School of International Arbitration, Queen Mary,
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International Arbitration Case Law

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LIBANANCO HOLDINGS CO LIMITED
V.
REPUBLIC OF TURKEY
(ICSID CASE NO. ARB/06/8),
DECISION ON JURISDICTION

Case Report by Daniel Brawn[**]
Edited by Ileana M. Smeureanu[***]

In a decision on jurisdiction rendered on 2 September 2011, the Tribunal upheld the Respondent's objections to the tribunal's jurisdiction (taken as a preliminary issue) and dismissed all the Claimant's claims in the arbitration. The Tribunal reached this decision on the basis that the Claimant had not proved that it owned the investments upon which the claim was founded before the relevant date which would have given the Tribunal jurisdiction. However, the Tribunal gave some brief comments on two of the remaining preliminary issues, to help those who confront them in future.

Tribunal:	Mr Michael Hwang SC (President), Mr Henri C Alvarez QC and Sir Franklin Berman QC.
Claimant's Counsel:	Mr Stuart H Newberger of Crowell & Moring LLP (Washington DC, USA) and Mr Achilleas L Demetriades (Nicosia, Cyprus).
Defendant's Counsel:	Ms Lucy Reed, Mr D Brian King and Mr Noah Rubins of Freshfields Bruckhaus Deringer LLP (New York, USA); Mr Jan Paulson of Freshfields Bruckhaus Deringer LLP (Paris, France); Mr Aydin Cosar, Ms Arzu Cosar and Mr Utku Cosar of Cosar Avukatlik Burosu (Istanbul, Turkey).

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1. Facts of the Case

In 1993, the Turkish Government decided to divest itself of its share ownership of Cukurova Elektrik Anonim Sirketi ("CEAS") and Kepez Elektrik Turk Anonim Sirketi ("Kepez"), two Turkish utility companies. The successful bidder in this privatisation of both companies was Rumeli Elektrik Yatirim A S, a company owned by the Uzan family. In 1998, CEAS and Kepez were required by law to enter into fresh Concession Agreements with the Turkish Government. The new concessions gave CEAS and Kepez the right to continue to operate the two utilities until 2058.

Turkey alleged various breaches of the Concession Agreements and in June 2003, the Turkish Ministry of Energy and Natural Resources raided the offices of CEAS and KEPEZ and cancelled the Concession Agreements.

In September 2003, CEAS and Kepez filed lawsuits challenging the cancellation of the Concession Agreements. In May 2005, the Turkish court issued a decision upholding the Ministry's grounds for cancellation of the Concession Agreements. This decision was upheld on appeal.

In February 2006, Libananco filed its Request for Arbitration against the Turkish Government. Libananco alleged that in April 2002, a close business associate acquired Libananco (a Cypriot company) on behalf of the Uzan family and that by May 2003 Libananco had acquired all of the Uzan family's shares in CEAS and Kepez. Libabanco therefore sought to challenge the expropriation of CEAS and Kepez as being breaches of the Energy Charter Treaty ("ECT") between Cyprus and Turkey, by which disputes are to be referred to the ICSID.

2. Legal Issues Discussed in the Decision

Turkey raised various jurisdictional objections, four of which the Tribunal took as Preliminary Jurisdictional Objections, on the basis that either one was capable of bringing the arbitration proceedings to an end: (1) whether Libananco owned the shares in CEAS and Kepez before the date of the alleged expropriation; (2) whether Libananco was an "investor" within the meaning of the ICSID Convention and the ECT; (3) whether Libananco's claims satisfied the express conditions of Turkey's consent to arbitration; (4) whether Libananco was entitled to the benefits of the ECT under its Article 17.

(a) Ownership of the shares (¶¶ 127-536)

The first issue was whether Libananco in fact owned the shares in CEAS and Kepez before June 12, 2003, which was the date of the alleged expropriation. This was the key issue in the case. It was common ground between the parties that Libananco would have no standing to prosecute the arbitration if it had not acquired the shares in CEAS and Kepez before June 12, 2003. Turkey argued that Libananco had acquired the shares after June 12, 2003.

The Tribunal considered Libananco's evidence in great detail. It contained inconsistencies and discrepancies for which no satisfactory explanation was offered. Libananco had changed its position without giving any convincing explanation. The Tribunal was "unable to reconcile the Claimant's case with the evidence given by its witnesses." Libananco was also unable to produce documents which would normally be expected to exist if its story were true. Although there was some evidence to support some aspects of Libananco's case, the Tribunal found that Libananco had "failed to meet its burden of proof when all the evidence is viewed as a whole." Libananco had not established that it had acquired the shares before June 12, 2003. Libananco therefore had no standing to bring the claim and the Tribunal had no jurisdiction to hear it.

(b) Was Libananco an "investor" within the meaning of the ICSID Convention and the ECT (¶¶ 537-538)

The issue here was whether Libabanco had a corporate existence of its own, or was merely the *alter ego* of the Uzan family and therefore did not qualify as an "investor". Having decided the first issue against Libananco, it was unnecessary for the Tribunal to decide the other three issues. The second issue was specific to the situation of Libananco and of no general application.

(c) Did Libananco's claims satisfy the express conditions of Turkey's consent to arbitration (¶¶ 539-548)

In the hope of benefitting those who confront these issues in future, the tribunal gave brief comments on the issues raised by the third and fourth Preliminary Jurisdictional Objections, without making any decisions.

The third issue was whether Libananco's claims satisfied the express conditions of Turkey's consent to arbitration. Turkey argued that the present dispute had already been submitted to the courts by the Uzan family, who had been unsuccessful, and that by Article 26(3)(b)(i) of the ECT, Turkey was entitled to withhold consent to arbitration where the Investor had previously submitted the dispute to the courts. Libananco argued that it was not Libananco itself that

had submitted to the jurisdiction of the Turkish courts and also that the present dispute was not the same as that which had been referred to the Turkish courts.

Whereas paragraph 3(a) of Article 26 confers unconditional consent by a Contracting Party to the submission of disputes to arbitration, paragraph 3(b)(i) limits that consent on the part of Contracting Parties listed in Annex ID, by excluding disputes which the Investor has previously submitted to the national courts of the Contracting Party. Under paragraph 3(b)(ii), each Consenting Party "shall provide a written statement of its policies, practices and conditions in this regard." Turkey is one of the Contracting Parties listed in Annex ID.

The Tribunal considered it reasonably clear that that the purpose of paragraph 3(b) in Article 26 was that Negotiating States (as listed in Annex ID) would, on becoming party to the ECT, give only limited consent to arbitration by comparison with the unconditional consent given by other Contracting States. That consent excludes disputes that have previously been submitted to the courts of that State. The effect of a listing in Annex ID is to limit that State's consent to arbitration and that limitation is not conditional upon the State having given "a written statement of its policies, practices and conditions in this regard" as referred to in Article 26(3)(b)(ii) of the ECT. Faced with this clear proscription, it did not appear open to the Tribunal to assemble some form of "constructive consent" so as to circumvent the fundamental rule that arbitration of any kind is rooted in consent to arbitrate.

There remained a question of how far the reference in Article 26(3)(b)(ii) to "the Investor" and "the dispute" require some form of identity between the claims in legal proceedings and in a potential arbitration. The Tribunal was in some doubt as to whether the provisions of a multilateral treaty of this kind should be construed with the same strict rigour that might be appropriate for the application of a national procedural rule such as *res judicata*. A more flexible interpretive approach, bearing in mind the purpose the treaty is intended to serve, can be justified by the different nature of the instruments involved and by the prospective effect: a domestic rule of *res judicata* is intended to prevent re-litigation of an issue that has already been authoritatively determined, whereas a treaty rule may serve to prevent forum-shopping. To make the issue turn on the *form* in which the local legal action was brought, rather than on the *substance* of the underlying rights at issue, would run the risk of subverting the intention behind the treaty.

If this issue were to arise for determination in a future case, the tribunal would have to rank the relative weight of two treaty provisions, sub-paragraphs (a) and (b) of Article 26(3), the one entailing an unconditional consent to arbitration and the other an unmistakable non-consent.

(d) Was Libananco entitled to the benefits of the ECT (¶¶ 549-556)

The fourth issue was whether Libananco was entitled to the benefit of the ECT under its Article 17. In broad terms, under Articles 17(1) and 17(2) of the ECT, the benefits of the ECT are denied to a legal entity that has no "substantial business activities" in the country in which it is organised and is owned by citizens of a third state, or the third state is one with which the denying party does not maintain diplomatic relations (as with Turkey and Cyprus). Turkey claimed that, by virtue of Article 17, it was entitled to deny Libananco the benefits of the ECT. Libananco argued that Cyprus and Turkey are both Contracting Parties to the ECT and therefore neither is a "third state".

By Article 17 of the ECT, a Contracting Party may deny the advantages of the Treaty when, amongst other things, (a) the Investor is owned or controlled by citizens or nationals of a third state and the Investor has no substantial business activity within the territory of the Contracting Party, or (b) if the Investor is in a third state with which the denying Contracting Party does not maintain diplomatic relations. The phrase "reserves the right" has troubled previous tribunals, particularly as to what the Contracting State must do to exercise this reserved right, when it may (or must) do so and whether the effect is retrospective or prospective only. The Tribunal had nothing to add on this subject.

The issue in the present case was what meaning should be attributed to "third state" and whether the term has the same meaning in Article 17 and in Article 7 (which provides explicitly that a "third state" can be a Contracting Party). The Vienna Convention of the Law of Treaties lays down that the starting point for interpretation is the ordinary meaning to be given to the terms of a treaty, in their context and in the light of the treaty's objective and purpose, unless it is established that the parties intended a special meaning to be given to the term. No evidence had been led to suggest any such intention in respect of the use of the term "third state" in Article 17, or indeed any other Article, with the possible exception of Article 7. The Tribunal was satisfied that "third state" had a well recognised ordinary meaning in treaty law, namely "state not party to the treaty in question".

In the Tribunal's view, it made no difference that Article 7 provided that a "third party" could be a Contracting State." The Article stated expressly that the definition was "[f]or the purposes of this Article," which automatically excluded its export to any other Article, including Article 17.

Article 17 had in mind a situation in which the Investment is made from within the circle of Contracting Parties but the ultimate beneficial owner of the Investment (the Investor) belongs to a "third state"

(e) Costs (¶¶ 557-569)

The Tribunal considered that Article 61(2) of the ICSID Convention gave it power to award costs and the discretion to decide at what level to do so. The Tribunal considered that it was appropriate in international arbitration to adopt the approach of many national jurisdictions to assess whether the costs have been reasonably and necessarily incurred for the purposes of the litigation. The Tribunal considered: (a) the importance of the matter to the Parties and the value of the property involved (namely, US$ 10.1 billion); (b) the amount of evidence adduced; (c) the conduct of the parties; and (d) the fact that the work was done across multiple jurisdictions. The Tribunal considered it appropriate to apply the principle that costs should follow the event and that a costs order should be made in favour of Turkey.

However, the Tribunal considered that it was not appropriate to award Turkey its costs in relation to the following issues: (a) dealing with Libananco's complaint relating to alleged covert surveillance of its representatives and witnesses by Turkey; (b) Turkey's application for forensic inspection of the share certificates, which produced little evidence that was of assistance to the parties; (c) similar inspections of other documents; (d) the second, third and fourth Preliminary Jurisdictional Objections, on which there was no winner because no decision needed to be reached.

The Tribunal was not in a position to make a detailed assessment, but it considered that the Respondent's costs of US$ 35,702,417.76 (being US$ 25,699,521 by way of legal fees and US$ 10,002,896.76 in respect of other expenses) were excessive and ordered the Claimant to pay to the Respondent US$ 15,000,000, plus US$ 602,500, being the contribution the Respondent had paid towards the fees and expenses of the Tribunal and the ICSID Secretariat.

3. Decision

The Tribunal dismissed the claim on the basis that Libananco had failed to establish that it owned the shares in CEAS and Kepez on June 12, 2003, which was the date upon which Turkey raided the offices of CEAS and KEPEZ and cancelled the Concession Agreements. Libananco therefore had no standing to bring the arbitration, and therefore the Tribunal had no jurisdiction, and there was no need to decide the other preliminary issues that had been raised.