

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

IN THE PROCEEDING BETWEEN

LIBANANCO HOLDINGS CO. LIMITED
(CLAIMANT)

AND

REPUBLIC OF TURKEY
(RESPONDENT)

(ICSID CASE No. ARB/06/8)

DECISION ON PRELIMINARY ISSUES
DATED: 23 JUNE 2008

Members of the Tribunal:

Mr. Michael Hwang S.C., *President*
Mr. Henri C. Alvarez Q.C., *Arbitrator*
Sir Franklin Berman Q.C., *Arbitrator*

Secretary of the Tribunal:

Mr. Ucheora Onwuamaegbu

Representing the Claimant:

Mr. Stuart H. Newberger
Mr. Dana Contratto
Mr. Alexandre de Gramont
Mr. Arif H. Ali
Ms. Traci L. Rodriguez and
Ms. M. Brinkley Tappan
Crowell & Moring LLP
Washington, D.C., U.S.A.
and
Mr. Achilleas L. Demetriades
Lellos P. Demetriades Law Office
Nicosia, Cyprus

Representing the Respondent:

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

I. Procedural History	2
II. The parties' positions with respect to the Respondent's first request for production of documents	11
II.1 Respondent's First Request for the Production of Documents filed 18 December 2007.....	11
II.2 Claimant's Response to Respondent's First Request for Production of Documents filed 11 February 2008.....	11
III. Summary of parties' positions with respect to Respondent's security for costs Application.....	12
III. 1 Respondent's Security for Costs Application filed 18 December 2007	12
III.2 Claimant's Response to the Respondent's Request for Security for costs filed 11 February 2008	13
III.3 Respondent's Reply in Support of its Request for Security for Costs.....	14
III.4 Libananco's response to the Respondent's Reply in support of the Respondent's Request for Security for Costs	15
IV. Respondent's Suspension Application in Letters dated 18 December 2007, 19 February 2008 and 26 March 2008	15
V. Parties' position with respect to Claimant's Application for 'summary' relief.....	16
V.1 The Claimant's position as reflected in its letter dated 29 February 2008 ('the surveillance application').....	16
V.2 Respondent's Response to Claimant's Application 19 March 2008.....	18
V.3 Further responses by parties to Claimant's surveillance application.....	18
V.4 Claimant's summary filed 11 April 2008	19
V.5 Respondent's summary of position filed 11 April 2008.....	20
VI. Respondent's Request for Safe-Keeping of Shares dated 19 March 2008	22
VII. Discussion.....	23
VII. 1 Security for Costs	24
VII. 2 Production and Examination of Share Certificates	26
VII. 3 'Summary' judgment.....	31

I. PROCEDURAL HISTORY

1. On 23 February 2006, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received from Libananco Holdings Co. Limited (“the Claimant” or “Libananco”), a company incorporated in Cyprus, a request for arbitration, dated 23 February 2006 against the Republic of Turkey (“Turkey”, “the Republic” or the “Respondent”).
2. On the same day, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“the Institution Rules”), acknowledged receipt of the request and transmitted a copy to the Republic of Turkey and to its Embassy in Washington, D.C.
3. The request, as supplemented by the Claimant’s letter of 13 March 2006, was registered by the Centre on 19 March 2006, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Acting Secretary-General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
4. By letter dated 30 May 2006, the parties informed the Centre that they had agreed that the Claimant was to appoint an arbitrator on or before 18 June 2006; that the Respondent would appoint an arbitrator on or before 18 July 2006, and the parties would attempt to agree on an appointee for President of the Tribunal by 17 August 2006, failing which the appointment would be made by the Chairman of the ICSID Administrative Council.

5. Within the agreed deadlines, the Claimant appointed Mr. Henri Alvarez, a Canadian national, as arbitrator, and the Respondent appointed Sir Franklin Berman Q.C., a national of the United Kingdom, as arbitrator. The Parties having failed to reach agreement as to the President of the Tribunal, by letter dated 21 August 2006, the Claimant requested that the Chairman of the ICSID Administrative Council appoint the President of the Tribunal. On 11 December 2006, after consulting the parties, the Chairman of the ICSID Administrative Council appointed Mr. Michael Hwang S.C., a national of Singapore, as the third and presiding arbitrator.

6. All three arbitrators having accepted their appointments, the Centre, by a letter of 18 December 2006, informed the Parties of the constitution of the Tribunal, consisting of Mr. Michael Hwang S.C., Mr. Henri C. Alvarez, and Sir Franklin Berman Q.C., and that the proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID Arbitration Rules.

7. The first session of the Tribunal was, by agreement of the parties, held on 12 February 2007, at the offices of Respondent's counsel, Freshfields Bruckhaus Deringer LLP, in New York, the United States of America. Present at the session were:

Members of the Tribunal:

1. Mr. Michael Hwang S.C., President
2. Mr. Henri C. Alvarez, Arbitrator
3. Sir Franklin Berman Q.C., Arbitrator (*participating via videoconference*)

ICSID Secretariat:

4. Mr. Ucheora Onwuamaegbu, Secretary of the Tribunal

Attending on behalf of the Claimant:

5. Mr. Stuart Newberger, Crowell & Moring LLP
6. Mr. Dana Contratto, Crowell & Moring LLP

7. Mr. Alex de Gramont, Crowell & Moring LLP
8. Ms. Brinkley Tappan, Crowell & Moring LLP
9. Mr. Arif H. Ali, Crowell & Moring LLP
10. Mr. Achilleas Demetriades, FIPRA Cyprus

Attending on behalf of the Respondent:

11. Ms. Lucy Reed, Freshfields Bruckhaus Deringer LLP
12. Mr. Jan Paulsson, Freshfields Bruckhaus Deringer LLP
13. Mr. Brian King, Freshfields Bruckhaus Deringer LLP
14. Ms. Lucy Martinez, Freshfields Bruckhaus Deringer LLP
15. Mr. Aydin Coşar, Coşar Avukatlık Bürosu
16. Ms. Utku Coşar, Coşar Avukatlık Bürosu
17. Mr. Sami Demirbilek, Undersecretary, Ministry of Energy and Natural Resources, Republic of Turkey
18. Ms. Zeynep Bekdik, Interpreter, Enterkon
19. Ms. Hande Güner, Interpreter, Enterkon

Court-Reporter:

20. Mr. David Kasdan, B&B Reporters, Washington, D.C.

8. Various aspects of procedure were determined at the session, including a schedule for the submission of written pleadings.

9. On 1 August 2007, the Claimant filed a request for extension of time, from 13 August 2007 until 12 October 2007, to file its Memorial on Jurisdiction and Merits. It stated that its central expert witness had withdrawn from participation in this case following publication in a Turkish newspaper of an article indicating that persons associated with the Claimant, including its counsel, were under surveillance by Turkish security forces and reporting on a meeting between Claimant's counsel and one of Claimant's witnesses, and that the additional time was

needed to prepare the statement of the replacement expert.¹ By agreement of the parties, the Tribunal granted the requested extension and allowed the Respondent the same amount of additional time to file its own submission.

10. Also on 1 August 2007, the Claimant filed its First Request for the Production of Documents, requesting the Tribunal to direct the Respondent to produce documents related to surveillance by the Respondent of the Claimant's potential witnesses and counsel.² In its request, the Claimant submitted that the documents requested were relevant and material in that surveillance of counsel in the preparation of the Claimant's case violated generally accepted principles regarding the privilege which attaches to attorney-client communications and affected the Claimant's ability to prepare and present its case. The Claimant also submitted that it was entitled to know the extent to which its privileges and protections may have been violated and which of its communications had been subjected to surveillance.

11. On 17 September 2007, at the invitation of the Tribunal, the Respondent filed its Response to the Claimant's First Request for Production of Documents. In its response, the Respondent advised that enquiries had been made of the relevant government departments (the Ministry of Justice, the Ministry of Interior and the Prime Ministry) and that all three entities had affirmed that no surveillance of the Claimant's counsel, or related to the present arbitration, had been (or was being) carried out.

¹ Claimant's Request for Extension of Time at 2, 1 Aug. 2007.

² Claimant's First Request for Production of Documents at 1-4, 1 Aug. 2007.

12. Having requested and obtained leave to do so, the Claimant filed a reply on 19 November 2007. In its reply, the Claimant questioned the Respondent's statement that no surveillance of Claimant's counsel or related to the arbitration had been or was being carried out. However, the Claimant went on to state that it recognized that, from a practical perspective, the Tribunal could not order the Respondent to produce documents it said did not exist. The Claimant reserved its right to reinstate its Request and to request provisional measures ordering the Respondent to cease and desist from conducting surveillance should the Claimant discover that surveillance was being or had been carried out.

13. Following the Claimant's Reply, the Tribunal, in a letter of 3 December 2007 to the parties, observed that the Claimant had effectively withdrawn its Request for the Production of Documents, and reserved costs in relation to the Request to be assessed together with the costs of the arbitration.

14. The Claimant's Memorial on Jurisdiction and Merits was filed on 12 October 2007.

15. On 18 December 2007, the Respondent filed its First Request for the Production of Documents, as well as a Request for Security for Costs, accompanied by a letter requesting suspension of the proceeding, production of documents, and provisional measures.³ In the Request for Production of Documents, the Respondent requested production by the Claimant of documents relating to Libananco's acquisition and ownership of CEAS and Kepez shares, Libananco's actions as shareholder and Libananco's business activities. In the Request for Security for Costs, the Respondent applied for an order that the Claimant post security adequate

³ The requests and the letter were filed with the Centre on 19 Dec. 2007.

to guarantee payment of any award of legal fees and other costs in the Republic's favor, in the amount of US\$5 million, or alternatively such other amount as the Tribunal might deem appropriate.

16. By letter dated 2 January 2008, the Tribunal requested the Claimant to file a reply to the Respondent's applications of 18 December 2007, by Friday, 11 January 2008. Subsequently, the Claimant requested an extension until 29 February 2007 to file the reply, and was granted an extension until 11 February 2008.

17. In its reply filed on 11 February 2008, the Claimant asked that the Tribunal deny the Respondent's document production request and Request for Security for Costs. It requested in turn, if Article 47 so permitted, an order requiring the Respondent to post security for costs.

18. On 25 February 2008, the Respondent filed a Reply to the Claimant's submission and in further support of its Request for Security for Costs.

19. By letter of 29 February 2008, the Claimant submitted an application in which it informed the Tribunal that it "recently has learned of Turkish court orders requested and obtained by Respondent in 2007 and 2008, expressly to conduct intercepts of emails and MSN instant messages not only sent by and to persons associated with Claimant, but also approximately 1,000 privileged, private and confidential emails sent by, to and between Claimant's counsel of record in connection with this arbitration over the past year."⁴ The Claimant requested the Tribunal "to rectify the otherwise irreparable effect of Respondent's

⁴ Claimant's letter to the Tribunal on 1, 29 Feb. 2008.

actions on Claimant's ability to present its case . . . by determining its jurisdiction under the ICSID Convention and the Energy Charter Treaty . . . and finding Respondent liable on the merits for its multiple breaches of the ECT and the protections and guarantees available to [the Claimant] under international and Turkish law,"⁵ and by awarding costs associated with this arbitration "in Claimant's favour as a sanction for Respondent's bad faith."⁶

20. The Respondent filed an initial reply on 3 March 2008 and, as directed by the Tribunal, a full reply on 19 March 2008. Thereafter, the Tribunal fixed 28 and 29 April 2008, in Washington, D.C., for an oral hearing of the various applications of the parties.

21. In its 19 March 2008 reply, the Respondent requested that the Tribunal deny the Claimant's application and order the Claimant "to deposit its original shares certificates of ÇEAŞ and Kepez for safekeeping."⁷ The Respondent also requested that it be awarded its costs for responding to Claimant's Application.⁸

22. On 25 March 2008, the Claimant filed a reply to the Respondent's Response, attaching new documents regarding surveillance, and maintaining that physical deposit of the requested share certificates was unnecessary.

⁵ *Id.* at 2.

⁶ *Id.* See also, *id.* at 33.

⁷ Respondent Response to Claimant's Application of 29 February 2008, at 25, 19 March 2008.

⁸ *Id.* at 26.

23. On 31 March 2008, the Tribunal suspended the deadlines for the filing of the Respondent's counter-memorial on jurisdiction and merits and ruled that it would issue a fresh procedural timetable after fully reviewing the parties' submissions on the applications before it.

24. On 7 April 2008, the Respondent filed a Rejoinder Regarding the Claimant's Application of 29 February 2008, and restated the request for relief sought in its Response of 19 March 2008.

25. On 11 April 2008, as directed by the Tribunal, the parties filed summaries of their respective positions on the Claimant's application of 29 February 2008, the Respondent's application of 18 December 2007 for security for costs, and the Respondent's application of 18 December 2007 for the production of documents and the share certificates.

26. The hearing on the parties' applications was held on 28 and 29 April 2008, at the Headquarters of the World Bank in Washington, D.C. Present at the session were:

Members of the Tribunal:

1. Mr. Michael Hwang S.C., President
2. Mr. Henri C. Alvarez Q.C., Arbitrator
3. Sir Franklin Berman Q.C., Arbitrator

ICSID Secretariat:

4. Mr. Ucheora Onwuamaegbu, Secretary of the Tribunal
5. Mr. Marat Umerov, Consultant

Attending on behalf of the Claimant:

6. Mr. Stuart Newberger, Crowell & Moring LLP
7. Mr. Dana Contratto, Crowell & Moring LLP
8. Mr. Baiju Vasani, Crowell & Moring LLP
9. Ms. Staci Gellman, Crowell & Moring LLP

10. Mr. Clifton Elgarten, Crowell & Moring LLP
11. Ms. Maria Gritsenko, Crowell & Moring LLP
12. Professor Thomas Wälde, Consultant
13. Dr. Selahattin Sakarya, Claimant's Representative

Attending on behalf of the Respondent:

14. Ms. Lucy Reed, Freshfields Bruckhaus Deringer LLP
15. Mr. D. Brian King, Freshfields Bruckhaus Deringer LLP
16. Ms. Ginger Hancock, Freshfields Bruckhaus Deringer LLP
17. Mr. James Freda, Freshfields Bruckhaus Deringer LLP
18. Mr. Selahattin Çimen, Ministry of Energy and Natural Resources
19. Mr. Mustafa Çetin, Ministry of Energy and Natural Resources
20. Mr. Aydın Coşar, Coşar Avukatlık Bürosu
21. Ms. Utku Coşar, Coşar Avukatlık Bürosu
22. Mr. Alper Arslan, Coşar Avukatlık Bürosu
23. Ms. Elizabeth DeLuca, Coşar Avukatlık Bürosu
24. Ms. Hande Güner, Interpreter, Enterkon
25. Ms. Zeynep Bekdik, Interpreter, Enterkon

Court-Reporter:

26. Mr. David Kasdan, B&B Reporters

27. Following the hearing, Members of the Tribunal deliberated and, on 1 May 2008, communicated to the parties its decisions on the different applications pending the issuance of a reasoned decision which is set out herein.

II. THE PARTIES' POSITIONS WITH RESPECT TO THE RESPONDENT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

II.1 Respondent's First Request for the Production of Documents filed 18 December 2007

28. The Republic requests voluntary production of documents by Libananco, alternatively an order by the Tribunal, pursuant to Article 43(a) of the ICSID Convention and Rule 34(2) of the ICSID Arbitration Rules relating to Libananco's acquisition and ownership of CEAS and Kepez shares, Libananco's actions as shareholder and Libananco's business activities.

29. The position of the Republic is as follows.

(a) Share ownership is in doubt given the competing claims in other (ICSID) proceedings adding up to ca. 200% of the shares issued by CEAS and Kepez.

(b) Libananco did not meet its promise to produce evidence of share ownership in its Memorial.

(c) There may not be an investment (Art. 25(1) of the ICSID Convention / Art. 1(6) ECT).

II.2 Claimant's Response to Respondent's First Request for Production of Documents filed 11 February 2008

30. The Claimant's response is as follows.

- (a) The Republic should not be allowed to make document requests until it has filed its objection to jurisdiction. Relevance of the requested documents cannot be assessed without a formal jurisdictional objection.
- (b) Libananco has produced sufficient evidence to establish a prima facie case, which remains unchallenged.
- (c) The Republic has not shown that it does not have the requested documents in its possession or custody (Art. 3(3)(c) IBA Rules).
- (d) Fairness requires that the Republic should not receive discovery on the issue of jurisdiction until it has actually made an objection.

III. SUMMARY OF PARTIES' POSITIONS WITH RESPECT TO RESPONDENT'S SECURITY FOR COSTS APPLICATION

III. 1 Respondent's Security for Costs Application filed 18 December 2007

31. The Republic applies for an order that Libananco post U.S. \$5 million as security for costs in the form of an irrevocable letter of credit or bank guarantee as a provisional measure under Article 47 of the ICSID Convention and Rule 47 of the ICSID Arbitration Rules.

32. The position of the Republic is as follows.

- (a) Security for costs would provisionally preserve the Republic's right to seek and enforce an award for costs, if it prevails in this arbitration. The hypothetical nature of the right is insufficient to refuse the request.

- (b) Libananco's share ownership is doubtful.
- (c) Libananco is a shell company without assets and has provided no undertaking to pay costs or evidence of its ability to do so.
- (d) Libananco's claim is financed by third parties.
- (e) A costs award against Libananco would be difficult to enforce owing to its seat in Cyprus.

III.2 Claimant's Response to the Respondent's Request for Security for costs filed 11 February 2008

33. The Claimant's response is as follows.
- (a) Security for costs is not ordinarily granted in ICSID proceedings and no exceptional circumstances exist.
 - (b) A costs award is too hypothetical: there must be an existing right to be protected.
 - (c) The allegations regarding Libananco's inability to pay are not specific enough to support a security for costs order.

(d) Security for costs would entail unfairly pre-judging the merits and would affect Libananco's ability to present its case.

(e) Generally, parties in ICSID proceedings bear their own costs.

(f) Libananco's lack of resources is the direct result of the Republic's alleged expropriation.

(g) Any limitations on the Republic to enforce an award in Cyprus are self-imposed and political in nature.

III.3 Respondent's Reply in Support of its Request for Security for Costs

34. The Respondent states that the Tribunal should be able to recommend in certain circumstances the deposit of a guarantee aimed at protecting the Respondent against eventual non-payment of costs when the claimant is financially incapable.

35. The Respondent states that this is an exceptional case in which security for costs should be allowed because the Claimant is a shell company, deliberately incorporated in Cyprus to make it difficult to enforce any award, with a wealthy third party ('the Third Party') funding the arbitration with no intention to pay any costs awards ('arbitral hit and run'). The Respondent argues that the Third Party and members of the Third Party have shown themselves to be fraudsters.

36. Even Libananco has impliedly treated itself as synonymous with the Third Party since it takes the Prime Minister of Turkey's threat that '[a member of the Third Party] will be left empty

handed' to mean that the Respondent would not honour any damages award made in favour of the Claimant.

37. Libananco has never filed any annual returns in Cyprus showing that it has any assets nor has it shown that it has adequate assets

III.4 Libananco's response to the Respondent's Reply in support of the Respondent's Request for Security for Costs

38. Libananco takes the position that, in the event the Tribunal determined that security for costs could be awarded, then it was the Republic which should post security for costs since it had repeatedly stated that it would not honour an award against it in this arbitration

IV. RESPONDENT'S SUSPENSION APPLICATION IN LETTERS DATED 18 DECEMBER 2007, 19 FEBRUARY 2008 AND 26 MARCH 2008

39. The Respondent requests that the "*Tribunal suspend the proceedings in this arbitration until the Claimant has proven that it legitimately owns the CEAS and Kepez stock percentage it claims*".

40. Based on the document production application, the Republic intends to physically inspect the share certificates to determine their authenticity and the circumstances of their transfer. Once the Republic has had an appropriate time to examine all of the share certificates and related documents in the competing cases and clarify the ownership situation of CEAS and Kepez, it will provide a report to the Tribunal, which would be the basis for lifting the suspension.

41. The Claimant opposes any suspension of the proceedings.

**V. PARTIES' POSITION WITH RESPECT TO CLAIMANT'S APPLICATION FOR
'SUMMARY' RELIEF**

**V.1 The Claimant's position as reflected in its letter dated 29 February 2008 ('the
surveillance application')**

42. The Claimant first initiated its application for a unique form of relief (loosely termed 'summary' relief or 'summary judgment') in a letter dated 29 February 2008. As its position was later refined closer to the hearing in its summary of its position submitted on April 11, 2008, the latter will be taken as a supplement to the Claimant's application in its letter of 29 February 2008.

43. The Claimant's position is that the Respondent's conduct towards Claimant, its Counsel and its witnesses has made it impossible – indeed unsafe - to continue the prosecution of this case in its present form. The Respondent, through court-ordered intercepts, has had the opportunity to review nearly 2,000 privileged and/or confidential emails.

44. The Claimant's position in its letter of 29 February 2008 is as follows.

(a) The Respondent falsely represented to the Tribunal and to the Claimant that it has not conducted and is not conducting surveillance of the Claimant's counsel in this arbitration.

(b) The Claimant has irrefutable evidence of the Respondent's surveillance conducted by the Chief Public Prosecutor of Sisli ('the Public Prosecutor of Sisli' or 'the

Sisli Prosecutor’) of privileged and confidential emails sent to and received from Claimant’s counsel throughout 2007 and even in 2008.

(c) The Respondent has violated the Energy Charter Treaty and the ICSID Convention by failing to arbitrate in good faith.

(i) The ICSID Convention provides immunity from legal process for legal counsel in the exercise of their functions, including their correspondence in the course of the arbitration.

(ii) Almost all of the emails accessed by Respondent were legally privileged.

(iii) The Respondent has created an untenable situation in this arbitration by abusing its sovereign powers to gain an unfair procedural advantage.

(d) The Tribunal has a fundamental duty to ensure procedural fairness of the arbitration and is required to restore a meaningful level of fairness to these proceedings by:

(i) determining its jurisdiction over the parties’ dispute and find against the Respondent on the merits of the record before it;⁹ and

⁹ Subsequently, the Claimant clarified that it was asking the Tribunal to make a decision on the merits on the record as it currently stands.

(ii) awarding costs against the Respondent.

(e) Any lesser remedies ordered by the Tribunal would not be sufficient to redress the irreparable harm caused by the Respondent's conduct.

V.2 Respondent's Response to Claimant's Application 19 March 2008

45. The Respondent acknowledges the authenticity of the court orders but states that the investigation was and is not directed at the Libananco arbitration or Libananco's counsel but rather was for investigation of the laundering of the \$16 billion that was lost in the Imar Bank fraud.

46. The investigation was conducted by police officers and kept confidential and no documents or information relating to this arbitration were provided to Respondent's counsel nor the Ministry of Energy and Natural Resources which has instructed Respondent's counsel in this arbitration. The Claimant has not been prejudiced in any way by the unrelated surveillance. The Respondent also says that the relief sought by the Claimant would deprive it of the right to a fair opportunity to present its case.

V.3 Further responses by parties to Claimant's surveillance application

47. It is not necessary to repeat the detailed comments and arguments of the Parties which were conveniently summarized by way of written summaries submitted on 11 April 2008 following the Tribunal's directions.

V.4 Claimant's summary filed 11 April 2008

48. The Claimant alleges in its summary of position filed 11 April 2008 as follows.

(a) It has undoubtedly been prejudiced as the Sisli Prosecutor has reviewed hundreds upon hundreds of emails sent to, by and between the Claimant's counsel during the course of this arbitration. The Sisli Prosecutor is a part of the Turkish Government, performs functions of a governmental nature, and is controlled by the Turkish Government. It is not "independent" of the rest of the Turkish Government. As a result, since it is clear under international law that the Republic of Turkey is a unified whole, it is the Respondent who has reviewed the Claimant's counsels' emails and it is that same Respondent that is a party to this arbitration.

(b) The Respondent intended to prejudice, or knowingly prejudiced, the Claimant's rights in this arbitration by commencing the surveillance.

(c) Regardless of the Respondent's intention, the effect of the Respondent's surveillance has been that the Claimant has been prejudiced in this arbitration.

(d) The exclusion of the Respondent from this phase of the arbitration process is the only means for the tribunal to equalize the playing field. This is because the Tribunal must ensure that whatever action it takes is commensurate to remedy the harm that has been caused to the equality of arms between the parties. Where, as here, the harm caused by Respondent has been so absolute, the remedy too must

be absolute. Otherwise, the equality will not have been restored and the Tribunal will not have fulfilled its mandate.

V.5 Respondent's summary of position filed 11 April 2008

49. The Respondent's position is as follows.

(a) The criminal investigation is not and has never been aimed at the Libananco arbitration, much less at Libananco's counsel or potential witnesses for Libananco in the arbitration.

(b) The statements in the Chief Public Prosecutor's Letter of 6 September 2007 were accurate, namely that:

(i) there was no *“technical surveillance conducted by our Chief Public Prosecutor's Office concerning any counsel in the ICSID case or any counsel representing either the Respondent or the Claimant in this case”*;
and

(ii) *“there is no ... interception of communication carried out by our Chief Public Prosecutor's Office in relation to the Parties or the counsel in the above-mentioned case.”*

(c) The Chief Public Prosecutor of Sisli was interested only in communications that contained references to asset transfers by the Third Party and its associates and

attempts by the Third Party's associate to defraud the Public. Only in late September 2007 were two of Claimant's counsel identified and set out as users of the intercepted email addresses. The surveillance in support of this investigation was terminated on 14 March 2008 after it was disclosed by the Claimant, which alerted at least certain suspects.

(d) The Claimant cannot demonstrate prejudice to its case.

(i) Under Turkish law and the court confidentiality order, the Prosecutor's Office cannot disclose evidence or surveillance results to any other entity or agency in the Turkish government. This includes the Ministry of Energy and Natural Resources, which instructs the Republic's arbitration counsel.

(ii) The Prosecutor's Office destroys e-mails irrelevant to the investigation, for example, any arbitration-related documents unconnected to possible third party asset transfers.

(iii) The Republic's arbitration counsel have not received or used any intercepts or other surveillance results from the Prosecutor's Office in preparing any submission to the Tribunal (other than those filed in connection with the Application).

(iv) The inference in the Republic's Security for Costs Application that Libananco was a shell and that this arbitration was being funded by the Third Party came from Libananco's own evidence submitted with its Memorial, and common sense and logic, not from the results of surveillance.

(e) There has been no threat levelled against Claimant's counsel for its actions in this proceeding.

(f) The relief the Claimant seeks is unprecedented and should be denied.

VI. RESPONDENT'S REQUEST FOR SAFE-KEEPING OF SHARES DATED 19 MARCH 2008

50. In its Response to Claimant's Application of 29 February 2008, the Republic requests that the Claimant deposit its share certificates in CEAS/Kepez for safe-keeping by the Tribunal.

51. The position of the Republic is as follows.

(a) The share certificates are crucial to determining jurisdiction.

(b) Given the competing claims in separate arbitration proceedings and the nature of the shares as bearer shares, steps must be taken prevent that the existence of an

investment in each arbitration is proven by using the same set of share certificates several times.

52. The Claimant has no objections to physical deposit of share certificates but maintains that there is no need to go to such trouble and expense as there are thousands of share certificates. (see Claimant's letter dated 25 March 2008).

VII. DISCUSSION

53. The Tribunal is thus confronted, at this preliminary stage in its procedure – that is to say, before it has seen the terms either of the Respondent's substantive defence to the Applicant's claims or of any preliminary objection that the Respondent may lodge to jurisdiction etc. – with the following competing applications; –

from the Claimant: (i) for an order granting Claimant a form of summary judgment, if not on its substantive claims in full then at least on the Tribunal's jurisdiction to hear its substantive claims;

(ii) for the inclusion in the procedure referred to under (iii) below of the shares in CEAS and Kepez alleged to have been removed from Claimant's offices at the time of the alleged expropriation of these companies;

from the Respondent: (iii) for an order for the production of the original share certificates in CEAS and Kepez said to be the foundation of the Request for Arbitration, so as to permit them to be examined under

controlled conditions by the Respondent's agents and representatives;¹⁰

(iv) for an order for security for costs.

54. Because these applications, and in particular the factual circumstances that lie behind them, raise troubling and important issues, the implications of which may well go beyond the confines of this arbitration and impinge on the integrity of the ICSID arbitral process more generally, the Tribunal felt it necessary to schedule an oral hearing at the seat of the arbitration. That allowed it to hear full argument from both sides, and to pose questions of its own. Having done so, the Tribunal now thinks it desirable to set out in a reasoned Decision the basis for its Orders below (the terms of which have already been conveyed to the Parties shortly after the conclusion of the oral hearing).

55. It will be more convenient to take item (iv) first, followed by items (ii) & (iii) together, and then item (i).

VII. 1 Security for Costs

56. This is the most straightforward of the applications, and can be dealt with briefly.

¹⁰ It should simply be noted, for precision, that this request is in fact the first of a lengthy list which together comprise the Respondent's First Request for the Production of Documents; but the remaining items on that list do not, in the Tribunal's view, raise special issues, and they are dealt with en bloc in the orders below.

57. The Tribunal is not aware of any established practice on the part of ICSID Tribunals in favour of granting security for costs either to a Claimant or to a Respondent. Asked during the oral hearing for its most favourable authority supporting the granting of security for costs, even by analogy, counsel for the Respondent was in some difficulty to name anything specific. In these circumstances, the Tribunal takes the view that it would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all.
58. The Tribunal does not believe that the present is such a case. The Respondent bases its request on the claim that the Claimant, Libananco, is a shell company without assets of its own, and is therefore unlikely to be able to meet an eventual award of costs against it should either its jurisdictional or its merits claims be rejected by the Tribunal in due course.
59. The Tribunal does not find that argument convincing. The state of Libananco's assets is not at this stage the subject of proof, but of mere assertion and counter-assertion. More important to the mind of the Tribunal is that, far from this being an unusual exception, it is in practice closer to the norm that the entity appearing as an ICSID Claimant is an investment vehicle created or adapted specially for the purpose of the investment transaction that has in the meanwhile become the subject of dispute. Nor, moreover, is it in fact standard practice for ICSID Tribunals invariably to make an award of costs against a losing Party. There is no express reference to such an

award in the Convention itself, and Rule 47(1)(j) of the Arbitration Rules is cast in broad and flexible terms which in its application entails an exercise of discretion by the individual tribunal in the light of the particular circumstances of the dispute before it. The Tribunal can see no good reason to prejudge at this stage in these proceedings how it might in due course wish to exercise that discretion, the more so as it has not yet (see paragraph 53 above) been apprised of the terms of the Respondent's arguments on either jurisdiction or merits.

60. The application for security for costs is therefore rejected.

VII. 2 Production and Examination of Share Certificates

61. There are a number of unusual factors underlying the claims brought by Libananco against Turkey in these proceedings, which centre round the alleged expropriation of two Turkish power utilities, CEAS and Kepez. The investment which Libananco asserts has been subjected to treatment contrary to the standards laid down in the ECT is precisely its shareholdings in CEAS and Kepez. The value which Libananco puts upon these investment assets is of the order of USD 10 billion, a very substantial sum indeed by any reckoning.
62. Turkey for its part – while not yet having taken a definitive position on the substance of the allegations concerning its treatment of CEAS and Kepez – casts doubt on whether Libananco is qualified to bring the Request for Arbitration at all, and wishes even at this early stage to put the genuineness of Libananco's ownership stake in CEAS and Kepez to a form of prior proof, on the basis that a defect in this respect

might provide the ground for it to lodge a preliminary objection, presumably either to the Tribunal's jurisdiction or at least to the admissibility of Libananco's claims.

63. The Tribunal does not have to decide whether the Respondent is entitled as of right to a form of pre-pleading discovery of this kind (taking into account in particular, as recorded in the Minutes of the First Session, its decision that each Party would file a Memorial on Jurisdiction and Merits, and that it would then be for the Tribunal to decide whether to divide the proceedings into two phases), since Libananco has consistently indicated that it is in fact willing to submit its share documents to inspection under suitable safeguards. As expressed during the oral hearing (Day 2, pp. 322 ff.), Libananco put forward an eight-point proposal involving the appointment of an escrow agent, but conditioned that proposal on the Respondent's agreement to bring into the inspection arrangement on the same footing the share certificates alleged to be in its possession (see fuller description in [53(ii)] above). For its part, the Respondent (Day 2, pp. 341 ff.) did not take express issue with the eight points as such, but drew the line at including in the arrangement shares physically held in Turkey. This was on the basis (substantively) that there was no claim before the Tribunal which depended on these shares, and (procedurally) that the shares which appeared to correspond to the request were in the custody of a bailee under the order of a Turkish Court.
64. That the share certificates lie at the very heart of these arbitral proceedings is clear. Their crucial characteristic for present purposes is, however, that they are bearer

shares. In other words, ownership over them passes by mere physical transfer, and dealings in them are not recorded in any formal trading register. Moreover, they represent (see paragraph 61 above) an asset both of enormous value and of some fragility. In those circumstances, it is hardly surprising that the arrangements for their preservation and inspection are a matter requiring the greatest care, and the Tribunal has approached the matter accordingly.

65. Building, therefore, on Libananco's eight-point proposal (paragraph 63 above), § 3.2 of the Orders below is designed to ensure that Libananco may safely offer up for inspection the share certificates it holds, and Turkey may inspect them strictly for the purposes of the present arbitration, in confidence that these valuable documents will be protected from harm, and that nothing in the process of delivery and inspection under this Order will affect in any way the substantive rights of either Party in connection with this arbitration. In particular: (a) although the escrow agent will be appointed by the Claimant (and will not be an agent of the Tribunal or of ICSID), the agent will take instructions exclusively from the Tribunal on anything that has to do with the holding of the share certificates; (b) the Tribunal assumes that, although the present somewhat special state of affairs was not expressly in the contemplation of the drafters of the ICSID Convention, the escrow agent will share in the immunities accorded by Article 22 of the Convention (read together with Article 21) in respect of any matter connected with the holding of the share certificates; (c) the specific provisions of § 3.2.6 are designed to reassure each Party that the other Party will not

make use of the movement of the share certificates into and out of escrow to gain for itself any extraneous advantage.

66. These dispositions respond to the first prayer in the Respondent's First Request to Produce. The Tribunal sees no need to make them conditional on Turkey's including in the inspection arrangements the share certificates in CEAS and Kepez alleged by Libananco to have been seized by the Turkish Government (paragraph 63 above). In the first place, the Tribunal is not in receipt of any formal request for document disclosure to that effect from Libananco under the provisions of the Minutes of the Tribunal's First Session. In the second place, the Tribunal cannot at first blush see how Libananco's standing as Claimant in this arbitration is affected one way or the other by the existence or ownership of these shareholdings; on Libananco's case as set out in its Memorial on Merits and Jurisdiction of 12 October 2007, the shareholdings which it asserts are in its present possession would suffice for the establishment of standing, and such claims as there might be to further shares would go primarily to quantum (if its claims were to be upheld) not to the substance of Libananco's case itself.
67. That said, the Tribunal feels called upon to utter a further word of explanation, and of caution, as to why it has granted (to the extent specified) this prayer by Turkey.
68. The argument marshalled by Turkey, as Respondent, is essentially that it entertains justifiable doubts as to the genuineness of Libananco's shareholdings. In its original

version, foreshadowed at the time of the Tribunal's First Session, this argument took the form of a generalized scepticism as to whether Libananco does in fact own the interests in CEAS and Kepez which it claims. More recently, however, the argument has developed into something more nuanced, namely that Turkey has reason to believe that the shareholdings, or at least parts of them, are being treated by more than one claimant entity as their own property, on the basis of which two other ICSID arbitrations have been commenced, the result being that, taken cumulatively, well over 100% of the shares in both CEAS and Kepez are being claimed in these various proceedings. As part of this line of argument, Turkey (the Respondent of course in all three arbitrations) has made the Tribunal privy to certain documents in the other two sets of proceedings.

69. Libananco answers, simply, that it can prove its own shareholdings and is willing to do so, and that the (corporate) claimants in the other two arbitrations, and the interests lying behind them, have nothing to do with it.

70. It may be recalled that the Minutes of the First Session of the Tribunal record that the Claimant was to file a memorial on jurisdiction and merits, but not quantum, within six months and that the Respondent was to file its counter-memorial on jurisdiction and merits within a further six months thereafter. As there indicated, that decision was taken by the Tribunal after deliberation, following extensive oral submissions by the parties on their differing positions on the schedule for the submission of the pleadings. After extensions granted by the Tribunal, the time limit in question duly

expired in April 2008. In these circumstances, the Tribunal shares to an extent the frustration expressed by Libananco that it remains in the dark as to what case it will have to meet, be it a straightforward defence on the merits, a preliminary objection as to jurisdiction or related matters, or a combination of the two. The Tribunal would have been in a better position to deal with the applications covered by the present Decision had it already been in possession of the formal lines of argument adopted by both Parties. The Tribunal, like any other arbitral tribunal in a similar position, could not allow its process to be used as the cover for a mere fishing expedition launched in the hope of uncovering material to serve as the foundation for an argument (preliminary or substantive) not yet formally advanced before it.

71. That said, it appears to the Tribunal that, in the no doubt somewhat unusual circumstances with which it is confronted, there is sufficient reason to take advantage of the cooperative willingness of the Claimant and grant the measure requested. The Tribunal does so, however, expressly in the interests of moving the arbitral process forward efficiently and also expeditiously. § 3.2 of the Order is therefore to be seen as closely linked to §§ 2.1 and 2.2: the Respondent is to file its Counter-Memorial on jurisdiction and merits by 1 July 2008, and will have a strictly limited period thereafter to amend this pleading in the light of the results of its inspection of the documents.

VII. 3 ‘Summary’ judgment

72. The Tribunal uses the term ‘summary judgment’ as shorthand for the exceptional remedies which Libananco asked the Tribunal to grant it in these circumstances. This

is far and away the most difficult, and most challenging, of the applications which the Tribunal has to determine. The background circumstances are essentially as follows. From the very outset of the proceedings the Tribunal has been faced by a repeated series of heated exchanges between the Parties, impugning on the one hand the standing and bona fides of the persons allegedly standing behind the Claimant and, on the other, the motives and methods of the Turkish authorities in pursuing their many differences with such persons. By the time of its First Request for Production of Documents, on 1 August 2007, this war of words had matured into a specific allegation brought to the Tribunal by Libananco that the Turkish authorities were holding Libananco's legal representatives and potential witnesses under surveillance and Claimant's counsel had informed the Tribunal that the surveillance had led to the Claimant's Turkish legal expert (who had worked with Claimant's counsel for many months) refusing to testify owing to fear of Government reprisal and harassment. In a written submission to the Tribunal in September 2007, Turkey responded with a formal denial of these allegations, while drawing attention to criminal investigations in train in Turkey into financial crime on a massive scale, in which investigations certain persons connected with the claims before the Tribunal were or might be implicated. The Respondent's formal denial was based in part on assurances from the relevant Government Ministries and in part on assurances received by the latter from the prosecuting authorities. On the basis of the assurances given by the Respondent, the Claimant withdrew its application since, if the Government denied the existence of any relevant documents, there was no point in pursuing the application. However, it reserved its right to bring the application back on, and

understandably did so. On 29 February 2008, Libananco seized the Tribunal with a more precise and pointed set of allegations, backed up by documentary evidence in the form of Orders sealed by a Turkish Court, to the effect that there had been (notwithstanding the formal denial just mentioned) a sustained campaign of interception of the e-mail communications of Libananco's counsel in this arbitration. As a result, it was alleged, the Respondent had had access to literally hundreds, or even thousands, of counsel's communications with their clients, contacts and potential witnesses in Turkey; this would have included access to documentary attachments covering the preparation and development of Libananco's case as Claimant, with irrevocable prejudice to its position in this arbitration. Libananco's counsel told the Tribunal that up to 2,000 of the communications that might have been intercepted were privileged and/or confidential.

73. While Libananco's relief claimed started out as a request to exclude the Respondent from the rest of the proceedings, by the time of the hearing this position had been refined substantially. In the end, the Claimant was seeking to exclude the Respondent from the "current phase of the arbitral process". It did not request a summary decision in the true sense. Rather, it accepted that the Tribunal would have to make a decision in terms of both jurisdiction and the merits, and maintained that it should do so on the basis of the evidence before it without receiving any further evidence from either party.

74. These are allegations which, supported as they were (as indicated above) by prima facie documentary evidence, the Tribunal was bound to treat with the utmost seriousness. It called upon Turkey to state without delay whether it acknowledged the authenticity of the Court orders produced by Libananco and, if so, on what basis Claimant's counsel had been included in the request put to the Court by the Public Prosecutor to grant the interception orders. It should be said at once that Respondent's counsel, to their credit, had immediately recognized the seriousness of the matter (which no doubt they saw as potentially touching their own professional ethics and responsibilities) and had already informed the Tribunal of their own motion that they were asking their client to have the matter looked into urgently.
75. Respondent's answer, received by the Tribunal in writing and reiterated in oral argument at the hearing, was essentially in four parts: (a) that there had never been any intention to conduct surveillance, covert or overt, of Claimant's preparations for this arbitration, nor had that in fact been done; (b) that Turkey, as a sovereign State, had an undeniable entitlement to conduct investigation into crime, particularly serious crime, within its jurisdiction, which could neither be affected, nor brought to a halt, by the existence in parallel of an ICSID arbitration; (c) that the earlier assurances by the Public Prosecutor were given in good faith, and reflected the situation at the time they were given; and (d) that the e-mail addresses to be intercepted represented a comprehensive list of those thought to have been used for communication with a particular suspect, but that the appearance *pro tempore* of counsels' addresses on that list did not imply that actual communications to or from those addresses would be

read, still less passed to those responsible for the conduct of Turkey's case in this arbitration. In reinforcement of that last point, counsel for Turkey gave what the Tribunal took to be formal personal assurances that they had neither been offered nor seen any such material. These assurances were qualified at the hearing when counsel disclosed that, in a meeting with the Public Prosecutor, a number of English language documents were reviewed to assist the Prosecutor in determining which documents were privileged and should be destroyed. A number of these, including a draft of the Claimant's Memorial in this case, bore headings that indicated they were privileged. Counsel did not read the documents in question and advised the Prosecutor that they were privileged and should be destroyed.

76. In sum, Turkey denies that, given these explanations, any actual prejudice could have been caused to Libananco in the arbitration. In response to this, Libananco makes the obvious retort that, once interception is admitted, the way in which intercepted material was handled becomes a matter of pure conjecture, and that none of Respondent's assurances touches the possibility that privileged material might have been seen by Turkish officials and might then have played an unspoken part in the instructions given by them to the in-house or outside lawyers conducting Turkey's case. The Tribunal might add that some of the documents attached to the reports from the Public Prosecutor and included in Respondent's submissions to the Tribunal clearly and without any doubt were capable of causing prejudice of the kind Libananco alleges, and that some other such documents were included in a redacted form (presumably designed to counter any supposition of prejudice) though it

remained unclear even at the end of the hearing by whom or on what basis the redaction had been undertaken.

77. Libananco's counsel then add the further point that the references in Respondent's written and oral submissions to unauthorized receipt and onward transmission of the interception orders of the Turkish Court being in itself a serious criminal offence which was under investigation, coupled with repeated polemical references over an extended period to Claimant's counsel in person, look very much like a standing threat to intimidate them from representing their client freely. Respondent's counsel had no real answer to this, other than that some of the Respondent's submissions might have been incautiously phrased.

78. These allegations and counter-allegations strike at principles which lie at the very heart of the ICSID arbitral process, and the Tribunal is bound to approach them accordingly. Among the principles affected are: basic procedural fairness, respect for confidentiality and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well. For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention. It requires no further recital by the Tribunal to establish either that these are indeed fundamental principles, or why they are. Nor does the

Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).

79. In approaching the matter in the light of the above, the Tribunal does not question the assurances given on behalf of Turkey, and recorded in paragraph 75 above. Extra weight was given to them by the fact that they were delivered by highly reputable counsel of international standing, conscious of their own professional responsibilities. The Tribunal takes it as a given, for example, that a sovereign State does indeed have a right and duty to pursue the commission of serious crime, and that that right and duty cannot be affected by the existence of an ICSID arbitration against it, or put into commission by the fact that an ICSID arbitration is begun against it. That proposition is expressly reflected in the Orders below. The question is, however, whether that basic proposition, on its own, is enough. The Tribunal recalls the well-known saying, very frequently repeated in legal discussion, that it is not enough that justice should be done, it must also manifestly be seen to be done. From that it must follow that, even if Turkey can be excused for not previously having taken steps to

ensure the strict separation of its criminal investigations, on the one hand, from the prosecution of this arbitration, on the other, that will not be sufficient for the future. The right and duty to investigate crime, accepted by the Tribunal above, cannot mean that the investigative power may be exercised without regard to other rights and duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration. To its credit, counsel for the Respondent did not challenge the essential principle that privilege must be respected even in the midst of a criminal investigation, as shown by counsel for the Respondent's account of her meeting with the Public Prosecutor of Sisli [see Transcript of Hearing on Various Applications dated Monday, April 28, 2008 at page 170 to 174]. When the Respondent asks the Tribunal in its written submissions to accept that "[t]he prosecutors' understanding, interest and patience for this offshore international arbitration, which falls within the remit of the Ministry of Energy and Natural Resources and concerns the termination of administrative energy concession contracts for fault several years ago, are understandably limited", the Tribunal must decline to do so. The coin has two sides, and both must be respected and put in harmony with one another. That is accordingly the purpose of the rule of separation laid down in §1.2 of the Orders below. But that rule must be seen together with the specific provisions in §§1.1.1-1.1.5, which serve the purpose not merely of itemising the reassurances that counsel for an ICSID claimant is entitled to rely on, but of stimulating the Respondent in this arbitration to set up specific machinery to ensure that the rule of separation is made good in practice. With that, justice will also be seen to be done.

80. The question arose, and was hotly debated between the Parties at the hearing, whether Libananco had in fact suffered prejudice in this arbitration by the interceptions undertaken under the Court orders. This was in turn linked to the argument as to whether the Claimant could hypothetically be entitled to the extreme form of relief which it was asking the Tribunal to grant (a summary judgment of one kind or another). The Tribunal notes that the question of possible prejudice is largely a matter of allegation and counter-allegation; it has not been proved or disproved, and indeed may not even be capable of proof, given the secret and clandestine nature of the interference alleged (though see paragraph 76 *in fine* above). The Tribunal does not believe that these are matters that have to be decided now: irrespective of whether the Tribunal is or is not endowed with powers as far-reaching as Libananco wishes it to assert, Libananco's entitlement to future protection for its agents, counsel and witnesses is clearly not conditional on proof that it has actually been prejudiced in the conduct of its case. As to the future, the Tribunal prefers to leave the matter open, relying expressly on both Parties to do their utmost to give effect, in good faith, to the present Orders. §§1.1.6 & 1.1.7 foreshadow as of now the exclusion from the future proceedings in this Arbitration of any privileged documents or information or evidence derived therefrom. The operation of that exclusion will naturally depend on proof of privilege in whatever manner seems to be appropriate in accordance with the particular circumstances, once it is claimed that protected material has in fact been submitted. If, as the arbitration progresses, it turns out that the Respondent has used, in any way, privileged or confidential information obtained during the surveillance, the Claimant will be at liberty to bring an appropriate application to the

Tribunal. The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises, the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information.

81. The Tribunal has given serious consideration to the Claimant's refined request for relief described at paragraph 73. However, in the present circumstances, the Tribunal does not believe it is warranted. With the Orders below, read in the light of the reasons above, the Tribunal believes that such orders are an adequate response to the Claimant's request and expects the proceedings in this arbitration now to be back on track, and relies upon both Parties and their legal representatives to carry them forward expeditiously and in good order.

82. For the reasons set out above, the Tribunal made the following orders in its letter to the Parties on 1 May 2008.

“1. ORDERS ON CLAIMANT’S APPLICATION OF FEBRUARY 29, 2008

1.1.1) Subject to paragraph 1.2 below, the Respondent must not intercept or record communications between legal counsel for the Claimant on the one hand and representatives of the Claimant and other persons in Turkey on the other hand.

1.1.2) The Respondent must permit legal counsel for the Claimant to have access, free from surveillance, to any person within Turkey for the purposes of preparing or conducting Claimant's case in this arbitration.

1.1.3) The Respondent must within 30 days of this order obtain a statement from the Public Prosecutor of Sisli that (subject to paragraph 1.2 below) all emails (including attachments) and communications intercepted by or under the direction of the Public Prosecutor which in any way relate to this arbitration have been or will within a period of 30 days be destroyed.

1.1.4) The Respondent must take steps to ensure that its criminal investigators and others having access to or knowledge of intercepted emails and other communications falling within paragraph 1.1.1 above do not provide copies or communicate the contents of (or information deriving from) such documents to any persons having any role in the defence of this arbitration.

1.1.5) To facilitate the application of Articles 21 and 22 of the ICSID Convention, the Claimant may provide the Respondent (and copied to the Tribunal) with a list of persons to whom the Claimant considers that Article 22 (read with Article 21) applies in this arbitration.

1.1.6) All privileged documents and information which have been tendered or disclosed to the Tribunal in connection with the Claimant's application of February, 29, 2008 will be excluded from the evidence to be received in this arbitration.

1.1.7) Any privileged documents or information which may be introduced into evidence in future proceedings of this arbitration will be excluded as well as any evidence derived from possession of privileged documents or information.

1.2 The Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in Turkey. The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration.

2. ORDERS AS TO THE COUNTER-MEMORIAL

2.1. The Respondent must file and serve its Counter Memorial on Jurisdiction and Merits by July 1, 2008.

2.2. The Tribunal grants the Respondent liberty to amend or supplement its Counter Memorial within 4 weeks after completion of its inspection of the Share Certificates provided for in paragraph 3.2. below.

3. ORDERS AS TO DOCUMENT PRODUCTION

3.1. The Claimant must produce copies of the documents requested under Prayers 2, 5, 7(a), 10, 12, 15 and 19 of Respondent's First Request to Produce dated December 18, 2007 ("the First Request") by June 2, 2008.

3.2. As to Prayer 1 of the First Request, the Tribunal orders as follows.

3.2.1.) By July 1, 2008, the Claimant must deliver to an Escrow Agent ("the Escrow Agent") the originals of the documents requested under Prayer 1 of the First Request ("the Share Certificates").

3.2.2.) The Escrow Agent will be appointed by the Claimant subject to the approval of the Tribunal after the Tribunal has heard the views of the Respondent, but must hold the Share Certificates to the order of the Tribunal and must take instructions only from the Tribunal. The place of custody will be determined by the Escrow Agent, subject to the approval of the Tribunal, after the Tribunal has heard the views of the parties.

3.2.3.) The Claimant will in the first instance pay the costs of delivery of the Share Certificates to the Escrow Agent, without prejudice to the Tribunal's eventual decision on the apportionment of the costs of the proceeding.

3.2.4.) The fees and expenses of the Escrow Agent must in the first instance be paid by the Claimant but the Respondent must reimburse half of such fees and

expenses to the Claimant promptly on demand.

3.2.5.) After the Escrow Agent has taken custody of the Share Certificates, the Respondent will be at liberty to employ forensic experts (at its expense) to examine the Share Certificates, but such examination must not destroy or damage the Share Certificates in any way. The Claimant must be given adequate advance notice of such examination so as to enable it to appoint its own forensic experts to monitor such examination when it is conducted by the Respondent's forensic experts. Such examination must be completed within 3 months after the appointment of the Escrow Agent. The Escrow Agent must not without the written consent of the Tribunal permit the Share Certificates (or any of them) to leave the place of custody designated by the Escrow Agent and approved by the Tribunal.

3.2.6.) While the Share Certificates are in the custody of the Escrow Agent, or in transit to and from such custody, neither party may seize or attach the Share Certificates (or any of them) or attempt to do so by any means whatsoever including but not limited to any governmental, administrative, legal or extra-legal measure, or otherwise interfere with the custodial arrangements set out in this Order.

3.2.7.) Upon completion of the forensic examination referred to in 3.2.5 above, the Tribunal will make further orders concerning the custody of the Share Certificates.

3.2.8) Either party may apply to the Tribunal for modification of the above orders 3.2.1) to 3.2.7), or for supplemental orders, if there is difficulty in the implementation of any of the above orders.

3.3. The Tribunal grants liberty to the Respondent to renew its request for orders under the remaining prayers of the First Request after service of its Counter Memorial.

3.4. The Tribunal makes no order on the Claimant's First Request for Production of Documents dated August 1, 2007.

3.5. The Tribunal grants liberty to the Claimant to renew its request after appropriate amendment of its Request for Arbitration and/or Memorial.

4. SECURITY FOR COSTS

The Tribunal makes no order on the Respondent's Application for Security for Costs dated December 18, 2008.

5. COSTS

The costs of and incidental to all the applications are reserved."

signed

Mr. Michael Hwang
President of the Tribunal

signed

Mr. Henri C. Alvarez
Arbitrator

signed

Sir Franklin Berman Q.C.
Arbitrator