

Title:

Ad Hoc-Award of October 27, 1989 and June 30, 1990, Antoine Biloune (Syria) and Marine Drive Complex Ltd. (Ghana) v. Ghana Investment Centre and the Government of Ghana, YCA 1994, at 11 et seq.



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AD HOC - UNCITRAL

Awards of 27 October 1989 and 30 June 1990*

Arbitrators: Judge Stephen M. Schwebel, Chairman (US); Prof. Don Wallace, Jr. (US); Monroe Leigh, Esq. (US)

Parties: Claimants: Antoine Biloune (Syria) and Marine Drive Complex Ltd. (Ghana); Respondents: Ghana Investments Centre and the Government of Ghana

Place of arbitration: Washington, DC, USA

Subject matters:

- prerequisite of efforts at amicable settlement
- no jurisdiction over claim for denial of justice or violation of human rights
- jurisdiction over party not party to agreement
- addition of respondent to arbitral proceedings
- validity of agreement
- constructive expropriation of assets by government
- reconsideration of award under UNICITRAL Rules
- evidential weight of contemporaneous books and records
- calculation of foreign currency investments
- historical investment value as basis for calculating damages
- currency of award
- compensation of arbitrators at ICSID rate

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Facts

This dispute arises out of the business activities in Ghana of the claimants, Antoine Biloune and Marine Drive Complex Ltd. (MDCL). MDCL is a Ghanaian corporation in which Mr. Biloune is the principal shareholder, and Mr. Michigan the

minority shareholder.

On 5 November 1985, MDCL and Ghana Tourist Development Company (GTDC) concluded a Lease Agreement (GTDC Lease Agreement). The GTDC Lease Agreement provided for a ten-year lease to MDCL of a 2.95 acre parcel of land and a restaurant complex, with a five-year renewal option, at a rate of 30,000 cedis per month. Under the GTDC Lease Agreement, MDCL was to renovate and manage the restaurant. The claimants alleged that prior even to the conclusion of the formal lease, GTDC issued a letter of intent, granting MDCL permission to enter the premises and begin renovation work.

At some point of time, the nature of the parties' relationship was modified. The claimants asserted that in place of the lease/operation contract, the parties to the lease negotiated the terms of a joint venture. MDCL's share of the venture was to be fixed at 49%, GTDC's at 51%; and MDCL was designated manager of the venture.

In early 1986, MDCL commissioned a feasibility study for the expansion of the facilities by the firm of Lambrise Industrial and Commercial Management. This study was completed in April 1986. It contemplated an expansion of the original scope of the project from simply renovating the existing restaurant to the construction of an extensive new 4-star hotel resort complex.

In April 1986, MDCL applied to Ghana Investment Centre (GIC) to obtain for the expanded project certain benefits available to joint ventures between foreign and Ghanaian partners under the Ghana Investments Code of 1985. MDCL submitted the April 1986 Lambrise study as part of the application process. On 16 July 1986, GIC reported favorably on the project and approved the investment. An arrangement, including the requested investment concessions, was realized in the GIC Agreement of 18 November 1986. The agreement contained the following arbitration clause:

"(1) Where any dispute arises between the foreign investor and the Government in respect of the enterprise, all efforts shall be made through mutual discussions to reach an amicable settlement.

(2) Any dispute between the foreign investor and the Government in respect of an approved enterprise which is not amicably settled through mutual discussions may be submitted to arbitration;

a. in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law"

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Moreover Art. 22 provided:

"Subject to the provisions of the Code:

(a) no enterprise approved under the Code shall be expropriated by the Government.

(b) no person who owns, whether wholly or in part, the capital of an enterprise approved under the Code shall be compelled by law to cede his interest in the capital to any other person."

At the outset of the project MDCL hired an architectural firm and an engineer to oversee the planned operations to the facilities. The same firm was retained to prepare plans and get Accra city planning approval for construction of the additional buildings. The claimants maintain that, before the building permit was obtained, GTDC obtained the Accra City Council's assurances that approval would be forthcoming and instructed MDCL to proceed with the work without the permit. The respondents denied that any such assurances or instructions were or could be given.

On 28 August 1987, the Accra City Council (ACC) caused a Stop Work notice to be issued, as no building permit had been issued. The notice, addressed to GTDC as "Owner or Developer", required GTDC, "on or before 4 September 1987", to "show cause" why the construction in progress "should not be stopped & demolished". On 3 September, the

Accra City Council ordered demolition of the project, which in some measure was carried out. MDCL immediately informed GTDC of the demolition. Several letters were written by Lt. Col. Yaache of GTDC to the ACC and to P.V. Obeng, who was "Chairman of the Committee of PNDC Secretaries" - apparently effectively the Prime Minister of Ghana - and who was also Chairman of the Board of GIC. Lt. Col. Yaache noted that the "project is 51 % owned by the Government and not a privately owned venture". He requested that Mr. Obeng "take the necessary action to save the project from destruction and enable us [to] proceed with the construction works."

On 3 September 1987, an announcement was made in the People's Daily Graphic that persons who had connection with MDCL were to report to the National Investigations Committee (NIC). Mr. Biloune and other named MDCL officers reported to the NIC where they were given "assets declaration forms" and ordered to fill them out within fourteen days.

On 19 October 1987, NIC referred the MDCL case to the Office of Revenue Commission. After Mr. Biloune or his accountants requested and obtained a number of extensions of the deadline to file his assets declaration form he was arrested on 11 December 1987 and held in custody for thirteen days without Charge. On 15 December 1987 a deportation notice was issued, stating that Mr. Biloune's presence in Ghana "is not conducive to the public

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good" and Biloune had to leave Ghana the same day. On 24 December 1987 Mr. Biloune was deported from Ghana to Togo.

In the ensuing arbitration, the claimants invoked the arbitration clause of the GIC Agreement. Mr. Biloune alleged that the GIC and the Government of Ghana interfered with his investment in MDCL and that by various means, including Mr. Biloune's arrest and deportation from Ghana, the respondents effectively expropriated the assets of MDCL. Mr. Biloune claimed damages for expropriation, denial of justice and violation of human rights. The respondents denied that they expropriated or unreasonably interfered in Mr. Biloune's investment in MDCL. They asserted that Mr. Biloune's detention and deportation were for reasons unrelated to the investment and were justified under the law of Ghana. Moreover, the respondents maintained that the question of denial of justice had been mooted by their participation in the arbitration and that the claim of violation of human rights was beyond the jurisdiction of the Tribunal.

In its *Award on Jurisdiction and Liability* of 27 October 1989, the Tribunal found that it had jurisdiction and held that the Government of Ghana expropriated MDCL's assets and Mr. Biloune's interest in MDCL. In view of the provision in the GIC Agreement which bound the Government not to expropriate such interests, the Tribunal concluded that the Government of Ghana was under an obligation, under the law of Ghana and international law, to compensate Mr. Biloune.

In its *Award on Damages and Costs* of 30 June 1990, the Tribunal gave its final calculation of damages and the compensation to be paid to Mr. Biloune.

Excerpt

Award on jurisdiction and liability

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[...]

III. THE TRIBUNAL'S DECISIONS

[25] "The fundamental outlines of the relevant events are clear. Where differences between the parties on the facts remain, the Tribunal has had recourse to the principle recorded in the UNCITRAL Rules that each party has the burden of proving the facts upon which it relies for its claim or defense. [UNCITRAL Rules](#), Art. 24.

(...)

[26] "This Tribunal must determine whether the above facts constitute, as the claimants charge, a constructive expropriation of MDCL's assets and Mr. Biloune's interest in MDCL. The motivations for the actions and omissions of

Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL

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from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL, unless the respondents can establish by persuasive evidence sufficient for these events.

[27] "The respondents' defenses on this point are that the various events described above are independent and unrelated, and that their conjunction is coincidental. The respondents maintain that the independent and unrelated reasons for Mr. Biloune's detention and deportation essentially were that in 1985 he was found guilty of selling kerosene stoves above the price-regulated price; that he had been accused by a private Ghanaian party of involvement in a bank fraud scheme; and that the sources of his investment in MDCL had not been shown to the satisfaction of the National Investigations Commission to be in accordance with the currency regulations of Ghana.

[28] "The evidence submitted in support of these alternative explanations is not convincing for the following reasons. First, while Mr. Biloune admits that he was fined for an apparently minor price-control infraction in respect of kerosene stoves, that case was apparently closed in 1985. The allegation of bank fraud is made only in a letter of a private individual which resulted in no indictment or other action by Ghanaian authorities. The sources of all of Mr. Biloune's investment in MDCL, on the basis of the record now before the Tribunal, are unclear. But by the same token it is not established that they were in violation of whatever may be the governing regulations of Ghana. The Tribunal therefore finds that the Government has not succeeded in establishing that there were reasons for the NIC investigation and the arrest and deportation of Mr. Biloune that were not connected to the MDCL project.

[29] "As for the failure to issue a building permit, and the partial demolition of the project (whether or not it was prompted by the lack of a building permit), the respondents have not adequately explained these actions, in view of the history of the site, the time elapsed between the application and the issuance of the stop work order, the work actually carried out by MDCL, and the claimants' justifiable reliance on GIC and GTDC as liaison with the relevant Governmental agencies. In particular, the Tribunal does not find credible that the authorities in Accra were ignorant of the existence for well over a year of construction activity on one of the most prominent sites in the city, and one which adjoins the seat of the Government of Ghana.

[30] "The Tribunal therefore holds that the Government of Ghana, by its actions and omissions culminating with Mr. Biloune's deportation, constructively expropriated MDCL's assets, and Mr. Biloune's interest therein, not later than 24 December 1987. The claimants are therefore entitled to compensation.

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[31] "In view of the Tribunal's holding that the Government of Ghana expropriated MDCL's assets and Mr. Biloune's interest in MDCL, and in view of provision in the GIC Agreement which binds the Government not to expropriate such interests, the Tribunal has concluded that the Government of Ghana is under an obligation, under the law of Ghana and international law, to compensate Mr. Biloune. The Tribunal is satisfied that Mr. Biloune suffered significant damage from the expropriation.

(...)"

Award on damages and costs

I. THE TRIBUNALS DECISION

[...]

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B. Standards of Proof

(...)

[36] "Under the [UNCITRAL Rules](#), 'Each party shall have the burden of proving the facts relied on to support his claim or defense'. This Tribunal, governed by the [UNCITRAL Rules](#), has proceeded in accordance with this principle. The Tribunal has reviewed the accounting records submitted to it, as well as the reports analyzing those records by both the claimants' and the respondents' accountants. The Tribunal holds that, in general, the contemporaneous books and records of a company regularly kept in the normal course of business should be accorded substantial evidentiary weight. In the present case, it appears that a firm of Ghanaian chartered accountants, licensed to pursue their profession by the Government of Ghana, designed MDCL's accounting system and controls and periodically performed audits. This same firm has provided its opinion to this Tribunal that the company's books in fact accurately reflect MDCL's financial status. MDCL's records are thus accepted by the Tribunal as presumptively accurate, subject to proof to the contrary by the respondents.

[37] "The respondents and their accountants, also professional Ghanaian chartered accountants, have alleged certain shortcomings and irregularities in the design of MDCL's accounting system and the companies' bookkeeping practice. They argue that a higher verification or confirmation standard should have been used by an auditor who was fully independent of the company's affairs, and they assert that many of the book entries could not be verified by their accountants' recent review of the records submitted to the Tribunal.

[38] "The Tribunal is not convinced, however, that difficulties in verifying every entry in books from admittedly incomplete files necessarily render the books unreliable and fundamentally erroneous. The respondents have not demonstrated any instances of wrong recording (the few instances which they mentioned were satisfactorily explained by the claimants and their accountants). In general, it appears to the Tribunal that the backup documents submitted adequately support the book entries."

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[...]

F. Basis for Calculating Damages

[56] "Having determined the amounts Mr. Biloune invested in the Marine Drive project, the Tribunal must now determine the basis for calculating the damages due the claimants from the respondents' constructive expropriation of that project. The claimants have proposed two alternative methods for calculating damages: historical investment value or lost profits.

[57] "The standard for compensation in cases of expropriation is restoration of the claimant to the position he would have enjoyed but for the expropriation. This principle of customary international law is stated in many recent awards on international arbitral tribunals. See, e.g., [Texaco Overseas Petroleum v. Libya](#) (TOPCO) (Dupuy, arb.), paras. 40-105, 17 I.L.M. 28-35 (1977);⁴ [Sedco, Inc. and National Iranian Oil Co.](#), Award No. ITL 59-129-3, 10 Iran-U.S. Claims Tribunal Rep. 180, 184-189 (1986), 25 I.L.M. 629, and separate opinion of Judge Brower in id.; [Amoco International Finance Corp and Islamic Republic of Iran](#) (Khemco), Award No. 310-56-3, 15 Iran-U.S. Claims Tribunal Rep. 189, paras 183-209 (1987), 27 I.L.M. 1320, 1391. This standard is also reflected in hundreds of bilateral investment treaties. The respondents in this case have not challenged this principle, and indeed have explicitly 'recognize[d] that there exists a generally accepted principle of international law that prompt, adequate and effective compensation be paid in case of expropriation'.

[58] "Normally, in cases of expropriation of a going concern, the most accurate measure of the value of the expropriated property is its fair market value, which in its nature takes into account future profits. The discounted cash flow method of valuation is often used to calculate the worth of the enterprise at the time of the taking. [Starrett Housing Corp. and Islamic](#)

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[Republic of Iran](#), Award No. 314-24-1, 16 Iran-U.S. Claims Tribunal Rep. 112, paras. 279-280 (1987).⁵

[59] "The claimants have made a compensation claim based on the future lost profits of MDCL. While the Tribunal

accepts the validity of the principle that lost profits should be compensated it is not possible to make an award on that basis in this case. The claimants have not provided any realistic proof of the future profits of the company. The Lambrise Report purports to project profits, but the Tribunal agrees with the respondents that this report was not an economic forecast of profits, but a projection intended to encourage potential investors. Moreover, at the time of the project's suspension and effective expropriation, the project remained uncompleted and inoperative. It was generating no revenue, still less profits. Thus, with no basis on which to calculate future profits, the Tribunal is required to consider an alternative methodology.

[60] "The claimants have also requested that Mr. Biloune be awarded the historical Investment value of the project. Given the nature of the project, and its early interruption by the respondents, the Tribunal has concluded that the most appropriate method for valuing the damages to be paid will be to return to Mr. Biloune the amounts he invested in MDCL, i.e., restitution.

[61] "Thus, respondents are obligated to pay Mr. Biloune the amounts shown to have been invested by him, i.e., £ Sterling 50,765.85; DM 600.00; and U.S. \$8,115.66 for the foreign currency investment, and 46,790,982.85 cedis. (The claimants set forth various totals for the total cedi investments with slight variations. Since the variations were not explained, the Tribunal has selected the lowest total claimed.)

[62] "Since this Award is based on amounts actually invested by Mr. Biloune, no apportionment to allow for the interests of GTDC or Mr. Michigan is appropriate. Thus, the Tribunal need not address allocation questions and other issues that might arise if the award were based on the going concern value of MDCL or of the Marine Drive project as a whole."

[...]

*These awards have been made public in court proceedings in the United States District Court for the District of Columbia, Case No. 90-2109.

⁴Reported in Yearbook IV (1979) pp. 177-187.

⁵Reported in Yearbook XIII (1988) pp. 271-284.

Referring Principles:

XI.1 - Compensation for expropriation

XII.1 - Distribution of burden of proof