STOCKHOLM CHAMBER OF COMMERCE
CASE NO. V 2014/023

- between –

CEM CENGIZ UZAN
(Claimant)

- and –

THE REPUBLIC OF TURKEY
(Respondent)

REQUEST FOR AN ADDITIONAL AWARD UNDER ARTICLE 42 OF THE SCC ARBITRATION RULES

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26 April 2016

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I. INTRODUCTION

1. The Claimant has received by email, on 21 April 2016, a signed copy of the Award on Respondent's Bifurcated Preliminary Objection in that case, rendered by the Tribunal on 20 April 2016 (hereinafter the "**Award**").

2. The Claimant wishes to let the Tribunal know about his deep surprise at the Tribunal's failure to decide a crucial head of claim presented in the arbitration, and observes that this failure appears to have been determinative of the Award rendered by the Tribunal. Based on this, the Claimant hereby submits, pursuant to Article 42 of the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce, a request to the Tribunal to make an Additional Award.

II. THE MAKING OF AN ADDITIONAL AWARD UNDER ARTICLE 42 OF THE SCC ARBITRATION RULES

3. Article 42 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force as of 1 January 2010), entitled « Additional award », provides as follows:

> "Within 30 days of receiving an award, a party may, upon notice to the other party, request the Arbitral Tribunal to make an additional award on **claims presented in the arbitration but not determined in the award**. If the Arbitral Tribunal considers the request justified, it shall make the additional award within 60 days of receipt of the request. When deemed necessary, the Board may extend this 60 day time limit" (emphasis added).

4. No relevant practice as to the application of this provision of the SCC Arbitration Rules seems to be publicly available. However, it is noteworthy (and relevant to the present Request) that this provision is closely modelled on a similar provision in the UNCITRAL Arbitration Rules. Article 39 of the UNCITRAL Arbitration Rules (as revised in 2010) provides indeed as follows:

> "1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

> 2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
>
> […]".

5. It has been noted that "Professor Sanders observed during the original Committee discussions that corresponding Article 37 of the 1976 UNCITRAL Rules was intended to cover « obvious cases of omission » in which the arbitrators failed to render a complete award".[1] The jurisprudence of the Iran-US Claims Tribunal on the application of Article 37 of the [1983] Tribunal Rules confirms that an arbitral tribunal may have to render an additional award in situations where it would have omitted to dispose of a claim brought before it.[2]

   It has been decided by the Iran-US Claims Tribunal in *Islamic Republic of Iran and United States of America,* Cases Nos. A3, A8, A9, A14 and B61, that

> "Article 37 is not applicable in cases where the Tribunal has deliberately elected not to decide a certain claim or deal with a certain question in its award and has given reasons for not doing so".[3]

6. As will be explained below, it is obvious in the present case that the Tribunal has failed to address one crucial claim set out in the Statement of Claim. This failure would apparently be the result of a gross negligence which led the Tribunal to commit a manifest error of assessment as to the existence of a claim in this arbitration. Thus, it is apparent that the Tribunal has not deliberately elected not to decide this claim, and consequently has not given reasons for not doing so. The Claimant therefore requests the Tribunal to issue an Additional Award, pursuant to Article 42 of the SCC Arbitration Rules, in order to fulfil its duty to arbitrate this claim presented in the arbitration but not determined in the award.

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[1] D.D. Caron and L.M. Caplan, *The UNCITRAL Arbitration Rules. A Commentary* (Oxford: Oxford University Press, 2013) 822.

[2] See e.g. *Assistance in Developing Educational System, Inc and Islamic Republic of Iran*, Case No. 218, Chamber One, Order of 31 October 1983; *Woodward-Clyde Consultants and Islamic Republic of Iran*, Case No. 67, Chamber Three, Order of 30 December 1983; *Exxon Research and Engineering Co and Islamic Republic of Iran*, Decision No. DEC 63-155-3 (29 July 1987) reprinted in 16 Iran-US CTR 110, 111 (1987-III); Esahak Saboonchian and Islamic Republic of Iran, Decision No. DEC-103-313-2 (13 February 1992), reprinted in 28 Iran-US CTR 51, 51-52 (1992).

[3] *Islamic Republic of Iran and United States of America*, Cases Nos. A3, A8, A9, A14 and B61, Decision No. DEC-135-A3/A8/A9/A14/B61-FT (1 July 2011), at 6-7.

III. THE OMITTED CLAIM

7. Claimant has submitted in his Statement of Claim that he made investments, of a multi-billion-euro value, while he was permanently residing in another Contracting Party (the United Kingdom). The substance of this claim, which may be found in the written submissions of the Claimant, will be only briefly recalled below. It is evident that this claim qualifies as a "claim" in the meaning of Article 42 of the SCC Arbitration Rules, and according to the plain meaning of the term.

A. The claim of having made investments (direct ownership of shares in ÇEAŞ and Kepez since 1996)

8. It results from paragraph 152 of the Award that the Tribunal considers "the time the investment was made" to be the relevant date upon which the test of "transnationality" has to be applied, in order to determine whether an investor qualifies as a protected Investor under the ECT. The Tribunal has also made clear that with respect to investments "made [by Claimant] while he was permanently residing in another Contracting Party", Claimant could possibly claim the status of Investor under the ECT.[4]

9. Claimant has explained in his Statement of Claim that he made investments, under the form of shares in ÇEAŞ and Kepez, since 1996, i.e. at a time when he was permanently residing in the United Kingdom. The relevant portions of the Statement of Claim dated 22 February 2015 are reproduced below:

> "**b. The Claimant has directly owned shares in ÇEAŞ and Kepez since 1996 under his own name**
>
> 192. The Claimant has been the direct owner of shares in ÇEAŞ and Kepez since **1996**. The Claimant's direct ownership results from both direct acquisition and through UBS-ordered acquisitions.
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> 193. At the time of Rumeli Elektrik's acquisition, the Claimant did not yet own shares in ÇEAŞ and Kepez. It was only later, in **1996**, that he began acquiring personal share participation in the two utility companies. At first, this equity participation was minimal, and the Claimant was the owner of 0,002 percent of shares in ÇEAŞ, and similar percentage for Kepez. This figure increased to 8,56 percent in ÇEAS and 9,89% in Kepez for the year **1998** and onwards, and remains so still today.
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> 194. In addition, the Claimant also gave instructions to UBS Switzerland for the purchase of shares in ÇEAŞ. The Claimant is the owner of the account no. 0206-PO-012366. The

[4] Award on Respondent's Bifurcated Preliminary Objection, para. 148.

summary statements provided show that, upon instruction by the Claimant, UBS Switzerland began acquiring ÇEAŞ shares around October **1997**. Together these summary statements for the years 2003, 2005, 2006, 2007, 2007, 2008 and 2009 confirm that this account held 600,000 units of ÇEAŞ shares, which amounts to 0.12% of share ownership in ÇEAŞ" (emphasis added).[5]

The Respondent is fully aware of this claim, which was referred to explicitly by their Expert, Mr. Tim Eicke QC:

> 12) The Claimant further asserts that he, personally, acquired shares between 1996 and 1998, culminating by 1998 in a:
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> a) 8.56% holding in ÇEAS; and
>
> b) 9.89% holding in Kepez.
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> 13) Finally, the Claimant asserts that he acquired shares in ÇEA§ through UBS Switzerland from around October 1997.[6]

B. The claim to be permanent resident in the United Kingdom at the time of the investment

10. Claimant has brought to this Tribunal a claim that under UK law, the Claimant can be seen as having permanently resided in the United Kingdom from 1996. It is during that period, at a time when he was permanently residing in the United Kingdom, that he became the direct owner of shares in ÇEAŞ and Kepez, both by means of direct acquisition and through UBS-ordered acquisitions.

11. The Statement of Claim detailed this claim.[7] This was reiterated in detail in the Reply on the Preliminary Objection to Jurisdiction *Ratione Personae*, where it was clearly asserted that the Claimant was permanently residing in the United Kingdom as of 1996.[8]

12. Claimant's written submissions on that point have shown that at the time when he made direct acquisitions of shares in ÇEAŞ and Kepez (from 1996 onwards), Claimant was residing permanently in the United Kingdom. The competent UK authorities were satisfied, when they granted Claimant "Indefinite Leave to Remain" on 10 November 2000, that Claimant had

[5] Statement of Claim, 22 February 2015, paras. 192-194.

[6] See Expert Opinion of Tim Eicke QC, 23 June 2015, paras. 12 to 13 (footnotes omitted).

[7] Statement of Claim, 22 February 2015, paras. 417 ff.

[8] Reply on the Preliminary Objection to Jurisdiction Ratione Personae, 20 September 2015, paras. 224 ff.

effectively been residing for the past four years in the United Kingdom, as required under UK law.

13. This fact, i.e. that Claimant had been residing for four years in the United Kingdom when the UK authorities granted him Indefinite Leave to Remain on 10 November 2000, has been acknowledged by the Tribunal. The Tribunal deemed it was "authorized to examine the underlying facts in order to determine whether the Claimant has permanently resided there in accordance with the applicable domestic law".[9]

14. Accordingly, the Tribunal examined the underlying facts as follows:

> "Indefinite leave to remain for an investor" is defined in Section 230 of the UK Immigration Rules. It requires that the investor should have spent a continuous period of four years in the United Kingdom in his capacity as an investor, and that ***the requirements of Section 227 of the UK Immigration Rules have been met over this period***. One such requirement, as set out in Section 227(iv) is that the investor "has made the United Kingdom his main home." ***On this basis, the Tribunal is satisfied that the granting of indefinite leave to remain under Section 230 of the UK Immigration Rules could be said to denote a status that might be equivalent to the situation of a person permanently residing***" (emphasis added)[10]

15. Claimant's residence in the United Kingdom as of 1996 under a "Leave to Remain" was "permanent" even if it was not yet granted as "indefinite", and therefore meets the test set by the Tribunal with regard to French *protection subsidiaire*, according to which "the necessity to extend such protection does not take away from its permanency" and "[t]he fact that it may be revoked at a future point in time is not relevant".[11]

16. The fact that Claimant had been permanently residing in the United Kingdom during the four years preceding the granting of Indefinite Leave to Remain by the UK authorities on 10 November 2000 is further corroborated by the document contained in the Claimant's UK immigration file, which will be referred to at Section VI below, in which a UK official stated that, in light of enquiries conducted by relevant UK authorities in connection with the requirements of UK law, he was satisfied that during the period from 1996 onwards, Claimant had its "main home" in the United Kingdom.[12]

[9] Award on Respondent's Bifurcated Preliminary Objection, para. 156.

[10] Award on Respondent's Bifurcated Preliminary Objection, para. 159.

[11] Award on Respondent's Bifurcated Preliminary Objection, para. 183.

[12] See Section VI below.

IV. THE FAILURE OF THE TRIBUNAL TO DECIDE THE CLAIM

17. At paragraph 147 of the Award, the Tribunal notes that 'when the Claimant first made his investment, he was only a national of Turkey, and he was not **– *and did not claim to be* –** permanently residing in another Contracting Party. The Claimant was a national, domestic investor, and not a protected "Investor" within the meaning of the ECT. ***The Claimant asserts that only subsequently was he "permanently residing" in another Contracting Party***' (emphasis added).

18. It is clear from this quote that the Tribunal incorrectly asserted that Claimant « did not claim to be » permanently residing in another Contracting Party when he « first made his investment ». On the contrary, Claimant actually claimed that he had permanently resided in the United Kingdom from 1996 in accordance with the laws of the United Kingdom, as is evident from the Statement of Claim[13] and the Reply on the Preliminary Objection to Jurisdiction *Ratione Personae*.[14]

19. The Tribunal thus misrepresented the Claimant's submissions and claims when it asserted that Claimant « did not claim to be » « permanently residing in another Contracting Party » at the time he made the investments (1996 onwards).

20. As a consequence of this undisputable error, which could obviously be seen as amounting to gross negligence, the Tribunal drew the erroneous conclusion that "[t]he Claimant was a national, domestic investor, and not a protected "Investor" within the meaning of the ECT".

21. The manifest error committed by the Tribunal is repeated at paragraph 148 of the Award, where the Tribunal states that: '"had the Claimant made additional energy investments back into the territory of Turkey, while he was permanently residing in another Contracting Party, the Claimant could possibly claim the status of Investor with respect to those investments. However, ***the Tribunal is not required to make a determination on this point, as those facts are not alleged by the Claimant, and there is no evidence before the Tribunal that he is making any claim in respect of an investment made while he was permanently residing in another Contracting Party***" (emphasis added).

22. As is apparent from the Claimant's submissions quoted above, the Tribunal was actually required to make a determination on this point. Those facts were actually alleged by the Claimant. The statement that "there is no evidence before the Tribunal that [Claimant] is making any claim in respect of an investment made while he was permanently residing in another Contracting Party" is plainly incorrect.

[13] Statement of Claim, 22 February 2015, paras. 417 ff.

[14] Reply on the Preliminary Objection to Jurisdiction Ratione Personae, 20 September 2015, paras. 224 ff.

23. The same error is further reiterated at paragraph 152 of the Award, where the Tribunal states that "***on the evidence that is available to it***, the Claimant is not a covered Investor as he is not an "Investor of another Contracting Party," because on the date he made his investment, and at all times until the alleged interference occurred, he was an investor of the Republic of Turkey" (emphasis added).[15] This statement deserves the same reply as the one made before.

24. The Tribunal has enunciated at paragraph 148 of the Award that:

> "Hypothetically speaking, ***had the Claimant made additional energy investments back into the territory of Turkey, while he was permanently residing in another Contracting Party, the Claimant could possibly claim the status of Investor with respect to those investments***" (emphasis added).

It is precisely what happened in the present case. Again, shares in ÇEAŞ and Kepez were acquired directly by Claimant from 1996 to 2000.[16] Therefore, to borrow the Tribunal's words, to the extent that those acquisitions were effected while Claimant was permanently residing in another Contracting Party, Claimant can claim the status of Investor with respect to those investments. Should it be deemed to be applicable, the "essential transnational link" referred to by the Tribunal,[17] in the circumstances of this case actually exists "in relation both to the time [Claimant's] "investment" was made and when he alleges it was interfered with".[18]

25. It is necessary to make another important observation. In its Award on Bifurcation and Security for Costs dated 20 July 2015, the Tribunal had denied the Respondent's *ratione materiae* preliminary objection, stressing that "there is too much potential for overlap with the merits of the case" (at para. 138). Your Tribunal will no doubt agree with the proposition that jurisdiction *ratione materiae* of an international tribunal refers to the subject matter of the claim, which in the context of investment treaty arbitration is typically defined by an investment treaty "by providing that only investments, as defined in the treaty, and not any other matters, are governed by the treaty".[19] This means basically that the existence of the jurisdiction *ratione materiae* of a tribunal is predicated upon the existence of a qualifying investment, as defined in the relevant treaty. Put simply, the jurisdiction *ratione materiae* of an arbitral tribunal relates to the issue of whether a protected investment exists.

26. What appears from the Award is that the Tribunal *in fact* engaged in the Award into an examination of the existence of a covered investment. It doing so, it disregarded its own prior

[15] Award on Respondent's Bifurcated Preliminary Objection, para. 152.

[16] See Section III(A) of the present Request.

[17] *See* Award on Respondent's Bifurcated Preliminary Objection, para. 152.

[18] *See* Award on Respondent's Bifurcated Preliminary Objection, para. 152.

[19] V. Heiskanen, 'Ménage à trois ? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2013) *ICSID Review* 1-16, at 8.

findings that *ratione materiae* issues were to be addressed with the merits of the case. Further, and most importantly, the Tribunal erred on this matter in basing its decision on the incorrect premise of the non-existence of a claim "in respect of an investment made while [Claimant] was permanently residing in another Contracting Party".

27. It may be added that, should the permanent residence of Claimant in Turkey have ceased at some point after 2000, this would not affect the quality of Claimant as a protected Investor under the ECT, to the extent that the investments have been made at a time when Claimant was permanently residing in another Contracting Party. Indeed, as the Tribunal emphasized at paragraph 18 of the Award, "the mere fact of the Claimant's subsequent change of residence, as well as the reasons and the circumstances thereof, cannot as such operate to transform the legal characteristic of the person into an Investor, within the meaning of Article 26(1)".[20] It is clear that the opposite situation deserves the same solution, and that accordingly a subsequent change of residence cannot as such operate to deprive a person of his or her previous quality as an Investor, within the meaning of Article 26(1) of the ECT.

28. As to the existence of the "essential transnational link"[21] in relation to the time when Claimant alleges Turkey "interfered with"[22] his investment, Claimant has already submitted, in substance, the following:

(i) 2013 and 2014 are the relevant dates as they are the dates of the constitution of the breaches because of their composite nature under Article 10 and Article 13 ECT ;

(ii) Alternatively, Turkey's breach of Article 13 is a continuous wrongful act under international law ;

(iii) In any case, 2014 is again a relevant date because it is the date of the legal transfer of ÇEAS and Kepez's hydro-electric plants.[23]

Most of all, this is an issue related to *ratione materiae*, that will accordingly have to be dealt with at the merits stage of the present case.

29. To summarize: Claimant made his investments (in the form of direct acquisitions of shares in ÇEAS and Kepez) without any doubt at a time when he was permanently residing in the United Kingdom in accordance with the laws of the latter. This has not been denied by the Tribunal, which in paragraph 189 of the Award explicitly limited itself to finding that "the Claimant was not "permanently residing in" the United Kingdom between 2002 and 2003".[24] It is clear that with respect to those investments effected between 1996 and 2000, Claimant

[20] Award on Respondent's Bifurcated Preliminary Objection, para. 148.

[21] *See* Award on Respondent's Bifurcated Preliminary Objection, para. 152.

[22] *See* Award on Respondent's Bifurcated Preliminary Objection, para. 152.

[23] Reply on the Preliminary Objection to Jurisdiction Ratione Personae, 20 September 2015, paras. 330 ff.

[24] Award on Respondent's Bifurcated Preliminary Objection, para. 189.

qualifies as an Investor in the meaning of Article 26(1) of the ECT. And Turkey's interference with his investments culminated at a time when he was permanently residing in France, as the Tribunal has admitted in the Award.[25]

V. CLAIMANT'S PERMANENT RESIDENCE IN THE UNITED KINGDOM

30. In its Statement of Defence dated 24 June 2015, Respondent asked why documents supporting the Claimant's residence in the United Kingdom, such as his immigration file, "would not be readily accessible to the Claimant by consulting public records in the United Kingdom".[26] Respondent went as far as to express doubts as to the existence of any such documents ("if they existed")[27] and alleged that there was "not one piece of evidence supporting any allegation in the SoC with respect to the Claimant's residence in the United Kingdom".[28]

31. In order to respond to those allegations, and despite the fact that he had already submitted detailed evidence of his permanent residence in the United Kingdom, Claimant has indeed requested from the competent UK authorities the release of his immigration file. On 29 February 2016, in response to a request submitted pursuant to the UK Data Protection Act 1998, Claimant received from the UK Home Office (Visas & Immigration section) a copy of his UK immigration file (provided under the disclosure from Home Office records under the Data Protection Act 1998) consisting of "copies of data we hold on our IT systems and paper case working files (including case notes, case correspondence sent and received, application forms, supporting documents and forms served by the Home Office)". In a letter dated 2 March 2016 addressed to the Tribunal, Claimant informed the Tribunal that he had received this document and asked for permission to submit it to the Tribunal. Claimant drew the attention of the Tribunal to the fact that this official document "may be considered by the Tribunal to be of particular relevance at this stage (and eventually a future stage) of this matter".

32. By means of an e-mail dated 4 March 2016, the Tribunal informed the parties that it had "decide[d] that it shall not accept the Claimant's request to submit further documents", noting that the arbitration proceedings were closed and that "the Claimant ha[d] not demonstrated that this new proposed filing includes any new evidence".

[25] Award on Respondent's Bifurcated Preliminary Objection, para. 186.

[26] Statement of Defence, 24 June 2015, para. 529.

[27] Statement of Defence, 24 June 2015, para. 529.

[28] Statement of Defence, 24 June 2015, para. 530.

33. Claimant hereby submits to the Tribunal, as **Exhibit C-159** a copy of the basic document summarizing the test conducted by the relevant authority, part of his UK immigration file received from the UK Home Office (Visas & Immigration section), together with the cover letter sent by the latter. This document states clearly the following in relevant part :

> **Main Home** He has travelled widely during his 4 years – more than 38 times in first 2 years. I am satisfied that he made the UK his home base criterion.

34. This document merely corroborates and supports what was admitted by the Tribunal in paragraph 159 of the Award, i.e. that

> "Indefinite leave to remain for an investor" is defined in Section 230 of the UK Immigration Rules. It requires that the investor should have spent a continuous period of four years in the United Kingdom in his capacity as an investor, and that the requirements of Section 227 of the UK Immigration Rules have been met over this period. One such requirement, as set out in Section 227(iv) is that the investor "has made the United Kingdom his main home." **On this basis, the Tribunal is satisfied that the granting of indefinite leave to remain under Section 230 of the UK Immigration Rules could be said to denote a status that might be equivalent to the situation of a person permanently residing**" (emphasis added).

35. It is undisputed that the test of effective residence of Claimant has actually been conducted by the competent UK authorities according to the applicable (UK) law – at the very least for the period covering 1996 to November 2000, in the context of the granting of the Indefinite Leave to Remain. The requirement of Section 227(iv) of the UK Immigration Rules that the Claimant "has made the United Kingdom his main home" has "been met over this period", comprised between 1996 to November 2000, i.e. at the time when Claiment proceeded with the acquisitions of shares in ÇEAS and Kepez.

VI. CONCLUSIVE OBSERVATIONS

36. The Tribunal is under an obligation, under Article 42 of the SCC Arbitration Rules, to grant the present Request, in order to remedy its failure to decide the claim presented in this arbitration and briefly recalled in Section III, and consequently to make an Additional Award. Not granting the present Request would amount to a violation of Article 42 of the SCC Arbitration Rules and would obviously have legal consequences, as it may be deemed

amounting to wilful misconduct or gross negligence in the meaning of Article 48 of the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce.

VII. PRAYER FOR RELIEF

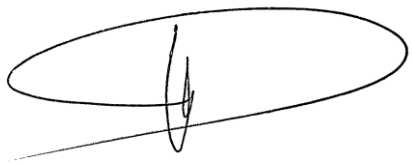
37. In light of the above considerations, Claimant requests the Tribunal to:

(i) given that the Tribunal decided on the legal standing of Claimant as a covered Investor during the period between 2002 and 2003, make an Additional Award finding that Claimant qualifies as an Investor of another Contracting Party in the meaning of Articles 1(7)(a)(i) and 26(1) of the ECT as regards the investments effected by him between 1996 and 2000, and is thus entitled to substantive protection of its covered investments under the ECT, and that the Tribunal has jurisdiction to hear the claims brought by Claimant in relation to these investments, and consequently allows for the case to proceed to the merits stage;

(ii) order a hearing to be held in relation to the present Request and the related claim.

Done in Paris, on 26 April 2016, on behalf of the Claimant.

Signature



Pierre-Emmanuel Dupont