

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/20/44

**MR. NASIB HASANOV**  
**(Claimant)**

v.

**GEORGIA**  
**(Respondent)**

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**DECISION ON RESPONDENT'S INTER-STATE NEGOTIATION OBJECTION**

*Members of the Tribunal*

Mr. Laurence Shore, President of the Tribunal  
Professor Stanimir Alexandrov, Arbitrator  
Mr. J. William Rowley QC, Arbitrator

*Secretary of the Tribunal*

Ms. Celeste Mowatt

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April 19, 2022

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**TABLE OF SELECTED DEFINED TERMS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Azerbaijan-Georgia BIT or the BIT	Agreement between the Government of Georgia and the Government of the Republic of Azerbaijan on the Encouragement and Reciprocal Protection of Investments, which entered into force on July 10, 1996
C-[#]	Claimant's Exhibit
CJ-slides	Claimant's Presentation of November 23, 2021 titled "Hearing on the Inter-State Negotiation Objection"
CLA-[#]	Claimant's Legal Authority
Cl. Submission	Claimant's Submission on the Bifurcated Issue dated April 23, 2021
CO	Caucasus Online LLC
Communications Law	Law of Georgia on Electronic Communications of June 2, 2005
Contracting Parties	The Government of Georgia and the Government of the Republic of Azerbaijan
Georgia, State or Respondent	Georgia
GNCC	Georgian National Communications Commission
Hearing	November 23, 2021 hearing on provisional measures and the bifurcated objection
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966

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Inter-State Negotiation Objection	Respondent's bifurcated objection regarding the Claimant's satisfaction of the requirements set out in Articles 9(1) and (2) of the BIT
MFN	Most Favoured Nation
Mr. Hasanov or the Claimant	Mr. Nasib Hasanov
R-[#]	Respondent's Exhibit
Request	Request for Arbitration dated October 19, 2020
Resp. Observations	Respondent's Observations on Claimant's Request for Provisional Measures dated December 21, 2020
Resp. Reply	Respondent's Reply to Claimant's Response on Provisional Measures dated February 5, 2021
Resp. Submission	Respondent's Submission on the Bifurcated Issue dated April 6, 2021
RJ-slides	Respondent's Presentation of November 23, 2021 titled "Georgia's Statement on the Inter-State Negotiations Requirement"
RL-[#]	Respondent's Legal Authority
Tr. [page]	Transcription of the November 23, 2021 hearing
Transaction	Claimant's acquisition of his investment in CO in January 2019
Tribunal	Arbitral tribunal constituted on February 18, 2021
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969, which entered into force on January 27, 1980

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## I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of Georgia and the Government of the Republic of Azerbaijan on the Encouragement and Reciprocal Protection of Investments, which entered into force on July 10, 1996 (the “**Azerbaijan-Georgia BIT**” or the “**BIT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “**ICSID Convention**”).
2. The claimant is Mr. Nasib Hasanov (“**Mr. Hasanov**” or the “**Claimant**”), a natural person having the nationality of Azerbaijan.
3. The respondent is Georgia (“**Respondent**” or “**State**” or “**Georgia**”).
4. The Claimant and the Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed above on page (i).
5. This Decision addresses the Respondent’s objection to jurisdiction on the basis that the Claimant failed to satisfy the requirements of Articles 9(1) and (2) of the BIT, which, the Respondent argues, “conditions resort to international arbitration on prior negotiations between” the Georgian and Azerbaijani Governments, and the Claimant did not seek or initiate such negotiations (the “**Inter-State Negotiation Objection**”).<sup>1</sup>
6. The underlying dispute in this arbitration concerns the Claimant’s status as the ultimate beneficial owner of Caucasus Online LLC (“**CO**”), a telecommunications company formed under the laws of Georgia. The Claimant explains that he “made and acquired his investment in CO” in January 2019 (the “**Transaction**”).

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<sup>1</sup> See Respondent’s Reply to Claimant’s Response on Provisional Measures (February 5, 2021) (“**Resp. Reply**”), para. 63. The Inter-State Negotiation Objection is also referred to as the “bifurcated objection” in this Decision.

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According to the Claimant, CO is the sole owner of a submarine, fibre-optic cable under the Black Sea, by which it “transits internet traffic from Europe to the South Caucasus and Caspian region.” The Georgian National Communications Commission (“GNCC”), a State administrative agency, authorizes CO’s operations.<sup>2</sup>

7. The Claimant’s position is that GNCC has (a) arbitrarily and illegitimately asserted a right to control and veto the Transaction by which Mr. Hasanov attained his CO beneficial ownership status; and (b) wrongfully taken retaliatory measures when the Claimant “insisted that the Transaction was unconstrained by the GNCC’s overreaching attempt to regulate.” The Claimant contends, in short, that the GNCC did not have the power to oblige CO to obtain the GNCC’s “prior consent to any future change in the beneficial ownership of CO (rather than just for a change in direct shareholdings in CO, as required by the Communications Law).”<sup>3</sup> Nonetheless, he and the “Seller” in the Transaction (Mr. Khvicha Makatsaria) kept the GNCC and the Georgian Government “fully informed of the potential change in beneficial ownership of CO.”<sup>4</sup>
8. The Respondent’s position in the underlying dispute is that the Claimant has attempted, “in plain defiance of the applicable admission requirements, to invest in and take over a company that has a dominant market position in a highly regulated industry and owns strategic infrastructure.” The Respondent explains that “Georgian law requires notification to and prior approval by the” GNCC “of any proposed investment in a telecommunications company authorized by the GNCC that would result in a transfer, direct or indirect, of five percent or more of the ownership in the company.” This notification requirement applies to CO, but the Claimant “never sought” the GNCC’s prior approval “for any of the transactions

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<sup>2</sup> Request for Arbitration (October 19, 2020) (“Request”), paras. 10-13.

<sup>3</sup> Request, paras. 14-16. The “**Communications Law**” is The Law of Georgia on Electronic Communications, June 2, 2005 (CLA-2).

<sup>4</sup> Request, para. 17.

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that purported to transfer to him a 100 percent indirect, beneficial interest in CO.” Instead, the Claimant concealed this acquisition from the Georgian authorities.<sup>5</sup>

9. According to the Respondent, Mr. Hasanov willfully defied the GNCC’s orders to comply with the law, which prompted the GNCC to issue administrative proceedings and an instruction to CO to eliminate its ownership violation. However, the violation remained and the Claimant “continued to unlawfully interfere with CO’s management.” The GNCC therefore appointed a “special manager” for CO, pursuant to the Communications Law, on October 1, 2020, rather than suspend CO’s authorization to operate. The latter option would have carried the risk of harming the economic interests of the State, as well as the “legitimate interests of authorized persons/licensees in the field of electronic communications, the consumers or the competitive environment in the market.”<sup>6</sup>
10. The Parties’ underlying dispute is briefly described by way of background. The issue that this Decision addresses, as identified above, is the Respondent’s Inter-State Negotiation Objection. The Tribunal, per its previous ruling,<sup>7</sup> considers this objection as a preliminary question.<sup>8</sup> The Respondent contends that the Inter-State Negotiation Objection, if successful, would dispose of the entire case.<sup>9</sup> The Claimant’s position is that even if the objection were successful, it would not dispose of the entire case or of any of the Claimant’s claims, because the Claimant would, “in line with an extensive line of jurisprudence, simply seek a stay of the

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<sup>5</sup> Respondent’s Observations on Claimant’s Request for Provisional Measures (December 21, 2020) (“**Resp. Observations**”), paras. 2-4.

<sup>6</sup> Resp. Observations, paras. 33, 49, 50.

<sup>7</sup> Procedural Order No. 2, March 26, 2021.

<sup>8</sup> The State has noted a reservation of right to raise “substantial jurisdictional objections” in addition to the Inter-State Negotiation Objection. Resp. Reply, para. 104.

<sup>9</sup> Resp. Letter dated February 24, 2021.

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proceedings and would make renewed attempts to initiate interstate negotiations before pursuing the same claims with the same scope.”<sup>10</sup>

## II. PROCEDURAL BACKGROUND

11. On October 19, 2020, ICSID received a Request for Arbitration (“**Request**”) dated October 19, 2020, from Mr. Nasib Hasanov against Georgia.<sup>11</sup>
12. On October 30, 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
13. Further to the calendar fixed by the Secretary-General in accordance with ICSID Arbitration Rule 39(5), on December 21, 2020, the Respondent filed observations on the provisional measures application set out in the Request. On January 12, 2021, the Claimant filed his response, which modified the application for provisional measures. The Respondent submitted its reply on February 5, 2021.
14. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators.

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<sup>10</sup> Cf. Letter dated March 8, 2021; *see also* Claimant’s Submission on Bifurcated Issue, April 23, 2021, para. 107: “if the Tribunal were minded to give credence to the Respondent’s objection, the appropriate course would be to stay the proceedings, in order for any prior negotiation requirement to be complied with by the Claimant (or here, its home State).”

<sup>11</sup> The Request included an application for provisional measures at paragraphs 110-124. The provisional measures application was subsequently amended on January 12, 2021, as noted below, and the subject of further written and oral submissions by the Parties.

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15. The Tribunal is composed of Laurence Shore, a national of the United Kingdom and the United States, President, appointed by agreement of the two co-arbitrators; Stanimir Alexandrov, a national of Bulgaria, appointed by the Claimant; and J. William Rowley, a national of Canada and the United Kingdom, appointed by the Respondent.
16. On February 18, 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Celeste Mowatt, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
17. On February 24, 2021, the Respondent submitted an application for bifurcation of the proceedings, seeking to have its Inter-State Negotiation Objection heard as a preliminary issue.
18. The Claimant filed his observations in response to the application for bifurcation on March 8, 2021, opposing the request.
19. Following consultations with the Parties, the first session of the Tribunal was scheduled for March 19, 2021, with the provisional measures application and request for bifurcation included in the agenda.
20. Correspondence from the Parties dated March 17 and 18, 2021, addressed developments connected to the provisional measures application. The Respondent requested that submissions on the provisional measures application be postponed in light of those developments, and the Claimant accepted postponement of the application *sine die*.
21. In accordance with ICSID Arbitration Rule 13(1), the first session of the Tribunal was held by video conference on March 19, 2021. In addition to the Members of the Tribunal and Tribunal Secretary, the following persons were in attendance:

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*For the Claimant:*

Mr. Michael Ostrove, DLA Piper France  
Ms. Kate Cervantes-Knox, DLA Piper France  
Ms. S  r  na Salem, DLA Piper France  
Mr. Angus Eames, DLA Piper UK  
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Mr. Anthony Sinclair, Quinn Emanuel Urquhart & Sullivan UK  
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Mr. Vano Gogelia, PWC Georgia  
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Mr. Panos Theodoropoulos, Dechert (Paris) LLP  
Mr. Hayk Kupelyants, Dechert (London) LLP  
Ms. Mariam Gotsiridze, Ministry of Justice of Georgia  
Ms. Ana Goglidze, Ministry of Justice of Georgia

22. The Tribunal deliberated following the session and communicated by letter of March 19, 2021, its decision on the bifurcation request, confirming that its reasons would follow.
23. Following the first session, on March 26, 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also sets out the agreed procedural calendar.
24. On the same date, March 26, 2021, the Tribunal also issued Procedural Order No. 2, which set out the Tribunal's decision on the request for bifurcation. As a result of this Procedural Order, the proceeding on the merits was suspended, pending a decision on the Inter-State Negotiation Objection.
25. On April 6, 2021, the Respondent filed a submission on the bifurcated objection.

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26. By letter of April 8, 2021, the Claimant requested that the Tribunal convene a hearing on the request for provisional measures at its earliest convenience. On April 9, 2021, the Respondent requested that the Tribunal convene the hearing no earlier than May 12, 2021.
27. On April 15, 2021, the Tribunal issued Procedural Order No. 3 concerning the request for provisional measures. The Order confirmed that submissions on provisional measures would be heard at the hearing scheduled for May 12, 2021, and provided directions to the Parties pending the Tribunal's decision on the request for provisional measures.
28. On April 23, 2021, the Claimant filed a submission on the bifurcated objection.
29. By emails of May 11, 2021, the Parties informed the Tribunal that the Parties had agreed to request the postponement of the hearing to pursue settlement of the dispute. The Tribunal confirmed its approval of the suspension by ICSID's email of May 11, 2021.
30. By email of June 25, 2021, the Claimant informed the Tribunal that the Parties were engaged in ongoing discussions regarding the settlement of the dispute, and agreed to the temporary suspension of the procedural calendar.
31. The Tribunal issued Procedural Order No. 4 on June 29, 2021, which confirmed that the procedural calendar was suspended in view of the Parties' agreement.
32. On July 26, 2021, the Claimant requested that the hearing on provisional measures and the bifurcated objection be rescheduled. The hearing was subsequently scheduled for November 23, 2021.
33. On November 11, 2021, the Claimant filed an updated submission regarding the request for provisional measures.
34. On November 18, 2021, the Respondent filed observations on the Claimant's submission of November 11, 2021.

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35. On November 19, 2021, the Respondent filed a request for the Tribunal to decide on confidentiality of documents. The Claimant filed observations on this request on November 22, 2021, and the Tribunal's decision on the request was conveyed to the Parties by letter of November 22, 2021.
36. On November 23, 2021, the Tribunal held a hearing on provisional measures and the bifurcated objection by video conference (the '**Hearing**'). In support of their respective positions on these two issues, the Parties filed slide presentations (one presentation per Party, per issue; a total of four presentations) on the day of the Hearing.
37. In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following persons attended the Hearing:<sup>12</sup>

*For the Claimant:*

Mr. Michael Ostrove, DLA Piper France  
Ms. Kate Cervantes-Knox, DLA Piper France  
Ms. S  rena Salem, DLA Piper France  
Ms. Lucia Bizikova, DLA Piper UK  
Ms. Katherine Roe, DLA Piper UK  
Mr. Anthony Sinclair, Quinn Emanuel Urquhart & Sullivan UK  
Mr. Vano Gogelia, PWC Georgia  
Ms. Natia Kobosnidze, PWC Georgia  
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Mr. Panos Theodoropoulos, Dechert (Paris) LLP  
Ms. Mariam Gotsiridze, Ministry of Justice of Georgia  
Ms. Ana Goglidze, Ministry of Justice of Georgia  
Dr. Beka Dzamashvili, Ministry of Justice of Georgia

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<sup>12</sup> The Hearing was transcribed by T. McGowan, G. Vaughan, and L. Gulland, with the Parties' corrections to the transcript (transmitted on December 23 and 27, 2021) subsequently incorporated. The Hearing transcript (as amended to reflect the Parties' corrections) is referred to as "Tr. [page]" in this Decision.

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38. Following the Hearing, by letter of November 26, 2021, the Tribunal informed the Parties that that it intended to issue a motivated decision as soon as possible, but that it did not consider that it would be procedurally efficient for the Tribunal to issue its ruling without reasons, followed by a motivated decision, as had been raised at the conclusion of the Hearing. The Tribunal further confirmed by the same correspondence that the Tribunal would confer with the Parties regarding the date for costs submissions following the ruling on the bifurcated objection, consistent with the Parties' communication of May 3, 2021 in this regard.
39. Further to para. 21.3 of Procedural Order No. 1, the Parties were invited to indicate any corrections to the transcript of the Hearing, and the corrections transmitted by the Parties on December 23 and 27, 2021, were incorporated and the amended version of the Transcript was distributed to the Parties.
40. The Parties were also invited to indicate any desired redactions to the Transcript, in reference to para. 20.6 of Procedural Order No. 1 and the Parties' correspondence of May 3, 2021, and November 5, 2021, indicating an agreement to publication of the transcript. Redactions were requested by the Respondent on December 27, 2021. The Claimant's objected to the requested redactions on January 25, 2022, and the Respondent replied to the Claimant's objections on February 1, 2022. The Tribunal's decisions on the redactions were set out in the Tribunal's letter of February 15, 2022.

### **III. THE PARTIES' WRITTEN AND ORAL SUBMISSIONS**

#### **A. The Respondent's Inter-State Negotiation Objection**

41. The Tribunal summarizes, in this section of the Decision, the Respondent's position on the bifurcated objection. While this summary is not intended to be comprehensive, the Tribunal has carefully considered all written and oral submissions, documentary evidence, and legal authorities presented by the Parties.

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42. The Respondent observes that the BIT must be interpreted in accordance with the general rule of interpretation codified in Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”) (May 23, 1969, CLA-12) (*i.e.*, “in accordance with the ordinary meaning to be given to its terms, in their context, and in light of the BIT’s object and purpose”).<sup>13</sup> Pursuant to the VCLT, Article 9 of the BIT conditions investor-State arbitration on “prior negotiations between the Republic of Azerbaijan and Georgia for six months.”<sup>14</sup>

43. Article 9 of the BIT<sup>15</sup> provides, in pertinent part:

“1. Any dispute that may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the latter Contracting Party, will be subject to negotiations between the Contracting Parties in dispute.

2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be settled in such a manner within 6 months from the day on which a written claim was submitted, the investor shall be entitled to refer the matter:

...

b) to the International Centre for Settlement of Investment Disputes (ICSID), having regard to the relevant provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for

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<sup>13</sup> Respondent’s Submission on the Bifurcated Issue (April 6, 2021) (“**Resp. Submission**”), para. 15.

<sup>14</sup> Resp. Submission, para. 16.

<sup>15</sup> The Parties agree that the Russian version of the BIT prevails for the purposes of interpretation. The Claimant adduces in CLA-1 the Russian version translated into English; the Respondent adduces in RL-65 the Preamble and Article 9 of the Russian text translated into English. The only difference between the translations (which the Tribunal considers to be insignificant and the Parties do not address) is in Article 9 (1): CLA-1 uses the word “negotiation”; RL-65 uses the word “negotiations.” The Tribunal will use, for convenience, “negotiations,” but reiterates that it does not view the difference to carry any significance.

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signature in Washington, District of Columbia, on 18 March 1965, when both Contracting Parties have become parties to this Convention, or ... .”

44. The BIT’s Preamble provides that the “Government of Georgia and the Government of the Republic of Azerbaijan, hereinafter referred to as the ‘Contracting Parties.’”
45. In view of these provisions, the Respondent argues that the negotiation precondition to arbitration plainly refers to negotiation between Georgia and the Republic of Azerbaijan – the “Contracting Parties.” The BIT employs the terms “Contracting Parties” or “Contracting Party” 75 times, in each instance to refer to one or both of Georgia and the Republic of Azerbaijan. On the other hand, when the BIT refers to an investor and the host State, “it consistently employs the undefined term “parties,” as in Article 9(2)(c) and Article 6.
46. The BIT’s use of “Contracting Parties” was clearly deliberate and conveys a different meaning than “parties.” The Respondent cites, *e.g.*, a WTO Appellate Body ruling (RL-20, *EC Measures Concerning Meat and Meat Products (Hormones)*, para. 164) in support: the use of different words in different places is designed to convey different meanings; a treaty interpreter is not entitled to assume that such usage was merely inadvertent.
47. The Claimant nonetheless contends that the use of “Contracting Parties” in Article 9(1) was a drafting error, on the basis that it is an oxymoron: (a) only one Contracting Party can be “in dispute” in an investor-State arbitration, and (b) requiring negotiations by the contracting States to attempt to settle an investor-State dispute would defeat the purpose of investor-State arbitration. This position, however, is contrary to investment treaty practice: at least twenty BITs condition resort to arbitration on prior inter-State negotiations or conciliation. In at least seven Azerbaijani and Georgian BITs there is a pre-condition-to-arbitration provision similar to that in Article 9 of the BIT. It is in the interest of contracting States to resolve disputes before going to arbitration. These inter-State negotiation

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pre-conditions are clearly not drafting errors; Article 9's terms "make sense in their context."<sup>16</sup>

48. Further, the Claimant's position, which would effectively rewrite Article 9(1), is incompatible with the treaty interpretation rule that every treaty term must be interpreted to give it meaning rather than to deprive it of meaning. Authorities in support of this rule include, *e.g.*, *Murphy v. Ecuador* (RL-81) and *Japan – Taxes on Alcoholic Beverages* (RL-83). Treaty interpretation must also proceed from the common intentions of the contracting States as expressed in the treaty text, not from presumed intentions. Here, the Respondent refers to, *e.g.*, *Wintershall v. Argentina* (RL-33) and *Ping An v. Belgium* (RL-86).
49. The Claimant refers to one aspect of the BIT's object and purpose in the Preamble ("Intending to create and support favourable conditions for investors of one Contracting Party in the territory of the other Contracting Party") in support of his position that Article 9(1) should be interpreted to mean investor-State negotiation. However, the Claimant ignores another purpose of the BIT as expressed in the Preamble, which supports the Respondent's Inter-State negotiation interpretation: "Desiring to strengthen economic cooperation on a long-term basis for the mutual benefit of both Contracting Parties." Moreover, the object and purpose of the BIT cannot in any event override an express condition precedent to arbitration, such as that contained in Article 9(1). The authorities supporting this proposition include *Daimler v. Argentina* (RL-31): "It is for States to decide how best to protect and promote investments."
50. Under the plain meaning of Article 9(1), unless the Inter-State Negotiation condition is satisfied, "the Centre lacks jurisdiction and the Tribunal lacks competence."<sup>17</sup> Consent is the basis for ICSID jurisdiction, and any conditions to a State's consent to international adjudication constitute limits to that consent.

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<sup>16</sup> Resp. Submission, para. 37.

<sup>17</sup> Resp. Submission, para. 55.

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See, e.g., the ICJ's ruling in *Armed Activities in the Territory of the Congo* (RL-91), and the award in *Kılıç v. Turkmenistan* (RL-99). In *Kılıç*, the tribunal stated that "an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into existence through a qualifying investor's acceptance of a host state's standing offer as made (*i.e.*, under its terms and conditions)." The phrasing in Article 9(2) of the BIT points to a mandatory requirement, not an option, and the word "If" at the beginning of Article 9(2) indicates that "the exercise of the right to arbitrate granted in Article 9(2) is conditional on prior inter-State negotiations."<sup>18</sup>

51. The Respondent reiterates that "Article 9 of the BIT thus expressly articulates a layered sequential dispute resolution system, requiring, as a first step, inter-State negotiations, after which the dispute, if not resolved within 6 months, may escalate to investor-State arbitration."<sup>19</sup> The fulfilment of the condition is therefore a jurisdictional requirement. The *Kılıç* tribunal emphasizes that compliance with conditions constitutes a jurisdictional requirement "in the sense that a failure to meet the conditions has the consequence that there is no jurisdiction to be exercised." A long line of cases has held that a negotiation pre-condition is a jurisdictional requirement.<sup>20</sup> The Claimant merely cites a handful of cases in support of the contention that it is only "desirable," rather than mandatory for jurisdiction, that the Contracting Parties should negotiate, and those cases are distinguishable on a number of grounds.<sup>21</sup>

52. The Claimant cannot overcome the jurisdictional bar by arguing that inter-State negotiations are outside his control or that they would have been futile. Moreover, non-compliance with the condition cannot be cured by a stay of the arbitral

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<sup>18</sup> Resp. Submission, para. 60.

<sup>19</sup> Resp. Submission, para. 60.

<sup>20</sup> Resp. Submission, paras. 61-65.

<sup>21</sup> Resp. Submission, para. 67.

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proceedings. At the very least, an investor “must use reasonable efforts to bring about inter-State negotiations before resorting to international arbitration.” At a minimum, an investor must submit a “written claim” and request that the Contracting States engage in negotiations pursuant to Article 9(1) of the BIT. The Contracting Parties are then under an obligation to negotiate in good faith.

53. However, in this case the Claimant did not take the necessary steps to bring about inter-State negotiations. The BIT does not impose any obligations on a Contracting Party to initiate inter-State negotiations on its own accord. Regardless of whether the Claimant must prompt inter-State negotiations, the critical point is that “there is a bar to ICSID arbitration if inter-State negotiations have not taken place for six months.”<sup>22</sup> See, e.g., *Urbaser v. Argentina* (RL-88). Thus, if the Contracting Parties failed to act in accordance with their good faith obligations under Article 9(1), their failure would not eliminate the applicability of the condition. See, e.g., the ICJ’s ruling in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (RL-84).
54. A stay of the proceedings cannot be implemented as a way to cure non-compliance with a mandatory pre-condition. The Respondent again cites *Kılıç v. Turkmenistan*: “the conditions for jurisdiction not having been met, the Tribunal has no jurisdiction to suspend the proceedings.” Further, the Claimant’s “futility” argument founders on the fact that where “negotiations have not even been initiated under Article 9(1) of the BIT, Claimant cannot simply assume their futility.”<sup>23</sup> This is especially the case where the Contracting Parties “have an evident interest in the settlement of the present dispute.”<sup>24</sup>
55. While initially arguing that no inter-State negotiations are required under Article 9(1), the Claimant has also taken the position that he requested the Azerbaijani

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<sup>22</sup> Resp. Submission, para. 77.

<sup>23</sup> Resp. Submission, para. 82.

<sup>24</sup> Resp. Submission, para. 83.

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Government to engage with the Georgian Government to assist in resolving the dispute, but the Azerbaijani Government took no action to do so.<sup>25</sup> The Claimant subsequently alleged that his request to the Azerbaijani Government had been acted on, but no settlement had ensued.<sup>26</sup> However, as of April 6, 2021, the Claimant had produced no evidence to support either of these contradictory contentions.<sup>27</sup>

56. As for the evidence of inter-State negotiations that the Claimant produced with his April 23, 2021 filing,<sup>28</sup> the Respondent makes the following points in its hearing presentation slides<sup>29</sup> (RJ-slides 23- 24; Tr., pp. 119-124; 159-162) and oral submissions:

- It is insufficient for the Claimant merely to draw the Contracting Parties' attention to the existence of an investment dispute.
- The *Capital Financial Holdings v. Cameroon* case relied on by the Claimant<sup>30</sup> is inapposite, since the treaty in that case provided for two alternative pre-arbitral mechanisms (investor-State or inter-State negotiations) and the Respondent (Cameroon), unlike Georgia, had not even acknowledged the investor's claims.
- In addition to submitting a written claim, informing the State of the dispute, a potential claimant should also "explicitly request that the contracting parties engage in inter-state negotiations pursuant to Article 9(1). And there

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<sup>25</sup> Resp. Submission, para. 86; citing Cl. Letter dated March 8, 2021.

<sup>26</sup> Resp. Submission, para. 87; citing First Procedural Session Tr., March 19, 2021, p. 48.

<sup>27</sup> Resp. Submission, para. 89. The Respondent observes (footnote 124) that it reserves the right to submit additional evidence and arguments or to object to any evidence that Claimant might adduce, "should he eventually provide the promised 'details' of either the Republic of Azerbaijan's purported refusal to engage with Georgia concerning this dispute or 'contact' at the inter-State level."

<sup>28</sup> Claimant's Submission on Bifurcated Issue, April 23, 2021 ("**Cl. Submission**"), paras. 127-140.

<sup>29</sup> Georgia's Statement on the Inter-State Negotiations Requirement, November 23, 2021 ("**RJ-slides**").

<sup>30</sup> Cl. Submission, paras. 128-135, CLA-90.

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is simply no evidence on record, . . . , that Claimant ever made such a request for inter-state negotiations to the contracting parties in the present case” (Tr., p. 120).

- C-43, a note dated April 1, 2021, created by the Azerbaijani Ministry of Foreign Affairs for the stated “purposes of protecting the interests of Claimant in the arbitration,” does not assist the Claimant’s latest position, which is that some inter-state contacts occurred, thereby satisfying the inter-State negotiation requirement.
- First, C-43 is an advocacy note, in which the Azerbaijani Government was simply seeking to help the Claimant’s case. Second, the note has no context or details, and does not record that the Claimant requested the Republic of Azerbaijan to initiate negotiations with Georgia pursuant to Article 9. Third, there is no evidence when Azerbaijan actually contacted Georgia. Fourth, the note “points to no settlement discussions regarding Georgia’s substantive obligations under the BIT,” and not even a mention of the BIT (Tr., p. 123).
- Any diligent investor “would have done something in connection with Article 9(1), and the record shows to us that the investor of our case did simply nothing” (Tr., p. 160).

57. The Respondent also rejects the Claimant’s estoppel and “Most Favoured Nation” (“**MFN**”) arguments to establish jurisdiction.<sup>31</sup> As for estoppel, under Article 41(1) of the ICSID Convention and the doctrine of *Kompetenz-Kompetenz*, an arbitral tribunal cannot abdicate the task of determining jurisdiction by reference to the parties’ (pre-arbitral) conduct. It follows that jurisdiction, as stated by the tribunal in *Oded Besserglik v. Republic of Mozambique*, “cannot be created by invoking the

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<sup>31</sup> On estoppel, see Resp. Submission, paras. 90-113; RJ-slides 18-21; Tr. pp. 114-118; on MFN, see RJ-slides 14-16; Tr., pp. 113-114.

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doctrine of estoppel.”<sup>32</sup> The Respondent also refers to other ICSID cases in accordance with this conclusion, such as *Vieira v. Chile* (RL-36Bis-SPA) and *Quiborax v. Bolivia* (RL-129). The Claimant’s reliance on *Fraport v. Philippines* (RL-87) and *Desert Line Projects v. Yemen* (RL-132) is misplaced, because those cases involved the “question whether a respondent State could raise a factual issue – the illegality of an investment – in the context of an objection to jurisdiction *ratione materiae*. Neither case involved an attempt by the claimant to establish jurisdiction on the basis of the doctrine of estoppel.”<sup>33</sup> Estoppel may only preclude a party from invoking a factual premise, “not the invocation of a jurisdictional objection as such.”<sup>34</sup>

58. If the estoppel doctrine were deemed to apply, the Claimant would have to establish that Georgia made a clear and unequivocal representation concerning the proper interpretation of Article 9 of the BIT, and the Claimant reasonably relied on that representation to his detriment or to Georgia’s disadvantage. As a factual matter, the Claimant has not demonstrated either of these elements. The GNCC’s participation in discussions with the Claimant without bringing the inter-State negotiation requirement to the Claimant’s attention does not constitute a “clear and unequivocal representation.”<sup>35</sup> Moreover, the purpose of the GNCC’s meeting with the Claimant’s lawyers was to discuss a resolution “within the framework of the Georgian legislation” (R-57). The Claimant’s reliance on C-42, the Administration of Georgia’s August 25, 2020 letter to the Claimant’s lawyers is also unavailing: that letter did not take any position concerning the negotiations required by Article 9. Further, the Claimant has not shown that he changed his position to his detriment or to Georgia’s advantage: the Claimant “had already settled on his erroneous interpretation of Article 9 of the BIT long before he entered

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<sup>32</sup> Resp. Submission, para. 92, quoting *Oded Besserglik v. Republic of Mozambique* (RL-34).

<sup>33</sup> Resp. Submission, para. 95.

<sup>34</sup> Resp. Submission, paras. 96-99.

<sup>35</sup> Resp. Submission, para. 102, citing *Quiborax v. Bolivia* (RL-129).

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into discussions with the GNCC on July 20, 2020, and indeed at the latest by June 22, 2020, when Claimant sent his Notice of Dispute.”<sup>36</sup>

59. The Claimant’s reliance on the BIT’s MFN clause (Article 4)<sup>37</sup> to avoid the inter-State negotiation requirement also fails on several grounds. As a matter of principle, an MFN clause does not apply to a State’s offer to arbitrate “unless the MFN clause leaves no doubt that the contracting parties intended to include dispute settlement within the scope of operation of the MFN clause.”<sup>38</sup> No such language or intention is expressed in Article 4 of the BIT. Instead, in Article 4, the MFN treatment is closely linked to fair and equitable treatment (*i.e.*, substantive rights). Moreover, an MFN clause cannot override carefully negotiated preconditions to arbitration (*see, e.g., Wintershall v. Argentina*, RL-33): these “are part and parcel of the contracting parties’ integrated offer to arbitrate, which must be accepted by the investor on the terms offered.”<sup>39</sup>

60. Finally, in respect of costs, the Respondent requests the Tribunal to “[o]rder Claimant to pay to Respondent the full costs arising out of these proceedings” and to grant any further relief that the Tribunal deems appropriate (Resp. Submission, para.114).

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<sup>36</sup> Resp. Submission, para. 108. See also RJ-slides 21 (“Estoppel cannot be based on a failure to say something where nothing ought ‘to have been said,’” citing *ELSI (US v. Italy)* (RL-141).

<sup>37</sup> Article 4 (1), (2) states as follows: “1. Each Contracting Party shall in its territory accord to investments of investors of the other Contracting Party treatment which is fair and equitable and no less favorable than that which it accords to investments of its own investors or of investors of any third State. 2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards the management, support, use or disposal of its investments, treatment which is fair and equitable and no less favorable than that which it accords to investments of its own investors or of investors of any third State.”

<sup>38</sup> Tr., p. 113; RJ-slides 14, citing, *e.g., Plama v. Bulgaria* (RL-144).

<sup>39</sup> Tr., p. 114.

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**B. The Claimant’s Opposition to the Inter-State Negotiation Objection**

61. The Claimant’s primary argument is that Article 9 of the BIT, “properly construed,” does not require Azerbaijan and Georgia to negotiate in an attempt to resolve the dispute between the Claimant and Georgia. The secondary argument is that even if the Tribunal were to find that Article 9 contains an inter-State negotiations requirement, the Claimant complied with it by appealing to Azerbaijan (early in 2020) to discuss the dispute with the Georgian government (though the Claimant did so “not because he felt obliged to by the BIT”)<sup>40</sup>. Further, regardless of the proper interpretation of Article 9, further negotiations, whether between Azerbaijan and Georgia or the Claimant and Georgia, would be pointless, and the “cooling-off” period in a treaty should not impede arbitration proceedings.<sup>41</sup>
62. The primary argument: the Respondent’s reading of Article 9 is erroneous. Pursuant to the most basic rules of treaty interpretation, whereby the negotiators’ intent is determined by reference to the ordinary meaning of the treaty’s terms taken in their context, and in light of the treaty’s object and purpose, Article 9(1) requires negotiations between the parties “in dispute” – *i.e.*, the investor and the host State – prior to resort to arbitration. Article 9(1)’s reference to “Contracting Parties in dispute” is otherwise nonsensical and must be a drafting error. When BITs genuinely require inter-State negotiations, the language is clear and unambiguous.<sup>42</sup>
63. Citing Richard Gardiner’s treatise on treaty interpretation and the *Alemanni v. Argentina* tribunal (CLA-57 and CLA-13), the Claimant contends that “ordinary meaning” must not be detached from context, object, and purpose; Article 31 of the VCLT does not impose a “lexicographical literalism.” There can be more than

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<sup>40</sup> Cl. Submission, para. 6.

<sup>41</sup> Cl. Submission, para. 10, citing *Biwater Gauff v. Tanzania* (RL-114).

<sup>42</sup> Cl. Submission, paras. 18-19.

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one “ordinary meaning,” and the task is to decide what the negotiators intended, which requires consideration of context, object, and purpose.<sup>43</sup>

64. The Respondent’s approach to Article 9(1) amounts to lexicographical literalism that leads to a meaningless result. Read literally, the term “Contracting Parties in dispute” is meaningless because the Contracting Parties are not in dispute; only the investor and the host State are in dispute. The Tribunal must adopt an interpretation that goes beyond the ordinary meaning of “Contracting Parties” taken in isolation. The words “in dispute” cannot be ignored: “In order to make the phrase ‘*Contracting Parties in dispute*’ meaningful, it is necessary to interpret it as ‘*parties in dispute*’ or as ‘the Contracting Party and the investor in dispute’ (as used in the title of Article 9), as the literal words ‘*Contracting Parties in dispute*’ refer to no one at all in the context of Article 9 and thus would lead to no requirement of negotiations of any kind.”<sup>44</sup>
65. The Claimant reiterates that his position is that Article 9 is “inherently ambiguous and must be construed in accordance with the context and the object and purpose of the BIT.” Among the relevant points of context is that Article 9 – undisputedly – is concerned with investor-State disputes. The title of Article 9 (“Settlement of disputes between the Contracting Party and an Investor of the other Contracting Party”) establishes this explicitly. Disputes between the Contracting Parties are dealt with in Article 10. Additionally, Article 9(2)’s reference to a “written claim” is evidently a claim submitted by the investor and not the investor’s home State. The exercise of diplomatic protection is incompatible with the ICSID system. Since the investor submits the written claim, it must be assumed that the investor participates in the negotiations. Further, only the investor and the host State are in a position to settle the dispute. Thus, the only plausible explanation for Article

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<sup>43</sup> Cl. Submission, paras. 22-25.

<sup>44</sup> Cl. Submission, para. 41.

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9(1)'s reference to "Contracting Parties" is that it is a drafting error; the obvious intention was to refer to the investor and the host State, the "parties in dispute."<sup>45</sup>

66. The Respondent's interpretation is also contrary to the BIT's object and purpose. The BIT's chapeau clarifies that the objective was to "create and support favourable conditions" for home State investors in the host State, and to recognise that reciprocal protection of investments will "stimulate business initiative." A main purpose of investor-State arbitration is to "depoliticize disputes by removing the home State from the picture." Thus, the object and purpose of the BIT supports the conclusion that the Claimant's interpretation of Article 9(1) – the Claimant and the Respondent are to negotiate with each other – is correct. The Respondent's references to other treaties providing for inter-State negotiations does not assist the Respondent's interpretation. Almost universally, BITs provide for investor-State negotiations; where two States play any role at all, the role is purely facilitatory.<sup>46</sup>
67. The Respondent's interpretation would in fact undermine an investor's ability to settle a dispute and thereby contravene the object and purpose of the BIT. The Claimant cannot force Azerbaijan to negotiate, and the investor would have no right to participate in the negotiation process. While the Respondent points to the "economic cooperation" provision in the chapeau, it does not explain how this provision supports its reading of Article 9(1). Moreover, since there is no inter-State negotiation precondition to arbitration, the BIT's object and purpose have not overridden a precondition, as alleged by Georgia.<sup>47</sup>
68. The Respondent's reliance on "at least twenty BITs" which allegedly include an inter-State negotiation precondition is misplaced. First, even if the Respondent's characterisation of those BITs were accurate, the characterisation is not relevant to

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<sup>45</sup> Cl. Submission, paras. 44-50.

<sup>46</sup> Cl. Submission, paras. 51-53.

<sup>47</sup> Cl. Submission, paras. 54-57.

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the interpretive exercise under the VCLT. Second, the Respondent's characterisation is misleading:

- The Respondent identified fifteen BITs, not twenty, only ten of which have come into force.
- The ten in force are a tiny minority of the BITs currently in force around the world.
- Where BITs do include the unusual inter-State negotiation requirement, the wording is clear and unambiguous in the dispute resolution clause, as are any notification requirements.
- The Respondent's identification of two BITs (Georgia-Ukraine and Azerbaijan-Kazakhstan) that contain a similar drafting error does not help the Respondent's case that there can be more than one Contracting Party "in dispute."
- Notably, the Respondent omitted to mention the Georgia-BLEU BIT, which demonstrates that "when the Respondent actually intended to subject recourse to arbitration to inter-State negotiations, it knew perfectly well how to clearly do so."
- The Respondent has not identified a single treaty award that has interpreted a "similar clause to require inter-State negotiations as a condition precedent to the commencement of arbitration proceedings."<sup>48</sup>

69. The Claimant contends that even if the Tribunal were to find in favour of the Respondent regarding the existence of an inter-State negotiation requirement, that requirement would be superseded by a more favourable dispute settlement provision in another Georgian BIT by effect of the MFN clause. The Netherlands-Georgia BIT provides direct access to arbitration. The Claimant is entitled to

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<sup>48</sup> Cl. Submission, paras. 58-62.

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invoke the MFN clause in the BIT, Article 4, to rely on the Netherlands-Georgia dispute resolution clause. Dispute settlement is not an excluded matter under Article 4(3) of the BIT. *See, e.g., Suez v. Argentina* (CLA-62; the failure to refer to dispute settlement in a list of exclusions reinforces the position that an MFN clause can extend to dispute settlement matters). Moreover, many tribunals have concluded that investors may invoke MFN clauses to “borrow” dispute settlement provisions from other treaties that do not contain local remedy or negotiation preconditions.<sup>49</sup>

70. Even if the inter-State negotiation requirement existed and was not superseded by the MFN clause, the Tribunal would maintain discretion on whether to apply the requirement. That is the case because an obligation to engage in prior negotiations is procedural and not jurisdictional in nature. This is the prevailing view of treaty tribunals. At most, this procedural issue affects the admissibility of the claim. Additionally, Professor J. Paulsson has opined (CLA-68) that conditions precedent such as participating in a conciliation attempt pose “no problem” to the authority of the tribunal itself.<sup>50</sup>

71. Along these lines, Georgia’s objection is at best an admissibility objection. The phrases in Article 9 “simply denote a conditionality to the reference of the dispute to arbitration, without illuminating the nature of the conditionality.” Article 9 of the BIT establishes the consent of the Contracting Parties to “any dispute” and then defines the procedure that an investor should follow before it involves the State’s consent to arbitrate. The negotiation requirement “cannot be read to condition the consent to arbitrate itself.” *See, e.g., İçkale İnşaat Limited Şirketi v. Turkmenistan* (CLA-69), which should be preferred to the reasoning in *Kılıç v. Turkmenistan*; *Burlington Resources v. Ecuador* (CLA-70); *Merrill & Ring v. Canada* (CLA-54); *Westwater Resources v. Turkey* (CLA-55). The Respondent relies on cases that reflect a minority view or provide obiter comments or concern contexts

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<sup>49</sup> Cl. Submission, paras. 63-75.

<sup>50</sup> Cl. Submission, paras. 76-79.

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distinguishable from the present case (e.g., *Mabco v. Kosovo* (RL-103); *Enron v. Argentina* (RL-101); *Tulip v. Turkey* (RL-105); *Itisaluna Iraq v. Iraq* (RL-104); *Almasryia v. Kuwait* (RL-105); *Murphy v. Ecuador* (RL-108)).<sup>51</sup>

72. The Claimant's "purported non-compliance" with a negotiation precondition should not in any event result in the dismissal of his claims. Any prejudice that the Respondent might claim to suffer from non-compliance could be addressed by a costs order (which would in any event be negligible). In reality, Georgia has suffered no prejudice, since it has been in negotiations with the Claimant since at least March 2020. Dismissal, on the other hand, could prompt a number of negative reactions from the Respondent, which could endanger the Claimant's investment. If the Tribunal were nonetheless minded to give credence to the inter-State Negotiation Objection, the appropriate step would be to suspend the proceedings, so that the Claimant (or Azerbaijan) could comply any prior negotiation requirement. Several investment treaty tribunals and the ICJ have adopted the suspension approach.<sup>52</sup>

73. Assuming an inter-State negotiation precondition existed, the doctrines of estoppel and good faith preclude the Respondent from enforcing the precondition. Estoppel applies in circumstances where, from March to September 2020, the Claimant sought to resolve the dispute through meetings the Respondent's representatives and issuing "written invitations" to the Respondent's representatives (including but not limited to the GNCC) to participate in negotiations. The invitations referenced Article 9 of the BIT, as did C-26, the Claimant's letter of June 22, 2020, which constituted a written claim of dispute under Article 9(2). The Respondent participated in meetings, and at no time did Georgia indicate that negotiations should instead take place between Azerbaijan and Georgia. It should have done

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<sup>51</sup> Cl. Submission, paras. 80-100.

<sup>52</sup> Cl. Submission, paras. 102-109.

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so had it thought so; evidently, Georgia understood that Article 9 required investor-State negotiations (assuming that Georgia was acting in good faith).<sup>53</sup>

74. The Respondent is therefore estopped from arguing that the settlement negotiations did not satisfy Article 9. Further, the duty of good faith in Articles 26 and 31(1) of the VCLT also precludes the Respondent from challenging the Tribunal's jurisdiction.<sup>54</sup>

75. The Respondent's reliance on arbitral awards that reject the use of estoppel and related doctrines to establish jurisdiction is misplaced. First, they are inapposite because the alleged inter-State negotiation requirement is procedural, not jurisdictional. Second, it is well-established that tribunals can apply the estoppel doctrine as a defence to jurisdictional challenges. *See, e.g., Fraport v. Philippines* (RL-87); *Desert Line Projects v. Yemen* (RL-132). The elements of estoppel have been made out in this case: the Respondent impliedly represented that it considered the Claimant's settlement attempts to accord with Article 9; the Claimant relied on those representations; and it would be unjust if the Respondent were allowed to change its position.<sup>55</sup>

76. The duty of good faith, independently from the estoppel doctrine, also precludes the Respondent's jurisdictional objection. By failing to correct the Claimant's alleged misunderstanding of Article 9, the Respondent acted contrary to Article 26 of the VCLT.<sup>56</sup>

77. The Claimant concludes its April 23, 2021 Submission with sections on (a) its compliance with the inter-State negotiation requirement in the event that such a requirement exists (Cl. Submission, paras. 126-157); and alternatively (b) the

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<sup>53</sup> Cl. Submission, paras. 110-112.

<sup>54</sup> Cl. Submission, para. 113.

<sup>55</sup> Cl. Submission, paras. 113-123.

<sup>56</sup> Cl. Submission, paras. 124-125.

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futility of compliance (Cl. Submission, paras. 158-163). These topics were also the starting points for the Claimant's presentation at the November 23, 2021 Hearing (jurisdictional part): CJ-slides 2-10 and Tr., pp. 127-135, 169-176 (compliance); CJ-slides 11-14 and Tr., pp. 135-137 (futility).

(i) *Compliance*

78. The award in *Capital Financial Holdings* (CLA-90) is instructive. There, even though the language referred to conciliation between the Contracting Parties through the diplomatic channel, the tribunal found that the investor had no obligation to ensure that such conciliation occurred or to initiate such conciliation. Instead, the investor was required only to "take all necessary measures that could reasonably be expected from it, in order to inform the authorities of both Contracting Parties to the Treaty about the existence and evolution of the dispute." The Contracting Parties were then responsible for initiating conciliation, if they so wished (CLA-90, paras. 158-166).
79. The *Capital Financial Holdings* approach applies to the present case. At most, Article 9(1) obligates the Claimant to inform the Contracting Parties about the dispute so that they may undertake negotiations. The Claimant did so: *see, e.g.*, C-26 (Cl. Letter dated June 22, 2020); C-43 (Letter from the Azerbaijani Ministry of Foreign Affairs dated April 23, 2021). Azerbaijan raised the issue with Georgian officials during the course of several meetings, including but not limited to meetings in September, October, and November 2020. Moreover, the BIT does not require that the investor request that the Contracting Parties engage in inter-State negotiations; the BIT only requires the investor to submit a written claim to the host State.
80. At the Hearing (Tr., pp. 127-128), the Claimant stated that it does not matter whether the BIT requires that the States "negotiate for six months prior to filing a claim., . . . . [W]e learnt belatedly that our client actually had requested the Azerbaijani Government to reach out to Georgia, starting nearly a year before the case was filed; not because of an obligation to do so, but simply because Mr

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Hasanov was trying all methods available to resolve the dispute.” The Claimant further argued that, with respect to Georgia, “after months of in-person discussions seeking to resolve the dispute, Claimant wrote several times to Respondent formally seeking an amicable settlement. . . . Claimant also informed the Ministry of Foreign Affairs of Azerbaijan, his home State, back in January 2020” (Tr., pp. 131-132). The Respondent incorrectly contends that six months of negotiations must actually have taken place: the BIT says that “arbitration can be filed if the two Contracting Parties – reading it the way Respondent does – cannot settle the – if the case cannot be settled in such a manner” (Tr., p. 134).

81. The Claimant reiterated during the Hearing (Tr., pp. 169-176) that, as reflected in C-25 (Cl. Letter dated May 22, 2020), meetings with the Georgian Prime Minister’s office and the Claimant’s representatives had previously taken place, but without any meaningful progress. Thus, the Respondent is wrong to say that the Claimant did nothing to fulfil its Article 9 obligations. C-43 (the Azerbaijani Foreign Ministry’s April 1, 2021, letter), read with R-73 (the translation of the cover note), also shows that when Azerbaijani officials contacted or attempted to contact Georgian officials, they did so in relation to, as Azerbaijan understood it, an investor-protection dispute.

(ii) *Futility*

82. Whether the Tribunal determines that the inter-State negotiation requirement is a matter of admissibility or of jurisdiction, it is clear that any further efforts to satisfy the requirement would be futile; such efforts would have no reasonable prospect of resolving the dispute. In these circumstances, many tribunals have found that there is no requirement to comply with a “cooling-off” period, and that failure to do so is not a jurisdictional bar. *See, e.g., Ethyl Corp. v. Canada* (CLA-64); *Orazul v. Argentina* (CLA-92).

83. Finally, in respect of costs, the Claimant has requested that the Tribunal order the Respondent “immediately to pay the Claimant’s full costs arising out of the Bifurcated Issue, to be assessed following further submissions from the parties,”

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and to grant such further relief as the Tribunal may consider appropriate (Cl. Submission, para. 164.2).

#### IV. THE TRIBUNAL'S ANALYSIS

84. There are four main questions that the Tribunal must initially address to resolve Georgia's Inter-State Negotiation Objection:

(i) Does Article 9 of the BIT include an inter-State negotiation precedent step to arbitration?

(ii) If so, is this precedent step a precondition to arbitration?

(iii) If it is a precondition to arbitration, what must be done to satisfy the precondition?

(iv) Has the precondition been satisfied in this case?

85. Depending on the answers to the above questions, it may be necessary to address the issues of estoppel, futility, good faith, and the operation of the MFN clause (Article 4) in the BIT.

##### A. Article 9 and Inter-State Negotiation

86. While certain awards and rulings of international tribunals, cited by the Parties, may aid the Tribunal in reaching its answers, the assistance is limited to possible approaches for resolving arguably similar matters. The Tribunal has not been referred to an on-point decision that considered the same treaty terms. While such a decision would not of course constitute precedential authority, it would have provided a useful platform for analysis of the questions.

87. The phrase that causes the Article 9(1) interpretive difficulties is "will be subject to negotiation between the Contracting Parties in dispute." The initial quandary is posed by the last part of the phrase – "Contracting Parties in dispute." Baldly

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stated, the Respondent contends that “Contracting Parties,” a defined term in the BIT, cannot be removed from the interpretive framework, and the words “in dispute” need to be understood in the context of the clause as a whole and the BIT as a whole. The Claimant, on the other hand, contends that “Contracting Parties” must be a drafting error; those words cannot fit with “in dispute” and must be replaced by the word “parties.”

88. The Tribunal is guided by the interpretive principles set out in Article 31 of the VCLT (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”) and by generally accepted principles that are consistent with Article 31, such as interpretation should give meaning and effect to all treaty terms. Pursuant to this guidance, the Tribunal makes the following observations.

- (i) The interpretive starting point is that the Contracting Parties, Azerbaijan and Georgia, meant to draft “Contracting Parties in dispute,” and therefore it is necessary to seek to give meaning to that term without rewriting it, which would entail removing and/or adding words. The intention of the Contracting Parties as expressed in the text of the BIT is the best guide to their common intentions. This does not preclude the possibility that the textual approach may itself lead to a choice of possible meanings, and that in exercising its choice a tribunal will need to pay particular attention to the treaty’s objects and purposes (of which there may also be a range of policies in play). However, it should not be presumed, as a starting point, that a certain type of instrument – here, an investment protection treaty – entails a certain formulation, and if the text does not reflect that formulation, it should further be presumed that the Contracting Parties have made a drafting error. In short, neither intentions nor mistakes should be presumed; the text should be examined.
- (ii) The Respondent has correctly placed importance on “Contracting Parties” being a defined term in the BIT, on its appearing many times in the BIT and clearly referring to Azerbaijan and Georgia, and, above all, on the contrary

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appearance of “parties” in Article 9(2)(c) (which, tellingly, is part of the same dispute resolution provision) and Article 6 of the BIT, where the reference to the investor and the State is clearly intended. It is apparent, then, that in using “Contracting Parties” the intent was to refer to Azerbaijan and Georgia.

(iii) While not a textual point, it is nonetheless noteworthy in relation to the Claimant’s “drafting error” position that, at approximately the same time as the BIT (March 8, 1996), Azerbaijan entered into an investment protection treaty with Kazakhstan (RL-23; September 16, 1996) that includes the phrase “shall be the subject of negotiations between the Contracting Parties involved in the dispute;” and Georgia entered into an investment protection treaty with Ukraine (RL-27; January 9, 1995) that includes the phrase “will be subject to negotiations between the Contracting Parties in dispute.” While the Claimant rightly says that these treaties (and others relied on by the Respondent for its “Contracting Parties” argument) form an extremely small proportion of the approximately 3,000 investor protection instruments, this minority status carries less significance than the fact that, during the same general time frame as the BIT (both before and after its entry into force), Azerbaijan and Georgia used a substantially similar phrase to designate – on the face of the treaty texts – inter-State negotiations for an investor-State dispute.

(iv) To be sure, the words “in dispute” are problematic, as the Claimant contends, since, in Article 9(1), the “dispute” that may arise is between an investor and the host State. Additionally, given the Respondent’s position on the nature of the negotiation requirement, the words “in dispute” might have been omitted. However, the words “in dispute” do not nullify the viability of an inter-State negotiation requirement; to the contrary, they support such a requirement.

- First, there is the textual or semantic point. Article 9(1) and Article 9(2), in their opening lines, recognize that the dispute is between the investor and the host State. However, read in context with the beginning of Article 9(1) – and the need to retain the defined term, “Contracting Parties,” in

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the phrase, “Contracting Parties in dispute,” the words “in dispute” denote not only that Azerbaijan and Georgia are the States involved in the dispute (“involved in the dispute” is the usage in the Azerbaijan-Kazakhstan BIT; see above), but also are effectively “in dispute,” since they are to negotiate with each other – albeit not in a diplomatic protection framework. Article 9(1) refers to any dispute that may arise between, first, the investor of one Contracting Party, and, second, the other Contracting Party in which the investor has an investment (*i.e.*, the host State); the dispute is then subject to negotiation between the Contracting Parties (“in dispute”). In seeking to give meaning to all treaty terms, it is reasonable to posit that the words “in dispute” indicate that the investor brings the home State into the dispute with the host State through negotiation on the investor’s behalf.

- As the Respondent has argued, negotiation by the Contracting States to seek to resolve an investor-State dispute is neither unheard of nor contrary to the purpose, in general terms, of investor-State dispute settlement nor inconsistent with the object and purpose of this particular BIT. Again, the issue is not whether the majority – or, in fact, the overwhelming majority – of BITs eschew the notion of inter-State negotiations to resolve investor-State disputes. A few BITs, as identified by the Respondent, do include such a procedure, and among these are BITs entered into by Azerbaijan and Georgia at around the same time as the BIT in this case. While certain fundamental features of diplomatic protection do not have a place in the ICSID framework, the notion of a home State seeking to negotiate on behalf of its investor in advance of an ICSID arbitral proceeding is not precluded by the ICSID Convention, would not upend investor-State arbitration, and does not signify the revival of diplomatic protection. It reflects, in part, the reality that nationality is a fundamental feature of investor-State arbitration.
- As the Respondent has commented, an inter-State negotiation requirement is consistent with the object and purpose of the BIT (Resp. Submission,

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para. 52). Negotiation between the Contracting Parties in an attempt to resolve an investor-State dispute supports the BIT's purpose to strengthen the Contracting Parties' long-term economic cooperation. Moreover, an inter-State negotiation requirement is not at odds with the object and purpose relied upon by the Claimant ("create and support favorable conditions for investors of one Contracting Party in the territory of the other Contracting Party") or the third objective and purpose in the Preamble ("reciprocal protection of investments").

89. For the reasons set out above, the Tribunal finds that Article 9(1) of the BIT provides for inter-State negotiation. Read with Article 9(2) it is clear that inter-State negotiation, in some manner (discussed below), precedes the investor's entitlement to refer his dispute with the host State to ICSID arbitration. The next question for the Tribunal to consider is whether this precedent step is a *precondition* to ICSID arbitration: that is, must the precedent step be satisfied in order for the investor to proceed to arbitration. If that is the case, the Tribunal must then determine what is required to satisfy the precondition and whether the precondition has been satisfied.

### **B. Admissibility or Jurisdiction**

90. The Parties have each cited to the Tribunal lengthy lines of awards/decisions in which the admissibility/jurisdiction question is considered. The Claimant's position, discussed above, is that "a time-restricted 'cooling-off' or prior negotiation requirement, such as the asserted inter-State negotiation requirement, is a procedural condition, at most affecting the admissibility of the claim. It is not a matter concerning the jurisdiction of the Tribunal" (Cl. Submission, para. 77). This is, the Claimant contends, the prevailing view of tribunals. The Claimant relies, in particular, on the reasoning of the tribunal majority in *İçkale İnşaat v. Turkmenistan*, CLA-69 (including the *İçkale* critique of the tribunal majority's reasoning in *Kılıç v. Turkmenistan*, RL-99, on which the Respondent relies), as well as the scholarly article of Professor J. Paulsson (CLA-68). The Claimant also

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dismisses the cases relied on by the Respondent as *obiter* or inapposite for factual reasons.

91. The Respondent's position, as discussed above, is that any conditions to a State's consent to arbitration (or international adjudication), including negotiation requirements, constitute limits on that consent. Thus, the inter-State negotiation requirement is jurisdictional in nature; more than twenty cases confirm that "jurisdictional" is the correct designation for such a requirement (Resp. Submission, paras. 55-57; RJ-slides 8-12). Moreover, numerous tribunals have relied on findings that the Claimant characterizes as *obiter*. The Respondent places particular weight on the reasoning in the *Kılıç v. Turkmenistan* decision.
92. In reaching its finding on this issue, the Tribunal first notes that while both Parties fully appreciate that the Tribunal is not bound by any "precedent," they nonetheless wish to impress upon the Tribunal that many previous awards (the Claimant posits a prevailing view in its favor) support their respective positions. The Claimant also cautions the Tribunal that it should not reach its determination "on this important doctrinal issue by reference to *obiter* remarks of previous tribunals" (Cl. Submission, para. 96).
93. However, the Tribunal considers that a "scorecard" of admissibility/jurisdiction rulings will not be of particular assistance to it, nor will an exercise in distinguishing "*obiter*" from "holdings" – in investment arbitration, where Parties often refer to scholarly writings to support their positions and where no *stare decisis* doctrine applies, every authority that is adduced is effectively "*obiter*." Suffice it to say that there are *many* eminent tribunals and scholarly opinions on opposite sides of this question, and many have motivated their rulings effectively. The potential usefulness of the authorities depends on the strength of their analysis of reasonably similar issues, taking into account the underlying context of the relevant BIT. Moreover, in this particular area of international investment law, the authorities on which the Parties – represented, as in this arbitration, by extremely experienced counsel – have themselves placed the greatest weight may provide the most

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efficient route to reaching a determination. As indicated above, the authorities in this instance are *Kılıç v. Turkmenistan* (for the Respondent), and, for the Claimant, *İçkale İnşaat v. Turkmenistan* (which relies in part on Professor Paulsson’s article; consequently, the Tribunal does not quote that article; see Cl. Submission, para. 79 for a lengthy quotation).

94. The *Kılıç* tribunal<sup>57</sup> made, *inter alia*, the following observations:

- (i) An arbitration agreement that would provide for jurisdiction under Article 25 of the ICSID Convention “can only come into existence through a qualifying investor’s acceptance of a host state’s standing offer as made (*i.e.*, under its terms and conditions)” (para. 6.2.1).
- (ii) “There is no dispute between the parties that states which wish to agree to ICSID arbitration are free to impose conditions that inform their consent to arbitrate” (para. 6.2.3).
- (iii) “The adoption of language which requires that a series of steps *shall* be taken, and which provide for a right to arbitrate, *provided that* another step has been taken, is an obvious construction of a condition precedent. Indeed, a number of reputed dictionaries offer a definition of ‘provided’ (followed by ‘that’) to indicate a meaning of ‘on the condition or understanding (that).’ When such conditions are set out in the [Dispute Resolution Provisions] of a BIT (*as conditions of the Contracting Parties’ offer to arbitrate*), which are the very source of an ICSID tribunal’s jurisdiction, compliance with them constitutes a jurisdictional requirement, in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised” (para. 6.2.9).

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<sup>57</sup> In a Decision that preceded the unanimous award, Arbitrator W. W. Park dissented (Separate Opinion, dated, 20 May 2013) on the interpretation of the specific language in Art. VII(2) of the Turkey-Turkmenistan BIT; he discerned a disjuncture between a jurisdictional subsection and a second “permissive” subsection. His dissent did not raise a specific doctrinal concern, such as asserting that a “cooling-off” period is by nature a matter of admissibility rather than jurisdiction.

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- (iv) “Article 26 of the ICSID Convention explicitly recognises that a Contracting State may impose conditions on its consent to arbitration under the ICSID Convention, in a manner that determines the conditions in which jurisdiction may be said to exist and be capable of being exercised (without prejudice to any issue as to admissibility)” (para. 6.3.4).
- (v) Quoting *Daimler v. Argentina*: “All BIT-based dispute resolution provisions, on the other hand, are by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties’ consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts” (para. 6.3.5).

95. The *İçkale İnşaat* majority<sup>58</sup> made, *inter alia*, the following observations:

- (i) “In the Tribunal’s view, the proper way to characterize Article VII of the BIT is that it is a dispute resolution clause which, apart from establishing the consent of the State parties to arbitrate, sets out the procedure that an investor must follow, or the steps it must take, before it can invoke the consent to arbitrate given by a State party to the Treaty. First, the investor must notify the State party to the dispute in writing of the dispute that has arisen between them and seek to settle the dispute by consultation and negotiation; this procedural step is set out in Article VII(1). If the dispute cannot be settled in this way within six months from the date of notification, the investor may choose to submit the dispute to international arbitration pursuant to Article VII(2) of the Treaty, ‘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

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<sup>58</sup> There is a “Partially Dissenting Opinion of Professor Philippe Sands QC,” discussed below. Notably, the *İçkale* Parties agreed with the *Kılıç* majority (which included Professor Sands QC) that compliance with Art. VII(2) of the Turkey-Turkmenistan BIT (the same provision at issue in *Kılıç*) was a matter of jurisdiction rather than admissibility.

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not been rendered within one year.’ The Tribunal has decided above that this prior step is in principle mandatory, and accordingly, before the investor can submit the dispute to international arbitration, it must take the additional step of submitting the dispute to local courts. If no final judgment has been rendered within a period of one year, the investor may proceed to arbitration” (para. 241).

(ii) “When conceptualized in these terms, it is plain that the ‘provided that, if’ clause does not constitute a jurisdictional requirement that delimits the scope of consent of the State parties to arbitrate; it sets out the procedure, or the step to be taken, in the event the dispute cannot be settled by way of negotiations between the parties, and thus constitutes a procedural rather than a jurisdictional requirement. The provision does not concern the issue of whether the State parties have given their consent to arbitrate – they have – but rather the issue of how that consent is to be invoked by a foreign investor; as an issue of ‘how’ rather than ‘whether,’ it must be considered a matter of procedure and not as an element of the State parties’ consent. Consequently, any objection raised on the basis of alleged non-compliance by an investor with any of the required procedural steps must be characterized as an objection to the admissibility of the claim rather than as an objection to the tribunal’s jurisdiction. A claim that has not been first submitted to local courts may be said to be inadmissible before an international tribunal on grounds that it is not yet ripe for such submission as all the required procedural steps have not yet been taken” (para. 242).

(iii) “On this issue, the Tribunal’s decision diverges from the approach adopted in the *Kılıç* Award, in which the majority of the tribunal took the view that the domestic litigation requirement constitutes a condition precedent to the State parties’ consent to arbitrate and is therefore an issue of jurisdiction. The majority of the *Kılıç* tribunal characterized the dispute resolution clause in Article VII of the BIT as the State parties’ ‘standing offer’ to arbitrate, which then had to be ‘accepted’ by the investor. In the view of the *Kılıç* majority, an

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arbitration agreement therefore could come into existence only ‘through a qualifying investor’s acceptance of a host state’s standing offer as made (i.e., under its terms and conditions).’ The majority referred, in support of its reasoning, to Article 26 of the ICSID Convention, which provides, *inter alia*, that ‘[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.’ Citing Professor Schreuer’s article ‘Consent to Arbitration,’ Professor Georges Abi-Saab’s dissenting opinion in *Abaclat and others v. Argentine Republic* and the *Daimler v. Argentine Republic* decision, the majority concluded that ‘the requirements set forth in Article VII.2 are to be treated as conditions, and that the failure to meet those conditions goes to the existence of the Tribunal’s jurisdiction, and are not to be treated as issues of admissibility’” (para. 243).

- (iv) “With the greatest respect to the distinguished majority of the *Kılıç* tribunal, this Tribunal is unable to agree with the *Kılıç* tribunal’s characterization of the issue. The BIT is not a contract; it is a treaty concluded by two States, and consequently the arbitration agreement concluded between one of the State parties and an investor of the other State party is not an arbitration agreement concluded on the basis of privity of contract, that is, on the basis of an ‘offer’ and ‘acceptance.’ On the contrary, the State’s consent, which is addressed to an anonymous class of foreign investors meeting the relevant nationality requirements, and not specifically to any particular foreign investor, is expressed in a binding manner even before any dispute has arisen, whereas the investor’s consent is usually – including in the present case – expressed only after the dispute has arisen, often with a considerable time interval . . . . While it is common and often harmless to somewhat loosely refer to dispute resolution clauses such as Article VII of the BIT as provisions containing the State parties’ ‘standing offer’ to arbitrate, this is in fact conceptually inaccurate and legally incorrect; Article VII rather contains the State parties’ ‘consent’ to arbitrate, which is binding on the State as such, without any further

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“perfecting,” as a unilateral undertaking vis-à-vis a class of foreign investors. Such consent can be invoked by a qualified investor once it has complied with and taken the procedural steps set out in the provision, as analyzed above in paragraph 241. While it is possible to refer, loosely speaking, to each of these steps as a ‘condition’ to the State parties’ consent to arbitrate, this is conceptually misleading as compliance with these procedural steps is not a ‘condition precedent’ to the State parties’ consent to arbitrate. The State’s consent has been given in Article VII, and it became effective, and as such unconditional, as soon as the Treaty entered into force; there is nothing conditional about it. It is another matter that, in order for the investor to be in a position to invoke the State’s consent to arbitrate in Article VII, it must first take the procedural steps set out in that Article. An investor taking these steps in order to be able to invoke the State’s consent does not affect the consent itself in any way; it only affects the investor’s right to invoke it. In other words, Article VII regulates the procedure for invoking consent; it does not condition the State’s consent. If anything, it rather ‘conditions’ the investor’s right to invoke the State’s consent. The *Kılıç* majority appears to have based its approach on a contractual analogy which, as noted above, is both conceptually inaccurate and legally incorrect. An arbitration agreement included in a contract and an arbitration agreement construed on the basis of a unilateral consent of the State, as expressed in an investment treaty, and the investor’s subsequent invocation of that consent after the dispute has arisen, are two very different types of agreements. While the former is based on privity, the latter is construed after the fact, once the dispute has arisen, and therefore effectively constitutes a hybrid between an arbitration agreement based on privity and an arbitration agreement based on a compromise” (para. 244).

- (v) “The Tribunal is mindful of the fact that the distinction between jurisdiction and admissibility is often a fine one, and reasonable arbitrators may reasonably disagree on how it should be made and in particular, on how it should be applied in a particular case. . . . [T]here are two strands of investment treaty

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jurisprudence on the issue, one of which it considers more persuasive. [The tribunal proceeds to quote Professor Paulsson’s article.]” (para. 245).

96. As indicated above, Professor Sands QC dissented on the question of admissibility versus jurisdiction in the *İçkale İnşaat* award, and, in particular, disagreed with the analysis in the paragraphs quoted above. The Tribunal considers his dissenting opinion to be particularly apt.<sup>59</sup> Professor Sands QC observes, in relation to paragraph 242, that the majority cites no authority “for the proposition that a procedure that the drafters of a BIT have required a potential claimant to take is not such as to create an obligation that goes to the existence of a jurisdiction” (para. 6). He comments that the *İçkale* majority criticizes the *Kılıç* majority for premising its finding on a contractual analogy, when the BIT is not a contract. However, Professor Sands QC notes that the *Kılıç* majority did not contend that the BIT is a contract or should be treated as such: the agreement that the award referred to is an offer made by the State (in the BIT) and accepted by the investor (para. 7). Further, the *Kılıç* decision relied heavily on Article 26 of the ICSID Convention and its use in interpreting the BIT and the condition incorporated into the arbitration agreement (para. 8).
97. Professor Sands QC also commented that the *İçkale İnşaat* majority accepted that the distinction between admissibility and jurisdiction is “often a fine one,” but did not develop its reasoning on that point. Instead, in relying on Professor Paulsson’s article, the majority omitted to address a relevant passage and misconstrued the article. Properly read, the Paulsson article supports the jurisdictional position taken by the *Kılıç* majority – a position that the Parties themselves accepted in *İçkale İnşaat*.
98. The Tribunal recognizes that the BIT provision at issue in *Kılıç* and *İçkale İnşaat* does not contain a negotiation requirement, and therefore the analyses in both of

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<sup>59</sup> Although the Claimant relied on the *İçkale İnşaat* award and the Respondent could have addressed the award in the Hearing (but did not do so), neither Party discussed the partially dissenting opinion of Prof. Sands. The Sands dissent of course forms a part of the *İçkale İnşaat* award, which both Parties could have discussed.

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those awards may be of limited assistance to the Tribunal in making its own “fine distinction” between admissibility and jurisdiction. However, the explication of consent in relation to mandatory steps in the *Kılıç* award is instructive in the context of this case. It is apparent that an inter-State negotiation step, to be undertaken in some manner, must be complied with before an investor can refer a dispute to arbitration under Article 9 of the BIT: Article 9 provides that any dispute “will be subject” to inter-State negotiation, and “if the dispute” cannot be settled in such a manner (within a certain time frame), the investor may refer the dispute to arbitration. A mandatory precedent step connected to a time frame indicates that the Contracting Parties have established a *condition precedent* to arbitration. As the *Kılıç* majority explains it, a condition precedent qualifies or limits a Contracting Party’s consent to arbitration under the BIT, in the sense that non-compliance with the condition means that the offer extended by the State has not been accepted.

99. While the Tribunal might have been inclined to conclude that non-compliance with the inter-State negotiation condition precedent, set out in Article 9 of the BIT, would have deprived the Tribunal of jurisdiction over the investor’s dispute, the Tribunal does not need to reach that conclusion.<sup>60</sup> The Tribunal notes that whether the inter-State negotiation condition precedent, set out in Article 9 of the BIT, is one of jurisdiction or admissibility, it would nevertheless preclude the Tribunal from proceeding to the merits of this dispute if the condition was not met. Therefore, the Tribunal will proceed to discuss what must be done to satisfy the condition and whether the Claimant has complied with it.

**C. What Must be Done to Satisfy the Inter-State Negotiation  
Precondition?**

100. The Tribunal makes two preliminary observations in considering this issue: (i) Article 9 of the BIT lacks clear guidance on what compliance with the negotiation precondition would entail; and (ii) the Claimant correctly points to *Capital Financial*

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<sup>60</sup> The Respondent has stated that it intends to adduce substantive jurisdictional objections in the event that this Inter-State Negotiation Objection were not to succeed.

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*Holdings*, CLA-90, as providing useful guidance on the limited obligations of an investor to satisfy an analogous precondition (CJ-slides 6-10; Cl. Submission, paras. 128-133, 141).

101. As discussed above, the Tribunal finds that Article 9 contains an inter-State negotiation precondition to arbitration. However, the manner in which that precondition is to be achieved is left unclear in Article 9. That is, Article 9 contains no standard, much less any guidance, on *how* the investor may comply with the precondition. There is nothing more than the Article 9(1) provision that the investor-State dispute “will be subject to” inter-State negotiation, and the Article 9(2) provision that if the dispute “cannot be settled in such a manner within 6 months from the day on which a written claim was submitted,” the investor may refer the dispute to arbitration. The words “in such a manner” clearly refer to inter-State negotiation, but the words “cannot be settled” leave the door quite open to various possibilities that entail unsuccessful negotiation. In these circumstances, what must the investor do, and/or what must one or both Contracting Parties do? Article 9 is silent.
102. Article 9’s silence suggests minimal requirements to satisfy the inter-State negotiation precondition, both for the investor and the Contracting Parties. If the Contracting Parties had intended to impose specific obligations, they could readily have done so. Interpretation under Article 31 of the VCLT is textually based, and the interpretive task is to give meaning (in context, in light of the BIT’s object and purpose, and in good faith) to the Article 9 provisions without imposing obligations that the drafters could have included but did not do so.
103. In this context, the only requirement that Article 9 arguably imposes on the investor is a notification obligation: informing one or both Contracting Parties of the investor’s dispute with the host State such that it may be possible for inter-State negotiation to occur, and the submission of a written claim to the host State –

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though the timing of these notifications need not be the same.<sup>61</sup> The Claimant correctly observes that Article 9 cannot fairly be read to impose an obligation on the investor somehow to initiate inter-State negotiation. Nor can it be read to oblige the investor to deliver a request to the Contracting Parties that they engage in negotiation. The words “will be subject to negotiation” do not entail such a request, and Article 9(2) does not provide any elaboration. Further, Article 9 cannot fairly be read to require that inter-State negotiation actually occur or even that a Contracting Party must attempt to initiate negotiation with the other Contracting Party. The words “cannot be settled in such a manner” require nothing more than the possibility for inter-State negotiation to occur must be created; if the negotiation fails for any reason – including that it never took place because a Contracting Party was uninterested in negotiating – the precondition is still satisfied.

104. In short, the text of Article 9 contains an inter-State negotiation precondition, but no compliance action is required of the Contracting Parties. The only compliance action that can reasonably be required of the investor is to inform the Contracting Parties (or possibly only one Contracting Party, if it then informs the other) of the existence of a dispute, such that six months are given for potential inter-State negotiation to be successful. This is, indeed, a precondition without much bite, but that is all that the text of the BIT reasonably requires.

105. During the November 23, 2021 Hearing, Arbitrator Alexandrov put this point to the Respondent: (Tr., p. 163): “Applying the rules of treaty interpretation of the Vienna Convention, is there an argument that all we need to decide is whether the dispute could be settled in the manner provided for in paragraph 1; and if it couldn’t, within six months, then the investor is entitled to submit the dispute to arbitration?” Dr. Alexandrov also observed that the text of Article 9 does not

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<sup>61</sup> Upon questioning by Arbitrator Rowley, the Respondent argued, Tr., p. 165, that the investor must submit a communication to both Contracting Parties, requesting that they engage in negotiations, at the same time that the investor submits a written claim. However, the Tribunal considers that the Respondent’s argument is not supported by the text of Article 9, and the Tribunal rejects this argument.

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“specify any particular result other than the dispute could not be settled through negotiations between Georgia and Azerbaijan; and it doesn’t seem controversial here that the dispute could not be settled in such a manner, meaning through negotiations between the Contracting Parties.” Arbitrator Rowley further queried (Tr., p. 165) whether the submission of a claim in writing would make much of a difference if a dispute was made known to the host State. The Respondent agreed with this proposition, but added that the investor did not send a letter to either Contracting Party referring specifically to Article 9(1) and asking both States to undertake inter-State negotiation. Again, however, the text of Article 9 imposes no such letter requirement on the investor, and the Respondent was not able to contest effectively the interpretation of the inter-State negotiation precondition posed by Dr. Alexandrov.

106. The interpretation of the precondition described above finds support in the *Capital Financial Holdings* award. There, the tribunal found, in arguably analogous circumstances, that the investor had no obligation “to initiate conciliation through diplomatic channels.” The tribunal pointed out that the investor had no capacity to force the State to carry out such a procedure; the investor “took all the necessary measures that could reasonably be expected from it, in order to inform the authorities of both Contracting Parties to the Treaty about the existence and the evolution of the dispute.” Absent a specific provision in the Treaty, the investor was not required to go any further. It was up to the States to initiate conciliation, if they so wished, using the usual means of communication between States (paras. 159, 166). These conclusions in *Capital Financial Holdings* are relevant to the present case. The Claimant’s obligation in this arbitration was to inform the Contracting Parties of the dispute, so that inter-State negotiation could take place – if the Contracting Parties so wished – for six months before the commencement of the arbitration.

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**D. Compliance with the Inter-State Negotiation Precondition**

107. The Tribunal considers that a review of the Request with certain exhibits filed by the Claimant – specifically, C-43, C-25, and C-26 – is sufficient to establish the Claimant’s compliance with the inter-State negotiation precondition, on the basis of the Article 9 requirements, discussed above.
108. C-43 is the April 1, 2021 letter provided by the Azerbaijani Ministry of Foreign Affairs to the Claimant, at the Claimant’s request, in which the Ministry provides a brief history of the CO-Georgia dispute. Importantly, the Ministry states that the “representative of Azerbaijani investor, Neqsol Holding, has informed the Ministry of Foreign Affairs of the Republic of Azerbaijan about the referred dispute in January 2020 and the Ministry has communicated the matter to Georgian side. However, Georgian side did not respond to the queries of the Ministry.” The Respondent has not denied receipt of the communication, which denial might at least cast doubt on the information provided by the Ministry. Moreover, the Tribunal has been given no reason to discount this information, which indicates that the Claimant, as early as January 2020 (the arbitration was commenced on October 19, 2020), informed its home State of its dispute with the host State (arguably a dispute under the BIT, even if Article 9 is not specifically referenced), and Azerbaijan sought to engage Georgia in negotiation (at an unstated subsequent time).
109. In addition to this important foundational and undisputed fact, the Claimant reported in C-25, the DLA Piper letter dated May 22, 2020, that previous meetings had taken place “between the Georgian Prime Minister’s office and our client’s representatives in Tbilisi, where government representatives have committed to procure an amicable solution, . . .” The “amicable solution” was sought in relation to a dispute and possible claim under the BIT. The Respondent has not denied the timing of the meetings (see below; the timing reference appears to be to March 2020) or that it was informed of a dispute and possible filing of a claim under the BIT. The point here is not that investor-State negotiations took place, such

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negotiations are not called for under Article 9. Instead, the point is that Georgia was notified of a BIT dispute – in addition, apparently, to having received the above-mentioned queries from the Azerbaijani Foreign Ministry – more than six months before the filing of the Request.

110. In the Request (paras. 27, 39-43), and reiterated in Cl. Submission, para. 110.1, the Claimant states that from “March to September 2020, the Claimant sought to resolve the dispute, through attending meetings with the Respondent, and issuing to the Respondent written invitations to participate in amicable negotiations.” Again, on this basis, Georgia had the opportunity, pursuant to Article 9,<sup>62</sup> to seek to engage in inter-State negotiation, if it so wished. By issuing a written invitation to discuss a dispute involving the investor’s investment in the territory of Georgia, and having previously (in January 2020) informed the Azerbaijani Government of this dispute, the Claimant was in compliance with the precondition when it commenced this ICSID arbitration in October 2020.
111. C-26, the DLA Piper/Quinn Emanuel letter dated June 22, 2020, is stated to be the Claimant’s “written claim within the meaning of Article 9.2” of the BIT. However, as noted above, the Claimant had already informed the Contracting Parties of the existence of a dispute in connection with the Claimant’s (purported) investment in the territory of Georgia, and one Contracting Party had even attempted to engage the other in negotiations. In these circumstances, the “formal” Article 9.2 written claim did not itself constitute fulfilment of the investor’s Article 9 precondition obligations in any respect. Rather, information in the June 22 letter demonstrated partial fulfilment of the obligations, by referencing, with further details, the notification to Georgia in, apparently, February (or March) 2020 of a dispute involving CO (the purported investment in Georgia) (para. 14): “In view of these

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<sup>62</sup> The Tribunal notes that Article 9(2) does not specify the form or content of the “written claim” to be submitted. There is no requirement that Article 9 be mentioned in such a claim. The only information that must be conveyed is the existence of dispute “in connection with the investor’s investment in the territory of the latter Contracting Party” (*i.e.*, the host State).

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adverse and unlawful decisions of the GNCC,<sup>63</sup> the Investor’s representatives entered into discussions with the Georgian government and the GNCC to seek to resolve the matter. Meetings took place in Tbilisi between (a) the Prime Minister, Mr Giorgi Gakharia, Mr Yusif Jabbarov (the CEO of Neqsol), the Seller and Mr Shmagi Kobakhidze (a former shareholder in Nelgado); and (b) the Chairman of the GNCC, Mr Kakhi Bekauri, Mr Jabbarov, Mr Ermin Karimov (Neqsol’s Chief Legal Officer) and the Seller.”

112. C-26 incorrectly states (para. 51) that the BIT provides in Article 9 “that an investor must first attempt to resolve any dispute through amicable discussions, before it refers the matter to arbitration.” Apparently inadvertently (as the Claimant acknowledged during the November 23, 2021 Hearing, in the event the Tribunal were to find an inter-State negotiation precondition), the Claimant had months earlier<sup>64</sup> taken the steps it needed to take to comply with the precondition – it had informed both Contracting Parties of the existence of a dispute in connection with CO, its purported investment in Georgia, such that the Contracting Parties were in a position to engage in negotiation, if they so wished.

113. The Tribunal therefore finds that the Claimant has complied with the Article 9 precondition to arbitration, and the Respondent’s Inter-State Negotiation Objection is dismissed.

114. Based on this finding, the Tribunal need not reach the MFN, futility or good faith arguments that the Claimant has submitted.

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<sup>63</sup> The letter references a February 6, 2020 GNCC decision in the preceding paragraph, and a February 14, 2020 CO notice in paragraph 16.

<sup>64</sup> In addition to the misreading of the negotiation requirement in Article 9 (inter-State, not investor-State), the Claimant’s proffered “written claim” was not submitted six months prior to his commencement of this arbitration – nor was the Claimant’s May 22, 2020 Letter (C-25). Neither Party discussed this in written or oral submissions.

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**V. DECISION**

115. For the reasons set forth above, the Tribunal decides as follows:

- (1) The Respondent's Inter-State Negotiation Objection is **dismissed**.
- (2) On the question of costs, the Tribunal previously informed the Parties (November 26, 2021; see above, para. 38) that, consistent with the Parties' suggestion (May 3, 2021) and para. 22.2 of Procedural Order No. 1, the Tribunal will confer with the Parties regarding the date for costs submissions (limited to two pages of argument together with a summary of costs incurred).

[signed]

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Stanimir Alexandrov  
Arbitrator

[signed]

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J. William Rowley  
Arbitrator

[signed]

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Laurence Shore  
President of the Tribunal