

Arbitration - Turkey

Settling Investment-Related Disputes: Implementation of the Washington Convention

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The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) provides for the settlement of disputes arising directly from an investment between a contracting state and a national of another contracting state.

Article 25(4) of the Washington Convention⁽¹⁾ states that a contracting state may notify the International Centre for Settlement of Investment Disputes (ICSID) “of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the centre”. Pursuant to this provision, on February 23 1989 Turkey notified the secretary general of the ICSID that:

“only the disputes arising directly out of investment activities which have obtained necessary permission in conformity with the relevant legislation of Turkey on foreign capital and that have effectively started shall be subject to the jurisdiction of the centre.”

The legal merit of such notification was disputed in the ICSID case *PSEG Global Inc and Konya İlgün Elektrik Üretim Ve Ticaret Limited Şirketi v Republic of Turkey* (ARB/02/5), which arose from the treaty between the United States and Turkey concerning the reciprocal encouragement and protection of investments.⁽²⁾ Turkey objected to the ICSID having jurisdiction in this case by submitting the following arguments:

- The notification to the ICSID had qualified when Turkey would consent to international arbitration proceedings as contained in the treaty. Since the project had never "effectively started", Turkey had not given its consent.
- Despite not being technically classed as ‘reservations’, states’ unilateral declarations can have legal effects. Moreover, internal government documents described the notification as a ‘condition’ to Turkey becoming signatory to the convention.
- The terms of the notification were more specific than those of the treaty and therefore, in the event of a conflict, the more specific terms should prevail.
- The treaty was signed on December 3 1985 and the notification was made on March 3 1989 upon ratification of the convention. The treaty only entered into force on May 18 1990. Thus, the notification preceded the consent and the terms of the notification were presumed to have been incorporated into the treaty when consent was later given. The claimant’s state, the United States, was fully aware of Turkey’s notification and had not previously objected to it.

The tribunal dismissed Turkey’s objection to the ICSID having jurisdiction in this case. First, the tribunal stated that notifications are for information purposes only and do not constitute reservations to the convention. As both parties had agreed that notifications were not reservations, they had agreed that notifications have no autonomous legal effect.

Furthermore, notifications create no obligation for the contracting state, but are rather associated with a claim to a right. Therefore, the contents of a notification must always be included in the consent that the contracting party later gives in its agreements or treaties. If, as in this case, consent is given in the treaty before the notification, the treaty can be supplemented by means of a protocol to include the notification’s limitations on the state’s consent. Otherwise, the consent given in the treaty stands unqualified by the notification. Therefore, the legal effects of such terms arise from the treaties and not the notification.

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Endnotes

(1) Published in the Turkish *Official Gazette* on June 2 1988 (numbered 19830) and entered into force on April 2 1989.

(2) Signed on December 3 1985 and entered into force on May 18 1990.