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# The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments by Hafiz Mirza and William Speller










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# Importing Consent to ICSID Arbitration? A Critical Appraisal of *Garanti Koza v. Turkmenistan*

Eric De Brabandere

The application of the most-favoured-nation (MFN) clause to investor-State dispute settlement provisions remains both an unsettled question in investment treaty arbitration[1], and a controversial one. Legally, this is in part the consequence of the fact that bilateral investment treaties (BITs) invariably use different language, making it necessary to interpret the applicable treaty on a case-by-case basis. A difficulty also results from the fact that the MFN clause touches upon a fundamental principle of international dispute settlement, namely the consent of States, and the diverging views of arbitral tribunals on the essential features of expressing consent to arbitration.

This brief article provides a critical examination of the tribunal's decision in *Garanti Koza LLP v. Turkmenistan*,[2] where the majority took a particularly expansive reading of the MFN clause in the United Kingdom-Turkmenistan BIT.

## Background on the case

The claimant, Garanti Koza LLP, a limited liability company incorporated in the United Kingdom (UK), submitted a request for arbitration to the International Centre for Settlement of Investment Disputes (ICSID) claiming that Turkmenistan breached its obligations under the UK-Turkmenistan BIT. Specifically, Garanti complained of modifications to its contractual relations with the State-owned highway authority *Turkmenavtoyollary* in respect of the design and construction of highway bridges and overpasses in Turkmenistan, and Turkmenistan's alleged attempts to confiscate its assets (para. 2).

The respondent's primary objection to the jurisdiction of the tribunal was based on the lack of consent to ICSID arbitration under the UK-Turkmenistan BIT (para. 7). Turkmenistan argued that consent to ICSID arbitration may not be "created by operation of the most favoured nation clause of the UK-Turkmenistan BIT" (para. 14). For its part, the claimant maintained that the MFN clause contained in the UK-Turkmenistan BIT allowed it to invoke more favourable dispute settlement clauses contained in other investment treaties signed between Turkmenistan and third States, and in particular third-party treaties that give foreign investors the option between ICSID arbitration and arbitration under the UNCITRAL arbitration rules (or access to ICSID Arbitration only) (para. 15).

In the long series of cases in which the application of the MFN clause to investor-State dispute settlement provisions contained in investment treaties has been discussed and analysed, the tribunal's decision in *Garanti Koza LLP v. Turkmenistan* is noteworthy. The decision stands out for allowing the claimant to invoke and rely on consent to arbitration before ICSID expressed by the respondent state in another investment treaty through application of the MFN clause. While claimants have traditionally limited the invocation of the MFN clause to dispute settlement provisions in order to override pre-arbitration requirements, such as waiting periods or requirements to submit the case first to domestic courts[3], in this case the invocation of MFN clause was done to 'import' consent to ICSID arbitration in the United Kingdom-Turkmenistan BIT, which did not contain consent to ICSID arbitration. The tribunal's July 3, 2013 decision on the objection to jurisdiction for lack of consent was supported by a majority composed of Presiding Arbitrator John M. Townsend and Arbitrator George Constantine Lambrou. Arbitrator Laurence Boisson de Chazournes disagreed with the findings of the majority and issued a dissenting opinion on this question.

## The decision of the tribunal

Article 8 of the UK-Turkmenistan BIT contains the investor-State dispute settlement clause. Considering its peculiar features, and the fact that the interpretation of the article formed the foundation of the majority's decision and Arbitrator Boisson de Chazournes' dissent, it is important to reproduce it in full:

> (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.
>
> (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
>
> (a) the [ICSID]
>
> (b) the Court of Arbitration of the International Chamber of Commerce; or
>
> (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the [UNICTRAL].
>
> If after a period of four months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the [UNICTRAL]as then in force. The parties to the dispute may agree in writing to modify these Rules.

Article 3 of the applicable BIT contains an MFN clause which, as one finds in several UK BITs, confirms explicitly in its third paragraph that MFN treatment applies to the provisions relating to investor-State dispute settlement.

The tribunal first noted that consent to jurisdiction is a fundamental requirement in investment arbitration, and in international law generally, and that it must be based on an express declaration of consent or any other action that demonstrates consent. It cannot, according to the tribunal, be presumed (para. 21), nor should dispute resolution provisions be interpreted differently than other provisions of a treaty (para. 22).

The tribunal subsequently analysed whether in this case Turkmenistan had consented to ICSID arbitration. First,

the tribunal confirmed the need to have, under Article 25 of the ICSID Convention, "consent in writing" (paras. 24). Secondly, the majority engaged in a "two steps" approach to the question of consent, corresponding to the investor-State dispute settlement clause contained in Article 8 of the UK-Turkmenistan BIT. According to the tribunal, the first paragraph of Article 8 dealt with consent to arbitration, while the second paragraph dealt with "the arbitration systems that may be used if the conditions of Article 8(1) are met" (para. 25). The tribunal interpreted the first paragraph to mean that Turkmenistan consented to submit disputes with UK investors to international arbitration generally, under three conditions, namely: (1) that the investor "so wishes"; (2) that the dispute has not been settled within four months following a written notification of the claim; and (3) that the dispute concerns an obligation of one of the Contracting States under the treaty (para. 27). That the first two conditions were satisfied in this case was uncontested. Discussion of the third condition, namely whether the claims concerned a treaty or a purely contractual breach, was deferred to the decision on the merits (*ibid.*).

The question remained, however, whether this sufficed to establish consent to ICSID arbitration. The tribunal first noted that the use of the word "shall" in Article 8(1) made the statement mandatory (para. 28), and thus appeared to the majority "to establish unequivocally Turkmenistan's consent to submit disputes with UK investors to international arbitration" (para. 29). The tribunal secondly analysed whether this consent involves consent to *ICSID arbitration* in particular, which is regulated in Article 8(2) of the UK-Turkmenistan BIT. The tribunal considered that that paragraph contains a "menu of options" and a default selection if "there is no agreement to one of the above alternative procedure" (i.e., UNICTRAL arbitration) (para. 32). The tribunal concluded that under Article 8 of the BIT Turkmenistan unambiguously consented to arbitration but not to ICSID arbitration (paras. 36-38).

Following the establishment of consent to arbitration generally, the tribunal moved to the question of whether the claimant, through application of the MFN clause contained in the UK-Turkmenistan BIT, may rely on consent to ICSID arbitration contained in investment treaties concluded between Turkmenistan and third States. This, the tribunal admitted, is "venturing into a fiercely contested non-man's land in international law" (para. 40). The tribunal decided it did not need to engage in a thorough interpretation of the MFN clause, since the clause in the UK-Turkmenistan BIT explicitly applied to investor-State arbitration clauses, which to the tribunal's majority confirmed the parties' intentions to this effect. After discarding other arguments of the Respondent in this respect, the majority concluded that, as a consequence, the MFN clause should be applied to investor-State dispute settlement clauses (para. 64).

The next step of the tribunal was to apply these principles to the case at hand. The claimant had invoked the benefit of more favourable dispute settlement provisions in multiple treaties, but since the focus was placed on the Switzerland-Turkmenistan BIT, the tribunal essentially focused on this treaty alone. The tribunal examined two separate questions: first, whether consent to ICSID arbitration may be 'imported' through operation of the MFN clause; and secondly, whether treatment of foreign investors and investments in the Switzerland-Turkmenistan BIT is more favourable than treatment under the UK-Turkmenistan BIT.

On the first question, the Turkmenistan had argued that the MFN clause may not be used to 'import' the State's consent to a different arbitration system from another treaty (para. 70 ff). In support of this argument, the respondent cited the decision of the tribunal in *Maffezini v. Spain,* the first decision to accept the application of MFN clauses to dispute settlement provisions. In that decision the tribunal explicitly excluded the invocation of MFN clauses "in order to refer the dispute to a different system of arbitration."[4] The tribunal, however, accepted that the MFN clause in the UK-Turkmenistan BIT, which explicitly applies to dispute settlement provisions, may be used to rely on more favourable dispute settlement clauses, such as the one contained in the Switzerland-Turkmenistan BIT, because the MFN clause of the UK-Turkmenistan BIT "effectively replaces Article 8(2) of the UK-Turkmenistan BIT with Article 8(2) of the Switzerland-Turkmenistan BIT, which requires no such case-specific consent" (para. 74). The tribunal thus did not argue that consent needed to be 'imported', since it had already established previously that Turkmenistan consented generally to arbitration (para. 75). The only provision to be 'imported' is the "choice between ICSID Arbitration and UNCITRAL Arbitration" (para. 75).

On the second question, whether the UK-Turkmenistan BIT provided less favourable treatment than the Switzerland-Turkmenistan BIT in respect of dispute settlement, the tribunal considered that it is impossible to establish, objectively, that ICSID arbitration is more favourable than arbitration under the UNCITRAL arbitration rules. However, the majority accepted that the *choice* given to investors to choose between both types of arbitration is in fact more favourable than BITs which restrict the submission of a claim to one system of arbitration (paras. 89-95).

### The dissenting opinion

Arbitrator Laurence Boisson de Chazournes, appointed by the respondent, issued a powerful dissent, asserting that the central question was whether consent to ICSID arbitration had been established under the UK-Turkmenistan BIT (para. 8). Boisson de Chazournes considered first that construing Article 8 of the UK-Turkmenistan BIT as containing two separate provisions—the first paragraph containing the consent to arbitration and the second paragraph the arbitration system which may be used as a consequence—disregarded the need to interpret that article as a whole. Secondly, the dissenting arbitrator considered that in any event, consent to ICSID arbitration in another BIT may not be used by a tribunal to find jurisdiction if such consent is lacking in the basic treaty (UK-Turkmenistan BIT).

On the first point, Boisson de Chazournes maintained that Article 8(1) of the UK-Turkmenistan BIT contains consent in principle to arbitration, after a waiting period of four months, but that such consent must be read in light of the specific conditions governing that consent in Article 8(2). In other words, Article 8(1) cannot be read in isolation from Article 8(2). The first governs the conditions under which an investor can resort to arbitration; the second paragraph "fixes the strict conditions under which the foreign investor can pursue one specific venue for international arbitration" (para.

19). She considered that the interpretation given by the tribunal of Article 8(1) has been used "as a means to achieve an end that it could not easily achieve by acknowledging that consent to arbitration is contained in Article 8(2)" (para. 20). Drawing the conclusion that consent *has* been given in Article 8(1) was according to Boisson de Chazournes patently wrong, since it confounded the power to initiate arbitration with consent to arbitration (para. 21). Article 8(2) indeed states that "the national or company and the Contracting Party concerned in the dispute *may agree to refer* the dispute either to" the four listed options, implying the need for a consent of both the investor and the host State to the forum of arbitration (paras. 22 ff). This reading, according to Boisson de Chazournes, is further confirmed by the last line of Article 8(2), which identifies UNITRAL arbitration as the default forum "if after a period of four months from written notification of the claim *there is no agreement* to one of the above alternative procedures"[5] (para. 26). Supplementary means of treaty interpretation also confirm such a reading of the dispute settlement clause, since the UK-Turkmenistan BIT contains the 'alternative' version of the UK Model BIT as opposed to the 'preferred' version which requires no prior agreement between the foreign investor and the host State and gives direct consent to ICSID Arbitration (paras. 28-30).

The dissenting arbitrator then analysed the ordinary meaning of the MFN clause in the UK-Turkmenistan BIT (Article 3(2)-(3)), which, as mentioned, explicitly applies to dispute settlement provisions. This article however should be read in light of the other provisions of the BIT, and not in isolation, which the majority failed to do (paras. 38 ff). Boisson de Chazournes considered that the "right" to MFN treatment "can only be exercised if the foreign investor and the host State are subject to a dispute settlement relationship under one of the dispute settlement options that are provided in Article 8(2)"(para. 41). This is a point that the majority had refused to accept, finding "no basis in the U.K.-Turkmenistan BIT for conditioning the rights enjoyed by an investor under the BIT on the temporal sequence in which the investor asserts those rights" (para. 61 of the decision). In Boisson de Chazournes' opinion, MFN treatment in respect of ICSID arbitration is simply inapplicable given the lack of mutual agreement to ICSID Arbitration (paras. 43-44).

Linked to this, Boisson de Chazournes analysed the specificity of the ICSID Convention, and in particular the need for consent in writing contained in Article 25 of the ICSID Convention. Such consent clearly is lacking in this case, according to Professor Boisson de Chazournes (paras. 46-51).

On the second question, namely whether, assuming that the MFN clause is applicable, one could 'import' consent to ICSID Arbitration, Boisson de Chazournes pointed to several decisions, including *Maffezini v. Spain*, in which tribunals unambiguously stated that the MFN clause may not alter an explicit choice of forum. The MFN clause's main objective is not to remedy the absence of consent, but rather to ensure that once consent is given, it is implemented in the most favourable way compared to treaties signed with other States (para. 61). From a more systemic perspective, Boisson de Chazournes argued that accepting the contrary "would involve a forum-shopping attitude that bypasses the consent requirement of the Respondent while running against the fundamental principles of international adjudication" (para. 63).

### A critical assessment of the tribunal's decision

The majority's decision stands out of in relation to many other decisions which have discussed the application of the MFN clause to dispute settlement provisions. Indeed, those decisions were mainly concerned with pre-arbitration requirements, such as waiting periods or exhaustion of domestic remedies requirements. A 2010 UNCTAD study reveals indeed that the invocation of the MFN clause to replace the arbitral forum or rules for the settlement of investor-State disputes has never been accepted by a tribunal.[6] Since then several tribunals have equally emphasised, sometimes implicitly, that MFN clauses may not be invoked to alter the arbitral forum.[7] Moreover, the few known decisions which have applied the MFN clause in order to broaden the scope of the legal issues susceptible of being arbitrated are dissimilar to the present case.[8]

Although the majority's decision is without doubt well-argued, there are several interpretative and conceptual constructions which leave it open to criticism, as has been thoroughly exposed in the dissenting opinion.

First, the tribunal's interpretation of Article 8 of the UK-Turkmenistan BIT seems to run counter to the exact wording and logic of the clause. To read the first and second paragraphs of the clause as two unconnected parts of an investor-State dispute settlement clause is contrary indeed to the logic behind the Article 8 of the UK-Turkmenistan BIT. It seems difficult to dissociate the first paragraph from the second, since doing so would simply render the second paragraph irrelevant. The very fact that in the second paragraph of Article 8 includes a 'default' option in case no agreement is reached on any of the listed options seems to clearly indicate that specific consent is required in order to initiate arbitral proceedings under the ICSID Convention, and that consent in fact is only give for arbitration under the UNCITRAL arbitration rules—the default option. In fact the first paragraph of Article 8 contains only pre-arbitration requirement—a waiting period of four months—and reading into that paragraph a general consent to arbitrate seems to be overly inventive.

Secondly, there is a question that precedes the possible application of the MFN clause, namely whether the parties to the dispute are in a "dispute settlement relationship," to use the words of Boisson de Chazournes. The argument developed in the dissenting opinion echoes the decision of the Tribunal in *Diamler v. Argentina*. The Tribunal there noted:

> "... a claimant wishing to raise an MFN claim under the German-Argentine BIT – whether on procedural or substantive grounds – lacks standing to do so until it has fulfilled the domestic courts proviso. *To put it more concretely, since the Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal.* The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction."[9]

The tribunal's argument in *Daimler*, based on the decision of the International Court of Justice in the *Anglo-Iranian Oil Co* case[10], is logical in that it provides that an MFN-clause, generally, can only be invoked if a tribunal first has jurisdiction to entertain a claim; the only exception to this being when the MFN clause *itself* provides jurisdiction to the tribunal. Boisson de Chazournes takes up this argument in her dissent, arguing that since Turkmenistan has not provided consent to ICSID arbitration in the basic treaty, the claimant is not in a position to invoke the MFN clause. The question then is whether, in the absence of consent in the basic treaty, the MFN clause *itself* can provide consent. This question is of course related to the problem whether one can 'import' consent through the application of an MFN clause, which Boisson de Chazournes categorically refutes. The tribunal in *Daimler* also made the same point.[11] The dissenting opinion has the merit of pointing to this important aspect of applying MFN clauses to dispute settlement provisions, and it is regrettable that the majority did not engage with this argument.

Thirdly, even if one assumes that the MFN clause applies and may be invoked by the claimant, it is doubtful that, through operation of that clause, consent to a particular form of arbitration may be 'imported' from another treaty. Here, the relative ease with which the majority discarded the paramount need for consent to a specific form of arbitration is very much open to criticism. Indeed, and this is of course peculiar to international law and the involvement of a State, the default principle is that international courts and tribunals have no jurisdiction unless States have given explicit consent. As such, the choice of the specific dispute settlement method made by the States needs to be respected. As noted by Boisson de Chazournes

> 'consent to jurisdiction in international adjudication must always be established. First, this is a necessary prerequisite to the exercise of the international judicial function. The principle of compétence de la compétence as defined under general international law, and under Article 41 of the ICSID Convention, empowers an arbitral tribunal or any other international court to determine proprio motu the extent and limits of its jurisdiction. At the same time, the principle of compétence de la compétence requires an arbitral tribunal or any other international court to establish the extent and limits of its jurisdiction objectively, i.e., on the basis of the title of jurisdiction that is conferred to the said tribunal, and not to go beyond it.'[12]

'Importing' consent to ICSID Arbitration through operation of the MFN clause runs counter this fundamental principle. The only legal argument one can find to accept such a possibility is in the event that States parties to the BIT which contains the MFN clause have intended that that clause may be invoked in order to establish consent – and not just to override pre-arbitration requirements - expressed in another treaty. In such a case consent to arbitration would in fact present in the basic treaty. This, however, seems not to have been the case in the UK-Turkmenistan BIT, although the majority argued otherwise. Linked to this, it should not be forgotten that consent to ICSID arbitration, as opposed to arbitration generally, is not only subject to the general rules of consent to jurisdiction applicable in international law, but is specifically addressed in Article 25 ICSID Convention which requires "consent in writing".

From a systemic perspective, it should also not be forgotten that creative findings of jurisdiction may well be counterproductive for the system of investment treaty arbitration. Considering the recent criticism of the system, and the denunciation by several States of the ICSID Convention and certain BITs,[13] tribunals should adhere to the general principles governing consent of States to arbitration, in order to avoid creating mistrust amongst States towards the ICSID system of arbitration, which, one should not forget, has much value in providing a neutral forum to settle investment disputes.

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## Notes

1 See, recently, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, 2 July 2013 Award and Separate Opinion of Professor William W. Park ; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction and Separate Opinion of Dr. Kamal Hossain, 21 December 2012 ; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, and Dissenting Opinion of Judge Charles N. Brower and Opinion of Professor Domingo Bello Janeiro ;

2 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, 3 July 2013, Decision on the Objection to Jurisdiction for Lack of Consent and Dissenting Opinion of the Decision on the Objection to Jurisdiction for Lack of Consent.

3 See however for the attempt by a Claimant to invoke the MFN clause in order to use a more favourable definition of 'investor' in a third party BIT, which was ultimately rejected by the Tribunal: *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, 4 October 2013 Award.

4 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, Jan 25, 2000, para. 63.

5 Emphasis in the dissenting opinion.

6 See for an overview: UNCTAD, *Most-Favoured Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II), (New York and Geneva: United Nations, 2010), pp. 73-84 available at http://unctad.org/en/Docs/diaeia20101_en.pdf.

7 See for instance, *Teinver v. The Argentine Republic*, see above note 2, paras. 182-186.

8 In *RosInvestCo*, the Tribunal accepted extending its jurisdiction based on the MFN clause, but did not discuss nor accept the possibility of 'importing' consent to ICSID Arbitration (*RosInvestCo. U.K. v. Russia*, Arbitration under Stockholm Chamber of Commerce, Case no: Arbitration V 079 / 2005, Award on Jurisdiction of October 2007, paras. 128 ff).

9 *Daimler v. Argentine Republic*, see above note 2, para. 200 (emphasis in the original).

10 ICJ, 'Anglo-Iranian Oil Co. case (jurisdiction), Judgment of 22 July 1952, *I.C.J. Reports* 1952, p. 93.'

11 Para. 204.

12 Para. 5.

13 See, for example, ICSID News Release, 'Venezuela Submits a Notice under Article 71 of the ICSID Convention', January 26, 2012, at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100 (last visited 4 December 2014).