Concurring and Dissenting Opinion
Professor Dr. Rolf Knieper

1. In more than one way and on more than one level, consensus and consent are cornerstones for the legitimacy and sustainability of arbitration.

2. Firstly, unanimity of arbitral decisions contributes greatly to their weight and force. I believe that arbitrators should make any every effort to reach consensus. This is what this Tribunal tried in extensive, frank and collegial deliberations on the objections to jurisdiction.

3. Secondly, a clearly expressed consent is indispensable to ground the jurisdiction of a tribunal.

4. Two issues were particularly difficult to determine. The Tribunal succeeded to overcome the difficulties in one issue, i.e., the one on the Claimant's nationality as defined in Article 1(c) BIT, where my esteemed colleagues dissipated my doubts **(A)**. On the second issue, i.e., the Parties' consent to arbitration, the divergences were too strong and the issue is of a too basic and important nature for me to agree to the existence of the Respondent's consent to have its dispute with the Claimant settled under the procedural rules and the institutional setting of the SCC, despite the fine and sophisticated line of argument of my colleagues **(B)**.

(A) The Issue of the Claimant's Double/Triple Nationality

5. As a matter of policy objectives of the BIT, as expressed in the Preamble, the Claimant stresses that

> *"[i]f you supposed a UK national, who happened also to have Georgian nationality, living in the UK, with assets in the UK, wanted to transfer $100 million into Georgia to buy a factory, or whatever, then of course that is a very desirable investor."*[1]

6. He relies on Douglas who refers to individuals who are immigrants from emerging countries, "*have acquired wealth elsewhere […] retain the nationality of their country of birth in addition to the nationality of their adopted country […] then there is no overriding consideration of principle that should prevent such an individual from investing in the country of birth with reliance upon a relevant investment treaty*"[2].

7. Both quotes do not describe Mr. Okuashvili's profile, as it emerges from his three witness statements and his application for provisional measures: He has acquired his wealth in Georgia and has taken part of this wealth out of Georgia to the UK to buy property there and to expand his Georgian business. All his business activities in the UK, whether as a highly skilled migrant, consultant, employee, sole trader or when

[1] Transcript, Hearing Day 1, page 190
[2] Z. Douglas, The International Law of Investment Claims, 2009 (CL-134), pages 321-322. The Claimant refers to Douglas in: Transcript, Hearing Day 1, page 198, and Hearing Day 3, page 229

incorporating a company, were centered around and ancillary to his investment in Georgia, which he continued to own as the ultimate beneficial owner. This profile does not fit the objective to the Preamble of the BIT, which is to create favourable conditions for greater investment by UK nationals in Georgia.

8. These were (and are) my hesitations. My colleagues convinced me that the reality of Mr. Okuashvili's personal life, his preparedness to lose his Georgian citizenship and the willingness of the UK authorities to naturalize him in full knowledge of the surrounding facts should override the hesitation.

9. As elegantly developed and explained in Section V.A. of the Award, Mr. Okuashvili's UK citizenship is real and genuine in fact, and I finally concur with my colleagues' findings that it should be respected.

(B) The Issue of Consent to Arbitration

10. However, consensus has a second, more principled meaning in international arbitration, and particularly so in investment arbitration. The parties' consensus is indispensable to establish jurisdiction of the tribunal. By consenting to arbitration, States accept a partial waiver of their sovereignty. That is not a trite matter. It is generally accepted that the consent must be conscious, expressed clearly and unequivocally.

11. The necessity of a clearly expressed common intention of the Contracting Parties to a BIT extends to an agreement whereby the dispute resolution mechanism of the particular BIT may be replaced, through the operation of a most favoured nation (MFN) clause, by a different institutional setting and/or different procedural rules. MFN clauses may replace the dispute resolution mechanism, it cannot replace consent.

12. In constellations without privity as here, the consent can be declared in several steps, by an offer of the State declared to the other Contracting State in the BIT, and the subsequent acceptance by the investor through the initiation of arbitral proceedings. The offer must be unambiguous but not necessarily oriented to one single system of dispute resolution; it can leave the final choice to the investor, in accordance with the provisions of the BIT.

13. Article 8.1 BIT contains an offer, oriented to the ICSID system. Georgia and the United Kingdom consent to submit disputes with nationals of the other Contracting Party "*to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as the "Centre") for settlement by […] arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States*".

14. It is apparent from the text that both the institutional setting and the procedural rules are of high relevance to the Contracting Parties. The text is straightforward and unambiguous in referring to the Centre as the institution and the Convention as the basic procedural rules, at the difference of both the "alternative" Article 8 in the UK Model IPPA and Article 10.3 of the BIT between Georgia and the Belgo-Luxemburg Economic Union on the Reciprocal Promotion and Protection of Investments, dated 23 June 1993

(Georgia-BLEU BIT) which is quoted in paragraph 22 further down. The relevance of the institutional setting is underlined by the fact that the Parties, in the hypothesis that Georgia might not yet be a Party to the Convention, agree that access to the Centre is to be guaranteed nonetheless, by having recourse to the Additional Facility Rules (Article 8.2). Thereby, the Centre is authorized to administer proceedings even if the ICSID Convention and Arbitration Rules were not applicable, after an explicit approval by the Secretary-General of the Centre.

15. The importance that the Contracting Parties place on the administration by the Centre is further underlined by the unusual heading of Article 8 BIT, which makes explicit "*Reference to International Centre of Investment Disputes*".

16. In 1972, when the UK Model BIT was drafted[3], until today, the United Kingdom and other States had and have good reasons to make the Centre and the ICSID Convention their "*preferred*"[4] choice of dispute settlement between States and investors. The Convention has been elaborated with the active participation of more than 80 States, it provides unique and autonomous procedures to settle disputes that originate from alleged violations of public law, its purpose is, not differently from the BIT, the promotion and protection of international, cross-border investment (Preamble ICSID Convention and Preamble UK-Georgia BIT), and it has established a Centre at the even-handed service of both its now more than 155 member States and investors "*under the auspices of the International Bank for Reconstruction and Development*" (Preamble ICSID Convention), enjoying immunities and privileges in "*the territories of each Contracting State*" (Article 19 ICSID Convention). There is no doubt that the ICSID system cannot be considered as being discriminatory nor arbitrary nor in any way unfavourable to a private investor.

17. Although most other international arbitration institutions such as the SCC Arbitration Institute have extended their competence in recent times to also allow for the adjudication of disputes based on public law, their origins and specific experience lie in the field of commercial law.

18. Georgia has gained independence and started to build institutions of the State in 1991. At the same time, Georgia sought to integrate into global institutions such as the World Bank and to establish bilateral and regional contacts on diplomatic and commercial levels. It is true that in the early years after its independence Georgia accepted a variety of BITs and their dispute resolution mechanisms that were proposed by their partners' model BITs without much active negotiations. From there, the Claimant draws the conclusion (against Georgia's assertion that it rejected the "*Alternative*" of Article 8 BIT which provides for a number of dispute settlement mechanisms and institutions[5]) that it cannot be suggested "*that Georgia made a conscious decision*" and that Georgia "*may have been thinking*".[6]

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[3] C. Brown/A. Sheppard, "United Kingdom", in: C. Brown (ed.), Commentary on Selected Model Investment Treaties, 2013 (CL-137) (Brown/Sheppard), page 24

[4] C. Brown/A. Sheppard, "United Kingdom", op.cit., page 23

[5] Quoted in Brown/Sheppard, op.cit., page 24

[6] Transcript Hearing Day 1, pages 162/163

19. I do not believe that Georgia opted for the reference to ICSID without thinking and making a conscious choice. Even if it had not been active in negotiations and accepted different models, in the "*unusual*" situation where two options were proposed like in the UK Model ICCA/BIT[7], there is no doubt that the options were discussed and that Georgia opted for the version that was supported by the prestige of the World Bank which Georgia had recently joined, and which corresponded at the same time to its constitutional principle not to allow double nationality.

20. The Claimant could have perfected the consent by accepting the Respondent's offer "*in writing to submit the dispute to the Centre*", as provided for in Article 8.4 of the BIT.

21. It has not done so for the obvious reason that his claim would have been rejected *ratione personae* because Article 25 ICSID Convention does not extend jurisdiction to natural persons who are also nationals of the respondent State.

22. Rather, he has opted to bring a claim under the auspices and procedural rules of the Arbitration Institute of the SCC. He asserts that he has thereby accepted Georgia's permanent offer to consent to submit disputes to the SCC and perfected the consent to arbitrate. Georgia's offer, he says, is contained in the MFN provisions of Articles 3.2 and 3.3 of the BIT. They are reproduced here for ease of reference:

> *"(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."*

23. The Claimant asserts that the most-favoured-nation provisions establish the applicability of the dispute resolution provision of the Georgia-BLEU-BIT. It reads in its relevant part:

> *"Article 10. Settlement of Investment Disputes*
> *1. and 2. […]*
> *3. In case of international arbitration, the dispute shall be submitted for settlement by arbitration to one of the hereinafter mentioned organizations, at the option of the investor:*
> *The International Centre for the Settlement of Investment Disputes (I.C.S.I.D.) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965, when each State party to this Agreement has become a party to the said Convention. As long as this requirement is not met, each Contracting Party agrees that the dispute shall be submitted to arbitration pursuant to the provisions of the additional facility of the I.C.S.I.D.;*
> *The Arbitral Court of the International Chamber of Commerce in Paris;*
> *The Arbitration Institute of the Chamber of Commerce in Stockholm.*
>
> *If the arbitration procedure has been introduced upon the initiative of a Contracting Party, this Party shall request the investor involved in writing to designate the arbitration organization to which the dispute shall be referred.*
> *4. – 6. […]*

[7] Brown/Sheppard, op.cit., page 24

24. The provision is partly identical to the "alternative" Article 8 in the UK Model ICCA, as far as the heading and the reference to ICSID and the ICC are concerned: it mentions the institutions but not the procedural rules, as does Article 8.1 of the UK-Georgia BIT. Further, instead of a reference to the UNCITRAL Arbitration Rules in the UK Model ICCA, the Georgia-BLEU-BIT refers to the Arbitration Institute of the SCC. Had the Contracting Parties of the UK-Georgia BIT chosen the "alternative" Article 8 of the UK Model ICCA, no application problem would arise: it is partly identical to Article 10 Georgia-BLEU-BIT and certainly *eiusdem generis* so that the investor's choice of the SCC Arbitration Institute would be covered by the MFN clause. However, the Contracting Parties have negotiated and decided otherwise. They have not accepted "alternative" Article 8 but the "preferred" version, which specifies both the institution and the procedural rules.

25. The Tribunal has to determine whether under such circumstances Article 3 of the BIT extends, indeed, to dispute settlement provisions, and whether the Respondent has consented to replace the administration of proceedings by the Centre as well as the ICSID Convention and the Arbitration Rules by the institution and the procedural rules of the SCC. This question "*of the scope of the treatment to be provided under an MFN provision has become one of the most vexed interpretative issues under international investment agreements. The problem concerns the applicability of an MFN clause to procedural provisions, as distinct from the substantive provisions of a treaty".*[8]

26. The Claimant submits that a "*national receives MFN treatment under Article 3(2) and pursuant to its ordinary meaning, treatment of nationals, as regards their management, maintenance, use, enjoyment or disposal of their investments is very broad and includes treatment in terms of jurisdictional protections*"[9]. It comprises "*consent by the Respondent to arbitration conducted pursuant to procedures other than ICSID*".[10]

27. The Claimant relies on the Study Group on the Most-Favoured-Nation clause which states that the "*United Kingdom […] Model BIT […] applies MFN to dispute settlement.*"[11]

28. More generally and without focusing on the specific text of the BIT, the tribunal in *Siemens v. Argentina* had found "*that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.*"[12]

29. The tribunal in *Siemens v. Argentina* had, in turn, relied heavily on the ground-breaking Decision on Jurisdiction in *Maffezini v. Spain*, which had "*concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable*

[8] Study Group on the Most-Favoured-Nation clause, Final Report, 2015, para 80 (Study Group MFN Report)
[9] Transcript Hearing Day 1, page 156; Claimant's Response, paras 81-91.
[10] Claimant's Rejoinder, para 61-68
[11] Study Group MFN Report, footnote 193; also para 163
[12] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (CL-7), para 102.

to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the eiusdem generis *principle*".[13]

30. However, the *Siemens* tribunal has overlooked that the *Maffezini* tribunal had insisted on "*some important limits that ought to be kept in mind*", such as "*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*".[14]

31. In this sense, the Respondent has refuted the Claimant's arguments and invoked its "*conscious choice to exclusively submit investor-State disputes to the fully autonomous and self-standing adjudicative system of ICSID, to the exclusion of other international adjudicative bodies such as SCC tribunals".*[15]

32. The Respondent asserts that its consent is limited to the ICSID system and rules, and that consent cannot be displaced by an MFN clause. Decisions and awards that are quoted by the Claimant do not serve his case, it says, since they had to deal with general references to arbitration and different alternative fora and rules.[16]

33. It considers Article 3.3 of the BIT as "*poorly drafted*" since the reference to "*Articles 1 to 11 is ambiguous and inconclusive".*[17]

34. To date, it is widely accepted that MFN provisions can apply to the dispute settlement provisions of BITs which allow private investors to bring claims against States for compensation of damages caused by a State's sovereign acts if so agreed in the BIT.

35. That is a recent development, as impressively recalled in the Final Report of the Study Group on the Most-Favoured-Nation clause[18], in the *Wintershall v. Argentina* Award[19], and in the concurring and dissenting opinion by Professor *Stern* in *Impregilo v. Argentina*[20].

36. The development was and is sensitive, because States agreed to waive part of their protection as a sovereign to appear before a foreign arbitral jurisdiction at the request of a private investor and to abide by arbitral awards, as provided for in Article 53 of the ICSID Convention. How delicate it was is still palpable in the Preamble of the ICSID

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[13] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (CL-40), para 56.
[14] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (CL-40), paras 62/63
[15] Respondent's Reply, paras 198, 216
[16] Respondent's Objections to Jurisdiction and Admissibility and Request for Bifurcation, paras, 163 ss.; Reply, paras 250 ss.
[17] Respondent's Reply, para 231; Respondent's Objections to Jurisdiction and Admissibility and Request for Bifurcation, paras, 163 ss.; Reply, paras 145-151
[18] Study Group MFN Report, paras 41 ss.;
[19] Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008 (CL-36), paras 100 ss.
[20] Impregilo S.p.A. v. The Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (CL-37), paras 6 ss.

Convention where the Contracting States declare "*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*". In fact, the *Daimler* tribunal found that, despite the importance of the issue, States have overwhelmingly confirmed that MFN clauses should **not** be considered "*to reach international dispute resolution*".[21]

37. I understand the Respondent's critique of Article 3 of the BIT. I believe that it is partly due to the slow and not always consistent extension of the MFN provisions to procedural protection. The critique concerns the following terms and concepts.

38. It is far from evident that the term "treatment", as used in Article 3.2. and 3.3 of the BIT, extends to dispute resolution. In its "*ordinary meaning*" (Article 31.1 VCLT) or – as expressed by the tribunal in *Daimler v. Argentina – "[i]n common usage, "treatment" evokes one party's manner of dealing with or behaving towards another party. In the international law setting, the term typically carries with it the sense of how a State or other legal authority regulates, protects, or otherwise interacts with specified actors*".[22] I share the view of the *Daimler* tribunal that the term 'treatment' was probably meant "*to refer to the Host State's direct treatment of the investment and not to the conduct of any international arbitration arising out of that treatment*". At the same time, I share the *Daimler* tribunal's view that one should "*hesitate to make a definite pronouncement as to the intended scope of the Treaty's MFN clauses on the basis of an isolated examination of the quite general word "treatment"*", in particular in light of other tribunals' position to extend the scope to dispute settlement.[23]

39. In examining the further language of Article 3.2, the Tribunal is confronted to equally ambiguous terminology. In common usage, the terms 'management, maintenance, use, enjoyment or disposal' of investments do not differ from the scope of the term 'treatment' and indicate more the investor's substantive interaction with its assets than their protection in arbitral proceedings. The formulation of Article 3.2 is from 1972[24], a time when drafters of international conventions and treaties were quick to codify substantive rights of citizens, women, children, humans but slow to complement these substantive rights by jurisdictional and procedural mechanisms to secure their enforcement. States were not prepared to waive their sovereign prerogatives and accept the jurisdiction of international courts and tribunals easily.

40. It is true that opinions have evolved, and the Final Report of the Study Group on the Most-Favoured-Nation clause has established that "*a majority of tribunals have found that such clauses are broad enough to include dispute resolution provisions*".[25] It is

[21] [21] Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CL-38), para 273

[22] Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CL-38), para 218

[23] Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CL-38), para 224

[24] Brown/Sheppard, op.cit., page 15

[25] Study Group MFN Report, para 198

argued that the extensive interpretation of the terminology is appropriate because the procedural protection of the investment through international arbitration is as important as its substantive protection. I subscribe to the importance of dispute resolution mechanisms. However, a hesitation remains: if the need for extension is generally recognized, it would be easy to modify the text of the treaties, especially of Model BITs, in order not to push tribunals to *"[a]dding words to a treaty on the basis of presumed intention [which] must be avoided*"[26].

41. It is not excluded that the United Kingdom did not amend the 1972 version of Article 3.2, when it added Article 3.3 in 1990[27], because it would have had to rethink the territorial limitation. Article 3.2 relates to treatment by either Contracting Party "*in its territory*". That does not pose a problem for the current formulation but cannot be maintained for dispute settlement provisions that necessarily transcend the territory.

42. That is one aspect of the matter. The other, more important aspect has been treated by the tribunal in *Daimler v. Argentina*. It held that a treaty's "*clearly expressed territorial limitation upon the scope of the MFN clauses establishes that the Contracting State Parties to the German-Argentine BIT do not intend for the Treaty's extra-territorial dispute resolution provisions to fall within the scope of those clauses*".[28]

43. The Claimant asserts that Article 3.2 has to be read in conjunction with Article 3.3 and Article 8. Applied in context, Article 3.3 entitles him "*to rely on the procedural rules of a different arbitral forum*". He says that Article 3.3 is unambiguous in this sense, as confirmed by jurisprudence and literature.[29]

44. The Claimant quotes *inter alia* the interim award in *Venezuela US v. Venezuela* which states in reference to a clause, in relevant parts identical to Article 3.3, that there is "*no doubt that the MFN provisions under the BIT are applicable to the provisions on settlement of disputes between one Contracting Party and nationals or companies of the other Contracting Party*."[30]

45. The Claimant relies further on the award in *Wintershall v. Argentina* and the concurring and dissenting opinion in *Impregilo v. Argentina,* which both quote Article 3.3 as providing that "*for avoidance of doubt MFN treatment shall apply to certain specific provisions of the BIT including the dispute settlement provision*".[31]

46. In reality, this is not what Article 3.3 says. Rather, it confirms for the avoidance of doubt "*that the treatment provided for in paragraphs (1) and (2) above shall apply to the*

[26] Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008 (CL-36), para 185
[27] Brown/Sheppard, op.cit., page 16
[28] Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CL-38), para 231
[29] Claimant's Response, paras 76, 79, 103 ss.
[30] Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34; Interim Award on Jurisdiction, 26 July 2016, (CL-30) para 100
[31] Claimant's Response, para 103.d.(i) and (iii): Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008 (CL-36), para 167; Impregilo S.p.A. v. The Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (CL-37), para 18

provisions of Articles 1 to 11". I find this formulation less clear than the quote in *Wintershall* and *Impregilo,* even though the Claimant can rely on Professor *Douglas* who accepts Article 3.3 as "*an unequivocal provision*" incorporating jurisdictional provisions into the basic treaty[32].

47. The ambiguities are threefold. First, the provision explains that it does not add anything to Article 3.1 and 3.2 but confirms it for the avoidance of doubt. Second, the provision does not make sense as far as it orders to apply the treatment to Articles 1 (Definitions), 3 (MFN Provision), 7 (Exceptions), 9 (Disputes between the Contracting Parties), and 10 (Subrogation). These provisions have no possible substance to which a MFN clause might apply[33]. Third, it refers to treatment provided for in Article 3.1 and 3.2 implying that their requirements must be met. That leads to the same difficulties as those to which the *Daimler* tribunal was confronted, unless one decides to interpret the territorial limitation away in order to allow the application of Article 8. In that perspective and in order to save the *effet utile* for the reference to Article 8 and its applicability in a chain of non-applicable Articles, the *effet utile* of the explicit territorial limitation has to be eliminated.

48. Ambiguities of a text must be interpreted even-handedly and in fairness to the parties involved. The principle of *effet utile* does not imply that an interpretation should be preferred that is more useful for one or the other party but that the text must have some substantial relevance. I will show further down that this is the case for Article 3.3 even when interpreted as not opening the door to the choice of another arbitral institution but only of different procedural rules, although, evidently, its effect is more significant when the Contracting Parties do not choose the 'preferred' version of Article 8 of the UK Model BIT but the 'alternative' version, which opens the way to variety of arbitral institutions. At the same time, ambiguities should not be held against a party that has not drafted the text, which reinforces the principle that the Contracting Parties to the BIT must declare their consent explicitly and unequivocally.

49. The Claimant quotes the *Wintershall* tribunal when it argues that "*all international arbitration must be based upon an agreement of the parties, which must be clear and unambiguous, even where reached by incorporation or by reference*".[34] I agree with *Wintershall* as I further agree with the *Daimler* tribunal when it holds that it "*is not possible to presume that consent has been given by a state. Rather the existence of consent must be established. That may be accomplished either through an express declaration of consent to an international tribunal's jurisdiction or on the basis of acts "conclusively establishing" such consent. […] Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. […] What is true for the very existence of consent to have recourse to a specific international*

[32] Claimant's Response, para 103.e(i); Zachary Douglas, The International Law of Investment Claims, 2009, (CL-134) page 362

[33] Respondent's Objections, paras 148-149; Claimant's Response, para 87

[34] Claimant's Response, para 103.d (i); Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008 (CL-36), para 167

dispute resolution mechanism is also true as far as the scope of this consent is concerned."[35]

50. It is a matter of party autonomy when Contracting Parties to a BIT determine the elements, conditions and prerequisites of consent to a dispute settlement system, and also the content of a MFN clause which allows an investor to rely on the elements, conditions and prerequisites of consent to a dispute settlement system in another BIT. The Contracting Parties do not have to justify their agreement vis-à-vis third parties, and it is not the role of tribunals to tell Contracting Parties how they should have formulated their Treaties.

51. When negotiating the BIT, the United Kingdom offered alternative versions of Article 8. The 'preferred' one was entitled "*Reference to International Centre for Settlement of Investment Disputes*". It contains in Article 8.1 an exclusive consent to the ICSID system and specifies, firstly, that only the International Centre for the Settlement of Investment Disputes should be competent to administer investment disputes, and, secondly, that the arbitration should be conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of other States. The acceptance of the ICSID system, which is based on a multilateral international treaty, implies that no relief might be pursued through diplomatic channels (Article 8.4).

52. The 'alternative' Article 8, under the heading "*Settlement of Disputes between an Investor and a Host State*", contains an open consent of contracting States to accept an investor's choice between two institutions – the Centre and the Court of Arbitration of the ICC – plus *ad hoc* arbitration under the UNCITRAL Rules of Arbitration.[36] The choice of the Centre does not necessarily imply the application of the ICSID Convention (Article 8.2(a)).

53. By way of comparison, Article 10 of the Georgia-BLEU-BIT, under the heading "*Settlement of Investment Disputes*", contains an open consent of the Contracting States to accept an investor's choice between three institutions: the Centre, the Arbitral Court of the ICC and the Arbitration Institute of the SCC.

54. Georgia rejected the 'alternative' and accepted the 'preferred' version. This is a conscious choice.

55. As said, not long before the bilateral negotiations with the United Kingdom (and, for that matter, with the Belgo-Luxemburg Economic Union) on the BIT, Georgia had joined the World Bank Group and had ratified the ICSID Convention. The ICSID Convention's "*objective […] is to encourage a larger flow of private international investment*" and to "*maintain a careful balance between the interests of investors and those of host States*"[37]. This is the focus of the procedural components of the ICSID

[35] Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CL-38), para 175 (emphasis added)
[36] quoted in Brown/Sheppard, op.cit., page 24
[37] Report of the Executive Directors on the Convention of 18 March 1965, Reproduced in ICSID – ICSID Convention, Regulations and Rules, April 2006, para 13

Convention and the Arbitration Rules in their autonomy, international basis, procedure, annulment and enforcement; and that is the focus of the Centre. It is an institution under public international law for the public service of the promotion of private investment, which is also in the public interest of the World Bank's member States; it is sponsored by the World Bank; and it provides an equal playing field both for investors and States.

56. Moreover, unlike other rules of arbitration such as the SCC ones, Article 25 of the ICSID Convention excludes jurisdiction for nationals that hold also the nationality of the host State. It is thus in line with Georgia's constitutional order that does not allow double nationality.

57. As a practical matter, the import of the dispute resolution clause of the SCC Arbitration Institute would expose Georgia to a situation where a fictitious consent would be construed via a provision that is quite similar to the alternative Article 8 of the UK Model BIT, and that Georgia had explicitly rejected. It would reintroduce an open consent to several arbitral institutions through the back-door. In addition, the dispute would be heard in a system, which has not been established by international law, and where the *lex fori*, i.e., national Swedish law, applied.

58. These are significant elements that leads me to believe that the reference to the ICSID system was crucial for the scope of Georgia's consent to the dispute settlement clause in Article 8. Certainly, the Contracting Parties were free to agree that, as an alternative, an investor would be entitled to choose other arbitral institutions and other, more favourable procedural rules to be found in another BIT.

59. However, such an option would have to be agreed in unambiguous terms, leaving some room for an interpretation that the arbitral system and the procedural rules were not meant to be exclusive and absolute but examples which could be replaced by other examples of arbitral systems and procedural rules *eiusdem generis*.

60. While this argument could be made with respect to procedural rules – and, in fact, has been made by the Claimant with respect to such rules – because Article 8 provides for two sets of procedural rules, it cannot be made with respect to the arbitral institution – and, in fact, has not been made explicitly by the Claimant.

61. Further, Article 3.3 provides that the treatment of UK nationals in the territory of Georgia with regard to the management, maintenance, use, enjoyment or disposal of their investments shall not be less favourable than the treatment of other nationals. That is an ambiguous formulation which does not address the scope of consent that was 'preferred' and crucial for both the United Kingdom and Georgia.

62. In light of these circumstances and the object and purpose of Article 8 of the BIT, I accept Georgia's representation that it has consented only to the "*fully autonomous, self-standing and truly international adjudicative system, which has its own jurisdictional requirements, functions independently from any domestic legal framework and does not*

allow the review of awards by national courts."[38] This consent to an arbitral system as well as to arbitral rules cannot be displaced by a MFN provision, unless it is explicitly agreed by the Contracting Parties. Article 3.3 of the BIT does not fulfil the requirements of such an explicit agreement.

63. My position is supported by the awards and decisions relied on by the Claimant.

64. As a general remark, none of the cases concerned a situation where the Contracting Parties to the respective BIT had opted for a dispute settlement provision comparable to Article 8 of the BIT. None was presented by the Parties, and I am not aware of any. All decisions were based on provisions that contained a general or even "*unconditional*"[39] consent to arbitration enumerating two or more fora and systems, to which another system was to be added *eiusdem generis,* since it represents the same subject matter. In contrast to Article 8, which contains one exclusive consent to one arbitral system and to one set of procedural rules, there was each time one consent to different arbitral fora, and "*not different consents*"[40] to different fora.

65. The first decision ever to extend provisions via the MFN clause to jurisdictional provisions, *Maffezini*, had set the tone by limiting its own liberal opinion through the *obiter dictum* that "*if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause"*[41].

66. In *Wintershall*, the tribunal referred back to *Maffezini* and agreed with it when finding that in its case the BIT "*provides for ICSID as the ultimate and only arbitration forum"*[42], which cannot be replaced by an MFN clause, since it would lead to "*a different system of arbitration under a different BIT*"[43].

67. In *Garanti Koza*, the Contracting Parties had selected the 'alternative' version of the UK Model BIT and not the 'preferred' one, and the Respondent had used the argument that they had thereby expressed their choice "not *to agree to ICSID Arbitration*"[44]. The tribunal had rejected this argument because the alternative model contains "*the essential consent […] to resolve disputes with U.K. investors by means of international arbitration*" and provides for a number of arbitral institutions, to which another one can be added under the MFN clause since the other one is *eiusdem generis*.[45] This finding is irrelevant in the present case since based on a different dispute settlement clause.

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[38] Respondent, Reply, para 216
[39] Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34; Interim Award on Jurisdiction, 26 July 2016, (CL-30) para 109
[40] Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34; Interim Award on Jurisdiction, 26 July 2016, (CL-30) para 109, makes this useful precision.
[41] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (CL-40), para 56
[42] Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008 (CL-36), para 174 (underlining by tribunal)
[43] Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008 (CL-36), para 176
[44] Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013 (CL-18), para 34
[45] Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013 (CL-18), paras 75 and 58 ss.

68. In *Venezuela US*, the tribunal held that that "*the MFN clause cannot serve the purpose of importing consent to arbitration when none exists*"[46]. Only the conditions for resorting to arbitration can be replaced, not the consent itself. The tribunal accepted the import of another forum because the State had given "*its unconditional consent to international arbitration. […] There is thus no question of importing Venezuela's consent to international arbitration*"[47].

69. In *Daimler*, the tribunal held that it was bound "*to determine what the contracting parties had actually consented to*", and that it was not authorized to interpret dispute resolution "*clauses in a manner which exceeds the consent of the contracting parties as expressed in the text*."[48]

70. The decisions accept that "*a restriction of consent to a certain type of arbitration, [or] a restriction on the scope of the arbitration – are jurisdictional conditions to the State's consent to arbitration, that cannot be displaced by an MFN clause*".[49]

71. The Claimant submits that it is not appropriate to compare "*Article 8 of the BIT and Article 10 of the Belux Treaty […] "*as a whole*"*".[50] Rather, "*Article 8(1) remains unchanged other than providing an offer of arbitration under SCC procedure, not ICSID procedure.*"[51] "*Article 3(3) allows him to rely on the procedural rules of a different arbitral forum*", and he says that is all he does.[52]

72. However, this is not what the Claimant does. He does not try to argue that Article 8.1 provides for the possibility to conduct proceedings under the procedural ICSID Additional Facility Rules, administered by the Centre, and that the SCC procedural rules are *eiusdem generis* to the Additional Facility Rules and can be imported under Article 3.3. He mentions the Additional Facility Rules to distinguish them from the ICSID procedure[53] but omits to mention that the consent contained in Article 8 of the BIT relates both to the procedural rules and the arbitral institution. He has not perfected an alleged consent of the Respondent to apply, via the MFN clause of Article 3.3, only other procedural rules than the ICSID ones.

73. In fact, he has requested, firstly, that the SCC procedural rules be imported, and, secondly, that the proceedings be administered by the SCC Arbitration Institute. That request is not covered by the MFN clause as formulated in Article 3.3. Georgia has

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[46] Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34; Interim Award on Jurisdiction, 26 July 2016, (CL-30) para 109
[47] Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela, PCA Case No. 2013-34; Interim Award on Jurisdiction, 26 July 2016, (CL-30) para 111
[48] Daimler Financial Services v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CL-38), para 172 (emphasis added)
[49] Impregilo S.p.A. v. The Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011 (CL-37), para 88
[50] Claimant's Response, para 108
[51] Claimant's Response, para 110
[52] Claimant's Rejoinder, para 60; Claimant's Response, para 76(a)
[53] Claimant's Rejoinder, para 65(b)

specifically and exclusively consented to the ICSID system comprising both the Centre and the procedural rules embedded in the Convention and the Arbitration Rules. It has further consented to proceedings under different procedural rules under certain circumstances, i.e., the Additional Facility Rules, as long as the exclusivity of the administration by the Centre is maintained.

74. In any event, an import of the SCC procedural rules only would not have been possible since the Centre has no competence to administer proceedings under such rules. It is competent to administer proceedings under different procedural rules such as the UNCITRAL Rules. Hypothetically, it would not be excluded to import such procedural rules as *eiusdem generis* to the Additional Facility Rules into Article 8, by applying Article 3.3, to the extent that the Centre is competent to administer proceedings under them. That must not be decided here. However, the hypothesis indicates that Article 3.3, how ever ambiguously drafted, is not void of meaning and has an *effet utile*, as it could be applied for procedural rules administered by the Centre.

75. The Respondent has consented to submit disputes exclusively to the ICSID Centre and the ICSID procedural rules, thereby waiving its jurisdictional immunity and transcending the territorial limitation of the term "treatment" in Article 3.2 and 3.3. The Contracting Parties could have agreed to extend this consent to other institutions and procedural rules in an appropriately formulated most-favoured-nation provision. They have not done so. The formulation of Article 3.3, which is possibly oriented to the "alternative" Article 8 of the UK Model BIT, refers to a "treatment" as defined in Article 3.2. It cannot be read as comprising a different consent to a different arbitration system and thus much more than "*procedural rules of a different arbitral forum*", as asserted by the Claimant.[54]

76. For these reasons, I firmly believe that the Tribunal has no jurisdiction to hear the dispute under the auspices of the SCC Arbitration Institute.

31 August 2022

(Rolf Knieper)

[54] Claimant's Rejoinder, para 64