

ICSID Arbitration and Turkey in Terms of the Subject and Parties

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Abstract

The International Centre for Settlement of Investment Disputes (ICSID) is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention) with over one hundred and fifty five member States. Turkey signed and ratified ICSID Convention. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes.

ICSID has become the leading arbitration institution for the resolution of investor-state disputes. This arbitration system is different from the other arbitration. First of all, ICSID was established by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through arbitration procedures. Second, The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. Third, recourse to the ICSID facilities is always subject to the parties' consent. Fourth, as evidenced by its large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws, ICSID plays an important role in the field of international investment and economic development.

Today, companies considering an investment in a foreign country, must be aware of ICSID and the other treaties providing access to ICSID. For example, Bilateral Investment Treaties (BIT's) Energy Charter Treaty (ECT) and Multilateral Treaties (MIT's). Turkey has signed numerous BIT's with different countries. Furthermore, Turkey ratified the Energy Charter Treaty (ECT) that includes a provision regarding ICSID arbitration. Due to the steps taken by Turkey to create a more appropriate legal climate for investments during 90's, foreign investors have brought eight arbitration cases before the ICSID against Turkey since 2002.

In this study, firstly, ICSID arbitration system and arbitration cases against Turkey will be taken hand. Then Turkish investor's cases against host state will be indicate. Finally general assesment will be made for Turkey and the other parties of ICSID Convention.

Key Words:arbitration, Investment, ICSID, Turkey.

Introduction

ICSID Convention, which came into force on 14th October 1966 established an International Centre for Settlement of Investment Disputes. This Convention, which is also referred to as Washington Convention came into force in Turkey on 02nd.04.1989. ICSID

Convention mainly aims to stop disputes being a political tool and a threat factor and resolve the disputes on a platform where the benefits of both parties are balanced. (Emek, 27)The Convention provides the ways of conciliation and arbitration for that.

464 applications have been registered so far. 255 of these have been concluded¹ and 169 of them are still on trial². Applications show that, disputes mainly come up in areas of banking, construction, energy, health, industry, mining, tourism and agriculture³.

ICSID (The International Centre) established within the body of the World Bank offers an objective and reliable arbitration case in the resolution of disputes between foreign investors and the host state. The Centre also aims to clear the concerns of foreign investors and to motivate them for investing in foreign states and to reduce the negative attempts of the host state towards investment.

ICSID Arbitration

Trial authority of the Centre covers legal disputes between states that are a party to ICSID Convention and the citizens of other states that are also a party to ICSID Convention, who have submitted their written consent related to the dispute to the General Secretariat. After the submission of consent, no party can withdraw it back unilaterally (Article 25 of the ICSID). Trial authority of the ICSID Arbitration Centre depends on three factors: The first one is the presence of a legal benefit dispute, arising directly out of the investment. The second one is the consents of the parties. And the third one is the requirement that the host state and the sending state are both parties to the ICSID Convention. (Sassoon, 102)So, it is possible to discuss the trial authority of the Centre with respect to the subject of the trial, parties of the dispute and consents of the parties (Nomer et al., 54):

1-Trial Subject

In the presence of a subject relevant to the tribal authority of the Centre, there has to be *a legal dispute directly related to investment* as a first condition⁴. (De Cassio, 230; Amerasinghe, 636)Consequently; political, economic, financial or commercial disputes are included within the scope of ICSID trial. (De Cassio, 230)

As the Convention not defines investment, wills of parties shall be studied. (Azrak, 27; Wagner, 472; Kurtz, 20) In ICSID arbitration, troubles related to subject limitation are too rare. (Park et al., 453; Hornick, 189; Escobar, 140) Any kind of dispute related to investment can generally be a trial subject in an ICSID arbitration system. However; expenses made by the Claimant prior to investment are not regarded as investments with respect to Article 25 of ICSID⁵.

2-Parties

According to ICSID Convention, one of the parties is a state party to the Convention and the other party is the citizen of another state which also is a party to the Convention (Article 25 of the ICSID). So, disputes, parties of which are real and/or special legal entities or states are outside the authority of ICSID.

One party of the dispute is the host state where the investment is made. In order for a dispute to be resolved by ICSID arbitration, the host state shall be a party to ICSID and

¹ See: <https://icsid.worldbank.org> (23.04.2013)

² See: <https://icsid.worldbank.org> (23.04.2013)

³ See: <https://icsid.worldbank.org> (23.04.2013)

⁴ See for additional knowledge: Mihaly - Sri Lanka, Award, ICSID Case No:00/2, p.32.

⁵Mihaly - Sri Lanka, Award, ICSID Case No:00/2, p.28-33, 52-54, ve 61-62.

have consent on arbitration issue. Moreover it is allowed that; the subunits forming any country or the state which has assigned a representative to the Centre is a party to the dispute (Erten, 216; Tawil, 278).

The other party of the dispute is the citizen of another state which is a party to the ICSID Convention (De Cassio, 230). This statement expresses the real or legal entities possessing the citizenship of a state party apart from the home state which was a part of the Centre at the date when the application was submitted to the Centre (Article 25/2-a of the ICSID). In case of dual citizenship, the investor can apply for ICSID arbitration if the state he/she is a citizen of is a party to the ICSID Convention⁶ (Nomer et al., 55). 23 ICSID Convention accepts that, if a prior agreement is made, companies under the control of foreign powers will be treated in the host state as a citizen of another state which is a party to the Convention (Article 25/2-b of the ICSID).

3-Written Arbitration Convention

In order for an international investment dispute to be resolved by ICSID arbitration, there must be a relevant written arbitration convention carried out between parties. This is an obligatory condition for the beginning of ICSID arbitration procedure (*sine qua non condition*). A *valid arbitration deal* means consent to arbitration. This consent relation can be provided with an arbitration condition or an independent arbitration deal (De Cassio, 229). Parties might give this consent before or after dispute (Günuğur, 339). In most of the disputes that come up in practice, this consent is given on the condition of arbitration put into the investment agreement (Nomer et al., 54). This consent is also given in BIT's carried out between states.

States that have signed the ICSID Convention doesn't mean that they give consent (Amerasinghe, 636; Şanlı, 9). This shows the states' desire to get into an ICSID arbitration system. It doesn't pose an obligation⁷ (Erten, 218). Declaration of consent for arbitration shall be given for a certain dispute. Being a party to the ICSID Convention doesn't require parties to give consent for applying for ICSID arbitration for the resolution of a dispute included within the scope of the Convention (De Cassio, 229). On the other hand; some consent declaration might not cover the consent required by the Convention for the tribal authority of the Centre. However; once the parties have submitted their consents to the Centre, it is not possible for them to withdraw these back unilaterally⁸ (Sassoon, 103).

Consents of the parties for arbitration within the framework of the Convention means they have rejected any solution outside the Convention unless stated otherwise. However; states might demand as a prior condition for these consents that, local administrations and legal ways have been exhausted (Article 26 of the ICSID).

On the other hand; the Convention allows states to make declaration for the types of disputes they don't want to put through ICSID arbitration any time. (Article 25/4 of the ICSID). This means, providing that they make the necessary declaration, they can restrict their membership to the Centre as long as they desire. Consequently; foreign investors shall study and monitor the concerns put into the Convention by the host state. Because in some cases, signing of the ICSID Convention might only be for promotional reasons (Altıntaş, 19). 36

⁶Olguin - Paraguay, Award, ICSID Case No:98/5, p.60-61.

⁷CSOB - Slovak Republic, Decision, ICSID Case No:97/4, p.36.

⁸Article 25 of the ICSID.

ICSID Arbitration and Turkey

In General

Turkey signed the ICSID Convention on 24th.06.1987 and approved it with Law No 3460 dated as 27th.05.1988. 37So far, *eight disputes* have been submitted to ICSID arbitration against Turkey. And *thirteen Turkish origin* companies have applied for ICSID arbitration against various states. The amounts both in arbitration cases sued against Turkey and sued by Turkish origin companies are quite high. Thus; ICSID arbitration is very important. Here, ICSID arbitration cases against Turkey will be discussed first and then, ICSID arbitration cases sued by Turkish citizens against various states will be discussed.

Cases against Turkey

Here, concluded cases against Turkey will be discussed first and then, cases still in progress will be discussed.

Concluded Cases

1-PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey⁹

The first application to ICSID against Turkey was the application of an enterprise consisting of PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şti., which was registered on 2nd May 2002. The arbitration procedure carried out for the dispute arising from the *Electricity power plant project* was concluded on 19th January 2007. Turkey was given a penalty of 9 million USD Dollars of compensation and it was required to pay 65% of the costs of the case.

2-Motorola Credit Corporation, Inc. v. Republic of Turkey¹⁰

The application made by the American Motorola company was registered on 04th January 2004. As parties came to a mutual agreement, the dispute on *communication networks* was ended on 21st November 2005 by the Tribunal according to Cl. 43/1 of ICSID Arbitration Rules. There are no documents issued about this case. This case is a one that was ended after the mutual agreement of the parties after the arbitration process had started.

3-Saba Fakes v. Republic of Turkey¹¹

The arbitration procedure started upon the application of Netherlander Saba Fakes on 13th August 2007 was concluded on 14th July 2010. The case won about mobile communication services and Turkey the case. It was claimed that Telsim, whose shares mostly belonged to the claimant, was seized by Turkey and sold to a third party. In return, Turkey claimed that the investment on trial didn't either carry the "investment" conditions stated in BIT made between Turkey and Holland or the ICSID Convention Cl. 25/1. The tribunal acknowledged that Turkey was right in its defense.

⁹PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5.

¹⁰Motorola Credit Corporation, Inc v. Republic of Turkey, ICSID Case No. ARB/04/21.

¹¹Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20.

4-Europe Cement Investment and Trade S.A. v. Republic of Turkey¹²

The application submitted by the Polish Europe Cement Company was registered on 6th March 2007. The arbitration case performed within the framework of the Additional Facility Rules of ICSID was about *electricity concession* and Turkey won the case on 13th August 2009. In the case, the claimant claimed that it was the owner of ÇEAŞ and Kepez Electricity shares and was injured as Turkey seized these companies. Respondent Turkey claimed that, owners of ÇEAŞ and Kepez Electricity had not carried out the required legal procedures and declarations for transfer. Turkey also stated that, the claimant didn't possess the "investor" charter defined in Energy Charter Treaty. The tribunal concluded the case for non-authority, it found Turkey right.

5-Cementownia "Nowa Huta" S.A. v. Republic of Turkey¹³

The application made by Polish Cementownia "Nowa Huta" Company was registered on 16th November 2006. The case was about *electricity concession*. The case was resolved within the framework of ICSID's Additional Facility Rules as Poland was not a party to the ICSID Convention. In the case, the claimant claimed that it was the owner of ÇEAŞ and Kepez Electricity shares and was injured as Turkey seized these companies. Respondent Turkey claimed that, owners of ÇEAŞ and Kepez Electricity had not carried out the required legal procedures and declarations for transfer. Turkey also stated that, the claimant didn't possess the "investor" charter defined in the Energy Charter Treaty. The case was concluded on 17th September 2009 and Turkey won it.

Cases Still in Progress

1-Libananco-Republic of Turkey¹⁴

Another application submitted to ICSID against Turkey is the application of Libananco Company from Southern Cyprus. Application of Libananco submitted to ICSID against Turkey was registered on 19th April 2006.

The case was about *electricity generation and distribution concession*. Republic of Turkey's Ministry of Energy seized the current assets of ÇEAŞ and Kepez Electricity based on the claim that it failed to fulfill its undertakings stated in the Concession Contract. Libananco Company on the other hand claimed that, it owned 66% of these seized company's assets and was injured by this seizure. Respondent Turkey claimed that the owners of ÇEAŞ and Kepez Electricity had failed to fulfill the legal procedures and make necessary declarations. Turkey further claimed that the Claimant didn't fulfill the "investor" charter defined in the Energy Charter Treaty. The case was concluded on 2nd September 2011 and Turkey won it. On 20th December 2011, Libananco Company applied for the cancellation of the decision. *The trial performed upon this application for cancellation is still in progress.*

2- Alaplı Elektrik B.V. v. Republic of Turkey¹⁵

An arbitration trial made upon Netherlander Alaplı Elektrik's application on 27th August 2008 was concluded on 16th July 2012. Turkey won the case about the dispute about *electricity concession*. Judge Marc Lalonde lodged a statement of opposition to the decision and on 16th November 2012, a cancellation application was made to present new evidences. *The trial performed upon the application for cancellation is still in progress.*

¹²Europe Cement Investment and Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2.

¹³Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2.

¹⁴Libananco Holdings Co. Limited-Republic of Turkey, ICSID Case No: ARB/06/8.

¹⁵Alaplı Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13.

3-Tulip Real Estate Development Netherlands B.V. v. Republic of Turkey¹⁶

The application of Tulip Real Estate Development Netherlands against Turkey was registered on 28th October 2011. The dispute arises from the residential and commercial construction project. *Arbitration trial is still in progress.*

Evaluation

In ICSID arbitration trial process started by *Libananco, Europe Cement and Cementownia "NowaHuta"* against Turkey, it was investigated whether claimants possessed the conditions of an investor within the framework of the ICSID Convention, Energy Charter and BIT. In these trials, tribunals decided that claimant investors did not fulfill the "investor" conditions defined in the relevant regulations. According to domestic legislation, the claimant should have recorded the registered shares into the shareholders' register of the company after the submission of endorsements and commercial papers. However, claimants didn't fulfill these conditions. Furthermore; it was concluded in these trials that claimants acted in bad faith. The same thing is true for *the Saba Fakes case*.

This case sued against *Turkey by PSEG/Ilgın* is the first experience of Turkey in ICSID arbitration case. In this case, the arbitration tribunal regarded the dispute arising from the concession contracts as an investment dispute within the scope of the ICSID Convention and BIT. The tribunal stated that, current regulations and BIT showed Turkey had consent for ICSID trial and so rejected Turkey's opposition that no resolution procedure was set forth in BIT. The tribunal also rejected claimant investor's some claims related to the base of dispute.

The tribunal also concluded that the investor failed to fulfill some of its obligations set forth in Law No 4501. In conclusion; although Turkey was sentenced to pay compensation to the claimant, the claimant was unable to get the result it desired.

Cases of Turkish People/Companies

Today, Turkey has come to be a home state as well as a host state. Consequently, Turkish citizens and companies investing in foreign states that are parties to ICSID Convention can also apply to ICSID arbitration. Arbitration trials started with *five* Turkish companies against host states have been concluded so far and arbitration trials of *eight* more companies are still in progress. Turkish companies will also have their disputes related to investments in ICSID arbitration henceforward.

Concluded Cases

1-Bayındır Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan¹⁷

Arbitration application made by Turkish Bayındır Insaat Turizm Ticaret ve Sanayi A.S. Against Pakistan was registered on 1st December 2003. The case, the dispute subject of which was highway construction contract, was concluded on 27th August 2009 and Pakistan won the case.

¹⁶Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28.

¹⁷Bayındır Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Case No. ARB/03/29.

2-Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan¹⁸

Arbitration application made by Turkish Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. Against Kazakhstan was registered on 30th August 2006. The case, the dispute subject of which was telecommunication, was concluded on 29th July 2009. However; cancellation application was made on 7th November 2009. The decision was given on 25th March 2010.

3-Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. – Kyrgyz Republic¹⁹

Arbitration application made by Turkish Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. Against Kyrgyzstan was registered on 12th April 2006. The case, the dispute subject of which was a hotel construction project, was concluded on 9th September 2009.

4-Barmek Holding A.S. v. Republic of Azerbaijan²⁰

Arbitration application made by Turkish Barmek Holding A.S. Against Azerbaijan was registered on 16th October 2006. The case, the dispute subject of which was electricity concession, was concluded on 28th September 2009 with the agreement of the parties according to Rule 43/2 of the ICSID Arbitration Rules.

5-ATA Construction, Industrial and Trading Company v. Kingdom of Jordan

Arbitration application made by Turkish ATA Construction, Industrial and Trading Company against Kingdom of Jordan was registered on 28th Feb 2008. The case, the dispute subject of which was Waterway Construction Project, was concluded on 18th May 2010. However; cancellation application was made on 27th September 2010. The *ad hoc* Committee issues an order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 44, on July 11, 2011.

Cases Still in Progress

1-Adem Doğan v. Turkmenistan²¹

Arbitration application made by Turkish citizen Adem Doğan against Turkmenistan was registered on 22nd May 2009. The dispute subject of the case is a chicken farm and the case is still in progress.

2-Kilic Insaat Ithalat Ihracat Snayi ve Ticaret Anonim Şirketi v. Turkmenistan²²

Arbitration application made by Turkish Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi against Turkmenistan was registered on 19th January 2010. In the case, the dispute subject of which is a construction project, on 7th May 2012 the Arbitration tribunal gave the decision that the claimant had to apply to local jurisdiction at first according to the BIT made between Turkey and Turkmenistan. Consequently; the arbitration case is still in progress.

¹⁸Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, Case No: ARB/05/16.

¹⁹Sistem Muhendislik Insaat Sanayi ve Ticaret A.S.-Kyrgyz Republic, Case No: ARB (AF) /06/1.

²⁰Barmek Holding A.S. v. Republic of Azerbaijan (ICSID Case No. ARB/06/16)

²¹Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9.

²²Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1.

3-Ömer Dede and Serdar Elhüseyni v. Romania²³

Arbitration application made by Turkish Ömer Dede against Romania was registered on 19th November 2010. The case, the dispute subject of which is agricultural machines and equipments, is still in progress.

4-Içkale Insaat Limited Sirketi v. Turkmenistan²⁴

Arbitration application made by Turkish Ickale Insaat Limited Sirketi against Turkmenistan was registered on 20th December 2010. The case, the dispute subject of which is designing and construction contract, is still in progress.

5-Turkiye Petrolleri Anonim Ortaklığı v. Republic of Kazakhstan²⁵

Arbitration application made by Turkish Fuel Oils Incorporated Partnership (TPAO in Turkish) against Kazakhstan was registered on 14th January 2011. The case, the dispute subject of which is Fuel oils search and production, is still in progress.

6-Garanti Koza LLP v. Turkmenistan²⁶

Arbitration application made by Turkish Garanti Koza against Turkmenistan was registered on 20th July 2011. The case, the dispute subject of which is a construction project, is still in progress.

7-Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan²⁷

Arbitration application made by Turkish Muhammet Çap & Sehil Insaat Endustri ve Ticaret Limited Sirketi against Turkmenistan was registered on 26th March 2012. The case, the dispute subject of which is a construction project, is still in progress.

8-Karkey Karadeniz Elektrik Üretim A.S. v. Islamic Republic of Pakistan²⁸

Arbitration application made by Turkish Karkey Karadeniz Elektrik Üretim Anonim Sirketi against Pakistan was registered on 8th February 2013. The case, the dispute subject of which is, energy generation equipment, is still in progress.

Conclusion

The following can be stated about ICSID Convention and Turkey under the light of the above mentioned decisions:

1-Turkey is a home state as well as a host state. Consequently, international arbitrations have now become a way for jurisdiction Turkish enterprises can apply to for the disputes arising from their international investments.

2-ICSID arbitration where one of the parties is a state is the most appropriate way of jurisdiction for the resolution of disputes arising from foreign investments. International commercial arbitration and particularly the ICSID arbitration is superior to the decisions given by foreign state courts. Because parties have the right to specify their own judge and the ways and principles they are going to use in their arbitration cases.

²³Ömer Dede and Serdar Elhüseyni v. Romania ICSID Case No. ARB/10/22.

²⁴Içkale Insaat Limited Sirketi v. Turkmenistan ICSID Case No. ARB/10/24.

²⁵Türkiye Petrolleri Anonim Ortaklığı v. Republic of Kazakhstan (ICSID Case No. ARB/11/2)

²⁶Garanti Koza LLP v. Turkmenistan (ICSID Case No. ARB/11/20)

²⁷Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan (ICSID Case No. ARB/12/6)

²⁸Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan(ICSID Case No. ARB/13/1)

3-Attracting foreign investments are among the priorities of Turkey just like all other developing countries. Foreign investors accepts international arbitration as one of the most significant elements of a legally reliable environment to invest in another country. Consequently; arbitration is a preferable resolution area for disputes in investment contracts.

4-Arbitration decisions given within the framework of ICSID Convention are binding for all members. The decision in question can be applied as a decision given by the national court of the member state.

5-It shall also be kept in mind that; ICSID arbitration system is the guarantee of the investments to be carried out by Turkish enterprises in foreign states.

6-In cases sued by foreign investors against Turkey, Turkey has mostly treated then investor in a fair way and conformed to the terms of multiple party treaties like BIT and Energy charter. In this sense, it can easily be said that Turkey is a suitable state for foreign investors.

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