

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Europe Cement Investment & Trade S.A.**  
Claimant

v.

**REPUBLIC OF TURKEY**  
Respondent

**(ICSID Case No. ARB(AF)/07/2)**

**AWARD**

**Tribunal**

**Professor Donald M. McRae**  
**Dr. Laurent Lévy**  
**Dr. Julian D.M. Lew, Q.C.**

**Secretary of the Tribunal**  
**Ms. Martina Polasek**

***For Claimant:***

Mr. Biser Hristov Biserov  
Kraków, Poland

***For Respondent:***

Ms. Lucy Reed and  
Mr. D. Brian King  
Freshfields Bruckhaus Deringer  
New York, NY, United States  
and  
Mr. Jan Paulsson  
Freshfields Bruckhaus Deringer  
Paris, France  
and  
Mr. Aydin Coşar, Ms. Arzu Coşar and  
Ms. Utku Coşar  
Coşar Avukatlık Bürosu  
Taksim, Istanbul, Turkey

*Date of Dispatch to the Parties: August 13, 2009*

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## **BACKGROUND**

1. On 6 March 2007, the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) registered a request for arbitration under the Additional Facility Rules submitted by Europe Cement Investment and Trade S.A., a company incorporated under the laws of Poland (the Claimant or Europe Cement), against the Republic of Turkey (the Respondent or the Republic).

2. The dispute concerned the Claimant's alleged shareholding in two electricity corporations, Cukarova Elektrik Anonim Sirketi (CEAS) and Kepez Elektrik T.A.S. (Kepez), established under the laws of Turkey. The claim arose out of the termination by the Respondent on 11 June 2003 of concession agreements granted to CEAS and Kepez in 1998 by the Turkish Ministry of Energy and relating to the generation, transmission, distribution and marketing of electricity in certain parts of Turkey (the Concession Agreements). The Claimant invoked Turkey's consent to arbitration under Article 26 of the Energy Charter Treaty. The request for arbitration had been submitted under Article 2(a) of the ICSID Additional Facility as Poland is not a Contracting State to the ICSID Convention.

## **THE PARTIES**

3. Europe Cement is a Polish joint stock company with its registered seat in Krakow. At the time of the registration of the request for arbitration the Claimant was represented by:

Messrs. Kaj Hobér,  
Jacob Ragnwaldh and  
Nils Eliasson  
Mannheimer Swartling Advokatbyrå  
Box 1711,  
111 87 Stockholm, Sweden

4. On 23 June 2008, the law firm of Mannheimer Swartling advised the Tribunal that they had resigned from the case. On 9 July 2008, the Tribunal received a letter from Mr. Biser Hristov Biserov, the Chairman of the Management Board and Managing Director of the Claimant, stating that the Claimant was searching for new counsel.

5. Shortly before the hearing on jurisdiction held in Paris on 3 May 2009, the Claimant informed the Tribunal that it was represented by:

Messrs. Guillaume Teissonnière and  
Frédéric Sardain  
Teissonnière Sardain Chevé  
25, rue Coquillière  
75001 Paris, France

Mr. Teissonnière attended the 3 May 2009 hearing.

6. The Respondent is the Republic of Turkey. Throughout these proceedings the Respondent has been represented by:

Mr. Jan Paulsson,  
Ms. Lucy Reed and  
Mr. D. Brian King  
Freshfields Bruckhaus Deringer LLP  
520 Madison Avenue, 34<sup>th</sup> Floor  
New York, NY USA 10022

and

Mr. Aydin Coşar,  
Ms. Arzu Coşar and  
Ms. Utku Coşar  
Coşar Avukatlık Bürosu  
Inonu Cad. No. 18/2  
344 37 Taksim  
Istanbul, Republic of Turkey

## **THE TRIBUNAL**

7. The Parties agreed that the Tribunal would consist of three arbitrators, but were unable to agree on the method of their appointment. The Tribunal was thus constituted in accordance with the procedure set out in Article 9 of the Arbitration (Additional Facility) Rules. The Claimant appointed Dr. Julian D. M. Lew as arbitrator. Dr. Lew accepted that appointment on 5 June 2007. The Respondent appointed Dr. Laurent Lévy as arbitrator. Dr. Lévy accepted that appointment on 18 June 2007.

8. The Parties having failed to agree on a presiding arbitrator, the Claimant requested that the Chairman of the Administrative Council of ICSID designate the President of the Tribunal pursuant to Article 6(4) of the Arbitration (Additional Facility) Rules. The Chairman appointed Professor Donald M. McRae as presiding arbitrator, who accepted that appointment on 10 September 2007. The Tribunal was thus constituted and the proceedings were deemed to have commenced on 13 September 2007.

9. Ms. Martina Polasek of the ICSID Secretariat was appointed as Secretary to the Tribunal on 30 October 2007.

## **THE PROCEDURAL HISTORY**

10. The Parties having been able to agree on all procedural issues on the Tribunal's agenda for a first session pursuant to Article 21 of the Arbitration (Additional Facility) Rules, they agreed that it was not necessary to hold an in person meeting between the Tribunal and the Parties. Consequently, the Tribunal held a first session by telephone conference among its Members on 21 November 2007, to discuss the Parties' joint submission on procedural matters

of 16 November 2007. After certain amendments agreed by the Parties, the Parties' joint submission on procedural matters was approved on 13 December 2007.

11. It was agreed that the Tribunal had been properly constituted in accordance with the ICSID Arbitration (Additional Facility) Rules and that the Rules in effect on 10 April 2006 would apply.

12. It was also agreed that the place of arbitration was Paris and that there would be bifurcation of the proceedings on liability and quantum.

13. Time limits for the filing of written pleadings were set as follows:

Claimant's Memorial, no later than 1 May 2008;  
Respondent's Counter Memorial, no later than 8 October 2008;  
Claimant's Reply, no later than 9 February 2009, and  
Respondent's Rejoinder, no later than 9 June 2009.

14. The oral hearing was set for the week of 9 November 2009.

#### **(a) Procedural Order No. 1**

15. On 19 December 2007 the Respondent filed a request for the suspension of the proceedings, a request for an order for the production of documents, and a request for security for costs. The Respondent claimed that the Claimant had made false statements in regard to its alleged ownership of the CEAS and Kepez investments in Turkey. The Respondent sought the production of documentary evidence relating to whether the Claimant owned certain shares at all relevant times.

16. The Respondent further claimed that the Claimant had no assets and thus provisional measures were necessary to protect the Respondent's right to apply for an award of costs. Because of what the Respondent claimed to be a potential abuse of process, the Respondent requested the suspension of the proceedings until the Claimant had proved its ownership. In a communication of 10 January 2008, the Respondent also requested a hearing to deal with these matters.

17. On 19 December 2008, the Claimant also filed a request for provisional measures seeking an order for the preservation and protection of certain documents allegedly seized from the premises of the Turkish companies CEAS and Kepez and now in the possession or under the control of the Respondent.

18. In Procedural Order No. 1 of 22 January 2008, the Tribunal rejected the Claimant's request for provisional measures relating to the protection of documents, noting the Respondent's assurance that it was the policy of the Republic of Turkey to preserve any documents seized and that this policy was to be applied in the present case.

19. The Tribunal also placed in abeyance the Respondent's request for the production of documents, pointing out that the question of ownership by the Claimant of an investment or

investments in Turkey, which was the subject of the request for the production of documents, was a matter that in the normal course of events would have to be established in the Claimant's Memorial. The Tribunal further noted that the Claimant was aware of the documents that the Respondent expects to see produced and presumably will take account of this in the production of evidence in support of its Memorial. The Tribunal indicated that the Respondent could renew its request for production of documents if necessary after the filing of the Claimant's Memorial.

20. The Tribunal also postponed the question of security for costs and denied the request for the suspension of the proceedings. It denied the Respondent's request for a date for a hearing, but set the date of 26 May for a potential hearing following the filing of the Claimant's Memorial in the event that the pending or renewable requests needed to be addressed further.

### **(b) Procedural Order No. 2**

21. On 13 March 2008 the Claimant alleged that certain circumstances had "severely undermined Europe Cement's right to fully present its case in this arbitration." The allegations concerned the surveillance by the Republic of Turkey of Claimant's representatives and witnesses by e-mail and telephone call interceptions. Since, the Claimant argued, this had impeded its preparation of witness statements from individuals inside Turkey, it asked for the postponement of the filing of its Memorial, and orders for discontinuance of surveillance and the production of intercepted emails and copies of intercepted telephone conversations. On 2 April 2008, the Claimant amended its request for postponement of the filing of the Memorial to a filing date of 22 May 2008, but excluding the submission of witness statements and expert reports that would require meetings to be held in Turkey.

22. On 20 March 2008, the Respondent responded that a Turkish Prosecutor had commenced criminal investigations in 2004 of certain Turkish nationals who are associated with the Claimant, but that the investigation was unconnected to the present arbitration. It renewed its request that the Tribunal order the Claimant to deposit its original CEAS and Kepez share certificates with the Tribunal for safekeeping.

23. In Procedural Order No. 2 of 11 April 2008, the Tribunal granted the Claimant an extension for the filing of the Memorial until 15 May 2008, noting that the Memorial should be supported with appropriate documents with regard to the question of the ownership by the Claimant of an investment or investments in Turkey. The Tribunal also stated that the Memorial need not be accompanied by witness statements and expert reports the preparation of which required meetings in Turkey. The Tribunal further stated that it saw no need to order the safekeeping of CEAS and Kepez shares pending the filing of the Memorial, but directed the Claimant to keep records of any transfer of those shares.

24. The Tribunal also set 25 May 2008 as the date for a hearing on all outstanding procedural matters, including any procedural matters arising out of the Claimant's Memorial. In respect of claims for the production of intercepted emails and telephone conversations, the Tribunal took note of the statement of the Deputy Chief Prosecutor for Sisli (Respondent's Exhibit RA-10), that "emails that are not related to the investigated crime or any other crime, emails that are duplicative or irrelevant to the investigation" to be a commitment by the Republic of Turkey that documents and telephone recordings in any way related to this arbitration derived from the

investigation had been or will be destroyed and that neither copies of those documents or telephone recordings nor their contents have been and will not be passed on to any other Ministry or Authority in Turkey or to any other person involved in the conduct of this arbitration”.

### **(c) The Claimant’s Memorial on Jurisdiction and Liability**

25. On 15 May 2008, the Claimant filed its Memorial on Jurisdiction and Liability. In its Memorial the Claimant alleged that it had purchased shares in the Turkish companies of CEAS and Kepez in May 2003. It claimed that the Concession Agreements held by CEAS and Kepez had been terminated unlawfully by the Respondent on 11 June 2000. It also claimed that the termination of the concessions was accompanied by police raids on the premises of CEAS and Kepez, physical mistreatment of the employees of CEAS and Kepez by the police, and confiscation of ledgers, records, files and other documents.

26. The Claimant alleged that the termination of the Concession Agreements was an unlawful expropriation of property contrary to Article 13 of the Energy Charter Treaty. It also claimed that Turkey had failed to accord Europe Cement’s investment “fair and equitable treatment”, contrary to Article 10(1) of the Energy Charter Treaty. The Claimant assessed the loss it had suffered from the wrongful acts of the Respondent to be in an amount exceeding \$3,800,000,000.

27. In proof of its ownership of shares in CEAS and Kepez, the Claimant produced with its Memorial copies of share certificates that it allegedly owned in CEAS and Kepez and copies of what were alleged to be share purchase agreements in respect of the shares in CEAS and Kepez, which Europe Cement claimed to have purchased in May 2003. The Memorial also included a witness statement from Mr. Kemal Uzan who purportedly sold the CEAS and Kepez shares to the Claimant.

28. On 22 May 2008, the Respondent renewed its request for the production of documents set out in a Redfern Schedule. The Respondent denied the adequacy of the documents produced to prove the Claimant’s ownership of the shares in CEAS and Kepez at the relevant time, and challenged the authenticity of documents that were produced. The Respondent requested that the Claimant produce the originals of the share certificates it claimed to own in CEAS and Kepez and originals or copies of share certificates of CEAS and Kepez that it claimed to have purchased in May 2003 or company records relating to those shares, and to make all available for forensic analysis.

29. The Respondent also requested documents evidencing the transfer and delivery of bearer shares and the production of a variety of documents relating to the management of the Claimant particularly in relationship to its alleged ownership of CEAS and Kepez shares, including resolutions, meeting minutes and financial statements. In the view of the Respondent the production of these documents was necessary in order to establish whether in fact the Tribunal had jurisdiction.

30. In its submission of 22 May 2008, the Respondent also renewed its request for security for costs.

#### **(d) Hearing of 25 May 2008**

31. At the hearing of 25 May 2008, held at the Paris offices of the World Bank, oral submissions were made on behalf of the Claimant by Kaj Hobér of Mannheimer Swartling, and on behalf of the Respondent by Jan Paulsson, Lucy Reed and Brian King all of Freshfields Bruckhaus Deringer. The Tribunal was provided with a copy of the orders of 1 May 2008, issued by the tribunal in *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No ARB/06/8). At the end of the hearing, the Tribunal made certain comments and directions to the Parties on the way forward, which were then incorporated in Procedural Order No. 3. Counsel for the Respondent made certain statements which were subsequently incorporated in Procedural Order No. 4.

#### **(e) Procedural Order No. 3**

32. In Procedural Order No. 3 of 29 May 2008, the Tribunal directed the Claimant to advise the Tribunal and the Respondent within 28 days of 25 May 2008:

- (i) whether it has the documents listed in the Redfern Schedule of 22 May 2008;
- (ii) any objections it has to the production of any documents on the grounds of relevance;
- (iii) how it will disclose those documents to the Respondent and the Tribunal;
- (iv) any claims to privilege it has with respect to any of these documents.

33. The Tribunal also directed the Parties to consult with a view to agreeing on an expert to examine the original documents mentioned in Request 1-3 of the Respondent's Redfern Schedule, including the questions that will be put to the expert; the means of access by the expert to the documents; the method and scope of reporting by the expert; and the timing for the expert's report to the Tribunal. The Parties were to notify the Tribunal of what they had agreed by 23 June 2008.

34. The Tribunal also directed the Claimant to provide a copy of the 2007 accounts of Europe Cement, without waiting for them to be audited.

#### **(f) Procedural Order No. 4**

35. In Procedural Order No. 4 of 4 June 2008, the Tribunal responded to the Claimant's requests relating to surveillance. The Tribunal concluded that in light of the assurances given by Counsel for the Republic of Turkey in the hearing of 25 May 2008, it had concluded that the following has been undertaken by the Republic of Turkey:

1. That all surveillance undertaken under the interception orders of the 2<sup>nd</sup> Criminal Court of Peace of Sisli was discontinued effective 14 May 2008.
2. That no intercept or other surveillance results relating to any communication between Counsel for Europe Cement, their witnesses and experts have been or will be used in this arbitration.

3. That intercepts and other surveillance results relating to communications between Counsel for Europe Cement, their witnesses and experts, if any, have been destroyed or would be destroyed by 30 May 2008.

4. That no other ministry or state organ of the Government of Turkey has received intercepts or other surveillance results relating to this arbitration.

5. That Counsel for Europe Cement will be able freely to enter and leave Turkey and have meetings with witnesses and experts or potential witnesses or experts to be used in this arbitration without surveillance and without intimidation or harassment of such witnesses and experts.

6. That the focus of the criminal investigation into the interception orders issued by the 2<sup>nd</sup> Criminal Court of Peace of Sisli relates to the wrongfully gaining possession and initial publication of the orders and there is no reason to believe that the lawyers for European Cement were involved in that.

36. The Tribunal thus concluded that there was no impediment to the Claimant obtaining the witness statements and expert opinions from individuals inside Turkey in order to complete the Memorial it had filed and set the date of 7 July 2008 for the filing of such witness statements and expert opinions.

### **(g) Resignation of Counsel for Europe Cement**

37. On 23 June 2008, Counsel for Europe Cement, Mannheimer Swartling, filed a partial response to Procedural Order No. 3 and advised that the Parties had not been able to agree on the matters on which they had been requested to agree in that Order. They also advised that they were resigning as Counsel for Europe Cement and asked that a reasonable time be granted for the Claimant to obtain new Counsel.

38. On 30 June 2008, the Respondent requested that the Tribunal proceed to rule on the Republic's request for security for costs and that it order the Claimant to transfer the original shares mentioned in Procedural Order No. 4 to a temporary depository.

39. On 9 July 2008 the Tribunal received a letter from the Chairman of the Board of Management and Managing Director of Europe Cement, Mr. Biser Hristov Biserov, requesting a suspension of deadlines for 90 days in order that the Claimant could instruct new counsel.

### **(h) Procedural Order No. 5**

40. In Procedural Order No. 5 of 23 July 2008, the Tribunal granted the Claimant a suspension of the deadlines set out in Procedural Orders Nos. 3 and 4 for a period of 45 days, that is to 8 September 2008. Europe Cement was also to advise the Tribunal by 22 August 2008 regarding the appointment of counsel.

41. The Tribunal also ordered that the original share certificates referred to in Procedural Order No. 3 be immediately transferred to a trust account to be established outside of Turkey in the names of the lawyers for the Republic of Turkey and the lawyers for Europe Cement, the account to be established initially in the names of the lawyers for the Republic of Turkey and the names of the lawyers for Europe Cement to be added after they were retained. If the lawyers for the Republic of Turkey did not wish to act as custodians, they were to advise the Tribunal of their search for an appropriate custodian.

42. The Tribunal further postponed the question of security for costs and any other outstanding questions to the end of the 45-day suspension period.

### **(i) Procedural Order No. 6**

43. On 6 September 2008, Europe Cement requested a further extension of deadlines for a period of 60 days to complete the hiring of counsel. On 2 September 2008, in response to an earlier communication of Europe Cement of 25 August 2008, counsel for the Respondent opposed any 60-day extension, suggesting that a maximum of 14 days was appropriate. In that letter the Respondent also enclosed a draft Custody Agreement for the deposit of the documents mentioned in Procedural Order Nos. 5 and 3, requested that the Tribunal approve the draft agreement and direct Europe Cement to sign it, complete the client identification requirements and deposit the relevant documents in accordance with Procedural Order No. 5.

44. In Procedural Order No. 6 of 12 September 2008, the Tribunal extended the suspension of deadlines for a further 28 days to 6 October 2008 and directed Europe Cement to advise it by 22 September on progress in the appointment of counsel.

45. The Tribunal also directed Europe Cement to advise the Tribunal no later than 22 September 2008 whether it had any objection to JPMorgan Chase Bank, National Association in London acting as custodian for the documents referred to in Procedural Order Nos. 5 and 3. The Tribunal further directed Europe Cement to advise the Tribunal by 6 October 2008 whether it has any objection to signing a draft Custody Agreement proposed by the Respondent and attached to the Order.

46. On 8 October 2008, Europe Cement made a request for a further extension of the deadlines granted in Procedural Order No. 6 and the Tribunal granted an extension in respect of all matters covered by Procedural Order No. 6 to 5 November 2008.

### **(j) Procedural Order No. 7**

47. On 12 November 2008, the Respondent drew the Tribunal's attention to the fact there had been no compliance by the Claimant with any of the rulings in Procedural Order No. 6 by the deadline of 5 November 2008, and requested the Tribunal to approve the Custody Agreement and fee schedule set out in the Respondent's letter of 2 September 2008. It also requested the Tribunal to direct Europe Cement to execute the Custody Agreement documents and complete JPMorgan's identification requirement and to produce the original share certificates to JPMorgan

as custodian and to produce the original share sales agreements to either JPMorgan or the Respondent.

48. The Respondent also requested the Tribunal to order Europe Cement to produce the documents listed in the revised Redfern Schedule of 22 May 2008 to which no objection had been made by the Claimant in its letter of 23 June 2008, and order Europe Cement to produce its 2007 financial statements. The Respondent also called on the Tribunal to rule on the production of the remaining documents in the Redfern Schedule. The Respondent noted that if the Claimant failed to comply with any of these rulings, the Respondent would seek the Tribunal to draw adverse inferences based on the non-production of share certificates and other documents.

49. On 13 November 2008, the Tribunal received a further request from Europe Cement for a 45-day extension for the appointment of counsel.

50. In Procedural Order No. 7 of 14 November 2008, the Tribunal gave a week, to 21 November 2008, for the Claimant to object to the appointment of JPMorgan Chase Bank, National Association in London as custodian for the deposit of the documents referred to in Procedural Order Nos. 5 and 3 and, in the event of such objection, to provide the Tribunal with an acceptable alternative custodian together with the agreement of that custodian to act. In the event of no objection, the Tribunal would appoint JPMorgan Chase Bank, National Association in London as custodian, and approve the Custody Agreement and fee schedule set out in the Respondent's letter of 2 September 2008.

51. The Tribunal also ordered the Claimant to deposit with the custodian all of the original documents referred to in Procedural Order Nos. 5 and 3 no later than 12 December 2008. By that date, too, the Claimant was to produce to the Tribunal and the Respondent the documents listed in the revised Redfern Schedule of 22 May 2008 to which no objection had been made by the Claimant in its letter of 23 June 2008.

52. The Tribunal also granted the Claimant a 45-day extension for the appointment of Counsel, to 29 December 2008 and directed the Claimant to provide the Tribunal no later than 1 December with a precise account of the stage it was at with the appointment of counsel.

53. The Tribunal further provided that in the event of failure of the Claimant to comply with any of the above procedural rulings, the Respondent was to advise the Tribunal no later than 5 January 2009 of the adverse inferences mentioned in its letter of 12 November 2008 that it wished to draw to the attention of the Tribunal. Any ruling made by the Tribunal in the light of such observations by the Respondent was to be communicated to the Parties no later than 19 January 2008.

54. Finally, the Tribunal stated that on 5 January 2009, it would make decisions on all outstanding procedural issues, including ruling on the production of remaining documents and security for costs, and determining the dates for the completion of the written and oral pleadings in this case including the filing of any preliminary objections. Any observations on these matters by either party were to be communicated to the Tribunal by 2 January 2008. Rulings on these matters were to be communicated to the Parties no later than 19 January 2009.

### **(k) Procedural Order No. 8**

55. Having received no objection from the Claimant by 21 November 2008 with respect to the appointment of the custodian, in Procedural Order No. 8 of 3 December 2008, the Tribunal appointed JPMorgan Chase Bank National Association in London as Custodian and authorized Respondent's counsel to proceed with the completion of the documents necessary for the opening and operation of the account and to require the Custodian to hold the documents ready for execution by the Claimant.

56. The Tribunal also reaffirmed its orders in Procedural Order No. 7 regarding the deposit of documents by the Claimant with the Custodian by 12 December 2008.

### **(l) Procedural Order No. 9**

57. By letter of 4 December 2008, Mr. Biserov advised the Tribunal that "due to the legacy of the previous management" Europe Cement would not be able to comply with the orders of the Tribunal. Mr. Biserov stated that the management of the Company had concluded that it would not be in the best interests of Europe Cement to continue the case and therefore he was informing the Tribunal of its "discontinuance of the Case, without prejudice to our rights".

58. On 5 December 2008, the Tribunal requested the Respondent to advise whether pursuant to Article 50 of the Arbitration (Additional Facility) Rules it opposed discontinuance of the proceedings.

59. On 16 December 2008, Counsel for the Respondent advised the Tribunal that it opposed discontinuance of these proceedings. It further queried whether Mr. Biserov had authority to act for Europe Cement. Noting that the Claimant wished to discontinue without prejudice to its rights, the Respondent stated that the Tribunal should "render an award finally disposing of this case". The Respondent also stated that it proposed to file its Memorial on Jurisdiction by 30 January 2009. The Respondent further requested "that a briefing schedule be established to permit its jurisdictional objections to be adjudicated in a bifurcated proceeding with an early hearing date".

60. In its Procedural Order No. 9 of 23 December 2008, the Tribunal ruled that in the absence of agreement between the Parties on discontinuance, the proceedings would continue pursuant to Article 50 of the Arbitration (Additional Facility) Rules.

61. The Tribunal further ruled that no later than 15 January 2009,

- (a) Mr. Biserov was to provide to the Tribunal proof of his authority to act on behalf of Europe Cement; and
- (b) the Respondent was to file with the Tribunal a statement of the relief it now seeks in this arbitration.

62. The Tribunal ruled in addition that no later than 30 January 2009, the Respondent was to file its Memorial on Jurisdiction and that no later than 45 days from the filing of the Respondent's Memorial on Jurisdiction, (on or before Friday 20 March 2009) the Claimant was

to file a Counter-Memorial on Jurisdiction. A hearing on jurisdiction was to be held in Paris on 3 and (if need be) 4 May 2009.

63. On 15 January 2009, the Respondent advised the Tribunal that the relief it requested was:

dismissal of Europe Cement's claim in its entirety on grounds of lack of jurisdiction, including principally that Europe Cement has failed to prove that it owned an investment in CEAS and Kepez at the time of the events complained of (June 2003) or at any other relevant time;

the drawing of adverse inferences against Europe Cement based on its failure to comply with the Tribunal's orders to produce: (i) the originals of the purported share certificates and share purchase agreements that it submitted in copy with its Memorial; and (ii) the other documents relevant to ownership that Procedural Order No. 7 directed it to produce;

an award of the Republic's full costs of arbitration with interest.

64. The Respondent also reserved the right to seek further and additional relief in its Memorial on Jurisdiction.

#### **(m) The Respondent's Memorial on Jurisdiction**

65. On 30 January 2009, the Respondent filed its Memorial on Jurisdiction. In its Memorial the Respondent requested that the Tribunal issue an Award:

- “(1) Dismissing Europe Cement'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.”

#### **(n) The Claimant's request for dismissal**

66. On 24 March 2009, Mr. Biserov wrote to the Tribunal indicating that Europe Cement had reviewed the Respondent's Memorial but that it was hindered by the fact that it had been unable to hire counsel. The letter reiterated that Europe Cement did in fact own shares in CEAS and Kepez, but requested the Tribunal to dismiss the case on the basis of lack of jurisdiction, “due to our company's inability to show the shares legally acquired by our company.”

67. On 24 March 2009, the Tribunal invited the Respondent to make any observations on Europe Cement's request for dismissal of the proceedings for lack of jurisdiction.

68. On 31 March 2009, the Respondent replied, opposing the Claimant's request indicating that the request was not for dismissal with prejudice. The Respondent pointed out that under Article 49(2) of the Arbitration (Additional Facility) Rules, there was no basis for unilateral discontinuance of arbitral proceedings. The proceedings could only be discontinued with the consent of both Parties. The Respondent reiterated the relief it requested in its Memorial on Jurisdiction.

69. On 2 April 2009, the Tribunal confirmed to the Parties that in light of the Respondent's observations on Europe Cement's request for dismissal of the proceedings, the hearing of 3 May 2009 would proceed and that the agenda would be:

any further submissions by either party on the Claimant's request for dismissal; and

any further submissions by either party on the relief requested by the Respondent in its Memorial on Jurisdiction. In this regard the Tribunal put a series of questions on which it wished to have elaboration.

70. The Tribunal also indicated that it wanted to keep open the possibility of calling the Respondent's expert witness, Professor Bahtiyar.

71. The Tribunal invited the Parties to make any further written submissions on the above matters by 17 April 2009. It also asked the Claimant to confirm that it would be represented at the hearing by legal counsel or by its own internal representatives.

72. On 12 April 2009, Europe Cement advised the Tribunal that it intended to have representatives of the Company attend the hearing on 3 May 2009.

73. On 17 April 2009, the Respondent submitted a response to the specific questions posed by the Tribunal in relation to the 3 May 2009 hearing.

74. On 22 April 2009, the Tribunal confirmed that it would be calling the Respondent's legal expert Professor Bahtiyar.

75. On 27 April 2009, Europe Cement advised the Tribunal that it would be represented at the 3 May 2009 hearing by Messrs Guillaume Tessonnière and Frederic Sardain of the law firm Tessonnière, Sardain and Chève in Paris.

### **(o) The Hearing on 3 May 2009**

76. At the hearing of 3 May 2009, held at the Paris offices of the World Bank, oral submissions were made on behalf of the Claimant by Guillaume Tessonnière of Tessonnière, Sardain and Chève, and on behalf of the Respondent by Jan Paulsson, Lucy Reed and Brian King, all of Freshfields Bruckhaus Deringer. The Tribunal's legal expert, Professor Bahtiyar, was examined by the Tribunal and by Counsel for the Claimant.

77. At the end of the hearing the Tribunal requested the Parties to file their statements of costs within four weeks of the hearing. The Respondent filed its statement on 3 June 2009 and the Claimant on 12 July 2009.

### **(p) Procedural Order No. 10**

78. On 4 June 2009, Mr. Biserov informed the Tribunal that the Claimant intended to “make a very important filing on Jurisdictional Matters to the honorable Tribunal by 16 June 2009.” The Respondent objected to the Claimant’s making any further filings. The Tribunal invited the Claimant to comment, by 15 June 2009, on the Respondent’s objections and to state whether its proposed filing on jurisdiction related to new facts and evidence or to legal arguments. Europe Cement did not file any comments by 15 June nor any filing by 16 June.

79. On 18 June 2009, Mr. Biserov wrote that the Claimant had recently “gained access to thousands of new documents, which include documents, that go to the core subject of jurisdiction.” The Claimant requested 35 days to go through the documents and to make a supplemental filing on jurisdiction. In its Procedural Order No. 10 of 23 June 2009, the Tribunal granted the Claimant until 7 July 2009 to produce documents that show the Claimant’s ownership of shares in CEAS and Kepez as at May 2003. Provided that the Claimant produced such documentation, the Tribunal would consider establishing a time limit for the filing of additional documents and legal arguments on jurisdiction. If the Claimant failed to produce the documents by 7 July, the Order stated that the Tribunal would close the proceedings and proceed to issue an award.

80. The Claimant made no filing on 7 July 2009. By letter of 8 July 2009, the Tribunal gave a final opportunity to the Claimant to file the relevant documents by 13 July 2009. The Claimant having failed to make any filing by 13 July, the Tribunal closed the proceedings on that date in accordance with Article 44(1) of the Arbitration (Additional Facility) Rules.

## **THE QUESTION OF JURISDICTION**

81. In this case the Tribunal is faced with the unusual circumstance that both Parties claim that the case should be dismissed for lack of jurisdiction. However, they do not agree on the precise basis on which the Tribunal lacks jurisdiction or on the consequences of dismissal for lack of jurisdiction. In addition, the Respondent has requested additional relief in this case.

82. Accordingly, the Tribunal will examine the issue of jurisdiction and address the specific claims for relief by each of the Parties. In dealing with the question of jurisdiction, the Tribunal will examine only the central question that has been in dispute between the Parties – whether at the relevant time the Claimant owned shares in the Turkish companies of CEAS and Kepez.

### **(a) The Basis on Which the Claimant Asserted Jurisdiction**

83. The basis for the Claimant’s original assertion of jurisdiction was that as a joint stock company established under the laws of Poland, it had been the owner since May 2003 of shares in CEAS and Kepez, described as shareholding companies registered under the laws of the

Republic of Turkey. The termination of the Concession Agreements held by these Turkish corporations led to the Claimant's allegation of violation of the terms of the Energy Charter Treaty.

84. According to the Claimant's Memorial on Jurisdiction and Liability, in May 2003, the Claimant acquired from Mr. Kemal Uzan a total of 102,500 shares in CEAS, which represented 20% of the total share capital, and 27,825 shares in Kepez, which represented 23% of the total share capital.<sup>1</sup> In his witness statement, Kemal Uzan described his relations with the Turkish authorities and his fear of the possible termination of the electricity concessions held by CEAS and Kepez, which led to his decision to transfer the shares to two Polish companies owned by the Uzan family, one of which was the Claimant.<sup>2</sup>

85. Based on Kemal Uzan's witness statement, the Memorial states that the shares were transferred in portions and were the subject of several separate share transfer agreements. The transactions, it was said, were carried out over the phone with a member of Europe Cement's management board, and the shares were delivered personally to Europe Cement's various bank deposits by "trusted employees of the Rumeli group".<sup>3</sup>

86. What were claimed to be copies of these share transfer agreements were included as Exhibits to the Memorial.<sup>4</sup> Under those agreements the purchase price for the shares (approximately US\$45,000) was not due until 10 January 2009.

87. Subsequently, shares in CEAS and Kepez were transferred from Europe Cement to two other Polish companies, Polski Cement Holdings S.A. and Polska Energetyka S.A. The result, the Memorial claimed, was that Europe Cement now held 51,300 shares in CEAS, representing 10.26% of the total shares and 13,950 shares in Kepez, representing 11.63% of the total shareholding.

88. The Memorial also asserts that on 24 December 2004, anticipating the introduction of a new Turkish lira, resolutions were passed by the Boards of Directors of CEAS and Kepez asking shareholders to return their existing shares and have them replaced by new share certificates with the nominal value printed in the new Turkish lira. This, it was claimed, Europe Cement did on 10 January 2005.<sup>5</sup> Copies of a record of the delivery of the new shares was included as an Exhibit to the Claimant's Memorial.<sup>6</sup>

89. Thus, it was claimed in the Memorial, "Europe Cement has in its possession share certificates representing 51,300 shares (10.26 percent of the total share capital) in CEAS and 13,950 shares in Kepez (about 11.63 percent of the total share capital)".<sup>7</sup> Included as Exhibits to the Memorial were "notarized copies of the complete set of shares."<sup>8</sup>

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<sup>1</sup> CM 257.

<sup>2</sup> KU 32-33, CM 266.

<sup>3</sup> CM 266.

<sup>4</sup> Ex. C-61.

<sup>5</sup> CM 270.

<sup>6</sup> Ex. C-68.

<sup>7</sup> CM 271.

<sup>8</sup> Ex. C-62, Ex. C-63.

90. On this basis, the Claimant asserted that it had established ownership in CEAS and Kepez and thus met the necessary requirements for the Tribunal to have jurisdiction in this case.

91. However, in his letter of 24 March 2009, Mr. Biserov, while reiterating that Europe Cement did in fact own shares in CEAS and Kepez, requested the Tribunal to dismiss the case on the basis of lack of jurisdiction, “due to our company’s inability to show the shares legally acquired by our company.”

### **(b) The Respondent’s Argument on Jurisdiction**

92. In its Memorial on Jurisdiction, the Respondent claimed that the Claimant had failed to establish ownership of shares in CEAS and Kepez at the relevant time of 12 June 2003, the date on which the Concession Agreements were allegedly revoked. Indeed, the Respondent asserted that not only had Europe Cement failed to establish ownership, but that it could not prove that it owned CEAS and Kepez shares at the relevant time. In short, the Respondent’s argument was that Europe Cement did not in fact own CEAS and Kepez shares on 12 June 2003.

93. The Respondent asserted in its Memorial on Jurisdiction that the evidentiary record demonstrates that Europe Cement was never an owner of shares in CEAS and Kepez. In making this assertion the Respondent relied on the financial records of Europe Cement, the fact that Europe Cement had failed to produce any of the documents ordered by the Tribunal, the failure of Europe Cement to acquire the necessary permissions or make any of the notifications required by law to make the relevant share transfers valid, and the conflict between Europe Cement’s claim and other “Uzan-initiated” claims.

#### **(i) Europe Cement’s Financial Records**

94. The Respondent pointed out that although the CEAS and Kepez shares would have been the largest assets of Europe Cement, and the obligation to pay for them would have been Europe Cement’s largest liability, the financial statements for Europe Cement for 2003 make no reference to its shareholding in CEAS and Kepez.<sup>9</sup> These financial statements were audited and filed with the Polish courts in accordance with Polish law, and were subject to criminal penalties for providing false information. Equally, the 2004 financial statements of Europe Cement, which were also audited and filed with the Polish courts, made no reference to Europe Cement’s ownership of CEAS and Kepez shares.<sup>10</sup>

95. The Respondent’s Memorial points out that the financial statements in each of those years were approved and signed by all members of the Europe Cement management Board including by Mr. Rauf Özcan. Yet Mr. Özcan had also signed the share purchase agreements purportedly transferring the CEAS and Kepez shares to Europe Cement.<sup>11</sup> The Respondent argued that it was simply not credible that Mr. Özcan would have overlooked such an important purchase.

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<sup>9</sup> RM 67-70.

<sup>10</sup> RM 71-75.

<sup>11</sup> 3 May 2009 Trans, 44: 13-25.

96. The Respondent also pointed out in its Memorial on Jurisdiction that copies of the purported share transfer records reflecting Europe Cement's receipt of the new shares in CEAS and Kepez of 10 January 2005 included the signatures of Mr. Özcan and Ms. Edyta Laszczewska, both members of the Europe Cement Board of Management. Yet just four days later, on 14 January 2005, both individuals signed the financial statements for Europe Cement for 2004 in which it was affirmed that Europe Cement's assets did not include the shares of any foreign company.<sup>12</sup> Again, the Respondent argued, any claim that this was a mistake was not credible.

97. The Respondent's Memorial points out that it was not until the 2005 financial statements of Europe Cement that any mention was made of shareholding in CEAS and Kepez. In those statements it was noted that the purchase of CEAS and Kepez shares had not been included in the 2003 and 2004 financial statements "due to an oversight".<sup>13</sup>

98. In short, the Respondent asserts that the 2003 and 2004 financial statements are themselves evidence that Europe Cement did not own CEAS and Kepez shares at the relevant time, and that the claim that they had been omitted due to an oversight was in the circumstances simply not plausible.

## **(ii) Europe Cement's Failure to Produce the Documents Ordered by the Tribunal**

99. The Respondent's Memorial points out that in Procedural Order No. 3 the Tribunal had ordered the production of certain documents, in particular originals of the certificates of the CEAS and Kepez shares issued in 2005, originals or copies of the share certificates originally purchased in May 2003, and originals of the share transfer agreements of 30 May 2003, and directed that they be made available for forensic examination. Since Europe Cement had failed to produce any of the documents so ordered, and had now admitted that it could not do so, the Respondent argued that the adverse inference must be drawn that the copies of the share certificates and the share purchase agreements submitted with the Claimant's Memorial were fabricated.

100. In support of these contentions, the Respondent argued that share certificates issued in 2005, even if they existed, had no probative value, since the relevant date was the date of the alleged termination of the CEAS and Kepez Concession Agreements, 12 June 2003. Thus, the copies of the share certificates of the "new" CEAS and Kepez shares were simply irrelevant.

101. Further, the Respondent argued that the five one-page share transfer agreements, copies of which were submitted with the Claimant's Memorial, were simply not credible.<sup>14</sup>

First, the share transfer agreements did not indicate how the shares were to be delivered, and no evidence had been produced to prove that delivery had taken place.

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<sup>12</sup> RM 74.

<sup>13</sup> RM 79.

<sup>14</sup> RM 95-103.

Second, the terms of the share transfer agreements were perfunctory; Europe Cement was given effectively seven years to pay without any security provided and the date on which the purchase price was due (10 January 2009) had no relationship to an alleged May 2003 purchase.

Third, the terms of the purported transaction made no economic sense; for a price of US\$45,000 Europe Cement was supposed to have acquired in May 2003 shares in CEAS whose second dividend payment on 19 September 2003 would have resulted in Europe Cement receiving US\$28 million.

Fourth, the agreements claimed that they were executed in both Turkish and Polish, but only the Polish copies of the agreements were signed.

Finally, there was a discrepancy between the numbers of shares in the share purchase agreements and those provided by Europe Cement in its Memorial. The Memorial stated that Europe Cement had purchased 102,500 shares in CEAS and 27,825 shares in Kepez, but according to the share purchase agreements, Europe Cement purchased only 51,000 shares in CEAS and 14,075 shares in Kepez.

102. In further support of its argument that the documents not produced were likely fabricated, the Respondent referred to other matters in which Kemal Uzan and his associates have been involved that related to the falsification of documents and pointed out that Kemal Uzan was a fugitive from justice hiding outside of Turkey and subject to an Interpol Red Notice.<sup>15</sup>

103. In light of all of the above, the Respondent argued that in the face of the failure of Europe Cement to comply with the orders of the Tribunal for the productions of documents, the appropriate inference for the Tribunal to draw was that Europe Cement did not own the shares in question and that its claim was fraudulent.

### **(iii) Europe Cement's Failure to Obtain the Necessary Permission for the Transfer of Shares or to make the Necessary Notifications**

104. In support of its contention that no share transfer to Europe Cement had taken place, the Respondent argued that since the Claimant had indicated in its response to the request for documentation that Europe Cement's purchase of shares in CEAS and Kepez had not been reported to either the Polish or the Turkish authorities, then no valid transfer of shares could have taken place.<sup>16</sup>

105. On the basis of an expert opinion provided by Professor Dr. Mehmet Bahtiyar of Kocaeli University Faculty of Law, the Respondent argued that in order for the transfer of shares from CEAS and Kepez to Europe Cement to have been legally valid, approval was needed from the Turkish electricity authority EMRA, from the Competition Board, and from the Undersecretariat of the Treasury of the Republic, General Directorate of Foreign Investment, and that certain public disclosures would have had to be made under the Capital Markets legislation and under

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<sup>15</sup> RM 106.

<sup>16</sup> RM, 127-146.

the requirements for listing on the Istanbul stock exchange. None of these authorizations were sought, nor were the public disclosures made.

106. The Respondent also argued that Europe Cement would also have been subject to Polish regulatory requirements relating to share transactions, including notification requirements, which by Europe Cement's own admission it had not complied with.

107. In short, these failures to obtain the necessary authorizations or make the required disclosures meant that no legally valid transfer of CEAS and Kepez shares to Europe Cement could ever have taken place.

#### **(iv) The Conflict Between Europe Cement's Claim and Other "Uzan-Initiated" Claims**

108. The Respondent argued further that there are several simultaneous claims brought by Uzan family related entities against the Republic of Turkey, including by Europe Cement, Cementownia, Libananco Holdings Co. Limited (all before ICSID), Polska Energetyka Holding S.A. (an *ad hoc* arbitration under the UNCITRAL Rules), and Kemal Uzan himself (in the European Court of Human Rights).<sup>17</sup> In all of these cases, the claims are based on shareholding in CEAS and Kepez. However, the cumulative shares claimed to be owned amount to 130% of the shares of CEAS and 125% of the shares of Kepez.

109. These multiple, overlapping and contradictory claims are, in the Respondent's view, supporting evidence that the claim by Europe Cement to own shares in CEAS and Kepez is baseless and fraudulent.

#### **(v) Alternative Bases for Denying Jurisdiction**

110. In addition to the Respondent's claim that the Tribunal has no jurisdiction because the Claimant failed to show that it held shares in CEAS and Kepez, and thus had no investment in Turkey, the Respondent also made several alternative arguments *ratione materiae, personae and temporis* to show that the Tribunal had no jurisdiction. The Respondent indicated that the Tribunal need not decide on the additional objections should it dismiss the claim based on the lack of share ownership. In the light of the Tribunal's decision, it considered that there is no need to address these alternative arguments and thus they have not been dealt with here.

### **(c) The Claimant's Request for Dismissal**

#### **(i) The Arguments of the Parties**

111. In his letter of 4 December 2008, Mr. Biserov informed the Tribunal of Europe Cement's "discontinuance of the Case, without prejudice to our rights." The Respondent opposed this discontinuance. In Procedural Order No. 9, the Tribunal ruled that in the absence of agreement

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<sup>17</sup> RM, 147-154.

between the Parties then pursuant to Article 50 of the Additional Facility Arbitration Rules, the proceedings would continue.

112. In a letter of 24 March 2009, following the deposit of the Respondent's Memorial on Jurisdiction, Mr. Biserov again wrote to the Tribunal, this time requesting the Tribunal to dismiss the case on the basis of lack of jurisdiction, "due to our company's inability to show the shares legally acquired by our company." This request was opposed by the Respondent. Citing Article 49(2) of the ICSID Additional Facility Arbitration Rules, the Respondent pointed out that proceedings could be discontinued only with the consent of both Parties.

113. The Respondent also noted that the Claimant had not requested that the proceedings be dismissed with prejudice and that it could only agree to discontinuance if Europe Cement agreed to all of the relief claimed by the Respondent in its Memorial on Jurisdiction.

114. In the hearing of 3 May 2009, Counsel for the Claimant pointed out that in addition to discontinuance with the agreement of the Parties, under Article 51 of the Additional Facility Arbitration Rules, proceedings could also be discontinued on basis of the failure of the Parties to take any action within six months. Counsel also argued that this was not a case of a refusal by Europe Cement to produce the relevant documents, rather it was a present inability to do so.<sup>18</sup> Counsel for the Claimant further argued that both Parties were agreed that the Tribunal lacked jurisdiction and in such circumstances there was no need for the Tribunal to consider any further arguments.<sup>19</sup>

115. In response Counsel for the Respondent reiterated its objection to the dismissal of the claim on the grounds sought by the Claimant, that Europe Cement was presently or temporarily unable to produce the bearer share certificates – what Counsel for the Respondent described as a "short-form award."<sup>20</sup>

116. Counsel for the Respondent further argued that there were three reasons for its objection to a "short-form award." First, the Republic of Turkey was entitled to a reasoned decision on its jurisdictional objections and requests for relief; second, Europe Cement's temporary inability to produce shares allegedly held today says nothing about the key jurisdictional question of whether it owned shares in CEAS and Kepez at the relevant time; and third, the Respondent has an interest in having the Tribunal render an award "that contains full and transparent findings on Europe Cement's abuse of this process."<sup>21</sup> Counsel described this last matter as an "international public interest" in having the Tribunal fulfill this role.

117. Referring to the relevant articles of the Arbitration (Additional Facility) Rules, Counsel for the Respondent noted that Article 49 provides for an award reflecting an agreed settlement of the Parties, and that Article 50 provides for discontinuance where the Parties are in agreement. The effect of these rules, Counsel claimed, was that the Respondent was entitled to an award within the meaning of Article 52 that decides all questions submitted to the Tribunal with findings of fact and reasons. With respect to the suggestion of Counsel for the Claimant that

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<sup>18</sup> Trans, 9: 8-25.

<sup>19</sup> Trans, 10: 16-21.

<sup>20</sup> Trans, 13: 4.

<sup>21</sup> Trans, 19: 1-9.

Article 51 on discontinuance on failure of the Parties to act might be relevant, Counsel for the Respondent pointed out that the provision applied to failure by both Parties and in any event, there had been action by both Parties within six months and thus Article 51 was not applicable.

## **(ii) Analysis**

118. In the Tribunal's view, in the absence of agreement between the Parties to discontinue the case, then in accordance with Article 50, the proceedings continue. A case could be discontinued under Article 49 if there was an agreed settlement between the Parties, but in the absence of any such settlement, there is no basis for the Tribunal to discontinue. That, essentially, was the position taken by the Tribunal in Procedural Order No. 9 with respect to Europe Cement's 4 December 2008 notification of its discontinuance of the case.

119. Nevertheless, Europe Cement's 24 March 2009 request for the case to be dismissed is different from its 4 December 2008 notification of discontinuance. This time Europe Cement makes an admission that it does not fulfill the jurisdictional requirements and thus the case should be dismissed for lack of jurisdiction. And, thus, to a certain extent the Claimant and the Respondent are in agreement that the Tribunal lacks jurisdiction. In such circumstances the question is whether this constitutes an agreement to discontinue.

120. In the view of the Tribunal, the fact that the Parties agree on the outcome – dismissal for lack of jurisdiction – does not mean that they must be deemed to have agreed on discontinuance or that there is no dispute between the Parties. They differ in their reasons for the lack of jurisdiction – Europe Cement says that it is because it cannot produce share certificates to establish that it owns shares in CEAS and Kepez but the Respondent says that the evidence shows that Europe Cement never had shares in CEAS and Kepez. In addition, the Respondent is seeking relief beyond dismissal of the case for lack of jurisdiction.

121. The Tribunal concludes, therefore, that it cannot simply dismiss the case for lack of jurisdiction without more as requested by the Claimant. There are arguments from the Respondent to consider and, as the Respondent has pointed out, in the absence of an agreed settlement under Article 49, the Tribunal has an obligation to render an award that will provide a decision on the questions submitted to it and a reasoned basis for those decisions. While Europe Cement's admission that it cannot produce the documents requested by the Tribunal is a relevant factor in determining whether the Tribunal has jurisdiction, it cannot be the basis for a peremptory dismissal of the case for lack of jurisdiction. The situation would be different if the Claimant was acknowledging it did not own the shares in CEAS and Kepez at the relevant time, but, as will be seen, this is not the case here.

122. In the light of this conclusion, the Tribunal rejects the Claimant's request to dismiss the case for lack of jurisdiction on the sole basis that it is unable to produce the shares in CEAS and Kepez, and will also consider the question of jurisdiction in the context of the Respondent's requests for relief. Accordingly, the Tribunal will go on to consider the requests of the Respondent for relief.

## **(d) The Respondent's Requests for Relief**

### **(i) The Arguments of the Parties**

123. In its Memorial on Jurisdiction, the Respondent requested the following relief (see above, paragraph 65):

- (1) Dismissing Europe Cement'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 its costs and expenses associated with this proceeding, plus interest.

124. The arguments in support of this relief are set out above in paragraphs 92-110.

125. The Claimant never offered any formal written response to the Respondent's Memorial although in the course of his letter of 24 March 2009, Mr. Biserov argued that a number of matters raised in the Memorial were not relevant to the question of jurisdiction including the factual background relating to the operation of the concessions and alleged "frauds by third parties." He reiterated that Europe Cement had legally purchased and was the owner of shares in CEAS and Kepez and that the inability to produce the shares was a "circumstantial hindrance" that the company could not at present overcome, but might be able to do so if it had another 12 months.

126. In a letter of 2 April 2009 setting the agenda for the hearing of 3 May 2009, the Tribunal asked specifically that the Parties address the following questions:

- (i) Whether the relief sought by Respondent under paragraph 232(2) of the Memorial on Jurisdiction that the Claimant's claim is "manifestly ill-founded, and has been asserted using inauthentic documents;" is a question of jurisdiction or on the merits of the dispute;
- (ii) If the relief under (i) is a question on the merits, can the Tribunal rule on the relief during the jurisdictional phase of the proceeding?
- (iii) The implications, especially the legal effects, of a ruling of the Tribunal on the Respondent's relief under (i); and
- (iv) Clarification of the monetary compensation sought by Respondent under paragraph 232(3) of the Respondent's Memorial on Jurisdiction.

127. In a letter of 17 April 2009, the Respondent stated in response to the questions in (i) and (ii) above that the matter went to jurisdiction and was not on the merits. It clarified that its position was that the Claimant's claim was "manifestly ill-founded as to jurisdiction" and that it was based on documents that were inauthentic.

128. With respect to question (iii) above, the Respondent asserted that the effect of a declaration was narrow and that any "future preclusive effect is limited to the parties to the proceeding in which the declaration is issued." Regarding question (iv), the Respondent indicated that monetary damages was an established remedy for moral damage, that in the present case the conduct of Europe Cement in bringing a "jurisdictionally baseless claim asserted in bad faith and for an improper purpose" had caused the Republic of Turkey "intangible but no less real loss." The Respondent cited the decision of in *Desert Line v. Yemen*<sup>22</sup> where an ICSID tribunal had awarded US\$1 million in moral damages for reputational harm.

129. In the oral hearing on 3 May 2009, Counsel for the Claimant argued that much of what the Respondent was claiming, and the arguments in support of those claims, went to the merits not to jurisdiction.<sup>23</sup> The question of jurisdiction was simple; both Parties agreed that the Tribunal did not have jurisdiction. Counsel pointed to the claim by the Respondent that the claim was "manifestly ill-founded" noting that there was no concept of "manifestly ill-founded" in the Additional Facility Arbitration Rules relating to jurisdictional claims. Rather, Counsel suggested, there was confusion with the concept of "manifestly without legal merit" under Article 45(6) of the Arbitration (Additional Facility) Rules, which in fact went to the merits of the case.<sup>24</sup>

130. Counsel for the Claimant further doubted whether there could be any declaration by the Tribunal at the jurisdictional stage, apart from a declaration that there was no jurisdiction, suggesting also that declarations made more sense in state-to-state cases and had less relevance to investor-state arbitrations, although in response to questions Counsel indicated that a tribunal can grant the remedy of declaration in investor-state cases.<sup>25</sup> However, Counsel argued that there was no basis for the declaratory relief claimed since the Claimant agreed that there was no jurisdiction, there had been no refusal to provide documents, just an incapacity, and thus no defiance of the Tribunal, and there was no proof of any intangible harm to Turkey.

131. With respect to the *Desert Line* case, Counsel for the Claimant argued that the facts are dissimilar. Moral damages were awarded there because of physical duress of the claimant. There was no parallel with the facts here. Indeed, the only allegation of physical mistreatment had been made by the Claimant against the Respondent.<sup>26</sup> Finally, with respect to costs, Counsel argued that the principle often followed in ICSID cases where each party bears its own costs should be followed here.

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<sup>22</sup> *Desert Line Project LLC v. Republic of Yemen* (ICSID Case No. ARB/05/07), Award of 6 February 2008 available at <http://icsid.worldbank.org>.

<sup>23</sup> Trans, 79: 4-17.

<sup>24</sup> Trans, 82: 3-17.

<sup>25</sup> Trans, 102: 19-24.

<sup>26</sup> Trans, 93: 16-19.

132. In their oral statements to the Tribunal, Counsel for the Respondent elaborated on the arguments already made in the Respondent's Memorial on Jurisdiction. Counsel emphasized the lack of any reference in Europe Cement's 2003 and 2004 financial statements to ownership of CEAS and Kepez shares, the overlap between those signing the financial statements and those whose signatures appeared on the alleged share transfer agreements, and the fact that there was no documentation in 2003 indicating that authorizations had been granted by relevant governmental authorities to any share transfers. In the Respondent's view, all of this indicated that there had never been any share transfers in 2003 as claimed by Europe Cement.

133. With respect to the 2005 financial statements, which for the first time indicated Europe Cement's ownership of CEAS and Kepez shares, Counsel for the Respondent pointed out that these were signed by Europe Cement in June 2006 just four months before Europe Cement sent its "trigger" letter to the Republic of Turkey commencing this claim. The claim that the CEAS and Kepez shares had been omitted from Europe Cement's financial statements due to an oversight was, Counsel argued, simply not plausible. It contributed to the inference that the share transfer agreements were not authentic and that they had been backdated to make it look as if they had been executed on 30 May 2003. It was, in the words of the Respondent's Counsel, a "post-hoc attempt to rewrite history to try to create international jurisdiction where none exists."<sup>27</sup>

134. Counsel for the Respondent also referred to contradiction in claims to shareholding in CEAS and Kepez amongst the various parallel proceedings involving those companies and pointed out contradiction between the witness statement of Kemal Uzan and submissions that he made in his case before the European Court of Human Rights. All of this, Counsel concluded, pointed to the conclusion that the share transfer agreements, the only evidence that Europe Cement owned shares in CEAS and Kepez at a jurisdictionally relevant time, were inauthentic.

135. Counsel for the Respondent further argued that the facts of this case make it clear that the case was not brought in good faith and that "there comes a time when those who abusively initiate legal proceedings must be held accountable for their conduct."<sup>28</sup> In ordering an amount for moral damages, Counsel argued, the Tribunal would be providing a form of satisfaction, even if the award were never to be paid. In terms of quantification, Counsel referred to the amount of US\$1 million ordered in the *Desert Line* case as representing an appropriate amount.<sup>29</sup>

136. In response to the Claimant's argument that the request for a declaration was a request for an order on the merits of the case, Counsel for the Respondent argued that it was a request for a declaration that the claim to jurisdiction was manifestly ill-founded because it was based on inauthentic documents. But, in any event, Counsel said, "we are more than prepared to give up that phrase 'manifestly ill-founded' once and for all."<sup>30</sup>

137. In further response to a question from the Tribunal regarding statements of Counsel for the Respondent that Mr. Kemal Uzan's testimony should be struck from the record because of his failure to attend for cross-examination, Counsel stated that the Respondent was not

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<sup>27</sup> Trans, 49: 18-19.

<sup>28</sup> Trans, 72: 24 – 73:1.

<sup>29</sup> Trans, 76: 13-15.

<sup>30</sup> Trans, 120: 3.

requesting that it be formally struck from the record, rather than on the question of jurisdiction before the Tribunal it should be disregarded and that “on the issues before you on jurisdiction you may not use it.”<sup>31</sup>

## **(ii) Analysis**

138. The Tribunal will deal with the issues raised by the Parties in the following way. First, it will consider whether the claim should be dismissed for lack of jurisdiction. Second it will consider whether it should make a declaration as requested by the Respondent that the jurisdictional claim was manifestly ill-founded and based on inauthentic documents. Third, it will consider whether there should be an award of monetary compensation to the Respondent. Finally, it will consider the question of costs.

### **(1) The Jurisdiction of the Tribunal**

139. Although, as pointed out earlier, the Parties both wish the Tribunal to find that it has no jurisdiction, they differ as to their reasons. The Claimant says that there is no jurisdiction because it cannot produce documents to prove its ownership of the CEAS and Kepez shares. The Respondent says that there is no jurisdiction because the Claimant has not shown, and indeed could not show, that it owned shares in CEAS and Kepez at any jurisdictionally relevant time. Furthermore, the Respondent contends, even if Europe Cement had produced originals of current share certificates indicating ownership of CEAS and Kepez shares, that would not demonstrate ownership at the relevant time of 12 June 2003. Moreover, if it had produced originals of the share transfer agreements, forensic examination would have shown that these documents were inauthentic.

140. Under the terms of Article 26(1) of the Energy Charter Treaty a claim can be submitted by an investor in respect of an “investment” that is made “in the Area” of the State against which the claim is submitted. Thus, for the Tribunal to have jurisdiction the Claimant would have to show that it has acquired ownership in an investment in Turkey at the time the alleged breaches of the provisions of the Energy Charter Treaty took place, that is at some time before 12 June 2003. At the hearing of 3 May 2009, Counsel for the Claimant agreed that this was the relevant date.

141. The evidence supporting ownership submitted by the Claimant was copies of shares transfer agreements dated 30 May 2003 and copies of bearer share certificates issued on 10 January 2005 purporting to show that Europe Cement was a shareholder in the Turkish companies CEAS and Kepez. The authenticity of these documents was challenged by the Respondent and the Tribunal ordered the Claimant to produce the originals of these documents and other documents that would be relevant to proving their authenticity and to proving whether the Claimant did own shares in CEAS and Kepez at the relevant time. However, the Claimant did not produce the relevant documents ordered by the Tribunal. Furthermore, in his letter of 24 March 2009, Mr. Biserov, speaking on behalf of Europe Cement, requested that the case be dismissed “due to our company’s inability to show the shares legally acquired by our company.”

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<sup>31</sup> Trans, 176: 8-9.

142. Although Mr. Biserov indicated that if another 12 months were granted Europe Cement might be able to produce the required documents, the Tribunal can treat the letter of 24 March 2009 as an admission by the Claimant that it does not have the proof necessary to show that it had an investment in Turkey at the relevant time. In short, it is an admission that the Claimant cannot prove the jurisdictional basis required under Article 26(1) of the Energy Charter Treaty.

143. On this basis alone, the Tribunal clearly does not have jurisdiction. Even if there had been no allegations by the Respondent that the documents submitted were inauthentic or the claim was manifestly ill-founded, the admission by a claimant that it cannot prove the jurisdictional basis of its claim would be sufficient to dispose of the case for lack of jurisdiction.

144. However, as will be pointed out below, even if the Claimant had not made such a concession, the Tribunal would have concluded that the evidence before it compelled the conclusion that Europe Cement did not own shares in CEAS and Kepez, at least at a jurisdictionally relevant time. On that basis, too, the Tribunal has no jurisdiction.

145. Accordingly, the Tribunal concludes that since the Claimant has failed to establish that it had an investment in Turkey at the relevant time, the claim of Europe Cement must be dismissed for lack of jurisdiction.

**(2) The Request for a Declaration “that the claim is manifestly ill-founded and has been asserted using inauthentic documents”**

146. The Respondent, however, wishes the Tribunal to go further than this. It requests a declaration “that the claim is manifestly ill-founded and has been asserted using inauthentic documents.” In response to a request for clarification by the Tribunal, the Respondent indicated that this was not a request in respect of the merits of the dispute, but rather a request that the claim to jurisdiction was “manifestly ill-founded.” Furthermore, the Respondent clarified in the oral hearing that the term “manifestly ill-founded” was not essential to the Respondent’s request and that they would be prepared to give the term up “once and for all.”

147. The essence of the Respondent’s claim is that Europe Cement commenced the claim on the basis of an assertion of a claim to ownership in the Turkish companies that they did not have and that this claim was supported by documents that were fraudulent. In short, what the Respondent is alleging is an abuse of process by the Claimant and the request for a declaration is a request for what amounts to a declaration that there has been such an abuse.

148. Declaratory relief is a common form of relief in international tribunals in state-to-state cases<sup>32</sup>, but no cases were cited to us of tribunals established under the ICSID Convention or Additional Facility or under international investment treaties more generally where declarations were granted as a form of relief. However, Counsel for the Claimant conceded in the oral hearing of 3 May 2009 that such declarations are possible.

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<sup>32</sup> The Respondent cited to the Tribunal both the *Corfu Channel Case* (UK v. Albania) (Merits), [1949] ICJ Reports 4, RLA-15 and the *Rainbow Warrior Case* (New Zealand v. France), Award, 30 April 1990, 20 RIAA 215, RLA-42.

149. Accordingly, the Tribunal will consider first whether the facts of this case do constitute an abuse of process and second, if they do, whether it should issue a declaration to that effect.

150. The Respondent claims that when the Claimant asserted in its Memorial on Jurisdiction and Liability of 15 May 2008 that it had purchased shares in the Turkish companies of CEAS and Kepez in May 2003 and that it currently “has in its possession share certificates representing 51,300 shares (10.26 percent of the total share capital) in CEAS and 13,950 shares in Kepez (about 11.63 percent of the total share capital)” that claim was false.

151. The only evidence furnished by the Claimant in support of the claim that shares were purchased in May 2003 were the copies of the alleged share transfer agreements dated 30 May 2009 and the witness statement of Mr. Kemal Uzan. The Respondent asserts that we cannot rely on that witness statement, and since there was no opportunity provided to cross-examine Kemal Uzan on his witness statement, it would have little probative value in any event.

152. The Tribunal has reviewed the share transfer agreements and the arguments made about them and it agrees that they raise some serious questions. If the originals of the share transfer agreements existed so that they could have been copied in order for copies to be included with the Claimant’s Memorial on Jurisdiction and Liability on 15 May 2008, why could they not be produced when ordered to be so by the Tribunal on 29 May 2008? In his letter of 4 December 2008, Mr. Biserov alluded to the “legacy of the previous management” and in his letter of 24 March 2009, the inability to produce the documents was referred to as a “circumstantial hindrance,” but no further explanation was provided. Thus, in the Tribunal’s view there is a strong inference that the documents were not produced either because Europe Cement did not have them or because they would not withstand forensic scrutiny.

153. The terms set out in the alleged copies of the share transfer agreements themselves raise questions. Why were they not executed in Turkish but only in Polish when they say that they were executed in both languages? Why was the date for payment for the purchase set for 10 January 2009, a date that has no relationship with the alleged date of purchase, but was four years after the date on which Europe Cement’s shares in CEAS and Kepez allegedly purchased in 2003 were exchanged for shares issued in new Turkish lira, that is 10 January 2005? The implication is that the share transfer agreements were in fact executed in 2005 and back-dated to 20 May 2003 in order to meet the jurisdictional requirements of Europe Cement’s claim.

154. The modalities of the transaction as set out in the Claimant’s Memorial on Jurisdiction and Liability also raise troubling questions. The shares, allegedly, were delivered personally to Europe Cement’s various bank deposits by “trusted employees of the Rumeli group.” But no information was provided of who these employees were, nor were any records provided of their travel to Poland to deliver the certificates, or bank records of deposits of share certificates. There is no “paper trail” and this sheds suspicion on the whole transaction. In short, no proof at all was offered that the transfer of shares had in fact taken place.

155. This lack of proof of delivery was commented on by the Respondent’s legal expert Professor Bahtiyar. In his opinion Professor Bahtiyar pointed out that under Turkish law, the mere signing of the share transfer agreements would not be sufficient to pass title in bearer share certificates. The certificates would have to be delivered to transfer title and this delivery could

be effected through various legal techniques.<sup>33</sup> And, although the Memorial asserted that the shares were delivered, no proof of delivery by any of the possible techniques was ever offered.

156. Professor Bahtiyar's opinion also set out the approvals and notifications that would be necessary under various branches of Turkish law in order for the share transfer to be valid according to Turkish law. These included the capital markets law, competition law, foreign investment law, electricity market law and the rules of the Istanbul stock exchange. Yet, by the Claimant's own admission no approval was requested under any legislation and no notifications were provided. At a minimum this suggests that no valid share transfers took place in May 2003. But, it also raises further questions about the authenticity of the share transfer agreements purporting to evidence a sale of shares in May 2003.

157. The authenticity of the share transfer agreements is further cast into doubt, as pointed out by the Respondent, by the failure of Europe Cement to include any reference to them in their financial statements of 2003 and 2004. The purchase of the shares was a substantial transaction, constituting the largest by far of Europe Cement's assets. That the directors of Europe Cement simply overlooked this when signing the financial statements seems highly implausible.

158. And this implausibility is reinforced by the commonality between those signing both the documents allegedly evidencing share ownership and the financial statements giving no indication of ownership. Mr. Rauf Özcan signed the alleged share transfer agreements and then later signed the 2003 financial statements making no reference to the CEAS and Kepez shareholding. The same Mr. Özcan and Ms. Edyta Laszczewska signed the records indicating receipt of the CEAS and Kepez shares issued in new Turkish lira, but four days later signed financial statements that did not indicate that any such shareholding existed. The Claimant's attempt to explain this as an "oversight" strains credulity. It all points to the inference that no share transfer took place in May 2003.

159. The claim Europe Cement acquired shares in CEAS and Kepez is thrown further into doubt by the various claims as to the number of shares held. The Claimant's Memorial on Jurisdiction and Liability claims that in May 2003 it purchased 102,500 shares in CEAS and 27,825 shares in Kepez. However, the share transfer agreements indicate that only 51,300 shares in CEAS and 14,075 shares in Kepez were transferred to Europe Cement. Moreover, as the Respondent pointed out, CEAS and Kepez shares are the basis on which a variety of claims are being made in ICSID arbitrations and elsewhere. According to figures provided by the Respondent, the cumulative amount of shares held by the claimants in these various cases amounts to 130% of CEAS shareholding and 125% of Kepez shareholding.

160. Furthermore, according to additional information filed by the Respondent on 17 April 2009 for the 3 May 2009 hearing, share certificates bearing share numbers claimed by Europe Cement to have been issued to it on 10 January 2005 as part of the shares in CEAS issued in new Turkish lira are being claimed in litigation in Turkish courts to be owned by another party, one Ms. Sylwia Kolasa, not by Europe Cement.<sup>34</sup> The Tribunal notes that a filing with the Court in that case purporting to be on behalf of CEAS asserts that no share certificates were ever issued

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<sup>33</sup> Legal Opinion, para 45.

<sup>34</sup> Exhibit R -163.

by CEAS in new Turkish lira, contradicting it would seem claims made in this case that such shares were issued.<sup>35</sup> Once, again, the inference that Europe Cement never in fact owned shares in CEAS and Kepez and that the documentary evidence filed in these proceedings supporting that claim are not authentic seems very strong.

161. There are further indications that the claim that Europe Cement purchased shares in CEAS and Kepez was not bona fide. The purchase price of US\$45,000, deferred for up to eight years (assuming a May 2003 purchase date) for shares valued at millions of dollars was nominal – in the words of the Respondent, it was “economic nonsense.”<sup>36</sup>

162. The Claimant’s Memorial suggests that the objective of the sale was to protect the shares of CEAS and Kepez from possible confiscatory action by the Turkish government. The Respondent, however, links the alleged sale to Europe Cement’s claim in this case. The Respondent’s Memorial on Jurisdiction points out that the sale of the shares to Europe Cement was first included in the 2005 financial statements of Europe Cement filed in the Polish court in June 2006 some four months before the “trigger” letter was sent to the Respondent giving notice of the claim in this case. In the Respondent’s view the share transfer agreements and the subsequent documentation relating to new shares in CEAS and Kepez are all part of an elaborate fraud designed to provide a basis for a claim in this case.

163. In the view of the Tribunal, the circumstances of this case as outlined above give rise to a strong inference that there was no transfer of shares in CEAS and Kepez to Europe Cement in May 2003 and that the Respondent is correct in its assertion that not only did the Claimant fail to prove that it had purchased the shares but that it never purchased the shares in fact. This carries with it the clear implication that the claim to share ownership was based on inauthentic documents and that the claim was fraudulent. If this were true, it would mean that the Claimant initiated a claim asserting that the Tribunal had jurisdiction on the basis of a false claim that it owned shares in Turkish companies and thus had an investment in Turkey.

164. The Claimant could have rebutted this inference. It could have produced the originals of the share agreements. It could have produced the share certificates that it claimed it owned. Indeed, its response to Procedural Order No. 3 indicated that it had no objection to the production of certain documents and at that stage the Tribunal had no reason to believe that it would not do so. But, it never produced any documents. This contributes to the inference that the originals of the documents copied in its Memorial and on which its claim was based either were never in the Claimant’s possession or would not stand forensic analysis, in which case the claim that Europe Cement had shares in CEAS and Kepez at the relevant time was fraudulent.

165. The letters of Mr. Biserov suggest that the inability of the Claimant to produce documents was linked to mismanagement by the previous management of Europe Cement and to the fact that it was unable to hire replacement counsel. None of this appears plausible to the Tribunal. On 15 May 2008 the Claimant asserted that it had the share certificates in its possession, yet it failed to produce those certificates some two weeks later when ordered to do so by the Tribunal. Moreover, the Tribunal granted the Claimant more than 5 months of extensions

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<sup>35</sup> Exhibit R -164

<sup>36</sup> Trans, 53: 15.

in order to hire counsel. No explanation was ever provided for this inability to hire counsel and there was no suggestion that this was due to a lack of resources. Surely a claimant with a bona fide claim could have retained counsel within such a period of time.

166. The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden.

167. In the Tribunal's view the circumstantial evidence points strongly to the conclusion that Europe Cement did not own shares in CEAS and Kepez at the relevant time. In view of the failure of the Claimant to produce the documents ordered, the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. All of the evidence placed before the Tribunal, and not contradicted by the Claimant, is that the share transfer agreements are not what they claim to be and that no transfer of CEAS and Kepez shares to Europe Cement took place at least before 12 June 2003. Indeed, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently.

168. In reaching this conclusion the Tribunal wishes to cast no aspersions on the counsel who have represented the Claimant in this case. The submissions of the Claimant's Counsel Mannheimer Swartling were clearly based on the evidence relating to the transfer of the shares provided in the witness statement of Kemal Uzan. Mannheimer Swartling resigned from the case shortly after the hearing of 25 May 2008. The Claimant's counsel in the 3 May 2009 hearing was appointed a few days before the hearing and made submissions appropriate to the circumstances with which he was confronted. In the view of the Tribunal, none of the lawyers acting for the Claimant have acted in any way improperly.

169. The Tribunal also points out that although the Respondent put before the Tribunal a substantial amount of material relating to alleged frauds by the Uzan family, judgments of courts in respect of claims against individuals whose names appear in this case, and charges allegedly against them, the Tribunal reached its conclusion in this case independently of that material and information. The Tribunal has assessed the Claimant's conduct and not the conduct of others, whether or not they were affiliated with the Claimant. In short, it was a background that the Tribunal was aware of because it had been raised in the pleadings of the Respondent, but it was not a factor in the reasoning of the Tribunal or in its conclusions.

170. The fact that the evidence on this case points to the conclusion that the Claimant did not own shares in CEAS and Kepez at the relevant date of 12 June 2003 means that there is no investment on which this claim can be based and the Tribunal has no jurisdiction to hear this dispute. This, then, forms a basis for the dismissal of the case for lack of jurisdiction equal to that set out in paragraph 145 above.

171. In the light of the above, do the circumstances of this case constitute an abuse of process? It was this issue that Respondent's counsel described as one of "international public interest."<sup>37</sup> It

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<sup>37</sup> Trans, para. 116.

is well accepted in investment arbitrations that the principle of good faith is a principle of international law applicable to the interpretation and application of obligations under international investment agreements.<sup>38</sup> In the Tribunal's view, this applies equally to cases brought under the Energy Charter Treaty.

172. In *Inceysa v. El Salvador*, the Tribunal regarded fraudulent conduct of an investor in obtaining an investment under El Salvador law to be a breach of the principle of good faith, which prevented the Tribunal from taking jurisdiction over the claim. In the view of the tribunal in that case, El Salvador had not consented to submit to investment arbitrations in respect of investments acquired in bad faith.<sup>39</sup>

173. In the case of *Phoenix v. Czech Republic*, the tribunal held that a company had been formed in Israel with the sole purpose of acquiring interests in two Czech companies in order to bring a claim against the Czech Republic that could not be brought under the domestic law of the Czech Republic. The tribunal in that case saw its function to ensure "that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected."<sup>40</sup> It concluded that "the Claimant made an 'investment' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic."<sup>41</sup>

174. Thus, in *Phoenix* the tribunal concluded that the purchase of the investment was not a bona fide transaction and thus the investment was not one that could be protected under the ICSID system. The conduct of the claimant, in the view of the tribunal, was an abuse of process and on that basis the Tribunal concluded that it did not have jurisdiction over the claim.

175. In the above cases, the lack of good faith was present in the acquisition of the investment. In the present case, there was in fact no investment at all, at least at the relevant time, and the lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic. The Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith. If, as in *Phoenix*, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.

176. It remains for the Tribunal to decide whether it will make the declaration requested by the Respondent that the claim to jurisdiction was "manifestly ill-founded and has been asserted using inauthentic documents." The Tribunal notes that the Respondent had abandoned the use of the term "manifestly ill-founded" without suggesting alternative language in which the declaration might be couched. In any event, in the light of the fact that the Tribunal has set out clearly the

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<sup>38</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award of 20 November 1984; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006; *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009.

<sup>39</sup> *Inceysa v. El Salvador*, Award of 2 August 2006, paras. 238-239.

<sup>40</sup> *Phoenix v. Czech Republic*, Award of 15 April 2009, para. 113.

<sup>41</sup> *Id.*, para. 145.

reasons that form the basis for the conclusion set out in paragraph 170 above that the Tribunal does not have jurisdiction because the Claimant did not have shares in CEAS and Kepez at the relevant time, the Tribunal decides not to make any additional declaration on the matter.

### (3) The Claim to Monetary Compensation

177. The Respondent seeks an award of monetary compensation for the moral damage it has suffered to its reputation and international standing through the bringing of a claim that is baseless and founded on fabricated documents. The Respondent asks for an award in an amount determined by the Tribunal which, it argued, should be separate from and additional to any costs award.

178. In support of its claim, the Respondent cited in particular the decision of an ICSID tribunal in *Desert Line v. Yemen*.<sup>42</sup> There the tribunal awarded the claimant an amount of USD\$1 million for “in particular the physical duress exerted on the Claimant’s executives”.

179. At the hearing of 3 May 2009, Counsel for the Claimant argued that although the Respondent asserted moral damage it had not proved that it had suffered damage to its reputation or standing. It further argued that the *Desert Line* case was inapplicable because there the executives of the Claimant had been harassed, threatened and detained. There was no comparable conduct here.

180. In the view of the Tribunal, conduct that involves fraud and an abuse of process deserves condemnation. In the present case, the Tribunal has concluded that the claim to ownership of shares in CEAS and Kepez was based on documents that on examination appear to have been back-dated and thus fraudulent. Since the Claimant either had no original documents to produce or no intention of producing original documents because they would not withstand forensic examination, the continual requests for extensions of time for over a five month period could only be seen as a cynical attempt to postpone the inevitable, further contributing to the abuse of process.

181. The difficult question is whether these actions warrant an award of damages to the Respondent. This question would entail an analysis of the Tribunal’s jurisdiction to hear the claim, which comes close to an ancillary claim under Article 47 of the Arbitration (Additional Facility) Rules. However, the Tribunal need not go this far as it does not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages. The Tribunal believes that any potential reputational damage suffered by the Respondent will be remedied by the reasoning and conclusions set out in this Award, including an award of costs, which as set out below is significant. This provides a form of “satisfaction” for the Respondent. In the circumstances, therefore, the Tribunal decides not to make a monetary award of compensation to the Respondent.

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<sup>42</sup> See *supra* note 22. Also cited *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo* (ICSID Case No. ARB/77/2). Award of 8 August 1980, 1 *ICSID Rep.* 330 (1993).

#### (4) Costs

182. The Respondent has requested a full award of costs, with interest, including all attorney fees, the fees and expenses of the Tribunal and the administrative charges of ICSID. It cites the views of Professor Schreuer that such an award “serves the purposes of compensating the victorious party and of dissuading unmeritorious claims”.<sup>43</sup> In its statement of costs of 4 June 2009, the Respondent specified that its legal fees and disbursements amounted to a total of US\$3,907,383.14 and its advances to ICSID to US\$175,000.

183. At the hearing of 3 May 2009, Counsel for the Claimant argued that since the Claimant had not refused to comply with orders of the Tribunal, rather that it just had an incapacity that prevented it from complying, costs should be shared equally between the Parties. On 12 July 2009, the Claimant submitted its statement of costs, detailing the fees of its legal costs and expenses in the amount of US\$1,011,204.18. Its contribution to ICSID was equally US\$175,000.

184. The Tribunal is not persuaded that the Claimant was prevented from complying with the Tribunal’s orders. The Claimant initiated this arbitration and knew that in this forum it would need to prove ownership of the shares at the relevant time.

185. In the circumstances of this case, where the Tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims.

186. Accordingly, pursuant to Article 58(1) of the Arbitration (Additional Facility) Rules, the Tribunal orders that the Claimant pay the Respondent its full costs in this case in the amount of US\$3,907,383.14, together with the Respondent’s share of the costs of this arbitration in the amount of US\$129,740 (*i.e.*, one half of the total disbursements made by ICSID).<sup>44</sup>

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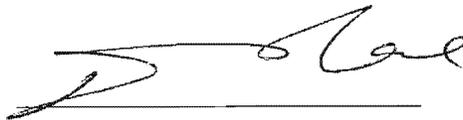
<sup>43</sup> RM para. 230.

<sup>44</sup> The ICSID Secretariat will in due course provide the Parties with a financial statement of the case account.

## AWARD

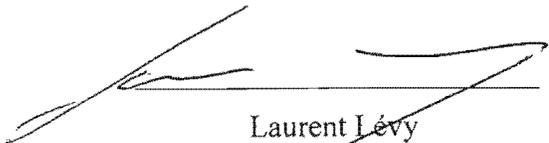
For the foregoing reasons, the Tribunal awards and orders as follows:

1. The Claimant's claim is dismissed in its entirety for lack of jurisdiction;
2. The Claimant shall pay the Respondent US\$3,907,383.14 representing the Respondent's legal costs and expenses;
3. The Claimant shall pay the Respondent US\$129,740 representing the Respondent's share of the costs of the arbitration;
4. In the event of non-payment of any of the amounts owing under (2) and (3) above within 30 days of notification of the Award, simple interest at the rate of 5% shall be paid until full payment;
5. All other requests for relief are dismissed.



Donald M. McRae

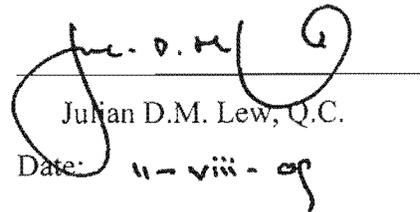
Date: 7 August 2009



Laurent Lévy

Date:

5 August 2009



Julian D.M. Lew, Q.C.

Date: 11 - VIII - 09