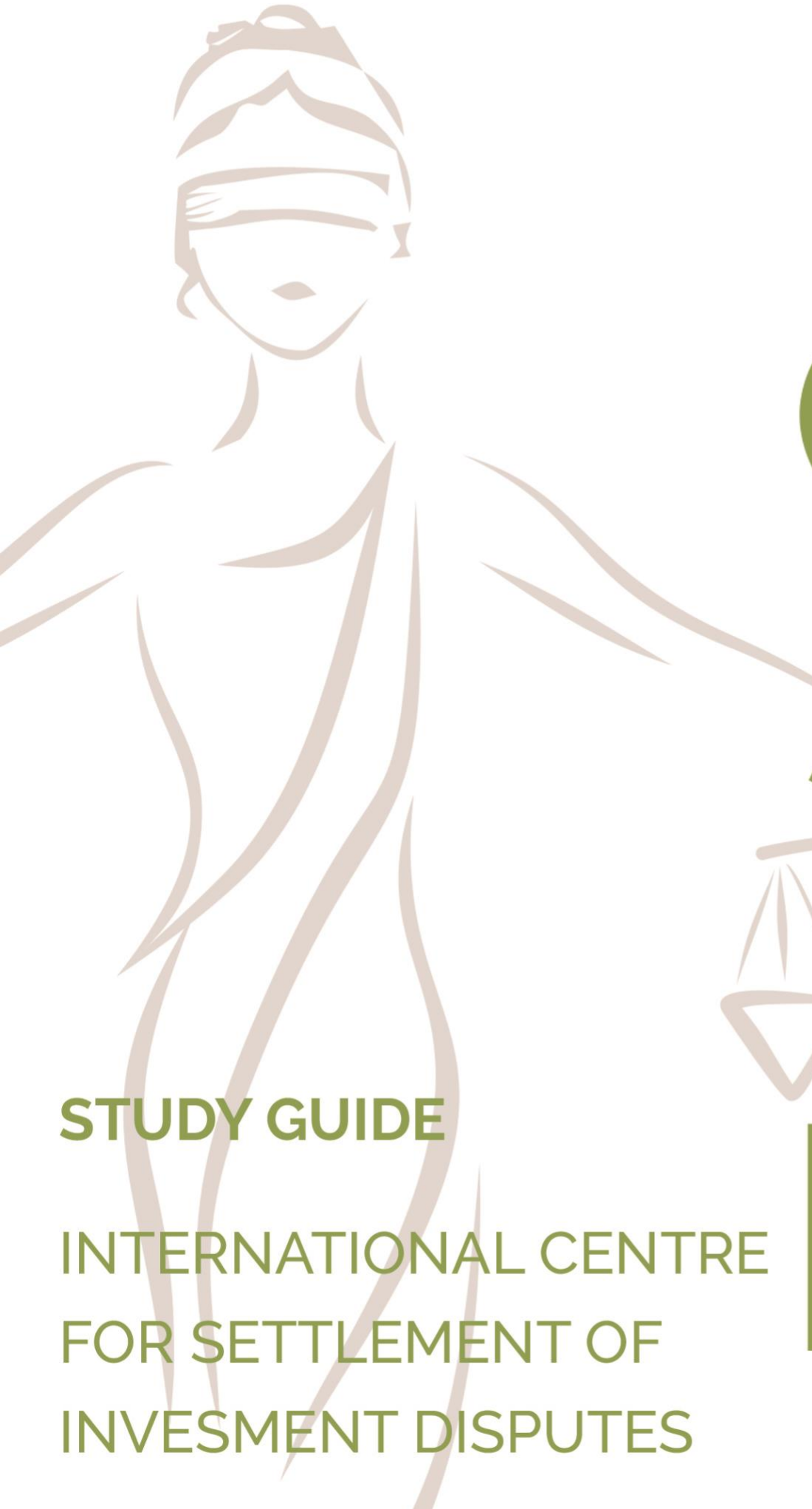

# STUDY GUIDE

## INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESMENT DISPUTES

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**Letter from the Secretary-General**

Distinguished participants,

It is a privilege for me, as the Secretary General of the conference, to introduce you to Themis Court Simulations 2023.

This year, once again we are hosting a leading moot court conference in Turkey, which have academic saturation in addition to organizational excellence. Themis Court Simulations has always advanced itself each passing year in this regard, once again, our goal is to keep this tradition going and host you a unique and exciting experience.

This year, we are continuing a tradition with additions. Our perspective is to have courts in the most exciting, competitive, and instructive areas of law, and in this scope, our conference will contain six court simulations. In the, participants will examine a phenomenal on case which includes key concepts such as multilateral regional treaties, unlawful expropriations, shell companies and the meaning of foreign investment. On behalf of the academic team, who prepared this exciting court, I would like to welcome you all to Themis Court Simulation. Likewise, our organization team will welcome you with their kind hospitality to make your experience as convenient as possible.

Moreover, I would like to thank in advance all of my academic team. I can see that I have an opportunity to work with an amazing group of people, therefore I'm glad to have a team like this. With their potential, it's clear that this journey will be incredibly joyful. Moreover, I would like to thank my friends, Director General Mr. Yiğit Hazar Eren and Deputy Director General Mr. Can Deryahan, and their tireless organization team. They are the people who are making this conference possible with their endless efforts.

Concluding my letter, on behalf of the Themis Court Simulations, I, once again, would like to welcome you all to this year's edition. Looking forward to meeting you soon, let's define justice together!

Best Regards,

**Arda Özkan**

***Secretary-General of Themis Court Simulations 2023***

**Letter from the Under Secretary-General**

Distinguished participants,

It is a privilege to serve you as Under Secretary General of the ICSID at Themis Court Simulations, 2023. I'm Ipek Bozbura, senior law student at Bahçeşehir University.

In this year's edition of ICSID at Themis Court Simulations, the participants will be involved in the broad deliberations in this highly controversial case and discuss highly important concepts such as good faith, multilateral regional treaties, unlawful expropriations, shell companies and the meaning of foreign investment: Cenk Kısan, a nationwide famous wealthy businessman started to lose his business enterprise after he became very active in political life, where he contradicted the current prime-minister. The Cypriot company, which argues that the successor owner of one of the electricity utilities, whose owner Cenk Kısan's Family Company before, brought the case before the arbitration tribunal. The claims arising out of the alleged termination by the Government of electricity concessions as well as the seizure of the assets owned by claimant's electricity companies.

The International Centre for Settlement of Investment Disputes (ICSID) is an intergovernmental institution established by treaty under World Bank Group. It is designed to promote the settlement of disputes between States and private foreign investors, whose aim is to contribute to the promotion of economic development.

We put a lot of effort and had so much fun creating this guide. And even though it is a complex one, we are pretty sure you will overcome the dilemmas the case has in itself and notice the clues we hid behind our details. I hope that you have an amazing three days and enjoy our case while increasing your abilities and gaining knowledge and bolstering your understanding of ICSID and investment law.

Firstly, I would like to offer our sincere thanks to Secretary-General Mr. Arda Özkan and for his support.Before concluding my remarks, I would like to thank my dear Academic Assistants Max Boddin And Umut Deniz Koç, to whom I owe a big thank-you, for their hard work and

dedication. Lastly, I would like to thank our whole organization team, for all of their efforts to make this conference the best of all.

In case of any questions you might have, do not hesitate to contact me via,

ipek.bozbura@bahcesehir.edu.tr

Kind Regards,

İpek Bozbura
Under Secretary General Responsible for International Center for Settlement of Investment Disputes

# List of Abbreviations

| ABBREVIATION | EXPLANATION |
|---|---|
| ÇAEŞ | Çukurova Elektrik Anonim Sirketi |
| BIT | Bilateral Investment Treaties |
| CJEU | The Court of Justice of the European Union |
| CLAIMANT | Libananco Holdings Co. Limited |
| ECT | Energy Charter Treaty |
| EU | European Union |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Agreement |
| ICSID | International Centre for Settlement of Investment Disputes |
| KEPEZ | Kepez Elektrik Türk Anonim Şirketi |
| TEIAŞ | Turkish Electricity Transmission Corporation |

**ICSID: International Center for Settlement of Investment Disputes**

## I. Introduction

The International Centre for Settlement of Investment Disputes (ICSID) is an intergovernmental institution established by treaty. It is closely aligned with the *International Bank for Reconstruction and Development (IBRD)*. It is designed to promote the settlement of disputes between States and private foreign investors. Its aim is to contribute to the promotion of economic development. ICSID is not an international court or tribunal but merely provides an institutional framework that facilitates conciliation and arbitration. The actual settlement of disputes takes place mainly through arbitral tribunals that are constituted on an *ad hoc* basis for each dispute. [1]

### A. Background

#### a. The World Bank

The World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects[2]. The World Bank is the collective name for the International Bank for Reconstruction and Development (IBRD), International Finance Corporation and International Development Association (IDA), three of five international organizations owned by the World Bank Group. It was established along with the International Monetary Fund at the 1944 Bretton Woods Conference.

[1] Schill, S. W. (2022). Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. (L. Malintoppi, A. Reinisch, C. H. Schreuer, & A. Sinclair, Eds.) (3rd ed.). Cambridge: Cambridge University Press.

[2] *"About Us". World Bank. 14 October 2008. Last Access 13 June 2022.*

***Figure 1: Five Agencies of World Bank Group***


**b. Establishment and the Convention**

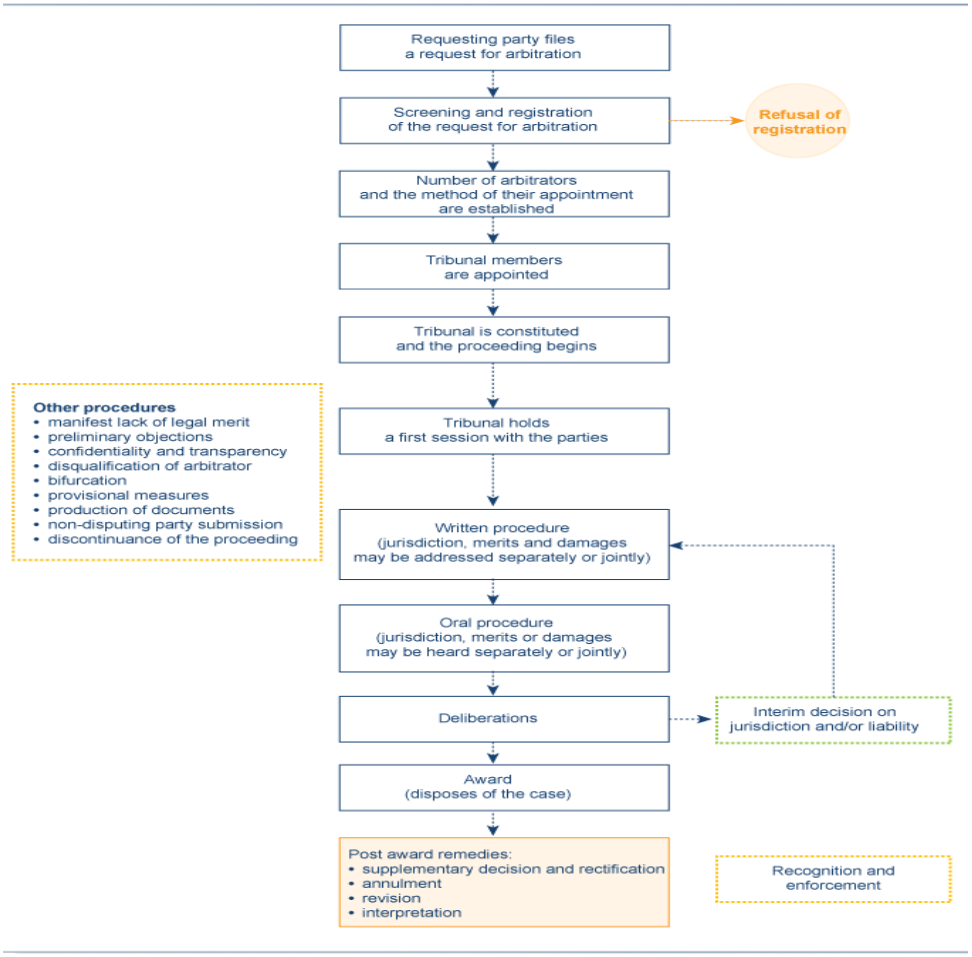
The Washington Convention of March 18, 1965, established the International Centre for the Settlement of Investment Disputes (ICSID) by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment.

**c. Procedure**

ICSID specializes in the settlement of investment disputes. Therefore, to be within ICSID's jurisdiction, there must first be a legal dispute arising directly out of an investment. While the ICSID Convention did not define what constitutes an investment, many investment agreements will provide a definition of investment. Also, the ICSID Convention does not contain any substantive rules but instead offers a procedure for the settlement of investment disputes. Pursuant to the ICSID Convention, the tribunals are to follow the law agreed upon by the

parties. However, in the absence of an agreed choice of law, the Tribunal shall apply the law of the host State, as well as any applicable international law. International law includes international agreements, *such as BITs and FTAs, and customary i*nternational law. Also, if authorized by both parties, a tribunal has the authority to decide a *case ex aequo et bono*, meaning *"on the basis of equity rather than law."* ICSID arbitration proceedings are initiated by submitting a Request for Arbitration to the Secretary-General of ICSID. The request describes the facts and issues of the particular case. The next step in the procedure is selecting the arbitral tribunal. Within sixty days after the tribunal has been established, an initial session is held to discuss preliminary questions of procedure. The proceedings then consist of a written procedure, followed by an in-person oral hearing where the parties present their case. Subsequently, the tribunal will deliberate and render an award.

***Figure 2 : Procedures of ICSID Arbitration***



**d. How to file a Request for Arbitration**

A party commences an arbitration under the ICSID Convention by submitting a request for arbitration to the Secretary-General.

The conditions for access to ICSID are contained in Article 25 of the ICSID Convention. There may be further conditions in the instrument containing the parties' consent to arbitration. The process of filing the request is governed by Article 36 of the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) and the Administrative and Financial Regulations (Regulations 16, 30 and 34(1)).

i. The Screening Process

The Secretary-General of ICSID should determine as soon as possible after a party files a request for arbitration whether the dispute is outside the jurisdiction of the Centre. The determination is based on the information in the request.

If one of the requirements in Article 25 of the ICSID Convention is *manifestly* lacking, the Secretary-General must refuse to register the request. Otherwise, the dispute must be registered, and the Tribunal can address objections. The decision to register the request is without prejudice to the powers of the Tribunal with regard to jurisdiction, competence and the merits (Institution Rule 7).

The screening process takes on average three weeks, depending on whether ICSID needs clarifications, additional information or documentation from the requesting party.

ii. Number of Arbitrators and Method of Appointment

Parties should compromise upon arbitrators on a Tribunal and the appointment method. If they cannot agree, ICSID's mechanism will apply automatically (Article 37 of the ICSID Convention and Arbitration Rules 2 and 3).

iii. Selection and Appointment of Tribunal Members

Once the number of arbitrators and the method of their appointment have been determined, the arbitrator may be appointed. If the parties cannot choose all members of the Tribunal pursuant to the established method of appointment, the ICSID mechanism will be applied automatically . Parties are free to select arbitrators from the ICSID Panel of Arbitrators, although they are welcome to do so. The Convention sets out certain requirements regarding the nationality and qualifications of appointees to ICSID Tribunals, but the parties are free to choose their appointees as they see fit.

iv. Requirements for Appointees

*Nationality Requirement*

A majority of arbitrators on a Tribunal must be citizens of States other than a party to the dispute (pursuant the Article 39 of the Convention and Arbitration Rule 1(3)).

In practice, this means that:

- A sole arbitrator may not have the same nationality as either party if both parties disagree upon.
- If each party has appointed a person of an excluded nationality (as approved by the other party), the parties must also agree on the appointment of the President of the Tribunal.

**e. Arbitrator Qualifications**

All ICSID arbitrators must be persons:

- of high moral character.
- with recognized competence in the fields of law, commerce, industry or finance; and who may be relied upon to exercise independent judgment (Article 14(1) and Article 40(2) of the Convention).

**f. Services**

ICSID offers services for the resolution of international disputes, primarily between investors and States, but also in State-to-State disputes. In addition, it offers fact-finding proceedings to examine and report on facts before a dispute arises. Its case administration services extend to:

- Arbitrations under the ICSID Convention
- Arbitrations under the Additional Facility
- Conciliations under the ICSID Convention
- Conciliations under the Additional Facility
- Fact-Finding Proceedings
- Non-ICSID investor-State Arbitrations (for example under the UNCITRAL Arbitration Rules)
- Non-ICSID State-State disputes (for example under free trade agreements)
- Mediations
- Other alternative dispute resolution cases

The Secretary-General is available to be designated as Appointing Authority to appoint arbitrators, conciliators and mediators, and to decide a proposal to disqualify an arbitrator in proceedings not conducted under the ICSID Convention or the ICSID Additional Facility Rules. Since ICSID is a non-profit organization, they provide a cost-effective and transparent fee structure for its services. It offers first class hearing facilities at World Bank premises around the world at no additional cost.

**Structure**

ICSID has four important bodies: the Board of Directors (Administrative Council), the Secretariat, the Panel of Mediators and the Panel of Arbitrators.

Duties of the Board of Directors; Approving the administrative and financial regulations of the Center, determining the rules of mediation and arbitration cases, arranging the relations with the World Bank, accepting the budget of the Center and discussing the annual activity report (Contract, article 6/1). The head of the World Bank is also the head of the Center (Convention, art.5)

## II. Key Concepts

### A. International Investment Agreements

Nowadays, international investment agreements, specifically either bilateral investment treaties (BITs) or free trade agreements (FTAs), overwhelmingly administer remote coordinate ventures to developing nations. BITs are agreements between states that determine the terms and conditions for private foreign investors in the jurisdiction of another country. FTAs, such as the *North American Free Trade Agreement* and the Central American Free Trade Agreement, are agreements that include chapters that provide for investor protections. FTAs can be bilateral agreements, between two states, or multilateral agreements, between more than two states. International investment agreements began to emerge in the 1960s to provide greater protection for private investments under international law. In addition to these factors, potential host countries offer international legal guarantees to investors through international investment agreements such as BITs and FTAs. Bilateral Investment Treaties ("BIT's") are international agreements between two States concerning the terms for private foreign investment by nationals of one State in another State. Such treaties are intended to encourage foreign direct investment in host States by ensuring standards for the treatment of foreign investors, including compensation for the expropriation of foreign investments, protection against the unfair and inequitable treatment of foreign investors, and protection against discriminatory treatment and lack of full protection and security.

### B. Jurisdiction

Participation in the ICSID Convention does not, by itself, constitute a submission to the Centre's jurisdiction. For jurisdiction to exist, the Convention requires separate consent in writing by the parties. Consent to the jurisdiction may be given in various ways. Consent may be contained in a direct agreement between the investor and the host State such as a concession contract. Alternatively, the basis for consent can be a standing offer by the host State which may be accepted by the investor in appropriate form. Such a standing offer may be contained in the host State's legislation. A standing offer may also be found in an investment treaty to which the host State and the investor's State of nationality are parties. Most bilateral investment

treaties (BITs) contain clauses offering access to ICSID to the nationals of one of the parties to the treaty against the other party to the treaty. The same method is employed by a number of regional multilateral treaties such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) which also contain such offers. Most of the recent cases that have come before ICSID were based on consent through a general offer by the host State in a treaty which was later accepted by the investor, often simply through instituting proceedings.

Consent expressed through treaty clauses is not uniform. Some expressions of consent are wide and refer to all disputes arising from investments. Other clauses are narrower and offer consent only in respect of violations of the rights guaranteed by the treaty. Yet other offers of consent are narrowly defined and may be restricted to the amount of compensation in the case of an expropriation. Some consent clauses contained in treaties are qualified by procedural requirements. A common requirement is that an amicable settlement must be attempted for a certain period of time. A typical waiting period under BITs is six months.

The ICSID Convention does not require the exhaustion of local remedies unless a State makes its consent subject to this condition (Art. 26). But some BITs provide that before bringing a dispute to ICSID the investor must seek a settlement through the host State's domestic courts for a certain period of time, most often 18 months. In a number of cases the respondents argued that an expression of consent to arbitration should be construed restrictively. Most tribunals have rejected this argument. The vast majority of tribunals have favored a balanced approach that accepts neither a restrictive nor an expansive approach to the interpretation of consent clauses. Consent by the parties to arbitration under the Convention is binding. Once given by both parties, it may not be withdrawn unilaterally. A party may not determine unilaterally whether it has given its consent to ICSID's jurisdiction: the decision on whether jurisdiction exists is with the tribunal.

### C. EU Law

The European Union (EU) in its current form came into existence through the Treaty of Maastricht in 1992. It was built on the foundation of several economic cooperations that had been in place since the 1950s, centered around the idea of the "European Single Market" from the 1957 Treaty of Rome. EU law is structured into two key levels: Primary Law contains the fundamental treaties, the treaty of the EU (TEU) which was concluded in 1992, the treaty for

the functioning of the EU (TFEU) which was concluded in Lisbon in 2008, and the Charter of Fundamental Rights of the European Union (CFR) proclaimed in 2000. Secondary law consists of all regulations and directives passed directly by the institutions of the European Union based on the competences given to it by Primary EU Law. The legal nature of EU law is unique: The EU is considered to be a subject sui generis of international law, not quite a state, but not an international organisation either. Within the competence awarded to its institutions under the strict principle of conferral in Art. 4 and 5 TEU, the union acts as a supranational force. The landmark Van Gend and Loos v Netherlands Court of Justice of the European Union (CJEU) judgment describes EU law as "a new legal order of international law" highlighting both its nature as international law as well as its unique and novel quality.

The European Parliament derives its legitimacy directly from elections held every 5 years, while the Council of the European Union is formed by the member states' ministers. The European Commission is the only "genuinely supranational organ" of the EU, consisting of one commissioner from each member state. All three organs together form the legislative process of the EU, with the Commission fulfilling a more executive and administrative role. The interpretation of EU law is the responsibility of the CJEU, which has a jurisdictional monopoly over it.

### a. The Achmea and Komstroy judgments

The Achmea and Komstroy judgments have been a legal earthquake for Investment Disputes in Europe. In 2017, the CJEU made its Achmea judgment. In proceedings that were referred to it by the Regional High Court of Frankfurt, it had to decide whether an ICSID award based on a BIT between the Netherlands and Slovakia was enforceable. The CJEU refused enforcement, arguing that the EU has exclusive jurisdiction over investment and that intra-EU BITs were therefore in violation of EU law. According to the court, they were inapplicable due to the principle of supremacy of EU law. Moreover, the judgment stated that investment disputes between EU members have to be assessed under EU law by the CJEU itself. As a reaction to that, the EU member states formed an agreement in 2020 that terminated all BITs between member states.

In 2021, the CJEU expanded on its jurisdiction of the issue in the Komstroy judgment. This time, the Paris Cour d'Appel had referred a dispute on the validity of an ad hoc investment

arbitration award between the Ukrainian Komstroy LLC and the Republic of Moldova applying the ECT to the Court. Again, the CJEU declared the award invalid. It argued, that the ECT constitutes part of EU law, and, as the CJEU has a jurisdictional monopoly on EU law, should be decided by it as well, regardless of the Parties' nationality.

### D. Foreign Investment and Expropriation

Foreign Direct Investment (FDI) refers to the investment made by a company or individual in one country into business operations in another country, with the aim of establishing lasting and effective control over the invested assets. In relation to the International Centre for Settlement of Investment Disputes (ICSID), FDI refers to investments made by investors from one country into another country and protected by ICSID convention, which provides international legal protection and dispute resolution mechanism for foreign investors.

Investment disputes that fall under the jurisdiction of ICSID include disputes between a foreign investor and the host state arising out of an investment, such as breaches of investment contracts or disputes over the expropriation of assets. The protection of ICSID is limited to disputes arising out of investments covered by a bilateral investment treaty or a multilateral investment treaty that provides for ICSID arbitration. To be eligible for ICSID protection, the investment must be a qualifying investment, such as a company, enterprise, or other asset, and the dispute must be between a foreign investor and a host state.

Expropriation simply means the compulsory taking of the assets of foreign investors by the host State. The term ‘expropriation’ is used interchangeably with ‘taking’, which is most often used by American Scholars and under the domestic law of the United States of America. In modern law, ‘takings’ by States are referred to mostly as expropriation. The taking of property by a State commonly known as ‘expropriation’ is prima facie (on the face of it) lawful as it is recognised that the State has a right to control property and economic resources within its territory for the enhancement of its objectives be it economic, political or otherwise. International Investment Law is designed to promote and protect the activities of private foreign investors particularly in the host state. This does not necessarily exclude the protection of government controlled entities as long as they act in a commercial rather than in a governmental capacity.

Investors are either individuals (natural persons) or companies (juristic persons). Though in a majority of cases submitted for investment disputes, the investor is a company. The foreignness of the investment is determined by: the investor's nationality. In addition, the investor's nationality determines from which treaties it may benefit. The Investor's nationality is relevant for two purposes –

(a) the substantive standards guaranteed in a Treaty will only apply to the respective nationals.

(b) the jurisdiction of an international tribunal is determined amongst other things by the Claimant's nationality.

The origin of the investment (especially the capital) is not a decisive question of the existence of foreign investment. The sovereign State or country into which an investment is made. It is worthy of note that the term- 'State' is used in this sense as a nation or country which is not the national jurisdiction of the investor. Different definitions have been attributed to the term investment relative from case to case. It could mean – every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debts, service and investment contracts. An expropriation is the taking of a foreign investor's private property by a government acting in its sovereign capacity. Nationalization being a form of expropriation, generally covers an entire industry or geographic region. Nationalizations typically occur in the context of a major social, political or economic change.

### E. Applicable Law

The ICSID Convention does **not** contain such **legal rules**. The Convention only sets out a procedural framework for the resolution of disputes. But the ICSID convention contains an article on substantive law. It directs tribunals primarily to decide in accordance with any choice of law made by the parties (Art. 42(1)).

The parties to the dispute, which are the host State and the investor, may compromise upon the governing law. Some contracts governing investments simply refer to the host State's domestic law. The choice of the law of the investor's home country or of the law of a third State is rare, but sometimes occurs in the context of loan contracts. In the majority of cases agreements between the parties on applicable law include international law as well as host State law.

Many of the treaty provisions that offer investor/State arbitration also contain provisions on applicable law. By taking up the offer of arbitration, the investor also accepts the choice of law clause contained in the treaty's dispute settlement provision and the treaty's provision on applicable law becomes part of the arbitration agreement. Some clauses in treaties governing the applicable law in investment disputes refer exclusively to international law. This is the case under NAFTA *(Art. 1131(1), the ETC (Art. 26(6)) and some BITs*. Other BITs, in provisions dealing with applicable law, combine the host State's domestic law with international law.

In the absence of an agreement on applicable law, Art. 42(1) directs the tribunal to apply the law of the host State and international law. Therefore, in most cases the applicable substantive law in the arbitration process is the combination of international law and the law of the host state. In the majority of cases tribunals have, in fact, applied both systems of law. Where there was a contradiction between the two, international law had to prevail. It is left to the tribunals to identify the various issues before them to which international law or host State law is to apply.

### a. Awards

Pursuant to Article 53 of the ICSID Convention, "[e]ach party shall abide by and comply with the terms of the award . . . ." In that sense, ICSID awards are binding and final and the award debtor is obligated to comply. Pecuniary obligations arising from awards are to be enforced like final domestic judgments in all Member States of the Convention. Accordingly, recognition and enforcement may be sought either in the host state, in the investor's state, or in any state that is a party to the ICSID Convention. The procedure for the enforcement and execution of the award is "governed by the laws concerning the execution of judgments in force in the State where such execution is sought." ICSID awards are not subject to scrutiny by domestic courts. As a result, a domestic court is not permitted to examine jurisdiction of the ICSID tribunal, procedure, or substantive validity of an award. After an award is rendered, the parties may request an interpretation, revision, or annulment of the award. The ICSID Convention offers its own system for review by which a party may seek annulment of the award by an ad hoc committee. The ad hoc committee consists of three persons, appointed by the Chairman of ICSID. In accordance with **Article 52 of the ICSID Convention**, *a party may request annulment of the award only on the following condition:*

*(a) the Tribunal was not properly constituted,*

*(b) the Tribunal manifestly exceeded its powers,*

*(c) corruption by a Tribunal member,*

*(d) a serious departure from a fundamental rule or procedure,*

*or (e) the award did not state the reasons for the decision*

**b. Binding Force and Enforcement**

The fact that ICSID Arbitration is an effective and specific way is based on its creation by independent states. According to the Convention, the arbitral awards rendered in the ICSID Arbitration procedure are enforced as binding judgments rendered by the courts in all contracting countries. ***In other words, each country that has signed and ratified the Convention has undertaken to enforce the ICSID arbitral award as if it were the final judgment rendered by a domestic court in its territory***. As can be seen, a strict enforcement regime is envisaged in ICSID Arbitration, which prohibits the control of local judicial bodies over arbitral awards.

## III. The Case

### A. Background

Libananco, a Cypriot company, claims that it had an ownership interest in two electric utility companies in Turkey, CEAS and Kepez. Libananco further claims that in 2013 the Turkish Government unlawfully seized and expropriated the facilities and assets of CEAS and Kepez, and Libananco's interest in these companies.

Cenk Kısan, in full Cenk Cengiz Kısan, (born 1960, Turkey), Turkish businessman and politician known for launching the first private television (Magic Box) channel in Turkey and for his subsequent foray into politics. Kısan’s father had made his fortune in the construction industry. The Kısan family’s various business holdings grew extensively over the years and came to include a football (soccer) team, several media outlets, and banks, along with other assets in construction, energy, and finance. Cenk Kısan played an active role in many of the family’s businesses. Kısan also pursued his own dealings, such as in 1990 when he, along with

Turkish President Turgut Özal's son, Ahmet, launched Turkey's first private television channel, Magicbox; that, however, violated the Turkish Radio and Television Corporation's constitutional monopoly. Even though considerable controversy ensued about the legality of a private channel, in the long run it symbolized the initial step of de facto deregulation of broadcasting in Turkey.

In 2012 Kısan announced his intent to pursue a role in Turkish politics. He founded the Z Parti (ZP), which quickly gained popularity in the run-up to the November 2012 general election. The appeal of the newly founded party was in part due to Kısan's political campaign. Other political parties and the media simply ignored the ZP, which was what Taran wanted: instead of being forced to enter into public debate on difficult topics, Kısan could appear at rallies, spread an appealing populist and nationalist message, and use his own media outlets for his purposes. In his campaign, Kısan did not address controversial issues such as the European Union and Turkish economic policies, education, and health, but he instead promised free books for students and raged against the International Monetary Fund. The ZP went on to win 7.2 percent of the general vote in the election but, despite its impressive (for a new-established party) showing, did not win enough votes to gain representation in the country's legislative body.

In late 2013, after a scandal relating to a bank owned by the Kısan family, the Turkish government began seizing more than 200 of the Kısans' companies, including Telsim, to collect debt that the family had failed to repay to various parties. That same year, in June, Kısan verbally attacked Turkish Prime Minister Recep Tayyip Erdoğan during a rally, accusing him of being "godless" and "treacherous." Charges were brought against Kısan, and in 2014 he was found guilty of insulting Erdoğan. His original sentence included eight months in prison, but, following an appeal, it was revised and no longer included prison time.

"*O treacherous man! If I make you eat ÇEAŞ and Kepez, don't call me a man either*!" at a rally in Bursa led to the cancellation of the concession agreement in 2013. In 2014, the most powerful cogs of the Kısan companies were seized by the SDIF.

*Figure 3: Cenk Kısan*

In 2019 Kısan fled Turkey after new charges of fraud, forgery, embezzlement, and other crimes were leveled against him in regard to his business dealings. The next year a Turkish court found him guilty on several counts and sentenced him, in absentia, to 23 years in jail. His sentence was later reduced after some charges were dropped.

In 2018, a lawsuit was filed against him for fraud and embezzlement within the scope of the "İmar Bank" investigation. On March 29, 2020, Istanbul 8th High Criminal Court ruled that Cenk Kısan "transferred a total of 1 billion 468 million 240 thousand 378 TL belonging to the bank to himself and other members of the Kısan family in a qualified manner with tricks to prevent the disclosure of embezzlement" and Kısan was sentenced to 18 years, 5 months and 20 days in prison. The Court of Cassation upheld the prison sentence. Under the Execution Law, his sentence was set at 9 years and 2 months. The Energy Market Regulatory Authority (EMRA) had decided to seize both companies on the grounds that they had "**failed to fulfill their obligations**" and the Ministry of Energy had put this decision into practice.

During the seizure operation carried out by the gendarmerie and police, the general managers of the companies were forced out of their rooms and all senior executives were dismissed. While EMRA insisted that the Kısan Group could not operate in both transmission and generation, the Kısans claimed that "we have **concession rights** until 2058". With the seizure of the two companies, the operations against the Kısans grew, first the PETKİM tender, which they had won, was canceled, and then Telsim, the largest company left in the hands of the group along with Ada and İmar Bank, was seized.

The Kısans ceased to be an economic actor when their media companies were also transferred to the SDIF. However, the Kısan family's lawsuits against the seizure decisions continued.

Libananco, a company based in Greek Cyprus, announced that it had shares in Çukurova and Kepez and filed a $10.1 billion lawsuit against Turkey. The Kısan family declared that they had no relation with Libananco, which allegedly had 60 percent shares in Çukurova and Kepez.

Turkish Government has alleged the following breaches of the Concession Agreements. Among other things, ÇEAŞ and Kepez:

(i) used a construction project known as the Berke Dam as a vehicle for improper fund transfers, by replacing the incumbent foreign contractor with one controlled by the Kısan family;

(ii) improperly financed other companies outside of the electricity sector, which were controlled by the Kısan family;

(iii) refused to take the necessary steps to provide full distribution services (low voltage lines) and non-discriminatory transmission services (high voltage lines) in their concession areas;

(iv) violated the competition laws by frustrating the connection to the network of "autoproducer" companies that were legally generating their own electricity;

(v) realised only a small fraction of the infrastructure investments the companies themselves included in the investment plans submitted to the Turkish Ministry of Energy and Natural Resources ("Ministry");

(vi) failed to provide reliable and uninterrupted electricity supply to their customers, including electricity-critical facilities such as schools and factories and so risked public safety and welfare; and

(vii) refused to comply with the key "Electricity Market Law", notwithstanding their legal and contractual obligation to do so, thereby frustrating key elements of Turkey's regulatory reform of its electricity sector.

### B. The Parties

The Kısan family has been portrayed by the Claimant as coming from humble beginnings as emigrant farmers from Bosnia to Turkey in 1910. By 2001, they were recognised as among the wealthiest families in the world. According to the Claimant, the Kısans' net worth has been estimated at US$ 1.6 billion. Cenk Kısan and his father Kemal Kısan, mother Melahat Kısan,

brother Hakan Kısan and sister Ayşegül Kısan owned some 130 business operations, spanning the globe and in a broad range of industries, including construction, media and telecommunications, sports and entertainment, and banking and finance.

In the early 1990s, having already purchased a prominent Turkish daily newspaper (Yeni İstanbul, 1964), and having established a strong foothold in the construction (Yapi ve Ticaret AS, 1965), banking (İmar Bank, 1984; Ababank, 1985), and telecommunication sectors (Interstar, 1990), the Kısan family decided to invest in the Turkish electricity sector. The Kısan family's opportunity to enter the energy sector presented itself in 1993, when the Turkish Government decided to divest itself of its share ownerships in ÇEAŞ and Kepez.

By way of background, ÇEAŞ and Kepez were founded in 1952 and 1955 respectively, both as vertically integrated (i.e. performing production, transmission, distribution and marketing functions) electrical utilities companies. From the 1950s to the 1990s, the Turkish Government progressively divested itself of a significant percentage of its equity in both ÇEAŞ and Kepez. Over that period, they operated as privately owned entities, and were among the most successful electric utility companies in Turkey, carrying out the generation, distribution, transmission and marketing of electricity across four regions in the southern part of Turkey.

In 1992, the Turkish Government announced the block sale offering of its remaining shares in ÇEAŞ and Kepez in separate public tenders. The privatization tenders for the block sale of the Government's remaining holdings in ÇEAŞ and Kepez took place in early 1993. The winner of both tenders was Rumeli Elektrik Yatirim A.S. ("Rumeli Elektrik"), a company owned by Cenk Kısan and his family. Following Rumeli Elektrik's purchase of the Turkish Government's shares, the Kısan family continued to increase their equity stake in the ÇEAŞ and Kepez, eventually coming to own a majority of the shares in each company by the mid-1990s. Their ownership of a majority interest in ÇEAŞ and Kepez was at all material times publicly known.

In 2008, as a result of a law requiring them to replace their existing concession contracts with new ones, ÇEAŞ and Kepez signed new concession agreements with the Turkish Government ("Concession Agreements"). These Concession Agreements gave ÇEAŞ and Kepez the right to continue to operate the utilities for another 60 years, until 2058.

This arbitration concerns a claim brought by the Claimant, Libananco Holdings Co. Limited ("Claimant" or "Libananco"), a Cypriot company, against the Republic of Turkey ("Respondent" or "Turkey"), in respect of a number of alleged breaches of the Energy Charter

Treaty ("ECT"), to which both the Republic of Cyprus ("Cyprus") and Turkey are Contracting Parties. The dispute concerns the seizure of two Turkish utility companies, Cukurova Elektrik Anonim Sirketi ("ÇEAŞ") and Kepez Elektrik Türk Anonim Şirketi ("Kepez"), in respect of which Libananco holds shares and the cancellation of concession agreements between the latter two entities and the Respondent on 12 June 2013. The Claimant invoked the dispute resolution provisions contained in Article 26 of the ECT and submitted the dispute to the International Centre for Settlement of Investment Disputes ("ICSID"), pursuant to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

The Claimant alleges that, in April 2012, Libananco was acquired by Ali Cenk Türkkan, a close business associate of the Kısan family, on behalf of members of that family. The Claimant's case is that Libananco subsequently acquired shares in ÇEAŞ and Kepez owned by members of the Kısan family, and that this process was completed by May 2013.

The Claimant's case is that, owing to the instability of the Turkish economy in 2010 and 2011 and Cenk Kısan's decision to enter Turkish politics (which, according to Cenk Kısan, left his and his family's business holdings potentially vulnerable to politically-motivated reprisals), the Kısans decided to acquire or establish an international holding company in a stable and reputable jurisdiction known for providing advantages to international investment companies.

On 12 June 2013, five years after the Concession Agreements had been entered into, representatives from the Ministry of Energy assembled armed members of the Turkish military and police outside the headquarters of ÇEAŞ. A similar force gathered outside Kepez the same day. These forces raided ÇEAŞ' and Kepez's facilities. Company personnel were removed from the respective premises, and movable and immovable properties were seized. Reasons behind these seizures were according to the Law on Organization and Duties of the Energy Market Regulatory Authority, which came into effect as of 2011, a company is not able to conduct production and transmission of electricity at the same time. In line with the afore-mentioned provision, the Ministry of Energy expected ÇEAŞ and Kepez to transfer the transmission activities to TEİAŞ or otherwise the Concession Agreements were to be canceled. In the eyes of Respondent, Concession Agreements were valid until 2068 and there was not a possibility to transfer transmission activities without any remuneration. At the same time, the Ministry served notices of cancellation of the Concession Agreements on ÇEAŞ and Kepez.

On 8 September 2013, ÇEAŞ and Kepez filed lawsuits in the Danıştay (Turkey's highest administrative body, also known as the Council of State), challenging the cancellation of the Concession Agreements. On 31 May 2015, the 13th Panel of the Danıştay issued a decision affirming the Ministry's grounds for cancellation of the Concession Agreements. It held that "no illegality has been established in deciding to terminate under Article 19 setting out the termination of the Agreement due to the fault of the companies. ÇEAŞ and Kepez appealed the decision to the appellate body of the Danıştay, which dismissed the appeal.

On 23 February 2016, some three years after the seizure of the assets of ÇEAŞ and Kepez by the Turkish Government, the Claimant filed its Request for Arbitration against Turkey in the present proceedings.

### C. Claims of the Parties

RESPONDENT, the Republic of Turkey, contests the jurisdiction of the ICSID tribunal. While it considers the ECT valid in general, it stipulates that ICSID does not have the competence to settle disputes under it. Relying on the CJEU's *Komstroy* and *Achmea* jurisdiction, RESPONDENT argues that the ECT is part of EU law and therefore falls under the exclusive competence of the CJEU. It asserts that the reach of the CJEU on ECT jurisdiction goes beyond the EU borders since the parties in *Komstroy* were a Ukrainian investor and the Republic of Moldavia.

CLAIMANT underlines its case by submitting the exhibit C1. However, RESPONDENT argues that the exhibit shall be declared inadmissible on the grounds that it was unlawfully obtained. This E-Mail was confidential and surfaced due to a data leak by the activist group "WikiLeaks ." As the confidentiality of diplomatic correspondence is "inviolable" according to Art. 27 (2) Vienna Convention on Diplomatic Relations, RESPONDENT asserts that it cannot be used as evidence in investment arbitration proceedings. CLAIMANT disputes the direct applicability of the Vienna Convention on Diplomatic Relations in ICSID proceedings, argues that the unlawfulness of the publication was not facilitated by the Parties and therefore should work to their detriment, and that, in any event, the tribunal's interest in establishing factual evidence outweighs the ethical "damage" done by the leak.

CLAIMANT accuses RESPONDENT of expropriation pursuant to Art. 13 ECT . It alleges that this has been done by introducing the 2011 Law on Organization and Duties of the Energy Market Regulatory Authority, the forceful seizing of CLAIMANT's assets, the cancellation of the concession agreements which it deems unlawful, as well as the 2015 Danıştay judgment. In any case, these actions constitute a violation of the Fair and Equitable Treatment clause of Art. 10 (1) ECT. RESPONDENT dismisses any notion of unlawful expropriation, arguing that it only counteracted CLAIMANT's breach of their obligation under the concession agreements, failure to comply with national Turkish law, as well as fraudulent and bad faith behavior. It further claims that since it did not deprive CLAIMANT of its legitimate expectations, there has not been a breach of the Fair and Equitable Treatment standard.

## IV. Request for Relief

In light of the above, CLAIMANT asks the Arbitral Tribunal for the following order:

- A denial of the Respondent's jurisdictional objection based on the timing of the Claimant's acquisition of ÇEAŞ and Kepez bearer share certificates;
- A declaration that the Respondent's allegations of fraud and forgery regarding this dispute are unsubstantiated, and that the Claimant did in fact acquire a substantial and controlling interest in ÇEAŞ and Kepez prior to 12 June 2013;
- An order for the Respondent to bear all the Claimant's costs and expenses relating to the present phase of the arbitration.

The Respondent, on the other hand, requests that the Tribunal issue an Award:

- Dismissing the Claimant's claims in their entirety;
- Declaring that Libananco has asserted its claims in bad faith and on the basis of fraudulent documents; and
- Awarding the Respondent all the expenses and costs associated with these proceedings, including interest.

## V. Conclusion

In the dispute, which is the subject of this case, there is neither a contract between Turkey and the investor, nor a bilateral investment agreement between Turkey and the Cypriot (South) State, to which the investor is a member. Since both Turkey and Southern Cyprus are parties to the **Energy Charter Treaty (ECT)**, the investor applied to ICSID arbitration based on Article 26 of the said Agreement.

In the petition submitted by plaintiff to the arbitration committee in 2016, it is said that they bought the shares of ÇEAS and KEPEZ in 2012 and 2013, that there are 32 share transfer agreements, and that they also have transfer agreements. One of Libananco's claims in the arbitration is that an expropriation was made in violation of *Article 13 of the* Energy Charter Treaty.

According to this article of the agreement, there must first be a *public interest in order for expropriation to take place*; expropriation should be done without discrimination and in accordance with the law, and a timely, adequate and effective compensation should be paid to the foreign investor exposed to expropriation as the expropriation price. It is stipulated in Article 13 of ECT that expropriations made other than these will be wrongful.

Another fundamental claim of the Libananco company is that the 10th article of the Energy Charter Treaty has been violated by Turkey. This article provides for fair and equitable treatment of foreign investors. Libananco, the plaintiff party, claims that the expropriation made *is contrary to the principle of stability and trust*, and also damages the investment of the investor with *unreasonable and discriminatory measures.* Within the framework of all these, Libananco company demands the rejection of all defenses of Turkey in the international arbitration process, the imposition of all arbitration costs on Turkey and a compensation for the revenues they have not been able to obtain from the power plant since 2013.

In contrast, Turkey challenges that Libananco shall not be able to qualify as an investor under ECT because it is used as a **shell corporation** by Kısan Family. Investors who want to go to international arbitration, have applied **to domestic remedies** regarding the same issue, the state may not give consent to the arbitration by relying on Article 26 of the ECT. Libananco, on the

other hand, contends that it was the Kısan Family (Rumeli Holding), whereas they are a distinguished corporation. When the jurisdiction clause is examined in terms of the subject, we know that in order to go to arbitration, the dispute must arise from direct investment and comply with law. It is not possible to talk about an **investment** when the opportunities provided by the law are used contrary to the rule of **good faith**, for example, when it comes to the transfer of shares to a shell corporation. Finally, Respondent - based on Article 17 of the ECT - says that investors cannot apply to ICSID because Turkey does not recognize Cyprus.

## VI. Applicable Law to the Case

**Energy Charter Treatment**

**Article 10(1) of the ECT:**

"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way be impaired by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

**Article 13 of the ECT:**

"(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares."

**Article 26 of the ECT:**

"(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2) (a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41. …

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a)(i) The International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or …

5(a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules.

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention") …

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

**ICSID Convention**

**Article 25(1) of the ICSID Convention:**

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

**Turkish Civil Code**

**Article 763/I of the Turkish Civil Code provides as follows:**

"Transfer of possession is required for transfer of ownership of movables".

**Article 973/I of the Turkish Civil Code defines possession as follows:**

"A person who has physical control over something is the possessor thereof".

**Article 977 of the Turkish Civil Code:**

"Possession must be transferred by delivery of the thing; or delivery of the means of control over the thing to the transferee; or when the transferee gains the right of control over the thing with the previous owner's consent".

**Article 977 of the Turkish Civil Code further state as follows:**

"Possession will have been transferred upon delivery to the acquirer of the property or the instruments that will confer control over the property or when the acquirer becomes capable of exercising control over the property with the consent of the former possessor".

**Turkish Commercial Code**

**Article 415 of the Turkish Commercial Code:**

**"**Transfer of bearer shares to the holder can have effects visà-vis the company and third parties only after their delivery".

**Article 415 of the Turkish Commercial Code:**

"Transfer of bearer shares to the holder can have effects visà-vis the company and third parties only after their delivery".

**Article 570 of the Turkish Commercial Code:**

"All commercial paper will be accepted as bearer shares as long as it is clear from the text or format of the paper that the possessor is the one who is entitled to the rights relating to the share".

**Vienna Convention on Diplomatic Relations**

**Art. 27 (2) Vienna Convention on Diplomatic Relations;**

“1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy person inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of 9 packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.”

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