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Case summary

Middle East Cement Shipping and Handling Co. S.A.
v
Arab Republic of Egypt

Year of the award: 2002
Forum: ICSID
Applicable law: Egypt-Greece BIT (concluded 1993), international law, Egyptian law

Arbitrators	**Timeline of the dispute**
Prof. Dr. Karl-Heinz Böckstiegel – President Prof. Piero Bernardini Prof. Don Wallace, Jr.	19 November 1999 – notice of arbitration 28 January 2000 – arbitral tribunal constituted 27 November 2000 – decision on jurisdiction 12 April 2002 – arbitral award

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I. Executive Summary

In 1982, Middle East Cement ("MEC"), a Greek corporation, established a branch in Egypt to carry out the business of importing, storing and selling cement under a 10 year License. In 1989, Egypt issued a decree prohibiting importation and sales of Grey Portland Cement thus effectively preventing MEC from continuing its business. Even though the 1989 Decree was revoked in 1992, MEC decided not to restart its business. Egypt did not grant its approval for re-exportation of MEC's on-shore installations until 1995. Finally, in 1999 MEC's ship Poseidon 8 was seized by the Red Sea Port Authority to cover MEC's debts and sold at auction.

MEC initiated ICSID arbitration under the provisions of the Egypt-Greece BIT. It claimed that Egypt's conduct amounted to expropriation of its investment and requested US$ 42 million in compensation for lost profits, the expropriated ship and expenses that it had to bear, plus interest and costs.

The Tribunal decided that the Decree amounted to expropriation of the Claimant's investment and awarded damages for lost profits calculated until the expiry of the License in 1993. The Tribunal decided not to add an additional sum for the loss of opportunity. The Tribunal further determined that Egypt's actions leading to the seizure and auction sale of the Claimant's ship also amounted to expropriation. The "market value" of the ship was determined by the Tribunal by averaging the figures submitted by the parties. All other claims for damages were rejected.

In total, the Tribunal awarded approximately US$ 2.2 million plus interest at the rate of 6% compounded annually, from the date of expropriation until the date of payment.

II. Factual Background and Claims of the Investor

Middle East Cement Shipping and Handling Co. S.A. ("MEC" or "Claimant") was a Greek corporation, which established – in 1982 – its Egyptian branch in Suez for the import and storage of bulk cement in depot ship, and for packing and dispatch of cement within Egypt. The Egyptian General Authority for Investments and Free Zones ("GAFI") had authorized the establishment of this branch and licensed it to exercise the described activity for the duration of 10 years (until 19 January 1993).

MEC carried out its operations until 1989, when Egypt issued Decree No.195 prohibiting import of all kinds of Grey Portland Cement. MEC had to stop sales in Egypt and could not honour commitments both to its suppliers and customers. In 1992, the cement import prohibition was revoked but the Claimant decided not to restart its business. Furthermore, Egypt was withholding the approval to re-export MEC's on-shore installations until December 1995. Finally, Poseidon 8, a ship which had been time-chartered by the Claimant to its Egyptian branch, was seized by Red Sea Port Authority in October 1999 and sold at auction one month later, allegedly for a fraction of its real value.

MEC initiated proceedings before an ICSID tribunal under the provisions of the 1993 Egypt-Greece BIT (which was applicable to investments made prior to its entry into force). MEC claimed that Egypt's actions amounted to expropriation and caused damages including lost profits in a total amount ranging from US$12 million (claimed initially) to US$ 42 million (claimed in the last stage of proceedings). MEC also requested the Tribunal to award interest and costs.

III. Findings on Merits[1]

A. Applicable law

Article 11 of the Egypt-Greece BIT provided that any rules more favourable to the investor contained in either the national laws of the Contracting Parties or international law should prevail over the BIT.

The Tribunal decided, pursuant to Article 42(1) of the ICSID Convention, that the mentioned Article 11 constituted an agreement between parties on applicable law. As the Tribunal did not identify any rules of Egyptian law that would be more favourable for the investor than BIT rules, it decided to take Egyptian law into account only where it was not overridden by the provisions of the BIT. The latter was held to be the primary source of applicable law. The Tribunal also noted that, in accordance with Article 42(1) of the ICSID Convention and the BIT, it could "have recourse to the rules of general international law to supplement those of the BIT". (paras.86-87)

Thus, rules of the BIT provided a primary source of applicable law, with Egyptian and international law being supplementary sources. The Tribunal did not determine which of the supplementary sources had prevalence in case of conflict.

B. Expropriation

Article 4 of the BIT prohibited expropriatory measures or measures that were tantamount to expropriation unless they were taken in the public interest and under due process of law, were clear and non-discriminatory, and accompanied by the payment of prompt, adequate and effective compensation. (see para.104)

The Claimant argued that the Decree No.195 effectively revoked its License for importation, storage and sales of cement. The Tribunal found that Decree No.195 deprived the Claimant of the use and benefit of his investment even though the MEC retained nominal ownership of the respective rights being the investment, and thus amounted to expropriation. The Tribunal also agreed with the Claimant that the taking affected the License until an expiry date of 19 January 1993.

[1] Prior to its award on merits, the Tribunal issued a decision on jurisdiction of 27 November 2000 which is not covered in this summary.

The Tribunal held that the Respondent had to pay compensation. However, as summarized below, the Tribunal was quite selective as to what exactly Egypt had to compensate for.

IV. Findings on Damages

A. Law Applicable to the Determination of Damages

As discussed above, the Tribunal applied the rules of the BIT as supplemented by international and Egyptian law. In its discussion of the quantum of damages, the tribunal did not refer to Egyptian law.

B. Burden of Proof and Evidence

The Tribunal noted that it was an established rule of international law that the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim lay with the Claimant. The Tribunal endorsed another rule of international law, namely that a "Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof". (paras.88-91, with reference to *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*)

In relation to the submission and assessment of evidence, the Tribunal also referred to the following pronouncements of the *Asian Agricultural Products*:

> "International tribunals are not bound to adhere to strict judicial rules of evidence. As a general principle the probative force of the evidence presented is for the Tribunal to determine…"
>
> "In exercising the free evaluation of evidence provided for under the previous Rule, the international tribunals decided the case on the strength of the evidence produced by both parties, and in a case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent."
> (para.94)

These statements were made by the Tribunal in relation to the claims in general and also apply to damages claims. As will be mentioned below, the Tribunal denied some of the claims for compensation because the Claimant had failed to meet its burden of proof.

B. Standard of Compensation

The standard of compensation was prescribed by BIT Article 4 "Expropriation". It provided that expropriatory measures should be accompanied by payment of "prompt,

adequate and effective compensation" amounting to the "market value of the investments affected immediately before the measures [of expropriation] occurred or became public knowledge".

C. Heads of Damages and Valuation

MEC claimed the following heads of damages:

1. Lost profits (with further breakdown into periods, see below);
2. The ship Poseidon 8, allegedly expropriated in October 1999;
3. Costs related to the bank loan from the Arab Bank Athens;
4. Foreign employee compensation and liquidation expenses;
5. Other claims.

1. Lost profits

Under this heading the Claimant claimed the following:

- Profits lost under the contracts already concluded on the date of expropriation, calculated until the end of the 10-year License period;
- Profits lost subsequent to the expiry of the License until the date of the re-exportation of its off-shore installations, calculated similarly to lost profits for the previous period (December 1995);
- Profits lost for the last period (from December 1995 until the sale of Poseidon 8 in November 1999), calculated on the basis of the time-chartering rate of the vessel.

Under the "Lost Profits" heading, the Tribunal also considered the possibility of compensating the Claimant for the loss of opportunity (it was not indicated whether the Claimant had made this claim or the Tribunal considered this issue at its own initiative).

To determine the amount of compensation for the first period, the Tribunal examined which supplies the Claimant may have contracted for during the remainder of the 10-year License period and which profits were lost from those contracts due to expropriation. (para.112)

The Claimant submitted to the Tribunal three contracts for cement supply, each granting the Claimant a right to handle a certain quantity of cement. To calculate the amounts of lost profits, the Tribunal applied a conservative analysis – in particular, it based its calculation on the *minimum* quantities guaranteed by its contractual partners rather than on the basis of the higher quantities corresponding to the Claimant's available capacity, as contended by the Claimant. (para.121) Also, the Tribunal adjusted upward the figure of the Claimant's operating costs – effectively decreasing the amount of lost profits. (para.123) The total amount of lost profits under the three cement supply contracts in force at the date of Decree No.195 was determined at US$ 1,712,712.

The Tribunal also considered compensation for the **loss of opportunity** to earn future profits caused by Decree No.195. The Tribunal stated that nothing would have

prevented the Claimant from concluding other contracts; that the License had not exhausted its potentiality of yielding further profits to Claimant's benefit and that, accordingly, the Claimant had a legitimate expectation that it could have earned additional profits under the License. Therefore, the "earning capacity" of the License during the remainder of its life might well come into consideration for assessing its "market value" under the BIT. (para.127)

However, the Tribunal held that in order to add such expectations to the "market value" of the investment, it would have been necessary for the Claimant to provide proof of *concrete* contracts missed and of the profit lost from them. The Tribunal concluded that the Claimant had not fulfilled that burden of proof and that therefore no additional compensation was due in that regard. (para.128)

As for MEC's claims for lost profits for non-use of its onshore installations until the date of their re-exportation (December 1995) and of the "Poseidon 8" vessel until its seizure and sale by Egyptian authorities (November 1999), the Tribunal dismissed these claims with reference to its reasoning on the loss of opportunity – apparently, because the Claimant had not produced concrete contracts or other proof of lost profits. (para.129)

2. The ship Poseidon 8

The ship Poseidon 8, which had been time-chartered by the Claimant to its Egyptian branch, was seized in October 1999 in favour of the Red Sea Port Authority which claimed from MEC dues amounting to 103,033 Egyptian pounds. In November 1999, the ship was sold at auction for 301,000 Egyptian pounds. The Tribunal found that the procedure used to seize and sell the ship (the Claimant was not duly notified of the seizure) did not fulfill the requirements of the BIT ("fair and equitable treatment", "full protection and security", "due process of law") and therefore (sic!) amounted to expropriation.

There was a disagreement between the parties as to the market value of Poseidon. The Claimant argued that the auction price of 301,000 Egyptian pounds (US$ 90,936) was inadequate and alleged that the value was at least US$ 5 million (on the basis of the insurance certificate for the ship of December 1989). The Claimant also has submitted evidence showing negotiations, correspondence and draft contracts for the sale of Poseidon in 1990 which pointed to the price of US$ 1,351,000. Lastly, on the basis of prices for bulkers published in Lloyd's Shipping Economist (2000), the Claimant calculated the 'scrap value' of the Poseidon, that is, the value of the ship without cranes and equipment, to be US$ 864,500.

In order to determine the "market value", the Tribunal simply calculated the average between the last figure submitted by the Claimant and the auction price, with the result being US$ 477,718.

3. Damages incurred due to a bank loan, foreign employees' compensation, liquidation expenses

The Tribunal stated that BIT Article 4 "Expropriation" did not cover "any losses occurring to an investor due to commercial risks or due to procedures of the State authorities and courts as long as they are under due process of law and are not discriminatory". The Tribunal reasoned that the mentioned costs and expenses could be compensated if they had been incurred as a result of discriminatory measures or measures in breach of the due process of law. Such reasoning implies that in the absence of discrimination or breach of due process (lawful expropriation), no compensation could be awarded. This position is at odds with the approach of many other tribunals, which have acknowledged the possibility of compensation for lawful expropriation. (para.153)

Moreover, the Tribunal did not seem to engage in an analysis of whether the claimed damages had been incurred *as a result* of the Decree No.195 (if the damages were the *consequences* of expropriatory measure), but looked at those damages in light of the State conduct immediately relating to the damages in question. For example, the Tribunal did not examine whether MEC had to liquidate its Egyptian branch and thus incurred liquidation expenses as a result of Decree No.195, but looked at whether in the process of liquidation itself the State engaged in discriminatory or expropriatory conduct.

With regard to the damages mentioned above, the Tribunal did not find them resulting from measures that were discriminatory or abusive. Therefore the relevant claims were dismissed. (para.154-156)

4. Other claims

After brief discussion (paras.157-165), the Tribunal dismissed all other claims on the grounds that the Claimant had not complied with its burden to proof to show that the Respondent' conduct leading to those damages had been "tantamount to expropriation or discriminatory". (paras.161, 164)

D. Mitigation of Damages

The Respondent argued that the amount of compensation had to be reduced because the Claimant had not complied with its duty to mitigate damages.

The Tribunal reasoned that although the duty to mitigate damages was not expressly mentioned in the BIT, this duty could "be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Article 42 of the ICSID Convention." (para.167) The Tribunal also noted that the "burden of proof for the facts establishing [a duty to mitigate] and the failure of Claimant to carry it out" lies on the Respondent. (para.170)

First, the Respondent alleged that the Claimant could continue supplying Thermal and White Portland cement and export cement from Egypt to other countries, which was not prohibited by Decree No.195. In this regard, the Tribunal accepted the Claimant's explanation (as no evidence to the contrary had been submitted by the Respondent)

that these activities were not economically feasible alternatives to the supply of Grey Portland cement barred by the Decree. (para.168)

Secondly, the Respondent argued that the Claimant could have resumed its activities after the lifting of the ban in 1992. The Tribunal rejected this argument reasoning that "[a]n investor who has been subjected to a revocation of the essential license for its investment activity, three years earlier, has good reason to decide that, after that experience, it shall not continue with the investment activity, after the activity is again permitted." (para.169)

The Tribunal concluded that the claims did not have to be reduced due to a duty to mitigate.

F. Interest

The Claimant sought compound interest from the time of expropriation. The Respondent argued that in accordance with Egyptian law only simple interest of not more than 4% p.a. running from the date of the Award could be granted.

The Tribunal held that Egyptian law did not apply to claims based on the BIT, i.e. public international law. The Tribunal noted furthermore, with reference to international jurisprudence and literature, that **compound** (as opposed to simple) interest was "at present deemed appropriate as the standard of international law in such expropriation cases". (para.174) The Tribunal also stated that award of compound interest would make the compensation "adequate and effective", as required by the BIT.

As to the question regarding the **rate** and **frequency of compounding** of interest, the Tribunal noted that some disagreement existed on these matters in international jurisprudence. The Tribunal decided to award interest at a rate of 6% p.a. (in view of the rates in financial markets during the relevant period), compounded annually. Interest was awarded from the date of expropriation until the date of payment. (para.175)

G. Costs

Taking into account that both the Claimant and the Respondent succeeded partially in arguing their respective cases, the Tribunal decided that each of the parties should bear its own costs, and arbitration costs should be split equally between parties.

V. Implications / Initial Analysis

- The Tribunal reaffirmed rules on **burden of proof and evidence** elucidated in *Asian Agricultural Products v. Sri Lanka*.

- The Tribunal approached the assessment of **lost profits conservatively**, that is, it awarded the minimum amount of profits that could be made under the given facts (contracts).
- Although the Tribunal recognized the possibility of compensation for the **loss of opportunity** in addition to compensation for lost profits (to account for the additional value of investment), the criteria it established to make such an award appear impossible to meet in practice. The Tribunal effectively demanded proof of specific contracts that presented an opportunity for additional profits. Such an approach seems illogical because it obscures the border between lost profits and loss of opportunity as two distinct elements of damages. The requirements for compensating these two elements were effectively equated by the Tribunal.
- The Tribunal's **finding of expropriation** in relation to the ship Poseidon 8 appears poorly reasoned. The Tribunal found expropriation not because there was a taking (there was none, in Tribunal's view) but because the lawful act of seizure of property to cover the Claimants' debt to the port was done with a violation of due process.
- The Tribunal's calculation of "**market value**" of Poseidon 8 is one of the less impressive examples of valuation. The Tribunal took the two figures offered by the parties and calculated the average between them. Furthermore, the Tribunal did not explain why it took the smallest figure (the one that represents only the scrap value of the ship without cranes and equipment) from the three alternatives suggested by the Claimant.
- The Tribunal affirmed the Claimant's **duty to mitigate damages**. The burden of proof of the fact that the Claimant did not comply with this duty lies on the Respondent.
- The Tribunal recognized that there was no consistency/guidelines in international jurisprudence as to the **rate of interest** to be used, and the **frequency of compounding** the interest. The Tribunal fixed the interest rate "in view of the rates in financial markets during the relevant period"; it is not clear which financial markets the Tribunal referred to and what the relevant period was. **Compound interest** was deemed appropriate.