

Dissenting Opinion of Professor Francisco Orrego Vicuña

Like with the dissent of this arbitrator in respect of the Decision on Jurisdiction, I very much regret not to be able to share some views and conclusions that my learned colleagues have reached in the Award on the merits which is now issued by the Tribunal. Once again I do so with great respect and admiration for the work that has been undertaken in the preparation of this Award. While I agree with many of the conclusions reached, I have felt that it is my duty to point out such differences where questions of special significance are involved. In a case so abundant on evidence and arguments, it is only natural that the record might be interpreted or assessed differently, which is a legitimate exercise for arbitrators and counsel alike. In this context I must express my appreciation to the distinguished counsel that have represented both parties in this arbitration, with some of whom I have had the pleasure of working on prior occasions.

The first such difference concerns yet again the question of one of the Claimants' nationality. This time, however, the issue has arisen not only in connection with the interpretation of the applicable legislation and principles, particularly insofar as Egypt's legislation on nationality and the operation of the *Nottebohm* principle of effective nationality are concerned, which were the thrust of the dissent on jurisdiction, but also in connection with a far more delicate matter. This is the question whether the certificate of registration concerning the relevant Lebanese nationality claimed by that Claimant was obtained by improper means and does not accordingly reflect the actual situation as no such registration was found in the official records of Lebanon.

This arbitrator of course willingly accepts that the interpretation of the facts brought before the Tribunal is open to different readings, but I have been persuaded and ultimately convinced that the evidence provided by the Respondent is enough to establish such impropriety. Whether this could be considered a case of fraud, corruption, traffic of influence or some other form of impropriety, the fact is that money appears to have changed hands with a view to obtain an untrue certification.

This conclusion in no way reflects adversely on any of the distinguished counsel that have represented the Claimants in these proceedings, nor on my colleagues in the Tribunal, as none would be willing to condone such practices. The difference of opinions is not concerned with the principle but only with a different assessment of the evidence and whether it is sufficient to establish such impropriety. In the view of counsel for the Claimants and the Award the evidence has not so established, while in

my opinion it has. An examination of the main facts is therefore important to explain the reasons of this dissent.

It has been explained by counsel for the Respondent that in the course of preparing the argument on *estoppel* that the Tribunal ordered in the Decision on Jurisdiction to be examined in conjunction with the merits, doubts arose as to certain characteristics of the certificates attesting to the registration of the Claimant concerned as a national of Lebanon. The case for *estoppel*, as argued by Egypt, was that the Claimant had relied on its Egyptian nationality to conduct its business and obtain certain benefits available to nationals of that country and accordingly could not rely now on the purported loss of Egyptian nationality because of having obtained that of Lebanon. It was accordingly necessary and appropriate to examine again the relevant evidence on Lebanese nationality.

In the light of such doubts, the question was brought to the attention of the Lebanese authorities concerned with public records, most notably the Ministry of the Interior, with a view to finding out the precise record of the Claimant's registration. After various inquiries it was concluded that such registration did not exist. The certificate attesting to that registration, it was argued, was thus false, forged or tainted by some other irregularity that did not reflect the actual truth. It was also argued that the documents based on that certification issued by the Lebanese Embassy in Cairo, including two passports in the name of the Claimant, were thus equally untrue.

While the issue of whether forgery, fraud, deception or some other misconduct characterized the documents in question gave place to lengthy discussions, the matter became crystal clear at the closing of the hearing on the merits. Following a question from the Chairman about whether the claim of forgery was to be disregarded, it was so confirmed by counsel for Egypt, with the clarification that two aspects were involved in this discussion: "...a document that was not genuine, on the basis of which everybody was misled to believe that the passports are genuine. They are not forged. The Lebanese Embassy in Egypt was misled by a document that is not genuine" [Transcript, 18 March 2008, at 46-47].

In my examination of the evidence, the latter statement is the one that convincingly explains what actually had been the real situation. Four different documents were subject to close scrutiny. The first was the certificate of registration. This was the document giving rise to doubts about its genuineness and the ultimate certification by the Lebanese authorities about the fact that no record of registration for the Claimant existed. Whether the certificate bore official seals and marks, or even signatures, that were illegible, does not alter the fact that it attested to a non-existent

registration. Impropriety in obtaining the certificate was therefore the necessary implication of such situation.

On the basis of that certificate, the Lebanese Embassy in Cairo issued first a certificate on Claimant's Lebanese nationality and its registration in the records of the mission. Such document does not mean that the individual record on which it was based was genuine, as the Lebanese consular office is not the authority in charge of public records of that country. The Embassy later issued the two passports noted, which were also based on the false information provided. It follows that neither these passports constitute proof that the Claimant was indeed a Lebanese national. Few countries will require that embassies check for the genuineness of documents submitted unless something awkward is apparent from them.

It has been admitted in the proceedings that the Claimant concerned paid US \$5,000 to a Lebanese lawyer in connection with obtaining the certificate of registration, as it has been also admitted that this was done in order to avoid military service in Egypt. That particular gentleman seems to have vanished from earth as his first name, address or other relevant information about him have been conveniently forgotten by the Claimant concerned [Transcript, March 10, 2008, at 153 et seq.] While it could be thought that the amount involved is not beyond the ordinary for professional services of the kind, it must not be forgotten that these events were contemporaneous with the most dramatic moments of civil war in Lebanon, a context in which such amount becomes significant and can go a very long way.

Because such events were surrounded by none too clear circumstances, the Tribunal rightly directed the Claimant concerned to submit documentary evidence in terms of a "certification from the Lebanese Ministry of the Interior that Mr. Siag is a Lebanese national, and the date and place of his registration" or if not to explain why it was unable to obtain the requested documents (Procedural Order No. 6, para. 6.3). No such document was produced as none existed. While many explanations were offered about the state of public records in Lebanon, none is in my view convincing. Lebanon has a long tradition of public service which in spite of many difficulties has continued to function, just as its diplomatic service has.

The burden of proof is, in my understanding, still on the Claimant who has to prove that it holds the nationality it claims to have and this it has failed to do in spite of having been directed by the Tribunal to supply the appropriate certification. The Award has taken a different view on this matter in the belief that it is for Egypt to prove fraud, deception or other dishonest behaviour, a proof that would not have been met. While I do not disagree with the need to so prove, I respectfully disagree in respect of the

conclusion that this did not happen. I believe that Egypt has so proven by providing ample official documentation on the matter.

In this context I also disagree about the applicable standard of proof. While the Award has chosen the United States standard of clear and convincing evidence, it is my view that arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized (Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration (2004), at pp. 89-92). The facts of this case, difficult as they are to establish with absolute certainty, could be best judged under a standard of proof allowing the Tribunal “discretion in inferring from a collection of concordant circumstantial evidence (*faisceau d’indices*) the facts at which the various indices are directed” [Ibid., at 93-94].

In the end, it must be decided whether the information provided by the Lebanese authorities, a country which is not a party to these proceedings, or that supplied by the Claimant, who is the party most involved in the arbitration and with specific interests in its outcome, is to be relied upon. This arbitrator has not the slightest doubt that the former is to prevail. The only other choice would have been to request the intervention of Interpol in support of the Tribunal’s task to establish the true facts, which was not asked for nor in my view appeared necessary in view of the evidence on record.

The legal implications of the facts noted above are serious indeed. It is not just a question concerning jurisdiction. In spite of jurisdiction having been affirmed by the Tribunal, a party is not prevented from submitting additional jurisdictional objections if they are based on events not known at the time of the pleadings on jurisdiction, which in this case neither could they have been known as the doubts about genuineness arose later. This is why I respectfully dissent from the Award’s finding about the claim on this count having been untimely and waived.

Irrespective of jurisdiction, however, the most serious consequences relate to the merits of the case. I am convinced that money changed hands improperly so as to obtain a certificate of a non-existent registration, a situation which was not uncommon at the time as a consequence of the civil war. While the goal pursued by the original certification was to avoid Egyptian military service, a goal which is bad enough, and this was done some years before the actual dispute was submitted to arbitration, the fact is that the same certification has now been used in support of a multi-million dollar claim.

Whether the principle of *ex turpi causa non oritur actio*, the doctrine of unclean hands or the policy of eliminating corruption domestically and internationally are relied

upon, the result is that an arbitration tribunal cannot find for a claim that is tainted by such practices. As the Tribunal in *World Duty Free* held in this respect:

“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal” [World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 157].

If one substitutes certificates of registration of nationality for contracts arrives exactly, in my respectful view, to the same conclusion. Accordingly, I believe that the claim in the instant case should be dismissed on the merits.

I regrettably must also dissent on some other points of law or fact relating to different matters. One such matter concerns the repossession of the land under the Sale contract and its later expropriation. It is an established fact the project suffered a number of delays. How influential these delays were in completing the project on time is a question open to discussion. The Award accepts the argument that the project was close to completion at the time the land was reposessed and the contract terminated. In spite of technical studies and courts decisions that would so establish, I am not quite convinced that this was the case. The photographic evidence does not seem to show such timely completion. In any event, what the Respondent did in this respect was to exercise a right under the provisions of the contract.

It is a fact, however, that expropriation of the land was later undertaken, a point which is not disputed. The question of the appropriate compensation, however, has been much disputed and is now decided in the Award. My dissent from the reasoning of the Award on this other matter is that I am not persuaded that the Treaty allows for a standard of compensation different from fair market value at the time of expropriation. There are of course situations where that standard might be inadequate in the light of the circumstances of the case, but in the instant case the application of Article 5 (iii) of the Treaty becomes compelling as the project had not actually began to operate, generate profits or provide any other element that would allow the Tribunal to consider that compensation should aim at a long-term view of the effects of expropriation. Such long-term view is what has led some tribunals and writers to suggest the existence of a different standard of compensation for unlawful expropriation, largely based on customary international law. This might well be justified in some cases, but this one

does not appear to qualify for that still exceptional treatment under international law. On this point I accordingly also dissent from the Award.

This has also implications for the amount of compensation decided. First, I am not quite in agreement about relying for such purpose on the exclusive view of experts invited by the Claimants, however distinguished they are. But more importantly, I believe that in this case the starting point should have been different from the comparative view taken by the experts and accepted by the Award in relation to other existing and ongoing projects, a number of which are unrelated to the Taba area.

I believe it would have been more appropriate to start from the award of discreet damages and costs, to be supplemented by such other factors as might be related to the fair market value of the property at the time of the expropriation and subject to the payment of an interest that would adequately take care of time and value. I also believe that it might have been appropriate to take into account eventual breaches of fair and equitable treatment and compensate them accordingly. In my view, the end figure of compensation should not have been above US\$ 30 million. It must also be kept in mind that the capital contribution made by the Claimants to the project was minimal, that is 25% of a total capital of approximately US\$ 3 million, in respect of which there are still important outstanding debts with the original partners and Egyptian banks.

A last point of this dissent relates to the award of costs. First, I do not believe that costs relating to stages of litigation that took place before this arbitration began should be awarded at all. In respect of the costs of this arbitration I believe that a more adequate approach would be to require each party to pay one half of such costs, particularly taking into account the fact that the Claimant agreed to pay attorney's fees only on a successful recovery. While there is nothing unusual in such arrangement, it entails the acceptance of the Claimant of a degree of risk that should not be entirely shifted to the Respondent, particularly in view of the amounts involved.

Respectfully submitted,

/signed/

Francisco Orrego Vicuña

Date: [11 May 2009]