

Separate Opinion of Michael Evan Jaffe on the Question of Attribution Under Art 8, ILC Articles

In this separate opinion, I write to express my views on the attribution issue under Art 8 of the Articles on State Responsibility (“ILC Articles”), noting that my separate views do not affect the outcome of the proceedings. Rather, I write to clarify that the evidence taken as a whole can be read as demonstrating that Emlak was not only under the control of the State – here TOKI – as a *de jure* matter; but, as a practical matter, took the decision to terminate the Ispartakule III Contract at the direction of TOKI. It is for that reason that I do not join the majority’s decision that Emlak’s conduct in terminating the Ispartakule III Contract cannot be attributed to the Turkish State.

1. As my colleagues in the majority observe, for the purposes of Art 8, ILC Articles, the question is whether Emlak acted ‘*on the instructions of, or under the direction or control of [the State] in carrying out the conduct*’ which forms the subject of the Claimant’s complaints under the BIT. And, I join them as well in their observation that the words ‘direction’ and ‘control’ in Art 8 are to be read disjunctively. Therefore, if either element is satisfied, there is a basis for attribution under Art 8.
2. Further, I join my colleagues in the majority in accepting the Respondent’s submission that the relevant test for determining whether Emlak acted under the control of TOKI is ‘effective control.’ From that proposition, the question can be stated as whether any aspect of the administration and termination of the Contract was performed under the instructions or direction of TOKI. And, I accept as correct the majority’s view that it is insufficient for the purposes of attribution under Art 8 to establish merely that Emlak was majority-owned by TOKI.
3. Here, the evidence establishes that TOKI was not only capable of exerting effective control over Emlak through its control over the voting shares and through its representation on the Board of Emlak; but, that through Mr. Bayraktar, the head of Emlak and the Chairman of TOKI, Emlak was all but read out of the decision-making equation as regards termination of the Ispartakule III Contract.
4. In addition to the discussion in the majority’s opinion of TOKI’s connection to the decision to terminate the Ispartakule III Contract based on the *Milliyet* newspaper article dated 2 June 2010, Mr Bayraktar’s testimony at the hearing showed that as a practical

matter the lines of separateness between TOKI and Emlak were all but non-existent as regards the termination decision.

5. Notably, the majority acknowledges that the Emlak Board was made up primarily of TOKI employees, that Mr. Bayraktar was their superior as the Chairman of TOKI, that the Emlak Articles of Association, at Art 8.9, state that TOKI's shares "constitute dominancy in management," and that "Emlak was subject to the control of TOKI and, therefore, the Turkish State." (Majority Award at ¶307). Moreover the majority observes that "TOKI was certainly capable of also exerting sovereign control over Emlak." (Majority Award at ¶308) And, the majority goes so far as to conclude "To the extent that TOKI exercised such governmental control in particular instances in order to achieve a particular result, the conduct of Emlak would have been attributable to the State." (Majority Award, *Id.*)
6. Significantly, however, the majority all but ignores the very evidence that they say would be probative, namely the evidence found in the testimony of Erdoğan Bayraktar. At a time when he was called to testify on the topic of the independence of Emlak, Mr. Bayraktar showed that control and direction were more than mere possibilities. In his testimony, when discussing the Tulip investment and the termination of the Ispartakule III Contract, and without being asked to address TOKI's interest or purpose, Mr. Bayraktar spoke not about Emlak's interest and purpose, but, about TOKI's. Mr. Bayraktar testified:

And allow me to make a couple of clarifications, please. I would definitely like to ensure that the distinguished arbitrators understand our sincere intentions. We were very delighted to see Tulip and its foreign capital enter the Turkish market, and we were more than willing to help them out, obviously in compliance with the laws.

That's exactly the working principle of TOKI. TOKI would like to attract more and more bidders into their tenders, and we are always delighted to have foreign capital in our tender process. And we also ensure that we facilitate the way contractors work. That's our main working principle. Had that not been our main principle, we would not have been able to build half a million units in eight years, and we did that without getting a single cent from the Treasury.

* * *

Until the last moment we never wanted to terminate. We never want to terminate any contract in TOKI. Maybe you also know that we have in Turkey about 200,000 contractors. We have an inflation of contractors; we are very strong. In Germany, that has an 82 million population, they have about 600 or 700 contractors. But we have an inflation of contractors. That's why we really had to take everything very seriously. That's why we really had to make sure that the contracts work.

* * *

But there is a contract in front of us. I implemented 30,000 tenders, tender documents, some big, some small. Yes, I had two hats on my head. Here I was president of TOKI; on the other hand, I was the president of the board of directors of the other institution, of Emlak. But that was natural. And I am repeating, I am repeating over and over again: when I saw Mr Meyer, he was a European, he was a Dutch citizen, he was the owner of this project, and when I saw him, I said: now the project is safe, and we shall be showing this project as a reference to other European investors. On the one hand, we want to increase our foreign investments; on the other hand, we would like to join the European Union, so we would like to cooperate with European companies. So we really spent an extraordinary effort in order to conclude this project positively.

Transcript, Day 3 at (25:8-13, 25:22-26:12, 34:10-18, 52:12-53:3).

7. Revealingly, it was not, according to the Respondent, TOKI that did the tender for the Ispartakule III Project;¹ it was not TOKI that was to facilitate the way contractors work; and it was not TOKI that terminated the Ispartakule III Contract. Yet, at each measure, Mr. Bayraktar addressed the issue as a principle, achievement, and action of TOKI, not Emlak.
8. The formal separateness urged by the Respondent notwithstanding, Mr Bayraktar's testimony shows that TOKI's sovereign interests drove the termination. On this record, it would be difficult to conclude that the decision to terminate the Ispartakule III Contract was not guided – if not fully directed – by the sovereign's hand.
9. The majority reaches the conclusion that there is no basis for attributing the acts of Emlak to the State because there were commercially viable grounds for the termination.

¹ See Respondent's Counter-Memorial on Jurisdiction, Merits and Damages at ¶138. In fact the tender announcement is captioned "ANNOUNCEMENT FOR THE JOB OF REVENUE SHARING IN EXCHANGE FOR SALE OF PARCELS" promulgated by "EMLAK RESIDENTIAL REAL ESTATE INVESTMENT PARTNERSHIP INC., A Partnership of TOKI under the Turkish Prime Minister's Office." (Exhibit CE-202).

(Majority Award at ¶¶ 324-326). That approach answers the first question (whether the acts of Emlak are to be attributed to the State) by answering the second question (whether the decision to terminate was based on commercially viable grounds).

10. However, the answer to the second question does not necessarily foretell the answer to the first. For example, if the President of TOKI were not on the Emlak Board; but, if she called the Chairman of Emlak and said that as a matter of public policy, the government was no longer interested in tolerating non-performance by foreign investors and, accordingly, Emlak was directed to terminate the Ispartakule III Contract, there would be no question that TOKI – a State organ – directed the termination. That conclusion, however, does not answer the second question, namely: whether the termination violated the BIT.
11. It is because the questions are separate and because there is at least a credible basis for finding that Emlak's termination decision was taken under the direction and control of TOKI, an organ of the Turkish State, I would treat the attribution question under Art 8 as provisionally addressed in favor of attribution and focus on the question of whether there was state action amounting to a violation of the BIT. On that question, I join my colleagues in concluding that the proof offered was not sufficient to find a violation of the BIT.



Mr. Michael Evan Jaffe

Arbitrator

Date:

March 7, 2014