligation of Fair and Equitable Treatment?	145
(a) Claimants’ Position	145
(b) Respondent’s Position.....	147
11. Is there a breach of the Expropriation standard under the BIT?	148
(a) Claimants’ Position	148
(b) Respondent’s Position.....	158
12. Is there a breach of the Fair and Equitable Treatment standard under the BIT?.....	164
(a) Claimants’ Position	164
(b) Respondent’s Position.....	166
13. Is there a breach of the Full Protection and Security standard under the BIT?.....	169
(a) Claimants’ Position	169
(b) Respondent’s Position.....	170
14. Is there a breach of the Protection against Arbitrary, Unreasonable and Discriminatory Measures under the BIT?	171
(a) Claimants’ Position	171
(b) Respondent’s Position.....	172
15. Is there a breach of the Umbrella Clause under the BIT?	172
(a) Claimants’ Position	172
(b) Respondent’s Position.....	173
16. Damages claimed by Claimants	174
IV. RELIEF SOUGHT	178
V. TRIBUNAL’S ANALYSIS AND CONCLUSIONS	181
1. Do Claimants’ claims arise out of an “investment” within the meaning of Article 25 of the ICSID Convention and of Article I(2) of the BIT?	181
2. Are Claimants the owners of the asserted claims?.....	184
3. Has the Tribunal jurisdiction over Claimants’ claims for breach of customary international law and Turkmenistan’s foreign investment laws	187
4. Are Claimants’ claims (i) Treaty claims that fall within the jurisdiction of this Tribunal or (ii) contractual disputes which do not?.....	188
5. Has the Tribunal jurisdiction over Respondent’s counterclaims and are they admissible?	191
6. What law is applicable to the claims arising out of the Disputed Contracts?	192

7. Which party has the burden of proof and what is the effect of the lack of evidence presented to the Tribunal?.....	193
8. When is a State responsible for contracts entered into by State entities?	197
ILC Article 4	199
ILC Article 8	213
9. Does the Most Favored Nation clause in the BIT give rights to Claimants to full protection and security, non-discrimination/non-impairment of investments, and the right to make claims under specific umbrella clauses?	214
10. Does the wording “fair and equitable treatment of investment is desirable” in the preamble of the BIT impose an obligation of Fair and Equitable Treatment?	219
11. Is there a breach of the Expropriation standard under the BIT?	220
A. Meaning of Expropriation	221
B. Investment allegedly expropriated.....	224
C. Specific acts and omissions effecting expropriation	228
a. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) withheld IPCs in an arbitrary manner and with no basis, and/or failed to make advance payments on time?.....	228
b. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) imposed, ordered and “forced” Claimants to take additional work without additional compensation?	231
c. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) imposed delay penalties on Claimants in an arbitrary manner with no basis?.	235
d. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) delayed the carrying out of certain administrative obligations?.....	237
e. Whether the Contractual Counterparties engaged in abnormal, disruptive, intimidating, and extensive site raids and inspections, abused their power?	241
f. Alleged interference of State organs with the performance of the contracts via threats, intimidations, imprisonments, penalties/fines, bans, et cetera	244
g. Interference by the Prosecutor and “its army” in the Disputed Contracts and/or Claimants’ investment.....	250
h. The imposition of delay penalties and termination of Contracts through Decisions of the judiciary	267
i. The seizure and sealing of Claimants’ property and assets by the Tax Authorities..	271
D. Tribunal’s General Conclusion.....	274

12. Is there a breach under the BIT of the Fair and Equitable Treatment, Full Protection and Security, Protection against Arbitrary, Unreasonable and Discriminatory Measures standards and the Umbrella Clause?	276
13. Damages claimed by Claimants	277
VI. COSTS.....	277
1. Claimants’ Position	278
2. Respondent’s Position	281
3. The Tribunal’s Costs	281
4. The Tribunal’s Decision on Costs	282
VII. AWARD.....	284
VIII.GLOSSARY	288
ANNEX A.....	291
ANNEX B	295

I. PROCEDURAL HISTORY

1. Filing of the Request for Arbitration

1. On 23 February 2012, ICSID received a request for arbitration dated 21 February 2012 from Mr Muhammet Çap and Sehil İnşaat Endustri ve Ticaret Ltd. Sti. against Turkmenistan (RfA).
2. On 1 March 2012, ICSID sent a communication to Claimants inquiring as to whether they met the requirements of Article VII(2) of the Turkey-Turkmenistan BIT.
3. By letter dated 6 March 2012, Claimants responded as follows:

We confirm that the one-year period referred to in Article VII(2) of the BIT only applies “if” the investor had chosen to bring its claims before Turkmen courts. Claimants in the present case have not commenced any proceedings before Turkmen courts in relation to their claims. Therefore, Claimants’ position is that the one-year period does not apply in the present instance.

4. On 26 March 2012, the Secretary-General of ICSID registered the case in accordance with Article 36(3) of the ICSID Convention. Upon the issuance of the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

2. The constitution of the Tribunal

5. By letter from Claimants dated 31 May 2012 and email from Respondent of 20 June 2012, the Parties agreed, in accordance with Article 37(2)(a) of the ICSID Convention, that the Arbitral Tribunal would consist of three arbitrators: one arbitrator to be appointed by each of Claimants and Respondent, and the third, presiding arbitrator, to be appointed by agreement of the two party-appointed arbitrators in consultation with the Parties.
6. On 31 May 2012, Claimants appointed Professor Bernard Hanotiau, a national of Belgium, as arbitrator (address: Hanotiau & van den Berg, IT Tower (9th Floor), 480 Avenue Louise,

- B9, 1050 Brussels, Belgium). Upon the Centre's invitation of 22 June 2012, Professor Hanotiau accepted the appointment on 25 June 2012 and provided a signed declaration in accordance with Article 6(2) of the ICSID Arbitration Rules.
7. On 26 June 2012, Respondent appointed Professor Laurence Boisson de Chazournes, a national of France and Switzerland, as arbitrator (address: University of Geneva Faculty of Law, 40, boulevard du Pont-d'Arve, 1211, Geneva 4, Switzerland). Professor Boisson de Chazournes accepted the appointment on 9 July 2012, and provided a signed declaration and a statement in accordance with Article 6(2) of the ICSID Arbitration Rules.
 8. By letter dated 27 September 2012, the Parties were informed that Mr Paul-Jean Le Cannu, ICSID Legal Counsel, would serve as Secretary of the Tribunal, when one was constituted. Mr Le Cannu was replaced by Ms Ella Rosenberg, ICSID Legal Counsel, on 8 August 2018, due to a redistribution of the workload at the Centre.
 9. By letter dated 5 October 2012, the Parties informed the ICSID Secretariat that they were *"now in agreement to submit to ICSID a list of three candidates from which [...] the Chairman of the Administrative Council would appoint the President of the Tribunal."* The Parties further explained that they were *"in agreement on all three candidates (in no particular order of preferences) and [left] it for ICSID to select a candidate taking into consideration the characteristics of the case concerned."*
 10. On 11 October 2012, Professor Julian D.M. Lew QC, a national of the United Kingdom, was appointed as President of the Tribunal by the Chairman of the Administrative Council, from the list provided by the Parties on 5 October 2012 (address: 20 Essex Street Chambers, 20 Essex Street, London WC2R 3AL, United Kingdom). Professor Lew accepted his appointment on 21 October 2012, and submitted a signed declaration and a statement in accordance with Article 6(2) of the ICSID Arbitration Rules.
 11. On 22 October 2012, the Secretary-General 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 in accordance with ICSID Arbitration Rule 6(1).

12. On 24 October 2012, the Centre requested each Party to make an initial advance payment of USD 100,000.00 to cover the costs of the proceedings in the first three to six months of the case. By letter dated 26 November 2012, the Centre confirmed receipt of Claimants' payment. By letter dated 4 June 2013, the Centre confirmed receipt of Respondent's payment.

3. The first session of the Tribunal and bifurcation of the proceedings

13. On 4 February 2013, the Tribunal held a first session with the Parties at the World Bank in Washington, D.C.
14. On 15 February 2013, the Tribunal issued Procedural Order No 1 (**PO No 1**), setting out the procedural rules that Claimants and Respondent had agreed to, and that the Tribunal had determined at the first session in Washington, D.C., should govern this Arbitration. The Parties confirmed that "*the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.*"¹ It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of proceedings would be Washington D.C., without prejudice to the Tribunal's decision to hold hearings at any other place that it considers appropriate after consulting with the Parties and seeking their agreement.
15. Paragraph 13.1 of PO No 1 embodied the agreement of the Parties and the Tribunal's determination with regard to the first phase of this Arbitration. It provided:

It was agreed by the Parties and decided by the Tribunal at the first session that in a first phase of this arbitration the Parties would make full submissions on Article 7 of the [BIT], including any relevant factual and legal arguments in support thereof. Following the Parties' exchange of written submissions and the hearing on this issue, the Tribunal shall render a decision or an award. Should the Tribunal uphold jurisdiction on the basis of Article 7 of the BIT, Respondent's other jurisdictional objections and the merits of the case shall be addressed in a second phase of the proceedings.

¹ PO No 1, § 2.1.

16. Accordingly, PO No 1 provided a timetable for the filing by Respondent and Claimants, sequentially, of written submissions with supporting evidence and legal materials on which the Parties rely, addressing Respondent's jurisdictional challenge. It also fixed 26-27 August 2013 for an oral hearing on jurisdiction to be held in Washington, D.C., or at a venue in Europe to be agreed.

4. Parties' submissions and hearing on jurisdiction

17. On 26 February 2013, the Parties informed the ICSID Secretariat that they had agreed on Paris, France as the venue for the hearing on jurisdiction scheduled for 26-27 August 2013.
18. As agreed at the first session and subsequently by the Parties and the Tribunal, the Parties filed their written submissions as follows.
19. On 18 March 2013, Respondent filed its Memorial on Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (**Memorial**) along with supporting documents, including the following expert reports:
- The Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 15 March 2013 (**Dr Öktem's and Dr Karlı's First Legal Opinion**);
 - The Expert Linguistics Opinion of Dr Jaklin Kornfilt on the Meaning of Article VII.2 in the Turkish Version of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 (**Dr Kornfilt's First Expert Linguistics Opinion**); and
 - The Expert Linguistics Opinion of Dr John Glad on the Meaning of Article VII.2 in the Russian Version of the Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 (**Dr Glad's Expert Linguistics Opinion**).
20. On 29 April 2013, Claimants filed their Counter-Memorial on Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (**Counter-Memorial**) along with supporting documents, including the following witness statements and expert reports:

- The Witness Statement of Mr Hasan Çap dated April 2013;
 - The Witness Statement of Mr Hüseyin Çap dated 29 April 2013;
 - The Witness Statement of Mr İrfan Dölek dated 29 April 2013;
 - The Witness Statement of Mr Ukkışe Çap dated 29 April 2013;
 - The Expert Linguistics Opinion of Dr Yorgos Dedes on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 26 April 2013 (**Dr Dedes' First Expert Linguistics Opinion**);
 - The Expert Linguistics Opinion of Professor Robert Leonard on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 29 April 2013 (**Prof. Leonard's First Expert Linguistics Opinion**); and
 - The Expert Linguistics Opinion of Dr Sergey Tyulenev on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 16 April 2013 (**Dr Tyulenev's First Expert Linguistics Opinion**).
21. By email of 28 May 2013, the Parties informed the Tribunal that they had agreed to amend the procedural calendar. On 13 June 2013, Respondent filed a request for a further extension of the deadline to file its Reply. On 14 June 2013, Claimants filed their comments on Respondent's request. By email of the same date, the Tribunal granted the requested extension, taking into account the views expressed in the Parties' communications and, in particular, the special circumstances invoked by Respondent. An identical extension was granted to Claimants for the filing of their Rejoinder.
22. On 19 June 2013, Respondent filed its Reply Memorial on Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (**Reply**) along with supporting documents, including the following expert reports:
- The Supplementary Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 19 June 2013 (**Dr Öktem's and Dr Karlı's Second Legal Opinion**);

- The Second Expert Linguistics Opinion of Dr Jaklin Kornfilt on the Meaning of Article VII(2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 June 2013 (**Dr Kornfilt’s Second Expert Linguistics Opinion**);
 - The Expert Linguistics Opinion of Professor Boris Gasparov on the Meaning of Article VII(2) of the Russian Version of the 1992 Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 17 June 2013 (**Prof. Gasparov’s Expert Linguistics Opinion**); and
 - The Expert Linguistics Opinion of Prof. Georgia M. Green concerning the “*provided that, if...and...*” clause in Article VII of the (signed) English version of the Turkey-Turkmenistan BIT dated 14 June 2013 (**Prof. Green’s Expert Linguistics Opinion**).
23. On 3 July 2013, Respondent filed an additional legal authority (Exh. RLA-98) in support of its jurisdictional challenge based on Article VII(2) of the Turkey-Turkmenistan BIT.
 24. On 15 July 2013, the Centre requested each Party to make a second advance payment of USD 150,000.00 to cover the costs of the proceedings in the next three to six months of the case, including the upcoming hearing on jurisdiction.
 25. By letter of 26 July 2013, Claimants informed the Tribunal that they would file their Rejoinder Memorial by 9 August 2013.
 26. By letter dated 8 August 2013, Respondent informed the Tribunal that some of its experts “*may have to give testimony by video rather than in person in Paris [...] due both to personal and professional obligations.*”² Respondent also advised that Dr Glad would not be available to testify at the hearing.
 27. On 9 August 2013, Claimants filed their Rejoinder on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty (**Rejoinder**) along with supporting documents, including the following witness statement and expert reports:

² Letter from Respondent dated 8 August 2013

- The Witness Statement of Mrs Zergül Özbilgiç dated 7 August 2013 (**Mrs Özbilgiç’s Witness Statement**);
 - The Second Expert Linguistics Opinion of Dr Yorgos Dedes on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 8 August 2013;
 - The Second Expert Linguistics Opinion of Professor Robert A. Leonard on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 8 August 2013 (**Prof. Leonard’s Second Expert Linguistics Opinion**); and
 - The Second Expert Linguistics Opinion of Dr Sergey Tyulenev on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 6 August 2013 (**Dr Tyulenev’s Second Expert Linguistics Opinion**).
28. On 15 August 2013, Claimants submitted the “*full version of the Witness Statement of Mrs Zergül Özbilgiç as well as a corrected version of Claimants’ Rejoinder*”, stating that the changes made to both documents were “*purely clerical*”.³ Claimants indicated that these documents replaced the earlier versions submitted on 9 August 2013.
29. A pre-hearing organisational meeting took place by telephone conference on 14 August 2013, at 10:00 am, Washington, D.C. time, with Mr Raed Fathallah and Mr Louis Christophe Delanoy for Claimants, and Ms Miriam Harwood and Ms Claudia Frutos-Peterson for Respondent, the President of the Tribunal and the Secretary. The meeting addressed the arrangements for the hearing scheduled for 26-27 August 2013. The timing of oral arguments and the examination of experts were specifically agreed.
30. Unexpectedly, without any indication even during the pre-hearing telephone conference the previous day, by letter dated 15 August 2013, Respondent requested the postponement of the hearing scheduled for 26-27 August 2013. Respondent’s reasons for the request were as follows:

We [Respondent’s counsel] have been in discussions with our client regarding the financial arrangements for the proceedings in this and other

³ Email from Claimants dated 15 August 2013.

pending cases and are still awaiting decisions in that regard. Unfortunately, under the circumstances, we will not be able to proceed with the hearing on the dates presently scheduled.

31. By email of 16 August 2013, the Tribunal requested Claimants' comments on Respondent's request for postponement.
32. By letter dated 16 August 2013, Claimants provided their comments on Respondent's request and confirmed "*their willingness to immediately advance Respondent's outstanding share of 150.000 USD*" for the second advance payment and requested that the Tribunal "*reject Respondent's request for postponement, maintain the hearing dates and order the Respondent to attend the hearing; failing which it shall be held in default.*" By letter of the same date, Respondent reiterated its request for a rescheduled hearing on its objection to jurisdiction. By separate email, Respondent also reserved its rights with respect to "*Claimants' attempt to submit a 'corrected version' of its Rejoinder.*" By letter dated 17 August 2013, Claimants provided further comments on Respondent's request, to which Respondent replied by letter dated 18 August 2013.
33. By letter dated 19 August 2013, the Tribunal informed the Parties of its decision, with strong reservation, to adjourn the proceedings scheduled for 26-27 August 2013, and to fix another two-day hearing as soon as possible. The Tribunal further noted that "[o]nce that hearing has been fixed it will be immutable and if Respondent again decides not to attend the hearing without providing any reasoned justification and proper notice, the Tribunal will proceed with Respondent in default and will issue a decision or an award determining the jurisdictional objection."
34. On 20 August 2013, the Centre acknowledged receipt of Claimants' share of the second advance payment requested on 15 July 2013. By letter dated 4 September 2013, the Centre confirmed receipt of Respondent's payment of the second advance.
35. By letter dated 11 September 2013, the Tribunal proposed new hearing dates to the Parties. By letter dated 14 September 2013, Respondent confirmed its availability for a hearing on 14-15 January 2014. By letter dated 16 September 2013, Claimants also confirmed their availability for the January hearing. By letter dated 18 September 2013, the Tribunal noted

the Parties' availability and confirmed that the hearing on jurisdiction would be held on 14-15 January 2014, in Paris, France, and proposed dates for a pre-hearing organisational meeting.

36. A second pre-hearing organisational meeting took place by telephone conference on 20 December 2013 between counsel for the Parties, the President of the Tribunal and the Secretary.
37. Further to the Parties' communications of 9 January 2014 regarding the attendance of Professor Dr Ziya Akıncı (of Akıncı Law Firm), the Tribunal requested by letter of 13 January 2014 that Claimants provide confirmation at the commencement of the hearing that Professor Dr Akıncı had been properly authorised by them to attend the hearing.
38. On 14-15 January 2014, at the World Bank, in Paris, France, a hearing on jurisdiction took place. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimants:

Mr Louis Christophe Delanoy	Bredin Prat
Mr Raéd Fathallah	Bredin Prat
Ms Laura Fadlallah	Bredin Prat
Mr Shane Daly	Bredin Prat
Ms Alexandra Mazgareanu	Bredin Prat
Professor Dr Ziya Akıncı	Akıncı Law Office
Mr Muhammet Çap	Claimant

For Respondent:

Ms Miriam Harwood	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Claudia Frutos-Peterson	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Ruslan Galkanov	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Simon Batifort	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Diora Ziyayeva	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Gülperi Yörüker	Yurttutan Gürel Yörüker Law Firm

39. The following persons were examined:

On behalf of Claimants:

Mrs Zergül Özbilgiç Toros	Fact Witness
Dr Sergey Tyulenev	Expert Witness
Professor Robert Leonard	Expert Witness
Dr Yorgos Dedes	Expert Witness

On behalf of Respondent:

Dr Jaklin Kornfilt	Expert Witness
Professor Boris Gasparov	Expert Witness
Professor Georgia Green	Expert Witness

40. At the hearing, Claimants submitted a power of attorney in the name of Professor Dr Akıncı. However, Respondent still objected to the presence of Professor Dr Akıncı at the hearing on the ground that the power of attorney did not specify whether Professor Dr Akıncı was authorised to represent Claimants as an attorney in this Arbitration. Claimants offered to print an older power of attorney dating from September 2013. The Tribunal ruled as follows:

The Tribunal has considered this issue and we are satisfied that this power of attorney does authorise Professor Akıncı to represent the Claimants in this case and to attend. I would add that we consider that every party and each party in this case is entitled to the counsel of their choice and as in many cases, of course, counsel is made up of teams of lawyers from different jurisdictions.⁴

41. Following the hearing on jurisdiction, as ordered by the Tribunal, the Parties filed simultaneous Post-Hearing Briefs (**PHB**) on 18 March 2014, and simultaneous Reply Post-Hearing Briefs on 28 March 2014.
42. On 4 April 2014, the Parties filed their statements on costs, and simultaneous comments on the other Party's costs statement on 11 April 2014.

Respondent's first application regarding third party funding

43. In its submission of 11 April 2014, Respondent asked the Tribunal to order Claimants to disclose "*(i) whether they have entered into third-party funding arrangements to finance*

⁴ Tr. J. Day 1, 5:17-6:3.

their claims in this proceeding; (ii) if so, what are the terms of such arrangements; and (iii) whether there are any contingency fee arrangements, with either Claimants' counsel or third party funders." On 13 May 2014, Claimants submitted comments on Respondent's request of 11 April 2014.

44. On 23 June 2014, the Tribunal issued its Procedural Order No 2 recording its decision on Respondent's request of 11 April 2014. The Tribunal ruled as follows:

9. The Tribunal considers that it has inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the process. In this case, the parties have provided no guidance to the Tribunal as to what factors it should take into account for consideration of the request.

10. It seems to the Tribunal that the following factors may be relevant to justify an order for disclosure, and also depending upon the circumstances of the case:

a. To avoid a conflict of interest for the arbitrator as a result of the third party funder;

b. For transparency and to identify the true party to the case;

c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;

d. If there is an application for security for costs if requested; and

e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.

11. In this case Respondent is asking for information as to whether Claimant has an arrangement with a third party funder and if so on what terms. However, Respondent has failed to show that third party funding is likely, or that it is relevant for the Tribunal's determination of the issues currently under deliberation between the Tribunal members. All Respondent is able to say is that it believes there is a third party funder as there has been in other arbitrations against Respondent. Further, no reasons have been given as to why this information is relevant and why Respondent wants this information.

12. There is no suggestion that there is any issue of conflict of interest due to third party funding, and no suggestion has been made concerning the disclosure or misuse of confidential information. None of the other considerations that could justify an order for disclosure of the kind sought by Respondent have been presented.

13. Accordingly, at the present time, the Tribunal is not persuaded that there is any reason to make an order requiring Claimants to disclose how they are funding this arbitration. Respondent's application is therefore denied.

14. This Decision does not preclude Respondent from making a further request for disclosure at a later stage in this arbitration if it has additional information to justify the application.

45. On 13 February 2015, the Tribunal issued its decision on jurisdiction by which it dismissed Respondent's objection to jurisdiction on the basis of Article VII(2) of the BIT. The Parties were invited to confer on the procedural calendar for the remainder of the proceedings and revert to the Tribunal within 30 days.
46. After several exchanges, by letters dated 7 April 2015, the Parties stated that they were unable to reach an agreement and laid out their respective proposals for procedural timetables.

5. Respondent's Request for Reconsideration of the Decision on Jurisdiction⁵

47. By letter dated 7 April 2015, Respondent stated its intention to apply for the reconsideration of the Decision on Jurisdiction dated 13 February 2015.
48. By email dated 8 April 2015, Claimants objected to Respondent's statement that it would seek the reconsideration of the Decision on Jurisdiction.
49. By letter dated 9 April 2015, ICSID informed the Parties that the Tribunal had set a deadline of 17 April 2015 for Respondent to submit its request for the reconsideration of the Decision on Jurisdiction, with comments from Claimants due 14 days from that date.
50. On 17 April 2015, Respondent submitted its Application for Reconsideration of the Tribunal's Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the

⁵ The Tribunal notes that there is no such right or process under the ICSID Rules – although it did reconsider and confirm its decision.

Turkey-Turkmenistan Bilateral Investment Treaty, along with the Second Expert Linguistics Opinion of Professor Boris Gasparov.

51. On 1 May 2015, Claimants submitted their Response to Respondent's Reconsideration Application.
52. By letter dated 7 May 2015, Respondent stated its objections to Claimants' Response of 1 May 2015 and reiterated its request for reconsideration.
53. By letter dated 11 May 2015, Claimants objected to the contents of Respondent's letter of 7 May 2015 and again requested that Respondent's Application for Reconsideration be dismissed. By letter of the same date, Respondent requested the Tribunal's attention to the manner and tone in which Claimants had addressed Respondent.
54. By letter dated 23 July 2015, Respondent advised that the *ad hoc* Annulment Committee in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1 ("*Kılıç v Turkmenistan*") had dismissed the Applicant's (Kılıç's) request for annulment of the Award, which had dismissed its claims for lack of jurisdiction under Article VII(2) of the Turkey-Turkmenistan BIT, the same provision which is behind the current proceedings. Respondent urged the Tribunal to take the annulment into account when rendering its decision on Respondent's Application for Reconsideration and offered to provide a full submission on the annulment should the Tribunal wish for one.
55. By letter dated 28 July 2015, Claimants requested that the Tribunal reject Respondent's offer to provide a submission on the *Kılıç v Turkmenistan* annulment. Additionally, Claimants renewed their request that the Tribunal order Respondent to bear the costs of its Application for Reconsideration and the attendant submissions.
56. By email dated 29 July 2015, ICSID informed the Parties that the Tribunal was in receipt of Claimants' letter of 28 July 2015 and required no further submissions on the issue.
57. On 3 August 2015, the Tribunal rendered its Decision on and rejected Respondent's Application for Reconsideration of the Tribunal's Decision on Respondent's Objection to

Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty. The Tribunal reserved the issue of costs.

6. Respondent's Second Request for the Disclosure of Claimants' Third-Party Funding Agreement and Security for Costs

58. By letter dated 10 April 2015, Respondent filed a second request for the disclosure of the identity and nature of Claimants' third-party funder. By letter of 13 April 2015, ICSID informed the Parties that the Tribunal had granted Claimants until 20 April 2015 to respond to Respondent's request.
59. By separate letter dated 13 April 2015, ICSID requested the third advance payment of USD 150,000 from each Party to defray the cost of the proceedings during the following three to six months.
60. By an email sent directly to the Parties on 15 April 2015, Professor Hanotiau stated for the record that he was not involved with any work for Vannin, a third-party funder referred to as a potential source of conflict by Respondent in its letter of 10 April 2015.
61. By letter dated 20 April 2015, Claimants submitted their comments on Respondent's letter of 10 April 2015 concerning third-party funding, along with the correspondence exchanged between the Parties on the issue. By way of conclusion, Claimants stated:

[...] Claimants submit that the Tribunal should direct Respondent to focus on the merits of this dispute and ultimately hold it liable for the disruption and costs that it is inflicting on Claimants by way of such baseless and repetitive applications. By way of example, Claimants have regularly overheard that the very large invoices of Turkmenistan's counsel cannot be absorbed by Turkmenistan and were being paid directly or indirectly by third party contractors that have benefited from the ousting of Claimants, including one of the Turkish contractors active in Turkmenistan that has been granted multi-billion dollar projects by the Turkmen State. Yet, Claimants have so far refrained from making corresponding applications without further evidence and the required causation with the contemplated applications. Claimants trust that Respondent will demonstrate the same courtesy.

62. By letter dated 21 April 2015, Respondent refuted Claimants' suggestion that it was being funded by a third-party and reiterated its request for Claimants to disclose the nature of their third-party funding.
63. By email dated 21 April 2015, Claimants stated that Respondent's letter of 21 April 2015 counted as an unsolicited submission and requested that the Tribunal "*direct Respondent to play by the basic ground rules.*"
64. By email dated 21 April 2015, Respondent responded to Claimants' email of the same date and requested further details regarding the relationship between Claimants' counsel and Vannin Capital.
65. By letter dated 1 May 2015, ICSID confirmed receipt of Claimants' share of the third advance payment and by letter dated 4 May 2015, ICSID confirmed receipt of Respondent's share of the third advance payment.
66. On 12 June 2015, the Tribunal issued Procedural Order No 3 which granted Respondent's request and ordered Claimants to disclose third-party funding (i) to avoid any potential conflicts arising with the Arbitrators in this proceeding, (ii) in light of Respondent's indication that it intended to apply for security for costs, and (iii) as acknowledgement of Respondent's concern that, should the outcome of this Arbitration be in its favour, a third-party funder would not pay as it is not party to this Arbitration.
67. By letter dated 16 June 2015, in compliance with Procedural Order No 3, Claimants disclosed that their third-party funder had been, since the outset of the proceedings to present, La Française IC Fund Sicav-Fis ("**La Française**"), that La Française has no relationship to any of the arbitrators or their firms, and that instruction to counsel was being given only by Claimants.
68. On 29 September 2015, Respondent submitted its Request for Security for Costs in which it requested

that the Tribunal order Claimants to post security in the amount of US\$4 million, in the form of an unconditional and irrevocable bank guarantee, to be provided within 14 days following the Tribunal's order, the posting

and maintenance of which shall be a condition to the continuation of this Arbitration, in order to secure payment of any award ordering Claimants to pay Respondent for its legal fees and costs incurred in this case.

69. By letter dated 12 October 2015, Claimants provided their comments on Respondent's Request for Security for Costs of 29 September 2015 and requested that the Tribunal reject Respondent's Request and order Respondent to bear the costs of the Request.
70. On 23 October 2015, Respondent submitted its Reply to Claimants' Response to Respondent's Request for Security for Costs, (i) requesting that Claimants comply with Procedural Order No 3 by explaining the nature of their agreement with La Française, specifically whether it would share in any money awarded to Claimants in the proceedings, whether it would pay a costs award, and under what circumstances they could withdraw funding from the case, and (ii) reiterating its request that the Tribunal order Claimants to post USD 4 million in security costs.
71. On 3 November 2015, the Tribunal ordered Claimants to submit a copy of their agreement with La Française and to advise specifically whether La Française had agreed to pay any adverse costs ordered against Claimants, and under what circumstances La Française could withdraw from the funding arrangement.
72. By letter dated 12 November 2015, Claimants replied to Respondent's Reply to Claimants' Response to Respondent's Request for Security for Costs dated 23 October 2015, again requesting the rejection of Respondent's Request and asking for a one-day, in-person hearing on the issue of security for costs. They additionally reserved the right to request an extension of time for the filing of their Memorial and again requested that the Tribunal order Respondent to bear the costs associated with its Request.
73. By email dated 13 November 2015, Respondent pointed out that Claimants had not provided a complete copy of their third-party funding agreement, as ordered by the Tribunal on 3 November 2015, but only selected excerpts.
74. By letter dated 23 November 2015, Claimants requested that Respondent confirm by 27 November 2015 whether or not it had a third-party funding agreement.

75. By email dated 25 November 2015, ICSID informed the Parties that the Tribunal (i) invited Respondent to provide its comments on the excerpts of the third-party funding agreement it had so far received, and (ii) requested that Claimants provide the entire funding agreement by 30 November 2015.
76. By email of 26 November 2015, Respondent requested an extension of the deadline until 2 December 2015 due to the Thanksgiving holidays in the United States. By email of the same date, ICSID informed the Parties that the extension had been granted.
77. By letter dated 1 December 2015, Claimants requested that, given that Respondent had not responded to their letter of 23 November 2015, the Tribunal order Respondent to disclose if it was the beneficiary of any direct or indirect third-party funding. By email dated 2 December 2015, ICSID informed the Parties that the Tribunal invited Respondent to respond to Claimants' request by 9 December 2015. By email dated 2 December 2015, Claimants supplemented their request as follows: "*We take the liberty to add that the disclosure sought is also warranted on a further ground, namely conflict check vis-à-vis members of the Tribunal and all the experts that will be taking part in this arbitration.*"
78. By letter dated 2 December 2015, in accordance with the Tribunal's message of 25 November 2015, Respondent submitted its comments on the excerpts of the third-party funding agreement between Claimants and La Française. Respondent maintained that such disclosure was necessary for several reasons: "*(i) to ensure that there are no conflicts with those involved in the arbitration, including the arbitrators; (ii) for purposes of seeking security for costs, given the fact that a third-party funder is outside the Tribunal's jurisdiction, unreachable to satisfy an adverse costs award, and able to withdraw its funding at any time during the proceedings; and (iii) to determine whether Claimants are the owners and real parties in interest with respect to the claims being advanced in this arbitration, or whether there has been an actual or de facto assignment of their interests to third parties.*"
79. By letter dated 4 December 2015, Respondent reiterated its 21 April 2015 confirmation that Respondent's costs were being born entirely by Respondent itself, and that it did not have a third-party funder.

80. By letter dated 16 December 2015, ICSID informed the Parties that the Tribunal was considering their submissions regarding Respondent's Request for Security for Costs and Claimants' Request for Disclosure and that no further submissions were required.
81. On 9 February 2016, the Tribunal issued Procedural Order No 6, *inter alia*, rejecting Respondent's request for Security for Costs and Claimants' Request for Disclosure.
82. By letter dated 19 February 2016, Claimants requested that the Tribunal reconsider Respondent's request for Claimants to produce their funding agreement or explain why the disclosure of their complete third-party funding agreement was warranted in these proceedings.
83. By letter dated 26 February 2016, Respondent responded to Claimants' request for reconsideration by calling upon the Tribunal to make adverse inferences based on Claimants' continued refusal to disclose their funding agreement.
84. By letter dated 15 March 2016, the Tribunal rejected Claimants' request of 19 February 2016 and suggested that the Parties confer amongst themselves to find a way for Claimants to produce the third-party funding agreement while still respecting the necessary confidential nature of any sensitive information contained in such agreement.
85. By letter dated 27 June 2016, Respondent informed the Tribunal that the Parties could not reach an agreement on the production of Claimants' funding agreement for "*counsel's eyes only*", as suggested by the Tribunal in their decision of 15 March 2016, and as a result, Respondent intended to initiate proceedings in the French domestic court system to obtain the complete funding agreement. To this end, Respondent requested that the Tribunal issue a procedural order inviting Respondent to use the French courts to compel La Française to produce the funding agreement.
86. By email dated 17 July 2016, ICSID informed the Parties that the Tribunal invited Claimants to submit their comments on Respondent's 27 June 2016 request by 22 July 2016. By letter dated 22 July 2016, Claimants requested that the Tribunal reject Respondent's request.

87. By letter dated 29 July 2016, the Tribunal refused Respondent's 27 June 2016 request that it issue an order regarding the production of the funding agreement and reiterated its belief that the Parties should be able to reach an agreement amongst themselves.

7. Procedural Calendar, Document Production and Visas and Safe entry into Turkmenistan

88. On 3 August 2015, the Tribunal issued Procedural Order No 4, laying out the procedural calendar for the remainder of the proceedings.
89. By letter dated 11 August 2015, Claimants requested an extension of the two deadlines provided in Procedural Order No 4, namely document production and visas and safe entry into Turkmenistan. Claimants informed the Tribunal that counsel were discussing an amended timetable and would revert to the Tribunal by 12 August 2015.
90. By letter dated 12 August 2015, the Parties provided the Tribunal with an updated timetable for document production and for visas and safe entry into Turkmenistan. By email dated 13 August 2015, ICSID informed the Parties that the Tribunal had agreed to the proposed changes.
91. On 24 August 2015, Claimants provided their Application for Visas and Guarantees of Safe Entry to and Return from Turkmenistan and Application for an Order on Pre-Memorial Document Production.
92. By email dated 10 September 2015, Respondent informed the Tribunal that it was unable to confirm its acceptance of the proposed procedural calendar before seeing arguments put forth in Claimants' Memorial on the Merits.
93. On 14 September 2015, Respondent submitted its Objections to Claimants' Application of 24 August 2015 for Pre-Memorial Document Requests and Claimants' Application for an Order Requiring Turkmenistan to Issue Visas, Allow On-Site Visits and Guarantee Safe Entry and Return.

94. By letter dated 16 September 2015, Claimants stated that they opposed the further delays to the proceedings proposed by Respondent in its 10 September 2015 email and asked the Tribunal to maintain the procedural calendar set forth in Procedural Order No 4.
95. On 7 October 2015, the Tribunal issued Procedural Order No 5 in which it (i) ordered Respondent to produce documents responsive to Claimants' Pre-Memorial Document Request in accordance with the Redfern Schedule there-attached and (ii) refused Claimants' Application for Visas and Guarantees.
96. By letter dated 25 October 2015, Claimants requested that Respondent provide an index of the documents submitted to Claimants on 22 October 2015 in response to their request for document production.
97. By letter dated 26 October 2015, Respondent rejected Claimants' request to provide an index of documents and instead provided a list of document types by page range.

8. Submissions on the Merits

98. On 10 December 2015, Claimants filed their Memorial on the Merits, including the following documentation:
 - The Witness Statement of Mr Dursun Kaptan Shain, in Turkish and English, dated 8 December 2015;
 - The Witness Statement of Mr Muhammet Çap, in Turkish and English, dated 10 December 2015;
 - The Witness Statement of Mr Ömer Gülçetiner, in Turkish and English, dated 9 December 2015;
 - The Witness Statement of Mr Salih Uz, in Turkish and English, dated 8 December 2015;
 - The Expert Accountants' Report of Messrs Sylvain Quagliaroli and Stephen Thompson (Grant Thornton), dated 10 December 2015; and

- The Expert Report of Mr Ekrem Kaya (Hill International), dated 10 December 2015.
99. On 18 April 2016, Respondent filed its Non-Bifurcated Objections to Jurisdiction and Counter-Memorial on the Merits, including the following supporting documentation:
- The Witness Statement of Ms Antonina Mihaylovna Yeliseyeva, in Turkmen and English, dated 17 April 2016;
 - The Witness Statement of Mr Alexis Rechov, in English, dated 14 April 2016;
 - The Witness Statement of Mr Ahmet Yusupov, in Turkmen and English, dated 17 April 2016;
 - The Witness Statement of Mr Murad Ashirovich Nepesov, in Turkmen and English, dated 17 April 2016;
 - The Witness Statement of Mr Vadim Chekladze, in Turkmen and English, dated 17 April 2016;
 - The Expert Report of dated 18 April 2016; and
 - The Expert Report of Mr Abdul Sirshar Qureshi (PwC) dated 18 April 2016.
100. By letter dated 31 May 2016, Respondent noted that Claimants' Redfern schedule included new document requests. By letter dated 3 June 2016, Respondent identified the documents that it considered new requests, and further noted that of the documents Claimants had produced to Respondent, 10 of 38 were already on record in the current proceedings.
101. By letter dated 7 June 2016, Claimants requested that the Tribunal grant their additional requests and reserved the right to request further documentation in the future.
102. By letter dated 20 June 2016, ICSID informed the Parties that the Tribunal was currently reviewing their document production requests and would need further time to render its decision.

103. By letter dated 25 July 2016, Claimants inquired as to the status of the Tribunal's decision on document production.
104. On 29 July 2016, the Tribunal issued Procedural Order No 7 on document production to which Annexes A and B recorded the Tribunal's decision in respect of Claimants' and Respondent's document production requests.
105. By letter dated 10 August 2016, Respondent asked that the Tribunal amend two aspects of the document production schedule of Procedural Order No 7 that it believed contained errors. By email of the same date, the Tribunal requested that Claimants provide observations on Respondent's letter by no later than 17 August 2016. By letter dated 12 August 2016, Claimants concurred with Respondent's request. By letter dated 16 August 2016, the Tribunal amended Annex B of Procedural Order No 7.
106. By letter dated 14 September 2016, ICSID requested the fourth advance payment of USD 200,000 from each Party to defray the cost of the proceedings during the following three to six months. USD 200,000 was received from Claimants on 6 October 2016, and USD 199,970 was received from Respondent on 12 October 2016.
107. On 29 September 2016, Claimants filed their Reply Memorial on the Merits and Counter-Memorial on Non-Bifurcated Objections to Jurisdiction, including the following supporting documentation:
 - The Second Witness Statement of Mr Muhammet Çap, in Turkish and English, dated 27 September 2016;
 - The supplementary expert accountants' report of Mr Sylvain Quagliaroli and Stephen Thompson (Grant Thornton), dated 28 September 2016; and
 - The Supplementary Expert Report by Mr Ekrem Kaya (Hill International), dated 27 September 2016.

108. By letter dated 6 October 2016, ICSID confirmed its receipt of Claimants' share of the fourth advance payment. By letter dated 12 October 2016, ICSID confirmed its receipt of Respondent's share of the fourth advance payment.

9. The Filing of Respondent's Rejoinder and the Primetals Expert Report

109. By letter dated 5 December 2016, Respondent informed the Tribunal that it would not be able to file its Rejoinder by the 23 December 2016 deadline and requested that the Tribunal consider rescheduling, in part, the upcoming hearing.

110. By letter dated 9 December 2016, Claimants asked the Tribunal to deny Respondent's request and grant only the extension previously agreed upon by the Parties, namely that deadline for Respondent's Rejoinder be moved to 27 December 2016 and the deadline for Claimants' Rejoinder on Jurisdiction be moved to 24 January 2017. By email of the same date, Respondent countered that it had been granted "*half of the time that Claimants had*" to file its submission, and it was "*impossible*" for it to meet the 27 December 2016 deadline.

111. By email dated 14 December 2016, Claimants contested Respondent's narrative about the different time periods granted for filing to the respective Parties, and, in any event, stated that if Respondent found the allotment unfair, it should have raised the issue when the schedule was set.

112. By letter dated 15 December 2016, the Tribunal refused Respondent's requested extension and gave it until 30 December 2016 to file its Rejoinder. It further fixed deadlines of (i) 13 January 2017 for the filing of the second witness statement of Mr Vadim Chekladze, (ii) 20 January 2017 for Claimants to file a rebuttal to Mr Chekladze's statement, and (iii) 27 January 2017 for Claimants to file their Rejoinder on Jurisdiction.

113. By letter dated 30 December 2016, Respondent noted that it would need additional time to finalize its Rejoinder, and at the same time submitted the following documents:

- Second Witness Statement of Ms Antonina Mihaylovna Yeliseyeva;
- Second Witness Statement of Mr Ahmet Yusupov;

- Second Witness Statement of Mr Murad Ashirovich Nepesov;
 - Second Expert Report of Navigant Consulting Inc./Marsh Risk Consulting;
 - Second Expert Report of PricewaterhouseCoopers; and
 - Expert Report of Primetals Technologies.
114. By emailed dated 31 December 2016, Claimants requested that the Tribunal declare the Primetals expert report out of scope and inadmissible, and order Respondent to file its Rejoinder immediately, failing which, it should also be found inadmissible.
115. By emailed dated 3 January 2017, Claimants noted that Respondent’s Rejoinder had not yet been filed and reiterated their request that the Primetals expert report be stricken from the record. Claimants stated that, should Respondent’s Rejoinder be admitted at this stage, it would unjustly prejudice Claimants’ preparation and defence. By email of the same date, Respondent stated that it was endeavouring to submit the Rejoinder as quickly as possible, and noted that Claimants would have the opportunity to respond to the Primetals expert report both at the hearing and in their PHBs.
116. By letter dated 4 January 2017, the Tribunal laid out the following deadlines:
- Respondent’s Rejoinder was to be filed by 6 January 2017, after which, it would be inadmissible;
 - Claimants’ Rejoinder on the Merits was to be filed by 3 February 2017;
 - The Primetals expert report was admitted, with Claimants given until 3 February 2017 to file an expert report in response.
117. By letter dated 5 January 2017, Claimants requested that the Tribunal reconsider its decision to admit the Primetals expert report to the record and sought leave from the Tribunal “*to include in their Rejoinder on Jurisdiction their arguments in response to any new argument raised by Respondent in its Rejoinder on the Merits in relation to its counterclaims.*” By email of the same date, Respondent requested that, should the Tribunal

be minded to reconsider its decision to admit the Primetals report, Respondent be given a chance to respond after it submitted its Rejoinder on 6 January 2017. Respondent agreed with Claimants' request to include new arguments in so far as they related specifically to its counterclaims.

118. On 6 January 2017, Respondent filed its Rejoinder on the Merits and Reply Memorial on Non-Bifurcated Objections to Jurisdiction.
119. On 11 January 2017, Respondent submitted the Second Witness Statement of Mr Vadim Chekladze in Russian and English.
120. By letter dated 12 January 2017, Respondent requested that, due to his medical condition, Mr Chekladze be allowed to testify by video conference from Ashgabat, in keeping with Article 14.8 of Procedural Order No 1.
121. By letters dated 16 January 2017, both Parties submitted notices of the witnesses and experts they intended to examine at the upcoming hearing. In their request, Claimants asked that Respondent produce five state officials, namely Mrs Yazmuhammedova, then Deputy Chairman of the Cabinet of Ministers responsible for Culture; Mr Sagulyýew, then Deputy Chairman of the Cabinet Council of Turkmenistan; Mr Orazov, then Mayor of Ashgabat and Vice Prime Minister for Construction; Mr Durdyyew, then Senior Jurist from the Mary City's Prosecutor's Office; and Mr Atdaýew, then Deputy General Prosecutor of Turkmenistan, "*who feature prominently in the factual narrative of the case*", and, should Respondent not agree to produce these witnesses, asked the Tribunal to order them to do so.
122. By letter dated 16 January 2017, ICSID circulated a draft agenda for the pre-hearing telephone conference and asked the Parties to provide their comments by 20 January 2017.
123. By letter dated 17 January 2017, the Tribunal responded to the Parties' requests of 5 January 2017. It decided (i) the Primetals export report would remain on the record, and (ii) the Tribunal would not deal with the substance of the Second Expert Report of Navigant

Consulting Inc./Marsh Risk Consulting until such time that Claimants were able to respond to it.

124. By email dated 17 January 2017, Respondent stated that it was not given an opportunity to respond to Claimants' requests of 16 January and stated that it would respond shortly. It also asked the Tribunal delay making any further decisions in the interim.
125. By letter dated 20 January 2017, Respondent requested that, in light of the Tribunal's decisions of 4 January and 17 January 2017, the upcoming hearing be devoted solely to jurisdictional issues, and not include any witness or expert testimony.
126. By email dated 20 January 2017, the Tribunal asked Respondent to submit, by 10:00 am EST on 23 January 2017, its comments regarding the five witnesses that Claimants requested to examine in their 16 January 2017 letter.
127. By letter dated 20 January 2017, Claimants informed the Tribunal that they did not intend to submit a rebuttal to Mr Chekladze's second witness statement. Additionally, they noted that Mr Hasan Çap would be unable to attend the hearing in person, but was available to testify by video conference.
128. By email dated 20 January 2017, the Parties informed ICSID that they would submit their joint agenda for the pre-hearing conference on 21 January 2017.
129. By email dated 21 January 2017, the Parties submitted their joint agenda for the pre-hearing conference.
130. By letter dated 21 January 2017, Respondent requested that the Tribunal reject Claimants' request to call the five witnesses listed in Claimants' 16 January 2017 letter. However, should the Tribunal decide that these witnesses should be made available, Respondent requested an opportunity to call additional witnesses whose testimony would be material to the case.

131. By letter dated 22 January 2017, Claimants requested that the Tribunal deny Respondent's 20 January 2017 request to limit the hearing to jurisdiction issues. This request was rejected in Procedural Order No 8 (see § 141 below).
132. By letter dated 23 January 2017, the Tribunal acknowledged receipt of the Parties' agenda for the pre-hearing conference, and stated that the call would also address the following:
- Respondent's concerns regarding Claimants' request of 5 January 2017 and the Tribunal's ruling of 17 January 2017 regarding the Primetals Technologies and NCI/MRC expert reports (see Respondent's communications of 17 and 20 January 2017);
 - Admissibility of evidence, in particular the expert evidence referred to above;
 - Scope of the hearing (see Respondent's letter of 20 January 2017; Claimants' letter of 22 January 2017); and
 - Claimants' request that Respondent make available for examination at the hearing the five individuals mentioned on page 3 of Claimants' 16 January 2017 letter; and Respondent's response thereto and request in its letter of 21 January 2017.
133. By letter dated 23 January 2017, Claimants asked the Tribunal to reject Respondent's 21 January 2017 request to call additional witnesses.
134. On 23 January 2017, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference. The following counsel were present on the call:

For Claimants
Ms Eloise Obadia
Ms Julie Spinelli
Mr Isaiah Soval-Levine
Mr Aksel Doruk
Ms Ceyda Cengizer

For Respondent
Ms Miriam Harwood
Mr Ali Gursel

Ms Kate Brown
Ms Christina Trahanas
Ms Zeynep Gunday

135. On 24 January 2017, Respondent filed a corrected version of its Rejoinder on the Merits and Reply Memorial on Non-Bifurcated Objections to Jurisdiction.
136. By letter dated 25 January 2017, Respondent requested that the witness statement of Mr Omer Gülçetiner, dated 9 December 2016, be excluded from the record due to his inability to testify at the hearing.
137. By letter dated 26 January 2017, following the pre-hearing conference call, the Tribunal addressed the following issues:
- Claimants were requested to indicate by 31 January 2017 if they intended to request site visits, and if so, when and where these visits would take place;
 - Both Parties' requests to examine additional witnesses were rejected because the Parties had failed to show any exceptional circumstances that would justify that these individuals be called to testify at the hearing at such a late stage;
 - Claimants were invited to submit observations on Respondent's request to exclude the witness statement of Mr Gülçetiner by 31 January 2017;
 - Claimants were asked to confirm, by 31 January 2017, if they planned to submit a rebuttal report to the Primetals expert report; and
 - The Parties were asked to provide hearing bundles.
138. By joint letter dated 27 January 2017, the Parties proposed adjustments to the Tribunal's requested hearing bundles. By letter dated 30 January 2017, ICSID informed the Parties that the Tribunal accepted their proposals.
139. By letter dated 31 January 2017, ICSID asked the Parties to indicate if they had any objections to Ms Irina Samodelkina, an intern at Professor Hanotiau's firm, attending the hearing as an observer. By emails of the same date, both Parties confirmed that they had

no objections to Ms Samodelkina's attendance. By further email of the same date, ICSID circulated Ms Samodelkina's confidentiality undertaking to the Parties.

140. By letter dated 31 January 2017, Claimants addressed the issues requested in the Tribunal's 26 January 2017 letter, namely (i) that they would be requesting site visits, (ii) that the witness statement of Mr Gülçetiner should remain on the record, and (iii) that they would not be filing an expert report in response to the Primetals report. Additionally, Claimants requested that Mr Guy Lepage and Ms Paulina Touroude, representatives of Claimants' third-party funder, La Française, be allowed to attend the hearing.
141. On 1 February 2017, the Tribunal issued Procedural Order No 8 regarding the organization of the upcoming hearing.
142. On 2 February 2017, Respondent submitted a corrected version of its Rejoinder.
143. On 3 February 2017, Claimants filed their Rejoinder Memorial on Non-Bifurcated Objections to Jurisdiction and Reply on Respondent's Counterclaims.
144. By email dated 3 February 2017, ICSID informed the Parties that the World Bank's Ashgabat office was unable to provide video conferencing facilities for the examination of Mr Chekladze, and that the Centre was attempting to identify alternative venues.
145. By letter dated 3 February 2017, Claimants objected to the Tribunal's rejection of further witnesses and reserved their rights.
146. By letter dated 6 February 2017, Claimants stated that Mr Hasan Çap no longer felt "*capable of supporting the pressure he would have to undergo to prepare for, attend and testify at the hearing, even via video conferencing*", and requested "*that the Tribunal give his witness testimony the weight that it deems appropriate in light of the above circumstances, especially since the content of Mr. Hasan Çap's witness statement is largely corroborated by the witness statements of Messrs. Huseyin Çap, Ukkase Çap and Muhammet Çap...*"

147. By further letter dated 6 February 2017, Claimants suggested that the Tribunal appoint an independent expert to conduct the necessary site-visits.
148. By emails dated 6 February 2017, both Parties indicated the order in which they intended to call their witnesses.
149. By letter dated 7 February 2017, Respondent requested that, in light of Mr Hasan Çap's decision not to attend the hearing, his witness statement be excluded from the record. Respondent also objected to Claimants' request that the Tribunal appoint independent experts to conduct site visits, and that representatives of their third-party funders be allowed to attend the hearing. Respondent maintained that the best solution to address outstanding issues regarding what it saw as the unfairness of the proceedings would be to postpone the hearing.
150. By letter dated 8 February 2017, the Tribunal addressed the Parties' letters of 31 January, 6 February, and 7 February 2017. In light of the Parties' arguments, the Tribunal decided the following:
- Claimants were given until 6:00 pm Paris time on 10 February 2017 to submit their comments on Respondent's request that Mr Hasan Çap's witness statement be struck from the record;
 - The Tribunal would decide the following after the hearing: "*(i) whether a further hearing shall be held to discuss the relevance of the Primetals Report and the Second NCI/MRC Report to the Claimants' claims and Respondent's counterclaims; (ii) whether an independent expert should be appointed to make the required assessment on all relevant issues, or (iii) whether the Parties shall be given the opportunity to file further written submissions specifically addressing the relevance of the Primetals Report and the Second NCI/MRC Report to the Claimants' claims and Respondent's counterclaims*";
 - The hearing would proceed as scheduled; and

- Claimants were given until 6:00 pm Paris time on 10 February 2017 to submit their comments on Respondent's request that Claimants' third-party funders be excluded from the hearing.
151. By email dated 9 February 2017, the Parties submitted their joint proposed daily schedule for the hearing, and invited the Tribunal offer guidance on outstanding points of contention.
 152. By letter dated 10 February 2017, in response to the Tribunal's letter of 8 February 2017, Claimants requested that Mr Hasan Çap's witness statement remain on record, noting that it was submitted during the jurisdictional phase, and that Respondent did not call him for examination at that time. Claimants also repeated their request that the representatives of La Française be allowed to attend the hearing, and suggested that they would be willing to sign confidentiality undertakings to do so.
 153. On 10 February 2017, Claimants filed corrections to the supplementary expert reports of Grant Thornton and Hill International that were submitted with their 29 September 2016 Reply Memorial on the Merits and Counter-Memorial on Non-Bifurcated Objections to Jurisdiction.
 154. By email dated 11 February 2017, as envisioned in § 56 of Procedural Order No 8, the Parties submitted joint glossaries of terms to aid the interpreters in the proceedings.
 155. By letter dated 12 February 2017, the Tribunal decided the following issues:
 - The witness statement of Mr Hasan Çap would remain on record, and the Tribunal would give it the weight it deemed appropriate;
 - Claimants' request that representatives of La Française be allowed to attend the hearing was denied;
 - In regards to the outstanding issues in the hearing schedule, (i) no rebuttal opening statements would be allowed; (ii) fact witnesses should be examined as efficiently as possible, but there would be no "*guillotine*" time; (iii) durations for expert conferencing could not be fixed in advance.

156. By letter dated 12 February 2017, Claimants submitted an application to file two new factual exhibits and four new legal authorities.⁶ By letter dated 19 February 2017, Claimants also sought leave to introduce five new factual exhibits, noting that, in accordance with § 44 of Procedural Order No 8, they first sought the consent of Respondent, who did not grant it.

10. Hearing on Jurisdiction and the Merits

157. A hearing on jurisdiction and the merits took place at the World Bank on 13-21 February 2017, in Paris, France. In addition to the Members of the Tribunal, the Secretary of the Tribunal, and Ms Irina Samodelkina, intern at Hanotiau & van den Berg and observer, present at the hearing were:

For Claimants:

Dr Hamid Gharavi	Derains & Gharavi
Professor Dr Ziya Akıncı	Akıncı Law firm
Mrs Eloise Obadia	Derains & Gharavi
Mrs Julie Spinelli	Derains & Gharavi
Mr Aksel Doruk	Derains & Gharavi
Mr Isaiah Soval-Levine	Derains & Gharavi
Mrs Ceyda Cengizer	Derains & Gharavi
Mr Dmitry Bayandin	Derains & Gharavi
Mrs Nazli Ece Kiliç	Akıncı Law Firm
Mrs Yuhua Deng	Derains & Gharavi
Mrs Marine Juston	Akıncı Law Firm
Mr Sixto Sanchez-Barbudo	Derains & Gharavi
Mr Muhammet Çap	Party

⁶ Exhibits: Exhibit C-623, “*Report prepared by the State Expert Review dated June 18, 2008 regarding the construction and demolition of the indoor swimming-pool in relation to Contract No 45, which demonstrates the existence of additional works at the site consistent with Claimants’ allegations*” and Exhibit C-624, “*several translations found on the Internet of the Turkmen word ‘tabşyryk’ used in Exhibit C-388 which Claimants have translated as ‘instructions’ while Respondent translates as ‘tasks’ in a replacement translation with its Rejoinder with which Claimants disagree.*” Legal authorities: Exhibit CLA-383, *Adem Dogan v Turkmenistan*, ICSID Case No ARB/09/9, Decision on Annulment, 15 January 2016; Exhibit CLA-384, Michael Reisman, *The Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, Yale Law School Legal Scholarship Repository 1982; Exhibit CLA-385, *Reports of International Arbitral Awards, Recueil Des Sentences Arbitrales*, Franqui Case, Volume X 1903; and CLA-386, *Piero Foresti, Laura de Carli & Others v Republic of South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2010

For Respondent:

Mr Ali R. Gürsel	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Miriam K. Harwood	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Kate Brown de Vejar	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Christina Trahanas	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Zeynep Gunday	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Maria Ongoren	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Bahar Charyyeva	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Ricardo Mier y Teran	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Alisa Shekhtman	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Katiria Calderon	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Sofia Mancilla Zapata	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Hesel Toyjanova	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Veronica Akimkanova	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Neli Cuzin	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Merdan Hanov	Turkmenistan Ministry of Justice

158. After opening statements on 13 February 2017 and during the hearing the following witnesses and experts were examined:

On behalf of Claimants:

Mr Huseyin Çap	Fact Witness	15 February 2017
Mr Ukkase Çap	Fact Witness	15 February 2017
Mr Dursun Kaptan Sahin	Fact Witness	15 February 2017
Mr Salih Uz	Fact Witness	16 February 2017
Mr Sylvain Quagliaroli	Expert Witness	21 February 2017
Mr Stephen Thompson	Expert Witness	21 February 2017
Mrs Pascale Pasquer	Expert Witness	21 February 2017
Mr Harshad Bharakhada	Expert Witness	21 February 2017
Mr Ekrem Kaya	Expert Witness	20 February 2017
Mr Uluc Inal	Expert Witness	21 February 2017
Mrs Irem Aksay	Expert Witness	21 February 2017

On behalf of Respondent:

Ms Antonina Mihaylovna Yeliseyeva	Fact Witness	20 February 2017
Mr Murad Ashirovich Nepesov	Fact Witness	17 February 2017
Mr Ahmet Yusupov	Fact Witness	16 February 2017
Mr Vadim Chekladze	Fact Witness	17 February 2017
Mr Reza Nikain	Expert Witness	21 February 2017
Mr Todd Vandenhaak	Expert Witness	21 February 2017
Mr Sirshar Qureshi	Expert Witness	21 February 2017
Ms Katerina Halasek Dosedelova	Expert Witness	21 February 2017

159. By email dated 28 February 2017, Respondent requested an extension of time until 3 March 2017 to submit the following documents: (i) Amendments to Hill International’s Second Report, dated 19 February 2017 (including Exhibit H-369) and (ii) Claimants’ Exhibits C-626, C-627, C-628 and C-629, introduced into the record on 20 February 2017. By email of the same date, Claimants confirmed that they had no objections to the extension. By further email of the same date, ICSID confirmed that the Tribunal did not object to the agreed-upon extension.
160. By letter dated 3 March 2017, the Tribunal laid out the following deadlines:
- As agreed by the Parties, Respondent would submit the documents specified in § 159 above by 3 March 2017;
 - The Parties would exchange their proposed corrections to the transcripts by 21 March 2017, exchange comments on the proposals by 14 April 2017, and submit their agreed-to corrections by 28 April 2017;
 - All new documents submitted at the hearing should be submitted in electronic format by 10 March 2017⁷;

⁷ The Tribunal’s letter of 3 March 2017 states: “*The Parties are invited to submit by March 10, 2017 in electronic format all of the new and corrected documents used or circulated at the hearing so that they may be included on the USB drive that the Parties provided at the start of the hearing.*”

- In response to Respondent's request that the Sehil bankruptcy file be disclosed, Claimants were to inform the Tribunal by 14 March 2017 whether the bankruptcy lawyer had agreed to disclose the file in full or in part, and, if so, submit the relevant documents to the Tribunal and Respondent on that day. Should the bankruptcy lawyer not agree to the disclosure, on 14 March 2017, Claimants were to submit such information as they were able;
- The Parties should try to agree between themselves on the submission to Respondent from Claimants of Sehil's books and records. If they were unable to agree, Respondent could apply to the Tribunal for an order on production;
- The Parties were to discuss the authenticity of new exhibit R-1337; should they fail to agree, Claimants could apply to the Tribunal for a ruling on this issue;
- Post-Hearing Briefs, not to exceed 100 double-spaced pages, were to be submitted on 16 June 2017; and
- The Tribunal would revert in due course with proposed dates for a hearing to allow for closing arguments.

161. On 3 March 2017, Respondent submitted the documents detailed in § 159 above.

162. By letter dated 7 March 2017, Respondent informed the Tribunal that Claimants had agreed to allow it to submit new exhibit R-1338, Status Report for Contract No 62 dated 1 August 2010, onto the record, but had rejected its request to submit exhibit R-1339, Annex No 2 - Bill of Quantities to Contract between Hatipoğlu and Client dated 3 September 2011 for Sehil's remaining work on Contract No 62. Respondent requested the Tribunal's permission to introduce R-1339 onto the record, noting that Claimants would have the ability to respond to it in their Post-Hearing Brief.

163. By email dated 10 March 2017, Claimants submitted in electronic format the following documents from the hearing:

- Exhibits C-623 to C-629;
- Exhibits CLA-383 to CLA-386;

- Amendments to Hill International’s Second Report together with Exhibits H-320R and H-369; and
 - The demonstrative exhibit prepared and used by Grant Thornton during its presentation on Day 7 of the hearing.
164. By email dated 10 March 2017, Respondent submitted a demonstrative exhibit relating to Contract No 44, which originally formed a part of exhibit R-1261.
165. By emailed dated 26 June 2017, the Parties informed the Tribunal that, notwithstanding the Tribunal’s directions that the Post-Hearing Briefs be limited to 100 pages, the Parties had agreed to extend the maximum length to 110 pages. By email dated 27 June 2017, the Tribunal confirmed that it had no objections to the additional pages.
166. On 27 June 2017, the Parties submitted their Post-Hearing Briefs. Respondent’s Post-Hearing Brief was filed together with Annexes 1-31.
167. By letter of 20 March 2018, Claimants “*request[ed] that the Parties be ordered to simultaneously submit a second round of written post-hearing briefs limited to 50 pages and dedicated to closing arguments only before the end of April 2018.*” The nine-month hiatus in the correspondence on the Post-Hearing Briefs was due to the Sehil bankruptcy, described below at Section 11, and the ensuing complications, and the challenge to Professor Hanotiau described below at Section 13.

11. The Bankruptcy of Claimant Sehil

168. During the course of this Arbitration, Claimant Sehil became the subject of bankruptcy proceedings under Turkish law. This has had important effects on this Arbitration which are discussed below. First, it caused a significant delay to the procedure and completion of this Arbitration. Second, it resulted in a change of counsel: Derain & Gharavi, and Professor Dr Akıncı ceased to represent both Claimants, Claimant Mr Çap and Claimant Sehil.

169. Derains & Gharavi continued to represent Claimant Çap but new counsel was appointed to represent Claimant Sehil in this Arbitration. (See §§ 187-207). Third, the nature of their specific claims and the amounts claimed in damages are in issue between Claimant Çap and Claimant Sehil. (see §§ 260-262, 278).
170. Claimant Sehil has been the subject of bankruptcy proceedings in Turkey before the 3rd Bankruptcy Directorate of Istanbul, Case No 2015/10, since 17 September 2015.⁸
171. On 18 April 2016, Respondent filed its Counter-Memorial on the Merits.⁹
172. In response to Respondent's request that the Sehil bankruptcy file be disclosed, Claimants were to inform the Tribunal by 14 March 2017 whether the bankruptcy lawyer had agreed to disclose the file in full or in part, and, if so, submit the relevant documents to the Tribunal and Respondent on that day. By letter dated 14 March 2017, Claimants submitted their comments on the Sehil bankruptcy proceedings, confirming that (i) the decision declaring Sehil bankrupt was not yet final, and (ii) Sehil's name did not have to change under Turkish law because of the bankruptcy proceedings. Claimants also provided the 6 March 2017 letter from Mr Mehmet Çevik, the Turkish bankruptcy attorney, and the 9 March 2017 letter from the Director of the Istanbul 3rd Bankruptcy Office.
173. By letter dated 16 March 2017, the Tribunal requested that Claimants clarify why the bankruptcy file, requested by Mr Çevik in his 6 March 2017 letter, was not referenced in the Bankruptcy Office's 9 March 2017 response.
174. By letter dated 16 March 2017, Respondent expressed its concerns over Claimants' letter of 14 March 2017 and its support for the Tribunal's request of 16 March 2017.
175. By letter dated 21 March 2017, Claimants responded to the Tribunal's letter of 16 March 2017. They stated, *inter alia*, that the Bankruptcy Office probably did not respond to the

⁸ Claimants' letter to the Tribunal dated 14 March 2017.

⁹ Respondent's Objections to Jurisdiction and Counter-Memorial on the Merits footnote 1024 states "[i]n preparing this submission, Respondent has become aware that Sehil has filed for bankruptcy in Turkey."

request for the file because it is already publicly accessible. Claimants said this was evidenced by Respondent's ability to access documents.

176. By letter dated 23 March 2017, the Tribunal informed the Parties that Respondent should submit its application regarding the bankruptcy proceedings, as foreseen, by 24 March 2017, along with any comments on Claimants' 21 March 2017 letter.
177. On 24 March 2017, Respondent submitted its Application for Disclosures and Further Procedures in regard to the Bankruptcy of Claimant Sehil along with exhibits R-1340 and R-1341.
178. By letter dated 28 April 2017, Claimants submitted their response to Respondent's Application for Disclosures and Further Procedures in regard to the Bankruptcy of Claimant Sehil.
179. On 23 May 2017, the Tribunal issued Procedural Order No 9 refusing Respondent's Application for Disclosures and Further Procedures in regard to the Bankruptcy of Claimant Sehil.
180. On 10 October 2017, Respondent officially registered as a creditor of Claimant Sehil. Respondent notified Claimants and ICSID that it had successfully registered as a creditor of Claimant Sehil by letter dated 17 November 2017.
181. By letter of 17 November 2017, Respondent submitted further comments concerning Claimant Sehil's bankruptcy to the Tribunal.
182. By letter of 20 March 2018, Respondent wrote to the Tribunal stating that following an Extraordinary Meeting of Sehil's creditors at the 3rd Bankruptcy Office of Istanbul, which had taken place the same day, the law firms of Derains & Gharavi, and Professor Dr Akıncı no longer had the authority to represent Claimant Sehil in this Arbitration. Mr Çevik, who had also been representing Mr Çap, resigned at that meeting. Respondent submitted the minutes of that meeting on 22 March 2018.

183. By email of 21 March 2018, the Tribunal invited Dr Gharavi to submit his comments on Respondent's letter and confirm that he and Professor Dr Akıncı still represented Claimants by 22 March 2018.
184. By letter of 22 March 2018, Derains & Gharavi, purporting to represent Claimants, alleged that Turkmenistan, in its role as a creditor in the Turkish bankruptcy proceedings, was attempting to interfere with these arbitration proceedings by proposing to replace Claimants' counsel with another counsel funded, and therefore controlled, by Respondent. Additionally, Derains & Gharavi requested provisional measures, which are described below at §§ Section 14, be recommended by the Tribunal.
185. By email of 22 March 2018, Respondent noted that Dr Gharavi had not refuted the fact that his firm and Professor Dr Akıncı had been removed from the case.
186. On 27 March 2018, the Turkish Bankruptcy office issued a power of attorney to Mr Ahmet Emin Yıldız to represent Claimant Sehil.¹⁰
187. By email of 29 March 2018, ICSID received, in English and Turkish, a power of attorney from Mr Yıldız under cover of a letter explaining that he had been appointed as attorney for Claimant Sehil. Mr Yıldız stated that he intended to appoint a different attorney to represent Claimant Sehil in this ICSID Arbitration. He requested that no substantial or procedural decision be taken in the Arbitration in the interim.
188. By letter of 4 April 2018, Derains & Gharavi contested Mr Yıldız's right to represent Claimant Sehil based on the power of attorney that he had submitted on 29 March 2018 and denied his right to appoint any assistant counsel.
189. By letter of 5 April 2018, the Tribunal stated its concern in relation to Turkmenistan's role as a creditor and hence appointer of counsel in the bankruptcy proceedings. It therefore requested further information, namely that "*Respondent [...] advise specifically what*

¹⁰ Respondent's letter of 7 May 2018. Mr Yıldız replaced Mr Cevik, Mr Çap's lawyer who had represented Sehil and Mr Çap. It was Mr Cevik who had appointed Derains & Gharavi to represent Sehil (and Mr Çap) in this Arbitration.

assistance, if any, Turkmenistan and its attorneys have provided/are providing to SEHIL and Mr Yıldız to identify and select counsel to represent SEHIL in the final stages of this arbitration. Respondent is also asked to advise what, if any, financial assistance Turkmenistan or its representatives have committed to provide to SEHIL for the ongoing costs of this Arbitration, and what, if any, financial assistance has already been so provided by Turkmenistan to SEHIL.” Additionally, it requested that Dr Gharavi and Professor Dr Akıncı confirm their firms’ continued authorization to represent Mr Muhammet Çap in this Arbitration.

190. On 9 April 2018, the Istanbul 3rd Bankruptcy Office issued a new “*Certificate of Authorization*” to Mr Yıldız. It specifically authorized him to act on behalf of Claimant Sehil in this ICSID Arbitration, including “*to submit all kinds of correspondence and applications within the framework of the ‘ICSID Case No ARB/12/6.’*”
191. By letter of 10 April 2018, Respondent provided its answers to the Tribunal’s questions of 5 April 2018. By letter of 13 April 2018, Dr Gharavi, on behalf of Claimants, provided his response to the Tribunal’s letter of 5 April 2018, stating, *inter alia*, that Dr Gharavi and Professor Dr Akıncı remained authorized to act on behalf of all Claimants in this case.
192. By letter of 14 April 2018, Mr Yıldız submitted, in English and Turkish, a second power of attorney explicitly recognizing his right to act on behalf of Claimant Sehil in this Arbitration.
193. By letter of 25 April 2018, the Tribunal reiterated its request in its 5 April 2018 letter that Derains & Gharavi and Professor Dr Akıncı provide updated powers of attorney confirming they were still authorized to represent Claimant Çap. The Tribunal also requested undertakings from Turkmenistan that “*(i) it will not participate in the selection of counsel for SEHIL, (ii) that if any funds have been or are in the future to be deposited with the 3rd Bankruptcy Office, such funds will be deposited outside the control of Turkmenistan, and (iii) that it will not be involved in giving instructions or making payments to SEHIL’s counsel.*”

194. By letter of 1 May 2018, Mr Yıldız stated, on the basis of his 9 April 2018 power of attorney, that “[he had] *been appointed as the representative of the estate to represent [Claimant Sehil] [...] in connection with all ongoing aspects of the ICSID arbitration proceedings and to perform judicial acts*” and that he was “*still the only and principal representative of the bankruptcy estate.*”
195. On 24 May 2018, Respondent provided a Letter of Undertaking specifying that (i) Turkmenistan would not participate in the selection of counsel for Claimant Sehil in this Arbitration; (ii) any funds that were to be provided by Turkmenistan for the payment of counsel for Claimant Sehil in connection with the Arbitration would be deposited with the 3rd Istanbul Bankruptcy Office for its use and disposition, at its sole discretion, which would be outside the control of Turkmenistan; and (iii) Turkmenistan would not be involved in instructing or making payments to counsel for Claimant Sehil in connection with this Arbitration.
196. By letter of 7 May 2018, Derains & Gharavi provided an up to date power of attorney, dated 2 May 2018, authorizing Derains & Gharavi and Akinci Law Office to represent Claimant Çap in this Arbitration. Derains & Gharavi further reiterated their concerns regarding the actions taken by Turkmenistan during the Extraordinary Meeting of Creditors of Sehil on 20 March 2018 where, according to Derains & Gharavi, Turkmenistan made clear that it had the intention of participating in the selection and remuneration of a new lawyer for the representation of Claimant Sehil.
197. By letter of 7 May 2018, Turkmenistan contested the assertion of Derains & Gharavi and Professor Dr Akıncı in their letter of the same date that they continued to work on behalf of Claimant Sehil. Turkmenistan also reserved its right to provide further comments on the 2 May 2018 power of attorney submitted for Claimant Çap, noting that it had only been provided in English and was not notarized.
198. By letter of 16 May 2018, received on 19 May 2018, Mr Yıldız wrote to the Tribunal in response to the various contentions in Derains & Gharavi’s letter of 7 May 2018. This included comments distinguishing between the respective receivables of Claimant Sehil and Claimant Çap. Mr Yıldız further confirmed that he did not have the authority directly

to appoint counsel to assist him. He explained, however, that he would be given authority to appoint one or two notified names as the additional attorneys once the 3rd Bankruptcy Office received answers to its inquiries from various universities for recommendations of individuals with the appropriate expertise.

199. By letter of 24 May 2018, the Ministry of Justice of Turkmenistan provided the undertakings requested by the Tribunal in its letter of 25 April 2018 in the following terms:

(i) Turkmenistan will not participate in the selection of counsel for Bankrupt Sehil in the Arbitration;

(ii) Any funds that may be provided by Turkmenistan for the payment of counsel for Bankrupt Sehil in connection with the Arbitration shall be deposited with the 3rd Istanbul Bankruptcy Office for its use and disposition, at its sole discretion, which will be outside the control of Turkmenistan;

(iii) Turkmenistan will not be involved in instructing or making payments to counsel for Bankrupt Sehil in connection with the Arbitration.

Nothing in this undertaking shall be construed as a limitation on Turkmenistan's right to participate as a creditor in Bankrupt Sehil's bankruptcy proceedings in Turkey in accordance with Turkish law.

200. By letter of 29 May 2018, Turkmenistan provided comments in relation to certain developments in Claimant Sehil's bankruptcy proceedings in Turkey.

201. By letter of 19 June 2018, the Tribunal, *inter alia*, (i) confirmed its understanding that Mr Yıldız was authorized to represent Claimant Sehil in all ongoing aspects of this Arbitration; (ii) requested an update on the appointment of any counsel in addition to Mr Yıldız for Claimant Sehil; (iii) confirmed that it was satisfied with Turkmenistan's undertaking of 24 May 2018.

202. By letter of 28 June 2018, Mr Yıldız stated that he was authorized to represent Claimant Sehil in all aspects of this Arbitration and that no additional counsel had been appointed for Claimant Sehil to date.

203. By letter of 6 August 2018, Mr Yıldız requested that "*Dr. Gharavi and Prof. Ziya Akıncı [...] limit their claims and assertions from now on only to issues related to Muhammet*

Çap's receivables.” He also requested that the Tribunal “*warn both counsels that the authority to assert any claims and statements related to the bankrupt entity belongs solely to myself [Mr Yıldız] and Istanbul 3rd Bankruptcy Office.*”

204. By letter of 26 September 2018, Turkmenistan wrote to the Tribunal to provide an update of Claimant Sehil’s bankruptcy proceedings.
205. By email of 9 October 2018, the Tribunal asked Mr Yıldız to confirm whether he intended to make any statements on the Decision of the Istanbul Commercial Court (submitted as Annex 1 with 26 September 2018 letter updating Tribunal on bankruptcy proceedings) and, if so, to submit them by 10 October 2018.
206. By email of 12 October 2018, Respondent informed the Tribunal that there had been developments in the Turkish bankruptcy case of Claimant Sehil and asked that the Tribunal refrain from ruling on Claimant Çap’s amended request for provisional measures as requested in its letter of 28 June 2018 before reviewing the information. Additionally, Respondent advised that the creditors of Claimant Sehil had “*resolved, inter alia, to appoint attorneys Messrs. Akin Alcitepe of Butzel Long and Egemen Egemenoglu of the Egemenoglu Law Firm to represent the bankruptcy estate of Bankrupt Sehil in the Arbitration as counsel in addition to Mr Yıldız*”.
207. By email of 15 October 2018, Mr Egemenoğlu provided a power of attorney in Turkish for himself and Mr Alcitepe.
208. By letter dated 15 October 2018, Mr Yıldız transmitted the Turkish-language power of attorney for Messrs Alcitepe and Egemenoğlu. This was received by ICSID on 16 October 2018.
209. By letter of 18 October 2018, the Tribunal requested an English translation of the power of attorney for Messrs Alcitepe and Egemenoğlu, which was submitted the following day.
210. By letter of 19 October 2018, Derains & Gharavi provided observations on the recent activity of the Turkish bankruptcy court, including the appointment of Messrs Alcitepe and Egemenoğlu, requesting that they disclose the following:

(i) the terms of their engagement letters so as to allow the Tribunal and Claimant Mr Çap to comprehend if payment is to be made on an hourly rate or fixed fee basis, from what source this payment could be paid, and/or if a contingency element exists, whether any impropriety arises from the incentives/targets involved; and

(ii) the conditions in which they have been selected before being proposed to Bankrupt Sehil's creditors as potential counsel to represent the estate, so as to allow the Tribunal and Claimant Mr Çap to ensure once again that Turkmenistan was not involved therein.

211. By letter of 21 January 2021, Respondent provided an update on the status of the Turkish bankruptcy proceedings of Claimant Sehil. The letter recorded that Claimant Çap had initiated procedural steps to reverse the removal of Mr Gharavi and Professor Dr Akıncı as counsel for Claimant Sehil following the decision of the Bankruptcy Court on 11 October 2018. On 17 November 2020 the 23rd Civil Chamber of Istanbul confirmed the decision of the 21st Enforcement Court of Istanbul on 14 April 2020 and “*issued a decision definitively and conclusively rejecting Claimant Çap’s request to reverse the decision of Claimant Sehil’s creditors regarding the removal of the Akıncı and Gharavi Firms and the appointment of Messrs. Alcıtepe and Egemenoglu as Claimant Sehil’s counsel in this arbitration*”. The letter stated that the court decision “*made clear that the removal decision is final*”.

12. Organization of a further hearing on closing arguments

212. By letter dated 23 March 2017, the Tribunal informed the Parties of its availability for a hearing on 23 and 24 November 2017 and invited the Parties to confirm their availability on those dates by 30 March 2017.
213. By emails dated 30 March 2017, the Parties indicated their availability for the proposed November 2017 hearing; Claimants confirmed their availability; Respondent requested alternative dates to avoid conflicting with the U.S. Thanksgiving holiday.
214. By letter dated 15 May 2017, the Tribunal asked the Parties to confirm their availability for a hearing for closing arguments to be held from 11 to 13 September 2017. By email

- dated 19 May 2017, Respondent confirmed its availability. By email dated 22 May 2017, Claimants informed the Tribunal they were not available on the proposed dates.
215. By letter dated 23 May 2017, the Tribunal proposed to hold the hearing for closing arguments on 26 October 2017, with 27 October 2017 held in reserve. By letter dated 27 May 2017, Respondent confirmed its availability. By letter dated 29 May 2017, Claimants stated they were not available on the new dates.
216. By letter dated 2 June 2017, the Tribunal invited the Parties to indicate to the Tribunal, without copying each other, their availability for a one to two-day hearing between September and December 2017.
217. By letters dated 9 June 2017, the Parties informed the Tribunal of their available dates for a hearing to be held before the end of 2017.
218. By letter dated 12 July 2017, the Tribunal asked the Parties to confirm their availability for a hearing to be held on 20 and 21 November 2017. By email dated 14 July 2017, Respondent confirmed its availability. By email dated 17 July 2017, Claimants stated they were not available on the proposed dates.
219. By further letter dated 26 July 2017, the Tribunal informed the Parties that the hearing for closing statements would be held in London from 23 to 24 November 2017 unless the Parties objected by 2 August 2017. No objections were received. The hearing was duly confirmed by letter from the Tribunal dated 10 August 2017.
220. By letter dated 21 September 2017, the Tribunal circulated a draft agenda for a pre-hearing conference call to be held on either 19 or 23 October 2017 should the Parties fail to agree on any items.
221. By email dated 4 October 2017, the Parties submitted their joint proposals on the draft agenda for the pre-hearing conference. Because there were no points of disagreement, a call was not deemed necessary.

222. On 2 November 2017, the Tribunal issued Procedural Order No 10 regarding the organization of the hearing.

13. Respondent's Proposal to disqualify Professor Bernard Hanotiau

223. On 19 November 2017 (i.e. 4 days before the hearing on closing arguments was scheduled to start), Respondent filed a proposal for the disqualification of Professor Bernard Hanotiau (**the Proposal**). As a result, this Arbitration was suspended in accordance with ICSID Arbitration Rule 9(6) and the scheduled hearing cancelled. By letter of the same date, the Secretariat confirmed receipt of the Proposal and informed the Parties that (i) the Proposal would be decided by the other members of the Tribunal and (ii) the proceeding would be suspended until a decision had been taken on the Proposal.

224. By letter of 20 November 2017, Claimants submitted preliminary observations on the Proposal.

225. By letter of 20 November 2017, the Secretariat reminded the Parties that the proceeding was suspended as of 19 November 2017 and that therefore no submission should be filed by the Parties other than those addressing the Proposal. The Parties were also informed of the schedule of submissions to address the Proposal.

226. On 27 November 2017, Respondent filed its Brief in Support of its Proposal for the Disqualification of Professor Bernard Hanotiau in accordance with the established schedule of submissions.

227. On 4 December 2017, Claimants filed their Reply to Respondent's Proposal to Disqualify Professor Hanotiau.

228. On 11 December 2017, Professor Hanotiau filed his explanations regarding the Proposal in accordance with ICSID Arbitration Rule 9(3).

229. On 18 December 2017, Respondent filed further observations on the Proposal.

230. On 16 March 2018, the disqualification of Tribunal member Professor Hanotiau was rejected by the two unchallenged members of the Tribunal. The proceeding was resumed pursuant to ICSID Arbitration Rules 53 and 9(6).

14. The Parties' Requests for Provisional Measures

231. By letter of 22 March 2018, Derains & Gharavi, purporting to represent Claimants, requested that the following provisional measures be recommended by the Tribunal:

Order the Turkish Bankruptcy Office to withdraw the Decision or convene a new Extraordinary Meeting of Sehil's creditors and present, at that meeting, a new motion seeking to re-appoint Derains & Gharavi and Akıncı Law Office as counsel for Sehil's creditors for the remainder of the ICSID arbitration proceedings with full disclosure of the foregoing;

Order Respondent to withdraw its claim before the Bankruptcy Office as this claim has been filed in violation of the BIT and the ICSID Convention;

Order Respondent to refrain from taking any steps that would further aggravate the dispute and jeopardize the integrity of the process; and

Order any other measures that it deems appropriate to safeguard the integrity of these proceedings.

232. By letter of 29 March 2018, Respondent asked that the Tribunal dismiss the Derains & Gharavi request for provisional measures purported to be on behalf of Claimants and reject the Derains & Gharavi 20 March 2018 request for a second round of Post-Hearing Briefs in lieu of a hearing for closing arguments.

233. By letter of 4 April 2018, Derains & Gharavi requested the Tribunal “*take a swift decision regarding the requests made in our letter of March 22, 2018.*”

234. By letter of 10 April 2018, Respondent requested that, prior to ruling on “*Claimant Çap's*” request for provisional measures, a briefing schedule be determined.

235. In its letter of 25 April 2018, addressing the Derains & Gharavi provisional measures request of 22 March 2018, the Tribunal stated that it would establish a briefing schedule once the issues surrounding the authorization of Parties' respective counsel had been clarified.

236. By letter of 13 June 2018, Derains & Gharavi reiterated their 22 March 2018 request for provisional measures and that a second round of post-hearing submissions be ordered allowing the Award to be rendered.
237. By letter of 19 June 2018, the Tribunal confirmed its understanding that Mr Yıldız was authorized to represent Claimant Sehil in all ongoing aspects of this Arbitration; requested an update on the appointment of any counsel in addition to Mr Yıldız for Claimant Sehil; confirmed that it was satisfied with Turkmenistan’s undertaking of 24 May 2018; invited counsel for Claimant Çap and counsel for Claimant Sehil to confirm whether the request for provisional measures was to be considered submitted jointly or only on behalf of Claimant Çap by 19 June 2018; asked both Claimants to confirm if the reliefs sought remained those at § 1144 of Claimants’ Reply Memorial by 19 June 2018; and asked the Parties to confirm their availability for a two-day hearing on 20-21 November 2018 in London.
238. By letter of 28 June 2018, Mr Yıldız stated that he was authorized to represent Claimant Sehil in all aspects of this Arbitration and that no additional counsel had been appointed for Claimant Sehil as at that date. Regarding the provisional relief requested by Claimant Sehil, Mr Yıldız stated that he “*make[s] demand in a vital way on your commission that the measures to be taken will be binding for the defendants and for the deputies of Muhammet ÇAP as well on the purpose of providing a healthy process of the lawsuit*”. With respect to the quantum of claim, Mr Yıldız confirmed that “[t]his case has been declared and approved by Advocate Mehmet ÇEVİK ... at Istanbul 6th Enforcement Law Court.” With respect to the reliefs sought by Claimant Sehil, Mr Yıldız stated: “*In this respect, all of our requests except the immaterial compensation with the amount of 30 000 000-USD stated on the paragraph 1144 on the reply brief belonging to the insolvent company and we have no additional new request.*”
239. By letter of 28 June 2018, Turkmenistan (i) confirmed its availability for a hearing in November 2018 in London, (ii) provided comments regarding the validity of the renewed power of attorney provided by Claimant Çap, (iii) opposed Claimant Çap’s request for provisional measures of 22 March 2018, and (iv) claimed that Claimant Çap and La

Française were trying to get Derains & Gharavi and Akıncı reinstated as counsel, despite the decision of Claimant Sehil's creditors to replace them and commented on the issue of separation of the reliefs sought by Claimants.

240. By letter of 28 June 2018, Claimant Çap confirmed the following request for provisional measures:¹¹

- (i) *Order Turkmenistan to immediately withdraw its claim registered on August 17, 2017 before the Bankruptcy Office relating to allegedly unpaid tax debts by Sehil in Turkmenistan, as the claim is currently being adjudicated by this Tribunal and was filed in violation of Article 26 of the ICSID Convention (and moreover with the objective to interfere and jeopardize the integrity of the process);*
- (ii) *Order Turkmenistan, after having officially withdrawn its claim before the Bankruptcy Office, to immediately, and in any event by no later than August 31, 2018, specifically inform the Istanbul 6th Civil Court of Enforcement, currently reviewing the validity of the Creditors' Extraordinary Decision of March 20, 2018, that it has withdrawn its claim before the Bankruptcy Office as the claim is currently being adjudicated by this Tribunal in ICSID Case No ARB/12/06, and consequently, it was neither entitled to register its claim before the Bankruptcy Office, nor to participate in the Creditors' Extraordinary Meeting of March 20, 2018;*
- (iii) *Order Turkmenistan not to make any payment to the Bankruptcy Office as the mere funding by Turkmenistan of Sehil in the arbitration against itself is inconceivable and would violate the integrity of the process and the Tribunal's initial order and its request of April 5, 2018 that Turkmenistan not be involved in Sehil's representation, including through the funding of the costs of Sehil's lawyers;*
- (iv) *Order Turkmenistan to refrain from taking any steps that would further aggravate the dispute and jeopardize the integrity of the process, including through the backdoor of the Turkish bankruptcy proceedings; and*
- (v) *Order any other measures that it deems appropriate to safeguard the integrity of these proceedings.*

241. By letter of 3 July 2018, Respondent objected to Claimant Çap's request for relief as set out in Claimant Çap's letter of 28 July 2018, stating that no distinction between the reliefs sought by each of Claimants had been made.

¹¹ This varied significantly from the provisional measures originally requested in the Derains & Gharavi letter of 22 March 2018.

242. By letter of 9 July 2018, Claimant Çap responded to Respondent's letters of 28 June and 3 July 2018 rejecting the contention that all claims of Claimants belong to Claimant Sehil with the possible exception of moral damages.
243. By letter of 20 July 2018, the Tribunal established a schedule for two rounds of written submissions on Claimants' request for provisional measures.
244. By letter of 6 August 2018, Mr Yıldız requested that "*Dr. Gharavi and Prof. Ziya Akıncı [...] limit their claims and assertions from now on only to issues related to Muhammet Çap's receivables.*" He also requested that the Tribunal "*warn both counsels that the authority to assert any claims and statements related to the bankrupt entity belongs solely to myself [Mr Yıldız] and Istanbul 3rd Bankruptcy Office.*" Finally, Mr Yıldız requested "*to be granted urgently with permission and opportunity to access all the contents of the case prior to the [November] hearing before the Tribunal*".
245. On 10 August 2018, Claimant Çap filed an Application for Provisional Measures seeking the following relief from the Tribunal:
- (i) *Order Turkmenistan to immediately withdraw its claim registered on August 17, 2017 before the Bankruptcy Office relating to allegedly unpaid tax debts by Bankrupt Sehil in Turkmenistan, as the claim is currently being adjudicated by this Tribunal and was filed in violation of Article 26 of the ICSID Convention (and moreover with the objective to interfere and jeopardize the integrity of the process);*
 - (ii) *Order Turkmenistan, after having officially withdrawn its claim before the Bankruptcy Office, to immediately, and in any event by no later than two days after the Tribunal renders its decision on provisional measures, specifically inform the Istanbul 6th Civil Court of Enforcement, currently reviewing the validity of the Creditors' Extraordinary Decision of March 20, 2018, that it has withdrawn its claim before the Bankruptcy Office as the claim is currently being adjudicated by this Tribunal in ICSID Case No ARB/12/06, and consequently, it was neither entitled to register its claim before the Bankruptcy Office, nor thus any standing to make the above referenced December 27, 2017 and February 12, 2018 applications to the Bankruptcy Office, let alone entitled to participate in the Creditors' Extraordinary Meeting of March 20, 2018;*
 - (iii) *Order Turkmenistan not to make any direct or indirect payment or any sort of contribution to the Bankruptcy Office as the mere funding by Turkmenistan of Sehil in the arbitration against itself is inconceivable and would violate the*

integrity of the process and the Tribunal's initial order and its request of April 5, 2018 that Turkmenistan not be involved in Sehil's representation, including through the funding of the costs of Sehil's lawyers;

- (iv) Order Turkmenistan to refrain from taking any steps that would further aggravate the dispute and jeopardize the integrity of the process, including through the backdoor of the Turkish bankruptcy proceedings; and*
- (v) Order any other measures that it deems appropriate to safeguard the integrity of these proceedings.¹²*

246. Also on 10 August 2018, Respondent filed a Response of Turkmenistan to Claimant Çap's Request for Provisional Measures and Turkmenistan's Request for Provisional Measures. Paragraph 63 of that submission states:

Respondent requests that the Tribunal order Claimant Çap and his representatives to:

- i. Refrain from attempting to act as counsel for Claimant Sehil in this arbitration, despite their removal by the Turkish bankruptcy authorities;*
- ii. Refrain from aggravating and impeding the efforts of the counsel appointed by the Turkish Bankruptcy Office, Mr Ahmet Yıldız, to duly represent the interests of Claimant Sehil's bankruptcy estate;*
- iii. Cooperate with Mr Yıldız in satisfying the requests of the Bankruptcy Office, including, but not limited to:*
 - a. Producing a full copy of the funding agreement entered into by Claimant Çap and Claimant Sehil with the third-party funder for this arbitration, La Française, which has been wrongfully withheld from the Turkish Bankruptcy Office as well as this Tribunal;*
 - b. Formally acknowledging and specifying the precise amounts of the claims that are being asserted in this arbitration, on behalf of Claimant Çap in his individual capacity, as distinguished from the claims of Claimant Sehil;*
 - c. Providing an undertaking, as requested by the Istanbul Bankruptcy Office, not to seek enforcement of any award that may be rendered in this arbitration, if and to the extent that the Tribunal may grant any recovery on the claims asserted by Claimant Çap and Claimant Sehil, without the consent and permission of the Istanbul 3rd Bankruptcy Office; and*

¹² Claimant Çap's Application for Provisional Measures § 8

- d. *Providing an undertaking by each of Claimant Çap, his counsel, and La Française that they will not attempt to collect any proceeds on the claims in this case except in accordance with the “consent and permission” of the Istanbul 3rd Bankruptcy Office, and will immediately notify the Turkish bankruptcy authorities of any award issued in this case; and*
- iv. *Post security to ensure payment of any costs award issued in favor of Turkmenistan, and any award issued in favor of Turkmenistan in respect of its counterclaims in this arbitration.*¹³
247. On 15 August 2018, the Tribunal Secretary requested that counsel from Derains & Gharavi and Curtis Malet urgently provide Mr Yıldız with the substantive submissions exchanged during the course of this Arbitration, including the corresponding exhibits and legal authorities.
248. On 4 September 2018, Claimant Çap filed his Comments on Turkmenistan’s Response to Claimant’s Request for Provisional Measures and Claimant’s Response to Turkmenistan’s Request for Provisional Measures and Turkmenistan filed a Rejoinder in Opposition to Claimant Çap’s Application for Provisional Measures and Request for Provisional Measures.
249. On 18 September 2018, Claimant Çap filed his Response to Turkmenistan’s Request for Provisional Measures.
250. On 8 October 2018, Respondent submitted its Reply on Provisional Measures as foreseen in the Tribunal’s second letter of 1 October 2018.
251. By letter of 8 October 2018, Claimant Çap stated that the bankruptcy documents submitted by Turkmenistan on 26 September 2018 did not have any impact on the provisional measures sought in this Arbitration.
252. By letter of 19 October 2018, Claimant Çap further requested that the Tribunal:

¹³ Response of Turkmenistan to Claimant Çap’s Application for Provisional Measures and Turkmenistan’s Request for Provisional Measures § 63. The same relief is sought in § 52 of Turkmenistan’s Rejoinder in Opposition to Claimant Çap’s Application for Provisional Measures and Turkmenistan’s Request for Provisional Measures.

(i) decide on Claimant Mr Çap's provisional measure application, which has been pending since March 22, 2018, urgently and this even more so given that the matter relates to the preservation of the very integrity of the proceedings as it is not every day that a Respondent States causes and gets away for such a long period with the shift of control and change of counsel of one of it opposing parties moreover by filling a phony claim belatedly and in violation of the ICSID Convention after the filing of a post hearing brief so as to delay and influence the outcome of the proceedings;

(ii) remind the Parties that the scope of the upcoming hearing is limited to (i) closing arguments on the merits, and (ii) bankruptcy-related issues; and

(iii) close these proceedings and renders its award in due course to prevent any further undue interference from Respondent.

253. By letter of 24 October 2018, the Tribunal (i) addressed certain items pertaining to the organization of the hearing, (ii) invited Claimants to provide a breakdown of the amounts claimed by each of them by 5 November 2018, and (iii) granted Turkmenistan until 5 November 2018 to respond to Claimant Çap's 19 October 2018 letter.
254. By letter of 25 October 2018, Mr Yıldız transmitted a letter from himself addressing the remuneration arrangement of Messrs Alcitepe and Egemenoğlu and his own remuneration as counsel for Claimant Sehil, and coverage of the costs of the hearing scheduled for November 2018.
255. On 26 October 2018, Claimant Çap filed his Response to Turkmenistan's Application for Security for Costs.
256. By letter of 2 November 2018, Claimant Çap requested:
- an urgent ruling from the Tribunal on his request for provisional measures that should in any event be rendered before the hearing on closing arguments;
 - to be granted a minimum of two hours for his closing arguments, plus 15 minutes to address the above procedural issues with the right to start first and 45 minutes for rebuttal and the right to go last and this with utmost flexibility given the circumstances and the unknown;

- skeleton arguments and breakdown of the amounts claimed, and in particular, the basis for each of the claims, to be filed on 16 November 2018 instead of 12 and 5 November 2018 respectively; and
 - disclosure of the letter of engagement of Sehil estate's new counsel.
257. By letter of 7 November 2018, Claimant Sehil rejected Claimant Çap's "*statements [...] related to Respondent's alleged control of Claimant Sehil's arbitration strategy*" and that Turkmenistan is "*manufacturing*" the retention of Claimant Sehil's new counsel. Claimant Sehil also requested that Claimant Çap produce a copy of the third-party funding agreement with La Française, and in the alternative, that the Tribunal issue an order requiring Claimant Çap to do so.
258. By letter of 9 November 2018, in response to Claimant Çap's letter of 2 November 2018, Respondent stated that "*Claimant Çap's requests are an improper attempt to seek relief*" and replied and sought to refute various comments which had been made by Claimant Çap.
259. By letter of 12 November 2018, Claimant Çap commented on Claimant Sehil's letter of 7 November 2018, objecting to the disclosure of the funding agreement with La Française.
260. On 19 November 2018 (following an extension of time granted by the Tribunal), both Claimants filed letters stating the damages to which they considered themselves entitled and the basis for those claims. Claimant Mr Çap submitted that he was entitled to:
- *[...] 97.5 percent of all the monies to be recovered from Respondent in relation to (i) the loss of the enterprise value claim; (ii) the confiscation of assets claim; (iii) the outstanding receivables claim; (iv) the reduced profit margin claim; and (v) the moral damages, assessed at USD 5 million out of the USD 35 million moral damages sought, for Sehil's reputational harm and the harassment of Sehil's employees;*
 - *[...] 100% of moral damages claim, assessed at USD 30 million out of the USD 35 million moral damages sought, for the pain, stress, shock, anguish, humiliation, shame and reputational harm that Mr. Çap has suffered as a result of (i) Turkmenistan's acts and omissions in relation to his investment, which forced him to leave the country for his own safety and the subsequent threats to Mr. Çap and his family; and (ii) Turkmenistan's acts and omissions and threats in relation to Mr. Çap's situation in Turkey in the bankruptcy*

proceedings, the effect of which was to harass, jeopardize his rights and jeopardize the integrity of the arbitration proceedings; [and]

- *[...] 100% of the costs of this arbitration incurred as of this date as well as any further share that would be paid by Mr. Çap, including all of the fees and expenses of the arbitrators and ICSID, plus all of the fees and expenses of Bredin Prat, Derains & Gharavi and Akıncı Law Office, experts and consultants, as well as Claimant Mr. Çap's expenses in pursuing this arbitration[.]*

261. Claimant Sehil submitted that it was entitled to (i) outstanding receivables of USD 121,770,424.00; (ii) confiscated assets of USD 10,758,373.00 (iii) a reduced margin claim for USD 92,115,092.00; (iv) loss of enterprise value of USD 188,368,000.00; and (v) interest and arbitration costs.

262. By letter dated 20 November 2018, Claimant Sehil requested *inter alia*, that the Tribunal:

Order Claimant Çap to produce a copy of the third-party funding agreement between Claimants Sehil, Çap and the third-party fund[er] and if Claimant Çap refuses to produce the aforementioned document, allow Claimant Sehil to file a request under 28 U.S. Code § 1782 (which provides for assistance to foreign and international tribunals and to litigants before such tribunals) in the United States District Court for the District of Columbia in order to compel Claimant Çap's counsel's Washington, DC office to produce the third-party funding agreement.

263. Claimant Sehil further requested that the Tribunal “*instruct counsel for Claimant Çap to refrain from contacting Claimant Sehil directly and only contact the latter through counsel.*”

264. On 13 December 2018, the Tribunal issued its decisions on Claimants' and Respondent's requests for provisional measures as follows:

Provisional Measures Requested by Claimants

(1) Subject to the Recommendations below, Claimants' specific requests for provisional measures are refused.

(2) The Tribunal recommends that Turkmenistan shall, within 5 (five) days of the date of this Decision, [...] inform the Istanbul 6th Civil Court of Enforcement and the Istanbul 3rd Bankruptcy Office that:

(i) Turkmenistan is seeking to recover the debt it claims is due from Bankrupt Sehil (and which it has registered in the bankruptcy of Bankrupt Sehil) in an ICSID arbitration (Case No ARB/12/6 Muhammet Çap & Bankrupt Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan) which is currently ongoing;

(ii) Turkmenistan's declaration of claim before the Bankruptcy Office in connection with Bankrupt Sehil has been and should be considered as having been registered on a conservative and protective basis, to be pursued only for the amount determined in the Award, in the event Turkmenistan prevails totally or partially, on its counterclaim in this Arbitration, or if the Tribunal declines jurisdiction on the Counterclaim; and

(iii) Turkmenistan requests that the Istanbul 6th Civil Court of Enforcement and the Istanbul 3rd Bankruptcy Office shall take into account that arbitration proceedings are on-going and make their best efforts not to take any decision on Turkmenistan's claim in Sehil's bankruptcy until the Tribunal has issued its Award in the Arbitration.

(3) The Tribunal confirms the direction made in its letter of 5 April 2018 that Turkmenistan shall not make any direct or indirect payment to the Bankruptcy Office in connection with Bankrupt Sehil's bankruptcy and/or Bankrupt Sehil's participation in this Arbitration. Within 5 (five) days of the date of this Decision, Turkmenistan shall inform the Bankruptcy Office of this Decision and the Undertaking dated 24 May 2018 given by the Ministry of Justice of Turkmenistan.

(4) The Tribunal further recommends that, to protect the integrity of the ICSID Arbitration (Case No ARB/12/6) proceeding, and until the Award in the ICSID Arbitration is issued:

(i) Turkmenistan shall not be involved in any way in Bankrupt Sehil's participation or involvement in this Arbitration;

(ii) Turkmenistan shall not receive copies, or otherwise be informed, of advices and instructions given or received from legal counsel representing Bankrupt Sehil in the Arbitration;

(iii) Bankrupt Sehil and its legal counsel shall not share with Turkmenistan, in the context of Turkmenistan as a creditor of Sehil's bankruptcy estate, any information relating to the Claimants' (Claimant Çap's and/or Bankrupt Sehil's) approach to the presentation of the Claimants' case and participation in this Arbitration including legal advices, draft submissions or correspondence or any other proposals. Bankrupt Sehil and its legal counsel shall produce an undertaking to this effect within 5 (five) days of this Decision.

Provisional Measures Requested by Turkmenistan

(5) Turkmenistan's request for provisional measures is refused.

Disclosure Requested by Bankrupt Sehil

(6) Bankrupt Sehil's request for disclosure is refused.

Additional Provisional Measures Recommended by the Tribunal

(7) The Tribunal recommends that Claimant Çap, Bankrupt Sehil and Turkmenistan:

(a) participate in this Arbitration in good faith; and

(b) refrain from taking any steps that would further aggravate the dispute and jeopardize the integrity of this Arbitration including through the bankruptcy proceedings of Bankrupt Sehil.

265. By email of 17 December 2018, Respondent requested an extension until 4 January 2019 to undertake the measures requested of it by the Tribunal in the Decision on Provisional Measures. The Tribunal subsequently granted the request on the same date.
266. By letter of 4 January 2019, Respondent provided its response to the Tribunal's request for an undertaking made in its decision on provisional measures. Respondent attached statements that it had prepared for submission to the Turkish Bankruptcy Office informing it that the claim Turkmenistan had registered against Sehil's bankruptcy estate was the subject of a counterclaim in the present arbitration and that there should be no double recovery by Turkmenistan with respect to the recovery of that alleged receivable.

15. Hearing on Closing Arguments

267. By letter of 24 August 2018, the Tribunal notified the Parties of a possible conflict for one of the Tribunal members for the November hearing dates and asked the Parties to confirm, by 28 August 2018, if they were available for a rescheduled hearing in February 2019.
268. By email of 26 August 2018, Respondent confirmed its availability. By letter of 27 August 2018, Derains & Gharavi on behalf of Claimant Çap opposed the rescheduling of the hearing. By letter of 28 August 2018, Mr Yıldız for Claimant Sehil stated that he left the decision on the hearing to the Tribunal's discretion.

269. By letter of 30 August 2018, the Tribunal confirmed that the November 2018 dates for the hearing would be maintained and invited Mr Yıldız to provide a power of attorney for the “*academician attorney*” that would be accompanying him to the hearing by 5 November 2018.
270. By letter of 17 September 2018, the Tribunal invited the Parties to confirm their availability for a pre-hearing teleconference on 24 or 26 October 2018 and submit their comments on a draft agenda.
271. By email of 21 September 2018, Derains & Gharavi confirmed Claimant Çap’s availability for a pre-hearing conference on 24 October 2018. By email of 24 September 2018, the Centre invited Mr Yıldız for Claimant Sehil and counsel for Respondent to confirm their availability for a pre-hearing conference on the dates proposed by the Tribunal in its letter of 17 September 2018. By email of the same date, Respondent stated that it was not available on 24 or 26 October 2018 and proposed 19 or 22 October 2018 as alternatives. By email of 25 September 2018, Mr Yıldız stated that he was available 24 October 2018 or later.
272. By its first letter of 1 October 2018, the Tribunal invited the Parties to agree on the hearing agenda to the extent possible by 15 October 2018. Should a pre-hearing conference still be needed after that point, the Tribunal proposed that the President should conduct it alone on behalf of the Tribunal on 5 November 2018.
273. By letter of 31 October 2018, the Tribunal provided the Parties’ with a draft of Procedural Order No 11 regarding the organization of the upcoming hearing and invited their comments.
274. By letter of 14 November 2018, Claimant Sehil wrote to the Tribunal requesting postponement of the hearing scheduled for November 2018. This was because its newly appointed counsel had not had adequate time to fully study the “*voluminous nature of the files*” and the “*latest rounds of communications from Claimant Çap*” in which Claimant Çap “*claim[ed] that any award in favour of the claimants would have to be directly go to*

Claimant Çap ... and that Claimant Çap's claims are merely derivative of those of Claimant Sehil's".

275. By letter of 14 November 2018, Claimant Çap commented on Claimant Sehil's request for the postponement of the hearing and requested that the Tribunal maintain the hearing dates. However, *"if maintaining the hearing is not possible under the circumstances, Mr Çap requests that the Tribunal order one final round of written closing statements within two weeks limited to mere rebuttal of the first post-hearing submissions"*.
276. By letter of 15 November 2018, Respondent stated that it did not object to the adjournment of the hearing but requested the Tribunal to rule on the *"open questions that hang over this case, including separation of the claims as between the Claimants, and the pending requests for provisional measures"*.
277. On 16 November 2018, the Tribunal agreed to the cancellation of the hearing scheduled for 20-21 November 2018 *"for reasons of due process"*. However, to proceed with this case the Tribunal made orders for the filing of Reply Post-Hearing briefs and reserved two days for a possible final meeting for closing arguments should that be considered necessary.
278. By letters of 19 November 2018, Claimants separately provided their breakdown of damages claimed.
279. By letter of 19 December 2018, the Tribunal asked the Parties to confirm their availability for new dates for a hearing on closing arguments.
280. By letter of 21 December 2018, Claimant Çap objected to the holding of a further hearing.
281. By email of 22 December 2018, Respondent confirmed its availability for a hearing.
282. By email of 1 January 2019, Mr Akin Alcitepe informed the Tribunal that he was no longer with the law firm Butzel Long and would now be representing Claimant Sehil from the law firm Offit Kurman.

283. By email of 4 January 2019, the Tribunal invited the Parties to provide their availability for different hearing dates in May 2019. By email of 7 January 2019, Claimant Sehil confirmed its availability. By email of 8 January 2019, Respondent confirmed its availability.
284. On 18 January 2019 Claimant Çap informed the Tribunal that its counsel was not available on the proposed dates. It added that neither La Française nor Mr Çap were in a position to further pay counsel for purposes of another hearing and thus requested that any further questions that the Tribunal may have be put in writing to the Parties.

16. Payment of Advances by the Parties

285. By letter dated 21 August 2017, ICSID requested the fifth advance payment of USD 150,000 from each Party to defray the cost of the proceedings during the following three to six months. USD 150,000 was received from Claimants on 25 September 2017, and USD 149,970 was received from Respondent on 28 September 2017.
286. By letter dated 14 November 2018, ICSID requested the sixth advance payment of USD 200,000 from each Party to defray the cost of the proceedings during the following three to six months.
287. By email of 8 January 2019, ICSID informed the Parties that it had not received any payments on the most recent request for funds, sent 14 November 2018, and invited the Parties to provide an update on the status of the payments.
288. In a letter dated 18 January 2019, Claimant Çap stated that he would be able to provide an update on the status of the outstanding payment after (i) hearing how much Claimant Sehil would be paying towards the advance and (ii) receiving an estimate of the fees for this Arbitration and the amount of time until the Award was to be rendered.
289. By email of 18 January 2019, Claimant Sehil informed the Tribunal that the issue of the payment was still being reviewed by the Turkish bankruptcy court and requested a further three weeks to provide an update on the status.

290. By letter of 18 January 2019, Respondent informed the Tribunal that it would make no further payments until both Claimants had paid their outstanding shares of the requested advance.
291. By letter of 31 January 2019, the Tribunal (i) provided an estimate of the further number of hours it would need to decide this case, (ii) reserved its decision on whether a final hearing would be held until after it had reviewed the Parties' Reply Post-Hearing briefs, (iii) granted Claimant Sehil's request for an extension to provide an update on the status of its payment.
292. By email of 8 February 2019, Claimant Sehil informed the Tribunal that it would provide an update on the status of its payment following a meeting of its creditors on 11 February 2019.
293. By letter of 11 February 2019, Claimant Sehil provided an update on the status of its payment, informing the Tribunal that it would be unable to make the payment and asking that its share be covered by the other Parties.
294. By letter of 8 March 2019, the Centre informed the Parties of the continuing default and requested that the outstanding balance be paid by 25 March 2019.
295. On 28 March 2019, the Centre informed the Parties that this Arbitration was stayed for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
296. By email of 9 April 2019, Claimant Çap objected to the stay of the proceedings and stated that a letter would follow.
297. By letter of 10 April 2019, Claimant Çap stated that he had paid his share of the outstanding advance and requested that the case be resumed.
298. By letter of 23 April 2019, the Tribunal stated that as Claimant Sehil and Respondent's payments were still outstanding, there were not sufficient funds to resume the case. The

Tribunal therefore invited any of the Parties to pay the outstanding balance in order for the proceedings to resume.

299. By letter of 29 April 2019, Respondent stated that it would pay its outstanding balance immediately after Claimants paid their outstanding balance.
300. By letter of 3 May 2019, the Tribunal was informed that Claimant Çap had paid Claimant Sehil's half of the requested advance.
301. By letter of 13 May 2019, the Centre confirmed receipt of the payments on behalf of Claimants and informed the Parties that, upon receipt of Respondent's payment, the suspension would be lifted.
302. By letter of 13 May 2019, Respondent stated that its payment would be made in the coming days.
303. By letter of 17 May 2019, the Centre confirmed receipt of Respondent's payment. Accordingly, the Centre informed the Parties that the suspension of the Arbitration had been lifted and the proceedings resumed.

17. The filing of further submissions

304. On 22 January 2019, each Party filed a simultaneous Reply Post-Hearing Brief; however, Claimant Sehil submitted both redacted and non-redacted versions of its submission. By email of 25 January 2019, the Tribunal informed the Parties it could not circulate Claimant Sehil's submission as received and asked it to decide by 29 January 2019 which version should be circulated amongst all of the Parties.
305. By email of 29 January 2019, Claimant Sehil asked that the redacted version of its Reply Post-Hearing Brief be circulated, but reserved its right to make further arguments related to the third-party funding agreement later in the proceedings.
306. By email of 11 February 2019, Claimant Çap restated his objection to the appointment of counsel for Claimant Sehil by the Istanbul bankruptcy authority claiming that the

appointment resulted from “*the registration by Turkmenistan of its phony tax claim in Turkey.*”

307. By letter of 11 February 2019, Respondent, *inter alia*, stated that both Claimants’ Reply Post-Hearing Briefs violated the instructions provided by the Tribunal and should be stricken from the record. By email of the same date, Claimant Sehil objected to Respondent’s request that its Reply Post-Hearing Brief be stricken from the record and confirmed its availability to attend a closing hearing.
308. By email of 19 February 2019, Respondent provided an updated power of attorney, appointing Squire Patton Boggs as counsel in this case.
309. By letter of 30 May 2019, the Tribunal sought the Parties’ approval of Dr Crina Baltag as assistant to the Tribunal. By email of the same date, Claimant Sehil confirmed its agreement to the appointment. By email of 6 June 2019, Respondent confirmed its agreement to the appointment. By email of 13 June 2019, the Tribunal asked Claimant Çap to provide his comments on the appointment.
310. By letter of 21 June 2019, Claimant Çap informed the Tribunal that he agreed to the appointment of Dr Crina Baltag only for a period of three months, after which he expected the Award to be rendered.
311. By letter of 30 July 2019, the Tribunal noted the contents of Claimant Çap’s 21 June 2019 letter, but informed the Parties that it could not consent to the time limit placed on Dr Baltag’s appointment. Claimant Çap was therefore invited to confirm his approval of Dr Baltag’s appointment without condition by 6 August 2019.
312. By email of 6 August 2019, Claimant Çap stated he had no objection to the appointment of Dr Baltag beyond the three-month period, provided that her fees beyond that point be paid directly by the Tribunal and not the Parties.
313. By email of 6 June 2019, Respondent asked the Tribunal to schedule a closing hearing as soon as possible.

314. By email of 16 August 2019, Respondent reiterated its expectation that a further hearing be held prior to the closure of the proceedings and the rendering of the Award.
315. By letter of 20 August 2019, Claimant Çap objected to Respondent’s email of 16 August 2019 and asked that the Tribunal render its Award without further delay. Claimant Çap also informed the Tribunal that his third-party funder was not willing to pay anything further towards this case and noted that “*the bulk*” of the counsel team that had been working on this case had left Claimant Çap’s counsel’s firm.
316. By email of 28 August 2019, Claimant Sehil provided its comments on Respondent’s email of 16 August 2019 and Claimant Çap’s letter of 20 August 2019, requesting, *inter alia*, that the Tribunal render its Award promptly while asking that “*if the Tribunal is so inclined to award damages to both Claimant Sehil and Claimant Çap, it must do so either by way of separate awards or, if unable, in a single award that clearly and unequivocally delineates and segregates the amounts due to each of the claimants.*”
317. By letter of 5 September 2019, the Tribunal acknowledged receipt of the Parties’ communications regarding the closing hearing and confirmed that it would take them into account during its upcoming deliberations.
318. By letter of 9 September 2019, Professor Dr Ziya Akıncı informed the Tribunal that he was resigning as counsel for Claimant Çap. By email of 17 September 2019, the Tribunal acknowledged receipt of Professor Dr Akıncı’s resignation.
319. By letter of 11 September 2019, Respondent once again requested that the Tribunal proceed to schedule a closing hearing.
320. By email of 13 September 2019, Claimant Sehil provided its comments on Respondent’s letter of 11 September 2019.
321. By letter of 13 November 2019, Respondent reiterated its request that the Tribunal schedule a closing hearing.

322. By email of 19 November 2019, Claimant Sehil asked that the Tribunal reject Respondent's requests for a closing hearing and proceed to the issuance of the Award.
323. By letter of 9 December 2019, the Tribunal informed the Parties that it was considering the issue of a final hearing in the context of its upcoming deliberations.
324. By letter of 11 December 2019, Respondent again requested that the Tribunal schedule a closing hearing. By email of the same date, Claimant Sehil reiterated its objection to Respondent's request.
325. By letter of 27 December 2019, the Tribunal informed the Parties that it would be deliberating in January 2020 and would revert to the Parties following that meeting.
326. By letter of 23 January 2020, the Tribunal informed the Parties that it had conducted its deliberations and decided that it had of all the relevant information to reach a final Award. As such, Respondent's requests for a closing hearing were rejected. The Parties were instructed to submit their statements of costs by 21 February 2020.
327. By letter of 6 February 2020, Respondent provided its comments on the Tribunal's 23 January 2020 letter.
328. By email of 7 February 2020, the Tribunal invited Claimants to respond to Respondent's 6 February 2020 letter by 21 February 2020.
329. By email of 19 February 2020, Claimant Sehil asked the Tribunal for an extension, agreed to by Claimant Çap and Respondent, until 28 February 2020 to provide its comments. By email of 20 February 2020, the Tribunal granted the requested extension.
330. By letter of 28 February 2020, Claimant Sehil submitted its comments on Respondent's 6 February 2020 letter, requesting, *inter alia*, that the Tribunal proceed to the issuance of the Award.
331. By letter of 4 March 2020, Claimant Sehil submitted its Statement of Costs.

332. By letters of 6 March 2020, Claimant Çap and Respondent submitted their Statements of Costs.
333. By letter of 15 April 2020, Respondent requested leave to submit the award issued in *Lotus Holding Anonim Şirketi v Turkmenistan* (ICSID Case No ARB/17/30) into the record.
334. By letter of 16 April 2020, Claimant Çap asked that the Tribunal reject Respondent's 15 April 2020 request.
335. By email of 16 April 2020, Respondent provided comments on Claimant Çap's letter of the same date.
336. By email of 27 April 2020, the Tribunal denied Respondent's request to admit the *Lotus Holding Anonim Şirketi v Turkmenistan* award into the record.
337. By letter of 27 July 2020, Claimant Çap, *inter alia*, requested that the Tribunal proceed to the issuance of the Award.
338. By email of 16 August 2020, the Tribunal acknowledged receipt of Claimant Çap's 27 July 2020 letter and confirmed that it intended to issue the Award in the coming months.
339. By email of 21 August 2020, Claimant Çap commented on the Tribunal's 16 August 2020 message.
340. By emails of 3 and 27 November 2020, Claimant Çap requested an update on the status of the Award and asked the Secretary-General of ICSID to review the correspondence on record and assist in bringing the case to its conclusion.
341. By email of 6 December 2020, the Tribunal informed the Parties it hoped to render its Award early in 2021.
342. By email of 20 December 2020, Claimant Çap asked that ICSID take a further role in monitoring the progress of the Award.
343. By letter of 26 January 2021, Claimant Çap's counsel wrote to inform the Tribunal of Mr Çap's arrest in Albania on an Interpol Notice issued by Turkmenistan and asked that the

- Tribunal (i) provide an exact date by which the Award would be issued and (ii) order measures against Turkmenistan, including the withdrawal of the Interpol Notice, provided this did not interfere with the timely issuance of the Award.
344. By email of 27 January 2021, the Tribunal invited Respondent's comments on Claimant Çap's 26 January 2021 letter by 2 February 2021.
345. By email of 1 February 2021, Respondent requested an extension until 5 February 2021 to provide its comments. By email of 2 February 2021, Claimant Çap objected to Respondent's request. By email of the same date, the Tribunal granted Respondent an extension until 4 February 2021.
346. By letter of 4 February 2021, Respondent asked that the Tribunal reject Claimant Çap's request to "*order any measures*" against Respondent or, if it should be inclined to do so, establish a briefing schedule for submissions from the Parties first.
347. By email of 7 February 2021, Claimant Sehil objected to Respondent's request that the Tribunal establish a briefing schedule and echoed Claimant Çap's request that the Tribunal proceed to issue the Award as soon as possible.
348. By email of 9 February 2021, the Tribunal invited further comments from Claimant Sehil on Respondent's 4 February 2021 letter. By email of 11 February 2021, Claimant Sehil confirmed that it had no further comments.
349. By email dated 19 February 2021, the Tribunal informed the Parties that it did not consider it appropriate to issue any order and measures against Turkmenistan, including the withdrawal of the Interpol Notice. It further informed the Parties that the Tribunal was working on finalizing the Award which it anticipated would be issued in April 2021.
350. By email of 7 April 2021, ICSID transmitted to the Parties a letter from Professor Lew disclosing his appointment in another ICSID case where Mr. Yves Derains of Derains & Gharavi was a party-nominated arbitrator. Professor Lew confirmed that he did not believe this would create a conflict, but stated that he would decline the appointment should the

Parties in the present case object. The Parties were given until 9 April 2021 to provide their comments.

351. By email of 9 April 2021, Claimant Sehil confirmed it did not object to the contents of Professor Lew's 7 April 2021 letter.
352. By email of 12 April 2021, Claimant Çap asked for permission to respond to Professor Lew's letter the following day. By email of the same date, the Tribunal granted the requested extension.
353. By letter of 13 April 2021, Claimant Çap stated his agreement to Professor Lew's appointment in the other ICSID case "*if, and only if, Respondent provides an express statement that it does not object to Professor Lew QC's acceptance of this appointment despite the involvement of the undersigned's partner in the other ICSID case.*"
354. By email of 15 April 2021, Respondent stated its intention to respond to Claimant Çap's letter on 19 April 2021.
355. By letter of 19 April 2021, Respondent, *inter alia*, confirmed it had no objection to Professor Lew's acceptance of his appointment.
356. The proceeding was closed by letter dated 20 April 2021.
357. By letter of 23 April 2021, Respondent "*request[ed] that all members of the Tribunal provide disclosures of any and all arbitrator appointments made by the Derains & Gharavi firm, or the Akinçi Law firm, from the inception of this case to the present time.*"
358. By email of 23 April 2021, Claimant Çap objected to Respondent's request for publically available information.
359. By letter of 4 May 2021 the Tribunal, for the sake of good order, informed the Parties that Professor Lew had no further disclosures to make; Professor Boisson de Chazournes is sitting as an arbitrator in a publicly available ICSID case, *Future Pipe International B.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/17/31), where Derains & Gharavi, Paris, France appear before her, and that Professor Hanotiau has "*just been appointed to replace*

Emmanuel Gaillard as arbitrator in a totally unrelated PCA Case involving two investors and the State of Bahrain which is at the moment at the stage of final deliberations and writing of the award.”

II. FACTUAL BACKGROUND

360. Both Mr Çap and Sehil are Claimants in this Arbitration. Mr Çap and his family are citizens of the Republic of Turkey. Sehil is a company established on 1 May 1992 in Istanbul, Turkey engaged in the construction business.¹⁴ Sehil was owned and controlled by Mr Çap, who owns 97.5% of the share capital of Sehil; Mrs Mine Çap, his wife, holds the remaining 2.5% of Sehil. During the course of this Arbitration Sehil entered bankruptcy proceedings in accordance with Turkish law. Since then (14 June 2016), decisions for Sehil are taken by the attorney appointed by and under the control of the Istanbul Bankruptcy Office. (See §§ 169-186 above.)¹⁵
361. Respondent is the State of Turkmenistan. It is currently governed by President Gurbanguly Berdimuhamedow since 2007. He succeeded President Niyazov.
362. This case concerns a large number of contracts entered into by Sehil with different entities in Turkmenistan over the course of 9 years. In particular, between 2000 and 2009, Sehil was awarded 64 contracts by different State organs and State-owned companies, “*with an aggregate value exceeding USD 700 million*”.¹⁶ However, not all of those 64 projects were completed.
363. Claimants contend that 32 of those contracts with an overall value of USD 60,222,088¹⁷ were completed successfully (Undisputed Contracts).¹⁸ In contrast, the other 32 contracts

¹⁴ Exhibit C-99, Company Profile, pp 9-12

¹⁵ See Respondent’s letter of 7 May 2018. Mr Yıldız replaced Mr Cevik, Mr Çap’s lawyer who had represented Sehil and Mr Çap.

¹⁶ Claimants’ PHB § 81

¹⁷ This is agreed by Respondent – it calculates the total value of the Undisputed Contracts (Exhibit C-MC05) as USD 60,222,088.

¹⁸ Claimants’ Memorial § 72 setting out a table of the contracts; See also Witness Statement of Mr Muhammet Çap; Exhibit C-MC05, Table of Undisputed Contracts

are disputed between the Parties due to various issues relating to their performance such as non-payment, delayed permissions, receivables owed to Sehil and others which, as explained below, Claimants argue are caused by Respondent. These contracts are thus subject to the claims in these proceedings (Disputed Contracts)¹⁹ with an estimated value of “over USD 736,814,000 plus USD 400,000,000 representing the awarded but not signed contract[s]”.²⁰

364. All of Claimants’ contracts in Turkmenistan were awarded to them following a tender process organized by State organs. The tender processes as well as the negotiation, execution and performance of the contracts, were regulated by Construction Norms of Turkmenistan (SNTs) and Turkmenistan’s General Tender Regulations.²¹
365. Respondent does not deny that in the period 2000-2009, Sehil was awarded 64 projects through different tender processes. Nor does it deny that 32 of those contracts are subject to dispute between the Parties. However, Respondent denies that those 32 contracts are disputed due to any “actions and omissions” on the part of Respondent that hampered or impeded their performance. Rather, Respondent contends that Claimants violated those Disputed Contracts by failing to perform their contractual obligations.

1. History of Parties’ Business Relationship

366. According to Claimants, the Parties’ business relationship began in 1993 when on 13 April the President of Turkey invited Mr Çap to go to Turkmenistan with him and a Turkish business delegation. They were invited by the then President of Turkmenistan, Mr

¹⁹ The list of Disputed Contracts is set out in Claimants’ Memorial § 77; Also set out in Exhibit C-MC06, Table of Disputed Contracts. Claimants specify in § 78 of their Memorial that the fact that these 32 contracts are referred to as Disputed Contracts does not mean that they have not been fully performed or that the corresponding plants and buildings are not operational.

²⁰ Claimants’ Memorial § 77; Respondent’s Objections to Jurisdiction and Counter-Memorial § 14 (Respondent calculates the total value of the Disputed Contracts as USD 695,564,668 (net of VAT). USD 695,564,668 divided by 31 is approximately USD 22.4 million per contract.)

²¹ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 28-29

Saparmyrat Turkmenbasy, for the purpose of establishing business relations and creating potential for future investments.²²

367. Following this meeting, Mr Çap decided to invest in Turkmenistan. In 1995 Mr Çap opened a construction supplies business in Turkmenistan which operated for more than five years.²³
368. In 2000, Mr Çap had a number of meetings with the Turkmenistan authorities discussing the possibility of undertaking large construction projects in the State. Those discussions were successful and on 6 April 2000, Sehil signed a contract with the Turkmenistan National Security Committee for “*cladding the façade of the KNB building with marble and granite and of installing a monument in honor of President Niyazov*”.²⁴ The value of the contract was USD 1,698,968.
369. Following the completion of this project Sehil was awarded more contracts.
370. In particular, between 2000 and 2004, Claimants entered into a number of contracts with State organs and State-owned companies for different kinds of construction work on both private and governmental buildings. The value of these contracts exceeded USD 49 million.²⁵ One of the contracts from that period, dated 10 September 2004, was not completed.²⁶
371. Between 2005 and 2006, Claimants executed 21 other construction contracts with various State organs and State-owned companies for a total value of more than USD 233.6 million.²⁷ However, out of these 21 projects, only five were allegedly completed “*without*

²² Claimants’ RfA § 18

²³ Claimants’ RfA § 19

²⁴ Claimants’ Memorial § 67; See also Respondent’s Objections to Jurisdiction and Counter-Memorial § 101

²⁵ Claimants’ Memorial § 68; Witness Statement of Mr Muhammet Çap § 8; Exhibit C-MC05, Table of Undisputed Contracts

²⁶ Exhibit R-66, Contract No T5 dated 10 September 2004; See Exhibit C-MC06, Table of Disputed Contracts

²⁷ Claimants’ Memorial § 75; See also Witness Statement of Mr Muhammet Çap; Exhibit C-MC05, Table of Undisputed Contracts

major problems".²⁸ The performance of 16 contracts continued during the President Berdimuhamedow's mandate.

372. Claimants were awarded another 16 contracts in the following two years i.e. 2007-2009, 15 of which were signed. However, Claimants contend that only 1 of the 16 contracts was completed "*without any dispute*".

373. Thus, the 32 Disputed Contracts consist of:

- 1 disputed contract from 2004;
- 16 disputed contracts entered into during the period 2005-2006; and
- 15 disputed contracts entered into during the period 2007-2009.²⁹

374. Claimants contend that 25 of the Disputed Contracts³⁰ have been completed. The other 7 contracts were partially completed – those consist of 6 signed contracts and one awarded.³¹ Claimants contend that this has been acknowledged by Turkmenistan as well.³²

2. Claimants' Claims against Respondent³³

375. Claimants contend that through various actions and omissions such as "*defaults and delays in payments, [...] the imposition of unjust restrictions on imports, and the issuance of*

²⁸ Claimants' Memorial § 75; these were Contracts Nos 28, 30, 43 and 61. Witness Statement of Mr Muhammet Çap; Exhibit C-MC05, Table of Undisputed Contracts.

²⁹ Claimants' Memorial § 77

³⁰ Those contracts are set out and identified in Claimants' Memorial § 77 and highlighted in green.

³¹ Namely, Contract No 47, Contract No 58, Contracts Nos 62-65 and the Awaza Island project (Claimants' Memorial § 78)

³² Claimants' Memorial § 78; See Exhibits C-103 and C-161, Letters No 2-05/3367 from the Minister of Culture to Sehil and No 2-05/3366 from the Minister of Culture to Sehil dated 29 November 2010 ("*Thanks to the immense efforts of our esteemed President there are plants and factories, as well as buildings for other purposes that meet international standards, are under continuous construction and are being put into operation in the beautiful capital Ashgabat, as well as in the regions and districts of Turkmenistan. This should also be credited to your Company 'Sehil Inshaat' which has been working in Turkmenistan for 10 years. During these years, your construction Company duly built and put into operation about 60 buildings and facilities.*").

³³ This section (§§ 375-383) presents Claimants' view of the factual background of the dispute. Unless stated otherwise, these are disputed by Respondent.

unjustified delay penalties and fines”,³⁴ Respondent destructed and impaired Claimants’ investments in Turkmenistan,³⁵ harassed Sehil’s employees, damaged Mr Çap’s reputation and forced Mr Çap to leave the country fearing for his own safety and that of his family, following a number of threats.³⁶

376. According to Claimants, the business relationship and trust established with Turkmenistan started deteriorating with the election of the new President Berdimuhamedow in 2007. Claimants claim that President Berdimuhamedow had a negative opinion of Turkish investors in Turkmenistan, which was evident not only from his public statements but also reflected in his treatment of other Turkish investors,³⁷ in addition to Mr Çap.
377. In particular, Claimants state that during the presidency of Mr Bedrimuhamedow, both Sehil, as a separate legal entity, and Mr Çap himself and his family, were subject to a number of “*adverse acts and omissions*” by Turkmenistan. Those acts and omissions included defaults and delays in contractual payments owed to Sehil, “*defaults in carrying out of administrative obligations, orders for additional works without compensation*”,³⁸ or any time or monetary adjustment corresponding to the required additional works.³⁹ Claimants contend that Turkmenistan also imposed unlawful and unjust restrictions on imports, travel bans and issued unjustified delay penalties and fines.
378. Moreover, Claimants state that Turkmenistan performed a number of “*disruptive and intimidating intrusions and inspections*” at Sehil’s construction sites.⁴⁰ These inspections were conducted without legitimate cause and prior notice, and thus effectively resulted in constant pressure and harassment of Sehil and its employees. This in turn caused many difficulties, delays and extra costs on the ground.⁴¹

³⁴ Claimants’ Memorial § 8

³⁵ Claimants RfA §§ 29-30

³⁶ Claimants’ Memorial § 481

³⁷ Claimants’ Memorial §§ 6-7

³⁸ Claimants’ Memorial § 8

³⁹ Claimants’ Memorial §§ 281-287

⁴⁰ Claimants’ Memorial § 210

⁴¹ Claimants’ Memorial §§ 210-213, 219

379. According to Claimants, by using its governmental organs such as the Office of the General Prosecutor and Vice Presidency, the State “*directly interfered in Claimants’ management, use, and enjoyment of their investment by means prohibited under international law*”.⁴² This also included the termination of some of the Disputed Contracts by using Turkmenistan’s judiciary to justify its actions. Specifically, the Awaza Committee, the Ministry of Culture and the Turkmenbashy Complex commenced a number of proceedings against Sehil in the fall of 2010 with the goal of terminating⁴³ Contracts Nos 62-65⁴⁴, 58⁴⁵ and 57.⁴⁶
380. Claimants submit that ultimately all of the above actions resulted in the taking and deprivation of the use and benefits of Claimants’ rights and investment, in “*humiliating and intimidating circumstances*”.⁴⁷
381. In addition, Claimants argue that the State went as far as to threaten and harass Mr Çap and his family, as well as Sehil’s employees “*by means of abusive and disruptive inspections, audits, and travel bans*”.⁴⁸ Claimants state that the General Prosecutor not only threatened Sehil’s employees with imprisonment, travel bans and deportation, but it actually arrested two of them – Messers Çuvalci⁴⁹ and Kaptan⁵⁰ – “*on specious grounds*”.⁵¹
382. According to Claimants, all of the above actions, including the three Vice Presidents’ visits in July 2010, caused Mr Çap two brain strokes and a speech disorder,⁵² and even made Mr Çap resign from his position at Sehil on 1 September 2010.⁵³ Fearing for their lives and

⁴² Claimants’ Memorial § 8

⁴³ Claimants’ Memorial § 295

⁴⁴ Claimants’ Memorial §§ 296-299

⁴⁵ Claimants’ Memorial §§ 300-301

⁴⁶ Claimants’ Memorial § 302

⁴⁷ Claimants’ Memorial § 206

⁴⁸ Claimants’ Memorial § 8, also at §§ 245-272

⁴⁹ Claimants’ Memorial § 253

⁵⁰ Claimants’ Memorial §§ 254-255

⁵¹ Claimants’ Memorial § 252

⁵² Claimants’ Memorial §§ 257-258

⁵³ Claimants’ Memorial § 262; Exhibit C-374, Letter of resignation of Mr Ömer Gülçetiner dated 1 September 2010

after the Turkish authorities' assistance in lifting the travel ban imposed by Turkmenistan, Mr Çap and his family decided to leave Turkmenistan for good.⁵⁴

383. Claimants allege that following their departure, Respondent “de facto *took over Sehil’s premises, documents, computers, and equipment*”⁵⁵ and sealed Sehil’s headquarters and construction sites without any prior notice or justification.⁵⁶ Claimants confirm that they were aware of the Main State Tax Service of Ashgabat’s decisions which permitted the Tax authority to “*limit Sehil’s right to property*”.⁵⁷ However, Claimants contend that “*there [was] no clear indication*” as to how the debt amount owed to Turkmenistan was calculated,⁵⁸ and whether this is the only ground on which they seized the property.⁵⁹

3. Respondent’s Defense to Claimants’ claims and Counterclaims⁶⁰

384. Respondent denies all of Claimants’ allegations that Turkmenistan unlawfully expropriated Claimants’ investments through various actions and omissions. Particularly, Respondent rejects Claimants’ assertion that the new administration under the governance of President Berdimuhamedow was hostile to Claimants. Respondent calls this assertion “*illogical*” as no State would award public works contracts to a contractor and then sabotage it. Further, 14 of Sehil’s Contracts for a total value of USD 459,435,847.90 were signed by Claimants after the new President took office.⁶¹
385. With regard to the payment delays, Respondent argues that those were caused by Sehil’s own failure to fulfil its obligations in a timely manner. According to Respondent, this failure was due to Sehil’s “*lack of technical and managerial capacity combined with its*

⁵⁴ Claimants’ Memorial §§ 265-270

⁵⁵ Claimants’ Memorial § 274

⁵⁶ Claimants’ Memorial §§ 274-276

⁵⁷ Claimants’ Memorial § 277

⁵⁸ Claimants’ Memorial § 193

⁵⁹ Claimants’ Memorial § 277

⁶⁰ This section (§§ 384-395) presents Respondent’s view of the factual background of the dispute. Unless stated otherwise, these are disputed by Claimants.

⁶¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 169

financial mismanagement”,⁶² as well as the fact that Sehil undertook too many projects, some of which were beyond its capability to perform.

386. Respondent further denies Sehil’s claim that the delayed contractual payments to Sehil resulted in its inability to pay the salaries of its employees. Respondent states that Turkmen labor laws require employers to pay the wages of their employees “*regardless of [the employer’s] financial situation*”.⁶³ According to Respondent, Sehil was paying out significant dividends to its shareholders, rather than salaries, and whenever salaries were paid, it was done in cash. These payment issues affected Sehil’s workers both at its offices and at its construction sites.⁶⁴
387. Concerning the sealing of Sehil’s property, Respondent denies Claimants’ statement that Turkmenistan “*de facto took over Sehil’s premises*” arguing that it was Claimants that left Turkmenistan with unpaid tax debts, unpaid salaries to its employees and unpaid debts to third-party creditors.⁶⁵
388. Respondent submits that the seizure of Sehil’s property was conducted by the Main State Tax Service due to Claimants’ failure to pay the amounts identified as outstanding by the 2010 tax audit. Specifically, the tax audits of Sehil carried out in 2008 and in 2010 resulted in the issuance of tax certificates some of which provided for the imposition of financial penalties and fines, as well as additional taxes on Sehil. Respondent explains that those tax certificates included reasons for the calculation of the specific fines/taxes and were received by Claimants as required. Claimants were further provided with notice on how those tax certificates could be appealed, if Claimants wished to do so. Neither the tax certificate issued in 2008 nor the one in 2010 was appealed by Claimants.

⁶² Respondent’s Objections to Jurisdiction and Counter-Memorial § 172

⁶³ Exhibit R-927, Labor Code of Turkmenistan, Article 111

⁶⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 197-198; See also PwC Report § 227(b); Witness Statement of Ms Antonina Yeliseyeva § 22

⁶⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 183

389. Thus, since Claimants neither paid nor appealed the tax outcomes, pursuant to Article 64 of Turkmenistan’s Tax Code,⁶⁶ the Main State Tax Service issued a decree by which it sealed Sehil’s property.⁶⁷
390. Additionally, Respondent also denies that the State, through its judiciary, expropriated Sehil’s property. Respondent contends that Claimants have failed to establish that there was a denial of justice. Further, Respondent explains that those properties were taken following court proceedings initiated by some of Sehil’s creditors who initiated those proceedings against Sehil to recover outstanding debts. The Arbitrage Court issued an award in favour of the creditors; as Sehil had no funds in its bank account, the creditors obtained permission to execute the award against Sehil’s property.⁶⁸ The debt was satisfied through a process of “*attachment, itemization and evaluation of assets*” at the construction

⁶⁶ Exhibit R-925, Tax Code of Turkmenistan, Article 64 (“*Seizure of property of the taxpayer (tax agent) is carried out in case of failure to perform their duties within the established period to pay tax ...*”)

⁶⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 192-195; See also Exhibit C-382, Decision No 62 on putting prohibition on the taxpayer’s right to possess property dated 1 November 2010. Claimants have not provided the original of this document, only a Turkish and English version.

⁶⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 205

site relating to Contract No 58.⁶⁹ Other creditors also won their claims against Sehil concerning different Contracts Nos 51, 55, and 62-65.⁷⁰

391. Respondent further denies that Claimants, Mr Çap's family or Sehil's employees, were harassed through "*inspections, decrees and assignments, threats and intimidation, ... [and] seizures*" arguing that Claimants did not provide any proof to substantiate these allegations. Respondent confirms that the Prosecutor conducted an investigation into the salary payments issue, as well as whether Sehil had the required licenses for conducting the given construction work. However, Respondent asserts that those were legitimate investigations and within the powers of the Prosecutor.
392. Respondent also argues that Claimants were not only aware of those investigations but were also given an opportunity to present their position regarding the investigated issues which they took. Specifically, on 14 September 2010, in a letter addressed to the Prosecutor's Office, Sehil acknowledged the payment delay of the workers' salaries and

⁶⁹ See, e.g. Exhibit R-939, Letter No 021/3 dated 26 January 2011 from the Arbitration Court of Turkmenistan to Forensic Research Center of the Ministry of Internal Affairs (requesting the Center to determine the current market value of the property of Sehil at the construction site for Contract No 58 – Cultural Center Complex); Exhibit R-940, Letter No 023/3 dated 27 January 2011 from Arbitration Court of Turkmenistan to Forensic Research Center of the Ministry of Internal Affairs (requesting the Center to determine the current market value of the property of Sehil at the construction site for Contract No 58 – Cultural Center Complex); Exhibit R-898, Expert Certificate No 31 of the Center of Forensic Research of the Ministry of Internal Affairs dated 28 January 2011 (responding to Letter No 021/3, setting out basis of examination and identifying and listing price of property); Exhibit R-941, Certificate of Court Enforcement Officer of the Arbitration Court dated 7 February 2011 (providing property valued in Expert Certificate No 31 to "*Dovletgurlushyk*" Economic Entity "*on the condition of payment on the basis of guarantee*"); Exhibit R-899, Expert Certificate No 44 of the Center of Forensic Research of the Ministry of Internal Affairs dated 7 February 2011 (responding to Letter No 023/3, setting out basis of examination and identifying and listing price of property); Exhibit R-942, Certificate of Court Enforcement Officer of the Arbitration Court dated 9 February 2011 (providing property valued in Expert Certificate No 44 to "*Dovletgurlushyk*" Economic Entity "*on the condition of payment on the basis of guarantee*"); Exhibit R-943, Letter No 208/3 dated 13 June 2011 from the Arbitration Court of Turkmenistan to Forensic Research Center of the Ministry of Internal Affairs (requesting the Center to determine the current market value of the property of Sehil at the construction site for Contract No 58 – Cultural Center Complex); Exhibit R-900, Expert Certificate No 453 of the Center of Forensic Research of the Ministry of Internal Affairs dated 14 June 2011; Exhibit R-944, Certificate of Court Enforcement Officer of the Arbitration Court dated 15 June 2011 (providing property valued in Expert Certificate No 453 to "*Dovletgurlushyk*" Economic Entity "*on the condition of payment on the basis of guarantee*"); Exhibit R-945, Payment Order No 153 from "*Dovletgurlushyk*" Economic Entity to Arbitration Court dated 16 April 2012 (paying for transportation vehicles, equipment and construction materials); Exhibit R-946, Payment Order No 164 from "*Dovletgurlushyk*" Economic Entity to Arbitration Court dated 19 April 2012 (paying for transportation vehicles, equipment and construction materials)

⁷⁰ Respondent's Objections to Jurisdiction and Counter-Memorial §§ 697-708

provided explanation to that end.⁷¹ The Prosecutor's Office also interviewed Ms Yeliseyeva⁷² and heard her story of the unpaid salaries issue.⁷³ Finally, Respondent contends that Sehil was also informed of its right to appeal the Prosecutor's findings and instructions pursuant to Article 60 of the Law of the Prosecutor's Office.⁷⁴ No appeal took place. Rather, Sehil started fulfilling some of the Prosecutor's instructions.⁷⁵

393. Concerning the travel bans, Respondent contends that those assertions are contradictory and without any credibility. Respondent explains that the travel bans were imposed pursuant to the Law on Migration in September 2010 after Sehil was already subject to tax inspections and investigations. The reason for the travel restriction was Respondent's concern that "*no legal representative of Sehil would be left to answer for Sehil's breaches of law and debts to its workers and the State*".⁷⁶ Respondent claims that the only person affected by the travel restrictions was Mr Çap,⁷⁷ whose travel restriction was valid for only five days.⁷⁸ Respondent submits that in any event Claimants failed to provide any proof as to how these bans "*caused a substantial deprivation of Sehil*".⁷⁹
394. Respondent argues that the arrest of two of Sehil's employees (i.e. Mr Mustafa Çuvalci and Mr Dursun Sahin) was lawful, and provoked by criminal activity on part of the two individuals. Both of them were investigated and tried in accordance with the Turkmen law.⁸⁰

⁷¹ See, e.g. Exhibit AMY-17, Certificate from Sehil to the Prosecutor's Office dated 14 September 2010 regarding payment of salaries; Exhibit AMY-18, Minutes of Interview of Ms Antonina Yeliseyeva dated 16 November 2010

⁷² Since February 2003, Ms Antonina Yeliseyeva is Chief of Accounting for the Turkmenistan branch of Sehil.

⁷³ Witness Statement of Ms Antonina Yeliseyeva §§ 29, 31; Exhibit AMY-18, Minutes of Interview of Ms Antonina Yeliseyeva dated 16 November 2010

⁷⁴ Respondent's Objections to Jurisdiction and Counter-Memorial § 748; See also Exhibit R-987, Law on the Prosecutor's Office, Article 60; Exhibit C-344, Assignment of the Prosecutor Office No 8/4 addressed to Sehil dated 26 February 2010 (Respondent's replacement translation)

⁷⁵ See e.g. Exhibit C-274, Letter No 1202 dated March 12, 2010 from Sehil to Minister of Culture (Respondent's replacement translation); Exhibit C-301, Letter No 2390 from Sehil to the Prosecutor of Turkmenbashi City dated 26 May 2010

⁷⁶ Respondent's PHB § 120

⁷⁷ Respondent's PHB § 120

⁷⁸ According to the record, Mr Çap tried to leave Turkmenistan on 24 September 2010, but could not due to the travel restrictions. Instead, Mr Çap left on 29 September 2010. See Hearing Tr., Day 1, 246:14-20; Day 3, 176:10-177:12.

⁷⁹ Respondent's Objections to Jurisdiction and Counter-Memorial § 475

⁸⁰ Respondent's Objections to Jurisdiction and Counter-Memorial §§ 763-769

395. According to Respondent, it was Claimants that breached the Disputed Contracts, not Turkmenistan. Respondent therefore brings counterclaims in respect of the following breaches of Claimants:

- Substantial delays in performance of the Disputed Contracts Nos 31, 35, 44, 46, 47, 51, 55, 56, 58 and 62-65;⁸¹
- Failure to meet fundamental obligations under Contract No33 – Iron & Steel Plant;⁸²
- Undue payments for unperformed works under Contract No58 – Sehil was paid around USD9 million for works it was supposed to perform under Contract No 58 but never did;⁸³ and
- Non-payment of its tax debt owed to the State.⁸⁴

III. ISSUES TO BE DETERMINED AND PARTIES' POSITIONS

1. Do Claimants' claims arise out of an "investment" within the meaning of (1.1) Article 25 of the ICSID Convention and (1.2) Article I(2) of the BIT?

(1.1) Article 25 of the ICSID Convention

(a) Respondent's Position

396. Respondent's jurisdictional objections based on the absence of an "*investment*" of Claimants within the meaning of the ICSID Convention and of Article I(2) of BIT can be summarized as follows:

Claimants were hired for a specific project of short duration. Claimants were given advances of funds to buy whatever supplies they needed to start their projects and pay whatever personnel they needed to hire. They received periodic progress payments from their Contractual Counterparties during the course of performance to pay for what was

⁸¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 313

⁸² Respondent's Objections to Jurisdiction and Counter-Memorial § 314

⁸³ Respondent's Objections to Jurisdiction and Counter-Memorial § 317

⁸⁴ Respondent's Objections to Jurisdiction and Counter-Memorial §§ 310, 318

*being done. When Claimants were finished with the projects, there was no continuing commitment to stay and manage, operate or take any risk or stake in their economic success.*⁸⁵

397. Consequently, Respondent argues that

*Claimants did not “invest” in Turkmenistan when they entered into short-term refurbishment and construction contracts for a fixed price. They never acquired an interest in the constructed facilities, nor was their compensation dependent on the economic outcome of the facilities or projects in question.*⁸⁶

398. Respondent bases its challenge on the “double-keyhole” or “double-barrelled” test: Claimants must show that they have an investment under both the ICSID Convention and the BIT.⁸⁷

399. Respondent submits that the requirement that a dispute arise “out of an investment” within the meaning of Article 25(1) of the ICSID Convention is an autonomous jurisdictional requirement. This requirement is for an objective test distinct from the definition of “investment” under the BIT.⁸⁸

400. Respondent contends that an investment under Article 25(1) of the ICSID Convention “requires at least four elements: (i) the investor’s participation in the risks of the operation; (ii) a substantial contribution; (iii) a minimum duration; and (iv) a significant contribution to the host State’s economic development.”⁸⁹ Respondent claims that Claimants agree with the relevance of the second, third and fourth requirement. However, they omit the requirement of “risk”, which is a core element of the notion of “investment”; Claimants’ contracts fail to meet that requirement.⁹⁰ Respondent submits that Claimants have also failed to meet the other three requirements under the ICSID Convention.⁹¹

⁸⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 244

⁸⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 243

⁸⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 245, with reference to Exhibit RLA-197, *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009; Exhibit CLA-138, *Global Trading v Ukraine*, ICSID Case No ARB/09/11, Award, 1 December 2010 (“*Global Trading v Ukraine*”); Respondent’s Rejoinder and Reply on Jurisdiction §§ 39, 65-66

⁸⁸ Respondent’s Rejoinder and Reply on Jurisdiction § 52; further explained in §§ 40-51

⁸⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 247

⁹⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 248, with reference to Claimants’ RfA § 108

⁹¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 248

401. Further, in response to Claimants’ submissions, Respondent states that “*the ‘elements identified in the Salini decision’ are [...] required criteria that must be met in order for the Tribunal to have jurisdiction ratione materiae.*”⁹² Also, Respondent contends that “[m]ost ICSID tribunals have followed the Salini test in order to determine whether there was a protected investment under Article 25(1) of the Convention”⁹³ and the elements of the test are, indeed, cumulative.⁹⁴
402. As to the absence of the “*risk*” element of Claimants’ alleged investment, Respondent relies on the case law,⁹⁵ and on doctrine⁹⁶ to support its argument. In particular, Respondent argues that the Disputed Contracts, as ordinary turnkey construction contracts, resemble

⁹² Respondent’s Rejoinder and Reply on Jurisdiction § 53, with reference to Exhibit RLA-397, *Victor Pey Casado and Foundation “Presidente Allende” v Republic of Chile*, ICSID Case No ARB/98/2, Award, 8 May 2008, § 232: “[A] definition of investment does exist within the meaning of the ICSID Convention and it does not suffice to note the existence of certain of the usual ‘characteristics’ of an investment to satisfy this objective requirement of the Centre’s jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning.”

⁹³ Respondent’s Rejoinder and Reply on Jurisdiction § 56 with reference to Exhibit RLA-182, *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004 § 53 (“*Joy Mining v Egypt*”); Exhibit CLA-255, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, § 130 (“*Bayindir v Pakistan Decision on Jurisdiction*”); Exhibit RLA-399, *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006, § 77; Exhibit RLA-198, *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, § 27; Exhibit CLA-97, *Saipem S.p.A. v The People’s Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, § 99; Exhibit RLA-395, *Malaysian Historical Salvors S.D.N. B.H.D. v Government of Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction, 17 May 2007, §§ 73-74; Exhibit RLA-200, *Romak S.A. v Republic of Uzbekistan*, PCA Case No AA280, Award, 26 November 2009, § 207 (“*Romak v Uzbekistan*”)

⁹⁴ Respondent’s Rejoinder and Reply on Jurisdiction §§ 57, 67, with reference to Exhibit CLA-224, *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, §§ 235, 238, 307, 319-320 (“*Biwater v Tanzania*”)

⁹⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 250, fn 661: “[C]ommercial and sovereign risks are distinct from operational risk. The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks.” Exhibit CLA-139, *Poštová Banka, A.S. And Istrokapital Se v The Hellenic Republic*, ICSID Case No ARB/13/8, Award, 9 April 2015, § 370

⁹⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 250: “[w]hat distinguishes investments from other international economic transactions is the uncertainty of their returns, which are subject to the future profitability of the project in which the investor participates.” Exhibit RLA-203, Sébastien Manciaux, “*Actualité de la notion d’investissement international*”, in *La Procédure Arbitrale Relative Aux Investissements Internationaux 145* (Anthemis 2010)

contracts of sale, which is “*the classic example of a transaction that falls outside ICSID jurisdiction*”,⁹⁷ more than an investment. Respondent explains this as follows:

*[o]ne of the fundamental differences between “investments” and ordinary commercial transactions is the economic risk that is a key feature of investments.*⁹⁸

*Claimants have not set forth any evidence to show that they intended to “commit” to Turkmenistan by assuming the risk of success or failure of the facilities Sehil constructed or repaired under the Sehil Contracts. The record unequivocally reveals that Claimants acquired no role in the operation of any of the projects that were the subject of the Sehil Contracts upon completion of the works, and saw themselves as a mere service provider.*⁹⁹

403. Respondent contends that Claimants failed to make a “*substantial contribution*” and “*confuse the allocation of resources to the performance of their contracts with an actual contribution to the host State.*”¹⁰⁰ However, Respondent argues that the allocation of resources by a construction company to a project does not constitute a “*contribution*”.¹⁰¹ Respondent further submits that “*Claimants actually received substantial advance payments from their Contractual Counterparties to carry out their projects*”.¹⁰²
404. Respondent rejects Claimants’ contentions that they had satisfied these requirements because they mobilized employees in Turkmenistan, imported machinery and equipment,

⁹⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 252. Respondent submits that Claimants themselves refer to their Contracts as “*sale*” Contracts: Claimants’ Memorial § 454 – “[*B*]ut for Respondent’s actions that increased the costs of the Projects, Sehil would have earned a normal contract profit margin percentage on its sales actually achieved.” (Respondent’s Objections to Jurisdiction and Counter-Memorial § 253, FN 668).

⁹⁸ Respondent’s Rejoinder and Reply on Jurisdiction § 69

⁹⁹ Respondent’s Rejoinder and Reply on Jurisdiction § 71

¹⁰⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 256

¹⁰¹ Exhibit RLA-203, Sébastien Manciaux, *Actualité de la notion d’investissement international*, in *La Procédure Arbitrale Relative Aux Investissements Internationaux* 145 (Anthemis 2010), § 32, referred to in Respondent’s Objections to Jurisdiction and Counter-Memorial § 257:

“[When] a foreign agent has deployed equipment, human resources, and has perhaps mobilized financial resources in another country prior to receiving its first payments ... [t]here is indeed in this case the allocation of all or part of the foreign agent’s resources to a project carried out abroad, but is it an investment? ... [W]hen a contractor goes to someone’s home to build a wall and provides his own equipment, uses his own tools, and receives compensation in consideration of his work, has he made a contribution in kind to the individual’s home? Has this contractor invested in the individual’s home? Basic common sense tells us that these questions must be answered in the negative.”

¹⁰² Respondent’s Objections to Jurisdiction and Counter-Memorial § 258, with reference to Claimants’ Memorial § 97

opened a branch office and bank accounts,¹⁰³ and provided bank guarantees for the advance payments.¹⁰⁴ Respondent also rejects Claimants’ submission that there was a contribution in “*know-how*”; rather it was a situation where “*their employees knew how to do certain things to perform the contracts*”.¹⁰⁵

405. Respondent also submits that Claimants did not have any long-term agreement with Respondent or any of the Contractual Counterparties.¹⁰⁶ In fact, the Disputed Contracts all had “*durations*” of less than 2 years, which is under the “*minimum duration generally required [...] from 2 to 5 years.*”¹⁰⁷

406. Respondent further contends:

*The requirement of a significant contribution to the host State’s development reflects the primary objective of the ICSID Convention, which is to promote economic development through private investment. [...] The short-term, fixed price contracts for the refurbishment and construction of discrete facilities that are at issue in this case are not the kind of significant, large-scale contributions to the host State’s development contemplated by the ICSID Convention.*¹⁰⁸

(b) Claimants’ Position

407. Claimants affirm that Mr Çap opened a branch office of Sehil in Ashgabat in 1998 “*with the aim of administering and developing a long-term investment in the country*”.¹⁰⁹ On 23 December 2003, Claimant Mr Çap incorporated a “*different business association with a separate legal entity*”, which grew steadily, as shown by the completed 33 projects for

¹⁰³ Respondent’s Rejoinder and Reply on Jurisdiction § 84

¹⁰⁴ Respondent’s Rejoinder and Reply on Jurisdiction § 86

¹⁰⁵ Respondent’s Rejoinder and Reply on Jurisdiction § 85

¹⁰⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 259

¹⁰⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 259, with reference to Exhibit RLA-200, *Romak v Uzbekistan*, § 198

¹⁰⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 261. In Respondent’s Rejoinder and Reply on Jurisdiction §§ 96-100, Respondent also advances that such requirement is in line with ICSID being part of the World Bank Group and the objectives of the other organizations making up the World Bank.

¹⁰⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 402

Turkmenistan between 2000 and 2004 “with most of the resulting profit being reinvested to further develop and strengthen *Sehil’s* business in Turkmenistan”.¹¹⁰

408. Further, Claimants contend that the present dispute specifically arises out of Turkmenistan’s destruction and impairment of Claimants’ business venture in Turkmenistan.¹¹¹
409. Claimants submit that their business venture in Turkmenistan fully qualifies as an investment both under Article 25(1) ICSID Convention and Article 1(2) BIT.¹¹² Claimants rely on two cases decided against Turkmenistan to support their contention, i.e. *İçkale v Turkmenistan* (fifteen construction contracts with value of approximately USD 250 million) and *Garanti Koza v Turkmenistan* (one construction contract with a value of USD 100 million). In both cases the tribunal found that the investors had an investment within the meaning of both the ICSID Convention and the BIT.¹¹³
410. Claimants advance that Article 25 ICSID Convention does not offer a definition of “investment”. This leaves it open to the parties to determine its scope and application pursuant to mutual agreement in the relevant BIT.¹¹⁴ Consequently, as suggested by Claimants, “investment” should be interpreted broadly taking into account the specific consent given by the parties in the BIT; in this case it expressly covers “every kind of assets”.¹¹⁵
411. As to the cumulative elements for the existence of an “investment” under the ICSID Convention advanced by Respondent, Claimants submit that they must be “assessed globally” and not cumulatively, as indicated by the *Salini v Morocco* decision. Further, these elements should be understood as typical characteristics of investments, rather than

¹¹⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 403

¹¹¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 404

¹¹² Claimants’ Reply and Counter-Memorial on Jurisdiction § 405

¹¹³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 14, FN 37 et seq (and Exhibit RLA-179, *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No ARB 10/24, Award, 8 March 2016 (“*İçkale v Turkmenistan*”)); Exhibit RLA-393, *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Award, 19 December 2016 (“*Garanti Koza v Turkmenistan*”))

¹¹⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 410

¹¹⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 410

jurisdictional requirements.¹¹⁶ As to the contribution to the economic development of the host State, Claimants contend that this is already implicitly covered by the other elements of the definition of an investment.¹¹⁷

412. Claimants also refer to the *İçkale v Turkmenistan*, relied upon by Respondent in which the tribunal:

*acknowledged the existence of an investment made by a Turkish investor in Turkmenistan in the form of the establishment of a branch office in Turkmenistan and the execution of substantial construction projects, and found that the contribution to the economic development of the host State should not be considered an element of definition of investment under Article 25 of the ICSID Convention or Article I.2 of the BIT.*¹¹⁸

413. Even so, “for the sake of completeness”, Claimants submit that they assumed risks, made substantial contributions over a long period of time, and undeniably made important contributions to Turkmenistan’s development.¹¹⁹

414. As to the “risk” element of the investment, Claimants contend that they had developed “a long-term construction venture in Turkmenistan, reinvesting most of their profit to pursue and ensure the growth of their activity in Turkmenistan”, thus taking “more than the risks inherent to each individual construction contract *Sehil* entered into with Respondent.”¹²⁰

¹¹⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 412-413, with reference to Exhibit CLA-257, *Salini Costruttori S.P.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, § 52 (“*Salini v Morocco*”); Exhibit CLA-224, *Biwater v Tanzania*; and Exhibit CLA-252, *The ICSID Convention A Commentary – Second Edition*, Christoph H. Schreuer, p. 128, § 153, and Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims of 29 September 2016 §§ 35-39

¹¹⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 416 and Exhibit CLA-261, *Antoine Abou Lahoud and Leila Bounafeh-Lahoud v Democratic Republic of Congo*, ICSID Case No ARB/10/04, Award, 7 February 2014, § 325

¹¹⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 417 and Exhibit RLA-179, *İçkale v Turkmenistan*, § 291

¹¹⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 420

¹²⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 423

415. Further, “*the ‘overall operation’ should be looked at to assess the existence of an investment.*”¹²¹ Claimants state that, in any event, even limiting the investment to the construction contracts, turnkey contracts have been recognized as an investment.¹²²
416. This investment incurred the risks acknowledged in *Salini v Morocco*, i.e. “*risks of termination, additional works, increases in cost of labor, and accidents or damage to property.*”¹²³ Relying on *Saipem v Bangladesh*, Claimants contend that the existence of advance payments do not imply the absence of risk.¹²⁴
417. Claimants also claim that they had made “*substantial contribution*” in money and to the host State’s industry with an undisputable economic value.¹²⁵ Claimants explain that they:
- did intend to pursue and increase their investment in Turkmenistan on a long-term basis [and] established a branch in Turkmenistan, opened bank accounts in Turkmenistan, mobilized teams consisting of regional managers and other employees including construction engineers, mechanical engineers, architects, and quantity surveyors, issued bank guarantees payable to the State Contracting Parties, and imported various types of machinery and equipment.*¹²⁶
418. Claimants rely on case law, where the tribunals, “*in assessing the contactor’s contributions in the host State, specifically held that the use of know-how, equipment and personnel or the issuance of bank guarantees by the contractor constituted substantial contributions*

¹²¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 424 and Exhibit CLA-56, *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, § 72

¹²² Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 426-427

¹²³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 429, FN 1032 and Exhibit CLA-257, *Salini v Morocco*

¹²⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 40 and Exhibit CLA-97, *Saipem S.p.A. v People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, § 55

¹²⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 440

¹²⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 436

from the investor.”¹²⁷ Claimants emphasize the fact that the monetary magnitude of the investment cannot be regarded as a “*general restriction*”.¹²⁸

419. Further, Claimants state that their investment was long-term. In any event, Claimants argue that the “*duration*” of more than two years submitted by Respondent “*is not a jurisdictional requirement*”.¹²⁹ This is so because tribunals have accepted that short-term projects can constitute investments.¹³⁰ In addition, Claimants submit that Respondent wrongly considers Sehil’s contracts individually, rather than seeing them as an investment as a whole.¹³¹
420. As to the “*significant contribution to the host State’s development*”, Claimants submit that this “*is generally admitted as not constituting ‘an essential element of investment’*.”¹³² In any case, Claimants submit that “[t]here is no doubt that the Disputed Contracts taken individually and Claimants’ business venture as a whole contributed ‘in one way or another’ to the development of the host state”.¹³³
421. Claimants reject Respondent’s description of the Disputed Contracts as “*refurbishment and construction of discrete facilities*”.¹³⁴ Claimants state that “*Sehil was entrusted with inter alia the construction of an Iron and Steel Plant, sanatoriums, holiday centers, a waste treatment plant, a drinking water plant, a police academy building, kindergartens and various housing projects commissioned by ministries, the Central Bank of Turkmenistan, or municipalities*.”¹³⁵ Further, Claimants contend that there is “*no doubt that Claimants’ 15-year long construction activity in Turkmenistan contributed to the development of the*

¹²⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 438 with reference to Exhibit CLA-257, *Salini v Morocco*, and Exhibit CLA-255, *Bayindir v Pakistan* Decision on Jurisdiction

¹²⁸ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 57 and Exhibit RLA-196, *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009, § 45 (“*Pantechniki v Albania*”)

¹²⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 442

¹³⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 442 and Exhibit CLA-260, *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award, 31 October 2012, § 303

¹³¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 443

¹³² Claimants’ Reply and Counter-Memorial on Jurisdiction § 448 and Exhibit RLA-179, *İçkale v Turkmenistan*, § 291

¹³³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 452

¹³⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 261

¹³⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 452

country. In fact, Respondent itself acknowledged the contribution made by Claimants as Mr. Çap received many letters of gratitude and appreciation, medals, and awards from Turkmen authorities in recognition of his work in the country.”¹³⁶

(1.2) Article I(2) of the BIT

(a) Respondent’s Position

422. Respondent submits that jurisdiction would still be lacking because the Disputed Contracts do not qualify as “investments” under Article I(2) BIT.¹³⁷ It reads as follows:

The term “investment”, in conformity with the hosting Party’s Laws and Regulations, shall include every kind of asset in particular, but not exclusively:

(i) shares, stocks or any other form of participation in companies,

(ii) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment.

(iii) movable and immovable property, as well as any other rights in rem such as mortgages, liens, pledges and other similar rights.

(iv) copyrights, industrial and intellectual property rights such as patents, licenses, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights.

*(v) business concessions conferred by law or by contract, including concessions to search for, cultivate extract or exploit natural resources on the territory of each Party as defined hereafter.*¹³⁸

423. Respondent rejects Claimants’ submission that they have an investment in the form of a participation in companies. According to Respondent, the branch incorporated in Turkmenistan is “*Sehil Turkmen*”, which has a separate legal personality from Sehil, the Turkish company, party to the Disputed Contracts.¹³⁹ Further, Respondent submits that Sehil was no longer a shareholder of “*Sehil Turkmen*” after May 2007, when two Turkmen

¹³⁶ Claimants’ Reply Memorial and Counter-Memorial on Jurisdiction § 453

¹³⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 263

¹³⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 264

¹³⁹ Respondent’s Rejoinder and Reply on Jurisdiction § 110

citizens became its shareholders.¹⁴⁰ Thus, “*there is no evidence to show that ‘Sehil Turkmen’ in any real or legal way related to Sehil’s purported construction [sic] business venture.*”¹⁴¹

424. Respondent contends that the “*returns reinvested*” must be “*related to an investment*”, as provided in Article I(2) BIT. No details are given by Claimants.¹⁴² This requirement, according to Respondent, was considered by the tribunal in *Global Trading v Ukraine* when concluding that the investment in question “*lacked the essential connecting factor of being ‘associated with an investment’*”.¹⁴³ It was also a decisive element in *Electrabel v Hungary*, where the tribunal found that claim to money was not itself an independent “*investment.*”¹⁴⁴ Respondent thus contends that “*Claimants in this case must prove that their alleged ‘Returns Reinvested’ are ‘related to an investment’*” and “[t]he ordinary meaning of the term ‘investment’ has been found to include at least three of the requirements discussed earlier in the context of Article 25 ICSID Convention: risk, contribution, and duration”. These are not met by Claimants’ construction contracts.¹⁴⁵
425. As to “*claims for money*”, Respondent submits that, as with the returns, such claims must relate to an investment.¹⁴⁶ Claimants failed to show that their claim for money in relation to the Disputed Contracts consisting of USD 120,113,015 of outstanding receivables and USD 92,115,092 for the reduced margin, is related to an investment.¹⁴⁷
426. Respondent rejects Claimants’ contentions that they hold “*industrial property rights*”, since “*‘knowing how’ to perform construction works is not the kind of industrial property*

¹⁴⁰ Respondent’s PHB § 17: two Turkmen citizens, Charyguly Suleymanov and Gulshat Babakulyyeva. Also during the Hearing, Mr Çap confirmed that lease agreement for Sehil’s headquarters with Kanagat Cooperative was signed by Sehil Turkmen.

¹⁴¹ Respondent’s Rejoinder and Reply on Jurisdiction § 111

¹⁴² Respondent’s Objections to Jurisdiction and Counter-Memorial § 266

¹⁴³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 267

¹⁴⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 267; Exhibit CLA-138, *Global Trading v Ukraine*, §§ 50-51; and Exhibit CLA-113, *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, §§ 5.52-5.53

¹⁴⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 268. Also, Respondent’s Rejoinder and Reply on Jurisdiction §§ 115-119

¹⁴⁶ Respondent’s Rejoinder and Reply on Jurisdiction § 113

¹⁴⁷ Respondent’s Rejoinder and Reply on Jurisdiction §§ 113-114

right covered by Article I(2)(iv)”.¹⁴⁸ Respondent refers to the doctrine to distinguish between “*know-how*” contemplated by investment treaties and the “*know-how deployed in the practice of one’s profession*”, which does not constitute property and is not an investment.¹⁴⁹

427. Respondent rejects Claimants’ submission that “*business concessions*” hold such investment, since “[t]he term ‘*concession*’ is defined as a grant by the State of economic rights and privileges ‘*within the framework of a public function*’” and “*typically relate[s] to the exploitation of natural resources, which is the example given by Article I(2)(v) of the Treaty [BIT]*.”¹⁵⁰ Further, Claimants did not have any rights or obligations to own, operate or manage any of the facilities they were constructing; they were to build, deliver, and leave against a fixed price.¹⁵¹

(b) Claimants’ Position

428. Claimants contend that the terms “*every kind of asset*” in the BIT “*embrace everything of economic value, virtually without limitation*.”¹⁵² As such, “*Claimants’ investment, considered either as Claimants’ business venture in Turkmenistan as a whole or as each construction contract taken individually, falls without any possible doubt within the scope of the definition of ‘investment’ offered by the BIT*.”¹⁵³ Claimants also refer to the conclusion of the tribunal in the *İçkale v Turkmenistan* arbitration that “*considered that claimant had made an investment ‘by way of opening a branch office and engaging in a series of substantial construction projects’*.”¹⁵⁴

¹⁴⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 269

¹⁴⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 270 and Exhibit RLA-189, Zachary Douglas, *The International Law of Investment Claimants* (Cambridge University Press 2009), § 406C. Also, Respondent’s Rejoinder and Reply on Jurisdiction §§ 120-122

¹⁵⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 272 and Exhibit RLA-205, Christoph Ohler, “Concession”, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013), §§ 5-6; Respondent’s Rejoinder and Reply on Jurisdiction §§ 125-128

¹⁵¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 272

¹⁵² Claimants’ Reply and Counter-Memorial on Jurisdiction § 457

¹⁵³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 458

¹⁵⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 458 and Exhibit RLA-179, *İçkale v Turkmenistan*, § 293

429. Claimants refer to shares, stocks or any other form of participation in companies (Article I.2(i)), explaining that “*Claimants did establish a business venture in Turkmenistan and even incorporated a branch in Turkmenistan, leaving no doubt that such venture constituted a ‘form of participation in companies’ constituting an investment under the BIT.*”¹⁵⁵

430. Claimants further clarify the situation of the two different entities in Turkmenistan, as follows:

*(i) First, there was the local branch of the Turkish entity Sehil Insaat Endustri ve Ticaret Ltd. Sti (“**Sehil**”), one of the Claimants in this arbitration, opened in Turkmenistan by Mr. Çap in 1998. Mr. Çap clarified during his cross-examination that this local branch is best described as “**Sehil Turkmenistan**” and not as “Sehil Branch” as referred to at paragraph 6 of his first witness statement. Sehil Turkmenistan did not have a separate legal personality from Sehil. There is no doubt that Respondent was well aware of Sehil Turkmenistan’s existence.*

*(ii) Second, Mr. Çap also incorporated a separate legal entity in Turkmenistan in order to comply with local laws and complete necessary administrative tasks. Mr. Çap referred to this entity as “**Sehil Turkmen**”. This entity was 95% owned by Mr. Çap’s Turkmen wife. Moreover, Sehil had managerial control over Sehil Turkmen since Mr. Gülçetiner, the General Director of Sehil, also acted as the General Director of Sehil Turkmen. Therefore, it is inaccurate to present Sehil Turkmenistan as having “no interest” in Sehil Turkmen.*¹⁵⁶

431. As to returns reinvested or claims to money, Claimants refer to Article I(3) BIT which defines “returns” as “*the amounts yielded by an investment and includes in particular, though not exclusively, **profit, interest, and dividends.***”¹⁵⁷ Claimants submit that they had returns from the construction contracts which were regularly reinvested into the acquisition of new materials, to continue securing bids and expanding the activity in Turkmenistan’s construction sector.¹⁵⁸ Claimants also have “*claims to money’ in relation to the Disputed*

¹⁵⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 460

¹⁵⁶ Claimants’ PHB § 23

¹⁵⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 461, emphasis by Claimants

¹⁵⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 461

*Contracts as they have sought to retrieve USD 120,113,015 of outstanding receivables, USD 92,115,092 for the reduced margin.”*¹⁵⁹

432. Claimants further contend that they hold intellectual property rights in relation to their construction operations in Turkmenistan, such as know-how and goodwill.¹⁶⁰ With reference to *Pantechniki v Albania* and *Bayindir v Pakistan*, Claimants state that “[i]t is a well-established ICSID practice that designs, projects, technical drawings, qualified personnel and know-how brought by a contractor to the host state are considered as constituting investments.”¹⁶¹
433. Further, Claimants refer to their investment as being “*business concessions*” under Article I.2.(v) BIT.¹⁶² Claimants refer to business concession as “[a]ny concession granted by the law or any contract that entitles the investor to carry out any activity which creates an economic value in the host state”¹⁶³ and submit that the investment meets the definition of “*concession*” relied on by Respondent:

*synallagmatic act by which a State transfers the exercise of rights or functions proper to itself to a foreign private person, state-owned enterprise or a consortium which, in turn, participates in the performance of public functions [...] and thus gains a privileged position vis-à-vis other private law subjects within the jurisdiction of the State concerned.*¹⁶⁴

2. Are Claimants the owners of the asserted claims?

(a) Respondent’s Position

434. Respondent argues that “*the terms of the third-party funder’s stake in this case remain unjustifiably hidden as Claimants have refused to produce a copy of the Funding*

¹⁵⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 461

¹⁶⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 462

¹⁶¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 462; Exhibit CLA-255, *Bayindir v Pakistan* Decision on Jurisdiction, § 116; and Exhibit RLA-196, *Pantechniki v Albania*, § 35

¹⁶² Claimants’ Reply and Counter-Memorial on Jurisdiction § 463

¹⁶³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 463

¹⁶⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 463 and Exhibit RLA-205, Christoph Ohler, “Concession”, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013), § 12

Agreement”,¹⁶⁵ despite the Tribunal’s repeated orders.¹⁶⁶ For this reason, Respondent contends that Claimants have failed to prove that they are the true owners of the claims for the purpose of jurisdiction under Article 25 ICSID Convention. Respondent further argues that the evidence in the record supports its assertion regarding “*the funder’s interest and power over settlement*”.¹⁶⁷ Accordingly, Respondent submits that “*the appropriate remedy*” for such refusal is “*for the Tribunal to infer that Claimants have transferred or otherwise relinquished ownership of their claims to their third-party funders*”.¹⁶⁸

435. Further, Respondent contends that dismissing the case due to Claimants’ assignment of their claims to their funders is justified by two independent basic principles. First, the “*proper claimant before an international tribunal is the beneficial owner of the claim, rather than the nominal owner.*”¹⁶⁹ Consequently, once Claimants assign “*its claim or beneficial ownership thereof to a third party*”, it loses its standing to bring a claim before this ICSID Tribunal.¹⁷⁰ Second, the Tribunal does not have jurisdiction over claims brought by non-Turkish nationals, such as Claimants’ funder, against Turkmenistan on the basis of the Turkey-Turkmenistan BIT.
436. On the basis that Claimants refused to produce the Funding Agreement, Respondent argues that the Tribunal should assume that Claimants have assigned their claims to their third-party funder, La Française.¹⁷¹ Accordingly, Respondent requests the Tribunal to decline jurisdiction over Claimants’ claims.

¹⁶⁵ Respondent’s PHB § 23

¹⁶⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 274; Respondent’s Rejoinder and Reply on Jurisdiction § 139

¹⁶⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 296

¹⁶⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 292

¹⁶⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 299

¹⁷⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 299

¹⁷¹ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 274-305; Respondent’s Rejoinder and Reply on Jurisdiction §§ 139-149; Respondent’s PHB § 23; with reference to Procedural Orders Nos 2 of 23 June 2014 and 3 of 12 June 2015 and Letter from ICSID to the Parties dated 3 November 2015

(b) Claimants' Position

437. Claimants contend that they “*are the true owners of their claims, as there [has been] no assignment of [their] rights*”.¹⁷² Claimants contend that “[a]ny assumption that funding entails assignment or transfer of claims owned by Claimants to third-party funders is erroneous and unsubstantiated.”¹⁷³ The existence of third-party funding does not result in an assignment or transfer of claims; this is also the case in the present dispute.
438. Claimants argue that Respondent has the burden of proof in establishing that there was an assignment of claims. Respondent failed to meet this burden and seeks to shift the burden to Claimants.¹⁷⁴
439. As to Claimants’ failure to disclose in full the Funding Agreement with La Française, Claimants contend they had “*legitimate reasons*” for not providing a full disclosure, i.e. due to “*commercial confidentiality, lack of materiality and privilege*”.¹⁷⁵ Claimants further state that Respondent has given no reason to “*justify full production of the funding agreement and/or outweigh claimants reasons for withholding it, namely confidentiality and the integrity of the process*”.¹⁷⁶ Nevertheless, Claimants submitted an affidavit from their counsel and from their third-party funder, dated 27 September 2016, confirming that the Funding Agreement “*does not in any way provide for a direct, indirect or de facto, or partial assignment of the claim to the Fund by the Claimants, nor establish a common legal interest in the claim on behalf of the Fund.*”¹⁷⁷
440. In any case, Claimants contend that even if there was an assignment of the claims, the Tribunal would still have jurisdiction over Claimants’ claims.¹⁷⁸ This conclusion is also

¹⁷² Claimants’ PHB § 19

¹⁷³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 470

¹⁷⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 469

¹⁷⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 471

¹⁷⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 473

¹⁷⁷ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 68 and Exhibit C-600, Affidavit from Mr Hamid Gharavi, 27 September 2016; and Exhibit C-601, Affidavit from La Française, 27 September 2016

¹⁷⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 482-486, with reference to Exhibit CLA-279, *RosInvestCo UK Ltd. v The Russian Federation*, SCC Arbitration V (079/2005), Final Award, 12 September 2010, §§ 323, 341; Exhibit CLA-106, *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, § 229

supported by Articles I(1) and I(2) BIT which do not exclude the protection of the Treaty in case of an assignment of the economic ownership of the investment.¹⁷⁹

3. Has the Tribunal jurisdiction over Claimants' claims for breach of customary international law and Turkmenistan's foreign investment laws?

(a) Respondent's Position

441. Respondent contends that a tribunal's jurisdiction is limited to considering whether there has been a breach of the substantive provisions under the treaty on the basis of which the claim was raised. Customary international law cannot form the basis of a separate cause of action before an investment treaty tribunal.¹⁸⁰

442. Respondent relies, among other arguments, on the conclusion of the arbitral tribunal in *İçkale v Turkmenistan* that there is no legal or other basis "to invoke the FET, FPS, non-discrimination, and umbrella clause protections on the basis that they have become 'an international customary norm for Turkmenistan'." The Tribunal continued stating:

*... there is no basis in the BIT for the Tribunal to apply any investment protection standards other than those specifically included in the BIT. The State parties' consent to arbitrate in Article VII of the BIT only covers disputes arising out of an alleged breach of these specific standards.*¹⁸¹

443. Respondent further rejects Claimants' attempt to distinguish between different dispute resolution provisions and to argue that those containing broad wording do not limit self-standing claims based on customary international law.¹⁸²

444. Even if Claimants could bring a claim for breach of customary international law pursuant to the BIT (which Respondent denies), Claimants have failed to meet their burden of

¹⁷⁹ Claimants' Reply and Counter-Memorial on Jurisdiction §§ 485-486; Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 74

¹⁸⁰ Respondent's Objections to Jurisdiction and Counter-Memorial § 307

¹⁸¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 307

¹⁸² Respondent's Rejoinder and Reply on Jurisdiction § 132

proving “*what standards can be deemed part of customary international law and [...] the content of such obligations*”.¹⁸³

(b) Claimants’ Position

445. Claimants argue that the Tribunal has jurisdiction over claims for breach of customary international law.¹⁸⁴ In particular, Claimants rely on Article VII(1) BIT which “*is broad and certainly not limited to disputes relating to substantive obligations contained in the Treaty*”.¹⁸⁵
446. Furthermore, Claimants rebut Respondent’s conclusion on the findings of the *İçkale v Turkmenistan* tribunal on two points. First, the *İçkale v Turkmenistan* tribunal erred in its interpretation of Article VII BIT when it stated that that provision “*only covers dispute arising out of an alleged breach of these specific standards*”, without quoting the relevant part of BIT’s provisions to justify this finding.¹⁸⁶ Second, the claimant in *İçkale v Turkmenistan* failed to plead that the BIT covered claims for breach of customary international law *per se*.¹⁸⁷
447. In contrast, Claimants rely on the following standards which are widely recognized as part of customary international law: (i) the international minimum standard of protection for aliens that has now evolved into greater protection for investors, equivalent to the FET standard, as observed by several tribunals; (ii) full protection and security; and (iii) protection against arbitrariness, unreasonableness and discrimination.¹⁸⁸ These issues are specifically addressed below.

¹⁸³ Respondent’s Rejoinder and Reply on Jurisdiction § 134

¹⁸⁴ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 77

¹⁸⁵ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 78

¹⁸⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 488 with reference to Exhibit RLA-179, *İçkale v Turkmenistan*, § 341

¹⁸⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 488 with reference to Exhibit RLA-179, *İçkale v Turkmenistan*, § 341

¹⁸⁸ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 84

4. Are Claimants' claims (i) Treaty claims that fall within the jurisdiction of this Tribunal or (ii) contractual disputes which do not?

(a) Respondent's Position

448. Respondent submits that the disputes arising out of the 32 Disputed Contracts are all typical construction contracts which should properly have been brought before the Arbitrage Court of Turkmenistan; the only exception was Contract No 33 which provided for disputes to be determined under the Rules of the ICC International Court of Arbitration.¹⁸⁹ These disputes concern “[non-]payment of amounts due under the contracts in dispute”, “the State Customers’ late payments”, “requests [for] additional works not contemplated by the contract”, “unfounded penalties ... levied by State Customers”, “the State Customer’s [failure to comply with its contractual] obligation to pay the applicable VAT”, or “termination of Sehil’s ongoing contracts”.¹⁹⁰ These are “all classic hallmarks of construction projects gone wrong”.¹⁹¹ However, Claimants disregarded this and decided instead to bring an ICSID arbitration against Turkmenistan under the BIT.
449. Respondent contends that the BIT “does not provide jurisdiction over contractual disputes and the contractually-agreed forum cannot be brushed aside, but rather must be respected”.¹⁹² This has been upheld by the arbitral tribunal in the *İçkale v Turkmenistan* case.¹⁹³ To do otherwise, would result in the tribunal manifestly exceeding its powers.¹⁹⁴
450. Respondent notes that the Tribunal “is not bound by Claimants’ self-serving labelling and characterization of their claims and must carry out an objective assessment of the nature and essential basis of the claims.”¹⁹⁵ Rather, the Tribunal “must determine the fundamental

¹⁸⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 220; Respondent’s Rejoinder and Reply on Jurisdiction § 32; See e.g. Exhibit C-191, Clause 3

¹⁹⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 219, with reference to Claimants’ Memorial §§ 8, 61, 155, 282, 285

¹⁹¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 219

¹⁹² Respondent’s Objections to Jurisdiction and Counter-Memorial § 220

¹⁹³ Exhibit RLA-179, *İçkale v Turkmenistan*, § 306: “The Tribunal notes that its jurisdiction is limited to claims arising under the Turkey-Turkmenistan BIT and does not extend to claims arising under the Contracts, which each contain a dispute resolution clause referring all disputes arising thereunder to the Arbitration Court of Turkmenistan.”

¹⁹⁴ Respondent’s Rejoinder and Reply on Jurisdiction § 26; Respondent’s PHB § 4

¹⁹⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 221

*basis of the claims before it as an objective matter” and “[i]n doing so, the Tribunal should also determine whether the alleged harm was caused by the exercise of sovereign authority (“puissance publique”) as opposed to commercial or other non-sovereign acts.”*¹⁹⁶

451. Further, Respondent argues that arbitral tribunals have not hesitated to decline jurisdiction in cases where claims were based on contractual rights even though treaty breaches had been invoked by the claimants.¹⁹⁷
452. In addition, Respondent submits that the supposed treaty “obligations” that Claimants allege were violated are not even obligations under the BIT as the BIT does not contain an “umbrella clause”, or a “fair and equitable treatment” obligation, or a “full protection and security” obligation.¹⁹⁸
453. Respondent also submits that the BIT provides jurisdiction only over claims against the State itself. Even if the BIT provided for jurisdiction over contract claims, and even if the dispute resolution provisions of the Disputed Contracts could somehow be ignored, there would be no basis for asserting jurisdiction over contractual disputes that involve entities other than the State itself.¹⁹⁹ Accordingly, Respondent argues that the Tribunal should conclude “that the disputes are contractual and that the Tribunal must dismiss them for lack of jurisdiction.”²⁰⁰
454. First, Respondent contends that the Tribunal has no jurisdiction over Claimants’ contract claims which are disguised as treaty claims. In doing so, Respondent identifies two categories of claims submitted by Claimants.

¹⁹⁶ Respondent’s PHB § 4

¹⁹⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 237-238, with reference to Exhibit CLA-146, *Gustav F. W. Hamester GmbH & Co. KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, § 329 (“*Hamester v Ghana*”); Exhibit RLA-196, *Pantechniki v Albania*, § 64; and Exhibit RLA-182, *Joy Mining v Egypt*, §§ 72, 82

¹⁹⁸ Respondent’s Rejoinder and Reply on Jurisdiction § 26

¹⁹⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 232 with reference to Exhibit RLA-194, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, §§ 214-216 (“*Impregilo v Pakistan*”)

²⁰⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 221

455. The first category, which comprises the majority of Claimants’ claims, arises out of the rights and obligations under the Disputed Contracts, and involves only the behaviour of Claimants’ Contractual Counterparties. They are therefore only contract claims. Specifically:²⁰¹

- a. Payment Delays and Payment Defaults: Respondent submits that such claims are “*the archetype of a contract claim.*”²⁰² Further, the payment obligations, as indicated by Claimants, were not an obligation of Turkmenistan, but of the Contractual Counterparty, even if it was an organ of the State or was attributed to the State. Claimants’ allegations that the Supreme Control Chamber or the Office of the Prosecutor, for Contract No 45, or even the President himself had interfered with such payment obligations are not proved and are frivolous.
- b. Works Beyond the Contractual Scope: Respondent submits that Claimants’ allegation that their Contractual Counterparties requested them to perform works beyond the agreed scope must be dismissed for falling within the contractual framework between the contracting parties.
- c. Late Handover of Construction Sites: The late handover of their construction sites in three of the Disputed Contracts and which resulted in delays in commencing the Works, are “*clearly contract claims*”.²⁰³
- d. Non-Compliance with VAT Obligations: Respondent submits that Claimants’ claims that the Contractual Counterparties failed to comply with their obligation to pay VAT are also contract claims.
- e. Delay in Registration of Contract Annexes: Respondent submits the claim that the relevant authorities delayed registering the annexes to the Disputed Contracts, is “*a*

²⁰¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

²⁰² Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

²⁰³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

*dispute against their Counterparties for alleged failure to follow contractual procedures by repackaging that dispute as a treaty claim.”*²⁰⁴

- f. Improper Visits to Construction Sites: In response to the complaint about site visits, alleging that they were too frequent, at odd hours, and that the Counterparties’ representatives used offensive language, is a contractual dispute; the Contractual Counterparties had the right to conduct site visits pursuant to the Disputed Contracts.
 - g. Non-Compliance with Final Handover Procedures: Sehil’s complaint that “*its Customers were unwilling to abide by the established handover procedure’ is yet another strictly contractual claim.*”²⁰⁵
 - h. Improper Delay Penalties: Respondent contends that Claimants’ claim that the Contractual Counterparties unduly imposed penalties for late performance “*is nothing more than a contractual dispute that should be brought in the contractually-agreed forum.*”²⁰⁶
 - i. Unjustified Contract Terminations: In response to Claimants’ complaint that when terminating some contracts the Contractual Counterparties failed to take into account that the reasons for Claimants non-performance are “*purely contractual in nature and do not belong in this Arbitration.*”²⁰⁷
456. The second category of claims consists of allegations that are directed against the State acting in its sovereign capacity. They are unsupported in fact or law and should “*be dismissed as frivolous*”. These include specifically:²⁰⁸
- a. Visa Issues: Respondent contends that Claimants purport to bring a claim in this case based on their general dissatisfaction with Turkmenistan’s “*restrictive visa regime*”, ignoring that “*a State enjoys broad sovereign authority in regulating*

²⁰⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

²⁰⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

²⁰⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

²⁰⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 240

²⁰⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 241

access and circulation of foreigners on its territory.”²⁰⁹ Claimants state that they requested visas for workers in the Iron & Steel project, which “*were never issued*”; and that their foreign workers were required to obtain travel permits to the Dashoguz Region which added inconvenient “*red tape*.” Respondent states that Claimants’ request for assistance from their Contractual Counterparties in obtaining visas under some contracts which provided for this type of assistance are contractual claims. They do not fall within the jurisdiction of the Tribunal.

- b. Restrictions on Procurement of Materials: As to certain regulations adopted around 2006 requiring contractors to procure stones, sand and cement from national producers and which resulted in “*bureaucratic hassles*”, these cannot be held to “*rise to the level of a treaty breach*”.²¹⁰ Respondent notes that Claimants continued entering into more contracts after 2006 aware of and accepting those regulations. The disputes between Sehil and the cement producer Turkmenement, which was unable to meet its supply obligations causing delays to Contracts Nos 44 and 48, had been agreed to be submitted to the Arbitrage Court of Turkmenistan.
- c. Interventions of the Prosecutor and Vice Presidents: Respondent rejects the contention that the interventions of the Prosecutor and of the Vice-Presidents could amount to treaty breach, as under Turkmen law they were responsible for ensuring the performance of these contracts. Under the Constitution of Turkmenistan and the Law of the Prosecutor’s Office, the Vice Presidents were responsible for overseeing implementation of the Decrees that authorized the projects and the Office of the Prosecutor was empowered to investigate violations of laws and regulations respectively. Respondent also contends that there is no evidence that those authorities exceeded their powers and, thus, breached the BIT.
- d. Tax Audit and Seizure of Assets: As to the audit carried out by the Tax Service in 2010 which concluded that Sehil had failed to pay outstanding taxes and led to the sealing of Claimants’ office due to the non-payment of taxes, Respondent submits

²⁰⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 241

²¹⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 241

that this was one of the functions of the Main State Tax Service. There is no evidence that the Tax Service exceeded its powers and, thus, breached the BIT.

- e. Travel Bans, Arrests, Medical Issues: Respondent submits that these claims “*consist of an assortment of vague allegations of travel bans, arrests, and medical issues allegedly caused by Respondent’s authorities*” and rejects them outright.²¹¹
457. Second, Respondent rejects Claimants’ argument that their contract claims fall within the jurisdiction of the Tribunal because an umbrella clause can be imported via the BIT’s MFN clause. Respondent states that the BIT does not contain an umbrella clause, or a fair and equitable treatment obligation, or a full protection and security obligation.²¹² Respondent further argues that even if Claimants were able to import the umbrella clause, their claims would not succeed since “*umbrella clauses do not extend treaty protection to commercial contractual obligations. They do not elevate mere breaches of contract into breaches of international law.*”²¹³

(b) Claimants’ Position

458. Claimants maintain that their claims fall within the jurisdiction of the Tribunal because they are treaty claims which arise out of Respondent’s breaches of the BIT.²¹⁴ The fact that these claims arise in respect of underlying contracts, which contain their own dispute resolution provisions, does not preclude the jurisdiction of this Tribunal over Treaty Claims.²¹⁵
459. Claimants submit that “[t]he fact that a claim may arise out of a contract is not the test for distinguishing contract and treaty claims. A contract claim is one thing, and international claim arising out of a contract is another.”²¹⁶ Further, it is well established that the fact

²¹¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 241

²¹² Respondent’s Rejoinder and Reply on Jurisdiction § 26

²¹³ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 778-784; Respondent’s Rejoinder and Reply on Jurisdiction §§ 1168-1188; Respondent’s Opening –Jurisdiction, Slide 22

²¹⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 49

²¹⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 493

²¹⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 496

that claims are rooted in contractual performance does not exclude them for the sphere of the BIT.²¹⁷

460. Claimants argue:

*In the context of a jurisdictional inquiry, the claims need only pass a prima facie test, namely whether the claims as stated are capable of coming within the purview of the substantive protections of a treaty. Such claims will pass the test if they are capable of giving rise to treaty breaches.*²¹⁸

461. Further, Claimants contend that “*if the Tribunal has to enter into a detailed review of the rights and obligations contained in the Disputed Contracts [...], this is different from exercising contractual jurisdiction*”.²¹⁹ Moreover, the case law and doctrine is unanimous that it does not matter for purposes of jurisdiction whether the underlying contract contains another forum selection clause than the one under the BIT pursuant to which the arbitration has been brought.²²⁰

462. Claimants argue further that:

*In the case at hand, the acts and omissions of the State Contracting Parties were that of sovereigns in nature and/or reflected their abject subservience to other State organs, including the President and the Cabinet of Ministers, rather than the autonomous acts of an ordinary contracting party. These State Contracting Parties committed not only standalone BIT breaches per se but also, by their other acts and omissions, contractual breaches, which in turn constitute BIT breaches via the umbrella clause [...].*²²¹

²¹⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 497-498 with reference to Exhibit CLA-283, *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction, 8 December 2003, § 76 (“*Azurix v Argentina* Decision on Jurisdiction”); Exhibit RLA-194, *Impregilo v Pakistan*, § 258; Exhibit CLA-255, *Bayindir v Pakistan* Decision on Jurisdiction, §§ 106, 167

²¹⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 501, with reference to Exhibit CLA-283, *Azurix v Argentina* Decision on Jurisdiction, § 76

²¹⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 503, with reference to Exhibit RLA-188, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, § 105 (“*Vivendi v Argentina* Decision on Annulment”)

²²⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 511; Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 129, with reference to Exhibit CLA-374, *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No ARB/02/6, Declaration of Prof. Crivellaro, § 4; and Exhibit CLA-255, *Bayindir v Pakistan* Decision on Jurisdiction, § 167

²²¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 516

463. Claimants contend that Respondent by its “*Government Ministers, the Prosecutor’s office, the Arbitration Courts and the Main State Tax Service, committed a series of independent breaches of the BIT and international law which impaired Claimants’ contractual performance.*”²²² These acts include:

- multiple interferences by various government officials in the performance of the disputed contracts, imposing meetings at inconvenient hours by Vice Presidents Sagulyyew and Orazov during which Sehil executives were pressured and verbally abused (Contracts Nos 33 and 47; imposition of daily meetings by the Deputy Minister of Construction (Contract No 57); and the “*overbearing presence*” of Vice Presidents Maysa Yazmuhammedradow, Orazov and Japarov, in an effort to force Claimants to abandon Contract No 58.
- the unwarranted, disproportional and non-notified travel ban on Claimants’ executives by the State Migration Service in September 2010;
- interferences by the Prosecutor’s Office with the Disputed Contracts and/or Claimants’ investments during the years 2008-2010, “*in violation of any international standards of due process*” and under the false pretence of alleged delays and/or default in payment of employees;
- unfair and ultra-decisions of the Arbitration Court of Turkmenistan imposing fines and penalties on Claimants in respect of Contracts Nos 35, 51, 55 , 58 and 62-65;
- Sealing and seizure of Claimants’ offices, warehouse, equipment, computer and documents , as well as the construction site for the cultural centre project (Contract No 58) by the State Tax Service of the Azatiyk district in Ashgabat, without any notification;
- the unfair and arbitrary decisions of the Arbitrage Court which terminated Contracts Nos 51, 55, 58, 62, 63, 64 and 65 “*purportedly on the ground of alleged delays*”.

²²² Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 93

464. There are additional breaches of the BIT and international law where the Contractual Counterparties utilised their sovereign powers which were ignored by Respondent; they include:
- a. The Contractual Counterparties, jointly with and/or under the instruction of other State organs such as the Central Bank and even the President, arbitrarily and without any reasonable basis, withheld the approval of IPCs, and/or failed to make advance payments on time, accumulated thousands of consecutive and concurrent payment delays for duly approved IPCs, and failed to pay the 5% retainage, the magnitude and duration of which went beyond what could normally be expected from ordinary contracting parties. This in turn adversely and materially affected Claimants' cash flow, delayed payment of employees, subcontractors, and purchase of materials and thus Sehil's ability to meet project completion deadlines.²²³
 - b. These same delays were then used by the Contractual Counterparties and the other State organs to penalize Claimants.²²⁴
 - c. The State Contracting Parties, jointly with and/or under the instructions of other State organs such as the President, ordered and even forced Claimants to undertake additional works, the nature and magnitude of which fell outside the original scope of works, without compensation or any time adjustments. This in turn adversely and materially impacted the project completion period, which was then not taken into account by any State Contracting Parties or other organs of the State when assessing project delays and costs.²²⁵
 - d. The Contractual Counterparties, jointly and/or under the instructions of other State organs, delayed, arbitrarily and without any reasonable basis and outside the contractual framework, the performance of administrative obligations, including (i) the Annex registration, (ii) the handing-over of the construction sites, (iii) the procurement of materials, and (iv) the issuance of visas. This in turn adversely and

²²³ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 95

²²⁴ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 95

²²⁵ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 95

materially impacted the project completion periods, and was then not taken into account by any State Contracting Parties or other organs of the State, when assessing project delays, costs and delay penalties.

- e. The Contractual Counterparties engaged in abnormal, disruptive, intimidating, and extensive site raids and inspections which fell outside the contractual framework and legitimate expectations of an investor. They went beyond what normally could be expected from an ordinary contracting party under international law, and abused the power derived from their position as State organs.²²⁶

465. Some of the events described above are due to administrative or legislative acts coming from State organs that were neither involved in the negotiation nor in the contractual performance of the Contracts. These include:

- a. With respect to Contract No 33, the Central Bank refused to proceed with the payment as requested by the Contractual Counterparty. Respondent's explanation that the Central Bank had a supervisory role as the repository and controller of Turkmenistan's foreign currency reserve fund, and as such was entitled to block the payment is unavailing. Nothing in Contract No 33 suggests that the Central Bank was entitled to block payments under the Contract. The only mention of the Central Bank appears in the bank details of the Contractual Counterparty. Even if the Central Bank had such authority as the supervisor of Turkmenistan's foreign currency reserve fund does not diminish the arbitrariness with which it operated.²²⁷
- b. Individual payments made under the Disputed Contracts financed from the State Budget (such as Contracts Nos 51, 52, 53, 54, 55 and 58) were in practice subject to President's approval who, unreasonably and without any legitimate basis, withheld payments due. These interventions from the President were unjustified and, in any event, not the result of the Parties' contractual prerogatives. Thus, they constitute in and of themselves sovereign acts.²²⁸

²²⁶ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 95

²²⁷ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 99

²²⁸ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 99

- c. For example, additional works were ordered under Contract No 45 in June 2008 by the President himself, without any pretense of following the contractual procedure for work variation orders, and without any compensation for these works by the Contractual Counterparty. This constitutes a sovereign act. When Claimants refused to undertake additional works for the account of the Prosecutor's Office as the Contractual Counterparty, in retaliation the Prosecutor's Office abused its position as State organ and reopened, in May 2008, a long dormant investigation which led to the imprisonment of Mr Çuvalci²²⁹ the following month. This too was a sovereign act.²³⁰
- d. Substantively unjustified and unfair delay penalties totalling USD 10,651,419.65 were imposed by the Contractual Counterparties under the instructions of other State organs such as the President, the Cabinet of Ministers, the Supreme Control Chamber at the request of the Cabinet of Ministers and the Central Bank. However, none of these State organs were entitled to apply delay penalties under the terms of the Contracts, nor were they entitled by law to decide whether delay penalties should apply.²³¹
466. Claimants argue that the normal acts and omissions by the Contractual Counterparties not only breached the contracts but also breached their powers as State organs. Claimants stated:

It is undeniable that when committing the acts and omissions, the State Contracting Parties went beyond what could normally be expected from a contracting party and not only breached the contracts but also, abused their powers derived from their position as State organs, to engage in adverse acts and omissions against Claimants, which contributed to Claimants' unfair and unequitable treatment, as well as to the expropriation of their investment.²³²

In any event, should the Tribunal consider that these acts and omissions do not amount to breaches of the BIT either independently or via the

²²⁹ Mr Mustafa Çuvalci was the former site chief of the 36-Apartment House Project for the Ministry of National Security (Contract No 29); see Claimants' Memorial § 253

²³⁰ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 99

²³¹ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 99

²³² Claimants' Reply and Counter-Memorial on Jurisdiction § 520

*umbrella clause, it must nevertheless conclude that Respondent breached the BIT through the acts and omissions, of its other State organs such as the President, the Office of the General Prosecutor, Vice Presidency, the judiciary, as well as enforcement authorities, which are also listed in Section VI.B. below. These acts and omissions led to the ousting of Sehil's owner and executives without payment outstanding receivables under the Disputed Contracts, the existence of which is not contested by Respondent, and to the taking of Claimants' investment in the utmost vexatious circumstances.*²³³

467. For the above reasons, Claimants submit that “*Respondent and its non-contracting State organs, in particular Government Ministers, the Prosecutor's Office, the Arbitration Courts, and the Main State Tax Service committed a series of independent breaches of the BIT and of international law which impaired Claimants' contractual performance and led to their ousting and the taking of their investment.*”²³⁴
468. Claimants further argue that even though some of the acts and omissions were not the result of administrative or legislative acts, they involved the exercise of sovereign authority.²³⁵ Relying on case law, Claimants argue that an action purportedly taken under a contractual regime may constitute a treaty breach where the true nature of the act was one exercising sovereign authority.²³⁶
469. Claimants contend that “*contractual claims fall within the jurisdiction of the BIT as Respondent is obliged to observe and respect the specific commitments it undertook with respect to Claimants' investments by the operation of Article II.2 of the BIT.*”²³⁷ Nevertheless, Claimants state that while “*Respondent claims that importing an umbrella clause from the UK-Turkmenistan BIT would expand the scope of the State's consent to*

²³³ Claimants' Reply and Counter-Memorial on Jurisdiction § 521, also §§ 513-515, with reference to Exhibit CLA-1, *Abaclat and Other v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, §§ 318, 321; Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims §§ 92-108

²³⁴ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 93

²³⁵ A non-exhaustive list of such sovereign conduct can be found in Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 107

²³⁶ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims §§ 99-106, with reference to Exhibit CLA-241, *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, § 666; Exhibit CLA-287, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, § 692; Exhibit CLA-318, *Vigotop Ltd. v Hungary*, ICSID Case No ARB/11/22, Award, 1 October 2014 § 313

²³⁷ Claimants' Reply and Counter-Memorial on Jurisdiction § 523

*arbitration in the Turkey-Turkmenistan BIT. [...] Respondent confuses consent to arbitration and scope of the protective rights.*²³⁸

470. With respect to Respondent’s argument that Claimants’ umbrella clause claim is inadmissible and it cannot be used to circumvent the normal forum selection clauses, Claimants argue that (i) the existence of a forum selection clause in the underlying contract does not preclude the Tribunal from exercising its jurisdiction under the Treaty,²³⁹ and (ii) umbrella clauses are substantive in nature and a breach of specific provisions covered by the umbrella clause also give rises to a breach of the BIT.²⁴⁰ Therefore, Claimants contend that any non-compliance with such undertakings, even if of a commercial nature, constitutes a Treaty violation and “*a contractual forum selection clause cannot override the consent to arbitration under a BIT when the investor invokes a violation of the umbrella clause.*”²⁴¹ Claimants also state that in *Garanti Koza v Turkmenistan*, the tribunal confirmed the existence of a self-standing right to pursue contractual breaches as treaty claims based on the umbrella clause.²⁴²
471. Claimants further submit that the Tribunal has jurisdiction by way of a umbrella clause by referring to Article VII(1) of Turkey-Turkmenistan BIT. This does not require an investor to allege a breach of the BIT itself. Rather, this provision deals with disputes “*between one of the Parties and one investor of the other Party, in connection with his investment.*” Thus, it is sufficient that the dispute relates to an investment made under the BIT.²⁴³

²³⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 526

²³⁹ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims, §§ 129-131

²⁴⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 532-533. See also Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims §§ 132-135

²⁴¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 534

²⁴² Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims, § 109, with reference to Exhibit RLA-393, *Garanti Koza v Turkmenistan*, § 244

²⁴³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 540

5. Has the Tribunal jurisdiction over Respondent's counterclaims?

(a) Respondent's Position

472. Respondent has presented four counterclaims. They are: (i) for damages corresponding to the delay penalties imposed by the State Contracting Parties on Sehil under Contracts Nos 31, 35, 44, 46, 47, 51, 55, 56, 58, and 62-65; (ii) the replacement cost of the Iron and Steel Plant which was the subject of Contract No 33; (iii) damages corresponding to the payment to Sehil for works which were not completed under Contract No 58; and (iv) damages corresponding to Sehil's alleged tax debt.
473. Respondent submits that in the event the Tribunal decides to uphold jurisdiction over Claimants' claims, it must also consider Respondent's counterclaims relating to the same Disputed Contracts and purported "investments" that are the subject of the disputes submitted to this Arbitration by Claimants.²⁴⁴ Respondent further argues that:

*Respondent's counterclaims give rise to damages even if Claimants do not prevail on the merits of their own claims (assuming the Tribunal dismisses them after finding jurisdiction), and, in any event, they must also be taken into account as appropriate set-offs of the amounts of damages sought by Claimants in the event they prevail in whole or in part.*²⁴⁵

474. Respondent contends that it is well established that counterclaims by a respondent State are permitted under both the ICSID Convention and the ICSID Arbitration Rules.²⁴⁶ However, the Parties disagree whether the counterclaims are permitted under the applicable BIT. Respondent submits that Article VII BIT allows counterclaims by host States.²⁴⁷

²⁴⁴ Respondent's Rejoinder and Reply on Jurisdiction § 151: "These counterclaims are asserted without prejudice to Respondent's jurisdictional objections that Claimants cannot assert breach of contract claims in this case, and that they do not even have qualifying 'investments' for purposes of the ICSID Convention and the BIT. Respondent submits that, in the event the Tribunal decides to uphold jurisdiction over Claimants' claims, it must also consider Respondent's counterclaims relating to the same Sehil Contracts and purported 'investments' that are the subject of the disputes submitted by Claimants. Respondent's counterclaims give rise to damages even if Claimants do not prevail on the merits of their own claims (assuming the Tribunal dismisses them after finding jurisdiction), and, in any event, they must also be taken into account as appropriate set-offs of the amounts of damages sought by Claimants in the event they prevail in whole or in part."

²⁴⁵ Respondent's Rejoinder and Reply on Jurisdiction § 151

²⁴⁶ Respondent's Rejoinder and Reply on Jurisdiction § 152

²⁴⁷ Respondent's Rejoinder and Reply on Jurisdiction § 155

475. Respondent further contends that the requirement that a “dispute” be “*in connection with [the] investment*” under Article VII(1) BIT, and often found in BITs, “*has been consistently recognized by commentators and tribunals to be broad enough to include the investor’s obligations, and not just the State’s obligations*”.²⁴⁸ As explained by Respondent, the words “*disputes between*” the state and the investor in Article VII(1) BIT suggest that disputes may be raised by either side. In contrast, the wording “*the dispute can be submitted, as the investor may choose*” to one of the three arbitration fora “*is not a limitation to claims of the investor only, but simply grants the investor the prerogative of choosing the forum for the dispute*”.²⁴⁹
476. Respondent submits that there is no language in the BIT precluding the host State from raising counterclaims in an arbitration commenced by an investor. Respondent also refers to the *Saluka v Czech Republic*, *Inmaris v Ukraine* and *Paushok v Mongolia* decisions in which the arbitral tribunals upheld the right of States to bring counterclaims where the respective bilateral investment treaties contained similar wording to that applicable in this Arbitration.²⁵⁰
477. Respondent also relies on *Goetz v Burundi* where the tribunal considered claimant’s consent to ICSID arbitration to be sufficient to constitute consent to the host state’s counterclaims as well, even though the relevant treaty lacked any mention of counterclaims.²⁵¹
478. Respondent further submits that its counterclaims satisfy the requirement of a close connection to Claimants’ primary claims. Respondent states that Claimants themselves have admitted that Respondent’s first three counterclaims bear a close connection to Claimants’ primary claims. Those are: (i) delays in performance of the Disputed Contracts;

²⁴⁸ Respondent’s Rejoinder and Reply on Jurisdiction § 157

²⁴⁹ Respondent’s Rejoinder and Reply on Jurisdiction § 158

²⁵⁰ Exhibit CLA-361, *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004 (“*Saluka v Czech Republic Counterclaim*”); Exhibit CLA-332, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No ARB/08/8, Excerpts of the Award, 1 March 2012; and Exhibit RLA-274, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (“*Paushok v Mongolia*”)

²⁵¹ Exhibit RLA-489, *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/01/2, Award, 21 June 2012, § 278 (“*Goetz v Burundi*”)

(ii) failure to carry out the contractual requirements in constructing the Iron & Steel Plant under Contract No 33, and (iii) overpayments for the works performed on the Cultural Center Complex under Contract No 58.²⁵²

479. Respondent rejects Claimants' argument that there is no jurisdiction over these claims because they arise out of Claimants' breaches of the relevant contracts which are governed by local law.²⁵³
480. Respondent also submits that the ICSID Convention and ICSID Arbitration Rules require that counterclaims arise "*directly out of the subject-matter of the dispute*". This entails a factual connection between the primary claims and counterclaims.²⁵⁴ Respondent submits these counterclaims arise directly from the same factors from which the claims arise.
481. Respondent further rejects Claimants' argument that the fourth counterclaim, concerning their tax debts, "*relate to questions of compliance with domestic Turkmen law rather than the primary claims advanced by Claimants*" and therefore "*fails the 'close connection' test*", as well as the case law relied on.²⁵⁵ Respondent refers the Tribunal to *Benvenuti v Congo*, *Southern Pacific Properties v Egypt* and *Goetz v Burundi* in which the counterclaims relating to taxes were upheld as admissible.²⁵⁶
482. Finally, Respondent rejects Claimants' submissions that the counterclaims are time-barred. Respondent submits that Claimants conveniently ignore the relevant tolling rules suspending or resetting any statute of limitations applicable under Turkmen law. These rules apply with respect to Respondent's counterclaims for unpaid delay penalties under

²⁵² Respondent's Rejoinder and Reply on Jurisdiction § 173

²⁵³ Respondent's Rejoinder and Reply on Jurisdiction § 173

²⁵⁴ Respondent's Rejoinder and Reply on Jurisdiction §§ 174-175

²⁵⁵ Respondent's Rejoinder and Reply on Jurisdiction §§ 181-185

²⁵⁶ Respondent's Rejoinder and Reply on Jurisdiction §§ 188-189 with reference to Exhibit RLA-367, *Benvenuti et Bonfant srl v The Government of the People's Republic of the Congo*, ICSID Case No ARB/77/2, Award, 8 August 1980 ("*Benvenuti v Congo*"); Exhibit CLA-315, *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award, 20 May 1992 ("*Southern Pacific Properties v Egypt*"); Exhibit RLA-489, *Goetz v Burundi*

Contract No 35 and Contract No 58, breach of fundamental contractual obligations under Contract No 33, and over-payment for unperformed works.²⁵⁷

483. Respondent explains the following on the merits of its counterclaims.
484. As to Delay Penalties Owed by Sehil, “*Turkmenistan asserts counterclaims totalling US\$6,700,408 for delay penalties owed by Sehil under Contract No. 35 – Main State Tax Service Residential Building (12-story) and Contract No. 58 – Cultural Center Complex. These contractual penalties were duly imposed by the relevant Contractual Counterparties for Sehil’s failure to perform works in accordance with the relevant contractual completion requirements*”.²⁵⁸
485. For Breach of Contract No 33 – Iron & Steel Plant, Respondent asserts that “*Sehil breached its fundamental contractual obligations for the design and construction of the Iron & Steel Plant. As detailed in the Primetals Report, it would require at least €35 million in remedial works to rectify the design defects in order to make the Plant compliant with contract specifications. The defects were first identified in the January 2010 Kamaz Report, then confirmed in the March 2010 Siemens Report, and then further confirmed in the December 2016 Primetals Report.*”²⁵⁹
486. For Overpayments on Contract No 58 – Cultural Center Complex, Respondent contends that “*The Cultural Center Complex project – the largest project undertaken by Claimants – is another striking example of their abject failure to carry out their contractual obligations. Claimants received a US\$26 million Advance Payment for this project in June 2008, yet, by the time Claimants left Turkmenistan two years later, having failed to meet even the extended completion deadline, they abandoned it with only 45% of the works completed. Respondent claims US\$9,359,854 due from Claimants, representing*

²⁵⁷ Respondent’s PHB § 45

²⁵⁸ Respondent’s PHB § 46; Respondent initially submitted a counterclaim for damages corresponding to the delay penalties owed by Sehil “*under Contracts Nos. 31, 35, 44, 46, 47, 51, 55, 56, 58 and 62-65 that Sehil never paid*” in the amount of USD 10,651,419.65 (Respondent’s Objections to Jurisdiction and Counter-Memorial § 313). However, following Claimants’ concealment of some of the debts owed, Respondent amended its counterclaim and “*now seeks delay penalties due under two of the Sehil Contracts, Contracts Nos. 35 and 58, in the amount of US\$6,700,408*” (Respondent’s Rejoinder and Reply on Jurisdiction § 194).

²⁵⁹ Respondent’s PHB § 47; Respondent’s Rejoinder and Reply on Jurisdiction §§ 210-228

*overpayment to Sehil by the Contractual Counterparty to Contract No. 58. The Contractual Counterparty brought a claim against Sehil for reimbursement of this amount before the Arbitration Court of Turkmenistan”.*²⁶⁰

487. Respondent’s fourth counterclaim “*relates to Sehil’s outstanding tax debt*²⁶¹ of US\$14,285,443.31 in connection with its activities in Turkmenistan. In this respect, Respondent has demonstrated that the tax audits of Sehil were duly performed.”²⁶²

(b) Claimants’ Position

488. Claimants contend that Respondent’s four counterclaims are all inadmissible and time barred. Further, Claimants also assert these claims fail on the merits as well as on quantification.²⁶³

489. Claimants contend that the BIT does not allow counterclaims.²⁶⁴ Specifically, Article VII BIT on the “*Settlement of Disputes between One Party and Investors of the Other party*” provides:

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

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

*provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.*²⁶⁵

²⁶⁰ Respondent’s PHB § 55; Respondent’s Rejoinder and Reply on Jurisdiction §§ 229-233

²⁶¹ Emphasis Added

²⁶² Respondent’s PHB § 56; Respondent’s Rejoinder and Reply on Jurisdiction §§ 234-242

²⁶³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1070

²⁶⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1080; Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 145

²⁶⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1078

490. Further, Article 46 ICSID Convention provides:

*Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*²⁶⁶

491. Claimants also refer to Rule 40(1) ICSID Arbitration Rules which provides:

*Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*²⁶⁷

492. Claimants submit that it is undisputed, as also agreed by Respondent, that the ICSID Convention and the ICSID Arbitration Rules conditionally permit the submission of counterclaims by a respondent party. These cumulative conditions require: (i) the counterclaim must be within the jurisdiction of ICSID, which includes the requirement of consent; and (ii) there must be a connection between the claims and the counterclaims.²⁶⁸

493. The first condition is resolved by reference to the terms of the applicable BIT relied upon for purposes of jurisdiction.²⁶⁹ Claimants contend that the text of Article VII BIT does not allow host States to assert counterclaims; rather it only encompasses claims brought by investors. Claimants further argue that the possibility of bringing counterclaim(s) was not expressly contemplated by Turkey and Turkmenistan in the BIT.²⁷⁰ Claimants state that this conclusion is supported by Articles VII.1 and VII.2 BIT which give the right to a claim only to an investor: “[d]isputes between one of the Parties and one investor of the other Party, in connection with his investment, shall be notified [...] by the investor”; “the dispute can be submitted, as the investor, may choose” and “provided that, if the investor

²⁶⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1075

²⁶⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1074

²⁶⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1076 with reference to Exhibit CLA-247, *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, § 407

²⁶⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1077

²⁷⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1080

*concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year”.*²⁷¹

494. This conclusion is supported by case law addressing similar wording of the BIT provisions.²⁷² Since Respondent’s counterclaims are excluded by the terms of Article VII BIT, Claimants conclude that they are also barred under the ICSID Convention and the ICSID Arbitration Rules; as seen above, Article 46 ICSID Convention and ICSID Arbitration Rule 40(1) only permit counterclaims to be made where a tribunal has jurisdiction over them.²⁷³ As to the second condition, Claimants submit that even if the Tribunal finds that Respondent’s counterclaims are covered by the consent under the BIT, they still fail, as there is no close connection with Claimants’ primary claims.²⁷⁴ Claimants refer to the findings of the tribunals in *Saluka v Czech Republic*,²⁷⁵ *Paushok v Mongolia*²⁷⁶ and *Oxus Gold v Uzbekistan*²⁷⁷ to support this submission. Claimants state that, as expressed by these tribunals, “*the counter-claims must be sufficiently connected to the claims, i.e. arise out of the investment and thereto relating obligations, and may not be matters merely covered by the general law of the Respondent.*”²⁷⁸
495. With respect to Respondent’s fourth counterclaim regarding Sehil’s alleged tax debt, Claimants argue that this is a classic example of a claim which relates exclusively to questions of compliance with local law.²⁷⁹ Claimants rebut Respondent’s submitted case law in that regard, arguing that tribunals have endorsed the distinction between claims

²⁷¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1081

²⁷² Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 1084-1103 and Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims §§ 146-154 with reference to Exhibit CLA-182, *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014; Exhibit CLA-195, *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011 (“*Spyridon Roussalis v Romania*”); Exhibit CLA-376, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016

²⁷³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1083

²⁷⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 1090

²⁷⁵ Exhibit CLA-361, *Saluka v Czech Republic* Counterclaim

²⁷⁶ Exhibit RLA-274, *Paushok v Mongolia*

²⁷⁷ Exhibit CLA-360, *Oxus Gold plc v Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 (“*Oxus Gold v Uzbekistan*”)

²⁷⁸ Exhibit CLA-360, *Oxus Gold v Uzbekistan*, § 954

²⁷⁹ Claimants’ Rejoinder on Jurisdiction and Reply on Counterclaims § 162

arising out of the application of national law and claims based under the BIT and international law.²⁸⁰

496. Claimants also state that, in the present case, recourse to the umbrella clause of Article II.2 of the UK-Turkmenistan BIT is impossible as the wording of that clause expressly refers only to obligations of the host State.²⁸¹ As a consequence, Respondent may not rely on the umbrella clause to transform alleged breaches of contract by Claimants into a breach of the BIT.²⁸²

497. In addition, Claimants contend that the State Contracting Parties to the Disputed Contracts are not Parties to this Arbitration. For this reason the first three counterclaims (i.e. items (i), (ii) and (iii) in § 472 above) i) for damages corresponding to the delay penalties imposed by the Contractual Counterparties on Sehil under Contracts Nos 35 and 58, (ii) the alleged cost of rectification works on the Iron and Steel Plant under Contract No 33, and (iii) the damages corresponding to the payment to Sehil for works which were allegedly not completed on Contract No 58, are inadmissible on this stand-alone ground.²⁸³ To this end, Claimants state:

*Parties can only consent to adjudicate disputes to which they are parties, and the tribunal must thus evaluate carefully whether the counterclaim is based on an obligation owed by the investor to the state.*²⁸⁴

498. Claimants' last argument is that the counterclaims are time-barred under the municipal law relied upon by Respondent itself.²⁸⁵ Specifically, Claimants refer to Articles 148 and 149 of the Turkmen Civil Code which provide:

The limitation period for contractual claims is three years, and for the contractual claims relating to immovable things the period is six years [and, further, that t]he limitation period shall start running from the moment when the claim materializes [and i]f the claim consists in the need

²⁸⁰ Exhibit RLA-367, *Benvenuti v Congo*; Exhibit CLA-315, *Southern Pacific Properties v Egypt*

²⁸¹ Claimants' Reply and Counter-Memorial on Jurisdiction § 1104

²⁸² Claimants' Reply and Counter-Memorial on Jurisdiction § 1104

²⁸³ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 175

²⁸⁴ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 172 with reference to Exhibit CLA-375, Pierre Lalive and Laura Halonen, "On the Availability of Counterclaims in Investment Treaty Arbitration", *Czech Yearbook of International Law* (2011), FN 17

²⁸⁵ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 176

*to refrain from a certain action, the limitation period starts running from the date of commitment of the said action.*²⁸⁶

499. In support of its time-bar contentions Claimants submit the following for each counterclaim:

- a. For Contract No 33, Claimants submit that, based on the Kamaz report dated 5 January 2010, Respondent became aware that the Iron and Steel Plant's production capacity was no more than 80,000 tons per year. Claimants state that the date on which Respondent's Counterclaim must be deemed to have materialized is therefore, at the latest, 5 January 2010 (even considering the category of "*contractual claims relating to immovable things*"). Respondent raised its Counterclaims for the first time with its submission of the Counter-Memorial on 18 April 2016.²⁸⁷
- b. For Contract No 35, Claimants submit that the claim is based on the settlement agreement signed by unauthorized employees of Sehil, setting off the penalty of USD 200,408 against the retainer amount owed to Sehil under Contract No 35. Claimants contend that it would have become apparent to the counterparty by 21 February 2012, at the very latest, that Sehil would not pay the penalty the date Claimants submitted their Request for Arbitration. This counterclaim should have been submitted by 21 February 2015, within three years of the dispute materializing.²⁸⁸
- c. Claimants also refer to the other counterclaims which were already the subject of domestic litigation, the outcome of which is challenged by Claimants: the delay penalties under Contracts Nos 35 and 58 were imposed by the Arbitrage Court of Turkmenistan, as was the State Contracting Party's claim for alleged overpayment to Sehil under Contract No 58. Claimants submit that under the Turkmen Arbitration Procedural Code, which provides a statute of limitations for

²⁸⁶ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims §§ 177, 178

²⁸⁷ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 179

²⁸⁸ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 180

enforcement of court judgments, the enforcement of these decisions should have been made by 12 May 2010, 20 January 2011, and 21 March 2011, respectively.²⁸⁹

500. Claimants summarize their position on the merits of Respondent's counterclaims as follows:

501. With respect to the first Counterclaim, i.e. for USD 6,700,408 as "*delay penalties relating to Contract Nos. 35 (USD 200,408) and 58 (USD 6,500,000)*",²⁹⁰ Claimants submit "*the expropriatory nature of Respondent's application of delay penalties, namely that (i) the decision to apply penalties was made by State organs other than the respective State Contracting Party, (ii) the decisions were not preceded by a reasonable attempt to determine the causes of the construction delay and were hence substantively unjustified, and (iii) the application of the penalties was substantially unfair.*"²⁹¹ Further, Claimants submit that Respondent failed to "*discharge its burden to prove that the delays were caused by Sehil and by Sehil only, which is necessary in order to justify the imposition of the said delay penalties.*"²⁹²

502. With respect to the second Counterclaim, i.e. "*claims at least US\$64,500,000 for Sehil's breach of its multiple guarantees under Contract No. 33*", Claimants submit that the reports of "*Kamaz, a Russian company with knowledge of the metallurgical industry*" and an "*external evaluator, Siemens*" are neither sufficient nor reliable evidence.²⁹³

503. As to the third Counterclaim, i.e. for "*damages in the amount of US\$9,359,854 under contract No. 58 ... payments made to Sehil for works that were never completed*", Claimants argue that this sum was calculated and then rubber-stamped by the Arbitrage Court of Turkmenistan in complete violation of Claimants' most basic rights of defence,

²⁸⁹ Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims §§ 181-185

²⁹⁰ Claimants' Rejoinder and Reply on Jurisdiction § 188

²⁹¹ Claimants' Rejoinder and Reply on Jurisdiction § 189

²⁹² Claimants' Rejoinder and Reply on Jurisdiction § 191

²⁹³ Claimants' Reply and Counter-Memorial on Jurisdiction §§ 1115 and 1123-1137; Claimants' Rejoinder and Reply on Jurisdiction §§ 202-214

on the erroneous assumption that Sehil had completed only USD 58,544,076 of work; the correct figure was USD 89,700,000.²⁹⁴

504. With respect to the fourth Counterclaim, i.e. USD 14,285,443.31 in respect of Sehil's alleged outstanding tax obligations in connection with its activities in Turkmenistan, Claimants contend it is unsubstantiated. The *Certificate of Tax Audit dated 8 October 2010* on which Respondent relies is signed by neither Mr Ömer Gülçetiner, nor the Chief Accountant Ms Antonina Yeliseyeva, although she allegedly participated in the audit.²⁹⁵

6. What law is applicable to the claims arising out of the Disputed Contracts?

(a) Claimants' Position

505. Claimants submit that the Tribunal must examine the treaty claims under international law,²⁹⁶ even if the BIT does not contain any explicit applicable law provision, as is the case here. The BIT constitutes the applicable law to the claims for the breaches of the protections contained therein and being a treaty, international law governs its interpretation and application.²⁹⁷
506. Claimants note that there is a distinction between the relevance of the domestic law and international law regarding the determination of certain issues: domestic law is relevant when determining certain factual matters relevant to ascertain breaches of the State's

²⁹⁴ Claimants' Reply and Counter-Memorial on Jurisdiction §§ 1115 and 1138-1140; Claimants' Rejoinder and Reply on Jurisdiction §§ 215-220

²⁹⁵ Claimants' Reply and Counter-Memorial on Jurisdiction § 1115; Claimants' Rejoinder and Reply on Jurisdiction §§ 221-238

²⁹⁶ Claimants refer to the conclusions of arbitral tribunals in Exhibit CLA-178, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, §§ 86-87, and Exhibit CLA-104, *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, §§ 144-146; see Claimants' Reply and Counter-Memorial on Jurisdiction, FN 1214

²⁹⁷ Claimants' Reply and Counter-Memorial on Jurisdiction § 545

duties,²⁹⁸ while international law, as the governing law, is relevant for determining the international responsibility of a State.²⁹⁹

507. Claimants submit that the decisions of the Arbitrage Court of Turkmenistan cannot stand as the authoritative determination on the questions they addressed.³⁰⁰ Claimants clarify that while “*arbitral tribunals cannot play the role of a court of appeal with respect to decisions of national courts, it is equally true that arbitral tribunals are not bound by their determinations*”.³⁰¹
508. As to the claims arising out of the Disputed Contracts, Claimants submit that “*these claims are treaty claims by virtue of the umbrella clause imported via the MFN clause...*”.³⁰² Thus, international law remains the governing law for determining whether the contractual undertaking has been breached by the State. Similarly, international law rules of attribution are applicable to determine whether the contractual obligations contained in the Disputed Contracts are attributable to the State.³⁰³

(b) Respondent’s Position

509. Respondent submits that Claimants’ contract-based claims must be determined by applying Turkmen law. Claimants’ claims are grounded on the provisions of the Disputed Contracts which in turn are governed by Turkmen law, “*including the relevant regulatory framework, as the law governing the contracting parties’ rights and obligations under the contracts*”.³⁰⁴ This is because “[e]ach *Sehil Contract expressly designates the laws of Turkmenistan, including the relevant regulatory framework, as the law governing the contracting parties’ rights and obligations under the contracts. Thus, all of Claimants’*

²⁹⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 546

²⁹⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 547

³⁰⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 549

³⁰¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 549

³⁰² Claimants’ Reply and Counter-Memorial on Jurisdiction § 548

³⁰³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 548

³⁰⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 326

*contract-based claims in this Arbitration must be determined by application of Turkmen law.*³⁰⁵

510. Furthermore, where Claimants' contract-based claims have previously been referred to and resolved by the Arbitrage Court of Turkmenistan, applying Turkmen law, Respondent contends that those decisions are correct and stand as the authoritative determination on these points. The Arbitrage Court of Turkmenistan is the correct forum for such claims pursuant to the dispute resolution provisions in all Disputed Contracts.³⁰⁶ Respondent refers to the findings of the tribunal in *Garanti Koza v Turkmenistan* which confirmed that municipal law plays a role whenever contractual rights and their application are at issue.³⁰⁷ Respondent also relies on the conclusion of the tribunal in *EDF v Romania* which concluded that municipal law was to be applied by the tribunal in evaluating the acts relating to investor's contract.³⁰⁸
511. Respondent rejects Claimants' submission that international law remains the governing law for determining whether the contractual undertaking has been breached by the State under the umbrella clause imported via the MFN clause. Respondent states:

³⁰⁵ Respondent's Objections to Jurisdiction and Counter-Memorial § 326

³⁰⁶ Respondent's Objections to Jurisdiction and Counter-Memorial § 327

³⁰⁷ Respondent's Rejoinder and Reply on Jurisdiction § 246, with reference to Exhibit RLA-393, *Garanti Koza v Turkmenistan*, § 331:

"In its prior submission on applicable law, Respondent explained that the nature and scope of Claimants' contractual rights may only be determined based on the terms and conditions of the Sehil Contracts and the law of Turkmenistan, which expressly governs those Contracts, and that international law may be applied only subsequently, to determine breaches of Treaty obligations. In their Reply, Claimants do not appear to disagree with this proposition, but rather claim that domestic law is only relevant as a factual matter. However, as discussed at length in Respondent's Counter-Memorial, in order to determine the general framework of the parties' rights, obligations and performance under the Sehil Contracts, Turkmen law as the expressly agreed governing law of the Contracts must be applied. The Garanti Koza tribunal recently upheld this principle, confirming that municipal law has a role to play whenever contractual rights or the interpretation thereof are at issue:

To the extent that the question presented to the Tribunal is whether a particular obligation was created by the Contract between Garanti Koza and [its contractual counterparty,] TAY, the Tribunal applies Turkmen law (to the best of its ability) to determine the existence and dimensions of the obligation, because the parties to the Contract agreed that the Contract would be governed by Turkmen law."

³⁰⁸ Exhibit RLA-258, *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, § 247: *"Such acts and conduct are to be evaluated in the context of Romanian law, which is the law applicable to the Parties' contractual relations. The fact that the acts and conduct in question may be attributed to Romania since they had been directed by the Ministry of Transportation does not change the nature of the issue involved, which remains contractual, nor does it indicate that any contractual obligations were breached."*

[c]ontrary to Claimants' argument, "determining whether a contractual undertaking has been breached by the State" is not based on international law, but on the terms of the Contracts themselves and the municipal law governing them.³⁰⁹

512. Respondent further submits that only where Claimants' claims are directed against Turkmenistan or its organs for conduct allegedly in breach of the BIT and constitute treaty claims should they be examined under international law.³¹⁰ Respondent contends that Turkmen law should be considered for the characterization of certain Turkmen entities as State "organs" for the purpose of attribution under Article 4 of the International Law Commission in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles on State Responsibility).³¹¹ Questions regarding the interpretation of the BIT should be resolved pursuant to the Vienna Convention on the Law of Treaties.³¹²

7. Which party has the burden of proof and what is the effect of the lack of evidence presented to the Tribunal?

(a) Claimants' Position

513. Claimants submit that they have limited and incomplete documentation relating to this dispute in their possession, and are unable precisely to identify the missing documents. This is due to Respondent's seizure of Claimants' documents on 3-5 November 2010 without providing any inventory of the documents seized.³¹³

³⁰⁹ Respondent's Rejoinder and Reply on Jurisdiction § 247, emphasis in original

³¹⁰ Respondent's Objections to Jurisdiction and Counter-Memorial § 328

³¹¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 328, FN 819

³¹² Respondent's Objections to Jurisdiction and Counter-Memorial § 328, FN 820

³¹³ Claimants' Memorial § 14: "*Claimants submit that they have limited and incomplete documentation relating to this dispute in their possession, and no means by which to precisely identify the missing documents. This is because, as set out in Section III.D.5 below, Turkmenistan seized Claimants' documents on November 3-5, 2010 without providing any inventory of the documents seized. This is an undisputed and, in any event, undisputable fact. Moreover, Mr Çap, his family, and Sehil's executives were forced to flee Turkmenistan in the summer and fall of 2010 as a result of the harassment to which they were subjected, never to return out of fear for their security. Not a single attorney or person in Turkmenistan is willing to assist Sehil in this process against Turkmenistan in order to obtain a minimum set of information and documents. This warrants extensive document production and eventually a site visit and/or expert determination. This also requires the Tribunal*

514. Claimants submit that the Tribunal should note that Respondent did produce 1,014 documents in response to Claimants’ post-Memorial document production requests, in addition to the 350 documents produced in response to Claimants’ pre-Memorial document production requests, Claimants incurred significant costs to discover that only a few documents produced by Respondent were actually responsive to Procedural Order No 7 dated 29 July 2016.³¹⁴
515. Claimants state that Respondent still has not produced a number of documents, nor described the efforts that it undertook to retrieve them. Those include: (i) documents relating to the State organs’ site inspections, including Contractual Counterparties, the Cabinet of Ministers, the Ministry of Construction, the Ministry of National Security, intelligence services, Vice Presidents and the Ministry of the Economy, (ii) documents evidencing due diligence by Prosecutor’s Office prior to inspections at working sites of Contract Nos 56, 57 and 58 and reports from said inspections; (iii) documents relating to inspections carried out or overseen by Vice-President Yzmukhamedova at the site of Contract No 58; (iv) inspection reports, or similar records prepared by Respondent relating to the seizure/confiscation of Sehil’s assets in November 2010; (v) documents relating to the travel ban or travel restrictions against Sehil’s executives and/or Mr Çap’s family members beginning in 2010; or (vi) documents such as drawings, including revised drawings incorporating the additional works, which would have enabled Claimants and their experts to identify and quantify further examples of additional works.³¹⁵

to take into consideration, as other tribunals have done in similar circumstances, these factors when assessing the evidence and the burden of proof if and to the extent necessary, when and where appropriate.” Claimants rely on several cases to support their position: Exhibit CLA-2, *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, § 444 (“*Rumeli v Kazakhstan*”); Exhibit CLA-60, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, §§ 8.3.16-8.3.19 (“*Vivendi v Argentina Award*”); and Exhibit CLA-122, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13, Award, 2 March 2015, §§ 23-26 (“*Hassan Awdi v Romania*”).

³¹⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 24

³¹⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 24. Claimants also submit that Respondent’s selective production of testimonial evidence is yet further proof of its reluctance to assist in the establishment of the truth (Claimants’ Reply and Counter-Memorial on Jurisdiction § 25).

516. Claimants request the Tribunal to take into consideration the above when assessing evidence together with the fact that Respondent, contrary to Claimants, has and continues to have full site access, as well as access to all the documents material to the dispute.³¹⁶
517. In addition, Claimants explain that the documents they possess in Turkey are very limited in their nature and number. Only Sehil’s contracts and interim payment certificates and some documents relating to accounting information were regularly returned to or kept in Turkey.³¹⁷ Claimants explain that this is because Sehil’s Turkish branch was not actively involved in Sehil’s daily operations in Turkmenistan. Further, Sehil no longer has access to the server it used while operating in Turkmenistan and which contained significant documents including the internal communications of the company and the few emails that were exchanged.³¹⁸ Claimants also explain that the absence of internal notes and memoranda is explained by the fact that the Parties had a preference for oral means of communication rather than written communications.³¹⁹
518. Due to these facts Claimants submit that Respondent should have the burden of proving that the projects were “*incomplete, delayed due to Claimants’ poor performance or deficient and that remedial works were necessary thus entailing a reduction of Claimants’ heads of claim*”.³²⁰

(b) Respondent’s Position

519. Respondent submits that Claimants, as the party bringing claims, bear the burden of proving the facts on which their claims are based. In this case, Claimants have failed to meet this burden.³²¹

³¹⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 27

³¹⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 272

³¹⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 272

³¹⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 272

³²⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 933

³²¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 330

520. Respondent argues that there is no legal support for Claimants' argument that the Tribunal should somehow adjust downwards, or reverse, the burden of proof.³²² Respondent argues that even though Claimants allege that they had no access to documentary evidence and that the evidence in question is in Respondent's possession this does not dilute the fact that Claimants bear the burden of proof.³²³
521. Respondent refers to the reasoning of the *ad hoc* Committee in *Azurix v Argentina* to support its position:

*However, in the Committee's view, in the ICSID system, none of these fundamental rules of procedure imply a right of a party to obtain evidence in the hands of the opposing party. In its letter dated August 2, 2004, Argentina refers to what it claims is 'a general principle of law that the party that is in a better position to prove a fact bears the burden of proof' [...] The Committee does not accept that such general principle exists in ICSID proceedings: to the contrary, the Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that "who asserts must prove", and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.*³²⁴

522. Further, Respondent contends that the legal burden of proving a claim is distinct from the burden of producing evidence, or the evidential burden: the latter refers to the obligation of each party to adduce evidence in support of its arguments as the case progresses. Respondent states that it "*has produced evidence that refutes Claimants' arguments, including evidence that Sehil failed to complete 13 Sehil Contracts, that it was responsible for delays in the completion, and that it is not owed the Retention for four completed contracts because it failed to remedy defects, as contractually required*".³²⁵

³²² Respondent's Objections to Jurisdiction and Counter-Memorial § 335

³²³ Respondent's Objections to Jurisdiction and Counter-Memorial §§ 349-350

³²⁴ Exhibit RLA-247, *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, § 215 ("*Azurix v Argentina* Decision on Annulment"). Further reference is made to Exhibit RLA-241, *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No 064/2008, Partial Award on Jurisdiction and Admissibility, 2 September 2009, § 115 ("*Al-Bahloul v Tajikistan*").

³²⁵ Respondent's Rejoinder and Reply on Jurisdiction § 254

523. Respondent rejects Claimants’ attempt to shift the burden of proof by claiming that they have limited and incomplete documentation due to Turkmenistan’s seizures.³²⁶ Respondent submits that reasonably prudent investors are expected to keep business records outside the host State as part of the ordinary course of business. Respondent further states that it would be surprising if Sehil had kept all of its business records solely in Turkmenistan.³²⁷ Further, Respondent submits that it is also utterly implausible that Sehil, allegedly owed millions by its Contractual Counterparties, had not taken precautions to ensure that it had expatriated sufficient documentation to prove its claims under the Disputed Contracts.³²⁸
524. Respondent also rejects Claimants’ submission on the alleged lack of available documentation by highlighting that Sehil maintained substantial records relating to the Disputed Contracts outside of Turkmenistan.³²⁹ This was further revealed by Claimants’ own document production requests.³³⁰

³²⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 334

³²⁷ Respondent’s Rejoinder and Reply on Jurisdiction § 253. Respondent refers to the following cases to support its position: Exhibit RLA-424, *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on the Application for Annulment dated 16 May 1986, 1 ICSID REPORTS 509 (1993), § 90 (“*Amco v Indonesia*”) (“[I]mportant documents such as those relating to the registration or the registerability of foreign exchange supposedly infused into the project were not submitted to the Tribunal by PT Amco; a reasonably prudent foreign non-resident investor may be expected in the ordinary course of business to keep copies of such documents outside the host State.”); Exhibit RLA-425, *William J. Levitt v Islamic Republic of Iran*, Iran-United States Claims Tribunal Case No 210, Award No 520-210-3, 29 August 1991, Concurring and Dissenting Opinion, § 6 (“*Levitt v Iran*”) (“The failure to maintain virtually any records outside Iran is rather inexplicable in a corporation with experienced and sophisticated management.”); Exhibit RLA-426, *Knesevich Claim*, International Claims Commission, Preliminary Decision and Decision, 1951-1954, 21 International Law Reports 154 (1954), p. 155 (“*Knesevich Claim*”) (“It would seem reasonable to believe that at some time during that period, when private, international communication was quite free, the claimant would have received from his brother some written communication reflecting the acquisition of at least some of these shares of stock and something in writing by way of acknowledgement of the claimant’s interest therein. This would be the kind of record which, in such a transaction, a reasonably prudent businessman would be expected to retain.”).

³²⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 343

³²⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 337. Respondent explains that “During the jurisdictional phase of this Arbitration, Mr. Çap’s son, Ukkşe Çap, who formed part of the Turkish management team at Sehil’s branch office in Turkmenistan, explained that Sehil’s practice was to transmit documents received at its branch in Turkmenistan to the head office in Turkey: [In September 2010, Turkmenistan’s ‘Main Prosecution Office’] asked for us to submit to them all the original documents signed with the State – the contracts, the Interim Payment Certificates. I told them that we didn’t have any of the documents at the offices in Turkmenistan, that I had sent them to Turkey because the headquarter of our company is in Turkey and that the office in Turkmenistan was merely a branch office.”

See also, Respondent’s Rejoinder and Reply on Jurisdiction §§ 281-295

³³⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 345

525. Further, while Respondent produced over 350 responsive documents, incurring significant expense in time and monetary terms, Claimants only used approximately 70 of those documents in their Memorial, although they filed 450 exhibits.³³¹
526. Respondent invites the Tribunal to draw appropriate adverse inferences from Claimants' failure to produce evidence pursuant to ICSID Arbitration Rule 34(3).³³² Respondent submits the following considerations in support the Tribunal exercising such discretion: (i) the party against whom an inference is requested "*has or should have access to the evidence sought*"³³³ and Claimants' own representations during the document production process showed that Claimants maintained documents in Istanbul, Turkey; (ii) Respondent's behaviour, as the party requesting the inference, in particular its efforts to comply with orders for the production of evidence;³³⁴ (iii) the fact that the inference sought should also be "*reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld.*"³³⁵
527. Respondent also points out that Claimants failed to produce documents during the document production phase,³³⁶ including for the following categories: (i) annex registration, (ii) additional works, and (iii) handover, detailed by Respondent in its submissions.³³⁷

³³¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 345

³³² Respondent's Rejoinder and Reply on Jurisdiction § 260. Respondent also refers the Arbitral Tribunal to the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010), Art. 9(5): "[i]f a Party fails without satisfactory explanation ... to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

³³³ Respondent's Rejoinder and Reply on Jurisdiction § 263

³³⁴ Respondent's Rejoinder and Reply on Jurisdiction § 264

³³⁵ Respondent's Rejoinder and Reply on Jurisdiction § 265

³³⁶ Respondent's Rejoinder and Reply on Jurisdiction § 267

³³⁷ Respondent's Rejoinder and Reply on Jurisdiction §§ 267-268

8. When is a State responsible for contracts entered into by State entities?

(a) Claimants' Position

528. Claimants submit that Respondent breached its obligations under the BIT towards Claimants through the acts and omissions of the officials and organs of the Turkmenistan State. This includes, *inter alia*, the President of Turkmenistan, the Cabinet of Ministers, the Extended Cabinet of Ministers, the Executive Office of Turkmenistan, the Ministry of Finance, the Ministry of Energy, the Ministry of Internal Affairs, the KNB and its successor the Ministry of National Security, the Ministry of Culture, the Ministry of Construction and Construction Materials Industry (as well as its successors, the Ministry of Construction and the Ministry of the Construction Materials Industry), the Main State Expert Review Board, the Ministry of Defence, the State Commercial Bank of Turkmenistan, the Senagat Bank, the Central Bank, the Main State Tax Service, the City of Ashgabat, the City of Mary, the City of Dashoguz, Turkmenmally, the Turkmenbasy Complex, the Awaza Committee, the State Service for Foreign Investment, the State Commodity and Raw Materials Exchange, the Supreme Control Chamber, the Ashgabat City Tax Service, the Mary State Tax Service, the Arbitration Court, the Administration of the Dashoguz Region, the Office of the Prosecutor General, the Ashgabat Prosecutor, the Mary Prosecutor, the Türkmenneft State Concern, Turkmencement and Turkmendashlary as well as all enforcement and security services of the country.³³⁸
529. Claimants also argue that organs of Respondent, other than Sehil's contractual counterparties, including *inter alia* the President of Turkmenistan, the Cabinet of Ministers, the Office of the Prosecutor General and its "*army of Prosecutors*", "*the Central Bank, the Main State Tax Service, the Supreme Control Chamber, and the [Arbitrage Court of Turkmenistan]*" *interfered with Claimants' investment in a manner inconsistent with the State's international obligations and largely contributed to Sehil's unfair and unequitable treatment, lack of full protection and security, and unreasonable, arbitrary and*

³³⁸ Claimants' Reply and Counter-Memorial on Jurisdiction § 550

discriminatory treatment as well as to the expropriation of its investment, thus breaching the BIT”.³³⁹

530. Claimants further contend that the acts and omissions complained of do not exclusively cover all breaches of the Disputed Contracts. Other alleged breaches include the threatening and harassing of Mr Çap’s family members and Sehil employees by means of abusive and disruptive inspections, audits and travel bans, and direct interference in Claimants’ management, use and enjoyment of their investment by means prohibited under international law, through organs such as the Prosecutor’s Office.³⁴⁰
531. Claimants submit that it is widely accepted under customary international law that a State is responsible for all of its organs, its territorial units such as provinces and municipalities, as well as for all branches of the government, including the judiciary. This attribution principle derives from the unity of the state concept and applies to all organs “*at all levels regardless of the position of the organ in the State’s administrative organization. The State’s responsibility extends to all branches of the government, that is, the executive, the legislature, and to the judiciary.*”³⁴¹
532. Claimants reject Respondent’s argument that when concluding the contracts, the Ministry or other agencies of the state, the provinces and municipalities acted “*as ordinary contracting parties*” and as such, their acts cannot trigger the State’s responsibility. To the contrary, Claimants contend that the distinction between sovereign authority (*iure imperii*) and the conduct that is classified as commercial (*acta iure gestionis*) is irrelevant in the context of attribution. This is so because the conduct of a State organ is attributable to the State whether or not it is characterized as *iure imperii* or *iure gestionis*.³⁴² As stated in the ILC Draft Articles on State Responsibility, commentary to Article 4:

It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as “commercial” or as acta iure gestionis. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international

³³⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 554

³⁴⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 555

³⁴¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 560

³⁴² Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 567-568

*law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.*³⁴³

533. Claimants further explain that the question of whether or not the State organs that were Sehil’s contractual counterparties went beyond the behaviour which could be adopted by an ordinary contracting party is a matter for the merits, not attribution. Similarly, the question of whether or not the conduct of the other State organs complained of was compatible with the role of that entity envisaged in the Disputed Contracts is a matter for the merits and not attribution.³⁴⁴
534. Claimants also reject Respondent’s submission that some of the entities in question are not state organs, because under Turkmen law these entities have a separate legal personality from that of Turkmenistan and their own capacity to assume rights and liabilities.³⁴⁵
535. Claimants argue that although Article 4(2) of the ILC Draft Articles on State Responsibility provides that determining whether an entity has the status of an organ may be done by reference to internal law it also states that the characterization or “labeling” given by domestic law is not dispositive.³⁴⁶ As such, the fact that the entity has a separate legal personality does not preclude the characterization as a State organ under international law. Accordingly, such bodies should not be disqualified automatically from “organ” status in international law when it is clear that they are part of the State’s machinery.³⁴⁷ Claimants refer to the ILC Draft Articles on State Responsibility which state:

But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization

³⁴³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 567

³⁴⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 568

³⁴⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 572

³⁴⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 574. Claimants further state: “Article 4(2) [of the ILC Draft Articles] should not be read as meaning that only those entities that are defined as state organs by the domestic law qualify as such at the international level. International law does not and cannot rely on bare classifications in domestic law; international law is concerned with the reality of the status of the relevant person or entity, not with internal-law labels.”

³⁴⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 575

*and act in that capacity, whether or not they have separate legal personality under its internal law.*³⁴⁸

536. Claimants contend that several factors allow the Tribunal to rebut the presumption that an entity with a separate legal personality is not a State organ. These include: (i) “*overwhelming governmental purpose: where the entity has been assigned considerable non-commercial functions and the commercial activities fund the non-commercial ones*”; (ii) “*institutional insufficiency: when the entity is not self-sufficient to make and implement decisions for its own account but rather rely on other State organs, its separate personality may appear to be an artefact without legal significance*”; (iii) “*executive agency role: when a corporation’s exclusive purpose is to administer public-infrastructure contracts that are approved or negotiated by a supervising Ministry (or terminated at its behest)*”; and (iv) “*complete dependence: when the independence is purely fictitious as the entity is strictly controlled by the State and completely dependent on the State*”.³⁴⁹
537. Based on these indicators, Claimants submit that the following seven counterparties should be considered as *de jure* organs of the State: Turkmenneft (Contract No T5); the “*Turkmenistan*” State Commercial Bank (Contract No 36); the Joint-Stock Commercial Bank “*Senagat*” (Contract No 37); Turkmenpagta (Contract No 42); Turkmenenergogurlushyk (Contract No 46); the Turkmenmallery Association of Joint-Stock Livestock Companies (Contract No 48); and Turkmenbashi Oil-Processing Complex (Contract No 57). Claimants state they are all strictly controlled by and completely dependent on the State.³⁵⁰
538. In the alternative, Claimants submit that the acts and omissions of these entities are still attributable to the State, pursuant to Article 8 of the ILC Draft Articles on State Responsibility, as they acted on the instructions of, or under the direction or control of, the State, in carrying out the specific conduct which breached the BIT.

³⁴⁸ Exhibit CLA-175, ILC Draft Articles on State Responsibility, Chapter II, § 7

³⁴⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 577-581 with reference to Exhibit CLA-295, Georgios Petrochilos, “Attribution”, *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small ed., Oxford 2010), pp 297-298

³⁵⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 582-589

539. Claimants also deny Respondent’s argument that the umbrella clause cannot be used to transform the obligations which are relied upon by Claimants into substantive obligations of international law.³⁵¹ Claimants contend that for the purposes of the umbrella clause contained in Article II.2 of the UK-Turkmenistan BIT, the relevant obligation is that of Turkmenistan. Since international law regards the State as a single unit, a State is responsible for all of its organs at all levels regardless of the position of the organ in the State’s administrative organization, including its territorial units such as provinces and municipalities.³⁵²

(b) Respondent’s Position

540. Respondent argues that Claimants’ attempt to avoid addressing the issue of State responsibility by simply claiming that “*Respondent breached its obligations towards Claimants through the acts and omissions*” of no less than 33 individuals and entities, all of which Claimants proclaim to be “*organs of Respondent under international law.*”³⁵³

541. Respondent also submits that even if a non-existent umbrella clause could be imported from another treaty, Claimants cannot succeed. Umbrella clauses only extend treaty protection to State obligations undertaken in its sovereign capacity, not to commercial

³⁵¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 601

³⁵² Claimants’ Reply and Counter-Memorial on Jurisdiction § 604: “*For the purposes of the umbrella clause contained in Article II.2 of the UK-Turkmenistan BIT, the relevant obligation is that of a ‘Contracting State’, here Turkmenistan. However, as explained in the previous sub-section, international law regards the State as a single unit (‘unity of the State’). Following from that concept of unity of the State, a State is responsible for all of its organs at all levels regardless of the position of the organ in the state’s administrative organization, including its territorial units such as provinces and municipalities.*” Claimants also rely on the conclusion of the tribunals in Exhibit CLA-9, *Eureko B.V. v Republic of Poland*, Partial Award, 19 August 2005, §§ 115-34; Exhibit CLA-302, *SwemBalt AB, Sweden v The Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration, 23 October 2000, § 37; Exhibit CLA-289, *Noble Ventures, Inc. v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, §§ 68 et seq.; Exhibit CLA-265, *Consortium Groupement L.E.S.I.-DIPENTA v People’s Democratic Republic of Algeria*, ICSID Case No ARB/03/08, Award, 10 January 2005, § 19; Exhibit RLA-43, *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, § 166

³⁵³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 353. Respondent adds that “*This is literally the extent of Claimants’ treatment of the issue of State responsibility. Perhaps this is not surprising, since the law of State responsibility presents an insurmountable hurdle to many of Claimants’ claims.*”

obligations. In any event, Respondent claims that Claimants' arguments on the issues of attribution in this respect are flawed.³⁵⁴

542. First, Respondent denies being a party to any of the Disputed Contracts. International law differentiates between a State's responsibility for contractual undertakings given to foreign nationals by the State in its sovereign capacity, and a State's responsibility for actions taken in the context of a contractual relationship. The latter applies when, for example, the State itself is not a party to the contract, or the contract is not entered into in exercise of the State's sovereign powers.³⁵⁵ Accordingly, where the contract is not concluded with the State's central government acting in its sovereign capacity, but is entered into by a State-owned entity or by a political subdivision of the State acting as an ordinary contracting party, the State cannot be held responsible for acts or omissions occurring within the framework of the contract. An exception to this rule may exist if it can be shown that (i) the breach was caused by some interference by the State acting outside the scope of the contractual relationship in a manner that an ordinary contracting party could not act, and (ii) the interference is inconsistent with the State's international law obligations.³⁵⁶
543. Respondent contends that this is not the case here. None of the Disputed Contracts were concluded with the central government of Turkmenistan acting in its sovereign capacity. In particular: (i) eight of the Disputed Contracts were concluded with State-owned entities, or State Concerns, organized under Turkmen law, with a separate legal personality from the State;³⁵⁷ (ii) three of the Disputed Contracts were concluded with a province or

³⁵⁴ Respondent's Rejoinder and Reply on Jurisdiction § 316

³⁵⁵ Respondent's Objections to Jurisdiction and Counter-Memorial § 355

³⁵⁶ Respondent's Objections to Jurisdiction and Counter-Memorial § 356; Respondent's Rejoinder and Reply on Jurisdiction §§ 321-323

³⁵⁷ These Contracts were concluded with Turkmenneft (Exhibit R-66, Contract No T5 – Turkmenneft Administrative Building); Turkmenmashyngurlushyk (Exhibit R-150, Contract No 33 – Iron & Steel Plant); the “*Turkmenistan*” State Commercial Bank (Exhibit R-191, Contract No 36 – State Commercial Bank Residential Building (12-story)); the Joint-Stock Commercial Bank “*Senagat*” (Exhibit R-214, Contract No 37 – Senagat Residential Building (12-story)); Turkmenpagta (Exhibit R-353, Contract No 42 – Residential Building (4-story) for Turkmenpagta); Turkmenenergogurlushyk (Exhibit R-412, Contract No 46 – Health Center (12-story, 180-room)), the Turkmenmallary Association of Joint-Stock Livestock Companies (Exhibit R-456, Contract No 48 – Turkmenmallary Residential Building (12-story)); Turkmenbashi Oil- Processing Complex (Exhibit R-578, Contract No 57 – Health Center (900-person)). Respondent notes that in September 2007, the Client for Contract No 33 changed to the Ministry of Construction and Construction Materials Industry which is a State organ. In mid-2008, the Iron & Steel Plant became the sole responsibility of the

municipality of Turkmenistan acting as an ordinary contracting party;³⁵⁸ and (iii) the remaining twenty Disputed Contracts were entered into with a Ministry or other agency,³⁵⁹ also in their capacity as an ordinary contracting party.³⁶⁰ As such, Respondent highlights that even if Claimants were able to establish that any of its Contractual Counterparties committed a breach of contract, this is not sufficient to give rise to Respondent's responsibility under international law.³⁶¹

544. Further, Claimants' allegations mostly concern acts and omissions of Sehil's Contractual Counterparties, in their capacity as ordinary contracting parties, none of which can be characterized as an internationally wrongful act attributable to Respondent.³⁶² Accordingly, Respondent contends that the relevant question is whether Turkmenistan

Ministry of Construction Materials Industry after the joint Ministry of Construction and Construction Materials Industry was dissolved and separated into two; Exhibit VC-1, Decree of the President of Turkmenistan No 8955 concerning the improvement of works of industrial enterprises of Turkmenistan dated 25 August 2007, Article 1; Exhibit R-152, Addendum No 1 to Contract No 33 dated 24 September 2007; Exhibit VC-6, Order of the President of Turkmenistan No PP-5056 dated 14 April 2008; Exhibit R-154, Addendum No 3 to Contract No 33 dated 9 April 2009; Witness Statement of Mr Vadim Chekladze § 3.

³⁵⁸ These Contracts are: Exhibit R-439, Contract No 47 – Recycling Plant concluded with the Municipality of the City of Ashgabat; Exhibit R-483, Contract No 51 – Water Treatment Plant concluded with the Governorship of the Dashoguz Province; Exhibit R-537, Contract No 55 – Ruhiyet Convention Center concluded with the Governorship of the Dashoguz Province.

³⁵⁹ These Contracts are: Exhibit R-112, Contract No 31 – Ministry of Economy and Finance Residential Building (12-story) concluded with the Ministry of Economy and Finance; Exhibit R-165, Contract No 35 – Main State Tax Service Residential Building (12-story) concluded with the Main State Tax Service; Exhibit R-500, Contract No 52 – Police Academy concluded with the Ministry of Internal Affairs; Exhibit R-556, Contract No 56 – State Energy Institute Building concluded with the Ministry of Energy and Industry; Exhibit R-597, Contract No 58 – Cultural Center Complex concluded with the Ministry of Culture and TV- Radio Broadcasting; five contracts concluded with the Ministry of National Security; Exhibit R-81, Contract No 27 – Refurbishment of Ministry of National Security Facility, Exhibit R-530, Contract No 54 – Reconstruction of Block “R” of Ministry of National Security Facilities; Exhibit R-96, Contract No 29 – Ministry of National Security Residential Building (4-story), Exhibit R-140, Contract No 32 – Refurbishment of Ministry of National Security Remaining Facilities; Exhibit R-518, Contract No 53 – Ministry of National Security Central Administrative Building; four contracts concluded with the Central Bank of Turkmenistan; Exhibit R-240, Contract No 38 – Central Bank Residential Building (12-story); Exhibit R-270, Contract No 39 – Central Bank Residential Building (12-story); Exhibit R-300, Contract No 40 – Commercial Center (8-story); Exhibit R-329, Contract No 41 – Kindergarten (4-story, 320 places); two contracts initially concluded with the Office of the Prosecutor General and then transferred to the Ministry of Defense: Exhibit R-369, Contract No 44 – Health Resort (12-story, 308-room) and Exhibit R-390, Contract No 45 – Luxury Individual Residential Building; and four Contracts concluded with the Committee for the Avaza National Tourist Zone: Exhibit R-610, Contract No 62 – Avaza Automobile Bridge; Exhibit R-615, Contract No 63 – Avaza Tree Planting and Irrigation System; Exhibit R-621, Contract No 64 – Avaza Street Lighting System; Exhibit R-629, Contract No 65 – Landscaping of Sidewalks.

³⁶⁰ Respondent's Objections to Jurisdiction and Counter-Memorial § 357

³⁶¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 357

³⁶² Respondent's Objections to Jurisdiction and Counter-Memorial § 357

bears any responsibility for the acts of Sehil’s Contractual Counterparties, or the acts of other Turkmen entities, in connection with the Disputed Contracts.³⁶³ As explained by Respondent, actions taken in the context of a contractual relationship may only amount to a treaty breach if they constitute an exercise of sovereign authority or “*puissance publique*” – that is, if the behaviour goes beyond that which could be adopted by an ordinary contracting party.³⁶⁴

545. Respondent contends that while a number of Sehil’s Contractual Counterparties are State organs to the extent that Claimants complain about mere breaches of the Disputed Contracts or other acts or omissions within the scope of the contractual relationship, these actions do not constitute internationally wrongful acts.³⁶⁵

546. Respondent further submits that the acts of State organs carrying out their proper functions with respect to the Disputed Contracts cannot constitute internationally wrongful acts. The Disputed Contracts expressly provide that certain State organs, such as the President, State Expert Review, the State Commodity and Raw Materials Exchange, the State Agency for Foreign Investments, the Ministry of Economy and Finance, and State Acceptance Committees, would exercise certain functions in relation to the authorization, review, registration and performance of the Disputed Contracts.³⁶⁶ As such, Respondent submits that Claimants must prove that the conduct complained of was not compatible with the role of that entity envisaged in the Disputed Contracts, and that it was an internationally wrongful act.³⁶⁷

547. Respondent also contends that a number of the entities that allegedly violated the BIT, contrary to Claimants’ assertions, are not State organs and their conduct is not attributable

³⁶³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 362

³⁶⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 363; Respondent’s Rejoinder and Reply on Jurisdiction §§ 328-332

³⁶⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 365

³⁶⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 367. Respondent refers in this context to the reasoning of the arbitral tribunal in Exhibit RLA-179, *İçkale v Turkmenistan*, §§ 309-310: “*Consequently, as the Contracts themselves envisaged that certain State organs would be involved in the performance of the Contracts, such involvement cannot, without more, be considered evidence of illegitimate State interference. The Claimant must prove that the State organs in question went beyond the role envisaged for them in the Contracts, and that their conduct amounted to a breach of the Treaty.*”

³⁶⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 368

to Turkmenistan under Article 4 of the ILC Draft Articles on State Responsibility.³⁶⁸ Respondent states that eight of Sehil’s Contractual Counterparties included in Claimants’ list are in fact State-owned entities, with a separate legal personality from that of Turkmenistan. They are not State organs.³⁶⁹

*... Turkmenefit, Turkmenmallery Association of Joint-Stock Livestock Companies, Turkmenbashi Oil-Processing Complex, Joint-Stock Commercial Bank “Senegat,” “Turkmenistan” State Commercial Bank, Turkmenmashyngurlushyk, Turkmenenergogurlushyk and Turkmenpagta. Three were with provinces or municipalities of Turkmenistan acting in their commercial capacities, namely, the Municipality of the City of Ashgabat and the Governorship of the Dashoguz Province. The remainder were with various ministries or agencies, in each case also acting in a commercial capacity.*³⁷⁰

548. Respondent also rejects Claimants’ submission that every act of everyone in Turkmenistan is done pursuant to the orders or wishes of the President of Turkmenistan.³⁷¹ Respondent argues that bare allegations of general control or influence are insufficient for attribution purposes. Such attribution must be proved under ILC Draft Articles on State Responsibility, Article 8, for which the threshold is very high.³⁷²

9. Does the Most Favored Nation clause in the BIT give rights to Claimants to full protection and security, non-discrimination/non-impairment of investments, and the right to make claims under specific umbrella clauses?

(a) Claimants’ Position

549. Claimants rely on Article II(2) BIT which requires Turkmenistan to accord to the investments of an investor from Turkey treatment no less favourable than that accorded in

³⁶⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 369

³⁶⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 372-373; Respondent’s Rejoinder and Reply on Jurisdiction §§ 333, 350-364

³⁷⁰ Respondent’s Rejoinder and Reply on Jurisdiction § 322

³⁷¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 374

³⁷² Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 376-377; Respondent’s Rejoinder and Reply on Jurisdiction §§ 365-371

similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.³⁷³

550. Claimants contend that it is well-established in arbitral practice that an MFN clause can expand the substantive protections for investors to encompass rights and obligations relating to fair and equitable treatment, full protection and security, non-impairment of investments, and observance of specific undertakings.³⁷⁴ Claimants contend that this is possible because of the recognition by tribunals that “*these substantive obligations relate to the same subject matter, namely the protection of investments, and, as such, satisfy the ejusdem generis rule which limits the applicability of MFN clauses*”.³⁷⁵
551. In this context, Claimants assert that the preambles of the Turkey-Turkmenistan BIT and the United Kingdom-Turkmenistan BIT “*are strikingly similar*”. The preamble of the BIT records the parties’ desire to “*promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party*”, while the preamble of the United Kingdom-Turkmenistan BIT expresses the goal of creating “*favourable conditions for greater investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party*.”³⁷⁶ As explained by Claimants, the substantive provisions in each treaty share a common subject matter, namely, the promotion and protection of investments and, consequently, the application of the MFN provision to import more extensive protections is in conformity with the *ejusdem generis* rule.³⁷⁷
552. Accordingly, Claimants submit that the *ejusdem generis* principle allows them to import substantive protections from other treaties because the object and purpose of those other treaties is very similar to that of the BIT. In this respect, Claimants refer in particular to:

Fair and equitable treatment of Claimants’ investments by virtue of Article 2 of the Turkmenistan-UK BIT, which stipulates that “[i]nvestments of nationals or companies

³⁷³ Claimants’ Memorial § 315

³⁷⁴ Claimants’ Memorial § 316

³⁷⁵ Claimants’ Memorial § 316

³⁷⁶ Claimants’ Memorial § 317

³⁷⁷ Claimants’ Memorial § 317; Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 653-654

of each Contracting Party shall at all times be accorded fair and equitable treatment ...". Claimants refer also to Article 4 of the Switzerland-Turkmenistan BIT, and Article 3 of the Turkmenistan-Egypt BIT;

Full protection and security of Claimants' investments by virtue of Article 2 of the Turkmenistan-UK BIT, which stipulates that "[i]nvestments of nationals or companies of each Contracting Party [...] shall enjoy full protection and security in the territory of the other Contracting Party". Claimants refer also to Article 4 of the Switzerland-Turkmenistan BIT, and Article 3 of the Turkmenistan-Egypt BIT;

Non-impairment of Claimants' investments by virtue of Article 2 of the Turkmenistan-UK BIT, which stipulates that "[n]either party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, or disposal of investments in its territory of nationals or companies of the other Contracting Party". Claimants refer also to Article 4 of the Switzerland-Turkmenistan BIT, and Article 3 of the Turkmenistan-Egypt BIT; and

Observance of specific undertakings by virtue of Article 2 of the Turkmenistan-UK BIT, which stipulates that "[e]ach Contracting Party shall observe any obligation it, may have entered into with regard to investments of nationals or companies of the other Contracting Party". Claimants refer also to Article 10(2) of the Switzerland-Turkmenistan BIT.³⁷⁸

553. Claimants further contend that Respondent's obligation to accord certain protections to Claimants' investment is provided for under customary international law and that the minimum standard of protection is "*mandatory by nature*".³⁷⁹ This minimum standard of protection includes all of the substantive protections provided for above.³⁸⁰
554. Claimants state that Turkmen law also provides substantive protections for foreign investors. In particular, Article 22(1) provides, in pertinent part that "*investment protection is ensured by the legislation of Turkmenistan*" and that "*all investors are guaranteed equal regime excluding discriminative measures which could obstruct the management of investments, their utilization or liquidation...*".³⁸¹ Claimants contend that this law also

³⁷⁸ Claimants' Memorial § 317; Claimants' Reply and Counter-Memorial on Jurisdiction § 655

³⁷⁹ Claimants' Memorial § 321

³⁸⁰ Claimants' Memorial § 320

³⁸¹ Claimants' Memorial § 322 referring to Exhibit C-23, the 1992 Law of Turkmenistan on Investment Activities in Turkmenistan, Article 22(1)

contains the obligation to ensure protection against expropriation without compensation.³⁸² Similar guarantees are also contained in the 2008 amended law of Turkmenistan.³⁸³

555. Claimants submit that the correct reading of the Article II(2) BIT leads to the conclusion that the MFN provision aims to protect against *de facto* discrimination and allows for the importation of substantive protections from other BITs. This function of the MFN clause does not expand the scope of Turkmenistan’s consent to arbitration.³⁸⁴ Claimants submit that the operation of an MFN clause does not need a comparative, fact-based analysis, as it automatically expands the set of substantive protections.³⁸⁵
556. Claimants reject Respondent’s contention that the words “*in similar situations*” in Article II(2) require Claimants to demonstrate that: (i) more favourable treatment was accorded to investments of nationals or investors from a country other than Turkey; (ii) these investments of non-Turkish investors were in a “*similar situation*” to Claimants’ investments in Turkmenistan; (iii) the difference in treatment was based on or caused by nationality; and (iv) there was no objective, rational basis or policy justifying the difference in treatment.³⁸⁶
557. Rather, Claimants contend that the proper interpretation of Article II(2) and of the words “*in similar situations*” is as follows. MFN clauses have several functions and, thus, may be used: (i) as a substantive non-discrimination protection standard in its own right, prohibiting host States from according more favourable treatment to their nationals or to nationals of third states *vis-à-vis* the claimant(s) or the investments protected under the base treaty; and/or (ii) to benefit from standards of treatment additional to those provided in the base treaty.³⁸⁷

³⁸² Claimants’ Memorial § 322

³⁸³ Claimants’ Memorial § 322 referring to Exhibit C-94, Law of Turkmenistan No 184-III of 3 March 2008 on Foreign Investments, see Articles 20 and 21.

³⁸⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 618

³⁸⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 625, with reference to Exhibit CLA-296, R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2nd ed., OUP 2012), pp 206, 211

³⁸⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 626, with reference to Respondent’s Objections to Jurisdiction and Counter-Memorial § 386

³⁸⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 628

558. Claimants disagree with Respondent’s assertion that when a breach of the non-discrimination standard contained in Article II(2) is invoked, then a comparative analysis of investors in similar situations is required.³⁸⁸ Rather, Claimants argue that when Article II(2) is used to import substantive protection standards from other BITs, the words “*in similar situations*” should be understood as referring to the requirement of sameness, i.e. the *ejusdem generis* principle. This means that substantive guarantees can be imported from a third-party treaty provided that treaty has a common subject-matter with the base treaty containing the MFN clause.³⁸⁹
559. Claimants further reject Respondent’s submission that by seeking to import from third-party treaties substantive standards of protection that are entirely absent from the BIT, the arbitral tribunal will assume jurisdiction over claims which do not fall within the BIT.³⁹⁰ Claimants submit that this cannot be based on Article VII(1) BIT, which broadly covers “[d]isputes between one of the Parties and one investor of the other Party, in connection with his investment”, and thus, encompasses all of the rights and benefits sought by Claimants by virtue of Article II(2).³⁹¹
560. Claimants contend that the only limit to the applicability of the MFN clause is the *ejusdem generis* rule mentioned above and Article II(4) BIT, which provides strictly limited restrictions on the MFN’s application:

*The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties: (a) relating to any existing or future customs unions, regional economic organization or similar international agreements, (b) relating wholly or mainly to taxation.*³⁹²

³⁸⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 629

³⁸⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 630 et seq., with reference to Exhibit CLA-2, *Rumeli v Kazakhstan*, § 575; Exhibit CLA-179, *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award, 18 May 2010, p 64, fn.16; and Exhibit CLA-177, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, §§ 157, 166, 201, 389-390 (“*Bayindir v Pakistan Award*”)

³⁹⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 643, with reference to Respondent’s Objections to Jurisdiction and Counter-Memorial § 383

³⁹¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 646

³⁹² Claimants’ Reply and Counter-Memorial on Jurisdiction § 647

561. Claimants therefore argue that any substantive obligations contained in third-party treaties that are not excluded by Article II(4) may be imported through operation of the MFN clause and as long as the *ejusdem generis* rule is satisfied; any other reading will defeat the very purpose of the MFN clause.³⁹³

(b) Respondent’s Position

562. Respondent contends that the BIT is a simple, pared-down treaty, with two basic protections for investors: (i) compensation in the event of expropriation; and (ii) treatment of investments equivalent to that accorded to investments of Turkmen nationals and nationals of third states. Respondent states there is no FET clause, no FPS clause, no “*impairment*” clause, and no umbrella clause in the BIT.³⁹⁴

563. Respondent argues that Claimants cannot be permitted to import substantive obligations into the BIT to which the State parties to that treaty never agreed. This would allow a party to assert claims the State parties never anticipated.³⁹⁵

564. Respondent further contends that the MFN clause in Article II(2) does not allow for the re-writing of the BIT by including provisions from other instruments. It protects only against actual nationality-based discrimination among actual investors.

565. Further, Respondent argues the MFN clause cannot be used to expand the scope of Turkmenistan’s consent to arbitration.³⁹⁶ In any case, Claimants cannot rely on the preamble of the BIT; it is well settled under international law that preambles are merely exhortative and do not create any legal commitments.³⁹⁷ A preamble only provides context for interpreting the ordinary meaning of the terms of a treaty.³⁹⁸

³⁹³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 648

³⁹⁴ Respondent’s PHB § 34

³⁹⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 384

³⁹⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 384 and Respondent’s Rejoinder and Reply on Jurisdiction §§ 398-406

³⁹⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 384

³⁹⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 394

566. Respondent submits that Claimants make no attempt to discuss or analyse the actual terms of the MFN obligation in Article II(2). If any terms were to be imported through the MFN provision, Claimants must demonstrate that: (i) more favourable treatment was accorded to investments of nationals or investors from a country other than Turkey; and (ii) that these investments of non-Turkish investors were in a “*similar situation*” to Claimants’ investments in Turkmenistan; and (iii) the difference in treatment was based on or caused by nationality; and (iv) there was no objective, rational basis or policy justifying the difference in treatment. Respondent states that Claimants have simply seized upon the existence of BIT provisions in a treaty between Turkmenistan and another country that they view as being more helpful to them in the context of this Arbitration, without satisfying their burden to prove the requisite elements of Article II(2).³⁹⁹
567. Respondent also contends that the wording of Article II(2) expressly refers to the treatment of investments of investors in similar situations. This shows that its purpose is to address actual measures taken by the host State *vis-à-vis* investments.⁴⁰⁰ Thus, Article II(2) requires the identification of a comparator, of an actual investment of an actual investor, plus proof that the comparator is in a “*similar situation*”; it is also necessary to show that the comparator is receiving treatment which is objectively more favourable and not simply pointing to hypothetical rights afforded to hypothetical investors under treaties with other countries.⁴⁰¹
568. Respondent contends that Article II(2) contains no express reference to “*treaty obligations*”, nor does it seek to accord MFN treatment “*in all matters relating to commerce and navigation, any privilege, favour or immunity whatever*” or “*in all respects*”, as is found in some MFN clauses in other BITs.⁴⁰² It refers only to treatment accorded to investments of investors in “*similar situations*”.⁴⁰³ As such, a genuine exercise of treaty interpretation, which accounts for meaningful variations among MFN clauses,

³⁹⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 386

⁴⁰⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 386

⁴⁰¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 387. Respondent refers extensively to Exhibit RLA-179, *İçkale v Turkmenistan*. Also, Respondent’s Rejoinder and Reply on Jurisdiction §§ 373-382

⁴⁰² Respondent’s Objections to Jurisdiction and Counter-Memorial § 394

⁴⁰³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 394

leads to the proper conclusion that Article II(2) was not designed or intended to be a means of “importing” provisions from other treaties.⁴⁰⁴ Respondent argues that Claimants misunderstand the *ejusdem generis* principle, which refers to the subject matter of the MFN clause itself, not to the subject matter of the treaty in which it is contained.⁴⁰⁵

10. Does the wording “fair and equitable treatment of investment is desirable” in the preamble of the BIT impose an obligation of Fair and Equitable Treatment?

(a) Claimants’ Position

569. Claimants contend that the BIT envisages the existence of an FET standard not only by way of the MFN clause,⁴⁰⁶ but also through the Preamble of the BIT. It reads as follows:

Agreeing fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.⁴⁰⁷

570. Claimants state that the FET obligation has to be “*placed squarely in the context of an obligation to ‘encourage and create’ favourable conditions for investors*”. It has to be “*understood in the context of [the] aim of encouraging the inflow and retention of foreign investment*”, considering both the wording of Article II(2) and of the Preamble of the BIT.⁴⁰⁸

571. Relying on the VCLT, Claimants contend that the preamble of an international convention does not merely contain exhortative or hortatory statements but that the preamble is part of the text of the Treaty. The fact that the terms “*fair and equitable treatment*” are contained in the Preamble means that, at a minimum, they form part of the object and purpose of the

⁴⁰⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 394; Respondent’s Rejoinder and Reply on Jurisdiction § 388. See also, Respondent’s PHB § 37

⁴⁰⁵ Respondent’s Rejoinder and Reply on Jurisdiction § 389

⁴⁰⁶ Claimants’ Memorial §§ 315-316; Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 619 et seq.

⁴⁰⁷ Claimants’ Memorial FN 559; Claimants’ Reply and Counter-Memorial on Jurisdiction § 742

⁴⁰⁸ Claimants’ Memorial § 385

Treaty. Accordingly, the possibility to import substantive protection clauses such as an FET obligation should be interpreted and applied.⁴⁰⁹

572. Claimants submit that the VCLT mandates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose of the Treaty. As the Preamble forms part of the text of the BIT, the Tribunal must give effect to the ordinary meaning of the terms “*fair and equitable treatment*” that it contains.⁴¹⁰
573. Claimants contend this is also supported by the principle of effectiveness, which is an established principle of international law. On this basis Claimants argue that “*a treaty ought to be so construed as to display a proper—if not the maximum—degree of effectiveness.*”⁴¹¹ Accordingly, Claimants advance that the term “*fair and equitable treatment*” should be given direct and operative binding effect.⁴¹²
574. Claimants also contend that Article 32 VCLT allows recourse to supplementary means of interpretation, e.g. the preparatory work of the treaty and the circumstances of its conclusion, where the meaning of a treaty is ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. Although the application of Article 31 in the present case does not leave the meaning ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable, Claimants argue it may be useful to refer to supplementary means of interpretation,⁴¹³ such as the explanatory note to Turkey’s Draft Law on Ratification of the BIT which confirms that the BIT is expected “*to create a secure investment environment in Turkmenistan for the Turkish investors who [...] will invest in Turkmenistan*”.⁴¹⁴

⁴⁰⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 751

⁴¹⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 748

⁴¹¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 749

⁴¹² Claimants’ Reply and Counter-Memorial on Jurisdiction § 750

⁴¹³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 755

⁴¹⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 756 with reference to Exhibit CLA-324, Draft Law on Ratification of the BIT executed by and between Turkey and Turkmenistan including its Reasoning and the Reports of the Ministry of Foreign Affairs and the Planning and Budget Commissions (1/618) Turkish Grand National Assembly

575. Further, Claimants rely on the fact that, at the time of conclusion of the BIT, the State parties to the BIT were not sophisticated negotiators, as also noted by the Tribunal in the Decision on Respondent’s Objection to Jurisdiction. Thus, Turkmenistan lacked enough experience to evaluate the importance of some substantive protection standards crucial for attracting investments. It also argues that the parties could not possibly have had the intention to exclude the importation of FET obligation.⁴¹⁵
576. As such, Respondent is obliged to ensure fair and equitable treatment of Claimants’ investments.⁴¹⁶

(b) Respondent’s Position

577. Respondent rejects Claimants’ submission that a FET obligation could be inferred from the Preamble of the BIT, as “*Preambles are hortatory statements and do not contain independent binding obligations.*”⁴¹⁷ As explained by Respondent, “*preambles only provide context for interpreting the ordinary meaning of the terms of a treaty*” and they cannot be viewed as “*capable of creating binding legal effects upon parties*”.⁴¹⁸
578. Respondent refers to the recent conclusion of the *İçkale v Turkmenistan* tribunal that rejected the attempt to create a binding FET obligation from the Preamble to the BIT, concluding that a preamble “*cannot be relied upon as a source of independent or free-standing legal rights or obligations*”.⁴¹⁹ Further, Respondent explains, the fact that “*FET is not included in the obligatory clauses of the BIT setting forth the substantive duties*

⁴¹⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 757

⁴¹⁶ Claimants’ Memorial § 319

⁴¹⁷ Respondent’s PHB § 38; Respondent’s Objections to Jurisdiction and Counter-Memorial § 406; Respondent’s Rejoinder and Reply on Jurisdiction § 407 with reference to Exhibit RLA-452, J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012), pp 76-77

⁴¹⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 407 with reference also to Exhibit RLA-277, *ADF Group Inc. v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, § 147; Exhibit RLA-112, *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, § 258 (“*Continental Casualty v Argentina*”); Respondent’s Rejoinder and Reply on Jurisdiction § 409

⁴¹⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 408, with reference to Exhibit RLA-179, *İçkale v Turkmenistan*, § 337

*agreed to by the States, shows that the States were cognizant of the concept, but deliberately chose not to include it as a binding obligation.”*⁴²⁰

579. Further, the “*ordinary meaning of the words used in the Preamble – that ‘fair and equitable treatment of investment is desirable’ – cannot reasonably be construed or interpreted as imposing a binding obligation on the States to guarantee fair and equitable treatment*”, as a mandatory language is absent in this context.⁴²¹

11. Is there a breach of the Expropriation standard under the BIT?

(a) Claimants’ Position

580. Claimants submit that “*Respondent’s acts and omissions, [...] taken individually, let alone collectively, culminated in the expropriation on multiple accounts under international law of [Claimants’] investment in Turkmenistan*”.⁴²² These acts and omissions ranged “*from delays in the registration of the Annexes, delays and defaults in payment, and requests for additional works uncompensated in time and cost materially impacted Claimants’ financial capacities and project schedule*”.⁴²³ Further, Claimants allege that “*State organs committed further acts and omissions ranging from unreasonable inspections, raids, intimidations, penalties, summons by the Prosecutors, and joined efforts with the State Contracting Parties to sue, fine, and seize Claimants’ assets led which together to the expropriation of Claimants’ investment*”.⁴²⁴ Claimants submit that under Article III(1) BIT, Respondent is required to refrain from expropriating or nationalizing investments, and from subjecting those investments to any other measures having an equivalent effect, except where such measures are taken for a public purpose, under due process of law, are not discriminatory and are accompanied by prompt, adequate, and effective compensation.⁴²⁵

581. Article III(1) and (2) BIT reads as follows:

⁴²⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 409

⁴²¹ Respondent’s Rejoinder and Reply on Jurisdiction § 411

⁴²² Claimants’ Reply and Counter-Memorial on Jurisdiction § 678

⁴²³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 681

⁴²⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 681

⁴²⁵ Claimants’ Memorial § 329

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

*2. Compensation shall be equivalent to real value of the expropriated investment before the expropriatory action was taken or became known Compensation shall be paid without delay and be freely transferable [...]*⁴²⁶

582. Claimants state that whilst “*expropriation*” is not usually defined in bilateral investment treaties, it is understood that the fundamental requirement is that the Investor is substantially deprived of the use and benefits of its investments.⁴²⁷
583. Public international law distinguishes between direct and indirect expropriations.⁴²⁸ The latter should be considered in light of the “*the actual effect of the measures on the investor’s property*”.⁴²⁹
584. Consequently, Claimants submit an expropriation occurs when the “*actual effect*” of a State’s actions is to deprive the investor “*of parts of the value of his investment*” or “*of the use or reasonably-to-be-expected economic benefit of property*”.⁴³⁰ The intent of the respondent State is irrelevant to a finding of expropriation, as is whether the State derives benefits from the investment taken.⁴³¹
585. Claimants submit that under the BIT a Turkish investor in Turkmenistan is entitled to protection against direct or indirect expropriation of their investment, unless the expropriation was carried out: a) for a public purpose, b) in a non-discriminatory manner, c) in accordance with due process of law, and d) upon payment of prompt, adequate and effective compensation.⁴³² Further, it “*is a widely accepted principle of international law*

⁴²⁶ Claimants’ Memorial § 329

⁴²⁷ Claimants’ Memorial § 330

⁴²⁸ Claimants’ Memorial § 331

⁴²⁹ Claimants’ Memorial § 338

⁴³⁰ Claimants’ Memorial § 338

⁴³¹ Claimants’ Memorial §§ 337, 339

⁴³² Claimants’ Memorial § 341

*that an expropriation can be unlawful and an internationally wrongful act even if it was undertaken by the State in accordance with its domestic laws”.*⁴³³

586. In the context of this case Claimants explain that “*there is no doubt that Claimants possessed an investment consisting of a bundle of different rights, including but not limited to its physical assets on the ground, headquarters, monies due under the Disputed Contracts, and its reputation as a leading contractor in the market*”.⁴³⁴ Accordingly, Claimants argue that “*this is a clear case of unlawful expropriation*”.⁴³⁵
587. In this case, “*Claimants submit that the expropriation qualification is met based on three independent grounds, namely that the taking was flawed procedurally (1); substantively (2) and for lack of compensation (3)*”.⁴³⁶ These are explained in context.
588. First, the taking of Claimants’ projects and investment was procedurally unlawful.⁴³⁷ Claimants contend that an investor is procedurally expropriated when the manner in which the investment was taken lacked due process of law. Claimants state this follows Article III(1) BIT “*which provides that the expropriation be carried out in accordance with due process and general principles of treatment set out at Article II, which include the provisions of the fair and equitable treatment set out in paragraphs above via the MFN*”.⁴³⁸
589. In this case, Claimants state that “*the taking occurred without consideration of Claimants’ most basic procedural rights*”; “*Turkmenistan did not address and/or did not in any way properly address Claimants’ position and requests*”.⁴³⁹ This extended to the “*inspections, decrees, assignments, travel ban[s], seizure (of the premises, equipment, computers, and documents), imposition of fines, penalties and ultimate termination of Claimants’ rights*”.⁴⁴⁰

⁴³³ Claimants’ Memorial § 343

⁴³⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 689

⁴³⁵ Claimants’ Memorial § 345

⁴³⁶ Claimants’ Memorial § 345; Claimants’ Reply and Counter-Memorial on Jurisdiction § 680

⁴³⁷ Claimants’ Memorial § 346

⁴³⁸ Claimants’ Memorial § 347; Claimants’ Reply and Counter-Memorial on Jurisdiction § 683

⁴³⁹ Claimants’ Memorial § 351

⁴⁴⁰ Claimants’ Memorial § 352

590. Claimants list the acts and omissions of Turkmenistan on the procedural expropriation, as follows.⁴⁴¹

353.1. Turkmenistan did not consider the circumstances, [...] under which the initial deadlines were set by the President, namely based on very broad specifications, which then naturally evolved a number of times as a result, and thus for this reason alone warranted a good faith as opposed to a mechanical approach to deadlines.

353.2. Turkmenistan did not consider in assessing project delays the fact that Sehil accumulated thousands of consecutive and concurrent of payment delays for duly approved IPCs worth USD 448,623,793 as broken down among Disputed Contracts [...] and in the Grant Thornton Expert Report, which adversely affected Claimants' cash flow, delayed payment of employees, subcontractors, and purchase of materials, and thus the project completion period.

353.3. Turkmenistan did not consider for purposes of assessing project delays its failure to pay Sehil's invoices under the Disputed Contracts in the amount of USD 118,300,678 in outstanding receivables, including USD 18,071,145 in approved IPCs [...] and in the Grant Thornton Expert Report, which adversely affected Claimants' cash flow and resources, delayed payment of employees, subcontractors, and purchase of materials, and thus the projection completion period.

353.4. Turkmenistan did not consider for purposes of assessing project delays its failure to pay prolongation costs [...] which adversely affected Claimants' cash flow and resources, delayed payment of employees, subcontractors, and purchase of materials, and thus the projection completion period.

353.5. Turkmenistan did not consider for purposes of assessing project delays its acts and omissions in relation to the VAT obligations [...] that adversely affected Claimants' cash flow, delayed payment of employees, subcontractors, and purchase of materials, and moreover resulted in administrative hurdles, adversely impacting the project completion period.

353.6. Turkmenistan did not consider for purposes of assessing project delays its acts and omissions in relation to the hand-over of the construction sites [...] that adversely impacted the project completion period.

353.7. Turkmenistan did not consider for purposes of assessing project delays its acts and omissions in relation to the procurement of locally

⁴⁴¹ Claimants' Memorial § 353

manufactured construction materials [...] that adversely impacted the project completion period.

353.8. Turkmenistan did not consider for purposes of assessing project delays its acts and omissions in relation to the issuance of visas for foreign specialists [...] that adversely impacted the project completion period.

353.9. Turkmenistan did not consider for purposes of assessing project delays its acts and omissions in relation to the additional works that it instructed, namely the nature and extent of works not falling within the original scope of the works and the resulting extension of time requested and warranted, [...] that adversely impacted the project completion period.⁴⁴²

591. Claimants further submit that “*Turkmenistan did not carry out any proper due diligence and internal or external audits or reports that contain any comprehensive analysis of the underlying reasons for the delays and/or Claimants’ position on the same, namely taking into account any of the above issues*”.⁴⁴³ To the contrary, Claimants argue the only thing “*Turkmenistan’s organs cared about was compliance with the mandate of the President to terminate the projects in time.*”⁴⁴⁴
592. Second, as to the substantive expropriation, Claimants state this was the due to “*interventions by non-contracting State organs*” that “*had no place or right under international law to interfere*”.⁴⁴⁵ Claimants specifically refer to the following acts of Respondent, without consideration of Claimants’ position:

358.1. Turkmenistan engaged (abstraction even made of their abnormal, disruptive, and intimidating nature) in extensive site raids and site inspections via its organs on project sit[e]s during the years 2008-2010 [...] on the ground of delay and/or default in payment of employees [...].

358.2. Turkmenistan interfered in the Disputed Contracts via its Vice Presidents in 2010 [...] on the ground of delay and/or default in payment of employees [...].

358.3. Turkmenistan interfered in the Disputed Contracts via its Prosecutor during the years 2008-2010 [...] on the ground of delay and/or default in payment of employees [...].

⁴⁴² See also: Claimants’ Reply and Counter-Memorial on Jurisdiction § 683

⁴⁴³ Claimants’ Memorial § 355

⁴⁴⁴ Claimants’ Memorial § 356

⁴⁴⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 684

358.4. *Turkmenistan seized and sealed Claimants' offices, warehouse, equipment, computers, and documents in 2010 [...].*

358.5. *Turkmenistan engaged in threats and imposed fines and penalties during the years 2008-2010 [...] on the ground of delay [...].*

358.6. *Turkmenistan terminated some of Sehil's Disputed Contracts, namely Contracts Nos 57, 58, 62, 63, 64, and 65 [...] on the ground of delay [...].*⁴⁴⁶

593. Claimants further submit:

*[...] the taking was illegal, and in any event, the delays were caused by the acts and omissions of Respondent [...], including the delays in payment, defaults in payment, additional costs caused by variations, prolongations cost caused by the payment delays and defaults as well as variations, defaults in relation to the VAT, failure to issue visas, failure in relation to the import of materials, failures in relation to the hand-over of the sight at the outset and at completion.*⁴⁴⁷

594. Claimants also explain that Respondent's acts and omissions which resulted in the expropriation complained of ranged from: "*site inspections and interferences of the prosecutors and vice presidents on sites and decrees [...] to the imposition of penalties, intimidation, travel bans, seizure of properties, and termination of the contracts*". Claimants contend these actions "*were each taken individually, let alone collectively, disproportionate, which alone is sufficient to meet the expropriation threshold.*"⁴⁴⁸

595. Third, Claimants submit that "[t]he fact that no compensation was paid, let alone any prompt, adequate and effective compensation is yet another independent ground that warrants the expropriation finding."⁴⁴⁹

596. Claimants reject Respondent's arguments that Claimants failed to identify correctly the expropriated property rights, or that Respondent's acts and omissions were not

⁴⁴⁶ Claimants' Memorial § 358

⁴⁴⁷ Claimants' Memorial § 368

⁴⁴⁸ Claimants' Memorial § 369; Claimants' Reply and Counter-Memorial on Jurisdiction § 684

⁴⁴⁹ Claimants' Memorial § 373; Claimants' Reply and Counter-Memorial on Jurisdiction § 685

expropriatory, and that the seizure and sealing of Claimants' assets in November 2010 was a legitimate exercise of State power.⁴⁵⁰ Claimants responds to each point in turn.

597. First, Claimants submit that they properly identified the tangible and intangible property rights that Respondent expropriated. There is no doubt that Claimants' investment consisted of a bundle of different rights, including but not limited to their physical assets on the ground, headquarters, monies due under the Disputed Contracts, and their reputation as a leading contractor in the market. The elements that constituted their construction business cannot be separated for purposes of the expropriation analysis.⁴⁵¹ It is well settled that contractual rights may be expropriated by State action. Claimants submit:

*In any event, the whole discussion is rendered moot by Respondent's admission that Claimants can assert a valid expropriation claim with regard to "the value of the works Sehil carried out under the Sehil Contracts (less delay penalties), most of which Claimants have already received and the remainder of which Respondent acknowledges as owing," and Claimants' physical assets which were seized and sealed.*⁴⁵²

598. Second, Claimants contend that Respondent's analysis ignores the doctrine of composite acts. Since all of these acts and omissions, individually and also collectively, resulted in the expropriation of Claimants' investment.⁴⁵³ Claimants explain: "*When considering composite acts or creeping expropriation, the focus is on the cumulative effect of the measures rather than the measures taken individually. The aggregate effect must be an 'effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor' or the effect of 'depriving one of rights or assets'.*"⁴⁵⁴

599. Claimants contend that the expropriation "*unfolded through the below series of acts and omissions, the cumulative effect of which was the substantial deprivation of the management, use, control and value of Claimants' investment.*"

- *Respondent's absurdly truncated tender process meant that Sehil often had to finalize the design of its projects and compile the contractual Annexes well after*

⁴⁵⁰ Claimants' Reply and Counter-Memorial on Jurisdiction § 688

⁴⁵¹ Claimants' Reply and Counter-Memorial on Jurisdiction § 689

⁴⁵² Claimants' Reply and Counter-Memorial on Jurisdiction § 693

⁴⁵³ Claimants' Reply and Counter-Memorial on Jurisdiction § 708

⁴⁵⁴ Claimants' Reply and Counter-Memorial on Jurisdiction § 713

the relevant contract had been signed, causing delays from the very start of the project;

- *the State Contracting Parties, jointly and/or under the instructions of other State organs, failed to fulfill in a timely fashion the carrying out of administrative obligations, including (i) the handing-over of the construction sites, (ii) the procurement of materials, and (iii) the issuance of visas, which in turn adversely and materially impacted the project completion periods;*
- *the State Contracting Parties, jointly with and/or under the instructions of other State organs such as the President, instructed Claimants to undertake additional works, outside the scope of Sehil's obligations, which were the source of additional construction delays;*
- *These were further compounded and aggravated by Respondent's massive payment delays of approved IPCs and other approved receivables including warranty retainage, especially towards the end of 2009 when, as acknowledged by Respondent, Sehil's cash flow position was negative across all the Disputed Contracts, not to mention taken individually. As described above, this pushed Sehil's finances to the brink in 2010 as it struggled to cover its construction expenses and laid the groundwork for Sehil's delays and default towards payment of its employees and later of the company's eventual bankruptcy;*
- *While Sehil struggled in 2009 and 2010 to finance the construction projects on its own and meet its deadlines because of the cash flow issues mentioned above, Respondent, instead of rectifying its own practices that were the source of construction delays or cooperating in good faith with Claimants by offering assistance or advancing money, commenced, through the State Contracting Parties and various other State organs, a sustained campaign of site raids, investigations and tax audits, unleashing its Prosecutors, and other State officials to harass Claimants on the alleged grounds of delays it itself created. The result was that Sehil's management was within a matter of months driven from Turkmenistan - Mr Çap suffered a stroke shortly after the encounter with the three Vice Presidents on the construction site of Contract No 58 and returned to Turkey in July 2010, and Mr Gülçetiner resigned from his position in September 2010 citing "the extreme pressure put on me by both the Turkmen Government and the Customers";*
- *The coup de grace was Respondent's imposition of a travel ban against members of the Çap family, from which they reasonably concluded that it was safer to leave Turkmenistan at the first available opportunity.*
- *Respondent's imposition of delay penalties through the Supreme Control Chamber, Central Bank, and President presaged the termination of several of Sehil's ongoing contracts, inasmuch as the State Contracting Parties and Prosecutor's Office recycled the same arguments devoid of any meaningful analysis in both instances. In addition, on at least two occasions at the height of Respondent's harassment campaign, penalties were suddenly asserted under Disputed Contracts which Sehil*

had completed and delivered one to two years prior. The only reasonable explanation for the timing is that Respondent sought to avoid paying Sehil the retainer payments to which it was entitled.

- *Thus, by October 2010 Turkmenistan had pushed Sehil on the verge of bankruptcy and driven its senior management out of the country, bringing its work to a halt and leaving Sehil without meaningful representation. Respondent seized Claimants' physical assets in November 2010 on the basis of alleged tax debts in relation to which Respondent "is continuing its investigations", without the slightest consideration for Claimants' position and notably the fact that Claimants were owed outstanding receivables in an amount exceeding the alleged tax debts. This pushed it over the edge, and effectively guaranteed that Sehil could never restart its construction business, either in Turkmenistan or elsewhere.*
- *The termination of Sehil's Contracts by the judiciary (but in reality upon the instructions of the President or after the President terminated the contract by decree (as was the case for Contract No. 58)) on the basis of construction delays officially deprived Claimants of their contractual rights, without any prompt, adequate and effective compensation.⁴⁵⁵*

600. In any event, Claimants explain, "*many of the State Contracting Parties' acts and omissions, which Respondent characterizes as purely contractual, were in fact the result of interference by other State organs or the State Contracting Parties' own abuse of State power and as such, acts of puissance publique*":

- *The reason IPC No. 9 to Contract No. 33 was never approved was that the Central Bank refused the State Contracting Party's request to pay the Consortium at least a portion thereof. Claimants have produced further examples of the Central Bank delaying or refusing to effect transfers under approved IPCs, in addition to pointing out the President's limitless discretion over individual payments under contracts funded through the State Budget.*
- *Claimants have demonstrated that the President could and did order drastic variations to the scope of works.*
- *Claimants have also provided several examples of how the State Contracting Parties abused Turkmenistan's legal framework to order Sehil to undertake additional works. As will be recalled, the State Contracting Parties could not execute addenda modifying the contract price without the President's approval, a restriction which, to Claimants' knowledge, only applied to "Ministries and ministerial management bodies" and not private entities. Thus, when faced with an order to undertake*

⁴⁵⁵ Claimants' Reply and Counter-Memorial on Jurisdiction § 715

additional work, Sehil's choices were either to absorb the cost of the additional works or refuse and pray that the consequences were less costly than compliance.

- *State Contracting Parties were powerless to approve extensions on their own initiative, but were instead required to wait until the Supreme Control Chamber brought the matter of deadline extensions to the President's attention for his approval, which consisted of quickly compiling only the barest information regarding the status of hundreds of projects. Therefore, Respondent's failure to respond to Sehil's requests for extensions in a timely manner was the result of Respondent's exercise of sovereign power.*
- *Similarly, it is clear that the directive to apply delay penalties came variously from the President, the Cabinet of Ministers, Supreme Control Chamber, and the Central Bank rather than the State Contracting Parties, and in any case the penalties were imposed without a delay analysis which Respondent's own experts agree is mandated by industry practice.*
- *While Respondent would have the Tribunal believe that the decision to terminate the contracts was taken by the respective State Contracting Parties and duly enforced by the Arbitration Courts, it cannot explain why the presidential decree terminating Contract No. 58 was issued prior to the Arbitration Court's decision, why a presidential decree terminating Contract No. 44 exists but not a court order, or what legal purpose the Arbitration Courts' decisions with respect to the termination of Contract Nos. 51, 55, and 62-65 served if the same contracts were again terminated by presidential decree. Claimants submit that this more than demonstrates that, as with everything else in Turkmenistan, the decision to terminate the contracts was not within the control of the relevant State Contracting Party.⁴⁵⁶*

601. Third, the seizure and sealing of Claimants' assets was not a valid use of Respondent's police power.⁴⁵⁷ Claimants submit the following facts in support of their argument:

- *The 2010 audit reviewed Sehil's taxes for the period of April 1, 2008 to June 30, 2010, despite the fact that the majority of this time had already been covered by two previous tax audits in September 2009.*
- *Respondent did not work with Claimants to arrive at a settlement that would have permitted Sehil to continue operating in Turkmenistan. As set out above at paragraphs 315 et seq, this could have taken the form of a payment installment plan or a set-off against the outstanding receivables which Respondent itself has admitted at various points were owed to Sehil, such as the USD 33 million acknowledged by Turkmenistan in the inter-governmental negotiations with Turkey at the end of 2010,*

⁴⁵⁶ Claimants' Reply and Counter-Memorial on Jurisdiction § 717

⁴⁵⁷ Claimants' Reply and Counter-Memorial on Jurisdiction § 725; Claimants' PHB §§ 34 et seq.

or the USD 120,113,015 in outstanding receivables as calculated by the Grant Thornton Supplementary Report.

- Respondent did not give Claimants a meaningful opportunity to dispose of their assets in an orderly fashion, as according to the results of the tax audit Sehil had five days to pay the amounts identified as outstanding. This was all the more so given that Respondent was aware of Mr. Çap and Mr. Gülçetiner's departure from Turkmenistan due to its overbearing harassment and had threatened Claimants' family and associates with travel bans.⁴⁵⁸

602. Further, Claimants state “the method by which Respondent calculated the amount of alleged tax debt for which Claimants’ assets were seized remains a mystery to this day.”⁴⁵⁹ Also, “the seizure was conducted in violation of Claimants’ due process rights and Turkmenistan’s own law.”⁴⁶⁰

(b) Respondent’s Position

603. Respondent denies that Claimants’ assets were expropriated as “[t]here cannot be an expropriation claim without the taking of identifiable property or property rights by the sovereign acts of a State.”⁴⁶¹ Respondent argues that while Claimants repeatedly allege that Respondent took their “investment”, they do so without identifying the property, or property rights, of which they were allegedly deprived.⁴⁶²

604. Respondent contends that for expropriation, Claimants must “show that some property or property right under local law, tangible or intangible, was interfered with so substantially by the sovereign acts of Respondent that it was rendered valueless.”⁴⁶³ Claimants have failed to do so. The interference with the property expropriated must also be “sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”⁴⁶⁴ This deprivation must be irreversible and permanent and must affect the entire

⁴⁵⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 731

⁴⁵⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 732

⁴⁶⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 733

⁴⁶¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 415

⁴⁶² Respondent’s Objections to Jurisdiction and Counter-Memorial § 416

⁴⁶³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 418

⁴⁶⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 421

investment.⁴⁶⁵ Respondent submits that Claimants also failed to provide any proper list of the assets that they claim were confiscated by Turkmenistan.⁴⁶⁶ Respondent further contends that “*Claimants have failed to establish that they were substantially and permanently deprived of property or a property right because of sovereign acts taken by Respondent.*”⁴⁶⁷

605. Respondent understands that Sehil, the company, is the property which Claimants allege was taken. This “*seems to fit with the damages analysis in the GT Report, submitted by Claimants, which purports to quantify ‘the reduction in the value of Sehil’, but actually takes all of Sehil’s projected future earnings, brings them to present day value, and then deducts only the value of certain equipment which Claimants claim separately in the Arbitration.*”⁴⁶⁸

606. Further, Respondent argues that “*Sehil*” is not an “*investment*” made in the territory of Turkmenistan, and it was not taken by the State. Sehil is a Turkish company controlled by Mr Çap.⁴⁶⁹ While Sehil opened a branch in Ashgabat, this branch did not possess separate legal identity from the Turkish company.⁴⁷⁰ To the extent that Claimants’ theory is not that “*Sehil*” as an entity was taken, but simply that it was “*prevented [...] from continuing operations in Turkmenistan*”, Respondent submits Claimants’ expropriation claim fails as a matter of law. This is because only property or property rights can be expropriated. Respondent explains that the ability to “*continu[e] operations in Turkmenistan*” is not a vested property right.⁴⁷¹

⁴⁶⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 421-422

⁴⁶⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 479

⁴⁶⁷ Respondent’s Rejoinder and Reply on Jurisdiction § 932

⁴⁶⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 416; Respondent’s Rejoinder and Reply on Jurisdiction §§ 439-441

⁴⁶⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 427

⁴⁷⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 427

⁴⁷¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 431; Respondent’s Rejoinder and Reply on Jurisdiction § 443

607. Respondent also contends that “*Claimants have not made any real attempt to establish any causal link between the demise of their business in Turkmenistan, and Sehil’s bankruptcy in Turkey.*”⁴⁷²
608. Further, Respondent argues that the Disputed Contracts are not assets capable of expropriation because pure contractual rights are not property rights.⁴⁷³ The legal authorities show that “*there can be no claim for expropriation in the absence of a vested right to engage in activities or exploit an asset. Absent such a vested right, it is immaterial that, up until that point in time, the investor had been successfully engaging in a business that was negatively affected or even eliminated as a result of the measure.*”⁴⁷⁴
609. With reference to Claimants’ contention that its “*investment*” includes State contracts (specifically the Disputed Contracts), Respondent submits that “*short-term, fixed price construction contracts do not establish a proprietary right to somehow ‘continue’ to do business in Turkmenistan*”. Respondent states: “*None of the Sehil Contracts granted long-term rights, such as building, owning and operating a project*”.⁴⁷⁵ These contractual arrangements, include the “*right to ‘be’ or to ‘operate’ in a country, or in this case, a right to bid on future contracts, is not an item of property which in itself has value which is available to meet debts, commitments or legacies.*” This right is therefore not susceptible to expropriation.⁴⁷⁶
610. Further, Respondent affirms that Claimants have been unable to identify an expropriatory act of Respondent.⁴⁷⁷ Respondent understands Claimants to be arguing that the following five categories of conduct constituted expropriatory acts:

- (i) Acts taken by Sehil’s Counterparties within the rubric of their Contracts that allegedly delayed and disrupted completion of the Disputed Contracts, such as payment delays and defaults;

⁴⁷² Respondent’s Rejoinder and Reply on Jurisdiction § 442

⁴⁷³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 433

⁴⁷⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 439

⁴⁷⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 440

⁴⁷⁶ Respondent’s Rejoinder and Reply on Jurisdiction § 452

⁴⁷⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 447

(ii) Acts connected to the operation of the Turkmen bureaucracy that also allegedly delayed and disrupted performance of works under the Contracts, such as restrictions on the procurement of materials within Turkmenistan and delays in processing visas;

(iii) The imposition of delay penalties and termination of certain Contracts by Sehil's Counterparties;

(iv) The decisions of the Arbitrage Court of Turkmenistan confirming the delay penalties and termination of certain contracts; and

(v) Allegations of harassment by Sehil's Contractual Counterparties, the Prosecutor General's Office, the Vice Presidents and other State organs.⁴⁷⁸

611. Respondent contends that all of the above acts arise either in the context of the contractual relationship between Sehil and its Counterparties,⁴⁷⁹ or are ordinary workings of the Turkmen bureaucracy and measures taken in the legitimate exercise of Turkmenistan's sovereign right to regulate,⁴⁸⁰ or taken by the Arbitrage Court of Turkmenistan as the forum chosen by the parties.⁴⁸¹

612. Respondent argues:

Even if Claimants could establish that their business in Turkmenistan was a property right capable of being expropriated, they would still have to show that there was a substantial and permanent deprivation of this venture caused by sovereign acts of Respondent. They have failed to do so. Claimants have at all times retained full ownership and control of Sehil, both the Turkish entity and its "business" in Turkmenistan. Not only does legal title to Sehil still formally remain with Mr. Çap and Mine Hatun Çap, but there is no evidence whatsoever that Respondent interfered with management's control over Sehil or its business in Turkmenistan. Mr. Çap and Sehil's executives continued to direct the day-to-day operations of Sehil in Turkey and Turkmenistan throughout 2010, including after

⁴⁷⁸ Respondent's Objections to Jurisdiction and Counter-Memorial § 448

⁴⁷⁹ Respondent's Objections to Jurisdiction and Counter-Memorial §§ 451, 463

⁴⁸⁰ Respondent's Objections to Jurisdiction and Counter-Memorial § 454

⁴⁸¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 470

*October 24, 2010 or November 3, 2010, the alleged dates of expropriation.*⁴⁸²

613. Respondent also submits that Claimants have failed to adduce evidence that the alleged indirect expropriation of Sehil were acts done “*to threaten, intimidate, [and] oust Claimants’ owner and executives*”.⁴⁸³ According to Respondent, the documents of the Prosecutor’s Office which Claimants present as proof of their harassment claim in fact required Sehil to take measures to remedy the slow pace of works for Contract No 57 – Health Center (900-person) and Contract No 58 – Cultural Center Complex; and gave notice to Sehil that it had to pay salaries to Sehil’s employees working on the State Energy Institute Building (Contract No 56).⁴⁸⁴ These letters were issued pursuant to the Prosecutor’s supervisory powers set out in the Law on the Prosecutor’s Office, including Article 55.⁴⁸⁵
614. As to the travel bans, Respondent says that Claimants have failed to demonstrate how these travel bans caused substantial deprivation of Sehil.⁴⁸⁶
615. Respondent denies that Claimants’ assets were expropriated when Turkmenistan seized and sealed Claimants’ offices, warehouse, equipment, computers, and documents in 2010.⁴⁸⁷
616. Respondent contends that Claimants have failed to identify the equipment and buildings that were allegedly taken. Respondent states:

⁴⁸² Respondent’s Rejoinder and Reply on Jurisdiction § 479

⁴⁸³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 472

⁴⁸⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 473

⁴⁸⁵ Article 55 provides that:

1. *A written order to eliminate violations of the law shall be issued by the prosecutor in those cases where the violation of laws may cause substantial harm to the rights and legitimate interests of citizen, government, enterprise, institution, organization, or that the violation is not corrected promptly.*
2. *An order shall be sent to the body or official causing the violation of law, or in accordance with the chain of command the superior body or official authorized to remedy the violation.*
3. *An order shall indicate which law is violated, the nature of the violation and specific proposals on measures to eliminate the violations.*
4. *An order shall be subject to immediate execution. The prosecutor shall be notified in writing regarding the execution of an order.*

⁴⁸⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 475

⁴⁸⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 476

*Vague references to “assets” or to “machinery, equipment and consumable items” or to “buildings” or to “Sehil’s premises, documents, computers, and equipment” do not suffice to identify the specific property that Claimants allege was expropriated, let alone establish that it belonged to Sehil, that it was located in Turkmenistan, and that it was interfered with by some act of Respondent.*⁴⁸⁸

617. The sealing of Claimants’ offices in Ashgabat was done by the Main State Tax Service pursuant to its powers under the Turkmen Tax Code.⁴⁸⁹ Respondent further explains that certain assets located at Sehil’s office and at the construction site for Contract No 58 were attached and sold pursuant to court proceedings instituted by third-party creditors of Sehil in Turkmenistan in order to satisfy Sehil’s debts.⁴⁹⁰
618. Respondent rebuts at length Claimants’ claims of expropriation, addressing, in turn, the tender process for Contracts Nos 44, 46, 51, 55, 57, 58, 62-65;⁴⁹¹ the fulfilment of administrative obligations – handover of construction sites, supply of cement and construction materials, issuance of visas;⁴⁹² the issue of payment delays;⁴⁹³ the additional works;⁴⁹⁴ the application of delay penalties and the termination of the Contracts;⁴⁹⁵ the alleged campaign of harassment;⁴⁹⁶ and travel restrictions.⁴⁹⁷
619. Respondent refutes Claimants’ assertions that there was no due process.⁴⁹⁸ It contends that Sehil had the opportunity to bring disputes to the Turkmen courts, pursuant to the Sehil Contracts, or challenge administrative decisions, yet it chose not to.⁴⁹⁹

⁴⁸⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 479

⁴⁸⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 497

⁴⁹⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 503

⁴⁹¹ Respondent’s Rejoinder and Reply on Jurisdiction §§ 503-560

⁴⁹² Respondent’s Rejoinder and Reply on Jurisdiction §§ 561-609

⁴⁹³ Respondent’s Rejoinder and Reply on Jurisdiction §§ 610-674

⁴⁹⁴ Respondent’s Rejoinder and Reply on Jurisdiction §§ 675-730

⁴⁹⁵ Respondent’s Rejoinder and Reply on Jurisdiction §§ 731-806

⁴⁹⁶ Respondent’s Rejoinder and Reply on Jurisdiction §§ 807-866

⁴⁹⁷ Respondent’s Rejoinder and Reply on Jurisdiction §§ 867-868

⁴⁹⁸ Respondent’s Rejoinder and Reply on Jurisdiction § 936

⁴⁹⁹ Respondent’s Rejoinder and Reply on Jurisdiction § 936

620. As to public purpose, Respondent contends that “*Claimants have failed to demonstrate that the Contractual Counterparties and State organs acted in bad faith*” and “[w]here a State organ acted in a sovereign capacity, they acted for the public interest”.⁵⁰⁰
621. As to compensation, Respondent explains that “[t]here is nothing unlawful about not calculating compensation in a case that involves no expropriation.”⁵⁰¹ In any case, Respondent argues that “*an expropriation is not rendered unlawful merely because payment of compensation has not yet been made.*”⁵⁰²

12. Is there a breach of the Fair and Equitable Treatment standard under the BIT?

(a) Claimants’ Position

622. Claimants argue that the actions and omissions of Respondent “*taken individually, let alone collectively, also constitute substantive and procedural breaches of the fair and equitable standard [FET]*”.⁵⁰³
623. Claimants contend that tribunals have identified six categories of obligations that are encompassed by the FET standard: a) the State must act consistently *vis-à-vis* an investor and cannot modify the legal framework when specific commitments have been made; b) the State must meet an investor’s legitimate expectations; c) the State must act in a transparent manner; d) the State must act in good faith; e) the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lack due process; and f) the State must ensure that there is a reasonable relationship of proportionality between the charge or weight imposed on a foreign investor and the aim sought to be realized by any expropriatory measure.⁵⁰⁴ Claimants explain that the FET standard should not be equivalent to the international minimum standard of treatment, as it is an autonomous

⁵⁰⁰ Respondent’s Rejoinder and Reply on Jurisdiction § 939

⁵⁰¹ Respondent’s Rejoinder and Reply on Jurisdiction § 940

⁵⁰² Respondent’s Rejoinder and Reply on Jurisdiction § 941

⁵⁰³ Claimants’ Memorial § 382

⁵⁰⁴ Claimants’ Memorial § 387

standard that goes beyond international minimum treatment standard as contained in customary international law.⁵⁰⁵

624. Claimants submit that Respondent breached the FET standard in five specific forms:

(i) Respondent’s Failure to Act Consistently, to Meet Claimants’ Legitimate Expectations and to Comply with its Contractual Obligations. Claimants explain that the protection of legitimate expectations is “*considered as the central pillar in the understanding and application of the FET standard.*”⁵⁰⁶ As such, Claimants submit that the “*expectation was obviously that the State would act in this manner at all times as this was required under the BIT and international law, and this even more so expected in light of the relationship of trust and confidence developed with Turkmenistan under President Niyazov. Respondent overall did so until the progressive shift that occurred during the era of President Berdimuhamedow.*”⁵⁰⁷

(ii) Respondent’s Failure to Act Transparently. Claimants submit that transparency forms part of the FET standard.⁵⁰⁸ Claimants argue that “*all laws and regulations were applied against Claimants via the acts and omissions*”⁵⁰⁹ of Respondent “*that lacked due process and transparency, and thus constitute an independent violation of the FET standard.*”⁵¹⁰

(iii) Respondent’s Harassment, Coercion, Abuse of Power and Respondent’s Failure To Act In Good Faith. Claimants explain that “*a violation of the FET standard does not require a showing of bad faith or malicious intent.*”⁵¹¹ However, this is an element that is taken into consideration by tribunals when assessing a breach of FET.⁵¹² Claimants refer to Respondent’s actions of intimidating and launching criminal proceedings against Claimants’ employees, including deporting some of them, imposing a travel ban on Claimants’ family members, conducting “*abnormal, disruptive and intimidating audits, inspections on working sites*”, imposing unjustified penalties and sealing Claimants’ assets. Claimants explain that, “[a]t the very least, there was an abusive and disproportional conduct, in violation of the good faith FET standard.”⁵¹³

⁵⁰⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 760

⁵⁰⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 775

⁵⁰⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 780

⁵⁰⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 787

⁵⁰⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 792

⁵¹⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 792, also at §§ 823-831

⁵¹¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 793, also at §§ 832-837

⁵¹² Claimants’ Reply and Counter-Memorial on Jurisdiction § 793

⁵¹³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 797

(iv) Respondent's Lack of Proportionality. Claimants explain that the acts and omissions of Turkmenistan "*are at very odds with the proportionality standard.*"⁵¹⁴ Claimants reject Respondent's submission that they have failed to demonstrate that proportionality is "*an independent source of obligation*".⁵¹⁵

(v) Respondent's Lack of Due Process as well as its Arbitrary, Grossly Unfair, Unjust, Idiosyncratic and Discriminatory Conduct. Claimants explain that Respondent's acts and omissions, "*taken individually, let alone collectively, lacked due process and were rather arbitrary, grossly unfair, unjust, idiosyncratic and discriminatory.*"⁵¹⁶ Claimants specifically give the example of default payments and delays, actions of the prosecutors and question "*why Respondent did not find necessary to look at or sanction the State organs that were causing, or at the very least contributing, to the project delays and financial problems of Claimants.*"⁵¹⁷ Claimants submit that this is sufficient to find a violation of the FET standard.

(b) Respondent's Position

625. Respondent argues that the BIT does not include FET as one of the legal obligations undertaken by the Contracting States with respect to each other's nationals. Respondent further explains that "*Claimants' fair and equitable treatment claim suffers from a lack of legal and factual precision, a characteristic in common with all of its claims.*"⁵¹⁸
626. Respondent affirms that there is wide support for the FET being equivalent of international minimum standard of treatment and there should be no departure from this approach "*absent any indication that the State parties to the treaty contemplated that a broader meaning would attach to the fair and equitable treatment standard.*"⁵¹⁹ Further, Respondent submits that Claimants' interpretation of FET is "*confusing*", as "[o]n the one hand, they agree that the minimum standard of treatment is an 'obligation' of the FET standard" and "[o]n the other hand, they seem to advocate for an interpretation that treats

⁵¹⁴ Claimants' Reply and Counter-Memorial on Jurisdiction § 801, also at §§ 838-842

⁵¹⁵ Claimants' Reply and Counter-Memorial on Jurisdiction § 801

⁵¹⁶ Claimants' Reply and Counter-Memorial on Jurisdiction § 803, also at §§ 843-851

⁵¹⁷ Claimants' Reply and Counter-Memorial on Jurisdiction § 803

⁵¹⁸ Respondent's Objections to Jurisdiction and Counter-Memorial § 513

⁵¹⁹ Respondent's Objections to Jurisdiction and Counter-Memorial § 514

the FET standard as a catch-all provision that can be breached by any conduct with which the investor is unhappy.”⁵²⁰

627. Further, Respondent argues that “*any inquiry into breaches of the FET standard must take into account the fact that a reasonable investor will investigate the host State and its laws, and negotiate for any contractual provisions or other assurances it believes necessary to secure against excessive business risk, and that when it agreed to the terms of the contract, it knew of and accepted the risks inherent in the contractual framework and applicable regulatory environment.*”⁵²¹ Respondent submits that this means that “[i]f the investor fails to carry out sufficient due diligence, and enters into a sector and a jurisdiction, and assumes the associated risks, it cannot then turn to the State and request indemnification if those risks materialize.”⁵²² As to the list of category of obligations under the FET presented by Claimants, Respondent cites several sources which indicate that this sets “*a standard that is ‘nearly impossible to achieve’.*”⁵²³

628. Specifically, Respondent replies to each alleged violation:

- i. Respondent’s Failure to Act Consistently, to Meet Claimants’ Legitimate Expectations and to Comply with its Contractual Obligations. Respondent submits that “[m]ere failure to meet an investor’s legitimate expectations does not violate the minimum standard of treatment in customary international law” unless there is “*a specific commitment by the state.*”⁵²⁴ Otherwise, this would “*deprive the state of its inherent sovereign right to regulate the conduct of business within its borders.*”⁵²⁵ Respondent explains that “*absent a specific and unambiguous promise or guarantee on the part of the State, for example in the form of a stabilization clause, an investor*

⁵²⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 520

⁵²¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 524

⁵²² Respondent’s Objections to Jurisdiction and Counter-Memorial § 524

⁵²³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 528; Respondent’s Rejoinder and Reply on Jurisdiction § 967

⁵²⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 532; Respondent’s Rejoinder and Reply on Jurisdiction §§ 967-981

⁵²⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 532

has no legitimate expectation that the regulatory framework applicable to its investment will not change.”⁵²⁶

- ii. Respondent’s Failure to Act Transparently. Respondent explains that “*standing alone, [this] is not a requirement of customary international law.*”⁵²⁷
- iii. Harassment, Coercion, Abuse of Power and Respondent’s Failure To Act In Good Faith. Respondent submits that “[a]lthough good faith is a well-established principle of public international law, it is of “negligible assistance” in interpreting the standard of fair and equitable treatment” and “[n]o tribunal has ever found a breach of the fair and equitable treatment standard by relying solely upon the principle of good faith.”⁵²⁸ On the other hand, Respondent explains, “*the standard of proof for allegations of bad faith is demanding indeed*” and “*Claimants have made no such demonstration here*”.⁵²⁹
- iv. Respondent’s Lack of Proportionality. Respondent submits that Claimants “*have not demonstrated that the ‘obligation’ of proportionality is “an independent source of obligation within the minimum standard of treatment” under customary international law*”.⁵³⁰
- v. Respondent’s Lack of Due Process as well as its Arbitrary, Grossly Unfair, Unjust, Idiosyncratic and Discriminatory Conduct. Respondent highlights that “*the concepts of arbitrariness, due process and procedural propriety 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*”.⁵³¹ As such, Respondent explains that “*the test for establishing a denial of justice is ‘a*

⁵²⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 532

⁵²⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 534; Respondent’s Rejoinder and Reply on Jurisdiction §§ 982-984

⁵²⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial § 536; Respondent’s Rejoinder and Reply on Jurisdiction §§ 985-993

⁵²⁹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 536

⁵³⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 545; Respondent’s Rejoinder and Reply on Jurisdiction §§ 999-1001

⁵³¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 538; Respondent’s Rejoinder and Reply on Jurisdiction §§ 994-998

demanding one” and “*encompasses only conduct that is ‘egregious and shocking,’ constituting a ‘gross maladministration of justice by domestic courts’*” and “*mere misapplication of local law or judicial error does not give rise to a denial of justice claim*”.⁵³²

629. Respondent also argues that Claimants failed to prove that contractual and administrative delays and disruptions resulted in a breach of the FET standard.⁵³³

13. Is there a breach of the Full Protection and Security standard under the BIT?

(a) Claimants’ Position

630. Claimants submit that in addition to the FET obligations, Respondent was also obliged to provide Claimants’ investments with full protection and security (FPS), pursuant to the preamble of the BIT and Article II(2) of the United Kingdom-Turkmenistan BIT, as well as customary international law.⁵³⁴
631. Claimants contend that relevant FPS is “*an objective standard of vigilance and thus to require the State to afford the degree of protection and security that should be legitimately expected to be secured by a reasonably well-organized modern State*”.⁵³⁵ Claimants highlight that the concept of “*security*” does not “*refer to physical security alone*”⁵³⁶ and that some tribunals have considered the introduction of changes into a regulatory framework of undertakings and assurances as contrary to FPS.⁵³⁷
632. Claimants explain that Respondent breached its obligation to provide Claimants’ investment FPS directly through the acts and omissions of its organs. It is therefore liable under the BIT and international law because of its own affirmative harmful conduct directed towards Claimants.⁵³⁸

⁵³² Respondent’s Objections to Jurisdiction and Counter-Memorial § 542

⁵³³ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 555 et seq

⁵³⁴ Claimants’ Memorial § 399

⁵³⁵ Claimants’ Memorial § 400

⁵³⁶ Claimants’ Memorial § 403

⁵³⁷ Claimants’ Memorial § 405

⁵³⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 858

633. Further, even if the Tribunal considers that the FPS standard is limited to physical protection only, Claimants state that Respondent cannot avoid liability since the case at hand presents elements of physical harm both to Mr Çap and Sehil’s executives, and to Claimants’ assets.⁵³⁹

(b) Respondent’s Position

634. Respondent emphasises that the BIT contains no FPS guarantee. Further, Respondent submits that Claimants’ claim with respect to the FPS standard breach fails on the merits.⁵⁴⁰

635. As to the content of the FPS standard, Respondent submits that “*FPS 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, a point with which Claimants agree*”.⁵⁴¹ As such, FPS “*does not subject States to strict liability for any loss suffered by an investor, and it does not constitute an insurance policy against the consequences of an investor’s own negligence, poor performance, misconduct or bad luck*”. As such, Respondent explains that “[t]he essential question is whether the State exercised due diligence to the extent ‘reasonable under the circumstances’ ”.⁵⁴²

636. Respondent also submits that the FPS standard concerns physical protection of investments. This is because it “*is necessary 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*”.⁵⁴³

637. Respondent further explains that even if the BIT contained an FPS provision, it:

would not have had an obligation to (i) prevent the Contractual Counterparties from conducting site inspections, (ii) abstain from enquiring into whether a company doing business in its jurisdiction was in breach of its tax code, (iii) abstain from enforcing its labor laws or laws

⁵³⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 870

⁵⁴⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 795-796

⁵⁴¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 798

⁵⁴² Respondent’s Objections to Jurisdiction and Counter-Memorial § 798

⁵⁴³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 801; Respondent’s Rejoinder and Reply on Jurisdiction § 1308

*on civil obligations, (iv) abstain from implementing its criminal laws, and (v) prevent third-party creditors from seeking satisfaction of their debts.*⁵⁴⁴

638. Respondent also rejects Claimants’ submission that a breach of FET triggers a breach of the FPS standard.⁵⁴⁵

14. Is there a breach of the Protection against Arbitrary, Unreasonable and Discriminatory Measures under the BIT?

(a) Claimants’ Position

639. Claimants submit that Respondent is under a specific obligation to ensure that Claimants’ investment is free from unreasonable and arbitrary measures. This is pursuant to Article II(2) of the United Kingdom-Turkmenistan BIT and customary international law.⁵⁴⁶

640. Claimants argue that *“the acts and omissions of Respondent [...] which amount to violations of the fair and equitable treatment standard, also constitute a violation of the standard of reasonableness and non-discrimination and non-arbitrariness with the same causation.”*⁵⁴⁷ Claimants explain that *“even assuming arguendo that the Tribunal does not consider that the acts and omissions of Respondent which amount to violations of the FET standard also constitute a violation of the standard of non-impairment clause, Claimants contend that a breach of the non-impairment clause certainly does amount to a breach of the FET.”*⁵⁴⁸

641. Claimants further explain that *“the underlying reason of these discriminatory measures is irrelevant”* and *“[w]hat matters is the impact of such measures”*.⁵⁴⁹

⁵⁴⁴ Respondent’s Rejoinder and Reply on Jurisdiction § 1317

⁵⁴⁵ Respondent’s Rejoinder and Reply on Jurisdiction § 1319

⁵⁴⁶ Claimants’ Memorial § 408

⁵⁴⁷ Claimants’ Memorial § 411

⁵⁴⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 882

⁵⁴⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 893

(b) Respondent's Position

642. Respondent submits that there is no obligation under the BIT to ensure that Claimants' investment is free from unreasonable and arbitrary measures.⁵⁵⁰
643. Respondent contends that "*Claimants misrepresent the standard required for proving arbitrariness*".⁵⁵¹ Respondent states that it has demonstrated "*that Claimants' contractual claims are unfounded and do not give rise to a breach of the BIT*" and that "*Claimants have also failed to establish that these purported contractual breaches impaired their 'business' in Turkmenistan*".⁵⁵²
644. Further, Respondent also submits that it "*is not entirely clear if Claimants' argument is asserted as a violation of the MFN clause in Article II(2) of the BIT or as a violation of the non-impairment obligation they seek to import from the U.K.-Turkmenistan BIT*".⁵⁵³ In any case, Respondent submits, "[p]roving the existence of discriminatory measures under the non-impairment obligation requires a similar high standard: Claimants must prove whether there has been any "*capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors*"".⁵⁵⁴ Respondent concludes that "*Claimants have utterly failed to meet their burden*".⁵⁵⁵

15. Is there a breach of the Umbrella Clause under the BIT?

(a) Claimants' Position

645. Claimants contend that Respondent was required to observe its particular undertakings relating to Claimants' investments by virtue of Article II(2) of the BIT and the umbrella clause contained in Article II(2) of the United Kingdom-Turkmenistan BIT.⁵⁵⁶

⁵⁵⁰ Respondent's Objections to Jurisdiction and Counter-Memorial § 807

⁵⁵¹ Respondent's Rejoinder and Reply on Jurisdiction § 1328

⁵⁵² Respondent's Rejoinder and Reply on Jurisdiction § 1330

⁵⁵³ Respondent's Rejoinder and Reply on Jurisdiction § 1335

⁵⁵⁴ Respondent's Rejoinder and Reply on Jurisdiction § 1337

⁵⁵⁵ Respondent's Rejoinder and Reply on Jurisdiction § 1341

⁵⁵⁶ Claimants' Memorial § 413

646. In proving a breach of the umbrella clause, Claimants submit that “*it is not necessary for the State to have abused its sovereign power in the violation of its obligations*”.⁵⁵⁷ Claimants state that Turkmenistan entered into the Disputed Contracts for the purpose of the umbrella clause “*because all of Sehil’s contractual counterparties shall be considered as organs of the State under international law*” and “*their conduct is thus attributable to Respondent, regardless of the distinction between commercial acts and sovereign acts*”.⁵⁵⁸
647. Claimants also reject Respondent’s argument that the umbrella clause “*cannot elevate mere contractual obligations of a commercial nature into treaty obligations and similarly cannot elevate breaches of contractual obligations into breaches of international law*”.⁵⁵⁹ Claimants explain that “*the question of whether or not an umbrella clause can elevate violations of investment contracts to the level of international law is an issue of treaty interpretation*” and, as such, “*this Tribunal must apply Article 31, paragraph 1 of the VCLT, which ... requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*”. Furthermore, the “*umbrella clauses should be interpreted in accordance with the cardinal rule of interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless, according to the maxim of effet utile*”.⁵⁶⁰

(b) Respondent’s Position

648. Respondent submits that “*Claimants’ umbrella clause claim cannot be sustained because the governing treaty in this case – the Turkey-Turkmenistan BIT – does not contain an umbrella clause. Claimants are not entitled to import one from another treaty.*”⁵⁶¹ Respondent adds that “*even if Claimants could import, for example, the umbrella clause*

⁵⁵⁷ Claimants’ Memorial § 414

⁵⁵⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 896

⁵⁵⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 898

⁵⁶⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 902

⁵⁶¹ Respondent’s Objections to Jurisdiction and Counter-Memorial § 772

*contained in Article 2(2) of the U.K.-Turkmenistan BIT, Claimants have failed to show that Respondent violated any obligations under that provision.”*⁵⁶²

649. Respondent submits that both obligations - payment obligations and the provisions relating to a variation in Sehil’s scope of work – which Claimants claim Respondent has violated, fail as a matter of fact.⁵⁶³

16. Damages claimed by Claimants

650. Based on the breaches asserted above, Claimants request the Tribunal to award damages which reflect their losses, including material damages, i.e. loss of profits, loss of business opportunities, loss of enterprise value, as well as moral damages.⁵⁶⁴
651. As to the material damages, Claimants submit that the BIT sets forth a standard of compensation in the event of a lawful expropriation.⁵⁶⁵ However, when it comes to unlawful expropriation, Claimants submit that the compensation due for such act must be determined pursuant to principles of international law set forth in the ILC Draft Articles on State Responsibility.⁵⁶⁶ In particular, Article 31 of the ILC Draft Articles on State Responsibility imposes an obligation on States “*to make full reparation for the injury caused by their internationally wrongful act*”,⁵⁶⁷ where a compensable injury includes “*any damage, whether material or moral, caused by the internationally wrongful act*”.⁵⁶⁸

⁵⁶² Respondent’s Objections to Jurisdiction and Counter-Memorial § 772

⁵⁶³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 788

⁵⁶⁴ Claimants RfA § 145

⁵⁶⁵ Claimants’ Memorial § 428; In case of lawful expropriation, Article III(2) *in fine* of the BIT provides that “[c]ompensation shall be equivalent to the real value of the expropriated investment immediately before the expropriatory action was taken or became known.”

⁵⁶⁶ Claimants’ Memorial § 429

⁵⁶⁷ Claimants’ Memorial §§ 428-429; Exhibit CLA-175, ILC Draft Articles on State Responsibility, Article 31(1): “*The Responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*”

⁵⁶⁸ Exhibit CLA-125, ILC Draft Articles on State Responsibility, Article 31 (2)

Claimants explain that the “*fair market value*” is the standard of compensation commonly applied for the assessment of damages in cases of expropriations.⁵⁶⁹

652. Claimants further submit that as to the breaches of Respondent’s obligations, some arbitral tribunals have applied the principle of full reparation and others have explicitly used the standard of fair market value in determining damages for violations of FET.⁵⁷⁰
653. Claimants also highlight that Article III(2) of the BIT provides that the value of the compensation shall be calculated “*before the expropriatory action was taken or became known.*” As such, “*tribunals have considered that, in cases of creeping expropriation, the date of expropriation is not necessarily the date of the first or of the last expropriatory event, but can be any point in time within that range when the owner has been irreversibly deprived of its property.*”⁵⁷¹ Claimants state that the exact date on which this moment is deemed to have occurred is left to the Tribunal’s discretion, but that

*the “moment of expropriation” (which goes to the question of liability) should always be distinguished from the “moment of valuation” (which goes to the question of damages), and this “moment of valuation” should be the date on which assessing the fair market value of a foreign investment for purposes of calculating compensation will enable a tribunal to give full effect to the principle of full reparation set forth in Chorow Factory.*⁵⁷²

654. Claimants claim to have suffered the following material damages as a result of Respondent’s breaches: loss of enterprise value, losses on confiscation of assets, outstanding claims on the Disputed Contracts and alternative claim for loss of opportunity.⁵⁷³ Additionally, Claimants submit that they must be compensated for moral damages for:

(i) the pain, stress, shock, anguish, humiliation and shame that Mr. Muhammet Çap has suffered as a result of Turkmenistan’s acts and omissions in relation to his investment, which forced him to leave the country for his own safety and the subsequent and threats to Mr.

⁵⁶⁹ Claimants’ Memorial §§ 430-431; Claimants’ Reply and Counter-Memorial on Jurisdiction § 935

⁵⁷⁰ Claimants’ Memorial § 432

⁵⁷¹ Claimants’ Memorial § 434

⁵⁷² Claimants’ Memorial § 434

⁵⁷³ Claimants’ Memorial § 436

*Muhammet Çap and his family; (ii) the harm to Mr. Muhammet Çap and Sehil's reputation; and/or (iii) the harassment of Sehil's employees.*⁵⁷⁴

655. Claimants reject Respondent's submission as to the absence of (i) the alleged lack of causation; and (ii) the alleged contributory fault of Claimants. Claimants contend that they have shown that each category of harm they suffered was the result of Respondent's multiple breaches of the BIT,⁵⁷⁵ and that they have not contributed to the damage they suffered in any way.⁵⁷⁶
656. Respondent submits that all Claimants' claims fail "*at the very first hurdle: causation*".⁵⁷⁷ Respondent explains that under international law, a State is only required to compensate an investor for an injury caused by its internationally wrongful act.⁵⁷⁸ Causation is also a condition under Article 422 of Turkmenistan Civil Code.⁵⁷⁹
657. Respondent asserts that "*Claimants' own mismanagement and Sehil's failure to perform its obligations under the Sehil Contracts were the proximate cause of the Claimants' misfortunes.*"⁵⁸⁰ Accordingly, "*Claimants cannot be permitted to assess their damages as if the Sehil Contracts were properly performed*".⁵⁸¹ The principle of contributory fault is reflected in Article 39 of the ILC Draft Articles on State Responsibility and Article 425 of the Turkmenistan Civil Code:⁵⁸²

*"if the loss of an investment is wholly or partially caused by claimant's bad business judgment, then the respondent State should not be held liable for the relevant part of the loss" which is attributable to the claimant.*⁵⁸³

658. Respondent challenges the calculation of Claimants' damages for the following reasons:

⁵⁷⁴ Claimants' Memorial § 481; Claimants' Reply and Counter-Memorial on Jurisdiction §§ 1006-1062

⁵⁷⁵ Claimants' Reply and Counter-Memorial on Jurisdiction § 939

⁵⁷⁶ Claimants' Reply and Counter-Memorial on Jurisdiction §§ 939-944

⁵⁷⁷ Respondent's Objections to Jurisdiction and Counter-Memorial § 815

⁵⁷⁸ Respondent's Objections to Jurisdiction and Counter-Memorial § 815

⁵⁷⁹ Respondent's Objections to Jurisdiction and Counter-Memorial § 818

⁵⁸⁰ Respondent's Objections to Jurisdiction and Counter-Memorial § 821

⁵⁸¹ Respondent's Objections to Jurisdiction and Counter-Memorial § 821

⁵⁸² Respondent's Objections to Jurisdiction and Counter-Memorial §§ 822-823

⁵⁸³ Respondent's Objections to Jurisdiction and Counter-Memorial § 826

- a. First, Respondent argues that Claimants’ claimed material damages are unrealistic, result in an overall damage claim which is remote, are speculative and uncertain,⁵⁸⁴
 - b. Second, as to the outstanding claim on the Disputed Contracts, Respondent challenges the categorization of eight of the contracts considered completed by Claimants,⁵⁸⁵ the percentage of completion for five of the contracts,⁵⁸⁶ the amount claimed given evidence of confirmation of payments under Disputed Contracts,⁵⁸⁷ the fact that some contracts are terminated,⁵⁸⁸ the amount claimed given delay penalties and other deductions supported by court decisions and other documents.⁵⁸⁹
 - c. Third, Respondent explains that Claimants’ claim for confiscated assets fails to satisfy the requirements of proof, causation and mitigation, and that the methodology used is flawed.⁵⁹⁰
 - d. Fourth, concerning the loss of opportunity claim, Respondent submits that it is without legal and factual basis.⁵⁹¹
659. Additionally, Respondent submits that the Tribunal has no authority to award moral damages because Claimants’ claims for moral damages “*have nothing to do with the rights attached to that investment, such as personal injury claims, claims for emotional distress and claims for reputational damage*”⁵⁹² which is a requirement in order for the BIT and ICSID Convention protection to apply. Further, the quantum of Claimants’ moral damages is unjustified.⁵⁹³

⁵⁸⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 837-839
⁵⁸⁵ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1378-1386
⁵⁸⁶ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1387-1391
⁵⁸⁷ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1392-1394
⁵⁸⁸ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1395-1397
⁵⁸⁹ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1398-1399
⁵⁹⁰ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1422-1424
⁵⁹¹ Respondent’s Rejoinder and Reply on Jurisdiction §§ 1462-1469
⁵⁹² Respondent’s Objections to Jurisdiction and Counter-Memorial § 869
⁵⁹³ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 893-898

IV. RELIEF SOUGHT

660. Although it has remained significantly the same, the relief sought in this Arbitration, has changed from the point of view of separating the claims to which Mr Çap and Sehil respectively may be entitled. This was due to the change in representation of Claimant Muhammet Çap and Claimant Sehil in 2019.

661. The relief sought in the Parties' respective Second Post-Hearing Briefs are as follows:

662. Paragraph 100 of Mr Çap's Second Post Hearing Brief dated 22 January 2019⁵⁹⁴ states:

Claimant respectfully requests, that the Arbitral Tribunal:

- *Declare that Turkmenistan has breached its obligations towards Claimant under the Turkey-Turkmenistan BIT and international law, namely that:*
 - *Turkmenistan has committed an unlawful expropriation of Claimant's investment;*
 - *Turkmenistan has breached its obligation to treat Claimant and his investment fairly and equitably;*
 - *Turkmenistan has breached its obligation to treat Claimant and his investment in a reasonable and non-arbitrary manner;*
 - *Turkmenistan has breached its obligation to accord Claimant full protection and security; and*
 - *Turkmenistan has failed to comply with its specific undertakings towards Claimant.*
- *Order Turkmenistan to pay Claimant 97.5 percent of the damages in the amount of **USD 413,011,889** due to Turkmenistan's breaches of its obligations under the BIT and international law, which resulted in the taking of Claimant's investment and include:*
 - ***USD 188,368,000** for the loss of the enterprise value;*
 - ***USD 10,758,373** for the confiscation of assets;*

⁵⁹⁴ The reliefs sought here are very similar to those requested in Claimants' Memorial dated 10 December 2015, Rejoinder Memorial on Non-Bifurcated Objections to Jurisdiction and Reply on Respondent's Counterclaims dated 3 February 2017, and Post-Hearing Brief dated 27 June 2017. There are changes in the damages claimed which have been updated over time to reflect claimed accrued interest.

- *USD 121,770,424 for the outstanding receivables claim under the Disputed Contracts, divided as follows:*
- *USD 33,150,954 for 23 completed Contracts;*
- *USD 27,888,054 for 3 substantially completed Contracts; and*
- *USD 60,731,416 for 5 partially completed Contracts;*
- *USD 92,115,092 for reduced profit margin under the Disputed Contracts;*
- *Alternatively to the claim for reduced profit margin, should the Tribunal deem that Claimant cannot be entitled to compensation on the basis of a reduced profit margin, to award Claimant compensation on the basis of the loss of opportunity or chance of making these profits, which Claimant submit is 99% or any other figure the Tribunal deems appropriate;⁵⁹⁵*
- *Order Turkmenistan to compensate in the amount of USD 35,000,000 for the moral damages resulting from Turkmenistan’s breaches and declare that Claimant Mr. Çap is entitled to (i) 97.5 percent of the moral damages, assessed at USD 5 million, sought for Sehil’s reputational harm and the harassment of Sehil’s employees; and (ii) 100% of moral damages claim, assessed at USD 30 million, sought for the pain, stress, shock, anguish, humiliation, shame and reputational harm Mr. Çap has suffered as a result of Turkmenistan’s acts and omissions in relation to his investment, which forced him to leave the country for his own safety and the subsequent and threats to Mr. Çap and his family; and Turkmenistan’s acts and omissions in the bankruptcy proceeding, the effect of which was to disrupt and jeopardize the integrity of this case;*
- *Declare that Sehil’s bona fide creditors registered since September 2015 until this date (which excludes Turkmenistan and any organs thereof) are entitled to recover in full and in priority the amount ultimately upheld by the Turkish courts up to the USD 2 million claimed, to be deducted in priority from any amount due to Bankrupt Sehil provided that the amount allocated thereto under the Award is with interest and costs above USD 2 million;*
- *Declare that Claimant Mr. Çap is entitled to 100% of the costs of this arbitration incurred as of this date as well as any further share that would be paid by Mr. Çap, and order Respondent to pay 100% of the same, including all of the fees and expenses of the arbitrators and ICSID, plus all of the fees and expenses of Bredin Prat, Derains & Gharavi and Akıncı Law*

⁵⁹⁵ Claimant Cap Second PHB, footnote 232: “Claimants hereby confirm that their alternative loss of opportunity claim relates to their main reduced profit margin claim and that the amount should be USD 91,193,941.”

Office, experts and consultants, as well as Claimant Mr. Çap's expenses in pursuing this arbitration;

- *Order Turkmenistan to pay compound interest at a rate of US dollar LIBOR rate for 6 months +2 compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant;*
- *Order any other and further relief as the Arbitral Tribunal shall deem appropriate;*
- *Dismiss Respondent's Counterclaims in their entirety as well as its request for an order for costs and expenses, including legal fees; and*
- *Order that all amounts awarded to Claimant Mr. Çap are to be made without any offset for any sums that might become due by Sehil Bankrupt to Turkmenistan or to any other third parties.*
- *Claimant reserves his right to amend or supplement the present Post-Hearing Brief and to make additional claims and to request such alternative or additional relief as may be appropriate, including conservatory, injunctive or other interim relief.*

663. Paragraph 63 of Claimant Sehil's Post-Hearing Reply dated 22 January 2019 states:

For all the reasons set forth in this submission, as well as previous [sic] evidence and arguments submitted, Claimant Sehil respectfully requests that the Tribunal:

- *Declare that Respondent has breached its obligations under BIT and customary international law against Claimant Sehil;*
- *Order Respondent to pay USD 413,011,889.00 to Claimant Sehil due to the aforementioned breaches;*
- *Order Respondent to pay the costs of this arbitration, including all legal fees, arbitrator expenses, ICSID and consultant fees as well as compound interest at a rate of US dollars LIBOR for 6 months + 2, compounded semi-annually, to be established on the above amount as of the date of these amounts are determined to have been due to Claimant Sehil; and*
- *Order any other and further relief as the Tribunal may deem appropriate.*

664. Paragraphs 95-97 of Respondent's Reply Post-Hearing Brief dated 22 January 2019 states:

In light of the foregoing and Respondent's prior submissions, Respondent respectfully requests that the Tribunal dismiss this case for lack of jurisdiction. Alternatively, if the Tribunal finds that it has jurisdiction, Respondent requests that the Tribunal dismiss all of Claimants' claims on the merits and award Respondent US\$69.5 million, plus interest, in connection with its counterclaims.

If the Tribunal upholds any of Claimant's claims and awards any damages, Respondent requests that the Tribunal determine which damages, under which heads of claim, are owed to Claimant Sehil and which are owed to Claimant Çap. In the event that any sums are awarded, these sums should be set off against Respondent's counterclaims.

Respondent further requests that Claimants 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 Respondent in this case.

V. TRIBUNAL'S ANALYSIS AND CONCLUSIONS

1. **Do Claimants' claims arise out of an "investment" within the meaning of Article 25 of the ICSID Convention and of Article I(2) of the BIT?**

665. The issue to be determined here is whether the Tribunal has jurisdiction *ratione materiae* over the dispute, i.e. do Claimants' claims arise out of an "investment" under Article 25 ICSID Convention and Article I(2) BIT. The Tribunal restates the parties' arguments and determines this issue separately below.

666. Article 25 ICSID Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

667. Article I(2) BIT is set out at § 422 above. In this context, Claimants contend they established a business venture in Turkmenistan and set up a branch office and a subsidiary

company, reinvested profits to acquire new materials and secure new business, brought intellectual property rights in the form of their knowledge of construction operations, and received concessions by the contracts concluded with the State-owned or -controlled entities.

668. Article 25 ICSID Convention contains neither a definition of “*investment*” nor the criteria needed for an “*investment*” within the meaning of the ICSID Convention. On the other hand, the BIT provides a definition of “*investment*” and a non-exhaustive list of “*assets*” which are included in this notion pursuant to Article I(2) BIT.
669. The Parties have supported their arguments with cases and academic resources discussing the notion of “*investment*” under the ICSID Convention and, more generally, in investment treaty arbitration.
670. The Tribunal has looked first at the nature of the assets owned and controlled by Mr Çap and Sehil in Turkmenistan, and then at the activities to which these assets related.
671. Claimants’ assets in Turkmenistan comprised three principal categories.
672. First, there was an infrastructure which enabled Claimants to undertake new construction and refurbishment contracts for State organs and State-owned companies in Turkmenistan. In fact, Sehil entered into 63 construction contracts over a period of around nine years, from 2000 to 2009. The face value of these contracts was over USD 800 million. Thirty-one of these contracts are not disputed; they were completed and paid for with little or no complaints. The remaining 32 contracts also involved significant work, much of which was carried out or even completed, but there are disputes between the parties concerning performance, timeliness in completion and payments due. The value of the disputed contracts is over USD 700 million.
673. Even if considered individually, where new construction and refurbishment contracts do not amount to an investment, a series of increasingly large contracts over several years indicates commitment and establishment in Turkmenistan. This is evidenced not only through extensive work carried out but also new and repeated contracts being successfully

tendered for and performed work being acknowledged by the representatives of Respondent.

674. Second, to be able to enter into these contracts, Claimants required manpower, expertise and commitment. Mr Çap brought with him to Turkmenistan several members of his family and other senior Sehil employees, including Sehil's general manager, Mr Gülçetiner. Sehil also hired over 1,000 local employees.
675. In addition, Sehil acquired significant construction equipment required for and which was used for the various construction projects. This included mixers, excavators, tower cranes, concrete pumps, rollers, etc. Claimants contend that much of this equipment was stolen and/or destroyed at the time when Sehil alleges it and its officials were required to leave Turkmenistan.
676. Third, Mr Çap and Sehil first came to Turkmenistan in 1993. In 1998, Mr Çap opened a construction supplies business in Turkmenistan which operated for more than five years.
677. In December 2003, Sehil Turkmen, a separate legal entity, was incorporated in Turkmenistan, with Sehil, the Turkish company, as the sole shareholder. This was to comply with local laws and complete necessary administrative tasks, such as entering into a lease for Sehil's offices in Ashgabat and opening bank accounts. Sehil Turkmen was not party to the Sehil Contracts.
678. In 2000, Sehil first entered into contracts with State organs and State-owned companies.
679. Further, Claimants used income and profits earned from the projects in Turkmenistan to invest in new and additional equipment, to seek more business in Turkmenistan and to engage additional employees.
680. In this context, the Tribunal need not make any decision concerning whether Sehil's ability to undertake construction projects amounts to intellectual property rights. However, the Tribunal notes that to undertake construction work of the kind covered by the Contracts subject to this Arbitration, Claimants required the knowledge, skill and experience necessary to undertake these projects.

681. In the Tribunal's view, Claimants made a contribution in Turkmenistan. They did not visit Turkmenistan just for one or two projects. They made a commitment which they honored for around nine years and during which they entered into 63 contracts with State-owned or -controlled entities. In addition, in the Tribunal's view, given that Claimants' overall contracts' value exceeded USD 800 million, their having engaged over 1,000 of local Turkmen employees, and their renting of office and other facilities, there can be little doubt that Claimants made a significant commitment and contribution in Turkmenistan. Whatever the reasons for the ultimate breakdown of the relationships and termination of the Disputed Contracts, this cannot take away from the nature of the investment and commitment of Mr Çap and Sehil in Turkmenistan.
682. For these reasons, the Tribunal concludes that Claimants had an investment in Turkmenistan that satisfies both Article 25 ICSID Convention and Article I(2) BIT.

2. Are Claimants the owners of the asserted claims?

683. Respondent's challenge to the Tribunal's jurisdiction under Article 25 ICSID Convention is based on the presence of Claimants' third-party funding and their refusal to disclose the Funding Agreement. The first question to be answered is whether there was an assignment of rights by Claimants by virtue of the existence of the third-party funding. If the answer is positive, the next question is whether the assignment of Claimants' claims deprives the Tribunal of its jurisdiction under Article 25 of the ICSID Convention and Article VII of the BIT.
684. Article VII BIT provides for the settlement by arbitration of "[d]isputes between one of the parties and one investor of the other party". In the context of this case, the Contracting State is Turkmenistan, and the investor is from Turkey (the other Contracting State). Both Mr Çap and Sehil are Turkish nationals and so have *locus standi* under the BIT. However, Respondent contends that Claimants have assigned their claims to La Française, a Luxembourg third-party funder, who is the real claimant in this case. For this reason, the Tribunal does not have jurisdiction in respect of the claims in this Arbitration.

685. On several occasions during the course of this Arbitration Respondent sought information from Claimants concerning the existence and name of the third-party funder and to receive a copy of the Funding Agreement.⁵⁹⁶ This was to determine whether Claimants remained the owners of the claims. Claimants consistently refused to provide a copy of the Funding Agreement.

686. Following an Order from the Tribunal dated 3 November 2015, in the context of Respondent's request for security for costs, Claimants declined to provide the Funding Agreement on the basis that it is

*a privileged document that contains not only confidential information, notably regarding the percentages of the success fee to be paid to the fund, and indirect assessment of the case, but also affects elements of claimant's legal strategy regarding the proceeding, in particular in the event of settlement negotiations.*⁵⁹⁷

687. However, Claimants provided an affidavit dated 12 November 2015 from Mr Guy Lepage and Mr Alain Grec on behalf of La Française detailing the provisions of the Funding Agreement "*directly relevant to the terms and conditions of (i) the costs borne by La Française and (ii) the circumstances under which the Fund can withdraw from the funding arrangement*".⁵⁹⁸

688. Following the Tribunal's letter dated 29 July 2016, Claimants provided an affidavit from Dr Hamid Gharavi, Claimants' lead counsel, and a second affidavit from Mr Guy Lepage and Alain Grec on behalf of La Française.

689. In his affidavit dated 27 September 2016,⁵⁹⁹ Dr Gharavi stated, in pertinent part:

3. In my capacity as authorized legal representative of Claimants in the Arbitration Proceedings, I confirm that, on September 29, 2011, Claimants entered into an agreement with La Française IC Fund Sicav-

⁵⁹⁶ For example, in Procedural Order No 3, § 13, of 12 June 2015, the Tribunal ordered Claimants to "*confirm to Respondent whether its claims in this arbitration are being funded by a third-party funder, and if so [...] the name or names and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any success that Claimants may achieve in this arbitration.*"

⁵⁹⁷ Derains & Gharavi letter dated 12 November 2015, § 13

⁵⁹⁸ Exhibit C-92

⁵⁹⁹ Exhibit C-600

Fis (the “Fund”) pursuant to which the Fund agreed to bear all of Claimants’ costs and expenses related to the Arbitration Proceedings (the “Funding Agreement”) in exchange for a share of any amounts recovered by Claimants pursuant to any Award or Settlement Agreement.

[...]

5. The Funding Agreement does not, in any circumstances, provide for any direct, indirect or de facto assignment of the claim, nor does it create joint ownership of the claim, or any part of the claim by the Fund and Claimants, nor a common legal interest in the claim, or any part of the claim between the Fund and Claimants.

6. The Funding Agreement does not contain any provision or mechanism by which the Fund or any affiliate of the Fund automatically or at its option becomes the owner of the claim in law or in equity, or otherwise is empowered to exercise control over, or have governance rights over, the claim.

690. In their second affidavit dated 27 September 2016, Mr Lepage and Mr Grec confirmed that under the Funding Agreement, La Française had “agreed to bear all of Claimants’ costs and expenses” relating to this Arbitration “in exchange for a share of any amounts recovered by Claimants pursuant to any Award or Settlement Agreement.”⁶⁰⁰ They stated further in pertinent part:

3. We confirm that the Funding Agreement does not, in any circumstances, provide for any direct, indirect or de facto assignment of the claim, nor does it create joint ownership of the claim, or any part of the claim by the Fund and Claimants, nor a common legal interest in the claim, or any part of the claim between the Fund and the Claimants.

4. The Funding Agreement does not contain any provision or mechanism by which the funds or any affiliate of the Fund automatically or at its option becomes the owner of the claim in law or in equity, or otherwise is empowered to exercise control over, or have governance rights over, the claim.

691. Respondent has presented no evidence to show or even suggest that Claimants are no longer the proper owners of the claims in this case and that they have been replaced in fact by La Française. By contrast, Claimants have provided an affidavit from Dr Gharavi and two affidavits from officials on behalf of La Française with assurances that, although La

⁶⁰⁰ Exhibit C-601, § 2

Française is entitled to a share in any amounts recovered by Claimants in this Arbitration, there has been no assignment of Claimants' rights to La Française. Furthermore, the Tribunal is not persuaded that Claimants' failure to disclose the full Funding Agreement following the Tribunal's directions to that end, justifies a conclusion that Claimants had assigned their claims to La Française and are no longer the owner of the claims in this Arbitration, absent other evidence.

692. Accordingly, this objection to the Tribunal's jurisdiction is rejected.

3. Has the Tribunal jurisdiction over Claimants' claims for breach of customary international law and Turkmenistan's foreign investment laws

693. The question here is whether the Tribunal has jurisdiction over claims based on customary international law. If the answer to this question is affirmative, it has to be clarified what "*customary international law*" specifically encompasses.

694. The Tribunal notes that Claimants have stressed that "*they do not rely on self-standing claims based on Turkmenistan's foreign investment laws. Rather Claimants contend that the provisions of such Laws are relevant to the extent that domestic law is applicable.*"⁶⁰¹

695. From the outset, it is worth recalling that the existence of substantive customary rights does not create jurisdiction or a separate cause of action. The legal nature of a norm is to be distinguished from the issue of jurisdiction. Jurisdiction needs to be *established* under an applicable instrument, regardless of the nature of the norms that may be invoked by a party.

696. The Tribunal is mindful that investment tribunals may refer to principles and rules of customary international law when interpreting and applying the investment arbitration standards contained in an investment treaty, for example in determining the proper standard

⁶⁰¹ Claimants' Reply and Counter-Memorial on Jurisdiction § 491

for compensation⁶⁰² or in establishing the Contracting Parties' international responsibility.⁶⁰³

697. Even if the Tribunal were to assert jurisdiction over breaches of customary international law, Claimants have failed to substantiate their argument that standards such as full protection and security or FET are part of customary international law.

4. Are Claimants' claims (i) Treaty claims that fall within the jurisdiction of this Tribunal or (ii) contractual disputes which do not?

698. The question to be determined here is whether the claims brought by Claimants are contractual in nature, in which case they should be determined in the Arbitrage Courts (or ICC arbitration for Contract No 33), or if the claims extend to breaches under the BIT. Respondent contends Claimants' claims are contractual in nature and therefore outside of the Tribunal's jurisdiction.

699. The Tribunal's jurisdiction is based on Article VII(1) BIT which provides that the Tribunal has jurisdiction over disputes "*between one of the Parties and one investor of the other Party, in connection with his investment.*" This jurisdictional challenge is considered in this context.

700. It is accepted that the same set of facts may have consequences at the international and contractual levels. The situation can become even more complicated when, as in this case, the protected investment under an investment treaty is a domestic contract governed by the law of the host State.⁶⁰⁴

701. The Tribunal acknowledges that it should not accept jurisdiction where a dispute is really a contractual dispute disguised as a treaty claim. On the other hand, "*a forum selection*

⁶⁰² CLA-203, *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/6, Award, 2 October 2006, § 483 ("*ADC v Hungary*").

⁶⁰³ Exhibit RLA-90, *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, § 378 (with respect to the state of necessity)

⁶⁰⁴ Respondent's Objections to Jurisdiction and Counter-Memorial § 326

*clause contained in a contract between the investor and the host State does not affect the competence of an ICSID tribunal based on a treaty.”*⁶⁰⁵

702. It follows that claims based on contractual performance are not necessarily excluded from jurisdiction under a BIT. As stated by the tribunal in *Impreglio v Pakistan*, “*the fact that a breach may give rise to a contract claim does not mean that it cannot also - and separately - give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct and necessary require different enquiries.*”⁶⁰⁶ Similarly, in *Bayindir v Pakistan*⁶⁰⁷ the tribunal stated that “*when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty.*”⁶⁰⁸ To determine whether it is dealing with a contract or a treaty claim, the tribunal must identify the “*fundamental basis of the claim*”,⁶⁰⁹ i.e. “*whether the dispute, as it has been presented by the Claimant, is prima facie a dispute arising under the BIT.*”⁶¹⁰ It is a well-established principle that State responsibility for breach of international law is conceptually distinct from responsibility for breach of contract, since “*a State may breach a treaty without breaching a contract and vice versa*”.⁶¹¹
703. Although Claimants’ protected investment is constituted by a complex matrix of contracts, involving contractual rights and obligations, Claimants allege violations of the BIT resulting from the exercise of sovereign prerogatives by state organs.
704. In substance, Claimants’ allegations relate to actions and omissions that the Contractual Counterparties adopted in relation to the performance of the Contracts in dispute in breach

⁶⁰⁵ Exhibit CLA-252, C. H. Schreuer, *The ICSID Convention: A Commentary* (2nd ed. 2009), pp. 375-377, §§ 92, 100

⁶⁰⁶ Exhibit RLA-194, *Impregilo v Pakistan*, § 258

⁶⁰⁷ Exhibit CLA-255, *Bayindir v Pakistan* Decision on Jurisdiction

⁶⁰⁸ Exhibit CLA-255, *Bayindir v Pakistan* Decision on Jurisdiction, § 167. See similarly Exhibit CLA-283, *Azurix v Argentina*, Decision on Jurisdiction, § 76, where the tribunal stated: “*Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement ... to the extent that such issues are relevant to the breach of the obligations of the respondent under the BIT they cannot per se transform the dispute under the BIT into a contractual dispute.*”

⁶⁰⁹ Exhibit RLA-188, *Vivendi v Argentina* Decision on Annulment, § 101

⁶¹⁰ Exhibit CLA-283, *Azurix v Argentina* Decision on Jurisdiction, § 76

⁶¹¹ Exhibit RLA-188, *Vivendi v Argentina* Decision on Annulment, §§ 95-96; Exhibit CLA-283, *Azurix v Argentina* Decision on Jurisdiction, § 76; Exhibit RLA-194, *Impregilo v Pakistan*, § 258

of the State's treaty obligations, and allegations of actions taken by non-contracting State organs.

705. The Tribunal accepts it is insufficient to rely on Claimants' subjective labelling of their claims as treaty claims. The true nature of a claim and whether it is a treaty claim must be objectively determined. This involves considering whether the alleged treatment of an investment was an exercise of sovereign authority and violated international obligations binding on the State party to a BIT.
706. The Tribunal recognizes that the Disputed Contracts provided for the involvement of State organs in the approval, registration, entry into force, and the performance of the contract. It is therefore possible that they may have interfered in the execution of the Disputed Contracts at issue beyond what would normally be expected from a contracting party.
707. However, it is not enough to establish that there was an intervention from the State organs. For a treaty claim to exist, the action or omission attributable to the State must be characterized as a violation of an international obligation binding upon the State concerned.
708. Accordingly, without prejudice to the Tribunal's finding on the merits, it appears that the essence of Claimants' claims relates to the alleged violation of international obligations explicitly contained in the applicable BIT such as that relating to expropriation, or allegedly and implicitly imported into it through the MFN provision, such as fair and equitable treatment and the umbrella clause. For example, Claimants state that the State "*committed a series of independent breaches of the BIT and of international law which impaired Claimants' contractual performance and led to their ousting and the taking of their investment*",⁶¹² allegedly in violation of the expropriation clause of the Treaty. Likewise, Claimants state that Turkmenistan "*committed not only standalone BIT breaches per se but also, by their other acts and omissions, contractual breaches, which in turn constitute BIT breaches via the umbrella clause*".⁶¹³

⁶¹² Claimants' Rejoinder on Jurisdiction and Reply on Counterclaims § 93

⁶¹³ Claimants' Reply and Counter-Memorial on Jurisdiction § 516

709. The Tribunal has satisfied itself at this stage that Claimants have advanced Treaty claims over which the Tribunal has jurisdiction. However, Claimants' claims which relate to contract performance issues, such as for non- or late payments, prolongation costs, extensions of time, are outside the Tribunal's jurisdiction and are not to be determined in this Arbitration.

5. Has the Tribunal jurisdiction over Respondent's counterclaims and are they admissible?

710. The key question for the Tribunal under this head is whether Respondent's counterclaims come within the Tribunal's jurisdiction and should be determined by the Tribunal. There are two questions involved. First, whether under the BIT and ICSID Convention the Tribunal has jurisdiction to determine the counterclaims. Second, whether Respondent's counterclaims arise out of the same contractual issues and investment that is being determined in this Arbitration. Respondents state:

These counterclaims are asserted without prejudice to Respondent's jurisdictional objections that Claimants cannot assert breach of contract claims in this case, and that they do not even have qualifying "investments" for purposes of the ICSID Convention and the BIT. Respondent submits that, in the event the Tribunal decides to uphold jurisdiction over Claimants' claims, it must also consider Respondent's counterclaims relating to the same Sehil Contracts and purported "investments" that are the subject of the disputes submitted by Claimants.⁶¹⁴

711. Respondent has conditioned its counterclaims on whether the Tribunal finds that it has jurisdiction to determine Claimants' contractual claims. If the Tribunal decides to determine Claimants' contractual claims, then Respondent contends the Tribunal "*must also consider Respondent's counterclaims relating to the same Sehil Contracts and purported 'investments' that are the subject of the disputes submitted by Claimants*". By

⁶¹⁴ Respondent Rejoinder and Reply on Jurisdiction § 151

corollary, if the Tribunal decides that it does not have jurisdiction to determine the contractual claims of Claimants, then the Tribunal should not determine Respondent's counterclaims arising out of the same issues.

712. In this Arbitration, the Tribunal has decided that its jurisdiction is limited to claims arising out of the BIT to the exclusion of contractual claims for which the Parties agreed to the exclusive jurisdiction of the Arbitration Court of Turkmenistan.

713. The subject-matter of the present dispute is limited to international claims and excludes claims arising out of the Disputed Contracts. The Tribunal has not considered the contractual differences between the Parties arising from the Disputed Contracts. As the Tribunal has not accepted jurisdiction over Claimants' contractual claims, Respondent's condition for its counterclaims to be determined by the Tribunal is not satisfied. Accordingly, the Tribunal will not consider Respondent's counterclaims based on the same contractual arrangements. The Tribunal will only address the Disputed Contracts' claims in context of Claimants' expropriation claim. (See §§ 802- 969 below.) For this reason, the Tribunal's jurisdiction to determine Respondent's counterclaims is moot; the merits of the counterclaims are properly to be determined in the Arbitration Court of Turkmenistan.

714. For the above reasons, the counterclaims in this Arbitration, are rejected.

6. What law is applicable to the claims arising out of the Disputed Contracts?

715. The Tribunal looks first to the BIT and the ICSID Convention applicable to this Arbitration. The BIT contains no provision as to the applicable law.

716. Article 42(1) ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

717. In determining the issues in this Arbitration, the Tribunal looks at the nature of the issue to decide whether Turkmen law or international law (or both) are applicable. Where the claims specifically arise out of contractual obligations, the parties' expressed choice of law will be applicable, at the very least as the basis for interpreting the underlying contract. Where Turkmen law is applied, the Tribunal looks to the totality of the applicable Turkmen rules, including binding decision of the Arbitrage Court of Turkmenistan, if applicable.
718. The Tribunal will apply rules of international law when determining all issues relating to obligations under or alleged breaches of the BIT.

7. Which party has the burden of proof and what is the effect of the lack of evidence presented to the Tribunal?

719. The Tribunal needs to decide two questions under this head. First, who has the burden of proving the claims, and if such burden can, or should be shifted under certain circumstances.
720. Second, whether the Tribunal can and should draw negative, adverse or other inferences based on an alleged failure of Claimants to produce evidence⁶¹⁵ under the ICSID Arbitration Rule 34(3).
721. With regard to the first question, the Tribunal is of the view that the party that asserts a claim bears the burden of proving it. This includes producing the evidence to support the contention asserted. Thus, Claimants bear the burden of proving the claims they assert against Respondent, while Respondent bears the burden of proving the claims and defences it alleges against Claimants. However, the Tribunal also notes that there are instances where such burden of presenting evidence to prove an allegation can shift if certain circumstances are present.

⁶¹⁵ Respondent uses the term “*negative inferences*” and “*adverse inferences*” interchangeably: Respondent’s Rejoinder and Reply on Jurisdiction § 260

722. In this case, the Tribunal is asked to determine whether Claimants can shift the burden to produce evidence to Respondent because they have “*limited and incomplete documentation relating to this dispute in their possession*” caused by Respondent’s seizure of Claimants’ documents in 2010.⁶¹⁶ Although Claimants have relied on several investment arbitration cases in support of the argument to shift the burden of producing evidence to Respondent, the Tribunal does not consider these cases support Claimants’ argument, for the following reasons.
723. The question before the tribunal in *Rumeli v Kazakhstan* was not whether the burden should shift from claimant to respondent due to lack or incomplete evidence. Rather, the question was whether the circumstantial evidence submitted by the claimant was sufficient to prove its claims especially because the lack of further evidence was allegedly caused by respondent’s actions.⁶¹⁷ Thus, the tribunal made its decision on the basis of the evidence in the record.
724. Similarly, the tribunal in *Vivendi v Argentina* was not concerned with whether the burden should be shifted to respondent due to limited availability of evidence. Rather, the issue was whether the tribunal could still award damages despite the evidence being incomplete. The tribunal concluded it could because although incomplete, the evidence in the record was credible enough to show that loss was suffered.⁶¹⁸
725. Finally, the *Hassan Awdi v Romania* case is also not applicable in the circumstances of this case. There, the respondent agreed at the beginning of the proceedings that it would produce certain documents previously seized by the state authorities and relevant to the issues in dispute. On that basis, the tribunal established the schedule of pleadings.⁶¹⁹ Thus, there was no issue of burden shifting.

⁶¹⁶ Claimants’ Memorial § 14; Claimants rely on several cases to support their position: Exhibit CLA-2, *Rumeli v Kazakhstan*, § 444; Exhibit CLA-60, *Vivendi v Argentina* Award, §§ 8.3.16-8.3.19; and Exhibit CLA-122, *Hassan Awdi v Romania*, §§ 23-26.

⁶¹⁷ Exhibit CLA-2, *Rumeli v Kazakhstan*, §§ 441-446

⁶¹⁸ Exhibit CLA-60, *Vivendi v Argentina* Award, §§ 8.3.16-8.3.19

⁶¹⁹ Exhibit CLA-122, *Hassan Awdi v Romania*, §§ 23-26

726. In contrast, the Tribunal notes that it has been stated by some investment arbitration tribunals that no “*general principle [of law] exists in ICSID proceedings providing that ‘the party that is in a better position to prove a fact bears the burden of proof’*”.⁶²⁰ Rather, the tribunal in *Azurix v Argentina* considered “*the general principle in ICSID proceedings, and in international adjudication generally, to be that ‘who asserts must prove’, and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.*”⁶²¹
727. Further, the tribunal in *Al-Bahloul v Tajikistan* was faced with a similar factual situation as in the present case, although the question of burden shifting was not specifically raised. The claimant in that case submitted limited and incomplete evidence to substantiate its allegations, arguing that this was caused by the fact that a lot of the documents were still in the respondent State to which it had no access. The tribunal found that although the claimant may have had “*no or very limited access*” to documents located in the respondent State, “*this does not allow the Tribunal to make far-reaching assumptions to the detriment of Respondent.*”⁶²²
728. In this Arbitration, the Tribunal does not consider that Claimants’ reasons for incomplete evidence to support their allegations suffices to shift the burden of producing evidence to Respondent. The Tribunal recognizes that documents may have been seized in 2010 by Respondent. However, the Tribunal concurs with the tribunals in *Amco v Indonesia*, *William J. Levitt v Iran* and the *Knesivich Claim* that “*reasonably prudent investors are expected to keep business records outside of the host State as part of the ordinary course of business*”.⁶²³

⁶²⁰ Exhibit RLA-247, *Azurix v Argentina* Decision on Annulment, § 215

⁶²¹ Exhibit RLA-247, *Azurix v Argentina* Decision on Annulment, § 215

⁶²² Exhibit RLA-241, *Al-Bahloul v Tajikistan*, § 115

⁶²³ Exhibit RLA-424, *Amco v Indonesia*, § 90 (“[I]mportant documents such as those relating to the registration or the registerability of foreign exchange supposedly infused into the project were not submitted to the Tribunal by PT Amco; a reasonably prudent foreign non-resident investor may be expected in the ordinary course of business to keep copies of such documents outside the host State.”); Exhibit RLA-425, *William J. Levitt v Iran*, § 6 (“The failure to maintain virtually any records outside Iran is rather inexplicable in a corporation with experienced and sophisticated management.”); Exhibit RLA-426, *Knesevich Claim*, p. 155 (“It would seem reasonable to believe that at some time during that period, when private, international communication was

729. The Tribunal also notes that during the document production stage Claimants were shown to possess many documents relating to the Sehil Contracts. Claimants also received documents from Respondent, although they have questioned the responsiveness of most of these documents.

730. Further, it is generally established that there is a difference between a “*legal*” and “*evidential*” burden of proof. It is further provided by some academics and practitioners, and confirmed by investment arbitration decisions, that while the evidential burden of proof may shift back and forth,⁶²⁴ the legal burden should not. In fact, it is argued that “*the legal burden of proof never shifts: the claimant must prove all elements of its claims, and the respondent must prove all elements of its affirmative defences.*”⁶²⁵ This is because:

*Burden of proof, however closely related to the duty to produce evidence, therefore implies something more. It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.*⁶²⁶

731. For the above reasons, the Tribunal finds that Claimants bear the *prima facie* burden of proving their allegations by the presentation of evidence to support their contentions. By corollary, Respondent bears the burden of presenting the evidence to support and prove its allegations and defences. Thus, the Tribunal will reach its conclusions on the basis of all the evidence in the record.

732. As to the Tribunal’s powers to draw negative inferences from a party’s conduct, Article 34 ICSID Arbitration Rules provides:

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

quite free, the claimant would have received from his brother some written communication reflecting the acquisition of at least some of these shares of stock and something in writing by way of acknowledgement of the claimant’s interest therein. This would be the kind of record which, in such a transaction, a reasonably prudent businessman would be expected to retain.”)

⁶²⁴ Exhibit RLA-97, Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge University Press 2006) (“Cheng”), p. 329 (distinguishing between the burden of proof and burden of adducing evidence)

⁶²⁵ Exhibit RLA-422, Born, On Burden and Standard of Proof, pp. 46, 54

⁶²⁶ Exhibit RLA-97, Cheng, p. 329

(2) *The Tribunal may, if it deems it necessary at any stage of the proceedings:*

(a) *Call upon the parties to produce documents, witnesses and experts; and*

(b) *Visit any place connected with the dispute or conduct inquiries there.*

(3) *The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.*

733. Thus, the Tribunal considers that it does have the power to draw adverse inferences and decide on its reading of the evidence and arguments concerning the requested inferences. In the present case, both parties accuse the other of failing to produce certain evidence; only Respondent requests the Tribunal to draw “*negative inferences*”. If the Tribunal, when determining evidence, draws inferences, it will provide its reasons for doing so.

8. When is a State responsible for contracts entered into by State entities?

734. It is undisputed between the Parties that the BIT should be read in light of the general international law rules on attribution as codified by the ILC Articles on State Responsibility.⁶²⁷

735. Respondent denies being a party to any of the Disputed Contracts, arguing that international law distinguishes between a State’s responsibility for contractual undertakings given to foreign nationals by the State in its sovereign capacity, and a State’s responsibility for actions taken in the context of a contractual relationship. Respondent also argues that Claimants’ allegations mostly concern acts and omissions of Sehil’s Contractual Counterparties, in their capacity as ordinary contracting parties, none of which can be characterized as internationally wrongful acts attributable to Respondent.

736. The Tribunal considers that Respondent blends two separate inquiries into one. In this respect, the Tribunal recalls that Article 2 of the ILC Articles on State Responsibility, titled

⁶²⁷ See e.g. Claimants’ Reply and Counter-Memorial on Jurisdiction § 553; Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 369-373

“*Elements of an internationally wrongful act of a State*”, provides that an internationally wrongful act of a State occurs when two *cumulative* conditions are met: (i) the act can be attributed to the State under international law; and (ii) the act constitutes a breach of an international obligation:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

a. is attributable to the State under international law; and

*b. constitutes a breach of an international obligation of the State.*⁶²⁸

737. Respondent’s argument above focuses on the second element of the inquiry, i.e. the extent to which the breach of a contract can be deemed a breach of an international obligation. However, it says nothing about the first condition, which is intellectually and analytically separate. As the Commentary to the ILC Articles on State Responsibility clarifies, one must *first* determine whether an act is attributable to the State before assessing whether the act can be deemed to be in breach of an international obligation:

*(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State.*⁶²⁹

738. Moreover, the fact that an act may be attributed to the State says nothing about the lawfulness of the act under international law:

As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules

⁶²⁸ Exhibit RLA-81, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 2(2) *Yearbook of the International Law Commission* 31 (2001) (“ILC Draft Articles on State Responsibility”), p. 34. In many respects, the ILC Draft Articles on State Responsibility codify customary international law. See, e.g. Exhibit RLA-249, *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No ARB/11/28, Award, 10 March 2014, § 281 (“*The Tribunal agrees with the Parties and accepts that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute.*”)

⁶²⁹ Exhibit RLA-81, ILC Commentary, p. 35.

*of attribution should not be formulated in terms which imply otherwise.*⁶³⁰
[emphasis added]

739. In other words, prior to reaching any conclusions on whether the alleged breach of the Disputed Contracts was a simple commercial breach (i.e. one in which any commercial entity could have engaged) or if it was sovereign in nature, the Tribunal must first determine the extent to which the conduct of various Turkmen entities can be attributed to the State. It is only if the Tribunal determines that conduct may properly be attributable to Respondent that, at the second stage of the inquiry, it will analyse whether the alleged breaches of contract can be characterized as breaches of international law under the BIT taking into account the conduct the various State organs and State-owned companies.

ILC Article 4

740. Claimants' case on attribution is mainly premised on its contention that the conduct of the various Turkmen entities is attributable to Respondent under ILC Article 4. This provides as follows:

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.

741. The Parties disagree on the extent to which the conduct of State subdivisions can be attributed to the State under ILC Article 4; on whether having separate legal personality precludes an entity from being classified as a State organ; and on whether State-owned entities can ever be considered State organs. According to Respondent, if a contract is concluded with a State-owned entity or a political subdivision of the State acting as an ordinary contracting party, attribution under ILC Article 4 does not follow. According to Claimants, attribution under ILC Article 4 follows whether the State organ involved is

⁶³⁰ Exhibit RLA-81, ILC Commentary, p. 39.

central or local (e.g. territorial units such as provinces and municipalities), regardless of the branch of government involved (legislative, executive or judicial), and regardless of whether or not they have separate legal personality. State-owned entities can also be, under specific circumstances, State organs. Moreover, in Claimants' view, *all* conduct of State organs is attributable to the State, regardless of its sovereign or commercial nature.

742. The Tribunal recalls that, under international law, the State is treated as a unity. The Commentary to the ILC Articles clarifies:

*(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.*⁶³¹ [emphasis added]

743. The unity of the State in international law is the reason why *all* conduct of *any* State organ is attributable to the State under ILC Article 4, which provides: “[t]he conduct of any State organ shall be considered an act of that State under international law”. Thus, the conduct of central and local State organs will be attributable to the State, as will be the conduct of legislative, judicial or executive organs:

*[T]he reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.*⁶³² [emphasis added]

⁶³¹ Exhibit RLA-81, ILC Commentary, pp. 35, 36.

⁶³² Exhibit RLA-81, ILC Commentary, p. 40.

744. Moreover, for purposes of attribution under ILC Article 4, it is irrelevant if the State organ's conduct is sovereign or commercial in nature. While the nature of the conduct can be determinative for a liability analysis, for purposes of attribution under ILC Article 4, a State organ's commercial conduct will also be deemed an act of the State:

*It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as acta iure gestionis. Of course, breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.*⁶³³ [emphasis added]

745. Importantly, the fact that an entity is not specifically classified as a State organ under domestic law, while relevant, is not outcome-determinative for the attribution inquiry under ILC Article 4, which is carried out pursuant to international law. Equally, the fact that an entity may have separate legal personality is not *per se* an impediment to that entity qualifying as a State organ:

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government. [...]

(7) [...] Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate

⁶³³ Exhibit RLA-81, ILC Commentary, p. 41.

*liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.*⁶³⁴ [emphasis added]

746. In order to determine whether an entity that is not expressly classified as a State organ in domestic law can be considered a State organ in international law, the status and functions of that entity within the apparatus of the State must be examined. The Tribunal agrees with Claimants that, among the factors that determine whether an entity can be deemed a State organ in international law, one must take into account: (i) whether the entity carries out an overwhelming governmental purpose; (ii) whether the entity relies on other State organs for making and implementing decisions; (iii) whether the entity is in a relationship of complete dependence on the State; and (iv) whether the entity carries out the role of an executive agency, merely implementing decisions taken by State organs.⁶³⁵
747. In the case before the Tribunal, Claimants seek to attribute to Respondent the conduct of “inter alia, *the President of Turkmenistan, the Cabinet of Ministers, the Extended Cabinet of Ministers, the Executive Office of Turkmenistan, the Ministry of Finance, the Ministry of Energy, the Ministry of Internal Affairs, the KNB and its successor the Ministry of National Security, the Ministry of Culture, the Ministry of Construction and Construction Materials Industry (as well as its successors, the Ministry of Construction and the Ministry of the Construction Materials Industry), the Main State Expert Review Board, the Ministry of Defence, the State Commercial Bank of Turkmenistan, the Senagat Bank, the Central Bank, the Main State Tax Service, the City of Ashgabat, the City of Mary, the City of Dashoguz, Turkmenmallary, the Turkmenbasy Complex, the Awaza Committee, the State Service for Foreign Investment, the State Commodity and Raw Materials Exchange, the Supreme Control Chamber, the Ashgabat City Tax Service, the Mary State Tax Service, the Arbitration Court, the Administration of the Dashoguz Region, the Office of the Prosecutor General, the Ashgabat Prosecutor, the Mary Prosecutor, the Türkmenneft State Concern,*

⁶³⁴ Exhibit RLA-81, ILC Commentary, p. 41.

⁶³⁵ Exhibit CLA-295, Georgios Petrochilos, “Attribution”, *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small ed., Oxford 2010), pp 297-298

*Turkmenisation and Turkmenisation as well as all enforcement and security services of the country”.*⁶³⁶

748. Respondent disputes that attribution can follow with respect to the Sehil Contracts:

*Not one of the Sehil Contracts is with the central government of Turkmenistan acting in its sovereign capacity. Rather, eight of the Sehil Contracts were concluded with State-owned entities, or State Concerns. Each of these entities is organized under Turkmen law, with a separate legal personality from the State. Three of the Sehil Contracts were concluded with a province or municipality of Turkmenistan acting as an ordinary contracting party, and the remaining 20 Sehil Contracts were entered into with a Ministry or other agency, also in their capacity as an ordinary contracting party.*⁶³⁷

749. Respondent thus disputes that the conduct of the provinces or municipalities of Turkmenistan in entering into, and performing, the three Sehil Contracts, as well as the conduct of Turkmen ministries and governmental agencies in entering into, and performing, the 20 Sehil Contracts cannot be attributed to Turkmenistan on account of the fact that such contracts were not concluded in a sovereign capacity and/or were not concluded by the central Government. For the reasons explained above, the Tribunal considers that these considerations inapposite for an attribution inquiry under ILC Article 4. Instead, the conduct of State ministries and State agencies, and the conduct of subdivisions of State, such as provinces and municipalities, are always attributable to a State under ILC Article 4. Consequently, the conduct of Turkmen State ministries and State agencies of Turkmen provinces and municipalities in entering into, performing, or in failing to perform, the 23 contracts, is the conduct of State organs and political subdivisions of the State, and is attributable to Turkmenistan under ILC Article 4. However, it bears emphasising that this conclusion says nothing about the issue of the State’s *liability* under international law for conduct in connection with the Sehil Contracts. This issue, which analytically is distinct from the issue of attribution, will be examined separately, in Section 11 below.

⁶³⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 550.

⁶³⁷ Respondent’s Objections to Jurisdiction and Counter-Memorial § 357

750. Respondent also disputes that attribution under ILC Article 4 can follow with respect to the conduct of State-owned entities that concluded 8 Sehil Contracts. This concerns Turkmenneft, Turkmenmashyngurlushyk, the “*Turkmenistan*” State Commercial Bank, the Joint-Stock Commercial Bank “*Senegat*”, Turkmenpagta, Turkmenenergogurlushyk, the Turkmen Association of Joint-Stock Livestock Companies, and the Turkmenbashi Oil-Processing Complex, which Respondent argues cannot be deemed State organs as they possess numerous commercial functions, underscoring their autonomous nature.⁶³⁸
751. In other words, Respondent does not dispute that all other entities listed in § 747 above are State organs, within the meaning of ILC Article 4. This includes the President of Turkmenistan, the Cabinet of Ministers, the Office of the Prosecutor General, the Central Bank, the Main State Tax Service, the Supreme Control Chamber and the Arbitration Court. The conduct of these entities, which were not Sehil’s contractual counterparties, is also challenged by Claimants. The Tribunal finds that attribution under ILC Article 4 has been established in respect of them.
752. The Tribunal will now turn to the status under international law of Turkmenmashyngurlushyk, Turkmenneft, the “*Turkmenistan*” State Commercial Bank, the Joint-Stock Commercial Bank “*Senegat*”, Turkmenpagta, Turkmenenergogurlushyk, the Turkmen Association of Joint-Stock Livestock Companies, and the Turkmenbashi Oil-Processing Complex.
753. Turkmenmashyngurlushyk. Contract No 33 was originally concluded between Sehil-Erenco Consirtium and Turkmenmashyngurlushyk.⁶³⁹ The Charter of the entity⁶⁴⁰ provides that: it is a “*government management agency*”;⁶⁴¹ that the government “*do[es] not bear responsibility for the Concern’s obligations*”⁶⁴²; that “[E]stablish[es], reorganize[s] and liquidate[s] subordinate enterprises using established procedure in coordination with the Ministry”;⁶⁴³ and the Chair of the entity was to be appointed and released by the President

⁶³⁸ Respondent’s Rejoinder and Reply on Jurisdiction § 358

⁶³⁹ Exhibit R-150

⁶⁴⁰ Exhibit R-978

⁶⁴¹ R-978, Art. 3.1

⁶⁴² R-978, Art. 1.3

⁶⁴³ R-978, Art. 3.1

of Turkmenistan.⁶⁴⁴ The Parties are agreed that, in September 2007, the Contract was amended so that the client changed to the Ministry of Construction and Construction Materials Industry.⁶⁴⁵ It appears that, for this reason, Claimants are basing their arguments concerning Contract No 33 on the conduct of the Ministry. On balance, the Tribunal accepts Claimants' contention that the Ministry of Construction and Construction Materials Industry is a State organ of Turkmenistan and its conduct in connection with Contract No 33 is attributable to Respondent under ILC Article 4.

754. Turkmenneft. Claimants contend that the client for Contract No T5, Turkmenneft, was strictly controlled by the State of Turkmenistan and was completely dependent on it. As support for this contention, Claimants refer to: (i) Turkmenneft's considerable non-commercial functions, which included the implementation of the program for the development of the oil and gas industry in Turkmenistan, the development of oil fields throughout Turkmenistan, and ensuring an increase of hydrocarbons reserves; (ii) the fact that it was funded in part by the State fund for the development of the oil and gas industry and mineral resources of Turkmenistan; (iii) Turkmenneft's obligation to submit quarterly and annual reports on its financial results and business activity to the Ministry of the Oil and Gas Industry and Mineral Resources of Turkmenistan; and (iv) the fact that its Statute had been approved by the President of Turkmenistan, who also authorized it to enter into a contract with Sehil.⁶⁴⁶ In rebuttal, Respondent refers to the fact that, under Turkmen law, Turkmenneft was an entity legally distinct from the State, with the capacity to assume rights and liabilities, and which had full economic control over its assets. Moreover, according to Respondent, Turkmenneft also had commercial functions, such as engaging in foreign trade.⁶⁴⁷

755. The Tribunal considers that Turkmenneft is a State organ of Turkmenistan, within the meaning of ILC Article 4. In reaching this conclusion, the Tribunal is mindful of the fact that an entity's separate legal personality and commercial purpose create a rebuttable

⁶⁴⁴ R-978, Art. 6.1

⁶⁴⁵ Respondent's Rejoinder and Reply on Jurisdiction § 358; Claimants' Reply and Counter-Memorial on Jurisdiction § 570

⁶⁴⁶ Claimants' Reply and Counter-Memorial on Jurisdiction § 583

⁶⁴⁷ Respondent's Rejoinder and Reply on Jurisdiction § 358

presumption that the entity is not a State organ. However, the Tribunal considers that, in the case of Turkmenneft, the State of Turkmenistan assigned it a considerable governmental purpose (*i.e.* the efficient management of strategic national resources in oil and gas), which far outweighs any commercial purpose pursued by the entity. In particular, the Tribunal notes that Turkmenneft’s Statute lists as its “*primary tasks*” a series of competences that more closely resemble those of a State organ than those of a commercial entity: the “[i]mplementation of the Concept for development of the oil and gas industry in Turkmenistan for oil and gas condensate recovery”; the “[d]evelopment of oil fields throughout Turkmenistan”; the “[c]reation of the economic and social conditions for efficient development of oil and gas condensate recovery”; and “[e]nsuring an increase in hydrocarbons reserves, as well as the most complete and sustainable use of oil resources and bentonite, with regard for their limited availability, nonrenewable nature, uniqueness and value”.⁶⁴⁸

756. Moreover, according to its Statute, Turkmenneft’s “*primary activity [is] financed using its own profit and funds from the State fund for the development of the oil and gas industry and mineral resources of Turkmenistan.*”⁶⁴⁹ In other words, while Turkmenneft does use its own profits to finance its activities, funds from the State budget are on par with the company’s own funds as regards its primary activity. This is a feature that distinguishes Turkmenneft from ordinary State-owned companies, which finance their activities through their revenue alone. The use of public funds to finance the entity’s operations also creates a strong presumption of control by the State of Turkmenneft’s primary activity, which goes beyond the ordinary, corporate, forms of control that may be exercised by a majority/sole shareholder. The Tribunal further considers that this form of control manifested itself in the express authorization that the President of Turkmenistan gave to Turkmenneft in order to enter into Contract No T5. Since the contract concerned the construction of a small-size administrative building, the presidential authorization further underscores the fact that Turkmenneft was serving State interests when contracting with Sehil.

⁶⁴⁸ Exhibit R-979, Regulation on the State Concern “*Turkmenneft*”

⁶⁴⁹ Exhibit R-979, Regulation on the State Concern “*Turkmenneft*”

757. For all these reasons, the Tribunal concludes that Turkmenneft can properly be qualified as a State organ under ILC Article 4.
758. The “Turkmenistan” State Commercial Bank. As support for their position that this entity is a State organ, Claimants argue that the bank carried out a public function (conducting “*the state policy on provision of loan funds for public services sector*”⁶⁵⁰) and lacked the self-sufficiency to make and implement decisions for its own account. With respect to the latter contention, Claimants note that the President of Turkmenistan was empowered to approve its Articles of Association and any change in the amount of the investment fund of the bank, and had specifically authorized the bank to enter into a contract with Sehil.⁶⁵¹ Respondent takes exception to Claimants’ allegation that the bank lacked self-sufficiency, noting that the articles of association specifically provided that decisions pertaining to the bank’s daily affairs did not depend on executive or legislative State authorities. Moreover, Respondent notes that the bank funded its activities through self-financing. The construction of the residential building under Contract No 36 was to be financed with the bank’s own and borrowed funds.⁶⁵²
759. The Tribunal agrees with Respondent that the bank possessed a sufficient degree of autonomy and self-sufficiency that prevent it from being qualified as a State organ. The presumption of autonomy resulting from the bank’s separate legal personality is only reinforced by the articles of association’s provision that the bank was self-sustained and self-financed, and by the fact that the bank used its own funds and borrowed funds for financing the construction works under Contract No 36. These are strong indicia that the bank functioned autonomously from the State.
760. Consequently, the Tribunal finds that the “Turkmenistan” State Commercial Bank is not a State organ of Turkmenistan, within the meaning of ILC Article 4.
761. The Joint-Stock Commercial Bank “Senegat”. Claimants’ contention that Bank Senegat was a State organ is based on the fact that the President of Turkmenistan authorized it to

⁶⁵⁰ Exhibit R-980, Articles of Association of “Turkmenistan” State Commercial Bank

⁶⁵¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 584

⁶⁵² Respondent’s Rejoinder and Reply on Jurisdiction § 358

enter into a contract with Sehil, which, according to Claimants, demonstrates that the bank lacked the self-sufficiency to make and implement decisions for its own account.⁶⁵³ Respondent disputes that the bank lacked self-sufficiency, noting that: (i) the bank had separate legal personality and could enter into contracts in its own name; (ii) was managed by a general assembly of shareholders, a board, a managing board and an audit commission, with the board members being elected annually by the general assembly; and (iii) the bank financed its own operations, including the construction of the residential building under Contract No 37.⁶⁵⁴

762. The Tribunal agrees with Respondent that the above shows that the bank exhibited a sufficient degree of autonomy that cannot support an inference that it was completely dependent upon the State. The Tribunal therefore finds that the Joint-Stock Commercial Bank “*Senegat*” cannot be qualified as a State organ under ILC Article 4.
763. Turkmenpagta. Claimants contend that Turkmenpagta is a State organ for the following reasons: (i) its Statute defines it as “*a body of state administration*” whose “*main objectives*” include the “*implementation of decisions of the President of Turkmenistan*” and “*ensur[ing] performance [...] of acts of the President of Turkmenistan and decisions of Cabinet of Ministers of Turkmenistan relating to issues of cotton farming and cotton processing industry*”;⁶⁵⁵ (ii) the President of Turkmenistan approved its Statute, appointed its Chairman and deputies, who report to the President and Cabinet; and (iii) the President of Turkmenistan authorized it to enter into a contract with Sehil.⁶⁵⁶ Respondent disputes that Turkmenpagta can be deemed a State organ, noting that it is a legal entity distinct from the State, with the capacity to assume rights and obligations in its own name. Respondent also notes that Turkmenpagta was to finance the construction of the building under Contract No 42 using proceeds from the sale of the apartments, as well as from its own funds.⁶⁵⁷

⁶⁵³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 585

⁶⁵⁴ Respondent’s Rejoinder and Reply on Jurisdiction § 358

⁶⁵⁵ Exhibit R-981, Statute of State-Owned Enterprise “*Turkmenpagta*”

⁶⁵⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 586

⁶⁵⁷ Respondent’s Rejoinder and Reply on Jurisdiction § 358

764. The Tribunal agrees with Claimants that Turkmenpagta can be considered a State organ under ILC Article 4. Indeed, the Statute of Turkmenpagta expressly provides that this State-owned entity forms part of the State apparatus (“*a body of state administration*”⁶⁵⁸) and is functionally subordinate to the office of the President, whose decisions on issues pertaining to cotton farming and the cotton processing industry it is legally required to execute. The authorization given by the President to Turkmenpagta entering into Contract No 42 only reinforces the presumption of complete dependence on the State. Consequently, Turkmenpagta both structurally and functionally lacked the autonomy that one would normally expect from a commercial entity. It can thus rightfully be characterized as a *de facto* State organ under ILC Article 4.
765. Turkmenenergogurlushyk. Claimants argue that Turkmenenergogurlyshyk is a State organ for the following reasons: (i) its Statute defines it as “*a government management agency*”, “*part of the Ministry of Energy and Industry of Turkmenistan*” and which operates “*in accordance with [...] resolutions of the Cabinet of Ministers of Turkmenistan, administrative orders of the Ministry of Energy and Industry*”;⁶⁵⁹ and (ii) the entity lacked the autonomy to make and implement decisions for its own account, as the President appointed its Chairman and specifically authorized it to enter into a contract with Sehil.⁶⁶⁰ Respondent disputes Claimants’ contention, noting *inter alia* that Turkmenenergogurlyshyk: (i) had a separate legal personality and could assume rights and obligations in its own name; and (ii) conducted foreign economic and trade relations with other countries on a self-sustained and self-financed basis.⁶⁶¹
766. The Statute of Turkmenenergogurlyshyk, in both versions (the one in force at the time Contract No 46 was concluded⁶⁶² and the amended Statute which entered into force in

⁶⁵⁸ Exhibit R-981, Statute of State-Owned Enterprise “*Turkmenpagta*”

⁶⁵⁹ Claimants quote from Exhibit R-978, Charter of the State-Owned Enterprise “*Turkmenmashyngurlushyk*” of the Ministry of Energy and Industry, which does not appear to be apposite, as it concerns a different legal entity than Turkmenenergogurlyshyk.

⁶⁶⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 587

⁶⁶¹ Respondent’s Rejoinder and Reply on Jurisdiction § 358. The Tribunal notes that Claimants mistakenly quote from the Statute of Turkmenmashyngurlushyk (Exhibit R-978, Charter of the State-Owned Enterprise “*Turkmenmashyngurlushyk*” of the Ministry of Energy and Industry) in order to substantiate their position that Turkmenenergogurlyshyk is a State organ.

⁶⁶² Exhibit R-1223, Charter of “*Turkmenenergogurlushyk*” Concern of Ministry of Energy registered on 10 March 1995

2009⁶⁶³), provided that the entity was a “*Concern of the Ministry of Energy and Industry*” (emphasis added). The older version of the Statute expressly provided that this State-owned entity was “*part of the Ministry of Energy of Turkmenistan*” (emphasis added), while also being “*a legal entity [that] act[ed] on the basis of self-sustaining, self-financing and self-cost accounting principles*”⁶⁶⁴ and being able to assume rights and liabilities in its own name. Moreover, the older version of the Statute provided that the Concern’s activities included “*working out projects for construction of new facilities, technical re-equipment, reconstruction and expansion of operating productions and facilities*” “*in light of interests of the Ministry and the national economy*”.⁶⁶⁵ Turkmenenergogurlyshyk was also tasked with the “*establishment, reorganization, liquidation and winding up of enterprises for fulfilment of objectives assigned to Concern*” “*after agreeing with the Ministry*”.⁶⁶⁶ The Tribunal thus considers that, pursuant to its Statute, despite having separate legal personality, Turkmenenergogurlyshyk was structurally and functionally dependent on the Ministry of Energy of Turkmenistan and had no meaningful institutional separateness, as it was tasked to achieve its objectives in light of the interests of the Ministry. The new Statute, adopted in 2009, did not in any way modify the above provisions, and thus maintained the structural and functional dependency of Turkmenenergogurlyshyk on the Turkmen State.

767. For these reasons, the Tribunal concludes that Turkmenenergogurlyshyk is a State organ of Turkmenistan, within the meaning of ILC Article 4.
768. The Turkmenmallery Association of Joint-Stock Livestock Companies. Claimants argue that this entity meets the criteria of a State organ under international law for the following reasons: (i) it was constituted as a special-purpose state company, authorized to hold the controlling share package belonging to the State and manage that property; (ii) it was

⁶⁶³ Exhibit R-1224, Charter of “*Turkmenenergogurlushyk*” Concern of Ministry of Energy registered on 15 May 2009

⁶⁶⁴ Exhibit R-1223, Charter of “*Turkmenenergogurlushyk*” Concern of Ministry of Energy registered on 10 March 1995, Art. 1.2

⁶⁶⁵ Exhibit R-1223, Charter of “*Turkmenenergogurlushyk*” Concern of Ministry of Energy registered on 10 March 1995, Art. 3.1

⁶⁶⁶ Exhibit R-1223, Charter of “*Turkmenenergogurlushyk*” Concern of Ministry of Energy registered on 10 March 1995, Art. 3.1

directly subordinated to the Council of Ministers and was tasked to operate in accordance with the “*acts of the President [... and] the decisions of the Cabinet of Ministers*”,⁶⁶⁷ (iii) its functions include the implementation of State programs; and (iv) the President approved its Statute by decree, appointed its chairman and deputies, and specifically authorized it to enter into a contract with Sehil.⁶⁶⁸ Respondent disputes that the association could be deemed a State organ, arguing that the association: (i) had separate legal personality, which allowed it to assume rights and obligations in its own name; (ii) had numerous commercial functions, such as carrying out foreign economic activities; and (iii) was to finance the construction of the building under Contract No 48 using proceeds from the sale of the apartments as well as its own funds.⁶⁶⁹

769. The Tribunal considers that the Association’s express subordination to the Cabinet of Ministers, as provided by its Statute, as well as the fact that the entity was tasked to operate on the basis of the instructions issued by the President and the Cabinet of Ministers, unquestionably point in the direction of pervasive State control. This presumption is further buttressed by the fact that the Association was empowered to implement State programs. The President’s specific authorization for the Association to enter into Contract No 48 further strengthens the presumption that the Association was subject to pervasive State control and was intended to serve State interests. For these reasons, the Tribunal finds that the Turkmenmallyary Association of Joint-Stock Livestock Companies is a State organ, within the meaning of ILC Article 4.

770. The Turkmenbashi Oil-Processing Complex. Claimants contend that this State-owned entity is a State organ for the following reasons: (i) the entity was tasked with “*ensuring fast-paced development of the Oil Processing Industry of Turkmenistan with the purpose of full supply of products [...] from the raw hydrocarbons to the economic sectors and population of Turkmenistan*”, as well as with “*implementing a uniform technological policy in the field of processing of raw hydrocarbons*”,⁶⁷⁰ both of which are non-commercial

⁶⁶⁷ Exhibit R-983, Statute of “*Turkmenmallyary*” Association

⁶⁶⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 588

⁶⁶⁹ Respondent’s Rejoinder and Reply on Jurisdiction § 358

⁶⁷⁰ Exhibit R-976, Charter of the Turkmenbashi Oil Processing Complex, approved by the Decree of the President of Turkmenistan No 7778 dated 20 February 2006

functions; (ii) the entity carries out its activities under the supervision of the President and the Cabinet; (iii) the entity's General Director is appointed directly by the President, to whom it also reports; and (iv) the President specifically authorized this entity to enter into a contract with Sehil.⁶⁷¹ Respondent disputes that the Turkmenbashi Oil-Processing Complex can be deemed a State organ, noting that the entity: (i) had separate legal personality, and could assume rights and obligations in its own name; and (ii) had numerous commercial functions, such as producing consumer goods.⁶⁷²

771. The Tribunal agrees with Claimants that the functions assigned to the Turkmenbashi Oil-Processing Complex of ensuring the development of Turkmenistan's oil-processing industry and implementing a uniform policy of processing hydrocarbons are not commercial functions, but denote a governmental purpose. Due to the strategic importance of this natural resource, such functions would ordinarily be assigned to State organs. The fact that the Turkmenbashi Oil-Processing Complex carried out these functions under the supervision of the President and the Cabinet underscores the fact that this entity was under pervasive State control. This is further buttressed by the fact that the General Director is appointed by the President, to whom he/she reports directly. The control exercised by the State over the Turkmenbashi Oil-Processing Complex further manifested itself in the specific authorization granted prior to the conclusion of the contract with Sehil. Had the Turkmenbashi Oil-Processing Complex had autonomy from the State, such an authorization would not have been called for. The Tribunal therefore finds that the Turkmenbashi Oil-Processing Complex was tasked with implementing State policy in the field of hydrocarbons and was subject to pervasive State control. For these reasons, the Tribunal concludes that the entity's legal autonomy was not matched by a structural and functional autonomy and independent decision-making. The Turkmenbashi Oil-Processing Complex therefore meets the criteria to be considered a State organ under ILC Article 4.

772. The Tribunal has therefore concluded that the following Turkmen State-owned entities are State organs, within the meaning of ILC Article 4: Turkmenneft, Turkmenpagta, Turkmenenergourlushyk, the Turkmen Association of Joint-Stock Livestock Companies

⁶⁷¹ Claimants' Reply and Counter-Memorial on Jurisdiction § 589

⁶⁷² Respondent's Rejoinder and Reply on Jurisdiction § 358

and the Turmenbashi Oil-Processing Complex. Consequently, the conduct of these entities is attributable to the State under ILC Article 4, regardless of whether such conduct is sovereign or commercial in nature. The Tribunal will examine the question of whether such conduct is in breach of the BIT in Section 11 below.

ILC Article 8

773. ILC Article 8 reads:

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.

774. The Tribunal agrees with the *Hamester v Ghana* tribunal that a “very demanding threshold” must be met for purposes of attribution under ILC Article 8, requiring “*both general control of the State over the entity, and specific control of the State over the particular act in question.*”⁶⁷³

775. As a corollary to the above, the Commentary to the ILC Articles shows that the mere ownership of shares in a State-owned company is not sufficient in order to establish attribution under ILC Article 8:

Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority

⁶⁷³ Exhibit CLA-146, *Hamester v Ghana*, § 179

within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.”⁶⁷⁴ [emphasis added]

776. In the case before the Tribunal, Claimants have not adduced any evidence apart from Respondent’s ownership of shares in the various State-owned entities that would demonstrate that Respondent was exercising both a general control over these entities at all relevant times and that it *specifically* controlled these same entities in connection with *specific* acts challenged in these proceedings.
777. The Tribunal is thus not persuaded that Claimants have conclusively demonstrated that the acts and omissions of Sehil’s Contractual Counterparties, that are not State organs, are attributable to the State pursuant to Article 8 of the ILC Articles. Claimants have failed to show that Sehil’s Contractual Counterparties, at all relevant times, acted “*on the instructions of, or under the direction or control of, that State in carrying out the conduct.*”

9. Does the Most Favored Nation clause in the BIT give rights to Claimants to full protection and security, non-discrimination/non-impairment of investments, and the right to make claims under specific umbrella clauses?

778. The issue for the Tribunal here is whether the MFN provision in Article II(2) BIT has a direct bearing on the merits of this dispute by allowing the importation of the substantive provisions from Article 2(2) of the UK-Turkmenistan BIT. The Parties disagree as to how the MFN provision should be interpreted and applied. Claimants contend it covers two distinct situations: protecting investors against *de facto* discrimination and also allowing for the importation of substantive protections from other BITs. Respondent argues it

⁶⁷⁴ Exhibit RLA-81, ILC Draft Articles on State Responsibility, p. 48

applies only to *de facto* discrimination, i.e. where one party is treated differently from the other when the two parties are in the same situation.

779. Article II(2) BIT provides that:

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

780. For the reasons explained below the Tribunal is of the opinion that the MFN clause in the present case applies only where there is *de facto* discrimination. In other words, there needs to be two actual investors in a similar situation who are being treated differently, i.e. one less favourably than the other. Further, and in the light of the wording of Article II(2) requiring for this *de facto* discrimination, the Tribunal is not persuaded by Claimants' argument that the MFN provision in Article II(2) allows Claimants to expand the protection for investors provided for in the BIT by importing provisions from other BITs to which one or other State is a Party. In the circumstances of this case the Tribunal's conclusion is based on the following reasons.

781. Contrary to Claimants' assertion,⁶⁷⁵ the benefit of the MFN is not "*automatic*". This type of MFN clause extends protection to investors when it is established that they are placed in similar situations and that activities in the host State are similar to those investors from a third State.

782. Interpreted in light of Article 31 of the VCLT, Article II(2) essentially provides that each State party has agreed to treat investments made in its territory by an investor from the other State in a manner that is "*no less favourable than that accorded in similar situations*" to other investors' investments coming from a third State. In other words, the legal effect of this provision is to prohibit the discriminatory treatment of investors' investments in the host State when compared to other investments made by third-State investors in similar situations.

⁶⁷⁵ Claimants' Reply § 625

783. The Tribunal considers the key wording here is “*similar situations*” since this obligation can only apply if the investments are in “*a similar situation*”. Accordingly, when determining if there was a breach of Article II(2) a comparison between the “*situations*” of the investments in question is needed. This involves comparing the factual circumstances surrounding the investments in question. It must be shown that actual investors, found in a similar situation, were treated differently. It is not sufficient that the two investors invested in the same State. This would simply render the term meaningless and without effect. Understanding the scope of application of “*similar situation*” only in relation to the territorial application of the treaty is contrary to the generally accepted treaty interpretation rules which provide that each term of the treaty should be given meaning and effect.
784. Accordingly, the Tribunal considers that the words “*similar situations*” indicate the State parties’ intention to restrict the scope of the MFN clause to apply only to discriminatory treatment between investments of investors of one of the State parties and investors of third States, insofar as such investments may be said to be in a factually similar situation. This required that the actual measures taken by the host State is directed towards investments of actual investors that are in a similar situation, and to prove that such measure had the effect of treating one less favourably than the other.
785. This limitation in the scope of application of the MFN provision was also pointed out in the *Final Report on the Most-Favoured-Nation Clause* of the ILC, which identified a number of different MFN clauses among which was those types of MFN treatment that are “*to be provided only to those investors or investments that are ‘in like circumstances’ or ‘in similar situations’ to investors or investments with which a comparison is being made*”. The ILC expressly referred to NAFTA as an example of a MFN clause limited to “*in like circumstances*” and to the Turkey-Turkmenistan BIT as an example of a clause limited to “*in similar situations*.”⁶⁷⁶ Case law confirms that the underlying rule of *ejusdem generis* is applicable to MFN provisions. However, reference to the rule is necessary and useful only

⁶⁷⁶ Exhibit RLA-441, International Law Commission, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 2(2) *Yearbook of the International Law Commission*, 2015, § 64

when those seeking to rely on it are dealing with a broadly worded MFN provision, which does not define the scope of its subject matter, which is not the case here.

786. Further, the Tribunal also disagrees with Claimants' contention that "*in similar situations*" refers to the requirement of "*sameness*"; and that the *ejusdem generis* principle allows a claimant to import substantive guarantees from a third-party treaty, provided that treaty has a "*common subject-matter*" with the basic treaty in which the MFN clause is contained.
787. The *ejusdem generis* principle refers to the sameness of the subject matter of the MFN clauses and the other substantial provisions in a treaty, not only of the treaties in which the provisions are contained. As established by the tribunal in *Ambatielos*, "*the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates*".⁶⁷⁷ This requirement was also confirmed and provided for by the ILC Final Report of the Study Group on the MFN which explained that Article 10 of the ILC Draft Articles provides that an MFN clause can be applied "*only if the granting State extends to a third State benefits within the subject matter of the clause.*" Further, "*Articles 9 and 10 also make clear that where the benefit is for persons or things within a determined relationship with the beneficiary State, they must belong to the same category and have the same relationship with the beneficiary State as persons or things within a determined relationship with the third State.*"⁶⁷⁸
788. Further, the substantive protections in each treaty apply to the investors that fall within that treaty's scope of application. Just because some standards in a third-party treaty appear to be more favourable (in the sense of introducing additional protections) than those in a basic treaty, does not mean that the treatment accorded is "*less favourable*". This may be simply a difference between two legal standards in two distinct legal instruments. Such difference cannot be considered as "*treatment accorded in similar situations*" because it would render the meaning of the words "*similar situation*" meaningless.

⁶⁷⁷ Exhibit CLA-24, *Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland)*, Award, 6 March 1956, p 107

⁶⁷⁸ Exhibit RLA-441, International Law Commission, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 2(2) *Yearbook of the International Law Commission*, 2015, p. 5

789. The tribunal in *İçkale v Turkmenistan* concluded on the facts in that case that “*given the limitation of the scope of application of the MFN clause to ‘similar situations’, it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State.*”⁶⁷⁹ The Tribunal concurs with this rationale and decision which is equally applicable to this case.
790. The wording of the MFN provision in this case, unlike other MFN clauses, does not refer to “*all matters*” or to be applied “*in all respects*”. Rather, it clearly states that its scope of application is restricted to where the investors are in a “*similar situation*”.
791. The Tribunal is also not persuaded by the argument that since the substantive protections Claimants seek to import are not explicitly excluded from the application of the BIT by Article II(4) BIT, they can be imported by using the MFN provisions. This argument is of no merit. Article II(4) BIT simply confirms that the provisions of Article II “*have no effect*” on agreements relating to customs unions, regional economic organizations or similar international agreements, as well as taxation. The fact that specific substantive protections have not been expressly excluded in Article II(4) does not mean that they can therefore be incorporated via the MFN provision.
792. The preamble of the BIT does not assist Claimants’ contentions. The purpose of the preamble of treaties is to provide context for interpreting the ordinary meaning of the terms of the treaty. It is not to create binding legal rights and obligations which have not been included in the treaty, and to impose those rights on the parties. Accordingly, the Tribunal also does not accept Claimants’ contention that just because the preambles of the Turkey-Turkmenistan BIT and UK-Turkmenistan BIT have similar language, this allows Claimants to rely on the MFN provision in Article II(2) to import protections from the UK-Turkmenistan or Swiss-Turkmenistan BIT.
793. The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to *de facto* discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar

⁶⁷⁹ Exhibit RLA-179, *İçkale v Turkmenistan*, § 329

situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.

794. Accordingly, Claimants' argument that the MFN provision in Article II(2) BIT allows it to import the substantive protections from the UK-Turkmenistan BIT is rejected.

10. Does the wording “fair and equitable treatment is desirable” in the preamble of the BIT impose an obligation of Fair and Equitable Treatment?

795. The question here is whether an FET obligation can be inferred on Respondent due to the wording in the Preamble. To this end the Tribunal must first determine whether the Preamble of the BIT gives rise to a FET obligation before considering the merits of the dispute.

796. Claimants' argument regarding the FET obligation consists in conferring on the Preamble a normative value from which a binding obligation could be derived. Such an interpretation runs contrary to the customary rules of interpretation as codified by the VCLT.⁶⁸⁰

797. In the *Beagle Channel case*, the tribunal stated:

Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance (in short they are not operative clauses) it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to “situate” it in respect of its object and purpose.⁶⁸¹

798. Likewise, other tribunals have held that a preamble “cannot be relied upon as a source of independent or free-standing legal rights or obligations”⁶⁸² or that “[d]espite the use of the verb ‘agree’, it is doubtful that, in the absence of a specific provision in the BIT itself, the

⁶⁸⁰ See also § 785 of the Award above

⁶⁸¹ Exhibit RLA-276, *Dispute between Argentina and Chile concerning the Beagle Channel*, Decision, 18 February 1977, § 19

⁶⁸² Exhibit RLA-179, *İçkale v Turkmenistan*, § 337

sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT”.⁶⁸³

799. On the basis of the general rules of treaty interpretation, the Tribunal does not consider that the Preamble of the BIT creates a free-standing obligation to accord FET.⁶⁸⁴
800. Claimants’ reliance on supplementary means of interpretation as provided by Article 32 VCLT does not alter this finding. Turkey’s Draft Law on Ratification of the BIT, which states that the purpose of the BIT is “*to create a secure investment environment in Turkmenistan for the Turkish investors who [...] will invest in Turkmenistan*”,⁶⁸⁵ cannot turn the hortatory and aspirational language of the Preamble into a binding obligation. Further, the Tribunal accepts that the fact that an FET obligation was not expressly included in the BIT, and the Preamble only referred to FET being desirable, is a clear indication that FET was not agreed.
801. Accordingly, the Tribunal rejects Claimants’ contention that the terms of the Preamble of the BIT reflect a common intention to include the FET as a free-standing obligation.

11. Is there a breach of the Expropriation standard under the BIT?

802. The issue before the Tribunal under this head is whether Respondent expropriated Claimants’ investment or subjected it indirectly to measures of similar effect in breach of Article III BIT. The Tribunal has concluded above that Claimants have an investment in Turkmenistan (§ 682 above) drawn from its significant construction contracts commitment

⁶⁸³ See Respondent’s Rejoinder footnote 954 referring to Exhibit CLA-177, *Bayindir v Pakistan Award*, § 153; see also Exhibit RLA-112, *Continental Casualty v Argentina*, § 258. (“*Stability of the legal framework for investments is mentioned in the Preamble of the BIT. It is not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of the Treaty. It is rather a precondition for one of the two basic objects of the Treaty, namely the promotion of the investment flow.*”)

⁶⁸⁴ Exhibit RLA-275, Makane Moïse Mbengue, “Preamble”, in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum ed., Oxford University Press 2008), § 11

⁶⁸⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 756 with reference to Exhibit CLA-324, Draft Law on Ratification of the BIT executed by and between Turkey and Turkmenistan including its Reasoning and the Reports of the Ministry of Foreign Affairs and the Planning and Budget Commissions (1/618) Turkish Grand National Assembly

and contribution in Turkmenistan over a period of about nine years; Sehil entered into 63 contracts with State organs and State-owned companies to a value exceeding USD 800 million and engaged over 1,000 employees locally, rented offices and other facilities for the purpose of managing and effecting these contractual commitments.⁶⁸⁶

803. The Tribunal considers three key questions in assessing whether Respondent expropriated Claimants' investment in Turkmenistan as alleged: first, what is meant by expropriation in the context of this Arbitration; second, what is the basis against which to measure whether Claimants' allegations of expropriation are justified; and third, specifically, whether Claimants' investment in Turkmenistan was expropriated by Respondent. If the Tribunal concludes that Claimants' investment was expropriated, the Tribunal will consider whether it was carried out in a lawful manner in compliance with the BIT's requirements.

A. Meaning of Expropriation

804. The Parties' arguments as to what constitutes expropriation substantially overlap, albeit they differ on the extent of the effect of expropriation in this case.
805. Claimants contend expropriation occurs when the "*actual effect*"⁶⁸⁷ of the State's actions deprive the investor of "*the use and benefits of the investments*"⁶⁸⁸, "*parts of the value of his investment*" or the "*reasonably-to-be-expected economic benefit of the property*".⁶⁸⁹ Claimants argue that under international law there is direct expropriation, i.e. an "*open, deliberate and acknowledged takings of property*", and there is also indirect (or creeping) expropriation, i.e. "*measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights*

⁶⁸⁶ Claimants' Memorial §§ 11, 20; Claimants' Reply and Counter-Memorial on Jurisdiction § 44

⁶⁸⁷ Claimants' Memorial § 338; See also Exhibit CLA-199, Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, Redfern and Hunter on International Arbitration, (2009), at § 8.83.

⁶⁸⁸ Claimants' Memorial § 330

⁶⁸⁹ Claimants' Memorial § 338; See also Exhibit CLA-197, *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, § 103 ("*Metalclad v Mexico*"): "*Thus, expropriation [...] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of the property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*

*subject to such measures have been affected in such a way that ‘...any form of exploitation thereof...’ has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.”*⁶⁹⁰ Claimants contend that in this case “Respondent adversely interfered with Claimants’ investment and their operations to such an extent that it effectively prevented Claimants from continuing operations in Turkmenistan.”⁶⁹¹ In effect, Respondent indirectly expropriated their investment.

806. Respondent contends that for expropriation to occur the interference must be such that it “renders rights so useless that they must be deemed to have been expropriated”, or “deprives the investor of fundamental rights of ownership”, or “makes rights practically useless” or “that the property can no longer be put to reasonable use”.⁶⁹² Further, such deprivation must be irreversible and permanent⁶⁹³ and “affect the totality of an investment”.⁶⁹⁴ The acts complained of must have been exercised by the State in its sovereign capacity and not within the context of its contractual obligations: “[A] Host State acting as a contracting party does not ‘interfere’ with a contract; it ‘performs’ it”.⁶⁹⁵
807. Article III BIT does not provide a definition of *expropriation*. However, it states clearly that investments should not be expropriated, unless such expropriation is conducted in a lawful manner. Under Article III(2) a lawful expropriation takes place subject to the following conditions: (a) it is for a public purpose; (b) it was done in a non-discriminatory manner; (c) prompt, adequate, and effective compensation was paid; and (d) the procedure followed was in accordance with the due process of law. Further, the compensation should

⁶⁹⁰ Claimants’ Memorial § 334; Exhibit CLA-197, *Metalclad v Mexico*, § 103

⁶⁹¹ Claimants’ RfA § 91. See also: Claimants’ Memorial § 344 (“It is clear from the facts set out in Section III above and the foregoing legal principles that Turkmenistan has taken Claimants’ investment. Payments were delayed or withheld, variations imposed and uncompensated in time and costs, Mr. Çap and Sehil’s executives forced to flee for their lives, offices, documents, and equipment seized, fines and penalties imposed, contracts terminated, Claimants’ claims and rights left unaddressed, and thus Sehil deprived of any value.”).

⁶⁹² Exhibit CLA-224, *Biwater v Tanzania*, § 463

⁶⁹³ Respondent’s Objections to Jurisdiction and Counter-Memorial § 421

⁶⁹⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 422

⁶⁹⁵ Exhibit RLA-194, *Impregilo v Pakistan*. The tribunal also stated that if a host State “performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority”, § 278.

be paid “without delay” and should be “equivalent to the real value of the expropriated investment before the expropriated action was taken or became known”.⁶⁹⁶

808. Article III(1) BIT recognises the distinction between direct and indirect expropriation as follows: “investments shall not be expropriated, nationalized or subject directly or indirectly to measures of similar effect except for a public purpose”. Arbitral tribunals have accepted that indirect expropriation occurs when due to a series of actions taken by the State an investor is “deprived substantially of the use and benefits of the investments”,⁶⁹⁷ or suffers “effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor”.⁶⁹⁸ As such, indirect expropriation should be considered in light of “the actual effect of the measures on the investor’s property”.⁶⁹⁹
809. This Tribunal considers indirect expropriation to occur when property or property rights were interfered with so substantially by the acts of a State that it resulted in substantial, irreversible and permanent deprivation of the value of the investment or effective loss of the use, control or management of that investment.⁷⁰⁰ In the Tribunal’s view, to constitute expropriation, the acts, omissions and interferences must affect the value of the whole investment, not just part(s) of it.⁷⁰¹ Further, it must be proved that the acts complained of were exercised by the State in its sovereign capacity (its *puissance publique*), not in the State’s capacity as a contractual party.
810. Accordingly, to be successful in this Arbitration, Claimants must show that there were (i) sovereign acts of Turkmenistan which interfered with their investment, and (ii) the

⁶⁹⁶ Article III(2) BIT

⁶⁹⁷ Exhibit CLA-190, *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Award, 29 June 2012, § 151; Exhibit CLA-200, *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case ARB/99/6, Award, 12 April 2002, § 107; Exhibit CLA-197, *Metalclad v Mexico*, § 103

⁶⁹⁸ Exhibit CLA-195, *Spyridon Roussalis v Romania*, § 327; *Generation Ukraine, Inc. v Ukraine*, ICSID Case No ARB/00/9, Award, 16 September 2003, § 20.22 (“a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.”); Exhibit CLA-194, *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No ARB(AF)/00/2), Award, 29 May 2003, § 114

⁶⁹⁹ Claimants’ Memorial § 338

⁷⁰⁰ Exhibit CLA-195, *Spyridon Roussalis v Romania*, § 327

⁷⁰¹ See e.g. Exhibit RLA-290, *Grand River Enterprises Six Nations, Ltd. Et al. v United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011

interference resulted in substantial, permanent and irreversible deprivation of the use, management, control and benefit of their investments. Accordingly, in order to determine if expropriation occurred, the Tribunal will consider “*the actual effect of the measures on the investor’s property.*”⁷⁰² The Tribunal will not take into account the State’s intent, i.e. whether or not it benefited from the taking, as it is irrelevant to a finding of expropriation.⁷⁰³ If the Tribunal finds that there was indirect expropriation on the part of Respondent, it will then consider the lawfulness of the expropriation, in accordance with the requirements in Article III BIT.

B. Investment allegedly expropriated

811. Claimants assert that the expropriation was carried out by Respondent through a number of actions and omissions which resulted in procedural and substantive expropriation of their investment, and without any compensation.
812. The Tribunal notes at the outset that “*procedural expropriation*” does not exist as such in investment law, nor is it contemplated by Article III BIT. However, this does not mean that there cannot be procedural violations or irregularities in the context of the substantive expropriation of an investment. In fact, unlawful expropriations may be carried through the violation of certain procedural guarantees, i.e. a breach of due process. However, these due process violations are assessed in the context of and together with the substantive expropriation claims to determine whether there was a wrongful taking of an investment. Procedural violations, i.e. breach of due process, do not form a separate expropriation claim.
813. In this context, the BIT requires that to be valid and legal an expropriation must be carried out in accordance with due process and the general principles in accordance with Article

⁷⁰² Exhibit CLA-199, Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Redfern and Hunter on International Arbitration*, (2009), § 8.83

⁷⁰³ Claimants’ Memorial § 337; Exhibit CLA-198, *Tippetts, Abbett, McCarthy, Stratton v TAMS AFFA (Iran)*, Award, 29 June 1984, 6 CTR 219 (1984), §§ 225-226; Exhibit CLA-175, *ILC Draft Articles on State Responsibility, Article 2, commentary*, at § 10. See also, Exhibit CLA-140, *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, § 602 (“*The Media Council’s possible motivation for such action [...] is irrelevant*”).

III BIT.⁷⁰⁴ This requires that there be a procedure for effecting an expropriation, including adequate notice of the State’s decision or actions, and opportunities to challenge the decisions taken, the factual basis and the appropriate compensation paid or to be paid. As stated in *ADC v Hungary*:

*“[D]ue process of law”, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful.*⁷⁰⁵

814. Accordingly, the Tribunal discusses below Claimants’ claims of “*procedural expropriation*” as part of its “*substantive expropriation*” claims in order to determine: (i) whether there were any acts of expropriation, and if so, (ii) whether they were taken by Respondent, and (iii) whether there were procedural avenues open to Claimants to “*raise its claims against the depriving actions already taken or about to be taken against it.*”⁷⁰⁶
815. Claimants describe the investment alleged to have been expropriated as “*consisting of a bundle of different rights, including but not limited to its physical assets on the ground, headquarters, monies due under the Disputed Contracts, and its reputation as a leading contractor in the market*” in Turkmenistan.⁷⁰⁷ Claimant also described the investment allegedly expropriated as “*a construction company that completed projects worth hundreds of millions of dollars over the course of a decade [...] and all of its assets and rights*”.⁷⁰⁸
816. To this end, Claimants identify the following expropriatory actions allegedly taken by Respondent:⁷⁰⁹

*a. Abnormal, Disruptive and Intimidating Intrusions and Inspections;*⁷¹⁰

⁷⁰⁴ Claimants’ Memorial § 347

⁷⁰⁵ Exhibit CLA- 203, *ADC v Hungary*, § 435.

⁷⁰⁶ Exhibit CLA-205, *Quiborax S.A. and Non Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015

⁷⁰⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 689

⁷⁰⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 688

⁷⁰⁹ Claimants’ Memorial §§ 207, 345; Claimants’ Reply and Counter-Memorial on Jurisdiction § 680

⁷¹⁰ For examples see Claimants’ Memorial §§ 210-217

b. The Undue Interference of the Prosecutor on Disputed Contracts and Sites;⁷¹¹

c. *The Undue Interference of the Vice Presidents in 2010 and Other Ranking Officials on Disputed Contracts and Sites;*⁷¹²

d. *Intimidation, Constructive Eviction and Ousting of Claimants' Owner and Executives;*⁷¹³

e. *Seizure and Sealing of Claimants' Offices and Data;*⁷¹⁴

f. Fines and Penalties;⁷¹⁵ and

g. *Termination of Sehil's Disputed Contracts, namely Nos 57, 58, 62, 63, 64 and 65.*⁷¹⁶

817. Claimants assert that Respondent's actions and omissions were taken without any legal or factual basis, and without considering that this would cause delays in the performance of Claimants.⁷¹⁷
818. Claimants further argue that "*the manner in which the investment was taken lacked due process of law*"⁷¹⁸ because "*the taking occurred without consideration of Claimants' most basic procedural rights ... [and] because Turkmenistan did not address and/or did not in any way properly address Claimants' position and requests.*"⁷¹⁹
819. Additionally, Claimants contend that "*there was never any legal procedure offered by Turkmenistan*" to Claimants to exercise and protect their rights and have their claims heard regarding the above issues.⁷²⁰ Further, no due diligence, internal or external audits or reports containing "*any comprehensive analysis of the underlying reasons for the delays and/or Claimants' position on the same*" were carried out by Turkmenistan.⁷²¹

⁷¹¹ For examples see Claimants' Memorial §§ 218-235

⁷¹² For examples see Claimants' Memorial §§ 236-244

⁷¹³ For examples see Claimants' Memorial §§ 245-272

⁷¹⁴ For examples see Claimants' Memorial §§ 273-280

⁷¹⁵ For examples see Claimants' Memorial §§ 281-292

⁷¹⁶ Claimants' Memorial §§ 358, 365; For examples see Claimants' Memorial §§ 293-313

⁷¹⁷ Claimants' Memorial §§ 361, 368

⁷¹⁸ Claimants' Memorial § 347

⁷¹⁹ Claimants' Memorial § 351

⁷²⁰ Claimants' Memorial § 354

⁷²¹ Claimants' Memorial § 355

820. Consequently, Claimants submit that “*Mr. Çap was kicked out for good and expropriated, without compensation*”. Claimants were left “*creditors of USD 118,300,678 in outstanding receivables alone*” and prolongation claims quantified at USD 43,685,435.60.⁷²² Claimants further claim loss of “*enterprise value in the amount of USD 195,603,000*” and an “*amount to be quantified for the trauma, stress, anxiety, pain and suffering, and loss of credit and reputation inflicted by Respondent on Claimants.*”⁷²³
821. In contrast, Respondent contends that none of the acts or omissions identified by Claimants are expropriatory. This is because they arose either in the context of the contractual relationship between Sehil and its counterparties, or were ordinary workings of the Turkmen bureaucracy and measures taken in the legitimate exercise of Turkmenistan’s sovereign right to regulate, or decisions taken by the Arbitrage Court of Turkmenistan which was the forum chosen by the parties under all Contracts, except Contract No 33.
822. Further, Respondent states that none of the projects under the Disputed Contracts are long-term projects or grant long-term rights to Claimants such as “*building, owning and operating a project.*”⁷²⁴ Rather, those Contracts were “*turn-key, fixed price EPC contracts for engineering, procurement and construction services.*”⁷²⁵ Additionally, Respondent argues that 18 of Sehil Contracts were “*complete or close to completion, and Sehil had received 95% or more of the value of most of those contracts before it left Turkmenistan in mid-fall 2010*”;⁷²⁶ five of Sehil Contracts were “*between 84% and 93% complete and mostly paid*”;⁷²⁷ and eight of the Sehil Contracts were terminated in accordance with their terms.⁷²⁸ Thus, Respondent submits that Claimants had no ongoing business in Turkmenistan beyond these mostly-completed, or terminated, contracts.

⁷²² Claimants’ Memorial § 303

⁷²³ Claimants’ Memorial § 303

⁷²⁴ Respondent’s Objections to Jurisdiction and Counter-Memorial § 814

⁷²⁵ Respondent’s Objections to Jurisdiction and Counter-Memorial § 814

⁷²⁶ Respondent’s Objections to Jurisdiction and Counter-Memorial § 814

⁷²⁷ PwC Report, Appendix E: Analysis of Acceptance of Works and Payments to Sehil – Contract Nos 33, 40, 44, 47 and 56, Appendix G: My Calculation of Outstanding Receivables – SQ Incomplete Contracts); NCI/MRC Report, § 21, Figure 2: Comparison of Complete and Incomplete Disputed Contracts

⁷²⁸ NCI/MRC Report §§ 105-106, Table 4: Summary of Basis of Termination; PwC Report, Appendix G: My Calculation of Outstanding Receivables – SQ Terminated Contracts. *See also infra* §§ 690-696.

C. Specific acts and omissions effecting expropriation

823. In determining whether there was an indirect expropriation of Claimants' investment in Turkmenistan, the Tribunal reviews below the specific acts and omissions described in § 816 above, which Claimants allege amounted to expropriation of their investment.

a. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) withheld IPCs in an arbitrary manner and with no basis, and/or failed to make advance payments on time?

824. The question under this head is whether the alleged withholding of interim payment certificates (IPC) and/or the alleged failure to make advance payments on time by Respondent amounted to an indirect expropriation of Claimants' investment. Claimants allege that late payments were one of "*Turkmenistan's most crippling practices*" throughout the contract and "*reached an unsustainable magnitude*" after 2007.⁷²⁹

825. Claimants claim that the issue of withheld/non-paid IPCs concerned various of the Disputed Contracts⁷³⁰ amounting to a total value of "*USD 118,300,678*".⁷³¹ However, the Tribunal discusses only two of these contracts, i.e. Contract No 33 and Contract No 56 by way of example, as to why those issues do not fall within the Tribunal's jurisdiction and cannot and have not amounted to expropriation. The same analysis would equally apply to the other contracts raising the same issue.

826. In particular, with respect to Contract No 33 Claimants state that "*the State Contracting Party refused, without any reasonable basis, to approve IPC Nos. 9 and 10 worth a combined USD 6,545,434 [...] for more than two years, and ultimately never paid them. This was in breach of the contract, and thus of the BIT by virtue of the umbrella clause.*"⁷³² Claimants allege that the State contracting party was acting on the instructions of the Central Bank.

⁷²⁹ Claimants' Memorial § 107

⁷³⁰ See Claimants' Memorial §§ 121-151

⁷³¹ Claimants' Memorial § 120

⁷³² Claimants' Reply and Counter-Memorial on Jurisdiction § 661

827. With respect to Contract No 56, Claimants state that in January 2010, Sehil submitted its final IPC No 13 for USD 3,259,289 which the Contractual Counterparty did not approve in breach of contract and “*the BIT by virtue of the umbrella clause.*” Claimants also allege that this non-payment was a sovereign act as the Contractual Counterparty behaved in a discretionary way outside the contractual framework. Claimants also state that in February 2010 the Prosecutor began investigating Sehil’s non-payment of wages, quantified at USD 624,688.
828. As a result of Respondent’s failure to approve payment of the IPCs, Claimants claim that their cash flow had been “*adversely and materially affected*” which in turn “*delayed payment of employees, subcontractors, and purchase of materials and thus Sehil’s ability to meet project completion deadlines.*”⁷³³
829. The Tribunal considers the above issues to be purely contractual issues arising within the framework of and subject to the terms of those two contracts. The times when payments were due, the evidence to be produced when seeking payments, the circumstances when payments could be delayed, whether delayed approval of the IPCs was justified and the effect of late payment, are regulated under the terms of the Contracts.
830. The Tribunal has no jurisdiction to determine the allegations of late and non-payments under these Contracts and expresses no view as to right and wrong on each instance raised by Claimants. The Contracts had their own jurisdiction clause (the Turkmenistan Arbitrage Courts and ICC Arbitration for Contract No 33) and mechanisms for determining and/or remedying issues of this kind. Sehil could and should have sought to determine its rights to payments and appropriate extensions of time in accordance with the relevant contract terms against the specific Contractual Counterparty in each case.
831. The Tribunal is not persuaded that Respondent exercised its executive power to order non-payments or to delay payments under these Contracts. There is insufficient evidence to support Claimants’ allegation that the Central Bank in respect of Contract No 33 or the Prosecutor in respect of Contract No 56 interfered to preclude the contractual

⁷³³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 661

counterparties from approving the IPCs or otherwise stopping payment of these IPCS, or more generally.⁷³⁴ The evidence in the record relied on by Claimants also does not support the conclusion that the actions of the Central Bank or the Prosecutors were directed, instructed or otherwise controlled by the State.

832. Claimants have not proved that the Central Bank or the Prosecutor acted any “*differently than another contracting party would have done*”. The Tribunal is also not persuaded that those entities exercised their sovereign power when performing their normal obligations. In fact, in the letter⁷³⁵ in which the Central Bank informs Sehil that it will not approve the IPC, it states that its actions are pursuant to the Presidential Decree No 7243 and the penalties imposed pursuant to Articles 21 and 22 of Contract No 33.⁷³⁶ In the Tribunal’s view, the Central Bank’s acts were based on the relevant contracts and IPCs submitted to it upon the request of one of the Contractual Counterparties.
833. Similarly, the evidence in the record also shows that the Prosecutor acted in its capacity as a “*former contracting party*” to inform the new Contractual Counterparty about the progress under the Contract, rather than in its sovereign capacity.⁷³⁷
834. Accordingly, Claimants have failed to prove that Respondent directed a concerted plan that the Contractual Counterparties in these (and other) Contracts would not pay, or would delay or hold back payments due to Sehil under the different Contracts, which would cause significant harm to Claimants’ business. Claimants have also failed to prove that effect of

⁷³⁴ See e.g. Exhibit C-243, Letter No 1656 dated 7 November 2009 from Dashoguz Governor to Central Bank (requesting the Central Bank to “*transfer payment after deduction the part from advanced payment, transferred to Turkish Firm ‘Sehil [...],’ which has amounted to 3 308 300,58 [...] USD.*”). The amount due under IPC No 9, dated 23 September 2009, was USD 3,308,300.58. Exhibit R-496, Payment Certificate No 9 and Act of Acceptance No 9 for Contract No 51 dated 23 September 2009; see also Exhibit C-244, Letter No 03/3840 dated 1 May 2010 from the Central Bank to Oil Refineries Complex in Turkmenbashi City; Exhibit R-836, Payment Order for Money Transfer No 42 for Contract No 57/41/12-G dated 26 May 2010 (payment order dated 26 May 2010 for 1,442,821.16€ with stamp dated 8 June 2010).

⁷³⁵ Exhibit C-516

⁷³⁶ Exhibit C-191

⁷³⁷ Exhibit C-246, Letter No 16-2/3 dated 30 August 2008 from Office of Prosecutor General to Ministry of Defense; Exhibit R-392, Addendum No 2 to Contract No 45 dated 14 August 2008; PwC Report, Appendix E: Analysis of Acceptance of Works and Payments to Sehil – Contract No 45, finding that 95% of the fixed price had been paid.

the late and delayed payments was to deprive Claimants' investment of value, use and benefits, i.e. indirect expropriation.

b. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) imposed, ordered and “forced” Claimants to take additional work without additional compensation?

835. The question under this head is whether additional works that Claimants claim they were “forced” and “ordered” to undertake by the Contractual Counterparty, with no additional compensation, amounted to an indirect expropriation of Claimants' investment. Claimants argue that the nature and magnitude of the additional works was outside the original scope of works of the contracts concerned. This additional work “*adversely and materially impacted the project completion duration, which was then not taken into account by any State contracting parties or other organs of the state when assessing project delays and costs*”.⁷³⁸
836. This specific complaint relates to Contract Nos 33, 44, 45 and 55.⁷³⁹
837. With respect to Contract No 33, Claimants contend that “*the State Contracting Party, the Arbitration Court of Turkmenistan and the Judicial Board of the Supreme Court collectively strong-armed the Consortium constructing the railway at the Iron and Steel Plant [...] in blatant disregard of the clear contractual terms and the parties' subsequent agreements to the contrary*”.⁷⁴⁰ This constituted “*an autonomous breach*” of the BIT by all organs involved.
838. With respect to Contract No 44, Claimants state the Ministry of Defence “*coerced*” Sehil to supply medical equipment to a value of USD 700,250.⁷⁴¹ This was recorded in an

⁷³⁸ Claimants' Memorial § 662

⁷³⁹ Claimants refer to “*autonomous*” or “*independent*” breaches of the BIT and breaches of the BIT “*via the umbrella clause*”. (See Claimants' Reply and Counter-Memorial on Jurisdiction § 662) The Tribunal, in the light of the decision on the MFN's scope of application in this case (see §787), will only address those alleged breaches which do not rely on the existence of an umbrella clause, as put forward by Claimants.

⁷⁴⁰ Claimants' Memorial § 662

⁷⁴¹ Claimants' Memorial §§ 181, 662; Claimants' Reply and Counter-Memorial on Jurisdiction § 208

addendum to Contract No 44 and was in return for an extension of time.⁷⁴² The Contracting counterparty imposed a penalty of USD 100,392 when Sehil initially refused to supply this equipment.⁷⁴³ Claimants contend this was an independent BIT breach because the Ministry of Defence abused the power it exercised as a State organ and also a BIT breach under the umbrella clause as the additional works were not included in the original scope of work.⁷⁴⁴

839. With respect to Contract No 45, Claimants state that “*in June 2008 the President himself intervened in the performance of the contract to unilaterally impose significant variations (demolition and reconstruction of a swimming pool and ceremonial hall), without any pretense of following the contractual procedure for work variation orders*”.⁷⁴⁵ Claimants contend this was an autonomous breach of the BIT including via the umbrella clause as the Contracting Counterparty did not compensate Claimants for the additional work.⁷⁴⁶

840. With respect to Contract No 55, Sehil was required to purchase carpets to a value of at least USD 1 million, as a replacement for mosaic tiles; no compensation was paid for this change. Claimants contend this was a breach of the BIT via the umbrella clause, and also an independent breach as the Contracting Counterparty “*behaved in a discretionary and unreasonable manner, outside the contractual framework, to do what it wanted in order to please the President rather than as an ordinary contracting party.*”⁷⁴⁷

841. In essence, Claimants contend that “*Respondent*” made modifications to the Disputed Contracts “*at will*”, did not follow the “*proper procedure*” or consider that these changes could increase Sehil’s workload and affect the original deadlines of the projects.⁷⁴⁸ Claimants contend they were “*frequently given verbal and written instructions*”⁷⁴⁹ during site visits from various State officials “*at every level of seniority*”,⁷⁵⁰ including the President.⁷⁵¹ Further, although presented as if within the original scope of work, the

⁷⁴² Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 213-215

⁷⁴³ Claimants’ Memorial § 182

⁷⁴⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 662

⁷⁴⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 662

⁷⁴⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 662

⁷⁴⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 662

⁷⁴⁸ Claimants’ Memorial § 169

⁷⁴⁹ Claimants’ Memorial § 172

⁷⁵⁰ Claimants’ Memorial § 173

⁷⁵¹ Witness Statement of Mr Ömer Gülçetiner § 22

additional works requests were in fact disruptive to Sehil's plans for all stages of the process,⁷⁵² including the financial aspect of the projects.⁷⁵³

842. Respondent denies all allegations and states that some of the additional work was not even performed by Claimants. Accordingly, Respondent argues that since Claimants' claims for additional works falling outside the scope of the original works is premised on works that never occurred, such additional works cannot form part of its expropriation claim.⁷⁵⁴
843. On balance, the Tribunal considers that the evidence is not sufficient to prove that Sehil was "*forced*" to accept the alleged contract modifications falling outside the original scope of works. If the requested works were indeed outside the scope of the originally agreed works under the contracts, then Sehil had every right to refuse to undertake it unless properly recorded in an addendum (as provided in Contract No 44 above) and in accordance with the contract procedure for additional or modified work. Instead, Sehil proceeded with the works accepting its Contractual Counterparty's modification. Claimants have also failed to show evidence that Sehil's refusal to accept contract modifications resulted in the State punishing the employees.
844. This is also true with regard to Contract No 44⁷⁵⁵ where Claimants claim to have been "*forced*" to agree in order to get an extension of time to complete the projects. In the letter⁷⁵⁶ relied on by Claimants, the Ministry of Defense informed Sehil that having failed to complete the project within the given deadline, it had breached Article 16 of the Contract. Consequently, the Contractual Counterparty imposed the corresponding penalty on Sehil, and said that the request for a time extension "*will be considered following the payment of financial penalties for delays*".⁷⁵⁷ The Tribunal does not consider this letter to be "*coercion*"; there was a breach and appropriate remedy was requested.

⁷⁵² Claimants' Memorial §§ 172-173

⁷⁵³ Claimants' Memorial § 174

⁷⁵⁴ Respondent's Rejoinder § 693

⁷⁵⁵ This Contract was originally concluded between Sehil and Prosecutor General's Office on 14 March 2006, See Annex 15. On 18 April 2008, the Contract was amended through Addendum No 1 replacing the Prosecutor with Ministry of Defense, Exhibit R-370

⁷⁵⁶ Exhibit C-334

⁷⁵⁷ Exhibit C-334

845. As to Contract No 55, the Tribunal is not persuaded that the additional work was imposed on Sehil. Sehil's Contractual Counterparty (Governor of Dashogyz Province) informed Sehil that further work would be required with regard to the project under Contract No 55.⁷⁵⁸ He explained the reason for the additional work, the nature and the cost. He also attached two Contracts for Sehil to sign and requested Sehil's confirmation with the said content. There is no evidence of "*coercion*". If Sehil did not want to or thought it would not be able to complete the work, it should have said so and could have rejected the modification, as this was additional work outside the original scope of the Contract. Further, the Tribunal notes that while Claimants have provided evidence showing the Contractual Counterparty's request for additional work,⁷⁵⁹ no evidence is provided as to Sehil's reaction or response to that correspondence.
846. Further and in any event, irrespective of whether additional works were imposed on Claimants which may or may not have resulted in time delays and payment issues, these are again contractual issues. Modification of a contract's scope of work is regulated by either the contractual terms, where provided, or by the applicable domestic laws and relevant procedures in Turkmenistan. Accordingly, deciding the merits of these claims falls outside this Tribunal's jurisdiction. Claimants could and should have gone to the appropriate jurisdictional forum to determine the rights and obligations under those Contracts.
847. Further, the Tribunal is not persuaded that the alleged contractual additions and modifications were directed or somehow influenced by Turkmenistan. Those alleged actions were conducted by Sehil's Contractual Counterparties. The Tribunal addresses this matter in §§734-777 above.
848. In the Tribunal's view, the acts and omissions alleged by Claimants under this head do not amount to or contribute to indirect expropriation. Whether justified or not in seeking additional work to be undertaken by Sehil, the Contractual Counterparties were acting in a private, commercial capacity and were purporting to act under the relevant contract terms.

⁷⁵⁸ Exhibit C-341

⁷⁵⁹ Exhibit C-340

Further, Claimants have failed to prove that the Contractual Counterparties “*used [their] sovereign power*”⁷⁶⁰ when carrying out the alleged conduct, or that the alleged conduct resulted in or contributed to depriving Claimants of the value and control of their investment.

c. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) imposed delay penalties on Claimants in an arbitrary manner with no basis?

849. The question under this head is whether the delay penalties allegedly imposed on Claimants by Sehil’s Contractual Counterparties in an “*arbitrary manner*” amounted to indirect expropriation of Claimants’ investment.
850. Claimants contend that penalty delays were imposed on them by the Contracting counterparties “*jointly with or under the instructions of other State organs such as the President and the Cabinet of Ministers, the Supreme Control Chamber, the Central Bank*”.⁷⁶¹ Claimants argue that these penalties were “*substantively unjustified and unfair*”, and arbitrary, and that the Contracting Counterparty did not take into account that the cause of the delays.
851. These allegations are made with regard to Contract No 31 (Ministry of Economy and Finance), No 33 (State-Owned Enterprise “*Turkmenmashyngurlushyk*”), No 46 (Concern “*Turkmenenergogurlushyk*”) and No 56 (Ministry of Energy and Industry).
852. Under Contract No 31 Claimants contend that after the expiry of the warranty period, and despite lengthy delayed payments, the Contracting Counterparty sought to deprive Sehil of the full warranty retainer.⁷⁶² Claimants argue this constituted a breach of the BIT via the umbrella clause and also an independent breach of the BIT because the Contracting Counterparty acted as a sovereign imposing a penalty arbitrarily.

⁷⁶⁰ Exhibit RLA-264, *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, § 445

⁷⁶¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 663

⁷⁶² Claimants’ Reply and Counter-Memorial on Jurisdiction § 360

853. Under Contract No 33 Claimants contend that the Central Bank refused to make a payment of USD 1.5 million requested by the Contracting Counterparty. Without any justification, the Central Bank instructed the Contracting Counterparty to apply a USD 3,225,000 delay penalty. This was a breach of the BIT “*per se*”.⁷⁶³
854. Under Contract No 46 Claimants contend the Contracting Counterparty imposed a delay penalty because Sehil allegedly had not met the initial deadline.⁷⁶⁴ Claimants contend this was a breach of the BIT via the umbrella clause, and also an independent breach of the BIT *per se* because the Contracting Counterparty acted as a sovereign arbitrarily imposing penalties without taking into account an agreed extension of the deadline and its own payment delays.⁷⁶⁵
855. Under Contract No 56 Claimants contend that a delay penalty was imposed by the Contracting Counterparty despite an automatic time extension under the Contract commensurate with the number of days of late IPC payments.⁷⁶⁶ This “*blatant disregard*” of the contract and “*arbitrary imposition of an unjustified penalty constitute both a breach of the BIT via the umbrella clause as well as an independent breach of the BIT.*”⁷⁶⁷
856. The Tribunal finds that the imposition of the delay penalties does not amount to indirect expropriation of Claimants’ investment for two main reasons.
857. First, the penalties were imposed pursuant to agreed contractual provisions which set out the right to impose delay penalties and when this is warranted. The contractual terms were negotiated and formally agreed by Sehil and the Contractual Counterparties which concluded it voluntarily. Claimants have not proved how exercising a contractual right in respect of a contract can amount to expropriation of the whole investment.
858. Second, in the Tribunal’s view, even where the Contractual Counterparty was a State-owned entity, the entity was acting in its capacity as a contractual party when exercising

⁷⁶³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 663

⁷⁶⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 363

⁷⁶⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 663

⁷⁶⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 367

⁷⁶⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 663

its contractual right to impose penalties on Sehil for the delayed construction work it was supposed to complete. There is no evidence that the entity went beyond that capacity or exercised sovereign power. Claimants have also failed to prove that the actions of the Sehil's Contractual Counterparties were "*on the instructions of, or under the direction or control of, that State in carrying out the conduct*".

d. Whether the Contractual Counterparties (jointly or under the instructions of other State organs) delayed the carrying out of certain administrative obligations?

859. The question under this head is whether the alleged delays caused by Sehil's Contractual Counterparties in the "*carrying out of certain administrative obligations*" amounted to indirect expropriation of Claimants' investment.
860. Claimants contend that Sehil's Contractual Counterparties "*jointly and/or under the instructions of other State organs delayed, arbitrarily and without any reasonable basis and outside the contractual framework, the carrying out of administrative obligations, including (i) the Annex registration, (ii) the handing over of the construction sites, (iii) the procurement of materials, and (iii) the issuance of visas*".⁷⁶⁸ In this respect Claimants refer non-exclusively to Contracts Nos 47, 51, 57, 33 and 58.
861. Under Contract No 47 Claimants state that the final registration of the Annexes took nearly a year due to omissions of the Contractual Counterparty. In the meantime, Sehil was instructed "*to increase the pace of construction*" by the Contractual Counterparty which did not take account of the delays and costs caused by these omissions and was not in line with the contract terms. Claimants allege this was a breach of the BIT via the umbrella clause and as these omissions were "*with the obvious objective of not upsetting the President and other organs of the state*" were also a breach of the BIT "*per se*".⁷⁶⁹
862. In respect of Contract No 51, Claimants contend that delay penalties were unjustly imposed on Sehil, without any regard to the cause of the delays and cost implication. This involved

⁷⁶⁸ Claimants' Reply and Counter-Memorial on Jurisdiction § 664

⁷⁶⁹ Claimants' Reply and Counter-Memorial on Jurisdiction § 664

the Contractual Counterparty “*along with the Turkmen Cabinet of Ministers*” delaying registration of the Annexes for 11 months and handing over the construction site several months late. This was in breach of the BIT via the umbrella clause. Claimants also contend that when Sehil complained about the delayed site hand over, the Contracting Counterparty threatened to withhold the advance payment and to inform the Cabinet of Ministers if Sehil did not commence construction works soon, “*which is a classic sovereign conduct and abuse of State power unavailable to normal contracting parties*” and an independent BIT breach.⁷⁷⁰

863. Sehil was subjected to delay penalties and the intervention of the Prosecutors Office in respect to Contracts Nos 51 and 57. Claimants contend that the penalties were imposed without taking into account that the cause of the delay was the 2006 Presidential Order that foreign contractors procure construction materials from Turkmenement and Turmendashery, local Turkmenistan suppliers.⁷⁷¹
864. Claimants allege that when imposing delay penalties and withholding an IPC payment under Contracts Nos 51 and 33 respectively, the Contractual Counterparty failed to take into account that it and the State Migration Service were responsible for the delays in issuing visas for foreign workers. These are breaches of the BIT *per se* and via the umbrella clause.⁷⁷²
865. With respect to Contract No 58, Claimants complain that Sehil had to devote considerable time and resources to clearing the construction site, which the President had instructed the Mayor’s office of Ashgabat, ministries and sectoral management agencies to do. This was not taken into consideration when Sehil was subjected to a USD 6.5 million delay penalty and constitutes a BIT breach via the umbrella clause. Claimants also allege that the actions of the Contracting Counterparty “*were taken with the obvious objective of not upsetting the*

⁷⁷⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 664

⁷⁷¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 664

⁷⁷² Claimants’ Reply and Counter-Memorial on Jurisdiction § 664

*President and other organs of the State in blatant disregard of the contractual terms” and constitute a breach of the BIT per se.*⁷⁷³

866. In the Tribunal’s view all these alleged administrative delays are contractual issues. Each Contract contained the arrangements and conditions for the handover of the sites, both before the commencement and after the completion of the work, the Annex registration, the procurement of materials, etc.; whatever was not covered by the specific contract was provided for by the relevant applicable law or procedure in Turkmenistan. Accordingly, whatever act or omission may or may not have been taken by Sehil’s Contractual Counterparties in that regard was in the exercise of a contractual right, which was freely to be exercised by both Sehil and its counterparty. Therefore, any issue arising out of or in connection with the project, including the manner of performance, is a pure contractual dispute to be resolved by Sehil and its Contractual Counterparty. Failure by Sehil’s Contractual Counterparties to perform their contractual obligations towards Sehil does not amount to expropriation. At best, if proved, it amounts to a breach of contract, the remedy to be sought in the agreed forum.
867. The Tribunal notes Claimants’ contention that the Governor of Dashoguz “*threatened*” Sehil that he would withhold the advance payment relating to Contract No 51 and would inform the Cabinet of Ministers if Sehil did not commence construction works soon. However, the Tribunal is not convinced on the evidence in the record that this is a “*classic sovereign conduct and abuse of State power unavailable to normal contracting parties*”. In the letter relied on by Claimants, the Governor wrote that he would withhold the payment due under the Contract and would inform the Cabinet of Ministers. However, the Governor also said that he would only do so if Sehil did not commence the work it was required to start under the Contract, despite the fact that Sehil was already late by a couple of months.⁷⁷⁴ Further, and in any event, the actions of the Governor were based solely on the terms of the Contract, including the notification of the Cabinet of Ministers.⁷⁷⁵ In particular, the Contract provided that if any necessary changes needed to be made to the construction

⁷⁷³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 664

⁷⁷⁴ The letter is dated 24 July 2007 and the work under the contract was supposed to commence in February 2007. See Exhibit C-501

⁷⁷⁵ See Exhibit C-200, Contract No 51

time-table which could influence the extension of construction time, such changes should be agreed by the parties “*in writing and shall be documented in the supplementary agreement to this Contract on the basis of the permit of the Chairman of the Cabinet of Ministers of Turkmenistan*” followed by a registration with other State organs.⁷⁷⁶ This obligation was also applicable with regard to “*change in scope of works*”,⁷⁷⁷ as well as “*any amendments and addenda to this Contract*”.⁷⁷⁸ Accordingly, informing the Cabinet of Ministers and obtaining its approval regarding any changes to the scope of work or the working time-table was an obligation specifically provided for in the Contract. Therefore, this conduct in itself is insufficient to prove “*sovereign intervention*” or that the Governor of Dashoguz acted beyond his capacity as a Contractual Counterparty.

868. Further, Claimants have also failed to prove that the any of alleged administrative acts and omissions done by Sehil’s Contractual Counterparties were directed, instructed or under the control of Turkmenistan. This is true also with regard to the issue of obtaining visas.
869. Although the issuance of visas is an act done by the State, the State has no obligation to issue visas. This is a State prerogative which the government exercises within its discretion taking into account the different circumstances of each person. In the current case, responsibility to obtain visas for foreign qualified workers, with the necessary expertise, was a contractual matter for Sehil and the Contractual Counterparty. Accordingly, any issue would be worked out between the contracting parties, depending upon which party was responsible in accordance with the contractual terms. If Sehil’s Contractual Counterparty had an obligation under the Contract(s) to assist Sehil in obtaining visas for its workers, failure to perform this obligation would amount to a breach of contract, not to a BIT violation or indirect expropriation.
870. Further, the Tribunal has not seen evidence that Respondent delayed or refused to issue visas with the intent to cause cash flow delays or other difficulties for Sehil or as part of a clear policy to expropriate Claimants’ investment. The Tribunal also considers that delays

⁷⁷⁶ Exhibit C-200, Clause 5.4

⁷⁷⁷ See Exhibit C-200, Clause 9.4.1

⁷⁷⁸ See Exhibit C-200, Clause 26.2

in issuing visas, even if sustained, do not amount to indirect expropriation. It is not Turkmenistan or its Ministry of Foreign Affairs that made a promise to Sehil to issue visas or to assist in obtaining visas and to do so on time.

871. There is an inherent business risk in every construction project, which includes potential administrative delays, especially in big projects where many sub-parties and sub-contractors are involved and co-depend on one another. Claimants have not proved that the above alleged acts were directed by Respondent and resulted in substantial, irreversible and permanent deprivation of the value, use and benefits of Claimants' investment. Accordingly, there is no basis that this head of claim, even if sustained, amounts to indirect expropriation.

e. Whether the Contractual Counterparties engaged in abnormal, disruptive, intimidating, and extensive site raids and inspections, abused their power?

872. Claimants contend that the Contracting Counterparties abused the power derived from their position as State organs by engaging in "*abnormal, disruptive, intimidating and extensive site raids and inspections*" outside the contractual framework and their legitimate expectations.
873. Claimants refer to Contracts Nos 51 and 55 and 45 as examples of this conduct.
874. With respect to Contracts Nos 51 and 55 Claimants allege "*there were constant and overbearing visits to the construction sites, which by their frequency, tone and intensity, fell outside the contractual framework and went beyond what could normally be expected*".⁷⁷⁹ In particular, Claimants contend there were "*'constant visits to [Sehil's] working premises' by various State authorities such as Vice Presidents, Mayors, Governors and Vice-Governors of the Dashoguz region*"⁷⁸⁰ at different times of the day. This was supported by the evidence of Mr Sahin⁷⁸¹ and Mr Uz. Claimants also contend that these statements are "*corroborated*" by Mr Çap and his family's evidence concerning the

⁷⁷⁹ Claimants' Reply and Counter-Memorial on Jurisdiction § 665

⁷⁸⁰ Claimants' Memorial § 265 referring to Witness Statement of Mr Dursun Kaptan Sahin § 12

⁷⁸¹ Claimants' Reply and Counter-Memorial on Jurisdiction § 274

alleged investigations, threats and intimidation acts on part of various State authorities.⁷⁸² Accordingly, Claimants claim this constituted an independent breach of the BIT or a breach of the BIT via the umbrella clause.

875. In respect of Contract No 45, Claimants allege that in retaliation to Claimants' refusal to undertake additional works, "*the Prosecutor abused its position as a State organ by reopening in May 2008 a long dormant investigation which led to the imprisonment*" of Mr Çuvalci.⁷⁸³
876. Claimants further allege that the "*abnormal, disruptive and intimidating*" behavior also consisted of forcing Claimants to leave Turkmenistan; threats and intimidation,⁷⁸⁴ taking over of Sehil's premises, documents, equipment, construction sites,⁷⁸⁵ and "*constant harassment*" by various state officials "*including the Prosecutor, the Vice Presidents and other high-ranking State officials.*"⁷⁸⁶ However, those allegations overlap with Claimants' other claims which are discussed and determined by the Tribunal at §§ 902-905 and 955-960 below.
877. The position concerning Mr Çuvalci is very specific. On balance, the evidence in the record does not prove that the investigation of Mr Çuvalci by the Prosecutor was contrary to the law of Turkmenistan or specifically aimed at depriving Claimants of their investment in Turkmenistan. The Tribunal has considered Mr Çuvalci's testimony, the Bill of Indictment and the Court's decision, as well as both Claimants' and Respondent's respective positions. The fact is Mr Çuvalci was found guilty of a crime and imprisoned.
878. The Tribunal is not persuaded that the alleged "*raids*", "*inspections*" and "*site visits*" did take place, and if they did that the visitors were state officials acting upon the instruction and/or direction of Respondent, and that the visits/inspections were "*abnormal, disruptive and intimidating*". The Tribunal has considered the witness evidence relied on by

⁷⁸² Claimants' Memorial § 266; See Witness Statement of Mr Hasan Çap § 9; Witness Statement of Mr Hüseyin Çap § 10; Witness Statement of Mr Ukkase Çap § 12

⁷⁸³ Claimants' Reply and Counter-Memorial on Jurisdiction § 665

⁷⁸⁴ Claimants' Reply and Counter-Memorial on Jurisdiction §§ 266, 271

⁷⁸⁵ Claimants' Reply and Counter-Memorial on Jurisdiction § 271

⁷⁸⁶ Claimants' Reply and Counter-Memorial on Jurisdiction § 274

Claimants⁷⁸⁷, as well as the two letters written by Mr Çap.⁷⁸⁸ However, these in themselves are insufficient for the Tribunal to conclude that the visits and inspections amounted to “raids” or were “*abnormal, disruptive and intimidating*”. Even if they were, these actions do not amount to expropriation; at best they could have been argued as FET or FPS violation under the BIT. However, since the Tribunal has no jurisdiction over such protections, it has not considered these issues. Accordingly, the Tribunal finds that Claimants have not proved that the alleged administrative delays, even if proved, contributed or amounted to deprivation of Claimants’ investment value.

879. Further, Claimants contend that “*offensive and derogatory words’ were used by Respondent*”.⁷⁸⁹ However, in the letter to the Governor of Dashoguz⁷⁹⁰ relied on by Claimants, Mr Çap says that their “*Project Director*” held meetings at the construction sites at 6 am and 9 pm; that “*offensive and derogatory words [were] used by managers at these meetings*”; that these meetings impeded the work and asked for assistance to sort out these and other payment related issues. In particular, Mr Çap asked the Governor to “*instruct and present orders only to Project Directors*”. Thus, Mr Çap appears to blame the “*Project Directors*” for those actions, not the State or any State officials.
880. The second letter relied on by Claimants and addressed to the Minister of Culture also does not support Claimants’ allegation.⁷⁹¹ In that letter, Mr Çap simply informs the Ministry of the status of the project undertaken. No allegations of “*abnormal, disrupting or intimidating*” behaviour, or site inspections/raids are made.
881. In the Tribunal’s view, these actions, even if substantiated, did not in themselves amount or contribute to depriving Claimants of control and/or the value of their investment. The right of a Contracting Counterparty to visit the construction site is normally regulated by the applicable Contract in each case.⁷⁹² In particular, Sehil’s Contractual Counterparties

⁷⁸⁷ Claimants’ Memorial § 266

⁷⁸⁸ See Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 265-266, 280, 276-279

⁷⁸⁹ Claimants’ Memorial § 215

⁷⁹⁰ Exhibit C-360

⁷⁹¹ Exhibit C-361

⁷⁹² Respondent’s Objections to Jurisdiction and Counter-Memorial § 668; Claimants’ Memorial § 211

had the right to monitor the quality of the performed work,⁷⁹³ as well as to “*send inspectors to verify Contractor’s production process, materials*” etc.⁷⁹⁴ If this right was exceeded or abused, this would have given rise to a contractual dispute, which in turn could have been resolved between the parties in accordance with the Contract.

882. For the reasons described above, Claimants have not proved that there were undue, improper or illegal site visits and inspections by the Contractual Counterparties. In any event, Claimants have not proved that the site visits were “*excessive, abnormal or intimidating*” resulting in Claimants’ being deprived of their investment in violation of the applicable treaty.

f. Alleged interference of State organs with the performance of the contracts via threats, intimidations, imprisonments, penalties/fines, bans, et cetera⁷⁹⁵

883. This head considers whether Respondent through its agencies intimidated, threatened, imprisoned and ousted Sehil’s employees, Mr Çap and his family, which resulted in the *de facto* expropriation of Claimants’ investment.⁷⁹⁶
884. Claimants have relied on the evidence of several of Sehil’s employees, as well as Mr Çap and his family. They all claim to have been threatened, intimidated and forced to leave Turkmenistan by Turkmenistan’s authorities. In this regard, the Tribunal considers below the evidence of the witnesses relied on by Claimants, passport scans and a few letters.⁷⁹⁷

⁷⁹³ See e.g. Article 7.4 of Contract No 44 requiring Sehil’s Contractual Counterparty to “[e]nsure monitoring of the works performed by taking as a basis the quality criteria of construction procedures, standards and specifications used in Turkmenistan.” (Exhibit R-369, Contract No 44, Article 7.4. See also e.g. Exhibit R-150, Contract No 33, Articles 7.7, 12.1.3; Exhibit R-439, Contract No 47, Articles 7.3-7.4; Exhibit R-483, Contract No 51, Articles 7.3-7.4; Exhibit R-537, Contract No 55, Articles 7.3-7.4, Exhibit R-556, Contract No 56, Articles 7.4, 11.1; Exhibit R-578, Contract No 57, Articles 7.7, 12.1.3; Exhibit R-597, Contract No 58, Article 6.4.)

⁷⁹⁴ See e.g. Exhibit R-369, Contract No 44, Article 11.1.

⁷⁹⁵ This section covers the issues raised in Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 668, 669

⁷⁹⁶ See Claimants’ Memorial §§ 245, 299

⁷⁹⁷ See Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 245-272; Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 299-312

885. Mr Gülçetiner claims to have been insulted by Turkmen authorities,⁷⁹⁸ and investigated “*in an aggressive way*” by the Prosecutor who threatened to “*jail him*” regarding the delay in the completion of a project.⁷⁹⁹ He resigned from Sehil on 1 September 2010 referring in his resignation letter to the “*heavy psychological pressure put on him by Respondent.*”⁸⁰⁰ However, apart from his testimony there is no track record or any other contemporary evidence is provided to show the presence of threats, intimidation or ousting, or that all of these were conducted by State authorities in their official sovereign capacity and outside.
886. Claimants explain that Mr Çuvalci⁸⁰¹ was investigated for the death of one of Sehil’s employees caused by an accident at the construction site. Claimants contend that Mr Çuvalci was targeted by the new Prosecutor who reopened the case, despite the fact that no action was taken against Mr Çuvalci by the Prosecutor at the time.⁸⁰² As a result, Mr Çuvalci was found guilty and sentenced to prison for five months.⁸⁰³ Following the end of his imprisonment, he returned to Turkey.⁸⁰⁴
887. As to Mr Sahin,⁸⁰⁵ Claimants said he was “*forced*”⁸⁰⁶ to sign a letter which said that if the employees for Contract Nos 51 and 55 were not paid within 20 days, he would go to jail.⁸⁰⁷ The employees were paid and he did not go to jail. However, Claimants state that after Mr Sahin complained to the Dashoguz Municipality and the Vice Governor of the Dashoguz Region, he was subsequently “*accused of having had sexual intercourse with one of his Turkmen colleagues*” and was imprisoned for 15 days, and then “*deported*”.⁸⁰⁸

⁷⁹⁸ Witness Statement of Mr Ömer Gülçetiner §§ 40; 42

⁷⁹⁹ Witness Statement of Mr Ömer Gülçetiner § 51

⁸⁰⁰ Claimants’ Memorial § 262; See Exhibit C-374, Letter of resignation of Mr Ömer Gülçetiner dated 1 September 2010 (“*I have been working for your company since September 1, 2001. As a result of the extreme pressure put on me by both the Turkmen Government and the Customers, I have suffered significant moral distress. Consequently, I hereby declare that I terminate my employment contract with this valid reason.*”)

⁸⁰¹ He is the former site chief of the 36-Apartment House Project for the Ministry of National Security (Contract No 29).

⁸⁰² Witness Statement of Mr Ömer Gülçetiner § 25

⁸⁰³ Exhibit C-338, Bill of Indictment dated 19 May 2008 by the Ashgabat City Authority.

⁸⁰⁴ Exhibit C-371, Passport of Mr Mustafa Çuvalci.

⁸⁰⁵ He was the project manager of the Drinking Water Treatment Plant project (Contract No 51) and of the Ruhiyet Palace project (Contract No 55), as of April 2009.

⁸⁰⁶ Claimants’ Memorial § 254

⁸⁰⁷ Witness Statement of Mr Dursun Kaptan Sahin § 8

⁸⁰⁸ Claimants’ Memorial § 255; See also Witness Statement of Mr Dursun Kaptan Sahin §§ 13-17; Exhibit C-317, Passport of Mr Dursun Kaptan Sahin.

888. The Tribunal is not persuaded that Mr Çuvalci and Mr Sahin were “*imprisoned and deported on suspicious grounds*”. Each of those instances is discussed individually below.
889. Mr Çuvalci was investigated and indicted⁸⁰⁹ for the murder of Mr Maksat Mamiyev who died as a result of power shock by the power-operated concrete finishing machine at one of Sehil’s construction sites. Mr Çuvalci’s responsibility arose from the fact that his “*functional work liabilities [were] to organize the construction of the building, to ensure safe and healthy labour conditions for workers, and to organize other daily affairs concerning the on-going construction*”. The Bill of Indictment states that Mr Çuvalci admitted that he “*did not give instructions to the victim*” as he was required to; rather he “*told [his] work safety personnel to conduct the instruction procedure*”. Mr Çuvalci further stated that he understood his “*failure in this case*” and that he “*fully accept[ed] [his] fault*”. Based on Mr Çuvalci’s confession, the witness statements of several witnesses and relevant documents, a Bill of Indictment was issued, and sent to the Office of the Prosecutor.⁸¹⁰
890. Accordingly, the Prosecutor charged Mr Çuvalci with murder based on his own testimony as well as other evidence showing his guilt, following an investigation conducted by another organ.⁸¹¹ Mr Çuvalci was found guilty by the District Court of Niyazov in Ashgabat.⁸¹² Mr Çuvalci had the opportunity and did exercise his right to appeal the decision; the appeal was dismissed and the first instance court’s decision upheld.⁸¹³
891. On the evidence, the Tribunal has concluded that the imprisonment of Mr Çuvalci was not act of “*intimidation*” or “*threat*” on part of the State using the Prosecutor. It was a legitimate punishment compliant with Turkmenistan law. Further, there is no evidence that Mr Çuvalci’s procedural or substantive rights were violated in any way, or that there was a due process violation by the Court. Claimants also failed to prove that Mr Çuvalci “*had no choice*” but to leave for Turkey, rather than leaving on his own will.

⁸⁰⁹ Exhibit C-338, Bill of Indictment dated 19 May 2008 by the Ashgabat City Authority

⁸¹⁰ Exhibit C-338, Bill of Indictment dated 19 May 2008 by the Ashgabat City Authority

⁸¹¹ An internal investigation was conducted by “*Turkmenstandartlari (Turkmen Standards)*” administration which issued the Report No 1. See Exhibit C-338 and Exhibit R-1025

⁸¹² Exhibit R-1025, Sentence of Mustafa Çuvalci dated 4 June 2008

⁸¹³ Exhibit R-1026, Decision of the Judicial Board for Criminal Cases of the city of Ashgabat

892. As to Mr Sahin, Claimants claim he was “*forced*”⁸¹⁴ to sign a letter which said that if the employees for Contracts Nos 51 and 55 were not paid within 20 days, he would go to jail.⁸¹⁵ Claimants have not provided that letter or any other evidence confirming the existence of such letter.
893. Further, Mr Sahin has stated that he believes that because of his letters of complaint “*the Turkmen authorities decided that [he] was a trouble maker and needed to be taught a lesson*”, and he was therefore imprisoned for 15 days and later deported to Turkey.⁸¹⁶ Neither Mr Sahin nor Claimants have provided any evidence to support this statement. Claimants have also failed to establish a link between Mr Sahin’s complaints to the Vice Governor of the Dashoguz Region and his departure from Turkmenistan.
894. To the contrary, the record shows that there was a reasoned decision by the Court of the city of Dashoguz subjecting Mr Sahin to administrative detention due to his breach of the Code of Administrative Violations by engaging in “*sexual intercourse with a citizen [...] engaged in prostitution*”.⁸¹⁷ Accordingly, Mr Sahin’s deportation was due to this violation which was a “*condition of entering and staying in Turkmenistan*”.⁸¹⁸ On balance, the Tribunal does not consider Mr Sahin’s sentencing or deportation was arbitrary or illegal.
895. The evidence given by Claimants’ witnesses was contradictory. Claimants contend that Ms Yeliseyeva suffered a stroke as a result of the State authorities’ undue interferences.⁸¹⁹ However, Ms Yeliseyeva denied this stating:

*I have read what Mr Gülçetiner says about my having suffered a stroke. He seems to suggest that it happened in 2010. But he must have been thinking of the events in 2008, which I described above. I did not have a stroke in 2010.*⁸²⁰

⁸¹⁴ Claimants’ Memorial § 254

⁸¹⁵ C-DKS1, Witness Statement of Mr Dursun Kaptan Sahin § 8

⁸¹⁶ C-DKS1, Witness Statement of Mr Dursun Kaptan Sahin § 13

⁸¹⁷ Exhibit R-1027, Order of the Court of the city of Dashoguz dated 23 November 2009

⁸¹⁸ Exhibit R-1028, Letter from Dashoguz Province Migration Administration to the Migration Service of Turkmenistan dated 14 December 2009; Exhibit C-317, Passport of Mr Dursun Kaptan Sahin

⁸¹⁹ Claimants’ Memorial § 263; Witness Statement of Ms Antonina Yeliseyeva § 21. This was also confirmed by Mr Gülçetiner’s testimony § 47; Witness Statement of Mr Hasan Çap in support of Claimants’ Counter-Memorial on Respondent’s Objection to Jurisdiction § 11.

⁸²⁰ Witness Statement of Ms Antonina Yeliseyeva § 21

896. Ms Yeliseyeva also explained that her illness in 2008 was not caused by the 2008 tax audit. Rather, it was caused by the additional stress imposed on her by Sehil. Specifically:

[...] toward the end of May, I unexpectedly received a summons from Sehil instructing me to return to Turkmenistan right away to help with the tax audit, which had just begun. I felt I had no choice but to return to Ashgabat immediately. We had to change our plans very hastily.

[...]

This was a very stressful time for me. On top of this, the physical exhaustion from the long international flights to and from Russia, combined with the internal transfers and unexpected change to our plans, as well as having to muster the energy, concentration and professionalism required to help with the audit, combined with my hypertension, all contributed to my feeling very unwell, and ultimately to my suffering a stroke on June 10, 2008.

[...]

I would not say that my illness stemmed from the tax audit procedures themselves, which were no different from those of any audit. Rather, I would say the principal factors which caused my illness were the physical exhaustion from travel and the stress and unpleasantness of the disruption to our plans during this time which was of such importance to my son's professional trajectory.⁸²¹

897. Ms Yeliseyeva's description of the events surrounding the tax audit in 2010 was similar. She explained that the audit was conducted by one inspector at the premises and that "*a big part of the stress was that [she] felt completely alone*".⁸²² This was because at that time Mr Çap had gone to Turkmenistan, Mr Gülçetiner was absent, while the other staff was not at the office. To this end, Ms Yeliseyeva stated that the "*anxiety of the tax inspection was bad enough, but this was magnified by the fact that I was left to deal with it all completely by myself.*"⁸²³

898. Accordingly, Claimants have not proved that Ms Yeliseyeva's health problems were caused by the State authorities.

⁸²¹ Witness Statement of Ms Antonina Yeliseyeva § 20

⁸²² Witness Statement of Ms Antonina Yeliseyeva § 22

⁸²³ Witness Statement of Ms Antonina Yeliseyeva § 23

899. Similarly, Claimants have also failed to prove that Mr Çap’s health problems were caused by the “*visits and demands*” of the State’s officials. Except for Mr Çap’s own evidence,⁸²⁴ no other record or evidence was presented to prove this causal link.
900. The same is true for Claimants’ allegations that Mr Çap was “*under threats of arrest and of a travel ban*”.⁸²⁵ The letter Mr Çap sent to President Berdimuhamedow⁸²⁶ and on which he relies to support its claim, does not prove that Turkmenistan threatened to or actually imposed a travel ban on Mr Çap or his family. Mr Çap’s letter states that “*my family members had been banned from leaving the country and this ban had been overturned after I said that I will claim my rights through official channels.*” The Tribunal further notes that in that letter, Mr Çap has confirmed that he “*had some health problems as a result of being subjected to the inhuman treatment by representatives of the employer when I was dealing with the projects.*” Mr Çap ends the letter by saying that he presented the above events to the President for his “*information which [he] believe[d] that the President does not have knowledge*” of.⁸²⁷
901. There is also no record of an “*indecipherable travel ban*” being imposed on Mr Çap or his family in September 2010 forbidding them to leave Turkmenistan, as alleged by Claimants.⁸²⁸ Further, Claimants’ reliance⁸²⁹ on the two letters written by Mr Çap to President Berdimuhamedow⁸³⁰ and to the Turkish Republic Prime Ministry Foreign Trade Undersecretariat⁸³¹ are not convincing. First, those letters present Mr Çap’s subjective view of events which are not confirmed by any other record or evidence. Second, in neither of those letters does Mr Çap say that he had or will ask the Turkish authorities for assistance

⁸²⁴ Witness Statement of Mr Muhammet Çap § 33

⁸²⁵ Claimants’ Memorial § 258; Witness Statement of Mr Muhammet Çap § 34; Claimants’ Memorial §§ 267-268; Exhibit C-376, Letter of Mr Çap to the Turkish Undersecretariat of Foreign Affairs dated 9 December 2010; Witness Statement of Mr Huseyin Çap in support of Claimants’ Counter-Memorial on Respondent’s Objection to Jurisdiction § 16; see also the Witness Statement of Mr Hasan Çap in support of Claimants’ Counter-Memorial on Respondent’s Objection to Jurisdiction §§ 9, 18, who confirms that Mrs. Maysa Yzmukhammedova threatened his cousin that he would not be able to leave the country.

⁸²⁶ Exhibit C-377, Letter of Mr Muhammet Çap to President Berdimuhamedow dated 10 November 2010

⁸²⁷ Exhibit C-377, Letter of Mr Muhammet Çap to President Berdimuhamedow dated 10 November 2010

⁸²⁸ Claimants’ Memorial § 267

⁸²⁹ See Claimants’ Memorial § 270 FN 474

⁸³⁰ Exhibit C-377, Letter of Mr Muhammet Çap to President Berdimuhamedow dated 10 November 2010

⁸³¹ Exhibit C-367, Letter from Mr Muhammet Çap to the Ministry of Culture and TV & Radio Broadcasting of Turkmenistan G.H. Myradov, dated 22 January 2011

for him to leave Turkmenistan. In fact, the second letter is directed to Turkmenistan's Ministry of Culture, not to Turkey.

902. In any event, even if all of the above claims are found to be true and Respondent did act as alleged, those actions *per se* do not suffice to constitute expropriation of Claimants' investment. Claimants have failed to prove how any of the alleged actions deprived them substantially of the value and control of their investment.

g. Interference by the Prosecutor and “its army” in the Disputed Contracts and/or Claimants' investment

903. The question under this head is whether “[b]lessed with the mandate and authority of the President”, “the General Prosecutors and its army of prosecutors” conducted “an increasing number of intrusions and inspections” of Sehil's construction sites, without any prior notice,⁸³² interfering in the Disputed Contracts “and/or with Claimants' investment”, and if so, whether that interference amounted or contributed to the indirect expropriation of Claimants' investment in Turkmenistan.
904. In particular, Claimants contend that in the period 2008-2010 the Prosecutor and “its army” interfered with Claimants' Disputed Contracts “and/or investment” in order to “disrupt and intimidate Claimants, in violation of any international standard of due process, under the false pretense of alleged delays and/or default in payment of employees, without prior due diligence or assessment [...] or without the slightest consideration for Claimants' position”. Claimants argue that this was a violation of “good faith, including cooperation, mitigation and assistance” which separately and collectively constitute an “independent breach of the BIT on several counts.”⁸³³

⁸³² Claimants' Memorial §§ 218-219. See also, Witness Statement of Mr Huseyin Çap in support of Claimants' Counter-Memorial on Respondent's Objection to Jurisdiction § 11. See also Exhibit C-302, Decree from the Office of Prosecutor of Turkmenistan to Muhammet Çap, No 8/5, dated 24 May 2010.

⁸³³ Claimants' Reply and Counter-Memorial on Jurisdiction § 670

905. Claimants make this allegation with regard to Contracts Nos 56, 58, 57, 51, 55 and 62-65, as well as the tax audit of 21 May 2008 by the Prosecutor’s office.⁸³⁴
906. Claimants allege that the two investigations of the Office of the Prosecutor of Mary City relating to Contract No 56⁸³⁵ were conducted without any prior due diligence and were “*undue, unexpected and disproportional*”.⁸³⁶ Further, Claimants contend that, following the first investigation, the Prosecutor’s instruction for Sehil to pay the salaries due to its employees was “*nonsensical*”⁸³⁷ given that “*Sehil was owed itself far more*” by the Contracting Counterparty with a delay “*more than 100 days*”⁸³⁸ and despite Claimants’ “*numerous complaints*”.⁸³⁹ Therefore, Claimants argue that the Prosecutor’s behaviour was “*unfair, arbitrary and disproportionate*” because it neither considered nor “*mitigate[d] or assist[ed] Claimants financially or otherwise*.”⁸⁴⁰ Claimants claim that the second investigation conducted in relation to Contract No 56⁸⁴¹ was similarly disproportionate and unfair and ignored the “*USD 8.2 million Sehil was owed at that time*”, including the Contracting Counterparty’s payment delays regarding which Claimants had complained several times.⁸⁴² Accordingly, Claimants argue that these actions are “*unfair, arbitrary and disproportional and alone constitutes an independent breach of the BIT*”.⁸⁴³

⁸³⁴ Exhibit C-557, Letter 8-1/13 from the Prosecutor General’s Office of Turkmenistan to Khanmammadov M., Head of State Tax Service of Ashgabat City dated 21 May 2008. This letter was produced by Respondent in the course of the Document Production Phase (R002840). (The date is not readable but we assume it is 2008 because it was produced as the basis of the 2008 tax audit in the document production exercise.)

⁸³⁵ Exhibit C-448, Letter from the Prosecutor’s Office of Turkmenistan, Mary City to Claimants dated 3 November 2008. This document was produced by Respondent during the Document Production Phase (R002839).

⁸³⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸³⁷ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸³⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction §§ 293(b), 671; See also Exhibit H-247, Calculation of payment delays for Contract No 56

⁸³⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671; See also Exhibit C-559, Letter No 608 dated 14 February 2008 from Sehil to the Minister of Energy; and Exhibit C-560, Letter No 1049 dated 13 March 2008 from Sehil to the Minister of Energy.

⁸⁴⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁴¹ Exhibit C-276, Decree on disposal of breach of law by the Office of Prosecutor of Mary City dated 3 February 2010.

⁸⁴² See Exhibit H-247; Exhibit C-277, IPCs No 10-12 related to Contract No 56 (containing Sehil’s payment certificate for USD 1,820,244.31, USD 2,800,546.62, and USD 3,622,351.58); Exhibit C-365, Letter No 4725 dated 22 October 2009 to the Director of the Director General of Turkmenbashi Complex; Exhibit C-366, Letter No 5216 to the Deputy Director General of Turkmenbashi Complex dated 3 December 2009

⁸⁴³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

907. In support of this contention, Claimants rely on the testimony of Mr Ömer Gülçetiner. He states that “*the Office of the General Prosecutor was mandated by the President*”⁸⁴⁴ by an official letter of “*Assignment*” dated 26 February 2010 in relation to Contract No 58.⁸⁴⁵ The letter was sent by the Prosecutor’s Office of Ashgabat City and provides in pertinent part:

Investigations and analyses have been conducted by Ashgabat City Attorney in the general monitoring procedures in accordance with the instruction of Esteemed President of Turkmenistan, in Extended Council of the Cabinet of Ministers held on October 3, 2009 to strengthen the supervision of construction of buildings, to monitor their completion and delivery on time in a required way carefully.

Under the Order No 9365 of the President of Turkmenistan dated January 11, 2008, the Contract was signed between the “Sehil İnşaat Endüstri ve Ticaret Limited Şirketi” Turkish Company and the Ministry of Culture and Broadcasting of Turkmenistan on construction of a complex on the crossroads of Atatürk and On Yyl Abadancylyk Streets [...]

Whereas, requirements of the Part 5.1 of the Contract between Customer and Contractor have been broken off rudely, and was overdue from construction period demonstrated in the Order No 9365 of the President of Turkmenistan dated January 11, 2008. Furthermore, since supervision was unstable the construction had been conducted in a low pace. [...]

Demonstrated violations of rules, because of negligence of responsible personnel of the “Sehil İnşaat Endüstri ve Ticaret Limited Şirketi” Turkish Company and the Ministry of Culture and Broadcasting regarding shortcomings made in meeting the requirements “on National Programme up until 2020” of the President of Turkmenistan and referring to the Article 55 of the Constitution of Turkmenistan “about Public Prosecutor’s Office of Turkmenistan”, I DEMAND the followings [sic]:

Making efforts to take away violations of law and other disorders immediately.

Reinforce pace of construction works of buildings.

Firm supervision to meet requirements of the contract signed in February 2008, according to the Order No 9365 of the President of Turkmenistan dated January 11, 2008.

Replace black stained marbles covering the building with white marbles as required.

⁸⁴⁴ Witness Statement of Mr Ömer Gülçetiner § 44

⁸⁴⁵ Exhibit C-344, Assignment of the Prosecutor Office No 8/4 addressed to Sehil dated 26 February 2010

Fulfil the assignment on time and make reports about results to Ashgabat City Attorney by a letter.

*In case of disagreement with the demand, complaints may be submitted to the attention of the foregoing prosecutor. Complaints don't suspend fulfilment of the assignment.*⁸⁴⁶

908. Claimants argue that this letter is an example of Respondent's "procedural and substantive breaches" for "5 independent reasons":⁸⁴⁷

- i. The letter confirms that the President gave the Prosecutor the "mandate" to "follow up on construction sites" which shows interference on part of Respondent.⁸⁴⁸
- ii. The assignment was not supported by any proper due diligence, analysis or substantiation "issued by qualified and learned specialists" in the field. In fact, the delays were caused by Respondent and justified an extension of time for completion which was denied to Claimants.⁸⁴⁹ Also, the Prosecutor repeatedly ignored Claimants' letters and complaints.⁸⁵⁰
- iii. The Prosecutor's "blanket and broad assertions" are baseless and constitute a "violation of international law, as good faith must be presumed and allegations put thoroughly and clearly and substantiated in order for the investor to comprehend, defend or cure."⁸⁵¹
- iv. The "assignment" letter demands Sehil address alleged violations "without even identifying [those] violations" and "reinforce pace of construction works" without any "proper analysis of the realities on the ground, background, and respective obligations."⁸⁵²

⁸⁴⁶ Exhibit C-344, Assignment of the Prosecutor Office No 8/4 addressed to Sehil dated 26 February 2010

⁸⁴⁷ Claimants' Memorial § 223

⁸⁴⁸ Claimants' Memorial § 224

⁸⁴⁹ Exhibit C-225, Letter No 702 from Sehil to the Prosecutor of Ashgabat City dated 9 February 2010

⁸⁵⁰ Exhibit C-363, Letter No 1128 dated 6 March 2010 from Mr Muhammet Çap to the Prosecutor of Ashgabat City; Exhibit C-275, Letter No 1717 dated 9 April 2010 from Mr Muhammet Çap to the Prosecutor of Ashgabat City; Exhibit C-364, Letter No 2182 dated 11 May 2010 from Mr Muhammet Çap to Prosecutor's Office of Ashgabat City; Witness Statement of Mr Muhammet Çap § 19

⁸⁵¹ Claimants' Memorial § 229

⁸⁵² Claimants' Memorial § 230

v. The “assignment” letter is a “*masterpiece and textbook example of a breach of international law*” because complaints by Sehil or objections to the breaches alleged to have been conducted, would have to be submitted to the same Prosecutor that sent the letter, and who is “*reported and known to be used for repression*” by the President himself. According to Claimants, this is a “*violation of elementary notions of fairness and due process*”.⁸⁵³

909. Moreover, on 26 February 2010 during one of the site meetings for the Contract No 58 project, Claimants allege that “*Respondent blamed Claimants for the stage of the works and attempted to force Sehil to assign the project to different contractors*”⁸⁵⁴ and to transfer its bank accounts to banks in Turkmenistan.⁸⁵⁵ Mr Çap states that at that meeting he was “*interrogated on the advancement of the project*” and was “*pressured [...] to sign a letter*” drafted by Respondent which contained a model contract whereby “*Sehil would admit default in the timely completion of the project and accept several companies as its subcontractors*”,⁸⁵⁶ with a new deadline of 3 months for the completion of the project. Mr Çap states that it was “*made clear*” to him that signing the letter was “*ordered*” by the President.⁸⁵⁷ Claimants argue that following Mr Çap’s refusal to sign the letter, Respondent “*persisted in its unfair and arbitrary drive*”, imposed fines on Claimants and eventually assigned the contract to other contractors.⁸⁵⁸ Accordingly, Claimants argue that all these actions constitute “*an independent breach of the BIT.*”⁸⁵⁹
910. According to Claimants, the investigation relating to Contract No 57⁸⁶⁰ was also carried out without any advance notice, due diligence or taking “*Claimants’ situation*” into consideration.⁸⁶¹ Claimants contend that this “*led to the issuance*” of the Decree 8/5 on

⁸⁵³ Claimants’ Memorial § 231

⁸⁵⁴ Claimants’ Memorial § 239

⁸⁵⁵ Witness Statement of Mr Muhammet Çap §§ 31-32. *See also*, Exhibit C-367, Letter from Mr Muhammet Çap to the Ministry of Culture and TV & Radio Broadcasting of Turkmenistan G.H. Myradov, dated 22 January 2011: “*Not even asking for our agreement, you have illegally decided to let 18 firms complete the construction.*”

⁸⁵⁶ Witness Statement of Mr Muhammet Çap § 31

⁸⁵⁷ Witness Statement of Mr Muhammet Çap § 31

⁸⁵⁸ Claimants’ Memorial § 243; Check Exhibit C-367, Letter No 4015 from Sehil to the Minister of Culture, G.H. Myradov, dated 22 January 2011.

⁸⁵⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁶⁰ Exhibit C-302, Decree from the Office of Prosecutor of Turkmenistan to Muhammet Çap, No 8/5, dated 24 May 2010.

⁸⁶¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

“disposal of breach of law” noting the incomplete works and requesting Claimants to *“accelerate”* the construction process.⁸⁶² Accordingly, Claimants contend that the *“unwarranted, non-notified and intrusive inspection of the construction site by the Prosecutor’s Office, which had no supervisory power over this project, constitutes an independent breach of the BIT.”*⁸⁶³

911. Claimants also contend that the Prosecutor imposed penalties totalling USD 9,121,946 on projects over which it had no supervisory power, i.e. Contracts Nos 51, 55, 58 and 62-65, *“on the ground of alleged delays”*.⁸⁶⁴ Those penalties were imposed without due diligence, consideration or *“prior assessment of Sehil’s situation”* and without taking into account *“the various breaches of the State Contracting Parties under the relevant contracts.”*⁸⁶⁵ Accordingly, Claimants contend that these constitute *“an independent breach of the BIT.”*
912. Finally, Claimants contend that different Prosecutor Offices also committed the following acts and omissions, some of which overlap with other heads of claim:⁸⁶⁶
- i. Questioning, harassment and intimidation of Mr Çap, his family and Sehil’s employees;⁸⁶⁷
 - ii. The investigation of Mrs Antonina Mihaylova Yeliseyeva on 16 November 2010 by the Prosecutor’s Office of Ashgabat City resulting in the intimidation and harassment of Claimants’ employees;⁸⁶⁸
 - iii. The Prosecutor from the department of supervision over legitimacy of court decisions of the Office of Prosecutor General of Turkmenistan, (D. Tashova) intervened in court proceedings initiated by third parties against Sehil in mid-

⁸⁶² Exhibit C-302, Decree from the Office of Prosecutor of Turkmenistan to Muhammet Çap, No 8/5, dated 24 May 2010

⁸⁶³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁶⁴ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁶⁵ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁶⁶ Items (i), (v) and (vi) overlap with other claims raised by Claimants which have been discussed and determined in detail at §§ 892-895, 865-875 and 948-of the Award, respectively.

⁸⁶⁷ Witness Statement of Mr Ukkase Çap § 17

⁸⁶⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 293(h)(i); See also Witness Statement of Antonina Yeliseyeva, §§ 29 et seq.; Exhibit AMY-18, Minutes of Interview of A. M. Yeliseyeva dated 16 November 2010

2011,⁸⁶⁹ disregarding the fact that “Respondent’s representatives had acknowledged several months earlier that Respondent owed USD 33 million to Claimants”; this was “more than 15 times the amounts requested through these Court proceedings”.⁸⁷⁰ Claimants argue that this constitutes “undue interference with Claimants’ investment [...] abuse of its powers of supervision”, and it was conducted “without any legitimate reason or cause nor any due diligence, prior notice, or any regard to due process”,⁸⁷¹

- iv. Discriminatory treatment towards Claimants – Claimants contend that although “Respondent was at times late and defaulting in payment” to Claimants, the Prosecutor never intervened; however, when Claimants were alleged to have committed violations or irregularities, the Prosecutors intervened.⁸⁷² Claimants contend that Respondent also failed to consider “Claimants’ situation” which caused their delays;⁸⁷³
- v. “Undue Interference of Vice Presidents and Other High-Ranking Officials on Disputed Contracts and at Sites” were also made at different times throughout the workday including sometimes late at night and without prior notice,⁸⁷⁴ and
- vi. The tax audit of 19 August 2010⁸⁷⁵ “launched by the General Prosecutor’s Office” had no “legitimate reason other than to harass Claimants”.⁸⁷⁶ Claimants claim that the audit was done for periods which were already covered by two former tax

⁸⁶⁹ Exhibit R-948, Decision of the Arbitration Court of Turkmenistan, 16 May 2011; Exhibit R-933, Decision of the Arbitration Court of Turkmenistan dated 10 May 2011

⁸⁷⁰ Claimants’ Reply and Counter-Memorial on Jurisdiction § 293(j); See also Exhibit C-104, Letter of the Turkish Foreign Trade Undersecretariat to Sehil, 8 December 2010

⁸⁷¹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 294

⁸⁷² Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁷³ Claimants’ Reply and Counter-Memorial on Jurisdiction § 293(b)

⁸⁷⁴ Claimants’ Memorial §§ 236-237; Witness Statement of Mr Ömer Gülçetiner § 45

⁸⁷⁵ Exhibit AMY-16, 2010 Certificate of Tax Audit of Sehil dated 8 October 2010; Exhibit C-561, Letter from the General Prosecutor’s Office of Turkmenistan to Mr Gocyew A.M., Minister of Finance dated 19 August 2010

⁸⁷⁶ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

audits⁸⁷⁷ during which “*the Prosecutor threatened and intimidated Claimants’ employees*”⁸⁷⁸ and which “*led to the sealing of Sehil’s assets*”.⁸⁷⁹

913. In contrast, Respondent denies Claimants’ allegations above as vague, unfounded and unsupported. Respondent contends that Claimants in general, and Mr Gülçetiner in particular, have failed to provide any hard evidence that any “*undue interference actually took place*” except for the subjective testimony of Sehil’s employees. There are “*no documentary proof of his calls ‘every Sunday’ with three unnamed ‘authorities’ nor of his meetings every Sunday*”, there are “*no minutes of calls, no emails sent following those calls or meetings*”, there is also “*no proof of his plane trips of ‘almost every week’ – there are no invoices for tickets, no other records of his travel*” for Respondent to even identify when such alleged interference took place and investigate.⁸⁸⁰
914. Nevertheless, Respondent claims to have sought to find such evidence and has concluded that as far as the Prosecutor’s visits and investigations are concerned, those were notified to Sehil⁸⁸¹ and that Sehil even “*had input into them*”.⁸⁸² In fact, Respondent contends that the actions of the Prosecutor’s Offices were a “*legitimate exercise of regulatory powers*” because they acted when there were irregularities on the part of Sehil.⁸⁸³ Further, Respondent states that the Prosecutor’s right to oversee Sehil’s projects in order to ensure that they comply with Turkmen law was provided for under Turkmen Law.⁸⁸⁴
915. The Tribunal notes that since there is no FET protection under the BIT, the role of the Tribunal is not to determine whether the conduct complained of was unfair or arbitrary. Rather, the Tribunal has to determine whether the conduct complained of was undue,

⁸⁷⁷ Exhibit AMY-16, 2010 Certificate of Tax Audit of Sehil dated 8 October 2010, p. 2 (the “*repeated audit of the period from 1 April 2008 to June 30, 2009*”); Exhibit AMY-15, 2008 Certificate of Tax Audit of Sehil dated 13 June 2008

⁸⁷⁸ Claimants’ Counter-Memorial § 671; See also Witness Statement of Mr Salih Uz § 7

⁸⁷⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 671

⁸⁸⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 716

⁸⁸¹ Exhibit AMY-17, Certificate from Sehil to the Prosecutor’s Office dated 14 September 2010 enclosing information regarding payment of salaries; Exhibit AMY-18, Minutes of Interview of A. M. Yeliseyeva dated 16 November 2010

⁸⁸² Respondent’s Objections to Jurisdiction and Counter-Memorial § 726

⁸⁸³ Respondent’s Rejoinder § 843

⁸⁸⁴ Respondent’s Rejoinder §§ 844-845

improper or illegal, was attributable to the State and, moreover, resulted in the expropriation of Claimants' investment.

916. As explained below, the Tribunal has reached the conclusion that the alleged actions of the General Prosecutor's Office were not an unlawful interference with the Disputed Contracts or with Claimants' investment in Turkmenistan, and in any case, they did not amount or contribute to the indirect expropriation of Claimants' investment. To the contrary, the Tribunal accepts that the Prosecutors' authority to oversee Sehil's projects, to initiate court proceedings where necessary and participate in such, as well as to require the remedy of breaches and irregularities, is provided in Turkmen law.
917. Article 36 of the Law on the Prosecutor's Office authorizes the Prosecutor's Office to carry out supervision to ensure "*compliance with laws and regulations of Turkmenistan legal acts issued by agencies and public offices*",⁸⁸⁵ as well as to take "*measures aimed at elimination of violations of law and circumstances, which have contributed to such violations, and at reinstatement of violated rights.*"⁸⁸⁶
918. Article 37 further provides that in carrying out the "*procedure of checking execution of laws*", the prosecutor should do so "*within the limits of his authority in connection with applications, complaints, notifications and other official information on the violation of laws*", and "*in connection with [...] direct discovery of indicia of violation of laws [and] assignment or inquiry of a superior prosecutor.*"⁸⁸⁷
919. In carrying out its supervisory action, the prosecutors are entitled to:
- 1) *enter the territory and premises of enterprises, entities and organizations, the activity of which relates to the subject of inspection, to have access to their documents and materials [...];*
 - 2) *demand from managers and other officials to present necessary documents, materials, statistical and other information regarding the status of legitimacy and measures taken for ensuring it, to conduct inspections and audits of activity of subordinate enterprises [...]*

⁸⁸⁵ Exhibit R-1281, Law on the Prosecutor's Office, Article 36.1(2)

⁸⁸⁶ Exhibit R-1281, Law on the Prosecutor's Office, Article 36.1(4)

⁸⁸⁷ Exhibit R-1281, Law on the Prosecutor's Office, Article 37.2

- 3) *send for officials and individuals, to demand from them verbal and written explanations regarding the violation of law [...];*
- 4) *carry out other actions relating to the inspection set forth in the legislation of Turkmenistan.*⁸⁸⁸

920. The prosecutors also have the authority to “*issue instructions on remedying gross breaches of the legislation of Turkmenistan*”,⁸⁸⁹ to “*bring the issue before court for protection of rights, and interests of individuals and [the] state*”⁸⁹⁰ or a “*written order to eliminate violations of the law*”.⁸⁹¹

921. Finally, Article 57 stipulates that:

*Prosecutor, within the scope of his competence, and in protection of interests of the state, enterprises, organizations[,] entities and individuals, is entitled to submit statement of claim to the Courts of Turkmenistan, and to participate in hearing of a case.*⁸⁹²

922. With respect to the Prosecutor’s letters⁸⁹³ regarding non-payment of employee’s salaries under Contract No 56 and completion of Contract Nos 57 and 58, Respondent contends that “*it is likely that the employees [...] complained to the Prosecutor’s Office*” and that the Contractual Counterparties “*requested the Prosecutor to investigate breaches of Sehil’s contractual obligations*”.⁸⁹⁴ Respondent states that there is “*objective evidence*” that Sehil’s employees under Contract Nos 57 and 58 had not been paid their wages⁸⁹⁵ and that

⁸⁸⁸ Exhibit R-1281, Law on the Prosecutor’s Office, Article 38.1

⁸⁸⁹ Exhibit R-1281, Law on the Prosecutor’s Office, Article 38.5(2)

⁸⁹⁰ Exhibit R-1281, Law on the Prosecutor’s Office, Article 38.5(4)

⁸⁹¹ Exhibit R-1281, Law on the Prosecutor’s Office, Article 55

⁸⁹² Exhibit R-1281, Law on the Prosecutor’s Office, Article 57

⁸⁹³ Exhibit C-448, Letter from the Prosecutor’s Office of Turkmenistan, Mary City to Claimants dated 3 November 2008 (Respondent’s replacement translation). From 1 May 2008 to 31 December 2008, the exchange rate was 14,250 old manats to USD 1. Using this exchange rate, Sehil owed Mr Nurov USD 255. Exhibit R-967, Åke Lönnberg, *New Money*, 50(4) FINANCE & DEVELOPMENT (2013), pp. 40-41; Exhibit C-276, Decree on disposal of breach of law by the Office of the Prosecutor of Mary City dated 3 February 2010 (Respondent’s replacement translation). Using the exchange rate of 0.3509 manats to USD 1 (Exhibit SQ-1, TMT 2009 exchange rate), the amount is USD623,414.38. USD623,414.38 divided by 515 employees equals USD 1,210.51. USD 1,210.51 divided by three months equals USD 403.50; Exhibit C-344, Assignment of the Prosecutor Office No 8/4 addressed to Sehil dated 26 February 2010 (Respondent’s replacement translation); Exhibit C-302, Decree from the Office of Prosecutor of Turkmenistan to Muhammet Çap, Ref 8/5, dated 24 May 2010 (Respondent’s replacement translation).

⁸⁹⁴ Respondent’s Rejoinder § 853

⁸⁹⁵ See, e.g. Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 739-747; Exhibit R-1289, Construction Quality Control Department Instruction No 14 dated 24 November 2009; Exhibit R-914, Letter No 2-05/686 dated 9 March 2010 from the Minister of Culture to Sehil

Ms Yeliseyeva confirmed this.⁸⁹⁶ Further, the said letters were “*legitimate acts*” exercised by the Prosecutor in response to Sehil’s actions.⁸⁹⁷

923. Additionally, Respondent argues that Sehil had the right to appeal those letters and their content to a “*superior Prosecutor*” if it disagreed with them.⁸⁹⁸ The superior prosecutor would have then investigated and either upheld or revoked, cancelled or changed “*the act*” of the other prosecutor if need be.⁸⁹⁹ However, Sehil did not appeal the Prosecutor’s instructions or argue that those were “*unduly invasive*”. Rather, it addressed the instructions separately trying to “*justify or excuse illegal conduct*”.⁹⁰⁰ Accordingly, Respondent submits that those letters cannot be considered to amount to harassment or expropriation on part of the Prosecutor, since the Prosecutor was simply requesting Sehil to comply with its contractual and legal obligations and pay its employees.⁹⁰¹

924. The Tribunal considers below each of the allegations related to specific contracts, i.e. Contracts Nos 56, 58, 57, 51, 55 and 62-65.

925. With regard to Contract No 56⁹⁰² the Tribunal notes that the Prosecutor of Mary City issued instructions and orders following an inspection at the Sehil’s construction site during which violations of Turkmenistan’s Labour law were found. In particular, it was determined that 515 of Sehil’s employees had not been paid their wages for three months,⁹⁰³ and one (Mr Nurov) was not paid compensation upon his resignation.⁹⁰⁴ Accordingly, in light of the above and relying upon Article 55 of the Constitution of Turkmenistan, the Prosecutor of

⁸⁹⁶ Second Witness Statement of Ms Antonina Yeliseyeva §§ 25, 27

⁸⁹⁷ Respondent’s Rejoinder § 858

⁸⁹⁸ Respondent’s Objections to Jurisdiction and Counter-Memorial §§ 748-749, *citing* Exhibit R-987, Law on the Prosecutor’s Office, Article 60. *See also* Exhibit R-987, Law on the Prosecutor’s Office, Article 12

⁸⁹⁹ Exhibit R-987, Law on the Prosecutor’s Office, Article 60, Article 12

⁹⁰⁰ Respondent’s Rejoinder § 857

⁹⁰¹ Respondent’s Rejoinder § 858

⁹⁰² Annex No 25, the contract was concluded with the Ministry of Energy and Industry

⁹⁰³ Exhibit C-276, Decree on disposal of breach of law by the Office of Prosecutor of Mary City dated 3 February 2010

⁹⁰⁴ See Exhibit C-448, Letter from the Prosecutor’s Office of Turkmenistan, Mary City to Claimants dated 3 November 2008. This document was produced by Respondent during the Document Production Phase (R002839); For evidence regarding Sehil’s failure to pay wages to its employees see Exhibit R-1289, Construction Quality Control Department Instruction No 14 dated 24 November 2009; Exhibit R-914, Letter No 2-05/686 dated 9 March 2010 from the Minister of Culture to Sehil; Second Witness Statement of Ms Antonina Yeliseyeva §§ 25, 27

Mary City requested Sehil to remedy those breaches by paying out the amounts due to the respective employees. The Tribunal does not find this to be an undue or improper interference because the Prosecutor was acting in compliance with the law and within its authority.

926. The Tribunal is also not persuaded that the fact that the Prosecutor did not consider that Sehil was owed money under the Contract by the Ministry of Energy and Industry was arbitrary or discriminatory. Instead, a rational and objective justification for this was given. The Prosecutor stated in the Decree it issued that:

Article 111 of the Labour Code of Turkmenistan [provides that]: “Despite the financial condition, the employer shall abide by the terms and periods of paying wages to workers for completed tasks.”⁹⁰⁵

927. Further and in any event, the Tribunal is persuaded that the alleged failure of the Ministry of Energy and Industry to pay the amounts due under the Contract did not relieve Sehil of its obligation to pay the employees it hired to work on the project. The latter is an independent obligation that any employer has towards its employees and which is specifically provided for by the Turkmen Labour law. Further, the fulfilment of this obligation was not premised upon Sehil getting paid under the Contract. While the lack of payment may have caused financial difficulties in practice for Sehil, in the Tribunal’s view it cannot be used as a legal justification for the non-payment of the wages due.
928. On the basis of the above, the Tribunal finds that Claimants have failed to show that the actions of the Prosecutor of Mary City were improper, or that the decree issued and the demands set out in it deprived Claimants of a significant part of the value of their investment or otherwise interfered with Contract No 56.
929. With regard to Contract No 58,⁹⁰⁶ the Tribunal is not persuaded why or how the actions of the Prosecutor’s Office of Ashgabat City were improper. The Assignment letter⁹⁰⁷ relied on by Claimants provides that the reason for the investigations and analysis was because

⁹⁰⁵ Exhibit C-276, Decree on disposal of breach of law by the Office of Prosecutor of Mary City dated 3 February 2010

⁹⁰⁶ Annex No 27, the Contract was concluded with the Ministry of Culture and TV-Radio Broadcasting

⁹⁰⁷ Exhibit C-344, Assignment of the Prosecutor Office No 8/4 addressed to Sehil dated 26 February 2010

of Sehil's breach of its obligations under Part 5.1 of Contract No 58, being "*overdue from construction period*", conducting the construction in the "*low pace*" and "*demonstrated violations of the rules, because of negligence of responsible personnel*".⁹⁰⁸ Thus, the Prosecutor's "*demands*" (e.g. to "*take away violations of law and other disorders immediately*", to "*reinforce pace of construction work of buildings*", and to "*fulfil the assignment on time*" ...etc.) were based on its power and authority under Turkmen law to request the breaching party to remedy its breaches.

930. As to the involvement of the President, the Tribunal notes that the Assignment letter provides that Contract No 58 was concluded between Sehil and the Ministry of Culture and Broadcasting of Turkmenistan pursuant to Order No 9365 of the President of Turkmenistan dated 11 January 2008.⁹⁰⁹ It was through that Order that Sehil was awarded Contract No 58 and the Ministry of Culture was "*authorized*" to enter into a contract with Sehil. The Order also provided for the Ministry's right to "*oversee the reliability of the building complex [...] and their compliance to the regulatory requirements of seismic stability, quality of materials and equipment used in the process of construction*".⁹¹⁰ The Order also designated a number of state organs to "*oversee*" compliance with the Presidential Decree as far as the project is concerned. Therefore, the President's "*involvement*" was to the extent necessary to award the Contract and "*decree[s]*" the general terms of performance as required by law. Claimants have not proved that the Prosecutor's actions complained of above were specifically ordered, instructed and/or otherwise influenced by the President.

931. Further, the Assignment letter expressly concludes: "*In case of disagreement with the demand, complaints may be submitted to the attention of the foregoing prosecutor.*" This is also provided for by Turkmen law as established above.⁹¹¹ Therefore, Sehil had the opportunity to object or complain or seek a review of the Prosecutor's decision. The Tribunal is not persuaded that submitting complaints before the Office of the Prosecutor that sent the Assignment letter constitutes a "*violation of elementary notions of fairness*

⁹⁰⁸ Exhibit C-344, Assignment of the Prosecutor Office No 8/4 addressed to Sehil dated 26 February 2010

⁹⁰⁹ See Exhibit C-183, Order No 9365 dated 11 July 2008

⁹¹⁰ Exhibit C-183, Order No 9365 dated 11 July 2008

⁹¹¹ See Exhibit R-987, Law on the Prosecutor's Office, Article 12 ("*Appeal against actions and acts of the prosecutor*")

and due process". In any event, the complaint would have been made to a "superior" prosecutor, not the same one that issued the decision.

932. Finally, on balance, the evidence in the record does not prove Claimants' allegations that Mr Çap was "interrogated" and "pressured", that Respondent "attempted to force Sehil to assign the project to different contractors" and "transfer its bank accounts to banks in Turkmenistan".⁹¹² Mr Çap⁹¹³ wrote a letter to the Minister of Culture, in which he made various allegations against the Ministry relating to the Contract.⁹¹⁴ Respondent denies these allegations and states that the questioning of Mr Çap was not "unjustified, unfair or discriminatory". To the contrary, as confirmed by Mr Çap testimony, it was warranted since it related to the Sehil's non-payment to its subcontractors and employees,⁹¹⁵ which remained the case even after Claimants left Turkmenistan.⁹¹⁶ This was also confirmed by Ms Yeliseyeva's testimony.⁹¹⁷ Accordingly, the evidence is insufficient for the Tribunal to determine whether there was "pressure" of the kind described by Claimants and "harassment" on the part of Respondent.
933. The Tribunal does not accept Claimants' other complaints regarding the imposition of penalties by the Tax Authorities and the decision of the Arbitrage Court relating to Contract No 58 as discussed and determined at §§ 954 and 960 in this Award.⁹¹⁸

⁹¹² Claimants' Memorial § 239

⁹¹³ Witness Statement of Mr Muhammet Çap §§ 31-32. According to Mr Muhammet Çap, Bahar Insaat, İlk Insaat, 5M Insaat, ERG Insaat, Anka Insaat and Doganlar Insaat were some of the Turkish companies present at the intervention. In this visit there were eighteen companies which were dragged along with members of the Turkmen Government.

⁹¹⁴ See Exhibit C-367, Letter from Mr Muhammet Çap to the Ministry of Culture and TV & Radio Broadcasting of Turkmenistan G.H. Myradov, dated 22 January 2011 "Not even asking for our agreement, you have illegally decided to let 18 firms complete the construction."

⁹¹⁵ Respondent's Rejoinder § 864; See Witness Statement of Mr Ukkase Çap § 17

⁹¹⁶ Respondent's Objections to Jurisdiction and Counter-Memorial §§ 202-204; Witness Statement of Ms Antonina Yeliseyeva §§ 27-28; Exhibit R-1291, Decision of the Azatlyk District Court dated 16 February 2011 relating to unpaid wages of 25 employees; Exhibit R-1292, Decision of the Azatlyk District Court dated 25 May 2011 relating to unpaid wages of 65 employees; Exhibit R-1293, Decision of the Azatlyk District Court dated 10 July 2012 relating to unpaid wages of 4 employees

⁹¹⁷ Second Witness Statement of Ms Antonina Yeliseyeva § 37

⁹¹⁸ For the Tax authorities actions see § 953; for the Arbitrage Court's decision see §947

934. For these reasons, the Tribunal does not consider that the actions of the Prosecutor of Ashgabat City were improper and moreover led or contributed to the expropriation of Claimants' investment.
935. Regarding Contract No 57, the Tribunal notes that Decree 8/5 issued by the Office of the Prosecutor of Turkmenbashi City provides that the construction was carried out in a “*low pace*” and that “*a number of works had not been completed*”.⁹¹⁹ By this decree the Prosecutor requested Sehil to “*duly carry out construction and instalment works*” in order for the project to be delivered “*on time as stated in the additional agreement*”.⁹²⁰ Further, the inspection was conducted as per the Prosecutor's authority under the Presidential Order No 9244.⁹²¹ It was pursuant to that Order that Sehil was awarded Contract No 57 and in which the general terms of contract performance were set out. No requirement of “*advance notice*” is provided for in the Contract or in the Order No 9244. Thus, Claimants have failed to prove how or why the Prosecutor's actions were illegal or improper, or that they resulted in a significant deprivation in the value of their investment.
936. Claimants' claims of imposed penalties regarding Contracts Nos 51, 55, 58 and 62-65 have been dealt with by the Tribunal at §§ 859-862, 916, 929-935 of the Award. Further, the Tribunal is not persuaded by Claimants' allegation that those penalties were imposed by the Prosecutor in respect of projects over which it had no supervisory power. First, those penalties were not imposed by the Prosecutor but by the Arbitrage Court of Turkmenistan,⁹²² and second, the Prosecutor commenced the court proceedings by

⁹¹⁹ Exhibit C-302, Decree from the Office of Prosecutor of Turkmenistan to Muhammet Çap, No 8/5, dated 24 May 2010; Respondent provides an alternative translation in which the quotes in the text were translated respectively as follows: “*at low rate*”, “*several works relating to the construction... remain completely unfinished*”.

⁹²⁰ Exhibit C-302, Decree from the Office of Prosecutor of Turkmenistan to Muhammet Çap, No 8/5, dated 24 May 2010; Respondent provides an alternative translation in which the quotes in the text were translated respectively as follows: “*to take measures necessary for the organization of works in compliance with the requirements*”, “*by the date set forth in the Addendum*”.

⁹²¹ Exhibit R-577, Decree of the President of Turkmenistan No 9244 concerning the construction of a Health Center in Avaza dated 3 December 2007

⁹²² See e.g. Decision of the Arbitration Court in Case 128 dated 16 December 2010 pertaining to Contract No 65 (Exhibits C-22B and C-22F); Decision of the Arbitration Court in Case No 129 dated 20 December 2010 pertaining to Contract No 64 (Exhibits C-22C and C-22G); Decision of the Arbitration Court in Case No 130 dated 21 December 2010 pertaining to Contract No 63 (Exhibits C-22E and C-22-I), Decision of the Arbitration Court in Case No 131 dated 21 December 2010 (Exhibits C-22D and C-22H)

submitting the “*letter[s] of claim*” in its capacity as a representative of Sehil’s Contractual Counterparties.⁹²³

937. Accordingly, the Tribunal finds that even if the Prosecutor was not an “*official supervisor*” of those projects, it had the right under Turkmen law to initiate and participate in court proceedings. The Tribunal considers that Claimants have failed to demonstrate that the Prosecutor’s actions were improper interventions with the various Contracts. On this basis, the Tribunal similarly dismisses Claimants’ contention that the Prosecutor “*improperly*” interfered in Claimants’ proceedings before the Arbitrage Court of Turkmenistan.
938. The Tribunal is also not persuaded that the questioning of Ms Yeliseyeva amounted to “*harassment*”. Respondent denies the allegations and refers to Ms Yeliseyeva’s witness statement in which she also denies it.⁹²⁴ In particular, Ms Yeliseyeva states that the “*whole experience of being questioned was not pleasant, but I do not think it is right to say it was personal or overbearing, or that it constituted harassment.*”⁹²⁵ Accordingly, the Tribunal finds that there is insufficient and contradictory evidence for it to conclude that the questioning amounted to harassment.
939. Finally, with regard to the tax audit of 19 August 2010, the Tribunal notes that the audit was requested by the Deputy General Prosecutor of Turkmenistan via letter dated 19 August 2010.⁹²⁶ In that letter, the Prosecutor requested the Minister of Finance to “*assign a specialist to audit financial and business activities performed by Turkmenistan branch*

⁹²³ See Exhibit C-564, Letter of Claim No 8/1 dated September 2010 from the General Prosecutor’s Office to the Arbitration Court of Turkmenistan, relating to Contract No 51; Exhibit C-565, Letter of Claim No 8-1/1 dated 1 October 2010 from the Prosecutor’s Office of Dashoguz to the Arbitration Court of Turkmenistan, relating to Contract No 55; Exhibit C-539, Letter of Claim dated 22 September 2010 from the Prosecutor’s Office of Ashgabat City to the Arbitration Court of Turkmenistan relating to Contract No 58; Exhibit C-566, Letter of Claim No 10/3 dated 30 September 2010 from the Prosecutor’s Office of Turkmenbashi to the Arbitration Court of Turkmenistan relating to Contract No 62; Exhibit C-567, Letter of Claim No10/3 dated 30 September 2010 from the Prosecutor’s Office of Turkmenbashi to the Arbitration Court of Turkmenistan relating to Contract No 63; Exhibit C-568, Letter of Claim No10/3 dated 30 September 2010 from the Prosecutor’s Office of Turkmenbashi to the Arbitration Court of Turkmenistan relating to Contract No 64; Exhibit C-569, Letter of Claim No10/3 dated 30 September 2010 from the Prosecutor’s Office of Turkmenbashi to the Arbitration Court of Turkmenistan relating to Contract No 65

⁹²⁴ Respondent’s Rejoinder § 860

⁹²⁵ Witness Statement of Ms Antonina Yeliseyeva §§ 29, 31; Exhibit AMY-18, Minutes of Interview of A. M. Yeliseyeva dated 16 November 2010

⁹²⁶ Exhibit C-561, Letter from the General Prosecutor’s Office of Turkmenistan to Gocyew A.M., Minister of Finance dated 19 August 2010 (Respondent’s replacement translation)

of the Turkish company Sehil [...] in accordance with the Article 28 of the Law of Turkmenistan on Prosecutor's Office of Turkmenistan."⁹²⁷

940. Further, the bodies or officials requested by the Prosecutor "*regarding the conduct of inspection and audits*" are legally required to "*immediately commence carrying out the requests*".⁹²⁸ Depending on the outcome of those inspections and/or audits, the Prosecutor has the authority to take any measures necessary to remedy potential breaches and/or initiate the necessary legal proceedings.⁹²⁹
941. For the above reasons, the Tribunal concludes that the actions of the different Prosecutors under all contracts set out above were a legitimate exercise of regulatory authority. They were conducted following alleged irregularities or violations of Sehil. Further, the Prosecutors' power to oversee and inspect the site projects was provided for by Turkmen law. The same holds true for the Prosecutors' authority to initiate and participate in court proceedings.
942. In any event, the Tribunal has not found persuasive evidence that the State in general, and the President in particular, interfered in or influenced the acts of the different Prosecutor Offices. In fact, Article 6.3 provides that

*the public prosecution bodies of Turkmenistan, within the limits of their authority shall exercise their powers independently from the bodies of state administration and local self-governance, public officials, public associations, and in strict compliance with the Constitution of Turkmenistan, laws and regulations of Turkmenistan.*⁹³⁰

943. Further, and in any event, Claimants have failed to show how these various actions, even if proved, deprived or contributed to depriving Claimants of the value of their investment and amounted or constituted indirect expropriation.

⁹²⁷ Exhibit C-561, Letter from the General Prosecutor's Office of Turkmenistan to Gocyew A.M., Minister of Finance dated 19 August 2010 (Respondent's replacement translation). *See also* Exhibit R-1281, Law on the Prosecutor's Office, Article 38. Article 28 was pursuant to the old Law of Turkmenistan; in the new Law this is Article 38. *See* Respondent's Rejoinder § 847

⁹²⁸ Exhibit R-1281, Law on the Prosecutor's Office, Article 38.4

⁹²⁹ For a list of the powers of the Prosecutor see Exhibit R-1281, Law on the Prosecutor's Office, Article 38.5

⁹³⁰ Exhibit R-1281, Law on the Prosecutor's Office, Article 6.1

h. The imposition of delay penalties and termination of Contracts through Decisions of the judiciary⁹³¹

944. The question under this head is whether the decisions of the Arbitrage Court amounted or contributed to the indirect expropriation of Claimants' investment in Turkmenistan as alleged by Claimants. Specifically, Claimants contend that the Arbitrage Court rendered decisions which affected Claimants' investment in two ways. First, in relation to several contracts, including Contracts Nos 35, 51, 55, 58, and 62-65, it "*blindly and arbitrarily imposed fines and penalties, upon request of the prosecutors and the State contracting parties, without the slightest consideration for the issues listed above and/or Claimants' position, which constitute further independent breaches of the BIT*".⁹³² Second, it terminated Contracts Nos 51, 57, 58, 62, 63, 64 and 65 "*on the ground of alleged delays, but in reality upon the instructions of the President or after the President terminated the contract by decree [...] in violation of Claimants' most basic substantive and procedural rights and without the slightest consideration for Claimants' position. This measure in and of itself constitutes an independent breach of the BIT.*"⁹³³
945. With respect to the specific contracts in which the Arbitrage Court imposed penalties on Sehil, Claimants allege the Arbitrage Court did not take account of relevant factors including, in Contract No 35, that the Contracting Counterparty was responsible for 487 consecutive and 616 concurrent days of payment delay and that Sehil had completed the works on the project; and for Contracts Nos 51, 55, 58, and 62-65 the Contracting Counterparty was seriously delayed in payment to Sehil.
946. According to the record, all proceedings before the Arbitrage Court were commenced on the basis of alleged violations of the Disputed Contracts and pursuant to the dispute resolution clauses in those Contracts.⁹³⁴

⁹³¹ This section covers the issues raised in Claimants' Reply and Counter-Memorial on Jurisdiction §§ 673; 675

⁹³² Claimants' Reply and Counter-Memorial on Jurisdiction § 673

⁹³³ Claimants' Reply and Counter-Memorial on Jurisdiction § 675

⁹³⁴ See e.g. Exhibit C-88, Contract 58, Clause 18.1: "*Disputes and/or controversies that may arise in the course of fulfillment of this Contract shall be resolved by means of negotiations. Should the Parties fail to reach*

947. By way of example, the proceedings for the termination of Contract No 58 were initiated by the Minister of Culture following two letters of notice dated 29 November 2010.⁹³⁵ In those letters, the Ministry informed Sehil of its delay to complete the projects and requested Sehil to take all necessary measures to complete the project within the agreed time period. Further, the Ministry gave Sehil a choice, i.e. either to continue the construction and complete the projects on time, or if it did not wish to continue with the project, to inform the Ministry of its decision to terminate the contract.⁹³⁶ Eventually, the Ministry filed two Statements of Claim against Sehil with the Arbitrage Court seeking two reliefs: (i) recovery of USD 9,359.854⁹³⁷ and (ii) termination of Contract No 58.⁹³⁸ Therefore, regardless of whether or not there was a delay, the reason and who was responsible for the delay, the essential point is that the proceedings were commenced on and revolved around an alleged violation of Contract No 58.
948. Equally, the termination of the other contracts by the Arbitrage Court followed proceedings and remedies requested by Sehil's Contractual Counterparties, relying on the terms of the contracts on the basis of alleged violations of the contract terms.⁹³⁹ Claimants have failed to prove that these proceedings were initiated or controlled by Respondent, or that there was any such State interference in the decisions of the Court. Claimants have also failed to show that there was any political interference with the decision-making process, or lack of due process, or that to any outcome that was a manifest misapplication of Turkmen law. A dispute arose out of a specific contract, the dispute was submitted to the Arbitrage Court, the forum agreed by both Parties, which in turn rendered a binding decision. These

agreement, the dispute shall be resolved in the Arbitration Court of Turkmenistan whose decision is final and mandatory for both Parties."

⁹³⁵ Exhibit C-103, Letter No. 2-05-3366 from the Minister of Culture to Sehil dated 29 November 2010; Exhibit C-161, Letter No. 2-05-3367 from the Minister of Culture to Sehil dated 29 November 2010

⁹³⁶ Exhibit C-161, Letter No. 2-05-3367 from the Minister of Culture to Sehil dated 29 November 2010, p. 2

⁹³⁷ Exhibit C-422, Statement of Claim of the Ministry of Culture before the Arbitration Court dated 11 January 2011 pertaining to Contract No 58.

⁹³⁸ Exhibit C-423, Statement of Claim of the Ministry of Culture before the Arbitration Court dated 28 January 2011 pertaining to Contract No 58.

⁹³⁹ See e.g. Exhibit C-426, Statement of Claim No 21/7629 dated 16 September 2011 pertaining to Contract No 57; See also Exhibit C-411, Letter No 1/1564 of the Awaza Committee to Sehil dated 23 November 2010, enclosing claims for the termination of Contracts Nos 62-65.

decisions determined the contractual rights and issues between the Parties; they did not amount or contribute to the expropriation of Claimants investment in Turkmenistan.

949. Further, the Tribunal finds that Claimants have not shown any due process violations by the Arbitrage Court in the manner in which it handled the proceedings.
950. Claimants contend that the termination proceedings of Contracts Nos 62-65⁹⁴⁰ were conducted in the absence of Sehil's representatives and that by accepting this the Court had also "*actively participated in the taking of Claimants' investment*".⁹⁴¹ Claimants do not allege direct judicial expropriation but rather a "*lack of independence and partiality*".⁹⁴² There is a high threshold to prove judicial expropriation and that has not been proved in this case.
951. The Tribunal notes as a preliminary matter, as pointed out by Respondent,⁹⁴³ that the Arbitrage Court's decisions on those four contracts, i.e. Nos 62-65 were rendered after Claimants had already left Turkmenistan.⁹⁴⁴
952. In any event, the Tribunal notes that in its judgments, the Arbitrage Court noted that Claimants had appointed representatives at the hearing, i.e. "*representatives of the Turkish*

⁹⁴⁰ Exhibit C-22A, Letter No 3/923 of the Awaza Committee to Sehil dated 24 August 2011; Exhibit C-22F, Letter No 3/922 of the Awaza Committee to Sehil dated 24 August 2011. Both letters enclose a copy of the Arbitration Court decisions terminating Contracts Nos 62-65: Decision of the Arbitration Court in Case 128 dated 16 December 2010 pertaining to Contract No 65 (Exhibits C-22B and C-22F); Decision of the Arbitration Court in Case No 129 dated 20 December 2010 pertaining to Contract No 64 (Exhibits C-22C and C-22G); Decision of the Arbitration Court in Case No 130 dated 21 December 2010 pertaining to Contract No 63 (Exhibits C-22E and C-22-I), Decision of the Arbitration Court in Case No 131 dated 21 December 2010 (Exhibits C-22D and C-22H)

⁹⁴¹ Claimants' Memorial § 299

⁹⁴² Claimants' Reply and Counter-Memorial on Jurisdiction § 387

⁹⁴³ Respondent's Objections to Jurisdiction and Counter-Memorial § 469

⁹⁴⁴ Exhibit C-22B, Decision of the Arbitration Court of Turkmenistan in Case No 128 dated 16 December 2010, pdf page 7 (concerning termination of Contract No 65); Exhibit C-22C, Decision of the Arbitration Court of Turkmenistan in Case No 129 dated 20 December 2010, pdf page 19 (concerning termination of Contract No 64); Exhibit C-22D, Decision of the Arbitration Court of Turkmenistan in Case No 131 dated 21 December 2010, pdf page 31 (concerning termination of Contract No 62); Exhibit C-22E, Decision of the Arbitration Court of Turkmenistan in Case No 130 dated 21 December 2010, pdf page 43 (concerning termination of Contract No 63). The same is true of the three termination decisions that Claimants do not refer to in their Memorial. Exhibit R-826, Decision of the Arbitration Court of Turkmenistan dated 2 June 2011 (regarding termination of Contract No 51); Exhibit R-828, Decision of the Arbitration Court of Turkmenistan dated 2 June 2011 (regarding termination of Contract No 55); Exhibit R-986, Decision of the Arbitration Court of Turkmenistan dated 8 March 2011 (regarding termination of Contract No 58)

*Company ‘Sehil Insaat Endustri ve Ticaret Limited Sirketi’ T. Atdayev, M.A. Atayev, in the open hearing of the court which took place...’*⁹⁴⁵ Further, at the end of all of its decisions, the Court specifically provided the parties a right to appeal or “*protest*” the decision as well as the forum for that.⁹⁴⁶

953. The Tribunal is also not persuaded that Claimants had “*no real opportunity to put a defense*” in the delay penalty proceedings.⁹⁴⁷ The evidence in the record shows that Claimants were properly notified of these proceedings; were represented at the hearings by T. Atdayev and M.A. Atdayev, who were authorised with powers of attorney;⁹⁴⁸ that they put forward arguments on behalf of Sehil which the Court considered,⁹⁴⁹ and had the

⁹⁴⁵ Exhibit C-21A, Decision of the Arbitration Court of Turkmenistan in Case No 113 dated 18 October 2010 (concerning delay penalties for Contract No 62) at p 1; Same representatives attended the other proceedings too; See also, Exhibit C-21B, Decision of the Arbitration Court of Turkmenistan in Case No 114 dated 19 October 2010 (concerning delay penalties for Contract No 65); Exhibit C-21C, Decision of the Arbitration Court of Turkmenistan in Case No 115 dated 20 October 2010 (concerning delay penalties for Contract No 63); Exhibit C-21D, Decision of the Arbitration Court of Turkmenistan in Case No 116 dated 20 October 2010 (concerning delay penalties for Contract No 64)

⁹⁴⁶ Exhibit C-21A, Decision of the Arbitration Court of Turkmenistan in Case No 113 dated 18 October 2010 (concerning delay penalties for Contract No 62) at p 1; Same representatives attended the other proceedings too; See also, Exhibit C-21B, Decision of the Arbitration Court of Turkmenistan in Case No 114 dated 19 October 2010 (concerning delay penalties for Contract No 65); Exhibit C-21C, Decision of the Arbitration Court of Turkmenistan in Case No 115 dated 20 October 2010 (concerning delay penalties for Contract No 63); Exhibit C-21D, Decision of the Arbitration Court of Turkmenistan in Case No 116 dated 20 October 2010 (concerning delay penalties for Contract No 64)

⁹⁴⁷ Claimants’ Memorial § 291

⁹⁴⁸ Exhibit R-916, Power of Attorney for Case No 110 dated 18 October 2010; Exhibit R-1012, Power of Attorney for Case No 114 dated 18 October 2010; Exhibit R-1013, Power of Attorney for Case No 115 dated 18 October 2010; Exhibit R-1014, Power of Attorney for Case No 116 dated 18 October 2010; Exhibit R-1015, Power of Attorney for Case No 112 dated 18 October 2010; Exhibit R-1016, Power of Attorney for Case No 111 dated 18 October 2010; Exhibit R-1017, Power of Attorney dated 12 October 2010

⁹⁴⁹ Exhibit C-21A, Decision of the Arbitration Court of Turkmenistan in Case No 113 dated 18 October 2010, pdf page 3 (emphasis added). *See similarly* Exhibit C-21B, Decision of the Arbitration Court of Turkmenistan in Case No 114 dated 19 October 2010, pdf page 13 (setting out Sehil’s arguments concerning delay penalties for Contract No 65); Exhibit C-21C, Decision of the Arbitration Court of Turkmenistan in Case No 115 dated 20 October 2010, pdf page 23 (setting out Sehil’s arguments concerning delay penalties for Contract No 63); Exhibit C-21D, Decision of the Arbitration Court of Turkmenistan in Case No 116 dated 20 October 2010, pdf page 33 (setting out Sehil’s arguments concerning delay penalties for Contract No 64)

opportunity and did file replies to the statements of claim⁹⁵⁰ and exercised its right to appeal.⁹⁵¹

954. Therefore, the Tribunal has concluded that the decisions of Arbitrage Court did not have the effect of depriving Claimants of the value of their investment, and therefore the expropriation of their investment. Those proceedings were initiated by Sehil's Contractual Counterparties on the basis of the dispute resolution clauses in the contracts claiming alleged violations of certain contractual terms. Hence, pure contractual issues were brought before and decided by the competent authority; there were no due process violations of Claimants' rights took place.

i. The seizure and sealing of Claimants' property and assets by the Tax Authorities

955. Claimants contend that the State Tax Service of the District of Ashgabat "*seized and sealed Claimants' offices, warehouse, equipment, computers, and documents as well as the construction site for the Cultural Center project (Contract No. 58)*". Claimants argue that this measure was "*disproportionate*" and violated Claimants' "*most basic substantive and procedural rights*", and that it "*unilaterally and arbitrarily put an end to Claimants' activities in the country.*"⁹⁵²
956. In particular, Claimants contend that Sehil's headquarters and Sehil's construction sites were entirely seized and sealed "*almost immediately after the last member of the Çap*

⁹⁵⁰ See e.g. Witness Statement of Mr Vadim Chekladze §§ 67, 70 ("*The Consortium was represented at the hearing by Ömer Gülçetiner, Zafer Gullan, and its lawyer, a Mr. N. Ekeyev. The Arbitration Court's judgment shows that it considered both parties' arguments, but the fact that the general layout design for the Iron & Steel Plant did not specify any part of the internal railway to be built by the Client, and the Consortium's confirmation of its obligation to build the internal railroad in the subsequent meeting minutes, were decisive. The Arbitration Court upheld our statement of claim and found that the Consortium was responsible for constructing the internal railroad of the Iron & Steel Plant.*"); Exhibit VC-17, Statement of Claim No 1-12/186 of the Ministry of Construction Materials dated 5 February 2009; See also Exhibit C-21E, Decision of the Arbitration Court of Turkmenistan in Case No 110 dated 20 October 2010 (Respondent's replacement translation)

⁹⁵¹ See e.g. Exhibit VC-19, Decision of the Arbitration Court of Turkmenistan dated 25 February 2009, p. 4; Exhibit VC-20, Ruling No 14 k-8 of the Judicial Board for arbitration cases of the Supreme Court of Turkmenistan, p. 1

⁹⁵² Claimants' Reply and Counter-Memorial on Jurisdiction § 674; See e.g. Exhibit C-382, Decision No 62 on putting prohibition on the taxpayer's right to possess property dated 1 November 2010

family” left Turkmenistan.⁹⁵³ Claimants argue that this was done without any prior notice and that it was “*unlawful, inexplicable and disproportionate*”.⁹⁵⁴ Claimants also allege that their construction materials and equipment were also “*expropriated*” by Respondent,⁹⁵⁵ without Claimants being provided any information or inventory, or even a report on the tax audit conducted.⁹⁵⁶ Accordingly, Claimants could neither understand nor challenge the alleged tax debt.⁹⁵⁷

957. With regard to Contract No 58, Claimants contend that the Tax Authorities “*seized and sealed*” the Cultural Center project under that contract, “*without any notification, on the basis of alleged tax debts of USD 10,546,119 in relation to which Respondent ‘is continuing its investigation’*”.⁹⁵⁸ Claimants argue that this was done without any consideration for their position and the fact that Claimants were “*owed outstanding receivables in an amount exceeding the alleged tax debts.*”⁹⁵⁹

958. The Tribunal notes that the property relating to Contract No 58 was sealed by the Main State Tax Service pursuant to their “*police powers*” in compliance with the Turkmen Tax Code. Following a tax inspection of Sehil, the Tax Authorities issued a certificate stating that Sehil had “*under-declared certain taxes for the period*”⁹⁶⁰ 1 April 2008 to 30 June 2010.⁹⁶¹ The certificate also outlined the reasons for the Tax authorities’ finding, the amount by which Sehil had under-declared its taxes, as well as delay penalties and fines imposed.⁹⁶² Pursuant to Article 64 of the Turkmen Tax Code, the Main State Tax Service

⁹⁵³ Claimants’ Memorial § 275; See Exhibit C-20, Photographs of seals on Sehil’s assets; See also Exhibit C-376, Letter No 1001 from Sehil to the Turkish Republic Prime Ministry Foreign Trade Under-Secretariat dated 9 December 2010. Mr Muhammet Çap wrote “[u]nfortunately, *Sehil Insaat’s business in Turkmenistan has been blocked; the main and other work sites of Sehil has been sealed, and water and electricity has been cut.*”

⁹⁵⁴ Claimants’ Memorial § 276

⁹⁵⁵ Witness Statement of Mr Irfan Dolek in support of Claimants’ Counter-Memorial on Respondent’s Objection to Jurisdiction § 15

⁹⁵⁶ Claimants’ Memorial § 278

⁹⁵⁷ Claimants’ Memorial § 278

⁹⁵⁸ Claimants’ Reply and Counter-Memorial on Jurisdiction § 674; See e.g. Respondent’s Objections to Jurisdiction and Counter-Memorial § 192; Exhibit C-382, Decision No 62 on putting prohibition on the taxpayer’s right to possess property dated 1 November 2010

⁹⁵⁹ Claimants’ Reply and Counter-Memorial on Jurisdiction § 674; See, e.g. Exhibit C-104, Letter from the Turkish Foreign Trade Undersecretary of the Prime Ministry dated 8 December 2010.

⁹⁶⁰ Respondent’s Objections to Jurisdiction and Counter-Memorial § 185

⁹⁶¹ Exhibit AMY-16, 2010 Certificate of Tax Audit of Sehil dated 8 October 2010

⁹⁶² Exhibit AMY-16, 2010 Certificate of Tax Audit of Sehil dated 8 October 2010, pdf pages 20-22

issued a decree informing Sehil of the sealing of the property due to its debt.⁹⁶³ Sehil's office and the construction site under Contract No 58 were then sealed.⁹⁶⁴

959. As to Claimants' allegations of assets confiscation, the Tribunals notes that some of those assets were attached and sold pursuant to court proceedings instituted by third-party creditors of Sehil in Turkmenistan in order to satisfy Sehil's debts.⁹⁶⁵ It is further disputed whether Claimants owned the headquarters of Sehil in Turkmenistan, which they claim to have been expropriated.⁹⁶⁶
960. The Tribunal has concluded that Claimants have failed to prove the unlawfulness of the Tax Authorities' actions. The evidence in the record shows that the authorities were exercising powers under the Turkmen Tax Code when seizing and sealing the property under Contract No 58. Taxation measures are generally considered part of a State's powers, and as such, are "*only subject to international review on very narrow grounds relating primarily to the violation of fundamental rights of due process.*"⁹⁶⁷ Further, the sealing of a property is a "*common measure*" taken by states when it comes to unpaid tax debts which tribunals have not considered as "*expropriatory*".⁹⁶⁸ In this case, Claimants have also failed to prove how the actions of the Tax authorities amounted to or contributed to Claimants' deprivation or taking of their investment. Consequently, the Tribunal does not find the actions of the Main Tax Authority amount to expropriation.

⁹⁶³ Exhibit C-382, Decision No 62 on putting prohibition on the taxpayer's right to possess property dated 1 November 2010; *supra* § 192. Claimants have not provided the original of this document, only a Turkish and English version.

⁹⁶⁴ Claimants' Memorial § 275; Exhibit C-20, Photographs of seals on Sehil's assets.

⁹⁶⁵ See e.g. Exhibit R-929, Statement of Claim concerning the recovery of debt in the amount of USD 150,000 dated 15 April 2011; R-931, R-932, R-933, R-934, R-935, R-936, R-938, R-939, R-940, R-941, R-899, R-951 Respondent's Objections to Jurisdiction and Counter-Memorial §§ 489-492; See also Witness Statement of Ms Antonina Yeliseyeva § 16 ("*Sehil did not own its premises located at 2127 (G. Kuliyeu) str. 3, Ashgabat, Turkmenistan, which included its office building, dormitory (not a fixed building), canteen, production yard, steel and decoration yards and warehouse storage areas.*")

⁹⁶⁷ Respondent's Objections to Jurisdiction and Counter-Memorial § 498, relying on *See* Exhibit RLA-239, Harvard Draft Articles on State Responsibility, Article 10 p. 561 Exhibit RLA-307, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, VOL. 2 (American Law Institute Publishers 1987), Commentary on § 712, p. 201; Exhibit CLA-228, UNCTAD, *Expropriation*, p. 79 Exhibit RLA-64, *Telenor*, § 64. *See also* Exhibit RLA-285, Newcombe and Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES, § 7.24 (Exhibit RLA-218, OECD Draft Multilateral Agreement on Investment, 22 April 1998, p. 86

⁹⁶⁸ See e.g. Exhibit RLA-309, *Emanuel Too v Greater Modesto Insurance Associates and United States of America*, Iran-United States Claims Tribunal Case No 880, Award, 29 December 1989, §§ 26-27

D. Tribunal's General Conclusion

961. For the reasons variously set out above, the Tribunal is not persuaded that the acts and omissions allegedly taken together amount to indirect expropriation of Claimants' investment in Turkmenistan. For expropriation it is necessary to show that the effect of the acts and omissions alleged by Claimants was to deprive Claimants of the value, benefit, use and management of its investment. The Tribunal has seen no evidence to show that any of the alleged contractual actions or omissions were planned, coordinated or directed by Respondent. There is also no evidence to support the allegation that these actions and omissions (even if proved) resulted in a taking or depriving Claimants of their investment in Turkmenistan.
962. Many of the issues raised by Claimants overlap. For example, matters concerning late or withheld payments, the effect of late payments, the causes of project delays, extensions of time, the imposition of delay penalties, were contract matters. They were dependent in the first instance upon what was agreed between Sehil and the relevant Contractual Counterparty for each Contract. These are almost all issues which could have been dealt with through the dispute resolution mechanism agreed in each case, i.e. the Arbitrage Court.
963. There is no evidence showing Respondent's involvement in the determination of these issues under numerous Contracts or any coordinated action to deprive Sehil of its investment. The allegations of intimidation and threats are not substantiated. In any event, such behaviour did not amount or contribute to depriving Claimants of their investments.
964. The procedure for obtaining contracts in Turkmenistan, as set out in detail by Claimants,⁹⁶⁹ was not averred to by Respondent in substance. It was known, agreed to and accepted by Claimants. Contracts were obtained by tender process; the essential terms being known when the tender offer was made with some later discussions as to changes. Claimants were successful in having been awarded many Contracts under that procedure and until 2008

⁹⁶⁹ See Claimants' Memorial §§ 84-105

most Contracts were completed successfully. Difficulties relating to payments due, delays, extensions of time, prolongation and additional payments for extra work, penalties for delays, were presumably worked out between Claimants and the Contractual Counterparties on a case by case basis.

965. Sehil's construction projects had a specific purpose and would be completed according to the terms and timetable agreed in the Contracts. When each Contract was completed, that was the end of that specific project, and the Contract came to an end. As stated above, Sehil obtained its Contracts through a tender process in accordance with Turkmenistan law and practice. It is also important in the context of this expropriation claim to appreciate that each contract was a standalone agreement subject to its own terms. There was no right to or guarantee that Sehil would receive additional Contracts. For that reason, and in any event, the Tribunal does not accept that the acts and omissions alleged by Claimants, even if proved and taken together with the other allegations, would have deprived Claimants of their investment.
966. There were certain situations where the involvement and approval of Turkmenistan Government officials was required but this was in accordance with Turkmen domestic practise and legal requirements. That would be in respect of specific Contracts and to resolve contractual difficulties but would not significantly affect Claimants' investment.
967. The Tribunal is not persuaded that Respondent, acting as a sovereign, interfered with payments, extensions of time, scope of works, imposition of penalties, registration of Annexes, etc. under the Contracts. First, these were purely contractual matters for the Contractual Counterparties. Second, and in any event, there is no evidence to suggest Respondent would have known Sehil's cash flow situation and its various commitments under all the Contracts at any particular time, so as to withhold payments so Sehil could not pay wages, purchase equipment and supplies necessary to complete projects on time. Third, there is no evidence to support such allegation.
968. To the extent that the Turkmenistan tax authority sealed the construction sites at which Sehil was working and Sehil's place of business and sold Sehil's assets to meet its tax liabilities, the evidence shows that this was carried out within the limits of the law of

Turkmenistan. These actions were not expropriatory or a contribution to the expropriation of Claimants' investment but were carried out within the police powers of the State.

969. The burden to show excess by the State or State officials of their authority and interference in the performance of the Counterparties' contractual obligations under the Contracts was on Claimants. They have not satisfied that burden. Claimants have also failed to prove how any of those alleged measures, even when considered together, deprived Claimants of the benefit, use, management or value of their investment in Turkmenistan. Accordingly, the Tribunal has concluded that acts and omissions complained of by Claimants are pure contractual issues. There is no basis in them to support the allegation of expropriation.

12. Is there a breach under the BIT of the Fair and Equitable Treatment, Full Protection and Security, Protection against Arbitrary, Unreasonable and Discriminatory Measures standards and the Umbrella Clause?

970. Claimants contend that Respondent has breached the BIT by failing to afford to their investment FET, FPS, protection against arbitrary, unreasonable and discriminatory measures and the umbrella clause protection. Since those protections are not expressly provided for by the BIT, Claimants have tried to rely on the MFN provision in Article II(2) to import them from other third-party treaties.
971. For the reasons set out above, (§§778-794) the Tribunal has concluded that the MFN's scope of application in this case is limited only to *de facto* discrimination and cannot be used to import other substantive protections not provided for in the BIT.
972. Accordingly, Claimants' claims under this head are dismissed.
973. In light of the above, as there were no remedies available for Claimants in this Arbitration, the Tribunal has not considered Claimants' various allegations that they were subjected by Respondent to harassment, unfair treatment and arbitrary, unreasonable and discriminatory treatment in the context of FET, FPS, protection against arbitrary, unreasonable and discriminatory measures and the umbrella clause protection. These issues have only been

considered, and rejected, within the context of Claimants' expropriation claim. It may be that some or all of these alleged actions by Respondent could amount to breach of FET, FPS, protection against arbitrary, unreasonable and discriminatory measures and the umbrella clause protection, but this is not within the jurisdiction of this Tribunal to determine and it expresses no view on this issue.

974. However, the Tribunal notes that some of the actions complained of, such as senior government officials, including vice presidents and prosecutors, visiting construction sites unannounced, interfering with Sehil's employees, seeking additional works to be undertaken without additional payment, late and non-payment for work done, failing to set off monies due to Claimants against money claimed for delays, not assisting Sehil to obtain visas for its non-Turkmen employees, may have had no justification. Claimants may have had the right to seek redress in the Arbitrage Courts but in many cases chose not to do so for practical reasons. Whatever the merit of these allegations, the Tribunal has concluded that these actions did not deprive Claimants of their investment in Turkmenistan and did not amount to expropriation.

13. Damages claimed by Claimants

975. The Tribunal has rejected Claimants' allegations of expropriation by Respondent and has determined that it has no jurisdiction in respect of Claimants' other claims (FET, FPS, protection against arbitrary, unreasonable and discriminatory measures and the umbrella clause protection). Accordingly, the Tribunal deems it is unnecessary under the present circumstances to consider Claimants' damages claim.

VI. COSTS

976. Both Parties have sought to recover their legal and other costs incurred in connection with the Arbitration.

977. At the request of the Tribunal, Claimant Sehil submitted its Statement of Cost on 4 March 2020, and Claimant Çap and Respondent submitted their respective Statements of Cost on 6 March 2020.⁹⁷⁰

1. Claimants' Position

978. Claimant Çap seeks to recover USD 9,552,816.99 for his costs and expenses incurred in this Arbitration, excluding the success fee of his counsel and the third-party funder's proceeds. This total amount is comprised of two sums: (i) USD 1,055,593.759 (EUR 959,630.69), which represents the cost incurred from the initiation of this Arbitration in February 2012 until April 2014⁹⁷¹; and (ii) USD 8,497,223.24 representing the cost incurred from the beginning of 2015 to 6 March 2020.

979. The costs and expenses incurred from February 2012 to April 2014, i.e. USD 1,055,593.759 (EUR 959,630.69) comprise:

Legal Fees and Expenses	Bredin Prat	EUR 622,293.55 ⁹⁷²
	Akıncı Law Firm	EUR 17,655.60 ⁹⁷³
Expert Costs	Prof. Robert Leonard	EUR 23,035.46 ⁹⁷⁴
	Dr Sergey Tyulenev	EUR 10,133.47 ⁹⁷⁵
	Dr Yorgos Dedes	EUR 23,649.50 ⁹⁷⁶

⁹⁷⁰ Claimant Çap's Statement of Costs dated 6 March 2020 supplements and sets out Claimants' Schedule of Costs dated 4 April 2014

⁹⁷¹ This has also been set out in Claimants' Schedule of Costs dated 4 April 2014

⁹⁷² This amount represents the sums of EUR 575,000 (fees) + EUR 47,293.55 (disbursements) + EUR 50,000 (fees incurred from rescheduling of original hearing dates).

⁹⁷³ This amount represents the sums of EUR 14,781.90 (fees) + EUR 2,873.63 (disbursements).

⁹⁷⁴ This amount represents the sums of EUR 15,813.22 (fees) + EUR 7,222.24 (disbursements).

⁹⁷⁵ This amount represents the sums of EUR 7,843.43 (fees) + EUR 2,290.04 (disbursements).

⁹⁷⁶ This amount represents the sums of EUR 21,448.20 (fees) + EUR 2,201.03 (disbursements).

Additional Expert Costs		EUR 1,830.85 ⁹⁷⁷
ICSID	Deposit for ICSID and Tribunal fees and expenses	EUR 211,032.26
TOTAL		EUR 959,630.69

980. The costs and expenses incurred from 2015 to 6 March 2020, i.e. USD 8,497,223.24 comprise:

Legal Fees and Expenses	Derains & Gharavi	USD 6,115,094.94 ⁹⁷⁸
	Akıncı Law Firm	USD 614,548.33 ⁹⁷⁹
Expert Costs	Quantum Expert (Grant Thornton France)	USD 385,838.60 ⁹⁸⁰
	Quantum Expert (Grant Thornton Turkey)	USD 45,540 ⁹⁸¹
	Construction Expert (Hill International)	USD 322,903.55 ⁹⁸²

⁹⁷⁷ Claimant Çap notes that this cost has arisen from rescheduling of original hearing dates.

⁹⁷⁸ This amount represents the sums of USD 6,000,000 (fees) + 108,440.453 (expenses) + 6,654.49 (expenses).

⁹⁷⁹ This amount represents the sums of USD 600,000 (fees) + 14,548.33 (expenses). It is noted that the latter amount includes expenses of USD 2,200 relating to the bifurcation phase and which were not added to Claimants' previous schedule of costs.

⁹⁸⁰ This amount represents the sums of USD 365,000 (fees) + 9,510.6 (fees) + 11,328 (expenses).

⁹⁸¹ This amount includes EUR 35,400 that relate to the period prior to beginning 2015, that was not added to Claimants' previous schedule of costs.

⁹⁸² This amount represents the sums of USD 293,019 (fees) + 29,884.55 (expenses).

ICSID	Deposit for ICSID and Tribunal fees and expenses	USD 700,000
Translation Costs		USD 288,338.65 ⁹⁸³
Other Expenses		USD 24,959.18 ⁹⁸⁴
TOTAL		USD 8,497,223.24

981. Claimant Bankrupt Sehil seeks to recover USD 101,984.73 for its costs and expenses incurred in this Arbitration in the period from 15 October 2018 to 4 March 2020 (the date of the appointment of Egemenoglu Law Firm and Butzel Long). This includes specifically:

Disbursements	Butzel Long	USD 126.00
	Egemenoglu	USD 1631.81
	Offit Kurman, P.A.	USD 226.92
ICSID	Deposit for ICSID and Tribunal fees and expenses	USD 100,000.00
TOTAL		USD 101,984.73

⁹⁸³ This amount represents the sums of USD 100,554.575 + 187,784.07.

⁹⁸⁴ This amount represents the sums of USD 6,420.7 (this amount relates to the payment made to Deutsche Bank pursuant to Turkmenistan's document production requests) + USD 18,538.48 (this amount relates to scanning services).

982. Claimant Sehil specifically notes that it had agreed 3% of “any amounts recovered by Claimant Sehil to be paid to Egemenoglu Law Firm and Offit Kurman, P.A. collectively”.⁹⁸⁵

2. Respondent’s Position

983. Respondent seeks to recover USD 14,046,183.42 for its costs and expenses incurred in the jurisdictional and merits phase of this Arbitration. This includes specifically:

Legal Fees	USD 9,778,328.41 ⁹⁸⁶
Costs Disbursements	USD 3,317,855.01 ⁹⁸⁷
ICSID (Deposit to cover ICSID and Tribunal fees and expenses)	USD 950,000 ⁹⁸⁸
TOTAL	USD 14,046,183.42

3. The Tribunal’s Costs

984. The costs of the Arbitration, including the fees and expenses of the Tribunal and the Tribunal’s Assistant, ICSID’s administrative fees and direct expenses, amount to (in USD):

⁹⁸⁵ Claimant Sehil’s Statement of Costs of 4 March 2020.

⁹⁸⁶ This amount represents the sums of USD 2,897,136.05 (jurisdiction) + USD 6,881,192.36 (merits). This amount includes the legal fees of both Curtis, Mallet-Prevost, Colt & Mosle LLP, Gurel Yoruker Law Offices and Squire Patton Boggs

⁹⁸⁷ This amount represents the sums of USD 388,611.90 (jurisdiction) + USD 2,929,243.11 (merits). This amount includes Respondent’s experts, and other costs and expenses incurred throughout the proceedings, *inter alia*, travel, hotels, means and other expenses.

⁹⁸⁸ This amount represents the sums of USD 250,000 (jurisdiction) + USD 700,000 (merits).

Arbitrators' fees and expenses	
Prof. Julian Lew	620,721.20
Prof. Laurence Boisson de Chazournes	261,194.10
Prof. Bernard Hanotiau	460,314.80
Dr Crina Baltag's fees and expenses	32,760.00
ICSID's administrative fees	328,000.00
Direct expenses	209,939.95
Total	<u>1,912,930.05</u>

985. The funds to cover the costs of this Arbitration were sought from the Parties in equal shares in accordance with Rule 28(1) of the ICSID Arbitration Rules. Accordingly, the above costs have been paid out of the advances made by the Parties.⁹⁸⁹ As a result, the Claimants' share of the costs of arbitration amount to USD 956,465.03 and Respondent's share amounts to USD 956,465.03.

4. The Tribunal's Decision on Costs

986. Article 61(2) ICSID Convention provides that, absent parties' agreement to the contrary, the Tribunal shall "*assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom those expenses shall be paid*". This includes the fees and expenses of the members of the Tribunal and the charges for the use of the ICSID facilities. It further provides that such decision will form part of the Award.

987. The Tribunal has given careful consideration to the allocation of costs in this case. The Tribunal has accepted jurisdiction to consider Claimants' expropriation claim which, after careful consideration, was rejected by the Tribunal for the reasons set out above.

⁹⁸⁹ The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

988. The Parties have also raised other issues which have been determined in this Award; for some of these issues, the Tribunal has decided it does not have jurisdiction, i.e. FET, FPS, protection against arbitrary and discriminatory measures and umbrella clause.
989. Overall, Claimants have been unsuccessful in this Arbitration. In this case, both parties have taken procedural steps which the Tribunal considers have delayed the determination of this Arbitration. This includes Respondent having cancelled attendance at the first hearing at short notice on 19 November 2017, and Claimant Sehil having done so for the hearing scheduled in November 2018. In addition, the Arbitration was disrupted and delayed when the independence of Professor Hanotiau was challenged and as a result, these proceedings were suspended. The proceedings were further delayed due to bankruptcy proceedings initiated in Turkey and Respondent then becoming a creditor in Sehil's bankruptcy, the termination of Derains & Gharavi as counsel for Sehil and the appointment of new counsel for Sehil. The Tribunal has reached no view on the merits of Claimants' substantive claims arising out of the various Contracts in dispute which do not come within the jurisdiction of this Tribunal.
990. Exercising its absolute discretion on the allocation of costs, the Tribunal has decided not to allocate costs against any Party. Accordingly, Claimant Mr Çap, Claimant Sehil and Respondent shall each be liable to pay their own legal costs and expenses incurred in connection with this Arbitration. The Tribunal makes no award in respect of reimbursement of costs between the parties.
991. The costs of arbitration, i.e. to cover the fees and expenses of the Tribunal and of ICSID, were paid in equal amounts by the Claimants and the Respondents. The Tribunal has decided not to order any reimbursement between Claimants and Respondent.

VII. AWARD

992. For the reasons set forth above, the Tribunal decides as follows:

- (1) Claimants have made an investment within the meaning of Article 25 ICSID Convention and Article I(2) BIT.
- (2) The Tribunal has jurisdiction in respect of Claimants' expropriation claim.
- (3) The Tribunal does not have jurisdiction in respect of Claimants' FET, FPS, arbitrary and discriminatory treatment, and umbrella clause claims.
- (4) Claimants' investment in Turkmenistan has not been expropriated.
- (5) All other claims and requests for relief by either Party are dismissed.
- (6) Each party shall be responsible for its own costs and expenses. Half of the costs of the arbitration shall be paid by Respondent and the other half by Claimants in proportion to the advances made to ICSID.

Date

May 4, 2021



Prof. Laurence Boisson de Chazournes
Arbitrator

Date: 29 April 2021

Prof. Bernard Hanotiau
Arbitrator

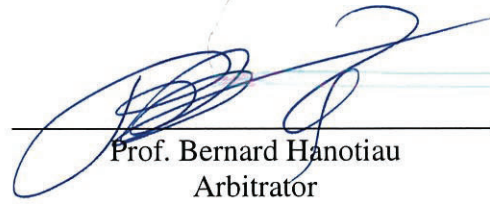
Date:

Prof. Julian D.M. Lew
President of the Tribunal

Date:

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:



Prof. Bernard Hanotiau
Arbitrator

Date: 23.4.2021

Prof. Julian D.M. Lew
President of the Tribunal

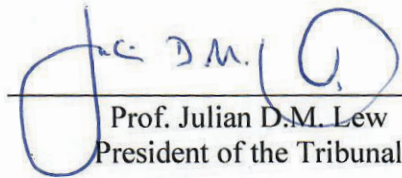
Date:

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:

Prof. Bernard Hanotiau
Arbitrator

Date:



Prof. Julian D.M. Lew
President of the Tribunal

Date: 4 May 2021

VIII. GLOSSARY

Term	Meaning
Arbitrage Court of Turkmenistan	The “ <i>Arbitration Court of Turkmenistan</i> ”, referred to in the contracts constitutes the state court that hears commercial disputes (and also referred to by the parties in their submissions as “ <i>Arbitration Court of Turkmenistan</i> ”)
BIT	Agreement between the Republic of Turkey and Turkmenistan concerning the reciprocal promotion and protection of investments dated 2 May 1992
Claimants’ RfA	Claimants’ Request for Arbitration dated 21 February 2012
Claimants’ Memorial	Claimants’ Memorial of 10 December 2015
Claimants’ Reply and Counter-Memorial on Jurisdiction	Claimants’ Reply Memorial on the Merits and Counter-Memorial on Non-Bifurcated Objections to Jurisdiction dated 29 September 2016
Claimants’ Rejoinder and Reply on Jurisdiction	Claimants’ Memorial on Non-Bifurcated Objections to Jurisdiction and Reply on Respondent’s Counterclaims dated 3 February 2017
Claimants’ PHB	Claimants’ Post-Hearing Brief dated 27 June 2017
Contractual Counterparties	Sehil’s clients under the Disputed Contracts
Disputed Contracts	Sehil Contracts listed in Annex B to this Award (Nos T5, 27, 29, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63, 64, 65 and Avaza Island Project
FET	Fair and Equitable Treatment
FPS	Full Protection and Security

Funding Agreement	Agreement between La Française and Claimants for the funding of these arbitration proceedings
ICSID Convention	The Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ILC	International Law Commission
ILC Draft Articles on State Responsibility	International Law Commission in the Draft Articles on Responsibility of States for Internationally Wrongful Acts
Investment	Assets owned or controlled by Claimants for the purposes of establishing jurisdiction under Article 25 ICSID Convention and Article I(2) BIT
IPC	Interim Payment Certificate
KNB	The Committee for National Security of Turkmenistan
La Française	La Française IC Fund Sicav-Fis, third-party funder incorporated in Luxembourg and providing finances to Claimants
MFN	Most-Favoured Nations Treatment
Mr Çap	Mr Muhammet Çap, claimant in this arbitration
Respondent's Objections to Jurisdiction and Counter-Memorial	Respondent's Non-Bifurcated Objections to Jurisdiction and Counter-Memorial on the Merits dated 18 April 2016
Respondent's Rejoinder and Reply on Jurisdiction	Respondent's Rejoinder and Reply Memorial on Non-Bifurcated Objections to Jurisdiction dated 6 January 2017
Respondent's PHB	Respondent's Post-Hearing Brief dated 27 June 2017
Sehil	Sehil İnşaat Endustri ve Ticaret Ltd. Sti, a company incorporated in Turkey whose majority holder is Mr Muhammet Çap, Turkish national. During the course of this Arbitration, Sehil entered bankruptcy proceedings in accordance with Turkish law (3rd Bankruptcy Directorate of

	Istanbul, Case No 2015/10, as of 17 September 2015). Starting 14 June 2016, decisions for Sehil are taken by the attorney appointed by and under the control of the Istanbul Bankruptcy Office.
Sehil Contracts	The 64 construction projects in Turkmenistan undertaken by Sehil
SNT	Construction Norms of Turkmenistan
Supreme Control Chamber	Supreme Control Chamber of Turkmenistan
VCLT	Vienna Convention on the Law of Treaties 1969
Undisputed Contracts	Sehil Contracts listed in Annex A to this Award (Nos 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 36/02, 24, 25, 26, 28, 30, 34, 43, 61)
UK-Turkmenistan BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, dated 9 February 1995

ANNEX A

UNDISPUTED CONTRACTS

	Contract No (chronological order)	Date	Contracting Party	Description	Value (USD)
1.	Contract No 1	6 April 2000	Ministry of National Security	Marble and granite lining of the facade of the buildings of the Ministry reconstruction and improvement of the adjacent territory, including erection of the provided constructions, reconstruction and repair of separate rooms	1,698,968
2.	Contract No 3	29 June 2000	Ministry of Internal Affairs	Installation of heating system and air-conditioning in the Administration Building	165,000
3.	Contract No 2	19 July 2000	Prosecutor's General Office	Marble facing of the Administration Building and installation of a monument of the President of Turkmenistan	496,667
4.	Contract No 6	8 February 2001	The Muratberdi Sopiyeu village of the Ahal Wilayat (Region) of Turkmenistan	Installation of monument of the President of Turkmenistan C. A. Niyazow and landscaping of the area surrounding the Cultural Centre ⁹⁹⁰	35,031
5.	Contract No 4	9 March 2001	Prosecutor's General Office	Overhaul of internal premises of the main building	764,161.80
6.	Contract No 5	3 July 2001	Prosecutor's General Office	Marble facing of the internal and external part of Administration Building of Investigatory Management	1,388,252

⁹⁹⁰ C-MC05 refers to: “an accomplishment of nearby territory of the Cultural Centre”.

7.	Contract No 7	10 August 2001	National Institute of Statistics	Marble facing of façades of the Administration Building	690,038.80
8.	Contract No 8	10 August 2001	National Institute of Statistics	Marble facing of façades of the Administration Building	680,683.53
9.	Contract No 9	15 August 2001	Ministry of Social Security	Marble facing of façades of the Administration Building	718,016.45
10.	Contract No 10	15 October 2001	Prosecutor's General Office	Delivery and installation of timbering to 12-storey building for the Law Enforcement Bodies of Turkmenistan	743,646.10
11.	Contract No 11	22 December 2001	" <i>Aşgabatmerkeziguruşyk</i> " Construction organization	Performing construction-installation and repair works of " <i>Liter – İ</i> " building	47,141 ⁹⁹¹
12.	Contract No 12	15 January 2002	National Center of Trade (Labor) Union of Turkmenistan	Marble facing of façade of Administration Building	396,965
13.	Contract No 15	1 May 2002	Prosecutor's General Office	Marble facing of façades of a building (previously Institute of The Rights and Democracy)	708,745.36
14.	Contract No 13	13 June 2002	Ministry of National Security	Repair of internal premises of the building	2,599,417.36
15.	Contract No 17	9 August 2002	Ministry of Economics and Finance	Repair of basements of Administration Building	346,000
16.	Contract No 36/02	11 November 2002	Central Bank of Turkmenistan	Construction of kindergarten for 160 places	1,900,000
17.	Contract No 18	7 April 2003	National Center of Trade (Labor) Union of Turkmenistan	Repair of internal premises of Administration Building	800,000

⁹⁹¹ Original amount in manat: 218,518,625. Exchange rate 1 USD = 4,635 MNT.

18.	Contract No 16	23 May 2003	Prosecutor's General Office	Repair of internal premises of Administration Building	652,150.26
19.	Contract No 22	21 July 2003	Ministry of Internal Affairs	Installation of heating and air-conditioning system of Central Administration Building	235,695.00
20.	Contract No 19	9 February 2004	Ministry of National Security	Construction of 12-storey building with 36 apartments	5,875,000
21.	Contract No 20	5 April 2004	National Manuscripts Institute named after Turkmenbashy	Repair of internal premises of main building	200,000
22.	Contract No 14	1 May 2004	Ministry of National Security	Construction of Base for combat training special groups of the Ministry of National Security of Turkmenistan and the State Border Service of Turkmenistan	2,625,383.82
24.	Contract No 25	17 May 2004	Prosecutor's General Office	Construction of kindergarten for 160 places and school for 800 places	11,225,000
23.	Contract No 21	19 May 2004	"Kanagat" Cooperative of Turkmenistan	Construction of 2-storey building office, shop and dining room	623,082 ⁹⁹²
25.	Contract No 24	19 May 2004	Ministry of Internal Affairs	Construction of 4-storey building with apartments	2,460,000
26.	Contract No 26	11 November 2004	Municipality of Ashgabat	Marble facing of façade of hotel "Ashgabat" and accomplishment of adjoining territory	1,460,000
27.	Contract No 23	22 February 2005	Municipality of Ashgabat	Construction of Turkmen-Turkish Forest Park of	1,816,100

⁹⁹² Original amount in manat: 3,994,952,937.48. Exchange rate 1 USD = 6,411.6 MNT.

				Friendship and The Great Turkmenbashy Park	
28.	Contract No 30	12 August 2005	Municipality of Ashgabat	Construction of a monument in honour “ <i>Serdar’s health road</i> ” and a forestation in Hindiwar	750,000
29.	Contract No 34	9 December 2005	Turkmenistan Head State Insurance Department	Construction of 12-storey building with 35 apartments of high comfort and the improved lay-out with underground parking place	6,992,000
30.	Contract No 28	26 December 2005	The National Centre of Trade Unions of Turkmenistan	Construction in Gokdere of Ruhabat district of a children’s health improving center for 150 places	5,462,500
31.	Contract No 43	1 May 2006	Ministry of Internal Affairs	Construction of 4-storey building with apartments	5,702,139
32.	Contract No 61	23 October 2008	Municipality of Ashgabat	Turkmen-Turkish Friendship Park	200,000

ANNEX B

DISPUTED CONTRACTS

	Contract No (chronological order)	Date	Contracting Party	Description	Value (USD)
1.	Contract No T5	10 September 2004	State-Owned Enterprise “ <i>Turkmenneft</i> ”	Designing and turnkey construction of the Administrative Building of Turkmenneft in the city of Balkanabat	10,000,000
2.	Contract No 27	21 April 2005	Ministry of National Security	Repair of Block “G” premises and elevations and capital repair of Block “A” basement premises of group of buildings of the Ministry of National Security	1,421,365.82
3.	Contract No 29	26 May 2005	Ministry of National Security	Construction of 4-storey building with 36 apartments and open parking space in Ashgabat	5,735,906 (without VAT, 4,987,745)
4.	Contract No 33	3 August 2005	State-Owned Enterprise “ <i>Turkmenmashyngurlu shyk</i> ”	Designing and turnkey construction of the Metallurgical Plant in Ovadandepo with capacity of 160,000 tons/a year of finished rolled steel Claimants’ consortium partner: “ <i>Erdemir Mühendislik Yönetim ve Danışmanlık Hizmetleri A.Ş</i> ”	64,500,000

5.	Contract No 38	15 November 2005	Central Bank of Turkmenistan	Construction of a 12-storey building with 36 apartments and underground parking in Ashgabat	8,096,000 (without VAT, 7,040,000)
6.	Contract No 39	15 November 2005	Central Bank of Turkmenistan	Construction of a 12-storey building with 36 apartments and underground parking in Ashgabat	8,096,000 (without VAT, 7,040,000)
7.	Contract No 35	7 December 2005	Main State Tax Service	Construction of a 12-storey building with 48 apartments and underground parking in Ashgabat	8,478,720 (without VAT, 7,372,800)
8.	Contract No 31	14 December 2005	Ministry of Economy and Finance	Construction of 12-storey building with 54 apartments and underground parking in Ashgabat	9,159,520 (without VAT, 7,964,800)
9.	Contract No 36	28 December 2005	“Turkmenistan” State Commercial Bank	Construction of a 12-storey building with 35 apartments and underground parking in Ashgabat	7,424,032 (without VAT, 6,455,680)
10.	Contract No 37	29 December 2005	“Senagat” Joint-Stock Commercial Bank of Turkmenistan	Construction of a 12-storey building with 35 apartments and underground parking in Ashgabat	7,985,600 (without VAT, 6,944,000)
11.	Contract No 40	31 December 2005	Central Bank of Turkmenistan	Construction of a 8-storey shopping center with underground parking in Ashgabat	12,999,991 (without VAT, 11,304,340)
12.	Contract No 41	31 December 2005	Central Bank of Turkmenistan	Construction of a 4-storey kindergarten for 320 places	8,499,903 (without VAT, 7,391,220)

13.	Contract No 42	17 January 2006	State-Owned Enterprise “ <i>Turkmenpagta</i> ”	Construction of a 4-storey building with 24 apartments and underground parking in Ashgabat	3,063,200 (without VAT, 2,663,652.17)
14.	Contract No 32	22 April 2006	Ministry of National Security	Repair of complex of buildings, furnishing of internal premises of buildings in Ashgabat and landscaping of the area	3,950,250 (without VAT, 3,435,000)
15.	Contract No 45	2 May 2006	Prosecutor’s General Office	Construction of apartment building in Ashgabat	31,981,462 (without VAT, 27,184,242.70) ⁹⁹³
16.	Contract No 44	17 August 2006	Prosecutor’s General Office	Construction of a 12-storey health center for 308 persons in the Avaza recreation zone ⁹⁹⁴	33,329,588 (without VAT, 28,982,250) ⁹⁹⁵
17.	Contract No 47	28 September 2006	Municipality of Ashgabat	Construction of Waste Treatment (Recycling) Facility in Ashgabat	30,816,000 (VAT not specified)
18.	Contract No 46	25 January 2007	Concern “ <i>Turkmenenergogurlushyk</i> ”	Construction of a 12-storey health center for 308 persons in the Avaza recreation zone	21,971,900 (without VAT, 19,106,000)
19.	Contract No 48	14 February 2007	“ <i>Turkmenmallary</i> ” Association of Joint-Stock Livestock Companies	Construction of a 12-storey building with 72 apartments and underground parking in Ashgabat	14,956,500 (without VAT, 13,005,652.17)

⁹⁹³ But see, Annex No 16 to Respondent’s Post-Hearing Brief, FN 2: “*Exhibit R-390, Contract No 45, Article 3.1 (providing contract price as USD 31,981,462, including VAT of USD 4,797,219.30). The contract price net of VAT is USD 27,809,966.95 (USD 31,981,462 x (1/1.15)). Second PwC Report, Appendix X, p. 5.*”

⁹⁹⁴ C-189: translated as “*rest house*”

⁹⁹⁵ Annex No 15 to Respondent’s Post-Hearing Brief

20.	Contract No 51	18 June 2007	Municipality of Dashoguz	Construction of the Drinking Water Plant in Dashoguz	27,990,723
21.	Contract No 52	26 June 2007	Ministry of Internal Affairs	Construction of Police Academy Building in Ashgabat	45,000,000
23.	Contract No 54	21 August 2007	Ministry of National Security	Designing and performing the overhaul works in the Block “R” of the Ministry in Ashgabat	4,255,000 (without VAT, 3,700,000)
24.	Contract No 56	23 August 2007	Ministry of Energy and Industry	Construction of the State Energy Institute building in the city of Mary	28,750,000 (without VAT, 25,000,000)
25.	Contract No 55	10 September 2007	Governorship of Dashoguz Province	Construction of the 2,800-seat Convention Center ⁹⁹⁶ in Dashoguz	20,000,000
22.	Contract No 53	19 September 2007	Ministry of National Security	Designing and construction of the Central Administrative Building of the Ministry in Ashgabat	6,900,000 (without VAT, 6,000,000)
26.	Contract No 57	28 December 2007	Turkmenbashi Oil-Processing Complex	Construction of health-center for 900 people in Avaza recreation zone	62,042,500 (without VAT, 53,950,000) ⁹⁹⁷
27.	Contract No 58	5 February 2008	Ministry of Culture and Television and Radio Broadcasting of Turkmenistan	Construction of Institute of Culture, Boarding School of Music under the Turkmen National Conservatory, kindergarten for 200 children, school for 600	130,000,000 1. Turkmen State Institute of Culture – 38,480,000.00

⁹⁹⁶ C-188: refers to “*Ruhiyet Palace*”

⁹⁹⁷ But see Annex No 26 to Respondent’s Post-Hearing Brief and FN 2 indicating the Contract Price of 75,530,000, explained as follows: Exhibit R-578, Contract No 57, Article 8.1. Value calculated as (62,042,500 * 1.4) less 15% VAT. 1 EUR = USD 1.4. First GT Report, § 5.26.

				students, two 12-storey building with 36 apartments and one 15-storey building with 144 apartments, underground parking and covered pool each in Ashgabat	2. Turkmen National Conservatory Music Boarding School – 37,180,000.00 3. Kindergarten for 200 children – 5,070,000.00 4. School for 600 children – 8,970,000.00 5. Building #1 – 6,716,000.00 6. Building #2 – 6,716,000.00 7. Building #3 – 26.868.000,00
28. 998		15 June 2009	Ministry of Petroleum	Avaza Island Project	400,000,000
29.	Contract No 62	24 August 2009	Committee for the Avaza National Tourist Zone	Automobile bridge in Turkmenbashi	3,049,346.59
30.	Contract No 63	24 August 2009	Committee for the Avaza National Tourist Zone	Planting trees and other greenery and installation of irrigation system in Turkmenbashi	26,212,527.60
31.	Contract No 64	24 August 2009	Committee for the Avaza National Tourist Zone	Street lightning system in Turkmenbashi	36,842,423.58

⁹⁹⁸ This is reflected only in C-MC06. Transcript Hearing on Non-Bifurcated Objections to Jurisdiction, Liability and Quantum, Day 3, Wednesday, 15 February 2017, page 3, Mr Çap stating that no contract was signed for this project.

32.	Contract No 65	24 August 2009	Committee for the Avaza National Tourist Zone	Landscaping sidewalks Turkmenbashi	of in	27,999,174.96
-----	-------------------	-------------------	---	--	----------	---------------

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

In the arbitration proceeding between

MUHAMMET ÇAP
SEHİL İNŞAAT ENDÜSTRİ VE TİCARET LTD. STİ.

CLAIMANTS

and

TURKMENISTAN

RESPONDENT

ICSID Case No. ARB/12/6

**DECISION ON RESPONDENT'S OBJECTION TO JURISDICTION
UNDER ARTICLE VII(2) OF THE TURKEY-TURKMENISTAN
BILATERAL INVESTMENT TREATY**

Members of the Tribunal

Professor Julian D.M. Lew QC, President
Professor Laurence Boisson de Chazournes
Professor Bernard Hanotiau

Secretary of the Tribunal

Mr Paul-Jean Le Cannu

Date of Dispatch: 13 February 2015

REPRESENTATION OF THE PARTIES

Representing Claimants:

Mr Raëd Fathallah
Mr Louis Christophe Delanoy
Bredin Prat
130, rue du Faubourg Saint-Honoré
75008 Paris
France

Representing Respondent:

Ms Miriam Harwood
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, N.Y. 10178
U.S.A.

Ms Claudia Frutos-Peterson
Curtis, Mallet-Prevost, Colt & Mosle LLP
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
U.S.A.

Mr Ali R. Gürsel
Curtis, Mallet-Prevost, Colt & Mosle LLP
Maya Akar Center
Buyukdere Caddesi No. 100-102
Kat 23, No. 89, Esentepe 34394
Istanbul
Turkey

Ms Sibel Yurttutan
Ms Alev Gürel
Ms Berin Hikmet
Ms Gülperi Yörüker
Yurttutan Gürel Yörüker Law Firm
Ahi Evran Caddesi
Polaris Plaza Kat: 25 D:89 Maslak 34398
Istanbul
Turkey

TABLE OF CONTENTS

I. INTRODUCTION AND THE PARTIES.....	1
II. PROCEDURAL HISTORY	2
A. The Request for Arbitration	2
B. The constitution of the Tribunal.....	3
C. The first session of the Tribunal and bifurcation of the proceedings.....	4
D. Parties' submissions and hearing on jurisdiction.....	5
III. NATURE OF THE DISPUTE	14
IV. SCOPE OF THIS DECISION AND ISSUES FOR DETERMINATION.....	17
V. FACTUAL BACKGROUND	19
VI. RELEVANT LEGAL TEXTS.....	21
A. The ICSID Convention and the ICSID Arbitration Rules	21
B. The Turkey-Turkmenistan BIT	22
C. The Vienna Convention on the Law of Treaties	27
VII. OVERVIEW OF THE POSITIONS OF THE PARTIES	29
A. The local court requirement under Article VII(2) of the BIT	29
(1) Respondent's position	29
(2) Claimants' position.....	30
B. The mandatory local court requirement should not be applied because of the MFN clause in the BIT and/or the futility of proceeding in the Turkmen courts.....	31
(1) The mandatory local court requirement should be overridden by operation of the MFN clause	31
(a) Claimants' position.....	31
(b) Respondent's position	32
(2) The mandatory local court requirement should not be enforced because seeking redress in the Turkmen courts is futile.....	33
(a) Claimants' position.....	33
(b) Respondent's position	34
VIII. THE ARBITRAL TRIBUNAL'S REASONS AND DECISION.....	35
A. Does Article VII(2) contain a mandatory requirement that disputes be referred first to the courts of Turkmenistan?.....	35
(1) Burden of proof	36

(a)	Parties' positions	36
(b)	Tribunal's analysis and conclusion	37
(2)	Authentic versions of the BIT	37
(a)	Respondent's position	38
(b)	Claimants' position.....	40
(c)	Tribunal's analysis and conclusion	41
(3)	Interpretation and meaning of Article VII(2)	42
(a)	Respondent's position	43
(b)	Claimants' position.....	54
(c)	Tribunal's analysis and conclusions.....	65
(i)	The ambiguity of Article VII(2)'s proviso and its two possible meanings.....	66
a.	The English authentic version.....	68
b.	The Russian authentic version	70
i.	The Russian authentic version is a translation of the English authentic version.....	71
ii.	The ambiguity found in the English original version is also present in the Russian version	73
iii.	The ambiguity of the Russian authentic version of Article VII(2) is consistent with the poor quality of the Russian text as a whole	75
iv.	The argument that the proviso only applies to ICC arbitration is rejected.....	75
(ii)	The context of Article VII(2)'s proviso	76
(iii)	The object and purpose of the BIT	78
(iv)	Other arguments of the Parties with respect to the interpretation of Article VII(2) of the BIT.....	80
a.	Claimants' contentions as to Turkey's reading of Article VII(2) of the BIT .	81
b.	Respondent's contentions based on Turkey's BIT practice.....	82
i.	Respondent's arguments based on the Turkish version of Article VII(2)	82
ii.	Respondent's argument based on the Russian version of the Turkey-Kazakhstan and Turkmenistan BITs.....	84
iii.	Respondent's arguments based on Turkey's BIT practice	85
(v)	Distinguishing <i>Kılıç</i>	86
(4)	The effect of Article VII(2) on the present case.....	88
(a)	Parties' positions	88
(b)	Tribunal's conclusion	89
B.	Avoidance of the mandatory local court requirements because of the MFN clause in the BIT or the futility of proceeding in the Turkmen courts	89

IX. COSTS..... 90
X. OPERATIVE PART 91

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT / Turkey-Turkmenistan BIT / Treaty	Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992
Claimants / Sehil and Mr Çap	Sehil İnşaat Endustri ve Ticaret Ltd. Sti. and Mr Muhammet Çap
CLs. Costs	Claimants' Statement on Costs dated 4 April 2014
CLs. Cmts Costs	Claimants' Comments on Respondent's Statement of Costs dated 11 April 2014
CPHB	Claimants' Post-Hearing Brief dated 18 March 2014
CPHBR	Claimants' Reply Post-Hearing Brief dated 28 March 2014
Counter-Memorial	Claimants' Counter-Memorial on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 29 April 2013
Dr Dedes' First Expert Linguistics Opinion	Expert Linguistics Opinion of Dr Yorgos Dedes, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 26 April 2013
Exh. [C-] [R-]	Exhibit [Claimants] [Respondent]
Exh. [CLA-] [RLA-]	Legal Authority [Claimants] [Respondent]
Prof Gasparov's Expert Linguistics Opinion	Expert Linguistics Opinion of Professor Boris Gasparov, Ph.D. on the Meaning of Article VII(2) of the Russian Version of the 1992 Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 17 June 2013
GDFI	Turkey's General Directorate of Incentives and Foreign Investment of the Ministry of Economy since 2011 (from 1994 to 2011, General Directorate of Foreign Investment of the Undersecretariat of Treasury; from 1991 to 1994, General Directorate of Foreign Investment of the Undersecretariat of Treasury and Foreign Trade)

Dr Glad's Expert Linguistics Opinion	Expert Linguistics Opinion of John Glad, Ph.D. on the Meaning of Article VII.2 in the Russian Version of the Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013
Prof Green's Expert Linguistics Opinion	Expert Linguistics Opinion of Prof Georgia M. Green, Ph.D. concerning the "provided that, if...and..." clause in Article VII of the (signed) English version of the Turkey-Turkmenistan BIT dated 14 June 2013.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID / the Centre	International Centre for Settlement of Investment Disputes
<i>Kılıç</i> Award	Award dated 2 July 2013 in <i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1) (Exh. RLA-98)
<i>Kılıç</i> Decision	Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 7 May 2012 in <i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1) (Exh. RLA-1)
<i>Kılıç</i> Separate Opinion	Separate Opinion of Professor William Park dated 20 May 2013 in <i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1) (Exh. RLA-98)
Dr Kornfilt's First Expert Linguistics Opinion	Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013
Dr Kornfilt's Second Expert Linguistics Opinion	Second Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII(2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 June 2013

Prof Leonard's First Expert Linguistics Opinion	Expert Linguistics Opinion of Professor Robert Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 29 April 2013
Prof Leonard's Second Expert Linguistics Opinion	Second Expert Linguistics Opinion of Professor Robert A. Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 8 August 2013
Memorial	Respondent's Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty dated 18 March 2013
Dr Öktem's and Dr Karlı's First Legal Opinion	Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 15 March 2013
Dr Öktem's and Dr Karlı's Second Legal Opinion	Supplementary Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 19 June 2013
Mrs Özbilgiç's Witness Statement	Witness Statement of Mrs Zergül Özbilgiç dated 7 August 2013
Parties	Claimants and Respondent
PO No. 1	Procedural Order No. 1 dated 15 February 2013
Rejoinder	Claimants' Rejoinder on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 9 August 2013
Reply	Respondent's Reply Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty dated 19 June 2013
Request	Request for Arbitration dated 21 February 2012
Respondent / Turkmenistan	Turkmenistan
Resp. Costs	Respondent's Statement on Costs dated 4 April 2014
Resp. Cmts Costs	Respondent's Comments to Claimants' Statement on Costs dated 11 April 2014
RPHB	Respondent's Post-Hearing Brief dated 18 March 2014

RPHBR	Respondent's Reply Post-Hearing Brief dated 28 March 2014
Tr. J. Day [#], [page:line]	Transcript of the hearing on jurisdiction of 14-15 January 2014
Dr Tyulenev's First Expert Linguistics Opinion	Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 16 April 2013
Dr Tyulenev's Second Expert Linguistics Opinion	Second Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 6 August 2013
Vienna Convention	Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969

1. This Decision determines Respondent’s challenge to the Tribunal’s jurisdiction on the basis of Article VII(2) of the Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 (the “**BIT**” or “**Turkey-Turkmenistan BIT**” or “**Treaty**”) in this arbitration.

I. INTRODUCTION AND THE PARTIES

2. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Turkey-Turkmenistan BIT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
3. The claimants are Sehil İnşaat Endustri ve Ticaret Ltd. Sti., a company incorporated under the laws of Turkey (“**Sehil**”), and Mr Muhammet Çap, a natural person of Turkish nationality. Sehil and Mr Çap will be hereinafter jointly referred to as “**Claimants**”. Claimants’ address is:

Mr Muhammet Çap
Sehil İnşaat Endustri ve Ticaret Ltd. Sti.
Eski Büyükdere cad.Bilek,
İş Merkezi No:29 Kat:2,
34416 4. LEVENT,
Istanbul, Turkey.

4. The respondent is Turkmenistan and is hereinafter referred to as “**Turkmenistan**” or “**Respondent**”.
5. Claimants and Respondent are hereinafter collectively referred to as the “**Parties**”. The Parties’ respective representatives and their addresses are listed above on page i.
6. The dispute relates to the purported destruction, impairment and unlawful expropriation of Claimants’ construction projects in Turkmenistan, through acts and omissions of

Respondent that allegedly violate the protections the latter afforded to Claimants under the BIT.

7. After careful consideration of the Parties' written submissions and oral presentations, this Decision rules on Respondent's objection to jurisdiction and request for dismissal of Claimants' claims pursuant to ICSID Convention Articles 25 and 41, and Rule 41 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"), on the ground that Claimants failed to submit their dispute to Turkmenistan's national courts prior to initiating ICSID arbitration proceedings in accordance with Article VII(2) of the Turkey-Turkmenistan BIT.

II. PROCEDURAL HISTORY

A. The Request for Arbitration

8. On 23 February 2012, ICSID received a request for arbitration dated 21 February 2012 from Mr Muhammet Çap and Sehil İnşaat Endustri ve Ticaret Ltd. Sti. against Turkmenistan (the "**Request**").
9. On 1 March 2012, ICSID sent a communication to Claimants inquiring as to whether they met the requirements of Article VII(2) of the Turkey-Turkmenistan BIT.
10. By letter dated 6 March 2012, Claimants responded as follows:

We confirm that the one-year period referred to in Article VII(2) of the BIT only applies "if" the investor had chosen to bring its claims before Turkmen courts. Claimants in the present case have not commenced any proceedings before Turkmen courts in relation to their claims. Therefore, Claimants' position is that the one-year period does not apply in the present instance.

11. On 26 March 2012, the Secretary-General of ICSID registered the case in accordance with Article 36(3) of the ICSID Convention. Upon the issuance of the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as

soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. The constitution of the Tribunal

12. By letter from Claimants dated 31 May 2012 and email from Respondent of 20 June 2012, the Parties agreed, in accordance with Article 37(2)(a) of the ICSID Convention, that the Arbitral Tribunal would consist of three arbitrators: one arbitrator to be appointed by each Party, and the third, presiding arbitrator to be appointed by agreement of the two party-appointed arbitrators in consultation with the Parties.
13. On 31 May 2012, Claimants appointed Professor Bernard Hanotiau, a national of Belgium, as arbitrator (address: Hanotiau & van den Berg, IT Tower (9th Floor), 480 Avenue Louise, B9, 1050 Brussels, Belgium). Upon the Centre's invitation of 22 June 2012, Professor Hanotiau accepted the appointment on 25 June 2012 and provided a signed declaration in accordance with Article 6(2) of the ICSID Arbitration Rules.
14. On 26 June 2012, Respondent appointed Professor Laurence Boisson de Chazournes, a national of France and Switzerland, as arbitrator (address: University of Geneva Faculty of Law, 40, boulevard du Pont-d'Arve, 1211, Geneva 4, Switzerland). Professor Boisson de Chazournes accepted the appointment on 9 July 2012, and provided a signed declaration and a statement in accordance with Article 6(2) of the Arbitration Rules.
15. By letter dated 27 September 2012, the Parties were informed that Mr Paul-Jean Le Cannu, ICSID Legal Counsel, would serve as Secretary of the Tribunal, when one is constituted.
16. By letter dated 5 October 2012, the Parties informed the ICSID Secretariat that they were *"now in agreement to submit to ICSID a list of three candidates from which [...] the Chairman of the Administrative Council would appoint the President of the Tribunal"*. The Parties further explained that they were *"in agreement on all three candidates (in no particular order of preferences) and [left] it for ICSID to select a candidate taking into consideration the characteristics of the case concerned"*.

17. On 11 October 2012, Professor Julian D.M. Lew QC, a national of the United Kingdom, was appointed as President of the Tribunal by the Chairman of the Administrative Council, from the list provided by the Parties on 5 October 2012 (address: 20 Essex Street Chambers, 20 Essex Street, London WC2R 3AL, United Kingdom). Professor Lew accepted his appointment on 21 October 2012, and submitted a signed declaration and a statement in accordance with Article 6(2) of the Arbitration Rules.
18. On 22 October 2012, the Secretary-General 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 in accordance with ICSID Arbitration Rule 6(1).
19. On 24 October 2012, the Centre requested each Party to make an initial advance payment of US\$ 100,000.00 to cover the costs of the proceedings in the first three to six months of the case. By letter dated 26 November 2012, the Centre confirmed receipt of Claimants' payment. By letter dated 4 June 2013, the Centre confirmed receipt of Respondent's payment.

C. The first session of the Tribunal and bifurcation of the proceedings

20. On 4 February 2013, the Tribunal held a first session with the Parties at the World Bank in Washington, D.C.
21. On 15 February 2013, the Tribunal issued Procedural Order No. 1 (“**PO No. 1**”), setting out the procedural rules that Claimants and Respondent had agreed to, and that the Tribunal had determined at the first session in Washington, D.C., should govern this arbitration. The Parties confirmed that “*the Tribunal was properly constituted and that no Party has any objection to the appointment of any Member of the Tribunal*”.¹ It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of proceedings would be Washington D.C., without prejudice to the Tribunal's decision to

¹ PO No. 1, § 2.1.

hold hearings at any other place that it considers appropriate after consulting with the Parties and seeking their agreement.

22. Paragraph 13.1 of PO No. 1 embodied the agreement of the Parties and the Tribunal's determination with regard to the first phase of this arbitration. It provided:

It was agreed by the Parties and decided by the Tribunal at the first session that in a first phase of this arbitration the Parties would make full submissions on Article 7 of the [BIT], including any relevant factual and legal arguments in support thereof. Following the Parties' exchange of written submissions and the hearing on this issue, the Tribunal shall render a decision or an award. Should the Tribunal uphold jurisdiction on the basis of Article 7 of the BIT, Respondent's other jurisdictional objections and the merits of the case shall be addressed in a second phase of the proceedings.

23. Accordingly, PO No. 1 provided a timetable for the filing by Respondent and Claimants, sequentially, of written submissions with supporting evidence and legal materials on which the Parties rely, addressing Respondent's jurisdictional challenge. It also fixed 26-27 August 2013 for an oral hearing on jurisdiction to be held in Washington, D.C., or at a venue in Europe to be agreed.

D. Parties' submissions and hearing on jurisdiction

24. On 26 February 2013, the Parties informed the ICSID Secretariat that they had agreed on Paris, France, as the venue for the hearing on jurisdiction scheduled for 26-27 August 2013.
25. As agreed at the first session and subsequently by the Parties and the Tribunal, the Parties filed their written submissions as follows.
26. On 18 March 2013, Respondent filed its Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty ("**Memorial**") along with supporting documents, including the following expert reports:

- The Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 15 March 2013 (“**Dr Öktem’s and Dr Karlı’s First Legal Opinion**”);
 - The Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 (“**Dr Kornfilt’s First Expert Linguistics Opinion**”); and
 - The Expert Linguistics Opinion of John Glad, Ph.D. on the Meaning of Article VII.2 in the Russian Version of the Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 (“**Dr Glad’s Expert Linguistics Opinion**”).
27. On 29 April 2013, Claimants filed their Counter-Memorial on Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (“**Counter-Memorial**”) along with supporting documents, including the following witness statements and expert reports:
- The Witness Statement of Mr Hasan Çap dated April 2013;
 - The Witness Statement of Mr Hüseyin Çap dated 29 April 2013;
 - The Witness Statement of Mr İrfan Dölek dated 29 April 2013;
 - The Witness Statement of Mr Ukkşe Çap dated 29 April 2013;
 - The Expert Linguistics Opinion of Dr Yorgos Dedes, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 26 April 2013 (“**Dr Dedes’ First Expert Linguistics Opinion**”);
 - The Expert Linguistics Opinion of Professor Robert Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 29 April 2013 (“**Prof Leonard’s First Expert Linguistics Opinion**”); and

- The Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 16 April 2013 (“**Dr Tyulenev’s First Expert Linguistics Opinion**”).
28. By email of 28 May 2013, the Parties informed the Tribunal that they had agreed to amend the procedural calendar. On 13 June 2013, Respondent filed a request for a further extension of the deadline to file its Reply Memorial. On 14 June 2013, Claimants filed their comments on Respondent’s request. By email of the same date, the Tribunal granted the requested extension, taking into account the views expressed in the Parties’ communications and, in particular, the special circumstances invoked by Respondent. An identical extension was granted to Claimants for the filing of their Rejoinder.
29. On 19 June 2013, Respondent filed its Reply Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (“**Reply**”) along with supporting documents, including the following expert reports:
- The Supplementary Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 19 June 2013 (“**Dr Öktem’s and Dr Karlı’s Second Legal Opinion**”);
 - The Second Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII(2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 June 2013 (“**Dr Kornfilt’s Second Expert Linguistics Opinion**”);
 - The Expert Linguistics Opinion of Professor Boris Gasparov, Ph.D. on the Meaning of Article VII(2) of the Russian Version of the 1992 Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 17 June 2013 (“**Prof Gasparov’s Expert Linguistics Opinion**”); and
 - The Expert Linguistics Opinion of Prof Georgia M. Green, Ph.D. concerning the “*provided that, if...and...*” clause in Article VII of the (signed) English version of

the Turkey-Turkmenistan BIT dated 14 June 2013 (“**Prof Green’s Expert Linguistics Opinion**”).

30. On 3 July 2013, Respondent filed an additional legal authority (Exh. RLA-98) in support of its jurisdictional challenge based on Article VII(2) of the Turkey-Turkmenistan BIT.
31. On 15 July 2013, the Centre requested each Party to make a second advance payment of US\$ 150,000.00 to cover the costs of the proceedings in the next three to six months of the case, including the upcoming hearing on jurisdiction.
32. By letter of 26 July 2013, Claimants informed the Tribunal that they would file their Rejoinder Memorial by 9 August 2013.
33. By letter dated 8 August 2013, Respondent informed the Tribunal that some of its experts “*may have to give testimony by video rather than in person in Paris [...] due both to personal and professional obligations*”.² Respondent also advised that Dr Glad would not be available to testify at the hearing.
34. On 9 August 2013, Claimants filed their Rejoinder on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty (“**Rejoinder**”) along with supporting documents, including the following witness statement and expert reports:
 - The Witness Statement of Mrs Zergül Özbilgiç dated 7 August 2013 (“**Mrs Özbilgiç’s Witness Statement**”);
 - The Second Expert Linguistics Opinion of Dr Yorgos Dedes on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 8 August 2013;
 - The Second Expert Linguistics Opinion of Professor Robert A. Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-

² Letter from Respondent dated 8 August 2013.

Turkmenistan BIT dated 8 August 2013 (“**Prof Leonard’s Second Expert Linguistics Opinion**”); and

- The Second Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 6 August 2013 (“**Dr Tyulenev’s Second Expert Linguistics Opinion**”).

35. On 15 August 2013, Claimants submitted the “*full version of the Witness Statement of Mrs Zergül Özbilgiç as well as a corrected version of Claimants’ Rejoinder*”, stating that the changes made to both documents were “*purely clerical*”.³ Claimants indicated that these documents replaced the earlier versions submitted on 9 August 2013.
36. A pre-hearing organisational meeting took place by telephone conference on 14 August 2013, at 10:00 am, Washington, D.C. time, with Mr Raëd Fathallah and Mr Louis Christophe Delanoy for Claimants, and Ms Miriam Harwood and Ms Claudia Frutos-Peterson for Respondent, the President of the Tribunal and the Secretary. The meeting addressed the arrangements for the hearing scheduled for 26-27 August 2013. The timing of oral arguments and the examination of experts were specifically agreed.
37. Unexpectedly, without any indication even during the pre-hearing telephone conference the previous day, by letter dated 15 August 2013, Respondent requested the postponement of the hearing scheduled for 26-27 August 2013. Respondent’s reasons for the request were as follows:

We have been in discussions with our client regarding the financial arrangements for the proceedings in this and other pending cases and are still awaiting decisions in that regard. Unfortunately, under the circumstances, we will not be able to proceed with the hearing on the dates presently scheduled.

³ Email from Claimants dated 15 August 2013.

38. By email of 16 August 2013, the Tribunal requested Claimants' comments on Respondent's request for postponement.
39. By letter dated 16 August 2013, Claimants provided their comments on Respondent's request and confirmed "*their willingness to immediately advance Respondent's outstanding share of 150.000 USD*" for the second advance payment and requested that the Tribunal "*reject Respondent's request for postponement, maintain the hearing dates and order the Respondent to attend the hearing; failing which it shall be held in default*". By letter of the same date, Respondent reiterated its request for a rescheduled hearing on its objection to jurisdiction. By separate email, Respondent also reserved its rights with respect to "*Claimants' attempt to submit a 'corrected version' of its Rejoinder*". By letter dated 17 August 2013, Claimants provided further comments on Respondent's request, to which Respondent replied by letter dated 18 August 2013.
40. By letter dated 19 August 2013, the Tribunal informed the Parties of its decision, with strong reservation, to adjourn the proceedings scheduled for 26-27 August 2013, and to fix another two-day hearing as soon as possible. The Tribunal further noted that "*[o]nce that hearing has been fixed it will be immutable and if Respondent again decides not to attend the hearing without providing any reasoned justification and proper notice, the Tribunal will proceed with Respondent in default and will issue a decision or an award determining the jurisdictional objection*".
41. On 20 August 2013, the Centre acknowledged receipt of Claimants' share of the second advance payment requested on 15 July 2013. By letter dated 4 September 2013, the Centre confirmed receipt of Respondent's payment of the second advance.
42. By letter dated 11 September 2013, the Tribunal proposed to the Parties new hearing dates. By letter dated 14 September 2013, Respondent confirmed its availability for a hearing on 14-15 January 2014. By letter dated 16 September 2013, Claimants also confirmed their availability for the January hearing. By letter dated 18 September 2013, the Tribunal noted the Parties' availability and confirmed that the hearing on jurisdiction would be held on 14-15 January 2014, in Paris, France, and proposed dates for a pre-hearing organisational meeting.

43. A second pre-hearing organisational meeting took place by telephone conference on 20 December 2013 between counsel for the Parties, the President of the Tribunal and the Secretary.
44. Further to the Parties' communications of 9 January 2014 regarding the attendance of Professor Dr Ziya Akinci (of Akinci Law Firm), the Tribunal requested by letter of 13 January 2014 that Claimants provide confirmation at the commencement of the hearing that Professor Dr Akinci had been properly authorised by them to attend the hearing.
45. A hearing on jurisdiction took place at the World Bank on 14-15 January 2014, in Paris, France. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimants:

Mr Louis Christophe Delanoy	Bredin Prat
Mr Raed Fathallah	Bredin Prat
Ms Laura Fadlallah	Bredin Prat
Mr Shane Daly	Bredin Prat
Ms Alexandra Mazgareanu	Bredin Prat
Professor Dr Ziya Akinci	Akinci Law Office
Mr Muhammet Çap	Claimant

For Respondent:

Ms Miriam Harwood	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Claudia Frutos-Peterson	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Ruslan Galkanov	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr Simon Batifort	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Diora Ziyaeva	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms Gülperi Yörüker	Yurttutan Gürel Yörüker Law Firm

46. The following persons were examined:

On behalf of Claimants:

Mrs Zergül Özbilgiç Toros	Fact Witness
Dr Sergey Tyulenev	Expert Witness
Professor Robert Leonard	Expert Witness

50. On 23 June 2014, the Tribunal issued its Procedural Order No. 2 recording its decision on Respondent's request of 11 April 2014. The Tribunal ruled as follows:

9. The Tribunal considers that it has inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the process. In this case, the parties have provided no guidance to the Tribunal as to what factors it should take into account for consideration of the request.

10. It seems to the Tribunal that the following factors may be relevant to justify an order for disclosure, and also depending upon the circumstances of the case:

- a. To avoid a conflict of interest for the arbitrator as a result of the third party funder;*
- b. For transparency and to identify the true party to the case;*
- c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;*
- d. If there is an application for security for costs if requested; and*
- e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.*

11. In this case Respondent is asking for information as to whether Claimants has an arrangement with a third party funder and if so on what terms. However, Respondent has failed to show that third party funding is likely, or that it is relevant for the Tribunal's determination of the issues currently under deliberation between the Tribunal members. All Respondent is able to say is that it believes there is a third party funder as there has been in other arbitrations against Respondent. Further, no reasons have been given as to why this information is relevant and why Respondent wants this information.

12. There is no suggestion that there is any issue of conflict of interest due to third party funding, and no suggestion has been made concerning the disclosure or misuse of confidential information. None of the other considerations that could justify an order for disclosure of the kind sought by Respondent have been presented.

13. Accordingly, at the present time, the Tribunal is not persuaded that there is any reason to make an order requiring Claimants to disclose how they are funding this arbitration. Respondent's application is therefore denied.

14. This Decision does not preclude Respondent from making a further request for disclosure at a later stage in this arbitration if it has additional information to justify the application.

III. NATURE OF THE DISPUTE

51. Sehil is a Turkish construction company, majority owned by Mr Çap. According to Claimants, Mr Çap made his first investment in Turkmenistan in 1995, when he established a construction supplies business there. He continued doing business in Turkmenistan until 2010. In April 2000, Mr Çap secured a major investment opportunity for his construction company Sehil İnşaat, to build the new headquarters of the Turkmen National Security Committee. During 2000-2004, Mr Çap and Sehil invested heavily in significant construction projects, including numerous high profile businesses and governmental buildings, such as a residential building for the Central Bank of Turkmenistan, a hotel complex for the Office of the Chief Prosecutor, a State Institute of Energy and a hotel building for the Ministry of Energy and Industry, a National Cultural Centre, a police academy, a municipal palace, and a health centre. Claimants say thirty-three of these projects were completed successfully, without encountering any problems; the other thirty-two projects are the underlying basis of this dispute.⁵
52. Claimants contend that these projects were part of the then Turkmen President's aspirations to transform Turkmenistan's Awaza region into the Dubai of Central Asia. For this reason the President took a personal and active interest in the projects, and the licenses issued and

⁵ In addition, Claimants contend that Sehil "was also granted further major landmark projects worth billions of dollars" including the island project, especially the Special Education Centre (military zone), the entertainment centre and the hippodrome project, and the biggest timeshare project in Turkmenistan (Request, § 26).

contracts awarded to Sehil were stated to be in accordance with a presidential decree or order.

53. Claimants state that, in order to pursue this business, and with the encouragement of the highest Turkmen authorities, including the President of the time, Mr Çap and his family moved to Turkmenistan, and established a Turkmen branch of Sehil in Turkmenistan.
54. Claimants contend that “*many of Sehil’s construction projects brought innovation to Turkmenistan and added significant value to the development of the country. Naturally, the Claimants had become one of the largest foreign investors in Turkmenistan, employing thousands of Turkmen nationals and injecting significant sums of money in the Turkmen economy*”.⁶
55. Claimants contend that, following the death of the President of Turkmenistan and the election of a new President in 2007, Sehil’s investment operations became much more difficult. According to Claimants, the new President ordered additional work to various contracts, increasing the true cost of the project without changing the payment arrangements. The Turkmen authorities hampered Claimants’ ability to manage their investments by *inter alia* imposing delays upon works, systematically failing to make the required interim payments, failing to pay for additional work which Sehil was obliged to carry out as a result of unilateral executive orders, and imposing intentionally complicated bureaucratic procedures. Claimants state that “[i]t was made very clear by the Turkmen authorities that Claimants were only to be paid for previous works should they complete the existing projects and undertake further projects”.⁷ Due to the situation Sehil was required to inject tens of millions of dollars of its own capital.
56. In addition, Claimants allege that Respondent unlawfully and arbitrarily terminated six projects and retracted four awarded projects for which Claimants had already started preparatory works. Respondent also forced Claimants to commence works on several

⁶ Request, § 28.

⁷ Request, § 37.

projects, including three hotels near the Caspian Sea, before the related contracts were signed. This allegedly resulted in significant losses for Claimants.

57. Claimants further contend that the Turkmen authorities, including the state-controlled police, conducted visits to the project sites with no legitimate cause, harassed and threatened Mr Çap, his two sons, his deputies, and their Turkish technical staff. This arbitrary treatment culminated in a visit, in early July 2010, of three vice-presidents of the Turkmen Government during which Mr Çap was asked to sign a statement agreeing to transfer the project to other contractors. Mr Çap refused to do so. He then received warnings that he was in danger. When he received further visits from Turkmen officials he suffered a cerebral bleeding. He was therefore forced to leave Turkmenistan on 14 July 2010 in order to reduce the stresses on his health.
58. According to Claimants, the Turkmen authorities then began to target his sons and his deputies, and sought to force the general manager to sign the document agreeing to transfer projects to another company. Following further harassment and pressure from the Turkmen Government, first by threatening not to allow them to leave Turkmenistan, and then fearful for their personal safety, Mr Çap's two sons, Mr Hüseyin Çap and Mr Ukkäşe Çap, left Turkmenistan. Sehil's technical staff were also forced to leave Turkmenistan when their visas were cancelled.
59. Claimants state that they were compelled to leave behind all their equipment and assets, worth over US\$ 10,000,000, which were then taken control of by the Turkmen authorities. In November 2010, the Turkmen authorities put Sehil's work site and office under seal.
60. Claimants allege that through its above-described acts and omissions, Turkmenistan violated several provisions of the BIT, including: the fair and equitable treatment provision (Preamble), the protection against arbitrary and discriminatory measures and assurances of legitimate expectations (Law of Turkmenistan on Investment Activities in Turkmenistan), the protection and security provision (Art. II(3), Art. VI(b)), the protection against expropriation without adequate compensation (Art. III(1)), and the most-favoured-nation ("MFN") provision (Art. II(1) and II(2)).

61. Claimants request compensation for the losses suffered as a result of these alleged violations, including loss of profits, loss of business opportunities, loss of enterprise value and moral damages amounting to “*no less than 300 million USD*”.⁸
62. Respondent has not commented on these facts as alleged by Claimants, but rather contends that Claimants’ claims “*are, at their core, contractual disputes between parties to commercial contracts. As such, Claimants should have submitted their disputes to the material courts of Turkmenistan, as provided for in their contracts*”.⁹ Respondent states: “*These claims have no place being asserted before an international tribunal constituted under an investment treaty*”.¹⁰ For these reasons other than denying these allegations, generally, Respondent has not answered any of the above allegations, and chose to instead rely at this stage on its jurisdictional challenge alone. It “*reserve[d] all rights to assert additional jurisdictional objections, as well as defenses on the merits, at the appropriate time in any subsequent phase of this proceeding, should that become necessary*”.¹¹

IV. SCOPE OF THIS DECISION AND ISSUES FOR DETERMINATION

63. The crucial issue for determination at this stage of the arbitration is the meaning and effect of Article VII(2) of the BIT. Essentially, the question is whether there is a prior mandatory requirement for a Turkish investor to seek redress for its claims in the Turkmen courts, before it can bring its claims in arbitration, or whether the investor has an option to bring its claims either in the Turkmen courts or before an international arbitration tribunal.
64. This Decision therefore determines Respondent’s jurisdictional challenge to Claimants’ submission to ICSID arbitration of their claims for violations of the BIT in respect of their investments in Turkmenistan.

⁸ Request, § 145.

⁹ Memorial, § 5.

¹⁰ Memorial, § 6.

¹¹ Memorial, § 2.

65. Claimants contend:

*[...] Article VII.2 of the Turkey-Turkmenistan BIT provides for the option, and not the obligation, for Turkish investors to submit their dispute to the domestic courts of Turkmenistan prior to commencing international arbitration proceedings.*¹²

66. Respondent's position is stated as follows:

*[...] Article VII(2) of the Treaty requires that an investor must submit its dispute to the national courts of the host State and allow a one-year period for the courts to render a decision, as a mandatory precondition that must be fulfilled before the investor has any right to pursue claims under the Treaty through international arbitration.*¹³

67. Accordingly, Respondent contends and seeks the following relief from the Tribunal:

*[...] Respondent submits that this Tribunal lacks jurisdiction to hear the merits of this dispute due to Claimants' failure to comply with the mandatory requirement of prior submission of the dispute to Turkmenistan courts under Article VII(2) of the BIT. As a result, Respondent respectfully requests that this Tribunal render an Award dismissing the case for lack of jurisdiction and ordering Claimant to pay all of the costs related to this Arbitration.*¹⁴

68. Claimants request that the Tribunal:

- a. DISMISS Respondent's Objection to Jurisdiction Under Article VII.2;*
- b. DECLARE that the Tribunal has jurisdiction over Claimants' claims;
and*
- c. ORDER Respondent to pay all Claimants' arbitration, legal and related costs, including but not limited to counsel fees incurred by Claimants in connection with these arbitration proceedings.*¹⁵

¹² CPHB, § 96.

¹³ RPHB, § 2.

¹⁴ Reply, § 227.

¹⁵ CPHB, § 98; *see also* CPHBR, § 35.

V. FACTUAL BACKGROUND

69. This section sets out the historical background and context in which the BIT was signed and executed, either as agreed by the Parties, where not in dispute, or as has been determined by the Tribunal.
70. According to Respondent, shortly after Turkmenistan obtained independence from the Soviet Union and became a sovereign State in 1991, the Prime Minister of Turkey conducted an eight-day tour of the newly established “*Turkic Republics*” - namely, Turkmenistan, Kyrgyzstan, Uzbekistan and Kazakhstan - during which he signed “*approximately 50 trade, investment and economic cooperation agreements*”.¹⁶
71. It was during this trip that Turkey, as part of its initiative to establish close economic and diplomatic ties with the newly independent republics, concluded bilateral investment treaties with all four countries in a five-day period between 28 April and 2 May 1992. The Turkey-Turkmenistan was the last BIT signed during this period, on 2 May 1992.
72. It is common ground between the Parties that Russian and English versions of the BIT were executed, both versions being signed by the President of Turkmenistan and the Prime Minister of Turkey at the time.
73. The signed English version of the BIT provides:

*DONE at Ashgabat on the day of May 2, 1992 in two authentic copies in Russian and English.*¹⁷

74. There are two signed versions of the Russian text, which differ in only one respect: one appears to have been signed on behalf of both Turkey and Turkmenistan;¹⁸ the second

¹⁶ Memorial, § 35.

¹⁷ Exh. C-1.

¹⁸ See Exh. C-1-B.

version contains a second signature on behalf of Turkey, believed to be that of the Turkish Minister of Foreign Affairs at the time.¹⁹

75. Both Russian versions provide (in agreed translation):

*Executed on May 2, 1992 in two authentic copies in the Turkish, Turkmen, English and Russian languages.*²⁰

76. It is also undisputed that there is no official Turkmen language version of the BIT and neither Party was able to locate a version of the BIT in the Turkmen language.

77. A Turkish text was published in the Official Gazette of Turkey on 15 January 1995. This Turkish version provides:

*DONE at Ashgabat on the day of May 2, 1992 in two authentic copies in Russian and English.*²¹

78. According to Respondent, other versions of the Turkish text have been published on the website of Turkey's Undersecretariat of Treasury.²² As described by Respondent, the "publicly available Turkish versions do not contain handwritten signatures, but rather typewritten notations in the signature lines stating that they were signed by the countries' representative".²³

¹⁹ See Exh. R-1. See also Memorial, § 36 and fn 64.

²⁰ Exhs. R-1, C-1-B. See also Memorial, § 36.

²¹ Exh. R-3. See also Memorial, § 48.

²² Mrs Özbilgiç explains in her witness statement that "[t]he Government department with responsibility for Bilateral Investment Treaty policy and negotiation is regulated by the Statutory Decree N° 637. The Government department with this responsibility have been as follows: Until 1989, it was the State Planning Organization - Directorate of Foreign Capital. Subsequently, between 1991 and 1994, it was placed under the DG of Foreign Investment of the Under-secretariat of Treasury and Foreign Trade, then, between 1994 and 2011, it was under the DG Foreign Investment of the Under-secretariat of Treasury, and lastly it was placed under the DG of Incentive Implementation and Foreign Investment of the Ministry of Economy where it has remained since 2011". (Mrs Özbilgiç's Witness Statement, fn 1; see also Tr. J. Day 2, 6:14-25.)

²³ Memorial, § 37.

79. The Turkish text of the BIT that appeared on the website of Turkey’s Undersecretariat of Treasury until August 2011, provided:

*Executed in Ashgabat on May 2, 1992 in two authentic copies in Turkish, Russian and English.*²⁴

80. It was removed and replaced with a version that deleted the reference to Turkish as an authentic copy.²⁵

VI. RELEVANT LEGAL TEXTS

81. The Tribunal sets forth below the relevant legal texts.

A. The ICSID Convention and the ICSID Arbitration Rules

82. Article 25(1) of the ICSID Convention provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

83. Article 26 of the ICSID Convention provides as follows:

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

²⁴ Exh. R-8. According to Respondent, “[t]hat copy was [...] removed (while the treaty’s “authenticity” issues were being briefed in pending international arbitrations against Turkmenistan, including the Kılıç case) and replaced with a different version that deleted the reference to Turkish as an authentic copy”. (Memorial, § 37.)

²⁵ See Exh. R-9.

84. Article 41 of the ICSID Convention provides in relevant part that:

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

85. ICSID Arbitration Rule 41, which addresses “*Preliminary Objections*”, provides in relevant part:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

[...]

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

B. The Turkey-Turkmenistan BIT

86. As described in Section V above, it is common ground between the Parties that the BIT exists in two authentic languages – English and Russian. Respondent contends that, although it was not signed on 2 May 1992, the Turkish version is also authentic as it was presented to the Turkish Parliament and published in the Turkish Gazette.

87. As discussed in Section VIII.A.(3) below, the Parties are in disagreement with respect to the meaning and interpretation of Article VII(2) of the BIT in the three languages.

88. Article VII of the English version of the BIT provides:

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

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

(a) The International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States". (in case both Parties become signatories of this Convention.)

(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), (in case both parties are members of U.N.)

(c) the Court of Arbitration of the Paris International Chamber of Commerce.

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

3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.²⁶

89. Article VII of the Russian version of the BIT provides:

1. Конфликты между одной из Сторон и одним из инвесторов другой Стороны, связанные с его инвестициями, будут ставиться в известность в письменной форме, включая подробную информацию инвестором по отношению к Стороне - реципиенту инвестиций.

²⁶ Exh. C-1.

Несколько это возможно, инвестор и заинтересованная Сторона будут стараться разрешать эти конфликты посредством консультаций и переговоров с доброй волей.

2. Если указанные конфликты не могут быть разрешены таким путем в течение шести месяцев после даты письменного извещения, о котором говорится в пункте I, то конфликт может быть представлен - по выбору инвестора -

a) Международному центру по разрешению инвестиционных конфликтов, учрежденному в соответствии с “Конвенцией о разрешении инвестиционных конфликтов между государствами и подданными других государств”, в случае если обе Стороны подписали эту конвенцию;

б) “ad hoc”, учрежденный в соответствии с Арбитражным процедурными правилами Комиссии по международному торговому праву при ООН в случае если Стороны являются членами ООН;

в) Арбитражный суд Парижской международной торговой палаты, при условии, если заинтересованный инвестор представил конфликт в суд той Стороны, которая является одной из Сторон конфликта, а окончательное арбитражное решение о возмещении убытков не вынесено в течение одного года.

3. Арбитражное решение должно быть окончательным и обязательным для всех сторон конфликта. Каждая Сторона обязуется выполнить решение о возмещении убытков в соответствии со своим национальным законом.²⁷

90. Respondent’s English translation of the Russian version in this proceeding reads as follows:

1. Conflicts between one of the Parties and one of the investors of the other Party, with regard to his investments, will be notified in writing, including a detailed information, by the investor to the Party - recipient of the investment. As far as possible, the investor and the concerned Party will

²⁷ Exhs. C-1-B (Russian version submitted by Claimants without English translation) and R-1 (Russian version submitted by Respondent with English translation).

endeavour to settle these conflicts through consultations and negotiations in good faith.

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

(a) The International Center for Settlement of Investment Conflicts, set up in accordance with the "Convention for Settlement of Investment Conflicts between States and Nationals of Other States", in case both Parties signed this Convention;

(b) "ad hoc", established in accordance with the Arbitration procedural rules of the United Nations Commission for International Trade Law, in case the Parties are members of U.N.;

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

3. The arbitration award shall be final and binding for all the parties to the conflict. Each Party undertakes to enforce the award on compensation of damages in accordance with its national law.²⁸

91. Article VII of the Turkish version provides:

1. Taraflardan biri ile diğ er Tarafın bir yatırımcısı arasında o yatırımcının yatırımı ile ilgili olarak çıkan ihtilaflar, yatırımcı tarafından ev sahibi Tarafa ayrıntılı bir şekilde yazılı olarak bildirilecektir. Yatırımcı ile ilgili Taraf, söz konusu ihtilafları mümkün olduğ unca karş ılıklı iyi niyetli görüşmeler yaparak çözüme kavuşturacaktır.

2. Bu ihtilafların, yutarıda 1. paragrafta belirtilen yazılı bildirim tarihinden itibaren altı ay içinde çözüme kavuşturulamaması halinde, yatırımcının ihtilaf konusunu ev sahibi Tarafın usul ve yasalarına göre adli mahkemesine götürmüş olması ve bir yıl içinde karar verilmemiş olması

²⁸ Exh. R-1.

kaydıyla, söz konusu ihtilaf, yatırımcının kararına göre aşağıda belirtilen Uluslararası Yargı Makamlarına sunulabilir:

a) “Devletler ve Diğer Devletlerin Vatandaşları Arasındaki Yatırım İhtilaflarının Çözümlemesi Hakkında Sözleşme” uyarınca kurulmuş Uluslararası Yatırım İhtilafları Çözüm Merkezi (ICSID) (her iki Taraf da bu Sözleşmeyi imzalamış ise);

b) Birleşmiş Milletler Uluslararası Ticaret Hukuku Komisyonu (UNCITRAL)’nun Hakemlik Kuralları uyarınca, bu amaçla kurulacak bir hakem mahkemesi (her iki Taraf da Birleşmiş Milletler’e üye ise);

c) Paris Uluslararası Ticaret Odası’nın Hakem Mahkemesi;

3. Tahkim Kararları, uyuşmazlığın bütün tarafları bağlayıcı ve kesin olacaktır. Taraflar, söz konusu kararı kendi ulusal yasalarına göre yerine getirecektir.²⁹

92. Respondent’s English translation of the Turkish version reads as follows:

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

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

(a) The International Center for Settlement of Investment Disputes (ICSID) which has been established in accordance with the “Convention on Settlement of Investment Disputes Between States and Nationals of Other States”, (if both Parties have signed this Convention);

²⁹ Exh. R-3.

(b) A court of arbitration to be constituted in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL) for this purpose, (if both Parties are members of the United Nations);

(c) Court of Arbitration of the Paris International Chamber of Commerce;

3. The arbitration awards shall be binding and definitive for all the parties to the dispute. The Parties shall execute the said award in accordance with their own national laws.³⁰

C. The Vienna Convention on the Law of Treaties

93. The main purpose of this Decision is to construe the meaning of Article VII(2) of the BIT. The Tribunal will do so in accordance with the customary rules of treaty interpretation as codified in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (“**Vienna Convention**”).³¹ The Tribunal notes that Turkey is not a party to the 1969 Vienna Convention on the Law of Treaties but that Turkmenistan is a party since 4 January 1996. As such, and has been accepted by the Parties in their submissions, the Vienna Convention is applicable as customary international law in the relations between the Parties and with respect to the interpretation of the BIT. Although discussed where pertinent below it is convenient to set out these provisions in full here.

94. Article 31 of the Vienna Convention, headed “*General rule of interpretation*”, provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

³⁰ Exh. R-3. This text was published in the Official Gazette of Turkey in 1995, pursuant to the country’s internal ratification procedures and was the text considered by the Turkish Parliament in ratifying the Treaty. See Memorial, § 48.

³¹ See e.g., *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 501, § 99 (Exh. RLA-36); *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, I.C.J. Reports 2002 (Exh. RLA-37), § 37.

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context:*

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

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

95. Article 32 of the Vienna Convention, headed “*Supplementary means of interpretation*”, provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

96. Article 33 of the Vienna Convention, headed “*Interpretation of treaties authenticated in two or more languages*”, provides:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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

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

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

VII. OVERVIEW OF THE POSITIONS OF THE PARTIES

97. The Tribunal sets forth briefly below the Parties' positions on the following issues:³²

- Whether Article VII(2) of the BIT, considering the multiple language versions of the Treaty, compels investors to refer the dispute to the local courts of the host state, prior to commencing arbitration; and
- If the BIT were to require the prior submission of the dispute to local courts, whether such a requirement could be superseded either by operation of the BIT's MFN provision, or alternatively on the grounds that Claimants' submission of the dispute to the Turkmen courts would have proven to be futile.

A. The local court requirement under Article VII(2) of the BIT

(1) Respondent's position

98. Respondent submits that Article VII(2) of the Turkey-Turkmenistan BIT sets forth a mandatory condition requiring prior submission of a dispute to the local courts of the host

³² The Parties' arguments are set out in greater detail in the Tribunal's analysis and decision below: §§ 112 *et seq.*

state and the allowance of a one-year period for resolution by the courts, as a prerequisite to international arbitration. Specifically, Respondent posits that:

[...] Turkmenistan's offer to submit to international arbitration with respect to disputes with Turkish investors under the Turkey-Turkmenistan BIT is expressly conditioned upon the investor's compliance with the mandatory provisions of Article VII(2), including prior submission of the disputes to the national courts in Turkmenistan and allowance of a one-year period for the courts to issue a decision. This condition is an essential element of the State's consent to the jurisdiction of an international arbitral tribunal, and a pre-requisite that cannot be ignored or disregarded. Claimants' failure to satisfy this condition means that the Tribunal lacks jurisdiction to adjudicate this dispute. Accordingly, all claims asserted in the Request for Arbitration must be dismissed for lack of jurisdiction.³³

99. In this respect, Respondent relies on the authentic versions of the BIT (English, Russian and (it claims) Turkish) to be construed where ambiguous in accordance with Articles 31-33 of the Vienna Convention. Respondent also introduced and relies on expert linguistic evidence in support of its position.

(2) Claimants' position

100. Claimants' position is that the BIT does not compel prior recourse to local courts before arbitration proceedings can be brought. This follows from the construction of the two authentic versions of the BIT - English and Russian. Claimants are entitled to commence arbitration proceedings under Article VII(2) after complying with the written notice requirement in Article VII(1) and the lapse of the six-month opportunity to settle matters "by consultations and negotiations in good faith". There is no requirement to first initiate proceedings in the courts of Turkmenistan.
101. In addition to their argument based on their interpretation of Articles 31-33 of the Vienna Convention, Claimants also rely on expert linguistic evidence. Claimants state that the evidence and arguments presented at the hearing confirmed their position that Article VII

³³ Memorial, § 29; *see also* Reply, § 2.

*[...] provides for optional recourse to local courts and expresses that “the right to apply to international arbitration may be exercised provided that access to local judicial bodies shall remain available”. Article VII does not provide for a mandatory recourse to local courts for investors before they may have recourse to international arbitration.*³⁴

B. The mandatory local court requirement should not be applied because of the MFN clause in the BIT and/or the futility of proceeding in the Turkmen courts

(1) The mandatory local court requirement should be overridden by operation of the MFN clause

(a) Claimants’ position

102. Claimants contend that if *par impossible* the Tribunal decides that Article VII(2) requires submission to the local courts before arbitration proceedings can be instituted, this requirement should be overridden by virtue of the MFN provision in Article II of the BIT. Claimants argue that this allows them to rely on more favourable provisions contained in investment treaties entered into by Turkmenistan with other countries, including on more favourable treatment with respect to dispute resolution. Specifically, Claimants refer to the UAE-Turkmenistan BIT signed on 9 June 1998,³⁵ which provides that both parties could refer their dispute, if it cannot be settled by negotiations within six months, either to the local host state courts, or to *ad hoc* arbitration under the UNCITRAL Rules or to ICSID.³⁶
103. Claimants state that “[t]he simple goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties” and that “the very character and intention of [MFN clauses] is that protection not

³⁴ CPHB, § 3 (emphasis in the original; footnote omitted).

³⁵ See Exh. C-58: Agreement between the Government of the United Arab Emirates and the Government of Turkmenistan for the Promotion and Reciprocal Protection of Investments (“UAE-Turkmenistan BIT”).

³⁶ See Article 8.3 of the UAE-Turkmenistan BIT.

accepted in one treaty is widened by transferring the protection accorded in another treaty".³⁷

104. Claimants contend that the Tribunal has jurisdiction to determine the application and scope of the MFN clause in the BIT which grants them access to the more favourable dispute resolution mechanism in the UAE-Turkmenistan BIT. This would entitle Claimants to directly access ICSID jurisdiction without any requirement to first resort to local courts. In support of this conclusion, Claimants' interpretation of the MFN provision relies on the Vienna Convention, and the contention that Turkey and Turkmenistan were aware that dispute resolution provisions were within the scope of the MFN clause as part of the "treatment" to be afforded to investments at the time they entered into the Treaty. Claimants argue that this is supported by Turkmenistan's subsequent practice, as well as by case law and scholarly commentary.

(b) Respondent's position

105. Respondent objects to Claimants' "attempt to create jurisdiction where it does not otherwise exist".³⁸ The requirement of prior recourse to local courts set forth in Article VII(2) cannot be overridden by virtue of the MFN clause in the BIT. First, Claimants have not satisfied the conditions of Respondent's consent to ICSID arbitration in the BIT and do not have the right to even ask this Tribunal to determine their claimed right to MFN treatment under the BIT. The Tribunal does not have jurisdiction to decide on the MFN standard set forth in the Treaty because Claimants have not satisfied the conditions of Respondent's consent to ICSID arbitration.
106. Second, even if the Tribunal has jurisdiction, Respondent argues that the MFN provision does not encompass dispute resolution and therefore cannot be used to displace or render ineffective the mandatory prior recourse to local courts under Article VII(2). In any event,

³⁷ Counter-Memorial, § 108, citing to Schreuer, Dolzer, Principles of International Investment Law, 2nd Edition (Oxford) (Exh. CLA-22), p. 206, and *RosInvestCo UK v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007 (Exh. CLA-20), § 131.

³⁸ Reply, § 108.

if the Tribunal was to exercise jurisdiction to determine Claimants' MFN claim, Respondent contends that the Tribunal should reject Claimants' attempt to override the conditions to Turkmenistan's consent to ICSID arbitration, as numerous other arbitral tribunals have done.

(2) The mandatory local court requirement should not be enforced because seeking redress in the Turkmen courts is futile

(a) Claimants' position

107. Alternatively, Claimants argue that it would be futile to enforce the mandatory referral to local courts. Therefore Claimants should be exempted from fulfilling any requirement to refer the dispute to the courts of Turkmenistan, as it would have been futile or impossible for them to seek redress there. Claimants allege that they have experienced first-hand the notorious failures of and abuses by Turkmenistan's judicial system. Claimants allege in particular that Respondent "*used its machinery (prosecutors, KGB, tax services, courts etc.) in mobilizing its sovereign powers to target Claimants in a systematic onslaught of unwarranted, inequitable and abusive measures which resulted in the arbitrary deprivation of their contractual rights, the destruction of its operations in Turkmenistan and the obligation for Claimants to flee Turkmenistan for their own safety*".³⁹
108. Claimants contend that futility is a recognised exception to a mandatory requirement to exhaust local remedies and is applicable even though the BIT does not expressly contain such a provision. According to Claimants, "*the concept of futility was developed as a widely-accepted and well-settled multi-faced exception to the requirement of exhaustion of local remedies within the framework of diplomatic protection and, more generally, customary international law*"⁴⁰ and "*has been recognized by investment arbitration tribunals as constituting an exception to the requirement to resort to local remedies which*

³⁹ Counter-Memorial, § 156; *see also* Rejoinder, § 266.

⁴⁰ Counter-Memorial, § 130; *see also* Rejoinder, § 207.

*allowed ICSID tribunals to comfortably refer to it when faced with provisions for mandatory recourse to local remedies”.*⁴¹

(b) Respondent’s position

109. Respondent denies that futility is applicable in this case. The BIT’s requirement of prior recourse to local courts is mandatory and cannot be avoided on account of an alleged ‘futility’ exception. Futility is not provided for under the BIT, and there is no basis to apply the futility concept from customary international law to a treaty case where the parties have expressly agreed on the courts to have jurisdiction over specific types of claim. Claimants cannot rely on customary international law to displace the treaty’s provisions. To do so would constitute “*an error of law and a manifest excess of powers*”⁴² and would also be inconsistent with the prevailing view in investment arbitration.
110. In any event, Respondent states that the exception of futility is not justified in this case. The burden is on Claimants to prove futility of the Turkmenistan courts and it has failed to do so. On the contrary, Respondent contends that “*these claimants are fully able and entitled to obtain relief on their claims in the domestic courts of Turkmenistan*”.⁴³ In this respect Respondent states that (i) the Turkmenistan Arbitrazh Court, which has jurisdiction over commercial disputes, was the proper, open and available forum for Claimants’ dispute; (ii) the recent treaty between Turkey and Turkmenistan on mutual assistance in legal matters that provides for the protection of foreign nationals in host state proceedings, evidences that Turkey itself does not regard the legal process in Turkmenistan as ‘futile’; and (iii) Claimants’ criticisms disregard the recent and ongoing changes to Turkmenistan’s legal and judicial systems.
111. These arguments based on MFN and futility are raised by Claimants as an alternative in the event the Tribunal were to uphold the mandatory nature of Article VII(2) of the BIT. In

⁴¹ Counter-Memorial, § 130; *see also* Rejoinder, §§ 208-209.

⁴² Reply, § 175; *see also* Reply, § 177.

⁴³ Tr. J. Day 1, 86:11-12.

view of the Tribunal's decision on that issue (see §§ 206 *et seq.* below), there is no need to discuss further the contentions made by Claimants and responses by Respondent on MFN and futility.

VIII. THE ARBITRAL TRIBUNAL'S REASONS AND DECISION

112. The principal issue in this arbitration can be stated simply: does Article VII(2) of the BIT establish a mandatory obligation that, in the event of a dispute between Claimants and the Government of Turkmenistan in respect of matters covered by the BIT, Claimants must first bring those claims before the appropriate Turkmen courts? This suggests further that Claimants can only commence ICSID proceedings under Article VII(2)(a) if the Turkmen courts fail to render a decision on the claims within one year.

113. Alternatively, in the event that the above question is determined in the affirmative, the Tribunal will have to consider whether

(a) Claimants are exempted from the requirement to submit claims first to local courts by virtue of the MFN provision in Article II(2) of the BIT (see §§ 102-106 above); and

(b) Claimants should not be required to submit claims to the Turkmenistan courts because it would be futile and impossible for them to do so (see §§ 107-110 above).

A. Does Article VII(2) contain a mandatory requirement that disputes be referred first to the courts of Turkmenistan?

114. In responding to this question, the Tribunal discusses the following issues below:

(1) Burden of proof;

(2) Authentic versions of the BIT;

(3) Interpretation and meaning of Article VII(2); and

(4) Effect of Article VII(2).

(1) Burden of proof

(a) Parties' positions

115. The Parties take opposing positions with respect to burden of proof. Respondent contends that Claimants have the burden to prove that the Tribunal has jurisdiction over their claims, including that Respondent has consented to ICSID arbitration. Accordingly the onus is on Claimants to establish that the local court requirement in the Turkey-Turkmenistan BIT is optional.
116. By contrast, Claimants contend that the onus of proof lies on Respondent to provide evidence in support of its interpretation of Article VII(2) of the BIT and its objection to jurisdiction. According to Claimants, Respondent has failed to meet its burden and this should suffice for the Tribunal to dismiss Respondent's objection to jurisdiction.
117. Claimants state that Respondent failed to present any evidence of a Turkmen language version of the BIT or any Turkmen legal text or any document or witness showing how Article VII(2) had been understood under Turkmen law. Respondent rejects this criticism by stating that, at the time the BIT was concluded, only a Russian version was required by law and no witnesses or documents from that time, more than twenty years ago, could be found. Respondent states that no explanatory note for the Treaty was prepared for the Turkmenistan Parliament.
118. Claimants argue that the evidence adduced in this proceeding confirms that Article VII(2) of the BIT provides for optional recourse to local courts and therefore the Tribunal has jurisdiction to hear their claims. Respondent argues that the evidence in the record (primarily the various versions of the BIT, and the linguistics experts, and other BITs to which Turkey is a party) "*leads to the inexorable conclusion that Article VII (2) contains a mandatory provision requiring prior submission of disputes to the courts of the host State as a prerequisite to international arbitration*".⁴⁴

⁴⁴ RPHB, § 3.

(b) Tribunal's analysis and conclusion

119. This Decision is concerned with the construction and meaning of Article VII(2) of the BIT and specifically whether this Tribunal has jurisdiction over the claims brought by Claimants. The Tribunal does not accept that the burden of proof in respect of jurisdiction is on either Party. Rather, the Tribunal must determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all the relevant facts and arguments presented by the Parties.
120. In this respect, in the first instance it is for Claimants to show that the relevant requirements for the Tribunal's jurisdiction are present, including consent to arbitration. Consent cannot be presumed and its existence must be established. By corollary, in this case, where Respondent is challenging jurisdiction, it has to adduce evidence to support its objections. Accordingly, the Tribunal has to weigh the evidence and arguments from both Parties to determine on balance whether it has jurisdiction in this matter.
121. In this case, the Tribunal has to interpret the meaning of a treaty provision in accordance with the rules of interpretation of the Vienna Convention. Accordingly, in reaching its conclusion, and for the reasons given below, the Tribunal has taken into consideration the language used in the authentic texts of Article VII(2), the circumstances under which the BIT was concluded, the opinions expressed by the linguistics and other experts in their reports and at the hearing, and the legal rules of construction. The Tribunal has reached its conclusions on the basis of all the evidence in the record.

(2) Authentic versions of the BIT

122. Before considering the meaning of Article VII(2), the first question is what are the authentic versions of the BIT, and therefore which language(s) are authoritative and are to be construed to determine the meaning of Article VII(2). The English and Russian texts were signed on 2 May 1992; no Turkish text was signed but a Turkish version was prepared and was presented to the Turkish Parliament for approval in 1993. As seen earlier (§§ 88-92 above), the English, Russian and Turkish language texts are structured slightly differently.

(a) Respondent's position

123. According to Respondent, “*all three versions of the Treaty – Russian, Turkish and English – should be considered ‘authentic’ and should be considered in arriving at the correct interpretation of Article VII (2)*”.⁴⁵
124. Respondent asserts that the Turkish version of the Treaty must also be recognised as “*authentic*” even though this is not stated in the English version. Respondent gives several reasons for this contention. First, the Turkish text was presented and ratified by the Turkish Parliament, and has the force of law in Turkey. Respondent’s counsel stated the position as follows:

We think precisely because it was presented to Parliament and read in that language and ratified in that language and published. The Official Gazette is where the official laws of Turkey are published; when they are enacted they are published in the Gazette, that is the record, in a sense, and that is the authority that is relied upon for the text, the authentic text, you could say, of any law of Turkey, and that includes the treaties that it enacts. So at least from the perspective of Turkey, that is the authentic text of the treaty.

*You have to rely on the Government to publish the authentic correct text. You have to rely on the Government, I guess, to prepare a translation of the text, if that’s what it was, that is correct. So in that respect, I don’t think it is a small thing to place reliance on the Official Gazette, I think it’s very legitimate.*⁴⁶

125. Second, the Russian version lists the Turkish version as authentic. According to Respondent, Claimants “*have no answer to the fact that the Russian version, which they recognize as authentic, recognizes Turkish as an official language of the Treaty*”.⁴⁷ Respondent argues that this analysis is consistent with Article 33(2) of the Vienna

⁴⁵ Memorial, § 41.

⁴⁶ Tr. J. Day 1, 36:23-37:15.

⁴⁷ Reply, § 42.

Convention, “*which provides that a treaty is authenticated [...] if designated as such or agreed by the Contracting Parties to the treaty*”.⁴⁸

126. Even if not accepted as an authentic version, Respondent argues that the Turkish version of the Treaty should be considered as a “*supplementary means of interpretation*” under Article 32 of the Vienna Convention (as was done by the *Kılıç* tribunal) to interpret the Russian and English versions. First, Respondent argues that no satisfactory explanation has been offered by Claimants for the absence of a signed Turkish version and the departure from Turkey’s normal practice of having signed Turkish versions of its BITs. Respondent refutes Claimants’ explanation that the treaty conclusion process was so rapid that there was no time to translate the English draft of the BIT into Turkish before it was signed. Respondent notes that in the 4-6 week gap between the time the English draft was given to the Turkic Republics and the signature of the Treaty, the Kazakh and Turkmen authorities had no difficulty translating the English draft into Russian.
127. Further, Turkey was the driving force in asking that the Turkic Republics, including Turkmenistan, enter into bilateral investment and other treaties in the spring of 1992. The “*newly-independent countries were in the nascent stages of their independence; none had a history of investment treaties or pre-existing policies in this area. In contrast, Turkey had already entered into twenty BITs*”.⁴⁹ Accordingly, it would make sense that the Turkish text was used as a model for the treaties concluded with all the Turkic countries. This would explain why the text of the treaties concluded with the four Turkic Republics are nearly identical.
128. In addition, Respondent contends that the Turkish text “*is the most clear, grammatically correct, and free of typographical errors of any of the three versions of the Treaty*”.⁵⁰ Relying on the “*awkwardly*” phrased English version of the Treaty, which is filled with

⁴⁸ Memorial, § 41.

⁴⁹ Memorial, § 42, citing Dr Öktem’s and Dr Karlı’s First Legal Opinion, § 86.

⁵⁰ Memorial, § 43.

errors both in typographical presentation and in translation, is “*an ill-advised and nonsensical approach to treaty interpretation*”.⁵¹

129. As the BIT does not establish which version of the Treaty would prevail in the event of inconsistencies or differences, Respondent argues that “[t]o the extent that questions of interpretation arise due to the different language versions of the BIT, the issue may be resolved by applying the principles set forth in the Vienna Convention”⁵² and in particular Articles 31 to 33.

(b) Claimants’ position

130. Claimants agree with Respondent that both the English and Russian texts of the BIT can be considered authentic. However, Claimants do not agree that the Turkish text can be considered an authentic text for the following four reasons:

*(i) contrary to Respondent’s repeated assertions, there is no Turkish text signed by the Parties, (ii) a Turkish Translation of the BIT was carried out some months later for the purposes of ratification procedures, (iii) this Turkish Translation which was subsequently published in the Official Gazette alongside the English Authentic Version does not refer to an authentic Turkish version but states that the authentic versions are English and Russian and (iv) no Turkish text was ever signed or handed over to Turkmenistan. Claimants would also point out that the Tribunal in Kılıç found there to be no authentic Turkish version, there being only two authentic versions (English and Russian).*⁵³

131. Claimants contend that the Turkish Government prepared the BIT in English and sent it to Turkmenistan for discussion. The preparation process for the Turkey-Turkmenistan BIT was out of the ordinary due to the short time frame imposed by the Prime Minister’s visits to the Turkic Republics. This explains why no Turkish version was prepared and signed at the time, and therefore why no Turkish version was included as being official.

⁵¹ Memorial, § 43.

⁵² Memorial, § 62.

⁵³ Counter-Memorial, § 56 (footnote omitted).

132. There were however no discussion and no negotiation, and Turkmenistan accepted the draft with one minor change. A Russian language version was prepared for signature but no official Turkish or Turkmen language texts were prepared. Claimants state that the BIT was prepared on the basis of the authentic English version of Turkey-Hungary BIT which had been concluded about four months before the Turkmen BIT.
133. Claimants also agree with Respondent that “[t]o the extent that the Tribunal may find there to be issues of interpretation arising from the different language versions of the Treaty”,⁵⁴ the Tribunal should apply the principles set out in Articles 31-33 of the Vienna Convention.

(c) Tribunal’s analysis and conclusion

134. Two versions of the BIT were signed: English and Russian. Both versions state which languages are authentic: the English version says English and Russian; the Russian version says English, Russian, Turkish and Turkmen. There was no Turkish version when the BIT was signed and there never has been a Turkmen version. Article 33(1) of the Vienna Convention provides that if a treaty is authenticated in two or more languages, each language is equally authoritative, unless the parties agree or the text provides otherwise. In this case, there is no agreement between the Parties and the text does not provide otherwise. A version of the treaty in another language can be considered an authentic text only if the treaty so provides or the parties agree: see Article 33(2) of the Vienna Convention.
135. The BIT was signed on 2 May 1992 in Ashgabat, Turkmenistan. It was signed in English and Russian by the President of Turkmenistan and the Prime Minister of Turkey. The English version states that it was made “*in two authentic copies in Russian and English*”;⁵⁵

⁵⁴ Counter-Memorial, § 92. *See also* Rejoinder, § 98.

⁵⁵ Exh. C-1-A.

the Russian version states that it was executed “*in two authentic copies in the Turkish, Turkmen, English and Russian languages*”.⁵⁶

136. The inconsistencies are clear on their face. No explanation has been given as to why the Russian version also listed Turkish and Turkmen as authentic copies. Article 33(2) of the Vienna Convention states that when a treaty is in a language that has not been authenticated “*it shall be considered an authentic text only if the treaty so provides or the parties so agree*”. In this case the English and Russian versions are contradictory and the Parties do not agree.
137. There is no evidence to suggest that the Parties agreed or intended that the non-existent Turkish and Turkmen texts be authentic versions of the BIT. There were no Turkish or Turkmen language versions of the BIT; not for negotiation purposes and not for signature purposes. There is no explanation why they were referred to as authentic versions in the Russian version of the BIT. No credibility can be given to claimed Turkish and Turkmen authentic copies. They did not exist at the time. The Turkish text was prepared only for the purposes of ratification by the Turkish Parliament and there is no evidence of there ever having been a Turkmen text.⁵⁷
138. Accordingly, the Tribunal has concluded that there were only two authentic versions of the BIT: the English and Russian versions.

(3) Interpretation and meaning of Article VII(2)

139. Both Parties agree that the Tribunal should apply Articles 31-33 of the Vienna Convention to properly interpret Article VII of the BIT.

⁵⁶ Exh. R-1.

⁵⁷ See Mrs Özbilgiç’s Witness Statement, §§ 24-25; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 1, 246:1-247:13; Tr. J. Day 2, 33:18-21; Tr. J. Day 2, 26:21-27:1; Memorial, fn 65. See also below §§ 222-226.

(a) Respondent's position

140. Respondent argues that an examination of the three versions (including the Turkish text) of the Treaty shows that under an ordinary meaning and a good faith interpretation, in accordance with Article 31 of the Vienna Convention, the parties consistently expressed their intention that recourse to international arbitration was conditioned on the prior submission of the dispute to national courts and the allowance of a one-year period for decision. Respondent argues that, as Turkey drafted the English and Turkish versions of the BIT, then, to the extent that the English version is unclear, “*the clearly mandatory text in the Turkish version (a text that was also drafted by Turkey as a translation of its own English draft) can and should be used to confirm that the local court requirement in the English version is also mandatory*”.⁵⁸
141. Respondent further contends that the mandatory meaning of Article VII(2) would also be the one that would best reconcile the various texts, having regard to the object and purpose of the BIT, as provided under Article 33(4) of the Vienna Convention. In the eyes of Respondent, the inclusion in Article VII(2) of a multi-tiered system of dispute resolution indicates an intention on the part of the State parties to the BIT that there should be no automatic, direct recourse to international arbitration against them. In Respondent's view

*[...] while the States recognized the importance of granting investors recourse to international arbitral tribunals, they clearly expressed their agreement to do so only after giving their respective judicial systems an opportunity to adjudicate the dispute first. This is consistent with Article 26 of the ICSID Convention, which expressly recognizes the right of a State to require submission to local courts as ‘a condition of its consent to arbitration’ under ICSID.*⁵⁹

⁵⁸ RPHB, § 8.

⁵⁹ Memorial, § 68.

142. Finally, according to Respondent, “[i]n the face of any lingering doubts, the principle of *in dubio mitius must also be applied*”,⁶⁰ i.e. Respondent’s treaty obligations should be interpreted restrictively.
143. According to Respondent, any doubts on the mandatory nature of the recourse to local courts requirement of Article VII(2) “*has been dispelled*”⁶¹ by the recent *Kılıç* Decision and “*is beyond reproach*”.⁶² The *Kılıç* tribunal did have “*correct and complete information*” and duly considered both the Explanatory Note and the letters from Turkey’s GDFI relied on by Claimants. In addition, the evidence adduced by Claimants in this proceeding does not point to a result that would be different from that reached by the *Kılıç* Decision.

The different versions of the BIT

144. Respondent argues that in the Russian text the mandatory nature of the obligation to submit the dispute to local courts is supported by (i) the linguistics experts who submitted opinions on behalf of both Respondent⁶³ and Claimants,⁶⁴ (ii) the independent translator who prepared the certified translation for Respondent,⁶⁵ and (iii) the *Kılıç* tribunal.
145. Respondent rejects Dr Tyulenev’s argument that the provision is ambiguous because of “*the conjunction ‘esli’ (if) and because of ‘the comma after it in the phrase ‘pri uslovii, esli’*”.⁶⁶ In Respondent’s view, since languages do not strictly correspond to each other in syntactical structure, stating that the Russian conjunction “*pri uslovii, esli*” - which has a compound structure with a comma - must be translated into English using the same structure and punctuation including the comma, results in absurdity. The word “*esli*” has

⁶⁰ Memorial, § 72 (emphasis in the original).

⁶¹ Memorial, § 9.

⁶² Reply, § 10.

⁶³ See Dr Glad’s Expert Linguistics Opinion, and Prof Gasparov’s Expert Linguistics Opinion.

⁶⁴ According to Respondent, Dr Tyulenev in his First Expert Linguistics Opinion admits that the Russian text allows for a mandatory interpretation (see Reply, § 17).

⁶⁵ See Exh. R-1.

⁶⁶ Reply, § 21.

no independent syntactic function and the comma hardly any role. The purpose of translating the Russian text is “to understand the meaning of its provisions”, “not to reproduce the ‘exact structure’”.⁶⁷ According to Respondent, “no Russian speaker would understand this phrase in the manner suggest[ed] [by Dr Tyulenev]”.⁶⁸ Indeed, both of Respondent’s experts explain that “*pri uslovi, esli*” is a standard phrase designed to express a single condition. Respondent further points out that Dr Tyulenev himself translated “*pri uslovii, esli*” as “*if*” in two instances in Appendix 2 to his second opinion, and explained at the hearing that “he was not trying to give a ‘literal’ translation in these examples”.⁶⁹

146. Respondent further underlines that this issue was addressed by the *Kılıç* tribunal. While the *Kılıç* tribunal “accepted the translation of ‘*pri uslovii, esli*’ into English as “on the condition that” – without a comma and without the word “*if*”,⁷⁰ it also stated that Respondent’s initial, word-for-word translation of the Russian text did not correctly convey its meaning. The reverse translation exercises that Claimants propose to conduct are not helpful and merely undercut Dr Tyulenev’s theory. Respondent also rejects Claimants’ argument that it would have been better to use the conjunction “*pri uslovii, chto*” to express “on the condition that”, noting that Dr Tyulenev recognised at the hearing that “*pri uslovii, esli*” and “*pri uslovii, chto*” were synonymous.

147. Respondent argued that Dr Tyulenev was trying to create ambiguity where there is none with his translation of the conjunction “*v sluchae esli*”, which is also found in Article VII(2) and whose meaning is “*if*” or “*in case*”.⁷¹ While noting that Dr Tyulenev awkwardly translated this conjunction as “*in case if*” in his first opinion, Respondent observes that Dr Tyulenev ultimately conceded at the hearing that “*v sluchae esli*” expresses one condition, as clearly confirmed by the English and Russian versions of the

⁶⁷ RPHB, § 16.

⁶⁸ Reply, § 24.

⁶⁹ RPHB, § 21.

⁷⁰ Reply, § 30, referring to the *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012 (“*Kılıç Decision*”) (Exh. RLA-1), §§ 8.5-8.8, 8.22.

⁷¹ RPHB, § 23.

UNCITRAL Model Law, and “*v sluchae esli*” and “*pri uslovii, esli*” are synonymous.⁷² According to Respondent, the Russian and English versions of the UNCITRAL Model Law further confirm that a four-word phrase, “*pri uslovii chto, esli*”, not “*pri uslovii, esli*”, would be accurately translated as “*provided that, if*”, a fact that Dr Tyulenev also recognised at the hearing.⁷³

148. Respondent further criticised Dr Tyulenev’s “*selective reliance on ‘extratextual evidence’*” to conclude that Article VII(2) contains an optional local court provision.⁷⁴ Respondent thus notes that Dr Tyulenev relied only on the English and Turkish versions of the Turkey-Hungary BIT; inexplicably, Dr Tyulenev did not look at the Hungarian version of that treaty nor even at the Turkish version of the Turkey-Turkmenistan BIT.
149. Respondent states that, on its face, the Turkish text clearly supports a mandatory interpretation and asserts that this statement is uncontested by both Claimants’ and Respondent’s experts. Under the Turkish text as translated, recourse to international arbitration is possible “*provided that the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and that a decision has not been rendered within one year*”.⁷⁵
150. Respondent further argues that the weight of the unambiguous Turkish text cannot be diminished by merely arguing that it is not authentic and turns out to be an “*erroneous*” translation of the English version.⁷⁶ This “*self-serving*” argument was rejected in *Kılıç*.⁷⁷ It is based on the speculation that the English version is the original version of the BIT and on unreliable evidence. In addition, if one accepts Claimants’ theory, it would mean that Turkish government officials translated their own English draft using mandatory terms in Turkish. The Turkish text was prepared in September 1992, well after the rush of the

⁷² See RPHB, §§ 23-26.

⁷³ See RPHB, § 27.

⁷⁴ RPHB, § 29.

⁷⁵ Reply, § 39; Exh. R-3.

⁷⁶ Reply, § 43.

⁷⁷ Reply, § 43.

treaty conclusion process, with ample time not only to produce a correct Turkish translation but also to spot errors and request corrections to the signed English version. Respondent further suggests that “[s]ince the Russian version contains a mandatory local court requirement, it may be that the Turkish version was deliberately drafted with a mandatory local court provision to reflect the known understanding of the Turkic Republics that it was indeed mandatory”.⁷⁸

151. Respondent also contends that the Turkish text constitutes the official version ratified by the Turkish Parliament that gave the BIT the status of law in Turkey, and it uses indisputable mandatory language. By contrast, the 1993 Explanatory Note to the BIT was not published in the Official Gazette and does not have the status of law; it cannot be given the same weight as the Turkish text.⁷⁹ Finally, as a number of other explanatory notes, the 1993 Explanatory Note does not accurately describe the Treaty and, as such, is unreliable.
152. Respondent states that the English version of Article VII(2) is not “clear”,⁸⁰ is “problematic”⁸¹ and that this was recognised by Claimants at the hearing. Respondent argues that this ambiguity ought to be resolved against Turkey, the drafter of the English text, and Turkish nationals who seek to rely on it, in accordance with the principle of *contra proferentem*.
153. Respondent further contends, with the support of Dr Jaklin Kornfilt’s Linguistics Opinion, that the lack of clarity and “grammatical awkwardness of this clause result[] from the fact that a condition is stated [...], but the consequence of the condition is not stated [...]”.⁸² Professor Leonard agrees with this analysis.⁸³ However, Professor Leonard’s own re-

⁷⁸ RPHB, fn 20.

⁷⁹ Respondent contends that, according to Dr Öktem and Dr Karlı, “the Turkish text published in the Official Gazette prevails over the explanatory note”. (RPHB, § 11; see also Dr Öktem’s and Dr Karlı’s Second Legal Opinion, § 39.)

⁸⁰ Reply, § 52.

⁸¹ RPHBR, § 9.

⁸² Reply, § 54.

⁸³ See Reply, § 56.

ordering of the sentence does not solve the problem; it merely relocates it.⁸⁴ Respondent also considers that his opinion is further weakened by the fact that (i) the patterns of usage of conditional clauses he claims to have identified in a treaty with multiple sources and authors have little significance and (ii) he failed to take into account the Turkish and Russian versions of the Treaty.

154. In Respondent's view, there are at least two possible rewordings which would clearly express either (i) an optional condition or (ii) a mandatory condition:

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

(ii) *“provided that, the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year”*.⁸⁵

155. Contrary to Claimants' allegation, Respondent does not contend that the words *“provided that, if”* cannot be used sequentially in English. They can, but given the way they are used in Article VII(2) of the BIT, the clause turns out to be ungrammatical and unclear. According to Respondent, this awkward formulation *“most likely result[s] from faulty translation of the Russian text”*,⁸⁶ but such *“infelicitous’ translation cannot be given undue weight nor can it be allowed to override the clear intent of the parties reflected in both the Russian and Turkish versions of the Treaty”*.⁸⁷ Rather, this Tribunal should agree with the *Kılıç* tribunal that the only reasonable, good faith interpretation of the English text

⁸⁴ See Reply, § 56. See Prof Leonard's First Expert Linguistics Opinion, § 40 (*“[...] If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year, the dispute can be submitted, as the investor may choose, to: [(a) an ICSID tribunal, (b) an ad hoc tribunal, or (c) an ICC tribunal]”*).

⁸⁵ Reply, § 58.

⁸⁶ Memorial, § 40. Respondent also argues that this awkward formulation may reflect an effort from a non-native speaker to *“emphasize the mandatory nature of the condition”*. (RPHB, § 32.)

⁸⁷ Memorial, § 60.

is a mandatory interpretation, which accords with the Turkish and Russian versions of the Treaty.

156. Respondent notes Claimants' extensive reliance on the testimony of Mrs Özbilgiç, according to whom the local court provision should be read as optional. According to Respondent, Mrs Özbilgiç's testimony and cross-examination suggest the opposite:

While Mrs. Özbilgiç now alleges in this case that the local court provision in the English text of Article VII(2) is optional, it is clear that her view, even if truly held now or back in 1992, was (i) not shared by her colleague in the GDFI who translated the English text of the Treaty into Turkish using mandatory language for the local court requirement; (ii) not shared by her supervisor, Mr Yıldırım (the co-drafter of the English text), who reviewed the English and Turkish texts of the Treaty in September 1992 and sent them to the Ministry of Foreign Affairs for transmittal to Parliament with a Turkish text containing a clearly mandatory local court requirement in Article VII(2); (iii) not shared by the Kazakh and Turkmen government representatives who translated the English text of the Treaty into Russian using mandatory language in Article VII(2); (iv) not shared by the Hungarian government representatives who translated the same English text as in Article VII(2) into Hungarian using mandatory language in Article X of the Turkey-Hungary BIT signed in January 1992; and (v) not shared by her colleagues who prepared the Turkish version of the Turkey-Croatia BIT in 1996, which also has the same English text as Article VII(2) of the Turkmenistan BIT, and uses mandatory language for that provision in the Turkish version.⁸⁸

157. While the above evidence confirms in the eyes of Respondent that the local court requirement is mandatory, Respondent contends that Mrs Özbilgiç's personal views or intent cannot "override the actual text of the Treaty, whether in English, Russian or Turkish"⁸⁹ or the intent of her colleagues in the Turkish Government or that of the other Contracting Party.

158. In addition, Respondent insists that the awkwardly worded English version of the Treaty cannot be given primacy as Claimants purport to do.

⁸⁸ RPHB, § 36.

⁸⁹ RPHB, § 38.

159. First, Respondent notes that the Vienna Convention does not provide for any primacy rule, which the International Law Commission in fact rejected when the Vienna Convention was drafted. The authorities relied upon by Claimants to assert that the original version of the Treaty should be given primacy do not support this proposition. Moreover, as transpired in Mrs Özbilgiç’s testimony at the hearing, the only change to the English draft that the Turkic Republics demanded and obtained was the deletion of the provision that English be the prevailing language. Finally, Respondent points out that giving precedence to an ambiguous text “*does not help the interpretative process [...], it obstructs it*”.⁹⁰ By contrast, reference to the clear Turkish version helps to elucidate the meaning of the unclear English text.
160. In support of their English primacy theory, Claimants unconvincingly argue that the BIT was modelled on the Turkey-Hungary BIT, which was used as a basis for drafting the former. Contrary to Claimants’ allegation, the Turkey-Hungary BIT was not the “*model*” for the BIT. Respondent says there is no evidence to support that proposition. In addition to making a number of dubious assumptions, Claimants ignore the fact that the Turkey-Hungary BIT “*uses an entirely different phrase in the clause*”⁹¹ regarding prior recourse to local courts. Claimants further fail to disclose the existence of the authentic Hungarian version which in its article 10 provides for prior submission of the dispute to local courts in mandatory terms. The Turkish version being optional and the English version (prevailing in the event of discrepancies) being again grammatically awkward, Claimants’ reliance on the Turkey-Hungary BIT raises more new issues than it offers solutions.
161. What is more, there are significant, substantive differences between the two treaties in a number of their provisions, including the dispute resolution clause. Even if the Turkey-

⁹⁰ RPHBR, § 13.

⁹¹ Reply, § 68. Respondent emphasises that “[i]n the Turkey-Hungary BIT, the Turkish version uses the phrase ‘*şu şartla ki, eğer,*’ which means ‘on the condition that, if’ or ‘provided that, if’. In contrast, the Turkish version of Article VII(2) of the Turkey-Turkmenistan BIT uses the word ‘*kaydıyla,*’ which means ‘provided that’ (or ‘on the condition that’)” (footnotes omitted).

Hungary BIT were reviewed by the drafters of the BIT, it is clear that the latter did not replicate or recycle the former.

162. By contrast, the Explanatory Note for Article VII of the BIT does appear to be modelled on the Explanatory Note for the Turkey-Hungary BIT. The fact that the BIT Explanatory Note suggests that the ‘prior recourse to local courts’ requirement is optional is likely to be a mistake owing to the less-than-careful recycling of the Turkey-Hungary BIT Explanatory Note. As held by the *Kılıç* tribunal, the express terms of the Turkish version of the BIT must trump the Explanatory Note. In any event, the BIT Explanatory Note is a mere “*unilateral assertion*”⁹² of only one Contracting Party to the Treaty and “*by no means binding or dispositive*”.⁹³
163. Respondent equally questions the weight and relevance to be given to two letters from Turkey’s GDFI that Claimants solicited in 2012 and 2013⁹⁴ and now rely upon to establish the alleged primacy of the English version of the Turkey-Turkmenistan BIT. According to Respondent, these “*letters*” of 30 November 2012 and 26 April 2013, which were created after the case was filed, are no more than disguised witness statements and should be stricken from the record. In addition, Respondent emphasises that while the letter from the GDFI dated 26 April 2013 states that the Turkish version of the Turkey-Hungary BIT provides for optional recourse to local courts, it fails to mention that the Hungarian version of the Turkey-Hungary BIT is mandatory and ignores the differences between the dispute resolution provisions of the two treaties.
164. As to the letter from Mr Ibrahim Uslu, the Director General of the GDFI dated 30 November 2012, it recounts a “*visit*” by counsel for Claimants to Mrs Özbilgiç, the Deputy Director General of the GDFI. While Respondent notes that this letter indicates that an English text served as a basis to conclude the BITs between Turkey and the four Turkic

⁹² Reply, § 78.

⁹³ Reply, § 79.

⁹⁴ Letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); letter from the GDFI dated 26 April 2013 (Exh. C-55).

Republics, that the Russian version was translated from the English text and that there was never any intention to compel prior submission to local courts, Respondent also stresses that this same letter fails to identify anyone (including Mr Uslu or Mrs Özbilgiç) who was involved in the negotiations, conclusion, and translations of the BITs, including the Turkey-Turkmenistan BIT. For these reasons, this letter cannot be considered as reliable evidence.

165. Respondent notes that the November 2012 letter refers to two other letters of June and September 1992, which Claimants have produced without the attached BIT translations. In particular, Respondent draws to the Tribunal’s attention that in the September 1992 letter, the GDFI informed the Ministry of Foreign Affairs that there were “*errors*” in the BITs and directed that written agreements be entered into with the four Turkic States to correct them. According to Respondent, these errors must have been significant for the GDFI to take such a step. Yet, Claimants ignore this “*critical fact*”.⁹⁵ Respondent contends that this undermines Claimants’ argument that the Turkish version of the BIT should be disregarded as non-authentic and that the English version should be regarded as authoritative.
166. Respondent further emphasises that this is not the first time that the Turkish Government actively assists its nationals in the course of arbitrations against Turkmenistan. It did so in the *Kılıç*, *Bozbey*, and *Içkale* cases.⁹⁶ Respondent further points to other initiatives to support Turkish claimants against Turkmenistan, which it considers improper, such as the removal from the Undersecretariat’s website of the Turkish version of the BIT which listed Turkish as one of the languages of the BIT, consistent with the Russian version.
167. Respondent argues that the Turkish Government’s interventions should be viewed with great caution.

⁹⁵ Reply, § 91.

⁹⁶ See Reply, § 93.

168. In addition, the letter of 30 November 2012 should be analysed as a unilateral interpretation of the Treaty, and therefore not binding or authoritative. Only a joint interpretation could be considered authoritative and Turkmenistan does not agree with the GDFI's reading of the Treaty.⁹⁷
169. Respondent stated at the hearing that Claimants invoked another treaty, the 1988 Turkey-Switzerland BIT, which they described as the “*origin of the problem*” and the “*key*”.⁹⁸ Respondent stresses that Claimants again failed to mention that the Turkish version of this treaty is phrased in mandatory terms, a fact which Claimants later acknowledged at the hearing. According to Respondent, the reference to Turkey's other BITs does not reveal any “*uniform policy regarding local court requirements*”⁹⁹ – quite the contrary – and is therefore unhelpful to elucidate the meaning of Article VII(2), the interpretation of which cannot in any event hinge on general policy considerations of either Contracting Party.
170. In any event, Respondent contends that it is both speculative and not necessary to try and determine which version of the BIT is the original and which one has been translated. According to Respondent, both the Russian and Turkish texts are clear and provide for mandatory prior submission of the dispute to local courts. Moreover, Claimants recognise that the Russian version of the BIT is authentic. Respondent concludes that the Tribunal need not inquire any further: the only interpretation of the local court provision that reconciles the English version with the Russian and Turkish versions of the Treaty, as required by Article 33(4) of the Vienna Convention, is one that reads the provision in mandatory terms. In any case, in Respondent's view, Claimants' theory that an “*original*” text in English was prepared by Turkish officials, if it is accepted, would prove that it should in fact be read as mandatory since it was subsequently translated in their native language in mandatory terms.

⁹⁷ See Reply, §§ 97-98.

⁹⁸ RPHB, § 42.

⁹⁹ RPHB, § 44.

(b) Claimants' position

171. On the basis that the English and the Russian texts are the only authentic versions of the BIT, Claimants state that “*an interpretation in good faith looking to the ordinary meaning of the Treaty provides that there is no mandatory referral to the host State’s local courts*”.¹⁰⁰ A linguistic and textual analysis of Article VII in each authentic version shows that “*each text, in and of themselves, must be considered to provide for an option not an obligation to resort to local courts*”.¹⁰¹
172. Looking to the object and purpose of the BIT in accordance with Article 31(1) of the Vienna Convention, Claimants argue that:

*[...] the interpretative process of Article VII of the BIT must in seeking to elucidate the meaning of the text and [sic] have reference to the object and purpose of the treaty. As set out, a textual analysis of the BIT necessitates an optional reading of the provision. Furthermore, as the international arbitration tribunals and national courts alike have expounded protection of the investment and access to international arbitration are central objectives of such treaties. As such, Article VII should be read in light of such an object and purpose. Further to this, the preamble of the Treaty calls for a stable framework for investment. It can only be considered then that to read Article VII as providing for a mandatory reference to local courts would be reading against not only the meaning of the words of the treaty but also its object and purpose.*¹⁰²

173. Under Article 32 of the Vienna Convention, the Tribunal should resolve any ambiguity in the different versions of the BIT by recourse to supplementary means of interpretation, including the drafting history and the explanatory notes to the Treaty. In this case, the Tribunal should have recourse specifically to the factual circumstances of the Treaty’s conclusions. Claimants refer to four points:

First, Turkey was the driving force. Second, it was a very quick process. Third, there was no Turkish text available at the time. And fourth, Russian

¹⁰⁰ Counter-Memorial, § 96.

¹⁰¹ Rejoinder, § 97.

¹⁰² Rejoinder, § 122. *See also* CPHB, §§ 87-88.

*has been translated from English, and not from Turkish. And English has not been translated from Russian.*¹⁰³

174. Claimants further argue that the Tribunal should take account of: (i) the fact that the English version of Article VII(2) significantly replicates the analogous provisions of the Turkey-Hungary BIT; (ii) the additional significance of the original English version even though there is no prevailing language under the Treaty; and (iii) the Explanatory Notes produced by the GDFI.
175. Referring to Article 33 of the Vienna Convention, Claimants rely on the opinion of Professor Shelton that “*it is logical to give preference to the language of the negotiating text on the basis of which agreement was reached, rather than that of subsequent translations. In the event there were multiple language negotiating texts, reconciliation through reference to the object and purpose of the treaty is appropriate*”.¹⁰⁴ According to Claimants, Article 33(2) “*gives primary importance to efforts to reconcile the different texts so far as they are authentic*”¹⁰⁵ and no authority should be given to official or unofficial translations.
176. Finally, mistakes or imperfect translations made in the treaty negotiation process are not a ground to presume that a restrictive meaning should be applied to the BIT. Claimants thus reject any restrictive interpretation of Article VII(2) and contend that the *in dubio mitius* principle does not apply to modern treaties.
177. Claimants assert that this Tribunal should not follow the *Kılıç* Decision and Award as “*there is no obligation on the present Tribunal to follow the decision rendered in the Kılıç case, there being no rule of precedent in ICSID arbitration*”.¹⁰⁶ Claimants argue that “*the Kılıç decision was made on the wrong premise and therefore should be disregarded by the present Tribunal*” because the *Kılıç* tribunal did not have the “*correct and complete*

¹⁰³ Tr. J. Day 1, 117:18-22.

¹⁰⁴ Rejoinder, § 135, quoting Exh. CLA-71. *See also* CPHB, § 92.

¹⁰⁵ Rejoinder, § 137.

¹⁰⁶ Counter-Memorial, § 5. *See also* CPHB, § 7.

information in rendering its decision".¹⁰⁷ In particular, Claimants assert that the *Kılıç* tribunal was not presented with (i) expert opinions other than that of Dr Kornfilt and (ii) the Explanatory Note submitted to the Turkish Parliament for the ratification of the BIT. In addition, Claimants note that the *Kılıç* tribunal was not unanimous in its analysis of Article VII, with Professor Park filing a dissenting Separate Opinion. Claimants further rely on the *Rumeli v. Kazakhstan* Award, which they contend "*examined this very same issue*" and "*found that there is no such obligation to first bring a dispute to local State courts prior to commencing international arbitration proceedings*".¹⁰⁸

178. In Claimants' view, there are two competing interpretations of Article VII(2). This provision of the BIT either provides for:

i. access to international arbitration with an optional recourse to local courts which, upon election, would allow recourse to international arbitration where there has not been a final decision rendered in one year by the local court;

or

*ii. a mandatory recourse to local courts which would only allow recourse to international arbitration where a final decision has not been rendered within one year. (Where a final decision is rendered within this period, this would then, effectively, only leave the possibility of initiating international arbitration in the context of claim for denial of justice.)*¹⁰⁹

179. While the first interpretation is in line with Article VII(2), "*the object and purpose of the treaty in addition to the normal practice for such clauses in BITs in offering access to international arbitration at the investors discretion*",¹¹⁰ the second interpretation is at odds with all these factors.

¹⁰⁷ Counter-Memorial, § 5. See also CPHB, § 7.

¹⁰⁸ Counter-Memorial, § 5, citing *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 (Exh. CLA-2).

¹⁰⁹ Rejoinder, § 12.

¹¹⁰ Rejoinder, § 13.

180. Indeed, if one were to opt for a mandatory reading of Article VII(2), Claimants argue that the “*no-judgment-within-one-year*” requirement would contradict the terms of Article VII(2) which provides that “*within six months following the date of the written notification [...] the dispute can be submitted, as the investor may choose, to: [international arbitration]*”.¹¹¹ Claimants share Professor Park’s view in the *Kılıç* case that “[i]nterpreting the ‘no-judgment-within-a year’ proviso as a jurisdictional precondition creates a pathology in which the same sentence purports to permit an investor to commence arbitration six months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point”.¹¹² With Professor Park, Claimants further argue that “[i]f arbitration begins before litigation, as in the present case, the claim is dismissed. Yet if litigation precedes arbitration, the claim can be defeated by a swift judgment, since the deemed jurisdictional precondition, the court’s failure to reach decision in a year, cannot be satisfied due to the judgment having arrived before the twelfth month”.¹¹³ This interpretation would also offend the object and purpose of the Treaty, which includes the promotion of a “*stable framework for investment*”, as reflected in the Treaty’s preamble.

The different versions of the BIT

181. Claimants state that the authentic English version of Article VII(2) does not provide for mandatory prior recourse to local courts. Claimants lament Respondent’s efforts to obfuscate the clear meaning of the English text, including through its Turkish linguistics expert, Dr Kornfilt, who wrongly asserts that the difficulty to interpret the English text derives from the fact that “*the expressions ‘provided that’ and ‘if’ follow each other in close proximity*”.¹¹⁴ Claimants say that contrary to Dr Kornfilt’s view “*provided that, if*” is

¹¹¹ Rejoinder, § 17.

¹¹² Rejoinder, § 20, citing *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Professor William Park’s Separate Opinion, 20 May 2013 (“***Kılıç Separate Opinion***”) (Exh. RLA-98), § 14.

¹¹³ Rejoinder, § 22, citing *Kılıç Separate Opinion* (Exh. RLA-98), § 21.

¹¹⁴ Counter-Memorial, § 63, citing Dr Kornfilt’s First Expert Linguistics Opinion, § 16.

a “common occurrence in the English language”.¹¹⁵ Claimants point to the numerous examples provided by their English linguistics expert, Professor Leonard, where “*provided that*” and “*if*” are used in close succession in the English language, including in legal texts. Claimants emphasise that in each instance, “*provided that, if*” indicates a double condition and therefore does not carry a mandatory meaning. In addition, the examples given by Professor Leonard refute Respondent’s further argument that the terms “*provided that*” and “*if*” must be followed by the word “*then*”.

182. In Claimants’ view, the idea of Respondent’s experts that “*if*” should be removed demonstrates a failure to consider Article VII(2)(c) in the context of the entire Article and is based on the false premise that bad grammar is tantamount to meaninglessness.

183. While Claimants concede that the English text is “*somewhat ungrammatical*”, the intent of the word “*and*” is in fact unproblematic.¹¹⁶ As explained by Professor Leonard, the “*likely cause of the [linguistic] infelicity*” in Article VII(2) lies in the drafter’s “*blending*” of two syntactic constructions into one, namely “*provided that, if*” and “*and*”.¹¹⁷ The semantic function of the word “*and*” in Article VII(2)(c) is to “*link [...] the entrance into local courts and the situation of no award within a year: if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year, THEN one can go to international arbitration*”.¹¹⁸

184. Although the removal of the word “*and*” would make the text more grammatical, it is not necessary. Indeed, according to Professor Leonard, “[*t*]he infelicity, the processing difficulties, of the section’s structure comes largely from ordering of clauses”.¹¹⁹ Together with the above linguistic analysis, this highlights the optional nature of Article VII(2).

¹¹⁵ Counter-Memorial, § 63. *See also* Rejoinder, § 84.

¹¹⁶ CPHB, § 43.

¹¹⁷ Rejoinder, § 94.

¹¹⁸ Rejoinder, § 93.

¹¹⁹ Counter-Memorial, § 68, citing Prof Leonard’s First Expert Linguistics Opinion, § 38. For the re-ordering of the clauses proposed by Prof Leonard, *see above* fn 84.

Respondent's criticism that Professor Leonard failed to refer to the translations of the Russian text into English precisely ignores that the authentic English version, and not the authentic Russian version, is the source text.

185. Claimants also insist on the primacy of the English authentic version because of its role in the circumstances of the conclusion of the Treaty. To Claimants, placing greater reliance on the original English text is in accordance with the Vienna Convention, especially Article 32, as acknowledged by both Claimants' and Respondent's experts.
186. Claimants emphasise that Turkey was the "*driving force*"¹²⁰ behind the conclusion of its BITs with the Turkic States (Kazakhstan, Kyrgyzstan, Turkmenistan, and Uzbekistan). It used the English authentic version of the Turkey-Hungary BIT signed on 14 January 1992 as a basis and model for preparing the English draft of the Turkey-Turkmenistan BIT. Article VII(2) is "*a recycling of Article 10 of the Turkey-Hungary BIT*",¹²¹ the terms "*provided that, if*" being present in both texts. Contrary to Respondent's allegation, there are only minor differences between the dispute resolution provisions of both treaties; it is not a translation from the Russian original.
187. Claimants also refer to the Turkish authentic version of the Turkey-Hungary BIT, which contains an optional local court requirement. Relying on the Explanatory Note submitted with the Turkey-Hungary BIT to the Turkish Parliament and that submitted with the Turkey-Turkmenistan BIT, Claimants argue that the English wording of Article VII(2) was intended to have the same optional meaning as that of Article 10 of the Turkey-Hungary BIT. This was confirmed by the letter from the GDFI dated 26 April 2013.¹²² Claimants

¹²⁰ Counter-Memorial, § 16; Rejoinder, § 27.

¹²¹ Counter-Memorial, § 20.

¹²² See Counter-Memorial, §§ 23-25. The relevant portions of the Explanatory Notes to the Turkey-Turkmenistan and Turkey-Hungary BITs are as follows:

[...] Having said that, if the investor has brought the dispute before local judicial bodies and an irrevocable decision (kesin karar) has been rendered (lit. taken), there remains no possibility of access to international arbitration, [...]. (Exhs. C-32, C-56.)

The purpose of the last paragraph is to prevent having a dispute for which an irrevocable decision (kesin karar) has been rendered being adjudicated again in an international official venue. (Exh. C-32.)

further state that the English draft BIT prepared by Turkey was accepted by Turkmenistan with only one minor modification and then signed in English and Russian in Ashgabat on 2 May 1992.

188. In Claimants' view, Respondent now conveniently argues that determining what is the original text is unnecessary. Yet, Respondent and its experts heavily relied on the wrong sequence of texts. Dr Öktem and Dr Karlı, Respondent's experts, even emphasised the importance of the original language and argued that “[b]e it either because of the superiority of the original version, or because of the role that version played within the circumstances of conclusion of the treaty, the [original] version of the Turkey-Turkmenistan BIT emerges as the text that best reflects the common intention of the parties”.¹²³
189. Claimants also maintain that the letters from the GDFI accurately reflect the circumstances in which the Treaty was concluded. In support of its assertion, Claimants affirm that unlike Turkmenistan, Turkey has no direct interest in the outcome of the dispute. In addition, the information provided by the GDFI, the governmental body in charge of Turkish BIT policy, is “*apposite, relevant and of great significance*”.¹²⁴ The GDFI letters of 30 November 2012 and 4 September 1992 establish that the Turkish text of the Treaty is a translation.
190. Mrs Özbilgiç also referred to the Turkey-Switzerland and Turkey-Netherlands BITs, which contain similar infelicitous language. Claimants finally note that shortly after signing the Treaty, Turkmenistan passed a law “*on Investment Activities in Turkmenistan*” and that among Turkmenistan's subsequent BITs that Claimants have reviewed not a single one contains a mandatory local court requirement.

¹²³ Rejoinder, § 43, citing Dr Öktem's and Dr Karlı's First Legal Opinion, § 31. The changes to the original quote were made by Claimants. *See also* CPHB, § 59.

¹²⁴ Rejoinder, § 48.

191. As to the Russian authentic version, Claimants note that Respondent originally submitted a different certified English translation of this text to the *Kılıç* tribunal. It reads:

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

(a) ...

(b) ...

(c) *The Court of Arbitration of the Paris International Chamber of Commerce, **on the condition that, if** the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*¹²⁵

192. On Claimants' reading, this first translation provides for an option to submit the dispute to local courts.

193. However, the revised translation submitted by Respondent in the *Kılıç* arbitration and in this arbitration removes the word "if" so as to better support Respondent's position. It reads:

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

...

(b) ...

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

¹²⁵ Counter-Memorial, § 70, citing the first translation submitted by Respondent to the *Kılıç* tribunal (*Kılıç* Decision (Exh. RLA-1), § 4.18 (emphasis in the original)).

*arbitral award on compensation of damages has not been rendered within one year.*¹²⁶

194. According to Claimants, this is not a faithful translation of the Russian authentic version. In support of their proposition, Claimants submit a certified translation back into Russian of Respondent’s revised English translation of the Russian authentic version. Claimants’ translation does not result, as one would expect had this been a faithful translation, in the same wording in Russian as the Russian authentic version.
195. According to Claimants and Dr Tyulenev, the textual analysis of the Russian authentic version confirms that the Russian version of Article VII(2) of the Treaty is a translation of the English version of this text, a fact which in Claimants’ view “*lends greater credibility to the English Authentic Version and, specifically, its formulation of Article VII.2.*”¹²⁷
196. In Claimants’ view, the “*fundamental difference*” between Claimants’ reverse translation into Russian and the Russian authentic version lies in the fact that “*the former provides for ‘при условии, что’ (or to transliterate ‘pri uslovii, chto’) a certain mandatory language, whereas the Russian Authentic Version provides ‘при условии, если’ or ‘pri uslovii, esli’*”.¹²⁸ Claimants then point to their own Russian translation of the English authentic version and emphasise that it uses the same relevant wording as the Russian authentic version, namely “*pri uslovii, esli*”.¹²⁹
197. Claimants also rely on their expert, Dr Tyulenev, who translated the Russian authentic version into English to read as follows:

If the indicated conflicts cannot be settled in this way during six months after the date of the written notification, mentioned in paragraph 1, then the conflict may be submitted—at investor’s choice—

a) [...];

¹²⁶ Counter-Memorial, § 71, citing to the *Kılıç* Decision (Exh. RLA-1), § 4.19 (emphasis in the original).

¹²⁷ Counter-Memorial, § 84.

¹²⁸ Counter-Memorial, § 77.

¹²⁹ See Counter-Memorial, §§ 78-79.

b) [...];

c) *The Court of Arbitration of the Paris international chamber of commerce, **on the condition, if** the interested investor presented the conflict to the [a?] court of the Party, which is one of the Parties to the conflict, and [but/yet/however?] a final arbitral decision about/on compensation of damages has not been rendered during one year.*¹³⁰

198. According to Claimants, Dr Tyulenev’s translation “*provides for an optional reading of the Russian Authentic Version*”,¹³¹ in line with the first certified English translation submitted in the *Kılıç* arbitration.
199. According to Claimants, Dr Tyulenev rejected Respondent’s contention that the text is clearly mandatory by highlighting that Respondent’s revised translation “*does not reflect the ambiguity of the Russian phrase caused by the presence of ‘if’*”¹³² and the “*two syntactic functions*” of this word (“*esli*” in Russian).¹³³ As a result, Respondent’s revised translation is more akin to “*an interpretation or an edition than to a faithful rendering of the Russian version which it claims to be*”.¹³⁴ Claimants further note that the mandatory interpretation of the same provision was not even argued by Kazakhstan in the *Rumeli* case.
200. Claimants insist that the Russian version is so “*poorly written*”¹³⁵ that it cannot be taken at face value and requires reference to the authentic English version to be properly understood. According to Dr Tyulenev, “*it was clearly not checked, edited, or even proof-read*”.¹³⁶ Claimants note Professor Gasparov’s change of heart and Respondent’s silence on this point. Claimants contend that the better interpretation of the clause would be

¹³⁰ Counter-Memorial, § 80, citing Dr Tyulenev’s First Expert Linguistics Opinion, § 4 (emphasis in the original).

¹³¹ Counter-Memorial, § 81.

¹³² Counter-Memorial, § 82.

¹³³ Rejoinder, § 56.

¹³⁴ Counter-Memorial, § 82.

¹³⁵ Rejoinder, § 58.

¹³⁶ Rejoinder, § 61, citing to Dr Tyulenev’s Second Expert Linguistics Opinion, § 15.

optional in light of extra-textual factors such as the sequence in time of the different versions, the letter from the GDFI dated 30 November 2012, and the fact that the “*provided that, if*” wording was already present in the earlier Turkey-Hungary BIT. Respondent’s argument that Dr Tyulenev selectively referred to the Turkey-Hungary BIT is belied by the fact that he could have referred to many other BITs, including the Turkey-Czechoslovakia BIT and the Turkey-Albania BIT.

201. Claimants finally argue that the above-described translations show that in the Russian authentic version of the Treaty, the “*operative phrase*” providing for submission to local courts applies is only relevant where the dispute is submitted to the International Court of Arbitration of the International Chamber of Commerce (“**ICC**”).¹³⁷ Therefore, if the Tribunal were to conclude that Article VII(2) of the Treaty contains a mandatory local court requirement, it should be held to apply only to ICC arbitration, and not to ICSID arbitration.¹³⁸
202. Claimants contend that the Turkish text is merely an “*erroneous*” translation of the English authentic version, which was provided to the Turkish Parliament for ratification purposes. Claimants state:

*It does not constitute a text of the Treaty. It was produced for consideration along with the relevant Explanatory Note which clearly sets out that there is no prior procedural requirements necessary needed before initialling ICSID proceedings. As has been noted no Turkish version has been exchanged with Turkmenistan.*¹³⁹

203. Claimants also argue that the Russian version mistakenly refers to a Turkish version: no Turkish text was signed on 2 May 1992 or at any time thereafter. According to Claimants’ expert on Turkish linguistics, Dr Dedes, the Turkish text has the hallmarks of a translation and contains not only errors but also superfluous additions.

¹³⁷ Counter-Memorial, § 85; *see* Rejoinder, §§ 67-70.

¹³⁸ *See* Counter-Memorial, § 85, citing Dr Glad’s Expert Linguistics Opinion, § 9.

¹³⁹ Rejoinder, § 72.

204. Claimants further contend that while the Turkish text of Article VII(2) “*is tidier from the point of view of Turkish, it achieves that at the cost of a misguided interpretation and translation of the infelicitous English passage*”.¹⁴⁰ By using mandatory language, the Turkish translator departed from “*the intention of the text*”, as suggested by “*the optional rendering in Turkish of the same English text in the preceding Turkey-Hungary BIT and the directly subsequent Turkey-Albania BIT, all three of which have optional Explanatory Notes*”.¹⁴¹
205. Claimants state that while Mrs Özbilgiç did prepare the Turkish version of the “*optional Turkish text*”, she did not draft the Turkish version of the Turkey-Turkmenistan BIT.¹⁴² Claimants also reject as baseless Respondent’s theory that the Turkish text may have been deliberately drafted in mandatory terms “*to reflect the known understanding of the Turkic Republics that it was mandatory*” since the Russian text contains a mandatory local court requirement. Claimants underline that the Russian version is not mandatory; the GDFI did not receive a copy of the Russian version prior to making its translation; Turkey, whose policy was to exclude mandatory local court requirements, was the driving force in the conclusion of the BIT, not the Turkic States; and the Explanatory Note provides for optional recourse to local courts.

(c) Tribunal’s analysis and conclusions

206. The key issue to be determined is the meaning of the proviso at the end of Article VII(2). In addition to the authentic English version and the translation of the authentic Russian version presented by Respondent, other translations and suggested constructions and meanings were proposed by the linguistics experts. Specifically:

¹⁴⁰ Counter-Memorial, § 89, citing Dr Dedes’ First Expert Linguistics Opinion, § 37.

¹⁴¹ Rejoinder, § 81. *See also* CPHB, § 79.

¹⁴² CPHBR, § 31, citing to Mrs Özbilgiç’s Witness Statement, § 16. Mrs Özbilgiç states that she prepared the Turkish translation of the Turkey-Hungary BIT.

(a) from the authentic English version:

*provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.*¹⁴³

(b) the translation from the authentic Russian version presented by Respondent:

*on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*¹⁴⁴

(c) the first Russian translation presented to the *Kılıç* tribunal:

*on the condition that, if the concerned investor submitted the conflict to a court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*¹⁴⁵

(i) *The ambiguity of Article VII(2)'s proviso and its two possible meanings*

207. Article VII(2) of the authentic English version is a poorly drafted provision. Its meaning is not clear; it can be read in different ways. The BIT itself was poorly drafted with grammatical errors and typos.¹⁴⁶ On a literal reading, the proviso could be understood either to allow the investor the option of resorting to arbitration or to seek redress in the local courts, in which case it would have to wait a year for a decision before it could go to

¹⁴³ Exhs. C-1-A, R-2.

¹⁴⁴ Exh. R-1. Prof Gasparov has endorsed Respondent's translation as correct. (See Prof Gasparov's Expert Linguistics Opinion, § 13.) Claimants' expert, Dr Tyulenev, has proposed the following translation: "[...] *on the condition, if the interested investor presented the conflict to the [a?] court of the Party, which is one of the Parties to the conflict, and [but/yet/however?] a final arbitral decision about/on compensation of damages has not been rendered during one year*". (Dr Tyulenev's First Expert Linguistics Opinion, § 4.)

¹⁴⁵ *Kılıç* Decision (Exh. RLA-1), § 4.18. This translation was not presented to the Tribunal in this proceeding. However, it was presented by Turkmenistan to the *Kılıç* tribunal and referred to in its Decision, which was submitted to this Tribunal. It was also quoted at § 70 of Claimants' Counter-Memorial.

¹⁴⁶ These were common to all the treaties with the Turkic countries and corrections were proposed in the letter dated 4 September 1992 from the GDFI (Exh. C-52). See also Tr. J. Day 2, 39:19-40:14; Hearing Document No. 1.

arbitration, or to compel the investor to go first to the local courts and, if the decision and award has not been issued within one year, then go to arbitration. The lack of clarity in the text is probably due to the fact that the Treaty was not practically negotiated, Turkey relied on the English text it had produced and Turkmenistan signed the Russian version – which had been translated from the English version. That is probably the reason that this issue has now arisen for determination in this arbitration (as well as in other cases).

208. The basis of all ICSID arbitrations is the agreement of the Contracting States to ICSID jurisdiction for particular matters arising between the State and an investor who is a subject of the other State. This is typical for a BIT. Accordingly, Article 26 of the ICSID Convention provides expressly that even where a State agrees to arbitration under the ICSID Convention: “*a Contracting State may require the exhaustion of local and administrative or judicial remedies as a condition of its consent to arbitration under this Convention*”.
209. To understand the meaning and intent of the parties in Article VII, the Tribunal has first looked at the wording itself and the context of Article VII, in the light of Article 31 of the Vienna Convention. Even though the English version was the original text on which the BIT was based, it cannot be considered in isolation where there are two authentic versions and they both carry equal value.
210. Accordingly, the Tribunal has sought to construe Article VII(2) “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*” (Article 31(1) of the Vienna Convention). In doing so the Tribunal has considered the ordinary meaning of the words used, linguistic arguments presented by the Parties, the context of the clause itself, and the BIT’s object and purpose.
211. Article VII is a multi-tiered provision. First, disputes between an investor from one country and the other State are to be notified in writing in some detail. The Parties are then to “*endeavour to settle these disputes by consultations and negotiations in good faith*”. There is to be a six-month period to consult and negotiate with a view to settlement. If no settlement is reached within 6 months then the investor can choose to initiate arbitration

before ICSID, under the UNCITRAL Arbitration Rules or under the ICC Rules. As the Tribunal will show below, the proviso at the end of Article VII(2) introduces a difficulty in the dispute resolution process contemplated in this provision owing both to its ambiguous wording and the starting point of the local court requirement it contains. There are two contended meanings to the proviso:

- first, Claimants’ position is that the investor has the option to seek redress of its claims in arbitration or in the courts in Turkmenistan. If it starts in the Turkmen courts then the investor cannot proceed with an arbitration until one year has passed without a decision.

OR

- second, Respondent’s position is that the investor must first seek redress in the Turkmen courts. If that court has not reached a decision within one year then the investor can bring its claims in arbitration proceedings. Respondent further argues that if the Turkmen courts reach a decision within the one year period then the matter is determined and the right to submit the claims to arbitration is lost.

a. The English authentic version

212. The Tribunal notes that both Parties agree that the English authentic version of the proviso in Article VII(2) is ambiguous.¹⁴⁷ While the analyses offered by the Parties’ linguistics experts acknowledge this ambiguity or linguistic infelicity, they have not been able to solve it.

213. Thus, Dr Kornfilt has not been able to explain why the word “*if*” rather than “*and*” should be removed to confer to Article VII(2) its proper meaning. While her “*instinct*”¹⁴⁸ was to delete one of the two conditional expressions (“*provided that*” or “*if*”) because “*and*” has a “*clear-cut syntactic function*”,¹⁴⁹ she recognised that deleting either “*if*” or “*and*” would do

¹⁴⁷ See above §§ 152, 155, 183.

¹⁴⁸ Tr. J. Day 2, 56:8.

¹⁴⁹ Tr. J. Day 2, 57:20-21.

violence to the text.¹⁵⁰ In addition, Dr Kornfilt’s analysis proceeded on the basis that the English authentic text was a translation from the Turkish text.¹⁵¹ Mrs Özbilgiç’s testimony has shown, as later examined in more detail,¹⁵² and Dr Kornfilt herself recognised at the hearing, that the “*educated guess*”¹⁵³ she had made turned out to be wrong.

214. The Tribunal notes that the other linguistics experts presented by Respondent made similar, inaccurate assumptions. In his expert linguistics opinion, Dr Glad repeatedly insisted that the awkward formulation of the English authentic text “*most likely result[ed] from a faulty translation of the Russian text into English*”,¹⁵⁴ suggesting that the BIT was first drafted in Turkish, then into Russian, and eventually into English.¹⁵⁵ According to Professor Gasparov, his colleague Dr Glad has put forward a “*reasonable theory*”.¹⁵⁶ Finally, Professor Green concluded that the “*if*” was “*incorrectly introduced in the preparation of the English version that was signed*”,¹⁵⁷ while at the same time admitting that she had “*no information on how the text of the signed English version [...] was arrived at*”¹⁵⁸ and arguing that “*the text is not consistent with any interpretation at all, without favouring any particular one*”.¹⁵⁹
215. The grammatical analysis propounded by Professor Leonard, Claimants’ expert in English linguistics, is equally unsatisfactory. Professor Leonard’s proposed “*reordering*”¹⁶⁰ of the clause merely relocates the problem and does not resolve the linguistic infelicity at issue.¹⁶¹ In addition, Professor Leonard’s examples of English texts where “*provided that*” is

¹⁵⁰ See Tr. J. Day 2, 61:5-9.

¹⁵¹ See Dr Kornfilt’s First Expert Linguistics Opinion, § 23.

¹⁵² See below §§ 222-226.

¹⁵³ Tr. J. Day 2, 65:10-19.

¹⁵⁴ Dr Glad’s Expert Linguistics Opinion, § 5. See also Dr Glad’s Expert Linguistics Opinion, §§ 13, 15, 17, 19, and 22. We know now that this sequence is wrong. See below §§ 220 *et seq.*

¹⁵⁵ Dr Glad’s Expert Linguistics Opinion, § 19.

¹⁵⁶ Prof Gasparov’s Expert Linguistics Opinion, § 15.

¹⁵⁷ Prof Green’s Expert Linguistics Opinion, § 10.3.

¹⁵⁸ Prof Green’s Expert Linguistics Opinion, § 5.

¹⁵⁹ Prof Green’s Expert Linguistics Opinion, § 4.

¹⁶⁰ Prof Leonard’s First Expert Linguistics Opinion, §§ 28, 40.

¹⁶¹ See Prof Leonard’s reordering above at fn 84.

immediately followed by “*if*” are unfortunately unhelpful: none of them present the same ambiguity as the proviso in Article VII(2) of the Turkey-Turkmenistan BIT.¹⁶²

b. The Russian authentic version

216. In the Tribunal’s view, the proviso in the Russian authentic text also presents an ambiguity that a grammatical or linguistic analysis alone cannot resolve.
217. It appears from the Parties’ submissions that they disagree as to whether the meaning of the Russian text is clear or ambiguous. Claimants contend that the text is unclear and should be interpreted as optional, while Respondent argues that it is clearly expressed in mandatory terms.
218. As stated earlier,¹⁶³ the English translation of the Russian authentic text submitted by Respondent in this proceeding¹⁶⁴ contains mandatory language (“*on the condition that ... and*”), but Claimants disagree with this translation. By contrast, the Tribunal notes that the first certified English translation submitted by Turkmenistan in the *Kılıç* case¹⁶⁵ and referred to in this proceeding¹⁶⁶ contains unclear language (“*on the condition that, if ... and ...*”), very similar to the language used in the English authentic text (“*provided that, if ... and ...*”).
219. Having reviewed the Parties’ submissions and the experts’ reports, the Tribunal is of the view that the disputed portion of Article VII(2) of the Russian authentic text is as ambiguous as its corresponding passage in the English original version for several reasons as examined below.

¹⁶² See Prof Leonard’s First Expert Linguistics Opinion, §§ 51-67.

¹⁶³ See Respondent’s English translation of the Russian text above at § 90.

¹⁶⁴ See also the second English translation of the Russian authentic text submitted by Turkmenistan and quoted in the *Kılıç* Decision (Exh. RLA-1) at § 4.19.

¹⁶⁵ See *Kılıç* Decision (Exh. RLA-1), § 4.18.

¹⁶⁶ See Counter-Memorial, § 70.

i. The Russian authentic version is a translation of the English authentic version

220. First and foremost, the Russian authentic text is a *translation* of the English authentic text, not the other way round. While this has now been confirmed,¹⁶⁷ this factor was not properly taken into account by Respondent and its Russian language experts, Dr Glad and Professor Gasparov.
221. The evidence on the record, including Mrs Özbilgiç's testimony and cross-examination,¹⁶⁸ shows that it was Turkey that prepared and submitted the draft BIT in its original English version as a basis for the negotiations.¹⁶⁹ Then, Turkmenistan translated the Treaty into Russian and this translation became the Russian authentic version of the BIT.¹⁷⁰ Turkmenistan made only one comment on the draft provided by Turkey: it requested the removal of English as the prevailing language in case of divergence between the different language versions of the BIT;¹⁷¹ there were otherwise no comments from Turkmenistan on the English text proposed by Turkey. While the fact that the English version is the original version of the BIT does not confer to this version any superiority or prevailing value whatsoever, it is one of the important factors that helped identify the ambiguity of the Russian authentic version, as a translation of the already ambiguous English authentic version.
222. In her written testimony and at the hearing, Mrs Özbilgiç explained the negotiation and conclusion process of the BIT. Mrs Özbilgiç was a junior GDFI lawyer at the time when the BIT was drafted and entered into. She is the author, along with her supervisor, Mr

¹⁶⁷ See below §§ 221-226.

¹⁶⁸ Contrary to Respondent's allegation that this evidence is not new (*see* Tr. J. Day 1, 17:13-14), it appears from the *Kılıç* Decision that Mrs Özbilgiç did not submit any witness statement and was not examined at the hearing in that case (*Kılıç* Decision (Exh. RLA-1), §§ 1.40-1.43).

¹⁶⁹ See Mrs Özbilgiç's Witness Statement, §§ 17-18; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 1, 19:13-15.

¹⁷⁰ See Mrs Özbilgiç's Witness Statement, § 22; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 1, 243:5-8.

¹⁷¹ See Mrs Özbilgiç's Witness Statement, § 22; Tr. J. Day 1, 19:22-20:1; Tr. J. Day 1, 248:13-18; Tr. J. Day 2, 1:18-24.

Yıldırım, and other GDFI colleagues, of the Model BIT that was used as a basis for negotiations with the Turkic states in late April/early May 1992.¹⁷²

223. Mrs Özbilgiç’s team began preparing this draft Model BIT “around 1990/1991” because they “had already gained experience, and [Turkish] investors were beginning to make investments in other countries”.¹⁷³ This draft was based on two earlier drafts prepared by the former GDFI legal advisor, Ms Alev Bilgen, one of which contained the “provided that, if...and...” language.¹⁷⁴ Mrs Özbilgiç emphasised that when she and her GDFI colleagues were preparing the draft Model BIT, they “took into consideration the legislation existing in our country, as well as the needs of our investors in the other countries, and the needs of the foreign investors in Turkey”.¹⁷⁵
224. Mrs Özbilgiç then explained that it was normal procedure for the GDFI to send an English language draft of a BIT to the other country as the basis for negotiations. When the final text was agreed, it would be initialled on behalf of the two countries and then translated into their respective languages.¹⁷⁶ In this particular case, according to Mrs Özbilgiç, it was not possible to produce a Turkish translation before signing the BIT owing to “the unusual speediness of the process that led to the signature of the Treaty”.¹⁷⁷ There was no direct discussion with the foreign affairs office in Turkmenistan. The draft BIT was not directly sent to the relevant Turkmen ministry, but instead to the Turkish embassy in Moscow in March 1992.¹⁷⁸ There were no negotiations around the proposed text, and no initialised text was sent to the GDFI for translation.¹⁷⁹ There are no *travaux préparatoires*. For these

¹⁷² Mrs Özbilgiç’s Witness Statement, § 18; Tr. J. Day 1, 221:12-22; 230:21-22; 234:8-16.

¹⁷³ Tr. J. Day 1, 231:3-6.

¹⁷⁴ See Tr. J. Day 1, 237:17-240:20. After Ms Alev Bilgen left the GDFI, Mrs Özbilgiç took on this role of legal advisor (see Tr. J. Day 2, 35:4-19).

¹⁷⁵ Tr. J. Day 1, 239:23-240:1-2.

¹⁷⁶ See Tr. J. Day 1, 236:20-25; 237:11-16.

¹⁷⁷ Mrs Özbilgiç’s Witness Statement, § 20.

¹⁷⁸ See Tr. J. Day 1, 241:14-242:15. See also letter from Mr Uslu, Director General of the GDFI, dated 3 December 2012 (Exh. R-25).

¹⁷⁹ See Mrs Özbilgiç’s Witness Statement, §§ 21-22; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 2, 30:8-16; Tr. J. Day 1, 247:10-13.

reasons the GDFI did not prepare a Turkish version of the BIT prior to signature and there was no Turkmen language version prepared either.¹⁸⁰ The BIT was available for signature when the Turkish Prime Minister visited Turkmenistan.

225. As already noted at § 135, the BIT was concluded during a short visit of the Turkish Prime Minister to Turkmenistan on 2 May 1992. Two versions were signed: in English and Russian. The Russian text was prepared by officials of the Turkic Republics in their offices in Moscow.¹⁸¹ There had been no discussion concerning the Russian text between the representatives of Turkey and Turkmenistan.

226. There was no refuting evidence and nothing to suggest, as claimed by Respondent, that the original version of the BIT was Turkish. Mrs Özbilgiç convincingly testified that the Turkish version was prepared several months only after the English version of the BIT was signed by Turkey and Turkmenistan representatives, and was based on the English version.¹⁸² The Turkish translation was produced only for the purposes of ratification together with an explanatory note for the benefit of the Turkish legislators.¹⁸³

ii. The ambiguity found in the English original version is also present in the Russian version

227. As determined above,¹⁸⁴ the English version cannot be held to have any superior or prevailing value by virtue of it being the original version of the BIT. However, because the Russian text is a translation of the English text, which both Parties agree is ambiguous, it is not surprising that the ambiguity found in the original text is reflected in the Russian translation. In fact, the Parties' experts accept this proposition. As Dr Kornfilt points out,

¹⁸⁰ See Tr. J. Day 1, 246:1-247:13; Tr. J. Day 2, 33:18-21; Tr. J. Day 2, 26:21-27:1.

¹⁸¹ See Tr. J. Day 1, 242:16-243:8.

¹⁸² See Mrs Özbilgiç's Witness Statement, § 25; Tr. J. Day 1, 246:1-13; Tr. J. Day 2, 8:7-14. See also letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33).

¹⁸³ The drafting process of the different versions of the BIT as explained by Mrs Özbilgiç, including the fact that the BIT was first drafted in English, is confirmed by Mr Uslu, Director General of the GDFI, in his letter of 30 November 2012 (Exh. C-33).

¹⁸⁴ See above § 221.

“[i]n general, translations of problematic, vague and ambiguous texts are themselves vague and ambiguous and are usually not clearer, syntactically better shaped and more fluent than the original”.¹⁸⁵ Dr Tyulenev similarly argues that the ambiguity found in the original text is to be expected in the translated text.¹⁸⁶

228. Secondly, Professor Gasparov’s analysis of the meaning of “*pri uslovii, esli*” is more nuanced than some of his statements suggest. The Tribunal did note his assertion that he “*categorically*” rejects the idea that “*pri uslovii, esli*” could be ambiguous;¹⁸⁷ he also insists that the only accurate, correct translation of the Russian text is “*provided that*” or “*on the condition that*”. According to him, this would be obvious to “*any reasonably competent speaker of the [Russian] language*”.¹⁸⁸ However, Professor Gasparov also recognises that “*pri uslovii, esli*” is not as stylistically satisfactory as “*pri uslovii, chto*” to translate “*on the condition that*”. He even goes so far as to characterise “*pri uslovii, esli*” as tautological in nature.¹⁸⁹
229. Thirdly and importantly, the Tribunal notes that the first certified English translation of the Russian authentic text submitted by Respondent in the *Kılıç* case translated “*pri uslovii, esli*” as “*on the condition that, if*”, as opposed to “*on the condition that*”.¹⁹⁰ This confirms that a reasonably competent Russian speaker (and even a professional translator) can translate this conjunction in this way and significantly undermines Professor Gasparov’s analysis.

¹⁸⁵ Dr Kornfilt’s First Expert Linguistics Opinion, § 27.

¹⁸⁶ Dr Tyulenev states: “*This is impossible for an imperfect text to result in a correct translation. Among translation scholars and practitioners, this situation is described as the ‘garbage in-garbage out’ effect: if a text one is given to translate should contain any infelicity, it is impossible to produce a translation that would be better, unless you temper with the original text [...]*”. (Dr Tyulenev’s Second Expert Linguistics Opinion, § 20 (emphasis in the original).)

¹⁸⁷ Prof Gasparov’s Expert Linguistics Opinion, § 36.

¹⁸⁸ Prof Gasparov’s Expert Linguistics Opinion, § 37.

¹⁸⁹ See Prof Gasparov’s Expert Linguistics Opinion, § 21.

¹⁹⁰ See *Kılıç* Decision (Exh. RLA-1), § 4.18.

230. Fourthly, “*pri uslovii, esli*” is indeed ambiguous. The Tribunal finds Dr Tyulenev’s analysis at § 20 of his second opinion persuasive:

In the flawed Russian Version of the Turkey-Turkmen BIT, the conflated ambiguous ‘pri uslovii, esli’ may be better expressed in Russian as ‘pri uslovii, chto, esli’. That is why ‘pri uslovii, chto’ would be a preferable version [if] the mandatory meaning of the clause were to be stated excluding any ambiguity. Since this has not been done, the result is that Article VII.(2)(c) can be read as either expressing a mandatory condition (best expressed by ‘pri uslovii, chto’) or an optional condition (best expressed by ‘pri uslovii, chto, esli’).

231. In addition, as pointed out by Dr Tyulenev, the conjunction “*pri uslovii, chto esli*”, which Professor Gasparov recommends to employ to translate “*provided that, if*”, is in fact “*rarely used*”.¹⁹¹

iii. The ambiguity of the Russian authentic version of Article VII(2) is consistent with the poor quality of the Russian text as a whole

232. The ambiguity of the conjunction “*pri uslovii, esli*” in the Russian version is consistent with the poor quality of the text as a whole - poor quality that both Professor Gasparov¹⁹² and Dr Tyulenev¹⁹³ have highlighted.¹⁹⁴

iv. The argument that the proviso only applies to ICC arbitration is rejected

233. Finally, in the interest of completeness, the Tribunal notes that Claimants suggested that as the proviso in the Russian version is included in the sentence stating the third option for arbitration, *i.e.* at the Court of Arbitration of the International Chamber of Commerce, this means that it applies to ICC arbitration only. The Tribunal rejects this argument. First, the

¹⁹¹ Dr Tyulenev’s Second Expert Linguistics Opinion, § 19. *See also* Dr Tyulenev’s Second Expert Linguistics Opinion, § 22.

¹⁹² Dr Glad’s Expert Linguistics Opinion, § 39.

¹⁹³ Dr Tyulenev’s Second Expert Linguistics Opinion, § 24.

¹⁹⁴ *See* the examples provided by Dr Tyulenev in his First Expert Linguistics Opinion at § 6 and in his Second Expert Linguistics Opinion at §§ 15-16.

proviso being added only to the provision on ICC arbitration does not conform with the English version of the BIT. Second, it makes no sense for the proviso, however it is understood, to apply only to ICC arbitration and not to ICSID and ad hoc arbitration.¹⁹⁵

234. The Tribunal concludes that the ordinary meaning of the Russian authentic text of Article VII(2), like the English authentic text of which it is a translation, is ambiguous.

235. Therefore, in order to resolve the ambiguity arising out the grammatically awkward formulation of Article VII(2)'s proviso, the Tribunal will turn to the context of Article VII(2)'s proviso and the object and purpose of the BIT, which both point to the optional nature of the local court requirement. In doing so, the Tribunal will focus its analysis on the text of the BIT.

(ii) The context of Article VII(2)'s proviso

236. The *chapeau* of Article VII(2) in the English authentic version of the BIT provides that

*If these disputes [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to [ICSID, UNCITRAL or ICC arbitration].*¹⁹⁶

237. Similarly, Respondent's English translation of the Russian authentic version reads as follows:

If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the

¹⁹⁵ Claimants acknowledged at the hearing that this argument may be wrong and it is not repeated in their post-hearing briefs.

¹⁹⁶ Exh. C-1 (emphasis added). Dr Tyulenev translated the *chapeau* of Article VII(2) as follows: "If the indicated conflicts cannot be settled in this way during six months after the date of the written notification, mentioned in paragraph 1, then the conflict may be submitted - at investor's choice - [...]". (Emphasis added.)

*conflict may be submitted at investor's choice to [ICSID, UNCITRAL or ICC arbitration].*¹⁹⁷

238. The permissive wording of Article VII(2)'s *chapeau* suggests that the Contracting States' intention was to offer to their investors the *possibility* to have recourse to international arbitration after the expiration of the six-month cooling-off period. In addition, as Professor Park noted in the *Kılıç* case, if contrary to the liberal language of the *chapeau* the local court requirement were read as mandatory, this would amount to creating "a pathology in which the same sentence purports to permit an investor to commence arbitration six months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point".¹⁹⁸ This Tribunal similarly sees little logic in requiring investors simultaneously to negotiate for six months *and* to go to local courts for a year from the same start date.
239. A better, much more plausible interpretation that would avoid this logical hurdle and be consistent with the permissive language of Article VII(2)'s *chapeau*, is that only investors who *choose* to go to local courts first will have to wait for a year prior to initiating international arbitration proceedings (in the absence of a final decision within the one-year period). By contrast, investors who choose *directly* to initiate international arbitration proceedings will only have to negotiate for six months after the notice of dispute prior to going to arbitration.
240. This "optional" interpretation, which depends on the investor's *choice*, is also much more in accord with the object and purpose of the BIT as described in its preamble, than a "mandatory" interpretation of Article VII(2)'s proviso.

¹⁹⁷ Exh. R-1 (emphasis added). Respondent's initial and subsequent English translations of the *chapeau* in the *Kılıç* case were identical to this one. See *Kılıç* Decision (Exh. RLA-1), §§ 4.18-4.19.

¹⁹⁸ *Kılıç* Separate Opinion (Exh. RLA-98), § 14.

(iii) The object and purpose of the BIT

241. The preamble of the English authentic version of the BIT reads as follows:

The Republic of Turkey and Turkmenistan, hereinafter called the Parties,

Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party,

Recognizing that agreement upon the treatment to be accorded such investment the flow of capital and technology and the economic developments of the Parties,

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and

Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments,

Hereby agree as follows: [...]¹⁹⁹

242. Respondent's English translation of the preamble of the Russian authentic version provides as follows:

The Republic of Turkey and Turkmenistan, hereinafter referred to as "Parties",

desiring to promote the strengthening of the economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party,

recognizing that this Agreement after the provision of appropriate conditions to such investment will stimulate the flow of capital and technology as well as the economic development of both Parties,

¹⁹⁹ Exh. C-1.

agreeing that fair and equitable approach to investments is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and

having resolved to conclude an Agreement on the promotion and reciprocal protection of investments,

have agreed as follows: [...] ²⁰⁰

243. Accordingly, the expressed intent of the BIT that the treaty is to establish an approach or conditions that are “*fair and equitable*”, and provide a “*stable framework*” for the investor from the other country. This must mean that where a dispute arises the investor has the opportunity to determine where the dispute should be determined: in the local courts or in international arbitration (and then which form, ICC, ICSID, ad hoc). To require a party to first go to the local courts with the expense and delay that will ensue would be neither “*fair and equitable*” nor provide a clear and “*stable framework*”.
244. If prior recourse to local courts were held to be compulsory, there would be two possible scenarios: (a) the local court decision is swiftly rendered in less than a year; or (b) the local court decision is not rendered in less than a year and the investor may initiate international arbitration proceedings.
245. Under the first scenario, there is a risk of denial of justice in the local courts (if the decision is rendered quickly without regard to due process), and a risk of further litigation (if a claim for denial of justice before an arbitral tribunal is possible). Under the second scenario, there is again a risk of further litigation of the same dispute. Both situations, with their attendant costs, run counter to the creation of a “*stable framework for investment*” and the “*maximum effective utilization of economic resources*” (both of the State and of the investor).
246. For these reasons the Tribunal has concluded that an optional reading of the proviso minimises both risks by allowing the investor to have direct access to international

²⁰⁰ Exh. R-1.

arbitration proceedings and to invoke the BIT's protections straight after the expiration of the cooling-off period, thus avoiding the risks of further litigation of the dispute and denial of justice issues potentially arising out of a very quick local court decision. By corollary, if the party wishes to avoid the cooling-off period and depending on the issues in dispute it could choose to go to the local Turkmen courts in which case it could not go to arbitration unless the local court failed to render a decision for more than twelve months.

247. In view of the above, the Tribunal has come to the conclusion that read in its context and in light of the object and purpose of the Treaty, Article VII(2)'s proviso is to be interpreted as offering an option to go either to international arbitration or the local courts, in both its English and Russian authentic versions.

(iv) Other arguments of the Parties with respect to the interpretation of Article VII(2) of the BIT

248. Both Parties made extensive arguments relating to the circumstances of the conclusion of the BIT (as described in part in §§ 156-170, 173-174, 185-190, 202-205 above) in support of their respective interpretations. The Tribunal has examined those arguments and has come to the conclusion that they are neither necessary for the conclusions it has already reached, nor do they undermine its conclusion as to the meaning of Article VII(2) under Article 31 of the Vienna Convention as determined above. For the sake of completeness the Tribunal deals with these contentions below.

249. Specifically, Claimants presented witness and documentary evidence in support of their contention that Turkey intended by Article VII(2) to have an optional character. Respondent presented three arguments, based on Turkey's alleged BIT practice, which it contends show that Turkey intended the proviso to Article VII(2) would have a mandatory character.

250. Article 32 of the Vienna Convention provides that

Recourse may be had to supplementary means of interpretation, including preparatory works of the treaty and the circumstances of its conclusion, in

order to confirm the meaning resulting from the application of article 31 [...].

251. The range of supplementary means of interpretation that a tribunal may use to elucidate the meaning of ambiguous treaty language is broad. Article 32 of the Vienna Convention specifically mentions the preparatory work of the treaty and the circumstances of its conclusion. As already noted there were no *travaux préparatoires* in respect of the BIT – or at least none were presented in this arbitration.

a. Claimants’ contentions as to Turkey’s reading of Article VII(2) of the BIT

252. As described above, Claimants have used Mrs Özbilgiç’s testimony and Mr Uslu’s letter of 30 November 2012 as evidence showing the drafting process of the different versions of the BIT.²⁰¹ Claimants have also relied on Mrs Özbilgiç’s and Mr Uslu’s own reading of Article VII(2)’s proviso, as recorded in her testimony and his letter,²⁰² to elucidate the meaning of Article VII. Claimants have also invoked a number of other treaties to which Turkey is a party.²⁰³

253. Mrs Özbilgiç stated that it was the GDFI’s intention that Article VII(2) in Turkey’s English draft text provided for an optional local court requirement prior to initiating international arbitration proceedings. Mrs Özbilgiç also specified that she had no reason to believe that the Turkish delegation told their Turkmen counterparts that this text was not optional.²⁰⁴ Finally, under cross-examination Mrs Özbilgiç said that the use of the phrase “*provided that, if*” in the English authentic text was not considered to be an error by either Contracting Party.²⁰⁵

²⁰¹ See above §§ 221-226.

²⁰² Mrs Özbilgiç’s Witness Statement, § 26; Tr. J. Day 1, 249:9-21; Tr. J. Day 2, 14:5-25; Tr. J. Day 2, 29:4-9; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33). See also letter from the GDFI dated 26 April 2013 (Exh. C-55).

²⁰³ See discussion in the next subsection, in particular §§ 266-271.

²⁰⁴ See Tr. J. Day 2, 29:10-15.

²⁰⁵ See Tr. J. Day 2, 41:7-44:23.

254. Claimants further rely on the 2012 letter from Mr Uslu where he states that the intent behind the optional nature of the Article VII(2)'s proviso was “to avoid [the] repetition of disputes”.²⁰⁶
255. Respondent challenged the credibility of the evidence of Mrs Özbilgiç and Mr Uslu as “biased” and “calculated to strengthen [Claimants’] position”,²⁰⁷ and lacking “all indicia of reliability”.²⁰⁸ This is largely because they were and are still employees of the Turkish Government. This criticism does not refute their evidence *per se*.
256. Whilst the Tribunal found this evidence interesting background, it does not consider the subjective intent of Turkey as expressed by Mrs Özbilgiç and Mr Uslu determinative or relevant in light of the Tribunal’s conclusions as to the meaning of Article VII(2). The Tribunal has not relied on this evidence for the purposes of its determination of the optional nature of Article VII(2).

b. Respondent’s contentions based on Turkey’s BIT practice

257. Respondent has raised a number of arguments based on Turkey’s BIT practice in response to Claimants’ arguments based on Mrs Özbilgiç’s testimony, and other Turkish BITs and their accompanying explanatory notes.²⁰⁹

i. Respondent’s arguments based on the Turkish version of Article VII(2)

258. Respondent’s first argument is that the Turkish text of the BIT that the GDFI translated from English to Turkish and sent to the Ministry of Foreign Affairs for transmittal to Parliament uses mandatory as opposed to optional language in Article VII(2), as do the Turkish translations of the three other Turkic States BITs. By contrast, Claimants point to

²⁰⁶ Letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33).

²⁰⁷ Tr. J. Day 1, 55:13-14.

²⁰⁸ Reply, § 86.

²⁰⁹ See e.g. above § 174.

the Explanatory Note to the Turkish version of the BIT, which in their view highlight the optional nature of Article VII(2)'s proviso.²¹⁰

259. The Tribunal does not consider these contentions helpful or relevant. First, the Turkish text is not an authentic version. Second, it was prepared for presentation to the Turkish Parliament so that the Treaty could be ratified, together with an explanatory note of the treaty's purpose and intent. Third, the structure of the Turkish text is different from that of the authentic version in that the proviso comes before the systems of arbitration which can be chosen. Fourth, as noted by the Parties' linguistics experts, there are notable discrepancies between the English and the Turkish texts, especially additional text that did not appear in the English original. In that regard, the Tribunal notes Dr Kornfilt's comment that a translator would not normally add entire phrases such as "*in accordance with the procedures and laws*" on his or her own initiative. Indeed, it is "*much more strange for a translator to add a phrase that was not in the original text, than for a translator to accidentally omit something while translating.*"²¹¹ Yet, the Turkish translator did make these additions, thereby further diminishing the value of the Turkish translation.²¹²
260. Finally, the Turkish text of the BIT and the GDFI's Explanatory Note presented to the Turkish Parliament at the same time are contradictory.
261. On its face, the language of Article VII(2) of the Turkish text is significantly different from the authentic versions which make no reference to the laws of the courts of the State party in which the legal proceeding may be brought.²¹³ In addition, the English translation of the

²¹⁰ See above § 205.

²¹¹ Dr Kornfilt's Second Expert Linguistics Opinion, § 19.

²¹² Similar discrepancies appear in the Turkish translations of the other Turkic States treaties. (See Exhs. R-14 and R-17, Kazakhstan-Turkey BIT, Article VII(2); Exhs. R-15 and R-18, Kyrgyzstan-Turkey BIT, Article VII(2); Exhs. R-16 and R-19, Turkey-Uzbekistan BIT, Article VII(2)).

²¹³ See above §§ 88-92.

Explanatory Note presented to the Turkish Parliament²¹⁴ with the Turkish text of the BIT gives the following explanation of Article VII:

*This Article sets forth remedies for dispute which may arise between one Party and the investor of the other Party. In accordance with the stipulated procedure, the dispute shall be primarily resolved by means of negotiation, if not resolved within six months; a right of recourse to international arbitration may be exercised provided that the recourse to local judicial bodies remains open. However, if the investor brought the dispute before the local judicial body and the final decisions was rendered, there is no possibility for recourse to international arbitration, and in case the final decision was not rendered within one year and both Parties are signatories to the following Agreements, the dispute may be taken to the [ICSID] or to an arbitration tribunal which will be constituted in accordance with UNCITRAL Arbitration Rules, or to the Court of Arbitration of the Paris International Chamber of Commerce.*²¹⁵

262. In light of the above differences and contradictions between the Turkish translation and its Explanatory Note, the Tribunal has concluded that little reliance, if any, can be placed on the Turkish text of the BIT to elucidate the meaning of Article VII(2).

ii. Respondent's argument based on the Russian version of the Turkey-Kazakhstan and Turkmenistan BITs

263. The second argument is that the Kazakh and Turkmen government representatives translated the English text of the Treaty into Russian using mandatory language. The Russian versions of both the BIT and the Kazakhstan-Turkey BIT are translations from a nearly identical English text.²¹⁶ Kazakhstan, like Turkmenistan, first accepted Turkey's English draft text.²¹⁷

²¹⁴ Exh. C-56.

²¹⁵ The same contradiction comes to light when one compares the Turkish translation of the Turkey-Uzbekistan BIT and its explanatory note (see Exh. R-16 and Respondent's Hearing Document No. 3).

²¹⁶ See Exhs. R-17, R-18, and R-19; Tr. J. Day 1, 19:17-18.

²¹⁷ See letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Mrs Özbilgiç's Witness Statement, § 22; Tr. J. Day 1, 19:22-20:1.

264. The Tribunal has already concluded that the Russian version of the BIT does not clearly provide for mandatory recourse to local courts prior to initiating international arbitration proceedings. It is ambiguous.²¹⁸ As to the Kazakhstan-Turkey BIT, the Tribunal notes that the Russian version also uses the same ambiguous wording as in the Russian version of the BIT, namely “*pri uslovii, esli*”.²¹⁹
265. As Respondent’s argument is primarily based on the alleged mandatory nature of the local court requirement, the Tribunal considers this argument unpersuasive.

iii. Respondent’s arguments based on Turkey’s BIT practice

266. Respondent’s third argument is that, contrary to Claimants’ position, Turkey’s practice in the conclusion of BITs does not show that the provision in dispute must be viewed as optional. While Claimants underscore the optional nature of the Turkish version of the Hungary-Turkey BIT, Respondent emphasises that the Hungarian government representatives used mandatory language to translate the same English text as in Article VII(2) in the Hungary-Turkey BIT into their own language; so did the GDFI when it translated the Croatia-Turkey BIT into Turkish.
267. Here again, the Tribunal is reluctant to place too much reliance on Respondent’s argument based on the existence of translations of the English phrase “*provided that, if...and...*” in mandatory terms in certain other treaties. The review of the treaties submitted by the Parties shows inconsistencies in the translation of the disputed English phrase in the different language versions of the Turkish BITs concluded before and around the conclusion of the BIT, as well as after its conclusion.
268. For example, as noted above, the Turkish language version of the Hungary-Turkey BIT is worded in optional terms, as is the explanatory note that was presented to Parliament along with this translation. However, the Tribunal notes that the Hungarian language version of

²¹⁸ See above § 234.

²¹⁹ Exh. R-20.

the proviso appears to be mandatory. Similarly, the 1988 Switzerland-Turkey BIT contains a local court requirement which is optional in the French version and mandatory in the Turkish version.²²⁰ The Czech and Turkish authentic versions (and the accompanying explanatory note in Turkish) of the Czech Republic-Turkey BIT, which was concluded on 30 April 1992, just a few days before the BIT, contain optional language in Article VII(2).²²¹ By contrast, the Turkish version of the Croatia-Turkey BIT concluded in 1996 is phrased in mandatory terms.²²² As indicated above, the Turkish translations of the Turkic States BITs also contain mandatory language, but their reliability is limited. It is worth recalling that the English version of all these treaties use the disputed English phrase “*provided that, if...and...*”.

269. In the Tribunal’s view, these inconsistencies among the different language translations of the English phrase at issue do not allow reliance on the texts of other BITs or the identification of treaty practices or policies, especially because the Tribunal has not been briefed on the negotiations of each of these treaties.
270. The Tribunal considers that it is not its task to resolve the inconsistencies between the various language versions of Turkey’s BITs;²²³ in any event, it has not been put in a position to do so.
271. Accordingly, the Tribunal has concluded that these treaty practices are inconsistent and cannot assist with the construction of Article VII(2).

(v) Distinguishing Kılıç

272. From the above analysis it will be clear that this Tribunal has reached a conclusion on the meaning of Article VII(2) which is different from the *Kılıç* tribunal. The Tribunal has

²²⁰ See Exh. C-83; Hearing Document No. 6.

²²¹ See Exhs. C-60, C-61, and C-62.

²²² See Exhs. R-26, R-27. The Tribunal has not had the benefit of the English translation of the Croat version of the Croatia-Turkey BIT.

²²³ Respondent appears to share this view. See Tr. J. Day 1, 53:4-13.

carefully considered the Decision and the Award in the *Kılıç* case. With great respect to the distinguished arbitrators in that case, this Tribunal has reached a different view on the construction and meaning of Article VII(2) for the reasons which are given in this Decision.

273. This Tribunal does not think it helpful or appropriate to express any views on the *Kılıç* Decision. That decision would have been based on the evidence and arguments presented to that tribunal and it reached its conclusions, with a separate opinion from Professor Park, after the deliberations of the arbitrators. This Tribunal is not privy to all the submissions made and evidence presented to the *Kılıç* tribunal or to the deliberations of the arbitrators in that case.
274. This Tribunal's conclusions have been reached after reviewing the evidence presented to the Tribunal and the arguments both in writing and at the hearing. This Tribunal has benefitted to a certain extent from the evidence and examination of Mrs Özbilgiç and the linguistics experts and their examination at the hearing. It is understood that Mrs Özbilgiç was not examined before the *Kılıç* tribunal²²⁴ and that Professors Gasparov, Glad,²²⁵ Green, Dedes, Leonard, and Tyulenev did not give evidence in that arbitration.²²⁶ Furthermore, this Tribunal has been influenced by its conclusion that the English version of the treaty was the original text and the basis for the proposal for the BIT, and the Russian authentic version was a translation of the English version. The *Kılıç* tribunal appears to have proceeded on the basis that the Russian version was the original version of the Treaty.

²²⁴ See *Kılıç* Decision (Exh. RLA-1), §§ 1.40-1.43; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013 (“*Kılıç Award*”) (Exh. RLA-98), §§ 1.2.39-1.2.42.

²²⁵ Dr Glad was not presented for examination at the hearing in this proceeding owing to his medical condition. See Minutes of the Organizational Meeting of 20 December 2013, item no. 6.

²²⁶ See *Kılıç* Decision (Exh. RLA-1), §§ 1.24-1.25, 1.52-1.53; *Kılıç Award* (Exh. RLA-98), §§ 1.2.24-1.2.25, 1.2.63, 1.2.65, 1.2.48-1.2.49, 1.2.68. Dr Kornfilt appears to be the only linguistics expert to have given evidence before the *Kılıç* tribunal.

275. The Tribunal finally notes that, in any event, there is no precedent in international arbitration and although previous decisions may be influential or even persuasive, they do not bind other tribunals or exonerate other tribunals from deciding issues on the specific facts and evidence of each case.

(4) The effect of Article VII(2) on the present case

(a) Parties' positions

276. Respondent argues that the mandatory nature of Article VII(2) means not only that the investors cannot choose whether to comply with this provision, but also that an essential element of the State's consent to international arbitration under the BIT has not been complied with, thereby "*depriv[ing] the Tribunal of jurisdiction and requir[ing] the dismissal of all claims in this case*".²²⁷

277. In this case, the Parties to the BIT decided to condition their consent to international arbitration upon the prior submission of a dispute to the local courts in accordance with Article 26 of the ICSID Convention, which contemplates these types of requirements. Respondent contends that "*Claimants' failure to accept the State's offer to arbitrate on the terms and conditions prescribed in Article VII means that there is no agreement to arbitrate. An investor can only accept or not accept the State's offer as it stands in the BIT; it cannot unilaterally alter the terms and conditions of the offer*".²²⁸

278. Accordingly, as Claimants did not satisfy the local court condition, the Tribunal lacks jurisdiction to adjudicate the dispute. Therefore all claims asserted by Claimants in the Request must be dismissed for lack of jurisdiction.

279. In Claimants' view, Article VII(2) of the BIT provides for direct access to ICSID arbitration, with only an option to submit the dispute to the local courts. For this reason the

²²⁷ Memorial, § 10.

²²⁸ Memorial, § 20.

Tribunal has jurisdiction to consider all of Claimants' claims as set out in the Request. The Tribunal should therefore dismiss Respondent's objection to jurisdiction.

(b) Tribunal's conclusion

280. For the reasons set out above, the Tribunal has concluded that Article VII(2) provides for an option allowing an investor of one Contracting State to bring proceedings in one of three arbitration venues or in the local courts. If claims are brought in a local court then arbitration proceedings cannot be brought until one year has elapsed and no decision has been issued by that court.²²⁹
281. In this case, Claimants gave notice in writing of its complaints and the six-month period for amicable negotiations and settlement passed by without success. Claimants chose not to bring proceedings in the courts of Turkmenistan but rather to institute these ICSID arbitration proceedings. There was no impediment to Claimants having brought these proceedings. Accordingly, the Tribunal concludes that it has jurisdiction to determine the claims brought by Claimants in the Request.

B. Avoidance of the mandatory local court requirements because of the MFN clause in the BIT or the futility of proceeding in the Turkmen courts

282. These arguments were presented as an alternative in the event the Tribunal decided *par impossible* that Article VII(2) contains a mandatory local court requirement. As the Tribunal has not reached this conclusion, it is unnecessary to consider and decide these two alternative arguments.

²²⁹ The Tribunal expresses no view as to whether an investor can bring international arbitration proceedings if it is dissatisfied with a decision rendered by the local court in less than a year. Cf, however, *Kılıç Award* (Exh. RLA-98), § 6.5.4., and *Kılıç Separate Opinion* (Exh. RLA-98), § 22.

IX. COSTS

283. With regard to costs, in their submission of 4 April 2014, Claimants indicated that they had incurred €639,949.15 in legal fees and expenses, and €56,818.43 in expert fees and expenses, and paid €211,032.26 (US\$ 250,000) in advances to ICSID. Claimants also requested that the Tribunal order Respondent to bear all costs of this proceeding, and in particular, all costs related to the re-scheduling of the hearing originally scheduled to take place on 26-27 August 2013, specifically amounting to a total of €51,830.85 (€50,000 in legal fees and €1,830.85 for experts).²³⁰
284. For its part, Respondent requested that the Tribunal order Claimants to bear all costs of this proceeding, including its legal costs and expenses, fees of its experts, and its share of the advance paid to ICSID. Respondent indicated that it had incurred US\$ 2,897,136.05 in legal fees, US\$ 232,024.28 in expert fees and expenses, and US\$ 156,587.62 in other expenses, for a total of US\$ 3,535,747.95.²³¹
285. In their comments on Respondent's costs statement, Claimants contended that Respondent's costs were disproportionate.²³² In its comments on Claimants' costs statement, Respondent first brought to the Tribunal's attention its belief that Claimants are financing this proceeding under arrangements with third-party funders, and requested that the Tribunal direct Claimants to disclose: (i) whether they have entered into such third-party funding arrangements; (ii) if so, the terms of the arrangements; and (iii) whether there are any contingency fee arrangements, with either Claimants' counsel or the third-party funders.²³³ The Tribunal rejected that application – see Tribunal's decision at § 50 above.
286. The Tribunal has decided not to make any award of costs at the present time and to leave this issue to be determined at a later stage in this arbitration unless agreed between the Parties.

²³⁰ See CLs. Costs, p. 3.

²³¹ See Resp. Costs, p. 2.

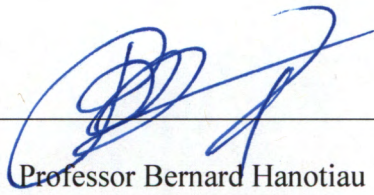
²³² See CLs. Cmts Costs, p. 1.

²³³ See Resp. Cmts Costs, p. 2.

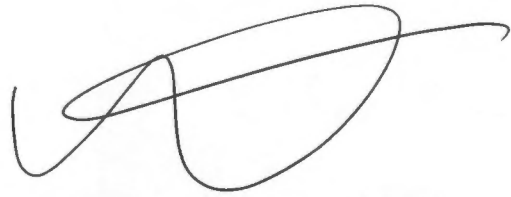
X. OPERATIVE PART

287. In light of the foregoing, the Tribunal decides as follows:

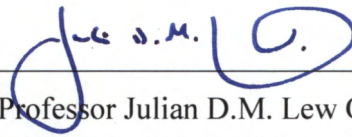
- a) Respondent's objection to jurisdiction on the basis of Article VII(2) of the BIT is dismissed.
- b) The allocation of costs is reserved for subsequent determination.
- c) The Parties are invited to confer regarding the procedural calendar for the second phase of the proceedings in accordance with paragraph 13.1 of PO No. 1, and to report to the Tribunal in this respect within 30 days of the date of this Decision.



Professor Bernard Hanotiau
Arbitrator



Professor Laurence Boisson de Chazournes
Arbitrator



Professor Julian D.M. Lew QC
President of the Tribunal