SEPARATE OPINION

of

Prof. Georges Abi-Saab

1. While I concur with my co-arbitrators in the *dispositif* of the decision to dismiss the Respondent's jurisdictional objections, based on Article VI of the Treaty, I do not share most of the grounds (*motifs*) they put forward to reach this conclusion; hence this separate opinion.

2. More concretely, I do not share their analysis of "Treaty Interpretation" (paras. 168-200); however, I do partake in their reasoning pertaining to the "Validity of Claimant's Consent to Murphy I" (paras. 201-204), for the following reasons.

I - The Interpretation of Article VI of the BIT

3. Paragraph 2 of Article VI of the BIT provides:

> "In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, *under one of the following alternatives*, for resolution:
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> a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
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> b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
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> c) in accordance with the terms of paragraph 3." (emphasis added).

4. Paragraph 3 of Article VI of the BIT provides:

> "a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID convention"), provided that the Party is a party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent".

5. Paragraph 3 of Article VI cannot be read in isolation from paragraph 2 of Article VI because together they constitute a logical continuum. Paragraph 3 is an elaboration of paragraph 2(c). Hence, paragraph 3 must be interpreted in accordance with the framework laid down in paragraph 2 that continues to apply to it - as detailing species of a genus.

6. Both paragraphs use the word "or" in listing the jurisdictional means of settling disputes that arise under the Treaty. The word "or" almost always carries a disjunctive meaning that signifies that the enumeration is between two or more mutually exclusive alternatives. The only exception is when it is used to signify equivalence:

> "connecting two words denoting the same thing, or introducing an explanation of a preceding word, etc.; otherwise called, that is."
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> (*Shorter Oxford English Dictionary*, 6th ed. 2007, vol.2, p. 2016).
>
> The example the dictionary gives: "An inhabitant…of the Netherlands or Holland"

7. The meaning of the word "or" never has a cumulative effect that is equivalent to the word "and".

8. Without having to call on such abstruse jargon as “fork in the road”, the use of “or” in paragraph 2 of Article VI is sufficient to indicate that the choice is limited to one of the alternatives enumerated therein. The added phrase (in italics) in the sentence: “the national or company concerned may choose to submit the dispute, *under one of the following alternatives*, for resolution”, is not necessary. However, it is not devoid of “effet utile” because it acts as a precautionary clarification, *ex abundanti cautela*, for the avoidance of doubt.

9. Considering, as mentioned above, that paragraph 3 is an elaboration of paragraph 2 and remains within its framework, the repetition of the precautionary phrase highlighted above, in paragraph 3, would have been redundant. It would have had no “effet utile” at all, as the clarification has already been done in paragraph 2 of which paragraph 3 is a mere elaboration.

10. The counter-argument that the two paragraphs are not logically connected – i.e. that the first paragraph deals with contract claims and the second deals with treaty claims – also does not stand. For this argument to be logically valid, paragraph 2 should not have included sub-paragraph (c), which establishes the link between the two and their legal and logical character as a continuum. It does not stand to reason that in such a continuum the provisions start by narrowing the choice for dispute resolution but end up extending it like a fish tail (effet queue de poisson).

11. Concerning the rules of interpretation, treaties should not be interpreted either restrictively or extensively. Interpretation should clarify the legal import and effect of the provisions, according to the ordinary meaning of the words in their context, without adding or subtracting from the text.

12. To argue that as long as the text of paragraph 3 does not expressly prohibit choosing more than one alternative, the rule is that what is not prohibited is permitted, runs squarely against the natural meaning of the text. It totally ignores the word “or” and

its disjunctive meaning which linguistically and logically mandates such a prohibition (*i.e.* that the choice of one alternative excludes all the others). Such an interpretation deprives the word "or" of any "effet utile". In fact, it rewrites the text by replacing "or" with its antonym "and".

13. The same objection applies to interpreting paragraph 3 as prohibiting the choice of more than one alternative "simultaneously" but not prohibiting the choice of more than one alternative "successively", or still, that the private party can choose different alternatives successively "until he gets a decision on the merits". These varied formulations in the guise of interpretation introduce into the text qualifications that it does not contain. They, in fact, re-write it by adding to it.

14. All these liberties with the text are beyond the judge's or arbitrator's discretion; unless of course he is deciding *ex aequo et bono*, which can only be done with the agreement of the parties.

15. Finally, the same objection also applies to the argument of teleological interpretation. According to this argument, the object and purpose of the treaty, which is the protection of foreign investment, mandates providing the foreign investor with an independent forum to decide on the merits of any disputes that may arise between him and the host State.

16. In the first place, the object and purpose of a BIT is not only to protect the interests of the foreign investor, but also those of the host State, particularly the respect of its sovereignty, including the conditions and limits it sets for its consent to international arbitration.

17. Secondly, to argue that the treaty has to provide in all cases an independent forum to decide on the merits of any dispute that may arise, overlooks or ignores all the conditions and limitations that the treaty lays down for recourse to arbitration. It thus amounts to rewriting the treaty by introducing into it an obligation of result

(*obligation de résultat*) which it does not contain, of delivering in all cases a forum that decides on the merits. It transforms the treaty into an insurance policy through an argument of necessity (which we know does not create law) – that without such a guarantee or obligation of result, there will be no forum to decide; which is allegedly an absurd result. But to consider this an absurd result is itself absurd; for, in international law, unlike in municipal law, the default position is the absence of an ultimate competent forum, because of the fundamental principle of the consensual basis of jurisdiction. This is particularly so, when, as *in casu*, the party was afforded a possibility in the treaty, but forfeited it by its own fault (by committing a deliberate violation of the treaty in order to precipitate the process).

18. For the above reasons, I do not share the reasoning of my co-arbitrators on Treaty Interpretation, as I consider that Article VI paragraph 3 does not afford the investor more than one choice of arbitral forum.

II – The Validity of the Claimant's Consent to Murphy I

19. In Murphy I, the ICSID Tribunal did not pronounce on the validity of Murphy's choice to consent to ICSID arbitration. It merely found that it lacked jurisdiction owing to the non-fulfillment of the condition precedent for the consent of the private party to go to arbitration via one of the three prescribed procedures, of a lapse of six months from the time the dispute arose.

20. The condition of prior negotiations or prior period for negotiations as well as that of exhaustion of local remedies are conditions of admissibility in general international law. However, when they are stipulated as conditions in the jurisdictional title, they become limits to jurisdiction as well, and can serve as legal bases for objections to jurisdiction.

21. In BITs, these conditions are usually stipulated as conditions for the consent of the State to go to arbitration. However, *in casu*, the text of the chapeau of paragraph 3(a) of Article VI is clear in providing a different solution. It reads:

> "a) *Provided that…six months have elapsed* from the date on which the dispute arose, *the national or company* concerned *may choose to consent*… to the submission of the dispute to settlement by binding arbitration" (emphasis added) via one of the three enumerated procedures.

22. In other words, what is subjected to the condition is *the consent to go to arbitration by choosing one of the three alternatives*; *i.e.* the condition qualifies the private party's consent to one of the three modes of arbitration.

23. This interpretation is based on the clear meaning of the text and is supported by its context, particularly sub-paragraph (b) of paragraph 3, which provides:

> "*Once the national or company concerned has **so** consented,* either party to the dispute may initiate arbitration in accordance with the choice specified in the consent". (emphasis added)

24. This provision envisages the separation of two legal acts: (a) the consent to go to arbitration by choosing an arbitral forum; and (b) the initiation of the arbitration before the chosen forum. This separation can be in relation to the timing of the consent and the initiation of the arbitration, as well as the subject that can perform the act (consent by the private party; initiation by either party).

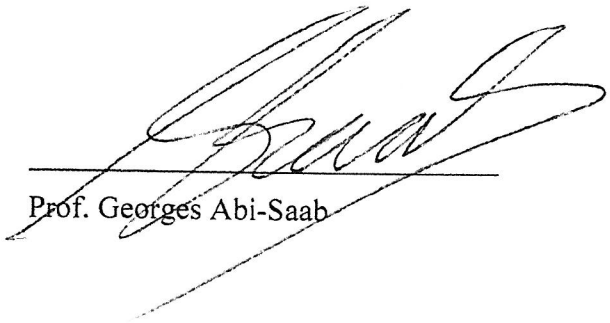
25. It is significant that, in this provision, the condition of the lapse of six months is not attached to the act of initiation of arbitration, but to the consent, as implied from the language "once the national…has *so* consented". The word "so" obviously refers to the consent as qualified by the two conditions stipulated under paragraph 3(a).

26. As already mentioned, the ICSID Tribunal did not declare that Murphy's choice to consent to ICSID's arbitration was invalid. However, the import of its decision is that this choice of consenting to ICSID arbitration, as a legal act (*acte juridique*), was

ineffective because it failed to produce the legal effect it purported to achieve. In other words, it was a defective legal act.

27. That this defect is attributable to the willful violation or non-observance of the condition by the Claimant, does not cure the legal act of its defect. However, it may provide another objection to the resubmission of the dispute to another forum, namely the principle that "no one can benefit from his own turpitude" (*Nemo auditur propriam turpitudinem allegans*). But this last point, though raised by the Respondent, was hardly pleaded by the parties.

28. For the reasons given above on the issue of the validity of the Claimant's consent to Murphy I, I concur with the conclusion of my co-arbitrators that the Respondent's objection to the jurisdiction of the Tribunal based on Article VI of the Treaty should be dismissed.



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