

**IN THE MATTER OF AN ANNULMENT PROCEEDINGS PURSUANT TO THE CONVENTION ON THE SETTLEMENT  
OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONAL OF OTHER STATES**

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**A Separate Opinion and A Statement of Dissent  
By Omar Nabulsi, member of the ad hoc Committee**

**In the Annulment Proceedings**

**Between**

**Hussein Nuaman Soufraki,**

**(Claimant)**

**v.**

**The United Arab Emirates,**

**(Respondent)**

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**CASE NO. ARB/02/7**

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## **I. Introduction**

1- A Request for Arbitration was brought on May 16, 2002 by Mr. Hussein Nuaman Soufraki (the “Claimant”). This Request was referred to an Arbitral Tribunal (“the Tribunal”), which consisted of:

Mr. L. Yves Fortier, President

Judge Stephen M. Schwebel, Member

Dr. Aktham El Kholi, Member

2- The Request for Arbitration was registered against the United Arab Emirates – UAE (the “Respondent”). The Claimant invoked his Italian nationality to present claims against the Respondent under the Treaty between Italy and UAE for the Protection and Promotion of Investment. This Treaty was entered into force on April 29, 1997.

3- The subject matter of the dispute concerned a concession agreement between the Claimant and the Respondent. However, before the case was heard on the merits, the Respondent raised an objection to the Tribunal’s jurisdiction challenging the Claimant’s allegation that he is an Italian citizen.

Pursuant to ICSID Rule 41, the Tribunal bifurcated the arbitration in order to hear the Respondent’s objection to jurisdiction as a separate preliminary matter.

- 4- The Tribunal decided that the dispute falls outside its jurisdiction under Article 25(1) and (2)(a) of the ICSID Convention, and Article 1(3) of the Investment Agreement Between Italy and The United Arab Emirates for the Protection & Promotion of Investment (BIT). Therefore, the Tribunal declined to hear the dispute on its merits. The Tribunal’s reasoning is that (a) it had jurisdiction only if the Claimant had Italian nationality on the pertinent dates, (b) it is empowered to decide whether the Claimant had Italian nationality, (c) it is not bound to accept certificates on nationality as conclusive evidence, (d) the Claimant had Italian nationality if he could prove that he had satisfied the requirements of Italian law, (e) the Claimant failed to prove that he satisfied these requirements by residing in Italy for one year on the relevant dates, and (f) the Claimant failed to prove that he had Italian nationality. Consequently, the Tribunal decided that it lacked jurisdiction<sup>1</sup>.
- 5- On 4 November 2004, pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID” or “the ICSID Convention”), an Annulment Application of the Arbitral Award issued on July 7, 2004—ICSID Case No. ARB/02/7—was submitted to the Secretary General.

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<sup>1</sup> Award, paras. 21, 23, 27, 81, 84

6- An ad hoc Committee was appointed by the Chairman of the ICSID Administrative Council in accordance with Article 52(3) of the ICSID Convention, and was composed of:

Judge Florentino P. Feliciano, President

Mr. Omar Nabulsi, Member

Professor Brigitte Stern, Member

The Claimant was represented by:

Mr. Whitney Debevoise (up until April 3, 2007), Ms. Jean E. Kalicki, of Arnold & Porter LLP, 555 Twelfth St., N.W., Washington, D.C. 20004, USA;

Prof. Christopher Greenwood, CMG, QC, Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3 EG, UK.

The Respondent was represented by:

Mr. Stephen Jagusch, Mr. Simon Roderick, Mr. Anthony Sinclair, of Allen & Overy LLP, One New Change, London EC4M 9QQ, UK

Professor James Crawford, SC, FBA, Lauterpacht Research Centre for International Law, 5 Cranmer Road, Cambridge CB3 9BL, UK.

## **II. Grounds for Annulment**

7- The Claimant's alleged grounds for annulment, as stated in his Request in his Memorial in support of the Request, and in his Reply Memorial in further support, are as follows:

- a) The Tribunal manifestly exceeded its powers by making its own determination as to whether Mr. Soufraki satisfied the requirements for receiving Italian nationality under Italian law instead of accepting his proffered certificates of nationality as conclusive as to his possession of Italian nationality.
- b) The Tribunal manifestly exceeded its powers by failing to apply Italian law, which is the applicable law to nationality determinations in accordance with the BIT.
- c) The Tribunal had jurisdiction over the dispute and, therefore, manifestly exceeded its powers by failing to exercise that jurisdiction.
- d) The Tribunal failed to state the reasons on which its award was based.

### **III. Dissenting Opinion**

- 8- As a member of the ad hoc Committee, I attended the hearings held in the Hague, the Netherlands, on May 19, 2005, and in Washington D.C., USA on June 13-14, 2006, and participated in the deliberations of the Committee in Washington D.C., USA, on June 12 and 15, 2006, and in Manila, the Philippines, on March 1 to 3, 2007.
- 9- I have contributed to the draft of the majority Decision adopted by my colleagues, members of the ad hoc Committee (the “Decision”). I agree

with my colleagues' analysis and opinion concerning the Claimant's allegations that the Tribunal had manifestly exceeded its power by making its own determination on the Claimant's nationality. I also agree with my colleagues that "a jurisdictional error is not a separate category of excess of powers. Only if an ICSID Tribunal commits a manifest excess of powers, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment". Hence, I agree with the Committee's rejection of the Claimant's contention that "the Tribunal's refusal to take jurisdiction, based on the inexistence of the Italian nationality of Mr. Soufraki for ICSID arbitration purposes, constituted a manifest excess of power". So, I will not deal in this opinion with the aforesaid two grounds as I totally concur with the Decision in this respect.

- 10- However, I had different views with regard to the Claimant's argument that the Tribunal failed to apply Italian law, and that it failed to state reasons upon which it based its Award. I had in particular a different point of view regarding the Tribunal's treatment of the official certificates submitted by the Claimant, and whether these certificates should have been treated as "prima facie" evidence, establishing the Claimant's nationality. I defended my opinion with clear argument in the ad hoc Committee's deliberations, and endeavoured to reach a consensus with my colleagues. Nevertheless, I remained firmly convinced of my views, which were not congruent with

my colleagues' judgment. Hence, I am stating herein my dissenting opinion.

- 11- In performing my duty as a member of this ad hoc Committee, I took into consideration the fact that the ICSID Convention has introduced a progressive innovation into the international arbitration scene by enacting the annulment procedures prescribed in Article (52) of the Convention. This is a genuine improvement which provided an advantage over other international arbitration rules, such as the ICC rules, the rules of the London Court of International Arbitration, and rules of other international arbitration systems, where there is no effective review or appeal of the awards issued under these rules, except revision and appeal before national courts. It is noteworthy that suggestions have been made in certain circles that appeal or annulment procedures should be introduced to the international arbitration systems. Such procedures would create an incentive for arbitrators to exert extra caution since their decisions would be under scrutiny by ad hoc Committees.
- 12- However, the advantage of the annulment procedure would become ineffectual if members of ad hoc Committees were reluctant or unwilling to exercise their power to annul an award once they have perceived through careful examination that the Tribunal did exceed its power by not applying strictly the rules of law as may be agreed by the parties, or the rules of the

law of the contracting state in accordance with Article (42) of the ICSID Convention.

- 13- Based on the above, the Tribunal's decision to assume the power to decide on the alleged nationality of the Claimant must be scrutinized by the ad hoc Committee in a precise and scrupulous manner to ascertain absolutely that such decision was taken in strict compliance with the proper law, according to which the Claimant's nationality shall be determined. Precise scrutiny is essential because a decision to disenfranchise a person from his nationality is a serious act since it shall have drastic consequences; particularly if this decision was taken in contradiction with official documents issued by competent governmental authorities. Nationality of a person is of paramount importance in all cases, and is especially important in ICSID arbitration, where the nationality of the Claimant is pivotal in determining his alleged rights.
- 14- In addressing the Claimant's grounds for annulment, I shall deal with two grounds: the Claimant's assertion that the Tribunal failed to apply Italian law, and that the Tribunal failed to state reasons for its decision. I should note that repetitions of statements and quotations in the Decision shall appear in this opinion because, as indicated above, I have been involved in drafting the Decision, and I concur with the said statements.



15- I agree with the Decision’s conclusion that ICSID Tribunals have the power to determine their jurisdiction to hear a dispute. It is a general principle of international law that international tribunals have the competence to determine their own competence. This principle is confirmed in Article (41) of the ICSID Convention, which states that:

“The Tribunal shall be the judge of its own competence.

Any objection by any party that the dispute is not within the jurisdiction of the Centre . . . shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question, or join it to the merits of the dispute.”

In determining whether the jurisdictional requirements of the ICSID Convention and the BIT have been satisfied, an ICSID Tribunal is empowered to make its own investigation into the nationality of Claimants on the basis of the official evidence adduced before it.

16- Jurisdiction of the ICSID Tribunal in this case is dependent upon compliance with the requirements of the ICSID Convention and the applicable BIT, which require that the Claimant be a “natural person holding the nationality of [Italy] in accordance with [Italy’s] law,” and that he should have this nationality on the “date on which the parties consented

to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered.”<sup>2</sup>

17- Although the established principle is that the issue of nationality of a person shall remain within the reserved domain of every state, this principle coexists with the principle that international tribunals are empowered to make their own determinations as to whether a claimant has the nationality of a state, when that nationality has been challenged and is central to the jurisdiction of the Tribunal.

18- However, determination of the Claimant’s nationality should be carried out in strict compliance with the proper law, and that official documents pertaining to the nationality issued by the concerned State should be accepted by an international tribunal as “prima facie evidence”, in accordance with the definition of this term.

19- It is an established principle of ICSID jurisprudence that failure to apply the appropriate law constitutes an excess of powers because “the provisions on applicable law are essential elements of the parties’ agreement to arbitrate and constitute part of the parameters for the Tribunal’s activity”.

Thus a “Tribunal’s disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the Tribunal has been

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<sup>2</sup> ICSID Convention, Article 25(2)(a)

authorized to function.”<sup>3</sup>. By failing to apply the law agreed upon by the parties, a Tribunal acts in a manner to which the parties did not consent. This is a manifest excess of power.

20- It is also an established principle of ICSID jurisprudence that a good faith error in applying the appropriate law does not constitute an excess of powers.<sup>4</sup> For example, according to one commentator: “ICSID case law has admitted that a Tribunal’s failure to apply the proper law—as opposed to a mere mistake in the application of the law—is subject to review under the manifest excess of powers standard of Article 52(1)(b).”<sup>5</sup> Another scholar commented:

“It is generally agreed that the failure to apply the proper law under Article 42(1) of the ICSID Convention may constitute manifest excess of power and lead to an annulment. It is also well established that failure to apply the proper law is not equivalent to an error in the application of the law.”<sup>6</sup>

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<sup>3</sup> Christopher Schreuer, *The ICSID Convention: A Commentary*, page 943

<sup>4</sup> M.B. Feldman, “The Annulment Proceedings and the Finality of ICSID Awards” (1987) 2 *ICSID Review-Foreign Investment Law Journal* 85, 100

<sup>5</sup> E. Gaillard, “The Extent of Review of the Applicable Law in Investment Treaty Arbitration”, in *Annulment of ICSID Award* (E. Gaillard and Y. Banifatemi, eds., 2004) page 236

<sup>6</sup> G. Kaufman-Kohler, “Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?” in *Annulment of ICSID Awards* (E. Gaillard and Y. Banifatemi, eds. 2004) page 207

21- An error in the application of the correct law is not a manifest excess of power. The review of such error is appropriate for an appeal, but not for an annulment. Feldman summarizes this point as follows:

Article 52(1)(b), which empowered annulment for excess of power, was not intended to permit review for any error of law. A variety of proposals to authorize annulment of ICSID awards for ‘unwarranted interpretation of principles of substantive law’, ‘serious misapplication of the law’, and ‘manifestly incorrect application of the law’ were rejected by the drafters of the ICSID Convention. It is noted that review of ‘serious error in the application of substantive law . . . would be tantamount to providing for an appeal.’<sup>7</sup>

22- The same approach was adopted by the ad hoc Committee in the Amco case:

“The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to

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<sup>7</sup> M.B. Feldman, loc.cit. page 100

which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute”.

- 23- It is stated in the same case that “failure to apply the proper law, distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The *ad hoc* Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.”<sup>8</sup>
- 24- Yet, it is conceded that if misinterpretation or misapplication of the proper law was so gross (egregious) to the extent that it cannot be accepted as it was repugnant to reason and common sense, it would be equivalent to an exclusion of the law and the failure to apply it.
- 25- According to the principle that failure to apply the law constitutes an excess of powers, while a good faith error in applying the law does not, the question which should be addressed in this case is whether the Tribunal failed to apply Italian law, or made a mere error in its application.

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<sup>8</sup> Amco Asia Corporation v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment (16 May 1986), 1 ICSID Rep. 509 (1993), para. 23

- 26- The Claimant argues that “a State’s nationality law consists of its legal provisions as well as the binding interpretations of those provisions by its highest court, and that the State’s law consists of its interpretive authorities, such as case law, official government circulars, and the consensus of leading scholars that illuminate the application and meaning of the law. When applying national law, an international tribunal should apply the legal provisions as interpreted by the binding judicial authorities and strive to apply those provisions as they are informed by the state’s interpretive authorities.”
- 27- The above principle is supported by case law and commentary. For example, the Tribunal said in the Serbian Loans case:

“For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national Tribunal ... would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members”.<sup>9</sup>

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<sup>9</sup> Serbian Loans Case, Permanent Court of International Justice, 12 July 1929, PCIJ, Ser. A., No. 20, 1929

28- Also, the Tribunal stated that in the Brazilian Loans case:

“Once the Court has arrived at the conclusion that it is to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force. It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case”.<sup>10</sup>

29- By examining the Award and the reasoning upon which it was based, it became clear that the Tribunal’s treatment of the official certificates submitted by the Claimant requires particular scrutiny since these documents, which were issued by competent authorities of the Italian government, were rejected by the Tribunal without any reliance on or

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<sup>10</sup> Brazilian Federal Loans Case, Permanent Court of International Justice, 12 July 1929, PCIJ, Ser. A, No. 21, 1929

reference to an identified rule of law, which the Tribunal must have applied in dealing with these documents.

30- The validity and conclusiveness of the official certificates is confirmed by the fact that there is no evidence in the record to rebut them. The competent authorities, who decided to issue these certificates, should be presumed to have based their decision on true facts ascertained by themselves. This presumption should remain a true fact until it is disproved by rebuttal evidence. The inquiry conducted by the Tribunal, and the conclusion that the Tribunal have reached on the basis of this inquiry do not rebut this fact.

31- The Tribunal stated in the Award that it “will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities”<sup>11</sup>. This statement, which was oft-quoted in several discussions by the parties, raised a serious and crucial question:

Did the Tribunal, by according “great weight to Italian law, apply this law as it is interpreted and applied by Italian authorities”? Or,

Did the Tribunal, as stated in the Award, having accorded great weight to Italian law, “decided at the end by itself whether the Claimant is an Italian national” by applying a law other than Italian law?

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<sup>11</sup> Award, para. 55



- 32- It is apparent from the statement in the Award that the Tribunal ... “will in the end decide for itself” ... that the Tribunal was not bound to apply Italian law as conclusive, albeit the Tribunal will accord great weight to this law. The meaning of the phrase “decide for itself”, as I understand it, is that Italian law was considered by the Tribunal as one of the factors, which was accorded great weight, but was not the only conclusive factor in determining the Claimant’s nationality.
- 33- The Tribunal applied Italian Law No. 91 of 1992 with respect to the requirements under this law that a person who lost his Italian nationality shall re-acquire it by a timely application or by taking up residence in Italy for a period of no less than one year. However, in deciding on this requirement of residency, the Tribunal did not apply all Italian rules according to which it should have discerned whether the Claimant fulfilled this requirement.
- 34- The Tribunal relied on Article 34 of the ICSID Rules of Procedure for Arbitration Proceedings, and applied a rule of procedure of its choice - which it did not identify- to evaluate the evidence concerning the legal requirements for re-acquiring Italian nationality. I shall explain below that Article 34 of the ICSID Rules is inapplicable in this case.
- 35- Since the Tribunal did not specify in the Award which rule it applied on its evaluation of the testimony, then the Tribunal cannot be presumed to have

applied Italian law. It is relevant to quote in this context the Claimant's statement:

“But there is no way of knowing whether the Tribunal would have reached the same result, had it properly applied Italian law to the two major documents corroborating Mr. Soufraki's testimony that he had physically returned, and had it not drawn the improper inference under Italian law that his failure to register his return meant he was not physically present. In an Award as concise as this one, there is no way of knowing how the Tribunal might have weighed other factors. It is quite possible that it would have reached the contrary conclusion that Mr. Soufraki remained Italian, as the highest officials in Italy themselves concluded after carefully reviewing the Tribunal's written analysis”.<sup>12</sup>

- 36- The vital question in this case is: Did the Tribunal treat the official certificates submitted by the Claimant as “prima facie evidence”? In order to answer this question, the meaning of the term and the concept of “prima facie” must be examined.

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<sup>12</sup> The Claimant's Post-Hearing Memorial (Tr), page 24

37- I have noted the Claimant’s comments on the term “prima facie” in international proceedings. This term has a technical meaning in common law countries where it is understood that if a certificate is deemed to be a “prima facie evidence”, it shall be treated as conclusive of what is set out therein, unless fraud is proved, or the content of the certificate is overturned by a process in the state in which the certificate was issued.<sup>13</sup>

The Claimant also commented that the concept of “prima facie” is used commonly in criminal cases, where the defendant will be convicted unless other evidence is adduced to displace the evidence against the defendant<sup>14</sup>.

38- Notwithstanding the comments of both parties on the definition of the term “prima facie evidence”, the Tribunal should have treated the official certificates as such in accordance with the accepted definition of this term, which is as follows:

“Prima facie evidence” is evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party’s claim or defense, and which if not rebutted or contradicted, will remain sufficient.

“Prima facie evidence” is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in

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<sup>13</sup> Transcripts of the Hearings (Tr), page 56

<sup>14</sup> Tr, page 90

favor of the issue which it supports, but which may be contradicted by other evidence<sup>15</sup>.”

39- “Prima facie evidence” is defined as:

“Evidence which must be received and treated as true and sufficient until and unless rebutted by other evidence<sup>16</sup>.”

“Prima facie evidence” is also defined as “evidence which is not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed by the jury, unless rebutted or contrary proved”<sup>17</sup>.

40- The Respondent conceded that official certificates ...“are entitled to be treated as prima facie evidence of nationality”<sup>18</sup>. But, having made this concession, the Respondent did not proceed to demonstrate how the Tribunal treated the official documents presented by the Claimant. Instead, the Respondent stated that ... “in any event, as far as the evidence goes, none of the officials who issued the certificates knew the critical fact that in 1991, Mr. Soufraki had lost his Italian nationality”, and that ... “the

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<sup>15</sup> Black’s Law Dictionary, 5<sup>th</sup> Edition, page 1071

<sup>16</sup> Ibid, page 1068

<sup>17</sup> Jowitt’s Dictionary of English Law, by John Burke, 2<sup>nd</sup> Edition, page 1422

<sup>18</sup> Respondent’s Post Hearing Memorial, para. 33

Consulate had no means of knowing about Mr. Soufraki's loss of Italian nationality"<sup>19</sup>.

- 41- There is no evidence about the contents of the records in the office of the officials who issued the certificates of nationality. The fact that the Claimant did not inform the authorities of the loss of his nationality is not evidence that the records do not include all the information according to which the certificates were issued.
- 42- Absence of evidence in the records that the authorities who issued the certificates did not have the required information does not in any manner rebut the official certificates, nor does it diminish their status as "prima facie evidence". These certificates should have remained conclusive, until definitely rebutted by other evidence.
- 43- The evidence required by the Respondent that the Italian authorities did not do their work would not appear in the certificates since they would not normally include any such information. It is irregular for officials who issued certificates of nationality to mention in the certificates that they have made the necessary investigations. The certificates themselves, which do not include any statement other than that the subject is a national of the State, should stand alone as conclusive evidence, unless other evidence is

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<sup>19</sup> Ibid. para. 24

- adduced to prove that they were issued fraudulently, negligently or without investigation by the authorities of the circumstances of the case.
- 44- It is not contested that the Tribunal shall be the primary fact-finder. In this case, the Tribunal did not find a fact that the officials who issued the certificates did not have the necessary information, nor did they conduct an inquiry into the reasons upon which the certificates were issued. As indicated above, the Claimant's statement that he did not inform the authorities that he lost his nationality does not prove that the authorities were not aware of such information.
- 45- It is correct that an Italian court can conduct an inquiry into the substantive position under Italian law<sup>20</sup>. But an ICSID Tribunal can conduct such inquiry only if there were no official certificates issued by competent authorities which should be presumed to have conducted the necessary inquiry. Nevertheless, if official certificates were presented to the Tribunal, it shall be bound to treat them as "prima facie evidence" in accordance with the accepted definition of this term.
- 46- In accordance with the definition of the concept of "prima facie evidence" cited above, and since the official certificates should have been considered by the Tribunal as "prima facie evidence", the Claimant has discharged his burden of proof by submitting the said certificates. He did produce "prima

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<sup>20</sup> Respondent's Post Hearing Memorial, para. 40

facie evidence” of his Italian nationality, which are official documents, identity papers, a passport and an entry into the Registry of Italian Overseas. By doing so, the Claimant was released from his obligation to prove his nationality, since he produced certificates that should have been sufficient to sustain his nationality claim, until and unless other evidence contradicted them.

47- Since the Claimant has discharged his burden of proof, as indicated above, this burden should have been shifted to the Respondent. However, the Tribunal did not deal with this issue in the proper manner by requiring the Respondent to produce evidence rebutting the official certificates, either by proving that they were issued negligently or fraudulently, or that the authorities issuing these certificates did not perform their duties. The Respondent did not do anything of this sort to contradict these certificates. Therefore, these certificates should have been treated by the Tribunal as true and sufficient to sustain a judgment in the Claimant’s favour, since there is no rebuttal against them in the records submitted by the Respondent.

48- I disagree with the Claimant that “the only evidence to displace the certificates would be evidence of fraud: a fraud on the authorities, or a fraud by the authorities<sup>21</sup>. In fact, any type of evidence that contradicts the

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<sup>21</sup> Tr. page 93

certificates can be the basis of the judgment, in addition to evidence of fraud. In other words, the Tribunal shall have the power to reject official certificates if they were contradicted by other evidence, even if this evidence was not related to fraud, as long as it is compelling and conclusive in refuting the certificates.

49- The Respondent did not produce such evidence to disprove the validity of the certificates. By not requiring the Respondent to submit proof undermining the authenticity of the certificates, the Tribunal has committed an erroneous reversal of the burden of proof, which is a serious departure from the fundamental rule of procedure. This is a ground of annulment under Article 52(1)(d) of the Convention<sup>22</sup>.

50- Nevertheless, despite the departure from a rule of procedure, the Claimant did not invoke this procedural defect as a ground for annulment since the Claimant's request for annulment was confined to the four grounds summarized in paragraph (7) of this opinion. The Claimant also submitted that the powers of the Tribunal, in determining a question which is governed by Italian law under Article I of the BIT, are limited to determining this question in accordance with Italian law, and not in accordance with any other standard<sup>23</sup>.

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<sup>22</sup> See Prof. Stern's comments. Tr, page 93

<sup>23</sup> Tr. page 97



- 51- I agree with the Claimant's statement that "the Tribunal jurisdiction is derived from international law; from the BIT, from the ICSID Convention and from the consent of the parties on the international plane. It is international law that determines the scope of the Tribunal's powers. Since international law requires that the question of the Claimant's nationality be determined in accordance with Italian law, then Italian law is relevant, and failure to apply it would be an excess of power under international law"<sup>24</sup>.
- 52- I should mention in this context that official certificates should be rejected if they contravene a rule of international law, such as the certificates issued by an occupier state, or by a racist regime against a persecuted person. For example, imposition of Iraqi nationality on Kuwaiti citizens during the occupation of Kuwait 1990, and the deprivation of German citizens of their nationality by the racist Nazi regime.<sup>25</sup>
- 53- The Tribunal stated that it will accept the Claimant's certificates of nationality as "prima facie evidence"<sup>26</sup> but, in fact, these certificates were not treated by the Tribunal as such. The Tribunal looked for other evidence and conducted its own inquiry. It concluded that the Claimant did not re-acquire Italian nationality notwithstanding the official certificates which, if treated as "prima facie evidence", should be sufficient to establish the nationality of the Claimant, until they are rebutted by other evidence.

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<sup>24</sup> Tr. page 98

<sup>25</sup> Tr. page 48

<sup>26</sup> Award. Para 63

- 54- The quotation by the Tribunal from Professor C. Schreuer is irrelevant because he did not refer to the certificate of nationality as “prima facie evidence”. He stated that such certificates will be treated as part of the “documents of other evidence”; whilst these certificates should have been considered not as a mere part of the evidence, but as conclusive evidence in accordance with the definition of “prima facie”, unless they were refuted by other evidence.
- 55- It is established that international tribunals shall have the authority to make nationality determination and go behind official government documents, but the Tribunal should start by treating these documents as “prima facie evidence”, which means that these documents shall be conclusive, unless other evidence has been brought before the Tribunal to undermine their conclusiveness.
- 56- The Tribunal stated that it has considered and weighed the totality of the evidence adduced by the Claimant, and that it unanimously reached its conclusion on the basis of the “totality of the evidence”. Based on that, the Tribunal decided that the Claimant has failed to discharge his burden of proof<sup>27</sup>. It is evident from this statement that the Tribunal did not distinguish the official certificates, as “prima facie evidence”, from the totality of other evidence; whilst official certificates should have been

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<sup>27</sup> Award, para. 81

- perceived by the Tribunal as separate from other evidence, since they must be treated as conclusive unless they were rebutted by other evidence.
- 57- The Tribunal's inquiry about the residency of the Claimant in Italy on the relevant dates, and its conclusion based on this inquiry does not rebut the official certificates issued by the competent government authorities. The fact, as stated in the Award, that there is no evidence in the record that any Italian officials did undertake any inquiry to determine the Claimant's nationality, does not constitute a definite rebuttal of the official certificates. On the contrary, absence of such evidence is a confirmation of the conclusiveness of these certificates.
- 58- The only evidence in the record that the competent authorities did not carry out the required inquiry, is that the Claimant did not inform these authorities that he had lost his Italian nationality by acquiring Canadian nationality. This is not a decisive proof that the consular officials did not know these facts since they may have obtained them from other sources.
- 59- The inquiry into the nationality of the Claimant should have been carried out by an Italian court. The Tribunal could have stayed the arbitration proceedings to allow the Respondent, if he so desired, to state his challenges against the certificates before an Italian court.
- 60- However, since a ruling on the Claimant's nationality by an Italian court was not obtained, then the Tribunal shall have the power to rule on this

issue on the basis of the adduced evidence, provided that “prima facie evidence”, such as official certificates, shall be treated as conclusive, unless rebutted by other evidence.

61- I concur with the view that in making inquiries into the nationality of a Claimant, an international tribunal shall have the power to make factual determination. However, the Tribunal in conducting such inquiry must strictly comply with the proper law, which is in this case, the substantive provisions of Italian law which Italian courts shall apply in determining Italian nationality. The Tribunal was bound to proceed entirely and exclusively under Italian law.<sup>28</sup>

62- The determination of the Claimant’s nationality should not have been achieved by application of procedural rules, since this determination should be governed by the substantive rules of Italian law which stated the conditions for the re-acquirement of Italian nationality. These rules should have been applied by the Tribunal because they shall have a substantive impact. The Tribunal’s application of rules other than the substantive rules of Italian law would be a manifest excess of power.

63- As mentioned above, I am of the opinion that Article (34) of the ICSID Rules is inapplicable in this case because determination of the Claimant’s nationality, as I have indicated above, shall be governed by the substantive

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<sup>28</sup> Tr, pages 151 & 152

provisions of Italian law. Hence, the evidence on the residency of the Claimant should be in accordance with the substantive rules of Italian law, and not in accordance with any rules chosen by the Tribunal. In this context, the Claimant stated:

“The difference between substantive rules of law and evidentiary presumption can be illusory...both achieve the same result, one by a substantive rule of law and the other by evidentiary presumption...an international Tribunal applying rules of national law must try to achieve the same result the national legal system will do...it makes no sense to distinguish between the two systems, requiring a tribunal to apply the law of the first but not the law of the second. The result would be a mockery of a coherent system of international justice<sup>29</sup>.”

64- The Claimant also stated that ...“very often the difference between a substantive rule of law and an evidential or procedural rule may be difficult to unpick.”<sup>30</sup> There are cases where the proper law of evidence was applied by international tribunals. An example cited in the Decision is, if under the proper law, two affidavits shall be sufficient to prove nationality, then a national court shall be bound by these affidavits. In this case, this rule of

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<sup>29</sup> Claimant’s Post Hearing Memorial, page 22

<sup>30</sup> Tr. page 382

evidence “would have to be applied by an international tribunal as an inseparable part of the applicable substantive rule on nationality”. There is no evidence whatsoever in the records of this case that this is not the situation under Italian law, although the Claimant did not assert that Italian law included such rule of evidence.

65- The law of citizenship in some jurisdictions may include a rule that a testimony of one or two witnesses that a person was present in the territory of the state at a certain date, shall be sufficient and conclusive. According to this rule, the administrative and judicial authorities of the state cannot go behind such testimony, or engage in further investigation whether the person resided in the territory. The Tribunal did not state in the Award that it made an inquiry whether such rule exists in Italian law. The Tribunal dismissed the sworn witnesses’ affidavit without any reference to a provision in Italian law. These testimonies were rejected without having the witnesses appear before the Tribunal so that it can assess their credibility by cross-examination. Thus, this sworn affidavit remains “as essentially unimpeached”.<sup>31</sup>

66- Since Article (34) of the ICSID Rules is not applicable in this case, the Tribunal shall not have the freedom to evaluate the evidence according to rules of its choice, and shall not be the judge of the admissibility and the

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<sup>31</sup> Claimant’s Post Hearing Memorial, page 21

probative value of this evidence. On the contrary, the Tribunal shall be bound to apply the substantive rules of Italian law because of the substantive impact of these rules as it is upon them the Claimant's nationality shall be determined.

67- However, the said Article (34) does not preclude the Tribunal from fulfilling its main obligation to apply the proper law under Article 42(1) of the ICSID Convention. The Claimant expressed this principle as follows:

“Article 34 does not obviate a Tribunal's overarching obligation under Article 42(1) to apply only the law that the parties have agreed. Where national law provides the exclusive rule of decision, a tribunal does not have free rein to adopt sweeping evidentiary presumptions on grounds that the national legal system would not accept, or to discount entirely evidence which the national system would carefully consider”<sup>32</sup>.

68- The Tribunal ostensibly intended to apply the relevant Italian laws governing the determination of the Claimant's nationality. According to Article 8/1 of the Italian Law No. 555 of 1912, the Claimant lost his Italian nationality as a consequence of his acquisition of Canadian nationality and

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<sup>32</sup> Ibid, page 22

residence in Canada<sup>33</sup>, and according to Article 17/1 or Article 13/1/d of the Italian Law No. 91 of 1992, the Claimant could have re-acquired automatically his Italian nationality after 1992 by a timely application, or by residing in Italy for a period of no less than one year<sup>34</sup>.

69- In applying Italian Law No. 91 of 1992, the Tribunal faced the fundamental question, which it must resolve in order to decide on the Claimant's alleged nationality. Did the Claimant reside in Italy for one year during 1993-1994?

70- I concur with the Respondent's argument that the Tribunal did not disregard the evidence presented by the Claimant on his residency in Italy: the lease for an apartment, and the sworn affidavit testimony of two witnesses, Mr. Casini and Mr. Nicotra. However, although the Tribunal did not disregard this evidence, and may have considered them intently, yet it rejected them as being not convincing because of the relationship of the witnesses with the Claimant. Since this evidence, supporting the Claimant's residency in Italy, is so crucial in this case, the evaluation thereof by the Tribunal should be in accordance with the applicable law.

71- It is evident from the award that the Tribunal discredited the above mentioned decisive evidence without any reference to an Italian rule of law. In fact, the Tribunal did not identify what is the body of rules it applied on

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<sup>33</sup> Award, para 52

<sup>34</sup> Award, para 27



the evidence of the Claimant's residency. In other words, as the Claimant stated, the Tribunal did not apply "the whole Italian legal system to determine whether the Claimant was a national of Italy in accordance with its laws"<sup>35</sup>.

72- It is thus clear that failure by the Tribunal to state the legal basis upon which it rejected the crucial evidence is an annulable error. Even if the Tribunal's reliance on Article (34) of the ICSID Rules was correct, failing to state the rule of procedure it had applied on its evaluation of the evidence is still an annulable error.

73- It is worthwhile to refer in this context to Article (11) of the Arbitration Rules of the International Chamber of Commerce (ICC), which reads as follows:

"The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration".

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<sup>35</sup> Claimant's Post-Hearing Memorial, page 18

The Tribunal could have applied municipal Italian procedural law. In this case, the Tribunal should have referred to a specific rule of Italian law which it had applied.

74- It is also pertinent to quote the Claimant's demonstration of how the Tribunal dealt with the adduced evidence:

“.... corroborating evidence was the affidavit testimony of two witnesses, sworn under oath in the exact form that Italian law provides. The witnesses swore that between the relevant dates Mr. Soufraki had resided at the same address he referenced in his testimony, namely the second home of his Italian lawyer which he was permitted to use pursuant to an “agreement for free accommodation” produced in evidence. The witnesses also swore that during the same time Mr. Soufraki used as an office the same apartment reflected in the lease discussed above. The affidavit was presented to the Tribunal on 2 May 2003, ten months before the Tribunal heard the U.A.E.'s cross-examination of Mr. Soufraki on 12 March 2004. The U.A.E. in the intervening ten months never asked to cross-examine the two witnesses, so their sworn affidavit was essentially unimpeached. Yet the Tribunal shunted it to

one side on the basis that one was a corporate auditor who performed services for Mr. Soufraki's companies as for other companies in Italy, and the other was a receptionist at his hotel.”<sup>36</sup>

75- The Respondent commented that the Claimant ignored the realities of the situation by suggesting that the Tribunal could have called the two witnesses, Messrs. Casini and Nicotra, to give evidence personally and be cross-examined. The Respondent stated that there was never an opportunity for this cross-examination because the affidavit of the witnesses was presented immediately prior to the jurisdiction hearing, and that the Tribunal re-opened the jurisdictional phase of its own motion, but only to order the cross-examination hearing for the sole purpose of examining the Claimant<sup>37</sup>.

The Claimant responded to this comment by stating that the hearing in question was the oral argument originally scheduled to address the UAE's effective nationality arguments, and that the Tribunal convened again ten months later to hear the cross-examination of Mr. Soufraki on the specific issue of his *residenza* in Italy between 1993-1994<sup>38</sup>.

76- I reiterate that dealing with the witnesses' affidavit is not a procedural matter, which the Tribunal shall deal with according to its own will

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<sup>36</sup> Ibid, page 21-22

<sup>37</sup> Respondent's Post-Hearing Memorial, pages 17-18

<sup>38</sup> Claimant's Post-Hearing Memorial, footnote 14 on page 21

pursuant to Article (34) of the ICSID Rule of Procedure, but is a substantive matter which must be dealt with in accordance with the substantive rules of Italian law. Omitting to examine personally the witnesses, and failure to cross-examine them in accordance with the applicable substantive law, is a failure to apply the proper law and, consequently is a manifest excess of power. Hence, I disagree with the Decision's conclusion that "the Tribunal applied ICSID Arbitration Rule 34, which it was competent and bound to apply and therefore did not commit a failure to apply the proper procedural law".

77- Since the Tribunal should have applied Italian law in dealing with the witnesses' affidavits, it is relevant to quote below the Claimant's description of the rules of Italian law governing this matter:

"...the Italian legal system routinely accepts witness evidence from employees as well as family members of parties. As Claimant's Italian law expert informed the Tribunal the only witness evidence that is barred in the Italian legal system is that from a person who have a direct interest in the outcome of the case. The UAE did not dispute this principle nor did it ever suggest that the two witnesses somehow met the Italian law standard for

disqualification. The basis for discounting the evidence was thus an invention by the Tribunal”<sup>39</sup>.

- 78- Should it be argued that the statement that ... “the Italian legal system routinely accepts witness’ evidence from employees” does not necessarily mean that Italian courts are bound to accept such evidence, then the Tribunal had failed to identify or refer to any Italian rule according to which Italian courts shall not be bound to accept evidence given by employees. In other words, the Tribunal did not specify the rule of Italian law which granted the Tribunal the power to consider testimonies from employees as being not convincing because of their relationship with the employer, albeit the Tribunal held that these testimonies were admissible under Italian law.
- 79- If the Tribunal relied on any rule of Italian law in its determination of the probative value of witness evidence, this rule should have been specifically cited in the Award. Otherwise, the Claimant would be justified to make a credible statement that “the basis for discounting the evidence was thus an invention by the Tribunal”.
- 80- It was imperative, in my opinion, for the Tribunal to call the two witnesses to appear in person to render testimony, and be cross-examined in order to evaluate the evidence. Cross-examination of the witnesses in this case

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<sup>39</sup> Claimant’s Post-Hearing Memorial, page 21-22

should have been considered by the Tribunal as obligatory in order to conduct proper evaluation of their testimony, which is decisive for the outcome of this case. This evaluation is not a mere subjective matter to be decided in accordance with personal appreciation, but is a substantive matter to be decided in accordance with objective criteria as stated in the law, because the residency of the Claimant in Italy at the relevant dates is the legal condition under Italian law for re-acquiring Italian nationality. Therefore, as I stated above, this rule of Italian law is a substantive rule since it shall have a substantive result, which is re-acquiring Italian nationality.

- 81- It is especially imperative for the Tribunal to conduct such rigorous investigation because no challenge has been made by the Respondent against the official certificates submitted by the Claimant on the basis of fraud. So, in order to dismiss the said certificates, the Tribunal should have first carried out the aforesaid investigation and search on the potential evidence that would have rebutted these certificates.
- 82- Even if the Tribunal had a discretionary power to evaluate the evidence as granted to the Tribunal by Article 34(1) of the ICSID Rules, then the Tribunal committed an egregious error in exercising this power, which is tantamount to a manifest excess of powers because proper evaluation of the witnesses' affidavits requires imperatively in this case, as stated above,

rigorous investigation and exhaustive search, which the Tribunal failed to do. Since the Tribunal's evaluation of the evidence resulted in disenfranchising the Claimant from his alleged nationality, which is a serious deprivation, then it is a flagrant error not to conduct the proper evaluation and to dismiss the witnesses' affidavits as being not convincing only because the witnesses have professional relationships with the Claimant.

83- The Tribunal has thus dismissed the witnesses' affidavits without taking into consideration the probability that the witnesses may have been telling the truth. It is as if being employees, or having a professional relationship with the Claimant, shall automatically deter the witnesses from being truthful. Hence, I am of the opinion that it is an egregious error to deem that a mere professional relationship makes unreliable the testimony of witnesses.

84- I noted the arguments rotated around the concept of "comity" (Act of State Doctrine), which requires that courts of one country should abstain from inquiring into the validity of acts of the government of another country. This concept does not apply to international tribunals where their jurisdiction depends on the nationality of the parties. In such cases, the Tribunal shall have the power to go beyond official certificates of nationality. But the concept of "comity" requires that international tribunals

should accord respect to official certificates by treating them as “prima facie evidence”. Accordingly, these certificates should not be totally discarded, and be replaced, as in this case, by the Tribunal’s findings.

85- In summary, the Tribunal failed to apply the proper law in its evaluation of the crucial evidence. Nevertheless, even if the Tribunal had the power to evaluate the evidence in accordance with said Article (34) of the ICSID Rules, then the Tribunal has committed an egregious error by its evaluation of the evidence, and by its unjustified dismissal of the witnesses’ testimonies, which constitutes a manifest excess of power and a ground for annulment under Article 52(1)(b) of the ICSID Convention.

**Conclusion:**

For the foregoing reasoning, I did not agree with my colleagues’ Decision. Yet, I should affirm that my different views on certain aspects of this case did not diminish my respect and admiration of my colleagues’ learning and wisdom, which were reflected in my deliberations with them, and in their well-reasoned and distinguished Decision.

Signed in Amman, Jordan on this 27<sup>th</sup> day of May, 2007.

*signed*

OMAR N. NABULSI

Member of the ad hoc Committee