

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

KILIÇ İNŞAAT İTHALAT İHRACAT SANAYİ VE TİCARET ANONİM ŞİRKETİ

Applicant

and

TURKMENISTAN

Respondent

ICSID Case No. ARB/10/1

Annulment Proceeding

DECISION ON ANNULMENT

Members of the ad hoc Committee

Dr. Andrés Rigo Sureda, President
Professor Karl-Heinz Böckstiegel, Member
Professor Hi-Taek Shin, Member

Secretary of the ad hoc Committee

Ms. Mairée Uran Bidegain

Date of dispatch to the Parties: July 14, 2015

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Applicant / Kılıç	Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi
Application	Application for annulment of the Award dated January 13, 2014 submitted by Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi
Award	Tribunal's Award dated July 2, 2013, as rectified on September 20, 2013
Background Paper	Background Paper on Annulment for the Administrative Council of ICSID
BIT / Treaty	Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments signed on May 2, 1992, and entered into force on March 13, 1997
Continuation Decision	Kılıç's Request for Continuation of the Stay of Enforcement of the Award
Decision on Bifurcation	Tribunal's Procedural Order No. 1 (Decision on Bifurcation) dated June 30, 2011
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
C-[xx] / R-[xx]	Exhibit [Applicant] [Respondent]
Counter-Memorial	Turkmenistan's Counter-Memorial on Annulment dated October 20, 2014
CLA-[x] / RLA-[xx]	Legal Authority [Applicant] [Respondent]
Interpretation Decision	Tribunal's Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated May 7, 2012

Memorial	Kılıç's Memorial on Annulment dated August 4, 2014
Reply	Kılıç's Reply on Annulment dated December 23, 2014
Rejoinder	Turkmenistan's Rejoinder on Annulment dated February 25, 2015
Respondent / Turkmenistan	Turkmenistan
Separate Opinion	Separate Opinion of Professor William W. Park dated May 20, 2013
Tr. [page:line(s)]	Transcript of the hearing on annulment held on April 28, 2015
Vienna Convention / VCLT	1969 Vienna Convention on the Law of Treaties

I. INTRODUCTION AND OVERVIEW OF THE APPLICATION

1. This case concerns an application for annulment of the award rendered on July 2, 2013 in the arbitration proceeding between Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi (“**Applicant**” or “**Kılıç**”) and Turkmenistan (“**Turkmenistan**” or “**Respondent**”) (ICSID Case No. ARB/10/1), as rectified on September 20, 2013 and incorporating the Tribunal’s Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty of May 7, 2012 (the “**Award**”).
2. The application, dated January 13, 2014, was filed on January 16, 2014, in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated March 18, 1965 (the “**ICSID Convention**”), and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) (the “**Application**”). The Application was submitted within the time period provided for in Article 52(2) of the ICSID Convention.
3. The original dispute was submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the ICSID Convention and the Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments signed in Ashgabat, Turkmenistan on May 2, 1992, which entered into force on March 13, 1997 (the “**BIT**” or “**Treaty**”).
4. Applicant, Claimant to the original proceeding, is a construction company with registered offices in Istanbul, Turkey.
5. Applicant and Respondent are hereinafter collectively referred to as the “**Parties**”. The Parties’ respective representatives and their addresses are listed above on page (i).
6. The Award was rendered by an arbitral tribunal composed of Mr. William Rowley Q.C., (a national of Canada), Professor William W. Park (a national of the United States), and Professor Philippe Sands (a national of France and the United Kingdom) (the “**Tribunal**”). In the Award, the Tribunal dismissed Claimant’s claim in its entirety for lack of jurisdiction on the basis that Claimant had failed to submit its dispute to the local courts of the Host State, which, as interpreted by the Tribunal, was a precondition to the existence

of the Tribunal’s jurisdiction under Article VII.2 of the BIT (the dispute resolution provision).

7. This decision of the *ad hoc* Committee rules on Applicant’s allegations that the Tribunal “acted in excess of power, failed to state reasons and seriously departed from a fundamental rule of procedure when it concluded that in order to properly construe the provisions of Article VII.2, they had to be read as if the ‘if’ were not included.”¹ Applicant further alleges, *inter alia*, that “the Tribunal based its interpretation of a legal text on extraordinary considerations that contravene the BIT and the intention of the drafters, as well as the canons of interpretation set in the 1969 Vienna Convention on the Law of Treaties” (the “**Vienna Convention**” or “**VCLT**”).²

¹ See Memorial, para. 10. Article VII of the Turkey-Turkmenistan BIT in the authentic English version of the Treaty provides, in relevant part, as follows:

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

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

(a) [ICSID];

(b) [UNCITRAL]; or

(c) [ICC International Court of Arbitration];

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

² Memorial, para. 11.

II. PROCEDURAL HISTORY

8. On January 27, 2014, the Secretary-General registered the Application in accordance with Rule 50(2) of the ICSID Arbitration Rules and transmitted the Notice of Registration to the Parties. On that same day, the Parties were notified that pursuant to Rule 54(2) of the Arbitration Rules, the enforcement of the Award was provisionally stayed.
9. By letter of March 3, 2014, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that an *ad hoc* Committee had been constituted. The *ad hoc* Committee is composed of Dr. Andrés Rigo Sureda (Spanish) as President, Professor Karl-Heinz Böckstiegel (German) and Professor Hi-Taek Shin (Korean) as Members (the “**Committee**”). The Parties were also informed that the annulment proceeding was deemed to have begun on that date and that Ms. Mairée Uran Bidegain would serve as Secretary of the Committee.
10. By letter of April 2, 2014, Applicant requested a continuation of the stay of enforcement of the Award (the “**Continuation Request**”). Respondent filed a reply to the Continuation Request on April 14, 2014. Applicant submitted comments on the reply on April 29, 2014, and Respondent filed observations on Applicant’s comments of late April on May 13, 2014.
11. On May 20, 2014, the Committee held a first session with the Parties by telephone conference.
12. On May 27, 2014, the Committee issued Procedural Order No. 1, setting forth the procedural calendar and the general rules applicable to the proceedings.
13. On June 5, 2014, the Committee rendered its Decision on the Applicant’s Continuation Request ordering that the stay of enforcement of the Award be maintained subject to provision of a bank guarantee by Applicant.
14. On July 21, 2014, Applicant informed the Committee and Respondent that it was not successful in securing an agreement with a banking institution to provide an unconditional and irrevocable bank guarantee in accordance with the Committee’s decision of June 5,

2014. It further requested a short extension to provide the bank guarantee, which was granted by the Committee.

15. On August 11, 2014, Applicant confirmed that it could not secure the bank guarantee and asked the Committee to reconsider its decision. On August 15, 2014, Respondent requested the Committee to deny Applicant's request to change its decision.
16. On August 19, 2014, the Committee issued Procedural Order No. 2 terminating the stay of enforcement of the Award under Arbitration Rule 54(3).
17. In accordance with the procedural schedule set forth in Procedural Order No. 1, Applicant filed its Memorial on Annulment on August 4, 2014, accompanied by a witness statement of Mrs. Zergül Özbilgiç (the "**Memorial**"), and Respondent filed its Counter-Memorial on Annulment on October 20, 2014 (the "**Counter-Memorial**").
18. On December 16, 2014, Applicant requested a brief extension of the time limit to file its Reply Memorial on Annulment, and the Committee granted the extension on the same day. On December 24, 2014, Applicant filed its Reply Memorial on Annulment dated December 23, 2014, accompanied by an expert opinion of Professor Rudolf Dolzer (the "**Reply**").
19. On February 25, 2015, Respondent filed its Rejoinder Memorial on Annulment (the "**Rejoinder**").
20. A hearing on annulment was held at the World Bank's headquarters in Washington, D.C., U.S.A., on April 28, 2015 (the "**Hearing**").
21. The following persons attended the Hearing:

Members of the *ad hoc* Committee

Dr. Andrés Rigo Sureda
Dr. Karl-Heinz Böckstiegel
Prof. Hi-Taek Shin

Secretary of the *ad hoc* Committee

Ms. Mairée Uran Bidegain

Applicant

Dr. Hamid Gharavi	Derains & Gharavi
Mr. Sergey Alekhin	Derains & Gharavi
Mr. Daniel Parga	Derains & Gharavi
Ms. Yasemin Çetinel	Çetinel
Ms. Ayça Aydın	Çetinel

Respondent

Mr. Peter M. Wolrich	Curtis, Mallet-Prevost Colt & Mosle LLP
Mr. Ali R. Gürsel	Curtis, Mallet-Prevost Colt & Mosle LLP
Ms. Gabriela Alvarez-Avila	Curtis, Mallet-Prevost Colt & Mosle LLP
Ms. Sabrina Aïnouz	Curtis, Mallet-Prevost Colt & Mosle LLP
Mr. Francisco Sanchez	Curtis, Mallet-Prevost Colt & Mosle LLP

22. The Parties filed their submissions on costs on May 29, 2015.
23. The proceeding was closed on July 13, 2015.

III. THE DISPUTE AND THE ARBITRATION PROCEEDINGS

24. In 2005, 2007 and 2008, Kılıç, or its affiliated companies, entered into a number of building contracts with various municipal governors, ministries and other officials of the Turkmen State in connection with projects in the Turkmen cities of Mary, Dashoguz and Ashgabat. Kılıç alleged that, during the course of construction of the various projects,³ issues arose between the contracting parties as to their respective performance under the relevant contracts.⁴
25. In December 2009, Kılıç filed a request for arbitration before ICSID. The case was registered in January 2010. A Tribunal comprised of Professor Emmanuel Gaillard (President, French, appointed by the Chairman of the Administrative Council of ICSID), Professor William W. Park (appointed by Claimant), and Professor Philippe Sands (appointed by Respondent), was constituted in December 2010 (the “**First Tribunal**”).

³ These projects included the construction of a conference center, certain residential and commercial buildings, a mosque, sports facilities, a university, and schools (*see* Memorial, para. 23).

⁴ The allegations include non-payment of advances and progress payments, failures to certify and pay in full for the completed projects, levying fines, drawing on bank guarantees, expulsion of Kılıç from the construction sites, confiscation of movable assets, harassment and coercion of Kılıç’s personnel and interference with the management of construction areas (*see* Memorial, para. 24).

26. In early February 2011, Respondent raised jurisdictional objections based on Claimant's non-compliance with Article VII.2 of the BIT and disagreements regarding whether the English, Russian and/or Turkish language versions were authentic versions of the BIT, and requested bifurcation of the proceedings between jurisdiction and merits.
27. On May 2, 2011, after the First Tribunal had held a procedural consultation with the Parties, and the Parties had filed their submissions on the issue of bifurcation of the proceedings and the nature of Respondent's jurisdictional objections in April 2011, Professor Gaillard resigned as President of the First Tribunal. The Tribunal was reconstituted on May 24, 2011, with Mr. J. William Rowley (Canadian, appointed by the Chairman of the Administrative Council of ICSID) as its President (jointly with Professors Park and Sands, the "**Tribunal**").
28. On June 30, 2011, the Tribunal issued a Decision on Bifurcation and Early Determination of BIT Issues in which it decided against bifurcation, but also found that it would be appropriate to determine (a) the number of authentic versions of the BIT; and (b) to the extent there were authentic version(s) of the BIT in languages other than English – determine the accurate translations into English of the authentic version(s).⁵ The Tribunal also indicated that it wished to explore further the meaning and effect of Article VII.2 of the BIT and requested the Parties' submissions thereon (collectively referred to as the "**BIT Issues**").⁶
29. On January 20, 2012, a one-day hearing on the BIT Issues took place in London, United Kingdom (the "**January hearing**").
30. On May 7, 2012, the Tribunal issued a Decision on Article VII.2 of the Turkey-Turkmenistan BIT (the "**Interpretation Decision**"), in which it determined that:
 - (a) there are two authentic versions of the BIT, being the English and Russian versions, both signed in Ashkabat on 2 May 1992;
 - (b) the translation into English of the Russian version of the BIT that is found in Exhibit R-1 (revised) is to be treated as accurate;

⁵ Interpretation Decision, para. 1.19; Award, para. 1.2.18.

⁶ Interpretation Decision, para. 1.20; Award, para. 1.2.19.

- (c) the meaning and effect of Article VII.2 of the BIT is that a concerned investor is required to submit its dispute to the courts of the Contracting Party with which a dispute has arisen, and must not have received a final award within one year from the date of submission of its case to the local courts, before it can institute arbitration proceedings in one of the fora in the manner permitted by Article VII.2.⁷

31. The Tribunal further determined that:

[N]otwithstanding the parties' apparent consensus that the Tribunal should, if it is able to do so, provide a definitive ruling on its jurisdiction, the Tribunal notes that the parties have not yet provided submissions on the effect of non-compliance with the provisions of Article VII.2 of the BIT, assuming it to require mandatory recourse to the courts of Turkmenistan in the present case.

In these circumstances, the Tribunal invites the parties to make submissions, within 10 days of the receipt of this Decision, as to whether they wish to have an opportunity to make written/oral submissions with respect to the consequences to be drawn from Claimant's non-compliance with the mandatory provisions of Article VII.2.⁸

32. The Interpretation Decision was signed by all members of the Tribunal.

33. On December 7, 2012, and further to two respective rounds of submissions by the Parties on the meaning and effect of Article VII.2, as specified in paragraph 31 above, a hearing on "the single question of the jurisdictional effect of the requirement for prior recourse to the courts of Turkmenistan" took place in London, United Kingdom.⁹

34. At the close of this hearing, the Tribunal invited the Parties to file 10-page post-hearing submissions on "the ability of this Tribunal to suspend these proceedings in the event that it would determine that the MFN provision does not encompass dispute resolution, and in the event it would determine that recourse to the Turkmenistan courts would not be futile," which the Parties submitted in due course, followed by their claims for costs and comments thereon.

⁷ Interpretation Decision, para. 11.1; *see also* Award, para. 1.2.52.

⁸ Interpretation Decision, paras. 9.28 and 9.29; Award, para. 1.2.53.

⁹ Award, paras. 1.2.62-1.2.68.

35. In its Award, the Tribunal considered that there were “three principal substantive questions to be addressed in relation to the single jurisdictional question,”¹⁰ namely:

- (a) is Article VII.2’s requirement for prior recourse to the courts of Turkmenistan a condition of Turkmenistan’s consent to ICSID arbitration;
- (b) does the BIT’s Article II.2 MFN provision encompass the BIT’s [dispute resolution provisions] DRPs contained in Article VII.2, so as to permit Claimant to rely on the DRPs of the Switzerland-Turkmenistan BIT; and
- (c) in the event that Claimant is not exempted from the mandatory prior recourse provisions of Article VII.2 by reason of the operation of Article II.2 MFN provision, is it otherwise exempted because compliance with the provisions of Article VII.2 would have been ineffective or futile?

36. The Award was signed by all members of the Tribunal. Professor William W. Park also issued a Separate Opinion (the “**Separate Opinion**”). The Majority of the Tribunal composed of Mr. Rowley and Prof. Sands (the “**Majority**”), explains the object of the Separate Opinion as follows:

In his Separate Opinion, our colleague Professor Park concludes, like the majority, that the wording of Article VII.1 imposes jurisdictional preconditions requiring notice of a dispute and an endeavour to settle by negotiation. He departs from the majority, however, in finding that Article VII.2’s requirements for local litigation and “no-judgment-within-a-year” are not conditions precedent and go only to ‘ripeness’ and the admissibility of the claim, as opposed to the jurisdiction of the Tribunal.¹¹

37. In its Award of July 2, 2013, the Majority of the Tribunal declined to uphold jurisdiction and held that:

- (i) Article VII of the BIT expressly articulates a multi-layered, sequential dispute resolution system providing for a sequence of separate dispute resolution procedures through which a dispute will escalate, if not resolved, in the former step. The Tribunal views the inclusion of such a multi-tiered system [...] to be in accordance with the provisions of Article 26 of the ICSID Convention;¹²
- (ii) According to the Majority, the adoption of language which requires that a series of steps *shall* be taken, and which provide for a right to arbitrate, *provided that* another step has been taken, is an obvious construction of a condition precedent. [...] When such conditions are set out in the DRPs of a

¹⁰ *Id.* para. 5.1.1.

¹¹ *Id.* para. 6.5.1.

¹² *See Id.*, para. 6.2.6.

BIT (*as conditions of the Contracting Parties' offer to arbitrate*), [...] compliance with them constitutes a jurisdictional requirement [not a question of admissibility], in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised;¹³

- (iii) In the absence of jurisdiction, the Tribunal has no power to suspend these proceedings even if it was minded to do so;¹⁴
- (iv) Article II.2's MFN provision of the BIT, does not encompass or apply to the BIT's dispute resolution provision so as to permit Claimant to rely on the dispute resolution provision of the Switzerland-Turkmenistan BIT, which did not require prior recourse to local courts;¹⁵
- (v) Based on the evidentiary record, the Tribunal was unable to conclude that it would have been ineffective or futile for Claimant to have sought to comply with Article VII.2's requirement for prior recourse to the courts of Turkmenistan. Accordingly, Claimant was not exempted from the application of Article VII.2.¹⁶

IV. THE APPLICABLE LEGAL FRAMEWORK: ARTICLE 52 OF THE ICSID CONVENTION

38. Article 52 of the ICSID Convention provides in relevant part:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered [...].

¹³ See *Id.* paras. 6.2.9 and 6.3.15.

¹⁴ See *Id.* para. 6.6.1.

¹⁵ See *Id.* para. 7.9.1.

¹⁶ See *Id.* para. 8.1.21.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. [...]. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

39. Rule 50(1) of the Arbitration Rules further confirms the grounds for annulment set forth under Article 52 of the ICSID Convention.
40. Applicant has applied for annulment on grounds of manifest excess of powers, failure to give reasons and serious departure of a fundamental rule of procedure. In their pleadings, the Parties interpret differently the pertinent provisions of Article 52. The Committee will address at the outset the Parties' different understandings of Article 52.
41. The Committee has considered the extensive factual and legal arguments presented by the Parties in their written submissions and oral argument during the Hearing. Below, the Committee discusses the arguments of the Parties that it considers relevant for its decision. The Committee's reasoning addresses what the Committee considers to be determinative factors in deciding the disputed issues and, accordingly, the relief sought by the Parties.

1. MANIFEST EXCESS OF POWERS

A. The Positions of the Parties

42. Applicant has submitted that the reference to powers in Article 52(1)(b) is to be understood as to those powers that stem from the agreement of the parties to submit their dispute to the arbitral tribunal and it is with reference to the agreement of the parties and the "powers" stemming therefrom that it must be determined whether a tribunal has exceeded its powers. According to Applicant, "manifest" is to be understood in the sense of significant or consequential and not necessarily obvious. When an extensive analysis may be required to determine whether a tribunal has exceeded its powers that does not mean that that excess is not manifest. Applicant discusses three instances where a tribunal manifestly exceeds its powers.

43. First, when it exercises jurisdiction if none exist or conversely when a tribunal fails to exercise the jurisdiction it has. Such failure, as argued by Applicant, constitutes always a manifest excess of powers, while “if an error is committed in relation to the merits, it will rarely constitute an excess of power and rarely mandate the annulment of an award. A jurisdictional error is of an entirely different character. It manifestly constitutes an excess of power in all cases.”¹⁷ Applicant refers to the report of its legal expert Prof. Dolzer who notes Schreuer’s comment that “[t]he distinction between non-application of the proper law and erroneous application of the proper law is relevant to questions of the merits but not to questions of jurisdiction. An erroneous application of the law applicable to jurisdiction may lead to an excess of powers and may be a ground for annulment.”¹⁸ Applicant submits that *ad hoc* Committees that have diverged on the standard of misapplication of the law have converged in that “the standard required for a tribunal to manifestly exceed its powers is lower with respect to misapplication of the principles of treaty interpretation regarding jurisdictional issues.”¹⁹
44. Second, failure by a tribunal to apply the proper law may amount to an excess of powers. Under this heading Applicant includes cases in which the tribunal purports to apply the applicable law but in reality applies rules of law other than those agreed by the parties or *de facto* disregards a provision of the BIT or of the Vienna Convention.
45. Third, gross misapplication of the law has led to the annulment of arbitral awards on grounds of manifest excess of powers. Applicant contends that, “[...] in fact a full review, which suggests even an appeal, is particularly warranted when dealing with jurisdictional issues.”²⁰
46. For Respondent, the legal standard of manifest excess of powers is not lower with respect to jurisdictional determinations than it is for determination of the merits. Respondent recalls that Applicant’s thesis has been rejected by commentators and not supported by annulment decisions. There is no basis for this distinction in the ICSID Convention and

¹⁷ Reply, para. 50.

¹⁸ *Id.* para. 71.

¹⁹ *Id.* para. 72.

²⁰ *Id.* para. 73.

it was rejected by the drafters of the Convention. An excess of powers is manifest when it is self-evident, easy to discern.

47. Respondent points out that awards have been annulled for failure to apply the proper law only in four occasions in extreme circumstances where the tribunal ignored provisions of the applicable law or the applicable law as a whole. Awards have not been annulled when the law has only partly been applied or has been applied incorrectly; only a “gross or egregious error that effectively amounts to the non-application of the proper law”²¹ would justify annulment. Hence consistent with this premise mere divergence of interpretations cannot justify annulment.

B. *Analysis of the Committee*

48. The Parties diverge on the meaning of “manifest” and on whether the threshold of manifest excess of powers is a lower threshold with regard to jurisdiction. On the meaning of “manifest” the divergence relates to whether manifest means obvious without need for deep analysis or the excess of powers may be manifest even if it requires extensive analysis.
49. The Parties have referred to decisions of annulment committees in support of either understanding of the meaning of “manifest.” While the present Committee is not bound to use the same criteria as previous committees, it will consider and take into account for its own decision reasoning used by previous committees regarding the relevant issues.
50. The *Repsol ad hoc* committee understood manifest in the sense of “obvious by itself” simply by reading the award.²² The *Wena ad hoc* committee understood “manifest” as “self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.”²³ Similarly, the *CDC*

²¹ Counter-Memorial, para. 47, citation of *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic’s Application for Annulment of the Award, June 29, 2010 (CLA-34), para. 164.

²² *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on the Application for Annulment, January 8, 2007 (RLA-5), para. 36.

²³ *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, February 5, 2002 (“*Wena Decision*”) (CLA-62), para. 25.

ad hoc committee stated: “[...] the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument ‘one way or the other’, is not manifest.”²⁴

51. On the other hand, for the *Vivendi I ad hoc* committee “manifest” means excess with clear and serious implications. Thus it concluded that, “the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding circumstances, the Committee can only conclude that the excess of powers was manifest.”²⁵
52. The *Soufraki ad hoc* committee found that the choice between these approaches was unnecessary: “[A] strict opposition between two different meanings of ‘manifest’ - either ‘obvious’ or ‘serious’ - is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.”²⁶
53. The Committee concurs in that it is unnecessary to consider the two approaches as alternatives. The term ‘manifest’ would by itself seem to correspond to ‘obvious’ or ‘evident’, but it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal’s excess had serious consequences for a party.
54. The second discrepancy in the Parties’ views relates to the application of the proper law in the jurisdictional context. It is undisputed that failure to apply the proper law is one instance of the tribunal exceeding its powers by acting outside the scope of the Parties’ agreement to arbitrate. The Background Paper on Annulment for the Administrative Council of ICSID (the “**Background Paper**”) notes that annulment committees concur in

²⁴ *CDC Group PLC v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005 (CLA-64), para. 41.

²⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002 (“**Vivendi I Decision**”) (CLA-43), para. 115.

²⁶ *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki (“**Soufraki Decision**”) (CLA-35), para. 40.

that “a Tribunal’s complete failure to apply the proper law or acting *ex aequo et bono* without agreement of the parties to do so as required by the ICSID Convention could constitute a manifest excess of powers.”²⁷

55. Applicant has argued that a lesser standard applies in the context of a decision on jurisdiction. Applicant contends that any jurisdictional mistake is necessarily a manifest excess of powers. This argument has been made before other annulment committees, but it has been rejected on the ground that there is no basis in Article 52(1)(b) to make an exception for issues of jurisdiction. Faced with the assertion that all jurisdictional errors should be manifest, the *Soufraki ad hoc* committee saw,

[...] no reason why the rule that an excess of power must be manifest in order to be annulable should be disregarded when the question under discussion is a jurisdictional one. Article 52(1)(b) of the Convention does not distinguish between findings on jurisdiction and findings on the merits. As noted by the ad hoc committee in *MTD Chile*; ‘... the grounds for annulment do not distinguish formally ... between jurisdictional errors and errors concerning the merits of the dispute and ... manifest excess of powers could well occur on a question of merits.’

It follows that the requirement that an excess of power must be “*manifest*” applies equally if the question is one of jurisdiction. A jurisdictional error is not a separate category of excess of power. Only if an ICSID tribunal commits a *manifest* excess of power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment.²⁸

56. The present Committee concurs that there is no basis in the Convention for the distinction propounded by Applicant and that, therefore, the same threshold applies to matters of jurisdiction and the merits in order for the Committee to find that an excess of powers is manifest.

²⁷ Background Paper on Annulment For the Administrative Council of ICSID, August 10, 2012 (“**Background Paper**”) (CLA-67), para. 94.

²⁸ *Soufraki* Decision (CLA-35), paras. 118-119. See also *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru (also known as Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru)* (ICSID Case No. ARB/03/4), Decision on Annulment, September 5, 2007 (“**Lucchetti Annulment Decision**”) (CLA-48), para. 101.

2. FAILURE TO STATE REASONS

A. Positions of the Parties

57. According to Applicant, an award falls short of this requirement when it fails to give reasons on an issue or to deal with a question, or the reasons are insufficient, inadequate, frivolous or contradictory. By reference to the *Soufraki* case, Applicant understands that reasons are insufficient or inadequate when reasons cannot in themselves be a reasonable basis for the solution arrived at by a tribunal.²⁹
58. Respondent agrees that failure to state reasons justifies the annulment of the award, but disputes that failure to state reasons be confused with a failure to state correct or convincing reasons. Respondent submits that, “an examination of reasons cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based.”³⁰ According to Respondent, the threshold for failure to state reasons is very high, it is not different for jurisdictional decisions, and annulment on this ground should only occur in a clear case and when a tribunal fails to state any reasons.³¹

B. Analysis of the Committee

59. The Parties differ on how the ground of annulment for failure to state reasons should be applied in the case of a jurisdictional award and on the level of scrutiny by the Committee of the reasons themselves. Applicant argues that sufficient and adequate reasons have greater importance when jurisdictional issues are involved and that the Committee should consider the adequacy or sufficiency of reasons.
60. It is undisputed that a reader of an award should be able to follow the reasoning of the tribunal and how the reasoning leads the tribunal to its decision. As expressed in the often quoted statement of the *MINE ad hoc* committee, “the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point

²⁹ Memorial, para. 152 (referring to the *Soufraki* Decision (CLA-35), paras 122-123).

³⁰ Counter-Memorial, para. 63.

³¹ *Id.* para. 60.

A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.”³² This statement applies equally to awards on jurisdiction and awards on the merits. As in the case of manifest excess of powers, the ICSID Convention does not make in this respect a distinction between jurisdictional or merit issues. No jurisprudence has been brought to the attention of the Committee in support of the distinction advocated by Applicant except the reference to Sir Frank Berman’s Dissenting Opinion in the *Lucchetti* Annulment Decision³³ which is not shared by the majority of that committee. For the reasons pointed out above in this paragraph and with regard to manifest excess of powers under the ICSID Convention, the review of the present Committee of the reasons for denial of jurisdiction in the Award should not be more or less strict than a review of reasons in an award on the merits.

61. Respondent has taken issue with Applicant’s contention that reasons should be sufficient and adequate. Applicant’s contention is based on the statement in *Soufraki* to the effect that “even short of a total failure, some defects in the statement of reasons could give rise to annulment [...]. [I]nsufficient or inadequate reasons refer to reasons that cannot, in themselves, be a reasonable basis for the solution arrived at.”³⁴ Applicant also quotes the *Soufraki ad hoc* committee’s holding that “insufficient or inadequate reasons as well as contradictory reasons can spur an annulment.”³⁵
62. The Committee first observes that a word of caution is in order in respect of use of words such as “adequate” or “sufficient” in the context of annulment. The doctrine and the case law warn about the danger of the review of reasons becoming an appellate review: “[o]nce an *ad hoc* committee starts looking into whether the tribunal explanation is sufficient to constitute a statement of reasons, it has already embarked upon a quality control of the award. The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal

³² *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988 (CLA-39), para. 5.09.

³³ See Reply, para. 81, n.103 (referring to *Lucchetti* Annulment Decision, Dissenting Opinion of Sir Franklin Berman (CLA-48)).

³⁴ Quoted in Reply, para. 152.

³⁵ *Id.*

becomes blurred.”³⁶ The *Soufraki ad hoc* committee quoted by Applicant was aware that the assessment of the insufficiency or inadequacy of reasons might easily place an *ad hoc* committee in a court of appeal role. It stated: “[i]nsufficient or inadequate reasons as a ground for annulment have thus to be distinguished from *wrong or unconvincing reasons*.” In support of this statement, the *Soufraki ad hoc* committee refers to the *Wena ad hoc* committee’s explanation that “Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal’s decisions were appropriate or not, convincing or not.”³⁷

63. The *Soufraki ad hoc* committee also refers to the *Vivendi I ad hoc* committee. This committee provided what can be considered the leading statement on the application of Article 52(1)(e):

[...] it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons [...]. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.³⁸

In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and the second, that point must itself be necessary to the tribunal’s decision.”³⁹

64. To conclude on this point, the present Committee, consistent with its limited role, will not judge the correctness or persuasiveness of the reasons provided by the Tribunal but only determine whether the Award “enables one to follow how the tribunal proceeded from Point A. to Point B.”

³⁶ C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2009) (CLA-32), p. 1003, at para. 363.

³⁷ *Soufraki* Decision (CLA-35), para. 123. Emphasis in the original.

³⁸ *Id.* para. 124, referring to *Vivendi I* Decision, para. 64.

³⁹ *Vivendi I* Decision, para. 65.

3. *SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE*

A. *Positions of the Parties*

65. The Parties agree that the rule of procedure must be fundamental and the departure must be serious, but diverge on the meaning of “serious.” For Applicant, “serious” means that the departure from the fundamental rule may have had an impact on the tribunal’s award. On the other hand, Respondent argues that “serious” means that the violation of the fundamental rule of procedure caused the tribunal to reach a result substantially different from what it would have been if the rule had been observed.

B. *Analysis of the Committee*

66. The Committee wishes first to clarify that the Background Paper does not acknowledge Respondent’s statement that “[a]d hoc committees have consistently interpreted the departure to be ‘serious’ if it has a material impact on the tribunal’s decision [...]”⁴⁰ The Background Paper only acknowledges that “[s]ome ad hoc Committees have required that the departure have a material impact on the outcome of the award for the annulment to succeed.”⁴¹ Evidently what the Background Paper acknowledges is that a few *ad hoc* committees had required that the departure must have a material impact.

67. The Committee also notes that the determination of “whether an alleged fundamental rule of procedure has been seriously breached is usually very fact specific, involving an examination of the conduct of the proceeding before the Tribunal.”⁴² The fact specific nature of this determination led an annulment committee to state that “the assessment of the seriousness criterion [...] should always be made on a case-by-case basis,”⁴³ which may make difficult the comparison of the decisions of *ad hoc* committees adduced by the Parties.

68. The Committee further notes that each party claims the *Wena* Annulment Decision to its advantage. Respondent finds support in the statement “[i]n order to be a ‘serious’

⁴⁰ Rejoinder, para. 17.

⁴¹ Background Paper (CLA-67), para. 101. Emphasis added by the Committee.

⁴² *Id.*

⁴³ *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment, July 3, 2013 (RLA-35), para. 37.

departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such rule been observed.”⁴⁴ On the other hand, Applicant refers to the dismissal of the request for annulment because the applicant in *Wena* did not show the impact that this issue may have had on the award.⁴⁵

69. The Committee observes that Professor Schreuer in his analysis of the meaning of “serious” in the practice of annulment committees reaches a conclusion in favor of the potential effect on the award relying on the same sentence of *Wena* as Respondent does in this proceeding to opposite effect. He comments as follows: “[i]n order to be serious the departure must be more than minimal. It must be substantial. In addition, the cases confirm that this departure must potentially have caused the tribunal to render an award ‘substantially different from what it would have awarded had the rule been observed.’”⁴⁶
70. The Committee is of the view that the choice between the two positions whether the departure had a material effect or had the potential to have a material effect will depend on the circumstances of the case and, therefore, it does not lend itself to a choice in abstract, valid in all cases. For instance, it is conceivable, to use an obvious example, that the right to be heard by a party is violated. If the tribunal has not heard that party on a relevant matter for its decision, it will never be known whether the tribunal would have decided differently had it heard the party in question. However in such a case it would be sufficient for an annulment committee to rely on the potential material effect on the award.
71. The Committee will be guided by these considerations in its analysis of the arguments of the Parties.

⁴⁴ *Wena* Decision (CLA-62), para. 58.

⁴⁵ Reply, para. 89.

⁴⁶ C. Schreuer *et al.* (CLA-32), p. 982, at para. 287. The quotation is from *Wena*, precisely the same as used by Respondent in defense of its position.

V. GROUNDS FOR ANNULMENT

72. The Committee's consideration of the Parties' arguments follows the structure used by Applicant in its Memorial on Annulment. Applicant contends that the Tribunal manifestly exceeded its powers, failed to give reasons and departed seriously from fundamental rules of procedure in respect of the meaning of Article VII.2 of the BIT and of the effect of Article VII.2 as interpreted by the Tribunal. Applicant has also pleaded that the Tribunal manifestly exceeded its powers and failed to give reasons for its decision on costs.

1. THE MEANING OF ARTICLE VII.2 OF THE BIT

A. Manifest Excess of Powers

a) Summary of the Positions of the Parties

73. Applicant claims that the Tribunal manifestly exceeded its powers on seven grounds. First, Applicant argues that the Tribunal improperly allocated the burden of proof. Respondent had raised the objection to the jurisdiction of the Tribunal and it was for Respondent to prove it. According to Applicant, when a respondent raises an affirmative defense it is for that respondent to prove the elements comprising such defense. In this case, Respondent raised as defense that Article VII.2 should be read as imposing a mandatory recourse to local courts for one year before resorting to international arbitration; the burden of proof was on Respondent.

74. Applicant points out that Respondent did not submit any documentary or testimonial proof showing that the parties to the BIT intended to impose a mandatory recourse to the judiciary. Applicant further notes that none of the BITs concluded by Respondent and publicly available provide for mandatory recourse to the local courts. Applicant submits that the Tribunal should have dismissed the objection for lack of proof and exercised jurisdiction on this ground alone.

75. Second, Applicant argues that the Tribunal failed to exercise jurisdiction, as it was entitled to do, on the plain reading of the English and Russian versions of the BIT. Applicant explains that the English authentic version served as the negotiation text used by the BIT parties. Applicant further argues that the disputed words "if" and "and" in Article VII.2 have both meaning: "[t]he word 'if' introduces the hypothetical situation where an

investor, at its own discretion, has chosen to bring a dispute before the local courts. In turn the word ‘and’ is the link between the situation where the investor has had recourse to the local courts and the fact that no award has been rendered within the year.”⁴⁷ The revised Russian translation eliminates “if”. According to Applicant, “to the extent that the Tribunal relied on the Russian version of the BIT to interpret Article VII.2, the interpretation should have been based on the translation by an independent expert and not on a revised interpretation of Respondent’s hired gun.”⁴⁸

76. Third, Applicant questions the reasons for the Tribunal not to be persuaded by the decisions in the cases of *Rumeli* and *Sistem* because both of them were brought under BITs containing the same language as Article VII.2. Applicant points out that neither state party to these cases ever tried to annul these awards, nor sought to clarify the clauses in their BITs with Turkey, which are similar to Article VII.2. Applicant contends that “[b]y de facto disregarding the case law on this very same point in relation to BITs concluded moreover within the same relevant period of time with neighboring Turkic States and Turkey and/or the corresponding accepted practice amongst States, the Tribunal manifestly exceeded its powers.”⁴⁹
77. Fourth, Applicant contends that, assuming that an interpretation of the text of Article VII.2 was necessary, the Tribunal failed to interpret the BIT in good faith, to give effect to the object and purpose of the BIT, and ignored the ordinary meaning of Article VII.2, the statements of Turkish officials and Applicant’s legal expert. In contrast, the Tribunal relied on assumptions made by Respondent’s experts who were not involved in drafting, signing and ratifying any of the four BITs with the Central Asia Turkic States.
78. Fifth, according to Applicant, Turkey’s intent that recourse to the local judiciary is optional is confirmed by Turkey’s own practice. Applicant points out that out of a total of 85 BITs signed by Turkey only four require mandatory recourse to the local courts. Applicant argues that this is not a policy concern of Turkmenistan since “no other publicly available BITs signed by Turkmenistan include a provision similar to that in Article VII.2

⁴⁷ Memorial, para. 207.

⁴⁸ *Id.* para. 212. Underlining in the original.

⁴⁹ *Id.* para. 229.

[...]”⁵⁰ Applicant adds in support of its argument that when Turkey has been a respondent in ICSID arbitration it did not “raise the mandatory nature of the recourse to local courts before resorting to arbitration as a jurisdictional objection, even though several of the arbitrations it was involved in were based on BITs that included provisions very similar and, in some cases, identical to the disputed one in the Turkey-Turkmenistan BIT without the investor having exercised any recourse before the Turkish judiciary.”⁵¹

79. Sixth, Applicant claims that to interpret Article VII.2 as requiring prior recourse to the local courts violates the object and purpose of the BIT and leads to an absurd result. Applicant points out that the interpretation of the Tribunal would mean that “Turkey prompted and negotiated a legal instrument that imposed on its own nationals, which were the only investors at the time and for a foreseeable future under the BIT, to litigate their investment dispute with the Turkmen State before the newly established Turkmen courts. The formula, as moreover interpreted by the Tribunal, would allow a Turkmen court to dismiss under any legal pretext the claims of the Turkish investors against the State within less than a year to be exempt from any liability, save for an action for denial of justice, which need to meet a higher threshold.”⁵²
80. Seventh, Applicant adduces here various grounds related to the reliance of the Tribunal on the revised English translation, on a linguistic expert to interpret the authentic English version of the BIT, on the non-existent authentic version of the Turkey-Kazakhstan BIT, and on the Turkish translation of the English authentic version as published in the Official Gazette. Applicant contends that each of these instances are independent violations of Article 52(1)(b), particularly because they were arbitrarily imposed over Claimant.
81. As regards Respondent’s request that certain documents be rejected by the Committee,⁵³ Applicant argues that they are not new under the terms of Procedural Order No. 1, because Mrs. Özbilgiç did not provide new evidence in her witness statement and affidavit. The submission letters of Turkish BITs to Turkey’s parliament (the “Submission Letters”)

⁵⁰ *Id.* para. 296.

⁵¹ *Id.* para. 297.

⁵² *Id.* para. 302.

⁵³ *See infra*, para. 90.

“relate to all three grounds for annulment raised by Kılıç in these proceedings, and in any event are intrinsically linked to the Turkish BITs and publicly available,” and the same applies to the Turkish BITs referred therein.⁵⁴

82. Respondent denies that the Tribunal failed to apply the applicable law. Respondent contends that the Tribunal interpreted and applied the relevant provisions of the BIT in light of the Vienna Convention. Respondent equally affirms that the Tribunal did not commit any error of law and in support refers to similar interpretative approaches adopted by tribunals in the interpretation of agreements concluded in multiple languages. According to Respondent, “[a] tribunal does not manifestly exceed its powers by adopting an interpretation of the applicable law that conforms with the interpretation of some prior tribunals and differs with that of others.”⁵⁵
83. As to the burden of proof, Respondent disputes that the Tribunal misallocated the burden of proof because, “while it is true that Respondent is the applicant with respect to the objection to jurisdiction at issue, it is also true that it is Claimant that bore the burden of establishing Turkmenistan’s consent to arbitration.”⁵⁶ Respondent further affirms to be a vain effort of Applicant to seek support in Article 26 of the ICSID Convention for the allegation that Turkmenistan bore the burden of proof. Article 26 does not require any specific allocation of the burden of proof to determine whether the prior recourse to the local courts is optional or mandatory. Moreover, according to Respondent, the Tribunal’s Interpretation Decision was not grounded on Kılıç’s failure to meet its burden of proof in this respect. Respondent points out that, under the guise of the alleged misapplication of the rules on burden of proof, Applicant seeks a *de novo* review of the Tribunal’s assessment of all the evidence, which the Committee cannot do.
84. Then Respondent turns to the argument that the Tribunal failed to apply the plain meaning of the English and Russian versions of the BIT. Respondent notes that Applicant, in its Request for Arbitration and relying only on the English version of the BIT, “recognized that, on its face, Article VII.2 of the BIT mandatorily requires prior submission of a dispute

⁵⁴ Reply, para. 11.

⁵⁵ Counter-Memorial, para. 76.

⁵⁶ *Id.* para. 81.

to national courts.”⁵⁷ Respondent further notes that only at the time the submissions on bifurcation were presented to the Tribunal did Kılıç change its position. In this respect, Respondent argues that, “Kılıç’s own change of position on the meaning of the English version of Article VII.2 of the BIT is the clearest proof that, as the Tribunal correctly found, there is no plain meaning of the English authentic version.”⁵⁸

85. Respondent also points out that, to elicit the plain meaning of Article VII.2, Applicant needs to rewrite the text of the English version and undermines the “plain meaning” argument. Respondent argues that the revised translation conveys precisely the complete sense of the Russian text. Respondent affirms that it is inadmissible that Applicant challenges the Tribunal’s reliance on Respondent’s revised English translation of the authentic Russian version of the BIT when Applicant itself never submitted an English translation of the authentic Russian version of Article VII despite the request of the Tribunal to do so in Procedural Order No. 1. Furthermore, Kılıç never agreed or consented to the first translation of the Russian version submitted by Respondent and objected to the appointment of an independent expert to confirm the revised Russian translation.
86. According to Respondent, Kılıç’s new translation and analysis of the authentic Russian version are inadmissible because they are entirely new arguments never made by Applicant in the arbitration proceeding, and the new translation is incorrect and ambiguous.
87. In respect of the third ground relied on by Applicant, Respondent points out that there is no *stare decisis* in international arbitration, at most, previous awards may provide guidance, but an arbitral tribunal is not bound by them. In any case Respondent disputes that the Tribunal disregarded the *Sistem* and *Rumeli* awards. According to Respondent, “the Tribunal carefully reviewed and studied the *Rumeli* and *Sistem* awards and found them unpersuasive for the purpose of interpreting the prior recourse requirement in Article

⁵⁷ *Id.* para. 90.

⁵⁸ *Id.*

VII.2 of the BIT.”⁵⁹ Furthermore, divergence of interpretation does not warrant annulment for manifest excess of powers.

88. Respondent contends that the Tribunal interpreted the text of Article VII.2 in strict accordance with the principles of interpretation in the Vienna Convention and did not violate the object and purpose of the BIT in its analysis of the ordinary meaning of the terms in each of the authentic versions. Respondent surmises that, “[w]hatever policy considerations Turkey and Turkmenistan may have taken into account in agreeing upon the Article VII.2 requirement of prior recourse, they specifically and expressly have chosen to do so and their choice must be respected.”⁶⁰
89. Respondent rejects the argument of Applicant that the Tribunal did not give proper weight to the evidence submitted in the underlying arbitration. Respondent affirms again that an annulment is not an appeal and annulment committees do not have the authority to review the original tribunal’s factual findings or to reassess the probative value of the evidence submitted. Furthermore, even if the documents in question were found “to represent Turkey’s view of Article VII.2, they could not constitute an authoritative interpretation of the intention of the parties to the BIT in the absence of an endorsement of that view by Turkmenistan.”⁶¹
90. Respondent refers to the new statement of Mrs. Özbilgiç submitted for the first time in this annulment proceeding. According to Respondent, this statement should be rejected because it is new evidence not submitted in the underlying arbitration and should be disregarded pursuant to Sections 16.2 and 16.3 of Procedural Order No. 1. In any case, Mrs. Özbilgiç was not fluent in English at the time the BIT was prepared, did not personally participate in discussions with the Turkic Republic’s representatives on their BITs with Turkey and her “alleged understandings or intentions when she was a junior member of GDFI staff in 1992 were obviously not universally held either by her colleagues or the other State parties to Turkey’s BITs, nor were they conveyed in the English text of Article VII.2 in a manner that would be understood by others as she

⁵⁹ *Id.* para. 118.

⁶⁰ *Id.* para. 125.

⁶¹ *Id.* para. 133.

supposedly intended.”⁶² Respondent also objects to the introduction in the annulment proceeding of the “Submission Letters” as well as the introduction of certain BITs, all on the basis that these documents were not before the Tribunal and are unrelated to the grounds for annulment as required by Procedural Order No.1.⁶³

91. Respondent turns to Applicant’s criticism of the Award because the Tribunal did not conclude, based on the BIT Submission Letter to parliament, that recourse to local courts is optional. Respondent points out that the BIT Submission Letter is just a unilateral statement, while the BIT as published in the Official Gazette has the status of law in Turkey. Moreover the Tribunal considered carefully the BIT Submission Letter and decided that it was trumped by the text of the BIT in the Official Gazette.
92. Respondent also addresses the argument of Kılıç related to other BITs for purposes of determining the meaning of Article VII.2. Respondent first points out that Applicant’s argument based on Turkish practice is based on reference to Turkish BITs that were not submitted in the underlying arbitration. Respondent contends that, in any case, the examples of BITs referred to by Applicant do not support Applicant’s preferred interpretation. Thus, the Turkey-Hungary treaty was done in three languages and the Hungarian version contains a mandatory local court requirement; the Turkey-Switzerland treaty was also done in three languages and the Turkish version requires first recourse to the local courts; the Turkish version of the Turkey-Croatia BIT includes a similar requirement. Respondent affirms that it is not possible to find a clear policy of Turkey. Turkey signed BITs with mandatory prior submission of a dispute to the local courts before and after the treaties with the Turkic Republics.
93. Respondent disputes Applicant’s contention that the Tribunal’s interpretation of Article VII.2 leads to an absurd result. Respondent explains: “Article VII.2 of the BIT provides for a mandatory multi-tiered mechanism requiring first a six-month period of settlement negotiations, then the submission of the dispute to the national courts, and only thereafter submission to an international tribunal if the national courts have not rendered a decision

⁶² *Id.* para. 140.

⁶³ Counter-Memorial, para. 32.

within one year.”⁶⁴ According to Respondent, this is not unusual in BIT practice and cannot be criticized as being absurd.

94. On Applicant’s seventh ground, Respondent argues that the Committee does not have authority to review the Tribunal’s original factual findings.

b) *Analysis of the Committee*

95. As a preliminary matter, the Committee needs to address the issue of whether the witness statement of Mrs. Özbilgiç, the “Submission Letters” and the Turkish BITs not submitted in the arbitration proceedings are admissible under Procedural Order No. 1. Article 16.2 of this order allows the submission of additional documentation provided that “[...] any and all additional evidence be related exclusively to the particular grounds for annulment raised in the Application for annulment and not to the underlying dispute in the original arbitration.” The Parties disagree on the relation of the additional documents to the grounds of annulment. For Respondent, Claimant has submitted the new documents as part of its arguments seeking to appeal the Award rather than its annulment. At the Hearing Respondent’s counsel stated:

It is precisely because annulment is not and cannot be an appeal that the new documents submitted by Claimant for the first time in this Annulment Proceeding must be disregarded. And so it’s not a matter, in our view, of your looking at them, studying them, and weighing them however you wish; our position is they must be totally disregarded because these documents include an entirely new Witness Statement by Mrs. Özbilgiç, who had never presented a Witness Statement in the prior arbitration and also a number of additional BITs and BIT Submission Letters which were not before the Kılıç Tribunal. And because they were not before the Kılıç Tribunal, they have no bearing on the Tribunal’s reasoning, and they have no bearing on any relevance to Claimant’s allegation of manifest excess of powers by that Tribunal because the Tribunal did not have those documents before it.⁶⁵

96. In the view of the Committee the terms of Procedural Order No.1 are not as trenchant as interpreted by Respondent. The key criterion is whether the new documentation relates to the grounds of annulment rather than whether they were documents before the Tribunal. This clarification notwithstanding, the documents objected by Respondent had been submitted in support of arguments that seek a reinterpretation of Article VII.2 by this

⁶⁴ *Id.* para. 158.

⁶⁵ Tr. 76:14-22, 77:1-9.

Committee, a task that exceeds its mandate as explained by the Committee later in this decision.

97. Another preliminary matter to be disposed by the Committee is the relevance of the *Sehil* Decision on Jurisdiction of February 13, 2015⁶⁶. This decision was issued after Applicant submitted its Reply and before Respondent submitted the Rejoinder. The arbitration in that case is an ICSID arbitration brought under the BIT. Counsel to the parties in that arbitration is the same as in these proceedings. Both Parties have discussed the *Sehil* decision *in extenso* during the Hearing and Respondent in the Rejoinder. Both, the Tribunal and the *Sehil* tribunal agree that Article VII(2) is ambiguous. The *Sehil* tribunal reached, however, a different interpretation of Article VII.2 from that of the Tribunal. Evidently the Tribunal did not have before it the *Sehil* decision and while the *Sehil* tribunal was aware of the Award and the Interpretation Decision it nonetheless reached a different conclusion.
98. Applicant relies on the *Sehil* decision in support of its argument that the Tribunal exceeded its powers and submits that the *Sehil* decision warrants annulment of the Kılıç Award “as otherwise the system would turn into the luck of the draw.”⁶⁷ Respondent in turn points out that “there is no basis from *Sehil* to find that there was a manifest excess of power by [the] K[ı]l[ı]ç Tribunal in interpreting VII. 2”⁶⁸ Respondent further asserts that there is no *stare decisis* and that it is “not the role of an *ad hoc* committee to bring about consistency between conflicting interpretations of an ambiguous decision because a definitive answer to something that is ambiguous may not exist.”⁶⁹
99. The Committee is of the view that just because a more recent non-binding interpretation of an ambiguous provision differs from how that provision has been interpreted earlier does not mean that the early tribunal manifestly exceeded its powers as argued by

⁶⁶ *Muhammet Çap and Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Decision on Respondent’s Objection to Jurisdiction under Article VII (2) of the Turkey-Turkmenistan Bilateral Investment Treaty, February 13, 2015 (RLA-30).

⁶⁷ Tr. pp.26:22; 27:1-2; 67:19-22.

⁶⁸ Tr. pp. 129:21-22; 130:1.

⁶⁹ Tr. pp 133:20-22; 134:1-2.

Applicant. The Committee will now turn to the grounds argued by Applicant in support of its contention that the Tribunal manifestly exceeded its powers.

100. Applicant's first argument, as summarized above, is that Tribunal wrongly placed the burden of proof on Applicant instead of requiring Respondent to sustain its objection to jurisdiction on the basis that Article VII.2 of the BIT required prior recourse to the local courts. Applicant alleges that Respondent did not provide any evidence in support of its allegations and that the Tribunal should have dismissed the objection and exercised jurisdiction.
101. The Committee first notes that the Tribunal did not discuss any issue of burden of proof or any of the Parties discussed the burden of proof as regards the objection to jurisdiction. The Tribunal did not in any way make it known that its decision was based on lack of proof provided by Applicant. While it is generally correct that the defense of a claim would be the responsibility of the defendant, and not of claimant to provide evidence sustaining it, it is also true that Applicant had to prove that Respondent had consented to arbitration under Article VII.2. Furthermore, the Tribunal itself has to be satisfied of its own jurisdiction.
102. The controversy on this issue relates to the revised English translation of Article VII.2 of the BIT from the Russian authentic text of the BIT provided by Respondent to the Tribunal three days before the January hearing.⁷⁰ Up to that moment, there had been no question as regards the English and Russian authentic versions of the BIT. Respondent ordered a new translation because, according to Counsel to Respondent, Russian speakers in the offices of Counsel noted that the existing English text did not convey accurately the meaning of the Russian text.
103. The Interpretation Decision noted that Claimant did not object to the revised translation at the time it was introduced, "[n]or did Claimant request the opportunity, or time, to provide a translation from another expert, or request the attendance of Respondent's translator at the hearing (or at a later date) for cross-examination."⁷¹ The Tribunal further noted that in

⁷⁰ See para. 29 *supra*.

⁷¹ Interpretation Decision, para. 8.14.

the closing arguments at the January hearing Counsel to Respondent requested the Tribunal to appoint an expert if did not believe in the revised translation or thought insufficient the sworn statement of the translator. It is also noted by the Tribunal (i) that Counsel to Claimant emphasized that the difference between the Parties was not on the translation, but on the interpretation provided by Respondent, and (ii) that on Respondent's proposition that the Tribunal appoint a Russian language expert, Counsel to Claimant stated:

I think that would be highly unusual. It would be a strange thing to do just in relation to the Russian text, and not the English text, and not the various Turkish texts. The Claimant has no desire to have further expenditures, and thinks it would be sufficient to have the pleadings of the parties on this point. And I say that, Mr. President, without having had any time to do more than to read the letter sent by the respondent. I've been out of the country and doing other things, so this is not an informed response.⁷²

The Tribunal at this point offered Claimant to come back to the Tribunal on this matter and gave Claimant additional time to consider the matter.

104. After the January hearing, the Tribunal wrote to the Parties that:

[...] having regard to: (a) the continuing uncertainty as to the accuracy of the translations into English of the Russian text of Article VII.2; and (b) the possible relevance of the translation into English of the Turkish version of Article VII.2 (as published in the Official Gazette), the Tribunal had decided to request two independent and qualified expert translators to provide it with English language translations of the relevant texts. The parties were provided with CVs for the proposed experts as well as the proposed instructions they were to receive. The Tribunal further advised that the parties would be given a reasonable opportunity to comment on such translation once they were in hand, and that the Tribunal would welcome comments, if any, on the Tribunal's intended instructions and on the choice of translators.⁷³

105. Respondent proposed to the Tribunal that the translator be asked: “[d]oes the Russian phrase, ‘*pri uslovii, esli*’, when used in a sentence create a double conditional or is it a construct that is used to create a single conditional the way either the words ‘on the condition that’, or the word ‘if’ create in the English language?”⁷⁴

⁷² *Id.* para. 8.14.

⁷³ *Id.* para. 8.16.

⁷⁴ *Id.* para. 8.17.

106. Claimant opposed the proposed retainer of a Russian expert translator by the Tribunal, and stated that, if the Tribunal insisted, then Respondent should pay for the exercise and objected to Respondent's request, indicating that

the Russian-English translator be asked not only to provide the translation of the text of Article 7(2) of the BIT but also give an opinion on, or make an interpretation in relation to, certain Russian words.⁷⁵

Claimant continued that “[i]t is notable that the Respondent does not seek to pretend that what it is asking for is a translation. It goes without saying that opinions and interpretations are not translations. It would not be appropriate in relation to the stated objective of the Tribunal in this exercise for the Tribunal to accede to the Respondent's request.”⁷⁶

107. Then the Tribunal advised the Parties that it would proceed to decide the BIT issues on the present record, but it reserved the right to instruct independent translators if necessary. The Tribunal did not instruct independent translators and concluded that

[T]he accurate translation of the authentic Russian text of Article VII.2 of the BIT for present purposes (*i.e.*, the one that conveys its true sense in Russian) is that set out in R-1 (revised). That is to say, a translation that has the word ‘if’ removed from the second line of sub-paragraph (c). In the view of the Tribunal, this more accurately conveys in the English language the sense of the Russian text.⁷⁷

108. The Tribunal was sensitive to the fact that the revised English translation of the Russian text was introduced three days before the January hearing. It recognized this fact and it equally recognized that

Respondent offered a plausible explanation for the reasons and timing of the revision. Moreover, Claimant did not object at that time to its introduction. Nor did Claimant request the opportunity, or time, to provide a translation from another expert or request the attendance of Respondent's translator at the hearing (or at a later date) for cross-examination.⁷⁸

109. As recorded in detail in the Interpretation Decision, the Tribunal received no evidence from Applicant on the meaning of Article VII.2. Claimant had the opportunity to object,

⁷⁵ *Id.* para. 8.14.

⁷⁶ *Id.* para. 8.19.

⁷⁷ *Id.* para. 8.22.

⁷⁸ *Id.* para. 8.10.

to introduce new evidence, to come back to the Tribunal after the January hearing, or to have independent experts give their translation or interpretation, as Applicant calls it. Applicant could have also appointed its own expert.

110. In the view of the Committee the question is not an issue of the Tribunal's shifting the burden of proof to Applicant, but of the Tribunal giving Applicant the opportunity to respond to the new evidence before the Tribunal and how Applicant used this opportunity. The new evidence, i.e., the revised translation, put in question the understanding that, until then, the Parties had of the meaning of Article VII.2. Respondent introduced the revised English translation in support of its objection to the jurisdiction of the Tribunal. Applicant decided not to introduce further evidence in response. An annulment proceeding is not the appropriate venue for the losing party in ICSID arbitration to make up for failures of the strategy followed by counsel in the arbitration proceeding.

111. The second ground adduced by Applicant in support of the manifest excess of powers is the alleged failure of the Tribunal to rely on the plain reading of the English and Russian versions of the BIT to decide whether Article VII.2 provided for an optional recourse to local courts.

112. Applicant contends that there is a plain meaning of Article VII.2; the meaning of the English and Russian authentic texts of the BIT, before the revised translation into English of the Russian version of Article VII.2 was submitted to the Tribunal on January 17, 2012. The non-Russian speaking Tribunal had before it a revised English translation of the authentic Russian text and the original English text. The Tribunal stated the following on the English text:

[...] the phrasing of the English is grammatically incorrect. Not only is it inelegant, as was conceded by Claimant, but the pertinent part of Article VII.2 contains a single word which does not immediately appear that it ought to be present, and would not be present if the text had been drafted by a native speaker. There are two different single words that might be removed: the word 'if' could be removed [...] or the word 'and' could [be] removed [...]. On either approach, the removal of one of those two words (but not both) would give the phrase grammatical

coherence. An issue that arises is which, if any, of the two words might be removed.⁷⁹

The Tribunal questioned a linguistics expert presented by Respondent. The Tribunal considered that the expert “[...] testified with considerable clarity and persuasiveness, that one would normally not expect two conditionals together (‘provided that’ followed by ‘if’), which is the only way one gets to an ‘optional’ text. On the other hand, the conjunctive ‘and’ has no business in any text, unless the local court provision is mandatory.”⁸⁰

113. The Tribunal concluded that “attempting to interpret the relevant English text in accordance with Article 31 of the VCLT leaves its meaning ambiguous or obscure.”⁸¹ It is not for the Committee to reach its own conclusion on whether the text of Article VII.2 of the authentic English version of the BIT is ambiguous or obscure. The Tribunal explained that it had difficulty with the use of the double condition “provided that, if” and how to make sense of the subsequent sentence. For the Committee, what is relevant is that the Tribunal reached its conclusion after hearing the Parties, analyzing the text and questioning the translator. It cannot be said that the Tribunal manifestly exceeded its powers by not exercising its jurisdiction on the basis of the plain meaning of Article VII.2. According to the Tribunal, such plain meaning alleged by Applicant was not supported by the Tribunal’s analysis of the text.

114. In its pleadings, Applicant refers to the Tribunal’s email of dated March 6, 2012 whereby it reserved its right to instruct an independent expert. Applicant argues:

It should have done so once it decided to disregard the initially agreed translation that was [sic] conform moreover with the authentic English and Russian versions of the Turkey-Kazakhstan BIT. The Tribunal members did not speak Russian. To the extent that the Tribunal relied on the Russian version of the BIT to interpret Article VII.2, the interpretation should have been based on the translation by an independent expert, and not a revised interpretation of Respondent’s hired gun.⁸²

⁷⁹ *Id.* para. 9.14.

⁸⁰ *Id.* para. 9.15.

⁸¹ *Id.* para. 9.17.

⁸² Memorial, para. 212. Underlined text in the original.

115. As we have already seen, the Tribunal tried to hire an expert and Applicant opposed it on grounds of cost and because of the question added by Respondent on the Russian expression. The Tribunal at the time refrained from instructing an expert given the Parties' views and announced that it would decide on the record. The Parties were advised that the Tribunal would proceed without appointing an expert. Given the opposition of Applicant to the retention of an expert by the Tribunal during the arbitration proceeding, it is somewhat incongruous at this stage to argue that the Tribunal should have engaged such expert.

116. The third ground advanced by Applicant is the failure of the Tribunal to follow the lead of the *Rumeli* and *Sistem* tribunals in interpreting Article VII.2. While Applicant finds the *Rumeli* and *Sistem* awards persuasive, the Tribunal did not. The Tribunal had no obligation to follow the interpretation by other arbitral tribunals of BIT articles identical or similar to Article VII.2. The Tribunal considered both decisions and explained why it was not persuaded. In the case of the *Rumeli* award, the Tribunal explains that the *Rumeli* tribunal concluded that the Turkey-Kazakhstan BIT did not require prior submission of the dispute to the local courts, but that tribunal reached this conclusion without analysis or reasoning in support. As a further reason, the Tribunal noted that, "the tribunal's reasoning in that case seems to have disregarded the Turkish text, which in that case was authentic, and plainly imposed a mandatory requirement to have recourse to the local courts."⁸³

117. The Tribunal also considered the *Sistem* award. The Tribunal noted that the *Sistem* tribunal concluded that it took "no position on the question because *Sistem* has not instituted any proceedings in the national courts against the Kyrgyz Republic."⁸⁴ The Tribunal found it difficult to rely on this conclusion because

It appears from the account of the *Sistem* case that the respondent there did not raise the same argument as the Respondent in the present case. It appears from the award that the *Sistem* tribunal did not consider the question that is before this

⁸³ Interpretation Decision, para. 9.9.

⁸⁴ Quotation in para. 9.11 of the Interpretation Decision. The quotation is from para. 106 of the *Sistem* award, but the footnote to para. 9.11 of the Interpretation Decision refers the reader to footnote 21. This footnote is in reference to the *Sistem* decision on jurisdiction and not to the award (*Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic* (ICSID Case No. ARB (AF)/06/1), Decision on Jurisdiction, September 13, 2007 (CLA-30).

Tribunal and disposed of the matter on a different basis, having regard to the different arguments of the parties.⁸⁵

118. In either case and irrespective of the merits of these reasons, they have to be considered in the context that the Tribunal had no obligation to adopt the views of the *Rumeli* and *Sistem* tribunals. A joint statement of the State parties to a treaty, as argued by Applicant, reflecting their understanding of controverted provisions may help arbitral tribunals to reach consistent decisions but states may choose not to issue such statement. To revise the interpretations and conclusions of tribunals in order to achieve uniformity of case law is not an objective within the limited terms of an annulment committee.
119. The fourth ground adduced by Applicant relates to the application of the VCLT to the interpretation of Article VII.2. The argument developed by Applicant has three angles: text of the BIT, supplementary means of interpretation and evidence presented by Applicant.
120. According to Applicant, the task of the Tribunal was to understand the intent of the state parties to the BIT but, instead, the Tribunal disregarded Turkey's intention. In support, Applicant contends that the Tribunal did not follow each of the stages of interpretation required for a textual analysis of Article VII.2 under Article 31 of the VCLT. Applicant highlights two elements of the textual interpretation missing from the analysis of the Tribunal. First, Applicant points out that Article VII.1 is written in mandatory terms: the notification of a dispute shall be in writing and the concerned party shall endeavor to settle the dispute. On the other hand, Article VII.2 is drafted in permissive terms: if the dispute cannot be settled within six months: "the dispute can be submitted, as the investor may choose, to [...]"
121. Secondly, the other missing element is consideration of the contradiction within Article VII created by an interpretation requiring prior recourse to the local courts, because

the investor is allowed to submit the dispute to arbitration six months after notice of the dispute while the said investor would have to wait twelve more months to bring the dispute to arbitration. In other words, a mandatory consideration of the Treaty reads against this clear provision in that one-year referral (in which no final

⁸⁵ Interpretation Decision, para. 9.13.

judgment is to be obtained) necessarily means that a dispute cannot be submitted to international arbitration within six months of presenting a notice of dispute.⁸⁶

122. The analysis of the text by the Tribunal is focused on whether “if” or “and” should be deleted from the text. The sentence “provided that, if ...” is analyzed without reference to the rest of the paragraph or of Article VII. On this limited analysis the Tribunal concludes that the text is ambiguous. There is no analysis of the context or of the purpose of the BIT before the Tribunal reaches out to the supplementary means of interpretation.
123. Among the supplementary means of interpretation the Tribunal considered the circumstances of the conclusion of the BIT. The Tribunal observed that Turkey entered into four BITs with Turkic States in the course of five days, the authentic versions of which include substantially identical provisions as those found in Article VII.2. The Tribunal also refers to the Turkey-Kazakhstan BIT signed the day before the BIT, which in its Turkish version requires mandatory recourse to the local courts. The Tribunal concludes that

the better view is that the English language version of Article VII.2 is properly to be interpreted as requiring mandatory recourse to the local courts. This view best reconciles the interpretation of the texts, having regard to the circumstances surrounding their adoption. The contrary view does not appear to find support in other circumstances surrounding the conclusion of the BIT.⁸⁷

124. Applicant argues that it provided the Tribunal evidence of the intention of Turkey when it signed the BIT while Respondent did not, and that the Tribunal disregarded Turkey’s intent and interpretation. In the instant case, the Tribunal considered the statements of Mrs. Özbilgiç and Mr. Kasimcan and found them not to be dispositive or persuasive. In the case of Mrs. Özbilgiç because the difficulty with her statement, “which limits its value, is that the certified English translation of the ‘official’ Turkish text [...] does not contain the word ‘if’”.⁸⁸ According to the Tribunal, the same reason applies to the statement of Mr. Kasimcan. In a footnote the Tribunal explained that it rejected

Claimant’s argument that the ‘official’ Turkish version of the BIT was mistranslated. The Tribunal reaches this conclusion having regard to the

⁸⁶ Memorial, para. 246.

⁸⁷ Interpretation Decision para. 9.21.

⁸⁸ *Id.* para. 9.7.

mandatory Russian text of the BIT and because of the identity of the ‘official’ Turkish text with the authentic Turkish text in the Turkey-Kazakhstan BIT.⁸⁹

The statements of Mrs. Özbilgiç and Mr. Kasimcan,⁹⁰ relied on the text of the Submission Letter of the BIT to the Turkish parliament while the Tribunal relied on the text of the BIT as published in the Official Gazette. In a further footnote the Tribunal explained that,

[it] does not disregard [...] the Council of Ministers’ letter to the Turkish Parliament, which described Article VII in terms which support the meaning of the relevant text as being optional. However, such a memorandum describing the draft Law on the Approbation of the Approval of the BIT is trumped by the subsequent publication in the Official Gazette of the ‘official’ Turkish translation of the authentic English version of the BIT in terms which are unquestionably mandatory.⁹¹

125. The Committee concludes that the Tribunal considered the evidence submitted by Applicant but for the reasons given was not convinced. The supplementary means of interpretation were properly used since it had reached the conclusion that the text was ambiguous. Nonetheless the Committee notes that the Tribunal reached the conclusion that the text is ambiguous without an express analysis of the context of Article VII.2 and of the object and purpose of the BIT as required by Art. 31 of the VCLT. From the Tribunal’s Award it is not quite clear whether these steps were ignored, found to be irrelevant, or used but not mentioned before reaching out for the supplementary means of interpretation for the interpretation of Art. VII.2 of the BIT. What is clear is that the Tribunal generally took into account the relevant Articles of the VCLT: The Award expressly mentions Respondent’s reasoning on the object and purpose of the BIT,⁹² expressly cites Arts. 31 and 32 VCLT with special references to the context and object and purpose⁹³ and states that the Majority finds Prof. Park’s reasoning based on the “key purposes of the BIT” not persuasive.⁹⁴ Even though one might consider that these references could have been reiterated in further detail before interpreting Article VII.2 as

⁸⁹ *Id.* n. 41.

⁹⁰ Mrs. Özbilgiç and Mr. Kasimcan, officials of the Turkish government, submitted, on behalf of Claimant, an email and a letter respectively, during the course of the arbitration proceedings advocating for the optionality of Art. VII. 2. *See* Interpretation Decision, para. 3.20.

⁹¹ *Id.* n. 48.

⁹² *See* Award, paras. 3.3.54 -3.3.56.

⁹³ *Id.* paras. 5.2.1-5.2.6.

⁹⁴ *Id.* para. 6.5.4.

ambiguous, the Committee finds that the Tribunal's use of the supplementary means of interpretation is at least plausible if one considers the full context of the Award.

126. Under the fifth ground, Applicant argues that Turkey's own practice confirms Turkey's intent that recourse to the local judiciary is optional. Applicant grounds its argument on an extensive review of the practice of Turkey as signatory of 85 BITs. There is no record that such practice was presented by Applicant to the Tribunal. It may have been helpful to that Tribunal, but this proceeding is not the venue to re-argue the case with new arguments and evidence that was not before the Tribunal.
127. The sixth ground advanced by Applicant is that mandatory recourse to the local judiciary would violate the object and purpose of the BIT and lead to an absurd result. Applicant is concerned that, if the local courts would decide on the investor's claim before one year, the investor would lose the protection afforded by the BIT save for an action for denial of justice. As a general matter, it is arguable that optional recourse to local courts may be considered as more fitting with the purpose of the BIT, but mandatory prior recourse to the local courts is not per se absurd or contrary to the BIT's purpose, even if it limits the grounds on which an investor could pursue its claims in arbitration if the courts decide within a year.
128. The seventh ground aggregates four arguments that, except for the argument related to the Turkey-Kazakhstan BIT, the Committee has already considered as part of the six other grounds for manifest excess of powers. The Committee will consider the argument in respect of the Turkey-Kazakhstan BIT as part of the next section. As regards the other grounds and for the reasons explained above, the Committee reaches the conclusion that Applicant has not proven that the Tribunal manifestly exceeded its powers.

B. *Failure to State Reasons*

a) *Summary of the Positions of the Parties*

129. Applicant claims that the Tribunal failed to state reasons in the following thirteen instances because it failed:

- (i) to explain the question of the burden of proof, the rules on evidence or the rules of interpretation that followed,
- (ii) to balance the probative value of the evidence on the record,
- (iii) to explain why it relied on the revised English translation of the Russian authentic version of the BIT,
- (iv) to explain why it relied on a linguistic expert to interpret a legal text,
- (v) to explain why it consider as interpretation the evidence provided by the Turkish State whereas this was evidence of the intention of the drafter,
- (vi) to explain why it relied on the Turkish authentic version of the Turkey-Kazakhstan BIT when no signed or authentic version was on the record,
- (vii) to explain why it relied on the Turkish authentic version of the Turkey-Kazakhstan BIT and it refused to rely on the English and Russian authentic versions of that BIT,
- (viii) to explain why it relied on the Turkish version of the BIT when it ruled that only English and Russian authentic versions existed,
- (ix) to explain why it relied on the Turkish version of the BIT published in the Official Gazette and the Turkish version of the Kazakh-Turkey BIT and not on the Turkish authentic version of the Turkey-Latvia BIT,
- (x) to explain the contradiction between its statement at paragraph 9.23 of the Decision that the Russian authentic version of the BIT is “*clearly mandatory*” with respect to the recourse to the local judiciary and the efforts and acrobatics it and Respondent had to undertake to reach this holding via moreover a revised opinion/translation and/or its general holding at paragraph 9.2.6 of the Award that the “*meaning of that requirement was mostly not clear,*”⁹⁵

⁹⁵ Memorial, para. 306.10. Emphasis in the original footnotes omitted.

(xi) to explain why it expected the arbitral tribunal in *Rumeli* to state reasons for the dismissal of a similar jurisdictional objection,

(xii) to explain why the Tribunal expected Kyrgyzstan to raise the same argument as Turkmenistan for the *Sistem* decision to be given probative value, and

(xiii) to explain “the practical considerations of its findings and what would have been the scope of substantive protection that Claimant would be entitled to should its recourse to the local judiciary lead to an adverse award within one year.”⁹⁶

130. According to Applicant, each one of these acts and omissions of the Tribunal constitutes a failure to state reasons under Article 52(1)(e) of the ICSID Convention.

131. Respondent replies: “[t]he Tribunal explained why it found that Article VII.2 provided for mandatory recourse to local courts, on both a legal and factual basis. The Tribunal explained how it determined the number of authentic versions of the BIT, how it interpreted Article VII.2 in accordance with the Vienna Convention and in particular (i) how it interpreted the authentic Russian version of the BIT as providing for mandatory recourse to local courts, (ii) why it concluded that the authentic English version was ambiguous, (iii) and in light of this ambiguity, how it had recourse to supplemental means of interpretation to elucidate the meaning of the authentic English version of the BIT and concluded that Article VII.2 requires mandatory recourse to local courts as a precondition to commencing an arbitration.”⁹⁷

132. Respondent addresses each one of Applicant’s allegations. According to Respondent, the Tribunal (i) explained the rules on interpretation that followed, (ii) considered all the evidence on the record, (iii) provided ample reasons why it found that the accurate translation into English of the authentic Russian version of Article VII.2 was Respondent’s revised translation, (iv) explained how Respondent’s linguistic expert’s report confirmed

⁹⁶ *Id.* para. 306.13

⁹⁷ Counter-Memorial, para. 190.

the Tribunal's conclusion that the authentic English version of Article VII.2 of the BIT is ambiguous, (v) explained why the evidence of Turkey's unilateral intent did not help interpreting Article VII.2, (vi) explained that it relied on the Turkish version of the Turkey-Kazakhstan BIT as a supplemental means of interpretation under Article 32 of the Vienna Convention, (vii) explained why it relied on the authentic Turkish version of the Turkey-Kazakhstan BIT, (viii) explained that it relied on the Turkish version of the BIT as a supplemental means of interpretation under Article 32 of the Vienna Convention, (ix) explained why it relied on the official Turkish text of the BIT as published in the Official Gazette and the Turkish version of the Kazakh-Turkey BIT, (x) amply explained why it found the local court requirement as "clearly mandatory" in the authentic Russian version of Article VII.2, (xi) explained why it did not find the *Rumeli* award convincing, (xii) explained why it did not find the *Sistem* award convincing, and (xiii) was not called upon to decide on the scope of substantive protection that Claimant would be entitled to in case of an adverse judgment of the local courts within one year.

b) Analysis of the Committee

133. At the outset, the Committee notes that arbitral tribunals have no obligation to expressly address, in their awards, every single issue and argument raised by the parties. Tribunals have discretion to focus on those issues and arguments that they find determinative for their decision and not to address in their awards arguments of the parties that they find to be irrelevant. Even more so, making use of that discretion is not by itself a reason for nullification under Article 52.1(e) of the ICSID Convention.
134. Nevertheless, the Committee will take one by one the arguments of Applicant in support of its claim that the Tribunal failed to state reasons; in so doing the Committee is mindful that it is not its mandate to review the quality or sufficiency of the reasons as it has already noted earlier in this decision.
135. The first argument in support of failure to state reasons is related to the burden of proof and the rules of evidence or interpretation followed by the Tribunal. As regards the burden of proof, the Committee has already found that Applicant's argument is misplaced and not supported by what the Tribunal did. The Tribunal gave an opportunity to present evidence in response to the new evidence introduced by Respondent three days before the January

hearing. Applicant did not present its own evidence to rebut Respondent's evidence and it did not object to the introduction of Respondent's evidence at the time.

136. As to the rules of interpretation, the Tribunal relied on Articles 31 and 32 of the VCLT as explained it in its Interpretation Decision: “[i]n the event, the Tribunal concludes that attempting to interpret the relevant English text in accordance with Article 31 of the VCLT leaves its meaning ambiguous or obscure. In these circumstances, it is appropriate for the Tribunal to consider supplementary means of interpretation as permitted under Article 32 of the VCLT.”⁹⁸ Then the Tribunal considers the circumstances of the conclusion of the BIT as supplementary means of interpretation under Article 32 of the VCLT.
137. It is correct, as argued by Applicant, that the Tribunal did not expressly consider the context of Article VII.2 or the object and purpose of the BIT in its analysis of Article VII.2 under Article 31 of the VCLT. The Tribunal reached the conclusion on the obscurity or ambiguity of the text of this article without following each of the steps to interpret a treaty under Article 31 of the VCLT. From that conclusion the Tribunal passed on to the supplementary means of interpretation. Article 32 provides that recourse may be had to supplementary means of interpretation, “including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure, or [...]” The Tribunal acted consequently to its conclusion on the obscurity of the text. With regard to how the Tribunal reached the conclusion on the ambiguity of the text, the Committee already concluded that the Tribunal's reasoning can be at least considered plausible though more detail might have made that reasoning clearer. Tribunals have a considerable discretion in how much detail they present at every single step of their legal reasoning in their awards.
138. Applicant questions the selection by the Tribunal, without giving reasons, of the translation of the Russian version of the BIT as revised by Respondent. The Tribunal explained the selection on the basis that it found it to be the accurate English translation. Applicant also questions the reliance of the Tribunal on the Turkish text of the Turkey-

⁹⁸ Interpretation Decision, para. 9.17.

Kazakhstan BIT. The Tribunal explained that, under Article 32 of the VCLT, it relied on BITs concluded around the date of the Turkey-Turkmenistan BIT. The Turkey-Kazakhstan BIT was concluded a day before the Turkey-Turkmenistan BIT.

139. Applicant also states that the Tribunal failed to give reasons for the rules of evidence that it followed. As a general matter, under the ICSID Arbitration Rules tribunals have ample discretion in the appreciation of the evidence furnished by the parties. In particular, Applicant argues that the Tribunal failed to explain why the probative value of the BIT Submission Letter was lower than that of the non-authentic and mistranslated version of the BIT. The Tribunal relied on a text published in the Official Gazette of Turkey; unless corrected this would be the law of the country as against an explanatory document to the parliamentarians. The Tribunal cannot be blamed for paying due attention to a text that by definition is the law of Turkey.
140. Applicant also criticizes the Tribunal for not giving reasons for the weight given to the Turkish text of the BIT published in the Official Gazette when it had found that the English and Russian versions were the authentic versions of the BIT. The Tribunal had recourse to the Turkish text after it found the English text obscure. The text published in the Official Gazette is the law of Turkey; it needs no further explanation that the text of a published law carries considerable weight.
141. Applicant is particularly critical of the use by the Tribunal of the Turkish version of the Turkey-Kazakhstan BIT when no authentic or signed version was on the record and disregarded the authentic Turkish version of the Turkey-Latvia BIT, which clearly provided optional prior recourse to the local courts. Applicant notes that the Tribunal reflected this argument of Applicant in the Decision and it had been discussed at the January hearing, but “the Tribunal failed to discuss this argument *at all* in its legal analysis, and therefore did not state the reasons why it apparently dismissed the Turkey-Latvia BIT.”⁹⁹

⁹⁹ Reply, para. 214.9. Emphasis in the original.

142. Under the “Claimant’s Case” the Tribunal described the argument of Applicant in the context of the discussion on the accurate translation into English of authentic versions of the BIT. The description of the Tribunal is as follows:

Claimant points to the fact that, although the English language versions of Article VII.2 in the two treaties are identical, the authentic Turkish language version of the Turkey-Latvia BIT states clearly that an investor has an option or discretionary power to bring a dispute to the courts of the host state.

Claimant maintains that because the Turkish version of the relevant provision of this treaty is authentic, this shows that a translation mistake was made when the same authentic English language version of Article VII.2 of the BIT was translated into Turkish for publication in the Official Gazette.¹⁰⁰

143. Notwithstanding recording Applicant’s argument and the discussion at the January hearing, the Tribunal did not address the argument of Applicant in its reasoning. On the other hand, the Tribunal explained why it considered the Kazakhstan BIT and the other BITs with Turkic states. The Tribunal was concerned with the circumstances of the conclusion of the Turkey-Turkmenistan BIT and noted: “[t]he closest thing to a Turkish version of the BIT that seems, on the evidence before us, to have existed at the time is the Turkish version of the Turkey-Kazakhstan BIT that was signed on 1 May 1992.”¹⁰¹ As indicated during the arbitration hearing, the Latvia BIT was entered a few years later in 1997 and was only published in 1999. The concentration of the attention of the Tribunal on Turkey’s BITs with Turkic states is consistent with the reliance of the Tribunal on the terms of Article 32 of the VCLT. The Tribunal explained its focus on the treaties concluded contemporaneously with the Turkey-Turkmenistan BIT, it did not need to give reasons why it did not consider others.

144. A constant thread in Applicant’s arguments is that the revised English version of Article VII.2 is an interpretation of the Russian text rather than a translation. The so-called interpretation was explained to the Tribunal at the January hearing. The Tribunal relied on the explanations of the linguistic expert. The Tribunal was non-Russian speaking; it had two versions of the English text. The Tribunal decided in favor of the revised English version, which the Tribunal found to be the accurate version. The Tribunal had proposed

¹⁰⁰ Interpretation Decision, paras. 3.16-3.17.

¹⁰¹ *Id.* n. 36.

to the Parties to engage an expert. Applicant did not agree on the terms of reference. While the Tribunal retained its right to appoint an expert, it never promised that it would appoint one. The Tribunal was very clear that it would decide on the record as it stood. The Tribunal did not need to explain further why it did not retain an expert itself.

145. As regards the *Rumeli* award, Applicant argues that, “the Tribunal failed to state the reasons why it imposed a certain persuasiveness test requiring a particular reasoning from the *Rumeli* tribunal.”¹⁰² As the Committee reads the Decision, the Tribunal simply stated that it was not persuaded because the *Rumeli* tribunal did not provide an analysis or reasoning to support its conclusion. The Committee believes it is timely to repeat that the Tribunal had no obligation to follow the *Rumeli* tribunal interpretation of an article equivalent to Article VII.2. At best arbitral tribunals may be guided by or find persuasive the decisions of other tribunals; they may also ignore them. In the instant case, the Tribunal considered the award, was unconvinced and stated why.
146. Applicant raises the same issue in respect of the *Sistem* award. To avoid repetition, the Committee refers *mutatis mutandis* to its comments in the previous paragraph.
147. The last ground argued by Applicant to state that the Tribunal failed to state reasons is related to the effect of the interpretation of the Tribunal and will be more appropriately addressed later in this decision. As regards the other arguments for failure to state reasons, Applicant has failed to convince the Committee of their merit.

C. *Departure from a Fundamental Rule of Procedure*

a) *Summary of the Positions of the Parties*

148. Applicant argues that the Tribunal disregarded the rules on the burden of proof by failing to place the burden on Respondent; the improper reversal of the burden of proof is an abuse of the Tribunal’s discretion to form its own view on the relevance and weight to be accorded to the evidence. In addition, Applicant adduces the following as grounds for annulment under this heading (i) the de facto delegation to interpret the BIT text in dispute to a translator, (ii) that the Tribunal based its ruling on an unsigned document or unproven

¹⁰² Reply, para. 214.11.

to be the authentic Turkish version of the BIT, (iii) that the Tribunal did not treat the Parties equally, and (iv) that the Tribunal relied on the Turkish authentic version of the Turkey-Kazakhstan BIT and refused to rely on its English and Russian authentic versions.

149. It is Applicant's contention that each of these acts or omissions constitutes a serious departure from a fundamental rule of procedure.

150. Respondent affirms that the burden of proof lies with Claimant to demonstrate that the Tribunal has jurisdiction, and explains that

[w]hile it is true that Respondent is the applicant with respect to the objection to jurisdiction at issue, it is also true that it is Claimant who bears the burden of establishing Turkmenistan's consent to arbitration. The question of whether or not Article VII.2 requires that the dispute be submitted to local courts as a precondition to the host State's consent is dispositive of the existence of Turkmenistan's consent to arbitrate the present case."¹⁰³

Respondent adds that, in any event, the Tribunal did not rule on the interpretation and meaning of Article VII.2 of the BIT on the ground that Kılıç did not meet its burden of proof.

151. As regards Applicant's arguments on the Tribunal's delegation of the mission to interpret Article VII.2 of the BIT to a translator and the Tribunal's reliance on the Turkish version of the Turkey-Kazakhstan BIT, Respondent affirms that it is another attempt to obtain a review by the Committee of the evidence submitted in the arbitration. Respondent recalls the arguments made in response in the discussion on the manifest excess of powers.

152. Then Respondent addresses Applicant's argument that the Tribunal treated the Parties unequally in its treatment and assessment of the evidence. This argument is related to the Tribunal's reliance on the Turkish version of the Turkey-Kazakhstan BIT. According to Respondent "the Tribunal carefully reviewed and weighed all of the evidence submitted by both Parties and concluded that Article VII.2 provides for mandatory recourse to local courts. In doing so, the Tribunal did not depart from any rule of procedure."¹⁰⁴

¹⁰³ Counter-Memorial, para. 178.

¹⁰⁴ *Id.* para. 188.

b) Analysis of the Committee

153. The Committee recalls what it has said under previous sections on the question of the shifting of the burden of proof. The argument of Applicant is based on Applicant's belief that Respondent did not prove that the State parties to the BIT had the intention to introduce a mandatory recourse to the local courts. The Tribunal evaluated the evidence that was presented by the Parties and decided otherwise. The decision of the Tribunal is not based, as Applicant's argument would seem to imply, on Applicant's failure to discharge its burden of proof. Respondent introduced new evidence and the Tribunal gave an opportunity to Applicant to respond. This is part of the equal treatment of the Parties in a judicial procedure. How or why Applicant took or did not take advantage of this opportunity is a matter for Applicant itself to judge.
154. Applicant contends that the Tribunal based its ruling on "an unsigned document and/or unproven to be the authentic Turkish version."¹⁰⁵ The Committee will not second-guess the Tribunal's appreciation of the evidence on which it relied. It will simply observe that the "ruling" of the Tribunal was not only based on the Turkey-Kazakhstan BIT. The Tribunal relied on other BITs "in addition" to the Turkey-Kazakhstan BIT.
155. Applicant further complains of unequal treatment by the Tribunal because it "relied on the [alleged] Turkish authentic version of the Turkey-Kazakhstan BIT whereas it refused to rely on the English and Russian authentic versions thereof (which were identical to the English and Russian authentic versions of the BIT) including for the purposes of translating into English the Russian authentic version of the BIT [...]."¹⁰⁶ The English and Russian authentic versions of the Turkey-Kazakhstan BIT were identical to the authentic English and Russian versions of the BIT, hence the reasons for not relying on the English version of the Turkey-Kazakhstan BIT would be the same as explained by the Tribunal for not relying on the authentic English version of the BIT. In this context it is understandable that the Tribunal would look into the Turkish version of the Turkey-Kazakhstan-BIT that the Tribunal considered authentic and that contained substantially

¹⁰⁵ Memorial, para. 316.

¹⁰⁶ *Id.* para. 319.

identical terms to those of the BIT as published in the Official Gazette. The Tribunal went on to note: “[t]he Turkish legal experts for both parties agree on this point.”¹⁰⁷

156. In the view of the Committee the Tribunal did not “refuse” to rely on any particular version of the various treaties before it. The Tribunal considered them and for the reasons that the Tribunal explained it found a particular version more convincing. The fact that it did not find convincing the arguments of Applicant is not a basis for a claim of unequal treatment in the appreciation of evidence.
157. Applicant has also argued under this heading that it delegated the interpretation of the BIT to a translator. In the view of the Committee, a translation of a document is not a delegation to interpret the document. A translation has to make sense in the language that it is translated into, whether the translation is literal or liberal. The consideration of this issue by the Tribunal cannot be isolated of what else the Tribunal did to ascertain the meaning of the text and that the Committee has by now repeated a number of times in this decision.
158. In sum, for the above reasons the Committee is unable to conclude that the Tribunal departed from a fundamental rule of procedure.

1. THE EFFECT OF ARTICLE VII.2 AS INTERPRETED BY THE TRIBUNAL

A. Manifest Excess of Powers

a) Summary of the Positions of the Parties

159. Applicant contends that the Tribunal exceeded its powers by disregarding or grossly misapplying the BIT and the Vienna Convention, by grossly misapplying or failing to set the standard to excuse Claimant from recourse to local courts, and by *de facto* imposing a recourse to local courts in order to test the futility test and thus not allowing derogation from the mandatory recourse as it exists under international law.

¹⁰⁷ Interpretation Decision, para. 9.19, n. 47.

160. Respondent argues that the Tribunal's finding that Article VII.2 provides for mandatory recourse to the local courts as a precondition to jurisdiction cannot constitute an egregious error when other tribunals before and after the Award have found that similar provisions requiring mandatory recourse to local courts constituted preconditions to jurisdiction, as opposed to admissibility.

b) *Analysis of the Committee*

161. Applicant by and large repeats the arguments presented under the chapter on *The Meaning of Article VII.2*. Applicant explains that it is

not challenging for annulment purposes the Tribunal's conclusion that the requirements set forth in a dispute settlement clause form part of the State's consent to arbitration. Claimant, however, challenges the Tribunal's specific finding that Article VII.2 of the BIT contains a mandatory recourse to local courts that is a precondition to its jurisdiction for the simple reason that there is no requirement of mandatory recourse to local courts [...]"¹⁰⁸

Here Applicant remits to its arguments on the meaning of Article VII.2. The Committee will address these arguments to the extent that they refer to the application of the VCLT in the context of the effect of the interpretation of Article VII.2.

162. In the Award the Tribunal sets the stage for the application of Articles 31 and 32 of the VCLT by referring to the principles of interpretation enumerated in the comments of the ILC on the Final Draft of the Convention of 1966. The Tribunal states:

Article 31(1) envisages the ordinary meaning to be given to the terms of a treaty in their context. Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty. *i.e.*, its text including its preamble and annexes and the other means mentioned in Articles 31(2) and 31(3).¹⁰⁹

163. The Tribunal reasons:

It is a fundamental principle that an agreement is formed by offer and acceptance. But for an agreement to result, there must be acceptance of the offer *as made*. It follows that an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into

¹⁰⁸ Memorial, para. 327.

¹⁰⁹ Award, para. 5.2.6.

existence through a qualifying investor's acceptance of a host state's standing offer as made [...]"¹¹⁰

Then the Tribunal states that "in order for the necessary consent/agreement in writing to result, the offer must have been accepted on the basis of, and having regard to, the conditions explicitly set out in the BIT."¹¹¹ The Tribunal concludes: "the requirements set forth in Article VII.2 are to be treated as conditions, and that the failure to meet those conditions goes to the existence of the Tribunal's jurisdiction, and are not to be treated as issues of admissibility."¹¹² Having found that the conditions for jurisdiction have not been met, the Tribunal concludes that it has no jurisdiction to suspend the proceedings.

164. Applicant's substantive argument is that the result of the interpretation defeats the crucial component of an effective treaty protection, namely, access to a fair and efficient means of settlement. Applicant is concerned that if a final decision from a local court is issued within one year, then the investor is barred from bringing a claim to arbitration unless it can show denial of justice. Applicant's criticism is based on arbitrator Park's separate opinion: "[i]f the investor in the current proceedings files a second arbitration following a swift judgment denying treaty rights, the claim can be heard only if a new tribunal treats the proviso as something other than the *ab initio* jurisdictional precondition asserted in the Award."¹¹³

165. The Tribunal addressed the issue raised in Arbitrator Park's opinion as follows:

Just as a requirement to exhaust local remedies may be disregarded when it can be shown that no remedy is available, or an attempt at exhaustion would be futile, an ICSID tribunal that was presented with evidence that a respondent's domestic court had decided unfairly against a claimant investor, albeit within one year, could nevertheless exercise jurisdiction assuming that the other conditions had been met. In other words, the mere fact that domestic proceedings had been initiated, and they had been unfairly concluded within a year, would not of itself be a bar to jurisdiction.¹¹⁴

¹¹⁰ *Id.* para. 6.2.1. Emphasis in the original.

¹¹¹ *Id.* para. 6.3.14.

¹¹² *Id.* para. 6.3.15.

¹¹³ Separate Opinion, para. 22.

¹¹⁴ Award, para. 6.5.4.

166. Irrespective of the merits of the reasoning of the Majority of the Tribunal, this is a matter that would be decided by another tribunal unbound by findings of the Tribunal. For the Committee, the determinant factor is that the Tribunal had considered the conditions as conditions precedent to consent to jurisdiction and consequently it decided that it had no jurisdiction to suspend the proceeding. Faced with the same question, other tribunals have decided differently on questions of jurisdiction and admissibility; it is not for the Committee to favor one or the other of these positions.
167. Applicant questions the futility standard chosen by the Tribunal and how the Tribunal applied it. Applicant refers to the following statement of the Tribunal:

Article VII.2 of the BIT does not require the exhaustion of local remedies as the concept is understood under international law. It simply requires an investor with a dispute to take the matter to the host state's courts and not have received a final award within one year.¹¹⁵

This notwithstanding, according to Applicant, the Tribunal applied the same standard as if the local remedies rule would apply. Applicant contends that, on the basis of *Daimler* and *Ambiente Ufficio*, the test should be lower: “the Tribunal should have checked whether (i) recourse to a local court was available, and (ii) the investor was not prevented from complying with the requirement to go before the local courts.”¹¹⁶

168. It is not evident, and Applicant does not explain it, in what way the standard set by *Daimler* is lower. The *Daimler* tribunal stated “the Claimant has not asserted that it lacked a cause of action before the Argentine courts or that it was in some other way prevented from complying with the requirements of Article 10(2).”¹¹⁷ The *Ambiente Ufficio* tribunal is more explicit: “the threshold to be met for the futility exception to be realized in the present case cannot possibly be considered higher than in the context of diplomatic protection; on the contrary, it is arguably rather lower.”¹¹⁸

¹¹⁵ Award, para. 8.1.7.

¹¹⁶ Memorial, para. 347.

¹¹⁷ *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, August 22, 2012 (CLA-173), para. 191, quoted in Memorial, para. 347.

¹¹⁸ *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, February 8, 2013 (CLA-171), para. 602, quoted in Memorial, para. 344. Underlining in the original.

169. The Committee first observes that the Tribunal did not affirm that the threshold must be lower, but “arguably” lower, a qualified affirmation. Secondly and more importantly, Applicant did not argue in the underlying arbitration whether the standard to apply should be lower because recourse to the local courts under Article VII.2 of the BIT was analogous but not identical to an obligation to exhaust remedies under international law. Rather, Applicant argued in its counter-memorial in the arbitration proceeding that the rule of exhaustion of local remedies was a flexible rule. Applicant did not establish a difference between the standard to apply in the case of the requirements of Article VII.2 as opposed to the applicable standard under the exhaustion of local remedies rule. Applicant left it in the hands of the Tribunal: “[i]t is the prerogative of the international tribunal before which the issue is raised to determine whether local remedies worth exhausting are indeed available and effective, rather than merely theoretical or illusory.”¹¹⁹ This is what the Tribunal did.

170. Thirdly, the Tribunal had no obligation to follow the precedents advocated by Applicant because they had not been brought to the attention of the Tribunal and because of the non-applicability of the *stare decisis* doctrine in international arbitration.

171. As regards the application of the standard, Applicant claims that the Tribunal failed to apply it or applied it in a manner that rendered moot any possible derogation of the mandatory recourse to the judiciary. Here the arguments of Applicant relate to the appreciation by the Tribunal of the evidence submitted by Applicant. The Tribunal reviewed it and found that “Claimant has tendered no evidence - whether in the form of a witness or expertise - to support its assertion. Nor has Claimant sought to offer any explanation or account as to its failure to tender such evidence.”¹²⁰ The Tribunal commented further:

Claimant’s futility analysis is based principally on broad statements and third party studies/reports, to the effect that the Turkmen judiciary lacks independence, and that the Turkmen authorities would have had a particular aversion to Turkish investors. The Tribunal considers, however, that if a party to proceedings such as these is to make a futility argument, it has the onus of showing that recourse to the Contracting State’s courts would be futile or ineffective, and that requires the

¹¹⁹ Reply, n. 434, referring to Claimant’s Counter-Memorial, para. 35 (CLA-18)

¹²⁰ Award, para. 8.1.5.

tendering of probative evidence that goes to the specificity of the issue in dispute. It is not enough to make generalized allegations about the insufficiency of a state's legal system. Against the backdrop of relevant Turkmen laws introduced into the record by Respondent, such material as has been relied upon by Claimant cannot constitute sufficient evidence of unavailability or ineffectiveness.¹²¹

172. The appreciation of evidence is the prerogative of the Tribunal and it is not the Committee's mandate to re-appraise it. The Committee will return to Applicant's argument below when considering Applicant's claim of a serious departure from a fundamental rule of procedure.

173. Given the flexibility argued by Applicant itself, and the implicit discretion of the Tribunal in setting the threshold, the Committee finds that Applicant has failed to show how the Tribunal manifestly exceeded its powers in setting the threshold or in applying it.

B. *Failure to State Reasons*

a) *Summary of the Positions of the Parties*

174. Applicant contends that the Tribunal failed to explain the following: (i) "how and why Article VII.2 of the BIT did not bar substantive claims under the BIT in case of unfair judgment within a year nor to identify the scope of the substantive protections and underlying reasons,"¹²² (ii) why it applied the futility standard of the exhaustion of local remedies, (iii) how a judge in Turkmenistan could decide a complex case within one year while ensuring the minimum required quality and due process safeguards, (iv) "why the impossibility to find Turkmen lawyers willing to testify and represent a foreign investor against the State was not compelling evidence,"¹²³ (v) "why the reports issued by reputable independent international institutions flagging the lack of independence, ethics and qualifications of the Turkmen judiciary did not constitute compelling evidence,"¹²⁴ (vi) why the anti-Turkish declaration of the President of Respondent did not constitute compelling evidence, (vii) what standard or what constituted compelling evidence for an investor to be excused from the recourse to the judiciary.

¹²¹ *Id.* para. 8.1.10.

¹²² Memorial, para. 373.

¹²³ *Id.* para. 376.

¹²⁴ *Id.* para. 377.

175. Respondent contends that the Tribunal provided ample reasons for its decision: (i) pursuant to Article 25 of the ICSID Convention for a tribunal to have jurisdiction there need be a written agreement to arbitrate between the host state and the foreign investor, (ii) for an agreement there is the need of an offer and an acceptance of the offer, (iii) Article 26 of the ICSID Convention permits a State to require prior exhaustion of judicial remedies, (iv) Article VII.2 of the BIT provides for a sequence of separate resolution procedures through which a dispute will escalate, if not resolved in the former step, (v) such a multi-layered dispute resolution system is in accordance with the ICSID Convention, (vi) “the adoption of language which requires that a series of steps ‘shall’ be taken, and which provide for a right to arbitrate ‘provided that’ another step has been taken, is “an obvious construction of a condition precedent,”¹²⁵ and (vii) the failure to meet the conditions means that jurisdiction cannot be exercised. According to Respondent, this line of reasoning fully enables the reader to follow the Tribunal from point A to point B.

b) Analysis of the Committee

176. The Committee has already dealt with the question of why Article VII.2 did not bar substantive claims under the BIT in case of an unfair judgment by the Turkmen courts. Applicant questions why the Tribunal applied the futility standard of the exhaustion of local remedies while it recognized that there was no exhaustion of local remedies required. This question has just been addressed and the reason should be obvious to Applicant: in the pleadings before the Tribunal, Applicant argued that the situation before the Tribunal was “analogous” to a situation where the local remedies rule applies.

177. Applicant further questions,

how it could be possible for a Turkmen judge to settle a dispute involving the construction of a major public utility project across the nation with different public entities involved and several hundred million USD at stake, that gives rise to complex factual, legal and quantification issues by way of a final award or decision within one year while ensuring the minimum required quality and due process safeguards.¹²⁶

¹²⁵ Counter-Memorial, para. 236, sixth bullet.

¹²⁶ Memorial, para. 375.

Applicant is concerned here about the integrity of proceedings rushed to completion within a year in order for Respondent to avoid arbitration. This concern may be understandable, but this matter was not raised before the Tribunal. The Tribunal did not need to raise it *motu proprio*.

178. Applicant also questions why the Tribunal found not compelling the evidence presented by Applicant. Among other reasons the Tribunal explained that, “Claimant has tendered no evidence - whether in the form of a witness or expertise - to support its assertion. Nor has Claimant sought to offer any explanation or account as to its failure to tender such evidence.”¹²⁷ For the Committee it is clear that, for the Tribunal, compelling evidence is “probative evidence that goes to the specificity of the issue in dispute,”¹²⁸ i.e., specific witness or expertise evidence, rather than general statements or reports.
179. The Committee concludes that the Tribunal provided reasons and Applicant’s argument in this respect fails.

C. *Departure from a Fundamental Rule of Procedure*

a) *Summary of the Positions of the Parties*

180. Applicant argues that the Tribunal departed from a fundamental rule of procedure when “de facto imposed a test or means of evidence that could not have been met other than by recourse to the local courts to assess the futility test or the standard that needs to be met to be excused from the local recourse requirement.”¹²⁹ In addition, the Tribunal refused

to shift the burden of proof on Turkmenistan on the question of futility and derogation from the mandatory recourse to the local judiciary requirement once it was confronted with international reports relied upon by Claimant on the Turkmen judiciary’s shortcomings, the statements of its President against Turkish investors, the taking of Claimant’s assets, and the impossibility to access local attorneys.¹³⁰

181. Respondent notes that, apart from the issues related to burden of proof and unequal treatment of the Parties, Applicant does not point to other specific rules of procedure that

¹²⁷ Award, para. 8.1.5.

¹²⁸ *Id.* 8.1.10.

¹²⁹ Memorial, para. 381.

¹³⁰ *Id.* para. 382.

the Tribunal allegedly violated. Respondent refers to the arguments already made earlier in this respect.

b) Analysis of the Committee

182. Applicant disputes again the allocation of the burden of proof by the Tribunal. The starting point for the Tribunal was that the party who claimed futility of the recourse to the local courts had to prove such futility. The Tribunal, for the reasons already discussed under the claim of failure to provide reasons, considered insufficient the evidence presented by Applicant, as opposed to the evidence provided by Respondent. The Tribunal explained the type of evidence that was missing to support Applicant's claim: "Claimant has tendered no evidence - whether in the form of a witness or expertise - to support its assertion. Nor has Claimant sought to offer any explanation or account as to its failure to tender such evidence."¹³¹

183. It is not a question of reversing the burden of proof but of whether the evidence presented by Applicant in the arbitration proceeding was sufficient. The Tribunal considered that evidence and found it insufficient to prove the futility of recourse to the local courts as against the test set by the Tribunal. Thus the Tribunal dismissed the cases of Mr. Arslan and Mr. Bozbey adduced by Applicant in support of the futility argument because it did not consider their subject matter relevant.¹³² In the first case because "to the Tribunal's mind, Mr. Arslan's evidence was not directed to the availability and efficacy of the Turkmen judicial system to handle investor-state disputes."¹³³ As to Mr. Bozbey's evidence, a criminal case, the Tribunal considered it not to be on point. The Tribunal noted that there was no suggestion that Mr. Bozbey had any relationship with Kılıç and added: "It is thus difficult to see how his [Mr. Bozbey's] complaints, even if justified, are relevant to Kılıç's complaints about the unavailability of or futility in having recourse to Respondent's courts over its BIT claims."¹³⁴ The Tribunal also noted that the case of

¹³¹ Award, para. 8.1.5.

¹³² See *Id.* para. 8.1.16. Mr. Osman Arslan, one of Kılıç's project manager, submitted a witness statement in the arbitration on the question of Turkmenistan's alleged animosity against those adverse to the government. Claimant also relied in reports by the UN Human Rights Committee relating to a complaint by Mr. Omar Faruk Bozbey, a Turkish investor in Turkmenistan. See Award paras. 4.3.10-4.3.11.

¹³³ Award para. 8.1.16.

¹³⁴ *Id.* para. 8.1.19.

Applicant was not helped in Mr. Bozbey's case by the UN Human Rights Committee's finding that his claims were not substantiated.

184. Applicant has raised as a separate question whether the Tribunal treated the Parties in the proceeding equally, in particular whether it had imposed a test that Applicant could not meet because, as the Tribunal admitted, there had been no previous cases of a similar nature before the Arbitrazh Court, in Turkmenistan.

185. The Tribunal recognized:

Respondent has not lead evidence of a track record of proceedings before the Arbitrazh Court involving investment disputes brought against Respondent. Although this is explained on the basis that there have been none, the more important point is that the onus is not on Respondent to prove the availability and efficacy of its court systems to manage investor related disputes. Rather, the onus is on Claimant to show, on sufficient evidence, that such recourse is unavailable or would be futile *in respect of the matters at issue in this case*, including in relation to this party and to matters in dispute.¹³⁵

186. According to Applicant, the test set by the Tribunal to prove the ineffectiveness of recourse to the local courts is set at a level of evidence that by the Tribunal's own terms would be practically impossible to meet: that evidence needs to be "in respect of the matters at issue in this case" notwithstanding the Tribunal's acknowledgement that there is "no [...] lead evidence of a track record of proceedings before the Arbitrazh Court involving investment dispute brought against Respondent. Although this is explained on the basis that there have been none [...]."¹³⁶ Lack of evidence in support of an argument of a party does not necessarily mean that the tribunal treated the parties differently. The ineffectiveness of the courts was a matter to be proven by Applicant, not Respondent. It is a question of who carries the burden of proof rather than whether the Tribunal had treated the Parties fairly.

187. The Tribunal could have been more inclined to look with a critical eye to the paper evidence presented by Respondent in view of the criticism of third party reports of highly reputable institutions submitted by Claimant, at least in the case of the EBRD, an institution whose objective among others is to strengthen the rule of law in countries such

¹³⁵ Award, para. 8.1.15.

¹³⁶ *Id.* para. 8.1.15.

as Turkmenistan. But the Committee is not in a position to second-guess the Tribunal's decision and Claimant was responsible for proving its contention. The Tribunal, based on the evidentiary record, was not able "to conclude that it would have been ineffective or futile for Claimant to have sought to comply with Article VII.2's requirement for prior recourse to the courts of Turkmenistan."¹³⁷

188. To conclude, the Committee finds that Applicant has not proven that the Tribunal departed from a fundamental rule of procedure.

2. *THE TRIBUNAL'S DECISION ON COSTS*

A. *Summary of the Positions of the Parties*

189. Applicant contends that the Tribunal provided contradictory and insufficient or inadequate reasons for its decision on costs. In support, Applicant refers to the Tribunal's statement that Claimant asserted far-reaching claims but at the beginning of the proceeding the Tribunal decided that the jurisdictional objections raised by Respondent did not require bifurcation. Furthermore, the Tribunal recognized that Article VII.2 was an unsettled question and yet, according to the Tribunal, Applicant "should have regarded the possibility that Article VII.2 of the BIT was requiring mandatory recourse to local courts."¹³⁸

190. Applicant refers to the Tribunal blaming Applicant for not explaining its decision not to seek to comply with the provisions of Article VII.2. Applicant argues that it believed in good faith that recourse to the local courts was optional and "advanced extensive practical considerations why it would have been futile or counter-productive to exercise this judicial recourse all of which were rejected but not considered to be made in bad faith."¹³⁹

191. Applicant pleads that the costs part of the Award be annulled for failure to state reasons or manifest excess of powers even if the rest of the Award is not annulled.

¹³⁷ *Id.* para. 8.1.21.

¹³⁸ Memorial, para. 386.

¹³⁹ *Id.* para. 387.

192. Respondent refers to the wide discretion of the Tribunal under Article 61(2) of the ICSID Convention and to the decisions of annulment committees in the *MINE* and *CDC* cases, and concludes that “[i]n light of this standard practice, it appears doubtful that the Tribunal’s award on costs, rendered in accordance with its discretionary power under Article 61(2) of the ICSID Convention, could be annulled on the grounds of manifest excess of powers or failure to state reasons.”¹⁴⁰
193. Respondent contends that, in any event, the Tribunal did not manifestly exceed its powers or failed to provide reasons. Respondent explains that the Tribunal reasoned as follows: (i) the Tribunal referred to the provisions of Article 61(2), (ii) the Tribunal noted that each of the Parties had asked the Tribunal to exercise discretion in its favor, (iii) the Tribunal noted that Applicant disregarded entirely the possibility that the requirement to have first recourse to the local courts under Article VII.2 may not be optional, (iv) the Tribunal also noted that, after the decision of the Tribunal on the meaning of Article VII.2, Applicant did not explain its decision not to comply with said article, (v) the Tribunal also noted that it was not evident that Applicant’s request complied fully with the notice requirements of Article VII.2, (vi) the Tribunal considered that in these circumstances Applicant exercised a right “on the basis of an expectation that there would be potentially serious challenges to jurisdiction or admissibility,”¹⁴¹ (vii) hence the Tribunal considered that Applicant should bear some of the consequences of its actions.
194. Respondent also refers to the Request for Arbitration where Applicant recognized that the BIT mandatorily requires prior submission of a dispute to national courts and knowingly chose not to comply with this requirement.

B. *Analysis of the Committee*

195. Tribunals have, under Article 61(2) of the ICSID Convention, ample discretion in deciding how to allocate costs of the arbitration. The Tribunal provided reasons for its decision. Applicant questions some of the reasons, in particular (i) the reliance of the Tribunal on Applicant’s far-reaching claims notwithstanding that the jurisdictional objections raised

¹⁴⁰ Counter-Memorial, para. 274.

¹⁴¹ *Id.* para. 275, fifth bullet.

by Respondent did not require bifurcation; and (ii) the Tribunal’s recognition that Article VII.2 of the BIT was an unsettled question and “yet, considers that Claimant should have regarded the possibility that Article VII.2 of the BIT was requiring mandatory recourse to local courts.”¹⁴²

196. The reason of “far-reaching claims” has to be seen in context and the time when the relevant statements were made. The Tribunal uses this expression in the Award at the end of the proceedings and in a sentence to indicate that, because the claims were far reaching, Applicant “must have expected Respondent to take [them] seriously and to defend [them] accordingly.”¹⁴³ The Tribunal would not have been in a position to qualify the claims as far reaching at the time it considered the bifurcation request. Furthermore, the Tribunal decided not to bifurcate the proceeding because it could result in undue cost and delay and two of the jurisdictional objections appeared “intertwined with issues and evidence that may relate to the merits of the case.”¹⁴⁴ Far reaching claims may be intertwined with issues and evidence that may relate to the merits. There is no contradiction between the two.
197. Applicant considers the qualification by the Tribunal of a question as “unsettled” to contradict the Tribunal’s statement that Applicant should have regarded the possibility of a mandatory requirement to local courts. It would seem logical to the Committee that, if a question is unsettled, the Parties would be aware of either possible outcome and act accordingly; particularly, when in the Request for Arbitration Applicant itself seems to have understood differently Article VII.2 of the BIT.
198. To conclude, the Committee finds no merit in the claim that the Tribunal manifestly exceeded its power or failed to provide reasons in its decision on costs in the Award.

¹⁴² Memorial, paras. 385 and 386.

¹⁴³ Award, para. 9.2.6.

¹⁴⁴ Decision on Bifurcation, p. 2.

VI. COSTS

199. Applicant requests that

- a. in case the Award is annulled, the Tribunal order Respondent to bear the entirety of Applicant's legal fees and the costs of the annulment proceeding;
- b. in the alternative and assuming that the Award is annulled, the Tribunal order Respondent to bear the entirety of the costs of the annulment proceeding;
- c. in a third alternative, and assuming that the Award is not annulled, the Tribunal order each Party to bear its own legal costs, and the costs of the annulment proceeding split in equal parts between the Parties; and
- d. in a fourth alternative, and assuming that the Award is not annulled, the Tribunal does not order the shifting of Respondent's legal costs to Applicant.,

200. On the other hand, Respondent requests an award of costs in respect of all the costs incurred in connection with this proceeding, including the Tribunal's legal fees and expenses and the costs of its representation.

201. As provided in Applicant's statement of costs, dated May 29, 2015, Applicant's paid legal fees and expenses incurred in connection with this proceeding amount to EUR 532,231.99, USD 364,526.45, TRY 20,129.04 and GBP 219.73USD, including USD 360,000.00 paid to ICSID on account of the fees and expenses of the Members of the Committee and the charges for the use of the ICSID facilities.

202. According to Respondent's statement of costs, dated May 29, 2015, Respondent's legal fees and expenses amount to USD 920,651.98.

203. The Tribunal's fees and expenses as well as the charges for the use of the ICSID facilities have been paid out of the advances made by Applicant and amount to USD 282,296.70, divided as follows (in USD):

Arbitrators' fees and expenses:	USD 208,699.71
ICSID's administrative charges:	USD 64,000.00
ICSID's expenses (estimated): ¹⁴⁵	USD 9,596.99

204. Article 52 (4) of the ICSID Convention provides that the provisions of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee. According to Rule 53 of the ICSID Arbitration Rules, “the provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.”

205. Article 61(2) of the ICSID Convention reads as follows:

[t]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

206. Article 61 of the ICSID Convention gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

207. Rule 47(1) of the ICSID Arbitration Rules provides that the Tribunal's Award “shall contain [...] (j) any decision [...] regarding the cost of the proceeding.”

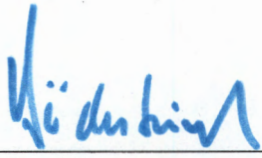
208. Although the Committee has found no ground for annulment, the issues raised by Applicant had sufficient merit for the Committee to decide in the exercise of its discretion that each Party shall bear in full its own legal costs and expenses incurred in connection with the proceedings and that Applicant shall bear the Committee's fees and expenses and ICSID's charges for the use of its facilities.

¹⁴⁵ The amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Decision.

VII. DECISION

209. For the reasons given above, the Committee decides:

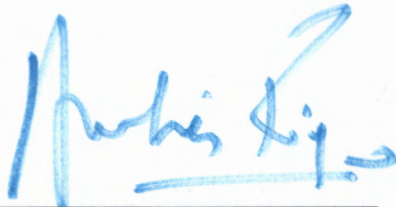
- (a) to dismiss the Application in its entirety;
- (b) that Applicant shall bear all charges for the use of the ICSID facilities in connection with this proceeding and the fees and expenses of the members of the Committee; and
- (c) that each party shall bear its own litigation costs and expenses incurred with respect to this proceeding.



Professor Karl-Heinz Böckstiegel
Member
Date: 07-14-2015



Professor Hi-Taek Shin
Member
Date: 07-14-2015



Dr. Andrés Rigo Sureda
President of the Committee
Date: 07-14-2015