

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

IN THE PROCEEDING BETWEEN

GARANTI KOZA LLP
(Claimant)

and

TURKMENISTAN
(Respondent)

(ICSID Case No. ARB/11/20)

DISSENTING OPINION

By
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Arbitrator

Date: 3 July 2013

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Dissenting Opinion

Introduction

1. From the outset, I would like to point out that the present Dissenting Opinion does not have the objective of dealing with the effect of most-favoured-nation (hereinafter “MFN”) clauses on investment arbitration provisions of bilateral investment treaties (“BITs”), and more specifically their effect on dispute settlement provisions. The applicable treaty *in casu* – the 1995 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments (hereinafter, the “U.K.-Turkmenistan BIT”) – deals explicitly with this issue.
2. My Dissenting Opinion deals with the Respondent’s first objection to jurisdiction in the present case, i.e. the objection for lack of consent. Throughout the jurisdictional phase and during exchanges with my esteemed colleagues, I have always kept in mind the need to preserve the exact balance of rights and obligations negotiated in the U.K.-Turkmenistan BIT. Such a concern stems from the desire to ensure that the rights and legal interests of *both* disputing parties are unaltered.¹
3. I have reflected at length on whether it is possible to support the decision of the majority (hereinafter “the Decision”). However, the importance of the issues as I see them is such that I have felt impelled to dissent, in particular from the finding of my colleagues that the Tribunal “has jurisdiction, as an ICSID tribunal, to hear the Claimant’s claims”.² I cannot agree with the reasoning and arguments on which this finding is based. The reasons for my dissent are set forth below.
4. The objective of my Dissenting Opinion is to determine the conditions for resorting to

¹ Recently, the International Court of Justice (ICJ) recalled the necessity and importance not to “alter the limits of a [court]’s judicial function”, see *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, para. 46, available at www.icj-cij.org.

² *The Decision*, para. 97.

ICSID arbitration under Article 8 of the U.K.-Turkmenistan BIT, and whether or not consent to ICSID arbitration can be *established* via the MFN clause contained in Article 3(3) of the same BIT. There is no doubt that these are the two provisions at stake at the present stage of the proceedings and that form the real legal dispute between the parties. A tribunal has a duty “to isolate the real issue in the case”.³

5. It is crucial to stress from the outset a fundamental legal safeguard governing the issue of consent before international courts and tribunals, in general, and ICSID tribunals in particular: consent to jurisdiction in international adjudication must always be *established*. First, this is a necessary prerequisite to the exercise of the international judicial function. The principle of *compétence de la compétence* as defined under general international law, and under Article 41 of the ICSID Convention, empowers an arbitral tribunal or any other international court to determine *proprio motu* the extent and limits of its jurisdiction. At the same time, the principle of *compétence de la compétence* requires an arbitral tribunal or any other international court to *establish* the extent and limits of its jurisdiction objectively, i.e., on the basis of the title of jurisdiction that is conferred to the said tribunal, and not to go beyond it.
6. The trust and confidence in third-party adjudication is dependent on the respect by international courts and tribunals of the limits to the jurisdiction conferred upon them. Tribunals should not create a *de facto* system of compulsory jurisdiction, which in the present stage of positive international law remains the exception. The international legal order still rests largely on a system of facultative jurisdiction, and because of that essential characteristic, a tribunal should never attempt to impose its jurisdiction and adjudicate the merits of a dispute when the parties have not consented to its jurisdiction. The ICSID arbitration system is not an exception to that approach. BITs were never concluded by sovereign states with the idea that a third-party adjudicator would then empower himself or herself with the authority to embark on ‘consent shopping’.

³ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29: “[...] it is the Court’s duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions”.

7. The MFN clause regardless of its formulation in a BIT does not vest such authority in a tribunal. The interpretation of MFN clauses is *mutatis mutandis* subject to the principle of consent⁴ as enshrined both in general international law as well as in treaty law (the ICSID Convention in the context of the present dispute). It would create a dangerous precedent to formulate new approaches that go against these fundamental rules and principles of international adjudication.⁵
8. Despite the repetitive use of the verb “import” by both the Claimant and the Respondent, the Tribunal should not be misled and consider that the question in the present arbitration is whether consent can be *imported* from one treaty to another treaty. I consider that the real question that the Tribunal should address first and foremost is whether consent to ICSID arbitration is or is not *established* under the U.K.-Turkmenistan BIT. Indeed, such consent exists or does not exist, and cannot be based on presumptions. Lack of consent cannot be remedied by the so-called ‘import’ of consent. As indicated by the International Court of Justice (ICJ), the jurisdiction of international courts and tribunals, including ICSID tribunals, “is based on the consent of the parties and is confined to the extent accepted by them”.⁶ Well-established principles governing the interpretation of titles of jurisdiction as formulated by the ICJ should guide the interpretation of dispute settlement provisions under the ICSID Convention and BITs.⁷

⁴ See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para 59: “the Tribunal finds no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the Argentina-Spain BIT” (hereinafter “*Interagua v. Argentina*”).

⁵ See, e.g., Ch. De Visscher, *Theory and Reality in Public International Law*, Princeton, New Jersey, 1968, pp. 395-396: “The judge is not asked to penetrate the intimate designs of the contracting parties; he is expected to discover by the means at his disposal that part of their intentions that external signs reveal. Now the words freely chosen by the parties are par excellence or at least primarily the instrument of this externalization. This, in turn, is a security factor. The security that the treaty affords the contracting parties is measured by its capacity to withstand pressures that might be brought to promote changes. Of this fundamental contractual guarantee the text, the common work of the parties, is the essential instrument [...] What the Court does not allow is that in the course of interpretation the text should be prematurely eclipsed by a teleological scrutiny that might distort its meaning. Such precipitate reasoning may result in sacrificing respect for the text to subjective considerations.”

⁶ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, I.C.J. Reports 2006, p. 39, para. 88; See also *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, I.C.J. Reports 2008, p. 204, para. 62.

⁷ It is well recognized that the drafters of the ICSID Convention heavily relied on the Statute and Rules of the ICJ when negotiating the ICSID Convention. See, e.g., G. Kaufmann-Kohler, “Foreword” in A. R. Parra, *The History of ICSID*, Oxford University Press, Oxford, 2012, p. viii. See also, A. R. Parra, *ibid.*, pp. 51-53.

9. The present Dissenting Opinion will avoid repeating the positions of the Respondent and the Claimant that have been already presented exhaustively in their respective written submissions and during the hearing. I will first describe briefly the approach to interpretation that should guide the Tribunal in light of the customary rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (hereinafter, the "VCLT")⁸ (I). Second, I will interpret Article 8 of the U.K.-Turkmenistan BIT (II). At that level, the aim will be to analyze the relationship between Article 8(1) and Article 8(2) of the U.K.-Turkmenistan BIT as well as to demonstrate that the real issue in the present dispute is whether consent can be established under Article 8(2) rather than on Article 8(1), as the majority has incorrectly tried to put it. Afterwards, I will focus on the ordinary meaning of Article 3(3) under the customary rules of treaty interpretation (III). Subsequently, I will briefly deal with the formal requirement(s) governing consent under Article 25(1) of the ICSID Convention, which are essential for the proper functioning of ICSID and other arbitral mechanisms (IV). Finally, assuming that the MFN clause of Article 3(3) of the U.K.-Turkmenistan BIT finds application in the present dispute, I will enquire whether the MFN clause permits the Tribunal to find jurisdiction on the basis of another BIT (or other BITs) to

⁸ Article 31 ("General rule of interpretation") reads as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

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

Article 32 ("Supplementary means of interpretation") states:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

which Turkmenistan is a party, if consent to ICSID jurisdiction is not given or established under Article 8(2) of the U.K.-Turkmenistan BIT (V).

I. Which guidance is offered by the customary rules of treaty interpretation as codified in the VCLT?

10. Under the customary rules of treaty interpretation, the Tribunal should essentially be guided by the general rule of interpretation contained in Article 31 of the VCLT when interpreting the scope of consent under Article 8 and the meaning of Article 3(3) of the U.K.-Turkmenistan BIT.⁹ The stated general rule of interpretation can be summarized as follows: the text must always be taken as the starting point.¹⁰ As such, no doctrine of restrictive or extensive interpretation of the text of the treaty should prevail.¹¹ Interpretation of the text should be based on an “*ex ante* neutral approach”.¹²
11. As explained by an arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA), the rule of interpretation under Article 31 of the VCLT “should be viewed as forming an *integral whole*, the constituent elements of which cannot be separated”.¹³ The same tribunal also explained that “all the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means”.¹⁴ But most importantly, the tribunal, following the practice of the ICJ in that respect, emphasized the following point:

[T]he “text of the treaty” is a notion distinct from, and broader than, the notion of “terms”. Relying on the text does not mean relying solely, or

⁹ See, e.g., *Romak S.A. (Switzerland) and the Republic of Uzbekistan*, Award of 26 November 2009, paras. 169, 172 and 241.

¹⁰ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 21-22, para. 41; Permanent Court of Arbitration, *In the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between The Kingdom of Belgium and The Kingdom of The Netherlands*, Award of the Arbitral Tribunal, 24 May 2005, para. 47.

¹¹ *Austrian Airlines v. Slovak Republic*, UNCITRAL Case, Award of 20 October 2009, paras. 119-121 (*hereinafter* “*Austrian Airlines v. Slovakia*”); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2001, para. 43.

¹² *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 171 (*hereinafter* “*Daimler v. Argentina*”).

¹³ Permanent Court of Arbitration, *Case concerning the Auditing Accounts between the Kingdom of The Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides*, Arbitral Award of 12 March 2004, para. 62 (emphasis added).

¹⁴ *Id.* .

mainly, on the ordinary meaning of the terms. Such a solution would effectively ignore the references to good faith, the context, and the object and purpose of the treaty. The ordinary meaning of the terms is even itself determined as a function of the context, object and purpose of the treaty. Lastly, as paragraph 2 of Article 31 of the Vienna Convention provides, the text of the treaty (including the preamble and annexes) is itself part of the context for the purposes of interpretation.¹⁵

12. It appears from the above quoted paragraph that the interpretation of the ordinary terms of a provision such as Article 8 of the U.K.-Turkmenistan BIT must take into account the *whole text* of the U.K.-Turkmenistan BIT and not be limited to the terms embodied in Article 8. The same logic applies to the interpretation of Article 3(3) of the U.K.-Turkmenistan BIT. The interpretation of the terms of Article 3(3) must take into account the *whole text* of the U.K.-Turkmenistan BIT and, thus, be read in light of Article 8 of the U.K.-Turkmenistan BIT. It is not possible under customary rules of treaty interpretation, as reflected in Article 31 of the VCLT, to isolate the interpretation of Article 8 from the interpretation of Article 3(3) or vice versa.¹⁶ The proper interpretation must give meaning and effect to *both* provisions, and not be an interpretation that would exclude one provision and render it meaningless while conferring a broad meaning and effect on the other provision.¹⁷ The “terms” of Article 3 of the U.K.-Turkmenistan BIT, and in particular of Article 3(3), do not have a legal existence of their own that would compel this Tribunal to ignore the context of the BIT and its object and purpose. As a result, the “terms” of Article 3(3) cannot be used to completely override another provision of the

¹⁵ *Id.* at para. 63.

¹⁶ The fact that both parties have not advanced this approach to interpretation is no reason not to apply it, since it is a normal approach to treaty interpretation that the Tribunal can and should apply. Moreover, the legal maxim *jura novit curia* applies. As stressed by the International Court of Justice (ICJ) in the *Fisheries jurisdiction cases*, for instance, “[...] an international judicial organ, is deemed to take judicial notice of international law and is therefore required [...] to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute” (see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment*, I.C.J. Reports 1974, p. 181, para. 18).

¹⁷ See, e.g., *United States – Standards for Reformulated and Conventional Gasoline*: “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”, Report of the WTO Appellate Body, adopted 20 May 1996, WT/DS2/AB/R, p. 23. This statement is quoted with approval in *Japan – Taxes on Alcoholic Beverages*, report of the WTO Appellate Body, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 and in *Brazil – Export Financing Programme for Aircraft*, Report of the WTO Appellate Body, adopted 20 August 1999, WT/DS46/AB/R, footnote 110. See also, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement – Decision by the Arbitrators*, 28 August 2000, footnote 17: “We therefore read these provisions as a whole and give a useful meaning to all, in application of the principle of effective interpretation (*ut res magis valeat quam pereat*)”.

U.K.-Turkmenistan BIT, including Article 8.

13. As a general rule, if after an examination of the terms of Article 8 and/or of Article 3(3), their meaning remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, recourse can be had to supplementary means of treaty interpretation (Article 32 of the VCLT) such as the *preparatory work* or the *circumstances* of the conclusion of the BIT.¹⁸ The supplementary means can also be referred to in order to confirm the interpretation of the ordinary meaning of the texts of Article 8 and/or of Article 3(3) of the U.K.-Turkmenistan BIT under Article 31 of the VCLT.¹⁹ In the context of the present Dissenting Opinion, supplementary means of treaty interpretation will be referred to in order to confirm, in particular, the interpretation of the ordinary meaning of the text of Article 8 of the U.K.-Turkmenistan BIT.

II. Interpretation of Article 8 of the U.K.-Turkmenistan BIT in light of the customary rules of treaty interpretation

A. Relationship between Article 8(1) and Article 8(2) of the U.K.-Turkmenistan BIT

14. Article 8(1) is inseparable of Article 8(2). Article 8(1) reads as follows:

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

¹⁸ “ [...] the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words”, see *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.

¹⁹ See also, *Air Services Agreement of 27 March 1946 between the United States of America and France*, Award of 9 December 1978, *United Nations Reports of International Arbitral Awards*, vol. 14, p. 434, para. 44, p. 440, para. 66, p. 441, para. 69; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 27-28, para. 55; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, *I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, *I.C.J. Reports 1995*, p. 21, para. 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 653, para. 53; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, para. 142.

15. Article 8(2) of the BIT reads as follows:

Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

16. The majority has persisted in considering that Article 8(1) deals with “Turkmenistan’s consent to participate in international arbitration with U.K. investors and the conditions attached to that consent”²⁰, and that Article 8(2) deals with “the arbitration systems that may be used if the conditions of Article 8(1) are met”.²¹ Contrary to the interpretation of the majority, Article 8 of the U.K.-Turkmenistan BIT does not divide the question of consent to participate in ICSID Arbitration into two parts. Elementary rules of treaty interpretation invite to interpret Article 8 as *a whole* and not as composed of segmented and fragmented provisions as the majority has chosen to do. The whole mechanism of Article 8 relates to consent to international arbitration. Article 8(1) does not invite the Tribunal to look first at whether the host state has consented to participate in international arbitration at all (under Article 8(1)), and second, at whether it has agreed to ICSID arbitration (under Article 8(2)). Such an approach is not grounded in a proper application

²⁰ *The Decision*, para. 25.

²¹ *Id.*

of the customary rules of treaty interpretation because it would deprive Article 8(1) of its real function and make Article 8(2) redundant.

17. Article 8(1) formulates the rule according to which if, after a period of four months, no amicable settlement can be reached between the foreign investor and the host state, the former can submit the dispute to international arbitration. The majority considers that consent is granted in Article 8(1).²²
18. The legal purpose of Article 8(1) is to fix pre-conditions or what is commonly referred to as ‘conditions precedent’ to international arbitration, i.e., negotiations during four months. There lies the *ratio legis* of Article 8(1). It is meant to govern the pre-conditions of consent to arbitration under Article 8 of the U.K.-Turkmenistan BIT. In other words, Article 8(1) contains, subject to the condition of four months of negotiations, consent in principle to international arbitration, and such consent in principle must still be read in light of the further specific conditions governing consent to arbitration by virtue of Article 8(2).
19. Articles 8(1) and 8(2) are two sides of the same coin. The coin – Article 8 – encompasses the provisions governing consent to international arbitration under the U.K.-Turkmenistan BIT. One side of the coin – Article 8(1) – shows the general pre-condition(s) under which a foreign investor can initiate international arbitration against the host state; the other side – Article 8(2) – fixes the strict conditions under which the foreign investor can pursue one specific venue of international arbitration (e.g., ICSID arbitration) rather than another (e.g. UNCITRAL arbitration).
20. I find it difficult to subscribe to the point of view of the majority according to which “Article 8(2) [is] only a menu of options concerning the arbitration process, and a default selection”.²³ As Article 8(1), Article 8(2) also embodies consent to international arbitration. Chronologically and logically, Article 8(2) becomes mandatorily applicable after it is proved (or has been proven that) that the requirement of negotiations during

²² *Id.* at para. 31.

²³ *Id.*

four months has been fulfilled under Article 8(1). This is where the analysis of Article 8(1) should stop and where the analysis under Article 8(2) should start. The majority has chosen to focus on Article 8(1) in order to justify its approach and to find jurisdiction in the present case. With all due respect for my colleagues, I believe that the Decision has used Article 8(1) as a means to achieve an end that it could not easily achieve by acknowledging that consent to arbitration is contained in Article 8(2). The focus should have been on Article 8(2), which is the true subject-matter of the dispute at this jurisdictional phase. The objection to the jurisdiction of the Tribunal that was raised by the Respondent is an objection for lack of consent under Article 8(2). Nothing less, nothing more. The remainder of my opinion will thus only deal with Article 8(2). I will now analyze the position of the majority according to which Article 8(2) does not encompass consent to arbitration.

B. The ordinary meaning of Article 8(2) of the U.K.-Turkmenistan BIT

21. The majority states in its Decision that because Article 8(2) begins with “Where the dispute is referred to international arbitration,” this indicates that “Article 8(2) only comes into play after the determination has been made, under the provisions of Article 8(1), to refer the dispute to arbitration”.²⁴ The position of the majority shows a misperception of the ordinary meaning of the terms contained in Article 8(2). The phrase “Where the dispute is referred to international arbitration,” does not imply at all that Article 8(2) does not deal with consent to arbitration. The said phrase relates specifically to the *initiation of international arbitration* under the U.K.-Turkmenistan BIT and simply confirms that under Article 8(2) – like in many other BITs – it is the foreign investor that initiates investment arbitration. In this respect, there is a cause-and-effect relationship between the last part of Article 8(1) (“disputes shall [...] be submitted to international arbitration if the *national or company concerned so wishes*”) and the beginning of Article 8(2) (“Where the dispute is referred to international arbitration”). In other words, if the foreign investor ‘wishes’, he can choose (to initiate) international arbitration to settle his dispute with the host state. **However** – and this is where I strongly disagree with the

²⁴ *Id.*

majority – the power of initiation (or choice to have recourse to investment arbitration) is not tantamount to consent to arbitration. The initiation of investment arbitration by the foreign investor in a specific arbitration forum is still conditioned to the consent from the host state under Article 8(2) of the U.K.-Turkmenistan BIT. That is why Article 8(2), next to the preceding paragraph of that article, also covers without any doubt, consent to international arbitration.

22. The wording of Article 8(2) is clear and confirms that consent to arbitration is specifically dealt with in Article 8(2) when a foreign investor envisages having recourse to a specific arbitration venue. Article 8(2) states that “the national or company and the Contracting Party concerned in the dispute *may agree* to refer the dispute *either* to the International Centre for the Settlement of Investment Disputes [...] *or* the Court of Arbitration of the International Chamber of Commerce or an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement **or** established under the Arbitration Rules of the United Nations Commission on International Trade Law” (emphasis added). The phrase “may agree to refer the dispute” demonstrates that Article 8(2) governs consent to arbitration when it comes to specific venues of arbitration. A similar wording can be found in Article 36(1) of the Statute of the International Court of Justice (ICJ). Article 36(1) provides that “The jurisdiction of the Court comprises all cases *which the parties refer to it*”. This provision is found in the part of the Statute dealing with the jurisdiction of the ICJ, i.e. the part governing ways of *consenting* to the jurisdiction of the Court. Why would a provision which affords the parties the possibility to agree to refer the dispute to the ICJ be considered a provision dealing with consent to jurisdiction while, on the other hand, a provision affording the possibility to agree to refer disputes to arbitration under the U.K.-Turkmenistan BIT, would not be qualified as relating to consent to arbitration?
23. Let us have a closer look at the mechanism of Article 8(2) of the U.K.-Turkmenistan BIT. Article 8(2) offers, three options to settle a dispute between a foreign investor and a host state arising out of the said BIT. The dispute can be settled under ICSID arbitration (*option 1*), ICC arbitration (*option 2*) or UNCITRAL arbitration (*option 3*).

24. However, for one of these options to be used by a foreign investor *both* the foreign investor and the host state must have *previously agreed* to refer the dispute to one of those three fora. The conditions for such previous agreement will vary depending upon which of the dispute settlement procedures is selected. Article 8(2) clearly states that in order to refer the dispute to international arbitration, “the national or company *and* the Contracting Party” concerned by the investment dispute “*may agree*” to settle the dispute under one of the above-identified options (italics added). Therefore, ICSID arbitration under the ordinary meaning of Article 8(2) of the U.K.-Turkmenistan BIT can only be used by the foreign investor if it has *mutually* agreed with the respondent state to do so.
25. It cannot be assumed that ‘and’ means ‘or’ in the context of Article 8(2) of the U.K.-Turkmenistan BIT. Nothing suggests that the Tribunal should depart from the ordinary meaning of the word ‘and’ which means ‘together with’ or ‘along with’ – i.e., the foreign investor ‘together with’ the state concerned. Moreover, the expression ‘may agree’ implies that the foreign investor is not granted with “an immediate right to resort to ICSID arbitration”²⁵ under Article 8(2) of the U.K.-Turkmenistan BIT. Assent of *both* the foreign investor and the host state concerned is necessary for ICSID arbitration to be triggered. A similar wording (“*as may be mutually agreed by the parties*”) in the context of a national investment legislation has been interpreted as meaning that a “subsequent agreement between the parties is *required*”²⁶ for ICSID arbitration to be initiated by a foreign investor.
26. This reading of Article 8(2) is confirmed by the fact that Article 8(2) itself provides that, “if after a period of four months from written notification of the claim *there is no agreement*” (italics added) to use one of the three options “the dispute *shall* at the request in writing of the national or company concerned be submitted to arbitration” (italics added) under the UNCITRAL Arbitration Rules. Such wording clearly indicates that a mutual agreement is needed for ICSID arbitration to be initiated by the foreign investor. When an agreement cannot be reached between the foreign investor and the state

²⁵ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 331 (*hereinafter* “*Biwater v. Tanzania*”).

²⁶ *Id.* at para. 329 (emphasis added).

concerned, *only* arbitration under UNCITRAL Arbitration Rules can be used by the foreign investor, *not ICSID arbitration or ICC arbitration*. The verb ‘shall’ illustrates that rationale. It shows that the only type of arbitration for which a subsequent or mutual agreement between the foreign investor and the state concerned is not needed under Article 8(2) – after four months of notification of the claim – is UNCITRAL *ad hoc* arbitration. Article 8(2) is clear in its literal meaning and its intended effect.²⁷

27. If the language of Article 8(2) of the U.K.-Turkmenistan BIT were not to be interpreted in the light of its ordinary meaning, there would be a risk of depriving the final part of Article 8(2) (“if after a period of four months ... under the Arbitration Rules of the United Nations Commission on International Trade Law”) of its *effet utile* (*ut res magis valeat quam pereat*). This principle of effectiveness must be taken into account when interpreting a BIT or specific provision(s) of a BIT under Article 31 of the VCLT. Not only has the ICJ acknowledged that “the principle of effectiveness [...] has an important role in the law of treaties”²⁸, but also some arbitral tribunals have recognized that “[i]t is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless”.²⁹
28. As indicated above (see para. 13 of the present Opinion), the ordinary meaning of Article 8(2) of the U.K.-Turkmenistan BIT can be *confirmed* by taking into account the circumstances of the conclusion of the U.K.-Turkmenistan BIT. This method of treaty interpretation is based on Article 32 of the VCLT, which also reflects customary international law.

²⁷ In the same sense, see *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

²⁸ *Fisheries Jurisdiction (Spain v. Canada), I.C.J. Reports 1998*, p. 455, para. 52. See also, *Advisory opinion of 21 June 1971 on the Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa)*, *ICJ Reports 1971*, p. 35, para. 66; *Border and transborder armed actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, *ICJ Reports 1998*, p. 89, para. 46. See also, H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, Cambridge, 1982, pp. 227-230.

²⁹ *Eureko BV v. Republic of Poland*, Partial Award (by Majority) of 19 August 2005, para. 248; See also, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of 27 July 2006, para. 132 and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 November 2004, para. 95.

29. The U.K.-Turkmenistan BIT was negotiated and concluded following the adoption of the 1991 U.K. Model BIT.³⁰ The said Model BIT set forth two approaches to Article 8. One approach called the ‘preferred’ version of Article 8 contained a direct consent to ICSID arbitration without the need of a prior agreement between the foreign investor and the host state (“Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes...”). The other approach, named the ‘alternative’ version, required a subsequent agreement by the parties to submit their dispute to ICSID. Article 8(2) of the U.K.-Turkmenistan BIT embodies the ‘alternative’ version. If a different interpretation were adopted, this would obviously change the nature of the intent of Turkmenistan and the U.K. It would also go against the ordinary meaning of Article 8(2) as it appears from the text of the provision itself as well as the circumstances of the conclusion of the U.K.-Turkmenistan BIT.
30. The circumstances of the adoption of the U.K.-Turkmenistan BIT confirm the intent of the Parties and the ordinary meaning to be given to Article 8(2) of the U.K.-Turkmenistan BIT in light of its context and object and purpose. Both U.K. and Turkmenistan have made the choice to opt for the ‘alternative’ version and that choice has to be given full effect by the Tribunal in the present case. Putting aside their choice (i.e., for the ‘alternative version’) would be tantamount to imposing on them an approach other than the one they negotiated and agreed to be bound by. However, restrictions to the sovereignty of states cannot be presumed – even through the application of an MFN clause.³¹ When states consent to the jurisdiction of an international court or tribunal, such as ICSID tribunals, they agree to restrict their sovereignty in a specific context. This is one of the very *raison d’être* of international adjudication: the acceptance by states to relinquish part of their sovereignty and submit to the judgment of third-party

³⁰ See Ex. R-7, 1991 U.K. Model BIT, International Investment Instruments: A Compendium, UNCTAD/DTCI/30 (Vol. III).

³¹ See *Daimler v. Argentina*, Award of 22 August 2012, para. 168: “all international treaties – whether bilateral, plurilateral or multilateral – are essentially expressions of the contracting states’ consent to be bound by particular legal norms. They encapsulate voluntarily accepted restraints upon the universally recognized principle of state sovereignty. Consent is therefore the cornerstone of all international treaty commitments, at least insofar as those commitments exceed the minimum requirements of customary international law. *The primacy of the principle of consent runs through all types of treaty commitments entered into by states. There is no distinction between substantive treatment provisions, MFN clauses, dispute resolution clauses, or otherwise. All are equally valid and equally binding to the full extent of the contracting State parties’ consent*” (emphasis added).

adjudicators. Therefore, consent to ICSID arbitration in a case such as this cannot be construed, when in reality a state has not consented to ICSID arbitration, but has instead opted for the approach of the ‘alternative’ U.K. model of BITs which excludes ICSID arbitration unless consented to by both parties.

31. The tribunal in *Daimler v. Argentina* has particularly insisted on the aforementioned aspects and its cautious approach deserves to be quoted here:

[...] as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care *not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.*³²

Thus, the choice of the ‘alternative’ model should govern the understanding and interpretation of the scope of application of Article 3(3) of the U.K.-Turkmenistan BIT.

32. The U.K. would not have adopted two models of BITs if it had considered that the two models would lead to the same result. Moreover, the U.K.’s BIT treaty practice is quite varied with respect to its dispute settlement commitments. This stresses the importance of the choices made by the negotiators in each specific case.
33. The disputes which have been brought in the context of BITs concluded by the U.K. with other countries always followed the arbitration procedures as foreseen in the concerned BITs. A most recent example is *Oxus Gold v. Uzbekistan*. The dispute arose out of the U.K.-Uzbekistan BIT which also encompasses the ‘alternative’ version of the U.K. Model BIT. The Claimant accordingly brought the dispute under the UNCITRAL Arbitration Rules, as there was no agreement between the two parties to bring the dispute to another forum, such as ICSID.³³

³² *Daimler v. Argentina*, Award of 22 August 2012, paras. 164 (emphasis added).

³³ *In the Matter of arbitration under the UNCITRAL between Oxus Gold PLC v. Republic of Uzbekistan, The State Committee of Uzbekistan for geology & mineral resources, and Na voi Mining & Metallurgical Kombinat*, Notice of Arbitration, Oral hearings, Claimant, p.154.

34. Having thus clarified aspects of the interpretation of Article 8(2) of the U.K.-Turkmenistan BIT under Articles 31 and 32 of the VCLT, the present opinion turns to establishing the ordinary meaning of Article 3(3) of the U.K.-Turkmenistan BIT.

III. The ordinary meaning of Article 3(3) of the U.K.-Turkmenistan BIT in light of the customary rules of treaty interpretation

35. Article 3 of the U.K.-Turkmenistan BIT reads as follows:

Article 3

National Treatment and Most-favoured-nation Provisions

- (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
- (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.
- (3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

36. Article 3 encompasses the national treatment obligation and the most-favoured nation (MFN) principle. As such, Article 3 reflects a common substantive standard that is found in the vast majority of BITs. What differentiates Article 3 from many provisions of BITs dealing with the national treatment obligation and the MFN principle is that it addresses specifically and explicitly the scope of its application within the U.K.-Turkmenistan BIT. Indeed, Article 3(3) of the said BIT specifies:

For the avoidance of doubt it is confirmed that the *treatment* provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement. (italics added)

37. During the last decade, much controversy has arisen with respect to MFN provisions contained in BITs. One of the major aspects of this controversy before investment arbitral tribunals is whether MFN provisions apply to dispute settlement provisions of BITs. The U.K.-Turkmenistan BIT clearly prevents such a controversy from arising before an

arbitral tribunal that has jurisdiction to deal with disputes under the said BIT. Indeed, the wording of Article 3(3) of the U.K.-Turkmenistan BIT shows that the MFN principle applies to dispute settlement provisions of the U.K.-Turkmenistan BIT, thus including Article 8(2) of the U.K.-Turkmenistan BIT.

38. It is not within the ambit of the present dissenting opinion to give a detailed analysis of MFN provisions and their meaning under general international law. It is sufficient to recall that the function of an MFN provision is to guarantee balanced and coherent treaty relations between the members of the international community. More specifically, what an MFN provision allows in the context of BITs is the following: to *extend* treatment of foreign investors that is more favourable under a BIT to treatment of foreign investors that is less favourable under other BITs. Therefore, because of the MFN provision contained in Article 3 of the U.K.-Turkmenistan BIT and its application to dispute settlement issues, a foreign investor of British nationality can invoke more favourable dispute settlement provisions embodied in other BITs concluded by Turkmenistan. Since Article 3(3) is part of a *whole*, i.e., the U.K.-Turkmenistan BIT, it is necessary to read and interpret its terms in light of the other provisions of the BIT (the context of the BIT) and, especially, Article 8(2).
39. The issue in the present dispute is the relationship between Article 3(3) and Article 8(2) of the U.K.-Turkmenistan BIT. As previously explained, the interpretation of the ordinary meaning of Article 3(3) cannot be isolated from the mechanism set forth in Article 8(2) (see paragraph 12 above). This approach was also adopted by the tribunal in *Austrian Airlines v. Slovakia*. Indeed, when dealing with the MFN clause contained in Article 3(1) of the Austria-Slovakia BIT, the tribunal found that it “must therefore look to the context of Article 3(1) as well as to the other elements relevant for its interpretation. Starting with the context, Article 3(1) must be viewed for present purposes in combination with Article 3(2) as well as with the treaty provision that deal with dispute settlement, i.e. Articles 8 and 4(4) and 4(5)”.³⁴ The tribunal even went further and specified that “[w]hat the Tribunal must examine is whether the Treaty provides for

³⁴ *Austrian Airlines v. Slovak Republic*, UNCITRAL Case, Award of 9 October 2009, para. 127.

exceptions to the application of the MFN clause, and more specifically, whether the provisions governing access to arbitration under the Treaty are to be regarded as a limitation to the scope of the MFN clause”.³⁵ In my view, there is, thus, no doubt that the relationship between Article 3(3) and Article 8(2) of the U.K.-Turkmenistan BIT is one that should have been dealt with by the majority in the present instance.

40. *Relationship between Article 3(3) and Article 8(2)*. To give effect to the MFN clause contained in Article 3(3), the foreign investor must first be in a *dispute settlement relationship* with the host state. A problem of *treatment* can only arise when the foreign investor is treated in a certain way while entertaining a specific relationship with the host state. If there is no relationship between the host state and the foreign investor, the question of more or less favourable treatment is not at stake and thus, the MFN principle does not apply. The so-called ‘choice’ that supposedly derives from an MFN provision and which has been extensively used by the majority to justify its approach *in casu*, does not come into play if a problem of treatment cannot be identified under the U.K.-Turkmenistan BIT.
41. In other words, the so-called ‘right’ to a more favourable treatment under Article 3(3) of the U.K.-Turkmenistan BIT can only be exercised if the foreign investor and the host state are subject to a dispute settlement relationship under one of the dispute settlement options that are provided in Article 8(2) of the U.K.-Turkmenistan BIT. In that sense, the application of Article 3(3) of the U.K.-Turkmenistan BIT is *subordinated* or *conditioned* to the prior application of Article 8(2) of the U.K.-Turkmenistan BIT.
42. As indicated above (see para. 23), Article 8(2) of the U.K.-Turkmenistan BIT offers three options to settle a dispute between a foreign investor and a state arising out of the said BIT. The dispute can be settled under the ICSID Convention (*option 1*), or by the ICC Court of Arbitration (*option 2*), or else under UNCITRAL arbitration (*option 3*). For the Claimant to benefit from more favourable treatment under other BITs concluded by Turkmenistan, one of these options of dispute settlement must first be deemed applicable. For an option to be deemed applicable, *prior and strict compliance with the conditions*

³⁵ *Austrian Airlines v. Slovakia*, UNCITRAL Case, Award of 9 October 2009, para. 131.

prescribed by Article 8(2) of the U.K.-Turkmenistan BIT is necessary.

43. Option 1 – ICSID arbitration – is only deemed applicable under Article 8(2) of the U.K.-Turkmenistan BIT if the foreign investor has *mutually* agreed with the respondent state to have recourse to ICSID arbitration. As long as such a mutual agreement is not established, an issue of treatment – and even less of MFN – does not arise under Option 1 (ICSID arbitration). The MFN principle can, thus, only apply with respect to ICSID arbitration if there is a mutual agreement between the foreign investor and the host state to settle the investment dispute through ICSID arbitration. If such a mutual agreement is established, then Article 3(3) of the U.K.-Turkmenistan BIT applies and a claimant in a dispute may be in a position to invoke more favourable ICSID arbitration provisions contained in other BITs concluded by Turkmenistan. In the absence of a mutual agreement to ICSID arbitration, a claimant will not be in a position to invoke more favourable treatment under Article 3(3) of the U.K.-Turkmenistan BIT with respect to ICSID arbitration under other BITs concluded by Turkmenistan.³⁶
44. Here, there is simply no issue of treatment under ICSID arbitration that arises, since ICSID arbitration is deemed inexistent in the absence of a mutual agreement. This is the reasonable ordinary meaning that can be given to Article 3(3) of the U.K.-Turkmenistan BIT under customary rules of treaty interpretation. This gives *effet utile* to the wording of *both* Article 3(3) and Article 8(2) of the U.K.-Turkmenistan BIT.³⁷ In this context, attention can be given to the approach of the *Tza Yap Shum v. Peru* tribunal, which went in the direction of both conferring full *effet utile* to the wording of a dispute settlement clause in a BIT and reading treaties as a whole (rather than as mere assemblage of

³⁶ It might be argued, and indeed is argued by Claimant, that in the present case "treatment" is established at least at the minimum level of the UNCITRAL rules without consent of Turkmenistan. On the basis of that "treatment", Claimant could seek the ICSID level of treatment – assuming that, for the sake of argument, it is more favourable than UNCITRAL treatment. As I have demonstrated above, this cannot be achieved within the framework of the U.K.-Turkmenistan BIT, as it would circumvent the precondition of mutual consent for ICSID arbitration. As to the argument that this could be based on another BIT in which Turkmenistan would have consented to ICSID arbitration without the need for mutual agreement, this question is dealt with in detail in Chapter V below.

³⁷ As explained by the International Court of Justice (ICJ): "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes [...] a meaning which would be contrary to their letter and spirit"; see *Interpretation of Peace Treaties (second phase)*, *Advisory Opinion: I.C. J. Reports 1950*, p. 229.

separate provisions).³⁸

45. Let us now turn to the formal requirement(s) that govern consent under Article 25(1) of the ICSID Convention.

IV. The formal requirement(s) governing consent under Article 25(1) of the ICSID Convention

46. Consent is a necessary prerequisite for ICSID arbitration.³⁹ It is the “cornerstone” of ICSID jurisdiction. Without consent, no ICSID arbitration can take place.
47. Article 25 of the ICSID Convention requires that the parties to the dispute “consent in writing” to submit that dispute to the Centre. Under Article 25, consent in writing is thus necessary, but the text does not give any further indication about either the manner or timing of such consent or the way in which it must be interpreted. There is no requirement that such consent be contained in a single article of a treaty or in a single treaty.⁴⁰ Consent to ICSID arbitration can be identified in a treaty, in a national investment law or in a contract. Nevertheless, an idea of implicit consent is not admissible in the ICSID system. Whatever the instrument in which consent to ICSID arbitration is embodied, consent must be given in writing.
48. The ICSID Convention is crystal-clear. Consent is a prerequisite and if it is not established, no jurisdiction can be exercised by an ICSID tribunal. There is no need to embark on a discussion whether consent must be “clear and unambiguous,”⁴¹ or whether dispute settlement provisions or so-called compromissory clauses must be interpreted in a

³⁸ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction of 19 June 2009, para. 216 (hereinafter “*Tza Yap Shum v. Peru*”).

³⁹ See preamble of the ICSID Convention: “Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration [...]”.

⁴⁰ *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 55 (hereinafter “*C.S.O.B. v. Slovakia*”). See also, *Renta 4 v. Russia*, SCC Case No. Arbitration V (024/2007), Award on Preliminary Objections, 20 March 2009, para. 82.

⁴¹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 198 (hereinafter “*Plama v. Bulgaria*”). See, e.g. *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 90; *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award of 21 August 2006, para. 181; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 167 (hereinafter “*Wintershall v. Argentina*”).

restrictive or liberal manner.⁴² Indeed, as stressed by Judge Rosalyn Higgins, “[i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses,” and there is no doubt that the ICJ “has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses; they are judicial decisions like any other”.⁴³

49. Nevertheless – and I consider that this is what should have guided the majority in the present dispute – the ICJ has been constant and strict in recalling that its jurisdiction “is based on the consent of States *under the conditions expressed* [in the relevant treaties]” (emphasis added).⁴⁴ The same rationale applies to the jurisdiction of ICSID tribunals under the ICSID Convention. The ICJ has also been consistent in recalling that the consent allowing for the Court to assume jurisdiction “must be *certain*”.⁴⁵ The same principle applies for consent to ICSID arbitration. Lastly, the ICJ has consistently emphasized that “whatever the basis of consent, the attitude of the respondent State must be capable of being regarded as ‘*an unequivocal indication*’ of the desire of that State to accept the Court’s jurisdiction in a ‘*voluntary and indisputable*’ manner” (emphasis added).⁴⁶ Once again, the same rationale applies to consent to ICSID arbitration. These are the parameters that the Tribunal in the present case should take into account. The tribunal in *National Grid v. Argentina* did not go in a different direction when it stated

⁴² *Interagua v. Argentina*, Decision on Jurisdiction of 16 May 2006, para. 64. See also, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 43; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Ltd.*, UNCITRAL Case, Decision on Jurisdiction of 3 August 2006, para. 65; *Austrian Airlines v. Slovakia*, UNCITRAL Case, Award of 9 October 2009, para. 20.

⁴³ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 12 December 1996, Separate Opinion of Judge Higgins, *I.C.J. Reports 1996*, p. 857, para. 35.

⁴⁴ *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, *I.C.J. Reports*, 2008, p. 203, para. 60.

⁴⁵ *Id.* at p. 204, para. 62.

⁴⁶ *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, *I.C.J. Reports*, 2008, p. 203, para. 62 (emphasis added); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 18; see also *Corfu Channel (United Kingdom v. Albania)*, *Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 620-621, para. 40; *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 24; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 113-114; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, *Judgment, I.C.J. Reports 1954*, p. 30

that “what matters is the intention of the parties *as expressed in the text*”.⁴⁷

50. No international court or tribunal, including ICSID tribunals, has challenged or contested those fundamental characteristics of consent to jurisdiction. The *RosInvest v. Russia* award – which remains a unique case with respect to the interpretation and application of the MFN clause – did not go as far as saying that consent to arbitration under a specific forum could be imported from one BIT to another BIT when consent to that specific arbitration forum under the latter had not been established.⁴⁸
51. *In casu*, it is clear that no mutual agreement *in writing* was reached between Garanti Koza and Turkmenistan to submit the dispute to ICSID arbitration. As explained above, no consent to ICSID arbitration can be found under Article 8(2) of the U.K.-Turkmenistan BIT. Since consent to ICSID arbitration cannot be identified, Article 3.3 on MFN treatment is not applicable.⁴⁹ The fact that Article 8(1) of the U.K.-Turkmenistan BIT refers to “international arbitration” cannot be invoked to circumvent Article 8(2). It also cannot be invoked to deduce a so-called ‘choice’ of the foreign investor under Article 3(3) to circumvent Article 8(2) and to decide which international arbitration procedure would be more favourable.
52. However, and in light of the arguments presented by the Claimant (as accepted by the majority), let us assume that the MFN clause contained in Article 3(3) of the U.K.-Turkmenistan BIT is applicable. It remains to be determined whether consent to ICSID arbitration could allegedly be established in the present case through the operation of the MFN clause, despite the absence of consent under Article 8(2) of the U.K.-Turkmenistan BIT. In other words, the issue is whether consent to ICSID arbitration can be established from an MFN clause read together with an ICSID arbitration clause contained in another treaty, that neither finds direct application in the present case nor has been precisely identified by the Claimant in its request for arbitration.

⁴⁷ *National Grid P.L.C. v. Argentine Republic*, UNCITRAL Case, Award of 3 November 2008, para. 80 (*hereinafter* “*National Grid v. Argentina*”).

⁴⁸ *RosInvestCo. U.K. v. Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007, paras. 128-130 (*hereinafter* “*Ros Invest v. Russia*”).

⁴⁹ F. Orrego-Vicuña, “Reports of (Maffezini’s) demise have been greatly exaggerated”, *Journal of International Dispute Settlement*, vol. 3, n° 2, 2012, p. 302.

V. Would the MFN clause of Article 3(3) of the U.K.-Turkmenistan BIT permit the Tribunal to find jurisdiction on the basis of another BIT regardless of the absence of consent to ICSID arbitration under Article 8(2) of the U.K.-Turkmenistan BIT?

53. Both the Respondent and the Claimant cited several authorities to support their arguments against or in favour of finding consent to ICSID arbitration through the MFN clause embodied in Article 3(3) of the U.K.-Turkmenistan BIT.

54. Article 3(3), in its relevant part, reads as follows:

For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

Article 8 of the BIT is the investor-state dispute resolution provision. As it falls within Articles 1 to 11 of the BIT, it is thus covered by the MFN clause of Article 3. However, does it provide a foreign investor with a right to ‘import’ from other Turkmenistan investment treaties a “more favourable treatment” with respect to dispute resolution, *including the arbitration forum?*

55. From the Claimant’s standpoint, consent to ICSID arbitration can be provided by an MFN clause read together with the dispute resolution clause of another investment treaty concluded by the host state. This is a novel approach. Indeed, the Claimant is not suggesting that the MFN clause contained in Article 3(3) of the U.K Turkmenistan BIT would allow for less stringent conditions for recourse to international arbitration in a specific forum. What the Claimant is suggesting is that the said MFN clause authorizes a foreign investor to import consent to ICSID arbitration from any other treaty to which Turkmenistan has consented to ICSID arbitration. More than raising issues of interpretation, this argument relates to the very foundations of the system of ICSID arbitration. In other words, can an MFN clause serve as a basis to establish consent to ICSID arbitration when such consent was not given in the treaty embodying the said MFN clause?

56. At the outset, one could question the admissibility *per se* of the claim. The Claimant has

made no real ‘offer to arbitrate’ under ICSID⁵⁰ and, thus, no ‘meeting of the minds’ about arbitration under ICSID between the foreign investor and the host state under ICSID was even possible.

57. Neither the interpretation of the U.K.-Turkmenistan BIT nor investment law practice can lead one to think that the MFN clause contained in Article 3(3) of the U.K-Turkmenistan BIT allows the Tribunal to endorse a reasoning according to which it is possible for an MFN clause to incorporate by reference an agreement to arbitrate from another treaty if it was not *prima facie* the intention of the Parties to the BIT.

58. The Claimant refers, *inter alia*, to the dissenting opinion of Brigitte Stern in *Impregilo v. Argentina* in support of its argument. If this opinion is examined in its entirety, it will show that the dissenting opinion does not state what the Claimant believes it states. The Claimant makes reference to the following passages of the dissenting opinion:

Naturally, an important *caveat* has to be presented here. The interpretation of the MFN clause is only necessary when the intention of the parties concerning its applicability or inapplicability to the dispute settlement mechanism is not expressly stated or clearly ascertained. It is quite evident that if there is an MFN clause expressly including the dispute settlement procedures or expressly excluding them, there is no need for an interpretation.

[...]

There are indeed cases where the parties expressly state that the MFN clause applies to the dispute settlement mechanism. This has been done, for example, by the drafters of the U.K. Model BIT, who have provided in Article 3(3) that “for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision”.⁵¹

59. However, in Brigitte Stern’s dissenting opinion, the main contention was that the MFN could not apply to the conditions of access to dispute settlement (as the condition *ratione voluntatis* could not be modified). *The question of the extension of the scope of a right was not discussed.* Brigitte Stern emphasized that if the conditions surrounding the

⁵⁰ It is important to stress that the Claimant asked the Tribunal to apply more favourable dispute resolution clauses of Turkmenistan’s BITs with Switzerland, France, Turkey, and India, and the ECT. However, the Claimant did not specify which BIT had to be applied in the present instance and, most of all, did not even mention those BITs in its request of arbitration.

⁵¹ *Impregilo S.p.A. v. Argentina Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern of 21 June 2011, paras. 17-18 (hereinafter “Impregilo v. Argentina”).*

consent as required in the basic treaty were not met, no right to arbitration exists and therefore no right can be modified by the MFN clause, and in particular the scope of the right to arbitrate. On the question of whether or not the MFN clause applies to dispute settlement provisions in a BIT, Brigitte Stern stated clearly:

[It] cannot change the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* [...] it must be equally true that an MFN clause cannot change the condition *ratione voluntatis*, which is a qualifying condition for the enjoyment of the jurisdictional rights open for the protection of substantial rights.

[...]

In other words, before a provision relating to the dispute settlement mechanism can be imported into the basic treaty, the right to international arbitration – here ICSID arbitration – has to be capable of coming into existence for the foreign investor under the basic treaty, in other words the existence of this right is conditioned on the fulfillment of all the necessary conditions for such jurisdiction, the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* as well as a supplementary condition relating to the scope of the State’s consent to such jurisdiction, the condition *ratione voluntatis*.

[...]

As long as the qualifying conditions expressed by the State in order to give its consent are not fulfilled, there is no consent, in other words no access of the foreign investor to the jurisdictional treatment granted by ICSID arbitration. An MFN clause cannot enlarge the scope of the basic treaty’s right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the conditions provided for in the basic treaty.⁵²

60. The same concerns were already addressed by the *Maffezini v. Spain* tribunal. The reasoning of the *Maffezini v. Spain* tribunal is worth noting as the tribunal acted in assuming that the MFN provision should find application with respect to dispute settlement, i.e., as if the concerned treaty contained a provision similar to Article 3(3) of the U.K.-Turkmenistan BIT. The tribunal stressed that “there are some important limits that ought to be kept in mind”⁵³ when dealing with an MFN clause. As stated by the same tribunal, one of those limits is that an MFN clause cannot provide for a particular arbitration forum (e.g., ICSID), if this option was not foreseen, or not initially permitted without the prior fulfillment of conditions in the treaty incorporating the said MFN

⁵² *Id.* at paras. 78-80.

⁵³ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, para. 62 (hereinafter “*Maffezini v. Spain*”).

clause.⁵⁴ In other words, the *Maffezini v. Spain* tribunal concluded that one system of arbitration cannot be replaced by another. Noting the potential disruption of the international arbitral system, the *Maffezini v. Spain* tribunal held:

[Third,] if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, *in order to refer the dispute to a different system of arbitration.*⁵⁵

In paraphrasing the *Maffezini v. Spain* decision, it could be said that if the agreement provides for a particular arbitration forum, such as UNCITRAL, this option cannot be changed by invoking the clause in order to refer the dispute to a different system of arbitration, such as ICSID.

61. In line with what the *Maffezini v. Spain* tribunal held, no investment award or decision has since then decided that an MFN provision would allow the import of consent to ICSID arbitration from another treaty. This possibility cannot even be deduced from the *RosInvest v. Russia* award. The role of the MFN clause is not to substitute for a lack of consent, but to ensure that the consent given is implemented in the most favourable manner to the individual investor entitled to protection, as compared to the treatment given to other such individuals in treaties with third countries.⁵⁶ The *National Grid v. Argentina* tribunal correctly noted that an MFN clause is not a basis for creating consent to ICSID arbitration when none exists.⁵⁷
62. In conclusion, the MFN clause embodied in Article 3(3) of the U.K.-Turkmenistan BIT cannot bypass the requirement of consent to ICSID arbitration. This is undeniable. If the requirement of consent to ICSID arbitration, as stipulated in Article 8 of the U.K.-Turkmenistan BIT, as well as in the ICSID Convention itself, could easily be put aside because of the interplay of MFN clauses, there would be a threat to the entire system of investor-state arbitration. BITs providing for ICSID jurisdiction should abide by the ICSID Convention. Article 8(2) of the U.K.-Turkmenistan BIT stresses this point when it

⁵⁴ *Id.* at paras. 62-63.

⁵⁵ *Id.* at para. 63.

⁵⁶ F. Orrego-Vicuña, "Reports of (Maffezini's) demise have been greatly exaggerated", *Journal of International Dispute Settlement*, vol. 3, n° 2, 2012, p. 303.

⁵⁷ *National Grid v. Argentina*, UNCITRAL Case, Decision on Jurisdiction of 20 June 2006, para. 92.

provides for the need to “having regard to the provisions, where applicable of the Convention on the Settlement of Investment Disputes between States and Nationals of other States [...]”.

63. Granting Article 3(3) of the U.K.-Turkmenistan BIT such extensive effect as to allow for consent to ICSID through incorporation by reference in the frame of a treaty that does not allow this, would have the effect of “replac[ing] a procedure specifically negotiated by parties with an entirely different mechanism”⁵⁸ or “system of arbitration”.⁵⁹ It would involve a forum-shopping attitude that bypasses the consent requirement of the Respondent while running against the fundamental principles of international adjudication.
64. The literal and ordinary meaning of Article 8(2) has to be given full effect to determine whether or not consent to ICSID arbitration exists. Any other interpretation would lead to an artificial construction. Under Article 8(2) of the U.K.-Turkmenistan BIT, consent to ICSID arbitration can *only* derive from a mutual agreement between the foreign investor and the host state. If there is no such mutual agreement, then there is no consent to ICSID arbitration. No attempt to establish consent to ICSID arbitration under an MFN clause is possible, since it will have the perverse effect of replacing *actual* non-consent by *virtual* consent. That would go against the fundamental pillars of the law of treaties (principle of consent, *pacta sunt servanda*, etc.) as well as against the pillars of the ICSID system.
65. The Claimant contends that “there is no obstacle of ‘form’ preventing a tribunal from finding that Turkmenistan has consented to arbitration through an MFN clause, provided the text of the clause allows for the incorporation by reference of an arbitration agreement”.⁶⁰ Rather than mere obstacle(s) of form, there are ‘procedural’ and ‘substantive’ impediments that would definitely preclude the Tribunal from granting to Article 3(3) of the U.K.-Turkmenistan BIT an effect that it does not and was never supposed to produce in the context of the said BIT. The *ejusdem generis* rule – which is

⁵⁸ *Plama v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, para. 209.

⁵⁹ *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 176.

⁶⁰ Counter-Memorial on Jurisdiction, para. 39.

considered a general principle of international law⁶¹ – dictates such a cautious attitude.

66. As explained by the International Law Commission (ILC) in its *Commentary on the Draft Articles on MFN Clauses*:

No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter. The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. *Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.* Thus the rule follows clearly from the general principles of treaty interpretation. *States cannot be regarded as being bound beyond the obligations they have undertaken.*⁶²

67. The subject-matter of Article 8(2) of the U.K.-Turkmenistan BIT sets forth non-consent to ICSID arbitration if there is no specific agreement between the parties.⁶³ The subject-matter of the dispute settlement clauses embodied in other BITs concluded by Turkmenistan and allegedly – albeit without relying specifically on one of them – invoked by the Claimant provides for consent to ICSID arbitration. In accordance with the *ejusdem generis* rule, the MFN clause under Article 3(3) of the U.K.-Turkmenistan BIT cannot be interpreted as allowing to “attract rights [to ICSID arbitration] conferred by other treaties” (i.e., the automatic right to resort to ICSID arbitration) when the subject-matter – not to say the very object and purpose – of the U.K.-Turkmenistan BIT

⁶¹ Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, p. 27. See also Report of the International Law Commission Study Group on MFN: “The Study Group affirmed the general understanding that the source of the right to MFN treatment was the basic treaty and not the third-party treaty; MFN clauses were not an exception to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning MFN seemed to be how the scope of the right to MFN treatment was to be determined, *that is to say what expressly or impliedly fell “within the limits of the subject-matter of the clause”*” (italics added). See *The Most-Favoured-Nation-Clause*, Report of the International Law Commission (26 April–3 June and 4 July–12 August 2011), General Assembly Official Records, Sixty-third session, A/66/10, p. 287, para. 355, available at: <http://untreaty.un.org/ilc/reports/2011/2011report.htm>.

⁶² *Draft Articles on Most-Favoured-Nation Clauses, with Commentaries*, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, p. 30, paras. 10-11 (emphasis added).

⁶³ *Daimler v. Argentina*, Award of 22 August 2012, para. 175. The tribunal considers that non-consent to ICSID arbitration is the *default rule* and that consent to ICSID arbitration is the *exception*.

is exactly to deny such rights to ICSID arbitration in the absence of mutual agreement.⁶⁴

68. The absence of a mutual agreement to ICSID arbitration is the main impediment for this Tribunal to exercise its jurisdiction. It is this absence of a mutual agreement that prevents the ‘import’ of ICSID arbitration into a treaty that does not provide for ICSID arbitration. In this context, there is a need to address the misleading parallel that the Claimant – followed in this regard by the majority in the present instance – has attempted to draw between this dispute and *C.S.O.B. v. Slovakia*. According to the Claimant, incorporation by reference of an ICSID arbitration provision from one treaty to another by operation of an MFN clause is similar to incorporation into a contract by reference to an ICSID arbitration provision contained in a treaty that has not entered into force.⁶⁵
69. In contrast to what the majority claims, *C.S.O.B. v. Slovakia* is neither about the applicability of an MFN provision to the dispute settlement provisions of a BIT nor about the possibility to ‘import’ consent to ICSID arbitration or to ‘create’ consent to ICSID arbitration when such consent is not established. The *C.S.O.B. v. Slovakia* decision confirms that, without consent to ICSID arbitration, no jurisdiction can be exercised by an ICSID tribunal. In *C.S.O.B. v. Slovakia*, the tribunal found that there was consent to ICSID arbitration,⁶⁶ because the so-called ‘Consolidation Agreement’ concluded between the Claimant and the Slovak Republic made explicit reference to the BIT concluded between the Czech Republic and the Slovak Republic, which in turn embodied consent to ICSID arbitration. Thus, both the foreign investor and the host state *agreed* (by virtue of the ‘Consolidation Agreement’) that disputes would be submitted to ICSID

⁶⁴ See also a similar point of view in the *Anglo-Iranian Oil Company* case, where the Court, dealing with an issue of MFN, stated: “In order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most favoured-nation clause is the basic treaty upon which the U.K. must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*”, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 109.

⁶⁵ Claimant’s Counter-Memorial, paras. 31-32.

⁶⁶ *C.S.O.B. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 59.

regardless of the ratification or entry into force of the BIT.⁶⁷ To put it simply, there was a *mutual agreement* between the foreign investor and the host state to have recourse to ICSID arbitration. Such mutual agreement is exactly what is lacking in the present case. There is *no mutual agreement* between the Claimant and Turkmenistan to have recourse to ICSID arbitration as required by Article 8(2) of the U.K.-Turkmenistan BIT.

70. The *C.S.O.B. v. Slovakia* decision cannot be used to justify the ‘importation’ of consent to ICSID arbitration in a BIT that only provides for such consent under very specific conditions. Had there not been a mutual agreement to have recourse to ICSID arbitration (i.e., the absence of an investment contract explicitly incorporating the BIT between the Czech Republic and the Slovak Republic), the *C.S.O.B. v. Slovakia* tribunal would have found that it had no jurisdiction.⁶⁸ This is the approach that should have been retained by the majority in the present case. An MFN clause in a BIT – even written in the same terms as Article 3(3) of the U.K.-Turkmenistan BIT – does not constitute consent to ICSID arbitration and does not imply incorporation of consent to ICSID arbitration by reference. An investment agreement or contract such as the ‘Consolidation Agreement’ in *C.S.O.B. v. Slovakia* is a proper means of establishing consent to ICSID arbitration. An MFN clause is not; it has neither the object and purpose nor the function of establishing jurisdiction. To use by analogy the language of the *C.S.O.B. v. Slovakia* tribunal, an MFN clause is not a “form of acceptance”⁶⁹ through which “ICSID jurisdiction can be satisfied”.⁷⁰

⁶⁷ *Id.* at paras. 52-54.

⁶⁸ *Id.* at para. 55.

⁶⁹ *Id.* at para. 44.

⁷⁰ *Id.*

Conclusions

71. In light of the aforementioned points, I conclude as follows:

- i) Article 8(2) of the U.K.-Turkmenistan BIT does not provide for ICSID arbitration in the absence of a mutual agreement between the foreign investor and the host state;
- ii) There is no mutual agreement in writing between this Claimant and Turkmenistan to resort to ICSID arbitration. As such, the requirement of consent in writing under Article 25(1) of the ICSID Convention is not met;
- iii) The MFN clause under Article 3(3) does not apply with respect to ICSID arbitration when the conditions to have recourse to ICSID arbitration under Article 8(2) of the U.K.-Turkmenistan BIT are not fulfilled. As a matter of fact, Article 8(2) explicitly states that the requirements of the ICSID Convention have to be fulfilled;
- iv) Without mutual agreement between the Claimant and the Respondent, only UNCITRAL ad hoc arbitration is available to the Claimant under Article 8(2) of the U.K.-Turkmenistan BIT, and not ICSID arbitration;
- v) The MFN clause contained in Article 3(3) of the U.K.-Turkmenistan BIT cannot be interpreted as allowing the ‘import’ of consent to ICSID arbitration to a treaty regime that does not contain such consent;
- vi) No tribunal has concluded that an MFN clause could be used to ‘import’ consent to ICSID arbitration or to international arbitration;⁷¹

⁷¹ Not even the *RosInvest v. Russia* tribunal. See, *RosInvest v. Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007.

- vii) Arbitral tribunals have exercised great caution when alluding to the possibility of importing consent through an MFN clause.⁷² The commentaries dealing with U.K. Model BITs has never envisaged the plausibility of this scenario.⁷³

In the light of the above, I do not reach the question of how the MFN clause should be applied because in my view, it is not even applicable in the present case.

[signed]

Laurence Boisson de Chazournes

⁷² See *Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, paras. 62-63; *Plama v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, para. 207; *RosInvest. v. Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007, paras. 129-130. See also, with more general terms, *National Grid v. Argentina*, UNCITRAL Case, Decision on Jurisdiction of 20 June 2006, para. 92.

⁷³ See Ch. Brown, and A. Sheppard, in Ch. Brown (ed.), *Commentaries on Selected Model Investment Treaties*, Oxford University Press, Oxford, 2013, pp. 727-730; see also, J. Harrison, “The Protection of Foreign Investment” (United Kingdom National Report), XVIII International Congress of Comparative Law Washington, 2010, Section IV. A, p. 8.