In the matter of:

CEM CENGIZ UZAN, Claimant

VS.

THE REPUBLIC OF TURKEY, Respondent

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

CASE No. V 2014/023

EXPERT OPINION

BY

PROFESSOR ADNAN AMKHAN BAYNO

Head of MENA Chambers

Former Head of Legal Affairs Department of the Energy Charter Secretariat, Brussels

INTRODUCTION

1. My name is Adnan Amkhan Bayno. I am an international investment and commercial arbitration practitioner, acting both as arbitrator and counsel. I am a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators, and a Senior Research Fellow of the Energy Analysis Group at the University of Kent.

2. I was an Honorary Senior Fellow at the Law School of the University of Edinburgh and Fellow in Law at the School of Law of the University of Bedfordshire, in both of which I taught international investment law and international commercial arbitration to postgraduate students. I was also Professor of International and European Law at BPP Law School, London.

3. I am a former Head of the Legal Affairs Department of the Energy Charter Secretariat (2000 to 2004), during which period I was responsible for all legal matters of the Energy Charter Conference and its Secretariat. I was responsible for drafting the Energy Charter Treaty Transit Protocol (yet un-adopted). The task of drafting the Transit Protocol involved an extensive examination of the negotiating history of the Energy Charter Treaty (hereinafter referred to as the "ECT" or "Treaty").

4. Prior to joining the Energy Charter Secretariat, I was a lecturer in law at the University of Edinburgh where I taught and supervised postgraduate students in international law, international economic law and international commercial arbitration.

5. I have advised governments, international organisations, multinational companies and private clients on matters relating to international law, international investment law, energy law and international commercial arbitration. I have given expert legal evidence before domestic and international courts and tribunals, including the International Court of Justice, the Arbitration Institute of the Stockholm Chamber of Commerce and the International Chamber of Commerce.

6. With respect to arbitrations brought under the ECT, I was lead counsel in *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* (Jurisdiction and Liability, SCC Arbitration Case No. V (064/2008)), and have given expert legal evidence in various cases, including: *Nykomb Synergetics Technology Holding AB v The Republic of Latvia* (SCC Arbitration No. 118/2001); *Petrobart Limited v The Republic of Kyrgyzstan* (SCC Arbitration No. 126/2003); *Electrabel S.A. v The Republic of Hungary* (ICSID Case No. ARB/07/19), and *Anatolie Stati, Gabriel Stati, Ascom Group s.a., and Terra Raf Trans Trading v. Republic of Kazakhstan* (SCC Arbitration Case No. V (116/2010)).

7. I have been asked by LALIVE, acting for the Republic of Turkey in the instant proceedings(*Cem Gengiz Uzan and the Republic of Turkey*, SCC Arbitration Case No. V (2014/023)), to provide one legal opinion in which I am to:

    - Review the Claimant's Statement of Claim and Professor Charles Leben's Expert Opinion; and
    - Respond to the arguments made by the Claimant and Professor Leben in the Claimant's Statement of Claim and Professor Charles Leben's Expert Opinion.

8. I was also instructed that my opinion should, in particular, address the definition of "Investor" under Article 1(7) of the ECT and whether a Turkish national who is allegedly "permanently residing" in another ECT member state qualifies for protection under the Treaty and can file claims against Turkey.

9. Accordingly, this opinion is set out the following main parts:

    - The Energy Charter Treaty;
    - The Processes Involved in Interpreting a Treaty;
    - Jurisdictional Issues: Article 26 ECT;
    - Conclusions.

10. LALIVE has supplied me with copies of the following submissions and documents:

    - Claimant's Request for Arbitration, dated 7 March 2014;
    - Respondent's Answer to the Request for Arbitration, dated 2 May 2014;
    - Claimant's Comments to the Respondent's Answer to the Request for Arbitration, dated 26 May 2014;
    - Claimant's Statement of Claim, dated 22 February 2015;
    - Expert Opinion of Professor Charles Leben, dated 16 February 2015.

11. I am mindful of the fact that members of the Arbitral Tribunal are eminent practitioners with extensive experience in international law, the ECT and investment treaty arbitration. I have therefore tried to keep this opinion brief. I believe that my experience as a former Head of Legal Affairs of the Energy Charter Secretariat, my close familiarity with the ECT and its negotiating history,[1] my subsequent practice in various ECT disputes and international arbitration, as well as my extensive academic background may be of assistance to the Arbitral Tribunal.

12. I am independent of the parties, their counsel and the members of the Arbitral Tribunal and I have no interest, financial or otherwise, in the outcome of this arbitration.

[1] In addition to having had the opportunity to examine the ECT's negotiating history during the Transit Protocol

13. I confirm that to the best of my knowledge this opinion and the conclusions therein are true.

THE ENERGY CHARTER TREATY

14. In this section I will provide an explanatory review of two interlinked and contextually important issues. First, since I shall be relying on the relevant ECT negotiating documents, I shall give a summary, by way of a background, of the negotiations and the designation of the *travaux préparatoires* of the ECT. Second, I will briefly review of the nature, scope and purpose of the ECT.

A BRIEF SUMMARY OF THE ECT NEGOTIATIONS AND THE DESIGNATION OF THE TRAVAUX DOCUMENTS

15. The initiative which led to the European Energy Charter and (subsequently) the ECT was first proposed by the Dutch Prime Minister, Mr. Ruud Lubbers, at the European Council in June 1990. He pointed out that there was a natural complementarity between the vast energy resources of the Eastern countries, particularly the former USSR, and the resources of business skills, technology and the significant capacity of private investment available in the Western countries. Mr. Lubbers' proposal was that these strengths should be brought together in a new East-West co-operation, which could act as a driving force for economic recovery in the East. Mr. Lubbers suggested that the damaging economic consequences of the disintegration of the Communist bloc could be halted through co-operation in the energy sector.

16. The other European Community heads of government present at the European Council welcomed Mr. Lubbers' proposal and asked the European Commission to study ways to put his idea into action. In February 1991, the Commission proposed the idea of a European Energy Charter. As a result, the European Community called together an international conference to discuss the proposal with other countries. The Charter Conference met for the first time in July 1991 and was attended by all the countries of Europe, including the USSR as it then was, as well as non-European countries of the OECD such as the U.S., Canada, Australia and Japan. This conference launched the negotiations on a European Energy Charter.

17. The "Conference on a European Energy Charter" formed several Working groups. Thus, Working Group I developed the European Energy Charter ("EEC"), which was intended to be a mere political declaration and which was signed on 19 December

1991. The EEC sets out the objectives of the representatives in the field of energy investment and trade, and calls for coordinated action to attain those objectives. The EEC negotiators agreed to negotiate various protocols pertaining to various aspects of the energy sector.

18. Working Group II was mandated to negotiate a "Basic Protocol"– this term was later changed to "Basic Agreement" in October 1991. This Basic Agreement was meant to contain relevant fundamental principles of investment, trade and dispute settlement mechanism. Three other Groups were established to negotiate the rules applicable to oil and gas, nuclear energy and energy efficiency.

19. Little progress was made by the last three groups. As a result, emphasis shifted (in the summer of 1992) towards concentrating the negotiations in Working Group II with the aim of focusing on one single wide-ranging treaty. In the spring of 1993, the primary negotiating responsibility moved from Working Group II to the European Energy Charter Conference meeting in Plenary Session, which began to call the "Basic Agreement" the "Energy Charter Treaty". The last formal meeting of the Conference Plenary was held in June 1994.

20. The system of document designation used in the negotiations reflects these stages. After the initial issuance of several "BP" designated documents (i.e., "Basic Protocol"); documents referring to the "Basic Agreement" bore the designation "BA". Documents of the Conference Plenary were "CONF" followed by a number and, if the particular "CONF" document was a draft treaty text, it also bore a serial "ECT" number. Notes and reports produced by the Legal Sub-Group (established in 1992) were labelled as "LAG".

21. Negotiations and discussions revolved around draft treaty language prepared by the Chairman of the Working Group II or by the provisional Energy Charter Secretariat. A draft text that had not been agreed was submitted within square brackets and/or underlined; other proposed amendments were contained in footnotes to each draft article. Amendments proposed during meetings were normally named "Room Document / (RD)", and commonly found their way into a subsequent draft version of the ECT text. In certain cases, the Chairman of Working Group II or the Chairman of the Conference Plenary introduced a "Chairman's compromise" draft treaty text, which constituted the main text of negotiations.

22. I make these clarifications, insofar as relevant for the Tribunal's review of some of the exhibits appended to this opinion.

NATURE, SCOPE AND PURPOSE OF THE ECT

23. The ECT was signed and applied provisionally on 17 December 1994. It entered into force on 16 April 1998 after having received the required thirty ratifications. As of 21 March 2015 forty-eight states (as well as the European Community, now European Union) have ratified or acceded to the ECT. Five signatories are still to ratify.[2] It is to be noted that Turkey, France and the United Kingdom are ECT Contracting Parties.

24. It is to be noted that the ECT is far more than a typical investment treaty. In addition to provisions pertaining to the promotion and protection of investment in the energy sector (Part III, Articles 10-17), the ECT contains, *inter alia*, provisions covering trade, competition, access to capital, transfer of technology, environment and transit.

25. The main purpose of the ECT is set out in Article 2, which reads as follows:

> "This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field based on complementarities and mutual benefits, in accordance with the objectives and principles of the ***Charter.***"[3]

26. It is to be noted that the word "**Charter**" in Article 2 is a reference to the EEC.[4] The relevant point for the purpose of this opinion is that the objectives and principles of the EEC have been incorporated into the ECT text by virtue of Article 2.

27. Under Title I, entitled "Objectives", the signatories of the EEC undertook "to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation …". The signatories were further determined "to create a climate favourable to the operation of enterprises and to the *flow of investments* and technologies by implementing market principles in the field of energy." (Emphasis added.)

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[2] The five signatories which have not yet deposited instruments of ratification are Australia, Belarus, Iceland, Norway and the Russian Federation (the Russian Federation withdrew its provisional application of the ECT in 2009). Belarus applies the ECT on a provisional basis.

[3] Emphasis added.

[4] Article 1(1) of the ECT defines "Charter" as "the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter." The European Energy Charter is a political declaration, which provided the impetus for the subsequent ECT.

28. In terms of implementing the EEC objectives (Title II, "Implementation"), the signatories of the EEC undertook "to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial sources, and to facilitate co-operation between such enterprises or institutions from different countries, acting on the basis of market principles."

29. More important however: "[i]n order to promote the *international flow of investments*, the signatories will at national level provide for a stable, transparent legal framework for *foreign investments*, in conformity with the relevant international laws and rules on investment and trade." (Emphasis added.)

30. To sum up: as noted above, some of the central objectives of the ECT are: (a) to promote long-term co-operation in the energy field based on complementarities and mutual benefits between its Contracting Parties, and (b) to promote *international* flow of investment by providing a high level of protection to *foreign* investments. This is so because the underlying central aim of the whole Energy Charter process is to improve the "security of energy supply": an aim that cannot be achieved without secure *international* investment.

31. In my opinion, it is with the above context in mind that the relevant provisions of the ECT should be construed and indeed interpreted.

THE PROCESSES INVOLVED IN INTERPRETING A TREATY

32. Since the present dispute has arisen in connection with the ECT, the meaning of any of its provisions should be ascertained in accordance with the generally accepted principles and rules of treaty interpretation.

33. In his seminal work on the subject of treaties, Lord McNair described the duty of the interpreter of a treaty "... as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*."[5] *Oppenheim* observes further that:

> "The purpose of interpreting a treaty is to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen."[6]

34. The specific methodology which an interpreter of a treaty is under duty to follow is codified in Articles 31-33 of the 1969 *Vienna Convention on the Law of Treaties* ("VCLT"). Due to the central importance of these articles to many of the issues examined in this opinion, and for ease of reference, it is appropriate to reproduce them below.

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

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[5] Lord McNair, *The Law of Treaties*, 1961, p. 365 (footnote omitted and emphasis in the original). [AAB-1]

[6] *Oppenheim's International Law*, (edited by Sir Robert Jennings and Sir Arthur Watts), 9th edition, 1996, p. 1267. [AAB-2]

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

THE GENERAL RULE AND MEANS OF INTERPRETATION

The General Rule

35. Article 31(1) VCLT provides the foundation of the applicable method of interpretation: good faith, the ordinary meaning of terms, the context, and the object and purpose of the treaty. Accordingly, ascertaining the common intention of the parties to the ECT in their choice of certain terms must be undertaken according to the general rule set out in Article 31(1) of the VCLT.[7]

36. The methodology of interpretation set out in the chapeau of Article 31 of the VCLT is embodied in one single rule, as is clear from the title of that Article. Describing this method of interpretation according to Article 31, Anthony Aust observes:

> "Article 31 is entitled '*General rule* of interpretation'. The singular noun emphasises that the article contains only one rule, that set out in paragraph 1. One must consider each of its three main elements – *the text, its context and the object and purpose of the treaty*."[8]

37. Paragraph 2 of Article 31 of the VCLT enumerates the kind of evidence that may be resorted to in order to establish the context of the treaty.

38. A *good faith* interpretation is to be made of the ordinary meaning of that part of the text in dispute; however if "it is established" that the parties intended to give a term a "special meaning", a good faith interpretation requires that the term in question must be assigned the "special meaning" that the parties intended it should have (Article 31(4) above).

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[7] This was confirmed by a Statement read by the Chairman at the ECT's Adoption Session on 17 December 1994. The Chairman noted "that the representative of Norway supported" by other representatives, have declared that "[t]he Treaty [ECT] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." For the full Statement of the Chairman, please see Annex I to CONF 115, dated 6 January 1995. [AAB-3]

[8] Anthony Aust, *Modern Treaty Law and Practice*, second ed., 2007, p. 234. Emphasis added. [AAB-4]

Supplementary Means

39. In contrast to the single rule methodology of Article 31, the language of Article 32 is of a contingent nature. In the process of interpretation it permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty [the *travaux préparatoires*] and the circumstances of its conclusion."

40. This permissive recourse is exercised only where the application of the general rule set out in Article 31 "[l]eaves the meaning *ambiguous* or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable" or "to *confirm* the meaning resulting from the application of Article 31".

JURISDICTIONAL ISSUES: ARTICLE 26 ECT

41. The parties disagree with each other on a number of issues that bear directly on the interpretation and application of Article 26 of the ECT. One issue, which is vehemently contested by the parties, is whether or not the Arbitral Tribunal has *ratione personae* jurisdiction; in other words, does the Claimant, a Turkish national, have standing to initiate an international arbitration claim against the Respondent, Turkey, under the ECT?

42. The aim of this section of the opinion is to highlight some relevant aspects of the ECT that may assist the Arbitral Tribunal in answering the above question.[9] It is appropriate at the outset to place the question at issue in a slightly wider context by making three preliminary observations:

43. *First*, it is imperative to note that the method of interpreting the jurisdictional provision of the ECT is not different from the method followed in interpreting any of its other provisions. Thus, for example, the tribunal in *Mondev v. United States* observed that:

> "... there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties."[10]

44. I suppose neither party in the instant dispute disagrees with the above proposition.

45. *Second*, a fundamental principle of the ECT is that of the Applicable Law, which is clearly set out in Article 26(6) of the ECT, stipulates as follows:

> "A tribunal established under paragraph (4) shall *decide the issues in dispute* in accordance with this Treaty and applicable rules and principles of international law."[11]

46. These provisions are clear: an arbitral tribunal (such as the present one) that has been established pursuant to paragraph 26(4) of the ECT is to decide any disputed issues by applying (a) the ECT provisions and (b) the applicable rules and principles of international law. Thus the question whether or not the Arbitral Tribunal has jurisdiction over the Claimant must be answered pursuant to Article 26 of the ECT.

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[9] I assume that the parties agree that the Arbitral Tribunal has the competence to decide on all aspects of its jurisdiction (*competence-competence*).

[10] *Mondev* v. *United States*, Award, 11 October 2002, 6 ICSID Reports, 192 (2004), paragraph 43 (footnote omitted). Copy of the Award is also available on line at: http://www.state.gov/documents/organization/14442.pdf [AAB-5]

[11] Emphasis added.

47. *Third*, Article 26 of the ECT, in material parts, reads as follows:

> "(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement the investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
>
> ...
>
> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
>
> …
>
> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."

48. As is clear from the above provisions, Article 26(1) of the ECT stipulates, in the pertinent part, that Investor-Contracting Party arbitration is available for "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [of the ECT]...".

49. Some of the terms of Article 26(1) relevant to determining the jurisdiction of an arbitral tribunal seized under the ECT refer to terms defined in Article 1 of the ECT entitled "Definitions". These terms are: (i) Contracting Party, (ii) Investor, (iii) Investment, and (iv) Area. These "Definitions" apply to all articles of the ECT.

50. With the above in mind, it is now appropriate to consider the crucial question whether the Claimant, Mr. Cem Cengiz Uzan, qualifies as an "… Investor of another Contracting Party …" as required by Article 26(1) of the ECT.

THE ARBITRAL TRIBUNAL'S JURISDICTION *RATIONE PERSONAE* UNDER THE ECT

51. As will be demonstrated presently, I am of the firm opinion that the Claimant does not qualify as an "Investor" under the definitional Article 1(7)(a)(i) of the ECT.

52. I also submit that, even if we were to assume (*arguendo*) that the Claimant is "an Investor of another Contracting Party [France]", his claim on the basis of the ECT is bound to fail.

53. I believe that the above two proposition find unequivocal support in (a) the textual interpretation of the relevant provisions of the ECT, (b) the negotiating history of the Article 1(7)(a)(i) of the ECT, and (c) the applicable rules and principles of public international law.

THE MEANING OF "INVESTOR": ARTICLE 1(7)(A) OF THE ECT

Textual Analysis

54. For the purposes of ECT, its Article 1(7) provides a definition for the term "Investor". It reads as follows:

> "Investor" means:
>
> (a) with respect to a Contracting Party:
>
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party. [Footnote omitted.]
>
> (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraphs (a) for a Contracting Party.

55. In terms of its overall design, Article 1(7) requires little comment, apart from three general observations:

First, Article 1(7) as a whole refers to two categories of investors: (a) investors from a Contracting Party and (b) investors from a "third state" (i.e., from a non-Contracting Party).

Second, Article 1(7) identifies two kinds of investors: (a) natural persons, and (b) companies or other organisations.

Third, if a natural person is a citizen or a national of a Contracting Party or "permanently residing" in that Contracting Party, he could fall under the literal notion of Investor for the purposes of the ECT.

56. However, it is suggested that a closer look at the construction of Article 1(7)(a)(i) of the ECT makes clear that the provisions under examination are *ambiguous* because they are susceptible to *more* than one meaning.

57. The first meaning may be stated as follows: a natural person who is either a citizen of, or national of, or "permanently residing in" a Contracting Party, and thus recognised by the law of that Contracting Party, is an Investor for the purposes of the ECT.

58. The *other* construction from the wording maybe as follows: if the domestic law of a Contracting Party does not provide for the status of citizenship in its domestic law but recognises the status of nationality **or** "permanent residency" then either fall-back option will suffice for the natural person to qualify as an Investor.

59. It is important to note that on this second construction of Article 1(7)(a)(i) ECT all three categories or connections between an ECT Contracting Party and a natural person were meant to be covered, in the sense of "if not this then this". This construction is made probable by the conjunction "**or**"[12], which appears in the text of Article 1(7)(1)(a) ECT without punctuation.

60. For the above reason, it cannot be readily assumed that the mere fact a natural person who happens to reside in the territory of an ECT Contracting Party will *automatically* qualify as "Investor" under Article 1(7)(a)(i) of the ECT. As we shall see below, this is not what the drafters intended.

"Permanently Residing": A Special Meaning

61. It is also my contention that the term "*permanently residing*" in Article 1(7)(a)(i) bears a special meaning, in the sense recognised by Article 31(4) of the VCLT: "*A special meaning shall be given to a term if it is established that the parties so intended.*"

62. The above contention is supported by Article 1(7)(a)(i) negotiating history, which is summarised below (see paras. 69-76).

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[12] A pedant of the English language will appreciate the intricate functions served by the conjunction "or": According to the Shorter Oxford English Dictionary, "or" connects two words denoting the same thing". Vol. II, page 1457, 1983.[AAB-6]; interestingly, Black's Law Dictionary defines the conjunction "or" as follows: "[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things. It is also used to clarify what has already been said, and in such cases, means "in other words," "to-wit," or "that is to say." The word or is to be used as a function word to indicate an alternative between different or unlike things … In some usages, the word "or" creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, "or" may be construed to mean "and" …", 6th ed., p. 1095. [AAB-7]

63. Moreover, it is clear that the term "permanent residency" has mainly been employed in international investment agreements when certain countries were parties to such treaties, notably, Australia and Canada. For historical reasons, these Commonwealth economic immigration countries adopted a unique immigration status of "permanent residency".

64. Thus, the majority of bilateral investment treaties to which Australia is a party contain a unique definition of an investor. For the present purposes, the following three examples may suffice to elucidate this point:

- BIT between the Australia and Indonesia of 1993:[13]

  ARTICLE 1

  […]
  (b) "investor" means:
  (i) in respect of the Republic of Indonesia:
  (A) a **natural person** who according to the laws of the Republic of Indonesia is an Indonesian national; and
  […]
  (ii) in respect of Australia:
  (A) a **natural person** who is a citizen or **permanent resident** of Australia; and [...]

- BIT between Australia and India of 2000:[14]

  ARTICLE 1

  1. For the purposes of this Agreement: [...]

  (d) "investor" means:
  (i) in respect of India, a company or a **national**. A **national** is a person deriving status as an Indian national from the laws in force in India;
  (ii) in respect of Australia, a company or a **natural person** who is a citizen or **permanent resident** of Australia. A **permanent resident** is a **natural person** whose **residence** in Australia is not limited as to time under its laws; [...]

- BIT between Turkey and Australia of 2009:[15]

  ARTICLE 1

  […]
  (c) "investor" means:
  […]
  (ii) a natural person who is a citizen of the Republic of Turkey; or
  (iii) a natural person who is a citizen or **permanent resident** of Australia; […]
  (e) "**permanent resident**" means a natural person whose **residence** in Australia is not limited as to time under Australian law; [...]

[13] [AAB-8]

[14] [AAB-9]

[15] [AAB-10]

65. Furthermore, most of the Canadian BITs have a similar feature to the Australian BITs. For example:

- BIT between Canada and the Philippines of 1995:[16]

Article 1

[...]
(g)"investor" means:

in the case of Canada:

(i) **Any natural person possessing the citizenship of or permanently residing in Canada** in accordance with its laws; […]

who makes investment in the territory of the Republic of the Philippines; and

in the case of the Republic of the Philippines,

(i) Individuals who are citizens of the Philippines within the meaning of its Constitution; […]

66. Finally, it is interesting to note in this context that Article 201 of NAFTA defines "**national**" as "a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1".[17]

67. In light of the above brief survey, I am of the opinion that the term "*permanently residing in*" in Article 1(7)(a)(i) was included to bear a special meaning. It was not included, as we shall see in the next section, in order to expand the coverage of the investment standards of the ECT, nor as a "*generous approach*",[18] as alleged by the Claimant and its expert.

68. I shall now turn to the ECT's *travaux préparatoires*.

Summary of Article 1(7)(a)(i) ECT Negotiations

69. The initial draft texts of Article 1(7)(a)(i) of the ECT did not include the term "*permanently residing*". One of Australia's early proposals was that the text should "*refer to 'permanent residence' rather than 'nationality*' ".[19]

70. In a Memorandum dated 15 September 1992, the Chairman of the Legal Sub-Group noted that "*Australia said its law defines "permanent residents" but not "nationals*"".[20]

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[16] [AAB-11]

[17] [AAB-12]

[18] Professor Charles Leben's Legal Opinion dated 16 February 2015, p. 9, paras. 18-19.

[19] [AAB-13]

[20] [AAB-14] It is to be noted that until recently, most commonwealth countries provided for the categories of citizenship and "permanent residence" but not nationality.

71. It was not until 21 December 1992 that the term "permanently residing in" was introduced to the main text of the Basic Agreement (i.e., the Treaty), whilst remaining in square brackets[21] until 1 May 1993.[22]

72. Version 1 of the draft ECT, dated 15 March 1993 read as follows:[23]

> "Investor" [DL] of a Contracting Party means:
>
> (a) natural persons having the citizenship or nationality of**,** **or who are permanently residing in,** that Contracting Party **in accordance with its applicable laws**;

73. But in the subsequent versions of these provisions, the commas were deleted. And until 25 June 1993, the definition of investor read as follows:[24]

> "Investor" of a Contracting Party means:
>
> (a) natural persons having the citizenship or nationality of or who are permanently residing in that Contracting Party **in accordance with its applicable laws**;

74. In its Memorandum dated 25 June 1993, the Legal Sub-Group recommended the following changes in the text providing for the definition of investor:

> (7) "Investor" means:
> (a) with respect to a Contracting Party
> (i) a natural person having the citizenship or nationality **of or who is permanently residing** in that Contracting Party **in accordance with its applicable laws**;
> [...]
> (b) with respect to a **"third state"**, a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party."

75. The Legal Sub-Group further explained that "[t]here is a need to define "Investor" not only in relation to a "Contracting Party" but also with respect to "third states", since a "third state" standard is employed in several places in the Treaty for purposes of "the most favoured nation standard."[25]

76. Finally, I can confirm that there is nothing in the negotiating history of Article 1(7)(1)(a), nor of Article 26 of the ECT where the parties considered that natural

[21] [AAB-15]

[22] [AAB-16]

[23] [AAB-17]

[24] [AAB-18]

[25] [AAB-19]

persons who qualifies as Investors, through permanent residency, would be allowed to claim against their national home States.

SUMMARY AND CONCLUSIONS

77. First, the expression "permanently residing in" was introduced into the text of the ECT in order to cater for the special circumstances of countries like Australia, the legal system of which, did not contain or define the word "nationality", but recognised a well defined legal categories of "citizenship" and "permanent residency"; that this is the case is clear from many of the Australian BITs.

78. Second, applying the rule of treaty interpretation, the expression "permanently residing in" was included as a special term that denotes lasting and effective residency. It is therefore at least questionable that residency obtained by investing a certain amount of money, as is the case in some countries, will suffice for the purposes of qualifying as having a genuine link to an ECT Contracting Party. And it is also questionable that the Claimant fulfils the requirement of "permanently residing in" either the United Kingdom or France in the sense intended by the drafters of the ECT described above (see paras 69-76 above).

79. Third, it is not at all true that the inclusion of the legal status of "permanently residing in" into the ECT was meant to be an approach of "*generosity*". In fact the opposite is true, as is clear from the *negotiating history* of the Article 1(7)(a)(i) of the ECT. As has been shown above, the term "permanently residing" was included at the insistence of Australia, with the specific aim of accommodating Australia's immigration law position. There is nothing in the negotiating documents that indicate that intention of the drafters by including the term "permanently residing" was to widen or expand the definition of "Investor".

80. Finally, in light of the above analysis and taken the circumstances of the instant case into account, my opinion is that that the Claimant in the instant case is not an Investor in the sense of Article 1(7)(a)(i) of the ECT.

81. Accordingly, the dispute between the Claimant and the Respondent is NOT a dispute between a Contracting Party to the ECT (Turkey) and an "Investor of another Contracting Party [be it the UK or France]". It is a dispute between a State and its national, which falls outside the Arbitral Tribunal's jurisdiction that has been seized under the ECT.

WHAT IF THE CLAIMANT WAS CONSIDERED AS AN INVESTOR UNDER THE ECT?

82. In spite of my above-mentioned opinion, LALIVE has asked me to comment on the following question: *Assuming* that, by virtue of his residency either in the UK or France, the Claimant qualifies as an Investor under the ECT, would that entail that the present Arbitral Tribunal has jurisdiction *ratione personae*?

83. In my opinion, the answer is a resounding No; I say this for the following reasons.

84. As noted above, according to Article 26(6) of the ECT an arbitral tribunal established for the purposes of settling "disputes between a Contracting Party and an Investor of another Contracting Party … shall decide the issues in dispute in accordance with this Treaty [i.e., the ECT] and applicable rules and principles of international law."

85. The issue in dispute in the instant case is this: has the Claimant, who is a national of Turkey but who alleges that he resides in France, legal standing to bring an arbitration claim against Turkey under the ECT?

86. I believe the above question has already been answered differently by the disputing parties in the instant case. The Claimant seems to assume readily that by virtue of being a "resident" in France, he qualifies as an "Investor" of a Contracting Party. For this reason alone, argues the Claimant and his expert, the Tribunal has *ratione personae* jurisdiction. On the other hand, the Respondent argues that the wording of ECT provides a clear answer to the above question: The phrase "of another Contracting Party' in Article 26(1) ECT means *another* and not the same. This interpretation is supported by the context.

87. As demonstrated above, it is my opinion that under the circumstances of this case, the Claimant does not qualify as "Investor" under the ECT. However, the question put to me above (para. 82) *assumes* the scenario of the Claimant qualifying as an Investor under Article 1(7)(a)(i) of the ECT. Under this scenario, I am of the opinion that to answer the instant question one must turn to the rules and principles of public international law (Article 26(6) ECT).

88. It is an established principle of international law that an individual who is a dual national is not in a position to claim against the State with which such an individual has "dominant and effective nationality". It is in light of this principle that the above question must be answered.

89. I should like to reiterate that I am of the opinion that the rules of international law that apply to claims of dual nationals are relevant to the instant case, if and only if, the Arbitral Tribunal decides to accept that the Claimant qualifies as an ECT Investor by virtue of his current residency in France or the United Kingdom. This is because he, the Claimant, would be placed at the same position as a citizen or a national of "another Contracting Party" for the purposes of finding jurisdiction *ratione personae* under Article 26(1) of the ECT.

90. Without going into the minutiae of the well-established rules of international law pertaining to the claims of dual nationals, which no doubt the Arbitral Tribunal is familiar with, it may suffice here to refer to one particular case of the Iran-U.S. Claims Tribunal. In Case No. A/18,[26] the Full Tribunal, after a thorough examination of the dual nationality rule under international law, concluded as follows:

> "… the relevant rule of international law which the Tribunal may take into account for the for purposes of interpretation, as directed by Article 31, paragraph 3(c) of the Vienna Convention, is the rule that flows from the *dictum* "stronger factual ties between the person concerned and one of the States whose nationality is involved".
>
> In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment."[27]

91. Applying the above general principle of international law to the present case, it seems clear that, according to the facts, the Claimant's dominant and effective links (at all times) were and still are clearly with the Respondent State, Turkey (of which he is a national). His links with the alleged States of residency (France and the United Kingdom) are recent and tenuous. Accordingly, the Claimant does not have the standing to file an arbitration claim against his State of nationality.

92. In short, even if were to assume for the sake of argument that the Claimant qualifies as an "Investor of another Contracting Party" for purposes of the ECT, he does not have legal standing to bring an arbitration claim against the Respondent.

WHAT ABOUT ESTOPPEL?

93. The Claimant and his expert seem to assert that Turkey is *estopped* from arguing that the Claimant has no standing to initiate an arbitration claim under the ECT.

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[26] [AAB-20]

[27] *Ibid.*, p. 265.

94. This assertion is based on the fact that Article 1 of the Turkish Foreign Direct Investment Law No. 4875 of 5 June 2003 ("FDIL"), defines "foreign investor" as "[r]eal persons who posses foreign nationality and Turkish nationals resident abroad, …".

95. I am of the opinion that the doctrine of estoppel is not relevant in the instant case. The Respondent has not made any representation or acted directly or indirectly to indicate that the Claimant would qualify as an "Investor" of any other Contracting party other than Turkey.

96. As a matter of basic law, the ECT and the FDIL are two different legal instruments, each of which has its own jurisdictional and substantive provisions. If the cause of action is based on an alleged breach of the ECT, all relevant ECT requirements must be fulfilled. The same is the case with the FDIL. In other words, each piece of legislation, whether domestic or international, determines the scope of its application within its terms.

97. It cannot be argued therefore that because the Turkish FDIL defines the word 'investor' broadly, the same definition should apply, as far as Turkey is concerned, to the definition of the same word in the ECT. This cannot be so.

BRIEF COMMENT ON PROFESSOR CHARLES LEBEN'S LEGAL OPINION

98. With all due respect to Professor Leben, I find nothing in his legal opinion that undermines my analysis above. Most of Professor Leben's analysis is of general historical interest. I find no difficulty in not taking issue with his broad proposition that under public international law, an individual might bring a claim against a State. However, I am aware that Professor Leben was not privy to the negotiating history of the relevant ECT provisions; I still find his general assertions irrelevant to the issues at hand and indeed of little help for the purposes of the instant case. To take one example, Professor Leben observes that: "[a]ll this [his historical analysis] goes to show that prohibition of nationals from bringing claims against a State in an international court has been abolished a long time ago."[28] This proposition is followed by a reference to the ECT as an example, which I find of little value, if not misleading.

99. Professor Leben concludes his legal opinion with the following assertion:

[28] Professor Charles Leben' Legal Opinion, para. 12, p. 6.

> "Whether based on the general principle of estoppel or the law of treaties, it is possible and consistent with international law for Mr. Uzan to bring a claim before the arbitral tribunal on the basis of Article 26 of the ECT".[29]

100. It is no denying that Mr Uzan has filed an arbitration claim against Turkey, but the crucial question is whether or not such claim is admissible and thus falls within the jurisdiction of the tribunal under the applicable relevant provisions of the ECT and rules and principles of international law.

101. In light of my examination of the relevant law, I am of the opinion that Professor Leben has *erred* in arguing that the Claimant may successfully bring an arbitration claim against the Respondent under Article 26 of the ECT.

[29] *Ibid.*, para. 35, p. 16.

CONCLUSIONS

102. For the above reasons, my conclusions are as follows:

(a) A core objective of the ECT is to promote and protect *foreign* energy investments in order to secure a sustained flow of energy across national borders.

(b) The Claimant in the present proceedings is a Turkish national. As such, he qualifies, as a general matter, as an Investor under Article 1(7)(a)(i) of the ECT. On this account however, he lacks standing to initiate arbitration proceedings under Article 26 of the ECT, because he is not "an Investor of *another Contracting Party*".

(c) Even if one were to assume, for the sake of argument, that the Claimant is "an Investor of another Contracting Party", as a consequence of his residency, the Claimant will still lack standing to initiate an ECT arbitration claim against Turkey. This is because the "dominant and effective links" of the Claimant lie with Turkey, his State of nationality.

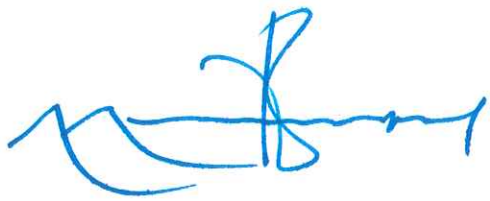
(d) Therefore, the Claimant's ECT arbitration claim must fail. He lacks standing. And, thus, the Arbitral Tribunal lacks jurisdiction *ratione personae*.

(e) Finally, I should like to reiterate that I have carefully considered Professor Leben's legal opinion of 16 February 2015. There is nothing in Professor Leben's legal opinion that dissuades me from the above conclusions.

I believe the contents of this opinion are true.

Done in Brussels: 23 June 2015

Respectfully submitted,



Professor Adnan Amkhan Bayno