Date of Dispatch to the Parties: January 19, 2007

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES WASHINGTON, D.C.

In the Proceeding Between

PSEG GLOBAL INC. AND KONYA ILGIN ELEKTRİK ÜRETİM VE TİCARET LİMİTED ŞİRKETİ
(CLAIMANTS)

and

REPUBLIC OF TURKEY
(RESPONDENT)

(ICSID Case No. ARB/02/5)

AWARD

Members of the Tribunal
Professor Francisco Orrego Vicuña
Mr. L. Yves Fortier, CC, QC
Professor Gabrielle Kaufmann-Kohler

Secretary of the Tribunal
Mr. Ucheora Onwuamaegbu

Representing the Claimants:

Carolyn B. Lamm
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Mesut Çakmak
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Prof. Dr. M. Fadlullah Cerrahoğlu
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John F. Doherty
PSEG Global

Representing the Respondent:

Mr. Daniel M. Price
Mr. Stanimir A. Alexandrov
Mr. Samuel B. Boxerman
Ms. Marinn F. Carlson
Ms. Jennifer Haworth McCandless
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Judge Stephen M. Schwebel
Washington, DC

Mr. Serdar Paksoy
Paksoy & Co.
Istanbul, Turkey

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I. Procedure

A. Procedure Leading to the Decision on Jurisdiction

1. On May 2, 2002, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") registered a request for arbitration against the Republic of Turkey ("Turkey" or the "Respondent") submitted by PSEG Global Inc. (PSEG), a company incorporated under the laws of New Jersey, United States of America (USA); the North American Coal Corporation ("North American Coal"), a company incorporated under the laws of Delaware, USA; and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi (the "Project Company"), described in the request for arbitration as a special purpose limited liability company incorporated under the laws of Turkey and wholly owned through several subsidiaries by PSEG (together referred to as the "Claimants").

2. The request invoked the ICSID arbitration provisions in the Treaty between the United States of America and the Government of the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (the "Treaty" or the "BIT"), which was signed on December 3, 1985, and entered into force on May 18, 1990.

3. Following the registration of the request, pursuant to the agreement of the parties on the method for constituting an arbitral tribunal, the Claimants appointed Mr. L. Yves Fortier, CC, QC, a Canadian national, as arbitrator and the Respondent appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. By agreement, the parties appointed Professor Francisco Orrego Vicuña, a national of Chile, as the presiding arbitrator. All three arbitrators having accepted their appointments, the Centre by a letter of October 25, 2002, informed the parties of the constitution of the Arbitral Tribunal (the "Tribunal"). By the same letter, the Centre also informed the parties that pursuant to ICSID Arbitration Rule 6(1), the proceeding was deemed to have commenced on that day.

4. The Tribunal held its first session on January 8, 2003, at the seat of the Centre in Washington, D.C. In accordance with the agreed upon schedule, the Respondent filed

its Memorial on Jurisdiction on April 3, 2003, and the Claimants filed their Counter-Memorial on Jurisdiction on June 27, 2003. In compliance with a revised schedule, the Respondent's Reply on Jurisdiction was filed on September 10, 2003, and the Claimants' Rejoinder on Jurisdiction was filed on November 24, 2003. The hearing on jurisdiction was held at the seat of the Centre in Washington, D.C., from February 22 to 25, 2004.

5. On June 4, 2004, the Tribunal issued its Decision on Jurisdiction in which it unanimously decided that:

> "(1) The dispute submitted by PSEG and Konya Ilgın Ltd. is within the jurisdiction of the Centre and the competence of the Tribunal.
>
> (2) The dispute submitted by [North American Coal Corporation] is not within the jurisdiction of the Centre and the competence of the Tribunal.
>
> (3) The costs of the jurisdictional phase of the arbitration are reserved."

6. The procedure leading up to the Tribunal's Decision on Jurisdiction is set out in greater detail in the Decision, a copy of which is attached to the present Award as an integral part of it.

B. Procedure Leading to the Award

7. Having dismissed the objections to jurisdiction with respect to PSEG and Konya Ilgın Ltd., the Tribunal, pursuant to ICSID Arbitration Rule 41(4), invited the parties, by letters of June 9 and July 19, 2004, to confer and advise the Tribunal on how to fix the time limits for the remainder of the proceeding.

8. By a joint letter dated July 28, 2004, the parties informed the Tribunal that they had agreed to a schedule for written submissions and for the hearing on the merits. According to that schedule, the Claimants were to file their Memorial on the Merits by February 18, 2005; Respondent was to file its Counter-Memorial by September 19, 2005; the Claimants were to file their Reply on the Merits by November 23, 2005; and the Respondent was to file its Rejoinder by January 31, 2006 (with the understanding that the deadline for the two latter submissions could be extended). In the event that the Respondent was to file a Counterclaim, the Claimants' Surreply, if any, was to be filed by March, 20, 2006. According to that schedule, the Hearing on the Merits was set for May 1, 2006.

9. The Claimants filed their Memorial on the Merits on February 22, 2005, and the Respondent filed its Counter-Memorial on September 19, 2005. By a letter dated November 9, 2005, the parties informed the Tribunal of their agreement that the Claimants' Reply would be filed by December 9, 2005, and the Respondent's Rejoinder by March 10, 2006. The Claimants filed their Reply on December 12, 2005. The Respondent filed its Rejoinder on March 17, 2006, after having been granted a one-week extension.

10. In accordance with a revised schedule agreed upon by the parties, the hearing on the merits was held at the seat of the Centre in Washington, D.C., from April 3 to April 12, 2006. The parties were represented by their respective counsel who made presentations to the Tribunal and examined witnesses and experts from their side and the opposing side. Present at the hearing were:

Members of the Tribunal: Professor Francisco Orrego Vicuña, President, Mr. L. Yves Fortier, CC, QC and Professor Gabrielle Kaufmann-Kohler.

ICSID Secretariat: Mr. Ucheora Onwuamaegbu, Secretary of the Tribunal, Mr. Tomas Solis, ICSID Consultant.

Attending on behalf of the Claimants: as representatives Mr. Matthew J. McGrath, Vice President, Chief Operating Officer and General Counsel, *PSEG Global LLC,* Mr. Michael J. Thompson, President, *PSEG Fossil LLC,* Mr. John F. Doherty, Counsel, *PSEG Global LLC,* and Mr. Thomas A. Koza, Vice President, Law and Administration, *The North American Coal Corporation (NACC)*; as counsel, Ms. Caroyln B. Lamm, Ms. Abby Cohen Smutny, Mr. Christopher M. Curran, Mr. Francis A. Vasquez Jr., Mr. Frank Panopoulos, Ms. Anne Smith, Mr. Lee A. Steven, Ms. Muge Onal, Ms. M. Megan Smith, Mr. Matthew S. Leddicotte, Mr. Daniel Gilbert, and Ms. Katherine Southwick;

Attending on behalf of the Respondent: as representatives, Mr. Sami Demirbilek, Undersecretary, *Ministry of Energy and Natural Resources*, Mr. Selahattin Çimen, Deputy Undersecretary, *Ministry of Energy and Natural Resources*, Ms. Sevim Argun, Chief Legal Advisor, *Ministry of Energy and Natural Resources*, Mr. Budak Dilli, General Manager, *Ministry of Energy and Natural Resources*, Mr. Osman Emed, Deputy General Director, *General Directorate of Foreign Investment, Undersecretariat of the Treasury*, Mr. Mustafa Boran, Acting Deputy General Director, *General Directorate of Foreign Economic Relations, Undersecretariat of the Treasury*, Mr. Murat Lutem, *Embassy of the Republic of Turkey*, and Mr. Mehmet Çağil, *Embassy of the Republic of Turkey;* as counsel, Mr. Daniel M. Price, Mr. Stanimir A. Alexandrov, Mr. Samuel B. Boxerman, Mr. P. David Richardson, Ms. Marinn F. Carlson, Ms. Jennifer Haworth McCandless, Ms. Sharon H. Yuan, Ms. Dara Levinson, Mr. Gus Kryder, Ms. Vilma Belen-Pettorino, Ms. Rhonda Diggins, Mr. Serdar Paksoy, Ms. Değer Boden, and Mr. Zeynel Tunç.

11. As agreed with the Tribunal, the parties filed submissions after the hearing on the merits. Also, following the hearing on the merits, the members of the Tribunal deliberated by various means of communication, including a meeting in Washington, D.C., on September 11 and 12, 2006.

12. The Tribunal considers it unnecessary to describe the numerous procedural issues that it was called upon to resolve, or to recount the parties' many submissions, requests and applications relating to these issues. Suffice it to say that the Tribunal was required to consider and determine a myriad of questions relating to the production of documents, time limits as well as issues concerning witnesses and experts.

II. Considerations

A. The Claimants' Participation in the Development of Turkey's Energy Sector

13. As a result of the growing demand for electricity that Turkey experienced in the 1980's, the Government undertook measures to privatize the energy sector, including the participation of foreign investors therein under the model of Build-Operate-Transfer ("BOT") projects. The Claimants in this case were specifically interested in the generation of electricity in connection with coal reserves in the Konya Ilgın area of the Central Anatolian region. The Decision on Jurisdiction of June 4, 2004, provides a detailed explanation of this policy and the governing laws, as well as of the essential elements of the relationship between the parties. These elements shall only be repeated in this Award to the extent necessary for consideration of the parties' arguments on the merits.

14. The contractual arrangements for the organization of the BOT projects proved to be difficult to conclude as there were shifting policies and models that came into play. These difficulties had a very specific impact on the present dispute. In 1984, Law No. 3096 had envisaged that there would be concession contracts governed by Turkish administrative law, subject to the approval and review of the Turkish Council of State (the "Danıştay"). The use of such a model, however, would have made the international financing of projects and the consent to international arbitration of any dispute problematic. Therefore, Law No. 3996, enacted in 1994, introduced in its Article 5 the possibility of concluding implementation contracts governed by private law.

15. Two years later, however, Turkey's Constitutional Court invalidated Article 5 of Law No. 3996 because, in its view, BOT projects constituted a public service that had to be organized under a concession contract subject to Turkish administrative law. Yet another change was introduced on January 22, 2000, with the enactment of Law No. 4501, which allowed parties to existing concession contracts to convert these instruments to private law contracts and submit disputes to domestic or international arbitration.

16. Another legal difficulty that had a specific impact on the present dispute was one related to the corporate structure of the Claimants' investment in the Konya Ilgın BOT project. A Turkish joint stock company was first considered as the corporate vehicle for the investment. However, as a consequence of the changes in the law outlined above, which had various tax implications, PSEG later proposed that the corporate structure should be a Turkish Branch Office of a Dutch company that had been incorporated to channel the investment. The Project Company was thus organized in accordance with the latter option.

17. This alternative did not find favour with the Turkish Government and ultimately the Project Company was incorporated in Turkey as a limited liability company, one of the Claimants in this case. These various corporate structures had different tax implications that had an impact on the Claimants' expected return on their investment. They also had implications in respect of the tariff that had to be agreed for the sale of electricity.[1] As further discussed below, this proved to be a key element of the dispute presently before the Tribunal.

18. PSEG Global applied to the Ministry of Energy and Natural Resources ("MENR") in 1994 to built a lignite-fired thermal power plant in the area of Konya Ilgın. Authorization was granted that same year to prepare a Feasibility Study which was submitted in early 1995. The Feasibility Study was approved by MENR on November 29, 1995. This was the first of the various documents that later became central to the present dispute.

19. This Feasibility Study proposed a power plant with a net output of 375 megawatts (MW) of electric power and an average unescalated tariff of US$4.98 cents/kwh over a period of 38 years, with an average plant availability of 85%. This

[1] Expert Report of Mr. Faruk Sabuncu, March 15, 2006, paras. 9–40.

last figure also turned out to be a crucial element of the dispute. Pre-construction costs were estimated to be in excess of US$10.5 million, including engineering and consultant studies, development costs and legal fees. In addition, the Feasibility Study set out in detail the benefits the project would bring to the Turkish economy by increasing the availability of electricity.

20. The next step in the preparation of the project was the negotiation of the Implementation Contract, which was concluded and initialed on August 9, 1996. At this point, because of the ruling of the Constitutional Court noted above, the contract could no longer be governed by private law as originally envisaged. It was accordingly submitted for approval of the Danıştay as a concession contract under Turkish administrative law. Before giving its approval, the Danıştay requested from PSEG a Letter of Undertaking to MENR that the company would abide by the terms of the Implementation Contract until the Concession Contract was executed.

21. The Danıştay approved the Concession Contract on March 30, 1998. The Project Company signed the Concession Contract on December 10, 1998 and MENR on March 8, 1999, which thus became the date of execution. Intense negotiations and discussions between the parties during this period account for this rather lengthy process of execution. A performance bond for US$8.04 million was posted by the Project Company on February 23, 1999.

B. The Commercial Terms of the Contract

22. One of the important issues debated between the parties concerns the commercial terms of the Contract. The Tribunal will now set out the facts as submitted by each Party.

C. The Claimants' Understanding of the Commercial Terms of the Contract

23. According to the Claimants, the essential commercial terms of the Concession Contract were the same as those envisaged by the Implementation Contract. This, in the Claimants' view, was further confirmed by the fact that PSEG was required by the Danıştay to submit the Letter of Undertaking mentioned above reaffirming its commitment to those terms.

24. Those terms provided for a total installed capacity of 425 MW gross/375 MW net, an average availability factor of 85.08% and an average unescalated tariff of 4.98 cent/kWh. The Project envisaged 38 years of commercial operation and a total investment cost of US$804.8 million. In addition, the Implementation Contract required the Project Company to conclude several agreements and protocols, including most importantly the Energy Sales Agreement, the Fund Agreement and the Treasury guarantee ICSID arbitration was also provided for.

25. One clause which is also at the heart of this dispute is Article 5.1 of the Implementation Contract. This provision authorized the Project Company to conduct further studies at the mine site and, as a result of such studies, to prepare a Revised Mine Plan. The Project Company would then submit to MENR a revision of the tariff structure to cover any increase in the Project's fuel production costs that may have resulted from the Revised Mine Plan. The Claimants stress that under this provision, MENR "shall approve such revised energy tariff if it reasonably incorporates the Company's increased fuel production cost and results in a reasonable cost of energy and capacity based on the Facility's cost of production."

26. During the review and approval of the Concession Contract by the Danıştay, Article 5.1 of the Implementation Contract became Article 8 of the Concession Contract. However, as noted in the Decision on Jurisdiction, the new provision, while maintaining the authorization to prepare a Revised Mine Plan, introduced amendments to the language concerning the eventual revision of the tariff. Article 8, paragraph 3, provides as follows:

> If such revised mine plan increases the Company's estimated fuel production cost, the Company shall submit to the Ministry a revised tariff reflecting such cost increase, which the Ministry shall approve or disapprove in no later than sixty days after the submission by the Company. In the event the Ministry withholds its approval for the revised tariff on the basis of reasonable grounds and if the Company abandons the project prior to the construction start date, the Company and the Ministry shall have no claims against the other.

27. In the Claimants' submission, Article 5.1 of the Implementation Contract meant that unless the cost of fuel production proved to be unreasonably high in light of the Revised Mine Plan, the agreement to develop the power plant and the mine would be binding on the parties.

28. The Claimants explain that on the basis of technical studies conducted at the mine site and the evaluation done by North American Coal, which later became one of the Project sponsors, the cost per ton of lignite would be US$31.05, a figure which was within the range accepted by the Turkish Coal Enterprise in other mines in Turkey.

29. The Revised Mine Plan was submitted to MENR on December 3, 1997, together with a revised tariff proposal resulting from the increased cost of fuel. Investment cost, would also need to be increased by US$361.6 million which, according to the Claimants' explanation, could be accommodated through the tariff structure "either by raising the energy tariff rate, or by increasing plant output, or by adjusting both variables."[2]

30. The Claimants also aver that, because the Project needed to service debt in a period shorter than the term of the energy project, the different tariff structures proposed to MENR had to be "front-end loaded." Those structures envisaged a tariff rate that was higher for the first 12 years and thereafter declined significantly. MENR had insisted on an overall average tariff of 4.98 cents/kWh for the 38-year term of the Project. In addition, the Project Company had to ensure a return on equity that was satisfactory both to international lenders and the investors. The long-term Energy Sales Agreement, the Fund Agreement and the Treasury guarantee were also key factors in ensuring the economic viability of the Project.

31. The Revised Mine Plan was formally approved by MENR on June 19, 1998 (the "Ministerial Approval"), following the favorable opinion of the Turkish Coal Enterprise issued on May 4, 1998. The Tribunal notes at this stage the significance of these dates in the context of the present dispute, as it evolved.

32. The first tariff proposal was made in conjunction with the presentation of the Revised Mine Plan in December 1997. In order to meet the increased costs, it was at this point proposed to build a power plant of 500 MW gross and a net dependable capacity for sale to TEAS of 433.5 MW. In this proposal, the average availability factor was 87% (increased from 85% in the Feasibility Study), while the average tariff was kept at 4.98 cents/kWh as required by MENR.

33. The Claimants also state that in February 1998 MENR requested that the Project Company submit a cash flow table for the December 1997 proposal. This was done on

[2] Claimants' Memorial, para. 37.

the basis that the Project Company would operate as the Turkish Branch Office of the Dutch investment company incorporated by PSEG for this purpose (Konya Ilgın Electric Production B.V.), which was the structure then in place. In a proposal made on February 10, 1998, using this corporate structure, the Claimants submitted a tariff table to accommodate the increased costs that maintained the plant capacity at 425 MW gross/375 MW net, but raised the average selling price per kWh.

34. The Claimants explain that at that point MENR demanded that the Project Company be incorporated as a Turkish limited liability company. The Claimants add that such a change would increase the tax burden by approximately US$256 million during the life of the Project which had to be compensated with an adjustment of the tariff. Three new proposals were made by the Project Company on February 13, 1998, accounting for both the increased costs reflected in the Revised Mine Plan and the additional tax burden. As will be noted below, the Respondent denies that it agreed that the higher tax costs could be absorbed by means of the revised tariff structure, as argued by the Claimants.

35. In the Decision on Jurisdiction, the Tribunal noted that these proposals ranged from 433 MW gross/375 MW net to 500 MW gross/433.5 MW net; from an average availability factor of 85% to 87%; and all involved an increase in the average tariff from 4.98 cents/kWh: to 5.71, 5.23 and 6.34, respectively. Meetings to discuss these various alternatives were held on February 19, 1998, and May 15, 1998. The Tribunal notes that the parties have very different recollections about what was or was not agreed during these meetings. In fact, these disagreements later became irreconcilable.

36. The Claimants further explain that after the meeting of May 15, 1998, a new proposal was made on the basis of a 465 MW net capacity, an average availability factor of 87% and an unchanged tariff of 4.98 cents/kWh. According to the Claimants, they presented this proposal to Respondent at a meeting on May 18, 1998. They then informed the Respondent that with a 465 MW net capacity the gross capacity would have to exceed 500 MW. The Respondent denies that such meeting ever took place. However, according to the Claimants, this proposal was accepted by the Respondent and further confirmed by them in a letter delivered the same day. A draft amendment protocol to the Concession Contract, reflecting the new tariff structure, was prepared by the Project Company on June 12, 1998. The Claimants assert that additional confirmations were obtained at a meeting held on June 16, 1998.

37. The crucial element of the dispute turns on the Ministerial Approval of the Project on June 19, 1998, which provided that "in order to ensure that the average sale tariff of 4,98c/kWh shall remain unchanged…the installed capacity of 425 MW shall be increased to 500 MW, the amount of electricity generation shall also be increased and the cost increases arising from such additional investments shall also be financed." The Tribunal notes that the Approval did not refer specifically to any net capacity. The Claimants concluded that the Approval implicitly referred to and accepted the 465 MW net capacity envisaged in the May 18, 1998 proposal. This was not the Respondent's understanding, as will be explained later. It believed that the approved structure was the one discussed in February 1998.

38. The Project Company followed-up this Ministerial Approval with a new draft amendment protocol on June 25, 1998, which included its understanding about a 465 MW net capacity and a total investment cost of US$1,166.4 million. After the Concession Contract entered into force on March 8, 1999, the parties scheduled a meeting for March 24, 1999, in order to finalize the written amendments to the Concession Contract. As explained in the Decision on Jurisdiction, the parties had different understandings and explanations on why the 465 MW net figure was set out in the draft amendment protocol prepared by MENR.

39. The Claimants believe that by that time the Government of Turkey had begun to have second thoughts about the desirability of BOT projects in light of a difficult domestic economic situation and alleged pressure from the World Bank and the International Monetary Fund to liberalize the energy market as a condition for much needed financial support.

40. The Claimants explain that, as a result, BOT projects under negotiation were delayed and ultimately abandoned, just as Treasury guarantees were discontinued. Although the Government approved a list of eligible BOT projects in May 2000, Konya Ilgın was not included; its inclusion at a later date did nothing to change the end result as none of the projects ultimately materialized.

41. The Claimants also allege that Article 8(1) of the Electricity Market Law No. 4268, enacted on February 20, 2001, eliminated the Treasury guarantees and that the law further restricted energy sales agreements with TEAS to terms not exceeding one year, as opposed to the previous practice of being in effect for the whole duration of the

project. The Electrical Energy Fund was also abolished by Law No. 4684 and projects not having yet executed a fund agreement no longer qualified for this benefit.

42. In the Claimants' view, this background explains why MENR changed its position in May 1999. MENR now took the position that it had never approved a 465 MW net capacity, either on May 18, 1998, or in the Ministerial Approval of June 19, 1998. On May 6, 1999, a MENR official observed that the revised tariff table submitted was not the same as that accompanying the Revised Mine Plan in 1997 and later expressly stated that such figures had never been approved.

43. After additional exchanges, the Claimants aver that, on October 26, 1999, they accepted what they understood to be MENR's position at the time, namely a 500 MW gross/433.5 MW net plant. This alternative they allege had again become viable as a result of the fact that the adverse tax consequences arising from the limited liability company structure had been neutralized by further changes in the law. The Tribunal also notes at this point that this tax issue, including the content of the letter of October 26, 1999, has become relevant in the context of the present dispute.

44. The Claimants submit that MENR then required that the same availability factor indicated in the Feasibility Study (85%) be used by the Project Company with its 500/433.5 MW proposal, in spite of the fact that every single proposal made to accommodate the Revised Mine Plan had been based on an availability factor higher than that of the Feasibility Study. The Claimants believe that the figure of 85% did not allow for the generation of an amount of electricity sufficient to make the Project viable. They also state that this figure had already been changed to 87% in the February 1998 proposal and that the Ministry had accepted it. Additional discussions did not lead to an agreement, not even in the terms of another proposal made by the Project Company on February 10, 2000, which was described as the "final possible situation of what can be done with the project economics." The Tribunal notes that a dead end was reached at this point.

D. The Respondent's Understanding of the Commercial Terms of the Contract

45. The Respondent alleges that all difficulties that have characterized the implementation of the Concession Contract stem from the fact that the Claimants badly

underestimated the costs and risks of the Project, as reflected in particular in the Revised Mine Plan. As a result, there was no agreement about the renegotiation of the commercial terms envisaged in the Contract. Many efforts directed at securing an amendment to the Concession Contract to accommodate the increased costs did not bear fruit and no new terms or amendments were ever approved by the Danıştay.

46. The Respondent also explains that the BOT model envisaged at the time under Turkish legislation involved a complex process of negotiation, financing and execution of many different contracts, obtaining of permits and financing. Very often, Respondent says, applicants never reached a financial closure.

47. According to the Government of Turkey, and contrary to the Claimants' position, the country was not facing imminent electricity shortages and there was no need to develop electricity generating capacity to serve a particular region as the interconnected grid was continuously expanding and had an efficient transmission system. This issue was different from that of the distribution of electricity by means of local infrastructure, to which the Project would not have added anything as it was only conceived to contribute electricity to the national grid.

48. The Respondent asserts that at the time the Claimants applied for a BOT project in April 1994, Turkish legislation required that contracts to generate and supply electricity had to be in the form of a concession contract issued by the Danıştay. Shortly after, in June 1994, Law No. 3996 mandated the form of a private law contract for such projects. However, one year later, in June 1995, the Turkish Constitutional Court held such a provision to be unconstitutional. The Respondent submits that the Claimants knew well that unless the Constitution was amended the contract for this project had to be reviewed and approved by the Danıştay. The Government did nothing to encourage the Claimants' proposal and this responded only to the Claimants' search for business opportunities the world over.

49. The Feasibility Study submitted by the Claimants proposed to build and operate a 425 MW gross capacity power plant with two units of 212.5 MW each using circulating fluidized bed technology ("CFB") with an internal load of 50 MW that would supply 375 MW net. According to Respondent, there was no 425 MW CFB plant yet in commercial operation.

50. The first tariff proposal made by PSEG envisaged an unescalated average price of 5.20 cents/kWh, with an annual availability factor of 81% and a total investment of US$920.7 million. This tariff was based on the assumption that the Project Company would be a Turkish capital company. After initial negotiations, the tariff that accompanied the Feasibility Study arrived at the figures set out above: 4.98 cents/kWh, 85.08% availability, and an US$804.8 million investment. The Respondent's submission is that the approval of the Feasibility Study issued by MENR on November 29, 1995, only authorized the Parties to proceed to negotiate a contract based on the amended commercial terms.

51. The Respondent adds that shortly thereafter the negotiations became very difficult when PSEG requested that the Project Company be structured as a branch office of a foreign company. This type of structure, unknown to MENR, would have resulted in a US$250 million windfall for the Company at the expense of the Turkish Republic. Furthermore, PSEG demanded the inclusion in the contract of an international arbitration clause, knowing that this could not be accepted by the Danıştay in the context of a concession contract. More importantly, additional mine studies would have to be conducted by Claimants because the Feasibility Study had been based on scant information. Article 5.1 of the Implementation Contract was intended precisely to take into account the increased costs that could result from the new studies.

52. The Respondent indicates that Article 5.1 left little or no discretion to the Government with respect to the approval of the tariff resulting from increased costs. Therefore, the Danıştay decided to replace this provision with Article 8 of the Concession Contract which gave MENR discretion to reject the proposed tariff on reasonable grounds.[3] The Project Company was required to be structured as a Turkish capital company, as PSEG had originally proposed.

53. The Revised Mine Plan reflected the drastic increase in costs and risks of the Project. According to the Respondent, the mining costs alone would have increased by more than US$1 billion because the mine would have to be much deeper, enormous amounts of non-coal material would have to be removed, dewatering would have to be intense and the soil stability would require flattening the mine slopes, among many other geological and operating problems. The cost per ton of coal mined would have increased from US$21.5/metric ton to more than US$31/metric ton.

[3] Affidavit of Judge Harun Çetintemel, September 9, 2006, paras. 9–12.

54. Because of the conclusions of the Revised Mine Plan, the Respondent submits that the terms of the draft Concession Contract then before the Danıştay were no longer feasible and the Claimants, it says, have never offered to implement the commercial terms that were ultimately approved by that body. The Respondent also states that since these fundamental changes were not reasonable, MENR was not under any obligation to approve the resulting revised tariff structure. In any event, any change had to be reviewed and approved by the Danıştay. This was never done.

55. Despite the cost increase, MENR continued the negotiations and tried to come to an agreement with PSEG on new terms. After consideration of various tariff proposals, including those discussed in February 1998, the Respondent submits that the parties had agreed at that point a tariff structured on a 500 MW gross/433.5 MW net, as proposed in the Revised Mine Plan.[4] The Respondent also alleges that it was under no obligation to compensate PSEG for the costs it incurred as a result of changes to the corporate structure of the Project Company from a foreign branch office to a Turkish capital company, on which it had insisted. Respondent points out that PSEG had not changed the tariff when the foreign branch office option was adopted and enormous tax savings had ensued.

56. The crucial divergence of position in this case, as noted earlier, arises from the fact that, according to Respondent, the June 19, 1998 approval was based on the February agreement. The Respondent submits that nothing different was agreed to in the alleged May 18, 1998 meeting, of which MENR has no official record. Even assuming that the meeting did take place, Respondent pleads that the officials allegedly involved had no authority to agree to such a fundamental change in the commercial terms of the Project. Moreover, the Respondent explains that a 500 MW gross/465 MW net tariff structure was not feasible as that net can only be supported by a 545 MW gross which PSEG itself had acknowledged.

57. The Respondent also explains that the June 19, 1998 Ministerial Approval was only an internal authorization to proceed with the negotiations. No amendment to the Concession Contract could be decided without the review and approval of the Danıştay. The parties, however, never agreed to such an amendment. Neither were there any underlying promises made by MENR, as the Claimants now assert, that led to their

[4] Testimony of Mr. Ahmet Oktay Kavas, April 10, 2006, Hearing transcripts, Vol. 8, at 1960–61, 2014.

signature of the Concession Contract. The various proposals considered between March 1999 and March 2000 entailed commercial terms that were not acceptable to MENR.

58. The Respondent explains that, in fact, the Claimants' proposed tariff structure would have placed an unacceptable financial burden on Turkey, as much as US$15.6 billion over the life of the Project. Moreover, the real rate of return expected by the Claimants was over 20% and not the 15.4% that was mentioned in every proposal.

59. Various other proposals were considered in June 1999, but MENR believes that all of them would have shifted cost increases to the public and were thus not acceptable. The October 26, 1999 proposal was based on the 500 MW gross/433.5 net structure the parties had agreed upon in February 1998. It used an availability factor of 87% instead of the 85% of the Feasibility Study which, in the Respondent's submission, had not been changed and thus made the proposal unacceptable. As noted above, the Claimants believed that the February 1998 structure had included the 87% availability factor.

60. The Respondent complains that the October 26, 1999 proposal also took into account the need to compensate the Project Company through the tariff for the corporate change to a limited liability company and the resulting additional tax burden of US$256 million at a time when the Claimants knew the tax law had changed again and the heavier burden had, in fact, been offset. According to the Respondent, this was never disclosed to MENR and hence a higher tariff was sought for a tax burden that no longer existed.

61. Neither was the February 10, 2000 proposal acceptable to MENR because, although lowering the average availability factor to 82.70%, a much higher availability factor would have been used during the first twelve years of commercial operation of the Project. This envisaged solution thus also failed to lead to an agreement.

62. The Respondent believes that MENR acted at all times within the discretionary authority granted by Article 8 of the Concession Contract as it was under no obligation to accept commercial terms proposed by the Claimants that were, in its sole judgment, disadvantageous to the Turkish Republic and its consumers. The grounds on which the various tariff proposals were rejected were "reasonable" from the Ministry's perspective, even if the Claimants did not agree.

E. The Benefits of a Private Law Framework under Law No. 4501

63. The parties have also made extensive submissions to the Tribunal in respect of the parallel issue of the benefits provided by Law No. 4501 enacted in January 2000 in order to implement a prior constitutional amendment allowing once again a private law regime for concession contracts. Under this law, a BOT project company with an executed concession contract had the right to apply to conclude an arbitration agreement or, alternatively, to convert its contract into a private law contract which also allowed for arbitration, with a view to facilitating international financing of such projects. The Claimants applied for the benefits of this law within the deadline of February 22, 2000 by first requesting the conversion of the Concession Contract and immediately after, in the alternative, requesting the inclusion in the Contract of an international arbitration clause.

64. The Claimants submit that MENR demanded terms and conditions that were not within its authority under this law. These terms and conditions concerned, in particular, the requirement to revise the procedure for determining the escalation of the price set out in the tariff, the requirement to pass on to Turkey cost savings realized in financing the Project by lowering the energy tariff, the requirement to lower the tariff in the early years of the Project, the requirement to agree to comply with any future changes in Turkish law, the requirement to commit to reach financial closure of the Project within a fixed period of time and the requirement to bear the risk of unforeseeable geological conditions.

65. According to the Claimants, all of these terms and conditions fundamentally changed the equilibrium of the Project and, except for certain amendments that the Claimants were willing to accommodate, the end result was unacceptable. The Claimants also submit that such requests interfered with and threatened their ongoing negotiations to secure international financing for the Project. The Claimants further explain that MENR, notwithstanding its obligation, refused to forward the application to the Council of Ministers.

66. The Respondent, on the other hand, answers that, according to the law, MENR was not expected merely to transmit PSEG's request to the Council of Ministers and that PSEG did not have an automatic right to convert the Concession Contract. MENR

acted within its authority in requesting that all project sponsors share with the Ministry the advantages the project would receive under the new law.

67. The Respondent adds that the terms MENR defined were addressed to all project sponsors who were all treated alike. In rejecting such terms, PSEG would have benefited unfairly from the improved loan conditions resulting from the conversion or would have imposed risks on the Ministry that were not justified. Neither, it says, could there have been any interference with international financing, since the process, according to Turkey, had not even begun.

F. The Treasury Guarantee, Energy Sales Agreement and Fund Agreement

68. The parties also have different views with respect to the facts and issues pertaining to the Treasury guarantee, the long-term Energy Sales Agreement and the Fund Agreement. All these additional contracts were contemplated by Articles 15 and 20 as well as Annexes 2 and 3 of the Concession Contract as key elements of the commercial terms of the Project.

69. The Claimants submit that the Electricity Market Law (Law No. 4628), enacted on March 3, 2001, had the effect of cancelling the Project Company's contract rights to a Treasury guarantee and to the long-term Energy Sales Agreement, just as Law No. 4684, in July 2001, cancelled their rights to the Electrical Energy Fund and all Fund Agreements related thereto.

70. In February 2002, the Constitutional Court invalidated Article 8(1) of the Electricity Market Law that had cancelled the right to a Treasury guarantee for all but 29 BOT projects, since such guarantees were part of the concession contracts concluded. Konya Ilgın was not one of the 29 projects. MENR requested a clarification from the Treasury and asked if it could begin to honor the contractual provisions for those guarantees in respect of a list of 30 BOT projects that had signed concession contracts; this time, the list included the Konya Ilgın Project. The Claimants allege that no action was taken because the Respondent was, at that time, pressured by the World Bank to change its policies in respect of such Treasury Guarantee.

71. The Respondent answers that there were never any external pressures affecting the conduct of negotiations in respect of concession contracts and that, in fact, the dispute in this case originated in late 1997 when the Revised Mine Plan was submitted.

This, says Turkey, was much earlier than the discussions that took place later with the World Bank and the IMF. The Respondent adds that the Government repeatedly issued instructions to various ministries to proceed with the negotiations of the supplementary agreements needed. It refers, in this connection, to a letter from the General Secretariat for the President to MENR dated May 13, 1999.[5]

72. The Respondent submits that, in fact, the Project never reached the stage where it could have received a Treasury guarantee. The Treasury, says Respondent, can only evaluate the financial risks of a project once the contracts and approvals, including financing, are completed. With such a Guarantee, the Treasury guarantees in particular that the payments for energy sales are made in the terms of an Energy Sales Agreement. It also guarantees payments under a Fund Agreement. None of these agreements had been concluded in the present case nor was there an agreement on the commercial terms of the Project. Many other agreements relating to insurance, contractors, loans, investment authorization, mining, plant performance and other matters had not been concluded either.

73. It follows, in the Respondent's view, that this benefit was never denied. In fact, the Respondent asserts, PSEG never applied for the guarantee. In any event, the Respondent asserts that there is no "right" to such a guarantee as the Government has full discretion to decide whether or not to issue it. This discretion was not fettered by the Concession Contract or the decision of the Constitutional Court. Respondent also explained that the limits the Government placed on Treasury guarantees for BOT projects were only introduced in May and June 2000, and that the Electricity Market Law was passed in March 2001, after the Project had failed since PSEG had abandoned it in early 2001.

74. The Claimants also allege that some of the amendments introduced by the Danıştay in respect of the Implementation Contract, particularly the elimination of the arbitration clause and the change of risk allocation concerning geological conditions of the mine, had negative implications since it made the financing of the Project more difficult to obtain. The Project Company, as recommended by MENR, worked diligently with TEAS and the Electrical Energy Fund in order to incorporate the

[5] Letter from General Secretary for the President to the Ministry of Energy and Natural Resources, May 13, 1999, Exhibit 74 to Respondent's Counter-memorial on the Merits, R 6690–91; and discussion in Respondent's Counter-memorial, para. 170, n. 320.

necessary safeguards for debt financing into the Energy Sales Agreement and the Fund Agreement.

75. These safeguards included, among others, broadening the scope of what constituted a force majeure and reinstating the arbitration clause. As a result, the draft agreements which followed had corrected many of these problems, including provision for ICSID arbitration. It is on this basis that the Project Company signed the Contract in December 1998. Soon thereafter the groundbreaking ceremony took place with the participation of Turkish dignitaries and U.S. officials.

76. According to the Claimants, all that remained in late 1999 to finalize these supplementary agreements was the incorporation of the revised tariff structure; as explained earlier, there was an ongoing process. Yet, the Claimants submit that, as a result of policy changes within the Turkish Government, TEAS and the EEF were not authorized to include the revised tariff figures which, they maintain, had been approved on June 19, 1998. In the end, the relevant agencies would not sign these agreements without the written approval of MENR, which was never granted.

77. The Respondent's view of these agreements is very different. Negotiations between TEAS and the Company they say were carried out in good faith for many months and a number of matters were settled, but the Claimants never concluded the negotiations. Among the various unresolved issues was the dispute settlement provision. TEAS could not insert in the Sales Agreement a mechanism which was different from that found in the Concession Contract; there could be no reference to ICSID arbitration in the drafts if such a clause was not included in the Contract.[6]

78. According to the Respondent, the situation was similar with respect to the Fund Agreement, which was never finalized. There were many unresolved issues when the Claimants abandoned the process. Prominent among these issues was the fact that the Agreement could not include a risk allocation clause found in private law contracts which the Claimants demanded, unless it was also included in the Contract. Furthermore, as noted earlier, there could not be any ICSID clause.

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[6] Affidavit of Mr. Abdulkadir Demirci, September 13, 2005, para. 11; Affidavit of Ms. Serpil Serdar, September 14, 2005, para. 13.

G. The Completion of Pre-Construction Development of the Project

79. A last factual question at issue between the Parties concerns the stage of development that the Project had reached when the process came to a standstill. In the Claimants' submission, the financial close of the Project after seven years of efforts was imminent. Construction was ready to commence. A lengthy list of authorizations, permits and contracts was included in the Claimants' pleadings to demonstrate that the Project was on the verge of financial close when the Respondent changed course and, without prior notice, decided to terminate the Contract.

80. The Respondent, on the other hand, alleges that the Government had enabled the conclusion of numerous authorizations and permits required to allow the Project to go forward. The Respondent submitted a list detailing the steps which it had taken. However, the Respondent concludes that by January 2000 the Project was no longer feasible as a consequence of the increase in diesel fuel costs, the unproven CFB technology offered and other factors. As a result, the Claimants were a long way from obtaining international financing. Numerous risks remained unmitigated, such as shareholders arrangements, fuel supply questions, technology and the absence of an arbitration clause.

H. The Tribunal's Evaluation of the Facts

81. The Tribunal is grateful to the parties' counsel who provided detailed explanation of the facts, together with a myriad of documents and the statements of numerous witnesses and opinions of learned experts. The Tribunal will now undertake the difficult task of considering and weighing these statements and opinions, as well as the evidence of the many witnesses in order to reach its own conclusions with respect to the facts of the case in terms of the rights and obligations of the parties.

1. *Was the Konya Ilgın Project Important to Turkey's Energy Sector or was it a Mere Gold Rush?*

82. The explanations given by the parties are based on totally different assumptions concerning the significance of this Project. For the Claimants, this Project was crucial

for the development of Turkey's energy sector in light of both a growing demand and the need to diversify the energy fuel sources. For the Respondent, this Project was simply part of a gold rush type of U.S. domestic power companies looking for new investment opportunities around the world. These different perspectives have, of course, a real impact on the way each party explains today the developments that took place in this case.

83. The Tribunal has no difficulty in concluding that Turkey was, in fact, faced with a growing need for electricity at that time in direct relationship with the expansion of its economy and industrial output. There is no doubt either about the fact that the BOT program was conceived to meet such needs in the medium and long-term. The Claimants recall in this respect that the very approval of the Konya Ilgın Project by the State Planning Organization in 1996 was expressly related to the need to "meet the increasing electricity demand of our country in a reliable manner."[7]

84. For the Tribunal, the question whether the location of the power plant in Central Anatolia was crucial for this development, as Claimants maintain, or whether it was just another input into an efficient national grid system, as the Respondent asserts,[8] is not a significant factor for the interpretation of the rights and obligations of the parties pursuant to their contractual arrangements. The location of the power plant has, of course, an incidence on the costs of the project having regard in particular to the losses of electricity transmission for long distances. However, it does not change the commitments that the parties did or did not undertake in respect of the Project in the negotiation and execution of the Concession Contract and related instruments.

85. It is therefore easy for the Tribunal to conclude that both parties undertook negotiations with a genuine interest in attaining a result conducive to the fulfillment of their respective expectations. Only this common interest can explain the many authorizations, approvals, proposals, meetings and discussions that continuously took place over many years in order to complete preparations for the Project, both legally and technically. Yet, it is also a fact that these efforts failed. The Tribunal must accordingly examine why this happened and who and to what extent was responsible for this failure.

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[7] Letter from the Undersecretariat of the State Planning Organization to the Ministry of Energy and Natural Resources, April 12, 1996, Exhibit C141 to Claimants' Memorial; *see also* discussion in Claimants' Reply, para. 50, n. 88.

[8] Affidavit of Mr. Budak Dilli, September 14, 2005, para. 4.

2. *Did the Implementation Contract Govern the Final Terms of the Project?*

86. The Claimants argue that the Implementation Contract represented a fully formed understanding between the parties and that this instrument, as the Protocol to the Implementation Contract recites, had been "negotiated, exchanged, and agreed upon as the final form."[9] It follows, in the Claimants' view, that the subsequent Danıştay review process was not meant to allow a rewrite of the commercial and technical terms of the Implementation Contract but simply to ensure its legal sufficiency and validity, a process which the Claimants characterize as an "imprimatur."

87. The Claimants assert that the Danıştay review was only made necessary because of changes in the law concerning the legal status of BOT projects that resulted from the Constitutional Court decision of June 28, 1995, that invalidated private law contracts. The Implementation Contract had been negotiated under a private law framework. Because the Constitutional Court decision came into effect in March 1996, the Contract, completed in August 1996, could only be implemented under the new framework of concession contracts approved by the Danıştay.

88. The Project, however, was only one. According to the Claimants, this explains why the Respondent directed and encouraged many of the technical services of the Turkish Government, including TEAS, the Electrical Energy Fund and the Treasury, to implement the Project as defined in the Implementation Contract while the Danıştay undertook its process of review. The Claimants invoke in support of their view many instances where MENR referred to the draft Contract agreed by the Parties including the June 19, 1998 Ministerial Approval.

89. The Respondent does not deny that the Implementation Contract represented the negotiated terms the parties had reached at the time, but argues that such terms had not finalized the key issue of the tariff structure as evidenced by Article 5.1 of the Implementation Contract and subsequently by Article 8 of the Concession Contract. The Respondent argues that this was the important issue which was never resolved as a result of the Revised Mine Plan and that, in any event, as noted above, an agreement on the commercial terms of the Project had to be approved by the Danıştay.

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[9] Protocol to Implementation Contract, August 9, 1996; and discussion in Claimants' Reply, para. 64, n. 123.

90. The Implementation Contract was undoubtedly an important milestone in the process of completion of the Project and its terms were clearly agreed by the parties. The Claimants' explanations to this effect are convincing and supported by both the text of the Implementation Contract itself and the Letter of Undertaking of November 27, 1996 which PSEG was requested to provide while the Danıştay proceeded with the review. In fact, the Project Company declared in this letter that it "shall be unconditionally bound by the presently existing terms of the Contract."[10] It also specified very clearly that the Project Company would be entitled to refuse to sign the Concession Contract if it incorporated provisions materially different from the Implementation Contract which could impede international financing.

91. However, in the view of the Tribunal, there are two important elements which weaken the Claimants' interpretation of the Implementation Contract. Firstly, although the Implementation Contract contained the agreed commercial terms and corresponding tariff structure, this matter was not considered closed as the parties agreed on a possible adjustment in light of the pending Revised Mine Plan. Article 5.1 of the Implementation Contract so provides unequivocally, as did subsequently Article 8 of the Concession Contract.

92. Thus, the commercial terms of the Project could not be considered final. Otherwise, the Claimants would have been bound by the commercial terms originally envisaged by the Feasibility Study, including the question of the availability factor that later became so prominent in their dispute with Respondent. It is quite evident from the totality of the whole process that, important though it was, the Terms of the Implementation Contract were not cast in stone. The Respondent argues rightly, in the opinion of the Tribunal, that the Claimants had never agreed to develop the Project according to the terms of the Implementation Contract.

93. Secondly, there is the key role of the Danıştay. As the highest administrative body in Turkey, it is clear that its role was mostly confined to the legal and administrative issues arising from the Implementation Contract, particularly in light of the evolving legal structure governing BOT projects. It follows that highly technical issues would normally be resolved by MENR.

[10] Letter of Undertaking from the Community Energy Alternatives Inc. to the Ministry of Energy and Natural Resources, November 27, 1996, Exhibit C45 to Claimants' Memorial; *see also* discussion in Claimants' Reply, par. 65, n. 126.

94. This does not mean, however, that the Danıştay's role was merely to rubber stamp the Implementation Contract or grant an "imprimatur." This important body has the authority to review and approve concession contracts, including all the terms contained therein, not just some of them. This is evidenced by the fact that among other issues that were still pending, there was the question of the ICSID arbitration clause. More importantly, any agreements the parties could have reached later had to be submitted to the Danıştay for final approval. There are numerous instances in the record of discussions between the Parties, always at the initiative of the Claimants, of amendments to the Concession Contract and the preparation of pertinent Protocols.

95. Important as the Implementation Contract was, it cannot be viewed by the Tribunal as the final word in the process. Other equally important steps were to follow.

3. *Did MENR Accept the Cost Increase of the Revised Mine Plan?*

96. The parties do not disagree about the fact that the Revised Mine Plan resulted in an increase in costs. The disagreement is whether such increase was "large," as the Claimants describe it, or whether it would have put the Project "among the most expensive power projects anywhere in the world," as the Respondent asserts. The parties also disagree whether MENR was at all times fully informed and aware of this increase and its magnitude or whether it came to the Ministry as complete surprise.

97. The Tribunal must first note that the parties have made different estimates in support of their respective positions. Based on the technical studies of Norwest,[11] the Claimants assert that in January 2004, Konya Ilgın came in at a cost of US$2.75/Mbtu. That is lower that the US$3.97/Mbtu weighted average cost of the six State-owned mine mouth power plants in Turkey and, indeed, the second least expensive of all such projects.

98. The expert report of Dr. Houser for Claimants estimated a fuel cost of US$2.87/MBtu for January 2000, while the Respondent's expert, Dr. Sansom, estimated a cost of US$5.05/MBtu.[12] In the Claimants' view, the difference stems from the fact that Dr. Sansom's report adds various costs that would be incurred if the mine was

[11] Expert Report of Norwest's Messrs. Conrad Houser and Andrew Scrymgeour, December 6, 2005, paras. 16–17.
[12] Testimony of Mr. Conrad Houser, April 7, 2006, Hearing transcripts, Vol. 5, at 1105–06; Testimony of Mr. Robert Sansom, April 8, 2006, Hearing transcripts, Vol. 6, at 1450–51.

separately managed and operated. However, the Claimants note that this Project was vertically integrated as a part of the overall Project.[13]

99. The parties also disagreed about the comparable cost of the TKI operated mines. The Claimants assert that TKI does not have to pay some taxes applicable to private developers and is subsidized by the government. This lowers its costs.[14] The Respondent submits to the contrary that TKI has to bear the same costs as private developers.[15]

100. The Respondent also argued that the total costs kept increasing: US$361 million more for the initial capital investment, US$557 million more in additional capital for the mine and US$20 million more each year for operation and maintenance. These increases in costs resulted by far, it says, in the most expensive thermal power project then under consideration by MENR. In his expert statement, Mr. Carlos Lapuerta concludes that each of the Claimants' proposals would have resulted in a substantial increase of the Project's total cost and a resulting increase in the "levelized" price for the electricity that the government would have to purchase.[16]

101. The Claimants further assert that at no time did MENR inform them that the price of electricity of the tariff proposals would be evaluated on a "levelized" basis. They aver that they were only told there would be an unescalated simple average tariff criterion. They say that their earlier suggestions to use a levelized price of electricity were rejected.[17]

102. The parties also disagree about the technical characteristics of the Project and the incidence they could have had on the cost increase. While the Respondent believes that the mine was "astonishingly complex," for the Claimants it "would have been reasonable easy to mine" and there was nothing particularly risky about it. On another issue, the Respondent asserts that the dewatering program would have ended up affecting a nearby lake, but the Claimants argue that the Environmental Impact Assessment had concluded that this was impossible in view of the geology of the area. For the Respondent, the area to be mined was so great that three towns had to be

[13] Testimony of Mr. Conrad Houser, April 7, 2006, Hearing transcripts, Vol. 5, at 1058–61.
[14] Claimants' Response to Respondent's new evidence, July 11, 2006, paras. 2–11.
[15] Respondent's Post-hearing Brief, n. 1.
[16] Expert Report of Mr. Carlos Lapuerta, September 19, 2005, paras. 47–48; Rejoinder Expert Report of Mr. Carlos Lapuerta, March 15, 2006, para. 15; Testimony of Mr. Carlos Lapuerta, April 9, 2006, Hearing transcripts, Vol. 7, at 1647–56.
[17] Claimants' Post-hearing Brief, paras. 44–49.

moved; for the Claimants this decision was entirely unrelated to the mine. While for the Respondent the mine would have been the size of Manhattan and an amount of overburden would have to be removed equaling that removed for the construction of the Panama Canal, for the Claimants there was nothing unusual in this project as evidenced by the existence of mines larger that Konya Ilgın throughout the world.

103. In the end, the Claimants argue that it did not matter that the investment or operational costs were higher than those accepted by MENR under the Revised Mine Plan as this was a risk of the Project Company; tariff adjustment and escalation were exceptional and specifically regulated under the Contract and no minimum profits or returns were guaranteed.[18] The Claimants assert in this respect that they were not seeking to recoup the extra costs of building a 500/465 MW plant or even a 545 MW plant, and that "they would have constructed a power plant producing a larger output for absolutely no additional investment cost." Yet, as will be seen later, to accommodate the higher costs of the Revised Mine Plan would have required TEAS to purchase more electricity. This was thus an expenditure which concerned MENR and which it wanted to limit.

104. While the Tribunal is not called upon to measure the real impact of the cost increase of the Revised Mine Plan on the economics of the Project, it is quite evident that this impact was significant. Clearly, it was inevitable that a series of factors would have to change, beginning with the plant capacity, followed by the amount of electricity that TEAS would have to buy and ending with the adjustment of the tariff.

105. The issue then becomes whether these changes were of the ilk envisaged in Article 5.1 of the Implementation Contract and Article 8 of the Concession Contract. The Respondent asserts that the Project Company was to some extent negligent in not having undertaken a complete mine study before the Feasibility Study and that MENR was not aware of the scope of the cost increases that were finally revealed by the Revised Mine Plan. The Tribunal must note in this respect that a witness for the Claimants in responding to a question from the Tribunal concluded that the Feasibility Study was an "educated guess" and that perhaps it should be more properly regarded as a "pre-Feasibility Study."[19]

[18] Claimants' Post-hearing Brief, paras. 25–31.
[19] Testimony of Mr. Conrad Houser, April 7, 2006, Hearing transcripts, Vol. 5, at 1135–36.

106. To this extent, the Respondent maintains that the articles of both the Implementation Contract and the Concession Contract with respect to the Revised Mine Plan were included, first, at the request of the Company and, secondly, with the understanding that the resulting changes would be limited and not too significant. It was on this basis that the Danıştay was seized of the issue.

107. The Claimants maintain that, on the contrary, MENR knew from the very beginning that the Feasibility Study would have to be supplemented by in-depth mine studies and that it would have been imprudent to do this before a government authorization to proceed with the Project was obtained. Moreover, the Claimants argue, MENR never questioned the need for these subsequent studies during the discussions held both before and after the Feasibility Study was completed. This explains why both the Implementation Contract and the Concession Contract provided for the preparation of the Revised Mine Plan. The Claimants explain that MENR was kept abreast of the significance of the Revised Mine Plan much earlier than the date it was submitted and still no objection was raised or even alluded to either directly or during the discussions before the Danıştay.

108. The Claimants submit that the Respondent accepted the new cost structure since the Revised Mine Plan was approved by the Turkish Coal Enterprise without amendment on May 4, 1998, and MENR issued its Ministerial Approval after a careful review that included the increased costs and their effect on the tariff and the amount of electricity needed to offset such costs. As noted above, the Respondent for its part has argued that MENR proceeded at all times with a different understanding about what would be acceptable in terms of a tariff adjustment resulting from such increase in the mine costs.

109. The Tribunal is persuaded that in the context of the many discussions that preceded the submission of the Revised Mine Plan, MENR, and to some extent, TKI, were aware that this study would lead to a new situation in terms of the costs involved. Yet, the Tribunal must note that when the Claimants informed MENR by letter of July 9, 1997, of the progress made in the preparation of the Revised Mine Plan and its likely effects on the electricity tariff, they stated that "initial computation indicates that there will be an impact to the electricity tariff" and that there would be a need for an increase

in the net capacity of the plant, concluding that "[a] minor adjustment to the electricity tariff may still be needed."[20]

110. MENR was therefore under the impression that these changes would be "minor," and this was so reported to the Danıştay. It is therefore plausible that this characterization is reflected in both Articles 5.1 and 8 of the Concession Contract. The reference in Article 5.1 to MENR's approval of a revised tariff "reasonably" incorporating the increase in fuel costs, seems to reflect this understanding. Article 8 of the Concession Contract refers to "reasonable grounds" for withholding approval. Major changes would appear to fall outside the scope of the standard of reasonableness envisioned in those provisions.

111. As the real extent of the increase in costs and their likely effect on the other factors in the process came to be fully known only with the submission of the Revised Mine Plan in December 1997, it is justifiable for the Respondent to argue that MENR was, to a certain extent, shocked by the results of the study. An expert for the Respondent stated that the Revised Mine Plan involved changes that were so dramatic that it resulted in "essentially presenting the Turkish Government with a second, entirely different project . . . that . . . , if pursued, would have been one of the most costly and risky power projects in the world."[21] However, the Tribunal notes that MENR, at the time, did not voice objections to these findings.

112. After the submission of the Revised Mine Plan, the discussions appeared to follow a two-track approach. First, there was the technical evaluation of TKI that led to the approval of the Revised Mine Plan, although reservations were made about cost and risk.[22] There was also the concern about the effects of the study on the commercial terms of the Project. This is undoubtedly where the attention of MENR was concentrated. In fact, while the Claimants' assertion that the Revised Mine Plan was approved is correct, this does not mean that the approval of the impact the increased costs had on the commercial terms of the Project automatically followed.

113. The two-tracks came together with the Ministerial Approval of June 19, 1998. However, this is where the differences between the parties become crucial. The technical aspects of the Revised Mine Plan were indeed approved, as noted. But was

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[20] Letter from Mr. Halil Sunar to the Ministry of Energy and Natural Resources, July 9, 1997, at 15, Exhibit C143 to Claimants' Memorial, *see also* discussion in Claimants' Reply, para. 74, n. 143.
[21] Written Statement of Mr. Robert Sansom, September 10, 2003, paras. 5–6.
[22] Affidavit of Mr. Ömer Ünver, September 3, 2003, para. 6.

this also the case for the new tariff structure? The Claimants believe that it was. The Respondent believes that this was not so. The Tribunal will discuss this issue later.

4. *For whom was the Tax Burden of the Project in Connection with the Corporate Structure?*

114. The discussion about the incidence of the corporate structure on the tax burden of the Project is a crucial factor in understanding the differences between the parties with respect to the commercial terms of this Project. This discussion took place during three different time periods: the negotiations concerning the Implementation Contract in 1996, the consideration of a change of structure in February 1998 and the disclosure about the effects of tax changes in 1999.

115. As noted earlier, the Respondent explains that, at the early stage of negotiations of the Project, a Turkish capital company was considered as the appropriate corporate structure for the Project Company, but that this was changed to a branch office of a Dutch incorporated company at the insistence of PSEG. The Respondent argues that the Claimants intended to obtain a tax windfall as a result of a lower tax burden but without disclosing it to MENR.

116. As also noted earlier, the Claimants explain that when the Feasibility Study was submitted in 1995 the law required BOT project companies to be formed as joint-stock companies. This law was amended in 1996 by Law No. 6224 allowing BOT project companies to be structured as branch offices of foreign corporations in order to promote foreign investments.[23] In the Claimants' view, it was only this consideration that led to the change in corporate structure.

117. The Claimants argue that there was nothing sinister in this change. Firstly, the Respondent must have been aware of the tax implications of the changes its own law was authorizing. Secondly, and more importantly, the Respondent specifically agreed to this change both in the Implementation Contract and in the Letter of Undertaking from the Claimants required by the Danıştay. The branch office was also authorized by the Permission Certificate of the Foreign Investment General Directorate issued on May 5, 1997, which the Tribunal addressed in its Decision on Jurisdiction.

[23] Claimants' Reply, para. 98, n. 208.

118. The Tribunal has no difficulty in concluding that the change from a Turkish joint-stock company to a branch office of a foreign company was both authorized by the law as amended and duly agreed to and approved by the Respondent. Indeed, there were tax advantages and such was the intent of the law, which was conceived as an incentive to attract foreign investment capital. The Respondent cannot be heard to argue that such advantages were unknown to MENR or, indeed, to the Turkish Government generally.

119. The evidence submitted by the Claimants on this question is convincing. The Implementation Contract made specific reference to Konya Ilgın Electric Production B.V. Turkey Branch and to Law No. 6224 Concerning the Encouragement of Foreign Investment Capital. The Letter of Undertaking made specific reference to the foreign capital company and to the commitment of the foreign investment company to bring a sufficient amount of capital to be determined by the Treasury.

120. The second time period when the corporate structure becomes relevant pertains to the negotiations that took place in February 1998 following the submission of the Revised Mine Plan. The Respondent alleges that because of the increase in the size of the Project resulting from the Revised Mine Plan, MENR requested that it be structured as a Turkish capital company, the corporate structure then in use for all BOT projects. The Claimants had no objection to the change provided they were compensated for the additional cost this change entailed, estimated at US$256 million. Compensation could be made by way of an adjustment in the tariff.

121. The issue then became one of compensation and whether it was agreed by the Parties. The Respondent avers that there should be no compensation for reverting to the original corporate structure proposed in the Feasibility Study as there had been no reduction in the tariff when the change to a branch office was made. The Respondent also asserts that the real tax cost of the change, as evidenced by the Claimants' financial models, was only US$96 million.

122. The Claimants argue that, on the contrary, they were entitled to be compensated. They claimed compensation from MENR by letter of February 10, 1998. The cash flow tables discussed in connection with the February 1998 proposals were explicit; they reflected the various corporate structures then considered. The Claimants assert that, moreover, all tax benefits of the foreign branch status had been computed in the revised tariff accompanying the Revised Mine Plan; there would have been no windfall, as the

internal rate of return under the Revised Mine Plan turned out to be lower than under the Feasibility Study.

123. The Claimants argue that the Parties agreed in February 1998 to adjust the tariff structure so as to compensate for the higher tax costs of the corporate change, and this was the basis for the various proposals made on February 13, 1998. The Respondent denies having so agreed.[24]

124. The evidence of the Parties on this issue is not very convincing. Their respective positions rest mainly on the witness statements they have each submitted. There are, however, two elements that the Tribunal finds helpful. First, according to two witnesses for the Respondent, MENR agreed to consider different proposals from the Claimants addressing the increased costs associated with the change in the corporate structure.[25] While this, in itself, is not dispositive, it does demonstrate that the Respondent was aware of the problem at the time and, as the Respondent later argued, that one of these proposals had been agreed as establishing the commercial terms of the Project. This evidence lends weight to the Claimants' argument that the agreement addressed the effects of the new corporate structure.

125. This acknowledgment also responds to a legal reality since the Feasibility Study in Section 11.1.1 and the Implementation Contract in Schedule 4 had envisaged a specific list of assumptions which defined the commercial terms with the express provision that if the bases for these assumptions changed, "the prices in the Tariff will be adjusted accordingly." The Claimants point out that these assumptions included taxation issues and the incentive allowances.[26]

126. A second element of evidence invoked by the Claimants is more direct and to the point. The minutes of the meeting held on February 11, 1998 refer to the fact that the new proposals "will be based on the establishment of a limited liability company,"[27] while those of the meeting held on February 12, 1998, refer to a consensus that there would be a change in corporate structure if the Revised Mining Plan and the tariffs were approved.[28] The discussion that followed in the Danıştay does not reflect that this body

[24] Affidavit of Mr. Metin Başlı, August 28, 2003, para. 8.
[25] Affidavit of Ms. Selda Bilgiç, September 13, 2005, para. 7; Affidavit of Mr. Ahmet Oktay Kavas, March 27, 2003, para. 23.
[26] Claimants' Post-hearing Brief, paras. 59–61.
[27] Resolutions of Meeting, February 11, 1998, Exhibit C583 to Claimants' Reply.
[28] Minutes of Meeting, February 12, 1998, at 1, Exhibit C148 to Claimants' Memorial.

required a specific corporate structure as the Respondent argues, since it referred to the fact that the law provided for both "domestic or foreign companies."[29]

127. The Tribunal can therefore conclude that it was reasonable for the Claimants to proceed to further stages of negotiations on the assumption that in accepting the corporate form of a limited liability company, the revised tariff would reflect this particular choice of form and its associated costs. As it has not been established that the change was required by law, it is also possible to conclude that the requirement for such change was more a matter of preference for MENR than a legal obligation.

128. The third time period when the issue of the corporate structure became relevant to this dispute was in late 1999. As noted earlier, additional tax changes made in early 1999 had the effect of offsetting the tax consequences that a limited liability company structure would have incurred as a result of the Project. The Claimants assert that they became aware of such results in October 1999. On this basis, they were prepared to accept what they understood was MENR's position at the time, which is what the Ministry had interpreted as the commercial terms approved on June 19, 1998. Yet, in the Claimants' submission, the Respondent once again changed its position and demanded the availability factor of the Feasibility Study.

129. The Respondent argues that the Claimants had ample time to consider the tax changes introduced on January 1, 1999, and yet, in October 1999, they were still proposing a tariff that included compensation for the effects of the limited liability corporate structure that was no longer relevant. They insisted on compensation as late as December 2000. The Respondent asserts in this regard that the new tax structure would have resulted in a US$250 million tax reduction for the Claimants even if the corporate structure had remained a Turkish capital company. The Claimants never disclosed this benefit and this, argues Respondent, evidences a bad faith negotiation strategy on their part.

130. The Tribunal is persuaded that it is quite possible that the Claimants became aware of the offsetting effects of the tax change in October 1999. The Respondent has pointed to convincing evidence showing that there were discussions earlier with advisors and executives to assess the changes.[30] However, it was not until October

[29] Minutes of Meeting, March 11, 1998, at R 0915.
[30] Letter from Deloitte and Touche to PSEG, October 8, 1999, Exhibit C571 to Claimants' Reply; Respondent's Post-hearing Brief, paras. 41–42.

1999 that firm conclusions emerged. The Tribunal finds plausible that, while at the time the Claimants were still demanding compensation for the corporate tax changes, the assessment of the tax situation was leading them to a different conclusion. A witness for the Claimants explained that it was shortly after that letter was written that PSEG learned of the offsetting effects of the tax changes.[31] In the circumstances, this is not evidence of bad faith negotiation.

131. But what might have been justified in October 1999 became less defensible later on. On November 17, 1999, a further letter was sent to MENR by the Claimants.[32] The Tribunal finds surprising that Claimants, by that date, would have been unaware of the changes. A proposal from PSEG on February 10, 2000 which still ignored the change in the tax law cannot be justified.[33] Even if the Claimants were under no obligation to inform MENR of the effects of the changes in Turkey's own tax laws,[34] in the context of this particularly complex negotiation the Tribunal would have expected the Claimants to proceed with greater transparency and to discuss the tax changes openly.

132. While the Tribunal will examine later the allegations of each Party concerning good or bad faith of the other Party, it can now positively conclude that the many successive changes that took place over the years in the law relating to the corporate structure of BOT projects and their resulting tax effects, in addition to the changing positions the parties adopted in the negotiations, whether or not these changes related to these legal changes, quite naturally led to misunderstandings and disagreements. This is one factor that contributed to the eventual total collapse of the negotiations.

5. *Was there Agreement on the Revised Tariff Structure Resulting from Increased Costs?*

133. The differences between the Parties on this issue have been outlined earlier. The Claimants assert that MENR had specifically considered two options after submission of the Revised Mine Plan as evidenced by the approval of June 19, 1998. The first was an installed capacity of 425 MW with an increase in the price of electricity to

[31] Third Written Statement of Mr. Halil Sunar, February 18, 2005, para. 57.
[32] *See* Letter from PSEG to Ministry of Energy and Natural Resources, November 17, 1999, Exhibit 110 to Claimants' Memorial; *see also* discussion in Respondent's Rejoinder, para. 103, n. 161.
[33] *See* Letter from PSEG to the Ministry of Energy and Natural Resources, February 10, 2000, Exhibit 111 to Claimants' Memorial; *see also* discussion in Respondent's Rejoinder, para. 105, n. 163.
[34] Testimony of Mr. Halil Sunar, April 5, 2006, Hearing transcripts, Vol. 3, at 503.

accommodate the higher costs while, in the second option, the capacity would be increased to 500 MW without changing the price per kWh.

134. The latter approach was the one the Claimants maintain was embodied in the tariff structure of the Revised Mine Plan. It resulted in keeping the same price of 4.98 cents per kWh and in the increase in the net generation capacity of the plant and the applicable availability factors from an average of 85.08% in the Feasibility Study to an average of 87.19% in the Revised Mine Plan. The sum total of these figures would yield "the amount of money in US dollars that TEAS would pay the Project Company in each year of the Project for the generated electricity."

135. The proposal accompanying the Revised Mine Plan was supplemented by the cash flow table that the Claimants sent to MENR on February 5, 1998. Yet, as this proposal was based on the corporate structure of a branch office of a foreign company which was no longer acceptable to MENR, the three above-mentioned new proposals submitted on February 13, 1998, envisaged an increase in the price which reflected the limited liability company structure favored by the Ministry. The Claimants assert that these various proposals were rejected by MENR in May 1998 only because of the increase in the price of electricity, not because it would have shifted the costs to the Republic as argued by the Respondent.

136. The Respondent, indeed, argues that such proposals would have resulted in an unfair shift of the costs to the Republic and that MENR was not willing to proceed regardless of the costs of building a larger plant that would be selling more electricity, all of which, as noted earlier, would have resulted in the most expensive power project in Turkey.[35]

137. The Respondent asserts that on February 13, 1998, the parties agreed to proceed on the basis of an increase in the installed capacity as proposed in the Revised Mine Plan (500 MW gross/433.5 MW net) provided the tariff did not change.[36] According to the Respondent, this was precisely what was approved on June 19, 1998.

138. As explained earlier, the Claimants, on the other hand, argue that the June 19, 1998 approval was based on the 500/465 MW figures the parties had agreed on May 18,

[35] Expert Report of Mr. Carlos Lapuerta, September 19, 2005, para. 30.
[36] Affidavit of Mr. Ahmet Oktay Kavas, September 13, 2005, para. 12.

1998.[37] A witness for the Respondent testified that the meeting when this agreement was allegedly reached never took place: "These were not meetings per se. These were, say, interviews…" within the many ongoing talks between the parties,[38] and if any meeting actually took place on that date it was possibly because "PSEG's representatives dropped by my office for an informal visit in those days,"[39] or possibly "a courtesy" visit.[40]

139. An additional aspect of the dispute is what the parties understood as the "tariff." The discussion on this issue before the Tribunal has been somewhat confusing, but in essence it appears that while the Claimants understood the electricity tariff as the price of electricity (cents/kWh), the Respondent used the term in a technical sense that includes also the net dependable capacity, the Annual Net Generation (ANG) and the availability factors.[41] It follows that when the Claimants referred to the tariff remaining unchanged in its various proposals, they were only referring to the price of electricity which remained the same while other commercial terms such as ANG and availability factor were indeed changing. But for the Respondent if the tariff remained unchanged, it meant that all the components remained the same, not only the price of electricity.

140. These differences became significant when the parties disagreed in respect of which availability factor they were each relying on. The Claimants maintain that it made no sense to leave out the ANG factor which determined a sufficient level of generation to ensure enough revenue to cover the higher costs of the Project. The Respondent asserts that such element was defined in the Feasibility Study and was not open to change.

141. The parties have also disagreed about a number of other aspects of a technical or legal nature associated with the approval of the commercial terms of the Project. The Claimants assert that all the elements of such approval were finally agreed in a meeting held on May 18, 1998, at which a specific cash flow table showing the ANG for a 500 MW/465 MW plant was made available. The Respondent does not even admit that the meeting took place or that a cash flow table for that capacity was produced. In any

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[37] Third Written Statement of Mr. Halil Sunar, February 18, 2005, paras. 38–39; Written Statement of Mr. Mesut Çakmak, February 18, 2005, paras. 6–9.
[38] Testimony of Mr. Metin Başlı, April 9, 2006, Hearing transcripts, Vol. 7, at 1864–67.
[39] Affidavit of Mr. Metin Başlı, August 28, 2003, para. 11.
[40] Second Affidavit of Mr. Metin Başlı, August 22, 2005, para. 15; Testimony of Mr. Metin Başlı, April 10, 2006, Hearing transcripts, Vol. 8, at 1896–98.
[41] Claimants' Post-hearing Brief, para. 37.

event, the Respondent argues that a commitment of billions of dollars could not be made at a meeting of which there is no record. A witness for the Respondent also explains that no agreement could have been reached without defining precisely the net capacity and the availability as the Ministry wanted to keep the cost as low as possible.[42]

142. From a legal and administrative viewpoint, the parties also give very different meanings to the June 19, 1998 MENR approval. The Claimants see it as a binding legal commitment recognized as such by MENR until as late as January 2001 and on the basis of which MENR instructed TEAS and the Electrical Energy Fund to finalize the additional agreements required. The Respondent, on the other hand, regards such approval by the Minister as a formal authorization for the staff to proceed with the negotiations on the terms agreed to in February 1998 but which resulted in no agreement to amend the Concession Contract. Eventually, the relevant Protocol would have to be submitted to the Danıştay.

143. Although the evidence on which the parties rely in support of their respective positions is not always decisive as it is based for the most part on notes written by one party or on witness statements produced by one or the other party, there is some evidence which is persuasive. In particular, the Tribunal finds that a meeting did take place on May 18, 1998, and that the relevant net equity buyout tables were submitted with the corresponding ANG figures, as a letter was sent by the Claimants with such information on the same date.[43] The notes of that meeting, which surfaced later in the course of the document production phase of the present proceeding support the Claimants' assertion to this effect.

144. The Tribunal finds that the explanations as to whether or not this meeting took place, as well as in respect of other events in the negotiations, given at the hearing by Mr. Başlı, the then Deputy General Manager of Energy Affairs at MENR, who led the discussions on the Ministry's side, were elusive and vague. He did not recollect facts he

[42] Third Affidavit of Mr. Metin Başlı, March 6, 2006, para. 16.
[43] *See* PSEG Letter to the Ministry of Energy and Natural Resources, May 18, 1998, Exhibit 41 to Respondent's Memorial on Jurisdiction; Written Witness Statement of Mr. Halil Sunar, June 26, 2003, submitted in support of Claimants' Counter-memorial on Jurisdiction, para 67; Respondent's Memorial on Jurisdiction, paras. 48–50; Respondent's Reply on Jurisdiction, paras 36–46, 102; Affidavit of Ms. Selda Bilgiç, March 27, 2003, para. 39, Exhibit 1 to Respondent's Memorial on Jurisdiction.

should have remembered and he made himself appear not to be aware of key aspects of the negotiations which he had responsibility for.[44]

145. What was agreed at the time or approved on June 19, 1998, is a different matter. The Tribunal finds no convincing evidence of an agreement reached on February 13, 1998. There is no document in the record which evidences this alleged agreement. Witness statements are contradictory on this question. A witness for the Respondent explains that "there was never a final agreement with PSEG on terms that are essential for any BOT power project, such as the net/gross capacities of the power plant and the electricity tariff, which includes the price per kilowatt hour and the availability of the electricity that would have to be purchased."[45] Yet, another witness for the Respondent contradicts that assertion and states that Energy Affairs and PSEG specifically agreed in February 1998 "to increase the gross capacity of the proposed project to 500 MW (from 425 MW) and the net capacity to 433.5 MW (from 375 MW) . . . ."[46]

146. True enough, many alternatives were discussed by the Parties during February 1998 and it is quite plausible that each Party may have come out of those meetings with different understandings about the basis on which the negotiations were to proceed. Yet, the Tribunal cannot conclude that an agreement was reached.

147. The evidence is also confusing with respect to the thrust of the negotiations when they resumed in May 1998. It is quite clear that, at that point, MENR had decided that any agreement necessarily had to be based on a price of 4.98 c/kWh and that no increase in the price would be acceptable. To this extent, it also follows that none of the proposals made in February that included a higher price were acceptable. It is also evident from the June 19, 1998 approval that a 500 MW gross capacity was acceptable. Leaving aside these two elements, what the Parties agreed with respect to the ANG and the resulting net capacity is less than clear.

148. The letter sent by the Claimants on May 18, 1998, further corroborated by the notes taken by the Claimants' representatives at the meeting held on that date, are however quite explicit about an agreement having been reached on the increase of the ANG so as to attain an average of 465 MW net. A witness for the Claimants, Mr. Halil Sunar, considers that this agreement was possible because "it met the Ministry of

[44] Testimony of Mr. Metin Başlı, April 10, 2006, Hearing transcripts, Vol. 8, at 1912–18.
[45] Written Statement of Dr. H. Yurdakul Yiğitgüden, August 25, 2003, para. 6.
[46] Second Affidavit of Mr. Metin Başlı, August 22, 2005, para. 12.

Energy's primary concerns, that the Project was structured as a Turkish limited liability company, the installed gross capacity was 500 MW, and the average tariff remained at 4.98 cents/kWh."[47] In the view of Mr. Sunar, the Claimants explained at this time that the power plant output would possibly have to exceed 500 MW, but the proposal was acceptable to MENR "because the only issue of concern for the MENR was the net amount of electricity delivered to TEAS."[48]

149. However, Respondent denies that this meeting ever took place and it has produced no record evidencing that it was held. Furthermore, no net figure is mentioned in the June 19, 1998 approval. The Respondent's argument that no Turkish official allegedly involved in these discussions had the authority to commit the Ministry on such a major issue is persuasive given the hierarchical structure of the Turkish public administration and MENR.[49] But, in the opinion of the Tribunal, as a letter was later sent by Claimants confirming their understanding, the Respondent had the obligation to clarify the matter and to reply to the letter if it did not accept that such an understanding had been reached. It never did so.

150. The Tribunal notes that the Claimants' evidence in respect of the meaning of the May 18, 1998 meeting was challenged at the hearing when it was revealed that the meeting had been conducted in Turkish. The non-Turkish speaking PSEG representatives participating in the meeting, according to the evidence of Mr. Clark Moseley, understood that MENR officials had agreed because of "their body language, their actions, nodding of heads, that sort of thing."[50] This evidence is far from persuasive and, in the view of the Tribunal, does not support the statement of those witnesses that MENR had unequivocally agreed to the 465 MW net figure.[51]

151. The Claimants have submitted additional evidence about the acceptance of the 465 net figure by the Respondent. This evidence pertains to the amendment of the Concession Contract that the Claimants proposed on June 12 and June 17, 1998, which was discussed at a meeting with MENR on June 25, 1998. A cash flow table corresponding to the 500/465 figures was also submitted by the Claimants on July 23,

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[47] Written Statement of Mr. Halil Sunar, June 27, 2003, para. 69.
[48] Fourth Written Statement of Mr. Halil Sunar, December 9, 2005, para. 34.
[49] Affidavit of Mr. Ahmet Oktay Kavas, September 13, 2005, para. 5; Second Affidavit of Mr. Haldun Atif Danişman, March 10, 2006, para. 11.
[50] Testimony of Mr. Clark Moseley, April 7, 2006, Hearing transcripts, Vol. 5, at 1046–47.
[51] Rejoinder Statement of Mr. Clark Moseley, November 20, 2003, para. 13; Fourth Written Statement of Mr. Clark Moseley, December 6, 2005, para. 17.

1998. The first draft of the TEAS agreement indicated a figure of 465 net, as did the first draft of the Plant Performance Report. Yet, all these documents were prepared by the Claimants and none was explicitly accepted by MENR. The evidence of Claimants is to the effect that neither of these documents was, in fact, rejected.

152. On the basis of the evidence adduced, the Tribunal has to determine whether a firm agreement had been reached as a result of the May 18, 1998 meeting and the June 19, 1998 approval. The Tribunal cannot so conclude. The fact that the Claimants did not sign the Concession Contract until December 10, 1998, while some valid reasons having to do with the arbitration and force majeure clauses were offered, denotes some real, uncertainty about the commercial terms that would finally be included. The Tribunal must note at this point that the Claimants' argument that they did not become aware of the Respondent's position until a year later is not convincing. The Respondent has demonstrated that this was not the case since the Claimants were aware of the wording of the Ministerial Approval soon after June 19, 1998.

153. The fact that MENR included the 465 figure in a draft amendment protocol on March 19, 1999, has also been invoked by Claimants as evidence of the Ministry's agreement. The Respondent answers that this was due to a mistake in a draft which had been sent earlier by the Claimants. The Tribunal has difficulty in accepting the evidence of Respondent that this was a mistake. However, the Tribunal is not persuaded that there was an agreement on this crucial question between the parties. The Tribunal cannot make a definitive finding on the basis of evidence that is less than clear of an agreement between the parties. It is not irrelevant to note that the fact that the Claimants did refer to a 433.5 net figure in letters they sent on January 23, 2001, does not constitute evidence that they had agreed to such net capacity after submission of the Revised Mine Plan.

154. The Tribunal thus concludes, based on the totality of the evidence which it has reviewed, that the commercial terms of the Project were not finalized on June 19, 1998, and that negotiations did not end at that time. This became only too evident in the months that followed as well as through 1999 and early 2000. Changing circumstances, legislation and information led to continuing negotiations in the midst of what can only be described as a very confusing setting.

155. The June 19, 1998 approval was another milestone in the process. Yet, the omission of the net capacity cannot be filled in simply by relying on what would have

been agreed on February 13, 1998, May 18, 1998, or at any other time if the terms of such agreements, as the Tribunal finds were not explicit and unequivocal. No binding effect can be given to a document that only defines some of the key elements of the commercial terms.

156. While the parties have discussed at length the translation of the Approval, the fact is that no reference to other key factors of the commercial terms were included. Such essential elements of the contractual relationship cannot be replaced by assumptions based on translations or confusing understandings.

157. This conclusion, however, does not excuse the Respondent's lack of diligence in clarifying the issue as the negotiations progressed. While the Claimants did attempt to clarify on numerous occasions what their understanding of the commercial terms was, the Respondent, in many instances, remained silent. The Respondent's explanations of their silence were not convincing. Bureaucratic paper shuffling is not a credible explanation.[52]

158. The Respondent has presented to the Tribunal a detailed list in order to rebut the Claimants' accusation that many of their communications and proposals went unanswered. The Tribunal has no reason to disagree with the Respondent's explanation.[53] That is not the issue, however. The issue is that when presented by Claimants with information – documents, letters – that did not reflect the Respondent's understanding, it did not record its objections or otherwise invited further discussions. This lends support to the Claimants' argument that the Respondent was rewriting the script of the negotiations, even if it is not the case.

6. *Were the Parties Engaged in Subsequent Negotiations in Bad Faith?*

159. During the second half of 1998, the Project progressed slowly. There were no major surprises. As noted, in December 1998 the Claimants signed the Concession Contract and shortly thereafter MENR also signed. The friendly state of affairs, however, did not last long. Soon after the Contract was signed, according to Respondent, it became clear to MENR officials that the parties had different understandings about the significance of the June 19, 1998 approval. A meeting to

[52] Testimony of Dr. H. Yurdakul Yiğitgüden, April 9, 2006, Hearing transcripts, Vol. 7, at 1793–95.
[53] Respondent's Post-hearing Brief, Annex A.

discuss these differences was held on May 26, 1999б and another on June 9, 1999. Two new proposals by the Claimants followed on June 15 and 16, 1999.

160. The Respondent asserts that new financial calculations on the basis of the 500/465 MW concept translated in cost nearly twice as high as the cost MENR had considered in February 1998; the US$380 million Turkey was willing to spend in buying additional power, would have been further increased by US$378 million. On the other hand, the Respondent maintains that a 500 MW gross capacity does not allow for a 465 MW net output because of the high demand for electricity needed to operate the plant.[54] The Respondent asserts that the new proposals presented in June 1999 were not acceptable to MENR, because one increased the gross capacity to 545 MW while the other also changed the gross capacity but with a different formula. These, in the Respondent's view, were more than reasonable grounds on which to withhold its acceptance.

161. The Claimants regard MENR's attitude at the time as a bad faith effort to reject what had been agreed on June 19, 1998. The Claimants recall that in submissions made by the Respondent during the jurisdictional phase of the present case, further corroborated by some of its witness statements, the 500/433.5 MW figure allegedly agreed to in February 1998 was at all times based on the tariff structure of the Revised Mine Plan. The Claimants argue that the Respondent had available and actually used in the negotiations that followed through 1999 the very cash flow tables of the Revised Mine Plan,[55] which indicated a specific availability factor that could not be ignored.

162. In the Claimants' view, the only element that would have remained unchanged was the price of electricity of 4.98 c/kWh, understood strictly as the "sales tariff," and this was the reason why the Ministerial Approval expressly referred to the objective of ensuring "that the average sale tariff of 4,98c/kWh shall remain unchanged." The Claimants also assert that the financial estimates made by MENR in May 1999 were completely distorted, perhaps even deliberately so.

163. In spite of these difficulties, the Claimants explain that they were willing to consider further accommodation of the tariff structure as long as it would cover the

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[54] Affidavit of Ms. Selda Bilgiç, September 1, 2003, para. 8.

[55] Written Witness Statement of Mr. Halil Sunar, June 26, 2003, submitted in support of Claimants' Counter-memorial on Jurisdiction, para. 98, in reference to the meeting with Mr. Ahmet Oktay Kavas of the Ministry of Energy held on May 26, 1999; *see also* Ministry's Memorandum on Konya-Ilgın Thermal Power Plant Subject to BOT Model, May 26, 1999, Exhibit 32 to Respondent's Memorial on Jurisdiction.

increased costs of the Revised Mine Plan. To this end, the Claimants believe, a higher gross output of MW discussed in May and June 1999 would have made no difference to the Respondent as it would remain committed only to the purchase of a given amount of electricity resulting from the ANG each contract year. This would not have required any additional investment by the Respondent. The Claimants assert that, in any event, a 500/465 figure was technically feasible because the equipment was designed to allow for substantial margins, sufficient to support the internal need of electricity and still meet the net generation for sale to TEAS.[56]

164. The negotiations reached a new stage in the fall of 1999. On October 26, 1999, the Claimants wrote to MENR proposing a new approach to unlock the negotiations: the Project could be based on the 500/433.5 MW figures that the Ministry had allegedly approved in February 1998, adjusting the tariff to 4.98 c/kWh. The Claimants assert that they still understood that the availability factor was as reflected in the cash flow tables from the Revised Mine Plan they had made available to Respondent for the February 1998 meetings.

165. The letter of October 26, 1999, referred to the need to solve the question of the effects of the change of the corporate structure to a limited liability company. The Respondent argues that this request was made in bad faith since at that point the Claimants were aware of the changes in the law that had offset such effects, but ignored the question in order to increase their benefits. This issue has been addressed by the Tribunal earlier.

166. The Respondent's understanding about the availability factor, as explained earlier, was different as it asserts that it believed that factor to be the same as that found in the Feasibility Study and not the one in the Revised Mine Plan. This position was confirmed in a MENR letter to the Claimants on November 9, 1999.[57] The Respondent also asserts that the new proposal from the Claimants was not at all new and had in fact been rejected in February 1998. The Claimants interpret this stated position of MENR as an abrupt change, never before expressed and developed in bad faith in order to kill the project.[58]

[56] Second Written Statement of Mr. William Van Herwarde, February 18, 2005, paras. 15–17.
[57] Affidavit of Ms. Selda Bilgiç, March 27, 2003, para. 37; Affidavit of Mr. Mustafa Mendilcioğlu, September 15, 2005, para. 11.
[58] Rejoinder Statement of Mr. Clark Moseley, November 20, 2003, paras. 15–16.

167. The Claimants, however, were not easily discouraged, if such was the objective of Respondent. Indeed, on February 10, 2000, the Claimants made yet another proposal that was based on the figures the Ministry had said was the basis of its acceptance, that is 500/433.5, with an availability factor lower than that of the Feasibility Study at an average of 82.70%.[59] The difference was that this new proposal would result in a higher generation capacity in the debt-service years so as to produce enough revenue to satisfy the lenders. The Claimants add that, overall, the Respondent's cash outlay for the life of the Project would remain the same.

168. MENR was not persuaded of the merits of this approach and stated on April 12, 2000, that only the exact pattern of the tariff structure of the Feasibility Study was only acceptable. The Respondent considers that such proposal would have shifted even more of a burden onto the Government as the availability for the first ten years would have been above 90%, when the price per kWh was much higher. The Respondent asserts that this proposal would have imposed an additional cost of US$536 million on the Turkish Government. The Respondent further explains that this proposal departed from the stated requirement of the November 9, 1999 letter to the effect of the availability ratios "being stable over the years."

169. The Project's internal rate of return (IRR) causes an additional exchange of accusations of bad faith. The Respondent argues that every proposal made by the Claimants indicated a 15.4% IRR in spite of the fact that each such proposal was based on different commercial terms, and that this was done to conceal the real figures from MENR. At the hearing it became clear that while only the Project's IRR had been discussed by the parties, the equity IRR showed different results in the area of 18-20%.[60] An expert for the Respondent stated in this respect that with the Contract's ANG levels, the equity IRR would have fallen to 14%. Accordingly, the Project failed to meet PSEG's minimum equity return expectations since the outset.[61]

170. In the Claimants' submission, the uniform reference to a 15.4% figure was never an issue in the discussions and negotiations and MENR never inquired about the Project's return. Since the legal requirement to maintain IRRs in the range of 16% was

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[59] Written Statement of Mr. Julian Beere, December 9, 2005, paras. 15–16.
[60] Cross-examination of Mr. Julian Beere by Mr. Samuel Boxerman, April 6, 2006, Hearing transcripts, Vol. 4, at 784–85.
[61] Second Expert Report of Mr. Robert Sansom, September 19, 2005, para. 73.

eliminated in 1996, the question had lost relevance.[62] In any event, in the Claimants' view, the Project never in fact exceeded a 15.4% IRR.

171. The Tribunal must note, however, that witnesses for the Claimants accepted at the hearing that the Project IRR had to be necessarily different in every proposal[63] and that it had to change according to the different sets of conditions of the proposals.[64]

172. Perhaps much to the disappointment of the parties, the Tribunal does not find bad faith in the negotiations undertaken after June 19, 1998, particularly in the context of the 1999 and 2000 discussions on the tariff structure. There was definitely an interest on the part of the Claimants to ensure a revenue sufficient to cover the higher costs of the Project and, preferably, to have this revenue at hand in the front-end years so as to meet the debt service requirements and promptly reach the financial close still pending. There was definitely an interest on the part of the Turkish Government to keep the costs as low as possible and not to bear expenditures that might be considered excessive. The two interests never came to meet.

173. It is also quite clear to the Tribunal that there was in this situation a lack of transparency on the part of MENR, which is particularly troublesome in connection with the June 19, 1998 approval. It has never been explained that there was a difference in the parties' understanding notwithstanding the large number of petitions containing a contrary point of view that the Claimants sent. It is also most troubling in connection with the November 9, 1999 statement that the availability factor would still be the same as in the Feasibility Study, which had not been raised before, not even in connection with the Respondent's understanding of the June 19, 1998 approval or the alleged February 1998 agreement. The argument that this was implicit in the negotiations is not only unpersuasive but neither does it help the case of MENR.

174. There is thus a cumulative lack of transparency that, short of bad faith, comes at the very least close to negligence, compounded by the fact that various witnesses admitted not having read key documents or taken appropriate action on them for long periods.[65]

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[62] Claimants' Post-hearing Brief, paras. 52–53.
[63] Testimony of Mr. Julian Beere, April 6, 2006, Hearing transcripts, Vol. 4, at 760–63.
[64] Testimony of Mr. Robert Dougherty, April 6, 2006, Hearing transcripts, Vol. 4, at 929–33; Testimony of Mr. Michael Rozensweig, April 8, 2006, Hearing transcripts. Vol. 6, at 1431.
[65] Closing Statement of Ms. Carolyn Lamm, making reference to Messrs. Metin Başlı and Ahmet Oktay Kavas, April 11, 2006, Hearing transcripts, Vol. 9, at 2202–03.

175. Yet, the Tribunal also finds that the Claimants were not fully transparent in connection with the unfolding events. The Claimants' position was fully and clearly stated throughout the negotiations. There are, however, two events with which the Tribunal is not comfortable.

176. The first event concerns the October 26, 1999 letter and subsequent references to the need to obtain compensation for the change in the corporate status. As concluded earlier, it is plausible that at the time this letter was written, the conclusion about the offsetting effects of the law was not final, but was certainly being discussed in detail internally. The issue could have been raised in that letter or at any other point, but it was not. As concluded above, nothing justifies that references to this matter kept appearing at later points in time, despite the fact that the parties also have different understandings about the context in which these references were made.[66] The Tribunal does not pass judgment on the parties' intentions, but simply notes that full transparency would have helped to reach a genuine understanding.

177. The second event by which the Tribunal is even more troubled emerged during the hearing on the merits. The Claimants have relied on the witness testimony of Mr. Halil Sunar, a leading company executive in charge of the Project's negotiation, to support the argument that they were not aware of the content of the June 19, 1998 approval until a year later and that in the meantime the Project's expenses had continued.[67] Yet, Counsel for the Respondent demonstrated at the hearing that there was evidence proving the contrary, in particular the lawyers' billings to the Claimants for meetings held with Mr. Sunar to discuss the ministerial approval on June 26, 1998, and additional expenses for translations of such approval and related communications of June 29, 1998.[68]

178. The conclusion that inescapably follows is that Mr. Sunar was quite aware of the content of the approval a few days after it was signed. Irrespective of the evidence, it would have been quite surprising if the Claimants had not made their best efforts to learn about the content of a document of such importance in the process, to which they even assign binding effect.

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[66] Testimony of Mr. Halil Sunar, April 5, 2006, Hearing transcripts, Vol. 3, at 448–50.
[67] Testimony of Mr. Halil Sunar, April 6, 2006, Hearing transcripts, Vol. 4, at 710–11.
[68] Respondent's Post-hearing Brief, paras. 25–26; Closing Statement of Mr. Stanimir Alexandrov, April 12, 2006, Hearing transcripts, Vol. 10, at 2471–73.

7. *Did the World Bank and the IMF Apply Pressure on Turkey to Terminate the Project?*

179. One of the main allegations of the Claimants as to why the negotiations on the Project ultimately failed is that the Government of Turkey changed its position on the BOT approach as a result of pressure from the World Bank and the IMF in the context of the discussion and approval of stand-by agreements and other loans essential to the country's economic recovery. The Respondent asserts in this respect that no such pressure related to existing Projects or negotiations underway existed and that the approach suggested by those international agencies only concerned future contracts.

180. The parties do not disagree that both the World Bank and the IMF unequivocally made their views known to the Government of Turkey about the need to develop a competitive energy market. This would eliminate electricity purchases by TEAS at prices that could be higher than those charged to the consumer, a policy which had a strong impact on the financial health of the country and the Treasury. Neither do the parties disagree about the fact that this policy related to future projects. The disagreement is about whether the issue also affected BOT projects already in the process of negotiation.

181. The Claimants have submitted persuasive evidence that the changes sought by the World Bank and the IMF also applied to projects under negotiation.[69] In the "Turkey: Country Economic Memorandum: Structural Reforms for Sustainable Growth" of September 15, 2000, it is stated, for example, that the "authorities project that, based on existing projects under construction and additional projects for which government guarantees have already been issued, supply will be sufficient to meet market demand in the period 2003 – 2004 . . . and no further take-or-pay guarantees are expected for projects coming on stream after 2002."[70]

182. Turkey's Letter of Intent with the IMF of December 9, 1999, also included a commitment to limit new Treasury guarantees in its 2001 budget. More specifically the Treasury explained to MENR in April 2000 that under the Stand-by Agreement with the IMF, the Turkish government had decided "not to continue the transactions regarding

[69] Expert Report of Mr. Rex Pingle, December 9, 2005, paras. 62–82.
[70] *See* Turkey: Country Economic Memorandum: Structural Reforms for Sustainable Growth (In Two Volumes) Volume I: Main Report, September 15, 2000, The World Bank, para. 183, submitted as C16 (selected paras.).

any new Build-Operate-Transfer (BOT) projects . . . in particular, the BOT projects of which concession contracts have been signed by your Ministry but the other agreements, including the Treasury Guarantee, have not been signed."[71]

183. The new policy resulted in the preparation of the list of 29 projects mentioned above for which Treasury guarantees would be considered. Konya Ilgın was later added to that list, but the Claimants explain that none of these projects ultimately came to completion. The Electricity Market Law enacted on March 3, 2001, also reflected that policy in eliminating Treasury guarantees and long-term energy sales agreements.

184. The broad macro-economic changes introduced in Turkey to overcome the crisis directly impacted on any specific policy running contrary to their goals, among which were the BOT projects. While there was no specific directive issued either by the World Bank or the IMF affecting concession contracts that had already been executed, it is not surprising that the Turkish Government was greatly reluctant to implement projects that had not yet been finalized and closed.

185. While a witness for the Respondent testified that MENR only checked the compatibility of projects with macroeconomic policies of the State Planning Organization and the Treasury at the outset of the process,[72] another witness clearly conveyed the view that MENR was well aware of the World Bank macroeconomic concerns and had the relevant information.[73]

186. Irrespective of the precise impact of the dealings of the Turkish Government with the World Bank and the IMF on this very project, it is clear that the changes of policy involved were not conducive to furthering negotiations that already encountered various other difficulties. This state of affairs may well have been one of the factors contributing to the failure of negotiations. The Tribunal thus accepts the Claimants' contention that the Respondent should have raised the change of policy openly and discussed any possible consequences or lack thereof.

[71] Letter from Undersecretary of Treasury to the Ministry of Energy and Natural Resources, April 28, 2000, Exhibit C124 to Claimants' Memorial; *see also* discussion in Claimants' Reply, para. 216, n. 427.
[72] Testimony of Mr. Metin Başlı, April 10, 2006, Hearing transcripts, Vol. 8, at 1947–52.
[73] Testimony of Mr. Haldun Atif Danişman, April 10, 2006, Hearing transcripts, Vol. 8, at 2092–99.

8. *Were the Claimants Arbitrarily Denied the Benefits of Law No. 4501?*

187. The differences of opinion between the parties concerning the application made by the Claimants to convert the Contract to private law status under Law No. 4501 have been explained earlier. The essence of the difference is whether Article 7 of this Law provides an automatic right to conversion as Claimants argue, or whether the conversion requires a renegotiation of certain terms to rebalance the Contract as the Respondent believes.

188. Within the purview of its understanding of the Law, MENR defined various conditions that the applicants had to meet in order for the application to be forwarded for approval to the Council of Ministers. The Respondent argues that, as the projects would benefit from the change in status, the Government was entitled to part of these added benefits, which in the case of Konya Ilgın related principally to updating the escalation formula.

189. The parties first discussed the question of MENR's authority under the Law. In spite of different interpretations the parties have invoked about the intention of drafters of the Law, the Tribunal first considers it quite improbable that in a highly bureaucratized system of administration, an application would be forwarded automatically to a higher political body without a detailed discussion with the relevant technical service, in the present case MENR. This reality lends support to the Respondent's argument that there was no automatic forwarding entailed in the process.

190. The terms of Article 7 of the Law also confirm this point in stating that the Council of Ministers "may" decide on the application. In this case, the agreement was to be restated "by considering the necessary criterion to secure international financing and similar implementational contracts of the administration," within specific datelines. This mandate appears to involve a degree of discretionary authority and technical evaluation that the Council of Ministers would unlikely exercise on its own. The Claimants explain that MENR's involvement was only required because private companies have no standing to apply to the Council of Ministers, an argument which is not quite convincing.

191. The extent of that discretion is a different question. The Respondent contends that the mandate of Article 7 allowed MENR to seek improvements to existing concession contracts that would benefit the Ministry, especially since the private law

status or international arbitration allowed under that Law would have resulted in lower financing costs for the Project. This interpretation goes as far as to state that "the Ministry had the authority to revise existing concession contracts when converting them into private law contracts" under Law 4501[74] or even under Turkish administrative law.[75]

192. For the Respondent, the Claimants themselves envisaged the renegotiation of certain aspects of the Contract on this occasion as reflected in a memorandum of Allen & Overy, legal advisors to Citibank in respect of this Project.[76]

193. The Claimants argue, on the contrary, that MENR had no authority to undertake new negotiations as a condition of the submission of the application to the Council of Ministers.[77] The Claimants assert that, in any event, the proposed terms would have resulted in making the Project wholly unfinanceable as explained by a witness for the Claimants.[78] This result contradicted the purpose of the Law. Moreover, the Claimants assert that none of these advantages would have resulted in lower financing costs but would only have made possible the obtaining of the required financing.

194. The Tribunal is persuaded by this last argument. If the whole purpose of the Law was to improve conditions of international financing for BOT projects by means of their conversion to private law status, following the long discussion about the status of such projects outlined above, it would make no sense to allow for a renegotiation that could have ended with the opposite result. This means that under Article 7 of the Law, MENR indeed had a role to play. This role was to make sure that the conversion was in harmony with the criterion to secure international financing and that the pattern of other similar contracts was observed, a mandate which does not allow for a full-fledged renegotiation as was apparently envisaged by MENR in this case. In any event, the full revision of concession contracts was a prerogative of the Danıştay which MENR could not have supplanted.

[74] Affidavit of Dr. H. Yurdakul Yiğitgüden, September 13, 2005, para. 20; Affidavit of Mr. Cumhur Ersümer, September 14, 2005, paras. 15–16.
[75] Legal Opinion of Mr. Mümtaz Soysal, September 4, 2003, paras. 33–35.
[76] Opening Statement of Mr. Stanimir Alexandrov, April 4, 2006, Hearing transcripts, Vol. 2, at 322–23.
[77] Legal Opinion of Professors Mahmut Birsel and Arzu Aksaç Yeşilirmak, December 9, 2005, para. 25.
[78] Written Statement of Mr. Julian Beere, December 9, 2005, para. 19.

9. *Did the Respondent Interfere with the Issuance of the Treasury Guarantee and Supplementary Agreements?*

195. The Claimants' argument about the issue of the Treasury Guarantee explained above is mainly based on the February 2002 ruling of the Constitutional Court. This ruling nullified Article 8 (1) of the Electricity Market Law because it eliminated the right to have a Treasury Guarantee issued in pursuance of concession contracts. Since the Treasury Guarantee is an integral part of the concession contracts, the Court indeed found that there was no discretion on the part of the Treasury to deny such a guarantee if MENR had made a binding commitment to this effect in the contract.[79]

196. Although the Respondent argues that Article 15 of the Contract in referring to the Company as the entity which shall conclude agreements such as the Treasury Guarantee, imposes an obligation only on the Claimants and not on MENR, the Tribunal has no difficulty in finding that this Article can only be understood as committing both parties to conclude such agreements. If the Government does not fulfill its own obligation the Claimants cannot attain the result envisaged by the Contract.

197. The Tribunal is not convinced by the Respondent's argument that the Guarantee could not have been denied because it was never requested. Even if this were true formally, in light of the history of the case there can be no doubt that the administration was moving towards a policy that aimed at the restriction and ultimate elimination of the Treasury guarantees. The list of 29 projects speaks for itself, and the fact that Konya Ilgın was added in May 2002 does not change the trend.

198. The Respondent also argued in this matter that the Treasury Guarantee was in fact the last step after a series of other agreements,[80] beginning with the commercial terms of the Project, followed by the Energy Sales Agreement and the Fund Agreement. It has argued that the Guarantee could not be issued until the terms of such other agreements were completed since the precise obligations and financial commitments to be guaranteed were only known at that point.[81] A witness for the Respondent stated

[79] Legal Opinion of Mr. Ergun Özbudun, February 14, 2005, paras. 16–19.
[80] Respondent's Rejoinder, para. 67, n.103, with reference to the Expert Report of Ms. Dianne Rudo, March 15, 2005, para. 134–36; Affidavit of Mr. Arif Erden, September 13, 2005, para. 10.
[81] Respondent's Post-hearing Brief, paras. 54–55.

that the Treasury only intervened after the parties had reached an agreement on the basic parameters of the project in the form of a firm draft.[82]

199. This argument of the Respondent is convincing. The purpose of the Guarantee is for the Treasury to back specific financial obligations which the State entities undertake in light of those other agreements, with particular reference to the amount to be paid for the electricity each year. A witness for the Respondent explained that one of the "primary roles of Treasury guarantees in power projects is to guarantee payments by TEAS under any ESA. Treasury guarantees also ensure that payments by the EEF to the project company will be made pursuant to the terms provided in any Fund Agreement."[83]

200. A witness for the Claimants admitted that, to the extent that the Project would be producing more electricity, TEAS would have to pay more under the Energy Sales Agreement.[84] This is why the Treasury Guarantee is decisive in ensuring international financing.[85] But it is obvious that no Treasury would issue a blank guarantee.

201. This conclusion does not discharge the Respondent from the obligations that it might have had in pursuing the successful completion of those other agreements. It does mean that the fact that the Guarantee was not issued at that time is not in itself a breach of the Respondent's contractual obligations if the required terms for so doing were not available.

202. A similar pattern characterizes the negotiations concerning the Energy Sales Agreement and the Fund Agreement. There can be no doubt either that, under the new macroeconomic policy Turkey was pursuing to put an end to the crisis, these kinds of agreements were not quite welcome. Yet, the issue here is whether these agreements could be concluded in the event that the commercial terms of the Contract had not been finalized.

203. The Tribunal concluded earlier that the commercial terms of the Project were not completed in light of the parties' different understandings. In such circumstances, it was not possible to complete either a Sales agreement when the amount of electricity to be purchased was not defined or a Fund agreement when the amount of money required

[82] Testimony of Mr. Sedat Çal, April 9, 2006, Hearing transcripts, Vol. 7, at 1826–29.
[83] Affidavit of Mr. Sedat Çal, September 14, 2005, paras. 6, 15; Affidavit of Mr. Nurhan Uyduranoğlu Karaca, September 14, 2005, para. 8.
[84] Testimony of Mr. Halil Sunar, April 6, 2006, Hearing transcripts, Vol. 4, at 718–23.
[85] Written Statement of Mr. John Watkins, February 18, 2005, para. 19.

by TEAS to that effect was not known. This is the chain of definitions and agreements that ultimately ends up with the Treasury Guarantee. As noted by a witness for the Claimants, the Treasury would guarantee payments by TEAS and EEF, thus making it necessary to complete these arrangements beforehand.[86]

204. The Claimants are right in arguing that progress was made with the technical services responsible for those agreements, including questions relating to the arbitration clause. It is also quite evident that such services would not finalize any agreement without being specifically backed up by the terms previously defined by MENR in respect of the commercial terms of the Project or even the Danıştay in respect of the amendment of the dispute settlement clauses of the Contract. As these definitions and terms were not forthcoming, neither was the approval of the supplementary agreements based on them.

205. Again this conclusion does not discharge the Respondent of its obligations concerning the overall conclusion of the Project, but it does mean that in itself the situation of the supplementary agreements cannot be considered a breach of the Contract.

206. The Claimants also complained about MENR interfering with the Ministry of the Environment so as to prevent the approval of the Project's Environmental Impact Assessment. However, as this approval was given on April 11, 2002, there is no point in the Tribunal examining the complaint.

10. *Did the Claimants Abandon the Project?*

207. The parties also exchanged accusations as to which of them was ultimately responsible for the failure of the negotiations. The Claimants argue that the Respondent abruptly changed its policy and actively interfered with the agreements attained or under negotiation in an arbitrary manner and made the ultimate completion of the Project impossible. The Respondent asserts that at all times it pursued negotiations with interest, diligence and good faith but that ultimately the Claimants decided to abandon the Project because it had proved to be unfinanceable and technically unviable. In the Respondent's view, the Project was actually abandoned before the alleged expropriation on March 3, 2001, namely the date of the enactment of the Electricity Market Law.

[86] Fourth Written Statement of Mr. Mesut Çakmak, December 9, 2005, para. 13.

208. The Tribunal is convinced by the evidence adduced by the Claimants that they did not abandon the Project or walk away from the negotiations. In fact, the record is plentiful of letters, proposals, meetings and other activities that were conducted throughout the year 2000 and early 2001 revealing that there was an ongoing effort to unlock the negotiations. The Respondent incorrectly considered the Claimant's proposal of February 10, 2000, as a "final" one. That letter does refer to "final figures" as every option appeared to have been exhausted, but there were many other subsequent initiatives and which, if successful, would have ended up with different figures. Neither was this an obstacle to the efforts made in achieving progress in many other matters related to the Contract.

209. The fact of the matter is that by early 2001 the deadlock was total and there was no point in taking additional initiatives. This was understood by both the Claimants and the Respondent who at that time ceased to devote additional time and resources to a project which obviously offering few or no perspectives. A witness for the Claimants mentioned the numerous efforts made to persuade Turkey to reconsider its views, but to no avail and in the end the only choice left was to begin this arbitration.[87]

11. *Were the Technical and Economic Aspects of the Project Feasible?*

210. The discussion about who was ultimately responsible for the failure of the Project also relates to its technical and economic viability, a matter on which the parties also have very different views.

211. The Respondent asserts that by early 2000 the Project was no longer economically feasible and quite likely would never reach financial close. This was the result of the dramatic increases in mine costs discussed earlier, as well as of the increase in diesel fuel costs. The Respondent contends that, moreover, the CFB technology of the power plant was unproven and could not handle the necessary availability requirements, a matter also discussed above.

212. In the Respondent's submission, the Project could not obtain financing in these conditions as it involved too many unmitigated risks,[88] including the absence of an

[87] Written Statement of Mr. Michael Thomson, December 9, 2005, para. 21.
[88] Rejoinder Expert Report of Mr. Robert Sansom, March 17, 2006, paras. 10–15.

arbitration clause and the technical risks associated with the mine and the power plant.[89] The Respondent further asserts that the Project's finance lacked the necessary documents for it to be considered by international or national credit agencies.[90]

213. The Claimants have exactly the opposite view as they contend that the Project was technically and economically viable. The technology had been proven in other power plants, the rise in fuel costs was not as severe as depicted by the Respondent and its effects would be mitigated by the adjustments based on the US Consumer Price Index. In addition, the technology for the operation of the mine had various feasible options. In these conditions, the Claimants further maintain that the Project would have met without difficulty the ANG targets.[91]

214. Were it not for the actions of the Respondent, the Claimants argue that the financing of the Project would have been achieved without question and that the necessary documents required by credit agencies would have been supplied as the applications progressed in these institutions, in line with usual practice. According to the Claimants, what mattered for financing purposes, was the adequate debt/equity ratio of the Project, which was better than in other projects financed by EximBank. In any event, the Claimants argue that there were alternative sources of financing if necessary. The assessment of the financial advisors was equally encouraging.

215. The Claimants also argue that none of the risks the Respondent mentions as obstacles to obtaining financing were an issue or could not have been resolved satisfactorily. These include legal matters such as the shareholders' agreement, as well as technical or economic issues, such as the fuel supply risk, the price of diesel, the mine technology and the plant CFB technology. The lack of an international arbitration clause was the only real difficulty, the Claimants explain, but even there progress was being made with TEAS and the Energy Fund, as discussed above.

216. Admittedly there were many unknown factors about the technical aspects of the plant and the mine, and the experts have extensively discussed the feasibility of one and

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[89] Rejoinder Expert Report of Ms. Dianne Rudo, March 15, 2006, paras. 88–91; Testimony of Ms. Dianne Rudo, April 8, 2006, Hearing transcripts, Vol. 6, at 1543–52.
[90] Expert Report of Ms. Dianne Rudo, September 19, 2005, paras. 44–62.
[91] Written Statement of Mr. Dominique Chaniolleau, December 9, 2005, para. 4; Written Statement of Mr. Scott Darling, December 9, 2005, para. 6; Expert Report of Mr. Robert Gamble, December 9, 2005, para. 11; Written Statement of Mr. John Philipp, November 19, 2003, paras. 17–19; Second Written Statement of Mr. John Philipp, February 18, 2005, paras. 11–15; Claimants' Post-hearing Brief, n. 30.

the other, including by way of the comparison with other plants.[92] Nevertheless, the Tribunal is persuaded that the project was feasible. The successful operation of the Turow CFB plants manufactured by Foster Wheeler, the same manufacturer as in Konya Ilgın, is sufficient evidence to this effect.[93] A witness for the Claimants also referred to the successful operation of various other plants of the same kind worldwide.[94]

217. More convincing still is the Claimants' argument that Foster Wheeler would have provided significant performance guarantees to the Project, which in the discussions underway with the Claimants would reach as much as 30% of the total EPC contract price, or US$141 million in potential liability. As a witness for the Claimants explained that Foster Wheeler would pay liquidated damages by means of "completion guarantees" and "performance guarantees."[95]

218. Many unknown factors also surround the question of international financing, but the Tribunal finds the Claimants' evidence to this effect persuasive. First, it would have been impossible to secure the necessary capital contribution if the Project were not financially sound. The same rationale would guide the decision of lenders.[96] Although a witness for the Respondent set out the risks which the Project faced, including the difficult integration of the mine with the power plant,[97] the Tribunal is certain that no one would have raised the necessary financing if such risks had remained unmitigated. Thus this uncertainty factor would have been eliminated.

219. Next, experienced companies and advisors would have made sure that the appropriate documentation were available at the right time for anyone deciding to provide the necessary loans.[98] And lastly, witnesses have adequately described the process of approval by lending agencies and shown by witness testimony evidencing

[92] Expert Report of Mr. Robert Gamble, December 9, 2005; Rejoinder Expert Report of Mr. Robert Sansom, March 17, 2006, paras. 123 et seq.
[93] Written Statement of Mr. Scott Darling, December 9, 2005, para. 13.
[94] Third Written Statement of Mr. John Philipp, December 9, 2005, para. 12.
[95] Written Statement of Mr. Dominique Chaniolleau, December 9, 2005, paras. 21–24.
[96] Reply Statement of Mr. Michael Austell, December 5, 2005, para. 9.
[97] Testimony of Ms. Dianne Rudo, April 8, 2006, Hearing transcripts, Vol. 6, at 1537–44.
[98] Written Statement of Mr. Ian Catterall, November 21, 2003, paras. 6–7; Second Written Statement of Mr. Ian Catterall, February 15, 2005, paras. 12–14.

that the Project was not misguided in this respect and followed a normal time schedule.[99]

III. Considerations on Liability

220. As it is by now customary in investment arbitration, the aggrieved party invokes the breach of every BIT clause dealing with the standards of the investor's protection, while the Respondent vehemently denies any breach. This the Claimants have done in the present case, with the sole exception that they have not claimed direct expropriation of the investment. The Government of Turkey denies any breach of the BIT.

221. The Claimants argue first that the Respondent violated the standard of fair and equitable treatment, failed to provide full protection and security, impaired the maintenance, use and enjoyment of the investment by arbitrary and discriminatory measures and failed to observe the obligations it entered into with regard to the investment. The Claimants also argue that the investment was expropriated through measures tantamount to expropriation. The Tribunal will examine each of these claims separately.

A. Was there a Breach of Fair and Equitable Treatment?

1. *The Legal Arguments of the Parties*

222. The Claimants argue that the fair and equitable treatment standard of Article II (3) of the BIT has been breached. Under this Article "Investments shall at all times be accorded fair and equitable treatment . . . in a manner consistent with international law," while the Preamble of the BIT recalls that such treatment is "desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources . . . ."

223. In light of recent decisions,[100] the Claimants assert that the standard specifically imposes the obligation not to act arbitrarily, in a manner that is grossly unfair and

[99] Testimony of Ms. Carol Hessler, April 7, 2006, Hearing transcripts, Vol. 5, at 1175–77; Expert Report of Ms. Carol Hessler, December 6, 2005, paras. 34–44; Testimony of Mr. Sikander Zaman, April 7, 2005, Hearing transcripts, Vol. 5, at 1151–55; Written Statement of Mr. Sikander Zaman, December 9, 2005, paras. 78–83; Expert Report of Mr. Frank Langhammer, December 8, 2005, paras. 88–98.

unjust, or that will be idiosyncratic and harmful. It also requires transparency and candor, particularly in administrative proceedings, as well as observance of the representations reasonably relied upon by the investor and sanctions acts performed in bad faith.

224. The Claimants assert in this respect that the Respondent's conduct was arbitrary, particularly because, as in the *Tecmed* case, prior decisions relied upon by the investor were revoked. In the Claimants' view, such arbitrary conduct is apparent in the actions of MENR when it denied the approval of the revised tariff structure of June 19, 1998, and later insisted on the availability factors of the Feasibility Study. The Claimants assert that there was also arbitrariness in the governmental disregard of the Constitutional Court's decision safeguarding vested contract rights.

225. Following the *MTD* and the *CME* cases, the Claimants next argue that their legitimate expectations originating in government assurances were also entirely disregarded, particularly since the legal and business environment of the investment was dramatically altered, as held by the Tribunal in *OEPC* in connection with the violation of fair and equitable treatment. The Claimants recall that Article 48 of the Turkish Constitution provides that the State "shall take measures to ensure private enterprises operate…under conditions of security and stability."

226. The Claimants argue that the changes in the law directed at enabling the development of BOT projects (courting foreign investors to this end) as well as the approval of the Feasibility Study, the Implementation Contract, the required Letter of Undertaking, the assurance that a Treasury Guarantee would be issued and that the Energy Sales Agreement and Fund Agreement would be signed, together with further legal changes in Law 4501, all gave rise to legitimate expectations. They also allege that these expectations were later frustrated when the Respondent revoked agreements and approvals and took away contractual rights.[101]

227. The Claimants also contend that the Respondent abused its sovereign prerogatives and authority in using its regulatory power to deprive the Project in 1999 and 2000 of the June 19, 1998 approval of an increased capacity, when it prevented the finalization of the supplementary contracts and attempted to force the Claimants to give

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[100] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of April 30, 2004.

[101] Legal Opinion of Professor Sait Güran, February 18, 2005, para. 2.

up concession rights in connection with the negotiations on the application under Law 4501. A legal opinion by Professors Birsel and Yeşilirmak notes that "under the principles of good faith and trust in the administration, it is our view that the Claimants had justified grounds to rely on the agreement of the MENR to increase the net capacity of the power plant to 465 MW."[102]

228. According to Claimants, such abuse of regulatory power ultimately resulted in the termination of the Project through a process characterized by a total lack of transparency and candor, within the meaning of the *Metalclad*, *Maffezini*, *Tecmed* and *OEPC* decisions. This failure, in the Claimant's view, finally led to the unreasonable rejection of all proposals aimed at breaking the deadlock in negotiations.

229. As a consequence, the Claimants argue that good faith, the most basic component of fair and equitable treatment, was deliberately breached so as to obstruct the completion of the Project, revealing in passing the complete lack of administrative competence and effectiveness as required in recent awards.[103]

230. A legal opinion submitted by the Claimants also underlines that the duty of good faith "includes refraining from behavior that may mislead the other party, the immediate notice to the other party when that party is understood to be acting on the basis of a misinterpretation of one's statements or acts, and acting with a genuine intent and desire to complete negotiations with the aim of reaching an agreement with the other party."[104] The Claimants thus conclude that the Respondent failed to maintain even a minimally adequate legal, regulatory and administrative structure to support the investment.

231. The Respondent dismisses these allegations on the ground that the Project was technically and financially unworkable and that every single discussion led to a dead end as substantial defects could not be remedied. According to the Respondent, the Project implied risks which result from business decisions and for which Turkey cannot

[102] Legal Opinion of Professors Mahmut Birsel and Arzu Aksaç Yeşilirmak, February 18, 2005, para. 27.
[103] *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award of November 15, 2004; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award of July 1, 2004; *Pope and Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001.
[104] Legal Opinion of Professors Mahmut Birsel and Arzu Aksaç Yeşilirmak, June 27, 2003, para. 53.

be blamed.[105] An investor might end up disappointed, but BITs are not designed to guard against disappointment.[106]

232. In the Respondent's view, fair and equitable treatment is a standard that depends on the facts of each case,[107] has to be applied with flexibility[108] and, in any event, requires a high standard of proof.[109] Only acts showing a willful neglect of duty far below international standards[110] and bad faith would qualify under this standard.

233. On the basis of its understanding of the facts as explained above, the Respondent asserts that since no common agreement was embodied in the June 19, 1998 Ministerial Approval, there was no prior decision that could have been later revoked by MENR. That approval was, it is further maintained, an internal document that created no rights for a private party.

234. In the Respondent's view, the situation is thus clearly distinguishable from all the cases cited by the Claimants as reasonable expectations had originated in formal decisions or permits on which the investors had relied. The Respondent asserts that here there was a willful misunderstanding by the Claimants, just as there was bad faith in concealing essential facts or issues. But even if there had been an approved agreement, the Respondent argues further, there would still be no violation of the fair and equitable treatment in light of the *Genin* award.[111]

235. For the same reason, the Respondent states that there could have been no breach of the Treasury Guarantee or the supplementary agreements as there was no agreement on the terms of such contracts. An unfinished negotiation cannot be converted into a Treaty breach, contrary to the Claimants argumentation. The Respondent add that the Contract did not either guarantee that any such agreements would be successfully concluded, but only that there was a right to negotiate those agreements.

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[105] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award of November 13, 2000, para. 64.
[106] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of November 1, 1999, para. 83.
[107] *Mondev International, Ltd. v. United States of America* (ICSID Case ARB/99/2), Award of October 11, 2002, para. 118.
[108] *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of April 30, 2004, para. 99.
[109] *S.D. Mayers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of November 13, 2000, para. 263.
[110] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001, para. 367.
[111] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001, paras. 370–71.

236. The Respondent argues that the Claimants only had a right to apply for a private law contract under Law 4501, and that the Law offered no guarantee that such private contract would be automatically granted. It further argues that arbitrariness and discrimination are thus unfounded allegations, which could not lead to the frustration of any legitimate expectation. For the Respondent, there can be no legitimate expectation that the proposed revisions of the Contract would be accepted no matter the cost to the Government.

237. The Respondent concludes that it acted in an equitable, transparent, and reasonable manner, in good faith and full compliance with the domestic law, and that there is thus no breach of the fair and equitable treatment standard under the Treaty. The Respondent further concludes that absent evidence to the contrary, negotiations must be presumed to be done in good faith,[112] and in light of both the UNIDROIT Principles of International Commercial Contracts (Article 2.1.15) and the *Wintershall* case,[113] there is no obligation to reach an agreement or liability for failure to do so.

2. *The Tribunal's Findings*

238. The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.

239. Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded.

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[112] *Mobil Oil Iran, Inc. v. Government of the Islamic Republic of Iran and National Iranian Oil Company*, Award No. 311-74-3 of July 14, 1987, para. 160.
[113] *Wintershall, A.G. et al v. Government of Qatar*, 28 I.L.M. 795, 814–15 (1989).

240. Recent awards have applied this standard to the assessment of rights affected by inconsistent State action,[114] arbitrary modification of the regulatory framework[115] or endless normative changes to the detriment of the investor's business and the need to secure a predictable and stable legal environment.[116] This includes most significantly the issue of legitimate expectations which, as the Tribunal in *Tecmed* concluded, requires a treatment that does not "detract from the basic expectations on the basis of which the foreign investor decided to make the investment."[117]

241. Although the Claimants, as noted above, provide a long list of legitimate expectations that in their view have not been met, the Tribunal is not persuaded that all such complaints relate to legitimate expectations. Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed.[118]

242. In fact, the Claimants invoke issues on which the Tribunal has found that no promise or commitment had been made by the Respondent. This is particularly the case of the lack of evidence about the alleged agreement of the commercial terms of the Project. Had these terms been missing, no Energy Sales Agreement or Fund Agreement, and ultimately no Treasury Guarantee could have been issued. As no such agreements were reached, the Tribunal finds that the Respondent is right in arguing that they could not be later revoked.

243. Neither does the Tribunal find merit in the Claimants' argument that the investment was actively requested by the Turkish Government. True enough, the whole BOT policy was built on the premise that foreign investments would be needed, encouraged and welcome,[119] but this was a matter of general policy that did not entail a promise made specifically to the Claimants about the success of their proposed project.

244. The evidence in fact points to the contrary conclusion. A witness for the Claimants testified that two high-ranking corporate executives made two short trips to

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[114] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004, para. 164).

[115] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, para. 154.

[116] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award of July 1, 2004, para. 183.

[117] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, para. 154.

[118] *See J*, Decision No. 349, World Bank Administrative Tribunal, 2006.

[119] Opening Statement of Ms. Carolyn Lamm, April 3, 2006, Hearing transcripts, Vol. 1, at 80–81.

Turkey, because they "wanted to meet with senior government officials, make sure they're aware of the Project, make sure that they viewed this as a beneficial development that they were happy to host in their country."[120] It thus appears that it was rather the Claimants who approached the Turkish Government.

245. In the present case, the Claimants contend, moreover, that the breach of fair and equitable treatment goes as far as to have reached the level of bad faith and have entailed the deliberate attempt by the Respondent to destroy the investment without paying compensation. The Tribunal, however, has found no evidence of bad faith or ultimately of a kind of conspiracy to take away legitimately acquired rights that could result in the deliberate termination of the Project. To that extent, the role of fair and equitable treatment in this case does not bring the standard near to expropriation or other forms of taking.

246. The Tribunal is persuaded nonetheless that the fair and equitable treatment standard has been breached, and that this breach is serious enough as to attract liability. Short of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants. The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.

247. Secondly, there is a breach of the obligation to accord fair and equitable standard of treatment in light of abuse of authority, evidenced in particular, but not exclusively, by the discussion of the Claimants' application under Law 4501. As noted above, MENR's demands for a renegotiation went far beyond the purpose of the Law and attempted to reopen aspects of the Contract that were not at issue in this context or even within MENR's authority.

248. Inconsistent administrative acts are also evident in this case in respect of some matters. On occasion the administration would ignore rights granted by law as a matter

[120] Testimony of Mr. Robert Dougherty, April 6, 2006, Hearing transcripts, Vol. 4, at 815–16; Written Statement of Mr. Robert Dougherty, December 9, 2005, para. 9.

of policy or practice. This was particularly the case of the foreign branch corporate structure, recognized under the law, the Implementation Contract, the Letter of Undertaking and the Danıştay, but was nevertheless ignored by MENR from February 1998 onward when it demanded the establishment of a Turkish corporation. A witness for the Claimants testified that since 1996 "the various groups determining energy policy in Turkey have not worked harmoniously."[121]

249. Similar was the situation in respect of the Constitutional Court decision upholding the rights acquired under a contract, which was simply ignored by MENR in its dealings with the Claimants. Such inconsistent acts might be unlawful under Turkish law, but in light of the provisions of the Treaty they are also in breach of the standard of fair and equitable treatment.

250. Thirdly, the Tribunal also finds that the fair and equitable treatment obligation was seriously breached by what has been described above as the "roller-coaster" effect of the continuing legislative changes. This is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and administrative concessions that went back and forth. This was also the case, to a more limited extent, of the changes in tax legislation.

251. Even if some of these changes were introduced to facilitate investments and the conclusion of projects, and to that extent cannot be open to criticism under this standard, the administration again failed to address the consequences of such changes in the negotiations and to accommodate the factors in the equation under discussion, with particular reference to the commercial terms of the Project.

252. Various examples of the breach of fair and equitable treatment obligation are to be found in the record of this case. Among such breaches, the most prominent are indeed those that have been discussed earlier in connection with the administration's negligence in the handling of the negotiations with the Claimants: an abuse of authority by MENR, in particular with respect to the latter's demands for renegotiation in connection with the Claimants' application under Law 4501, and the numerous changes in the legislation and inconsistencies in the administration's practice, in particular with

[121] Third Written Statement of Mr. Ahmet Eltekin, February 18, 2005, para. 18; Reply Statement of Mr. Ahmet Eltekin, December 9, 2005, para. 8.

respect to the corporate status of the Project Company and the legal status of the concession.

253. The aggregate of the situations explained raise the question of the need to ensure a stable and predictable business environment for investors to operate in, as required not only by the Treaty but also by the Turkish Constitution as noted above. This is what the United States Technical Memorandum on the BIT had very much in mind when it referred to fair and equitable treatment as a standard "that can be invoked in arbitration to protect investments against possible vagaries of the host-Party's national laws and their administration."

254. The handling of the case shows the exact opposite. Stability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation. While in complex negotiations, such as those involved in this case, many changes will occur beyond the control of the government, as was particularly the case with the increased costs, the issue is that the longer term outlook must not be altered in such a way that will end up being no outlook at all. In this case, it was not only the law that kept changing but notably the attitudes and policies of the administration.

255. While noting that no investor "may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged," the Tribunal in *Saluka* held that the investor can still expect that the conduct of the host State subsequent to the investment will be fair and equitable as the investor's decision to invest is based on "an assessment of the state of the law and the totality of the business environment at the time of the investment."[122]

256. Even if all the above conduct were to comply with good faith, which the Tribunal has no reason not to believe, there still would be an evident breach of the fair and equitable treatment standard under the Treaty, and under Turkish law. To the extent that this caused damage, compensation will of necessity be awarded.

[122] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, paras. 301, 305.

B. Was there a Breach of the Obligation to Provide Full Protection and Security?

257. The Claimants have also alleged a breach of the obligation to provide full protection and security as a separate heading of liability. This obligation is indeed embodied in Article II (3) of the Treaty. The Claimants have advanced two arguments in this respect. The first is that, following *CME*, full protection and security includes the adverse effects of the amendments of the law or administrative actions on the investment. The second argument is that, following *OEPC*, the breach of fair and equitable treatment automatically entails the absence of full protection and security. The Respondent opposes both arguments.

258. The Tribunal is mindful of the fact that this particular standard has developed in the context of the physical safety of persons and installations, and only exceptionally will it be related to the broader ambit noted in *CME*. To the extent that there is such an exceptional situation, the connection with fair and equitable treatment becomes a very close one.

259. The Tribunal does not find that in the present case there has been any question of physical safety and security, nor has any been alleged. Neither does the Tribunal find that there is an exceptional situation that could qualify under this standard as a separate heading of liability. The anomalies that have been found are all included under the standard of fair and equitable treatment discussed above. This heading of liability is accordingly dismissed.

C. Was there Arbitrariness or Discrimination?

260. The Treaty also provides in Article II (3) for protection against arbitrary and discriminatory measures that impair the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of the investment. This, the Claimants argue, occurred in the present case, particularly in respect of the repudiation of the Ministerial Approval and of the rights under the Contract, the refusal to reinstate such rights following the decision of the Constitutional Court, as well as in connection with the demands related to the application under Law 4501.

261. Again in this different context, the Tribunal finds that, to the extent supported by the facts, the anomalies that took place in connection with the conduct just referred to

are included in the breach of fair and equitable treatment and that there is no ground for a separate heading on liability on account of arbitrariness.

262. As far as discrimination is concerned, the Tribunal notes that all the measures adopted, rightly or wrongly, related to the whole array of BOT projects under consideration, as the Claimants themselves have repeatedly argued. Thus, it is quite evident that Konya Ilgın was not singled out in a discriminatory manner. The Claimants' argument about foreign investments having been discriminated against is equally not supported by the facts. The changes in macroeconomic policy that would have occurred concerned the economy as a whole. The question of foreign investment being particularly intense in the energy sector is a separate matter unrelated to the claim on discrimination. This heading of liability is accordingly also dismissed.

D. Was there a Breach of Obligations Entered into with Regard to the Investment?

263. The Claimants also argue that the Respondent has breached the obligation under Article II (3) of the Treaty to "observe any obligation it may have entered into with regard to investments," including therein not just the undertakings under the Contract but also a host of other commitments originating in the legislative, administrative and regulatory undertakings concerning the investment. Prominent among such alleged breaches is the failure to permit the Claimants to benefit from the laws enacted specifically to improve the financing of the Project, the failure to observe the regulatory undertakings under Article 8 of the Contract, and the failure to exercise the regulatory and administrative authority in good faith and in a reasonable manner.

264. As noted above, the Respondent asserts that under Article 8 of the Contract it had discretion to approve the revised tariff. The discretion contrasted with the more limited language of Article 5.1 of the Implementation Contract,[123] with the sole requirement of reasonable grounds, which the Respondent argues was amply satisfied in light of the public interest.[124] Judge Schwebel also concluded in this respect that

[123] Affidavit of Judge Harun Çetintemel, September 9, 2006, para. 11.

[124] Legal Opinion of Professor Zehreddin Aslan, September 14, 2005, para. 22; Legal Opinion of Professor Ender Ethem Atay, September 15, 2005, para. 22; Second Legal Opinion of Professor Ergun Özsunay, September 13, 2005, para. 12.

MENR "rejected Claimants' various tariff proposals for what it saw as reasonable grounds and that it did not do so roughly, abruptly, arbitrarily or capriciously."[125]

265. The Respondent further asserts that at all times it proceeded to negotiate in good faith and, as discussed above, there could be no liability attached to the failure to conclude an agreement if it was deemed to be too onerous for Turkey and if less expensive alternatives were available.[126]

266. The Tribunal concluded in its Decision on Jurisdiction that the existence of the Contract, its validity and binding effects were beyond doubt. The issue that was then left pending for the merits stage was whether the parties had reached agreement on any amendment to some important commercial terms of the Project. As noted above, the Claimants maintain that the parties were under an obligation to complete the negotiations and finalize the Project, while the Respondent asserts that the discretion envisaged in Article 8 was broad enough so as to allow for the disagreements that followed. The Tribunal has found above that important as the Feasibility Study and the Implementation Contract were, they were not self-contained as some of the essential commercial terms were still open to discussion, a conclusion that Article 8 of the Contract clearly corroborates.

267. Although negotiations on the commercial terms were pursued for a long time there is no decisive evidence about an agreement having been unequivocally reached. In view of the fact that the Contract provided for such negotiations to be carried forward, it follows that liability cannot be attached to the fact that agreement was not reached.

268. While a legal expert for the Claimants expressed the view that MENR's legal options were limited either to approve or disapprove on reasonable grounds,[127] this was hardly realistic to expect in a project as complex as this. In fact the Claimants were greatly interested in exhausting the possibilities of reaching a negotiated agreement.

269. It follows from the above that the Tribunal cannot conclude that there was a breach of the Contract obligations, except to the extent that the sixty-day time line for a rejection of the revised tariff was never complied with. Such a time limit was in any event not essential as both parties pursued negotiations for many more months and it

[125] Opening Statement of Judge Stephen Schwebel, April 4, 2006, Hearing transcripts, Vol. 2, at 332–35.
[126] Affidavit of Mr. Cumhur Ersümer, September 14, 2005, para. 11.
[127] Legal Opinion of Professor Sait Güran, December 9, 2005, para. 21.

could hardly be expected that it could be met in the context of a negotiation as complex as this.

270. The Tribunal has also found that while both parties were required under the Contract to pursue the negotiations on the additional agreements needed to complete the Project, such as the Treasury Guarantee, the Energy Sales Agreement and the Fund Agreement, such agreements were dependent upon the finalization of the commercial terms of the Contract, a key event that never occurred. It follows that, in spite of the fact that the Contract envisaged these agreements as a part of the overall commitments undertaken by the parties, compliance with such objectives could not be achieved irrespectively of or separately from the commercial terms.

271. A number of recent awards have extensively discussed the meaning of the "umbrella clause"[128] and there is no point for this Tribunal to go over this discussion again. In the context of the present dispute, it suffices to note that there are different views about whether a contract breach can be transformed into a treaty breach or should be handled differently as an ordinary commercial breach of contract.[129] As the Tribunal has not found a specific breach of obligations under the Contract, the issue does not arise in this case. Questions concerning the interference arising from the exercise of sovereign powers of the State have been discussed above in connection with the breach of fair and equitable treatment and are, in the light of the facts of this case, independent from contract rights.

E. Was the Investment Expropriated through Measures Tantamount to Expropriation?

272. Although the Claimants have not argued the existence of direct expropriation in this dispute, they have requested a finding of liability on account of the breach of Article III (1) of the Treaty in that various measures adopted are tantamount to expropriation and have resulted in indirect expropriation. Regulatory or creeping

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[128] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003; *SGS Société Générale de Surveillance S.A. v. Republic of Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction of November 19, 2004; *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of October 12, 2005.

[129] *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction of August 6, 2004, paras. 78, 81.

expropriation, the Claimants recall, has been long accepted in the literature of international law and the decisions of international courts and tribunals.

273. Such measures can include, the Claimants assert, covert or incidental interference with the property resulting in the deprivation of economic benefits,[130] the taking of contract rights and the imposition of unreasonable regulatory regimes.[131] For the Claimants, the aggregate of measures taken in this case resulted in the termination of the Project and the complete destruction of the investment made.

274. The Respondent opposes such allegations on the ground that, as held by the tribunal in Feldman, "not every business problem experienced by a foreign investor is an indirect or creeping expropriation"[132] nor does the protection under the Treaty cover commercial risks.[133]

275. In the Respondent's view, the disputed actions were not expropriatory in nature as no rights under the Contract were taken and no vested rights arose from the Implementation Contract, which was only initialed and never signed, from the June 19, 1998 Ministerial Approval, which contained no contractual commitment, or from Law No. 4501, which gave no automatic rights to the conversion of contracts.

276. The Respondent further asserts that neither was there a deprivation of substantial rights, and the Claimants were free, and are still free, to pursue the proposed Project under the terms originally agreed in the Feasibility Study. However, the Claimants chose to abandon the Project even before the actual alleged date of expropriation.

277. In any event, the Respondent argues that, as held in *OEPC*, the deprivation must affect a significant part of the investment, which was also the reason that led the Tribunal in *Noble Ventures* to conclude that no viable company or valuable assets were concerned in the actions taken in that case.[134] Given that the Respondent asserts that the Project had no economic viability, no value could have been affected by its actions.

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[130] *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 6, 2004, para. 103.

[131] *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002, at par 103; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, para. 603.

[132] *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002, para. 112.

[133] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, (ICSID Case No. ARB/99/6), Award of April 12, 2002, para. 153.

[134] *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of October 12, 2005, para. 216.

278. The Tribunal has no doubt that indirect expropriation can take many forms. Yet, as the tribunal in *Pope & Talbot* found, there must be some form of deprivation of the investor in the control of the investment, the management of day-to day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.[135]

279. The Tribunal is not persuaded that any such extreme forms of interference took place in this case. Many things were wrongly handled, but none could be considered to amount to regulatory expropriation. The rights that were affected one way or the other, including the Claimants' legitimate expectation, have indeed resulted in a finding of breach of the standard of fair and equitable treatment, yet none of the measures adopted envisaged the taking of property, which is still the essence of expropriation, even indirect expropriation. Although measures tantamount to expropriation may well make the question of ownership irrelevant,[136] it does require a strong interference with clearly defined contract rights that in this case were in the end incomplete.

280. The Tribunal accordingly concludes that the Respondent has not breached Article III (1) of the Treaty. This conclusion does not mean that there was no value of property or rights affected, but this is a separate question that the Tribunal will address next in the assessment of damages.

IV. Damages and Compensation

A. Claims

1. *The Claim for Compensation of Damages*

281. In the Claimants' view, the Respondent's violations of the BIT were so severe as to deprive them of the value of their entire investment in the Project, thus resulting in the complete loss of the benefit of such investment and of the value of the contract rights. The Claimants accordingly request, in light of the *Chorzów Factory* case, the full reparation for the injuries caused so as to "as far as possible, wipe out all the

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[135] *Pope and Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, para. 100.

[136] *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of April 30, 2004, para. 143.

consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[137]

282. The above claim for compensation, in the Claimants' submission, should cover all financially assessable damage, including loss of profits arising from either contract arrangements or from a well-established history of dealings, just as the International Law Commission concluded in its comments on Article 36 of the Articles on State Responsibility.

283. Based on the expert reports prepared by Dr. Michael Rosenzweig, the Claimants have put forth three approaches to the assessment of damages: the fair market value, the lost profit valuation, and the investments actually made and out of pocket expenses incurred by the Project sponsors.[138] The Tribunal will examine each of these heads of claim.

2. *Fair Market Value*

284. As to the fair market value, the Claimants conclude in their last post-hearing submission that, on the assumption that there has been expropriation, the value of the investment at the time of expropriation was US$114.951 million. The expert and the Claimants put the expropriation date to be March 3, 2001, the date on which the Electricity Market Law was enacted. Applying interest at the rate of 10.6% per annum, compounded annually, this amount came at the end of 2006, the probable date of the award, to US$171.986 million. The interest rate retained by the Claimants is the Project's cost of equity and is thus necessary to return the Claimants to the economic condition they would have been in "but for" the Respondent's actions.

3. *Loss of Profits*

285. As to the second approach, if the measure of losing the entire economic benefit that contractual performance would have brought is taken as the basis for compensation, the Claimants estimate their lost profits to be US$223.742 million. Together with

[137] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment of 13 December, 1928, P.C.I.J. at 47.
[138] Expert Report of Dr. Michael Rosenzweig, February 18, 2005, para. 7; Testimony of Dr. Michael Rosenzweig, April 8, 2006, Hearing transcripts, Vol. 6, at 1262–65.

interest at the rate just noted, lost profits would amount to US$334.756 million at the end of 2006.

286. All such estimates are without prejudice to certain tax questions concerning the award and the compensation. In the expert's calculation, the net present value of the losses as of the end of 2006 would be US$301.677 million, which including the avoidance of certain tax effects would amount to US$494.552 million.

287. The Claimants assert in justification of this approach that they are entitled to the economic equivalent of the contract performance that they were denied, that is the amount of profits that they would have obtained under the Concession Contract.

288. The Claimants argue that such a measure of profits is certain and non-speculative because there was an agreed minimum of electricity to be sold year by year to TEAS under a "take-or-pay" contract, at a defined tariff rate and with guaranteed payments by the Treasury. Moreover, in the Claimants' view, certainty about profits arises from the fact that all Project costs were thoroughly analysed and agreed to, the Project sponsors were highly experienced with a long history of successful projects and the Project was technically and financially practicable.

289. As a consequence of the reliability of the Project, which the Claimants' experts Norwest Corporation describe as "exceptionally high quality," "well-developed" and "fully bankable," the Claimants argue that there was a reasonably certain projected profit stream, much more certain than in other projects considered in other arbitration proceedings where some uncertainty in damage assessment was held not to be an obstacle to the award of damages and lost profits.[139] The Claimants add that such an approach has been upheld by the award of an ICC tribunal in *SBD v. Turkey*.[140]

4. *Amount of Investment*

290. In the alternative, the Claimants submit, a third approach, arguing that other criteria support their claim for damages. In the Claimants' view, at "the barest minimum," they should be allowed to recoup the amounts invested on behalf of the

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[139] With reference to *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award of May 20, 1992; *Sapphire International Petroleum Co. v. National Iranian Oil Co. (Sapphire)*, Award of March 15, 1993, and *Karaha Bodas Co. LLC v. Perusahan Pertambangan Minyak Dans gas Bumi Negara (Pertamina)*.

[140] Claimants' Reply, para. 347, n. 740, with reference to *SBD Sakarya Bolu Elelrik Dagitim Anonim Sirketi v. The Republic of Turkey*, (ICC Case No. 125751MS), Award of March 20, 2004.

Project Company by its sponsors PSEG Global, North American Coal and Guris. All such amounts expended are, in their submission, reasonable and proper and were all envisaged by the Feasibility Study and the project's authorizing documents. These expenditures include in particular the updated mine costs, the amounts invested by the Project sponsors and out of pocket expenses. Such expenses refer to matters such as the costs of preparing the power plant project and the mine studies, contract negotiations and financing, environmental costs, permits and license fees, and legal and consulting fees.

291. These expenses were estimated by the Claimants' expert on the basis of the "opportunity costs" the Claimants incurred by investing in the Project, that is the "time value of money." In the last post hearing submission, the expenses were estimated to add up to US$27,941,740.30 by the end of 2006, including prejudgement interest based on the cost of equity. An amount of US$45,806,131.64 has also been estimated as that resulting from a tax gross up. Alternatively, the Claimants have also calculated prejudgement interest in accordance with the Turkish Bond Yield, which brings these figures to US$29,050,241.68 and US$47,623,347.01, respectively.

292. The Claimants finally argue that, contrary to what the Respondent asserts, the contractual rights had a market value even prior to the financial close, as evidenced by the value of the Letter of Guarantee, the Feasibility Study, the Revised Mine Plan and other significant intellectual property and work product worth millions of dollars. The Claimants note that the Contract itself recognized an economic value of between US$8 million and US$12 million in connection with the guarantee, just as the applicable BOT regulations[141] placed a value of up to 1.5% of the project cost for the completed Feasibility Studies and finalized project documentation.[142]

5. The Respondent's Opposition to the Claim for Damages

293. The Respondent's views start out from the premise that "Claimants did not excavate a mine and never extracted a single shovel of coal or limestone at Konya Ilgın. Claimants did not lay a brick to build a power plant and never delivered a single kilowatt hour of electricity to the Turkish power grid. Claimants did not even start

[141] BOT Regulation No. 85/9799.
[142] Claimants' Post-hearing Brief, para. 196; Fourth Legal Opinion of Professors Mahmut Birsel and Arzu Aksaç Yeşilirmak, December 9, 2005, CLA 108 to Claimants' Reply on the Merits, paras. 77–78.

work on those projects." The Respondent accordingly considers that all the activities undertaken were related to a "pre-investment" phase.[143]

294. On these bases, the Respondent argues that the Project had no economic value either in terms of the market for global independent power projects or in terms of an economic project valuation; the amounts allegedly taken were certainly invested elsewhere at competitive rates of return; the expenses allegedly made were "at risk," as in every power project, and the Claimants should have expected to incur a loss if financial close was not reached; and not even out of pocket expenditures should be recovered because in abandoning the Project the sponsors avoided losses that exceeded the value of the alleged investment.[144]

295. The Respondent is in agreement with the principle on reparation laid down in the *Chorzow Factory* case which the Claimants have invoked, but notes that in this case the *status quo ante* that should be restored would leave the Claimants with a project that was "infeasible and not financeable," that is a project without any value that could have been taken by the Respondent's acts and, moreover, there was no certainty that the Project would ever have come into existence.

296. The Respondent further argues that the fair market value of any such project is zero as there is no market for projects that are still in development.[145] The Respondent also maintains that the market does not assign a value to a project's future earnings at least until it has materialized in a full set of contracts and that arbitral awards have refused to accept claims for speculative, uncertain or contingent damages.[146]

297. For the same reason, the Respondent maintains that arbitration tribunals will not consider future earnings as a basis for damages when the affected entity is not a "going concern" with a history of actual operations.[147] This is certainly not the case of Konya Ilgın as the revised Concession Contract was not agreed to and none of the other necessary agreements had been concluded either.

[143] Expert Report of Mr. Rutherford Poats, September 9, 2003, para. 7.
[144] Expert Report of Mr. René Stulz, September 19, 2005, paras. 99–105.
[145] Expert Report of Ms. Dianne Rudo, September 19, 2005, paras. 33–40.
[146] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award of July 1, 2004; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 6, 2004; *Wena Hotels v. Arab Republic of Egypt,* (ICSID Case No. ARB/98/4), Decision on Jurisdiction of May, 25, 1994.
[147] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award of 21, 1990; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 6, 2004; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award of September 23, 2003.

298. Neither does the Respondent accept that the contractual arrangements provide a basis to award compensation, particularly in view of the fact that the claim for compensation on this count does not rely on the Contract but on cash flow tables that were a part of the February 13, 1998 Claimants' proposal for a renegotiation that was never agreed upon. The Respondent in particular opposes the Claimants' argument that the *Sapphire* and the *Pertamina* decisions would lend support to the role of contractual arrangements in determining projected income streams subject to compensation. In those cases there were complete contracts that actually described and governed the projects in question, which is far from the case here.

299. In the opinion of an expert for the Respondent, even if the Project had proceeded to construction in 2002, and to operation in 2004, it still would have failed economically by 2005 given the increases in world oil prices, mining costs and other key factors.[148]

300. Aside from the fact that the Respondent opposes the valuation methods suggested by the Claimants, in the understanding that both are mere variations of loss of profits calculations, there are numerous disagreements about the specific factors taken into account to this effect by Dr. Rosenzweig, the Claimants' expert, with particular reference to the discount rate used in those calculations and the method for its application.[149] In Dr. Stulz's estimates, the appropriate corrections result in a fair market value put at negative US$33 million and a loss of profits at negative US$40 million.

301. The Respondent also opposes the claim for development and out of pocket expenses because of the "at risk" nature of such expenses noted above, and also questions a number of specific expenditures which in the Respondent's view are unrelated to the Project, including expenditures made by NACC and Guris, entities that are not Claimants in this case. The Respondent estimates in its last post hearing submission that if the appropriate corrections are made to this effect, and the risk-free Treasury bill rate is applied as the relevant interest rate, such expenses would amount in 2006 to only US$8.754 million.

[148] Expert Report of Mr. Robert Sansom, March 17, 2006, paras. 10–15.
[149] Testimony of Mr. René Stulz, April 10, 2006, Hearing transcripts Vol. 8, at 2125–31.

B. The Tribunal's Findings

302. In its jurisdictional decision, the Tribunal found that an investment had been made in the form of a Concession Contract, and distinguished this situation from that considered in *Mihaly*, where the parties never signed a contract and expressly disclaimed any obligations arising from the preparatory work undertaken.[150] So too, this case was distinguished from *Zhinvaly*, where the parties expressly acknowledged that the Claimants did not have an investment. Moreover, the Tribunal is mindful that in *Mihaly* the decision did in fact consider that it might well be the case in other investments that the moneys spent or expenses incurred in their preparation can be swept within the umbrella of such investment.[151]

303. At the jurisdictional stage, the Tribunal also decided that a different question, pertaining to the merits, is "whether all or some of the activities undertaken qualify as a part of the investment or are to be regarded as merely preparatory. The same holds true of whether the assets of the Project Company constitute an investment."[152] This is the first issue the Tribunal must now decide on the merits.

304. As noted, the Respondent is of the view that because there was no mining undertaken and the plant never even started to be built, there is nothing to compensate for. It is an accepted fact of the case that, except for a groundbreaking ceremony, there was no mining undertaken or construction started, not even in terms of the necessary preparations to that effect. This, however, is not a reason sufficient in itself to rule out the existence of damages subject to compensation. An investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre-investment expenditures, particularly when, like in this case, there is a valid and binding Contract duly executed between the parties.

[150] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgın Electrik ve Ticaret Limited Sirketi v. The Republic of Turkey* (ICSID Case No. ARB/02/5), Decision on Jurisdiction of June 4, 2004, para. 81.
[151] *Mihaly International Corporation v. Sri Lanka*, (ICSID Case No. ARB/00/2), Award of March 15, 2002, para. 50.
[152] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgın Electrik ve Ticaret Limited Sirketi v. The Republic of Turkey* (ICSID Case No. ARB/02/5), Decision on Jurisdiction of June 4, 2004, para. 104.

1. *Fair Market Value*

305. The Tribunal will accordingly consider first whether the claim to a fair market value of the Project is justified in light of the nature of the investment made. It must be noted in this respect that the BIT, like most treaties of its kind, provides for the fair market value as the measure for compensation only in connection with expropriation. Since the Tribunal has found above that there is no expropriation in this case, either direct or indirect, the fair market value does not appear to be justified as a measure for compensation in these circumstances.

306. From a financial point of view, the Tribunal is persuaded by the view of Dr. Carlos Lapuerta, the Respondent's expert, who in answering a question from the Tribunal, first explained that there might be a market for projects that have not reached financial close or started construction or operation, as long as there is a willing buyer and a willing seller prepared to buy and sell for one dollar. However, he noted that this is normally a very limited market, based on private contacts and not on public offers, that never comes anywhere near the amount claimed in this case.[153]

307. From a legal point of view, the Tribunal is mindful that a number of cases accepted the measure of compensation based on the fair market value as appropriate for treaty breaches not amounting to expropriation and relating to the breach of fair and equitable treatment and other standards of protection under the treaty in question, as evidenced by both NAFTA[154] and ICSID[155] cases.

308. Yet, in all these cases the breach that was compensated had resulted in damage to investments that were at the production stage, not merely in planning or under negotiation. While the Tribunal has found that there is in this case a breach of fair and equitable treatment, this breach relates not to damages to productive assets but to the failure to conduct negotiations in a proper way and other forms of interference by the Respondent Government. The appropriate remedies thus do not relate to a

[153] Testimony of Mr. Carlos Lapuerta, April 9, 2006, Hearing transcripts, Vol. 7, at 1719–72.
[154] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of November 13, 2000; *Pope and Talbot, Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001.
[155] *Marvin Roy Feldman Karpa v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002; *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/1), Award of April 20, 2005; *Azurix Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of July 14, 2006, para. 424.

compensation for the market value of those assets but to a different objective. This, as will be discussed below, also entails an economic value but of a different nature.

309. The Tribunal accordingly finds that the fair market value shall not be retained as the measure for compensation in this case and hence it will also not discuss the many technical aspects raised by the parties in connection with the factors that were taken into account for assigning a value to the claim and the appropriate method for its calculation.

2. *Loss of Profits*

310. The second heading of claim for compensation is based on the lost profits approach put forth by the Claimants. The Tribunal is mindful that, as the award in *Aucoven* noted, ICSID tribunals are "reluctant to award lost profits for a beginning industry and unperformed work."[156] This measure is normally reserved for the compensation of investments that have been substantially made and have a record of profits,[157] and refused when such profits offer no certainty.[158]

311. The Respondent convincingly invoked in support of its objections to this approach the awards in *AAPL*[159] and *Metalclad*,[160] which required a record of profits and a performance record, just as the awards in *Wena*,[161] *Tecmed*[162] and *Phelps Dodge*[163] refused to consider profits that were too speculative or uncertain. The Respondent also convincingly noted that in cases where lost profits have been awarded, such as *Aminoil*,[164] this measure has been based on a long history of operations.

312. The Claimants also noted that line of decisions, but distinguish the situation where there have been contractual arrangements "that establish the expectation of profit

[156] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, September 23, 2003, para. 360.
[157] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, September 23, 2003, para. 361.
[158] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, September 23, 2003, para. 365.
[159] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award of 21, 1990.
[160] *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 6, 2004.
[161] *Wena Hotels v. Arab Republic of Egypt,* (ICSID Case No. ARB/98/4), Decision on Jurisdiction of May, 25, 1994, paras. 122–24.
[162] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003.
[163] *Phelps Dodge Corporation v. Iran*, 10 Iran–US C.T.R. 121, 132–33 (1986).
[164] Respondent's Counter-memorial, para. 309, n. 564, with reference to *Kuwait v. Aminoil*, 21 I.L.M. 976, 989–94 (1982).

at a certain level and over a given number of years," which results in the concern regarding speculation being removed. The Tribunal would have no difficulty with this proposition, because in fact a self-contained and fully detailed contract can well determine a basis for the calculation of future profits. However, the Tribunal must also note that in many long-term contracts it is most difficult if not impossible to calculate such future profits with certainty, particularly if the contract is subject to adjustment mechanisms and other possible variations with time.[165]

313. Even assuming that none of those difficulties existed, in this case the exercise becomes moot because the parties never finalized the essential commercial terms of the Contract, and as a result neither could the additional agreements concerning the sale of electricity, the Fund payments and the Treasury guarantee be finalized. Relying on cash flow tables that were a part of proposals that did not materialize does not offer a solid basis for calculating future profits either.[166] The future profits would then be wholly speculative and uncertain. By definition, the concept of *lucrum cesans* requires in the first place that there is a lucrum that comes to an end as a consequence of certain breaches of contract or other forms of liability. Here such an element is not only entirely absent but impossible to estimate for the future.

314. The Tribunal is also troubled by the economic foundations offered by the Claimants for the lost profit approach. Dr. Rosenzweig's justification for this claim is based on the "cost of equity to the providers of the equity because that's the value to them … the minimum return that the equity providers are willing to accept . . . ."[167] The Respondent notes that this approach turns on the subjective assessment of the investor's own minimum acceptable return on equity, without any objective or market-based assessment of the project and its risks, an approach which results in a claim twice the amount of the claim for fair market value put forth in this case.

315. The Tribunal will accordingly also not retain the lost profits heading of claim as the measure of compensation because it cannot be justified from a legal or economic point of view in the circumstances of the case.

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[165] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award of September 23, 2003.
[166] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award of September 23, 2003, para. 354.
[167] Testimony of Dr. Michael Rosenzweig, April 8, 2006, Hearing transcripts, Vol. 6, at 1335–37.

3. *Compensation of Investment Expenses*

316. The third approach to compensation that the Claimants have put forth concerns the investments made and out of pocket expenses referred to above. While these amounts have been described at various points as pre-investment, pre-closing, pre or post-expropriation and other, they all correspond to the period of preparation and negotiation of the Project's technical and legal aspects.

317. The Tribunal found above that the Respondent was in breach of some Treaty provisions imposing upon it obligations in connection with the protection of the investment. The question remains whether all or only some of the investments made qualify under that protection so as to justify compensation for the damage caused.

318. Dr. Rosenzweig's expert report has grouped these investments into five principal categories: legal; mine and fuel supply; other technical studies; environmental; and Project preparation, which in turn refers to items such as financing, permits, corporate structure, preparations for implementation and drafting and negotiation of commercial terms. The Tribunal notes that such categories correspond to the history of the negotiation of the Project outlined above and the many issues that arose along the way, and thus offer a reasonable framework to examine the specific amounts claimed.

319. All such categories were also envisaged in the Feasibility Study and the Contract, as explained above. It should be noted in particular that Article 6 of the Contract includes in the total investment cost of the Project "all the expenses made by the Company regarding the facilities in accordance with the feasibility report, until the commercial operation date." It is not unusual either for awards to allow for the costs of negotiation of a project.[168]

320. The Tribunal also notes that the specific amounts claimed have been subject to a detailed audit by the Claimants' expert, who has also introduced the necessary corrections justified by its own revisions or by some of the comments made by the Respondent's experts. To this end, the Tribunal is mindful that in *Aucoven* the award

[168] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award of September 23, 2003, para. 263.

did not find any reason to disregard financial statements produced by the Claimants and took into account the corrections made.[169]

321. Subject to the Respondent's objections that will be examined below, the Tribunal considers that the approach followed by Dr. Rosenzweig offers a solid basis on which to proceed. The amount of expenses estimated by Dr. Rosenzweig was set at US$11,467,668, before escalation by interests and tax gross up.[170] Prejudgement interest based on the cost of equity brings this amount to US$27,941,740.30 by the end of 2006. With the tax gross up that will be discussed the amount claimed further escalates to US$45,806,131.64. However, the basic amount claimed that the Respondent considered to make its objections was US$11.722 million. For the sake of avoiding confusion, the Tribunal will take this last amount as the claimed figure.

322. The Respondent's first objection concerns the fact that the Claimants have included in their estimates expenses incurred by NACC and Guris, entities that are not parties to these proceedings. In the Respondent's view, the Claimants' contention that the payments were made on behalf of the Project company does not change the fact that such payments were not made by either the Project company or PSEG, and thus are not actual expenditures subject to compensation.

323. The Claimants have in fact argued that the amounts invested by all the sponsors of the Project represent the minimum value that could be assigned to the rights owned directly by the Project company and indirectly by PSEG, and that, moreover, this view is consistent with the Memorandum of Understanding among the sponsors.

324. The Tribunal found in its Decision on Jurisdiction that indeed NACC had no standing in these proceedings as it had not signed the Contract and was acting basically as the technical operator for the investor; whether there were legal arrangements in place between the sponsors as to actual or potential equity holdings in the Project company did not change the situation. Guris was at an even greater disadvantage to this effect, because its participation as a sponsor was less evident and its field of expertise is construction, which was one of the activities that never came to be.

325. The Tribunal will not undo with one hand what it did with the other. This would be the result if compensation is awarded in respect of investments or expenses incurred

[169] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award of September 23, 2003, paras. 248, 258.
[170] Written Statement of Dr. Michael Rosenzweig, September 18, 2005, Annex 17.

by entities over which there is no jurisdiction, even if this was done on behalf of one of the Claimants. As the Tribunal also noted in the Decision on Jurisdiction, these entities might have a claim against PSEG in the light of intra-corporate arrangements, but this is not something for which Turkey is liable, directly or indirectly.

326. The expenses incurred by NACC and Guris, as calculated by Mr. Carlos Lapuerta, the Respondent's expert, amount to US$2.317 million. The development expenses claimed will be accordingly reduced by this amount.

327. The second objection made by the Respondent's expert, Mr. Carlos Lapuerta, concerns the fact that the claim includes expenses for work performed prior to February 1995, that is before the Feasibility Study was submitted to MENR, as well as expenses incurred after the date of alleged expropriation, that is after March 2001.

328. The Claimants have explained that although some of the expenses were incurred prior to the submission of the Feasibility Study, they were actually paid after that submission. This, however, appears to be inconsistent with the expert's methodology of recording expenses at the time made and not at the time paid, and is also inconsistent with his own description of these being "pre-investment expenses."[171] The Tribunal considers the objection tenable and will accordingly reduce the development expenses, as calculated by the Respondent's expert, by an amount of US$94,126.

329. As the Tribunal has found that there is no expropriation involved in this case, the actual date of the alleged expropriation is immaterial for the purposes of establishing expenses made. As long as these were within the accepted categories and reasonably related to the negotiations and advancement of the Project completion, compensation is not limited to that date. The Tribunal accordingly dismisses the objection made on this count for US$254,810.

330. A third objection concerns the payments of VAT in the United Kingdom and the Netherlands for US$62,039, which the Respondent believes are unrelated to the Project and which could be offset by the Project sponsors. In the Claimants' view, these were legitimate expenses incurred in the development of the Project and could not be diminished by theoretical offsets which could have related to other business of the Project sponsors in those jurisdictions. The Tribunal is persuaded by the Claimants'

[171] Written Statement of Dr. Michael Rosenzweig, September 18, 2005, para. 46.

views in this respect and finds no reason to believe that VAT could have been improperly claimed. The objection is accordingly dismissed.

331. The Respondent raises a fourth objection concerning the absence of adequate evidentiary support for salaries of PSEG employees, requesting a reduction of US$820,651. While detailed evidentiary support has not been submitted for every single penny spent on the Project, the Tribunal does not find any reason to doubt that the audit by Dr. Rosenzweig and his associates could have added unjustified entries in respect of salaries. It is only natural that such lengthy expenses, involving in the Respondent's expert argument around 1,085 different entries, will be grouped into more succinct categories and periods. The objection is accordingly dismissed.

332. A fifth objection concerns what the Respondent believes are excessive overhead expenses. Dr. Rosenzweig used a 99% ratio of overhead to salaries as this was PSEG's company wide average for the period. The Respondent's expert believes that a comparison with other U.S. firms would suggest a 57% ratio, which is closer to the 60% ratio used for NACC. In addition, there would appear to be problems of double counting and other expenses irrelevant to the Project, as well as doubts about some items that could have been included also in other expenses claimed. In the light of these objections, the Respondent's expert proposes a reduction of US$407,199; if overhead is eliminated altogether the reduction would be in the sum of US$799,294.

333. While it is true that a 99% ratio appears high and that some specific items are unclear, the Tribunal accepts Dr. Rosenzweig's figures in this matter, which are based on the contemporaneous accounts of the Project's sponsors. In addition, the Tribunal does not find that an overall overhead expense of US$799,294 is excessive for a Project of this kind and its many complexities. The objection is accordingly dismissed.

334. The sixth objection made by the Respondent concerns transcription errors for US$60,923, double counting of some travel expenses for US$8,622, and inappropriate expenses, in particular the participation in the American-Turkish Council (US$21,730) and legal fees relating to the investigation of Guris for possible corrupt practices (US$67,234). Of 1900 invoices submitted, the objections concern 11.

335. The Claimants' expert reviewed the objected invoices and has established that in some cases corrections were justified. The claimed amount has accordingly been reduced by a total of US$16,430.66, which is also reflected in the final amount claimed

in the last post hearing submission. The Tribunal is satisfied that these corrections have been made in accordance with appropriate accounting practices and also finds that the explanations to this effect have been satisfactory.[172]

336. The Tribunal finds, however, that the objections made to expenses relating to the American-Turkish Council and legal expenses concerning Guris' investigation are justified. The first is a kind of general forum for policy discussions that, while of interest to the Project, cannot be considered a cost related directly to the Project development. The second objection relates to legal fees also unrelated to the development of the Project and which concern a foreign entity not a party to these proceedings. The amounts claimed will accordingly be reduced by US$21,730 and US$67,234 on account of these two expenses.

337. Reducing the basic claimed amount of US$11.722 million by the objections that the Tribunal has accepted above (US$2.317 million for NACC and Guris expenses; US$94,126 for pre-investment expenses; US$21,730 for participation in the American Turkish Council; and US$67,234 for Guris' investigation), and further reducing it by the corrections that the Claimants' expert made to some items in the amount of US$144,000 (as per submission of March 20, 2006) and US$16,430.66 as noted above, the compensation is set at US$9,061,479.34.

338. The Claimants escalated the amount claimed by two factors. The first is the interest rate that will be discussed below. The second is a tax gross up resulting from the applicable Turkish taxes to the compensation awarded to the Project Company (39%). This tax gross up is not claimed if the compensation is awarded to PSEG.

339. The Claimants assert in this connection that this tax gross up is the only way to ensure that an award makes the company whole. The Respondent objected to this claim because the Project sponsors wrote-off the development expenses and thus deducted them against the corporate income, thus reducing their tax bill and receiving substantial tax benefits.[173]

340. As the Tribunal has excluded the claims relating to expenses by NACC and Guris, PSEG Global is the only investor remaining in the Project Company. While the Project Company might have assets in its own name, compensation for these values has

[172] Claimants' Response to Respondent's new evidence, July 11, 2006, Annex 3.
[173] Expert Tax Report of Mr. Faruk Sabuncu, March 15, 2006.

been computed in the development expenses discussed above. Moreover, the Tribunal notes that the Project Company is wholly owned by PSEG Global. The Tribunal accordingly finds no reason to award compensation to the Project Company and will do so only to PSEG Global. The question of the tax gross up is thus no longer relevant in this context.

4. *Interest*

341. The parties have also extensively discussed the question of interest. The Claimants' expert, Dr. Rosenzweig, has used the date of alleged expropriation, March 3, 2001, to calculate prejudgement interest relating to expenses made before and after this date. For the period prior to March 2001, the estimated interest rate is 12% based on the opportunity cost to the Project Company at that particular point in time and the length of time since the investment was made until the date of expropriation. This opportunity cost is in turn based on the "historic" cost of equity. After March 2001, the estimated interest is 10.6% based on a "forward looking" cost of equity. Post-award interest is also calculated at 10.6%. Alternatively, the Claimants accept the applicable Turkish sovereign rate as reflected in the Turkish Bond yield, which as noted results in an increased amount of the compensation claimed.

342. As noted above, the expenses, including prejudgement interest based on the cost of equity, were estimated by the Claimants to add up to US$27,941,740.30 by the end of 2006. Alternatively, the calculated prejudgement interest in accordance with the Turkish Bond Yield, brings this figure to US$29,050,241.68.

343. The Respondent's expert, Mr. Lapuerta, considers this approach unjustified from a methodological point of view. In his view there is no reason to apply a different prejudgement interest rate before and after the alleged expropriation. As noted above, the Respondent also objects to the fact that in Dr. Rosensweig's approach the cost of equity is subjectively established by each investor. Moreover, the Respondent also objects to the computation of expenses before they were actually paid.

344. Another expert for the Respondent, Dr. Stulz, explained that in his view the appropriate interest rate is that of the United States Treasury Bill as it would only be justified to exceed this rate when there is a risk involved, which is not the case of the

compensation resulting from an award.[174] In the Respondent's estimates, total damages after reductions and corrections, including interest at the United States Treasury Bill rates, amount to only US$8.754 million.[175]

345. The Tribunal will examine first the question of the prejudgement interest. The Tribunal is not persuaded by the Claimants' argument that the cost of equity offers an appropriate basis to this effect. As noted above, the cost of equity is based on subjective determinations by the investors. For this reason it does not offer a useful basis for calculating interest that aims at the protection of the value of funds spent rather than the value of expropriated assets, which was in the first place the assumption behind the Claimants' choice.

346. Even less so is the Tribunal persuaded by the alternative reliance on the Turkish Bond yield as the funds not invested in the Project would certainly not be placed in the Turkish financial market at that time. The sovereign risk is not the appropriate measurement for an alternative placement of funds.

347. Neither is the Tribunal persuaded by the Respondent's choice of the US Treasury Bill as the reference point. It would not offer a realistic alternative for the Claimants' investment of funds that were not placed in Turkey, independent of the question as to whether or not the compensation provided in an award involves some measure of risk.

348. In the opinion of the Tribunal, taking into account all the circumstances of the present case, the most appropriate benchmark which will compensate adequately an international company such as PSEG Global is the 6 month average LIBOR plus 2 per cent per year for each year during which amounts are owing. The interest shall start running on the date specified below until payment of the Award. Interest shall be compounded semi-annually.

349. The Tribunal turns now to the discussion of *dies a quo*. Had there been in this case a finding of expropriation, the determination of the starting point for the application of interest could have been certain. As noted by the Tribunal in *Azurix*, however, where there is indirect expropriation or a breach of fair and equitable

[174] Expert Report of Mr. René Stulz, September 19, 2005, para. 114; Rejoinder Expert Report of Mr. René Stultz, March 16, 2006, para. 125.
[175] Review of Development Expenses of Mr. Carlos Lapuerta, May 26, 2006, para. 57.

treatment this determination is more difficult and less certain, except perhaps if the acts in question result in a clear deprivation of the investment.[176]

350. In recent cases, the date of termination of a concession agreement has been used as the starting point because it offers a date which is certain.[177] In this case, however, none of those elements is available. The breach of fair and equitable treatment is not of such nature as to be comparable to expropriation or deprivation, and neither was there a specific date of termination of the Contract. It follows that there is no reason to make a distinction based on the date of the alleged expropriation for expenditures made before or after that date.

351. The Tribunal has considered the list of expenses submitted by the Claimants and the comments of the Respondent's experts. Some deductions have been upheld by the Tribunal, as explained above. The yearly apportionment of the expenses which the Tribunal has found the Claimants are entitled to recover from the Respondent is a task which neither the Tribunal nor the parties need to undertake. Some practical solution is needed. The Tribunal notes that the expenses are spread over a period of approximately 7 years, (i.e., from early 1995 until the request for arbitration in early 2002). The Tribunal holds that interest shall run on the total amount awarded, from August 1, 1998, as a mean due date, until payment of the Award. There is accordingly no need for a separate or different determination of the post Award interest.

5. *Costs*

352. Finally, the Tribunal turns to costs. Although the Claimants did not prevail on the major portions of their monetary claims, they prevailed on jurisdiction and on liability in respect of certain breaches of the Treaty. To obtain justice, they had no option but to bring this arbitration forward and to incur the related costs. For this reason, the Tribunal considers it fair that the parties contribute to the cost in the proportion of 65% for the Respondent and 35% for the Claimants. Without entering into details of the claimed costs, the Tribunal accepts the costs claimed by the parties in

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[176] *Azurix Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of July 14, 2006, para. 417, with reference to *Malek v. Iran*, award 534-193-3, para. 114 (1992) (citing *Int'l Technical Prods. Corp*. v. *Iran*, Award No. 190-302-3, at 49, 9 Iran-U.S. Cl. Trib. Rep. 206, 240-241 (1985)).

[177] *Azurix Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of July 14, 2006, para. 418; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award of September 23, 2003, paras. 369–75.

their post hearing submissions, which are in the total amount of US$20,851,636.62, including legal costs and fees.

353. The Respondent shall accordingly pay 65% of the costs of the arbitration proceeding and of the legal costs and fees (US$13,553,563.80), of which it has already advanced US$8,950,832.10. The Claimants shall pay 35% of the costs of the arbitration proceeding and of the legal costs and fees (US$7,298,072.81), having paid US$11,900,804.52. Therefore, the Respondent shall pay to the Claimants US$4,602,731.70 in respect of such costs.

354. The Tribunal is pleased to extend its appreciation to counsel for both parties for having performed their professional duties with distinction, greatly helping the Tribunal to fully understand the complex issues discussed and to reach this award.

AWARD

1. The Respondent breached its obligation to accord the investor the fair and equitable treatment guaranteed in Article II (3) of the Treaty.
2. The Respondent shall pay PSEG Global compensation in the amount of US$9,061,479.34.
3. The Respondent shall pay PSEG Global interest at the 6 month average LIBOR rate plus 2 per cent per year for each year during which amounts are owing. Interest shall be compounded semi-annually.
4. Interest on the above amount awarded shall be paid from August 1, 1998, as the mean due date for the period during which expenses were made, until payment of the Award.
5. The total costs of the arbitration, including legal costs and fees, is set at US$20,851,636.62.
6. The Respondent shall pay 65% of the costs of the arbitration and legal costs and fees (US$13,553,563.80), of which it has already advanced US$8,950,832.10. The Claimants shall pay 35% of the costs of the arbitration and legal costs and fees (US$7,298,072.81), having paid US$11,900,804.52. Therefore, the Respondent shall pay to PSEG Global US$4,602,731.70 in respect of such costs.

7. All other claims are hereby dismissed.

[signed]
Francisco Orrego Vicuña
President of the Tribunal
January 17, 2007

[signed] L. Yves Fortier Arbitrator January 17, 2007	[signed] Gabrielle Kaufmann-Kohler Arbitrator January 16, 2007

ANNEX

(DECISION ON JURISDICTION)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

PSEG Global Inc., The North American Coal Corporation, and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi
(CLAIMANTS)

and

Republic of Turkey
(RESPONDENT)

(ICSID Case No. ARB/02/5)

DECISION ON JURISDICTION

Members of the Tribunal
Professor Francisco Orrego Vicuña
Mr. L. Yves Fortier, CC, QC
Professor Gabrielle Kaufmann-Kohler

Secretary of the Tribunal
Mr. Ucheora Onwuamaegbu

Representing the Claimants:

Ms. Carolyn B. Lamm,
Ms. Abby Cohen Smutny and
Mr. Lee A. Steven
White & Case LLP

Mr. Mesut Çakmak and
Ms. Tuğba Bayman
Çakmak Ortak Avukat Bürosu

Representing the Respondent:

Judge Stephen M. Schwebel

Messrs Daniel M. Price,
Stanimir A. Alexandrov,
Samuel B. Boxerman and
P. David Richardson
Sidley Austin Brown & Wood LLP

Mr. Serdar Paksoy
Paksoy & Co

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I Procedure

A. Registration of the Request for Arbitration

1. On March 22, 2002, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received a request for arbitration against the Republic of Turkey ("Turkey" or the "Respondent") from PSEG Global Inc. (PSEG), a company incorporated under the laws of New Jersey in the United States of America (USA); the North American Coal Corporation ("North American Coal"), a company incorporated under the laws of the state of Delaware in the USA; and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi (the "Project Company"), described in the request for arbitration as a special purpose limited liability company incorporated under the laws of Turkey and wholly owned through several subsidiaries by PSEG (together referred to as the "Claimants").

2. The request invoked the ICSID arbitration provisions in the Treaty between the United States of America and the Government of the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (the "Treaty"), which was signed on December 3, 1985 and entered into force on May 18, 1990.

3. The Centre, on March 25, 2002, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules") acknowledged receipt of the request and on the same day transmitted a copy to the Republic of Turkey and to the Embassy of Turkey in Washington, D.C.

4. On April 12, 2002, the Centre requested further information from the Claimants, with regard to (i) the investment of each requesting party, for purposes of the ICSID Convention and the Treaty; (ii) the dispute of each requesting party, including further information as to the date on which the dispute arose; (iii) each claimed violation of the Treaty in respect of each requesting party; and (iv) the efforts on the part of each requesting party to settle the dispute through consultations and negotiations in good faith. The Claimants responded by a letter of April 18, 2002.

5. The request, as supplemented by the Claimants' letter of April 18, 2002, was registered by the Centre on May 2, 2002, pursuant to Article 36(3) of the ICSID

Convention, and on the same day the Secretary General, in accordance with Institution Rule 7, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

B. <u>Constitution of the Arbitral Tribunal and Commencement of Proceeding</u>

6. Following the registration of the request for arbitration by the Centre and the invitation to the parties to proceed to constitute an Arbitral Tribunal, the Claimants reiterated the proposal in their request for arbitration that the Tribunal be composed of three arbitrators, one appointed by each party and the third, who shall be the President of the Tribunal, to be appointed by agreement of the parties. Pursuant to Rule 2(2) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), the Centre communicated this proposal to the Republic of Turkey by letter of May 9, 2002 and by letter of May 24, 2002, the Republic of Turkey notified the Centre of its acceptance of the proposal.

7. The Claimants, by a letter of June 6, 2002, appointed Mr. L. Yves Fortier, C.C., Q.C., a national of Canada, as arbitrator and by letter of June 25, 2002, the Respondent appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. By agreement, the parties in a joint letter of October 22, 2002 appointed Professor Francisco Orrego Vicuña, a national of Chile, as the presiding arbitrator.

8. All three arbitrators having accepted their appointments, the Centre by a letter of October 25, 2002, informed the parties of the constitution of the Tribunal, consisting of Professor Francisco Orrego Vicuña, Mr. L. Yves Fortier, C.C., Q.C., and Professor Gabrielle Kaufmann-Kohler, and that the proceeding was deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1).

<u>C. Written and Oral Proceedings</u>

9. After consulting with the parties and the Centre, the Tribunal scheduled a first session for January 8, 2003, and the parties, by a joint letter of December 23, 2002, communicated to the Tribunal their agreement on procedural matters identified in the provisional agenda for the first session, which had been sent to them by the Tribunal's Secretary. In that letter, the parties notified the Tribunal that the Respondent intended to raise objections to jurisdiction, which the Tribunal would be required to rule on before proceeding to the merits of the case in accordance with Article 41 of the ICSID

Arbitration Rules. They also notified the Tribunal of their agreed schedule for the submissions and hearing on jurisdiction. Further, the parties in the same letter informed the Tribunal that in the event that the Tribunal were to reach the merits of the dispute, the Respondent intended to submit a counterclaim and the Claimants reserved their rights to raise objections as to the Tribunal's jurisdiction over any such counterclaim, which objection would be heard at the same time as the merits of the claims and counterclaims.

10. The first session of the Tribunal was held as scheduled on January 8, 2003, at the seat of the Centre in Washington, D.C. The parties reiterated their agreement on the points communicated to the Tribunal in their joint letter of December 23, 2002, and the remainder of the procedural issues on the agenda for the session were discussed and agreed. All the conclusions were reflected in the written minutes of the session, signed by the President and Secretary of the Tribunal and provided to the parties, as well as all Members of the Tribunal.

11. In accordance with the agreed schedule, the Respondent on April 3, 2003, filed its Memorial on Jurisdiction, and on June 27, 2003, the Claimant filed its Counter-Memorial on Jurisdiction.

12. On July 11, 2003, the Respondent requested the Tribunal, in accordance with ICSID Arbitration Rule 26, to extend by 45 days the time for the Respondent to file its Reply on Jurisdiction. The Respondent cited as the reasons for this request, the volume of the Claimants' Counter-Memorial on Jurisdiction (121 pages) and the number of exhibits thereto (300); and the fact that "a substantial portion of the materials in [the] Claimants' Counter-Memorial … including 13 of the witness statements and expert opinions, [were] in English only" and needed to be translated into Turkish. The Claimants in a letter of July 15, 2003 objected to the Respondent's request, suggesting instead that if an extension of time was of critical importance, it should be for no more than 30 days to minimize the delay to the originally agreed schedule, and that, in such an event, a similar extension should also be allowed the Claimants for their Rejoinder.

13. Following a further letter of July 15, 2003 from the Respondent, the Tribunal by its Secretary's letter of July 17, 2003, communicated to the parties its decision to extend the deadline for the filing of the Reply on Jurisdiction by 30 days and to allow a similar extension to the Claimants for the submission of the Rejoinder on Jurisdiction. The

Tribunal also decided to reschedule the hearing on jurisdiction, originally set for November 3 to 6, 2003, to take place no earlier than the second half of January 2004 on dates to be agreed by the Tribunal in consultation with the parties and the Secretariat.

14. In compliance with the new schedule, the Respondent's Reply on Jurisdiction was duly filed on September 10, 2003, and the Claimants' Rejoinder on Jurisdiction was duly filed on November 24, 2003.

15. Also, in accordance with a new schedule, agreed after several exchanges of correspondence between the Tribunal and the parties, and in consultation with the Centre, the hearing on jurisdiction was held at the seat of the Centre in Washington, D.C., from February 22 to 25, 2004. The parties were represented by their respective counsel who made presentations to the Tribunal and examined witnesses and experts from their side and the opposing side. Seven witnesses and experts testified on behalf of the Claimants and six testified on behalf of the Respondent. Present at the hearing were:

Members of the Tribunal: Professor Francisco Orrego Vicuña, President, Mr. L. Yves Fortier, CC, QC and Professor Gabrielle Kaufmann-Kohler.

ICSID Secretariat: Mr. Ucheora O. Onwuamaegbu, Secretary of the Tribunal.

Attending on behalf of the Claimant: Carolyn B. Lamm, Abby Cohen Smutny, Lee A. Steven, Lee M. Caplan, Noyan K. Goksu, Petr Polasek, Katherine F. Price, Matthew N. Drossos, Erica M. Preiss, and Darryl S. Lew of White & Case LLP; Mesut Çakmak and Tuğba Bayman of Cakmak Ortak Avukat Bürosu; Matthew J. McGrath and Halil E. Sunar PSEG Global, Inc.; Clark A. Moseley of North America Coal Corporation; Sarah P. Voll and Carlos A. Pabón-Agudelo of National Economic Research Associates; as well as William VanHerwarde, Michael B. Rosenzweig, Metin Gunday, Sait Guran, and Ata Sakmar.

Attending on behalf of the Respondent: Selahattin Çimen, Sevim Argun, and Oğuzhan Ertuğrul, Representatives; Daniel M. Price, Stanimir A. Alexandrov, Stephen M. Schwebel, Samuel Boxerman, P. David Richardson, Marinn F. Carlson, Lesley Foxhall, Jennifer Haworth McCandless, Banu Demiralp, Serdar Paksoy, Duygu Limnili, Elvan Aziz, and John P. Wintrol, Counsel; Selda Bilgiç, Osman Emed, Ahmet Oktay Kavas, Carlos Lapuerta, Ergun Özsunay, Rutherford B. Poats, Robert Sansom, and Mumtaz Soysal.

16. Following the hearing, the Members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in London on May 4, 2004.

17. The Tribunal considers it unnecessary to describe the numerous procedural issues that it was called upon to resolve, or to recount the parties' many submissions, requests

and applications relating to these issues. Suffice it to say that throughout the written phase of this jurisdictional phase of the arbitration, the Tribunal was required to consider and determine a myriad of questions relating to the disclosure of documents and the availability of one witness.

II. Considerations.

A. The facts of the dispute.

The early start-up of the Project, the Feasibility Study and the Implementation Contract.

18. In the past two decades Turkey has undertaken an important expansion of its energy sector with a view to ensuring the overall development of its economy. In 1984, Parliament enacted Law No. 3096 authorizing private companies to build and operate generation facilities and to sell the generated electricity to TEAS, the Turkish state-owned electric entity. Under this Law a "Build-Operate-Transfer" ("BOT") model was established, allowing private investors to undertake the generation project with the requirement of transferring to the Government the ownership of the site and plant at the end of the authorization period. This legal framework was perfected in 1994 with the enactment of Law No. 3996, which in essence provided for the BOT contracts and agreements to operate subject to private law.

19. Foreign investment was expected to be a key feature in this energy expansion program. In April 1994, PSEG requested the Ministry of Energy to undertake the negotiation of a contract with a view to developing a lignite-fired electric power plant in the Turkish Province of Konya. The development of an adjacent lignite mine that would supply the plant's fuel was also envisaged in the proposal. After some initial negotiations and revisions, the Ministry in November 1995 approved the Feasibility Study of the project prepared by PSEG.

20. The Feasibility Study considered a plant with a generating capacity of 425 MW gross and 375 MW net. The average annual price per kilowatt-hour was US$0.0498 cents,[1] the operational period 38 years, the annual availability factor 85.08% and the total investment US$804. 8 millions. The net capacity, the price and the availability factor are

[1] All references to currencies made in this Decision are to dollars of the United States of America.

the key commercial terms and are set out in a "tariff" which establishes the terms and conditions for the provision of and payment for power on a yearly basis.

21. In March 1996, the Turkish Constitutional Court ruled that BOT power projects could not be subject to private law and had to follow the traditional model of concession contracts subject to the approval of the Turkish Council of State (the "Danıştay"). Upon approval of the project by the State Planning Organization, the parties in August 1996 initialed an Implementation Contract[2] based on the same factors as the Feasibility Study. This contract was then submitted to the Danıştay for review and approval in the form of a Concession Contract.[3]

22. A few weeks before the Implementation Contract was initialed, PSEG advised the Ministry that an additional site exploration had to be conducted before preparing the final Mine Plan, a step that could have an influence in the operation plan and coal production costs. Article 5.1 of the Implementation Contract allowed the Claimants to conduct additional studies concerning the mine site and, if necessary, to prepare a Revised Mine Plan; it also allowed for the submission of a revised energy tariff reflecting such cost increases.

23. The Implementation Contract also provided for a Long Term Energy Sales Agreement to be entered into by the Claimants and TEAS and for a Fund Agreement with the Electrical Energy Fund, as well as for the project to benefit from a Treasury guarantee under Article 11 of Law 3996.[4] Discussions on the Energy and Fund agreements made progress but ultimately were not finalized. The Treasury guarantee experienced other problems as will be mentioned below.

The Revised Mine Plan and the corporate structure.

24. The Revised Mine Plan was submitted by the Claimants in December 1997, incorporating conditions for the mine that were different from those originally envisaged. As a result, it was estimated by the Claimants that a capital investment of US$361.6 million would have to be made in addition to the US$804.8 million investment envisaged in the Feasibility Study, thus totaling US$1.166 billion. Furthermore, the Revised Mine Plan called for an additional US$557 million that would be needed for the mine during

[2] Hereinafter the "Implementation Contract".
[3] Hereinafter the "Concession Contract" or the "Contract".

the life of the Project and an additional US$20 million yearly operating and maintenance costs. It was also proposed that these increased costs could be met by increasing the generating capacity of the plant to 500 MW gross and 433.5 MW net with an average availability of 87%, the price per kilowatt hour remaining unchanged. Additional energy would have to be bought by TEAS under this proposal. The overall cost of the project would increase by approximately US$1 billion.

25. The negotiations between the parties that followed in 1998 were of an increasingly complex nature. Part of it was related to the implications of the Revised Mine Plan and part to the proposed corporate structure.

26. At first, a Turkish joint stock company was envisaged as the corporate vehicle, but as a result of amendments of the Turkish law and tax issues PSEG later proposed that it be changed to a Turkish branch Office of the foreign investor. The Ministry favored the first choice although there would be adverse tax implications for the project. In this context, the Ministry apparently requested the Claimant to prepare alternative proposals that would take into account variations in the plant capacity and other factors that could affect the tariff structure, including the question of the corporate structure. Consequently, the Project Company was first established as a Turkish branch Office of a Dutch corporation created to handle the investment and later incorporated as a limited liability company.

27. The North American Coal Company (NACC) began assisting with the mining aspects of the project in 1996 and in 1998 entered into a Memorandum of Understanding with PSEG so as to become an equity investor.

28. In so far as the settlement of disputes was concerned, the Implementation Contract had provided for ICSID arbitration. The relevant clause was, however, deleted from the Concession Contract in the review process before the Danıştay and as a result the Contract did not contain any specific provision on dispute settlement.

29. Three proposals were submitted by the Claimant to take account of the changed costs in February 1998. These proposals ranged from 433 MW gross/375 MW net to 500 MW gross/433.5 MW net; from an average availability factor of 85% to 87%; and all had

[4] Hereinafter the "Treasury guarantee".

in common an increase in price from the original US$0.0498 cents to: US$0.0571 cents/Kwh, US$0.0523 cents/Kwh and US$0.0634 cents/Kwh, respectively.

30. The parties have different views about what was agreed in this respect. The Respondent is of the view that the proposals were rejected because they would increase the cost to the Turkish Government and consumer, but that it was prepared to accommodate the 500/433.5 MW alternative provided the price remained unchanged and that a limited liability company was established. The Respondent also submits that this was agreed at a meeting held on February 13, 1998. The Claimants have a different view, believing that no agreement was reached at this time and that the Ministry would continue to examine the various proposals and to consider the Revised Mine Plan.

31. The discussions continued at another meeting held on February 19, 1998, where it was agreed that a draft amended Contract would be submitted to the Danıştay, including the changes agreed. Exactly what changes and amendments would be submitted remained unclear in the light of the continuing discussions about the Revised Mine Plan and the plant capacity and other associated elements. The Revised Mine Plan was later approved by the Turkish Coal Enterprise in May 1998.

The Concession Contract.

32. The fact is, however, that the Danıştay approved the Implementation Contract in the form of a Concession Contract on March 30, 1998. The economics of the project as envisaged in the Feasibility Study were not changed as no agreed amendment had been submitted. It follows that a plant capacity of 425 MW gross/375 MW net, on a 38-year term, an annual average availability factor of 85.08% and an average price of US$0.0498 cents/Kwh, were approved.

33. One of the amendments introduced by the Danıştay concerned the revised tariff and its approval. Article 5.1 of the Implementation Contract had provided for the possibility of submitting a new tariff to the Ministry covering the increased fuel production costs. This resulted in the amended Article 8, paragraph 3, of the Contract, which provides:

> "If necessary, the Company will prepare a revised mine plan based on such additional research and exploration conducted in the mine site prior to the construction start date. If such revised mine plan increases the

> Company's estimated fuel production cost, the Company shall submit to the Ministry a revised tariff reflecting such cost increase, which the Ministry shall approve or disapprove in no later than sixty days after the submission by the Company. In the event the Ministry withholds its approval for the revised tariff on the basis of reasonable grounds and if the Company abandons the project prior to the construction start date, the Company and the Ministry shall have no claims against the other".

34. Additional meetings were allegedly held in May 1998, although the Respondent has explained that it has no official records of any such meetings and the officials allegedly participating do not recall attending such meetings. In the Claimants' version, at a meeting held on May 18, 1998 the Ministry orally accepted a proposal for a 500 MW gross/465 MW net plant capacity and an 87% availability factor so as to include the increased costs and the added tax burden resulting from the limited liability company corporate structure. Furthermore, a letter from the Claimant followed on the same date confirming the alleged understandings. The Respondent, however, does not believe that any such agreement was reached and that the letter remained unanswered as it was beyond the scope of the agreement allegedly reached in February. In any event, the Respondent argues, the Claimant itself believed that the May terms were only a proposal, as reflected in a letter of June 3, 1999.

35. Other crucial steps in the process of negotiation took place in June 1998, but again the views of the parties on such events are different. Following the approval of the Revised Mine Plan by the Turkish Coal Enterprise, the Ministry approved on June 19, 1998 the commercial terms of the project. The Respondent believes these are the terms agreed to in February 1998, that is, a plant capacity of 500 MW gross/433.5 MW net, the availability factor and the tariff remaining unchanged. The Claimant, for its part, submits that as a result of the May meetings and another meeting held on June 16, 1998, the Ministry through its approval of June 19, 1998 accepted the 500 MW/gross and 465 MW net plant capacity as the means to cover the increased costs, although admittedly no reference was made to the net factor. The Respondent further argues that the 465 MW net capacity was not feasible and that in any event the Ministry alone could not approve new commercial terms. It also does not agree with the Claimants that a meeting was held in this context.

36. After further exchanges of correspondence between the Claimant and the Ministry concerning the Danıştay approval of the Contract and the Claimant's reservations in respect of arbitration and other issues, PSEG executed the Concession Contract as issued by the Danıştay on December 10, 1998. A ground breaking ceremony took place on December 17, 1998. In February 1999 the Claimant issued a performance bond for US$8.848 millions and on March 8, 1999 the Ministry signed the Concession Contract.

37. Whether the Contract included a final agreement on key commercial terms and what those terms were has also been a matter of controversy. The Respondent is of the view that the Contract did not include a final agreement on essential commercial terms as the original cost estimates turned to be inaccurate and no amendments were submitted to the Danıştay. A reference to 425 MW was made in the Ministry's transmittal letter of the executed Contract and later a reference to 500 MW gross/465 MW net was included in a draft Protocol that the parties discussed in connection with the amendments that could be submitted to the Danıştay.

38. Each party argues that this Protocol was drafted by the other. In Respondent's view the reference to 465 MW net is a mistake that originated in the draft being prepared by the Claimant; conversely, the Claimant argues that this was drafted by the Respondent and therefore constitutes further evidence of the revised commercial terms having been agreed to and that in any event the alleged mistake, even if such, was never corrected. New meetings were held and correspondence exchanged in March and April 1999 concerning the terms of the Protocol and again the parties dispute whether the 465 MW figure was accepted or even discussed at this other stage.

The aftermath of the execution of the Contract.

39. Various meetings that followed the execution of the Contract and the discussion of the draft amendment Protocol showed that the parties were entrenched in their views of the facts. The Ministry considered in particular that the final figures had been agreed to in February 1998 and that any increase in the net capacity above 433.5 MW would inevitably result in an unacceptable increase of the envisaged tariff of US$0.0498 cents. In addition, the Ministry's engineers believed that the increased tariff would not only cover the costs but would also result in a higher profit for the Company. The Claimants insisted that only by increasing the net capacity to 465 MW, as agreed in May 1998,

could the tariff be kept at that level and at the same time offset the additional costs imposed by a limited liability company structure.

40. Additional proposals were made by the Claimants in June 1999 but none of them were acceptable to the Ministry if it resulted in a higher cost to the Government and, eventually, to the consumer. The alternative of a 545 MW gross/465 MW net was also considered at this stage. On February 10, 2000, the Claimants made what they considered their final offer: a 500 MW gross/433.5 MW net plant capacity with a higher availability factor for the first twelve years of the project, but this was not acceptable to the Ministry.

41. Several important steps were taken as from mid-1999 in respect of the corporate organization of the project and the governing legal framework. A Permission Certificate authorizing the Project Company to invest and do business in Turkey was issued on July 5, 1999. The Company was incorporated as Konya Ilgin Ltd. on August 19, 1999. Also in August 1999 the Turkish Constitution was amended to enable Parliament to authorize certain public services to be provided under private law contracts and to permit the Republic of Turkey to consent to international arbitration. Following the enactment of Law No. 4493 in December 1999, BOT contracts could be concluded as private law contracts.

42. Also with the enactment of Law No. 4501 on January 22, 2000, parties to existing concession contracts could convert these instruments to private law contracts or could agree to submit disputes to international or domestic arbitration. The Claimants applied to the Ministry within the deadline given to convert the Concession Contract to a private law contract or, alternatively, to amend the Contract agreeing to submission of disputes to international arbitration.

43. This application led to a new round of disagreements between the parties as to the commercial terms of the Contract. According to the Claimants, the Ministry demanded six changes in the Contract before forwarding the application to the Council of Ministers. In the view of the Claimants the Ministry was seeking to obtain financial concessions which it did not have authority to demand under the law.

44. On December 22, 2000, the Claimants indicated that they would demand reimbursement of the expenses made and payment for its losses. It appears that no further negotiations took place thereafter. The performance bond expired on February 23, 2001 and was not extended.

45. An additional amendment of the legal framework took place in March 2001 with the enactment of Law No. 4628 on the Electricity Market. The Claimants believe that Article 8 (1) of this Law, by eliminating the possibility of obtaining a Treasury guarantee, effectively terminated the Concession Contract as this was one of its essential components. The Respondent believes that the law had no impact on the project as the Claimant had ended the negotiations before its adoption.

46. A decision of the Turkish Constitutional Court of February 13, 2002 invalidated the provision of Law No. 4628 eliminating the rights of a company to the Treasury guarantee, because this was a right created by the concession contract and hence had to be protected under the contract, the rule of law and the Turkish Constitution. The Claimants believe that their right to this guarantee has thus been revived, but no governmental action was taken in this respect.

47. As noted, the Claimants introduced a request for arbitration before ICSID on March 22, 2002, thus beginning this proceeding.

The parties' explanation of the dispute.

48. The parties also offer different explanations about the reasons for their disagreements and, ultimately, for submitting their dispute to arbitration. A number of the issues raised are connected more to the merits than to jurisdiction in this case, but it is necessary to keep them in sight in order to better understand the nature and extent of the jurisdictional objections made by the Respondent and the views of the Claimants thereon.

The Claimants' views.

49. The Claimants have argued that the Respondent took action and engaged in deliberate inaction to destroy the Claimants' investment in the Republic of Turkey. After having authorized the investment and concluded a valid and binding Concession Contract, it is argued, the Respondent took steps to deprive the Claimants of the Treasury guarantee, the long-term power purchase agreement and the Fund Agreement that were essential to the success and feasibility of the project. In this context, the Claimants argue

that various contractual undertakings were breached, in particular the revision of the tariff structure so as to accommodate increased costs. It is also claimed that other rights provided to investors by law were denied.

50. Given the fact that the project was organized along the lines of a BOT model, the actions and inactions were particularly detrimental to its feasibility. The Claimants explain that the significant level of investment required involves both equity and loan resources, including international debt financing, which is dependent on a tariff structure that is able to generate sufficient income to repay lenders, meet the operational expenses and offer sufficient returns on equity. Although regulations in force at the time provided that a BOT project's rate of return should be capped at 16%, most of the alternatives discussed with the Ministry ended up in lower figures that led, in the Claimants' view, to an inadequate and unreasonable rate of return.

51. In the Claimants' understanding these difficulties stemmed from the changing priorities of the Turkish Government and particularly from the pressure to reform the country's economy in the light of the negotiations for access to the European Community and World Bank policies. It is alleged that these policies were contrary to the BOT model as it was thought that the profitability of the project would be artificially ensured through government guarantees and other mechanisms, including a subsidized tariff structure resulting in uncompetitive generation costs. The Government was required to impose limits on the new projects included in the public investment program and to limit the issuance of new guarantees.

52. The end result was that the Government abandoned the large-scale BOT projects, with the exception of 29 small projects that did not include the Claimants' project. Treasury guarantees were effectively eliminated under the Electricity Market Law, noted above, and power purchase agreements could not exceed one year. These measures led to the effective termination of the project. Notwithstanding the fact that the Constitutional Court ruled that such restrictive provisions of the Electricity Market Law were unconstitutional, as explained above, no government action ensued to remedy the situation. Moreover, it is argued by the Claimants that both the Energy Sales Agreement and the Fund Agreement had been substantially completed with the technical bodies involved but the Ministry never extended the necessary authorization.

53. The Claimants also explain that all the major components of the project had been completed prior to financial closing. These components included the preparation of an Environmental Impact Assessment, the selection of the engineering, procurement and construction contractor, the conduct of hydrological studies, a mining license and operation permit for the mine, loan applications and appointment of financial agents, zoning changes and preparatory steps for the necessary expropriations.

The Respondent's views.

54. The Respondent rejects all of the above explanations and believes that the dispute arises from the project never having moved off the drawing board or the negotiating table. Since the Claimants had dramatically underestimated the costs of the project in the Feasibility Study, it is argued, there simply was no agreement on the commercial terms. It follows in the Respondent's view that all the activities undertaken were merely preparatory to the investment and did not involve any legal expectation or right.

55. Before any Concession Contract was approved by the Daniştay, the Claimants knew that the original commercial terms were unfeasible as they had changed dramatically in the light of the Revised Mine Plan. The Respondent believes that the Claimants have constantly sought to pass on to the Turkish Government and consumer the higher costs involved by selling more electricity, resulting in a burden to the public of US$2 billion. The Ministry repeatedly advised the Claimants that the original commercial framework was not feasible as neither were many additional proposals that differed substantially from the original. In particular it is asserted that the Ministry never agreed to and the Daniştay never approved a 500 MW gross/465 MW net plant capacity.

56. Even after the Daniştay approved the Concession Contract, both parties clearly understood that new commercial terms would have to be agreed to and submitted for the approval of this body. This was the reason for the many negotiations that took place and the draft amendment Protocol that was discussed after the approval of the Concession Contract.

57. In addition, the Respondent is of the view that the Claimants never completed the steps required to make an investment in Turkey. The initial framework setting was not followed up and as a result the Claimants did not obtain the necessary authorizations from the Treasury to proceed with the investment, did not obtain approval from the

Turkish Coal Enterprises to mine certain needed reserves, never concluded the Energy Sales Agreement or the Plant Performance Report and never obtained a host of other permits nor took other steps required, including loan agreements, insurance, plant permission, construction license and others. The activities undertaken by the Claimants are all pre-investment steps and in a number of cases do not even fall in this category. The ground-breaking ceremony was merely symbolic.

58. As to the question of the Treasury guarantee, the Respondent explains that there was no obligation in this connection as the issuance of such guarantees is a discretionary power of the Treasury and there was no obligation to this effect under the Concession Contract. Neither did the restrictions introduced by the Electricity Market Law have any consequence for the project as the commercial terms had failed much earlier and the project had in fact been abandoned. In any event, it is argued, as the Constitutional Court held these restrictions unconstitutional, the Claimants could have pursued an agreement and applied for the guarantee at any time, but this was not done.

59. The Respondent also explains that the Ministry worked diligently at all times and that its responses to the various proposals were reasonable in the light of the need to protect the public interest. So was the requirement to organize the project company as a Turkish capital company as PSEG had obtained a windfall by changing the structure to a branch office of a foreign company. At all times the Ministry instructed the various public services involved to cooperate in the obtaining of permits, agreements and elements required for the beginning of the project, but the Claimants were remiss in their own action to this effect while they waited for more favorable legislation to be enacted.

60. The Respondent opposes in particular any connection with World Bank policies, as these were discussed much later than the date when disagreements emerged as a result of the increased costs of the Revised Mine Plan. Neither did the Ministry interfere with the Claimants' rights to obtain the benefits of a private law regime under Law No. 4501 as it only asked for the introduction of standard conditions required to improve all projects.

III. Respondent's jurisdictional objections.

61. Based upon its views of the facts and the meaning of the dispute, the Respondent has made the following objections to jurisdiction:

a) There is no jurisdiction in this case because there is no investment or an investment dispute under the ICSID Convention or the Treaty.

b) Even if there was an investment, the Government of Turkey has not consented to jurisdiction.

c) The obligation under the Treaty to resort to any previously agreed dispute settlement procedure has not been met.

d) The North American Coal Corporation (NACC) and the Project Company do not have standing in this case.

62. The parties have raised as a preliminary point an aspect that the Tribunal wishes to dispose of at the very outset.

63. The Claimants have argued that the Tribunal needs only to be satisfied that if the facts alleged by Claimants are ultimately proven true, they would be capable of constituting a violation of the Treaty. The Claimants have invoked in support of this proposition the prima *facie* test applied in *UPS v. Canada*[5] and the assumption relied upon in *Methanex v. United States*[6] that, for purposes of jurisdiction, the Claimants' factual contentions are deemed correct. In the Respondent's view, however, when the jurisdictional challenge involves disputed questions of fact, as in this case, the Tribunal has the duty to consider the facts alleged by both parties and make its own findings of fact for deciding the jurisdictional aspects.

64. The Tribunal is aware that the *prima facie* test has been applied in a number of cases, including ICSID cases such as *Maffezini*[7] and *CMS*[8], and that as a general approach to jurisdictional decisions it is a reasonable one. However, this is a test that is always case-specific. If, as in the present case, the parties have views which are so different about the facts and the meaning of the dispute, it would not be appropriate for

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[5] United Parcel Service of America v. Government of Canada, *available at* http://www.state.gov/s/l/c3749.htm

[6] Methanex Corp. v. United States of America, *available at* http://www.state.gov/s/l/c5818.htm

[7] Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7), Decision on Request for Provisional Measures of October 28, 1999 and Decision on Objections to Jurisdiction of January 25, 2000, 16 *ICSID Rev.—FILJ* 212 (2001); Award of the Tribunal of November 13, 2000; 16 *ICSID Rev.—FILJ* 248 (2001). Rectification of the Award of January 31, 2001; 16 *ICSID Rev.—FILJ* 279 (2001).

[8] CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003).

the Tribunal to rely only on the assumption that the facts as presented by the Claimants are correct.

65. The Tribunal necessarily has to examine the facts in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination, keeping of course separate the need to prove the facts as a matter pertaining to the merits. This is what the Tribunal will do.

A. Jurisdictional Objection concerning the existence of an investment.

Respondent's arguments.

66. The Respondent argues first that the Treaty protection extends only to the investments defined therein and as neither the proposed project nor the Concession Contract are an investment the Tribunal lacks jurisdiction. Article I (1) (c) of the BIT defines "investment" as follows:

> "'Investment' means every kind of investment in the territory of one Party owned or controlled, directly or indirectly, by nationals or companies of the other Party, including assets, equity, debt, claims and service and investment contracts; and includes
>
> (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value and associated with an investment;
>
> (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademark, trade names, industrial designs, trade secrets and know-how, and goodwill;
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law; and

(vi) reinvestment of returns, and of principal and interest payments arising under loan agreements."

67. As noted above, the Respondent believes that the project never moved beyond the drawing board and the lengthy negotiations undertaken did not mature into an investment. As the parties never agreed to the essential commercial terms of the project, such as gross and net plant capacity, availability factor and purchase price, there was simply no "meeting of the minds".[9] Even if there had been an agreement, the Respondent adds for the sake of argument, no amendments or revisions were submitted to the Danıştay for approval, an essential step under Turkish law, nor were a number of other key agreements concluded, notably the Energy Sales Agreement.

68. The Respondent further argues that the situation in this case is analogous to that in *Mihaly v. Sri Lanka*,[10] where a number of preliminary expenditures and steps undertaken by the Claimant were ruled not to be an investment as no binding and effective concession contract was concluded by the parties. It alleges that there is no investment in this case either; there are only some expenditures on a project that never materialized.

69. The Respondent argues next that, while it is not disputed that the Concession Contract was approved by the Danıştay and executed by the parties, this Contract does not constitute an investment because it did not contain the essential agreed commercial terms. In the best of circumstances there was a framework for an agreement to negotiate further. The parties knew this before the Contract was submitted to the Danıştay and this explains why the Contract contains provisions for a revised mine plan and a revised tariff. However, it is explained, the Danıştay provided the Ministry with broad discretion to withhold its approval of the revised tariff and did not fix the commercial terms to be negotiated.

70. In the Respondent's view nothing prevented the Claimants from implementing the Contract in the terms that it contained reflecting the early agreement of the Feasibility Study, but, before submission to the Danıştay, the Claimants advised that the Contract

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[9] Legal Opinion of Professor Dr. Ergun Özsunay. September 10, 2003, at 14.

[10] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2), Award of March 15, 2002, 17 ICSID Rev.—FILJ 142 (2002).

was not feasible in those terms and that it had to be renegotiated. The amendments requested by the Claimants were ultimately not acceptable to the Respondent.

71. The end result is that the Contract, the Respondent asserts, is not a valid and binding agreement to which both parties have expressed their consent to be bound. The original terms were repudiated by the Claimants and there are no new terms agreed to. In addition, under Turkish law a contract is null and void if its subject matter is impossible to carry out, this being the case here from a technological and economic point of view unless entirely new terms were introduced. Neither was the Contract financially feasible without the financial incentives that the Claimants never obtained nor sought. Such situation of uncertainty made it impossible for any tribunal to fill the gaps concerning the essential commercial terms, which are thus clearly unenforceable.

72. Also the Respondent opposes in this context the characterization that the Claimants have made of the Branch Office and Konya Ilgin Ltd, the Project Company, as an investment within the meaning of the Treaty or that any of the claimed assets of this Company qualify as investments. First, because in the Respondent's argument the Branch Office established in January 1998 is not an investment under any definition and, in any event, this would not be an investment out of which the dispute arises. The dispute in this case concerns the proposed project and not the activities of a branch Office which did not even sign the Concession Contract submitted to the Danıştay. The fact that a limited liability Company was incorporated in August 1999, long after the relevant events invoked by the Claimants in support of their argument, does not in Respondent's view alter the situation as this is still not an investment.

73. Relying on the criteria set out in *Mihaly*[11] and *Zhinvali* (R1907),[12] the Respondent argues in particular that the Feasibility Study, the Revised Mine Plan, the Transfer of Mining Rights Agreement and other permits and licenses claimed to be part of the assets of the Project Company are mere development activities undertaken in preparation of an investment that never came about.

[11] Mihaly cit.

[12] Zhinvali Development Ltd. v. Republic of Georgia (ICSID Case No. ARB/00/1), Award of January 24, 2003, unpublished but introduced in the arbitration record.

The Claimants' argument.

74. In making their argument the Claimants rely on the accepted fact that the ICSID Convention deliberately omitted the definition of investment and left this definition to the parties.[13] Broad definitions were embodied in numerous treaties and agreements and a broad interpretation has also been upheld by ICSID tribunals, particularly *Fedax*[14] and *CSOB*.[15] The Treaty concerned in this case is no exception as the Parties thereto have agreed to a broad definition of investment. The Claimants assert that the Concession Contract clearly constitutes an investment which is listed in Article I (1)(c) to include service and investment contracts, claim to performance and intangible property.

75. The UNIDROIT Principles of International Commercial Contracts are invoked by the Claimants in support of their view that it is not always necessary to reach an agreement on all the essential terms of a contract as long as the parties have the intention of forming a contract[16] and the obligation to proceed to negotiate the pending terms in good faith. It is further invoked that civil law systems also allow the parties to leave open many terms of the contract to be determined later in good faith and that, particularly in long-term concession contracts, it is often the case that adjustment clauses will allow for change to basic terms in order to remain within the economic parameters of the contract. It is also stated that the validity of adjustment clauses and their enforceability have been upheld by arbitral tribunals.[17]

76. The Claimants also argue that the Contract is unequivocally a valid and binding legal agreement between the parties, as reflected in a precise legal language and the use of all the solemnities of a contract, all of it far from a mere statement of intention. In the Claimants' view there is no possible analogy with *Mihaly*, where no contract was signed and all preliminary documents of intention expressly contained disclaimers that no binding rights were being created. Moreover, the Concession Contract in the present case

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[13] Expert Opinion of Prof. Dr. Dr. Rudolf Dolzer, June 27, 2003, at 2-5.

[14] Fedax N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction of July 11, 1997, 37 ILM 1378 (1998); Award of March 9, 1998, 37 ILM 1391 (1998).

[15] Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction (May 24, 1999), *available at* http://www.worldbank.org/icsid/cases/csob_decision.pdf; Decision of the Tribunal on the Further and Partial Objection to Jurisdiction of December 1, 2000, 15 ICSID Rev.—FILJ 530 (2000).

[16] UNIDROIT Principles of International Commercial Contracts, 1994, Article 2.14.

[17] *Aminoil* Award, 21 ILM 976, (1982).

expresses its binding legal character and was executed by the parties, authorizing the completion of further contracts but not depending itself on these other contracts.

77. Expert opinions introduced by the Claimants also examine in detail the validity of contracts under Turkish law,[18] concluding in this respect that once a concession contract is approved by the Danıştay and executed by the parties it constitutes a legally binding and valid instrument. It is also concluded that in this particular case the Contract includes more comprehensive terms than most contracts approved by the Danıştay, even the essential commercial terms the Respondent argues to be missing. Adjustment clauses, such as Article 8 of the Contract, constitute an integral part of the agreement and are also binding under Turkish law. In any event, as explained in connection with the facts, the Claimants believe that an agreement on the new essential commercial terms was reached with the Ministry.

78. In the Claimants' argument the Project Company is in itself an investment that was duly incorporated under Turkish law and granted the necessary Permission Certificate to operate and do business in that country. In particular, it is further affirmed, all of its assets are investment in the meaning of the Treaty, including the Feasibility Study and the Revised Mine Plan as well as intangible property and industrial property rights, the Transfer of Mining Rights Agreement as both intangible property and licenses and permits, and the Environmental Impact Assessment Report and other permits and licenses. Even if it were correct to observe that the project does not constitute an investment, all the agreements, legal rights, licenses, authorizations, assets and property of the investor do qualify as investments under the Treaty.

The Tribunal's findings in respect of the existence of the investment.

79. The Tribunal must first note that the facts alleged by the parties are not always consistent with the very views in support of which they are invoked. A number of contradictions can be noted in this respect. This is not surprising in a highly complex operation and negotiation that on many occasions were handled by technical staff not familiar with the legal language.

[18] Rejoinder Opinion of Prof. Dr. Metin Günday, November 24, 2003, par. 13; Legal Opinion of Prof. Dr. Sait Güran, November 24, 2003, par. 6.

80. The essential point that the Tribunal must establish, however, is a legal one. Does the Concession Contract exist? The answer to this question is not difficult as the parties do not dispute the fact that the Concession Contract does exist, was duly signed, submitted to the Danıştay and approved by this body and later executed with all the legal formalities and requirements. It is not disputed either that both parties unequivocally believed that the Contract had become effective on the date of the signing by the Ministry. The Contract is couched in proper legal language.

81. Numerous documents in the record evidence this understanding of the parties. Letters from the Ministry of March 11, 1999, April 9, 1999 and July 20, 1999, for example, refer to the Contract having become effective. This in itself is a substantive difference with the facts in *Mihaly* where, as explained above, the parties never signed a concession contract and expressly disclaimed any legal obligations arising from the preparatory work undertaken. The same is true of *Zhinvaly* where the parties expressly acknowledged that the Claimant did not have an investment.

82. The question that the Tribunal must answer next is a more difficult one. Is the Contract valid? Herein lies the fundamental dispute between the parties. The answer is related to the question of whether the Contract omitted essential terms and conditions that make it a nullity or a different kind of instrument.

83. The Tribunal must first note in this respect that the Contract did not ignore the essential commercial terms of the transaction as the terms originally agreed to in the Feasibility Study were incorporated in the Contract. Technical formulas to define the tariff structure and the price were thus included in Annex 2 of the Contract. To this extent there is not a blank or a vacuum in the Contract. Theoretically, on the basis of the Contract as signed and executed, the Claimants could still undertake the project on the commercial terms therein specified, which the Respondent has admitted was a possibility. The Claimants could also seek either to amend those terms, under both Articles 8 and 32 of the Contract or to ultimately abandon the project.

84. The parties to the Contract knew before its submission to the Danıştay in draft form that costs would increase as a result of the Revised Mine Plan.[19] This Revision

[19] Witness Statement of Halil L. Sunar, June 27, 2003, par. 59.

entailed significant changes to the earlier economic estimates and to the work envisaged in the mine site. Letters pointing to the need for accommodation and tariff restructuring were abundant. This is precisely why the Implementation Contract included a rebalancing mechanism in Article 5.1, which later led to Article 8 of the Concession Contract. This is also why the Claimants repeatedly made reservations of their rights under the Implementation Contract and stated that amendments included in the draft submitted to the Daniştay did not constitute a waiver of such rights.

85. The fact that economically the project might be difficult to execute or even become unfeasible does not render the Contract invalid. Neither does the fact that the project could become impossible to perform. As Professor Güran stated in his Legal Opinion, "…economic hardship does not constitute a valid excuse to escape a party's contractual obligations, whether under the doctrine of impossibility of performance or any other principle of Turkish law".[20] Professor Günday offered a similar opinion. He said that "…economic hardship is not recognized as impossibility as that concept is understood by Turkish law".[21]

86. Moreover, the repudiation that the Claimants have allegedly made of the original terms stems from its economic and financial feasibility. It does not alter the legal validity of the Contract, particularly since both parties foresaw that there would be a need for an economic adjustment as a result of the Revised Mine Plan and other issues intervening in the negotiation. The need for an economic adjustment informs Article 8 of the Contract. Article 8 of the Contract allows the Claimants to seek an economic rebalancing of the Contract terms in case of significant change in that balance.

87. An additional consideration arises because the Contract contains a mechanism for renegotiating the commercial terms and the tariff as a result of the Revised Mine Plan. Again, this does not affect the validity of the Contract; it only means that the terms therein defined can be reopened in the light of certain events.

88. This is not an unusual feature in contracts dealing with highly complex concessions of services of long duration or other types of long-term transactions. Faced with the possibility of renegotiation of certain contract terms, the parties' intent is

[20] Legal Opinion of Prof. Dr. Sait Güran, November 24, 2003, par. 23.
[21] Rejoinder Opinion of Prof. Dr. Metin Günday, November 24, 2003, par. 26.

dispositive of the question whether the Contract nevertheless came into existence. In the present case, both the language of the Contract as well as the circumstances, as they are reviewed below, demonstrate an intent by the Parties to be bound in spite of the fact that certain terms still needed to be agreed upon at a later date.

89. The Tribunal also notes that several experts on Turkish administrative law have opined that the Concession Contract is binding on the Turkish State and meets all the conditions to become effective under Turkish administrative law.

90. The conclusions reached by the Tribunal on the existence and the validity of the Contract would suffice to affirm jurisdiction on this point. The issue whether the parties undertook the required negotiations on the amendment and rebalancing of the commercial terms of the Contract in good faith and its eventual legal consequences pertains to the merits.

91. The Tribunal cannot ignore, however, the related question whether the commercial terms were actually agreed as this question is also of the essence of the dispute between the parties. The documentary evidence offered by the parties in support of their respective arguments is not generally conclusive on this matter. Whether the terms were agreed to in February 1998, as the Respondent believes, or in May and June 1998, as the Claimants believe, and what those terms were, is not sufficiently documented. In fact, there are indications pointing both ways and again many contradictions. The same is true of the statements of fact witnesses.

92. The Respondent argues in particular that the Claimants in a letter of June 3, 1999,[22] characterized as a proposal what they now argue was an agreement referred to in an earlier letter of May 18, 1998,[23] thus acknowledging that an agreement was never reached. While grammatically that may be so, the Tribunal cannot draw from this fact a legal conclusion since it is perfectly possible that the Claimants were referring to the proposal on the basis of which the alleged agreement of May 18, 1998 was reached. The ongoing submission of cash flow tables and tariff alternatives up to the year 2000 suggests, however, that no firm agreement was in place but that it was being explored and negotiated.

[22] Sunar to Ministry, June 3, 1999.
[23] Sunar to Ministry, May 18, 1998.

93. The Respondent has also invoked minutes of the Claimants concerning, for example, meetings held on May 14, July 19, September 21 and October 13, 1999, suggesting that a number of issues were not considered sufficiently clarified, agreed to or settled. The Respondent also argued that the Claimants stated clearly that the project could not move forward without an agreement on the tariff, as reflected in minutes of meetings held on December 16, 1999, January 27, March 3 and April 10, 2000.

94. The Claimants have also bolstered their arguments with documentary evidence. The letters sent by the Claimants to the Ministry on May 18 and June 23, 1998 make specific reference to agreements on amendments discussed at meetings, as does the draft Protocol that was prepared but not actually sent to the Danıştay. Furthermore, various notes of meetings appear to corroborate the Claimants' view that an agreement was in fact reached. On this question, Claimants refer to notes of meetings held on May 15 and 18 and June 16, 1998, filed late in the proceedings. The Claimants also refer to documents allegedly evidencing that the Respondent's view that a different agreement was reached is not tenable. Some documents do indeed point to the specific figures of 500 MW gross/465 MGW net or to the 500 MW alone.[24]

95. Considering the conclusion on jurisdiction which the Tribunal reached on the basis of the intent of the Parties, there is no need at this stage for the Tribunal to elaborate on the fact that some of these documents were indeed filed very late in the proceedings. This may be a matter to be considered during the second phase of the arbitration.

96. There are, however, other documents which the Tribunal believes are particularly important in establishing the intent of the parties to conclude and be bound by the Contract. The most fundamental of these is evidently the Contract itself. There are many provisions in the Contract which evidence the intent of the parties to be bound. The main one is Article 8 which specifically allows for a rebalancing of the Contract where a Revised Mine Plan introduces substantial changes in the economics of the Contract, such as in the present case. The wording of Article 8 is very clear. The pertinent terms of this Article, reproduced above, are clearly indicative of the central role played by the economic rebalancing which is envisaged.

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[24] Ministry to TEAS, 30 June 1998; Letter by Technical staff to Ministry, 19 June, 1998.

97. While much has been discussed about whether the 60-day period the Ministry had to approve or disapprove the Article 8 amendments on reasonable grounds entails a mandatory action, or the opposite conclusion that if no action is taken it simply means the rejection of the amendments under Turkish law, this does not alter the fact that the Claimants could avail themselves of this mechanism and indeed did so in order to seek to rebalance the Contract. The long negotiations between the parties with respect to a new tariff so indicates and the very terms of the draft Protocol discussed by the parties also show that commercial elements were being debated pursuant to the mechanism set out in Article 8 of the Contract.

98. In turn, this mechanism is related to Article 15 of the Contract which refers to a number of agreements or protocols to be concluded by the Company. The fact that this was seen as an obligation is clearly expressed by the use of the term "shall". This very obligation also assumes that the Respondent's institutions will concur in these agreements which will supplement the Contract.

99. Article 35 of the Contract is also significant in this context. This Article provides that the Contract shall be effective on the date of execution upon review by the Daniştay, all of which happened in fact. It provides next for the Company to complete other related steps concerning, in particular, financing, executing the Contracts envisaged in Article 15, obtaining required authorizations and permits and obtaining the final approval of projects by the Ministry. Paragraph 2 of Article 35 begins with the expression "However". This word does not condition the effectiveness of the Contract under paragraph 1 because termination only arises in case of "default" of the Company. Otherwise the Contract remains in force and is effective.

100. The Daniştay Decision of 11 March 1998 approving the Contract refers to the fulfillment of a number of additional transactions by the Company as "an obligation arising from the contract", thus indicating that the obligations would be in effect as soon as the Contract was approved and executed. Clearly, these obligations were to be fulfilled once the Contract had become effective.

101. Although, as noted, the witness statements are contradictory, it is well established that there were meetings held by the Company officials with the Ministry's representatives in charge of negotiations, in particular Mr. Basli. The correspondence that

followed these meetings indicates clearly that discussions were progressing on the commercial terms, including the plant capacity. Although witnesses for the Respondent have stated that they were not aware of any such meetings, that no official records were prepared and that, at the most, these should be considered simply as visits, the fact is that a certain number of meetings were held.

102. The Tribunal need not find during this phase of the arbitration whether or not the parties reached agreement on any amendment to some of the commercial terms of the Contract. However, in weighing the totality of the evidence submitted by the parties, the Tribunal does find that amendments to the Contract terms were pursued. This finding further confirms the existence, validity and binding nature of the Contract.

103. In reaching its conclusion on this matter the Tribunal is also persuaded by the argument that if the parties did not intend to bind themselves by means of a Contract, why would they then have signed, submitted for approval and executed a Contract? Letters of intention or other instruments would have sufficed to provide a general framework to continue negotiations until an agreement was reached or not without any legal consequence for either party, as the events in *Mihaly* show. The view of the Respondent that the Contract was signed as a mere courtesy or sign of good will is not tenable, nor is the view that this is nothing but a framework devoid of legal significance.

104. A contract is a contract. The Concession Contract exists, is valid and is legally binding. This conclusion is sufficient to establish that the Tribunal has jurisdiction on the basis of an investment having been made in the form of a Concession Contract. A different question, again pertaining to the merits, is whether all or some of the activities undertaken qualify as a part of the investment or are to be regarded as merely preparatory. The same holds true of whether the assets of the Project Company constitute an investment.

105. The objection to the Tribunal's jurisdiction on this count is therefore dismissed.

B. <u>Jurisdictional objection concerning the question that the dispute does not arise directly out of an investment.</u>

The Respondent's argument.

106. Intertwined with the arguments on the jurisdictional objection concerning the existence of an investment, the Respondent has also raised the question that if there is no

investment, there cannot be an investment dispute under the Treaty and the ICSID Convention. But even if there is an investment, the argument follows, the dispute does not arise directly from such investment in terms of Article 25 (1) of the Convention.

Article VI (1) of the Treaty defines an investment dispute as

> "a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."

107. The Respondent believes that none of these three situations arise in the present case. There is no investment agreement or authorization in this case, avers the Respondent, and there are no Treaty rights associated with an investment. If the activities undertaken do not qualify as investments under the Treaty the dispute cannot be said to arise directly out of an investment as required under Article 25 (1) of the Convention, particularly since the Convention left the definition of investment to the parties.

108. The *CSOB* decision invoked by the Claimants in connection with the definition of an investment is, according to the Respondent, to be distinguished from this case. The dispute and the investment in the *CSOB* case were held to be sufficiently connected since the specific transaction involved was an integral part of an overall operation qualifying as an investment, but in this case the proposed project does not qualify as an investment nor does the Contract.

109. The Respondent submits further that there can be no investment authorization because at the time the project was under discussion there were three foreign investment permissions required under Turkish law, the Claimants having obtained only one. These permissions were the "permission certificate" (or pink certificate) that the Claimants did obtain both for the branch office and later for the limited liability company; the "investment permission certificate" (or green certificate) and the "investment permission and incentive certificate" (or blue certificate - usually encompassing also the green

certificate), which the Claimants failed to apply for. It follows, in the Respondent's view, that there is no proper investment authorization under Turkish law and Article VI (1) of the Treaty.

The Claimants' argument.

110. The Claimants are of the view that the dispute in this case involves in essence the interpretation or application of the Concession Contract and also the interpretation or application of the investment authorization granted, just as Treaty rights associated to the investment are also involved. As the dispute falls within the terms of Article VI of the Treaty, the jurisdictional requirement of Article 25 (1) of the Convention has been met as the dispute arises directly from the investment.

111. In this connection, the Claimants rely in particular on the decision in *CSOB* and its precedents to the extent that an investment is frequently a complex operation the elements of which ought not to be examined in isolation but cumulatively,[25] and the *Holiday Inns* approach emphasizing "the general unity of an investment operation".[26] *Lanco* is also invoked to the extent that a concession contract was characterized as such as an investment,[27] as also is *SGS v. Pakistan* in recognizing intangible property as an investment.[28]

112. The Claimants also argue that since the Concession Contract is a valid and binding instrument it is properly characterized as an investment agreement and can also be characterized as an investment authorization from the State to pursue the project defined. The Claimants also assert that even the authorization granted to conduct the Feasibility Study was a foreign investment authorization by the Turkish Government. The Claimants further submit that the discussion about obtaining a green and a blue certificate is not relevant. The blue certificate refers to non-mandatory economic incentives for which the investor may or may not apply, and the green certificate is not a part of the requirements for foreign investment authorization in Turkey.

[25] *CSOB* cit., par. 72.
[26] Holiday Inns S.A. and others v. Morocco (ICSID Case No. ARB/72/1), **Yes,** Lalive's article, p. 84.
[27] Lanco International, Inc. v. Argentine Republic (ICSID Case No. ARB/97/6), Decision of the Tribunal of December 8, 1998 (English text), 40 ILM 457 (2001).
[28] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of August 6, 2003; 18 ICSID Rev.—FILJ 301 (2003).

113. The Claimants conclude that the dispute arises directly from the investment made and that both the Treaty and the Convention requirements are met.

The Tribunal's findings on the dispute arising directly out of the investment.

114. The Tribunal has held above that the Concession Contract is valid and binding. By its very nature and specific terms the Contract embodies an investment agreement under which the investor is authorized to undertake the power generation activities therein specified. The Contract refers repeatedly to the investment, its amount, financing, period of implementation and a host of other investment connected questions. Article 4 of the Contract provides in particular for a detailed investment schedule.

115. The foreign investor is a party to the Contract in its own right. The investor was specifically encouraged to undertake the project and assurances were apparently given at the time of signing of the Contract that any pending problems would be accommodated. The investment operation as a whole was related to the activities to follow the delivery of the site as is evident from both Articles 4 and 35 of the Contract, which refer to such step among many others to be undertaken by the Company.

116. The Tribunal also concludes that, in addition, the proper authorization has been granted by the foreign investment authority to the company, first in the form of a branch office and later as a limited liability company. The Turkish law governing foreign investments does not require a string of authorizations[29] nor does the Foreign Capital Framework Decree of 1995.[30] More specifically, the Communiqué explaining this last decree only requires one authorization issued in the form of a permit by the Foreign Investment General Directorate, Undersecretary of the Treasury.[31]

117. The terms of the authorizations given in this case are also self-contained, in that a permit is granted for the Company to "conduct its activities by having equal rights and responsibilities with local institutions acting in the same field…".[32] The field of activity permitted is broad as it allows the Company to "…plan, construct and operate energy power plants, to exploit mining reservoirs, to trade electric energy and conduct all types

[29] Law Concerning the Encouragement of Foreign Capital, No. 6224 Jan 18, 1954.
[30] Decree No. 95/6990, June 7, 1995.
[31] Communiqué No. 95/2, August 24, 1995.
[32] Permission Certificate No. 6014, 5 July 1999, replacing certificate No. 4492 of 5 May 1997.

of electricity, mining and other activities in accordance with the current related legislation".

118. It is quite common that countries, host to an investment, will require a number of other authorizations to permit the investment to operate a number of specific activities, but in so far as the authorization to invest is concerned only one decision by the pertinent government service suffices. This authorization has been duly given by the Foreign Investment General Directorate, as noted.

119. The so called green and blue certificates may be necessary to undertake given activities or acquire certain rights, but these elements are not an essential part of the investment authorization. The Tribunal notes that the information required by both the green and blue certificates is in essence the same, this probably being the reason why in practice both are combined. Moreover, as the Claimants have argued, the blue certificate relates to a non-mandatory incentive the investor may or may not apply for. The very Communiqué noted above requires the activity to be undertaken to be listed in "permits and/or incentive certificates granted by the General Directorate of Foreign Investment…"; the incentive is evidently not compulsory.

120. There is yet another aspect that convinces the Tribunal that an authorization was duly given by the Respondent. The Concession Contract could not have been approved by the Daniştay if the foreign investment had not been authorized. Neither could it have been submitted to this body by the Ministry or even signed. Moreover, the very Contract provides in connection with the transfer of authorization in Article 27 that shareholders shall be free to transfer, assign, pledge or sell the Company shares in whole or in part subject to the Ministry's approval and in cases required by the legislation, "the permit to be issued by the Undersecretariat of Treasury, Foreign Investment General Directorate". If other authorizations would have been required in connection with the original investment, there is every reason to conclude that they would have been required for subsequent activities.

121. The dispute that has been described above, in the view of both parties, involves questions of interpretation or application of both the investment agreement and the investment authorization. This is also the case in respect of the Respondent's argument that there is no investment, agreement or authorization as these very claims involve the

interpretation of the Contract and the authorization. The dispute therefore arises unequivocally directly out of the investment subject, of course, to the same proviso made above that the issue of what constitutes precisely an investment as opposed to mere preparatory activities pertains to the merits.

122. There is yet another element in Article VI (1) concerning a dispute involving an alleged breach of any right conferred or created by the Treaty with respect to an investment. The Claimants have argued in the Request for Arbitration that, in addition to having failed to fulfill its obligations under the Contract and the authorizations given, the Respondent has also violated the Treaty. In particular, Claimants submit that there haven been breaches of Article II of the Treaty, concerning treatment of the investment, and Article III, concerning expropriation.

123. Although it is not possible at this jurisdictional stage to decide whether breaches have been committed, the history and terms of the dispute described are indicative that the investment is in principle subject to protection under the Treaty and that the Claimants are entitled to have their complaint examined.

124. The Tribunal accordingly finds that it has jurisdiction under this heading as the dispute concerned arises directly out of an investment in terms of the interpretation and application of the Contract and the investment authorization, as well as in terms of Treaty rights connected to this investment that could have been compromised.

C. Jurisdictional Objection Concerning Respondent's Notification under Article 25 (4) of the Convention.

Respondent's arguments.

125. Article 25 (4) of the Convention allows any Contracting State to "…notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre…". On the basis of this provision, the Republic of Turkey notified the Secretary-General of ICSID on February 23, 1989 that "only the disputes arising directly out of investment activities which have obtained necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and that have effectively started shall be subject to the jurisdiction of the Centre".

126. The Respondent argues in this connection that the notification made qualifies the consent to arbitration contained in the Treaty, admittedly not as a reservation to the Convention but with the effect of informing the limits and scope of its subsequent consent to arbitration under the Treaty. As in the Respondent's view the project never "effectively started", the consent to arbitration is absent. Effective start is generally identified by the Respondent with the beginning of construction of either the mine or the power plant. As discussed above, the Respondent has also argued that the Claimants lacked the necessary investment permits.

127. In support of its objection, the Respondent first notes that unilateral declarations of States can have legal effects in spite of not technically being reservations. Internal documents of the Turkish Government describe the notification as a "condition" to becoming signatory to the Convention.

128. *CSOB* and *Fedax* are relied upon in support of the Respondent's understanding of the effects of a notification under Article 25 (4) of the Convention. The first case refers to the declarations made under this Article as limiting the scope of the Centre's jurisdiction, while the second, in the Respondent's view, puts investors on notice as to the disputes envisaged and that in the context of that case it was recognized that such notification would have qualified the State's consent under the pertinent treaty. The Respondent further alleges that *Aguas del Aconquija* accepted a similar exclusion effect of notifications.

129. The Respondent also argues in this context that the terms of the notification are more specific than those of the Treaty and, therefore, in the event of a conflict the more specific terms would prevail.

130. As to the timing of the various instruments concerned, the Respondent argues that although the Treaty was signed on December 3, 1985 and the notification made on March 3, 1989 upon ratification of the Convention, the entry into force of the Treaty only took place on May 18, 1990. It follows in the Respondent's arguments that the notification preceded the consent and that the terms of the notification are presumed to be incorporated into the meeting of the minds when the consent is later given. As the United States was fully aware of the notification made by Turkey and did not object to it before

making the Treaty effective, the Respondent believes that the United States accepted those qualifications to Turkey's consent as notified.

The Claimants' approach.

131. The Claimants have argued in respect of this objection that notifications under Article 25 (4) of the Convention do not have a binding legal effect. That very Article explicitly provides that "Such notification shall not constitute the consent required by paragraph (1)". In the light of the drafting history of the Article, the World Bank Executive Director's Report on the Convention and scholarly writings,[33] the Claimants conclude that this notification only serves information purposes in terms of letting prospective investors or their respective governments know that the terms of the notification will be relied upon or called up at the time of expressing the consent to arbitration. As the Convention does not deal with the question of consent neither can it deal with a qualification or condition to consent, a matter to be taken up in agreements or treaties. Both parties agree that the notification is not a reservation to the Convention.

132. The Claimants are also of the view that the consent expressed in the Treaty is far more specific than the general qualifications contained in the notification and that, as the Treaty entered into force after the notification, both the United States and Turkey could have qualified their consent as expressed in the Treaty, just as they did in a Protocol to the Treaty in respect of other matters, but kept silent in connection with the terms of the notification.

133. In any event, the Claimants are of the view that the investment activities had all effectively started and that there is no reasonable basis to equate this requirement with the start of construction. A long list of activities that had effectively started is referred to by the Claimants, who further submit that if activities did not go beyond a certain stage it was because the Respondent prevented the project from proceeding further.

134. The Claimants also submit a different interpretation of ICSID cases in this respect, particularly of *Fedax* which clearly stated that Article 25 (4) allows Contracting States "to put investors on notice" as to the disputes they would or would not consider consenting to.

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[33] Christoph H. Schreuer: The ICSID Convention. A Commentary, 2001, at 342.

The Tribunal's findings in respect of consent qualified by notification under the Convention.

135. The Tribunal has examined the important question raised by the Respondent in respect of the legal extent of notifications under Article 25 (4) of the Convention, with particular attention to the most thorough and learned discussion of the subject by Judge Schwebel in his presentation on the matter at the hearing held in this case.[34]

136. It must first be noted that Article 25 (4) in itself does not assign any particular legal effect to notifications as it refers to the disputes that the Contracting State "would or would not consider submitting to the jurisdiction of the Centre". This is quite natural as the whole issue of consent was left to instruments other than the Convention, for example investment agreements and bilateral investment treaties. This is also the reason why that very Article clearly separates notification from consent by providing that "Such notification shall not constitute the consent required by paragraph (1)".

137. The Claimants have invoked the *travaux préparatoires* of this provision, noting in particular that Mr. Broches, the architect of the Convention, conceived the notification system as one allowing Contracting Parties to "make declarations under the Convention in which they could define in advance, if they so desired, the scope within which they would be willing to consider, always subject to the specific consent on their part in any specific case, making use of the Center".[35] The Report on the Convention by the Bank's Executive Directors also clarified that notifications would "serve for purposes of information only" and not constitute reservations to the Convention.[36] Scholarly opinions have also supported this interpretation.[37]

138. Most pertinently, following a question from the Tribunal, Judge Schwebel emphasized that notifications must necessarily have a purpose as otherwise they would be a meaningless exercise. There is no doubt that this is true. In fact, at the time the Convention was negotiated it was envisaged that the Contracting States would normally express their consent in investment agreements concluded with the private investors, which were later supplemented by the massive network of bilateral investment treaties in

[34] Hearing, February 22, 2004, at 37-57.
[35] ICSID, History of the Convention, Vol. II, at 567.
[36] Report of the Executive Directors on the Convention, 1 ICSID Reports 29.
[37] Legal Opinion of Professor W. Michael Reisman, June 27, 2003, at 25; Expert Opinion of Prof. Dr. Dr. Rudolf Dolzer, June 27, 2003, par. 39; Schreuer, at 342.

force today. Notifications were a useful means to inform beforehand the kind of disputes to which consent for arbitration might or might not be expected by the prospective investor or its State of nationality. To this extent the notification has a specific purpose.

139. In this connection the Tribunal does not share the Respondent's interpretation of the *CSOB* and *Fedax* cases. Although the language in *CSOB* appears to support the interpretation that notifications can limit the scope of the Centre's jurisdiction, that Tribunal concluded that by not making such a declaration the Contracting Party has "submitted itself broadly to the full scope of the subject matter jurisdiction governed by the Convention".[38] Yet it remains that the "subject matter" jurisdiction is determined by the consent of the Contracting State expressed in a separate instrument and by the definition of investment included in that expression of consent. True, it is governed by the Convention but it is not defined by it. It follows that notifications under Article 25 (4) do not have a life of their own and are wholly dependent on the consent mechanism.

140. Similarly, *Fedax* was also explicit in referring to notifications as putting "investors on notice", but it does not follow that the Tribunal accepted a qualification of consent by means of a notification under Article 25 (4). Evidently, in case of doubt, the notification will help the interpretation of the parties' consent but it does not have an autonomous legal operation.

141. The discussion above still does not answer the key question concerning the legal nature or effect of notifications. Both parties have agreed that notifications are not reservations. This is also the view of the Tribunal. An autonomous legal effect of notifications has been ruled out for the reasons explained above.

142. The view that unilateral acts of States have legal effects under international law is accurate as evidenced by the decisions of the Permanent Court of International Justice in the *Eastern Greenland* case[39] and of the International Court of Justice in the *Nuclear Tests* case.[40] There is no doubt that notifications qualify as unilateral acts under international law[41], although in the present case it is not an autonomous act as it depends on the Convention. However, in the cases mentioned above the essence of the legal

[38] *CSOB* cit., par. 65.
[39] Permanent Court of International Justice, *Eastern Greenland* case, 1933, PCIJ, Ser. A/B, No. 53, at 52.
[40] International Court of Justice, *Nuclear Tests* case, ICJ Reports 1974, at 253.

effects admitted has been that the unilateral acts in question create obligations for the State concerned on which other States can rely.

143. In the instant case, the notification does not create an obligation for the Contracting State, but rather it is associated with the claim to a right. In fact, States making notifications will always wish to remain free to either follow or not follow the terms of the notification when expressing their consent. No State would believe that by making a notification it has become bound by its terms as in that case there would be no difference between notification and consent, thus contradicting specific provisions of the Convention. In this context, the Contracting State is in fact claiming a right to later exclude certain disputes from consent, if it so wishes, and it is always free not to adhere to the terms of its notification.

144. It has become increasingly common for treaties to exclude reservations and allow for declarations instead. These declarations do not alter the legal rights and obligations under the treaty nor do they amend any of its provisions. They are simply an instrument that allows States to express questions of policy to which they are not bound and that do not create rights for the other parties. It is a matter of information, normally resorted to for domestic needs. This is also the legal nature of the declarations made by States in the form of notifications under Article 25 (4) of the Convention. Interestingly Mr. Broches, quoted above, referred to these notifications as "declarations".

145. It follows that to be effective the contents of a notification will always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. If, as in this case, consent was given in the Treaty before the notification, that treaty could have been supplemented by means of a Protocol to include the limitations of the notification into the State's consent. Otherwise the consent given in the Treaty stands unqualified by the notification.

146. Although the practice of the Contracting Parties in this connection under Article 25 (4) of the ICSID Convention is not easy to establish in view of the fact that few notifications have been made, it must be noted, for example, that the terms of the notification made by the People's Republic of China are reproduced in various bilateral

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[41] Patrick Daillier et Alain Pellet: Droit International Public, 2002, 359-366.

investment treaties entered into with other countries.[42] It follows that the legal effects of those terms arise from the treaties and not from the notification as such.

147. The Tribunal accordingly holds that the objection to jurisdiction on this count is also dismissed.

D. <u>Objection to Jurisdiction on the basis of the Claimants not having resorted to previously agreed dispute settlement procedures.</u>

The Respondent's argument.

148. The Respondent has invoked in the alternative the lack of jurisdiction of this Tribunal in view of the fact that under the Treaty the parties are required to exhaust any previously agreed upon dispute settlement procedures before they may resort to international arbitration. The Respondent refers to the question as one requiring the parties to resort to those procedures but not necessarily to exhaust them.

149. In this connection, the Respondent relies on Article VI (2) and its relationship with Article VI (3) (a) of the Treaty. The first clause provides that if the dispute cannot be solved by consultations and negotiations, "the dispute shall be submitted for settlement in accordance with any previously agreed, applicable dispute settlement procedures". The second clause provides that after one year a party may resort to ICSID arbitration if "the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedure previously agreed to by the parties to the dispute".

150. The Respondent is of the view that the Claimant has the obligation to resort to the agreed procedure before arbitration since Article VI (2) so mandates by using the verb "shall". If this was not so, the second clause would result in the cancellation of the first. It follows that only if the Claimant had a compelling reason, not just "any reason", for not submitting the dispute to the previously agreed procedure could it resort to the ICSID arbitration.

[42] See, for example, the Agreement between the Government of Australia and the Government of the People's Republic of China, 11 July 1988, Article XII, 2, b; Agreement between the Government of Lithuania and the Government of the People's Republic of China, 8 November 1993, Article 8, 2, b; Agreement between the People's Republic of China and the Government of the Republic of Korea, 30 September 1992, Article 9. 10. The text of the notification of the People's Republic of China is found in www. Worldbank.org/icsid/pubs/icsid-8-d.htm

151. The Respondent further believes that the parties in this case have agreed to a dispute settlement procedure. Although the draft Contract submitted to the Danıştay had an ICSID arbitration clause, this clause was expressly deleted by that body on the understanding that the Danıştay had exclusive jurisdiction over disputes concerning Concession Contracts under Turkish law. This was in particular the result of the Constitutional Court's decision that concession contracts were administrative contracts. As the Claimants failed to submit the dispute to the Danıştay and did not offer any reason for it, they are precluded under the Treaty from resorting to ICSID arbitration.

152. It is further argued by the Respondent that if Turkey had envisaged giving an option to the Claimants it would have included in the Treaty the typical "fork-in-the-road" clause that it has used in many other treaties. Neither could any most favored nation clause argument affect this conclusion as the requirement of Article VI (2) embodies a fundamental policy consideration not subject to the operation of the clause, as established by the Tribunal in *Maffezini*, a case also relied on by the Claimants. In any event, it is asserted, the Treaty in this case contains a more restricted most favored nation clause than the one in the treaty concerned in *Maffezini* and does not allow for the application of the clause to dispute settlement mechanisms.

153. The Respondent also argues for distinguishing this case from that of *Lanco*, invoked by the Claimants, because in that case the Claimants had a typical choice of procedures that is absent in the present case.

The Claimants' view.

154. The Claimants argue that Article VI of the Treaty does not require that a dispute be referred first to a previously agreed, applicable dispute settlement procedure as a condition for submitting the dispute to ICSID. In the light of Article VI (3)(a)(i), the investor may choose to submit the dispute to ICSID if it has not otherwise been submitted for resolution in accordance with a previously agreed procedure. This means in Claimants' view that the investor may submit the dispute to the previously agreed mechanism if it so wishes, but that it would by so doing lose its right to resort to ICSID. This would be the equivalent of a "fork-in-the-road" provision.

155. The most favored nation clause is also invoked by the Claimants in support of their view and they argue that a number of bilateral investment treaties to which Turkey

is a party do not include a mechanism for resorting to a previously agreed mechanism and investors are free to choose. In the light of *Maffezini* the Claimants argue they are entitled to benefit from a more favorable treatment included in those treaties.

156. The Claimants are also of the view that, in any event, there was no previously agreed procedure in this case because they never accepted that the Contract was subject to the exclusive jurisdiction of the Danıştay and an express reservation was made to safeguard their right to resort to ICSID when that body deleted the ICSID clause from the draft Contract. Moreover, the ICSID clause was not replaced by another clause with the result that the Contract does not contain a dispute settlement mechanism. As in *Lanco*, there was no choice freely available to the investor and therefore there can be no agreement to submit disputes to domestic jurisdiction.

157. It is further argued that not even under Turkish law does the Danıştay have exclusive jurisdiction, among other reasons because international law is part of the domestic legal order and prevails over municipal law. Therefore, the rights of the investors under treaties have to be observed, including the right to resort to ICSID.

158. Even if there had been an agreement to submit disputes to the Danıştay, this would not have prevented ICSID arbitration since, as in *Aguas del Aconquija*,[43] the *Vivendi* annulment,[44] *Salini v. Morocco*,[45] *SGS v. Pakistan*[46] and other recent cases, contract based disputes are different from treaty based disputes and arise out of separate causes of action. Treaty based disputes can always be submitted to international arbitration from this point of view.

The Tribunal's findings in respect of the previously agreed dispute settlement procedure.

159. Following the detailed examination of the issues discussed above, the Tribunal concludes that there is no incompatibility between the provisions of Article VI (2) and Article VI (3) (a) and that they respond to a step by step search for a dispute resolution mechanism. First, consultations and negotiations are envisaged as an initial step. If this

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[43] Compañia de Aguas del Aconquija S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000, 16 ICSID Rev.—FILJ 641 (2001)

[44] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3), Decision on Application for Annulment of July 3, 2002, 41 ILM 1135 (2002).

[45] Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision of July 23, 2001, [French original] 129 Journal du droit international 196 (2002); English translation in 42 ILM 609 (2003).

[46] *SGS v. Pakistan* cit.

fails, third party non-binding procedures can be attempted if agreed between the parties. If these procedures fail, then the dispute shall be submitted to the previously agreed mechanism.

160. If no submission had been made pursuant to the previously agreed mechanism, then, after one year, the investor can apply to ICSID. This sequence of dispute settlement procedures is quite typical of dispute settlement arrangements under international law, beginning with political alternatives, followed by third party non-binding intervention and ultimately by binding procedures, which can include a method agreed to or lead to binding international arbitration.

161. The fact that Article VI (2) provides that the dispute "shall" be submitted to the previously agreed mechanism does not entail an obligation on the part of the investor. The investor may well choose to live with the dispute and never attempt a settlement. This is always a choice of the claimant party. If the investor chooses to resort to the previously agreed mechanism, the dispute must then be submitted to that procedure. It is obligatory and the other party has no further option. It is in this context that the "shall" becomes mandatory for the other party.

162. This is the reason why Article VI (3) (a) expressly provides that the ICSID alternative will not be available if the "national or company" has submitted the dispute to the previously agreed procedure, thereby clearly indicating that the choice belongs to the investor. Any other interpretation would mean that the principal feature of the Treaty, which is to make ICSID arbitration available to the investor, would be nullified and impaired by Article VI (2).

163. In the light of this finding, based on the interpretation of the Treaty, the Tribunal does not consider it necessary to discuss the issue in terms of the operation of the most favored nation clause. If the right to resort to ICSID arbitration in the terms discussed is embodied in the Treaty itself, there is no need to look for it under other treaties.

164. The Tribunal is not convinced either that in the light of the facts of the case there was a procedure previously agreed to. This is not because of the rather elliptic *Lanco* argument that a party cannot select a jurisdiction which by law is not subject to agreement or waiver, such as an administrative court, but because of an entirely different

reason. The decision of the Danıştay to delete the ICSID clause contained in the draft Contract certainly does not have the effect of precluding ICSID jurisdiction provided by consent in treaties. Otherwise treaties would be subject to unilateral derogation by one party. The Respondent has argued in this connection that the Danıştay has exclusive jurisdiction over contract disputes as a consequence of the Constitutional Court ruling of 1996 not allowing private law contracts for BOT power projects and requiring instead concession contracts approved by the Danıştay. This view, however, cannot be imposed upon the investor who seeks to rely on an arbitration established by treaty.

165. The Claimants' argument to the effect that the Danıştay's deletion of the ICSID arbitration clause did not really mean that the clause was rejected is not tenable. As expressed in paragraph 10 of the Danıştay's approval decision of March 11, 1998

> "the Council of State has jurisdiction on disputes between parties arising from concession contracts. Therefore, Article 28 regarding arbitration and pre-arbitration, which is a private law tool, has been removed from the text".

166. The submission of the Respondent that such deletion was accepted by the Claimants on signing the Contract and that, in any event, the Danıştay also has jurisdiction to hear treaty-based claims does not convince the Tribunal. On the contrary, this discussion evidences that there was no agreement on an exclusive dispute settlement mechanism.

167. But even assuming for the sake of argument that the Danıştay jurisdiction could be exclusive under Turkish legislation, there are two additional considerations to be had. The first is that the Turkish legislature came later to the conclusion that concession agreements could be submitted to international arbitration and that investors could request their conversion to private law contracts, as noted above. This new approach entailed recognition that international arbitration was not to be regarded as incompatible with Turkish legislation. Claimants believe this to be the case since the very outset.

168. The second consideration is the place of treaties under Article 90 of the Turkish Constitution. The last paragraph of this Article provides that "International agreements duly put into effect carry the force of law…". In the Turkish Constitutional system this

means that at the very least treaties rank equally with the law. A number of opinions are of the view that treaties even prevail over the law. In this context, whatever jurisdiction the Danıştay might have had or still has in respect of administrative acts and concession contracts yields to treaty provisions which, in the instant case is the investment protection Treaty and associated arbitration.

169. The discussion about a forum selection clause is also associated to the question of contract-based and treaty-based rights that have haunted many ICSID tribunals, which if applicable to the present case would mean that some disputes are capable of being submitted to Danıştay or Turkish jurisdiction and some other kind of disputes could be submitted to international arbitration.

170. The difference between contract-based claims and treaty-based claims has been discussed by various international arbitral tribunals as evidenced by the decisions in *Lauder*,[47] *Genin*,[48] *Aguas del Aconquija*,[49] *CMS*[50] and *Azurix*[51] and by those of the Annulment Committees in *Vivendi*[52] and *Wena*.[53] The Tribunal held in *CMS*, referring to this series of decisions, that "as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claim to arbitration".[54]

171. Where to draw the line, however, is not easy in practice as has been evidenced by the discussion of these various cases. The *Vivendi* Annulment Committee explained that "[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract".[55] However, to the extent that the basis for the claim is a treaty violation, the existence of an exclusive jurisdiction clause in a contract between the claimant and

[47] Ronald S. Lauder v. Czech Republic, UNCITRAL Final Award (Sept. 3, 2001).
[48] Alex Genin and others v. Republic of Estonia (ICSID Case No. ARB/99/2), Award of the Tribunal (June 25, 2001); Decision on Claimants' Request for Supplementary Decisions and Rectification (April 4, 2002), *available at*: http://www.worldbank.org/icsid/cases/conclude.htm
[49] *Aguas* cit.
[50] *CMS* cit.
[51] Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, International Law in Brief *available at*: http://www.asil.org/ilib/azurix.pdf.
[52] *Vivendi annulment* cit.
[53] Wena Hotels Ltd. v. Egypt (ICSID Case No. ARB/98/4), Decision on Application for Annulment rendered on February 5, 2002, 41 ILM 933 (2002).
[54] *CMS* cit., par. 80; *Azurix* cit., par. 89.
[55] *Vivendi Annulment* cit., par. 98.

the respondent state "cannot operate as a bar to the application of the treaty standard".[56] To the extent that there are valid concurrent alternatives, the choice will then depend on the nature of the dispute submitted.

172. In the recent case of *SGS* v. *Pakistan*, the Tribunal concluded in this respect that it did not have jurisdiction over contract claims "which do not also constitute or amount to breaches of the substantive standards of the BIT".[57]

173. In the instant case, however, it is not evident that there was such an alternative or an agreed forum selection clause. The existence of a previously agreed procedure is questionable and disputed. In any event, the dispute that has arisen in this case rather qualifies as a treaty-based dispute as it is related both to the issue of interpretation and implementation of the Contract as an investment agreement and to the allegation that the Government, through various measures, impeded and ultimately destroyed the investment. The nature of the dispute is therefore not that of a typical contractual dispute.

174. The Tribunal accordingly affirms its jurisdiction and the objection based on the lack of resort to a previously agreed dispute settlement mechanism is dismissed.

E. <u>Objection to jurisdiction on the basis of lack of standing.</u>

Respondent's objection.

175. The Respondent also objects to the jurisdiction of the Tribunal in respect of the North American Coal Corporation (NACC) and the Project Company on the ground that these entities lack standing. It is argued that NACC has no investment in Turkey nor any rights under the Daniştay approved Contract, which was not even signed by NACC. Moreover, the Respondent believes that NACC owns no equity in the Project Company and owns none of the assets that have been claimed as investments. The only link it has to the case is a Memorandum of Understanding signed on August 1, 1998 between NACC and PSEG, conferring the option to acquire ownership interest in the Project Company by means of a Shareholders Agreement to be negotiated later.

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[56] *Vivendi Annulment* cit., par. 101.
[57] *SGS v. Pakistan* cit., par. 162.

176. In Respondent's view, the Memorandum in question is not valid because it is a preliminary agreement which is not binding until the parties' intention to be bound materializes, a situation that never happened. The instrument was conceived as the expression of a desire to "explore an arrangement", the terms of which were never formalized or even agreed to. However broad the definition of "investment" might be, it does not include mere options and, therefore, this Memorandum does not qualify either as an investment under the Treaty or in any other way. Even if some expenses were made by NACC in connection with the Revised Mine Plan, these are not an investment subject to recovery.

177. In respect of the Project Company, the Respondent argues that it is not a company of the United States as required by the Treaty. Under Article VI (6) a company incorporated in Turkey must have existed before the events giving rise to the dispute for it to be considered a national of the United States. In this case, the Project Company was incorporated in August 1999, two years after the disputed events. Moreover, the Respondent believes that the Project Company cannot simply be considered the successor to the earlier Branch Office opened in January 1998, as this was not a company of the United States; it was merely a component of a foreign company not recognized in Turkey as a separate legal entity and, unlike other treaties concluded by the United States, not included in the Treaty governing this case.

The Claimants' view.

178. The Claimants' view is that NACC owns a 25% interest in the Project Company and 25% of all its assets, including the Contract. Under the Treaty definition of investment it is not necessary to own shares of stock as "other interests" are also included. In its view, the Memorandum is valid and binding and currently in force, providing a clear intention of the parties and establishing all the essential terms of the transaction, a situation that the legal opinion of Mr. David Rivkin explains is sufficient under the law of New York to uphold the validity of such an agreement.[58] If there was an intent not to be bound, this would have to be expressed clearly, as in *Mihaly*.

179. The Claimants also argue that the NACC investments in the Project are clearly covered by the Treaty and even if it were correct to characterize them as an option, this is

[58] Expert Opinion of David W. Rivkin, June 27, 2003.

also covered by the Treaty definition as encompassing a present interest to acquire that property in the terms of the option.

180. As to the Project Company, Claimants argue that it was established following long negotiations with the Ministry as to the terms of the project and the corporate structure required and that, in any event, the vast majority of the events giving rise to the dispute occurred after the date of incorporation, such as the question of the Treasury guarantee and the application under Law No. 4501. But even in respect of events that took place before 1999 Claimants are of the view that, as held in *Mondev*,[59] events or conduct prior to the entry into force of an obligation may be relevant in determining whether the Respondent has subsequently committed a breach of an obligation.

181. In the Claimants view, the branch office of a foreign investor controlled by PSEG is governed by the Treaty because under its Article I (1) (a) any kind of juridical entity qualifies as a company, including any business association or other organization. The branch office under Turkish law is distinct from the head office and a Permission Certificate was issued specifically to such branch for the purpose of the investment.

The Tribunal's findings on the question of standing.

182. The standing of PSEG to bring this arbitration is not disputed. The objection made concerns only the standing as Claimants of NACC and the Project Company. The Tribunal will now examine each of these objections, beginning with that relating to the Project Company.

183. It must first be noted that the establishment of a branch office of a foreign investor in Turkey is done in accordance with Turkish legislation. The foreign company of which the branch office was an integral part was owned and controlled by PSEG. This fact alone would provide a clear link between this branch and the investment. However, other facts also strengthen this link. The branch was known to the Turkish Government as the conduit for the proposed investment and its establishment for this purpose was discussed at various times. More importantly, the fact that the first Permission Certificate was issued to this branch is in itself evidence that it was regarded by the Turkish Government as the entity authorized to operate and do business in that country in

[59] Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Award of October 11, 2002, 42 ILM 85 (2003).

the specific context of the mining and power project envisaged. The Tribunal notes that the legal status of the Project Company is persuasively explained in the Opinions of Professors Reisman and Dolzer.

184. It was later that the question of a new corporate structure arose in the light of tax policies and other interests. This discussion resulted in long negotiations, including the impact of the change on the tariff, and ultimately led to the incorporation of Konya Ilgin Ltd. There can be no doubt that whatever rights or interests the branch office had were transferred to the new company as its successor in law and business. The objectives of the Project Company as stated in the act of incorporation are unequivocally linked to the investment.[60]

185. Because of this continuity, the fact that the Company as such only came into existence later is immaterial. Any right or dispute concerning the branch office was also the concern of the successor as both entities were the legal vehicles of the investment made. Even if the Tribunal were to accept a line separating events in time in connection with the date of incorporation, there are still events after that date which involve a dispute between the parties.

186. On many occasions the critical date for the purpose of jurisdiction is whether the dispute arose before or after the entry into force of the relevant treaty. This is the situation specifically considered in *Mondev*, where events or conduct prior to that date were considered only for the purpose of establishing breaches subsequent to the entry into force of the treaty. Similarly, in *Maffezini* the Tribunal held that events before the critical date might be factors leading to the legal dispute after that date. The critical date in this case is not the incorporation date of the Project Company but again that of the entry into force of the Treaty. Every dispute affecting the investment arose in this case after the Treaty had entered into force.

187. The jurisdiction of the Tribunal is therefore not affected either because of the change of corporate structure or because of the date of the events leading to the dispute.

188. The situation in respect of NACC is different. This company began participating in the Project in the summer of 1996 to assist in developing the mining aspects of the

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[6060] Trade Registry Gazette, No. 4861, 27 August 1999.

power project and later, in 1998, allegedly joined PSEG as an equity investor by means of the Memorandum discussed above. NACC at all times participated as an auxiliary to PSEG and even though it intervened actively in the preparation of the mining plans, the counterpart of the Turkish Government was at all times PSEG. This explains why NACC is not a signatory to the Contract. Exhibit A to the Memorandum clearly outlines NACC functions as mainly those of a service provider to the Project Company under a Management Services Agreement.

189. Whether the Memorandum is valid and in force is immaterial for the purpose of the Tribunal's decision. The Tribunal considers that the Respondent's argument that the definition of investment does not include an option is persuasive as a general approach. Broad as many definitions of investment are in treaties of this kind, there is a limit to what they can reasonably encompass as an investment. Options such as this particular one can not, in the view of the Tribunal, be interpreted as an "investment". The Tribunal acknowledges that different circumstances from those which obtain in the present case may lead to a different conclusion.

190. Professor Dolzer's Rejoinder Opinion to the effect that the Treaty definition of investment refers to any right, even one that can be exercised at any time in the future, is not persuasive.[61] The Tribunal is not persuaded either by the explanation that a Shareholders' Agreement was not pursued by the parties to the Memorandum because it would not have been a prudent business decision and a waste of time.

191. In the opinion of the Tribunal NACC was at best only a technical operator for the investor in respect of the mining operations of the project and, later, an equity holder with a standing no different from any other equity holder. In fact at some point another entity had the same status as NACC since a similar Memorandum was signed between PSEG and Guris, a Turkish corporation. Given the corporate structure of the project, only PSEG as the investor and the Project Company as the conduit for this investment can be considered legally linked to the Turkish Government for the purpose of the Contract and the operation of the Treaty, including the consent given to arbitration. Other equity holders do not have an interest separate from these entities and consequently cannot claim on their own.

[61] Additional Expert Opinion, Professor Dr. Dr. Rudolf Dolzer, November 24, 2003, at 11.

192. The case may be different when minority shareholders are accorded a right to claim independently from the project company because, for example, of questions of nationality or other reason as in *CMS*[62] or *Enron*.[63] In those cases the interest of the investor would be nugatory if they were not allowed to claim in their own right. The operation of the respective treaties would then be paralyzed. This is not the case here. Any interest, which the investor may eventually have, may accrue, in part, to NACC, if the latter still has an ongoing equity participation in the investor company. But this is a matter which concerns only intra-corporate arrangements that are separate and distinct from any Treaty connection between NACC and the Respondent. As such, while it may possibly result in a claim by NACC against PSEG, it does not give rise to a Treaty claim by NACC against the Respondent.

193. As held in *Enron*, the corporate linkages can be recognized for the purpose of the jurisdiction of an arbitral tribunal to the extent that the consent to arbitration is considered to extend to a given entity, but not beyond. NACC is beyond the reach of the consent to arbitration as far as the Respondent is concerned.

194. The Tribunal accordingly finds that it lacks jurisdiction in respect of claims by NACC in this case.

[62] *CMS* cit.

[63] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, International Law in Brief, *available at:* http://www.asil.org/ilib/Enron.pdf

IV. Decision.

For the above reasons, the Tribunal decides that:

1. The dispute submitted by PSEG and Konya Ilgin Ltd. is within the jurisdiction of the Centre and the competence of the Tribunal.

2. The dispute submitted by NACC is not within the jurisdiction of the Centre and the competence of the Tribunal.

3. The costs of the jurisdictional phase of the arbitration are reserved.

So decided.

Date: June 4, 2004

[signed]
Francisco Orrego Vicuña
President of the Tribunal

[signed]
L. Yves Fortier
Arbitrator

[signed]
Gabrielle Kaufmann-Kohler
Arbitrator