

Tribunal accepts jurisdiction over claim brought by a UK investor against Turkmenistan by the operation of MFN clause *Garanti Koza LLP v. Turkmenistan*, ICSID case No. ARB/11/20

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The majority of a three-member tribunal has granted a UK investor access to ICSID arbitration by importing more flexible dispute resolution provisions contained in the Turkmenistan-Switzerland BIT.

The decision on jurisdiction, dated July 3, 2013, centers once again on the contentious question of whether a most-favoured-nation (MFN) clause may be used to by-pass restrictions on dispute resolution. In this case the UK-Turkmenistan BIT's MFN clause expressly extended to dispute settlement. In the majority's view, that allowed the claimant to avoid the BIT's competing demand that the parties settle disputes via UNCITRAL arbitration, unless they agree to another arbitration process (such as ICSID).

Background

The claimant, Garanti Koza LLP, a limited liability company incorporated in the United Kingdom, was contracted by the state-owned Turkmenautoyollari (Turkmen Road) to construct highway bridges and overpasses. Garanti complains that Turkmenistan employed state powers to force changes to the contract, leading to losses and the eventual confiscation of its assets.

Turkmenistan counters that it terminated the contract due to Garanti's failure to complete the work according to the agreed schedule.

Given that the proceedings were bifurcated, the present decision addresses Turkmenistan's objections to the tribunal's jurisdiction. Turkmenistan asserted that it did not consent to ICSID jurisdiction under the UK-Turkmenistan BIT and, moreover, such consent cannot be imported from a different BIT in the absence of the express consent in the basic BIT.

BIT stipulates that UNCITRAL arbitration is the default

The tribunal focused on the interpretation of paragraphs (1) and (2) of Article 8 of the UK-Turkmenistan BIT. Article 8(1) concerns the host state's consent to settle disputes by means of international arbitration, and Article 8(2) provides options for the arbitration process. Notably, UNCITRAL arbitration is the default selection, while ICSID and ICC are available upon the consent of the parties. The tribunal clarified that Article 8(1) deals with Turkmenistan's consent to participate in international arbitration and Article 8(2) concerns the arbitration systems that may be used if the conditions of Article 8(1) are met. Giving notice to the words "shall" and "may" in Article 8(1) and 8(2) respectively, the majority of the tribunal decided that only Article 8(1) deals with the issue of consent.

As explained below, Professor Boisson de Chazournes differed on this point, concluding that Article 8(2) also concerns the host-state's consent to arbitration. That conclusion would contribute to

her decision to part-ways with the majority on the issue of whether the MFN clause could be used to access alternative dispute resolution options found in Turkmenistan's other BITs.

Consent to ICSID arbitration via MFN clause permitted by the majority

In deciding whether the MFN clause encompasses dispute-resolution provisions—and thus would allow the claimant to by-pass the UNCITRAL-only condition in Article 8(2)—the tribunal turned to the wording of the MFN clause at stake and its coverage. Article 3(3) of the basic BIT states that the MFN clause is applicable to the provisions of Articles 1 to 11. As such, the tribunal decided that the MFN clause clearly applied to the dispute resolution provisions contained in Article 8.

The tribunal therefore entitled the claimant to invoke more favourable dispute resolution provisions (i.e., those allowing for ICSID arbitration) which were found in Turkmenistan's treaties with Switzerland, France, Turkey, India, and under the Energy Charter Treaty. In doing so, the tribunal rejected Turkmenistan's argument that the application of the MFN clause to the dispute resolution provision would deprive the basic BIT of its *effet utile* (practical effectiveness). Turkmenistan noted that in 1995 (the date of signature of the UK-Turkmenistan BIT) the UK was already a party to other treaties that provided consent for ICSID arbitration. As such, a conscious decision to extend the MFN clause to dispute settlement, while simultaneously carefully restricting consent only to UNCITRAL arbitration, would have been contradictory. However, the tribunal stated that the MFN clause's own 'practical effectiveness' was at stake. In the tribunal's words "the MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty."

A choice is better than no choice

Finally, the tribunal considered whether the Switzerland–Turkmenistan BIT, on which the claimant relied upon in particular, did in fact provide for more favorable treatment than in the basic BIT by providing a choice between ICSID and UNCITRAL arbitration. The tribunal did not delve into the procedural differences between UNCITRAL and ICSID rules, but instead decided that the mere fact that a treaty provides a choice is more favourable than one that does not.

Laurence Boisson de Chazournes' dissent

In Professor Boisson de Chazournes' view, the function of the MFN clause is to guarantee balanced and coherent treaty relations between the members of the international community. She asserted that BITs were never concluded by sovereign states with the idea to allow "consent shopping." Therefore, the primary task of the tribunal is to establish, without any presumptions, whether consent to ICSID arbitration is provided under the UK-Turkmenistan BIT. If not,

the lack of consent cannot be remedied by importing consent from a different treaty.

Interpretation of Article 8 of the UK-Turkmenistan BIT

Professor Boisson de Chazournes disagreed with the majority's interpretation of Article 8 of the UK-Turkmenistan BIT. In her view, the conditions that Article 8(1) sets with respect to consent to international arbitration must be read in light of the specific conditions listed in Article 8(2). In other words, it is not only Article 8(1) that deals with the issue of consent; the initiation of investment arbitration in a chosen forum is also subject to consent under Article 8(2).

MFN clause and dispute settlement provision of the UK-Turkmenistan BIT

The dissenting opinion states that the MFN clause only applies if a foreign investor is already in a dispute-settlement relationship with the host state; if that relationship has not been formed, there is no ground to raise the question of more or less favorable treatment.

On this basis, Professor Boisson de Chazournes emphasized that the application of MFN clause is subordinated to the prior application of Article 8(2) of the UK-Turkmenistan BIT. Given that Turkmenistan had not provided its consent to ICSID arbitration as required by Article 8(2), Professor Boisson de Chazournes concluded that the claimant should not be entitled to invoke more favorable treatment with regard to ICSID arbitration under other BITs agreed to by Turkmenistan.

In Professor Boisson de Chazournes's opinion, the MFN clause is not "a form of acceptance through which ICSID jurisdiction can be satisfied."

There award is available here:

<http://www.italaw.com/sites/default/files/casedocuments/italaw1541.pdf>

The dissenting opinion of Laurence Boisson de Chazournes is available here:

<http://www.italaw.com/sites/default/files/casedocuments/italaw1540.pdf>