

Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L and
Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan
(ICSID Case No. ARB/ 13/ 38)

SEPARATE OPINION OF THE HONORABLE L. YVES FORTIER

2 October 2017

1. I agree with the conclusion of the Tribunal that the decision of the Court of Cassation cannot be impugned at the international law level as arbitrary, being a decision that no reasonably competent tribunal could reach.
2. I also agree that there is no evidence that the Court was politically motivated or acting in bad faith.
3. I also join in the Tribunal's conclusion that the Tax Measure was imposed according to an interpretation of Jordanian law which was upheld by the Court of Cassation in a decision that is not itself a breach of the State's international law obligation.
4. Accordingly, the Claimants' claim of arbitrary treatment must fail as do all their claims of other breaches of the Respondent's international law obligations, to wit:
 - a. Fair and equitable treatment (Article 4 of the BIT);
 - b. Full protection and security and legal stability and predictability (Articles 3(1) and 12 of the BIT);
 - c. Legitimate expectations (Article 4);
 - d. Discrimination (Articles 3(1) and 4 of the BIT); and
 - e. Impairment of rights to liquidate

for the reasons given in paragraphs 476 to 488 of the Award.

5. These are the reasons why I have joined in the dispositif.
6. However, where I part company with my friends and distinguished colleagues is in my appraisal of the evidence which led to the imposition of the Tax Measure in 2008.
7. Having reviewed carefully the totality of the evidence, in particular the testimony of the Director General of the ISTD, Mr. Al Kudah, as well as the testimony of Mr. Almusned, I have formed the view that, as submitted by the Claimants, the Respondent acted in an arbitrary manner vis-à-vis the Claimants' investment by deciding to impose a tax on the sale by UTT of its shares in UMC to Batelco in 2006 in response to media and Parliamentary pressure on the Government in the light of the public perception of an illegitimate profit on the sale and irrespective of the provisions of the law.

8. Where my colleagues found Mr. Al Kudah to be a reliable witness, I found his evidence totally unconvincing.
9. A few days after the transaction and strident criticism of the deal by the Jordanian press, the die was cast when Mr. Al Kudah issued a statement which concluded that “it [was] unlikely that the deal be exempted from income and sales taxes”.
10. In my opinion, the initial reaction to the transaction by the Director General of the ISTD does suggest a pre-determination to impose a tax on UTT. I found his denial under cross-examination unpersuasive.
11. Mr. Al Kudah then set up an internal technical committee (the “Committee”) within the ISTD to investigate further the taxability of the transaction (para. 378 of the award).
12. A mere 5 days later, the Committee reported that “the profits of the deal between the two parties are subject to tax”.
13. I note that my colleagues attach importance to the words “in principle” which precede that sentence.
14. After having listened to the evidence of Mr. Almusned, who was a member of the Committee, those words strike me as a mere fig leaf. In short, I was not impressed by the testimony of Mr. Almusned, who appeared to me to be simply parroting Mr. Al Kudah.
15. After the Committee issued its report, the pressure from members of Parliament continued unabated*.
16. The process which gives me pause was then followed by the unprecedented constitution by the Prime Minister of a committee to address questions which had been raised by the Parliamentary Financial and Economics Committee (para. 383 of the award). I note that Mr. Al Kudah was a member of that special committee. He acknowledged that he could not recall another instance where a Prime Ministerial Committee was asked to consider the taxability of a specific transaction and the tax liability of a taxpayer.

* See paragraphs 58, 59 and 382 of the Award.

17. One of the questions which was put to the Committee evidences, in my opinion, the pre-determination of the Respondent to levy a tax on UTT irrespective of the provisions of the law. That leading question was: "Why was there no imposition of income tax on the (good will of the company)?"
18. In short, these are the reasons why I reach the conclusion that the events of 2006-2007 demonstrate that the Respondent acted in an arbitrary manner vis-à-vis the Claimants' investment by deciding to impose a tax on the sale in response to media and political pressure and irrespective of the provisions of the law.
19. However, as noted earlier, I agree with the Tribunal's analysis of the position at international law vis-à-vis the decisions of the Jordanian Courts and I accordingly join in the Tribunal's dispositif. There was no denial of justice in this case.
20. If the Claimants had filed their request for arbitration immediately after the imposition of the Tax Measure in 2008, my decision may well have been different. But they chose to have recourse to the Jordanian courts rather than an international venue. The break of the link between the administrative decision and their recourse to the Jordanian courts is fatal to the Claimants' case.