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Jurisdictional battle arises from Turkey and Turkmenistan bilateral investment treaty

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Introduction

The treaty between Turkey and Turkmenistan concerning the reciprocal promotion and protection of investments was signed on May 2 1992 in both English and Russian. There have been three International Centre for Settlement of Investment Disputes (ICSID) arbitration cases brought by Turkish investors based on the treaty since its execution. In two of these cases, the proceedings were bifurcated and jurisdictional awards were rendered in 2012 and 2015.

The jurisdictional dispute in the ICSID arbitrations arose from the meaning and effect of Article VII(2) of the treaty and whether seeking redress at the local courts referred to in the article should be construed as optional or mandatory. Article VII(2) of the English version of the treaty reads as follows:

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

(a) The International Center for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States'. (in case both Parties become signatories of this Convention.)

(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), (in case both parties are members of U.N.)

(c) the Court of Arbitration of the Paris International Chamber of Commerce.

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

ICSID arbitration cases

The first jurisdictional award was rendered on May 25 2012 in the ICSID arbitration case brought by the Turkish investor Kiliç Insaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi against Turkmenistan. The arbitral tribunal decided that the English language version of Article VII(2) should be interpreted as requiring mandatory recourse to the local courts and thereby accepted the respondent's jurisdictional objection.(1)

On February 13 2015, in the ICSID arbitration case brought by the Turkish investors Muhammet Çap and Sehil Insaat Endustri ve Ticaret Limited Sirketi against Turkmenistan, the arbitral tribunal decided that Article VII(2)'s provision should be interpreted as offering an option to go to international arbitration or the local courts, in both its English and Russian versions.(2)

The arbitral tribunals in *Kiliç* and *Sehil* decided that the Vienna Convention on the Law of Treaties 1969 was applicable as customary international law regarding the interpretation of the treaty.(3)

The English version of the treaty states that it is executed in two authentic versions (Russian and English), while the Russian version states that the treaty is executed in two authentic versions in Turkish, Turkmen, English and Russian. As there are no signed Turkish or Turkmen texts, both arbitral tribunals accepted that the authentic versions of the treaty are the English and Russian texts.(4)

First decision

Referring to Article 32 of the Vienna Convention (ie, supplementary means of interpretation), the arbitral tribunal in *Kiliç* took into account other treaties signed by and between Turkey and Turkic states around the time that the treaty was executed as well as its Turkish translation, which was published in the *Official Gazette* for the purpose of ratification.(5) Accordingly, the arbitral tribunal decided that the circumstances surrounding the conclusion of the treaty meant that the English language version of Article VII(2) should be interpreted as requiring mandatory recourse to the local courts.(6) The arbitral tribunal decided that only this interpretation reconciled the English and the Russian texts of the treaty.(7)

Second decision

Conversely, the arbitral tribunal in *Sehil* decided that Article 32 of the Vienna Convention specifically mentioned the treaty's preparatory work and the circumstances of its conclusion and thus could not be applied to this dispute, as there was no preparatory work in respect of the treaty – or at least none was presented to the tribunal.(8) The arbitral tribunal disagreed with the approach that treaties signed prior to the treaty between Turkey and Turkmenistan or the Turkish translation of the treaty – which was prepared months after its execution – could be taken into consideration as supplementary means of interpretation in the sense of Article 32 of the Vienna Convention.(9)

The arbitral tribunal in *Sehil* chose to interpret Article VII(2) in accordance with Article 31(1) of the Vienna Convention – that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The tribunal explained that in doing so, it took into consideration the following:

- the ordinary meaning of the words used;
- linguistic arguments presented by the parties;
- the context of the clause itself; and
- the treaty's object and purpose.(10)

Accordingly, the tribunal decided that the intent of the treaty was to establish conditions that are fair and equitable and requiring a party to seek redress first at the local courts, given the expense and delay, would not be fair or equitable.(11)

The different approaches of the two arbitral tribunals resulted in two contrary decisions, one favouring the position of the Turkish investor and the other the state of Turkmenistan.

Ongoing proceedings

The third ICSID case – which was brought by the Turkish investor İçkale Insaat Limited Sirketi against Turkmenistan under the treaty – is pending.(12) Although the respondent has made a jurisdictional objection, the arbitration proceedings in *Içkale* were not bifurcated and the hearing on jurisdiction and merits was held between March 9 2015 and March 20 2015 in Paris.

Although the specifics of *Içkale* are unknown, it is likely that the jurisdictional dispute is similar to the other two cases. The arbitral tribunal's award in *Içkale* will likely break the tie.

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Endnotes

(1) Par 9(21) of Decision on Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty rendered on May 7 2012 in ICSID Case ARB/10/1.

(2) Par 247 of the Decision on Respondent's Objection to Jurisdiction under Article VII(2) of The Turkey-Turkmenistan Bilateral Investment Treaty rendered on February 2 2015 in ICSID Case ARB/12/6.

(3) Par 6(3) of ICSID Case ARB/10/1; Par 93 of ICSID Case ARB/12/6.

(4) Par 11(1)(a) of ICSID Case ARB/10/1; Par 138 of ICSID Case ARB/12/6.

(5) Par 9(20) of ICSID Case ARB/10/1.

(6) Par 9(21) of ICSID Case ARB/10/1.

(7) Par 9(23) of ICSID Case ARB/10/1.

(8) Par (251) of ICSID Case ARB/12/6.

(9) Par 262 of ICSID Case ARB/12/6; Par 271 of ICSID Case ARB/12/6.

(10) Par 210 of ICSID Case ARB/12/6.

(11) Par 243 of ICSID Case ARB/12/6.

(12) ICSID Case ARB/10/24.

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