

# The *Kilic* and *Sehil* Decisions: Resolving the Meaning of Dispute Resolution Provisions in Treaties Written in Multiple Languages

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☞ Annulment; Arbitration awards; Authentic texts; Bilateral investment treaties; ICSID; Treaty interpretation

## I. Introduction

On July 14, 2015, in the latest stage of the conflicting jurisdictional decisions in the *Kilic*<sup>1</sup> and *Sehil*<sup>2</sup> proceedings based on the same Bilateral Investment Treaty between Turkey and Turkmenistan,<sup>3</sup> an ICSID annulment committee issued a decision upholding the *Kilic* award.<sup>4</sup> That award denied jurisdiction over a claim brought by a Turkish construction company, *Kilic*, against Turkmenistan, on the ground that a provision in the governing Treaty providing for submission of the claim to local courts prior to arbitration was mandatory and not optional. In the *Sehil* proceeding, involving a claim brought by another Turkish construction company, *Sehil*, against Turkmenistan, a different ICSID panel held that the same provision regarding prior submission of the claim to local courts was optional, and not mandatory, and so concluded that it had jurisdiction over the claim.

In both cases, the tribunals had to determine the authenticity and meaning of conflicting and ambiguous versions of the Treaty. An English version provided that Russian and English copies of the Treaty were authentic. The Russian version equivocally referred to “two authentic copies” written in: (1) Turkish; (2) Turkmen; (3) English; and (4) Russian. According to two different (but unsigned) Turkish versions of the Treaty, there were either: (1) authentic Russian and English versions; or (2) Turkish, Russian and English authentic versions. It was claimed that at some point, one of the Turkish versions was altered to delete the reference to either English or Russian as an authentic version, and no Turkmen version,

signed or not, was ever found. On top of this labyrinth of confusion, the tribunal had to evaluate the accuracy of materially different translations of the Russian version.

The *Kilic* and *Sehil* cases present interesting issues regarding the interpretation of BITs written in multiple languages, as well as the role of an ICSID annulment committee when charged with the task of reviewing an award, and confronted with a second ICSID arbitration decision reaching a directly contradictory conclusion in interpreting the identical BIT provision.

## II. The 1992 Turkey-Turkmenistan Bilateral Treaty at issue

In both the *Kilic* and *Sehil* cases, the dispute centered on the meaning and effect of one particular article of the BIT, art.VII.2. The first question was whether the article mandated prior submission of the dispute to Turkmenistan courts or merely provided for prior recourse to local courts as an optional choice for the investor. A second question was, assuming that the provision was mandatory, was it a condition precedent that constituted a bar to jurisdiction, or merely a procedural requirement that went to ripeness or admissibility, and did not bar the arbitration panel from hearing the claim? The panels’ task was complicated by the fact that they were confronted with versions of the Treaty in multiple languages, with competing translations of the Russian version, and arguments as to which versions constituted authentic versions for purposes of the Treaty.

The Turkey-Turkmenistan BIT was signed in 1992, soon after Turkmenistan established itself as an independent state. Turkey was one of the first countries to recognise Turkmenistan, and the other three former Turkic republics—Kyrgyzstan, Uzbekistan and Kazakhstan—as independent states, and to establish diplomatic relations with them. During a five-day period in the spring of 1992, Turkey signed BITs with each of the four former Turkic republics. Each of the four Treaties has an English version, and the English text of art.VII.2 is identical in all four BITs. The Turkey-Kazakhstan BIT also has an authentic Turkish version identical to an “official” version of the Turkey-Turkmenistan BIT that was published in the Turkish Official Gazette as part of Turkey’s ratification process.

In both *Kilic* and *Sehil*, the claimants alleged that there were only two authentic versions of the BIT—English and Russian. In the *Kilic* case, the respondent alleged that there were four authentic versions of the BIT—English, Russian, Turkish and Turkmen. In *Sehil*, the respondent alleged there were three—English, Russian and Turkish.

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<sup>1</sup> *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan* ICSID Case No.ARB/10/1.

<sup>2</sup> *Muhammet Cap Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan* ICSID Case No.ARB/12/6 February 13, 2015 (*Sehil*).

<sup>3</sup> The Agreement between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, entered into force March 13, 1997.

<sup>4</sup> *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan* ICSID Case No.ARB/10/1 July 2, 2013 (*Kilic* Award).

### III. The initial Kilic Decision

The request for arbitration in the *Kilic* case was filed in December 2009. Kilic alleged breaches of the BIT between Turkey and Turkmenistan. The tribunal was chaired by Professor Emmanuel Gaillard (France), with Professor William W. Park (US), appointed by Kilic, and Professor Phillippe Sands QC, (UK/France), appointed by Turkmenistan. (Gaillard was later replaced as president by J. William Rowley QC). The language of the proceedings was English.

Turkmenistan objected to jurisdiction on the ground that Kilic had bypassed art.VII.2 of the BIT, which, in Turkmenistan's view, required Kilic to first submit its claim to the local courts of Turkmenistan, and allowed for arbitration only if the court failed to issue a ruling within one year. Kilic claimed that the tribunal did have jurisdiction, because art.VII.2 was optional, not mandatory, and, thus, it had the choice to submit its claims to the local courts, or to proceed directly to arbitration, as it had done.

At the outset the tribunal declined to bifurcate the proceedings on jurisdiction and the merits, but did decide to make an initial determination as to the number of authentic versions of the BIT and identification of accurate translations of the BIT, as well as to explore the meaning and effect of art.VII.2. At the parties' request, the tribunal then decided to allow for further proceedings following its initial decision, and to issue a second decision resolving the jurisdictional issue.

The *Kilic* panel issued its initial decision on May 7, 2012.<sup>5</sup> In reaching its decision, the tribunal examined the authenticity of the BIT texts written in different languages, and the interpretation of the texts.

As a preliminary matter, the tribunal held that the dispute governing the authenticity of the texts of the BIT in different languages and their interpretation was governed by the Vienna Convention of the Laws of Treaties.<sup>6</sup> Turkmenistan is a signatory to the Vienna Convention. Turkey is not; however, the tribunal determined that provisions of the Vienna Convention reflect customary international law, and that such customary international law is part of the applicable law of Turkey.

#### A. Determining the number of authentic versions of the BIT

Under art.10 of the Vienna Convention, the parties' signatures to the text of a Treaty suffice to establish the text as authentic.<sup>7</sup> The parties agreed that the English and Russian texts of the BIT were signed by both Turkey and

Turkmenistan, and, thus, were authentic versions of the BIT, in accordance with art.10 of the Vienna Convention. The respondent, Turkmenistan, argued that there were also authentic Turkish and Turkmen versions of the BIT.

The authentic English version of the BIT referred to "two authentic copies in Russian and English." The authentic Russian version, on the other hand, referred to "two authentic copies in Turkish, Turkmen, English and the Russian languages."<sup>8</sup>

The respondent produced two unsigned versions of the Turkish Treaty. One version was the text published in the Turkish *Official Gazette* after the Treaty was signed as required under Turkish law as part of its Treaty ratification process. Although the *Kilic* tribunal does not expressly state, the *Sehil* decision makes clear that this Turkish version, like the English version, referred to two authentic copies in Russian and English.<sup>9</sup> The respondent also produced a Turkish version that had been published on the Turkish Undersecretariat's website and which, according to respondent, stated that there were authentic Turkish, Russian and English versions of the Treaty. The claimant disputed the accuracy of respondent's claim, and contended that the Turkish version on the website referred to only two authentic languages, English and Russian.

To confuse matters further, the respondent claimed that during the course of the arbitration, the Turkish Government changed the Turkish version on the website to delete the reference to the authentic English version.<sup>10</sup> (The *Sehil* tribunal stated that the respondent claimed it was the reference to the Turkish version that was deleted.)<sup>11</sup> No copy of the Turkmen version, signed or unsigned, was ever produced, as Turkmenistan stated that none could be found.

In sum, according to the authentic English version, the Russian and English copies were authentic. According to the authentic Russian version, there were "two" authentic copies in Turkish, Turkmen, English and Russian. There were two different (but unsigned) Turkish versions whose authenticity was contested. One referred to authentic Russian and English versions. It was disputed whether the second referred either to authentic Russian and English versions, or authentic Turkish, Russian and English versions, and whether the reference to an authentic English version was at some point deleted. Turkmenistan claimed there was also an authentic Turkmenistan version but no Turkmen version was ever found.

In order to determine which versions of the Treaty were authentic, the tribunal turned to the Vienna Convention. Article 33(2) provides:

<sup>5</sup> *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan* ICSID Case No.ARB/10/1 May 7, 2012 (*Kilic* Decision).

<sup>6</sup> Vienna Convention on the Law of Treaties (Vienna, May 23, 1969) 1155 U.N.T.S. 331, entered into force January 27, 1980 (Vienna Convention).

<sup>7</sup> Article 10 provides: "The text of a treaty is established as authentic and definitive: (a) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) Failing such procedure, by the signature, signature *ad referendum* or by the initialing by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text."

<sup>8</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [2.8]–[2.9].

<sup>9</sup> *Sehil* ICSID Case No.ARB/12/6 February 13, 2015 at [77].

<sup>10</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at fn.26.

<sup>11</sup> *Sehil* ICSID Case No.ARB/12/6 February 13, 2015 at [79]–[80], fn.24.

“A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.”

The respondent claimed that the Turkish version was authentic, because the Russian version expressly refers to it as one of the authentic copies, and, therefore, it was designated by the parties as authentic in accordance with art.33(2) of the Vienna Convention. The tribunal concluded that neither the Turkish nor Turkmen version of the BIT could be considered authentic, because there was insufficient evidence that either version had been signed by the parties, or otherwise provided as authentic under the terms of the Treaty, or as agreed to by the parties, in accordance with art.33(2) of the Vienna Convention. Further, the tribunal noted that even if the Turkish version could be considered authentic, there was no evidence as to which Turkish version the Russian authentic version referred.

Under art.31 of the Vienna Convention, a Treaty is to be interpreted

“in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

If, after application of art.31, the meaning of the text is ambiguous, or leads to manifestly absurd or unreasonable results, art.32 allows for supplementary means of interpretation, “including the preparatory works of the treaty and the circumstances of its conclusion.” Article 33 specifically concerns interpretation of Treaties executed in multiple languages. It states that unless the Treaty provides otherwise, or the parties agree otherwise, each authentic text is equally authoritative and the terms of the Treaty are presumed to have the same meaning in each authentic text. Further, except in cases where the Treaty or parties have designated a prevailing language, when a comparison of the authentic texts discloses a difference of meaning that cannot be resolved by applying arts 31 and 32, the tribunal shall adopt “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.”

The *Kilic* tribunal concluded that the language of the authentic Russian version with respect to the number of authentic texts was ambiguous, because it referred to two authentic copies written in four different languages. Thus, the tribunal turned to supplementary means of interpretation as permitted under art.32 of the Vienna Convention. Based on the evidence that only the English and Russian versions of the BIT were signed, the tribunal concluded that the circumstances surrounding the drafting, execution and adoption of the BIT further supported the conclusion that there were only two authentic language versions of the BIT. Further, the tribunal noted that the

same result would have been reached by application of art.33 as it “best reconciles” the divergent Russian and English texts.

### ***B. Determining the accuracy of the English translations of the Russian text***

The tribunal then considered the identification of an accurate translation of the Russian version into English. Initially the parties had agreed as to the accurate translation of the Russian text. That first translation provided that if a dispute were not settled within a six-month period, the investor could submit it to an international arbitration tribunal

*“on the condition that, if the concerned investor submitted the conflict to the court of the Party, that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year.”*(Emphasis added.)<sup>12</sup>

Three days before the hearing, Turkmenistan submitted a revised translation that was identical to the first, with one important exception. It deleted the word “if” preceding the words “on the condition that.”<sup>13</sup> The effect of the revision was to transform art.VII.2 of the BIT from an arguably optional or ambiguous provision to a mandatory provision, requiring recourse to the Turkmenistan courts prior to initiating arbitration.

As to the question of which translation was accurate, Turkmenistan argued that the first translation was a literal, word-for-word translation, but the second translation accurately reflected the meaning of art.VII, because the “if” in the Russian text “is part of the correct syntax needed in Russian to create the conditional, but it does not create a second or separate conditional.”<sup>14</sup>

Kilic maintained that the first translation was the accurate translation. However, it failed to object to the introduction of the second translation, did not request an opportunity to provide a translation from another expert, did not ask that the translator attend the hearing so it would have an opportunity to cross-examine the translator and rejected the respondent’s proposal to appoint an independent expert translator to provide an English translation of art.VII.2 of the Russian text. Finally, even after the hearing, when the Tribunal itself proposed appointing two expert translators to provide English translations of the Russian and official Turkish texts, Kilic did not agree.

Thus, the tribunal proceeded on the evidence before it, and concluded that the revised translation of the Russian text was the more accurate.

As to the meaning of art.VII.2, the tribunal concluded that the ordinary meaning of the words in the revised Russian translation requires the submission of the dispute to local courts prior to the initiation of arbitration proceedings.

<sup>12</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [4.18].

<sup>13</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [4.19]–[4.20].

<sup>14</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [4.20].

The authentic English text provided that in the event the dispute cannot be settled within six months, the investor can submit it to an international arbitration tribunal

“provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.”<sup>15</sup>

The tribunal concluded that the language of the English text was grammatically incorrect and that the removal of either the word “if” or “and” was necessary to give the text grammatical coherence. Thus, the tribunal concluded that the language was ambiguous and that it should look to supplementary means of interpretation pursuant to art.32 of the Vienna Convention.

Thus, although it held that the Turkish text was not authentic, the tribunal looked to it, as well as to an authentic Turkish version of the Turkey-Kazakhstan BIT as supplementary means of interpretation. The tribunal noted that the authentic Turkish text of the Turkey-Kazakhstan BIT was identical to the official (but not authentic) Turkish text of the Turkey-Turkmenistan BIT at issue, and that both, like the authentic Russian version of the BIT at issue, contained language making prior recourse to the courts mandatory.<sup>16</sup> Thus, the tribunal concluded that the English version of the BIT at issue should also be interpreted as requiring mandatory recourse to the local courts. The tribunal noted that, although it was unnecessary to apply art.33 of the Vienna Convention, the same result would follow under its terms, which provide that to the extent any difference of meaning in the texts remains, the tribunal should adopt the meaning “which best reconciles the text, having regard to the object and purpose of the treaty.” The tribunal stated that art.33 would direct that the ambiguous English text be reconciled with the mandatory Russian language to make the English text mandatory as well because “what is plainly mandatory cannot be optional, but what may either be mandatory or optional, can be seen as mandatory.”<sup>17</sup>

## IV. The Kilic Award

### A. The majority decision

Following the parties’ submissions and a one-day hearing, the *Kilic* tribunal considered the jurisdictional issue, and issued its decision on July 2, 2013. It addressed three questions. The first was whether art.VII.2 was a condition precedent that was an essential element of Turkmenistan’s consent to arbitrate, and as such, constituted a jurisdictional requirement. The tribunal noted that under art.25 of the ICSID Convention,<sup>18</sup> jurisdiction does not exist in the absence of written consent of the parties.<sup>19</sup> The tribunal explained that art.VII.2 constitutes the respondent’s standing offer to arbitrate, and that an agreement to arbitrate can only come into existence by the claimant’s acceptance of that offer under the terms made. Article 26 of the ICSID Convention provides that contracting states may require exhaustion of local remedies as a condition of its consent to arbitrate.<sup>20</sup> The tribunal opined that while art.26 refers to exhaustion of local remedies, its principles apply equally to conditions of consent involving less than full exhaustion, such as the provision at issue requiring submission of a claim to local courts for a specified time period. The tribunal concluded that art.VII.2 was a condition precedent that went to jurisdiction and not admissibility. Accordingly, it had no power to suspend the proceedings, as the claimant had proposed; its only option was to dismiss the claim on jurisdictional grounds.

The second question the tribunal addressed was whether the BIT’s Most Favoured Nation clause<sup>21</sup> could be used to incorporate into the BIT dispute resolution provisions from a Switzerland-Turkmenistan Treaty that did not contain the precondition requiring prior submission of claims to local courts. The tribunal concluded that under the particular terms of the BIT before it,<sup>22</sup> the MFN provision was intended to pertain only to the grant of substantive rights in relation to

<sup>15</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [2.10].

<sup>16</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [2.25], [9.19].

<sup>17</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [9.23].

<sup>18</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, March 18, 1965) 575 U.N.T.S. 159; 17 U.S.T. 1270; T.I.A.S. No.6090, entered into force October 14, 1966 (ICSID Convention).

<sup>19</sup> Article 25(1) of the ICSID Convention provides: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre ....”

<sup>20</sup> Article 26 of the ICSID Convention provides: “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.”

<sup>21</sup> The BIT’s MFN provision, art.11.2, provides: “Each party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.” *Kilic* Award ICSID Case No.ARB/10/1 July 2, 2013 at [7.1.1].

<sup>22</sup> The parties relied on two distinct lines of cases. The claimant relied on a line beginning with *Emilio Agustín Maffenzi v The Kingdom of Spain* ICSID Case No.ARB/97/7, for the proposition that an MFN clause in a BIT is presumed to apply to a dispute resolution provision (DRP), in the absence of plain evidence to the contrary. The respondent relied on a line of cases beginning with *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan* ICSID Case No.ARB/02/13, that applied the opposite presumption, namely, that it is presumed that a DRP clause does not fall within the scope of a MFN clause, in the absence of clear and unequivocal intention to the contrary. Noting that the decisions are non-binding, the tribunal stated that the Vienna Convention does not indicate that there is to be a presumption one way or the other, and that the scope of a MFN “depends on the ordinary meaning of the words used in their context and having regard to the objects and purposes of the relevant treaty.” *Kilic* Award ICSID Case No.ARB/10/1 July 2, 2013 at [7.6.5]. The tribunal concluded that the MFN clauses in the *Maffenzi* line of cases were broader than the one at issue before it.

investments, and not to the procedural provisions for resolving disputes, and so could not be relied on to expand the tribunal's jurisdiction.<sup>23</sup>

Thirdly, the tribunal considered whether the claimant was excused from complying with art.VII.2 on the ground that submission of the dispute to Turkmenistan courts would have been ineffective or futile. To support its argument of futility, Kilic relied on: (a) third-party reports by organisations, including the United Nations Human Rights Committee and Human Rights Watch, concerning Turkmenistan's lack of an independent judiciary or ill-treatment of individuals who oppose the government; (b) disparaging remarks made by Turkmenistan's president relating to Turkish investors; and (c) its inability to find a single Turkmenistan attorney who would be willing to testify against Turkmenistan, because of fear for personal security. The tribunal concluded that the claimant's generalised allegations fell far short of the sufficient and compelling evidence needed to meet its burden of showing that prior recourse to Turkmenistan courts would be futile.

Thus, the case was dismissed on jurisdictional grounds.

### **B. Professor Park's separate Kilic Opinion**

In a separate opinion, Professor William W. Park argued that, even assuming that the provision of art.VII.2 regarding prior recourse to the courts was mandatory, it should not be treated as a jurisdictional precondition to arbitration, but rather as a procedural requirement that goes to ripeness or admissibility that can be cured during the arbitration. Thus, Professor Park argued that the correct solution would be to hold the arbitration proceedings in abeyance so as to allow the investor a reasonable time to seek recourse to the local courts, and to resume arbitration in the event it remains aggrieved.

Professor Park noted that art.VII.1 of the BIT requires that a party provide written notice of a dispute, and then obligates the parties to engage in negotiations in an effort to settle the dispute. Article VII.2 provides that a dispute can be submitted to arbitration if not settled within six months from notice, but then states that if not settled within the six months of notice, the dispute can be submitted to arbitration, provided that a local court has not rendered a final judgment within one year. According to Professor Park:

"Interpreting the 'no-judgment-within-a year' proviso as a jurisdictional precondition creates a pathology in which the same sentence purports to permit an investor to commence arbitration six

months after notice of the dispute, while simultaneously requiring the investor to wait twelve months from the very same starting point."<sup>24</sup>

Professor Park argued that reading the "no-judgment-within-a year" proviso as a jurisdictional precondition acts to restrict investors' access to arbitration, contrary to the intention of the BIT to provide unlimited access to arbitration. If arbitration is initiated before litigation, the claim will be dismissed. If litigation is initiated first, and a judgment denying Treaty rights is rendered within a year, the investor has no recourse to arbitration because the jurisdictional precondition that there be no judgment within a year is not met. Professor Park concluded that a Treaty should not be interpreted so as to defeat its goals when it was possible to reach a more reasonable construction—treating the proviso as a procedural requirement and not a jurisdictional precondition.

### **V. The Sehil tribunal interprets the same Treaty provision as optional**

In February 2015, 20 months after the *Kilic* award, another ICSID panel interpreted the same article, art.VII.2, of the same 1992 Turkey-Turkmenistan BIT, and reached the opposite result. That arbitration proceeding was brought by a Turkish construction company, Sehil, and its owner, Muhammet Cap, against Turkmenistan.<sup>25</sup>

The *Sehil* tribunal was comprised of Professor Julian D.M. Lew QC, as President (UK), with Professor Bernard Hanotiau (Belgium), appointed by Sehil, and Professor Laurence Boisson de Chazournes (France/Switzerland), appointed by Turkmenistan. Counsel to the parties in the proceeding were the same as those in *Kilic*.

In *Kilic*, the tribunal did not discuss the nature of Kilic's allegations regarding the alleged breaches of the Treaty, except to note that they concerned performance issues relating to various construction projects in Turkmenistan.<sup>26</sup> The *Sehil* tribunal provided much more detail. It was alleged that Sehil was one of the largest foreign investors in Turkmenistan, and that its difficulties began following Turkmenistan's election of a new president in 2007. Sehil alleged that six of its projects were arbitrarily terminated, four projects it had been awarded were retracted, and it was forced to begin work on new projects before contracts were signed. Further, Sehil claimed that Turkmen authorities harassed and threatened Sehil executives and their Turkish technical

<sup>23</sup> The tribunal stated that its conclusion was buttressed by applying the principle of contemporaneity, and the principle that treaties must be interpreted in light of the principle of effectiveness of all their provisions. At the time the BIT was negotiated, Turkey had signed 22 BITs with other countries, a number of which did not mandate prior submission of disputes to the host states' courts. Thus, the tribunal reasoned, if the DRP were interpreted to fall within the MFN clause, any Turkmen investor investing in Turkey could disregard the prior recourse requirement under the DRP, and the DRP would be without any effect when adopted. Furthermore, the prior recourse requirement would not have been reciprocal at the outset, because Turkish investors would be bound to first submit their disputes to Turkmen courts, in the absence of any more favourable Turkmenistan BITs, while Turkish investors could proceed directly to arbitration.

<sup>24</sup> *Kilic* Separate Opinion of Professor William W. Park at [14].

<sup>25</sup> *Sehil* ICSID Case No.ARB/12/6 February 13, 2015.

<sup>26</sup> *Kilic* Award ICSID Case No.ARB/10/1 July 2, 2013 at [2.2.4]–[2.2.5]. The *Kilic* annulment committee provided a bit more detail in a footnote stating that the allegations concerned issues of non-payment, failure to certify completed projects, the levying of fines, drawing on bank guarantees, Kilic's expulsion from construction sites, confiscation of assets, harassment and coercion. *Kilic* Decision on Annulment July 14, 2015 at (*Kilic* Annulment Decision) at [24], fn.4.

staff, attempted to pressure Sehil into agreeing to transfer projects to another company and caused them to flee Turkmenistan because of fear for their personal security.

### A. Determining the number of authentic versions of the BIT

As it had in the *Kilic* case, Turkmenistan challenged the jurisdiction of the ICSID panel on the ground that the claimants had not first sought recourse in the Turkmenistan courts as required under the terms of art.VII.2. The claimants argued that the terms of art.VII.2 were optional, and not mandatory. At the outset, it was agreed to bifurcate the proceedings so as to first hear the jurisdictional challenge. As in *Kilic*, the proceedings were conducted in English.

As had the *Kilic* tribunal, the *Sehil* tribunal held that the Vienna Convention governed the interpretation of the different language versions of the BIT. In *Sehil*, as in *Kilic*, both parties agreed that the English and Russian texts were authentic. Turkmenistan contended that the official Turkish version was authentic as well (but dropped the claim it had made in *Kilic* that there was also an authentic Turkmenistan text).

As to the number of authentic texts, the *Sehil* tribunal concluded, as had the *Kilic* tribunal, that only the English and Russian versions were authentic. The official Turkish text could not be considered authentic because it did not exist at the time the Treaty was signed, and it was prepared only for Turkey's ratification process. Thus, there was no evidence the parties ever intended or agreed it would be an authentic text.

### B. Determining the accuracy of the English translations of the Russian text

As to the interpretation and meaning of art.VII.2, the *Sehil* tribunal arrived at the same conclusion as the *Kilic* tribunal that the English text was ambiguous. However, the *Sehil* tribunal departed from the *Kilic* tribunal in its interpretation of the Russian text. While the *Kilic* tribunal had determined that the Russian text made recourse to the Turkmen courts mandatory, the *Sehil* tribunal concluded that the Russian text was ambiguous in this respect.

The *Sehil* tribunal had both Russian translations before it—the first one presented to the *Kilic* tribunal and the revised version submitted by the respondent in the *Kilic* case. In contrast to the *Kilic* tribunal that chose one translation over another, the *Sehil* tribunal pointed to the differing translations as evidence that the Russian text was ambiguous, and could be interpreted differently by “reasonably competent Russian speaker[s].”<sup>27</sup>

The evidence before the *Sehil* tribunal indicated that the English version was the original text on which the BIT was based, and the Russian text was a translation of the English text. The Turkish version was not prepared until after the BIT was signed. Thus, Turkey prepared the draft BIT in its original English version, and Turkmenistan translated the BIT into Russian. The language was not negotiated. The draft English BIT became the authentic English version, and the Russian translation became the authentic Russian version. The *Sehil* tribunal noted that while both the English and Russian authentic versions carried equal weight under art.33 of the Vienna Convention, it was important to understand that the ambiguity in the Russian text resulted from the translation of an already ambiguous English text.

In resolving the perceived ambiguity in the text of art.VII.2, the tribunal examined the context of the language. It noted that the language of art.VII.2 was permissive, and appeared to give the investor the choice to submit the dispute to arbitration.<sup>28</sup> The tribunal then adopted the arguments that Professor Park had made in the *Kilic* case to support his conclusion that the art.VII.2 proviso should be seen as a procedural requirement rather than a jurisdictional precondition, to support its conclusion that the proviso should be viewed as optional rather than mandatory. Thus, the *Sehil* tribunal argued that if the proviso were read as mandatory, it would create a pathology by permitting the investor to commence arbitration within six months from notice of the dispute, while, at the same time, requiring the investor to wait 12 months from the same starting date. This pathology is avoided if the proviso is interpreted as optional.

Further, the *Sehil* tribunal opined that an interpretation of the proviso as optional is more consistent with the object and purpose of the BIT, as expressed in its preamble, to promote free and equitable treatment of investments and to provide a stable framework for investors. Freer access to international arbitration, the tribunal reasoned, would lessen the risk of a denial of justice in local courts, and of further litigation of the same dispute.

In *Sehil*, the claimant also raised the arguments that had been made in the *Kilic* case that the MFN clause in the BIT should be interpreted to allow the incorporation into the BIT of terms of more favorable dispute resolution provisions from Treaties between Turkmenistan and other countries, and also that it should be exempt from any requirement to seek recourse to the Turkmenistan courts, because such efforts would be futile. Having determined that art.VII.2 was optional, the tribunal found it unnecessary to address these issues.

<sup>27</sup> *Sehil* ICSID Case No.ARB/12/6 February 13, 2015 at [229].

<sup>28</sup> The authentic English version of art.VII.2 for example, provides in relevant part: “If these disputes [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to [ICSID, UNCITRAL or ICC arbitration].” See *Sehil* ICSID Case No.ARB/12/6 February 13, 2015 at [236]. The authentic Russian version contained comparable language. See *Sehil* at [237].

### C. Distinguishing the *Kilic* Decision

In reaching its decision, the *Sehil* tribunal took note that the *Kilic* tribunal had reached a different conclusion, but pointed out that the evidence before the tribunals was different, and that it had the benefit of evidence and expert testimony that the *Kilic* tribunal did not. The *Sehil* tribunal opined that the *Kilic* tribunal appeared to have assumed the Russian version was the original text. (However, this is not clear from the *Kilic* decision, as the *Kilic* tribunal refers to testimony that

“an English draft of the text was used by the Turkish side during the negotiations [of the BIT] and that the Russian translation was made in Turkmenistan before the English and Russian versions were signed.”<sup>29</sup>

In any event, the *Sehil* tribunal noted that there is no precedent in international arbitration, and that it was obligated to make its own determination on the specific facts and evidence before it.

## VI. The *Kilic* annulment committee’s decision

The *Kilic* ad hoc annulment committee<sup>30</sup> rendered its decision on July 14, 2015, five months after the *Sehil* decision. The annulment committee was chaired by Andrés Rigo Sureda (Spain), and included Hi-Taek Shin (South Korea) and Karl-Heinz Böcksteigel (Germany).

### A. Annulment grounds

*Kilic* sought annulment on grounds of manifest excess of powers, failure to give reasons and serious departure of a fundamental rule of procedure.<sup>31</sup>

The parties differed as to the definition of manifest excess of power. The applicant argued that “manifest” excess of power can be an excess that is serious or consequential, but not necessarily obvious, so that extensive analysis might be necessary to determine whether a tribunal has acted in excess of its powers. The respondent argued that “manifest” means obvious, without need for extensive analysis. The annulment committee

examined decisions that had interpreted “manifest” to mean obvious and others to mean serious or consequential, but concluded that manifest requires both:

“The term ‘manifest’ would by itself seem to correspond to ‘obvious’ or ‘evident’, but it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal’s excess had serious consequences for a party.”<sup>32</sup>

The tribunal also rejected the claimant’s argument that the threshold for determining whether a tribunal has acted in manifest excess of its powers is lower for jurisdictional issues as compared to issues on the merits.

As to a failure to state reasons, the parties differed as to the degree of scrutiny the committee should employ in considering the reasons in the award. The committee rejected *Kilic*’s argument that the reasons should be sufficient and adequate. The committee stated that its function was not to be confused with that of an appeals court.<sup>33</sup> It adopted the standard set forth by the *MINE* ad hoc committee that

“the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or law.”<sup>34</sup>

As it had with regard to manifest excess, the committee rejected *Kilic*’s view that a stricter standard should govern with respect to jurisdictional questions. Further, in rejecting *Kilic*’s various arguments regarding the tribunal’s failure to state reasons, the tribunal observed that “arbitral tribunals have no obligation to expressly address, in their awards, every single issue and argument raised by the parties,” but “have discretion to focus on those issues and arguments they find determinative for their decision,” and the tribunal’s use of that discretion provides no grounds for annulment.<sup>35</sup>

Finally, with respect to a determination as to whether there had been a serious departure from a fundamental rule of procedure, the committee stated that the analysis was “very fact specific,”<sup>36</sup> and that a departure could be

<sup>29</sup> *Kilic* Decision ICSID Case No.ARB/10/1 May 7, 2012 at [7.9]. *Kilic* argued that the English version was the original text. Turkmenistan asserted that the original text might have been written in Turkish. At [3.9], [3.26]–[3.27].

<sup>30</sup> Article 52 of the ICSID Convention provides that upon request of either party, made within 120 days after the award date, the Chairman “shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons . . .”

<sup>31</sup> The grounds for annulment under art.52(1) of the ICSID Convention include: “(a) that the Tribunal was not properly constituted; (b) that the Tribunal had manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.”

<sup>32</sup> *Kilic* Annulment Decision July 14, 2015 at [53]. In reaching its conclusion as to the meaning of “manifest”, the committee expressed its view that it was “not bound to use the same criteria as previous committees.” *Kilic* Annulment Decision July 14, 2015 at [49].

<sup>33</sup> The tribunal explained: “The doctrine and the case law warn about the danger of the review of reasons becoming an appellate review: ‘[o]nce an *ad hoc* committee starts looking into whether the tribunal explanation is sufficient to constitute a statement of reasons, it has already embarked upon a quality control of the award. The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal becomes blurred.’” *Kilic* Annulment Decision July 14, 2015 at [62], quoting C. Schreuer et al., *The ICSID Convention: A Commentary* (2009) (CLA-32), p.1003, para.363.

<sup>34</sup> *Kilic* Annulment Decision July 14, 2015 at [60], quoting *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case No.ARB/84/4, Decision on the Application of Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988 (CLA-39) at [5.09].

<sup>35</sup> *Kilic* Annulment Decision July 14, 2015 at [133].

<sup>36</sup> *Kilic* Annulment Decision July 14, 2015 at [67].

one that had a material effect on the award or had the potential to have a material effect, depending on the circumstances of the case.<sup>37</sup>

### ***B. The annulment committee's review of the award***

Applying these standards of review, the annulment committee concluded that there were no grounds for annulment. As a preliminary matter, the committee addressed the significance of the *Sehil* decision that was issued shortly before the annulment hearing, and discussed extensively by both parties. The tribunal concluded that the fact that the *Sehil* tribunal's "more recent non-binding interpretation of an ambiguous provision" differed from the tribunal's interpretation provided no basis for annulment.<sup>38</sup>

The annulment committee rejected Kilic's argument that the tribunal had improperly placed the burden on the claimant to prove that jurisdiction existed, when it should have been placed on the respondent who raised the jurisdictional objection as an affirmative defense. The committee noted that the tribunal had not addressed the burden of proof, but that while it is generally true that the respondent would bear the burden of proving the defense of a claim, it was also true that the claimant had to prove that the respondent had consented to arbitrate under the BIT, and the tribunal itself had to be satisfied of its own jurisdiction.

With respect to the proper Russian to English translation of the Treaty, the committee also pointed out that Kilic had to take responsibility for its decision not to provide further evidence as to the accurate Russian translation, after the respondent presented the revised Russian translation. The committee stated that the annulment proceeding was not the proper venue for the claimant "to make up for failures of the strategy followed by counsel in the arbitration proceeding."<sup>39</sup>

Further, the committee held that the tribunal had properly reached its conclusion that art.VII.2 of the authentic English version was ambiguous, and that it was not the committee's role to reach its own conclusion on this point. The committee also rejected Kilic's argument that the tribunal erred in not following two previous decisions (*Rumeli* and *Sisten*)<sup>40</sup> in interpreting art.VII.2. The committee stated that the tribunal had properly considered them but had no obligation to follow their interpretations, and it was not the annulment committee's role "[t]o revise the interpretations and conclusions of tribunals in order to achieve uniformity of case law."<sup>41</sup>

Turning to Kilic's objection that the tribunal had not correctly applied the Vienna Convention in interpreting art.VII.2, the tribunal noted that in reaching its conclusion that the text was ambiguous, the tribunal did not expressly analyse the context of art.VII.2 and the purpose of the BIT before considering supplementary means of interpretation, as required by art.31 of the Vienna Convention. Nonetheless, the committee concluded that the tribunal had considered the relevant articles of the Vienna Convention, and although it could have expressed in greater detail the steps taken in reaching the conclusion that the text was ambiguous, its reliance on supplementary means of interpretation was at least "plausible."<sup>42</sup>

The committee also addressed the arguments the claimant raised based on Professor Park's separate decision. The committee noted the tribunal had addressed Professor Park's arguments, and had concluded that an arbitral tribunal would not necessarily be jurisdictionally barred from hearing a claim when a local court had rendered a judgment within one year if there was evidence that the court had decided unfairly against an investor, in the same way that a requirement to exhaust local remedies may be disregarded where it can be shown that no remedy is available or attempts at exhaustion would be futile. The committee stated:

"Irrespective of the merits of the reasoning of the Majority of the Tribunal, this is a matter that would be decided by another tribunal unbound by findings of the Tribunal. For the Committee, the determinant factor is that the Tribunal had considered the conditions as conditions precedent to jurisdiction and consequently it decided that it had no jurisdiction to suspend the proceeding. Faced with the same question, other tribunals have decided differently on questions of jurisdiction and admissibility; it is not for the Committee to favor one or the other of these positions."<sup>43</sup>

Kilic also complained that the tribunal had improperly disregarded the evidence it had presented regarding futility. Furthermore, it argued that the tribunal had imposed an impossible test for claimant by requiring it prove the futility of recourse to local courts with respect to the matters at issue in the arbitration, despite the tribunal's acknowledgment that there had been no prior investment dispute proceedings against Turkmenistan in the Turkmenistan courts. The committee gently suggested that the tribunal "could have been more inclined to look with a critical eye" at respondent's evidence,<sup>44</sup> in light of the critical third-party reports claimant had submitted by

<sup>37</sup> The annulment committee cited the example of a case in which it was claimed a party was deprived of the right to be heard. In such a case, it might never be known whether the tribunal would have decided differently, and so it would suffice for an annulment committee to consider whether the departure from a fundamental rule of procedure had the potential to have a material effect on the award. *Kilic* Annulment Decision July 14, 2015 at [70].

<sup>38</sup> *Kilic* Annulment Decision July 14, 2015 at [99].

<sup>39</sup> *Kilic* Annulment Decision July 14, 2015 at [110].

<sup>40</sup> *Rumeli Telecom AS and Telsim Mobile Telekomik ASYON Hizmetleri AS v Republic of Kazakhstan* ICSID Case No.ARB/05/16; *Sistem Muhendislik Insaat Sanayi ve Ticaret AS v Krygzyz Republic* ICSID Case No.ARB (AF)/06/01. See *Kilic* Annulment Decision July 14, 2015 at [116]–[118].

<sup>41</sup> *Kilic* Annulment Decision July 14, 2015 at [118].

<sup>42</sup> *Kilic* Annulment Decision July 14, 2015 at [125], [137].

<sup>43</sup> *Kilic* Annulment Decision July 14, 2015 at [166].

<sup>44</sup> The *Kilic* tribunal appeared to give credence to the documentation submitted by respondent as to the Turkmenistan Constitution and laws guaranteeing matters such as timely proceedings, independence of judges and fair trials. *Kilic* Award ICSID Case No.ARB/10/1 July 2, 2013 at [3.4.8]–[3.4.17], [8.1.10]–[8.1.15].



highly-reputable institutions, including the European Bank for Reconstruction and Development, but, in the end, repeated that it would not “second-guess” the tribunal.<sup>45</sup>

## VII. Conclusion

The *Kilic* and *Sehil* decisions underscore the significant issues that can arise in the interpretation of treaties written in multiple languages. They demonstrate the need to carefully consider the issue of the authenticity of various versions of the Treaty, and to examine whether one language has been designated as the prevailing language in the event of disputes. Obviously, the need for accurate translations is key, and in the event the parties are unable to agree on the accuracy of the translations, each party must carefully weigh the quality of the translation on which it is relying, and the need for expert testimony, independent translations and other evidence. As the *Kilic* and *Sehil* decisions make clear, the type and quality of evidence that is put before the tribunal can be outcome determinative. Further, while expenses and other practical considerations are always present, a party must carefully weigh the wisdom of turning down a tribunal’s request for further evidence that it says is necessary to its decision.

The decisions also highlight issues that can arise with respect to dispute resolution provisions in particular, including, when private contracts are involved, the need to consider drafting such provisions to clearly state whether they are intended to be optional or mandatory, and if mandatory, whether they are intended to constitute a condition precedent to a tribunal’s jurisdiction.

As the cases also show, the contentious issue of whether or not a MFN clause applies to a dispute resolution clause in a Treaty may well depend upon the particular terms used in the drafting of the Treaty. Further, while the cases demonstrate the possibility of raising arguments of futility with respect to dispute resolution provisions that require something less than exhaustion of remedies, the *Kilic* case indicates the need for compelling evidence of futility.

As an aside, there is cause to speculate whether the *Sehil* tribunal’s attention to the egregious nature of the alleged Treaty breaches, and Turkmenistan’s alleged role in those breaches, contributed at all to its conclusion that the dispute resolution provision was optional and did not require prior course to Turkmenistan courts. Certainly, if the *Sehil* tribunal had reached the question of whether such recourse, in any event, would be futile, it would seem that its consideration of the alleged facts would predispose it to give greater weight to the claimant’s argument than did the *Kilic* tribunal.

The *Kilic* case provides a stark illustration of the limited role of ICSID annulment committees. The committee was quick to point out that it would not weigh in on the correctness of the differing conclusions of the two tribunals, and did not hesitate to state that its role was not to act as an appeals court, but only to provide a review based on the specific grounds for annulment set forth in the ICSID Convention. Moreover, its approach was to interpret those grounds in restrictive terms. The committee also volunteered that future tribunals were free to reach different conclusions. Putting aside the fact that arbitration awards have no precedential value, the annulment committee’s decision cannot even be viewed as lending greater persuasive power to the *Kilic* award, as it is so limited in scope and so qualified in its language, that one is left to doubt whether the committee even agrees with the decision reached by the *Kilic* tribunal.

There appear to be other Treaties to which Turkey is a party that are written in multiple languages and contain these same issues of interpretation and translation of ambiguous and conflicting dispute resolution provisions. In addition to the Treaties with the other three former Turkic republics, the *Kilic* tribunal also makes reference to a Turkey-Latvia BIT that contains the same dispute resolution provision, and was authenticated in three languages. Thus, more arbitration on these issues is likely to be forthcoming. In fact, a decision concerning the interpretation of the same art.VII.2 of the Turkey-Turkmenistan BIT is pending from a third ICSID arbitration panel in the case of *Ickale Insaat Ltd Sirketi v Turkmenistan* (ICSID Case No.ARB/10/24).

<sup>45</sup> *Kilic* Annulment Decision July 14, 2015 at [187].