

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

IN THE PROCEEDING BETWEEN

**KILIÇ İNŞAAT İTHALAT
İHRACAT SANAYİ VE TİCARET
ANONİM ŞİRKETİ**

Claimant

and

TURKMENISTAN

Respondent

ICSID Case No. ARB/10/1

**DECISION ON ARTICLE VII.2 OF THE
TURKEY-TURKMENISTAN BILATERAL INVESTMENT TREATY**

Members of the Tribunal:

Professor William W. Park
Professor Philippe Sands QC
Mr J. William Rowley QC (President)

Secretary of the Tribunal: Ms Mairée Uran-Bidegain

Representing Claimant

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TABLE OF CONTENTS

1.	Introduction	1
2.	The Facts	12
3.	Claimant's Case.....	18
4.	Respondent's Case.....	24
5.	Tribunal's Approach to the BIT Issues.....	33
6.	Authentication and Interpretation Principles Applicable to the BIT.....	33
7.	Number of Authentic Versions of the BIT	34
8.	Accurate Translations into English of Authentic Versions of the BIT.....	38
9.	Meaning and Effect of Article VII.2 of the BIT	43
10.	Costs	51
11.	The Tribunal's Operative Decision	52

1. INTRODUCTION

- 1.1 On 30 December 2009, Claimant, Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi (also referred to as “Kilic”), a company with registered offices in Istanbul, Turkey, filed a Request for Arbitration (“Request”) before the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) alleging breaches by Respondent, Turkmenistan (referred to indistinctively as “Turkmenistan” or “Respondent”) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, which entered into force on 13 March 1997 (“BIT”).
- 1.2 The Request was registered by the Secretary-General of ICSID on 19 January 2010, in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).
- 1.3 Claimant and Respondent are hereinafter collectively referred to as the “parties.” The parties’ respective representatives and their addresses are listed above.

The First Tribunal

- 1.4 On 20 March, 2010, Claimant informed the Centre that pursuant to Rule 2(3) of the Centre’s Rule of Procedure for Arbitration Proceedings, it elected to have the Tribunal constituted in accordance with Article 37(2)(b) of the ICSID Convention. The Centre acknowledged Claimant’s election by letter dated 22 March 2010, and the parties proceeded with the appointment of the arbitrators.
- 1.5 On 7 December 2010, a tribunal (“First Tribunal”) was constituted, comprising Professor William W. Park (USA), appointed by Claimant, Professor Philippe Sands QC (UK/France), appointed by Respondent, and Professor Emmanuel Gaillard (France), appointed as its President by the Chairman of the Administrative Council of ICSID, in accordance with Article 38 of the ICSID Convention. Ms. Aïssatou Diop, ICSID, was designated to serve as Secretary of the Tribunal.
- 1.6 On 8 December 2010, the Centre requested each party to make an initial advance payment of US\$ 100,000.00 to cover the costs of the proceedings in the first three to six months of the case. The Centre received the payment from the parties in due course.

1.7 On 31 January 2011, the First Tribunal held a first session, alone without the parties, by telephone-conference, in order to meet the time limit for the Tribunal's first session set forth under Rule 13(1) of the Centre's Rules of Procedure for Arbitration Proceedings.

Objections to Jurisdiction

1.8 On 11 February 2011, having been made aware of Respondent's objections to jurisdiction and proposal that these proceedings be bifurcated as between jurisdiction and merits, the First Tribunal invited the parties to provide submissions on the issue of the bifurcation of these proceedings.

1.9 On 22 February 2011, Respondent wrote to the First Tribunal setting out its brief submission on the nature of (but not justifications for) its objections to jurisdiction, as Requested in the Tribunal's letter of 11 February 2011.

1.10 On 2 March 2011, Claimant wrote to the First Tribunal setting out its response to the First Tribunal's letter of 11 February 2011, and to Respondent's submission of 22 February 2011.

First Meeting

1.11 On 14 March 2011, the First Tribunal held a procedural consultation with the parties ("First Meeting") by teleconference at 12:00 p.m., Washington, D.C. time.

1.12 During the course of the First Meeting, the parties confirmed, *inter alia*, that:

- (a) the rules applicable to this arbitration are the ICSID Rules of Procedure for Arbitration Proceedings as amended as of 10 April 2006 ("**Rules**");
- (b) the First Tribunal had been constituted in accordance with the ICSID Convention and the Rules;
- (c) the proceedings would be held in Paris; and
- (d) the language of the proceedings would be in English.

1.13 As regards the written and oral procedures to be adopted in the arbitration, after hearing each party's oral presentation, the First Tribunal decided that:

- (a) Respondent would have three weeks to elaborate on the nature of each of the five grounds on which it based its objections to jurisdiction;
- (b) Claimant would have three weeks thereafter to respond;
- (c) in their respective submissions, each party was to provide alternative procedural calendars, one with bifurcation and one without; and
- (d) the First Tribunal would then decide on bifurcation.

The Parties' Further Comments on Jurisdiction

1.14 On 4 April 2011, Respondent provided further observations on the issue of bifurcation of the proceedings and the nature of its objections to jurisdiction, as directed by the Tribunal during the First Meeting.

1.15 On 25 April 2011, Claimant provided further observations on the issue of bifurcation of the proceedings and set out its response to Respondent's letter of 4 April 2011, as directed by the Tribunal during the First Meeting.

The Second Tribunal

1.16 On 2 May 2011, Professor Gaillard resigned from the Tribunal. On 3 May 2011, the Secretary-General notified the parties of the vacancy on the First Tribunal and suspended the proceeding in accordance with Rule 10(2).

1.17 On 24 May 2011, the First Tribunal was reconstituted ("Tribunal"), with Professor Park and Professor Sands continuing, and with the appointment, by the Chairman of the Administrative Council of ICSID, of Mr J. William Rowley QC, as its President. In accordance with Rule 12, the proceeding resumed on that same date.

1.18 On 24 August 2011, the Secretary General announced to the parties and the Tribunal that Ms. Diop would take a temporary leave of absence and that Ms. Mairée Uran Bidegain, had been designated to serve as Secretary of the Tribunal during her absence. On 10 January 2012, the Secretary-General of ICSID informed the parties and the Tribunal that Ms. Mairée Uran Bidegain would continue serving as Secretary of the Tribunal on a permanent basis.

Decision on Bifurcation and Early Determination of BIT Issues

1.19 On 30 June 2011, having considered the parties' submissions on bifurcation, the Tribunal issued a reasoned decision on bifurcation, declining to direct bifurcation of the proceedings. In reaching this decision, the Tribunal made it clear that it had in no way pre-judged the outcome of any of the jurisdictional objections raised, that Respondent was fully entitled to maintain such objections as it considered appropriate, and that they would be addressed as joined to the merits of the dispute in the manner envisaged by Article 41 of the ICSID Convention. However, having regard to the parties' differences concerning Article VII.2 of the BIT, and the significance of that issue, the Tribunal considered it would be appropriate, at an early stage, to determine:

- (a) the number of authentic versions of the BIT; and
- (b) to the extent there are authentic version(s) of the BIT in languages other than English - accurate translations into English of any authentic version(s) of the BIT.

Mindful of the need for early resolution of these issues in order to avoid unnecessary cost and argument later in the proceedings, the Tribunal also indicated that it wished to explore further the meaning and effect of Article VII.2 of the BIT.

1.20 Having also considered the parties' respective proposed timetables, and bearing in mind that the case was registered with the Centre some 15 months earlier, the Tribunal established the timetable for the case, fixing all procedural steps up to and including the production of a hearing bundle on 29 October 2012. The hearing date was to be fixed at a later date.

1.21 As regards its questions concerning Article VII.2 of the BIT, referred to at 1.19 above ("BIT Issues"), the timetable provided for two rounds of simultaneous written submissions as follows:

- (a) by 1 August 2011, submissions on what constitutes authentic versions / accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2, together with documentary testimonial or expert evidence relied upon; and

- (b) by 15 August 2011, simultaneous reply submissions on what constitutes authentic versions / accurate English translation(s) of the BIT, as well as the meaning and effect of Article VII.2, together with documentary, testimonial or expert evidence relied upon.

Subsequent Procedural Matters

- 1.22 On 13 July 2011, Claimant requested that the procedural calendar be extended by an additional step, to allow it to file a Rejoinder on Jurisdiction if Respondent submits its objections to jurisdiction with its Counter-Memorial on the Merits (making that pleading Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction).
- 1.23 On the same date, the Tribunal invited Respondent to submit its comments, if any, on Claimant's request by 18 July 2011, which Respondent provided in due course.
- 1.24 On 1 August 2011, the parties exchanged written submissions on the BIT Issues. Claimant's submission was supported by an email to Claimant from Mrs. Özbîlgiç, a report from Mr. Fuat Kasimcan and an expert report from Professor Yusuf Çalıřkan. Respondent's submission was supported by a legal opinion by Dr. Emre Öktem and Dr. Mehmet Karli.
- 1.25 On 15 August 2011, the parties exchanged written reply submissions on the BIT Issues. Claimant's submission was supported by a report from Mr Ibrahim Uslu. Respondent's submission was supported by a second legal opinion from Dr. Öktem and Dr. Karli and an expert report from Professor Jacklin Kornfilt.
- 1.26 On 8 September 2011, following consultation with the parties, and with their agreement, the Tribunal fixed the dates of 14-18 January 2013 for the oral hearing on the merits and jurisdiction - the hearing to take place at the World Bank's facilities in Paris.
- 1.27 On the same date, the Tribunal advised the parties that, unless they were content that the BIT Issues should be decided on the papers, the Tribunal considered that a one-day, in-person, oral hearing would be of assistance, to be attended by counsel and the parties' legal experts.

- 1.28 The Tribunal also advised the parties that, having considered the parties' submissions regarding Claimant's application to add a final (fifth) Memorial/pleading four weeks after Respondent's Rejoinder Memorial, it was not, for the moment, disposed to add the requested fifth memorial. The Tribunal noted that this was not a case in which jurisdictional objections would appear suddenly in the Counter-Memorial (Claimant having already been made aware of Respondent's jurisdictional objections through two sets of written exchanges). In these circumstances, the Tribunal noted that Claimant would be in a position to deal initially with Respondent's objections, to the extent that it wished, in its Memorial. However, should it turn out that any new objections were raised for the first time in Respondent's Counter-Memorial, the matter could be revisited.
- 1.29 On 15 September 2011, the parties commented on the Tribunal's suggestion to hold a one-day hearing on the BIT Issues.
- 1.30 On 23 September 2011, having considered the parties' comments, the Tribunal fixed 17 January 2012 for a one-day hearing in London on the BIT Issues. At the same time, it confirmed Paris as the place for the substantive hearing on 14-18 January 2013. The parties were also invited to discuss, with a view to agreeing, a proposal on the approach to/time allocation for the hearing on the BIT Issues.
- 1.31 Having been advised shortly thereafter of Mr Volterra's unavailability on 17 January 2012, and having confirmed the availability of all counsel, and their experts, on 20 January 2012, the Tribunal requested the parties to block 20 January 2012 for the BIT Issues hearing.
- 1.32 On 3 October 2011, Claimant wrote to the Centre stating that Mr Fatih Serbest had been dismissed as counsel of record for Claimant in the case.
- 1.33 On 4 October 2011, the Tribunal advised the parties that the hearing on BIT Issues in London was confirmed for 20 January 2012, starting at 10:00 a.m.
- 1.34 On that same date, Claimant advised the Centre that it had appointed Ms Yasemin Çetinel to act on its behalf as its legal representative along with Volterra Fietta (which firm had been on record from the start) in these proceedings.

- 1.35 On 24 October 2011, Claimant advised the Centre that the parties had agreed to amend the pleading schedule set out in the Tribunal's Procedural Order No. 1 of 30 June 2011, which agreement, amongst other things, would lead to a new hearing date-June 2013 being suggested. The parties requested the Tribunal to endorse this agreed schedule. Respondent agreed with the content of Claimant's communication on 25 October 2011.
- 1.36 On 4 November 2011, the Tribunal advised the parties that it was in general agreement with the new proposed timetable and confirmed its availability for a five-day hearing in Paris, commencing on 17 June 2013. The parties were also advised that their proposed new schedule was problematic with respect to the timetable for disclosure of documents. The parties were therefore requested to propose a slight adjustment. Once a new proposal had been agreed, the Tribunal indicated it would be pleased to consider it for endorsement.
- 1.37 On 23 November 2011, the Centre requested Claimant to make a second advance payment of US \$125,040.00 and Respondent to make a second advance payment of US \$125,000.00.
- 1.38 By correspondence dated 2 November 2011, 25 November 2011 and 30 November 2011, the parties provided their proposals for the conduct of the 20 January 2012 BIT Issues hearing. Respondent proposed, *inter alia*, that the hearing should focus on what the experts had to say. It favoured expert conferencing with the parties' legal experts, and suggested that its linguistic expert, Professor Kornfilt, attend for examination and subsequent questioning by Claimant. Claimant indicated that it did not require any of Respondent's experts to attend the hearing to be cross-examined and thus did not see the need for them to attend. Claimant also noted that Respondent had declined to Request that Claimant make available any of its experts for cross examination.
- 1.39 On 11 December 2011, the Tribunal advised the parties, *inter alia*, that it continued to feel that it would be helpful for the parties' legal experts to attend the hearing to enable the members of the Tribunal to raise questions directly with them. Accordingly, the Tribunal invited the parties to arrange for the attendance of their respective legal experts at the 20 January 2012 hearing. Since neither party had notified the other that it required the other parties' expert(s) for cross-examination, the

Tribunal proposed that the legal experts appear together, to respond to such questions as the Tribunal might have. Counsel for the parties would then have the opportunity to ask questions arising from the answers given to the Tribunal's questions. Respondent was also invited to have its linguistic expert available by video-conference facility, against the event the Tribunal had questions.

- 1.40 On 13 December 2011, Respondent advised the Tribunal that it objected to the attendance of Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu, stating that the Tribunal had only required the legal experts to attend and these experts did not fit in such category, and that the appearance of these three officials of the Government of the Republic of Turkey, would contravene Article 27 of the ICSID Convention.
- 1.41 On 19 December 2011, following further correspondence with the parties relating to the conduct of the 20 January 2012 hearing, the Tribunal advised that there would be an opportunity for counsel to make brief opening statements, following which the experts were requested to be available for questions (there would be no need for introductory statements, or testimony in chief), following which there would be an opportunity for counsel to make brief closing statements.
- 1.42 As regards Respondent's objection to the attendance of Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu, based on Article 27 of the Convention, the Tribunal clarified that, when it issued its 11 December 2011 invitation, it principally had in mind the attendance (for Claimant) of Professor Caliskan. Nevertheless, it advised that it did not consider Respondent's objection to be well founded and that, if Claimant wished them to attend, they might do so. If they did, and should the Tribunal question any of them, counsel would be given the opportunity to ask follow-on questions.
- 1.43 On 23 December 2011, following further correspondence from the parties in which *inter alia*, Claimant did not state that it wished Mr Kasimcan, Mrs Özbîlgiç and Mr Uslu to attend, the Tribunal confirmed that it did not feel that the attendance of the three officials would be sufficiently helpful as to warrant their travel to London.
- 1.44 On that same date, Claimant advised the Tribunal that the parties had agreed to a further amendment of the pleading schedule. Whilst the proposed amendment would not affect the 20 January 2012 BIT Issues hearing, it would affect the planned

merits/jurisdictional hearing of 14-18 June 2013. Amongst other things, a new hearing date was suggested for October 2013.

- 1.45 On 3 January 2012, neither party having made the second advance payment that had been requested on 23 November 2011, the Centre followed up with the parties.
- 1.46 On 4 January 2012, Respondent's counsel advised that Respondent's second advance payment would be made by the next week at the latest.
- 1.47 On 5 January 2012, Claimant's counsel advised that Claimant expected to make its second advance payment within 30 days.
- 1.48 On the same day, following a number of exchanges between the Tribunal and the parties on the proposed new schedule, the Tribunal advised the parties that it would be sensible to discuss these matters in person, and to fix a new schedule that worked for all concerned during the hearing in London on 20 January 2012.
- 1.49 On 17 January 2012, Claimant wrote to the Centre, denying Respondent's assertion (see Section 4, Respondent's Case) that the Turkish version of the BIT published on the Turkish Undersecretariat of the Treasury's website states that Turkish is one of the authentic languages in which the BIT was executed. A copy of the Turkish version of the BIT as downloaded from the website was attached.
- 1.50 On the same day, Respondent wrote to the Centre:
 - (a) providing a revised certified translation into English of the authentic Russian version of the BIT (Exhibit R-1 (revised)), with a letter from the translators explaining the reason for the submission of the revised translation; and
 - (b) advising that the Turkish version of the BIT that was on the Undersecretariat's website in early August 2011 had indeed listed Turkish as an authentic language of the BIT.

The 20 January 2012 Hearing

1.51 The BIT Issues hearing was held, as scheduled, in London on 20 January 2012 at the IDRC, 70 Fleet Street, London, EC4Y 1EU, United Kingdom. The hearing was recorded and transcribed.

1.52 At the hearing, the Tribunal heard oral testimony from the following experts presented by Claimant:

(a) Professor Yusuf Çalişkan

1.53 The Tribunal also heard oral testimony from the following experts presented by Respondent:

(a) Dr. Emre Öktem

(b) Dr. Mehmet Karli

(c) Dr. Jaklin Kornfilt

1.54 In the light of the parties' prior agreement and the Tribunal's directions, the available time at the hearing was divided roughly equally.

1.55 During the course of the hearing, and having regard to the revised English translation of the Russian version of Article VII.2 that had been filed on 17 January 2012, counsel for Respondent invited the Tribunal to appoint a qualified Russian expert translator to provide a further translation of Article VII.2.¹ When questioned about Respondent's invitation, Claimant's counsel suggested that such a course would be highly unusual and advised that Claimant had no desire for further expenditures for such a translation. However, Claimant's counsel also advised that this was "not an informed response".²

1.56 At the conclusion of the hearing, when the question of the payment of the second advances and the future scheduling were discussed, the Tribunal was advised that:

(a) Claimant would be in a position to make its payment within 30 days;

¹ Transcript of 20 January 2012 Hearing, pp. 167/21 - 168/11.

² *Id.* at p. 184/8 - 184/24.

- (b) Respondent had now made payment of the requested second advance;
and
- (c) because the decision on the BIT Issues had the potential to be dispositive of the Tribunal's jurisdiction, the parties were agreed that the Tribunal should decide the BIT Issues prior to considering a new timetable based on the parties' proposed amendment of the previously settled pleading schedule.

- 1.57 On 10 February 2012, Respondent wrote to the Tribunal, noting that Claimant had not paid its share and requesting that the funds it had disbursed be exclusively used for payment of expenses already incurred in connection with the 20 January 2012 hearing.
- 1.58 On 13 February 2012, the Centre informed the parties of Claimant's default in the payment of the second advance requested from it. Claimant was requested to confirm that it intended to and would make such payment by 20 February 2012.
- 1.59 On 20 February 2012, Claimant informed the Centre that it had paid its share of the second advance payment.
- 1.60 On 22 February 2012, the Centre advised the parties that, because of the Tribunal's continuing uncertainty as to the accuracy of the two English translations tendered by Respondent of Article VII.2 of the authentic Russian language version of the BIT, and the possible relevance of the English translation of Article VII.2 of the Turkish language version of the BIT published in the Turkish Official Gazette on 15 January 1995, it proposed to request two independent and qualified expert translators to provide it with English language translations of the relevant texts.
- 1.61 The parties were provided with the names and credentials of the translators that had been identified, together with the text of the Tribunal's proposed instructions to them. The parties were asked to comment by 1 March 2012 on the instructions the Tribunal proposed to issue to the expert translators.
- 1.62 On 27 February 2012, Respondent confirmed that it was content with the Tribunal's proposal to instruct independent expert translators. It proposed that a further question

be asked to the Russian-English translator and raised a question as to the potential suitability of the Turkish-English translator.

- 1.63 On 28 February 2012, Claimant advised the Tribunal “that it does not agree to the Tribunal taking up the Respondent’s proposal on this point” (*i.e.*, the appointment by the Tribunal of an independent translator(s)).
- 1.64 On 6 March 2012, having regard to the absence of agreement of the parties to the Tribunal’s retainer of/instructions to independent translators, the Tribunal advised the parties that it would proceed by analysing the BIT Issues on the existing record of the evidence and argument before it. The Tribunal reserved the right to instruct an independent expert in the event that it considered it necessary to do so.
- 1.65 Following the hearing, the members of the Tribunal deliberated by various means of communications including a meeting in London, United Kingdom, on 20 January 2012 and by a teleconference thereafter. In reaching its conclusions in this Decision, the Tribunal has taken into account all pleadings, documents, testimony, expert opinions and oral submissions filed or made so far in this case.

2. THE FACTS

- 2.1 A review of disputing parties’ submissions, witness statements, expert reports and the oral testimony given at the hearing indicates that, with few exceptions, the factual matrix of the negotiation and conclusion of the BIT is either agreed or not seriously disputed.³ Put another way, most of the differences between the parties as regards the BIT issues have to do with: (a) the proper construction of the concluding statement in the Russian version of the BIT which provides “[e]xecuted on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and the Russian language” - *i.e.*, the number of authentic versions of the BIT; (b) the accurate English translation of the authentic Russian version of Article VII.2 of the BIT; and, (c) the parties’ competing visions as to the proper construction (meaning and effect) of Article VII.2 of the BIT.

³ The parties differed on whether an English or a Turkish text was used in the negotiations, but, in the end, and given the absence of clear evidence, nothing turned on this point.

- 2.2 In particular, Claimant construes Article VII.2 of the BIT to mean that “recourse to the domestic courts of the Respondent prior to seeking dispute resolution through international arbitration is only an optional choice for the investor, not a compulsory requirement”.⁴
- 2.3 Respondent construes Article VII.2 of the BIT to require “prior submission of a dispute to national courts as a condition precedent to the commencement of international arbitration against Turkmenistan”.⁵
- 2.4 We set out in detail below a summary of the facts most relevant to a determination of the BIT Issues - either as agreed, not disputed or determined by the Tribunal.

Signing of the BIT

- 2.5 The BIT was signed on 2 May 1992 in Ashgabat, the capital of Turkmenistan.
- 2.6 It is common ground that the parties signed both an English language version and a Russian language version of the BIT at that time. It is common ground that both are authentic versions of the BIT.
- 2.7 Neither of the parties produced signed copies of the BIT in any other language, and the Tribunal concludes on the basis of the evidence before it that the BIT was signed only in its English and Russian versions.
- 2.8 The authentic English version of the BIT provides that the Treaty was:

*“DONE at Ashghbat on the day of May 2, 1992 in two authentic copies in Russian and English.”*⁶

- 2.9 The authentic Russian version of the BIT (translated into English) states:

*“Executed on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and Russian languages.”*⁷

⁴ Claimant’s Submission of 1 August 2011, para 21.

⁵ Respondent’s Submission of 1 August 2011, para. 55.

⁶ Request for Arbitration, Annex D; Exhibit R-2 (hereinafter all references to the English version of the BIT will be deemed references to these two identical documents submitted by Claimant and Respondent, respectively).

Article VII.2 of the BIT

2.10 The text of Article VII.2 that appears in the English version of the BIT provides, in pertinent part as follows:

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

(a) ...

(b) ...

(c) ...

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.”

2.11 The text of Article VII.2 that appears in the Russian version of the BIT (translated literally into English) provides, in pertinent part, as follows:

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

(a) ...

(b)

(c) The Court of Arbitration of the Paris International Chamber of Commerce, on the condition that, if the concerned investor submitted the conflict to the court of the Party,

⁷ Exhibit R-1; Exhibit R-1 (revised).

that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.”⁸

Context of the BIT and Circumstances of its Conclusions

- 2.12 The BIT was signed shortly after Turkmenistan established its independence as a sovereign state, after many years as part of the Soviet Union.
- 2.13 Turkey was one of the first countries to recognise the newly-declared independence of the four former Turkic Republics - Turkmenistan, Kyrgyzstan, Uzbekistan and Kazakhstan - in November and December 1991, and to establish diplomatic relations with them, which was accomplished by early 1992.
- 2.14 Between 1991 and 1993, approximately 1,200 delegations of Turkish government representatives visited these new states and, during the same period, Turkey signed more than 140 treaties with them.
- 2.15 It was against this background that the Prime Minister of Turkey at the time, Suleyman Demirel, conducted an eight-day tour of the Turkic States beginning on 27 April 1992.
- 2.16 During this tour, *inter-alia*, Turkey signed BITs with each of the four Turkic States within a five-day period, *i.e.*, between 28 April 1992 and 2 May 1992.
- 2.17 The Turkey-Kyrgyzstan BIT was signed on 28 April 1992. This bilateral investment treaty, which is stated to be “DONE ... in two authentic copies in English”, contains exactly the same Article VII.2 provisions as are found in the English language version of the BIT.
- 2.18 The Turkey-Uzbekistan BIT was also signed on 28 April 1992. This treaty is also stated to be “DONE at Tashkent on the day of 28/4/1992 in two authentic copies in English”. Article VII.2 of the English version of the Turkey-Uzbekistan BIT is exactly the same as Article VII.2 of the English version of the BIT.

⁸*Id.*

2.19 The Turkey-Kazakhstan BIT was signed on 1 May 1992. It provides that it was “DONE at Alma Ata on the day of 1 May 1992 in two authentic copies each in Turkish, Kazak (sic), English and Russian.” The text of Article VII.2 of the English and Turkish versions of the Turkey-Kazakh BIT are identical to the texts of the authentic English version of the BIT and the “official” Turkish version of the BIT that was published in the Turkish Official Gazette on 15 January 1995.⁹

Turkish Ratification of the BIT

2.20 Turkey ratified its investment treaties with the four Turkick States using its ordinary procedures of ratification, culminating in their publication in the Official Gazette on 15 January 1995.

2.21 The first step in the ratification involved sending the four treaties, together with their respective draft Laws of Approbation to the Turkish Parliament in 1993.

2.22 The letter which submitted the BIT to the Turkish Parliament included, *inter alia*, explanatory notes on the treaty’s text. The following description was provided for Article VII:

“Article 7 - This article regulates the resolution of investment disputes which may arise between a Party and an investor of the other Party. According to the procedure which has been foreseen, the Parties will first try to resolve the dispute by way of negotiations, in the event the dispute is not resolved within 6 months, provided that the access to local judicial bodies remains open, the right to proceed to international arbitration may be used. In addition, if the investor has brought the dispute before local judicial bodies and the final decision is obtained, it will not be possible for the investor to proceed to international arbitration; however, in the event that no final decision is obtained within 1 year and that both of the Parties have signed these treaties, the dispute may be brought before

⁹ Exhibit EO/MK-6.

International Centre for Settlement of Investment Disputes (ICSID) ...”

The purpose of the last paragraph is to avoid the repetition of discussion of the disputes which were finally resolved by local courts, before international bodies.”¹⁰

- 2.23 The four Laws of Approbation (for the Turkick States’ BITs) were published in the Official Gazette in September 1994.
- 2.24 The Turkish Council of Ministers adopted ratification decrees for the four treaties at the end of 1994 and during the first days of 1995. In the case of the BIT, and as noted above, the respective ratification decree was published in the Official Gazette, dated 15 January 1995, which also included both the authentic English text and an “official” Turkish text.
- 2.25 The “official” Turkish text of Article VII as published in the Official Gazette is set out, in pertinent part, below in certified English translation:

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

(a) ...

(b) ...

(c) ...”.¹¹

¹⁰ Exhibit EO/MK-15, p. 3.

¹¹ Exhibit R-3. The English translation of the Turkish text was provided by Respondent. However, Claimant does not dispute the translation, nor did it provide an alternative translation. (In its letter concerning bifurcation dated 25 April 2011, Claimant provided what appears to be an incorrect Turkish text of Article VII.2, translated into English.

3. CLAIMANT'S CASE

Number of Authentic Versions of the BIT

3.1 Claimant contends that there are only two authentic versions of the BIT; the English and Russian language versions. These are said to be the only versions of the BIT that were signed by the Contracting States. Claimant argues that both expressly state that there are only two authentic copies.¹²

3.2 The authentic English version of the BIT provides that the treaty was:

“DONE at Ashgabat on the day of May 2, 1992 in two authentic copies in Russian and English.”

3.3 By contrast, Claimant initially alleged that the authentic Russian version of the BIT (translated into English) states:

“it is comprised on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and the Russian language.”¹³

3.4 Claimant asserts that the English version of the BIT clearly identifies the two authentic copies as the Russian and English versions. Although the authentic Russian version refers to two authentic copies in four languages, Claimant argues that the two authentic copies referred to in the Russian version are the signed Russian and English versions.

3.5 Claimant further argues that no signed versions of the BIT exist in Turkish or Turkmen. However, it maintains that, in order to satisfy national constitutional law

Respondent pointed out this error in its submission on the BIT Issues dated 1 August 2011. Claimant did not seek to refute Respondent's position on this point).

¹² Respondent has produced two copies of the Turkish text, under Exhibits R-3 and EO/MK-6 and Exhibits R-4 and EO/MK -37, neither of which is signed. No copy of the Turkmen text was produced - Respondent advising that none could be found.

¹³ Although a dispute developed as to the accurate Russian-English translation of BIT Article VII.2, the parties eventually agreed on the translation of this clause. Claimant provided this translation in its 1 August 2011 submission but appeared to have abandoned it in its 15 August 2011 submission, when it instead referred to Respondent's submitted translation using the word “Executed on...”. See Claimant's Submission of 15 August 2011 ¶ 7, citing Respondent's submitted translation. The English translations of the Russian version submitted under Exhibits R-1 or R-1 (revised), do not include the word “comprise” but instead “Executed on...”.

requirements, both Turkey and Turkmenistan were required to produce “official” translations of the (or one of the) authentic version(s) of the BIT for publication in their respective Official Gazettes. The relevant laws of the two countries make it clear that these “official” translations are not authentic versions of the BIT.

- 3.6 Article 3.1(2) of Turkey’s Law No. 244 (unofficially translated into English by Claimant, but not contested by Respondent) states:

“The Turkish text of which is the subject of international treaty ratification or accession is published in the Official Gazette with one of the specified authentic language or languages of the treaty as an attachment to the Decree of the Council of Ministers pursuant to the above paragraph.”¹⁴

- 3.7 Article 24.3 of the Law of Turkmenistan on the International Treaties of Turkmenistan (unofficially translated into English by Claimant, but not contested by Respondent) states:

“The international agreements of Turkmenistan, whose authentic texts are comprised in the foreign languages, are published on one of these languages with the official translation into the Turkmen language.”¹⁵

- 3.8 Claimant notes that Respondent accepts that the English and Russian language versions of the BIT are both authentic.

- 3.9 Claimant relies on a report made to it of Mr Ibrahim Uslu, General Manager of the General Directorate of Foreign Trade of the Undersecretariat of Treasury of Turkey ¹⁶ (“**Undersecretariat**”), who states in his report, *inter alia*, that;

“Normally, Bilateral Investment Treaty negotiations are conducted in English. ... English is used in the drafting stage

¹⁴ Claimant’s Submission of 1 August 2011, para. 7.

¹⁵ *Id.* at para. 9.

¹⁶ Claimant says that the role of the Undersecretariat is to conduct procedures and negotiations concerning the agreements to be concluded with foreign countries in relation to the bilateral encouragement and protection of investments.

and in the abridgement stage as this enables parties to see more clearly whether as a result of negotiations they reached a compromise on the issues. Then, in the signature stage, this English draft agreement ... is translated into the languages of the Contracting Parties and the Agreement is signed in the languages of the Contracting Parties, along with English. In the Bilateral Investment Treaty between Turkmenistan and Turkey, however, the observed procedure could not be applied In this BIT, the English draft text of the agreement was used by the Turkish side and the Russian translation was made in Turkmenistan and these texts were signed by the Contracting Parties. The translated Turkish text, however, was prepared in Turkey to fulfil the procedural requirements of the approval stage. In this context, the Turkish text is not the authentic text of the agreement, but it is the official translation made according to the approval procedure.”

“In order for Turkish language version to be authentic, the Contracting Parties should sign the translated Turkish text ... The publication of the unsigned translated text in the Official Gazette shall not constitute as evidence that it is an authentic version of the BIT.”

“There is no signed version of the Turkish Text for the Turkmenistan-Turkey BIT.”

- 3.10 Claimant contends that Respondent’s claim that there exists an authentic Turkmen version of the BIT is undermined by its own, unexplained concession that no copy of such a text can be found.

- 3.11 It also rejects Respondent’s contention that the Undersecretariat’s website “declares Turkish as one of the authentic languages of the BIT”.¹⁷ Although, Claimant did not provide an English language translation of the Turkish version of the BIT as published in the Official Gazette in either of its BIT Issues submissions, it wrote to the Tribunal on 17 January 2012, to point out what it described as a material error contained in Respondent’s 1 August 2011 submission. It stated that the Turkish version of the BIT that had been filed by Respondent (which was described as having been published on the Undersecretariat’s website and which was said to state that Turkish is one of the authentic languages in which the BIT was executed) “is not a version of the Turkish BIT that is actually published on the website in question.”¹⁸
- 3.12 Claimant further advised that the Turkish version of the BIT that is published on the website clearly states that “there are only two authentic languages in which the BIT was executed; English and Russian.”¹⁹ A notarised copy of the Turkish version of the BIT as downloaded from the website was provided.

Accurate Translation into English of Authentic Versions of the BIT

- 3.13 The English language version of the BIT upon which Claimant relies is not questioned by either party.
- 3.14 Claimant did not provide an English language translation of the Russian version of the Treaty. It accepts the translation of the Russian text tendered by Respondent with its submission, 1 August 2011, i.e., as set out in R-1. It does not accept the accuracy of Respondent’s revised translation of the Russian text, as set out in R-1 (revised).
- 3.15 As noted above, Claimant does not accept the Turkish version of the Treaty to be authentic. Nevertheless, it contends that: (a) Respondent relies upon an inaccurate, unverified and non-authoritative Turkish-language version of the BIT (*i.e.*, the Turkish version said to have been found on the Undersecretariat’s website - see paragraph 19 of Respondent’s 1 August 2011 submission (Exhibits R-4 and EO/MK-

¹⁷ Claimant’s Submission of 15 August 2011, para 9, citing to Respondent’s Submission of 1 August 2011, para 21.

¹⁸ Letter from Claimant to the Tribunal dated 17 January 2012, p. 1

¹⁹ *Id.*

37)); and (b) the English translation of the BIT published in Turkey's Official Gazette (Exhibits R-3 and EO/MK-6) is erroneous.

3.16 In support of the latter point, Claimant refers to the Turkey-Latvia BIT which has exactly the same dispute settlement provision as found in Article VII.2 of the BIT and which was authenticated in 1997 in three languages (Turkish, Latvian and English), each of which is stated to be equally authentic.

3.17 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.

3.18 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.

Meaning and Effect of Article VII.2

3.19 Claimant argues that the meaning and effect of Article VII.2 as found in the two authentic copies of the BIT is plain; that the investor has the option to pursue resolution of the dispute before Turkmenistan's domestic courts, but that it is not required to do so before resorting to ICSID arbitration. If it chooses to exercise that option, it is unable to initiate international arbitration proceedings before the expiry of one year.

3.20 In support of its interpretation of Article VII.2, Claimant relies on the ordinary meaning of the words used, a letter from Mr Fuat Kasimcan, Head of Department of the Turkish Ministry of Economy of the Undersecretariat, dated 22 July 2011, which confirms the optionality of the text, and an email from Mrs Zergul Özbîlgiç, of the Undersecretariat of Foreign Trade, dated 7 July 2011, to the same effect.

3.21 Claimant also points to the decision of the *Rumeli* tribunal which, having considered Article VII of the Turkey-Kazakhstan BIT (which used precisely the same language as the BIT), concluded:

“317. By contrast with the Turkish version, the English and Russian versions of the Treaty do not require a prior submission of the dispute to local courts before initiation of arbitration proceedings before ICSID. The Arbitral Tribunal considers therefore that no such requirement had to be fulfilled by Claimants before starting this arbitration.”²⁰

3.22 In addition, Claimant points to the *Sistem* decision which considered the same language as that contained in Article VII.2 of the BIT and, it is said, concluded that resort to local remedies was not a mandatory precondition to ICSID arbitration. That tribunal held:

“106. The Respondent takes the view that the words ‘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’ in Article VII(2) apply only to Article VII(2)(c). The Tribunal need take no position on the question because Sistem has not instituted any proceedings in the national courts against the Kryrgyz Republic.”²¹

3.23 Claimant refers to the undisputed authentic English version of the BIT which states:

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

3.24 Claimant contends that Respondent’s own certified translation of the authentic Russian version, which accompanied its 1 August 2011 submission, contains a formulation which is identical in its meaning:

²⁰ *Rumeli Telecom A.S. and Telsim Mobile Telekomik A.S.Y.O.N. Hizmetleri A.S. v Republic of Kazakstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para 317.

²¹ *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v Kryrgyz Republic* (ICSID Case No. ARB (AF)/06/1), Decision on Jurisdiction dated 13 September 2007, para. 106.

“... on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.”

3.25 Claimant points out that if either one of the conditional clauses “provided that” or “if” were removed from the provisions,²² it would be clear that the investor had to pursue local remedies. Thus, the presence of “if” in both the English and Russian authentic versions confirms that the Contracting States deliberately adopted the actual formulation of the clause. Claimant describes as “self-serving” Respondent’s original argument that the word “if” is merely intended to emphasise the strength of the preceding conditions. Moreover, such an interpretation deprives the second conditional word of any meaning. Claimant contended that Respondent’s revised translation was to be rejected because it constituted an interpretation rather than a translation of the text.

3.26 As regards Respondent’s argument that, even if the authentic English and Russian versions of the BIT may plausibly be interpreted in the manner suggested above, this “may be the result of a mistake in translation”, Claimant says that Respondent’s speculative contention, that the BIT was originally negotiated and drafted in Turkish, and only later translated into English and Russian, is central to this argument.

3.27 Claimant points out that this speculation is directly contrary to the statements by Mr Kasimcan and Mr Uslu that the first/original version of the BIT was in English. It was subsequently translated into Russian in Turkmenistan; it was signed in English and Russian, and, only later, translated into Turkish.

4. RESPONDENT’S CASE

Number of Authentic Versions of the BIT

4.1 By way of relevant background, Respondent points out that Turkey was one of the first countries to recognise the newly-declared independence of the four former Turkic Republics (Turkmenistan, Kyrgyzstan, Uzbekistan and Kazakhstan) in

²² In the Russian translation, “on the condition that” or “if”.

November and December 1991. Between 1991 and 1993 Turkey signed more than 140 treaties with them.

- 4.2 Respondent says that, given the political circumstances and Turkey's strong interest in establishing its relationships with these countries, speed appears to have been a primary concern. Thus, it says that it is not surprising that accuracy in the documents sometimes suffered in the process.
- 4.3 Respondent asserts that Turkey was the driving force in the process of negotiating BITs with the former republics. It argues that this is reflected in the fact that Turkey's BITs with the Turkic States contain almost identical language: this demonstrates that Turkey undoubtedly drafted the texts of the treaties that were used in each case.
- 4.4 Turkmenistan contends that the determination of the authentic versions of the BIT gives rise to questions of interpretation due to the different language versions of the BIT, and that such issues of interpretation are to be resolved by applying the principles set forth in the Vienna Convention on the Law of Treaties ("VCLT").
- 4.5 Article 31 of the VCLT, which contains the general rule on treaty interpretation, requires that treaties be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".
- 4.6 In cases where the test set forth in Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 permits consideration of supplementary means of interpretation, such as the preparatory works of the treaty and the circumstances of its conclusion, to confirm or determine the meaning.
- 4.7 Respondent points out that the VCLT contains a provision devoted entirely to interpretation issues which arise when treaties are executed in different languages. Article 33 provides:

"Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,

unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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

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

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.²³

- 4.8 Respondent argues that the BIT was done in four languages: Turkish, English, Russian and Turkmen, each of which is authentic.
- 4.9 “Authentication” is defined in Article 10 of the VCLT and includes signature by the state parties, or any other procedure provided for in the treaty or agreed to by the State Parties.
- 4.10 Respondent’s case focuses on the Russian, English and Turkish versions of the BIT. Respondent says that the Russian version is authentic by virtue of the fact that it was executed by the Parties and also because it expressly refers to “authentic copies in the Turkish, Turkmen, English and Russian language”.²⁴
- 4.11 The English version of the BIT is authentic by virtue of the fact that it was executed by the Parties and states that English as well as Russian are authentic languages. However, it argues that Claimant’s reliance on its construction of the English version is untenable, given that it recognises that the Russian version as authentic, and the

²³ Vienna Convention on the Law of Treaties, art. 33, May 23, 1969, 1155 U.N.T.S. 331.

²⁴ Respondent’s Submission 1 August 2011, para. 17, citing Exhibit R-1.

Russian version recognises the Turkish version as authentic. In addition, Respondent argues that since English is a language that is foreign to both Turkmenistan and Turkey, it is unlikely that the English version best reflects the intent of the parties. Rather, it is contended that the Turkish version was undoubtedly the original text that was discussed in negotiations and agreed by the Parties.²⁵

4.12 The Turkish version of the BIT is said to be authentic by reason of the fact that the Russian version expressly refers to the Turkish version as one of the “authentic copies”. It thus qualifies as authentic by reason of Article 33(2) of the VCLT, because it was designated as such by the Contracting Parties to the treaty. In addition, the Turkish version of the treaty found on the Undersecretariat’s website in early July 2011 is reported by Öktem and Karli to list Turkish, Russian and English as authentic languages.²⁶

4.13 Relying on Dr. Öktem and Dr. Karli, Respondent also argues that Turkey has designated Turkish as an authentic language for every investment treaty which it has entered into, except where English has been designated as the sole authentic language and, thus, that there are no Turkish BITs in which the language of the other State is designated as authentic, but Turkish is not so designated.

4.14 Respondent rejects Claimant’s suggestion that the Russian version of the BIT “expressly state[s] that there are only two authentic versions of the BIT,” one in Russian and one in English.²⁷ Respondent argues that the phrase “two authentic copies” in the Russian version means that the BIT was executed “... in two authentic physical copies each of the Turkish, Turkmen, English and Russian versions”.²⁸ Providing for two copies in each language would permit each of the two parties to

²⁵ Dr. Öktem and Dr. Karli argue that the Turkish version was the model text supplied by Turkey for the BITs that were simultaneously being negotiated with the four Turkic States. The Turkish version of all those treaties are virtually identical versions. Thus, given the linguistic similarity between Turkish and Turkmen, it is most probable that the BIT between Turkey and Turkmenistan was negotiated in Turkish and thus the Turkish version is the original text negotiated and agreed by the parties.

²⁶ In its letter to the Tribunal of 17 January 2012, in response to Claimant’s letter of the same date, Respondent accepts that the Turkish version of the BIT that is currently on the Turkish government’s website does not refer to an authentic version of the BIT in English. It leaves it to “the appreciation of the Tribunal” as to why the Turkish government changed the Turkish version on its website following Respondent’s filing of its 15 August 2011 submissions.

²⁷ Respondent’s Submission of 15 August 2011, para 19, citing to Claimant’s submission of 1 August 2011, para. 3.

²⁸ Respondent’s Submission of 15 August 2011, para. 19.

have an executed copy in each of the four languages, which makes simple good sense. Moreover, while there is no indication of priority in the text of the BIT, Turkish comes first, and it would seem highly implausible that an inauthentic language would be mentioned first. Finally, Respondent contends that the use of the word “copy” in each of the treaties relied on by Claimant, refers not to the number of official versions or languages of the treaties, but rather to the number of physical copies made of each of these official versions in each of its official languages.

Accurate Translations into English of Authentic Versions of the BIT

4.15 Respondent submitted certified English translations of the Russian (an initial and a revised version) and Turkish texts of the BIT. It notes that a Turkmen version of the BIT could not be found.

4.16 The “official” Turkish version of the BIT, as published in the Official Gazette on 15 January 1995 (in certified English translation), provides:

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

(a) ...

(b) ...

(c) ... ”²⁹

4.17 Respondent says that Claimant provided an incorrect Turkish text of Article VII.2 in its letter concerning bifurcation dated 25 April 2011, which it translated in pertinent part as follows:

²⁹ Exhibit R-3.

“... if the investor has brought the subject matter of the dispute to the judicial court of the host Party in accordance with the procedures and laws of the host Party and if a decision has not been rendered within one year.”³⁰

4.18 The first certified English translation of the Russian version of the BIT proposed by Respondent (R-1) reads in pertinent part as follows:

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

(a) ...

(b) ...

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

4.19 The second certified English translation of the Russian version of Article VII-2 of the BIT proposed by Respondent (R-1 (revised), which was filed on 17 January 2012), reads in pertinent part:

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

(a)

³⁰ Respondent’s Submission of 1 August 2011, para. 28.

(b) ...

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

4.20 The only change made to the initial translation - the removal of the word “if” following the words “on the condition that,” in sub-paragraph (c), - was explained by the translators in their covering letter to counsel for Respondent in the following terms:

“Please be advised that in our translation dated July 30, 2011 into English of the Russian version of the Turkey-Turkmenistan BIT, we translated to the best of the translator’s knowledge and ability, the following segment of Article VII.2 of the BIT:

[Russian text of pertinent part of VII.2 (c)]

into English as follows:

‘on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.’

The above translation is a literal translation of the words in Russian in the order in which they appear in the Russian text. However, it does not accurately reflect the meaning of the Russian version of this segment of Article VII.2 of the BIT. The correct meaning of the above quoted text of the Russian version of the BIT is:

‘on the condition that the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict,

and a final arbitral award on compensation of damages has not been rendered within one year.'

This is because the phrase '...[Russian text] ...', which literally reads word-by word in Russian '... on the condition that, if' is used in order to make the sentence conditional but should correctly be translated as '... on the condition that' to properly convey the meaning. The 'if' in the Russian text is part of the correct syntax needed in Russian to create the conditional, but it does not create a second or separate conditional. In fact, the complete phrase ' ... [Russian text] ...' is used in Russian as a single expression to mean 'on the condition that' or 'if'.

We are therefore providing you with a revised translation in which that change, and only that change, has been made."

Meaning and Effect of Article VII.2

- 4.21 Respondent contends that where there are textual differences in treaties done in multiple languages, the VCTL (Article 33) requires that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."³¹ Turkmenistan maintains that, notwithstanding the different phrasing of Article VII.2 in each of the English, Russian and Turkish versions of the treaty, a clear intention can be gleaned that the parties contemplated submission of a dispute to international arbitration only after the investor had submitted it to the national courts of the host state, and a period of one year had been allowed for a decision.
- 4.22 This interpretation is said to accord with the "ordinary meaning" of the text of Article VII.2. The Phrase "provided that" used in the Turkish and English versions and the phrase "on the condition that" used in the Russian version, clearly means that submission to national courts and the allowance of a one year period for a decision is a condition that has to be fulfilled before recourse to international arbitration. The different placement of the conditional phrase, either at the head or at the conclusion of

³¹ See Respondent's Submission of 15 August 2011, para. 24.

Article VII.2, is a difference in form rather than substance, and does not change the meaning of the provision.

- 4.23 The addition of the word “if” in the English version is said, most likely, to have been a syntactical error, made when the original Turkish text was being translated. Its inclusion in the Russian version, as explained by the translators, is part of the correct syntax to create a condition and does not create a second or separate conditional. In neither case, does it change the meaning of the clause, but rather emphasises and strengthens the prior conditional phrase “provided that” / “on the condition that”.
- 4.24 Such a good faith interpretation of the ordinary meaning of the text of Article VII.2 is said to be consistent with the treaty’s context.
- 4.25 Respondent maintains that its construction of the Russian and English texts is supported by the clear (and mandatory) text of Article VII.2 that is contained in the Turkish version. Assuming the Turkish text to be authentic, Respondent asserts that only its construction of the English and Russian texts can be reconciled with the Turkish. Should the Tribunal conclude that only the English and Russian texts are authentic, the ambiguity or obscurity of the English text permits the Tribunal to consider supplementary means of interpretation. These include the “official” Turkish version of Article VII.2 as published in the Official Gazette (which is agreed to be mandatory) to confirm its contention as to the meaning of the authentic version of the BIT.
- 4.26 With respect to Mr Kasimcan’s letter and Mrs Özbîlgiç’s email supporting Claimant’s interpretation of Article VII of the BIT, Respondent argues that neither should be given weight. This is because the interpretation by only one party to a treaty is not binding or authoritative. Only a corresponding endorsement of that view by Turkmenistan would constitute an authoritative interpretation as evidence of the intention of the parties to the BIT.
- 4.27 Respondent finally relies on the principle of *in dubio mitius*, which posits that, in the case of doubt, treaty obligations must be interpreted restrictively, in deference to the sovereignty of states. Respecting a provision that requires prior submission of a dispute to national courts before a state can be subjected to the jurisdiction of an international arbitration is the correct application of this principle.

5. TRIBUNAL'S APPROACH TO THE BIT ISSUES

- 5.1 The Tribunal starts its analysis by outlining the applicable rules for the establishment of the authentic and definitive text of a treaty, the general rules of treaty interpretation, when supplementary means of interpretation may be employed, and the applicable rules for the interpretation of treaties authenticated in two or more languages.
- 5.2 The Tribunal then deals separately with the three principal substantive issues that require to be determined:
- (a) the number of authentic versions of the BIT;
 - (b) the accurate translation into English of any authentic version of the BIT done in a language other than English; and
 - (c) the meaning and effect of Article VII.2 of the BIT

6. AUTHENTICATION AND INTERPRETATION PRINCIPLES APPLICABLE TO THE BIT

- 6.1 The VCLT establishes the analytical framework, guidelines and rules for the determination of the authenticity of the text of treaties and the interpretation of such texts.
- 6.2 Turkmenistan has been a signatory to the VCLT since 2 February 1996.³² Accordingly, the VCLT is applicable to Turkmenistan.
- 6.3 Turkey is not a signatory to the VCLT. However, customary international law is part of the applicable law in Turkey.³³ Accordingly, the Tribunal proceeds on the basis that the provisions of the VCLT that reflect customary international law are to be treated as part of the Turkish legal system and are applicable to Turkey.

³² See Vienna Convention on the Laws of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Multilateral Treaties Deposited with the Secretary General, XXIII - 1, 2.

³³ Öktem & Karli, Legal Opinion on the 1992 Turkey-Turkmenistan BIT, Part III.2.b. This is not contested by Claimant.

6.4 Articles 31 through 33 of the VCLT provide for the rules of interpretation of international treaties, and the case law of the International Court of Justice (“ICJ”) confirms that these articles reflect customary international law.³⁴

6.5 In these circumstances, there being no suggestion by Claimant that the Tribunal ought not to have regard to the principles and rules established by the VCLT, where appropriate its relevant provisions are referred to and used by the Tribunal in its analysis of the three substantive questions below.

7. NUMBER OF AUTHENTIC VERSIONS OF THE BIT

Ordinary Meaning of the Texts

7.1 It is common ground that both the English and Russian versions of the BIT were signed by the parties on 2 May 1992, and may thus be regarded as authentic versions of the BIT by reason of Article 10(b) of the VCLT.³⁵

7.2 Respondent’s case for the authenticity of the Turkish version of the treaty rests on the fact that the Russian version of the BIT expressly refers to the Turkish version as one of the “authentic copies”. It is therefore said to qualify as authentic by reason of Article 33(2) of the VCLT, because it was designated as such by the Contracting Parties to the treaty.

7.3 Article 33 of the VCLT provides:

“Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,

³⁴ For example the ICJ applied Articles 31 and 32 even in cases when one or both parties were not parties to the Convention, on the grounds that these articles reflect customary international law. See *Sovereignty Over Pulau Litigan and Pulau Sipidan, (Indonesia v. Malaysia)*, 2002 I.C.J. Rep. 625 (December 17), ¶37. See also, *Kasikili / Sedudu Island (Botswana / Namibia)* 1999 I.C.J. Rep., 1045 (December 13), ¶325 and *LaGrand (Germany v U.S.)*, 2001, I.C.J. Rep. 466 (June 27), ¶101, where the ICJ established that the rules contained in Article 33 also reflected customary international law.

³⁵ Article 10 of the VCLT provides that: “*The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature add referendum, or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.*”

unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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

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

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

7.4 Claimant asserts that an initial difficulty with Respondent’s case on this point is that the authentic English version of the BIT provides that the treaty was:

“DONE at Ashkabat on the day of May 2, 1992 in two authentic copies in Russian and English”. (emphasis added)

7.5 Moreover, the Russian text also refers to two authentic copies, albeit in four languages.

7.6 Respondent seeks to explain the apparent difference in the number of authentic versions of the treaty, as referred to in the English and Russian versions, on the basis that the number of “copies” in each of the treaties refers not to the number of authentic languages or versions of the treaty, but rather to the number of physical copies made of each of the authentic versions in each of its authentic languages.

7.7 In the result, for Respondent, the phrase “two authentic copies” in the Russian version means that the BIT was executed “in two authentic physical copies *each* of the Turkish, Turkmen, English and Russian versions”.

- 7.8 The Tribunal notes, however, that Respondent was unable to produce signed copies of either the Turkish or Turkmen versions of the treaty which it argues were signed by the parties. This suggests that, even if Turkish or Turkmen versions of the BIT were available in Ashgabat on 2 May 1992, they were not executed by the parties. In any event, no such copies are part of the record and there is therefore no evidence to indicate that such versions were actually signed by the parties.
- 7.9 Had a Turkish version existed and been signed at that time, one would expect it to have been published in its executed format in the Turkish Official Gazette. However, this did not occur. Moreover, Mr Uslu who is the General Manager of the Undersecretariat (the role of which is to conduct procedures and negotiations concerning such treaties) stated in his report, submitted by Claimant, that “[t]here is no signed version of the Turkish text for the Turkmenistan-Turkey BIT.” He also explained that during the negotiations of the BIT, an English draft of the text was used by the Turkish side during the negotiations and that the Russian translation was made in Turkmenistan before the English and Russian versions were signed.
- 7.10 The Tribunal further notes that, even if it could be said that the Turkish version of the text should be considered as authentic, on the basis that the authentic Russian version of the treaty so provides or that the parties had so agreed (*i.e.*, pursuant to Article 33 (2) of the VCLT), the question would then turn to the identification of such an authentic text. There is no evidence before the Tribunal as to which, if any, particular Turkish version of the text the Contracting Parties might have been referring to in the Russian version of the BIT.³⁶
- 7.11 Finally, Respondent has not produced any copy even of an unsigned version of the allegedly authentic Turkmen version, stating that it has been unable to locate any copy. In the Tribunal’s view this confirms that the evidence points to a conclusion that it is highly unlikely that any Turkmen version was actually ever signed.

³⁶ The 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. There is also Mr Uslu’s evidence that the translated Turkish text of the BIT was prepared in Turkey to fulfill the procedural requirements of the approval stage.

Supplementary Means of Interpretation

7.12 Article 32 of the VCLT provides that:

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

(a) leaves the meaning ambiguous or obscure; or

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

7.13 Here, the ordinary meaning of the text of the Russian version of the BIT concerning the number of authentic languages of the treaty appears to the Tribunal to qualify as “ambiguous or obscure”. The Tribunal may therefore look at the circumstances of the conclusion of the BIT for assistance on the number of its authentic versions.

7.14 The circumstances surrounding the conclusion of the BIT include its drafting, execution and adoption. As noted above, the evidence points strongly to the fact that it was only signed in its English and Russian language versions.

7.15 A conclusion that there are only two authentic texts of the BIT - English and Russian - is further supported by the application of the provisions of Article 33(1) and (4) which provide that:

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

...

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of

Article 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted”:

7.16 Had the Tribunal concluded that it was unable to remove the difference of meaning in the English and Russian text by the application of Articles 31 and 32, it would have reached the same conclusion based on the application of Article 33(4) on the basis that the identification of only the English and Russian texts as authentic is an approach that “best reconciles” the divergent texts in the Russian and English versions of the BIT.

8. ACCURATE TRANSLATIONS INTO ENGLISH OF AUTHENTIC VERSIONS OF THE BIT

8.1 Having concluded that the only authentic version of the BIT in a language other than English is the Russian version, the next issue concerns the identification of an accurate translation of the Russian version into English.

8.2 One reason for translating the text of the Russian version of the BIT into English is to enable the non-Russian speaking Tribunal to construe properly the Russian text. Had the Tribunal been composed of Russian speakers, such a translation may not have been required. In such circumstances, the Tribunal would have looked to the ordinary meaning to be given to the terms of the Russian version of the treaty in their context and in the light of its object and purpose as required by Article 31(1) of the VCLT. This indicates the importance of the role of an accurate translation in these circumstances, and the need to identify an appropriate translator.

8.3 Until Respondent filed R-1 (revised) - on 17 January 2012, there was no disagreement as to the accurate translation into English of the Russian text. It was agreed that the certified translation made by Language Innovations, LLC, dated 30 July 2001, was an accurate translation from Russian into English of Article VII.2.

8.4 A first point may be made that the Tribunal does not accept the proposition made by counsel for Claimant in his closing address, following the receipt of the revised translation, that the parties are still in agreement about the Russian-English translation of Article VII.2. All that was, and is now, agreed is that Respondent’s initial

translation of the Russian text constituted a word-for-word, literal, translation of the Russian words used in the text of the treaty.

- 8.5 However, accurate translation of, for example, a sentence in one language into another, requires something more than a literal and word-for-word translation of each and every word employed in the text that is being translated.
- 8.6 The first definition of the verb “translate” found in the Oxford Concise Dictionary, 7th ed. is “[t]o express the sense of (word, sentence ...) in or into another language”.
- 8.7 Similarly, Collins Pocket Dictionary, Canadian edition, defines translate as to “[t]urn from one language into another; interpret”.
- 8.8 The Tribunal thus considers it to be necessary and proper for a translation to convey accurately the complete sense of the Russian text when it is translated into English.
- 8.9 In its letter of 17 January 2012, Respondent’s translator explains that the literal translation it provided in the form of R-1 does not accurately reflect the meaning of the Russian version of this segment of Article VII.2 of the BIT (*see* para. 4.20 above). The translator goes on to state that the correct meaning (or sense) of the Russian text is conveyed properly by a translation which removes the word “if” from the second line of sub-paragraph (c). This is because the inclusion of the word “if” in the Russian text, while part of the correct syntax required in Russian to create the conditional, does not operate to create a second or separate conditional, as the original translation into English (R-1) provided.
- 8.10 The Tribunal is cognizant of the fact that the revised translation was produced only three days before the 20 January 2012 hearing. Equally, however, it recognizes 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.
- 8.11 The matter of the revised translation was addressed by counsel for each of the parties during their closing arguments.

8.12 Counsel for Respondent explained that Respondent had not submitted the revised translation lightly. It did so, he said, only after asking six Russian-speakers in his office, who knew nothing about the case, to read the relevant passage in Russian and to advise whether resort to local courts prior to arbitration was mandatory or optional. All, he said, advised that it was mandatory. He concluded:

“Now, I am not asking you to believe that; I can’t put anything in evidence here. But what I am asking you to do is the following: either to rely upon and accept what the translator in this sworn statement says, that this now gives you the accurate meaning, this mandatory meaning in the Russian; or, if you don’t believe that or don’t feel that that’s sufficient, I would ask you to go out and get a Tribunal-appointed Russian expert to read that, and I tell you in ten minutes or less they will tell you that this language in Russian is mandatory.

*We are prepared to agree in advance: go ahead and do that, and see what that comes up with. And I predict - - I mean, I would be very surprised if there were any other result, because we asked so many different people and they all, without any hesitation, said that this is clearly mandatory language”.*³⁷

8.13 In his closing speech, counsel for Claimant dealt briefly with the revised translation of the Russian BIT in terms set out below, but did not address Respondent’s invitation to the Tribunal to retain its own expert:

“The Tribunal will have noted that the parties were in agreement on the translation and interpretation of that treaty until a number of days ago.

I want to emphasise for the Tribunal that the parties are still in agreement about the translation; what they do not agree about is the interpretation because the translated words say what they say, and there appears to be - - and I’ve heard nothing from the

³⁷ Transcript, *supra* note 1 p.167/21 - 168/11.

respondent's side to the contrary - - there appears to be agreement that the translation ends up with the English words as the parties have been using up until the most recent submission on the point by the respondent. The difference now is not translation but interpretation, and that's a meaningful distinction I would put to the Tribunal."³⁸

8.14 However, when asked for his own position on Respondent's proposition that the Tribunal appoint a Russian language expert, Mr Volterra on behalf of Claimant replied that:

*"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 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."*³⁹

8.15 The Tribunal indicated to counsel for Claimant that it might come back to him, and give him additional time to consider the matter.

8.16 Following the hearing, on 22 February 2012, the Tribunal wrote to the parties to advise 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

³⁸ *Id.* at pp. 173/5 – 174/4.

³⁹ *Id.* at p. 184/13- 24.

comment on such translations 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.

8.17 On 27 February 2012, counsel for Respondent responded to the Tribunal with the proposal that the Tribunal's translator also be asked the following question:

“Does 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?”

8.18 Respondent's counsel had no comment or objection with respect to the proposed Russian translator, but raised a question concerning the proposed Turkish translator.

8.19 On 28 February 2012, counsel for Claimant responded to the Tribunal. With respect to the proposed retainer of a Russian expert by the Tribunal, counsel wrote:

“The Claimant reiterates for the avoidance of doubt that it does not agree to the Tribunal taking up the Respondent's proposal on this point.”

He continued:

“If the Tribunal insists on taking up the Respondent's proposal, as appears to be the case, the Claimant has the following observations:

1. *the Respondent alone should pay for this exercise;*

....
4. *the Claimant objects to the Respondent's request 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 to give an opinion on, or make an interpretation in relation to, certain Russian words. It 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."

- 8.20 Having regard to the responses of the parties to the Tribunal's proposal to instruct independent translators, including Claimant's objection, the Tribunal advised the parties that it would, for the time being, proceed to decide the BIT Issues on the present record, whilst reserving the right to instruct independent translators if considered necessary.
- 8.21 In proceeding on this basis, the Tribunal notes that the revised translation provided by Respondent provides additional evidence before the Tribunal on the Russian sense (*i.e.*, the accurate translation into English of the Russian) of the Russian text version of Article VII.2.
- 8.22 Accordingly, based on the explanation provided by Respondent's translators for the revisions of their original translation (which it accepts as reasonable), the Tribunal concludes that the 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.
- 8.23 The remaining task for the Tribunal (addressed in the next Section below) is therefore to determine the meaning and effect of the authentic Russian and English texts of the BIT, having regard to the applicable provisions of the VCLT and, of course, the submissions of the parties.

9. MEANING AND EFFECT OF ARTICLE VII.2 OF THE BIT

- 9.1 The competing positions of the parties on the meaning and effect of Article VII.2 of the BIT are: for Claimant, the provision is to be interpreted as meaning that the prior submission of the dispute to local courts before the initiation of arbitration proceedings is optional; for Respondent, the provision means that the prior

submission of the dispute to local courts before the initiation of arbitration proceedings is mandatory.

- 9.2 These positions require to be assessed by consideration of the Russian and English texts of Article VII. 2, being the only two authentic versions of the text of the BIT.

The Russian Text

- 9.3 Looking first at the Russian text, in what the Tribunal has found to be its accurate English translation (R-1 revised), no difficulties appear to arise. There is only one ordinary meaning of the relevant words found in sub-paragraph (c) (“..., on the condition that the concerned investor submitted the conflict to the court of the Party, that is a party to the conflict, and a final award of compensation of damages has not been rendered within one year.”). The ordinary meaning of these words in their context and in the light of the object and purpose of the treaty requires the submission of the dispute to local courts prior to the initiation of arbitration proceedings, whether before ICSID, “ad hoc” (in accordance with the UNCITRAL Rules), or before the ICC Court of Arbitration in Paris.

The English Text

- 9.4 Turning to the authentic English version of Article VII.2, Claimant seeks support for its position (*i.e.*, that the plain meaning of the words is to provide an option to the investor either to pursue resolution before the Respondent’s domestic courts or to proceed straight to arbitration) from statements made by Mr Kasimcan and Mrs Özbîlgiç and the decisions of the *Rumeli* and *Sistem* tribunals.
- 9.5 The Tribunal finds that neither the statements nor the decisions are dispositive or persuasive.
- 9.6 Mrs Özbîlgiç’s email to Claimant of 7 July 2011, states that:

“... it is not true to translate the Turkish Text as if it mean the Mandatory requirement to apply local Turkmen courts, because it clearly states ‘IF the investor has gone to the local court but the decision could not be rendered within 1 year then he can apply to international arbitration’”.

9.7 The difficulty with this statement, which limits its value, is that the certified English translation of the “official” Turkish text (Exhibit R-3, provided by Respondent and not contested by Claimant) does not contain the word “if”. The absence of the word “if” has the effect of making mandatory the requirement of recourse “to the judicial court of the host Party”. The text provides in relevant part:

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

9.8 Mr Kasimcan’s report of 22 July 2011 also contains the same approach with respect to the accurate text of the Turkish version of the BIT, writing in the word “if”. For this reason the Tribunal finds the view there expressed to lack persuasive authority.

9.9 As regard prior arbitral awards, the Tribunal considers that the *Rumeli* decision is also unpersuasive.⁴⁰ The *Rumeli* tribunal concluded that the English and Russian versions of the Turkey-Kazakhstan BIT did not require a prior submission of the dispute to local courts. However, the tribunal in that case simply states this in conclusory terms: it provides no analysis or reasoning in support of that conclusion. Moreover, 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.⁴¹ It is not immediately apparent to the Tribunal in the present case that the *Rumeli* tribunal’s reliance on the English and Russian versions alone is consistent with the requirements of Articles 33(1) and (4) of the VCLT. It may be that the *Rumeli* tribunal had a reasoned basis for excluding the Turkish text, but it does not appear to have set out that reasoning in its award.

⁴⁰ Mr Stephen, counsel for Claimant, rightly agreed that the reasoning in *Rumeli* was not entirely helpful. See Transcript, *supra* note 1, p. 73/5 - 10.

⁴¹ The Tribunal rejects Claimant’s argument that the “official” Turkish version of the BIT was mistranslated. The Tribunal reaches this conclusion having regard to the 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.

9.10 With respect to the award in the *Sistem* case, where the tribunal concluded that a claimant is not obliged to seek local remedies prior to turning to arbitration, the Tribunal in the present case does not see a sufficient basis in the *Sistem* award to support the proposition for which Claimant argues in the present case.

9.11 The relevant parts of the *Sistem* award provide:

*“The Respondent takes the view that the words ‘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’ in Article VII.2(2) apply only to Article VII.2(2)(c)[of the BIT].”*⁴²

The Tribunal then concludes that it:

“take[s] no position on the question because Sistem has not instituted any proceedings in the national courts against the Krygyz Republic.”

9.12 A difficulty with reliance on the conclusion of that tribunal in the present case is that the *Sistem* tribunal’s latter statement makes little sense when taken on its own. It may be that what the tribunal meant to say “because *Sistem* has not brought a case to the ICC.”⁴³

9.13 If this is right, the *Sistem* decision is of little persuasive value. 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 Tribunal and disposed of the matter on a different basis, having regard to the different arguments of the parties.

Meaning of the English Version is Ambiguous and/or Obscure

9.14 Respondent describes the English text as grammatically awkward, and says that the phrasing is mangled and non-sensical. The Tribunal agrees that the phrasing of the

⁴² *Sistem*, *supra* note 21, para 106.

⁴³ Article VII.2(2)(c) of the relevant BIT relates to the submission of disputes to the ICC Court of Arbitration in Paris.

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 (after which the relevant text would read “provided that, the investor concerned has brought the dispute before the courts ... and a final award has not been rendered in one year.”), or the word “and” could be removed (after which the relevant text would read “provided that, if the investor concerned has brought the dispute before the courts ... a final award has not been rendered in one year.”). 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.

9.15 Professor Kornfilt, expert on linguistics, 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.

9.16 When questioned by Professor Park as to whether any linguistic principle would suggest the removal of one of the extra words in preference to the other, Professor Kornfilt said that while she might not be able to formulate a principle she felt that:

“leaving out the “if” would be preferable to leaving out the “and”, because there is already a bit of text, namely the “provided that”, which is a conditional ... just the way “if” is also a conditional.

So this is why I would tend to, I would lean towards a solution towards well-formedness that would leave out the “if” and retain the “provided that” as the only conditional, and leave in the “and”, therefore, as under the two options you gave me.”⁴⁴

⁴⁴ Transcript, *supra* note 1 p. 154/9-18.

Her evidence has not been challenged by Claimant.⁴⁵

9.17 In 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.

Supplementary Means of Interpretation

9.18 One supplementary means of interpretation is to consider the circumstances of the conclusion of the BIT. The circumstances include the process relating to the negotiation, conclusion and signing of the BIT in Ashgabat on 2 May 1992, as well as events leading up to its ratification.⁴⁶

9.19 Amongst these circumstances, the Tribunal notes that Turkey entered into four treaties with the Turkic States within a very short period of time, namely five days, in late April / early May 1992. Each of these four treaties included authentic English versions, and each such version includes substantially identical provisions as those that are to be found in Article VII.2 of the BIT. In addition, the authentic Turkish text of the Turkey-Kazakhstan BIT, which was entered into just one day before the BIT, contains substantially identical terms (*i.e.*, requiring mandatory recourse to the local courts) as those found in the official Turkish text of the BIT that was published in Turkey's Official Gazette on 15 January 1995.⁴⁷

9.20 The Tribunal is bound to note a convergence on a mandatory recourse to the local courts in: (a) the authentic Russian text of the BIT (R-1, revised); (b) the authentic Turkish text of the Turkey-Kazakhstan BIT, which employs the same text as Article VII.2 of the BIT; and (c) the official English-Turkish translation of Article VII of the BIT that was published in Turkey's Official Gazette. Against that, the only text that can be said to point against the mandatory recourse to the local courts is the authentic text of the English version of the BIT.

⁴⁵ Although Professor Kornfilt was speaking here about the English version of the Russian text, as translated literally, her testimony applies equally to the authentic English text of Article VII.2.

⁴⁶ Transcript, *supra* note 1 pp. 137/5 - 138/19.

⁴⁷ The Turkish legal experts for both parties agree on this point.

9.21 These circumstances surrounding the conclusion of the BIT lead the Tribunal to conclude 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.⁴⁸ 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.

Only a Mandatory Meaning Reconciles the Two Authentic Texts

9.22 To the extent that it might not be possible to resolve the possible difference in meaning of the English and Russian text through the application of Articles 31 and 32, the Tribunal can, in accordance with the principles reflected in Article 33(4) of the VCLT, adopt the meaning which would best reconcile the two texts.

9.23 To the extent that this had been necessary – and the Tribunal concludes that it is not – the Tribunal would have had no hesitation in concluding that the ambiguity of the English text could only be reconciled with the clearly mandatory Russian text by the determination that the English text also required a mandatory recourse to the local courts. This follows, because what is plainly mandatory cannot be optional, but what may either be mandatory or optional, can be seen as mandatory.

The Effect of a Mandatory Text

9.24 In each of its written submissions on the BIT Issues, Respondent reserved its rights to develop further its jurisdictional arguments. However, at the 20 January hearing, in its opening and closing submissions, counsel for Respondent formally requested the Tribunal to dismiss the case in its entirety for lack of jurisdiction if it concluded that pursuant to Article VII.2, as properly construed, a prior submission of the dispute to local courts was mandatory before ICSID arbitration proceedings could properly be instituted.

⁴⁸ The Tribunal does not disregard Exhibit EO/MK-15, 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.

9.25 Counsel for Claimant responded to this request in his closing submissions. After noting certain complaints Claimant had previously made in relation to the proceedings prior to the hearing, he observed:

“... [T]here was a formal request put forward by the [R]espondent that the Tribunal promptly dismiss for lack of jurisdiction the claim of the claimant after this hearing.

... But what is the Tribunal going to do now? There is an issue before it [the Tribunal] which could be dispositive on the jurisdictional basis of the case. Is the Tribunal going to wait until 2013 or 2014 to decide upon it, and waste all of our time and money? Obviously, not. Well, I hope it’s not going to choose to waste all of our time and money.

*So what does it have to do? Well, obviously it has to render a decision on this point and obviously, as we are going to discuss in a little while, that’s going to have an effect on the schedule for the pleadings, because I don’t want to advise my client that it should proceed with drafting a memorial in a case in which during the course of the writing or shortly thereafter there is going to be a decision that will conclude that there is no jurisdiction of this Tribunal”.*⁴⁹

9.26 Subject to the procedural concerns that Claimant has raised, it appears to agree with Respondent that a decision on jurisdiction should be made at this stage, insofar as it relates to the meaning and effect of Article VII.2.

9.27 In this regard, the Tribunal notes that on its own case Claimant has not treated Article VII.2 as imposing a mandatory requirement to have recourse to the local courts of Turkmenistan, and states in its written submissions that it “has chosen not to pursue domestic remedies, instead exercising its rights to commence the current proceedings”.⁵⁰ There is therefore no dispute that Claimant has not had recourse to

⁴⁹ Transcript, *supra* note 1, pp. 178/1-4 - 179/2-17.

⁵⁰ Claimant’s Submission, 1 August 2011, para. 14.

the local courts. Moreover, Claimant has stated that its decision not to have recourse to the local was one that it has chosen, and although it has not provided reasons for the exercise of such choice, it has not argued that recourse to the local courts was not available.

9.28 Nevertheless, and notwithstanding 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.

9.29 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.

9.30 In the event that the parties wish to do so, the Tribunal will fix a timetable for further submissions on that point.

9.31 In the event that the parties do not wish to do so, and are content for the Tribunal to determine its jurisdiction on the basis of Claimant's admitted non-compliance with the provisions of Article VII.2, the Tribunal will supplement this Decision and issue an Award dismissing jurisdiction.

10. COSTS

10.1 At this stage, the Tribunal takes due note of the parties' positions and requests with respect to costs. The Tribunal reserves this question for decision at a later stage along with the issuance of an Award.

11. THE TRIBUNAL'S OPERATIVE DECISION

11.1 For the foregoing reasons, the Tribunal unanimously **DECIDES AND DECLARES** 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;
- (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.
- (d) the decision on costs is deferred to a later stage of the arbitration.

[Signed]

Prof.W.W. Park
Arbitrator

[Signed]

Prof. Philippe Sands QC
Arbitrator

[Signed]

Mr J. William Rowley QC
President