

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

In the arbitration proceeding between

**MUHAMMET ÇAP**  
**SEHIL İNŞAAT ENDUSTRI VE TİCARET LTD. STİ.**

CLAIMANTS

and

**TURKMENISTAN**

RESPONDENT

**ICSID Case No. ARB/12/6**

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**DECISION ON RESPONDENT'S OBJECTION TO JURISDICTION  
UNDER ARTICLE VII(2) OF THE TURKEY-TURKMENISTAN  
BILATERAL INVESTMENT TREATY**

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*Members of the Tribunal*

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

*Secretary of the Tribunal*

Mr Paul-Jean Le Cannu

*Date of Dispatch: 13 February 2015*

## REPRESENTATION OF THE PARTIES

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## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>I. INTRODUCTION AND THE PARTIES.....</b>  | <b>1</b>  |
| <b>II. PROCEDURAL HISTORY .....</b>  | <b>2</b>  |
| A. The Request for Arbitration .....   | 2         |
| B. The constitution of the Tribunal.....   | 3         |
| C. The first session of the Tribunal and bifurcation of the proceedings.....   | 4         |
| D. Parties' submissions and hearing on jurisdiction .....  | 5         |
| <b>III. NATURE OF THE DISPUTE.....</b>   | <b>14</b> |
| <b>IV. SCOPE OF THIS DECISION AND ISSUES FOR DETERMINATION.....</b>  | <b>17</b> |
| <b>V. FACTUAL BACKGROUND .....</b>   | <b>19</b> |
| <b>VI. RELEVANT LEGAL TEXTS.....</b>   | <b>21</b> |
| A. The ICSID Convention and the ICSID Arbitration Rules .....  | 21        |
| B. The Turkey-Turkmenistan BIT .....   | 22        |
| C. The Vienna Convention on the Law of Treaties .....  | 27        |
| <b>VII. OVERVIEW OF THE POSITIONS OF THE PARTIES .....</b>   | <b>29</b> |
| A. The local court requirement under Article VII(2) of the BIT .....   | 29        |
| (1) Respondent's position .....  | 29        |
| (2) Claimants' position.....   | 30        |
| B. The mandatory local court requirement should not be applied because of the MFN clause in the BIT and/or the futility of proceeding in the Turkmen courts..... | 31        |
| (1) The mandatory local court requirement should be overridden by operation of the MFN clause .....  | 31        |
| (a) Claimants' position.....   | 31        |
| (b) Respondent's position .....  | 32        |
| (2) The mandatory local court requirement should not be enforced because seeking redress in the Turkmen courts is futile .....                                   | 33        |
| (a) Claimants' position.....   | 33        |
| (b) Respondent's position .....  | 34        |
| <b>VIII. THE ARBITRAL TRIBUNAL'S REASONS AND DECISION.....</b>   | <b>35</b> |
| A. Does Article VII(2) contain a mandatory requirement that disputes be referred first to the courts of Turkmenistan?.....                                       | 35        |
| (1) Burden of proof .....  | 36        |

|       |  |    |
|-------|--|----|
| (a)   | Parties' positions .....   | 36 |
| (b)   | Tribunal's analysis and conclusion .....   | 37 |
| (2)   | Authentic versions of the BIT .....  | 37 |
| (a)   | Respondent's position .....  | 38 |
| (b)   | Claimants' position.....   | 40 |
| (c)   | Tribunal's analysis and conclusion .....   | 41 |
| (3)   | Interpretation and meaning of Article VII(2) .....   | 42 |
| (a)   | Respondent's position .....  | 43 |
| (b)   | Claimants' position.....   | 54 |
| (c)   | Tribunal's analysis and conclusions.....   | 65 |
| (i)   | The ambiguity of Article VII(2)'s proviso and its two possible meanings.....   | 66 |
| a.    | The English authentic version.....   | 68 |
| b.    | The Russian authentic version .....  | 70 |
| i.    | The Russian authentic version is a translation of the English authentic version.....   | 71 |
| ii.   | The ambiguity found in the English original version is also present in the Russian version .....   | 73 |
| iii.  | The ambiguity of the Russian authentic version of Article VII(2) is consistent with the poor quality of the Russian text as a whole .....          | 75 |
| iv.   | The argument that the proviso only applies to ICC arbitration is rejected.....   | 75 |
| (ii)  | The context of Article VII(2)'s proviso .....  | 76 |
| (iii) | The object and purpose of the BIT .....  | 78 |
| (iv)  | Other arguments of the Parties with respect to the interpretation of Article VII(2) of the BIT.....  | 80 |
| a.    | Claimants' contentions as to Turkey's reading of Article VII(2) of the BIT .   | 81 |
| b.    | Respondent's contentions based on Turkey's BIT practice.....   | 82 |
| i.    | Respondent's arguments based on the Turkish version of Article VII(2) .....  | 82 |
| ii.   | Respondent's argument based on the Russian version of the Turkey-Kazakhstan and Turkmenistan BITs.....   | 84 |
| iii.  | Respondent's arguments based on Turkey's BIT practice .....  | 85 |
| (v)   | Distinguishing <i>Kılıç</i> .....  | 86 |
| (4)   | The effect of Article VII(2) on the present case.....  | 88 |
| (a)   | Parties' positions .....   | 88 |
| (b)   | Tribunal's conclusion .....  | 89 |
| B.    | Avoidance of the mandatory local court requirements because of the MFN clause in the BIT or the futility of proceeding in the Turkmen courts ..... | 89 |

**IX. COSTS..... 90**  
**X. OPERATIVE PART ..... 91**

## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

|  |  |
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| Arbitration Rules                          | ICSID Rules of Procedure for Arbitration Proceedings   |
| BIT / Turkey-Turkmenistan BIT / Treaty     | Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992   |
| Claimants / Sehil and Mr Çap               | Sehil İnşaat Endustri ve Ticaret Ltd. Sti. and Mr Muhammet Çap   |
| CLs. Costs                                 | Claimants' Statement on Costs dated 4 April 2014   |
| CLs. Cmts Costs                            | Claimants' Comments on Respondent's Statement of Costs dated 11 April 2014   |
| CPHB                                       | Claimants' Post-Hearing Brief dated 18 March 2014  |
| CPHBR                                      | Claimants' Reply Post-Hearing Brief dated 28 March 2014  |
| Counter-Memorial                           | Claimants' Counter-Memorial on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 29 April 2013  |
| Dr Dedes' First Expert Linguistics Opinion | Expert Linguistics Opinion of Dr Yorgos Dedes, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 26 April 2013   |
| Exh. [C-] [R-]                             | Exhibit [Claimants] [Respondent]   |
| Exh. [CLA-] [RLA-]                         | Legal Authority [Claimants] [Respondent]   |
| Prof Gasparov's Expert Linguistics Opinion | Expert Linguistics Opinion of Professor Boris Gasparov, Ph.D. on the Meaning of Article VII(2) of the Russian Version of the 1992 Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 17 June 2013  |
| GDFI                                       | Turkey's General Directorate of Incentives and Foreign Investment of the Ministry of Economy since 2011 (from 1994 to 2011, General Directorate of Foreign Investment of the Undersecretariat of Treasury; from 1991 to 1994, General Directorate of Foreign Investment of the Undersecretariat of Treasury and Foreign Trade) |

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| Dr Glad's Expert Linguistics Opinion            | Expert Linguistics Opinion of John Glad, Ph.D. on the Meaning of Article VII.2 in the Russian Version of the Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013          |
| Prof Green's Expert Linguistics Opinion         | Expert Linguistics Opinion of Prof Georgia M. Green, Ph.D. concerning the "provided that, if...and..." clause in Article VII of the (signed) English version of the Turkey-Turkmenistan BIT dated 14 June 2013.  |
| ICSID Convention                                | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965   |
| ICSID / the Centre                              | International Centre for Settlement of Investment Disputes   |
| <i>Kılıç</i> Award                              | Award dated 2 July 2013 in <i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1) (Exh. RLA-98)  |
| <i>Kılıç</i> Decision                           | Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 7 May 2012 in <i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1) (Exh. RLA-1)                                   |
| <i>Kılıç</i> Separate Opinion                   | Separate Opinion of Professor William Park dated 20 May 2013 in <i>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan</i> (ICSID Case No. ARB/10/1) (Exh. RLA-98)   |
| Dr Kornfilt's First Expert Linguistics Opinion  | Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 |
| Dr Kornfilt's Second Expert Linguistics Opinion | Second Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII(2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 June 2013                 |

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| Prof Leonard's First Expert Linguistics Opinion  | Expert Linguistics Opinion of Professor Robert Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 29 April 2013           |
| Prof Leonard's Second Expert Linguistics Opinion | Second Expert Linguistics Opinion of Professor Robert A. Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 8 August 2013 |
| Memorial   | Respondent's Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty dated 18 March 2013                                      |
| Dr Öktem's and Dr Karlı's First Legal Opinion    | Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 15 March 2013  |
| Dr Öktem's and Dr Karlı's Second Legal Opinion   | Supplementary Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 19 June 2013   |
| Mrs Özbilgiç's Witness Statement                 | Witness Statement of Mrs Zergül Özbilgiç dated 7 August 2013  |
| Parties  | Claimants and Respondent  |
| PO No. 1   | Procedural Order No. 1 dated 15 February 2013   |
| Rejoinder  | Claimants' Rejoinder on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 9 August 2013  |
| Reply  | Respondent's Reply Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty dated 19 June 2013                                 |
| Request  | Request for Arbitration dated 21 February 2012  |
| Respondent / Turkmenistan                        | Turkmenistan  |
| Resp. Costs                                      | Respondent's Statement on Costs dated 4 April 2014  |
| Resp. Cmts Costs                                 | Respondent's Comments to Claimants' Statement on Costs dated 11 April 2014  |
| RPHB   | Respondent's Post-Hearing Brief dated 18 March 2014   |



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| RPHBR   | Respondent's Reply Post-Hearing Brief dated 28 March 2014  |
| Tr. J. Day [#], [page:line]                     | Transcript of the hearing on jurisdiction of 14-15 January 2014  |
| Dr Tyulenev's First Expert Linguistics Opinion  | Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 16 April 2013        |
| Dr Tyulenev's Second Expert Linguistics Opinion | Second Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 6 August 2013 |
| Vienna Convention                               | Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969  |

1. This Decision determines Respondent’s challenge to the Tribunal’s jurisdiction on the basis of Article VII(2) of the Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 (the “**BIT**” or “**Turkey-Turkmenistan BIT**” or “**Treaty**”) in this arbitration.

## **I. INTRODUCTION AND THE PARTIES**

2. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Turkey-Turkmenistan BIT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
3. The claimants are Sehil İnşaat Endustri ve Ticaret Ltd. Sti., a company incorporated under the laws of Turkey (“**Sehil**”), and Mr Muhammet Çap, a natural person of Turkish nationality. Sehil and Mr Çap will be hereinafter jointly referred to as “**Claimants**”. Claimants’ address is:

Mr Muhammet Çap  
Sehil İnşaat Endustri ve Ticaret Ltd. Sti.  
Eski Büyükdere cad.Bilek,  
İş Merkezi No:29 Kat:2,  
34416 4. LEVENT,  
Istanbul, Turkey.

4. The respondent is Turkmenistan and is hereinafter referred to as “**Turkmenistan**” or “**Respondent**”.
5. Claimants and Respondent are hereinafter collectively referred to as the “**Parties**”. The Parties’ respective representatives and their addresses are listed above on page i.
6. The dispute relates to the purported destruction, impairment and unlawful expropriation of Claimants’ construction projects in Turkmenistan, through acts and omissions of

Respondent that allegedly violate the protections the latter afforded to Claimants under the BIT.

7. After careful consideration of the Parties' written submissions and oral presentations, this Decision rules on Respondent's objection to jurisdiction and request for dismissal of Claimants' claims pursuant to ICSID Convention Articles 25 and 41, and Rule 41 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"), on the ground that Claimants failed to submit their dispute to Turkmenistan's national courts prior to initiating ICSID arbitration proceedings in accordance with Article VII(2) of the Turkey-Turkmenistan BIT.

## II. PROCEDURAL HISTORY

### A. The Request for Arbitration

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

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

11. On 26 March 2012, the Secretary-General of ICSID registered the case in accordance with Article 36(3) of the ICSID Convention. Upon the issuance of the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as

soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

**B. The constitution of the Tribunal**

12. By letter from Claimants dated 31 May 2012 and email from Respondent of 20 June 2012, the Parties agreed, in accordance with Article 37(2)(a) of the ICSID Convention, that the Arbitral Tribunal would consist of three arbitrators: one arbitrator to be appointed by each Party, and the third, presiding arbitrator to be appointed by agreement of the two party-appointed arbitrators in consultation with the Parties.
13. On 31 May 2012, Claimants appointed Professor Bernard Hanotiau, a national of Belgium, as arbitrator (address: Hanotiau & van den Berg, IT Tower (9<sup>th</sup> Floor), 480 Avenue Louise, B9, 1050 Brussels, Belgium). Upon the Centre's invitation of 22 June 2012, Professor Hanotiau accepted the appointment on 25 June 2012 and provided a signed declaration in accordance with Article 6(2) of the ICSID Arbitration Rules.
14. On 26 June 2012, Respondent appointed Professor Laurence Boisson de Chazournes, a national of France and Switzerland, as arbitrator (address: University of Geneva Faculty of Law, 40, boulevard du Pont-d'Arve, 1211, Geneva 4, Switzerland). Professor Boisson de Chazournes accepted the appointment on 9 July 2012, and provided a signed declaration and a statement in accordance with Article 6(2) of the Arbitration Rules.
15. By letter dated 27 September 2012, the Parties were informed that Mr Paul-Jean Le Cannu, ICSID Legal Counsel, would serve as Secretary of the Tribunal, when one is constituted.
16. By letter dated 5 October 2012, the Parties informed the ICSID Secretariat that they were "*now in agreement to submit to ICSID a list of three candidates from which [...] the Chairman of the Administrative Council would appoint the President of the Tribunal*". The Parties further explained that they were "*in agreement on all three candidates (in no particular order of preferences) and [left] it for ICSID to select a candidate taking into consideration the characteristics of the case concerned*".

17. On 11 October 2012, Professor Julian D.M. Lew QC, a national of the United Kingdom, was appointed as President of the Tribunal by the Chairman of the Administrative Council, from the list provided by the Parties on 5 October 2012 (address: 20 Essex Street Chambers, 20 Essex Street, London WC2R 3AL, United Kingdom). Professor Lew accepted his appointment on 21 October 2012, and submitted a signed declaration and a statement in accordance with Article 6(2) of the Arbitration Rules.
18. On 22 October 2012, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date in accordance with ICSID Arbitration Rule 6(1).
19. On 24 October 2012, the Centre requested each Party to make an initial advance payment of US\$ 100,000.00 to cover the costs of the proceedings in the first three to six months of the case. By letter dated 26 November 2012, the Centre confirmed receipt of Claimants' payment. By letter dated 4 June 2013, the Centre confirmed receipt of Respondent's payment.

**C. The first session of the Tribunal and bifurcation of the proceedings**

20. On 4 February 2013, the Tribunal held a first session with the Parties at the World Bank in Washington, D.C.
21. On 15 February 2013, the Tribunal issued Procedural Order No. 1 (“**PO No. 1**”), setting out the procedural rules that Claimants and Respondent had agreed to, and that the Tribunal had determined at the first session in Washington, D.C., should govern this arbitration. The Parties confirmed that “*the Tribunal was properly constituted and that no Party has any objection to the appointment of any Member of the Tribunal*”.<sup>1</sup> It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of proceedings would be Washington D.C., without prejudice to the Tribunal's decision to

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<sup>1</sup> PO No. 1, § 2.1.

hold hearings at any other place that it considers appropriate after consulting with the Parties and seeking their agreement.

22. Paragraph 13.1 of PO No. 1 embodied the agreement of the Parties and the Tribunal's determination with regard to the first phase of this arbitration. It provided:

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

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

**D. Parties' submissions and hearing on jurisdiction**

24. On 26 February 2013, the Parties informed the ICSID Secretariat that they had agreed on Paris, France, as the venue for the hearing on jurisdiction scheduled for 26-27 August 2013.
25. As agreed at the first session and subsequently by the Parties and the Tribunal, the Parties filed their written submissions as follows.
26. On 18 March 2013, Respondent filed its Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty ("**Memorial**") along with supporting documents, including the following expert reports:

- The Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 15 March 2013 (“**Dr Öktem’s and Dr Karlı’s First Legal Opinion**”);
  - The Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 (“**Dr Kornfilt’s First Expert Linguistics Opinion**”); and
  - The Expert Linguistics Opinion of John Glad, Ph.D. on the Meaning of Article VII.2 in the Russian Version of the Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 March 2013 (“**Dr Glad’s Expert Linguistics Opinion**”).
27. On 29 April 2013, Claimants filed their Counter-Memorial on Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (“**Counter-Memorial**”) along with supporting documents, including the following witness statements and expert reports:
- The Witness Statement of Mr Hasan Çap dated April 2013;
  - The Witness Statement of Mr Hüseyin Çap dated 29 April 2013;
  - The Witness Statement of Mr İrfan Dölek dated 29 April 2013;
  - The Witness Statement of Mr Ukkşe Çap dated 29 April 2013;
  - The Expert Linguistics Opinion of Dr Yorgos Dedes, Ph.D. on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 26 April 2013 (“**Dr Dedes’ First Expert Linguistics Opinion**”);
  - The Expert Linguistics Opinion of Professor Robert Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 29 April 2013 (“**Prof Leonard’s First Expert Linguistics Opinion**”); and

- The Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 16 April 2013 (“**Dr Tyulenev’s First Expert Linguistics Opinion**”).
28. By email of 28 May 2013, the Parties informed the Tribunal that they had agreed to amend the procedural calendar. On 13 June 2013, Respondent filed a request for a further extension of the deadline to file its Reply Memorial. On 14 June 2013, Claimants filed their comments on Respondent’s request. By email of the same date, the Tribunal granted the requested extension, taking into account the views expressed in the Parties’ communications and, in particular, the special circumstances invoked by Respondent. An identical extension was granted to Claimants for the filing of their Rejoinder.
29. On 19 June 2013, Respondent filed its Reply Memorial on its Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (“**Reply**”) along with supporting documents, including the following expert reports:
- The Supplementary Legal Opinion on the 1992 Turkey-Turkmenistan BIT of Dr Emre Öktem and Dr Mehmet Karlı dated 19 June 2013 (“**Dr Öktem’s and Dr Karlı’s Second Legal Opinion**”);
  - The Second Expert Linguistics Opinion of Jaklin Kornfilt, Ph.D. on the Meaning of Article VII(2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 14 June 2013 (“**Dr Kornfilt’s Second Expert Linguistics Opinion**”);
  - The Expert Linguistics Opinion of Professor Boris Gasparov, Ph.D. on the Meaning of Article VII(2) of the Russian Version of the 1992 Treaty Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments dated 17 June 2013 (“**Prof Gasparov’s Expert Linguistics Opinion**”); and
  - The Expert Linguistics Opinion of Prof Georgia M. Green, Ph.D. concerning the “*provided that, if...and...*” clause in Article VII of the (signed) English version of



the Turkey-Turkmenistan BIT dated 14 June 2013 (“**Prof Green’s Expert Linguistics Opinion**”).

30. On 3 July 2013, Respondent filed an additional legal authority (Exh. RLA-98) in support of its jurisdictional challenge based on Article VII(2) of the Turkey-Turkmenistan BIT.
31. On 15 July 2013, the Centre requested each Party to make a second advance payment of US\$ 150,000.00 to cover the costs of the proceedings in the next three to six months of the case, including the upcoming hearing on jurisdiction.
32. By letter of 26 July 2013, Claimants informed the Tribunal that they would file their Rejoinder Memorial by 9 August 2013.
33. By letter dated 8 August 2013, Respondent informed the Tribunal that some of its experts “*may have to give testimony by video rather than in person in Paris [...] due both to personal and professional obligations*”.<sup>2</sup> Respondent also advised that Dr Glad would not be available to testify at the hearing.
34. On 9 August 2013, Claimants filed their Rejoinder on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty (“**Rejoinder**”) along with supporting documents, including the following witness statement and expert reports:
  - The Witness Statement of Mrs Zergül Özbilgiç dated 7 August 2013 (“**Mrs Özbilgiç’s Witness Statement**”);
  - The Second Expert Linguistics Opinion of Dr Yorgos Dedes on the Meaning of Article VII.2 in the Turkish Version of the Turkey-Turkmenistan BIT dated 8 August 2013;
  - The Second Expert Linguistics Opinion of Professor Robert A. Leonard, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-

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<sup>2</sup> Letter from Respondent dated 8 August 2013.

Turkmenistan BIT dated 8 August 2013 (“**Prof Leonard’s Second Expert Linguistics Opinion**”); and

- The Second Expert Linguistics Opinion of Dr Sergey Tyulenev, Ph.D. on the Meaning of Article VII.2 in the Authentic Russian Version of the Turkey-Turkmenistan BIT dated 6 August 2013 (“**Dr Tyulenev’s Second Expert Linguistics Opinion**”).

35. On 15 August 2013, Claimants submitted the “*full version of the Witness Statement of Mrs Zergül Özbilgiç as well as a corrected version of Claimants’ Rejoinder*”, stating that the changes made to both documents were “*purely clerical*”.<sup>3</sup> Claimants indicated that these documents replaced the earlier versions submitted on 9 August 2013.
36. A pre-hearing organisational meeting took place by telephone conference on 14 August 2013, at 10:00 am, Washington, D.C. time, with Mr Raéd Fathallah and Mr Louis Christophe Delanoy for Claimants, and Ms Miriam Harwood and Ms Claudia Frutos-Peterson for Respondent, the President of the Tribunal and the Secretary. The meeting addressed the arrangements for the hearing scheduled for 26-27 August 2013. The timing of oral arguments and the examination of experts were specifically agreed.
37. Unexpectedly, without any indication even during the pre-hearing telephone conference the previous day, by letter dated 15 August 2013, Respondent requested the postponement of the hearing scheduled for 26-27 August 2013. Respondent’s reasons for the request were as follows:

*We have been in discussions with our client regarding the financial arrangements for the proceedings in this and other pending cases and are still awaiting decisions in that regard. Unfortunately, under the circumstances, we will not be able to proceed with the hearing on the dates presently scheduled.*

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<sup>3</sup> Email from Claimants dated 15 August 2013.

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

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

For Claimants:

|                             |                   |
|-----------------------------|-------------------|
| Mr Louis Christophe Delanoy | Bredin Prat       |
| Mr Raëd Fathallah           | Bredin Prat       |
| Ms Laura Fadlallah          | Bredin Prat       |
| Mr Shane Daly               | Bredin Prat       |
| Ms Alexandra Mazgareanu     | Bredin Prat       |
| Professor Dr Ziya Akinci    | Akinci Law Office |
| Mr Muhammet Çap             | Claimant          |

For Respondent:

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

46. The following persons were examined:

On behalf of Claimants:

|                           |                |
|---------------------------|----------------|
| Mrs Zergül Özbilgiç Toros | Fact Witness   |
| Dr Sergey Tyulenev        | Expert Witness |
| Professor Robert Leonard  | Expert Witness |

Dr Yorgos Dedes

Expert Witness

On behalf of Respondent:

Dr Jaklin Kornfilt

Expert Witness

Professor Boris Gasparov

Expert Witness

Professor Georgia Green

Expert Witness

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

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

48. The Parties filed simultaneous Post-Hearing Briefs on 18 March 2014, and simultaneous Reply Post-Hearing Briefs on 28 March 2014.
49. The Parties filed their statements on costs on 4 April 2014, and simultaneous comments on the other Party's costs statement on 11 April 2014. In its submission of 11 April 2014, Respondent asked the Tribunal to order Claimants to disclose "(i) whether they have entered into third-party funding arrangements to finance their claims in this proceeding; (ii) if so, what are the terms of such arrangements; and (iii) whether there are any contingency fee arrangements, with either Claimants' counsel or third party funders". On 13 May 2014, Claimants submitted comments on Respondent's request of 11 April 2014.

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<sup>4</sup> Tr. J. Day 1, 5:17-6:3.

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

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

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

- a. To avoid a conflict of interest for the arbitrator as a result of the third party funder;*
- b. For transparency and to identify the true party to the case;*
- c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;*
- d. If there is an application for security for costs if requested; and*
- e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.*

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

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

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

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

### **III. NATURE OF THE DISPUTE**

51. Sehil is a Turkish construction company, majority owned by Mr Çap. According to Claimants, Mr Çap made his first investment in Turkmenistan in 1995, when he established a construction supplies business there. He continued doing business in Turkmenistan until 2010. In April 2000, Mr Çap secured a major investment opportunity for his construction company Sehil İnşaat, to build the new headquarters of the Turkmen National Security Committee. During 2000-2004, Mr Çap and Sehil invested heavily in significant construction projects, including numerous high profile businesses and governmental buildings, such as a residential building for the Central Bank of Turkmenistan, a hotel complex for the Office of the Chief Prosecutor, a State Institute of Energy and a hotel building for the Ministry of Energy and Industry, a National Cultural Centre, a police academy, a municipal palace, and a health centre. Claimants say thirty-three of these projects were completed successfully, without encountering any problems; the other thirty-two projects are the underlying basis of this dispute.<sup>5</sup>
52. Claimants contend that these projects were part of the then Turkmen President's aspirations to transform Turkmenistan's Awaza region into the Dubai of Central Asia. For this reason the President took a personal and active interest in the projects, and the licenses issued and

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<sup>5</sup> In addition, Claimants contend that Sehil "was also granted further major landmark projects worth billions of dollars" including the island project, especially the Special Education Centre (military zone), the entertainment centre and the hippodrome project, and the biggest timeshare project in Turkmenistan (Request, § 26).

contracts awarded to Sehil were stated to be in accordance with a presidential decree or order.

53. Claimants state that, in order to pursue this business, and with the encouragement of the highest Turkmen authorities, including the President of the time, Mr Çap and his family moved to Turkmenistan, and established a Turkmen branch of Sehil in Turkmenistan.
54. Claimants contend that “*many of Sehil’s construction projects brought innovation to Turkmenistan and added significant value to the development of the country. Naturally, the Claimants had become one of the largest foreign investors in Turkmenistan, employing thousands of Turkmen nationals and injecting significant sums of money in the Turkmen economy*”.<sup>6</sup>
55. Claimants contend that, following the death of the President of Turkmenistan and the election of a new President in 2007, Sehil’s investment operations became much more difficult. According to Claimants, the new President ordered additional work to various contracts, increasing the true cost of the project without changing the payment arrangements. The Turkmen authorities hampered Claimants’ ability to manage their investments by *inter alia* imposing delays upon works, systematically failing to make the required interim payments, failing to pay for additional work which Sehil was obliged to carry out as a result of unilateral executive orders, and imposing intentionally complicated bureaucratic procedures. Claimants state that “[i]t was made very clear by the Turkmen authorities that Claimants were only to be paid for previous works should they complete the existing projects and undertake further projects”.<sup>7</sup> Due to the situation Sehil was required to inject tens of millions of dollars of its own capital.
56. In addition, Claimants allege that Respondent unlawfully and arbitrarily terminated six projects and retracted four awarded projects for which Claimants had already started preparatory works. Respondent also forced Claimants to commence works on several

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<sup>6</sup> Request, § 28.

<sup>7</sup> Request, § 37.



projects, including three hotels near the Caspian Sea, before the related contracts were signed. This allegedly resulted in significant losses for Claimants.

57. Claimants further contend that the Turkmen authorities, including the state-controlled police, conducted visits to the project sites with no legitimate cause, harassed and threatened Mr Çap, his two sons, his deputies, and their Turkish technical staff. This arbitrary treatment culminated in a visit, in early July 2010, of three vice-presidents of the Turkmen Government during which Mr Çap was asked to sign a statement agreeing to transfer the project to other contractors. Mr Çap refused to do so. He then received warnings that he was in danger. When he received further visits from Turkmen officials he suffered a cerebral bleeding. He was therefore forced to leave Turkmenistan on 14 July 2010 in order to reduce the stresses on his health.
58. According to Claimants, the Turkmen authorities then began to target his sons and his deputies, and sought to force the general manager to sign the document agreeing to transfer projects to another company. Following further harassment and pressure from the Turkmen Government, first by threatening not to allow them to leave Turkmenistan, and then fearful for their personal safety, Mr Çap's two sons, Mr Hüseyin Çap and Mr Ukkışe Çap, left Turkmenistan. Sehil's technical staff were also forced to leave Turkmenistan when their visas were cancelled.
59. Claimants state that they were compelled to leave behind all their equipment and assets, worth over US\$ 10,000,000, which were then taken control of by the Turkmen authorities. In November 2010, the Turkmen authorities put Sehil's work site and office under seal.
60. Claimants allege that through its above-described acts and omissions, Turkmenistan violated several provisions of the BIT, including: the fair and equitable treatment provision (Preamble), the protection against arbitrary and discriminatory measures and assurances of legitimate expectations (Law of Turkmenistan on Investment Activities in Turkmenistan), the protection and security provision (Art. II(3), Art. VI(b)), the protection against expropriation without adequate compensation (Art. III(1)), and the most-favoured-nation ("MFN") provision (Art. II(1) and II(2)).

61. Claimants request compensation for the losses suffered as a result of these alleged violations, including loss of profits, loss of business opportunities, loss of enterprise value and moral damages amounting to “*no less than 300 million USD*”.<sup>8</sup>
62. Respondent has not commented on these facts as alleged by Claimants, but rather contends that Claimants’ claims “*are, at their core, contractual disputes between parties to commercial contracts. As such, Claimants should have submitted their disputes to the material courts of Turkmenistan, as provided for in their contracts*”.<sup>9</sup> Respondent states: “*These claims have no place being asserted before an international tribunal constituted under an investment treaty*”.<sup>10</sup> For these reasons other than denying these allegations, generally, Respondent has not answered any of the above allegations, and chose to instead rely at this stage on its jurisdictional challenge alone. It “*reserve[d] all rights to assert additional jurisdictional objections, as well as defenses on the merits, at the appropriate time in any subsequent phase of this proceeding, should that become necessary*”.<sup>11</sup>

#### **IV. SCOPE OF THIS DECISION AND ISSUES FOR DETERMINATION**

63. The crucial issue for determination at this stage of the arbitration is the meaning and effect of Article VII(2) of the BIT. Essentially, the question is whether there is a prior mandatory requirement for a Turkish investor to seek redress for its claims in the Turkmen courts, before it can bring its claims in arbitration, or whether the investor has an option to bring its claims either in the Turkmen courts or before an international arbitration tribunal.
64. This Decision therefore determines Respondent’s jurisdictional challenge to Claimants’ submission to ICSID arbitration of their claims for violations of the BIT in respect of their investments in Turkmenistan.

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<sup>8</sup> Request, § 145.

<sup>9</sup> Memorial, § 5.

<sup>10</sup> Memorial, § 6.

<sup>11</sup> Memorial, § 2.

65. Claimants contend:

*[...] Article VII.2 of the Turkey-Turkmenistan BIT provides for the option, and not the obligation, for Turkish investors to submit their dispute to the domestic courts of Turkmenistan prior to commencing international arbitration proceedings.*<sup>12</sup>

66. Respondent's position is stated as follows:

*[...] Article VII(2) of the Treaty requires that an investor must submit its dispute to the national courts of the host State and allow a one-year period for the courts to render a decision, as a mandatory precondition that must be fulfilled before the investor has any right to pursue claims under the Treaty through international arbitration.*<sup>13</sup>

67. Accordingly, Respondent contends and seeks the following relief from the Tribunal:

*[...] Respondent submits that this Tribunal lacks jurisdiction to hear the merits of this dispute due to Claimants' failure to comply with the mandatory requirement of prior submission of the dispute to Turkmenistan courts under Article VII(2) of the BIT. As a result, Respondent respectfully requests that this Tribunal render an Award dismissing the case for lack of jurisdiction and ordering Claimant to pay all of the costs related to this Arbitration.*<sup>14</sup>

68. Claimants request that the Tribunal:

- a. *DISMISS Respondent's Objection to Jurisdiction Under Article VII.2;*
- b. *DECLARE that the Tribunal has jurisdiction over Claimants' claims;*  
*and*
- c. *ORDER Respondent to pay all Claimants' arbitration, legal and related costs, including but not limited to counsel fees incurred by Claimants in connection with these arbitration proceedings.*<sup>15</sup>

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<sup>12</sup> CPHB, § 96.

<sup>13</sup> RPHB, § 2.

<sup>14</sup> Reply, § 227.

<sup>15</sup> CPHB, § 98; *see also* CPHBR, § 35.

## V. FACTUAL BACKGROUND

69. This section sets out the historical background and context in which the BIT was signed and executed, either as agreed by the Parties, where not in dispute, or as has been determined by the Tribunal.
70. According to Respondent, shortly after Turkmenistan obtained independence from the Soviet Union and became a sovereign State in 1991, the Prime Minister of Turkey conducted an eight-day tour of the newly established “*Turkic Republics*” - namely, Turkmenistan, Kyrgyzstan, Uzbekistan and Kazakhstan - during which he signed “*approximately 50 trade, investment and economic cooperation agreements*”.<sup>16</sup>
71. It was during this trip that Turkey, as part of its initiative to establish close economic and diplomatic ties with the newly independent republics, concluded bilateral investment treaties with all four countries in a five-day period between 28 April and 2 May 1992. The Turkey-Turkmenistan was the last BIT signed during this period, on 2 May 1992.
72. It is common ground between the Parties that Russian and English versions of the BIT were executed, both versions being signed by the President of Turkmenistan and the Prime Minister of Turkey at the time.
73. The signed English version of the BIT provides:

*DONE at Ashgabat on the day of May 2, 1992 in two authentic copies in Russian and English.*<sup>17</sup>

74. There are two signed versions of the Russian text, which differ in only one respect: one appears to have been signed on behalf of both Turkey and Turkmenistan;<sup>18</sup> the second

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<sup>16</sup> Memorial, § 35.

<sup>17</sup> Exh. C-1.

<sup>18</sup> See Exh. C-1-B.

version contains a second signature on behalf of Turkey, believed to be that of the Turkish Minister of Foreign Affairs at the time.<sup>19</sup>

75. Both Russian versions provide (in agreed translation):

*Executed on May 2, 1992 in two authentic copies in the Turkish, Turkmen, English and Russian languages.*<sup>20</sup>

76. It is also undisputed that there is no official Turkmen language version of the BIT and neither Party was able to locate a version of the BIT in the Turkmen language.

77. A Turkish text was published in the Official Gazette of Turkey on 15 January 1995. This Turkish version provides:

*DONE at Ashgabat on the day of May 2, 1992 in two authentic copies in Russian and English.*<sup>21</sup>

78. According to Respondent, other versions of the Turkish text have been published on the website of Turkey's Undersecretariat of Treasury.<sup>22</sup> As described by Respondent, the "publicly available Turkish versions do not contain handwritten signatures, but rather typewritten notations in the signature lines stating that they were signed by the countries' representative".<sup>23</sup>

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<sup>19</sup> See Exh. R-1. See also Memorial, § 36 and fn 64.

<sup>20</sup> Exhs. R-1, C-1-B. See also Memorial, § 36.

<sup>21</sup> Exh. R-3. See also Memorial, § 48.

<sup>22</sup> Mrs Özbilgiç explains in her witness statement that "[t]he Government department with responsibility for Bilateral Investment Treaty policy and negotiation is regulated by the Statutory Decree N° 637. The Government department with this responsibility have been as follows: Until 1989, it was the State Planning Organization - Directorate of Foreign Capital. Subsequently, between 1991 and 1994, it was placed under the DG of Foreign Investment of the Under-secretariat of Treasury and Foreign Trade, then, between 1994 and 2011, it was under the DG Foreign Investment of the Under-secretariat of Treasury, and lastly it was placed under the DG of Incentive Implementation and Foreign Investment of the Ministry of Economy where it has remained since 2011". (Mrs Özbilgiç's Witness Statement, fn 1; see also Tr. J. Day 2, 6:14-25.)

<sup>23</sup> Memorial, § 37.

79. The Turkish text of the BIT that appeared on the website of Turkey’s Undersecretariat of Treasury until August 2011, provided:

*Executed in Ashgabat on May 2, 1992 in two authentic copies in Turkish, Russian and English.*<sup>24</sup>

80. It was removed and replaced with a version that deleted the reference to Turkish as an authentic copy.<sup>25</sup>

## **VI. RELEVANT LEGAL TEXTS**

81. The Tribunal sets forth below the relevant legal texts.

### **A. The ICSID Convention and the ICSID Arbitration Rules**

82. Article 25(1) of the ICSID Convention provides that:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

83. Article 26 of the ICSID Convention provides as follows:

*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*

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<sup>24</sup> Exh. R-8. According to Respondent, “[t]hat copy was [...] removed (while the treaty’s “authenticity” issues were being briefed in pending international arbitrations against Turkmenistan, including the Kılıç case) and replaced with a different version that deleted the reference to Turkish as an authentic copy”. (Memorial, § 37.)

<sup>25</sup> See Exh. R-9.

84. Article 41 of the ICSID Convention provides in relevant part that:

*(1) The Tribunal shall be the judge of its own competence.*

*(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.*

85. ICSID Arbitration Rule 41, which addresses “*Preliminary Objections*”, provides in relevant part:

*(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.*

*(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.*

[...]

*(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.*

## **B. The Turkey-Turkmenistan BIT**

86. As described in Section V above, it is common ground between the Parties that the BIT exists in two authentic languages – English and Russian. Respondent contends that, although it was not signed on 2 May 1992, the Turkish version is also authentic as it was presented to the Turkish Parliament and published in the Turkish Gazette.

87. As discussed in Section VIII.A.(3) below, the Parties are in disagreement with respect to the meaning and interpretation of Article VII(2) of the BIT in the three languages.

88. Article VII of the English version of the BIT provides:

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

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

*(a) The International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States". (in case both Parties become signatories of this Convention.)*

*(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), (in case both parties are members of U.N.)*

*(c) the Court of Arbitration of the Paris International Chamber of Commerce.*

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

*3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.<sup>26</sup>*

89. Article VII of the Russian version of the BIT provides:

*1. Конфликты между одной из Сторон и одним из инвесторов другой Стороны, связанные с его инвестициями, будут ставиться в известность в письменной форме, включая подробную информацию инвестором по отношению к Стороне - реципиенту инвестиций.*

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<sup>26</sup> Exh. C-1.



*Несколько это возможно, инвестор и заинтересованная Сторона будут стараться разрешать эти конфликты посредством консультаций и переговоров с доброй волей.*

*2. Если указанные конфликты не могут быть разрешены таким путем в течение шести месяцев после даты письменного извещения, о котором говорится в пункте I, то конфликт может быть представлен - по выбору инвестора -*

*а) Международному центру по разрешению инвестиционных конфликтов, учрежденному в соответствии с “Конвенцией о разрешении инвестиционных конфликтов между государствами и подданными других государств”, в случае если обе Стороны подписали эту конвенцию;*

*б) “ad hoc”, учрежденный в соответствии с Арбитражным процедурными правилами Комиссии по международному торговому праву при ООН в случае если Стороны являются членами ООН;*

*в) Арбитражный суд Парижской международной торговой палаты, при условии, если заинтересованный инвестор представил конфликт в суд той Стороны, которая является одной из Сторон конфликта, а окончательное арбитражное решение о возмещении убытков не вынесено в течение одного года.*

*3. Арбитражное решение должно быть окончательным и обязательным для всех сторон конфликта. Каждая Сторона обязуется выполнить решение о возмещении убытков в соответствии со своим национальным законом.<sup>27</sup>*

90. Respondent’s English translation of the Russian version in this proceeding reads as follows:

*1. Conflicts between one of the Parties and one of the investors of the other Party, with regard to his investments, will be notified in writing, including a detailed information, by the investor to the Party - recipient of the investment. As far as possible, the investor and the concerned Party will*

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<sup>27</sup> Exhs. C-1-B (Russian version submitted by Claimants without English translation) and R-1 (Russian version submitted by Respondent with English translation).

*endeavour to settle these conflicts through consultations and negotiations in good faith.*

*2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor's choice to*

*(a) The International Center for Settlement of Investment Conflicts, set up in accordance with the "Convention for Settlement of Investment Conflicts between States and Nationals of Other States", in case both Parties signed this Convention;*

*(b) "ad hoc", established in accordance with the Arbitration procedural rules of the United Nations Commission for International Trade Law, in case the Parties are members of U.N.;*

*(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*

*3. The arbitration award shall be final and binding for all the parties to the conflict. Each Party undertakes to enforce the award on compensation of damages in accordance with its national law.<sup>28</sup>*

91. Article VII of the Turkish version provides:

*1. Taraflardan biri ile diğ er Tarafın bir yatırımcısı arasında o yatırımcının yatırımı ile ilgili olarak çıkan ihtilaflar, yatırımcı tarafından ev sahibi Tarafa ayrıntılı bir şekilde yazılı olarak bildirilecektir. Yatırımcı ile ilgili Taraf, söz konusu ihtilafları mümkün olduğ unca karş ılıklı iyi niyetli görüşmeler yaparak ç özüme kavuşturacaktır.*

*2. Bu ihtilafların, yutarıda 1. paragrafta belirtilen yazılı bildirim tarihinden itibaren altı ay içinde ç özüme kavuşturulamaması halinde, yatırımcının ihtilaf konusunu ev sahibi Tarafın usul ve yasalarına göre adli mahkemesine götürmüş olması ve bir yıl içinde karar verilmemiş olması*

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<sup>28</sup> Exh. R-1.

*kaydıyla, söz konusu ihtilaf, yatırımcının kararına göre aşağıda belirtilen Uluslararası Yargı Makamlarına sunulabilir:*

*a) “Devletler ve Diğer Devletlerin Vatandaşları Arasındaki Yatırım İhtilaflarının Çözümlemesi Hakkında Sözleşme” uyarınca kurulmuş Uluslararası Yatırım İhtilafları Çözüm Merkezi (ICSID) (her iki Taraf da bu Sözleşmeyi imzalamış ise);*

*b) Birleşmiş Milletler Uluslararası Ticaret Hukuku Komisyonu (UNCITRAL)’nun Hakemlik Kuralları uyarınca, bu amaçla kurulacak bir hakem mahkemesi (her iki Taraf da Birleşmiş Milletler’e üye ise);*

*c) Paris Uluslararası Ticaret Odası’nun Hakem Mahkemesi;*

*3. Tahkim Kararları, uyuşmazlığın bütün tarafları bağlayıcı ve kesin olacaktır. Taraflar, söz konusu kararı kendi ulusal yasalarına göre yerine getirecektir.<sup>29</sup>*

92. Respondent’s English translation of the Turkish version reads as follows:

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

*2. In the event that these disputes cannot be settled within six months following the date of the written notification stated in paragraph 1 above, such dispute can be submitted to the below stated International Judicial Authorities as per the decision of the investor; provided that the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and that a decision has not been rendered within one year:*

*(a) The International Center for Settlement of Investment Disputes (ICSID) which has been established in accordance with the “Convention on Settlement of Investment Disputes Between States and Nationals of Other States”, (if both Parties have signed this Convention);*

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<sup>29</sup> Exh. R-3.

*(b) A court of arbitration to be constituted in accordance with the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL) for this purpose, (if both Parties are members of the United Nations);*

*(c) Court of Arbitration of the Paris International Chamber of Commerce;*

*3. The arbitration awards shall be binding and definitive for all the parties to the dispute. The Parties shall execute the said award in accordance with their own national laws.<sup>30</sup>*

### **C. The Vienna Convention on the Law of Treaties**

93. The main purpose of this Decision is to construe the meaning of Article VII(2) of the BIT. The Tribunal will do so in accordance with the customary rules of treaty interpretation as codified in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (“**Vienna Convention**”).<sup>31</sup> The Tribunal notes that Turkey is not a party to the 1969 Vienna Convention on the Law of Treaties but that Turkmenistan is a party since 4 January 1996. As such, and has been accepted by the Parties in their submissions, the Vienna Convention is applicable as customary international law in the relations between the Parties and with respect to the interpretation of the BIT. Although discussed where pertinent below it is convenient to set out these provisions in full here.

94. Article 31 of the Vienna Convention, headed “*General rule of interpretation*”, provides:

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

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<sup>30</sup> Exh. R-3. This text was published in the Official Gazette of Turkey in 1995, pursuant to the country’s internal ratification procedures and was the text considered by the Turkish Parliament in ratifying the Treaty. See Memorial, § 48.

<sup>31</sup> See e.g., *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 501, § 99 (Exh. RLA-36); *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, I.C.J. Reports 2002 (Exh. RLA-37), § 37.

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

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

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

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

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

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

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

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

95. Article 32 of the Vienna Convention, headed “*Supplementary means of interpretation*”, provides:

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

*(a) leaves the meaning ambiguous or obscure; or*

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

96. Article 33 of the Vienna Convention, headed “*Interpretation of treaties authenticated in two or more languages*”, provides:

*1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*

*2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*

*3. The terms of the treaty are presumed to have the same meaning in each authentic text.*

*4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

## **VII. OVERVIEW OF THE POSITIONS OF THE PARTIES**

97. The Tribunal sets forth briefly below the Parties' positions on the following issues:<sup>32</sup>

- Whether Article VII(2) of the BIT, considering the multiple language versions of the Treaty, compels investors to refer the dispute to the local courts of the host state, prior to commencing arbitration; and
- If the BIT were to require the prior submission of the dispute to local courts, whether such a requirement could be superseded either by operation of the BIT's MFN provision, or alternatively on the grounds that Claimants' submission of the dispute to the Turkmen courts would have proven to be futile.

### **A. The local court requirement under Article VII(2) of the BIT**

#### **(1) Respondent's position**

98. Respondent submits that Article VII(2) of the Turkey-Turkmenistan BIT sets forth a mandatory condition requiring prior submission of a dispute to the local courts of the host

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<sup>32</sup> The Parties' arguments are set out in greater detail in the Tribunal's analysis and decision below: §§ 112 *et seq.*

state and the allowance of a one-year period for resolution by the courts, as a prerequisite to international arbitration. Specifically, Respondent posits that:

*[...] Turkmenistan's offer to submit to international arbitration with respect to disputes with Turkish investors under the Turkey-Turkmenistan BIT is expressly conditioned upon the investor's compliance with the mandatory provisions of Article VII(2), including prior submission of the disputes to the national courts in Turkmenistan and allowance of a one-year period for the courts to issue a decision. This condition is an essential element of the State's consent to the jurisdiction of an international arbitral tribunal, and a pre-requisite that cannot be ignored or disregarded. Claimants' failure to satisfy this condition means that the Tribunal lacks jurisdiction to adjudicate this dispute. Accordingly, all claims asserted in the Request for Arbitration must be dismissed for lack of jurisdiction.<sup>33</sup>*

99. In this respect, Respondent relies on the authentic versions of the BIT (English, Russian and (it claims) Turkish) to be construed where ambiguous in accordance with Articles 31-33 of the Vienna Convention. Respondent also introduced and relies on expert linguistic evidence in support of its position.

## **(2) Claimants' position**

100. Claimants' position is that the BIT does not compel prior recourse to local courts before arbitration proceedings can be brought. This follows from the construction of the two authentic versions of the BIT - English and Russian. Claimants are entitled to commence arbitration proceedings under Article VII(2) after complying with the written notice requirement in Article VII(1) and the lapse of the six-month opportunity to settle matters "by consultations and negotiations in good faith". There is no requirement to first initiate proceedings in the courts of Turkmenistan.
101. In addition to their argument based on their interpretation of Articles 31-33 of the Vienna Convention, Claimants also rely on expert linguistic evidence. Claimants state that the evidence and arguments presented at the hearing confirmed their position that Article VII

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<sup>33</sup> Memorial, § 29; *see also* Reply, § 2.

*[...] provides for optional recourse to local courts and expresses that “the right to apply to international arbitration may be exercised provided that access to local judicial bodies shall remain available”. Article VII does not provide for a mandatory recourse to local courts for investors before they may have recourse to international arbitration.*<sup>34</sup>

**B. The mandatory local court requirement should not be applied because of the MFN clause in the BIT and/or the futility of proceeding in the Turkmen courts**

**(1) The mandatory local court requirement should be overridden by operation of the MFN clause**

*(a) Claimants’ position*

102. Claimants contend that if *par impossible* the Tribunal decides that Article VII(2) requires submission to the local courts before arbitration proceedings can be instituted, this requirement should be overridden by virtue of the MFN provision in Article II of the BIT. Claimants argue that this allows them to rely on more favourable provisions contained in investment treaties entered into by Turkmenistan with other countries, including on more favourable treatment with respect to dispute resolution. Specifically, Claimants refer to the UAE-Turkmenistan BIT signed on 9 June 1998,<sup>35</sup> which provides that both parties could refer their dispute, if it cannot be settled by negotiations within six months, either to the local host state courts, or to *ad hoc* arbitration under the UNCITRAL Rules or to ICSID.<sup>36</sup>
103. Claimants state that “[t]he simple goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties” and that “the very character and intention of [MFN clauses] is that protection not

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<sup>34</sup> CPHB, § 3 (emphasis in the original; footnote omitted).

<sup>35</sup> See Exh. C-58: Agreement between the Government of the United Arab Emirates and the Government of Turkmenistan for the Promotion and Reciprocal Protection of Investments (“UAE-Turkmenistan BIT”).

<sup>36</sup> See Article 8.3 of the UAE-Turkmenistan BIT.



*accepted in one treaty is widened by transferring the protection accorded in another treaty”.*<sup>37</sup>

104. Claimants contend that the Tribunal has jurisdiction to determine the application and scope of the MFN clause in the BIT which grants them access to the more favourable dispute resolution mechanism in the UAE-Turkmenistan BIT. This would entitle Claimants to directly access ICSID jurisdiction without any requirement to first resort to local courts. In support of this conclusion, Claimants’ interpretation of the MFN provision relies on the Vienna Convention, and the contention that Turkey and Turkmenistan were aware that dispute resolution provisions were within the scope of the MFN clause as part of the “*treatment*” to be afforded to investments at the time they entered into the Treaty. Claimants argue that this is supported by Turkmenistan’s subsequent practice, as well as by case law and scholarly commentary.

*(b) Respondent’s position*

105. Respondent objects to Claimants’ “*attempt to create jurisdiction where it does not otherwise exist*”.<sup>38</sup> The requirement of prior recourse to local courts set forth in Article VII(2) cannot be overridden by virtue of the MFN clause in the BIT. First, Claimants have not satisfied the conditions of Respondent’s consent to ICSID arbitration in the BIT and do not have the right to even ask this Tribunal to determine their claimed right to MFN treatment under the BIT. The Tribunal does not have jurisdiction to decide on the MFN standard set forth in the Treaty because Claimants have not satisfied the conditions of Respondent’s consent to ICSID arbitration.
106. Second, even if the Tribunal has jurisdiction, Respondent argues that the MFN provision does not encompass dispute resolution and therefore cannot be used to displace or render ineffective the mandatory prior recourse to local courts under Article VII(2). In any event,

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<sup>37</sup> Counter-Memorial, § 108, citing to Schreuer, Dolzer, *Principles of International Investment Law*, 2nd Edition (Oxford) (Exh. CLA-22), p. 206, and *RosInvestCo UK v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007 (Exh. CLA-20), § 131.

<sup>38</sup> Reply, § 108.

if the Tribunal was to exercise jurisdiction to determine Claimants' MFN claim, Respondent contends that the Tribunal should reject Claimants' attempt to override the conditions to Turkmenistan's consent to ICSID arbitration, as numerous other arbitral tribunals have done.

**(2) The mandatory local court requirement should not be enforced because seeking redress in the Turkmen courts is futile**

*(a) Claimants' position*

107. Alternatively, Claimants argue that it would be futile to enforce the mandatory referral to local courts. Therefore Claimants should be exempted from fulfilling any requirement to refer the dispute to the courts of Turkmenistan, as it would have been futile or impossible for them to seek redress there. Claimants allege that they have experienced first-hand the notorious failures of and abuses by Turkmenistan's judicial system. Claimants allege in particular that Respondent "*used its machinery (prosecutors, KGB, tax services, courts etc.) in mobilizing its sovereign powers to target Claimants in a systematic onslaught of unwarranted, inequitable and abusive measures which resulted in the arbitrary deprivation of their contractual rights, the destruction of its operations in Turkmenistan and the obligation for Claimants to flee Turkmenistan for their own safety*".<sup>39</sup>
108. Claimants contend that futility is a recognised exception to a mandatory requirement to exhaust local remedies and is applicable even though the BIT does not expressly contain such a provision. According to Claimants, "*the concept of futility was developed as a widely-accepted and well-settled multi-faced exception to the requirement of exhaustion of local remedies within the framework of diplomatic protection and, more generally, customary international law*"<sup>40</sup> and "*has been recognized by investment arbitration tribunals as constituting an exception to the requirement to resort to local remedies which*

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<sup>39</sup> Counter-Memorial, § 156; *see also* Rejoinder, § 266.

<sup>40</sup> Counter-Memorial, § 130; *see also* Rejoinder, § 207.

*allowed ICSID tribunals to comfortably refer to it when faced with provisions for mandatory recourse to local remedies”.*<sup>41</sup>

*(b) Respondent’s position*

109. Respondent denies that futility is applicable in this case. The BIT’s requirement of prior recourse to local courts is mandatory and cannot be avoided on account of an alleged ‘futility’ exception. Futility is not provided for under the BIT, and there is no basis to apply the futility concept from customary international law to a treaty case where the parties have expressly agreed on the courts to have jurisdiction over specific types of claim. Claimants cannot rely on customary international law to displace the treaty’s provisions. To do so would constitute “*an error of law and a manifest excess of powers*”<sup>42</sup> and would also be inconsistent with the prevailing view in investment arbitration.
110. In any event, Respondent states that the exception of futility is not justified in this case. The burden is on Claimants to prove futility of the Turkmenistan courts and it has failed to do so. On the contrary, Respondent contends that “*these claimants are fully able and entitled to obtain relief on their claims in the domestic courts of Turkmenistan*”.<sup>43</sup> In this respect Respondent states that (i) the Turkmenistan Arbitrazh Court, which has jurisdiction over commercial disputes, was the proper, open and available forum for Claimants’ dispute; (ii) the recent treaty between Turkey and Turkmenistan on mutual assistance in legal matters that provides for the protection of foreign nationals in host state proceedings, evidences that Turkey itself does not regard the legal process in Turkmenistan as ‘futile’; and (iii) Claimants’ criticisms disregard the recent and ongoing changes to Turkmenistan’s legal and judicial systems.
111. These arguments based on MFN and futility are raised by Claimants as an alternative in the event the Tribunal were to uphold the mandatory nature of Article VII(2) of the BIT. In

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<sup>41</sup> Counter-Memorial, § 130; *see also* Rejoinder, §§ 208-209.

<sup>42</sup> Reply, § 175; *see also* Reply, § 177.

<sup>43</sup> Tr. J. Day 1, 86:11-12.

view of the Tribunal's decision on that issue (see §§ 206 *et seq.* below), there is no need to discuss further the contentions made by Claimants and responses by Respondent on MFN and futility.

### **VIII. THE ARBITRAL TRIBUNAL'S REASONS AND DECISION**

112. The principal issue in this arbitration can be stated simply: does Article VII(2) of the BIT establish a mandatory obligation that, in the event of a dispute between Claimants and the Government of Turkmenistan in respect of matters covered by the BIT, Claimants must first bring those claims before the appropriate Turkmen courts? This suggests further that Claimants can only commence ICSID proceedings under Article VII(2)(a) if the Turkmen courts fail to render a decision on the claims within one year.

113. Alternatively, in the event that the above question is determined in the affirmative, the Tribunal will have to consider whether

(a) Claimants are exempted from the requirement to submit claims first to local courts by virtue of the MFN provision in Article II(2) of the BIT (see §§ 102-106 above); and

(b) Claimants should not be required to submit claims to the Turkmenistan courts because it would be futile and impossible for them to do so (see §§ 107-110 above).

#### **A. Does Article VII(2) contain a mandatory requirement that disputes be referred first to the courts of Turkmenistan?**

114. In responding to this question, the Tribunal discusses the following issues below:

(1) Burden of proof;

(2) Authentic versions of the BIT;

(3) Interpretation and meaning of Article VII(2); and

(4) Effect of Article VII(2).

## **(1) Burden of proof**

### *(a) Parties' positions*

115. The Parties take opposing positions with respect to burden of proof. Respondent contends that Claimants have the burden to prove that the Tribunal has jurisdiction over their claims, including that Respondent has consented to ICSID arbitration. Accordingly the onus is on Claimants to establish that the local court requirement in the Turkey-Turkmenistan BIT is optional.
116. By contrast, Claimants contend that the onus of proof lies on Respondent to provide evidence in support of its interpretation of Article VII(2) of the BIT and its objection to jurisdiction. According to Claimants, Respondent has failed to meet its burden and this should suffice for the Tribunal to dismiss Respondent's objection to jurisdiction.
117. Claimants state that Respondent failed to present any evidence of a Turkmen language version of the BIT or any Turkmen legal text or any document or witness showing how Article VII(2) had been understood under Turkmen law. Respondent rejects this criticism by stating that, at the time the BIT was concluded, only a Russian version was required by law and no witnesses or documents from that time, more than twenty years ago, could be found. Respondent states that no explanatory note for the Treaty was prepared for the Turkmenistan Parliament.
118. Claimants argue that the evidence adduced in this proceeding confirms that Article VII(2) of the BIT provides for optional recourse to local courts and therefore the Tribunal has jurisdiction to hear their claims. Respondent argues that the evidence in the record (primarily the various versions of the BIT, and the linguistics experts, and other BITs to which Turkey is a party) "*leads to the inexorable conclusion that Article VII (2) contains a mandatory provision requiring prior submission of disputes to the courts of the host State as a prerequisite to international arbitration*".<sup>44</sup>

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<sup>44</sup> RPHB, § 3.

*(b) Tribunal's analysis and conclusion*

119. This Decision is concerned with the construction and meaning of Article VII(2) of the BIT and specifically whether this Tribunal has jurisdiction over the claims brought by Claimants. The Tribunal does not accept that the burden of proof in respect of jurisdiction is on either Party. Rather, the Tribunal must determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all the relevant facts and arguments presented by the Parties.
120. In this respect, in the first instance it is for Claimants to show that the relevant requirements for the Tribunal's jurisdiction are present, including consent to arbitration. Consent cannot be presumed and its existence must be established. By corollary, in this case, where Respondent is challenging jurisdiction, it has to adduce evidence to support its objections. Accordingly, the Tribunal has to weigh the evidence and arguments from both Parties to determine on balance whether it has jurisdiction in this matter.
121. In this case, the Tribunal has to interpret the meaning of a treaty provision in accordance with the rules of interpretation of the Vienna Convention. Accordingly, in reaching its conclusion, and for the reasons given below, the Tribunal has taken into consideration the language used in the authentic texts of Article VII(2), the circumstances under which the BIT was concluded, the opinions expressed by the linguistics and other experts in their reports and at the hearing, and the legal rules of construction. The Tribunal has reached its conclusions on the basis of all the evidence in the record.

**(2) Authentic versions of the BIT**

122. Before considering the meaning of Article VII(2), the first question is what are the authentic versions of the BIT, and therefore which language(s) are authoritative and are to be construed to determine the meaning of Article VII(2). The English and Russian texts were signed on 2 May 1992; no Turkish text was signed but a Turkish version was prepared and was presented to the Turkish Parliament for approval in 1993. As seen earlier (§§ 88-92 above), the English, Russian and Turkish language texts are structured slightly differently.

(a) Respondent's position

123. According to Respondent, “*all three versions of the Treaty – Russian, Turkish and English – should be considered ‘authentic’ and should be considered in arriving at the correct interpretation of Article VII (2)*”.<sup>45</sup>
124. Respondent asserts that the Turkish version of the Treaty must also be recognised as “*authentic*” even though this is not stated in the English version. Respondent gives several reasons for this contention. First, the Turkish text was presented and ratified by the Turkish Parliament, and has the force of law in Turkey. Respondent’s counsel stated the position as follows:

*We think precisely because it was presented to Parliament and read in that language and ratified in that language and published. The Official Gazette is where the official laws of Turkey are published; when they are enacted they are published in the Gazette, that is the record, in a sense, and that is the authority that is relied upon for the text, the authentic text, you could say, of any law of Turkey, and that includes the treaties that it enacts. So at least from the perspective of Turkey, that is the authentic text of the treaty.*

*You have to rely on the Government to publish the authentic correct text. You have to rely on the Government, I guess, to prepare a translation of the text, if that’s what it was, that is correct. So in that respect, I don’t think it is a small thing to place reliance on the Official Gazette, I think it’s very legitimate.*<sup>46</sup>

125. Second, the Russian version lists the Turkish version as authentic. According to Respondent, Claimants “*have no answer to the fact that the Russian version, which they recognize as authentic, recognizes Turkish as an official language of the Treaty*”.<sup>47</sup> Respondent argues that this analysis is consistent with Article 33(2) of the Vienna

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<sup>45</sup> Memorial, § 41.

<sup>46</sup> Tr. J. Day 1, 36:23-37:15.

<sup>47</sup> Reply, § 42.

Convention, “*which provides that a treaty is authenticated [...] if designated as such or agreed by the Contracting Parties to the treaty*”.<sup>48</sup>

126. Even if not accepted as an authentic version, Respondent argues that the Turkish version of the Treaty should be considered as a “*supplementary means of interpretation*” under Article 32 of the Vienna Convention (as was done by the *Kılıç* tribunal) to interpret the Russian and English versions. First, Respondent argues that no satisfactory explanation has been offered by Claimants for the absence of a signed Turkish version and the departure from Turkey’s normal practice of having signed Turkish versions of its BITs. Respondent refutes Claimants’ explanation that the treaty conclusion process was so rapid that there was no time to translate the English draft of the BIT into Turkish before it was signed. Respondent notes that in the 4-6 week gap between the time the English draft was given to the Turkic Republics and the signature of the Treaty, the Kazakh and Turkmen authorities had no difficulty translating the English draft into Russian.
127. Further, Turkey was the driving force in asking that the Turkic Republics, including Turkmenistan, enter into bilateral investment and other treaties in the spring of 1992. The “*newly-independent countries were in the nascent stages of their independence; none had a history of investment treaties or pre-existing policies in this area. In contrast, Turkey had already entered into twenty BITs*”.<sup>49</sup> Accordingly, it would make sense that the Turkish text was used as a model for the treaties concluded with all the Turkic countries. This would explain why the text of the treaties concluded with the four Turkic Republics are nearly identical.
128. In addition, Respondent contends that the Turkish text “*is the most clear, grammatically correct, and free of typographical errors of any of the three versions of the Treaty*”.<sup>50</sup> Relying on the “*awkwardly*” phrased English version of the Treaty, which is filled with

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<sup>48</sup> Memorial, § 41.

<sup>49</sup> Memorial, § 42, citing Dr Öktem’s and Dr Karlı’s First Legal Opinion, § 86.

<sup>50</sup> Memorial, § 43.



errors both in typographical presentation and in translation, is “*an ill-advised and nonsensical approach to treaty interpretation*”.<sup>51</sup>

129. As the BIT does not establish which version of the Treaty would prevail in the event of inconsistencies or differences, Respondent argues that “[t]o the extent that questions of interpretation arise due to the different language versions of the BIT, the issue may be resolved by applying the principles set forth in the Vienna Convention”<sup>52</sup> and in particular Articles 31 to 33.

*(b) Claimants’ position*

130. Claimants agree with Respondent that both the English and Russian texts of the BIT can be considered authentic. However, Claimants do not agree that the Turkish text can be considered an authentic text for the following four reasons:

*(i) contrary to Respondent’s repeated assertions, there is no Turkish text signed by the Parties, (ii) a Turkish Translation of the BIT was carried out some months later for the purposes of ratification procedures, (iii) this Turkish Translation which was subsequently published in the Official Gazette alongside the English Authentic Version does not refer to an authentic Turkish version but states that the authentic versions are English and Russian and (iv) no Turkish text was ever signed or handed over to Turkmenistan. Claimants would also point out that the Tribunal in Kılıç found there to be no authentic Turkish version, there being only two authentic versions (English and Russian).*<sup>53</sup>

131. Claimants contend that the Turkish Government prepared the BIT in English and sent it to Turkmenistan for discussion. The preparation process for the Turkey-Turkmenistan BIT was out of the ordinary due to the short time frame imposed by the Prime Minister’s visits to the Turkic Republics. This explains why no Turkish version was prepared and signed at the time, and therefore why no Turkish version was included as being official.

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<sup>51</sup> Memorial, § 43.

<sup>52</sup> Memorial, § 62.

<sup>53</sup> Counter-Memorial, § 56 (footnote omitted).

132. There were however no discussion and no negotiation, and Turkmenistan accepted the draft with one minor change. A Russian language version was prepared for signature but no official Turkish or Turkmen language texts were prepared. Claimants state that the BIT was prepared on the basis of the authentic English version of Turkey-Hungary BIT which had been concluded about four months before the Turkmen BIT.
133. Claimants also agree with Respondent that “[t]o the extent that the Tribunal may find there to be issues of interpretation arising from the different language versions of the Treaty”,<sup>54</sup> the Tribunal should apply the principles set out in Articles 31-33 of the Vienna Convention.

*(c) Tribunal’s analysis and conclusion*

134. Two versions of the BIT were signed: English and Russian. Both versions state which languages are authentic: the English version says English and Russian; the Russian version says English, Russian, Turkish and Turkmen. There was no Turkish version when the BIT was signed and there never has been a Turkmen version. Article 33(1) of the Vienna Convention provides that if a treaty is authenticated in two or more languages, each language is equally authoritative, unless the parties agree or the text provides otherwise. In this case, there is no agreement between the Parties and the text does not provide otherwise. A version of the treaty in another language can be considered an authentic text only if the treaty so provides or the parties agree: see Article 33(2) of the Vienna Convention.
135. The BIT was signed on 2 May 1992 in Ashgabat, Turkmenistan. It was signed in English and Russian by the President of Turkmenistan and the Prime Minister of Turkey. The English version states that it was made “*in two authentic copies in Russian and English*”;<sup>55</sup>

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<sup>54</sup> Counter-Memorial, § 92. *See also* Rejoinder, § 98.

<sup>55</sup> Exh. C-1-A.

the Russian version states that it was executed “*in two authentic copies in the Turkish, Turkmen, English and Russian languages*”.<sup>56</sup>

136. The inconsistencies are clear on their face. No explanation has been given as to why the Russian version also listed Turkish and Turkmen as authentic copies. Article 33(2) of the Vienna Convention states that when a treaty is in a language that has not been authenticated “*it shall be considered an authentic text only if the treaty so provides or the parties so agree*”. In this case the English and Russian versions are contradictory and the Parties do not agree.
137. There is no evidence to suggest that the Parties agreed or intended that the non-existent Turkish and Turkmen texts be authentic versions of the BIT. There were no Turkish or Turkmen language versions of the BIT; not for negotiation purposes and not for signature purposes. There is no explanation why they were referred to as authentic versions in the Russian version of the BIT. No credibility can be given to claimed Turkish and Turkmen authentic copies. They did not exist at the time. The Turkish text was prepared only for the purposes of ratification by the Turkish Parliament and there is no evidence of there ever having been a Turkmen text.<sup>57</sup>
138. Accordingly, the Tribunal has concluded that there were only two authentic versions of the BIT: the English and Russian versions.

### **(3) Interpretation and meaning of Article VII(2)**

139. Both Parties agree that the Tribunal should apply Articles 31-33 of the Vienna Convention to properly interpret Article VII of the BIT.

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<sup>56</sup> Exh. R-1.

<sup>57</sup> See Mrs Özbilgiç’s Witness Statement, §§ 24-25; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 1, 246:1-247:13; Tr. J. Day 2, 33:18-21; Tr. J. Day 2, 26:21-27:1; Memorial, fn 65. See also below §§ 222-226.

(a) Respondent's position

140. Respondent argues that an examination of the three versions (including the Turkish text) of the Treaty shows that under an ordinary meaning and a good faith interpretation, in accordance with Article 31 of the Vienna Convention, the parties consistently expressed their intention that recourse to international arbitration was conditioned on the prior submission of the dispute to national courts and the allowance of a one-year period for decision. Respondent argues that, as Turkey drafted the English and Turkish versions of the BIT, then, to the extent that the English version is unclear, “*the clearly mandatory text in the Turkish version (a text that was also drafted by Turkey as a translation of its own English draft) can and should be used to confirm that the local court requirement in the English version is also mandatory*”.<sup>58</sup>
141. Respondent further contends that the mandatory meaning of Article VII(2) would also be the one that would best reconcile the various texts, having regard to the object and purpose of the BIT, as provided under Article 33(4) of the Vienna Convention. In the eyes of Respondent, the inclusion in Article VII(2) of a multi-tiered system of dispute resolution indicates an intention on the part of the State parties to the BIT that there should be no automatic, direct recourse to international arbitration against them. In Respondent's view

*[...] while the States recognized the importance of granting investors recourse to international arbitral tribunals, they clearly expressed their agreement to do so only after giving their respective judicial systems an opportunity to adjudicate the dispute first. This is consistent with Article 26 of the ICSID Convention, which expressly recognizes the right of a State to require submission to local courts as ‘a condition of its consent to arbitration’ under ICSID.<sup>59</sup>*

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<sup>58</sup> RPHB, § 8.

<sup>59</sup> Memorial, § 68.

142. Finally, according to Respondent, “[i]n the face of any lingering doubts, the principle of in dubio mitius must also be applied”,<sup>60</sup> i.e. Respondent’s treaty obligations should be interpreted restrictively.
143. According to Respondent, any doubts on the mandatory nature of the recourse to local courts requirement of Article VII(2) “has been dispelled”,<sup>61</sup> by the recent *Kılıç* Decision and “is beyond reproach”.<sup>62</sup> The *Kılıç* tribunal did have “correct and complete information” and duly considered both the Explanatory Note and the letters from Turkey’s GDFI relied on by Claimants. In addition, the evidence adduced by Claimants in this proceeding does not point to a result that would be different from that reached by the *Kılıç* Decision.

*The different versions of the BIT*

144. Respondent argues that in the Russian text the mandatory nature of the obligation to submit the dispute to local courts is supported by (i) the linguistics experts who submitted opinions on behalf of both Respondent<sup>63</sup> and Claimants,<sup>64</sup> (ii) the independent translator who prepared the certified translation for Respondent,<sup>65</sup> and (iii) the *Kılıç* tribunal.
145. Respondent rejects Dr Tyulenev’s argument that the provision is ambiguous because of “the conjunction ‘esli’” (*if*) and because of “the comma after it in the phrase ‘pri uslovii, esli’”.<sup>66</sup> In Respondent’s view, since languages do not strictly correspond to each other in syntactical structure, stating that the Russian conjunction “*pri uslovii, esli*” - which has a compound structure with a comma - must be translated into English using the same structure and punctuation including the comma, results in absurdity. The word “*esli*” has

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<sup>60</sup> Memorial, § 72 (emphasis in the original).

<sup>61</sup> Memorial, § 9.

<sup>62</sup> Reply, § 10.

<sup>63</sup> See Dr Glad’s Expert Linguistics Opinion, and Prof Gasparov’s Expert Linguistics Opinion.

<sup>64</sup> According to Respondent, Dr Tyulenev in his First Expert Linguistics Opinion admits that the Russian text allows for a mandatory interpretation (see Reply, § 17).

<sup>65</sup> See Exh. R-1.

<sup>66</sup> Reply, § 21.

no independent syntactic function and the comma hardly any role. The purpose of translating the Russian text is “to understand the meaning of its provisions”, “not to reproduce the ‘exact structure’”.<sup>67</sup> According to Respondent, “no Russian speaker would understand this phrase in the manner suggest[ed] [by Dr Tyulenev]”.<sup>68</sup> Indeed, both of Respondent’s experts explain that “*pri uslovi, esli*” is a standard phrase designed to express a single condition. Respondent further points out that Dr Tyulenev himself translated “*pri uslovii, esli*” as “*if*” in two instances in Appendix 2 to his second opinion, and explained at the hearing that “he was not trying to give a ‘literal’ translation in these examples”.<sup>69</sup>

146. Respondent further underlines that this issue was addressed by the *Kılıç* tribunal. While the *Kılıç* tribunal “accepted the translation of ‘*pri uslovii, esli*’ into English as “on the condition that” – without a comma and without the word ‘*if*’”,<sup>70</sup> it also stated that Respondent’s initial, word-for-word translation of the Russian text did not correctly convey its meaning. The reverse translation exercises that Claimants propose to conduct are not helpful and merely undercut Dr Tyulenev’s theory. Respondent also rejects Claimants’ argument that it would have been better to use the conjunction “*pri uslovii, chto*” to express “on the condition that”, noting that Dr Tyulenev recognised at the hearing that “*pri uslovii, esli*” and “*pri uslovii, chto*” were synonymous.

147. Respondent argued that Dr Tyulenev was trying to create ambiguity where there is none with his translation of the conjunction “*v sluchae esli*”, which is also found in Article VII(2) and whose meaning is “*if*” or “*in case*”.<sup>71</sup> While noting that Dr Tyulenev awkwardly translated this conjunction as “*in case if*” in his first opinion, Respondent observes that Dr Tyulenev ultimately conceded at the hearing that “*v sluchae esli*” expresses one condition, as clearly confirmed by the English and Russian versions of the

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<sup>67</sup> RPHB, § 16.

<sup>68</sup> Reply, § 24.

<sup>69</sup> RPHB, § 21.

<sup>70</sup> Reply, § 30, referring to the *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012 (“*Kılıç Decision*”) (Exh. RLA-1), §§ 8.5-8.8, 8.22.

<sup>71</sup> RPHB, § 23.

UNCITRAL Model Law, and “*v sluchae esli*” and “*pri uslovii, esli*” are synonymous.<sup>72</sup> According to Respondent, the Russian and English versions of the UNCITRAL Model Law further confirm that a four-word phrase, “*pri uslovii chto, esli*”, not “*pri uslovii, esli*”, would be accurately translated as “*provided that, if*”, a fact that Dr Tyulenev also recognised at the hearing.<sup>73</sup>

148. Respondent further criticised Dr Tyulenev’s “*selective reliance on ‘extratextual evidence’*” to conclude that Article VII(2) contains an optional local court provision.<sup>74</sup> Respondent thus notes that Dr Tyulenev relied only on the English and Turkish versions of the Turkey-Hungary BIT; inexplicably, Dr Tyulenev did not look at the Hungarian version of that treaty nor even at the Turkish version of the Turkey-Turkmenistan BIT.
149. Respondent states that, on its face, the Turkish text clearly supports a mandatory interpretation and asserts that this statement is uncontested by both Claimants’ and Respondent’s experts. Under the Turkish text as translated, recourse to international arbitration is possible “*provided that the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and that a decision has not been rendered within one year*”.<sup>75</sup>
150. Respondent further argues that the weight of the unambiguous Turkish text cannot be diminished by merely arguing that it is not authentic and turns out to be an “*erroneous*” translation of the English version.<sup>76</sup> This “*self-serving*” argument was rejected in *Kılıç*.<sup>77</sup> It is based on the speculation that the English version is the original version of the BIT and on unreliable evidence. In addition, if one accepts Claimants’ theory, it would mean that Turkish government officials translated their own English draft using mandatory terms in Turkish. The Turkish text was prepared in September 1992, well after the rush of the

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<sup>72</sup> See RPHB, §§ 23-26.

<sup>73</sup> See RPHB, § 27.

<sup>74</sup> RPHB, § 29.

<sup>75</sup> Reply, § 39; Exh. R-3.

<sup>76</sup> Reply, § 43.

<sup>77</sup> Reply, § 43.

treaty conclusion process, with ample time not only to produce a correct Turkish translation but also to spot errors and request corrections to the signed English version. Respondent further suggests that “[s]ince the Russian version contains a mandatory local court requirement, it may be that the Turkish version was deliberately drafted with a mandatory local court provision to reflect the known understanding of the Turkic Republics that it was indeed mandatory”.<sup>78</sup>

151. Respondent also contends that the Turkish text constitutes the official version ratified by the Turkish Parliament that gave the BIT the status of law in Turkey, and it uses indisputable mandatory language. By contrast, the 1993 Explanatory Note to the BIT was not published in the Official Gazette and does not have the status of law; it cannot be given the same weight as the Turkish text.<sup>79</sup> Finally, as a number of other explanatory notes, the 1993 Explanatory Note does not accurately describe the Treaty and, as such, is unreliable.
152. Respondent states that the English version of Article VII(2) is not “clear”,<sup>80</sup> is “problematic”<sup>81</sup> and that this was recognised by Claimants at the hearing. Respondent argues that this ambiguity ought to be resolved against Turkey, the drafter of the English text, and Turkish nationals who seek to rely on it, in accordance with the principle of *contra proferentem*.
153. Respondent further contends, with the support of Dr Jaklin Kornfilt’s Linguistics Opinion, that the lack of clarity and “grammatical awkwardness of this clause result[] from the fact that a condition is stated [...], but the consequence of the condition is not stated [...]”.<sup>82</sup> Professor Leonard agrees with this analysis.<sup>83</sup> However, Professor Leonard’s own re-

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<sup>78</sup> RPHB, fn 20.

<sup>79</sup> Respondent contends that, according to Dr Öktem and Dr Karlı, “the Turkish text published in the Official Gazette prevails over the explanatory note”. (RPHB, § 11; see also Dr Öktem’s and Dr Karlı’s Second Legal Opinion, § 39.)

<sup>80</sup> Reply, § 52.

<sup>81</sup> RPHBR, § 9.

<sup>82</sup> Reply, § 54.

<sup>83</sup> See Reply, § 56.



ordering of the sentence does not solve the problem; it merely relocates it.<sup>84</sup> Respondent also considers that his opinion is further weakened by the fact that (i) the patterns of usage of conditional clauses he claims to have identified in a treaty with multiple sources and authors have little significance and (ii) he failed to take into account the Turkish and Russian versions of the Treaty.

154. In Respondent's view, there are at least two possible rewordings which would clearly express either (i) an optional condition or (ii) a mandatory condition:

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

(ii) *“provided that, the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year”*.<sup>85</sup>

155. Contrary to Claimants' allegation, Respondent does not contend that the words *“provided that, if”* cannot be used sequentially in English. They can, but given the way they are used in Article VII(2) of the BIT, the clause turns out to be ungrammatical and unclear. According to Respondent, this awkward formulation *“most likely result[s] from faulty translation of the Russian text”*,<sup>86</sup> but such *“infelicitous’ translation cannot be given undue weight nor can it be allowed to override the clear intent of the parties reflected in both the Russian and Turkish versions of the Treaty”*.<sup>87</sup> Rather, this Tribunal should agree with the *Kılıç* tribunal that the only reasonable, good faith interpretation of the English text

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<sup>84</sup> See Reply, § 56. See Prof Leonard's First Expert Linguistics Opinion, § 40 (*“[...] If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year, the dispute can be submitted, as the investor may choose, to: [(a) an ICSID tribunal, (b) an ad hoc tribunal, or (c) an ICC tribunal]”*).

<sup>85</sup> Reply, § 58.

<sup>86</sup> Memorial, § 40. Respondent also argues that this awkward formulation may reflect an effort from a non-native speaker to *“emphasize the mandatory nature of the condition”*. (RPHB, § 32.)

<sup>87</sup> Memorial, § 60.

is a mandatory interpretation, which accords with the Turkish and Russian versions of the Treaty.

156. Respondent notes Claimants' extensive reliance on the testimony of Mrs Özbilgiç, according to whom the local court provision should be read as optional. According to Respondent, Mrs Özbilgiç's testimony and cross-examination suggest the opposite:

*While Mrs. Özbilgiç now alleges in this case that the local court provision in the English text of Article VII(2) is optional, it is clear that her view, even if truly held now or back in 1992, was (i) not shared by her colleague in the GDFI who translated the English text of the Treaty into Turkish using mandatory language for the local court requirement; (ii) not shared by her supervisor, Mr Yıldırım (the co-drafter of the English text), who reviewed the English and Turkish texts of the Treaty in September 1992 and sent them to the Ministry of Foreign Affairs for transmittal to Parliament with a Turkish text containing a clearly mandatory local court requirement in Article VII(2); (iii) not shared by the Kazakh and Turkmen government representatives who translated the English text of the Treaty into Russian using mandatory language in Article VII(2); (iv) not shared by the Hungarian government representatives who translated the same English text as in Article VII(2) into Hungarian using mandatory language in Article X of the Turkey-Hungary BIT signed in January 1992; and (v) not shared by her colleagues who prepared the Turkish version of the Turkey-Croatia BIT in 1996, which also has the same English text as Article VII(2) of the Turkmenistan BIT, and uses mandatory language for that provision in the Turkish version.<sup>88</sup>*

157. While the above evidence confirms in the eyes of Respondent that the local court requirement is mandatory, Respondent contends that Mrs Özbilgiç's personal views or intent cannot "override the actual text of the Treaty, whether in English, Russian or Turkish"<sup>89</sup> or the intent of her colleagues in the Turkish Government or that of the other Contracting Party.

158. In addition, Respondent insists that the awkwardly worded English version of the Treaty cannot be given primacy as Claimants purport to do.

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<sup>88</sup> RPHB, § 36.

<sup>89</sup> RPHB, § 38.

159. First, Respondent notes that the Vienna Convention does not provide for any primacy rule, which the International Law Commission in fact rejected when the Vienna Convention was drafted. The authorities relied upon by Claimants to assert that the original version of the Treaty should be given primacy do not support this proposition. Moreover, as transpired in Mrs Özbilgiç’s testimony at the hearing, the only change to the English draft that the Turkic Republics demanded and obtained was the deletion of the provision that English be the prevailing language. Finally, Respondent points out that giving precedence to an ambiguous text “*does not help the interpretative process [...], it obstructs it*”.<sup>90</sup> By contrast, reference to the clear Turkish version helps to elucidate the meaning of the unclear English text.
160. In support of their English primacy theory, Claimants unconvincingly argue that the BIT was modelled on the Turkey-Hungary BIT, which was used as a basis for drafting the former. Contrary to Claimants’ allegation, the Turkey-Hungary BIT was not the “*model*” for the BIT. Respondent says there is no evidence to support that proposition. In addition to making a number of dubious assumptions, Claimants ignore the fact that the Turkey-Hungary BIT “*uses an entirely different phrase in the clause*”<sup>91</sup> regarding prior recourse to local courts. Claimants further fail to disclose the existence of the authentic Hungarian version which in its article 10 provides for prior submission of the dispute to local courts in mandatory terms. The Turkish version being optional and the English version (prevailing in the event of discrepancies) being again grammatically awkward, Claimants’ reliance on the Turkey-Hungary BIT raises more new issues than it offers solutions.
161. What is more, there are significant, substantive differences between the two treaties in a number of their provisions, including the dispute resolution clause. Even if the Turkey-

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<sup>90</sup> RPHBR, § 13.

<sup>91</sup> Reply, § 68. Respondent emphasises that “[i]n the Turkey-Hungary BIT, the Turkish version uses the phrase ‘*şu şartla ki, eğer,*’ which means ‘on the condition that, if’ or ‘provided that, if’. In contrast, the Turkish version of Article VII(2) of the Turkey-Turkmenistan BIT uses the word ‘*kaydıyla,*’ which means ‘provided that’ (or ‘on the condition that’)” (footnotes omitted).

Hungary BIT were reviewed by the drafters of the BIT, it is clear that the latter did not replicate or recycle the former.

162. By contrast, the Explanatory Note for Article VII of the BIT does appear to be modelled on the Explanatory Note for the Turkey-Hungary BIT. The fact that the BIT Explanatory Note suggests that the ‘prior recourse to local courts’ requirement is optional is likely to be a mistake owing to the less-than-careful recycling of the Turkey-Hungary BIT Explanatory Note. As held by the *Kılıç* tribunal, the express terms of the Turkish version of the BIT must trump the Explanatory Note. In any event, the BIT Explanatory Note is a mere “*unilateral assertion*”<sup>92</sup> of only one Contracting Party to the Treaty and “*by no means binding or dispositive*”.<sup>93</sup>
163. Respondent equally questions the weight and relevance to be given to two letters from Turkey’s GDFI that Claimants solicited in 2012 and 2013<sup>94</sup> and now rely upon to establish the alleged primacy of the English version of the Turkey-Turkmenistan BIT. According to Respondent, these “*letters*” of 30 November 2012 and 26 April 2013, which were created after the case was filed, are no more than disguised witness statements and should be stricken from the record. In addition, Respondent emphasises that while the letter from the GDFI dated 26 April 2013 states that the Turkish version of the Turkey-Hungary BIT provides for optional recourse to local courts, it fails to mention that the Hungarian version of the Turkey-Hungary BIT is mandatory and ignores the differences between the dispute resolution provisions of the two treaties.
164. As to the letter from Mr Ibrahim Uslu, the Director General of the GDFI dated 30 November 2012, it recounts a “*visit*” by counsel for Claimants to Mrs Özbilgiç, the Deputy Director General of the GDFI. While Respondent notes that this letter indicates that an English text served as a basis to conclude the BITs between Turkey and the four Turkic

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<sup>92</sup> Reply, § 78.

<sup>93</sup> Reply, § 79.

<sup>94</sup> Letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); letter from the GDFI dated 26 April 2013 (Exh. C-55).

Republics, that the Russian version was translated from the English text and that there was never any intention to compel prior submission to local courts, Respondent also stresses that this same letter fails to identify anyone (including Mr Uslu or Mrs Özbilgiç) who was involved in the negotiations, conclusion, and translations of the BITs, including the Turkey-Turkmenistan BIT. For these reasons, this letter cannot be considered as reliable evidence.

165. Respondent notes that the November 2012 letter refers to two other letters of June and September 1992, which Claimants have produced without the attached BIT translations. In particular, Respondent draws to the Tribunal’s attention that in the September 1992 letter, the GDFI informed the Ministry of Foreign Affairs that there were “*errors*” in the BITs and directed that written agreements be entered into with the four Turkic States to correct them. According to Respondent, these errors must have been significant for the GDFI to take such a step. Yet, Claimants ignore this “*critical fact*”.<sup>95</sup> Respondent contends that this undermines Claimants’ argument that the Turkish version of the BIT should be disregarded as non-authentic and that the English version should be regarded as authoritative.
166. Respondent further emphasises that this is not the first time that the Turkish Government actively assists its nationals in the course of arbitrations against Turkmenistan. It did so in the *Kılıç*, *Bozbey*, and *Içkale* cases.<sup>96</sup> Respondent further points to other initiatives to support Turkish claimants against Turkmenistan, which it considers improper, such as the removal from the Undersecretariat’s website of the Turkish version of the BIT which listed Turkish as one of the languages of the BIT, consistent with the Russian version.
167. Respondent argues that the Turkish Government’s interventions should be viewed with great caution.

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<sup>95</sup> Reply, § 91.

<sup>96</sup> See Reply, § 93.

168. In addition, the letter of 30 November 2012 should be analysed as a unilateral interpretation of the Treaty, and therefore not binding or authoritative. Only a joint interpretation could be considered authoritative and Turkmenistan does not agree with the GDFI's reading of the Treaty.<sup>97</sup>
169. Respondent stated at the hearing that Claimants invoked another treaty, the 1988 Turkey-Switzerland BIT, which they described as the "*origin of the problem*" and the "*key*".<sup>98</sup> Respondent stresses that Claimants again failed to mention that the Turkish version of this treaty is phrased in mandatory terms, a fact which Claimants later acknowledged at the hearing. According to Respondent, the reference to Turkey's other BITs does not reveal any "*uniform policy regarding local court requirements*"<sup>99</sup> – quite the contrary – and is therefore unhelpful to elucidate the meaning of Article VII(2), the interpretation of which cannot in any event hinge on general policy considerations of either Contracting Party.
170. In any event, Respondent contends that it is both speculative and not necessary to try and determine which version of the BIT is the original and which one has been translated. According to Respondent, both the Russian and Turkish texts are clear and provide for mandatory prior submission of the dispute to local courts. Moreover, Claimants recognise that the Russian version of the BIT is authentic. Respondent concludes that the Tribunal need not inquire any further: the only interpretation of the local court provision that reconciles the English version with the Russian and Turkish versions of the Treaty, as required by Article 33(4) of the Vienna Convention, is one that reads the provision in mandatory terms. In any case, in Respondent's view, Claimants' theory that an "*original*" text in English was prepared by Turkish officials, if it is accepted, would prove that it should in fact be read as mandatory since it was subsequently translated in their native language in mandatory terms.

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<sup>97</sup> See Reply, §§ 97-98.

<sup>98</sup> RPHB, § 42.

<sup>99</sup> RPHB, § 44.

(b) Claimants' position

171. On the basis that the English and the Russian texts are the only authentic versions of the BIT, Claimants state that “*an interpretation in good faith looking to the ordinary meaning of the Treaty provides that there is no mandatory referral to the host State’s local courts*”.<sup>100</sup> A linguistic and textual analysis of Article VII in each authentic version shows that “*each text, in and of themselves, must be considered to provide for an option not an obligation to resort to local courts*”.<sup>101</sup>
172. Looking to the object and purpose of the BIT in accordance with Article 31(1) of the Vienna Convention, Claimants argue that:

*[...] the interpretative process of Article VII of the BIT must in seeking to elucidate the meaning of the text and [sic] have reference to the object and purpose of the treaty. As set out, a textual analysis of the BIT necessitates an optional reading of the provision. Furthermore, as the international arbitration tribunals and national courts alike have expounded protection of the investment and access to international arbitration are central objectives of such treaties. As such, Article VII should be read in light of such an object and purpose. Further to this, the preamble of the Treaty calls for a stable framework for investment. It can only be considered then that to read Article VII as providing for a mandatory reference to local courts would be reading against not only the meaning of the words of the treaty but also its object and purpose.*<sup>102</sup>

173. Under Article 32 of the Vienna Convention, the Tribunal should resolve any ambiguity in the different versions of the BIT by recourse to supplementary means of interpretation, including the drafting history and the explanatory notes to the Treaty. In this case, the Tribunal should have recourse specifically to the factual circumstances of the Treaty’s conclusions. Claimants refer to four points:

*First, Turkey was the driving force. Second, it was a very quick process. Third, there was no Turkish text available at the time. And fourth, Russian*

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<sup>100</sup> Counter-Memorial, § 96.

<sup>101</sup> Rejoinder, § 97.

<sup>102</sup> Rejoinder, § 122. *See also* CPHB, §§ 87-88.

*has been translated from English, and not from Turkish. And English has not been translated from Russian.*<sup>103</sup>

174. Claimants further argue that the Tribunal should take account of: (i) the fact that the English version of Article VII(2) significantly replicates the analogous provisions of the Turkey-Hungary BIT; (ii) the additional significance of the original English version even though there is no prevailing language under the Treaty; and (iii) the Explanatory Notes produced by the GDFI.
175. Referring to Article 33 of the Vienna Convention, Claimants rely on the opinion of Professor Shelton that “*it is logical to give preference to the language of the negotiating text on the basis of which agreement was reached, rather than that of subsequent translations. In the event there were multiple language negotiating texts, reconciliation through reference to the object and purpose of the treaty is appropriate*”.<sup>104</sup> According to Claimants, Article 33(2) “*gives primary importance to efforts to reconcile the different texts so far as they are authentic*”,<sup>105</sup> and no authority should be given to official or unofficial translations.
176. Finally, mistakes or imperfect translations made in the treaty negotiation process are not a ground to presume that a restrictive meaning should be applied to the BIT. Claimants thus reject any restrictive interpretation of Article VII(2) and contend that the *in dubio mitius* principle does not apply to modern treaties.
177. Claimants assert that this Tribunal should not follow the *Kılıç* Decision and Award as “*there is no obligation on the present Tribunal to follow the decision rendered in the Kılıç case, there being no rule of precedent in ICSID arbitration*”.<sup>106</sup> Claimants argue that “*the Kılıç decision was made on the wrong premise and therefore should be disregarded by the present Tribunal*” because the *Kılıç* tribunal did not have the “*correct and complete*

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<sup>103</sup> Tr. J. Day 1, 117:18-22.

<sup>104</sup> Rejoinder, § 135, quoting Exh. CLA-71. *See also* CPHB, § 92.

<sup>105</sup> Rejoinder, § 137.

<sup>106</sup> Counter-Memorial, § 5. *See also* CPHB, § 7.



*information in rendering its decision*".<sup>107</sup> In particular, Claimants assert that the *Kılıç* tribunal was not presented with (i) expert opinions other than that of Dr Kornfilt and (ii) the Explanatory Note submitted to the Turkish Parliament for the ratification of the BIT. In addition, Claimants note that the *Kılıç* tribunal was not unanimous in its analysis of Article VII, with Professor Park filing a dissenting Separate Opinion. Claimants further rely on the *Rumeli v. Kazakhstan* Award, which they contend "*examined this very same issue*" and "*found that there is no such obligation to first bring a dispute to local State courts prior to commencing international arbitration proceedings*".<sup>108</sup>

178. In Claimants' view, there are two competing interpretations of Article VII(2). This provision of the BIT either provides for:

*i. access to international arbitration with an optional recourse to local courts which, upon election, would allow recourse to international arbitration where there has not been a final decision rendered in one year by the local court;*

*or*

*ii. a mandatory recourse to local courts which would only allow recourse to international arbitration where a final decision has not been rendered within one year. (Where a final decision is rendered within this period, this would then, effectively, only leave the possibility of initiating international arbitration in the context of claim for denial of justice.)*<sup>109</sup>

179. While the first interpretation is in line with Article VII(2), "*the object and purpose of the treaty in addition to the normal practice for such clauses in BITs in offering access to international arbitration at the investors discretion*",<sup>110</sup> the second interpretation is at odds with all these factors.

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<sup>107</sup> Counter-Memorial, § 5. *See also* CPHB, § 7.

<sup>108</sup> Counter-Memorial, § 5, citing *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (Exh. CLA-2).

<sup>109</sup> Rejoinder, § 12.

<sup>110</sup> Rejoinder, § 13.

180. Indeed, if one were to opt for a mandatory reading of Article VII(2), Claimants argue that the “*no-judgment-within-one-year*” requirement would contradict the terms of Article VII(2) which provides that “*within six months following the date of the written notification [...] the dispute can be submitted, as the investor may choose, to: [international arbitration]*”.<sup>111</sup> Claimants share Professor Park’s view in the *Kılıç* case that “[i]nterpreting the ‘no-judgment-within-a year’ proviso as a jurisdictional precondition creates a pathology in which the same sentence purports to permit an investor to commence arbitration six months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point”.<sup>112</sup> With Professor Park, Claimants further argue that “[i]f arbitration begins before litigation, as in the present case, the claim is dismissed. Yet if litigation precedes arbitration, the claim can be defeated by a swift judgment, since the deemed jurisdictional precondition, the court’s failure to reach decision in a year, cannot be satisfied due to the judgment having arrived before the twelfth month”.<sup>113</sup> This interpretation would also offend the object and purpose of the Treaty, which includes the promotion of a “*stable framework for investment*”, as reflected in the Treaty’s preamble.

#### *The different versions of the BIT*

181. Claimants state that the authentic English version of Article VII(2) does not provide for mandatory prior recourse to local courts. Claimants lament Respondent’s efforts to obfuscate the clear meaning of the English text, including through its Turkish linguistics expert, Dr Kornfilt, who wrongly asserts that the difficulty to interpret the English text derives from the fact that “*the expressions ‘provided that’ and ‘if’ follow each other in close proximity*”.<sup>114</sup> Claimants say that contrary to Dr Kornfilt’s view “*provided that, if*” is

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<sup>111</sup> Rejoinder, § 17.

<sup>112</sup> Rejoinder, § 20, citing *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Professor William Park’s Separate Opinion, 20 May 2013 (“***Kılıç Separate Opinion***”) (Exh. RLA-98), § 14.

<sup>113</sup> Rejoinder, § 22, citing *Kılıç Separate Opinion* (Exh. RLA-98), § 21.

<sup>114</sup> Counter-Memorial, § 63, citing Dr Kornfilt’s First Expert Linguistics Opinion, § 16.

a “common occurrence in the English language”.<sup>115</sup> Claimants point to the numerous examples provided by their English linguistics expert, Professor Leonard, where “*provided that*” and “*if*” are used in close succession in the English language, including in legal texts. Claimants emphasise that in each instance, “*provided that, if*” indicates a double condition and therefore does not carry a mandatory meaning. In addition, the examples given by Professor Leonard refute Respondent’s further argument that the terms “*provided that*” and “*if*” must be followed by the word “*then*”.

182. In Claimants’ view, the idea of Respondent’s experts that “*if*” should be removed demonstrates a failure to consider Article VII(2)(c) in the context of the entire Article and is based on the false premise that bad grammar is tantamount to meaninglessness.

183. While Claimants concede that the English text is “*somewhat ungrammatical*”, the intent of the word “*and*” is in fact unproblematic.<sup>116</sup> As explained by Professor Leonard, the “*likely cause of the [linguistic] infelicity*” in Article VII(2) lies in the drafter’s “*blending*” of two syntactic constructions into one, namely “*provided that, if*” and “*and*”.<sup>117</sup> The semantic function of the word “*and*” in Article VII(2)(c) is to “*link [...] the entrance into local courts and the situation of no award within a year: if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year, THEN one can go to international arbitration*”.<sup>118</sup>

184. Although the removal of the word “*and*” would make the text more grammatical, it is not necessary. Indeed, according to Professor Leonard, “[*t*]he infelicity, the processing difficulties, of the section’s structure comes largely from ordering of clauses”.<sup>119</sup> Together with the above linguistic analysis, this highlights the optional nature of Article VII(2).

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<sup>115</sup> Counter-Memorial, § 63. *See also* Rejoinder, § 84.

<sup>116</sup> CPHB, § 43.

<sup>117</sup> Rejoinder, § 94.

<sup>118</sup> Rejoinder, § 93.

<sup>119</sup> Counter-Memorial, § 68, citing Prof Leonard’s First Expert Linguistics Opinion, § 38. For the re-ordering of the clauses proposed by Prof Leonard, *see above* fn 84.

Respondent's criticism that Professor Leonard failed to refer to the translations of the Russian text into English precisely ignores that the authentic English version, and not the authentic Russian version, is the source text.

185. Claimants also insist on the primacy of the English authentic version because of its role in the circumstances of the conclusion of the Treaty. To Claimants, placing greater reliance on the original English text is in accordance with the Vienna Convention, especially Article 32, as acknowledged by both Claimants' and Respondent's experts.
186. Claimants emphasise that Turkey was the "*driving force*"<sup>120</sup> behind the conclusion of its BITs with the Turkic States (Kazakhstan, Kyrgyzstan, Turkmenistan, and Uzbekistan). It used the English authentic version of the Turkey-Hungary BIT signed on 14 January 1992 as a basis and model for preparing the English draft of the Turkey-Turkmenistan BIT. Article VII(2) is "*a recycling of Article 10 of the Turkey-Hungary BIT*",<sup>121</sup> the terms "*provided that, if*" being present in both texts. Contrary to Respondent's allegation, there are only minor differences between the dispute resolution provisions of both treaties; it is not a translation from the Russian original.
187. Claimants also refer to the Turkish authentic version of the Turkey-Hungary BIT, which contains an optional local court requirement. Relying on the Explanatory Note submitted with the Turkey-Hungary BIT to the Turkish Parliament and that submitted with the Turkey-Turkmenistan BIT, Claimants argue that the English wording of Article VII(2) was intended to have the same optional meaning as that of Article 10 of the Turkey-Hungary BIT. This was confirmed by the letter from the GDFI dated 26 April 2013.<sup>122</sup> Claimants

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<sup>120</sup> Counter-Memorial, § 16; Rejoinder, § 27.

<sup>121</sup> Counter-Memorial, § 20.

<sup>122</sup> See Counter-Memorial, §§ 23-25. The relevant portions of the Explanatory Notes to the Turkey-Turkmenistan and Turkey-Hungary BITs are as follows:

*[...] Having said that, if the investor has brought the dispute before local judicial bodies and an irrevocable decision (kesin karar) has been rendered (lit. taken), there remains no possibility of access to international arbitration, [...].* (Exhs. C-32, C-56.)

*The purpose of the last paragraph is to prevent having a dispute for which an irrevocable decision (kesin karar) has been rendered being adjudicated again in an international official venue.* (Exh. C-32.)

further state that the English draft BIT prepared by Turkey was accepted by Turkmenistan with only one minor modification and then signed in English and Russian in Ashgabat on 2 May 1992.

188. In Claimants' view, Respondent now conveniently argues that determining what is the original text is unnecessary. Yet, Respondent and its experts heavily relied on the wrong sequence of texts. Dr Öktem and Dr Karlı, Respondent's experts, even emphasised the importance of the original language and argued that “[b]e it either because of the superiority of the original version, or because of the role that version played within the circumstances of conclusion of the treaty, the [original] version of the Turkey-Turkmenistan BIT emerges as the text that best reflects the common intention of the parties”.<sup>123</sup>
189. Claimants also maintain that the letters from the GDFI accurately reflect the circumstances in which the Treaty was concluded. In support of its assertion, Claimants affirm that unlike Turkmenistan, Turkey has no direct interest in the outcome of the dispute. In addition, the information provided by the GDFI, the governmental body in charge of Turkish BIT policy, is “*apposite, relevant and of great significance*”.<sup>124</sup> The GDFI letters of 30 November 2012 and 4 September 1992 establish that the Turkish text of the Treaty is a translation.
190. Mrs Özbilgiç also referred to the Turkey-Switzerland and Turkey-Netherlands BITs, which contain similar infelicitous language. Claimants finally note that shortly after signing the Treaty, Turkmenistan passed a law “*on Investment Activities in Turkmenistan*” and that among Turkmenistan's subsequent BITs that Claimants have reviewed not a single one contains a mandatory local court requirement.

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<sup>123</sup> Rejoinder, § 43, citing Dr Öktem's and Dr Karlı's First Legal Opinion, § 31. The changes to the original quote were made by Claimants. *See also* CPHB, § 59.

<sup>124</sup> Rejoinder, § 48.

191. As to the Russian authentic version, Claimants note that Respondent originally submitted a different certified English translation of this text to the *Kılıç* tribunal. It reads:

*If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor's choice to*

(a) ...

(b) ...

(c) *The Court of Arbitration of the Paris International Chamber of Commerce, **on the condition that, if** the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*<sup>125</sup>

192. On Claimants' reading, this first translation provides for an option to submit the dispute to local courts.

193. However, the revised translation submitted by Respondent in the *Kılıç* arbitration and in this arbitration removes the word "if" so as to better support Respondent's position. It reads:

*2. If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investor's choice to*

...

(b) ...

(c) *The Court of Arbitration of the Paris International Chamber of Commerce, **on the condition that** the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final*

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<sup>125</sup> Counter-Memorial, § 70, citing the first translation submitted by Respondent to the *Kılıç* tribunal (*Kılıç* Decision (Exh. RLA-1), § 4.18 (emphasis in the original)).

*arbitral award on compensation of damages has not been rendered within one year.*<sup>126</sup>

194. According to Claimants, this is not a faithful translation of the Russian authentic version. In support of their proposition, Claimants submit a certified translation back into Russian of Respondent’s revised English translation of the Russian authentic version. Claimants’ translation does not result, as one would expect had this been a faithful translation, in the same wording in Russian as the Russian authentic version.
195. According to Claimants and Dr Tyulenev, the textual analysis of the Russian authentic version confirms that the Russian version of Article VII(2) of the Treaty is a translation of the English version of this text, a fact which in Claimants’ view “*lends greater credibility to the English Authentic Version and, specifically, its formulation of Article VII.2.*”<sup>127</sup>
196. In Claimants’ view, the “*fundamental difference*” between Claimants’ reverse translation into Russian and the Russian authentic version lies in the fact that “*the former provides for ‘при условии, что’ (or to transliterate ‘pri uslovii, chto’) a certain mandatory language, whereas the Russian Authentic Version provides ‘при условии, если’ or ‘pri uslovii, esli’*”.<sup>128</sup> Claimants then point to their own Russian translation of the English authentic version and emphasise that it uses the same relevant wording as the Russian authentic version, namely “*pri uslovii, esli*”.<sup>129</sup>
197. Claimants also rely on their expert, Dr Tyulenev, who translated the Russian authentic version into English to read as follows:

*If the indicated conflicts cannot be settled in this way during six months after the date of the written notification, mentioned in paragraph 1, then the conflict may be submitted—at investor’s choice—*

a) [...];

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<sup>126</sup> Counter-Memorial, § 71, citing to the *Kılıç* Decision (Exh. RLA-1), § 4.19 (emphasis in the original).

<sup>127</sup> Counter-Memorial, § 84.

<sup>128</sup> Counter-Memorial, § 77.

<sup>129</sup> See Counter-Memorial, §§ 78-79.

b) [...];

c) *The Court of Arbitration of the Paris international chamber of commerce, **on the condition, if the interested investor presented the conflict to the [a?] court of the Party, which is one of the Parties to the conflict, and [but/yet/however?] a final arbitral decision about/on compensation of damages has not been rendered during one year.***<sup>130</sup>

198. According to Claimants, Dr Tyulenev’s translation “*provides for an optional reading of the Russian Authentic Version*”,<sup>131</sup> in line with the first certified English translation submitted in the *Kılıç* arbitration.
199. According to Claimants, Dr Tyulenev rejected Respondent’s contention that the text is clearly mandatory by highlighting that Respondent’s revised translation “*does not reflect the ambiguity of the Russian phrase caused by the presence of ‘if’*”<sup>132</sup> and the “*two syntactic functions*” of this word (“*esli*” in Russian).<sup>133</sup> As a result, Respondent’s revised translation is more akin to “*an interpretation or an edition than to a faithful rendering of the Russian version which it claims to be*”.<sup>134</sup> Claimants further note that the mandatory interpretation of the same provision was not even argued by Kazakhstan in the *Rumeli* case.
200. Claimants insist that the Russian version is so “*poorly written*”<sup>135</sup> that it cannot be taken at face value and requires reference to the authentic English version to be properly understood. According to Dr Tyulenev, “*it was clearly not checked, edited, or even proof-read*”.<sup>136</sup> Claimants note Professor Gasparov’s change of heart and Respondent’s silence on this point. Claimants contend that the better interpretation of the clause would be

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<sup>130</sup> Counter-Memorial, § 80, citing Dr Tyulenev’s First Expert Linguistics Opinion, § 4 (emphasis in the original).

<sup>131</sup> Counter-Memorial, § 81.

<sup>132</sup> Counter-Memorial, § 82.

<sup>133</sup> Rejoinder, § 56.

<sup>134</sup> Counter-Memorial, § 82.

<sup>135</sup> Rejoinder, § 58.

<sup>136</sup> Rejoinder, § 61, citing to Dr Tyulenev’s Second Expert Linguistics Opinion, § 15.



optional in light of extra-textual factors such as the sequence in time of the different versions, the letter from the GDFI dated 30 November 2012, and the fact that the “*provided that, if*” wording was already present in the earlier Turkey-Hungary BIT. Respondent’s argument that Dr Tyulenev selectively referred to the Turkey-Hungary BIT is belied by the fact that he could have referred to many other BITs, including the Turkey-Czechoslovakia BIT and the Turkey-Albania BIT.

201. Claimants finally argue that the above-described translations show that in the Russian authentic version of the Treaty, the “*operative phrase*” providing for submission to local courts applies is only relevant where the dispute is submitted to the International Court of Arbitration of the International Chamber of Commerce (“**ICC**”).<sup>137</sup> Therefore, if the Tribunal were to conclude that Article VII(2) of the Treaty contains a mandatory local court requirement, it should be held to apply only to ICC arbitration, and not to ICSID arbitration.<sup>138</sup>
202. Claimants contend that the Turkish text is merely an “*erroneous*” translation of the English authentic version, which was provided to the Turkish Parliament for ratification purposes. Claimants state:

*It does not constitute a text of the Treaty. It was produced for consideration along with the relevant Explanatory Note which clearly sets out that there is no prior procedural requirements necessary needed before initialling ICSID proceedings. As has been noted no Turkish version has been exchanged with Turkmenistan.*<sup>139</sup>

203. Claimants also argue that the Russian version mistakenly refers to a Turkish version: no Turkish text was signed on 2 May 1992 or at any time thereafter. According to Claimants’ expert on Turkish linguistics, Dr Dedes, the Turkish text has the hallmarks of a translation and contains not only errors but also superfluous additions.

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<sup>137</sup> Counter-Memorial, § 85; *see* Rejoinder, §§ 67-70.

<sup>138</sup> *See* Counter-Memorial, § 85, citing Dr Glad’s Expert Linguistics Opinion, § 9.

<sup>139</sup> Rejoinder, § 72.

204. Claimants further contend that while the Turkish text of Article VII(2) “*is tidier from the point of view of Turkish, it achieves that at the cost of a misguided interpretation and translation of the infelicitous English passage*”.<sup>140</sup> By using mandatory language, the Turkish translator departed from “*the intention of the text*”, as suggested by “*the optional rendering in Turkish of the same English text in the preceding Turkey-Hungary BIT and the directly subsequent Turkey-Albania BIT, all three of which have optional Explanatory Notes*”.<sup>141</sup>
205. Claimants state that while Mrs Özbilgiç did prepare the Turkish version of the “*optional Turkish text*”, she did not draft the Turkish version of the Turkey-Turkmenistan BIT.<sup>142</sup> Claimants also reject as baseless Respondent’s theory that the Turkish text may have been deliberately drafted in mandatory terms “*to reflect the known understanding of the Turkic Republics that it was mandatory*” since the Russian text contains a mandatory local court requirement. Claimants underline that the Russian version is not mandatory; the GDFI did not receive a copy of the Russian version prior to making its translation; Turkey, whose policy was to exclude mandatory local court requirements, was the driving force in the conclusion of the BIT, not the Turkic States; and the Explanatory Note provides for optional recourse to local courts.

(c) Tribunal’s analysis and conclusions

206. The key issue to be determined is the meaning of the proviso at the end of Article VII(2). In addition to the authentic English version and the translation of the authentic Russian version presented by Respondent, other translations and suggested constructions and meanings were proposed by the linguistics experts. Specifically:

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<sup>140</sup> Counter-Memorial, § 89, citing Dr Dedes’ First Expert Linguistics Opinion, § 37.

<sup>141</sup> Rejoinder, § 81. *See also* CPHB, § 79.

<sup>142</sup> CPHBR, § 31, citing to Mrs Özbilgiç’s Witness Statement, § 16. Mrs Özbilgiç states that she prepared the Turkish translation of the Turkey-Hungary BIT.

(a) from the authentic English version:

*provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.*<sup>143</sup>

(b) the translation from the authentic Russian version presented by Respondent:

*on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*<sup>144</sup>

(c) the first Russian translation presented to the *Kılıç* tribunal:

*on the condition that, if the concerned investor submitted the conflict to a court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.*<sup>145</sup>

**(i) *The ambiguity of Article VII(2)'s proviso and its two possible meanings***

207. Article VII(2) of the authentic English version is a poorly drafted provision. Its meaning is not clear; it can be read in different ways. The BIT itself was poorly drafted with grammatical errors and typos.<sup>146</sup> On a literal reading, the proviso could be understood either to allow the investor the option of resorting to arbitration or to seek redress in the local courts, in which case it would have to wait a year for a decision before it could go to

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<sup>143</sup> Exhs. C-1-A, R-2.

<sup>144</sup> Exh. R-1. Prof Gasparov has endorsed Respondent's translation as correct. (See Prof Gasparov's Expert Linguistics Opinion, § 13.) Claimants' expert, Dr Tyulenev, has proposed the following translation: "[...] *on the condition, if the interested investor presented the conflict to the [a?] court of the Party, which is one of the Parties to the conflict, and [but/yet/however?] a final arbitral decision about/on compensation of damages has not been rendered during one year*". (Dr Tyulenev's First Expert Linguistics Opinion, § 4.)

<sup>145</sup> *Kılıç* Decision (Exh. RLA-1), § 4.18. This translation was not presented to the Tribunal in this proceeding. However, it was presented by Turkmenistan to the *Kılıç* tribunal and referred to in its Decision, which was submitted to this Tribunal. It was also quoted at § 70 of Claimants' Counter-Memorial.

<sup>146</sup> These were common to all the treaties with the Turkic countries and corrections were proposed in the letter dated 4 September 1992 from the GDFI (Exh. C-52). See also Tr. J. Day 2, 39:19-40:14; Hearing Document No. 1.

arbitration, or to compel the investor to go first to the local courts and, if the decision and award has not been issued within one year, then go to arbitration. The lack of clarity in the text is probably due to the fact that the Treaty was not practically negotiated, Turkey relied on the English text it had produced and Turkmenistan signed the Russian version – which had been translated from the English version. That is probably the reason that this issue has now arisen for determination in this arbitration (as well as in other cases).

208. The basis of all ICSID arbitrations is the agreement of the Contracting States to ICSID jurisdiction for particular matters arising between the State and an investor who is a subject of the other State. This is typical for a BIT. Accordingly, Article 26 of the ICSID Convention provides expressly that even where a State agrees to arbitration under the ICSID Convention: “*a Contracting State may require the exhaustion of local and administrative or judicial remedies as a condition of its consent to arbitration under this Convention*”.
209. To understand the meaning and intent of the parties in Article VII, the Tribunal has first looked at the wording itself and the context of Article VII, in the light of Article 31 of the Vienna Convention. Even though the English version was the original text on which the BIT was based, it cannot be considered in isolation where there are two authentic versions and they both carry equal value.
210. Accordingly, the Tribunal has sought to construe Article VII(2) “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*” (Article 31(1) of the Vienna Convention). In doing so the Tribunal has considered the ordinary meaning of the words used, linguistic arguments presented by the Parties, the context of the clause itself, and the BIT’s object and purpose.
211. Article VII is a multi-tiered provision. First, disputes between an investor from one country and the other State are to be notified in writing in some detail. The Parties are then to “*endeavour to settle these disputes by consultations and negotiations in good faith*”. There is to be a six-month period to consult and negotiate with a view to settlement. If no settlement is reached within 6 months then the investor can choose to initiate arbitration

before ICSID, under the UNCITRAL Arbitration Rules or under the ICC Rules. As the Tribunal will show below, the proviso at the end of Article VII(2) introduces a difficulty in the dispute resolution process contemplated in this provision owing both to its ambiguous wording and the starting point of the local court requirement it contains. There are two contended meanings to the proviso:

- first, Claimants’ position is that the investor has the option to seek redress of its claims in arbitration or in the courts in Turkmenistan. If it starts in the Turkmen courts then the investor cannot proceed with an arbitration until one year has passed without a decision.

OR

- second, Respondent’s position is that the investor must first seek redress in the Turkmen courts. If that court has not reached a decision within one year then the investor can bring its claims in arbitration proceedings. Respondent further argues that if the Turkmen courts reach a decision within the one year period then the matter is determined and the right to submit the claims to arbitration is lost.

**a. The English authentic version**

212. The Tribunal notes that both Parties agree that the English authentic version of the proviso in Article VII(2) is ambiguous.<sup>147</sup> While the analyses offered by the Parties’ linguistics experts acknowledge this ambiguity or linguistic infelicity, they have not been able to solve it.

213. Thus, Dr Kornfilt has not been able to explain why the word “*if*” rather than “*and*” should be removed to confer to Article VII(2) its proper meaning. While her “*instinct*”<sup>148</sup> was to delete one of the two conditional expressions (“*provided that*” or “*if*”) because “*and*” has a “*clear-cut syntactic function*”,<sup>149</sup> she recognised that deleting either “*if*” or “*and*” would do

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<sup>147</sup> See above §§ 152, 155, 183.

<sup>148</sup> Tr. J. Day 2, 56:8.

<sup>149</sup> Tr. J. Day 2, 57:20-21.

violence to the text.<sup>150</sup> In addition, Dr Kornfilt’s analysis proceeded on the basis that the English authentic text was a translation from the Turkish text.<sup>151</sup> Mrs Özbilgiç’s testimony has shown, as later examined in more detail,<sup>152</sup> and Dr Kornfilt herself recognised at the hearing, that the “*educated guess*”<sup>153</sup> she had made turned out to be wrong.

214. The Tribunal notes that the other linguistics experts presented by Respondent made similar, inaccurate assumptions. In his expert linguistics opinion, Dr Glad repeatedly insisted that the awkward formulation of the English authentic text “*most likely result[ed] from a faulty translation of the Russian text into English*”,<sup>154</sup> suggesting that the BIT was first drafted in Turkish, then into Russian, and eventually into English.<sup>155</sup> According to Professor Gasparov, his colleague Dr Glad has put forward a “*reasonable theory*”.<sup>156</sup> Finally, Professor Green concluded that the “*if*” was “*incorrectly introduced in the preparation of the English version that was signed*”,<sup>157</sup> while at the same time admitting that she had “*no information on how the text of the signed English version [...] was arrived at*”<sup>158</sup> and arguing that “*the text is not consistent with any interpretation at all, without favouring any particular one*”.<sup>159</sup>
215. The grammatical analysis propounded by Professor Leonard, Claimants’ expert in English linguistics, is equally unsatisfactory. Professor Leonard’s proposed “*reordering*”<sup>160</sup> of the clause merely relocates the problem and does not resolve the linguistic infelicity at issue.<sup>161</sup> In addition, Professor Leonard’s examples of English texts where “*provided that*” is

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<sup>150</sup> See Tr. J. Day 2, 61:5-9.

<sup>151</sup> See Dr Kornfilt’s First Expert Linguistics Opinion, § 23.

<sup>152</sup> See below §§ 222-226.

<sup>153</sup> Tr. J. Day 2, 65:10-19.

<sup>154</sup> Dr Glad’s Expert Linguistics Opinion, § 5. See also Dr Glad’s Expert Linguistics Opinion, §§ 13, 15, 17, 19, and 22. We know now that this sequence is wrong. See below §§ 220 *et seq.*

<sup>155</sup> Dr Glad’s Expert Linguistics Opinion, § 19.

<sup>156</sup> Prof Gasparov’s Expert Linguistics Opinion, § 15.

<sup>157</sup> Prof Green’s Expert Linguistics Opinion, § 10.3.

<sup>158</sup> Prof Green’s Expert Linguistics Opinion, § 5.

<sup>159</sup> Prof Green’s Expert Linguistics Opinion, § 4.

<sup>160</sup> Prof Leonard’s First Expert Linguistics Opinion, §§ 28, 40.

<sup>161</sup> See Prof Leonard’s reordering above at fn 84.

immediately followed by “*if*” are unfortunately unhelpful: none of them present the same ambiguity as the proviso in Article VII(2) of the Turkey-Turkmenistan BIT.<sup>162</sup>

**b. The Russian authentic version**

216. In the Tribunal’s view, the proviso in the Russian authentic text also presents an ambiguity that a grammatical or linguistic analysis alone cannot resolve.
217. It appears from the Parties’ submissions that they disagree as to whether the meaning of the Russian text is clear or ambiguous. Claimants contend that the text is unclear and should be interpreted as optional, while Respondent argues that it is clearly expressed in mandatory terms.
218. As stated earlier,<sup>163</sup> the English translation of the Russian authentic text submitted by Respondent in this proceeding<sup>164</sup> contains mandatory language (“*on the condition that ... and*”), but Claimants disagree with this translation. By contrast, the Tribunal notes that the first certified English translation submitted by Turkmenistan in the *Kılıç* case<sup>165</sup> and referred to in this proceeding<sup>166</sup> contains unclear language (“*on the condition that, if ... and...*”), very similar to the language used in the English authentic text (“*provided that, if ... and...*”).
219. Having reviewed the Parties’ submissions and the experts’ reports, the Tribunal is of the view that the disputed portion of Article VII(2) of the Russian authentic text is as ambiguous as its corresponding passage in the English original version for several reasons as examined below.

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<sup>162</sup> See Prof Leonard’s First Expert Linguistics Opinion, §§ 51-67.

<sup>163</sup> See Respondent’s English translation of the Russian text above at § 90.

<sup>164</sup> See also the second English translation of the Russian authentic text submitted by Turkmenistan and quoted in the *Kılıç* Decision (Exh. RLA-1) at § 4.19.

<sup>165</sup> See *Kılıç* Decision (Exh. RLA-1), § 4.18.

<sup>166</sup> See Counter-Memorial, § 70.

i. The Russian authentic version is a translation of the English authentic version

220. First and foremost, the Russian authentic text is a *translation* of the English authentic text, not the other way round. While this has now been confirmed,<sup>167</sup> this factor was not properly taken into account by Respondent and its Russian language experts, Dr Glad and Professor Gasparov.
221. The evidence on the record, including Mrs Özbilgiç's testimony and cross-examination,<sup>168</sup> shows that it was Turkey that prepared and submitted the draft BIT in its original English version as a basis for the negotiations.<sup>169</sup> Then, Turkmenistan translated the Treaty into Russian and this translation became the Russian authentic version of the BIT.<sup>170</sup> Turkmenistan made only one comment on the draft provided by Turkey: it requested the removal of English as the prevailing language in case of divergence between the different language versions of the BIT;<sup>171</sup> there were otherwise no comments from Turkmenistan on the English text proposed by Turkey. While the fact that the English version is the original version of the BIT does not confer to this version any superiority or prevailing value whatsoever, it is one of the important factors that helped identify the ambiguity of the Russian authentic version, as a translation of the already ambiguous English authentic version.
222. In her written testimony and at the hearing, Mrs Özbilgiç explained the negotiation and conclusion process of the BIT. Mrs Özbilgiç was a junior GDFI lawyer at the time when the BIT was drafted and entered into. She is the author, along with her supervisor, Mr

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<sup>167</sup> See below §§ 221-226.

<sup>168</sup> Contrary to Respondent's allegation that this evidence is not new (*see* Tr. J. Day 1, 17:13-14), it appears from the *Kılıç* Decision that Mrs Özbilgiç did not submit any witness statement and was not examined at the hearing in that case (*Kılıç* Decision (Exh. RLA-1), §§ 1.40-1.43).

<sup>169</sup> See Mrs Özbilgiç's Witness Statement, §§ 17-18; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 1, 19:13-15.

<sup>170</sup> See Mrs Özbilgiç's Witness Statement, § 22; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 1, 243:5-8.

<sup>171</sup> See Mrs Özbilgiç's Witness Statement, § 22; Tr. J. Day 1, 19:22-20:1; Tr. J. Day 1, 248:13-18; Tr. J. Day 2, 1:18-24.



Yıldırım, and other GDFI colleagues, of the Model BIT that was used as a basis for negotiations with the Turkic states in late April/early May 1992.<sup>172</sup>

223. Mrs Özbilgiç's team began preparing this draft Model BIT "around 1990/1991" because they "had already gained experience, and [Turkish] investors were beginning to make investments in other countries".<sup>173</sup> This draft was based on two earlier drafts prepared by the former GDFI legal advisor, Ms Alev Bilgen, one of which contained the "provided that, if...and..." language.<sup>174</sup> Mrs Özbilgiç emphasised that when she and her GDFI colleagues were preparing the draft Model BIT, they "took into consideration the legislation existing in our country, as well as the needs of our investors in the other countries, and the needs of the foreign investors in Turkey".<sup>175</sup>
224. Mrs Özbilgiç then explained that it was normal procedure for the GDFI to send an English language draft of a BIT to the other country as the basis for negotiations. When the final text was agreed, it would be initialled on behalf of the two countries and then translated into their respective languages.<sup>176</sup> In this particular case, according to Mrs Özbilgiç, it was not possible to produce a Turkish translation before signing the BIT owing to "the unusual speediness of the process that led to the signature of the Treaty".<sup>177</sup> There was no direct discussion with the foreign affairs office in Turkmenistan. The draft BIT was not directly sent to the relevant Turkmen ministry, but instead to the Turkish embassy in Moscow in March 1992.<sup>178</sup> There were no negotiations around the proposed text, and no initialised text was sent to the GDFI for translation.<sup>179</sup> There are no *travaux préparatoires*. For these

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<sup>172</sup> Mrs Özbilgiç's Witness Statement, § 18; Tr. J. Day 1, 221:12-22; 230:21-22; 234:8-16.

<sup>173</sup> Tr. J. Day 1, 231:3-6.

<sup>174</sup> See Tr. J. Day 1, 237:17-240:20. After Ms Alev Bilgen left the GDFI, Mrs Özbilgiç took on this role of legal advisor (see Tr. J. Day 2, 35:4-19).

<sup>175</sup> Tr. J. Day 1, 239:23-240:1-2.

<sup>176</sup> See Tr. J. Day 1, 236:20-25; 237:11-16.

<sup>177</sup> Mrs Özbilgiç's Witness Statement, § 20.

<sup>178</sup> See Tr. J. Day 1, 241:14-242:15. See also letter from Mr Uslu, Director General of the GDFI, dated 3 December 2012 (Exh. R-25).

<sup>179</sup> See Mrs Özbilgiç's Witness Statement, §§ 21-22; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Tr. J. Day 2, 30:8-16; Tr. J. Day 1, 247:10-13.

reasons the GDFI did not prepare a Turkish version of the BIT prior to signature and there was no Turkmen language version prepared either.<sup>180</sup> The BIT was available for signature when the Turkish Prime Minister visited Turkmenistan.

225. As already noted at § 135, the BIT was concluded during a short visit of the Turkish Prime Minister to Turkmenistan on 2 May 1992. Two versions were signed: in English and Russian. The Russian text was prepared by officials of the Turkic Republics in their offices in Moscow.<sup>181</sup> There had been no discussion concerning the Russian text between the representatives of Turkey and Turkmenistan.

226. There was no refuting evidence and nothing to suggest, as claimed by Respondent, that the original version of the BIT was Turkish. Mrs Özbilgiç convincingly testified that the Turkish version was prepared several months only after the English version of the BIT was signed by Turkey and Turkmenistan representatives, and was based on the English version.<sup>182</sup> The Turkish translation was produced only for the purposes of ratification together with an explanatory note for the benefit of the Turkish legislators.<sup>183</sup>

ii. The ambiguity found in the English original version is also present in the Russian version

227. As determined above,<sup>184</sup> the English version cannot be held to have any superior or prevailing value by virtue of it being the original version of the BIT. However, because the Russian text is a translation of the English text, which both Parties agree is ambiguous, it is not surprising that the ambiguity found in the original text is reflected in the Russian translation. In fact, the Parties' experts accept this proposition. As Dr Kornfilt points out,

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<sup>180</sup> See Tr. J. Day 1, 246:1-247:13; Tr. J. Day 2, 33:18-21; Tr. J. Day 2, 26:21-27:1.

<sup>181</sup> See Tr. J. Day 1, 242:16-243:8.

<sup>182</sup> See Mrs Özbilgiç's Witness Statement, § 25; Tr. J. Day 1, 246:1-13; Tr. J. Day 2, 8:7-14. See also letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33).

<sup>183</sup> The drafting process of the different versions of the BIT as explained by Mrs Özbilgiç, including the fact that the BIT was first drafted in English, is confirmed by Mr Uslu, Director General of the GDFI, in his letter of 30 November 2012 (Exh. C-33).

<sup>184</sup> See above § 221.

*“[i]n general, translations of problematic, vague and ambiguous texts are themselves vague and ambiguous and are usually not clearer, syntactically better shaped and more fluent than the original”*.<sup>185</sup> Dr Tyulenev similarly argues that the ambiguity found in the original text is to be expected in the translated text.<sup>186</sup>

228. Secondly, Professor Gasparov’s analysis of the meaning of “*pri uslovii, esli*” is more nuanced than some of his statements suggest. The Tribunal did note his assertion that he “*categorically*” rejects the idea that “*pri uslovii, esli*” could be ambiguous;<sup>187</sup> he also insists that the only accurate, correct translation of the Russian text is “*provided that*” or “*on the condition that*”. According to him, this would be obvious to “*any reasonably competent speaker of the [Russian] language*”.<sup>188</sup> However, Professor Gasparov also recognises that “*pri uslovii, esli*” is not as stylistically satisfactory as “*pri uslovii, chto*” to translate “*on the condition that*”. He even goes so far as to characterise “*pri uslovii, esli*” as tautological in nature.<sup>189</sup>
229. Thirdly and importantly, the Tribunal notes that the first certified English translation of the Russian authentic text submitted by Respondent in the *Kılıç* case translated “*pri uslovii, esli*” as “*on the condition that, if*”, as opposed to “*on the condition that*”.<sup>190</sup> This confirms that a reasonably competent Russian speaker (and even a professional translator) can translate this conjunction in this way and significantly undermines Professor Gasparov’s analysis.

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<sup>185</sup> Dr Kornfilt’s First Expert Linguistics Opinion, § 27.

<sup>186</sup> Dr Tyulenev states: “*This is impossible for an imperfect text to result in a correct translation. Among translation scholars and practitioners, this situation is described as the ‘garbage in-garbage out’ effect: if a text one is given to translate should contain any infelicity, it is impossible to produce a translation that would be better, unless you temper with the original text [...]*”. (Dr Tyulenev’s Second Expert Linguistics Opinion, § 20 (emphasis in the original).)

<sup>187</sup> Prof Gasparov’s Expert Linguistics Opinion, § 36.

<sup>188</sup> Prof Gasparov’s Expert Linguistics Opinion, § 37.

<sup>189</sup> See Prof Gasparov’s Expert Linguistics Opinion, § 21.

<sup>190</sup> See *Kılıç* Decision (Exh. RLA-1), § 4.18.

230. Fourthly, “*pri uslovii, esli*” is indeed ambiguous. The Tribunal finds Dr Tyulenev’s analysis at § 20 of his second opinion persuasive:

*In the flawed Russian Version of the Turkey-Turkmen BIT, the conflated ambiguous ‘pri uslovii, esli’ may be better expressed in Russian as ‘pri uslovii, chto, esli’. That is why ‘pri uslovii, chto’ would be a preferable version [if] the mandatory meaning of the clause were to be stated excluding any ambiguity. Since this has not been done, the result is that Article VII.(2)(c) can be read as either expressing a mandatory condition (best expressed by ‘pri uslovii, chto’) or an optional condition (best expressed by ‘pri uslovii, chto, esli’).*

231. In addition, as pointed out by Dr Tyulenev, the conjunction “*pri uslovii, chto esli*”, which Professor Gasparov recommends to employ to translate “*provided that, if*”, is in fact “*rarely used*”.<sup>191</sup>

iii. The ambiguity of the Russian authentic version of Article VII(2) is consistent with the poor quality of the Russian text as a whole

232. The ambiguity of the conjunction “*pri uslovii, esli*” in the Russian version is consistent with the poor quality of the text as a whole - poor quality that both Professor Gasparov<sup>192</sup> and Dr Tyulenev<sup>193</sup> have highlighted.<sup>194</sup>

iv. The argument that the proviso only applies to ICC arbitration is rejected

233. Finally, in the interest of completeness, the Tribunal notes that Claimants suggested that as the proviso in the Russian version is included in the sentence stating the third option for arbitration, *i.e.* at the Court of Arbitration of the International Chamber of Commerce, this means that it applies to ICC arbitration only. The Tribunal rejects this argument. First, the

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<sup>191</sup> Dr Tyulenev’s Second Expert Linguistics Opinion, § 19. *See also* Dr Tyulenev’s Second Expert Linguistics Opinion, § 22.

<sup>192</sup> Dr Glad’s Expert Linguistics Opinion, § 39.

<sup>193</sup> Dr Tyulenev’s Second Expert Linguistics Opinion, § 24.

<sup>194</sup> *See* the examples provided by Dr Tyulenev in his First Expert Linguistics Opinion at § 6 and in his Second Expert Linguistics Opinion at §§ 15-16.

proviso being added only to the provision on ICC arbitration does not conform with the English version of the BIT. Second, it makes no sense for the proviso, however it is understood, to apply only to ICC arbitration and not to ICSID and ad hoc arbitration.<sup>195</sup>

234. The Tribunal concludes that the ordinary meaning of the Russian authentic text of Article VII(2), like the English authentic text of which it is a translation, is ambiguous.

235. Therefore, in order to resolve the ambiguity arising out the grammatically awkward formulation of Article VII(2)'s proviso, the Tribunal will turn to the context of Article VII(2)'s proviso and the object and purpose of the BIT, which both point to the optional nature of the local court requirement. In doing so, the Tribunal will focus its analysis on the text of the BIT.

***(ii) The context of Article VII(2)'s proviso***

236. The *chapeau* of Article VII(2) in the English authentic version of the BIT provides that

*If these disputes [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to [ICSID, UNCITRAL or ICC arbitration].*<sup>196</sup>

237. Similarly, Respondent's English translation of the Russian authentic version reads as follows:

*If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the*

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<sup>195</sup> Claimants acknowledged at the hearing that this argument may be wrong and it is not repeated in their post-hearing briefs.

<sup>196</sup> Exh. C-1 (emphasis added). Dr Tyulenev translated the *chapeau* of Article VII(2) as follows: "If the indicated conflicts cannot be settled in this way during six months after the date of the written notification, mentioned in paragraph 1, then the conflict may be submitted - at investor's choice - [...]". (Emphasis added.)

*conflict may be submitted at investor's choice to [ICSID, UNCITRAL or ICC arbitration].*<sup>197</sup>

238. The permissive wording of Article VII(2)'s *chapeau* suggests that the Contracting States' intention was to offer to their investors the *possibility* to have recourse to international arbitration after the expiration of the six-month cooling-off period. In addition, as Professor Park noted in the *Kılıç* case, if contrary to the liberal language of the *chapeau* the local court requirement were read as mandatory, this would amount to creating "a pathology in which the same sentence purports to permit an investor to commence arbitration six months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point".<sup>198</sup> This Tribunal similarly sees little logic in requiring investors simultaneously to negotiate for six months *and* to go to local courts for a year from the same start date.
239. A better, much more plausible interpretation that would avoid this logical hurdle and be consistent with the permissive language of Article VII(2)'s *chapeau*, is that only investors who *choose* to go to local courts first will have to wait for a year prior to initiating international arbitration proceedings (in the absence of a final decision within the one-year period). By contrast, investors who choose *directly* to initiate international arbitration proceedings will only have to negotiate for six months after the notice of dispute prior to going to arbitration.
240. This "optional" interpretation, which depends on the investor's *choice*, is also much more in accord with the object and purpose of the BIT as described in its preamble, than a "mandatory" interpretation of Article VII(2)'s proviso.

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<sup>197</sup> Exh. R-1 (emphasis added). Respondent's initial and subsequent English translations of the *chapeau* in the *Kılıç* case were identical to this one. See *Kılıç* Decision (Exh. RLA-1), §§ 4.18-4.19.

<sup>198</sup> *Kılıç* Separate Opinion (Exh. RLA-98), § 14.

**(iii) *The object and purpose of the BIT***

241. The preamble of the English authentic version of the BIT reads as follows:

*The Republic of Turkey and Turkmenistan, hereinafter called the Parties,*

*Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party,*

*Recognizing that agreement upon the treatment to be accorded such investment the flow of capital and technology and the economic developments of the Parties,*

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

*Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments,*

*Hereby agree as follows: [...]*<sup>199</sup>

242. Respondent's English translation of the preamble of the Russian authentic version provides as follows:

*The Republic of Turkey and Turkmenistan, hereinafter referred to as "Parties",*

*desiring to promote the strengthening of the economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party,*

*recognizing that this Agreement after the provision of appropriate conditions to such investment will stimulate the flow of capital and technology as well as the economic development of both Parties,*

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<sup>199</sup> Exh. C-1.

*agreeing that fair and equitable approach to investments is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and*

*having resolved to conclude an Agreement on the promotion and reciprocal protection of investments,*

*have agreed as follows: [...]*<sup>200</sup>

243. Accordingly, the expressed intent of the BIT that the treaty is to establish an approach or conditions that are “*fair and equitable*”, and provide a “*stable framework*” for the investor from the other country. This must mean that where a dispute arises the investor has the opportunity to determine where the dispute should be determined: in the local courts or in international arbitration (and then which form, ICC, ICSID, ad hoc). To require a party to first go to the local courts with the expense and delay that will ensue would be neither “*fair and equitable*” nor provide a clear and “*stable framework*”.
244. If prior recourse to local courts were held to be compulsory, there would be two possible scenarios: (a) the local court decision is swiftly rendered in less than a year; or (b) the local court decision is not rendered in less than a year and the investor may initiate international arbitration proceedings.
245. Under the first scenario, there is a risk of denial of justice in the local courts (if the decision is rendered quickly without regard to due process), and a risk of further litigation (if a claim for denial of justice before an arbitral tribunal is possible). Under the second scenario, there is again a risk of further litigation of the same dispute. Both situations, with their attendant costs, run counter to the creation of a “*stable framework for investment*” and the “*maximum effective utilization of economic resources*” (both of the State and of the investor).
246. For these reasons the Tribunal has concluded that an optional reading of the proviso minimises both risks by allowing the investor to have direct access to international

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<sup>200</sup> Exh. R-1.



arbitration proceedings and to invoke the BIT's protections straight after the expiration of the cooling-off period, thus avoiding the risks of further litigation of the dispute and denial of justice issues potentially arising out of a very quick local court decision. By corollary, if the party wishes to avoid the cooling-off period and depending on the issues in dispute it could choose to go to the local Turkmen courts in which case it could not go to arbitration unless the local court failed to render a decision for more than twelve months.

247. In view of the above, the Tribunal has come to the conclusion that read in its context and in light of the object and purpose of the Treaty, Article VII(2)'s proviso is to be interpreted as offering an option to go either to international arbitration or the local courts, in both its English and Russian authentic versions.

*(iv) Other arguments of the Parties with respect to the interpretation of Article VII(2) of the BIT*

248. Both Parties made extensive arguments relating to the circumstances of the conclusion of the BIT (as described in part in §§ 156-170, 173-174, 185-190, 202-205 above) in support of their respective interpretations. The Tribunal has examined those arguments and has come to the conclusion that they are neither necessary for the conclusions it has already reached, nor do they undermine its conclusion as to the meaning of Article VII(2) under Article 31 of the Vienna Convention as determined above. For the sake of completeness the Tribunal deals with these contentions below.

249. Specifically, Claimants presented witness and documentary evidence in support of their contention that Turkey intended by Article VII(2) to have an optional character. Respondent presented three arguments, based on Turkey's alleged BIT practice, which it contends show that Turkey intended the proviso to Article VII(2) would have a mandatory character.

250. Article 32 of the Vienna Convention provides that

*Recourse may be had to supplementary means of interpretation, including preparatory works of the treaty and the circumstances of its conclusion, in*

*order to confirm the meaning resulting from the application of article 31 [...].*

251. The range of supplementary means of interpretation that a tribunal may use to elucidate the meaning of ambiguous treaty language is broad. Article 32 of the Vienna Convention specifically mentions the preparatory work of the treaty and the circumstances of its conclusion. As already noted there were no *travaux préparatoires* in respect of the BIT – or at least none were presented in this arbitration.

**a. Claimants’ contentions as to Turkey’s reading of Article VII(2) of the BIT**

252. As described above, Claimants have used Mrs Özbilgiç’s testimony and Mr Uslu’s letter of 30 November 2012 as evidence showing the drafting process of the different versions of the BIT.<sup>201</sup> Claimants have also relied on Mrs Özbilgiç’s and Mr Uslu’s own reading of Article VII(2)’s proviso, as recorded in her testimony and his letter,<sup>202</sup> to elucidate the meaning of Article VII. Claimants have also invoked a number of other treaties to which Turkey is a party.<sup>203</sup>

253. Mrs Özbilgiç stated that it was the GDFI’s intention that Article VII(2) in Turkey’s English draft text provided for an optional local court requirement prior to initiating international arbitration proceedings. Mrs Özbilgiç also specified that she had no reason to believe that the Turkish delegation told their Turkmen counterparts that this text was not optional.<sup>204</sup> Finally, under cross-examination Mrs Özbilgiç said that the use of the phrase “*provided that, if*” in the English authentic text was not considered to be an error by either Contracting Party.<sup>205</sup>

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<sup>201</sup> See above §§ 221-226.

<sup>202</sup> Mrs Özbilgiç’s Witness Statement, § 26; Tr. J. Day 1, 249:9-21; Tr. J. Day 2, 14:5-25; Tr. J. Day 2, 29:4-9; letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33). See also letter from the GDFI dated 26 April 2013 (Exh. C-55).

<sup>203</sup> See discussion in the next subsection, in particular §§ 266-271.

<sup>204</sup> See Tr. J. Day 2, 29:10-15.

<sup>205</sup> See Tr. J. Day 2, 41:7-44:23.

254. Claimants further rely on the 2012 letter from Mr Uslu where he states that the intent behind the optional nature of the Article VII(2)'s proviso was “to avoid [the] repetition of disputes”.<sup>206</sup>
255. Respondent challenged the credibility of the evidence of Mrs Özbilgiç and Mr Uslu as “biased” and “calculated to strengthen [Claimants’] position”,<sup>207</sup> and lacking “all indicia of reliability”.<sup>208</sup> This is largely because they were and are still employees of the Turkish Government. This criticism does not refute their evidence *per se*.
256. Whilst the Tribunal found this evidence interesting background, it does not consider the subjective intent of Turkey as expressed by Mrs Özbilgiç and Mr Uslu determinative or relevant in light of the Tribunal’s conclusions as to the meaning of Article VII(2). The Tribunal has not relied on this evidence for the purposes of its determination of the optional nature of Article VII(2).

**b. Respondent’s contentions based on Turkey’s BIT practice**

257. Respondent has raised a number of arguments based on Turkey’s BIT practice in response to Claimants’ arguments based on Mrs Özbilgiç’s testimony, and other Turkish BITs and their accompanying explanatory notes.<sup>209</sup>

i. Respondent’s arguments based on the Turkish version of Article VII(2)

258. Respondent’s first argument is that the Turkish text of the BIT that the GDFI translated from English to Turkish and sent to the Ministry of Foreign Affairs for transmittal to Parliament uses mandatory as opposed to optional language in Article VII(2), as do the Turkish translations of the three other Turkic States BITs. By contrast, Claimants point to

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<sup>206</sup> Letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33).

<sup>207</sup> Tr. J. Day 1, 55:13-14.

<sup>208</sup> Reply, § 86.

<sup>209</sup> See e.g. above § 174.

the Explanatory Note to the Turkish version of the BIT, which in their view highlight the optional nature of Article VII(2)'s proviso.<sup>210</sup>

259. The Tribunal does not consider these contentions helpful or relevant. First, the Turkish text is not an authentic version. Second, it was prepared for presentation to the Turkish Parliament so that the Treaty could be ratified, together with an explanatory note of the treaty's purpose and intent. Third, the structure of the Turkish text is different from that of the authentic version in that the proviso comes before the systems of arbitration which can be chosen. Fourth, as noted by the Parties' linguistics experts, there are notable discrepancies between the English and the Turkish texts, especially additional text that did not appear in the English original. In that regard, the Tribunal notes Dr Kornfilt's comment that a translator would not normally add entire phrases such as "*in accordance with the procedures and laws*" on his or her own initiative. Indeed, it is "*much more strange for a translator to add a phrase that was not in the original text, than for a translator to accidentally omit something while translating.*"<sup>211</sup> Yet, the Turkish translator did make these additions, thereby further diminishing the value of the Turkish translation.<sup>212</sup>
260. Finally, the Turkish text of the BIT and the GDFI's Explanatory Note presented to the Turkish Parliament at the same time are contradictory.
261. On its face, the language of Article VII(2) of the Turkish text is significantly different from the authentic versions which make no reference to the laws of the courts of the State party in which the legal proceeding may be brought.<sup>213</sup> In addition, the English translation of the

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<sup>210</sup> See above § 205.

<sup>211</sup> Dr Kornfilt's Second Expert Linguistics Opinion, § 19.

<sup>212</sup> Similar discrepancies appear in the Turkish translations of the other Turkic States treaties. (See Exhs. R-14 and R-17, Kazakhstan-Turkey BIT, Article VII(2); Exhs. R-15 and R-18, Kyrgyzstan-Turkey BIT, Article VII(2); Exhs. R-16 and R-19, Turkey-Uzbekistan BIT, Article VII(2)).

<sup>213</sup> See above §§ 88-92.

Explanatory Note presented to the Turkish Parliament<sup>214</sup> with the Turkish text of the BIT gives the following explanation of Article VII:

*This Article sets forth remedies for dispute which may arise between one Party and the investor of the other Party. In accordance with the stipulated procedure, the dispute shall be primarily resolved by means of negotiation, if not resolved within six months; a right of recourse to international arbitration may be exercised provided that the recourse to local judicial bodies remains open. However, if the investor brought the dispute before the local judicial body and the final decisions was rendered, there is no possibility for recourse to international arbitration, and in case the final decision was not rendered within one year and both Parties are signatories to the following Agreements, the dispute may be taken to the [ICSID] or to an arbitration tribunal which will be constituted in accordance with UNCITRAL Arbitration Rules, or to the Court of Arbitration of the Paris International Chamber of Commerce.*<sup>215</sup>

262. In light of the above differences and contradictions between the Turkish translation and its Explanatory Note, the Tribunal has concluded that little reliance, if any, can be placed on the Turkish text of the BIT to elucidate the meaning of Article VII(2).

ii. Respondent's argument based on the Russian version of the Turkey-Kazakhstan and Turkmenistan BITs

263. The second argument is that the Kazakh and Turkmen government representatives translated the English text of the Treaty into Russian using mandatory language. The Russian versions of both the BIT and the Kazakhstan-Turkey BIT are translations from a nearly identical English text.<sup>216</sup> Kazakhstan, like Turkmenistan, first accepted Turkey's English draft text.<sup>217</sup>

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<sup>214</sup> Exh. C-56.

<sup>215</sup> The same contradiction comes to light when one compares the Turkish translation of the Turkey-Uzbekistan BIT and its explanatory note (*see* Exh. R-16 and Respondent's Hearing Document No. 3).

<sup>216</sup> *See* Exhs. R-17, R-18, and R-19; Tr. J. Day 1, 19:17-18.

<sup>217</sup> *See* letter from Mr Uslu, Director General of the GDFI, dated 30 November 2012 (Exh. C-33); Mrs Özbilgiç's Witness Statement, § 22; Tr. J. Day 1, 19:22-20:1.

264. The Tribunal has already concluded that the Russian version of the BIT does not clearly provide for mandatory recourse to local courts prior to initiating international arbitration proceedings. It is ambiguous.<sup>218</sup> As to the Kazakhstan-Turkey BIT, the Tribunal notes that the Russian version also uses the same ambiguous wording as in the Russian version of the BIT, namely “*pri uslovii, esli*”.<sup>219</sup>
265. As Respondent’s argument is primarily based on the alleged mandatory nature of the local court requirement, the Tribunal considers this argument unpersuasive.

iii. Respondent’s arguments based on Turkey’s BIT practice

266. Respondent’s third argument is that, contrary to Claimants’ position, Turkey’s practice in the conclusion of BITs does not show that the provision in dispute must be viewed as optional. While Claimants underscore the optional nature of the Turkish version of the Hungary-Turkey BIT, Respondent emphasises that the Hungarian government representatives used mandatory language to translate the same English text as in Article VII(2) in the Hungary-Turkey BIT into their own language; so did the GDFI when it translated the Croatia-Turkey BIT into Turkish.
267. Here again, the Tribunal is reluctant to place too much reliance on Respondent’s argument based on the existence of translations of the English phrase “*provided that, if...and...*” in mandatory terms in certain other treaties. The review of the treaties submitted by the Parties shows inconsistencies in the translation of the disputed English phrase in the different language versions of the Turkish BITs concluded before and around the conclusion of the BIT, as well as after its conclusion.
268. For example, as noted above, the Turkish language version of the Hungary-Turkey BIT is worded in optional terms, as is the explanatory note that was presented to Parliament along with this translation. However, the Tribunal notes that the Hungarian language version of

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<sup>218</sup> See above § 234.

<sup>219</sup> Exh. R-20.

the proviso appears to be mandatory. Similarly, the 1988 Switzerland-Turkey BIT contains a local court requirement which is optional in the French version and mandatory in the Turkish version.<sup>220</sup> The Czech and Turkish authentic versions (and the accompanying explanatory note in Turkish) of the Czech Republic-Turkey BIT, which was concluded on 30 April 1992, just a few days before the BIT, contain optional language in Article VII(2).<sup>221</sup> By contrast, the Turkish version of the Croatia-Turkey BIT concluded in 1996 is phrased in mandatory terms.<sup>222</sup> As indicated above, the Turkish translations of the Turkic States BITs also contain mandatory language, but their reliability is limited. It is worth recalling that the English version of all these treaties use the disputed English phrase “*provided that, if...and...*”.

269. In the Tribunal’s view, these inconsistencies among the different language translations of the English phrase at issue do not allow reliance on the texts of other BITs or the identification of treaty practices or policies, especially because the Tribunal has not been briefed on the negotiations of each of these treaties.
270. The Tribunal considers that it is not its task to resolve the inconsistencies between the various language versions of Turkey’s BITs;<sup>223</sup> in any event, it has not been put in a position to do so.
271. Accordingly, the Tribunal has concluded that these treaty practices are inconsistent and cannot assist with the construction of Article VII(2).

***(v) Distinguishing Kılıç***

272. From the above analysis it will be clear that this Tribunal has reached a conclusion on the meaning of Article VII(2) which is different from the *Kılıç* tribunal. The Tribunal has

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<sup>220</sup> See Exh. C-83; Hearing Document No. 6.

<sup>221</sup> See Exhs. C-60, C-61, and C-62.

<sup>222</sup> See Exhs. R-26, R-27. The Tribunal has not had the benefit of the English translation of the Croat version of the Croatia-Turkey BIT.

<sup>223</sup> Respondent appears to share this view. See Tr. J. Day 1, 53:4-13.

carefully considered the Decision and the Award in the *Kılıç* case. With great respect to the distinguished arbitrators in that case, this Tribunal has reached a different view on the construction and meaning of Article VII(2) for the reasons which are given in this Decision.

273. This Tribunal does not think it helpful or appropriate to express any views on the *Kılıç* Decision. That decision would have been based on the evidence and arguments presented to that tribunal and it reached its conclusions, with a separate opinion from Professor Park, after the deliberations of the arbitrators. This Tribunal is not privy to all the submissions made and evidence presented to the *Kılıç* tribunal or to the deliberations of the arbitrators in that case.
274. This Tribunal's conclusions have been reached after reviewing the evidence presented to the Tribunal and the arguments both in writing and at the hearing. This Tribunal has benefitted to a certain extent from the evidence and examination of Mrs Özbilgiç and the linguistics experts and their examination at the hearing. It is understood that Mrs Özbilgiç was not examined before the *Kılıç* tribunal<sup>224</sup> and that Professors Gasparov, Glad,<sup>225</sup> Green, Dedes, Leonard, and Tyulenev did not give evidence in that arbitration.<sup>226</sup> Furthermore, this Tribunal has been influenced by its conclusion that the English version of the treaty was the original text and the basis for the proposal for the BIT, and the Russian authentic version was a translation of the English version. The *Kılıç* tribunal appears to have proceeded on the basis that the Russian version was the original version of the Treaty.

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<sup>224</sup> See *Kılıç* Decision (Exh. RLA-1), §§ 1.40-1.43; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013 ("*Kılıç Award*") (Exh. RLA-98), §§ 1.2.39-1.2.42.

<sup>225</sup> Dr Glad was not presented for examination at the hearing in this proceeding owing to his medical condition. See Minutes of the Organizational Meeting of 20 December 2013, item no. 6.

<sup>226</sup> See *Kılıç* Decision (Exh. RLA-1), §§ 1.24-1.25, 1.52-1.53; *Kılıç Award* (Exh. RLA-98), §§ 1.2.24-1.2.25, 1.2.63, 1.2.65, 1.2.48-1.2.49, 1.2.68. Dr Kornfilt appears to be the only linguistics expert to have given evidence before the *Kılıç* tribunal.



275. The Tribunal finally notes that, in any event, there is no precedent in international arbitration and although previous decisions may be influential or even persuasive, they do not bind other tribunals or exonerate other tribunals from deciding issues on the specific facts and evidence of each case.

#### **(4) The effect of Article VII(2) on the present case**

##### *(a) Parties' positions*

276. Respondent argues that the mandatory nature of Article VII(2) means not only that the investors cannot choose whether to comply with this provision, but also that an essential element of the State's consent to international arbitration under the BIT has not been complied with, thereby "*depriv[ing] the Tribunal of jurisdiction and requir[ing] the dismissal of all claims in this case*".<sup>227</sup>

277. In this case, the Parties to the BIT decided to condition their consent to international arbitration upon the prior submission of a dispute to the local courts in accordance with Article 26 of the ICSID Convention, which contemplates these types of requirements. Respondent contends that "*Claimants' failure to accept the State's offer to arbitrate on the terms and conditions prescribed in Article VII means that there is no agreement to arbitrate. An investor can only accept or not accept the State's offer as it stands in the BIT; it cannot unilaterally alter the terms and conditions of the offer*".<sup>228</sup>

278. Accordingly, as Claimants did not satisfy the local court condition, the Tribunal lacks jurisdiction to adjudicate the dispute. Therefore all claims asserted by Claimants in the Request must be dismissed for lack of jurisdiction.

279. In Claimants' view, Article VII(2) of the BIT provides for direct access to ICSID arbitration, with only an option to submit the dispute to the local courts. For this reason the

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<sup>227</sup> Memorial, § 10.

<sup>228</sup> Memorial, § 20.

Tribunal has jurisdiction to consider all of Claimants' claims as set out in the Request. The Tribunal should therefore dismiss Respondent's objection to jurisdiction.

(b) Tribunal's conclusion

280. For the reasons set out above, the Tribunal has concluded that Article VII(2) provides for an option allowing an investor of one Contracting State to bring proceedings in one of three arbitration venues or in the local courts. If claims are brought in a local court then arbitration proceedings cannot be brought until one year has elapsed and no decision has been issued by that court.<sup>229</sup>

281. In this case, Claimants gave notice in writing of its complaints and the six-month period for amicable negotiations and settlement passed by without success. Claimants chose not to bring proceedings in the courts of Turkmenistan but rather to institute these ICSID arbitration proceedings. There was no impediment to Claimants having brought these proceedings. Accordingly, the Tribunal concludes that it has jurisdiction to determine the claims brought by Claimants in the Request.

**B. Avoidance of the mandatory local court requirements because of the MFN clause in the BIT or the futility of proceeding in the Turkmen courts**

282. These arguments were presented as an alternative in the event the Tribunal decided *par impossible* that Article VII(2) contains a mandatory local court requirement. As the Tribunal has not reached this conclusion, it is unnecessary to consider and decide these two alternative arguments.

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<sup>229</sup> The Tribunal expresses no view as to whether an investor can bring international arbitration proceedings if it is dissatisfied with a decision rendered by the local court in less than a year. Cf, however, *Kılıç Award* (Exh. RLA-98), § 6.5.4., and *Kılıç Separate Opinion* (Exh. RLA-98), § 22.

## IX. COSTS

283. With regard to costs, in their submission of 4 April 2014, Claimants indicated that they had incurred €39,949.15 in legal fees and expenses, and €6,818.43 in expert fees and expenses, and paid €11,032.26 (US\$ 250,000) in advances to ICSID. Claimants also requested that the Tribunal order Respondent to bear all costs of this proceeding, and in particular, all costs related to the re-scheduling of the hearing originally scheduled to take place on 26-27 August 2013, specifically amounting to a total of €1,830.85 (€50,000 in legal fees and €1,830.85 for experts).<sup>230</sup>
284. For its part, Respondent requested that the Tribunal order Claimants to bear all costs of this proceeding, including its legal costs and expenses, fees of its experts, and its share of the advance paid to ICSID. Respondent indicated that it had incurred US\$ 2,897,136.05 in legal fees, US\$ 232,024.28 in expert fees and expenses, and US\$ 156,587.62 in other expenses, for a total of US\$ 3,535,747.95.<sup>231</sup>
285. In their comments on Respondent's costs statement, Claimants contended that Respondent's costs were disproportionate.<sup>232</sup> In its comments on Claimants' costs statement, Respondent first brought to the Tribunal's attention its belief that Claimants are financing this proceeding under arrangements with third-party funders, and requested that the Tribunal direct Claimants to disclose: (i) whether they have entered into such third-party funding arrangements; (ii) if so, the terms of the arrangements; and (iii) whether there are any contingency fee arrangements, with either Claimants' counsel or the third-party funders.<sup>233</sup> The Tribunal rejected that application – see Tribunal's decision at § 50 above.
286. The Tribunal has decided not to make any award of costs at the present time and to leave this issue to be determined at a later stage in this arbitration unless agreed between the Parties.

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<sup>230</sup> See CLs. Costs, p. 3.

<sup>231</sup> See Resp. Costs, p. 2.

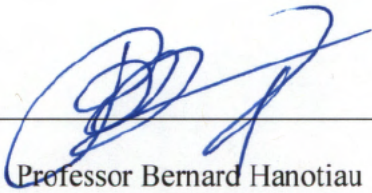
<sup>232</sup> See CLs. Cmts Costs, p. 1.

<sup>233</sup> See Resp. Cmts Costs, p. 2.

## **X. OPERATIVE PART**

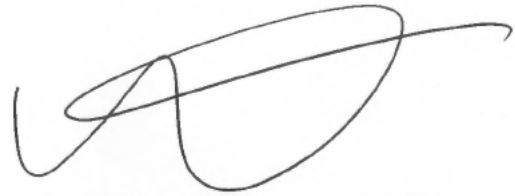
287. In light of the foregoing, the Tribunal decides as follows:

- a) Respondent's objection to jurisdiction on the basis of Article VII(2) of the BIT is dismissed.
- b) The allocation of costs is reserved for subsequent determination.
- c) The Parties are invited to confer regarding the procedural calendar for the second phase of the proceedings in accordance with paragraph 13.1 of PO No. 1, and to report to the Tribunal in this respect within 30 days of the date of this Decision.



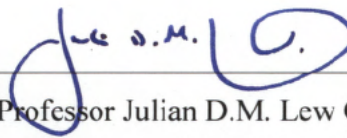
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Professor Bernard Hanotiau  
Arbitrator



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Professor Laurence Boisson de Chazournes  
Arbitrator



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Professor Julian D.M. Lew QC  
President of the Tribunal