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

In the proceeding between

KILIÇ ĬNŞAAT ĬTHALAT ĬHRACAT SANAYI VE TICARET ANONIM ŞIRKETI

Claimant

and

TURKMENISTAN

Respondent

ICSID Case No. ARB/10/1

SEPARATE OPINION OF PROFESSOR WILLIAM W. PARK

Kılıç Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi
v.
Turkmenistan
Separate Opinion of William W. Park

I. Background

1. With respect to certain construction projects in Turkmenistan, Claimant in December 2009 filed a Request for Arbitration pursuant to the Agreement between Turkey and Turkmenistan Concerning Reciprocal Promotion and Protection of Investments (the "BIT").

2. In pertinent part, Article VII appears below.

   (1) Disputes between one of the Parties and one investor of the other Party, in connection with his investment, shall be notified in writing, including a [sic] detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.

   (2) If these desputes [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 [choice of ICSID, UNCITRAL or ICC] provided that, if [sic] the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and [sic] a final award has not been rendered within one year.

3. The first subsection uses the mandatory "shall" to impose jurisdictional preconditions requiring notice of the dispute and an endeavor to settle the dispute by negotiation. If settlement proves elusive during a period of six months from notice, the second subsection says that disputes "can be" submitted to arbitration, which will go forward if host states have not given final judgment in a year.

4. The Request for Arbitration met the six-month waiting period with respect to four construction projects. However, the "no-judgment-within-a-year" proviso has not been fulfilled. As an initial matter, therefore, the Tribunal had to consider whether the "no-judgment-within-a-year" proviso was optional or mandatory.

5. An option to litigate would say that disputes can be arbitrated "provided that **if** the investor has brought litigation, a final award has not been rendered within one year." A mandatory text would say that disputes can be arbitrated "provided that the investor has brought litigation **and** a final award has not been rendered within one year."

6. The English version of the BIT combines "if" (optional) with "and" (mandatory) as follows: "Disputes can be submitted [to arbitration] provided that, **if** the investor has brought the dispute [local courts] **and** a final award has not been rendered within one year." The Russian text connects the proviso only to ICC arbitration, arguably making it irrelevant to ICSID proceedings. The Tribunal's task was complicated by arguments invoking treaty texts in Turkish and Turkmen.

7. Earlier in the proceedings, this Tribunal came to a view that English and Russian, but not Turkish or Turkmen, were authentic treaty texts. Rightly or wrongly, that ruling also said the "no-judgment-within-a-year" proviso was mandatory. The word "if" was read out of the treaty, in part due to linguistics testimony suggesting pleonastic Russian usage of "provided that" (при условии) and "if" (если) to translate as "on condition that" an investor files litigation.

8. Now the Award says the "no-judgment-in-a-year" proviso precludes arbitral authority. After three years, the Parties return to where they started. Claimant bears costs despite the undisputedly defective wording of Article VII. Such conclusions run counter to the BIT terms and purpose. The proper course would be to put proceedings into abeyance for a reasonable time to permit filing local litigation. If a timely judgment proves acceptable to the investor, proceedings end. If the investor remains aggrieved, arbitration resumes for claims falling within the scope of the BIT.

II. Consent to Arbitration

9. Article VII says that a dispute can be submitted to arbitration if not settled through negotiation "within six months following the date of the written notification." When Claimant consented to arbitrate by its Request of 15 December 2009, the host state's standing offer to arbitrate was met, as to the four relevant projects, according to the terms of that offer, including the notice/settlement period.

10. Notice of disputes may be given either independently or in connection with local litigation. Claimant elected the former, sending notices and then waiting the requisite six months. Notice was given in early 2009 as follows: (i) sports stadium, by letters of 10 & 16 January, 13 & 16 February, 25 May and 3 June; (ii) Agriculture University, by letter of 16 February; (iii) schools, by letters of 5, 16 & 23 January, 13 & 16 February, and 15 April; and (iv) Ashgabat residential/commercial buildings, by letters of 26 March and 5 & 6 June.

11. The notices contain information on geological surveys, iron foundations, bitumen isolation, payment terms, penalty percentages and contract identification. In some instances the notices refer to "Turkmenistan Fortification Law Court" demonstrating hopes of local court resolution.

12. These letters meet the treaty requirements for content as well as for timing. Article VII requires "detailed information" about the dispute, but not legal theories derived from treaty provisions, which might reveal themselves only after host state reaction to the notices.

III. Six Months Means Six Months

13. The BIT says disputes "can be" submitted to arbitration if not settled within six months from notice.

14. Interpreting the "no-judgment-within-a-year" proviso as a jurisdictional precondition creates a pathology in which the same sentence purports to permit an investor to commence arbitration six months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point.

15. Perhaps a special jurisdictional predicate, divorced from the six-month waiting period, might arguably impose itself if the "no-judgment-within-a-year" proviso depended on an event other than notice of the same dispute which serves as the starting gun for the right to arbitrate.

16. Such is not the case. The English text consistently uses the same term "dispute" for all purposes. The Russian displays the same consistency, using "конфликт" ("conflict") regardless of whether relief is sought before courts or arbitrators.

IV. Arbitration of BIT Violations

17. Interpreting the "no-judgment-within-a-year" proviso as a precondition to arbitral authority means that investors remain without arbitral recourse if denial of treaty rights comes through swift court action. The treaty's standing offer to arbitrate cannot be accepted because judgment arrives within a year.

18. Consequently, no arbitral tribunal with any jurisdictional legitimacy can hear claims of treaty violations such as uncompensated expropriation or denial of justice.

19. Nothing in the BIT gives even a hint of intent to limit recourse to arbitration for treaty-based claims. Article VII contains the broadest of language, providing arbitration for all "disputes … in connection with" an investor's investment.

20. Reading any treaty in a way that defeats its goals, should normally be avoided when a more reasonable construction presents itself. Article 31 of the Vienna Convention on the Law of Treaties directs interpretation of treaties 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" which in this case include promotion of "a stable framework for investment."

21. To construe the proviso as a jurisdictional precondition creates anything but such a "stable framework" for investment. If arbitration begins before litigation, as in the present case, the claim is dismissed. Yet if litigation precedes arbitration, the claim can be defeated by a swift judgment, since the deemed jurisdictional precondition, the court's failure to reach decision in a year, cannot be satisfied due to the judgment having arrived before the twelfth month.

22. The Award predicts that arbitrators faced with rapid denial of treaty rights will nevertheless hear claims in certain cases. If so, the proviso takes a chameleon-like character barring arbitral authority in certain instances but not others. If the investor in the current proceedings files a second arbitration following a swift judgment denying treaty rights, the claim can be heard only if a new tribunal treats the proviso as something other than the *ab initio* jurisdictional precondition asserted in the Award.

23. By contrast, no conflict arises between treaty objectives and the proviso when the "no-judgment-within-a-year" rule receives its normal reading as a procedural requirement not reaching the level of jurisdictional precondition. An arbitral tribunal can be constituted with authority to hear complaints about treaty violations through quick but incorrect decisions.

V. The Wording of Article VII

24. In Article VII, neither the English nor the Russian version gives any hint of merging or amalgamating the jurisdictional quality of the first subsection (mandating that disputes "shall" be notified and negotiated) into the permissive second subsection (providing that disputes "can be" submitted to arbitration if not settled within six months).

25. The treaty language and purpose support reading the "no-judgment-in-a-year" proviso as a clause designed to give local courts a chance to resolve disputes whether or not arbitration has already begun.

26. Neither magic nor mystery attaches to procedural steps that fail to reach the level of preconditions to the creation of arbitral authority.

27. Procedural flaws that may be cured during the arbitration are often characterized by reference to notions such as ripeness, *recevabilité* or admissibility. Such terms derive not from technical treaty definition, but from usage as convenient labels to describe steps to be taken either before or after constitution of a tribunal, even if they must be met prior to merits being addressed.

28. These distinctions remain commonplace. Arbitrators often confirm jurisdiction, but proceed to the merits only "provided that" Terms of Reference are signed, deposits lodged, and/or settlement mechanisms satisfied. Such requirements may be met after exercise of a right to arbitrate.

29. Few requirements introduced by "provided that" possess an intrinsically jurisdictional quality. Instead, the meaning of a proviso depends on the drafters' intent as evidenced by context, structure and wording, construed in light of all related factors.

30. The present interpretative exercise might yield a different conclusion had the treaty employed other language, such as a statement saying "investors are entitled to arbitrate only after going to local courts." Instead, the BIT says that disputes "can be submitted" to arbitration six months after notice. Considered in the context of the totality of Article VII, the "no-judgment-within-a-year" proviso cannot be construed as a precondition to arbitral authority without ignoring the ordinary meaning of the BIT's terms in light of its purpose to allow submission of disputes to arbitration after a six-month notice period.

William W. Park
20 May 2013