In the matter of:

CEM CENGIZ UZAN, Claimant

VS.

THE REPUBLIC OF TURKEY, Respondent

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

CASE No. V 2014/023

SUPPLEMENTARY EXPERT OPINION
BY
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INTRODUCTION

1. I have been asked by LALIVE, counsel for the Respondent, to provide any comments I may have on both Professor Charles Leben's second Legal Opinion[1] and Mr Craig Bamberger's Legal Opinion,[2] insofar as their comments are relevant to issues I examined in my first opinion, dated 23 June 2015.

2. The principal aim of this supplementary opinion is to clarify and expand on some of the arguments I put forward in my first opinion in which I have demonstrated that:

   (a) the Claimant does not fulfil the criteria set out in Article 1(7)(a)(i) of the ECT to qualify as a natural person who is "permanently residing", and;

   (b) even if, *arguendo*, it is accepted that he does qualify as an Investor for the purposes of Article 1(7)(a)(i) of the ECT, the Claimant's claim must fail because his "effective and dominant nationality" links are with the Respondent State.

3. The numbering of the exhibits appended to this opinion commences from the last exhibit introduced in my first opinion, AAB-20. Thus, the exhibits attached to this supplementary opinion start at AAB-21.

SUMMARY

4. At the outset, I would like to recall the section entitled "The General Rule and Means of Interpretation" of my first opinion in which I set the general rules of treaty interpretation. There, at para. 35, I stated that "Article 31(1) VCLT provides the foundation of the applicable method of interpretation: good faith, the ordinary meaning of terms, the context, and the object and purpose of the treaty." I also quoted in full Articles 31 and 32 of the VCLT which contain the relevant provisions to the issues at hand.

5. I remain of the opinion that, in light of all the evidence and analysis carried out in my first opinion and supplemented in this opinion, the good faith interpretation of the phrase "permanently residing" in Article 1(7)(a)(i) of the ECT is thus:

> For a natural person to qualify as an ECT Investor on the basis of his or her "permanently residing" in a Contracting Party, it must be established that the applicable law of that Contracting Party accords that natural person significantly the same treatment as it accords to nationals or citizens of that Contracting Party.

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[1] Dated 20 September 2015.
[2] Dated 14 September 2015.

6. I am of the firm opinion that this is what the negotiating parties of the ECT intended the phrase "permanently residing" to mean. Any other interpretation is speculative and unsupported by convincing evidence.

7. Thus, in order to determine whether a natural person, who is "permanently residing" in a Contracting Party, qualifies as an Investor of that Contracting Party under Article 1(7)(a)(i) of the ECT, one should address the following crucial question:

> Does this person have *the same or equivalent* status as a national or citizen of the Contracting Party of which he is alleging to be an Investor?

8. If the answer is *No*, then such a person does not qualify as an Investor on the basis of his or her permanent residency. What this in fact means is that the actual status of "permanently residing" lies in the content of this peculiar category of belonging and not in the mere description or title. It is a matter of substance and not form.

9. Therefore, according to the facts and circumstances of this case as they were made available to me, I remain of the opinion that the Claimant lacks standing to bring an arbitration claim against the Respondent under the ECT, and thus, the Arbitral Tribunal is well justified in finding that it lacks jurisdiction over Mr Uzan.

10. I shall now comment on Professor Leben's second Legal Opinion and Mr Bamberger's Legal Opinion, in turn.

PROFESSOR CHARLES LEBEN'S SECOND LEGAL OPINION DATED 20 SEPTEMBER 2015

11. **In paras. 1 to 16 of his second Legal Opinion**, Professor Leben offers a number of arguments based on certain assumptions, including:

(a) He asserts that I have argued that the literal interpretation of Article 1(7)(a)(i) of the ECT "is wrong".[3] According to Professor Leben, the provisions of said Article, "[…] read simply and literally, means there are **two** categories of investors under the ECT: the citizens or nationals on the one hand […], and persons permanently residing on the other […]".[4] Thus, Professor Leben readily assumes that citizenship and nationality are one and the same thing. An assumption which Professor Leben struggles to sustain throughout his opinion;

(b) Professor Leben states several times that I have *denied* that Australian law recognises the status of citizenship;

(c) Professor Leben offers a short rendition of Australian and Canadian domestic immigration law position concerning the unique meaning of the expression "permanently residing in"; he quotes conveniently that "[a]s a general principle, permanent residents share the same rights and duties as citizens."[5]

(d) In paras. 7 to 9, Professor Leben provides a theoretical explanation of the concept of nationality; more important, however, is his summary of the unique position of the Commonwealth countries;

(e) He then admits that "[s]ome "multinational" countries […] distinguish between citizenship and nationality", an example given is Russia;[6]

(f) Immediately after, in para. 10, he refers to me in order to conclude that "[a]nyway, to say that in 1992 there were in Australia neither nationals nor implicitly citizens but only permanent residents seems to be 'nonsensical'";

(g) In para. 12, Professor Leben concedes that, in Australia, there exists "a permanent resident status with many benefits bringing it close to a citizenship status but that is not the citizenship status";

[3] Para. 2.
[4] Para. 1. Emphasis added.
[5] Para. 5.
[6] Para. 8.

(h) Finally, Professor Leben picks up my reference to Article 201 of NAFTA in my first opinion and opines thus: "Article 201 states that in this treaty [NAFTA] when talking about **nationals** one means not only citizens in a formal sense, but also permanent residents […];"[7]

(i) Again, without any evidence, Professor Leben seems to think that the ECT "offers a generous protection to both citizens/nationals and persons permanently residing".[8] How such a conclusion can be drawn from the definition of an "Investor", I fail to see.

12. At the outset, I would like to repeat what I said in my first opinion. In para. 77, I noted thus:

> "[…] [T]he expression "permanently residing in" was introduced into the text of the ECT in order to cater for the special circumstances of countries like Australia, the legal system of which, did not contain or define the word "nationality", but recognised a well defined legal categories of "citizenship" and "permanent residency"; that this is the case is clear from many of the Australian BITs."

13. First to note is that I am not qualified to offer any opinion on the immigration law of Australia or Canada. However, it is quite puzzling to me to find that Professor Leben states that I have said that Australia does not recognise the status of citizenship.[9] This I did not say whether explicitly or implicitly.

14. Professor Leben seems to suggest that there are two categories of "Investors", as natural persons, under the ECT: the first are nationals or citizens, and the second are natural persons who are "permanently residing". He holds this view because he is of the opinion that nationality and citizenship are interchangeable or "overlap". By doing away with this distinction he asserts that the first conjunction "or" which separates citizenship and nationality is nothing more than a plain distinction between equal categories. Although, as we saw, he struggles to maintain that same position with regard to what he refers to as "multinational" countries (see para. 11(e) above).

15. What Professor Leben is saying is that in the context of Article 1(7)(a)(i) of the ECT, there is no distinction between nationals and citizens, even though separated by a clear

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[7] Para. 15. Emphasis added. However, what Professor Leben does not tell us is that Articles 30 and 34 of the Mexican Constitution mentioned in the Annex referred to by Professor Leben makes a clear distinction between who is a Mexican national and a Mexican citizen. No overlap there.

[8] Para. 16.

[9] Para. 2.

conjunction, but there is a distinction between citizens/nationals and natural persons who are "permanently residing". The first two is of equal status, but not the third.

16. I would respectfully note that Professor Leben seems to experience difficulty when he attempts to argue that nationality and citizenship "overlap", even though the article is clear in using both words separately. But, Professor Leben seems to think that they are the same according to *his* literal interpretation.

17. By advocating this interpretation, Professor Leben demonstrates that he is unable to sustain his basic assumption that the literal interpretation would assist in reaching the same convoluted interpretation that he advocates. His interpretation is based on conjecture and contradictory propositions. And thus erroneous.

18. It is also noticeable that Professor Leben, in advocating the literal interpretation, does not seem to refer to the context, which is a "singular rule" as required by Article 31 of the VCLT.

19. **In paras. 17-21 of his second Legal Opinion**, Professor Leben confirms that "[t]he "literal" meaning of the sentence [i.e. Article 1(7)(a)(i) of the ECT] […] is clear. Anyone given this article will say that investor within the meaning of this article means a national/citizen or a person permanently residing."[10]

20. As shown above, I beg to disagree. According to Professor Leben's literal interpretation, he readily assumes that there is a distinction between the two conjunctions "or" without explaining as to why this is so, except expressing his own personal view that the two categories, namely citizenship and nationality, "overlap" and thus are the same thing. The evidence speaks otherwise.

21. Professor Leben disagrees with what I said in my first opinion that "ambiguous" means "*susceptible to more than one meaning.*" Instead, Professor Leben provides his own definition as follows: "[t]o qualify it [the provision of Article 1(7)(a)(i) of the ECT] as ambiguous, one must ask whether an ordinary, independent legal expert would have difficulty understanding it."[11]. I say no more on this.

22. In para. 56 of my first opinion, I contended that "a closer look at the construction of Article 1(7)(a)(i) of the ECT makes clear that the provisions under examination are *ambiguous* because they are susceptible to *more* than one meaning. In paras. 57 and 58, I then offered

[10] Para. 18.
[11] Para. 21.

two contrasting possible interpretations for the provision under examination. I also noted that the conjunctions "**or**" which have been placed between citizenship, nationality and "who is permanently residing" compounded the ambiguity in question.

23. The main reason for highlighting the ambiguity of the provision in question was the apparent readiness of the Claimant and its expert, Professor Leben, to assume, without a single piece of evidence, that the inclusion of the link of "permanently residing" in the definition of Investor was of an (inexplicably) "generous approach" to expand the coverage of the investment standards of the ECT. This interpretation directly results from the ambiguity in the overall construction of Article 1(7)(a)(i) of the ECT and, in particular, Professor Leben's failure to appreciate the nuanced function served by the conjunctions "**or**".

24. From Professor Leben's response in his second opinion, it appears that I did not make a clear distinction between two interpretative concepts, namely: "special meaning"[12] and "ambiguous or obscure".[13]

25. The reason for this is that I thought that the ambiguity caused by the conjunctions "**or**" will be demystified as soon as it is realised that the phrase "permanently residing" bears a special meaning, i.e. that "permanently residing" is not meant to bear a meaning of a category with a lesser importance than nationality or citizenship. I tried, in my first opinion, to demonstrate that "permanently residing" was added to the definition of Investor in order to cater for the needs of a few negotiating parties, notably, Australia and Canada. In other words, its inclusion is not meant to introduce a broad concept for the purposes of generosity, and a category that is dissimilar to nationality or citizenship.

26. I am aware that up to now, this has been misunderstood by Professor Leben due to the ambiguity of the construction of the provision and the lack of familiarity with what has happened during the negotiations of the ECT. I shall do my best to clarify my actual position further. I shall also highlight the fundamental flaw that is inherent in Professor Leben's assertion that the phrase "permanently residing" is unambiguous and is meant to provide a "generous approach" with the aim of covering purported investors such as the Claimant.

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[12] Article 31(4) of the VCLT.
[13] Article 32(a) of the VCLT.

27. In this regard, one is reminded of a pertinent general comment offered by P. Merkouris concerning the issue of ambiguity of a treaty language. He aptly observes:

> "Article 32 of the VCLT requires ambiguity or obscurity. Neither the text nor the *travaux préparatoires* of the VCLT itself delineate the level of ambiguity required. It was left up to the judges to decide when to consider the text ambiguous enough to resort to Article 32. Even the least amount of ambiguity could suffice. The fact that a provision enters the interpretative process means *ipso facto* that there is ambiguity. It is then the judge's task to decide whether this ambiguity is tantamount to zero or whether, taking into consideration all the relevant circumstances, that it is sufficient for the activation of Article 32."[14]

28. Thus, the certainty volunteered by Professor Leben concerning the interpretation of Article 1(7)(a)(i) of the ECT is difficult to uphold; thus erroneous.

29. **In paras. 22-38 of his second Legal Opinion**, Professor Leben embarks on a long-winded analysis of the term "special meaning" as set out in Article 31(4) of the VCLT. I must admit that I have struggled to understand what Professor Leben is attempting to establish other than to say that the expression "permanently residing" does not have a special meaning.

30. In my first opinion, I argued that the term "permanently residing" in Article 1(7)(a)(i) of the ECT bears a special meaning, in the sense provided for in Article 31(4) of the VCLT (see paras. 61-76 of my first opinion). I have not changed my opinion in this respect. However, in this supplementary opinion I would like to add a few additional clarifications.

31. First, I am aware that to establish a special meaning is a matter of evidence. Thus, the burden of proof of a special meaning rests on the party claiming it. It is my contention that any documentary evidence, including the *travaux préparatoires*, is evidentiary material. This point was succinctly summarised by R. Gardiner as follows:

> "The most common way in which a special meaning is indicated is by including a definition article in a treaty. Beyond that there is little practice showing clearly what would amount to the necessary 'special evidence'. If no definition is provided it is a matter of assessing the intent of the parties in the light of the available evidence.
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> […]
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> Where material is generally regarded as providing an authoritative interpretation of a treaty, it seems plausible to accept from it a special meaning. Where a special meaning is recorded in

[14] Footnotes omitted. [AAB-21].

the preparatory work, its effect on interpretation is probably no different from that of other statements or declarations in preparatory work, but confirmation of this is not readily found."[15]

32. In my first opinion, I have already shown that it is clear from the ECT *travaux* that the phrase "permanently residing" in Article 1(7)(a)(i) of the ECT has been included to bear a special meaning (see, in particular, paras. 69-74 of my first opinion).

33. Second, I have already referred to Article 201 of the NAFTA (see para. 66 of my first opinion). There, I stated "that Article 201 of NAFTA defines "**national**" as "a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1". Article 201 NAFTA clearly defines a national to include "permanent resident"; thus, providing more evidence that the terms nationals, citizens and permanent residents must have a meaning common to all of them.

34. Third, I have provided additional evidence in my first opinion (see paras. 64-65) to show that Australia (the negotiating party that proposed the inclusion of the term "permanently residing" into the definition of Investor in the ECT) has as well consistently included a protection of permanent residents into most of its BITs.

35. To conclude: it is clear from the ECT *travaux* and indeed from all the evidence reproduced in my first opinion and supplemented in this opinion, that the phrase "permanently residing" has been included into to the definitional Article 1(7)(a)(i) of the ECT to bear a special meaning; this is beyond reproach.

36. **In paras. 29-42 of his second Legal Opinion**, Professor Leben, if I understand him correctly, seems to argue as follows:

(a) The Claimant is an "Investor" according to Article 1(7)(a)(i) of the ECT by virtue of "permanently residing in" France;

(b) Regardless of the fact that he is a national of the Respondent State, the Claimant "may invoke Article 26 on the basis of the second possibility open to him under Article 1 (7) (a) (i) […];"[16]

(c) The "dominant and effective nationality" test does not apply because (i) "the Treaty [ECT] says nothing on that", and (ii) "[…] in this case we are not in *[sic]* faced with dual nationality

[15] Footnotes omitted. [AAB-22].
[16] Para. 40.

but with a case where a **Turkish national** claims a possibility explicitly provided for in a treaty [ECT] to which Turkey is a party and which grants anyone who is a permanent resident of a Contracting Party to the ECT the ability to bring a dispute before an arbitration tribunal."[17]

37. Since similar arguments have been raised by Mr Bamberger in his Legal Opinion as well, I shall deal with them, in order to avoid repetition, in paras. 63-78 below.

38. At the outset, I confirm what I have said in my first opinion about the application of the principle of estoppel to the present dispute (see paras. 93-97 of my first opinion).

39. I would like to add, however, that it would be otiose and, indeed, wrong to suggest that public international law does not recognise the principle of estoppel. It is a general principle of law that has been recognised in one way or another by international courts and tribunals.[18] Lord McNair observed in the *South-West Africa* case that, it is never a question of "importing [into international law] private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules".[19]

40. As long ago as 1963, the late Sir Robert Jennings made a pertinent comment concerning the application of the principle of estoppel in international law. He warned:

> "The first thing to be said is that the principle of estoppel in international law must be approached with some caution; for once loosed from the many technical shackles that severely limit its operation in the common law, from which it is after all by analogy derived, it is in danger of seeming to be applicable to almost any situation in which a State has expressly or tacitly adopted some attitude towards a legal question. This tends only to obscure the actual legal questions and principles involved."[20]

41. In the same vein and more recently, Mr Brown in a detailed study on the application of the principle of estoppel in international law, opines that:

> "Estoppel in international practice is a principle of law used in so many different circumstances, a term associated with so many other fundamental principles of law, that it threatens to become a hatchet in the hands of inept woodsmen."[21]

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[17] Emphasis added. Paras. 40-41, Professor Leben's second Legal Opinion. See para. 41.
[18] [AAB-23].
[19] [AAB-24].
[20] R. Y. Jennings, *The Acquisition of Territory in International Law*, 1963, at p. 41; Sir Robert Jennings goes on "to quote an extensive passage" from the separate opinion of Judge Sir Gerald Fitzmaurice in the *Temple* case "warning against the temptation to put more weight upon estoppel than it can rightly bear […]". [AAB-25].
[21] [AAB-26].

42. With all due respect to Professor Leben, I am of the opinion that he has seriously "obscure[d] the actual legal questions and principles involved" by attempting to apply the principle of estoppel to the instant case "ineptly".

43. I noted in paras. 93 to 97 of my first opinion, that the principle of estoppel is not relevant in relation to Turkey's FDI Law. To reiterate, I remain of the opinion that it cannot be held that because the Turkish Foreign Direct Investment Law ("FDIL") defines "foreign investor" to include "[…] Turkish nationals resident abroad […]", Turkey is estopped under international law from arguing that the Claimant is not an Investor under the ECT.

44. As far as I am aware, Turkey has not made any representation that a Turkish resident in an ECT Contracting Party would qualify as an Investor under the ECT. The crucial issue before this Arbitral Tribunal is whether Mr Uzan (a national of Turkey) qualifies as an Investor of another Contracting Party under the ECT, not the FDIL. What is said in the latter cannot be considered as a representation under the former.

45. Thus, to assert that Turkey is legally estopped or prevented from contesting jurisdiction *ratione personae* in the instant case because its FDIL permits a national of Turkey, who resides abroad, to invoke Turkey's domestic legislation will lead to an absurd result. It will lock Turkey into such a definition so no other variant definition would apply under any other bilateral or multilateral agreement.

46. In other words, no matter how Turkey agrees to define an Investor, for example, in an investment treaty, the definition of the FDIL will prevail because, as argued by the Claimant, Turkey is estopped from arguing otherwise. Surely, this is not how the doctrine of estoppel applies under international law. Its meaning should not be stretched in the manner advocated by Professor Leben.

47. **In paras. 48-51 of his second Legal Opinion**, Professor Leben introduces the principle of legitimate expectation, which he freely holds as applicable to the case at hand. He bases his argument on Article 10(1) of the ECT and concludes that the principle of legitimate expectation is "derived from the general principle of fair and equitable treatment, which is stated in all the investment protection treaties […]".[22] In support of this finding he refers to the Separate Opinion of the late Thomas Wälde in the *Thunderbird* arbitration case.

[22] Para. 49.

48. What is not mentioned by Professor Leben, unfortunately, is that the reference to Part III of the ECT (where Article 10(1) ECT can be found) is misplaced. This part deals with the merits of the case and not with jurisdictional issues.

49. Even if we were to entrain, *arguendo*, Professor Leben's invocation of a legitimate expectation, allegedly based on Article 10(1) of the ECT as applicable to jurisdictional matters, what he seems to argue in the present case is this: the Claimant, Mr Uzan, at the time he made investments in his state of nationality, legitimately expected that, if he goes to France or for that matter to any other ECT Contracting Party, and obtains residency there, his new status will qualify him as an "Investor of another Contracting Party'" for the purposes of Article 26(1) ECT. This is so, according to Professor Leben, regardless that the principle of legitimate expectation is based on the substantive obligation of fair and equitable treatment.

50. Overall, Professor Leben's difficulty in sustaining a logical coherence of his arguments presented in his second Legal Opinion is clear from the summary he provides by way of a conclusion at p. 18. For example, he concludes that:

> "The concepts of nationality and citizenship overlap except in States where a distinction is made between citizens of the State and different nationalities within the State. This is not the case in Australia since it has become a fully sovereign State as part of the Commonwealth."

51. And, how Article 1(7)(a)(i) of the ECT is unambiguous in light of Professor Leben's above conclusion is puzzling, to say the least.

52. Moreover, Professor Leben makes another sweeping statement: "[t]he comparison with dual nationals is not admissible since the claimant is not a dual national and makes no claim as such."[23] By making such a statement, Professor Leben places what he refers to as "persons permanently residing" in a much favourable position than nationals or citizens. Because, as opposed to "natural persons … who are permanently residing", nationals or citizens of the ECT Contracting Parties will have to pass the "dominant and effective nationality" test. This does not make the slightest sense.

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[23] P. 18, Professor Leben's second Legal Opinion.

MR GRAIG BAMBERGER'S LEGAL OPINION OF 14 SEPTEMBER 2015

53. I shall now turn to Mr Bamberger's Legal Opinion. I shall examine Mr Bamberger's comments on the interpretation of Article 1(7)(a)(i) of the ECT. For my views on whether the provision under dispute is ambiguous, and whether the phrase "permanently residing" is meant to bear a special meaning, I refer the Arbitral Tribunal to my comments above (see paras. 21-35 above).

ARTICLE 26 ECT ARGUMENT

54. Mr Bamberger seems to suggest that I have argued that the negotiating parties intended to deny access to Article 26 of the ECT for dual nationals. This is not entirely correct. What I said was that if the natural person alleging to be an Investor is a dual national, he must pass the "dominant and effective nationality" test (see paras. 88-92 of my first opinion). However, Mr Bamberger concludes, without much analysis, that, "[t]he ECT is *lex specialis,* and *pacta sunt servanda.* Even if there were a potentially applicable rule of customary international law that a natural person cannot bring a claim against a State of which he is a national without the consent of the State, that rule would be displaced by the ECT."[24] As to how the well established principle of "dominant and effective nationality" would be displaced is not clear from Mr Bamberger's exposition, except that he refers to a list of questions put by Canada and Australia's response to Canada's questions (exhibited at CB10) during the negotiations of the dispute settlement provisions.[25] In order to explain my position on the two issues raised by Mr Bamberger, I shall comment on each proposition in turn. First, I shall say a brief word on the *lex specialis* argument; second, I shall comment whether the general rule was displaced by the negotiating parties of the ECT.

The ECT is Lex Specialis, but …

55. Generally speaking, it should not be a matter of debate that the ECT, as a whole, is a *lex specialis* treaty.[26] Many other specific treaties, e.g., BITs, NAFTA, human rights treaties and, indeed, the WTO have been considered to represent *lex specialis* agreements.

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[24] Para. 45, Mr Bamberger's Legal Opinion of 14 September 2015.
[25] *Ibid.*, para. 41.
[26] Understanding 1(a) with respect to the ECT as a whole, implies this: "[t]he representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty [ECT] aiming at a legal framework to promote long-term co-operation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations."

56. However, to recognise that the ECT is *lex specialis* or that it contains rules of similar nature does not mean that the relevant rules or principles of general international law are excluded. Generally speaking, the above proposition is clearly supported by international law. For the purposes of this opinion, a few examples would suffice. The International Court of Justice in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* clearly set out the standard for the exception implied by the *lex specialis* rule. The Court observed:

> "The Court considers that an exception of this kind could not be admitted unless it were very clearly expressed. Recognition of the compulsory jurisdiction of the Court is an important aspect of the freedom and equality of States in the choice of the means of peaceful settlement of their disputes. Such a limitation is not to be presumed, and must be clearly and expressly stated if it is to be admitted. Article 62 of the Statute contains no such express derogation; and neither its position in the Statute, nor the *travaux préparatoires* of its adoption, serve to support an interpretation of the Article as intended to effect such derogation."[27]

57. Similarly, the Arbitral Tribunal in the *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* case noted that:

> "[I]n the absence of a specific rule provided for in the Treaty itself as *lex specialis*, the general international law rules have to assume their role as *lex generalis*."[28]

58. In *Azurix Corp. v. The Argentine Republic,* the Annulment Committee elaborated thus:

> "The Committee considers that it is implicit from this discussion that the Tribunal considered that the law that it was to apply in determining the quantum of damages was the BIT itself, and that failing any express provision in the BIT, the matter was governed by general principles of international law. The Committee finds no fault with the Tribunal's identification of the applicable law for purposes of determining the quantum of damages, which is in fact consistent with Argentina's position."[29]

59. Furthermore, the Arbitral Tribunal in the *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* expounded on the issue of *lex specialis* rule in the context of investment treaties as follows:

> "There is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law [...]. But in the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful

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[27] [AAB-27].
[28] [AAB-28].
[29] [AAB-29].

> expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. This would have been possible if the BIT expressly provided for such a position, but this does not exist in the present case."[30]

60. Most significantly, in the three recent *Yukos* ECT cases, the Arbitral Tribunals made the following pertinent and helpful remark:

> "Indeed, parties to a treaty are free to agree to any particular regime. This would include a regime where each signatory could modulate (or eliminate) its obligation of provisional application based on consistency of each provision of the treaty in question with its domestic law. For the reasons set out above, however, **agreement to such a regime would need to be clearly and unambiguously expressed**, a standard which Article 45(1) does not meet."[31]

61. Finally, it is to be recalled that Article 26(6) of the ECT reads as follows:

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

62. To conclude: in light of the above, any *lex specialis* rule that is alleged to derogate from the *lex generalis* must first be held to be in conflict with the normally applicable general rule (bearing in mind that the presumption is that any such conflict does not exist). More importantly however, the *lex specialis* rule must be "clearly and unambiguously expressed". A self-serving interpretation cannot be allowed.

Article 26(1) ECT Does Not Exclude The Application Of The "Dominant And Effective Nationality" Test

63. In my first opinion, I noted that LALIVE put the following question to me:"*[a]ssuming* that, by virtue of his residency either in the UK or France, the Claimant qualifies as an Investor under the ECT, would that entail that the present Arbitral Tribunal has jurisdiction *ratione personae*?" (see para. 82 of my first opinion)

64. In paras. 84 to 92 of my first opinion, I gave a summary of the reasons for my negative answer to the above question, which I need not to repeat here.

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[30] [AAB-30].
[31] Emphasis added. [AAB-31].

65. However, in this supplementary opinion, I would like to offer two additional observations.

66. First, the Claimant's two experts appear to argue that because the Claimant is bringing the claim on the basis of his "permanently residing" in another Contracting Party to the ECT, the "dominant and effective nationality" test would not apply. This assertion suffers from a serious logical deficiency and, if admitted, would lead to an absurd and unreasonable outcome. Below is the explanation of the reasons for this conclusion.

67. The assertion, made on behalf of the Claimant, is based on the assumption that the "dominant and effective nationality" rule applies when the claim in question is initiated by a natural person who is a citizen or a national of the two Contracting Parties directly involved in the claim (by virtue of a claimant's nationality or citizenship). It is then argued that the Claimant's claim in the instant case is different from a claim lodged by a dual national; this is because he is *not* a French national/citizen, but is "permanently residing" in France. Consequently, the Claimant is exempt from going through the "dominant and effective nationality" test in order to have standing in the present arbitration.

68. The absurdity of the above argument is not difficult to ascertain. Because accepting such an argument would inevitably lead to a situation where the Claimant, Mr Uzan, would be much better off as a mere permanent resident than a national of a Contracting Party. For, in the latter case he would have to prove that his dominant and effective nationality links are with France and not Turkey, and according to the facts, it seems without doubt that he would fail.

69. Thus, according to this view, Mr Uzan can avoid the "dominant and effective nationality" test by bringing a claim based on a much weaker connection than nationality or citizenship, i.e., permanently residing. This is illogical and cannot be so. Such an absurd argument should not be allowed.

70. The second point concerns whether Article 26(1) ECT provides for a *lex specialis* rule that excludes the "dominant and effective nationality" test. This appears to be an argument put forward by Mr Bamberger, and indeed, as shown above, by Professor Leben.

71. In support of his argument, Mr Bamberger refers to an exchange that took place between Canada and Australia.[32] For convenience, I would like to summarise this exchange again in

[32] Para. 41, Mr Bamberger's Legal Opinion.

order to show that the course of events that took place then do not support Mr Bamberger's argument.

72. As Mr Bamberger rightly noted, during the ECT negotiations of Article 26 of the ECT, Canada raised a number of general comments which concerned the Investor-Contracting State dispute settlement provisions (then Article 23). One comment, which is relevant to the instant case, was presented as follows:

> "Would Investors with dual nationality of two Contracting Parties be able to choose international arbitration to challenge measures of one or the other of those Contracting Parties?"[33]

73. Australia responded to Canada's request for clarification on Article 23 by providing a discussion paper. With regard to the question of claims by dual nationals, Australia opined as follows:

> "As to ICSID Convention procedures - generally the answer is no. [...]
>
> In Art. 23(5) instances, where the other means of dispute settlement are relied on, there currently no such limitation on a dual national taking action against a state of its nationality. To ensure consistency with the ICSID and Additional Facility provisions it may therefore be preferable to add a proviso to Article 23 to the effect that:
>
> > "This paragraph does not apply where the investor concerned is a national of the Contracting Party which is party to the dispute".
>
> Alternatively, it may be possible to exclude dual nationals from the benefits of the Agreement *in toto*, by, for example, a provision to the following effect:
>
> > "This agreement shall not apply to a person who is a national of the Contracting Party in which that person has made an investment, except to the extent that the [investor is a juridical, rather than a natural, person and] Contracting Party has agreed to treat the investor as a national of another Contracting Party."
>
> Australia could support adoption of either proposal."[34]

74. More importantly, however, and Mr Bamberger seems to have missed this point: the Canadian question was dropped immediately after the **applicable law** provisions that evolved into Article 26(6) which were added into the ECT.

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[33] [AAB-32].
[34] [AAB-33].

75. This clearly indicates that the answer to the Canadian question whether a dual national could bring a claim against one Contracting Party of which he or she is a national, was left to general international law to answer.

76. Referring to a similar problem in the contexts of BITs, Dolzer and Stevens observed:

> "Most BITs fail to address two potential problem areas concerning nationality. The first concerns the determination of the rules applicable to the situation where a national of one Contracting Party also holds the nationality of the other Contracting Party. **In the absence of treaty regulation, general principles of international law would apply, according to which the "effective" nationality of the individual would govern.**"[35]

77. In light of the above (and paras. 55-62), I am of the firm opinion that it is incorrect to suggest that Article 26(1) of the ECT provides for a *lex specialis* rule which derogates from the *lex generalis* rule of "dominant and effective nationality" test. This much is clear from the above analysis.

78. Therefore, under the ECT, if a dual national Investor submits its claim to ICSID, such a claim will, in general, be inadmissible. However, if the arbitration claim is submitted to other venues, such as SCC or ad hoc, then the general rule of international law concerning dual nationals shall apply.

Article 17 ECT

79. Mr Bamberger suggests that the issue of whether dual nationals may successfully bring a claim against their national States which was discussed "[...] was in the context of what became ECT Article 17, "Non-Application of Part III in Certain Circumstances," a so-called denial of benefits provision […]".[36]

80. There is nothing in the *travaux* of Article 17 of the ECT where the issue of dual nationality was discussed or referred to. Mr Bamberger opines that "[…] the provision [Article 17(1) of the ECT] does not apply to legal entities owned or controlled by natural persons who are [citizens or] nationals of the host State."[37]

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[35] Emphasis added. [AAB-34].
[36] Para. 34, Mr Bamberger's Legal Opinion.
[37] Para. 35, Mr Bamberger's Legal Opinion. In his footnote, Mr Bamberger observes that "[i]t conceivably was an oversight not to include mention of permanently residing persons in Article 17, but their inclusion would not have altered the fact that Article 17 only applies with regard to non-Contracting Party persons." It is unfortunate that this was not picked up by the Legal-Sub Group, whose mandate was to make sure that the provisions of the Treaty were consistent.

81. Mr Bamberger seems to conclude his analysis of Article 17 of the ECT by observing that he "[...] never heard any indication that the negotiating parties intended a rule of dominant and effective nationality to apply to ECT dispute resolution involving natural persons."[38] Indeed, he did not. Because this was not the place for it. The issue was raised by Canada in the context of Article 26 of the ECT and the answer was left for international law to determine, as was envisaged by Article 26(6) of the ECT.

82. Finally, Mr Bamberger concludes his analysis noting that the "ECT Articles 1(7)(a)(1) [*sic*] and 26(1) do enable a natural person to bring arbitration proceedings against the state of his nationality."[39]

83. In these proceedings, the real issue however is: Whether Mr Uzan, pursuant to Article 1(7)(a)(i) ECT, (a) qualifies as "a natural person … permanently residing in" the UK or France, and (b) even if he does so qualify, does the Tribunal, pursuant to Article 26(1) and (6) ECT, have jurisdiction *ratione personae* under the circumstances of this case, namely, the Claimant's dominant and effective nationality being with the Respondent, Turkey?

[38] Para. 38, Mr Bamberger's Legal Opinion. Emphasis added.
[39] Para. 50, Mr Bamberger's Legal Opinion.

CONCLUSIONS

84. In light of all the above, my conclusions remain unchanged:

(a) A core objective of the ECT is to promote and protect *foreign* energy investments in order to secure a sustained flow of energy across national borders.

(b) The Claimant in the present proceedings is a Turkish national. As such, he qualifies, *generally*, as an Investor under Article 1(7)(a)(i) of the ECT. On this account, however, he lacks standing to initiate arbitration proceedings under Article 26 of the ECT, because he is not "an Investor of *another Contracting Party*".

(c) Even if one were to assume, for the sake of argument, that the Claimant is "an Investor of another Contracting Party", as a consequence of his permanent residency, the Claimant will still lack standing to initiate an ECT arbitration claim against Turkey. This is because the "dominant and effective" links of the Claimant lie with Turkey, his State of nationality.

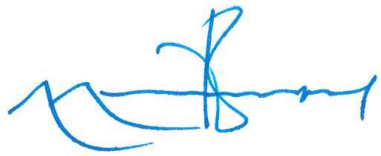
(d) Therefore, the Claimant's ECT arbitration claim must fail. He lacks standing. And, thus, the Arbitral Tribunal lacks jurisdiction *ratione personae*.

(e) Finally, having examined most carefully Professor Leben's two Legal Opinions and Mr Bamberger's Legal Opinion, I have to say that they present no argument which I find convincing; it follows that nothing said by Professor Leben nor by Mr Bamberger leads me to depart from the above conclusions.

I believe the contents of this supplementary opinion are true.

Done in Brussels: 27 November 2015

Respectfully submitted,



Professor Adnan Amkhan Bayno