

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

**TULIP REAL ESTATE AND DEVELOPMENT
NETHERLANDS B.V.,**

CLAIMANT

v.

REPUBLIC OF TURKEY,

RESPONDENT

REQUEST FOR ARBITRATION

CROWELL & MORING LLP
Stuart H. Newberger
Dana Contratto
Marguerite C. Walter
1001 Pennsylvania Avenue NW
Washington, DC 20004
+1 (202) 624-2500 (Telephone)
+1 (202) 628-5116 (Facsimile)

Cristina Ferraro
590 Madison Avenue
New York, NY 10022-2524
United States of America
+ 1 (212) 223 4000 (Telephone)
+ 1 (212) 223 4134 (Facsimile)

I. INTRODUCTION

1. Claimant Tulip Real Estate and Development Netherlands B.V. (“Tulip” or “Claimant”), a company constituted in accordance with the laws of The Netherlands, hereby requests the institution of arbitration proceedings against Respondent the Republic of Turkey (“Turkey,” “Respondent” or the “Government”) in accordance with Articles 25 and 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) and Rules 1 and 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”).
2. Tulip brings this arbitration pursuant to the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey (the “Treaty” or “BIT”), which was signed on 27 March 1986 and entered into force for Turkey on 1 November 1989.¹ Article 8 of the Treaty sets forth Turkey’s consent to arbitrate disputes before the International Centre for Settlement of Investment Disputes (“ICSID”). The present Request for Arbitration is Claimant’s consent to arbitrate its disputes arising under and in connection with the Treaty.
3. Tulip is a wholly-owned subsidiary of A. van Herk Holding B.V., a major Dutch investment company based in Rotterdam that is part of the Van Herk group of companies. Tulip was established for purposes of holding and pursuing investments in Turkey. The Van Herk group of companies has significant investments in not only residential and commercial properties and construction, but also in project development, biotechnology, financial services, and energy.² Its residential and commercial property investments alone are worth approximately €1.5 billion.³ A. van Herk Holdings B.V. is owned and managed by Mr. Adrianus van Herk, a Dutch investor and entrepreneur. Tulip was one

¹ Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey (“BIT”), Cl. Exh. C-1.

² See Van Herk Groep website, www.vanherkgroep.nl (last accessed 10 October 2011).

³ *Id.*

of the first major foreign investors in the Turkish housing construction industry, and the first to do business with Turkey's Housing Development Administration⁴ ("TOKI"), part of Turkey's Prime Ministry.⁵

4. Tulip's claims arise out of its investments in several large residential and commercial construction projects in Istanbul and Ankara, Turkey, and include, most significantly, the Ispartakule III project in Istanbul. After extensive due diligence by Mr. van Herk himself and his colleague Mr. Meyer Benitah (also a Dutch national), the Van Herk group of companies and Mr. Benitah made significant investments in several projects and most particularly the Ispartakule III project promoted by Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. ("Emlak"), a company 100% controlled by TOKI. The explicit encouragement Messrs. van Herk and Benitah personally received from numerous Government officials during multiple visits to Turkey in 2005 and 2006 was a major factor in their decision to invest. Among others, they met with Egemen Bagis, then an aide to Prime Minister Erdogan and currently the Minister for European Affairs and the chief negotiator for Turkey's accession to the European Union. He expressed Turkey's interest in encouraging foreign investment, which would contribute to the Turkish economy, and pledged his support for any investment the two Dutch investors might eventually make. They were further encouraged to invest by the fact that the project would be under the direct control of TOKI. With the Government supporting the project, they believed that, in combination with their hard work, expertise, and financial backing, the investment had every chance to succeed. In reliance on all these factors, these Dutch

⁴ In Turkish, T.C. Basbakanlik Toplu Konut Idaresi Baskanligi.

⁵ See TOKI website, at <http://www.TOKI.gov.tr/english/index.asp> (last accessed 10 October 2011). The other agencies under the direct control of the Prime Minister's office include the Turkish national intelligence agency and the investment promotion and development agency, demonstrating TOKI's critical position in carrying out national policies of the Turkish Republic.

investors arranged to bid on and signed a Contract for Revenue-Sharing In Exchange for Sale of Parcels (“Contract”) to develop the Ispartakule III site in August 2006⁶.

5. Their trust in the Turkish Government was soon betrayed. Shortly after the Contract was signed, all construction on the entire Ispartakule site came to an abrupt halt because of zoning-related litigation brought by a professional association against the Government. In fact, the litigation had been *pending since 2005* – a fact that the Government failed to disclose to Tulip or Mr. Benitah. Notably, the solicitation for bids for the Ispartakule III project *explicitly represented* that zoning for the project was already in place and did not disclose the existence of the pending litigation. The two Dutch investors could not have reasonably discovered the existence of the dispute on their own and legitimately relied on the Government to act transparently and in good faith. Had they understood the true situation, neither the Van Herk group of companies nor Mr. Benitah would have made the investment.
6. Apparently not content to have lured these foreign investors into making an investment without providing full disclosure, Emlak and TOKI denied any responsibility for delays caused by the zoning dispute, instead insisting that Tulip was somehow to blame. After Tulip’s signing of the Ispartakule III contract nearly two years passed while TOKI dealt with its zoning problems, two years during which Tulip was legally prevented from even beginning construction. Meanwhile Tulip’s costs were accumulating. When the stay on zoning was finally lifted in 2008, Emlak and TOKI insisted that Tulip complete the entire project in a fraction of the time provided for in the Contract. Tulip and Mr. Benitah were thus denied the full benefit of their investment twice over, first because of the zoning-related delays that Emlak and TOKI failed to disclose to them before the Contract was signed, and then because of the clear breach of essential contractual terms to which the parties had agreed.
7. Notwithstanding this absurdly unfair treatment, Tulip was determined to go forward with the project. As soon as the way was cleared for it to begin construction, it forged ahead

⁶ Contract for Revenue-Sharing In Exchange for Sale of Parcels, 3 August 2006, Cl. Exh. C-2.

simultaneously on construction, publicity, and sales. But Emlak and TOKI seemed equally determined to place new obstacles in Tulip's way at every opportunity. They continually harassed Tulip about the supposed delay in construction, as if Tulip had not spent two years waiting for TOKI to resolve the zoning problems it had failed to disclose. Emlak repeatedly threatened to cancel the project using Tulip's supposedly late performance as an excuse, forcing Tulip to beg for an "extension" even though Tulip's "late" performance was entirely attributable to Emlak and TOKI themselves. Ultimately, just as construction and sales were truly taking off, Emlak abruptly terminated the Contract – in violation of Turkish law – cashed Tulip's performance guarantee, and illegally re-tendered the project to an affiliate of Tulip's own sub-contractor, a Turkish construction company with close ties to Emlak and TOKI. As a result, Tulip was deprived of its entire investment without compensation, of which the Ispartakule III project alone was worth at least US\$450 million at the time and likely more.

8. As described in greater detail below, Tulip's claims under the BIT arise out of, *inter alia*, Turkey's: (a) unlawful expropriation of its investment in the Ispartakule III construction project; (b) unlawful expropriation of its rights under contract; (c) unfair and inequitable treatment of Tulip and its investment in connection with the company's: (i) performance under the construction contract; and (ii) legitimate expectations in connection with that project; (d) arbitrary and capricious actions having the effect of hindering Tulip's use, enjoyment, and expansion of Ispartakule III and related investments; (f) failure to accord its investments in Turkey full protection and security; and (g) violation of Turkish and international law.

II. PARTIES TO THE DISPUTE

A. The Claimant

9. The Claimant in this arbitration is Tulip Real Estate and Development Netherlands B.V. ("Tulip"). Tulip is a corporation formed under the laws of the Netherlands and ultimately owned by Mr. Adrianus van Herk, a Dutch national. Tulip was created in

2007 to consolidate Mr. van Herk's interests in the Turkish investments. Before the creation of Tulip, the interests in investments made in Turkey were held by different companies within the Van Herk group (all of them Dutch companies as well). As Tulip started to establish its brand in Turkey, it was decided to increase the investment in Turkey. To manage the growing business and all of the construction projects including the Ispartakule III project, Mr. van Herk decided to create Tulip to consolidate the investments in Turkey under one Netherlands company for greater ease of administration. Tulip is asserting claims both on its own behalf and on behalf of one of its co-investors in the project, Mr. Meyer Benitah, also a Dutch national.⁷

10. Claimant's contact details are as follows:

Tulip Real Estate and Development Netherlands B.V.
P.O. Box 4068
3006 AB Rotterdam
The Netherlands

11. Claimant has authorized Crowell & Moring LLP to institute and pursue these proceedings on its behalf.⁸ It is represented in this arbitration by:

Stuart H. Newberger, Esq.
Dana Contratto, Esq.
Marguerite C. Walter, Esq.
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
United States of America
Telephone: + 1 202 624 2500
Fax: + 1 202 628 5116

Cristina Ferraro, Esq.
Crowell & Moring LLP
590 Madison Avenue

⁷ Mr. Benitah has executed a Power of Attorney in favor of Tulip permitting it to pursue his claims in these proceedings along with its own. Power of Attorney granted by Mr. Meyer Benitah, Cl. Exh. C-3.

⁸ Van Herk Management Services B.V., Management Board Resolution, 4 October 2011, Cl. Exh. C-4; Certificate of Erik A.G. Esveld, Managing Director of Tulip Real Estate and Development Netherlands B.V., 4 October 2011, Cl. Exh. C-5.

New York, NY 10022-2524
United States of America
Telephone: + 1 212 223 4000
Fax: + 1 212 223 4134

All communications concerning this matter should be directed to counsel.

B. Respondent

12. The Respondent in this arbitration is the Republic of Turkey. To the best of Claimant's knowledge and belief, service of this Request for Arbitration may be made on the Government of Turkey using the following contact details:

The Honorable Ahmet Haluk Karabel
Chairman of the Housing Development Administration (TOKI)
Republic of Turkey, Prime Ministry, Bilkent Plaza B1 Blok 06800 Bilkent
Ankara, Turkey

Government of the Republic of Turkey
Attention: Ugur Dogan
Turkish Ambassador to the Netherlands
Jan Evertstraat 15 2514 BS
The Hague - The Netherlands

III. SUMMARY OF RELEVANT FACTS

A. Tulip's Decision To Invest In Turkey's Housing Sector

13. In 2006, when the Dutch investors made their initial investment, Turkey was a rising star for investment, attracting foreign investors from all over the world and especially from the European Union. Not only had Turkey recently adopted legislation promoting and protecting foreign investments, but it had also just begun negotiations for accession to the European Union following years of anticipation and preparations. Turkey's rapid growth and development needs provided an additional incentive for foreign investors. At the same time, Turkey actively reached out to potential investors to encourage them to invest there, widely publicizing its attractive investment climate and meeting with potential investors who came to Turkey.

14. Mr. Adrianus van Herk was one of those investors. Aware of Turkey's young and growing population, and the continuing need for construction following two devastating earthquakes in late 1999, Mr. van Herk began exploring a possible investment in Turkey's booming construction sector sometime in 2005. Mr. van Herk consulted with a longstanding business associate, Mr. Meyer Benitah, who was also interested in making such an investment. Together, Mr. van Herk and Mr. Benitah made several visits to Turkey in 2005 and early 2006 to assess possible investments there. During those visits, they met with numerous local officials to discuss potential investments, as well as officials of the Government of Turkey interested in promoting foreign investment. Among the local officials they met with was Mr. Melih Gokcek, the Mayor of Ankara, to discuss potential investments in the Ankara area. More significantly, they met with Mr. Egemen Bagis, then an aide to Prime Minister Erdogan. Mr. Bagis exhorted them to consider investing in Turkey because Turkey needed foreign investment and would gladly reap the benefits of any investment they made in the form of much-needed jobs and infrastructure. He also assured them that he would personally support any future investment they made, a promise that carried great weight with Messrs. van Herk and Benitah given Mr. Bagis' close relationship to the Prime Minister. It was through these meetings that they heard about potential investments being offered by TOKI.

15. Sometime in early 2006, Messrs. van Herk and Benitah learned that there was an upcoming tender for the construction of new housing on the western outskirts of Istanbul, an area undergoing rapid development. The tender was being offered through Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. ("Emlak" or "Emlak GYO"),⁹ an entity controlled by TOKI. The request for bids described the project as a revenue-sharing arrangement.¹⁰ The winning bidder would take responsibility for the development and sale of residential and commercial units on land provided by Emlak and share revenues

⁹ The name translates as Emlak Residential Real Estate Investment Partnership, Inc.

¹⁰ Emlak Residential Real Estate Investment Partnership LLP Proposal Submission Specifications, Cl. Exh. C-6.

obtained from such sales with Emlak. Significantly, the bid solicitation documents required that bidders prepare their bids in conformity with a specific zoning plan already in place.¹¹

16. Mr. van Herk and Mr. Benitah believed the project, called “Ispartakule III,” was just the kind of investment opportunity they had been looking for in Turkey. Not only was it in the construction sector, but because it involved a revenue-sharing arrangement they would not have to purchase land to undertake the project. They also believed that the project had great potential in light of the high demand for housing in the Istanbul area, a belief confirmed by a subsequent feasibility study and actual sales.¹² In addition, since the area was on the western side of Istanbul, research indicated that it was less prone to earthquakes than the eastern side. As its name indicates, Ispartakule III was one of several large-scale housing projects in the same area, which was located near the Istanbul airport and about 35 kilometers from the city center. Two of the other projects, Ispartakule I and Ispartakule II, were under development by a joint venture called Emlak Pazarlama-Fideltus-Oztas. Emlak Pazarlama (“EPP”)¹³ was a sister company of Emlak and was also controlled by TOKI, while Oztas was owned by Suleyman Cetinsaya, who also owned 25% of EPP. TOKI itself thus had a direct interest in the neighboring (and competing) projects. Other development projects were also located nearby. Mr. van Herk and Mr. Benitah believed that the Ispartakule III parcel was desirable for a number of reasons. First, it was consistent as a matter of size with their development objectives, and it was quite manageable for a company like Mr. van Herk’s. In terms of that all-

¹¹ *Id.*, Art. 4.1 (“The Special Technical Specifications [attached to the bid solicitation] state the block/parcel and zoning status of the land in the project under this contract.”); Art. 4.7 (requiring bidders to “agree unconditionally” to prepare proposals according to zoning regulations of the Istanbul New Zoning Directive). Notably, although the bid solicitation required a declaration from bidders that they had “a good grasp of the legal and administrative situation,” nowhere did it alert bidders to the fact that there was a pending legal challenge to the zoning before the Danistay, a fact that Tulip could not reasonably have ascertained before the Danistay issued any rulings.

¹² Moore Stephens, Ispartakule III Project Feasibility Study, 5 October 2006, Cl. Exh. C-7.

¹³ The full name is Emlak Pazarlama, Insaat, Proje Yonetimi ve Ticaret A.S.

important location factor, it was well placed, facing the main road and highly visible; indeed, Ispartakule III was directly accessible from the Trans-European Motorway connected to the second Bosphorus Bridge.¹⁴

17. Most importantly, because the project was to be carried out in partnership with Emlak, Mr. van Herk and Mr. Benitah understood that they were, and would be, dealing directly with the Turkish Government.¹⁵ They met with representatives of TOKI in the summer of 2006 to discuss the project before making their bid, and Emlak repeatedly represented itself as a Government-owned company both publicly and privately.¹⁶ As the Government's housing development agency, TOKI was the ultimate authority overseeing development and zoning for its vast landholdings in Turkey. Indeed, TOKI describes itself as "the single responsible public body within the housing sector in Turkey," vested with extensive powers to regulate housing as part of the Government's Emergency Action Plan.¹⁷ TOKI has the power to establish zoning for any construction project that is deemed to further the Government's policy of developing affordable housing for its growing population.¹⁸ From their experience on many other development projects, Messrs. Van Herk and Benitah knew that there were often administrative delays caused

¹⁴ See Moore Stephens Feasibility Study, Cl. Exh. C-7.

¹⁵ Indeed, under the Contract Tulip was required to obtain Emlak's approval for all publicity relating to the project; Emlak insisted that both TOKI's and Emlak's names appear on every sign advertising Ispartakule III. Contract, art. 8.3, Cl. Exh. C-2.

¹⁶ In fact, both TOKI and Emlak have consistently maintained that laws and regulations pertaining to national Government construction projects also apply to Emlak's projects, including the Ispartakule III project.

¹⁷ TOKI website, <http://www.TOKI.gov.tr/english/hda.asp> (citing Law No. 5273, 14 December 2004, Article 4, granting additional powers to TOKI) (last accessed 5 October 2011).

¹⁸ See TOKI website, <http://www.TOKI.gov.tr/english/hda.asp> (citing Law No. 5162, 5 May 2004, which authorizes TOKI "to realize all kinds and scales of development plans, to have made all these type of plans and to alter these plans in areas determined as the mass housing settlement regions") (last accessed 5 October 2011). Indeed, revenues from TOKI's for-profit housing development projects are earmarked "for the financing of TOKI's future social housing projects." *Id.*

by local regulations. Being “in partnership” with the national Government on a project that was directly promoted by the Government would minimize this risk.

18. Mr. van Herk and Mr. Benitah decided to bid for the project through a local company that they would create. A new Turkish corporation, Tulip Gayrimenkul Gelistirme ve Yatirim Sanayi Ticaret Anonim Sirketi (“Tulip I”), was formed in May 2006 to make the bid. At the time that Respondent wrongfully terminated the Contract, Mr. van Herk held a 65% interest in Tulip I through the Dutch company Tulip Real Estate and Development B.V., while Mr. Benitah held an additional 16.6% interest in the company in his individual capacity; the remaining interest in the company was held by Turkish investors.¹⁹
19. To meet all the requirements for the tender, however, Tulip I needed local partners. Accordingly, a joint venture or “JV” (legally a partnership) was formed with three other Turkish companies: FMS Mimarlik Danismanlik Insaat San. ve Tic. Limited Sirketi (“FMS”), Mertkan Insaat Sanayii Ve Ticaret Limited Sirketi (“Mertkan”), and Ilci Insaat San. ve Tic. A.S. (“Ilci”). The Tulip investors understood from their conversations with TOKI and Emlak officials that FMS was a highly regarded company that would bring added value to the Contract. In addition, FMS had experience marketing large-scale housing developments; it was to be a supportive partner for sales and had a 25% interest in the JV.²⁰ Tulip had a 74.8% interest in the JV and was explicitly designated as the lead partner in the JV agreement.²¹ Each partner was to provide capital *pro rata* to its share interest for a fully paid capital in the JV of 100,000 new Turkish liras (“YTL”).
20. The Tulip JV submitted a proposal for the construction of a mixed-use site that would feature 11 multi-story residential apartment buildings and two high-rise towers with

¹⁹ Tulip I Notice of Attendance for the Ordinary General Assembly Meeting for 2006, 2007, and 2008 held on 28 July 2009, Cl. Exh. C-8.

²⁰ See Agreement for Unincorporated Company, art. 2, 3 August 2006, Cl. Exh. C-9.

²¹ *Id.* Two other local partners, Mertkan and Ilci, each had a 0.1% interest in the JV.

housing and a large retail component.²² The name of the 11-block development was to be Tulip Turkuaz, or Tulip Turquoise; the other portion was to be named Tulip Towers. Tulip Turkuaz included both “A” and “B” blocks. A blocks contained larger apartments suitable for families, while B blocks featured smaller apartments for individuals or couples. The entire site was to be one of Turkey’s first “green” developments, designed by internationally renowned UK architect Ken Yeang. Tulip proposed a minimum guaranteed sales price for all of the units in the project of 415,800,000 YTL (US\$ 279,454,264), of which Emlak would be entitled to a 35% share of revenue or 145,530,000 YTL (US\$ 97,808,992).²³ However, by the time the project was terminated and Tulip’s investment destroyed, the total value of the project was no less than approximately US\$450 million.

21. An artist’s rendering of the project shows what the completed project would have looked like had Tulip been allowed to complete its work:

²² See Brochures entitled “Turkish Real Estate Investment,” Cl. Exh. C-10; “Tulip Real Estate,” Cl. Exh. C-11.

²³ See Contract, art. 4, Cl. Exh. C-2.



Figure 1: Tulip Turkuaz



Figure 2: Tulip Towers

22. The Netherlands investors' careful review of the general business climate and residential and commercial markets in Turkey for development led them to conclude that Ispartakule III could be their rock-solid foundation for rapid growth in the market. They perceived Ispartakule III as a signature opportunity to establish the Tulip "brand" as the preferred brand for housing in the multi-billion dollar Turkish market. Accordingly, as they pursued Ispartakule III, so too did they initiate other developments in Istanbul and Ankara, two of the most celebrated city centers in the country.
23. In short order, the Netherlands investors teamed with Turkish partners and undertook to fulfill the promise and ambition of the Tulip brand. Beyond Ispartakule III in Istanbul, they moved deliberately with three other very substantial and innovative projects – Esenyurt (also known as Tulip 360), another apartment and commercial units development in Istanbul; Ulus, a project to include a 1,000 bed hotel and shopping and convention center in Ankara; and Ostim, another development in Ankara with apartments, a 500-bed hotel and a shopping center.²⁴ With Ispartakule III about to break ground and three similarly large developments waiting in the wings ready to follow as Ispartakule III led, the Netherlands and Turkish investors likewise turned their attention to establishing the financial base necessary to position Tulip as a leading brand in the market.

B. The Construction And Development Contract

24. Tulip won the Ispartakule III tender and signed the Contract with Emlak on 3 August 2006. Under the terms of the Contract, Tulip was to pay Emlak a minimum of 145,530,000 YTL in revenue-sharing over the life of the Contract.²⁵ This amount was to be paid in installments due at dates specified in the Contract, beginning 270 days after

²⁴ The two Ankara projects were put on hold in late 2008 when the global financial crisis brought Turkey's housing and development industry to a virtual halt. The Istanbul project was cancelled after news of the Government's seizure of Tulip Turkuaz became widely known.

²⁵ Contract, art. 4, Cl. Exh. C-2.

signature.²⁶ In addition, Tulip was required to post a performance bond of 16,632,000 YTL (US\$ 11,178,170), which Tulip provided in a timely manner.²⁷

25. Tulip was responsible for development, construction and sales of flats.²⁸ Revenue from the project was to be paid into a bank account under Emlak's control.²⁹ Emlak would then disburse Tulip's share of funds from that account based on the amount of work completed as established by periodic sharing reports.³⁰ Construction was to be completed within 900 days of the date on which the site was handed over to Tulip, unless there were delays beyond Tulip's control.³¹ The Contract also provided Tulip an additional 365 days following completion of construction for "maintenance, protection and completion" of Emlak's total share of revenues.³² Under the Contract, Tulip was responsible for meeting the technical requirements necessary for obtaining licenses and permits.³³
26. Significantly, with Emlak's permission, the Contract could be extended over and above the original, contract-allowed performance term of 900 days "for compelling reasons."³⁴

²⁶ *Id.*, art. 5.4. In January 2008, in the midst of a lengthy delay caused by the zoning dispute brought by a professional association that prevented Tulip from even beginning construction, the parties agreed to delay payment of the Minimum Company Share of Revenue due under the Contract. Supplementary Protocol No. 1 to the Agreement, 15 January 2008, Cl. Exh. C- 12.

²⁷ Contract, art. 7, Cl. Exh. C-2.

²⁸ *Id.*, art. 8 (marketing and sales).

²⁹ *Id.*, art. 5.1.1. Although Tulip was responsible for sales, the sales contracts were between Tulip and Emlak on one side and the third party on the other. According to these contracts the buyers were required to make payments to an account that would be controlled by Emlak.

³⁰ *Id.*, art. 5.5.

³¹ *Id.*, art. 6.1.

³² *Id.*, art. 6.1.

³³ *Id.*, art. 11.6.

³⁴ *Id.*, art. 6.3.

More specifically, Article 33 established that the time for completing construction could be increased if there were “extenuating circumstances,” described as follows:

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

If the following occur,

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

27. Thus, under this provision, the time for completing construction could be extended if there were delays caused by someone other than Tulip. The decision to grant an extension was within Emlak’s discretion, however – a discretion that Emlak later abused.³⁵ The property was officially handed over to Tulip on 17 August 2006, thus beginning the 900-day clock for construction and a delivery date of 2 February 2009 unless circumstances arose that led Emlak to grant an extension.

28. However, although Emlak and TOKI never breathed a word about it to Tulip, this timetable was impossible from the outset. In August 2006 the Ispartakule site was already the subject of a lawsuit over zoning that had been pending since 2005. The Union of Chambers of Turkish Engineers and Architects (TUCEA) City Planners Istanbul Branch had initiated a challenge to the existing zoning plan. After the Contract

³⁵ *Id.*, art. 33 (“Time extensions to be granted based on extenuating circumstances are dependent on the following conditions: the degree to which these circumstances have affected the job, the CONTRACTOR’S not having caused these circumstances and inability to prevent or eliminate them,” and “Discretion on these matters and the authority to grant the time extension lies with COMPANY,” *i.e.*, Emlak).

was signed, the zoning plan was suspended by Turkey's highest administrative court – the Danistay – and construction on the site became legally impossible. This remained the situation until June 2008, nearly two years after Tulip officially took possession of the site under the first zoning plan.

29. Emlak and TOKI knew full well when Tulip signed the Contract that the zoning was under attack and that there was a good chance construction would be at least temporarily halted while the dispute was resolved. But they never informed Tulip of the situation. Tulip only found out when it submitted its architectural plans to the Avcilar Municipality in 2007. Incredibly, even after TOKI's court case ended, it turned out that Emlak and TOKI had re-zoned the area without taking into consideration the location of the Ispartakule III project. Instead of correcting their mistake, Emlak and TOKI insisted that Tulip had to change its plans. This forced Tulip to endure yet further delay while it worked with its architect to re-do the technical drawings for Tulip Turkuaz. Additional changes to the zoning were later made that seriously affected Tulip Towers and resulted in yet more delays relating to that portion of the project.
30. Thus, in reality, the site was not effectively handed over to Tulip for development until 2008. The net result of these delays, which were completely beyond Tulip's control, was that Tulip was not legally able to obtain a valid construction permit until September 2008, leaving it a small fraction of the 900 days for construction that had been allocated at the outset – a plainly impossible task. Emlak and TOKI, however, consistently treated Tulip as if the delays were entirely its fault. Ultimately, they terminated the Contract based on the spurious excuse that Tulip had fallen behind on the job schedule.

C. Tulip Is Prevented From Obtaining A Construction Permit Due To A Zoning Dispute Between The Government And A Third Party

1. Tulip Was Legally Prevented From Beginning Construction Due To Zoning Litigation Concealed From It By Emlak and TOKI

31. As discussed above, when Tulip signed the Contract, the Ispartakule parcels were already the subject of zoning litigation, but the solicitation for bids made no disclosure of this fact, and neither TOKI nor Emlak ever told Tulip about this. In May 2007, unbeknownst to Tulip, the Danistay suspended all development on the Ispartakule parcels pending the outcome of a zoning dispute. As a result, all construction on the Ispartakule III site became *legally prohibited* as of May 2007, making it impossible for Tulip to perform.
32. Unaware of any of this, in June 2007, Tulip submitted an application for a construction permit to the Avcilar Municipality, where the land on which the project was to be built was located. The municipality notified Tulip that the façades were larger than permitted by regulation and asked it to provide a variance from TOKI. TOKI refused to do so, never mentioning the Danistay injunction. Instead, Tulip applied for and received a variance through the Ministry of Public Works and Housing pursuant to an administrative procedure that took longer than a variance from TOKI would have taken. Because of this administrative delay, Tulip was only able to re-submit its application for a permit in September 2007.
33. To Tulip's surprise, the Avcilar Municipality informed Tulip that all construction had been halted by the Danistay months earlier. In fact, not only had the Danistay suspended all construction on the sites, but it had cancelled the previous titles to the land. This meant that Tulip could not begin construction even with a construction permit issued by the municipality. News of the injunction and cancellation of the titles came as a complete surprise to Tulip, since it had been in regular communication with Emlak and TOKI about the project, but neither one had ever informed Tulip of the injunction.

34. Naturally, Tulip went to Emlak to find out what was going on. Emlak repeatedly assured Tulip that there would be no problem with obtaining the necessary permits and that it should go forward with the project as planned. According to Emlak, the lawsuit would not ultimately affect the project, since TOKI had full powers to establish a zoning plan for the property. Incredibly, Emlak not only brushed off Tulip's concerns, but even encouraged Tulip to begin construction without a valid permit – an obviously illegal act that Tulip would have been foolish to do. Tulip was forced to simply wait, without knowing when (or even whether) it would be able to begin the project.
35. The wait continued for another nine months until June 2008 when the zoning dispute was finally resolved, and new deeds for the property were issued. The resolution of the litigation came a full year after Tulip's first application for a construction permit and nearly two years after it had ostensibly received the property from Emlak for development, due to circumstances entirely unrelated to Tulip and over which it had no control whatsoever. As noted above, this left Tulip with little time to perform a task originally contemplated by the parties to take 900 days. Clearer circumstances meriting an extension of the construction period pursuant to Article 33 of the Contract could hardly be imagined. Tulip requested such an extension from Emlak numerous times. However, as discussed below, Emlak refused to grant an extension sufficient to give Tulip the full 900 days to which it was entitled under the Contract, despite the fact that all the delays were beyond Tulip's control. In other words, Emlak abused its position, knowing that zoning for the project was the sole responsibility of itself and TOKI when it signed the Contract with Tulip.

2. Tulip Was Forced To Revise Its Architectural Plans When TOKI Inexplicably Changed The Zoning For Its Project

36. As noted, with TOKI's zoning litigation finally resolved, in June 2008 Tulip began preparing to submit a new application for a construction permit. But once again it was prevented from moving ahead because of Emlak and TOKI. Tulip discovered that the zoning plans designating the boundaries of the sites upon which it was to build Tulip

Towers had been changed from those previously established and provided, and the coordinates for Tulip Turkuaz had been moved. TOKI had simply drawn up a new zoning plan and never even bothered to advise Tulip of this most fundamental change that could possibly be made to a construction project – its location. The reason for these changes, Tulip was informed, was that Emlak had not informed the individuals at TOKI who were responsible for the new zoning of the existence of the Ispartakule III project, although it had apparently kept them fully informed as to the presence and location of Tulip’s neighbors and competitors. Later, further changes to the zoning resulted in a neighboring project (Ihlas 2) being too close to the Tulip Towers site to satisfy zoning regulations. Tulip was the one that had to bear the burden of remedying both of these “mistakes” made by Emlak and TOKI.

37. The notion that TOKI was somehow “unaware” of the existence of the Ispartakule III project was patently absurd. Not only was TOKI the government agency that controlled Emlak, but the same person, Erdogan Bayraktar, was chairman of both TOKI and Emlak. Furthermore, representatives of TOKI had been personally involved in meetings with representatives of Tulip to discuss details of the project. In other words, TOKI was at all times fully informed of Tulip’s project and its plans for the Ispartakule III site, yet made the decision to change the specific location for Tulip’s project – and *only* Tulip’s project – without even notifying Tulip of the change.
38. Given that the problems were the direct result of actions taken (or not taken) by Emlak and TOKI, the reasonable solution would have been for Emlak and TOKI to correct the situation to enable Tulip to move ahead with its plans. Indeed, the Avcilar Municipality, which was responsible for issuing permits, told Tulip that it needed to work with TOKI to resolve the matter of the permit for Tulip Turkuaz. But TOKI refused to do anything to address Tulip’s situation. Instead, Tulip was told that it had to revise its architectural plans and re-submit its application for a construction permit for Tulip Turkuaz to Avcilar Municipality.

39. Emlak's and TOKI's insistence that Tulip revise its architectural plans to account for their "error," and to make room for the neighboring project, was manifestly unfair. Not only was Tulip forced to bear the additional expenses and delays needed to address a problem caused by Emlak and TOKI, but it was the only one of the developers who suffered this penalty. The neighboring project zoned too close to Tulip Towers was not asked to alter its plans. Nor were any other neighboring projects asked to move the location of their buildings, as Tulip had to do for Tulip Turkuaz. However, faced with TOKI's utter refusal to take responsibility for the "mistake" it had made, Tulip had no choice but to revise the architectural plans, incurring additional expenses and experiencing yet more delay.
40. Tulip was not finally able to obtain a valid construction permit until September 2008, 25 *months* after it initially "obtained possession" of the Ispartakule III parcel from Emlak. For much of this time period, it *could not even have legally begun construction* because of the injunction on zoning and construction, regardless of Emlak's insistence that it begin construction without a valid permit. It was then delayed an additional three months for Tulip Turkuaz (and later, even longer for Tulip Towers) when Emlak and TOKI forced it to change its architectural plans to accommodate zoning changes that only became necessary because of Emlak and TOKI's own apparent carelessness. Tulip was obviously severely prejudiced by the more than two years of delays caused by Emlak and TOKI. Nevertheless, Emlak proceeded to pressure Tulip, claiming that *Tulip* was behind schedule.

D. Emlak's Arbitrary Refusal To Grant Tulip Its Contractual Rights And Threats Of Termination

41. With barely five months remaining until the deadline for completion of construction based on the original land delivery date, Tulip had been deprived of nearly the entirety of the construction period to which it was entitled under the Contract. It therefore immediately sought assurances from Emlak that it would have the full 900 days to complete the project. Emlak balked. It insisted that Tulip's 900 days had begun to run as

of 17 August 2006, when the parcel had originally been “made available” to Tulip.³⁶ Privately, on the other hand, representatives of Emlak assured Tulip that Emlak would give it an extension.

42. After some negotiations, Emlak finally agreed to “give” Tulip an “extension” of 471 days starting from the original completion date of 2 February 2009, putting the revised completion date at 19 May 2010. This “extension” was far less time than the 655 days that had elapsed while the Government resolved the zoning litigation it had failed to disclose to Tulip before it signed the Contract, much less the total of 750 days that had gone by before Tulip was able to get a construction permit for Tulip Turkuaz based on the revised plans.³⁷ As a result, Tulip had only a fraction of the 900 days for construction agreed in the Contract, from September 2008 (when the way was finally cleared for Tulip to obtain a construction permit) until May 2010 – all because of delays directly attributable to the Government, not to Tulip.
43. The two years of delay in themselves constituted serious prejudice for Tulip. But the situation was made even worse with the eruption of the global financial crisis in September 2008, precisely when Tulip finally received a construction permit. This made it much more difficult for Tulip to find financing and subcontractors to carry out the project than it would have been two years earlier, when Tulip had signed the Contract expecting to begin immediately. Emlak recognized and accounted for the difficulties the changed economic circumstances posed for other contractors, but not for Tulip. In early 2009 Emlak granted 250-day extensions to neighboring developers to offset delays caused by the global crisis. But when Tulip requested an extension on the same basis, Emlak simply refused. Meanwhile, the companies developing Ispartakule I and II, one of which was EPP, were able to negotiate new contractual terms when they were unable to

³⁶ See Notice of Termination, 24 May 2010, Cl. Exh. C-13 (purporting to terminate Contract based on revised deadline).

³⁷ Letter from Emlak, 6 November 2008 (giving Tulip 471 additional days for construction starting from the original delivery date of 2 February 2009), Cl. Exh. C-14.

begin construction on all the parcels assigned to them under their original contract with Emlak.³⁸ Emlak's more favorable treatment of other projects in the area – all being developed by Turkish companies – remains unexplained.

44. Nor did Emlak's arbitrary and unfair treatment of Tulip and its investment stop with denying Tulip its contractually agreed 900 days for construction. Eager to avoid taking responsibility for its own considerable role in the two-year delay in the project, Emlak latched onto conflicts within the Tulip JV as the cause of "problems" that it claimed, with absolutely no basis, were delaying or otherwise harming the project. In reality, Tulip managed to accomplish an enormous amount in a short period of time and did so despite Emlak's unreasonable conduct and persistent obstruction of its performance.
45. Tulip began performance as soon as the site was handed over in August 2006. Among other things, it hired Moore Stephens Turkey to complete a feasibility study to be used in obtaining additional financing, and, as indicated above, hired world-famous architect Ken Yeang (known for his leading role in developing ecologically sustainable high-rise buildings) to draw up the architectural plans for the project. In June 2007, Tulip posted the US\$11,178,170 performance bond required under the Contract and submitted its application for a construction permit. At the same time, Tulip also provided a higher proportion of equity for the project than comparable development projects.
46. But Tulip soon realized that the local partners Emlak and TOKI had recommended were not what they seemed. Within days after the Contract had been signed, FMS – the second JV partner – attempted to extort thousands of liras from Tulip. FMS had volunteered to have the Contract notarized. The other partners provided it with appropriate powers of attorney for that purpose, and FMS requested that Tulip pay it 500,000 YTL to pay the notarization fee. Tulip, however, quickly discovered that the actual fee was only 18,000 YTL. When Tulip confronted representatives of FMS about the matter, they turned out to be both armed and dangerous. They shot Mr. Murat Mertoglu, one of the Turkish

³⁸ Letter from Emlak to Hayri Hisarciklioglu (Tulip's sales representative in Ankara), 30 May 2011, Cl. Exh.C-15.

shareholders in Tulip I, who was hospitalized for the gunshot wound. Criminal proceedings against the individuals involved are continuing. A few months later, Tulip also discovered that FMS had wrongfully appropriated a check for approximately 3,500,000 YTL (US\$ 2,417,460.97), leading to a criminal indictment of the individuals involved.

47. Tulip sought Emlak's permission, as it was contractually required to do, to remove FMS from the JV, or at least confirmation from Emlak that Tulip was permitted to act on behalf of the JV as the lead partner.³⁹ But Emlak refused to cooperate, even though under Turkish law Tulip had every right to represent the JV. Instead, both Emlak and TOKI expressed "concerns" about the project as early as October 2006.⁴⁰ Astonishingly, it turned out that TOKI's concern was not FMS' criminal conduct, but the efforts of the Turkish shareholders in Tulip I to redress that conduct. Consistent with TOKI's apparent support for FMS, Emlak also initially refused to accept Tulip's architectural plan without FMS' signature, something that FMS refused to provide in light of its dispute with Tulip. Only after Tulip obtained a court order confirming its authority to represent the JV did Emlak consent to accept the plans so that Tulip could apply for a construction license.
48. FMS was not the only partner to cause problems. Not long after FMS' criminality came to light, Mertkan announced its bankruptcy and tried both to leave the JV and to terminate the Contract. Tulip arranged for Mertkan to be replaced by another company, but FMS refused to give its permission for the replacement. Despite knowing that members of FMS had seriously assaulted and shot a Tulip I shareholder, Mr. Mertoglu, Emlak insisted that FMS permission was required to replace Mertkan, and even

³⁹ See Letter from Tulip to Emlak, 5 May 2009, Cl. Exh. C-16.

⁴⁰ See Letter from M. Benitah and M. Mertoglu to E. Bayraktar, 16 October 2006, Cl. Exh. C-17; *see also* Letter from M. Mertoglu to E. Bayraktar, 27 October 2006, Cl. Exh. C-18.

threatened to terminate the Contract altogether.⁴¹ This unreasonable attitude stonewalled progress on the project for several months.

49. Tulip found itself obliged to appeal to the local courts to obtain a ruling that it had the authority to make decisions for the JV as the lead partner. In June 2008, Tulip obtained a court decision holding that the junior partners (such as FMS) could not unreasonably interfere with the project, and confirming Tulip's authority to make decisions for the JV.⁴² Only then did Emlak relent and recognize that Tulip had the authority to act for the JV.
50. But these difficulties were not the cause of any construction delays. The timing alone of Emlak's accusations reveals the lie beneath its posturing. In *November 2008*, a mere two months after the legal obstacles to construction were finally lifted, Emlak began pressuring Tulip to speed up its work, claiming that conflicts within the Tulip JV had somehow caused delays in Tulip's performance. Emlak chastised Tulip for the supposedly "substantial" effects JV issues allegedly had on the project, urging Tulip to complete the project "as soon as possible and without any problem." It is difficult if not impossible to imagine just how Emlak could have believed that any conflicts in the JV could possibly have caused a "substantial" delay – which could not have been more than two months, under the circumstances – after the 25-month delay caused by the Government itself. Emlak soon followed up with another letter alleging delays attributable to Tulip and demanding to know what Tulip would do to address the situation. This pattern of harassment continued throughout the duration of the project.
51. Emlak and TOKI also apparently engaged in a campaign of negative publicity designed to undermine Tulip's burgeoning success, frustrating many possible sales. Tulip's sales manager was told by customers that they had been shown copies of Emlak's letters

⁴¹ See Letter from Tulip to Emlak, 5 May 2009, Cl. Exh. C-16.

⁴² See Case No. 2006/624, Miscellaneous Verdict from the 9th Istanbul Commercial Court of 1st Instance, 11 June 2008, Cl. Exh. C-19.

threatening to terminate Tulip's contract when they visited the sales offices of neighboring development projects. This obviously raised concerns among potential buyers that purchasing units in Tulip Turkuaz was too much of a risk, concerns that Tulip was obliged to continually assuage – while nonetheless having a legal right to sell. In fact, Emlak and TOKI repeatedly assured Tulip verbally that they had no intention of terminating the Contract. They repeated these same assurances to Mr. Fehmi Celikkol, whom Tulip had hired in 2009 as an Emlak liaison for the project. Indeed, scarcely a month before the termination, top officials of Emlak and TOKI attended the launch of Tulip Towers, giving the appearance of lending their credibility and support to the project.

52. Yet Emlak's threatening letters continued to arrive at Tulip's offices. In 2009, Tulip was advised by members of TOKI's inner circle to hire Fehmi Celikkol to serve as a coordinator for the project and liaison with Emlak. Mr. Celikkol was recommended by Mr. Sadik Soylu, an adviser to TOKI chairman Erdogan Bayraktar, as someone who was close to Mr. Bayraktar and could improve Tulip's communications with TOKI and Emlak. Mr. Celikkol was also the general secretary for Ilim Yayma Vakfi, a prominent charitable foundation with close ties to the ruling party and the Prime Minister. Nevertheless, in or around February 2010, Emlak sent Tulip a letter advising that it must complete all work on the project by 19 May 2010 or face termination – obviously, an impossible deadline.⁴³ Soon afterwards, Emlak ceased distributing funds to Tulip from the revenues earned through sales, allegedly for minor bookkeeping reasons. This placed further significant pressure on Tulip's cash flow, which was already strained by the need to hire additional subcontractors to satisfy Emlak's wholly unrealistic and indeed, impossible, deadlines.

⁴³ See Letter from Emlak to Tulip, 10 March 2010, Cl. Exh. C-20.

E. Tulip Performs All Of Its Obligations Under The Agreement

53. Emlak's pressure was patently unjustified. It certainly had no basis when it began, in November 2008, just after Tulip obtained its construction permit. And it had no better basis in the following months after Tulip began construction. With the new permit in hand, Tulip began construction on the project in or around December 2008. Because of the delays caused by the zoning litigation, Tulip obtained its construction permit for Tulip Turkuaz just a few weeks before the collapse of major financial institutions and the beginning of the global financial crisis. Turkey's housing and development industry came to a virtual standstill and did not begin to recover until the third quarter of 2009. Tulip, however, persevered despite the difficult circumstances. By mid-2009 it had already invested more than US\$45 million cash equity in the project and was beginning sales of units in Tulip Turkuaz. To the best of Tulip's knowledge, no other developer on any of TOKI's comparable projects contributed so much cash equity to those projects. After Tulip's first subcontractor, Yeni Dogus (which had also been recommended by TOKI), was unable to make sufficient progress on construction of the full 11 buildings that constituted Tulip Turkuaz, Tulip hired additional subcontractors to take over work on half the buildings. By early 2010, there were more than 300 workers on the site every day.
54. At the same time, Tulip began to implement its sales and marketing plan. Sales for Tulip Turkuaz began in May 2009 and were immediately a success. In part this was due to Tulip's extensive advertising and marketing efforts.⁴⁴ However, Tulip also worked intensively with local banks to put together a variety of attractive mortgage packages to facilitate sales. By April 2010, Tulip had succeeded in selling 505 units out of a total of 1,200 units for Tulip Turkuaz.⁴⁵ With the funds generated by these sales, Tulip was

⁴⁴ For example, Tulip brought together numerous high-profile Turkish investors, Government officials, and others for a ceremony marking the opening of its Ankara office in November 2009. *See* Photographs from November 2009 meetings, Cl. Exh. C-21.

⁴⁵ *See* Letter from Adrianus Van Herk to Jean-Paul Dirkse, 19 July 2010, Cl. Exh. C-22.

assured of being able to complete the entire project within the next year to 18 months, a fact which Emlak must have recognized. Moreover, units in Tulip Turkuaz commanded significantly higher prices than apartments in the neighboring projects, selling for 2,500-2,600 YTL per square meter as opposed to 1,200-1,600 YTL per square meter.⁴⁶ With a total area of 132,000 square meters, Tulip Turkuaz alone was worth more than 357,750,000 YTL (US \$228,638,077) by May 2010. The average expected sale price for Tulip Towers was 3,500 YTL per square meter for residential areas and 4,500 YTL per square meter for the commercial space. The total area for Tulip Towers was 83,000 square meters (39,000 square meters being commercial space and 44,000 square meters residential area). Tulip Towers was worth a total of 329,500,000 YTL (US \$ 210,583,498). Tulip was also moving ahead with Tulip 360, for which there were 150 reservations made for units within just a few short months.

55. The pictures below, taken in early 2011, provide a sense of just how far Tulip had come in such a short time:

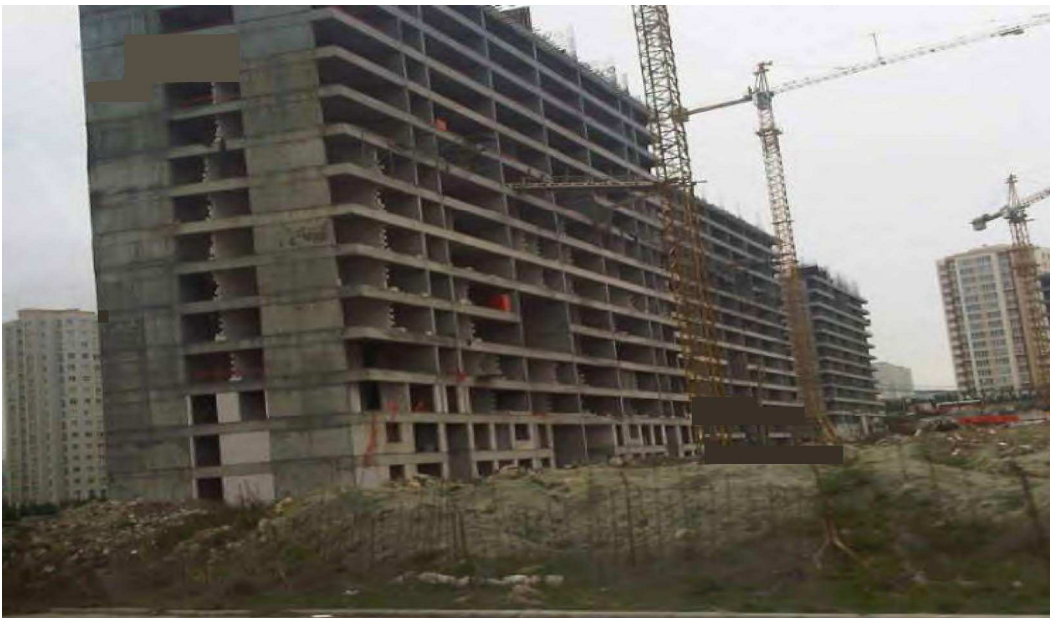


Figure 3: Tulip Turkuaz, early 2011

⁴⁶ *Id.*



Figure 4: Tulip Turkuaz, early 2011

56. In short, scarcely a year and a half, Tulip had made extraordinary progress on both construction and sales of Tulip Turkuaz units, generating even more revenue than TOKI or Emlak had expected. It had done so, moreover, not only without Emlak and TOKI's cooperation and assistance, but after overcoming multiple obstacles placed in its path by both TOKI and Emlak. And it had done so despite a crippling financial crisis that caused a severe slowdown in Turkey's housing sector. Under the Contract, Tulip still should have had almost another 400 days to complete construction and was well on its way to completing the entire project by August 2011. Meanwhile, the main contractual goal of generating revenue was already being met far in excess of the Government's expectations. Nevertheless, because of the Government's zoning delays, Emlak considered Tulip to be "late," despite the fact that the zoning problems were solely attributable to Emlak and TOKI.
57. As the completion date approached, Tulip had multiple meetings and discussions with both Emlak and TOKI about an extension. Based on the pace of construction and sales, Tulip projected a completion date of August 2011. Emlak repeatedly gave verbal

assurances that it would not hold Tulip to the May 2010 completion date and that there would be “no problem” about deadlines, but it refused to put these assurances in writing. Then it began delaying Tulip’s remittances of its share of revenues from sales. As allowed and anticipated by the Contract, Tulip planned to use revenues from such sales to fund additional construction, yet Emlak increasingly delayed remitting Tulip’s share of revenues to it in a timely manner.⁴⁷ By the early spring of 2010, Emlak’s delayed remittances of revenue from sales had begun to place severe pressure on Tulip’s cash flow.

58. It was against this backdrop that in mid-May 2010, and contrary to its repeated verbal assurances to Tulip (made directly to Tulip shareholders and subcontractors as well as to Tulip’s Emlak liaison Mr. Fehmi Celikkol), Emlak abruptly cashed Tulip’s performance bond, unlawfully terminated the Contract, and attempted to confiscate and occupy the project site – just as the rate of both construction and sales began to hit its stride and Emlak itself stood to reap the substantial benefits of Tulip’s hard work. By early June 2010, construction and sales had ceased, Tulip’s subcontractors had abandoned the site, and Tulip was fighting in court to prevent Emlak from re-tendering the project to a Turkish contractor. In July 2010, Emlak did just that, awarding a new contract to none other than Dogu Construction, in the same group of companies as Yeni Dogus, Tulip’s former main subcontractor, notwithstanding Tulip’s pending court challenge to Emlak’s unlawful termination of the Contract. As a result, Tulip was deprived of its entire investment in the project, and Emlak, rather than merely reaping the substantial benefits of Tulip’s hard work, simply confiscated Tulip’s entire investment, including all monies from sales owed to Tulip that remained undisbursed from Emlak’s account. Tulip subsequently lost its investment in its other housing projects in Turkey as well because of the termination of the Ispartakule III project.

⁴⁷ See Contract, art. 5.5, Cl. Exh. C-2.

F. Emlak's Wrongful Termination Of The Contract

59. On 20 May 2010, Mr. Celikkol reported that Emlak had definitively decided not to grant an extension and that the Contract was to be terminated. The next day, Mr. Erten met with Emlak representatives, including the General Manager of Emlak, Murat Kurum, to discuss the situation. During the conversation, Mr. Kurum told Mr. Erten that Emlak intended to terminate the Contract, assuring them that as a state entity, Emlak would have no difficulty doing so whether or not such termination was lawful. By the end of the conversation, however, Mr. Kurum appeared to back down, assuring Mr. Erten that Emlak would not terminate the Contract. Instead, he told him that most of Emlak's board was ready to grant Tulip an extension; there was just one holdout who would need to be convinced.
60. The following Monday, 24 May 2010, Mr. Celikkol spent much of the day trying to locate the supposed holdout on Emlak's board. At 6:00 p.m., with no warning, Tulip received a fax from Fortis Bank informing it that Emlak was attempting to draw on its performance bond. Within hours, the money had been withdrawn. A formal notice of termination followed, stating that the Contract had been terminated through an Emlak Board decision of 18 May 2010 – three days before the meeting with Mr. Kurum.⁴⁸
61. Tulip refused to accept the termination, challenged it in the Bakirkoy court and instructed its subcontractors to continue to work on the project in the meantime. On 7 June 2010, Emlak sent representatives to the site to perform an assessment of the amount of work completed pursuant to Article 31 of the Contract. When Tulip informed them that it did not agree that the Contract had been terminated, they left and returned the following day with police officers to force the inspection.
62. On 24 June 2010, Emlak returned to the site with approximately 400 police officers and 60 "private security guards" and attempted to take over the site by force, as illustrated in

⁴⁸ See Notice of Termination, Cl. Exh. C-13.

the photographs below taken during the raid. The gentleman in the suit and tie on the right is Murat Kurum, the General Manager of Emlak, with whom Tulip had been dealing personally in its efforts to obtain additional time for construction.



Figure 5: Invasion of the site, June 2010



Figure 6: Murat Kurum during the invasion of the site, June 2010

63. The security guards, as well as lawyers purporting to represent Emlak, entered Tulip's sales office and remained there for two days. Tulip immediately applied to the public prosecutor's office to have the police officers and Emlak's security guards removed.⁴⁹ The public prosecutor investigated the situation and made the following factual determinations:

[O]n 06.24.2010, Emlak Gayrimenkul Yatirim Ortakligi A.S. officials Murat Kurum and Hasan Hacıhasanoğlu, taking with them the other

⁴⁹ Tulip's complaint to the Chief Prosecutor of the Republic in Kucukcekmece, 25 June 2010, Cl. Exh. C-23.

suspects whose particulars are given above and who are employed as security personnel by the private security company Tac Guvenlik Sirketi, and accompanied further by security forces supplied by the County Security Directorate, arrived at the construction site and tried to take possession of it by force. When the complainants resisted, the arrivals, together with the private security personnel, broke down the remote-controlled vehicle-access gate erected at the site and entered the site by force. The police officers providing security intervened to prevent fighting between the two sides. The private security personnel employed by Tac Guvenlik Sirketi remained on the site in uniform, prevented the complainants and their employees from entering and leaving the site and made difficulties, and during these incidents, suspect Kenan Erdogan, who was at the head of the private security force, attacked the complainants' attorney Atilla Tunckale and tore his clothes, and, on the instructions of the suspect Murat Kurum, the private security personnel kept things in this state on the site until 06.30.2010.⁵⁰

64. As a result, a number of individuals, including Mr. Kurum, were indicted for criminal trespass. Nevertheless, the police remained on the property for over two months, only vacating the premises in September 2010.
65. In the meantime, and notwithstanding Tulip's court challenge to the unlawful termination, on 15 July 2010 Emlak announced a new tender for the property.⁵¹ Tulip understands that Emlak signed a contract in September 2010 with Dogu Construction, which has been working on the site, presumably under the new contract, since approximately October 2010. Far from having any benefit for Emlak, TOKI, or the Republic of Turkey, the re-tendering has put the completion of the project even further into the future, in addition to introducing new uncertainties as to financing for the project.

⁵⁰ Indictment No. 2010/6644 to Kucukcekmece Criminal Court of First Instance, 30 September 2010, at 7, Cl. Exh. C-24.

⁵¹ According to press reports, Emlak assured bidders that the winner would be compensated with Tulip's own money if the tender were challenged. "Emlak GYO General Director Murat Kurum assessed the tender bidding as follows: 'The offers will increase next week during the second session. Tulip Gayrimenkul made a TRY145 million commitment to us for this project. However, it would be wrong to make a comparison, as the company winning the new tender bidding will give the 205 units directly to us. These are the units that have been sold. If there is still a difference with the initial offer, we will demand that from the first contractor [*i.e.*, Tulip]. We will deduct it from the down payment on which we have put a hold.'" See *Tulip Turkuaz' in Arsasina En Iyi Teklif Gul Yapi'dan, Menekse Ataselim*, HABERTURK, 16 July 2010, Cl. Exh.C-25.

Meanwhile, Tulip's partner in Tulip 360 terminated that contract on grounds that Tulip would not be able to perform now that its project with Emlak and TOKI had been confiscated by the Government.

G. Pending Litigation In Local Courts

66. Emlak's unlawful termination of the Contract led to several claims still pending before the Turkish local courts, in particular: (i) the determination of whether Emlak's termination of the Contract was valid; (ii) the criminal responsibility of Emlak's officers for the unlawful occupation of the construction site on 24 June 2010; and (iii) the validity and effects of the new tender.
67. As previously noted, Tulip challenged Emlak's unilateral termination of the Contract. Tulip filed a lawsuit in the Bakirkoy 5th Commercial Court of First Instance (File No. 2010/788) challenging Emlak's termination as invalid under Turkish law and asserting that the Contract continues to be effective. Initially the Court ruled that a decision in the case would require detailed examination of all relevant facts and legal questions. It accordingly denied many of Tulip's requests for injunctive relief. But after a year, and having dealt only with procedural matters and not examined any of the substantive issues as it initially decided, the First Instance Court suddenly dismissed the case on 16 June 2011, accepting Emlak's argument that Tulip lacked standing to bring the case.
68. Tulip initially requested the court to issue an injunction ordering that: (i) Emlak be barred from entering the construction site (for any purpose other than evaluating progress); (ii) Emlak be barred from tendering the project through a new bid; (iii) an annotation be made in the title deeds to show the existence of this legal action and prevent transfers; (iv) performance under the Contract be allowed to continue (in particular allowing the sales to continue); (v) the performance bond that was improperly called be returned; and

(vi) Emlak stop making public announcements and declarations regarding the Contract's termination.⁵²

69. Many of these requests have become moot due to Emlak's subsequent actions. However, the court added the annotation "being litigated" on the deeds of title subject to the Contract and temporarily blocked the account used for payments under the Contract, preventing any payments from and to such account.⁵³ In turn, Emlak has requested the Kadikoy Civil Court of General Jurisdiction to issue a preliminary injunction ordering Tulip to deliver the construction site to Emlak. This request was dismissed on jurisdictional grounds.⁵⁴
70. Furthermore, on 30 September 2010, the Prosecutor of the 6th Criminal Court of First Instance of Kucukcekmece filed an indictment before the Criminal Court naming Murat Kurum, the General Manager of Emlak, and others for the crimes of trespass, violation of the right to conduct business and to work, and damage to property for their roles in Emlak's forced occupation of the Tulip construction site on 24 June 2010.⁵⁵
71. Tulip also requested an investigation of Emlak's re-tendering of the project to Dogu Construction on the ground that Emlak and Dogu had conspired to rig the tender. The investigation at the Kadikoy Prosecutor's office was closed due to a supposed lack of evidence, although Tulip had provided significant evidence to demonstrate its claim. Further, the prosecutor's office never interviewed the witnesses put forward by Tulip, nor did it inform Tulip of the decision. Instead, it made its decision based solely on the

⁵² File No. 2010/788E, Demand for an Injunction filed in the Bakirkoy 5th Commercial Court of First Instance by Tulip, 16 June 2010, Cl. Exh. C-26; File No. 2010/788, Request for a Temporary Injunction filed in the 5th Commercial Court of Bakirkoy by Tulip, 12 July 2010, Cl. Exh. C-27.

⁵³ Decision of the Bakirkoy 5th Commercial Court of First Instance, 14 July 2010, Cl. Exh. C-28; Interlocutory Decision of the 5th Commercial Court of Bakirkoy, 17 August 2010, Cl. Exh. C-29. *See also* Interim Panel Decision, 2 July 2010, Cl. Exh. C-30.

⁵⁴ Decision of Kadikoy 5th Civil Court, 19 July 2010, Cl. Exh. C-31.

⁵⁵ *See* Indictment to Kucukcekmece Criminal Court of First Instance, Cl. Exh. C-24.

testimony of the accused parties, never bothering even to let Tulip know of the outcome of the “investigation.”

H. Turkey’s Breaches Of The BIT

72. Respondent’s treatment of Tulip and its investment, through the acts and omissions of TOKI and Emlak, has violated its international legal obligations under the BIT and customary international law as set forth below and as will be further elaborated in the course of this arbitration.

73. Article 3(1) of the BIT requires that:

Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment[,] sale or liquidation thereof by those investors.

Article 3(2) provides that:

Each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors or to investments or investors of any third State, whichever is more favourable to the investor.

Finally, the same provision requires that “Each Contracting Party shall observe any obligation it may have entered into with regard to investments.”

74. Respondent’s treatment of Tulip and its investment violated these obligations through, *inter alia*, the following acts and omissions:

- The inducement of Tulip’s investment without disclosing the existence of the pending zoning litigation to Tulip before the Contract was signed, as well as TOKI’s failure to provide zoning for the Ispartakule III project and Emlak’s failure to deliver the land in a timely fashion, contrary to representations in the bid documents;

- The arbitrary and unreasonable refusal to remedy last-minute alteration of the zoning plans for the Ispartakule III site, a change imposed only on Tulip and not on Tulip's competitors in neighboring projects, thus forcing Tulip to revise its architectural plans at substantial cost in both money and time;
- The arbitrary and unreasonable refusal to accord Tulip the full 900 days for construction required by the Contract;
- The arbitrary and unreasonable abuse of discretion to grant Tulip an extension to offset damages caused by the global economic crisis that began in 2008, while nonetheless providing such extensions to Tulip's Turkish competitors;
- Failure to provide national treatment to Tulip;
- The continual harassment of Tulip and threats to terminate Tulip's Contract for delays that were attributable, not to Tulip, but to Emlak, TOKI and the rest of the Government;
- Unreasonable, arbitrary, and damaging public announcements and declarations regarding the termination of the Contract;
- Arbitrary and unreasonable demands that Tulip accelerate construction on the project while withholding Tulip's share of revenues obtained through unit sales;
- Representations to Tulip that it would be given an extension while simultaneously threatening to terminate the Contract;
- The sudden termination of the Contract, in violation of the Contract and Turkish law;
- The forcible occupation of the Ispartakule III site in an effort to force Tulip to abandon the property; and
- The re-tendering of the project and award of a contract to one of Tulip's sub-contractors, notwithstanding Tulip's pending legal challenge to the purported termination.

75. These acts and omissions, as outlined above and as will be further developed during this arbitration, were arbitrary and unreasonable. As a result, Respondent failed to accord Tulip and its investment national treatment and fair and equitable treatment; impaired Tulip's enjoyment of its investment through arbitrary and discriminatory treatment; failed to provide Tulip's investment with full protection and security; and violated Respondent's obligation to respect its contractual commitments with respect to investments in its territory.

76. In addition, Article 5 of the BIT provides as follows:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory;
- (c) the measures are accompanied by provision for the payment of just compensation.

77. Respondent violated Article 5 of the BIT by, *inter alia*:

- Purporting to terminate the Contract unilaterally, contrary to the terms of the Contract and Turkish and international law;
- Attempting to forcibly seize the Ispartakule III project from Tulip's control;
- Depriving Tulip of its entire investment, not only without any pretense whatsoever of doing so in the public interest, but acting *contrary* to public interest by extending the projected time for completion of the project;
- Depriving Tulip of the entirety of its investment in a manner that was arbitrary, capricious, and discriminatory;

- Refusing to provide Tulip with any compensation whatsoever, much less just compensation, for the loss of its investment.

78. Each of these violations will be further detailed as these proceedings unfold.

IV. ICSID JURISDICTIONAL REQUIREMENTS

79. The ICSID Convention sets forth certain conditions that must be satisfied in order for ICSID to retain jurisdiction over a dispute submitted to it. These are:

- (1) the dispute must be “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.” *ICSID Convention, Article 25(1)*;
- (2) the dispute must be “legal.” *ICSID Convention, Article 25(1)*;
- (3) the dispute must be one “arising directly out of an investment.” *ICSID Convention, Article 25(1)*;
- (4) the parties to the dispute must “consent in writing to submit [the dispute] to the Centre.” *ICSID Convention, Article 25(1)*; and
- (5) the dispute must not fall within the class or classes of disputes which the Contracting State that is a party to the dispute would not consider submitting to the jurisdiction of the Centre. *ICSID Convention, Article 25(4)*; and
- (6) the absence of any prerequisite regarding the exhaustion of local administrative or judicial remedies. *ICSID Convention, Article 26*.

80. As demonstrated below, the instant dispute between Tulip and Turkey satisfies the prerequisites for ICSID jurisdiction.

A. Nationality

81. Tulip is incorporated in the Kingdom of The Netherlands. The Netherlands became a party to the ICSID Convention on 14 October 1966, and remains a party to this day.⁵⁶

⁵⁶ See ICSID, available at <http://icsid.worldbank.org> (last accessed 5 October 2011).

Accordingly, Tulip is a national of a Contracting State for the purposes of the ICSID Convention. Likewise, Mr. Meyer Benitah, for whose share in the investment Tulip also claims, is a Dutch national.⁵⁷

82. The Republic of Turkey is also a party to the ICSID Convention, which it signed on 24 June 1987. The ICSID Convention entered into force in Turkey on 2 April 1989.⁵⁸

B. Legal Dispute

83. This dispute involves Turkey's violations of the Treaty, customary international law, and Turkish law. The acts and omissions of Turkey described above and to be developed further in the course of this proceeding violate, *inter alia*, the following Treaty provisions: Article 3(1), Article 3(2) and Article 5.

84. Thus, Turkey's violations of the Treaty provisions, as well as its violations of customary international law and Turkish law, involve Claimant's legal rights and entitle Claimant to legal remedies.

C. Investment

85. Although "investment" is not defined in Article 25 of the ICSID Convention, the term is widely understood to have a broad definition such as that found in the Treaty. Indeed, Article 1(b) of the Treaty states as follows:

'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;

⁵⁷ Passport of Mr. Meyer Benitah, Cl. Exh. C-32.

⁵⁸ See ICSID, available at <http://icsid.worldbank.org> (last accessed 5 October 2011).

- iii. a claim to money or a claim to performance having economic value and associated with an investment;
 - iv. industrial property rights, including rights with respect to patents, trademark, trade names, industrial designs and know-how and goodwill and copyrights;
 - v. any right conferred by law or contract, and any licences and permits pursuant to law.
86. Under this definition, Tulip’s investment in Turkey is comprised of its majority share ownership of Turkish Tulip, as well as the tens of millions of dollars it invested directly in Ispartakule III and related projects. Tulip’s investment thus includes contractual rights under the Contract, as well as legal rights. As a result, this dispute arises directly out of an investment, as required by Article 25(1) of the ICSID Convention.

D. Turkey Has Consented To Arbitration Under The ICSID Convention

87. Claimant has consented to ICSID arbitration by virtue of this Request for Arbitration.
88. Turkey’s consent to arbitration under the ICSID Convention is laid out in Article 8 of the Treaty, and provides Turkey’s consent for arbitration of investment disputes “at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party dispute, and there has not been rendered a final award.”⁵⁹ Turkey further specified that the parties to any dispute must first seek to resolve the dispute “by consultations and negotiations in good faith.”⁶⁰ Both criteria have been met here.
89. As noted above, Emlak purportedly terminated the Contract as of 18 May 2010. More than one year has therefore passed since the dispute between Claimant and the Government arose. The claims that Tulip I has brought before the Turkish courts relate purely to Tulip’s contractual rights under Turkish law. In contrast, the present Request

⁵⁹ BIT, art. 8(2), Cl. Exh. C-1.

⁶⁰ *Id.*

for Arbitration seeks redress for Turkey's violations of the BIT with respect to the Dutch investment. Even if the pending disputes in Turkish courts were considered to encompass all of the treaty violations set forth above, none of those municipal courts have rendered a final award.

90. Claimant has also complied with the requirement that it first seek to resolve this dispute through good faith consultations and negotiation. Soon after the dispute arose, Claimant sent several letters seeking a negotiated resolution to the dispute, including a letter to the Dutch Embassy in Turkey seeking its assistance.⁶¹ Representatives of Tulip also met with representatives of Emlak and, later, with other representatives of the Government, to discuss the possibility of settling the dispute, but were unable to reach a resolution. Mr. Burak Erten was invited by Mr. Kemal Unakitan, former Minister of Finance for seven years and a founding member of the AKP Party – the present and governing political party in Turkey – to seek an amicable solution to the dispute. Mr. Erten and Mr. Benitah then met with Mr. Unakitan. In response to Mr. Benitah's inquiry, Mr. Unakitan confirmed that he was there as a representative of TOKI and the Republic of Turkey. During the meeting, Messrs. Erten and Benitah agreed to a proposal made by Mr. Unakitan to return the project and confiscated monies to Tulip. Mr. Benitah requested, however, that the proposal be made in writing. Mr. Unakitan promised to provide a written proposal soon thereafter, but never did. Over the following nine months, Mr. Erten continued to meet with various AKP party members who offered to help resolve the dispute, but no official settlement proposal ever materialized.
91. The jurisdictional requirements for submitting this dispute to arbitration have therefore been met.

V. PROCEDURAL MATTERS

92. There is no agreement between the parties regarding the number of arbitrators or the method for the constitution of the Arbitral Tribunal. As a result, for the purposes of Rule

⁶¹ Letter from Tulip to Emlak, 1 June 2010, Cl. Exh. C-33; Letter from Tulip to Emlak, 2 June 2010, Cl. Exh. C-34; Letter from Adrianus Van Herk to Jean-Paul Dirkse, 19 July 2010, Cl. Exh. C-22.

2 of the ICSID Arbitration Rules, Claimant proposes that a three-member Arbitral Tribunal be appointed and the 20-day time limit contained in Rule 2(1)(b) of the ICSID Arbitration Rules run from the date of registration of this Request.

93. Claimant further proposes that the Tribunal be appointed in accordance with the following procedure:

- (1) Within 25 days of registration of the Request for Arbitration, Claimant shall appoint its arbitrator;
- (2) Within 30 days of the appointment of Claimant's arbitrator, Respondent shall appoint its arbitrator;
- (3) The two arbitrators so appointed shall, within 30 days of the appointment of Respondent's arbitrator and in consultation with the parties, jointly select a third arbitrator to serve as President of the Arbitral Tribunal; and
- (4) In the event that a party fails to appoint its arbitrator or the two party-appointed arbitrators are unable to reach agreement on the identity of the President of the Arbitral Tribunal within the time limits specified above, the Chairman of the ICSID Administrative Council shall appoint the arbitrator or arbitrators not yet appointed and shall designate the President of the Arbitral Tribunal.

94. Claimant further proposes that the place of arbitration be at the seat of ICSID in Washington, D.C. and that the language of the arbitration be English.

95. Tulip respectfully requests that the foregoing be taken as Claimant's proposal for purposes of Rule 2(1)(a) of the ICSID Arbitration Rules.

VI. REQUEST FOR RELIEF

96. Specifically reserving its rights to supplement or otherwise amend its claims and the relief requested in connection therewith, Claimant requests an award granting it the following relief:

- A declaration that Turkey has violated the Treaty, customary international law and Turkish law with respect to Claimant's investment;
- Compensation to Claimant for all damages that it has suffered, to be developed and quantified in the course of this proceeding but likely to include, by way of example and without limitation, compensation for the wrongful expropriation of Tulip's investment, and damages for Respondent's failure to provide Tulip and its investment fair and equitable treatment, national treatment, and full protection and security, and its arbitrary and discriminatory interference with Tulip's use and enjoyment of its investment;
- All costs of this proceeding, including attorneys' fees;
- An award of compound interest until the date of Turkey's final satisfaction of the award; and
- Such other relief as the Tribunal may deem appropriate in the circumstances.

VII. CONCLUSION

97. For the reasons set forth above, Claimant respectfully requests that ICSID register this arbitration against the Republic of Turkey.

Dated: 11 October 2011

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Sara Cantalero", written over a horizontal line.

Crowell and Moring LLP