

SEPARATE OPINION
of Professor Georges Abi-Saab

1 – Whilst concurring with the outcome of this very thorough and lengthy award, I have difficulty with some interpretations of the law it provides. Without necessarily endorsing unreservedly all the others, I would like to single out one or two such areas.

I Legitimate expectations

2 – The Award bases the liability of Romania, mainly on its frustration, by its premature ending of the Tax Incentives Scheme, EGO 24, of the legitimate expectations of the Claimants, in violation of the Fair and equitable treatment standard stipulated in Article 2(3) of the BIT. According to the Award, in its exposition of the grounds, the acts, conduct and representations generating such “legitimate expectations” need not rise to the level of sources of legal obligations

3 – For me, however, to deserve the qualifier “legitimate”, the “expectations” must be based on some kind of legal commitment. Under general international law, responsibility cannot ensue without a prior breach of a legal obligation. The conduct or representation of the government has to bear the makings of an identifiable legal commitment towards the specific investor, before we can speak of a breach (or frustration) of legitimate expectations, calling for a remedy or compensation.

4 – Such a commitment on the part of a government cannot transpire or be captured or condensed out of thin air; from general political statements, pep

up talks of encouraging investments, but must bear the makings of real legal assurances and commitments.

5 – This does not mean that such commitment must necessarily take the form of a formal or an explicit agreement. It can ensue from behaviour or conduct. But such conduct must be sufficiently concrete and specifically directed to the particular investor, to constitute an objective “representation” of a legal commitment, that can be objectively seen as generating legitimate expectations. Otherwise, any subjective perception (or self-interpretation) on the part of a potential investor or a favorable declaration or stance of a government, would be sufficient to trigger so called “legitimate expectations”, that can be used (or rather abused) as a basis of an allegation of a breach of an obligation that does not exist; or as means of circumventing the prior essential condition of responsibility, which is the proof of the obligation whose breach gives rise to that responsibility.

6 – *In casu*, the “Tax Incentives Scheme” (EGO 24) does not constitute by itself (i.e. the legislation as such) a legal commitment by the Romanian Government towards the investors to whom it is addressed in general. However, the issue of a “Permanent Investor Certificate” (PIC) to an investor under this Scheme, in addition to specifying the other party (the addressee, *le destinataire*), establishes in my view, a synallagmatic or reciprocal relation of exchange of legal considerations - by imposing on the investor certain legal obligations if he invests and takes advantage of the incentives – which bear the makings of legal commitments on both sides.

7 – Still, this does not totally dispose of the matter. It remains to be determined the contents and extent of the commitments of the Romanian Government in this regard. For while the Scheme was adopted for 10 years,

terminating in 2009, nowhere does it (or the complementary regulations including the PICS) contain the equivalent of a “stabilization clause” guaranteeing the freezing of its contents in terms of tax concessions throughout this period. In other words, all the PIC does it to confer on the investor the right to take advantage of the facilities provided under the Scheme, whatever they may be, at a given moment of time. The content of the Tax Incentives Scheme can change; and this variability of content has been recognized by the beneficiary investors, who did not contest earlier changes, whether in their favour or to their detriment. It can thus legitimately be argued that Romania did not violate any commitment towards PIC holders, as long as the Scheme continued to function until its term, with some incentives included in it; which was indeed the case here, as the “profits tax exemption” continued to run until the end of the term of the Scheme in 2009.

8 – It could equally be legitimately argued that by reducing radically the contents of the Tax Incentives Scheme EGO 24, and more particularly by abolishing the Raw Materials Facility, four years before its term, the synallagmatic relationship of exchange of legal considerations (fastened by the PIC) becomes extremely skewed. Such severe imbalance cannot be without legal consequences including possibly a measure of liability.

II – Possible remedies including compensation

9 – Such a severe imbalance between the exchanged legal considerations – be it in a commutative or synallagmatic formal contractual relationship, which is not the case here – gives place to a claim for the revision or the termination of the contract, on grounds of what is called in certain civil law jurisdictions “lésion”. The claim of revision involves the reduction of the

obligations of the other party, to eliminate the substantial disparity between the exchanged considerations. It (or more so the termination of the contract) can be accompanied by a measure of compensation, depending on the reasons that led the first party to reduce its initial legal commitments, and the circumstances surrounding this reduction.

10 – *In casu*, the reduction, and particularly the early termination of the Raw Materials Facility, was motivated by the imperious necessity for Romania to join the European Union, which was an overriding national interest. I realize, however, that the Respondent has not invoked “necessity”, as a ground for precluding wrongfulness (Article 25 of the ILC Draft Articles on State Responsibility), as Romania considers that it has acted rationally and reasonably; hence it did not commit a wrongful act at the face of it, that need to be exonerated by invoking necessity. That with which I agree, in the absence of the equivalent of a stabilization clause guaranteeing the freezing of the contents of the Scheme until its term and provided that Romania reduces proportionally the obligations of the PIC holders, to reestablish a semblance of balance between the exchanged considerations (which it claims it did, by not requiring the implementation of these obligations).

11 – The Award, however, while conceding that Romania acted reasonably, in good faith, and in pursuit of an overriding national interest, does not find this as precluding responsibility for what it considers the frustration of legitimate expectations of the Claimants.

12 – Another potential source of liability identified in the Award is the slackness of Romania in informing beneficiary investors of the inevitability of early termination of the raw materials facility. At the beginning, none of the major actors – the Romanian Government, the EU Commission, the Claimants – realized the absolute incompatibility of the raw materials

facility with the EU law (as a “hole in the tariff wall”). This is because of the initially prevailing opinion that it may be covered by the “Regional Aid” exception in European law. The incompatibility became increasingly obvious as the negotiations and exchanges advanced. Thus, for a certain span of time starting at some point in 2003 and ending up on 31st August 2004, with the declaration that the raw materials facility would be terminated 90 days later (subsequently extended to 22 February 2005), part of Romanian authorities, particularly the regional ones, continued to reassure investors that the raw materials facility will be safeguarded one way or another; while another part of the Romanian Government, particularly those who were negotiating with the EU Commission (such as Mr. Orban, the Deputy Chief Romanian negotiator at the time, who testified before the Tribunal) became increasingly convinced that there was no way to save the raw materials facility.

13 – Such situations of two parts of government speaking at cross-purposes, as well as hesitation or wavering, are usual occurrences, particularly in times of rapid (and rather disorderly) change. They can happen in the best of governments. I don’t think we can speak here of lack of transparency, as does the Award, which considers it as a breach of the fair and equitable treatment standard. This is because there was no intent of dissimulation or hiding (and diplomatic negotiations are, by their very nature, confidential). It is rather a case of failure of communication and lack of synchronization and coordination between different parts of government. This leads to slackness in “due diligence” (or negligence) on the part of the government, by failing to inform investors as soon as one of its components reached the conclusion that it would not be able to safeguard the raw materials facility to the end of

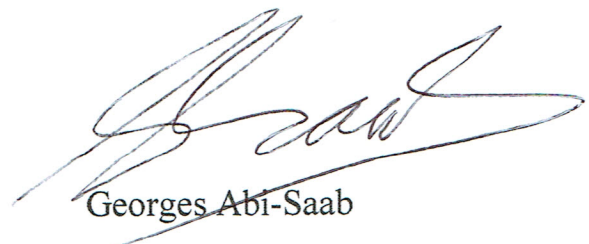
its term, in order to enable them to mitigate at the earliest the detrimental effect of this before-term termination.

14 – The honest admission of Mr. Orban of the failure of communication within the Government and between the Government and PIC holders, in addition to the declarations of the Prime Minister until early 2005 that the government would try to safeguard what it can of the incentives (which it did to no avail), or convert them into Euro-compatible ones, and to negotiate and possibly compensate investors (which it did not), bear recognition of a measure of responsibility.

15 – The measure of responsibility ensuing from this slackness or negligence, accompanying the taking of reasonable and lawful measures in the pursuit of legitimate overriding national interests, is limited. It is limited to actual ascertained loss, but does not include *lucrum cessans* according to general international law, in my opinion.

16 – However, Counsel for the Respondent considered that compensation as a general rule covers lost profits, though *in casu* those claimed are highly speculative. But the Award undertook a very tight and thorough calculation, dismissing indeed most of the claimed lost profits as speculative, which makes it difficult not to accept the result, particularly in the light of the admission of the principle by Counsel of the Respondent.

17 – In sum, I concur with the pecuniary outcome of the Award, but on other legal grounds, briefly explained above.



Georges Abi-Saab

5 December 2013