

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

In the matter between

TOTO COSTRUZIONI GENERALI S.P.A.
(Claimant)

and

REPUBLIC OF LEBANON
(Respondent)

(ICSID Case No. ARB/07/12)

AWARD

Members of the Tribunal

Professor Dr. Hans van Houtte

Judge Stephen M. Schwebel

Mr. Fadi Moghaizel

Secretary of the Tribunal

Ms. Milanka Kostadinova

Representing the Claimant

Bechara S. Hatem, Esq.

Professor Hadi Slim, Esq.

Hatem, Kairouz, Messihi & Partners

Beirut, Lebanon

Representing the Respondent

Nabil Abdel-Malek, Esq.

Mireille Rached, Esq.

Joseph Bsaibes, Esq.

Nabil Abdel-Malek Law Offices

Beirut, Lebanon

Date of Dispatch to the Parties: June 7, 2012

I. INTRODUCTION

A. THE PARTIES:

- 1- The Claimant in this arbitration is Toto Costruzioni Generali S.p.A., ("Toto" or the "Claimant"). Toto is an Italian joint stock company registered at the commercial register of the Chamber of Commerce of Chieti and incorporated under the laws of Italy, with registered offices at Viale Abruzzo 410, 66013 Chieti, and with a place of business at Via Sardegna 14, 00187 Rome, Italy. The Claimant is represented in these proceedings by Mr. Bechara S. Hatem and Professor Hadi Slim of *Messrs. Hatem, Kairouz, Messihi & Partners* Law Firm at Ashrafieh, 738 Sioufi Street, P.O. Box 116-2264, Beirut, Lebanon.
- 2- The Respondent in this arbitration is the Republic of Lebanon ("Lebanon" or the "Respondent"). The Respondent is represented in these proceedings by Mr. Nabil B. Abdel-Malek, Mrs. Mireille Rached and Mr. Joseph Bsaibes of *Messrs. Nabil B Abdel-Malek Law Offices* at Ashrafieh (Medawar), Pasteur Street, Pasteur 40 Building, 8th Floor, P.O. Box 113-5205, Beirut, Lebanon¹.

B. BACKGROUND TO THE DISPUTE:

- 3- On April 12, 2007, the *International Centre for Settlement of Investment Disputes* ("ICSID" or the "Centre") received a request for arbitration (the "Request") dated March 19, 2007, submitted by Toto against Lebanon. The Request was submitted pursuant to the arbitration provisions contained in the Treaty between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments signed on November 7, 1997, and which entered into force on February 9, 2000 (the "Treaty").
- 4- The dispute arose in relation to a contract dated December 11, 1997 (the "Contract") entered into between the *Lebanese Republic-Conseil Exécutif des Grands Projets* ("CEPG") and *Toto Costruzioni Generali S.p.A.*, to construct the Saoufar-Mdeirej Section (the "Project"), which is a portion of the Arab Highway linking, *inter alia*, Beirut to Damascus.
- 5- Toto alleges that the Lebanese Government in the person of first the CEPG, and later its successor, the Council for Development and Reconstruction ("CDR"), both acting on behalf of the Lebanese Government, was responsible for several actions and omissions in relation to the Project, such as delaying or failing to carry out the

1. Toto and Lebanon are jointly referred to as the "Parties".

necessary expropriation of private property, failing to deliver the sites of the work in a timely fashion, failing to protect Toto's legal possession, giving erroneous or undesirable design information and instructions, changing the regulatory framework, and refusing to adopt corrective measures in relation to the aforementioned matters.

- 6- These actions and omissions, according to Toto, caused substantial delays in the construction of the portion of the highway entrusted to it, jeopardized Toto's investment in Lebanon, and had - and are still having - a direct negative impact on the reputation of the Toto group. Toto argues that those actions and omissions are breaches of the Treaty and is seeking an award of damages for those breaches.
- 7- More specifically, Toto requests from the Tribunal an award in its favor²:

- 1- *Declaring that the Respondent has breached Articles 2, 3 and 4 of the BIT, jeopardizing the Investment made by the Claimant through the Contract and caused damages to said Investment.*
- 2- *Directing the Respondent to indemnify the Claimant for all material damage set out below caused to its Investment as a result of BIT breaches:*
 - a- *Compensation for additional costs incurred because of delays in expropriations and in removing Syrian troops, failing to secure the use of expropriated parcels and to integrate in the design rules and standards edicted by the Republic of Lebanon for public safety and security purposes. The total amount of the compensation is L.P. 116,040,766,976/ (sixteen billions forty millions seven hundred sixty six thousand nine hundred seventy six Lebanese Pounds), equivalent to USD 110,694,000/ (ten millions six hundred ninety four thousand US Dollars), being the aggregate of the amounts shown in Exhibits MM 48, MM 49, MM 50 and MM 51.*
 - b- *Compensation for additional costs incurred because of changes in legislation, for a total amount of L.P. 1833,386,120/ (eight hundred thirty three millions three hundred eighty six thousand one hundred twenty Lebanese Pounds) equivalent to USD 1545,590/ (five hundred forty five thousand five hundred ninety US Dollars) being the aggregate of the amounts shown in Exhibits MM 59, MM 60 and MM 61.*
- 3- *Directing the Respondent to pay to the Claimant:*
 - a- *Interest on payments received after due date, for a total amount of L.P. 1807,799,237/ (eight hundred seven millions seven hundred ninety nine thousand two hundred thirty seven Lebanese Pounds) equivalent to USD 1538,000/ (five hundred thirty eight thousand US Dollars) (Exhibit MM 62).*

2 . Toto's claims are quoted from the Claimant Reply on Merits of August 10, 2011, pp. 100-101.

- b- Compound interest on amounts claimed under the present Request, totaling L.P. 117,681,952,333/ (seventeen billions six hundred eighty one millions nine hundred fifty two thousand three hundred thirty three Lebanese Pounds) equivalent to USD 111,769,590/ (eleven millions seven hundred sixty nine thousand five hundred ninety US Dollars). The interest should be calculated based upon the above figure at LIBOR rate + 5, from the due date up to the date of effective payment by the Respondent.*
- 4- *Directing the respondent to compensate the Claimant for the loss of opportunities, for a total amount of L.P. 18,562,253,000/ (eight billions five hundred sixty two millions two hundred fifty three thousand Lebanese Pounds) equivalent to USD 15,980,000/ (five millions seven hundred and nine thousand US Dollars). The same basis of calculation should be adopted for subsequent years until the Award is fully executed.*
- 5- *Directing the Respondent to compensate the Claimant for moral damage suffered, for a total amount of L.P. 16,048,403,161/ (six billions forty eight millions four hundred three thousand one hundred sixty one Lebanese Pounds) equivalent to USD 14,010,877/ (four millions ten thousand eight hundred seventy seven US Dollars), as explained in §289, 290 and 291 of the Claimant's Memorial.*
- 6- *Directing the respondent to pay the Claimant the arbitration and arbitrators' fees and expenses as well the Claimant's attorneys fees.*
- 7- *Ordering any such further relief as may be available and appropriate in the circumstances.*

II. PROCEDURAL HISTORY

A. CONSTITUTION OF THE TRIBUNAL:

- 8- On June 8, 2007, Lebanon appointed as arbitrator, Mr. Fadi Moghaizel, a Lebanese national. By letter of July 27, 2007, the Centre informed Lebanon that it could not proceed with Mr. Moghaizel's appointment in view of Rule 1(3) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules), according to which the co-national of a party to a proceeding cannot be appointed as an arbitrator by a party without the agreement of the other party to the dispute.
- 9- On August 21, 2007, Toto appointed as arbitrator Mr. Alberto Feliciani, an Italian national, and proposed that it would not object to Lebanon's appointment of Mr. Moghaizel as a co-national of Lebanon provided that Lebanon did not object to Toto's appointment of Mr. Feliciani as a co-national of Toto. On September 24, 2007, Lebanon confirmed that it had no objection to Mr. Feliciani's appointment.
- 10- On September 27, 2007, the Parties filed a joint letter invoking Article 37(2)(b) of the ICSID Convention and appointing Professor Dr. Hans van Houtte, a Belgian national,

as the third and presiding arbitrator. On October 1, 2007, the Centre asked the Parties to clarify whether Professor Dr. Hans van Houtte's appointment was by the two party-appointed arbitrators, reflecting the method of constituting the Tribunal agreed by the Parties, or by another method and, if so, to indicate which one. The Parties informed the Centre by joint letter of October 16, 2007, that the appointment of the third arbitrator was by the two party-appointed arbitrators. Thus, the Centre contacted the two party-appointed arbitrators who, on October 19, 2007, confirmed their appointment of Professor van Houtte as the third arbitrator.

- 11- All three arbitrators having accepted their appointments, the Centre informed the Parties, pursuant to Rule 6(1) of the Arbitration Rules, of the constitution of the Arbitration Tribunal and the commencement of the proceedings as of October 30, 2007, with successively Mr. Ucheora Onwuamaegbu, Ms. Aïssatou Diop and Ms. Milanka Kostadinova, serving as Secretary.
- 12- By joint letter of November 9, 2007, the Parties proposed Paris as the venue of the proceedings. On November 20, 2007, the Tribunal, after consulting with the ICSID Secretariat, scheduled a first session with the Parties for December 13, 2007, at the World Bank European Headquarters in Paris, France. At the first session, the Parties confirmed their agreement that the Tribunal was properly constituted and that they had no objections to its Members. The Parties also agreed to bifurcate the arbitration proceedings addressing firstly the issue of jurisdiction and secondly the merits of the case. On December 13, 2007, both Parties agreed to the tentative calendar for the preliminary phase of the proceedings on jurisdiction. Submissions on jurisdiction were filed accordingly.
- 13- In accordance with the agreed schedule, the Tribunal held a hearing on jurisdiction at the World Bank European Headquarters in Paris, France, on October 16-17, 2008. In a partial award dated September 11, 2009 ("**Decision on Jurisdiction**"), the Tribunal decided that it had jurisdiction over elements of the dispute and established, *inter alia*, that the dispute arose on June 30, 2004.
- 14- On October 15, 2009, the Parties submitted to the Tribunal an agreed procedural calendar in respect of the proceedings on the merits of the case.
- 15- On October 29, 2009, the Tribunal issued **Procedural Order No. 1** setting out the time limits for filing submissions on the merits as agreed by the Parties.
- 16- The Claimant and Respondent accordingly filed the following submissions:
 - i. Claimant's Memorial on Merits dated January 29, 2010;
 - ii. Respondent's Counter Memorial on the Merits dated May 3, 2010;

- iii. Claimant's Reply on Merits dated August 3, 2010; and
 - iv. Respondent's Rejoinder on the Merits November 23, 2010.
- 17- On December 16, 2010, the Tribunal issued **Procedural Order No. 2** directing the Parties to file further submissions in respect of particular issues related to the merits of the case. The hearing dates, scheduled for January 18 -22, 2011, were postponed to early fall, 2011.
- 18- The Parties accordingly filed the following submissions:
- i. Claimant's Submission dated January 7, 2011;
 - ii. Respondent's Submission dated February 4, 2011;
 - iii. Claimant's Submission dated February 4, 2011;
 - iv. Respondent's Submission dated March 24, 2011;
 - v. Claimant's Reply Submission dated March 24, 2011 supported by the Witness Statements of Mr. Luciano D'Onofrio, Mr. Hisham Riachi, Mr. Gabriele Trovarelli, Mr. Michele Amore, and Mr. Massimo Cacciagrano, and the Expert Reports in accounting and finance of Dr. Romano Allione and Dr. Alberto Donatelli;
 - vi. Respondent's Reply Submission dated April 4, 2011;
 - vii. Respondent's Witness Statements of Mr. Mounir Chegade, and Dr. Ibrahim el Khatib, and the Expert Reports related to delay by Mr. Steve Huyghe and related to quantum by Mr. Graham D. McNeill, all dated in June 2011;
 - viii. Claimant's Additional Witness Statements of Mr. Hisham Riachi (2) and Dr. Romano Allione (2), dated in July 2011;
 - ix. Respondent's Witness Statements of Dr. Ibrahim el Khatib (2) and Expert Reports related to the delay by Mr. Steve Huyghe (2) and related to quantum by Mr. Graham D. McNeill (2), all dated in August 2011; and
 - x. Claimants Witness Statement of Mr. Hisham Riachi with Comments on Toto's Film³.
- 19- From October 17 to 21, 2011, a hearing on the merits was held at the World Bank European Headquarters in Paris, France.

Present at the hearing were the following:

The Tribunal:

Professor Dr. Hans van Houtte (Presiding Arbitrator)

Mr. Alberto Feliciani (Arbitrator)

Mr. Fadi Moghaizel (Arbitrator)

3 . Exhibit MM136.

ICSID Secretariat:

Ms. Milanka Kostadinova (Secretary of the Tribunal).

For the Claimant:

Mr. Bechara S Hatem and Ms. Nada Nassour of *Messrs. Hatem, Kairouz, Moukheiber and Messihi Law Firm*; Professor Hadi Slim, University of Tours.

Witnesses and Experts for the Claimant:

Mr. Luciano D'Onofrio

Mr. Hisham Riachi

Dr. Romano Allione

Dr. Alberto Donatelli

For the Respondent:

Ms. Mireille Rached, Mr. Joseph J. Bsaibes and Mr. Patrick Obeid of *Messrs. Nabil B. Abdel-Malek Law Offices*.

Witnesses and Experts for the Respondent:

Mr. Mounir Chehade

Dr. Ibrahim el Khatib

Mr. Steve Huyghe

Mr. Graham McNeill

- 20- On October 31, 2011, the Claimant made a post-hearing written submission related to the *locus standi* argument of Respondent, with further correspondence from both Parties and the Tribunal on November 3, 10, 16, 2011, December 16 and 30, 2011 and January 13, 23 and 30, 2012.
- 21- On February 14, 2012, the Secretary of the Tribunal informed Professor van Houtte and Mr. Fadi Moghaizel that Mr. Alberto Feliciani had notified the Secretary-General of ICSID of his resignation as arbitrator in this case. The proceeding was suspended in accordance with Rule 10(2) of the ICSID Arbitration Rules.
- 22- On February 15, 2012, Mr. Feliciani informed the two other members of the Tribunal of certain reasons for his resignation, pursuant to Rule 8 of the Arbitration Rules. The two other members of the Tribunal were unable to consent to his resignation.
- 23- Pursuant to Arbitration Rule 11(2)(a) of the Arbitration Rules, the Chairman of the ICSID Administrative Council proceeded with the appointment of an arbitrator in replacement of Mr. Feliciani. On March 6, 2012, the Secretary-General of ICSID informed the Parties that Judge Stephen M. Schwebel was considered for that appointment. The Parties did not object. By letter of March 16, 2012, the Secretary-General of ICSID informed the

Parties that Judge Schwebel accepted his appointment as arbitrator, and that the Tribunal was deemed to be reconstituted as of that date. The proceeding was resumed.

24- Judge Schwebel received a copy of all the submitted briefs, exhibits, witness statements, expert statements, minutes and records of hearings. The three arbitrators deliberated through teleconference and correspondence.

25- On May 1, 2012, the Tribunal declared the proceedings closed pursuant to Rule 38 of the Arbitration Rules.

B. THE ARBITRATION CLAUSE:

26- This arbitration is governed by Article 7.2.b of the Treaty which reads:

SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY:

- 1- *In case of disputes regarding investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the Parties concerned with a view to solving the case, as far as possible, amicably.*
- 2- *If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:*
 - a) *the competent court of the Contracting Party in the territory of which the investment has been made; or*
 - b) *the International Center for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; [...].*

27- Italy and Lebanon being both members of the Convention, the dispute was submitted to ICSID for settlement.

C. THE DECISION ON JURISDICTION:

28- On September 11, 2009, the Tribunal rendered its Decision on Jurisdiction, in which it held the following:

- 1) *The Conseil Exécutif des Grands Projets and the Council for Reconstruction and Development are public legal entities whose actions are attributable to the Republic of Lebanon;*
- 2) *Toto's project meets the requirements to be considered as an "investment" under the Treaty as well as under the ICSID Convention;*
- 3) *The Tribunal has jurisdiction over the dispute *ratione temporis* under Article 7.2.b and Article 10 of the Treaty as the dispute has arisen on June 30, 2004, i.e., after the Treaty entered into force;*
- 4) *The Tribunal has jurisdiction to decide the dispute pursuant to the ICSID Convention, the ICSID Arbitration Rules and the Treaty rules;*
- 5) *Subject to the Tribunal's considerations, stated above, the Tribunal has jurisdiction to decide whether (i) the delay in expropriation, (ii) the failure to remove Syrian troops and (iii) the changes in the regulatory framework, constitute breaches of Article 2 and/or Article 3.1 of the Treaty;*
- 6) *The Tribunal has no jurisdiction with respect to the following claims:*
 - a) *Erroneous Instructions and Design as breaches of Article 2 and Article 3.1 of the Treaty;*
 - b) *Disruption of negotiations as breach of Article 3.1 of the Treaty;*
 - c) *Delays in two law suits before the Conseil d'Etat as breach of Article 3.1 of the Treaty;*
 - d) *Lack of Transparency in the proceedings before the Conseil d'Etat as breach of Article 3.1 of the Treaty; and*
 - e) *Indirect expropriation as breach of Article 4.2 of the Treaty.*
- 7) *With regard to Article 9.2 of the Treaty, and in the presence of a jurisdiction clause in the Contract, the Tribunal has no jurisdiction with respect to breaches to the extent they are violations of the Contract;*
- 8) *The Tribunal has jurisdiction to decide over breaches of Articles 2, 3 and 4 of the Treaty, its jurisdiction thereover not being affected by Article 7.2 of the Treaty; and*
- 9) *The Tribunal deems it improper to stay the proceedings because of the proceedings already pending before the Conseil d'Etat as the Tribunal will not deal with matters covered by those proceedings.*
- 10) *The decision of the Tribunal with respect to the party who will bear the legal costs and the costs and expenses of the arbitration, and in what proportion, will be included in the final award.*

III. FACTUAL BACKGROUND

- 29- For the purpose of this decision on the merits, the Tribunal will summarize the pertinent facts. Such summary, however, is not to be taken as prejudging the issues of fact or law considered by the Tribunal.
- 30- The following section sets out the ascertained relevant facts regarding the background to the dispute.

A. THE PROJECT:

- 31- The construction of the Saoufar-Mdeirej section, which is the object of the present dispute, is part of the 62-kilometer long "Hadath-Syrian Border" highway project linking Beirut to the Syrian border. The Saoufar-Mdeirej portion extends over a total length of 5,525 meters spreading over valleys and mountains. The "Hadath-Syrian Border" highway project had been already planned in the seventies by Dorsch, a German company. However, it was only in March 1997, a few years after the end of the 1975-1990 Lebanese Civil War, that the tender documents and technical studies for the Saoufar-Mdeirej section were prepared by a Lebanese company, Gicome. The award of the construction was temporarily granted to Toto for an amount of L.P. 53,294,145,729, *i.e.*, the equivalent of USD 35,352,667.⁴
- 32- The Lebanese Council of Ministers in its Decision No.40, dated October 16, 1997⁵, ratified the award. The Decision repeated what was expressly contained in the tender documents, more precisely in Article II.03 *Cahier des Conditions Juridiques et Administratives ("CCJA")*, *i.e.*, that part of the site would be delivered *progressively* to the contractor as soon as the parcels were expropriated.
- 33- It was therefore clear that the expropriation of the required parcels to construct the road was not finalised when the Contract was concluded⁶. Even just before the Contract was concluded, the alignment of the road was altered from downtown Saoufar to the Grand Hotel.

4. Due to the modifications, the revised contract price value became L.P. 60,564,361,619, equivalent to approximately USD 40 million.

5. Exhibit MM3, Council of Ministers' Decision No. 40 issued on October 16, 1997.

6. Although the general alignment of the Highway was already established in 1974 and the specific alignment for the Saoufar-Mdeirej section was established in April 1993 by Presidential Decree No. 9169, the latter had been amended in May 1997 by Presidential Decree No.10267. These Presidential Decrees authorized also the expropriation of the plots and sections that were part of the alignment. See Exhibit R 32.

- 34- By a letter dated November 18, 1997, Toto accepted, without reservation, to execute the Project for the unit prices and within the time prescribed for completion of the Contract⁷.
- 35- The necessary expropriations for the change in alignment were ordered on November 26, 1997⁸.
- 36- On December 11, 1997, CEGP notified Toto that it accepted Toto's offer to execute the Project as amended.

B. THE CONTRACT:

- 37- The Contract governing the execution of the Project consists of Special Conditions, Legal Conditions (*Cahier des Conditions Juridiques et Administratives - CCJA*), Technical Conditions (*Cahier des Prescriptions Techniques - CPT*) as well as other documents, which had been attached to the tender⁹.
- 38- The Contract required Toto to execute mainly the following works:
- The Highway and link roads;
 - West and East Mdeirej interchanges;
 - Specific structure works;
 - Retaining walls, "passes", hydraulic structures¹⁰ ;
 - Viaduct V 25.1 in Mdeirej;
 - Viaduct Grand Hotel in Saoufar replacing Viaducts V22.1 and VD 23.1; and
 - Viaduct on Saoufar linking road¹¹.
- 39- The Contract provided that CEGP would appoint an engineer (the "Engineer") to represent it, to control the execution of the Project, and to instruct Toto in relation to the execution of the works¹². The Contract required Toto to maintain a daily record (*journal de chantier*) which should include, *inter alia*, the events that may be subject of a claim by the Contractor¹³. The Contract also envisaged periodical Site Meetings between Toto, CEGP and the Engineer, minutes of which would

7. Exhibit R2.

8. Presidential Decree no. 11396, Exhibit R 33.

9. The complete list of the documents forming part of the Contract is found under Article I.02 of the CCJA, Exhibit R 34.

10. See Article I.01 of the CCJA "*Nature et objet du Marché*".

11. Article VI.02 (3) CPT. "*Description du Project*", Exhibit R31.

12. Article II.06 CCJA, Exhibit R34.

13. Article II.10 CCJA, Exhibit R34.

record the Engineer's decisions or comments and be countersigned by all parties present.¹⁴

- 40- The Contract provided that the works would be completed within 18 months. These 18 months included the hindrances Toto would encounter because of bad weather, the rainy season, holidays, strikes and the conditions then existing in Lebanon. As a compensation for these hindrances, the months of December, January and February were counted as one month¹⁵.
- 41- CEGP ordered Toto to commence the works on February 10, 1998. The contractual completion date of the works was thus October 24, 1999. The Contract provided for a post completion maintenance and guarantee period of 12 months. The Project was thus intended to be completed on October 24, 2000.

C. MODIFICATIONS FOLLOWING THE EXECUTION OF THE CONTRACT:

- 42- Soon after the works had started, Toto proposed modifications to the Project notably:
- Modification of the curved alignment of Viaduct 25.1 into a straight one;
 - Modification of the Saoufar interchange at the entrance of the Project;
 - Modification concerning the structure of all the viaducts;
 - Cancellation of west Mdeirej interchange at the extremity of the Project;
 - Modification of the east Mdeirej interchange; and
 - Modification of the route at the level of Saoufar Grand hotel to avoid the costly demolitions of a few houses¹⁶.
- 43- In November 1998, the Parties entered into Addendum No. 1 to construct a retaining wall in reinforced earth¹⁷.
- 44- Lebanon accepted the modifications listed above and a new Addendum to the Contract (Addendum No. 2) was signed on December 23, 1998 with the contractual completion date unchanged. Because the alignment of the road was modified, new expropriations had to be carried out.
- 45- The actual construction was only completed in December 2003, and the Project was handed over after the 12-month maintenance and guarantee period, in December 2004.

14 . Article II. 09 CCJA, Exhibit R34.

15 . Article II .02 CCJA, Exhibit R34.

16 . See Toto's formal proposal of variations dated May 4, 1998, Exhibit R 45.

17 . Addendum No.1 was signed in November-December 1998 (there are various signatures on the document with different dates).

Between 1997 and 2003, Toto submitted various claims to the CEPG and to its successor, the CDR.

46- Such claims covered:

- a) additional costs due to changes in legislation leading to (i) change in customs duties, (ii) increase of the price of diesel, (iii) increase in government fees on cement, and (iv) increase in aggregates prices;
- b) increase in the price of bitumen due to delayed execution;
- c) additional works due to misleading information;
- d) loss of productivity due to unforeseen circumstances;
- e) additional costs occasioned by the nature of the soil not meeting the qualifications originally set in the Contract;
- f) additional works resulting from a change in the design;
- g) delayed site possession and expropriation and unforeseen works; and
- h) extra works due to damages caused by third parties on site.

47- In August 2001, Toto started two proceedings before the Lebanese *Conseil d'Etat*.¹⁸ In the first claim, submitted on August 1, 2001, Toto requested to be indemnified for unforeseen works it had to carry out because the nature of the soil did not meet the specifications set out in the Contract. The second claim, submitted on August 24, 2001, requested compensation for additional works because the original design, prescribed in the Contract, had been substantially changed.

48- By a letter dated September 12, 2002, Toto submitted to the Engineer a claim for compensation because of the time extension in the amount of LBP 15,289,737,554, but the claim was not admitted.¹⁹

49- It is with this background that Toto has lodged the claims under the Treaty in the present arbitration.

IV. THE TRIBUNAL'S DECISION ON PRELIMINARY ISSUES

50- In the context of this arbitration, Lebanon has raised several objections that are not directly related to substantive issues pertaining to the works and the Project. Such issues are the following: (A) Toto's *locus standi*, (B) applicable law, (C) limitation *ratione temporis* of the Tribunal's jurisdiction, and (D) the waivers signed by Toto.

18. A body that controls the legality of governmental actions, and acts as a consultative organ and an administrative court.

19. Exhibit R 69.

51- The Tribunal will assess such issues before turning to the matters directly related to the Project and the works.

A. TOTO'S LOCUS STANDI:

52- Lebanon contends that, while the Contract was entered into with the company named *Toto S.p.A.*, the Claimant in this arbitration is a different entity named *Toto Costruzioni Generali S.p.A.*, which therefore lacks "*locus standi*". Toto replied that the company is the same and supports its argument by the submission of a certificate from the Italian Registrar of Companies evidencing that its name is *Toto Costruzioni Generali S.p.A.* or, in short, *Toto S.p.A.*

53- The Parties made several post-hearing submissions in relation to this matter, and Toto explained that the difference in registration numbers of the Company resulted from statutory changes under Italian law, and that such numbers belong to the same entity.

54- In this regard, the Tribunal finds that the certificate and clarifications submitted by Toto give satisfactory evidence that the legal entity is the same and therefore rejects the Respondent's *locus standi* objection.

B. APPLICABLE LAW:

55- Toto submits that acts or omissions of the CEGP and the CDR in breach of the Treaty or of other applicable rules of law engage Lebanon's international responsibility. For Lebanon, the Tribunal, in its Decision on Jurisdiction, stated that only those acts or omissions which involve the exercise of sovereign authority may engage the international responsibility of Lebanon.

56- Lebanon and Toto further disagree to what extent the Tribunal should apply domestic law. For Lebanon, whenever matters are not covered by rules of international law, the law of the Republic of Lebanon applies pursuant to Article 42 (1) of the ICSID Convention, which refers not only to international law, but also to the law "*of the Contracting State party to the dispute (including its rules on the conflict of laws)*".²⁰ For Toto, even if the Treaty and the principles of international law are silent, international

20. Article 42 reads as follows: "(1) *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*"

law is "a complete system of law that comprises rules applicable to any issue that falls within its scope." Hence, if a matter would not be covered by the Treaty, international law and no other legal order applies²¹.

- 57- The Tribunal does not see a need to pass upon the question of the extent to which Lebanese law applies besides the Treaty and the principles of international law. The Treaty and the principles of international law suffice to decide the case at hand.

C. LIMITATION *RATIONE TEMPORIS* OF JURISDICTION:

- 58- As a general rule, treaties do not apply retroactively.²² The treaty, moreover, can specify how it applies *ratione temporis*. In the Treaty between Italy and Lebanon, Article 10 provides that "*the Agreement shall not apply to disputes that have arisen before its entry into force.*" As the Treaty entered into force on February 9, 2000, disputes which have arisen before that date are not covered by its scope *ratione temporis*.

- 59- Lebanon argues that the subject-matter of the claims that Toto has submitted to Lebanon or the Engineer between 1997 and February 9, 2000 should be excluded from the Tribunal's jurisdiction because the Treaty only entered into force on February 9, 2000.²³ For instance, the alleged failure to remove the Syrian troops certainly predated the entry into force of the Treaty as these troops left the site in September 1998.²⁴ The alleged failure to remove the owners obstructing the site occurred in 1999. Toto commented on the alleged faulty design of the initially conceived Viaduct 25.1 and replaced it by its own design in 1998.²⁵ The last expropriations for the new alignment took place in March 2000.

- 60- Toto, however, argues that this Tribunal had ruled in its Decision on Jurisdiction that the disputes, which are the subject matter of its present claims, arose on June 30, 2004,²⁶ which is after the Treaty entered into force, when Toto invited Lebanon to

21. See Professor Prosper Weil's article entitled "*The State, The Foreign Investor and International Law, the No Longer Stormy Relationship of a Ménage à Trois*", Liber Amicorum Ibrahim F.I. Shihata, The Hague, Kluwer Law International, 2001, page 839; and The Annulment Committee in Vivendi II and the UNCITRAL Partial Award rendered in *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* on September 13, 2001.

22. Vienna Convention on the Law of Treaties, Article 28.

23. Decision on Jurisdiction, paragraph 88.

24. See Minutes of Meeting April 22, 1998 and Exhibit R38.

25. Toto discovered the alleged breach on March 12, 1998 when it informed the CEGP of the error in design.

26. Decision on Jurisdiction, at paragraph 90: "*The Tribunal agrees that a mere demand is not a dispute. In the Tribunal's view the dispute arose on June 30, 2004....*".

submit Toto's payment claim to arbitration. The disputes thus would fall within the Treaty's scope *ratione temporis*.

- 61- For Lebanon, not only the *disputes*, but also the *breaches* which lead to the disputes, must have arisen after February 9, 2000. The fact that the Treaty applies to *disputes* which have arisen after its entry into force does not mean that the substantive provisions of the Treaty apply retroactively to the *breaches* which have occurred prior to its entry into force.
- 62- The Tribunal notes that the CCCG,²⁷ which are part of the Contract, distinguish between "*difficulties*" (problems) (Article 50) and "*contestations*" (disputes) (Article 51). As held in its Decision on Jurisdiction, the Tribunal did not consider a mere problem, breach or demand for reparation to be a "dispute."
- 63- The Tribunal wishes to reassert in relation to this question that "breach," "problem" and "dispute" are three different notions. A "breach" arises when contractual or treaty obligations are not honored. A "problem" arises when that party's claim is not accepted by the other side, *i.e.*, when the engineer and the contractor have different views which need to be referred for final decision to the employer/administration. On September 12, 2002, Toto requested to be compensated for the additional works and the delay occurred.²⁸ However, the CDR did not take a position, so Toto invited it on June 30, 2004, to have recourse to Article 7 of the Treaty ("Settlement of Disputes"). Thus, the dispute, which had been in limbo for months, crystallized then.
- 64- Based on the foregoing, the Tribunal dismisses Lebanon's argument that the subject-matter of the claims that Toto has submitted to Lebanon or its Engineer between 1997 and February 9, 2000, should be excluded from the Tribunal's jurisdiction.

D. THE EXTENSION OF TIME AND THE VALIDITY OF THE WAIVER:

- 65- Under the Contract, the works had to be completed on October, 24, 1999. Both Parties agree that Toto has obtained several extensions of time. The disputed issue is whether the waivers of liability, in exchange for such extensions of time, are valid and dispositive.
- 66- On August 25, 1999, Toto requested for the first time to postpone the works' completion date to December 18, 2000 ("First Extension of Time"). CEGP approved this extension of the time for the execution of the project, but by letter of September 22, 1999, the

27. *Clauses et Conditions Générales Imposées aux Entrepreneurs* (Decree No. 405/NI of March 1942).

28. Exhibit R69.

Engineer informed Toto that "this extension does not constitute any ground for any claims."²⁹

- 67- Subsequently, on October 11, 2000, Toto requested a second extension of time until September 28, 2001³⁰ and in its letter, Toto expressly stated that it waived all claims regardless of their nature and origin before the date of making the request:

Dans tous les cas, nous déclarons renoncer expressément à toutes réclamations quelque soit leur nature, leur origine et leur genre antérieures à la date de la formulation de cette demande, et conséquentes à l'extension des délais contractuels.

- 68- On October 19, 2000,³¹ CEGP accepted Toto's request of October 11, 2000 ("Second Extension of Time"):

The Board decides: to approve the program of works proposed and subsequently to extend the period of execution of Sawfar - Mdeirej section up till 28/9/2001 provided the Contractor Toto waives any claim whatever is its source or kind or nature related to the period from the beginning of the works until this date including the reasons that led to the request of this extension.

- 69- CEGP subsequently granted a third extension of time to Toto until November 15, 2001, provided that Toto waived any rights resulting from such extension ("Third Extension of Time").³²

- 70- In fact, Toto did not hand over the works on November 15, 2001 but on December 12, 2001 ("*reception provisoire*").³³ Meanwhile, additional works had to be executed after December 2001 with new prices and new completion dates. The CDR thus approved an extension of time for the "new works" till August 4, 2002 ("Fourth Extension of Time").

- 71- On August 13, 2002, the CDR approved Toto's new request for extension of time until December 31, 2002 provided that "*the Contractor waives in advance its right to claim*

29. Exhibit R63. Although no documentary evidence has been submitted that Toto has accepted this condition in the First Extension of Time, no evidence of Toto's objections has been submitted either. Toto, however, has accepted this extension, thereby also impliedly accepting the waiver. Moreover, Toto has waived all claims for compensation of the delay in the Second Extension of Time (see footnote 31).

30. Exhibit R64.

31. Exhibit MM39.

32. Respondent's Counter Memorial, paragraph 164.

33. Exhibit R66, Article IV.04 CCJA refers.

*any compensation or indemnities as a result of such extension.*³⁴ On September 13, 2002, Toto accepted this additional extension of time, but indicated that it could not possibly waive in advance any such claim arising from this extension ("Fifth Extension of Time").³⁵ Actually, one day before, by a letter dated September 12, 2002, in the claim of L.P. 15,289,737,554 it submitted to the Engineer, Toto included compensation for the extra time.³⁶ On September 23, 2002, Toto repeated to the CEGP that it did not waive any claim for compensation as the last extension concerned the performance of additional works, and not the Project itself.³⁷

- 72- Both Parties do not dispute that Toto has obtained the successive extensions of time. However, they disagree on whether the waivers of liability granted for the four first extensions are valid and binding for Toto.

1. LEBANON'S POSITION:

- 73- According to Lebanon, Toto, while obtaining the first four extensions of time, repeatedly waived its right for compensation for the delay resulting from the alleged breaches at stake in the present proceedings. For instance, on the occasion of the Third Extension of Time, Toto waived any rights it may have had prior to October 11, 2000. This waiver covered the alleged late expropriation of the parcels as all parcels had been delivered in June 2000. Moreover, at that time, the plans for the retaining wall had been modified³⁸, the Syrian troops had left the site, the obstruction of the owners had ceased, and Toto had already criticized the original plans for the Viaduct 25.1 and waived any rights connected with the modification of that Viaduct.³⁹
- 74- Moreover, Toto had not requested an extension of the original Contract period in the 2001 proceedings before the *Conseil d'Etat*.
- 75- Besides, Lebanon adds, the fact that Toto did not claim compensation for the extra time to execute the works is not surprising. It had committed under Articles II-02 and II-03 of CCJA not to claim damages for late delivery of the sites, bad weather and all

34. Exhibit MM98.

35. Exhibit R67. There was also another request for extension of time until June 2003, but the Parties did not submit documentary evidence in relation to such request.

36. Exhibit R69.

37. Exhibit R68.

38. Exhibit MM8, Amendment No.1, with respect to the unstable soil problem. Fifth Article reads: "The Contractor waives any right or claim or indemnity that result of this Annex."

39. Exhibit R53, Amendment No.2, Article 6: "*The second party (Toto) shall relinquish any right, legal proceedings, claim, or compensation stemming from this addendum*".

'circumstances existing in Lebanon' ("*conjuncture existante dans le pays*").⁴⁰ Moreover, during the performance of the Contract from 1998 to September 2002, Toto failed to claim relief because of delay, in due time. It did not submit to the Engineer claims for compensation for additional costs because of the extension of time. It also did not contest any of the Engineer's decision within the 60-day time limit, as required by the Contract. Toto did not inform CEGP "*as soon as possible*" of all events which may have repercussions on the period of execution as required by Article II-02(2) of the CCJA. It thus consolidated and reiterated its express waivers regarding the extension of time.

76- Lebanon contends that it was only in September 2002 that Toto, in its claim to the Engineer, requested for the first time compensation for the postponement of the completion date. This late claim was totally inconsistent with the attitude it had taken the years before. Toto's conduct estopped it from now claiming compensation for the extra time beyond the original completion date, otherwise, Toto would be acting in a manner inconsistent with the position it had taken at least until September 2002. Toto can thus not be compensated for any claim arising out of the extension of the completion date.

77- For Lebanon, the waivers apply to contractual as well as to Treaty claims. The waiver in the letter of October 11, 2000 for instance, is clear, explicit and "categorical." It concerns only the extension of time,⁴¹ but covers any recovery whatever its origin and nature. Consequently, Lebanon argues that this waiver extends to Treaty claims related to extension of time.

2. TOTO'S POSITION:

78- Toto denies that by letter of October 11, 2000, it waived its right for compensation of the additional time to perform the works required as a result of Lebanon's delays. For Toto, a waiver cannot be implied or deduced from any of its acts or omissions. Its attitude after October 11, 2000 does not imply a waiver either. On the contrary, its claims filed before the *Conseil d'Etat* and made to the Engineer indicate that it intended to claim compensation.

40. Exhibit R34.

41. See letter of February 6, 2001, Exhibit MM93: "*Par ailleurs, la renonciation contenue dans notre lettre du 11.10.2000 est bien spécifique. Elle se limite à la renonciation en ce qui concerne seulement extension des délais.*"

- 79- Also, referring to the UNCITRAL Award of *CME vs. Czech Republic*, Toto points out that waivers obtained under duress are invalid under Lebanese as well as under international law.
- 80- Toto submits that, having substantially invested in the Project, it needed the extensions to complete the Project. Toto had no other choice than to accept the waiver of compensation in exchange for additional time. For Toto, there was no real consent. On February 6, 2001, Mr. Paolo Toto objected to CEGP's request that Toto waives its claim for compensation on the occasion of the second extension. In its letter of September 23, 2002, Toto indicated to the President of CDR that such waiver had not "*any legal justification but is due to a procedure usually implemented in CDR whenever an extension of time is granted.*"
- 81- For Toto, the waivers were extorted in breach of the required fair and equitable treatment and they diminish the value of the investment. As both results are inconsistent with Articles 3 and 4 of the Treaty, the waivers have no effect under the Treaty. Toto submits that the waivers must clearly, explicitly and categorically indicate that they also covered Treaty claims. Lebanon failed to adduce any clear evidence in this respect.
- 82- Furthermore, Toto argued that its waivers were not validly made in the context of a settlement agreement, as it did not knowingly renounce its rights in exchange for concessions from the other party. Toto states that it waived its rights without any reciprocal concession by Lebanon.⁴²
- 83- Finally, Toto points out that the Tribunal, distinguishing between contract claims and Treaty claims, ruled that its decision only concerned Treaty claims. Toto's waiver letter of October 11, 2000, mentions clearly "*contractual time limit,*" and Addendum No. 2, which "*waives any right related to that particular Addendum,*" is an addendum to the Contract and concerns only contractual matters. For Toto, the present arbitration relates to Treaty breaches, while the alleged waivers concern contractual claims and are imposed by provisions of the Contract, such as Articles II-02 and II-03 of the CCJA. By waiving compensation for extension of time under the Contract, Toto did not waive its right to claim compensation for Treaty breaches. Waivers related to contractual issues cannot operate to waive Treaty claims.

42. This is contested by Lebanon which alleged that the letter of October 11, 2000 was in fact reciprocal and also released Toto from paying liquidated damages. Toto, however, dismisses this allegation as it did not owe liquidated damages and it was ready to start work.

3. THE TRIBUNAL'S DECISION:

- 84- The Tribunal finds Toto's argument that it did not waive its claims to compensation under the Contract unconvincing. The text of the relevant documents is unambiguous. In fact, it is customary in circumstances such as the case at stake that the employer grants time extensions in return for a waiver by the contractor of its right to claim compensation for the additional time to be used to finish the Project. There is no proof that waivers were not granted under the Contract or that they were obtained under duress.
- 85- However, as stated repeatedly, the Tribunal is concerned by claims of Treaty breaches, and not by breaches of the Contract. Toto's waiver of its right to invoke the CEGP's liability under the Contract to claim contractual damages does not affect its right to invoke Lebanon's breach of the Treaty before this Tribunal. However, as will be elaborated later, the assessment of damages Page 26 of 67 and of the compensation to be granted for a Treaty breach may be affected by a waiver not to claim compensation under the Contract, when both damage claims cover the same harm. Indeed, when it concerns the same damage for the same act, compensation that a Claimant has waived under the Contract cannot be recovered under the Treaty.

V. THE ACTUAL WORKS:

- 86- It was clear that, before the Contract was entered into, the sites and plots where the highway had to be constructed had not already been expropriated but had to be successively delivered to the contractor in the course of the works. Article II-03 of the CCJA specified that the delivery of parts of the site would be made *progressively* to the Contractor as soon as the parcels were expropriated. This was restated by the Council of Ministers in its Decision No. 40, dated October 16, 1997,⁴³ which ratified the award of the Project to Toto.
- 87- Moreover, before Toto had signed the Contract, it had proposed to change the *tracé* of the road at the level of Saoufar, which thus required additional expropriations which were ordered on November 26, 1997, *i.e.*, merely two and a half months before the works started in February 1998.⁴⁴
- 88- Well informed that the sites and plots would be delivered progressively after they would have been expropriated, Toto prepared a 'Preliminary Work Program', which it revised twice in January and March 1998 but could not submit to the Tribunal.⁴⁵

43 . Exhibit MM3, Council of Ministers' Decision No. 40 issued on October 16, 1997.

44 . Presidential Decree No. 11396 of November 26, 1997, Exhibit R33.

45 . Given that the Preliminary Work Programme and the Revisions A and B are not submitted, Toto's initial or,

- 89- The Tribunal is therefore unable to determine how Toto intended to manage the successive delivery of the parcels; however, in May 1998 Toto established a new version of the Work Programme which probably reflected to a large extent the previous programmes and provided that the parcels and plots would be delivered in three stages⁴⁶ :
- Lot 1: 20/2/98 (PK 25+200 - PK 26+300)
Lot 2: 22/04/98 (PK 25+200 - PS 23.1)
Lot 3: 15/07/98 (PS 23.1 - start)
- 90- Although this Work Programme has not been formally approved by the Engineer, *inter alia* because the dates on which the respective plots actually would be delivered were not yet clear, it may be assumed that it has received the approval of CEGP.
- 91- The Tribunal has consolidated the maps submitted by the Parties (attached to this Award) and has outlined the dates on which the respective parcels have been delivered, with reference to the lots and colours of Attachment 1 [...].
- 92- In brief, while the Work Programme provided for a delivery in three stages, with the last delivery in July 1998, the plots and parcels were actually delivered in nine stages, with the last delivery in June 2000, *i.e.*, 24 months later.
- 93- Originally, the works had to be completed by October 24, 1999. In view of the substantial delays, the completion date was extended several times and the works were actually finally completed in December 2003 after further extensions of time.
- 94- The relevant facts as well as the Parties' respective positions with regard to the nine lots listed above are summarized here below.

A. LOT 1 – YELLOW AREA:

- 95- On February 10, 1998, Toto received the order to start construction on Lot 1, PK24900 to PK26300 (1400 m),⁴⁷ where also a curbed viaduct had to be built and which corresponded to 50% of the workload.

revised work plan intentions are not known. Besides, Lebanon asserts that neither the Preliminary Programme nor the Revisions A and B were approved by the CEGP, in particular because they went beyond the completion date in the Contract (R48).

46. *Programme des Travaux Définitif, Révision C- 21 May 1998*, Exhibit MM101.

47. Exhibit MM4.

- 96- Pursuant to the initial work programme, the parcels of Lot 1 had to be delivered on February 20, 1998. According to Toto, however, Lot 1 was only "*theoretically*" put at its disposal at that date and was not in fact available. Toto states that "*major parts*" of Lot 1 were occupied by the Syrian Army and that, as the *tracé* of Viaduct 25 was modified from a curved structure to a straight one, the parcels that had been expropriated were not sufficient to enable effective work and progress.
- 97- Lebanon argues that this initial work programme had not been approved by the Engineer, and that, moreover, Toto does not indicate when the respective parcels had actually been delivered. Lebanon further argues that Toto should not focus on the delivery date of its initial work programme since the *tracé* has been substantially changed because of the changes in Viaduct V 25.1 that Toto had proposed.
- 98- The two causes for the delay in the construction of Lot 1, *i.e.*, (a) the presence of the Syrian troops; and (b) the change in the alignment of Viaduct 25.1, will now be addressed by the Tribunal.

1. The Presence of the Syrian Troops:

a) Toto's Position:

- 99- Toto alleges that the construction in Lot 1 was delayed by more than seven months because it was not allowed to access the parcels that were occupied by the Syrian Army along the original alignment until September 11, 1998. Toto adds that it constantly reminded Lebanon of the fact that it was prevented by the Syrian Army to build the workshop in a zone adjacent to the Viaducts planned in the initial work programme. Since Toto was adamant in starting the works, it had to scatter its workshop in other less appropriate locations. Because of the delay in starting the works and the inefficient location of the workshop, Toto was prevented from working on the site, and it incurred additional costs.⁴⁸ For instance, Toto's specialized equipment remained idle for a long period of time.

b) Lebanon's Position:

- 100- Lebanon contends that Toto visited the site before it entered into the Contract, was aware of the presence of the Syrian Army, and expressed no reservations.⁴⁹ Moreover, the area occupied by the troops was confined to an area of 250m out of

48. Exhibits MM31, MM32 and MM33.

49. Exhibit R40.

the total 1,400m. Therefore the Syrian troops could not have substantially hindered the works.⁵⁰ Although the Syrian Army expressly informed the Engineer and Toto that Toto could work in the other parts and Toto stated that it had the intention to start work the next day, Toto failed to mobilize any equipment and start work. Moreover, approximately two months after Toto's request to evacuate the Syrian troops, the Syrian Army troops started moving out in May upon Lebanon's insistence, although Lebanon had no authority over them. They definitively vacated the site in September 1998. Despite this complete evacuation and constant reminders from the Engineer, Toto still failed to carry out work at or near the zone for months after the troops had completely left.

- 101- The Syrian Army, which only occupied an area of 250 m, could not have prevented Toto from installing its workshop elsewhere, which was done by Toto. In any event, Lebanon is not responsible to provide space for the workshop, as this workshop was not included in the alignment of the road, for which Lebanon had to deliver the space. Toto could install the workshop at the place of its choice and was compensated for such installation.⁵¹ Moreover, in the Contract, Toto had recognized that it would accept the 'specific Lebanese circumstances' which certainly included the presence of Syrian troops. Finally, Toto's statement that the Syrian Army denied passage or prevented Toto to mobilize its special machinery is not supported by evidence.⁵²
- 102- Lebanon submits that Toto never intended to start work immediately when the order to commence work was given. At the tender stage, Toto received conceptual drawings of the viaducts and had to prepare the design and the shop drawings related thereto, which had to be approved by the Engineer before the construction could start. From the very beginning, Toto intended to construct another Viaduct than the one foreseen in the tender and to change the Project design.⁵³ For instance, in the first Site Meeting, held just 10 days after the commencement of the works, Toto unofficially showed a set of drawings for the variation of the Viaduct. Toto was seeking to modify the "decks" (*tablier*) of all the Viaducts and to replace the curved

50. Exhibit MM76 (black spot in the Yellow Area). Toto was working at PK 24900 while the Syrian troops were on PK 25000 (Record 1.26). Lebanon furthermore argues that the Monthly Report upon which Toto relies to prove alleged problems with the Syrian Army, have no evidentiary value because those reports were only signed by Toto and not by the Engineer and Toto. However, the Tribunal considers such argument unconvincing as it is not in dispute that the Syrian troops effectively occupied some sites.

51. Besides, Toto failed to submit the workshop plans for approval to the Engineer. See also Article II.22 CCJA.

52. Most specific machinery was probably needed for the construction of the straight Viaduct, decided after the Syrian troops had left.

53. Respondent's Counter Memorial on the Merits, dated May 3, 2010, paragraph 111.

alignment of Viaduct 25.1 by a straight one,⁵⁴ so that the *tracé* of the Viaduct shifted meters away from the original one and different and additional parcels had to be expropriated.⁵⁵ According to Lebanon, Toto froze all operations until the variations were approved.

2. The Challenges Related to Viaduct 25.1:

103- It is an agreed fact by both Parties' expert witnesses, Dr. Romano Allione for Toto and Steve Hughes for Lebanon, that the viaducts were the most crucial structures in the whole project.

104- The original Project, as proposed by CEGP in its tender documents, provided for the construction of a curbed Viaduct with the traditional techniques. Although Toto contractually accepted to build the curbed viaduct as required under the tender, on March 12, 1998, it proposed to the Engineer a straight viaduct with pre-cast beams, installed by a launching girder. Toto justified this change, *inter alia*, by the argument that a straight viaduct would be safer for traffic, and that the viaduct would offer a better seismic protection. At the hearing, these alleged advantages were extensively discussed, notably by Mr. Mounir Chehade and Dr. Ibrahim Khatib, respectively Toto's and Lebanon's expert.⁵⁶

105- In the Tribunal's eyes, whether the variation was better than the original bridge, or whether Toto preferred a straight viaduct to be able to use its launching girder, is irrelevant to the case, since both Lebanon and Toto, as will be mentioned further, agreed to implement the variation.

106- According to Lebanon, Toto's work did not progress sufficiently. The Minutes of Meeting dated March 12, 1998, recorded that Toto had not made any design or performed any works in Lot 1.⁵⁷ In those minutes, Toto neither objected to that statement, nor to the Engineer's reminder that variation is no ground for delay.

107- At the Site Meeting of April, 2, 1998, the Engineer requested Toto to submit as soon as possible its variation regarding Viaduct 25.1.⁵⁸ In early July 1998, the Engineer

54. Attachment 1, compares Lot 1 being the curved Viaduct 25.1 with Lot 7 being the modified straight viaduct.

55. Exhibit R119.

56. See Transcript of Day 2 of the Hearing on the Merits (Transcript Day 2) as well as Transcript of Day 1 of the Hearing on the Merits (Transcript Day 1) at pp. 41-43.

57. Exhibit R42.

58. Exhibit R41.

had still not received the final financial data regarding Viaduct 25.1 needed to determine the additional costs.

- 108- Once again, on September 17, 1998, the Engineer urged Toto to submit shop drawings.⁵⁹ Finally, at the Site Meeting of October 7, 1998, the Engineer did not accept the variations and referred the matter for final decision to CEGP.⁶⁰ CEGP gave Toto three choices in respect of the execution of Viaduct 25.1.⁶¹ Toto replied on October 22, 1998, that it chose to follow its own variation.⁶²
- 109- To modify the construction of Viaduct 25.1, the costs of the amended construction needed to be approved, and the Contract needed to be amended.
- 110- Toto, which had suggested the variation, had to lay down the complete design and plans for the new Viaduct 25.1.⁶³ It submitted some provisional proposals, but according to Lebanon, it was late in submitting a complete proposal in spite of the repeated reminders by the Engineer.⁶⁴ It submitted the design for approval by CEGP on May 4, 1998. However, because a pre-stress viaduct with precast girders was unfamiliar to the CEGP, CEGP asked a third party-expert, Calgarop, to verify the design. In July 1999, Toto submitted a first financial study of the construction of the Viaduct for further discussion. On August 28, 1998 the variation of Viaduct 25.1 and its financial data were finally submitted. In October 1998 Amendment No. 2 approved the variation in Viaduct 25.1 as well as the variation of the Viaduct of the Grand Hotel, which also would be constructed with the same pre-cast technique.⁶⁵ However, this Amendment had to be signed by the Engineer and CEGP and to be ratified by the *Cour des Comptes*, which took place on December 23, 1998. Before that date, Toto did not consider the Amendment as sufficient instructions to start the works.
- 111- The areas previously expropriated and delivered for the construction of the initial, curbed viaduct, could not be used for the amended straight viaduct. Other terrain needed to be expropriated and delivered for construction. However, after the Amendment was ratified, Toto did not immediately request CEGP to expropriate the areas required for the construction of the amended Viaduct. It only submitted the

59. Exhibit R49.

60. Exhibit R50.

61. Exhibit R51.

62. Exhibit R52.

63. D'Onofrio, Transcript Day 1, p.87; Chehade, Transcript Day 2, pp.151-154 and.171-172; Rached, Transcripts Day 1, p. 72.

64. Exhibits R41, R93, and R94.

65. Exhibit R53.

expropriation plan to the CEGP in February or March 1999.⁶⁶ The expropriation took place in January and March 2000, *i.e.*, around one year after Toto requested such expropriations.

- 112- Before the construction area had been formally expropriated and delivered to Toto, Toto had already started the preparation of the erection of the Viaduct. In order to mitigate damages, it started to prepare the design of the bridge in January and February although the site was not yet fully delivered.⁶⁷ It submitted its detailed design for control and it cleared the terrain. To the extent possible and feasible, Toto started the construction of the foundations, even before the last design had been approved.⁶⁸ These preliminary works were necessarily limited in scope. For instance, the proper foundations could only be constructed in April 2000 when the actual load of the bridge was known.
- 113- Initially, the construction of the Viaduct 25.1 was unrelated to the construction of the Viaduct Grand Hotel. With Amendment No. 2, both viaducts would be pre-casted and the beams would be installed with the same launching girder. Consequently, Toto planned to first build the Viaduct 25.1 (*i.e.*, from May till November 1999) and then the Viaduct Grand Hotel (, from November - March 2000).
- 114- The fact that no expropriation decree had yet been issued for the altered alignment undoubtedly delayed the construction of Viaduct 25.1.⁶⁹ Because of the delay in the expropriation and delivery of the site for the new alignment of Viaduct 25.1, Toto changed the order of construction, and started first with the construction of the piers and the placing of beams of the Viaduct Grand Hotel from September 1999 to September 2000, while the same work at Viaduct 25.1 was done from October 2000 till April 2001. As of November 2000, Toto started launching the girders at Viaduct 25.1.

B. LOT 2 – GREEN AREA:

1. Toto's Position:

- 115- Although CEGP delivered to Toto Lot 2 (PK 24+000 to PK 24+650), which corresponds to less than 5% of the Project or 675m, on April 22, 1998, as per the initial work

66 . Chehade, Transcript Day 2, p.140.

67. Riachi, Transcript Day 2, pp. 31-32.

68. Riachi, Transcript Day 2, pp.34-35.

69. This was also confirmed by CEGP in a letter dated September 1, 1999 to the Council of Ministers, Exhibit MM 46.

programme, this Lot was not delivered "in a progressive manner" since it (Green Area) was separated from Lot 1 (Yellow Area) by Lot 6 (Brown Area) which was only delivered on August 4, 1999.⁷⁰

- 116- For Toto, the Contract⁷¹ providing for a progressive hand over, the word "*progressively*" means "*continuing by successive steps, i.e., 'coming in succession,'*" following one after the other in sequence; "*consecutively.*"⁷² Thus, Toto expected Lebanon to act in a consistent manner by delivering the parcels needed for the construction within a reasonable period of time and in a consecutive manner. Since Lebanon's expropriations were delayed and the parcels were delivered in an inconsistent and incoherent manner, Toto considers that its expectations were unfulfilled and its investment was jeopardized.⁷³
- 117- Toto furthermore claims that the soil of Lot 2 was inappropriate to construct the designed slopes and that either additional expropriations or the construction of retaining walls were required. The CEGP decided to widen the construction area,⁷⁴ which again required additional expropriations,⁷⁵ two of them even as late as March 14, 2000.⁷⁶ Notwithstanding the above, Toto worked on the Green Area as the daily reports show.⁷⁷

2. Lebanon's Position:

- 118- For Lebanon, Lot 2 was a continuation of Lot 1 and was delivered on time.
- 119- Lebanon argues that Article II-03 CCJA, the tender documents and the Council of the Ministers' Decision No. 40, clearly underlined that CEGP had the right to deliver the sites depending on the progress of the expropriation procedure. Lebanon considers that since the selection process spread from July till November, 1997, Toto had ample time to study the Project and the geographic conditions.

70. Exhibit R71.

71. Article II.03 CCJA : "[...] Le Conseil se réserve le droit de livrer l'emplacement des travaux par tronçons en fonction de l'avancement des travaux d'expropriation ou de remembrement. L'Entrepreneur réajustera son programme de travail en conséquence et en accord avec le Conseil. L'Entrepreneur n'a droit à aucune réclamation ou indemnité dans le cas du retard dans la livraison de l'emplacement des travaux à cause du retard dans la livraison des expropriations."

72. Webster's New World Dictionary on Power CD-version 2.1 copyright 1994/95-Zane Publishing.

73. Exhibit MM25.

74. Hatem, Transcript Day 1, p. 51.

75. Transcript Day 2, p.49; Exhibit R 119.

76. Transcript Day 1, p. 34.

77. Exhibits MM80-82.

- 120- Lebanon adds that Toto did not object to the progressive delivery of parcels, or could even not have tendered for the Project. Toto accepted that the delivery of the respective lots would encounter some delays and had to adapt its work programme, as the Contract required.
- 121- For Lebanon, the record shows that Toto did not work on Lot 2 because it was waiting for the acceptance of the various variations which it had suggested, and especially the green light for the construction of Viaduct 25.1; not because it had to wait for additional expropriation.

C. LOT 3 – PINK AREA:

1. *Toto's Position:*

- 122- CEGP delivered Lot 3, an area of 1625m (PK0+175 to PK 1+800) and consisting of 20% of the workload,⁷⁸ on September 29, 1998, *i.e.*, more than 7 months after the partial order to start works on February 10, 1998, and 2 months later than provided in the initial work programme. In Toto's opinion, as the *tracé* of Lot 3 had not been substantially modified, the cause for late delivery could not be the additional expropriations required after the works had started.
- 123- Toto points out that some owners who had not received compensation for their expropriated parcels refused access or a mere right of passage.⁷⁹ On September 5, 1998, for instance, Toto faced physical obstruction⁸⁰ and the owners threatened to break Toto's tools.⁸¹ The opposition of owners seriously obstructed Toto's work.
- 124- Toto asserts that Lebanon knew of these difficulties since August 29, 1998 but has not been of much help. At least 6 times, Toto had to solicit the help of the Internal Security Forces⁸² but without success⁸³. Obstructions by the owners⁸⁴ were so serious that CEGP had to grant an extension of time.⁸⁵

78 . Claimant's Reply, paragraph 148.

79 . Exhibit MM76-the obstruction from the owners are circled in black in Lot 3 Pink Area.

80 . See Witness Statement of Mr. Hisham Riachi of March 22, 2011, at p. 3.

81 . Exhibit MM40.

82 . Exhibits R50, R85, MM85, MM86, MM87 and R88.

83 . Exhibits MM86 and 87.

84 . For example, with respect to parcel 287 (the owner stood inside his house during demolition), Exhibit MM103; parcel 694 (the police was present twice but unsuccessful), Exhibit MM104, and parcel 19 (tomb of Druze dignitary), Exhibit MM11.

85 . Minutes of Meeting October 19, 2000, Exhibit MM39; Transcript Day 1, p. 33; Riachi, Transcript Day 2, p. 19.

125- Later in the construction, the Municipality of Saoufar also ordered Toto to stop works on Lot 3 because of a waterway.⁸⁶

2. Lebanon's Position:

126- Lebanon argues that the initial work programme had not been approved by the Engineer because the exact dates of the expropriations were not yet known.⁸⁷ Consequently, Toto cannot base its calculation of the delay in delivery of the parcels upon this programme.

127- Lebanon adds that, when Toto encountered the opposition of the owners, it merely asked the permission from the occupants to start work instead of seeking police assistance. It did not file a certified report of the obstruction (*constat*) as requested by the Engineer.

128- Lebanon also challenges Toto's argument that the works on Lot 3 had not been substantially modified. There were minor changes in alignment. Toto had proposed to shorten the length of the Grand Hotel Viaduct, a variation which was later accepted in Amendment No.2.⁸⁸

129- Lebanon alleges that, because of the pending modifications, Toto did not seriously initiate work on the site and used the mainly verbal opposition of the owners as an excuse for not working.⁸⁹

130- On February 1, 1999,⁹⁰ in a letter to the Engineer, Toto did not complain that the site was handed over too late. In fact, on that date, 90% of the original Project including Lot 3, as well as lots 1 and 2, were delivered to Toto. The construction of the Grand Hotel Viaduct took place later than originally foreseen because Toto had its structural elements available only in October 2000.

86 . Letter dated March 20, 2001 (Exhibit MM12) and letter dated August 23, 2002 (Exhibit MM13).

87 . Exhibit R48.

88 . Amendment No. 2, Exhibit R53.

89 . However, on September 2, 1998, as he had done at the first site meeting and on several occasions afterwards, the Engineer had reminded Toto once again to use as far as possible the expropriated site and to continue construction on the basis of the original drawings until and unless the proposed variations were approved (Exhibit R48).

90 . Exhibit R54.

D. LOT 4 – DARK BLUE AREA:**1. Toto's Position:**

131- Lot 4 was only delivered on April 28, 1999, instead of on July 15, 1998, as provided in the initial work program, *i.e.*, more than 14 months after the first order to start work on the Project. Moreover, Lot 4 comprised eleven parcels, located in three different areas along the alignment.⁹¹ These circumstances prevented Toto from working in an efficient manner. Here again, the CEGP failed to hand over the sites in the progressive manner Toto expected.

2. Lebanon's Position:

132- According to Lebanon, however, Lot 4 does not relate to the original Project but to the amended one, as proposed by Toto. After the works had started, the design of the Saoufar interchange had been completely changed, the alignment of the link road shifted, and a viaduct was removed.⁹² Lebanon alleges that because the project has been modified upon Toto's proposal, Toto is not entitled to refer to the deadline of the original Project.

E. LOT 5 – OLIVE GREEN AREA:**1. Toto's Position:**

133- Lot 5 was delivered on June 14, 1999 instead of on July 15, 1998, as the initial work programme provided, *i.e.*, more than 15 months after the order to start work. This delay prevented Toto from working in a timely and efficient manner.

2. Lebanon's Position:

134- According to Lebanon, however, Lot 5, as well as Lot 4, do not relate to the original Project but to the amended one. Indeed, the design of the interchange has been completely changed, the alignment of the link road shifted, and a viaduct has been deleted.⁹³ Lebanon argues that because the project has been modified upon Toto's proposal, Toto is not entitled to refer to the deadline of the original Project.

91 . Exhibits MM 16, 18 and 19.

92 . Respondent's Rejoinder, paragraph 176. See Attachment 1.

93 . Respondent's Rejoinder, paragraph 176. See Attachment 1.

F. LOT 6 – BROWN AREA:**1. Toto's Position:**

135- Toto argues that Lot 6, which has not been the object of any modification in alignment, comprised 16 parcels located in two different places for which the expropriation order was issued only on August 4, 1999⁹⁴, *i.e.*, 2 months before the original completion date. At a very early stage, Toto had informed Lebanon about the mandatory slope protection in Lot 6 that was required because of the sliding soil.⁹⁵ It took Lebanon 7 months, until November 1998, to decide on the matter and to enter into Addendum No.1 of the Contract.⁹⁶ Toto was then ready to start works but the expropriation was ordered only 9 months later.⁹⁷ The Lot was delivered on October 24, 1999, although many of its parcels had not yet been expropriated at that time.⁹⁸

2. Lebanon's Position:

136- According to Lebanon, although Lot 6 was not directly affected by the modifications, the variation of Viaduct 25.1 had an impact on Lot 6 as well. That is why the Parties agreed to postpone its expropriation.⁹⁹

137- Lebanon alleges that Toto had the obligation to verify the geological nature of the soil, and thus should have been aware of the risks of sliding soil when it tendered for the Contract.¹⁰⁰ When the Parties in November 1998 agreed that Toto should construct the retaining wall in "reinforced earth" instead of "reinforced concrete" in Addendum No.1, contrary to Toto's allegation, no slope protection or additional works were discussed. Consequently, the sustaining walls cannot be considered additional works which caused a delay for which CEGP would be responsible.

138- Finally, Lebanon rejects Toto's allegation that it was ready to start constructing the walls in Lot 6 prior to expropriation. Toto had not submitted yet the corresponding shop drawings with the exact location and procedure to construct the walls for the

94 . Exhibits MM 18 and 19.

95 . Exhibit MM7; Letter dated August 28, 1998. Documentary evidence of Toto working on the area is found in Addendum No. 1 to the Contract (MM 8 'it appeared during the excavation works the presence of unstable soil within the course of the highway, ...which required sustaining walls').

96 . Witness Statement of Mr. Hisham Riachi of March 22, 2011 at p.8.

97 . Exhibit MM8, Addendum No. 1 to the Contract.

98 . Transcript Day 1, pp. 34-35; Rached, Transcript Day 1, p. 63.

99 . Respondent's Rejoinder, paragraph 128 and Exhibit R70.

100 . Article 1-12 CCJA.

Engineer's approval. According to Lebanon, the shop drawings were only submitted in May 1999 and October 1999.¹⁰¹

G. LOT 7 – SKY BLUE AREA, LOT 8 – DARK RED AREA, AND LOT 9 – DARK PINK AREA:

1. Toto's Position:

139- The changed alignment of the Viaduct 25.1 was accepted in Addendum No. 2 on December 23, 1998 and required delivery of Lot 7, consisting of 7 parcels spread over different places along the alignment. The amended work programme provided for this delivery in February 1999.¹⁰² However, Lot 7 was only delivered on January 19, 2000.¹⁰³

140- Seven parcels of Lot 8 were delivered on March 14, 2000.¹⁰⁴ Lot 9, with 5 parcels, was delivered on June 26, 2000, and all the parcels required to comply with the modifications in Addendum No. 2 were expropriated and delivered on that date.¹⁰⁵

141- Toto argues that the expropriations were too late and delayed the works.

2. Lebanon's Position:

142- Lebanon admits that the original expropriation procedure was delayed and had to be started all over again because the variation of Viaduct 25.1 changed the expropriation corridor.¹⁰⁶

143- However, upon delivery of the lots, Toto did neither start work, nor submit the shop drawings as required under Article VIII 1.10 CPT.¹⁰⁷

101 . Exhibits R129-131.

102 . Claimant's Submissions dated February 4, 2011, paragraph 98, Exhibits MM21 and 22.

103 . Decision No. 7/1 (Exhibit MM21).

104 . Decision No.47/1 (Exhibit 22).

105 . Decision 72/1 (Exhibits MM24 and 25).

106 . Respondent's Counter Memorial on the Merits dated May 3, 2010, paragraph 143.

107 . Submissions were made progressively, Exhibits R56-61 (a) Drawings related to Viaduct Grand Hotel were submitted progressively in July, August and November 1999; (b) Drawings related to Viaduct 25.1 were submitted in June, July, November and December 1999; (c) Drawings related to Retaining Walls and Underpass Saoufar were submitted in May 1999; (d) Drawings related to Mdeirej Interchange were submitted in June 1999; (e) Drawings related to Saoufar Interchange were submitted in June 1999; and (f) Drawings related to Overpass P.S. 23.1 were submitted in July 1999.

VI. CLAIMED BREACHES OF TREATY PROVISIONS

- 144- In its Decision on Jurisdiction, the Tribunal decided that subject to the considerations expressed in such Decision:
- "the Tribunal has jurisdiction to decide whether (i) the delay in expropriation, (ii) the failure to remove Syrian troops and (iii) the changes in the regulatory framework constitute breaches of Articles 2 and/or Article 3.1 of the Treaty."*
- 145- The Tribunal also ruled that it had no jurisdiction with respect to (i) erroneous instructions and design, (ii) indirect expropriation, and (iii) breaches that are violations of the Contract.
- 146- Toto submits that the various delays and disruptions, which also entailed additional costs, were caused by the Respondent in its capacity as a Sovereign Authority, *i.e.*, as holder of the "*puissance publique*." Such delays prejudiced Toto's investment (Article 2 of the Treaty), failed to ensure fair and equitable treatment (Article 3.1 of the Treaty)¹⁰⁸, and to provide full protection and security within the Respondent's territory (Article 4.1 of the Treaty).
- 147- When arguing on the merits, Toto stated that it considered the following matters to be breaches of the Treaty:
- 1) The alleged late expropriations, which resulted in late delivery of the respective parcels and plots;
 - 2) The failure to remove the Syrian troops from the site;
 - 3) The failure to remove the owners from the site in breach of the Treaty;
 - 4) The faulty design of the initial Viaduct V25 because of Lebanon's outdated standards;
and
 - 5) The change in the regulatory framework.
- 148- The Tribunal will examine each of the claimed breaches. However, it will first consider the Treaty provisions which are allegedly breached.

108 . Where Toto alleges a breach of Article 3 of the Treaty, it in fact restricted its allegation to a breach of Article 3.1 (fair and equitable treatment) and did not allege a breach of Article 3.2 (most favored nation provision).

A. TREATY PROVISIONS:

1. Article 2:

149- Article 2 of the Treaty reads as follows, under the heading "Promotion and Protection of Investments":

(1) *Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.*

(2)

(3) *Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments. In particular, each Contracting Party or its competent authorities shall issue the necessary permits mentioned in paragraph 2 of this Article.*

(4) *Each Contracting Party shall create and maintain, in its territory favourable economic and legal conditions in order to ensure the effective application of this Agreement.*

150- As held in several ICSID awards such as the decisions in *AMT v. Zaire*,¹⁰⁹ *Wena Hotels v. Egypt*¹¹⁰ and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, "a substantive failure to take reasonable precautionary and preventive action is sufficient to engage the international responsibility of a state for damage to public and private property in that area."¹¹¹

2. Article 3.1:

151- Article 3(1) of the Treaty, under the Heading "National Treatment and Most Favoured Nation Treatment" requires Lebanon to ensure fair and equitable treatment of investments:

"Each Contracting Party shall ensure fair and equitable treatment within its territory

109 . American Manufacturing & Trading v. Zaïre, ICSID Case No. ARB/93/1), Award, February 21, 1997, 5 ICSID Rep. 11, paragraphs 6.02-6.11 (Exhibit MM42).

110 . Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, December 8, 2000, paragraph 84.

111 . Claimant's Reply on Merits dated August 8, 2010, paragraph 302; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, paragraph 725 (Exhibit MM97).

of the investments of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of any third State, if this latter treatment is more favourable."

- 152- As held in *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*¹¹² as well as in *EDF (Services) Limited v. Romania*¹¹³ and *Waste Management Inc v. United Mexican States*,¹¹⁴ in light of the principle of good faith established by international law, fair and equitable treatment requires the State¹¹⁵:

"...to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."

- 153- The *Saluka Investments BV (The Netherlands) v. The Czech Republic* award specified that fair and equitable treatment:

*"Should therefore be understood to be treatment which, ... does not at least deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."*¹¹⁶

- 154- In *LG&E v. Argentine Republic*¹¹⁷ it was held that fair and equitable treatment required the host State to maintain *"stability of the legal and business framework in the State party..."* and in *Bayindir v. Islamic Republic of Pakistan*,¹¹⁸ the Tribunal held that fair and equitable treatment comprises *"the obligation to refrain ... from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment."*

112 . ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, paragraph 154, Exhibit MM28.

113 . ICSID Case No. ARB/05/13, Award, October 8, 2009, paragraph 216, Exhibit MM29.

114 . ICSID Case No ARB/AF/003, Award, April 30, 2004.

115 . Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, paragraph 154, Exhibit MM28.

116 . Saluka Investments BV (The Netherlands) v. The Czech Republic, Permanent Court of Arbitration, Partial Award, March 17, 2006, paragraph 301, Exhibit MM41.

117 . LG&E Energy Corp, LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, paragraph 125, Exhibit MM57.

118 . Bayindir Insaat Turizm Ticaret VE Sanayi A.S. v. Islamic Republic of Pakistan, Case No. ARB/03/29, Award, August 27, 2009, paragraph 178, Exhibit MM58.

- 155- The threshold for finding a violation of the fair and equitable standard is high as confirmed by *Biwater Gauff Tanzania Ltd v. United Republic of Tanzania*.¹¹⁹
- 156- In *EDF (Services) Limited v. Romania*,¹²⁰ the Arbitration Tribunal unanimously held that:
"the idea that legitimate expectations, and therefore, FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life."
- 157- An unreasonable or discriminatory measure is defined in this case as (i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in wilful disregard of due process and proper procedure.
- 158- In *Parkerings-Compagniet AS v. Lithuania*, the arbitrators stated:
*"The expectation is legitimate if the investor received an explicit promise or guarantee from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment."*¹²¹
- 159- Legitimate expectations may follow from explicit or implicit representations made by the host state, or from its contractual commitments. The investor may even sometimes be entitled to presume that the overall legal framework of the investment will remain stable. Much depends, however, on the circumstances of the case.¹²²
- 160- Toto's position is that fair and equitable treatment also includes the duty to act vigilantly and consistently in a coherent manner.

119 . ICSID Case No. ARB/05/22, Award, July 24, 2008, paragraph 597, Exhibit R79.

120 . ICSID Case No. ARB/05/13, Award, October 8, 2009, paragraph 217, Exhibit R105.

121 . ICSID Case No. ARB/05/8, Award, September 11, 2007, paragraphs 331-333.

122 . See R. Kläger, Fair and Equitable Treatment in International Investment Law, p. 164 *et seq.*

- 161- For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct is required. As was found in *Impreglio SpA v. Pakistan*:
*"In order that the alleged breach of contract may constitute a violation of the BIT, it 'must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the state in the exercise of its sovereign authority ('puissance publique'), and not as a contracting party, may breach the obligations assumed under the BIT."*¹²³
- 162- As was also stated in other decisions, only when the State acted as sovereign authority - and not merely as a contracting partner - was there treaty protection of fair and equitable treatment.¹²⁴
- 163- Moreover, in the event a contract has allegedly been breached and the investor has access to the domestic courts, the threshold for a fair and equitable treaty protection may be higher. If the treaty requires recourse to domestic courts, it is not the existence of the contractual breach as such, but the 'treatment' that the alleged breach of contract has received in the domestic context that may determine whether the treaty obligation of fair and equitable treatment has been breached.¹²⁵
- 164- In the present case, as extensively discussed in the Decision on Jurisdiction,¹²⁶ Toto had access to the domestic courts of Lebanon, but did not establish that it diligently pursued the settlement of its contractual claims before them.
- 165- Finally, legitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State.¹²⁷
- 166- The fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and

123 . *Impreglio SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, paragraph 260 (footnote omitted). See also paragraph 267 of the Decision.

124 . See also *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Award, December 22, 2003, paragraph 51; *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award, August 6, 2004, paragraphs 78-79; *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, paragraph 345.

125 . See *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, September 7, 2007, paragraphs 319-320.

126 . Paragraphs 139-168.

127 . R. Kläger, *op.cit.*, p. 186.

comparative domestic public law as a benchmark. As was recently also confirmed in *Total S.A. v. Argentina*, "a comparative analysis of what is considered generally fair and unfair conduct by domestic public authorities in respect to private investors and firms in domestic law may also be relevant to identify the legal standards under BITs."¹²⁸

167- Article 3.1 of the Treaty *in fine* also requires Lebanon to treat Toto's investment not less favourably than investments of its own nationals or of investors of third countries. Toto has not substantiated a claim that its treatment was less favourable. Consequently, the Tribunal will specifically focus on fair treatment and legitimate expectations.

3. Article 4.1:

168- Toto states that its construction works in Lebanon have not received from Lebanon the full protection and security as required under Article 4.1 of the Treaty which reads:

"Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Part."

169- In *AMT v. Zaïre*, the Tribunal held that the obligation of protection and security requires "to take all measures of precaution to protect the investment."¹²⁹ In *Azurix v. Argentina*¹³⁰ and *Biwater Gauff v. Tanzania*¹³¹ it was moreover held that in case the investment treaty referred to "full" protection and security, as is the case for Article 4 of the Treaty between Italy and Lebanon, then the obligation of protection and security goes beyond mere physical security and includes affording a commercial and legal and secure investment environment.

170- Lebanon quoted *Saluka Investments BV (The Netherlands) v. The Czech Republic* to specify the scope of this obligation in the context of investment protection:

"the protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and

128 . *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paragraph 111. See also *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 paragraph 506; *Noble Ventures Inc. v. Romania*, ICSID case No. ARB/01/11, Award, October 12, 2005, paragraphs 177-178 (Exhibit R90).

129 . *American Manufacturing & Trading v. Zaïre*, ICSID Case No. ARB/93/1), Award, February 21, 1997, paragraph 6.05 (Exhibit MM42).

130 . *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, paragraph 408.

131 . *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, paragraph 729.

*extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations."*¹³²

- 171- Toto alleges that the failure to remove the obstructing owners from the site was a breach of Article 4.1, but it did not elaborate on the possibility that the failure to remove the Syrian troops from the site could be a breach of Article 4.1 as well. This being as it is, the Tribunal sees a strong overlap between protection and security under Article 4.1 of the Treaty, and protection of the investment under Article 2.3 of the Treaty. Consequently, the finding that a claim is not covered by Article 2.3 will also entail that it is not covered by Article 4.1.

B. THE ALLEGED BREACHES:

1. Alleged Late Expropriations:

- 172- Toto submits that expropriations took almost twice the time originally provided for the completion of the works and that the last expropriations occurred only a few months before the actual end of the works. For Toto, it was mainly because of the late expropriations and the non-consequential delivery of the expropriated parcels, that the works took 48 months instead of the initial 18 months. The heavy equipment and plant, the manpower and the purchased construction material were available at great cost, but remained unused. For instance, during the months of January till March 1999, Toto could only do "*some site preparatory works,*¹³³ *preparation of the new designs of the Viaduct and retaining walls and mainly office work.*"¹³⁴

- 173- Moreover, Toto adds, because of the late expropriations, it had to make private arrangements for the temporary use of parcels at great expense, and it even had to suffer and settle a court case filed by one of the owners. Once the parcels for the Viaduct 25.1 had been delivered early 2000, the pace of the works increased significantly, but substantial harm had been suffered by Toto in the meantime.

132 . Saluka Investments BV (The Netherlands) v. The Czech Republic, Permanent Court of Arbitration, Partial Award, March 17, 1996, paragraph 300, p. 65, Exhibit R92.

133 . Geotechnical investigation pursuant to the new viaduct in the light blue section, excavation at the Mdeirej Interchange, and clearing.

134 . Witness Statement of Mr. Hisham Riachi of March 22, 2011, at p. 2.

- 174- Lebanon contends that Toto knew that not the whole site would be delivered when the works had to start, and that the parcels would be delivered progressively. When it concluded the Contract, Toto accepted the progressive handover of the parcels delivery as soon as they were expropriated. Moreover, it had agreed that it would not claim compensation in case of late delivery.¹³⁵
- 175- For Toto, "progressive delivery" means "consecutive delivery." As Lebanon's expropriations were delayed and the parcels were delivered in an inconsistent manner, Toto's investment was jeopardized and Lebanon thwarted Toto's expectations.
- 176- For Lebanon, '*progressively*' delivery does not necessarily mean '*consecutively*' in the order the construction was planned. In all events, Lebanon objects to Toto's argument that the delivery of the parcels had to be carried out in three stages and before specific dates. Lebanon observes that the initial work programme, which mentions these dates, was never approved by the CEPG, because it was uncertain when the respective parcels could be delivered. Likewise and for the same reasons, the delivery dates in Toto's amended work programme had not been approved and therefore could not be relied upon either.¹³⁶
- 177- Lebanon further asserts that in the first 7 months, 90% of the parcels under the original Project were put at Toto's disposal (Lots 1, 2 and 3), so that no substantial delay was suffered.
- 178- For Lebanon, the true reason for the late delivery of parcels was the fact that Toto, once the construction had started, suggested several variations to the Project, of which the most substantial was the construction of the Viaduct 25.1, originally foreseen as a curved bridge, in a straight alignment. Such change required expropriation of the land where the straight viaduct would be built. Moreover, Toto did not start construction of the amended Viaduct before its variation and plans had been approved, which took some time, and it only requested the additional substantial expropriations in February-March 1999.
- 179- Lebanon adds that Toto suggested also altering the original plans of the Viaduct Grand Hotel, widening the alignment in some places and changing the construction of the Saoufar interchange. These changes too required additional or modified expropriations, which were ordered and had to be carried out after the construction had started. Toto's argument that the Project was supposed to end in October 1999

135 . Article II.03 of the CCJA.

136 . Exhibit R48.

and that, therefore, Lebanon expropriated too late, ignores the modifications Toto suggested and which required additional expropriations.

180- Furthermore, Lebanon alleges that Toto, already late in the execution of the works, froze the construction works pending approval of its modified design of the Viaduct¹³⁷ and failed to mobilize its equipment in due time. For instance, on April 27, 2000, CEGP considered Toto's available equipment to be insufficient and requested Toto to take the necessary measures to speed up the work.

181- The Tribunal has noted that Toto focuses on the late delivery of the parcels by its contracting partner, the CEGP, while the allegedly late expropriations had to be carried out by Lebanon in its capacity of '*autorité publique*.' Although Toto has submitted the CEGP's decisions on the delivery of the parcels, it has not submitted evidence that the actual expropriation proceedings by the public authority were unreasonably delayed. The chronology of events indicates that the expropriations were generally finalized within a year.¹³⁸

182- The Tribunal has noted that Toto does not allege that Lebanon openly mishandled the expropriations in an outright and unjustified repudiation of its own established expropriation practice.

a) Article 2:

183- Toto alleges that the late expropriations and the failure to deliver the parcels in a consecutive order constitute a breach of Lebanon's obligation to act in a diligent manner to promote and protect Toto's financial interest in the performance of the Contract, as Article 2 of the Treaty requires. For Toto, Lebanon failed to create and maintain favourable conditions for Toto's investment.

184- For the Tribunal, a breach of Article 2 requires, not only (1) an established delay in expropriation, but also (2) that this delay is attributable to Lebanon.

185- It is a fact that the expropriations with regard to the original alignment were substantially finalized before or within the first months after the works had started. Toto did not convincingly demonstrate that - in the first months of the Project - it had been hindered by the fact that not all sites had been expropriated. Indeed, as Toto

137 . See Expert Report of Mr. Steve Huyghe, dated June 15, 2011.

138 . The initially expropriated parcels could of course be delivered sooner as the expropriation process was already on its way before the Contract was concluded.

had proposed substantial variations, which would change the alignment of the highway, it apparently avoided carrying out works on the expropriated sites of the original alignment, which would no longer serve a useful purpose.

- 186- Once the variations had been accepted, new expropriations were needed. It took two months for Toto to request the Lebanese authorities to carry out these expropriations. It took some twelve months for the authorities to carry out the latest of these expropriations. Taking into account the complexity of expropriation procedures, which may involve also court proceedings, the Tribunal is of the view that a time span of twelve months is reasonable.
- 187- The parties have discussed whether Article 2.1 of the Treaty, which obliges Lebanon to 'promote' investments, imposes upon Lebanon an obligation of due diligence, as argued by Toto. Even if 'due diligence' were to be required, Toto has not submitted evidence that Lebanon had not behaved in a diligent way.
- 188- Article 2.3 of the Treaty sanctions unreasonable or discriminatory delays in expropriation which would have impaired Toto's investment. Toto does not allege that Lebanon acted in a discriminatory fashion. It did not indicate how Lebanon ought to have acted "in a reasonable manner."
- 189- Article 2.4 of the Treaty requires Lebanon in general "*to create or maintain favourable legal or economic conditions.*" Toto failed to show how the alleged delay in the expropriations for the construction of a portion of the highway constitutes a failure "*to create or maintain favourable legal or economic conditions.*" Toto did not provide particulars in respect of the kind of general legal and economic conditions Article 2.4 refers to. On the contrary, Toto accepted the granting of an extension to complete the works and waived any claim to damages because of the delay in expropriations.¹³⁹ Such acceptance, in all events, undercuts the factual grounds for arguing that Lebanon failed to protect the investment.

b) Article 3.1:

- 190- Toto submits that Lebanon failed to ensure fair and equitable treatment to Toto's investment because of the late expropriations. Toto expected expropriations which would not prevent the performance of the Contract within the agreed time frame. Toto alleges that its legitimate expectations of a consistent and consequential delivery of the parcels had been frustrated.

139 . Minutes of meeting October 19, 2000, Exhibit MM39.

- 191- For Lebanon, Toto could not have legitimate expectations of this nature. When Toto agreed to the Contract, it was aware that the expropriations had not been carried out and that parcels would be delivered progressively in the first months of the works. This was the only expectation Toto could have had. Toto accepted to execute the works within the contractual time limit in spite of the uncertainty concerning the date of delivery of the parcels. Moreover, Toto was aware that additional expropriations needed to be carried out when it proposed to alter the alignment of the Viaduct 25.1 and the road. Toto cannot escape responsibility for the implications of its own proposals. By proposing variations to the *tracé* of the Project, it accepted the risk of the delay which may result from the additional expropriations.
- 192- The Tribunal fails to see how Toto could have legitimately expected that the parcels would be expropriated earlier than they actually were. Although Toto alleges that it constantly warned CEGP for the delays in expropriation, it did not submit contemporary complaints holding CEGP responsible for them.
- 193- Furthermore, fair and equitable treatment has to be interpreted with international and comparative standards of domestic public law as a benchmark. The investor is certainly entitled to expect that the host State will not act capriciously to violate the rights of the investors. Toto indicated that Lebanon failed to carry out the expropriations in a consistent and coherent manner as it would have done if investments of its own or other foreign investors would have been involved. However, Toto did not submit any proof that Lebanon acted in a discriminatory or capricious way, or that it did not comply with the applicable international minimum standards.
- 194- On the contrary, the extension of time and waiver of its claim to compensation because of late expropriations, that Toto accepted, detract from the legitimacy of Toto's expectations to receive compensation for delayed expropriations.

2. Failure to Remove Syrian Troops:

- 195- As stated before, Toto alleges that it could not proceed with the works as Syrian troops had established a settlement in part of the area that was intended for the main workshop and the construction of the road. Until September 1998, when the soldiers finally left, Toto was denied access to that part. Toto argues that it had to obtain at additional costs another, less appropriate, location to install the workshop. Moreover, when the Syrian soldiers finally moved to another site, Toto had to erect for such soldiers new facilities at its own expense.
- 196- Lebanon, from its side, states that, under the Contract, it was solely Toto's responsibility to identify the private or public land to build its workshop, and at its

own expense.¹⁴⁰ When it signed the Contract, Toto knew where the Syrian troops were, and nevertheless intended to have the workshop at the location of their encampment.

a) Article 2:

197- Toto considers the failure to remove the Syrian troops to be a breach of Article 2 of the Treaty, which requires the host State to create and maintain favourable conditions for the investment. For Toto, Lebanon, as a *puissance publique*, failed to promote and protect Toto's investment, which received a treatment below the international minimum standard because, when the works had to start, the site was still occupied by the Syrian army and not available for the installation of the equipment and workshop.

198- Lebanon contends that Toto did not - as Toto alleges - urge Lebanon to obtain the evacuation of the Syrian troops and indicate that their presence had obstructed the works. Toto merely signaled the presence of the soldiers and indicated that they should be evacuated in order to avoid future delays¹⁴¹ and that the preparation of an access road - not the works as such - was hindered.¹⁴²

199- Moreover, Lebanon recalls that it discussed with the Syrian Army in April 1998 the removal of the troops,¹⁴³ and the Syrian Army started evacuation in May 1998. It completely left the site in September 1998. Lebanon therefore submits that the time this evacuation took is fair, given the fact that the Syrian Army was a foreign force and not under Lebanon's purview. Besides, Toto was aware of the occupation, and could have started work on other parts of the area. In fact, for Lebanon, Toto was not actually ready to start the construction of Viaduct 25.1 as it was initially planned because it envisaged constructing that Viaduct on a different location. The evacuation of the Syrian troops was thus not that urgent and did not practically affect Toto's work.

200- The Tribunal finds that Toto was - or should have been - aware that the Syrian troops occupied areas along the alignment. Taking into account the circumstances, the Tribunal is satisfied that Lebanon did whatever was within its power to obtain the Syrian troops' departure. Lebanon did not neglect its obligation under Article 2 of the Treaty to protect Toto's investment: the measures it undertook to obtain the

140 . Article II-22 CCJA.

141 . Exhibits MM6 and R82.

142 . Exhibit MM31.

143 . April 22, 1998, Minutes of Meeting where Lebanon was represented by the Engineer.

evacuation of the Syrian troops were not unreasonable or discriminatory, and they proved to be adequate.

b) Article 3.1:

- 201- Toto argues that, pursuant to Article 3.1 of the Treaty, Lebanon has to ensure within its territory fair and equitable treatment for Toto's investment. According to Toto, Lebanon acted in an inconsistent manner by failing to ensure that the site occupied by the Syrian Army was evacuated when the works started. For Toto, Lebanon failed to meet Toto's reasonable and legitimate expectations because it was expected to ensure that the evacuation of the Syrian soldiers would not be delayed so that Toto could complete the works in eighteen months, as provided for in the Contract.
- 202- Lebanon, on the contrary, points out that Toto was already aware of the presence of the Syrian Army, and it could not reasonably have expected that the Syrian troops would be removed earlier than in fact they were.
- 203- Toto did not prove to the Tribunal that, in the then prevailing circumstances, Lebanon was inefficient in obtaining the departure of the foreign forces; even less that Lebanon failed to give Toto a fair and equitable treatment in this respect.
- 204- Toto furthermore alleges that with regard to the evacuation of the Syrian troops, Lebanon provided Toto's investment a treatment which was discriminatory and less favourable as that required by international law for investments of other foreign contractors working on sites expropriated for public works projects.
- 205- However, the Tribunal's view is that Toto did not establish that Lebanon behaved negligently or capriciously, or that it acted discriminatorily or violated the international minimum standard by not obtaining immediately the departure of foreign troops. If in fact it had been established that the presence of Syrian troops for a limited period on part of the site materially prejudiced the Toto's operations, Toto would have had a good claim, because, as between Lebanon and Toto, the burden of the presence of Syrian troops on the Lebanese territory would have to be borne by Lebanon. In the view of the Tribunal, Toto has not so established.
- 206- Consequently, the Tribunal finds that Toto did not prove that Lebanon has acted in breach of Article 3.1 of the Treaty with regard to the evacuation of the Syrian soldiers.

3. Failure to Remove Owners from the Site:

207- Toto contends that, when at times it was prevented by owners of expropriated parcels from accessing their properties, Lebanon failed to intervene to put an end to such obstructions. These obstructions and Lebanon's negligence, Toto argues, delayed the works and thus caused damage to Toto's investment.

208- Lebanon, on the other hand, alleges that Toto did not establish that it was actually and physically prevented from working, and that Toto was not ready to work on the expropriated areas in a timely fashion. Toto's allegations that Lebanon refrained from taking the necessary measures are therefore not only irrelevant, but remain vague and unsubstantiated.

a) Article 2:

209- Toto argues that Lebanon failed to promote and protect Toto's investment as required by Article 2 of the Treaty, which Lebanon denies.

210- In its Decision on Jurisdiction, the Tribunal has considered that Lebanon's alleged failure to prevent owners and occupants from obstructing the works could, if proven, constitute a failure to protect investments under Article 2 of the Treaty.¹⁴⁴

211- However, the Tribunal does not consider Lebanon's behavior a breach of Article 2. Expropriations, which are known to be generally complex and lengthy procedures, often give rise to objections by expropriated owners with respect to the indemnification standards and amounts of compensation. Toto did not establish that Lebanon had knowledge, or should have had knowledge, of the impending obstructions, and that it failed to take precautions to prevent them. Toto did not indicate what specific actions could Lebanon have taken, and did not take, in order to prevent the protests from occurring. It would be unreasonable to consider that Lebanon had the duty under the Treaty, or had the actual means, to prevent certain owners from expressing their discontent.

212- The Tribunal notes that Toto's Monthly Reports mention obstructions from July 1998 to September 1999 in specific locations, by individual expropriated owners. These obstructions and protests were not of a magnitude that revealed a general failure of the expropriation process. Had there been massive protests, this would have been an indicator of a malfunctioning of the expropriation process for which

144. Paragraphs 117 and 118 of the Decision.

Lebanon could have been held liable under certain circumstances, but this was not the case.

- 213- In addition, it has not been demonstrated that Lebanon failed to take action to end the owners' obstructions. No formal request from Toto to intervene has been submitted to the Tribunal. Monthly Reports merely signaled the obstruction in some areas. The Tribunal therefore is unable to determine whether Lebanon, as a *puissance publique*, has failed to intervene.
- 214- What has been established in this case is that (i) the CEGP requested the assistance of the Internal Security Forces to remove expropriated owners,¹⁴⁵ (ii) the CEGP indicated in December 1998 that it resorted to the local administration and police force,¹⁴⁶ (iii) the CEGP requested the Governor again for the assistance of the Internal Security Forces on March 23, 1999,¹⁴⁷ (iv) the CEGP informed the Governor in May 1999 of the specific parcels which still had to be evacuated,¹⁴⁸ (v) as of July 1999, only one parcel was obstructed¹⁴⁹ but was free in October 1999, and (vi) in September 1999, the CEGP asked the Governor for the assistance of the Internal Security Forces to vacate the last parcels.¹⁵⁰
- 215- Furthermore, Toto does not establish to what extent the temporary obstructions at specific spots actually prevented it from finishing the works by the contractual completion date. In fact, these obstructions were one of the reasons for which Toto had obtained a postponement of the contractual completion date.¹⁵¹
- 216- The Tribunal therefore determines that Lebanon's breach of Article 2 of the Treaty has not been established by Toto in relation to the matter of the owner's obstructions.

b) Article 3.1:

- 217- In its Decision on Jurisdiction, the Tribunal stated that Lebanon's failure to act against the obstructing owners would fall under the protection of legitimate expectations of Article 3.1 of the Treaty if this failure was proven to be unfair and inequitable.¹⁵²

145 . Letter to the Governor of Mount Lebanon, Exhibit MM85.

146 . Minutes of Meeting December 2, 1998, Exhibit R85.

147 . Exhibit MM86.

148 . Telegram May 26, 1999, Exhibit MM87.

149 . Monthly reports for the months of July 1999 to October 1999, Exhibit MM39.

150 . Letter of September 24, 1999, Exhibit R88.

151 . Minutes of Meeting of October 19, 2000, Exhibit MM39.

152 . Paragraph 175 of the Decision.

- 218- Toto contends that Lebanon failed to ensure a fair and equitable treatment of its investment as required by Article 3.1 of the Treaty, because Lebanon failed to respect Toto's legitimate expectations to be able to use the expropriated parcels.¹⁵³
- 219- Lebanon argues that, absent any specific representation made by Lebanon regarding obstructing owners, the doctrine of legitimate expectations does not apply, and therefore no breach of Article 3.1 of the Treaty has occurred.¹⁵⁴
- 220- The Tribunal finds that it would be unreasonable to expect Lebanon to guarantee that no owner objects to the expropriation process including, *inter alia*, by obstructing access to his/her parcels.
- 221- The Contract had foreseen that problems may arise with the owners of parcels located along the alignment ("*riverains*") and that Toto should refer obstructions to the local police.¹⁵⁵
- 222- Toto, on the other hand, could legitimately expect Lebanon to resolve owners' obstructions, whenever they occurred, and to mitigate their adverse impact on the works.
- 223- The Tribunal has noted, when considering the alleged violation of Article 2 of the Treaty, that Lebanon did take action to put an end to the obstructions, and that Toto accepted an extension of the Contract, which was, *inter alia*, granted because of the temporary obstructed access to some parcels.
- 224- Moreover, only the frustration of legitimate expectations which upsets the stability of the legal or business framework, the fair and equitable treatment standard, or the rights acquired under domestic law, should be protected under Article 3.1 of the Treaty. Toto did not prove that the owners' obstructions have upset any of such elements.
- 225- The Tribunal did not find evidence that Toto had legitimate expectations with regard to the removal of the obstructing owners, which were frustrated by Lebanon in a way leading to unfair and inequitable treatment of Toto's investment in violation of Article 3.1 of the Treaty.

153 . Paragraphs 174 and 176 of the Claimant's Memorial on Merits dated January 29, 2010.

154 . Paragraphs 384 and 386 of the Respondent's Counter-Memorial on the Merits dated May 3, 2010.

155 . Paragraphs 364 and 386 of the Respondent's Counter Memorial on the Merits and Article VIII.2.01 CCJA.

c) Article 4:

- 226- Toto argued that, by not taking action to prevent and put an end to the owners' obstructions, Lebanon failed to provide its investment with full protection and security as prescribed by Article 4.1 of the Treaty.
- 227- Lebanon objects by stating that Toto has not established Lebanon's breach of the Treaty's standard of security. The obligation of full protection and security is not a strict liability standard, but requires due diligence.¹⁵⁶ Toto did not submit supporting evidence establishing that Lebanon had been negligent in its actions in relation to the owners' obstructions.
- 228- The Tribunal agrees that, under Article 4.1 of the Treaty, Lebanon had a duty to provide full protection and security to investors. However, the International Court of Justice in *Electronica Sicula S.p.A.(ELSI) (United States of America v. Italy)* found that the provision in a treaty for '*constant protection and security cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed*'.¹⁵⁷ In *Noble Ventures v. Romania*¹⁵⁸ an ICSID Tribunal, referring to the ELSI decision, held that workers on strike did not pose a threat to the investor even though they occupied the investor's business premises. In *Saluka Investments BV (The Netherlands) v. The Czech Republic*, another ICSID Tribunal held that the obligation to grant full security does not address all kinds of impairment, but only those which affect the physical integrity of the investment against the use of force.¹⁵⁹
- 229- In the present case, the temporary obstructions of some expropriated owners did not amount to an impairment which affected the physical integrity of the investment. Moreover, Toto did not demonstrate that Lebanon could have taken preventive or remedial action that it failed to take, and that it acted negligently in relation to the owners' obstructions.
- 230- The Tribunal therefore concludes that, under the owners' obstructions head of claim, Lebanon has not acted in breach of Article 4.1 of the Treaty.

156 . By way of example, *Noble Ventures v. Romania*, ICSID Case No. ARB/01/111, Award, October 12, 2005, paragraph 164 (Exhibit R90), and *Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, paragraph 177 (Exhibit R91).

157 . ICJ Reports 1989, p.15, paragrah 108.

158 . *Noble Ventures v. Romania*, ICSID Case No. ARB/01/111, Award, October 12, 2005, paragraphs 155 and 166.

159 . *Saluka Investments BV (The Netherlands) v. The Czech Republic*, (Permanent Court of Arbitration), Partial Award, March 17, 2006, paragraphs 483- 484 (Exhibit R92).

4. Faulty Design Due to Inappropriate Standards:

- 231- Toto argues that Lebanon, on various occasions, has been late in submitting or approving the necessary designs and plans.
- 232- Lebanon objects by saying that the Tribunal has excluded from its jurisdiction errors of, and delays in, the processing of the design, and that the Decision on Jurisdiction, which is final and cannot be revised, has *res judicata* and cannot be revisited.
- 233- The Tribunal, in its Decision on Jurisdiction, has indeed ruled that erroneous design relates to the contractual obligations of the Engineer and/or the CEGP, and afterwards the CDR, and does not involve the use of sovereign authority. It cannot therefore be the subject of this arbitration.
- 234- Toto argues that the design of the originally conceived Viaduct 25.1, as submitted in the tender, would make traffic circulation unsafe, and did not comply with the required anti-seismic standards. In Toto's view, the imposition of adequate safety and anti-seismic standards is a matter of *puissance publique* and is thus covered by the Treaty.
- 235- Toto states that, on March 12, 1998, it asked the CEGP for the authorization to change the design, and that it took Lebanon ten months, *i.e.*, until December 23, 1998, to accept the amended design which complied with the proper safety and anti-seismic standards.¹⁶⁰ According to Toto, even though it is the one who took the initiative to change the design, the safety aspects of the design, which Lebanon overlooked, as so Toto argues, were exclusively in the hands of Lebanon. Lebanon's failure to act promptly on this matter thus prejudiced Toto's investment. Lebanon did not grant Toto the fair and equitable treatment prescribed by the Treaty.¹⁶¹ Toto explained that, when it decided to engage into the Project, it had expected Lebanon to incorporate the proper safety and anti-seismic standards in the tender documents. For Toto, Lebanon's faulty design delayed the execution of the Project and made Toto incur additional costs.¹⁶² Consequently, Toto considers that Lebanon has breached Articles 2 and 3 of the Treaty.
- 236- The Tribunal reasserts its position that it does not assume jurisdiction over claims which are contractual in nature. The Tribunal's duty is restricted to assessing

160. Exhibit MM46: The letter only said that the alternative straight bridge was 'better' than the initial adjudicated '*courbe*' with regard to the traffic safety and security as well as to earthquakes handling.

161. Claimant's Reply on the Merits dated August 8, 2010, paragraphs 90-96.

162. Claimants Memorial on the Merits dated January 29, 2010, paragraph 203.

whether Lebanon, as *puissance publique*, breached Articles 2 and 3.1 of the Treaty as a result of the submission, by the CEGP, of a design that did not incorporate the safety and anti-seismic standards which were later implemented in Toto's amended design.

- 237- The Tribunal did not find that Toto established that the initial standards applied by the CEGP to Viaduct 25.1 were wrong; or that the selection of safety standards for a construction project was a matter of sovereign authority. Toto did not show to the satisfaction of the Tribunal how Lebanon, by choosing the standards originally to be followed for the construction of Viaduct 25.1, has breached international law, and more specifically, Articles 2 and 3.1 of the Treaty.
- 238- The Tribunal therefore concludes that the inappropriate Project's design alleged by Toto with respect to safety standards for Viaduct 25.1 does not lead to a violation of the Treaty by Lebanon.

5. Change in the Regulatory Framework:

- 239- Toto argues that the Contract implied that the Project would be subject to the Lebanese tax legislation in effect at the time the Contract was entered. Article I-13 of the CCJA invited Toto to examine all the tax laws applicable when it submitted its offer, which for Toto means that CEGP had committed not to change that law. Despite such commitment, Lebanese custom duties on cement, building materials, diesel, and steel unreasonably increased in Toto's view, thus increasing Toto's costs. For instance, diesel price allegedly increased about 40%, and government duties on cement more than doubled. For Toto, Lebanon failed to maintain favourable economic and legal conditions, and the changes in tax and customs duties legislation amount to breach of Article 2 of the Treaty. They moreover constitute a breach of the requirement of fair and equitable treatment provided for in Article 3 of the Treaty.
- 240- Lebanon acknowledges that there have been increases in customs and tax duties, but contends that there also have been price decreases which Toto failed to mention. Lebanon adds that Toto had agreed not to expect increases in custom duties and taxes to be compensated: the price adjustment formula of Article III-04 CCJA, to which Toto had agreed, included several parameters, but did not take into account increases in custom duties and taxes. Toto moreover, at that time, has explicitly recognized that it was not entitled to compensation for increased diesel prices.¹⁶³

163 . Toto's letter dated September 4, 2000, Exhibit R104.

- 241- For Lebanon, Article I-13 CCJA only aimed at making clear that Toto had to pay all taxes or duties prescribed by Lebanese law. Under Article III-4 CCJA, the submitted unit prices could be adjusted with time, but a change in taxes or duties as such was not included in the formula to amend the prices. Moreover, the Contract neither contained a stabilisation clause, nor provided that custom duties and taxes would not be changed. Lebanon's position is that, under such circumstances, Toto could not have legitimate expectations to be compensated for price increases beyond what the Contract provided for.
- 242- The Tribunal considers that fair and equitable treatment does not, in the circumstances prevailing in Lebanon at the time, entail a guarantee to the investor that tax laws and customs duties would not be changed.
- 243- In *Parkerings-Compagniet AS v. Lithuania*, the arbitrators recognized the right of States to modify their laws:
*"It is each State's undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power."*¹⁶⁴
- 244- In the absence of a stabilisation clause or similar commitment, which were not granted in the present case, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction. Toto failed to establish that Lebanon, in changing taxes and customs duties, brought about such a drastic or discriminatory consequence. The additional cost resulting from increased taxes and custom duties is small compared to the overall amount of the Project. The changes to the custom duties and taxes on cement, diesel, and construction material were moreover applicable to foreign investors as well as Lebanese nationals. This cannot amount to discriminatory or unreasonable actions towards Toto.
- 245- In *Parkerings-Compagniet AS v. Lithuania*, the arbitrators concluded that the circumstances in a country in transition could not justify the legitimate expectations

164 . ICSID Case No. ARB/05/8, Award, September 7, 2007, paragraphs 331-333.

as regards the stability of the investment's environment. Rather, the investor was considered to have taken the business risk to invest, notwithstanding the possible legal and political instability.¹⁶⁵ Likewise, the post-civil war situation in Lebanon, with substantial economic challenges and colossal reconstruction efforts, did not justify legal expectations that custom duties would remain unchanged.

- 246- For the reasons above, the Tribunal finds that there is no violation of Articles 2 or 3 of the Treaty by the Republic of Lebanon with respect to the increase of taxes and customs duties.

VII. DECISION ON COMPENSATION

- 247- Toto claims in this arbitration an amount of L.P. 16,040,766,9769 (equivalent to USD 10,694,000) as compensation for additional costs incurred because of the 1164-day extension in the works supposedly caused by Lebanon's alleged breaches of the Treaty.¹⁶⁶ Toto assumed that the delay has been exclusively caused by Lebanon's alleged breaches, thereby claiming compensation for all its operational expenses, without further specification of labour, plant and material costs caused by the specific alleged delays, and without comparing these additional expenses to the originally envisaged expenses.
- 248- Toto has not established how many of the 1164 days were caused by Lebanon's alleged respective Treaty breaches.¹⁶⁷ Some delays were also due to Toto (e.g., by not bringing in specific equipment and not arranging the molds on time), by bad weather or because of slippery soil.¹⁶⁸
- 249- Toto did not specify which delay was supposedly caused by which alleged breach of the Treaty. Neither did it sufficiently establish the causality between the alleged breach of the Treaty and the loss sustained. For instance, Toto recognized that expropriations were not on the 'critical path' for the construction of Viaduct 25.1¹⁶⁹; in

165 . ICSID Case No. ARB/05/8, Award, September 7, 2007, paragraphs 335-336.

166 . This delay was the sum of a delay of 799 days till December 31, 2001 when the Project was substantially handed over and a further delay of 365 days with less personnel and facilities till December 31, 2002, when the Project effectively terminated. This amount included also compensation for the price increase of bitumen and aggregates as well as the study and design costs for drainage and stability (Exhibits MM49-51).

167 . Some delays, due to CEGP, such as changing from calcareous to basaltic gravel (Exhibits MM90-A and MM90-B), were clearly outside the Treaty protection.

168 . See Export Report of Mr. Steve Huyghe, dated June 15, 2011 and Minutes of Meeting October 19, 2000, Exhibit 39.

169 . Letter to CEGP dated 18 November 1999, Exhibit MM109.

fact, even when parcels were not yet expropriated, work on the Viaduct 25.1 could be undertaken.¹⁷⁰

- 250- Toto also did not prove to what extent the workshop, which was moved to another area because the originally-foreseen area was occupied by Syrian troops, was an actual cause of delay.
- 251- Irrespective of the lack of evidence, for the reasons stated in this decision, the Tribunal does not find that Lebanon has breached its Treaty obligations towards Toto, and as a result, no compensation is due to Toto. Because the Tribunal finds that no compensation is owed by Lebanon to Toto, it is not relevant that Toto also failed to prove the damages caused by the alleged Treaty breaches.
- 252- It is also not relevant that Toto, although it has described its claim as one for cumulative delay as well as for disruption, did not, independently from the delay, analyse the disruption in the works, which does not necessarily result in delay, and the additional costs, resulting from such disruption.
- 253- Toto has additionally claimed L.P. 833,386,120 (equivalent to USD 545,590) because during the extension period of the Project, legislative changes led to an increase in the prices of cement, diesel and steel.
- 254- Here again, regardless of the fact that the cement should have been ordered in June 1999 as the Contract required,¹⁷¹ that diesel prices and consumption are not supported by documentary proof, and that Toto could have purchased the steel earlier, the Tribunal finds that Lebanon owes no compensation to Toto because there were no breaches of the Treaty by Lebanon.
- 255- Toto, furthermore claims (i) L.P. 807,799,237 (equivalent to USD 538,000) as interest on payments received after the due date, compounded interest at LIBOR rate on unpaid amounts up to the date of effective payment, (ii) L.P. 8,562,253,000 (equivalent to USD 5,980,000) as compensation for the loss of opportunities, and (iii) L.P. 6,048,403,161 (equivalent to USD 4,010,877) as compensation for moral damages. However, as Lebanon has not been found in breach of Treaty obligations, the claims for all such heads of compensation are dismissed.

170 . E.g., the construction of Viaduct 25.1 did not have to wait until all the parcels of the new alignment had been formally expropriated and delivered as Toto had made prior arrangements with the owners to start work on their lands.

171 . Under paragraph 2 of Article VII of the CPT, Toto had "to send to the engineer within one month as of the notification of the project's approval, a copy of the letters by virtue of which it had ordered cement."

VIII. DECISION ON COSTS

- 256- Each of the Parties has submitted that the other should be ordered to bear all the costs of the arbitration and reimburse the amounts incurred by it in this case.
- 257- Article 61(2) of the ICSID Convention provides as follows:
"In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award."
- 258- Under Article 61(2), the Tribunal is granted discretion in making its determination with respect to the allocation of costs.
- 259- In the present case, Lebanon's objection to jurisdiction has been partially rejected, but the Claimant's claims are dismissed on the merits, not because Lebanon's behavior was irreproachable, but because the actions and omissions of Lebanon, some of which could amount to breaches of the Contract, were not proven to be breaches of the Treaty.
- 260- There are good reasons therefore, for the Tribunal to decide that the costs and expenses should be shared by Toto and Lebanon. For that reason, and having taken into account all the circumstances of the case, the Tribunal concludes that the Parties shall bear on an equal basis the fees and expenses of the members of this Arbitral Tribunal, and of the International Centre for Settlement of Investment Disputes, and that each party shall bear the legal fees and expenses incurred by it in relation to this case.

IX. OPERATIVE PART

- 261- For the reasons set out above, the Tribunal unanimously decides and orders as follows:
- (a) For the reasons set forth in the Tribunal's Decision on Jurisdiction of September 4, 2009 (which is incorporated by reference), and in the present Award, the Tribunal has jurisdiction over the Claimant's claims for breaches of Articles 2, 3 and 4 of the Treaty.
 - (b) The Tribunal declares that the Respondent did not breach its obligations under Article 2 and/or Article 3 of the Treaty. The Respondent also did not fail to comply with the full protection and security standard of Article 4 of the Treaty.

- (c) Accordingly, all substantive claims of the Claimant are dismissed.
- (d) The parties shall bear the costs of the arbitration in equal shares.
- (e) Each party shall bear its own costs and legal fees.

[Signed]

 Judge Stephen M. Schwebel
 Date: May 24, 2012

[Signed]

 Mr. Fadi Moghaizel
 Date: May 28, 2012

[Signed]

 Prof. Dr. Hans van Houtte
 Date: May 30, 2012

X. CONCURRING OPINION OF JUDGE SCHWEBEL

I was appointed as a member of this Tribunal at a very late stage, after the pleadings had been filed, the oral hearings had concluded, and the three members of the Tribunal had deliberated. I have read the resultant records and accept the evaluation of the facts of the case at which my colleagues have arrived. I do not necessarily share their interpretation of the legal effect of the "umbrella clause" of the Treaty which was a feature of the Tribunal's judgment on jurisdiction. Nor do I necessarily share every shade of their interpretation of the international jurisprudence respecting obligations arising out of bilateral investment treaties. I have been glad to join them in signing this Award because I agree with the essentials of their finding of the facts, a finding which does not establish the liability of Lebanon.

[Signed]

 Date: May 24, 2012

Judge Stephen M. Schwebel

Commentary by Dany Khayat*

The award rendered on 7 June 2012 in ICSID Case No. ARB/07/12 in the matter of *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, is the first ICSID award involving Lebanon since the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "ICSID Convention") which entered into force in this country on 30 June 2004.

The arbitration proceedings between the Italian company *Toto Costruzioni Generali S.p.A.* (hereinafter "Toto" or the "Investor") and Lebanon were initiated on 12 April 2007, on the basis of Article 7.2b of the Treaty between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments signed on 7 November 1997, and which entered into force on 9 February 2000 (hereinafter the "Bilateral Investment Treaty" or the "BIT").

The dispute between the parties arose out of the construction by Toto of a 5.5 km section of the Beirut-Damascus highway, comprising the Dahr El Baidar Bridge, considered at the time to be the longest in the Middle East. The work was carried out by Toto on the basis of a 40 million USD contract signed in 1997 between Toto and the Lebanese Republic's *Conseil Exécutif des Grands Projets*, which subsequently became the Council for Development and Reconstruction (hereinafter "CDR"). This contract contained a dispute resolution provision providing for the settlement of disputes before Lebanese courts.

The Investor claimed that Lebanon breached several of its undertakings pursuant to the Bilateral Investment Treaty, by, inter alia, provoking additional costs borne by Toto, changing various provisions of the applicable law resulting in further expenditures, requiring additional work and creating substantial delays hampering the work.

A first phase on jurisdiction ended on 11 September 2009 when an Arbitral Tribunal, composed of Mr. Hans Van Houtte, President, Alberto Feliciani,¹⁷² appointed by Toto and Fadi Moghaizel, appointed by Lebanon, rendered a decision in which a substantial part of Toto's claims were considered to be outside the jurisdiction of the Arbitral Tribunal.

The decision of 11 September 2009 was commented on by Professor Ibrahim Fadlallah in a previous issue of this Journal.¹⁷³ In addition to calling on the readers to

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172. Mr. Feliciani resigned from his position in February 2012 and was replaced by Judge Stephen Schwebel.

173. See Commentary of the decision on jurisdiction by Prof. Ibrahim Fadlallah in the International Journal of Arab Arbitration, No. 4 (2009), pp. 235 *et seq.*, in part. pp. 289 *et seq.*

review Professor Fadlallah's comments, it is sufficient to recall here that the Arbitral Tribunal decided that only the following claims by Toto were within its jurisdiction:

"Whether (i) the delay in expropriation, (ii) the failure to remove Syrian troops and (iii) the changes in the regulatory framework, constitute breaches of Article 2 and/or Article 3.1 of the Treaty".

The provisions of the Treaty at stake refer to Lebanon's undertaking "not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation" of Italian investments in Lebanon, the creation and maintenance of "favourable economic and legal conditions in order to ensure the effective application" of the BIT, and to ensure "fair and equitable treatment" of Toto's investments. Toto also asserts that Lebanon breached Article 4.1 of the BIT which required Lebanon to afford "full protection and security" to Italian investments in its territory.

The position of the arbitrators rejecting contractual claims from their jurisdiction, even in the presence of a so-called "umbrella clause" in Article 9.2 of the BIT deeply and adversely affected the Investor's position.¹⁷⁴ As such, the 2012 award only decided on a small part of the Investor's myriad of initial claims by limiting its analysis to potential breaches of the BIT. Even with this substantially smaller scope, Toto failed to convince the Arbitral Tribunal of the validity of any of its arguments as the award strikes out all of the Investor's claims, which amounted to a total of more than 21 million USD.

The readers of this journal should be particularly interested in the fact that the Arbitral Tribunal determined that it was not necessary to apply Lebanese law to the dispute given that, "[t]he Treaty and the principles of international law suffice to decide the case at hand" (Award, §57). This position is consistent with the current case law of ICSID tribunals interpreting Article 42(1) of the ICSID Convention, which provides that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

Interpretation of Lebanon's undertakings under the BIT:

Before examining the merits of the Investor's claims, the Arbitral Tribunal set out its understanding of the various provisions of the BIT that were at stake in this arbitration (Award, §§149 *et seq.*).

174. See on this matter, I. Fadlallah's comments on the decision on jurisdiction, at p. 295 *et seq.*

The definition of the Arbitral Tribunal's standing with respect to the fair and equitable standard under Article 3.1 of the BIT is the most detailed. Having regard to several precedents in ICSID jurisprudence, the Arbitral Tribunal sets out the following characteristics of this provision:

- The fair and equitable provision takes into account the legitimate expectations of an investor.
- Legitimate expectations may follow from explicit or implicit representations made by the host state, or from its contractual commitments.
- The threshold for finding a violation of the fair and equitable standard is high (Award, §155).
- The fair and equitable standard does not mean "*the virtual freezing of the legal regulation of economic activities*", rather the State must be found to have acted either without serving any apparent legitimate purpose, or "*not on the basis of legal standards but on discretion, prejudice or defiance*", or "*for reasons that are different from those put forward by the decision maker*" or "*taken in willful disregard of due process and proper procedure*" (Award, §§156-157).
- For an alleged breach of contract to be considered as a breach of the fair and equitable treatment principle, State conduct is required, i.e. the State must have acted as a sovereign authority and "*not merely as a contracting partner*" (Award, §§161-162).
- Finally, in the latter situation of a breach of contract characterized to be a breach of treaty, and in the presence of a dispute settlement provision in the contract, it is not the violation of the contract that counts but "*the 'treatment' that the alleged breach of contract has received in the domestic context that may determine whether the treaty obligation of fair and equitable treatment has been breached*" (Award, §163). On this last point, the decision of the Arbitral Tribunal is subject to criticism. If a breach of contract may be considered to be a breach of treaty, there is no reason to apply the dispute resolution provision of the contract and require unlawful behaviour under international law by the local courts to find a breach of treaty. What counts in this situation is the breach, given that one has agreed to treat the breach of contract as a breach of treaty, not the "treatment" of the breach by local courts.

The Arbitral Tribunal's rulings over Toto's claims:

Although construction cases are generally complex and involve a wide range of claims, Toto's case is in fact relatively simple. The facts leading up to the award of the Arbitral Tribunal can be divided into three main categories: (i) the alleged delays by Lebanon to implement expropriations that were necessary to carry out the works on schedule, (ii) Lebanon's alleged failure to remove Syrian troops from the work site, and (iii)

the alleged changes in the regulatory framework that would have hampered Toto's investment. The Arbitral Tribunal dismissed Toto's claims in each and every case.

1. *The alleged delays by the State to carry out the required expropriations do not constitute a breach of the BIT:*

The Italian Investor argued that it had to incur considerable costs in the implementation of its contract as a result of delays attributable to the State's failure to perform contractually required expropriations on the work site. Toto alleged that the last expropriations occurred only a few months before the actual completion of the work. For Toto, it was mainly because of the late expropriations and the non-consequential delivery of the expropriated parcels, that the work took 48 months instead of the initial 18 months (Award, §172). Consequently, Toto considers that "*the late expropriations and the failure to deliver the parcels in a consecutive order constitute a breach of Lebanon's obligation to act in a diligent manner to promote and protect Toto's financial interest in the performance of the Contract, as Article 2 of the Treaty requires*" (Award, §183), as well as a breach of Article 3.1 of the Treaty given that its legitimate expectations to have "*consequential and consecutive*" delivery of parcels was frustrated (Award, §190). On the contrary, Lebanon's position was that it actually carried out most of the expropriations on time and any delays were due to variations by Toto of the original plans.

The Arbitral Tribunal rejected Toto's arguments and refused to determine that Lebanon breached any provision of the BIT in its handling of the expropriations. It first firmly determined that Toto had not been, for the most part, affected by any delay in the expropriations and that, in any case, twelve months is not an unreasonable time span (Award, §186). The Arbitral Tribunal also faulted Toto for not having provided any evidence of discriminatory or capricious actions by Lebanon in its handling of the expropriations. Finally, the Arbitral Tribunal also rightly gave weight to certain contractual waivers and extension of time granted by Toto over the relevant period of time which "*detract from the legitimacy of Toto's expectations to receive compensation for delayed expropriations*" (Award, §194).

Given the very slim evidence put forward by the claimant, the Arbitral Tribunal's findings may hardly be subject to any criticism.

The Arbitral Tribunal took very similar views and rejected Toto's claim with respect to a related claim concerning the removal of former owners of expropriated lands, based on Lebanon's undertaking to provide full protection and security to Italian investors (Award, §§207 et seq, particularly §226 et seq). On this latter point, the Arbitral Tribunal took a very restrictive view of the standard of full protection and security set out in the

BIT by limiting it to measures concerning "*the physical integrity of the investment*". In many other cases, ICSID Arbitral Tribunals took the view, rightly in our opinion, that full protection and security goes beyond physical integrity to reach the legal protection of the Investor.¹⁷⁵

2. Lebanon did not fail to remove Syrian troops from the works area in breach of its BIT undertakings:

For any follower of the situation in Lebanon and that of Lebanese/Syrian relations in the 1990s, Toto's claim that Lebanon failed to remove members of the Syrian army from the works area may seem to be quite audacious. Indeed, Toto alleged "*that it could not proceed with the works as Syrian troops had established a settlement in part of the area that was intended for the main workshop and the construction of the road*" and sought a determination that this is "*a breach of Article 2 of the Treaty, which requires the host State to create and maintain favourable conditions for the investment*" (Award, §197). Lebanon's defence insisted on the fact that the Syrian troops did eventually leave the area at stake relatively quickly and that, in any case, Toto was not able to set out any adverse consequence of their presence on these grounds. Finally, in what would have been perceived for decades in Lebanon as a politically sensitive statement, Lebanon also argued that "*the time this evacuation took is fair, given the fact that the Syrian Army was a foreign force and not under Lebanon's purview*" (Award §199).

The Arbitral Tribunal again resolutely rejected Toto's arguments by holding that "*Lebanon did whatever was within its power to obtain the Syrian troops' departure*" and that the measures taken proved to be adequate (Award, §200). The Arbitral Tribunal also added that Toto did not establish that "*Lebanon was inefficient in obtaining the departure of the foreign forces; even less that Lebanon failed to give Toto a fair and equitable treatment in this respect*". In an interesting obiter dictum, the Arbitral Tribunal took the view that, whether or not the Syrian troops were under the control of Lebanon, the burden of their presence would have to be borne by that country, from an international law perspective. In the present circumstance however, the Arbitral Tribunal determined that their presence in the locations at stake did not prejudice Toto's investment in Lebanon and thus did not breach any of Lebanon's undertakings under the BIT (Award, §205). On the basis of the evidence put forward by Toto as set out in the Award, the Arbitral Tribunal's position seems also reasonable and justified.

175. See, *inter alia*, *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006 which held that "*full protection and security may be breached even if no physical violence or damage occurs*".

3. Lebanon did not breach its treaty obligations in modifying its tax rules:

Toto claimed that Lebanon owed it a duty to maintain favourable economic and legal conditions, in particular on tax matters, pursuant to the BIT. By increasing certain taxes, including duties on cement and diesel, Toto argues that Lebanon breached its treaty undertakings.

The Arbitral Tribunal's response is, rightly so, in total opposition to Toto's claims as it recalled that the BIT provisions, and particularly the fair and equitable standard, does not "*entail a guarantee to the investor that tax laws and customs duties would not be changed*" (Award, §242). Given that there was no stabilization clause in the relationship between Toto and Lebanon, the Arbitral Tribunal had no difficulty in determining that "*changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction*" (Award, §244). As Toto did not come close to establishing this, there could not be any breach by Lebanon of its treaty obligations. On this issue, the Arbitral Tribunal's position seems balanced and in line with several precedents in ICSID arbitration.¹⁷⁶ It is clear that the fair and equitable provision of investment treaties cannot be taken to mean that any changes in a legal system would be unlawful under international law. What is prohibited, as the Arbitral Tribunal in *Parkerings v. Lithuania* decided, is for a State to "*act unfairly, unreasonably or inequitably in the exercise of its legislative power*".¹⁷⁷

Having rejected every single claim and argument by Toto, the Arbitral Tribunal logically rejects every claim for damages, including claims for moral damages, and decides that each party should pay its own costs.

Despite the severity of the Arbitral Tribunal on certain aspects in this award, such as on the interpretation of the full protection and security provision, it is hard not to agree with the substantial findings and conclusion in this case. The Investor's case seems, at least from reading the award, to have been quite fragile in terms of evidencing the treaty breaches. With the burden of proof resting on the Investor's shoulders, the Arbitral Tribunal's position seem justified. That being said, Toto lost its ICSID case long before the merits phase, when the Arbitral Tribunal took its decision on jurisdiction whereby it refused to decide on any of Toto's contract claims, for debatable reasons, as observed by Professor Fadlallah in this Journal.

176. See in particular *El Paso v. Argentina*, Award, 31 October 2011, §§350 *et seq.*, in particular §§365 *et seq.*

177. *Parkerings v. Lithuania*, Award, 7 September 2007, §335.