

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