

OVERVIEW OF LAW AND PRACTICE OF FOREIGN ARBITRATION IN TURKMENISTAN: AN ARGUMENT IN FAVOUR OF RATIFICATION OF THE NEW YORK CONVENTION

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I INTRODUCTION

Turkmenistan is the second largest state in Central Asia¹ and is the fourth largest former Soviet Republic.² About 80 per cent of its territory is comprised of waterless desert landmass, hostile to plant and animal life.³ The desert landmass holds enormous quantities of untapped energy wealth beneath it. As a part of the USSR, Turkmenistan was the second-largest gas producer after Russia.⁴ Nowadays, according to some sources,⁵ Turkmenistan

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1 Gavin R G Hambly "Turkmenistan" (Encyclopedia Britannica, 2020) <<https://global.britannica.com/place/Turkmenistan>> accessed 14 July 2020.

2 Robert E Ebel and Rajan Menon *Energy and Conflict in Central Asia and the Caucasus* (Rowman & Littlefield, 2000) 108.

3 David Angelson and Andrea Egan "A Desert, a Mountain, and an Oasis: Promoting Climate-Resilient Farming in Turkmenistan" (United Nations Development Programme Turkmenistan, 26 August 2015) <<https://undp.exposure.co/a-desert-a-mountain-and-an-oasis>> accessed 14 July 2020.

4 Thomas M Leonard *Encyclopedia of the Developing World* (Taylor & Francis, 2006) 1579.

5 The estimated amount of hydrocarbon resources varies from source to source. According to estimates made by US Energy Information Agency, as of January 2016, Turkmenistan has 600 million barrels of proven oil reserves and estimated proven natural gas reserves of 265 trillion cubic feet (TcF). This makes Turkmenistan the sixth gas reserve holder in the world, according to US Energy Information Agency. More information at the US Energy

has the third-largest natural gas reserves in the world, after the Russian Federation and Iran.⁶ Hydrocarbons have been the primary factor in the economic development of the country ever since they were discovered. The revenues from the export of natural gas helped the government to sustain economic growth over the years and graduated the status of the country from a low-income to upper-middle-income status in 2012.⁷ The current state of affairs continues the trend: hydrocarbons play the central role in the economy of the country as it accounts for the top 3 out of 5 exported goods.⁸ The exact amount generated in revenues by the export of oil and natural gas remains a matter of an educated guess; economic statistics and gas revenues are classified and closely guarded as state secrets.⁹

In 2012, the United Nations Conference on Trade and Development (UNCTAD) ranked Turkmenistan among the top ten countries in the world in its foreign direct investment (FDI) attraction index.¹⁰ According to the data provided by the World Bank, the average value of FDI as a percentage of GDP for the period of 1993-2014 was 7.09 per cent with a "minimum of 2.39 per cent in 1998 and a maximum of 22.52 per cent in 2009".¹¹ The data provided by UNCTAD suggests that foreign investment into Turkmenistan increased by 2.8 per cent in 2014.¹²

Information Administration (EIA) official website: <<https://www.eia.gov/totalenergy/reports.php#/T120>> accessed 14 July 2020.

- 6 See Robert E Ebel and Rajan Menon, above n 2, at 108.
- 7 Gohar Gyulumyan *Turkmenistan - Diversifying the Turkmen economy* (Washington DC World Bank Group ACS12651, 2015) 13 <<http://documents.worldbank.org/curated/en/887311468111849090/Turkmenistan-Diversifying-the-Turkmen-economy>> accessed 14 July 2020.
- 8 The World Bank "Turkmenistan Trade at a Glance" (World Integrated Trade Solution, 2016) <<http://wits.worldbank.org/CountrySnapshot/en/TKM/textview>> accessed 14 July 2020.
- 9 Overland Indra, Heidi Kjærnet and Andrea Kendall-Taylor (eds) *Caspian Energy Politics: Azerbaijan, Kazakhstan and Turkmenistan* (Routledge, 2010) Vol 22 at 79.
- 10 "United States Department of State Turkmenistan Investment Climate Statement" (US Department of State, 2015) 5 <<http://www.state.gov/documents/organization/241988.pdf>> accessed 14 July 2020.
- 11 The World Bank "Foreign Direct Investment, Net Inflows (% of GDP)" (The World Bank, 2016) <<https://data.worldbank.org/indicator/BM.KLT.DINV.WD.GD.ZS>> accessed 14 July 2020.
- 12 UNCTAD *World Investment Report 2015* (UNCTAD/WIR/2015).

The government of Turkmenistan has made a number of attempts to improve the legal façade of foreign investment protection¹³ as foreign investors are reluctant to enter the country with weak legal and banking institutions and rampant corruption.¹⁴ A recent attempt is the Law of Turkmenistan on International Commercial Arbitration (ICA).¹⁵ The new law promises ever-greater protection of foreign investor rights and adds to the existing body of laws regulating inward foreign investment.¹⁶ The promise of the protection of property rights of an investor is also enshrined in Bilateral Investment Treaties (BIT). They are important marketing tools for states for signalling reliability and attracting investment.¹⁷ The existing legal framework regulating incoming foreign investment is subject to bilateral or multilateral investment treaties¹⁸ and other domestic legislation such as the Law on Foreign Investment (last amended in 2008), the Law of Turkmenistan on Investment Activities 1992 (last amended in 2015), and the Law on Corporations 1999.¹⁹ Foreign investments are also affected by the Law on Enterprises 2000, the Law on Business Activities (last amended in 2008), and the Land Code 2004. The Tax Code of Turkmenistan 2000 establishes the legal framework for taxation matters of foreign investment. Investments made in the energy sector are regulated by the Petroleum Law

13 PWC, *Doing Business Guide Turkmenistan* (2010 Edition, PricewaterhouseCoopers, 2010) 8 <<https://www.pwc.com/uz/en/assets/pdf/doing-business-guide-in-turkmenistan-2012-2013.pdf>> accessed 14 July 2020.

14 The Economist "Stans undelivered" *The Economist Central Asia* (Astana, 30 June 2016) <<http://www.economist.com/news/asia/21701522-five-former-soviet-republics-struggle-survive-new-great-game-stansundelivered?fsrc=scn/fb/te/pe/ed/stansundelivered>> accessed 14 July 2020.

15 The law was enacted in 2014 and enforced on 1 January 2016.

16 See for reputational effects, Andrew Guzman *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York, 2008).

17 Anne van Aaken "International Investment Law and Rationalist Contract Theory" (Institute for International Law and Justice Colloquium 2009, New York, 22 January 2009) 24 <<http://www.iilj.org/courses/documents/2009colloquium.session2.aaken.pdf>> accessed 14 July 2020.

18 There are 27 Bilateral Investments Treaties and 6 Treaties with Investment Provisions signed by Turkmenistan. For more details, see the UNCTAD Investment Policy Hub website <<http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/215#iiaInnerMenu>> accessed 14 July 2020.

19 US Department of State, above n 10, at 5.

of 2008.²⁰ The importance of the Civil Code of Turkmenistan, as it defines what constitutes a legal entity under the laws of Turkmenistan, and the Arbitration Procedural Code of Turkmenistan has to be mentioned here.

The interplay of international agreements with the domestic legislative norms defines the basis of legal, economic and other necessary conditions for an investment to be made in the country. The objectives of the laws are not limited to ensuring equal protection of rights, interests and assets of an investor in the territory of Turkmenistan,²¹ they also aim at achieving the economic agenda of the government such as the import of scientific and technological know-how and attaining other social policies through foreign investment into the country.²² These laws together form the legal body that defines the rights and obligations of a foreign investor.

II LEGAL ENVIRONMENT IN TURKMENISTAN FOR INTERNATIONAL ARBITRATION

The spectre of communism that was once lingering over Europe has long since faded away, and the alliance, one of the biggest socialist experiments in the history of mankind, which stood to safeguard and promote its ideals, has failed. In 1991 out of the remains of the Soviet Union emerged five independent Central Asian states. The current legal system of Turkmenistan is primarily rooted in the one which the Turkmen Soviet Socialist Republic had.²³ Up until recently, international arbitration was a novel concept in the region.²⁴ Turkmenistan has no alternative dispute resolution mechanisms as a means for settling disputes between two private parties.²⁵ Consequently, the

20 The law is also known as the Law on Hydrocarbon Resources, amended in 2011 and 2012.

21 Law on Investment Activities 2016 (Turkmenistan).

22 Article 16.

23 Rolf Knieper and Dora Ziyeva "Turkmenistan" in Kaj Hobér and Yarik Kryvoi (eds) *Law and Practice of International Arbitration in the CIS Region* (Kluwer Law International BV 2017) 346.

24 Noah Rubins and Gorsha Sur "Application of Article V of the New York Convention-A Central Asian Perspective" (2008) 25 J Int'l Arb 809.

25 International Trade Administration-US Department of Commerce "Turkmenistan Legal Regime" (International Trade Administration-US Department of Commerce, 2017) <<https://www.export.gov/article?id=Turkmenistan-Legal-Regime>> accessed 14 July 2020.

most widely used mechanism for dispute resolution has been the judiciary.²⁶ The judiciary is supplemented by state-organised arbitration courts, which are attached to the ordinary civil courts of general jurisdiction with the exception of the Arbitration Court of the City of Ashgabat,²⁷ with jurisdiction over disputes between corporations and other commercial disputes.²⁸

The Arbitration Procedural Code of Turkmenistan 2000 was not enacted based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law) for quite some time; Turkmenistan was on the list of countries that were at odds with the UNCITRAL Model Law.²⁹ In 2016, the government of Turkmenistan adopted the ICA, which in a number of ways follows the UNCITRAL Model Law. For instance, the new Code allows ad hoc arbitration,³⁰ and recognises the doctrine of *kompetenz-kompetenz*,³¹ as opposed to domestic law on arbitration, which sets rather stringent requirements (see art 4 of Annex 1 to the Civil Procedural Code (CPC)). The ICA grants the parties to a dispute the freedom of selection and the procedure of selection of arbitrators³² and sets rather lenient requirements for the definition of the arbitration agreement.³³

26 See Rolf Knieper and Diora Ziyaeva, above n 23, at 351.

27 The city of Ashgabat is the capital of the country and is an autonomous-administrative district.

28 See Rolf Knieper and Diora Ziyaeva, above n 23, at 351.

29 Michael Charles Pryles and Michael J Moser *Asian Leading Arbitrators' Guide to International Arbitration* (Juris Publishing Inc, 2007).

30 The Law on International Commercial Arbitration Article 2016 (Turkmenistan), art 2(1) stipulates "arbitration – an international commercial arbitration expressly established to resolve a specific dispute or operating on a permanent basis as well as an arbitrator considering a dispute solely".

31 The Law on International Commercial Arbitration Article 2016 (Turkmenistan), art 16(1) recognises that an arbitral tribunal can decide on the question of its jurisdiction over the matter and any questions regarding the existence and validity of the arbitration agreement.

32 The Law on International Commercial Arbitration Article 2016 (Turkmenistan), art 11(1) (2).

33 See the Arbitral Procedural Code of Turkmenistan, art 7 "Definition and Form of Arbitration Agreement". Of the two options, suggested by the UNCITRAL law, the first one was chosen: "[a]n 'arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement".

With the new law in force, now many disputes of a transnational commercial character, as well as many types of civil disputes involving foreign investors, can be resolved by international commercial arbitration within Turkmenistan when the parties so agree.³⁴ The new law is a step in the right direction and meets the basic requirements set by the UNCITRAL Model Law. The overall picture emerging from the new law is that Turkmenistan has an arbitration-friendly legal environment.

III INTERNATIONAL ARBITRATION UNDER THE DOMESTIC LEGAL SYSTEM

In terms of the nature of the legal system, Turkmenistan is a civil law country,³⁵ which is to a greater extent based and built on the legal system and institutions from the Soviet era.³⁶ The judiciary of Turkmenistan represents a three-tier system: local trial courts, regional appellate courts, and the Supreme Court.³⁷ However, according to art 32(2) of the Law on the Judicial System and the Status of Judges of Turkmenistan, arbitration courts of the country act as the resort of the first instance for settlement of commercial disputes, with the Supreme Court acting as the court of appeals. Does this mean that the law of Turkmenistan provides a two-tiered judicial system for the settlement of commercial disputes?³⁸ Where the Supreme Court of Turkmenistan can review appeals against court and arbitration decisions thereby exercises a unifying function of judicial practice.³⁹

34 See Rolf Knieper and Diora Ziyaeva, above n 23, at 351.

35 See above n 20.

36 See Rolf Knieper and Diora Ziyaeva, above n 23, at 351.

37 See Rolf Knieper and Diora Ziyaeva, above n 23, at 351.

38 *WTO Canada — Continued Suspension of Obligations in the EC — Hormones Dispute* (14 November 2008) WT/DS321/16. See the Law on the Judicial System and the Status of Judges (Turkmenistan) art 32(2) (unofficial translation): The commercial arbitral court of Turkmenistan considers cases in accordance with the laws of Turkmenistan as the court of the first instance
<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/84137/93357/F844375246/TKM84137.pdf>> accessed 14 July 2020.

39 See above n 20.

Article 99 of the Constitution of Turkmenistan holds that the judicial authority in the country belongs to the courts.⁴⁰ Further, art 101 of the same Constitution guarantees the independence of the judges and the judicial body.⁴¹ In a similar vein, art 5 of the Arbitration Procedural Code of Turkmenistan guarantees the independence of the judges and their subordinates to the Constitution and other relevant laws of Turkmenistan.⁴² The same article stipulates that any extraneous influence upon judges is prohibited and entails liability under the laws of Turkmenistan.⁴³ However, the independence of the judiciary body has been questioned by a number of observers.⁴⁴ The requirement set by the law to keep all judicial decisions confidential⁴⁵ makes it difficult to assess the success of implementation and enforcement of not only the Law of Turkmenistan on International Commercial Arbitration Law but any laws in general. Thus, as one goes through the reading of the laws of Turkmenistan, it is important to examine them within this context.

There are a number of sources that form the body of arbitration law in Turkmenistan.⁴⁶ The different pieces of law have to be gathered together into a single body to bring final certainty into the process. According to art 3(1) of the Arbitral Procedural Code, the arbitral proceedings in Turkmenistan are based on the Constitution of Turkmenistan, the Law on the Judicial System and the Status of Judges of Turkmenistan and the Arbitral Code of Turkmenistan.⁴⁷ The law allows not only the nationals but also foreign natural and juridical persons to bring their claims before the arbitration courts

40 Constitution of Turkmenistan (adopted 18 May 1992; amended in 1995, 1999, 2003, 2006, 2008, 2016) <<http://turkmenistan.gov.tm/?id=11808>> accessed 14 July 2020.

41 Constitution of Turkmenistan 2008.

42 Arbitral Procedural Code 2000 (Turkmenistan), <http://minjust.gov.tm/ru/mmerkezi/doc_view.php?doc_id=8374> accessed 14 July 2020.

43 Arbitral Procedural Code 2000 (Turkmenistan) art 5.

44 See above n 38; See also the International Trade Administration (ITA) US Department of Commerce "Turkmenistan Legal Regime" (International Trade Administration, 2017) <<https://www.export.gov/article?id=Turkmenistan-Legal-Regime>> accessed 14 July 2020.

45 See above n 38.

46 See Rolf Knieper and Diora Ziyaeva, above n 23, at 351.

47 Article 3(1), Arbitral Procedural Code of Turkmenistan.

of the country.⁴⁸ However, it is important to note that there are considerable differences between the Arbitral Procedural Code of Turkmenistan and the Law of Turkmenistan on International Commercial Arbitration Law.⁴⁹ The difference between the two laws has already been addressed elsewhere.⁵⁰ Thus, the domestic rules of arbitration will not be discussed unless they carry relevance to the subject matter of the current paper, ie legal environment governing the international commercial arbitration.

International commercial arbitration is governed by the ICA and other relevant domestic laws of the country.⁵¹ Article 2(1) of the ICA defines international commercial arbitration as "an arbitration, specifically established to resolve a specific dispute or operating on a permanent basis as well as an arbitrator considering a dispute solely".⁵² The scope of the international commercial arbitration is limited to disputes arising from contractual and other civil law relationships resulting in the course of foreign trade and other forms of international economic activities:⁵³

provided that the place of business of at least one of the parties is situated outside of Turkmenistan, disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of Turkmenistan; disputes between the participants of such entities; as well as disputes between such entities and other subjects of Turkmenistan law.

The commercial law enforcement system tries 13 categories of disputes, both pre-contractual and post-contractual, including taxation, legal foundations and bankruptcy issues.⁵⁴ The law guarantees autonomy and exclusion of the arbitration proceedings from any kind of interference by the

48 Article 4(3), Arbitral Procedural Code of Turkmenistan.

49 For a detailed analysis of the two laws see Rolf Knieper and Diora Ziyayeva, above n 23, at 345–382.

50 Rolf Knieper and Diora Ziyayeva, above n 23.

51 At 348.

52 See above n 32, art 2(1).

53 Arbitral Procedural Code of Turkmenistan, art 1(2). As of yet, there is no official English version of the Law available, translation is from: Rolf Knieper and Diora Ziyayeva, above n 23, at 348.

54 See above n 20.

domestic courts to the extent allowed by the Code. Thus, according to the ICA, parties to a dispute can appeal the decision of the arbitration to the Supreme Court of Turkmenistan.⁵⁵ Further details for the grounds of appeal will be discussed later in the paper.

The new international commercial arbitration law delivers certain arbitral functions to the Chamber of Commerce and Industry of Turkmenistan.⁵⁶ Specifically, pts 3 and 4 of art 11 of the ICA hold that the Chamber shall be entitled to nominate the arbitrators if the parties to the dispute fail to do so within the specified time frame.⁵⁷ Part 3 of art 13 stipulates that parties to a dispute may address the Chamber with a request to review a notice of challenge to suspend or terminate the powers of an arbitrator.⁵⁸ The decision of the Chamber with regards to suspension or termination of powers of an arbitrator cannot be appealed.⁵⁹ Although the law recognises the doctrine of *kompetenz-kompetenz*,⁶⁰ pt 3 of art 16 gives the parties the right to challenge the competence of the arbitration tribunal by making a corresponding request to the Chamber.⁶¹ In other words, at the request of either party, the Chamber has the power to decide if the arbitration tribunal has jurisdiction over the disputed matter in question within a defined timeframe.

IV RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS IN TURKMENISTAN UNDER THE DOMESTIC LAW

The Government of Turkmenistan prefers to have international disputes settled within its jurisdiction, yet in the past, there were a few instances where it accepted the international arbitration of investment disputes. Article 3 on the Objectives of enforcement proceedings of the Law of Turkmenistan On

55 Arbitral Procedural Code (Turkmenistan), art 45.

56 The English version of the official website of the Chamber of Trade and Industry is available at <<http://www.cci.gov.tm/index.php/en/>> accessed 14 July 2020.

57 Law of Turkmenistan on International Commercial Arbitration 2016, art 11(3), (4).

58 Ibid, art 13(3), (4), art 14(1).

59 See above n 57, art 13(3), (4).

60 See above n 57, art 16(1). Article 16 recognises that an arbitral tribunal can decide on the question of its jurisdiction over the matter and any questions regarding the existence and validity of the arbitration agreement.

61 See above n 57, art 16(3), (4).

Enforcement Proceedings and the Status of Enforcement Agents holds that the order of enforcement of judgments of international and foreign courts and arbitral tribunals in Turkmenistan shall be determined based on international treaties of Turkmenistan and the Law of Turkmenistan On Enforcement Proceedings and the Status of Enforcement Agents in accordance with legal norms of Turkmenistan.⁶² Other than that, the judgments of foreign courts are subject to review on a case-by-case basis and might not be recognised.⁶³ In other words, the Courts of Turkmenistan can recognise and enforce the judgment of a foreign court based on the principle of reciprocity with certain exceptions.⁶⁴ Article 420(1) of the Civil Procedural Code (CPC) defines judgments of foreign courts as the ones pertaining to civil cases and excludes ones dealing with economic and other disputes related to business and economic relations.⁶⁵

In case the judgment of a foreign court is recognised in Turkmenistan, its enforcement is subject to a ruling of a court.⁶⁶ A court reviewing the enforcement application has the right to rule only on the condition of enforcement and merits of the judgment.⁶⁷

The recognition and enforcement of foreign arbitral awards is governed by art 46 of the ICA. The language of the article, in many ways, builds on the UNCITRAL Model Law. Namely, the article holds that:

an arbitral award, irrespective of the country in which it was made, upon application in writing to the courts of Turkmenistan, shall be recognized and be enforced subject to the provisions of part 2 of this article and article 47 of the present law, and in accordance with procedural legislation of Turkmenistan and its international treaties.

Further, pt 2 of art 46 holds that:

62 Law of Turkmenistan on Enforcement Proceedings and the Status of Enforcement Agents (2014), art 3; See also Arbitral Procedural Code (Turkmenistan) art 11(4).

63 See above n 20.

64 Civil Procedural Code 2015 (Turkmenistan), art 421.

65 Ibid, art 420.

66 See above n 64, art 422.

67 See above n 64.

the party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof, the original of the arbitration agreement, stipulated in art 7 of the present law, or a certified copy thereof. If the award is not made in an official language of this state, a party to the dispute has to present a certified copy of the documents in the State language of Turkmenistan.

A party seeking enforcement of a foreign arbitral award can present such a request to a provincial court (*welayat*) in the regions of Turkmenistan, but in Ashgabat, the enforcement action has to be brought before the Arbitration Court of Ashgabat.⁶⁸

V TREATIES GOVERNING THE MATTERS OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS

Besides the regulations stipulated under the domestic law that regulate recognition and enforcement of foreign judgments, there are a number of bilateral and multilateral treaties that are regional or international in character to which Turkmenistan is a party that regulate the matter as well. Important regional conventions are the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau Convention adopted in Chisinau 7 October 2002),⁶⁹ the Kiev Convention on Settling Disputes Related to Commercial Activities (Kiev Convention, adopted in Kiev 20 March 1992),⁷⁰ and the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 1993).

The regional conventions regulate and provide rules on various aspects of legal cooperation on matters related to civil, family and criminal issues between the Commonwealth of Independent States (CIS). They are also of note here because they deal with issues related to the recognition and enforcement of foreign court judgments, arbitral tribunals⁷¹ and conflict of

68 Law on International Commercial Arbitration (Turkmenistan), art 6(2).

69 CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (adopted in Chisinau on 7 October 2002) (2002) (Chisinau Convention).

70 CIS Kiev Convention on Settling Disputes Related to Commercial Activities (adopted in Kiev, 20 March 1992) (1992) (Kiev Convention).

71 See Kiev Convention (1992), art 3, that relates to the proceedings and awards of arbitral tribunals.

laws among the member states. The importance of these two Agreements for arbitral procedures is manifold. For instance, art 3 of the Kiev Convention holds that the market participants of the CIS region shall have unhindered access to courts, arbitration and other competent bodies of member states.

Property and investment protection rights enjoyed under general international law are limited to the concept of the international minimum standards. It is the central concept used by the states to manipulate the regime of diplomatic protection to provide security and safety to properties and investments of its nationals abroad.⁷² In a sense, the growth and development of the international investment protection regime have the rules and regulations of a diplomatic protection regime at its foundation. And yet, despite the fact that the two regimes share certain basic concerns, claiming that diplomatic protection was an incipient law of the investment protection regime and that the rules of the investment protection regime are mere reinterpretations of the traditional rules, such as those found in state responsibility and diplomatic protection, does not reflect the structural complexity of the relationship between the two.

The recognition that investment is deserving of protection under the diplomatic protection regime is certainly related to the development of the modern investment protection law. The rules and principles such as those embodied in the concept of an international minimum standard, which is at the heart of the diplomatic protection regime, have influenced the substance of international investment protection law. Despite the close relationship between the two regimes, the investment protection regime is conceivably broader both substantially and procedurally. Today as far as the issue of foreign investment is concerned, the diplomatic protection regime has been replaced by the international investment protection law.⁷³ It is safe to say that the international investment protection regime, to a greater extent, is a treaty driven enterprise.

Turkmenistan has not ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New

72 Muthucumaraswamy Sornarajah *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 86.

73 John Dugard "Diplomatic Protection" (Audiovisual Library of International Law, United Nations) <http://legal.un.org/avl/lis/Dugard_DP_video_1.html> accessed 14 July 2020.

York Convention).⁷⁴ There are two key multilateral investment agreements to which Turkmenistan is a party, namely the Energy Charter Treaty and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Turkmenistan has also concluded 27 bilateral investment treaties.⁷⁵ There are three ICSID arbitration cases pending against Turkmenistan and five concluded ones.⁷⁶

VI GROUNDS FOR REFUSAL TO ENFORCE

Turkmenistan is not a party to the New York Convention. Thus, the recognition and enforcement of arbitration awards that were rendered abroad between Turkmen and non-Turkmen parties are governed by the relevant laws of Turkmenistan and other international or regional treaties.⁷⁷

There are situations where national laws provide that arbitral decisions and awards are subject to full appeals,⁷⁸ namely matters relating to fact-finding and issues of law. It is important to make a note of the legal framework for recognition of foreign judgments, where an award of a foreign tribunal has been overruled by a judgment of a foreign court; for the purpose of the judgment's enforcement in Turkmenistan, it will be subject to the CPC, not the ICA.

Under the domestic law of Turkmenistan, art 47 provides grounds for the refusal of recognition or enforcement of the judgment, irrespective of the country in which it was made, rendered by an international arbitration. If the

74 List of contracting states of the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (1958) (New York Convention) <<http://www.newyorkconvention.org/countries>> accessed 14 July 2020.

75 See the relevant data about Turkmenistan at UNSTAD Investment Policy Hub website <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/215>> accessed 14 July 2020.

76 See the list of cases at the International Centre for Settlement of Investment Disputes (ICSID) official website: <<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>> accessed 14 July 2020.

77 For instance, art 9 of the Kiev Convention lists *res judicata*, incompetence of the arbitral tribunal, the statute of limitation and lack of due process as the grounds for refusal.

78 Jan Paulsson "Jurisdiction and Admissibility" in Gerald Aksen and Robert Briner (eds) *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (International Chamber of Commerce, 2005) 618.

party against whom it is invoked furnishes to the competent court where recognition or enforcement is sought proves one of the following:⁷⁹

- (i) a party to arbitration was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) there were procedural violations such as absence of a proper notice or a party was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, in other words the arbitral tribunal acted beyond its jurisdiction; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

They may also refuse recognition or enforcement⁸⁰ if it violates the principle of the sovereign immunity of Turkmenistan, provided that Turkmenistan has not explicitly waived such immunity. Further, if the disputed subject matter is not capable of settlement by arbitration under the law of Turkmenistan, or if it is against the public policy of Turkmenistan, recognition or enforcement of the award may be refused.⁸¹

The legislation of Turkmenistan defines public order as the basis of the rule of law of Turkmenistan.⁸² And as it has been noted by an observer, this is pretty much the case with most of the CIS states.⁸³ A relatively broad

79 Law on International Commercial Arbitration (Turkmenistan), art 47 (1).

80 Ibid, art 47(2).

81 See above n 79, art 47(1), (2).

82 See above n 79, art 2(5).

83 Yarik Kryvoi and Kaj Hobér "Arbitration in the CIS Region: From Soviet Roots to Modern Arbitration Laws" (Kluwer Arbitration Blog, 2017) <<http://arbitration.blog.kluwerarbitration.com/017/11/15/arbitration-cis-region-soviet-roots-modern-arbitration-laws/>> accessed 14 July 2020.

definition of the concept gives the courts an opportunity to interpret it in a comprehensive manner and instils a certain degree of uncertainty in the system. However, in practice the CIS states rarely refuse to enforce awards based on an expansive interpretation of public policy.⁸⁴

VII ARGUMENT IN FAVOR OF RATIFYING THE NEW YORK CONVENTION

The harmonisation of commercial laws is not a goal in itself but rather part of a greater project designed to deliver higher living standards, faster growth and new opportunities through commerce.⁸⁵ The UNCITRAL Model Law was designed to constitute a sound basis for the harmonisation and improvement of national laws.⁸⁶ In order to ensure continuity, the New York Convention was deliberately aligned with the UNCITRAL Model Law.⁸⁷ One might say that the adoption of an arbitration law based on the UNCITRAL Model Law without joining the New York Convention is an incomplete project for a number of reasons.

For international arbitration to be effective, its awards must be enforceable across borders.⁸⁸ Where the arbitration is seated in Turkmenistan, the enforcement abroad will be subject to the laws of the jurisdiction where the enforcement is sought. Under international law its enforcement will depend on the principle of reciprocity. However, with the adoption of the New York Convention, it could be enforced in more than 150 jurisdictions.⁸⁹ In other words, if an arbitration award is unenforceable in the jurisdiction in which the losing party has assets, the award does not hold much of a legal currency.⁹⁰

84 Ibid.

85 United Nations Commission on International Trade Law "About UNCITRAL" (UNCITRAL) <http://www.uncitral.org/uncitral/en/about_us.html> accessed 14 July 2020.

86 Ibid.

87 Giuditta Cordero-Moss *International Commercial Arbitration* (Cambridge University Press, 2013) at 7 <<http://ebooks.cambridge.org/ref/id/CBO9781139519779>> accessed 14 July 2020.

88 Rolf Knieper and Dora Ziyayeva, above n 23, at 345–382.

89 See the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 14 July 2020.

90 Rolf Knieper and Dora Ziyayeva, above n 23, at 377.

Enforcement is what gives value to international commercial arbitration.⁹¹ Ratification of the New York Convention is also associated with a number of other benefits, such as an increase in trade and inflow of foreign investment. More importantly, it would allow Turkmen companies to enforce contracts in other jurisdictions.⁹²

It is safe to conclude that ratification of the New York Convention is imperative for a well-functioning international arbitration system. The Convention has had a successful track record for almost sixty years and has been accepted by many of the CIS states.⁹³ Adoption of the New York Convention is associated with greater export of goods⁹⁴ which is for the greater good of the country's economy.

VIII CONCLUSION

From a historical perspective, the legal regime of post-Soviet independent Turkmenistan is a young enterprise. It is yet to occupy its place in the complex mechanism of international law. Although the complexities of the domestic law prevent an outside observer from evaluating the effectiveness of the new law. At its face value it is a step in the right direction for the purpose of harmonisation of the rules of international commercial arbitration. However, for it to be more effective and command a greater degree of influence both domestically and internationally, it has to be reinforced by the New York Convention.

91 Reyadh Mohamed Seyadi *The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States* (Cambridge Scholars Publishing, 2017).

92 Rolf Knieper and Diora Ziyaeva, above n 23, at 377.

93 At 377.

94 Andrew Myburgh and Jordi Paniagua "The Impact of UNCITRAL on Foreign Direct Investment" in *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law* (Vienna, 4-6 July 2017) Vol 4 1-10 <http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/113-MYBURGH_and_PANIAGUA_The_Impact_of UNCITRAL_on_FDI.pdf> accessed 14 July 2020.