

**International Centre for  
Settlement of Investment Disputes  
(ICSID)**

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In the Matter of an Arbitration between

**HUSSEIN NUAMAN SOUFRAKI,**

Claimant

and

**THE UNITED ARAB EMIRATES**

Respondent

Case No. ARB/02/7

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**AWARD**

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***President:*** L. Yves Fortier, C.C., Q.C.

***Members of the Tribunal:*** Judge Stephen M. Schwebel  
Dr. Aktham El Kholy

***Secretary of the Tribunal:*** Mrs. Martina Polasek

In Case No. ARB/02/7

***BETWEEN:*** **Hussein Nuaman Soufraki (“Claimant”)**

Represented by:

**Mr. Jan Paulsson, Mr. Peter J. Turner, Mrs. Lucy Reed and  
Mr. Georgios Petrochilos**

of the law firm *Freshfields Bruckhaus Deringer*, as counsel

*And*

**The United Arab Emirates (“Respondent”)**

Represented by:

**Mr. Stephen Jagusch, Mr. Simon Roderick and Mr. David  
Mackie, C.B.E, Q.C.**

of the law firm *Allen & Overy*, as counsel

THE TRIBUNAL

Composed as above,

After deliberation,

*Makes the following Award:*

### **PROCEDURAL HISTORY**

1. On 16 May 2002, Claimant seized the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) with a Request for Arbitration directed against Respondent. The agreement at the heart of these proceedings is a Concession Agreement between the Dubai Department of Ports and Customs and Claimant dated 21 October 2000 (the “**Concession Agreement**”).
2. The Concession Agreement awarded Claimant a concession for a period of 30 years for the purpose of developing, managing and operating the Port of Al Hamriya and its surrounding area after which it was to revert to the Dubai Department of Ports and Customs.
3. The Concession Agreement was entered into by Mr. Soufraki in his personal capacity and, in that capacity, he is described in the Concession Agreement as a Canadian national.

4. In its Request for Arbitration, Claimant describes himself as an Italian national and invokes the Bilateral Investment Treaty between Italy and the United Arab Emirates (“**UAE**”) dated 22 January 1995 (the “**BIT**”). This BIT, which came into force on 29 April 1997, is similar in character and terms to the multitude of bilateral investment treaties that have been concluded in the last 35 years.
5. The Claimant claims that Respondent has breached its obligations under certain Articles of the BIT and claims damages which he alleges to have suffered as a result of these breaches.
6. The arbitration clause in the BIT reads as follows:
  - (1) All kinds of disputes or differences, including disputes over the amount of compensation for expropriation, requisition, nationalization or similar measures, between the Contracting State and an investor of the other Contracting State concerning an investment of that investor in the territory and maritime zones of the former Contracting State shall, if possible, be settled amicably.
  - (2) If such disputes or differences cannot be settled according to the provisions of

paragraph (1) of this Article within six months from the date of a written request for settlement, the investor concerned may submit the dispute to:

- (a) The competent court of the Contracting State having territorial jurisdiction for decision; or
  - (b) the Arbitral Tribunal according to the provisions provided in the protocol.
  - (c) the "International Center for the Settlement of Investment Disputes", for the application of the arbitration procedures provided by the Washington Convention of 18<sup>th</sup> March 1965 on the "Settlement of Investment Disputes between States and Nationals of other States".
- (3) Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have been exhausted and a Contracting State has failed to abide by or to comply with the award rendered by the Arbitral Tribunal within the term prescribed by the judgment pursuant to internal laws.

7. The ICSID registered the Request for Arbitration on 18 June 2002.

8. Claimant designated Judge Stephen M. Schwebel as arbitrator and Respondent designated Dr. Aktham El Kholy as arbitrator. With the agreement of the Parties, the Secretary-General of the Centre appointed L. Yves Fortier, C.C., Q.C. as President of the Arbitral Tribunal and, in accordance with Rule 6(1) of the Rules of Procedure for Arbitration Proceedings of the Centre (the “**ICSID Arbitration Rules**”), the Arbitral Tribunal (the “**Tribunal**”) was deemed to have been constituted and the proceedings to have commenced on 23 October 2002. Mrs. Martina Polasek, Counsel, ICSID, was designated by ICSID as Secretary of the Tribunal. With the consent of the Parties, Ms. Catherine Dagenais, an associate of Mr. Fortier, was appointed as Assistant to the Tribunal on 7 May 2003.
9. A first session of the Tribunal was held on 20 December 2002 in Washington, D.C., at the seat of the Centre, in the presence of representatives of the Parties, members of the Tribunal and the Secretary. Respondent gave notice of its intention to challenge the jurisdiction of the Tribunal on the grounds that Claimant was not a national of Italy under Italian law and that he did not possess effective Italian nationality under international law so as to entitle him to invoke the BIT.

10. At the first session, the Tribunal announced its decision to bifurcate the arbitration and to hear Respondent's objection to the jurisdiction of the Tribunal as a separate, preliminary issue.
11. In accordance with the timetable directed by the Tribunal, Respondent filed on 31 January 2003 its Memorial on the Claimant's nationality contesting the jurisdiction of the Tribunal (“**Respondent's Objection to Jurisdiction**”) on the basis that Claimant had not established that he was a national of Italy in order to meet the nationality requirement of Article 25(2)(a) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “**Convention**”) and to avail himself of the offer of the consent to ICSID jurisdiction made by the UAE in the BIT.
12. On 3 March 2003, Claimant submitted its Reply to Respondent's Objections to Jurisdiction, arguing that Claimant met the nationality requirement of Article 25(2)(a) of the Convention and could invoke the BIT to avail himself of the ICSID jurisdiction.
13. On 7 May 2003, a hearing on jurisdiction of the Tribunal was held in London. Counsel for both Parties presented oral submissions and answered questions from members of the Tribunal. Claimant was not present at this hearing. At the conclusion of the hearing, the Tribunal

directed each Party to file a bundle of their respective exhibits and a Post-Hearing Brief.

14. Claimant and Respondent filed their bundles of exhibits and Post-Hearing Briefs on jurisdiction on 30 June 2003. Among the exhibits filed by Claimant were five Certificates of Nationality issued by Italian authorities, copies of Claimant's Italian passports, and a letter from the Ministry of Foreign Affairs of Italy reading in part as follows:

I confirm that the right to have recourse to the said [ICSID/BIT] forum is recognized to you on the basis of your Italian citizenship, which is attested to by the documents that you provided to ... the Ministry of Foreign Affairs..

15. On 5 August 2003, following an exchange of letters between the Parties and submissions to the Tribunal, the Tribunal directed Claimant to file an affidavit addressing all of the issues pending before the Tribunal arising from Respondent's Objection to Jurisdiction.
16. On 9 September 2003, pursuant to the Tribunal's directions, Claimant filed his affidavit with the Tribunal.
17. On 23 September 2003, Respondent applied to the Tribunal for leave to cross-examine Mr. Soufraki on his affidavit. Claimant objected to Respondent's Application.



18. After deliberation, on 29 September 2003, the Tribunal granted Respondent's Application.
19. A hearing was held in Washington, D.C., on 12 March 2004. At the hearing, Claimant was cross-examined by Respondent on his affidavit and answered questions from members of the Tribunal.
20. As directed by the Tribunal, Claimant and Respondent filed their submissions following Mr. Soufraki's examination on 3 May 2004.

#### **ISSUE TO BE DETERMINED**

21. Under Article 41(1) of the ICSID Convention "the Tribunal shall be the judge of its own competence". Pursuant to that provision and Rule 41 of the ICSID Arbitration Rules, the Tribunal has to decide whether the dispute falls within the jurisdiction of the Centre. The Tribunal must determine whether Claimant is a national of Italy according to Article 25(2)(a) of the Convention and whether Claimant belongs to the class of investors to whom Respondent has offered consent to ICSID arbitration pursuant to the BIT.

## THE LAW

22. With respect to the nationality requirement, Article 25(1) and (2)(a) of the Convention reads, in its relevant parts, as follows:

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or a constituent subdivision or agency of the Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
- (2) “National of another Contracting State” means:
  - (a) any natural person who had the nationality of the Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either

date also had the nationality of the Contracting State party to the dispute.

23. Article 1(3) of the BIT defines an “investor of the other Contracting State” as a “natural person holding the nationality of that State [Italy] in accordance with its law”.

24. In order to determine whether Claimant is a national of Italy, on the facts of the present case three provisions of Italian law are relevant:

(1) Article 8, paragraph 1 of the Italian Law No. 555 of 1912 which reads as follows:

Loses the [Italian] citizenship:

(1) whoever spontaneously acquires a foreign citizenship and establishes his residence abroad.

(2) Article 17(1) of the Italian Law No. 91 of 1992 which reads as follows:

17.-1 Who has lost the [Italian] citizenship according to articles 8 and 10, Law 13<sup>th</sup> June, 1912, n. 555, or because he/she has not adhered to the option provided for by article 5, Law 21<sup>st</sup> April, 1983, n. 123, may reacquire the citizenship if he/she submits a relevant declaration

within two years from the entry into force of this law.<sup>1</sup>

(3) Article 13(1)(d) of the Italian Law No. 91 of 1992 which provides:

(1) whoever has lost his [Italian] citizenship reacquires it:

...

(d) one year after the date at which he established his residence in the territory of the Republic [of Italy], save in case of explicit renunciation within the same time-limit;

## **POSITIONS OF THE PARTIES**

### **1) Nationality of Claimant prior to and after 1991**

25. Both Parties agree that, prior to 1991, Claimant was or became an Italian national.

26. Respondent maintains that pursuant to Article 8, paragraph 1 of the Italian Law No. 555 of 1912 (which was the law in force in 1991), Mr. Soufraki lost his Italian nationality automatically when he acquired Canadian nationality and took up residence in Canada in or about 1991. Claimant in his testimony before the Tribunal affirmed that he considers himself to be

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<sup>1</sup> This term was further postponed to 31 December 1997 by article 2195, Law 23 December 1996, n. 662.

an Italian, as of right and choice, and that he never intended to relinquish his Italian nationality when he acquired Canadian nationality and took up residence in Canada in or about 1991.

27. It is also common ground between the Parties and their experts that, under Article 17(1) or Article 13(1)(d) of the Italian Law No. 91 of 1992, Mr. Soufraki could have reacquired automatically his Italian nationality after 1992 by a timely application or by taking up residence in Italy for a period of no less than one year.
28. It is acknowledged by Claimant that no application to reacquire Italian citizenship was ever made by Mr. Soufraki under Article 17(1).
29. In order to establish that he did reacquire his Italian nationality after 1992, under Article 13(1)(d), Mr. Soufraki maintained that, in order to oversee personally the renovation of a hotel in Viareggio acquired by one of his companies, he moved to Italy in February 1993, rented an office for a period of two years and resided in Italy “from March 1993 until April 1994”.
30. In order to demonstrate that he established his residence in Italy during that period, Claimant filed with the Tribunal the following:

- (i) An affidavit dated 17 April 2003, in which two affiants affirmed that Claimant was a resident of Viareggio/Massarosa between January 1993 and April 1994;
  - (ii) A two-year lease dated 15 February 1993 for office space in Viareggio/Massarosa; and
  - (iii) His own affidavit dated 9 September 2003.
- 31. Respondent submits that the evidence of Claimant does not constitute the “substantial evidence” necessary under Italian law to establish that Claimant reacquired Italian nationality after 1992.
- 32. Respondent avers, in particular, that Mr. Soufraki could not show that his 1993-1994 Italian office was attended to by a secretary, incurred telephone bills and otherwise acted as the center of his considerable and far-flung interests. Respondent also submits that the fact that Mr. Soufraki did not possess an Italian tax number before January 2003, his extensive overseas travel during the relevant period and his acquisition of a UAE residency visa during the same period all demonstrate conclusively that Claimant was not resident in Italy for one year within the meaning of Italian law.
- 33. Respondent also contends that even if Claimant were able to demonstrate that he was in fact resident in Italy for the required period, he still would not be entitled to reacquire Italian nationality because he was not registered as a resident with the Italian local authorities during that period

but rather remained on the register of Italians living overseas (the “AIRE” register).

**2) Certificates of Italian nationality**

34. Respondent contends that questions of nationality are not within the exclusive competence of the Italian State. Respondent maintains that the Tribunal has the power to determine disputed issues of nationality and that it must look behind the Certificates of Italian nationality that have been produced by Claimant, since these Certificates constitute, at best, merely *prima facie* evidence of nationality.
  
35. The only Certificate, avers Respondent, that could be said to support Claimant’s case is the Certificate issued by the Italian Consulate General in Istanbul dated 5 May 2003. However, argues Respondent, this Certificate cannot be relied upon since it was issued without knowledge by the Italian authorities of all the relevant facts, particularly that Mr. Soufraki had lost his Italian nationality in 1991.
  
36. For its part, Claimant points out that the BIT between Italy and the United Arab Emirates, in Article 1(3), defines a “natural person” as follows: “with respect to either Contracting State a natural person holding the nationality of that State according to its laws.” It follows that, pursuant to the Treaty as well as customary international law, the conferral and

possession of Italian nationality is a matter of Italian law, within the exclusive competence of Italy. Accordingly, Claimant maintains, the Tribunal is not entitled to look behind the Certificates issued by Italian authorities that state that Claimant is an Italian national. It is not entitled to gainsay the official letter of the Ministry of Foreign Affairs of Italy not only affirming Mr. Soufraki's Italian nationality but his entitlement to have recourse as an Italian national to proceedings against the UAE instituted under Italy's investment treaty with the Respondent.

37. The Claimant argues that, in the absence of fraud, it is not the province of the Tribunal to challenge the position of Italian authorities affirming the Italian nationality of Mr. Soufraki, a position taken by those authorities with knowledge of the law of Italy which they administer.
38. More particularly, Claimant argues that the Certificate of Nationality issued by the Italian Consulate General in Istanbul on 5 May 2003 is the appropriate and indeed exclusive means of nationality certification under Italian law and is therefore conclusive evidence of Claimant's Italian nationality under international law. Claimant also relies upon the above-quoted letter from the Italian Ministry of Foreign Affairs of 7 May 2003 which "confirm[s] that the right to have recourse to the said [ICSID/BIT] forum is recognized to you on the basis of your Italian citizenship, which



is attested to by the documents that you provided to ... the Ministry of Foreign Affairs.”

39. Respondent however questioned whether the Consulate General in Istanbul was aware of the loss of Mr. Soufraki’s Italian nationality by reason of his naturalization as a Canadian, noting that there is no evidence that the Consulate General was so informed. It contended in its written pleadings and in its cross-examination of Mr. Soufraki that, while his letter to the Ministry of Foreign Affairs soliciting the Ministry’s letter referred to his assumption of Canadian nationality, it did not make full disclosure by failing to refer to the consequential loss of his Italian nationality.
40. Mr. Soufraki resisted this latter contention, countering that he had revealed all that the Ministry needed to know. The import of his position was that the Italian Ministry of Foreign Affairs could be expected to know the law of Italy and to apply it to the facts of his case as he had adequately disclosed them.
41. Respondent also argued that, by describing himself in the Concession Agreement as a Canadian national, Mr. Soufraki made, in effect, for the purpose of the document constitutive of the investment, a clear agreement on nationality. Claimant responded that the Concession Agreement was

drafted by the UAE, that the reference to his Canadian nationality was unobjectionable since it was accurate but that it could just as easily have been a reference to his Italian nationality, of which the UAE was informed and which it had recognized.

### **3) The Requirement of Effective Nationality**

42. An alternative argument advanced by the Respondent was that, even if Mr. Soufraki should be found by the Tribunal to have been a national of Italy at the relevant dates, his dominant nationality was then not Italian but Canadian and hence his Italian nationality should not be treated as effectively Italian for purposes of an action under the Italy-UAE BIT.
43. The Claimant replied that dominant or effective nationality is not today accepted as a rule of customary international law and in any event finds no support in the provisions of the BIT or in the terms and *travaux préparatoires* of the ICSID Convention.
44. The Claimant also argued that, even if considerations of effective nationality were to be applied in this case, the Claimant's connections with Italy greatly outweighed his connections with Canada. Claimant maintained that the UAE itself had recognized Mr. Soufraki's Italian nationality in entry and residence permits, passport entries and like documents.

45. On the facts of this case, avers Claimant, Mr. Soufraki could not possibly be said to have acquired Italian nationality in order to come within the protection of the BIT between Italy and the UAE; his Italian nationality was not a nationality of convenience, bestowed, as in the *Nottebohm* case, in circumstances of speed and accommodation.
46. For the reason that appears below, it is unnecessary for the Tribunal to pass upon the question of dominant or effective nationality.

#### **DISCUSSION**

47. The Tribunal must decide:
- (1) whether Claimant, prior to 1991, was an Italian national;
  - (2) if so, whether Claimant lost his Italian nationality when he acquired Canadian nationality and took up residence in Canada in 1991;
  - (3) whether Claimant reacquired automatically his Italian nationality according to Italian law after 1992;
  - (4) whether questions of Italian nationality are within the exclusive and dispositive competence of Italy or whether the Tribunal is entitled to look behind the passports, identity cards, certificates and assurances issued by Italian authorities certifying the Italian nationality of Mr. Soufraki.

48. As noted above, the Parties are in agreement that, prior to acquiring his Canadian nationality in 1991, Mr. Soufraki was or became an Italian national.
49. Mr. Soufraki maintains that he was – and is – an Italian national by birth, having been born on the soil of Libya which was then under the sovereignty of Italy, as the child of Italian nationals. That is to say, Mr. Soufraki claims Italian nationality by right of *jus soli* and *jus sanguinis*.
50. Mr. Soufraki has recounted the steps that he took in 1988 at the age of 51 to be recognized as an Italian national and to carry an Italian passport, and he has provided his Italian passports and identity cards valid throughout the period 1988 to the present time, as well as five Certificates of Nationality and other indicia of Italian citizenship referred to below.
51. As was noted earlier, Mr. Soufraki in his testimony before the Tribunal affirmed that he considers himself to be an Italian, as of right and choice, and that he never intended to relinquish his Italian nationality. For its part, the Tribunal accepts and respects the sincerity of Mr. Soufraki's conviction that he was and remains a national of Italy.
52. However, the terms of Article 8, paragraph 1 of the Italian Law No. 555 of 1912 are clear and leave no room for interpretation. As a consequence of

his acquisition of Canadian nationality and residence in Canada, Mr. Soufraki, in 1991, lost his Italian nationality by operation of Italian law. It appears from the evidence that Mr. Soufraki was unaware of the loss of his Italian nationality at the time and became aware of it only in the course of, and as a result of expert evidence submitted in, these proceedings.

53. The first contentious question to be decided is whether, as Claimant maintains, the Certificates of Nationality issued by Italian authorities characterizing Mr. Soufraki as an Italian national,<sup>2</sup> and his Italian passports, identity cards and the letter of the Italian Ministry of Foreign Affairs so stating, constitute conclusive proof that Mr. Soufraki reacquired his Italian nationality after 1992 and that he was an Italian national on the date on which the parties to this dispute consented to submit it to arbitration as well as on the date on which the request to ICSID was registered by it.
54. Claimant contends that it is for the Italian authorities to interpret Italian nationality law, and that this Tribunal should apply their conclusions. He emphasizes that Article 1(3) of the BIT specifies that the nationality of a

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<sup>2</sup> Certificates of Nationality issued by the Municipality of Massarosa dated 12 September 1988, 7 October 2002 and 9 January 2003 (Exhibit R-2);  
Certificate of Nationality dated 14 April 2003 (Exhibit C-113(1));  
Certificate of Nationality issued by the Italian Consulate General in Istanbul dated 5 May 2003 (Exhibit C-106(1)).

natural person shall be determined according to the law of the Contracting State in question.

55. It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue.
56. While the Claimant does not dispute the foregoing authority of this Tribunal, it submits that it should exercise it so as to override official Italian affirmations of the Italian nationality of Mr. Soufraki only in response to allegations and proof of fraud.

57. While the Respondent did not in terms maintain that evidence in support of Mr. Soufraki's acquisition or reacquisition of Italian nationality was fraudulent, counsel of the Respondent when cross-examining Mr. Soufraki did characterize the evidence that he submitted in support of his claim that he was resident in Italy for more than a year 1993-94 as "bogus".<sup>3</sup> Nevertheless, the Tribunal wishes to make clear that, in its view, issues of alleged fraud need not be addressed.
58. The question rather comes to this. Mr. Soufraki asserts as a fact that he was resident in Italy for business purposes for more than one year in 1993-94. In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts. Claimant accordingly bears the burden of proving to the satisfaction of the Tribunal that he was resident in Italy for more than one year in 1993-94 and accordingly that he was an Italian national on the relevant dates and that, as a result, he belongs to the class of investors in respect of whom the Respondent has consented to ICSID jurisdiction.

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<sup>3</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at p. 55.

59. The Tribunal agrees with Claimant that, as an international Tribunal, it is not bound by rules of evidence in Italian civil procedure.<sup>4</sup>

60. The “substantial” evidence rule, while it may well be required in an Italian court,<sup>5</sup> has no application in the present proceedings.

61. What weight is given to oral or documentary evidence in an ICSID arbitration is dictated solely by Rule 34(1) of the ICSID Arbitration Rules:

The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

62. In the present instance, it is thus for this Tribunal to consider and analyse the totality of the evidence and determine whether it leads to the conclusion that Claimant has discharged his burden of proof.

63. The Tribunal will, of course, accept Claimant’s Certificates of Nationality as “*prima facie*” evidence. We agree with Professor Schreuer that:

... A certificate of nationality will be treated as part of the “documents or other evidence” to be examined by the tribunal in accordance with Art. 43 [of the Convention].

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<sup>4</sup> Claimant's Post-Hearing Brief dated 30 June 2003 at para. 60.

<sup>5</sup> Prof. Sacerdoti's Second Supplemental Legal Opinion dated 2 June 2003, Exhibit R-17.



Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents.<sup>6</sup>

64. It is common ground between the Parties that, if Claimant reacquired his Italian citizenship after 1992, it is as a result of having established his residence in Italy for one year after that date.
65. Consequently, it is evident that Mr. Soufraki's Certificate of Nationality issued in 1988 cannot inform the Tribunal's decision.
66. As to the four Certificates of Nationality issued after 1992, there is no evidence in the record that any Italian official who issued to Mr. Soufraki any of these Certificates undertook any inquiry in order to determine whether he had lost his Italian citizenship prior to 1992 and whether he had established his residence in Italy for one year after enactment of the Law of 1992 and thus reacquired his Italian citizenship.
67. Furthermore, the Tribunal notes that, when he was cross-examined, Mr. Soufraki admitted that he had not informed any Italian official of his loss of Italian citizenship since he did not believe that he had lost it.<sup>7</sup>

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<sup>6</sup> Christopher SCHREUER, *The ICSID Convention: A Commentary*, p. 268, para. 433.

<sup>7</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at pp. 225-226.

68. The Tribunal accordingly holds that the Claimant cannot rely on any of the pleaded Certificates of Nationality to establish conclusively that he was a national of Italy on the dates of the Request for Arbitration and its registration. Nor can it treat the letter from the Ministry of Foreign Affairs as conclusively establishing Mr. Soufraki's Italian nationality and his entitlement to invoke Italy's BIT with the UAE, essentially for the same reason, namely, that it is not shown that the Ministry knew when it wrote its letter that Mr. Soufraki had lost his Italian nationality and that hence the question was whether he had reacquired it.
69. The Tribunal must now examine the other evidence in the record which, Claimant maintains, demonstrates that Mr. Soufraki resided in Italy for one year after the enactment of Italian Law No. 91.
70. The concept of "residence" as used in Article 13(1)(d) of Italian Law No. 91 is factual. It is different from the concept of "legal residence".<sup>8</sup>
71. Consequently, actual residence for one year is a sufficient requisite for the reacquisition of Italian citizenship.

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<sup>8</sup> Legal opinion of Avv Castellani and Curto dated 23 June 2003, Exhibit C-114, paras. 16-25.

72. Residence does not imply continuous presence and does not disallow travel. However, the Tribunal agrees with Respondent that proof of some continuity of residence during that year is required.
73. The Tribunal will consider whether the evidence discloses that Mr. Soufraki, during the relevant period, had his “habitual abode” in Italy and that he manifested his “intention to fix in Italy the center of [his] own business and affairs.”<sup>9</sup>
74. The Tribunal’s inquiry begins with Mr. Soufraki’s Affidavit. In paragraphs 29 to 33 of his Affidavit, as we noted earlier, Mr. Soufraki deposed that, in order to oversee personally the renovation of a hotel in Viareggio acquired by one of his companies, he moved to Italy in February 1993, rented an office for a period of two years and resided in Italy “from March 1993 until April 1994.”
75. Mr. Soufraki has produced two documents to prove his claimed period of residence in Italy in 1993 and 1994. These are the affidavit sworn by Messrs Casini and Nicotra dated 17 April 2003 and the lease for office space of a flat in Viareggio dated 15 February 1993.

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<sup>9</sup> Legal opinion of Avv Castellani and Curto dated 23 June 2003, Exhibit C-114, para. 22(a).

76. The Tribunal finds the following evidence provided by Mr. Soufraki in his Affidavit and in the course of his cross-examination particularly relevant to its inquiry:

- (i) After leaving Libya in 1978, Mr. Soufraki established his “main family home” in London.<sup>10</sup>
- (ii) From 1988 until 1997 or 1998, Mr. Soufraki had the free use of a house in Italy belonging to his friend and lawyer, Avvocato Picchi.<sup>11</sup> At the same time, in his Reply Memorial of 3 March 2003, Claimant stated in respect to his periods of residence in Italy that:

... the Claimant has not taken permanent residence in Italy for longer than two years at a time. However:

- In 1983-1984 the Claimant had the day to day management of the Fratelli Benetti shipyard in Viareggio;
- In 1988 the Claimant resided permanently in Massarosa and is recorded as so doing in official records; and
- during his subsequent frequent stays in Italy, the Claimant stays at his

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<sup>10</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at pp. 20, 164.

<sup>11</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at p. 64.

own hotel in Viareggio, the American Hotel, which is not documented.<sup>12</sup>

- (iii) After obtaining his Italian passport in 1988, Mr. Soufraki returned to his residence in Monaco “for tax purposes”.<sup>13</sup>
- (iv) In 1988, Mr. Soufraki placed himself on the Register of Italians living overseas (the “**AIRE Register**”). He has remained on the AIRE Register to this date and did not, in 1993, inform the Italian authorities of a change in his residence.<sup>14</sup>
- (v) In January 1993, when he says that he took up his residence in Italy, Mr. Soufraki states that he “had no intention of being a resident again”.<sup>15</sup>
- (vi) During the 1993-94 period in which Mr. Soufraki maintains that he was resident in Italy while directing his international business interests, Mr. Soufraki did not personally obtain an Italian tax number.<sup>16</sup>

77. The Tribunal observes that in the quotation reproduced above in paragraph 76(ii) of this Award, Claimant’s Reply made no mention of Mr. Soufraki’s residing in Italy in the 1993-94 period.

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<sup>12</sup> Claimant’s Reply Memorial dated 3 March 2003 at p. 53, para. 156.

<sup>13</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at pp. 41, 45, 56, 57, 73.

<sup>14</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at pp. 66-69, 74.

<sup>15</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at p. 85.

<sup>16</sup> Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at p. 236.

78. The Tribunal does not find that the affidavit of Messrs. Casini and Nicotra constitutes disinterested and convincing evidence. It should be noted that Mr. Casini is an auditor whom Mr. Soufraki has engaged over the years, and that Mr. Nicotra is a receptionist at Mr. Soufraki's hotel in Viareggio.
79. As to the lease, the Tribunal notes that it was to be used by Mr. Soufraki "as his own personal office" and that it was never registered although its terms required that, "in case of use" (in *caso d'uso*), it needed to be registered.
80. In the opinion of the Tribunal, neither the affidavit of Messrs. Casini and Nicotra, nor the unregistered lease of the Viareggio flat, sufficiently sustain the central submission of the Claimant that he resided in Italy for more than one year as from March 1993.
81. Having considered and weighed the totality of the evidence adduced by Mr. Soufraki, the Tribunal, unanimously, comes to the conclusion that Claimant has failed to discharge his burden of proof. He has not demonstrated to the satisfaction of the Tribunal that he established and maintained his residence in Italy during the period from March 1993 until April 1994.

82. In the circumstances, Claimant cannot rely today on Article 13(1)(d) of Italian law No. 91 of 1992.
83. The Tribunal recognizes that it is difficult for Mr. Soufraki, whose business interests span continents and who constantly travels the world, to reconstruct his actual residence during a twelve or thirteen month period more than ten years earlier. It recognizes that Mr. Soufraki, had he been properly advised at the time, easily could have reacquired Italian nationality by a timely application. It further appreciates that, had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be.
84. Since, as found by the Tribunal, Claimant was not an Italian national under the laws of Italy at the two relevant times, namely on 16 May 2002 (the date of the parties' consent to ICSID arbitration) and on 18 June 2002 (the date the Claimant's Request for Arbitration was registered with ICSID), this Tribunal does not have jurisdiction to hear this dispute.

## **COSTS**

85. Taking into account the circumstances of the case and the Respondent's success with its jurisdictional objection, the Tribunal concludes that it is appropriate that the costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, be borne two-thirds by Claimant and one-third by Respondent, but that each party bears its own legal costs and expenses in connection with the proceeding.

## **AWARD**

86. For the reasons set out in the foregoing paragraphs, the Tribunal unanimously decides:

- a. That the present dispute falls outside its jurisdiction under Article 25(1) and (2)(a) of the ICSID Convention and Article 1(3) of the BIT;
- b. That the costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, be borne two-thirds by Claimant and one-third by Respondent;
- c. That each party shall bear its own legal costs and expenses in the proceeding.



SIGNED in Washington, this 7th day of July 2004

signed  
Dr. Aktham El Kholy  
Co-arbitrator

signed  
Judge Stephen M. Schwebel  
Co-arbitrator

signed  
L. Yves Fortier, Q.C.  
Chairman