

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**WASHINGTON, D.C.**

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IN THE PROCEEDINGS BETWEEN

**Mr. Saba Fakes**

(Claimant)

AND

**Republic of Turkey**

(Respondent)

**(ICSID Case No. ARB/07/20)**

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**AWARD**

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*Members of the Tribunal:*

Professor Hans van Houtte, Arbitrator

Dr. Laurent Lévy, Arbitrator

Professor Emmanuel Gaillard, President

*Secretary of the Tribunal:*

Ms. Martina Polasek

*Assistant to the President of the Tribunal:*

Ms. Anna Crevon

*Representing the Claimant:*

Mr. Dirk Knottenbelt

Mr. Eddie Meijer

Ms. Marielle Koppenol-Laforce

Mr. Maarten Strum

HOUTHOFF BURUMA N.V.

*Representing the Respondent:*

Mr. Hamid G. Gharavi

Mr. Julien Fouret

Mr. Stephan Adell

DERAINS & GHARAVI

*Date of dispatch to the Parties: July 14, 2010*

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## **I. INTRODUCTION**

1. On August 13, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) registered a Request for Arbitration dated June 6, 2007, as supplemented by a letter dated August 3, 2007, submitted on behalf of Mr. Saba Fakes (“the Claimant”) against the Republic of Turkey (“the Respondent”). The Request for Arbitration was filed on the basis of the ICSID Convention and the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated March 27, 1986 (“the Netherlands-Turkey Bilateral Investment Treaty” or “BIT”) which entered into force on November 1, 1989.
2. The dispute relates to the alleged breaches by the Respondent of a number of the BIT’s standards, including the Respondent’s alleged failure to ensure to the Claimant fair and equitable treatment and the alleged expropriation of the Claimant’s investment in Telsim Mobil Telekomunikasyon Hizmetleri A.S. (“Telsim”), a leading Turkish telecommunications company put in receivership and subsequently sold to a third party by the Turkish authorities. The Claimant’s preliminary assessment of the damages it claims to have suffered as a result of the Respondent’s alleged breaches is for an amount up to US\$ 19,000,000,000 (nineteen billion United States dollars).

## **II. THE PARTIES**

3. The Claimant, Mr. Saba Fakes, is a dual Dutch and Jordanian national. The effectiveness of Mr. Fakes’ Dutch nationality is disputed by the Republic of Turkey (*see infra* at para. 54 *et seq.*). Mr. Fakes is represented in these proceedings by Messrs. Dirk Knottenbelt, Eddie Meijer, Maarten Strum and Ms. Marielle Koppenol-Laforce of the law firm of Houthoff Buruma N.V., Weena 355, PO Box 1507, 3000 BC, Rotterdam, the Netherlands.
4. The Republic of Turkey is the Respondent in the present arbitration. It is represented by Messrs. Hamid G. Gharavi, Julien Fouret and Stephan Adell of the law firm of Derains & Gharavi, 25 rue Balzac, 75008, Paris, France.

## **III. PROCEDURAL HISTORY**

5. The Tribunal was constituted in accordance with the formula contained in Article 37(2)(b) of the ICSID Convention. On November 26, 2007, the Claimant appointed

Professor Hans van Houtte, a Belgian national, as arbitrator. On January 23, 2008, the Respondent appointed Dr. Laurent Lévy, a Swiss and Brazilian national, as arbitrator and proposed that Professor Emmanuel Gaillard, a French national, act as President of the Arbitral Tribunal.

6. On February 12, 2008, the Claimant informed ICSID that it had no objections to the appointment of Professor Gaillard as President of the Arbitral Tribunal. The Claimant objected, however, to the appointment of Dr. Lévy as arbitrator. On February 15, 2008, ICSID instructed the Parties that in accordance with Article 57 of the ICSID Convention and Rule 9 of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”), a proposal for the disqualification of an arbitrator can be made to the tribunal once constituted.
7. On March 4, 2008, the Centre notified the Parties that Professor Emmanuel Gaillard, Professor Hans van Houtte and Dr. Laurent Lévy had accepted their appointments, and that the Tribunal was deemed to have been constituted and the proceedings to have begun on that day, in accordance with Arbitration Rule 6(1).
8. On March 14, 2008, following the constitution of the Arbitral Tribunal, the Claimant submitted his Proposal to disqualify Dr. Laurent Lévy as an arbitrator, pursuant to Article 57 of the ICSID Convention and Arbitration Rule 9. The same day, the Centre invited the Respondent to submit by March 21, 2008 its observations on the Claimant’s Proposal to disqualify Dr. Lévy. The Respondent submitted its observations on March 21, 2008.
9. Pursuant to Article 58 of the ICSID Convention and Arbitration Rule 9(4), on April 28, 2008 Professor Emmanuel Gaillard and Professor Hans van Houtte issued a Decision dismissing the Claimant’s Proposal to disqualify Dr. Laurent Lévy as an arbitrator. Following the communication of this Decision by the Centre to the Parties, the proceedings resumed on April 28, 2008, in accordance with Arbitration Rule 9(6).
10. On June 20, 2008, the Claimant submitted a request for provisional measures in relation to an alleged risk of surveillance of counsel for the Claimant by the Respondent. Shortly thereafter, on June 24, 2008 the Respondent submitted its jurisdictional objections to the Claimant’s Request for Arbitration, in which it requested the bifurcation of the arbitral proceedings and the production of certain documents, together with a separate request for security for costs.

11. At the first session of the Arbitral Tribunal, held on June 26, 2008 at the World Bank premises in Paris, the Tribunal determined various procedural matters and set a schedule for the Parties' further submissions on preliminary issues raised in the Parties' respective requests of June 20, 2008 and June 24, 2008.
12. Pursuant to this schedule, on July 18, 2008 the Claimant filed his first round of observations on the Respondent's request for security for costs, and the Respondent filed its first round of observations on the Claimant's request for provisional measures. On August 29, 2008, the Parties filed their respective replies to the first round of observations on the request for provisional measures and on the request for security for costs. Also on August 29, 2008, the Claimant filed his first round of observations on the Respondent's request for bifurcation and production of documents. On September 10, 2008, the Respondent filed its second round of observations on its request for bifurcation and production of documents, together with its additional observations on the Claimant's request for provisional measures. Finally, on September 12, 2008 the Claimant filed his second round of observations on the Respondent's requests for bifurcation, production of documents and security for costs, together with his final observations on his request for provisional measures.
13. On October 1, 2008, the Tribunal issued its Decision on Preliminary Issues rejecting the Claimant's request for provisional measures as well as the Respondent's requests for production of documents and for security for costs, and granting the Respondent's request for bifurcation.
14. The Tribunal thus decided to examine the Respondent's jurisdictional objections as a preliminary matter. Noting that the examination of these objections could not proceed without the Claimant putting forward evidence of his ownership of shares in Telsim, and that the Respondent had already submitted the gist of its legal arguments in support of its jurisdictional objections, the Tribunal set out the schedule for the filing of the Parties' written pleadings on the Respondent's Jurisdictional Objections. Pursuant to this schedule:
  - a) On January 30, 2009, the Claimant filed his Memorial on the Respondent's Jurisdictional Objections ("Memorial"), together with supporting documents, as well as an Expert Opinion of Prof. Rudolf Dolzer and a Witness Statement of Mr. Saba Fakes.

- b) On April 30, 2009, the Respondent filed its Response to the Claimant's Memorial on the Respondent's Jurisdictional Objections ("Response"), together with supporting documents.
  - c) On June 30, 2009, the Claimant filed his Reply to the Respondent's Response ("Reply"), together with supporting documents, as well as a Supplemental Expert Opinion of Prof. Rudolf Dolzer, a Legal Opinion of Prof. Hayri Domanıç, a Witness Statement of Mr. Hakan Uzan and a second Witness Statement of Mr. Saba Fakes.
  - d) On August 31, 2009, the Respondent filed its Rejoinder on the Claimant's Reply ("Rejoinder"), together with supporting documents, as well as an Expert Opinion of Dr. Kemal Erol and a Legal Opinion of Prof. Mehmet Bahtiyar.
15. Following the exchange of written pleadings, on September 8, 2009 the Tribunal held a pre-hearing telephone conference with the Parties in order to determine the various organizational issues in relation to the hearing on jurisdiction. In advance of this pre-hearing conference, the Parties submitted on September 4, 2009 their respective positions in relation to these organizational issues.
16. Subsequent to the pre-hearing conference, ICSID considered the possible legal implications arising from Mr. Hakan Uzan's examination before the Tribunal in light of Mr. Uzan being subject to an Interpol Notice and a US arrest warrant, while the Arbitral Tribunal, by letter of September 24, 2009, invited the parties to comment on the implications of the examination of Mr. Uzan.
17. On September 30, 2009 the Parties provided their respective observations as regards the opportunity and potential implications of Mr. Uzan's examination by video-conference. On October 1, 2009, after careful examination of the Parties' positions and having taken into consideration ICSID's views, the Tribunal reached the decision that, in "*these exceptional circumstances,*" the examination of Mr. Hakan Uzan, initially intended to be organized by video-conference, was not necessary and that Mr. Uzan's witness statement would remain on record. The Tribunal further invited the Parties to state at the hearing their respective positions on a possible examination of Mr. Uzan in writing by way of questionnaire.

18. The hearing on jurisdiction took place at the World Bank premises in Paris on October 5-6, 2009. The following persons attended the hearing:

▪ On behalf of the Claimant:

Mr. Saba Fakes, Claimant

Mr. Dirk Knottenbelt, Houthoff Buruma

Ms. Marielle Koppenol-Laforce, Houthoff Buruma

Mr. Maarten Sturm, Houthoff Buruma, and

Prof. Christian Rumpf, Rumpf Rechtsanwälte

▪ On behalf of the Respondent:

Mr. Fethi Calik, Vice Chairman, Saving Deposit Insurance Fund, Turkey

Ms. Asli Yildirim, Head of foreign litigation and arbitration, Saving Deposit Insurance Fund, Turkey

Ms. Ayse Ozge Daggez, Lawyer, Saving Deposit Insurance Fund, Turkey

Mr. Ismail Emrah Karayel, Lawyer, Saving Deposit Insurance Fund, Turkey

Ms. Dilek Bacanh, In-house counsel, Ministry of Finance of the Republic of Turkey

Mr. Ilker Cetin, In-house counsel, Ministry of Finance of the Republic of Turkey

Prof. Ziya Akinci, Akinci Law Firm

Ms. Cemile Gokyayla, Akinci Law Firm

Mr. Hamid G. Gharavi, Derains Gharavi & Lazareff

Mr. Stephan Adell, Derains Gharavi & Lazareff

Mr. Julien Fouret, Derains Gharavi & Lazareff, and

Mr. Rory Wheeler, Derains Gharavi & Lazareff

19. Mr. Saba Fakes, Prof. Rudolf Dolzer, Prof. Mehmet Bahtiyar and Dr. Kemal Erol provided oral testimony before the Tribunal.

20. Prof. Hayri Domaniç, whose cross-examination was initially scheduled to take place by way of video-conference, was unable to present his expert testimony due to poor health conditions and an unscheduled hospital admittance on the eve of the hearing on jurisdiction. Under these circumstances, the question of Prof. Domaniç's examination at a subsequent date was discussed at the hearing. The Respondent indicated that it had no questions for Prof. Domaniç, because, in its opinion, any delay or postponement of the

proceedings “*outweigh[ed] any advantages [it] would gain out of cross-examining him.*”<sup>1</sup> The Tribunal also indicated that it was “*satisfied with the record as it stands*”<sup>2</sup> and had no questions to Prof. Domaniç in view of the limited scope of his expert opinion. Absent any questions from the Respondent or the Tribunal, the Tribunal took the decision not to re-schedule Prof. Domaniç’s cross-examination and to keep in the record his Legal Opinion, the probative value of which would be determined in due course.<sup>3</sup>

21. The issue of Mr. Hakan Uzan’s testimony was also discussed during the hearing on jurisdiction. Although emphasizing that it would be both inappropriate and illegal for it to cross-examine Mr. Uzan, the Republic of Turkey indicated that it had no objections to keeping Mr. Uzan’s witness statement in the record of the arbitration. Considering that, in the absence of any cross-examination of Mr. Uzan by the Respondent or any questions from the Tribunal, there would be no opportunity for the Claimant to submit questions to Mr. Uzan in re-direct examination, the Tribunal reached the conclusion that the Claimant would not be prejudiced in any manner by Mr. Uzan’s absence at the hearing on jurisdiction.<sup>4</sup>
22. The Tribunal further determined that it did not require any additional factual evidence with respect to Mr. Fakes’ and Mr. Uzan’s written witness statements. The Tribunal nonetheless asked the Parties whether they wished to present any further witnesses who would be in a position to testify on the events described in Mr. Uzan’s witness statement. The Parties stated that they did not intend to submit any further witness statements.<sup>5</sup>
23. By unanimous decision, the Tribunal maintained in the record the witness statement of Mr. Uzan, the probative value of which would be determined in due course, and decided that there was no need for any further written statements by Mr. Hakan Uzan.<sup>6</sup>
24. The Tribunal further decided to grant the Claimant’s request to submit a post-hearing brief, and authorized the simultaneous filing of such briefs by both Parties six weeks after

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<sup>1</sup> Transcript of Hearing on Jurisdiction, October 6, 2009, at 189/17-18.

<sup>2</sup> Transcript of Hearing on Jurisdiction, October 6, 2009, at 190/22-23.

<sup>3</sup> Transcript of Hearing on Jurisdiction, October 6, 2009, at 210/2-11.

<sup>4</sup> Transcript of Hearing on Jurisdiction, October 6, 2009, at 197/8-12.

<sup>5</sup> Transcript of Hearing on Jurisdiction, October 6, 2009, at 2001/11-16.

<sup>6</sup> Transcript of Hearing on Jurisdiction, October 6, 2009, at 210/13-23.



the completion of the hearing on jurisdiction. The Parties' respective post-hearing briefs were filed on November 18, 2009.

25. On December 2, 2009, the Parties submitted their respective Statements of Costs.
26. Finally, on December 11, 2009, the Claimant reopened the issue of Mr. Hakan Uzan's examination before the Tribunal in view of arrangements made by ICSID in another case in which Mr. Uzan submitted a witness statement. By letter of same date, the Respondent objected to this request.
27. Having carefully examined the Claimant's request for Mr. Uzan to be called to testify in these proceedings, the Tribunal recalled that, at the end of the hearing on jurisdiction, it had decided (i) that Mr. Uzan's written statement would be maintained in the record, and (ii) that neither the Respondent nor the Tribunal had any questions to address to Mr. Uzan. The Tribunal also recalled that the Parties were granted an additional opportunity to explain the factual and legal background of the case by way of post-hearing briefs. In light of the foregoing, the Tribunal decided to reject the Claimant's request. This decision was communicated to the Parties on December 17, 2009.

#### **IV. FACTUAL BACKGROUND**

28. The circumstances underlying the dispute between the Parties relate to various investigations and lawsuits brought against the Uzans, a prominent family in Turkey who controlled a vast group of companies in a variety of business sectors including banking, electricity, television and telecommunications. These investigations and lawsuits ultimately resulted in the freezing and subsequent sale by the Turkish authorities of various assets held directly or indirectly by the Uzans. It is undisputed between the Parties that Messrs. Kemal Uzan, Cem Uzan and Hakan Uzan are Turkish nationals and are, consequently, barred from bringing a claim against the Republic of Turkey on the basis of the ICSID Convention and the Netherlands-Turkey BIT.
29. The present dispute centres specifically on the receivership and subsequent sale by the Turkish authorities of assets held by Telsim, a major mobile phone company founded and organized under the laws of Turkey in 1993, which became the second largest mobile phone company in Turkey with approximately 10 million subscribers. It is undisputed between the Parties that at least until March 28, 2003, approximately 67% of the shares

in Telsim were indirectly held by the Uzans, through Standard Telekomünikasyon Bilgisayar Hizmetleri AS (“Standard Telekom”).

30. The Claimant submits that on July 3, 2003 he became the legal owner of 66.96% of the shares in Telsim, which constituted his investment in the Republic of Turkey. The Claimant also submits that in July 2003 the Respondent commenced a series of actions that resulted in the expropriation of the Claimant’s investment through the arrest of his shares in Telsim, and the subsequent forced sale of Telsim’s assets to a third party.
31. In particular, the Claimant submits that the Respondent put Telsim in receivership and “*grossly mismanaged Telsim between February 2004 and December 2005 causing the value of Claimant’s shares to decrease dramatically.*”<sup>7</sup> The Claimant further submits that in December 2005 the Respondent sold Telsim’s assets through an auction process that “*lacked competitive bidding*” at a price that “*vastly undervalued Telsim*” and reflected “*Turkey’s poor management of the company up until the sale.*”<sup>8</sup> According to the Claimant, when Telsim was sold to a third party by the Turkish authorities, he received no compensation for the loss of his investment.
32. The Claimant maintains that the Republic of Turkey’s actions were committed in violation of its undertakings under the Netherlands-Turkey BIT. Namely, the Claimant submits that the Respondent breached (i) its obligation not to deprive the Claimant of his investment without just compensation as required under Article 5 of the BIT; (ii) its obligation to transfer to the Claimant, without unreasonable delay, payments resulting from his investment, including profits, dividends, capital gains and similar payments, and the proceeds of the sale and liquidation of all or any part of the investment under Article 4 of the BIT; (iii) its obligation to ensure to the Claimant’s investment fair and equitable treatment as required under Article 3(1) of the BIT; (iv) its obligation not to impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, sale or liquidation of the Claimant’s investment as required by Article 3(1) of the BIT; (v) its obligation to accord to the Claimant’s investment full security and protection as required under Article 3(2) of the BIT; and (vi) its obligation to promote economic cooperation through the protection of the Claimant’s investment in Turkey as required by Article 2(1) of the BIT.

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<sup>7</sup> Claimant’s Request for Arbitration of June 6, 2007, paras 21 and 35.

<sup>8</sup> *Ibid.*, para 23.

33. The Respondent argues that the present dispute “*arises directly from the largest banking fraud in the history of the Republic of Turkey, perpetrated by members of the Uzan family and entities controlled by them.*”<sup>9</sup> According to the Respondent, the “*fraudulent schemes of the Uzan Group were brought to light*” in 2001-2002 when Nokia Corporation and Motorola Credit Corporation brought a lawsuit against the Uzan family members and several companies controlled by them in the United States District Court for the Southern District of New York, alleging common law fraud and RICO claims and seeking recovery of the loaned funds.<sup>10</sup> The Respondent emphasized that on July 31, 2003, that Court found the Uzans and a number of companies held by the Uzans guilty of fraud, and held them jointly and severally liable.
34. The Respondent claims that, following these proceedings, it uncovered “*irregularities in the financial operations of the Uzan Group*”.<sup>11</sup> According to the Respondent, an investigation conducted in June 2003 revealed that “*the Uzan family, through Imar bank, had hidden and diverted savings deposits in the amount of USD 6 billion by way of a sophisticated system of double bookkeeping. The embezzled funds were hidden within the Uzan Group of companies that were shareholders of Imar Bank.*”<sup>12</sup> The Respondent further maintains that it discovered “*further financial irregularities at Imar Bank involving Telsim, namely fraudulent conveyances within the Uzan Group.*”<sup>13</sup> This ultimately led to the authorities’ decision to put Telsim in receivership in order to undertake “*remedial measures to cure the shortcomings in the operation and accounts of Telsim*”<sup>14</sup> and, subsequently, sell the bulk of Telsim’s assets to a third buyer “*to reimburse part of the debts contracted by the Uzans as a result of their fraud.*”<sup>15</sup>
35. In parallel, since 2003, a number of criminal proceedings have been brought in Turkey against the Uzan family members in their individual capacity on charges ranging from fraud to fraudulent conveyance and money-laundering.

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<sup>9</sup> Respondent’s Preliminary Jurisdictional Objections of June 24, 2008, at para 5.

<sup>10</sup> *Ibid.*, at para 6.

<sup>11</sup> *Ibid.*, at para 8.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, at para 11.

<sup>14</sup> *Ibid.*

<sup>15</sup> Respondent’s Response on Jurisdiction of April 30, 2009, at para 51.

36. While the nature of the Respondent's actions in relation to the sale of Telsim's assets, as well as the characterization to be given to such actions is in dispute between the Parties, the Arbitral Tribunal does not need to address these questions for the purpose of its jurisdiction. The chronology of the events leading to the sale of Telsim's assets to a third party is however relevant to the issue of the jurisdiction of the Centre and of the Arbitral Tribunal.
37. The following events led to the sale of the assets allegedly held by the Claimant by the Turkish authorities:
- a) On February 10-27, 2003, the Turkish authorities questioned certain operations of some companies held by the Uzan family. However, these notices made no mention of Telsim or Standard Telekom.<sup>16</sup>
  - b) In June 2003, Turkey's Banking Regulation and Supervision Agency ("BRSA") opened an investigation of Imar Bank T.A.S. held by the Uzan family.
  - c) Following this investigation, on July 3, 2003 the BRSA revoked Imar Bank's banking licence.<sup>17</sup>
  - d) Immediately thereafter, on July 4, 2003, Turkey's Savings Deposit Insurance Fund ("SDIF") assumed management and control of Imar Bank and obtained injunctions from the 1<sup>st</sup> Commercial Court of First Instance of Ankara to freeze the assets and receivables of the Bank's board members and controlling shareholders, including the members of the Uzan family.<sup>18</sup> The injunctions did not specifically mention Telsim or Standard Telekom.
  - e) On July 31, 2003, the United States District Court for the Southern District of New York issued a judgment finding the Uzans and a number of companies

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<sup>16</sup> Official Notice of the Ministry of Energy and Natural Resources to Cukurova Elektrik (February 10, 2003), **Exhibit R-27**; Official Notice of the Ministry of Energy and Natural Resources to Kepez Elektrik (February 10, 2003), **Exhibit R-28**; and Response of the Ministry of Energy and Natural Resources to Cukurova Elektrik (February 27, 2003), **Exhibit R-29**.

<sup>17</sup> Decision No. 1085 of BRSA, **Exhibit C-8**.

<sup>18</sup> Decisions by the 1st Commercial Court of First Instance of Ankara (July 4, 2003), **Exhibit R-3**.

held by the Uzans, including Standard Telekom, guilty of fraud and holding them jointly and severally liable.<sup>19</sup>

- f) On August 14 and 26, 2003, the SDIF obtained two further injunctions from the Sisli 2<sup>nd</sup> Criminal Court of Peace against the assets of the managers, shareholders, and former authorized signatories of Imar Bank.<sup>20</sup> The second injunction, issued on August 26, 2003, expressly referred to Telsim and Standard Telecom.
- g) On February 13, 2004, the SDIF appointed Telsim's Directors and seized the rights attached to Telsim's shares, with the exception of the right to receive dividends.<sup>21</sup>
- h) On December 13, 2005, the SDIF sold most of Telsim's assets to Vodafone for an amount of approximately USD 4.5 billion.<sup>22</sup> This sale was finalized on May 25, 2006.

38. The Claimant alleges to be the legitimate owner of approximately 67% of the shares in Telsim, which it claims to have acquired on July 3, 2003. The Claimant's description of this acquisition is contested by the Respondent both in terms of its legal characterization and as a matter of fact. The Respondent observes that certain dates crucial for the demonstration of Mr. Fakes' ownership of shares in Telsim conspicuously coincide with the freezing of those shares, as well as the subsequent sale of Telsim's assets by the Turkish authorities.

39. The circumstances surrounding the Claimant's alleged acquisition of shares in Telsim are disputed by the Parties.

40. The Claimant submits as follows:

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<sup>19</sup> Motorola Credit Corporation and Nokia Corporation v. Kemal Uzan et al., 274 F.Supp.2d 481 (SDNY 2003), **Exhibit R-2**.

<sup>20</sup> Sisli Court Injunction 2003/426 (August 14, 2003), **Exhibit R-4**; and Sisli Court Injunction 2003/442 (August 26, 2003), **Exhibit R-5**. Both Injunctions were also submitted as **Exhibit C-3**.

<sup>21</sup> **Exhibit C-11** ("Seizure papers").

<sup>22</sup> **Exhibits C-6 and C-7**.

- a) On January 2, 2003, Telsim’s Board of Directors issued a resolution authorizing the issuance, at the request of Standard Telekom, of a “*Consent Certificate*” representing the shares owned by Standard Telekom in Telsim.<sup>23</sup>
- b) On the basis of this resolution, on February 10, 2003, Telsim issued 32 temporary share certificates to Standard Telekom, to be “*exchanged for share certificates to be issued in the future*”.<sup>24</sup>
- c) On February 14, 2003, Standard Telekom’s Board of Directors issued a resolution authorizing Mr. Hakan Uzan to sell Standard Telekom’s shares in Telsim, to negotiate and sign the sale agreements, and to complete all transactions regarding such sale agreements.<sup>25</sup>
- d) Between March 28 and April 2, 2003, Standard Telekom transferred the 32 temporary share certificates representing its shareholding in Telsim to Masoud International Trading Establishment (“Masoud”),<sup>26</sup> a company incorporated in Jordan by Mr. Nasser Masoud, a Jordanian national.
- e) In late April 2003, Mr. Fakes received a proposal from Mr. Sinan Ghosheh, an accountant and financial advisor in Amman, concerning a “*possible business investment involving Telsim*.”<sup>27</sup> It was explained to the Claimant that “*Mr. Ghosheh had created with Mr. Uzan a structure whereby a third party would be the legal owner of the relevant shares [in Telsim] over which Mr. Hakan Uzan had beneficial rights over*.”<sup>28</sup> The Claimant understood that, at the time of his discussions with Mr. Ghosheh, Masoud was the legal owner of approximately 67% of shares in Telsim, and that the proposal consisted in the Claimant acquiring the legal ownership of these shares from Masoud. The Claimant alleges that it accepted this proposal.

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<sup>23</sup> Telsim Board Resolution (January 2, 2003), **Exhibit C-49**.

<sup>24</sup> Temporary Registered Share Certificates, **Exhibits C-25 and C-38**.

<sup>25</sup> Standard Telekom Resolution of the Board of Directors (February 14, 2003), **Exhibit C-53**.

<sup>26</sup> Temporary Registered Share Certificates, **Exhibit C-25**.

<sup>27</sup> Fakes Witness Statement I, para 9.

<sup>28</sup> Fakes Witness Statement I, para 10.

- f) On June 30 and July 1-2, 2003, the Claimant and Masoud signed 10 Agreements of Purchase, Transfer, Assignment of Rights and Sale of Shares, concerning the transfer of “*shares owned by the Vendor*” in Telsim (“Masoud-Fakes Agreements”).<sup>29</sup> Pursuant to these Agreements, Masoud agreed to transfer a total of 66.96% of shares in Telsim to the Claimant for a total of US\$ 3,800 paid upon the execution of the Agreements and US\$ 17,668,000 to be due and payable upon the occurrence of certain events described in the Agreements. The Claimant paid the amount of US\$ 3,800, which was immediately payable upon the execution of the Agreements, in cash.<sup>30</sup>
- g) On July 3, 2003, Masoud endorsed and delivered to the Claimant 32 temporary share certificates, representing 66.96% of shares in Telsim.<sup>31</sup> Following the transfer of these temporary share certificates, the Claimant alleges that he became the legal owner of 66.96% of shares in Telsim. However, pursuant to an oral agreement between Mr. Fakes and Mr. Hakan Uzan concluded in 2003, Mr. Hakan Uzan remained the beneficial owner of these shares.<sup>32</sup>
- h) On July 15, 2003, the Claimant received two letters from Telsim informing the Claimant that Telsim had “*undertaken all requirements for the recording of the new shareholding with the Records of [the] company*” and confirming that Mr. Fakes was registered as a shareholder in Telsim’s records.<sup>33</sup> The first letter was signed by Mr. Hakan Uzan in his capacity as Chief Executive Officer of Telsim, and the second letter was simply signed “*on behalf of Shareholders Services.*”

41. The Claimant submits that he is the legal owner of 66.96% of shares in Telsim since July 3, 2003. He acknowledges that, since that date, he has not received any invitation to a

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<sup>29</sup> Share Purchase Agreements between Fakes and Masoud, **Exhibit C-24**.

<sup>30</sup> Fakes Witness Statement II, para 9.

<sup>31</sup> Share Purchase Agreements between Fakes and Masoud, **Exhibit C-24**.

<sup>32</sup> Fakes Witness Statement II, para 5. Pursuant to Mr. Fakes’ statement during the hearing on jurisdiction, the oral agreement between him and Mr. Uzan was entered into prior to the signing of the Masoud-Fakes Agreements (see Transcript of Hearing on Jurisdiction, October 5, 2009, at 103/16/18).

<sup>33</sup> Letters from Telsim to Mr. Saba Fakes dated July 15, 2003, **Exhibit C-26**.

meeting of Telsim's shareholders or any other communication from Telsim, save for the two letters of July 15, 2003 described above.

42. As regards the events leading to the receivership and sale of the shares in Telsim, the Claimant submits that while he followed the developments as they unfolded, he was advised by Mr. Ghosheh "*not to become involved . . . and wait until the dispute between Turkey and the Uzan family had been resolved.*"<sup>34</sup> The Claimant maintains that he followed this advice and did not undertake any action to secure his claims in relation to his shareholding in Telsim between July 2003 and May 2006, when the sale of Telsim's assets to Vodafone was finalized. In particular, during this period the Claimant did not contact the Turkish authorities to indicate that the sale of Telsim's assets would breach his rights as the legal holder of 67% of Telsim's shares.
43. However, the Claimant submits that after the sale of Telsim's assets to Vodafone he conferred with Mr. Ghosheh regarding his possible options in relation to his holding in Telsim. From his and Mr. Ghosheh's research, the Claimant maintains that he understood that he could file a claim against the Respondent on the basis of the Netherlands-Turkey BIT.<sup>35</sup> On March 14, 2007, the Claimant sent a notice letter to the Republic of Turkey requesting the payment of compensation in the amount of up to US\$ 19,000,000,000 for the alleged expropriation of his investment in Telsim.
44. For its part, the Respondent submits that the claims brought by Mr. Fakes are "*abusive and frivolous,*" and that he does not qualify as an "investor" who made an "investment" in the Republic of Turkey. The Respondent maintains that "*Mr. Fakes is serving as a front, for jurisdictional purposes, for the Uzans, a Turkish family whose assets have been frozen in the Republic of Turkey because of proven fraud and criminal activity, and who cannot, as Turkish nationals, bring claims in their own right against the Respondent before ICSID.*"<sup>36</sup>
45. According to the Respondent, the Claimant did not provide sufficient evidence of his ownership of shares in Telsim. The Respondent questions whether the evidence presented by the Claimant was contemporaneous to the facts in dispute. In particular, the

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<sup>34</sup> Fakes Witness Statement I, para 24.

<sup>35</sup> Fakes Witness Statement I, paras 27-28.

<sup>36</sup> Respondent's Preliminary Jurisdictional Objections dated June 24, 2008, para 3.



Respondent submits that the temporary share certificates contain only one signature – that of Mr. Hakan Uzan - whereas two signatures are required by Turkish law. Likewise, the two letters of July 15, 2003 addressed by Telsim to the Claimant lack a second signature, were issued in English only, and have no reference number, whereas Telsim’s letters, according to the Respondent, were customarily drafted in Turkish and referenced for archival purposes.

46. The Respondent also questions the timing of the Claimant’s purported acquisition of shares in Telsim, which the Claimant maintains became “effective” on July 3, 2003, the very day of the revocation of Imar Bank’s licence and on the eve of the freezing of assets held by the Uzan family members.
47. The Respondent also emphasizes that Mr. Fakes’ purported shareholding in Telsim was never recorded in Telsim’s records. On the contrary, in August 2003, *i.e.* after the purported acquisition of the shares in dispute by the Claimant, those shares have remained registered under the names of Standard Telekom and the Uzan family members.
48. In support of this argument, the Respondent submits two letters sent by Telsim to the Turkish Telecommunications Authority on August 14 and August 20, 2003. In reply to the Authority’s query, Telsim stated that until August 20, 2003 “*all of the share transfers were made to the group companies and all of them below 10% threshold.*”<sup>37</sup>
49. The Respondent further points to the following elements: the four-year period that lapsed between the alleged acquisition of the shares in Telsim by the Claimant and the Claimant’s disclosure of his alleged ownership of those shares; the alleged attempts by the members of the Uzan family to retroactively transfer the ownership of certain of their other assets to third parties; the lack of credibility of the Claimant’s profile as a serious investor; and the various lawsuits brought in Jordan against Messrs. Ghosheh, Masoud and Harbawi as individuals closely involved in structuring the agreements between Messrs. Uzan, Masoud and Fakes.

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<sup>37</sup> Telsim Letter No. 2083 to the Telecommunications Authority (August 20, 2003), **Exhibit R-34**; Telsim Letter No. 1987 to the Telecommunications Authority (August 14, 2003), **Exhibit R-76**.

50. The Respondent concludes that Mr. Fakes “*is simply acting as a ‘dummy’ shareholder, bringing this claim on behalf of Uzans*”<sup>38</sup> and objects to the jurisdiction of the Centre and of the Tribunal to hear the Claimant’s claims.

## V. JURISDICTIONAL ISSUES

51. The Respondent’s jurisdictional objections may be summarized as follows:

- The Claimant lacks effective Dutch nationality which is necessary for him to qualify as an investor under Article 1(a)(i) of the Netherlands-Turkey BIT and Article 25(2)(a) of the ICSID Convention.
- The Claimant did not make an “investment” within the meaning of Article 25(1) of the ICSID Convention and Article 1 of the Netherlands-Turkey BIT. The Claimant holds, at best, an assigned claim belonging to third parties, namely the Uzan family, and has engaged in abusive treaty shopping prohibited under general principles of international law; and
- The Claimant’s alleged investment was made in violation of the laws and regulations of the Republic of Turkey and, thus, does not qualify as a protected investment under Articles 2(1) and (2) of the Netherlands-Turkey BIT.

52. The Respondent also argued that the Claimant had failed to first bring the dispute before the courts of Turkey as required under Article 8(2) of the Netherlands-Turkey BIT. However, this objection was withdrawn by the Respondent in its Response of April 30, 2009. There is, consequently, no need for the Tribunal to address this issue.

53. The Tribunal will address each of the Respondent’s jurisdictional objections in turn below. Finally, the Tribunal will determine the allocation of the costs incurred by the Parties.

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<sup>38</sup> Respondent’s Preliminary Jurisdictional Objections dated June 24, 2008, para 15.

**A. Does the Claimant Satisfy the Nationality Requirement under Article 25(2)(a) of the ICSID Convention and Article 1(a)(i) of the Netherlands-Turkey BIT?**

**1) The Parties' Respective Positions**

54. The Respondent accepts that the Claimant holds both Jordanian and Dutch nationalities.<sup>39</sup> The Respondent contends, however, that in order to bring ICSID arbitration under the Netherlands-Turkey BIT, it does not suffice to hold Dutch nationality. Such nationality must be effective. The Respondent submits that the effective nationality test, as established in the *Nottebohm* case by the ICJ, is one of international law without limitations to any particular forum. The Respondent maintains that the Claimant did not submit any evidence of the effectiveness of his Dutch nationality. To the contrary, according to the Respondent, the evidence before the Tribunal suggests that the Claimant holds an effective Jordanian nationality, and should be precluded from relying on the provisions of the Netherlands-Turkey BIT.
55. The Claimant argues that the question of his effective nationality is irrelevant in the context of ICSID arbitration. The Claimant submits that while he is a dual national, such dual nationality does not concern the nationality of the Respondent State. To the extent that he is a national of a Contracting Party within the meaning of Article 1(a)(i) of the Netherlands-Turkey BIT and does not hold the nationality of the host State, the Claimant qualifies as an investor both under the Netherlands-Turkey BIT and Article 25(2)(a) of the ICSID Convention. Furthermore, the Claimant disputes the contention that he does not have effective Dutch nationality and submits that he has a substantial bond to the Netherlands. The Claimant emphasizes that he has always maintained a genuine link with the Netherlands (he was born to a Dutch mother and a Jordanian father who acquired Dutch nationality when the Claimant was eight years of age), and that his Dutch nationality is effective.

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<sup>39</sup> While the Respondent initially argued that the Claimant failed to establish his Dutch nationality altogether, it subsequently abandoned this position and accepted the fact that the Claimant holds Dutch nationality, instead focusing on the effectiveness of such nationality: “Respondent is now satisfied with Claimant’s proof of Dutch nationality but maintains its jurisdictional objections with regard to the effective nationality of Claimant” (Respondent’s Rejoinder on Jurisdiction of August 31, 2009, para 269).

## 2) The Tribunal's Decision

56. Having examined the Parties' submissions, as well as the relevant sections of Prof. Dolzer's expert opinions in relation to the consequences, if any, of the Claimant's dual nationality on the Tribunal's jurisdiction in the present arbitration, the Tribunal is not convinced by the Respondent's arguments that the Claimant should be precluded from submitting his claims to the present Tribunal due to the alleged lack of effectiveness of his Dutch nationality.<sup>40</sup>
57. Article 25(2)(a) of the ICSID Convention and Article 1(a)(i) of the Netherlands-Turkey BIT are the two relevant provisions to be considered in the present case for the purposes of the Tribunal's jurisdiction *ratione personae*. The Tribunal will examine these provisions in turn.
58. Pursuant to Article 25(2)(a) of the ICSID Convention, "*national of another Contracting State*" means:

*"any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 26, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute"*

59. The wording of Article 25(2)(a) of the ICSID Convention expressly excludes from the Centre's jurisdiction any natural person who holds the nationality of a Contracting State party to the dispute. This exclusion applies "*even if at the same time*" the investor holds

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<sup>40</sup> The Tribunal notes in this respect that, contrary to the Respondent's contention, the Tribunal did not accept in its Decision on Preliminary Issues the effective nationality test within the framework of the ICSID Convention, nor did it come to any conclusion on the issue of the Claimant's effective nationality. At para 23 of its Decision on Preliminary Issues, the Tribunal merely referred to the Parties' positions in that regard and requested a proper briefing on the issue prior to reaching its determination: "*The Claimant's general representation that he 'has genuine links with the Netherlands' . . . does not suffice to put to rest the Respondent's objection relating to Mr. Fakes' effective nationality, to the extent that the Respondent continues to challenge Mr. Fakes' standing as investor under Article 1(a) of the Netherlands-Turkey BIT and Article 25(2) of the ICSID Convention. A proper briefing of this issue by the Parties is required prior to any determination by the Tribunal on the Respondent's jurisdictional objection relating to the Claimant's standing as investor under the Netherlands-Turkey BIT and the ICSID Convention.*"

the nationality of another Contracting Party. As underlined in the Report of the Executive Directors, “[t]his ineligibility is absolute and cannot be cured even if the State party to the dispute has given its consent.”<sup>41</sup>

60. As emphasized by Aron Broches, the nationality requirement in Article 25(2)(a) consists of two parts, a negative one and a positive one: “*The negative one ... is that the non-State party may not have the nationality of the State with which it has a dispute. The positive one is that it must have the nationality of a State which is a party to the Convention.*”<sup>42</sup>
61. The explicit exclusion from the Centre’s jurisdiction of dual nationals who hold the nationality of the host State is the only jurisdictional bar relating to a natural person’s nationality that was contemplated by the drafters of the Convention. It is significant, in the Tribunal’s opinion, that this bar is not subject to the test of the effectiveness of the host State’s nationality. Indeed, the Contracting Parties have avoided any reference to the effectiveness of an investor’s nationality for the purposes of Article 25 of the ICSID Convention.<sup>43</sup>
62. On the other hand, the Contracting Parties to the ICSID Convention did not exclude claims of dual nationals *per se*, in circumstances when such dual nationals (i) hold the nationality of at least one Contracting State and (ii) do not hold the nationality of the host State. This is precisely the case here, since the Claimant holds the nationality of an ICSID Contracting Party (the Netherlands) and does not hold the nationality of the Respondent State.
63. It is of particular importance that, as regards dual nationals who do not hold the nationality of the host State (for example, a dual national who holds the nationality of two Contracting States other than the host State, or the nationality of a Contracting State

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<sup>41</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para 29.

<sup>42</sup> A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, Martinus Nijhoff Publishers (1995), at p. 202, **Exhibit C-66**.

<sup>43</sup> See *Victor Pey Casado et Foundation Presidente Allende v. Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008, para 241.

other than the host State and a non-Contracting State), the ICSID drafters did not subject their access to ICSID jurisdiction to the effective nationality test.<sup>44</sup>

64. Similarly, the text of the BIT leaves no room as to the question of whether the Contracting Parties intended such effectiveness test to be applied in the context of the BIT. Pursuant to Article 1(a)(i) of the Netherlands-Turkey BIT, for the purposes of this BIT “‘investor’ means: (i) a natural person who is a national of a Contracting Party under its applicable law.” It clearly results from this definition that the Netherlands-Turkey BIT does not require an investor’s nationality to be effective for him or her to bring a claim against the host State on the basis of the BIT. The Tribunal concurs with the *Micula* Tribunal, which ruled on a similar issue in relation to the Sweden-Romania BIT, that “the clear definition and the specific regime established by the terms of the BIT should prevail and that to hold otherwise would result in an illegitimate revision of the BIT.”<sup>45</sup> On that basis, the *Micula* Tribunal rejected the respondent State’s argument that “the Swedish nationality of [the claimants could] not be opposed to Romania because of purported tenuous links with Sweden.”<sup>46</sup>
65. The Netherlands-Turkey BIT therefore does not exclude dual nationals from the protection extended by the BIT, to the effect that Mr. Fakes may file a claim against the Republic of Turkey as a Dutch national regardless of the fact that he also holds Jordanian nationality.<sup>47</sup>
66. The Respondent argues, nevertheless, that the Claimant should be required to prove the effectiveness of his Dutch nationality in order to fulfill “the joint nationality

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<sup>44</sup> The Tribunal observes, in this respect, that during the negotiations a delegate from Guatemala suggested including the requirement of effective nationality in the Convention, but that suggestion was not adopted by the drafters of the Convention (see Supplemental Expert Opinion of Prof. Dolzer, para 46). See also *Victor Pey Casado et Foundation Presidente Allende v. Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008, para 241.

<sup>45</sup> *Micula et al. v. Romania* (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, September 24, 2008, para 101.

<sup>46</sup> *Ibid.*, para 105.

<sup>47</sup> For a similar solution, in relation to the nationality requirement in the Chile-Spain BIT of October 2, 1991, see *Victor Pey Casado et Foundation Presidente Allende v. Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008, para 415: “to fulfill the nationality requirement within the meaning of the BIT, it suffices for the Claimant to demonstrate that he holds the nationality of the Contracting Party to the BIT other than the Host State. The fact that the Claimant holds dual nationality, including instances when one of the nationalities is that of the Host State, does not preclude such claimant from the protection offered by the BIT” (Tribunal’s translation).

*requirement*” under Articles 1(a) of the BIT and 25(2)(a) of the ICSID Convention.<sup>48</sup> The Respondent suggests that the Claimant’s nationality should meet the effective nationality test as set forth in the *Nottebohm* case and in Decision A/18 of the Iran-US Claims Tribunal. According to the Respondent, when faced with a similar issue, previous ICSID tribunals did not exclude “*in any way*” the application of this test in the context of investor-State arbitration.

67. The Tribunal is not convinced by this argument for the following reasons.
68. First, while the *Nottebohm* case set forth a requirement of a “genuine link” *with the State of nationality*, that requirement was applied in the context of diplomatic protection of nationals by way of claims filed by the State whose nationality they hold. The issue in that case was not one of dual *nationality* and its consequences, if any, on an individual’s right to bring a direct claim against a third State, but whether a State could exercise diplomatic protection *on behalf of* an individual who had no “genuine link” with that State.
69. The Tribunal notes that treaties for the promotion and protection of investments, as well as the ICSID Convention, establish a separate mechanism of direct recourse to international arbitration against the host State. Pursuant to Article 27(1) of the ICSID Convention, Contracting Parties have waived their right to grant diplomatic protection to, or bring an international claim on behalf of, their nationals who pursue arbitration under the auspices of the Centre. The rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration. As underscored by Professor Dolzer in his Expert Opinion, “*the rules of nationality in a BIT do not follow the rules of customary law as they pertain to the right of diplomatic protection between two states which have both granted nationality to the same person.*”<sup>49</sup> As also summarized by Anthony C. Sinclair in a recent study on ICSID’s nationality requirements referred to by the Respondent, “[a]n increasingly clear distinction is evident in the ICSID jurisprudence between standing for the purposes of ICSID jurisdiction, especially in cases where the parties have formulated a particular agreement on nationality, and rules governing the nationality of claims for the purposes of diplomatic protection. This is a manifestation of the very scheme of ICSID, which ‘firmly

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<sup>48</sup> Respondent’s Response on Jurisdiction of April 30, 2009, para 244.

<sup>49</sup> Supplemental Expert Opinion of Professor Dr. Dr. Rudolf Dolzer, para 39.

*establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum’, and renders an award binding on both State and investor. Nationality, for the purposes of ICSID, merely ‘serves as a means of bringing the private party within the jurisdictional pale of the Centre,’ to the point where the significance of the bond of nationality seems to have diminished to a mere formality. This bond is ‘relevant only to determine whether the facilities of [ICSID] could be used by the parties [who have] agreed to do so.’”<sup>50</sup>*

70. For the same reason, the Tribunal considers that the effective nationality test in *Nottebohm* and in Decision A/18 of the Iran-US Claims Tribunal cannot supersede the clear language of Article 1(a)(i) of the Netherlands-Turkey BIT. This Article is the only relevant provision in the BIT that deals with the issue of nationality. Had the Contracting Parties intended to set additional limitations as regards jurisdiction *ratione personae*, no doubt they would have expressly stated such limitations in the text of the BIT.
71. Second, Decision A/18, relied upon by the Respondent, was rendered by the Iran-US Claims Tribunal established on the basis of the Algiers Declarations for the specific purpose “*of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States*”.<sup>51</sup> The decisions of the Iran-US Claims Tribunal, including Decision A/18, dealt with the specific issue of whether dual Iran-US nationals could bring a claim against Iran where their Iranian nationality was not dominant and effective. The Iran-US Claims Tribunal allowed such claims and ruled that “*references to ‘national’ and ‘nationals’ in the Algiers declarations must be understood as consistent with that rule [the effective nationality test in Nottebohm] unless an*

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<sup>50</sup> A. Sinclair, “ICSID’s Nationality Requirement”, in TJ Grierson Weiler (ed.), *Investment Treaty Arbitration and International Law* (2008), at pp. 86-87, **Exhibit R-97**, quoting A. Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (1972) 136 *Recueil des Cours* 331, 349, C.F. Amerasinghe, “The Jurisdiction of the International Centre for the Settlement of Investment Disputes” (1979) 19 *Indian. J. Intl. L.*, 198, 203, Chairman’s Report on the Preliminary Draft of the Convention of 9 July 1964, Doc Z11, in *Documents Concerning the Origins and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington, D.C.: ICSID, 1968) Vol. II, 557, 579-582, and A. Broches, in Summary Record of Proceedings of the Consultative Meeting of Legal Experts 16-20 December 1963, Doc Z7, in *Documents Concerning the Origins and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington, D.C.: ICSID, 1968) Vol. II, 236, 256.

<sup>51</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), January 19, 1981, Article II(1).



*exception is clearly stated. As stated above, the Tribunal does not find that the text of the Algiers Declarations provides such a clear exception.*”<sup>52</sup>

72. The present Tribunal observes that, contrary to the Algiers Declarations, the ICSID Convention contains an express exclusion of claims by dual nationals when one of the nationalities is that of the host State regardless of whether those nationalities are effective. In the Tribunal’s opinion, this exclusion is an example of a “*clearly stated*” exception contemplated in Decision A/18. Consequently, the case law of the Iran-US Claims Tribunal, which adopts a different solution from that retained by the ICSID drafters in Article 25(2)(a), finds little, if any, application in the context of ICSID arbitration.
73. Third, the Tribunal considers that none of the ICSID cases cited by the Respondent provides support for its proposition that “*the Claimant’s position is in blatant contradiction with ICSID jurisprudence, which has recognized the effective nationality test as applied in Decision A/18.*”<sup>53</sup> On the contrary, the Tribunal notes that previous ICSID decisions and awards specifically excluded the application of the effective nationality test in the context of investor-State arbitration. Indeed, when previous ICSID tribunals made references to the *Nottebohm* case or to Decision A/18, it was to rule that those decisions found no application in the context of the ICSID Convention. Specifically, the majority in the *Siag* case stated that it concurred “*with the finding of the ICSID Tribunal in the Champion Trading case that the regime established under Article 25 of the ICSID [Convention] does not leave room for a test of dominant or effective nationality. The BIT contains a clear definition of who is to be considered a national. ... While it may be asserted that if this were a diplomatic protection case it could be argued differently, the parties have consented to have their dispute resolved under the ICSID Convention and it sets out a particular regime for the determination of jurisdiction. Under Article 9(3) of the BIT the avenue of diplomatic protection is specifically excluded while the arbitration is in progress. Developments in international law concerning*

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<sup>52</sup> Case A/18, decision No. DEC 32-A18-FT, April 6, 1984, 5 IUSCTR 251, at 263 et seq. The Iran-US Claims Tribunal ruled that “*it had jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States.*” (*Ibid.*)

<sup>53</sup> Respondent’s Rejoinder on Jurisdiction of August 31, 2009, para 277.

*nationality of individuals in the field of diplomatic protection ..., while of interest, must give way to the specific regime under the ICSID Convention and the terms of the BIT.*”<sup>54</sup>

74. As regards the Tribunal constituted in the *Champion Trading* case, it ruled that “[t]he *Nottebohm* and *A/18* decisions, in the opinion of the Tribunal, find no application in the present case. The Convention in Article 25(2)(a) contains a clear and specific rule regarding dual nationals. The Tribunal notes that the above cited *A/18* decision contained an important reservation that the real and effective nationality was indeed relevant ‘unless an exception is clearly stated.’ The Tribunal is faced here with such a clear exception.”<sup>55</sup>
75. The Respondent contends that this decision “does not in any way exclude the application of the effective nationality test set forth in *Nottebohm* or in *Decision A/18* in general. Rather, it merely concludes that these decisions ‘find no application in the present case,’ namely in the presence of dual nationals having the nationality of the Host State (Egypt and the United States) subject to the Article 25(2)(a) exception. The case at hand is very different. Mr. Fakes is not a national of the Republic of Turkey and thus cannot rely on this exception to circumvent the effective nationality test.”<sup>56</sup> The Respondent submits that the effective nationality test is distinct and should not be “confused” with the question of dual nationality dealt with in Article 25(2)(a) of the ICSID Convention.
76. The Tribunal cannot side with this interpretation of the nationality requirements within the framework of the ICSID Convention, as such interpretation finds no support in the text of the Convention. The language of Article 25(2)(a) of the ICSID Convention is clear and does not require any further clarification. Pursuant to the generally accepted rules of treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal is precluded from elaborating any interpretation that would run counter to this clear language, in particular any interpretation that would result in establishing additional limitations to the Centre’s jurisdiction where no such limitations were provided by the Contracting Parties.

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<sup>54</sup> *Waguih Elie George Siag and Clorinda Vecchi v. Egypt* (ICSID Case No. ARB/05/15), Decision on Jurisdiction, April 11, 2007, para 198.

<sup>55</sup> *Champion Trading Company et al. v. Egypt* (ICSID Case No. ARB/02/9), Decision on Jurisdiction, October 21, 2003, p. 16.

<sup>56</sup> Respondent’s Rejoinder on Jurisdiction of August 31, 2009, para 283 (emphasis added by the Respondent).

77. This is not to say that the effective nationality test never has any bearing in the context of ICSID arbitration. One might envisage several instances when its application could be justified in light of the particular circumstances of a given case. Broches observed that “*there was a general recognition that in the course of ruling on their competence Commissions and Tribunals might have to decide whether a nationality of convenience, or a nationality acquired involuntarily by an investor could or should be disregarded.*”<sup>57</sup>
78. Thus, one might argue that a nationality of convenience, acquired “*in exceptional circumstances of speed and accommodation*”, for the purposes of bringing a claim before the Centre should not be considered to satisfy the nationality requirements of a BIT and Article 25(2)(a) of the Convention.<sup>58</sup> Likewise, the question may arise whether a person deemed to have a nationality merely because such nationality has passed over several generations, with “*the third or fourth foreign born generation [having] no ties whatsoever with the country of its forefathers, could still be considered to have, for the purposes of the Convention, the nationality of [that] state.*”<sup>59</sup> Neither of these situations is found in the present case. Mr. Fakes acquired his Dutch nationality as a youngster, while living in the Netherlands with his parents, and there is certainly nothing exceptional in such acquisition. His nationality is not one of convenience, obtained for the purposes of bringing his claim against the Respondent.
79. In light of the above, the Tribunal decides that the effective nationality test is not applicable in the present case. Thus, the effectiveness of the Claimant’s Dutch nationality is irrelevant for the purposes of determining the Tribunal’s jurisdiction.
80. In any event, as far as the facts of the present case are concerned, the Tribunal considers that Mr. Fakes has effective Dutch nationality. The effectiveness of Mr. Fakes’ Dutch nationality is demonstrated, *inter alia*, by the fact that both of his parents held Dutch nationality, his wife and three children are also Dutch, he has spent a significant part of his childhood and early adulthood in the Netherlands, has studied in the Netherlands, holds a Dutch passport and driver’s license. These facts were not challenged by the

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<sup>57</sup> A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, Martinus Nijhoff Publishers (1995), pp. 204-205, **Exhibit C-66**.

<sup>58</sup> See, for instance, A. Sinclair, “ICSID’s Nationality Requirement”, in TJ Grierson Weiler (ed.), *Investment Treaty Arbitration and International Law* (2008), at p. 101, **Exhibit R-97**.

<sup>59</sup> *Champion Trading Company et al. v. Egypt* (ICSID Case No. ARB/02/9), Decision on Jurisdiction, October 21, 2003, at pp. 16-17.

Respondent, the Respondent merely arguing that they were not sufficient to demonstrate the effectiveness of the Claimant's nationality. Against this background, the Tribunal is satisfied in the present case that the Claimant's links to the Netherlands are genuine and effective.

81. In view of the foregoing, the Respondent's jurisdictional objection based on the Claimant's nationality is rejected and the Tribunal finds that it has jurisdiction *ratione personae* over the Claimant.

**B. Did the Claimant Make an Investment in the Republic of Turkey?**

**1) The Parties' Respective Positions**

82. In objecting to the Tribunal's jurisdiction, the Respondent argues that the Claimant's alleged holding of shares in Telsim does not constitute a protected investment within the meaning of Article 25(1) of the ICSID Convention and Article 1 of the Netherlands-Turkey BIT. The Respondent submits that the definition of an investment is contingent on the fulfilment of the requirements of both the ICSID Convention and the relevant BIT.
83. The Respondent invites the Tribunal to follow the so-called *Salini* test when examining whether there is an investment within the meaning of Article 25(1) of the ICSID Convention, namely the fulfilment of the following four requirements: (i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's economic development or, at the very minimum, a contribution to the economy of the host State. The Respondent argues that the Claimant's operation falls short of the *Salini* test, as none of the four requirements are met in the present case.
84. According to the Respondent, the Claimant's payment of US\$ 3,800 in cash cannot amount to a contribution reasonably expected under the ICSID Convention and the Netherlands-Turkey BIT. Likewise, the duration criterion is lacking, since the Claimant never intended to retain the shares in his ownership and for his benefit, but pursued an objective of facilitating the transfer of those shares to a third party. The fact that the Claimant was precluded from transferring the shares further due to the freezing orders imposed by the Turkish authorities is inoperative as far as the duration criterion is concerned. Moreover, by entering into an "arrangement" with Mr. Uzan, the Claimant did not assume any risk distinctive of an investment under the ICSID Convention. Finally, the Respondent submits that the Tribunal cannot disregard the necessity of a

contribution to the economic development of the host State or to the economy of the host State, which constitutes the fourth criterion of the definition of an investment under the ICSID Convention. According to the Respondent, the Claimant's operation also fails to meet this criterion, to the extent that the Claimant did not carry out any economic activity and did not contribute to any flow of international capital or technology into the Republic of Turkey.

85. Furthermore, relying on the *Phoenix v. The Czech Republic* award of April 15, 2009,<sup>60</sup> the Respondent submits that an operation made in violation of the principle of good faith cannot qualify as an investment protected under the ICSID Convention and the relevant BIT. The Respondent contends that Mr. Fakes' arrangement violated the principle of good faith, as it was aimed at artificially transforming a domestic dispute between Turkish nationals, namely the Uzans, and the Turkish State into an international dispute involving a foreign national fronting the claims of Turkish nationals.
86. Finally, the Respondent submits that the Claimant's operation constitutes nothing more than an assignment of claim and an abusive treaty shopping which violates the "investment" requirement of both the ICSID Convention and the Netherlands-Turkey BIT.
87. The Claimant rejects the Respondent's interpretation of the definition of an investment under Article 25(1) of the ICSID Convention, and in particular the Respondent's reliance on the *Salini* and *Phoenix* tests for the purposes of defining protected investments. The Claimant submits that the definition of an investment agreed upon in the relevant BIT should prevail over the interpretation of the ICSID Convention in circumstances where the Convention's drafters have explicitly left the term "investment" to be defined further by the Contracting Parties in their respective BITs.
88. The Claimant thus submits that the Tribunal should first examine the definition of an investment in Article 1 of the Netherlands-Turkey BIT, and that, as decided by the *ad hoc* Committee in *MHS v. Malaysia*, should such test be satisfied, no further condition is required under Article 25(1) of the ICSID Convention. In any event, according to the Claimant, his investment complies both with the definition of Article 1 of the

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<sup>60</sup> *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award, April 15, 2009.

Netherlands-Turkey BIT and with the criteria set out in the *Salini* test to the extent that the Tribunal should decide to apply that test in the present case.

## 2) The Tribunal's Decision

89. The Respondent's objections are based on the proposition that the Claimant does not meet the 'investment' requirement of Article 25(1) of the ICSID Convention. The Respondent further alleges that the Claimant does not meet the "investment" requirement of the Netherlands-Turkey BIT.
90. Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT are the relevant provisions with respect to this jurisdictional objection, and will be examined by the Tribunal in turn.
91. Article 25(1) of the ICSID Convention provides as follows:

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

92. Article 1(b) of the Netherlands-Turkey BIT provides for its part:

*"For the purposes of the present Agreement:*

*...*

*(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, trademarks, 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.”*

93. While the ownership of shares by a Dutch national in a company incorporated in the Republic of Turkey falls within the definition of an investment provided in Article 1(b)(ii) of the Netherlands-Turkey BIT, this general conclusion does not suffice to address fully the Respondent’s jurisdictional objection.

94. Based on the Parties’ arguments regarding the interpretation to be given to the applicable provisions and the existing case law, the Tribunal must resolve the following issues in order to determine the existence of an investment in the present case: *(i)* Does the ICSID Convention provide for an autonomous definition of ‘investment’ that cannot be overridden by the terms of a given BIT, and if so, which criteria should be taken into consideration for the purposes of determining whether an investment exists within the meaning of Article 25(1) of the ICSID Convention? *(ii)* Does the Netherlands-Turkey BIT impose a condition of legality of the investment and, in the affirmative, what are the scope and content of such requirement? *(iii)* Does the Claimant’s transaction meet the requirements set forth in the ICSID Convention and, for the purposes of consent within the meaning of Article 25(1) of the ICSID Convention, the requirements of the Netherlands-Turkey BIT?

*(i) The definition of ‘investment’ within the meaning of Article 25(1) of the ICSID Convention*

95. In their respective submissions on the definition of ‘investment,’ both Parties extensively relied on the numerous ICSID awards and decisions that have addressed the notion of investment within the meaning of Article 25(1) of the ICSID Convention.

96. The Tribunal is not bound by the decisions adopted by previous ICSID tribunals. At the same time, it believes that it should pay due regard to earlier decisions of such tribunals. The present Tribunal shares the opinion of the Tribunal in the *Bayindir v. Pakistan* case that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the treaty under consideration and the circumstances of the case. By

doing so, it will fulfill its duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.<sup>61</sup>

97. As far as the definition of ‘investment’ is concerned, however, the Tribunal observes that, while a number of ICSID tribunals have dealt with this notion, no unanimous approach has emerged so far from the existing case law. The proposed solutions are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals.
98. In the Tribunal’s opinion, there currently exist, from a methodology standpoint, two distinct approaches to the notion of investment under the ICSID Convention.<sup>62</sup>
99. According to the first approach, while the ICSID Contracting Parties’ freedom to extend ICSID protection to various types of economic operations is limited by an objective notion of what was meant to be protected within the framework of the ICSID Convention, that notion is apprehended through a number of characteristics which should be viewed as “*benchmarks or yardsticks to help a tribunal in assessing the existence of an investment, and their proponents or users rightly insist on the flexibility with which they should be used by a tribunal.*”<sup>63</sup> Accordingly, the suggested characteristics need not be satisfied cumulatively and any number of elements may suffice to characterize an economic operation as an investment in a given case.
100. Pursuant to this approach, the addition of new characteristics is meant to facilitate the recognition of an investment in a given case, as this approach accepts that an investment be recognized on the basis of some, but not all, of the said characteristics. As

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<sup>61</sup> *Bayindir v. Pakistan* (ICSID Case No. ARB/03/29), Award, August 27, 2009, para 145. See also *Saipem v. Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendations on Provisional Measures, March 21, 2007, para 67; *Pey Casado v. Chile* (ICSID Case No. ARB/98/2), Award, May 9, 2008, para 119.

<sup>62</sup> On these approaches, see E. Gaillard, “Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice,” in *International Investment Law for the 21<sup>st</sup> Century*. Essays in Honour of Christoph Schreuer, OUP, 2009, Ch. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), p. 403 *et seq*; K. Yannaca-Small, “Definition of ‘Investment’: An Open-ended Search for a Balanced Approach”, in *Arbitration Under International Investment Agreements. A Guide to the Key Issues*, OUP, 2010, p. 243.

<sup>63</sup> *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, March 13, 2009, para 241; see also *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, Decision on Jurisdiction, May 24, 1999, para 64.



summarized by the *MCI v. Ecuador* Tribunal, these characteristics are considered as “mere examples” to be applied, or not, in a given case:

*“The Tribunal states that the requirements that were taken into account in some arbitral proceedings for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.”*<sup>64</sup>

101. The proponents of the second approach consider, on the contrary, that an objective definition of investment must necessarily include a certain number of elements for an operation to qualify as an ‘investment’. As opposed to the first, it requires the constitutive elements to be satisfied cumulatively for an operation to qualify as an investment under the ICSID Convention.
102. However, no unanimous solution has emerged as to the precise number and content of such constitutive elements. A number of ICSID tribunals, such as the *LESI-Dipenta* Tribunal, considered that the term ‘investment’ should be defined through the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk.<sup>65</sup>
103. Several other tribunals ruled that at least four criteria are indispensable to satisfy the investment requirement of the ICSID Convention. These criteria, commonly referred to

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<sup>64</sup> *MCI Power Group LC and New Turbine v. Ecuador* (ICSID Case No. ARB/03/6), Award, July 31, 2007, para 165. See also C. Schreuer with L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention. A Commentary*, Cambridge University Press, 2<sup>nd</sup> edition, 2009, para 153: “. . . it seems possible to identify certain features that are typical to most of the operations in question. . . . These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”

<sup>65</sup> *LESI-Dipenta v. Algeria* (ICSID Case No. ARB/03/08), Award, January 10, 2005, para II.13(iv): “. . . it seems to correspond to the purpose of the Convention that an agreement, in order to constitute an investment within the meaning of its provision, meet the following three criteria: it is necessary (i) that a contracting party to the agreement makes a contribution in the host country, (b) that such contribution is made with a certain duration in mind, and (c) that it contains an element of risk for the person making such contribution. On the other hand, it does not seem necessary that, in addition, an investment specifically contribute to the economic development of the host country, a condition which, in any event, is difficult to establish and which is implicitly covered by the three criteria retained above.” (Tribunal’s translation). See also *Bayindir v. Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, November 14, 2005, paras 131-137; and *Victor Pey Casado et Foundation Presidente Allende v. Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008, para 233.

as the *Salini* test, consist of (i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's economic development.<sup>66</sup>

104. Some tribunals have considered that five, and not four, criteria should be fulfilled for an economic transaction to be qualified as an investment, elaborating further on the *Salini* criteria by adding the requirement of a regularity of profit and return.<sup>67</sup> In a recent case, a tribunal supplemented the *Salini* test by two further requirements, namely that assets be invested in good faith and in accordance with the laws of the host State, thus bringing the total number of requirements to six.<sup>68</sup>
105. Yet other tribunals have suggested that the requirements listed by the *Salini* Tribunal should be examined as to the “*nature and degree of their presence*” in a given case.<sup>69</sup> For example, a contribution to the host State's economic development should satisfy “*the requirement of significance*” in order for an operation to qualify as an investment under the ICSID Convention.<sup>70</sup>
106. The Tribunal observes that this ever-increasing list of elements to be retained for the definition of investments has led to a reaction on the part of a number of tribunals, which decided to revert to what they considered to be the initial spirit of the ICSID Convention and to view the notion of ‘investment’ purely through the prism of consent to ICSID arbitration: to the extent that contracting States to investment treaties have consented to ICSID jurisdiction in such treaties and the drafters of the ICSID Convention did not define the term ‘investment’, such consent necessarily embraces their consent to the definition of protected investments as provided in those treaties. Under this latter

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<sup>66</sup> *Salini Constuttori SPA and Italstrade SPA v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, July 23, 2001, paras 50-58.

<sup>67</sup> *Joy Mining v. Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, August 6, 2004, para 53; see also *Helnan International Hotels v. Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction, October 17, 2006, para 77.

<sup>68</sup> *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5), Award, April 15, 2009, para 114.

<sup>69</sup> *Malaysian Historical Salvors v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Award on Jurisdiction, May 17, 2007, para 106(e), subsequently annulled by a Decision rendered on April 16, 2009.

<sup>70</sup> *Ibid.*, para 123.

approach, the definition of an investment by contracting States in their respective BITs is therefore the only relevant definition to be considered by an ICSID tribunal.<sup>71</sup>

107. For its part, the Tribunal believes that ‘investment’ under the ICSID Convention is to be interpreted as follows.
108. First, the Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties’ consent, which is a distinct condition for the Centre’s jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning.
109. In this respect, the Tribunal agrees with the Tribunal in the *Joy Mining v. Egypt* case, which emphasized that the “*Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. . . . The parties to the dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention.*”<sup>72</sup>
110. Second, the present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of ‘investment’ that embodies specific criteria corresponding to the ordinary meaning of the term ‘investment’, without doing violence either to the text or the object and purpose of the ICSID Convention. These three criteria derive from the ordinary meaning of the word ‘investment,’ be it in the context of a complex international transaction or that of the education of one’s child: in both instances, one is required to contribute a certain amount of funds or know-how, one

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<sup>71</sup> *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), Award, July 24, 2008, and *Malaysian Historical Salvors v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, April 16, 2009.

<sup>72</sup> *Joy Mining v. Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, August 6, 2004, paras 49-50; see also *RSM Production Corporation v. Grenada* (ICSID case No. ARB/05/14), Award, March 13, 2009, para 235, which stated that “[t]here are certain objective elements to an investment which must be present and it is the duty of this Tribunal to ensure that they are present, lest its assertion of jurisdiction be false and amount to an abuse of power.”

cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might not be up to his parents' hopes or expectations.

111. The Tribunal is not convinced, on the other hand, that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the "*need for international cooperation for economic development,*" it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal's opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.
112. Likewise, the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be 'legal' or 'illegal,' made in "good faith" or not, it nonetheless remains an investment. The expressions 'legal investment' or 'investment made in good faith' are not pleonasm, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons.<sup>73</sup>

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<sup>73</sup> The same goes for the size of an investment. Contrary to what was suggested by some authors (see Ch. Schreuer *et al.*, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press 2009, p. 128: "*The forth typical feature is that the commitment is substantial.*") and by some decisions, subsequently annulled (see *Malaysian Historical Salvors v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Award on Jurisdiction, May 17, 2007), small investments are covered by the ICSID Convention in the same way as large investments. An investment can be large or small, or it can be profitable or unprofitable, or it can contribute or not to the economic development of a country. All those propositions make sense and neither the

113. While a treaty should be interpreted and applied in good faith, this is a general requirement under treaty law, from which an additional criterion of ‘good faith’ for the definition of investments, which was not contemplated by the text of the ICSID Convention, cannot be derived.

114. As far as the legality of investments is concerned, this question does not relate to the definition of ‘investment’ provided in Article 25(1) the ICSID Convention and in Article 1(b) of the BIT. In the Tribunal’s opinion, while the ICSID Convention remains neutral on this issue, bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another. This is precisely the case of the Netherlands-Turkey BIT, which contains such a requirement in its Article 2(2). This question will now be addressed by the Arbitral Tribunal.

(ii) *The legality requirement of the Netherlands-Turkey BIT*

115. Article 2(2) of the Netherlands-Turkey BIT provides that: “[t]he 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.” This provision plainly states that the BIT protection shall not apply to investments which have not been established in conformity with the Respondent’s laws and regulations, the term ‘investment’ having been defined in Article 1(b) of the BIT. If this condition is not satisfied, the BIT does not apply. As a result, the Contracting Party cannot be deemed to have given its consent to arbitrate the dispute under Article 8(3) of the BIT and there would therefore be no consent to the Centre’s jurisdiction within the meaning of Article 25(1) of the ICSID Convention.

116. That said, the Tribunal must interpret the exact scope of the legality requirement of Article 2(2) of the Netherlands-Turkey BIT. The Parties are in disagreement as to whether all or only certain laws and regulations are covered by this provision, and whether there exists a threshold below which a violation would not be considered as relevant for the purposes of the BIT’s application.

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size nor the profitability or the usefulness of investments are included in the ordinary meaning of the word.

117. As a general proposition, the Respondent submits that if an investment is made in breach of any of the host State's laws in any way, such breach would "taint" the investment and deprive it of the protection under the BIT and the ICSID Convention. According to this proposition, a violation of any law or regulation should trigger the application of the legality provision, depriving an investment of the protection offered by the BIT.
118. The Claimant disagrees with the Respondent's interpretation of Article 2(2) of the Netherlands-Turkey BIT and submits that a "certain level of violation" is required to trigger this provision. According to the Claimant, an investment should be considered 'illegal' only if made in violation of a fundamental legal principle.
119. The Tribunal is not convinced by the Respondent's position that any violation of any of the host State's laws would result in the illegality of the investment within the meaning of the BIT and preclude such investment from benefiting from the substantive protection offered by the BIT. As to the nature of the rules contemplated in Article 2(2) of the Netherlands-Turkey BIT, it is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State. This is made clear by the plain language of the BIT, which applies to "*investments . . . established in accordance with the laws and regulations . . .*" The Tribunal also considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. However, unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory.
120. In the present case, the Respondent alleges that the Claimant's transaction was made in breach of the Republic of Turkey's legislation relating to the encouragement of foreign investment, the regulation of the telecommunication sector, as well as Turkish competition law. The first violation, if demonstrated, might be covered by the legality requirement of Article 2(2) of the Netherlands-Turkey BIT and – as a consequence – might lead the present Tribunal to conclude that the conditions set forth by the BIT for an investment to be protected were not met and, hence, the Respondent did not give its

consent to arbitration within the meaning of Article 25(1) of the ICSID Convention. On the other hand, the Tribunal believes that a violation of the regulations in the telecommunication sector or of competition law requirements would not trigger the application of the legality requirement in Article 2(2) of the BIT. In the latter case, the violations of Turkish law, if established, are not covered by the language of Article 2(2) of the BIT according to which the BIT applies “*to investments . . . established in accordance with the laws and regulations in force . . . at the time the investment was made*”.

121. To conclude, the Tribunal considers that while Article 25(1) of the ICSID Convention provides for an objective definition of an investment, this definition is comprised of three criteria, namely (i) a contribution, (ii) a certain duration, and (iii) an element of risk. Neither the text, nor the object and purpose of the Convention commands that any other criteria be read into this definition. The Tribunal also considers that, for the purposes of consent to the Centre’s jurisdiction within the meaning of Article 25(1) of the ICSID Convention, the Claimant’s alleged investment must satisfy the legality requirement of Article 2(2) of the Netherlands-Turkey BIT, as interpreted above.

122. The Tribunal will now turn to the question whether, in the present case, an investment exists within the meaning of Article 25(1) of the Convention and Article 1(b) of the Netherlands-Turkey BIT, and, in the affirmative, whether such investment meets the legality requirement found in Article 2(2) of the Netherlands-Turkey BIT.

(iii) *Is there an investment within the meaning of Article 25(1) of the ICSID Convention and Article 1(b) of the BIT and, if so, is the investment made in accordance with Turkish law pursuant to Article 2(2) of the Netherlands-Turkey BIT?*

123. According to the Claimant, his legal ownership of Telsim’s shares results from the transfer of Telsim’s temporary share certificates from Standard Telekom to Masoud and, subsequently, from Masoud to the Claimant. The Respondent not only contests these transfers as a matter of fact and law, but also questions the validity *ab initio* of the temporary share certificates under Turkish law. While the Respondent raised the nullity of the temporary share certificates in relation to the alleged illegality of the Claimant’s investment, the Tribunal considers that this issue should be resolved first, to the extent that any discussion of the consequences of their transfer to Mr. Fakes would be moot, should the Tribunal find that the certificates were not valid at the time of such transfer.

124. Thus, the Tribunal will rule (a) on the issue of the validity of Telsim's temporary share certificates, and then (b) turn to the question of whether any rights, within the meaning of Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT, were transferred to Mr. Fakes by way of endorsement of those certificates.

(a) *Are the temporary share certificates valid under Turkish law?*

125. The Respondent raised the nullity *ab initio* of Telsim's temporary share certificates in relation to the alleged illegality of the Claimant's investment.

126. To summarize the Respondent's position, it is submitted that the temporary shares certificates were issued in violation of Article 413 of the Turkish Commercial Code. This provision requires that the share certificates be signed "by at least two persons authorized to sign on behalf of the company." The Respondent filed a Legal Opinion by Professor Bahtiyar in support of its proposition that this provision also governs the form of the temporary share certificates, and that a joint signature is a prerequisite for the validity of these temporary certificates under Turkish law. To the extent that the temporary share certificates bear only the signature of Mr. Hakan Uzan, the Respondent argues that these certificates are not valid under Turkish law.

127. The Claimant's expert on Turkish law, Professor Domaniç, disagrees with this interpretation of the relevant provisions of the Turkish Commercial Code and submits that the requirement of a double signature did not apply to the temporary share certificates held by the Claimant.

128. While Prof. Bahtiyar was cross-examined by the Claimant's counsel, Prof. Domaniç was absent from the hearing due to the reasons described above at paragraph 20. As discussed, the Tribunal was satisfied with the evidence presented by both Parties and did not consider it necessary to be briefed further on this issue, in particular through an oral examination of Prof. Domaniç. The Tribunal took particular note of Prof. Bahtiyar's admission, under cross-examination, that the position according to which a joint signature on a temporary share certificate is required was neither expressly contemplated in the Turkish legislation, nor addressed by Turkish courts.

129. To the extent that there appears to be no case law or legal provision in Turkish law requiring a double signature on a temporary share certificate, the Tribunal considers that in the present case the Respondent did not meet the burden of proof of the compulsory



nature of such requirement in Turkish law. Thus, the Tribunal considers, for the purposes of its further analysis relating to the existence of an investment, that the temporary share certificates are valid. However, the question remains as to whether these temporary share certificates transferred any rights to the Claimant that would warrant the corresponding shareholding to qualify as an investment within the meaning of Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT.

(b) *Do the rights, if any, derived by Mr. Fakes from the “arrangement” between himself and Mr. Uzan, meet the criteria of an investment under Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT?*

130. The Claimant submits that in late April 2003 he received a proposal to become the legal owner of approximately 67% of Telsim’s shares, to be acquired from Masoud International. Following the signing of the Masoud-Fakes Agreements on June 30 and July 1-2, 2003, Masoud endorsed for the benefit of the Claimant 32 temporary share certificates representing 66.96% of Telsim’s shares. The Respondent questioned the authenticity of the temporary share certificates submitted by the Claimant, suggesting, *inter alia*, that they were postdated for the purposes of bringing the present arbitration. However, the Respondent did not go as far as making a claim of forgery, leaving the Tribunal with a number of allegations based on assumptions drawn from indirect evidence discussed in other arbitrations. When challenged directly by counsel for the Respondent, the Claimant was consistent in his denial of any tempering with the documents.
131. The Tribunal considers that the burden of proof of any allegations of impropriety is particularly heavy. This burden of proof was not met in the present case. Consequently, the Tribunal accepts the Claimant’s submission as to the dates of the transfer of the temporary certificates to the Claimant.
132. The Tribunal will now address the question whether any property and rights corresponding thereto were actually transferred to the Claimant on July 3, 2003 or on any other date.
133. The Claimant explained both in his written statements and during his examination before the Tribunal that he entered into an oral agreement with Mr. Hakan Uzan regarding the scope of the Claimant’s ownership of the shares to be transferred through the Uzan-Masoud-Fakes transaction. According to the Claimant, pursuant to the Uzan-Fakes oral agreement, which was concluded prior to the signing of the Masoud-Fakes Agreements,

the Claimant holds legal title to Telsim's shares and Mr. Uzan has the beneficial ownership of such shares. Furthermore, the Claimant "*would vote [his] shares as instructed by Mr. Uzan, and Mr. Uzan would make any final decision as to when and to whom the shares in Telsim would be sold.*"<sup>74</sup> The Respondent does not take issue with this allegation while questioning the transfer of the legal title itself.

134. The Tribunal observes, in this respect, that the division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a *fiducie* or any other similar structure. Such structures are in no way indicative of a sham or a fraudulent conveyance, and no such presumption should be entertained without convincing evidence to the contrary. The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.

135. However, upon careful examination of the evidence before it, the Tribunal reached the conclusion that the Claimant does not hold legal title over the share certificates in Telsim and, thus, does not have an investment within the meaning of Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT. This conclusion is based primarily on the Claimant's own statements and explanations provided to the Tribunal during the hearing on jurisdiction. While the Tribunal is not convinced that the Claimant disclosed every aspect of his "arrangement" with Messrs. Uzan and Masoud, those details that the Claimant chose to discuss before the Tribunal suffice to conclude as to the absence of an investment in the present case.<sup>75</sup>

136. In the Tribunal's opinion, the Claimant's statements unequivocally indicate that the parties to the Masoud-Fakes and the Uzan-Fakes transactions never had any intention to

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<sup>74</sup> Fakes Witness Statement II, para 5.

<sup>75</sup> The Tribunal wishes to emphasize, in this respect, that Mr. Hakan Uzan's witness statement, which was kept in the record and was taken at face value by the Arbitral Tribunal, does not advance the Claimant's case. To the contrary, this witness statement corroborates the Claimant's oral submissions relating to his arrangement with Mr. Uzan, such submissions ultimately leading the Tribunal to conclude that no protected rights were actually transferred to the Claimant under the Uzan-Masoud-Fakes arrangement.

transfer any rights to the Claimant in relation to Telsim's shares, nor did they actually transfer such rights.

137. First, by the Claimant's own admission, the self-proclaimed purpose of the Uzan-Masoud-Fakes arrangement was to use the name of the legal owner of Telsim's shares (be it Masoud or Fakes) as "*bait*" to attract potential buyers of those shares who would be hesitant to deal with Mr. Uzan in view of the pending lawsuits against him and his family members. Had a potential buyer become interested in purchasing Telsim's shares, Mr. Uzan's name would have been disclosed to such buyer to pursue the negotiations. While in his subsequent explanations the Claimant attempted to give some substance to his role as the alleged legal owner of Telsim's shares, the Tribunal is not persuaded that this role went beyond the Claimant's eloquent description of "*bait*." When questioned by the Tribunal, Mr. Fakes conceded that the name of the beneficial owner would have to be disclosed to potential buyers in order for any negotiations to proceed further.<sup>76</sup> Indeed, it is hardly conceivable that any potential buyer of shares in Turkey's second largest telecommunication company would not conduct due diligence as to the identity of the owner of the shares.
138. The Claimant further conceded that he had no role in contacting or selecting potential buyers of Telsim's shares, something that would have given some substance to his role as a "*bait*" allegedly holding legal title to those shares. Mr. Gosheh, an advisor who introduced Mr. Fakes to Mr. Uzan and who acted in the interests of both Mr. Uzan and

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<sup>76</sup> Transcript of Hearing, October 5, 2009, at 175-178: "THE PRESIDENT: *So the idea is that if you say you are the owner of the shares, it would help a potential buyer to have confidence and to buy the shares from you whereas if it was Mr. Uzan selling the shares directly, the buyer would be scared of something? Is that your testimony?* A [Mr. Fakes]: *Yes. . . .* THE PRESIDENT: *What makes you think that dealing with you instead of dealing with the former owners would help? Because with all due respect you are not known to have had a past in the telecom business, or running of your – your former job was not to run France Telecom or a big telecom business, you know? So we want to understand how a potential buyer would have been reassured by dealing with you as opposed to dealing with, say, Mr. Uzan.* A: *Because his name, in the meantime, while there were too many objections against Mr. Uzan and the Uzan family, so the intention was to have a kind of a bait to get people interested in acquiring those shares.* THE PRESIDENT: *Okay, but would a potential buyer worry about dealing with someone who is not known in the telecom industry?* A: *Possibly. Could be. . . .* THE PRESIDENT: *So you would assume for yourself that at some point you would have to disclose that the beneficial owners are Mr. Uzan? Or the Uzan family?* A: *Yes.*"

Mr. Fakes (but most likely, in the Tribunal's opinion, primarily as Mr. Uzan's advisor), was apparently tasked with that role.<sup>77</sup>

139. Second, the lack of any meaningful role played by the Claimant within the structure explains, in the Tribunal's opinion, the very low purchase price requested of the Claimant at the time of the transfer of shares between Masoud and Mr. Fakes. Had the Claimant acquired any genuine legal rights in the transactions, no doubt he would have been expected to make a contribution (either financial or managerial) beyond the US\$ 3,800 cash payment allegedly made in July 2003.<sup>78</sup> Such figure cannot be reconciled with the significance of the underlying business and the Claimant's valuation of his alleged shareholding at US\$ 19 billion for the purposes of his claim in this arbitration.
140. The Tribunal notes that no further contribution was in fact expected of the Claimant either by Mr. Uzan (who specifically retained the beneficial ownership of the shares within the framework of the Uzan-Masoud-Fakes transaction) or Mr. Masoud. While the Masoud-Fakes Agreements provided for a further total payment of US\$ 17.6 million, no such payment was made by the Claimant within the stipulated 5-year period from the date of the transfer of shares. Although the Claimant submitted that he was still under the obligation to make this payment, the Tribunal is convinced that he was never expected (nor did he expect) to make any payments beyond the initial US\$ 3,800, even assuming that this initial down payment has actually been made. Mr. Masoud never

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<sup>77</sup> Transcript of Hearing, October 5, 2009, at 173/14-25 through 174/1-9: "THE PRESIDENT: *So as of September 2003 Mr. Gosheh says, 'Do not do anything.' Before then you had no time to do any research for a potential buyer and afterwards, after September 03 you are told, 'Stop doing that.' That is your testimony?* A [Mr. Fakes]: *Correct. Yes. That's right.* THE PRESIDENT: *Now, do you know if Mr. Gosheh has made some investigations to find a potential buyer for Telsim?* A: *He assured me that he was busy, even before I bought the shares, that he had made some contacts possibly to find a buyer.* THE PRESIDENT: *Are you aware of any contacts?* . . . A: *No, I do not know.*"

<sup>78</sup> The Claimant failed to provide any evidence of payment of his purported contribution of US\$ 3,800, simply stating that this amount was first withdrawn from his bank account, converted into dollars and then handed to Masoud in US\$ 100 bank notes (see Transcript of Hearing, October 5, 2009, at 122/3-25 through 123/1-7). The Tribunal is not convinced by this explanation. In the Tribunal's opinion, one would have requested documentary confirmation of such payment to the extent that it resulted in the acquisition of a 66.96% stake in a company now valued by the Claimant at US\$ 19,000,000,000. It seems highly implausible that an individual acquiring a majority shareholding in a leading telecommunications company would forego documenting his payment for this shareholding.

requested the payment of the full purchase price, and the Claimant felt no need to renegotiate his obligations.<sup>79</sup>

141. Third, it results from the Claimant's explanations that not only the parties to the Uzan-Masoud-Fakes transaction never intended to transfer any rights to Mr. Fakes alongside the alleged transfer of legal title over Telsim's shares, but that Mr. Fakes never actually came into possession of those shares following their endorsement by Masoud. Contrary to Mr. Fakes' written submission that Mr. Masoud "*endorsed and delivered*" to him the 32 temporary share certificates, it results from Mr. Fakes' oral examination that those temporary share certificates never left the offices of Mr. Gosheh, where they were kept in a safe.<sup>80</sup> The Tribunal is of the opinion that Mr. Fakes was at no point put in a position to exercise his alleged "legal ownership" over Telsim's shares as he had no independent access to those shares. Had he intended to transfer those temporary share certificates to a different place or person, he would have had to obtain Mr. Gosheh's prior approval and cooperation to such transfer. Considering that Mr. Gosheh acted as Mr. Uzan's advisor well before Mr. Fakes became involved in the arrangements at the request of Mr. Gosheh himself, it is reasonable to conclude that Mr. Gosheh would not have acted without Mr. Uzan's prior knowledge and consent and that Mr. Fakes was not even entrusted with the legal title over the share certificates.

142. Fourth, the Tribunal is not convinced by the Claimant's argument that Telsim acknowledged the transfer of 66.96% of shares in Telsim to the Claimant and undertook "*all requirements for the recording of the new shareholding in the Records*" of Telsim.<sup>81</sup> This argument is based on the text of the two letters that the Claimant purports to have received from Telsim on July 15, 2003.<sup>82</sup> According to the Claimant, this is the only correspondence that he had received from Telsim during the period that he held shares in Telsim. It also appears to be the Claimant's only direct proof of registration of his shareholding in Telsim's records, since the Claimant did not provide any other evidence that would demonstrate that his shareholding was known to and recorded by Telsim.

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<sup>79</sup> Transcript of Hearing, October 5, 2009, at 125/20-25 and 126/1-13.

<sup>80</sup> Transcript of Hearing, October 5, 2009, at 163/16-20: "THE PRESIDENT: *Can you tell us exactly where these certificates were kept? Their life, starting from the beginning, as far as you know?* A. [Mr. Fakes]: *Always stayed in Mr. Gosheh's office.*"

<sup>81</sup> Letter from Telsim to Mr. Saba Fakes dated July 15, 2003, **Exhibit C-26**.

<sup>82</sup> **Exhibit C-26**.

143. It emerged during the hearing that the Claimant never received the originals of the two Telsim letters submitted as Exhibit C-26, that he considered as sufficient – and only – evidence of Telsim’s knowledge of Mr. Fakes’ alleged shareholding in Telsim. While the Claimant’s counsel holds an original of one of the two letters in a safe at its offices in Rotterdam,<sup>83</sup> the Claimant unequivocally stated that he “*never received the originals*” of the two letters in Exhibit C-26.<sup>84</sup> This statement seems particularly meaningful to the Tribunal, especially in light of the Claimant’s further statement that he was “*surprised*” to have received only a copy of the letters on which he subsequently relied to support his argument that Telsim was duly put on notice of the changes in its shareholding structure.<sup>85</sup>
144. It also emerged during the hearing that the Claimant never directly corresponded with Telsim, all purported correspondence having been sent by or received from Mr. Gosheh. While there is nothing unusual in corresponding through one’s advisor or counsel, the Tribunal finds it perplexing that a shareholder holding almost 67% of Telsim’s shares would simply content himself with Mr. Gosheh’s oral explanation that the originals of the two Telsim letters would be forthcoming, without pursuing the matter further with Telsim.
145. Moreover, the two letters submitted in Exhibit C-26 as evidence of Telsim’s confirmation of the Claimant’s alleged shareholding in Telsim are patently contradicted by Telsim’s

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<sup>83</sup> Letter from Mr. Dirk Knottenbelt (Houthoff Buruma) to Ms. Martina Polasek (ICSID) dated October 12, 2009, advising that Exhibits C-24, C-25 and C-26 “*are being preserved in the safe of my law firm*” and confirming that Houthoff Buruma holds “*the original copies of Exhibits C-24 and C-25, an original copy of the first letter of Exhibit C-26 and a copy of the second letter of Exhibit C-26.*”

<sup>84</sup> Transcript of Hearing, October 5, 2009, at 165/9-21: “THE PRESIDENT: *The first one . . . is, we understand, in Mr. Knottenbelt’s safe. Correct?* A [Mr. Fakes]: *Yes. He has a copy.* THE PRESIDENT: *He has a copy or he has the original?* A: *He has no original.* THE PRESIDENT: *He has a copy which comes from where?* A: *From me. Because I never received the originals.*” See also Transcript of Hearing, October 5, 2009, at 167/10-21: “THE PRESIDENT: . . . *What about the other letter . . . Have you received this letter?* A [Mr. Fakes]: *Also a copy.* THE PRESIDENT: *You received a copy?* A: *Yes.*”

<sup>85</sup> Transcript of Hearing, October 5, 2009, at 216/14-25: “Q [Mr. Gharavi]: *When you opened the envelope, the mail, were you surprised that the original was not there and you found only a copy?* A [Mr. Fakes]: *Yes, I was surprised. They had assured me that I would receive the original afterwards.* Q: *Who is, ‘They’? ‘They assured you.’ Who assured you?* A: *Mr. Gosheh.* Q: *Gosheh. Did you send a fax to Telsim or Mr. Gosheh saying, ‘Where is the original? I received only a copy’, or was that oral as well?* A: *That was oral.*”

letters of August 14 and 20, 2003 addressed to the Turkish Telecommunications Authority.<sup>86</sup>

146. The letters of August 14 and 20, 2003 were sent by Telsim in reply to the Telecommunications Authority's queries relating to Telsim's shareholding in August 2003. The Telecommunications Authority inquired on the alleged changes in Telsim's ownership structure that were reported at the time in the Turkish press. Telsim's reply – supported by detailed tables of its shareholding structure and changes thereto – was unequivocal: “*no attempt has been made to transfer our companies' shares to either national or foreign entities. The news released regarding such transfers is entirely groundless.*”<sup>87</sup> The Tribunal sees no reason for Telsim to have misrepresented its shareholding structure to the Telecommunications Authority in August 2003. Moreover, in light of the fact that Telsim's shares were seized by the Turkish authorities on August 26, 2003, it is only reasonable to assume that the authorities would have raised the issue of the alleged changes in Telsim's ownership structure had the authorities uncovered any such changes in Telsim's register of shareholders at the time of its arrest. However, no such issue was raised by the authorities at the time of the relevant events. This adds further credibility to Telsim's letters of August 14 and 20, 2003 and contradicts the statements, attributed to Telsim in Exhibit C-26, that Telsim “*registered ... Saba Fakes under number 21 with our companies [sic] Share Register.*”

147. In light of the foregoing, the Tribunal concludes that the parties to the Uzan-Masoud-Fakes “arrangement” never intended to give effect to the alleged transfer of shares from Masoud to Mr. Fakes and, instead, agreed to implement an agreement which did not transfer even the legal ownership of the share certificates in Telsim to Mr. Fakes. As a result, the Tribunal concludes that Mr. Fakes' arrangement does not meet the requirement of a contribution (see *supra* paras 140-141), nor the requirements of duration and risk, since no rights were actually transferred to the Claimant through the Uzan-Masoud-Fakes arrangement (see *supra* para 137 *et seq.*). In other words, Mr. Fakes has not made any investment in Telsim which would satisfy any of the three criteria for an investment to exist within the meaning of Article 25(1) of the ICSID Convention.

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<sup>86</sup> Telsim Letter No. 2083 to the Telecommunications Authority (August 20, 2003), **Exhibit R-34**; and Telsim Letter No. 1987 to the Telecommunications Authority (August 14, 2003), **Exhibit R-76**.

<sup>87</sup> Telsim Letter No. 1987 to the Telecommunications Authority (August 14, 2003), **Exhibit R-76**.

148. To the extent that Mr. Fakes does not hold an investment in the present case, there is no need for this Tribunal to consider whether Mr. Fakes' transaction was conducted in accordance with the Respondent's laws and regulations relating to the admission of investments in Turkey and, thus, satisfied the requirement of legality set forth by the BIT to qualify as an investment protected by that instrument.
149. It results from the foregoing that the present dispute brought by Mr. Saba Fakes against the Republic of Turkey is not within the jurisdiction of the Centre and of this Tribunal.

**C. Allocation of Costs**

150. On December 2, 2009, the Parties filed their respective Statements of Costs. The Respondent further amended its Statement by letter of December 11, 2009.
151. The Claimant submits that he incurred a total of € 756,156.10 in legal fees and expenses. He paid an advance on costs to ICSID and the Tribunal in the amount of US\$ 239,970. The Respondent submits that it incurred a total of US\$ 1,496,248.49 in legal fees and expenses. Its contribution to ICSID to cover the costs of the proceedings was US\$ 239,880.
152. Pursuant to Article 61(2) of the ICSID Convention, as well as Rule 28 of the ICSID Arbitration Rules, an arbitral tribunal has discretionary power to allocate the arbitration costs and the legal fees and expenses between the parties, including by ordering the losing party to bear in full the costs of the arbitration and the entirety of the legal fees and expenses incurred by both parties.
153. In light of the Tribunal's finding that the Claimant's claim was brought before the Centre on the basis of a transaction that did not correspond to an arrangement that was meant to deploy any legal consequences other than on paper and, as a result, plainly could not fulfil the requirements of an investment within the meaning of Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT, the Tribunal considers it appropriate that the Claimant bear in full his legal fees and expenses, as well as the arbitration costs which are estimated to US\$ 365,000.<sup>88</sup>

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<sup>88</sup> The ICSID Secretariat will in due course provide the Parties with a financial statement of the case account.



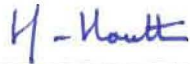
154. For the same reasons, the Tribunal also considers it appropriate that the Claimant bear the Respondent's legal fees and expenses. A party pursuing a claim which is clearly outside the scope of the Centre's jurisdiction should not be encouraged, and should bear the risk of paying the full costs of such frivolous proceedings. In light of the amount in dispute, as well as the nature of the arguments raised by both Parties, the Tribunal considers the Respondent's legal costs reasonable and orders the Claimant to pay to the Respondent the amount of US\$ 1,496,248.49.

155. Consequently, the Claimant is ordered to pay to the Respondent the amount of US\$ 182,500.00, representing the Respondent's share of the ICSID costs, as well as the amount of US\$ 1,496,248.49, representing the Respondent's legal fees and expenses.

## VI. DECISION

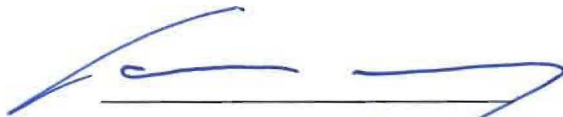
156. For the foregoing reasons, the Arbitral Tribunal unanimously:

- 1) Declares that the Centre and this Arbitral Tribunal do not have jurisdiction over the present dispute;
- 2) Declares that the Claimant shall bear in full his legal costs and expenses, the costs of this arbitration, as well as the Respondent's legal costs and expenses;
- 3) Orders the Claimant to pay to the Respondent the amount of US\$ 182,500.00, corresponding to the Respondent's share of the costs of this arbitration, as well as the amount of US\$ 1,496,248.49, representing the Respondent's legal costs and expenses.



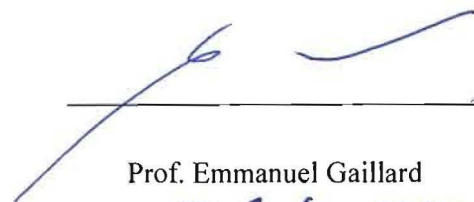
Prof. Hans van Houtte

Date: 8 July 2010



Dr. Laurent Lévy

Date: 2 July 2010



Prof. Emmanuel Gaillard

Date: 12 July 2010