

Alapli Elektrik B.V. v. Republic of Turkey
(ICSID Case No. ARB/08/13)

Excerpts of Award dated July 16, 2012 made pursuant to Rule 48(4) of the
ICSID Arbitration Rules of 2006

Claimant

Alapli Elektrik B.V. (company incorporated under the laws of the Netherlands)

Respondent

Republic of Turkey

Tribunal

William W. Park (President; US), appointed by the Chairman of the Administrative Council of ICSID under Article 38 of the ICSID Convention

Marc Lalonde (Canadian), appointed by the Claimant

Brigitte Stern (French), appointed by the Respondent

Award

Award of July 16, 2012 in English; dissenting opinion by Marc Lalonde

Instruments relied on for consent to ICSID arbitration

Energy Charter Treaty (“ECT”)

Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey of March 27, 1986 (“BIT”)

Procedure

Applicable Arbitration Rules: ICSID Arbitration Rules of 2006

Place of Proceedings: Washington, D.C.; sessions held in Paris

Procedural Language: English

Full procedural details: Available at
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C382&actionVal=viewCase>

Factual Background

The dispute concerned a concession to develop, finance, construct, own, operate and transfer a combined cycle power plant in Turkey (“the Project”).

In 1995, two Turkish nationals (“the Project Sponsors”) established a company in Turkey (“the First Project Company”) as an investment vehicle for the Project. In 1997, the First Project Company submitted a feasibility study for the Project which was approved by a Turkish Ministry. Concurrently, the First Project Company concluded a Letter of Intent with a corporate group based in the United States (“X”), providing that X would be the engineering, procurement and construction (“EPC”) contractor for the Project. It also entered into a Joint Development Agreement (“JDA”) with an affiliate of X, which provided, among other things, that the affiliate would provide certain funding for development of the Project.

In October 1998, the First Project Company and a Turkish Ministry concluded a concession contract concerning the Project (the "Concession Contract"). Progress was made regarding contracts with State-owned companies concerning the supply of gas to the plant and the sale of electricity generated at the plant.

Subsequently, in April 1999, the Claimant, Alapli Elektrik B.V., was established as a subsidiary of a holding company, which was wholly owned by one of the Project Sponsors. In March 2000, the Claimant obtained shares in a newly registered Turkish entity ("the Second Project Company"), which was assigned the rights of the First Project Company under the Concession Contract. The assignment was approved by a Turkish Ministry in November 2000.

The actions complained of related to a number of legislative changes in 2000 concerning infrastructure projects in Turkey. In February 2000, following the adoption of a law providing for a conversion process for certain administrative law concession contracts (Law No. 4501), the First Project Company sought to convert the Concession Contract to a private law contract. About a year later, another new law in Turkey eliminated Treasury Guarantees for certain energy sector projects not finalized before December 31, 2002 (Law No. 4628) and made certain restrictions to energy sales agreements. Claimant asserted that the Respondent's actions in connection with the conversion process and some of the legislative changes led to the loss of its investment and violated a number of investment protection provisions of the ECT and the BIT.

EXCERPTS

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

In the arbitration proceeding between

ALAPLI ELEKTRIK B.V.

Claimant

and

REPUBLIC OF TURKEY

Respondent

(ICSID Case No. ARB/08/13)

AWARD

Members of the Tribunal

Professor William W. Park, President

Hon. Marc Lalonde, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

Date of dispatch to the Parties: July 16, 2012

TABLE OF CONTENTS*

I.	Introduction	3
II.	Procedural History.....	4
III.	Factual Background.....	9
	A. Corporate Relationships	9
	B. Feasibility Study, Joint Development Agreement & Concession	9
	C. Establishment of Claimant and [the Second Project Company]	9
	D. Law No. 4501, Law No. 4628 and the Conversion Process	9
IV.	The Parties' Arguments on Jurisdiction	9
	A. Claimant	9
	B. Respondent.....	11
V.	The Parties' Arguments on the Merits.....	13
	A. Claimant	13
	B. Respondent.....	13
VI.	The Parties' Arguments on Quantum	14
	A. Claimant	14
	B. Respondent.....	14
VII.	Tribunal's Analysis on Jurisdiction.....	14
	A. Introduction	14
	B. Scope of Tribunal's Decision.....	15
	C. Applicable Treaties and Principles of Interpretation	17
	D. Arbitrator Park	25
	E. Arbitrator Stern	39
VIII.	Merits.....	49
IX.	Costs	49
	A. Claimant	49
	B. Respondent.....	50
	C. Submissions on Parties' Costs	50
	D. Allocation of Costs.....	51
X.	Disposition.....	51

*The page numbers in the Table of Contents of the Excerpts do not match the page numbers of the original Award.

REPRESENTATION OF THE PARTIES

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Representing Respondent:

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I. Introduction

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) pursuant to the terms of the Energy Charter Treaty (“ECT”), the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey of 27 March 1986 (the “Netherlands-Turkey BIT”) (together, sometimes referred to as the “Treaties”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).
2. The dispute concerns an alleged investment by a Dutch company in a power project in Turkey, which was purportedly made in reliance upon governmental assurances and legislation intended to attract international investment. The Dutch company asserts that the Republic of Turkey undermined the project by conduct that contradicted its assurances and by making several adverse legislative changes. As a result, it claims that the Republic of Turkey violated the investment protections provisions of the ECT and the Netherlands-Turkey BIT.
3. The claimant, Alapli Elektrik B.V., is a company incorporated under the laws of the Netherlands (“Alapli Elektrik” or “Claimant”). It is represented by Messrs. Robert Volterra and Stephen Fietta of the law firm of Volterra Fietta, and Ms. Aimee-Jane Lee, Mr. Charles Claypoole, Ms. Catriona Paterson, and Mr. Sebastian Seelmann-Eggebert of the law firm Latham & Watkins (of which Messrs. Volterra and Fietta were previously partners).
4. The respondent is the Republic of Turkey (the “Republic of Turkey,” “Turkey” or “Respondent”), represented by Mr. Stanimir Alexandrov, Ms. Marinn Carlsson and Ms.

Jennifer Haworth McCandless of the law firm of Sidley Austin LLP. Mr. Daniel M. Price of the same firm represented the Respondent until 30 June 2011.

5. Claimant and Respondent shall be referred to collectively as the “Parties.”

II. Procedural History

6. On 16 July 2008, Alapli Elektrik filed a Request for Arbitration against the Republic of Turkey (the “Request”), which was registered by the Acting Secretary-General of ICSID on 27 August 2008 pursuant to Article 36(3) of the ICSID Convention.
7. The notice of registration invited the Parties to communicate to ICSID any provisions agreed by them regarding the number of arbitrators and the method of their appointment. By letter of 26 September 2008, the Parties informed the Centre that they had reached an agreement on the method, according to which the Tribunal was to consist of three arbitrators, one appointed by each Party within a certain time limit, and the presiding arbitrator (sometimes referred to as the “President”) was to be appointed by agreement of the Parties. If the Parties were unable to reach an agreement on the President by 30 December 2008, either Party could request that the Chairman of the Administrative Council of ICSID appoint the President pursuant to Article 38 of the ICSID Convention.
8. On 31 October 2008, Claimant appointed The Honorable Marc Lalonde, PC, OC, QC, a national of Canada. On 4 December 2008, Respondent appointed Professor Brigitte Stern, a national of France. The Parties failed to reach an agreement on the President of the Tribunal by 30 December 2008; therefore, by letter dated 5 January 2009, Claimant requested that the Chairman of the Administrative Council of ICSID appoint the presiding arbitrator under the default rules.

9. After consultations with the Parties, on 27 February 2009, the Chairman appointed Professor William W. Park, a U.S. national, as the President of the Tribunal. The Tribunal was thus constituted and the proceedings began on 2 March 2009, pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings of 10 April 2006 (the “Arbitration Rules”). Ms. Martina Polasek, Senior Counsel, ICSID, was designated as the Tribunal’s Secretary.
10. On 18 May 2009, the Tribunal held its first session with the Parties in Paris. Among other matters, it was agreed that the proceeding would be conducted in accordance with the Arbitration Rules. Because the Parties were unable to reach an agreement on the procedural calendar, the Tribunal ordered that Claimant file a memorial on the merits by 25 September 2009 (the “Claimant’s Memorial”) and that Respondent indicate by 30 October 2009 whether it intended to raise any objections to jurisdiction and to request bifurcation of the proceedings.
11. Claimant’s Memorial was filed on 26 September 2009 and was accompanied by [...].
12. On 2 October 2009, Respondent filed a request for the production of documents concerning Claimant’s Memorial, relating to issues of jurisdiction. On 9 October 2009, at the invitation of the Tribunal, Claimant filed a Redfern Schedule with observations on and objections to Respondent’s request. On 21 October 2009, the Tribunal issued Procedural Order No. 1 granting one of Respondent’s requests for production. Upon Claimant’s request, Respondent subsequently undertook to hold confidential all documents produced by Claimant pursuant to the Tribunal’s order.
13. By letter of 30 October 2009, Respondent declared that it intended to raise jurisdictional objections and to move for bifurcation of the proceedings. The Tribunal was requested to

address the objections as a preliminary matter and suspend the proceedings on the merits.

Following Claimant's observations on Respondent's requests, the Tribunal directed

Respondent to submit all jurisdictional objections that it intended to raise by 24 November 2009.

14. After a series of exchanges with respect to Respondent's request for bifurcation of the proceedings, on 3 December 2009, the Tribunal instructed Respondent to file, in accordance with Arbitration Rule 41, any and all jurisdictional objections with its Counter-Memorial on the Merits. It further directed the Parties to confer on the date for further written pleadings.
15. As the Parties were unable to agree on filing dates, by Order of 23 December 2009; the Tribunal established a schedule for written pleadings. This schedule was amended by Order of 30 December 2009 following a request made by Respondent and after due consideration of Claimant's objections.
16. On 12 January 2010, Respondent filed a second request for production of documents. After observations filed by the Parties, the Tribunal issued Procedural Order No. 2 dated 21 January 2010 with directions as to the procedure concerning Respondent's second request for document production. By Order of 16 February 2010, the Tribunal granted certain of Respondent's requests.
17. On 15 March 2010, Respondent filed its Memorial on Jurisdiction and Counter-Memorial on the Merits, including its request for bifurcation of the proceedings. The Counter-Memorial was accompanied by [...].
18. By letter dated 22 March 2010, Claimant commented on Respondent's request for bifurcation.

19. Having considered the Parties' submissions, the Tribunal issued Procedural Order No. 3 of 23 April 2010, declining to bifurcate the proceedings.
20. On 13 May 2010, the Parties jointly requested to modify the procedural calendar by an extension of 90 days to file their respective pleadings. The Tribunal approved the request by Procedural Order No. 4 dated 19 May 2010.
21. On 28 May 2010, Claimant filed its first request for production of documents in the form of a Redfern Schedule. On 8 June 2010, Respondent filed its observations on the request, objecting to most requests for production. The Tribunal addressed the request in Procedural Order No. 5 of 1 July 2010, partly granting Claimant's request.
22. On 23 July 2010, Claimant filed a Reply on the Merits and a Counter-Memorial on Jurisdiction, accompanied by four witness statements and five expert reports.
23. On 8 September 2010, Respondent filed a third request for production of documents. Having received Claimant's observations, the Tribunal issued Procedural Order No. 6 dated 7 October 2010, partly granting Respondent's request.
24. By letter dated 13 October 2010, following a disagreement by the Parties, the Tribunal ruled on the procedural calendar for the remainder of the written pleadings. In accordance with the Tribunal's directions, Respondent submitted its Counter-Memorial on Jurisdiction and Rejoinder on the Merits on 28 October 2010.¹ The submission was accompanied by five witness statements, two legal opinions and two expert reports.

¹ The Tribunal has maintained the citation to the Respondent's filing of 28 October 2010 in its original form, "Counter-Memorial on Jurisdiction and Rejoinder on the Merits," even though a
(footnote cont'd)

25. On 12 November 2010, Claimant filed its second request for production of documents.
Having received Respondent's observations and a further response from Claimant, the Tribunal issued Procedural Order No. 7 of 26 November 2010 granting certain of Claimant's requests and noting Respondent's agreement to produce certain documents.
26. Further to the Tribunal's directions of 13 October 2010, Claimant filed its Rejoinder on Jurisdiction on 13 December 2010, together with two further expert reports.
27. On 6 January 2011, the Tribunal held a pre-hearing conference with the Parties, discussing an agreed Protocol of the Parties on Procedures for the Hearing on Jurisdiction and the Merits. The hearing was subsequently held from 31 January 2011 to 10 February 2011 in Paris. The Tribunal heard the Parties' witnesses and experts as well as their opening and closing arguments. Verbatim transcripts and audio recordings were made of the hearing and subsequently transmitted to the Parties. At the end of the hearing, the Tribunal directed the Parties to file Post-Hearing Briefs and Statements of Costs within certain time limits.
28. Pursuant to the Tribunal's directions, the Parties each filed a Post-Hearing Brief on 20 April 2011.
29. On 27 April 2011, Claimant filed a revised Post-Hearing Brief for "formatting corrections and deletions."
30. Each Party filed its Statement of Costs on 6 June 2011.

more conventional format might have described the filing as a "Reply" (rather than "Counter-Memorial") on Jurisdiction.

31. On 8 August 2011, as a result of the Tribunal’s deliberations, the Tribunal addressed a number of questions to the Parties. The Parties responded to the Tribunal’s questions by submissions dated 26 August 2011.
32. On 2 September 2011, Claimant filed an application to submit new documentary evidence to address a matter arising from Respondent’s answers of 26 August 2011. The Tribunal granted Claimant’s application and allowed Respondent to comment on the new documents.
33. On 11 November 2011, Claimant submitted a Revised Statement of Costs, providing updated cost figures and noting the fees incurred in relation to preparation of its response to the Tribunal’s post-hearing questions and submissions in connection with new evidence.
34. On 5 June 2012, the proceedings were closed in accordance with Arbitration Rule 38(1).

III. Factual Background

A. Corporate Relationships

[...]

B. Feasibility Study, Joint Development Agreement & Concession

[...]

C. Establishment of Claimant and [the Second Project Company]

[...]

D. Law No. 4501, Law No. 4628 and the Conversion Process

[...]

IV. The Parties’ Arguments on Jurisdiction

A. Claimant

[...]

1. Claimant is a *Bona Fide* Investor

[...]

2. Claimant has a *Bona Fide* Investment

[...]

a) The ECT and the Netherlands-Turkey BIT Each Contain Broad Definitions of the Term “Investment”

[...]

b) Claimant’s Rights in the Project Constitute an Investment under the ECT and the Netherlands-Turkey BIT

[...]

3. There was an Investment for the Purposes of Article 25(1) of the ICSID Convention

[...]

a) “Investment” and the *Salini* Criteria

[...]

b) The Dispute Arises Directly from the Investment

[...]

c) Notification under Article 25(4) of the ICSID Convention

[...]

4. Claimant’s Investment in [the Second Project Company] was a *Bona Fide* Transaction and Not an “Abuse”

[...]

a) The Creation of [the Second Project Company] was a *Bona Fide* Transaction

[...]

b) Claimant’s Investment in [the Second Project Company] was Not Made to Transform a Pre-existing Domestic Dispute into an International Dispute Subject to ICSID Arbitration under a Bilateral Investment Treaty, and Therefore was Not Abusive

[...]

c) [The Second Project Company] Acquired Rights under the Concession Contract on 30 March 2000

[...]

d) The Dispute with Respondent Arose in Late 2001 or Early 2002, and Not Prior to 30 March 2000

[...]

e) The Project Company and the Project Sponsors at All Times Acted Transparently

[...]

f) “Piercing of the Veil” and the Finding of Abuse

[...]

g) Conclusion

[...]

5. Respondent’s ECT-Specific Objections to Jurisdiction Are Groundless

[...]

a) The Tribunal Has Jurisdiction *Ratione Temporis*

[...]

b) Respondent’s Attempts to Deny Jurisdiction pursuant to Article 17 of the ECT are Ineffective

[...]

c) ECT Article 26(3)(b) is Inapplicable

[...]

d) Respondent’s Public Order Objection Does Not Relate to Jurisdiction

[...]

B. Respondent

[...]

1. Claimant Is Not an “Investor” under the ECT, the Netherlands-Turkey BIT or the ICSID Convention

[...]

a) Claimant’s Creation was for Illegitimate Purposes and Is Abusive of the Investment Arbitration System

[...]

b) Turkish Project Sponsors Disregarded Corporate Formalities

[...]

c) Unjust Windfall

[...]

2. There is no “Investment” under the ECT, the Netherlands-Turkey BIT or the ICSID Convention

[...]

a) The Concession Contract and Law No. 4501

[...]

b) Shares in [the Second Project Company]

[...]

c) “Asset” Requirement

[...]

d) Objective Criteria of “Investment”

[...]

3. The Tribunal Does Not Have Jurisdiction Over Claims Based on Events That Occurred Prior to Alleged Investment

[...]

4. Turkey’s Notification under Article 25(4) of the ICSID Convention

[...]

5. Article 17(1) of the ECT

[...]

V. The Parties' Arguments on the Merits

A. Claimant

[...]

1. Summary of Claimant's Claims

[...]

2. Respondent's Conduct during the Conversion Process was Contrary to Law No. 4501 and International Law

[...]

3. Respondent's Imposition of the End-of-2002 Deadline as a Pre-Condition to the Treasury Guarantee was Unlawful as a Matter of Turkish and International Law

[...]

4. The Fate of the Other 28 BOT Projects Identified for "Expedited" Treatment Demonstrates the Egregiousness of Respondent's Conduct

[...]

5. Respondent's Sovereign Conduct Constitutes a Violation of the ETC and the Netherlands-Turkey BIT

[...]

6. But for Respondent's Unlawful Conduct, the Project Would Have Proceeded to Financial Close

[...]

B. Respondent

[...]

1. Respondent Accorded Fair and Equitable Treatment

[...]

2. Respondent Did Not Expropriate Claimant's Alleged Rights

[...]

3. Respondent Accorded Full Protection and Security

[...]

4. Respondent Complied with Its Obligations

[...]

VI. The Parties' Arguments on Quantum

A. Claimant

[...]

1. The Project's Underlying Cash Flows Were Certain and Not Speculative.

[...]

2. Claimant Is Entitled to Damages on an Ex-Post Basis

[...]

3. Claimant Disputes the Analysis of Respondent's Expert

[...]

B. Respondent

[...]

VII. Tribunal's Analysis on Jurisdiction

A. Introduction

311. A Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity which is claiming treaty protection for a proposed combined cycle power plant. The entirety of the financial contribution and technological know-how came from American backers, [X], which advanced monies to realize an opportunity to provide equipment and services, taking all risk of loss if the Project

never came to fruition.³⁰ The Concession Contract, by which the host country agreed in principle to the Project's terms, was awarded to a Turkish company, [the First Project Company].

312. After careful consideration of all arguments and evidence, Arbitrators Stern and Park (the "Majority") conclude that this Tribunal lacks jurisdiction to hear the dispute pursuant to the ECT and the Netherlands-Turkey BIT.

313. The Majority has considered the two lines of reasoning set forth below. Although Arbitrator Stern and Arbitrator Park do not necessarily assign the same weight to the various components in these overlapping lines of reasoning, both members conclude that jurisdiction is clearly absent.

B. Scope of Tribunal's Decision

314. Article 41 of the ICSID Convention directs the Tribunal to determine its own jurisdiction.

In this connection, the Tribunal has considered the ICSID Convention itself, along with provisions of the Netherlands-Turkey BIT and the Energy Charter Treaty.

315. The Majority has found Claimant not entitled to protection under either the Energy Charter Treaty or the Netherlands-Turkey BIT. For Arbitrator Stern this conclusion derives from notions of timing and *bona fides*, considering that Claimant did not make an investment until after the root of the controversy was evident and the dispute itself had become a high

³⁰ In the event of successful conclusion, [X] would receive the money invested plus 10% interest per annum and US\$ 1,000,000, over and above the profit from sale of equipment and provision of engineering services.

probability. For Arbitrator Park, the Claimant simply lacks the status of an investor, for want of any contribution to the [...] Project.

316. The Majority notes that it has addressed all essential points necessary to sustain Respondent's objection to jurisdiction. In passing, the Majority acknowledges that Respondent made multiple objections to jurisdiction that did not need to be reached in order to sustain the Majority's conclusion.
317. These questions included *inter alia* the following: (i) whether the dispute existed before the investment was made (addressed by Arbitrator Stern alone), (ii) whether ICSID Convention Article 25(4) limited Turkey's consent to cases where investment has "effectively started" and, if so, whether the investment in this case had met that standard; (iii) whether the ECT had taken effect when the dispute arose; (iv) whether Claimant's non-expropriation claims are barred under the ECT because measures were necessary to maintain "public order" (a matter which goes more to the merits); and (v) whether Claimant's claims are barred by ECT Article 26(3)(b), a "fork-in-the-road" provision that allows States to exclude from their consent disputes that have already been submitted to domestic courts.
318. The Majority remains cognizant of ICSID Convention Article 48(3), which provides that the award "shall deal with every question submitted" to the Tribunal.
319. Having given Claimant every benefit of the doubt on all objections related to jurisdiction, the Majority finds that it lacks competence over this dispute for the reasons summarized above and explored more fully below. Consequently, it becomes unnecessary for the Majority to speculate on matters not pertinent to its conclusion.

C. Applicable Treaties and Principles of Interpretation

1. Key Treaty Provisions

320. The Netherlands-Turkey BIT and the ECT provide the operative provisions under which the claims have been made.

321. Claimant asserts that: (i) Turkey deprived Claimant of its investment in violation of Article 5 of the Netherlands-Turkey BIT and Article 13 of the ECT; (ii) Turkey failed to accord fair and equitable treatment in violation of Article 3(1) of the Netherlands-Turkey BIT and Article 10(1) of the ECT; (iii) Turkey failed to provide full protection and security in violation of Article 3(2) of the Netherlands-Turkey BIT and Article 10(1) of the ECT; and (iv) Turkey failed to observe the obligations it concluded in respect of Claimant's investment in violation of the "umbrella clauses" in Article 3(2) of the Netherlands-Turkey BIT and Article 10(1) of the ECT.

a) The ECT

322. Under Article 1(6) of the ECT, "Investment" means:

"every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the Effective Date”) provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

“Investment” refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as “Charter efficiency projects” and so notified to the Secretariat.”

323. Under Article 1(7) of the ECT, “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;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a “third state,” a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

324. Article 10 of the ECT provides:

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any

obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

- (2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).
- (3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

325. Article 13 of the ECT provides:

- (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
 - (a) for a purpose which is in the public interest;
 - (b) not discriminatory;
 - (c) carried out under due process of law; and
 - (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

326. Article 17 of the ECT provides that each Contracting Party reserves the right to deny the advantages of [Part III] to:

- (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;

327. Article 26 of the ECT provides:

- (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.
 - (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
 - (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
 - (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

- (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:
- (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
 - (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
 - (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or
 - (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.
- (5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
- (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
 - (ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and
 - (iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.
- (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

- (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
- (7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.
- (8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

b) The Netherlands-Turkey BIT

328. Under Article 1(b) of the Netherlands-Turkey BIT, “Investment” means:

every kind of asset such as equity, debt, claims and service and investment contracts and includes:

- i. tangible and intangible property, including rights such as mortgages, liens and pledges;
- ii. shares of stock or other interests in a company or interests in the assets thereof;
- iii. a claim to money or a claim to performance having economic value and associated with an investment;
- iv. industrial property rights, including rights with respect to patents, trademark, trade names, industrial designs and know-how and goodwill and copyrights;
- v. any right conferred by law or contract, and any licences [*sic*] and permits pursuant to law.

329. Under Article 1(a) of the Netherlands-Turkey BIT, “Investor” means:

- i. a natural person who is a national of a Contracting Party under its applicable law;

- ii. a legal person duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Contracting Party;

330. Article 3 of the Netherlands-Turkey BIT provides:

- (1) Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment sale or liquidation thereof by those investors.
- (2) Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

331. Article 5(3) of the Netherlands-Turkey BIT provides:

- (3) Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
 - (a) the measures are taken in the public interest and under due process of law;
 - (b) the measures are not discriminatory;
 - (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall amount to the fair market value of the investment or in the absence of a fair market value the genuine value of the investments affected and shall, in order to be effective for the investors, be paid and made freely transferable, without unreasonable delay, to the country of which the investors concerned are nationals or to any other country accepted by the Contracting Party concerned and in the currency in which the investment was originally made or in any freely convertible currency, mutually agreed to by the investor and the Contracting Party.

332. Article 8 of the Netherlands-Turkey BIT provides:

- (1) For the purposes of this Article, an investment dispute is defined as a dispute involving:

- a. the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party; or
 - b. a breach of any right conferred or created by this Agreement with respect to an investment.
- (2) In the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of nonbinding, third party procedures upon which such investor and the Contracting Party mutually agree. If the dispute cannot be resolved through the foregoing procedures the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ('Centre') for settlement by arbitration, at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award.
- (3)
 - c. Each Contracting Party hereby consents to the submission of an investment dispute to the Centre for settlement by arbitration.
 - d. Arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States and the 'Arbitration Rules' of the Centre.
- (4) For the purposes of this Article, any legal person incorporated or constituted under the applicable laws and regulations of either Contracting Party, but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of investors of the other Contracting Party, shall in accordance with Article 25 (2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States be treated as an investor of such other Contracting Party.

2. Principles of Treaty Interpretation

333. In construing the jurisdictional provisions of the Netherlands-Turkey BIT and the ECT, as well as the ICSID Convention to the extent relevant, the Tribunal begins with the interpretative principles in Article 31 of the 1969 Vienna Convention on the Law of

Treaties. These provisions instruct the Tribunal to look to the “ordinary meaning” of the terms in their context and in the light of their object and purpose.

334. In examining the Treaties’ object and purpose, the Tribunal has been mindful of competing concerns. On the one hand, a conscientious arbitrator will not set jurisdictional barriers at unreasonable levels which deny investors’ legitimate expectations. Neither, however, should a tribunal facilitate use of treaties by persons not intended to receive their benefits.

335. In signing the Netherlands-Turkey BIT and the ECT, Turkey could not have expected that treaty benefits would extend to just any Dutch company, regardless of its relationship to a Turkish investment. Nor could Turkey have expected that benefits would accrue to enterprises from the United States.

336. Rather, Turkey agreed to arbitrate with Dutch entities that had actually made investments in Turkey. That jurisdictional principle must serve as the foundation in construing the notions of “investor” and “investment” in both Treaties, as well as the analogous provisions in the ICSID Convention.

D. Arbitrator Park

1. Claimant’s Failure to Contribute to the Project

337. Claimant never made a contribution to the [...] Project sufficient to create for itself the status of an investor under either the ECT or the Netherlands-Turkey BIT, the two investment treaties which would have conferred substantive protection had the jurisdictional hurdles been met.

338. All contributions to the Project came from someone other than Claimant. The capital came from the American backers, [X]. Negotiations were conducted by the Turkish Sponsors

[...]. The Concession Contract came from the First Project Company, [...]. The technology was to be provided by [X].

339. The capital contributed by [X] merits special comment, given its role in funding ownership of the shares in the Second Project Company, [...], which ultimately held the Project Concession.

340. Claimant served as a conduit through which [X], in particular [...] and [...], funneled financial contributions to [the Second Project Company], such contributions comprising the entirety of that entity's statutory capital. [X], not Claimant, funded all capital for the corporate interest characterized as "shares of stock" by Netherlands-Turkey BIT Article 1(b)(ii) and "shares, stock or other form of equity" in ECT Article 1(6)(b).

341. On a dollar-for-dollar basis, Claimant's bank statements record a series of transactions by which the statutory capital found its way from the American backers [X] to the Second Project Company [...]. Through multiple bank transfers, [X] reimbursed each of Claimant's asserted contributions to [the Second Project Company] statutory capital, plus another US\$ 100 sufficient to cover wire fees.

342. Had the statutory capital of the Second Project Company derived from a loan made to Claimant by [X], the conclusion might be different. However, the loan thesis seems untenable in light of several undisputed facts.

343. First and foremost, all payments were made pursuant to [X] obligations to [the First Project Company], not to Claimant. The funding of so-called "development costs" (which ultimately included capital of the Second Project Company) was based on the Joint

Development Agreement, concluded between [...] and the first Turkish company, [the First Project Company] not with Claimant.

344. Second, all funds from [X] were disbursed to [the First Project Company], the first Turkish company, not to Claimant.

345. Third, Claimant never had any meaningful control over use of the funds, which were simply passed through its bank accounts after being forwarded by the First Project Company, [the First Project Company], prior to reimbursement to that Turkish company by [X].

346. Finally Claimant had no duty to reimburse any advances, which were made without recourse in the event the Project did not achieve Financial Closing, subject to limited exceptions.

347. Thus, Claimant neither made any contribution nor took any risk. Indeed, even liability on the Project's performance bonds was assumed by the First Project Company, [...], rather than Claimant. See Exhibit R-101 (Performance Bond of 19 April 2000) and Exhibit C-33 (Performance Bond of 19 October 2000). All relevant contributions to the Project came from someone other than Claimant.

348. One need not speculate on what remedies under Turkish or international law might be open either to [X], to the Project Companies, or to the original Sponsors. It is sufficient to note that Claimant itself, the entity purporting to have rights guaranteed by investment treaties before this Tribunal, contributed nothing to the Project.

349. No general test is suggested with respect to permissible funding sources. Rather, as discussed more fully below, the compelling point is simply that, on the unique facts of this

case, Claimant made no relevant contribution to the Project. Thus, Claimant cannot be considered as an “Investor” pursuant to either the ECT or the Netherlands-Turkey BIT.

350. To be an investor a person must actually make an investment, in the sense of an active contribution.³¹ Status as a national of the other contracting state is not in itself enough. The Dutch entity, [the First Project Company], has not demonstrated that it actually made any investment in Turkey, in the sense of a meaningful contribution to Turkey. To the extent that contributions were made, they came from nationals or companies of the United States and Turkey.

351. Nor does this case present the situation of one person stepping into the shoes of another which had already made a qualifying contribution, as might be the case for a child who inherits from a parent that had made the contribution prior to death. To the extent that the inheritance analogy has any impact in this case, Claimant would be stepping into the shoes of a Turkish national. Claimant’s ownership of the Second Project Company derives from [...], not a Dutch entity otherwise entitled to treaty protection.

352. In this context, it is noteworthy that the foundational concept of active contribution is set forth clearly in both the Netherlands-Turkey BIT and the ECT. The BIT begins in its

³¹ Oxford English Dictionary defines investor as “one who invests money or makes an investment.” This definition implicates action. Likewise, Webster’s Third defines investor as “one that invests; one that seeks to commit funds for long-term profit with a minimum of risk.” Again, we see that a person is labeled an investor when he partakes in the activity of investing. Le grand Robert: “personne qui place des capitaux dans l’achat de biens de production” action de “placer des capitaux.”

preamble by anticipating that an agreement on the treatment to be accorded to investments will “stimulate the flow of capital and technology” as between the Contracting Parties.

353. The “flow” being considered must in this context run from the Netherlands to Turkey, not from the United States or some other third country. Investment treaties provide standards of treatment with relation to investments from designated nationals. They are not intended as treaties with the world.

354. Also significant is that Article 10(1) of the ECT (one of the provisions relied upon by Claimant) contemplates that the Contracting Parties shall “encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to *make* Investments in its Area.” (Emphasis added.)

2. Investment “of” an Investor: The Treaty Language

355. As a Dutch corporation, Claimant might otherwise have fallen within the range of entities eligible for consideration as Investors under the Netherlands-Turkey BIT, the ECT and the ICSID Convention. The relevant language includes “legal person” under the laws of The Netherlands (Article 1(a)(ii) of the Netherlands-Turkey BIT), company “organized in accordance with” the law of The Netherlands (Article 1(7)(a)(ii) of the ECT), and “juridical person[s]” pursuant to ICSID Convention Article 25.

356. However, to establish status of an Investor, such as to create jurisdiction pursuant to these investment treaties, something more is required than simple incorporation under Dutch law. Many Dutch entities have been incorporated as “legal persons” and “companies” and “juridical persons.” Without an actual contribution to some Turkish investment, however,

the Dutch incorporation creates no entitlement to protection as an Investor subject to the jurisdiction of this Tribunal.

357. The jurisdictional predicates of the Tribunal's competence can be found in two significant treaty provisions. ECT Article 26(1) provides for resolution of 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." (Emphasis added.) Likewise, the Netherlands-Turkey BIT Article 3(1) states that Contracting Parties shall ensure fair and equitable treatment to the "investments *of* investors of the other Contracting Party." (Emphasis added.)
358. In each instance, the investor is assumed to be an entity which has engaged in the activity of investing, in the form of having made a contribution. An alleged investor must have made some contribution to the host state permitting characterization of that contribution as an investment "of" the investor.
359. Consequently, [...] (the Second Project Company) cannot be considered an investment "of" Claimant. Although not a very long word, the term "of" constitutes the operative language for determining investor status in both relevant treaties. Pursuant to the interpretative principles of the Vienna Convention on the Law of Treaties, which instruct that treaty terms are to be read in their ordinary meaning in context, reference to the investment "of" an investor must connote active contribution of some sort.
360. Put differently, the treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal must find an action transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another.

361. Finally, it is a truism that investment treaties are country-specific, not intended to constitute treaties with the entire world. Even if economic contributions were made by nationals of the United States [X], they were not investments “of” a Dutch claimant.³²

3. Claimant’s Failure to Make an Investment: Further Inquiry

362. Given the importance of making an investment, further details may be in order with respect to Claimant’s failure in this respect, under both the Netherlands-Turkey BIT and the ECT. The record suggests that any significant contribution to the Project was made either by Americans, [X], or by Turkish nationals (the Project Sponsors), not by the Dutch Claimant.

363. Investment in this case is comprised of three distinct concepts: (i) the Concession Contract, (ii) technological expertise, and (iii) the statutory capital of [the Second Project Company]. For each of these assets, no relevant contribution was made by Claimant.

a) The Concession Contract

364. The Concession Contract represents a long-term, high-expense commitment which might ultimately have contributed to enhancing infrastructure in Turkey. However, Claimant has not demonstrated any contribution to obtaining this Concession. Claimant did not negotiate

³² The Tribunal need not decide on the applicability of Article 17 of the ECT, which allows each Contracting Party to deny the advantages of Part III (*i.e.*, the substantive protections) to “a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.” However, even if Claimant’s contention is correct that Article 17 is concerned with substantive rights, this provision provides further evidence that the Contracting Parties envisaged that an investor would be someone having made a significant contribution.

the terms. Claimant is not a signatory. Nor did Claimant become a party by virtue of assignment.

b) Technological Expertise

365. It is not contested that pursuant to the terms of the JDA, [...] was to be the exclusive engineering, procurement, and construction (“EPC”) contractor. The comprehensive assistance of [...] to the Alapli Project demonstrates that the proffered investment cannot properly be attributed to Claimant.

366. Even if the Project had been carried out as planned, Claimant’s role would have been limited to providing the corporate structure for foreign equity partners, not providing engineering expertise.

c) Statutory Capital: The Conduit Bank Accounts

367. On 3 March 2000 and 28 June 2000 funds for statutory capital were transferred to [...], the Second Project Company. The Parties’ submissions of 26 August 2011 show that this statutory capital was contributed entirely by [X], with Claimant serving merely as a conduit.

368. It is not credible, a Claimant contends, that a loan was made by Claimant’s parent, [...]. This assertion has no support in the facts of this case.

369. As discussed below, Claimant’s own bank account records show that the funds for the statutory capital were transferred to Claimant directly from [the First Project Company], not from [...] (see Exhibit C-273, which lists [the First Project Company] as “Ordering Customer” and [Dutch Company] as “Benefic[iary] Customer” for the transfers of both 24 February 2000 and 26 June 2000) and came ultimately from [X] (see Exhibits C-274 and C-

- 275). A mere notation of a loan on Claimant's books, on advice of its accountants, does not change what actually happened for purposes of the relevant investment treaties.
370. Nor is there any support for the proposition that the funds should be considered a loan to Claimant from [X]. The advance by [...] bears little resemblance to a loan, certainly not one made to Claimant.
371. First, Claimant was not a party to any agreement to borrow money from [X], which paid development costs as it was obligated to do pursuant to Article 2.1.3 of the Joint Development Agreement concluded *not* with Claimant, but with the First Project Company, [...].
372. Second, the bank records supplied by Claimant show that it was [the First Project Company] which received from [X] the monies destined for use as statutory capital.
373. The details of the banking transfers are striking. [The First Project Company] wired money to Claimant shortly before each capital payment. The wire transfer on 24 February 2000 covered US\$ 50,000 (first page, Exhibit C-273). The wire transfer on 26 June 2000 covered US\$ 10,800 (second page, Exhibit C-273). Each wire transfer listed [the First Project Company] as "Ordering Customer" and Claimant as "Beneficiary Customer."
374. Capital was contributed to [...] (the Second Project Company) when funds were transferred on 3 March 2000 and 28 June 2000. Although these amounts (US\$ 60,700) came from a bank account in the Netherlands, they were contributed by [X] to [...], the First Project Company, which then passed them on to Claimant. See summary in the final sentence of paragraph 13 of Claimant's submission of 26 August 2011. This document recites that the sums of US\$ 50,000 and US\$ 10,800 (an extra hundred dollars above the US\$ 10,700

contributed) were reimbursed by [...] to [the First Project Company] shortly after the contribution to capital, with reimbursements coming on 13 March 2000 and 18 July 2000, respectively. See also paragraph 8 of Claimant's Response to the Tribunal's Request for Further Information dated 26 August 2011.

375. Claimant's communication of 22 September 2011 introduces a slight ambiguity when compared to the earlier submission of 26 August 2011. The September letter and its accompanying bank documents show that the payment on 13 March 2000 was in fact for US\$ 51,958, value date 14 March 2000 (Exhibit C-274) while the payment on 18 July 2000 (apparently the value date for the amount received the prior day (Exhibit C-275), was in an amount of \$52,249.

376. These payments came shortly after each capital contribution. The larger figure (documents of 22 September 2011) obviously included the smaller (submission of 26 August 2011). The backup exhibits correspond to each monthly statement ("Hesap Özeti") from "Bank Ekspres," one dated 31 March 2000 and the other dated 31 July 2000, both for the account of [...], the First Project Company.

377. Regardless of whether one takes the larger amount (shown in the bank records of [the First Project Company]) or the smaller sum (invoiced to [...] by [the First Project Company]), the document trail submitted by Claimant demonstrates that the entire amount of its capital contribution to [the Second Project Company] was covered by [...].

378. To summarize, the sequence was as follows. First Project Company made payments to Claimant; Claimant made payments to Second Project Company; [...] reimbursed the capital payments to First Project Company.

379. The payments were all made within a period of five months, from late-February through mid-July 2000, pursuant to a scheme best characterized as a revolving door of sorts. Back-to-back payments by [...] reimbursed [the First Project Company] for monies sent to Claimant as capital contribution to [...], the Second Project Company.

380. Claimant thus acquired no dominion over the funds used for the statutory capital.

Moreover, pursuant to the JDA, such funds were advanced without recourse, given that the Project failed to achieve Financial Closing.³³ The funds simply passed in transit through Dutch accounts en route from [X] to the Project,³⁴ in a series of transactions which under the circumstances implicated no repayment duty by Claimant.

4. Other Investor-State Awards

381. If the notion elaborated above needed support from the panoply of investor-state awards, such support is not missing. Although not bound by previous decisions of other international tribunals, the relevant cases have been given due consideration with the aim of enhancing consistent interpretation of comparable treaty language as applied to similar fact patterns, thereby promoting the legitimate expectations of both host states and foreign

³³ Claimant itself admits that absent financial close, [...] was entitled to seek repayment only on the occurrence of three limited events: (i) a sale or other disposition of the Project; (ii) [...] mandatory (not voluntary) withdrawal pursuant to Articles 2.1.3 and 6 of the JDA; or (iii) successful arbitration against [...] pursuant to Article 3.2.3 of the Termination Protocol. Claimant's submission of 26 August 2011, paragraphs 39-47.

³⁴ [X]'s own interest was more akin to that of an investor than that of a lender. In the event the Project failed to close, [X] received nothing. In the event of success, [X] received not only the money advanced plus 10%, but also US\$ 1 million over and above the profit from sale of equipment and provision of engineering services.

investors. In this connection, several ICSID cases have commented on the notions of investment and investor for the purposes of investment-treaty arbitration.

382. Of particular relevance to this case are *Salini v. Morocco* and *Toto Costruzioni v. Lebanon*, which analyzed the concept of “investment” under Article 25 of the ICSID Convention. In contrast, this decision to decline jurisdiction in this case implicates notions of “investment” and “investor” as those terms are used in the Netherlands-Turkey BIT and the ECT. Those caveats notwithstanding, the attributes listed by the *Salini* and *Toto* tribunals can be useful in substantiating the admittedly sparse definitions of “investor” and “investment” under the BIT and the ECT.

383. In the words of the *Salini* tribunal, “[t]he doctrine generally considers that the investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract.”³⁵

384. Another case that sheds light upon the notion of “investor” is *Toto v. Lebanon*.³⁶ In finding that the construction project met the necessary requirements, the tribunal stated that, “[i]n

³⁵ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, (4 February 2004), at paragraph 52. RLA-110.

³⁶ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, (11 September 2009). RLA-127.

the absence of specific criteria or definitions in the ICSID Convention, the underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.”³⁷ The tribunal later listed the operative criteria in its case as “a contribution by the investor, a profitability risk, a significant duration and a substantial contribution to the State’s economic development.”³⁸

385. Even the cases cited by Claimant assume some contribution. Claimant advances *Mobil v. Venezuela* as support for the proposition that corporate restructuring aimed at gaining treaty protection for future disputes is legitimate. The tribunal in that case found that “the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT.” and that such restructuring could be either “legitimate corporate planning” or an “abuse of right” depending on the circumstances.³⁹

386. The tribunal in *Mobil* found jurisdiction under the BIT despite the respondent’s contention that the claimant was a “corporation of convenience.” However, the *Mobil* tribunal did not doubt the legitimacy of the Dutch company’s role, noting that the claimant in that case

³⁷ *Toto* at paragraph 84.

³⁸ *Toto* at paragraph 86.

³⁹ *Mobil* at paragraphs 190-191.

“contributed their part to [the] investments.”⁴⁰ For this reason, *Mobil* is not perfectly analogous to the present dispute. While Claimant may have been established pursuant to “legitimate corporate planning,” there is no indication that it contributed anything to the relevant investments. Claimant acted merely as a conduit in effecting the back-to-back payments required to incorporate [the Second Project Company].

5. Conclusion

387. The testimony of [...] proves instructive in connection with the conclusion that Claimant played no meaningful role in any aspect of the relevant investment.

388. On the second day of the evidentiary hearings, Tuesday 1 February 2011, he gave the following testimony in response to questions from Respondent’s counsel:

Counsel: Nothing came from Claimant out of pocket; right?

[...]: Nothing came from the Claimant as the first Project Company as well as the second Project Company.

Transcript, page 286, lines 9-12.

Counsel: Claimant never paid any development expenses. Those were paid for by [X]; right?

[...]: Right.

Counsel: As a practical matter, Claimant never paid out any money at all in connection with this Project, right?

[...]: Right.

Transcript, page 301, lines 2-5 and 10-14.

⁴⁰ *Mobil* at paragraph 197.

389. In the view of Arbitrator Park, this reality prevents this Tribunal from taking jurisdiction over the current dispute. Neither the ECT nor the Netherlands-Turkey BIT contemplates jurisdiction over a claim brought by an entity which played no meaningful role contributing to the relevant host state project, whether by way of money, concession rights or technology.

E. Arbitrator Stern

390. Although Arbitrator Stern shares the conclusion arrived at by Arbitrator Park, to the effect that the Tribunal has no jurisdiction, she arrives at such a conclusion through a different legal analysis. The uncontested fact that a Dutch company owns the shares of [the Second Project Company] seems sufficient to consider that there is indeed in this case a foreign investor which is the legal owner of an investment. However, the factual elements on which Arbitrator Parkn relies are a confirmation that there is no protected investment in this case, as they are the visible sign that the whole operation did not have any economic rationale, but had as its main purpose to gain access to ICSID arbitration at a time when there were already important disagreements between the Turkish company and the Turkish authorities, the precise disagreements that are at the core of the present claim of Claimant. In other words, the introduction of the Dutch company in the investment chain was, at the time it was performed, an abuse of the system of international investment protection under the ICSID/BIT/ECT mechanism.

391. This does not mean that any structuring of a national investment through a foreign corporation is an abuse. It will indeed depend on the timing of such restructuring, as indicated in *Mobil v. Venezuela*, where the tribunal stated that “(s)uch restructuring could be

‘legitimate corporate planning’ as contended by Claimants or an ‘abuse of right’ as submitted by Respondent. It depends upon the circumstances in which it happened.”⁴¹

392. This important question of timing was also explained in the *Phoenix* award, in the following terms:

International investors can of course structure upstream their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. ...

But on the other side, an international investor cannot modify downstream the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.⁴²

393. In order to determine whether or not there was an abuse in the present case, all circumstances have to be analysed. This analysis will show first, that, at the time it was performed, the introduction of the Dutch company had as its main purpose the access to international arbitration which did not exist for the Turkish nationals and the Turkish company before such introduction and second that such operation was precisely performed at a moment when the facts at the root of the dispute presented to the Tribunal were already known.

⁴¹ *Mobil v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, (10 June 2010), paragraph 169.

⁴² *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), paragraphs 94-95. Emphasis in the original.

394. A few uncontroversial facts can be restated here. The Concession Contract, which [the First Project Company] signed on 27 October 1998, in its Article 3 entitled “Establishment of a new company,” provided the following:

Within three months following the execution of the Contract, [the First Project Company] shall establish a new capital stock company, the articles of association of which shall be approved by the Ministry, in order to realize the works that are included within the scope of this Contract.

All rights and obligations, which the Company has undertaken under the Contract, shall deem to be transferred to the new company to be established following the registration and announcement of such company.

395. This new company was therefore to be created before 28 January 1998, by [the First Project Company]. This is not at all what happened. In order to convince the Tribunal that the creation of [the Second Project Company] by two Dutch corporations was done in good faith, Claimant insists on the fact that such creation was mandated by the just mentioned Article 3. But contrary to the assertions of Claimant, it is not at all what was mandated that happened, but a very different structuring of the investment following a completely different timing and a completely different logic than foreseen in the initial project.

396. *Initially*, the new Turkish company was to be established by [the First Project Company], but *in fact* [the Second Project Company] was established by the shareholders of [the First Project Company], through an indirect line of foreign companies, with one layer of companies of Curaçao and another layer of Dutch companies.⁴³

⁴³ This raises also some concerns about the misuse of corporate assets, as the Concession Contract was transferred from the [the First Project Company] company to another Turkish company which was not its subsidiary and with which it had no links besides the fact that they

(footnote cont'd)

397. *Initially*, the new Turkish company was to be established before 28 January 1999, but it was *in fact* established 14 months after this contractual deadline, on 27 March 2000.

398. *Initially*, the new Turkish company was supposed to attract the interest of foreign shareholders, which were going to buy its shares. The main target for foreign investors was the United States. However, it appeared quite quickly that no American company was ready to become an equity partner in the project, even [X], which was quite involved, stopped short of acquiring shares in [the Second Project Company]. *In fact*, the new Turkish company's shares were bought by Dutch shell companies, whose owners were the two Turkish Sponsors of the Project, [...].

399. *Initially*, the creation of diversity of nationality by the introduction of a foreign company had three purposes, as stated by Claimant: tax purposes; BIT protection; attraction of foreign investors. *In fact*, the new Turkish company was created at a time when it was clear that no real foreign investor was interested. And as it has transpired from the file that the tax benefits were quite minor. In other words, of the three initial purposes, only two remained at the time of introduction of the Dutch company. The inescapable conclusion is that when the Dutch companies created [the Second Project Company], the main remaining purpose was to attract BIT protection.

400. Accordingly, the factual situation here is materially similar to the facts found by the tribunal in the *Mobil v. Venezuela* case, where it stated that "... the main, if not the sole purpose of

had the same shareholders. This element of the file is not central to the finding of the Tribunal, but is one more indicia that the whole operation was not a real economic operation, but a manipulation of corporation structures.

the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT.”⁴⁴

401. The next question is then whether such restructuring was made in good faith or was only a device to gain access to international arbitration, at a time when the acts at the core of the Claimant’s claim were already known to it.

402. There is indeed a dividing line between a good faith (re)structuring to get access to international arbitration and a bad faith restructuring to get access to international arbitration.

403. The dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a high probability and not merely a general future controversy. It appears that it would be unfair to allow Claimant to change its nationality in the grey period of the Parties’ relationship between good relations and a full-fledged dispute, when disagreement and acrimony have already arisen. It is indeed an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. Before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case.

⁴⁴ *Mobil v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, (10 June 2010), paragraph 190.

404. All the elements in the file and the particular circumstances of the case prove that the investment was manipulated to appear as a foreign investment, beyond this dividing line, with the result that the foreign investment must be considered to be the result of an abuse – a manipulation not inside a family like in *Phoenix*, but inside a “corporate family”, in other words, a corporate structure involving only two persons – and cannot therefore be analyzed as a protected investment that can benefit from the protection of the ICSID/BIT/ECT arbitration mechanism.

405. Again, a few uncontroversial facts can be restated here, on which such conviction rests.

406. Although it should have been established at the beginning of the year 1998, Claimant was established on 26 April 1999, as an empty shell. *Initially*, the idea was to create the new Turkish company when this empty shell would no longer be empty, but would have found international foreign investors. Contrary to what was still the plan beginning of May 2000, suddenly the shareholding structure was finalized end of that month. Indeed, even beginning May 2000, it was stated in a Confidential Briefing Memorial (R-265) prepared by [...] for providing information to financial institutions that the new structure will only be put in place when international developers would enter into the project: “ATAM ... is currently in discussions with several major *international developers* who have expressed interest in acquiring an equity interest in the Project. It is contemplated that one or more of those developers will join the consortium in due course, *at which time the shareholding structure will be finalized* and the Sponsors will establish a special purpose Turkish limited liability company to undertake the Project.” (Emphasis added.) But *in fact*, contrary to the plans, when it clearly had appeared that problems were ahead and that there was a high probability

of things turning into a dispute, the new shareholding structure had been put into place, with no international developers, and with the sole participation of the two Turkish Sponsors, using the intermediary of Curaçao and Dutch companies of which they were the sole owners. Under being questioned at the hearing, [...] could not offer any plausible reason why Claimant's [the Second Project Company] was formed when it was, some 14 months after it should have been created according to the Concession Contract. (Transcript, 354:14-20) The fact that the only "investors" implicated were the two Turkish men who initiated the Project matters here. It is worth noting that this information was only found upon discovery, and was not spontaneously given by Claimant. It seems difficult to deny that the Turkish Sponsors tried to hide the fact that no international investor was concerned by the use of the Dutch companies, which had not attracted foreign investment and therefore appeared as mere shell companies at the moment they got involved in the Project in March 2000. Also worth mentioning is the fact that Claimant itself stated that "the identity (and nationality) of the Claimant's ultimate shareholder is juridically irrelevant, unless the Respondent can prove an abuse of the rights that otherwise vest in the Claimant as a qualifying 'investor'." See Claimant's Post-Hearing Brief of 20 April 2011, at paragraph 19. Such an abuse is precisely present here, as will be indicated now.

407. It is worth recalling what has happened just shortly before this change of policy, which shows that the Dutch entity was clearly established by the American-financed Turkish group to obtain treaty protection at a moment when negotiations with the Turkish government went sour.

408. It is uncontested that on 22 January 2000, Law No. 4501 was adopted, which allowed parties to existing BOT concession contracts to apply to the Ministry to either add international arbitration to their concession contracts or to convert their contracts into private law contracts. Turkish [...] did not elect simply to add an arbitration clause to its Concession Contract, which was one of the possibilities opened by Law 4501, but, being dissatisfied with the Concession Contract, elected the other option, in full knowledge of possible difficulties.

409. The process of transformation never succeeded, as is well known. It appears that all of the present claims are based on facts well known to the Sponsors of the Project before the restructuring: the necessity to adjust tariffs and renegotiate the Concession Contract, the importance of the 31 December 2002 deadline, which was in any case in the Concession Contract from the beginning.

410. First, [Turkish Ministry] publicly announced its principles for Law No. 4501 conversions, including the principle of tariff reductions, on 21 March 2000. On that date, the Ministry met with [the First Project Company] and outlined the general principles that would guide the process of converting the Concession Contract into an Implementation Contract under Law No. 4501. The minutes of that important meeting clarify these principles:

Concerning the application of the provisions of law no. 4501 to [...] contract which was approached within the context of build-operate-transfer model, the following considerations were notified to the company in the meeting held in the [...] on March 21, 2000 at 1:30 pm.

1. Making a reduction in the tariff at the betterment rate in case new loans are found in more appropriate conditions, not reflecting any increases in loan conditions to the tariff.

2. Reorganizing the tariff tables by taking the average sales tariff, except for fuel, for 20 years as [...].

3. Making necessary changes in the agreements in order to be attuned to legal regulations comprised within the scope of “Restructuring” of Electrical Energy Sector in the forthcoming years on condition that the company does not receive any advantage or suffer any losses.

4. Putting the loans into operation by completing the subsidiary agreements in the jointly determined eventual time.

411. A week later (R-93), [the First Project Company] expressed its disagreement with a tariff modification:

We believe we will be able to conform to most of items 1, 3 and 4 of the report with 4 items that you have brought to our meeting on Tuesday, 21-03-2000 and we can discuss them immediately if you wish.

The Tariff you mention in item 2 is a subject that was finalized by the signed contract ...

This is a point which has been decided by signed contracts. It does not seem possible for us to make a modification on the Tariff.

412. In this arbitration, Claimant specifically identifies this meeting as an example of when “the [Turkish Ministry] started to pressure the Project Company to re-open the commercial terms agreed in the Conversion Contract.” Claimant points to such Ministry requests for terms, which Claimant says were not in the Ministry’s power, as a breach of the BIT and the ECT. Claimant has described this meeting as a key turning point in the case. Claimant’s [Second Project Company] was suddenly incorporated and registered nine days after this meeting at which [the First Project Company] was allegedly “pressured” and subjected to treatment allegedly inconsistent with the BIT and the ECT. It is uncontested that the scope of the Ministry’s authority to discuss new commercial terms during the process of converting the

Concession Contract into a private law contract under Law No. 4501, which was asserted before the introduction of the Dutch Company, is at the heart of the present dispute.

413. Second, [the First Project Company] was also aware, before the entry on the scene of Claimant through the restructuring, that the Turkish authorities were insisting on the completion date of 31 December 2002. It results indeed from the file, more precisely from an e-mail from [...] to [...], dated March 13, 2000 (R-256), [the First Project Company] was already on notice on 13 March 2000, before the entry on the scene of the Dutch company, that the Turkish authorities would insist on the committed completion date of end of December 2002.” (This document was found through discovery. See Respondent’s Counter-Memorial on Jurisdiction and Rejoinder on the Merits, at paragraph 437):

[...] informed me today that [the First Project Company] will be required to give assurance that the plant will be in commercial operation by 31 December 2002.

414. It is uncontested that [the First Project Company] refused to give this assurance and that this is also one of the central elements of the present claim.

415. [...] confirmed during the hearing that, immediately before [the Second Project Company] formation on 27 March 2000, he became personally aware that Law No. 4501 would involve: (i) negotiating a new contract; (ii) renegotiating the tariff and other terms; and (iii) agreeing to complete the project by the end of 2002. See Transcript, at 417:21-22; 418:1-2; 408:21-409:3; 437:20-440: 8.

416. From all these circumstances, it is clear that Claimant, as a Dutch company, acquired its investment for the sole purpose of manufacturing international jurisdiction, at a time when the project was already in great difficulty and the facts that are at the root of the dispute with

Turkey were already known to the Sponsors of the Project. This was underscored by Respondent, when it stated: “The actions of the Respondent on which the Claimant’s principal claims are predicated were all taken, or at a minimum set in motion, prior to Claimant’s alleged investment.”

417. In conclusion, because the investment was not a *bona fide* investment, as it was performed at a time were the facts at the root of the dispute were already known and a dispute was already a high probability, the Tribunal has no jurisdiction over this investment, as it cannot benefit from the international protection granted by the ICSID/BIT/ECT mechanism.

VIII. Merits

418. Given the Tribunal’s finding that jurisdiction over the claims is absent under the Netherlands-Turkey BIT and the ECT, it would be inappropriate to proceed to address the merits of this dispute.

IX. Costs

A. Claimant

419. In its Post-Hearing Brief of 20 April 2011, Claimant requested an award ordering Respondent to pay the costs of this arbitration, including all fees and expenses of the Tribunal and of ICSID, along with all legal costs and expenses incurred by Claimant in respect of this arbitration.

B. Respondent

420. In its Post-Hearing Brief of 20 April 2011, Respondent requested an award ordering Claimant to pay Respondent's costs, including counsel fees, incurred in respect of this arbitration.

C. Submissions on Parties' Costs

421. The Hearing Protocol attached to the Minutes of the Pre-Hearing Conference on 6 January 2011 invited the Parties to submit their costs pursuant to ICSID Rule 28 by 6 June 2011.

Pursuant to the Hearing Protocol agreed by the Parties, Claimant submitted its Statement of Costs on 6 June 2011. According to Claimant's 6 June 2011 submission, Claimant had incurred total costs of US\$ 8,118,421 representing attorneys' fees, experts' fees, and out-of-pocket expenses.

422. On 11 November 2011, Claimant submitted a revised Statement of Costs, updating its figures in light of the preparation of Claimant's response to the Tribunal's post-hearing questions and submissions in connection with new evidence. According to Claimant's revised submission, Claimant had incurred total costs of US\$ 8,264,624, representing attorneys' fees, experts' fees, and out-of-pocket expenses. Claimant has advanced US\$ 449,960 to ICSID to cover the costs of the proceedings (excluding the lodging fee of US\$ 25,000).

423. Pursuant to the Hearing Protocol agreed by the Parties, Respondent provided its Cost Submission on 6 June 2011. According to Respondent's submission of 6 June 2011, Respondent had incurred total costs of US\$ 4,349,540.77, representing attorneys' fees,

experts' fees, travel expenses for government representatives, and the advances to ICSID (US\$ 450,000).

D. Allocation of Costs

424. Having considered the Parties' arguments, the Tribunal finds that both sides presented their arguments in good faith. Consequently, the Tribunal thus finds it appropriate to direct each side to bear its own legal expenses, including fees for attorneys and experts. The costs of arbitration, including the fees of the arbitrators and the administrative expenses of the Centre, shall be divided on an equal (50/50) basis.⁴⁵

X. Disposition

425. In light of the Majority's decision, the Tribunal dismisses with prejudice all claims for lack of jurisdiction under the Netherlands-Turkey BIT and the ECT.

426. Each side shall bear its own legal expenses, including fees for attorneys and experts. The costs of arbitration shall be divided on an equal (50/50) basis.

signed
Professor William W. Park
President

Date: 25 June 2012

⁴⁵ The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final. The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

signed
Hon. Marc Lalonde
Arbitrator
(Dissenting)
Date: 6 July 2012

signed
Professor Brigitte Stern
Arbitrator
Date: 27 June 2012

EXCERPTS

Alapli Elektrik B.V.

v.

Republic of Turkey

(ICSID Case No. ARB/08/13)

Dissenting Opinion

1. While agreeing with some of the legal analysis of the Majority, I must register a dissenting opinion from their conclusion that the Tribunal has no jurisdiction to consider the merits of this case. My dissent relates to matters of law and of facts.
2. In my view, the Tribunal has jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* under both the BIT and the ECT.

A- Jurisdiction *ratione personae*

3. As to *ratione personae*, Article 1(a) of the BIT defines "investor" as meaning, *inter alia*, "a legal person duly incorporated, constituted or otherwise duly organized under the applicable laws of a Contracting Party". Similarly, Article 1(7) of the ECT includes in the definition of "investor" "a company or other organization organized in accordance with the law applicable in that Contracting Party". That is all that is required.¹ Contrary to some other BITs, there are no further restrictions to qualify as an investor under either instrument.
4. In the present case, Claimant having registered as a Dutch company on 26 April 1999 clearly meets the definition of "an investor" under both the BIT and the ECT. I believe that Prof. Stern shares that view.²
5. I agree with the Majority that "(i)n signing the Netherlands-Turkey BIT and the ECT, Turkey could not have expected that the treaty benefits would extend to just any Dutch company, regardless to its relationship to a Turkish investment. (...) Turkey agreed to arbitrate with Dutch entities that had actually made investments in Turkey."³ However, this is a different question that goes rather to *ratione materiae*.
6. It is also well established that the investor must be a bona fide investor; there cannot be an abuse of process whereby a company is created in a Contracting State by nationals of the other Contracting State (or other investors) after a dispute has arisen in order to claim the

¹ See *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010).

² Paragraph 390; unless otherwise stated the mention "Paragraph" in the footnotes refers to a paragraph of the Award.

³ Paragraphs 335 and 336 of the Award.

benefits of a BIT. Again, this is a different question which I will address below.

B- Jurisdiction *ratione materiae*

7. As to *ratione materiae*, both the BIT⁴ and the ECT⁵ contain a broad definition which includes shares, stock and other forms of equity participation in a company. In the present instance, Claimant held a 50% equity participation in [...] (the Second Turkish Project Company) which detained valuable rights relating to the Concession Contract, and, more particularly, the right to operate the [...] power plant for a period of 20 years with a guaranteed income stream.
8. I disagree with Prof. Park's conclusion⁶ that "Claimant cannot be considered as an "Investor" pursuant to either the ECT or the Netherlands-Turkey BIT", Claimant having made "no relevant contribution to the Project".
9. In his analysis, Prof. Park refers some time to "contribution" and some time to "investment", e.g. "(...) to be an investor a person must actually make an investment, in the sense of an active contribution. (...) The Dutch entity, Alapli Elektrik, has not demonstrated that it actually made an investment in Turkey, in the sense of a meaningful contribution to Turkey".⁷ There is a risk of confusion in the indifferent use of those terms as "contribution" is sometimes interpreted as requiring a meaningful contribution to the economic development of the receiving State, a notion that has been the subject of considerable controversy both in awards and in the literature relating to investment arbitration. The views expressed in that regard by the Tribunal in the *Salini v. Morocco*⁸ have not been adopted by other tribunals addressing the issue, the prevailing view being that the criteria mentioned in those two cases are not to be considered as "jurisdictional requirements".⁹ In any event, in the present case, I am of the view that the Project Company (and thereby Claimant) would meet even the *Salini* criteria if they were to be applied. For the purpose of brevity, I am assuming that when Prof. Park uses "contribution", he refers to "investment" as that word is defined in the BIT and the ECT.
10. Contrary to his conclusion, I am very much of the view that Claimant made a qualifying investment in Turkey.
11. It has been clearly established that Claimant had equity capital of US\$ 60,800, most, if not all, of which was invested in [the Second Project Company]. It thus acquired 50% equity

⁴ Article 1(b).

⁵ Article 1(6).

⁶ Paragraph 349.

⁷ Paragraph 350.

⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

⁹ See *Malaysian Historical Salvors SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application of Annulment (16 April, 2009) para. 77; see also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) para. 130 and other cases cited in that Decision. Even in the case of *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009) mentioned by Prof. Park, the Tribunal rejected a strict reliance on the *Salini* tests.

ownership in [the Second Project Company] which detained valuable rights in the form of the Concession Contract.¹⁰

12. Prof. Park argues that, since the capital constituting the equity had been advanced by [X], Claimant could not be an investor under either the BIT or the ECT. In my view, nothing in either instrument allows for such an interpretation. Whether Claimant has obtained its equity money through a bank loan, a lottery win, a gift from a benevolent friend or found it on the street, is totally irrelevant. The question is whether Claimant has made an investment into Turkey directly or through a local company; pursuing how it raised that money is getting into a wild goose chase, which is neither required nor authorized by the BIT or the ECT.
13. This issue has already been addressed by previous tribunals and, more specifically in *Saipem S.p.A v. Bangladesh*, where the Tribunal stated the following:

(...) it is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant (My underlining). This results from the drafting history of the ICSID Convention and is confirmed by several arbitral decisions relating to BITs.¹¹

14. Similarly, Prof. Schreuer has concluded:

It follows that the origin of the funds is irrelevant for the purposes of jurisdiction. (My underlining). Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans makes no difference to the degree of protection enjoyed. The decisive criterion for the existence of a foreign investment is the nationality of the investor. There is no additional requirement of foreignness for the investment in terms of its origin. In the same way, the origin of capital from persons who are foreigners but do not enjoy protection under the Convention because they do not meet the nationality requirements is immaterial."¹²

15. In the present instance, it does not matter whether the equity investment into Claimant by [...] (through [...], a Virgin Islands holding company) was advanced or repaid by [X]. The fact is that Claimant was a 50% shareholder in [the Second Project Company]; [X] did not hold a single share in Claimant or [the Second Project Company] and had no equity right whatever; all those rights belonged exclusively, on a 50% basis each, to Claimant and the

¹⁰ See *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case, No. ARB/02/5, Award (19 January 2007), para. 104.

¹¹ ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), paragraph 106. See also in that Decision several other Decisions and Awards cited in support.

¹² Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2nd Edition, Cambridge University Press, 2009, p.137).

other Sponsor.¹³

16. It has been established that [...] (“the Project Sponsors”), two Turkish citizens, joined forces in December 1995 in relation to the Project. They established [the First Project Company] and they produced three interim feasibility studies in 1996 and a final one in February 1997, almost doubling the size of the Project. In March 1997, the Turkish Ministry [...] approved the final feasibility study.
17. It was only on 24 February 1997 that a letter of intent was signed with [...] and, on 8 July 1997, that a Joint Development Agreement (“the JDA”) was signed with [...]. The nature of the arrangements between the parties is described in the Award.
18. On 27 October 1998, a Concession Contract was signed between [the First Project Company] and [Turkish Ministry]. On 26 April 1999, Claimant¹⁴ was registered under the laws of the Netherlands and, on 27 March 2000, the Second Turkish Project Company¹⁵ was registered. On 30 March 2000, Claimant paid for and acquired a 50% share in [the Second Project Company] and, on the same day, the rights and obligations of [the First Project Company] were assigned to [the Second Project Company]. At that moment, Claimant, through its shareholding in [the Second Project Company], became the 50% owner of what could legitimately be considered a very valuable Concession Contract which, if allowed to proceed, would have been a significant investment in Turkey, as recognized by the Government at least at the time it signed it. To argue that Claimant contributed nothing to Turkey (if this criterion were to be retained) is to ignore not only the payment by Claimant for its shares in [the Second Project Company] but also that it had thus become the half-owner of the Concession Contract which resulted from the initiatives previously undertaken by [...] and [the First Project Company]. In fact and in law, it was indirectly substituted to [...] as far as his rights in the Project were concerned. Claimant thereby had valuable rights under the Concession Contract.
19. I have found nothing in the arrangements between either the Project Sponsors or Claimant and [X] which deprived Claimant of its status as an investor in Turkey under either the BIT or the ECT. The Project Sponsors recognizing that, even though they succeeded in obtaining a Concession Contract, they did not have the competence nor the funds to build the Project, wisely decided to join forces with an internationally recognized company in a position to provide them with all the required technical and financial support. There is nothing strange or incongruous in such arrangements; they are part of ordinary business life anywhere in the world.
20. [X] saw an attractive business deal whereby it would be in a position of exclusivity to supply all the technical services and the equipment in connection with a large Turkish project without compromising itself by becoming a shareholder and appearing to compete with other similar projects in Turkey which might be willing to buy [X] products or use its consulting services.

¹³ [...]

¹⁴ Alapli Elektrik, B.V.

¹⁵ [...]

21. In order to benefit from an exclusive arrangement, it was ready to advance the funds necessary to bring the Project to fruition, with the risk of losing its advances if the Project was not realized (except under the following circumstances: 1- a sale or other disposition of the Project; 2- [...] mandatory withdrawal pursuant to Articles 2.1.3 and 6 of the JDA; 3- successful arbitration against the [Turkish Ministry] pursuant to Article 3.2.3 of the Termination Protocol). In the case of success, [X] would be fully reimbursed for all the money advanced plus 10% interest per annum and would receive a US\$ 1,000,000 success fee.
22. But, again, at no time did [X] become a shareholder in any of the entities controlled by the Project Sponsors. Claimant, not [X], would have been entitled to its share of the profits generated by the Project. [X]'s interest in the Project was of a totally different nature from that of an investor under the BIT or the ECT.
23. I therefore disagree with Prof. Park's view that Claimant somehow acted only "as a conduit" for the [X]¹⁶ and that "[X]'s interest was more akin to that of an investor than that of a lender".¹⁷ In my view, [X]'s financial contribution to the Project had all the characteristics of a conditional loan. The conditions may appear to some as generous in favor of the debtor but this is the arrangement that was arrived at legally and freely between two groups of knowledgeable business people who each saw to the advancement of their interests in the transaction. I see nothing in the JDA (reimbursement of the advances plus 10% interest and a \$1million success fee) which transforms that arrangement into an "investment" by [X].
24. From the evidence submitted to the Tribunal, it is clear that, at all times, the Project Sponsors remained the full and exclusive owners of the various Turkish or foreign companies (including Claimant) they created in connection with the Project. Had the Project succeeded, it would have been the Sponsors (Claimant being in for 50%), not [X], which would have benefited from the return on equity.
25. A related argument of Prof. Park which gives me concern is his statement regarding the contribution of Turkish actors.¹⁸ If it is recognized – as it should be – that contributions were made by the Turkish Project Sponsors, there is nothing either in the BIT or in the ECT prohibiting those persons from arranging their affairs in such a way as to be able to benefit from investment protection and international arbitration granted by such treaties.

¹⁶ Paragraphs 350, 367, 386.

¹⁷ Footnote 37 of the Award.

¹⁸ "To the extent that contributions were made, they came from nationals or companies of the United States and Turkey", Paragraph 350.

26. Reference was made, during the proceedings, to cases where jurisdiction was denied when the incorporation by a national of one Contracting Party of a company in the other Contracting Party was patently artificial, was not proven, or occurred after the facts giving rise to the dispute had arisen. In particular, each Party referred to *Mobil Corporation, Venezuela Holdings B.V. and ors. v. Bolivarian Republic of Venezuela*.¹⁹

27. I fully subscribe to the following paragraphs of that Decision which read as follows:

190. *It thus appears to the Tribunal that the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT.*

191. Such restructuring could be "legitimate corporate planning" as contended by the Claimants or an "abuse of right" as submitted by the Respondents. It depends upon the circumstances in which it happened. (My underlining).

(...)

204. *As stated by Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.* (My underlining).

205. *With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. (...)."*

28. I will deal below with the *ratione temporis* issue; for the moment, I will concentrate on the abuse of process argument.

29. Prof. Park considers that there are three elements to the investment in this case.²⁰ 1- the Concession Contract; 2- technological expertise and 3- the statutory capital of [the Second Project Company]. I have already addressed the last two elements. In connection with the first, Prof. Park argues that "(...) Claimant has not demonstrated any contribution to obtaining this Concession. Claimant did not negotiate the terms. Claimant is not a signatory. Nor did Claimant become a party by virtue of assignment"²¹ and earlier on²², he states that "Claimant's ownership of the Second Project Company derives from [...], not a Dutch entity otherwise entitled to treaty provision."

30. In my view, in order to qualify under the BIT or the ECT, Claimant did not need to

¹⁹ *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

²⁰ Paragraph 363.

²¹ Paragraph 364.

²² Paragraph 351.

contribute to obtaining the Concession Contract, did not need to negotiate its terms, did not need to sign it, did not need to become a formal party to it nor to go through some “other Dutch entity otherwise entitled to treaty provision”. Claimant’s ownership in [the Second Project Company] certainly derived from [...] and the assignment of rights and obligations made in favor of [the Second Project Company] by [the First Project Company] fully entitled Claimant, with its acquisition of a 50% equity in [the Second Project Company], to the rights that [...] or [the First Project Company] might have had in the Concession Contract; to use Prof. Park’s words, “Claimant would be stepping into the shoes of a Turkish national”.²³ There is nothing illegitimate or contrary to the BIT or the ECT in that regard. As seen in the *PSEG* case²⁴, a concession contract can represent an investment.

31. There is no doubt in my mind that Claimant was created pursuant to “legitimate corporate planning”, as in the *Mobil* case.
32. In the present instance, the intention of the Turkish sponsors to create a foreign company was mentioned several years before the dispute arose and it was well known by the Turkish authorities who never raised the matter as an issue until after the initiation of the present arbitration. In November 1998, the Project Sponsors obtained opinions from [...] and [...] as to the advisability of such a step and it was pointed out to them that there would be advantages in proceeding in that direction, for tax purposes, for the attraction of foreign investors as well as for the purpose of international arbitration.
33. Claimant was registered in April 1999 and acquired a 50% equity ownership in [the Second Project Company] on 30 March 2000.
34. The Tribunal was given sufficient evidence to conclude that Claimant was created in order to achieve the three purposes mentioned by its professional advisors.
35. First, as to tax, why would the Project Sponsors have each bothered to create a Curaçao holding company for any purpose other than tax planning? If their purpose had merely been to access international arbitration, they did not need the addition of that unnecessary legal intermediary. The direct creation of a Dutch company would have been amply sufficient. Prof. Stern says that “it has transpired from the file that the tax benefits were quite minor”.²⁵ Leaving aside the rather skimpy evidence received by the Tribunal in that respect, I see nothing in awards or in the doctrine requiring that, in order to qualify as legitimate under a BIT, the tax benefits of a legal structuring have to be substantial.
36. Secondly, it has also been established that the Project Sponsors were repeatedly told by their advisors that, if they wished to recruit foreign investors, they needed to create a company in a jurisdiction which would give the investors the protection available under a BIT and/or the ECT. With the help of their financial advisor²⁶ which had prepared documents in 1997 and 1998 concerning the eventual participation of foreign equity investors and lenders, the

²³ *Id.*

²⁴ *PSEG Global Inc. v. Konya Ilgin Eledtrik Uretim ve Ticaret Limited Sirekti v. Republic of Turkey*, ICSID Case No. ARB/02/4, Decision on Jurisdiction, 4 June 2004.

²⁵ Paragraph 399.

²⁶ , appointed in 1997.

Project Sponsors received, from December 1998 to February 2001, expressions of interest from more than a dozen large financial and business institutions. They were advised that, in order to maximize the premium for entry into the Project, it would be preferable to bring an equity partner as late as possible and, preferably, after the conversion of the Concession Contract into an implementation contract.²⁷ In December 2000, [...] were instructed to draft a sale and purchase agreement and a shareholders agreement.

37. Thirdly, taking into account the nature and size of the project, it was quite natural that the Project Sponsors would have wished to have access to international arbitration through the creation of an appropriate foreign company. This matter has already been discussed above. I would merely repeat, in line with the *Mobil* Decision, that, even if the sole purpose of the legal structuring had been to gain access to international arbitration, this would not render such operation *per se* illegal.
38. Finally, Prof. Park seems to attach some importance²⁸ to the statement made by [...], during his cross-examination at the Tribunal hearing, that Claimant ended up never paying out any money in connection with the Project. [...] is a businessman without any legal training; I respectfully submit that he is not an authoritative source to determine whether Claimant qualifies as an investor under the BIT and/or the ECT.

C- Jurisdiction *ratione temporis*

39. The next issue to be addressed is the one of jurisdiction *ratione temporis*, which appears to be the main point upon which Prof. Stern bases her conclusion that the Tribunal has no jurisdiction in this case. My disagreement with her is not so much with her interpretation of the law in that regard but with her interpretation of the facts.
40. Her view is that “the main purpose” of the creation of Claimant was “to gain access to ICSID arbitration at a time when there were already important disagreements between the Turkish company and the Turkish authorities, the precise disagreements that are at the core of the present claim of Claimant”.²⁹ I beg to differ.
41. I have no quarrel with her references to *Mobil* (which I have already commented upon) or to *Phoenix*.³⁰ I also agree with her that, to quote *Phoenix*, “once the acts which the investor considers are causing damages to its investment have already been committed”, the investor cannot re-arrange its affairs so to claim the benefits of investment protection under a BIT or the ECT.
42. I also agree that there is a dividing line between good faith and bad faith restructuring. However, I have serious concerns about reaching a negative conclusion about a restructuring, on the basis of an investor “seeing a dispute looming with his own

²⁷ Second W.S. of [...], Paragraph 15.

²⁸ Paragraphs 388 and 389.

²⁹ Paragraph 390.

³⁰ Paragraphs 391 and 392. *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraphs 94 and 95.

government”³¹ or when “the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration”.³² Large development projects, whether a State is a party or not, regularly give rise to disagreements between the parties. Entrepreneurs are constantly sailing in a fog of “looming disputes”.

43. Prof. Stern is right to state that “(t)he dividing line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a high probability and not merely a general future controversy”³³ but I would add that one is not talking here about any dispute but about the one which is specifically the subject of a claim under an investment treaty.
44. In my view, the present case is very far from even approaching that famous dividing line and my conviction in that regard rests on two factors: 1- the restructuring in question had been planned for a long time, justified on three grounds and was finalized for valid reasons at the time it took place; 2- the events which are the basis of Claimant’s claim are events which took place after the corporate creation of Claimant and after [the Second Project Company] (and thus Claimant) acquired rights in the Project.
45. I have already addressed the first factor above and there is no need to repeat my views in that regard. However, taking into account the detailed analysis and interpretation of the facts made by Prof. Stern, I believe I should at least stress some of the points where I am parting ways with her.
46. She seems to attach importance to a Confidential Briefing Memorial prepared by [X], at the beginning of May 2000, which indicated that the shareholding structure would be finalized once one or more major international developers would enter into the project and that suddenly later in May, the strategy was changed and the restructuring took place, with the sole participation of the two Turkish sponsors. I do not see how the decision to proceed at the end of March 2000 with the acquisition by Claimant of a 50% share in [the Second Project Company] somehow jeopardized the finalization of the shareholding structure; it remained quite possible to make further adjustments to that structure once international partners were ready to invest into the Project.
47. Prof. Stern also seems to attach significance to the fact that it was only upon discovery during the arbitration process that it came out that the two Turkish sponsors were the only “investors” implicated at that time. I fail to see how such a fact has any relevance to the question as to whether the creation of the Claimant was done in good faith or was abusive of the BIT or the ECT process.
48. As to the second factor, Respondent, in its pleadings, referred to “threats and risks”³⁴ faced by [the Second Project Company] by March 2000 and to the possibility of “difficulties, delays, uncertainties, and likely tariff reductions.”³⁵ Apart from the issue of tariff reduction

³¹ Paragraph 311.

³² Paragraph 403.

³³ *Id.*

³⁴ Tr., 2306:8-9.

³⁵ Tr., 2314:22. 2315:1.

which I will address below, such general statements cannot constitute the basis for a jurisdictional challenge about abuse of process.

49. However, Respondent makes more specific allegations in that regard³⁶ which are retained by Prof. Stern in her analysis³⁷ to the effect that [...] confirmed during the hearing that, before March 27 March 2000, he was aware that Law 4501 would involve: (i) negotiating a new contract; (ii) renegotiating the tariff; (iii) agreeing to complete the project by the end of 2002.
50. Before dealing with the main issue relating to these allegations, a few preliminary comments on each of them appears necessary.
51. As to the fact that a new contract would have to be negotiated to go from a Concession Contract to an implementation contract, this was not, before 30 March 2000, a matter which was the subject of any dispute. Law 4501 had been enacted in January 2000 by Respondent to further encourage foreign investment, by giving the choice to investors to use private implementation contracts rather than concession contracts; [...] (through [...], the First Project Company) made a deliberate decision in February 2000 to opt for the route of an implementation contract, a choice which was approved by Respondent's Council of Ministers on 8 September of that year. Far from being seen as a matter of dispute, that choice was seen as a potential improvement of the Sponsors' situation compared to the arrangement under the 1998 Concession Contract.
52. As to the renegotiation of the tariff, [the First Project Company] was aware, by the end of March 2000, that Respondent would request a reduction of the electricity tariff contained in the Energy Sales Agreement of 1999 between [...] and [the First Project Company], in order to take into account the financial benefit to the Project Company which would result from the conversion of the Concession Contract into a private law contract, under the provisions of Law No. 4501. In June 2000, the [Turkish Ministry] gave the Project Company 48 hours to accede to its demand for a 15% reduction of the non-fuel elements of the tariff that had been agreed in the Concession Contract. In order to proceed with the Project, the Project Company accepted the revised terms imposed upon it. In fact, it had received advice on 28 March 2000 from [X] that, in the new environment of a private contract, the Project could readily sustain a reduction in the electricity tariff. However, what is not mentioned in the Award is that, in July 2000, the [Turkish Ministry] issued new demands for further reductions, without which, it said, it would not forward the Project to the Council of Ministers for approval as a private law contract.³⁸

³⁶ Tr. 417:21-22; 418:1-2; 408-21-409:03; 437:20-440:8.

³⁷ Para. 415.

³⁸ [...], Exh. C-61.

53. As to the deadline of the Project, it is not contested that [the First Project Company] was aware, before the entry on the scene of Claimant, that the Turkish authorities would insist on its completion by the end of December 2002 (a deadline which was already in the Concession Contract in any event). In fact, [the Second Project Company] (supported by [X]) confirmed, on 27 June 2000, that, with a prompt resolution by Respondent of the outstanding issues, it could finalize the power plant by the end of 2002.
54. But the essential element to retain on this subject is that the Claimant's claim is not based on the necessity to negotiate a new contract, or on the first request to amend the electricity tariff or on the obligation to complete the Project by the end of 2002 but on Respondent's decisions (or lack of them) subsequently to 30 March 2000 which made it impossible to complete the Project. I am of the firm opinion that Claimant had no reason at that time to believe that Respondent would adopt what Claimant considers as dilatory tactics and steps that would derail not only the Project, but also the 28 other BOT projects which had been prioritized under Law No. 4501 on 30 May 2000 and were declared eligible to Treasury guarantees provided they were completed by the end of December 2002 (in fact, not a single one of them ended up being able to achieve conversion under Law 4501 or received a Treasury guarantee; Respondent argues however that more than one-third of those companies completed their projects instead through the conditions created by Law 4628).
55. According to Claimant, the following events (all subsequent to 30 March 2000) are the components of the dispute and constitute alleged breaches of the BIT and the ECT:
- 1) The [Turkish Ministry] failed to implement the Council of Minister's decree of 8 September 2000 and arbitrarily refused to convert the Concession Contract into a private law implementation contract.
 - 2) Respondent unilaterally abrogated the Project Company's right to the Treasury guarantee.
 - 3) Respondent sought unilaterally to revoke the "take-or-pay" obligation, contained in the Concession Contract and the Energy Sales Agreement.
 - 4) Respondent liquidated the [...].
56. All these allegations would have to be proven at the merits stage but Claimant produced evidence to the effect that:
- 1) In a letter of 21 June 2000, the [Turkish Ministry] unilaterally stipulated that, if the Project Company did not commission the plant by the end of 2002, it would lose its right to the power purchase guarantee (i.e. the "take-or-pay" obligation).
 - 2) In late July 2000, a second demand for tariff reduction was made by the [Turkish Ministry] under the threat of blocking the conversion of the Concession Contract into an implementation contract. Such demand was repeated at meetings held on 20-21 December 2000 and on 12 January 2001.

- 3) On 16 January 2001, Respondent announced that, unless the Project (and the other 28 retained) was completed by the end of 2002, no Treasury guarantee would be available.
 - 4) On 3 March 2001, Law No. 4628 was enacted which confirmed the announcement of 16 January 2001. That law was subsequently declared unconstitutional by Respondent's Constitutional Court in a decision rendered in February 2002.
 - 5) Then, on 9 May 2001, a letter was sent by the Treasury Under secretariat to the [Turkish Ministry] stating that Respondent would be in a situation of excess energy capacity from 2003-2005 and that, after the two-year transition period under Law No. 4628, [...] should pay only for the actual energy purchased by [...]. The same letter indicated that Respondent had taken the decision to liquidate by the end of 2001 the [...] which was committed to enter into the Fund Agreement with the Project Company pursuant to the Concession Agreement.
 - 6) On 24 October 2001, at a meeting chaired by [...] to evaluate the situation regarding the 29 retained BOT projects, it was repeated that Treasury guarantees would only be available for projects which started operation by the end of 2002 but it was also announced that such guarantees would only cover [...] payment obligation under ESAs for ten years and that thereafter only energy actually purchased would be guaranteed. Moreover, it was announced that [...] obligation to purchase electricity would in every case terminate in 2012. Those decisions were confirmed in a letter of 27 December 2001 which the [Turkish Ministry] sent to the Project Company: the Project had to be commissioned by the end of 2002; a Treasury guarantee would be provided only for the first ten years of the Contract and the "take or pay" obligation by [...] would end in 2012 at the latest.
57. The important point at this stage of the proceedings is that none of the allegations of breaches of the BIT and ECT provisions relate to events which occurred before 30 March 2000. In my view, there was no way that Claimant could have reasonably anticipated, on or before 30 March 2000, such a turn of events. It has been shown that, during 2000-2001, Respondent suffered a severe financial crisis which forced it to call on the IMF and the World Bank for assistance. Those institutions recommended a number of amendments to some of Respondent's policies, including abandoning resort to BOTS and the use of Treasury guarantees to support such projects. But no evidence has been adduced to show that, before the end of March 2000, Claimant or anybody else outside government officials was made aware of the eventuality of drastic measures like those which were subsequently taken.
58. If Claimant had concerns in that regard in March 2000, they would at best have been of a general nature and the resort to the assignment to Claimant of 50% of the Project Company's right in the Concession Contract would have been, like stated in paragraph 204 of the *Mobil* Decision quoted above, "a perfectly legitimate goal as far as it concerned future disputes." It was, in fact, the wise and proper thing to do.
59. I therefore conclude that the Tribunal has jurisdiction, under both the BIT and ECT, to hear the dispute between Claimant and Respondent concerning all events arising after 30 March

2000, the date of the acquisition of 50% of the shares of [the Second Project Company] by Claimant.

60. In light of the Majority decision reached by the Tribunal, there is no point in proceeding to discuss the other jurisdictional objections raised by Respondent or the merits issues.

Signed

The Hon. Marc Lalonde

Date: 12 July 2012