

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

IN THE PROCEEDING BETWEEN

**GARANTI KOZA LLP**  
(Claimant)

and

**TURKMENISTAN**  
(Respondent)

(ICSID Case No. ARB/11/20)

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**DECISION ON  
THE OBJECTION TO JURISDICTION  
FOR LACK OF CONSENT**

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*Tribunal*

John M. Townsend, President  
George Constantine Lambrou, Arbitrator  
Laurence Boisson de Chazournes, Arbitrator

*Secretary of the Tribunal*

Marco Tulio Montañés-Rumayor

*Representing the Claimant*

Mr. Tefvik Gur  
Mr. Serkan Yildirim  
Ms. Gülcin Köker  
GUR law firm

Mr. John Savage  
Ms. Elodie Dulac  
King & Spalding LLP

*Representing the Respondent*

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Mr. Ali R. Gürsel  
Ms. Claudia Frutos-Peterson  
Ms. Sabrina Ainouz  
Curtis, Mallet-Prevost, Colt & Mosle LLP

Ms. Gülperi Yörüker  
Ms. Berin Hikmet  
Gürel Yörüker Law Offices

Date: July 3, 2013

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

BIT	Bilateral Investment Treaty
Claimant's Counter-Memorial	Counter-Memorial on the Objection to Jurisdiction for Lack of Consent of January 11, 2013
Decision	Decision of the Tribunal on the Objection to Jurisdiction for Lack of Consent
ECT	Energy Charter Treaty of 1994
Garanti Koza or the Claimant	Garanti Koza LLP
ICC Arbitration	Arbitration conducted under the Rules of the International Chamber of Commerce
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Arbitration	Arbitration conducted under the ICSID Rules
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18, 1965
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings
MFN	Most Favored Nation
Request	Request for Arbitration of May 18, 2011
Respondent's Memorial	Memorial on the Objection to Jurisdiction for Lack of Consent of November 30, 2012
Respondent's Reply	Reply on the Objection to Jurisdiction for Lack of Consent of February 22, 2013
Switzerland-Turkmenistan BIT or Switzerland BIT	Accord entre le Conseil federal suisse et le Gouvernement du Turkménistan concernant la promotion et la protection réciproque des investissements
Turkmenistan or the Respondent	Turkmenistan

U.K.-Turkmenistan BIT or U.K. BIT or the BIT	Agreement for the Promotion and Protection of Investments concluded between the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration	Arbitration conducted under the UNCITRAL Rules
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law
Vienna Convention	Vienna Convention on the Law of Treaties of 1969

## I. BACKGROUND

### A. The Dispute

1. The Claimant, Garanti Koza LLP (“Garanti Koza” or the “Claimant”), a limited liability company incorporated in the United Kingdom, submitted a Request for Arbitration (the “Request”) dated May 18, 2011 to the Secretary-General of the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”) on May 19, 2011. In that Request, Garanti Koza demanded institution of arbitration proceedings against Turkmenistan (“Turkmenistan” or the “Respondent”) under the terms of a bi-lateral investment treaty (a “BIT”) entitled Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments which entered into force on February 9, 1995 (the “U.K.-Turkmenistan BIT” or “U.K. BIT” or “the BIT”). Garanti Koza supplemented its Request by letters dated July 4, 11, 13 and 19, 2011. The Secretary-General of ICSID registered the Claimant’s Request on July 20, 2011.

2. According to the Claimant’s Request for Arbitration:

The present dispute arises out of the investments on the 28 highway bridges and overpasses in Turkmenistan. A contract regarding the investments in Turkmenistan numbered 01/2008 and dated 18.03.2008 for the lump sum price of USD 100.000.000 (“Contract”) was entered into by and between State Concern Turkmenautoyollari as the owner and Garanti Koza LLP as the contractor for the execution of the projection, construction, and installation works of 28 highway bridges and overpasses.

\* \* \*

(1) In breach of its obligations, by using the state power, the Respondent has avoided to make the payments it has undertook to pay, tried to change the contract regarding the investment which is established as a lump sum price contract into unit price contract, made requests which contradict with its rights and obligations, tried to change the terms and conditions of the Contract to the favor of the Respondent and tried to prevent the

continuation of the works in various ways, thus did not fulfill its obligations.

(2) Garanti Koza LLP suffered losses and damages as a consequence of the Respondent's intention to confiscate the assets and investments of Garanti Koza LLP by not performing its related obligations and attempt to undermine the investment.<sup>1</sup>

3. The Respondent summarizes the dispute between the parties in somewhat different terms:

On March 18, 2008, Garanti Koza LLP, a U.K.-registered entity controlled by the Turkish company Garanti Koza Insaat Sanayi ve Tikaret A.S., and Turkmenavtoyollary, the highway authority, concluded a construction contract for the design and construction of 28 highway bridges and overpasses on the Mary-Turkmenabad highway in Turkmenistan (the "Contract"). In 2009, Garanti Koza LLP suspended all the works under the Contract with Turkmenavtoyollary. The parties to the Contract exchanged their views on the dispute related to the performance of the Contract by correspondence and in person, but this did not result in a resolution of the dispute. On February 22, 2010, Turkmenavtoyollary invoked termination of the Contract under Article 17 of the Contract Conditions, in view of the Contractor's failure to complete the work on time and failure to resume works for a prolonged period of time.<sup>2</sup>

## **B. The Tribunal**

4. The Arbitral Tribunal was constituted in accordance with Articles 37(2)(b) and 38 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"):

- The Claimant appointed Mr. George Constantine Lambrou of Athens, Greece as an arbitrator on September 26, 2011. Mr. Lambrou accepted his appointment on October 7, 2011.

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<sup>1</sup> Request for Arbitration, p. 3.

<sup>2</sup> Respondent's Memorial, ¶3.

- The Respondent appointed Professor Laurence Boisson de Chazournes of Geneva, Switzerland as an arbitrator on October 18, 2011. Prof. Boisson de Chazournes accepted her appointment on October 26, 2011.
- The Chairman of the ICSID Administrative Council appointed Mr. John M. Townsend of Washington, D.C., U.S.A., as President of the Tribunal on April 10, 2012. Mr. Townsend accepted his appointment on April 13, 2012.

Mr. Marco Tulio Montañés-Rumayor, Legal Counsel to ICSID, was appointed to act as Secretary to the Tribunal.

5. The Tribunal was formally constituted on April 13, 2012. The members of the Tribunal submitted their signed declarations in accordance with Rule 6(2) of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Rules”) and copies of those declarations were distributed to the parties by the Secretary.<sup>3</sup>

6. After postponements made at the request of the parties, a first session of the Tribunal with the parties was held in Washington, D.C. on October 19, 2012 (the “First Session”). At the First Session, the parties confirmed that the Tribunal was properly constituted and that neither party had any objection to the appointment of any member of the Tribunal.<sup>4</sup>

### **C. Objections to Jurisdiction**

7. In response to a request for comments on a proposed agenda for the First Session, the Respondent informed the Tribunal that the “Respondent has objections to jurisdiction that are separate and distinct from the merits and warrant bifurcation.”<sup>5</sup> In response to a request from the Tribunal for a more specific description of its objections to jurisdiction, the Respondent sent a

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<sup>3</sup> Procedural Order No. 1, ¶¶2.1, 2.2.

<sup>4</sup> Procedural Order No. 1, ¶2.1.

letter to the Tribunal on September 5, 2012 specifying two grounds upon which it objected to jurisdiction:

Respondent hereby informs the Tribunal that it intends to assert jurisdictional objections on the following grounds: (i) Turkmenistan did not consent to ICSID jurisdiction under the Agreement between the United Kingdom and Turkmenistan for the Protection and Promotion of Investments (“U.K.-Turkmenistan BIT”) and (ii) most of the claims brought by Claimant are contractual in nature and therefore not within the jurisdiction of this Tribunal.

First, the Tribunal does not have jurisdiction to decide the merits of this dispute due to the lack of Turkmenistan’s consent to ICSID arbitration under Article 8 of the UK-Turkmenistan BIT. The BIT specifically requires that in order for a dispute to be submitted to ICSID, an agreement to ICSID arbitration between the investor and the BIT’s Contracting Party must exist. Respondent respectfully submits that in the absence of Turkmenistan’s consent to submit this dispute to ICSID, this Tribunal does not have jurisdiction over the claims brought by Claimant.

Claimant has attempted to import into the UK-Turkmenistan BIT an alleged consent by Turkmenistan to ICSID arbitration contained in another BIT. Claimant’s reliance on Article 3 of the UK-Turkmenistan BIT to bypass the essential requirement of the State’s consent to ICSID arbitration is to no avail. That consent cannot be imported from a different BIT when Turkmenistan manifestly did not give such consent in the basic BIT. As is clear from the wording of Article 8 of the UK Turkmenistan BIT, the Contracting Parties expressly agreed that there could be no ICSID arbitration of a dispute in the absence of a specific agreement between the investor and the Contracting Party to submit the dispute to ICSID.

Secondly, it is clear that most of Claimant’s claims are contractual in nature. They arise under the Contract concluded between Garanti Koza LLP and Turkmenavtoyollary, by which the Claimant agreed to resolve disputes “of any kind” pursuant to the dispute-resolution mechanism of Article 21 of the Contract Conditions. The dispute-resolution mechanism agreed to by the Claimant provided for the jurisdiction of the Arbitration Court of Turkmenistan, with a possibility of subsequent submission of the dispute to an arbitral tribunal in The Hague. The Claimant has invoked the mechanism under the BIT in order to avoid the dispute resolution mechanism provided for in the Contract, as Turkmenistan will show.<sup>6</sup>

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(Footnote continued from previous page)

<sup>5</sup> Comments of the Respondent on the proposed agenda for the First Session, June 25, 2012.

<sup>6</sup> Letter from Counsel for the Respondent to the Tribunal, September 5, 2012 (emphasis in original).



8. At the First Session on October 19, 2012, the parties agreed, without prejudice to the Respondent's objections to jurisdiction, that this proceeding would be conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006, at the seat of the Centre in Washington, D.C.<sup>7</sup>

9. Also at the First Session, it was agreed pursuant to ICSID Rule 41(4) that the Respondent's first objection to jurisdiction (that Turkmenistan did not consent to ICSID jurisdiction) would be considered as a preliminary matter on an accelerated schedule, while the Respondent's second objection to jurisdiction (that most of the claims brought by the Claimant are contractual in nature) would be considered together with the merits of the dispute, if the Tribunal were to reach the merits. Pursuant to the schedule established at the First Session and incorporated into Procedural Order No. 1,<sup>8</sup> the Respondent submitted its Memorial on the Objection to Jurisdiction for Lack of Consent ("Respondent's Memorial") on November 30, 2012. The Claimant submitted its Counter-Memorial on the Objection to Jurisdiction for Lack of Consent ("Claimant's Counter-Memorial") on January 11, 2013. And the Respondent submitted its Reply on the Objection to Jurisdiction for Lack of Consent ("Respondent's Reply") on February 22, 2013. The Claimant waived its right to submit a rejoinder in the interest of compressing the schedule.<sup>9</sup>

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<sup>7</sup> Procedural Order No. 1, ¶¶4.1, 9.1.

<sup>8</sup> Procedural Order No. 1, ¶12.1.

<sup>9</sup> Procedural Order No. 1, ¶ 12.1.

10. On March 11, 2013, a hearing was held at the seat of the Centre in Washington, D.C., to hear argument on the Respondent's Objection to Jurisdiction for Lack of Consent. The following persons attended that hearing:

*For the Claimant:*

Mr. John Savage, King & Spalding LLP  
Ms. Elodie Dulac, King & Spalding LLP  
Mr. Serkan Yildirim, GUR Law Firm  
Ms. Gülcin Köker, GUR Law Firm  
Mr. Murat Isikustun, Vice President Finance and Administration, Garanti Koza LLP

*For the Respondent:*

Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP  
Mr. Ali R. Gursel, Curtis, Mallet-Prevost, Colt & Mosle LLP  
Ms. Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP  
Ms. Sabrina A. Ainouz, Curtis, Mallet-Prevost, Colt & Mosle LLP  
Mr. Ali Topalogu, Curtis, Mallet-Prevost, Colt & Mosle LLP  
Ms. Gülperi Yörüker, Yurttutan Gurel Yörüker  
Ms. Berin Hikmet, Yurttutan Gurel Yörüker

*The Tribunal:*

Mr. John M. Townsend, President  
Professor Laurence Boisson de Chazournes, Arbitrator  
Mr. George Constantine Lambrou, Arbitrator

*ICSID Secretariat:*

Mr. Marco Tulio Montañés-Rumayor, Secretary of the Tribunal

Mr. William Prewett, court reporter, also attended the hearing and made a transcript of the proceedings.<sup>10</sup>

11. At the conclusion of the hearing on March 11, 2013, the Tribunal took the Respondent's Objection to Jurisdiction for Lack of Consent under advisement.

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<sup>10</sup> That transcript is cited in this Decision as "Hearing Tr. \_\_\_."

12. This Decision on the Objection to Jurisdiction for Lack of Consent (the “Decision”) sets forth an analysis of the issues presented by the Respondent’s first objection to jurisdiction and the reasons for which a majority of the members of the Tribunal ultimately rejects that objection and concludes that the Tribunal has jurisdiction to hear this dispute. Professor Boisson de Chazournes disagrees with the analysis set forth in this Decision and with the conclusions reached by the majority, for reasons explained in her Dissenting Opinion (the “Dissenting Opinion”).

## II. ANALYSIS

### A. The Objection to Jurisdiction for Lack of Consent

13. The parties’ respective positions as to whether Turkmenistan has consented to participate in an arbitration conducted under the ICSID Rules (“ICSID Arbitration”) for the purpose of resolving the claims advanced against it by the Claimant may be summarized very simply at the outset. The arguments advanced by each party in support of its position are more complex, and will be considered in the body of this Decision.

14. The Respondent’s first objection to the jurisdiction of the Tribunal, which is the only one to be addressed in this Decision,<sup>11</sup> may be stated in the most summary form as follows:<sup>12</sup>

- Turkmenistan has not consented or agreed, in the U.K.-Turkmenistan BIT or otherwise, to participate with this Claimant in an ICSID Arbitration.

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<sup>11</sup> The Respondent’s second objection to the jurisdiction of this Tribunal was expressly reserved. Respondent’s Memorial, ¶¶1, 72.

<sup>12</sup> See Respondent’s Memorial, ¶¶6-7.

- Rather, the U.K.-Turkmenistan BIT contains Turkmenistan’s consent only to participate in international arbitration under the Rules (“UNCITRAL Rules”) of the United Nations Commission on International Trade Law (“UNCITRAL” and “UNCITRAL Arbitration”), unless Turkmenistan agrees with a claimant to refer a specific claim to ICSID Arbitration, which it has not done in this case.<sup>13</sup>
- Turkmenistan’s consent to submit this dispute to ICSID Arbitration may not be created by operation of the most favored nation (“MFN”) clause of the U.K.-Turkmenistan BIT.
- This ICSID Tribunal therefore lacks jurisdiction to hear the Claimant’s claims.

15. The Claimant’s argument that this Tribunal does have jurisdiction may be stated in equally summary form as follows:<sup>14</sup>

- The MFN clause of the U.K.-Turkmenistan BIT assures the Claimant of treatment no less favorable than Turkmenistan accords to nationals or companies of any third State.
- Turkmenistan has consented, in its BITs with Switzerland, France, Turkey, and India, and in the Energy Charter Treaty (“ECT”), to either ICSID Arbitration or UNCITRAL Arbitration, at the election of the investor, with nationals or companies of those States.
- A treaty that consents to ICSID Arbitration is more favorable to an investor than one that does not, or, alternatively, a treaty that provides a choice between UNCITRAL Arbitration and ICSID Arbitration is more favorable to an investor than one that does not.
- Therefore, Turkmenistan’s consent to ICSID Arbitration is established by operation of the MFN clause of the U.K.-Turkmenistan BIT.

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<sup>13</sup> The U.K.-Turkmenistan BIT provides for the application of the UNCITRAL Rules “as then in force.” BIT, Art. 8(2). The current UNCITRAL Rules came into effect on August 15, 2010, after the date of the Claimant’s notification of the dispute to Turkmenistan, but before the date of the Request for Arbitration.

<sup>14</sup> See Claimant’s Counter-Memorial, ¶¶2-3.

## B. The U.K.-Turkmenistan BIT

16. The starting point for deciding whether this ICSID Tribunal has jurisdiction to hear the dispute between the Claimant and the Respondent is the text of the BIT under which the claim is brought. As the tribunal in *Daimler v. Argentina* explained:

BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.<sup>15</sup>

17. Article 8 of the U.K.-Turkmenistan BIT deals with “Settlement of Disputes between an Investor and a Host State.” It provides:

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.<sup>16</sup>

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

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between

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<sup>15</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of August 22, 2012 (hereinafter “*Daimler v. Argentina*”) ¶164.

<sup>16</sup> The bracketed word “[months]” does not appear in the text of Article 8(1) of the U.K.-Turkmenistan BIT published by the United Kingdom in its Treaty Series No. 47 (2003), which was submitted by the Claimant (with its Request for Arbitration) and also by the Respondent (with its Memorial on Jurisdiction) as Exhibits C-4, and R-4, respectively, and used by both parties. The Tribunal has supplied the word, because the text makes no sense without it and it appears to have been inadvertently omitted. The context in which Article 8(1) appears also supports that reading, because of the appearance of the phrase “four months” in the final sentence of Article 8(2). The signature page of the BIT states that it was done in the English and Russian languages, with a text in the Turkmen language to be certified in due course, and that the English text would prevail in case of divergence. No other version of the BIT was submitted by either party.

States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

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

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

18. Garanti Koza sent the Notification of the dispute required by Article 8(1) of the U.K.-Turkmenistan BIT to the Government of Turkmenistan on June 25, 2010.<sup>17</sup>

19. Article 3 of the U.K.-Turkmenistan BIT deals with “National Treatment and Most-favoured-nation Provisions” and provides:

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

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<sup>17</sup> Respondent’s Memorial, ¶4.

20. It is common ground between the parties that the U.K.-Turkmenistan BIT, including Articles 3 and 8 of the BIT, is to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“Vienna Convention”).<sup>18</sup> That is, the U.K.-Turkmenistan BIT is to “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.”<sup>19</sup> Supplementary means of interpretation are to be resorted to only as permitted by Article 32 of the Vienna Convention.

### C. The Requirement of State Consent to Arbitration

21. “[Q]uestions concerning the consent of the parties to jurisdiction, in the context of a BIT arbitration, are generally governed by international law.”<sup>20</sup> Few propositions are as well established in international law as that “a State may not be compelled to submit its disputes to arbitration without its consent.”<sup>21</sup> The tribunal in *Teinver v. Argentina* called it a “fundamental requirement” that “a State Party consent to jurisdiction.”<sup>22</sup> It is equally accepted that a State’s consent is not to be presumed, but must be established by an express declaration or by actions that demonstrate consent.<sup>23</sup>

22. Some arbitration tribunals have followed *Plama v. Bulgaria* in grafting onto the requirement that the State must consent to arbitration the corollary that the State’s consent must

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<sup>18</sup> Hearing Tr. 28, 101. The Vienna Convention entered into force on January 27, 1980. See United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>19</sup> VIENNA CONVENTION, Article 31.1.

<sup>20</sup> Christopher F. Dugan, et al., *Investor-State Arbitration*, 208 (2008).

<sup>21</sup> *Ambatielos Case* (Greece v. United Kingdom) Merits: Obligation to Arbitrate, Judgment of May 19, 1953 (I.C.J.REPORTS 1953) p. 19; See also, *Status of Eastern Carelia*, Advisory Opinion of July 23, 1923 (P.C.I.J. SERIES B, No. 5) p. 27 (“Il est bien établi en droit international qu’aucun Etat ne saurait être obligé de soumettre ses différends avec les autres Etats soit à la médiation, soit à l’arbitrage, soit enfin à n’importe quel procédé de solution pacifique, sans son consentement”).

<sup>22</sup> *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction of December 21, 2012 (hereinafter “*Teinver v. Argentina*”) ¶176.

<sup>23</sup> *Daimler v. Argentina* ¶175.

be “clear and unambiguous.”<sup>24</sup> This Tribunal finds no basis in the Vienna Convention for imposing such a standard onto the interpretation of the terms of a treaty.<sup>25</sup> Rather, this Tribunal agrees with the tribunal in *Suez and Interagua v. Argentina* “that dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.”<sup>26</sup>

23. Judge Higgins explained in the *Oil Platforms Case*:

It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses... The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses; they are judicial decisions like any other.<sup>27</sup>

The same point was made by the tribunal in *National Grid v. Argentina*:

As regards the intention of the parties, the approach of the Vienna Convention and the ICJ is that “what matters is the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties.” The convention does not establish a different rule of interpretation for different clauses. The same rule of

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<sup>24</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005 (hereinafter “*Plama v. Bulgaria*”) ¶198. The tribunal in *Plama v. Bulgaria* cited no authority for this proposition, although it called it a “well-established principle.” *Id.* See also *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award of September 13, 2006 (hereinafter “*Telenor v. Hungary*”) ¶90; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award of August 21, 2006 (hereinafter “*Berschader v. Russia*”) ¶181; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of December 8, 2008 (hereinafter “*Wintershall v. Argentina*”) ¶167.

<sup>25</sup> As noted above, the parties are in agreement that the Tribunal should interpret the U.K.-Turkmenistan BIT in accordance with the Vienna Convention.

<sup>26</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 (formerly *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales del Agua, S.A.*), Decision on Jurisdiction of May 16, 2006 (hereinafter “*Suez and Interagua v. Argentina*”) ¶64. See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002 ¶43; *Suez, Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction of August 3, 2006 (hereinafter “*Suez and Vivendi v. Argentina*”) ¶65; *Austrian Airlines v. The Slovak Republic*, UNCITRAL Case, Award of October 9, 2009 (hereinafter “*Austrian Airlines v. Slovakia*”) ¶120. See also Hearing Tr. 102.

<sup>27</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of December 12, 1996, Separate Opinion of Judge Higgins (I.C.J. REPORTS, 1996), p. 857, ¶ 35.



interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.<sup>28</sup>

The tribunal in *Austrian Airlines v. Slovakia* agreed:

[T]he Tribunal does not consider that provisions that embody a State's consent to arbitration must be strictly interpreted. This view, which was adopted by the tribunals in *Plama v. Bulgaria*, *Telenor v. Hungary*, *Bershadar v. Russia* and *Wintershall v. Argentina*, is not an accurate reflection of international law on this matter.<sup>29</sup>

#### **D. Has Turkmenistan Consented to Arbitration?**

24. We confront in this case the question whether Turkmenistan has consented to participate in ICSID Arbitration with the Claimant. Under the ICSID Convention, to which specific reference is made in Article 8(2) of the U.K.-Turkmenistan BIT, a consent to ICSID Arbitration must be expressed in writing:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting 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.<sup>30</sup>

But neither the ICSID Convention nor any other authority of which this Tribunal is aware requires that the State's consent to arbitration be expressed in a particular form or in a single article, or even in a single instrument or treaty.<sup>31</sup>

25. In examining the text and structure of the U.K.-Turkmenistan BIT, the majority of the Tribunal approaches the question of whether Turkmenistan has consented to participate in

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<sup>28</sup> *National Grid plc v. Argentine Republic*, UNCITRAL Case, Decision on Jurisdiction of June 20, 2006 (hereinafter "*National Grid v. Argentina*") ¶80.

<sup>29</sup> *Austrian Airlines v. Slovakia* ¶119.

<sup>30</sup> ICSID CONVENTION Article 25(1) (emphasis added).

<sup>31</sup> C. Schreuer, UNCTAD COURSE ON DISPUTE SETTLEMENT – INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE, 2.3 CONSENT TO ARBITRATION (United Nations, 2003) p. 5 ("Under the Convention, consent must be in writing. But there is no particular form in which this must be done"); *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections of March 20, 2009 (hereinafter "*Renta 4 v. Russia*") ¶82 ("There is no rule that the entirety of arbitration agreements must be contained in a single article of an instrument.").

ICSID Arbitration in two steps, corresponding to the organization of the relevant article of the U.K.-Turkmenistan BIT, Article 8. Because Article 8(1) deals with Turkmenistan's consent to participate in international arbitration with U.K. investors and the conditions attached to that consent, and Article 8(2) deals with the arbitration systems that may be used if the conditions of Article 8(1) are met, we look first at whether Turkmenistan has consented to participate in international arbitration at all, and second at whether it has agreed to ICSID Arbitration.

26. The answer to whether Turkmenistan has consented to participate in *any* kind of arbitration with a U.K. claimant such as Garanti Koza may be found in Article 8(1) of the U.K.-Turkmenistan BIT. Article 8(1) provides:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled *shall*, after a period of four [months] from written notification of a claim, *be submitted to international arbitration* if the national or company concerned so wishes.<sup>32</sup>

27. In Article 8(1), Turkmenistan consents to participate in international arbitration to resolve disputes with U.K. investors, subject only to three conditions, all of which are met in this case:

- a. The first condition is that the investor "so wishes." It is uncontested that the investor in this case wishes to submit its claim to international arbitration.
- b. The second condition is that the dispute shall not have been settled within four months of written notification of the claim. It is also uncontested that the Claimant's claim was not settled within four months of written notification of the claim to Turkmenistan.
- c. The third condition is that the dispute must concern an obligation of Turkmenistan under the U.K.-Turkmenistan BIT. The Respondent has advised the Tribunal that it will argue,

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<sup>32</sup> U.K.-TURKMENISTAN BIT Art. 8(1) (emphasis added).

if this arbitration reaches the merits, that most of the Claimant’s claims are contractual in nature, and therefore do not arise under the BIT.<sup>33</sup> For purposes of determining whether we have jurisdiction to hear the claims, however, we accept (for this purpose only) the Claimant’s pleading that its claims arise under the BIT, because the question of whether the Claimant has actually stated a claim under the BIT has been reserved for the merits phase of the proceeding.<sup>34</sup>

28. Article 8(1) provides that a claim that meets the three conditions specified in that article “*shall . . . be submitted to international arbitration.*”<sup>35</sup> The use of the auxiliary verb “shall” makes that statement mandatory. As the tribunal in *Wintershall v. Argentina* put it, “[t]he use of the word ‘shall’ [...] is itself indicative of an ‘obligation’ – not simply a choice or option. The word ‘shall’ in treaty terminology means that what is provided for is legally binding.”<sup>36</sup>

29. Article 8(1) thus appears to a majority of the Tribunal to establish unequivocally Turkmenistan’s consent to submit disputes with U.K. investors to international arbitration. That consent satisfies the fundamental condition that the State must have consented to participate in arbitration before it may be required to do so. What Professor Stern calls the *ratione voluntatis* is thus established with regard to Turkmenistan’s participation in international arbitration with a U.K. investor.<sup>37</sup> Turkmenistan has consented to arbitrate disputes with U.K. investors arising out of the U.K.-Turkmenistan BIT.

30. Article 8(1) does not, however, tell us whether Turkmenistan has agreed to participate in ICSID Arbitration with a U.K. investor, because Article 8(1) contains no

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<sup>33</sup> Letter from Counsel for the Respondent to the Tribunal, September 5, 2012.

<sup>34</sup> Procedural Order No. 1, ¶12.2.

<sup>35</sup> U.K.-TURKMENISTAN BIT Art. 8(1) (emphasis added).

<sup>36</sup> *Wintershall v. Argentina* ¶119 (emphasis in original).

<sup>37</sup> See *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern ¶78.

information about *what kind* of international arbitration Turkmenistan has consented to engage in. As the particular BIT before us is structured, the State Parties' consent to participate in international arbitration is expressed in the first section of Article 8, while the type of arbitration to which a dispute may be referred is dealt with in the second section of Article 8. To find what kind of arbitration an investor may avail itself of, we must look at Article 8(2).

#### **E. What Kind of Arbitration?**

31. While the Dissenting Opinion finds that “[c]onsent to arbitration is specifically dealt with in Article 8(2) when a foreign investor envisages having recourse to a specific arbitration venue,”<sup>38</sup> in addition to Article 8(1), we find in Article 8(2) only a menu of options concerning the arbitration process, and a default selection. Consent, as explained in the preceding section, is granted in Article 8(1) of the U.K.-Turkmenistan BIT. Article 8(2) begins “Where the dispute is referred to international arbitration,” indicating that Article 8(2) only comes into play after the determination has been made, under the provisions of Article 8(1), to refer the dispute to arbitration.

32. Article 8(2) of the U.K.-Turkmenistan BIT (quoted in full in paragraph 17, above) addresses specifically the kinds of arbitration available to a U.K. investor who wishes to take advantage of the offer of international arbitration made by Turkmenistan in Article 8(1). It does so in two steps. The first part of Article 8(2) identifies three types of arbitration to which an investor with a claim *and* Turkmenistan together “*may agree* to refer the dispute” (emphasis added). These are:

- (a) ICSID Arbitration;
- (b) Arbitration under the auspices of the Court of Arbitration of the International Chamber of Commerce (“ICC Arbitration”); or

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<sup>38</sup> Dissenting Opinion ¶22.

(c) UNCITRAL Arbitration.

33. The second part of Article 8(2) provides that, if “there is no agreement to one of the above alternative procedures” after four months, “the dispute *shall* at the request in writing of the [investor] be submitted to arbitration under” the UNCITRAL Rules.<sup>39</sup>

34. The Respondent argues that Article 8(2) is modeled on the “alternative” version of Article 8 of the 1991 U.K. Model BIT, which was in effect when the U.K.-Turkmenistan BIT was signed in 1995.<sup>40</sup> The “preferred” version of Article 8 in the U.K. Model BIT, in contrast, provided that “[e]ach Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes” any legal dispute with an investor of the other party.<sup>41</sup> The Respondent argues that the selection of the alternative version, rather than the preferred version, reflects a choice by the parties to the BIT *not* to agree to ICSID Arbitration.<sup>42</sup>

35. The Claimant counters that the U.K.-Turkmenistan BIT does not exclude ICSID Arbitration, either in the text of Article 8 or in the exclusions from the scope of the MFN clause listed in Article 7.<sup>43</sup> Indeed, the Claimant argues, Article 8 identifies ICSID Arbitration as one possible alternative that may under certain conditions be available to investors.<sup>44</sup>

36. If the Tribunal found Article 8(2) to be ambiguous or obscure, Article 32 of the Vienna Convention would permit us to consider supplementary means of interpretation, and the model BIT from which the parties evidently derived the text of Article 8(2) would be among the “circumstances of [the] conclusion” of the U.K.-Turkmenistan BIT that could be considered in

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<sup>39</sup> U.K.-TURKMENISTAN BIT Art. 8(2) (emphasis added).

<sup>40</sup> Respondent’s Memorial, pp. 14-15; Hearing Tr. 11-12.

<sup>41</sup> Respondent’s Memorial, p. 15.

<sup>42</sup> Respondent’s Memorial, pp. 15-16; Respondent’s Reply, p. 29.

<sup>43</sup> Hearing Tr. 98-100, 105.

<sup>44</sup> *Id.*

interpreting that article.<sup>45</sup> But the Tribunal finds no ambiguity in Article 8(2). The ordinary meaning of the words of that article is that Turkmenistan expressed in the BIT its willingness to consider three possible kinds of arbitration whenever it was notified by a U.K. investor of a claim under the BIT -- ICSID Arbitration, ICC Arbitration, and UNCITRAL Arbitration. Article 8(2) is equally clear that the fall-back option, failing a case-specific agreement to use one of the first two kinds of arbitration, is UNCITRAL Arbitration. Vattel's First Maxim ("It is not allowable to interpret what has no need of interpretation") counsels that we accept that these words mean what they say.<sup>46</sup>

37. The ordinary meaning of Article 8 is thus that Turkmenistan consented in Article 8(1) to submit disputes with a U.K. investor arising under the U.K.-Turkmenistan BIT to international arbitration. However, unless Turkmenistan reaches an agreement with such an investor to submit a particular dispute to either ICSID or ICC arbitration, Article 8(2) restricts the investor to submitting the dispute to UNCITRAL arbitration.<sup>47</sup> On the latter point, the majority agrees with the Dissenting Opinion, although we reach that conclusion by a different route.

38. Within the four corners of Article 8 of the U.K.-Turkmenistan BIT, therefore, the majority of the Tribunal finds that Turkmenistan has consented to international arbitration with

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<sup>45</sup> VIENNA CONVENTION Art. 32.

<sup>46</sup> Emer Vattel, *The Law of Nations* (1758; Liberty Fund edition 2008) §263. Of course, Article 32 of the Vienna Convention would allow the model BIT to be used for the purpose of confirming the ordinary meaning of these words.

<sup>47</sup> The tribunal in *Biwater* reached a similar conclusion interpreting a similarly-phrased treaty provision. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008 (hereinafter "*Biwater v. Tanzania*") ¶331. The *Biwater* tribunal relied in part on the statement of Dolzer & Stevens that:

"A handful of BITs provide . . . that investment disputes "shall" be submitted to ICSID arbitration but only if there is a subsequent agreement to that effect between the disputing parties. . . . Under none of these provisions, however, would the investor have an immediate right to resort to ICSID arbitration. Such right would in each case depend upon the granting by the host State of the required "assent" or consent."

Dolzer & Stevens, *Bilateral Investment Treaties*, pp. 132-134. See Respondent's Memorial, ¶¶37-40.

U.K. investors, but not to ICSID Arbitration. Turkmenistan has simply expressed its willingness to consider ICSID arbitration as one of three options, and only on a case by case basis. The Respondent states that the Claimant “never obtained or even sought Turkmenistan’s agreement to refer [this] dispute to ICSID arbitration, as required under Article 8(2),”<sup>48</sup> and the Claimant does not take issue with that statement.<sup>49</sup>

39. Nevertheless, Article 8 may not be interpreted in isolation from the other provisions of the U.K.-Turkmenistan BIT, because the BIT must be read as a whole. The Claimant rests its argument that this ICSID Tribunal has jurisdiction to hear this arbitration squarely on the proposition that Turkmenistan has consented to ICSID Arbitration of disputes with investors of third states, specifically investors of Switzerland, France, Turkey, and India in Turkmenistan’s BITs with those states, and in the ECT, to which Turkmenistan is a party.<sup>50</sup> The Claimant argues that it is entitled “to import the more favourable dispute resolution provisions” of those treaties into the U.K.-Turkmenistan BIT by operation of the MFN clause in Article 3 of the BIT, because Turkmenistan’s consent to ICSID Arbitration with Swiss, French, Turkish, and Indian investors, and in the ECT, provides more favorable treatment to those investors and to claimants under the ECT than Article 8 provides to U.K. investors.<sup>51</sup> We therefore turn to Article 3 of the BIT and whether it may be used for that purpose.

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<sup>48</sup> Respondent’s Memorial, ¶4.

<sup>49</sup> The Respondent also notes that the Claimant sent a letter to ICSID, after the ICSID Secretariat raised questions about the request for arbitration and before the Secretariat had registered that request, in which the Claimant asked the Secretary General “to ask the Respondent Turkmenistan to confirm its consent to the arbitration proceedings to be held before ICSID.” Respondent’s Memorial, ¶29.

<sup>50</sup> Claimant’s Counter-Memorial, ¶¶61-63; Hearing Tr. 109.

<sup>51</sup> Claimant’s Counter-Memorial, p. 13.

## F. The Most Favored Nation Clause

### 1. MFN Clauses and Arbitration Provisions

40. This Tribunal is well aware that, in embarking on the consideration of whether the MFN clause of a BIT may be used to vary the terms of the investor-state arbitration article of the same BIT, we are venturing into a fiercely contested no-man's land in international law. The issues of textual interpretation, legal theory, and public policy that this question presents have been ably and exhaustively explored by more than twenty tribunals, and have been expounded in decisions and dissents authored by some of the most eminent authorities on international law and investment arbitration.<sup>52</sup>

41. By this Tribunal's count, there is a fairly even split between the number of tribunals that have applied the MFN clause of a BIT to vary its dispute resolution provisions,<sup>53</sup> and the number that have declined to do so.<sup>54</sup> We recognize that decisions of other arbitral

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<sup>52</sup> Compare, e.g., *Renta 4 v. Russia*, Award on Preliminary Objections (by Majority) and Separate Opinion of Judge Charles N. Brower, with *Impregilo v. Argentina*, Award (by Majority) and Concurring and Dissenting Opinion of Professor Brigitte Stern.

<sup>53</sup> Tribunals applying an MFN clause for this purpose include those in: *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction of January 25, 2000 (hereinafter "*Maffezini v. Spain*") ¶¶54-64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of May 25, 2004 (hereinafter "*MTD Chile S.A. v. Chile*") ¶¶100-104; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004 (hereinafter "*Siemens v. Argentina*") ¶¶102-105; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción of June 10, 2005 (hereinafter "*Camuzzi v. Argentina*") ¶¶16-17; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005 (hereinafter "*Gas Natural v. Argentina*") ¶¶29-31; *Suez and Interagua v. Argentina* ¶¶52-66; *National Grid v. Argentina* ¶¶79-94; *Suez and Vivendi v. Argentina* ¶¶52-68; *RosInvestCo U.K. Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of October 1, 2007 (hereinafter "*RosInvestCo v. Russia*") ¶¶124-139; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award of June 21, 2011 (hereinafter "*Impregilo v. Argentina*") ¶¶79-108; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction of October 24, 2011 (hereinafter "*Hochtief v. Argentina*") ¶¶59-75; *Teinver v. Argentina* ¶¶59-186.

<sup>54</sup> Tribunals refusing to apply an MFN clause for this purpose include those in: *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003 (hereinafter "*Tecmed v. Mexico*") ¶¶69-74; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 9, 2004 (hereinafter "*Salini v. Jordan*") ¶¶103-119; *Plama v. Bulgaria* ¶¶183-227; *Berschader v. Russia* ¶¶159-206; *Telenor v. Hungary* ¶¶90-101; *Wintershall v. Argentina* ¶¶160-167; *Renta 4 v. Russia* ¶¶77-119; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of June 19, 2009 ¶¶199-216;

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tribunals, interpreting other BITs, have no binding authority on this Tribunal. But we have found the analysis in many of these awards helpful in framing the question before us, and indeed both parties have relied on these decisions in making their arguments. And the fact that so many arbitrators with such a collective wealth of experience in international law and investment arbitration have been unable to reach a consensus on the subject certainly counsels caution in approaching it.<sup>55</sup>

42. Fortunately, perhaps, the present case does not require this Tribunal to take a position on the policy issues implicated in deciding whether an MFN clause *ought to be* applied to the investor-state arbitration article of a BIT. As Dolzer and Schreuer have observed, “much will depend on the wording of the particular MFN clause.”<sup>56</sup> In the BIT before us, we find the answer to whether the MFN clause (Article 3) should be applied to the investor-state arbitration article (Article 8) in the specific language of Article 3(3) of the U.K.-Turkmenistan BIT. That article reads:

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above **shall apply** to the provisions of Articles 1 to 11 of this Agreement.<sup>57</sup>

Article 8 of the BIT, of course, is among “the provisions of Articles 1 to 11” to which Article 3(3) states that the MFN provisions of Articles 3(1) and 3(2) shall apply. As noted above (¶28), the use of the word “shall” makes that statement mandatory.

43. Both parties agree that Article 3(3) of the U.K.-Turkmenistan BIT has its origin in the 1991 U.K. Model BIT.<sup>58</sup> Both parties also agree that, of the more than twenty tribunals to

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*Austrian Airlines v. Slovakia* ¶¶92-140; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction of February 10, 2012 (hereinafter “*ICS v. Argentina*”) ¶¶274-313; *Daimler v. Argentina* ¶¶205-278.

<sup>55</sup> See *Renta 4 v. Russia* ¶94 (“What can be said with confidence is that a *jurisprudence constante* of general applicability is not yet firmly established.”).

<sup>56</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law*, p. 257 (Oxford 2008).

<sup>57</sup> U.K.-TURKMENISTAN BIT Art. 3(3) (emphasis added).

have considered the effect of an MFN clause on the investor-state arbitration article of a BIT, this Tribunal is the first to be called upon to interpret an MFN clause containing the language of Article 3(3).<sup>59</sup>

44. The language of the U.K. Model BIT adopted in Article 3(3) of the U.K.-Turkmenistan BIT has not escaped previous attention, however. It has been held up for comparison by arbitrators faced with different wording in other BITs as an example of how State parties to a BIT *could* make it clear that the MFN clause applies to the investor-state arbitration provision, if they chose to do so. For example, the *Plama v. Bulgaria* tribunal stated:

Rather, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed. This is, for example, the case with the U.K. Model BIT, which provides in its Article 3(3):

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

Articles 8 and 9 of the U.K. Model BIT provide for dispute settlement. The drafters of the U.K. Model BIT rightly noted that there could be doubt and expressly neutralized that doubt.<sup>60</sup>

45. Professor Stern, in her thorough exposition of “why, in principle, an MFN clause cannot import, in part or *in toto*, a dispute settlement mechanism from a third party BIT into the BIT which is the basic treaty applicable to the dispute,” explicitly carved out of her discussion treaties with the language found in Article 3(3) of the U.K. Model BIT:

Naturally, an important *caveat* has to be presented here. The interpretation of the MFN clause is only necessary when the intention of the parties concerning its applicability or inapplicability to the dispute

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<sup>58</sup> Claimant’s Counter-Memorial, p. 14; Respondent’s Reply, p. 30; Hearing Tr. 12, 16.

<sup>59</sup> Hearing Tr. 72; Claimant’s Counter-Memorial, ¶68.

<sup>60</sup> *Plama v. Bulgaria* ¶204; to the same effect see *Berschader v. Russia* ¶179. See also E. Gaillard, “Establishing Jurisdiction through a Most-Favored-Nation Clause,” *New York Law Journal*, July 2, 2005, p. 9, Exhibit CL-22 (“Equally, when the contracting parties have expressly included dispute settlement arrangements in the scope of an MFN clause, such intention must be given effect.”).

settlement mechanism is not expressly stated or clearly ascertained. It is quite evident that if there is an MFN clause expressly including the dispute settlement procedures or expressly excluding them, there is no need for an interpretation.

There are indeed cases where the parties expressly state that the MFN clause applies to the dispute settlement mechanism. This has been done, for example, by the drafters of the U.K. Model BIT, who have provided in Article 3(3) that “for avoidance of doubt” MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.<sup>61</sup>

46. The Respondent points out that neither the *Plama v. Bulgaria* tribunal, nor Professor Stern in the dissent discussed above, was called upon to consider the implications of the parties to a BIT having selected the alternative version of Article 8 of the U.K. Model BIT in preference to the preferred version of that article.<sup>62</sup> The selection of the alternative version, rather than the preferred version, is indeed suggestive of a reluctance to agree in advance to ICSID Arbitration. But as we have already stated, we do not find the meaning of Article 8 of the U.K.-Turkmenistan BIT to be uncertain, and the choice of one version of Article 8 in preference to another does not appear to us to provide any sound basis for failing to apply Article 3(3).

## **2. Does an MFN Clause Create Rights?**

47. The Respondent argues that rights which do not exist under the basic treaty cannot be created by operation of an MFN clause, but that MFN clauses are rather designed only to improve the implementation of rights already granted under the basic treaty through “the importation of more favourable conditions of exercise of such rights.”<sup>63</sup>

48. The Claimant argues that the use of an MFN clause to establish the State’s consent to ICSID Arbitration is simply a particular example of using an MFN clause to import

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<sup>61</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern ¶¶17-18.

<sup>62</sup> Hearing Tr. 66-67, 163-164.

<sup>63</sup> Respondent’s Reply, ¶21.

into a treaty a right that the treaty does not otherwise provide.<sup>64</sup> The Claimant quotes Professor Schreuer to this effect:

The argument that the MFN clause is inapplicable in cases where the basic treaty limits or refrains from *granting consent*, since the parties' intention in that respect is clear, is not convincing. An MFN clause is not a rule of interpretation that comes into play only where the wording of the basic treaty leaves room for doubt. It is intended to endow its beneficiary with *rights that are additional to the rights contained in the basic treaty*. The meaning of an MFN clause is that whoever is entitled to rely on it be granted rights accruing from a third party treaty even if these rights clearly go beyond the basic treaty.<sup>65</sup>

49. The majority of the Tribunal finds it unnecessary to try to resolve whether rights may be created by an MFN clause, although Professor Schreuer is persuasive and other tribunals have had no difficulty in extending rights via an MFN clause.<sup>66</sup> First, to the extent that access to international arbitration may be considered a “right” of a complaining investor, such access is already accorded to U.K. investors under Article 8(1) of the U.K.-Turkmenistan BIT, so there is no need to resort to the MFN clause to create it. Second, the MFN clause of the particular BIT before us frames the question in terms of “treatment,” not of “rights.” We are therefore concerned only with whether Turkmenistan has accorded to investors of third states, or their investments, treatment more favorable than it accords to U.K. investors or their investments.

### 3. General vs. Specific Language

50. The Respondent argues that the MFN clause of the U.K.-Turkmenistan BIT should not be applied to Article 8, because the “general” language of Article 3(3) to the effect that paragraphs (1) and (2) of Article 3 “shall apply to the provisions of Articles 1 to 11” should

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<sup>64</sup> Claimant’s Counter-Memorial, ¶38.

<sup>65</sup> See C. Schreuer et al., *The ICSID Convention – A Commentary*, Cambridge University Press, 2<sup>nd</sup> ed., 2009, p. 248 (Exhibit C-19)(emphasis added); Claimant’s Counter-Memorial, ¶38.

<sup>66</sup> E.g. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of August 27, 2009 ¶¶ 157-160.

give way to the more “specific” language of Article 8 about the availability only of UNCITRAL Arbitration unless there is a case-specific agreement to a different form of arbitration.<sup>67</sup>

51. That the MFN clause is broadly worded, while the dispute resolution clause is by comparison specific, does not appear to the majority of this Tribunal to bar the application of one to the other. It is in the nature of MFN clauses to be general, because such clauses are intended to apply to a variety of provisions of numerous treaties that may be more or less favorable to the person or entity protected by the MFN clause than the corresponding clause of the base treaty. Indeed, Article 3(3) states that the MFN clauses of the BIT are to be applied to eleven articles of that treaty, each of which might be compared with similar provisions in other BITs entered into by the U.K. or Turkmenistan, some of which did not exist at the time the U.K. –Turkmenistan BIT was entered into. As the UNCTAD paper on *Most-Favoured-Nation Treatment* observes, “[t]he treatment refers to all measures applying specifically to foreign investors (investment-specific measures) or to measures of general application that regulate the economic and business activity of the investor and his investment throughout the duration of the investment.”<sup>68</sup> In the words of the *Siemens v. Argentina* tribunal, “In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted.”<sup>69</sup>

#### 4. *Effet Utile*

52. Nor is the majority of the Tribunal convinced by the Respondent’s argument that application of the MFN clause to the dispute resolution provision of the BIT would deprive the

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<sup>67</sup> Respondent’s Reply, ¶¶ 30-31.

<sup>68</sup> UNCTAD, MOST-FAVOURLED-NATION TREATMENT (UNCTAD Series on Issues in International Investment Agreements II 2010) (“UNCTAD MFN Paper”), p. 16.

<sup>69</sup> *Siemens v. Argentina* ¶106. See *RosInvestCo v. Russia* ¶131 (“While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.”).

latter of *effet utile*.<sup>70</sup> This would occur, the Respondent argues, because, when the U.K.-Turkmenistan BIT was signed in 1995, the U.K. was already a party to other treaties that provided for ICSID Arbitration. If the MFN clause can be used as the Claimant seeks to use it, the Respondent argues, Article 8(2) would have been a nullity from inception, because the MFN clause could always have displaced its provisions in favor of a clause from a treaty providing for ICSID Arbitration.<sup>71</sup>

53. The Claimant responds that no *Turkmenistan* BIT had entered into force in 1995 other than the China-Turkmenistan BIT, which did not provide for ICSID Arbitration.<sup>72</sup> The China BIT was Turkmenistan's first to enter into force, and the U.K. BIT was Turkmenistan's second, according to UNCTAD's list of BITs to which Turkmenistan is a party.<sup>73</sup> There was thus no more favorable Turkmenistan treaty in force at the time the U.K.-Turkmenistan BIT became effective. The Respondent argues that some U.K. treaties that provided for ICSID Arbitration *did* precede the U.K.-Turkmenistan BIT: The U.K.-Barbados BIT entered into effect in 1993, the U.K.-Peru BIT in 1994, the U.K.-Belarus BIT in 1994.<sup>74</sup> The existence of those treaties may have made the effect of Article 3(3) on the United Kingdom uncertain, but it had no effect on the impact of that article on Turkmenistan. The Claimant also points out that, in any event, an investor always has the right to avail itself of Article 8(2) if it is content with UNCITRAL Arbitration.<sup>75</sup>

54. In this connection, it seems significant to the majority of the Tribunal that it is in the nature of an MFN clause to be used to displace a treaty provision deemed less favorable in

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<sup>70</sup> Hearing Tr. 30-31.

<sup>71</sup> Hearing Tr. 30-33.

<sup>72</sup> Hearing Tr. 144-145.

<sup>73</sup> Exhibit CL-44 (UNCTAD list of Turkmenistan BITs).

<sup>74</sup> Hearing Tr. 165-166.

<sup>75</sup> Hearing Tr. 146.

favor of another clause, from another treaty, deemed more favorable. The MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty. Certainly, the principle of *ejusdem generis* restricts the application of an MFN clause to the displacement of clauses dealing with the same subject matter in other treaties of the same nature.<sup>76</sup> But that principle is not offended by the use of an MFN clause to displace a provision from the dispute resolution article of one bilateral investment treaty with a corresponding provision from the dispute resolution article of another bilateral investment treaty signed by the same State.

## 5. Contemporaneity

55. The Respondent argues that the principle of “contemporaneity” prevents application of the MFN clause to the dispute resolution provisions of the BIT.<sup>77</sup> That principle, the Respondent argues, requires the Tribunal to look at the situation of the State parties at the time the U.K.-Turkmenistan BIT was executed, in 1995, and to determine whether the State parties could have contemplated “even the possibility of importing consent via an MFN clause from another treaty.”<sup>78</sup> Prior to the *Maffezini v. Spain* decision in 2000, the Respondent argues, such an idea was “utterly unheard of.”<sup>79</sup>

56. The Claimant responds that, where the words of a treaty are not ambiguous, there is no occasion under the Vienna Convention to look beyond the terms of the treaty to discern the intentions of the parties. To the extent that contemporaneity is relevant, the Claimant adds, the Bahrain-Turkmenistan BIT, signed in 2011, contains an MFN clause that applies broadly to the

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<sup>76</sup> See *Draft Articles on Most-Favoured-Nation Clauses, with Commentaries*, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, p. 30, ¶¶10-11 (hereinafter “*ILC Draft Articles on MFN Clauses*”).

<sup>77</sup> Hearing Tr. 50.

<sup>78</sup> Hearing Tr. 51.

<sup>79</sup> *Id.* Of course, under this line of reasoning, the *Maffezini v. Spain* case could not have been decided as it was, because no previous decision under a BIT had applied an MFN clause to the investor-state arbitration article.

dispute resolution provision,<sup>80</sup> so there is no reason to believe that *Maffezini v. Spain* and the intervening decisions following *Maffezini v. Spain* had any effect on Turkmenistan's treaty practice.<sup>81</sup>

57. The majority of the Tribunal concludes that the principle of contemporaneity does not bar the application of Article 3 to Article 8. The best indication of the intentions of the State parties to the U.K.-Turkmenistan BIT is the text of the treaty they signed. Article 3(3) provides unequivocally that Article 3 "shall apply" to Article 8. Whatever the authors of the text may have foreseen, their intentions, as expressed in the text of the treaty, seem to this Tribunal to be clear.<sup>82</sup>

#### **6. Interpretation of Article 3(3)**

58. The wording of Article 3(3) indisputably presents some interpretive difficulties. For example, Article 7 of the U.K.-Turkmenistan BIT, headed "Exceptions," carves out of the MFN treatment provided by the BIT the benefits that may be provided by any existing or future customs union or taxation treaty or legislation.<sup>83</sup> Yet Article 7 is one of the articles included in "Articles 1 to 11," to which the MFN clause is made applicable by Article 3(3). It would be challenging to apply a guarantee of most favored nation treatment to an article enumerating the exceptions to most favored nation treatment, but fortunately this Tribunal is not called upon to do so. While recognizing the difficulty of applying Article 3 to all of the first eleven articles of the BIT, we are confronted in this case only with how to apply it to Article 8.

59. Article 3(3) of the U.K.-Turkmenistan BIT states that the treatment provided for in Articles 3(1) and 3(2) *shall apply* to a range of articles that includes Article 8. The treatment

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<sup>80</sup> The Bahrain BIT (Exhibit CL-43) provides that "Unless specifically excepted, [MFN] treatment provided for in Article 3.1 and 3.2 herein shall apply to the whole of this Agreement."

<sup>81</sup> Hearing Tr. 150-152.

<sup>82</sup> See *Renta 4 v. Russia* ¶118 ("The Treaty must be taken as it is written.").

<sup>83</sup> See Hearing Tr. 208-210.



provided for in Articles 3(1) and 3(2) includes most favored nation treatment. As noted above (¶ 28), the words “shall apply” appear to the majority of this Tribunal to be intended to *require* the application of the one to the other, not merely to permit it. These terms of the BIT, like all terms of a treaty, are to be given effect.

60. The Dissenting Opinion reads into the U.K.-Turkmenistan BIT two conditions that neither side has advanced and that the majority of the Tribunal is unable to find in the text of the treaty. First, the Dissenting Opinion would require Articles 3 and 8 of the BIT to be applied in a particular sequence. As the Dissenting Opinion sees it, “to give effect to the MFN clause contained in Article 3(3), the foreign investor must first be in a *dispute settlement relationship* with the host state.”<sup>84</sup> Under this reasoning, an investor’s right to MFN treatment under Article 3 does not come into being until the investor has commenced an arbitration proceeding under Article 8. It necessarily follows, if that is the case, that an investor cannot commence an ICSID Arbitration or an ICC Arbitration unless the state has specifically agreed to do so. The second condition that the Dissenting Opinion reads into the BIT follows logically from the first: “[i]n that sense, the application of Article 3(3) of the U.K.-Turkmenistan BIT is *subordinated* or *conditioned* to the prior application of Article 8(2) [...]”<sup>85</sup>

61. The majority of the Tribunal finds no basis in the U.K.-Turkmenistan BIT for conditioning the rights enjoyed by an investor under the BIT on the temporal sequence in which the investor asserts those rights. A U.K. investor with an investment in Turkmenistan enjoys rights under the BIT simply by virtue of having made that investment.<sup>86</sup> No action on the investor’s part other than the making of the investment is required to vest the investor with those rights. And the protection of the MFN clause applies to such an investor from the moment that

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<sup>84</sup> Dissenting Opinion ¶40 (emphasis in original).

<sup>85</sup> *Id.* ¶41.

the host State accords more favorable treatment to an investor from a third state. As the International Law Commission puts it:

The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause \* \* \* arises at the moment when the relevant treatment is extended by the granting State to a third state or to persons or things in the same relationship with that third State.<sup>87</sup>

Dolzer and Schreuer explain:

“The [MFN] clause may not have any practical significance if the state concerned fails to grant any relevant benefit to a third party. However, *as soon as* the state does confer a relevant benefit, it is automatically extended to the state that benefits from the MFN clause.”<sup>88</sup>

62. The protection of the U.K.-Turkmenistan BIT includes the access to international arbitration to which the sovereign parties consented in Article 8(1), and also the right to treatment no less favorable than that accorded to nationals of third countries provided by Article 3. Nothing in the text of the treaty requires an investor to commence an arbitration before claiming its rights under the MFN clause, or subordinates the MFN clause to the investor-state arbitration provision. To the contrary, the BIT provides that the MFN clause “shall apply” to the investor-state arbitration article. The majority of the Tribunal therefore concludes that nothing in the BIT prevents an investor from simultaneously invoking the right to international arbitration provided by the BIT and invoking the MFN clause to obtain the benefit of a more favorable arbitration process provided by another treaty to nationals or companies of a third country.

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(Footnote continued from previous page)

<sup>86</sup> Indeed, the BIT provides that “the term ‘investment’ includes all investments, whether made before or after the date of entry into force of this Agreement.” U.K.-TURKMENISTAN BIT Art. 1(a).

<sup>87</sup> *ILC Draft Articles on MFN Clauses*, Article 20(1) (2005). The Switzerland-Turkmenistan BIT entered into force in April 2009.

<sup>88</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law*, p. 186 (Oxford 2008) (emphasis added).

63. All of the words of a treaty are to be interpreted together, in good faith and in the context of the object and purpose of the treaty.<sup>89</sup> The object and purpose of the U.K.-Turkmenistan BIT, as expressed in its preamble, is “to create favourable conditions for greater investment.”<sup>90</sup> Assuring a prospective investor that neither he nor his investment will be subjected to treatment less favorable than the treatment accorded to investors from third countries and their investments, insofar as the process available to resolve any disputes with the host country that may arise under the BIT is concerned, certainly seems to create a favorable condition for investment by the investor so protected. The *RosInvestCo v. Russia* tribunal explained that “the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his ‘use’ and ‘enjoyment,’ procedural options of obvious and great significance.”<sup>91</sup> As the *Hochtief v. Argentina* tribunal observed, “the right to enforcement is an essential component of [the] property rights.”<sup>92</sup>

64. The majority of this Tribunal is therefore satisfied that the ordinary meaning of the words of Article 3(3) of the U.K.-Turkmenistan BIT, read in light of the object and purpose of the BIT, requires that the MFN clause be applied to Article 8, the investor-state arbitration provision. We turn next to what consequences follow from so applying those terms, or, as the Respondent phrases it, “how Article 8 and Article 3 work together.”<sup>93</sup>

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<sup>89</sup> See VIENNA CONVENTION, Art. 31.1.

<sup>90</sup> U.K.-TURKMENISTAN BIT, Preamble.

<sup>91</sup> *RosInvestCo v. Russia* ¶130 (emphasis in original). The *RosInvestCo* case was brought under the rules of the Stockholm Chamber.

<sup>92</sup> *Hochtief v. Argentina* ¶67.

<sup>93</sup> Hearing Tr. 158.

## G. Application of the MFN Clause to the Arbitration Article

65. Article 3 of the U.K.-Turkmenistan BIT contains two most-favored-nation protections, one applicable to nationals or companies of the other contracting party, and one applicable to the investments of such nationals or companies:

- **Article 3(1)** of the BIT contains Turkmenistan’s undertaking not to “subject investments or returns of nationals or companies of the [U.K.] to treatment less favourable than that which it accords \* \* \* to investments or returns of nationals or companies of any third state;” and
- **Article 3(2)** of the BIT contains Turkmenistan’s undertaking not to “subject nationals or companies of the [U.K.], as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords \* \* \* to nationals or companies of any third state.”

66. The Claimant invokes the protection of both Article 3(1) and Article 3(2).<sup>94</sup> While the Claimant asks the Tribunal to apply those MFN clauses to give it the benefit of the dispute resolution clauses of Turkmenistan’s BITs with Switzerland, France, Turkey, and India, and the ECT, the Claimant focuses on the Switzerland-Turkmenistan BIT.<sup>95</sup> Following the Claimant’s example, the Tribunal will therefore focus on the Switzerland-Turkmenistan BIT as containing the provisions that the Claimant deems more favorable.<sup>96</sup> Our resolution of the issue

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<sup>94</sup> Hearing Tr. 107.

<sup>95</sup> See Claimant’s Counter-Memorial, ¶59. The Switzerland, France, and Turkey BITs with Turkmenistan all condition the offer of ICSID Arbitration on the contracting parties to the BIT being parties to the ICSID Convention, but all of the States concerned are now parties to that Convention.

<sup>96</sup> The dispute resolution provisions of Turkmenistan’s BITs with Switzerland, France, and Turkey, insofar as the Claimant seeks to rely upon them, are substantially identical. *Compare* Accord entre le Conseil federal suisse et le Gouvernement du Turkménistan concernant la promotion et la protection réciproque des investissements (the “Switzerland-Turkmenistan BIT”) (date of entry into force: April 2, 2009), Exhibit CL-24; Accord entre le Gouvernement de la République Française et le Gouvernement du Turkmenistan sur l’encouragement et la protection réciproque des investissements (entry into force: May 2, 1996), Exhibit CL-28; Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments (Footnote continued on next page)

before us on the basis of the provisions of the Switzerland-Turkmenistan BIT makes examination of the other treaties relied upon by the Claimant unnecessary.

67. The discussion in the preceding section of this Decision explains the conclusion of the majority of the Tribunal that Article 3(3) of the U.K.-Turkmenistan BIT *requires* the Tribunal to apply Articles 3(1) and 3(2) of the BIT to Article 8. Two questions nevertheless remain:

- First, is there something different about the selection of a particular system of arbitration and the rules that accompany it, as opposed to the interposition of a condition, such as a waiting period, that permits the application of an MFN clause to the latter, but not to the former?
- And, second, do the provisions of Article 8 of the BIT provide “less favourable” treatment to U.K. investors (as regards their management, maintenance, use, enjoyment or disposal of their investments), or to their investments, than the corresponding articles of the Switzerland-Turkmenistan BIT provide to Swiss investors, or their investments?

**1. May Consent to ICSID Arbitration Be Provided Via an MFN Clause?**

68. The provision of the Switzerland-Turkmenistan BIT on which the Claimant relies is Article 8 of that treaty, which provides:

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned.
2. If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute for settlement to:

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(Footnote continued from previous page)  
(entry into force: March 13, 1997), Exhibit CL-25. Turkmenistan’s BIT with India and the ECT contain more complex provisions.

- (a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965; or
  - b) an ad hoc-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
3. Each Contracting Party hereby consents to the submission of an investment dispute to conciliation or international arbitration.<sup>97</sup>

69. Specifically, the Claimant seeks to apply the MFN provisions of Articles 3(1) and 3(2) of the U.K.-Turkmenistan BIT to give it the benefit of what it considers to be the more favorable treatment accorded by Turkmenistan to Swiss investors in Article 8(2) of the Switzerland-Turkmenistan BIT, insofar as a Swiss investor may choose to submit a dispute that cannot be resolved within six months of consultations with Turkmenistan either to ICSID Arbitration or to UNCITRAL Arbitration. As the Dissenting Opinion puts it, “because of the MFN provision contained in Article 3 of the U.K.-Turkmenistan BIT and its application to dispute settlement issues, a foreign investor of British nationality can invoke more favourable dispute settlement provisions embodied in other BITs concluded by Turkmenistan.”<sup>98</sup>

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<sup>97</sup> Claimant’s Counter-Memorial, ¶59; Exhibit CL-24 (Unofficial translation). The French original of Article 8 reads: “(1) Afin de trouver une solution aux différends relatifs à des investissements entre une Partie Contractante et un investisseur de l’autre Partie Contractante, des consultations auront lieu entre les parties concernées. (2) Si ces consultations n’apportent pas de solution dans les six mois à compter de la demande de les engager, l’investisseur pourra soumettre le différend pour règlement: (a) au Centre international pour le règlement des différends relatifs aux investissements (CIRDI), institué par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d’autres Etats ouverte à la signature à Washington le 18 mars 1965, ou (b) à un tribunal arbitral ad hoc qui, à moins que les parties au différend n’en disposent autrement, sera constitué conformément au règlement d’arbitrage de la Commission des Nations Unies pour le droit commercial international(CNUDCI). (3) Chaque Partie Contractante donne son consentement à la soumission à la conciliation ou à l’arbitrage internationaux de tout différend relatif à un investissement”).

<sup>98</sup> Dissenting Opinion ¶38.

70. The Respondent argues that, while an MFN clause may possibly be used to overcome a qualifying condition, such as a waiting period, in the dispute resolution clause of a BIT, as was the case in *Maffezini v. Spain*, it may not be used to “import” the State’s “consent to a different arbitration system” from one treaty into another.<sup>99</sup> The Respondent cites statements from both *Maffezini v. Spain* and *Plama v. Bulgaria* to this effect:

[I]f the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the [MFN] clause in order to refer the dispute to a different system of arbitration . . . because these very specific provisions reflect the precise will of the contracting parties.<sup>100</sup>

It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, . . . their agreement to most favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.<sup>101</sup>

71. Indeed, the Respondent argues that, because no investor has previously tried to use an MFN clause for that purpose, this Tribunal would be the first tribunal to do so if we were to agree with the Claimant.<sup>102</sup>

72. The Claimant takes issue with the proposition that no tribunal has ever used an MFN clause to import consent to ICSID Arbitration from one instrument to another by pointing out that this is effectively what the tribunal did in *C.S.O.B. v. Slovakia*.<sup>103</sup> In that case, The Czech and Slovak Republics, prior to their separation, had signed a BIT that gave an investor of

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<sup>99</sup> Respondent’s Memorial, ¶57; Hearing Tr. 58.

<sup>100</sup> *Maffezini v. Spain* ¶63.

<sup>101</sup> *Plama v. Bulgaria* ¶209.

<sup>102</sup> Hearing Tr. 59-61.

<sup>103</sup> *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999 (hereinafter “*C.S.O.B. v. Slovakia*”).

one State the right to elect ICSID Arbitration of a dispute with the other State, but the Slovak Republic argued that the BIT had never entered into force as between the State parties.<sup>104</sup> The tribunal found that “the uncertainties relating to the entry into force of the BIT prevent that instrument from providing a sound basis upon which to found the parties’ consent to ICSID jurisdiction.”<sup>105</sup> However, the parties to the *C.S.O.B. v. Slovakia* arbitration had signed a “Consolidation Agreement” which made reference to the BIT, and the tribunal found that:

In the absence of a separate dispute resolution provision, the reference to the BIT satisfies the requirement that international arbitration, as specified in its Article 8, is the agreed dispute resolution mechanism.<sup>106</sup>

73. While the facts of *C.S.O.B. v. Slovakia* are unique, the majority of this Tribunal is inclined to agree with the Claimant that importation of a provision for ICSID Arbitration from one treaty to another by operation of the MFN clause of a treaty should not be considered conceptually more difficult than the incorporation by reference into a contract of a provision for ICSID Arbitration from a treaty that has not entered into force. In either case, the consent to ICSID Arbitration is written in one instrument and imported into another by virtue of a provision in the latter instrument to which the State has agreed. The State has expressed its consent to ICSID Arbitration, in writing, in one instrument, and has agreed in a second instrument to look, under certain conditions, to the terms of the first instrument. Whether looking to the terms of the first instrument is accomplished by means of an incorporation by reference or an MFN clause does not appear to be a material distinction.

74. The Dissenting Opinion finds *C.S.O.B. v. Slovakia* inapposite, because the agreement containing the reference to the draft BIT in *C.S.O.B. v. Slovakia* was signed by both parties to the arbitration, thus supplying a separate agreement to ICSID arbitration (by virtue of

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<sup>104</sup> *C.S.O.B. v. Slovakia* ¶4.

<sup>105</sup> *Id.* ¶43.

<sup>106</sup> *Id.* ¶54.



the incorporation by reference) between the host state and the claimant. We would agree with this distinction, if the purpose of looking to the Switzerland-Turkmenistan BIT was to supply the missing case-specific consent to submit this particular dispute to ICSID Arbitration required by Article 8(2) of the U.K.-Turkmenistan BIT. But the MFN provision of the U.K.-Turkmenistan BIT effectively replaces Article 8(2) of the U.K.-Turkmenistan BIT with Article 8(2) of the Switzerland-Turkmenistan BIT, which requires no such case-specific consent. In the U.K. BIT, the sovereign parties agreed that their respective investors would have the benefits of more favorable provisions of other provisions in other treaties, and specified in Article 3(3) that the investor-state provisions of the BIT were included within the ambit of this protection. Once the requirements of Article 8(2) of the U.K. BIT are displaced by those of Article 8(2) of the Switzerland BIT, it is sufficient that the investor have complied with the requirements of that provision of the Switzerland BIT.

75. In any event, the essential consent of the State -- the consent to resolve disputes with U.K. investors by means of international arbitration -- does not in this case need to be imported by operation of the MFN clause, because that consent is contained in Article 8(1) of the BIT. The consent of Switzerland and Turkmenistan to submit disputes between each of them and investors of the other to international arbitration is similarly contained in a separate paragraph of the Switzerland-Turkmenistan BIT, Article 8(3) of that treaty. There is no need for the Claimant to seek to import that consent into the U.K.-Turkmenistan BIT, because Article 8(1) of the U.K. BIT already achieves the same result.

76. The only provision of the Switzerland-Turkmenistan BIT to which the Claimant needs the MFN clause to apply is the provision of Article 8(2) of the Switzerland BIT that provides a Swiss investor a choice between ICSID Arbitration and UNCITRAL Arbitration, which the Claimant argues to be more favorable than the corresponding provision of Article 8(2)

of the U.K.-Turkmenistan BIT, which restricts a U.K. investor to UNCITRAL Arbitration. Such an application to Article 8(2) is consistent with the International Law Commission’s observation that the beneficiary of an MFN clause not only has “an ‘either/or’ choice, but might also be in a position to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned.”<sup>107</sup>

77. The Respondent argues that Article 8(2) requires a specific agreement between the Claimant and Turkmenistan to submit a dispute to ICSID Arbitration. Article 3, the Respondent argues, is an agreement between Turkmenistan and the United Kingdom, and cannot satisfy the requirement of an agreement between the Claimant and Turkmenistan.<sup>108</sup> But, as noted above, the effect of the MFN clause is not *to satisfy* the requirements of Article 8(2), but *to replace* those requirements with a more favorable provision from another treaty, in this case Article 8(2) of the Switzerland-Turkmenistan BIT, which does not require a separate agreement between the Claimant and Turkmenistan in order to commence an ICSID Arbitration. We adopt the observation of the *Renta 4 v. Russia* tribunal that:

It is not convincing for a State to argue in general terms that it accepted a particular “system of arbitration” with respect to nationals of one country but did not so consent with respect to nationals of another. The extension of commitments is in the very nature of MFN clauses.<sup>109</sup>

78. The Dissenting Opinion asserts that “[i]t would involve a forum shopping attitude,” “running against the fundamental principles of international adjudication,” to bypass the consent requirement.<sup>110</sup> But the consent requirement is not bypassed by this interpretation: Turkmenistan consented to international arbitration in Article 8(1) of the U.K.-Turkmenistan BIT, and the State Parties to the BIT opened the door to a search by a U.K. investor for more

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<sup>107</sup> *ILC Draft Articles on MFN Clauses*, Article 19, Comment 9 (2005).

<sup>108</sup> Hearing Tr. 159-161.

<sup>109</sup> *Renta 4 v. Russia* ¶92.

<sup>110</sup> Dissenting Opinion ¶63.

favorable terms in treaties entered into by Turkmenistan with other states by choosing to make the MFN clause of the BIT applicable to the investor-state arbitration provisions. It is the State Parties to the BIT, not the present Tribunal, that decided that the MFN clause should apply to the investor-state arbitration article. As Professor Schreuer explains in the passage quoted above (paragraph 48), the rights provided by MFN clauses are *additional to* the rights provided in the basic BIT.<sup>111</sup>

79. The majority of the Tribunal concludes that, where Turkmenistan: (a) has expressly consented in the basic U.K.-Turkmenistan BIT to submit investment disputes with U.K. investors to international arbitration, (b) has provided in the same BIT that U.K. investors and their investments will not be subjected to treatment less favorable than that accorded to investors of other States or their investments, (c) has expressly provided that the MFN treatment so accorded “shall apply” to the dispute resolution provision of the BIT, and (d) has provided investors of third States, specifically Switzerland, with an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration, there is no reason why Turkmenistan’s consent to ICSID Arbitration in its BIT with Switzerland may not be relied upon by a U.K. investor, *if* the provision for ICSID Arbitration or an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration provides treatment more favorable to the investor than the treatment provided by the base treaty.

**2. Does the U.K.-Turkmenistan BIT Provide Less Favorable Treatment than the Switzerland-Turkmenistan BIT?**

80. We turn next to whether the treatment accorded by Turkmenistan to Swiss investors and their investments is more favorable than the treatment accorded to U.K. investors and their investments by the U.K.-Turkmenistan BIT insofar as the type of arbitration made

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<sup>111</sup> C. Schreuer et al., *The ICSID Convention – A Commentary*, p. 248.

available is concerned. The Claimant describes “whether the treatment [the Claimant] seek[s] to incorporate is more favorable than the treatment in the basic treaty” as “the only legitimate question” that this Tribunal has to answer.<sup>112</sup>

81. The dispute resolution provisions of the U.K.-Turkmenistan BIT differ in two principal respects from those of the BIT between Turkmenistan and Switzerland:

- The U.K.-Turkmenistan BIT requires a waiting period of four months, while the Switzerland-Turkmenistan BIT requires a waiting period of six months.
- The U.K.-Turkmenistan BIT permits an investor making a claim to commence an arbitration only under the UNCITRAL Rules, unless Turkmenistan agrees on a case-by-case basis to ICSID or ICC arbitration, while the Switzerland BIT provides an investor a free choice between ICSID Arbitration and UNCITRAL Arbitration.

82. Neither party has argued that the difference between the four-month waiting period under the U.K.-Turkmenistan BIT and the six-month waiting period under the Switzerland-Turkmenistan BIT has any significance. In any event, more than six months elapsed between the Claimant’s Notification of its claim to Turkmenistan on June 25, 2010 and the filing of its Request for Arbitration on May 19, 2011, so the Claimant has satisfied the waiting requirement under either treaty.

83. The Claimant argues that Article 8 of the Switzerland-Turkmenistan BIT contains “more favourable dispute resolution provisions than that found in” the U.K.-Turkmenistan BIT,<sup>113</sup> for two reasons:

- (a) a treaty that provides the State’s consent to ICSID Arbitration is more favorable to an investor than one that does not;<sup>114</sup>

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<sup>112</sup> Hearing Tr. 111.

<sup>113</sup> Claimant’s Counter-Memorial, ¶58.

(b) and, in any event, a treaty that provides an investor the choice between ICSID Arbitration and UNCITRAL Arbitration is more favorable to an investor than one that provides no choice.<sup>115</sup>

84. The Respondent argues that, to prevail, the Claimant must establish that ICSID Arbitration is objectively more favorable than UNCITRAL Arbitration, not merely that the Claimant prefers it.<sup>116</sup> The Respondent also argues that no arbitral tribunal has ever reached the conclusion urged by the Claimant.<sup>117</sup>

85. The Claimant disputes that there is any basis in international law for the “objective” standard advocated by the Respondent.<sup>118</sup> Rather, the Claimant argues that the Tribunal should defer to the Claimant’s view that ICSID Arbitration is more favorable than UNCITRAL Arbitration, because “we know what is best for us, especially if the tribunal thinks that objectively it may be more difficult to assess whether one treatment is more favorable than another.”<sup>119</sup>

86. Even if the Tribunal adopts an “objective” standard, the Claimant argues, it should find that ICSID Arbitration is more favorable to investors than UNCITRAL Arbitration, because (a) ICSID Arbitration is institutional arbitration, (b) ICSID is specialized in investor-State disputes, (c) ICSID Arbitration is insulated from interference by courts at the seat of the arbitration, (d) a decision in favor of jurisdiction may not be challenged until after the final

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(Footnote continued from previous page)

<sup>114</sup> *Id.* ¶95.

<sup>115</sup> *Id.* ¶96.

<sup>116</sup> The Respondent relies on the UNCTAD MFN Paper and *Daimler v. Argentina* for the proposition that the determination of whether one treaty provision is more or less favorable than another must derive “from an objective appreciation of the text of the treaty,” and not “from the subjective perceptions of individual claimants.” Hearing Tr. 70-71, quoting *Daimler v. Argentina* ¶¶245-246. See Respondent’s Memorial, ¶65; Respondent’s Reply, ¶¶74-75.

<sup>117</sup> Hearing Tr. 72.

<sup>118</sup> Hearing Tr. 112-113.

<sup>119</sup> Hearing Tr. 111-112.

award, (e) local courts are not involved in enforcement or review of ICSID awards, and (f) there is no uncertainty about the seat of arbitration, as there is in UNCITRAL Arbitration.<sup>120</sup>

87. The Respondent, in arguing that ICSID Arbitration is not objectively more favorable than UNCITRAL Arbitration, points to the risk of annulment of awards in ICSID Arbitration and to the availability of the New York Convention to enforce UNCITRAL awards.<sup>121</sup> Principally, however, the Respondent relies on studies by commentators who have reviewed the features of each system and have concluded that neither system is inherently better than the other.<sup>122</sup>

88. The UNCTAD MFN Paper defines the appropriate standard for applying an MFN clause differently from the formulation put forward by either party, but in terms that this Tribunal finds pertinent. “The MFN Treatment provision,” the UNCTAD MFN Paper states, “is a relative standard, which means that it implies a comparative test.” MFN treatment, that paper continues, “requires a comparison as well as the finding of more favourable treatment granted to investors of a given nationality as opposed to the investors covered by the basic treaty.” But a finding of an alleged breach “calls not only for the finding of an objective difference in treatment

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<sup>120</sup> Hearing Tr. 115-116.

<sup>121</sup> Respondent’s Reply, ¶¶76-81; Hearing Tr. 73. The Respondent informed the Tribunal that, of five currently pending cases against Turkmenistan brought under BITs that provide the claimant with a choice between ICSID Arbitration and UNCITRAL Arbitration, three were brought at ICSID and two under the UNCITRAL Rules. Hearing Tr. 169. These figures would appear to weigh against describing either system as inherently and objectively more favorable to an investor than the other.

<sup>122</sup> Respondent’s Reply, ¶¶82-84; Hearing Tr. 74; See Freya Baetens, *Enforcement of Arbitral Awards: “To ICSID or Not to ICSID” Is Not the Question*, in I.A. Laird, T.J. Weiler, eds., *Investment Treaty Arbitration and International Law*, Vol. 5, (Juris 2012) (), p. 212; Gaetan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in Albert Jan van den Berg, ed., *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Vol. 14* (Kluwer Law International 2009) (“Verhoosel, *Annulment and Enforcement Review of Treaty Awards*”); Stephen Jagusch and Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern in THE BACKLASH AGAINST INVESTMENT ARBITRATION* (Michael Waibel, Asha Kaushal, et al., eds., 2010, p. 109 (“These systems are similar on many levels, but they also diverge in certain fundamental areas. Neither system is perfect, particularly in relation to transparency and the review of awards.”), p. 314 (“Jagusch & Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration*”); Respondent’s Reply, ¶¶78-84.

between two foreign investors, but also for a competitive disadvantage directly stemming from this difference in the treatment.”<sup>123</sup>

89. The Tribunal finds itself in agreement with the Respondent that ICSID Arbitration cannot be described as objectively more favorable to investors than UNCITRAL Arbitration. Each system has its advantages and disadvantages, as the comparisons made by both parties illustrate. ICSID does indeed offer the advantages of administration by experienced professionals on behalf of a specialized institution. It also offers the considerable advantage of freedom from interference by courts at the seat of the arbitration, the perils of which are illustrated by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *The Republic of Argentina v. BG Group plc.*<sup>124</sup> But at least one learned commentator has applauded the role of national courts “in annulment proceedings where indeed they have come to provide, with few exceptions, a guarantee of stability and legal certainty not always found in some recent decisions of ICSID annulment committees.”<sup>125</sup> ICSID Arbitration has also been criticized for the overuse by unsuccessful parties of the annulment procedure provided by Chapter VII of the ICSID Rules,<sup>126</sup> and some parties favor the greater flexibility offered by the UNCITRAL Rules.

90. Acknowledging the difficulty of establishing that ICSID Arbitration is objectively more favorable to an investor than UNCITRAL Arbitration for all purposes, the Claimant’s

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<sup>123</sup> UNCTAD MFN Paper, pp. 23-24.

<sup>124</sup> 665 F.3d 1363 (D.C. Cir. 2012). The United States Supreme Court granted BG Group’s petition for a writ of certiorari to review that decision on June 10, 2013. 2013 WL 2459615 (Mem).

<sup>125</sup> Francisco Orrego Vicuña, “Reports of [Maffezini’s] demise have been greatly exaggerated,” *Journal of International Dispute Settlement* Vol. 3, No. 2, p. 308 (2012).

<sup>126</sup> See Jagusch & Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration*; Verhoosel, *Annulment and Enforcement Review of Treaty Awards*.

principal argument is that it is more favorable to have a choice between the two than not to have a choice.<sup>127</sup> This argument finds support in the decisions of other tribunals.

91. In *Impregilo v. Argentina*, for example, the tribunal concluded, in the context of a choice between resorting to domestic courts and international arbitration, that “a system that gives a choice is more favorable to the investor than a system that gives no choice.”<sup>128</sup> The *Hochtief v. Argentina* tribunal agreed: “whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice.”<sup>129</sup> Similarly, the tribunal in *Renta 4 v. Russia*, while ultimately declining to apply the MFN clause of the particular BIT before it to the arbitration clause, because of the specific language of that treaty, stated that, “[h]aving options may be thought to be more ‘favoured’ for MFN purposes than not having them.”<sup>130</sup> And in the specific context of a choice between ICSID Arbitration and *ad hoc* arbitration (such as UNCITRAL Arbitration), the *Plama v. Bulgaria* tribunal stated that, “[t]he Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice.”<sup>131</sup>

92. The Respondent characterizes the “choice” argument as bootstrapping, reasoning that if one system is not objectively more favorable than the other, having a choice between the systems cannot be more favorable than accepting the system selected in the base treaty.<sup>132</sup> As noted above, the Tribunal agrees that neither ICSID Arbitration nor UNCITRAL Arbitration may

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<sup>127</sup> Hearing Tr. 113.

<sup>128</sup> *Impregilo v. Argentina* ¶101.

<sup>129</sup> *Hochtief v. Argentina* ¶100.

<sup>130</sup> *Renta 4 v. Russia* ¶92.

<sup>131</sup> *Plama v. Bulgaria* ¶208.

<sup>132</sup> Hearing Tr. 79.



be described as objectively more favorable than the other. At the same time, however, those two systems of arbitration are indisputably different from each other.<sup>133</sup>

93. Article 3(2) of the U.K.-Turkmenistan BIT contains Turkmenistan's undertaking not to subject U.K. companies, as regards their management, use, enjoyment, and disposal of their investments in the territory of Turkmenistan, "to treatment less favourable" than it accords to companies of any third state. Article 3(3) of the BIT explicitly makes that undertaking applicable to the dispute resolution provisions of the BIT set forth in Article 8.

94. Where BIT "A" provides an investor with the option of selecting, as between two different systems of arbitration, the one that appears to that investor most favorable to the presentation of the particular claim that investor wishes to pursue with regard to an investment protected by the BIT, and BIT "B" restricts investors covered by that treaty to bringing a claim under only one of those systems of arbitration unless the State concerned agrees to the use of another system for the particular dispute, it appears to the majority of this Tribunal that investors under BIT "A" have been accorded more favorable treatment, as regards their management, use, enjoyment, and disposal of their investments, than investors under BIT "B." Indeed, depending on the circumstances, investors making a claim under BIT "B" may be said to be at a competitive disadvantage compared to investors claiming under BIT "A."

95. Turkmenistan accords to Swiss investors a choice between bringing a claim under Turkmenistan's BIT with Switzerland in an ICSID Arbitration and bringing such a claim in an UNCITRAL Arbitration. The tribunal in *National Grid v. Argentina* found that Argentina's agreement in its BIT with the United States that investors could resort to arbitration without first resorting to the Argentine courts was an aspect of its "treatment" of investors subject to the MFN

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<sup>133</sup> Indeed, if there were no difference between them, the Tribunal would probably not have been called upon to decide the present Objection to Jurisdiction for Lack of Consent.

clause of the Argentina-U.K. BIT.<sup>134</sup> The restriction imposed by Turkmenistan on U.K. investors, insofar as the U.K.-Turkmenistan BIT limits them to bringing claims under the BIT only in an UNCITRAL Arbitration, is similarly a form of treatment, and is less favorable than the treatment accorded by Turkmenistan to Swiss investors.

96. The Claimant, as a U.K. investor, is thus entitled by the MFN provisions of Article 3 of the U.K.-Turkmenistan BIT to avail itself of the more favorable treatment accorded by Turkmenistan to investors of Switzerland under Turkmenistan's BIT with that country, and specifically to avail itself of the provision of that BIT in which Turkmenistan agrees to resolve disputes with Swiss investors in an ICSID Arbitration or an UNCITRAL Arbitration, at the election of the investor. The Claimant here has availed itself of that more favorable treatment by commencing an ICSID Arbitration. In light of this finding, it is not necessary to consider Turkmenistan's BITs with France, Turkey, and India, nor the ECT.

97. The majority of the Tribunal therefore finds, without prejudice to the Respondent's second objection to jurisdiction (which it reserves for the next stage of this proceeding), that it has jurisdiction, as an ICSID tribunal, to hear the Claimant's claims.

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<sup>134</sup> *National Grid v. Argentina* ¶93. See also *RosInvestCo v. Russia* ¶130 (“the submission to arbitration forms a highly relevant part of the corresponding protection for the investor”).

### III. COSTS

98. Both parties have asked for an award of costs. The Respondent has asked for all costs related to this arbitration, including its legal fees.<sup>135</sup> The Claimant has asked for all costs associated with the Respondent's Objection to Jurisdiction for Lack of Consent.<sup>136</sup>

99. The Tribunal reserves all questions of costs until the conclusion of this proceeding.

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<sup>135</sup> Respondent's Memorial, ¶71.

<sup>136</sup> Claimant's Counter-Memorial, ¶105(ii).

#### IV. DECISION

100. For the reasons set forth above, the Tribunal decides as follows:
- a. The Respondent's Objection to Jurisdiction for Lack of Consent is rejected.
  - b. The Tribunal will proceed to a consideration of the merits of the Claimant's claim, to which it will join the Respondent's second objection to jurisdiction, on a schedule to be established after consultation with the parties.
  - c. All questions of costs are reserved.

[signed]

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George Constantine Lambrou  
Arbitrator

[signed]

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Laurence Boisson de Chazournes  
Arbitrator  
(with the attached Dissenting Opinion)

[signed]

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John M. Townsend  
President of the Tribunal