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

In the matter between

Tulip Real Estate Investment and Development Netherlands B.V.
(Claimant)

and

Republic of Turkey
(Respondent)

(ICSID Case No. ARB/11/28)

DECISION ON BIFURCATED JURISDICTIONAL ISSUE

Members of the Tribunal

Dr. Gavan Griffith QC (President)
Mr. Michael Evan Jaffe
Prof. Dr. Rolf Knieper

Secretary of the Tribunal

Ms. Martina Polasek

Representing the Claimant	*Representing the Respondent*
Stuart H. Newberger George D. Ruttinger Meriam Alrashid Crowell &Moring LLP	Robert C. Sentner Harry P. Trueheart Nixon Peabody LLP M. Rasim Kuseyri Ferdi Karoglu Simge Sertoglu Akyuz Kuseyri Hukuk Bürosu Michael E Schneider Matthias Scherer Laura Halonen Lalive

Date of dispatch to the Parties: 5 March 2013

TABLE OF CONTENTS

1) Parties

1. The claimant is Tulip Real Estate and Development Netherlands B.V. ("Tulip" or "Claimant"), a company constituted in accordance with the laws of The Netherlands. Claimant is a wholly owned subsidiary of the van Herk group, a Dutch investment company.
2. Claimant is represented by Mr. Stuart H. Newberger and Mr. George D. Ruttinger of Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington D.C. 20004 USA and Ms. Meriam Alrashid of Crowell & Moring LLP, 11 Pilgrim Street, London, EC4V 6RN, United Kingdom.
3. The respondent is the Republic of Turkey ("Republic of Turkey" or "Respondent").
4. Respondent is represented by Mr. Michael E Schneider, Mr. Matthias Scherer and Ms. Laura Halonen of Lalive, 35 rue de la Mairie, CH-1207 Geneva, Switzerland; Mr. Robert C. Sentner and Mr. Harry P. Trueheart of Nixon Peabody LLP, 437 Madison Avenue, New York NY 10022 USA; and Mr. M. Rasim Kuseyri, Mr. Ferdi Karoglu and Ms. Simge Sertoglu Akyuz of Kuseyri Hukuk Bürosu, Via Tower, Nergiz Sok. No. 7/49, Sogutozu 06520, Yenimahalle/Ankara, Turkey.

2) Procedural History

5. On 11 October 2011 the International Centre for Settlement of Investment Disputes received a Request for Arbitration (the "Request"), dated the same, from Claimant against Respondent. On 12 October 2011, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, acknowledged receipt of the Request and transmitted a copy to Respondent.

6. The dispute is brought under the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated 27 March 1986 (the "BIT").

7. On 28 October 2011, the Secretary-General of ICSID registered the Request and notified the Parties, pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Convention") and in accordance with Institution Rules 6 and 7. The case was registered as ICSID Case No. ARB/11/28. In the same letter the Secretary-General invited the Parties to

inform the Centre of any agreed provisions as to the number of arbitrators and the method of their appointment as soon as possible.

8. On 16 November 2011, Respondent proposed, pursuant to Rule 2(1)(b) of the ICSID Arbitration Rules, a procedure for constituting the Tribunal.

9. On 1 December 2011, Claimant appointed Michael Evan Jaffe, a national of the United States, as arbitrator in accordance with Article 37 of the Convention.

10. By letter dated 1 December 2011, the Centre informed the Parties that it understood that no agreement had been reached on the method of constituting the Arbitral Tribunal and that it would act on the appointment as soon as the method was established.

11. By letter dated 27 December 2011, Claimant informed ICSID that it opted for the formula provided for in Article 37(2)(b) for the constitution of the Tribunal: that it consist of three arbitrators, with each party appointing an arbitrator, and the third, the President of the Tribunal, to be appointed by agreement of the Parties.

12. On 28 December 2011, ICSID's Secretary-General informed the Parties that, in accordance with Article 37(2)(b) and Rule 2(3) of the Rules, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the Parties. The Secretary-General also invited Claimant, in accordance with Rules 3(1)(a)(i) and (ii), to propose the name of a person who shall be the President of the Tribunal and invited Respondent to concur in this proposal or to propose another person as the President, and to appoint another arbitrator.

13. On 10 January 2012, ICSID informed the Parties that Michael Evan Jaffe accepted his appointment as arbitrator.

14. On 25 January 2012, Respondent appointed Professor Rolf Knieper, a national of Germany, and informed the Centre that the Parties were cooperating to agree upon the President of the Tribunal.

15. On 30 January 2012, ICSID informed the Parties that Professor Rolf Knieper accepted his appointment as arbitrator.

16. On 23 March 2012, Respondent informed ICSID that the Parties had reached an agreement on the appointment of Dr. Gavan Griffith, QC, a national of Australia, as

the President of the Tribunal. On 26 March 2012, Claimant confirmed that the Parties agreed to appoint Dr. Griffith as President of the Tribunal.

17. On 28 March 2012, ICSID's Secretary-General notified the Parties that the Tribunal was deemed to be constituted in accordance with Article 37(2)(b) and under Rule 6. The Tribunal is thus composed by (i) Michael Evan Jaffe (appointed by Claimant), (ii) Professor Rolf Knieper (appointed by Respondent) and (iii) Dr. Gavan Griffith (appointed by agreement of the Parties). The Centre also informed the Parties and the Tribunal that Ms. Martina Polasek, ICSID, would serve as the Secretary to the Tribunal.

18. On 30 April 2012, pursuant to ICSID Arbitration Rule 13(1), the Tribunal held the first session in Paris, France.

19. On 22 May 2012, after consultation with the Parties, Procedural Order No. 1 was issued by the President of the Tribunal, recording the Parties' agreement and the Tribunal's decisions on a number of procedural matters. Among other things, it was agreed that the applicable Arbitration Rules would be the Rules in force as of April 2006 and that the place of proceedings would be Paris, France.

20. On 15 August 2012, pursuant to Procedural Order No. 1, Claimant submitted its Memorial on Jurisdiction, Merits and Damages together with witness statements of Mr. Meyer Benitah ("Benitah 1st W/S"), Mr. Erik Esveld ("Esveld W/S") and Mr. Huseyin Burak Erten ("Erten W/S") and an expert report of Dr. José Alberro ("Alberro E/R").

21. On 12 October 2012, Respondent filed a Request for Bifurcation in accordance with the timetable established in Procedural Order No. 1, para 13. In its Bifurcation Application, Respondent applied to have three objections to jurisdiction heard as preliminary questions, namely:

    (1) Claimant's claims are contract claims not treaty claims;

    (2) It is premature to decide any treaty claims and they are therefore inadmissible; and

(3) The mandatory negotiation period set out in Article 8(2) of the BIT was not respected, taking the dispute outside the Tribunal's jurisdiction or making it inadmissible.[1]

22. On 16 October 2012, the Tribunal invited Claimant to provide its observations to the Bifurcation Application by 26 October 2012.

23. On 26 October 2012, Claimant filed its Reply to the Bifurcation Application.

24. On 2 November 2012, the Tribunal issued its Decision on Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention which determined to deal only with Respondent's third objection, concerning compliance with Article 8(2) as a preliminary question. The Tribunal also rejected Respondent's application to suspend the proceedings on the merits and made procedural directions for the disposition of the bifurcated issue.

25. On 21 November 2012, Claimant filed its Memorial on Article 8(2) ("C Memorial"), together with a witness statement of Mr. Meyer Benitah dated 19 November 2012 and an expert opinion of Prof Rudolf Dolzer dated 20 November 2012.

26. On 14 December 2012, Respondent filed its Counter-Memorial on Compliance with Article 8(2) of the BIT.

27. On 27 December 2012, Claimant filed its Reply on Compliance with Article 8(2).

28. On 31 December 2012, the Tribunal alerted the Parties of the recent Decision on Jurisdiction dated 21 December 2012 made by the Tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1) and invited the Parties to address this decision at the hearing to be held in Paris.

29. On 4 January 2013, Respondent wrote to the Tribunal, identifying the issues that it considered to be ripe for determination by the Tribunal and suggesting that no further evidence was required. Respondent also informed the Tribunal that it did not request to cross-examine Mr. Benitah or Prof Dolzer.

30. On 10 January 2013, the Tribunal confirmed the hearing and proposed a preliminary timetable for oral arguments leading to the hearing in Paris on 28 January 2013.

[1] Bifurcation Application, para. 66.

31. In attendance on behalf of Claimant were: Mr. Stuart Newberger, Mr. John Laird and Ms. Meriam Alrashid of Crowell and Moring LLP. Attending as Claimant's representatives were Mr. Meyer Benitah and Mr. Burak Erten.

32. In attendance on behalf of the Respondent were: Mr. M. Rasim Kuseyri and Ms. Simge Sertoglu Akyuz of Kuseyri Law Office; Mr. Robert C. Sentner and Mr. Craig R. Tractenberg of Nixon Peabody LLP and Mr. Michael E. Schneider, Mr. Joachim Knoll, Ms. Laura Halonen, Mr. Cristophe Guibert de Bruet and Mr. Alptug Tokeser of Lalive. Attending as Respondent's representatives were: Mr. Sami Arslan Askin (Head Legal Counsel of Prime Ministry) and Mr. Guray Ozsu (Legal Counsel of Prime Ministry).

3) Facts Relevant to Decision on the Article 8(2) Jurisdictional Issue

(1) Introduction

33. For the purposes of this Decision on the Article 8(2) Jurisdictional Issue, the Tribunal will limit itself to summarising the facts pertinent to this jurisdictional phase as currently pleaded. This summary is not to be taken as prejudging in any way the issues of fact or law to be resolved at a subsequent phase of this arbitration.

34. This dispute arises out of investments of Claimant in several residential and commercial construction projects in Istanbul and Ankara, Turkey, in particular, the Ispartakule III project in Istanbul. The Ispartakule III project was allegedly promoted to foreign investors by Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. ("Emlak"). Turkey's Housing Development Administration ("TOKI"), which is part of Turkey's Prime Ministry, and, at the times material to this decision, held a significant shareholding in Emlak. The exact percentage of this shareholding appears to have evolved since the commencement of the Ispartakule III project. It is unclear to the Tribunal the exact percentage of TOKI's current shareholding in Emlak, although it is common ground that TOKI is the majority or controlling shareholder in Emlak.[2] It is equally uncontested that at the time when the dispute arose both Emlak and TOKI were directed by the same person, Mr. Erdogan Bayraktar.

35. Claimant conducted its investments in Turkey by way of several special investment vehicles, including companies referred to as "Tulip I," "Tulip II" and "Tulip JV." Emlak and Tulip JV signed the Contract for Revenue-Sharing in Exchange for Sale of

[2] Respondent says that it currently stands at 75% (Transcript, 74:5-6). Other evidence indicates the shareholding at various times has been 39%, 50% and 99%.

Parcels for the Ispartakule III Project on 3 August 2006, and Tulip I took possession of the land from Emlak on behalf of Tulip JV a few days later.

(2) The Dispute

36. The dispute concerns allegations by Claimant that actions taken by Respondent deprived Claimant of the entire value of its real estate development projects. In summary, it is claimed -

    (1) Respondent failed to disclose pending zoning litigation in tender documents presented by Emlak and TOKI to Claimant, which litigation resulted in a delay of two years, i.e., to September 2008, in the commencement of construction, while Tulip JV waited for a construction permit.

    (2) In January 2007, the government official who was head of both TOKI and Emlak informed Claimant's investors that he would terminate the Contract if the investors did not oust the Turkish professionals who were part of Tulip JV and effectively hand over control of the project to a Turkish national recommended by the government official.

    (3) Once construction commenced, Respondent's agencies Emlak and TOKI harassed Claimant by, *inter alia*, delaying approvals, which should have been mere formalities; denying time extensions to cover delays for approvals, which should have been mere formalities; denying time extensions to cover delays for which Emlak and TOKI themselves were responsible; and, threatening to terminate the Contract for vague and unjustifiable reasons.

    (4) Respondent terminated the Contract in May 2010 - calling it a "termination for delay" – as a pretext for Respondent to take the project away from Claimant and seize all its assets associated with the Ispartakule III project as the delay could only be attributed to Respondent.

    (5) Respondent forcibly seized the construction site with the aid of police and private security forces and summarily seized the performance bond that had been posted by Claimant.

    (6) Respondent re-tendered the project while Claimant's court actions to nullify the termination of the Contract were still pending. What is more, according

to Claimant, the award of the new contract for the project was on less favourable terms to Respondent than under the contract with Claimant.

37. Claimant argues that these constitute breaches by Respondent of its obligations under the BIT, including -

(1) to ensure the fair and equitable treatment ("FET") of Claimant's investment (Article 3(1));

(2) to provide treatment that is not arbitrary or discriminatory;

(3) to accord at all times to Claimant's investment full protection and security (Article 3(2));

(4) to observe any obligation it may have entered into with regard to investments (Article 3(2));

(5) to refrain from unlawful expropriation without compensation (Article 5); and

(6) to protect foreign investors.

4) Scope of this Decision

38. As noted above, in its Decision on Bifurcation, the Tribunal determined to hear as a preliminary question only Respondent's third objection to jurisdiction, namely that Claimant has failed to respect the mandatory negotiation period set out in the Article 8(2) objection and otherwise directed Respondent's first and second objections to be heard with the merits in a subsequent phase.

5) Preliminary Matters to Analysis

(1) Introduction

39. The Tribunal finds it convenient to begin its analysis by reciting the relevant rules governing the Tribunal's jurisdiction and provisions of the BIT (section 2); considering the relevance of previous decisions (section 3); identifying the onus of establishing jurisdiction (section 4) and dealing with non-contentious matters (section 5).

(2) The rules governing the Tribunal's jurisdiction

40. The Tribunal's jurisdiction arises under the provisions of the ICSID Convention and the BIT.

41. The relevant provision of the ICSID Convention is Article 25(1) -

> *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.*

42. The relevant provision of the BIT that provides for ICSID arbitration is Article 8 -

> *1) For the purposes of this Article, an investment dispute is defined as a dispute involving:*
>
> *(a) the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party; or*
>
> *(b) a breach of any right conferred or created by this Agreement with respect to an investment.*
>
> *2) In the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of non-binding, third party procedures upon which such investor and the Contracting Party mutually agree. If the dispute cannot be resolved through the foregoing procedures the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ('Centre') for settlement by arbitration, at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award.*
>
> *3) (a) Each Contracting Party hereby consents to the submission of an Investment dispute to the Centre for settlement by arbitration.*
>
> *(b) Arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States and the 'Arbitration Rules' of the Centre.*

43. In the ordinary course, the principles for construction of relevant provisions of the ICSID Convention and the BIT are as provided under the Vienna Convention on the Law of Treaties ("Vienna Convention"). Although Turkey has not acceded to the Vienna Convention, the Parties nonetheless agreed that the Tribunal may proceed on the basis

that the principles stated in the Vienna Convention may be applied in construing the BIT, either as a matter of consent, or, in any event, as reflecting the accepted principles of customary international law. Although it may not be for the Parties to so agree, as it here appears to the Tribunal that issues of possible differences between that treaty and of customary international law do not lead to material differences of construction in interpreting and enforcing the BIT, the Tribunal has regard to the terms of the Vienna Convention, particularly Articles 31 and 32.

44. One further background matter that the Tribunal refers to is that consent is the cornerstone of all international treaty commitments and that here the provisions of the BIT qualify the state sovereignty of Turkey. Here, Article 8 is a specific and qualified derogation to Turkey's sovereign immunity and the Tribunal accepts that in its interpretation and application there is an inertia against too expansive a construction of the reach of the BIT.

(3) The relevance of previous ICSID and ICJ decisions or awards

45. Each Party refers the Tribunal to previous ICSID and investment treaty awards, and statements made in ICJ judgments. Although not bound by such citations, the Tribunal accepts that, as a matter of comity, it should have regard to earlier decisions of courts (particularly the ICJ) and of other international dispute tribunals engaged in the interpretation of the terms of a BIT.[3]

46. At the hearings, the issue of the "hierarchy" of authority that should be attached to decisions of particular international courts and tribunals was raised: Respondent submits that the judgments of the ICJ are at the apex;[4] whilst Claimant submits that decisions of previous ICSID tribunals are more relevant as they specifically concern investment treaty law, and the construction of BITs, as compared to general principles of international law.[5]

47. In this regard, the Tribunal does not find it necessary to engage in an hierarchical analysis of precedent. On one hand, the Tribunal accords deference to relevant statements by the ICJ of general principles as to the construction of the terms of a treaty as those principles may apply to the construction of the BIT. On the other hand, as there

[3] See e.g., *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 13 July 2005, paras. 30-32; *Saipem S.p.A v. the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 67.
[4] Transcript, 21:16-17.
[5] Transcript, 119:21-24.

is no precedential order in regard to previous decisions on the construction of bilateral investment treaties, the relevant enquiry remains for the Tribunal to interpret and apply the terms of the BIT itself. Prior decisions may inform that enquiry, but it is for this Tribunal to make its own interpretation of Article 8(2), informed by the rigor and persuasiveness of relevant analysis and statements by decisions of earlier tribunals.

(4) The onus of establishing jurisdiction

48. As a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase.[6] Here, the Parties agree that whilst the Article 8(2) Objection was raised by Respondent, the onus remains on Claimant to establish that the requirements of Article 8(2) have been satisfied, and that the Tribunal has jurisdiction.[7]

(5) Non-contentious matters for the purposes of this Decision

49. For the purposes of this phase of the arbitration only, it is assumed that Claimant has made an investment in Turkey and that the claims advanced by Claimant in its Request are an "investment dispute" within the BIT.[8]

6) Position of the Parties on Article 8(2)

50. The following summarizes the Parties' positions with respect to the Article 8(2) Objection.

(1) Claimant's position

51. In its written and oral submissions, Claimant has put forward the following arguments -

    (1) Claimant and its representatives provided ample notice of the dispute and engaged in repeated good faith efforts to resolve the dispute with Turkish authorities well over a year prior to seeking arbitration.[9]

[6] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, para. 79; *Saipem S.p.A v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, para. 83.
[7] Transcript, 3:5-23.
[8] Transcript, 49:24-25; 51:15-16; Transcript, 6:1-22.
[9] C Memorial, para. 33.

(2) Article 8(2) of the BIT does not create a jurisdictional hurdle to filing an ICSID claim, nor does it impact the admissibility of a claim. It is argued that the weight of previous arbitral decisions favors avoiding the formalistic conclusion that certain "pre-arbitration procedures" must be complied with before an investor can seek arbitration, particularly where negotiation would be futile.[10]

(3) The fact that the timeframe of Article 8(2) has already passed in this case since the filing of the Request can give the Tribunal comfort in deciding that Article 8(2) does not create a jurisdictional hurdle.

(4) Respondent has in any case waived its chance to rely on Article 8(2) as its own behavior and attitude demonstrates that it had no interest in settling the dispute.[11]

(5) Respondent has waived its chance to rely on Article 8(2) by waiting until its submission of its Request for Bifurcation, over a year into the present proceedings.[12]

(6) Respondent's objection does not support procedural economy.

52. Claimant requests that the Tribunal determines that -

(1) Claimant has complied with Article 8(2);

(2) Claimant's claims under the BIT are admissible pursuant to Article 8(2);

(3) Respondent's jurisdictional objections with respect to Article 8(2) be dismissed;

(4) The procedural timetable set forth in its First Procedural Order, and reiterated in its Decision on Bifurcation, be confirmed; and

(5) Claimant be awarded its legal fees and costs incurred in the preparation of its Memorial on Article 8(2).[13]

[10] C Memorial, para. 44.
[11] C Memorial paras 62-63. As examples of Respondent's behavior, Claimant refers to Respondent's alleged actions of Emlak forcefully and illegally entering the project site, occupying Tulip's offices, announcing a new tender on the project and signing a new contract with another company.
[12] C Memorial para. 66.
[13] C Memorial para. 73.

(2) Respondent's position

53. In summary, Respondent's contentions in answer are -

(1) Article 8(2) is a binding obligation and not merely a "procedural device." Article 8(2) provides for a mandatory negotiation period as a condition for Respondent's consent to the Tribunal's jurisdiction.[14]

(2) Claimant did not notify Respondent about the investment dispute or seek to engage in negotiations with respect to that dispute before filing its Request. Respondent only first became aware of Claimant's treaty claims upon the commencement of the present arbitration. It is argued that in no communications with Respondent by or on behalf of Claimant was reference made to treaty claims.[15]

(3) In the absence of a notified BIT dispute and settlement efforts there is no consent and the Tribunal has no jurisdiction.[16]

(4) The requirements of Article 8(2) cannot be dispensed with on grounds of "procedural economy" or "futility".[17]

(5) An invitation to negotiations once arbitration has been commenced does not comply with the requirements of Article 8(2).[18]

54. Respondent requests orders to dismiss the entire claims for lack of jurisdiction or as inadmissible, together with the award of costs. [19]

7) Analysis

55. In its plain meaning, Article 8(1) relevantly defines an investment dispute as a dispute involving a breach of any right conferred or created by the BIT with respect to an investment. Article 8(2) provides that the parties to an "investment dispute" shall initially seek to resolve the dispute by consultations and negotiations in good faith. If the dispute

[14] R Counter-Memorial, para. 15.
[15] R Counter-Memorial, paras. 57-60; 70-163.
[16] R Counter-Memorial, paras. 164-168.
[17] R Counter-Memorial, paras. 169-181.
[18] R Counter-Memorial, paras. 182-190
[19] R Counter-Memorial, para. 193.

cannot be resolved, the investor may submit the dispute to arbitration at any time after one year from the date upon which the dispute arose.[20]

(1) Nature of Article 8(2)

56. A requirement for prior notice of a dispute to be given and negotiations to follow for a period before filing a claim along the lines of Article 8(2) is not an uncommon provision in investment treaties.

57. In this context, it is clear enough that there is no overriding *jurisprudence constante* concerning the construction and application of such provisions.[21] Indeed, the jurisprudence is very much *non constante*. Lines of decisions that have decided that such consultation and negotiation provisions are not of a jurisdictional nature, and do not have to be strictly followed,[22] are matched by a lesser number of decisions that have held that compliance with such requirements for notice and negotiation enure as a pre-condition to the jurisdiction of the Tribunal, and must be strictly complied with.[23] Additionally, there is a body of decisional authority that examines, with contrary conclusions, whether non-compliance may be ignored where negotiations would be futile or where there is no realistic likelihood of meaningful negotiation.[24]

---

[20] Article 8(2) is extracted in full at para. 42.
[21] This was acknowledged by Respondent. Transcript, 22:17-22.
[22] *Ethyl Corporation v. Government of Canada*, NAFTA/UNCITRAL (Award dated 24 June 1998); *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction dated 25 January 2000; *Ronald S Lauder v. Czech Republic*, UNCITRAL Arbitration, 3 September 2001, Final Award; *Link-Trading v. Department for Customs Control of Republic of Moldova*, UNCITRAL (Award on Jurisdiction dated 16 February 2001); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Objection to Jurisdiction dated 6 August 2003); *Bayindir Insaat Turizm Ticaretve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Decision on Jurisdiction dated 14 November 2005); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award dated 24 July 2008); *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11 (Decision on Jurisdiction, 9 September 2008); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, Stockholm Chamber of Commerce Case No. V (o64/2008) (Partial Award on Jurisdiction and Liability dated 2 September 2009); *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Award dated 5 March 2011).
[23] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Jurisdiction dated 2 June 2010); *Murphy Exploration and Production Company Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Award on Jurisdiction dated 15 December 2010); *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda*), Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006*; Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Decision on Preliminary Objections, Judgment, 1 April 2011; *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, (14 Jan 2004).
[24] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1 (Decision on Jurisdiction, 24 December 2012); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, Stockholm Chamber of Commerce Case No. V (o64/2008) (Partial Award on Jurisdiction and Liability dated 2 September 2009); *Occidental Petroleum Corporation, Occidental Exploration*

58. Within this controversy, Claimant submits that Article 8(2) is not intended to raise a jurisdictional hurdle to filing an ICSID claim, nor does it impact the admissibility of a claim.[25]

59. Claimant contends that Respondent rests its contrary position upon *Burlington v. Ecuador* and *Murphy v. Ecuador* as the only two principal decisions that go against the grain of arbitral precedent.[26] Claimant also relies on the "expert opinion" of Prof Dolzer, confirming published statements by himself and also by Prof Christoph Schreuer to support his conclusions that a "review of the jurisprudence by all investment tribunals speaks in favor of the more flexible approach."[27] Prof Dolzer was not called for examination upon his report and the hearings proceeded upon the basis that the report was received as submission in legal argument made by Claimant.

60. Respondent's answer is that Article 8(2) is mandatory and equivalent to a requirement, in common law terminology, of a *condition precedent* with the consequences that in the absence of compliance there is no consent by Turkey to arbitration.[28]

Tribunal's Analysis

61. In *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*[29] the ICJ addressed the function of a 'compromissory' provision of this sort in terms -

> *[I]t is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfills three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter… In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication. In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States.*

---

and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11 (Decision on Jurisdiction, 9 September 2008); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award dated 24 July 2008); *Bayindir Insaat Turizm Ticaretve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Decision on Jurisdiction dated 14 November 2005); *Link-Trading v. Department for Customs Control of Republic of Moldova*, UNCITRAL (Award on Jurisdiction dated 16 February 2001*); Ronald S Lauder v. Czech Republic*, UNCITRAL Arbitration, 3 September 2001, Final Award.

[25] C Memorial, para. 35.

[26] C Memorial, para. 36.

[27] Dolzer E/O, para. 22.

[28] R Counter-Memorial, para. 1.

[29] ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation),* Decision on Preliminary Objections, Judgment, ICJ reports 2011.

62. The Tribunal adds a fourth aspect, namely, that it sees that such a requirement also fulfils the policy function of conferring upon the State Party an opportunity to address a potential claimant's complaint before it becomes a respondent in an international investment dispute.

63. In *Armed Activities (DRC v. Rwanda)* the ICJ also said -[30]

> *[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.*

64. Statements to the like effect are made in other investment tribunal decisions interpreting a BIT in similar terms.

65. In *Enron v. Argentine Republic*,[31] after finding that the six-month negotiation period had been complied with, the tribunal stated:

> *The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.*

66. Likewise, the tribunal in *Murphy v. Ecuador*[32] found that the six-month waiting period in the relevant Treaty between the Republic of Ecuador and the United States of America had not been complied with and made the following findings:

> *The Tribunal also does not accept the consequences Claimant seeks to derive between "procedural" and "jurisdictional" requirements. According to [Claimant], "procedural requirements" are of an inferior category than the "jurisdictional requirements" and, consequently, its non-compliance has no legal consequences. It is evident that in legal practice this does not occur, and that non-compliance with a purely procedural requirement, such as, for example, the time to appeal a judgment, can have serious consequences for the defaulting party.*[33]
>
> …

[30] *ICJ, Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, at para. 88.
[31] *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, (14 Jan 2004), para. 88.
[32] *Murphy Exploration and Production Company Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Award on Jurisdiction dated 15 December 2010), paras 140 -156.
[33] *Murphy Exploration and Production Company Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Award on Jurisdiction dated 15 December 2010), para 142.

> *Claimant's interpretation of Article VI of the BIT simply ignores the existence of provisions mandating the parties to have consultations and negotiations to resolve their disputes (paragraph 2) and preventing them from resorting to ICSID before six months have elapsed from the date on which the dispute arose (paragraph 3).*[34]
>
> …
>
> *It is contrary to the fundamental rules of interpretation to state that while [Article VI] constitutes a "procedural rule that must be satisfied by the claimant", non-compliance does not have any consequence whatsoever. Such a way of interpreting the obligation simply ignores the "object and the purpose" of the rule, which is contrary to Article 31(1) of the aforementioned Vienna Convention.*
>
> *Similarly, the SGS v. Pakistan tribunal held that "…Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature." This Tribunal cannot agree with that statement which implies that, even though there is an explicit treaty requirement, the investor may decide whether or not to comply with it as it deems fit. [footnote omitted]*
>
> *This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, "a procedural rule" or a directory and procedural" rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.*[35]

67. In *Burlington Resources v. Ecuador*[36] the tribunal found that the claimant's full protection and security claim was inadmissible in accordance with Article VI [the six-month waiting provision] of relevant Treaty between the Republic of Ecuador and the United States of America and made the following findings:

> *Article VI does not require the investor to spell out its legal case in detail during the initial negotiation process; Article VI does not even require the investor to invoke specific Treaty provisions at that stage. Rather, Article VI simply requires the investor to inform the host State that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal. In other words, it requires the investor to apprize the host State of the likely consequences that would follow should the negotiation process break down.*[37]

---

[34] *Murphy Exploration and Production Company Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Award on Jurisdiction dated 15 December 2010), para 145.
[35] *Murphy Exploration and Production Company Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Award on Jurisdiction dated 15 December 2010), paras 147-149.
[36] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Jurisdiction dated 2 June 2010), para. 340.
[37] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Jurisdiction dated 2 June 2010), para. 338.

…

Therefore, the Tribunal concludes that Burlington's full protection and security claim for Block 23 is inadmissible in accordance with Article VI of the Treaty. It adds that in ICSID arbitration the inadmissibility of claims has the same consequence as the failure to meet the requirements for jurisdiction under Article 25 of the ICSID Convention or the BIT, such consequence being that the Tribunal cannot exercise jurisdiction over the dispute.[38]

68. Lastly, in the recent decision of the tribunal in *Teinver v. Argentine Republic*,[39] the Tribunal held that:

> *The Tribunal agrees with Claimants that Article X(1) can fairly be interpreted as a general "best efforts" obligation for the parties to attempt to amicably settle their dispute. However, it would be an overly literal interpretation of Article X(2)'s "cannot be settled within six months" language to read it as simply requiring that the Parties wait for six months after the dispute began before they proceed to the next step in the dispute settlement process. The natural reading of Articles X(1) and (2) together is that the Parties are obligated to make their best efforts to amicably settle their dispute, and that they are required to do so for six months before proceeding to the next step.*

69. The Tribunal concurs with each of these statements of principle.

70. In the Tribunal's opinion the ordinary meaning of the terms in Article 8(2) is clear. It provides in plain language that the parties shall -

(1) First seek to resolve the dispute by consultations and negotiations in good faith; and

(2) Second, if these procedures are unsuccessful, then, at any time after one year from the date upon which the dispute arose, the investor may choose to submit the dispute to arbitration.

71. The language is mandatory in form. The explicit requirements that the parties must seek to engage in consultations and negotiations with respect to the dispute as arising under the BIT and that there be a one-year waiting period from the date the dispute arose are accepted by the Tribunal as pre-conditions to submitting the dispute to arbitration. In this regard, the date the dispute arises is the date of first notification of a claim arising under the BIT by one party to the other. In the opinion of the Tribunal, this interpretation accords with the plain object and purpose of the provision.

---

[38] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Jurisdiction dated 2 June 2010), para. 340.

[39] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1 (Decision on Jurisdiction, 24 December 2012), para. 108.

Conclusion

72. Accordingly, the Tribunal rejects Claimant's contention that Article 8(2) is merely procedural. The explicit requirements to give notice of the dispute as arising under the BIT and to seek consultations and negotiations until one year has elapsed from the date of notification of the dispute is not to be watered down to a mere statement of aspiration. The Tribunal finds compliance is an essential element of Turkey's prospective consent to qualify its sovereignty to permit unknown future investors of the other contracting State to claim relief under the terms of the BIT against it in an international forum. The Tribunal finds that the fulfillment of the requirements in Article 8(2) is a pre-condition to the jurisdiction of this Tribunal.

(2) Requirements of Article 8(2)

73. The Tribunal turns to consider compliance in this dispute with the three requirements in Article 8(2), namely -

    (a) That there be an "investment dispute" under the BIT that Claimant must have provided notice to Respondent;

    (b) That efforts to engage in consultation and negotiation to resolve the dispute have been undertaken; and

    (c) That proceedings may not be commenced until one year after notification of a dispute.

(a) The Dispute and Notice Requirement

74. Respondent contends that Claimant did not notify Respondent of the existence of an investment dispute under the BIT until it filed the Request.[40] Respondent says that Article 8(2) requires that a dispute be identified as an "investment dispute" under Article 8(1), and that this dispute be notified to Respondent 12 months prior to the Request.[41] It contends that it is of particular importance that the notification of a dispute be clear and unambiguous, particularly where, as here, the investor was engaged in two disputes, with

[40] Transcript, 238:23-239:9.
[41] R Counter-Memorial, para. 2.

one against Emlak pending before the courts of Turkey in relation to the Ispartakule III project (the "Contract Dispute") and the other dispute arising under the BIT.[42]

75. Claimant argues that the investment dispute was notified to Turkey at the latest 15 months and potentially as early as 16 January 2007, when a meeting took place with representatives of TOKI prior to the filing of the Request, and at the latest, when it sent a letter to the President of Turkey dated 8 July 2010.[43] Claimant submits that numerous correspondences and communications between it and Respondent also made it clear to Turkey that an investment dispute existed well before a year prior to when the Request was filed.[44]

76. As to form of notice, Claimant contends that the BIT contains no requirement as to the form and that there are no "magic words" that a claimant must employ to notify the State of the dispute and that it wishes to begin settlement negotiations regarding an investment dispute.[45]

77. Claimant invokes the statements of the tribunal in *Maffezini v. Kingdom of Spain,*[46] where it said "[w]hile a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim."[47] Claimant argues that the *Maffezini* tribunal held that the fact that the legal instrument of consent to international arbitration has not been specifically invoked does not mean that a dispute covered by the terms of that treaty has not arisen.

78. Claimant also cites the tribunal in *Link-Trading v. Department for Customs Control of Republic of Moldova,*[48] where it stated that the "formal complaint … represented the culmination, not the inception, of [a] dispute"[49] and also the tribunal in *Burlington Resources v. Ecuador*, extracted at para 67 above.[50]

---

[42] R Counter-Memorial, para. 32.
[43] C Memorial, para. 5.
[44] C Memorial, para. 5.
[45] C Reply, para. 21.
[46] *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision on Jurisdiction dated 25 January 2000).
[47] *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision on Jurisdiction dated 25 January 2000), para. 97.
[48] *Link-Trading v. Department for Customs Control of Republic of Moldova*, UNCITRAL (Award on Jurisdiction dated 16 February 2001).
[49] *Link-Trading v. Department for Customs Control of Republic of Moldova*, UNCITRAL (Award on Jurisdiction dated 16 February 2001), para. 8.6.3.
[50] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, (Decision on Jurisdiction dated 2 June 2010), para. 338.

79. In response, Respondent refers to statements of the ICJ in the *Headquarters Agreement Advisory Opinion*,[51] that -

> *[W]here one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.*[52]

80. Respondent also relies on statements by the tribunal in *Murphy v. Ecuador* where it held that "without the prior allegation of a Treaty breach, it is not possible for a dispute to arise which could then be submitted to arbitration under Article VI of the BIT."[53]

81. Respondent further cites the decision on jurisdiction in *Burlington Resources v. Ecuador*[54] where the tribunal said:

> *... as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI. This requirement makes sense as it gives the state an opportunity to remedy a possible Treaty breach and thereby avoid arbitration proceedings under BIT, which would not be possible without knowledge of an allegation of Treaty breach. Because a dispute under Article VI(3)(a) only arises once an allegation of Treaty breach is made, the six-month waiting period only begins to run at that point in time.*[55]

82. On this issue of form of notice, it is apparent to the Tribunal that the Parties generally agreed on the standard to be applied. At the hearing, Claimant submitted that the Tribunal should apply a test that it is the subject matter that determines when the dispute arose.[56] Similarly, Respondent submitted that the form of notice is:

> *… not a question of specific wording; it is a question of the substance of the complaint that is being made. If it's being made clear that what is complained about here, and what therefore is brought into existence, is the investment dispute, as defined as a breach of a right conferred or created by this BIT, then that's fine…*[57]

---

[51] ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988.
[52] ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, at para. 38,
[53] *Murphy Exploration and Production Company International v. Republic of Ecuador,* ICSID Case No. ARB/08/4, (Award on Jurisdiction dated 15 December 2010), para. 104.
[54] *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, (Decision on Jurisdiction dated 2 June 2010.
[55] *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, (Decision on Jurisdiction dated 2 June 2010, paras. 335-336.
[56] Transcript, 125:9-11.
[57] Transcript, 27:21-28:2.

Conclusion

83. The Tribunal accepts that Article 8(2) does not impose a formal notice requirement, and finds that the applicable legal standard is as stated by the tribunal in *Burlington Resources v. Ecuador*. In this regard, Article 8(2) does not require the investor to spell out its legal case in detail during the initial negotiation process. Nor does Article 8(2) require the investor, on the giving of notice of a dispute arising, to invoke specific BIT provisions at that stage. Rather, what Article 8(2) requires is that the investor sufficiently informs the State party of allegations of breaches of the treaty made by a national of the other Contracting State that may later be invoked to engage the host State's international responsibility before an international tribunal.

(b) Consultation and Negotiation Requirement

84. The second requirement in Article 8(2) is that the parties seek to engage in consultations and negotiations in good faith. Respondent relies on decisions by the ICJ in *Armed Activities (DRC v. Rwanda) case*[58] and *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*[59] to emphasize that negotiations must be referable to the treaty dispute. In the latter case, the ICJ said:

> *… to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.*[60]

85. The Tribunal understands that Claimant essentially agrees with Respondent's position that the relevant enquiry is to consider whether the subject matter of the negotiations concerned the same subject matter as the eventual treaty claim.

---

[58] *ICJ, Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, at para. 80.
[59] ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation),* Decision on Preliminary Objections, Judgment, ICJ reports 2011.
[60] ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation),* Decision on Preliminary Objections, Judgment, ICJ reports 2011, at para. 161,

86. Claimant also says that if the Tribunal follows this subject matter approach, as compared to what Claimant calls the "strict formalities" approach, then the subject matter of this "ICSID proceeding was exactly what was being presented by the Dutch investor to the Government of Turkey in the summer of 2010."[61] This is to identify the controversy as to characterization for determination by the Tribunal.

87. The Tribunal agrees with the above statement of the ICJ and considers that the subject matter of the consultations and negotiations to be engaged must relate to the subject matter of the investment dispute brought before this Tribunal under the BIT. It is not necessary for the parties to make express reference to the treaty in their consultations or negotiations.

(c) One-year Requirement

88. The Tribunal's position is that the one-year waiting period under Article 8(2) starts running once notice is provided to Respondent that an investment dispute exists within the meaning of Article 8(1).

(d) Satisfaction of Article 8(2) requirements after filing the Request

89. Claimant also argues that, in any event, as of October 2011, when the Request was filed, an investment dispute existed and that more than a year has since passed without the dispute being resolved. In these circumstances, it is intended that any procedural requirements in Article 8(2) should be regarded as abrogated, or compliance unnecessary, either through what Claimant has called the application of the "futility doctrine" or for some other reason.[62]

90. In reply, Respondent maintains that the several requirements of Article 8(2) are specific pre-conditions to the Tribunal's jurisdiction and they must be completely complied with before the Request is filed.[63]

91. The Tribunal concurs with Respondent's position. It would be to rewrite the BIT and to confound its plain meaning to accept that a party may file its Request without notice and then perfect the breach after the arbitration commenced. In the absence of a waiver (and, possibly, circumstances giving rise to estoppel), which do not arise here, the Tribunal

[61] Transcript, 127:12-17.
[62] Transcript, 230:12-25; C Memorial, para. 60.
[63] R Counter-Memorial, para 40.

does not have jurisdiction if the notice requirements are not satisfied before the arbitration is commenced. Absent a waiver, actions, or inactions, of the Parties after the commencement of arbitration will not perfect a defective commencement.

Conclusion

92. The Tribunal concludes that under Article 8(2) Claimant must first prove that it provided such notice to Respondent that can be reasonably be characterized as notice to the recipient of a claim arising under the BIT. The investor does not have to spell out its case beyond informing the host State that it contends that the alleged conduct constitutes a violation of a treaty. The subject matter of the negotiations that Claimant must seek to engage in must relate to the subject matter of the dispute, namely a claim arising under substantive obligations contained in the BIT, and at least one year must have elapsed since notice of the dispute was given to Respondent before a dispute may be submitted to arbitration.

(3) Compliance with Article 8(2)

(a) Introduction

93. The Tribunal moves to analyse evidence presented by Claimant and to determine whether Claimant has satisfied the requirements of Article 8(2) to this legal standard. It considers whether and when Claimant provided adequate notice of the investment dispute and negotiations with Respondent for at least one year from the date of first notification before the Request was filed.

(b) Did Claimant provide adequate notice of the investment dispute?

94. The first, and here decisive, question for the Tribunal's determination is whether Claimant provided adequate notice to Respondent that an investment dispute had arisen concerning alleged breaches of the terms of the BIT.

(i) Does notice to Emlak constitute notice to Respondent?

95. The Tribunal first considers whether notice provided to Emlak constitutes notice to Respondent for the purposes of this Decision. Claimant relies on a number of documents

and conversations between Tulip I (the Turkish incorporated company) and Emlak. Claimant contends that for current purposes Emlak was Respondent,[64] and argues that any correspondence addressed to Emlak should be ascribed as notice to TOKI and therefore the Republic of Turkey as TOKI is part of the Turkish Prime Ministry.

96. Claimant refers the Tribunal to the following evidence in this regard:

    (1) Emlak, at different times describes itself as "Subsidiary of Prime Minister's Office, Housing Development Administration of Turkey,"[65] "A partnership of the Housing Development Administration, Prime Ministry of the Republic of Turkey"[66] and "Emlak Konut, with its controlling shareholder TOKI, is the largest REIC in Turkey by market value...;"[67]

    (2) Mr. Bayraktar was both the Chairman of Emlak and TOKI;

    (3) Emlak was a majority-owned subsidiary of TOKI; and

    (4) Mr. Benitah statements that he and the Dutch Investor understood that partnering with Emlak was effectively partnering with the Turkish Government.[68]

97. In reply, Respondent identifies Emlak as a private law entity, distinct from the Government of Turkey,[69] as the party to the Contract under Turkish law. Hence it follows that communications addressed to Emlak do not constitute communications to Respondent.

Conclusion

98. As an issue to be canvassed on the merits, Claimant does not claim that Emlak constitutes the State, but rather that its acts are attributable to Respondent within Article 8 of the ILC Articles on State Responsibility. That remains a live controversy, including as the subject matter of Claimant's requests for production of documents and the question whether information known to Emlak, and actions taken by Emlak, can be attributed to the Respondent. On the evidence currently before it, the Tribunal is not sufficiently satisfied that Emlak is to be equated to the State. Whilst not constituting a decision on

[64] Transcript, 153:4-154:17.
[65] CE-73.
[66] CE-219.
[67] CE-214.
[68] Benitah 1st W/S, paras. 22-30.
[69] R Counter-Memorial, para. 140.

the merits of the issue, the Tribunal concludes that for the purposes of this application, it has not been established that acts by or notice to Emlak are attributable to the State.

99. That being said, and given all of Mr. Bayraktar's dual responsibilities and the acknowledged close relationship between Emlak and TOKI and the fact that TOKI is part of the Republic of Turkey, the Tribunal cannot ignore the fact that Mr. Bayraktar was both the Chairman of Emlak and TOKI and that TOKI was the controlling shareholder of Emlak. As a background issue, it is not unreasonable to infer that, at the least, Respondent, as a State party to the BIT, should have been aware of the circumstances of the on-going disagreement between Tulip I and Emlak with respect to the Ispartakule III. Especially is that so as the on-going disagreement was discussed in January 2007 at a meeting between representatives of TOKI and Claimant. To this extent, prior knowledge of Mr. Bayraktar himself may be a relevant to the assessment of later evidence pointing to requisite notice of the dispute having been given to the Government itself as distinct from notice to Mr. Bayraktar.

(ii) Key pieces of evidence produced

100. *Meeting of 16 January 2007 between TOKI and Claimant:* Claimant says that a meeting took place on 16 January 2007 in Ankara, where Mr. Bayraktar spoke on behalf of TOKI, and Mr. Benitah spoke on behalf of the Claimant. Claimant relies on the evidence of Mr. Benitah who describes this meeting as "...clearly a meeting between a Turkish government official and foreign investors to discuss a dispute regarding our investment…"[70] Claimant argues that this is evidence of notice to Respondent of a dispute with Dutch investors and an attempt to find reasonable solutions through negotiations directly with high-ranking officials of the Turkish State.[71]

101. Respondent does not deny this meeting took place or refute the statements of Mr. Benitah. Respondent's position is that negotiations prior to the termination of the Contract in May 2010 concerned the then on-going Ispartakule III Project and not any claim for damages for breaches of international law made in this arbitration.[72] Respondent refers to Claimant's statement that "[t]he dispute between Tulip and the Government of Turkey arose when the Contract was purportedly terminated as of 18 May 2010."

[70] Benitah 2nd W/S, para 10.
[71] C Memorial, para 12.
[72] R Counter-Memorial, para 77.

102. *Dutch Consul Letter to Emlak dated 3 August 2009:* By letter dated 3 August 2009, Paul Korff de Gidts, Deputy Consul General of the Netherlands and Head of Commercial and Economic Department in Istanbul wrote to Dr. Feyzullah Yetgin, General Manager of Emlak.[73] This letter, sent on behalf of Tulip I representatives, made a number of points. First, Mr. Korff de Gidts noted Tulip I's representatives request for "fair treatment as an internationally owned corporation. A discrepancy in treatment was observed compared with other local companies." Second, it summarized Tulip I's requests made in previous correspondence to Emlak. Third, it states: "[a]s it is the duty of the Netherlands economic missions worldwide to assist Dutch origin companies in solving their trade and *investment related disputes*, I kindly bring Tulip REIC's position on this incident to your attention…" (emphasis added).

103. *Post-termination communications and meetings between Tulip and Emlak:* Claimant contends that after the May 2010 termination of the Contract, numerous letters were sent and a number of meetings occurred on behalf of Claimant with Mr. Haluk Sur (a member of the Board of Emlak), and other officials representing the Turkish State.[74] It is argued that during these meetings further efforts to communicate the grounds for a complaint and a desire to resolve the matter through negotiation were expressed.

104. *Dutch Consul letter to Emlak dated 27 May 2010:* Paul Korff de Gidts wrote another letter, dated 27 May 2010, this time to Mr. Murat Kurum, General Manager of Emlak.[75] This letter, sent on behalf of Tulip representatives, makes a number of additional points. First, Mr. Korff de Gidts notes that the letter is sent by Tulip REIC in coordination with their Dutch partners Van Herk Groep, Panagro B.V. Second, it advises that Tulip REIC would like to continue the project and proposes options for its continuation. Third, it reiterates that "[a]s it is the duty of the Netherlands economic missions worldwide to assist Dutch origin companies in solving their trade and *investment related disputes,* I kindly bring Tulip REIC's position on this incident to your attention…" (emphasis added).

105. *Tulip I letter to Emlak dated 1 June 2010:* By letter dated 1 June 2010, Tulip I wrote to Emlak regarding "Notice of Annulment."[76] In that letter Tulip I explains in detail why it thinks the grounds for annulment are unjust and a violation of the Law. At paragraph 3.4.2 Tulip I says "Due to the Fact that Our Company Has Foreign Partners, the

[73] CE-225.
[74] C Memorial, para 17; Benitah 1st W/S, para.99; Benitah 2nd W/S, para. 16.
[75] CE-224.
[76] CE-222.

Annulment Will Inevitably Have Negative National and International Consequences:"…"It is manifestly evident that *the Van HERK Group will pursue the matter* in national and *international courts* as well as with political offices." (emphasis added).

106. *Tulip I letter to Prime Minister's Office dated 25 June 2010:* By letter dated 25 June 2010, Tulip I wrote to the Republic of Turkey, Prime Ministry.[77] In this letter Tulip I notes that it is a company with a foreign partner. It then goes on to detail the conduct of Emlak stating that "[w]e are certain that the Prime Minister, knowing the situation, would not condone this type of illegal behavior, and that is why we are bringing this matter to your attention."

107. *Tulip I letter to President of the Republic of Turkey dated 8 July 2010:* By letter dated 8 July 2010, Tulip I wrote to The Honorable Abdullah Gül, President of the Republic of Turkey.[78] In this letter Tulip I notes that it is a company in a partnership with foreign capital investors. It goes on to list the alleged illegal actions taken against Tulip I and makes a number of assertions and pleas. The relevant paragraphs of the letter for the present purpose are extracted below. At paragraph 11, the letter states:

> *We are now in the process of drawing up our complaints with regard to the practices of the EMLAK GYO management over the course of the project,... The absurd attitudes of EMLAK GYO is forcing us to take even more serious legal precautions. This situation was explained to them through a letter written to the company last year in July 2009 by the Consulate-General of the Netherlands, in which it was requested that the company 'refrain from actions perpetuating unfair competition'.*

108. At paragraph 15 it states:

> *The gravity of the matter in terms of foreign capital investors, and particularly the fact that the Netherlands Embassy is engaged in the affair, is boundless. Moreover, the application of the Van Herk Group to the ICSID in France is a lawsuit that is almost sure to be won because of EMLAK GYO's unquestionably unfair actions.*

109. Claimant asserts that the language of this letter could not be clearer. Claimant says that this letter was from a Dutch investor, well known to Respondent, notifying the Head of State that an international investment dispute has arisen with the Turkish Government. It is said that for the avoidance of doubt, ICSID was specifically cited in the written notice

[77] CE-200.
[78] CE-226.

as the potential forum for vindicating Claimant's investment rights as a Dutch company.[79]

110. As noted in para 121(4) below, this contention of clarity is somewhat clouded by the fact that para 16 commences, "We have no requests in the name of Foreign Capital interests."

111. Respondent contends that the entire letter contains a long list of complaints against only Emlak, not TOKI or the Government. Respondent says that this is a different dispute from the BIT dispute before the Tribunal. It is material that the letter was not written by the Dutch investor, but a Turkish company and does not notify the President of a possible investment dispute under the BIT.[80]

112. *Tulip I letter to Prime Minister of the Republic of Turkey dated 23 July 2010:* By letter dated 23 July 2010, Mr. Adrianus van Herk of Tulip Real Estate and Development BV and CEO of Van Herk Groep wrote to the Prime Minister of the Republic of Turkey, with the letter sent through the Embassy of Turkey in The Hague.[81] In that letter, Mr. van Herk asks for the attention of the Prime Minister to be directed to Tulip's complaints as "TOKI, as 99% shareholder of Emlak Konut GYO, are directly under the Prime Minister Office." In relevant part, the letter states:

> *That is the reason of forwarding attached letter for your kind attention through the Embassy of Turkey in The Hague due to the fact that we are Dutch investors domiciled in the Netherlands and main shareholder and financier of TULIP.*
>
> *We are very frustrated commercially, facing serious reputational consequences, as well very substantial profit losses to all parties involved due to breach of laws of Turkey by TOKI and Emlak Konut GYO with the full consent of the president of TOKI, Mr. Erdogan Bayaktar, and the Chairman of Emlak Konut GYO. This behavior is very shocking to us as they should be an example of respecting the laws of Turkey and not breaching them. We are treated illegally, unfairly and improperly in accordance to any ethical and decent way of conducting our business.*

113. *Letter from Turkish Presidency to Murat Mertoglu dated 6 September 2010:* By letter dated 6 September 2010, the General Secretariat of the Turkish Presidency wrote to Mr. Murat Mertoglu, Vice-Chairman of a Tulip entity and co-signatory of the letter to the

[79] C Memorial, para. 23.
[80] R Counter-Memorial, paras. 108-114.
[81] CE-213.

Prime Minister, and delivered it to Tulip's Ankara office.[82] Respondent says that this letter was a reply to the letters to the President of 8 July 2010 and to the Prime Minister of 25 June 2010 and called for a reply for Claimant in refutation. The letter states that the General Secretariat of the Presidency does not conduct the type of investigations that the Turkish company had requested; such requests are, if necessary, relayed to the authorities concerned. The letter then continues:

> *However, since it was understood that your referenced letter (a) is delivered to the concerned authorities in the form of distributed letter and Emlak Konut Gayrimenkul Yatırım Ortakltgt Anonim Sirketi is a corporation subject to private law provisions, there are no procedures that can be implemented by the Presidency regarding their transactions and the practices specified in your letters.*

114. Respondent says that this response confirms that the letters sent to the Government by Tulip I were not understood as raising any claims against the Government, but merely complain and make requests for action against Emlak. Respondent argues that if Claimant or its Turkish subsidiary had intended to notify the Prime Minister and the President of an investment dispute, seeking consultations and negotiations, they must have concluded from the reply of the Presidency that they were misunderstood: Claimant's reaction should have been to write to the Presidency explaining that the true objective of their letters was not, as the Presidency had understood, investigation and assistance; but that they or their group sought the resolution of a BIT dispute.[83]

115. Respondent presented evidence that the letter was received and signed for at one of Tulip's Turkish addresses. In his witness statement, Mr. Benitah says that the letter to the President did not receive a response.[84] At the hearing, Claimant maintained that the letter of 6 September 2010 was unknown to Claimant until it received Respondent's Counter-Memorial.[85]

116. The Tribunal accepts that the letter of 6 September 2010 was sent by the Presidency and received and signed for by Mr. Hayri Hisarciklioglu at Tulip's Ankara offices.[86] However, it also accepts that Claimant itself was unaware of this letter until raised in Respondent's Counter-Memorial. Unfortunate as it is, it appears that Claimant was not aware of Respondent's apparent misunderstanding of Tulip I's letters to the Prime

[82] RE-2.
[83] R Counter-Memorial, para. 125.
[84] Benitah 2nd W/S, para. 28.
[85] Transcript, 142:9-14.
[86] Transcript, 206:15-18; RE-3.

Minister and Presidency, and because of that, this apparent misunderstanding went uncorrected.

(iii) When was notice provided that there was an investment dispute?

117. As articulated above, the finding of the Tribunal is that Article 8(2) requires the investor to inform the host State that it faces allegations of treaty breaches that could eventually engage the host State's international responsibility before an international tribunal. It requires the investor to apprize the host State of the likely consequence of Treaty claims being filed should the negotiation process break down.

118. As the Tribunal enquires whether, on the evidence presented, Claimant satisfied this requirement of providing notice of the dispute to Respondent, on any view, the language used in the correspondence relied upon by Claimant is imperfect.

119. It is barely tenable to suggest that correspondence sent by the Dutch Consular or Tulip I to Emlak informed Respondent itself of the existence of a dispute arising under the BIT. These letters are addressed to Emlak, and only indirectly refer to possible consequences arising under the BIT. Nevertheless, these letters did inform the Chairman of Emlak, who was also the Chairman of TOKI, of the deteriorating relationship between Tulip I (which had foreign investors) and Emlak and the 27 May 2010 letter advises that the Dutch government was involved to assist Dutch origin companies in solving "… *investment related disputes* …" (emphasis added).

120. Of a stronger characterization is the 8 July 2010 letter to the President of Turkey. Whilst somewhat obscure in its drafting (which may, in part, be due to it being translated from Turkish) the letter makes a number of significant points -

    (1) First, it informs the President that the "attitudes of EMLAK GYO" are forcing Tulip I to take "even more serious legal precautions." It is unclear what the "more serious legal precautions" entail, but some light may be shed by reference to the following sentence, which refers to the letter from 2009 of the Consulate-General of the Netherlands. The Tribunal assumes the reference to July 2009 actually refers to the 3 August 2009 letter considered above. In this regard, by reference to "fair treatment as an internationally owned corporation," the Tribunal considers that the Consul's 3 August 2009 letter invoke a provision of the BIT, namely Article 3. Therefore, the "more serious legal precautions" quite possibly refers to claims in an international

forum for alleged violations of the BIT, although, this, on its own, is inconclusive.

(2) Second, it refers to foreign capital investors and the fact that the Netherlands' Embassy is engaged. The Tribunal considers that these statements put the recipient on notice that this is no longer merely a domestic matter.

(3) Third, reference is made to the application of the "Van Herk Group to the ICSID in France."

(4) Fourth, and as noted above, somewhat in derogation of the first 3 points, the letter says that Tulip I has "No requests in the name of Foreign Capital interests." The meaning of this sentence is not entirely clear to the Tribunal. It seems to detract from the preceding threat of the potential for ICSID proceedings. An alternative interpretation is that Tulip I is merely saying there are no requests in the name of foreign capital interests at present, but should the matter not be resolved, the ICSID proceedings on behalf of foreign interests may follow.

Conclusion

121. Doing the best it can with these confusing correspondences, the Tribunal concludes that, as a whole, following as it did the prior communications, and also in the context of the deteriorating relationship between Tulip I and Emlak, this letter of 8 July 2010 to the Head of State of Turkey supports the finding that Claimant just satisfies the requirement of providing notice of the dispute arising under the BIT to Respondent. Claimant clearly did not employ the most perfect forms when it notified Respondent of the dispute. However, what is required by Article 8(2) is to apprize the host State of the dispute as arising under the BIT and that the likely consequences if negotiation processes break down are proceedings before an international tribunal pursuant to the BIT.

122. In all the circumstances, the Tribunal accepts, albeit with difficulty and hesitation, that no later than 8 July 2010 Claimant informed Respondent it faced allegations of breaches of the terms of the BIT that could eventually engage its international responsibility before an ICSID tribunal. In the result, Claimant overcomes, but only just, the very powerful case to the contrary made by Respondent.

123. Accordingly, the Tribunal determines that no later than 8 July 2010 notice of the dispute arising under the BIT was given in compliance with Article 8(2).

(c) Did Claimant seek to engage in consultations and negotiations with Respondent?

124. Article 8(2) secondly requires that the parties seek to resolve the investment dispute by consultations and negotiations in good faith. It establishes a best effort standard and does not require a result.

125. As the Tribunal has determined that the investment dispute arose, at the latest, by 8 July 2010, the enquiry is whether from that date negotiations were sought with Turkey on the subject matter of the investment dispute.

126. The letter from the Dutch Consul General in Istanbul, 27 May 2010 reads, "…Tulip REIC would like to continue the project as the pilot partner under the same contract or alternatively, purchase the land by the contract value and proceed with the project independently." While the proposal may not have been acceptable, indeed even realistic, there can be little doubt that it is an effort to seek an amicable resolution. In that sense it evidences an interest in engaging in consultations and negotiations in general to resolve disputes concerning the Ispartakule III Project.

127. In the last paragraph of the 8 July 2010 letter from Tulip I to the President of Turkey, Tulip I makes numerous requests to the President to intervene in the dispute. In the context of the preceding paragraphs, which loosely indicate that ICSID proceedings may be commenced if the dispute is not resolved, the Tribunal accepts that this letter seeks to engage with the President to resolve the dispute arising under the BIT. Based on the findings of this Tribunal above, these overtures concern the subject matter of the investment dispute brought before this Tribunal under the BIT.

128. Further, in the letter dated 23 July 2010 from Mr. Adrianus van Herk to the Prime Minister of the Republic of Turkey, after bringing circumstances of the dispute to the attention of the Prime Minister, Mr. van Herk offers Mr. Murat Mertoglu to be at the disposition of the Prime Minister, "any time, any day, to provide full disclosure on the issue and all legal facts." [87]

Conclusion

129. Based on the above, the Tribunal finds that after giving notice of the dispute arising, Claimant sufficiently sought amicably to resolve the investment dispute through consultations and negotiations. Accordingly, the Tribunal finds that this negotiation requirement of Article 8(2) is satisfied.

[87] CE-213.

(d) Had one year elapsed from the date the dispute arose and the commencement of these proceedings?

130. As the Tribunal has determined that notice of the investment dispute was given by no later than 8 July 2010, one year is found to have elapsed when the Request was filed on 11 October 2011.

Conclusion

131. Based on the determinations above, the Tribunal finds that Article 8(2) of the BIT has been complied with and the Tribunal has jurisdiction to proceed to hear the next phase of this arbitration.

8) Futility, Waiver and Procedural Economy

132. Claimant submits that even if Article 8(2) was not strictly complied with, this Tribunal maintains jurisdiction either because -

    (1) The provision could be dispensed with on the basis of its futility in the circumstance of the case;

    (2) Respondent waived compliance with Article 8(2); or

    (3) By reason of procedural economy.[88]

133. Respondent contends that none of these arguments or alleged principles may override the requirements of Article 8(2), which concerns the jurisdiction of the Tribunal.[89]

134. The Tribunal accepts that there are differing views with respect to the existence and operation of principles of futility and procedural efficiency. As has been noted, there are no grounds in this case to contend for waiver.

135. As a matter of approach, the Tribunal notes again that jurisdiction under a BIT constitutes a qualified waiver of State sovereignty. As such, a State is entitled to stipulate conditions for compliance before claims may be issued as arising under a BIT. In the Tribunal's opinion, explicit provisions for notice and negotiations, as in Article 8(2), are required strictly to be complied with and not to be ignored. Nonetheless, as the decision here is that the notice and negotiation requirements were met, it becomes

[88] C Memorial, para 72.
[89] R Counter-Memorial, para 169 *et seq.*

unnecessary for the Tribunal to determine the alternative constructions canvassed by the Claimant noted in para 132 above.[90]

9) Costs

136. Each Party has requested to be awarded its full professional costs, expenses and disbursements in relation to this part of the proceedings.

137. Claimant contended that Respondent's Article 8(2) Objection was frivolous and was pursued in bad faith.

138. The Tribunal disagrees. The requirements for notice and other steps under Article 8(2) were plain enough and Claimant well had it within its means to make the application now addressed in this decision entirely avoidable.

139. In the Tribunal's view, the ambiguity inherent in the evidence presented by Claimant to support a finding of compliance with Article 8(2) effectively invited the Rule 41(1) application. Respondent was entirely reasonable to call Claimant to its proofs.

140. Indeed, the Tribunal remains at a loss to understand why explicit notice was not given, especially as Claimant was advised that it should delay proceedings until the expiry of the one-year period under Article 8(2).

141. Respondent's filed submissions in reply ably express how close to the margin Claimant sailed: in nautical metaphor, the Tribunal finds the notice given complies at a level of satisfaction to be just above the Plimsoll Line. It recalls the Duke of Wellington's comment after Waterloo, that it was "a damned near-run thing."

142. In the particular circumstances, the Tribunal regards it as appropriate to determine that in any ultimate costs orders, Claimant should not have its costs of this application. As regards Respondent's request for costs, the Tribunal reserves leave to Respondent to contend upon finality that, although unsuccessful on this application, Respondent should have its costs of this application.

[90] In this regard, the Tribunal notes that the bar to the acceptance of a permissive approach embraced by some tribunals to overcome situations of non-compliance with treaty requirements expressed as a condition, is that, no more than for the ICJ, this Tribunal is without capacity to dispense with inconvenient terms of a treaty. Neither the Vienna Convention nor principles of customary international law enable the terms of State consent to jurisdiction to be redefined as merely directory or subject to unexpressed qualifications.

Decision on Bifurcated Jurisdictional Issue

For the reasons set forth above, the Tribunal declares that:

1 Respondent's Rule 41 (1) application is rejected.

2 Costs issues reserved to final costs orders.

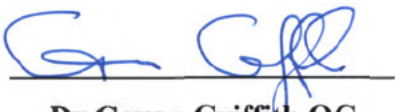
The extant procedural directions are confirmed.

Mr. Michael Evan Jaffe

Arbitrator

Prof. Dr. Rolf Knieper

Arbitrator



Dr Gavan Griffith QC

President of the Tribunal