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Some Reflections on certain Pioneering Arbitral Awards

Key-note speech of Prof. Dr. Ahmed Sadek El-Kosheri delivered at the opening of Sharm El Sheikh Conference (16/11/2014)

1- When I reflect on my past experiences and recollect the memories of the arbitration cases encountered over the past forty years, a persistent idea comes always to my mind, according to which the awards issued with the unanimous concurrence of all the members of the arbitral panels demonstrate a sense of consciousness and morality that illustrates absolute integrity and ultimate neutrality and non bias, regardless of this or that member's personal culture or background marked by the environment of his upbringing.

2- The first image that is readily recalled is that of the highly esteemed Swedish Chief Justice Gunnar Lagergren who was the sole judge in a case filed before the International Court of Arbitration in Paris in the early sixties of the past century. The case had been filed by a citizen of a South American country claiming a commission fee of several millions of Sterling Pounds from a British military aircraft manufacturer which had supplied military aircrafts to this Latin American State. The distinguished Judge, following the intuition of a genuine judge seeking to find the truth, unexpectedly asked the Claimant before him about the reasons that induced the British Company to pick him up and

choose him in particular and entrust him with the task of helping to conclude this deal. The Claimant impulsively responded to this question by saying that he was the only one who could perform this job, as his brother was the Minister of Defense of that country who is authorized to approve that deal.

3- The distinguished Judge Lagergren then issued his historical decision rejecting the case of the Claimant who had admitted exploiting the status of his brother, the Minister of Defense in charge of issuing the procurement decision. The Judge's ruling was based on the principle that he who turns to international arbitration must have "Clean Hands", and should not seek to acquire a gain through the exploitation of the influence or authority of a government official. This is the form of corruption that came to be known as "Traffic of Influence" .The equitable and just conclusion which this honorable Judge has reached as a sole arbitrator went down in history as one of the most memorable decision, regardless of the solidity of the grounds on which he based his decision, and whether it would have been better for him to declare that the case be rejected on the merits as being contrary to international public policy as advocated by many jurists such as the late famous Jurist Pierre Lalive.

It must be mentioned here that the honorable Gunnar Lagergren was also chosen as the Chairman of the Panel in the border arbitration case between India and Pakistan in what came to be known as the "Run of Kutch" case, and equally to chair the famous border case arbitration between Egypt and Israel which is known as the "Taba" arbitration case.

4- My thoughts lead me to focus on a case of arbitration which was a turning point in my arbitration career. It was the case related to the nationalization of the operations of Aminoil Company by the State of Kuwait, when three of the most learned and widely known arbitrators of the same outstanding caliber, namely, Sir Gerard Fitz Maurice, the former Chief Justice of the International Court of Justice, with the late prominent Egyptian Professor Dr. Hamed Sultan, and one of the great French jurists and scholars Paul Reuter who was chosen, by the then Chief Justice of the International Court of Justice, as Chairman of the Arbitration Panel to adjudicate the claim of compensation requested by the American Company which amounted at that time to unprecedented sum of three billion US Dollars. The American company had filed this claim against the State of Kuwait for terminating the oil concession in 1977 before its due date in 2008, on the grounds that this nationalization was an internationally illegitimate act that breached a contract in which the two parties had agreed that its validity should last until 2008, and that this contract may not be unilaterally tampered with neither from the legislative or executive powers before its due term. The Company claimed that the termination of its concession had caused it to lose huge sums of profit which it was entitled to earn during the remaining three future decades of the contract's duration, and that this concession guaranteed its fixed, firm and stable rights by virtue of what is known as "a Stabilization Clause."

5- In that historical arbitration I had the honor of defending the cause of the State of Kuwait with regard to the legitimacy of the act of nationalization as such and the consequences of this act. Thus, I had to examine thoroughly thousands of pages reflecting

the legal opinions of twelve highly knowledgeable jurists from Europe, the United States and the Arab world, and reputable experts specialized in the evaluation of projects on the basis of what is known as" Discounted cash flow" in which the value of a project is assessed according to the profit it would have achieved, and hence payment of its equivalent in cash at the time of nationalization as a form of compensation for the said future gains.

My main task was to examine the latest developments in the field of oil contracts concluded after 1948, and particularly how those contracts endeavored to strike a balance between the principle of the sanctity of the contract known as "*Pacta Sunt Servand*a" and the principle of "*Rebus Sic Stantibus "* which is just as firm and is considered the other side of the coin and necessitates taking the changes in circumstances into account. This latter principle had been established in the Vienna Convention on International Contracts and had been likewise acknowledged by the international and national legal systems. In fact the United Nations had adopted this basic rule within its codification of the principle of "the Permanent Sovereignty of the States over the Natural Resources", as well as its fundamental right to introduce the necessary amendments to such contracts if circumstances call for it, and to readjust the contractual balance of the existing contracts.

6- After an exchange of submissions between the Parties and extensive Pleadings on this point and in particular its consequences, during which I had to plead my case before that August Panel, their final unanimous award was announced in May 1982. It recognized the necessity of taking into consideration the latest developments in oil dealings, as It was these developments

that initiated OPEC's decision to recognize the necessity of replacing the oil concessions inherited from the colonial era by agreements that guarantee the rights of the Sovereign States to have full control over their wealth of natural resources. The multinationals that had monopolized the exploration, extraction and transportation of oil (123 of them to be exact) after negotiating with the representative of OPEC ,Sheik Ahmed Zaki Yamani, the Saudi Minister of Petroleum at that time, for months in New York, had agreed to give up their old concessions which provided them excessive wealth in the past and agreeing to become simple contractors implementing a certain job for a given return to be agreed upon from time to time.

7- That explanation of the latest developments within the framework of the decisions of OPEC and its member States , or other States that benefited from this experience, was accompanied by a new climate that gave rise to a new form of legitimate expectations of all parties, hence rendering the mere idea of compensation for loss of gains that might be achieved in future years a purely unrealistic notion. In my defense about the second aspect of the case relevant to the amount of compensation for the nationalization of Amenoil in 1977 I focused in my pleading on the negotiations that took place between the representatives of the Company and those of the Government of the State of Kuwait a few weeks prior to the nationalization. In these negotiations the representatives of the Company offered to give up the 1948 concession in return for a service contract that would yield a tax free annual income of ten million US Dollars and for ten years. Meanwhile, the representatives of the Government of the State of Kuwait insisted on accepting to pay only half of that amount for a

service contract. When no agreement was reached the government had to resort to nationalization and to the termination of the contract.

8- We can thus confirm with full confidence that the Arbitration Panel was convinced of the necessity of taking into account the latest developments in the oil contracts, and that it is absurd to insist on abiding by the terms of a contractual relationship when the company concerned had immensely recovered the value of its investments in oil, and that presumptions of excessive gains to be achieved over the next thirty years had the concession remained in force is quite an unreasonable conception. All must accept the reality that the era of colonialist oil concessions have long gone by not only at the State of Kuwait but in its neighboring countries as well. The compensation for the termination of the concession did not exceed several hundreds of millions of Dollars and not the three billions that were claimed and had no justification whatever. I believe that the unanimous agreement of the three wise arbitrators in this unanimous Award is a declaration of the end of the era of colonialist dreams that were initiated by the monopoly of multinational oil companies in the exploration extraction and transportation of oil. It also marked the emergence of a new era where negotiations to reestablish the economic balance of the contracts has become a must, as renegotiations have become an eminent feature of contemporary times.

9- The best evidence of the impact of these developments is the review of the decisions issued by the Iranian- American Claim Tribunal in the oil disputes that arouse after the Iranian Islamic

Revolution and the termination of the oil contracts with the American companies which had returned to resume their activities in Iran during the reign of the Shah after the toppling of Mussadek'c cabinet and reversing the effect of his nationalization of the Iranian Oil.

In essence, all the oil disputes with Iran were settled on the basis of the ruling issued by the three wise arbitrators of the Aminoil dispute. In this respect I may refer to an interesting event that took place during the litigation of an Iranian -American oil disputes, when I had been called upon to give my testimony as an expert in one of those disputes, and I became later one of the arbitrators in other oil disputes. This happened when the Iranian member of the Tribunal withdrew from the Chamber in which he was a member, and I, quite surprisingly, was called upon to replace him. As a result these cases were settled amicably on the basis of Awards by "Consent of the Panels", and I was one of the signatories of these Awards. For reference see P.392 of Volume 28 of the Collection of the Principles set forth by the Iranian-American Claims Tribunal.

10- Away from the memories of the oil litigations and investments and disputes between the oil companies and the host countries and their sovereignty. I move now to another case that was also a turning point in my arbitration career. I had the honor of being one of the five arbitrators who were to issue an award pertaining to a dispute between Yemen and Eretria regarding sovereignty over a group of Islands near Bab El Mandab straits. War was about to break out between the two Countries when militants from Eretria, which had at that time only recently become independent, seized the island of Heneish. To avoid a military

intervention by Yemen, Dr. Botrous Ghali, the then United Nations Secretary General, played a vital role to prevent the outbreak of a war between the two Countries by persuading them to establish an arbitration panel in charge of arriving at a peaceful solution to this dispute. The Panel was made up of five arbitrators, each state to choose two and the four persons would agree on a fifth to chair the Panel. The task of this panel in the first stage was to determine the sovereignty over each one of the islands subject of the dispute. Then on the basis of the results of this first phase the second would be the demarcation of the territorial waters and the adjacent economic zones between the two Countries on the basis of the decision issued by the Arbitration Panel determining the line separating the maritime borders of each Country.

Together with a well experienced colleague, the late Keith Height, we, both became the two arbitrators chosen by Yemen in this arbitration. Eretria appointed two celebrities in the field of arbitration, namely, Steve Schewbel, the then Chief Justice of the International Court of Justice , and the British Professor Rosalyn Higgins, who later became a judge, and consequently the Chief Justice of the International Court of Justice .The four persons proceeded with their deliberations until it was finally agreed that the Chairman of the Arbitration Panel has to be the late Sir Robert Jennings, the former Chief Justice of the International Court of Justice. It must be mentioned in this context that the impeccable performance and neutrality of this knowledgeable Chairman was overwhelming as he managed the sessions and proceedings of the arbitration in such an excellent manner that a unanimous agreement was reached on both its first phase of determining the sovereignty of each Country and its second phase of the demarcation of the maritime boundaries of the two Countries.

Without disclosing the secrets of the deliberations respecting their confidentiality, I shall simply shed light on some of the positive aspects of the achievement we have accomplished through the guidance and directions of an unbiased Chairman who was keen to arrive at an equitable solution on profound legal basis. It is worth mentioning that due to his wisdom he was able to bring together four initially different and diverse stands, one or two were inclined to reject the claims of the two Countries on the ground that both did not have sufficient evidences to substantiate their claims. The unanimous decision was reached after the reopening of the case for a second round of pleading with each team having the chance to submit certain required evidence and documents to sustain the position of that party. Having access to documents which were not submitted during the original pleading, and being the only Muslim and the only Arab speaking member of the Arbitral Panel, I identified information and documents which became available to us after reopening the case for pleading, and which were invoked in an open hearing attended by all the members of the Tribunal and debated by representatives of both Parties. Thus, leading to decisive factors which rendered possible arriving to a right solution and formulations based on Islamic Law concepts which were in force for many centuries on both sides of the Red Sea. These concepts and prevailing traditions played a pivotal role in arriving at the required unanimity, as the arbitration Panel decided to apply the well known Islamic principle that three things are the common property of all mankind, "water, fire and grass". Therefore the Tribunal decided to safeguard the historical rights of the fishermen of the African side to continue with their traditional fishing throughout that area. Meanwhile the inhabitants of the Eritrean side were allowed to sell their

catch in the Port of Hodayeda in Yemen. The Arbitration Panel had likewise recognized the right of easement of fishing to individuals occupied in primitive traditional fishing even within the territorial waters of Yemen. It may be interesting to note Judge Higgins was proud of been involved in the application of an Islamic Law general principle.

I greatly cherish this particular arbitration experience as I consider it a model of unanimity based on the common sense and conviction of five arbitrators with different cultural backgrounds and inclinations who gathered their effort to elaborate a unanimous solution acceptable to all five. This arbitration award reflects genuine unbiased justice that transcends in its idealism all the specific characteristics among the various legal cultures and systems.

12- Then, I request your indulgence to take you, dear brothers and colleagues, to a recent unanimous award that supports the first example that I had cited which proves that the present has its roots in the past, such case relates to a context similar to the one that I had mentioned earlier which took place in the early sixties of the past century when Judge Lagrengen invoked the principle according to which the essence of Arbitration is to have "Clean Hands".

An important unanimous award was issued last year by an arbitral Panel of three arbitrators within the framework of ICSID. This award consolidates the legal propositions according to which the exploitation of the influence of an official in a host

country by a foreign investor has to be treated as "Traffic of influence." constituting a case of "corruption" under both the national and international contemporary legal systems.

This unanimous award was announced on 4 October 2013 by the Arbitral Panel set up within the framework of ICSID in Arbitration case No ARB/10/3 with Professor Gabrielle Kaufman Kohler as the Chairman, and with the membership of Mr. John Towsend and Dr. Claus Von Wobesser. This arbitration case is filed under the name METAL-TECD LTD, which is the name of the Claimant company having an Israeli nationality as well as domicile against the Republic of Uzbekistan.

13- The facts of this case can be summarized as follows: the Claimant sought to establish a joint stock company under the Investment Law of Uzbekistan to produce a raw material used in the construction and painting of buildings. The capital of this enterprise was one million US Dollars, equally divided between the Israeli company and a public sector company in Uzbekistan. The project that was initiated in the mid nineties of the past century and lasted until 2005 met with some difficulties that led to the suspension of its production and the submission of the dispute to the local courts, ending with declaring the bankruptcy of the Joint Venture Company and the liquidation of its assets.

Following the said Court Judgment, the Israeli company filed in January 2010 a case of international arbitration before ICSID on the grounds that the Respondent Uzbekistani company had breached its obligations provided for in the Uzbekistani Law of Investment under which the enterprise was established, and that it has violated, as well, the protection provided under the Israel/Uzbekistan Bilateral Treaty providing international

safeguards to investments. The Respondent State raised an objection about the lack of jurisdiction of the Arbitral Tribunal, as well as a plea for the non admissibility of the case. The Arbitral Tribunal, which was set up within the framework of the ICSID convention, decided to adjoin these objections to the merits of the case, in the sense that it refused to divide the arbitration case into two phases: a first one to adjudicate the preliminary objections, and a second one devoted to the merits of the case.

Upon the completion of exchanges related to the written submissions, several oral hearings were held during which the witnesses gave their testimonies regarding the huge sums that were about five million US Dollars paid as fees for certain persons under the name of companies claimed to be consultancy firms established in Switzerland and France. These firms belonged to local citizens who were influential persons in the host country.

14- Confrontations between the two Parties during the testimony of the representative of the Israeli company, proved to the Arbitral Tribunal, that one of the persons who had claimed rendering services to the project and had received huge sums of money in return was a high official in the presidency of the Republic in Uzbekistan and the other person was the brother of the Prime Minister. The Israeli company could not submit any evidence that either of them had independently rendered consultancy services to the project other than facilitating the obtainment of approvals due to their strong relationship with the presidency and the Prime Minister at that time. The first had received a share in the Swiss company MPC for a sum of 2.5

million Dollars and a share worth 775 thousand Dollars in the French company Laceg in addition to 95 thousand Dollars in cash. The second had received a similar sum in cash and a share in the two above mentioned companies that were specifically established outside the country in implementation of contracts concluded with them for so called consultancy services.(paragraphs 209-211 –P.68 of the Arbitration Award)

15- The Arbitral Tribunal concluded in paragraph 243 of its unanimous award (P.79) that it is its duty on the basis of the elements of proof under its disposal to prove whether corruption has been established with reasonable certainty through circumstantial evidences.

16- Therefore it analyzed each document or statement of testimony of every witness and came to the conclusion in its paragraph 327 (P.112) of its Award, that the Claimant company had exploited the influence of Mr. Chijenok to obtain approvals for investment, hence such investment is illegitimate according to Article 1(1) of the Israeli-Uzbekistani Agreement. The Arbitration Tribunal reached the same conclusion for Mr. Sultanov in paragraph 362 (P.121) of the Award.

17- Therefore the Arbitration Tribunal unanimously decided the following in paragraphs 372 and 373

"372- On the basis of the foregoing analysis the Tribunal comes to the conclusion that corruption is established of the Claimant's investment in Uzbekistan. As a consequence the investment has not been" implemented in accordance with the laws and

regulations of the contracting party in which territory the investment is made "as required by Article (1) of the BIT.
373- Uzbekistan's consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes "concerning an investment" and Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of ICSID Convention. Thus this Tribunal lacks jurisdiction over this dispute".

In the light of all what I stated, I conclude by saying: judges and arbitrators of Egypt and, of the Arab World this is justice as it should be done, and God bless you all.