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| SVEA COURT OF APPEAL | **JUDGMENT** | Case No. |
| Department 02 | 26 February 2018 | T 6582-16 |
| Division 020103 | Stockholm | |

**CLAIMANT**
Mr. CU
*[INFORMATION OMITTED]*

**RESPONDENTS**
Republic of Turkey
Address at counsel

Counsel: Advokat Bo G H Nilsson and advokat Therése Isaksson and jur. kand. Emma Blomstervall
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**MATTER**
Invalidity etc. of arbitral award rendered in Stockholm on 20 April 2016

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**JUDGMENT OF THE COURT OF APPEAL**

1. The Court of Appeal rejects the motion of the Republic of Turkey to dismiss Mr. CU's motion for invalidity pursuant to Section 33 of the Swedish Arbitration Act (1999:116).
2. The Court of Appeal dismisses Mr. CU's motion for the annulment of the arbitral award pursuant to Section 34 of the Swedish Arbitration Act.
3. The Court of Appeal rejects Mr. CU's motion for dismissal of the circumstance referenced by the Republic of Turkey that Mr. CU may not commence litigation against the Republic of Turkey because he is a Turkish citizen.
4. The Court of Appeal rejects Mr. CU's motion that the arbitral award shall be declared invalid.
5. The Court of Appeal rejects Mr. CU's motion that the arbitral award be adjusted pursuant to Section 36 of the Swedish Arbitration Act.
6. Mr. CU is ordered to compensate the Republic of Turkey for its litigation costs before the Court of Appeal in the amounts of USD 371,633 and CHF 137,130, of which USD 371,481 and CHF 136,818.44 comprise costs for legal counsel, plus interest on the first two amounts pursuant to Section 6 of the Interest Act (1975:635) as from the date of the Court of Appeal's judgment until the day of payment.

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## BACKGROUND

On 7 March 2014, Mr. CU commenced arbitration against the Republic of Turkey (Turkey) before the Arbitration Institute of the Stockholm Chamber of Commerce (Arbitration V/2014/023). Messrs. BC (chairman), DC and PS were appointed as arbitrators.

The arbitration was commenced pursuant to article 26 of the Energy Charter Treaty (ECT). Mr. CU asserted that Turkey had violated its obligations under articles 10 and 13 of the ECT, amongst others, through being involved in unlawful expropriation of investments he had made in Turkey by way of acquisitions of the two Turkish power companies Çukurova Elektrik A.Ş. (ÇEAŞ) and Kepez Elektrik T.A.Ş. (Kepez). He moved that Turkey should be ordered to pay damages to him because of the violations.

During the arbitral proceedings, Turkey objected to the jurisdiction of the arbitral tribunal to review the grounds in Mr CU's claim on several grounds. In a decision of 20 July 2015 the arbitral tribunal decided to firstly examine Turkey's objection that the arbitrators lacked jurisdiction *ratione personae*, because Mr. CU was not an investor in the sense defined by articles 1(7)(a)(i) and 26 of the ECT. In the English language version of the articles, the relevant parts have the following wording.

> **Article 1: Definitions**
> As used in this Treaty: [- - -]
> (7) "Investor" means:
> (a) with respect to a Contracting Party:
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; [- - -]
>
> **Article 26: Settlement of Disputes between an Investor and a Contracting Party**
> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. [- - -]
>
> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: [- - -]
> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

The parties agreed that the said articles should be interpreted pursuant to the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties

(the "Vienna Convention"). The relevant parts of the said articles have the following wording.

> **Article 31 – GENERAL RULE OF INTERPRETATION**
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> **Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION**
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result which is manifestly absurd or unreasonable.

As grounds for the arbitral tribunal's jurisdiction, Mr. CU, who is a Turkish citizen, invoked that he permanently resided in another contracting state other than Turkey. The arbitral award was rendered on 20 April 2016. In the interpretation of article 1(7)(a)(i) of the ECT, the arbitral tribunal concluded that a physical person can be qualified as an investor both by being a citizen and by permanently residing in a contracting state as per the provisions of that state's legislation. According to the arbitral tribunal neither takes precedence, and there was thus nothing to prevent an investor, who permanently resides in a contracting state, to commence litigation against another contracting state, of which the investor is a citizen. The arbitral tribunal further stated that the requirement that an investor shall be permanently residing in a contracting state means *in part* a requirement that the investor shall have legal status as permanent resident as per that state's legislation, *and in part* a requirement that the investor actually resides there permanently.

Further, the arbitral tribunal concluded that article 26 of the ECT poses additional requirements which must be met for an investor to qualify as a protected investor under the treaty. The arbitral tribunal concluded that the provision according to its wording covers disputes between a contracting state and an investor from another contracting state, concerning investments made by the investor on the territory of the former state. According to the arbitral tribunal, this means that the investor, in order to enjoy protection under the ECT, must have made his/her investment in a certain contracting state while he/she permanently resided in another contracting state, i.e. he/she must have made a cross-border transaction. According to the arbitral tribunal, it is not possible for an investor to obtain protection under the ECT by moving to another contracting state after the investment has been made. The arbitral tribunal stated that the purpose of the ECT is to protect foreign investors and not domestic investors who invest in their "home state".
The arbitral tribunal concluded that Mr. CU was not a protected investor because he did not reside in another contracting state at the time when he made the alleged investments, i.e. between 1996 and 2000, and noted that Mr. CU had not alleged that he had. Therefore, he was not an investor from another contracting state. According to the arbitral tribunal, Mr. CU was already for this reason not entitled to commence arbitration against Turkey based on the relevant article.
The arbitral tribunal also reviewed whether Mr. CU had been permanently resident in another contracting state at any later point in time. The arbitral tribunal concluded that it had not been established that he had been permanently residing

in the United Kingdom during 2002-2003, during which time some of the violations of the ECT he invoked in the arbitration had occurred. However, the arbitral tribunal did conclude that Mr. CU had been permanently residing in France since the year 2009. However, the arbitral tribunal concluded that this was not sufficient to obtain the protected investor status giving the right to commence arbitration against Turkey under the ECT. Therefore, the arbitral tribunal dismissed his action.

Following the closing of the arbitration, Mr. CU on 26 April 2016 and 17 May 2016, requested an additional award on the arbitral tribunal's jurisdiction. The motions for an additional award were dismissed by the arbitral tribunal through decisions of 10 May 2016 and 6 June 2016, respectively.

## CLAIMS

*Mr. CU* has moved that the Court of Appeal shall (i) declare the arbitral award wholly or partially invalid or (ii) wholly or partially annul the arbitral award, or (iii) wholly or partially adjust the arbitral award.
*Turkey* has disputed Mr. CU's action in its entirety and moved that Mr. CU's motions (i) and (ii) shall be dismissed or alternatively rejected and that motion (iii) shall be rejected.

Mr. CU has disputed the motions for dismissal.

The parties have claimed compensation for their litigation costs.

Further, the parties have moved that certain circumstances referenced by the other party shall be dismissed. Mr. CU has moved that the circumstance referenced by Turkey that he is prevented from commencing litigation against Turkey because he is a Turkish citizen shall be dismissed (see page 9 of this judgment). Turkey has moved that the circumstance referenced by Mr. CU that the arbitral tribunal exceeded its mandate or committed a procedural error in connection with its dismissal of his motion for a separate arbitral award shall be dismissed (see page 17 of this judgment). Each party has disputed the other party's respective motions for dismissal.

## LEGAL GROUNDS

**Mr. CU**

The arbitral award or the manner in which it was given is obviously in violation of fundamental principles of Swedish law. Therefore, the arbitral award is invalid pursuant to item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act (1999:116).

The arbitral tribunal has exceeded its mandate or has, without it having been caused by the claimant, committed a procedural error which affected the outcome of the arbitration. Therefore, the arbitral award shall be wholly or partially declared invalid (items 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

The arbitral tribunal's conclusion that it did not have jurisdiction to review his action is incorrect. Therefore, the arbitral award shall be adjusted such that it is annulled (the first paragraph of Section 36 of the Swedish Arbitration Act).

**The Republic of Turkey**

By way of the arbitral award, the arbitral tribunal closed the arbitration without a review of the merits. As a result, the arbitral award can only be challenged pursuant to Section 36 of the Swedish Arbitration Act. Therefore, the motions under Sections 33 and 34 should be dismissed.

In the alternative, the following is claimed:

The arbitral award or the manner in which it was given is not obviously in violation of fundamental principles of Swedish law. Therefore, the arbitral award shall not be declared invalid pursuant to item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act.

The arbitral tribunal did not exceed its mandate. Further, no procedural error occurred in the arbitration, in any event, no procedural error which affected the outcome was made. Therefore, the arbitral award should not be wholly or partially annulled pursuant to items 2 or 6 of the first paragraph of Section 34. The arbitral tribunal's conclusion that it did not have jurisdiction to try Mr. CU's action is correct. Therefore, there are no grounds to adjust the arbitral award such that it is annulled. Moreover, the other objections raised by Mr. CU concerning the arbitral tribunal's dealing with the arbitration and its review of various matters do not constitute grounds for adjustment of the arbitral award pursuant to Section 36 of the Swedish Arbitration Act.

## CIRCUMSTANCES REFERENCED BY THE PARTIES

**Mr. CU**

*The arbitral tribunal's jurisdiction – the motion under Section 36 of the Swedish Arbitration Act*

An investor under article 1(7)(a)(i) of the ECT is amongst other things, a natural person who permanently resides in a contracting state as per the state's legislation. This entails, in the application of article 26(1) of the ECT, that a dispute between a contracting state and a natural person who permanently resides in another contracting state is a dispute between the state and an investor from another contracting state, regardless of in which state the investor has his/her citizenship. Thus, the relevant provisions grant a person who permanently resides abroad the right to commence litigation against the state of which he is a citizen, and this was the conclusion of the arbitral tribunal. This interpretation of the wording of the relevant provisions coincides with the purpose and objective of the ECT. Even if there existed a contrary principle of international law, the ECT would take precedence as *lex specialis*.

Because Turkey did not challenge the arbitral award under the Swedish Arbitration Act, Turkey is not entitled to move that the Court of Appeal should review the arbitral tribunal's conclusion on this matter. The circumstance referenced by Turkey that Mr CU is prevented from commencing litigation against Turkey because he is a Turkish citizen should therefore be dismissed.

Further, Turkish law provides (Act no. 4875 of 5 June 2003 on foreign direct investments) that Turkish citizens who permanently reside abroad are entitled to commence arbitration against Turkey concerning investments in Turkey.
The only relevant time for the assessment of whether he is an investor from another contracting state entitled to commence arbitration against Turkey pursuant to article 26 of the ECT is the time when he requested arbitration against Turkey, i.e. on 7 March 2014. At that time, he was permanently residing in France, a contracting state of the ECT. Thus, he holds the protected investor status under the ECT and is entitled to commence arbitration against Turkey. It is a generally acknowledged principle of law that the review of a party's right to commence international arbitration – in the absence of explicit provisions concerning the relevant timing – shall be made based on the circumstances at the time of the request for arbitration.

In order for Mr CU to obtain the status as protected investor under the ECT it is not required that he was permanently residing in another contracting state at the time of his investments in Turkey or at the time of Turkey's violations of the ECT. However, Mr CU did meet the requirements of being permanently resident abroad also at these times as per the clarifications below.
Mr CU made the investments in Turkey, in the form of acquisitions of shares in the companies ÇEAŞ and Kepez, during the years 1996-2000. During that time, he was a permanent resident of the United Kingdom under UK law. This matter was settled by UK authorities. In connection with his being granted permanent

residency in the UK in November of 2000, UK authorities actually concluded that he had fulfilled the requirements to be a permanent resident for four years, i.e. since 1996. In order to be granted permanent residency, UK law requires that the person has his main residence in the UK. The UK authorities' conclusion that he had met the requirements was based on an overall review of his actual situation. Thus, Mr CU was actually a permanent resident of the UK during the relevant time period.

His action in the arbitration concerned a number of measures taken by Turkey during 2002-2014, which resulted in his investments in ÇEAŞ and Kepez being expropriated without him receiving any compensation. Turkey's involvement in his investments commenced in November of 2002, when ÇEAŞ and Kepez were forced to transfer certain rights and assets to a publicly held company (TEIAŞ). Thereafter, the concession agreements of the companies were terminated in June of 2003. During the years 2002-2003, he was permanently residing in the UK where he, as previously mentioned, had been granted permanent residency by UK authorities in 2000. The violations continued until 2014, when Turkey resolved that some of the companies' intellectual property should be transferred to another publicly held company (EÜAŞ). At that time, Mr CU resided in France, where he had had resided permanently since 2009.

*Excesses of mandate and procedural errors – the motions under Section 34 of the Swedish Arbitration Act*

There is no impediment to challenging an arbitral award through which the arbitral tribunal closed the arbitration without reviewing the merits pursuant to Section 34 of the Swedish Arbitration Act. Therefore, Turkey's objections shall be rejected.

In order to obtain protected status under the ECT, the arbitral tribunal required that the investor, at the time of the investment, should be residing in another contracting state. This requirement has no basis in the wording of the ECT or elsewhere. Through its actions, the arbitral tribunal exceeded its mandate. Alternatively, the arbitral tribunal committed a procedural error which affected the outcome of the arbitration.

The arbitral tribunal's conclusion that the date of the investments was the relevant time for the review of whether he had protected investor status entails that the arbitral tribunal reviewed the issue of whether a protected investment under the ECT was at hand, although this matter, according to the arbitral tribunal's decision to split the proceeding of 20 June 2015, should have been tried only in connection with the review of the merits. Thereby, the arbitral tribunal exceeded its mandate. Alternatively, the arbitral tribunal committed a procedural error which affected the outcome of the arbitration.

In violation of article 1(7)(a)(i) of the ECT, the arbitral tribunal has carried out an independent review of whether he was permanently residing in the UK under UK law. This was done, although the matter had already been settled by the

authorities of a sovereign state following a general review of his actual situation. The arbitral tribunal had no mandate to review the conclusion reached by the UK authorities. Further, the arbitral tribunal did not apply any specific standard for its review, which the arbitral tribunal actually noted in the arbitral award. Moreover, the arbitral tribunal did not apply UK law, which it was obliged to do under article 1(7)(a)(i). Thereby, the arbitral tribunal acted grossly negligently. By not applying the ECT or UK law, the arbitral tribunal exceeded its mandate. Alternatively, the arbitral tribunal committed a procedural error which affected the outcome of the arbitration.

The UK authorities' decision that he was permanently residing in the UK is further covered by the principle of mutual recognition of administrative documents within the European Union. This means that the decision concerning his residency shall be deemed valid under international law, EU law and Swedish law.

The arbitral tribunal's decisions of 10 May and 6 June 2016 to dismiss his motions for an additional award violates SCC's Arbitration Rules of 2010 as well as the Swedish Arbitration Act. His motions were based on the arbitral tribunal's failure to review his claim that he was permanently residing in the UK when he made his investments in Turkey during the years 1996-2000. In the arbitral award, the arbitral tribunal stated that he was not – or had even claimed to be – permanently residing in another contracting state at the time of the investments, although he had stated so in his submissions in the arbitration. According to article 42 of the SCC's rules, a party may move that the arbitral tribunal shall give an additional award for motions lodged in the arbitration, but which were not decided in the arbitral award. Further, Section 32 of the Swedish Arbitration Act provides that the arbitrators may supplement the arbitral award if they by accident omitted to review a matter which should have been reviewed in the arbitral award. By incorrectly dismissing his motions for an additional award, the arbitral tribunal exceeded its mandate.

*It took over two years for the arbitral tribunal decide on its jurisdiction. This violates Section 37 of the Swedish Arbitration Act, which stipulates that a final arbitral award shall be given no later than six months following the arbitration having been submitted to the tribunal. The arbitral tribunal's failure to give an arbitral award within the prescribed time constitutes grounds to annul the arbitral award. The arbitral award or the manner in which it was given violates fundamental principles of Swedish law – the motion under Section 33 of the Swedish Arbitration Act*

There is no impediment to challenging an arbitral award through which the arbitral tribunal concluded the arbitration without reviewing the merits pursuant to Section 33 of the Swedish Arbitration Act. Thus, Turkey's motion for dismissal shall be rejected.

In the decision to bifurcate the proceeding of 20 June 2015, the arbitral tribunal stated that the review of the tribunal's jurisdiction would include a review of whether he was resident in the UK at the time of the alleged violations of the

ECT. Later, in "Procedural Order No. 4", the arbitral tribunal stated that the dates of the alleged violations fell within the scope of the review of the merits of the case. When the arbitral tribunal subsequently decided on its jurisdiction, the tribunal concluded that it was the date of the investments which was the relevant time for the review of whether or not he held protected investor status under the ECT. Thus, the arbitral tribunal reviewed whether a protected investment was at hand, despite that in its decision to bifurcate the proceeding, it had stated that this matter belonged to the review of the merits.

Thus, the arbitral tribunal has provided the parties with contradictory information. Moreover, the arbitral tribunal failed to inform the parties about its changed views. Thereby, he was deprived of the equal opportunity to present and argue his case as per the provisions of article 19 of the SCC's rules. The actions of the arbitral tribunal were grossly negligent in the sense set forth in article 48 of the SCC's rules. The actions of the arbitral tribunal entail that the arbitral award and the manner in which it was given is in obvious violation of fundamental principles of Swedish law.

The arbitral tribunal incorrectly noted that in the arbitration Mr CU had not claimed that he was permanently residing in another contracting state at the time of his investments in Turkey. In his submissions in the arbitration, he had stated that he permanently resided in the UK when he made his investments in Turkey during 1996-2000. Moreover, he had invoked evidence to support this. Thus, the arbitral tribunal was obliged to take his statements on this issue into account. The arbitral tribunal has thereby acted grossly negligently, which entailed that the arbitral tribunal incorrectly concluded that he was a domestic investor without protection under the ECT. As previously mentioned, he requested an additional award because the arbitral tribunal had omitted to review his arguments on this issue. The arbitral tribunal's incorrect decision to dismiss Mr CU's motions for an additional award are grounds for declaring the arbitral award invalid.

Further, in a decision of 4 March 2016, the arbitral tribunal rejected his motion to be allowed to reference further documentation – the file concerning his residency – in support of his permanently residing in the UK at the time of the investments. The arbitral tribunal based its decision on the fact that the proceeding was closed and that he had not showed that the documents contained any new evidence. It was not, however, new evidence, but rather underlying documentation for already invoked evidence. The documentation showed that the UK authorities had based their decision on the fact that he had his main residence in the UK in such manner as was required to grant him permanent residency in the UK as per UK law, i.e. based on an overall review of his actual situation. If the arbitral tribunal had allowed this documentation, it would also have concluded that he was permanently residing in the UK during 1996-2000. In connection with the dismissal decisions of 10 May and 6 June 2016, the arbitral tribunal yet again rejected his motions to be allowed to invoke the relevant evidence.

The arbitral tribunal's failure to take into account what he had invoked and the tribunal's decision to disallow new evidence violates applicable requirements for

legal security and affected the outcome of the arbitration. Therefore, the arbitral award and the manner in which it was given obviously violates fundamental principles of Swedish law.

The arbitral tribunal's failure to render an arbitral award within the time stipulated in article 37 of the SCC's rules entails that the arbitral award or the manner in which it was rendered obviously violates fundamental principles of Swedish law.

**The Republic of Turkey**

*The jurisdiction of the arbitral tribunal – the motion under Section 36 of the Swedish Arbitration Act*

An investor's right to initiate dispute resolution under article 26 of the ECT applies only between a contracting state and an investor from another contracting state. This is in line with the ECT's purpose that the contracting states shall promote and protect investments in their territories made by investors from other contracting states. Turkey's agreement to dispute resolution under article 26 covers only such disputes as set forth in the provision, i.e. disputes with investors from other contracting states who have made cross-border investments.
The principles of international law applicable to the disputes under article 26(6) of the ECT provide that a citizen of a contracting state may request arbitration against his state of citizenship only in exceptional cases. An exception could apply if the state of citizenship has formally agreed to it in a treaty. Turkey has given no such agreement in the ECT.

According to article 1(7)(a)(i) of the ECT citizens of a contracting state can only be investors from that state. Mr. CU is and has at all relevant times been a Turkish citizen and is consequently an investor from Turkey. He cannot concurrently be an investor from the UK, even if he had been permanently residing there at some point in time. As a consequence, Mr. CU was not entitled to initiate arbitration against Turkey, irrespective of where he had his residence at the relevant times. Thus, there is a hierarchical relationship between the requirements to qualify as an investor, which means that the requirement of "citizenship or nationality" shall take precedence over "permanent residence". Only if a party who claims to be an investor is not a citizen, or of a contracting state's nationality, should his residency be taken into account. The relevant provision must be interpreted in light of its purpose. The ECT serves to protect foreign investors and foreign investments. Already in view of this is it impossible for a citizen of a contracting state to commence litigation against his/her state of citizenship. In the review to be carried out by the Court of Appeal under Section 36 of the Swedish Arbitration Act, it is entitled to reach another conclusion than that of the arbitral tribunal. The Court of Appeal is free take into account all circumstances referenced by the parties. Turkey has not lost the right to move that the Court of Appeal shall review the arbitral tribunal's conclusions by not challenging the arbitral award, which Turkey as the winning party was unable to do.

The definition of foreign investors under Turkish investment law is irrelevant for the issue of whether the arbitral tribunal had jurisdiction under the ECT. Moreover, the Turkish legislation to which Mr. CU refers had not even entered into force when the disputed measures are alleged to have been carried out. In addition, there is no Turkish legislation which gives Turkish citizens who reside abroad the right to commence litigation against Turkey by application of international law.

In the event that the Court of Appeal would conclude that the citizenship does not prevent Mr. CU from requesting the relevant arbitration against Turkey, then the Court of Appeal must review of the other requirements under article 26 of the ECT are met.

For Mr. CU to be entitled to request dispute resolution under article 26 of the ECT, it is not sufficient that he was permanently residing in another contracting state at the time of that request. It is also required that he was permanently residing in another contracting state when the alleged investments were made, i.e. between 1996 and 2000, but also when the alleged violations occurred in the form expropriation of the investments, i.e. 2002-2003. The alleged violations occurred from November of 2002 until June of 2003, when the concessions to ÇEAŞ and Kezep were terminated and the facilities were reclaimed. When the investment thereby is alleged to have been expropriated, the state per definition is no longer able to act with respect to it. Thus, what Mr. CU has stated concerning further violations during 2013-2014 cannot be taken into account.

For a person to be considered as a permanent resident of a contracting state, it is required that the person has the legal status as a permanent resident as per that state's laws, and that the person actually resides there permanently. Under this definition, Mr. CU was not permanently residing in the UK at any of the relevant times. This is actually what the arbitral tribunal had concluded when it stated that Mr. CU was not permanently residing in the UK during 1996-2009. It is disputed that Mr. CU was granted permanent residency in the UK in 2000. Even if this were the case, i.e. that he had been granted the legal right to take up residence in the UK, this does not show that he was *actually* permanently residing there.

*Excesses of mandate and procedural errors – the motion under Section 34 of the Swedish Arbitration Act*

The first paragraph of Section 34 of the Swedish Arbitration Act explicitly provides that when the arbitral tribunal – as in the action at issue – closed an arbitration without reviewing the merits of the case, because it did not have jurisdiction, through a so-called dismissal award, the award cannot be challenged under Section 34 of the Swedish Arbitration Act. Therefore, the motion that the arbitral award shall be annulled pursuant to Section 34 of the Swedish Arbitration Act shall be dismissed.

In any event, there are no grounds to annul the arbitral award due to excess of mandate or procedural error.

Under application of UK law, the arbitral tribunal tried Mr. CU's assertion that he was permanently residing in the UK at the time of his investments in Turkey during 1996-2000 and concluded that this was not true.

The arbitral tribunal's conclusion, namely that the time of the investments was the relevant point in time at which Mr. CU's status as protected investor turned, does not mean that the arbitral tribunal also decided the issue of whether a protected investment under the ECT was at hand. Consequently, the arbitral tribunal did not exceed its mandate.

The arbitral tribunal was within its rights to make an autonomous review of whether Mr. CU was permanently residing in the UK under UK law. Thus, in its review the arbitral tribunal was not bound by the permanent residency allegedly issued by UK authorities. In addition, there are judgments given by UK courts which imply the opposite, i.e. that Mr. CU was not permanently residing in the UK. The alleged decision to grant Mr. CU's permanent residency in the UK would not have shown anything other than that he was entitled to take up permanent residence in the UK as from when the permission was granted, i.e. in November of 2000. Thus, the alleged decision would not show that Mr. CU was actually permanently residing in the UK in the sense required under article 1(7)(a)(i) of the ECT. According to his own statements, prior to 2000 he did not even have a permit giving him the right to permanently reside in the UK. It is disputed that a principle on mutual recognition is applicable and that it would mean that the decision is valid under international law, EU law and Swedish law.

Mr. CU's repeated motions for an additional award fall outside the scope of the Court of Appeal's review. The circumstance referenced by Mr. CU, that the arbitral tribunal exceeded its mandate or committed a procedural error in connection with the arbitral tribunal's dismissal of his motion for an additional award shall consequently be dismissed.

The arbitral tribunal did not breach article 37 of the SCC's rules. The arbitral tribunal was granted additional time to finally decide the arbitration and rendered its arbitral award within the extended time.

*The arbitral award or the manner in which it was given does not violate Swedish fundamental principles of law – the motion under Section 33 of the Swedish Arbitration Act*

When the arbitral tribunal – as in this case– has closed the proceeding without reviewing the merits due to lacking jurisdiction through a so-called dismissal award, the arbitral award cannot be challenged under Section 33 of the Swedish Arbitration Act. Therefore, the motion to have the arbitral award declared invalid under Section 33 of the Swedish Arbitration Act shall be dismissed.
In any event, there are no grounds to declare the arbitral award invalid. The circumstances referenced by Mr. CU do not contain anything implying that any fundamental principle of law has been disregarded. Therefore, item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act is not applicable.

Entirely correctly, the arbitral tribunal tried Mr. CU's assertion that he was permanently residing in the UK when he made his investments in Turkey during 1996-2000 and concluded that this was not the case.

The arbitral tribunal did not try the issue of whether a protected investment was at hand, in violation of the decision on a bifurcation of the proceeding of 20 June 2015. The arbitral tribunal was entitled, and did, try the issue of whether Mr. CU was an investor under the ECT without also examining whether a protected investment was at hand. Therefore, the arbitral tribunal neither exceeded its mandate nor deprived Mr. CU the opportunity to equally present and argue his case or otherwise acted in violation of fundamental principles of law.
The arbitral tribunal was justified in taking the decision to disallow the additional evidence Mr. CU wished to invoke because it was invoked too late. The arbitral tribunal declared the arbitration closed on 25 January 2016. Only on 2 March of that year did Mr. CU declare that he wished to invoke new evidence and without motivating why he had been unable to invoke the evidence earlier.
The arbitral tribunal has, as previously mentioned, not violated the deadline for rendering the arbitral award set forth in article 37 of the SCC's rules.

## THE INVESTIGATION AND THE COURT OF APPEAL'S DEALING WITH THE PRESENT ACTION

The parties have referenced documentary evidence.
The claim has, based on Section 1 of Chapter 53 and item 5 of the first paragraph of Section 18 of Chapter 42 of the Code of Judicial Procedure, been decided without a main hearing.

## GROUNDS OF THE COURT OF APPEAL

### Outline of the grounds of the Court of Appeal

The case at issue concerns an arbitral award through which the arbitral tribunal has dismissed Mr. CU's action against Turkey, on the grounds that Mr. CU failed to establish that he was entitled to commence the relevant arbitration, due to his personal circumstances (*ratione personae*). Mr. CU has contested the arbitral award on three separate grounds; invalidity (Section 33 of the Swedish Arbitration Act), annulment (Section 34 of the Swedish Arbitration Act) and adjustment (Section 36 of the Swedish Arbitration Act).

There are no reasons to try whether an invalid arbitral award shall be annulled or adjusted. Therefore, the Court of Appeal will first try the motion to have the arbitral award declared invalid and subsequently try the motions that the arbitral award shall be annulled or adjusted. Under each respective heading, the Court of Appeal will detail the legal starting points for each portion of the review, decide on any motions for dismissal and provide an account for the factual circumstances referenced by each party.

Finally, the Court of Appeal will summarize its conclusions on each respective issue.

As a final matter, the Court of Appeal will decide on the issue of litigation costs.

**The question of invalidity under Section 33 of the Swedish Arbitration Act**

In item 2 of the first paragraph of Section 33 it is stipulated that an arbitral award is invalid if the arbitral award or the manner in which it was given obviously violates fundamental principles of Swedish law.

Turkey has asserted that the provision is not applicable to arbitral awards through which the arbitration has been closed without a review of the merits. This position has some support in jurisprudence (see Heuman, Skiljemannarätt, p. 535 and Olsson/Kvart, Lagen om skiljeförfarande, p. 138). Elsewhere in jurisprudence, however, it is stated that it cannot be excluded that an arbitral award through which an action has been dismissed could violate fundamental principles of Swedish law, and that item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act could be applicable in these instances (see Lindskog, Skiljeförfarande, 2nd ed., Zeteo 1 May 2016, the commentary to Section 2, paragraph 4.4.3, and Section 36, paragraph 3.2 and footnote 8).

According to the Court of Appeal, the wording and structure of item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act indicates that the provision is applicable also when the merits of an arbitration dispute have not been tried. There is no statement in the preparatory works which would indicate that the provision would not be applicable in such cases (see Government Bill 1998/99:35 p. 138 f. and p. 234). An action under item 2 of the first paragraph of Section 33 would also lead to another legal outcome than an action under Section 36 of the Swedish Arbitration Act and may be brought without any limitations in time. In addition hereto, there is no reason for a court to try whether an invalid arbitral award should be annulled or adjusted, and such a review should not be carried out. Thus, according to the Court of Appeal, both the wording of the provision as well as its purpose indicate that actions pursuant to item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act can be brought also for arbitral awards through which the proceedings are closed without a review of the merits. Thus, Turkey's motion for dismissal of Mr. CU's invalidity motion shall be rejected.

On the merits, the Court of Appeal finds as follows.

Swedish law takes a restrictive view on the possibility of having an arbitral award declared invalid pursuant to item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act. The preparatory works state that the provision is intended to cover highly improper cases where truly fundamental principles of material or procedural law have been disregarded and that the provision, due to its narrow applicable scope, only very rarely becomes applicable. It is further stated

that an award should only be declared invalid if the public's or a third party's interests are violated. As an example of cases where an award could be declared invalid is mentioned that an arbitrator through threats or bribes has been coerced into giving a certain outcome. (see Government Bill 1998/99:35 p. 141 f. and p. 234.) An arbitral award should further be deemed invalid when it is based on false evidence which had direct impact on the outcome (see statements in the judgment of Svea Court of Appeal of 9 December 2016 in case no. T 2675-14 and Heuman, *op. cit*., p. 600 f.) The possibility of having an arbitral award declared invalid is thus very limited and relates to such circumstances where it would be offensive to the general public to give the award legitimacy.

The circumstances referenced by Mr. CU as grounds that the arbitral award shall be deemed invalid are, summarized, that the arbitral award was not given in due time, that the arbitral tribunal tried an issue on the merits within the scope of its jurisdictional review, that the arbitral tribunal provided contradictory information to the parties and thereby deprived the claimant of the right to argue his case to any reasonable extent, that the arbitral tribunal failed to review his assertions that he was permanently residing in the UK during 1996-2000, that he was not allowed to reference additional information following the closing of the arbitration proceeding and that the arbitral tribunal dismissed his motions for an additional award. These circumstances are – even if they would be at hand – not of such grave nature that the arbitral award or the manner in which it was given could be deemed in obvious violation of fundamental principles of Swedish law. Therefore, Mr. CU's motion for invalidity shall be rejected.

**The question of annulment under Section 34 of the Swedish Arbitration Act**

Section 34 of the Swedish Arbitration Act provides that an arbitral award, which cannot be challenged under Section 36, shall be wholly or partially annulled following a challenge, if certain requirements are met. According to the Court of Appeal, the wording clearly provides that the provision is not applicable if an action under Section 36 of the Swedish Arbitration Act is possible (see also Olsson/Kvart, *op. cit*., p. 155 and Heuman, *op. cit*., p. 535; cf. Lindskog, *op. cit*., the commentary to Section 34 of the Swedish Arbitration Act, paragraph 7.2.4). Mr. CU has brought an action that the dismissal award shall be adjusted pursuant to Section 36 of the Swedish Arbitration Act, which is the action now tried by the Court of Appeal. Under said circumstances it is not possible to concurrently bring an action under Section 34 of the Swedish Arbitration Act. Therefore, Mr. CU's challenge under Section 34 of the Swedish Arbitration Act shall be dismissed. Upon this outcome, the Court of Appeal has no reason to try Turkey's motion for dismissal of the circumstances referenced by Mr. CU in this respect.

**The question of adjustment under Section 36 of the Swedish Arbitration Act**

*Starting point for the review of the arbitral tribunal's jurisdiction*
A review under Section 36 of the Swedish Arbitration Act of an arbitral award through which the arbitral tribunal ended the proceeding without a review of the

merits, because it concluded it did not have jurisdiction to review them, means that the jurisdictional issues shall be reviewed again by the Court of Appeal. If the Court of Appeal finds that the arbitral tribunal reached an incorrect conclusion the arbitral award shall be annulled (see Government Bill 1998/99:35 p. p. 238 and Kvart/Olsson, *op. cit*., p. 156). The Court of Appeal will procedurally deal with the action under the provisions of the Code of Judicial Procedure applicable to the review before the District Court (Section 1 of Chapter 53 of the Code of Judicial Procedure). It is the parties who frame the proceeding by invoking evidence and relevant circumstances. There is nothing preventing the parties from introducing other circumstances and other evidence before the Court of Appeal as compared to that which was invoked in the arbitration (cf. Lindskog, *op. cit*., the commentary to Section 36 of the Swedish Arbitration Act, paragraph 4.2.2). It should be pointed out that the Court of Appeal does not have access to the documentation of the arbitration, unless the parties submit it. Thus, the Court of Appeal's review of the jurisdiction could therefore be based on somewhat different documentation than that which was reviewed by the arbitral tribunal. Mr. CU has moved that the Court of Appeal dismiss the circumstance referenced by Turkey that his citizenship prevents him from commencing the relevant arbitration. In view of the parties' right to freely decide which circumstances should be referenced for the Court of Appeal's review there are no grounds to dismiss that circumstance, which was also referenced before the arbitral tribunal. Therefore, the motion for dismissal shall be rejected.

As regards the actual circumstances in the action at issue, it should initially be noted that it is undisputed that Turkey, the UK and France have acceded to the ECT, and thus are contracting states under the treaty. The parties further agree that Mr. CU is a Turkish citizen and does not hold citizenship or nationality of any other contracting state. Turkey has further stated that it no longer disputes that Mr. CU has permanently resided in France since 2009. It is finally undisputed that the alleged investments were carried out in Turkey. However, the parties disagree whether Mr. CU at any point in time permanently resided in the UK or not.

For an arbitral tribunal to have jurisdiction to review a dispute, the parties must have agreed to the tribunal's jurisdiciton. In international investment disputes, the states have often agreed to submit to arbitration in a treaty between two or more states. Such agreement could be considered an offer by the states to certain qualified investors to participate in international arbitration. The obligation to submit to arbitration arises when a qualified investor requests arbitration in line with what the state has agreed to. (See, amongst others, Dugan *et al*., Investor-State Arbitration, p. 220 f. and Dolzer/Schreuer, Principles of international investment law, 2nd ed., p. 254 f.). It is – as the arbitral tribunal noted (see the arbitral award, p. 135) – a well-established principle of international law that the agreement to participate in the arbitration shall clearly and unambiguously cover disputes such as the one that has arisen (see, e.g., the arbitral award of 8 February 2005 on jurisdiction in the dispute between Plama Consortium Limited and Bulgaria, ICSID case no. ARB/03/24, p. 198). For Mr. CU to be entitled to request arbitration against Turkey, it is thus required that it can be established that

Turkey, through the ECT, has agreed to submit to arbitration with a person with the personal characteristics referenced by Mr. CU (*ratione personae*).
Article 26 of the ECT sets forth the contracting states' agreement to participate in arbitration. Article 26(1) of the ECT lists four prerequisites which must be fulfilled for the article to be applicable, and the first prerequisite is that the dispute must involve a contracting state and an investor from another contracting state (see also Amkhan, Consent to submit investment disputes to arbitration under Article 26 of the Energy Charter Treaty, International Arbitration Law Review, 2007, p. 67).

The relevant dispute involves Turkey, which is a contracting state to the ECT. Thus, for the first prerequisite of article 26(1) to be fulfilled it is further required that Mr. CU is considered an investor from another contracting state under the article.

Below, the Court of Appeal will first review the definition of the term investor under the ECT, and thereafter how the term shall be interpreted within the scope of the contracting states' agreement to submit to arbitration under article 26. Finally, the Court of Appeal will review whether Mr. CU, on the basis of the factual circumstances referenced in the action at issue, is covered by the agreement to submit to arbitration given by Turkey by way of article 26.
As noted above under the heading Background, the interpretation of the ECT shall be made under the principles of treaty interpretation set forth by the Vienna Convention. The starting point of the interpretation shall always be the wording of the treaty (article 31). If the wording is unambiguous, this is usually the end of the interpretational operation. The treaty shall be interpreted in accordance with the generally accepted interpretation of the treaty's expressions, seen in their context, and in light of the treaty's purpose and objective. The purpose and objective of a treaty are not autonomous means of interpretation, but a part of the interpretation to be made under article 31 to understand the treaty's general meaning. (See judgment of Svea Court of Appeal of 9 December 2016 in case no. T 2675-14 and judgment of Svea Court of Appeal of 18 January 2016 in case no. T 9128-14, including references therein.) To confirm an interpretation under article 31 or to determine the meaning, when an interpretation under the article does not clarify ambiguity or obscurity or leads to a meaning which is manifestly absurd or unreasonable, it is allowed to have recourse to supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion (article 32).

*The definition of investor under the ECT*

Article 1(7)(a)(i) of the ECT defines the term investor in relation to a contracting state as a natural person having the citizenship or nationality of or who is permanently residing in that contracting party in accordance with its applicable law. Mr. CU has asserted that the provision shall be interpreted such that a person is an investor under the ECT as soon as he or she fulfills any of the criteria of the article with respect to a contracting state, and that it is irrelevant whether the person is also a citizen of another contracting state and thus fulfills the criteria also with respect to that state. Turkey, on the other hand, has asserted that a person who is a citizen of a contracting state can never be considered as an

investor from another contracting state in relation to the state of citizenship, and that the criteria of permanent residency can only become relevant when a person who claims to be an investor does not have citizenship or nationality of a contracting state.

The Court of Appeal notes that article 1(7)(a)(i) is linguistically neutral and the wording is general (see also, amongst other things, the arbitral award of 30 November 2009 concerning jurisdiction between Veteran Petroleum Limited and Russia, PCA case no. AA 228 p. 413). According to the Court of Appeal, who has read the article in several of the official language versions, the article can be understood both in the manner proposed by Mr. CU and Turkey, respectively, but the wording does imply that there is no order of precedence between the various prerequisites and that a natural person could as per the definition indeed be viewed as an investor from several different contracting states. Thus far Mr. CU fulfills, based on what he himself asserts, the prerequisites to be considered an investor from several states. However, an interpretation based solely on article 1(7)(a)(i) does not answer the pivotal question of the action at issue, i.e. whether Mr. CU is entitled to commence the relevant arbitration against Turkey. To answer this question, article 1(7)(a)(i) must – as noted by the arbitral tribunal itself (see arbitral award p. 145) – be read in conjunction with the dispute resolution mechanism in article 26 of the ECT.

*Investors from another contracting state*
The contracting state's agreement to participate in arbitration covers, as per the provisions of article 26 of the ECT, investors from another contracting state concerning investments made by the latter on the former's territory. The Court of Appeal agrees with the arbitral tribunal that the wording of article 26 entails that there is a cross-border/transnational element to the article. The arbitral tribunal qualifies this by determining whether the alleged investments entail a cross-border transaction. Only if this is the case, is the investor protected under the ECT. (See the arbitral award, p. 146-153). The Court of Appeal is of the opinion, however, that the first question to be answered is whether Turkey, by way of article 26, has agreed to participate in arbitration against a Turkish citizen because of his/her alleged permanent residence in another contracting state.
Article 26 of the ECT, read in conjunction with article 1(7)(a)(i) of the ECT, provides that a person who requests arbitration against the state in which he or she has citizenship always fulfills the prerequisites of being an investor from the state of citizenship. It then appears, according to the Court of Appeal, very doubtful that such an investor – with respect to his/her state of citizenship – concurrently could be an investor from another contracting state because he or she has taken up residence there.

Also article 26(7) contradicts an interpretation which means that the agreement in article 26(1) of the ECT covers investors who are citizens of the state involved in the dispute. The said the article provides that legal entities of the same nationality as the contracting state involved in the dispute in certain circumstances can nevertheless be deemed citizens of another contracting state. The fact that it has been specifically stipulated when a legal entity of a certain nationality is

permitted to commence international arbitration against its "home state" implies that the agreement does not otherwise cover persons who are citizens of the state involved in the dispute.

Further, according to article 2 of the ECT, the purpose of the treaty is to promote long-term cooperation in the energy industry. The intention of the treaty was to implement a stable and non-discriminating legal framework, which would facilitate cross-border cooperation and investment as well as to promote and protect, amongst other things, foreign investments. Foreign investments would be protected against major political risks, such as discrimination and expropriation, through the provisions of the treaty. The protection was meant to be strengthened through the dispute resolution mechanism of article 26 of the ECT, because there was concern about the neutrality, competence and efficiency of national courts in some of the contracting states. (See Energy Charter Secretariat, The Energy Charter Treaty: A Reader's Guide, 2002, p. 9 f., 19 and 51.) The purpose is described in the same way in the legal opinions from Professors Alain Pellet and Adnan Amkhan Bayno submitted in the action at issue.

The fact that the purpose of the treaty is to promote international investments and prevent discrimination of foreign investors strongly contradicts, according to the Court of Appeal, that persons who are citizens of the state involved in the dispute would fulfill the prerequisite of being an investor from another contracting state simply by taking up permanent residence in another state than the state of citizenship. Taking into account that the purpose of the ECT was that the energy market would become more liberal, it is not unthinkable that the intention might have been to widen the scope of the term investor to grant protection to persons with permanent residency. However, there is nothing that implies that the intention ever was to grant a state's own citizens access to an international dispute resolution mechanism in respect of their own state alongside national courts. According to the Court of Appeal, article 26 of the ECT – interpreted according to its wording and structure in conjunction with the purpose and objective thereof – must be understood to mean that the agreement to arbitration given by the contracting states does not cover the states' own respective citizens who have taken up permanent residency in another contracting state.
To confirm this interpretation it is permitted, as mentioned above, to have recourse to supplementary means of interpretation.

Prof. Bayno's legal opinion submitted in the matter at issue describes the negotiations that took place before the final wording of articles 1(7)(a)(i) and 26 of the ECT was agreed. The opinion states that there is nothing in the history of the negotiations implying that the intention of the treaty would have been to grant investors the right to commence arbitration against the state where he/she has citizenship when the investor has taken up permanent residence in another contracting state. No statements or circumstances in connection with the drafting of the ECT which would contradict the interpretation reached by the Court of Appeal have been referenced in the action at issue.

Further – as Prof. Pellet, amongst others, has noted in his legal opinion – it is a principle of international law, that a natural person cannot commence international dispute resolution against a state where he/she has citizenship, unless that state has explicitly agreed, or the person has double citizenship. In the latter case, it has been deemed possible to hold a state accountable for its actions against its own citizens if the person has shown that he/she has substantially closer connection to the other state of citizenship (dominant and effective nationality). The principle of how to deal with double citizenships has been considered applicable also to international investment disputes, in which no explicit rules on the issue were stipulated (see Dugan *et al.*, *op. cit*., p. 291-304). Thus, the Court of Appeal's conclusions on the interpretation are well in line with international legal principles.

That, which Mr. CU has stated concerning the contents of Turkish law does not affect the Court of Appeal's conclusion, because domestic legislation cannot be considered of importance when interpreting of the states' agreement to arbitration under article 26 of the ECT.

The fact that an investor, based on the neutral and general definition of article 1(7)(a)(i) of the ECT, could get the impression that there would be a possibility to commence arbitration against the state where he/she has citizenship if that person fulfills the prerequisites to be an investor also in respect of another contracting state cannot itself expand the scope of the agreement to arbitration made by the contracting states.
The above means that article 26 of the ECT does not grant citizens of a state the right to commence arbitration against that state on the grounds that he/she has taken up permanent residence in another contracting state.

*The Court of Appeal's conclusions on Mr. CU's right to commence the arbitration*
The above conclusions of the Court of Appeal entail that Mr. CU, who is a Turkish citizen, is not entitled to commence the relevant arbitration against Turkey, irrespective of whether he is, or at any point in time has been, permanently residing in another contracting state. The arbitral tribunal's conclusion that it does not have jurisdiction to resolve the dispute due to lacking *ratione personae* was therefore correct. Consequently, Mr. CU's action under Section 36 of the Swedish Arbitration Act cannot be successful.

*Other circumstances referenced under Section 36 of the Swedish Arbitration Act*
Mr. CU has made several objections to the arbitral tribunal's procedural handling of the proceeding, which the Court of Appeal has not tried because his motions under Section 34 of the Swedish Arbitration Act have been dismissed. According to the preparatory works of Section 36 of the Swedish Arbitration Act, procedural errors could, however, be tried within the scope of a review under this provision (see Government Bill 1998/99:35 p. 155 and 238 as well as Olsson/Kvart, *op. cit*., p. 156).
In the action at issue, the Court of Appeal has tried the jurisdiction of the arbitral tribunal. The parties have been free to frame their respective actions and invoke

the references and circumstances before the Court of Appeal as they have wished. The majority of the insufficiencies asserted by Mr. CU could thus have been cured during the proceeding before the Court of Appeal. There is no reason to review the other procedural errors alleged by Mr. CU, as they are irrelevant for the review of the arbitral tribunal's jurisdiction. (See also Lindskog, *op. cit*., the commentary to Section 36, paragraph 4.2.2 and footnote 19.)

**Summary of the Court of Appeal's conclusions**
The Court of Appeal has concluded that Mr. CU's pleading for invalidity under item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act shall be rejected and that his challenge under Section 34 of the Swedish Arbitration Act shall be dismissed.

Further, the Court of Appeal has concluded that article 1(7)(a)(i) and article 26 of the ECT must be understood such that the states' agreement to participate in arbitrations does not cover citizens of the state involved in the dispute when the person has taken up permanent residence in another contracting state. Against this background, the Court of Appeal has concluded that Mr. CU, in his capacity as a Turkish citizen, was not entitled to commence the arbitration against Turkey under article 26 of the ECT and that the arbitral tribunal's conclusion that it did not have jurisdiction to resolve such a dispute was correct. Finally, the Court of Appeal has concluded that there is no reason to adjust the arbitral award because of the procedural errors Mr. CU has invoked. Therefore, Mr. CU's motion for adjustment under Section 36 of the Swedish Arbitration Act is rejected.

**Litigation costs**
The Court of Appeal's conclusions in the action at issue mean that Mr. CU, as the losing party, shall compensate Turkey for its litigation costs (see Section 1 of Chapter 18 of the Code of Judicial Procedure).
Turkey has claimed compensation for its litigation costs in the amounts of USD 371,633 and CHF 137,130, of which USD 371,481 and CHF 136,818.44 comprises costs for legal counsel and the remaining amounts relate to expenses. Taking the nature and what has transpired in the case before the Court of Appeal into account, the claimed compensation must be deemed reasonable.

## APPEALS
The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if the Court finds that it is of importance for the development of case-law that an appeal is reviewed by the Supreme Court. The Court of Appeal finds no reason to grant leave to appeal.
**The judgment of the Court of Appeal may not be appealed.**

[*SIGNATURES*]
The decision has been made by: Judges of Appeal UB, KN and LF (reporting).