INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

İÇKALE İNŞAAT LIMITED ŞIRKETI

Claimant

and

TURKMENISTAN

Respondent

(ICSID Case No. ARB/10/24)

PARTIALLY DISSENTING OPINION

PROFESSOR PHILIPPE SANDS QC

1. I am in general agreement with the final outcome of these proceedings, as reflected in an Award and reasoning that rejects the entirety of the claims put forward by the Claimant in these proceedings. I am comfortable with much of the Tribunal's approach as regards the interpretation and application of the Turkey-Turkmenistan Bilateral Investment Treaty, in particular the conclusion that its Article VII(2) is properly to be interpreted as requiring prior recourse to the domestic courts of the relevant party before international arbitration proceedings are brought (Award, para. 228).

2. Regrettably, I disagree with the approach adopted by the majority on two matters that relate to the interpretation and application of the Article VII(2) treaty requirement: *first*, the majority's conclusion that Article VII(2) is to be interpreted and applied as a provision that goes to the admissibility of the claim brought, as opposed to the existence of the jurisdiction of the forum that has been seized; and *second*, the majority's finding that on the facts of this case the requirements of Article VII(2) were not a bar to the admissibility of the claims, despite the fact the Claimant had no prior recourse to the national courts.

Jurisdiction/Admissibility

3. With regard to the question of whether the obligation set forth in Article VII(2) to have prior recourse to national courts is a jurisdictional requirement or goes to the admissibility of a claim, I disagree with the reasons and conclusions as set out in paragraphs 240-247 of the Award. In my view, that requirement of Article VII(2) is an obligation that goes to the existence of the jurisdiction of the Tribunal.

4. This is the same issue that was before another ICSID arbitral tribunal on which I sat, in the case of *Kılıç*.[1] That Tribunal decided, by a majority, that Article VII(2) imposed a mandatory requirement of recourse to the national courts as a jurisdictional prerequisite to having access to an ICSID Tribunal. In accepting appointment to this Tribunal, following a challenge made by the Claimant, I made clear that I would treat this issue with an open mind, and this I have done. The arguments of the parties in this case were different from those put forward in the earlier case: in this case, <u>both</u> parties agreed with the finding of the majority in the *Kılıç* case, a point noted by the majority (see paras. 238-9 of the Award: "Both Parties have … taken the position that compliance with Article VII(2) of the BIT is an issue of jurisdiction rather than admissibility").

5. The only argument to the contrary has been put forward by the majority. I agree that an arbitral tribunal is not bound by the shared views of the parties, on a matter that goes to the question of whether the Tribunal has jurisdiction to decide a case. However, I am not

[1] ICSID Case No. ARB/10/1, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, Award (2 July 2013).

persuaded by the arguments put forward by the majority in departing from the commonly held views of the parties.

6. The majority view is somewhat minimalist in its approach. *First*, it asserts that the relevant provision of Article VII(2) is not a jurisdictional requirement because it merely "sets out the procedure, or the step to be taken, in the event the dispute cannot be settled", and is accordingly to be treated as addressing an "issue of *how* … consent is to be invoked by a foreign investor … rather than 'whether'" (Award, para. 242). No authority is provided for the proposition that a procedure that the drafters of a BIT have required a potential claimant to take is not such as to create an obligation that goes to the existence of a jurisdiction. Moreover, none of the authorities that adopt a different view to the majority in this case on this point – see e.g. the leading authority of *Wintershall Aktiengesellschaft v. Argentine Republic*[2] - is addressed or distinguished.

7. *Second*, the majority takes issue with the approach of the majority in *Kılıç* on the basis that the finding was premised on "a contractual analogy which … is both conceptually inaccurate and legally incorrect": the "BIT is not a contract", the majority in this case concludes (Award, para. 244). Yet the majority in *Kılıç* did not assert that a BIT was a contract, or was to be treated as a contract: the agreement to which reference is made in that decision is to the existence of an offer by the State (as reflected in the BIT) and the acceptance by the investor (of the offer made in the BIT) (*Kılıç*, paras. 6.2.1-2). The contractual analogy to which the majority in *Kılıç* referred did not go to the manner of interpreting Article VII(2), as asserted.

8. Rather, the heart of the *Kılıç* decision is the reference to Article 26 of the ICSID Convention (at paras. 6.2.4 *et seq.*), and its use in interpreting the condition that Turkey and Turkmenistan incorporated into their BIT. Article 26 provides that

[2] ICSID Case No. ARB/04/14, Award (8 December 2008) (Nariman, Torres Bernárdez, Bernardini); see also Pierre-Marie Dupuy, 'Preconditions to Arbitration and Consent of States to ICSID Jurisdiction', in Meg Kinnear et al. (Eds), *Building International Investment Law: The First 50 Years of ICSID* (2015), at 219-236.

"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." (emphasis added)

This language appears to make clear that in providing its consent for ICSID jurisdiction, a Contracting State to the ICSID Convention (such as Turkmenistan or Turkey) is free to attach as a condition the requirement that a claimant shall have prior recourse to a local judicial remedy. As set out in Article 26 – which is to be found in Chapter II of the ICSID Convention, entitled "Jurisdiction of the Centre" – the *Kılıç* tribunal found that a condition of this kind forms part of the very existence of the jurisdiction of the forum that is seized, not the exercise of a jurisdiction that has been found to exist. Chapter II of the ICSID Convention is concerned with matters of jurisdiction, not admissibility: indeed, the word "admissibility" is not to be found in that Chapter, or indeed in the Convention. Yet the majority in this case is curiously silent about Chapter II of the ICSID Convention and its Article 26, and offers no explanation as to how it justifies an alternative interpretation or reading of Article 26 and the surrounding provisions.

9. *Third*, the majority states that it sees no need to distinguish the facts of the present case from others, or the legal authorities cited by the *Kılıç* Tribunal, or the legal authorities invoked by the Parties (Award, para. 245). Indeed, it is unfortunate that the majority cites not a single authority in support of its conclusion, instead making the point by assertion that the distinction between jurisdiction and admissibility is a fine one and that "reasonable arbitrators may reasonably disagree". Reasonable arbitrators may indeed reasonably disagree, but the nature of the disagreement is more easily comprehended – and the possibility of its resolution more likely – if it is accompanied by reasoning that cites to existing authorities.

10. *Fourth*, and relatedly, the one authority on which the majority places considerable reliance is an article by Jan Paulsson, entitled 'Jurisdiction and Admissibility', published in 2005 and cited by the majority in *Kılıç* in support of its conclusion (Award, para. 245). The majority melds together three selected passages from pages 616 and 617 of Mr Paulsson's article, but the act of melding seems to have misconstrued what the author

intended. The majority omits the significant words of the text that incorporates footnote 47, a footnote in which Mr Paulsson expresses his view that

> "If an ephemeral arbitral tribunal is established under a treaty which contains requirements as to the nationality of private claimants, or as to their prior exhaustion of local remedies, the *claims* as such are perhaps subject to no impediment but the *forum seized* is lacking one of the elements required to give it life in the first place. <u>For such a tribunal these are matters of jurisdiction</u>." (emphasis added)

Contrary to the view expressed by the majority, the plain meaning of pages 616 and 617 of the article, when read as a whole, appears to point clearly in favour of the conclusion that an "ephemeral tribunal" such as this one will have no jurisdiction where a requirement to have recourse to national remedies has not been met.

11. For these reasons, and in the absence of any other arguments put forward by the majority, I agree with the view put forward by both parties: the absence of prior recourse to the national courts of Turkmenistan means that this Tribunal is without jurisdiction.

Recourse to the Turkmen courts

12. Having concluded that Article VII(2) goes to the admissibility of a claim, rather than the jurisdiction of the arbitral tribunal, the majority concludes that the Claimant's claims are not inadmissible for a failure to comply with the domestic litigation requirement in Article VII(2) of the BIT. This is notwithstanding the undisputed fact that the Claimant never submitted the dispute it has brought to this Tribunal to the courts of Turkmenistan.

13. The majority concludes that "it would not be appropriate now to require that the Claimant first submit the present dispute to local courts" (Award, para. 263). To reach that conclusion, it takes the view that local court proceedings have already been conducted in the context of the present dispute, as summarized at paragraph 252 of the Award, and that "essential aspects of the dispute have in fact been submitted to and litigated before the Turkmen courts, with the result that seven out of the thirteen contracts at issue in this arbitration, including all those that were still ongoing at the time, were terminated (or their termination was upheld)" (Award, para. 262). The majority notes that the proceedings were brought by the Turkmen authorities and not the Claimant, that seven

out of the thirteen contracts at issue in this arbitration were considered to be terminated, and that it is "unclear" why the Claimant failed to participate effectively in the proceedings. Notwithstanding these points, the majority concludes that "the subject matter, or the fundamental basis, of the dispute had already been litigated 'before the courts of justice of the Party that is a party to the dispute'", as required by Article VII(2) (Award, para. 262).

14. The approach taken by the majority is troubling. On its face, Article VII(2) makes clear that two requirements are to be met: (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. On its face neither of these requirements has been met in the present case: *first*, the Claimant has never brought any claim to any national court in Turkmenistan; and *second*, the claims brought to the national courts by other parties (in relation to some of the thirteen contracts) had as their essential cause of action a breach of the relevant underlying contract, and did not not concern any allegation of a violation of the BIT. A *third*, and rather obvious and related point, is that six of the thirteen contracts appear never to have been raised before any national court in Turkmenistan, not for breach of contract or any other cause of action.

15. In these circumstances, on the basis of the evidence that is before this Tribunal, and the arguments raised by the majority, I am unable to agree with the conclusion that the requirement set forth in Article VII(2) has been complied with. It is not here a matter of taking an excessively formalistic view of the facts or the law, but ensuring that the intentions of the drafters of the BIT – in effect the legislature, in international legal terms – in imposing an obligation are fully respected by the arbitral tribunal – in effect the judiciary, in international legal terms - deals thoroughly and completely with the legislated obligations they have put in place in the BIT. The function of an arbitral tribunal is to establish the fact and then interpret and apply the law to those facts, not to decide what is (or is not) "appropriate". The drafters of the BIT imposed a reasonably clear obligation, namely that the investor must first take the dispute that it wishes to take to arbitration to the national courts, and in circumstances in which that has plainly

not happened it is difficult to see the basis upon which an arbitral tribunal could then be free to dispense with the obligation. This is all the more so where the Tribunal has ruled that "the BIT does not provide for any "futility exception" to the local litigation requirement in Article VII(2) of the BIT", and has not been persuaded that it would have been futile to bring the case to the Turkmen courts (Award, para. 260).

16. This aspect of the case touches upon a related matter. The dispute that has given rise to these proceedings is, in my view, manifestly about obligations arising under thirteen contracts between the Claimant and Turkmenistan, and whether or not those obligations have been complied with, on both sides. The BIT in issue does not provide for the jurisdiction of an ICSID tribunal over mere contractual disputes. One of the more striking aspects of the case is the failure of the Claimant to have recourse to the dispute settlement mechanism set forth in those contracts, which mandated recourse exclusively to the national courts, coupled with its failure to keep decent records. Having made its choice, the Claimant can hardly be surprised at the obstacles it has faced before an ICSID tribunal. When the parties to a contract have agreed on a national forum for the resolution of disputes relating to that contract, and that national forum is by-passed, they can hardly expect matters that appear to be essentially of a contractual nature will easily be treated as breaches of treaty (and ones requiring proof of the unlawful exercise of *puissance publique*). This is all the more so where the evidential record on which the claim is brought is as flimsy and inadequate as the one before this Tribunal. The ICSID system is not, and was never intended to be, an insurance against mere contractual failures.

[*Signed*]

Professor Philippe Sands QC

10 February 2016