

Partially Dissenting Opinion

in

İçkale İnşaat Limited Şirketi v. Turkmenistan

(ICSID Case No. ARB/10/24)

I am in agreement with the Tribunal's Award except as noted below:

1. Section 4: The Interpretation of Article VII(2) of the Turkey-Turkmenistan BIT

1. I address here specifically the Tribunal's analysis beginning at paragraph 210 of the Award.
2. I disagree in part with the assumptions of the majority in paragraph 210. I found credible and persuasive the testimony of Ms. Özbilgiç, then a member of the staff of the Turkish Government agency (Directorate of Incentive Implementation and Foreign Investment, Turkish Ministry of the Economy) with responsibility for investment treaties. Ms. Ozbilgic worked on the draft of the Turkey-Turkmenistan BIT. Her testimony may be considered under Article 31 of the Vienna Convention as part of the preparatory work of the treaty and circumstances of its conclusion. Ms. Özbilgiç's testimony, together with the official explanatory note prepared by the Government of Turkey during its ratification of the Turkey-Turkmenistan BIT¹ and the subsequent letter of the Secretariat of the Treasury,² were all consistent and persuasive. While allowing for the majority's view that this documentary evidence is only information that is "relevant," I regard it as confirmatory of Ms. Özbilgiç's testimony, which even the majority found to be "helpful in understanding the way in which Turkey prepared for investment treaty negotiations."³ The testimony and documents, taken together with the clear language of the chapeau of

¹ Exh. C-93 (Reply).

² Exh. C-96 (Reply).

³ Award, para. 210 & n. 47.

Article VII(2), evidence the contracting States' intent to provide an option to foreign investors to choose whether to go to international arbitration or to host State courts. Neither party provided evidence of any interest to the contrary. Indeed, Turkmenistan offered no evidence of anything related to the negotiating history or any circumstances of the conclusion of the Treaty, and the Turkish investor provided direct evidence that Turkey intended to provide the investor an option to choose the forum in the event of a dispute and that this was a significant interest of Turkey at the time.

3. Further, the plain language of the chapeau of Article VII(2) (“the dispute can be submitted as the investor may choose”) providing that it is the investor’s option is deprived of meaning if one attributes a mandatory reading to the “provided that, if” language in a subsidiary clause. The testimony of Ms. Özbilgiç and documentary evidence assist in the interpretation of the “provided that, if” clause in Article VII(2) of the BIT. Indeed, my view in this regard is confirmed by the failure of Turkmenistan to provide any contemporaneous evidence to support its current interpretation of Article VII(2) of the BIT, including of its own treaty practice, or any contemporaneous evidence of any circumstance demonstrating its interest in imposing a mandatory requirement to go first to the Turkmen courts. It is most revealing that Turkmenistan did not require this in any other treaty that it entered into before or after concluding this treaty.⁴
4. Investment treaty tribunals commonly consider the parties’ contemporaneous practice in concluding investment treaties as a reflection of the parties’ general policies relating to such treaties, and thus as part of the circumstances of the conclusion of a treaty, in order to confirm the interpretation of its provisions. *See, e.g., KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013), para. 123 (“the Tribunal’s reading of the treaty language is further strengthened if one bears in mind that in twenty-four Kazakh BITs the Respondent has agreed to the same test as in the present one ... while in ten other BITs it has added a requirement ...”); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), para. 195 (“treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a

⁴ See Exh. C-103 (Reply) (chart of BITs concluded by Turkmenistan).

treaty's text at the time it was entered into"); *id.*, para. 196 (taking into account, as a circumstance of the conclusion of the Bulgaria-Cyprus BIT, that, "[a]t that time, Bulgaria was under a communist regime that favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions"); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), n. 147 (referring to BITs entered by Argentina with third States as relevant to confirm whether Argentina had a "policy" with respect to the provision at issue, and emphasizing the importance of "contemporaneity" in the interpretation of a treaty: "it must be construed as at the time it was entered into."); *see also National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006), paras. 84-85 (considering the treaty practice of the parties to the UK-Argentina BIT in interpreting that BIT's MFN clause); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 Oct. 2005), para. 293 ("Most relevant to an assessment of state practice possibly bearing on the 1992 Bolivia-Netherlands BIT are those BITs which were negotiated contemporaneously in the early 1990s."); *id.*, paras. 294-314 (analyzing the Dutch and Bolivian investment treaty practice). Hence the relevance of the other Turkmen treaty practice, all of which permits the choice of the forum for international arbitration without any mandatory reference to Turkmen courts, and complete paucity of any evidence to the contrary is compelling.

5. With respect to paragraph 217-218 of the Award, I agree with the majority to the extent that, in view of the evidence before the Tribunal, neither Turkey nor Turkmenistan appears to have had a clear policy requiring the resolution of investor-State disputes before local courts. As noted above, no such requirement is found in any of Turkmenistan's BITs, and neither Party presented evidence that could be taken into account in the interpretation of the "provided that, if" clause in the Turkey-Turkmenistan BIT as a supplementary means of interpretation. I diverge, however, and find that the absence in any other Turkmen treaty and/or any provision in Turkmenistan's foreign investment law requiring mandatory reference of international disputes to the Turkmen courts should be taken into account in assessing whether the treaty language of Article VII(2) provides an optional approach.

6. With respect to paragraphs 220-226 of the Award, I do not accept Professor Gasparov's evidence as dispositive on the proper translation of the Russian expression "*pri uslovii, esli*". Professor Gasparov's testimony referred to translation of a term by a native Russian speaker who was writing in Russian. Respondent chose not to call the Claimant's opposing Russian language expert whose declaration affirmed that the phrase could have been translated from the awkward English version of the treaty submitted by the native Turkish speakers.⁵ I regard the evidence provided by Ms. Özbilgiç that the Russian version was likely translated from the English version supplied by the Government of Turkey significant.⁶ In the absence of any evidence whatsoever presented by Turkmenistan that the Russian version of the BIT was translated by a native Russian speaker, rather than someone to whom Russian may have been a third or fourth language in the Turkish Embassy or Turkmen Embassy in Moscow or in Ashgabat translating the English drafted by a native Turkish speaker, indeed the evidence supports the view that the Russian version was translated by a non-native Russian speaker. Hence, I did not find persuasive Professor Gasparov's evidence on the proper translation in classical Russian as to the meaning of that term in the treaty. I found more persuasive of the actual circumstances at the time of the execution of the BIT the testimony of Ms. Özbilgiç and Mr. Kozyrev that the clause "*pri uslovii, esli*" likely was translated by a non-native Russian speaker from the English version of the treaty (drafted by a native Turkish speaker) and was meant to convey the same optional meaning "provided that if".
7. With respect to paragraph 228 of the Award, again, I disagree with the majority. A fundamental rule of treaty interpretation is that meaning must be afforded to provide meaning to the entire clause: *ut res magis valeat quam pereat*, i.e., each word of a clause must be given meaning, and a proper interpretation cannot leave words meaningless,⁷ a

⁵ See Declaration of Mr. Kozyrev dated 9 Aug. 2013, para. 6 (concluding that the flawed grammar and ambiguity of the Russian text most likely resulted from a literal and inaccurate translation from the English text).

⁶ See Witness Statement of Ms. Özbilgiç dated 17 Aug. 2013, para. 5 ("The English authentic version of the BIT which was signed between Turkey and Turkmenistan ('the Contracting Parties') is the text prepared by Turkey. The Authentic Russian version of the BIT was translated from the authentic English version only after the Contracting Parties had agreed upon the terms of the English version."); Hearing Transcript, Day 3, pp. 96:22-100:25 (Cross-Examination of Ms. Özbilgiç).

⁷ See *Eureko B.V. v. Republic of Poland*, Partial Award dated 19 Aug. 2005, para. 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than

principle the Tribunal recognizes elsewhere in the Award.⁸ Under Article VII(2) of the BIT, the chapeau clearly provides the option to the investor to select a method of dispute resolution (“the dispute can be submitted as the investor may choose”). To give meaning to the investor’s option to select among the international arbitral fora ICSID, UNCITRAL or ICC, the selection of the local courts must provide an additional option (*i.e.*, the investor has the choice of the three types of international arbitration mentioned **or** to select host state courts). If the investor selects the local courts then there is a one year hiatus for the local courts to decide and only after that time may the investor invoke the international arbitral option (as described below there could be a different option depending on the relevance of the formatting). The investor’s option provided in the chapeau cannot be deprived of any meaning by interpreting a subsidiary clause as effectively depriving the investor of any choice. I accordingly disagree with paragraph 225 of the Award.

8. With respect to paragraphs 227 and 228 of the Award, I disagree, as the Tribunal cannot conclude that the Russian version is “clear and unambiguous” choosing it as the more reliable version and at the same time minimize as a matter of treaty interpretation the difference in formatting in the Russian version of the BIT (compare the quotes of the text in paragraphs 176 and 189 of the Award), which is formatted in such a way that the clause “*pri uslovii, esli*” forms part of the ICC option. It is undeniable that Article VII(2) provides “the dispute can be submitted as the investor may choose” from one of three options for international arbitration: (a) ICSID, (b) UNCITRAL, or (c) ICC. If the formatting from the Russian version is given meaning then that reference to Turkmen courts modifies only the ICC option, the alleged ambiguity or obscurity that concerns the majority is removed as it provides the investor the choice that the chapeau envisions and does not mandate the investor proceed first to host State courts unless the investor prefers

meaningless. [T]reaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.”); *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013, para. 593 (“Treaty provisions should not be construed in a way that takes away from them all useful effect (*ut res magis valeat quam pereat*).”); OPPENHEIM’S INTERNATIONAL LAW 1280-81 (R. Jennings & A. Watts eds., 9th ed. 1996) (“The parties are assumed to intend provisions of a treaty to have a certain effect, and not to be meaningless: the maxim is *ut res magis valeat quam pereat*. Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.”).

⁸ Award, para. 329.

the ICC option. The formatting therefore is significant in the Russian version in that it in fact confirms the optional reading of the clause as a whole. Under Article 31 of the Vienna Convention, the “provided that, if” clause in my view should be interpreted in good faith such that the plain language in the chapeau of Article VII(2) as to the investor’s option must have a meaning.

9. Accordingly, the formatting would include the “*pri uslovii, esli*” clause as part of and only applicable to the ICC option, but not to the ICSID or UNCITRAL options. This approach provides full meaning to all parts of Article VII(2), requiring the investor to proceed first to Turkmen courts only if the investor rejects ICSID and UNCITRAL arbitration.

10. I similarly disagree with paragraph 228 of the Award, where the majority of the Tribunal notes that the meaning of the “provided that, if” clause in the English and Russian texts of the Treaty diverges: according to the majority, the meaning of the English version remains obscure, and the Russian version is clear and unambiguous. On the basis of the evidence before the Tribunal as to the circumstances surrounding the preparation and execution of the BIT, other treaty practice of both State parties and the language experts presented by both sides, I disagree. To the contrary, the English and Russian versions of Article VII (2) when read together in their entirety (beginning with the chapeau language of the clause) provide an optional choice between international arbitration and the local courts in the context of this dispute: an investor who chose ICSID without first going to Turkmen courts. According to the English text (with its formatting), the investor may select among three international arbitral fora or local courts: but if the investor selects the local courts option, and the local courts do not render a decision within one year, then the investor may still choose international arbitration. According to the Russian text with its formatting, the investor may choose among two international arbitral fora; if the investor chooses local courts, it may subsequently choose only ICC arbitration.⁹ I agree with the

⁹ See Declaration of Mr. Kozyrev dated 9 Aug. 2013, para. 6 (“Even if the Russian text is not grammatically correct, should the provision including the phrase *pri uslovii, esli* be considered mandatory, it will bring an obligation to the investor to recourse to the local courts of the host State only if it chooses to apply to the Court of Arbitration of the Paris International Chamber of Commerce.”); Award, para. 225. In this regard, I disagree with the majority’s view as reflected in paragraph 226 of the Award.

majority's observation in paragraph 229 of the Award that the Tribunal is limited to resolving the dispute submitted to it on the basis of the evidence before it. The optional reading of the clause is a consistent one with respect to the dispute presented here: the investor chose ICSID arbitration—not the local courts—as its first choice which is permitted under the plain language of either version. While the formatting is different in the English and the Russian language versions, this is irrelevant to the present dispute because the investor selected ICSID arbitration and in both the English and Russian versions read optionally this selection is permissible without resort to the local courts. The Tribunal need not go further to resolve potential ambiguity or obscurity issues that may arise if an investor in another dispute wishes to choose the local courts and/or ICC arbitration.

11. Further, I disagree with the majority's conclusion in paragraph 230 of the Award. I agree that the State parties may make a choice to impose a mandatory domestic court litigation precondition to international arbitration, but I regard the State parties to the Turkey-Turkmenistan BIT as having made the choice in this instance to provide the investor with the option to go to international arbitration or to local courts. I agree with the interpretation of the *Sehil* tribunal (including the portion of its decision quoted in paragraph 229 of the Award).
12. I disagree with paragraph 241 of the Award to the extent that reference is made to the selection of local courts as “in principle mandatory”; as stated above, it is optional. I agree with the remainder of paragraph 241. I also disagree with paragraph 260 to the extent that the majority finds it is unable to accept Claimant's allegations and evidence as proof that any resort to the Turkmen courts would have been futile. To the contrary, in my view, Claimant demonstrated it suffered a denial of justice by the Turkmen courts in the proceedings before the Turkmen courts initiated by Turkmenistan.¹⁰ Thus it would have been futile to impose a requirement for further recourse to Turkmen courts. I, however, agree with the majority that the BIT simply does not include a provision that

¹⁰ See Claimant's Memorial on the Merits, paras. 224-234; Witness Statement of Ahmet Uyar, at 2; Claimant's Reply, paras. 127-31, 836-40, 851-58, 868-73, 883-89, 899-902; Claimant's Rejoinder on Jurisdiction, paras. 197-208; Claimant's Post-Hearing Brief, paras. 90-92; Witness Statement of Abdullatif Özbek; Witness Statement of Ozan İçkale, at 14-16.

permits Claimant to recover for a lack of fair and equitable treatment or a denial of justice, but that does not preclude consideration of such a denial of justice for purposes of considering the futility of requiring a claimant to proceed to local courts.

13. Further, I disagree with paragraph 260 to the extent the majority's analysis stops with the lack of a futility exception in the express language of Article VII. I do not regard the lack of express language in Article VII(2) of the BIT permitting a finding of futility as dispositive. Under established customary international law, which under Article 31 of the Vienna Convention is to be "taken into account, together with the context" in interpreting the BIT to the extent it provides "relevant rules of international law applicable in the relations between the parties," Claimant is not required to pursue recourse to local courts that is demonstrably futile.¹¹
14. In the context of the facts, treaty language, treaty practice and evidence in this particular case, I agree with the remainder of the Award regarding the interpretation of Article VII(2).

2. Section 7: The Claimant's Expropriation Claims

15. I dissent with respect to paragraphs 371-376 of the Award. Specifically, with respect to paragraph 371 of the Award, I regard the Supreme Court's directive dated 9 June 2010 to the State Customs Service as going beyond what was necessary to recover the delay penalties to which the contracting parties were entitled pursuant to the Arbitration Court's decisions. Based upon the evidence in the record and for the reasons set forth below, I

¹¹ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013, para. 599 ("It appears to be generally accepted in international law that obligations requiring an individual to approach a State's local courts before a claim may be taken to the international plane do not apply unconditionally. . . . This exception to the local to the local remedies rule, the so-called *futility* rule, is now universally recognized in the law of diplomatic protection. It is set out in Art. 15(a) of the Draft Articles of the International Law Commission on Diplomatic Protection of 2006 . . . in the following manner: 'Local remedies do not need to be exhausted where [. . .] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.');" *see id.*, para. 600 ("Art. 8(3) of the Argentina-Italy BIT does not mention or refer to such [futility] exception. This is not the end of the matter, however. According to the general rules of treaty interpretation as codified in Art. 31 of the VCLT, it is required that when interpreting a treaty provision 'any relevant rules of international law applicable in the relations between the parties' shall be 'taken into account, together with the context' (Art. 31 para. 3 lit. c of the VCLT). The term 'relevant rules of international law' also includes pertinent customary international law.") (internal references omitted).

disagree with the majority and conclude that the Supreme Court's directive was in fact excessive and thus expropriatory, because it resulted in the seizure of all of Claimant's machinery and equipment in Turkmenistan, significantly in excess of any penalties. The combined value of this machinery and equipment, which was deployed by Claimant to perform its investment, far exceeded any reasonable delay penalty that could have been imposed by the Supreme Court.

16. As a preliminary matter, Claimant contends that the Arbitration Court greatly inflated the amount of delay penalties, which resulted in unjust and premature fines upon Claimant.¹² The evidence in the record supports a discrepancy as to the amount of any legitimate penalties. Specifically, Claimant explained that the Arbitration Court failed to consider the "actual events causing a delay" and "did not evaluate a possible responsibility of the Respondent for the delay."¹³ In its Decision dated 18 March 2010 regarding the Avaza Canal Contract (TNGIZ-I 13), the Arbitration Court ruled that some of Claimant's property was to be attached and sold in order to collect a delay penalty of EUR 228,520 and governmental tax of 1,625,582 Manat (USD 587,380).¹⁴ In reaching this decision, the Arbitration Court, however, did not take into account that Respondent had contributed to the delay in construction by failing to make progress payments on time or, in some instances, failing to make them at all and, furthermore, that the Contract was terminated by Respondent's Contracting Authority on 27 August 2009, prior to the scheduled completion date of 10 October 2009.¹⁵
17. Despite the significant evidence in the record questioning the amount of the delay penalties,¹⁶ the majority accepted the amount of the delay penalties as alleged by

¹² Claimant's Post-Hearing Brief, paras. 449-453.

¹³ Claimant's Post-Hearing Brief, para. 449.

¹⁴ Claimant's Post-Hearing Brief, para. 450; *see* Exh. C-64 (Memorial) (Decision of Turkmenistan Arbitration Court dated 18 Mar. 2010 with respect to enforcement proceedings over the machinery and equipment of Claimant).

¹⁵ Claimant's Post-Hearing Brief, para. 451; Claimant's Reply, paras. 1092-1094.

¹⁶ *See* Claimant's Reply, paras. 678-733 (referencing the evidence); *id.*, para.1101 (stating that the "Arbitration Court allowed for the recovery of erroneously imposed penalties of 1,650,825 USD for the Contract Nos. TNG-I 08 (Babarap Project) and TNG-I 16 (Ashgabat Cinema Project)."); *see also* Exh. C-64 (Memorial) (Decision of Turkmenistan Arbitration Court dated 18 Mar. 2010 with respect to enforcement proceedings over the machinery and equipment of Claimant).

Respondent (USD 2,812,786).¹⁷ I disagree with the majority's approach. A review of the record shows that Claimant provided sufficient evidence detailing the amount of the inflation of the penalties (USD 1,650,825), and that should be taken into account to reduce them to USD 1,161,961.¹⁸

18. According to Claimant's expert Mr. Almaci of Mazars, the total value of the machinery and equipment that Respondent is alleged to have expropriated amounted to USD 13,990,000 (without VAT).¹⁹ Claimant submitted evidence, in the form of a list, showing the valuation of the equipment and machinery imported by it, which Respondent subsequently confiscated.²⁰ In this context, the Tribunal notes in paragraph 373 of the Award that Respondent's expert Mr. Qureshi had offered certain criticisms of Mr. Almaci's valuation, including that the latter had failed to account for the depreciation of the equipment and machinery.²¹ The Tribunal further observes in paragraph 373 of its Award that Mr. Almaci testified at the Hearing that the depreciated value of the assets amounted to approximately USD 10 million. I disagree further with the majority's rejection of the testimony of Claimant's expert and the majority's reference to the number in the Second Expert Report of Mr. Qureshi reducing the value of the machinery by USD 6.3 million to USD 7,690,000.²²
19. In further considering this issue, the Tribunal considered whether any offsets should be applied to the USD 10 million in determining whether Claimant was entitled to any damages. I agree with the majority's application of three offsets, as delineated in paragraph 372 of the Award, relating to: Claimant's inter-company transfers totaling USD 1.8 million; double-counting of some of the assets amounting to USD 23,000; and

¹⁷ Award, para. 371 (concluding, without taking into account Claimant's evidence, that the total delay penalties imposed upon Claimants was approximately USD 2,812,786).

¹⁸ USD 2,812,786 – USD 1,650,825 = USD 1,161,961. *See* Claimant's Reply, para. 1101.

¹⁹ Mazars Report, paras. 121-122.

²⁰ Exh. C-67 (Memorial) (documents indicating the temporary importation to Turkmenistan); *see also* Claimant's Reply, para. 1082.

²¹ Respondent's Post-Hearing Brief, para. 195.

²² *See* Award, para. 375 & n. 225.

transfer of some assets, valued at approximately USD 1.2 million, to third parties, after their alleged confiscation.

20. I disagree however, with the majority's application of the fourth offset, relating to Claimant's assumed insurance arrangements. In paragraph 373 of the Award, the majority notes that Claimant has not commented on Respondent's (unsubstantiated) assertion that Claimant's insurance arrangements for the leased assets should be taken into account when determining the actual valuation of the machinery. The majority assumes that Claimant would have been able to recover any payments it made to the lessors for the leased assets from its insurance arrangements and Claimant's silence is essentially acquiescence in this. I note however, that Claimant's evidence establishes that it was obligated to pay the value of the leased machinery and equipment to its lessors.²³ Furthermore, as the Award recognizes in footnotes 220, 221 and 222, only some of the equipment was leased, with the rest being rented or owned by Claimant, and only some of the lease agreements required insurance coverage. There is no evidence in the record showing that Claimant was reimbursed through an insurance policy for *any* of the machinery and equipment leased from third parties. Respondent thus failed to satisfy its evidential burden to support its assertion that insurance recovery should be taken into account.²⁴ For these reasons, I disagree with the majority, and cannot conclude by inference or otherwise, that Claimant was reimbursed by insurance for machinery and equipment leased from third parties.

21. To the extent the majority had any doubt at the conclusion of the Hearing as to whether Claimant's evidence was sufficient with respect to the depreciation and insurance issues, the issues could have been included among the questions put to the parties for post-hearing briefing.²⁵ The Tribunal's summary of outstanding issues that was

²³ See Exh. C-212 to Claimant's Reply.

²⁴ See *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award dated 25 Aug. 2014, para. 8.8 (finding that the principle of *onus probandi incumbit actori*, according to which a party asserting certain facts must establish the existence of such facts, "applies to the assertions of fact both by the Applicant and the Respondent.") (quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. Reports, p. 14 (20 Apr. 2010), para. 162).

²⁵ See ICSID Convention, Art. 43 ("... the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence"); ICSID Arbitration Rule 34(2)(a) ("The Tribunal

communicated to the parties after the Hearing did not include the depreciation or insurance issues.

22. I also do not agree with paragraph 375 of the Award. Contrary to an international tribunal's remit to conduct an "overall assessment of the accumulated evidence,"²⁶ the majority assessed the evidence without balanced consideration of both sides. Fundamentally, as described above, I do not agree with the amount of the delay penalties, as the majority did accepting Respondent's allegations, as USD 2.8 million. This ignored all of Claimant's evidence. In my opinion, for the reasons reflected in paragraphs 16-17 above, the legitimate penalties are at most USD 1,161,961.
23. The real value of all of the Claimants machinery and equipment (*i.e.*, USD 10 million), accounting for the various deductions noted in paragraph 373 of the Award, amounts to USD 6,977,000²⁷ or, if using USD 13,990,000, to USD 10,973,000.²⁸ The gap between the amount of the penalties (USD 1,161,961; *see* para. 17 above) and the value of the equipment seized is significant—at least USD 5,815,039²⁹ or at most USD 9,805,039.³⁰ Even use of the alternative number from Mr. Qureshi's Second Report results in a valuation results in a gap of USD 3,505,039.³¹ The majority however does not accept the various expert reports and import documentation as sufficient and concludes it could not determine the real value of the Claimant's machinery. This imposes too high a standard of proof in my view. The Claimant's evidence when viewed in its totality and weighed against Respondent's rebuttal in my view was sufficient. I therefore conclude that

may, if it deems necessary at any stage of the proceeding: (a) call up upon the parties to produce documents, witnesses and experts"); *see also The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 181 ("The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, ... whether it would like to see further evidence of any particular kind on any issue arising in the case").

²⁶ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 178.

²⁷ *See* Award, n. 223: USD 10,000,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 6,977,000.

²⁸ *See* Award, n. 224: USD 13,990,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 10,967,000.

²⁹ USD 6,977,000 – USD 1,161,961 = USD 5,815,039.

³⁰ USD 10,967,000 – USD 1,161,961 = USD 9,805,039.

³¹ *See* Award, n. 225: USD 13,990,000 – USD 6,300,000 = USD 7,690,000; USD 7,690,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 4,667,000; USD 4,667,000 – USD 1,161,961 = USD 3,505,039.

Claimant has demonstrated that the Supreme Court's directive was excessive and thus expropriatory. This is not a relatively limited discrepancy.

24. Most fundamentally, given that the Supreme Court's directive to the Customs Service was in fact excessive, the resulting expropriation of the machinery and equipment occurred without due process, was discriminatory and not in the public interest. Thus, the directive of the Supreme Court and the actions of the Customs Service prohibiting Claimant to export its machinery and equipment did in fact violate Article III of the BIT. Furthermore, in the context of USD 10 million (the claim for the machinery and equipment), the amount of the discrepancy is USD 5.8 or USD 9.8 million (or at a minimum USD 3.5 million), which is either 58% or 98% of the entire imported value. Both sums are substantial within the circumstances of this dispute.³²
25. A violation of a treaty results in State responsibility.³³ Turkmenistan's violation of the Treaty is sufficient to support the imposition of State responsibility for the breach of Article III and thus damages according to Article III(2). This clearly is not a violation without consequence. Damages in the amount of the excess should be imposed in the amount of USD 5,815,039.00.

3. Section 9: Costs

26. In Section 9.2 of the Award, I disagree specifically with the majority's analysis in paragraph 409. In my view, in exercising its discretion under Article 61(2) of the Convention, the Tribunal is required to weigh the reasonableness of a claim for costs, taking into account a number of factors including the importance of the matter to the Parties, the amount in dispute, the amount and extent of factual and expert evidence

³² Other investment tribunals have awarded lower amounts. *See, e.g., Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002, paras. 172, 178 (awarding a total amount of USD 2,190,430 in compensation for expropriation, which included a distinct amount of compensation of USD 477,718 for the taking of a ship); *SwemBalt AB v. Republic of Latvia*, Award dated 23 Oct. 2000, paras. 40-41 (awarding a total amount of USD 2,506,258 for expropriation for the taking of a ship and various pieces of construction equipment).

³³ *See Chorzow Factory case (Merits), Germany v. Poland*, Judgment dated 13 Sept. 1928, PCIJ Series A, Vol. 17, at 47 ("The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.").

produced, the conduct of the Parties during the proceeding, and whether the work required efforts across multiple jurisdictions, extensive arrangements for travel and/or translation work. In considering these various factors in context in this case, the amount in dispute is USD 537,356,530.33 plus EUR 26,678,407.26 plus interest,³⁴ and the matter is of significant importance to the Claimant. Claimant allegedly has been deprived of significant value of its investment and performance on thirteen construction contracts in Respondent's territory.

27. Further, Claimant was deprived of its machinery and equipment in the amount of USD 5.8 million (at a minimum) due to the excessive seizure of the machinery and equipment by the Supreme Court's directive due to limited delay penalties. At a minimum, this amount should be offset against the Respondent's costs. The Tribunal in its discretion is balancing here the interests of both sides and this cannot be ignored.
28. Moreover, Respondent insisted on and raised preliminary objections seeking bifurcation on an issue of jurisdiction after the *Kilic* Decision on Jurisdiction was rendered.³⁵ Respondent's request protracted the proceeding, and it was denied.³⁶ Moreover, the Tribunal ultimately rejected Respondent's jurisdictional objections.³⁷ Thus a portion of the expense must be attributed to an issue Claimant prevailed on: Jurisdiction. In such circumstances, even the "costs follows the event" approach is subject to modification considering that the proceedings in this case have consisted of not one single event, but rather of several events with different outcomes.³⁸ Further, Respondent delayed the hearing on the merits while it organized its finances as noted in paragraphs 40-44 of the Award. In the context of Respondent's procedural conduct, it significantly increased pre-merits issues that Claimants and the Tribunal were required to consider and decide. Moreover, the proceedings involved translations of documents and proceedings in three

³⁴ See Claimant's Post-Hearing Brief, para. 508.

³⁵ See Award, para. 31.

³⁶ See Award, para. 33.

³⁷ See Award, paras. 263, 293, 411.

³⁸ See, e.g., *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 298 (applying a modified "costs follow the event" approach and concluding that the arbitration costs should be borne equally by the parties and that each party should bear its own costs).

languages including Turkish, Russian and English, which similarly caused additional costs which the parties should bear equally. In the context of the facts in this proceeding as to the conduct of the parties, I do not agree that Claimant should bear 20% of Respondent's costs. In the context of this proceeding, it is unjustified. Both parties should bear their own costs.

Date: 23 February 2016

[Signed]

Carolyn B. Lamm
Arbitrator