

*This case summary was prepared in the course of research for  
[S Ripinsky with K Williams, Damages in International Investment Law \(BIICL, 2008\)](#)*

## Case Summary

# Biloune and Marine Drive Complex Ltd

v

# Ghana Investments Centre and the Government of Ghana

**Year of the award:** 1989-1990

**Forum:** Ad hoc tribunal (UNCITRAL rules)

**Applicable law:** Investment agreement, law of Ghana, international law

<b>Arbitrators</b>	<b>Timeline of the Dispute</b>
Mr Stephen M. Schwebel, President Mr Don Wallace, Jr. Mr Monroe Leigh	10 February 1988 – request for arbitration 6 October 1988 – arbitral tribunal constituted 27 October 1989 – Award on Jurisdiction and Liability <sup>1</sup> 30 June 1990 –Award on Damages and Costs <sup>2</sup>

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<sup>1</sup> 95 ILR 184.

<sup>2</sup> 95 ILR 211.

## **I. Executive Summary**

Mr. Antoine Biloune, a Syrian national held a 60% equity interest in MDCL, a corporation incorporated in Ghana. MDCL was initially granted a lease in November 1985 by GTDC (a corporation owned and formed by the Ghanaian Government to operate tourist facilities) to renovate and manage a restaurant at the Marine Drive Complex in Accra, Ghana. In 1986, MDCL formed a joint venture with GTDC for the construction of a 4-star hotel resort complex. The project was approved by the Ghana Investments Centre in the “GIC Agreement”. MDCL accomplished substantial remodeling and construction, when the Accra City Council issued an order to stop work citing the lack of a building permit. The City Council then demolished part of the project, and Mr. Biloune, and other investors were subjected to financial scrutiny by the authorities, after which Mr. Biloune was arrested, held in custody for 13 days without charge, and subsequently deported from Ghana to Togo. The Government then closed the site of the project. Mr. Biloune was not permitted to return to Ghana and MDCL was not allowed to carry out any further work on the project, which remained uncompleted.

On the basis of the arbitration clause contained in the GIC Agreement, Mr. Biloune initiated arbitration under UNCITRAL rules against the GIC and the Government of Ghana claiming that the respondents had effectively expropriated MDCL’s assets and his interest in MDCL and that they therefore had to pay compensation.

The Tribunal concluded that when viewed in conjunction, the issuance of the stop work order, the partial demolition of the construction, the arrest and detention of Mr. Biloune, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing irreparable cessation of work on the project. These actions constituted constructive expropriation of MDCL’s contractual rights in the project and accordingly the expropriation of the value of Mr. Biloune’s interest in MDCL. The Tribunal concluded that the Government of Ghana was under an obligation under the law of Ghana and under international law to compensate Mr. Biloune.

The Tribunal referred to the customary international law principle according to which, in case of expropriation, compensation should restore the Claimant to the position that it would have enjoyed but for the expropriation. The Tribunal stated that there existed “a generally accepted principle of international law that prompt, adequate and effective compensation be paid in case of expropriation”. The Arbitral Tribunal concluded that the most appropriate method of compensating Mr. Biloune was to award him the amount of his actual investment in MDCL along with interest up to the date of payment and costs. The Tribunal declined to make an award on the basis of lost future profits in the absence of sufficient proof.

## **II. Factual Background and Claims of the Investor**

Mr. Antoine Biloune was a Syrian national who held a 60% equity interest in MDCL, a corporation incorporated in Ghana. MDCL was initially granted a lease in November 1985 by GTDC (a corporation owned and formed by the Ghanaian Government to operate tourist facilities) to renovate and manage a restaurant at the Marine Drive Complex in Accra, Ghana. In 1986, the relationship of the parties changed and MDCL entered into a *de facto* partnership or joint enterprise with GTDC for the construction of an extensive 4-star hotel resort complex. Although no formal joint venture agreement was signed, it was understood that GTDC's contribution to the joint venture would be the land and the existing structure at the Complex, while MDCL would finance and carry out the expansion and renovation. Minutes of meetings between the parties indicated that MDCL's stake in the venture was fixed at 49%, and GTDC's at 51%. The Ghana Investments Centre (GIC) approved the investment and granted certain investment concessions. This arrangement was formalized in an agreement dated 18 November 1986 between MDCL and GIC ("the GIC Agreement"). The Agreement contained, *inter alia*, an arbitration clause and the prohibition of expropriation.

Mr. Biloune's investment in MDCL was used to fund MDCL's expenditure on the project towards the payment of contractor fees, purchase of construction material and other equipment and supplies, for communication and travel expenses and for the payment of salaries and wages. However, after MDCL carried out substantial work on the premises, its work was interrupted. In August 1987, the Accra City Council issued a Stop Work notice on the ground that no building permit had been obtained by GTDC. Even before the deadline for submitting a reply had passed, the City Council ordered demolition of the project, which was carried out in some measure. Mr. Biloune and certain other MDCL officers were asked to declare their assets and directed to report twice a week to the authorities. By mid-November 1987, Mr. Biloune was of the opinion that the Government was not willing to permit the project to proceed, and hence placed the project in the hands of administrators; the workforce of MDCL was also discharged. In December 1987, Mr. Biloune was arrested and held in custody for 13 days without charge, and was subsequently deported from Ghana to Togo.

Mr. Biloune and MDCL invoked the arbitration clause contained in the GIC Agreement to initiate arbitration under UNCITRAL Rules. Mr. Biloune claimed that GIC and the Government of Ghana had interfered with his investment in MDCL, and that there was a constructive expropriation of MDCL's assets and of his interest in MDCL. He claimed damages for the expropriation of his investment, and proposed two alternative methods for calculating damages: historical value of actual monetary investment made by him and lost profits.

### **III. Findings on Merits**

#### **A. Applicable Law**

The Tribunal held that the rights and obligations of the parties to the GIC Agreement were governed by the provisions of that Agreement, and Article 24 of the Agreement required the Tribunal to construe the Agreement "according to the laws of Ghana". The Tribunal also applied customary international law as there was "no indication that

Ghanaian law diverges on the central issue of expropriation from customary principles of international law.” (95 ILR p. 207)

### ***B. Constructive Expropriation***

The Tribunal concluded that the actions of the Government of Ghana and GIC constituted a violation of the following provisions of the GIC Agreement:

“22. Subject to the provisions of the [Ghana Investment] 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.”

The Tribunal rejected the contentions of the Respondents that the arrest, detention and deportation of Mr. Biloune was justified, and that it was unrelated to his investment in MDCL. The Tribunal held that when viewed in conjunction, the issuance of the stop work order, the partial demolition of the construction, the arrest and detention of Mr. Biloune, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of reentry had the effect of causing irreparable cessation of work on the project. The Tribunal considered Mr. Biloune’s role to be pivotal in promoting, financing and managing the project and that his expulsion from Ghana effectively prevented MDCL from pursuing its approved project. These actions constituted constructive expropriation of MDCL’s contractual rights in the project and accordingly the expropriation of the value of Mr. Biloune’s interest in MDCL. The Tribunal concluded that the expropriation was contrary to the terms of the GIC Agreement, but did not expressly indicate whether it considered the expropriation to be lawful or unlawful under international law. The Tribunal however held that the Government of Ghana was under an obligation to compensate Mr. Biloune not only under the law of Ghana but also under international law. (95 ILR p. 209-10)

## IV. Findings on Damages

### A. Law Applicable to the Determination of Damages

The Tribunal applied principles of customary international law.

### B. Standard of Compensation

In its Award on Jurisdiction and Liability, the Arbitral Tribunal indicated that its determination of damages would be based upon the customary international law principle that a claimant whose property had been expropriated by a foreign State was entitled to “full – i.e., prompt, adequate and effective – compensation”. The Tribunal interpreted this standard as entitling a Claimant to receive “...the fair market or actual value of the property at the time of the expropriation, plus interest, and that the compensation must be reasonably made and in a form that (could) be easily repatriated or otherwise satisfactorily deployed”. (95 ILR p. 211)

In its Award on Damages and Costs, the Tribunal reiterated that the standard for compensation under customary international law was the restoration of the Claimant to the position it would have enjoyed but for the expropriation. It opined that this principle was reflected in hundreds of bilateral investment treaties, and referred to the application of the principle in *Texaco Overseas Petroleum v. Libya (TOPCO)*, *Sedco Inc v. The National Iranian Oil Co*, *Amoco International Finance Corporation v. Islamic Republic of Iran*. (95 ILR p. 228)

### C. Heads of Damages Claimed

The Claimants submitted two alternative claims for compensation (based on two different valuation methods):

- (i) *Investment Value*: The Claimants claimed US\$689,961 as the value of Mr. Biloune’s expropriated investment (at historical cost) in MDCL based on the amounts of expenditures made for the purpose of the expropriated project;
- (ii) *Lost profits value*: The Claimants valued at 569,128,000 cedis the loss of future profits due to the expropriation of MDCL’s contractual right to develop and operate the Marine Drive project. Dividing the amount of this profit with GTDC as the joint venture partner, MDCL claimed lost profits for its share of 49% or 278,872,720 cedis. Of this amount, Mr. Biloune claimed the right to 276,641,730 cedis (US\$ 1,571,828) representing his 99.2% investment in MDCL.<sup>3</sup>

### D. Valuation

The Tribunal, citing *Starrett Housing Corp v. Islamic Republic of Iran*, held: “(n)ormally, in cases of expropriation of a going concern, the most accurate measure

<sup>3</sup> Although Mr. Biloune only held a 60% stake in MDCL, he claimed to have actually provided 99.2% of the company’s capital.

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.” (95 ILR p. 228)

Thus, the Tribunal accepted the validity of the principle that lost profits should be compensated. However, it declined to base its decision on the basis of loss of future profits because at the time of the project’s suspension and effective expropriation, the project remained uncompleted and unoperative. Since the expropriated project was not generating profits or revenue, the Tribunal found no basis on which it could calculate future profits. Given the nature of the project and its early interruption by the respondents, of the two methodologies offered by the Claimant, the Tribunal chose the “actual investment” method as the most appropriate method for valuing the damages payable to Mr. Biloune for his expropriated investment in MDCL. (95 ILR p. 228-29)

## **1. Investments made**

Mr. Biloune claimed that he had made investments by means of both foreign as well as Ghanaian currency in MDCL. The Claimants claimed foreign currency investments in the project towards in-kind inputs in the form of building materials and communication and Mr. Biloune’s travel expenses in Europe to secure financing for the project. The Tribunal accepted the travel and communication expenses in the amounts claimed.

The Respondents disputed the investment allegedly made towards the purchase of building material by MDCL on the ground that some of these materials were diverted to another company controlled by Mr. Biloune’s wife or to Mr. Biloune himself. The Tribunal held that even if MDCL did sell some material originally imported by it for the project, the value of the goods at the time of their original importation would still represent Mr. Biloune’s investment in MDCL. This would be so unless the proceeds of these sales were unlawfully diverted, of which the Tribunal found no evidence. The Tribunal also concluded that the funds invested in MDCL were used in furtherance of the project. (95 ILR p. 226-27)

Accordingly, the Tribunal held that the Respondents were obligated to pay Mr. Biloune the amounts shown to have been invested by him, i.e., US\$ 334, 637.49, sterling £61,811.67, DM 430.55 for the foreign currency investment and 46,790,982.85 cedis.

In view of the fact that the Tribunal based its award on the amounts actually invested by Mr. Biloune in MDCL, it found it unnecessary to make any apportionment to allow for the interests of GTDC and Mr. Michigan, the 40% shareholder in MDCL. The Tribunal also found no ground for deducting the residual value, if any, of MDCL’s assets since it concluded that all the assets of MDCL were constructively expropriated by Ghana and that accordingly, the title to all these assets had passed to the Government of Ghana. (95 ILR p. 226)

## 2. Evidence of investments

The Tribunal requested evidence of the amounts invested by Mr Biloune in MDCL as well as evidence of the expenditures of MDCL on the Marine Drive project such as receipts, bills, contracts, purchase orders, bank statements, and payroll documentation. It relied on MDCL's books of accounts to identify the investments made by Mr. Biloune in MDCL by holding that contemporaneous books and records of a company regularly kept in the course of business should be presumed to be accurate. (95 ILR p. 223-4)

### *E. Date for Establishing the Value*

The Tribunal concluded that the Government of Ghana expropriated MDCL's assets and Mr Biloune's interest therein not later than 24 December 1987, i.e., immediately after Mr. Biloune's deportation from Ghana to Togo.

The Tribunal also held that under the norms of international law, "...the Respondents were obligated to pay the amounts awarded in freely convertible, transferable currency on the date of the expropriation." On this basis, the 46,790,982.85 cedis awarded would have to be paid in its dollar equivalent of \$266,721.67. The Claimants argued that they were entitled to a larger sum of \$599,928.44 on the basis that cedis ought to be converted into dollars on the various dates on which they were invested in the project. The Tribunal rejected this contention and held that to require conversion at the rates applicable on the date of the investment would amount to requiring the Government to insure foreign investors against depreciation of the local currency. (95 ILR p. 229-30)

### *F. Interest*

The Tribunal held that interest was required to be awarded in order to fully compensate the victim of expropriation for the delay in payment of the value of the expropriated property. It considered the London Interbank Offered Rate (LIBOR) as the appropriate rate for the calculation of interest, and awarded simple interest calculated from the time of Biloune's deportation (date of expropriation) to the time of payment of the award. (95 ILR p. 230-31)

## V. Implications/ Initial Analysis

- The Tribunal held that the expropriation was contrary to the terms of the contract, and did not pronounce on the **legality of expropriation** under international law. Nor did it make a distinction between the **standard of compensation** for lawful and unlawful expropriation.
- The Tribunal held that customary international law prescribes the **standard of "full compensation"** (= "prompt, adequate and effective" = "fair market value

or actual value”) for any expropriation. This embraces the Hull formula and is at odds with the frequently made argument that customary international law requires less than full compensation for lawful expropriations.

- The Tribunal treated the terms “**fair market value**” and “**actual value**” as synonymous.
- For apportionment of compensation, the Tribunal relied on the **actual investments** made, and not on the *de jure* shareholding structure.
- Had the Tribunal determined that only MDCL’s contractual rights were expropriated, then proof would be required that the invested amounts had a **direct link to the investment project**. However, since the Tribunal found expropriation of both MDCL’s contractual rights as well as Mr Biloune’s *de facto* shareholding in MDCL, it became irrelevant whether the invested amounts had been spent for the purpose of the Marine Drive project or otherwise. It appears that in cases of expropriation of shareholding, questions of actual deployment of amounts investment in the company should not arise.
- The Tribunal held that even if MDCL did sell some material originally imported by it for the project, the value of the goods at the time of their original importation would still represent Mr. Biloune’s investment in MDCL. This would be so unless the proceeds of these sales were unlawfully diverted, of which the Tribunal found no evidence. The Tribunal also concluded that the funds invested in MDCL were used in furtherance of the project. (95 ILR p. 226-27)
- The Tribunal accepted the appropriateness of awarding **lost profits** as a suitable means of compensation but found no basis on which it could calculate lost profits in the circumstances of the case.
- The Tribunal held that when the award was to be based on the amounts actually invested, **reasonable proof** would be required to establish that the amounts claimed.
- The Tribunal examined the **evidentiary value of the company’s books** and records and considered them to be *prima facie* accurate unless the respondent proved the contrary.
- **Date of expropriation** was determined with reference to the date of the last episode of interference with investment.
- The award was made in **freely convertible currency** (US\$) although part of the investment was made in local currency.
- **Currency conversion** was performed on the date of expropriation, not on the date of investment (the latter option would have been much more favourable for the investor); to hold otherwise would mean that foreign investors were insured against depreciation of local currency.

- **Flow-through of damages.** The Tribunal did not clearly distinguish between the damages suffered by MDCL by virtue of the expropriation of its contractual rights in the project, and the damages suffered by Mr. Biloune by virtue of the loss of value of his shareholder's interest in MDCL. The Tribunal contended itself with only ascertaining the amounts invested, and therefore lost, by Mr. Biloune and did not examine or quantify the losses of MDCL and how they had flowed to Mr Biloune as MDCL's shareholder.