School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date:

Içkale Inşaat Limited Şirketi v. Turkmenistan (ICSID Case No. ARB/10/24) – Award, 8 March 2016

Case Report by:

Radhika Agarwal**, Maria I. Pradilla Picas***

Summary:

In the Award rendered on 8 March 2016, which was accompanied by the dissenting opinions of both the Claimant- and the Respondent-appointed arbitrator, the Tribunal decided that it had jurisdiction to hear the dispute between Içkale Inşaat Limited Şirketi and the Republic of Turkmenistan and that the Claimant's claims were admissible. The Tribunal also found that none of the claims made by the Claimant had merit and hence dismissed them in their entirety.

Main Issues:

Jurisdiction – Consent – Fork in the Road; Nature of Claims – Whether Treaty Claims or Contract Claims; Protection and Treatment of Investments – Fair and Equitable Treatment – Non-discrimination; Expropriation

Arbitral Tribunal:

Dr. Veijo Heiskanen, (President); Ms. Carolyn B. Lamm; Prof. Philippe Sands QC.

Claimant's Counsel:

Prof. Dr. Ata Sakmar, Ms. Mine Sakmar, Mr. Aycan Özcan; Mr. William Kirtley (Aceris Law); and Dr. Gregor Grubhofer, LL.M. (BAIER Rechtsanwalte KG).

Respondent's Counsel:

Ms. Miriam K. Harwood, Mr. Ali R. Gürsel and Ms. Kate Brown de Vejar (Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, U.S.A.); and Ms. Alev Gürel and Ms Berin Hikmet (Gürel & Yörüker Law Firm, Istanbul, Turkey).

*Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Radhika Agarwal is a lawyer based in India. She graduated from NALSAR University of Law with a B.A. LL.B. (Hons.) degree in 2015. She is currently working as a Research Associate at the Indian Institute of Technology, Madras.

*** Maria I. Pradilla Picas is an associate in the Washington, D.C. office of Jones Day, and holds a J.D. from Georgetown University Law Center and a Master in International Business from Florida International University. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated. Ms. Pradilla Picas can be contacted at mpradillapicas@jonesday.com.

Digest:

1. Facts of the Case and Procedural Background

Claimant, Içkale Inşaat, is a limited liability company incorporated in 1982 under the laws of the Republic of Turkey that mainly engages in the design, development, and implementation of real estate development and infrastructure projects commissioned both by private and public sector entities (¶¶ 1, 112). Respondent is the Republic of Turkmenistan. In 2004, Claimant established a branch office in Turkmenistan and entered into 15 contracts for various public construction projects in Turkmenistan (¶ 113). The total value of these projects amounted to USD 20 million (*id.*).

The dispute arose out of a series of measures taken by Turkmenistan in relation to 13 contracts which Claimant had concluded with various Turkmen State organs and State entities between March 2007 and July 2008 (¶¶ 3, 4). Claimant complained of governmental interference in the performance of the contracts in breach of the Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 ("Turkey-Turkmenistan BIT" or the "BIT") (¶ 3). Claimant alleged that Respondent increased Claimant's scope of work without compensation; abolished the State Fund for the Development of the Oil and Gas Industry and Mineral Resources (the "State Fund")—which was supposed to finance the works—resulting in substantial delays in progress payments made under the Contracts; changed financial terms of the Contracts; blocked bank accounts for non-payment of value-added tax; imposed unfair penalties; terminated the still ongoing Contracts without valid justification; initiated judicial proceedings without notice and participation, resulting in fines and confiscation of machinery and equipment; refused to pay retention amounts; discriminated against Claimant in favor of Polimek (another Turkish contractor which, like the Claimant, had been awarded a contract for half of one of the projects); and encashed letters of guarantee without justification (¶ 4). Claimant alleged that Respondent had breached Claimant's rights under (1) the Turkey-Turkmenistan BIT; (2) the Foreign Investment Law of Turkmenistan; and (3) general principles of international law (¶ 148).

Claimant filed a Request for Arbitration with the ICSID Secretariat on 10 November 2010 (¶ 8). The Secretariat registered the Request on 20 December 2010 (*id.*). Following the Tribunal's first session with the Parties at the World Bank's office in Paris on 22 July 2011, Respondent on 5 August 2011 sought bifurcation of the proceedings and a determination as a preliminary matter of its objections to jurisdiction (¶ 24). Following an exchange of submissions, on 31 August 2011, the Tribunal denied Respondent's request for bifurcation

(¶ 26). A substantive hearing on jurisdiction and merits was held in Paris between 9 March and 20 March 2015 (¶ 75).

2. Tribunal's Analysis with regard to Jurisdiction and Admissibility

Before turning to the merits of the claim, the Tribunal analyzed the three jurisdictional objections raised by Respondent, and found that the Tribunal had jurisdiction and the claims were admissible as follows:

2.1 Analysis of Respondent's First Objection: Claimant has failed to comply with the domestic litigation requirement contained in Article VII(2) of the BIT

Respondent's argued that Claimant had failed to comply with what it viewed as a mandatory requirement of domestic litigation contained in Article VII(2) of the BIT (¶ 234). Respondent argued that its offer to arbitrate was expressly conditioned upon Claimant's compliance with Article VII(2) of the BIT and that such a condition was a jurisdictional pre-requisite (¶ 236). Respondent explained that this was the same position reached by the tribunal in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan ("Kılıç")* (¶ 238).

Claimant contended that Article VII(2) of the BIT does not contain a domestic litigation requirement and, in any event, it would have been futile to resort to the Turkmen courts. Further, and alternatively, Claimant argued that it can rely on the most-favored nation ("MFN") clause contained in Article II(2) of the BIT to circumvent the domestic litigation requirement (¶ 234). However, as noted by Respondent, Claimant did not contest Respondent's arguments regarding the applicability of *Kılıç* in so far as *Kılıç* found that the issue is one of jurisdiction and not admissibility (¶ 238).

The Tribunal noted that Respondent had stated its position in a more elaborate manner than Claimant and decided that Article VII(2) of the BIT did not constitute "a condition to Turkmenistan's offer to submit itself to the jurisdiction of an international tribunal to arbitrate investor-State disputes under the Treaty" and that the consent of the parties to arbitrate under the Treaty was unconditional (¶ 240). The Tribunal found that Article VII(2) was a dispute resolution clause which lays down the procedure required to be followed by the investor before invoking its consent to arbitrate under the BIT; the investor is required to notify the State party to the dispute about the dispute and aim to settle this through consultation and negotiation. In the event that the dispute is not resolved in this manner within 6 months from the date of notification, the investor could exercise his option to submit the dispute to international arbitration under the BIT provided that it has first submitted the dispute to local courts and the final judgment has not been rendered within a year (¶ 241).

The Tribunal held that Article VII(2) laid down a procedural requirement rather than a jurisdictional requirement because it is concerned with "how" the consent to arbitrate is invoked, rather than "whether" such consent has been invoked (¶ 242). Any objection based on the non-compliance on the part of the investor with the procedural steps in the Treaty must hence be construed as an objection to the admissibility of the claim and not as an objection to the jurisdiction of the Tribunal (*id.*). The Tribunal diverged from the approach taken in the *Kılıç* case that the domestic litigation requirement was a condition precedent to invoking the consent of the parties to arbitrate and was therefore a jurisdictional issue (¶ 243). Rather, the "Tribunal conclude[d] by a majority that the 'provided that, if' clause establishes a procedural

requirement that relates to the admissibility of the claim rather than the Tribunal's jurisdiction" (¶ 247).

Upon deciding that Article VII(2) sets out an admissibility requirement, the Tribunal then turned to the question of whether Claimant's claims were admissible (¶ 248). Claimant contended that if the Tribunal found a domestic litigation requirement in the BIT, the Tribunal should find that submitting the claims to domestic court would have been futile because domestic courts lack independence and are influenced by the Turkmen Government (¶¶ 249, 251). Respondent, however, counter-argued that the futility exception should not be used to circumvent the BIT's domestic litigation requirement (¶ 254). The Tribunal agreed with Respondent's argument and found that "the BIT does not provide for any 'futility exception' to the local litigation requirement in Article VII(2) of the BIT," and that "[a]ny claim arising out of the alleged inadequacy of the local legal system would have to be pursued as a denial of justice claim" (¶ 260). Nevertheless, the Tribunal held that "it would not be appropriate now to require that Claimant first submit the present dispute to local courts, given that the Contracting Parties and/or the General Prosecutor have already had recourse to the local courts, and given that all of the still ongoing contracts have been terminated by Turkmen courts (¶ 263).

The Tribunal did not consider Claimant's argument that it could rely on the MFN clause to circumvent the domestic litigation requirement (¶ 264).

2.2 Analysis of Respondent's Second Objection: Claimant has not made any "investment" in Turkmenistan within the meaning of Article 25 of the ICSID Convention or Article I(2) of the BIT

Respondent argued that Claimant must prove that it has made an "investment" both under Article 25 of the ICSID Convention and Article I(2) of the BIT (the so called "double key-hole test") and that Claimant failed to satisfy either part of the test (¶ 265). Respondent relied upon the criteria of "essential requirements" laid down in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* ("*Salini*") for proving the absence of an "investment" under Article 25 of the ICSID Convention (¶ 266).

Respondent contended that Claimant did not meet any of the *Salini* requirements, namely, (1) *that it took on an investment risk* (the compensation under the Contracts did not depend even partly on the operation of the facilities they related to); (2) *that it made a contribution to Turkmenistan* (Claimant did not contribute in the form of "technical know-how" and the mere allocation of resources like employees and equipment do not qualify as contributions); (3) *that its alleged investment was of a certain minimum duration* (all but one of Claimant's contracts were of a duration less than 2 years); and (4) *that its alleged investment made a contribution to Turkmenistan's economic development* (Claimant's activities neither had "productive purposes" nor provided "large scale benefits" for the economic development of Turkmenistan, a fact that Mr. İçkale recognized in his witness statement) (¶¶ 266–71). Respondent also argued that "Claimant's claims for money and the value of the contractual performance" were not "assets" within the meaning of "investment" in Article I(2) of the BIT (¶¶ 273–74).

Claimant argued that the criteria laid down in *Salini* should not be applied and that in most of the relevant ICSID jurisprudence, the *Salini* criteria were used merely as "typical characteristics" or features of an investment (¶ 277). Claimant also argued that, in any case,

the *Salini* criteria were met (1) since neither the ICSID Convention nor the *Salini* test specified the nature of the risk to be taken by the investor and it had been established in ICSID jurisprudence that "construction contracts, including those which do not involve the operation of the constructed facilities by the contractor, are considered to be investments," and Claimant had assumed major risks including unilateral alteration/termination of contracts by the Turkmen authorities and expropriation of its machinery and equipment; (2) contributions "made in money, in kind and in industry" by construction contractors constituted substantial contributions (according to ICSID jurisprudence) and that it had thus made substantial contributions including providing technical know-how; (3) the full duration of the contracts including warranty periods, varying from 24 to 36 months should be taken into account which prove that the minimum duration requirement was met; (4) it had made contribution to Turkmenistan's economic development by undertaking major infrastructure projects (which the Respondent itself considered vital to its economy) (¶¶ 278–82). Claimant also contended that "investment" under Article I(2) of the BIT refers to "every kind of asset" and hence its activities such as "payment for major construction works, payment of the cost of additional works" were an investment under the BIT (¶¶ 283–84).

The Tribunal considered the criteria laid down in the *Salini* case as useful in determining whether an investment had been made (¶ 289). The Tribunal noted that the first three criteria in the case, namely the contribution of capital, certain duration, and assumption of risk were interdependent and not independent (¶ 290), and that "contribution to the economic development of the host State" is not an essential element of "investment" (¶ 291). The Tribunal found that Claimant had established a business venture in Turkmenistan and that it had committed significant assets in the form of money, machinery, and equipment which when considered as a whole qualified as an investment (¶¶ 292–93). In light of the scale, duration and number of projects, and the commitment of capital by Claimant, the Tribunal concluded that it could be inferred that Claimant had made an investment under both Article 25 of the ICSID Convention and Article I(2) of the BIT (¶ 293).

2.3 Analysis of Respondent's Third Objection: Claimant's claims are not treaty claims but contract claims which are subject to the dispute settlement provisions of the relevant Contracts, all of which provide for recourse to the Arbitration Court of Turkmenistan

Respondent argued that the Tribunal while deciding on the nature of Claimant's claims must objectively assess whether the "fundamental basis of the claims" is the BIT or the Contracts (¶ 295). Further, Respondent contended that the claims in this case "do not truly constitute violations [of the BIT]," but rather "stem from differences over the Contracting Parties' interpretation and enforcement of their rights and obligations under the terms of the [C]ontracts" (¶ 294). It also stated that many of those claims were "patently contractual disputes on their face" (¶ 297).

Claimant contended that previous arbitral tribunals have held that a claim should not be denied treaty protection merely because it relates to an "investment made on the basis of a contract" or because an "alleged breach of a treaty also amounts to a breach of contract" (¶ 301). Its claims, Claimants' argued, "directly arise from the acts and omissions of [the] Respondent which resulted in unjust state intervention and violated the BIT" (¶ 302). It alleged that Respondent, through its State authorities, had intervened in Claimant's investments, such as through a Presidential Decree, abolition of the State Fund, delays in approval of technical annexes to the Contracts, and demanding additional work outside the scope of the Contracts, among others (¶¶ 302–03).

The Tribunal noted that its jurisdiction extended to treaty claims and not contract claims (¶ 306). The Tribunal also noted that Claimant's claims were directed against organs of the State of Turkmenistan and not the Contracting Parties (¶ 307). The Tribunal stated that it would thus consider the claims directed against State organs and not Contracting Parties, even in cases where a contracting party is a State organ (¶ 308). The Tribunal held that Claimant must prove that the State organs went beyond the extent of their involvement (as laid down in the Contracts) and that their conduct was a breach of the Treaty; these issues would then be considered by the Tribunal along with the merits of the claims (¶ 310).

3. Tribunal's Analysis of the Merits

3.1. Availability of the substantive protection standards invoked by Claimant

Claimant raised claims under the BIT for fair and equitable treatment ("FET"), full protection and security ("FPS"), non-discrimination standard, umbrella clause, as well as unlawful expropriation (¶ 311). Respondent argued, however, that with the exception of the expropriation protection, the BIT does not contain any of the protections raised by Claimant (¶ 311). Claimant countered that it could invoke protections not available under the BIT through (1) the BIT's MFN clause in Article II; (2) the BIT's Preamble providing for FET; and (3) Turkmenistan's "international customary practice" (¶ 312).

3.1.1. Invoking FET, FPS, non-discrimination, and umbrella clause protections through the MFN clause in Article II of the BIT or the non-derogation clause in Article VI of the BIT

Claimant contended that it can invoke the FET, FPS, non-discrimination, and umbrella clause protections set out in BITs concluded by Turkmenistan with other countries through the MFN clause in Article II of the BIT and the non-derogation clause in Article VI of the BIT (¶ 314). Claimant relied on earlier decisions in support of its argument that the term "treatment" in Articles II and VI of the BIT, when interpreted in good faith under Article 31 of the Vienna Convention, should be understood to cover at least the substantive protections provided to other foreign investors (¶ 315). Claimant also argued that any matters, including substantive protections not expressly excluded under the MFN clause in Article II(4) of the BIT, should be considered to be within its scope (*id.*). Claimant also relied on *EDF v. Argentina* where the tribunal allowed the claimants to invoke an MFN clause to rely on the umbrella clauses in two other bilateral investment treaties concluded by the host State (¶ 316).

Respondent argued that Claimant could not rely on either Article II or Article VI of the BIT to import substantive protections from other bilateral investment treaties (¶ 318). First, Respondent stated that Article VI could not be interpreted to impose any additional substantive obligations on the host State as it was a non-derogation clause and not a supplementary MFN clause (¶ 319). Second, Respondent argued that Article II of the BIT was not meant to import substantive provisions from other BITs (¶ 320). Respondent relied on *Hochtief v. Argentina* to argue that an MFN clause in Article II of the BIT could not be used to import substantive provisions that are "completely absent" from the BIT (¶ 323).

The Tribunal disagreed with Claimant's arguments that the substantive protections not expressly excluded under the MFN clause in Article II(4) of the BIT should be interpreted to be included in the scope of the clause as the clause merely confirms that provisions of Article II do not have any effect on any agreements relating to customs, unions, or taxation (¶ 330).

The Tribunal agreed with Respondent that Article VI of the BIT is a non-derogation clause and not an MFN clause (¶ 331). The Tribunal dismissed the claim noting that when including the terms "similar situations" in Article II(2) of the BIT, the State parties must be considered to have agreed to restrict the scope of the MFN clause to discriminatory treatment between investments of investors of one of the State parties and those of investors of third States, insofar as such investments may be said to be in a factually similar situation (¶ 332). It stated that since neither Article II(4) nor Article VI of the BIT created such entitlement, Claimant could invoke only those protection standards included in the BIT (*id.*).

3.1.2. FET obligations arising out of the Preamble of the BIT (whether binding)

Claimant contended that the Preamble of the BIT imposed an FET obligation on Respondent and that it was invoking the FET standard on the basis of a passage indicating that FET is a binding obligation for both Contracting Parties, which it found in an explanatory note on Article II of the BIT in Turkey's Draft Law on Ratification of the BIT (¶¶ 333–34).

Respondent argued that FET protection was not included in the BIT's "obligatory clauses" but in the Preamble, which mentions FET as being "desirable," and that the Preamble does not create any binding obligations (¶ 335). Respondent also argued that the explanatory note relied upon by Claimant did not create any FET obligation and that Turkey's Draft Law was a unilateral statement by a party which did not create any obligation (¶ 336).

The Tribunal dismissed the claim stating that while the Preamble to a treaty can be relied upon for treaty interpretation, it is not an operative part of the treaty and does not create any binding legal obligation (¶ 337).

3.1.3. Invoking FET, FPS, non-discrimination, and umbrella clause protections on the basis of Turkmenistan's alleged "international customary practice"

Relying on previous arbitral decisions and eight bilateral investment treaties concluded by Turkmenistan between 1994 and 2011, Claimant argued that the FET, FPS, non-discrimination, and umbrella clause protections are part of Turkmenistan's "international customary practice" (¶ 338). Respondent contended that Claimant provided "no intelligible basis" for its arguments regarding Turkmenistan's international customary practice and that such a practice could not emerge solely through its BIT practice, which in any event had not been consistent, general, and repetitive (¶ 339). Respondent also stated that it did not intend to be bound by the protections invoked by Claimant since it did not have a BIT with most of the other countries (*id.*).

The Tribunal dismissed the claim stating that Claimant could not provide any legal basis for its invocation of the protections under customary international law and that there is no basis in the BIT for the Tribunal to apply any investment protection standards other than those specifically included in the BIT (¶ 341).

3.2. Expropriation claim

3.2.1. Expropriation of Claimant's contractual rights

Claimant argued that the termination of some of the Contracts authorized by the Cabinet of Ministers amounted to an expropriation of its contractual rights, in breach of Article III of the

BIT (¶ 342). Claimant stated that its contracts had been terminated despite the Cabinet's knowledge of the problems faced by Claimant such as the late or non-payment of the progress payments it was owed, Claimant's entitlement to time extensions, and the State Expert Review's requests that the volume of the works be increased (¶ 344).

Respondent argued that the termination decisions were not "taken pursuant to sovereign authority," but by the Contracting Parties on the basis of delays and failures to comply with the Work Performance Schedules and that Claimant had not adduced any evidence that the Contracts were terminated on the instructions of the Cabinet of Ministers (¶ 347). Respondent also argued that any knowledge of, or approval by, the Cabinet of Ministers of the Contracting Parties' decisions to terminate the Contracts "cannot transform those commercial acts into sovereign interference" (¶ 347).

The Tribunal dismissed the claim stating that there was no evidence of impermissible governmental interference amounting to expropriation of contractual rights (¶ 354). The Tribunal also noted that there was no evidence that the State-Owned Enterprise "Turkmenneftegazstroy" (TNGS), the contracting party, acted upon the instructions of the Cabinet of Ministers, or that the latter impermissibly intervened in the performance of the Contracts (¶ 351).

3.2.2. Expropriation of Claimant's machinery and equipment

Claimant argued that the Arbitration Court ordered the attachment and sale of Claimant's machinery and equipment to enforce decisions it had rendered in connection with the imposition of delay penalties which amounted to denials of justice, which breached Article III of the BIT and amounted to expropriation of its machinery (¶¶ 356–57). Claimant also argued that as a result of an indefinite prohibition imposed by the Turkmen Supreme Court preventing the exportation of the Claimant's machinery and equipment, Claimant has been unable to export and use its remaining machinery and equipment (¶ 358).

Respondent argued that neither the Arbitration Court's decisions on attachment of Claimant's machinery and equipment, nor the prohibition imposed by the Turkmen Supreme Court on the removal of the machinery and equipment from the country, amounted to an expropriation (¶ 360). Respondent also stated that the decisions of the Arbitration Court imposing delay penalties which underpin the Court's attachment decisions did not amount to denials of justice (¶ 361). Respondent noted that the request by the Supreme Court in its letter dated 9 June 2010 to the State Customs Service to prevent the removal of Claimant's machinery and equipment from Turkmenistan arose out of the same proceedings in which the Contracting Parties sought to enforce delay penalties against Claimant and that Claimant did not make any effort to remove its machinery and equipment in the ten months between the Supreme Court's letter and the termination of the Contracts (¶ 362).

The Tribunal dismissed the claim stating that neither the termination of the Contracts by the Contracting Parties nor the Arbitration Court decisions amounted to a direct or indirect expropriation of the Claimant's machinery and equipment, within the meaning of Article III of the BIT (¶ 369). The Tribunal also noted that there was no evidence to prove that the termination of the seven Contracts relating to ongoing projects was based on instructions from the Cabinet of Ministers and that it was done by the Contracting Parties at their own initiative (*id.*). The Tribunal concluded by majority that the Supreme Court's directive did not amount to an expropriation of Claimant's machinery and equipment (¶ 376).

3.2.3. Expropriation of Claimant's ownership rights over the facilities it was building

Claimant contended that Respondent expropriated its ownership rights over the facilities it was building by operating them without completing the contractual handover procedure (¶¶ 377, 379). Claimant stated that under Article 3, paragraph 4 of the Turkmen "Regulation about Preparation of Construction Contracting Agreements" a contractor retains the ownership of the works until they are accepted by the customer and that under Article 20.2 of the Contracts, Claimant retained ownership over the facilities it built until they were accepted by the State Acceptance Committee through the execution of a Handover Certificate (¶ 378).

Respondent stated that though the Contracting Parties complied with the handover procedures, the handover of the facilities was not certified by the State Acceptance Committee as "serious defects were discovered" (¶ 381). Respondent noted that any breach of the procedure is a contractual matter that must be settled in accordance with the contractual dispute resolution provisions (¶ 380). Respondent also argued that Claimant had not identified any "ownership rights" in the works performed under the Contracts which could be expropriated and that the Turkmen Regulation on which Claimant relied only states that it is possible that construction contracts may grant such ownership rights, but does not itself confer any property rights (¶ 382).

The Tribunal dismissed the claim noting that Claimant failed to show that the alleged failure to comply with the handover procedures is attributable to the State rather than the Contracting Parties, and that in any event, according to the Turkmen "Regulation About Preparation of Construction Contracting Agreements," the parties to a construction contract may agree that ownership of the works rests with the contractor (¶ 383). The Tribunal noted that Claimant did not allege that there is any provision to that effect in the Contracts, and that it appeared that there are no such provisions (*id.*).

3.3. The discrimination claim

Claimant contended that Respondent had failed to comply with the non-impairment provision contained in Article II(2) of the United Kingdom-Turkmenistan BIT which provided protection against discrimination (Claimant relied on the MFN clause in Article II(2) of the Turkey-Turkmenistan BIT to import such standard of protection) (¶ 384).

The Tribunal held that the importation of such standard by Claimant was not possible in light of its earlier finding and the claim for non-discrimination based on the United Kingdom-Turkmenistan BIT lacked legal basis (¶ 384). The Tribunal also noted that Claimant failed to pursue the claim for non-discrimination under the MFN clause of Article II(2) of the Turkey-Turkmenistan BIT which did provide for the protection of such a claim (¶ 385). The Tribunal further noted that pursuing such a claim under the MFN clause would have failed on a *prima facie* basis (¶¶ 386–87).

3.4. Claims under the Turkmen Foreign Investment law

Claimant contended that Respondent had intervened in the former's activities through unlawful acts and thus breached Articles 19(1) and 19(5) of the Turkmen Foreign Investment Law of 2008 (¶ 389). Claimant also argued that Respondent through the State Expert Review had violated Article 19(5) by increasing the volume of work under the Contract (¶ 390). Claimant stated that Respondent had violated the FET obligation arising from the BIT by

prejudicing Claimant's legitimate expectations (*i.e.*, the guarantees provided by Respondent in the Foreign Investment Law of 1992) (¶ 392).

Respondent argued that Claimant failed to establish any unlawful conduct on the part of Respondent and that the Foreign Investment Law did not restrict the normal procedure of the State Expert Review (¶ 394). Respondent also noted that Claimant was not asserting any claim of breach of the Foreign Investment Law and that it could not bring any such claim in this arbitration since Article 29 of the Foreign Investment Law provided for the submission of the disputes to the Arbitration Court (¶ 393).

The Tribunal dismissed the claim noting that the BIT neither created any cause of action based on an alleged breach of domestic investment protection laws nor did the Foreign Investment Law create jurisdiction for a treaty tribunal to resolve these claims (¶ 396).

3.5. Claims under "general principles of international law"

Claimant argued that Respondent breached the principle of the rule of law by failing to implement the protections under the Foreign Investment Law and that since such a breach was intentional, it had subsequently breached the principle of good faith (¶ 400). Claimant also contended that Respondent breached the principle of *nemo auditor propriam turpitudinem allegans* by placing unfair pressure on Claimant and consequently imposing delay penalties and termination of contracts (*id.*).

Respondent contended that Claimant had neither coherently explained its claims nor provided any legal basis for any claim which had already been shown to lack merit in the context of its other claims (¶ 401).

The Tribunal held that Claimant had not provided any basis for its claims related to breaches of general principles of international law under BIT, and in light of the fact that there is no basis for the claims in the BIT, which does not create any cause of action under such principles, the claims should be dismissed (¶ 402).

4. Costs

The Committee directed Içkale Inşaat to bear Turkmenistan's legal costs and to reimburse not more than 20% of Turkmenistan's costs of arbitration (*i.e.*, US$ 1,747,521) and directed each party to bear the expenses of the proceedings, finding that Içkale Inşaat's claims lacked in merit and were hence dismissed in their entirety (¶¶ 409–11).

5. Decision

In a majority decision, the Committee dismissed Içkale Inşaat's claims in their entirety.

6. Dissenting opinion of Ms. Carolyn Lamm (Claimant-Appointed Arbitrator)

Ms. Lamm was in agreement with the Tribunal's award, except that she disagreed with the majority on the interpretation of Article VII(2) of the Turkey-Turkmenistan BIT (¶ 2 of Ms. Carolyn Lamm's Partly Dissenting Opinion ("CL Dissent")), Claimant's expropriation claims (¶ 15 of CL Dissent), and costs (¶ 26 of CL Dissent).

6.1. Article VII (2) of the Turkey-Turkmenistan BIT imposes a mandatory domestic litigation requirement

Ms. Lamm disagreed with the majority's finding that Article VII(2) of the BIT contained a mandatory requirement of domestic litigation, and found convincing the testimony of Ms. Özbilgiç who had worked on the draft of the Turkey-Turkmenistan BIT (¶ 2 of CL Dissent). In Ms. Lamm's view, Ms. Özbilgiç's testimony and the documents provided, together with the chapeau of Article VII(2), evidenced the intention of the Contracting Parties to provide an option to foreign investors to either submit a dispute for arbitration or initiate proceedings in the host State courts, and neither party submitted evidence of any interest to the contrary (*id.*). She also noted that Respondent failed to provide any contemporaneous evidence of any intention of the Contracting Parties to impose a mandatory requirement to first approach the courts, and that Respondent did not make this mandatory requirement in any other treaty (¶ 3 of CL Dissent). Ms. Lamm concluded that in determining whether Article VII(2) of the Treaty provided an optional approach, the absence of a mandatory litigation requirement in other treaties should be considered (¶ 5 of CL Dissent).

As to the translation of "provided that, if," Ms. Lamm disagreed with Professor Gasparov's evidence because that evidence referred to a translation by a native Russian speaker writing in Russian, where in this case the evidence Ms. Özbilgiç provided was that the Russian version had been likely translated from the English version (¶ 5 of CL Dissent). Further, the chapeau of Article VII(2) of the BIT "clearly provides the option to the investor to select a method of dispute resolution," and the interpretation given by the majority would deprive the chapeau of any meaning (¶ 7 of CL Dissent).

Ms. Lamm disagreed with the majority's conclusion in paragraph 230 of the Award and "regard[ed] the State parties to the Turkey-Turkmenistan BIT as having made the choice in this instance to provide the investor with the option to go to international arbitration or to local courts" (¶ 11 of CL Dissent). Ms. Lamm also disagreed with the majority's view in paragraph 241 that recourse to domestic courts is "in principle mandatory" (¶ 12 of CL Dissent). Finally, in Ms. Lamm's view, the majority's finding in paragraph 260 of the Award that Claimant had failed to show that it was futile to approach the courts was incorrect because Claimant had shown that it had suffered denial of justice by the Turkmen courts (*id.*).

6.2. Claimant's expropriation claims

Ms. Lamm dissented with respect to paragraphs 371–76 of the Award and concluded that in view of the evidence before it, the Turkmen Supreme Court's directive was excessive and expropriatory since it resulted in the seizure of all machinery and equipment belonging to the Claimant in Turkmenistan, and was in excess of any penalties (¶ 15 of CL Dissent). She also noted that Respondent had failed to support its assertion that insurance recovery should be taken into account while determining the actual value of Claimant's machinery (¶ 20 of CL Dissent). Ms. Lamm also disagreed with the amount of the delay penalties imposed on Claimant (¶ 22 of CL Dissent). She concluded that Turkmenistan's violation of the Treaty in the form of expropriation resulted in State responsibility and that damages in the excess of US$ 5,815,039.00 should be imposed (¶ 25 of CL Dissent).

6.3. Costs

Ms. Lamm disagreed with the majority's findings at paragraph 409 of the Award and stated that the Tribunal "is required to weigh the reasonableness of a claim for costs, taking into account a number of factors including the importance of the matter to the Parties, the amount in dispute, the amount and extent of factual and expert evidence, conduct of the Parties . . . ." (¶ 26 of CL Dissent). Ms. Lamm noted that since Claimant had been deprived of a significant value of its investment, performance of 13 construction contracts, machinery, and equipment (valued at a minimum of US$ 5.8 million), this amount should be offset against Respondent's costs (¶¶ 26–27 of CL Dissent).

7. Dissenting opinion of Prof. Philippe Sands (Respondent-Appointed Arbitrator)

Prof. Sands disagreed with the majority on two issues related to interpretation and application of Article VII(2) of the treaty: the majority's decision (1) that Article VII(2) is to be interpreted and applied as a provision that goes to the admissibility of the claim rather than as a jurisdictional issue; and (2) that the requirements of Article VII(2) were not a bar to the admissibility of the claims, despite the fact Claimant had no prior recourse to the national courts (¶ 2 of Prof. Philippe Sands' Partly Dissenting Opinion ("PS Dissent")).

7.1. Article VII (2) is not an obligation that goes to the existence of the jurisdiction of the Tribunal

Prof. Sands dissented with the majority's conclusions in paragraphs 240–47 of the Award and stated that Article VII(2) is an obligation that goes to the existence of the jurisdiction of the Tribunal (¶ 3 of PS Dissent). He also observed that no authority had been provided to prove that the intent behind the BIT was not to create an obligation that goes to the existence of the jurisdiction of the Tribunal (¶ 6 of PS Dissent), and agreed with the views put forth by both parties that the absence of prior recourse to the national courts of Turkmenistan meant that the Tribunal had no jurisdiction (¶11 of PS Dissent).

7.2 Claimant's claims are not inadmissible for failure to comply with the domestic litigation requirement in Article VII(2) of the BIT

Prof. Sands stated that while Article VII(2) clearly laid down the requirements that "(1) the claim is to be brought to the national courts by the 'investor concerned,' and (2) the claim there brought is presumably the one that relates to 'the dispute' that is also before the ICSID arbitral tribunal," Claimant had not complied with either requirement because Claimant had neither brought any claim before the Turkmen courts nor did the claims (related to the 13 contracts) brought by other parties before the national courts allege any violation of the BIT (¶14 of PS Dissent). He further noted that 6 of the 13 contracts were not brought before the national courts either on allegation of breach of contract or violation of treaty provisions (*id.*), and disagreed with the conclusion that the requirement set forth in Article VII(2) had been met (¶15 of PS Dissent). Prof. Sands concluded that the BIT did not confer jurisdiction to an ICSID tribunal to resolve mere contractual disputes and that Claimant had failed to fulfill the domestic litigation requirement mandated under the BIT (¶16 of PS Dissent).