

Cementownia “Nowa Huta” SA v Turkey, Award, ICSID Case No ARB(AF)/06/2; IIC 390 (2009)

11 September 2009

Parties:	Cementownia “Nowa Huta” SA (Poland) Turkey
Date of Decision:	11 September 2009
Date of Despatch:	17 September 2009
Jurisdiction/Arbitral Institution/ Court:	International Centre for Settlement of Investment Disputes
Arbitrators/Judges:	Professor Pierre Tercier (President); Honourable Marc Lalonde, PC, OC, QC (Claimant appointment); Mr J Christopher Thomas, QC (Respondent appointment)
Procedural Stage:	Award
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Decision – full text

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C. AWARD

b) Summary of Facts¹

The following summary of facts does not purport to be exhaustive. When necessary, Part B of this Award will include further discussion of issues of fact of particular importance to points of decision.

b) The Parties and Certain Companies Concerned

1. The Claimant, Cementownia "Nowa Huta" A.S. ("the Claimant" or "Cementownia"), with its seat at Ul. Cementowa 2, 31-983, Krakow, is a joint stock company existing and organized under the laws of Poland. It is registered, as of

August 28, 2003, in the national court register under KRS 000169321. Its initial capital was 20 130 044 PLN (Exhibit C-1).

2. The Respondent is the Republic of Turkey (“the Respondent” or “Turkey”).

3. The present arbitration is in connection with the measures taken by the Republic of Turkey against Çukurova Elektrik A.S. (“CEAS”) and Kepez Elektrik Türk A.S. (“Kepez”), both companies incorporated under the laws of Turkey, shares of which the Claimant claims to have acquired on May 30, 2003. The Respondent contests this ownership. The Arbitral Tribunal will therefore rule only on this jurisdictional issue in the present Award.

4. According to the information given by the Respondent, under somewhat similar circumstances, other companies alleging ownership in CEAS and Kepez in May–June 2003 have also launched arbitration proceedings against it. In particular, Libananco Holdings Co. Ltd, a Cypriot investment firm, and Europe Cement Investment Trade S.A., a Polish firm, have filed parallel requests for arbitration under the Energy Charter Treaty (“ECT”) against the Republic of Turkey claiming damages for the alleged expropriation of their investments.

II. Factual Background

5. CEAS is a Turkish company with its seat in Adana. It has been registered in the Adana Trade Register since December 24, 1952. It was founded as a vertically integrated electric utility and as a joint stock company open for private ownership for the purpose of the construction and operation of power plants and related facilities financed by World Bank loans. At the time of its establishment, the Turkish government controlled approximately 35% of CEAS’s shares through state entities and companies. Today, CEAS is active in electricity services, electric power distribution, electricity transmission and sale (Claim. 15 April 2008, para. 15).

Kepez is a Turkish hydroelectric company with its seat in Antalya. It was founded in 1953 as a vertically integrated electric utility and as a joint stock company. When Kepez was established, the Turkish government controlled approximately 40% of its shares through state entities and companies (Claim. 15 April 2008, para. 16).

— Both companies are registered under the laws of Turkey. Their businesses have been based on Concession Agreements concluded with the Turkish Ministry of Energy and Natural Resources (“the Ministry”) (Claim. 15 April 2008, para. 3 and Resp. 9 Feb. 2009, no. 17) as follows:

— in 1953, CEAS was granted a concession for the generation, transmission, distribution and marketing of electricity in three regions in south central Turkey; and

— in 1956, Kepez was granted an equivalent concession for the region of Antalya and south central Turkey (Claim. 15 April 2008, para. 18).

6. In 1970, it was decided that all electricity industry activities in Turkey were to be concentrated into the newly created state-owned and state-run Turkish Electricity Company. Exceptionally, CEAS and Kepez continued their activities pursuant to the Concession Agreements (Claim. 15 April 2008, para. 20).

7. In 1984, a new law, entitled “Law 3096: Law Entrusting of Institutions other than Turkish Electricity Authority with Generation, Transmission, Distribution and Trading of Electricity” was enacted with the objective of liberalizing the Turkish energy sector (Claim. 15 April 2008, no. 21). Since this law permitted private parties to enter into “authorization agreements” with the government, CEAS and Kepez applied for conversion of the Concession Agreements into authorization agreements (Resp. 9 Feb. 2009, para. 23). These new agreements were concluded in 1988 (*idem*).

8. In 1992, Turkey decided to privatize its remaining 11.25% shares in CEAS and 25.39% in Kepez by offering them to national and foreign investors in a bidding process. According to the Claimant, the winner of both these tenders was Rumeli Elektrik Yatirim A.S., owned by members of the Turkish Uzan family through their holding company, Rumeli Holding. The purchase price for the shares in CEAS was approximately USD 81 million and for the shares in Kepez approximately USD 33 million (Claim. 15 April 2008, para. 30; witness statement of Kemal Uzan, para. 2).

9. On March 9, 1998, CEAS and Kepez entered into new Concession Agreements with the Ministry which granted them concession rights for the generation, transmission, distribution and marketing of electricity (“the 1998 Concession Agreements”) (Claim. 15 April 2008, para. 27; Exh. C-8 and 9). These Agreements provided that facilities used in performing the concessions would remain State property and revert to the State when the concessions ended (Art. 20[a]; Exh. R-83 and 84).

10. On February 20, 2001, a new Electricity Market Law (“Law 4628”) was enacted, consistent with the then-existing EU Directive 96/92 (Exh. C-13). The entire transmission network would be operated by a State-owned company: the Turkish Electricity Transmission Joint Stock Company (“TEIAS”) (Exh. R-94). Vertically integrated companies, including CEAS and Kepez, would no longer be able to engage in transmission, which would be entrusted to TEIAS (Resp. 9 Feb. 2009, para. 30).

After its enactment, Law 4628 became a matter of dispute in Turkish court proceedings. Various members of the Turkish Parliament challenged this law on the grounds that it violated the articles in the Turkish Constitution safeguarding the rule of law, the freedom to conclude agreements and the protection of private property. The following text of provisional Article 4 of Law 4628 was annulled by the Constitutional Court: “*An agreement concluded by a company shall be deemed to have been nullified if the company has failed to complete transfer of a power generating and distribution plant owned by the government by June, 2001.*” (Claim. 15 April 2008, para. 36; Exh. C-14).

11. Pursuant to an implementing regulation that took effect on November 28, 2002, companies in CEAS’s and Kepez’s category were directed to transfer transmission facilities to TEIAS by December 31, 2002 (Exh. R-98, Art. 4).

12. On December 30, 2002, CEAS and Kepez sent letters to the Energy Market Regulatory Authority contesting the above-mentioned Regulation (Claim. 15 April 2008, para. 46; Exh. R-102 and 103). In their letters, CEAS and Kepez stated the following:

- It would be illegal to force CEAS and Kepez to waive their concessions;
- The 1998 Concession Agreements would have been reviewed and approved by the Danistay (the Turkish Council of State) before being signed;
- The administration would not be entitled to remove unilaterally the signed Concession Agreements and would thereby infringe CEAS and Kepez’s legal and financial rights;
- CEAS and Kepez would have made large infrastructure investments for generation, transmission and distribution of electricity within the concession areas with their own capital and in reliance upon concession terms until year 2058;
- There would be no need for any intervention by the State since CEAS and Kepez had fulfilled all their duties;
- Law 4628 and the implementing Regulation would violate the Turkish Constitution;
- The request for transfer of transmission lines and facilities based on the above-mentioned Regulation would be illegal because no compensation would be provided;
- The State would not follow the correct procedure for amending the Concession Agreements since the correct procedure would require a review and approval by the Danistay and the consent of the parties.

13. On February 10, 2003, the Ministry stated in two similar letters to CEAS and Kepez, respectively, that it considered that the companies had violated their legal obligations by not transferring their transmission facilities and rights to TEIAS before December 31, 2002. A new deadline of February 28, 2003 was fixed to transfer such assets to TEIAS. The Ministry warned the companies that the 1998 Concession Agreements were otherwise subject to termination (Exh. R-108 and 109).

14. In February, March and April 2003, letters between the Ministry and CEAS and Kepez, respectively, were exchanged (Exh. C-23, 24 and 29; R-110–113). These letters contained *inter alia* the following arguments:

- In its letter of February 10, 2003, CEAS objected to any transfer of its transmission operations and challenged the legality of the actions requested. It also argued that the administration must abide by the principle of *pacta sunt servanda* and that it expected to be compensated for any transfer of its transmission operations to TEIAS. CEAS concluded that it looked forward to discussing this matter with the Ministry (Exh. C-23);
- In its answer of February 27, 2003 the Ministry referred to the framework of Law 4628 and the Regulations issued under that law as the legal basis for its actions. It stated *inter alia* that “*it is beyond discussion that the ownership of the transmission facilities that are under your possession belongs to the public*”. As regards the invitation for discussion the Ministry stated that: “*The fact that your party has previously been invited twice to a meeting is a clear indication that our Ministry is open to a dialog which may be needed for transfer procedures.*”

However, by not attending these meetings you yourself have closed this dialog which we wanted to establish." (Exh. C-27);

— In its letter of March 20, 2003, Kepez stated that it would not accept any one-sided process that would cause harm to its shareholders, but that it was open to any meeting (Exh. C- 24);

— In its letter of April 7, 2003, CEAS stated that it expected to receive a written financial offer for the transfer of the transmission facilities and that it was ready to participate in the meetings (Exh. C-29).

15. The events in Turkey just recounted all predated the event which the Claimant asserts gives it the right to seek access to international jurisdiction. According to the Claimant, on May 30, 2003, Cementownia acquired from Mr. Kemal Uzan 12.23% of the total share capital in CEAS and 10.74% of the total share capital in Kepez (Claim. 15 April 2008, para. 268; Exh. C-60 and 61; witness statement of Kemal Uzan, para. 33).

The Claimant further asserts that the transaction was carried out during a telephone call between Mr. Kemal Uzan and the chairman of Cementownia's Management Board, Mr. Jerzy Ciepiela. Mr. Uzan allegedly signed the related *share purchase agreements* in Istanbul on May 30, 2003 and Mr. Ciepiela allegedly signed the agreements in Krakow (Exh. C-60). Immediately in connection with the transfer of the shares, the share certificates representing the transferred bearer shares are said to have been handed over to Cementownia. According to Mr. Uzan, trusted employees of the Rumeli Group personally transported the shares to Cementownia's bank deposits in Krakow and Vienna (witness statement of Kemal Uzan, para. 33). Since this alleged transaction goes to the heart of the Tribunal's jurisdiction, the Arbitral Tribunal will focus upon it in its legal considerations (see below paras. 116 *et seq.*).

16. The claimed sale and purchase of the shares on May 30, 2003 assumes pivotal importance because of the fact that on June 12, 2003, twelve days after the Claimant says it acquired interests in CEAS and Kepez, the 1998 Concession Agreements were terminated by the Respondent, in breach, it is argued, of the Respondent's obligations under the ECT.

According to the Claimant, the facilities of CEAS and Kepez were raided and seized by armed police forces (Claim. 15 April 2008, para. 54). During the seizure, all ledgers, records, files, papers, correspondence and other documents belonging to CEAS and Kepez were confiscated along with all of CEAS's and Kepez's other assets. No more access to the companies' premises was allowed (Claim. 15 April 2008, paras. 55–58). According to the Claimant, during these raids and seizures, CEAS and Kepez representatives were presented with letters dated June 11, 2003 terminating the 1998 Concession Agreements with immediate effect (Claim. 15 April 2008, para. 59).

According to the Respondent, the terminations of the agreements were due to CEAS's and Kepez's ongoing breaches of the Concession Agreements and their refusal to transfer transmission facilities in compliance with the Electricity Market Law (Resp. 9 Feb. 2009, paras. 32–36). In connection with the terminations, the Ministry repossessed the concession facilities, based upon the companies' multiple uncured breaches. According to the Respondent, this action was consistent with the terms of the 1998 Concession Agreements and the operational assets' status as State property (Resp. 9 Feb. 2009, para. 37).

17. On February 12, 2004, Mr. Slawomir Szurman and Mr. Jadwiga Szyfko, on behalf of AdAc Sp. Z o.o, submitted as independent certified auditors their opinion and report from an audit of Cementownia's 2003 financial statements. Thereafter, the auditors issued them to the Claimant's General Shareholders' Meeting and the Supervisory Board of the Claimant. The following persons signed the report: Mr. Jadwiga Szyfko (Chief Accountant), Mr. Mustafa Düzgünce (President of the Management Board), Mr. Jerzy Ciepiela (the chairman of the Management Board who, it was asserted, had agreed the share purchase agreements with Mr. Kemal Uzan) and Mr. Hüseyin Sahin (another Member of the Management Board). No mention was made in Cementownia's 2003 financial statements of any purchase of shares in the CEAS and Kepez companies (Exh. C-70).

18. On January 1, 2005, the new Turkish lira was introduced. In connection therewith the Turkish Parliament introduced, by Law 5274, new provisions in the commercial code which facilitated and, under certain circumstances, mandated, the replacement of old lira share certificates with new lira share certificates. According to the Claimant, the Boards of Directors of CEAS and Kepez passed resolutions to the effect that all shareholders in CEAS and Kepez should surrender their old share certificates. In return, they would receive new share certificates with the nominal value printed in the new Turkish lira (Claim. 15 April 2008, para. 270; Exh. C-62 and 63; witness statement of Kemal Uzan, para. 35). Also, according to the Claimant, Cementownia returned its old share certificates to CEAS and Kepez. In return, Cementownia received new share certificates with their nominal value in the new currency (Claim. 15 April 2008, para. 271; Exh. C-66).

19. On January 25, 2005, Ms. Janina Martinek, on behalf of the Accounting Centre of the Association of Accountants in Poland, submitted an opinion and report on Cementownia's 2004 financial statements. As was the case for the 2003 statements, no mention of any purchase of CEAS and Kepez shares was made in the 2004 financial statements (Exh. C-71).

20. On June 19, 2006, Mr. Badanie Sprawozdan Finansowych and Mr. Jadwiga Szyfko, on behalf of Mr. Wladyslaw Licak, submitted their opinion and report from the audit of Cementownia's financial statements for 2005. That report states as follows: "3.3.9 *In 2003, the Company purchased from Mr Kemal Uzan from Istanbul shares in 16 foreign companies for the total amount of PLN 315,505,975.00. Pursuant to the agreements concluded, the payment for the shares purchased is due within two years after 2009.01.10*" (Exh. C-72). CEAS and Kepez were two of the sixteen foreign companies in which Cementownia is stated to have purchased shareholding interests.

21. On March 28, 2007 and on April 5, 2007, according to the Respondent, Cementownia sold its factories in Poland, its right to the land where the factories were located, and the appurtenant equipment and materials to two other Uzan-controlled companies, *i.e.*, Polski Cement Holding S.A. and Polska Energetyka Holding S.A. (Respondent's Request for an Order for the Posting of Security for Costs of December 18, 2007, p. 7; Exh. R-9 and R-10).

22. To this date, according to the Claimant, Turkey is still in possession and control of all the assets of CEAS and Kepez, and the facilities that used to belong to CEAS and Kepez are operated by *inter alia* the state-owned company TEIAS under the coordination of the Ministry (Claim. 15 April 2008, para. 62).

III. The Arbitral Proceedings

23. On April 19, 2006, the first parallel proceeding was registered at the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre"). The Cypriot firm Libananco Holdings Co. Ltd., claiming ownership in the companies CEAS and Kepez, filed a request for arbitration against the Republic of Turkey alleging that the latter had expropriated the two companies. The case is still pending.

24. On September 28, 2006, the Claimant, represented by Prof. Dr. Kaj Hobér, Mr. Jakob Ragnwaldh and Dr. Nils Eliasson of the law firm Mannheimer Swartling Advokatbyrå (Sweden), filed a Request for Arbitration before the Centre whereby it proposed that (Request for Arbitration, p. 14):

"[T]he Tribunal consists of three arbitrators, one appointed by each party. The arbitrators so appointed will jointly appoint the third arbitrator who shall be the Presiding Arbitrator."

In its Request, the Claimant addressed the preliminary indication of the relief sought (Request for Arbitration, p. 13):

"(i) Order the State to pay to Cementownia an amount of USD 4,648,157,411 together with interest at a rate to be determined later; and

(ii) Order the State to compensate Cementownia for its cost of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone to bear the compensation to the Arbitral Tribunal and to the Secretariat of the Centre."

25. On November 16, 2006, the Secretary-General of ICSID registered the Request for Arbitration on the basis of the Additional Facility clause contained in Article 26 of the ECT.

26. On January 24, 2007, the Claimant was informed of the appointment of Mr. Jan Paulsson, Ms. Lucy Reed, Mr. Brian King of Freshfields Bruckhaus Deringer and Mr. Arzu Cosar and Ms. Utku Cosar of Cosar Avukatlık Bürosu (Turkey) as Respondent's Counsel.

27. On January 31, 2007, the Claimant requested that the Arbitral Tribunal in this case be constituted in accordance with Article 9 of the Arbitration (Additional Facility) Rules. Accordingly, the Claimant appointed Mr. Marc Lalonde, P.C., O.C., Q.C. as arbitrator. The Respondent subsequently appointed Mr. J. Christopher Thomas, Q.C. on February 14, 2007. Both arbitrators accepted their respective appointments.

28. On February 21, 2007, the Respondent invoked Article 6(4) of the Arbitration (Additional Facility) Rules requesting ICSID to appoint the arbitrator not yet appointed. On May 7, 2007, after consultations with the Parties, the Chairman of the ICSID Administrative Council appointed Prof. Pierre Tercier as the third presiding arbitrator, and he accepted the appointment on May 8, 2007.

29. On March 6, 2007, the Centre registered the request for arbitration submitted by the Polish firm Europe Cement Investment and Trade S.A against the Republic of Turkey in the second parallel proceeding concerning the purported expropriation of CEAS and Kepez. On August 13, 2009, that arbitral tribunal rendered its award dismissing the claimant's claim in its entirety for lack of jurisdiction (*Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2).

30. On May 11, 2007, the Arbitral Tribunal was constituted in accordance with Article 13(1) of the Arbitration (Additional Facility) Rules of the Centre. In its letter to the Parties, the Centre informed them that Prof. Tercier had acted as President in another ICSID case in which the Respondent's Counsel, Mr. Jan Paulsson, served as co-arbitrator. No objection to this fact was raised by any of the Parties.

31. On May 23, 2007, the Centre requested each Party to pay an amount of USD 75,000 to defray the costs of the proceeding. Both Parties made their advance payments.

32. On August 23, 2007, the first session of the Arbitral Tribunal was held in Paris to decide various procedural matters. The Claimant was represented by Prof. Dr. Kaj Hobér, Mr. Jakob Ragnwaldh and Dr. Nils Eliasson of Mannheimer Swartling Advokatbyrå. The Respondent was represented by Mr. Jan Paulsson, Ms. Lucy Reed and Mr. Brian King of Freshfields Bruckhaus Deringer, Mr. Arzu Cosar and Ms. Utku Cosar of Cosar Avukatlık Bürosu, and Mr. Sami Demirbilek, Mr. Mustafa Cetin and Mr. Pelin Gudulluoglu of the Ministry of Energy and Natural Resources (Republic of Turkey).

The Parties confirmed their agreement that the Tribunal had been properly constituted on May 11, 2007 in accordance with the ICSID Arbitration (Additional Facility) Rules, and that they had no objection to the appointment of any of its members. As regards the applicable arbitration rules, it was agreed that the Arbitration (Additional Facility) Rules in effect as of April 10, 2006 apply to the proceedings. In addition to the relevant provisions of the Arbitration Rules on the production of evidence, they agreed that the IBA Rules on the Taking of Evidence in International Commercial Arbitration would apply.

The Arbitral Tribunal decided also on fees and expenses, advance payments, records of hearings, means of communication, decisions of the Tribunal, procedural language, place of arbitration, and written and oral procedures. With regard to the procedural timetable, it was agreed that there would first be a proceeding on liability as follows:

- Claimant's Memorial on or before March 1, 2008;
- Respondent's Counter-Memorial on or before September 8, 2008;
- Claimant's Reply on or before December 19, 2008;
- Respondent's Rejoinder on or before April 17, 2009;
- Hearing in September 2009.

Furthermore, the following issues were discussed and agreed: the production of evidence, the dates and the organization of subsequent sessions, and the publication of decisions and the Award (Minutes of the first session of the Arbitral Tribunal of August 23, 2007).

33. On December 18, 2007, the Claimant made a request for provisional measures, whereby it requested that the Arbitral Tribunal (Claimant's Request for provisional measures of December 18, 2007, para. 6):

"Orders the Republic to preserve and take no adverse step in relation to the Documents and to procure that any entity under its control (including, but not limited to, the Ministry of Energy and Natural Resources, the Energy Market Regulatory Authority, the Turkish Electricity Distribution Co. Inc. ("TEDAS"), the Electricity Generation Co. Inc. ("EUAS"), the Turkish Electricity Transmission Co. Inc. ("TEIAS"), and the Turkish Electricity Trading and Contracting Co. Inc. ("TETAS")) preserves and takes no adverse steps in relation to the Documents."

34. On the same day, the Respondent submitted three requests (the "18 December 2007 Applications"):

- a first Request (incorporating a Redfern List) for the production of the following documents:
 - share certificates in CEAS and Kepez;

- purchase agreements or other contracts;
- loan agreements and documents evidencing any security or collateral for the financing of Cementownia's acquisition of the shares in CEAS and Kepez;
- records of transport and delivery of the original share certificates to Cementownia; and
- Cementownia's tax returns for 2003–2006.

— a Request for an order for the posting of security for costs whereby it *inter alia* sought (Respondent's Request for an Order for the Posting of Security for Costs of December 18, 2007, para. 5.1):

"[A] binding order from the Tribunal pursuant to Additional Facility Rule 46 that CNH provide security adequate to ensure the payment of an eventual award of costs incurred by the Republic in this arbitration. The Republic asks that CNH be required to provide such security within 14 days of the date of the Tribunal's order, in the amount of US\$ 5 million and in the form of an irrevocable letter of credit or bank guarantee from a first-class international bank, to remain in place until any monetary award against CNH has been paid"; and

— a Request for the suspension of the proceedings whereby it requested, *inter alia* (Respondent's Request for suspension of the proceedings of December 18, 2007, p. 3):

"[T]o suspend the proceedings in this arbitration until the Claimant has proven that it legitimately owns the CEAS and Kepez stock percentage it claims."

35. On December 30, 2007, the Claimant replied to the Respondent's requests, opposing them in their entirety. It also sought an extension of time to file its Memorial. On January 10, 2008, the Respondent replied to the Claimant's response and to the Claimant's request for provisional measures. It opposed the Claimant's request for an extension of time and requested that a hearing should be convened at the Tribunal's earliest convenience. On January 21, 2008, the Claimant presented its observations to the Respondent's response to the Claimant's request for provisional measures. It reiterated its request for provisional measures dated December 18, 2007. On January 24, 2008, the Respondent replied to these observations and asked the Arbitral Tribunal to dismiss the Claimant's request with costs.

36. On January 25, 2008, the Arbitral Tribunal issued its **Procedural Order No. 1**, whereby it decided:

- "1. As the case stands, the Respondent's request for production of documents is denied;*
- 2. As the case stands, the Respondent's request for suspension of the proceedings is denied. The Respondent is at liberty to renew its request after receipt of the Memorial;*
- 3. As the case stands, the Respondent's request to hold a hearing before this Tribunal and to hold a joint meeting with the other two ICSID Tribunals is denied;*
- 4. As the case stands, the Respondent's request for the posting of security for costs is denied. It is at liberty to renew the request after receipt of the Memorial;*
- 5. The Arbitral Tribunal takes note of the Respondent's commitment not to destroy the documentation in its control. With respect to the request for the production of documents, the Claimant is at liberty to renew the request with greater precision at a later stage if judged necessary and the Respondent will be given the opportunity to respond to any such request;*
- 6. The Claimant's request for an extension of time is granted until April 1, 2008. The Arbitral Tribunal will adapt the time schedule agreed upon after consultation with the Parties. "*

37. On February 6, 2008, the Claimant noted the Respondent's undertaking confirmed by the Arbitral Tribunal in its Procedural Order No. 1. It also reserved the right to renew its request for provisional measures.

38. On March 13, 2008, the Claimant alleged that the Claimant's legal representatives and witnesses had been under surveillance by the Respondent, that telephone lines had been tapped and that threats had been received. It requested the Arbitral Tribunal to order several provisional measures in order to discontinue the alleged surveillance.

39. On March 14, 2008 the Arbitral Tribunal issued its **Procedural Order No. 2**, whereby it decided:

“1. The Respondent is directed to respond fully and with appropriate evidence to the Claimant’s letter and request of March 13, 2008 by March 20, 2008;

2. Acting on the basis that the Claimant’s allegations appear to be credible, without having yet received any evidence from the Respondent that might contradict the allegations or put them into doubt, the Republic of Turkey is directed to immediately discontinue until further notice all forms of surveillance or interference of communications directed at Cementownia and its legal counsels;

3. Acting on the basis that the Claimant’s allegations appear to be credible, without having yet received any evidence from the Respondent that might contradict the allegations or put them into doubt, the Republic of Turkey is directed to conserve copies of all e-mails or other electronic messages and recordings of all telephone calls within its possession related to this pending arbitration.”

40. On March 20, 2008, the Respondent sent to the Arbitral Tribunal a copy of a letter filed in connection with *Europe Cement Investment and Trade S.A. v. Republic of Turkey*. According to the Respondent, the Claimant’s representatives and related persons were under surveillance for other purposes (*i.e.*, criminal investigations) than for the purpose of obtaining information about the ongoing arbitral proceedings.

41. On March 26, 2008, the Respondent invited the Arbitral Tribunal to set a deadline for the Claimant to submit a reply to the Respondent’s letter dated March 20, 2008. It also asked the Arbitral Tribunal to lift the provisional directives imposed in Procedural Order No. 2 and to confirm the Claimant’s deadline for submitting its Memorial on Jurisdiction and Liability.

42. On March 28, 2008 the Arbitral Tribunal issued its **Procedural Order No. 3**, whereby it decided:

“1. The Claimant is instructed to file its reply to the Respondent’s response of March 20, 2008 by Tuesday, April 1, 2008;

2. The Respondent is instructed to file any comments that it may have on the Claimant’s reply by Friday, April 4, 2008;

3. In view of the Claimant’s application of 13 March 2008 and the time taken to address the issues raised therein, the time limit for submitting the Claimant’s Memorial is extended until Tuesday, April 15, 2008;

4. The Respondent’s other requests of March 20, 2008 are, for the time being, set aside pending the further submissions of the parties as contemplated in paragraph 1 above; and

5. With the exception of the amendments made herein to the Arbitral Tribunal’s Procedural Orders Nos. 1 and 2, the Tribunal’s directions and orders are for the time being maintained, including the date of May 26, 2008 for a hearing on preliminary issues.”

43. On April 1, 2008, the Claimant replied to the Respondent’s letter dated March 20, 2008. On April 2, 2008, the Respondent submitted English translations of the Claimant’s exhibits contained in its reply dated April 1, 2008. On April 7, 2008, the Respondent filed a rejoinder with exhibits, responding to the Claimant’s reply of April 1, 2008 regarding the Claimant’s application of March 13, 2008. On April 9, 2008, the Respondent forwarded to the Arbitral Tribunal its rejoinder filed in *Europe Cement Investment & Trade S.A. v. Republic of Turkey*.

44. On April 10, 2008, the Arbitral Tribunal issued its **Procedural Order No. 4**, whereby it decided:

“1. In accordance with item 3 of the Arbitral Tribunal’s Procedural Order No. 3, the Tribunal maintains the time limit of April 15, 2008 for submitting the Claimant’s Memorial. As noted by the Tribunal at its first meeting with the parties, the Memorial should include all evidence relied upon, including witness statements and expert reports. In the Tribunal’s view, the Claimant has had ample time to prepare its Memorial and it must file it in accordance with the schedule which has already been adjusted at its request;

2. Given the circumstances raised in the Claimant’s letter of March 13, 2008 which have necessitated the subsequent exchanges of submissions, it will be open to the Claimant to apply to the Arbitral Tribunal for leave to submit additional witness statements and/or expert reports thereafter. This must be done on a timely basis, and must not disrupt the conduct of the proceeding, in particular, the preparation and filing of the Counter-Memorial. The

Respondent will be given an opportunity to comment on any such application. If justified, the Tribunal will grant leave for the submission of additional witness statements and expert reports after the April 15, 2008 filing of the Memorial;

3. Procedural Order No. 1 contemplated that the Respondent would be at liberty to renew certain requests after receipt of the Memorial (Order, Points 1 to 4). In view of the issues addressed in the parties' recent submissions, and the date reserved for a hearing on May 26, 2008, the Tribunal now considers it appropriate that the Respondent make such of those requests as it still sees fit and wishes to advance and it is directed to submit a response to the Claimant's Memorial by Friday, May 9, 2008. The response should address only those issues in the Claimant's Memorial that are to be discussed at the hearing on May 26, 2008;

4. The Respondent's request that the Claimant deposit with the Tribunal share certificates concerning its ownership in CEAŞ and Kepez is, for the time being, set aside pending the submission of the Memorial, the Respondent's response thereto and the parties' submissions at the hearing;

5. The Arbitral Tribunal maintains Point No. 2 of its Procedural Order No. 2 of March 14, 2008;

6. The Arbitral Tribunal takes note of the statement made by counsel for the Respondent in its Rejoinder that "we have not received or used any intercepts or other surveillance results from the Prosecutor's Office in conjunction with this arbitration." Given the seriousness of the matters raised by the Claimant, the extensive investigation by Respondent's counsel that it has provoked, and the fundamental importance of such a representation to the proper administration of the arbitration, the Tribunal accepts that statement. The Respondent and its counsel are subject to a continuing duty to ensure that there shall be no use whatsoever made of intercepted communications in this arbitration;

7. The Arbitral Tribunal takes note of the statement by the Deputy Chief Public Prosecutor of Sişli in the Report of April 4, 2008 (Exhibit RA-10 to the Rejoinder) that "[e]-mails that are not related to the investigated crime or any other crime, e-mails that are duplicative or irrelevant to the investigation are destroyed." The Respondent is directed to obtain a supplementary statement from the Deputy Chief Public Prosecutor of Sişli that all other documents and telephone recordings in any way related to this arbitration have been or will be destroyed. Such statement should be attached to the response to be filed on Friday, May 9, 2008;

8. The Arbitral Tribunal postpones any ruling on costs of the parties' pending applications until after the hearing scheduled for May 26, 2008."

45. On April 15, 2008, the Claimant filed its **Memorial on Jurisdiction and Liability**. It sought the following prayers for relief (Claim. 15 April 2008, para. 13):

"Order Turkey to pay compensation to Cementownia in an amount quantified in the quantum phase, but not less than USD 4,000,000,000, together with interest at a rate to be determined later; and

Order Turkey to compensate Cementownia for its costs of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone bear the compensation to the Tribunal and the Secretariat of the Centre."

46. On May 9, 2008, the Respondent filed a renewal of its 18 December 2007 Applications. A revised Redfern List was annexed to the request.

47. On May 21, 2008, the Secretariat of the Centre requested that each Party pay a further advance of USD 100,000. The Republic of Turkey complied with this request.

48. On May 22, 2008, the Claimant restated and amended its requests for relief contained in its letters of March 13 and April 1, 2008 and submitted a partial response to the Respondent's renewal of its 18 December 2007 Applications.

49. On May 26, 2008, a hearing took place with the Arbitral Tribunal and the Parties in Paris (26 May 2008 Transcript). The Claimant was represented by Prof. Dr. Kaj Hobér, Mr. Jakob Ragnwaldh and Dr. Nils Eliasson of Mannheimer Swartling Advokatbyrå. The Respondent was represented by Mr. Jan Paulsson and Mr. Brian King of Freshfields Bruckhaus Deringer; Mr. Arzu Cosar, Ms. Utku Cosar and Mr. Alper Arslan of Cosar Avukatlık Bürosu; and Mr. Selahattin Çimen, Mr. Mustafa Çetin, Ms. Sevim Argun of the Ministry of Energy and Natural Resources (Republic of Turkey).

The hearing concerned the Respondent's requests for the production of documents and for the posting of security for costs, as well as an update on the issues raised in the Claimant's letter of March 13, 2008 (see above para. 38).

In general, the Claimant agreed to comment on the Redfern List submitted by the Respondent within a short period of time; both Parties agreed that they would try to reach an agreement on the Renewal Request; and both Parties had a further opportunity to present their positions on the subject related to the Respondent's Request for Provisional Measures for the Posting of Security for Costs.

In particular, with respect to the Claimant's Request for Provisional Measures related to surveillance, the Respondent made a declaration according to which no information pertaining to this arbitration had been communicated by Turkey's prosecutor to the Republic's legal representatives. Furthermore, the government of Turkey gave the assurance that the legal team of the Claimant would not be hindered from coming to Turkey and that they would not be surveyed in Turkey (26 May 2008 Transcript, p. 126–127).

50. On May 29, 2008, the Arbitral Tribunal issued its **Procedural Order No. 5**, whereby it decided:

"1. (a) Claimant is instructed to comment on the amended Redfern List submitted by Respondent within ten days from the date of the hearing. The Arbitral Tribunal will then decide promptly on the basis of each Party's submission;

1. (b) The Parties are invited to agree on the production of original documents and the modalities of their forensic examination within 21 days from the date of the hearing. In case of disagreement, the Parties shall make submissions within seven days and the Arbitral Tribunal will decide;

2. A decision on the Request for Security for Costs is postponed until completion of the document production phase discussed in this Order;

3. (a) The Arbitral Tribunal confirms its previous decisions in Procedural Orders Nos. 2 and 4;

3. (b) In view of the Claimant's renewed requests, the Arbitral Tribunal takes note of Respondent's counsel's further declaration as to the position of the Republic of Turkey;

3. I The Arbitral Tribunal confirms the Claimant's right to submit a new request in the event of new difficulties;

4. The Arbitral Tribunal will decide on the next steps of the procedure in a further procedural order."

51. On June 5, 2008, the Claimant made the following comments and objections on the revised Redfern Schedule:

— the production of the original share certificates and the original sales agreements would be subject to measures for the safe and secure delivery of such originals to the depository to be agreed upon;

— the old lira share certificates were no longer in Cementownia's possession;

— Cementownia was trying to locate resolution No. 4A/2003 of Cementownia's board;

— Cementownia was investigating whether other minutes of its shareholders' meeting of October 29, 2006 were available for production;

— the share certificates were kept in bank deposit boxes, therefore, no receipts or inventories were issued by the banks at which the share certificates were kept;

— as regards the freight, insurance, custom records, custom clearance or air ticket and passports of the accompanying persons, they did not exist or were not in possession or control of Cementownia;

— no copies of the original bank transfers exist since the payment of the share certificates would take place within two years following January 10, 2009;

— no approvals from the Turkish government that could evidence the purchase were sought;

— Cementownia was in the process of retrieving copies of its tax declarations for the years 2002–2007;

— Cementownia was not in the possession or control of documents evidencing Kemal Uzan's ownership or participation in CEAS and Kepez;

— Cementownia contested the production of its share register, other documents identifying its shareholders from 2003, and documents concerning the sale of its assets to Polska Energetyka.

On June 9, 2008 the Respondent reacted on the Claimant's comments and objections.

52. On June 16, 2008, the Respondent informed the Arbitral Tribunal that the Parties were actively discussing custodial arrangements for the deposit of original documents (so that they could be forensically examined) in accordance with paragraph 1(b) of Procedural Order No. 5 (cf. above para. 50).

53. On June 16, 2008 the Arbitral Tribunal issued its **Procedural Order No. 6**, whereby it decided that:

"1. The Arbitral Tribunal refers to its Procedural Order No. 5, point 1(b), concerning the production of originals of documents submitted by the Claimant in copies. Accordingly, with respect to Respondent's requests Nos. 1, 3, 4 and 6(c), the Parties are invited to agree on the production of original documents and the modalities of their forensic examination within 21 days from the date of the hearing held on May 26, 2008 (i.e. by June 16, 2008). In case of disagreement, the Parties shall make submissions within seven days and the Arbitral Tribunal will decide.

2. The Arbitral Tribunal notes, with respect to Respondent's request No. 2, the Claimant's statement that neither originals nor copies of the original share certificates in CEAS and Kepez are in Cementownia's possession any longer and therefore cannot be produced. The Tribunal accepts this statement.

3. The Arbitral Tribunal notes that the Claimant agrees to the production of and is in the process of locating documents concerning the Respondent's requests Nos. 4, 8, 11, 14 and 15. The Tribunal orders that those documents that have so far been located be produced to the Respondent without delay and that any remaining responsive documents be produced by July 8, 2008.

4. With respect to Respondent's requests Nos. 5(a) and (b), 6(a) and (b), 7, 9 and 10, the Claimant states that these documents do not exist. The Arbitral Tribunal accepts this statement and wishes to remind the Parties of the Tribunal's Procedural Order No. 1 in which it held that:

"It is not contested that the documents that are required by the Respondent are necessary to decide some of the basis for the claim, in particular the right of the Claimant to be considered as an investor. Indeed, if the Claimant cannot prove ownership and/or control of the Cukurova Elektrik A.S. (CEAS) and Kepez Elektrik Türk A.A. (Kepez) shares at all relevant times, it would lack standing and the Arbitral Tribunal in turn would lack jurisdiction." The probative value of the evidence adduced or the lack of evidence will thus be assessed by the Tribunal.

5. With respect to Respondent's request under No. 5l (passports of persons transporting share certificates to Cementownia's bank deposits in Poland in 2003), Claimant contests the request because the documents are not in the possession or control of Cementownia. The Arbitral Tribunal accepts this statement and wishes to repeat its observations under paragraph 4 of this Order.

6. With respect to Respondent's request under No. 11 (documents evidencing the share ownership in CEAS and Kepez of Kemal Uzan in the period March 2003 to July 2003) and No. 12 (resolutions of the CEAS and Kepez Board of Directors authorizing Kemal Uzan to act as the companies' representative), Claimant contests the request because the documents are not in the possession or control of Cementownia. The Tribunal notes that Mr. Kemal Uzan has submitted a witness statement in which he describes the relationships between the group of companies in which he is involved and states that he is a member of the Supervisory Board of Cementownia. Therefore, although Cementownia may not have de iure control over documents falling under the category of requests Nos. 11 and 12, it must be deemed to have access to such documents. The Tribunal thus grants the Respondent's requests and orders that any responsive documents be produced to the Respondent by July 8, 2008.

7. With respect to Respondent's requests Nos. 16 and 17 (documents concerning the application of Articles 1(6) and 17(1) of the Energy Charter Treaty), the Claimant contests the requests because the documents are in its view not relevant for the purposes of the Arbitral Tribunal's jurisdiction. Without prejudice to the Arbitral Tribunal's decision as to the proper qualification of any legal issue in this case, the Tribunal finds that it is appropriate in view of the efficiency of the process to grant these requests. The Tribunal thus orders that any responsive documents be produced to the Respondent by July 8, 2008.

8. With respect to Respondent's request No. 18 (documents concerning the sale of Cementownia's assets to Polska Energetyka), the Claimant contests the request because the documents are in its view not relevant for the purposes of jurisdiction and because certain documents under this category are already in the possession of the Respondent.

The Arbitral Tribunal finds that the request is premature at this stage of the proceeding. It further notes that Exhibits 9 and 10 to the Respondent's Request for Production of Documents of December 18, 2008 are in the possession of the Respondent. The Tribunal thus denies the request at this stage, but grants liberty to the Respondent to renew its request after the filing of the Counter-Memorial."

The Arbitral Tribunal notes that the documents mentioned under point 3 have not been produced by the Claimant despite the fact that it agreed to the production and therefore admitted that they exist.

54. On June 23, 2008, the Claimant's Counsel informed the Arbitral Tribunal, without stating any reasons therefore, that it had resigned from representing the Claimant with immediate effect. Thereafter, the Chairman of the Management Board and Managing Director of Cementownia, Mr. Biser Hristov Biserov, corresponded with the Respondent and the Arbitral Tribunal.

55. On July 9, 2008, Mr. Biserov requested suspension of all deadlines and requirements for at least 90 days. On July 21, 2008, the Respondent requested the Arbitral Tribunal to deny the Claimant's request concerning the suspension. In order to keep the Arbitral Tribunal informed about the parallel proceedings, the Respondent forwarded to it on July 25, 2008 Procedural Order No. 5 issued in *Europe Cement Investment and Trade S.A. v. Republic of Turkey*.

56. On July 30, 2008, the Arbitral Tribunal issued its **Procedural Order No. 7**, whereby it decided:

"1. The Claimant is instructed that it shall have up to 45 days as of the date of this Order to appoint new legal counsel with notice of such appointment to be given to the Tribunal and the Respondent immediately after such appointment is made;

2. The Respondent is invited to make alternative arrangements for depository services at a location outside of Turkey and Poland concerning the production of share certificates by August 15, 2008, and to communicate the details of such arrangements to the Tribunal and the Claimant by that date;

3. The Claimant shall produce the share certificates to the designated depository no later than August 30, 2008;

4. The Claimant shall produce all other documents under Procedural Order No. 6 directly to the Respondent's counsel no later than 15 days after the appointment of the Claimant's new counsel;

5. The Arbitral Tribunal reserves its decision concerning the further procedure."

57. On August 15, 2008, the Respondent, referring to Procedural Order No. 7, informed the Arbitral Tribunal that it had made arrangements for depository services with JPMorgan Chase Bank in London, with whom it had negotiated a draft Custody Agreement.

58. On August 25, 2008, Mr. Biserov requested 60 additional days in order to retain new legal counsel.

59. On August 28, 2008, the Arbitral Tribunal, after having reviewed the draft Custody Agreement and making minor amendments to it, approved the agreement and directed the Parties to sign it.

60. On August 29, 2008, the Respondent sent four original copies of the Custody Agreement to the Claimant for its signature.

61. On September 6, 2008, the Claimant informed the Arbitral Tribunal that it was about to receive all documents from its former counsel and that it was in process of finding new counsel. It therefore sought a further extension of time until October 30, 2009 to appoint new legal counsel and *"more time to comply with all aspects of the tribunal's order including the order for production of documents and the production of original share certificates."* On September 12, 2008, the Respondent requested the Arbitral Tribunal to reject the Claimant's request for time extensions. On September 22, 2008, the Claimant informed the Arbitral Tribunal about the progress of its search for new counsel.

62. On September 22, 2008, the Arbitral Tribunal issued its **Procedural Order No. 8**, whereby it decided:

"1. The Claimant is instructed to appoint new legal counsel as soon as possible, but no later than October 15, 2008. The Claimant shall keep the Arbitral Tribunal informed about the measures taken in order to appoint its new legal counsel;

2. The Claimant shall sign the Custody Agreement upon receipt of the present Order;

3. *The Claimant shall produce the share certificates in accordance with the Custody Agreement no later than September 30, 2008;*

4. *The Claimant shall produce all other documents under Procedural Order No. 6 directly to the Respondent's counsel no later than 21 days after the appointment of the Claimant's new counsel;*

5. *The Arbitral Tribunal reserves its decision concerning the further procedure."*

63. On September 25, 2008, the Arbitral Tribunal reminded the Claimant that the obligations to sign the Custody Agreement (cf. above para. 57) and to deposit of the original share certificates were independent of the appointment of new counsel.

64. On October 8, 2008, Mr. Biserov informed the Arbitral Tribunal that the Claimant had not signed the Custody Agreement and that it had not deposited any shares. It declined to make any comments on this matter without receiving legal advice.

65. On October 15, 2008, the Claimant informed the Arbitral Tribunal that it was at its final stage of choosing counsel and requested therefore a further extension of 30 days to meet the time limits.

66. On October 20, 2008, the Respondent submitted its observations on the Claimant's letter of October 15 and requested that the Claimant sign the Custody Agreement, deliver the share certificates and produce all requested documents under Procedural Order No. 6 (cf. above para. 53).

67. On October 23, 2008, the Arbitral Tribunal issued its **Procedural Order No. 9**, whereby it decided:

"1. The Claimant is instructed to appoint new legal counsel as soon as possible, but no later than November 14, 2008.

2. The Claimant shall sign the Custody Agreement immediately.

3. The Claimant shall produce the share certificates in accordance with the Custody Agreement immediately.

4. The Claimant shall produce all other documents under Procedural Order No. 6 directly to the Respondent's Counsel as soon as possible but no later than 21 days after the appointment of the Claimant's new counsel.

5. The Arbitral Tribunal reserves its decision concerning the further procedure."

68. On November 4, 2008, the Respondent informed the Claimant that the custodian, JPMorgan Chase Bank, had not yet received the signed Custody Agreement and the original share certificates. On November 13, 2008, the Claimant informed the Arbitral Tribunal of its progress in finding new counsel and asked for yet another time extension of 45 days. On November 21, 2008, the Respondent objected to the Claimant's request. It also stated that it did not wish the arbitration to be suspended. On November 25, 2008, the Claimant wrote that it would file a submission by December 2, 2008.

69. On December 4, 2008, Mr. Biserov informed the Tribunal that there had been a change in the Claimant's shareholders resulting in a subsequent change in both the Board of Directors and Management Board of the company, and that he had had to become involved in the case after the resignation of Mannheimer Swartling. He stated further that upon receipt of the documents from the former legal representative, he had discovered that there were no originals amongst the returned documents. He concluded that the Claimant would not be able to comply with the Arbitral Tribunal's orders and therefore sought the discontinuation of the case without prejudice to the Claimant's rights.

70. On December 16, 2008, the Respondent objected to the discontinuance under Article 50 of the Arbitration (Additional Facility) Rules and requested that *"a briefing schedule be established to permit its jurisdictional objections to be adjudicated in a bifurcated proceeding with an early hearing date"* (Respondent's Request of December 16, 2008, p. 4).

71. On December 18, 2008, the Arbitral Tribunal issued its **Procedural Order No. 10**, whereby it decided:

"1. The proceeding continues.

2. *Either party is invited to pay the Claimant's outstanding share of the advance payments in the amount of US \$100,000 within 30 days of this Order.*

3. *Should the payment in point 2 remain outstanding after 30 days, the proceedings will be suspended in accordance with ICSID Administrative and Financial Regulation 14(3)(d).*

4. *The Arbitral Tribunal intends to revert to the parties regarding the procedural calendar."*

In the letter accompanying the above-mentioned Procedural Order, the Arbitral Tribunal requested that the Claimant make its comments and/or objections by December 23, 2008 at the latest. The Claimant did not respond.

72. On January 9, 2009, the Respondent sent a letter to the Arbitral Tribunal noting that the Claimant had not respected the December 23, 2008 deadline. It also stated that it would transfer USD 100,000 in substitution for the Claimant's payment, as the latter was in default. On January 16, 2009, the Secretariat received the Claimant's outstanding advance from the Respondent.

73. On January 15, 2009, the Respondent proposed a procedural schedule for proceedings on jurisdiction. The Claimant did not respond to the Respondent's proposal.

74. On January 22, 2009, the Arbitral Tribunal issued its **Procedural Order No. 11**, whereby it decided:

"1. The Arbitral Tribunal will deal with the Respondent's objections to jurisdiction as a preliminary question in accordance with Article 45(5) of the Arbitration (Additional Facility) Rules.

2. The proceeding on the merits is suspended in accordance with Article 45(4) of the Arbitration (Additional Facility) Rules.

3. The procedural timetable concerning the proceeding on jurisdiction will be as follows:

- February 9, 2009 Respondent's Memorial on Jurisdiction;*
- March 23, 2009 Claimant's Reply on Jurisdiction;*
- April 15, 2009 Deadline for submission of additional documentary evidence; and*
- May 5–7 Reserved days for a hearing on jurisdiction in Paris."*

75. On February 9, 2009, the Respondent filed its **Memorial on Jurisdiction** by which it requested the Arbitral Tribunal to grant the following relief (Resp. 9 Feb. 2009, para. 1):

"a) dismissal of Cementownia's claim in its entirety;

b) a declaration that Cementownia's claim is manifestly ill-founded, and has been asserted using inauthentic documents;

c) an award of monetary compensation to the Republic, in an amount to be fixed by the Tribunal; and

d) a full award of the Republic's costs of arbitration."

76. By letter of February 21, 2009, Mr. Biserov responded *inter alia* that *"we are prepared to represent to the Tribunal that we do not oppose dismissal of these proceedings on the basis of lack of jurisdiction, if the sole basis for such ruling is that Claimant has not come forward with the bearer shares at issue. Such a stipulated basis for dismissal would avoid additional cost and burden on the parties and the Tribunal"* (p. 2).

The Claimant also alleged that the President of the Arbitral Tribunal had not disclosed his involvement with one of the Respondent's counsel, Mr. Jan Paulsson, in another ICSID case as arbitrators, and his participation in a seminar on arbitration held in Ankara. The Claimant therefore asked to dismiss or discontinue the arbitration proceedings on this ground as well.

77. On February 24, 2009, the President provided the Claimant with information regarding the question of independence and impartiality: The Parties had been informed by letter on May 11, 2007 from the ICSID Secretariat about the fact that the President had chaired an arbitral tribunal in which Mr. Paulsson had served as co-arbitrator (see above para. 30). As regards the conference in Ankara, the President stressed that he had been invited as

Chairman of the ICC Court of Arbitration on behalf of the Turkish Chamber of Commerce, which was in charge of the invitations.

78. On March 3, 2009, the Respondent again opposed the Claimant's proposal to dismiss the case. It stated *inter alia* that: "*The Republic's concern regarding the CEAS and Kepez shares is not just that Cementownia has failed to produce the original share certificates, but rather that — even if it could now, or later, somehow present the originals — Cementownia has not proven and cannot prove that it owned the shares at the relevant time (...) The Republic could accept an agreed resolution of this case only if it resulted in the issuance of an award granting the Republic each element of relief set out above [reference to its Memorial on Jurisdiction of February 9, 2009, no. 232] (Respondent's letter of March 3, 2009, p. 2).*"

79. On March 16, 2009, Mr. Biserov confirmed that Cementownia did not oppose dismissal of the present proceedings on the basis of lack of jurisdiction. He also stated that it did not understand the reasons for the Arbitral Tribunal's failure to disclose the President's collaboration with Mr. Paulsson in another case.

80. On March 17, 2009, the Arbitral Tribunal asked the Claimant to clarify as soon as possible whether the letter of March 16, 2009 should be regarded as a proposal for the disqualification of the President of the Tribunal. No reply was received from the Claimant.

81. On March 25, 2009, the Claimant submitted a letter concerning the Respondent's Memorial on Jurisdiction. It concluded as follows (Claimant's Reply on jurisdiction of March 25, 2009, p. 3 and 4):

"We therefore seek that your honorable Tribunal dismisses this case based on the fact of lack of jurisdiction due to our company's inability to show the shares legally acquired by our company."

82. On April 8, 2009, the Arbitral Tribunal invited the Claimant to inform the Tribunal at the latest by April 14, 2009 whether or not it intended to participate in the hearing scheduled for May 6, 2009.

83. On April 27, 2009, Mr. Biserov informed the Tribunal that the Claimant would attend the hearing and that it would be represented by Messrs. Guillaume Tessonière and Frédéric Sardain of Tessonière Sardain and Chev .

84. On April 28, 2009, the Arbitral Tribunal requested the Claimant to clarify the powers and role of their accompanying lawyers. Furthermore, referring to Article 45(5) of the Arbitration (Additional Facility) Rules, the Arbitral Tribunal reminded the Parties that they should not address questions relating to the merits at the hearing.

On the same day, the Claimant replied that the accompanying lawyers were duly authorized to represent it at the hearing.

85. On May 5, 2009, the legal representatives of Cementownia declared, by letter, that they were not "authorized" counsel in the present case and that they would not attend the meeting scheduled for the next day.

On the same day, Mr. Biserov informed the Arbitral Tribunal that Messrs. Guillaume Tessonière and Frédéric Sardain had never been authorized to represent the Claimant; the copy of a power of attorney of April 28, 2009 had been sent by mistake to the ICSID Secretary-General. Since the Claimant was unable to attend the scheduled hearing, it submitted the following arguments:

- If the Claimant is unable to produce original purchase agreements and bearer shares, it is jointly agreed by the Parties and by the Tribunal that the Tribunal lacks jurisdiction;
- The Respondent did not file a preliminary objection for a claim which is manifestly without legal merit;
- The award rendered in the present case has to deal with issues related to jurisdiction;
- If the jurisdiction condition is not satisfied, the Tribunal cannot decide whether submissions are well-founded in fact and in law;
- The prayers of relief sought by the Respondent in its Memorial on jurisdiction constitute questions on the merits;
- Each Party should bear its own costs because bearer shares are fragile documents, Cementownia was only unable to produce the shares and has never tried to evade its liability.

86. On May 6, 2009, a hearing took place in Paris concerning the Respondent's jurisdictional objections. Despite its earlier advising that it would participate in the hearing, no representative of the Claimant attended. The Respondent was represented by the following persons: Mr. Jan Paulsson, Ms. Lucy Reed, Mr. Brian King, Mr. Noah Rubins and Mr. Jonathan Gass of Freshfields Bruckhaus Deringer; Mr. Arzu Cosar, Ms. Utku Cosar, Mr. Alper Arslan and Ms. Ozge Bilgi of Cosar Avukatlik Bürosu; and Mr. Selahattin Çimen, Mr. Budak Dilli, Mr. Mustafa Çetin and Ms. Sevim Argun of the Ministry of Energy and Natural Resources (Republic of Turkey). The Arbitral Tribunal noted the Claimant's absence but accepted its letter of May 5, 2009. The Arbitral Tribunal heard the expert witness, Prof. Dr. Mehmet Bahtiyar and posed questions to him. The Respondent made its legal submissions. At the end of the hearing, the Arbitral Tribunal invited both Parties to file their statements of costs by June 8, 2009 (6 May 2009 Transcripts).

87. On May 27, 2009, Mr. Biserov submitted the Claimant's statement of costs. According to Mr. Biserov, Claimant's total costs and fees amount to USD 1,288,449.95.

88. On June 4, 2009, Mr. Biserov informed the Arbitral Tribunal by letter that Cementownia intended to make "a very important filing on Jurisdictional Matters to the honorable Tribunal by 16 June 2009."

89. On June 6, 2009, the Centre requested each Party to make an advance payment of USD 50,000.00.

90. On June 8, 2009, the Respondent submitted its statement of costs. According to Respondent, it has incurred legal fees of USD 3,859,053.35 and disbursements of USD 1,045,768.71. In its filing, the Respondent also stressed that it had paid USD 100,000.00 to cover the Claimant's shortfall in the advance payment (which subsequently became USD 150,000).

91. On June 9, 2009, the Arbitral Tribunal reminded the Claimant that it was not for a party to either decide in its discretion whether to file new submissions or to fix any time limits. It further stated that a new filing would be accepted only if there were new facts that could not be previously submitted and which were important and relevant to the resolution of the jurisdictional objection. The Arbitral Tribunal then invited the Claimant to submit its filing by Tuesday, June 16, 2009.

92. On June 16, 2009, the Claimant did not file any submission.

93. On June 18, 2009, Mr. Biserov informed the Arbitral Tribunal by letter that the Claimant had gained access "to thousands of new documents, which include documents, that go to the core subject of jurisdiction." As the Claimant deemed it imperative to fully review these new documents, Mr. Biserov requested a period of 35 days to make the supplementary filing.

94. On June 23, 2009 the Respondent commented on the Claimant's request to file a supplementary submission. It requested the Arbitral Tribunal to deny the request, and to proceed to render an Award.

95. On June 26, 2009 the Arbitral Tribunal issued its **Procedural Order No. 12**, whereby it decided:

"1. The Claimant is directed to submit by July 6, 2009:

b) A detailed identification of specific classes of documents that are mentioned in the Claimant's letter of June 18, 2009 and that the Claimant requests to file before the Tribunal;

(ii) A demonstration how and why the documents in (i) address the jurisdictional questions that are before the Tribunal based on the Respondent's objections to jurisdiction and relate only to the jurisdictional questions that are before the Tribunal based on the Respondent's objections to jurisdiction; and

(iii) An explanation in detail of the reasons why it was unable to file the documents earlier in this proceeding.

2. If any of the classes of documents in 1(i) are the originals of the Claimant's alleged shares in CEAS and Kepez, the Claimant must sign the Custody Agreement with its filing on July 6, 2009. It shall then deposit the original share certificates with the designated depository pursuant to Procedural Orders Nos. 7 and 8 by July 13, 2009 at the latest.

3. The Claimant is directed to pay to ICSID by July 6, 2009 US\$50,000, representing a part of its outstanding advance payments and by July 13, 2009 the balance of US\$100,000.

4. Unless the Arbitral Tribunal receives responses to all points raised in paragraph 1 above, a copy of the executed Custody Agreement, and ICSID receives the Claimant's payments under paragraph 3 by July 6, 2009 and July

13, 2009, respectively, the Tribunal will deny the Claimant's request to submit any further filing in this case and will proceed to render its decision."

96. On July 6, 2009, the Claimant did not file any submission. In accordance with Procedural Order No. 12 (see above para. 95), the Arbitral Tribunal notified the Claimant on July 7, 2009 that its request to file any further submissions was denied.

97. The proceedings were declared closed on September 1, 2009, in accordance with Article 44(1) of the Arbitration (Additional Facility) Rules.

98. The Arbitral Tribunal has already noted the existence of two other parallel ICSID arbitration proceedings before other arbitral tribunals in which the claimants claim to own or to have owned CEAS and Kepez shares transferred to them in 2003 (see above para. 23 and 29).

Furthermore, CEAS and Kepez together with Kemal Uzan and Rumeli Elektrik have brought an action against the Republic of Turkey before the *European Court of Human Rights* (ECHR) for breach of the European Convention for Human Rights and seeking damages therefor in relation to CEAS and Kepez (Application No. 18240/03, dated May 22, 2003) (Respondent's letter of December 18, 2007).

These proceedings are legally independent of each other. However, the Arbitral Tribunal reserves the right to consider declarations made in such other proceedings if they are adduced as evidence in the present one. The Tribunal notes that the Award in the *Europe Cement* claim was issued in August 2009 and forwarded to it by the Respondent after the Tribunal had conducted its own deliberations. The Tribunal has reviewed that Award but has arrived at its own conclusions based upon the evidence and submissions before it and independently of the approach taken by that distinguished tribunal (although, it will be seen that in some respects the approach taken by the Tribunal is consistent with that taken in the other case).

B. Legal Considerations

I. Generally

1. The Proceedings and the Constitution of the Arbitral Tribunal

99. The Claimant initiated the present arbitration proceeding on September 28, 2006 (cf. above para. 24). The Request for Arbitration was registered by ICSID on November 16, 2006.

The Arbitral Tribunal was constituted on May 11, 2007 (cf. above para. 30). The Parties did not raise any objections to the appointment of its members. During the proceeding, the Tribunal has specifically replied to the Claimant on the question of the independence of its President (see above para. 77).

100. The proceeding was conducted in accordance with the ICSID Arbitration (Additional Facility) Rules. Following the request of the Respondent, the Arbitral Tribunal decided in Procedural Order No. 11 (cf. above para. 74) that the proceeding would be bifurcated between questions related to jurisdiction and those related to the merits. The Parties agreed at the first session of the Tribunal to the application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (see above para. 32).

101. As stated above, a number of procedural steps have been initiated in the present proceeding, specifically:

- Requests for provisional measures;
- Requests for production of documents;
- Requests for several consecutive time extensions.

The Arbitral Tribunal considers in that regard that each Party, in particular, the Claimant, has repeatedly been given the opportunity to be heard.

102. The issue of representation has undergone several changes. During the process the Claimant has been advised by the following persons;

— the law firm Mannheimer Swartling Advokatbyrå filed the Request for Arbitration, all requests for provisional measures, all responses to the Respondent's requests for various orders, and the Claimant's Memorial of April 15, 2008;

— the Chairman of the Management Board of Cementownia, Mr. Biserov, has been in charge of all correspondence and requests for time extensions since Mannheimer Swartling Advokatbyrå's resignation on June 23, 2008;

— one week before the hearing, Messrs. Teissonnière and Mr. Sardain of the Teissonnière Sardain Chevé law firm were announced by Cementownia as its new legal representatives;

— one day before the hearing, Mr. Biserov informed the Arbitral Tribunal that Messrs. Teissonnière and Sardain were not authorized to represent the Claimant.

The Arbitral Tribunal considers the following:

— At the hearing of May 6, 2009, the Respondent's counsel asserted that Mr. Biserov did not have the authority to represent the Claimant (5 May 2009 Transcript, p. 45). If that were the case, all requests made by Mr. Biserov on Cementownia's behalf would be invalid. Having regard to the record, the Tribunal is of the view that all allegations of fact relevant to the question of the Claimant's ownership of the shares, save one, were made by the Claimant when it was represented by competent counsel. The only relevant representation of fact made by Mr. Biserov that bears upon the issues presented here is his claim that, although the Claimant still does own the shares, it is unable to produce the original share certificates. The Tribunal does not consider that the issue of Mr. Biserov's power to represent the Claimant in any way materially alters the fundamental issues that it must resolve in the present application.

— With respect to the Claimant's request to appoint new counsel, the Tribunal has been extremely patient; the Claimant's Counsel resigned on June 23, 2008 and throughout the ensuing period the Tribunal repeatedly extended deadlines at the Claimant's request. The hearing ultimately took place on May 6, 2009, almost a year after Counsel resigned.

103. Finally, the Arbitral Tribunal notes the following:

— Both Parties made the first advance payment. As regards the second advance payment, this has been borne by the Respondent alone (on January 16, 2009) after the Secretariat declared a default. The third advance payment requested by the Secretariat on May 26, 2009 was made only by the Respondent, but no further declaration of default was necessary.

— As regards the prayers for relief, the Arbitral Tribunal takes into account the Claimant's position on the jurisdictional issue (see above para. 81).

— The Claimant forwent its opportunity to attend the May 6, 2009 hearing, advising the Arbitral Tribunal only the day before that, contrary to its earlier letter, it in fact had not retained counsel. The meeting was dedicated to the hearing and questioning of the Respondent's legal expert, whose opinion was already submitted in writing, and to the Respondent's pleadings. No other witnesses were heard.

104. The Arbitral Tribunal closed the proceedings on September 1, 2009. It can now rule on the issues that have been submitted to it.

2. The Basis for the Arbitration Proceedings

105. The Request for Arbitration is based on the following undisputed elements:

a) Both Poland and Turkey are signatories to the Energy Charter Treaty ("ECT"). In accordance with Article 44 of the ECT, the ECT entered into force for the Republic of Turkey on July 4, 2001 and for the Republic of Poland on July 23, 2001. The ECT is therefore in force for both States, and was in force during the time of the principal measures alleged to violate the ECT (<http://www.encharter.org>; Exh. C-58).

The Claimant submitted its claim under Part III of the ECT. According to the Claimant, by terminating the 1998 Concession Agreements and its actions on June 13, 2003, the Respondent has violated the following provisions:

— Article 10(1) ECT, which provides that investments of investors of other Contracting Parties shall 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; and

— Article 13 ECT, which provides that investments may not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation except in certain specified conditions, one of which is that the nationalization or expropriation be accompanied by the payment of prompt, adequate and effective compensation.

b) The proceeding is conducted under the ICSID Additional Facility (see Article 27 ECT and Annex ID of the ECT). The Administrative Council of the Centre adopted the Additional Facility in order to authorize the Secretariat to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. In the case at hand, since Turkey has ratified the 1965 Washington Convention whereas Poland has not, the Additional Facility is applicable.

3. Final Positions of the Parties and Structure of the Award

106. Pursuant to their last submissions, the positions of the Parties are as follows:

a) The Respondent requests that the Arbitral Tribunal issue an award (Respondent's Memorial on Jurisdiction of February 9, 2009, para. 232):

“(1) Dismissing Cementownia’s claim in its entirety;

(2) Declaring that the claim is manifestly ill-founded, and has been asserted using inauthentic documents;

(3) Awarding monetary compensation to the Republic in an amount to be fixed by the Tribunal; and

(4) Awarding to the Republic all of its costs and expenses associated with this proceeding, plus interest.”

b) The Claimant requests as follows (Claimant's Reply on jurisdiction of March 25, 2009, p. 3 and 4):

“We therefore seek that your honorable Tribunal dismisses this case based on the fact of lack of jurisdiction due to our company’s inability to show the shares legally acquired by our company.”

107. On the basis of the Parties' submissions and arguments, the Arbitral Tribunal will analyze the following questions:

— It will commence its analysis by examining the Respondent's jurisdictional objections arising from Cementownia's role as investor (see below II);

— It will further examine the Respondent's jurisdictional objections to the Claimant's standing (see below III);

— On that basis, it will then analyze the declaratory and financial consequences (see below IV);

— Finally, it will address the issue of the allocation of costs (see below V).

II. Respondent's Jurisdictional Objections Arising from Cementownia's Role as Investor

b) The Issue

108. The first jurisdictional question concerns the Claimant's standing to sue. In that regard, the Parties request the following:

The Respondent seeks the following prayer for relief (Resp. 9 February 2009, no. 1):

“(2) Declaring that the claim is manifestly ill-founded, and has been asserted using inauthentic documents;”

The Claimant's response to the Respondent's objection is as follows (Claimant's Reply on jurisdiction of March 25, 2009, p. 3 and 4):

“We therefore seek that your honorable Tribunal dismisses this case based on the fact of lack of jurisdiction due to our company’s inability to show the shares legally acquired by our company.”

109. In the case at hand, the situation is quite unusual since both Parties have requested the Arbitral Tribunal to dismiss the claim based on the lack of the Claimant’s standing to sue, although they differ sharply on the reasons therefore. In that regard, the Claimant manifestly accepts the Respondent’s first prayer for relief. The point that divides the two Parties is that the Claimant requests the Arbitral Tribunal to base its reasoning on a single motive, namely, the Claimant’s inability to produce the original share certificates (see Claimant’s Reply on jurisdiction of March 25, 2009, p. 3 and 4). That is, the Claimant maintains that it acquired a shareholding interest in the two Turkish companies at the legally relevant time, but it claims that it is not in a position to prove this and therefore it agrees to the claim’s dismissal, but on a without prejudice basis. In contrast, the Respondent requests the Arbitral Tribunal to render an award which scrutinizes all aspects of the issue of the Claimant’s standing to sue (6 May 2009 Transcripts, pp. 45–46) and dismisses the claim with prejudice and with an award of damages and costs in its favour.

The Arbitral Tribunal is of the opinion that either party may make submissions on what matters should be the subject of a tribunal’s ruling, but this does not bind the tribunal. The Arbitral Tribunal therefore agrees with the Respondent that it is not for the Claimant (the respondent in this jurisdictional challenge) to delimit the Tribunal’s analysis to a particular point (see the pleadings of Ms. Lucy Reed in 5 May 2009 Transcript, pp. 57–59). In a reasoned request, the Respondent has requested the Tribunal to rule on several prayers for relief. It has a legal interest in seeking a binding award which, if favourable to it, disposes of the claim with *res judicata* effect in regard to the Claimant’s standing to sue. If, in the face of all of the evidence adduced by the Respondent, the Arbitral Tribunal were to confine itself to stating that a certain, even though decisive, class of documentary evidence (namely, the original bearer share certificates) has not been produced, it would be rendering an award on a without prejudice basis, giving the Claimant the opportunity to submit a new request before another tribunal and start the whole process all over again.

The issue is an important one. As the tribunal found in *Waste Management II*:

“In international litigation, the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State re-commencing its action.” (*Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Mexico’s Preliminary Objection concerning the Previous Proceedings, Decision of the Tribunal of June 26, 2002 at 36, available at <http://www.worldbank.org/icsid>).

For that reason and having regard to Article 52(1)(i) of the ICSID Arbitration (Additional Facility) Rules and the fact that the Respondent has both adduced extensive evidence and made submissions on different bases as to why the Tribunal is without jurisdiction, although it could dismiss the claim on the fact that both Parties agree that the Claimant did not produce the original bearer share certificates, the Tribunal considers that it is bound to examine the issue of the Claimant’s standing to sue in the light of the objections raised by the Respondent, at least insofar as it is necessary to do so in order to decide the Respondent’s application.

110. In its last letter of May 5, 2009 (see above para. 85), the Claimant considered that the Respondent, judging the claim manifestly without merits, should have immediately raised objections. According to the Claimant, the Arbitral Tribunal should then have ruled on that issue in an expedited procedure pursuant to Article 45(6) of the Arbitration (Additional Facility) Rules. According to the Respondent, the jurisdictional problem requires the production of evidence proving that Cementownia actually owned the CEAS and Kepez shares before June 12, 2003; that constitutes a necessary fact-finding for ruling on the jurisdictional issue (6 May 2009 Transcript, p. 110).

Article 45(6) of the Arbitration (Additional Facility) Rules reads as follows:

“Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without the prejudice to the right to a party to file an objection pursuant to paragraph (2) or to object, in the course of the proceeding, that a claim lacks legal merit.”

This article corresponds to Article 41(5) of the ICSID Arbitration Rules. The principle on preliminary objections was introduced in 2006 when the ICSID Rules were amended. Under the new rule, a party may, no later than 30 days after the constitution of the tribunal and before the first session of the tribunal, file an objection that a claim is

manifestly without legal merit. The tribunal, after giving the parties the opportunity to present their observations on the objection, can, at its first session or promptly thereafter, notify the parties of its decision on the objection. If the tribunal decides that all claims are manifestly without legal merit, it will render an award to that effect.

In the case at hand, it must be said that the Claimant's argument, based on Article 45(6) of Arbitration (Additional Facility) Rules, is surprising. In fact, the Claimant filed its Request for Arbitration asserting that it had standing to sue and that it had the evidence to prove it. The Claimant affirmed this for months and it would be odd if the Arbitral Tribunal would rule on that issue after two years of proceedings in an expedited procedure without any analysis. Regardless of the terms used in the Claimant's request, what it is really seeking is a finding from the Arbitral Tribunal that the Respondent should have filed its preliminary objections no later than 30 days after the Tribunal's constitution. That argument is without merit, is inconsistent with the express terms of Article 45 of the Rules (which permits a respondent to file objections to jurisdiction no later than the filing of its Counter-Memorial), and is rejected.

For that reason, the Arbitral Tribunal considers that it is appropriate to examine the objections raised by the Respondent.

111. The Arbitral Tribunal will therefore proceed as follows:

- It will start the analysis with the question of the burden of proof;
- It will continue with the question of the transfer of the shares.

2. The Burden of Proof

112. It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred. In this regard, the Arbitral Tribunal recalls its Procedural Order No. 1 of January 25, 2008 (see above para. 36) issued after it had received submissions from the Parties on *inter alia* the question of whether the Claimant had actually acquired any interest in the two Turkish companies at the time that it claimed to have done so:

“— It is not contested that the documents that are required by the Respondent are necessary to decide some of the basis for the claim, in particular the right of the Claimant to be considered as an investor. Indeed, if the Claimant cannot prove ownership and/or control of the Cukurova Elektrik A.S. (CEAS) and Kepez Elektrik Türk A.A. (Kepez) shares at all relevant times, it would lack standing and the Arbitral Tribunal in turn would lack jurisdiction.

— However, the Arbitral Tribunal considers that there is no special urgency to have the Claimant respond to this request whilst in the final stages of the preparation of its Memorial. Given the Parties' exchanges on the issue of ownership and the Claimant's recognition that it will be incumbent upon it to address this issue fully in its Memorial, the Tribunal does not see the need for the order at this time. The request is therefore premature.”

113. The Claimant was thus put on notice by the Respondent and in turn by the Tribunal that it bore the burden of proving that it owned or controlled the CEAS and Kepez shares at all relevant times.

114. The Claimant's former counsel in fact accepted the Respondent's pleadings on this issue (see Resp. 9 Feb. 2009, paras. 55–60 and 26 May 2008 Transcript, pp. 81–82).

The investor must evidence all the necessary conditions for the Arbitral Tribunal to affirm its jurisdiction. The first condition in that regard is the Claimant's ownership of the share certificates at the time of the alleged expropriation. The Claimant must therefore prove:

- that it had effectively and validly acquired the share certificates of CEAS and Kepez; and
- that it acquired them before the alleged expropriation, *i.e.*, before June 12, 2003, and that it still was the owner of the shares on that date.

115. As mentioned above (see para. 109), the Claimant does not dispute this reasoning but considers that the Arbitral Tribunal should limit its award to a simple statement that it was unable to produce the original share certificates and that the claim should therefore be dismissed, without analyzing the other questions with respect to the Claimant's ownership of the shares, which have been raised by the Respondent. It even seems that the Claimant makes the inability to produce a condition to admit it. The Respondent views the matter differently, requesting the Arbitral

Tribunal to rule not only on the Claimant's inability to produce the original share certificates, but on all jurisdictional issues raised by it.

The Arbitral Tribunal is of the view that:

- a) It is obvious that one Party cannot direct the Arbitral Tribunal on the issues that it should rule on. All jurisdictional issues have been referred to the Arbitral Tribunal and it therefore falls to the Arbitral Tribunal to ascertain the matters on which it should rule.
- b) The Claimant's request to dismiss the claim is akin to a withdrawal of the claim. If the Arbitral Tribunal accepts a withdrawal of the claim by a decision taken without prejudice, it would enable the Claimant to file a new claim on the same basis in the hope of convincing a new tribunal on the merits. Pursuant to Article 50 of the Arbitration (Additional Facility) Rules, a claim may be withdrawn only with the consent of the other party. That other party may for its own reasons find it necessary to request the Arbitral Tribunal to rule on the dispute or, at least, on certain issues. This is precisely the case at hand as far as the Respondent has a legal interest to request that the Arbitral Tribunal rule on the jurisdictional issues at stake.
- c) In support of this argument, Article 52(1)(i) of the Arbitration (Additional Facility) Rules states that the Arbitral Tribunal shall decide on every claim. That said, it does not mean that the Arbitral Tribunal must expressly address in its Decision or Award every single argument made with respect to each claim or objection raised, but it must consider all such arguments when it decides the basis on which it disposes of each claim or objection, as the case may be.
- d) Even though the Claimant has the burden of proving that it is an investor, nothing prevents the Respondent from submitting evidence that the Claimant is not an investor.

For that reason, the Arbitral Tribunal will examine all questions related to the transfer of the share certificates and its validity.

3. The Transfer of the Shares

116. The Arbitral Tribunal turns to the second question, which is the material transfer of the shares on May 30, 2003. By way of introduction to its detailed review of the evidence, the Tribunal wishes to place the significance of the claimed share transfer in proper context.

The Tribunal observes that prior to the date of the alleged sale and purchase of the shares, the matters complained of involved the Turkish State and Turkish nationals, all operating exclusively within the framework of Turkish law. Being a Turkish national holding shares in CEAS and Kepez, under the Energy Charter Treaty, Mr. Kemal Uzan could not bring an international claim against his own State. This could only occur if a person holding foreign nationality owned or controlled the investment.

The Claimant possessed foreign nationality and, in particular, the nationality of another State party to the Energy Charter Treaty. This meant that if it actually acquired an interest in the two companies, *prima facie* it would have the right to take what until that point of time had been a purely local grievance arising under local law, subject to resolution in the local courts, and in respect of matters occurring after the date of acquisition it could submit a claim to an international arbitration applying international law. But if Mr. Uzan's shareholdings in the two electricity companies were not transferred to the foreign Claimant, his rights *vis-à-vis* the Respondent would remain defined exclusively by Turkish law and subject to the remedies afforded by the Turkish legal system (and the European Convention on Human Rights). This is trite law, but fundamental to the Respondent's objections to jurisdiction.

117. The Claimant was frank about the reasoning underlying its claim. According to Mr. Uzan, he transferred the shares because he feared that "the government would unilaterally take at least the transmission rights of the companies" and he "wanted to protect our interests." (Kemal Uzan witness statement, para. 32). The way in which he claimed to have protected his interests was to transfer his shares to a foreign company that his family's company, the Rumeli Group, in turn controlled.

This, if true, is unabashedly treaty shopping. As other tribunals have found, treaty shopping *per se* is not in principle to be disapproved of, but in some instances it has been found to be a mere artifice employed to manufacture an international dispute out of a purely domestic dispute. Given the dispute's history and the temporal aspects of the case (a mere twelve days elapsed between the claimed acquisition of shares in companies already on notice of potential termination of the concessions and the actual termination measures themselves), had the Tribunal found

that the share transfers actually *did* occur on May 30, 2003, it would have held that this case fell within the category of an artifice.

Even if they did occur, the share transfers would not have been *bona fide* transactions, but rather attempts (in the face of government measures dating back some years about to culminate in the concessions' termination) to fabricate international jurisdiction where none should exist.

b) General Considerations

118. The Tribunal begins by noting certain facts and considerations that have influenced its decision on the Respondent's application, because some of those facts, when examined individually, and certainly when taken together, show the utter implausibility of the transaction claimed to have occurred on May 30, 2003.

119. As the procedural history of this case already reproduced in this Award has shown, from the beginning the Respondent put the matter of the Claimant's claimed ownership of the shares at the material time squarely at issue. It sought, and the Tribunal granted, procedural orders that required the Claimant to submit the originals of the documents said to support the claim to a custody agent so that they could be forensically examined to determine whether or not they were forgeries.

However, there is *no trace of the original bearer share certificates*. The Claimant has alleged that they exist and has promised several times to comply with the Arbitral Tribunal's orders to produce them (for example, the Claimant's letter of September 6, 2008 and Claimant's comments on the Redfern List of June 5, 2008, prior to Mannheimer Swartling's resignation, and the Claimant's letter of September 6, 2008). The Claimant has explained its non-production by circumstantial hindrance: "*Cementownia Nowa Huta has all documents to prove its ownership in both CEAS and Kepez beyond the shadow of doubt, however to undertake such a task on our own without the representation of legal counsel would not only be a travesty of justice, it would also be a breach of my fiduciary duties towards my shareholders*" (Claimant's letter of September 6, 2008, p. 3) and "*The request is not contested. However, the production of the requested originals is subjected to the implementation of measures for the safe and secure delivery of such originals to the depository to be agreed upon by the Parties in accordance with Point 1b) of the Tribunal's Procedural Order No. 5*" (Claimant's comments on the Redfern List of June 5, 2008, point 1). Even if the Claimant had produced the original share certificates claimed to have been issued in 2005, they would not have constituted undisputed evidence of acquisition on May 30, 2003, since no date of purchase was noted on the share certificates (photo-copies of which were filed with the Memorial). The date of issuance is however a characteristic of bearer shares.

After the resignation of the Claimant's counsel, it then represented that it was not in a position to submit the originals for inspection, while still insisting that it acquired the shares at the legally relevant time. Notwithstanding the Tribunal's repeated extensions of time, the Claimant has never signed the Custody Agreement, contrary to the Tribunal's repeated instruction to do so, nor has it adjusted its position (taken since counsel resigned) that it owned the shares but is unable to prove that fact.

120. The Claimant's having taken a position that it cannot substantiate the ownership that it insists it possesses, the question arises as to whether this precludes the Tribunal from making its own judgment as to whether the claimed transactions occurred on May 30, 2003. After considering all of the record evidence with care, the Tribunal has concluded that it is not so precluded. Obviously, the Tribunal's task would be simplified by expert forensic evidence. But the Respondent's inability — through no fault of its own — to test the original documents cannot preclude it from arguing that the weight of the existing evidence is sufficient for the Tribunal to decide that the claim is a sham and the transactions never occurred.

121. The Tribunal believes that this is procedurally fair and correct as a matter of law. Extensions cannot be granted forever and it is entirely fair for a tribunal, after giving a disputing party more than adequate extensions of time and notice, to decide that it should consider the other party's application to dismiss the claim in light of such evidence as has been adduced. The Tribunal cannot allow evidentiary perfection to be the enemy of common sense and judgment. There is ample evidence to conclude that the claimed transactions never occurred on May 30, 2003. The Tribunal will explain why it has arrived at that conclusion in the following overview of the evidence.

b) The Date of the Transaction

122. The date of June 12, 2003 assumes importance in the Tribunal's consideration of the claimed transaction, because that is the date on which the measures complained of culminated with the termination of the concessions. The claim is that Cementownia took ownership of the shares just prior to the Respondent's measures, which

constitute an unlawful expropriation of the recently acquired investments, and therefore it should be compensated by the Respondent.

123. The timing of the claimed transaction is important because for any share transfers taking place *after* June 12, 2003 the purchaser would be deemed to be aware of the reduction in value of the shareholdings resulting from the acts of termination. To have a chance of sustaining its very large claim for damages — USD 4,648,157,411, according to the Claimant — Cementownia's case depended upon its proving that it acquired the shares before the Government acted.

124. As regards the date of the transaction of the shares, there are several inconsistencies:

— First, the Respondent adduced evidence filed on behalf of Mr. Uzan in a European Court of Human Rights (ECHR) proceeding against the Respondent in which it was asserted that he did not transfer the CEAS and Kepez shares to Cementownia until *after* the end of June 2003, i.e., after the termination of the Concession Agreements on June 12, 2003: “*Le Gouvernement est donc à roc de prouver l’illégalité du transfert des actions de M. Uzan aux rocedure polonaises du ciment. S’il s’agit du grief selon lequel la vente ou le transfert des actions devrait être communiqué à la Bourse d’échanges des titres d’Istanbul (IMKB : Istanbul Menkul Kiymetler Borsasi/the Istanbul Stock Exchange (ISE)), il convient de préciser que les titres de CEAS et Kepez étaient exclus de la Bourse à partir du juin 2003, la vente effectuée par M. Uzan est survenue plus tard*” (emphasis added). (Exhibit attached to Respondent's letter of June 18, 2008, Annex 6, para. 23). The Tribunal thus has before it inconsistent statements from the only witness proffered by the Claimant — who did not appear before the Tribunal at the hearing — as to the timing of the alleged disposition of the shares. In this proceeding Mr. Uzan asserted that he transferred the shares *on* May 30, 2003 and in the ECHR proceeding he asserted that he did so *after* June 30, 2003. (*Kemal Uzan and others v. The Republic of Turkey* (ECHR Case No. 18240/03), Supplemental ECHR Application, 22 May 2004, Exh. R-24, para. 3). The two statements cannot stand together.

— The Respondent adduced evidence of yet another statement which stands at odds with Mr. Uzan's testimony. On September 8, 2003, some three months after he claims he transferred the CEAS shares to Cementownia, CEAS argued to the 10th Chamber of the Council of State (Danistay) that the “company's investments are *entirely based on domestic capital*” (emphasis added) and argued further, “In our country while foreign investment is immune, doesn't domestic investment have any legal security?” (CEAS Statement of Claim. File No. 2003/3946 of the 10th Chamber of the Council of State [Danistay], September 8, 2003, Exhibit R-122, p. 38). Thus, some three months after Mr. Uzan claims to have transferred CEAS shares to Cementownia, CEAS was telling the Turkish courts that it was “entirely” owned by Turkish nationals.

c) The Circumstances of the Transaction

125. According to Mr. Uzan, the share transfer deal was struck during a telephone call that he had with the chairman of Cementownia's Management Board, Mr. Jerzy Ciepiela, on May 30, 2003: “*The transaction was carried out over the phone with the chairman of Cementownia's management board, Mr Ciepiela, representing Cementownia.*” (Kemal Uzan's witness statement, para. 33). It was then documented in four **one-page** “contracts” dated “as of the 30th of May 2003.” Of the four photocopied contracts submitted as Exhibit C-60, only one was signed and it was signed by only one party (Mr. Uzan). Quite apart from the requirements of Turkish law on the passing of legal title to the shares, it is apparent to anyone with a passing knowledge of general corporate/commercial practice that a share purchase agreement for shares in two significant utilities (particularly two companies already in dispute with the Government over alleged deficiencies in their performance of the concession agreements as well as the compulsory transfer of their transmission rights — see Respondent's Memorial on Jurisdiction, paras. 32–37) could not be reduced to a single page.

126. Upon review, the Tribunal can only characterize the “contracts” as being extraordinarily rudimentary and raising more questions than they answer. None of the four photocopied documents submitted with the Memorial bore Mr. Ciepiela's signature, which is odd given that Mr. Uzan testified that “Mr. Ciepiela signed them in Krakow,” (Kemal Uzan witness statement, para. 33) and only one of the four bore Mr. Uzan's signature even though he testified he signed them on May 30, 2003. No witness evidence was adduced from Mr. Ciepiela to corroborate Mr. Uzan's account generally and in particular to explain why the photocopies adduced as evidence of the transaction did not bear his signature. Nor did Mr. Uzan explain why only one of the four documents evidently bears his signature. Nor was there any provision on the face of the documents for witnesses' signatures.

127. As for the transfer of the shares from seller to purchaser, the Claimant has alleged the following: “*Immediately in connection with the transfer of the shares, the share certificates were handed over to Cementownia. Trusted*

employees of the Rumeli Group personally transported the shares to Cementownia's bank deposits in Krakow and Vienna." (Kemal Uzan's witness statement, para. 33). No explanation was offered as to how the documents were executed by two persons situated in Krakow and in Istanbul who, Mr. Uzan testified, agreed the deal over the telephone that day and then signed the documents. Moreover, there was no documentary evidence in support of this claim, nor did the Claimant submit any witness statement from any of the "trusted employees" said to have transported the bearer shares. This account begged the question of when title to the shares could have passed under Turkish law.

The Claimant allegedly deposited the bearer shares in Cementownia's banks in Vienna and Krakow (Kemal Uzan's witness statement, para. 33). However, no documents evidence the existence of a bank safe deposit contract or the rental of a safe deposit facility. Nor was there any statement from a representative of either of the two (unidentified) banks said to have received the bearer shares submitted in support of the claimed transactions.

128. The curious features of the four documents and Mr. Ciepiela's conspicuous absence from the Claimant's record evidence might, in and of themselves, raise sufficient doubt about whether the transaction occurred. But the contemporaneous evidence gets far more problematical for the Claimant.

b) Cementownia's Financial Statements

129. It will be seen that Cementownia neither reported the claimed transaction to the Polish and Turkish authorities at the time, nor did it seek the necessary Turkish regulatory approvals to acquire the shares in CEAS and Kepez (see below para. 139 *et seq.*). But more damning than any of the *lacunae* in its evidence of the documentation of the claimed transaction and the absence of *any* evidence of even the most basic reporting of the transaction to the relevant authorities, is the fact that Cementownia *did not record the claimed transaction in its own financial statements for the year in which it allegedly occurred or in the ensuing year (2003 and 2004)*. Moreover, Mr. Ciepiela, the very person whom Mr. Uzan testified signed the four "agreements" on Cementownia's behalf, signed and certified those audited financial statements as being true.

With respect to the relevant years, Cementownia's financial statements reveal the following:

- a) The 2003 financial statements are signed *inter alia* by Mr. Ciepiela, who allegedly signed the share purchase agreements. However, there is no mention in those statements that a multimillion PLN transaction pursuant to which Cementownia acquired interests in two much larger companies took place during that financial year;
- b) As regards the 2004 financial statements, the situation is no better: Mr. Ciepiela once again signed them and again there is no mention of any such transactions in these financial statements;
- c) The 2005 financial statements do mention that a transaction took place in 2003 but without stating any exact date (which would necessarily have to be before June 12, 2003). It might be asked why the Tribunal prefers two out of three audited financial statements, when all are certified as true and approved by the shareholders. The answer lies in the fact that with the exception of the four one page "agreements" already found not to prove the transaction and Mr. Uzan's statement which is contradicted by the two other statements, *all* other contemporaneous evidence supports the conclusion that it is the 2003/2004 statements which are accurate, and the 2005 statement, completed just before the Respondent learned for the first time of the existence of the supposed foreign shareholders, is false.

130. Following the aforementioned observations, the Arbitral Tribunal is of the opinion that Cementownia's 2003 and 2004 audited financial statements' omission of any record of the purported transactions at the time they were alleged to occur is evidence that they never occurred. The Tribunal cannot believe that: (i) Mr. Ciepiela could have been a party to the telephone conversation with Mr. Uzan which committed Cementownia to acquire holdings in the two Turkish utilities; (ii) Mr. Ciepiela could have then reviewed and certified the company's financial statements as being true; and (iii) when doing so, forgot that he had recently agreed, on Cementownia's behalf, to buy a 12.23% stake in CEAS and a 10.74% stake in Kepez — two companies that dwarfed Cementownia and in respect of which Cementownia now claims to be entitled to damages of over USD 4 billion.

131. The significance of the 2003 (and 2004) audited financial statements' silence in respect of the share acquisitions is compounded when it is noted that once audited and then certified by management as accurate, they were then put before Cementownia's shareholders for approval. This was done on April 14, 2004 (Cementownia's 2004 Financial Statements, Exhibit C-71, Auditor's Report, para. 12, p. 6). At that time, nearly all of Cementownia's shares were owned by Rumeli Cimento, A.S., a company belonging to Mr. Kemal Uzan (Cementownia's 2003 Financial Statements, Exhibit C-70, Report on Operations, p. 21).

132. Thus, the Tribunal has before it a circular transaction that cannot be reconciled. That is, the Claimant's only witness, Mr. Uzan, attests to significant transactions which the alleged counterparty's audited financial statements did not mention at the time; that alleged counterparty's alleged representative certifies the accuracy of those financial statements (which should have mentioned transactions of this magnitude); the company that controls the counterparty then approves the financial statements at a general meeting; and that corporate shareholder is controlled by the same Mr. Uzan who testifies that the unmentioned transaction (now worth US\$4 billion) *did* occur.

133. There is even more damaging contemporaneous evidence: Mr. Uzan testified that due to the introduction of the new Turkish lira on January 1, 2005, and a change in Turkish law, the old CEAS and Kepez share certificates had to be replaced with new certificates denominated in the new lira (Kemal Uzan witness statement, paras. 35–36). The evidence filed with the Memorial put January 10, 2005 as the date that Cementownia surrendered its old bearer certificates to CEAS and Kepez in order to exchange them for new share certificates. (Exhibit C-66, Record for delivery of the new shares in CEAS and Kepez, January 10, 2005). The receipts tendered as evidence of this exchange bear Mr. Ciepiela's signature and that of two other Cementownia officers, yet *only four days later*, Mr. Ciepiela and the same officers signed and certified as true Cementownia's 2004 financial statement which, for the second year running, omitted any mention of the company's acquisition of the claimed shareholding in CEAS and Kepez.

134. It was not until the company's 2005 financial statement was completed and signed in 2006 that Cementownia ever stated that it had acquired the shares of a number of foreign companies, including CEAS and Kepez. This financial statement, completed in 2006, around the time that international claims began to be filed in relation to the Respondent's measures *vis-à-vis* CEAS and Kepez, deviated sharply from the two preceding years' audited financial statements.

135. It defies credulity that the transaction now claimed to have been effected on May 30, 2003 actually took place as contended by the Claimant. To recapitulate, the Tribunal is being asked: (i) to prefer Mr. Uzan's account of the transfers given in this proceeding over Mr. Uzan's account given in the ECHR proceeding and CEAS' representations in domestic legal proceedings; (ii) to ignore the questions that arise from a careful review of the one page share purchase agreements; and (iii) to ignore the fact that the Claimant itself never mentioned the share acquisitions in its audited financial statements for two years running and only mentioned them once the international claims began to be asserted.

136. It is therefore impossible for the Arbitral Tribunal to accept the Claimant's allegation that Cementownia purchased the bearer shares before June 12, 2003. The financial statements produced by the Claimant rather show that Cementownia and Kemal Uzan attempted in 2005 to fabricate the transaction in order to protect the Uzan family's economic interests and to gain access to international jurisdiction.

137. Each one of these points is highly damaging and virtually of itself fatal to the Claimant's case. When the Tribunal then considers the other evidence adduced by the Respondent, the claimed transaction becomes even more implausible.

b) Other Evidence

138. First, in contrast to the size of the USD 4.6 billion claim, Cementownia was a small company that had minor assets in comparison to the two companies whose shares it is claimed it was purchasing. A reasonable person looking at the claimed transactions would be interested in the value of the assets being purchased and the purchaser's financial capacity to effect the transaction. Here, the Claimant was supposed to pay a total of only USD 51,852.50 for shares in two enterprises now claimed to be worth over USD 4.6 billion. The disproportionality between the value assigned to the shares then and the value assigned to them now — some 77,000 times greater — need hardly be noted other than to add it to the list of implausibilities. As for Cementownia's financial capacity, this issue was avoided by the Claimant's asserting that the purchaser was not obliged to make any payment at the time of the alleged transaction; the USD 51,852.50 was supposedly due some five years hence. Moreover, according to the purchase agreement (Exh. C-60), the deferred payment of the shares was "payable in installments or as a lump sum", that is the payment was without interest. The Cementownia 2005 financial statement also omits any mention of interest for the deferred payment (Exh. C-72).

139. Second, the Claimant alleges that Kemal Uzan would have sold, in 2003, shares in 16 foreign companies for the total amount of PLN 315,505,975.00 out of which 12,875 Kepez shares and 61,200 CEAS shares respectively (Exh. C-72). Leaving aside the issues of the seller's security over the transferred shares (due to the alleged deferred payment) and precisely when title would allegedly pass, there were, as the expert evidence adduced by the

Respondent showed, many regulatory compliance issues that would have to be addressed were true share sale and purchase agreements to be negotiated and executed.

140. In every developed economy, particularly with respect to publicly traded companies involved in a regulated sector, a sale and purchase of a significant block of shares will ordinarily require the giving of notice and the granting of approvals from the interested regulators. These are typically obtained prior to or at the time of the closing of the transaction and, if they are not, it is standard practice to provide in the legal documentation for adjustment to, or even rescission of, the transaction in the event that approvals are not forthcoming.

141. CEAS and Kepez were both subject to extensive regulation under local law governing *inter alia* electricity generation and transmission, capital markets, foreign investment law, and general commercial law. Expert evidence was led by the Respondent on the regulatory aspects of the purported transaction. The Respondent showed how, under applicable Turkish law, a *bona fide* acquisition of a significant shareholding in CEAS and Kepez would have required the parties to the transaction to give notices, seek approvals, and obtain consents from different regulators (Claim. 15 April 2008, paras. 127–145; expert opinion of Dr. Mehmet Bahtiyar).

142. The transactions at issue in the instant case, even on the most generous weighing of the evidence in the Claimant's favour, bore *none* of the hallmarks of compliance with the manifold mandatory regulatory requirements of the applicable Turkish legislation. The "contracts" are bereft of any reference to the different regulatory requirements that would have governed such a transaction and had an impact on its structuring. No evidence of any attempt by either of the parties to the claimed transaction was adduced to show that any effort was made to register the transaction with the relevant Polish and Turkish authorities or that the requisite approvals were applied for, let alone obtained, from the relevant Turkish authorities.

143. In fact, when the Respondent requested production of documents relating to the commercial and regulatory law aspects of the purported transaction, the Claimant stated in its Observations on the Respondent's Revised Redfern List (June 5, 2008 at pages 8–9, comments on items 9 and 10), that it had not reported the purported acquisition of the shares to any Polish or Turkish authority.

144. Under Turkish law, a foreign company like Cementownia would have to notify a variety of different regulators of its intent to acquire a shareholding interest in the two companies. For example, as a Polish company, it would have to seek the authorization of the Undersecretariat of the Turkish Treasury, General Directorate of Foreign Investment. It was common ground between the Parties that Cementownia never made any filing or sought any approval in Turkey in relation to the purported change in the ownership of the shares.

145. Third, not only did the Claimant take no step in Turkey to file any document or seek any permission to effect the alleged share transfer, it likewise did nothing under Polish law to report these sizable transactions to the relevant Polish authorities. Under Polish law, Polish companies having a shareholding of at least 10% in the capital of a foreign company (and of a value of at least € 10,000) must file with the National Bank of Poland a detailed annual report on "capital held abroad" (Foreign Exchange law of 27 July 2002, Exhibit R-95, art. 30.1; Council of Ministers Decree, December 10, 2002, Exhibit R-100, § 4.2). Yet the Claimant admitted that the "purchase of the shares in CEAS and Kepez has not been reported to any Polish governmental or regulatory agency" (Claimant's Observations on the Respondent's Revised Redfern List, June 5, 2008, comments on item 9).

146. Thus, the documents said to evidence the transfer of legal title to the shares are completely unconnected to the manifold regulatory and commercial law issues that would have governed any *bona fide* acquisition of the shares by a foreign investor.

147. The Tribunal considers that the weight of the evidence proves overwhelmingly that the transactions never took place on May 30, 2003, and that the claim is a sham.

148. The Respondent spent a considerable amount of time and effort tracing Mr. Kemal Uzan's history as well as directing the Tribunal to foreign judicial decisions which have made findings on his business and document production practices and veracity. It is not necessary for the Tribunal to dwell on this evidence because of its conclusion already reached. It does draw comfort from the evidence, however, particularly from the conclusions arrived at by courts whose independence is unquestionable on the facts of this case, that Mr. Uzan and his associates were guilty of fraud and obstruction of justice in other legal proceedings. Thus, the sole witness adduced by the Claimant in support of its contention that the transactions actually occurred has a track record on precisely the same kind of issues as arise in the instant case.

4. Conclusion

149. The Arbitral Tribunal considers that the Claimant has not produced any persuasive evidence that could prove either its shareholding in CEAS and Kepez at the relevant time or that it was an investor within the meaning of the ECT.

III. Respondent's Jurisdictional Objections to Claimant's Standing

b) The Issue

150. The Respondent raises several other issues and seeks the following declaratory relief (Resp. 9 Feb. 2009, para. 232):

"Declaring that the claim is manifestly ill-founded (...)"

According to the Claimant, the Arbitral Tribunal cannot decide whether the claim is manifestly ill-founded at the jurisdictional stage. *A fortiori*, it contends, the Tribunal has no competence to grant a declaratory relief on these issues (Claimant's Letter of May 5, 2009, para. 5.1).

In order to rule on the question whether the Claimant's claim is ill-founded, the Arbitral Tribunal will examine whether there has been any bad faith in and/or misconduct on the part of the Claimant with respect to this proceeding.

2. The Parties' Positions

a) The Respondent's Position

151. According to the Respondent, Cementownia's claim was brought and has been pursued in bad faith. In support of that argument, the Respondent contends:

- Cementownia knew when it commenced this arbitration that it did not own CEAS and Kepez shares at the relevant time (if at all) (Resp. 9 Feb. 2009, para. 223);
- Turkish nationals have used Cementownia as an instrument of fraud and abuse of process;
- The company did not record the transaction in its corporate books until three years after the transaction allegedly took place;
- Cementownia has undergone "internal restructuring" after it initiated the current arbitration, it sold its operating assets to PEH and PCH and is now insolvent, and this was done to make it "award-proof";
- The shareholding and management of the company is uncertain, with accusations of fraud between the Uzan factions currently pending before the Polish courts;
- Kemal Uzan has used Cementownia to shield assets from Turkish legal process;
- Cementownia is only one part of the Uzan's family's illicit effort to use foreign corporate vehicles to assert baseless claims before a variety of international tribunals (Resp. 9 Feb. 2009, paras. 191, 202, 204).

In addition, the Respondent alleges that CEAS, Kepez and the Uzan family have had a full opportunity to challenge all of the measures of which Cementownia now complains. As the Republic of Turkey has adopted Annex ID to the ECT, it may choose to withhold its consent to international arbitration of disputes that have already been submitted to domestic litigation (Resp. 9 Feb. 2009, para. 220).

b) The Claimant's Position

152. According to the Claimant, the declaratory relief sought by the Respondent should be rejected for the following reasons (Claimant's letter of May 5, 2009, para. 5.1):

- First, the Claimant does not challenge and indeed accepts the Tribunal's lack of jurisdiction. This official fact should be mentioned in the Award. The Claimant asserts further that it is the true owner of the shares, that it has conducted itself appropriately and that it has been prevented from making out its case by events beyond its control. Cementownia argues further that it never refused to provide original documents, as ordered by the Tribunal, but was not in a position to comply with the orders. There is therefore no reason for the Tribunal to insert a formal declaration in the Award;

- Second, the Republic of Turkey has not proven that Cementownia’s claim caused an intangible injury to the Respondent;
- Third, such a declaratory relief would not be appropriate given the circumstances of the case since CEAS’s and Kepez’s premises and facilities were allegedly raided and seized by brute force by Turkish police and army;
- Fourth, the case at hand is not comparable to other cases in international law where a declaratory relief is considered as “appropriate satisfaction”;
- Finally, the Republic of Turkey is not seeking legal relief against the Respondent but rather political relief against natural persons who are third parties to the dispute.

3. The Arbitral Tribunal’s Decision

153. Parties to an arbitration proceeding must conduct themselves in good faith. This duty, as the *Methanex* tribunal found, is owed to both the other disputing party and to the Tribunal (*Methanex Corporation v. United States of America*, NAFTA Chapter Eleven case under the UNCITRAL Arbitration Rules, Final Award, Part II — Chapter I, para. 54 at p. 56).

154. In recent cases, some tribunals have found that a party that makes an investment, not for the purpose of engaging in commercial activity, but for the sole purpose of gaining access to international jurisdiction, does not engage in a *bona fide* transaction. Such a transaction is deemed not to be a protected investment and a party’s creation of a legal fiction so as to gain access to an international arbitration procedure to which it was not entitled is an abuse which could be “*détournement de rocedure*” (*Phoenix Action, Ltd. V. Czech Republic* (ICSID Case No. ARB/06/5), award of April 15, 2009, paras. 142–143, available at <http://www.worldbank.org/icsid>). The arbitral tribunal in the *Phoenix Action* case stressed that if jurisdiction were admitted, “*any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would ipso facto constitute a ‘protected investment’ — and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited.*” (*idem*, para. 144).

155. The International Court of Justice noted in the *Barcelona Traction* case that “the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law,” noting further that “[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to protect the evasion of legal requirements or of obligations” (*Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3 at para. 58). Cases which have upheld the right of foreign legal persons controlled by nationals of the respondent State, such as the majority decision in the case of *Tokios Tokelés v. Ukraine*, have been at pains to distinguish between the creation of foreign legal personality for legitimate commercial planning purposes from the kind of conduct which the ICJ noted can lead to the piercing of the veil in municipal legal systems (See *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/8), award of July 26, 2007, paras. 54–55, available at <http://www.worldbank.org/icsid>).

156. Here the Claimant’s conduct is not even close to proper conduct. Had Cementownia actually proven that on May 30, 2003 it legally acquired the shares of CEAS and Kepez, there would still be the question of whether this was treaty shopping of the wrong kind, in the words of *Phoenix Action*, “*a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT.*” The problem for the Claimant is that the evidence shows that it did not even interpose itself between Mr. Kemal Uzan and the Republic of Turkey. The transaction that would pose the issue of whether the corporate veil should be pierced was fabricated.

157. The Claimant’s conduct in bringing the instant claim fails to meet the requisite standard of good faith conduct. The claim is manifestly ill-founded.

158. With respect to the sanction in case of an abuse of rights, ICSID tribunals can award costs against parties as a sanction against what they see as dilatory or otherwise improper conduct in the proceedings (*Benvenuti & Bonfant v. People’s Republic of Congo* (ICSID Case No. ARB/77/2), award of August 15, 1980, in 1 ICSID Reports 1993, p. 365; *MINE v. Guinea* (ICSID Case No. ARB/84/4), award of January 6, 1988) in 4 ICSID Reports 78; *American Manufacturing Trading v. Zaire* (ICSID Case No. ARB/93/1), award of February 21, 1997, in 36 ILM 1531; and *Liberian Eastern Timber Corporation v. Republic of Liberia (LETCO)* (ICSID Case No. ARB/83/2), award of March 31, 1986, in 2 ICSID Reports 370). In the *LETCO* case, the Government did not appear nor present any case. In addition,

the Government instituted proceedings in its own courts in respect of the same dispute. That procedural misconduct justified the allocation of all costs on the Republic of Liberia (see also CH. SCHREUER, *The ICSID Convention: A Commentary*, Cambridge 2001, ad Art. 61, para. 24).

In the case at hand, the Claimant is manifestly responsible for several procedural incidents:

— It has filed a Request for Arbitration under an important international treaty framework and pursued it for two and a half years without being an investor. On the basis of the contemporaneous documents, the Arbitral Tribunal has concluded that that Cementownia and Kemal Uzan invented *post factum* the transaction and transfer of the shares in order to gain access to international jurisdiction to which neither the initial investor nor the putative successor was entitled;

— The arbitration proceeding and its schedule have been considerably delayed upon several requests of the Claimant. During the time that it was represented by Mannheimer Swartling, it sought two time extensions in order to file its Memorial on Jurisdiction and Liability (Claimant's request of December 30, 2008 and Claimant's letter of January 21, 2008). After Mannheimer Swartling's resignation, the Claimant requested no less than five time extensions going from 30 days to 12 months in order to produce evidence that it repeatedly claimed would prove its investment in CEAS and Kepez (Claimant's letters of July 9, 2008; September 6, 2008; October 15, 2008; November 13, 2008 and March 25, 2009);

— Mannheimer Swartling's withdrawal caused additional delays in the proceedings. The Claimant requested several time extensions in order to find new legal representation, advising the Tribunal a number of times that it was about to retain counsel and never doing so until its eleventh hour appointment of Messrs. Tessonière and Sardain (who lasted less than ten days before the Tribunal was advised that counsel was not in fact retained to represent the Claimant in this proceeding). The Arbitral Tribunal has showed considerable patience from June 23, 2008, the date of the withdrawal, until May 6, 2009, the date of the hearing. The Claimant's conduct in this regard has moreover brought confusion to the issue of Cementownia's representation. With respect to Mr. Biserov's power of representation, the Arbitral Tribunal, notwithstanding the fact that it left this question open (see above para. 102), stresses that the Claimant has not at all attempted to clarify this procedural matter. This issue became even more confusing when the Claimant first announced that Messrs. Tessonière and Sardain, duly authorized by power of attorney of April 27, 2009, would represent it at the hearing, and when these two lawyers then informed the Arbitral Tribunal the day before the hearing that they had never been authorized to represent the Claimant. Finally, the Claimant did not even appear at the hearing on May 6, 2009, despite its having previously announced its participation.

— The Claimant's prayers for relief have changed: In its Memorial of April 15, 2008, the Claimant requested the Arbitral Tribunal to order Turkey to pay compensation to Cementownia in an amount not less than US \$4,000,000,000. In its letter of December 4, 2008, the Claimant requested the Arbitral Tribunal to discontinue the case without prejudice to its rights. In its letters of February 21, March 16 and March 25, 2009, the Claimant did not oppose dismissal of the proceedings on the basis of lack of jurisdiction, if the sole basis for such ruling was that the Claimant had not come forward with the bearer shares at issue. Finally, the day before the hearing, the Claimant concluded that it was commonly agreed by the Parties that the Tribunal lacks jurisdiction because the Claimant had not proven ownership of CEAS and Kepez shares. In addition to this, the Claimant submitted further conclusions with regard to the Respondent's prayers for relief.

— Meanwhile, Cementownia has sold virtually all of its operating assets and has gone out of business. Indeed, by two contracts dated March 28 and April 5, 2007, respectively, Cementownia sold its factories, its right to the land where the factories were located, and the appurtenant equipment and materials, to Polski Cement Holding SA and Polska Energetyka Holding (two other Uzan-controlled companies) (Exh. R-9 and R-10). The Arbitral Tribunal therefore agrees with the Respondent that Cementownia is now an empty shell the purpose of which was to pursue this arbitral proceeding without any exposure to an award of costs. (Respondent's Request for an Order for the Posting of Security for Costs of December 18, 2008, para. 4.8). In the Tribunal's view, when confronted with the burden of submitting original documents for forensic analysis, the Claimant sought to then delay the consideration of the Respondent's objections and to try to withdraw from the case on a without prejudice basis.

159. In light of all the above-stated considerations, the Arbitral Tribunal is of the opinion that the Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process. In addition, the Claimant is guilty of procedural misconduct: once the arbitration proceeding was commenced, it has caused excessive delays and thereby increased the costs of the arbitration.

As can be seen by the ICSID case-law (see above para. 158), the misconduct of an arbitration proceeding leads generally to the allocation of all costs on the party in bad faith. As the present case concerns an accumulation of liabilities — abuse of process and procedural misconduct — there is good cause for the Arbitral Tribunal to go beyond the general sanction and to declare that the Claimant has brought a *fraudulent* claim against the Republic of Turkey.

IV. Declaratory and Financial Consequences

1. Declaratory Consequences

a) The Issue

160. The Respondent seeks a formal declaration from the Tribunal that Cementownia's claim is manifestly ill-founded. The Claimant opposes this prayer for relief.

The Arbitral Tribunal will therefore examine whether the Respondent's request is well founded.

b) The Parties' Positions

161. The Respondent seeks a declaration stating that Cementownia's claim is manifestly ill-founded in the award whereas the Claimant asserts that there is no reason for the Arbitral Tribunal to grant such a declaration (Resp. 9 Feb. 2009, para. 227 and Claimant's Letter of May 5, 2009, para. 5.1).

b) The Arbitral Tribunal's Decision

162. As stated above (see para. 158), the Arbitral Tribunal is of the opinion that the Claimant is responsible for several procedural incidents. It arises out of the file that companies owned or controlled by the Uzan family have filed two other requests for arbitration against Turkey within the ICSID framework (*Europe Cement Investment Trade SA v. Republic of Turkey* and *Libananco Holdings Co. Ltd. V. Republic of Turkey*). In addition, Kemal Uzan has himself filed an appeal before the European Court of Human Rights against the Republic of Turkey.

On the basis of the procedural incidents caused by the Claimant in the case at hand, the Arbitral Tribunal is of the opinion that, in the present case, Mr. Kemal Uzan attempts to gain access to international jurisdiction without having made an investment within the meaning of Art. 1(6) of the ECT. By agreeing to dismiss the present claim on the basis of lack of jurisdiction, but only without prejudice to its rights, the risk is considerable that the Claimant will file other similar or identical requests before other international jurisdictions or even before ICSID. The Arbitral Tribunal condemns such conduct, which constitutes a manifest abuse of the international institutional arbitration system. A formal declaration in the present Award would therefore constitute a fully justified remedy in order to prevent the Claimant from filing this baseless claim before other international jurisdictions or even before ICSID again.

163. Consequently, the Arbitral Tribunal accepts the Respondent's request for a declaration in the Award that the Claimant has filed a fraudulent claim before ICSID.

2. Financial Consequences

a) The Issue

164. With respect to monetary consequences, the Respondent seeks the following prayer for relief (Resp. 9 Feb. 2009, para. 232):

"Awarding monetary compensation to the Republic in an amount to be fixed by the Tribunal"

The Claimant requests that this prayer for relief should be rejected.

The Arbitral Tribunal will therefore examine whether the conditions for monetary compensation are fulfilled.

b) The Parties' Positions

i. The Respondent's Position

165. Tribunals applying international law may award to a State the remedy of satisfaction where it has suffered an intangible injury, such as injury to its reputation or prestige. In investment treaty cases, compensation has been awarded where the injury was inflicted maliciously.

According to the Respondent, Cementownia's conduct in this case has been egregious and malicious. It has asserted and pursued a baseless claim and it has made spurious allegations against Turkey with the intent of damaging its international stature and reputation. Referring to two ICSID cases (*Desert Line Projects LLC v. Republic of Yemen*, (ICSID Case No. ARB/05/17), award of February 6, 2008, available at <http://www.worldbank.org/icsid> — RLA-17; and *Benvenuti et Bonfant srl v. The Government of People's Republic of Congo* (ICSID Case No. ARB/77/2), award of 8 August 1980 in 1 ICSID Reports 365; 21 ILM 740 — RLA-8), the Respondent states that "although both of these cases involved awards of 'moral' or 'equitable' damages to the claimant party, there is no principal reason why equivalent relief should not be available to the respondent State in an appropriate case." (Resp. 9 Feb. 2009, para. 226 with footnote). The Respondent therefore requests an award of damages separate from and additional to a costs award.

ii. The Claimant's Position

166. According to the Claimant, the issue of moral damage is not clarified. The conditions for moral damage are not fulfilled in the present case. In particular, the condition of exceptional and specific circumstances is absent since it was the Respondent which exerted the physical duress (Claimant's Letter of May 5, 2009, para. 5.2).

3. The Arbitral Tribunal's Decision

167. In the *Benvenuti* case (see above para. 165, p. 361), that arbitral tribunal dealt with the question of intangible loss and stated the following:

"(...) The Tribunal has reason to doubt B&B's simple statement that it lost its credit with its suppliers or bankers or that it could not obtain the necessary personnel. Taking into account, however, the measures of which B&B was the object and the proceedings resulting therefrom, which have certainly disturbed B&B's activities, the Tribunal considers it equitable to award it the sum of CFA 5,000,000 as damages for intangible loss."

168. In the *Desert Line Projects LLC v. Republic of Yemen* (see above para. 165), that arbitral tribunal first stated that investment treaties :

"(...) do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides economic damages" (para. 289).

169. As can be seen by these two awards, there is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages. It must however be stressed that in the *Desert Line Projects* case, the arbitral tribunal decided, on the basis of the obligations contained in the Bilateral Investment Treaty (BIT) between Yemen and Oman, in particular the obligation of security, that exceptional circumstances, such as physical duress suffered by the investor, justified the compensation.

170. In the present case, it is the Claimant — the purported investor —, and not the Respondent — the Government — that is responsible for the abuse of process. In contrast to the *Desert Line Projects* case (see above para. 165), where the investor based its request for compensation for moral damages on the Yemen-Oman BIT, the Respondent requests, in the case at hand, that the Arbitral Tribunal grant compensation for moral damages based merely on a general principle, *i.e.*, abuse of process. It is doubtful that such a general principle may constitute a sufficient legal basis for granting compensation for moral damages. In any event, such compensation goes clearly beyond the general sanction of awarding the total costs on the responsible Party, a sanction that is based on Article 58(1) of the Arbitration (Additional Facility) Rules.

171. A symbolic compensation for moral damages may indeed aim at indicating a condemnation for abuse of process. However, in the case at hand, the Arbitral Tribunal deems it more appropriate to sanction the Claimant with respect to the allocation of costs (see below para. 173 *et seq.*). In any case, since the Arbitral Tribunal has already accepted the Respondent's request with respect to the fraudulent claim declaration, the Respondent's objective is already achieved.

Consequently, the Respondent's request for moral damages is dismissed.

4. Conclusion

172. On the basis of the above-mentioned considerations, the Arbitral Tribunal declares formally that the Claimant has filed a fraudulent claim against the Republic of Turkey. The Respondent's first remedy request is therefore accepted.

On the other hand, the Respondent's second remedy request is dismissed.

V. Costs

1. The Issue

173. The Parties submitted their statements on costs simultaneously on June 8, 2009. The Claimant informed the Arbitral Tribunal that its total costs incurred in connection with this proceeding were USD 1,363,449.95 (legal advisor and notary fees of USD 873,198.70; disbursement of USD 415,251.25; advances on the Tribunal's fees and costs of USD 75,000.00). Respondent determined that its total costs in connection with this arbitration were USD 5,179,822.06 (legal fees of USD 3,859,053.35; disbursements of USD 1,045,768.71; advances on the Tribunal's fees and costs of USD 275,000.00).

174. In its Memorial on jurisdiction and liability, the Claimant requested the following (Claim. 15 April 2008, para. 13):

“Order Turkey to compensate Cementownia for its costs of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone bear the compensation to the Tribunal and the Secretariat of the Centre”

In its Memorial on jurisdiction, the Respondent requested the following (Resp. 9 Feb. 2009, para. 232):

“Awarding to the Republic all of its costs and expenses associated with this proceeding, plus interest.”

2. The Parties' Position

106. Both Parties have asked that their legal and arbitration costs be borne by the other Party.

3. The Arbitral Tribunal's Decision

175. Article 58(1) of the Arbitration (Additional Facility) Rules reads as follows:

“Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.”

This provision establishes the Arbitral Tribunal's discretion in allocating arbitration costs (the advances paid by the Parties to ICSID) and the fees for legal representation between the Parties as it deems appropriate.

176. While many ICSID tribunals have ruled that each party should bear its own costs, some have applied the principle that “costs follow the event”, making the losing party bear all or part of the costs of the proceeding and attorney fees. (See, in particular, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), award of August 27, 2008, para. 307 *et seq.*).

177. In the circumstances of this case, the Arbitral Tribunal intends to employ this principle for the following reasons:

- The Claimant has filed a fraudulent claim;
- The Claimant has failed on all its requests for relief;
- The Claimant has delayed the present arbitration proceeding and therefore raised its costs;
- The Claimant has never signed the Custody Agreement, notwithstanding repeated direction to do so;
- It not complied with the ICSID Secretariat's instruction of May 21, 2008 and May 26, 2009 to pay the advance payment, thus forcing the Respondent to bear the major part of the costs of the arbitration; and

— The Claimant used the pendency of the arbitration to dispossess itself of its Polish assets in an attempt to make it “award-proof”.

178. Therefore, using its discretionary power, the Arbitral Tribunal concludes that the Claimant is to bear all ICSID costs (the fees and expenses of the Members of the Tribunal and of the ICSID Secretariat) which are estimated to USD 400,000.00. The Claimant is to pay to the Respondent USD 325,000.00, which represents the Respondent’s contribution to ICSID. The Tribunal further finds that the Respondent’s legal fees and expenses are not unreasonable having regard to the course of these proceedings and that, therefore, the Claimant is to bear such costs in the amount of USD 4,904,822.06.

C. Award

179. For the reasons stated above, the Tribunal unanimously decides:

1. The claim brought by the Claimant is dismissed in its entirety for two reasons:

a) the failure of the Claimant to prove that it owned or controlled an investment in accordance with Articles 1(6), 1(7) and 26(1) of the Energy Charter Treaty;

b) the finding by the Tribunal that the Claimant’s claim is fraudulent and was brought in bad faith.

2. The Claimant shall pay to the Respondent USD 5,304,822.06, which represents the Respondent’s legal fees and expenses and the Respondent’s contribution to the costs of these proceedings.

3. In the event of non-payment of the amount owing under (2) above within 30 days of notification of the Award, interest be at the 6 month successive EURIBOR rate plus 2% for each year, or portion thereof, beginning 30 days from the date of notification of the Award. Interest shall be compounded semi-annually.

4. All other claims are dismissed.

Professor Pierre Tercier

President

Date: September 11, 2009

Marc Lalonde, P.C., O.C., Q.C.

Arbitrator

Date: Sept. 10, 2009

Mr. J. Christopher Thomas, Q.C.

Arbitrator

Date: 03 September 09

Footnotes

¹ The following abbreviations are used in the present document:

— Claim. 15 April 2008: Claimant’s Memorial of April 15, 2008

— Resp. 9 Feb. 2009: Respondent’s Memorial on jurisdiction of February 9, 2009

— Exh. C- []: Exhibits to the Claimant’s submissions

— Exh. R- []: Exhibits to the Respondent’s submissions

— Exh. CLA- [...] Exhibits to the Claimant’s Legal Authorities

— Exh. RLA- [...] Exhibits to the Respondent’s Legal Authorities

— PO No. [...] The Arbitral Tribunal's Procedural Order No.