

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT
DISPUTES**

WASHINGTON, D.C.

ICSID Case No. ARB/11/28

Tulip Real Estate Investment and Development Netherlands B.V.

(Claimant)

and

Republic of Turkey

(Respondent)

AWARD

Members of the Tribunal

Dr Gavan Griffith QC (President)

Mr Michael Evan Jaffe

Professor Dr Rolf Knieper

Secretary to the Tribunal

Ms Martina Polasek

Legal Assistant to the Tribunal

Ms Eugenia Levine

Date of dispatch to the Parties: 10 March 2014

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I. THE PARTIES

1. The Claimant is Tulip Real Estate and Development B.V. (**Tulip** or **Claimant**), a wholly-owned subsidiary of A. van Herk Holding B.V., itself a company within the Van Herk Group, ultimately owned by Rotterdam-based Dutch investor Adrianus Van Herk.¹
2. The Claimant is represented by Mr Stuart H. Newberger, Mr George D Ruttinger, Mr James J. Saulino, Ms Joanna Slott Coyne, Ms Derya Tokdemir, Ms Staci Gellman and Mr John Laird of Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington D.C., 20004 USA and Ms Meriam Alrashid, Ms Claire Stockford and Mr Gordon McAllister of Crowell & Moring LLP, 11 Pilgrim Street, London, EC4V 6RN, United Kingdom.
3. The Respondent is the Republic of Turkey (**Turkey** or **Respondent**).
4. The Respondent is represented by Mr Michael E. Schneider, Mr Matthias Scherer, Mr Joachim Knoll, Mr Christophe Guibert de Bruet and Ms Laura Halonen of Lalive, 35 rue de la Mairie, CH-1207 Geneva, Switzerland; Mr Robert C. Sentner, Mr Harry P. Trueheart and Ms Kathryn Martinez of Nixon Peabody LLP, 437 Madison Avenue, New York NY 10022 USA; and Mr M Rasim Kuseyri, Mr Ferdi Karoglu and Ms Simge Sertoglu Akyüz of Kusyeri Hukuk Bürosu, Via Tower, Nergiz Sok. No. 7/49, Sogutozu 06520, Yenimahalle/Ankara, Turkey.

¹ Organization Chart (Exhibit CE-37).

II. PROCEDURAL HISTORY

5. On 11 October 2011, the Claimant submitted a Request for Arbitration (the **Request**) against the Respondent to the International Centre for the Settlement of Investment Disputes (**ICSID** or the **Centre**). The Claimant sought resolution of the dispute with the Respondent under the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated 27 March 1986 (the **BIT**).²
6. On 12 October 2011, pursuant to Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the **Institution Rules**), the Centre acknowledged receipt of the Request and transmitted a copy of the Request to the Respondent.
7. On 28 October 2011, the Secretary-General of ICSID (the **Secretary-General**) registered the Claimant's Request for Arbitration pursuant to Art 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the **ICSID Convention**) as Case No. ARB/11/28. The Secretary-General invited the Parties to inform the Centre of any agreed provisions as to the number of arbitrators and the method of their appointment.
8. On 16 November 2011, the Respondent proposed a method for constituting the Tribunal pursuant to Rule 2(1)(b) of the Rules of Procedure for Arbitration Proceedings (the **Arbitration Rules**).
9. On 1 December 2011, the Claimant appointed Mr Michael Evan Jaffe, a national of the United States, as arbitrator in accordance with Art 37 of the ICSID Convention.
10. By letter dated 1 December 2011, the Centre informed the Parties that it understood that no agreement had been reached on the method of constituting the Tribunal and that it would act on the appointment as soon as the method was established.
11. On 27 December 2011, the Claimant informed ICSID that it opted for the formula provided for in Art 37(2)(b) of the ICSID Convention for the constitution of the

² BIT (Exhibit C-1).

Tribunal, *i.e.*, that the Tribunal would consist of three arbitrators, with each party appointing an arbitrator, and the Parties agreeing on the appointment of the third, the President of the Tribunal.

12. On 28 December 2011, the Secretary-General informed the Parties that the Tribunal would be constituted in accordance with Art 37(2)(b) of the Convention and Rule 2(3) of the Arbitration Rules. The Secretary-General also invited the Claimant, in accordance with Rules 3(1)(a)(i) and (ii) of the Arbitration Rules, to propose a person to serve as the President of the Tribunal, and invited the Respondent either to concur with that proposal or to propose another person as the President, and to appoint another arbitrator.
13. On 10 January 2012, ICSID informed the Parties that Mr Jaffe accepted his appointment as arbitrator.
14. On 25 January 2012, the Respondent appointed Professor Dr Rolf Knieper, a national of Germany, and informed the Centre that the parties were cooperating to agree upon the President of the Tribunal.
15. On 30 January 2012, ICSID informed the Parties that Professor Dr Knieper accepted his appointment as arbitrator.
16. On 23 March 2012, the Respondent informed ICSID that the Parties agreed on the appointment of Dr Gavan Griffith QC, a national of Australia, as the President of the Tribunal.
17. On 26 March 2012, the Claimant confirmed that the Parties agreed to appoint Dr Griffith as President of the Tribunal.
18. On 28 March 2012, the Secretary-General notified the Parties that the Tribunal was deemed to be constituted in accordance with Art 37(2)(b) of the ICSID Convention and under Rule 6 of the Arbitration Rules. The Secretary-General also informed the Parties that Ms Martina Polasek of ICSID would serve as Secretary to the Tribunal.
19. On 30 April 2012, the Tribunal held its First Session in Paris, France.

20. Following the First Session, on 22 May 2012, the President of the Tribunal issued Procedural Order No. 1. Among other things, Procedural Order No. 1 reflected the Parties' agreement that the proceeding would be conducted in accordance with the Arbitration Rules of 2006 and that the place of the proceedings would be Paris, France. Procedural Order No.1 also set out a timetable for the filing of the Parties' written submissions.
21. On 15 August 2012, in accordance with Procedural Order No. 1, the Claimant filed its Memorial on Jurisdiction, Merits and Damages. Together with its Memorial, the Claimant filed witness statements of Mr Meyer Benitah, Mr Erik Esveld and Mr Huseyin Burak Erten, and an expert report on the quantum of the Claimant's alleged damages from Dr José Alberro.
22. On 12 October 2012, in accordance with Procedural Order No. 1, the Respondent filed its Request for Bifurcation, applying for the following three objections to jurisdiction to be heard as preliminary questions:
- (1) That the Claimant's claims do not arise out of the BIT and are, rather, claims in contract to be determined by the Turkish municipal courts.
 - (2) Alternatively, that any BIT claims are premature and inadmissible pending the resolution of the contract claims in the Turkish municipal courts.
 - (3) That the negotiation period set out in Article 8(2) of the BIT was not complied with and that the dispute is therefore either outside the jurisdiction of the Tribunal or inadmissible.
23. On 16 October 2012, the Tribunal invited the Claimant to submit its observations on the Respondent's Request for Bifurcation by 26 October 2012.
24. On 26 October 2012, the Claimant filed its Reply to the Request for Bifurcation.
25. On 2 November 2012, pursuant to Art 41(2) of the ICSID Convention, the Tribunal issued a Decision on the Respondent's Request for Bifurcation. The Tribunal determined to deal solely with the Respondent's third objection concerning compliance with Art 8(2) of the BIT as a preliminary question. The Tribunal rejected

the Respondent's application to suspend the proceeding on the merits and made procedural directions for the disposition of the bifurcated issue (the **Bifurcated Jurisdictional Issue**).

26. On 21 November 2012, the Claimant filed its Memorial on Compliance with Art 8(2), accompanied by the second witness statement of Mr Meyer Benitah and the expert opinion of Professor Rudolf Dolzer.
27. On 14 December 2012, the Respondent filed its Counter-Memorial on Compliance with Art 8(2) of the BIT.
28. On 27 December 2012, the Claimant filed its Reply on Compliance with Art 8(2).
29. On 28 January 2013, the Tribunal held a hearing in Paris and heard oral arguments from the Parties' representatives on the preliminary issue of compliance with Art 8(2) of the BIT.
30. On 15 February 2013, the Respondent submitted its Counter-Memorial on Jurisdiction, Merits and Damages, accompanied by the witness statements of Mr Ertain Yetim, Mr Ibrahim Keskin, Ms Hicran Cakmak and Mr Ali Seydi Karaoglu, as well as the expert report of Messrs Nicolas Barsalou and Erik van Duivenvoorde on the quantum of alleged damages and the preliminary report of Messrs Hervé de Trogoff and Chris Ives of Accuracy on construction delay.
31. On 5 March 2013, the Tribunal issued its Decision on the Bifurcated Jurisdictional Issue, determining that there had been compliance with Art 8(2) of the BIT and that the Tribunal had jurisdiction to proceed to hear the next phase of the arbitral proceeding. The Decision makes integral part of this Award.
32. On 15 April 2013, the Claimant submitted its Reply on Jurisdiction, Merits and Damages, together with the third witness statement of Mr Meyer Benitah, the second witness statement of Mr Erik Esveld, the second witness statement of Mr Huseyin Burak Erten, as well as a second expert report of Dr José Alberro, an expert report from Mr John Anderson concerning construction delay and an expert opinion of Professor Metin Günday on issues of Turkish administrative law.

33. On 15 June 2013, the Respondent submitted its Rejoinder on Jurisdiction, Merits and Damages, accompanied by the second witness statement of Mr Ibrahim Keskin, the witness statement of Mr Ekim Alptekin, the witness statement of Mr Enver Bulut, as well as the second expert report of Messrs Nicholas Barsalou and Erik van Duijvenvoorde, the supplemental report of Messrs Hervé de Trogoff and Chris Ives on construction delay and the legal opinion of Professor Ender Ethem Atay on issues of Turkish administrative law.
34. On 9 July 2013, the Tribunal invited the Parties to participate in a pre-hearing conference and requested that the Parties make submissions on certain procedural issues to be determined by the Tribunal in connection with the hearing on the merits (the **Hearing**) and remaining jurisdictional issues.
35. On 15 July 2013, the Tribunal circulated an agenda for the pre-hearing conference to the Parties.
36. On 16 July 2013, at 9.00 am Washington D.C. time, the Tribunal held a pre-hearing conference with the Parties by telephone.
37. Following the pre-hearing conference, on July 19, 2013, the Tribunal issued Procedural Order No. 2. Among other matters, Procedural Order No. 2 confirmed that the Hearing would take place at the World Bank Conference Centre in Paris between 23 and 27 September 2013 and 30 September and 2 October 2013, and set out procedural directions for the Hearing. Procedural Order No. 2 also directed, following an application by the Claimant and in accordance with Rule 34(2)(a) of the Arbitration Rules, that a witness, Mr Erdogan Bayraktar (at the time a Minister in the Turkish Government) be called for examination at the Hearing.
38. On 26 July 2013, with the agreement of the Parties, the Tribunal appointed Ms Eugenia Levine as the Legal Assistant to the Tribunal.
39. By letter dated 29 July 2013, the Respondent confirmed that Mr Bayraktar would be available to give evidence in person. Following an exchange of correspondence between the Parties and the Tribunal regarding the format of Mr Bayraktar's evidence, on 2 August 2013, the President of the Tribunal issued Procedural Order

No. 3, which provided directions for the taking of Mr Bayraktar's evidence at the Hearing.

40. On 23 August 2013, pursuant to the direction in Procedural Order No. 2, the Respondent submitted, on behalf of both Parties, the joint reports of the expert witnesses on issues of alleged construction delay, quantum of damages and Turkish administrative law.
41. By letter dated 2 September 2013, pursuant to the direction in Procedural Order No. 3, the Claimant submitted to the Tribunal a list of proposed subject matters and issues for the examination of Mr Bayraktar, as well as a witness examination file including seven new exhibits described by the Claimant as relevant to the issues in dispute.
42. Following an invitation from the Tribunal, on 5 September 2013, the Respondent submitted its response to the Claimant's proposed subject matters for examination of Mr Bayraktar, objecting to certain topics and documents for examination.
43. On 8 September 2013, the Tribunal issued Procedural Order No. 4, which provided direction for the examination of Mr Bayraktar on the topics proposed by the Claimant and required the Parties to consult with respect to the admissibility of any new exhibits bearing directly on the subject-matter of the dispute.
44. Following the direction of the Tribunal, the Parties exchanged views with respect to the admissibility of new exhibits.
45. On 16 September 2013, pursuant to the direction in Procedural Order No. 2, the Parties submitted their respective skeleton arguments.
46. On 17 September 2013, the Claimant sought leave to admit additional new exhibits. By letter of the same date, the Respondent objected to the admission of these additional exhibits and protested the manner in which the Claimant had made its application. On 18 September 2013, the Claimant submitted comments in response to the Respondent's letter of 17 September 2013.

47. On 18 September 2013, the Tribunal issued Procedural Order No. 5, which set limits on the Claimant's right to introduce new exhibits into the record or to use such exhibits for the purposes of examining Mr Bayraktar.
48. The Hearing was held from 23 September to 27 September and 30 September to 2 October 2013 at the World Bank Conference Centre in Paris, France.
49. In attendance at the hearing, on behalf of the Tribunal, were: Dr Griffith QC (President), Mr Jaffe and Professor Knieper, as well as Ms Martina Polasek (Tribunal Secretary) and Ms Eugenia Levine (Legal Assistant to the Tribunal); also present were Mr Trevor McGowan (English-language Court Reporter), and Ms Zeynep Bekdik, Ms Ahu Latifoğlu Doğan and Ms Verda Kivrak (Interpreters).
50. In attendance on behalf of the Claimant were Mr Stuart H Newberger, Mr George D Ruttinger, Ms Claire Stockford, Ms Meriam Alrashid, Mr James J. Saulino, Ms Joanna Slott, Ms Derya Tokdemir, Ms Staci Gellman and Mr John Laird of Crowell & Moring LLP, Mr Meyer Benitah (party representative and witness), Messrs Burak Erten and Erik Esveld (witnesses), Mr John Anders, Dr José Alberro and Professor Metin Günday (expert witnesses), and Mr Stephen Health (Berkeley Research Group) and Ms Elif Merve Gulec (Assistant to Professor Günday).
51. In attendance on behalf of the Respondent were Messrs Michael E. Schneider, Joachim Knoll, Christophe Guibert de Bruet, Alptug Tokeser and Ms Juliette Richard (Lalive), Messrs Mehmet Rasim Kuseyr and Ferdi Karoglu and Ms Simge Sertoglu Akyüz (Kuseyri Hukuk Bürosu) and Messrs Robert Sentner and Craig Tractenberg and Ms Kathryn Martinez (Nixon Peabody LLP), as well as Mr Sami Arslan Aşkın (party representative), Messrs Ertan Yetim, Murat Kurum, Ali Seydi Karaoglu, Ibrahim Keskin, Hicran Cakmak, Ekim Alptekin and Enver Bulut (witnesses), Messrs Ender Ethem Atay, Nicolas Barsalou, Erik van Duijvenvoorde, Hervé de Trogoff and Chris Ives (expert witnesses), Mr Anthony Theau-Laurent and Ms Kirsten Simpson (Accuracy), Mr Mehmet Erhan Caglar (translator), Mr Erdogan Bayraktar (Tribunal witness), Mr Erdal Oguz (Mr Bayraktar's bodyguard) and Mr Abdulaziz Ünal (Advisor to Mr Bayraktar).

52. On the last day of the hearing, the Claimant proposed to join Mr Benitah as another claimant in the proceeding with the consent of the Respondent. The Respondent indicated that it would consider the proposal and respond in writing following the conclusion of the hearing. By letter dated 11 October 2013, the Respondent informed the Tribunal that it did not accept the Claimant's proposal to add Mr Benitah as a party. On 18 October 2013, the Claimant submitted its response to the Respondent's letter of 11 October.
53. On 18 November 2013, pursuant to Procedural Order No. 2, the Parties filed their submissions on costs. By letter dated 6 December 2013, in accordance with Procedural Order No. 2, the Claimant submitted a reply to the Respondent's costs submission.
54. The Tribunal conducted its deliberations in the form of meetings at the Centre's offices in Washington, D.C., as well as by electronic communication.
55. On 25 February 2014, in accordance with Rule 38 of the Arbitration Rules, the proceeding was declared closed.

III. FACTS OF THE DISPUTE

A. Introduction

56. This dispute concerns allegations by the Claimant that the Respondent violated the BIT in its treatment of alleged investments made by the Claimant in connection with the construction of a mixed-use residential and commercial real estate development project in Istanbul, known as Ispartakule III.
57. The Ispartakule III development was to be carried out by an unincorporated joint venture known as Tulip JV, which was awarded a tender to complete the project by a Turkish real estate investment trust, Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. (**Emlak**) in 2006.
58. The “lead” partner in Tulip JV, a Turkish company known as Tulip Gayrimenkul Gelistirme ve Yatirim Sanayi ve Ticaret A.S. (**Tulip I**), was established as a local investment vehicle by the Van Herk Group and Mr Meyer Benitah, a national of the Netherlands and a long-standing business partner of Mr Van Herk, in advance of bidding for the Ispartakule III project.³ Following the award of the tender for the Ispartakule III project to Tulip JV, Tulip I and the other joint venture partners entered into a “Revenue- Sharing in Exchange for the Sale of Parcels” Contract with Emlak (the **Contract**).⁴
59. The Claimant, a company within the Van Herk Group, was incorporated on 10 July 2007⁵ and, on 14 August 2008, acquired a 65% shareholding in Tulip I and, correspondingly, an interest in Tulip JV.⁶

³ Claimant’s Memorial, para. 52; Articles of Association of Tulip I dated 23 May 2006 and the amendment to the Articles (Exhibit CE-58).

⁴ Contract (Exhibit C-2).

⁵ Articles of Association of Tulip Netherlands B.V. dated 10 July 2007 (Exhibit CE-38).

⁶ Claimant’s Reply, para. 98; Tulip I Board of Directors Resolution dated 14 August 2008 (Exhibit CE-239).

60. The Claimant asserts that the Respondent, acting through various alleged state actors and/or entities operating under State control, engaged in a pattern of conduct that interfered with the construction of Ispartakule III in breach of the BIT and ultimately terminated the Contract in a manner that amounts to wrongful expropriation that deprived the Claimant and Mr Benitah of the entire value of their real estate development projects throughout Turkey.⁷

B. Pre-Contractual Background

61. According to the Claimant, in or around 2005, Mr Adrianus Van Herk, and Mr Meyer Benitah (referred to by the Claimant jointly as the “Dutch Investors”), decided that there was considerable opportunity in the Turkish real estate market and began exploring avenues for entering that market.⁸

62. Between 2005 and 2006, Mr Van Herk and Mr Benitah made several trips to Turkey to learn more about potential investment opportunities in Turkey.⁹ There is some dispute about the nature of the representations made to Messrs Van Herk and Mr Benitah by individuals they met during their preliminary visits to Turkey.

63. In the spring of 2006, Mr Van Herk and Mr Benitah learnt that there would be a tender for the construction of a mixed-use real estate project in western Istanbul, called Ispartakule III.¹⁰ The tender would be conducted by Emlak, a real estate investment trust¹¹ that was, at the time, 39% owned by TOKI,¹² Turkey’s Housing

⁷ Claimant’s Memorial, para. 3.

⁸ Benitah Witness Statement, paras. 13-15.

⁹ *Ibid.*, para. 15.

¹⁰ *Ibid.*, para. 22.

¹¹ Emlak Articles of Association (Exhibit IK-1).

¹² Keskin Witness Statement, para. 10. Note that although the ownership was 39%, TOKI controlled over 99.9% of the shares. *See* para. 235 below.

Development Organisation (a state organ responsible for Turkey's public housing and operating under the auspices of the Prime Ministry of Turkey).¹³

64. Emlak's Articles of Association¹⁴ provided as follows in relevant part:

Art 5: The Company is an Open Joint Stock Company in order to get involved in the issues and objectives stipulated in the Regulations of Capital Markets Board for real estate investment partners essentially to make investments in real estate, capital market board tools based on real estate, real estate projects and rights based on real estate; and it is associated with registered capital.

Art 6, para. 9: [...] the Company can create any pre-emption, redemption and option rights which have arisen to the benefit of the Company out of the Contract and real estate contracts and any rights in kind in compliance with the provisions of Civil Law, on its immovable properties providing that these shall be within the limits stipulated by Capital Board legislations and in connection with its objectives of activity [...]

Art 8, para. 9: Prime Ministry Mass Housing Administration is the leader capitalist. The shares representing minimum capital rate of the shareholder or shareholders in the capacity of leader capitalist and preference shares in the proportion to constitute dominancy in management of the partnership cannot be transferred to any other persons for two years following the end of sale period through public offering of the shares that represent the minimum free float rate according to capital markets legislation [...]

Art 12, para. 1: Management of the Company and representing and binding powers of the company shall belong to Management Board which shall be selected by the General Shareholders Committee in line with Turkish Commercial Code provisions for 1 year and which shall be constituted out of 7 members who hold the qualifications that are stipulated in Turkish Commercial Code and Capital Markets Legislation.

Art 12, para. 3: Members are obliged to be independent [...]

Art 14, para. 2: Each member [of the Management Board] shall have one voting right in the meetings. Voting rights shall be used personally. A decision can be taken if any of the members does not participate in the meeting upon such member's notification of consent in writing for any proposal of any other member.

65. The proposed Ispartakule III project was structured as revenue in exchange for the sale of parcels of land, whereby the successful bidder would be given the right to

¹³ *Ibid.*, para. 7.

¹⁴ Emlak Articles of Association dated 6 September 2010, (Exhibit IK-1).

build on Emlak's land and sell "off the plan" residential and commercial units pursuant to agreed contractual terms and project specifications.

66. Mr Van Herk and Mr Benitah assessed the potential of the Ispartakule III project and found the structure, size and location of the proposed project to be an attractive proposition.¹⁵ They decided to bid for the project.
67. Mr Van Herk and Mr Benitah determined that it would be in their interest to use a local investment vehicle.¹⁶ On that basis, on 23 May 2006, Tulip I was incorporated under Turkish law.¹⁷ At the time of incorporation, Mr Van Herk was a direct shareholder in Tulip I and Mr Benitah held an indirect shareholding through his company, Panagro Holding BV.¹⁸ There were several other minority shareholders.
68. For the purposes of making the bid for Ispartakule III, Mr Van Herk and Mr Benitah formed an unincorporated joint venture, Tulip JV, with three local Turkish partners - FMS Mimarlik Ltd Sti. (**FMS**), Mertkan Insaat Ltd Sti. (**Mertkan**) and Ilci Insaat A.S. (**Ilci**).¹⁹
69. The Board of Emlak authorised the tender for Ispartakule III on 24 May 2006.²⁰ On 20 June 2006, Tulip JV submitted its bid for the Ispartakule III development and proposed a revenue-sharing structure whereby Emlak would be entitled to a 35% share of the revenues from the sale of units in the development, with a minimum payment of TRL 145.53 million.²¹ Pursuant to the original proposal, Tulip JV would develop a residential area comprising 11 low-rise building blocks (**Tulip Turkuaz**)

¹⁵ Benitah Witness Statement, paras. 26-28.

¹⁶ *Ibid.*, para. 31.

¹⁷ Articles of Association of Tulip I dated 23 May 2006 and the amendment to the Articles (Exhibit CE-58).

¹⁸ Articles of Association of Tulip I dated 23 May 2006 and the amendment to the Articles (Exhibit CE-58); Benitah Witness Statement, para. 31

¹⁹ Claimant's Memorial, para. 53; Agreement for Unincorporated Company, notarized 2 August 2006 (Exhibit CE-9).

²⁰ Emlak Board Decision dated 24 May 2006 (Exhibit RE-13).

²¹ Claimant's Memorial, para. 61; Joint Venture Bid (Exhibit RE-17).

and a commercial centre. Tulip JV subsequently decided to add luxury apartments on top of the commercial centre (the **Tulip Towers**).²²

70. Tulip JV's bid was successful and, on 27 June 2006, the Emlak Board passed a resolution accepting the bid.²³
71. On 2 August 2006, the members of Tulip JV executed a Joint Venture Agreement (the **JV Agreement**).²⁴ Pursuant to that agreement, Tulip I was allocated a 74.8% interest in the joint venture, FMS a 25% interest and Mertkan and Ilci a 0.1% interest each.²⁵ Tulip I was designated as the "Lead Partner" and the other parties were designated as "Private Partners".²⁶
72. On 3 August 2006, Emlak and Tulip JV executed the Contract for the Ispartakule III project.²⁷
73. The Van Herk Group secured a "performance bond" in the sum of EUR 8,716,981.05 in favour of Emlak by way of a bank guarantee issued by Fortis Bank.²⁸
74. On 17 August 2006, Emlak delivered the Ispartakule III project site to Tulip JV.²⁹

²² Benitah Witness Statement, para. 44.

²³ Resolution of the Board of Directors of Emlak dated 27 June 2006 (Exhibit CE-60).

²⁴ Agreement for Unincorporated Company, notarised 2 August 2006 (Exhibit CE-59).

²⁵ *Ibid.*, Art 2.

²⁶ *Ibid.*

²⁷ Contract (Exhibit C-2).

²⁸ Esveld Witness Statement, para. 13; Letter from Fortis Bank to Emlak dated 3 August 2006 (Exhibit CE-74).

²⁹ Claimant's Memorial, para. 81.

C. Key Terms of the Contract

75. The Contract contained a number of specific provisions relating to the manner in which the construction of Ispartakule III was to be carried out, and set out the parties' rights and obligations with respect to the project.
76. Art 3 of the Contract set out the subject matter of the agreement and stated in relevant part:

In accordance with the Contract, Specifications and attachments related to the completion of the **REVENUE SHARING IN EXCHANGE FOR THE SALE OF PARCELS IN REGION 3 OF ISTANBUL BAHÇESEH_R ISPARTAKULE JOB**, which was tendered by Company on the parcel/parcels specified in article 1.2 of the Special Technical Specification using the “revenue sharing in exchange for the sale of parcels” method with all responsibility borne by CONTRACTOR and all expenses covered by CONTRACTOR (no expense related to the job under contract regardless of what it is called shall be covered by COMPANY) pursuant to the projects to be approved by COMPANY and the mandatory provisions of concerned regulations and the Real Estate Investment Partnerships Principles Communiqué [...] (original emphasis)

3.1. In the event that it is necessary for the completion of the contracted job, conducting and concluding all types of proposal work and procedures for drawing up or modifying Zoning Plans (scale: 1/5000 – 1/1000) in accordance with COMPANY approval as well as performing work and procedures, such as subdivision, merger, exchange, easement, allotment, and abandonment to relevant administrations by obtaining COMPANY approval.

3.2. All of the necessary plans and projects related to the job under Contract, including infrastructure, shall be prepared and approvals and permits of all types shall be obtained from the relevant Municipalities and Administration after COMPANY approval is obtained.³⁰

77. Art 4 of the Contract provided:

This contract is an agreement for Revenue Sharing in Exchange for Sale of Parcels and has been concluded for "Minimum CMSTR [Company Share of Total Revenue] + VAT" for CMSRP [Company Share of Revenue Percentage] of **35.00% (Flat thirty five percent)**, which is **145,530,000 YTL (One hundred and forty-five million five hundred and thirty thousand)** offered to COMPANY by CONTRACTOR from the **415,800,00 YTL (Four hundred**

³⁰ Contract, Art 3 (Exhibit C-2).

and fifteen million eight hundred thousand) projected in CONTRACTOR'S proposal.³¹ (original emphasis)

78. Art 6 of the Contract stated:

6.1. Contractor is obligated to complete the construction work it is responsible for within 900 (nine hundred) days of the date on which the site is handed over. The period for maintenance, protection and completion of COMPANY'S Share of Total Revenue is the period between the Provisional Acceptance date and the Final Acceptance date is 365 (three hundred and sixty five) days. During this time, promotional, marketing and sales work may be continued. In this case, the duration of the job is 1265 (one thousand two hundred and sixty-five) days.

6.2. In the event that Construction Permits cannot be obtained within 270 days of the date of the Contract or if a time extension is not granted by COMPANY to obtain construction permits (Extending the time for obtaining Construction Permits is not subject to the provisions of article 33), this contract shall automatically be annulled without it being necessary to obtain a judgment or serve notice or warning and the contracted job shall be liquidated without any payment being made to CONTRACTOR, no matter what it is called, and the CONTRACTOR'S performance bond shall be returned. If there is an installment that has been paid by CONTRACTOR, it shall be returned to CONTRACTOR without interest. In the event that the contract is annulled for this reason, CONTRACTOR shall not claim any rights or make any demands and accepts and agrees in advance to cover all damages or losses that the COMPANY incurs for this reason. However, in the event that it is demonstrated that the construction permits could not be obtained because of CONTRACTOR neglect, in addition to the aforementioned provisions, CONTRACTOR'S performance bond shall be recorded as income.

6.3. All of the time periods specified as days in the Contract shall be considered to be Calendar Days unless there is a provision to the contrary. Various reasons that might obstruct the work and all weather conditions have been taken into account in the determination of the time period for the job, and the time period will not be extended apart from the compelling reasons specified in article 33 of the Contract.³²

79. Art 7 mandated the payment of a "performance bond" to Emlak at the start of the project:

³¹ *Ibid.*, Art 4.

³² *Ibid.*, Art 6.

The Performance Bond for this job is **16,632,000 YTL (Sixteen million thirty two thousand [sic] New Turkish Lira)** which is 4% of the Total Sales Revenue (TSR) specified in article 4. In accordance with the provision of Article 5.3, if there is an increase in the TSR amount, CONTRACTOR shall increase the performance bond by the calculated amount of TSR. (original emphasis)

In the event that all or part of the Performance Bond is collected by COMPANY in accordance with Contract provisions for any reason other than annulment of the Contract, CONTRACTOR is required to [ILLEGIBLE] the Performance Bond within 15 days. Otherwise, COMPANY is free to annul this Contract in accordance with the provisions of article 31.³³

80. The contractual arrangement between Emlak and Tulip JV pre-supposed that Tulip JV would sell units in Ispartakule III in advance of the project being completed and pay the agreed share of the revenue to Emlak.³⁴ On that basis, Art 8 of the Contract dealt with marketing and sales activities for the purpose of selling units in Ispartakule III:

8.1. Marketing and Sales of the independent units will be conducted by CONTRACTOR. Sales agreements for independent units will be concluded between CONTRACTOR and buyers and will become valid after being approved by COMPANY.

The sales agreements that will be concluded between CONTRACTOR and buyers shall explicitly specify that the sales agreement takes effect after being approved by Emlak Konut GYO A.S. and that all responsibility and every circumstance as the seller belongs to CONTRACTOR and that Emlak Konut GYO A.S. bears no responsibility as the seller nor is it a party. However, if COMPANY wants to, it can not only conduct sales and title deed transfer itself in the situations specified in article 8.5 but it can also revoke CONTRACTOR'S authority to conducts sales and conclude contracts.

8.2. In order for sales transactions to begin, the following conditions must be fulfilled by CONTRACTOR.

- Construction Permits must be obtained
- Construction site facilities must be set up
- Promotion and sales offices must be set up
- Promotional brochures must be prepared
- Conditions of the sales agreement for independent units must be approved by COMPANY

³³ *Ibid.*, Art 7.

³⁴ *Ibid.*, Art 5: this clause contained provisions dealing with the sharing of total revenue from sales and the payment by Tulip JV of Emlak's share of total revenue.

· Construction must actually commence³⁵

81. Art 9 of the Contract set out the principles that Tulip JV was to comply with in its work on Ispartakule III, requiring adherence to Public Works General (and other) Specifications, as well as a range of technical specifications from other agencies.³⁶

82. Art 11 of the Contract dealt with the “General Responsibilities of the Contractor”.³⁷ Art 11.1 specified that Tulip JV had responsibility for:

Conducting and concluding all type of proposal work and procedures for drawing up or altering the Zoning Plans [...]³⁸

83. Art 11.6 of the Contract provided that Tulip JV:

shall obtain approval from the concerned Municipality and Administrations for the project plans approved by COMPANY for the contracted jobs [and] [s]hall obtain all kinds of permits and prepare a Summary of Estimated Costs and submit for COMPANY approval.³⁹

84. Art 11.17 stated that Tulip JV “may not halt the job on the grounds that sales are insufficient and is required to continue the job with its own resources.”⁴⁰

85. Art 30 addressed “Transfer and Assignment” and provided:

Without the written consent of COMPANY, CONTRACTOR may not transfer or assign, either partially or entirely, any of the rights and benefits specified in this contract to third parties. Even in part, the contracted job may only be transferred to third parties with approval form the Board of Directors of Emlak Gayrimenkul Yatırım Ortaklığı A.S. However, the transferees must meet the conditions specified in this Job’s Specifications for Receipt of Proposal. In the event of transfer, without permission or assignment by CONTRACTOR, of the rights and benefits arising from the Contract, this contract shall automatically be annulled without the need to obtain a separate judgment or file official

³⁵ *Ibid.*, Art 8.

³⁶ *Ibid.*, Art 9.

³⁷ *Ibid.*, Art 11.

³⁸ *Ibid.*, Art 11.1.

³⁹ *Ibid.*, Art 11.6.

⁴⁰ *Ibid.*, Art 11.17.

warnings or complaints. The contracted job shall be liquidated according to the provisions of article 31 and CONTRACTOR'S performance bond shall be recorded as income. CONTRACTOR irrevocably [sic] accepts and agrees in advance that if the contract is annulled for this reason, it will not make any claims or demands under any guise whatsoever.⁴¹

86. The provisions of Art 31(a) addressed termination (or “annulment of the contract and liquidation of the job”), stating:

In the event that a ruling is issued for the insolvency of CONTRACTOR or [illegible], or legal restraints, such as an attachment, provisional attachment, injunction are place [sic] upon CONTRACTOR'S rights and receivables resulting from this Contract, CONTRACTOR foregoes the undertaking after concluding the contract or fails to fulfil [sic] either partially or completely the obligations assigned and specified in this Contract and its attachments without the existence of extenuating circumstances, and if the situation continues in spite of an official warning from the COMPANY that clearly specifies the grounds and gives at least 30 (thirty) days, COMPANY shall annul the contract without the need to obtain a separate judgment or make official complaints or warnings and shall inform CONTRACTOR of this situation. If [sic] the event that the Contract is violated in this manner, CONTRACTOR's Performance Bond shall be recorded as income by COMPANY. The Performance Bond recorded as income shall in no wise by deducted from CONTRACTOR'S debt.⁴²

87. Art 32 addressed “General Late Penalties and Times” and stated:

Apart from accepted extenuating circumstances, if jobs are not completed by the date specified in this contract, the ratio of outstanding work to total work shall be calculated and a late penalty of 0.003% (three ten thousandths) multiplied by the Total Sales Revenue (TSR) on the date that this ratio is determined shall be deducted from CONTRACTOR'S Share of Total Revenue (CNSTR) or the performance bond for each late day and applied to the remaining work, If the delay exceeds 30 (thirty) days COMPANY has the authority to receive this penalty for each day and wait an additional 30 (thirty) days and if the job is not finished at the end of this time period, to abrogate the contract and record the performance bond as income or allow the penalty time period to continue.⁴³

88. Art 33 addressed “Time Extensions and Extenuating Circumstances”, providing:

⁴¹ *Ibid.*, Art 30.

⁴² *Ibid.*, Art 31(a).

⁴³ *Ibid.*, Art 32.

The job time period specified in article 6 of this contract may be extended in the extenuating circumstances specified below:

If the following occur,

1. Causes for delay that COMPANY also accepts other than CONTRACTOR fault
2. Setbacks on the job caused by damage resulting from extraordinary natural disasters
3. Situations that occur due to social causes:
 - a. The occurrence of a legal strike
 - b. Declaration of partial or complete military mobilization
 - c. The occurrence of contagious epidemic disease and significant setback to the work caused because employees cannot work.

Time extensions to be granted based on extenuating circumstances are dependent on the following conditions: the degree to which these circumstances have affected the job, the CONTRACTOR'S [sic] not having caused these circumstances and inability to prevent or eliminate them, CONTRACTOR'S [sic] informing COMPANY in writing within 10 (ten) days after their occurrence with certified documents and CONTRACTOR'S request.

Discretion on these matters and the authority to grant the time extension lies with COMPANY. The fact that CONTRACTOR is given a time extension does not constitute grounds for CONTRACTOR to gain any other benefit, such as damages and compensation or to demand a change in the COMPANY'S Share of Total Revenue and the Percentage of COMPANY'S Share of Revenue.

The idle winter months have already been taken into consideration for the time period given and time extensions will not be granted for reasons such as a harsh or rainy winter. The provisions of article 27 of the Public Works General Specification will be followed for time extensions.⁴⁴

89. Art 36 set out the dispute resolution clause:

The Courts and Bailiff Offices of Istanbul shall have jurisdiction in the resolution of all disputes that might arise from the implementation of the Specifications for Receipt of Proposal, Special Technical Specifications, the Contract and its attachments as well as other documents. Attorney fees of

⁴⁴ *Ibid.*, Art 33.

10% (ten) shall be borne by CONTRACTOR in disputes arising from the Contract.⁴⁵

D. Events after Execution of the Contract

a) Tulip JV Partnership Problems

Dispute with FMS

90. Shortly after entering into the Contract, Tulip I, Mertkan and Ilci began experiencing problems with joint venture partner FMS. There was a dispute about the payment of stamp duty, which involved allegations of embezzlement against FMS.⁴⁶ During the course of the dispute, a representative of FMS fired a shot at Mr Murat Mertoglu, a shareholder in and Vice Chairman of Tulip I.⁴⁷ Further, Tulip JV personnel were unable to enter the JV office,⁴⁸ which was designated to be at the premises of FMS.⁴⁹

91. The JV Agreement required the involvement of FMS in key decisions with respect to the Contract. In particular, the JV Agreement mandated, at Art 5:

This Joint Venture shall be bound and represented before the Corporation, as its addressee, and other governmental and non-governmental entities from the beginning to the end of the job, by a “EXECUTIVE BOARD” to be elected by Lead Partner TULIP GAYRIMENKUL GELISTIRME VE YATIRIM SAN. VE TIC. A.S. and Private Partner FMS MIMARLIK DANISMANLIK INSAAT SAN. VE TIC. LIMITED SIRKET. Executive Board shall be formed of two full members and two substitute members. One full member and one substitute member shall be appointed by Lead Partner TULIP GAYRIMENKUL GELISTIRME VE YATIRIM SAN. VE TIC. A.S. and other one full member and one substitute member shall be appointed by Private Partner FMS MIMARLIK DANISMANLIK INSAAT SAN. VE TIC:

⁴⁵ *Ibid.*, Art 36.

⁴⁶ Benitah Witness Statement, para. 62.

⁴⁷ Expert Opinion of Sukru Yildiz in Istanbul 9th Commercial Court of First Instance, Case No. 2006/624 (Exhibit CE-167); Benitah Witness Statement, paras. 32 and 62; Transcript, Day 1, Schneider and Sentner (136: 1-22).

⁴⁸ Letter from Tulip JV to Emlak dated 26 December 2006 (Exhibit CE-172).

⁴⁹ Agreement for Unincorporated Company, Art 1 (Exhibit CE-59).

LIMITED SIRKET. Parties shall at any time may replace the members appointed by them. If any membership in the Executive Board becomes vacant, the appointment for the vacant position shall be made by the party that had appointed the former one.

Executive Board's full members shall administer, represent and bind the joint venture in every situation with with [sic] two signatures to be signed below the joint venture's seal.⁵⁰

92. The JV Agreement further stipulated that, for the initial year, the members of the Tulip JV Executive Board would be Mr Cem Ozer (Tulip I) and Mr Fatih Megmet Sagdic (FMS).⁵¹

93. The JV Agreement stated, in Art 6, that the Executive Board would be responsible for:

- (1) Deciding general organization, choosing the staff and equipment required for the organization, approving any agreement for the same, determining the maximum amount for work in any outsourced service, empowering Joint Venture's executive team, Project Manager and Construction Supervisor,
- (2) Procuring from the Lead Partner the necessary cash and guarantee credits for execution of the works,
- (3) Implementing any agreement to be concluded by the Joint Venture in connection herewith, deciding whether to amend the agreement and determining the conflicts,
- (4) Determining, approving and applying Project Management Policy, strategy and Joint Venture's Financial Policy and principles,
- (5) Approving annual balance sheets, profit and loss accounts,
- (6) Reviewing and determining the issued referred by the partners to the Executive Board,
- (7) Approving collective bargain agreements and staff employment, determining staff wages and allowances and approving the practices relating to the same,
- (8) Approving joint venture's organization chart and approving appointments made for the key staff shown in the chart,

⁵⁰ *Ibid*, Art 5.

⁵¹ *Ibid*.

- (9) Taking all decisions and measures required by laws and the contract in respect of any matter covered by this agreement,
- (10) Running any discussions and correspondence required for execution of the contracted job,
- (11) Running correspondence on behalf of the Joint Venture for full compliance with the existing contract, with the client Administration, the contracted project and the annexes thereto, signing any document, progress reports, progress records books and the quantities or causing any other person to sign the same,
- (12) Collecting and bearing the accrued progress payments,
- (13) Causing usage of the Joint Venture's resources in line with the Joint Venture's purpose,
- (14) Delegating and appointing third parties as attorney and cancelling [sic] the same when necessary.⁵²

94. Art 13 of the JV Agreement, dealing with transfer of rights and assignment, provided:

None of the partners may transfer in part or in full any right or duty under this agreement to a company, a person without common written consent of Emlak Konut Gayrimenkul Yatırım Ortaklığı A.S. and other three partners.⁵³

95. Tulip I, Mertkan and Ilci sought to remove FMS from the joint venture and requested that Emlak approve the transfer of FMS' interest in the joint venture to Tulip I.⁵⁴ On 11 September 2006, Tulip I, Mertkan and Ilci entered into a new Agreement which did not include FMS in Tulip JV.⁵⁵ However, by letter dated 14 September 2006, Emlak informed Tulip JV that it would not authorise the purported transfer of FMS' interest absent a notarised document confirming that FMS had assigned its interest in the joint venture.⁵⁶ On 2 October 2006, Tulip JV and Tulip I initiated a lawsuit to

⁵² *Ibid.*, Art 6.

⁵³ *Ibid.*, Art 13.

⁵⁴ Letter from Tulip JV to Emlak dated 5 September 2006 (Exhibit CE-168).

⁵⁵ Tulip-Mertkan-Ilci Partnership Agreement dated 11 September 2006 (Exhibit CE-233).

⁵⁶ Letter to Tulip-Ilci-Mertkan dated 14 September 2006 (Exhibit CE-169).

expel FMS from the joint venture.⁵⁷ On 3 October 2006, the remaining partners in Tulip JV sent a “cease and desist” letter to FMS, whereby they purported to exclude FMS from the joint venture.⁵⁸

96. Emlak did not accept that Tulip I, Mertkan and Ilici could continue to act on behalf of Tulip JV without the approval and signature of FMS.⁵⁹ On 18 December 2006, FMS wrote to Emlak informing Emlak that actions purportedly taken by Tulip JV without the signature of FMS would be invalid and that Emlak could be held responsible.⁶⁰

97. On 16 January 2007, Mr Van Herk, Mr Benitah and several others met with the representatives of Emlak in Istanbul and with Mr Bayraktar in Ankara.⁶¹

98. While there is a factual dispute about the precise events that transpired at the meetings, it suffices for the purposes of setting out the factual background to note that the meetings involved a discussion about the internal problems experienced by Tulip I and its JV partners.

99. On 28 March 2007, Tulip JV submitted architectural plans to Emlak.⁶² The plans were not accepted by Emlak on the basis that FMS had not consented to the submission.⁶³

100. On 16 April 2007, Tulip JV obtained a “provisional injunction” from a court in Istanbul, allowing it to replace Mr Sagdic with another Executive Board member and therefore permitting Tulip JV to take steps in connection with the Contract without

⁵⁷ Expert Opinion of Sukru Yildiz in Istanbul 9th Commercial Court of First Instance, Case No. 2006/624 (Exhibit CE-167).

⁵⁸ Cease and Desist Letter from Tulip-Mertkan-Ilici to FMS dated 3 October 2006 (Exhibit CE-235).

⁵⁹ See, *e.g.*, Letter from Emlak to Tulip JV dated 9 November 2006 (Exhibit CE-171); Keskin Witness Statement, paras. 22-32.

⁶⁰ Letter from FMS to Emlak dated 18 December 2006 (Exhibit RE-23).

⁶¹ Benitah Witness Statement, paras. 69 – 80; Yetim Witness Statement, paras. 38 – 43.

⁶² Letter from Tulip JV to Emlak dated 28 March 2007 (Exhibit CE-78).

⁶³ Letter from Emlak to Tulip I dated 17 April 2007 (Exhibit CE-173).

FMS.⁶⁴ Tulip JV later applied for and, on 11 June 2008, obtained an injunction allowing Tulip I to act for Tulip JV.⁶⁵

101. However, the problems with FMS continued. At the beginning of 2010, an indictment was issued following a complaint by Mr Sagdic against Messrs Ozer and Mertoglu and others in connection with the conflict between FMS and Tulip JV.⁶⁶ Further, the injunction granted by an Istanbul court to Tulip JV to allow it to take action without FMS was lifted in February 2010.⁶⁷ Subsequently, FMS again wrote to Emlak to argue that it ought to cease and desist from accepting submissions made by Tulip JV without consent from FMS.⁶⁸

Mertkan's Financial Problems

102. Emlak wrote to Tulip JV at the start of December 2006 and notified it that it had received a "First Seizure Notice" with respect to Mertkan's rights and receivables from Emlak and requested "removal of this seizure" within 30 days to avoid termination of the Contract pursuant to Art 31.⁶⁹ Tulip JV responded on 26 December 2006, stating that Mertkan's financial issues were close to being resolved and requesting additional time to address them.⁷⁰

103. Following additional correspondence between Emlak and Tulip JV regarding this issue (as well as steps to transfer Mertkan's interest in the joint venture to another

⁶⁴ Case No. 2007/340, Provisional Injunction Decree from the Büyükçekmece 3d Court of First Instance (Exhibit RE-24).

⁶⁵ Case No. 2006/624, Miscellaneous Verdict from the 9th Istanbul Commercial Court of 1st Instance (Exhibit C-19).

⁶⁶ No. 2010/497, Office Indictment from the Sisli Criminal Court of First Instance (Exhibit RE-33).

⁶⁷ See, e.g., Letter from FMS to Emlak dated 8 February 2010 (Exhibit RE-89).

⁶⁸ Letter from FMS to Tulip I, Tulip JV and Turk Barter dated 24 February 2010 (Exhibit RE-34).

⁶⁹ Letter from Emlak to Tulip JV and Mertkan dated 4 December 2008 (Exhibit RE-35).

⁷⁰ Letter from Tulip JV to Emlak dated 26 December 2006 (Exhibit CE-172).

company, with Emlak's permission), Mertkan wrote to Emlak on 17 November 2008 and requested to withdraw from Tulip JV.⁷¹

104. On 13 March 2009, the 7th Commercial Court of First Instance of Ankara decreed Mertkan bankrupt.⁷² On 26 October 2009, one of Tulip JV's subcontractors, YPU Yapi Proje Uyg. Insaat. Taah. Nak. Ltd. Sti., warned Tulip JV about an enforcement action against the joint venture for USD 70,000 owed on work at Ispartakule III and asserted that the joint venture should have been dissolved under Turkish law because of the Mertkan bankruptcy.⁷³ On 30 October 2009, Emlak issued a warning to Tulip JV advising that the joint venture had to secure a new partner that possessed the requisite Business Experience Certificate (which Mertkan was described as having in the tender documents) within thirty days and that, otherwise, Emlak would terminate the Contract and cash in the performance bond.⁷⁴

105. Although this matter was not resolved with Emlak prior to the termination of the Contract, Tulip I had proposed a replacement for Mertkan or to form a new joint venture.⁷⁵

b) Zoning Litigation & Extension of Time

106. On 2 May 2007, after the 270-day deadline prescribed by the Contract,⁷⁶ Tulip JV submitted its preliminary drawings to Emlak.⁷⁷ On the same day, Tulip JV submitted its application for a construction permit for Tulip Turkuaz to the Avcilar

⁷¹ Respondent's Counter-Memorial, para. 210; Letter from Mertkan to Emlak dated 17 November 2008 (Exhibit CE-172).

⁷² No. 2007/616, Ankara 7th Commercial Court of First Instance Decree of Bankruptcy of Mertkan, dated 19 March 2009 (Exhibit RE-10).

⁷³ Letter from YPU to Tulip I dated 26 October 2009 (Exhibit RE-40).

⁷⁴ Letter from Emlak to Tulip JV dated 30 October 2009 (Exhibit RE-41).

⁷⁵ Respondent's Counter-Memorial, paras. 214-216.

⁷⁶ Contract, Art 6.2 (Exhibit C-2).

⁷⁷ Letter from Tulip JV to Emlak dated 2 May 2007 (Exhibit CE-85).

Municipality.⁷⁸ Tulip JV was then required to make some revisions to comply with the zoning requirements and resubmitted its application to the Avcilar Municipality in August 2007.⁷⁹

107. In the process of applying for a construction permit to the Avcilar Municipality, Tulip JV learnt that there was a dispute pending with respect to the zoning plan for the Bahcesehir Ispartakule III district (the area where Ispartakule III was located).⁸⁰ The dispute centred on the question of whether TOKI rather than the Ministry of Public Works and Settlement, the government body that had approved the relevant zoning plan, should have prepared the zoning plan.

108. On 24 May 2007, the Danistay, Turkey's highest administrative court, issued an order suspending all development on the Ispartakule III parcels.⁸¹ The order also required that TOKI prepare a new zoning plan.

109. In the period following the Danistay order and the publication of the new zoning plan by TOKI, Tulip JV requested that the new plan take into account Tulip JV's approved construction plans.⁸² Emlak also wrote to TOKI to request that the new zoning accommodate Tulip JV's existing plans.⁸³

110. On 7 December 2007, the new zoning plan prepared by TOKI in respect to the area encompassing Ispartakule III was made publicly available.⁸⁴ The new plan introduced certain changes to the zoning requirements that affected Tulip JV's plans with respect to the construction of the residential parcel of Ispartakule III.⁸⁵

⁷⁸ Letter from Tulip JV to Emlak dated 2 May 2007 (Exhibits RE-46).

⁷⁹ Construction Control Department Report dated 4 February 2010 (Exhibit RE-75).

⁸⁰ Benitah Witness Statement, para. 47.

⁸¹ Council of State, Appeal No. 2007/210, Stay of Execution (Exhibit BE-8).

⁸² Letter from Tulip JV to Emlak dated 24 October 2007 (Exhibit CE-86).

⁸³ Letter from Emlak to TOKI dated 16 November 2007 (Exhibit CE-245).

⁸⁴ Implementation Zoning Plan (Exhibit RE-49).

⁸⁵ Construction Control Department Report dated 4 February 2010 (Exhibit RE-75).

111. On 7 January 2008, Tulip JV wrote to the Istanbul Metropolitan Municipality and requested that the new zoning plan prepared by TOKI be revised so as to accommodate Tulip JV's existing plans.⁸⁶
112. On 11 January 2008, TOKI wrote to Emlak and stated that, given the existence of the new zoning plan, Tulip JV would have to revise its plans to accord with the zoning requirements.⁸⁷
113. On 23 January 2008, Emlak and Tulip JV entered into Supplementary Protocol No. 1 to the Contract, whereby it was agreed that certain instalment payments due to Emlak under the Contract would be postponed.⁸⁸
114. On 8 June 2008, the new zoning plan became effective.⁸⁹
115. On 30 June 2008, Tulip JV submitted to Emlak its preliminary designs for the purposes of obtaining a modified construction permit in respect of the residential portion of the Ispartakule III project.⁹⁰ On 1 July, Tulip JV submitted its application to the Avcilar Municipality for the new construction permit.⁹¹ On 3 September 2008, Avcilar Municipality granted a construction permit for Tulip Turkuaz to Tulip JV.⁹²
116. On 17 October 2008, Tulip JV requested that Emlak grant it a 655-day extension of time to complete the Contract work to account for the zoning-related delay in the period from 17 August 2006 until 2 June 2008.⁹³ Tulip JV stated in its request that the delay was an event of "force majeure" pursuant to Art 33.1 of the Contract.⁹⁴

⁸⁶ Letter from Tulip JV to Istanbul Metropolitan Municipality dated 7 January 2008 (Exhibit BE-9).

⁸⁷ Construction Control Department Report dated 4 February 2010 (Exhibit RE-75).

⁸⁸ Supplementary Protocol dated 23 January 2008 (Exhibit C-12).

⁸⁹ Yetim Witness Statement, para. 57.

⁹⁰ Letter from Tulip JV to Emlak dated 30 June 2008 (Exhibit CE-80).

⁹¹ Letter from Emlak to Avcilar Municipality dated 1 July 2008 (Exhibit RE-50).

⁹² Letter from Tulip JV to Emlak dated 3 September 2008 (Exhibit CE-81).

⁹³ Tulip's letter per zoning problems and extension dated 17 October 2008 (Exhibit CE-118).

117. The request for an extension of time was considered by Emlak's Survey Project and Planning Directorate⁹⁵ and Emlak's Construction Control Department.⁹⁶ Tulip JV was granted an extension of 471 days.⁹⁷ Tulip JV accepted the extension.

c) *Development of Ispartakule III by Tulip JV*

Funding and Sales

118. In October 2006, Moore Stephens carried out a feasibility study for the Ispartakule III project and estimated that the total cost of the project would be approximately USD 234 million.⁹⁸ Moore Stephens also concluded that:

The required initial investment amount (including the working capital requirements) of **43 M USD** is composed of **13 M USD** equity funds and **30 M USD** of loans. Furthermore, performance bonds amounting up to approximately **12 M USD** will be arranged by TULIP partners. The remaining costs of the project will be financed by funds to be produced by project itself.⁹⁹ (original emphasis)

119. While the new zoning plan was still pending, on 10 July 2007, the Van Herk Group incorporated the Claimant.¹⁰⁰ Then, in September 2007, Tulip Gayrimenkul Yatirim A.S. (**Tulip II**) was incorporated under Turkish law, using a similar shareholding structure to Tulip I.¹⁰¹ In October 2007, Tulip JV entered into a Construction Agreement with Tulip II whereby it purported to assign the obligations under the

⁹⁴ *Ibid.*

⁹⁵ Letter from Survey Project and Planning Directorate dated 23 October 2008 (Exhibit RE-51).

⁹⁶ Letter from Construction Control Directorate dated 24 October 2008 (Exhibit RE-52).

⁹⁷ Decision of the Administrative Board of Emlak dated 30 October 2008 (Exhibit CE-190).

⁹⁸ Moore Stephens, Ispartakule III Project Feasibility Study dated 5 October 2006, p. 7 (Exhibit C-7).

⁹⁹ *Ibid.*

¹⁰⁰ Articles of Association of Tulip Netherlands B.V. dated 10 July 2007 (Exhibit CE-38).

¹⁰¹ Claimant's Memorial, para. 63.

Contract to Tulip II in return for 90% of the revenue from the Ispartakule III project.¹⁰²

120. On 1 March 2008, the Claimant and Tulip II executed a Subordinated Loan Facility Agreement for EUR 20 million (the **First Loan Facility**).¹⁰³ Art 2 of the First Loan Facility provided that:

Subject to the terms of this Agreement, the Loan Facility may only be used by Borrower to finance the development and construction of the Project, in compliance with the TOKI Contract and The Construction Agreement.¹⁰⁴

121. The First Loan Facility specified at Art 4.4 that “at least €1,951,134.16” had already been extended in loans by two other Van Herk entities, OGBBA Van Herk BV and Van Herk Real Estate Participations BV to Tulip II.¹⁰⁵ These amounts were included in the overall sum of EUR 20 million available under the First Loan Facility.

122. On 25 February 2009, the Claimant and Tulip I executed a Subordinated Loan Facility Agreement for EUR 2 million (the **Second Loan Facility**).¹⁰⁶ It was stated in the Second Loan Facility that, as at 28 November 2008, the full EUR 20 million had been drawn down from the First Loan Facility.¹⁰⁷

123. The Second Loan Facility relevantly provided:

1.4 The Loan Facility of EUR 2,000,000 under this Agreement will be used to finance open bills of Borrower, TULIP2 and TULIP JV, overhead and salaries of these respective companies for the period until 31 May 2009 and expenditures and investments relating to marketing/sales and start of

¹⁰² Construction Commitment Contract dated 2007 (Exhibit CE-62).

¹⁰³ Subordinated Loan Facility Agreement between Tulip II and Tulip Real Estate and Development Netherlands BV (Exhibit CE-63).

¹⁰⁴ *Ibid.*, Art 2.

¹⁰⁵ *Ibid.*, Art 4.4.

¹⁰⁶ Subordinated Loan Facility Agreements between Tulip I and Tulip Real Estate and Development Netherlands (Exhibit CE-64).

¹⁰⁷ *Ibid.*, Recital E.

construction of the Project, in line with the head line allocation budget below (Table 1).¹⁰⁸

124. The Second Loan Facility then provided that certain parts of the EUR 2 million would be used to cover existing bills and expenses, among other things, and that only EUR 800,000 would be available for construction of the Ispartakule III project.¹⁰⁹

125. Relevantly, the Second Loan Facility also provided:

1.5 The worldwide financial crisis and macro economic uncertainties in Turkey may create uncertainties for the sale of the Project. Therefore, the period until 31 May 2009 will be used to make a full start in sales of the Project, as a test of the market.

1.6 In case sales until 31 May 2009 will not be sufficient to finance construction of the first 3 blocks of the Project, being TULIP Turquaz, block 11a, 10a, 9b, TULIP JV will discuss with Emlak Konut GYO extension of the Project under clause 33 of the TOKI Contract or otherwise renegotiate more favourable terms and conditions. A possible sale of apartment of the Project to companies affiliated to Lender is not included in this respect.

1.7 After providing by Lender the EUR 20m Facility Agreement, the YTL 16,6m performance bond for the Project and the EUR 2m Loan Facility under this Agreement, all parties understand that Lender will not provide additional financing to the Project. Therefore the priority will be to find a new partner who will buy out Lender's position in full, meaning all it's [sic] shares in Borrower and TULIP2, full repayment of all the (converted) loans invested into the companies/ project with the accrued interest and the return of the performance bond to Lender. In case such a new partner is not found, Borrower and Lender will arrange for other solutions to acquire new finance to the company with various alternatives including partial share sales to a new partner. In case such a new partner would request for it, all Board Members and shareholders of Borrower and TULIP2 are open to discuss to leave/hand over all management responsibilities and all external representation rights (c.q. signature circular) to new management of the new partner, provided profit shares of existing shareholders are protected. Management of Borrower/TULIP2 targets to finalise the search and structure for entry of a new partner before 31 May 2009.¹¹⁰

¹⁰⁸ *Ibid.*, Cl. 1.4.

¹⁰⁹ *Ibid.*, Cl. 1.4, Table 1.

¹¹⁰ *Ibid.*, Cl. 1.5 – 1.7.

126. Although there is some dispute between the parties about the proportion of funds from the First Loan Facility and the Second Loan Facility that were used for the Ispartakule III project, it is accepted that the capital injection by the Van Herk Group into construction costs was limited to funds from these two loan agreements (putting aside certain out-of-pocket expenses).¹¹¹ Neither Mr Benitah nor any of the Turkish joint venture partners invested any funds in the Ispartakule III project.¹¹² It is undisputed that the EUR 2 million of funds under the Second Loan Facility was drawn down by May 2009.¹¹³

127. As until the termination of the Contract, the joint venture partners, and namely Tulip I, intended revenue from the pre-sale of units at Ispartakule III to be the principal, if not the sole, source of continued funding.¹¹⁴ Such revenue would be accrued and collected in a bank account in Emlak's name and Tulip JV's share of revenues was to be paid in proportion to the completion rate on the project, provided that such funding could be covered by the amounts available in the Emlak bank account specifically set up to deposit Tulip JV's 65% share of funds.¹¹⁵ The final and total percentage of units pre-sold at termination is a matter of disagreement between the Parties.

Completion Progress

128. In December 2008, Tulip JV and Emlak agreed upon a new Work Program that set out a schedule for the completion of construction on Ispartakule III in accordance with Art 13 of the Contract. The Work Program provided that all aspects of the project (including both the residential and commercial construction) would be complete by 19 May 2010.¹¹⁶ The schedule included specific milestones that were

¹¹¹ Transcript, Day 1, Benitah (233:2-20).

¹¹² Transcript, Day 1, Benitah (212: 11-16; 213: 4-12).

¹¹³ Esveld Witness Statement, para. 11; Tulip I Copies of Drawdown Requests and Wire Transfers (Exhibit EE-6); Tulip I Summary of Drawdown Requests (Exhibit EE-7).

¹¹⁴ Transcript, Day 1, Benitah (215: 18-23).

¹¹⁵ Expert Report on Quantum by Accuracy, paras. 57-60.

¹¹⁶ December 2008 Program (Exhibit RE-54).

required to be achieved by Tulip JV at particular intervals before the completion date.

129. Pursuant to the agreed Work Program, Tulip I was required to complete 11.17% of the Ispartakule III project by the end of January 2009.¹¹⁷ On 20 January 2009, Emlak wrote to Tulip JV and stated that the required level of progress had not been achieved with respect to construction and that, as at December 2008, the physical progress remained at 1%.¹¹⁸ Emlak referred to Art 9 of the Contract (referred to in paragraph 81 above) and stated that Tulip JV was required to comply with the agreed work schedule.¹¹⁹ Tulip JV responded to Emlak by letter dated 29 January 2009, stating that it would accelerate the work in February and March 2009 to make up for the delay.¹²⁰ The letter from Tulip JV to Emlak relevantly stated:

Following the two years of delay due to the works on the change of zoning plan by TOKİ and various other reasons, in spite of the great financial crisis breaking out simultaneously with obtaining construction licence and sales permit, our Partnership has begun the construction work with its own resources and completed the preparations for sales campaign to a great extent. Although there is not a substantial delay in the schedule, we need to work on reconsidering our selection of construction subcontractors-materials due to changing financial and economical market conditions, and we hope that you will understand the consequent small deviations in program targets. In any case, the necessary measures will be taken with accelerated pace in February-March term to ensure that the minimal failure pointed out in physical realization will catch up with program targets.¹²¹

130. On 10 April 2009, Tulip JV requested that Emlak grant it a 470-day extension of time for delays said to be associated with the global economic crisis in terms:

[w]ith reference to TulipTurkuaz project in the extent of the “Work for Sharing Revenue Against Selling Land Lots in 3rd Region of Istanbul Bahçeşehir Ispartakule” under our commitment with on-going construction;

¹¹⁷ December 2008 Program (Exhibit RE-54).

¹¹⁸ Emlak Letter to Tulip JV dated 20 January 2009 (Exhibit RE-60).

¹¹⁹ *Ibid.*

¹²⁰ Letter from Tulip JV to Emlak dated 29 January 2009 (Exhibit CE-119).

¹²¹ *Ibid.*

global economical crisis started in August 2009 and in Turkey accordingly, showed an continuously increasing trend, and made all sectors, mainly the construction sector to come to a halting point.

As the economical crisis also affected the housing sales, the sales were generally stopped and the prices were declined. Thus, we could not start the sales in our project. It is definite that the global economical crisis flared with the failure of Lehman Brothers Bank on September 15, 2008, will continue until the end of the 2009.¹²²

131. By letter dated 16 April 2009, Emlak notified Tulip JV that:

Your demand for additional period extension for 470 days to work period in your reference letter, was not assessed by considering current situation of the work. However, after acceleration of productions, reaching to the level, determined in the work program and continuation of this reached level continuously, your demand for additional period shall be able to be assessed.¹²³

Emlak also stated that it required Tulip JV to accelerate construction on the site and to have the requisite number of personnel on site for that purpose in order to comply with its contractual obligations, and indicated that in the absence of such compliance, Emlak would terminate the Contract.¹²⁴

132. In May 2009, Turkey's Supreme Audit Board evaluated the Ispartakule III project and concluded:

Given that sufficient progress has not been made in the construction work in 2009 in accordance with the recommendations stated in the YDK report for 2008, it is recommended that the termination of the job be considered.¹²⁵

133. This recommendation was subsequently noted, but not acted upon, in Emlak's annual report.¹²⁶

¹²² Tulip's letter to Emlak requesting 470-day extension dated 10 April 2009 (Exhibit CE-120).

¹²³ Letter from Emlak to Tulip JV dated 16 April 2009 (Exhibit CE-189).

¹²⁴ *Ibid.*

¹²⁵ Supreme Audit Board Annual Reports 2007-2010 (excerpts) (Exhibit CE-265).

¹²⁶ Emlak 2008 Annual Report (RE-74).

134. On 29 June 2009, Tulip JV and Emlak prepared their first Progress Report with respect to Ispartakule III.¹²⁷ Representatives of Tulip JV and Emlak met on site and agreed together on the amount of progress at the site. According to the Progress Report, they agreed that, as at that date, construction on site was less than 1% complete.¹²⁸ However, other sources of factual information indicate that construction works had taken place at the end of 2008 and early 2009.¹²⁹

135. Between June and August 2009, Tulip JV and Emlak exchanged correspondence whereby Tulip JV indicated that it would accelerate construction and Emlak again notified Tulip JV that there was insufficient progress on Ispartakule III.¹³⁰

136. On 10 July 2009, Tulip JV requested a 250-day extension for the completion of construction on the basis of the economic crisis.¹³¹ The letter sent by Tulip JV to Emlak stated that Mr Van Herk had, due to ill health, transferred to all authority with respect to the Ispartakule III project to Mr Benitah.¹³² On 24 August 2009, Emlak responded and stated:

With regard to your demand in the 8.a line of your notice, our Company has provided the ordinary partnership with the required support and will continue to do so. Your other demands will be taken into consideration subsequent to the realization of the issues mentioned in the letter of warning sent by our Company to the ordinary partnership as well as the repetition of these demands by the ordinary partnership.¹³³

¹²⁷ Construction Progress Status Assessment Report dated 29 June 2009 (Exhibit RE-18).

¹²⁸ *Ibid.*

¹²⁹ Preliminary Report on Construction Delay to the Project by Accuracy, para. 104 referring to Emlak's daily site diaries recording construction commencing on 05 September 2008 and continuing throughout 2008 and 2009.

¹³⁰ Letter from Emlak to Tulip JV (undated) (Exhibit RE-64); Letter from Emlak to Tulip JV dated 24 August 2009 (Exhibit RE-65); Letter from Tulip JV to Emlak dated 31 August 2009 (Exhibit CE-116).

¹³¹ Letter from Tulip I to Emlak dated 10 July 2009 (Exhibit CE-123).

¹³² *Ibid.*

¹³³ Letter from Emlak to Tulip JV dated 24 August 2009 (Exhibit RE-65).

137. In August 2009, Tulip JV described to Emlak the efforts it was undertaking to increase construction progress,¹³⁴ including having contracted with Yeni Dogus Insaat and having also added Gas Metas Is Ortakligi to its team of subcontractors.¹³⁵
138. On 16 September 2009, Tulip JV submitted to Emlak its preliminary architectural plans for the Tulip Towers.¹³⁶ Emlak approved those plans the next day, 17 September 2009.¹³⁷ On 5 November 2009, Tulip JV submitted geotechnical reports with respect to Tulip Towers to Emlak for its approval.¹³⁸
139. On 4 December 2009, Tulip JV made another request for an extension of time to complete the Ispartakule III project.¹³⁹ Tulip JV requested additional days for the zoning dispute, 350 days of extension due to economic crisis, and 200 days due to formwork construction changes, amounting to a total of approximately 550 days.
140. On 18 December 2009, Tulip JV received a letter from the Istanbul Metropolitan Municipality whereby it was notified that the Municipality rejected its proposed design for the Tulip Towers part of Ispartakule III on the basis of nine specified reasons.¹⁴⁰
141. On 30 December 2009, Tulip JV and Emlak agreed and signed the second Progress Report regarding construction at Ispartakule III.¹⁴¹ The report showed that the project was 4.58% complete rather than the 68.7% required by the agreed work schedule.

¹³⁴ Letter from Tulip JV to Emlak dated 31 August 2009 (Exhibit CE-116).

¹³⁵ Contract between Tulip I and Yeni Dogus (Exhibit RE-59).

¹³⁶ Letter from Tulip JV to Emlak dated 16 September 2009 (Exhibit CE-83).

¹³⁷ 646 Tulip Towers approval of architectural plans (Exhibit BRG-87).

¹³⁸ Letter from Tulip JV to Emlak dated 5 November 2009 (Exhibit CE-101).

¹³⁹ Letter from Tulip JV to Emlak dated 4 December 2009 (Exhibit CE-124).

¹⁴⁰ Letter from Istanbul Metropolitan Municipality to Emlak dated 18 December 2009 (Exhibit RE-57).

¹⁴¹ December 2009 Construction Progress Status Assessment Report (Exhibit RE-19).

142. On 11 January 2010, Mr Yeni Dogus, the general manager of Dogus (the main contractor for Ispartakule III) travelled to Rotterdam to meet with Mr Van Herk.¹⁴² He was unable to meet with Mr Van Herk and sent him a fax, in which he stated that construction was delayed at Ispartakule III because of Tulip JV's failure to pay the contractors pursuant to a "realistic payment plan" and advised that it would have to stop construction at Ispartakule III unless it received a revised work schedule and payment plan.¹⁴³

143. On 4 February 2010, the Construction Control Manager of Emlak's Construction Control Department recommended the approval by the General Manager, Mr Marat Kurum, that Tulip JV be granted an extension of time amounting to 418 days, extending the Ispartakule III completion deadline to 11 June 2011.¹⁴⁴ The recommendation was approved by Mr Kurum on 5 February 2010.¹⁴⁵ Mr Kurum also had discussions with representatives of Tulip JV around the same time in which he indicated that he would support an extension of time for completion of the project if there were a substantial improvement in performance.¹⁴⁶

144. Notwithstanding Mr Kurum's recommendation, Emlak's Board (including Mr Kurum) decided not to grant the requested extension to Tulip JV. On 1 March 2010, Emlak sent a letter to Tulip JV notifying it that the completion date for the project was still 19 May 2010.¹⁴⁷

145. By letter dated 17 February 2010, Tulip JV indicated to Emlak that "the original delivery date that we have verbally agreed on in our meetings is 31.07.2011".¹⁴⁸ Emlak did not provide any acknowledgement of this agreement. To the contrary, on 3 March 2010, Emlak wrote to Tulip JV (as well as to the individual partners)

¹⁴² Fax from Yeni Dogus Insaat to A. Van Herk dated 11 January 2010 (Exhibit RE-66).

¹⁴³ Fax from Yeni Dogus Insaat to A. Van Herk dated 11 January 2010 (Exhibit RE-66).

¹⁴⁴ Construction Control Department Report dated 4 February 2010 (Exhibit RE-75).

¹⁴⁵ *Ibid.*

¹⁴⁶ Kurum Witness Statement, para. 6; Transcript, Day 4. Kurum (76:-1-25).

¹⁴⁷ Letter from Emlak to Tulip JV dated 1 March 2010 (Exhibit CE-193).

¹⁴⁸ Letter from Tulip JV to Emlak dated 17 February 2010 (Exhibit CE-195).

advising that if the issues Emlak had previously raised and the progress delays were not resolved within thirty days, Emlak would terminate the Contract pursuant to Art 31.¹⁴⁹

146. By March 2010, Tulip JV was making efforts to increase progress at the Ispartakule III site: the number of personnel on site increased from fewer than 60 people on 16 March to over 250 people in the middle of April.¹⁵⁰ Similarly, there was a substantial increase in the number of concrete floors poured.¹⁵¹

147. On 7 April 2010, Tulip JV submitted revised preliminary drawings for the construction permit for Tulip Towers.¹⁵²

148. On 21 April 2010, Tulip JV made another request for an extension of time to Emlak, seeking an additional 582 days for completion of the project.¹⁵³ The request proposed a completion date of 31 August 2011 for the Tulip Turkuaz part of the project and 31 December 2011 for the Tulip Towers. Emlak did not respond to this request prior to the eventual termination of the Contract.

149. On 29 April 2010, Tulip JV and Emlak agreed to a third Progress Report.¹⁵⁴ This report indicated that there was completion of 10.35% of the Tulip Turkuaz (residential) portion of the project and 6.21% completion of the overall project.¹⁵⁵

150. On 14 May 2010, Tulip JV, intending to secure existing debts and obtain financing for the Ispartakule III project, transferred rights under the Contract amounting to TRL 3,100,000 to Denizbank Inc, Maslak Trade Center and Istanbul Public Finance

¹⁴⁹ Letter from Emlak to Tulip JV dated 3 March 2010 (Exhibit RE-68).

¹⁵⁰ Supplemental Report on Construction Delay to the Project by Accuracy, Appendix 4.

¹⁵¹ *Ibid.*

¹⁵² Letter from Tulip JV to Emlak dated 7 April 2010 (Exhibit CE-84).

¹⁵³ Letter from Tulip JV to Emlak dated 21 April 2010 (Exhibit CE-75).

¹⁵⁴ April 2010 Progress Report (Exhibit RE-20).

¹⁵⁵ *Ibid.*

Section.¹⁵⁶ Three days later, on 17 May 2010, Tulip JV wrote to Emlak and requested Emlak's permission to assign rights to Denizbank, stating:

In order to speed up the jobs that are being performed within the scope of the Revenue Sharing in Exchange for the Sale of Parcels Istanbul Bahçeşehir, Ispartakule Region 3 Job dated March 8, 2006, we would like to assign 7,500,000 TL (Seven million five hundred thousand Turkish Lira) of the receivables that you will owe us to Denizbank A.Ş. as security for a loan we will secure. We request that permission be granted within the scope of article 30 of the agreement.¹⁵⁷

151. Emlak did not act on to the requested assignment prior to the termination of the Contract.

E. Termination of the Contract

152. On 18 May 2010, the Emlak Construction Control Department issued a memorandum to Emlak's Legal Department, noting that the term of the Contract would expire on 19 May 2010 and requesting that the Legal Department act with respect to the "nature of transaction required to be made" pursuant to the Contract and also stating:

Even though after the last letter of notification [dated 3 March 2010], the contracting partnership provided significant rate of increase in the number of employees and equipments functioning on the site, the required construction progress was not caught up due to insufficiency of site organisation.¹⁵⁸

153. The Legal Department then prepared a recommendation to the General Manager of Emlak, Mr Kurum, that the Contract be terminated.¹⁵⁹ The Legal Department referred to a number of matters in the context of recommending termination, including the fact that progress at the site was at 10.17% and the Contract term would expire the next day, 19 May 2010, the bankruptcy of Mertkan, the assignment

¹⁵⁶ Deed of Assignment (Exhibit RE-70).

¹⁵⁷ Letter from Tulip JV to Emlak dated 17 May 2010 (Exhibit CE-259).

¹⁵⁸ Construction Control Department Memorandum dated 18 May 2010 (Exhibit H-957).

¹⁵⁹ Emlak Legal Department Memorandum dated 18 May 2010 (Exhibit H-958).

of receivables under the Contract to Denizbank and the ongoing dispute with FMS.¹⁶⁰ The recommendation concluded:

For the reasons mentioned above and because the term of the contractor would expire on 19 May 2010 according to the contract, because the progress rate for the contracted work is at 10.17%, and because [the contractor] has assigned its rights arising from the contract without the permission of our Company, it is recommended that the contract for the “Job of Revenue Sharing in Exchange for the Sale of Building Lots in Istanbul Bahcesehir Ispartakule 3. Region,” signed between the ORDINARY PARTNERSHIP OF TULIP-FMS-MERTKAN-ILCI and our Company on 3 August 2006, be terminated based on Articles 30 and 31 of the same contract. If this recommendation is approved by your office, we request that our letter be submitted to the discretion and approval of the Board of Directors to authorize the General Management to terminate the said contract, to cash the performance bond of the contractor as revenue, to perform associated liquidation procedures, to contract out the remainder of the work under the Procedure of Revenue Sharing in Exchange for the Sale of Building Lots, and to conduct all other business affairs.¹⁶¹

154. On 18 May 2010, the Board of Emlak passed a unanimous resolution to terminate the Contract, determining to:

[...] Annul the agreement of the “Income Sharing Work for Bahçeşehir Ispartakule 3rd Region in return of Land” under the 30th and 31st articles of the agreement entered into by our company and TULIP-FMS-MERTKAN-İLCİ-ORDINARY PARTNERSHIP dated 03/08/2006, to record the final guarantee of the undertaker as a revenue, to carry out the liquidation transactions

To tender the said work in its current condition according to the “Income Sharing Work in return of Land” method in accordance with the “Regulation on the Tender for Income Sharing Work for in return of Sales, Rent, and Land Sales” by our Company, and to authorize the General Directorate in order to implement and conclude the tender works.¹⁶²

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Emlak Board Decision dated 18 May 2010, p. 4 (Exhibit RE-73).

F. Events after Termination

155. On 24 May 2010, Emlak notified Tulip JV of the decision of the Board to terminate the Contract “because the job cannot be completed in the time period agreed upon and because [Tulip JV’s] conduct violates the contract.”¹⁶³ Emlak also notified Tulip JV that:

(b) The performance bond has been recorded as revenue in accordance with the agreement by liquidating the account for the construction job according to the provisions of the agreement that was concluded

(c) Furthermore, our Company’s Liquidation Commission Delegation will be at the construction site on 07 June 2010 at 10:00 o'clock to draw up a Status Determination Report, and our Company shall be informed of the representatives that will participate in the determination proceedings on behalf of your Ordinary Partnership and be present at the specified date and time at the construction site. Otherwise, the Status Determination Report will be drawn up unilaterally by our Company and the Ordinary Partnership being addressed will not have the right to object to this.¹⁶⁴

156. Emlak drew the full amount of the “performance bond” (*i.e.*, the bank guarantee provided by Fortis Bank) on 26 May 2010.¹⁶⁵

157. Following the termination of the Contract, representatives of the Van Herk Group, Panagro BV (Mr Benitah’s company) and Turkish members of Tulip I approached the Consulate General of the Netherlands in Turkey.¹⁶⁶ On 27 May 2010, the Consul General wrote to Mr Kurum and stated, *inter alia*, that:

TULIP REIC is of the opinion that this decision is unjust and unnecessary. Their counter arguments to this decision are based on the financial standing of their company, sales figures and ongoing construction work on the site. In this respect, Tulip REIC would like to continue the project as the pilot partner under the same contract or alternatively, purchase the land by the contract

¹⁶³ Notice of termination dated 24 May 2010 (Exhibit C-13).

¹⁶⁴ *Ibid.*

¹⁶⁵ Memo from J. Herkens to Fortis Bank (Netherlands) dated 26 May 2010 (Exhibit CE-69); Fortis Bank statement dated 3 June 2010 (Exhibit CE-68).

¹⁶⁶ Letter from the Dutch Consulate to Emlak dated 27 May 2010 (Exhibit CE-224).

value and proceed with the project independently. Tulip REIC also requests an objective investigation of the case by public authorities.¹⁶⁷

158. In the next several weeks, Tulip I made a number of other attempts to revise and continue the Ispartakule III project, including offering again to buy the land for the price of the full minimum guaranteed revenue under the Contract.¹⁶⁸

159. Between 7 and 8 June 2010, representatives of Emlak's Liquidation Commission sought to enter the Ispartakule III site and conduct an assessment.¹⁶⁹ Although the Parties disagree about the precise actions that transpired (and this aspect of the evidence will be discussed in further detail as part of the Tribunal's assessment of the merits of the claims asserted by the Claimant), there is agreement that the Commission arrived at but did not enter the site on 7 June 2010 and then returned the next day, 8 June 2010, accompanied by members of the police force. On that occasion, the Commission carried out its assessment.¹⁷⁰

160. On 24 June 2010, Mr Kurum attended the site of Ispartakule III, accompanied by security personnel.¹⁷¹ The Parties disagree on the nature of events that occurred when Mr Kurum attended the site and, accordingly, the Tribunal will assess the evidence surrounding this event as part of the Tribunal's assessment of the merits of the claims asserted by the Claimant. In any event, on 2 July 2010, the Office of the Prosecutor sent a letter to the Manager of the Department of Public Safety, notifying the department that Emlak must obtain an order from the civil courts to vacate the Ispartakule III site and that it would be within the duties of the department to prevent Emlak from seeking otherwise to obtain access to the site.¹⁷² Subsequently, the 6th Criminal Court of Kucukcekmece found Mr Kurum guilty of having restricted Tulip JV's "freedom to engage in business and freedom of labour" when he attended the

¹⁶⁷ *Ibid.*

¹⁶⁸ Letter from Tulip I to Emlak dated 4 June 2010 (Exhibit CE-212).

¹⁶⁹ Letter from Tulip I to the Prime Minister dated 25 June 2010 (Exhibit CE-200).

¹⁷⁰ Emlak Letter Awarding EOT dated 6 November 2010 (Exhibit AD-14).

¹⁷¹ Indictment No. 2010/6644 To Kucukcekmece Criminal Court of First Instance (Exhibit C-24).

¹⁷² Letter of the Kucukcekmece Prosecutor's Office dated 2 July 2010 (Exhibit BE-27).

Ispartakule III site on 24 June 2010.¹⁷³ However, Mr Kurum has appealed the decision of the court and an appeal remains pending.¹⁷⁴

161. In July 2010, Emlak re-tendered the Ispartakule III project.¹⁷⁵ Two companies, Dogu Insaat San ve Tic Ltd. Sti. – Precast Beton San. ve Tic. A.S. – Ustunler Yapi San ve Tic. Ltd. Sti. Ortak Girişimi (**Dogu Joint Venture**) and Gul Yapi Insaat Turizem Petrol Urunleri ve Dis. Tic. A.S. submitted bids.¹⁷⁶ On 23 July 2010, Emlak’s Board resolved to grant a new contract to the Dogu Joint Venture.¹⁷⁷ On 1 September 2010, Emlak signed an agreement for Ispartakule III with Dogu Joint Venture.¹⁷⁸ Under the Contract, Dogu Joint Venture was given 720 days to complete the residential housing, and 1100 to complete the commercial portion of the work. The site was delivered to the Dogu Joint Venture on 8 October 2010.¹⁷⁹

G. Other Tulip Projects in Turkey

162. At the time of the Contract termination, the Tulip companies had also engaged in preliminary steps in other real estate development projects in Turkey and had considered various opportunities.¹⁸⁰ In particular, in 2008, Moore Stephens conducted a feasibility study into three potential development projects other than Ispartakule III (known as Esenyurt in Istanbul, and Ulus and Ostim in Ankara).¹⁸¹ Further, an entity known as Tulip International Construction Industry and Trade S.A.

¹⁷³ Decision, 6th First Instance Criminal Court of Kucukcekmece (2010/1357 E 2013/751 K) (Exhibit RE-100).

¹⁷⁴ Transcript, Day 4, Kurum (150: 22-24).

¹⁷⁵ Tender announcement from Emlak (Exhibit CE-202).

¹⁷⁶ Bidding Commission Minutes (Exhibit CE-206).

¹⁷⁷ Emlak Board Decision (Exhibit RE-80).

¹⁷⁸ Enquiry Report by the Audit Board of the Office of the Prime Minister (CE-107); Dogu-Emlak Draft Contract (CE-207).

¹⁷⁹ Supreme Audit Board Annual Reports 2007-2010 (excerpts) (Exhibit CE-265).

¹⁸⁰ Declaration, Bakirkoy 4th Commercial Court of First Instance, Case No. 2011/688 (Exhibit RE-102).

¹⁸¹ Moore Stephens, Tulip Gayrimenkul Yatirim Project Feasibilities Report (Exhibit CE-209).

had entered into a contract with a landowner in respect of a development known as Esenyurt 360; that contract was terminated before completion on 1 October 2010.¹⁸²

H. Domestic Turkish Litigation

163. Following the termination of the Contract, Tulip I and Tulip JV commenced litigation against Emlak in the municipal courts of Turkey.¹⁸³

164. In particular, Tulip I commenced a proceeding against Emlak in Bakirkoy 5th Commercial Court of First Instance, claiming that Emlak improperly terminated the Contract. The court rejected the case, stating that it should be brought by all of the joint venture partners, as Tulip I did not have the authority or standing to file the suit on behalf of Tulip JV.¹⁸⁴ Tulip I then applied to the Supreme Court of Appeals for a Correction of Decision (after Turkey's Civil Court of Appeal rejected Tulip I's request for appeal) stating that the appeals court approved of the local court's decision without justification and that the local court's decision was contrary to civil procedure law.¹⁸⁵

165. Following the dismissal of Tulip I's case by the lower court, Tulip JV initiated a proceeding against Emlak in the Kadikoy 5th Commercial Court of First Instance, claiming that Emlak could not legally terminate the Contract unilaterally. Tulip JV sought declaratory and injunctive relief, along with TRL 100,000 in damages caused by the termination.¹⁸⁶ The Tribunal understands that this proceeding is still pending.¹⁸⁷

¹⁸² Bakirkoy Commercial Court of 1st Instance, Case No. 2011/688H-360 (Exhibit RE-103).

¹⁸³ Litigations chart (Exhibit IK-10).

¹⁸⁴ No. 2010/788, Bakirkoy 5th Commercial Court of First Instance, Decision (Exhibit RE-82).

¹⁸⁵ No. 2010/788, Bakirkoy 5th Commercial Court of First Instance, Request for Correction of Decision (Exhibit RE-83).

¹⁸⁶ No. 2010/1654, Kadikoy 5th Commercial Court of First Instance, Petition for Injunction, Section C (Exhibit RE-84).

¹⁸⁷ Transcript, Day 4, Keskin (160:2 – 161:2).

I. Commencement of ICSID Arbitration

166. As noted above, the Claimant filed its Request with ICSID on 11 October 2011 and the Request was subsequently registered by ICSID on 28 October 2011 in accordance with Art 36 of the ICSID Convention.

167. As formulated in its written submissions and at the Hearing, the Claimant has requested that the Tribunal make findings that:

- (1) The Tribunal has jurisdiction over the dispute and all the claims asserted by the Claimant are admissible.
- (2) The Claimant may present BIT claims on behalf of Mr Benitah on the basis that Mr Benitah is a Dutch investor who has made an investment within the meaning of the BIT and has formally consented to have the Tribunal adjudicate his claims.
- (3) The conduct complained of by the Claimant is attributable to the Respondent in accordance with applicable principles of international law.
- (4) The Respondent has breached its obligations under the BIT in the following ways:
 - i. The Respondent has failed to comply with the “fair and equitable treatment” obligation in Art 3(1) of the BIT.
 - ii. The Respondent expropriated the relevant investment in breach of Art 5 of the BIT.
 - iii. The Respondent failed to comply with its obligations in Art 3(2) of the BIT to “observe any obligation it may have entered into with regard to investments” and to afford “full protection and security” to the relevant investment.
- (5) The Claimant is entitled to compensation for the loss caused by the termination of the Contract in breach of the BIT.

168. In response, the Respondent has requested that the following findings be made:

- (1) The Claimant's alleged investments fall outside the Tribunal's jurisdiction.
- (2) The claims asserted by the Claimant on behalf of Mr Benitah are inadmissible on the basis that he has not joined as a party and the Claimant cannot otherwise present his claims on the basis of a purported power of attorney signed by Mr Benitah in favour of the Claimant.
- (3) The claims asserted by the Claimant are not attributable to the Respondent.
- (4) The claims asserted by the Claimant do not arise from the BIT and are, on the contrary, in essence contractual claims that are subject to the jurisdiction of the Turkish courts (or, alternatively, are not admissible pending the resolution of local Turkish litigation).
- (5) The Respondent has not violated any aspect of the BIT.

IV. RELEVANT PROVISIONS OF THE BIT AND APPLICABLE LAW

A. Relevant Provisions of the BIT

169. It is convenient to set out certain relevant provisions of the BIT.¹⁸⁸

Art 1(a) contains the definition of “investor” and provides that:

(a) ‘investor’ means:

- ii. a natural person who is a national of a Contracting Party under its applicable law;
- iii. a legal person duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Contracting Party.

Art 1(b) contains the definition of “investment” and provides that:

(b) ‘investment’ means every kind of asset such as equity, debt, claims and service and investment contracts and includes:

- i. tangible and intangible property, including rights such as mortgages, liens and pledges;
- ii. shares of stock or other interests in a company or interests in the assets thereof;
- iii. a claim to money or a claim to performance having economic value and associated with an investment;
- iv. industrial property rights, including rights with respect to patents, trademark, trade names, industrial designs and know-how and goodwill and copyrights
- v. any right conferred by law or contract and any licences and permits pursuant to law.

Art 2(1) provides that:

(1) Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each

¹⁸⁸

BIT (Exhibit C-1).

Contracting Party shall admit investments of investors of the other Contracting Party.

Art 2(2) sets out the scope of application of the BIT to investments and states:

(2) The present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made.

The phrase "owned or control" referred to in Art 2(2) of the BIT is defined in Art 1(d) as follows:

(d) 'owned or controlled' means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located.

Art 3 imposes the following obligations on Contracting Parties:

- (1) Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, sale or liquidation thereof by those investors.
- (2) Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor. Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

Art 5 contains the BIT's protection against unlawful expropriation and provides as follows in relevant part:

- (1) Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
 - (a) the measures are taken in the public interest and under due process of law;
 - (b) the measures are not discriminatory;
 - (c) the measures are accompanied by the provision for the payment of just compensation. Such compensation shall amount to the fair market value of the investment or in the absence of a fair market value the genuine value of

the investments affected and shall, in order to be effective for the investors, be paid and made freely transferable, without unreasonable delay, to the country of which the investors concerned are nationals or to any other country accepted by the Contracting Party concerned and in the currency in which the investment was originally made or in any freely convertible currency, mutually agreed to by the investor and the Contracting Party.

Art 8 contains the BIT's investor-State dispute settlement procedure and states:

- (1) For the purposes of this Article, an investment dispute is defined as a dispute involving:
 - (a) the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party; or
 - (b) a breach of any right conferred or created by this Agreement with respect to an investment.
- (2) In the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of non-binding, third party procedures upon which such investor and the Contracting Party mutually agree. If the dispute cannot be resolved through the foregoing procedures the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ('Centre') for settlement by arbitration, at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award.
- (3) (a) Each Contracting Party hereby consents to the submission of an investment dispute to the Centre for settlement by arbitration.
 - (b) Arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States and the 'Arbitration Rules' of the Centre.
- (4) For the purposes of this Article, any legal person incorporated or constituted under the applicable laws and regulations of either Contracting Party, but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of investors of the other Contracting Party, shall in accordance with Article 25(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States be treated as an investor of such other Contracting Party.

B. Applicable Law

170. Although the BIT does not refer to a particular law as being applicable to the resolution of the dispute, Art 8(2) of the BIT references the application of the ICSID Convention, which provides at Art 42(1):

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

171. The Tribunal observes that although the parties have not expressly agreed the applicable law, the Claimant has presented its claims (and matters concerning jurisdiction) on the basis of the provisions of the BIT, and the Respondent has proceeded to present its defence on the same basis. Therefore, the Tribunal considers that the applicable law consists, for the most part, of the BIT, as interpreted in accordance with international law, as well as the ICSID Convention. The Tribunal further observes that, in addition to applying the provisions of the BIT and the ICSID Convention, aspects of Turkish municipal law are also invoked, in particular as the Claimant asserts that Emlak is a “state organ” and entities designated as “state organs” under domestic law will enjoy that status under international law.

V. JURISDICTION AND ADMISSIBILITY

A. Investment by Claimant

a) *Position of the Claimant*

172. The Claimant contends that it made a unified investment into the Ispartakule III Project, and the Turkish construction sector, in accordance with Article 1(b) of the BIT as set out at paragraph 169 above.

173. According to the Claimant, its overall investment includes several “investment categories”, which validly constitute the parts making up its entire investment structure.¹⁸⁹ The Claimant relies on the decision in *CSOB v Slovak Republic*¹⁹⁰ and other arbitral jurisprudence for the proposition that the Tribunal must assess the totality of its investment even if each element of that investment may not be sufficient on its own.¹⁹¹

174. First, the Claimant relies on its 65% shareholding in Tulip I, acquired on 14 August 2008.¹⁹² The Claimant asserts that this shareholding falls within the terms of Art 1(b)(ii) of the BIT, referring to “shares of stock or other interests in a company or interests in the assets thereof”.¹⁹³

175. The Claimant argues that, at that time of its acquisition of Tulip I shares, the “previous Dutch Investors restructured their Turkish investment, and Claimant succeeded to the rights and obligations inherent in the shares of Tulip I transferred to

¹⁸⁹ Claimant’s Reply, para. 352.

¹⁹⁰ *CSOB v Slovak Republic*, ICSID Case No. ARB/97/4 (Decision on Objections to Jurisdiction dated 24 May 1999) (Exhibit CLA-126).

¹⁹¹ Claimant’s Reply, paras. 351-352 and fn. 479.

¹⁹² Claimant’s Reply, para. 356; Tulip I Board Decision dated 14 August 2008 (Exhibit CE-239).

¹⁹³ BIT, Art 1(b)(ii) (Exhibit C-1).

it.”¹⁹⁴ The Claimant relies on the fact it acquired the shares from a related Van Herk Group corporate entity, OGBBA Van Herk BV, stating that the Claimant was a ‘daughter company’ of this entity.¹⁹⁵

176. The Claimant asserts that:

Scenarios in which an investment is transferred from one potential claimant to another sharing the same nationality, such that a BIT containing the state’s standing offer to arbitrate would be applicable to both investors at one time or another, have not been found to trouble an ICSID tribunal’s jurisdiction.¹⁹⁶

177. The Claimant also relies on the decision in *CME v Czech Republic*, where the tribunal stated with regard to another share transfer between related companies:

[A]ny claims deriving from the Claimant’s predecessor’s investment (also covered by the Treaty) follow the assigned shares [...] If the Treaty allows - as it does - the protection of indirect investments, the more the Treaty must continuously protect the parent company’s investment assigned to its daughter company under the same Treaty regime.¹⁹⁷

178. Accordingly, the Claimant asserts a right to rely on a prior investment in Tulip I shares by the “Dutch Investors” for the purpose of bringing BIT claims pre-dating its own establishment and acquisition of an equity interest in Tulip I.

179. In its submissions, the Claimant has also referred to its shareholding in Tulip II in the context of its investment structure.¹⁹⁸ However, it is not entirely clear from the

¹⁹⁴ Claimant’s Reply, para. 356.

¹⁹⁵ *Ibid.*, para. 357.

¹⁹⁶ *Ibid.*, para. 356.

¹⁹⁷ *CME v. Czech Republic*, UNCITRAL (Partial Award dated 13 September 2001), paras. 423-424 (Exhibit CLA-122). The Claimant also cites the *Vivendi* annulment decision for the proposition that there only *might* be a question to answer even if rights were transferred between potential claimants of different nationalities – see *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision on Annulment dated 3 July 2002), para. 50 (Exhibit CLA-82); Claimant’s Reply, fn. 494.

¹⁹⁸ Claimant’s Memorial, para. 63; Claimant’s Reply, fn. 499.

Claimant's pleadings whether it pursues any purported equity interest in Tulip II as a basis for its overall "investment".¹⁹⁹

180. Aside from its shareholdings, the Claimant also refers to loans made pursuant to the EUR 20 million First Loan Facility with Tulip II dated 1 March 2008 and the EUR 2 million Second Loan Facility with Tulip I dated 25 February 2009 as forming part of its "investment".²⁰⁰

181. According to the Claimant, it is well-established that loans may form part of an investment when they are extended to local companies "whose share ownership has already constituted part of the claimant's investment", irrespective of their purpose.²⁰¹ The Claimant argues that, in any event, the loans were drawn down and the Claimant has accounted for the use of the funds in Turkey as money spent for the Ispartakule III or other projects in Turkey.²⁰²

182. The Claimant draws the Tribunal's attention to the fact that the First Loan Facility included an assignment by OGBBA Van Herk BV and Van Herk Real Estate Participations BV to the Claimant of certain earlier loans to Tulip II²⁰³ in addition to some EUR 3.5 million in "fresh" capital and stated as follows in Art 5.1 of the Agreement:

Van Herk and OGGB herewith assign to Lender, and Lender accepts (i) the assignment of all rights and obligations of Van Herk and OGGB under the loans provided by Van Herk and OGGB to Borrower before the date of this Agreement, and (ii) the assignment of all rights and obligations of Van Herk

¹⁹⁹ The Claimant has referred to Exhibit CE-281, Articles of Association of Tulip II, dated 25 September 2007 and Exhibits CE-284, CE-285 and CE-286, Tulip II Share Transfers, but has not elaborated in its written submissions or at the Hearing on the precise nature or scope of its shareholding in Tulip II at any relevant time or whether it relies on any interest in Tulip II as an alternative to its alleged interest in Tulip I.

²⁰⁰ Claimant's Reply, paras. 360-362; Subordinated Loan Facility Agreement between Tulip II and Tulip Real Estate and Development Netherlands BV dated 1 March 2008 (Exhibit CE-63); Subordinated Loan Facility Agreements between Tulip I and Tulip Real Estate and Development Netherlands BV dated 25 February 2009 (Exhibit CE-64).

²⁰¹ Claimant's Reply, para. 360 and fn. 499.

²⁰² Claimant's Reply, para. 360.

²⁰³ Transcript, Day 1, Newberger (35:15-23).

and OGGB under the payments made by Van Hark and OGGB on behalf of Borrower before the date of this Agreement, all specified in table 2, in an aggregate amount of at least €14,453,267.13, excluding accrued interest, costs and other amounts, but including 1% arrangement fee's [sic].²⁰⁴

183. In accordance with Art 5.2 of the Agreement, the Borrower approved this assignment.²⁰⁵ Further, Art 5.4 of the Agreement specified that the balance available under the loan facility amounted to EUR 3,595,598.71 (which funds were drawn down after the loan facility was executed).²⁰⁶

184. The Claimant appears to reference this “very specific assignment” to support its contention that any “earlier investment” was transferred to and “captured” by the Claimant.²⁰⁷

185. The Claimant also claims “direct out-of-pocket expenses”, such as travel costs, as contributions to the Claimant’s pre-existing investment on the basis that they had no reason to exist other than in support of that investment.²⁰⁸ According to the Claimant, the fact that some of these expenses may have been paid by entities other than Claimant is “of no impediment”, since the “Dutch Investors” who initially made the investment then reorganised that investment.²⁰⁹ Equally, the fact that some expenses were paid by other Van Herk entities after the Claimant came into existence can be justified as an investment belonging to the Claimant on the basis of Art 1(d) of the BIT, which the Claimant appears to interpret as extending to investments owned or controlled by an “affiliate”, including a Van Herk sister company.²¹⁰ The Claimant has submitted spreadsheets documenting the out-of-

²⁰⁴ Subordinated Loan Facility Agreement between Tulip II and Tulip Real Estate and Development Netherlands BV, Cl. 5.1 (Exhibit CE-63).

²⁰⁵ *Ibid.*, Art 5.2.

²⁰⁶ *Ibid.*, Art 5.4.

²⁰⁷ Transcript, Day 1, Newberger (35:15-23).

²⁰⁸ Claimant’s Reply, para. 363; Esveld Witness Statement, para. 12.

²⁰⁹ Claimant’s Reply, para. 363.

²¹⁰ *Ibid.*

pocket expenses allegedly incurred by the Claimant itself and different members of the Van Herk Group in the period between 2006 and 2011.²¹¹

186. The Claimant further asserts that its investment included a “performance bond” of EUR 8,716,981.05 which took the form of a guarantee provided to Emlak by OGBBA Van Herk BV in August 2006 and subsequently transferred as a liability to the Claimant.²¹² The performance bond was drawn by Emlak shortly after the termination of the Contract, in May 2010. A corporate entity within the Van Herk Group, OGBBA Van Herk BV, paid the amount of EUR 8,716,981.05 to the Claimant’s bank in Turkey as compensation for the payment of the principal and bank commissions. Within the Van Herk Group, the payment was recorded as a loan from van Herk Real Estate Participations B.V. to the Claimant.²¹³

187. Finally, the Claimant refers to the “burgeoning” Tulip brand, extending to other planned or commenced real estate projects in Turkey, as part of its overall investment. According to the Claimant, the Tulip “brand” falls within the meaning of an “investment” in Art 1(b) of the BIT on the basis that this treaty provision is inclusive rather than exhaustive and encompasses all kinds of assets.²¹⁴

b) *Position of the Respondent*

188. The Respondent accepts that “investments” may be composed of various interrelated transactions, even if not each of these transactions, as such, would individually qualify as an investment.²¹⁵ Nevertheless, the Respondent contends that the

²¹¹ Summary of Tulip Expenses (Exhibit EE-8).

²¹² Claimant’s Reply, para. 363; Esveld Witness Statement, para. 13.

²¹³ Esveld Witness Statement, paras. 13-14.

²¹⁴ Claimant’s Reply, para. 366.

²¹⁵ Respondent’s Rejoinder, para. 291.

Claimant must show that the different elements of what it refers to as its “investment as a unity” validly constitutes part of the whole.²¹⁶

189. The Respondent does not appear to dispute that the transfer of shares to Tulip I on 14 August 2008 was valid.²¹⁷ Although the Respondent notes that the Claimant’s ownership interest in Tulip I “remains unclear”, it does not substantiate this assertion with specific evidence.²¹⁸

190. The Respondent also rejects the suggestion that the transfer of shares in Tulip I assigned to the Claimant any pre-existing treaty rights acquired by the “Dutch Investors” prior to the Claimant’s incorporation.²¹⁹

191. According to the Respondent, a corporate re-organisation does not automatically entail the transfer of treaty claims under the BIT. Rather, the Respondent argues, the Claimant must prove valid assignment pursuant to applicable law and has not done so in this proceeding.

192. The Respondent relies on the decision in *Daimler v Argentina*, where the tribunal held that:

The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments. The Tribunal therefore rejects the Respondent’s contention that the Claimant’s ICSID claims (or at least those connected with the shareholding) were necessarily and automatically transferred along with the shares by operation of law. Rather, the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken – provided that the investor did not otherwise relinquish its right to bring an ICSID claim.²²⁰

²¹⁶ Respondent’s Counter-Memorial, para. 488; Respondent’s Rejoinder, para. 292.

²¹⁷ Respondent’s Rejoinder, para. 304.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*, paras. 305 and 296-297.

²²⁰ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 (Award dated 22 August 2012), para. 145 (Exhibit CLA-98); Respondent’s Rejoinder, fn. 378.

193. The Respondent also contests the characterisation of the two loan facilities referred to by the Claimant as parts of the Claimant’s investment. The Respondent argues, firstly, that the loan agreements constitute private financial arrangements, similar to the transactions considered by the tribunal in *Burimi SRL and Eagle Games SH.A. v. Republic of Albania*.²²¹

194. The Respondent further argues that:

- (1) the Claimant has not shown that the loans were in fact “associated” with an investment that is the subject of the present dispute;²²²
- (2) large parts of the “loan” investment were not validly made on the basis that Emlak rejected Tulip II’s participation in the Ispartakule III project;²²³
- (3) no claims were made by Claimant in relation to Tulip II so that a loan to it falls outside the Tribunal’s jurisdiction.²²⁴

195. The Respondent also asserts that the loan agreements can only operate to establish an investment prospectively from the time they were executed and not otherwise.²²⁵

196. With respect to “direct out-of-pocket expenses”, the Respondent argues that the Claimant has failed to show that this expenditure constitutes an investment establishing the Tribunal’s jurisdiction²²⁶ and, in particular, contends that the Claimant:

²²¹ *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18 (Award dated 29 May 2013 (Exhibit RLA-81); Respondent’s Rejoinder, para. 293 and fn. 374.

²²² Respondent’s Rejoinder, para. 310.

²²³ *Ibid.*, para. 311.

²²⁴ *Ibid.*, para. 313.

²²⁵ Respondent’s Counter-Memorial, para. 521; Respondent’s Rejoinder, para. 312.

²²⁶ Respondent’s Rejoinder, para. 314.

- (1) has not identified the amount of expenses actually being claimed as an investment;²²⁷ and
- (2) has not provided a satisfactory explanation for claiming amounts paid by other Van Herk entities and/or paid after the alleged breaches of the BIT took place.²²⁸

197. The Respondent argues that the Claimant has not explained how the “performance bond” it relies on constitutes an additional aspect of its investment, has not disclosed the terms of the bond, and has not proven that the bond, paid by another Van Herk Group entity, OGBBA Van Herk BV, amounts to an investment by the Claimant.²²⁹ The Respondent further contends that the Claimant has not established how the alleged assignment of the performance also assigned potential ICSID claims arising on the basis of the bond.²³⁰ Finally, the Respondent asserts that, in any event, the bond was paid to Emlak on 26 May 2010 and, therefore, only claims arising after that date could fall within the Tribunal’s jurisdiction.²³¹

198. Finally, the Respondent disputes the suggestion that the “Tulip brand” constitutes part of the overall investment under Art 1(b)(iv) of the BIT or otherwise. According to the Respondent, Art 1(b)(iv) includes a comprehensive list of intellectual property rights that were intended to be protected as investments under the BIT and does not extend to “brands” and the Claimant has not claimed that the brand constitutes goodwill or that it had its claimed value at the time of the termination of the Contract.²³²

²²⁷ *Ibid.*, para. 315.

²²⁸ Respondent’s Counter-Memorial, para. 527; Respondent’s Rejoinder, paras. 317-318.

²²⁹ Respondent’s Rejoinder, para. 321.

²³⁰ *Ibid.*, para. 322.

²³¹ *Ibid.*, para. 323.

²³² *Ibid.*, paras. 324-332.

199. On this basis, the Respondent argues that only a small part of the “whole” investment relied on by the Claimant could found the jurisdiction of the Tribunal in accordance with Art 1(b) of the BIT and Art 25 of the ICSID Convention.

c) *Determination of the Tribunal*

200. The Tribunal finds that the Claimant made an “investment” for the purposes of Art 1(b) of the BIT and Art 25 of the ICSID Convention when it acquired shares in Tulip I on 14 August 2008.²³³ The effect of this transaction was to give the Claimant an ‘indirect investment’ into Tulip JV and, consequently, the Ispartakule III Project.

201. It is well-established that an indirect shareholding in a local vehicle may form the basis for an “investment”.²³⁴ Further, in this case, Art 1(d) of the BIT expressly contemplates direct or indirect ownership or control of an investment. Accordingly, the Claimant’s Tulip I shareholding constitutes a qualifying investment for the purposes of the Tribunal’s jurisdiction.

202. Further, although the Tribunal need not quantify the Claimant’s overall investment for jurisdictional purposes,²³⁵ the Tribunal accepts that the Claimant’s overall investment included various infusions of capital into the Ispartakule III Project through loans under the First Loan Facility and Second Loan Facility and other expenditure, such as certain out-of-pocket expenses.

203. Upon reviewing the evidence on the record, the Tribunal concludes that, as a matter of substance, at least part of the financing provided under the two loan facility agreements constitutes an “investment” by the Claimant. Although the Respondent has disputed the validity of the loan agreements for formal reasons, it is not contested that the Claimant was a party to the agreements as a lender of the funds (together

²³³ Tulip I Board Decision dated 14 August 2008 (Exhibit CE-239).

²³⁴ See, e.g., *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 (Award dated 22 August 2012), para. 91 (Exhibit CLA-98).

²³⁵ Such quantification issues are a matter to be assessed in determining whether, and, if so, to what extent, the Claimant is entitled to compensation for any breaches of the BIT.

with other Van Herk Group members as assignors). The Tribunal also finds that the Claimant had in fact effected regular payments pursuant to the loan arrangements in order to finance expenses in relation to Ispartakule III. Accordingly, the Tribunal concludes that certain funding provided under the loan facility agreements constitutes an ‘investment’ for the purposes of the BIT.

204. Further, the Tribunal accepts that, from the moment of the Claimant’s incorporation and until the termination of the Contract, the Claimant incurred certain out-of-pocket expenses in connection with the Ispartakule III project. Indeed, the Respondent accepts that expenditure of at least EUR 161,088 is attributable to the Claimant.²³⁶ Accordingly, the Tribunal concludes that the Claimant also made a qualifying ‘investment’ by way of certain direct out-of-pocket expenses.

205. For jurisdictional purposes, the Tribunal need not determine whether the “performance bond” drawn by Emlak after the termination of the Contract constitutes a part of the Claimant’s investment or whether it would form part of any claim for damages.

206. As regards the Tribunal’s jurisdiction *ratione temporis*, the Tribunal understands the Claimant’s complaint concerns violations of the BIT that culminate in the termination of the Contract in May 2010. Indeed, the Claimant has stated in its submissions that “[t]he dispute between Tulip and the Government of Turkey arose when the Contract was purportedly terminated as of 18 May 2010.”²³⁷

207. Therefore, the Tribunal understands that while the Claimant asserts certain other wrongful conduct by the State (such as conduct in connection with the zoning dispute), these allegations do not concern the Claimant’s principal complaint. As the Claimant put it at the Hearing, in describing its allegation with respect to the zoning dispute: “That’s important background as the foundation of the case, but it’s not what our claim is about for the purposes of breach”.²³⁸

²³⁶ Respondent’s Counter-Memorial, para. 529.

²³⁷ Claimant’s Memorial, para. 384.

²³⁸ Transcript, Newberger, Day 1 (43:12-14).

208. While the Tribunal may take account of the Claimant’s overall complaints in assessing the whole of the Respondent’s alleged conduct, the Tribunal is satisfied that the Claimant’s principal claim arises out of an “investment” for the purposes of the BIT.

B. Claims asserted on behalf of Mr Benitah

a) Position of the Claimant

209. The Claimant claims that it may bring BIT claims on behalf of Mr Benitah on the basis that Mr Benitah is a Dutch “investor” with a relevant “investment” who “has an independent right, under the BIT, to seek redress, a right which he has properly exercised in this arbitration.”²³⁹

210. The contention is that Mr Benitah may pursue BIT claims through the Claimant despite not being named as a party because he has “provided his irrevocable consent to Claimant to bring claims on his behalf in these proceedings”.²⁴⁰ In this regard, the Claimant relies on a Power of Attorney executed by Mr Benitah in favour of the Claimant, which grants the Claimant:

... all necessary powers, and more specifically to act in his stead and in and on his behalf in any and all ways, with respect to any claim or rights that the Grantor has or may have arising out of, related to, or in connection with residential and commercial development and construction projects, companies, partnerships or other juridical or natural entities undertaken in or with respect to the Republic of Turkey ... including but not limited to certain shareholding interests of the Grantor in [Tulip I] and [Tulip JV].²⁴¹

211. According to the Claimant, by executing the Power of Attorney, Mr Benitah has complied with the “jurisdictional” requirement in Art 25 and the “procedural”

²³⁹ Claimant’s Reply, paras. 368 and 372.

²⁴⁰ *Ibid.*, para. 243.

²⁴¹ *Ibid.*, para. 374; Benitah Witness Statement, para. 11; Power of Attorney of Meyer Benitah (Exhibit CE-295).

requirement in Art 36 of the ICSID Convention.²⁴² That is, Mr Benitah has given his written consent and the Request for Arbitration was signed by his legal representative. The Claimant also relies on ICSID Institution Rule 1(1), which states that a ‘request shall be signed by the requesting party or its duly authorised representative.’²⁴³ The Claimant asserts that, even if there were any deficiencies in the Request for Arbitration, the Respondent would now be time-barred for the purposes of challenging jurisdiction on the basis of such deficiencies.²⁴⁴

212. The Claimant relies on the decision in *Ambiente v Argentine Republic* for the proposition that “...the jurisdictional requirement of written consent in Art. 25 is satisfied by discharging the procedural one of filing a written request in Art. 36, either by the party itself or by its duly appointed representative.”²⁴⁵ The Claimant also references *Abaclat v Argentine Republic* in support of the proposition that it may bring claims on behalf of Mr Benitah.²⁴⁶

213. The Claimant presents the issue of Mr Benitah not being named as a party as merely “procedural” rather than “jurisdictional”.²⁴⁷ At the Hearing, the Claimant offered to have Mr Benitah formally joined as a party with the agreement of the Respondent as a “procedural device”,²⁴⁸ although that invitation to consent to the joinder of Mr Benitah *nunc pro tunc* was refused by the Respondent.²⁴⁹ The Claimant maintains

²⁴² Claimant’s Reply, paras. 369-372.

²⁴³ *Ibid.*, paras. 371.

²⁴⁴ *Ibid.*, paras. 377.

²⁴⁵ *Ibid.*, para. 372, referring to *Ambiente Ufficio S.P.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (Decision on Jurisdiction and Admissibility dated 8 February 2013), para. 220 (Exhibit CLA-119).

²⁴⁶ Transcript, Day 8, Newberger (19:3); *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5 (Decision on Jurisdiction and Admissibility dated 4 August 2011) (Exhibit CLA-1).

²⁴⁷ Transcript, Day 8, Newberger (16:21-24).

²⁴⁸ *Ibid.*, (19:14-23).

²⁴⁹ Respondent’s Letter to the Tribunal dated 11 October 2013.

the contention that it is nevertheless able to assert claims ‘on behalf of’ Mr Benitah.²⁵⁰

b) *Position of the Respondent*

214. The Respondent asserts that the claims of Mr Benitah are inadmissible in this arbitration because Mr Benitah is not prosecuting his claims as a party and has not assigned his claims to the Claimant.²⁵¹

215. According to the Respondent, the Claimant is “stating the obvious” in relying on Rule 1(1) of the Institution Rules or the decision in *Ambiente v Argentine Republic* for the proposition that a request for arbitration may be signed by a “representative”.²⁵² That is, the Respondent accepts that a request for arbitration plainly need not be signed by the investor itself.²⁵³

216. However, the Respondent argues that the relevant issue is not whether Mr Benitah has validly consented to the arbitration, whether he has met the formal requirements for the introduction of a claim or whether there are deficiencies to the Request for Arbitration.²⁵⁴ Rather, the Respondent bases its assertion of inadmissibility with respect to Mr Benitah’s claims on the following matters (which, it argues, the Claimant has left unanswered):

- (1) The Power of Attorney relied on by the Claimant to bring claims on behalf of Mr Benitah does not act as an assignment of rights but merely grants the

²⁵⁰ Claimant’s Letter to the Tribunal dated 18 October 2013.

²⁵¹ Respondent’s Counter-Memorial, paras. 545-550. Although the Respondent previously asserted that Mr Benitah did not make an “investment” for the purposes of the BIT (see Respondent’s Counter-Memorial at paras. 551-556), it appears to have abandoned this particular objection in its Rejoinder, stating at para. 334 that the Claimant can be taken as providing “some evidence for a possible investment held by Mr Benitah.”

²⁵² Respondent’s Rejoinder, para. 335-336.

²⁵³ *Ibid.*, para. 336.

²⁵⁴ *Ibid.*

Claimant the power to “prosecute” claims as a representative of Mr Benitah.²⁵⁵

- (2) The Power of Attorney does not give the Claimant the right to assert substantive rights belonging to Mr Benitah, nor does it allow for Mr Benitah’s claims to be represented in circumstances where he is not a party to the proceedings and would not be liable for costs should an award of costs be made in Respondent’s favour.²⁵⁶

c) *Determination of the Tribunal*

217. In referring to claims brought “on behalf of” Mr Benitah, undoubtedly the Claimant is seeking to assert Mr Benitah’s claims in a representative capacity. Indeed, it is apparent from the Claimant’s description of Mr Benitah in its submissions that the Claimant itself does not characterise Mr Benitah as a “party” to this proceeding in his own right. For example, the Claimant stated at the Hearing with reference to Mr Benitah:

For this proceeding, where **he has been appointed as the Claimant representative by BV through authorisation**, he is no stranger to the Tribunal or the Respondent, and he was cross-examined, he appeared here, he has submitted three witness statements.²⁵⁷ (emphasis added)

218. In making these submissions, the Claimant has plainly sought to justify the right of a non-party to assert claims before the Tribunal.

219. Further, in its letter of 18 October 2013 to the Tribunal, the Claimant stated in discussing the claims of Mr Benitah that “[h]e could have brought his own claims under the BIT.”²⁵⁸

²⁵⁵ *Ibid.*, para. 337.

²⁵⁶ *Ibid.*, para. 337.

²⁵⁷ Transcript, Day 8, Newberger (18:6-10).

²⁵⁸ Letter from Claimant to the Tribunal dated 18 October 2013.

220. The central point is that Mr Benitah did not bring his own claims before the Tribunal. Rather, he has sought to have the Claimant assert his claims in a representative capacity.
221. The issue before the Tribunal is whether it may entertain such representative claims without Mr Benitah acting as a claimant in his own right.
222. The fact that Mr Benitah may be an “investor” who has made an “investment” for the purposes of the BIT and that he may have consented in writing to have his claims brought before the Tribunal cannot suffice for the purposes of the Tribunal being satisfied that it may entertain claims under the BIT brought by the Claimant “on behalf of” Mr Benitah. The relevant enquiry must be whether the respondent State has consented to prospective liability under the BIT on the basis of representative claims. This issue is properly characterised as jurisdictional in nature rather than being merely procedural, as it concerns the scope of State consent in treaty arbitration.
223. In addressing this question, the Tribunal must defer to the fact that a host State’s consent to prospective liability with respect to claims brought under the treaty, here the BIT, constitutes a waiver of State sovereignty and is governed by the terms of the BIT as defining its extent.
224. It is plain to the Tribunal that the terms of the BIT do not provide a basis to conclude that the State has consented to have representative claims brought against it.
225. Art 8 of the BIT, addressing submission of disputes with the State to ICSID arbitration, relevantly provides:

2) In the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of nonbinding, third party procedures upon which such investor and the Contracting Party mutually agree. If the dispute cannot be resolved through the foregoing procedures **the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes (‘Centre’) for settlement by arbitration**, at any time after one year from the date upon which the dispute

arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award.

3) (a) Each Contracting Party hereby consents to the submission of an investment dispute to the Centre for settlement by arbitration.

(b) Arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States and the 'Arbitration Rules' of the Centre. (emphasis added)

226. In its unambiguously plain language, Art 8 limits the right to assert claims against the State to the "investor" who has an investment dispute with the State. Art 8 contemplates only that the "investor" who has a dispute with the State may submit claims in its own right, as a claimant. The Tribunal considers that there is no basis to read into Art 8, or any other provisions of the BIT, the establishment of a right for any alleged investor to bring claims through another entity (albeit itself a claimant) acting in a representative capacity.

227. The provisions of the ICSID Convention and the Institution Rules, relied on by the Claimant, do not alter this position. Contrary to the Claimant's contentions, the Tribunal characterises the "jurisdictional" requirement in Art 25 of the ICSID Convention referred to by the Claimant as a substantive stipulation that it be the investor itself who is the claimant, not its formally authorised representative. The reference to the jurisdictional requirement of written consent in *Ambiente v Argentine Republic* is no more than a reference to what is required to constitute such written consent so far as the signification of consent is concerned, and in no way extends capacity to a third party (or even to an extant claimant) to stand as agent in place of the investor required personally to be claimant in the proceedings.

228. The relevant inquiry for the Tribunal is defined as identifying the claimant or claimants from the constituting Request made under Art 36 of the ICSID Convention. As a matter of substance, it is those principal parties alone who are the claimants in proceedings instituted under the BIT, and none of Art 36 or any other provision of the ICSID Convention enable a third person not named as a claimant to prosecute claims as agent for a non-party principal.

229. *Ex facie*, no provision of the ICSID Convention enables such a non-party to impose himself upon a State party respondent by deciding to “submit himself” by giving a prior or subsequent authority to the named claimant, nor to himself be joined later in the proceeding without the explicit consent of the respondent State.
230. These obvious issues of construction have the Tribunal at somewhat of a loss to understand why Mr Benitah did not join with the Claimant as a co-claimant upon the initiation of the proceedings. For one reason or another, he made the election not to join. It is for the respondent State, here Turkey, to take the parties as it finds them. There are no means short of its consent to enable Mr Benitah to be moved from the status of a witness for the Claimant to the status either of a party advancing principal claims himself or through an agent advancing representative claims on his behalf.
231. It would be to ignore the clear provisions of the ICSID Convention and the BIT to enable the Claimant to prosecute his claims as his attorney. This suffices to find Mr Benitah cannot advance his personal claims in this proceeding. There is no obvious bar to Mr Benitah initiating his own claims as an investor within Art 25 of the ICSID Convention, but that possibility does not fall within the Tribunal's remit.

VI. ATTRIBUTION

a) *Position of the Claimant*

Acts of Emlak

232. The Claimant contends that the acts of Emlak which form the basis of its complaint in this proceeding are attributable to TOKI and therefore to the State of Turkey.

233. In this regard, the Claimant relies on Arts 4, 5 and 8 of the ILC Articles on State Responsibility (the **ILC Articles**) as representing the relevant principles of public international law on State attribution.²⁵⁹

Art 4 states:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Art 5 states:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Art 8 states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

²⁵⁹ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, Yearbook of the International Law Commission (2001) (Exhibit RLA-34).

234. Although the Claimant’s submissions do not fully relate the particular facts relied on by the Claimant to the legal criteria for attribution under each of the ILC Articles that it invokes, the Tribunal understands the Claimant’s position to be as set out below.

Article 4

235. With respect to Claimant being a “state organ” for the purposes of Art 4 ILC Articles, the Claimant has argued that:

- (1) Emlak is “an arm of the Turkish government”²⁶⁰ which works “to fulfil an executive function of the Turkish State”;²⁶¹
- (2) Emlak was treated as a State entity. It was characterised as an arm of the State by the Turkish Ministry of Public Works and Housing and was described as enjoying “special status” by observers such as JP Morgan.²⁶² It was audited like other public entities the Supreme Audit Board;²⁶³ and
- (3) Emlak was majority-owned by TOKI, a State organ within the Office of the Prime Ministry. As explained by Professor Günday, an expert on Turkish administrative law retained by the Claimant, at all relevant times TOKI owned 39% of Emlak’s shares and controlled over 99.9% of the shares.²⁶⁴ Such State ownership gives rise to the presumption of statehood in accordance with previous investment tribunal decisions in *Maffezini*²⁶⁵ and *Salini*.²⁶⁶

²⁶⁰ Transcript, Day 1, Newberger (66:7-12).

²⁶¹ Claimant’s Reply, para. 303.

²⁶² *Ibid.*, para. 270.

²⁶³ *Ibid.*, para. 271.

²⁶⁴ Legal Opinion of Metin Günday, para. 32, fn. 4.

²⁶⁵ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision on Objections to Jurisdiction dated 25 January 2000), para. 77 (Exhibit CLA-134).

²⁶⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Decision on Jurisdiction dated 23 July 2001 (Exhibit CLA-37); Claimant’s Reply, paras. 288-290.

236. In its closing submissions, the Claimant placed emphasis on Art 4 as being applicable to TOKI rather than Emlak: specifically, the Claimant contended that TOKI is the relevant entity to consider for the purposes of determining whether the Contract was administered by a State organ within the meaning of Art 4.²⁶⁷ As the Tribunal understands the closing submission, the Claimant substituted this closing approach for its initial position that Emlak is the relevant state organ for the purposes of Art 4.

Article 5

237. With respect to Art 5, because Emlak enjoys certain privileges afforded to public agencies, the Claimant argued that Emlak was empowered by Turkish law to exercise elements of governmental authority.²⁶⁸ According to the Claimant, Emlak exercised power under Turkey's zoning laws and with respect to land acquisition from TOKI's land banks.²⁶⁹ In particular, the Claimant relied on Emlak's special power under Art 26 of the Turkish Zoning Law to obtain construction permits in a preferential manner.²⁷⁰

Permits for Public Structures and Facilities As Well As Industrial Facilities:

Article 26 - Permits shall be granted for structures that public agencies and institutions build or have built in accordance with the preliminary designs as long as it is designated for that purpose on the zoning plans and does not violate the plan or regulations on the condition that these public agencies and institutions assume responsibility for architecture, static analysis, installations and all types of scientific responsibility, and that ownership is documented.

A construction permit shall be granted for structures that require secrecy in terms of state security and safety or the maneuvers and defense of the Turkish Armed Forces without requiring the documents listed in article 22 provided that the concerned municipality or governor's office is notified in writing that responsibility for static analysis and installations belong to the agencies and that the project designs are certified by the agencies in compliance with the

²⁶⁷ E.g., Transcript, Day 8, Newberger (39:9-13 and 19-21).

²⁶⁸ Claimant's Memorial, para. 363.

²⁶⁹ Claimant's Reply Memorial, para. 275.

²⁷⁰ *Ibid.*, paras. 267 – 269.

zoning status, storey regulation, building line, construction depth and total construction square meters received from the municipality.²⁷¹

238. The Claimant relied on the expert opinion of Professor Günday, who emphasises that Art 26 refers to buildings being built by “public authorities and institutions” and opines that:

Therefore, when Emlak Konut requests permits from municipalities, it acts as a public authority; and concerned municipalities regard Emlak Konut as a public authority. In this regard, I can say that Emlak Konut enjoys the public privileges bestowed to public authorities and institutions.²⁷²

239. The Claimant also refers to Emlak’s ability to acquire land from TOKI on a priority basis and its consequential privileged status.²⁷³

240. Finally, the Claimant relies on the fact that Respondent’s counsel were hired for the purpose of the arbitration proceedings through a public procurement process commenced by Emlak as demonstrating that Emlak is able to avail itself of processes only available to public entities.²⁷⁴

241. The Claimant contends broadly that Emlak relies on these privileges in the context of its development contracts with private parties.²⁷⁵ The Claimant also alleges that Emlak invoked its State authority unlawfully to cancel the Contract. It refers to Mr Kurum’s alleged statement: “We are the State. We can create an excuse”.²⁷⁶

242. At the Hearing, counsel for the Claimant also asserted, in the context of the application of Art 5 ILC Articles, that Emlak was “publicly characterised by TOKI as an affiliate of this organ of the state”.²⁷⁷

²⁷¹ Zoning Law, Art 26 (partial translation) (Exhibit CE-55).

²⁷² Legal Opinion of Metin Günday, para 49.

²⁷³ Claimant’s Reply, para. 275.

²⁷⁴ *Ibid.*, para. 299.

²⁷⁵ Claimant’s Memorial, para. 363; Letter from Tulip JV to Emlak dated 7 May 2007 (Exhibit CE-219).

²⁷⁶ Claimant’s Memorial, para. 363; Erten Witness Statement, para. 54.

Article 8

243. With respect to the application of Art 8, the Claimant contends that the criteria of this provision are satisfied because TOKI exercised “an extraordinary level of control over every aspect of Emlak’s operations.”²⁷⁸ In particular, the Claimant relies on the fact that TOKI controlled the voting shares of Emlak and that TOKI appointed the majority of the Emlak Board members, who were constituted by employees of TOKI and represented them as such.²⁷⁹

244. The Claimant highlights that Mr Ertan Yetim, the President of Emlak’s Board, had served as an expert within TOKI since 2007; that Mr Murat Kurum, a civil engineer and a Board Member of Emlak, had served as an expert within TOKI from 2006 to 2012; and that Mr Ali Seydi Karaoglu was a TOKI employee and a member of Emlak’s Board.²⁸⁰

245. In addition, the Claimant places specific emphasis on the fact that Mr Bayraktar was, at all relevant times, the head of Emlak and the Chairman of TOKI. In that sense, he wore “two hats”.²⁸¹

246. The Claimant relies on the fact that all key decisions with respect to the Contract took place in the offices of TOKI, rather than Emlak.²⁸²

247. The Claimant also argues that TOKI and Emlak publicly presented themselves as closely linked entities as:

- (1) TOKI listed Emlak among its “affiliates and subsidiaries”;
- (2) Emlak itself described itself as a “state company”;

²⁷⁷ Transcript, Day 1, Newberger (66:25 – 67:2).

²⁷⁸ *Ibid.*, (67:12-13).

²⁷⁹ Claimant’s Reply, para. 262.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*, para. 264.

- (3) TOKI claimed that it could use its relationship with Emlak to ‘secure TOKI’s ambitious goals and to meet the expectations of Turkish citizens; and
- (4) certain correspondence and promotional materials displayed the logos of TOKI and Emlak together.²⁸³

248. Further, according to the Claimant, the decision to cancel the Contract was not driven by commercial considerations purportedly surrounding delay as:

- (1) Emlak’s Construction Control Department had recommended an extension of 418 days;
- (2) Emlak stood to gain more financially from staying with Tulip rather than re-tendering to Dogus; and
- (3) Emlak could have received its share of the Ispartakule III development by accepting Tulip’s offer to buy the land outright. The fact that Emlak ignored all these considerations and re-tendered to a contractor that had not completed the project as of April 2013 indicates that the Contract was not cancelled for any *bona fide* commercial reasons.²⁸⁴

249. According to the Claimant, the decision to terminate the Contract was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power. In making this argument, the Claimant relies upon, as evidence of TOKI exercising control over Emlak in the decision to terminate the Contract, a statement made by Mr Bayraktar following the termination of the Contract in the Turkish news publication *Milliyet*, where he was referred to as the “TOKI Administrator” and was quoted as saying:

²⁸³ *Ibid.*, paras. 263 – 265.

²⁸⁴ *Ibid.*, paras. 278 – 282.

Their sales have increased but there are problems among the partners. They refuse to give their consent. We cannot help any more. We have to protect the public interest.²⁸⁵

250. The Claimant further argues that, although Emlak ostensibly relied on the delay as the reason for the cancellation, the press reported the reason as being due to the problems between the Tulip JV partners.²⁸⁶

251. Finally, as for Art 5, the Claimant again relies on the assertion that Respondent's counsel was hired for the purpose of the arbitration proceedings via a public procurement process commenced by Emlak. According to the Claimant, this is also evidence that Emlak is controlled by the State.

252. The Claimant relies upon the decisions in:

- (1) *Alpha Projektholding GMBH v. Ukraine* for the proposition that, for the purposes of attribution, it is irrelevant whether instructions or guidance given by a State organ are based on "commercial or other reasons."²⁸⁷
- (2) *Salini*, citing the finding of the tribunal that "[t]he administrative nature of the contract and of the laws that govern it corroborate the view of the Tribunal [that the entity in question's main object was to accomplish tasks that are under State control]."²⁸⁸ According to the Claimant, there is a clear parallel to the present case in which Public Work Specifications are said to be incorporated into the Contract.

253. Finally, Counsel for the Claimant has relied on the assertion that Emlak takes land from TOKI's land banks as being relevant to the application of Art 8 ILC Articles.

²⁸⁵ Bayraktar: Tulip Isi Aksatti, Tebernus Kirecci, MILLIYET (Exhibit CE-228); Transcript, Day 1, Newberger (104:18-24).

²⁸⁶ Claimant's Reply, para. 281.

²⁸⁷ *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16 (Award dated 8 November 2010) (Exhibit CLA-3); Claimant's Memorial, para. 362.

²⁸⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Decision on Jurisdiction dated 23 July 2001, para. 34 (Exhibit CLA-37); Claimant's Reply, para. 274.

Acts of other State entities

254. The Claimant asserts that Turkish “state agencies” besides Emlak were involved in committing violations of the BIT.

255. Specifically, the Claimant asserts that the Turkish state breached the BIT through numerous Turkish officials, including an aide to Prime Minister Erdogan, the Mayor of Ankara and Mr Bayraktar, TOKI, the Turkish police, the Supreme Audit Board and the Turkish Prime Ministry.²⁸⁹

b) *Position of the Respondent*

Acts of Emlak

256. The Respondent contends that the acts of Emlak are not attributable to the State and that, as a consequence, the Respondent has not consented to the jurisdiction of the Tribunal in this dispute and, in any event, the claims fail on the merits.

257. According to the Respondent, the question of attribution must be assessed with reference to the specific acts of Emlak that Claimant presents as constituting a breach of the BIT. The Respondent contends that, although the Claimant has not provided a definitive list of all such acts, the following acts (as referred to in different parts of the Claimant’s submissions) were relied upon, namely:

- (1) acts in negotiating and tendering the Ispartakule III project.
- (2) non-disclosure of the zoning issue to Tulip JV or any of the Van Herk Group companies.
- (3) acts with respect to grants of permissions that were required for Tulip JV to carry out the Contract.
- (4) allegedly wrongful failure to grant Tulip JV extensions of time to complete the Ispartakule III project.

²⁸⁹ Claimant’s Reply, paras. 291 – 297.

- (5) termination of the Contract in May 2010.
- (6) confiscation of all assets remaining in the account from the unit sales in June 2010; and
- (7) actions with respect to the project site following termination of the Contract.²⁹⁰

258. With respect to the question of attribution, the Respondent does not deny the link between Emlak and TOKI. It asserts, however, that, in the absence of the requirements of Arts 4, 5 or 8 of the ILC Articles being satisfied, a link, even a close link, between a State entity and a private company does not, in itself, provide a basis for attribution of the private company's acts to the State.²⁹¹

Article 4

259. The Respondent firstly asserts that Emlak is not a "state organ" under Art 4. According to the Respondent, Emlak is, effectively, a private company formed under Turkish law.²⁹² It is subject to the provisions of the Turkish Commercial Code, and to the same court jurisdiction as any private individual or company.²⁹³ As a real estate investment trust, it is regulated as other commercial entities by the Turkish Capital Markets Board.²⁹⁴ Emlak does not enjoy immunity against enforcement against its assets, contrary to public entities, which are protected by such immunity.²⁹⁵ Also, contrary to TOKI's employees, Emlak's employees are not civil servants.²⁹⁶

²⁹⁰ Respondent's Counter-Memorial, para. 391.

²⁹¹ Respondent's Rejoinder, para. 176.

²⁹² *Ibid.*, para. 181.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

260. Given that Article 127 of the Turkish Constitution provides that state entities can only be established by law, the Respondent also relies on the fact that Emlak has not been created by a specific Turkish law.²⁹⁷ The Respondent argues that although the expert opinion of Professor Günday refers to a kind of “quasi-state” status, no such status exists for the purposes of Art 4 ILC Article.²⁹⁸ In any event, the Respondent asserts that Professor Günday conceded during the Hearing that the only real link between TOKI and Emlak is established through TOKI’s shareholding in Emlak.²⁹⁹

261. The Respondent further contends that Emlak was only audited by the Supreme Audit Board on the basis of being an investment of TOKI, which is a state entity.³⁰⁰ Therefore, the Respondent argues that the fact that Emlak was so audited is not indicative of state character.

262. Further, the fact that TOKI held the majority stake in Emlak does not, in itself, render it a state entity. In particular, the Respondent rejects the position adopted in *Maffezini* or *Salini* to the effect that state ownership gives rise to the rebuttable presumption of statehood.³⁰¹ Instead, the Respondent relies on the Commentary to the ILC Articles, which states in relevant part:

Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5.³⁰²

263. Accordingly, the Respondent asserts that Emlak is not a ‘state organ’ within the meaning of Art 4 ILC Articles.

²⁹⁷ Transcript, Day 8, Knoll (125: 16-19).

²⁹⁸ Respondent’s Rejoinder, para. 182.

²⁹⁹ Transcript, Day 8, Knoll (125: 23-25).

³⁰⁰ Respondent’s Rejoinder, para. 183.

³⁰¹ *Ibid.*, paras. 188-189.

³⁰² James Crawford, “The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries”, Cambridge University Press, (2002) p. 112 (Exhibit CLA-53); Respondent’s Rejoinder, para. 189.

Article 5

264. The Respondent further asserts that neither prong of the two-prong test under Art 5 is satisfied in the case of Emlak, as it is not empowered by Turkish law to exercise elements of governmental authority and, in any event, was not exercising any governmental authority in its execution, administration and termination of the Contract.

265. The fact that Emlak enjoys certain privileges does not, the Respondent contends, satisfy the first limb of Art 5. Further, the Respondent emphasises that “the fact that Emlak might help to meet the constitutional objective in the Turkish Constitution does not make it a public entity and does not make its acts in any way governmental or sovereign or of *puissance publique*.”³⁰³ Hence, as to the first limb, the Respondent argues that the minor prerogative granted to Emlak by Art 26 of the Zoning Law with respect to zoning permits does not amount to any requisite “*puissance publique*” or governmental authority.³⁰⁴ Similarly, Emlak’s ability to obtain land from TOKI’s land banks is not tantamount to being empowered to exercise governmental authority.³⁰⁵

266. With respect to the second limb of the Art 5 test, the Respondent asserts that the relevant acts, the execution, administration and termination of the Contract, were performed with a commercial rather than State purpose. The Respondent relies on the decision in *Bosh International*³⁰⁶ and argues that there is no basis to distinguish the facts of that decision from the present case.³⁰⁷ Here, the fact that the Supreme Audit Board recommended the termination of the Contract, which was not followed by Emlak, or that the Emlak Board making the decision to terminate comprised of

³⁰³ Transcript, Day 8, Knoll (127: 15-19).

³⁰⁴ Respondent’s Rejoinder, para. 193.

³⁰⁵ *Ibid.*

³⁰⁶ *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No ARB/08/11 (Award dated 25 October 2012) (Exhibit RLA-16).

³⁰⁷ Respondent’s Rejoinder, paras. 204-205.

majority TOKI representatives does not detract from the ultimate decision being commercial and not governmental in character.³⁰⁸

267. Accordingly, the Respondent argues that neither of the requirements of Art 5 is satisfied with respect to any relevant acts committed by Emlak.

Article 8

268. The Respondent contends that the requirements of Art 8 are not met because the State did not exercise control over Emlak with respect to its acts in performing and terminating the Contract.

269. The Respondent here relies on existing jurisprudence from the International Court of Justice and previous investment tribunals to contend that it is necessary to show that the Turkish State exercised effective control over Emlak and, in particular, over the acts that the Claimant seeks to have attributed to the State.³⁰⁹ The Respondent contends that the “apparent control” criterion referred to by the Claimant is not relevant to an assessment of attribution for the purposes of Art 8 (or at all).³¹⁰

270. The Respondent also argues that the acts of Emlak are not attributable to the State pursuant to Art 8 on the basis that they were not performed under the effective control of the State.

271. According to the Respondent, none of the facts that TOKI exercised voting rights on behalf of over 99% of Emlak’s shareholders during the relevant period or that TOKI allegedly had control of Emlak’s Board on the basis that a number of Emlak Board members were chosen by TOKI or that there was some commonality of employment between Emlak and TOKI amount to effective control.³¹¹

272. The Respondent argues that Emlak has an independent board of directors and the fact that Mr Bayraktar was both the head of TOKI and Emlak does not detract from

³⁰⁸ *Ibid.*, para. 205.

³⁰⁹ *Ibid.*, paras. 213-215.

³¹⁰ *Ibid.*, para. 235.

³¹¹ *Ibid.*, paras. 217-224.

this:³¹² shared personnel does not equal effective control.³¹³ The Respondent relies on the witness statement of Mr Yetim who states that Emlak personnel had a duty only to Emlak and not to TOKI and was obliged under Turkish law to act in Emlak’s best commercial interests.³¹⁴ The Respondent also asserts that TOKI had no power over the management of Emlak and had no role in determining which bidders prevailed on bids for Emlak projects, how contracts were managed, or decisions about terminating those contracts.³¹⁵ Rather, those decisions were made by Emlak alone, on a purely commercial basis, independent of TOKI.³¹⁶

273. The Respondent contends that any “recommendation” by the Supreme Audit Board that the Contract be cancelled did not amount to a binding order and did not impact Emlak’s decision to terminate the Contract.³¹⁷ Neither did TOKI have control over Emlak on the basis of land ownership, since land owned by Emlak was not State property.³¹⁸

274. Finally, the Respondent contends that even if the Tribunal finds that Emlak acted under the direction or control of TOKI, the question of attribution to the Respondent would turn on what Emlak perceived to be in its best interest with respect to the issues raised by the Claimant, and whether TOKI went beyond the legitimate exercise of the rights of a majority shareholder to manage the company’s affairs in furtherance of those perceived interests.³¹⁹ The question is whether the decision was commercially motivated and viable. In this regard, the Respondent argues that the termination was made *bona fide* and was a reasonable commercial decision in the

³¹² *Ibid.*, para. 219.

³¹³ *Ibid.*, para. 220.

³¹⁴ Yetim Witness Statement, para. 2.

³¹⁵ Respondent’s Rejoinder, paras. 222 and 237.

³¹⁶ *Ibid.*, para. 229.

³¹⁷ *Ibid.*, para. 234.

³¹⁸ *Ibid.*, para. 225.

³¹⁹ *Ibid.*, para. 227.

circumstances.³²⁰ On that basis, the Respondent asserts that there can be no attribution to the State.

Acts of other State entities

275. Turkey notes the “limited factual allegations made [by the Claimant] on the basis of direct misconduct on the part of TOKI, the Supreme Audit Board, the police and the Price Ministry”, and accepts that these entities are part of the State machinery and, as such, their acts would be attributable to the State.³²¹

c) *Determination of the Tribunal*

General Approach to Attribution

276. The issue of attribution relates both to the Tribunal’s jurisdiction and to the merits of this dispute. Attribution is relevant in the present context to ascertaining whether there is a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Art 25 of the ICSID Convention. At the same time, the claims presented in this investment arbitration (particularly with respect to the conduct of Emlak) may only succeed if they are attributable to the State. In that sense, the issue of attribution is also relevant to the merits of the dispute. Finally, purely contractual conduct *per se* does not amount to (wrongful) action of the State.

277. The appropriate approach to the question of attribution in a similar context is usefully discussed by the tribunal in *Hamester v Ghana*:

143. The question of “attribution” does not, itself, dictate whether there has been a violation of international law. Rather, it is only a means to ascertain whether the State is involved. As such, the question of attribution looks more like a jurisdictional question. But in many instances, questions of attribution and questions of legality are closely intermingled, and it is then difficult to deal with the question of attribution without a full enquiry into the merits

³²⁰ *Ibid.*, para. 234.

³²¹ *Ibid.*, para. 286.

144. In any event, whatever the qualification of the question of attribution, the Tribunal notes that, as a practical matter, this question is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State.

145. This approach – to deal with the question of attribution as a merits question – is particularly appropriate, in the Tribunal’s view, in this case. The Tribunal is not faced here with a situation where it is readily evident that the State is not involved at all, or where the issue is capable of an answer based upon a limited enquiry (akin to other jurisdictional issues). On the contrary, the evidential record in this case is more complex. In fact, the Respondent itself recognises that some acts are attributable to the Ghanaian Government, while denying that they amount to international illegal behaviour. In other words, while the extent of the State’s involvement is unclear, it is not contested that some acts are attributable to Ghana. In such a situation, the Tribunal considers that it has jurisdiction over the case brought against Ghana and jurisdiction to decide which acts are attributable and which are not.³²²

278. The Tribunal agrees with the *Hamester v Ghana* approach to the question of attribution.

279. First, as in *Hamester v Ghana*, the Respondent accepts that insofar as the Claimant alleges wrongful conduct by actors such as the Supreme Audit Board or the Prime Ministry of Turkey, these are State actors. Accordingly, for the purposes of jurisdiction, the Tribunal is satisfied that the allegations by the Claimant involve actions of the State. For practical purposes, this means the Tribunal may decide which particular acts (including the acts of Emlak) constitute State actions.

280. As the Tribunal has not accepted bifurcation with respect to questions of jurisdiction (other than the question of compliance with the Art 8(2) notice requirement), and has joined those jurisdictional objections to the merits, it now has the benefit of the Parties’ full pleadings. In those circumstances, and taking into account that the question of attribution is also relevant to the merits, the Tribunal may not limit its enquiry to a *prima facie* standard and must, instead, make an informed and dispositive ruling on the question of attribution.³²³

³²² *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24 (Award dated 18 June 2010), paras. 143-145 (Exhibit RLA-14).

³²³ *Ibid.*

Attribution of Emlak's Acts to the State

281. The Tribunal agrees with the Parties and accepts that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute.

Article 4

282. For the purposes of Art 4, the Tribunal must determine whether any acts complained of by the Claimant with respect to the execution, administration and termination of the Ispartakule III project were carried out by a “state organ”.

283. As noted above, the Tribunal had understood the Claimant's primary position to be that Emlak was the relevant alleged State organ. However, on the basis of its closing argument, the Claimant has moved its position to rely on TOKI as the relevant State organ that administered and terminated the Contract.

284. Although it is common ground between the Parties that TOKI is a State organ, Emlak was the counterparty to the Contract and was the entity that officially took all the relevant acts with respect to the administration and termination of the Contract. Accordingly, although, as noted, it remains somewhat unclear whether the Claimant maintains the argument that Emlak is a “state organ”, the relevant assessment for the purposes of attribution under Art 4 must be whether Emlak is a State organ. To the extent that the Claimant asserts that the acts in question were effectively taken by TOKI because it exercised full control over Emlak, the proper analysis of that argument is under Art 8.

285. Art 4(2) ILC Articles establishes that an “organ includes any person or entity which has that status in accordance with the internal law of the State”. Therefore, the Tribunal must first assess whether Emlak is an organ of the State under the domestic law of Turkey.

286. First, while not conclusive, it is notable that Tulip I has itself stated in previous correspondence to Emlak that “your company is not an administration within the scope of administrative law but a commercial company conducting business within

the scope of private law” and that “As mentioned in article 1 of its Articles of Incorporation [...] your company is a joint stock company subject to the Turkish Commercial Code”.³²⁴

287. In fact, Emlak’s Articles of Association³²⁵ establish that Emlak is an open joint stock company, pursuing commercial activities under the Commercial Code and Capital Markets legislation.³²⁶ The Articles of Association also require Emlak’s Board members to be independent and meet the requirement of the Turkish Commercial Code.³²⁷ This structure indicates that Emlak is a private entity.

288. Further, Professors Günday and Atay agree that Emlak is classified under Turkish law as a company subject to private law.³²⁸ Although Professor Günday notes that it “falls short of being a commercial company”,³²⁹ the Tribunal accepts Turkey’s submission that there is no “quasi-state” organ for the purposes of Art 4. Given that Emlak is a separate, private, entity under Turkish law, it cannot be said that Turkish municipal law treats it as a State organ. The fact that certain State entities, such as the Ministry for Public Works, referred to it as a “public institution” does not displace the plain legal position under Turkish law. In fact, the Turkish Supreme Court of Appeal has relevantly stated:

Public Economic Enterprises, since they set up and operate commercial undertakings, are merchants. The fact that their capital belongs to the state and there is a particular way in which appointments are made to certain of their managerial organs does not imbue these entities with public law establishment capacity and these bodies are civil law judicial persons and the provisions of private law apply to them.³³⁰

³²⁴ Letter from Tulip I to Emlak dated 21 June 2010 (Exhibit CE-201).

³²⁵ Emlak Articles of Association (Exhibit IK-1).

³²⁶ *Ibid.*, Art. 5.

³²⁷ *Ibid.*, Arts 12–13.

³²⁸ Joint Legal Expert Report, para. 7.

³²⁹ *Ibid.*, para. 8.

³³⁰ No. 2004/13-66K, No. 2004/719, Republic of Turkey Supreme Court of Appeal, General Committee Basis (unpaginated, last page) (Exhibit RE-6).

289. Finally, the Tribunal does not accept the Claimant’s contention that, as a matter of international law, majority ownership of an entity by the State gives rise to a presumption of statehood in respect of that entity. While the decisions in *Mazzeffini* and *Salini* may have held otherwise, the Tribunal is not bound by those decisions. Rather, the Tribunal is compelled to decide the issues before it in accordance with the BIT and applicable principles of international law. The conclusion of the Tribunal is that there is no basis under international law to conclude that ownership of a corporate entity by the State triggers the presumption of statehood. The position of the Tribunal is that, whilst state ownership may, in certain circumstances, be a factor relevant to the question of attribution, it does not convert a separate corporate entity into an ‘organ’ of the State. The Tribunal agrees with the holding in *EDF (Services) Limited v Romania* that state-owned corporations “possessing legal personality under [municipal] law separate and distinct from that of the State, may [not] be considered as a State organ”.³³¹

290. In view of the evidence before it, the Tribunal’s determination is that Emlak is:

- (1) an entity separate from the State;
- (2) not part of the governmental structure;
- (3) subject to the Commercial Code, the Capital Markets Law and other private law instruments; and
- (4) separate from rather than an emanation of the State.

291. For these reasons, the Tribunal determines that Emlak is not a “state organ” within the meaning of Art 4 ILC Articles.

Article 5

292. As regards attribution under Art 5, referring to the exercise of governmental authority, the Tribunal agrees with the Parties that in order for Emlak’s conduct to be attributable to Turkey, it must be established both that:

³³¹ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award dated 8 October 2009), para. 190 (Exhibit CLA-12).

- (1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and
- (2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority.

293. As to (1), the evidence on the record does not establish that Emlak is empowered to exercise elements of governmental authority. The Claimant refers to Art 26 of the Zoning Law as granting governmental privileges to Emlak. However, as is plain on the face of Art 26, it refers to the granting of permits to public agencies and institutions in accordance with preliminary designs. It grants certain preferential treatment with respect to construction permits, but does nothing to empower Emlak actually to exercise any kind of governmental authority with respect to any other entity or subject matter.

294. The position is similar with respect to the fact that Emlak is entitled to buy land from TOKI's land banks on a preferential basis. This merely establishes that Emlak enjoys certain privileges granted to organisations affiliated with TOKI. It does not show that Emlak itself exercises elements of governmental authority vis-à-vis any particular object or person.

295. Equally, decisions made by Emlak within the framework of the Contract, such as whether or not to grant certain extensions of time for the completion of Ispartakule III (governed by Art 33 of the Contract) did not require the exercise of any public authority.

296. Since Emlak did not exercise any governmental authority *per se*, it cannot be the case that it exercised specific governmental authority with respect to the acts that the Claimant asserted constituted violations of the BIT.

297. Accordingly, the Tribunal concludes that the requirement of the first limb of Art 5 is not satisfied.

298. In light of this conclusion as to the first limb of Art 5, the Tribunal need not make a dispositive finding with respect to the second limb. Nevertheless, the Tribunal turns to consider this issue in light of the Parties' submissions.

299. In this regard, the Claimant did not explain precisely how the relevant elements of governmental authority were exercised in Emlak's administration of the Contract for the purposes of attribution of those acts to the State under Art 5 ILC Articles. That is, the Claimant did not explain how Emlak exercised *puissance publique* in carrying out any of the acts relating to its pre-contractual dealings with Tulip JV, its administration and termination of the Contract or any other acts it may have performed with respect to Ispartakule III and the Tulip JV or any of its members. The Tribunal finds that none of the acts constituted the exercise of governmental authority. There is no evidence on the record to conclude that Emlak's pre-contractual dealings with Tulip JV, its decisions on requests for extension of time and, particularly, its decision to terminate the Contract, expose *per se* any exercise of *puissance publique*.

300. Accordingly, the Tribunal concludes that the evidence on the record does not show that Emlak exercises any governmental power within the meaning of Art 5 ILC Articles.

Article 8

301. Paragraphs 302 – 327 below set out the reasoning of the majority of the Tribunal for the determination that the acts of Emlak are not attributable to the State under Art 8 ILC Articles. The attached opinion of Mr Jaffe, assenting in the result, states Mr Jaffe's reasons for dissenting on the issue of Art 8 attribution.

302. For the purposes of Art 8 ILC Articles, the question before the Tribunal is whether Emlak acted "on the instructions of, or under the direction or control of [the State] in carrying out the conduct" which forms the subject of the Claimant's complaints under the BIT.

303. Plainly, the words "instructions", "direction" and "control" in Art 8 are to be read disjunctively. Therefore, the Tribunal need only be satisfied that one of those

elements is present in order for there to be attribution under Art 8. The Claimant's main contention appears to be that Emlak acted under the control of TOKI in administering and terminating the Contract. However, at certain points in its pleadings, the Claimant also refers to influence or instructions. The Tribunal has, therefore, considered whether any of the categories of "instructions", "direction" or "control" are met for the purposes of Art 8.

304. With respect to the question of "control", the Tribunal accepts the Respondent's submission that the relevant test for determining whether Emlak acted under the control of TOKI is "effective control".
305. The question before the Tribunal is whether TOKI exercised effective control over Emlak and thereby enforced public policy in the administration and termination of the Contract or whether any aspect of the administration and termination of the Contract was performed under the instructions or direction of TOKI in an exercise of sovereign power.
306. The Commentary to the ILC Articles confirms that it is insufficient for the purposes of attribution under Art 8 to establish merely that Emlak was majority-owned by TOKI, *i.e.*, a part of the State:

Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control

of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.³³²

307. Here, the evidence shows that TOKI at all relevant times controlled the majority of Emlak's voting shares. The evidence also establishes that the majority of Emlak's Board was made up of TOKI employees and that Mr Bayraktar served as the head of both TOKI and Emlak. In fact, Emlak's Articles of Association specifically state, at Art 8.9, that TOKI is "the leader capitalist" and its shares "constitute dominancy in management".³³³ Accordingly, the Tribunal concludes that, from an ordinary company law perspective, Emlak was subject to the control of TOKI and, therefore, the Turkish State.

308. As a result of this control over the voting shares and through its representation on the Board, TOKI was certainly capable of also exerting sovereign control over Emlak. Indeed, the Tribunal accepts the expert view of Professor Günday that TOKI may have at times used Emlak in order to fulfil a specific public purpose, namely to promote the development of and access to housing across Turkey.³³⁴ In that sense, TOKI was capable of exercising a degree of control over Emlak to implement elements of a particular state purpose. To the extent that TOKI exercised such governmental control in particular instances in order to achieve a particular result, the conduct of Emlak would have been attributable to the State.

309. However, the relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company's perceived commercial best interests.

310. There is some limited evidence supporting the Claimant's contention that the decision to terminate the Ispartakule III contract was connected to TOKI and the

³³² James Crawford, "The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries", Cambridge University Press, (2002) pp. 112-113 (Exhibit CLA-53).

³³³ Emlak Articles of Association (Exhibit IK-1).

³³⁴ Legal Opinion of Metin Günday, para. 45.

exercise of its public power. In particular, the *Milliyet* newspaper article referred to by the Claimant quoted Mr Bayraktar, speaking in his capacity as the head of TOKI, stating with respect to the termination of the Contract:

Their sales have increased but there are problems among the partners. They refuse to give their consent. We cannot help any more. **We have to protect the public interest.**³³⁵ (emphasis added)

311. However, the Tribunal considers that the weight of the evidence is strongly to the contrary, to establish that the decision to terminate the Contract with Tulip JV was made by the Board of Emlak independently, in the pursuit of Emlak's commercial interests and not as a result of the exercise of sovereign power by TOKI. An analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers, does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose. Rather, the evidence confirms that Emlak acted in each relevant instance to pursue what it perceived to be its best commercial interest within the framework of the Contract.

312. For example, it is evident that Emlak made the initial decision to award the Contract to Tulip JV on the basis of commercial considerations relating to what would be the most "advantageous" bid.³³⁶ The relevant minute of the decision of the Board does not indicate that Emlak made that decision to achieve any particular State purpose for TOKI, or that it chose to award the Contract to Tulip JV on the basis of any particular non-commercial consideration.

313. Similarly, Emlak's decision to grant a 471-day extension of time to Tulip JV demonstrates that Emlak acted as a party to a Contract and referenced Article 33 of the Contract in determining to grant the extension of time.³³⁷ There is no basis for the Tribunal to infer that the decision was taken under the control, influence or instruction of TOKI on the basis of any non-commercial considerations.

³³⁵ Bayraktar: Tulip Isi Aksatti, Tebernus Kirecci, MILLIYET (Exhibit CE-228).

³³⁶ Resolution of the Board of Directors of Emlak dated 27 June 2006 (Exhibit CE-60).

³³⁷ Decision of the Administrative Board of Emlak dated 30 October 2008 (Exhibit CE-190).

314. The Tribunal has also assessed the evidence surrounding Tulip JV's request for an extension of time in late 2009,³³⁸ the recommendation from the Construction Control Department to grant such extension³³⁹ and the decision of Emlak's Board not to grant it.³⁴⁰ Again, there is no basis for the Tribunal to conclude that the decision, which was successively considered by the Control Department, Mr Kurum and the Board, was in fact made pursuant to any sovereign control. To the contrary, the plain documentary evidence illustrates that the decision-making process was carried out within Emlak in its capacity as a party to a commercial venture.

315. The central act that the Claimant asserts constitutes a breach of the BIT, and the act with respect to which the Claimant seeks compensation, is the termination of the Contract on 18 May 2010.

316. In assessing whether this act of termination is attributable to the State, the starting point is the documented decision of the Board of Emlak,³⁴¹ which shows that in terminating the Contract, the Board took legal advice, relied on substantial delays in performance and noted the purportedly impermissible assignment of receivables by Tulip JV to a third party. On that basis, the Board determined:

Due to the above-mentioned reason, and also due to the fact that the period will be terminated on 19/05/2010 and that the progress of the work is at the level of 10.17%, it was deemed appropriate to annul the agreement of the "Income Sharing Work for Bahçeşehir Ispartakule 3rd Region in return of Land" under the 30th and 31st articles of the agreement.³⁴²

317. The minute of the Board's decision establishes that Emlak acted in its capacity as a commercial party to terminate the Contract on the basis of its perceived contractual rights and contractual non-performance by Tulip JV.

³³⁸ Letter from Tulip JV to Emlak dated 4 December 2009 (Exhibit CE-124).

³³⁹ Construction Control Department Report dated 4 February 2010 (Exhibit CE-232).

³⁴⁰ Letter from Emlak to Tulip JV dated 1 March 2010 (Exhibit CE-193).

³⁴¹ Emlak Board Decision dated 18 May 2010 (Exhibit RE-73).

³⁴² *Ibid.*

318. It is not established by the evidentiary record that Emlak invoked alleged contractual breaches as a pretext, in fact acting under the control of TOKI to promote or achieve an ulterior purpose of interest to the State.

319. Again, to the contrary, the evidence of Mr Kurum (which is accepted by the Tribunal) establishes that there were compelling commercial reasons for the termination, primarily the very substantial delay in construction.³⁴³ Emlak’s ongoing concern regarding the delay in construction, arising in the context of its contractual relationship with Tulip JV, is well-documented.³⁴⁴

320. Further, there is compelling evidence, as confirmed by both Parties’ delay experts, that the Ispartakule III project suffered from insufficient funds which exposed the entire project to the significant delays complained of by Emlak.³⁴⁵ Other than providing a small (and uncertain) amount of initial “seed money” through the First Loan Facility and Second Loan Facility, it is common ground that the Van Herk Group did not otherwise fund the project and no other external funds were provided by Mr Benitah, any of the Turkish shareholders in Tulip I, or the joint venture partners. Indeed, the Second Loan Facility expressly provided that no additional funds would be extended by the Van Herk Group for construction of Ispartakule III. As a consequence, Tulip JV was required to rely primarily on pre-sales of units to fund the project, in circumstances where the sales were below optimal on any view and the project needed a substantial injection of capital to increase construction and meet the May 2010 completion date. Undoubtedly, the absence of the required level of capital which the Claimant was obliged to provide under Art 11.17 of the Contract, being the result of a flawed business plan, was the substantial cause of the disabling delays to construction and the non-completion of the project within previously agreed timeframes.

321. This evidence that the project was severely limited by a lack of funding and that the Claimant had not lived up to its contractual obligations, together with evidence that

³⁴³ E.g., Transcript, Day 4, Kurum (75: 9-25).

³⁴⁴ See, e.g., correspondence from Emlak to Tulip JV referred to in the “facts” section above.

³⁴⁵ Joint Statement of Experts on Delay, para. 3.2.

there were ongoing problems among the joint venture partners to the point of complete breakdown in relationships (the seriousness of which is illustrated by the fact that the conflict with FMS resulted in a member of Tulip I being shot) confirms that there were legitimate commercial reasons for Emlak to determine that it would invoke its perceived contractual rights to terminate the Contract. Accordingly, the evidence militates against the conclusion that the termination of the Contract was pre-textual and that it amounted to any kind of improper usurpation of the Claimant's rights by the "invisible" hand of the State.

322. Furthermore, there is no evidence of any specific and disproportionate influence by Mr Bayraktar or any instructions from TOKI to make a particular decision for an ulterior sovereign purpose. To the contrary, the evidence of Mr Kurum confirms that the termination decision was made pursuant to the ordinary procedures of the Emlak Board and was done in the exercise of perceived rights as a party to the Contract, and only after a succession of indulgences given to the Claimant after its failure to meet contractual milestones.³⁴⁶ The evidence (particularly the Board minutes) confirms that the decision to terminate the Contract was considered carefully and dispassionately by members of the Emlak Board and that they acted professionally and independently as required by Art 12.3 of Emlak's Articles of Association.

323. There is also no evidence that the decision to terminate the Contract was made under the direction, instructions or control of Turkey's Supreme Audit Board (an entity that the Parties accept is an organ of the State).

324. Rather, the Tribunal concludes that Emlak was acting in what it perceived to be its commercial best interest in terminating the Contract.

325. As a consequence of these findings, the Tribunal also finds that Emlak's conduct in seizing the project site for Ispartakule III or its decision to re-tender the project rather than sell the project land to Tulip I amount to independent action taken in reliance on contractual rights and in furtherance of Emlak's perceived commercial best interests. The Tribunal finds no basis to depart from that characterisation with respect to any other actions taken by Emlak following the termination of the Contract.

³⁴⁶ *E.g.*, Transcript, Day 4, Kurum (118:13-21).

326. Accordingly, the Tribunal concludes that while Emlak was subject to TOKI's corporate and managerial control, Emlak's conduct with respect to the execution, maintenance and termination of the Contract is not attributable to the State under Art 8 of the ILC Articles due to an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests.

327. In conclusion, the Tribunal therefore determines by majority that Emlak's conduct with respect to the Contract and the Ispartakule III Project is not attributable to the Turkish State and is, on that basis, outside the remit of the Tribunal.

Attribution of Acts of other State Entities

328. On the other hand, insofar as the Claimant alleges that certain independent acts of other state entities breached the BIT (such as TOKI and its alleged misuse of zoning powers or the Turkish police and its alleged actions with respect to the Ispartakule III site), the Tribunal agrees with the Parties that these allegations plainly involve action by State organs which would be attributable to the State.

VII. TREATY VERSUS CONTRACT CLAIMS

a) *Position of the Claimant*

329. The Claimant asserts that its claims are based on violations of the substantive protections of the BIT and are not merely claims arising out of the Contract.

330. The Claimant agrees with the Respondent that the relevant inquiry for the Tribunal for the purposes of determining whether the Claimant has asserted treaty claims or other kinds of claims (in this case Contract claims) is whether the BIT constitutes the “essential basis” of the claims.³⁴⁷ The Claimant also accepts that the exercise of *puissance publique* is central to assessing whether or not the claims it asserts are to be characterised as BIT rather than contract claims.³⁴⁸

331. In characterising the nature of its claims, the Claimant asserts that their “essential basis” is the BIT. While the Claimant acknowledges that labelling the claims as arising from the BIT is insufficient to establish the jurisdiction of the Tribunal, the Claimant also emphasises that claims “must be taken as they are” and the Tribunal must determine if they “fit into the jurisdictional parameters set out by the relevant treaty.”³⁴⁹

332. In any event, the Claimant further asserts that it has gone beyond labelling the claims as resulting from treaty violations, and has in fact provided compelling analysis illustrating that what underlies its claims is “the interlinking state apparatus of Emlak, TOKI and the Prime Minister’s Office, **and it is the use of state power and motivations as to public purpose, not contract terms**, which is the ‘essence’ of Claimant’s claims.”³⁵⁰ (original emphasis) With respect to the actions of Emlak, the Claimant argues that they are not merely breaches of contract because they involve also “interference by TOKI and the Prime Minister’s Supreme Audit Board,

³⁴⁷ Claimant’s Reply, para. 308.

³⁴⁸ *Ibid.*, para. 309.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

representatives of the Turkish State.”³⁵¹ Further, although the Claimant accepts that part of its case “is that Emlak arbitrarily denied an extension to the Contract, and improperly insisted upon the continuance of FMS as a joint venture partner in Tulip JV”, the Claimant argues that these allegations are not made “as points of contractual breach.”³⁵² Rather, the Claimant contends that these actions by Emlak “were parts of a decision-making process which was controlled by other state organs to subvert Claimant’s investment.”³⁵³

333. The Claimant argues that the Respondent (*i.e.*, the Turkish State) engaged in a “pattern of conduct”, acting through TOKI and the Supreme Audit Board to “induce” the cancellation of the Contract by Emlak and unlawfully to seize the work site without court authorization and with the aid of the Turkish police.³⁵⁴ In that sense, Claimant asserts that the Turkish State used its “imperium” to control or induce Emlak’s behaviour and it is the use of this imperium that amounts to the essence of BIT claims.³⁵⁵ According to the Claimant, this conduct constitutes a patent abridgement of Claimant’s rights under the BIT, regardless of any breach of the Contract which may also have occurred.

334. The Claimant also relies on claims arising from the alleged acts of various state actors, such as TOKI, the Prime Minister’s Office, the police, and the Supreme Audit Board, which it says are *prima facie* susceptible to BIT claims.³⁵⁶ The Claimant argues that the existence of *puissance publique* cannot be disputed for the purposes of these allegations and represents a significant contribution to the fullness of

³⁵¹ *Ibid.*, para. 307.

³⁵² *Ibid.*, para. 309.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, para. 313.

³⁵⁵ *Ibid.*, para. 314.

³⁵⁶ *Ibid.*, para. 320.

Claimant's claims.³⁵⁷ The Claimant argues that the Respondent has accepted these latter claims to be susceptible to determination under the BIT.³⁵⁸

335. The Claimant also rejects the Respondent's argument that its claims are not admissible on the basis that they remain premature while the contractual litigation between Emlak and Tulip JV is pending before the Kadikoy 5th Commercial Court of First Instance in Istanbul.³⁵⁹

336. The Claimant argues that Art 36 of the Contract, giving jurisdiction for resolution of contractual disputes between Tulip JV and Emlak to the courts of Istanbul, has no bearing on the admissibility or jurisdiction of the Claimant's claims against Turkey under the BIT. The key contention made by the Claimant is that treaty and contract jurisdiction is normatively different and a treaty cause of action is not barred by a contractual dispute resolution and governing law clause, and that the parties in both disputes are different.³⁶⁰

337. In particular, the Claimant contends that it is not compelled to withdraw its BIT claims owing to a contract dispute resolution clause in a contract to which it is not a signatory but which forms part of the factual basis for its investment and treaty claims. According to the Claimant, the doctrine of *lis pendens* determines the admissibility of concurrent actions, and requires a triple identity of parties, object and cause of action.³⁶¹ The case brought by Tulip JV against Emlak in Kadikoy 5th Commercial Court of First Instance has no identity of parties between itself and the present arbitration. Moreover, the subsidiary rule of *ne bis in idem* regarding identity of causes of action, as noted by the tribunal in *SGS v. Pakistan*, provides that "if the claims are not *idem*, *bis* does not arise".³⁶² The Claimant argues that the object of

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*, para. 323.

³⁶⁰ *Ibid.*, paras. 326 and 335.

³⁶¹ *Ibid.*, para. 335.

Tulip JV's claims and Claimant's claims in this arbitration also differ, and this should be construed to allow jurisdiction over Claimant's claims.³⁶³

338. Therefore, the Claimant asserts that it has presented BIT claims within the jurisdiction of the Tribunal and neither the action in the Kadikoy 5th Commercial Court of First Instance nor Art 36 of the Contract bar jurisdiction over or admissibility of those claims.

b) *Position of the Respondent*

339. The Respondent argues that the Tribunal's jurisdiction extends only to treaty-based claims and not to claims arising under a contract. According to the Respondent, putting aside the "special case" of umbrella clauses, in the absence of a specific BIT provision, parties to the BIT should not be presumed to have submitted themselves to international jurisdiction for purely contractual disputes.³⁶⁴

340. The Respondent argues that the Tribunal may only determine claims which have the substantive provisions of the BIT as their "normative source" or "essential basis" and that the Arbitral Tribunal must fully review the question whether the claims asserted arise out of the BIT.³⁶⁵

341. In assessing this question, the Tribunal must, according to the Respondent, analyse whether the Claimant's claims have an "autonomous existence outside the contract".³⁶⁶ That is, the Tribunal must assess whether the acts in question went beyond acts that could be carried out by an ordinary contractual party and crossed over to the realm of sovereign conduct. As an example, the Respondent draws a

³⁶² *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Decision on Objections to Jurisdiction dated 6 August 2003), para. 182 (Exhibit CLA-91); Claimant's Reply, para. 337.

³⁶³ Claimant's Reply, para. 345.

³⁶⁴ Respondent's Counter-Memorial, para. 424.

³⁶⁵ Respondent's Rejoinder, para. 261.

³⁶⁶ Respondent's Counter-Memorial, para.432.

distinction between ordinary contractual behaviour and the acts of the Argentine Republic in *Abaclat*, where the State used its *puissance publique* to enact emergency legislation which rendered it immune from making repayments under its bond commitments.³⁶⁷

342. The Respondent contends that the “essential basis” or “normative source” of the claims here asserted by the Claimant do not extend beyond the realm of the Contract between Emlak and Tulip JV, including pre-contractual and contractual actions taken by Emlak in the administration and termination of that Contract. The Respondent asserts that the Claimant has effectively “re-packaged” and “labelled” an assortment of contractual claims in order to present them as purported treaty claims in this arbitration.³⁶⁸

343. The Respondent argues that, in fact, the acts of Emlak did not go beyond those of an ordinary contract party. According to the Respondent, even if Emlak were an emanation of the State, it did not use any *puissance publique* in relation to its treatment of zoning matters, its responses to Tulip JV’s requests for extension of time to deliver the Ispartakule III project, or its decision to terminate the Contract and seize the project site.³⁶⁹ The Respondent asserts that the Claimant has failed to provide any valid evidence for an alleged conspiracy implicating sovereign action or an alleged “pattern of conduct” involving State actors.³⁷⁰ On that basis, the Respondent argues that the Claimant has merely “labelled” its claims as treaty claims whereas, on a proper analysis, their essential basis is contractual.

344. Although this point does not appear to be pursued by the Claimant, the Respondent notes, in any event, that the umbrella clause in Art 3(2) of the BIT cannot be used to elevate Tulip JV’s contractual claims against Emlak to international law claims by

³⁶⁷ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (Decision on Jurisdiction and Admissibility dated 4 August 2011) (Exhibit CLA-1); Respondent’s Counter-Memorial, para. 450.

³⁶⁸ Respondent’s Counter-Memorial, para. 420.

³⁶⁹ Respondent’s Rejoinder, para. 263.

³⁷⁰ *Ibid.*, para. 257.

the Claimant against the Republic of Turkey on the basis that the Contract involves Emlak, a party distinct from the State.³⁷¹

345. The Respondent further contends that even if, as the Claimant alleges, the acts of TOKI, the Prime Minister’s Office, the police, and the Supreme Audit Board “represent[ed] a significant contribution to the fullness of Claimant’s claim”, which is denied, this would not make them the “essential basis” of the Claimant’s claims. According to the Respondent, their “essential basis” remains contractual.³⁷²

346. The Respondent also draws the Tribunal’s attention to Art 36 of the Contract, which it describes as the “exclusive jurisdiction” clause for the purposes of resolving disputes arising from the Contract.³⁷³ The Respondent’s position is that this provision represents the contractual choice of forum for disputes with respect to the Contract and the Claimant must abide by this contractual bargain.³⁷⁴ According to the Respondent, neither *lis pendens* nor *res judicata* principles apply in circumstances where the relevant claim is properly characterised as a contractual claim for damages.³⁷⁵ The Respondent contends that, in those circumstances, the Tribunal is in effect being improperly petitioned by the Claimant, indirectly to enforce alleged contractual rights of Tulip JV.³⁷⁶

347. Finally, the Respondent asserts that even if the Tribunal were to conclude that certain of the claims presented by the Claimant are “genuine” BIT claims, they depend upon a determination of the rights and obligations under the Contract, a matter to be resolved by the Turkish courts in reliance on the “exclusive” jurisdiction conferred on them by Art 36 of the Contract.³⁷⁷ On that basis, the Respondent contends that any purportedly genuine treaty claims are presently inadmissible before

³⁷¹ Respondent’s Counter-Memorial, para. 424.

³⁷² Respondent’s Rejoinder, para. 258.

³⁷³ Respondent’s Counter-Memorial, para. 459.

³⁷⁴ *Ibid.*, para. 468.

³⁷⁵ *Ibid.*, para. 472.

³⁷⁶ Respondent’s Rejoinder, para. 282.

³⁷⁷ *Ibid.*, para. 279.

the Tribunal pending the resolution of the local Turkish litigation concerning the Contract.

c) *Determination of the Tribunal*

348. The Tribunal considers that the BIT, properly construed, does not extend to cover purely contractual disputes. This is apparent from the definition of the term “investment dispute” in Art 8(1) of the BIT:

- 1) For the purposes of this Article, an investment dispute is defined as a dispute involving:
 - (a) the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party; or
 - (b) a breach of **any right conferred or created by this Agreement with respect to an investment**. (emphasis added)

349. Art 8(3) confers jurisdiction on the Tribunal only with respect to “investment disputes”, stating:

- (a) Each Contracting Party hereby consents to the submission of an investment dispute to the [ICSID] for settlement by arbitration.

350. The Tribunal notes that Art 3(2) of the BIT may be characterised as an obligation contained in an ‘umbrella clause’, which provides that:

[...] Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

351. While Art 3(2) of the BIT may arguably be relied on in certain circumstances to “elevate” a contractual obligation “entered into” by the State “with regard to investments”, the Claimant does not here rely on Art 3(2) to argue that the Contract with Emlak is so converted into an international obligation. The Claimant’s only contention with respect to the “umbrella clause” aspect of Art 3(2) of the BIT concerns Turkey’s alleged obligations under the Foreign Direct Investment Law. Indeed, the Claimant confirms in its submissions:

To clarify its position: Claimant is *not* seeking to argue that breaches of any contract it entered into relating to its investments in Turkey should be elevated to the level of breaches of the BIT; the archetypical example of a so-called “umbrella clause” claim. Rather, Claimant has demonstrated that Respondent’s obligation under Article 3(2) of the BIT, to “*observe any obligation it may have entered into with regard to investments[,]*” extends to the Foreign Direct Investment Law (the “FDIL”).³⁷⁸

352. Accordingly, the Tribunal need not address whether certain obligations under the Contract may be construed as treaty obligations by virtue of the “umbrella clause” in the BIT.

353. The Tribunal must therefore consider whether, apart from the umbrella clause (other than in the context of the Foreign Direct Investment Law), the Claimant has asserted BIT claims within the jurisdiction of the Tribunal.

354. The Tribunal agrees with the Parties that the determination of whether a claim arises under a BIT involves an inquiry into the “essential basis” or “normative source” of that particular claim. In order to amount to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of *puissance publique*. This principle has been affirmed by numerous previous investment tribunals. For example, in *Impregilo v Pakistan*, the tribunal stated:

In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.³⁷⁹

³⁷⁸ Claimant’s Reply, para. 677.

³⁷⁹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/03 (Decision on Jurisdiction dated 22 April 2005), para. 260 (Exhibit CLA-84).

355. Similarly, the Annulment Committee in the *Vivendi* case observed that “[a] Treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standards.”³⁸⁰

356. The Tribunal’s views are in accord with the statement in *Bayindir* that:

because a treaty breach is different from a contract violation, the Tribunal considers that the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power.³⁸¹

357. The Tribunal must therefore assess whether the impugned conduct involves the exercise of sovereign power distinct from action attributable to an ordinary contractual counter-party.

358. This issue is inexorably intertwined with the question of attribution. Indeed, it is difficult in this case clearly to separate the issue of attribution from the question of whether the claims presented by the Claimant arise from the BIT. In this regard, in concluding that the conduct of Emlak is not attributable to the State under Art 5 of the ILC Articles, the Tribunal has already determined that none of the conduct in question amounted to the exercise of governmental (*i.e.*, sovereign) power. Similarly, in holding that the actions of Emlak vis-à-vis Tulip JV and the Ispartakule III project are not attributable to the State under Art 8 ILC Articles, the majority of the Tribunal has concluded that such conduct was not carried out under the instructions, direction or control of the State in pursuit of a sovereign purpose. In sum, the majority of the Tribunal has concluded that there is no cogent evidence of sovereign interference - *i.e.*, sovereign instructions, direction or control - in Emlak’s contractual relations with Tulip JV.

³⁸⁰ *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision on Annulment dated 3 July 2002), para. 113 (Exhibit CLA-82).

³⁸¹ *Bayindir İnşaat Turizm Ticaret ve Sanayi A.Ş. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 180 (Exhibit RLA-78).

359. The Tribunal's finding that Emlak's conduct is properly characterised as contractual in nature, in the context of attribution, informs its determination that the claims asserted by the Claimant with respect to Emlak's conduct may not properly be characterised as treaty claims.
360. This would remain the position even if the Tribunal were to assume, *arguendo*, that Emlak is an emanation of the State. The question for the Tribunal would nevertheless remain whether Emlak has gone beyond acting as an ordinary contractual party to utilise State power to interfere with the contractual arrangement (as was the case in *Abaclat*, where the State plainly went beyond acting as an ordinary contractual party in enacting legislation to shield itself from its bond obligations).
361. To the contrary, there is no persuasive evidence before the Tribunal that Emlak went beyond acting as an ordinary contractual party in pursuit of its commercial best interests. For example, the Claimant's claims regarding Emlak's failure to grant reasonable extensions of time is, essentially, a claim arising out of the contractual relationship between Emlak and Tulip JV and Emlak's exercise of rights in reference to the Contract. Similarly, the termination of the Contract was, as discussed above, an exercise of perceived contractual rights consistent with promoting Emlak's commercial best interests. Indeed, none of the claims presented by the Claimant with respect to the conduct of Emlak are amenable to be characterised by the Tribunal as arising out of the BIT. Accordingly, they fall outside the scope of the Tribunal's jurisdiction.
362. The Respondent has placed emphasis on the "exclusive" jurisdiction clause in favour of Turkish courts contained in Art 36 of the Contract. Here, Art 36 does not expressly state that the jurisdiction of the Turkish courts shall be to the exclusion of any other forum. The proper meaning of Art 36 remains a matter of construction. However, in circumstances where the Tribunal has concluded that, even in the absence of a contractual choice of forum provision, the claims asserted by the Claimant with respect to Emlak and its administration and termination of the Contract do not arise out of the BIT, the Tribunal need not further consider the construction or application of Art 36.

363. Insofar as the Claimant has asserted claims arising from the independent conduct of various government bodies and officials, such as TOKI with respect to its use of zoning powers, the conduct of the Prime Ministry, the Supreme Audit Board and the Turkish police, these are plainly assertions about the conduct of state entities in the performance of their state functions.
364. The Tribunal does not accept the submission of the Respondent that, even if the Tribunal concludes that such claims are within its jurisdiction, their essential basis remains contractual and the Tribunal must therefore await the resolution of the contractual aspects of the dispute in the Turkish courts before proceeding with its determination of such claims on the merits. Indeed, the Respondent has not explained why it asserts that those claims are inadmissible pending the resolution of the contractual dispute in the Turkish courts.
365. The Tribunal's view is that a proper analysis of the claims with respect to State actors such as TOKI, the Supreme Audit Board, the Prime Ministry and the police demonstrates that the allegations are not substantially connected to contractual issues between Emlak and Tulip JV. For example, the question of whether TOKI used its zoning powers in violation of the BIT is independent of the parties' rights and obligations under the Contract. The same may be observed with respect to the (unsuccessful) recommendation of the Supreme Audit Board to terminate the Contract, and whether in making such a recommendation the Board misused its governmental powers. Accordingly, the Tribunal need not await the resolution of the contractual dispute in Turkey before addressing these "ancillary" claims on their merits.

VIII. THE CLAIMANT'S CLAIMS

366. Since the Tribunal has concluded by majority that the claims asserted by the Claimant with respect to the conduct of Emlak do not entail acts attributable to the State (and has also determined that such claims do not arise from the BIT), those claims must fail.

367. Nevertheless, the Tribunal will turn to consider whether the claims presented by the Claimant in respect of Emlak could amount to any violations of the BIT if the Tribunal were to assume that they could be characterised as treaty claims attributable to the Respondent.

368. The Tribunal will also consider the Claimant's claims asserted by the Claimant with respect to State actors such as TOKI, the Prime Ministry, the Supreme Audit Board and the Turkish police which are, in any event, properly within the Tribunal's jurisdiction and admissible before it.

369. In deciding on the different claims put forward by the Claimant, the Tribunal has examined the evidence put before it and has concentrated on assessing the extent to which, if any, the evidence supports a finding of a violation of the BIT. It has found unanimously that no such violation occurred. To the extent that any question is not discussed, it is because the Tribunal considers that the resolution of the question would not affect its decision, even if the question were resolved in favour of the Claimant.

A. Fair and Equitable Treatment Claim

a) Position of the Claimant

370. The Claimant contends that the Respondent, acting through TOKI, Emlak and various other entities, engaged in conduct that breached the "fair and equitable treatment" (**FET**) standard embodied in Art 3(1) of the BIT.

371. The Claimant's principal complaints are that the Respondent's conduct:

(1) breached the Claimant's legitimate expectations with respect to its investment; and

(2) amounted to arbitrary and/or discriminatory treatment of the Claimant's investment.³⁸²

372. According to the Claimant, the Tribunal must assess its claims concerning breach of the FET standard, as well as its claims regarding other alleged violations of the BIT, by reference to the entire course of conduct allegedly engaged in by the Respondent.³⁸³ The Claimant argues that there is no need to establish that this alleged course of conduct was motivated by a common illegal intent.³⁸⁴ Rather, the Tribunal must assess whether the Respondent engaged in "converging action" towards the same ultimate result, namely the termination of the Contract.³⁸⁵

373. The Claimant contends that the proper inquiry for determining whether acts or omissions violate the FET standard is the impact of measures on the investment, not the intent in adopting those measures.³⁸⁶ There is, therefore, no requirement to establish that the State acted with bad faith.

374. With respect to the content of the FET obligation imposed on the State by Art 3(1) of the BIT, the Claimant asserts that the "pro-active" standard in *Tecmed* applies.³⁸⁷ That is, the State is required by Art 3(1) to provide stability and predictability for Claimant's investment and to protect the Claimant's legitimate expectations by creating a transparent and stable legal and business framework.³⁸⁸ The Claimant argues that this legal standard should apply given the plain language and purposes of the BIT in issue to promote foreign investment and recent awards in investment arbitration endorsing

³⁸² Claimant's Skeleton, paras. 62 – 84.

³⁸³ Claimant's Reply, para. 389.

³⁸⁴ *Ibid.*, para. 389.

³⁸⁵ *Ibid.*, para. 400.

³⁸⁶ *Ibid.*, para. 407.

³⁸⁷ *Ibid.*, para. 413.

³⁸⁸ *Ibid.*

standards similar to that in *Tecmed*.³⁸⁹ On that basis, the Claimant argues that the less exacting standard endorsed by the tribunal in *Saluka* ought not apply (contrary to the position of the Respondent).³⁹⁰

375. In asserting violations of its legitimate expectations, the Claimant relies on the expectations of the Van Herk Group and Mr Benitah from the time of their initial investment in 2006, and, in particular on representations that the Claimant says were made to them regarding the benefits of TOKI's control over Emlak's Board of Directors, the Contract and tender documents, as well as the Respondent's conduct during the performance of the Contract and the general principles of good faith as embodied in Turkish and international law.³⁹¹

376. In particular, Claimant argues that the "Dutch Investors" had legitimate expectations that: (1) zoning was in place for the Ispartakule III project; and (2) if zoning issues arose, TOKI would act in accordance with its representations as well as its own commercial interests.³⁹² The Claimant asserts that it can rely on those legitimate expectations on the basis that it succeeded as the relevant investor as a result of a corporate re-organisation.

377. The Claimant contends that the Respondent violated these legitimate expectations on the basis that:

(1) Prior to the Contract being concluded, TOKI and Emlak knew about the existence of the zoning litigation and failed to disclose that material fact to the Claimant; and

³⁸⁹ *Tecnicas Medioambientales TecMed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award dated 29 May 2003) (Exhibit CLA-43); Claimant's Reply, paras. 417-419.

³⁹⁰ *Saluka Investments BV v. Czech Republic*, UNCITRAL (Partial Award dated 17 March 2006) (Exhibit CLA-38); Claimant's Reply, para. 413.

³⁹¹ Claimant's Skeleton, para. 61.

³⁹² *Ibid.*, para. 62.

(2) TOKI and Emlak failed to take the design of Ispartakule III into account in redrawing the zoning plan despite their own alleged commercial interests and representations.³⁹³

378. The Claimant further contends that the Respondent failed to grant reasonable extensions to Tulip JV in connection with the zoning dispute.³⁹⁴ According to the Claimant, both Emlak's Construction Control Department and the Supreme Audit Board recognised that the 471-day extension granted to Tulip JV to complete the Ispartakule III construction was insufficient because the delay period from 17 August 2006 until 27 June 2008 was "due to no fault of the contractor".³⁹⁵ Contrary to the suggestion otherwise by the Respondent, even if the Claimant had commenced construction before the Danistay order, such progress would have been futile in light of the new zoning.³⁹⁶

379. The Claimant further argues that the Respondent cannot claim to have "cured" its breach of the Claimant's legitimate expectations by granting an allegedly insufficient extension, because Emlak later used delay as a pretext to terminate the Contract.³⁹⁷

380. Accordingly, the Claimant contends that the Respondent breached the Claimant's legitimate expectations in its handling of the zoning litigation.

381. The Claimant further asserts that the Respondent violated the requirements of Art 3(1) not to act arbitrarily, in a discriminatory manner or in the absence of proportionality.

382. For the purposes of defining arbitrariness, the Claimant relies on the standard endorsed by the tribunal in *EDF v Romania*, which described an "arbitrary" measure as being:

(a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (b) a measure that is not based on legal standards but on discretion, prejudice or personal preference; (c) a measure taken for reasons

³⁹³ Claimant's Reply, para. 453-455.

³⁹⁴ *Ibid.*, para. 458.

³⁹⁵ *Ibid.*, para. 459.

³⁹⁶ *Ibid.*, para. 462; Legal Opinion of Metin Günday, para. 26.

³⁹⁷ *Ibid.*, para. 460.

that are different from those put forward by the decision maker; (d) a measure taken in wilful disregard of due process and proper procedure.³⁹⁸

383. With regard to the standard for discrimination, the Claimant contends that State conduct is discriminatory where: “(i) similar cases are (ii) treated differently (iii) and without reasonable justification”.³⁹⁹

384. The Claimant’s complaints with respect of Art 3(1) include the following:

- (1) TOKI discriminated against the Claimant’s investment and/or made an arbitrary decision when it failed to take into account the design of Ispartakule III despite being requested to do so and despite taking into account other “similarly situated” neighbouring construction projects, *i.e.*, Ispartakule I and Ispartakule II.⁴⁰⁰
- (2) The Respondent engaged in arbitrary conduct with respect to FMS by: (a) refusing to approve the removal of FMS from the partnership despite its criminal acts and its default of partnership obligations; and (b) subsequently requiring FMS’ signature for Tulip JV to take any action.⁴⁰¹
- (3) The Respondent arbitrarily interfered in Tulip JV on the basis that Mr Bayraktar, in his capacity as the President of TOKI and the head of Emlak, threatened to terminate the Contract unless the Van Herk Group and Mr Benitah removed Messrs Erten and Mertoglu from Tulip I.⁴⁰² The Claimant contends that Mr Bayraktar made this alleged threat directly to the Van Herk Group and Mr Benitah at the January 2007 meeting in Ankara. The purported basis for the alleged

³⁹⁸ *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13 (Award dated 8 October 2009), para. 303 (Exhibit CLA-12); Claimant’s Memorial, para 163; Claimant’s Reply, para. 466.

³⁹⁹ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL (Partial Award dated 17 March 2006), para. 303 (Exhibit CLA-38). Claimant’s Reply, para. 471.

⁴⁰⁰ Claimant’s Reply, paras. 456, 473 and 475.

⁴⁰¹ Claimant’s Memorial, paras. 123-129; Claimant’s Reply, para. 483.

⁴⁰² Claimant’s Reply, para. 530.

request to remove Messrs Erten and Mertoglu was “pressure from the Party” and that they are “bad people”.⁴⁰³

- (4) The Respondent treated the Claimant’s investment in an inconsistent manner. It threatened to terminate the Contract and, at the same time, gave assurances that the Contract would not be cancelled and encouraged the Claimant to continue performing the Contract.⁴⁰⁴ In particular, despite the alleged threats made by Mr Bayraktar on 16 January 2007, Mr Kurum made assurances to Mr Erten in November 2009 that Tulip JV would be granted an extension if it improved the pace at which the project was being constructed, then on 5 February 2010 approved the recommendation of the Construction Control Department to grant Tulip JV an extension of time of 418 days and then the Emlak Board, despite substantial improvement in the pace of construction, endorsed the decision to deny Tulip JV any further extension, thereby setting the basis for the termination of the Contract that followed.⁴⁰⁵
- (5) The Respondent arbitrarily and discriminatorily refused to grant reasonable extensions to the Claimant on the basis of Art 33 of the Contract to compensate for the delays that were outside the control of Tulip JV. Aside from the failure to grant a sufficient extension of time in connection with the zoning dispute, the Respondent did not grant extensions of time to compensate for delays caused by the global economic crisis. This denial was despite the fact that: (a) Emlak’s Construction Control Department noted that the global financial crisis “had a major impact up until the middle of 2009 particularly affected the real estate

⁴⁰³ Claimant’s Memorial, paras. 143-144.

⁴⁰³ Claimant’s Reply, para. 530.

⁴⁰⁴ *Ibid.*, para. 553.

⁴⁰⁵ *Ibid.*, para. 552; Erten Witness Statement, para. 45.

industry” in Turkey⁴⁰⁶; and (b) Emlak granted such an extension to other similarly situated Turkish developers, such as Kuzu Toplu Insaat Ltd. Sti.⁴⁰⁷

(6) According to the Claimant, the course of conduct engaged in by the Respondent culminated in the arbitrary and discriminatory termination of the Contract in breach of Art 3(1). Specifically, the Contract termination: (a) violated Turkish law; (b) the reasons to justify the termination were pre-textual; (c) the termination was discriminatory, treating Claimant’s investments differently than similarly situated Turkish developers.⁴⁰⁸ Further, and in any event, the termination of the Contract was in breach of the FET standard because it was not proportional to any legitimate end.⁴⁰⁹

b) *Position of the Respondent*

385. The Respondent denies that there has been any breach of Art 3(1) either on the basis of a violation of legitimate expectations or any arbitrary or discriminatory conduct.

386. As a general matter, the Respondent contends that the Tribunal need not consider the Respondent’s conduct as a whole in assessing whether there has been a violation of Art 3(1) (or any other substantive provisions of the BIT) unless it can be shown that such a course of conduct was motivated by an illegal common intent.⁴¹⁰ The Respondent asserts that there was no such common intent driving any of the actions at issue in this arbitration.⁴¹¹ The Respondent contends that, if the Tribunal accepts that it can assess the entire course of the Respondent’s conduct, then it is necessary to consider the impact of all relevant actions; the Claimant cannot “pick and choose”.⁴¹²

⁴⁰⁶ Claimant’s Reply, para. 560.

⁴⁰⁷ *Ibid.*, para. 559.

⁴⁰⁸ *Ibid.*, para. 567.

⁴⁰⁹ Claimant’s Memorial, paras 261-270; Claimant’s Reply, paras. 600-607.

⁴¹⁰ Respondent’s Rejoinder para. 341.

⁴¹¹ *Ibid.*, para. 344.

⁴¹² *Ibid.*

387. The Respondent rejects the assertion that the “pro-active” *Tecmed* standard applies to Art 3(1). The Respondent relies on criticisms of the *Tecmed* standard as “questionable”, imposing “inappropriate and unrealistic obligations” on the State, appearing to be “a programme of good governance that no State in the world is capable of guaranteeing at all times”, or a “description of perfect public regulation in a perfect world, to which all states should aspire but few (if any) will ever attain.”⁴¹³

388. The Respondent argues that the State cannot be expected to adhere to an ideal business and regulatory environment. Rather, as found by the tribunal in *Saluka*, the ordinary meaning of the term “fair and equitable” is “‘just,’ ‘even-handed’, ‘unbiased’, ‘legitimate’”; infringement of that standard requires “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”⁴¹⁴

389. The Respondent’s position is that the language of Art 3(1) is very similar to the FET clause at issue in *Saluka* and, therefore, the Tribunal ought to follow the *Saluka* standard.⁴¹⁵

390. Further, according to the Respondent, the relevant legitimate expectations are those of the Parties in these proceedings, not those of the “Dutch Investors”. The Claimant’s legitimate expectations arose, at the earliest, on 14 August 2008, and must reflect “the state of the law and the totality of the business environment” in Turkey at this time.⁴¹⁶ Since the zoning dispute and the Danistay order took place before the Claimant made its investment, and at a time when the Claimant knew of the issues surrounding the zoning litigation, the zoning dispute cannot serve as the basis for the Claimant’s allegations of a breach of legitimate expectations.

⁴¹³ *Ibid.*, para. 348.

⁴¹⁴ *Ibid.*, para. 351.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*, paras. 358-363; Respondent’s Skeleton, para. 40.

391. In any event, the Respondent asserts that any conduct associated with the zoning dispute did not breach the legitimate expectations of the Claimant in violation of Art 3(1) of the BIT.
392. The Respondent denies that either TOKI or Emlak knowingly withheld any material facts regarding the zoning litigation at the time when Emlak entered into the Contract with Tulip JV.⁴¹⁷
393. Further, the Respondent asserts that the substance of the Claimant's complaint in truth amounts to an expectation of "immutable zoning" and that there was no basis in the Contract for such an expectation to exist.⁴¹⁸
394. Rather, Art 4.9 of the Tender Specifications imposed on the Claimant an obligation to conduct its own due diligence and to be aware of the zoning situation at the time of entering into the Contract.⁴¹⁹ In addition, TOKI did not have any obligation towards the Claimant to act in any "commercial" best interests. To the contrary, in effecting zoning changes, TOKI was entitled to, and did, exercise its legitimate State planning powers, acting in the public interest.⁴²⁰
395. In addition, the Respondent argues that TOKI did not take Ispartakule III into account in approving the new zoning plan on the basis that this approval took place on 11 September 2007 whereas Mr Benitah first sought Emlak's assistance to ensure that Ispartakule III would be accommodated in the new zoning plan on 9 November 2007.⁴²¹
396. Further, and in any event, any delay that may have been caused by the zoning change was cured by the extension of time that Tulip JV was granted.⁴²² Any other extensions

⁴¹⁷ Respondent's Counter-Memorial, paras. 240 and 598; Respondent's Rejoinder, paras. 136-140.

⁴¹⁸ Respondent's Counter-Memorial, paras. 170; 246, 588, 589, 592 and 595; Respondent's Rejoinder, paras. 133, 364, 365 and 367-369.

⁴¹⁹ Respondent's Rejoinder, para. 371.

⁴²⁰ *Ibid.*, para. 380.

⁴²¹ *Ibid.*, para. 381.

⁴²² *Ibid.*, para. 388.

of time were within the discretion of Emlak under Art 33 of the Contract.⁴²³ Therefore, the determination of the extent of the extension of time granted in a construction contract was the act of an ordinary contracting party and not a government measure which could breach the Claimant's legitimate expectations.

397. With respect to the Claimant's allegations of arbitrary and/or discriminatory conduct, the Respondent first takes issue with the Claimant's characterisation of the applicable legal standard for the "arbitrariness". The Respondent's contention is that the standard formulated by the International Court of Justice in *ELSI* should be applied by the Tribunal.⁴²⁴ The position of the Respondent is that the Tribunal ought to be guided by the pronouncements of the ICJ, since it is the highest judicial authority with power to interpret international law instruments.⁴²⁵ Accordingly, and on the basis of the decision in *ELSI*, the Respondent argues that, to be arbitrary, the State's actions must:

- (1) go beyond a merely inconsistent or questionable application of administrative or legal policy or procedure; and
- (2) constitute an unexpected and shocking repudiation of a policy's very purpose and goal; or
- (3) otherwise grossly subvert a domestic law or policy for an ulterior motive.⁴²⁶

398. Turning to the issue of discrimination, the Respondent accepts that State conduct is discriminatory where "(i) similar cases are (ii) treated differently (iii) and without reasonable justification" and that "it is not essential to establish any bad faith on part of the host state" in order for a measure to be discriminatory.⁴²⁷

⁴²³ *Ibid.*, para. 391.

⁴²⁴ *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, 1989 ICJ Reports 15 (Exhibit RLA-42).

⁴²⁵ Respondent's Counter-Memorial, para. 602; Respondent's Rejoinder, para. 395.

⁴²⁶ Respondent's Skeleton, para. 43.

⁴²⁷ Respondent's Skeleton, para. 44.

399. The Respondent's position with respect to the Claimant's numerous assertions of arbitrary and/or discriminatory treatment is as follows:

- (1) The zoning changes were carried out by TOKI in line with applicable regulations and in the public interest and could not take into account Tulip JV's request to take its existing plans into account since the request was made only after TOKI had already approved the zoning plans.⁴²⁸ Further, and in any event, Tulip JV suffered no harm by the new zoning Plan, given that it was granted a sufficient extension of time and was able to make changes to the Project to make it more profitable.⁴²⁹
- (2) With respect to FMS, Emlak did not engage in any arbitrary conduct in refusing to accept the submissions of Tulip JV without the signature of FMS, given that:
 - (i) Tulip JV's Joint Venture Agreement explicitly required FMS's signature on all Tulip JV submissions;
 - (ii) FMS' management and signature authority in Tulip JV could not be legally revoked without a court order, as confirmed by Tulip I's own legal expert; and
 - (iii) FMS had notified Emlak that it exposed itself to civil and criminal liability if it accepted submissions from Tulip JV without FMS's approval.⁴³⁰
- (3) There was no improper interference in Tulip JV or Ispartakule III by TOKI or Emlak. There is no cogent evidence in support of Mr Benitah's account of the 16 January 2007 meeting with Mr Bayraktar and the allegations that Mr Bayraktar threatened to terminate the Contract in the event that Tulip JV failed

⁴²⁸ *Ibid.*, paras. 45-46.

⁴²⁹ *Ibid.*, paras. 47.

⁴³⁰ *Ibid.*, section 5.1.2.3.

to remove Messrs Erten and Mertoglu from the Ispartakule III project.⁴³¹ The Claimant presents no evidence of any impact due to Tulip I's refusal to comply with Emlak's alleged demands and, in any event, these alleged threats did not constitute a government measure.⁴³²

(4) Emlak did not treat the Claimant's investment inconsistently in breach of Art 3(1) of the BIT. Rather, in light of the uncontested delay to the Project, with Tulip JV failing to achieve more than 10% progress in almost 2 years of construction, Emlak was fully justified to demand acceleration, invoke the possibility of termination and eventually to terminate the Contract.⁴³³ In this regard, Emlak engaged in an exercise of contractual rights and did not violate the BIT.

(5) Emlak did not discriminate in granting extensions to any other construction project on the basis that such projects were not "similarly situated" to Ispartakule III. In particular, the Respondent relies on: (a) Art 11.17 of the Contract, which was specific in placing the risk of low sales on Tulip JV and required it to continue construction and not to halt the work despite such low sales; and (b) the fact that other construction on other projects progressed faster than Ispartakule III.⁴³⁴

(6) The termination of the Contract was not arbitrary or discriminatory because Emlak did not go beyond the exercise of contractual rights in its perceived best interests.⁴³⁵

400. On this basis, the Respondent asserts that it is not responsible for any violation of Art 3(1) of the BIT.

⁴³¹ *Ibid.*, para. 53.

⁴³² *Ibid.*, paras. 54-55.

⁴³³ *Ibid.*, para. 56.

⁴³⁴ Respondent's Counter-Memorial, para. 327; Respondent's Rejoinder, paras. 475-476.

⁴³⁵ Respondent's Skeleton, para. 60.

c) *Determination of the Tribunal*

401. The Tribunal concludes that Art 3(1) of the BIT is to be construed according to the ordinary meaning of the term “fair and equitable,” *i.e.*, “‘just,’ ‘even-handed’, ‘unbiased’, ‘legitimate’” and infringement of that standard requires “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable”.⁴³⁶
402. The Tribunal notes that the Claimant has indicated that its principal claims on the merits concern the failure to grant extensions (principally in 2009-2010) and the termination of the Contract. The Tribunal has considered the Claimant’s other assertions about earlier conduct, such as with respect to the zoning dispute, as part of the course of conduct alleged against the Respondent, but has noted that they do not form part of the primary claim asserted by the Claimant.
403. Turning to the Claimant’s complaint surrounding the zoning dispute, the Tribunal considers that there is no cogent evidence that representatives of the Turkish State, such as an aide to Prime Minister Erdogan, the Mayor of Ankara, Mr Bayraktar or any other actors made specific representations or gave concrete assurances to the “Dutch Investors” about the nature and scope of Ispartakule III prior to the execution of the Contract. Rather, the Tribunal finds that, at best, the evidence supports the conclusion that Turkish State actors expressed general support for the “Dutch Investors” making their proposed investment into the Turkish construction sector.
404. The Tribunal therefore considers that the primary source of any legitimate expectations with respect to the Ispartakule III project would have been the Contract and any pre-contractual representations made through the Tender Specifications or agreed in the Contract.
405. Contrary to making specific warranties about the condition of the zoning, Art 4.9 of the Tender Specifications for Ispartakule III placed the obligations of due diligence with respect of relevant administrative requirements and permits on Tulip JV, stating:

⁴³⁶ See *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL (Partial Award dated 17 March 2006), para. 297 (Exhibit CLA-38).

BIDDER declares unconditionally that it has read and understood the entire tender document and its attachments, that it knows the responsibilities of BIDDER and CONTRACTOR, that it has seen the location where the job will be carried out before bidding and has **carried out the necessary investigation, that by seeing the location it has learned about the location where the job will be carried out and has learned about all matters, material resources and ground conditions related to the job and about the local conditions necessary to perform the Job, that it has a good grasp of the legal and administrative situation, that it knows the CONTRACTOR shall fulfill [sic] all administrative requirements to obtain permits, all necessary legal requirements** and any actual conditions that must be met in order to start the job, and that after the Tender is concluded, the contract to be signed will be certified by a notary public.⁴³⁷ (emphasis added)

406. The affirmative witness evidence of Messrs Bayraktar⁴³⁸ and Yetim,⁴³⁹ which the Tribunal accepts, is that neither TOKI nor Emlak knew of the zoning litigation at that time when Tulip JV entered into the Contract. Further, Professor Atay, an expert in Turkish administrative law, opines that there was no basis for TOKI, a third party to the zoning dispute, to have prior actual knowledge that the zoning litigation had been initiated and was pending.⁴⁴⁰ Professor Günday does not provide a compelling basis to contradict the finding of Professor Atay.⁴⁴¹

407. On the re-zoning issue, the evidence illustrates that Tulip JV wrote to Emlak to request that TOKI take the design of Ispartakule III into account in October 2007, when TOKI's new zoning plan was already in progress. In any event, the Parties agree that Emlak granted Tulip JV a 471-day extension of time to complete construction on the basis of delays caused by the zoning litigation. The parties then agreed on a new Work Program for Ispartakule III, which fixed a new completion date of 19 May 2010 and took the extension of time explicitly into account. In these circumstances, even if there had been

⁴³⁷ Emlak Residential Real Estate Investment Partnership LLP Proposal Submission Specifications (Exhibit C-6).

⁴³⁸ Transcript, Day 3, Bayraktar (35:14-20).

⁴³⁹ Yetim Witness Statement, para. 54.

⁴⁴⁰ Legal Opinion of Ender Ethem Atay, paras. 46-47.

⁴⁴¹ See Legal Opinion of Metin Günday.

a basis for a complaint under the BIT in connection with the re-zoning, the extension of time and the new agreed Work Program cured that complaint and closed the matter.

408. On the Claimant's complaint that Emlak insisted on FMS's participation in the affairs of Tulip JV, the Tribunal notes, without determining issues of Turkish law, that the Tulip JV Agreement which was not imposed upon the Van Herk Group by TOKI or Emlak but freely entered into, specifically provided for an appointee of FMS, as a member of the Executive Board, to be included in all submissions. The Tribunal also notes that FMS consistently insisted on the respect of this provision and threatened legal actions against Emlak on several occasions in the event that Emlak proceeded to deal with Tulip JV without FMS. The Claimant does not argue that the provisions of the Joint Venture Agreement were inoperative in light of FMS' conduct absent a court order, nor does the Claimant dispute that the interim injunction obtained against FMS was vacated. What is more, it is uncontested that in February 2010, the FMS issue re-emerged, after the injunction against FMS, which permitted the other Tulip JV partners to act without it, was lifted. At that time, FMS repeated its threat to hold Emlak and others responsible for any actions taken without FMS' participation.
409. While Emlak could have elected to ignore FMS' threats and deal with the consequences, the Tribunal cannot say that it was obliged to choose that course. From that it follows that it cannot be said that Emlak's decision amounted to arbitrary behaviour. Accordingly, insofar as Tulip JV predicates a claim of a BIT violation on Emlak's response to FMS' threats, that claim is not sustained.
410. Since there is no evidence that the termination three years later was driven by the participation of Messrs Erten and Mertoglu in the Joint Venture, the Claimant's version of events at 16 January 2007, *i.e.*, that Mr Bayraktar threatened to terminate the Ispartakule III project in the event that the "Dutch Investors" failed to remove Messrs Erten and Mertoglu, could not constitute a violation of the BIT. This is particularly so given that the evidence suffices to establish that: (1) Emlak did not terminate the Contract after the 270 days for acquiring a construction permit had expired (when it could have done so); and (2) Emlak actually gave Tulip JV a substantial extension of time after the zoning dispute. Such conduct by Emlak is inconsistent with the notion that Mr Bayraktar had decided to terminate the Contract in January 2007.

411. In addition, the Claimant has not shown how the alleged threats of Contract cancellation in January 2007 impacted in any negative manner on Tulip JV's construction progress. To the contrary, the evidence on the record shows that the progress was primarily impeded by factors attributable to Tulip JV, *i.e.*, inadequate resourcing and internal conflict. Accordingly, the Tribunal cannot conclude that the Claimant's version of events as at the 16 January 2007 meeting constitutes a breach of the BIT.
412. Further, the Tribunal notes that the Claimant did not offer persuasive evidence that Emlak violated Art 3(1) of the BIT when it decided not to grant further extensions to Tulip JV in early 2010 or when it subsequently terminated the Contract.
413. The decision to decline further extensions cannot be considered "discriminatory" or "arbitrary" in circumstances where Emlak enjoyed a broad contractual discretion by virtue of Art 33 of the Contract and where: (1) the evidence showed that construction progress on other projects that received extensions vastly outpaced the progress made on the Ispartakule III project, even if measured only by the progress achieved in 2010 when Tulip JV increased the resources that it brought to bear; (2) Art 11.17 of the Contract required Tulip JV to complete the project with its own resources in the absence of funds available from sales; and (3) the EUR 20 million available under the First Loan Facility was completely drawn down on 28 November 2008 and the EUR 2 million available under the Second Loan Facility was completely drawn down on 19 May 2009.⁴⁴²
414. For these reasons, the Tribunal also concludes unanimously that the termination of the Contract was not a violation of Art 3(1) of the BIT in circumstances where Emlak was faced with a project that was in substantial financial hardship and beset with severe construction delays.

⁴⁴² Esveld Witness Statement, para. 11; Tulip I Copies of Drawdown Requests and Wire Transfers (Exhibit EE-6); Tulip I Summary of Drawdown Requests (Exhibit EE-7).

B. Expropriation Claim

a) Position of the Claimant

415. In short, the Claimant contends that the termination of the Contract by Emlak and the acts that followed constitute an expropriation of its investment by the Republic of Turkey in violation of Art 5(1) of the BIT. The Claimant argues that, by terminating Claimant's Contract, physically seizing the Ispartakule III site by force, calling the performance bond, seizing all of the money in the Project sales account and leaving the Tulip brand without its founding project, Respondent expropriated Claimant's entire investment in Turkey.⁴⁴³ According to the Claimant, the termination of the Contract was not commercial in nature but rather an act that attracts the protection of the BIT.⁴⁴⁴ The Claimant refers to the recommendation of the Supreme Audit Board, a Turkish State organ, to Emlak to terminate the Contract.⁴⁴⁵ According to the Claimant, the recommendation was a catalyst for the termination.⁴⁴⁶

b) Position of the Respondent

416. The Respondent's position is that Emlak was contractually entitled to terminate the Contract due to Tulip JV's numerous breaches, namely the project delays, Mertkan's bankruptcy, FMS's criminal conduct, and the assignment of receivables to Denizbank.⁴⁴⁷ The Respondent further contends that the other acts complained about by the Claimant

⁴⁴³ Claimant's Reply, para. 650.

⁴⁴⁴ *Ibid.*, para. 659.

⁴⁴⁵ *Ibid.*, para. 657.

⁴⁴⁶ Aside from referring to the May 2009 recommendation of the Supreme Audit Board with respect to the Ispartakule III project, the Claimant also relies on a Supreme Audit Board recommendation purportedly made following an inspection carried out in April 2010 but included in the 2009 Supreme Board Audit Report – see Claimant's Reply, fn. 358.

⁴⁴⁷ Respondent's Skeleton, para. 66.

(repossession of the site, calling of the performance bond, seizing the funds in the Project sales account) are a legitimate consequence of the termination.⁴⁴⁸

c) *Determination of the Tribunal*

417. The Tribunal has concluded unanimously that the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in Emlak's perceived commercial best interests.

418. As regards the recommendation of the Supreme Audit Board, suggesting that Emlak consider termination of the project in light of the slow pace of construction, the record does not reveal that any such recommendation had any particular influence on Emlak. What is more, Claimant offers no basis on which the Tribunal could find a mere recommendation to consider taking an action as an improper exercise of sovereign power. Especially is that so in the absence of any evidence that the Board exerted pressure on Emlak to terminate the Contract or that its recommendation was motivated by an improper purpose.

C. Full Protection and Security Claim

a) *Position of the Claimant*

419. The Claimant contends that the Respondent breached the "full protection and security" (FPS) clause in Art 3(2) of the BIT, which imposed on the host State an obligation to "make every reasonable effort to ensure the physical protection and security of foreign investments."⁴⁴⁹

⁴⁴⁸ *Ibid.*, para. 67.

⁴⁴⁹ Claimant's Reply, para. 619.

420. The Claimant's position is that the Respondent violated its FPS obligations when Mr Kurum of Emlak orchestrated the physical invasion of the Ispartakule III site, accompanied by police and armed security personnel.⁴⁵⁰

421. The Claimant relies on the views of the alleged invasion expressed by the Kucukcekmece Public Prosecutor in issuing an indictment against Mr Kurum and others for trespass and other offences, which stated:

...[T]he attempt by one party to remove the other from the construction site by using its own resources and employing force is clearly in breach of Articles 151, 154 and 117 of Act No. 5237; and it was ascertained that the suspects committed the offences they are accused of.⁴⁵¹

422. The Claimant contends that there was no legal justification for the invasion, as Tulip JV had challenged the legality of the purported termination in the Turkish courts and the case was pending at that time.⁴⁵²

423. The Claimant's position is that the alleged use of violence by Emlak representatives, the apparent cooperation of the police and the failure of the State to prevent the invasion renders the events at issue here analogous to the scenario in *Wena Hotels*.⁴⁵³

424. Accordingly, the Claimant asserts that the Respondent has violated the FPS clause in Article 3(2) of the BIT.

b) *Position of the Respondent*

425. The Respondent asserts that the events surrounding the repossession of the Ispartakule III site did not amount to a breach of the FPS clause of the BIT.

⁴⁵⁰ Claimant's Skeleton, para. 94.

⁴⁵¹ Claimant's Reply, para. 622; Indictment No. 2010/6644 To Kucukcekmece Criminal Court of First Instance (Exhibit CE-24).

⁴⁵² Claimant's Skeleton, para. 95.

⁴⁵³ *Ibid.*, para. 96; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award dated 8 December 2000) (Exhibit CLA-49).

426. The Respondent's position is that once the Contract was terminated, Emlak was entitled to repossess the site and Tulip JV no longer had any right to occupy the site. Accordingly, the Respondent contends that the Republic no longer had any duty to secure and protect access to it by the Claimant or any of the Tulip companies.⁴⁵⁴

427. Further, the Respondent contends that, although the 6th Criminal Court of Kucukcekmece found Mr Kurum guilty of having restricted Tulip JV's "freedom to engage in business and freedom of labour", which constitutes a crime under Article 117 of the Turkish Criminal Code, the finding established that there was no substantial violence involved in the site repossession.⁴⁵⁵

428. The Respondent also argues that the police did not assist Emlak with the repossession of the site, but ensured the safety of all involved.⁴⁵⁶

429. Finally, the Respondent's contends that the fact that the Public Prosecutor ordered that Tulip JV should regain exclusive possession of the site shows the State provided Tulip JV with effective remedies, meaning that there was no failure to provide FPS.⁴⁵⁷

c) *Determination of the Tribunal*

430. The Tribunal agrees with the observations in *Wena Hotels* that the FPS standard does not impose on the State a "strict liability" obligation.⁴⁵⁸ That is, the State cannot insure or guarantee the full protection and security of an investment. The question of whether the State has failed to ensure FPS is one of fact and degree, responsive to the circumstances of the particular case.

431. In the Tribunal's view, the events that transpired in this case do not amount to a breach of the FPS standard by the State.

⁴⁵⁴ Respondent's Skeleton, para. 76.

⁴⁵⁵ *Ibid.*, para. 77.

⁴⁵⁶ *Ibid.*, para. 78.

⁴⁵⁷ *Ibid.*, para. 79.

⁴⁵⁸ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award dated 8 December 2000), para. 84 (Exhibit CLA-49).

432. Without determining whether the repossession was legally justified under Turkish law, the Tribunal considers it relevant that Emlak came to the site in the belief that, having terminated the Contract, it could exercise its contractual rights to repossess the site in circumstances where it was the owner of the land. While Emlak may have been mistaken, there is no indication that it acted with a pre-determined intention to seize the site illegally and through organised violent action.
433. There is, therefore, no basis to conclude, that the State (assuming, *arguendo*, that Emlak were an emanation of the State) planned to engage in an unlawful seizure of land belonging to a foreign investor or, alternatively, that State organs failed to exercise due diligence and to prevent planned unlawful action by a private party.
434. Contrary to the assertion put forward by the Claimant, the Tribunal concludes that Emlak's attempt to repossess the site did not involve substantial violence. The video material submitted by the Claimant establishes that, while there was some force being employed by persons representing Emlak, including Mr Kurum, such force does not rise to the level of generalised violence.⁴⁵⁹
435. Further, the Tribunal considers that there is no evidence that the Turkish police violated the FPS clause by either assisting Emlak through use of force or being inactive, as was the case in *Wena Hotels*.
436. Finally, and perhaps most significantly, the State took action against Emlak representatives for improperly using force and the State prevented Emlak from repossessing the Ispartakule III site while legal action against those representatives was pending. The fact that Emlak was ordered to remove its personnel from the site renders this case starkly different to the circumstances in *Wena Hotels*, where the tribunal found that the State of Egypt took no steps to return the hotels to Wena until nearly a year later.⁴⁶⁰

⁴⁵⁹ Video Recording of the Site Seizure (Exhibit CE-308).

⁴⁶⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award dated 8 December 2000), para. 91 (Exhibit CLA-49).

437. Accordingly, in all the circumstances, the Respondent has not breached the FPS obligation in Art 3(2) of the BIT.

D. Umbrella Clause Claim

a) Position of the Claimant

438. The Claimant states explicitly that it “is not seeking to argue that breaches of any contract it entered into relating to its investment in Turkey should be elevated to the level of breaches of the BIT, the archetypal example of the so-called “umbrella clause” claim but contends that the provisions of the Foreign Direct Investment Law (**FDIL**), a domestic Turkish legislative instrument concerning protections of foreign direct investment, constitutes an obligation which falls within the scope of the “umbrella clause” in Art 3(2) of the BIT.⁴⁶¹ On that basis, the Claimant asserts that Art 3(2) of the BIT elevates the domestic law provisions of the FDIL into international obligations, assumed by the Turkish State vis-à-vis investors from the Netherlands.

439. The Claimant further asserts that the Respondent breached the obligation in Article 3(a) of the FDIL to afford “national treatment” to foreign investors, guaranteeing that they would be “subject to equal treatment with domestic investors” on the basis that:

- (1) TOKI forced Tulip JV to incur additional expense and delay to revise its plans in connection with a new zoning plan following the zoning dispute, while neighbouring projects developed by Turkish companies were not asked to alter their plans or to move the locations of their buildings.⁴⁶²
- (2) TOKI, acting through Emlak, arbitrarily refused to grant Tulip JV reasonable extensions in performing the Contract, whereas it routinely granted reasonable extensions to similarly situated Turkish companies.⁴⁶³

⁴⁶¹ Claimant’s Reply, para 677.

⁴⁶² Claimant’s Memorial, para. 310.

⁴⁶³ *Ibid.*, para. 311; Claimant’s Reply, paras. 678-684.

(3) The Respondent cancelled and forcibly invaded Ispartakule III, which was under development by foreign investors but did not subject projects being developed by Turkish firms to the same treatment.⁴⁶⁴

440. The Claimant further contends that the Respondent breached the obligation in Art 3(2) of the BIT not to expropriate or nationalise foreign direct investments, except for public interest and upon compensation in accordance with due process of law.⁴⁶⁵

441. Finally, the Claimant asserts that, separate from its obligations under the FDIL, the Respondent also failed to comply with the obligations it undertook through binding unilateral assurances to support the investment, including assurances allegedly made by Mr Egemen Bagis, Prime Minister Erdogan's aide, during a meeting specifically designed to discuss investment opportunities in Turkey.⁴⁶⁶

442. According to the Claimant, the alleged breaches of the FDIL and non-compliance with State assurances amount to breaches of the "umbrella clause" in Art 3(2) of the BIT.

b) *Position of the Respondent*

443. The Respondent contends that the scope of the umbrella clause in Art 3(2) of the BIT does not extend to legislative acts such as the FIDL. The Respondent relies in particular on the assertion that the term "entered into" in Art 3(2) of the BIT denotes an obligation other than a general legislative instrument, and is targeted towards obligations specifically undertaken by the State, such as contractual obligations.⁴⁶⁷

444. Accordingly, the Claimant asserts that any alleged breach of the FDIL does not amount to a breach of the umbrella clause.

445. Even if it does, the Claimant's argument that the Respondent failed to comply with the obligations it assumed under the FDIL is in any event irrelevant since the FDIL's

⁴⁶⁴ Claimant's Memorial, para. 312.

⁴⁶⁵ *Ibid.*, para. 313.

⁴⁶⁶ *Ibid.*, para. 314-315.

⁴⁶⁷ Respondent's Rejoinder, para. 626.

requirement to provide “national treatment” does not create any additional obligations to those already encompassed in Article 3(1) of the BIT, namely the requirement to provide fair and equitable treatment.⁴⁶⁸

446. With respect to the Claimant’s assertions concerning breach of assurances by the State, the Respondent contends that a vague and general statement of support by a government official of the “Dutch Investors” efforts in Turkey does not create any “legally binding obligation” on Turkey.⁴⁶⁹

447. In any event, the Respondent asserts that it was not in a position to intervene in Emlak’s decision to terminate the Contract. The Respondent refutes any suggestion that the Contract was terminated at the recommendation of the Supreme Audit Board or that it otherwise had any power to interfere in the contractual relations between Emlak and Tulip.⁴⁷⁰

c) *Determination of the Tribunal*

448. Although the Tribunal has reservations about the argument that a legislative instrument such as the FDIL is capable of falling within the scope of obligations envisaged by the “umbrella clause” in Art 3(2) of the BIT, there is no need for the Tribunal to decide this matter conclusively in circumstances where it does not consider that, in any event, there has been any non-compliance with the requirements of the FDIL.

449. First, the Tribunal has already considered and rejected the Claimant’s contention that its investment was subjected to arbitrary and discriminatory treatment. The same reasoning applies to the issue of whether there has been any failure not to afford national treatment to the Claimant. In short, there has not been any such failure in the circumstances.

450. Second, the Tribunal has also addressed the Claimant’s contention that the Respondent breached certain pre-contractual assurances in its determination with respect to the Art 3(1) claim for breach of the FET standard. It is sufficient merely to state that the

⁴⁶⁸ Respondent’s Skeleton, para. 80.

⁴⁶⁹ Respondent’s Rejoinder, para. 636.

⁴⁷⁰ *Ibid.*, para. 639.

Tribunal does not find there to be any compelling evidence of specific non-Contractual assurances that went beyond general expressions of support for the proposed foreign investment.

451. The Claimant has not, therefore, established its “umbrella clause” claims under Art 3(2) of the BIT.

E. Promotion and Protection of Investments Claim

452. In its Memorial, the Claimant asserted a violation of Art 2(1) of the BIT on the basis of the State’s failure to intervene and assist Tulip JV following the termination of the Contract. It is unclear whether this claim is still being pursued by the Claimant.⁴⁷¹

453. In its Reply, the Claimant appears also to have suggested that the actions of the Turkish police in the attempted repossession of the Ispartakule III site amount to a breach of Art 2(1).⁴⁷²

454. The Respondent rejects any violation of Art 2(1) on the basis that this provision does not impose a legally-binding obligation to promote and protect foreign investments.⁴⁷³ In any event, the Respondent disputes any suggestion that the State violated Art 2(1) either by failing to intervene after the Contract was cancelled or through any inappropriate action of the Turkish police.⁴⁷⁴

455. In short, and even assuming, *arguendo*, that Art 2(1) imposes a binding obligation on the State, the Tribunal does not accept that the State in this case acted incompatibly with any requirement to protect and promote the investment. The Tribunal concludes that, in circumstances involving a contractual relationship between Emlak and Tulip JV, the State did not breach any international obligation due to its non-interference in the termination of the Contract.

⁴⁷¹ Claimant’s Memorial, para. 317.

⁴⁷² Claimant’s Reply, para. 416.

⁴⁷³ Respondent’s Skeleton, para. 80.

⁴⁷⁴ *Ibid.*, para. 81.

456. The Tribunal has already made findings with respect to the actions of the police in the context of the Claimant's FPS claim. Its conclusions that the police did not act in a manner that breached the State's international obligations under the BIT apply equally here.

457. The Claimant has not, therefore, established its Art 2(1) claim.

IX. COSTS

458. Both Parties request an award of costs in respect of the legal fees and expenses and the costs of arbitration incurred in this proceeding, namely the advances paid to ICSID to cover the fees and expenses of the Members of the Tribunal and the charges for the use of ICSID's facilities.

459. The Claimant's legal fees and expenses total USD 9,368,621.48. This amount consists of the following items: (i) Crowell & Moring fees: USD 6,215,000; (ii) Crowell & Moring expenses: USD 1,461,952.16; (iii) expert fees and expenses: USD 1,360,846.74; (iv) Dutch and Turkish counsel fees: USD 323,644.85; and (v) additional direct travel expenses: USD 7,177.73. The Claimant has advanced USD 500,000 to ICSID to cover the costs of arbitration, as well as a lodging fee of USD 25,000.

460. In addition, the Claimant has incurred USD 506,032.04 in connection with the Bifurcated Jurisdictional Issue (USD 466,422.75 Crowell & Moring fees, USD 25,089.29 Crowell & Moring expenses, and USD 14,520 expert fee). In view of the Tribunal's Decision on the Bifurcated Jurisdictional Issue, the Claimant has not included these costs in its request for costs.

461. The Respondent's legal fees and expenses amount to USD 2,194,884 and EUR 1,605,082.00. These amounts consist of the following items: (i) Kuseyri Hukuk Bürosu fees and expenses: USD 874,898; (ii) Nixon Peabody fees and expenses: USD 660,000; (iii) LALIVE fees and expenses: USD 659,986; (iv) expert fees and expenses: EUR 1,501,740; (v) travel and accommodation: EUR 72,598; and (vi) hearing expenses: EUR 30,744. The Respondent has advanced USD 499,847.86 to ICSID to cover the costs of arbitration.

462. The Respondent estimates that it has incurred USD 300,000 in connection with the pleadings and hearing on the Bifurcated Jurisdictional Issue. It maintains that these costs, as well as all other costs incurred as a result of this proceeding, should be borne by the Claimant.

463. Art 10(6) of the BIT states in relevant part:

Each Party shall bear the cost of its own member of the Tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the

remaining costs shall be borne in equal parts by the Parties. The Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the Parties, and this award shall be binding on the Parties.

464. Further, the ICSID Convention provides in Art 61(2) that:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

465. Both Parties agree that the Tribunal enjoys broad discretion to decide on the allocation of costs. They both contend that the Tribunal ought to apply the ‘costs follow the event’ principle, in the sense that the unsuccessful party is required to pay the successful party’s costs.

466. There is no rule in ICSID arbitration that ‘costs follow the event’, nor does the broad body of arbitral practice suggest that this is the approach which should be followed in ICSID arbitration proceedings. However, in the exercise of its discretion to allocate costs, the Tribunal has the authority to award all or part of a party’s costs of the arbitration and its legal fees and expenses. Taking into account all factors in this case, the Tribunal has decided partially to apply this principle.

467. As the Respondent ultimately prevails in this arbitration, the Tribunal determines that the Claimant shall bear USD 450,000 of the costs of arbitration (the advances paid to ICSID to cover the fees and expenses of the Members of the Tribunal and the charges for the use of ICSID’s facilities) incurred by the Respondent.⁴⁷⁵

468. As to the Art 8(2) proceeding, the Claimant was successful in establishing compliance with the requirements of Art 8(2) of the BIT. However, the Tribunal indicated in its Decision on the Bifurcated Jurisdictional Issue that the Claimant should not have its costs of the Art 8(2) application and that Respondent may contend upon finality that it should have its costs, which are estimated to USD 300,000. The Tribunal determines

⁴⁷⁵ The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final. The final costs of arbitration incurred by each party may not correspond to the amount awarded. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

that these costs should be paid by the Claimant. While the Claimant prevailed on the application, it could have been avoided by an explicit notice to the Respondent of an investment dispute pursuant to Art 8(2) of the BIT.

469. Accordingly, the Claimant shall pay to the Respondent USD 750,000.

X. DISPOSITIVE PART

The Tribunal determines as follows:

1. The Claimant has made an investment into Turkey within the terms of the BIT and the ICSID Convention.
2. The claims of Mr Benitah are inadmissible.
3. By majority, the acts of Emlak are not attributable to Turkey.
4. Unanimously, and in any event, the acts of Emlak do not constitute breaches of the BIT.
5. Also unanimously, the acts of TOKI, the Supreme Audit Board, the Turkish police and Turkish government officials are attributable to Turkey but do not constitute breaches of the BIT.

Accordingly, the Claimant's claims are dismissed.

Costs:

The Claimant is ordered to pay the Respondent USD 750,000, constituted by:

- (a) USD 450,000 in part reimbursement of the advances paid by the Respondent to ICSID; and
- (b) USD 300,000 for its other costs.



Mr. Michael Eyan Jaffe
Arbitrator
Date: Feb. 25, 2014



Prof. Dr. Rolf Knieper
Arbitrator
Date: 25/02/2014



Dr. Gavan Griffith QC
President of the Tribunal
Date: 25. 11. 2014