SVEA HOVRÄTT
Avdelning 02
Rotel 020103

DOM
2018-02- 26
Stockholm

Mål nr
T 6582-16

KÄRANDE
Cem Uzan
36, Avenue Raphaël
75016 Paris
Frankrike

SVARANDE
Republiken Turkiet
Adress hos ombuden

Ombud: Advokaterna Bo G H Nilsson och Therese Isaksson samt jur.kand. Emma Blomstervall
Advokatfirman Lindahl KB
Box 1065
101 39 Stockholm

SAKEN
Skiljedoms ogiltighet m.m. avseende skiljedom meddelad i Stockholm den 20 april 2016

HOVRÄTTENS DOMSLUT

1. Hovätten avslår Republiken Turkiets yrkande om avvisning av Cem Uzans talan om ogiltighet enligt 33 § lagen (1999:166) om skiljeförfarande.
2. Hovrätten avvisar Cem Uzans talan om att skiljedomen ska upphävas enligt 34 § lagen om skiljeförfarande.
3. Hovrätten avslår Cem Uzans yrkande om avvisning av den av Republiken Turkiet åberopade omständigheten att Cem Uzan inte kan väcka talan mot Republiken Turkiet på grund av att han är turkisk medborgare.
4. Hovrätten ogillar Cem Uzans talan om att skiljedomen ska ogiltigförklaras.
5. Hovrätten ogillar Cem Uzans talan om ändring av skiljedomen enligt 36 § lagen om skiljeförfarande.
6. Cem Uzan ska ersätta Republiken Turkiet för rättegångskostnader i hovrätten med 371 633 USD och 137 130 CHF, varav 371 481 USD och 136 818,44 CHF avser

Postadress	Besöksadress	Telefon	Telefax	Expeditionstid
Box 2290 103 17 Stockholm	Birger Jarls Torg 16	08-561 670 00 08-561 675 00 **E-post**: svea.hovratt@dom.se www.svea.se	08-561 675 09	måndag – fredag 09:00–15:00

ombudsarvode, jämte ränta på de två förstnämnda beloppen enligt 6 § räntelagen (1975:635) från dagen för hovrättens dom till dess betalning sker.

INNEHÅLLSFÖRTECKNING

BAKGRUND

Cem Uzan påkallade den 7 mars 2014 ett skiljeförfarande mot Republiken Turkiet (Turkiet) vid Stockholms Handelskammares Skiljedomsinstitut (Arbitration V 2014/023). Till skiljemän utsågs Bernardo M. Cremades (ordförande), Dominique Carreau och Philippe Sands QC.

Skiljeförfarandet påkallades med stöd av artikel 26 i Energy Charter Treaty (ECT). Cem Uzan gjorde gällande att Turkiet brutit mot sina skyldigheter enligt ECT, bl.a. artiklarna 10 och 13, genom inblandning i och olaglig expropriation av investeringar som han gjort i Turkiet i form av förvärv av aktierna i de två turkiska elbolagen Çukurova Elektrik A.Ş. (ÇEAŞ) och Kepez Elektrik T.A.Ş (Kepez). Han yrkade att Turkiet med anledning av överträdelserna skulle förpliktas att utge skadestånd till honom.

I skiljeförfarandet invände Turkiet att skiljenämnden på flera grunder saknade behörighet att pröva de frågor som Cem Uzans talan avsåg. I beslut om uppdelning av skiljeförfarandet den 20 juli 2015 beslutade skiljenämnden att först pröva Turkiets invändning om att skiljenämnden saknade jurisdiktion *ratione personae*, därför att Cem Uzan inte var en investerare i den mening som avses i artiklarna 1(7)(a)(i) och 26 ECT. Artiklarna har i sin engelska språkversion i relevanta delar följande lydelse.

Article 1: Definitions

As used in this Treaty: [– – –]
(7) "Investor" means:
(a) with respect to a Contracting Party:
(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; [– – –]

Article 26: Settlement of Disputes between an Investor and a Contracting Party

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
(b) in accordance with any applicable, previously agreed dispute settlement procedure; or
(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. [– – –]

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: [– – –]
(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

Parterna var överens om att tolkningen av ovannämnda artiklar skulle ske enligt artiklarna 31 och 32 i Wienkonventionen om traktaträtten ("Wienkonventionen"). Artiklarna har i relevanta delar följande lydelse.

Artikel 31 – Allmän regel om tolkning

1. En traktat skall tolkas ärligt i överensstämmelse med den gängse meningen av traktatens uttryck sedda i sitt sammanhang och mot bakgrunden av traktatens ändamål och syfte. [– – –]

Artikel 32 – Supplementära tolkningsmedel

Supplementära tolkningsmedel, inbegripet förarbetena till traktaten och omständigheterna vid dess ingående, kan anlitas för att få bekräftelse på den mening som framkommer vid tillämpningen av artikel 31 eller för att fastställa meningen, när en tolkning enligt artikel 31 a) icke undanröjer dess tvetydighet eller oklarhet; eller b) leder till ett resultat som uppenbarligen är orimligt eller oförnuftigt.

Till grund för skiljenämndens behörighet åberopade Cem Uzan, som är turkisk medborgare, att han var permanent bosatt (permanently residing) i en annan fördragsslutande stat än Turkiet. Skiljedom meddelades den 20 april 2016. Vid tolkningen av artikel 1(7)(a)(i) ECT fann skiljenämnden att en fysisk person kan kvalificera sig som en investerare både genom att vara medborgare i och genom att vara permanent bosatt i en fördragsslutande stat i enlighet med dess lagstiftning. Enligt

skiljenämnden fanns det inte någon rangordning mellan de olika kriterierna och därmed inte i och för sig något hinder för en investerare som är permanent bosatt i en fördragsslutande stat att väcka talan mot en annan fördragsslutande stat som investeraren är medborgare i. Skiljenämnden uttalade även att kravet på att en investerare ska vara permanent bosatt i en fördragsslutande stat innebär dels ett krav på att investeraren ska ha rättslig status som permanent bosatt i enlighet med den statens lagstiftning, dels ett krav på att investeraren faktiskt bor där permanent.

Skiljenämnden fann vidare att artikel 26 ECT ställer ytterligare krav som måste vara uppfyllda för att någon ska vara en skyddad investerare i den mening som avses i fördraget. Skiljenämnden konstaterade att bestämmelsen enligt sin ordalydelse avser tvister mellan en fördragsslutande stat och en investerare från en annan fördragsslutande stat, rörande en investering som investeraren gjort på den förstnämnda statens område. Detta innebar enligt skiljenämnden ett krav på att en investerare, för att vara skyddad enligt ECT, skulle ha gjort sin investering i en viss fördragsslutande stat medan investeraren var permanent bosatt i en annan fördragsslutande stat, dvs. ha ägnat sig åt en gränsöverskridande transaktion. Enligt skiljenämnden var det inte möjligt för en investerare att skaffa sig skydd enligt ECT genom att först efter att en investering gjorts flytta till en annan fördragsslutande stat. Skiljenämnden uttalade att syftet med ECT är att skydda utländska investerare och inte inhemska investerare som gör investeringar i sin hemstat.

Skiljenämnden fann att Cem Uzan inte var en skyddad investerare eftersom han inte var permanent bosatt i en annan fördragsslutande stat under den tid då han gjorde de påstådda investeringarna, dvs. mellan 1996 och 2000, och anförde att Cem Uzan inte heller hade påstått att han skulle ha varit det. Han var alltså inte en investerare från en annan fördragsslutande stat. Enligt skiljenämnden saknade Cem Uzan redan på grund av detta rätt att påkalla skiljeförfarande mot Turkiet med stöd av den aktuella bestämmelsen.

Skiljenämnden prövade även om Cem Uzan varit permanent bosatt i en annan fördragsslutande stat vid någon senare tidpunkt. Skiljenämnden fann inte visat att han varit permanent bosatt i Storbritannien under åren 2002–2003, då vissa av de över-

trädelser av ECT som han åberopade i skiljeförfarandet ägde rum. Däremot fann skiljenämnden att Cem Uzan hade visat att han varit permanent bosatt i Frankrike sedan år 2009. Enligt skiljenämnden var detta dock inte tillräckligt för att han skulle vara en skyddad investerare med rätt att påkalla skiljeförfarande mot Turkiet enligt ECT. Skiljenämnden avvisade därför hans talan.

Sedan skiljeförfarandet avslutats begärde Cem Uzan den 26 april 2016 och den 17 maj 2016 tilläggsskiljedom i frågan om skiljenämndens behörighet. Yrkandena om tilläggsskiljedom avvisades av skiljenämnden i beslut den 10 maj 2016 respektive den 6 juni 2016.

YRKANDEN

Cem Uzan har yrkat att hovrätten ska (i) förklara skiljedomen ogiltig i dess helhet eller (ii) upphäva skiljedomen helt eller delvis, eller (iii) ändra skiljedomen helt eller delvis.

Turkiet har bestritt käromålet i sin helhet och yrkat att Cem Uzans yrkanden enligt punkten (i) och (ii) ska avvisas alternativt ogillas och att yrkandet enligt punkten (iii) ska ogillas.

Cem Uzan har bestritt avvisningsyrkandena.

Parterna har yrkat ersättning för rättegångskostnader.

Parterna har även yrkat att vissa omständigheter som den andre parten har åberopat ska avvisas. Cem Uzan har yrkat att den av Turkiet åberopade omständigheten att det förligger hinder för honom att väcka talan mot Turkiet eftersom han är turkisk medborgare ska avvisas (se s. 9 i denna dom). Turkiet har yrkat att den av Cem Uzan åberopade omständigheten att skiljenämnden har gjort sig skyldig till ett uppdragsöverskridande alternativt ett handläggningsfel i samband med att nämnden avvisade hans yrkande om tilläggsskiljedom ska avvisas (se s. 17 i denna dom). Parterna har motsatt sig varandras avvisningsyrkanden.

RÄTTSLIGA GRUNDER

Cem Uzan

Skiljedomen eller det sätt på vilket skiljedomen tillkommit är uppenbart oförenligt med grunderna för rättsordningen i Sverige. Skiljedomen är därför ogiltig enligt 33 § första stycket 2 lagen (1999:116) om skiljeförfarande (LSF).

Skiljemännen har överskridit sitt uppdrag alternativt har det utan hans vållande förekommit fel i handläggningen som inverkat på utgången i målet. Skiljedomen ska därför helt eller delvis upphävas (34 § första stycket 2 och 6 LSF).

Skiljenämndens bedömning att den inte var behörig att pröva hans talan är felaktig. Skiljedomen ska därför ändras på så sätt att den upphävs (36 § första stycket LSF).

Republiken Turkiet

Genom skiljedomen avslutade skiljenämnden skiljeförfarandet utan att pröva målet i sak. Skiljedomen kan därför enbart angripas enligt 36 § LSF. Yrkandena enligt 33 och 34 §§ LSF ska därmed i första hand avvisas. I andra hand görs följande gällande.

Skiljedomen eller det sätt på vilket skiljedomen har tillkommit är inte uppenbart oförenligt med rättsordningen i Sverige. Skiljedomen ska därför inte förklaras ogiltig enligt 33 § första stycket 2 LSF.

Skiljenämnden har inte överskridit sitt uppdrag. Det har inte heller förekommit något fel i handläggningen. I vart fall inte något fel som påverkat utgången. Skiljedomen ska därför inte upphävas helt eller delvis enligt 34 § första stycket 2 eller 6 LSF.

Skiljenämndens slutsats att den inte var behörig att pröva Cem Uzans talan är korrekt. Det finns därför inte skäl att ändra skiljedomen på så sätt att den upphävs. Inte heller utgör de invändningar som Cem Uzan i övrigt har anfört mot skiljenämndens handläggning och bedömning av olika frågor grund för ändring av domen med stöd av 36 § LSF.

AV PARTERNA ÅBEROPADE OMSTÄNDIGHETER

Cem Uzan

Skiljenämndens behörighet – talan enligt 36 § LSF

Med investerare i artikel 1(7)(a)(i) ECT avses bl.a. en fysisk person som är permanent bosatt i en fördragsslutande stat i enlighet med dess lagstiftning. Därav följer, vid tillämpningen av artikel 26(1) ECT, att en tvist mellan en fördragsslutande stat och en fysisk person som är permanent bosatt i en annan fördragsslutande stat är en tvist mellan staten och en investerare från en annan fördragsslutande stat, oavsett i vilken stat investeraren är medborgare. De aktuella bestämmelserna ger alltså en fysisk person som är permanent bosatt utomlands rätt att väcka talan mot en stat som han är medborgare i, något som skiljenämnden också kom fram till. Den tolkning som följer av nu aktuella bestämmelsers ordalydelse överensstämmer med ändamålet och syftet med ECT. Denna tolkning har även stöd i förarbetena till ECT och i doktrinen. Även om det skulle finnas en internationell rättsprincip av motsatt innebörd, så har ECT i kraft av lex specialis företräde.

Eftersom Turkiet inte har angripit skiljedomen i enlighet med LSF har Turkiet inte heller rätt att begära att hovrätten ska ompröva skiljenämndens bedömning i denna fråga. Den av Turkiet åberopade omständigheten att det föreligger hinder för honom att väcka talan mot Turkiet eftersom han är turkisk medborgare ska därför avvisas.

Vidare följer av turkisk lag (lag nr 4875 av den 5 juni 2003 om utländska direkt-investeringar) att turkiska medborgare med hemvist utomlands har rätt att påkalla skiljeförfarande mot Turkiet avseende investeringar i Turkiet.

Den enda relevanta tidpunkten för bedömningen av om han är en investerare från en annan fördragsslutande stat med rätt att påkalla skiljeförfarande mot Turkiet enligt artikel 26 ECT, är tidpunkten för hans påkallelse av skiljeförfarandet mot Turkiet, dvs. den 7 mars 2014. Vid denna tidpunkt var han permanent bosatt i Frankrike, som är en fördragsslutande stat till ECT. Han är därför en skyddad investerare enligt ECT med rätt att påkalla ett skiljeförfarande mot Turkiet. Det är en allmänt erkänd rättsprincip

att bedömningen av en parts behörighet att inleda ett internationellt rättsligt förfarande – i avsaknad av en uttrycklig reglering i frågan om den relevanta tidpunkten – ska göras med utgångspunkt i förhållandena vid tidpunkten för talans väckande.

För att han ska vara en skyddad investerare i den mening som avses i ECT krävs inte att han var permanent bosatt i en annan fördragsslutande stat vid tidpunkten för hans investeringar i Turkiet eller vid tidpunkten för Turkiets överträdelser av ECT. Han har dock uppfyllt kravet på att vara permanent bosatt utomlands även vid dessa tidpunkter enligt vad som framgår i det följande.

Han gjorde investeringarna i Turkiet, i form av köp av aktier i bolagen ÇEAŞ och Kepez, under åren 1996–2000. Han var under den tiden permanent bosatt i Storbritannien i enlighet med brittisk lag. Den frågan har avgjorts av brittiska myndigheter. I samband med att han i november 2000 beviljades permanent uppehållstillstånd i Storbritannien fann nämligen brittiska myndigheter att han uppfyllt kraven för att vara permanent bosatt där de senaste fyra åren, dvs. sedan år 1996. För att någon ska beviljas permanent uppehållstillstånd krävs enligt brittisk lag att personen i fråga har gjort Storbritannien till sitt huvudsakliga hem. De brittiska myndigheternas slutsats att han uppfyllt detta krav grundade sig på en allsidig bedömning av hans faktiska situation. Han var alltså faktiskt permanent bosatt i Storbritannien under den aktuella perioden.

Hans talan i skiljeförfarandet avsåg en rad åtgärder från Turkiets sida under tiden 2002–2014, vilka resulterade i att hans investeringar i bolagen ÇEAŞ och Kepez exproprierades utan att han erhöll någon ersättning. Turkiets inblandning i hans investeringar påbörjades i november 2002 då ÇEAŞ och Kepez tvingades att överföra vissa rättigheter och tillgångar till ett statligt bolag (TEIAŞ). Därefter sades bolagens koncessionsavtal upp i juni 2003. Under åren 2002–2003 var han permanent bosatt i Storbritannien där han, som anförts tidigare, beviljats permanent uppehållstillstånd av brittiska myndigheter år 2000. Överträdelserna fortsatte fram till år 2014 då Turkiet beslutade att vissa av bolagens materiella tillgångar skulle överföras till ett annat statligt bolag (EÜAŞ). Vid denna tidpunkt bodde han i Frankrike, där han varit permanent bosatt sedan år 2009.

Uppdragsöverskridanden och handläggningsfel – talan enligt 34 § LSF

Det finns inget hinder mot att angripa en skiljedom varigenom skiljenämnden avslutat skiljeförfarandet utan att pröva målet i sak med stöd av 34 § LSF. Turkiets avvisningsyrkande ska därför avslås.

För skydd enligt ECT uppställde skiljenämnden ett krav på att investeraren, vid tidpunkten för investeringen, skulle vara bosatt i en annan fördragsslutande stat än den där investeringen gjordes. Ett sådant krav saknar stöd i ECT:s ordalydelse eller någon annanstans. Genom sitt agerande överskred skiljenämnden sitt uppdrag. Alternativt har skiljenämnden gjort sig skyldig till ett handläggningsfel som inverkat på utgången i målet.

Skiljenämndens slutsats att tidpunkten för investeringarna var den relevanta tidpunkten för prövningen av om han var en skyddad investerare innebär att skiljenämnden prövade frågan om det förelåg en skyddad investering enligt ECT trots att denna fråga, i enlighet med skiljenämndens beslut om uppdelning den 20 juni 2015, skulle ha prövats i samband med målets prövning i sak. Skiljenämnden har därigenom överskridit sitt uppdrag. Alternativt har skiljenämnden gjort sig skyldig till ett handläggningsfel som inverkat på utgången i målet.

Skiljenämnden har i strid med artikel 1(7)(a)(i) ECT gjort en självständig bedömning av om han var permanent bosatt i Storbritannien i enlighet med brittisk lag. Detta trots att frågan redan avgjorts av myndigheterna i en suverän stat efter en allsidig bedömning av hans faktiska situation. Skiljenämnden var inte behörig att överpröva den bedömning som brittiska myndigheter har gjort. Skiljenämnden tillämpade vidare inte någon standard för sin prövning, vilket nämnden också uttalade i skiljedomen. Nämnden tillämpade inte heller brittisk lag, vilket den var skyldig att göra enligt artikel 1(7)(a)(i). Skiljenämnden har därigenom förfarit grovt vårdslöst. Genom att varken tillämpa ECT eller brittisk lag överskred skiljenämnden sitt uppdrag. Alternativt har skiljenämnden gjort sig skyldig till ett handläggningsfel som inverkat på utgången i målet.

De brittiska myndigheternas beslut att han var permanent bosatt i Storbritannien omfattas dessutom av principen om ömsesidigt erkännande av administrativa handlingar inom Europeiska unionen. Detta innebär att beslutet rörande hans uppehållstillstånd ska anses giltigt enligt internationell rätt, EU-rätt och svensk rätt.

Skiljenämndens beslut den 10 maj och 6 juni 2016 att avvisa hans yrkanden om tilläggsskiljedom strider mot 2010 års skiljedomsregler från SCC (SCC:s regler) och LSF. Hans yrkanden grundade sig på skiljenämndens underlåtenhet att pröva hans påstående om att han var permanent bosatt i Storbritannien när han gjorde sina investeringar i Turkiet under åren 1996–2000. I skiljedomen påstod skiljenämnden att han inte varit – eller påstått sig vara – permanent bosatt i en annan fördragsslutande stat vid tidpunkten för investeringarna, trots att han hade gjort gällande detta i sina inlagor i skiljeförfarandet. Enligt 42 § i SCC:s regler får en part begära att skiljenämnden meddelar en tilläggskiljedom på yrkanden som framförts under skiljeförfarandet, men som inte har avgjorts genom skiljedomen. Vidare framgår av 32 § LSF att skiljemännen får komplettera skiljedomen om de av förbiseende inte har avgjort en fråga som skulle ha behandlats i domen. Genom att felaktigt avvisa hans yrkanden om tilläggskiljedom har skiljenämnden överskridit sitt uppdrag.

Det tog mer än två år för skiljenämnden att besluta om sin behörighet. Detta strider mot 37 § i SCC:s regler som stadgar att en slutlig skiljedom ska meddelas senast sex månader från det att skiljeförfarandet hänsköts till skiljenämnden. Skiljenämndens underlåtenhet att meddela skiljedom inom föreskriven tid utgör grund för att upphäva skiljedomen.

Skiljedomen eller det sätt på vilken den tillkommit strider mot grundläggande svenska rättsprinciper – talan enligt 33 § LSF

Det finns inget hinder mot att angripa en skiljedom varigenom skiljenämnden avslutat skiljeförfarandet utan att pröva målet i sak med stöd av 33 § LSF. Turkiets avvisningsyrkande ska därför avslås.

I beslutet om uppdelning den 20 juni 2015 uttalade skiljenämnden att prövningen av nämndens behörighet skulle innefatta en prövning av om han var bosatt i

Storbritannien vid tidpunkten för de påstådda överträdelserna av ECT. Senare, i "Procedural Order No. 4", uttalade skiljenämnden att datumen för de påstådda överträdelserna hörde till sakfrågan i målet. När skiljenämnden därefter prövade sin behörighet, fann nämnden att det var tidpunkten för investeringarna som var den relevanta tidpunkten för prövningen av om han var en skyddad investerare enligt ECT. Skiljenämnden prövade alltså om det förelåg en skyddad investering trots att nämnden i sitt beslut om uppdelning uttalat att denna fråga hörde till sakfrågan i målet.

Skiljenämnden har följaktligen lämnat motsägelsefull information till parterna. Dessutom har skiljenämnden underlåtit att informera parterna om sina ändrade ställningstaganden. Han har därigenom berövats sin rätt till lika möjlighet att i skälig omfattning utföra sin talan i enlighet med 19 § i SCC:s regler. Skiljenämndens agerande har varit grovt vårdslöst i den mening som avses i 48 § SCC:s regler. Skiljenämndens agerande innebär att skiljedomen och det sätt på vilket den tillkommit är uppenbart oförenligt med grunderna för rättsordningen i Sverige.

Skiljenämnden konstaterade felaktigt att han i skiljeförfarandet inte påstått att han var permanent bosatt i en annan fördragsslutande stat vid de tidpunkter han gjorde sina investeringar i Turkiet. Han hade i sina inlagor i skiljeförfarandet påstått att han var permanent bosatt i Storbritannien när han gjorde sina investeringar i Turkiet åren 1996–2000. Han hade även åberopat bevisning till stöd för detta. Skiljenämnden var skyldig att pröva hans påståenden i denna del. Skiljenämnden har därigenom agerat grovt vårdslöst, vilket ledde till att nämnden felaktigt fann att han var en inhemsk investerare som saknade skydd enligt ECT. Som tidigare anförts begärde han tilläggsskiljedom på grund av att skiljenämnden underlåtit att pröva vad han hade gjort gällande i denna del. Även skiljenämndens felaktiga beslut att avvisa hans yrkanden om tilläggsskiljedom utgör grund för att ogiltigförklara skiljedomen.

Skiljenämnden avslog vidare i beslut den 4 mars 2016 hans begäran om att få åberopa ytterligare dokumentation – akten rörande hans uppehållstillstånd – till stöd för att han var permanent bosatt i Storbritannien vid tidpunkten för investeringarna. Skiljenämnden motiverade sitt beslut med att skiljeförfarandet var stängt och att han inte visat att handlingarna innehöll några nya bevis. Det var dock inte fråga om ny

bevisning utan om underliggande dokumentation till redan åberopad bevisning. Dokumentationen visade att de brittiska myndigheterna grundat sin slutsats på att han haft sitt huvudsakliga hemvist i Storbritannien på det sätt som krävs för att beviljas permanent uppehållstillstånd enligt brittisk lag, dvs. utifrån en allsidig bedömning av hans faktiska situation. Om skiljenämnden hade tillåtit denna dokumentation, vilket den var skyldig att göra, skulle den också ha kommit fram till att han varit permanent bosatt i Storbritannien åren 1996–2000. I samband med avvisningsbesluten den 10 maj och den 6 juni 2016 avslog skiljenämnden på nytt hans begäran om att få åberopa den aktuella bevisningen.

Skiljenämndens underlåtenhet att beakta vad han hade gjort gällande och nämndens beslut att inte tillåta ny bevisning strider mot rådande krav på rättssäkerhet och har inverkat på utgången i målet. Skiljedomen och det sätt på vilket den tillkommit är därför uppenbart oförenligt med grunderna för rättsordningen i Sverige.

Skiljenämndens underlåtenhet att meddela skiljedom inom den tid som stadgas i 37 § SCC:s regler innebär att skiljedomen eller det sätt på vilket den tillkommit är uppenbart oförenligt med grunderna för rättsordningen i Sverige.

Republiken Turkiet

Skiljenämndens behörighet – talan enligt 36 § LSF

Rätten för en investerare att påkalla tvistlösning enligt artikel 26 i ECT gäller endast tvister mellan en fördragsslutande stat och en investerare från en annan fördragsslutande stat. Detta överensstämmer med ECT:s syfte att de fördragsslutande staterna ska främja och skydda investeringar inom deras områden som gjorts av investerare från andra fördragsslutande stater. Turkiets samtycke till tvistlösning enligt artikel 26 omfattar endast sådana tvister som avses i bestämmelsen, dvs. tvister med investerare från andra fördragsslutande stater som har gjort gränsöverskridande investeringar.

Enligt de internationella rättsprinciper som är tillämpliga på tvisten enligt artikel 26(6) ECT får en medborgare i en fördragsslutande stat påkalla skiljeförfarande mot sin hemstat endast i exceptionella situationer. Undantag kan förekomma om hemstaten

formellt medgett det i en traktat. Turkiet har inte lämnat något sådant medgivande i ECT.

Enligt artikel 1(7)(a)(i) ECT kan en medborgare från en fördragsslutande stat endast vara en investerare från den staten. Cem Uzan är och har vid samtliga relevanta tidpunkter varit turkisk medborgare och alltså en investerare från Turkiet. Han kan inte samtidigt vara en investerare från Storbritannien även om han varit permanent bosatt där vid någon tidpunkt. Cem Uzan hade därför inte rätt att påkalla skiljeförfarande mot Turkiet, oavsett var han varit bosatt vid de relevanta tidpunkterna. Det finns alltså ett hierarkiskt förhållande mellan de olika kriterierna för att kvalificera sig som en investerare, som innebär att kriteriet "medborgarskap eller nationalitet" ska prövas före kriteriet "permanent bosatt". Endast om den som påstår sig vara en investerare saknar medborgarskap eller nationalitet i en fördragsslutande stat, kan hans bosättning prövas. Den aktuella bestämmelsen ska tolkas mot bakgrund av sitt syfte. ECT syftar till att skydda utländska investerare och utländska investeringar. Redan mot den bakgrunden kan en person som är medborgare i en fördragsslutande stat inte väcka talan mot sin hemstat. Hovrätten har vid den prövning som ska göras enligt 36 § LSF, rätt att göra en annan bedömning än den som skiljenämnden har gjort. Hovrätten är fri att beakta samtliga omständigheter som åberopas av parterna. Turkiet har inte förlorat rätten att begära att hovrätten omprövar skiljenämndens slutsatser genom att inte klandra skiljedomen, vilket Turkiet som vinnande part i skiljeförfarandet saknat möjlighet att göra.

Definitionen av utländska investerare i turkisk investeringslagstiftning saknar relevans för frågan om skiljenämnden hade behörighet enligt ECT. Dessutom hade den turkiska lagstiftning som Cem Uzan hänvisat till inte ens trätt i kraft när de omtvistade åtgärderna påstås ha ägt rum. Därtill förekommer inte någon turkisk lagstiftning som ger turkiska medborgare bosatta utomlands en rätt att väcka talan mot Turkiet med tillämpning av internationell rätt.

Om hovrätten anser att medborgarskapet inte exkluderar Cem Uzan från att påkalla det aktuella skiljeförfarandet mot Turkiet måste hovrätten pröva om övriga kriterier enligt artikel 26 ECT är uppfyllda.

För att Cem Uzan ska ha rätt att påkalla tvistlösning enligt artikel 26 ECT är det inte tillräckligt att han var permanent bosatt i en annan fördragsslutande stat vid tidpunkten för påkallelsen. Det krävs dessutom att han var permanent bosatt i en annan fördragsslutande stat när de påstådda investeringarna gjordes, dvs. mellan 1996 och 2000, men också när de påstådda överträdelserna i form av expropriation av investeringarna ägde rum, dvs. 2002–2003. De påstådda överträdelserna inträffade från november 2002 till juni 2003 när koncessionsavtalen med ÇEAŞ och Kepez sades upp och faciliteterna återtogs. När investeringen därigenom påstås ha blivit exproprierad har staten per definition inte längre möjlighet att ingripa mot den. Vad Cem Uzan har anfört om att ytterligare överträdelser inträffade under perioden 2013–2014 kan därför inte beaktas.

För att en person ska anses permanent bosatt i en fördragsslutande stat krävs både att personen har rättslig status som permanent bosatt i staten i enlighet med den statens lagstiftning, och dessutom att personen faktiskt också bor där permanent. Med denna definition var Cem Uzan inte permanent bosatt i Storbritannien vid någon av de relevanta tidpunkterna. Detta är också vad skiljenämnden fann när den konstaterade att Cem Uzan inte var permanent bosatt i Storbritannien under perioden 1996–2009. Det bestrids att Cem Uzan beviljades permanent uppehållstillstånd i Storbritannien år 2000. Även om så skulle vara fallet, dvs. att han erhållit en juridisk rättighet att bosätta sig i Storbritannien, visar detta inte att han *faktiskt* var permanent bosatt där.

Uppdragsöverskridanden och handläggningsfel – talan enligt 34 § LSF

Det framgår uttryckligen av 34 § första stycket LSF att när skiljenämnden – såsom i detta fall – avslutat skiljeförfarandet utan att pröva målet i sak på grund av bristande jurisdiktion genom en så kallad avvisningsskiljedom, kan domen inte angripas enligt 34 § LSF. Yrkandet att skiljedomen ska upphävas med tillämpning av 34 § LSF ska därför avvisas.

I vart fall saknas förutsättningar att häva skiljedomen på grund av uppdragsöverskridande eller handläggningsfel.

Skiljenämnden prövade med tillämpning av brittisk rätt Cem Uzans påstående om att han var permanent bosatt i Storbritannien när han gjorde sina investeringar i Turkiet åren 1996 – 2000 och fann att så inte var fallet.

Skiljenämndens slutsats, nämligen att tiden för investeringarna utgjorde en relevant tidpunkt för att avgöra om Cem Uzan var en skyddad investerare, innebär inte att skiljenämnden också prövade frågan om det fanns en skyddad investering enligt ECT. Skiljenämnden har följaktligen inte överskridit sitt uppdrag.

Skiljenämnden hade rätt att göra en självständig bedömning av om Cem Uzan var permanent bosatt i Storbritannien i enlighet med brittisk lag. Skiljenämnden var alltså vid prövningen av sin behörighet inte bunden av det permanenta uppehållstillståndet som påstås ha utfärdats av brittiska myndigheter. Därtill finns domar som meddelats av brittiska domstolar som ger stöd för det motsatta, nämligen att Cem Uzan inte var permanent bosatt i Storbritannien. Det påstådda beslutet att bevilja Cem Uzan permanent uppehållstillstånd i Storbritannien skulle inte visa mer än att han hade rätt att vara permanent bosatt i Storbritannien från det att han beviljades uppehålls-tillståndet, dvs. i november 2000. Det påstådda beslutet skulle alltså inte visa att Cem Uzan faktiskt var permanent bosatt i Storbritannien på det sätt som krävs enligt artikel 1(7)(a)(i) ECT. Innan 2000 hade han inte ens enligt sina egna uppgifter ett tillstånd som gav honom rätten att vistas permanent i Storbritannien. Det bestrids att en princip om ömsesidigt erkännande är tillämplig och att den skulle innebära att beslutet är giltigt enligt internationell rätt, EU-rätt och svensk rätt.

Cem Uzans upprepade begäran om tilläggsskiljedom faller utanför ramen för hovrättens prövning. Den av Cem Uzan åberopade omständigheten, att skiljenämnden gjort sig skyldig till ett uppdragsöverskridande alternativt handläggningsfel i samband med att nämnden avvisade hans yrkanden om tilläggsskiljedom, ska därför avvisas.

Skiljenämnden har inte brutit mot 37 § i SCC:s regler. Skiljenämnden beviljades ytterligare tid för att slutligt avgöra målet och meddelade dom inom den beslutade tiden.

Skiljedomen eller det sätt den tillkommit på strider inte mot grundläggande svenska rättsprinciper – talan enligt 33 § LSF

När skiljenämnden – såsom i detta fall – avslutat skiljeförfarandet utan att pröva målet i sak på grund av bristande jurisdiktion genom en så kallad avvisningsskiljedom, kan domen inte angripas enligt 33 § LSF. Yrkandet att skiljedomen ska ogiltigförklaras med tillämpning av 33 § LSF ska därför avvisas.

I vart fall saknas förutsättningar att ogiltigförklara skiljedomen. De omständigheter som Cem Uzan gör gällande innebär inte ett åsidosättande av någon grundläggande rättsnorm. Bestämmelsen i 33 § första stycket 2 LSF är därför inte tillämplig.

Skiljenämnden har helt korrekt prövat Cem Uzans påstående om att han var permanent bosatt i Storbritannien när han gjorde sina investeringar i Turkiet åren 1996–2000 och funnit att så inte var fallet.

Skiljenämnden har inte prövat frågan om det förelåg en skyddad investering i strid med beslutet om uppdelning den 20 juni 2015. Skiljenämnden kunde pröva och har prövat frågan om Cem Uzan var en investerare i ECT:s mening utan att ta ställning till om det förelåg en skyddad investering. Skiljenämnden har därför varken överskridit sitt uppdrag eller berövat Cem Uzan lika möjlighet att i skälig omfattning utföra sin talan eller på annat sätt agerat i strid med grundläggande rättsnormer.

Skiljenämnden hade fog för sitt beslut att inte tillåta den ytterligare bevisning som Cem Uzan ville åberopa eftersom bevisningen åberopades för sent. Skiljenämnden förklarade handläggningen avslutad den 25 januari 2016. Cem Uzan förklarade först den 2 mars samma år att han ville åberopa ny bevisning utan att motivera varför bevisningen inte hade kunnat åberopas tidigare.

Skiljenämnden har, som anförts tidigare, inte brutit mot den tidsfrist för meddelande av skiljedom som uppställs i 37 § i SCC:s regler.

UTREDNING OCH HANDLÄGGNING I HOVRÄTTEN

Parterna har åberopat skriftlig bevisning.

Målet har, med stöd av 53 kap. 1 § och 42 kap. 18 § första stycket 5 rättegångsbalken, avgjorts utan huvudförhandling.

HOVRÄTTENS DOMSKÄL

Dispositionen av hovrättens domskäl

Målet gäller en skiljedom i vilken skiljenämnden avvisat Cem Uzans talan mot Turkiet eftersom Cem Uzan inte visat sig behörig att påkalla det aktuella skiljeförfarandet, med hänsyn till sina personliga omständigheter (ratione personae). Cem Uzan har fört sin talan mot skiljedomen med inriktning på tre alternativa rättsföljder; ogiltighet (33 § LSF), upphävande (34 § LSF) och ändring (36 § LSF).

Det finns inte något skäl att ta ställning till om en ogiltig skiljedom ska upphävas eller ändras. Hovrätten kommer därför att pröva yrkandet om ogiltigförklaring först och därefter ta ställning till yrkandena om att skiljedomen ska upphävas eller ändras. Under respektive rubrik kommer hovrätten att redogöra för de rättsliga utgångspunkterna för varje prövning, ta ställning till eventuella avvisningsyrkanden och till de omständigheter i sak som parterna har åberopat.

Avslutningsvis kommer hovrätten att sammanfatta sina bedömningar i de olika frågorna.

Sist i domskälen kommer hovrätten att ta ställning till frågan om rättegångskostnader.

Frågan om ogiltighet enligt 33 § LSF

I 33 § första stycket 2 LSF anges att en skiljedom är ogiltig om skiljedomen eller det sätt på vilket skiljedomen tillkommit är uppenbart oförenligt med grunderna för rättsordningen i Sverige.

Turkiet har gjort gällande att bestämmelsen inte är tillämplig på skiljedomar genom vilka ett skiljeförfarande har avslutats utan att tvisten prövats i sak. Denna uppfattning har visst stöd i doktrinen (se Heuman, Skiljemannarätt, s. 535 och Olsson/Kvart, Lagen om skiljeförfarande, s. 138). I annan doktrin uttrycks dock att det inte kan uteslutas att en skiljedom genom vilken en talan har avvisats skulle kunna vara oförenlig med grunderna för rättsordningen i Sverige och att 33 § första stycket 2 LSF kan tillämpas även i dessa fall (se Lindskog, Skiljeförfarande, andra uppl., Zeteo den 1 maj 2016, kommentaren till 2 § punkt 4.4.3 och 36 § punkt 3.2 och fotnot 8).

Enligt hovrätten talar ordalydelsen och uppbyggnaden av 33 § första stycket 2 LSF för att bestämmelsen kan tillämpas även när en skiljetvist inte prövats i sak. Det finns inte heller något uttalande i förarbetena som talar mot att bestämmelsen skulle kunna tillämpas i dessa fall (se prop. 1998/99:35 s. 138 f. och 234). En talan enligt 33 § första stycket 2 LSF leder dessutom till en annan rättsföljd än en talan enligt 36 § LSF, och får föras utan inskränkning i tiden. Till detta kommer att det inte finns något skäl för en domstol att ta ställning till om en ogiltig skiljedom ska upphävas eller ändras, och att en sådan prövning inte heller bör göras. Enligt hovrätten talar alltså såväl bestämmelsens utformning som ändamålsskäl för att en talan enligt 33 § första stycket 2 LSF kan föras även beträffande skiljedomar där förfarandet avslutats utan någon materiell prövning. Turkiets yrkande om avvisning av Cem Uzans ogiltighetstalan ska därför avslås.

I sak gör hovrätten följande bedömning.

Svensk rätt intar en restriktiv inställning till möjligheten att få en skiljedom ogiltigförklarad med stöd av 33 § första stycket 2 LSF. Av förarbetena framgår att bestämmelsen är avsedd att omfatta endast höggradigt stötande fall då grundläggande rättsprinciper av materiell eller processuell art har åsidosatts och att bestämmelsen på grund av sitt snäva tillämpningsområde ytterst sällan blir aktuell att tillämpa. Det anges vidare att ogiltighet bör följa endast om skiljedomen kränker det allmännas eller tredje mans intresse. Som exempel på ett fall där bestämmelsen skulle kunna aktualiseras nämns att en skiljeman genom hot eller muta förmåtts att meddela en viss

skiljedom. (Se a. prop. s. 141 f. och 234.) En skiljedom bör även kunna anses vara ogiltig när den grundar sig på falsk bevisning som varit direkt avgörande för utgången (se uttalanden i Svea hovrätts dom den 9 december 2016 i mål nr T 2675-14 och Heuman, a.a., s. 600 f.). Möjligheterna att få en skiljedom ogiltigförklarad är alltså mycket begränsade och hänför sig till fall där det vore stötande för det allmänna att ge domen legitimitet.

De omständigheter som Cem Uzan anfört som grund för att skiljedomen ska anses vara ogiltig är sammanfattningsvis att skiljedomen inte meddelats i rätt tid, att skiljenämnden prövat en materiell fråga inom ramen för frågan om nämndens behörighet, att skiljenämnden lämnat motsägelsefull information till parterna och därmed berövat honom rätten att i skälig omfattning utföra sin talan, att skiljenämnden underlåtit att pröva hans påstående om att han var permanent bosatt i Storbritannien under åren 1996–2000, att han inte tillåtits åberopa ytterligare dokumentation efter att skiljeförfarandet stängts och att skiljenämnden avvisat hans yrkanden om tilläggsskiljedom. Dessa omständigheter är – även om de skulle föreligga – inte av den allvarliga karaktär att skiljedomen eller det sätt på vilket skiljedomen tillkommit kan anses vara uppenbart oförenligt med grunderna för rättsordningen i Sverige. Cem Uzans talan om ogiltighet ska därför ogillas.

Frågan om upphävande enligt 34 § LSF

I 34 § LSF anges att en skiljedom som inte kan angripas enligt 36 § LSF helt eller delvis ska upphävas efter att en part klandrat den, om vissa förutsättningar är uppfyllda. Det följer enligt hovrättens mening redan av bestämmelsens ordalydelse att den inte är tillämplig om det är möjligt att föra en talan enligt 36 § LSF (se även Olsson/Kvart, a.a., s. 155, och Heuman, a.a., s. 535, jfr Lindskog, a.a., kommentaren till 34 § LSF, punkt 7.2.4).

Cem Uzan för en talan om att skiljedomen om avvisning ska ändras med stöd av 36 § LSF, vilken talan nu är föremål för hovrättens prövning. Vid detta förhållande är det inte möjligt att samtidigt föra en talan enligt 34 § LSF. Cem Uzans klandertalan enligt 34 § LSF ska därför avvisas. Hovrätten saknar då anledning att ta ställning till

Turkiets avvisningsyrkande avseende av Cem Uzan åberopade omständigheter i denna del.

Frågan om ändring enligt 36 § LSF

Utgångspunkter för prövningen av skiljenämndens behörighet

En prövning enligt 36 § LSF av en skiljedom genom vilken en skiljenämnd avslutat ett förfarande på grund av att den ansett sig sakna behörighet att pröva de hänskjutna frågorna i sak innebär att behörighetsfrågan prövas på nytt av hovrätten. Om hovrätten kommer fram till att skiljenämnden har gjort en felaktig bedömning ska skiljedomen upphävas (se a. prop. s. 238 samt Olsson/Kvart, a.a., s. 156). Hovrätten handlägger målen enligt rättegångsbalkens bestämmelser om rättegången i tingsrätt (53 kap. 1 § rättgångsbalken). Det är parterna som förfogar över processen genom att föra in bevisning och relevanta omständigheter. Något hinder för parterna att föra in andra omständigheter eller åberopa annan bevisning i hovrätten jämfört med vad som gjordes i skiljeförfarandet finns inte (jfr Lindskog, a.a., kommentaren till 36 § LSF punkt 4.2.2). Det finns skäl att framhålla att hovrätten inte har tillgång till materialet från skiljeförfarandet, om parterna inte ger in det. Hovrättens bedömning av behörighetsfrågan kan alltså komma att göras utifrån ett delvis annat underlag än det skiljenämnden haft tillgång till.

Cem Uzan har yrkat att hovrätten ska avvisa den av Turkiet åberopade omständigheten att hans medborgarskap hindrar honom från att påkalla det aktuella skiljeförfarandet. Mot bakgrund av att det står parterna fritt att bestämma vilka omständigheter som ska göras gällande under prövningen i hovrätten finns det inte någon grund för att avvisa omständigheten, som för övrigt åberopades även i skiljenämnden. Yrkandet om avvisning ska därför avslås.

När det gäller de faktiska omständigheterna i målet kan det inledningsvis konstateras att det är ostridigt att Turkiet, Storbritannien och Frankrike har tillträtt ECT och alltså är fördragsslutande stater i fördragets mening. Parterna är också överens om att Cem Uzan är turkisk medborgare och inte har medbogarskap eller nationalitet i någon annan föredragsslutande stat. Turkiet har vidare uppgett att man numera inte ifrågasätter att

Cem Uzan är permanent bosatt i Frankrike sedan år 2009. Det är slutligen ostridigt att de påstådda investeringarna skett i Turkiet. Parterna är emellertid oense om Cem Uzan vid något tillfälle varit permanent bosatt i Storbritannien.

För att en skiljenämnd ska vara behörig att pröva en tvist måste parterna ha kommit överens om detta. I internationella investeringstvister har staterna vanligen lämnat sitt samtycke till att delta i skiljeförfarandet i en traktat mellan två eller flera stater. Ett sådant samtycke kan betraktas som ett erbjudande från staterna till vissa kvalificerade investerare att delta i ett internationellt skiljeförfarande. Skyldigheten för staten att underkasta sig skiljeförfarandet uppkommer när en kvalificerad investerare påkallar skiljeförfarandet i enlighet med vad staten gett sitt samtycke till. (Se bl.a. Dugan m.fl. Investor-State Arbitration, s. 220 f. och Dolzer/Schreuer, Principles of international investment law, andra uppl., s. 254 f.) Det är – som också skiljenämnden konstaterat (se skiljedomen p. 135) – en väl etablerad internationell rättsprincip att samtycket till att delta i skiljeförfarandet klart och otvetydigt ska omfatta en tvist som den uppkomna (se t.ex. skiljedomen av den 8 februari 2005 om jurisdiktion i tvisten mellan Plama Consortium Limited och Bulgarien, ICSID mål nr ARB/03/24, p. 198). För att Cem Uzan ska ha rätt att påkalla skiljeförfarandet mot Turkiet krävs alltså att det kan fastställas att Turkiet, genom ECT, har samtyckt till att underkasta sig skiljeförfarandet i förhållande till en person med de personliga egenskaper som Cem Uzan har åberopat (ratione personae).

I ECT återfinns de fördragsslutande staternas samtycke till att delta i skiljeförfarandet i artikel 26. Artikel 26(1) i ECT upptar fyra kriterier som måste vara uppfyllda för att artikeln ska aktualiseras, och där det första kriteriet innebär att det ska föreligga en tvist mellan en fördragsslutande stat och en investerare från en annan fördragsslutande stat (se också Amkhan, Consent to submit investment disputes to arbitration under Article 26 of the Energy Charter Treaty, International Arbitration Law Review, 2007, s. 67).

Den aktuella tvisten gäller Turkiet, som är en fördragsslutande stat enligt ECT. För att det första kriteriet i artikel 26(1) ECT ska vara uppfyllt krävs därutöver alltså att Cem Uzan anses vara en investerare från en annan fördragsslutande stat i artikelns mening.

Hovrätten kommer i det följande först att behandla definitionen av begreppet investerare i ECT och därefter hur begreppet ska förstås inom ramen för de fördragsslutande staternas samtycke till att delta i ett skiljeförfarande enligt artikel 26. Slutligen kommer hovrätten att pröva om Cem Uzan med utgångspunkt i de faktiska omständigheter som förts fram i målet omfattas av det samtycke till skiljeförfarande som Turkiet lämnat genom artikel 26.

Som anförts ovan under rubriken Bakgrund ska tolkningen av ECT ske enligt de principer för traktattolkning som anges i Wienkonventionen. Utgångspunkten för tolkningen är alltid traktatens ordalydelse (artikel 31). Är ordalydelsen klar blir den i princip också slutpunkten för tolkningen. Traktaten ska tolkas i överenstämmelse med den gängse meningen av traktatens uttryck sedda i sitt sammanhang och mot bakgrund av traktatens ändamål och syfte. En traktats ändamål och syfte är inte ett självständigt tolkningsmedel, utan en del av den tolkningsoperation som ska göras enligt artikel 31 för att förstå traktatens gängse mening. (Se Svea hovrätts dom den 9 december 2016 i mål nr T 2675-14 och Svea hovrätts dom den 18 januari 2016 i mål nr T 9128-14 med där gjorda hänvisningar.) För att bekräfta en tolkning enligt artikel 31 eller för att fastställa innebörden när en tolkning enligt artikeln inte undanröjer tvetydigheter eller oklarheter alternativt leder till ett uppenbart orimligt eller oförnuftigt resultat kan kompletterande tolkningsmedel, innefattande förarbetena till traktaten och omständigheterna vid dess ingående, användas (artikel 32).

Definitionen av investerare i ECT

Enligt artikel 1(7)(a)(i) ECT definieras begreppet investerare i förhållande till en fördragsslutande stat som en fysisk person som har medborgarskap eller nationalitet eller är permanent bosatt (permanently residing) i den staten i enlighet med dess lagstiftning. Cem Uzan har gjort gällande att bestämmelsen ska tolkas så att en person är en investerare i ECT:s mening så snart han eller hon uppfyller något av kriterierna i artikeln i förhållande till en fördragsslutande stat, och att det inte spelar någon roll om personen dessutom är medborgare i en annan fördragsslutande stat och alltså uppfyller kriterierna även i förhållande till den staten. Turkiet har å sin sida gjort gällande att en person som är medborgare i en fördragsslutande stat aldrig i förhållande till medborgarstaten kan betraktas som en investerare från någon annan stat, och att

kriteriet att vara permanent bosatt i ett land endast blir aktuellt att pröva när en person som påstår sig vara en investerare saknar medborgarskap eller nationalitet i en fördragsslutande stat.

Hovrätten konstaterar att artikel 1(7)(a)(i) ECT språkligt sett är neutral och allmänt hållen (se även bl.a. skiljedomen av den 30 november 2009 om jurisdiktion i tvisten mellan Veteran Petroleum Limited och Ryssland, PCA mål nr AA 228 p. 413). Enligt hovrätten, som läst artikeln på flera av de officiella språkversionerna, kan artikeln läsas både på det sätt som Cem Uzan gör gällande och på det sätt som Turkiet förespråkar men ordalydelsen talar närmast för att det inte finns någon hierarki mellan de olika kriterierna, och att en fysisk person alltså i och för sig i enlighet med definitionen skulle kunna betraktas som en investerare från flera olika fördragsslutande stater. Så långt uppfyller Cem Uzan, utifrån vad han själv påstår, kraven för att kunna betraktas som en investerare från flera stater. En tolkning av enbart artikel 1(7)(a)(i) besvarar dock inte den centrala frågan i målet, dvs. om Cem Uzan har rätt att påkalla det aktuella skiljeförfarandet mot Turkiet. För att kunna ta ställning till den frågan måste – som även skiljenämnden angett (se skiljedomen p. 145) – artikel 1(7)(a)(i) läsas tillsammans med tvistlösningsmekanismen i artikel 26 ECT.

Investerare från en annan fördragsslutande stat

Den fördragsslutande statens samtycke till att delta i ett skiljeförfarande omfattar i enlighet med artikel 26 ECT investerare från en annan fördragsslutande stat rörande investeringar som den senare gjort i den förstnämndas område. Hovrätten delar skiljenämndens bedömning att formuleringarna i artikel 26 innebär att det finns ett gränsöverskridande/transnationellt element i artikeln. Skiljenämnden kvalificerar detta element genom att ta ställning till om de påstådda investeringarna innebär en gränsöverskridande transaktion. Endast om så anses vara fallet är investeraren skyddad enligt ECT. (Se skiljedomen p. 146–153.) Enligt hovrättens mening är emellertid den första frågan som måste besvaras om Turkiet, genom artikel 26, samtyckt till att delta i ett skiljeförfarande mot en turkisk medborgare på grund av dennes påstådda permanenta bosättning i en annan fördragsslutande stat.

Av artikel 26 ECT läst tillsammans med artikel 1(7)(a)(i) ECT framgår att en person som påkallar ett skiljeförfarande mot den stat där han eller hon är medborgare alltid uppfyller kriterierna för att vara en investerare från medborgarstaten. Det framstår då, enligt hovrätten, som mycket tveksamt att en sådan investerare – i förhållande till sin medborgarstat – samtidigt skulle kunna anses vara en investerare från en annan fördragsslutande stat på grund av att han eller hon bosatt sig där.

Mot en tolkning som innebär att samtycket i artikel 26(1) ECT omfattar investerare som är medborgare i den stat som tvisten gäller talar också artikel 26(7) ECT. Av den artikeln framgår att juridiska personer som har samma nationalitet som den fördragsslutande stat som tvisten gäller under vissa förutsättningar ändå ska behandlas som medborgare från en annan fördragsslutande stat. Att det särskilt reglerats när en juridisk person med viss nationalitet ska kunna påkalla ett internationellt skiljeförfarande mot sin "hemstat" talar för att samtycket i övrigt inte omfattar personer som är medborgare i den stat som tvisten gäller.

Vidare är, enligt artikel 2 ECT, syftet med fördraget att främja ett långsiktigt samarbete inom energiområdet. Genom fördraget avsågs att etablera ett stabilt och icke-diskriminerande juridiskt ramverk som skulle gynna gränsöverskridande samarbeten och investeringar samt bl.a. främja och skydda utländska investeringar. De utländska investerarna skulle skyddas mot de största politiska riskerna, bl.a. diskriminering och expropriation, genom fördragets bestämmelser. Skyddet skulle förstärkas genom tvistlösningsmekanismen i artikel 26 ECT, eftersom det fanns en oro beträffande neutraliteten, kompetensen och effektivitetet hos de nationella domstolarna i vissa av de fördragslutande staterna. (Se Energy Charter Secretariat, The Energy Charter Treaty: A Reader's Guide, 2002, s. 9 f., 19 och 51.) Syftet beskrivs på samma sätt i de rättsutlåtanden av professor Alain Pellet och professor Adnan Amkhan Bayno som getts in i målet.

Det förhållandet att syftet med fördraget är att främja internationella investeringar och motverka diskriminering av utländska investerare, talar enligt hovrätten starkt mot att personer som är medborgare i den stat som tvisten gäller ska anses uppfylla kravet på att vara en investerare från en annan fördragslutande stat enbart genom att permanent

bosätta sig i en annan stat än medborgarstaten. Med hänsyn till att syftet med ECT var att energimarknaden skulle bli mer marknadsliberal kan det i och för sig ha funnits en avsikt att vidga investerarbegreppet genom att ge permanent bosatta personer skydd. Det finns dock ingenting som tyder på att avsikten med fördraget var att ge staternas egna medborgare tillgång till en internationell tvistlösningsmekanism i förhållande till den egna staten vid sidan av de nationella domstolarna.

Enligt hovrättens bedömning måste artikel 26 ECT – tolkad efter sin lydelse och uppbyggnad i förening med fördragets ändamål och syfte – förstås på så sätt att det samtycke till skiljeförfarande som staterna lämnat inte omfattar egna medborgare som bosatt sig permanent i en annan fördragsslutande stat.

För att bekräfta den tolkning som gjorts kan, som tidigare anförts, kompletterande tolkningsmedel användas.

I det rättsutlåtande från professor Adnan Amkhan Bayno som getts in i målet beskrivs de förhandlingar som förekom innan artiklarna 1(7)(a)(i) och 26 ECT fick sin slutliga utformning. I utlåtandet anförs att det inte finns någonting i förhandlingshistoriken som tyder på att avsikten med fördraget var att ge en investerare rätt att påkalla skiljeförfarande mot den stat där han eller hon är medborgare på grund av att investeraren bosatt sig i en annan fördragsslutande stat. Några uttalanden eller omständigheter i samband med tillkomsten av ECT som talar mot den tolkning som hovrätten gjort har inte presenterats i målet.

Det är vidare – som bl.a. professor Alain Pellet framhållit i sitt rättsutlåtande – en internationell rättsprincip att en privatperson inte kan få till stånd en internationell rättsprocess mot en stat där han eller hon är medborgare såvida inte staten uttryckligen har accepterat detta eller personen har dubbla medborgarskap. I sistnämnda fall har en stat ansetts kunna hållas ansvarig för agerande gentemot statens egna medborgare om personen visat att han eller hon har en betydligt starkare anknytning till den andra stat där personen också är medborgare (dominant and effective nationality). Principen om hur dubbla medborgarskap ska hanteras har ansetts kunna tillämpas även i internationella investeringstvister när det saknats en uttrycklig reglering av frågan (se

Dugan m.fl., a.a. s. 291–304). Hovrättens slutsats om hur artikel 26 ECT ska tolkas är alltså väl förenlig med internationella rättsprinciper.

Vad Cem Uzan anfört om innehållet i turkisk lagstiftning påverkar inte hovrättens bedömning eftersom inhemsk lagstiftning inte kan tillmätas någon betydelse vid tolkningen av staternas samtycke till skiljeförfarande enligt artikel 26 ECT.

Att en investerare utifrån den neutrala och allmänt hållna definitionen i artikel 1(7)(a)(i) ECT skulle kunna uppfatta att det finns en möjlighet att påkalla ett skiljeförfarande mot den stat där han eller hon är medborgare om personen uppfyller kriterierna för att vara investerare även i förhållande till en annan fördragsslutande stat kan inte heller utvidga omfattningen av det samtycke till skiljeförfarande som de fördragsslutande staterna har enats om.

Det anförda innebär att artikel 26 ECT inte ger medborgare i en stat rätt att påkalla ett skiljeförfarande mot den staten för att han eller hon bosatt sig permanent i en annan fördragsslutande stat.

Hovrättens slutsatser om Cem Uzans rätt att påkalla skiljeförfarandet

Hovrättens bedömning i det föregående leder till att Cem Uzan, som är turkisk medborgare, inte var behörig att påkalla det aktuella skiljeförfarandet mot Turkiet oavsett om han är eller vid något tillfälle har varit permanent bosatt i en annan fördragsslutande stat. Skiljenämndens slutsats att den saknar behörighet att avgöra tvisten på grund av bristande ratione personae var alltså korrekt. Cem Uzans talan enligt 36 § LSF kan således inte vinna bifall på denna grund.

Övriga omständigheter anförda under 36 § LSF

Cem Uzan har framställt flera invändningar mot skiljenämndens handläggning som hovrätten inte har tagit ställning till eftersom hans talan enligt 34 § LSF har avvisats. Enligt förarbetena till 36 § LSF kan handläggningsfel emellertid bedömas även inom ramen för prövningen enligt den bestämmelsen (se a. prop. s. 155 och 238 samt Olsson/Kvart, a.a., s. 156).

I målet har hovrätten tagit ställning till skiljenämndens behörighet. Det har stått parterna fritt att utforma sin talan och åberopa den bevisning de önskat i hovrätten. Majoriteten av de brister Cem Uzan gjort gällande har därmed kunnat läkas under hovrättsprocessen. Någon anledning att pröva de övriga handläggningsfel som Cem Uzan gjort gällande, vilka inte har någon betydelse för bedömningen av skiljenämndens behörighet, finns inte. (Se även Lindskog, a.a., kommentaren till 36 §, punkten 4.2.2 och fotnot 19.)

Sammanfattning av hovrättens bedömning

Hovrätten har kommit fram till att Cem Uzans talan om ogiltighet enligt 33 § första stycket 2 LSF ska ogillas och att hans klandertalan enligt 34 § LSF ska avvisas.

Vidare har hovrätten kommit fram till att artikel 1(7)(a)(i) och artikel 26 ECT måste förstås så att staternas samtycke till att delta i ett skiljeförfarande inte omfattar medborgare från den stat som tvisten gäller när denne bosatt sig permanent i en annan fördragsslutande stat. Hovrätten har mot bakgrund av detta funnit att Cem Uzan i egenskap av turkisk medborgare inte hade rätt att påkalla skiljeförfarandet gentemot Turkiet enligt artikel 26 ECT och att skiljenämndens slutsats att den saknar behörighet att avgöra en sådan tvist var korrekt. Hovrätten har slutligen funnit att det inte finns något skäl att ändra skiljedomen på grund av de handläggningsfel som Cem Uzan gjort gällande. Även Cem Uzans talan om ändring enligt 36 § LSF ska därför ogillas.

Rättegångskostnader

Hovrättens bedömning av målet innebär att Cem Uzan, som tappande part, ska ersätta Turkiet för dess rättegångskostnader (se 18 kap. 1 § rättegångsbalken).

Turkiet har yrkat ersättning för rättegångskostnader med 371 633 USD och 137 130 CHF, varav 371 481 USD och 136 818,44 CHF avser ombudsarvode och resterande belopp utlägg. Med hänsyn till målets art och vad som förekommit i hovrätten får den begärda ersättningen anses skälig.

ÖVERKLAGANDE

Enligt 43 § andra stycket LSF får hovrättens dom överklagas bara om rätten anser det vara av vikt för ledningen av rättstillämpningen att överklagandet prövas av Högsta domstolen. Hovrätten anser att det inte finns skäl att tillåta att avgörandet överklagas.

Hovrättens avgörande får inte överklagas.

I avgörandet har deltagit hovrättsråden Ulrika Beergrehn, Kerstin Norman och Lina Forzelius, referent.

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ARTICLE 26 OF THE ENERGY CHARTER TREATY AND THE 2010 RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

CEM CENZIG UZAN
(Claimant)

v.

THE REPUBLIC OF TURKEY
(Respondent)

AWARD ON RESPONDENT'S BIFURCATED PRELIMINARY OBJECTION

Arbitration V 2014/023

April 20, 2016

Members of the Arbitral Tribunal:
Mr. Bernardo M. Cremades (Chairperson)
Mr. Dominque Carreau (Co-Arbitrator)
Mr. Philippe Sands QC (Co-Arbitrator)

Secretary to the Arbitral Tribunal:
Mr. Daragh M. Brehony

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This Award on Respondent's Bifurcated Preliminary Objection is issued in the SCC Arbitration V 2014/023 pursuant to Article 26 of the Energy Charter Treaty (the "**ECT**") and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce in force as of January 1, 2010 (the "**SCC Rules**").

I. INTRODUCTION

A. Parties

1. The **Claimant** in this arbitration is Cem Cengiz Uzan, a Turkish national born on December 26, 1960 in Istanbul, Turkey. The Claimant is currently residing in Paris, France.

2. The Claimant is represented by:[1]

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Mr. Didier Bollecker (d.bollecker@caavocat.com)
CAA Juris Europae
11a rue du Fossé des Treize
F- 67000 Strasbourg

[1] The Claimant was previously represented, until December 9, 2015, by:

Mr. Alexandre de Fontemichel (adefontmichel@slvf-associes.com)
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Mr. Alexandre Meyniel (ameyniel@slvf-associes.com)
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Mr. Armando Betancor Alamo (betancor@alasabogaods.es)
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Mr. Pierre-Emanuel Dupont (p.dupont@lcilp.org)
Consultant
London Centre of International Law Practice
Gray's Inn Chamber 19-21
High Holborn
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Tel: (+44) 20 7404 5029

3. The **Respondent** in this arbitration is The Republic of Turkey.

4. The Respondent is represented by:

Dr. Veijo Heiskanen (vheiskanen@lalive.ch)

Mr. Matthias Scherer (mscherer@lalive.ch)
Ms. Laura Halonen (lhalonen@lalive.ch)
Mr. David Bonifacio (dbonifacio@lalive.ch)
Ms. Emilie McConaughey (emcconaughey@lalive.ch)
Mr. Alptug Tokser (atokeser@lalive.ch)
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Fax: (+41) 58 105 20 60

5. The Members of the Arbitral Tribunal are:

Prof. Bernardo M. Cremades Sanz-Pastor (bcremades@bcremades.com)
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B. Background of the Dispute

6. The Claimant has commenced these proceedings pursuant to Article 26 of the ECT, and in accordance with Article 2 of the SCC Rules. The dispute arises out of an investment said to have been made by the Claimant in the territory of the Respondent, and the alleged unlawful seizure and expropriation of that investment by the Respondent in violation of a number of provisions of the ECT.

7. The Claimant argues that the Respondent illegally expropriated two vertically integrated electric utility companies: Çukurova Elektrik A.Ş. ("**ÇEAŞ**") and Kepez Eletrik T.A.Ş. ("**Kepez**") (together the "**Companies**"). The Companies were established respectively in 1952 and 1953. The Respondent initially owned 35% of the shares in ÇEAŞ and 40% of the shares in Kepez. The Claimant argues that he is currently (i) the direct owner of 8.64%, and indirect owner of 2.7%, of the shares in ÇEAŞ, and (ii) the direct owner of 9.89%, and indirect owner of 6.09%, of the shares in Kepez.

8. Having operated under various agreements since the 1950s, the Companies were granted 50-year Concession Agreements which were adopted and executed on March 9, 1998. The Claimant alleges that the Companies operated normally for a number of years but that eventually, in the context of intense political rivalry between the Claimant's newly established political party (the Genç Party) and the political party then in power in Turkey, the Respondent government attempted to seize the assets and the rights of the Companies by enacting discriminatory laws and carrying out measures that were aimed at dispossessing the Claimant of his investment. Such actions, the Claimant alleges, included the cancellation of the Concession Agreements and, the failure of a corrupt court system to properly remedy the illegal measures, as well as the instituting of state wide legal actions against the Claimant and his family that bore the sole purpose of harassing and intimidating the Claimant. The actions in question occurred in or around November 2002, and according to the Claimant continued until at least 2013. The Claimant

argues that the Respondent has breached a number of provisions of the ECT in this regard.

9. The Respondent asserts that the Concession Agreements were terminated for breach due to the Companies refusal to comply with new laws regarding the transmission of energy in Turkey. The Respondent further states that the Claimant is a serial litigator who has brought numerous unsuccessful claims in both local Turkish courts and before international tribunals, either directly himself or through companies owned by the Uzan family. The Claimant and his family have been convicted of a number of frauds and have also received prison sentences relating thereto. These judicial proceedings constitute part of the Claimant's allegations of judicial harassment and intimidation.

10. The Respondent has made a number of preliminary objections regarding the jurisdiction and admissibility of the Claimant's claims, as well as objections relating to abuse of the arbitral process. In its Award on Security for Costs and Bifurcation, dated July 20, 2015, the Tribunal granted the Respondent's request for bifurcation of its objection as to jurisdiction *ratione personae*. The Tribunal did not grant bifurcation of the Respondent's further preliminary objections, and also denied the Respondent's request for security for costs.

II. PROCEDURAL HISTORY

A. Request for Arbitration

11. On March 7, 2014, the Claimant filed a Request for Arbitration with the SCC seeking to institute arbitral proceedings under Article 26(4)(c) of the ECT.

12. On May 2, 2014, the Respondent filed its Answer to the Request for Arbitration.

B. Constitution of the Arbitral Tribunal

13. In its Request for Arbitration, dated March 7, 2014, the Claimant nominated Prof. Dominique Carreau as Co-Arbitrator.

14. By letter dated May 5, 2014, the Respondent nominated Prof. Philippe Sands QC as Co-Arbitrator.

15. By letter dated June 25, 2014, the Respondent informed the SCC that the co-arbitrators, in consultation with the Parties, would seek to agree on the Chairperson by July 4, 2014.

16. By letter dated July 15, 2014, the SCC notified the Parties that the Co-Arbitrators had nominated Prof. Bernardo M. Cremades as the Chairperson of the Tribunal.

C. Resolution of Procedural Matters

1. Bifurcation

17. By letter dated September 30, 2014, the Respondent explained that talks regarding the conduct of the arbitral proceedings had broken down, and the Respondent filed its Request for Bifurcation.

18. On October 19, 2014, the Claimant filed its Answer to the Respondent's Request for Bifurcation dated October 17, 2014.

19. Both Parties requested an in person meeting before the Tribunal in order to resolve preliminary issues relating to bifurcation and the Respondent's application for security for costs (the Respondent by letter dated October 2, 2014, and the Claimant by letter dated October 19, 2014).

20. Following a telephone conference held on October 20, 2014, by letter dated October 22, 2014, the Tribunal instructed the Parties that it had decided to postpone its decision with regard to the requests for bifurcation and security for costs. The Tribunal decided that the Parties should first file their Statement of Claim and Statement of Defence before the Tribunal can rule on the preliminary issues.

21. On February 24, 2015, the Claimant submitted its Statement of Claim and accompanying exhibits.

22. On June 24, 2015, the Respondent submitted its Statement of Defence and accompanying exhibits.

23. On July 2, 2015, the hearing on security for costs and bifurcation was held at Hotel Wellington, Calle Velázquez 8, 28001, Madrid, Spain.

24. On July 20, 2015, the Tribunal issued its Award on Security for Costs and Bifurcation, in which the Tribunal decided to bifurcate a single issue, namely the Respondent's preliminary objection relating to *ratione personae*.

2. Submissions on *Ratione Personae*, Document Production and Requests for Interim Measures

25. On July 29, 2015, the Claimant submitted a request for the production of documents.

26. By email dated August 3, 2015, the Tribunal stated that the Respondent must respond to the document production request, and produce any responsive documents by August 17, 2015.

27. On August 17, 2015, the Respondent provided its response to the Claimant's document production requests, and separately produced to the Claimant the documents to which it did not object to the production thereof.

28. By letter dated August 24, 2015, the Claimant objected to the Respondent's refusal to disclose certain documents and requested a number of reliefs from the Tribunal in this regard.

29. On September 1, 2015, the Tribunal issued Procedural Order No. 4, accompanied by the Tribunal's decision on the Claimant's document production requests.

30. On September 22, 2015, the Claimant submitted its Reply on the Preliminary Objection to Jurisdiction *Ratione Personae*.

31. By letter dated October 1, 2015, the Claimant filed a Second Request for Interim Measures relating to the forensic examination of documents.

32. On October 6, 2015, the Respondent submitted its document production requests, as well as a request for interim measures relating to the forensic examination of documents.

33. On October 8, 2015, the Respondent submitted its Observations on the Claimant's Second Interim Measures Request.

34. On October 8, 2015, the Claimant submitted its response to the Respondent's Request for Interim Measures.

35. By email dated October 9, 2015, the Tribunal decided "that neither of the Parties' requests are sufficiently urgent to warrant the forensic inspection of documents and exhibits. The Tribunal will, at a later point in time, decide whether it is necessary for any document or exhibit to be forensically inspected. Ultimately, the Tribunal will examine all of the relevant circumstances in determining the weight, relevance, and credibility of the evidence presented before it at the Hearing on Jurisdiction."

36. In the same communication dated October 9, 2015, the Tribunal set down a timetable for the exchange of submissions on the Respondent's document production request.

37. On October 20, 2015, the Claimant submitted its response to the Respondent's document production request.

38. On October 23, 2015, the Respondent submitted further comments on its document production request and its response to the Claimant's objections in this regard.

39. On October 30, 2015, the Tribunal issued Procedural Order No. 5, accompanied by the Tribunal's decision on the Respondent's document production requests.

40. On November 20, 2015, the Respondent submitted its Rejoinder on Bifurcated Procedural Issue.

41. On December 22, 2015, the Claimant sought to submit the legal opinion of Mr. Francois Sureau.

42. On January 4, 2016, the Tribunal admitted the legal opinion of Mr. Francois Sureau into evidence.

3. Hearing on *Ratione Personae* Logistics

43. By email dated September 28, 2015, the Tribunal communicated to the Parties its intent to begin making preparations for the Hearing on the Respondent's Bifurcated Preliminary Objection, scheduled to begin on January 18, 2016, and in this regard sought proposals from the Parties regarding the venue of the hearing and the recording of an official transcript.

44. After a number of exchanges between the Parties regarding the location of the Hearing, by email dated December 22, 2015, the Tribunal stipulated that the Hearing should take place in Paris, France, in order to allow the Claimant to be cross-examined in person. The Tribunal decided that the Hearing take place at the ICC Hearing Centre, 112 avenue Kléber, 75016, Paris.

45. On January 18 and 19, 2016, the Hearing on the Respondent's Bifurcated Preliminary Objection took place in Paris, France.

46. In attendance at the Hearing, on behalf of the Claimant were:

Mr. Cem Cengiz Uzan, *Claimant*
Mr. Didier Bollecker, *Counsel*
Ms. Eve-Marine Bollecker, *Counsel*
Mr. Clifford J. Hendel, *Counsel*
Mr. Armando Betancor Alamo, *Counsel*
Mr. Achilleas Demetriades, *Counsel*
Mr. Pierre-Emanuel Dupont, *Consultant*
Mr. Francois Surreau, *Legal Expert*
Mr. Selahattin Sarkaya, *Adviser to the Claimant*
Mr. Aurélien Walter, *Clerk with CAA Juris Europae*

47. In attendance at the Hearing, on behalf of the Respondent were:

Mr. Veijo Heiskanen, *Counsel*
Mr. Matthias Scherer, *Counsel*
Ms. Laura Halonen, *Counsel*
Mr. David Bonifacio, *Counsel*
Ms. Emilie McConaughey, *Counsel*
Mr. Alptug Tokser, *Counsel*
Mr. Zafer Demircan, *Representative of Turkey*
Mr. Ali Agaçdan, *Representative of Turkey*
Mr. Ayhan Kandemir, *Representative of Turkey*
Mr. Serkan Yikarbaba, *Representative of Turkey*
Mr. Mehmet Ümit Yusufoglu, *Representative of Turkey*
Mr. Tahsin Yazar, *Representative of Turkey*
Mr. Tim Eicke QC, *Legal Expert*
Prof. Vincent Tchen, *Legal Expert*

48. On January 18, 2016, the Parties made their opening submissions. The Claimant was cross-examined by the Respondent. Mr. Sureau and Prof. Tchen appeared at the Hearing where they presented their legal opinions.

49. On January 19, 2016, the Parties made their closing submissions.

50. On January 22, 2016, the Respondent submitted its comments on photocopies of the Claimant's passport, held by French authorities, that the Claimant submitted during the Hearing.

51. By email dated January 25, 2016, the Tribunal closed the proceedings.

52. On February 2, 2016, the Parties both submitted to the Tribunal their costs.

53. On February 10, 2016, the Parties made further submissions to the Tribunal on the issue of costs.

III. RESPONDENT'S OBJECTION OF *RATIONE PERSONAE*

54. The Respondent objects to the jurisdiction of the Tribunal on the grounds that the Claimant has not established jurisdiction *ratione personae*, in accordance with Articles 26 and 1(7)(a)(i) of the ECT. The Tribunal briefly summarizes the Parties' respective positions and their voluminous submissions on the issues in dispute.

A. The Claimant's Position

55. The Claimant argues that the Tribunal has jurisdiction to hear his case, and that this has been established in accordance with Articles 26 and 1(7)(a)(i) of the ECT. The Claimant states that "the issue involves a strictly legal and focused analysis of Article 1(7)(a)(i) of the Treaty, and rather straightforward related factual submissions."[2]

1. Interpretation of the Energy Charter Treaty

56. The Claimant argues that he qualifies as an "Investor," as defined in Article 1(7)(a)(i) of the ECT and applied in Article 26 of the ECT, thus entitling the Claimant to avail of the dispute settlement provisions within Part V of the ECT. Article 1(7)(a)(i) of the ECT provides:

> *Investor means (a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law.*

57. Article 26(1) of the ECT provides:

> *Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*

[2] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 12.

58. The Claimant rejects the Respondent's argument that customary international law precludes a natural person from bringing a treaty claim against a state of which he is a national.[3] However, "even if [it] could be said that such a limitation was grounded in international law, it would be necessary to establish that the parties' intent was not to derogate from it by [] consenting to a *lex specialis* regime."[4] The Claimant argues that the ECT plainly allows a national to bring a claim against his or her home state and that Turkey, as a Contracting Party to the ECT, has consented to this.[5] It is submitted that the ECT does not have to explicitly state that a national may bring an action against their own State, and the Claimant relies in this regard on the German-Polish Convention concerning Upper Silesia of 1922.[6] The Claimant also cites a number of other treaties with similar definitions of investor.[7]

59. Regardless of the interpretation of customary international law, the Claimant submits that it is clear from the ordinary meaning of the ECT that nationals are permitted to bring treaty claims against their home state. The Claimant refers to Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), sub-article 1 of which provides:

> *A Treaty shall 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 the light of its object and purpose.*

60. The Claimant states that "[t]he right for an investor to sue his national State on the basis of his 'permanently residing' in another Contracting Party accords with the plain meaning of the ECT."[8] Relying on the text of Article 1(7)(a)(i) of the ECT, the Claimant argues that "the use of the term 'or'… unequivocally shows the Contracting Parties' intent to create alternative conditions to satisfy the definition

[3] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 47.
[4] *Id.*, ¶ 127.
[5] *Id.*, ¶ 50.
[6] Official Transcript of Hearing, Volume 1, dated January 18, 2016, pp. 16-17.
[7] *Id.*, pp. 20-21.
[8] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 57 (emphasis original).

of an investor under the ECT."[9] The Claimant continues that there is no hierarchy between the alternatives of citizenship, nationality and permanently residing, nor is the use of these terms cumulative in nature.[10] The Claimant argues that "[o]nce the Investor elects any one of these three alternatives, that choice is exclusive of the other. Making one dependent on the other would deprive the terms of their *effet utile*, and would be in blatant contradiction with the language of Article 1(7)(a)(i)."[11]

61. According to the Claimant, the most "logical and sensible" approach is to incorporate the definition of "investor" in Article 1(7)(a)(i) into the text of Article 26(1).[12] The Claimant contends that Article 26(1) is similarly "straightforward and the provision should be considered clear on its face."[13] The Claimant argues that the Respondent has reassembled the word order in inserting Article 1(7)(a)(i) into Article 26(1) "instead of replacing word for word the defined term 'Investor' with the definition it provides for…"[14] The Claimant explains that "the entire point of having defined terms is precisely to encapsulate within a single word content that may necessitate more than one award…Here the defined term is 'Investor', and by implication the phrase 'of another Contracting Party' should apply to that precise term and its segmented content."[15]

62. Turning to the object and purpose of the ECT, the Claimant submits that these confirm the textual interpretation that the Claimant posits. The Claimant states that "the ECT's object and purpose is to encourage and create stable conditions, transparent and favourable to investors and fostering investment in the energy sector."[16] Professor Leben explains that the ECT is "a large multilateral

[9] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 22.
[10] *Id.*
[11] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 65.
[12] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 30.
[13] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 74.
[14] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 32.
[15] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 92.
[16] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 23.

agreement…establishing a general system whose overall purpose is different from the objectives pursued by each of the Contracting Parties. Under these connections what matters is not so much the criterion of nationality but that of the connection of an investment to any of the contracting parties even through a weaker connection than that of nationality, i.e. the residence connection."[17] Thus, the Claimant submits, there should be no distinction "between permanent residents, according to whether or not they have the nationality of the State against which they wish to make a claim."[18]

63. Should the Tribunal seek to rely on the *travaux prépartoire* of the ECT, the Claimant argues that, as provided for in Article 32 of the VCLT, this should only occur where interpretation according to Article 31 of the VCLT "leaves the meaning ambiguous or obscure," or "leads to a result which is manifestly absurd or unreasonable."[19] The Claimant explains that such an absurd or unreasonable result would be where there is an "internal contradiction."[20] The Claimant argues that there is no internal contradiction in this regard. Even turning to the *travaux prépartoires*, the Claimant states that this does not "indicate that the treaty drafters intended that permanently resident persons should be denied access to the dispute settlement mechanism of Article 26 in a proceeding against a State of their nationality."[21] Supporting this argument, the Claimant submits that the drafters of the ECT refrained from including in the treaty text a provision similar to Article 25(2)(a) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("**ICSID**"), which excludes persons from suing their state of nationality. Comparisons are drawn between the wording of the ECT and Bilateral Investment Treaties entered into by Australia,[22] which contain clear language excluding nationals from suing their home state. Mr. Bramberger states that in the drafting of the ECT "Australia suggested language [to avoid the result

[17] Legal Opinion of Professor Charles Leben, dated February 16, 2015, ¶ 29.
[18] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 25.
[19] *Id.*
[20] *Id.*
[21] *Id.*, at p. 26.
[22] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶¶ 106-118.

where an investor with nationality of the state they were suing could bring a claim before the SCC but not under ICSID], but I am unaware that it ever was even advanced formally, and certainly no such language was ever adopted."[23] The Claimant argues that "you cannot find in legal literature, academic studies, comments on the ECT any statement corresponding to the interpretation of Article 1(7) supported by the Respondent in these proceedings."[24] Thus, the Claimant submits that "[b]y treating nationality and 'permanently residing' as two independent connections, the ECT combines two relationships: that of the legal and abstract connection between an investor and its national State and that of the economic connection between an investor and the State in which he resides."[25]

64. The Claimant submits that The Turkish Foreign Direct Investment Law of 2003 (the "**FDI Law**") supports the Claimant's conclusions regarding the interpretation of Article 1(7)(a)(i) of the ECT.[26] The Claimant argues that "Turkey itself recognizes the international right for its own nationals residing abroad to pursue international arbitration against Turkey for violations of their investments in Turkey. On that basis, Turkey is therefore estopped from disregarding its unilateral interpretations of the ECT in the FDI Law."[27] Article 2(a)(1) of the FDI Law defines "Foreign Investor" as:

> *Real Persons who possess foreign nationality and Turkish nationals resident abroad.*

65. The Claimant also relies on Article 10 of the Regulation for Implementation of Foreign Direct Investment Law of August 20, 2003 (the "**FDI Regulation**"), which provides:

[23] Legal Opinion of Mr. Craig S. Bamberger, dated September 14, 2015, ¶ 41.
[24] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 29.
[25] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 130.
[26] *Id.*, ¶¶ 131-179.
[27] *Id.*, ¶ 132.

Turkish Citizens certifying that they are residing abroad with the work or residence permits, are regarded as foreign investors with regard to the implementation of the Law.

66. The Claimant stresses that he is not trying to invoke the substantive protections enshrined in the FDI Law, or for the purposes of jurisdiction.[28] Rather, the Claimant seeks to "illuminate the Tribunal on the Respondent's undertaking of its prior international commitments, notably its consent to arbitrate disputes with Turkish nationals permanently residing in another Contracting Party under Article 26 of the ECT."[29] The Claimant relies on Article 31 of the VCLT to show that the FDI Law was a "subsequent practice" and a "subsequent legislative adjustment to its international investment treaty regime."[30] Further to its arguments concerning the interpretation of Article 1(7)(a)(i), the Claimant submits that the FDI Law and FDI Regulation "qualify as a unilateral act under international law, in the meaning of the International Law Commission's [Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations]."[31] The Claimant states that "[b]y alleging that the Tribunal's jurisdiction *ratione personae* does not cover claims by its own nationals despite permanently residing in another Contracting Party, it is contradicting a previous interpretation it gave of the ECT in its domestic law."[32] The Claimant explains that the FDI Law and the FDI Regulations gave rise to legitimate expectations on the part of its nationals residing abroad that they would be granted the benefit of a right of action before a tribunal constituted under the ECT. In now denying this right of access, the Claimant argues that Turkey has violated the fair and equitable treatment standard contained at Article 10 of the ECT.[33]

67. Turning to the meaning of the terms used in Article 1(7)(a)(i) of the ECT, the Claimant submits that "it is undisputed that the determination of who qualifies as

[28] *Id.*, ¶¶ 137-138.
[29] *Id.*, ¶ 138.
[30] *Id.*, ¶ 141.
[31] Official Transcript of Hearing, Volume 1, dated January 18, 2016, pp. 29-30.
[32] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 172.
[33] *Id.*, ¶ 176.

'permanently residing in' for the purposes of Article 1(7)(a)(i) is governed by the domestic law of the State of residence, and is thus to be effected by the competent authorities of the State in question."[34] The Claimant contends that "[t]his is the basic rule. This amounts to a legal recognition by the State of a factual assessment conducted by its competent authorities."[35] The Claimant continues that "[n]ot only is it [the State's] sovereign right to determine who can reside on its territory, it is also the only one that has the means and resources to investigate the reality of the foreigner's residency."[36] The Claimant explains that Article 1(7)(a)(i) operates "a *renvoi* to the Contracting Party's applicable law, [and that] the ECT grants complete discretion to each Contracting Party to determine who qualifies as a 'permanently residing' person in accordance with its domestic law."[37]

68. In conclusion, the Claimant submits that: (1) "read jointly in accordance with the general rule of interpretation of treaties, Article 1(7)(a)(i) and Article 26(i) of the ECT leave no doubt as to the fact that Turkey consented to the arbitration of disputes under Article 26 in situations where an individual is permanently residing in another contracting party in accordance with its applicable law, irrespective of his or her nationality"; and (2) "the determination of who qualifies as 'permanently residing in'… for the limited purposes of Article 1(7)(a)(i), is a sovereign prerogative of the State of residence, is governed by the latter State, and is to be effected by the competent authorities of that State."[38]

2. The Claimant's Status as an Investor in Accordance with Article 1(7)(a)(i) of the ECT

69. The Claimant submits that he meets the criteria enunciated in Article 1(7)(a)(i) at all relevant times in order to qualify as an Investor thereunder.

[34] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 41.
[35] *Id.*
[36] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 185.
[37] *Id.*, ¶ 190; *see id.*, ¶¶ 180-219.
[38] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 44.

(a) The Relevant Dates

70. In making its submissions regarding the dates for the Tribunal to consider, the Claimant relies heavily on a passage from Procedural Order No. 4, which provides:

> *"The Tribunal considers that what the Claimant has to prove at this stage of the proceedings concern the determination of elements relating to jurisdiction* ratione personae *on the alleged relevant dates, rather than the dates or period of time on which the alleged breaches occurred. The alleged illegal acts and particular dates on which they occurred are matters for the merits that will be dealt with by the Tribunal, if necessary and as appropriate in due course."*[39]

71. The Claimant submits that "the only relevant date in order for the Tribunal to determine its jurisdiction *ratione personae* should be the date of the Request For Arbitration."[40] However, the Claimant maintains that he has satisfied the jurisdictional criteria even if the Tribunal relies on other potentially relevant dates.

72. The Claimant notes that the ECT does not make explicit reference to the moment in time at which the Tribunal's jurisdiction is to be established.[41] The Claimant turns to the object and purpose of the ECT and states that determining the procedural capacity to bring the claim "is equivalent to assessing whether he has *jus standi*…[and] [b]ecause *jus standi* is evaluated at the time a claimant consents to arbitration, this means that the time at which the Tribunal must determine whether it has jurisdiction *ratione personae* is the time when the Investor consented to arbitration: that is, the filing of the request for arbitration."[42] The Claimant argues that to include the date of breach, or breaches, would "add[] to the requirement for jurisdiction *ratione personae* a date that is in reality only relevant to the determination of jurisdiction *ratione materiae*."[43] The Claimant filed his Request

[39] Procedural Order No. 4, dated September 1, 2015, ¶ 19.
[40] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 314.
[41] *Id.*, ¶ 315.
[42] *Id.*, ¶ 316.
[43] *Id.*, ¶ 319.

for Arbitration on March 7, 2014. The Claimant maintains that this is the only relevant date for determining jurisdiction *ratione personae*.

73. Concerning the dates of the alleged breaches, the Claimant posits that he "holds dominion over the alleged relevant dates, which at this stage cannot disputed by the Respondent."[44] The Claimant argues that 2013 and 2014 are the relevant dates of the constitution of the breaches because of their composite nature under Article 10 and Article 13 of the ECT. The Claimant alleges that the Respondent forced ÇEAŞ and Kepez to first "transfer their commission rights against their will in November 2002," followed by a number of further actions, and "finally deciding to officially transfer the production (generation) assets from the companies to EÜAŞ in 2013," and that this amounted to an incremental expropriation.[45] The Claimant refers to further dates in 2014 and 2015 formally effectuating the transfer of the assets from the Claimant.[46]

74. Relevant to determining the dates of the alleged breaches, the Claimant submits that the Respondent's alleged breaches of the ECT are composite acts under international law. The Claimant explains that a composite act arises from "a series of behaviour, acts, or omissions, legal or illegal when taken independently, but when taken together constitute a breach of an international obligation."[47] Article 15 of the International Law Commission Draft Articles on State Responsibility provides:

> *(1) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*

[44] *Id.*, ¶ 327.
[45] *Id.*, ¶ 331.
[46] *Id.*, ¶ 332.
[47] *Id.*, ¶ 335.

> *(2) In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.*

75. The Claimant argues that "the illicit measures taken together constitute composite acts under international law, which extend from November 2002 up until at least 2013."[48]

76. Regardless of whether or not the alleged breaches amount to a composite act, the Claimant submits that the breach of Article 13 of the ECT has been continuous.[49] The Claimant states that "[a] continuous breach is a breach that takes place until the State puts an end to it by executing its *primary obligation*, source of the breach."[50] The Claimant continues that "[t]ribunals have affirmed that continuous breaches fall within the jurisdiction *ratione temporis* of a tribunal, by extending it to breaches that are the continuation of conduct that occurred before the entry into force of the treaty (or the jurisdictional provision)."[51]

77. The Claimant relies on the European Court of Human Rights decision in *Loizidou v. Turkey* and summarises the case as holding that "if direct expropriation is to be considered as an immediate act with a continuous effect, any deprivation of access, use and enjoyment of property does indeed constitute a continuous act."[52] In response to the Respondent's argument that *Loizidou* is no longer good law, the Claimant submits that "if *Loizidou* is good law, then the Claimant's argument for continuing violation will hold and the Respondent's objection must be dismissed."[53] The Claimant argues that *Loizidou* is good law because, among other reasons,

[48] *Id.*, ¶ 342.
[49] *Id.*, ¶ 358.
[50] *Id.* (emphasis original).
[51] *Id.*
[52] *Id.*, ¶ 364; *Case of Loizidou v. Turkey*, European Court of Human Rights, Application No. 15318/89, Judgment of December 18, 1996 (Exhibit CL-70).
[53] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 70.

Turkey has paid the damages rendered in that case, and a remedy has been established by the Respondent in order to pay compensation in "*Loizidou* clones."[54]

78. Summarising the factual allegations in light of the legal reasoning that the Claimant puts forth, the Claimant argues that the Respondent's "measures incrementally disrupted the functioning of ÇEAŞ and Kepez and they crippled their value. These progressive measures culminated when the Respondent took the decision to have all the assets, and mainly the dams, transferred from the accounting sheets of ÇEAŞ and Kepez, to those of EÜAŞ in 2013 and 2014."[55] The Claimant continues that "[a]ll of the [] measures put together were equivalent to an expropriation, and in actual fact, amount to a creeping expropriation…[I]t took place through a series of actions whose aggregate effect was to destroy the value of the investment and effectively negate the Claimant's interest therein."[56]

(b) Claimant's Residence in the United Kingdom

79. In making his submissions regarding his stay of residency in the United Kingdom, the Claimant repeats his argument that "[i]t is not for this Tribunal to second-guess these determinations [of the Home Office], whether in application of what the Tribunal believes to be the applicable law, rules and regulations of the jurisdiction, or on the basis of any other standard or criteria."[57] The Claimant submits that the United Kingdom Home Office, which is responsible for border control and considering applications to stay and enter in the United Kingdom, has made three determinations as to the Claimant's status. The Claimant notes that he first applied for "Leave to Remain" in 1996, pursuant to Section 224 of the UK Immigration Rules. The Claimant draws attention to part (iii) of Section 224, which provides that the person "intends to make the United Kingdom his main home." Turning to Section 227 of the UK Immigration Rules, the Claimant highlights part (iv) which again refers to the person's "main home." The Claimant argues that "these provisions all accord on the requirement that any extension of stay must bring the

[54] *Id.*, p. 72.
[55] *Id.*, p. 74.
[56] *Id.*, pp. 75-76.
[57] *Id.*, p. 49.

proof to the Secretary of State (Home Office now) that the applicant had made his main home in the United Kingdom."[58] The Claimant further explains that a similar threshold is contained in Section 230 and Section 231, concerning "Indefinite leave to remain," which reverts back to Section 227 in incorporating the "main home" requirement.[59]

80. Detailing how the Claimant's factual circumstances connect with these legal definitions, the Claimant recounts that he was granted "Leave to Remain" in the United Kingdom on September 5, 1996, which was extended on August 31, 1997, and thereafter renewed annually. Then, on November 10, 2000, the Claimant was granted "Indefinite Leave to Remain." The Claimant argues that the granting of these statuses to him, "as well as by the administrative decisions of each border officer checking his papers when he entered the UK, once he was the beneficiary of the indefinite leave, the Home Office has concluded…that Mr. Uzan has made the UK his main home, i.e. not only he has the entitlement to reside permanently there, but also that at that time he was so residing, as the concept of permanently residing is known or was known and applied under English law."[60] In this regard, Messers. Clive Nicholls QC and James Lewis QC state that "[i]n English law the maxim '*omnia praesumuntur rite esse acta*' applies and therefore the presumption of regularity applies. In those circumstances it is presumed that the Immigration Officers and the Home Office acted correctly and in accordance with their duty."[61]

81. Concerning the UK courts and their determination of the Claimant's place of residence, the Claimant argues that "none of the cases cited by the Respondent that allegedly call into question the Claimant's settlement in the United Kingdom ever ruled on the evidence of the Claimant's indefinite leave to remain or on the executive findings of the Home Office regarding the fact that he had made the

[58] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 237.
[59] *Id.*, ¶ 238.
[60] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 50.
[61] Supplemental Legal Opinion of Clive Nicholls QC and James Lewis QC, dated September 18, 2015, ¶ 25.

United Kingdom his main home."[62] Messers. Clive Nicholls QC and James Lewis QC state that "[i]t is clear that there is no *ratio* in those judgments concerning the Claimant's residence in the United Kingdom and any comments were strictly *obiter dicta*."[63] The Claimant also argues that a number of exhibits relating to the Claimant's exit and entry from Turkey are tampered evidence.[64] In response to a question from the Tribunal, the Claimant explained that the Tribunal is "not bound to follow or to take as gospel, and to take as relevant, for the purpose of this case, the finding or comment of the court in [the UK case], because the context, the purpose, the underlying facts and circumstances of that matter and of this matter are not the same…"[65]

82. Finally, the Claimant submits that neither his temporary absences from the United Kingdom or his forced stay in Turkey cannot alter the fact that the United Kingdom was his main home.[66] The Claimant interprets the "permanently residing" to mean "main home," and because of the use of the word "residence," it is clear that such a classification is not lost through temporary absences abroad.[67] The Claimant thus concludes that "[i]t is not asserted or proven, nor need it be asserted or proven, that Mr. Uzan spent a majority of his days and nights in the U.K. during the period in question. Respondent's insistence on the importance of documentary evidence is inapposite. The relevant factual determinations have been made by the British authorities."[68]

(c) Claimant's Residence in France

83. The Claimant submits that he has been "permanently residing" in France since his arrival there on September 3, 2009. The Claimant states that he has not left the

[62] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 245.
[63] Supplemental Legal Opinion of Clive Nicholls QC and James Lewis QC, dated September 18, 2015, ¶ 42.
[64] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶¶ 251-268.
[65] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 54.
[66] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 272.
[67] *Id.*, ¶¶ 276-277.
[68] Official Transcript of Hearing, Volume 1, dated January 18, 2016, pp. 51-52.

territory of France since that point in time, and thus, if the Tribunal requires any factual link to France during this period, it has been fulfilled on this basis.[69] The Claimant details his residences in Paris since his time of arrival, his marriage to a French citizen, and his attendance at medical facilities in Paris.[70] The Claimant thus argues that "it is indisputable that the center of the Claimant's vital interests is Paris, France, and has been the case since 2009 because it [is] where he has structured his family, professional, economic, and social life."[71]

84. The Claimant explains how the protections he has been granted by the French authorities amount to recognition of his "permanently residing" in France in accordance with French law. The Claimant argues that "[i]t is absolutely not necessary, with regard to the French law, to have a legal title of permanent resident to be considered there as living permanently in France."[72] Professor Pascal Beauvais states that "compared to the notion of 'permanent residence' in the territory, the status of beneficiary of the 'subsidiary protection' displays a connecting link even stronger between the individual and a State."[73]

85. Upon his arrival in France, the Claimant was first given a temporary residence permit (*récépissé*) which was linked to his application for political asylum.[74] The Claimant was then given *protection subsidiaire*, the aim of which was to "ensure the civil, economic, and social integration of the person who benefits from it."[75] The Claimant explains that "[a]t the heart of the *protection subsidiaire* is the idea that the individual must stay in the French territory to gain protection from the State…[and] [b]y allowing a foreign national to reside on its territory under the *protection subsidiaire*, France necessarily considers that person to be a permanent resident of France, including for the purposes of the application of the ECT to which

[69] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 286.
[70] *Id.*, ¶¶ 290-293.
[71] *Id.*, ¶ 294.
[72] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 61.
[73] Expert Legal Opinion of Professor Beauvais, dated February 17, 2015, ¶ 4.
[74] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 59.
[75] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 297.

France participates as a Contracting Party."[76] The Claimant argues that "[t]his protection can only be removed by a judicial decision, if the fundamental interests of France or the behaviour of the person duly established by enquiries, for example political activities, commands it necessarily."[77] For these reasons, the Claimant submits that no emphasis should be placed on the fact that the *protection subsidiaire* is subject to renewal. The Claimant states that "the administrative authorization is temporary, not the residence itself."[78]

86. The Claimant therefore argues that "there can be no doubt possible that the Claimant qualifies as 'permanently residing' in France, from the date of his arrival in France in 2009 and therefore as an 'Investor' of another Contracting Party, that is to say France, for the purposes of the application of the ECT."[79]

3. Claimant's Conclusion

87. Based on the above principal arguments, as well as further arguments expanded upon by the Claimant in his written submissions, which the Tribunal has fully considered, the Claimant submits that he qualifies as an Investor at all relevant times in accordance with Articles 1(7)(a)(i) and 26 of the ECT.

B. The Respondent's Position

88. The Respondent argues that the Tribunal does not have jurisdiction to hear the Claimant's case as the Claimant has not established his status as an "Investor" in accordance with Articles 26 and 1(7)(a)(i) of the ECT. The Respondent submits that the Tribunal dismiss all of the Claimant's current claims against the Republic of Turkey.

[76] *Id.*, ¶ 298.
[77] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 63.
[78] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 303.
[79] *Id.*, ¶ 312.

1. Interpretation of the Energy Charter Treaty

89. The Respondent submits that interpretation of the ECT in line with the VCLT confirms that nationals of Turkey cannot file ECT claims against Turkey. The Respondent explains that it is "one of the fundamental principles of international law [] that international courts and tribunals do not have jurisdiction over purely domestic disputes."[80] The Respondent argues that Turkey must have clearly and unambiguously consented to being sued before an international court or tribunal. The Respondent relies on a number of "rules and principles of international law that require consent to arbitration to be unequivocal," and submits that these are "part of the law governing the present dispute pursuant to Article 26(6) of the ECT."[81]

90. Turning to the text of the ECT, the Respondent argues that there are three categories of "Investors" under the ECT: "own Investor," "Investor of another Contracting Party," and "Investor of a third state."[82] The Respondent argues that these are mutually exclusive.[83] The Respondent continues that it is "apparent that the notion of 'Investor of another Contracting Party' has a clear meaning in Article 26, which is not divorced from the rest of the ECT. The wording excludes, *inter alia*, claims of a national of Turkey against Turkey, irrespective of whether she or he qualifies as an Investor of "a Party" under Article 1(7)."[84] Thus, interpreting Article 26 on its own, the Respondent argues that the Claimant cannot establish jurisdiction thereunder.

91. The Respondent further argues that "permanently residing in" is a subsidiary link, and that this is confirmed by an interpretation that is in accordance with Article 31 of the VCLT. The Respondent states that "[c]itizenship/nationality are the first links listed reflecting the priority of these over 'permanently residing in.'"[85] The Respondent argues that the use of the word "or" is a "disjunctive conjunction which

[80] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 86.
[81] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 207.
[82] *Id.*, ¶¶ 191-194.
[83] *Id.*, ¶ 196.
[84] *Id.*, ¶ 198.
[85] *Id.*, ¶ 211.

is used *inter alia* to separate two or more mutually exclusive options presented."[86] The Respondent argues that the Claimant's interpretation of "or" in this context is a "sterile grammatical approach" that is not consistent with Article 31(1) of the VCLT. The Respondent relies on the SCC decision of *Stati v. Kazakhstan* where it was stated that:

> *"residence would only matter, as is clear from the wording of the definition in Art. 1(7) ECT by the second alternative after the word "or", if they would not have the nationality of a Contracting State."*[87]

92. The Respondent submits that this interpretation is the "ordinary meaning" that should be given to "permanently residing in." The Respondent argues that it is "not a question of hierarchy. It [is] simply a question of reading the natural meaning of the provision."[88] The Respondent argues that international law, and in particular the ILC articles on state responsibility, place stronger emphasis on the link of nationality, including residence as only a fall-back link, relevant if no link of nationality can be established.[89] In his expert opinion, Professor Pellet states that nationality is "the strongest possible bond existing between an individual and a State…[and] it is both the basis of the right of the State to regulate the activities of its nationals wherever they are (*compétence personnelle*) and the condition to protect them *vis-à-vis* a foreign State."[90] The Respondent further notes that the "overriding aspect of nationality is evident in a variety of provisions of the ECT," and in this regard the Respondent refers to Article 17(1) which speaks of "citizens or nationals," but not persons "permanently residing."[91] For these reasons, the Respondent submits that it is not necessary to look into the *travaux prépartoire* in accordance with Article 32 of the VCLT.[92]

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[86] *Id.*
[87] *Id.*, ¶ 213; Anatoli Stati et al. v. Republic of Kazakhstan, Award, SCC Case No V 116/2010, dated December 19, 2013 (Exhibit RLA-68), ¶ 743.
[88] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 93.
[89] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶¶ 218-228.
[90] *Id.*, ¶ 224; Legal Opinion of Alain Pellet, dated November 17, 2015, ¶ 67.
[91] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶¶ 225-226.
[92] *Id.*, ¶ 228; Official Transcript of Hearing, Volume 1, dated January 18, 2016, pp. 93-94.

93. However, should the Tribunal wish to turn to the *travaux prépartoire*, the Respondent submits that this confirms the meaning arrived at on the basis of the ordinary meaning. The Respondent argues that "the reference to 'permanently residing' was added, based on a proposal by Australia," because Australia does not have the concept of nationality and "they were concerned that the definition that was initially adopted would be too narrow."[93] The Respondent states that "[t]his reference to 'permanently residing' has therefore nothing to do with the consent to bring claims against the home State of the investor."[94] The Respondent argues that during the drafting of the ECT "there was no discussion or intention expressed during the negotiations of Article 1(7) to drastically deviate from international law."[95] The Respondent maintains that "[a]pplying the rule of treaty interpretation, the expression 'permanently residing in' contained in Article 1(7) is to be construed as a special term that denotes effective and lasting residence, as being tantamount to nationality in Contracting Parties where the notion of nationality does not exist in their domestic law."[96]

94. Turning to the Turkish FDI Law, the Respondent argues that the FDI Law is not a subsequent practice in the application of the ECT, that it was not in force at the time of the alleged expropriation, and that the FDI Law does not contradict the Respondent's position in this arbitration.[97] Regarding its alleged interpretation as a "subsequent practice" under Article 31 of the VCLT, the Respondent argues that the FDI Law of 2003, replacing the previous FDI Law of 1954, was aimed at modernising the Turkish FDI policy, and there is no link between it and the ECT.[98] The Respondent further argues that "[t]he possibility of a Turkish citizen suing the Republic before international courts or tribunals was not an issue since the FDI Law of 2003 does not provide Turkey's consent to arbitrate any disputes. The FDI Law of 2003 merely envisages that Turkey may (or may not) agree to conclude

[93] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 94.
[94] *Id.*, p. 95.
[95] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 237.
[96] *Id.*, ¶ 239.
[97] *Id.*, ¶ 241.
[98] *Id.*, ¶¶ 248-250.

arbitration agreements with foreign investors."[99] The Respondent highlights the differences between both the substantive protections and the procedural rights afforded in the FDI Law and the ECT in arguing that the FDI Law cannot be considered a subsequent practice in order to satisfy the requirements of Article 31 of the VCLT.[100]

95. The Respondent argues that "[t]he FDI Law of 2003 would not be applicable in this arbitration in any event as it was enacted after the dispute arose."[101] The Respondent submits that the FDI Law came into force on June 17, 2003, however, the date of the alleged expropriation was June 12, 2003.[102] Furthermore, the Respondent submits that even if the FDI Law of 1954 was applicable, it does not regard foreign residents as foreign investors but instead focuses on the origin of the investment.[103]

96. Furthermore, the Respondent submits that the FDI Law does not contradict the Respondent's position. The Respondent argues that there are "no unified standards binding Turkey at the international law level" as Turkey has not adopted a "one-size-fits-all" approach in its investment treaties.[104] The Respondent continues that "if one were to accept the Claimant's contention that the FDI Law of 2003 and the ECT are on the same level, Turkey would be contradicting most of its own BITs through the FDI Law of 2003 in one way or another."[105] The Respondent submits that in order to succeed on a claim of estoppel, the Claimant must show that he had relied on the representation made to him to his detriment. However, the Respondent states that the Claimant's own arguments in this regard suggest that he does not rely on the FDI Law in terms of establishing jurisdiction, yet he is relying on the law for purposes of establishing estoppel. The Respondent concludes that "[t]his internal

[99] *Id.*, ¶ 254.
[100] *Id.*, ¶¶ 255-258.
[101] Respondent's Statement of Defense, dated June 24, 2015, ¶ 684.
[102] *Id.*, ¶ 685.
[103] *Id.*, ¶¶ 688-691.
[104] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 267.
[105] *Id.*

inconsistency in the Claimant's argument is a text book example of circular reasoning and is another ground for rejecting his estoppel argument."[106]

97. Turning to the criteria required in order to be considered "permanently residing in," the Respondent submits that there are three such criteria: (1) that the Claimant is in fact residing in the Contracting State; (2) that on the critical dates the Claimant lived in the territory "permanently," and; (3) that the fact of permanently residing is recognised as such under the domestic law of the Contracting State in which the Claimant claims to be permanently residing.[107] The Respondent argues that the Claimant's interpretation is not compatible with the "ordinary meaning" of the terms used.[108] The Respondent states that "permanently residing in" does not refer to a status, as it is a verb, and not a noun.[109] And, "permanently" means indefinitely, and not temporarily, or based on a temporary status.[110] The Respondent argues that the wording in Article (1)(7)(a)(i) "in accordance with its applicable law" is a *renvoi* that "expresses an independent and additional requirement that a claimant invoking Article 1(7) must prove."[111] The Respondent submits that "[a] person who lives in a country provisionally based on a temporary permit or a provisional authorization does not live permanently in that country in accordance with the applicable law."[112] Lastly in relation to this point, the Respondent argues that "this international tribunal is not bound by the determination or the determinations of the national authorities as to permanent residence or authority to reside. This is a matter of evidence for this Tribunal…[t]his Tribunal must determine independently, within its own jurisdictions, applying rules and principles of treaty interpretation, whether it has jurisdiction."[113]

[106] *Id.*, ¶ 269.
[107] *Id.*, ¶¶ 52-57.
[108] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 98.
[109] *Id.*
[110] *Id.*
[111] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 60.
[112] *Id.*, pp. 98-99.
[113] *Id.*, p. 99.

2. The Claimant's Status as an Investor in Accordance with Article 1(7)(a)(i) of the ECT

98. The Respondent submits that the Claimant does not meet the criteria enunciated in Article 1(7)(a)(i) at all relevant times in order to qualify as an Investor thereunder.

(a) The Relevant Dates

99. The Respondent submits that there are two relevant dates for determining jurisdiction, and that the Claimant must satisfy the relevant criteria on both of these dates. The Respondent argues that "[f]irst, he must meet the criteria in Articles 10 and 13 of the ECT at the time the alleged breaches of those provisions took place for such breaches to be possible…Secondly, he must meet the criteria in Article 26 of the ECT at the time he invokes the jurisdiction of the Tribunal in order for the Tribunal to have such jurisdiction."[114] The Respondent submits that it does not matter whether the alleged act is instantaneous, creeping, or continuing as the "Claimant must meet the jurisdictional requirements on both the date the claim arose and the date the claim was filed with the SCC."[115]

100. Therefore, the Respondent contends that "the Claimant must show that jurisdiction existed on November 28, 2002, which is allegedly the date when the creeping process started."[116] The Respondent relies on the decision in *Garcia v. Venezuela* where it was held:

> *"[T]he relevant times to be able to invoke the protection of the [applicable treaty] are: (a) the date on which the alleged violation occurred (in this case, the Measures); and (b) the date on which the arbitral proceeding is initiated, aimed at resolving the dispute between the investor and the State receiving the investment resulting from the alleged violation."*[117]

[114] Respondent's Statement of Defense, dated June 24, 2015, ¶ 521.
[115] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 106.
[116] *Id.*
[117] Garcia v. Venezuela, Decision on Jurisdiction, PCA Case No. 2013-3, dated December 15, 2014, ¶ 214 (Exhibit RLA-60).

101. The Respondent argues that the Claimant must also meet the jurisdictional requirements on the date he filed the Request for Arbitration, the reasons for that being that "on that date the Claimant purported to accept Turkey's consent to arbitrate under the ECT."[118]

102. Furthermore, the Respondent submits that the only relevant events occurred in 2002-2003. The Respondent argues that the Claimant's reliance on events that occurred in 2013 and 2014 "is a complete misrepresentation of the record."[119] The Respondent explains that "ÇEAŞ and Kepez never owned the transmission facilities. The assets always belonged to the State, to the treasury. Under the Concession Agreement, they had the right to operate those assets, and when the Concession Agreements were terminated in June 2003, the assets continued to be State property. So there can be no basis for a composite or creeping expropriation."[120] The Respondent states that "[i]n 2013 and 2014 an internal reorganisation was undertaken at the recommendation of the Court of Accounts (*Sayiştay*) whereby some of the generation facilities were transferred from the accounts of the Treasury to the accounts of EÜAŞ."[121] The Respondent therefore concludes that the real dispute between the Parties "concerns the enactment of the Licensing and Transfer Regulations in 2002 and the termination of the ÇEAŞ and Kepez Concession Agreements and repossession of the State facilities they had run in June 2003. In order for the Tribunal to have jurisdiction to hear this actual dispute, the Claimant must prove that he fulfils the requirements of jurisdiction *ratione personae* in 2002-2003, as well as in 2014, when this arbitration was commenced."

103. Further in support of its argument that the date of the alleged breach was 2002-2003, the Respondent refutes the Claimant's arguments that the alleged breach was continuous and/or composite. The Respondent argues that the real dispute concerns instantaneous acts in 2002 and 2003.

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[118] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 108.
[119] *Id.*, p. 107.
[120] *Id.*, pp. 107-108.
[121] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 42.

104. Regarding continuous acts, the Respondent submits that "[c]ontinuous breaches create an illegal situation, which can be contrasted with an illegal act…[T]he Claimant's main claim, is quintessentially an instantaneous (or, in the case of creeping expropriation, a composite) act, which has continuing effects. In this regard it can be contrasted with omissions, such as failures to pay a sum due (if the obligation to pay is the primary obligation), or acts which inherently contain a time element, such as delay, which are easy to recognise as continuous."[122] Responding to the Claimant's reliance on the *Loizidou* case, the Respondent argues that this is no longer good law, and that the ILC's published work on state responsibility makes it clear that "expropriation is not a continuous act…"[123] The Respondent explains that "[c]laiming that an expropriation is a continuing breach simply because the economic effects continue is akin to saying that any breach of international law is a continuing breach until reparations have been made."[124] In any event, the Respondent argues that *Loizidou* "has nothing to do with expropriation."[125] The Respondent states that *Loizidou* "was a question of whether there was interference with the right to peaceful enjoyment of possessions under Article 1 of the additional protocol of the European Convention of Human Rights. That is not a claim for expropriation, it is a question of whether there was interference with the property rights, the right to enjoyment, the peaceful enjoyment, of possessions."[126]

105. Regarding composite acts, the Respondent argues that in determining whether there has been a composite act, "the critical criterion is the course of the conduct, as a whole, constituting something more than the sum of its parts. The individual acts cannot constitute the same alleged wrong as the composite whole. In the specific context of international investment law, the most common example of a composite act is a practice exhibiting an illegal policy (and a creeping expropriation resulting from such practice)."[127] Even if the alleged acts are accepted as being composite in

[122] *Id.*, ¶ 29.
[123] *Id.*, ¶¶ 29-31.
[124] *Id.*, ¶ 33.
[125] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 104.
[126] *Id.*
[127] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 34.

nature, the Respondent argues that the Claimant must show that he was permanently residing in another Contracting Party to the ECT from 2002 to 2014.[128]

106. Lastly regarding the relevant dates, the Respondent refutes the Claimant's contention that he alone holds dominion over the alleged relevant dates.[129] The Respondent relies on *Continental Casualty v. Argentina* which held that:

> *"[It] does not mean necessarily that the 'Claimant's description of the facts must be accepted as true,' without further examination of any type. The Respondent might supply evidence showing that the case has no factual basis even at a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined."*[130]

107. Thus, the Respondent submits that "even a 'preliminary scrutiny' or 'summary exam' reveals that no continuous or composite breach of the ECT could have occurred in the present case, or than anything occurred in 2013-14 that could have amounted to a breach of the ECT."[131]

108. The Respondent therefore concludes that the Claimant must establish jurisdiction under the ECT on the date of the alleged breach and on the date of filing his Request for Arbitration.

(b) Claimant's Residence in the United Kingdom

109. Firstly examining the Claimant's "leave to remain" granted to him by the United Kingdom, the Respondent submits that doubts exist as to whether the copies of the Claimant's passport (Exhibit C-1) are genuine, but that if the Tribunal were to find it to be genuine "it would be at most *prima facie* evidence of permanent residence."[132] Nevertheless, the Respondent argues that "[b]oth experts [] agree that

[128] *Id.*, ¶¶ 19-24.
[129] *Id.*, ¶ 36.
[130] Continental Casualty Company v. The Argentine Republic, Decision on Jurisdiction, ICSID Case No ARB/03/9, dated February 22, 2006, ¶ 61 (Exhibit RLA-144).
[131] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 38.
[132] Official Transcript of Hearing, Volume 1, dated January 18, 2016, pp. 140-141.

the closest, albeit inexact analogy in English law, to being "permanently residing in" is settled. Being settled as a matter of English law requires that three conditions are fulfilled: That the person is free from any restrictions on the period for which he remains in the UK; that he is ordinarily resident in the UK at the relevant time; and he has not remained in the UK in breach of immigration laws."[133] The Respondent accepts that the first condition may have been fulfilled if the Tribunal accepts the Exhibit C-1 as genuine. Turning to the second condition, the Respondent argues that this requires ordinary residence which "must be accompanied by a settled purpose which again must be proven."[134] The Respondent explains that "[t]here is no evidence here of ordinary residence, let alone a settled purpose."[135] Furthermore, the Respondent argues that the Claimant may have breached United Kingdom immigration laws as the photocopy of his leave to remain did not allow him to enter as an investor, and the Claimant was thereby not entitled to engage in business activities.[136] The Respondent states that "[t]he conclusion is that this illegality, namely, conducting business in England, in breach of the express terms of the leave, would again defeat the claim of being settled."[137]

110. The Respondent reiterates its argument that the Tribunal should not blindly accept the determinations of the United Kingdom authorities without further examination. The Respondent argues that "[i]t is for the Tribunal and nobody else to decide whether the Claimant fulfils the criteria for having "permanently resided in [the United Kingdom] in accordance with its laws."[138]

111. Turning to whether the Claimant was permanently residing in the United Kingdom between 2002 and 2003, the Respondent submits that the Claimant was actually permanently residing in Turkey at all the relevant times. The Respondent argues that "[in the Claimant's second affidavit, the Claimant] denies the relevance of the numerous references in multiple court cases to his own pleadings and evidence in

[133] *Id.*, p. 141.
[134] *Id.*
[135] *Id.*
[136] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶¶ 140-142.
[137] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 142.
[138] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 144.

which he submitted or testified that he resided in Turkey at the relevant time…"[139] The Respondent states that the Claimant has himself previously denied his residence in the United Kingdom in other proceedings, and in particular in the case of the Telsim fraud. The Respondent explains that the primary venue for the Telsim fraud litigation was New York, but that the English courts became involved when Motorola sought a worldwide freezing order from the English courts in support of the New York litigation.[140] The Respondent continues that the Claimant "contested the injunction, a key argument being that the court had no jurisdiction over him since he was neither domiciled nor resident in the United Kingdom. He was given several chances to comply with an order to disclose assets and appear for cross-examination, but refused to do so. Ultimately the court was left with no alternative than to condemn him for contempt of court and subject him to a prison term in December 2002 – a month after the Transfer Regulation was implemented. This judgment was not enforced as Cem Uzan has never set foot in England."[141] The Respondent refers to a Judgment of the United Kingdom Court of Appeal which stated that:

> *"the point of principle…at the heart of the appeals [was] whether a world-wide freezing order should be made…where the defendant [was] neither domiciled nor resident within the jurisdiction."*[142]

112. The Respondent argues that the Claimant has also argued before the New York courts that he was residing in Turkey, at the relevant times. The Respondent refers to the Claimant's own "Counterclaims" in the New York litigation, dated October 15, 2002, which states that:

> *"Counter-Plaintiff Cem Uzan is a citizen of and resides in Turkey."*[143]

[139] *Id.*, ¶ 84.
[140] *Id.*, ¶ 98.
[141] *Id.*, ¶ 99.
[142] Motorola v. Cem Uzan et al., Judgment, UK Court of Appeal [2003] EWCA Civ 752, dated June 12, 2003, ¶ 2 (Exhibit R-146).
[143] Motorola v. Kemal Uzan et al., Counterclaims, United States District Court for the Southern District of New York, 02 Civ 0666 (JSR), dated October 15, 2002, ¶ 19 (Exhibit R-516).

113. The Respondent argues that these judgments and evidence from the New York and English court proceedings are "highly persuasive evidence" as they are "contemporaneous," "based on the Claimant's own evidence and submissions to courts," and show that "the Claimant was not residing in the UK in 2002 and 2003."[144]

114. As further proof of the Claimant's residence in Turkey between 2002 and 2003, the Respondent argues that the Claimant voted in the Beykoz district of Istanbul in November 2002, and "[s]ince it was not possible during the 2002 elections to vote at diplomatic missions abroad, only voters residing in Turkey had a right to vote. Accordingly, of the Claimant's allegation that he was residing in the United Kingdom in 2002 was true, he simply could not have voted, since Turkish Civil Law provides that a person can only have one permanent residence."[145] The Respondent also makes reference to the Claimant's tax returns which were filed in Turkey from 1998 to 2003.[146]

115. The Respondent highlights the length of the Claimant's stays in the United Kingdom when the Claimant was actually within the jurisdiction. The Respondent argues that custom records confirm that the Claimant could not have been present in the United Kingdom for a total of no more than 38 days during the entirety of the years 2001-2009.[147] While the Claimant has argued that these entry and exit records were forged, the Respondent replies that these were merely translation errors that have since been corrected in Exhibit R-464 (bis), and that any double entries or exits were likely the result of the Claimant travelling by sea and failing to have his entry recorded at the relevant port.[148] The Respondent further notes that the Claimant does not dispute the accuracy of any of the entry and exit records, and that the Claimant has not taken the opportunity to produce originals of all of his passports for examination, and thus "[t]he fact that the Claimant could have spent

[144] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 132.
[145] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 91.
[146] *Id.*, ¶ 92; Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 134.
[147] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 116.
[148] *Id.*, ¶ 118.

no more than 38 days in the United Kingdom in 2001-2009 remains substantively unchallenged."[149]

116. The Respondent therefore concludes that the Claimant was not factually permanently residing in the United Kingdom between 2002 and 2003, and that the Claimant also does not meet the legal criteria in order to be considered "permanently residing in [the United Kingdom] in accordance with its applicable laws." The Respondent submits that the Claimant was in fact residing in Turkey over the course of this period of time.

(c) Claimant's Residence in France

117. The Respondent submits that the Claimant has not established that he has been "permanently residing in [France] in accordance with its applicable laws" at the time of filing his Request for Arbitration with the SCC.

118. Regarding the Claimant's actual residence since 2009, the Respondent "objects to the Claimant's conclusion that his permanent residence in France may be inferred from the unproven fact that he 'has not once left the French territory since his arrival in 2009.' At best, this could be (if proven) an indication of residing in France, not of permanently residing there."[150] The Respondent questions the lease agreements that have been produced by the Claimant and states that these "are not accompanied by any evidence that he actually lived in these apartments…"[151] The Respondent highlights that the Claimant has not produced any documents showing his affiliation to associations, clubs or social organisations, nor has he produced documents such as vehicle insurance policies, which would typically be held by a person permanently residing in France.[152] The Respondent further objects to the Claimant's late introduction of his marriage certificate to a French national, but in any event submits that the marriage was in November 2012, and adding three years to that

[149] *Id.*, ¶ 121.
[150] *Id.*, ¶ 176.
[151] *Id.*, ¶ 177.
[152] *Id.*, ¶ 180.

(the time required by law to become resident by virtue of marriage) would fall later than the filing of the March 2014 Request for Arbitration.[153]

119. Turning to whether the Claimant can be considered to be "permanently residing in [France] in accordance with its applicable laws," the Respondent argues that the permits that have been granted to the Claimant are temporary in nature and do not grant to the Claimant the right to permanently reside in France.[154] The Respondent refers to the documentary evidence that has been produced by the Claimant and submits that these documents are not permits, but rather receipts (*récépissé*), and that there have been a number of gaps in the record concerning the Claimant's status at particular points in time.[155] The Respondent argues that "[t]here is no evidence whatsoever that at the time of the introduction of this arbitration, Mr. Uzan had anything but subsidiary protection, and even the subsidiary protection is not properly evidenced."[156]

120. Furthermore, the Respondent argues that any subsidiary protection afforded to the Claimant would have been obtained by making misrepresentations on Turkish law and the *Libananco* arbitration to the French authorities.[157] The Respondent states that the Claimant had submitted to the French authorities that he had been condemned to over 50 years of prison terms in Turkey because those prison terms would have been cumulative.[158] However, the Respondent submits that this is not true, the prison terms would not have accumulated, and the maximum amount of time the Claimant would have served in prison would have been 28 years.[159]

121. The Respondent refutes the Claimant's argument that subsidiary protection creates a connection between the Claimant and France that is stronger than permanent residence.[160] The Respondent argues that such subsidiary protection is by nature

[153] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 144-145.
[154] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 155.
[155] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 148-149.
[156] *Id.*, p. 150.
[157] *Id.*, p. 151.
[158] *Id.*
[159] Official Transcript of Hearing, Volume 2, dated January 19, 2016, p. 291.
[160] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 160.

temporary and that "[s]ubsidiary protection and corollary rights will only be guaranteed as long as the circumstances for which it was granted in the first place have not ceased to exist; at which times the French authorities may take the decision – at any time and on their own motion – to revoke the status."[161] The Respondent highlights the differences between temporary residence permits and permanent residence permits.[162] The Respondent relies on the legal opinion of Professor Tchen who states that:

> *"The beneficiaries of [temporary residence permits] are not, however, entitled to a permanent residence in the sense that their will to remain in France is not binding on the authorities. Indeed, the law imposes time limits on their stay based on a factor they do not control and that does not allow them to claim unlimited residence."*[163]

122. The Respondent argues that there is a difference between subsidiary protection and asylum status. The Respondent submits that "[u]nder French law, a refugee is granted a ten-year residence permit (as opposed to a one-year permit for the beneficiary of subsidiary protection), which is automatically renewable (whereas the renewal of the permit granted to beneficiaries of subsidiary protection is subject to a review of the person's situation)."[164] Thus, the Respondent concludes that "subsidiary protection is, by essence, not compatible with the notion of permanently residing: this form of asylum will always be conditioned by facts falling outside the protected person's control, which is the most important factor distinguishing between the right to reside permanently and temporarily."[165] For the above reasons, the Respondent submits that the Claimant was not "permanently residing in [France] in accordance with its applicable laws" when the Claimant filed his Request for Arbitration.

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[161] *Id.*, ¶ 161.
[162] *Id.*, ¶ 162.
[163] Legal Opinion of Professor Vincent Tchen, dated November 17, 2015, ¶ 50.
[164] Respondent's Rejoinder on Bifurcated Jurisdictional Issue, dated November 20, 2015, ¶ 168.
[165] *Id.*, ¶ 169.

3. Respondent's Conclusion

123. Based on the above principal arguments, as well as further arguments expanded upon by the Respondent in its written submissions, which the Tribunal has fully considered, the Respondent submits that the Claimant does not qualify as an Investor at all relevant times in accordance with Articles 1(7)(a)(i) and 26 of the ECT.

C. *Decision on the Respondent's Objection of* Ratione Personae

124. Having summarized the main elements of each Party's case, the Tribunal will now address the Respondent's objection on the grounds of *ratione personae*.

125. The Tribunal notes Article 22(1) of the SCC Rules, which provides:

> *The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.*

126. In their submissions, the Parties have relied on a number of different sources of law, at both a national and international level. The Tribunal thus relies on the Parties' submissions regarding the applicable laws, and identifies and applies the agreed upon and most appropriate laws on an issue by issue basis.

1. Interpretation of Articles 1(7)(a)(i) and 26 of the ECT

127. The Claimant seeks to bring a number of claims against the Republic of Turkey relating to an investment made by the Claimant in the Republic of Turkey, and the alleged unlawful seizure and expropriation of that investment by the Republic of Turkey in violation of the provisions of the ECT.

128. In disputing that the Claimant has jurisdiction to bring these current claims, the Respondent argues that the Claimant has not established jurisdiction *ratione personae*, because the Claimant does not qualify as an "Investor" within the meaning of the ECT.

129. Article 26 of the ECT, entitled "Settlement of Disputes Between an Investor and a Contracting Party," sets out the means by which Investors and Contracting Parties to the ECT may settle their disputes. Part (1) of Article 26 defines the disputes which are capable of settlement in accordance with the following sections of Article 26:

> *Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*

130. Article 26(1) contains two terms that are separately defined within the ECT. Article 1 of the ECT contains the definition section. Article 1(2) defines a "Contracting Party" as:

> *[A] state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.*

131. There is no dispute that Turkey is a Contracting Party to the ECT.

132. Article 1(7) contains the definition of "Investor," and sub-article (a) thereof defines the meaning of "Investor" "with respect to a Contracting Party." The Claimant argues that he comes within the definition of "Investor" contained within Article 1(7)(a)(i) of the ECT, which provides:

> *[A] natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law.*

133. The Claimant seeks to invoke the status of "permanently residing in" in order to establish the jurisdiction of the Tribunal to hear the Claimant's claims.

134. It is clear to the Tribunal that in order to establish jurisdiction *ratione personae*, the Claimant must show that he satisfies the criteria for being an Investor laid down in Article 1(7)(a)(i), as this term is contained within Article 26. Article 1 is a definition

section, intended to give meaning to terms used throughout the ECT, relating to the substance of the ECT, its scope and protections.

135. The Tribunal emphasises that, like any arbitration agreement, the basis of the agreement to arbitrate arises from consent: the consent of both an Investor and a Contracting Party to have their dispute heard by a Tribunal constituted in accordance with the SCC Rules, per Article 26(4)(c) of the ECT. Thus, it must be clearly established that the Parties have agreed to arbitrate the current claims in dispute.[166] The Claimant must therefore satisfy the Tribunal that he is an Investor, within the meaning of the ECT, so that he was capable of accepting the Respondent's consent to arbitrate when he filed his Request for Arbitration on March 7, 2014.

136. In interpreting the ECT, the Tribunal seeks guidance from the VCLT, which assists in the interpretation of treaties, containing both general rules of interpretation and supplementary means of interpretation. Article 31 of the VCLT, entitled "General Rules of Interpretation" provides in sub-article (1) that:

> *A treaty shall 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 the light of its object and purpose.*

137. The Parties agree on the application of Article 31 in interpreting Articles 1(7)(a)(i) and 26 of the ECT. The Tribunal therefore seeks to give effect to the ordinary meaning of the language contained within the ECT. However, the Tribunal notes that the phrase "ordinary meaning" is immediately followed by "to be given to the terms of the treaty in their context and in the light of its object and purpose." The Tribunal understands this to mean that a simple dictionary reading of the terms in a treaty is not what is called for. Rather, a treaty's language must be examined having regard also to the entirety of the text read together (to provide context), and having regard to what the objects and purposes were in enacting the treaty. Thus, the

[166] "It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous." Plama Consortium Limited v. Republic of Bulgaria, Decision on Jurisdiction, ICSID Case No. ARB/03/24, dated February 8, 2005, ¶ 198 (Exhibit CLA-052).

Tribunal is obliged to seek to give meaning to the wording of the ECT as drafted, beyond what could possibly be garnered from an overly grammatical reading of the relevant provisions.

138. Should the Tribunal determine that it is not possible to decipher the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," the Tribunal shall turn to the "Supplementary Means of Interpretation" in accordance with Article 32 of the VCLT. Article 32 provides:

> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
> *(a) Leaves the meaning ambiguous or obscure; or*
> *(b) Leads to a result which is manifestly absurd or unreasonable.*

139. Turning to the wording of Article 1(7)(a)(i), there are three ways in which a natural person may qualify as an Investor: (1) having the nationality of, or (2) having the citizenship of, or (3) permanently residing in a Contracting Party to the ECT in accordance with its applicable law. The first two requirements have an identical meaning and can be considered as one. There is no dispute that the Claimant is a national of the Republic of Turkey, and that he does not hold nationality or citizenship of any other country, or any other Contracting Party to the ECT.

140. The Tribunal must therefore determine whether the element of "permanently residing in that Contracting Party" entitles an Investor, without more, to commence an arbitration against a Contracting Party of which he or she is a national or citizen. The Tribunal does not accept the Respondent's argument that the structure of Article 1(7)(a)(i) creates a hierarchy between the different types of Investor. "[P]ermanently residing in" cannot be considered to be a subsidiary link. The structure of Article 1(7)(a)(i) and the use of the conjunction "or" creates an equal set of criteria for determining whether a natural person is an Investor. To interpret

the conjunction "or" in the manner that the Respondent suggests would not be line with the natural and ordinary meaning of the text. Had the meaning that the Respondent posits been so intended, this could have been expressed using clearer and more precise language. While under general international law nationality may be a stronger link than "permanently residing in," the Tribunal is satisfied that the ECT does not on its face seek to create a hierarchical relationship between the criteria of nationality and permanently residing. The wording of Article 1(7)(a)(i) appears to be broad in scope. Without having to examine the preparatory works of the ECT, it is clear that its "object and purpose" was to create a wide expanding energy framework for the ease and encouragement of international energy investments. As has been evidenced in these proceedings, the Contracting Parties to the ECT address the issues of nationality, citizenship and permanent residence in different ways. The inclusion of "permanently residing" appears to have been intended to give protection to investors who may not meet the often strict requirements for nationality and citizenship, as defined by a particular Contracting Party. The Tribunal agrees with the statement of Professor Leben that:

> *"If the States had wanted to make a restriction of such importance, they would have certainly indicated so."*[167]

141. The Tribunal further accepts the Claimant's argument that it is not necessary to turn to customary international law in determining the meaning of "Investor" in Article 1(7)(a)(i) and whether an Investor can sue a Contracting Party of which they are a national. The Tribunal considers the ECT to be a *lex specialis*. The Tribunal takes note of the decision of *Serafin Garcia Armas and Karina Garcia v. Venezuela*, where it was stated that:

> "*In this award, the Tribunal shed light on the fact that contemporaneous international law, investor protection, and dispute resolution linked to it are essentially governed by bilateral or multilateral treaties for the protection of foreign investment, such as bilateral investment treaties and contracts between investors and States. As a consequence, the role of*

[167] Legal Opinion of Professor Charles Leben, dated February 16, 2015, ¶ 20.

> *diplomatic protection has diminished, having recourse to it only when treaties do not exist or are inoperable.*"[168]

142. As further noted in the *Serafin Garcia* case, the *lex specialis* of the ECT is consistent with the United Nations' International Law Commission Draft Articles on Diplomatic Protection, Article 17 of which provides:

> *The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.*

143. Paragraph 3 of the Commentary on the Draft Articles states that:

> *Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply "to the extent that" they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.*

144. Thus, the Tribunal is satisfied that it is not necessary in the present instance to investigate the content of customary international law on this issue. Even though Article 26(6) of the ECT states that the issues in dispute shall be decided "in accordance with this Treaty and applicable rules and principles of international law," this cannot be taken to mean that rules of customary international law are capable of overriding the clear text of the ECT, assuming it to exist.

145. Examining Article 1(7)(a)(i) in isolation, it is apparent that there is no order of priority between the different classifications of Investor. Once an Investor asserts jurisdiction based on either one of these three possible characteristics, the Investor may not then rely on another. However, in order to establish jurisdiction, the most

[168] Serafin Garcia Armas and Karina Garcia v. Venezuela, PCA Case No. 2013-3, Decision on Jurisdiction, dated December 15, 2014, ¶ 172 (Exhibit CL-92, unofficial translation).

relevant article of the ECT is Article 26. Therefore, the Tribunal must investigate whether the Claimant is an Investor within the meaning of Article 26 of the ECT.

146. Turning to the ordinary meaning of Article 26(1), the Tribunal considers that the use of the word "another" is what essentially makes an Investor an international investor. Furthermore, the words "of the latter in the Area of the former" appears to place an emphasis on the Investor being imbued with a transnational quality – that is to say an Investor who is engaged in some form of cross-border transaction. The Tribunal believes that Article 26(1) implies a condition of transnationalism. While Article 1(7)(a)(i) defines the ways in which a natural person can be an Investor, Article 26(1) offers a further element that must be satisfied for a person to be characterised as an Investor to whom protection – and the right to bring proceedings – will be extended. From the ordinary meaning of Article 26(1), the Tribunal is satisfied that an Investor must possess some cross-border characteristic in order to be protected by the ECT (a covered Investor).

147. Examining the Claimant's circumstances, the Tribunal notes that when the Claimant first made his investment, he was only a national of Turkey, and he was not – and did not claim to be – permanently residing in another Contracting Party. The Claimant was a national, domestic investor, and not a protected "Investor" within the meaning of the ECT. The Claimant asserts that only subsequently was he "permanently residing" in another Contracting Party.

148. This raises the question of whether a subsequent change of residence – assuming it to have occurred – may of itself allow the Claimant to be treated as a protected "Investor" within the meaning of the ECT. In the view of the Tribunal, the mere fact of the Claimant's subsequent change of residence, as well as the reasons and the circumstances thereof, cannot as such operate to transform the legal characteristic of the person into an Investor, within the meaning of Article 26(1). Though the investor may have changed residence, he was not initially an Investor within the meaning of the ECT such as to be entitled to protections. Hypothetically speaking, had the Claimant made additional energy investments back into the territory of Turkey, while he was permanently residing in another Contracting

Party, the Claimant could possibly claim the status of Investor with respect to those investments. However, the Tribunal is not required to make a determination on this point, as those facts are not alleged by the Claimant, and there is no evidence before the Tribunal that he is making any claim in respect of an investment made while he was permanently residing in another Contracting Party.

149. The Tribunal is not able to accept the argument that the Claimant can be considered an Investor under Article 26(1) merely by the fact of a change of residence, and nothing more. The Tribunal is further satisfied that this reading of Article 26(1) is in line with proper interpretation of the ECT, including by regard to its object and purpose.

150. The Claimant has argued that the "ECT's object is broader than most investment agreements, which are usually based on the notion of reciprocity; rather the ECT's object and purpose is to encourage and create stable conditions, transparent and favourable to investors and fostering investment in the energy sector. In this sense, the ECT has more of the features of a 'common area of protection' (like NAFTA, or MERCOSUR), with a goal of 'creating a single energy area.'"[169]

151. The Tribunal is able to accept the submission that the ECT was intended to be broad and far reaching in scope, thus including protection for natural persons permanently residing in a Contracting Party who may not have the nationality of a Contracting Party. Article 2 of the ECT, entitled "Purpose of the Treaty" provides:

> *This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.*

152. However, the Tribunal has more difficulty in accepting that the object and purpose of the ECT is so broad as to extend its protections to the Claimant in his particular circumstances, and on the basis of the evidence before it. As established by the

[169] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 96; Emmanuel Gaillard, *Investments and Investors Covered by the Energy Charter Treaty*, in Clarisse Ribeiro, ed., Investment Arbitration and the Energy Charter Treaty (2006), n. 39 (Exhibit CL-94).

objectives and the implementation of the Concluding Document of the Hague Conference of the European Energy Charter, the object and purpose of the ECT is to protect "the international flow of investments," and hence to protect international investors.[170] The Claimant, no matter how he frames his arguments, is missing this essential transnational link, in relation both to the time his "investment" was made and when he alleges it was interfered with. The ECT was intended to protect Investors investing into Turkey, not nationals within Turkey who make investments in their own country. At the time the investment was made, the Claimant was plainly not an Investor who made an investment that was entitled to any protections under the ECT. The Tribunal does not believe that a subsequent change in residence – assuming it to have occurred – can of itself transform the Claimant into an Investor with respect to domestic investments already made, who is entitled to protections under the ECT, at least not in the absence of investments made as a protected Investor under the ECT. In the view of the Tribunal, on the evidence that is available to it, the Claimant is not a covered Investor as he is not an "Investor of another Contracting Party," because on the date he made his investment, and at all times until the alleged interference occurred, he was an investor of the Republic of Turkey.

153. The Tribunal recognises the Claimant's unfortunate circumstances in light of his multiple changes of residence over a number of years, and the Tribunal does not suggest that the Claimant has engaged in any sort of treaty shopping exercise. However, from the ordinary meaning of Article 26(1), and having regard to the object and purpose of the ECT, the Tribunal concludes that the ECT was not intended to protect domestic investors in circumstances such as the Claimants, and the Claimant's claim thus fails at this first hurdle.

154. Having regard to the Parties' submissions, which further addressed a number of other issues, the Tribunal deems it appropriate to make findings on some of these

[170] Title II, Section 4 of the Concluding Document of the Hague Conference on the European Energy Charter.

pleaded issues. These operate to confirm the Tribunal in the conclusion it has reached.

155. As noted above, in order to satisfy the criteria of Article 1(7)(a)(i), the Claimant must show that he was "permanently residing in that Contracting Party in accordance with its applicable law."

156. The Tribunal decides that there are thus two requirements that a natural person must meet in order to be considered an Investor based on the permanently residing criterion. The ordinary meaning of this Article necessitates a factual and a legal component. Starting with the latter, there is no dispute that this operates a *renvoi* to the domestic law of the Contracting Party. The Tribunal must look to the domestic law of the Contracting Party in question to determine whether the Claimant qualifies as permanently residing in that country in accordance with that law. However, determinations by domestic authorities, while highly persuasive, are not absolutely determinative, and the Tribunal is authorized to examine the underlying facts in order to determine whether the Claimant has permanently resided there in accordance with the applicable domestic law. Regarding the factual component, the Tribunal decides that the structure of the wording "permanently residing" implies that there must also be a determination that an Investor was actually living permanently in the territory of the Contracting Party. This is obvious from the ordinary and natural meaning of the text. If the intention behind Article 1(7)(a)(i) had been to refer solely to the legal status of the natural person as defined by domestic law, the text might have used the words "permanent resident." The use of "permanently residing" appears to require that a natural person should be both permanently residing in the Contracting Party (a factual requirement), and for such status to be recognised by local domestic law (a legal requirement). Such interpretation avoids a situation whereby a natural person could obtain resident permits from multiple jurisdictions (e.g. by becoming an investor in that state) in order to avail of such state's protections, without actually having to reside within any of those states. The factual and legal connection of the Investor to the Contracting Party is thus of high importance under the ECT.

2. Claimant's Residence in the United Kingdom

157. The Claimant argues that he was "permanently residing in [the United Kingdom] in accordance with its applicable law," during 2002 and 2003 at the time of the alleged expropriation, including on June 11, 2003.

158. The Claimant recounts that he was granted "Leave to Remain" in the United Kingdom on September 5, 1996, which was extended on August 31, 1997, and thereafter renewed annually. On November 10, 2000, the Claimant was granted "Indefinite Leave to Remain." Thus, between 2002 and 2003, the Claimant's alleged status was that of having "Indefinite Leave to Remain."

159. "Indefinite leave to remain for an investor" is defined in Section 230 of the UK Immigration Rules. It requires that the investor should have spent a continuous period of four years in the United Kingdom in his capacity as an investor, and that the requirements of Section 227 of the UK Immigration Rules have been met over this period. One such requirement, as set out in Section 227(iv) is that the investor "has made the United Kingdom his main home." On this basis, the Tribunal is satisfied that the granting of indefinite leave to remain under Section 230 of the UK Immigration Rules could be said to denote a status that might be equivalent to the situation of a person permanently residing. The law among the Contracting States to the ECT regarding permanent residency is broad ranging. It is not necessary that a natural person holds a status of that precise wording in order to be considered an Investor within the meaning of the ECT. Rather, this Tribunal determines that the United Kingdom's status of "Indefinite Leave to Remain" may – under the appropriate factual circumstances – give rise to a situation which is equivalent to permanently residing, within the meaning of Article 1(7)(a)(i) of the ECT, subject to the point that follows.

160. As the Tribunal has already stated, however, having a legal status equivalent to permanent residence does not end the inquiry that the Tribunal must engage in. Article 1(7)(a)(i) further requires that the natural person is as a matter of fact permanently residing in the Contracting Party. The Claimant, having been granted

indefinite leave to remain, was entitled to permanently reside in the United Kingdom, but this does not lead to the automatic conclusion that the Claimant was actually permanently residing in the United Kingdom at the times the Claimant argues, including in June 2003. The words "permanently residing" indicates not only that a person should have a right to permanently reside in the United Kingdom, but that he should actually be there residing, and be doing so under conditions of permanence.

161. Having examined the factual evidence submitted by the Parties over the course of these proceedings, the Tribunal is not able to determine with certainty how many days the Claimant actually spent in the United Kingdom over the period of time in question. Nor is the Tribunal able to say precisely how many days the Claimant would be required to remain in the United Kingdom in order to be considered permanently residing therein. However, the Tribunal can draw a number of conclusions from the evidence presented before it in order to determine where the Claimant's business, legal, family and social interests were centred during this period.

162. The Claimant has submitted that he was permanently residing in the United Kingdom between 1996 and 2009. In the Claimant's Second Affidavit, the Claimant states that he intended to make his main home in the United Kingdom, though he believed that owning second residences in other countries and travelling outside of the United Kingdom would not affect the status of the United Kingdom as his place of permanent residence.[171] In the Claimant's First Affidavit, he explains his decision to move his principal home to the United Kingdom as a result of the attractive tax system and the education available for his children.[172] The Claimant recounts a number of details as proof of his permanent residence in the United Kingdom: his family home in Halkin Street, Chelsea; his ownership of a Rolls Royce; the location of his business premises in London; his membership in local social clubs; and, the hiring of an English public relations firm.[173] The Claimant

[171] Second Affidavit of Cem Cengiz Uzan, dated September 18, 2015.
[172] Affidavit of Cem Cengiz Uzan, dated February 19, 2015, ¶ 6.
[173] Id., ¶¶ 9-18.

acknowledges, however, that he also spent a considerable amount of time travelling, that he owned property in New York, and that in this period his children relocated to New York for their schooling.

163. The Tribunal does not dispute that the Claimant had certain connections with the United Kingdom, sufficient to be afforded indefinite leave to remain in 2000. However, it is apparent from the record that there is more to the evidence than the Claimant has sought to suggest. During the period in question in which the Claimant argues he was permanently residing in the United Kingdom, the evidence also establishes that the Claimant maintained numerous and significant links with the Republic of Turkey. While it is not necessary to explore each of these contacts in detail, which are all on the record, the Tribunal deems it important to comment upon a number of these that are of particular relevance.

164. The Claimant filed tax returns in Turkey.[174] In a number of these tax returns the Claimant lists his residence as being in Istanbul, Turkey. This is despite the Claimant's assertion that his move to the United Kingdom was inspired, in part, by the United Kingdom's favourable tax regime. Notwithstanding the Claimant's explanations for the filing of his Turkish tax returns in this way,[175] the Tribunal considers that these returns are demonstrative of a significant link with Turkey, where the Claimant was active in operating his businesses. Further evidence has been put forward that the Claimant voted in Turkish elections.[176] There is a dispute over the actual significance of this as the Parties put forward differing interpretations regarding the connection between voting and residence in Turkish elections. Coupled with the Claimant's establishment of a political party in Turkey (the Genç Party), it is difficult to reconcile these actions with those of a person whose principal business, family and social interests had migrated (on the basis of a permanent residence) to the United Kingdom. In fact, the Claimant states in his affidavit that "if and until [he] was successful in politics [in Turkey], [he] did not

[174] Tax Declarations of Cem Uzan and Various Documents Submitted to the Ministry of Finance (Exhibit R-466).
[175] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 171.
[176] "Cem Uzan votes," NTVMSNBC dated November 3, 2002 (Exhibit R-471).

have an intention to permanently live in Turkey."[177] This statement is contradictory and plainly at odds with the evidence on record. It is not immediately apparent how the Claimant can plausibly claim that his factual place of residence was in a country where he spent a minority of his time, even as he was becoming actively involved in the political process of his home country. The act of setting up a political party would tend to offer further proof of the Claimant's strong ties to Turkey at this time, making it less credible that the Claimant could have been permanently residing in the United Kingdom.

165. As noted, the Tribunal refrains from identifying a minimum number of days requirement, or establishing precisely how many days the Claimant spent in the United Kingdom. The Claimant sought to explain – without the benefit of supporting evidence – that on many occasions, upon his re-entry to the United Kingdom, he was not required to pass through immigration as he was travelling on a private plane.[178] Nevertheless the Tribunal has no difficulty in concluding that the Claimant's various stays in the United Kingdom were not of a sufficiently continuous or lengthy nature to allow it to determine that he should be considered as permanently residing in the United Kingdom. The Claimant's multiple absences were not only spent working abroad, or living in another of his residences in New York. The Claimant spent a considerable period of this time in Turkey. This occurred before the Claimant was later prevented from leaving Turkey. A person may have contacts with multiple states, whether of a business or social nature. However, legal determinations aside, the Tribunal has some difficulty in easily concluding, as the Claimant seeks to argue, that a natural person can be permanently residing in more than one state at the same point in time. The evidence presented by the Parties of the Claimant's activities between 1996 and 2009 provides strong evidence to indicate that the Claimant was not permanently residing in the United Kingdom. The status of the Claimant as defined by the United Kingdom authorities cannot alter the clarity of this factual finding.

[177] Affidavit of Cem Cengiz Uzan, dated February 19, 2015, ¶ 22.
[178] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 185.

166. While evidence of the Claimant's movements, as well as the centre of his business and political interests, is enough to persuade the Tribunal that the Claimant was permanently residing in Turkey, the Tribunal takes further guidance from the Claimant's own prior legal submissions (in other proceedings) to reach this same conclusion. In a judgment of the United Kingdom Court of Appeal, it was stated that:

> *"[The evidence before the court demonstrated that the Claimant owned] a valuable London property, Halkin Gate House, originally bought because [the Claimant] intended to develop business interests in London under a scheme which fell through, which property had been on the market for over a year. The plaintiff had continued to visit the United Kingdom intermittently for leisure purposes, usually staying in hotels because the property was for sale. The house had a value of some £6 million, together with contents left in it to create the effect of a home in order to assist obtaining a buyer. He also had a Rolls Royce car and shares in a service company in the United Kingdom, but otherwise his substantial assets were in other jurisdictions, in particular Turkey and America."*[179]

167. The Court of Appeal was basing its knowledge on evidence submitted by the Claimant himself, through his lawyers. At the beginning of this same judgment the Court of Appeal stated that:

> *"The point of principle which lies at the heart of the appeals is whether a world-wide freezing order should be made under s.25 of the CJJA in support of an action in another jurisdiction in circumstances where the defendant in question is neither domiciled nor resident within the jurisdiction and there is no substantial connection between the relief sought and the territorial jurisdiction of the English Court."*[180]

[179] *Motorola v. Cem Uzan*, Judgment of the UK Court of Appeal [2003] EWCA Civ 752, dated June 12, 2003, ¶ 86 (Exhibit R-146).
[180] *Id.*, ¶ 2.

168. Thus, the Court of Appeal was of the view that the Claimant was not domiciled in the United Kingdom. Regardless of what issues were being determined by the Court of Appeal, this is a definite finding of fact.

169. The Claimant has failed to provide any explanation for why his current submissions regarding his then residence are now different from submissions that he made to domestic courts on this same issue. At the Hearing, the Tribunal presented this issue to counsel for the Claimant as follows:

> *"Prof. Sands: So my follow-up question is, what are we to make of that submission [by Claimant's counsel, Mr. Strauss QC to the Court of Appeal], which appears to be rather clear, at least insofar as it relates to the statement and submission that Mr. Uzan was not a resident of the United Kingdom in 2002?*
>
> *You are asking us to conclude that although that submission was made in those, as you say different circumstances, he was not a resident but he was nevertheless permanently residing in the United Kingdom. Is that your submission?*
>
> *Mr. Hendel: Yes."*[181]

170. In response to questions from the Tribunal regarding these same submissions by then counsel for the Claimant, the Claimant himself states that:

> *"The Witness: Sir, I really don't remember whether I met him [Mr. Strauss QC], whether I gave him any instructions or I didn't give him instructions. I don't recall."*[182]

171. The Tribunal is unable to accept the Claimant's explanation in this regard. The evidence before it is clear that the Claimant's own lawyers argued before English courts that the Claimant was not a resident of the United Kingdom. The fact that the English proceedings related to different matters, including the obtaining of a

[181] Official Transcript of Hearing, Volume 1, dated January 18, 2016, pp. 55-56.
[182] *Id.*, p. 190.

worldwide freezing order, does not take away from the simplicity of the core issue: was the Claimant permanently residing in the United Kingdom in 2002 and 2003? The Tribunal is unimpressed with the Claimant's efforts to obtain affidavits and court submissions from the English and New York court proceedings, which may have provided further guidance as to the Claimant's position at that time, as ordered by the Tribunal in Procedural Order No. 5. Nevertheless, the further factual evidence in these proceedings is in line with the arguments that were made by the Claimant himself before the English courts. Relating to the Claimant's asserted residence in France, the Claimant has stated that "it is indisputable that the center of the Claimant's vital interests is Paris, France, and has been the case since 2009 because it [is] where he has structured his family, professional, economic, and social life."[183] Based on the evidence before this Tribunal, it cannot be concluded that the Claimant's "vital interests" were in the United Kingdom between 2002 and 2003, and this is not where he appeared to structure "his family, professional, economic, and social life."

172. The only conclusion that the Tribunal can draw from all of the evidence before it is that the Claimant was not "permanently residing in" the United Kingdom between 2002 and 2003, and in particular on June 11, 2003. It follows from this that the Claimant on that date could not have been an Investor in accordance with Article 1(7)(a)(i).

3. Claimant's Residence in France

173. The Claimant argues that he fulfils both the factual and legal requirements in order to be considered "permanently residing in [France] in accordance with its applicable law."

174. The Claimant states that he arrived in France on September 3, 2009, after fleeing from Turkey. The Claimant was first given a temporary residence permit, before being afforded *protection subsidiaire*. The question is therefore whether *protection*

[183] Claimant's Reply on the Preliminary Objection to Jurisdiction Ratione Personae, dated September 20, 2015, ¶ 294.

subsidiaire is equivalent to the act of permanently residing in accordance with French law. The Claimant has argued that "[i]t is absolutely not necessary, with regard to the French law, to have a legal title of permanent resident to be considered there as living permanently in France."[184] The Parties have made thorough legal submissions and the Tribunal has heard from the Parties' experts on this point.

175. The Tribunal agrees that the aim of the *protection subsidiaire* regime is to ensure the civil, economic and social integration of the person who benefits from it. The system, it appears, is designed to accommodate the full integration into French society of the protected person. In his legal opinion, Professor Beauvais states that:

> *"More than a simple right of residence (or residency), subsidiary protection thus constitutes a connection to a new State of an individual who is no longer protected by his State of origin. Therefore, granting subsidiary protection reflects a divide, or even a destruction, of the factual and legal relation to the State of origin and the establishment of a new legal, civil and administrative relation, primarily, with the protecting State. In a way, the connecting link of the individual with the protecting State partially replaces that which exists with the State of origin. Thus, the protecting State guarantees one of the strongest State protections that exists…"*[185]

176. Thus, while the Claimant still holds the nationality of Turkey, the state of France has effectively stepped into the shoes of Turkey in terms of providing the Claimant with the protections that would normally be afforded by one's home country. In fact, the holder of *protection subsidiaire* receives such a status based on their persecution (as determined by the French authorities in this case) by their home state.

177. Professor Beauvais details a number of benefits that a holder of *protection subsidiaire* receives from France, including: right of access to employment;

[184] Official Transcript of Hearing, Volume 1, dated January 18, 2016, p. 61.
[185] Legal Opinion of Professor Pascal Beauvais, dated February 17, 2015, ¶ 4.

education; social protection; health services; and, housing.[186] The holder of *protection subsidiaire* appears to be treated, for most intents and purposes, as a permanent resident of France.

178. Professor Beauvais further states that:

> *"By definition, the territory from which the beneficiary departs and returns to during his travel is that of the protecting State. Although, in principle, the protecting State may not impede the freedom of movement of persons benefiting from the subsidiary protection, the characteristics of this permit indicates it is its responsibility to limit and monitor the exercise of said freedom. The existence of this restrictive regime of movement, let alone of installation, into other States from the protecting state territory logically leads to the conclusion that the protecting State is the permanent residency of the recipient of the subsidiary protection status."*[187]

179. These characteristics of the *protection subsidiaire* points to the Claimant's position that it is capable of constituting permanent residency. However, the Tribunal does not go as far as the Claimant to suggest that *protection subsidiaire* is a stronger connecting link than holding a French permanent residence card. It is sufficient to say that *protection subsidiaire* is a connecting link that is equivalent to "residing permanently in [France] in accordance with its applicable law."

180. The Respondent has argued that a person holding *protection subsidiaire* must seek renewal of this status annually, thus demonstrating that the protection cannot be characterised as permanent in nature. Professor Tchen notes that:

> *"…the right to reside does appear as an accessory to subsidiary protection. Indeed, how could a beneficiary of subsidiary protection be residing 'permanently' when it is the consequence of a factual situation (analysed as a persecution) that can be requalified at any time?"*[188]

[186] *Id.*, ¶ 5.
[187] Supplementary Legal Opinion of Professor Pascal Beauvais, dated September 14, 2015, ¶ 9.
[188] Legal Opinion of Professor Vincent Tchen, dated November 17, 2015, ¶ 17.

181. Professor Tchen describes the *protection subsidiaire* as a "fragile right to reside."[189] Professor Tchen further states that:

> *"The law did not establish a right to reside permanently in France. If such were the case, why limit the duration of the residence permit to two years instead of proposing to grant a residence permit similar to that of statutory refugees?"*[190]

182. In response, Mr. François Sureau argues that:

> *"…although the residency card is limited in time and renewable, the protection granted under subsidiary protection is continuous and does not depend on the condition for the issuance of the permit to stay."*[191]

183. The Tribunal has already recognised that holders of *protection subsidiaire* are provided with a host of protections and benefits by France. The *protection subsidiaire* entitles the holders to establish their family, professional, and social lives within France. The Tribunal considers that the necessity to extend such protection does not take away from its permanency. There are a number of reasons why the holders of permanent residence cards in France may have such status revoked. Such permits can be revoked for reasons including polygamy, violence on a child under the age of 15, and an individual stay for more than three years in a third country.[192] Thus, the idea that any permanent residence will definitively last forever is not realistic. The Tribunal prefers to proceed on the basis that permanent residency (within the meaning of the ECT) *should be capable* of lasting for the duration of a person's life. The fact that it may be revoked at a future point in time is not relevant. *Protection subsidiaire* is capable of lasting for the duration of a person's life.

184. The Respondent argues that because the Claimant's situation is subject to reassessment, the Claimant's holding of *protection subsidiaire* is incapable of being

[189] *Id.*, ¶ 2.2.2.
[190] *Id.*, ¶ 26.
[191] Legal Opinion of Professor François Sureau, dated December 21, 2015, p. 4.
[192] *Id.*, p. 6.

considered as a permanent residency. However, the Tribunal does not believe it fit to base such a status on a future hypothetical event. The Tribunal has already stated that the Claimant cannot say that his permanent residency was in the United Kingdom while he began his political career in Turkey, *and that this was subject to succeeding in Turkish politics*. Similarly, the Tribunal would find it difficult to conclude that the Claimant is receiving protection and benefits from France, without a definite end date, but that because a reassessment may change this status in one, five, 10 or 15 years, the Claimant is not to be considered to be permanently residing in France (within the meaning of the ECT) at this exact point in time. The Respondent's interpretation of *protection subsidiaire* may be seen as overly formalistic and not in accordance with the reality of the situations of those people to whom it benefits, including the Claimant in this instance. The Tribunal therefore decides that the Claimant's possession of *protection subsidiaire* from the Government of France is sufficient to consider the Claimant as presently permanently residing in France, within the meaning of the ECT.

185. The Claimant must also show that he has in fact been permanently residing in France in order to meet the requirements of Article 1(7)(a)(i) of the ECT. The Tribunal does not have difficulty in coming to the conclusion that the Claimant has satisfied this burden. The Tribunal is satisfied that the Claimant has not left the jurisdiction of France since his arrival there in 2009. The Claimant has further provided to the Tribunal details of his residences over a period of time in which he has lived in Paris.[193] The Claimant has begun making fiscal declarations in France.[194] The Respondent argues that the proofs provided by the Claimant are not sufficient to establish his factual permanent residence in France. While the burden is on the Claimant to prove his permanent residence in France, the Tribunal recognises that there has been no alternative put forward for where the Claimant has been permanently residing from 2009. The Tribunal has not been presented with evidence of any other permanent residence since the Claimant arrived in France in

[193] *See* Exhibit C-147; Exhibit C-148; Exhibit C-149; Exhibit C-150.
[194] *See* Exhibit C-153; Exhibit C-154.

September 2009. Thus, the Tribunal can only rely on the evidence before it which in this case points to the Claimant's presence in France since 2009.

186. The Tribunal reiterates that determining whether an individual has been permanently residing in a state should not be a counting of days exercise, and there is no magic number in this regard. However, where an individual has been residing continuously within a country (legally), for more than six years, and without the ability to leave, this provides strongly persuasive evidence of that individual's permanently residing over that course of time. The Tribunal is satisfied that since 2009, the Claimant has structured his family, social, economic and professional life in France.

187. However, as the Tribunal has already determined, permanently residing in a Contracting Party is not sufficient to determine that the Claimant is an Investor in accordance with Articles 1(7)(a)(i) and 26(1) of the ECT, as the Claimant is not an Investor "of another Contracting Party." Therefore, despite the Claimant's permanently residing in France, the Claimant cannot qualify as an Investor. The Tribunal is therefore further unable to find jurisdiction within the Claimant's French law arguments.

4. Conclusion

188. The Tribunal is mindful of the Claimant's current personal circumstances. However, the Tribunal has been tasked with deciding upon a number of legal and factual questions that are unrelated to the merits of the Claimant's case. In interpreting the ECT, the Tribunal has sought to give effect to the ordinary meaning of its provisions, in line with the objects and purposes behind the Treaty. Establishing that the Claimant may fit the definition of an "Investor" at a particular point in time is only part of the inquiry. The Tribunal is persuaded that Article 26(1) of the ECT does not seek to protect the Claimant in the present circumstances. Both the wording of this Article, as well as the objects and purposes behind the ECT, clearly indicate the Treaty's intention to protect foreign Investors, from "another"

Contracting Party. The Claimant has not demonstrated that the facts of his case are in line with this definition.

189. Even taking the Claimant's arguments regarding the interpretation of Articles 1(7)(a)(i) and 26 as correct, the Tribunal finds that the Claimant was not "permanently residing in" the United Kingdom between 2002 and 2003, thus placing an insurmountable obstacle in the Claimant's path to recovery under the ECT.

190. Furthermore, permanently residing in France cannot establish that the Claimant is an Investor based on the Claimant's failure to meet the criteria of Article 26(1) of the ECT.

191. The Tribunal decides that the Claimant is not an "Investor" in accordance with Article 1(7)(a)(i) and Article 26 of the ECT. The Claimant has not established jurisdiction *ratione personae*, and the Tribunal does not have jurisdiction to hear the Claimant's ECT claims against the Republic of Turkey.

IV. COSTS

192. In making its decision on the allocation of the Parties' costs, the Tribunal is bound by Articles 43-45 of the SCC Rules, entitled "Costs of the Arbitration." In accordance with Article 43(3) of the SCC Rules, the Tribunal has requested the SCC Board "to finally determine the Costs of the Arbitration." The Board having made this determination, and now in accordance with Article 43(4), the Tribunal includes in Section V the Costs of the Arbitration.

193. Article 43(5) of the SCC provides:

> *Unless otherwise agreed by the Parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.*

194. The Respondent has argued that applying the SCC, as well as the provisions of the Swedish Arbitration Act (the "**SAA**"), leads to the identical result that costs should follow the event, and that the Claimant should therefore reimburse the Respondent for both costs of the arbitration and the other costs it has incurred in defending itself (principally lawyer and expert fees).[195]

195. Section 37 of the SAA provides, in part:

> *The parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. However, where the arbitrators have stated in the award that they lack jurisdiction to determine the dispute, the party that did not request arbitration shall be liable to make payment only insofar as required due to special circumstances.*

196. The Respondent argues that no such special circumstances exist in the present case, and that the Respondent should therefore not be liable to make payment.[196]

197. The Claimant in turn submits that Section 37 of the SAA is not mandatory, and that even if it were, it does not lead to the result that the Respondent argues.[197] The Claimant notes how one of the Respondent's own legal authorities provides:

> *"[The SAA] is based on the principle of party autonomy, also with respect to compensation to the arbitrators. (...) Such issues may be expressly governed by the parties in an arbitration clause or, e.g., through reference to arbitration rules that contain provisions in this respect."*[198]

198. The Tribunal is in agreement with this statement. The requirements of Section 37 of the SAA are not mandatory, though the Tribunal may seek "guidance" from the

[195] Respondent's Costs Submission, dated February 2, 2016, ¶¶ 16-17.
[196] *Id.*
[197] Claimant's Letter to the Tribunal, dated February 10, 2016, ¶ 1.
[198] F. Madsen, *Commercial Arbitration in Sweden* (Oxford, 2007) 3rd Edition (extract), pp. 305-306.

provisions of the SAA, as it did in its Award on Security for Costs and Bifurcation.[199] The Parties have consented to the application of the SCC Rules.

199. In deciding how to allocate the payment of the costs of the arbitration, the Tribunal shall therefore have "regard to the outcome of the case and other relevant circumstances," in accordance with Article 43(5) of the SCC Rules.

200. Article 44 of the SCC Rules further provides rules regarding the "Costs incurred by a party." Article 44 states:

> *Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.*

201. Thus, Article 44 provides the same standard for determining the "Costs incurred by a party," as is provided in Article 43(5) regarding the "Costs of the Arbitration." The Tribunal may also have regard to the outcome of the case and other relevant circumstances.

202. The outcome of the case is in favour of the Respondent, as the Tribunal has decided that it does not have jurisdiction *ratione personae*. The Tribunal recognises that in such circumstances it may be ordinary or typical to order an award of costs for the Respondent. However, the Tribunal should also look to other relevant circumstances before making an award in favour of one party.

203. In the present case the Tribunal considers that there exists a relevant circumstance that persuades the Tribunal that costs should not follow the outcome of the case. This case involved a novel issue of interpretation of the ECT. The Tribunal is aware that the core issue does not appear to have been the subject of arbitral consideration or authority (at least in a published decision by another international tribunal or body). The issues raised were novel, and they were certainly arguable. The Tribunal

[199] Award on Security for Costs and Bifurcation, dated July 20, 2015, ¶ 88.

does not consider that the Claimant has treaty shopped or committed an abuse of process in bringing his claims before this Tribunal. The questions presented before the Tribunal involved complex and often conflated issues of international and domestic law. The Tribunal believes that the resolution of these issues sheds much needed light on previously unresolved or unanswered questions of law. Hence, despite the Tribunal finding that it lacks jurisdiction, the Tribunal believes it fair in the circumstances that each Party should bear its own costs, and further share the costs of conducting this arbitration.

204. The Tribunal notes that even if Section 37 of the SAA was to be mandatorily applied, the relevant circumstances outlined above are also capable of constituting "special circumstances." Thus, the result would be the same.

205. Therefore, the Tribunal decides that it shall not make an order for costs in favour of the Respondent. Relating to the "Costs of the Arbitration," under Article 43 of the SCC Rules, the Parties shall each share half of the costs. Relating to the "Costs incurred by a party," each Party shall bear its own costs.

V. DECISION

206. The undersigned Arbitrators, having been designated in accordance with the Energy Charter Treaty and the Arbitration Rules of the Stockholm Chamber of Commerce, and having been duly sworn and having duly heard the proofs and allegations of the Parties, as indicated above, do hereby decide that:

206.1. The Claimant has not established jurisdiction *ratione personae* in his claims against the Respondent.

206.2. The Claimant's claims under the Energy Charter Treaty are dismissed.

206.3. The Parties are jointly and severally liable to pay the Costs of the Arbitration. The Costs of the Arbitration have been set as follows:

206.3.1. The Fee of Bernardo M. Cremades amounts to EUR 189 900 and compensation for expenses EUR 7 367,46, in total EUR 197 246,46, plus VAT of EUR 41 006,17.

206.3.2. The Fee of Dominique Carreau amounts to EUR 113 940 and compensation for expenses EUR 1 046, in total EUR 114 986, plus VAT of EUR 22 997,20.

206.3.3. The Fee of Philippe Sands QC amounts to EUR 113 940 and compensation for expenses EUR 2 480,46, in total EUR 116 420, 46, plus VAT of EUR 23 084,01.

206.3.4. The Administrative Fee of the SCC amounts to EUR 60 000, plus VAT of EUR 15 000.

206.4. The costs incurred separately by the Parties shall be borne by each Party themselves.

206.5. The Parties are reminded that they should pay social security contributions and file an income tax return to the Swedish Tax Agency.

206.6. A party may bring an action to amend the award within three months from the date when the party received the award. This action should be brought before the Svea Court of Appeal in Stockholm.

206.7. A party may bring an action against the award regarding the decision on the fees of the arbitrators within three months from the date when the party received the award. This action should be brought before the Stockholm District Court.

Agreed by the Tribunal:

Place of Arbitration: Stockholm, Sweden

Mr. Dominique Carreau	Mr. Bernardo M. Cremades	Mr. Philippe Sands QC
Co-arbitrator	Chairperson	Co-arbitrator
Date: 18/IV/2016	Date: 20.IV.2016	Date: 14/4/2016