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International Arbitration Case Law

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TULIP REAL ESTATE INVESTMENT AND DEVELOPMENT NETHERLANDS B.V.
V.
REPUBLIC OF TURKEY
(ICSID CASE NO. ARB/11/28)

DECISION ON BIFURCATED JURISDICTIONAL ISSUE

Case Report by Elis Wendpap**
Edited by Lise Johnson***

In a Decision of March 5, 2013, the Tribunal concluded that if the BIT establishes that the State must receive a notice of the dispute one year before the Request of Arbitration is presented and that the parties engage negotiations before starting the arbitral procedure, these provisions are mandatory.

Main Issues:	Procedure – admissibility; procedure – negotiations; procedure – waiting period
Tribunal:	Dr. Gavan Griffith (President), Mr. Michael Evan Jaffe, Prof. Dr. Rolf Knieper.
Claimant's counsel:	Stuart H. Newberger, George D. Ruttinger, and Meriam Alrashid, of Crowell & Moring LLP.
Defendant's Counsel:	Robert C. Sentner and Harry P. Trueceart of Nixon Peabody LLP; M. Rasim Kuseyri, Ferdi Karoglu, and Simge Sertoglu Akyuz, of Kuseyri Hukuk Bürsu; Michael E Schneider, Matthias Scherer, and Laura Halonen, of Lalive.

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Digest

1. Facts of the Case

On October 11, 2011, Tulip Real Estate and Development Netherlands B.V. ("Tulip" or "Claimant") started an arbitral procedure at ICSID against the Republic of Turkey ("Respondent"), alleging breaches of the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey, of 1986 (the "BIT").

Tulip had several investments in Turkey, concluded through special investment vehicles such as the companies "Tulip I", "Tulip II" and "Tulip JV". Emlak Knout Gayrimenkul Yatirim Ortakligi A. S. ("Emlak") is a Turkish company related to the Ispartakule III project. Emlak is significantly owned by Turkey's Housing Development Administration ("TOKI"), which is part of Turkey's Prime Ministry. "*Enlak and Tulip JV signed the contract for Revenue-Sharing in Exchange for Sale of Parcels for the Inspartakule III Project on 3 August 2006, and Tulip I took possession of the land from Emlak on behalf of Tulip JY a few days later*" (¶35).

Claimant claims "*that actions taken by Respondent deprived Claimant of the entire value of its real estate development projects*" (¶36). The reasons for the alleged breach were not relevant for the decision.

After Procedural Order n. 01, Respondent presented three objections to the Tribunal's jurisdiction and requested bifurcation of the procedure for the following preliminary questions to be decided: (1) that Claimant's claims were contract claims not treaty claims; (2) that it would be premature to decide any treaty claims and they were, thus, inadmissible; and (3) there was a mandatory negotiation period in Article 8(2) of the BIT not respected by Claimant (¶21).

Article 8(2) of the BIT stipulates that: "*In the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of non-binding, third party procedures upon which such investor and the Contracting Party mutually agree. If the dispute cannot be resolved through the foregoing procedures the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ('Centre') for settlement by arbitration, at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award*" (¶42).

The Tribunal bifurcated the procedure to rule solely on the third objection and without suspending the procedure on the merits.

2. *Legal Issues Discussed in the Decision*

(a) The rules governing the Tribunal's jurisdiction (¶¶40-44)

Although Respondent is not a signatory to the Vienna Convention on the Law of Treaties, the Parties had agreed that the Tribunal would apply this Convention when interpreting the BIT, which the Tribunal then indicated it would do, making particular reference to Articles 31 and 32 of the Convention.

(b) The relevance of previous ICSID and ICJ decisions or awards (¶¶45-47)

The Tribunal accepted that previous ICJ and ICSID decisions should be considered in the interpretation of the BIT, especially ICJ's positions on "*general principles as to the construction of the terms of a treaty as those principles may apply to the construction of the BIT*" (¶47). Yet, the Tribunal has autonomy to make its own interpretations of Article 8(2) of the BIT.

(c) The onus of establishing jurisdiction (¶48)

Claimant bares the onus to demonstrate the requirements of Article 8(2) of the BIT have been satisfied.

(d) Non-contentious matters for the purposes of this Decision (¶49)

For the purpose of analyzing Respondent's third objection to the Tribunal's jurisdiction, it is assumed there is an investment dispute within the BIT.

(e) Article 8(2) of the BIT

Claimant alleged Article 8(2) was merely a procedural provision and, thus, its noncompliance would not affect the Tribunal's jurisdiction or the admissibility of a claim. Respondent defended that there is a mandatory negotiation period as a condition for its consent to the Tribunal's jurisdiction and that there should have been a notification of the investment dispute one year before the Request of Arbitration. According to Respondent, Claimant did not comply with these conditions (¶51 and 53).

The Tribunal drew from the reasoning of the ICJ decision in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*) and concluded that a 'compromissory' provision such as Article 8(2) has four functions: (1) it "*gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter*"; (2) it enables the parties to settle the dispute; (3) "*prior*

resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States"; and (4) it has a policy function allowing the State to address the issue before an international arbitral procedure is installed (¶¶61-62).

Then, after referring to other decisions rendered by ICSID tribunals, the Tribunal affirmed that the provisions of Article 8(2) of the BIT are mandatory. It stated that the ordinary meaning of the Article requires the disputing parties to "*first seek to resolve the dispute by consultations and negotiations in good faith*" and "*second, if these procedures are unsuccessful, then, at any time after one year from the date upon which the dispute arose, the investor may choose to submit the dispute to arbitration*" (¶70).

This conclusion, the Tribunal reasoned, was consistent with the plain object and purpose of the provision of Article 8(2). The Tribunal agreed with Respondent that compliance with Article 8(2)'s requirements is essential to constitute the State's consent to a procedure before ICSID.

(i) First requirement of Article 8(2) – Dispute and Notice (¶¶74-83)

According to the Tribunal's understating of Article 8(2), the State must receive notice of the investment dispute. Respondent alleged it did not receive such notice until the Request for Arbitration, on October 11, 2011. Claimant, in turn, asserted that Respondent was notified of the dispute as early as January 16, 2007 and at the latest on July 8, 2010.

Because Article 8(2) does not impose a formal notice requirement, the Tribunal determined that the Claimant had the duty to sufficiently inform the host State about the breaches of obligations of the BIT that could later be invoked in an international arbitral procedure. Agreeing with the legal standard established in *Burlington Resources v. Ecuador*, the Tribunal further explained that this obligation did not require Claimant to be specific about the details of the legal case or the provisions of the BIT.

(ii) Second requirement of Article 8(2) – Consultation and Negotiation (¶¶84-86)

The Tribunal agreed with the ICJ decision in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*) concluding that, to fulfill the consultation and negotiation requirement, the subject matter of the consultations and negotiations and of the treaty claim must be related. However, the Tribunal added, it was not

mandatory to have an express reference to the treaty during the negotiation or consultations.

(iii) Third requirement of Article 8(2) – One-year waiting period (¶88)

The Tribunal decided that the waiting period starts once the Respondent receives notification of the existence of an investment dispute.

(iv) Satisfaction of the requirements after the Request for Arbitration (¶¶89-92)

Claimant must fulfill the Article 8(2) requirements before presenting the Request for Arbitration. Moreover, since there was no waiver of those requirements, the Tribunal would not have jurisdiction over the dispute if the mandatory conditions were not met. "*Absente a waiver, actions, or inactions, of the Parties after the commencement of arbitration will not perfect a defective commencement*" (¶91).

(v) Compliance with Article 8(2) (¶¶93-131)

Regarding the first requirement of notice, the Tribunal found that Claimant had not established that acts by or notice to Emlak could be attributed to the State.

However, because Mr. Bayaktar was the chairman of both Emlak and TOKI, which was the controlling shareholder of Emlak, "*it is not unreasonable to infer that, at the least, Respondent, as a State party to the BIT, should have been aware of the circumstances of the on-going disagreement between Tulip I and Emlak with respect to the Ispartakule III*" (¶99). The Tribunal determined that the deteriorating relationship between Tulip I and Emlak, combined with a letter sent by Tulip I to the President of Turkey on July 8, 2010, indicated that, although notice had not been given in the "*most perfect form[]*", Respondent had been apprised by at least July 8, 2010 that there was a dispute arising under the BIT and that, if unresolved, that dispute would result in arbitral proceedings under that treaty (¶121).

The second requirement, consultations and negotiations, was also met by various letters sent by Tulip I and others on its behalf to various Turkish government officials. These included a letter from the Dutch Consul General in Istanbul of May 27, 2010; the letter of July 8, 2010 to the President of Turkey; and a letter of July 23, 2010 to the Prime Minister of Turkey (¶128).

The Tribunal then turned to the third requirement of Article 8(2) and found that it had also been met as the Claimant had presented its Request for Arbitration more than one year after the July 8, 2010 letter was sent.

(f) Futility, Waiver and Procedural Economy (¶¶132-135)

The Tribunal reiterated that conditions such as the ones in Article 8(2) of the BIT are mandatory and cannot be disregarded by the investor. Yet, Claimant met them all. Consequently, the Tribunal did not have to examine the significance of doctrines of futility, waiver, or procedural economy.

3. Decision

The Tribunal rejected Respondent's objection to jurisdiction based on Article 8(2) of the BIT because Claimant complied with the mandatory requirements of that provision.

The Tribunal reserved the costs issues to the final costs orders.