INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE ANNULMENT PROCEEDING BETWEEN

ORASCOM TMT INVESTMENTS S.À R.L.

Applicant

and

PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA

Respondent

ICSID Case No. ARB/12/35

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
H.E. Judge Peter Tomka, President
Ms. Bertha Cooper-Rousseau, Member
Prof. Dr. Klaus Sachs, Member

Secretary of the *ad hoc* Committee
Ms. Aurélia Antonietti

Date of dispatch to the Parties: September 17, 2020

Representing the Applicant

Ms. Carolyn B. Lamm
Ms. Andrea J. Menaker
Mr. Brody K. Greenwald
Ms. Kristen M. Young
Ms. Noor Davies
Ms. Rocío Digón
Ms. Hadia Hakim

White & Case LLP
Washington, D.C.

Mr. Oussama Daniel Nassif
Group Legal Counsel

Representing the Respondent

Prof. Emmanuel Gaillard
Dr. Yas Banifatemi
Mr. Benjamin Siino
Mr. Pierre Viguier
Ms. Teresa Vega
Mr. Peter Petrov

Shearman & Sterling LLP
Paris, France

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS/DEFINED TERMS

Award	Award rendered in *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) on May 31, 2017.
Annulment Hearing	Hearing on Annulment held on May 27-28, 2019 in Paris
Applicant/Claimant/Orascom	Orascom TMT Investments S.à r.l. (formerly Weather Investments II S.à r.l.)
Application	Application for Partial Annulment dated September 28, 2017
A. PHB1	Applicant's Post-Hearing Brief dated July 3, 2019
A. PHB2	Applicant's Reply Post-Hearing Brief dated July 17, 2019
BIT or the Treaty	Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments signed April 24, 1991 (entered into force October 17, 2002)
CLA-[#]	Applicant's Legal Authority
Committee	*Ad hoc* Committee composed of Judge Peter Tomka (President), Ms. Bertha Cooper-Rousseau, and Professor Klaus Sachs, constituted on October 26, 2017
Counter-Memorial	Respondent's Counter-Memorial on Annulment dated June 15, 2018
ENTV	Entreprise Nationale de Télévision
FNI	Fonds National d'Investissement algérien
Hearing	Hearing on Preliminary Objections that took place in the World Bank Offices in Paris from May 26 to 30, 2015
ICJ	International Court of Justice
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006

ICSID Convention or Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
Investment Agreement	Investment Agreement entered into between OTH, Oratel (on behalf of OTA) and Algeria on August 5, 2001
Majority	The majority of the members of the Tribunal
Memorial	Applicant's Memorial on Partial Annulment of the Award dated March 15, 2018
MTN	Mobile Telephone Networks Holdings (Proprietary) Limited
Oratel	Oratel International Inc.
OS	OS Holding
OTA	Orascom Telecom Algérie S.P.A.
OTH	Orascom Telecom Holding S.A.E. (now Global Telecom Holding S.A.E (GTH))
OTH Arbitration	PCA Arbitration Case No. 2012-20 *Orascom Telecom Holding S.A.E.* v. *People's Democratic Republic of Algeria*
OTMTI (Claimant; formerly Weather Investment II S.à.r.l.)	Orascom TMT Investment S.à.r.l.
OTSE	Orascom Telecom Services Europe
PCA	Permanent Court of Arbitration
R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder on Annulment dated February 15, 2018
Reply	Applicant's Reply on Partial Annulment of the Award dated October 12, 2018

R. PHB1	Respondent's Post-Hearing Brief dated July 3, 2019
R. PHB2	Respondent's Second Post-Hearing Brief dated July 17, 2019
RL-[#]	Respondent's Legal Authority
Request for Arbitration	Request for Arbitration filed on October 24, 2012
Respondent/Algeria	The People's Democratic Republic of Algeria
SPA	Share Purchase Agreement entered into between VimpelCom, OTH (which had by then changed its name to Global Telecom Holding S.A.E., "GTH") and the Algerian Fonds National d'Investissement (the "FNI") on April 18, 2014
Tr. Day [#] [language] page:line	Transcript of hearings
Tribunal	Arbitral Tribunal which rendered the award of May 31, 2017 consisting of Professor Gabrielle Kaufmann-Kohler (President), Professor Albert Jan van den Berg and Professor Brigitte Stern
VCLT	Vienna Convention on the Law of Treaties
VimpelCom	VimpelCom Limited
WAHF	Wind Acquisition Holdings Finance S.p.A.
WCSP1	Weather Capital Special Purpose 1 S.A.
Weather Capital	Weather Capital S.à r.l.
Weather Capital Finance	Weather Capital Finance S.A.
Weather I	Weather Investments S.A.
Weather II [the Claimant, i.e. OTMTI, under its previous denomination]	Weather Investments II S.à r.l.
Weather Investments	Weather Investments S.p.A. (originally called Weather Investments S.r.l.; subsequently changed name into Wind Telecom S.p.A)
Wind	Wind Telecomunicazioni S.p.A.
Wind Acquisition or WAF	Wind Acquisition Finance S.p.A.

I. INTRODUCTION AND THE PARTIES

1. This case concerns the outcome of a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments (the "**BLEU-Algeria BIT**", the "**BIT**" or the "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**" or the "**Convention**").

2. The Claimant in the arbitration proceeding and the Applicant in the annulment proceeding is Orascom TMT Investments S.à r.l. ("**OTMTI**" – formerly "**Weather II**" or the "**Applicant**"), a company incorporated in Luxembourg.

3. The Respondent is the People's Democratic Republic of Algeria ("**Algeria**" or the "**Respondent**").

4. The Applicant and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives are listed above on page (i).

II. PROCEDURAL HISTORY

5. On May 31, 2017, a tribunal composed of Professor Gabrielle Kaufmann-Kohler, a Swiss national (President); Professor Albert Jan van der Bern, a Dutch national; and Professor Brigitte Stern, a French national (the "**Tribunal**"), rendered the Award whereby it decided and ordered as follows (the "**Award**"):

> a. The claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute;
>
> b. The Claimant shall reimburse to the Respondent the amounts which the Respondent has deposited with ICSID for the costs of the arbitration;
>
> c. The Claimant shall pay US$ 2,842,811.01 plus €58,382.16 to the Respondent, as a contribution to the legal fees and other expenses which the Respondent incurred in connection with the arbitration;

d. All other requests for relief are dismissed.[1]

6. On September 28, 2017, OTMTI filed an Application for Partial Annulment of the Award (the "**Application**") pursuant to Article 52(1) of the ICSID Convention and requested the stay of enforcement of the Award pursuant to Article 52(5) thereof. The Application was made within the time-period provided in Article 52(2) of the ICSID Convention.

7. On October 2, 2017, the ICSID Secretary-General registered the Application and notified the Parties that the enforcement of the Award was provisionally stayed, pursuant to Rule 54(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**").

8. On October 12, 2017, the Applicant requested the Centre to use certain criteria for the appointment of the members of the *ad hoc* Committee.

9. On October 16, 2017, the Respondent presented its observations on the Applicant's letter of October 12, 2017.

10. On October 16, 2017, the Secretary-General informed the Parties that, in accordance with Article 52(3) of the ICSID Convention, she intended to recommend to the Chairman of the Administrative Council the appointment of Judge Peter Tomka, a Slovak national, Ms. Bertha Cooper-Rousseau, a Bahamian national, and Professor Dr. Klaus Sachs, a German national, to the *ad hoc* Committee (the "**Committee**") and invited the Parties to provide any comments by October 20, 2017.

11. On October 20, 2017, the Respondent informed the Centre that it had no observations regarding the proposed candidates.

12. On October 21, 2017, the Applicant indicated that it had no observations regarding the proposed candidates.

13. On October 26, 2017, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three Committee Members had accepted their

[1] Award, para. 587.

appointments and that the Committee was therefore deemed to have been constituted on that date. Ms. Aurélia Antonietti, Senior Legal Adviser, was designated to serve as Secretary of the Committee.

14. On October 27, 2017, the Committee informed the Parties of its availability to hold a first session on December 12 or 13, 2017, in Paris, or on December 13, 2017 in Washington, D.C., noting their preference for a hearing in Paris, without prejudice to the agreement of the Parties or the decision of the Committee on the place of the proceeding or the place of future hearings.

15. On October 31, 2017, the Respondent confirmed its availability for a first session on December 12, 2017 in Paris, while the Applicant confirmed its availability for a hearing in Washington, D.C on December 13, 2017, and noted that it was not available for a hearing in Paris on December 12 or 13.

16. On November 1, 2017, the Centre transmitted a draft Agenda and a draft Procedural Order No. 1 to the Parties in view of the first session, and invited them to submit a joint proposal by November 17, 2017, advising the Committee of their points of agreement and/or their respective positions where they did not reach an agreement. The Committee further invited the Respondent to indicate whether it would be available for an in-person meeting in Washington, D.C. or by video conference on December 13, 2017, and invited the Applicant to confirm by November 6, 2017, whether it wished to maintain its request for a stay of enforcement of the Award.

17. On November 4, 2017, the Respondent informed the Centre of its availability for a first session on December 13, 2017, in Paris.

18. On November 6, 2017, the Applicant confirmed that it wished to maintain its request for the stay of enforcement of the Award, and informed the Centre that the Parties had agreed on a timetable of written submissions on the continuation of the stay of enforcement of the Award.

19. On November 7, 2017, the Committee confirmed the provisional stay of enforcement of the Award, and that the first session and hearing on the request for the stay of enforcement

of the Award would take place on December 13, 2017. It also confirmed that the Applicant could participate from the World Bank Offices in Washington, D.C. while the Members of the Committee, the Respondent, and the ICSID Secretary would participate from the World Bank Offices in Paris.

20. On November 7, 2017, the Applicant's counsel objected to their participation to the hearing by video conference from Washington, D.C. and objected to the Respondent's participation from Paris.

21. On November 9, 2017, the Respondent reiterated its request to hold the hearing in Paris, and invited the Committee to decide on the place of the proceeding.

22. On November 10, 2017, as agreed between the Parties, the Applicant filed its Request for Continuation of the Stay of Enforcement, together with Legal Authorities CLA-1 through CLA-23 (the "**Request for Continuation of the Stay**").

23. On November 14, 2017, the Committee invited the Parties to indicate by November 17, 2017, whether they agreed to:

> extending the time for the Committee to decide on the Request in view of the fact that the Respondent's Rejoinder according to the Parties' agreed schedule was due by December 8, 2017; and
>
> the Committee deciding the Request on the basis of the Parties' written submissions without holding a hearing.

24. On November 16 and 17, 2017, the Applicant and the Respondent respectively confirmed their agreement to extend the deadline provided for in Arbitration Rule 54(2). The Respondent further requested that the Committee allow the Parties to discuss the stay of enforcement during the hearing scheduled on December 13, 2017. The Applicant further suggested that the date of the first session and hearing on the Request for Continuation of the Stay be moved to a later date.

25. On November 17, 2017, the Parties asked that the Committee authorize them to submit their joint proposal on the draft Agenda and draft Procedural Order No. 1 by December 1, 2017. The Tribunal granted the Parties' request on November 18, 2017.

26. On November 17, 2017, the Committee informed the Parties of its decision that the first session and the hearing on the Request for Continuation of the Stay would take place in Paris on December 18, 2017, specifying that the Parties remained free to amend their agreement on the venue for any subsequent hearing.

27. On November 20, 2017, the Parties indicated that they were not available for a hearing in person on December 18, 2017.

28. On November 22, 2017, the Respondent informed the Committee that they were available for a hearing in the evening of December 12, 2017, while the Applicant indicated its unavailability and proposed that the hearing be held at a later date.

29. On November 23, 2017, the Respondent asked that the hearing be held on December 13, 2017, as initially planned.

30. On November 24, 2017, the Respondent filed its Response to the Applicant's Request for Continuation of the Stay of Enforcement, together with Exhibits R-1 through R-4, and Legal Authorities RL-1 through RL-12.

31. On November 30, 2017, the Respondent informed the Centre that the Parties had agreed to hold a first session and hearing on the Request for Continuation of the Stay on December 12, 2017, in Paris. On the same date, the Applicant confirmed its agreement. The Parties further requested that the Committee grant them until December 6, 2017, to file their comments on the draft Procedural Order. The Committee granted this extension on December 1, 2017.

32. On December 1, 2017, the Applicant filed its Reply to Respondent's Response, along with Legal Authorities CLA-24 through CLA-31.

33. On December 7, 2017, the Applicant submitted the Parties' joint comments on the draft Procedural Order No. 1. That same date, the Respondent provided its separate comments on the draft Procedural Order No. 1.

34. On December 8, 2017, the Respondent filed its Rejoinder to the Applicant's Reply, along with Exhibits R-5 through R-11 and Legal Authorities RL-8 and RL-13 through RL-16.

35. On December 12, 2017, a first session and hearing on the Request for Continuation of the Stay was held in the World Bank's Offices in Paris, France, with simultaneous interpretation. In addition to the Members of the Committee and the Secretary, the following persons participated in the first session and hearing on the Request for Continuation of the Stay:

Representing the Applicant:

Ms. Carolyn B. Lamm, White & Case LLP
Ms. Andrea J. Menaker, White & Case LLP (by video conference)
Mr. Brody K. Greenwald, White & Case LLP (by video conference)
Ms. Kristen M. Young, White & Case LLP
Ms. Hadia Hakim, White & Case LLP
Ms. Eliane Holmlund, White & Case LLP

Representing the Respondent:

Prof. Emmanuel Gaillard, Shearman & Sterling LLP
Dr. Yas Banifatemi, Shearman & Sterling LLP
Mr. Benjamin Siino, Shearman & Sterling LLP
Mr. Pierre Viguier, Shearman & Sterling LLP
Ms. Teresa Vega, Shearman & Sterling LLP

36. On December 14, 2017, the Committee circulated a revised draft Procedural Order No. 1.

37. On December 15, 2017, as instructed during the hearing on the Request for Continuation of the Stay and the first session, the Applicant provided clarifications regarding its statement on Mr. Sawiris' share ownership in OTMTI.

38. On December 29, 2017, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English and French, and that the place of proceeding would be Paris, France.

39. On March 12, 2018, the Committee rendered its Decision on the Stay of Enforcement of the Award whereby it unanimously decided as follows:

> For the reasons set forth above, the Committee unanimously decides as follows:
>
> (1) the stay of enforcement of the Award shall continue until the Decision of the Committee on the Annulment Application subject to the conditions specified in paragraph 70[2] above;
>
> (2) if the conditions set out above are not complied with, the stay of enforcement shall be automatically terminated;
>
> and
>
> (3) the costs of this phase of the proceeding are reserved.[3]

40. On March 15, 2018, the Applicant filed its Memorial on Partial Annulment of the Award, together with an Expert Report of Professor Jan Paulsson, the third Expert Report of Professor Rudolf Dolzer, Exhibits C-1096 through C-1098 and Legal Authorities CLA-334 through CLA-453 (the "**Memorial**").

41. On March 22, 2018, the Applicant requested leave to submit into the record two publicly available documents and a press release (Exhibits C-1096 through C-1098). Algeria was invited to submit its comments by March 26, 2018.

42. On March 26, 2018, the Respondent indicated that it had no objections to the production into the record of the Applicant's Exhibits C-1096 through C-1098.

43. On March 27, 2018, the Committee, in accordance with Section 15.4 of Procedural Order No.1, granted the Applicant's request to admit into the record the Exhibits C-1096, C-1097 and C-1098, without prejudice to the Respondent's right to present, in its Counter-Memorial, its view on the relevance of the said documents for the annulment proceeding.

---

[2] Paragraph 70 reads as follows: "The Committee therefore decides that the provisional stay of enforcement of the Award rendered on May 31, 2017, in *Orascom TMT Investments S.à.r.l.* v. *People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) shall continue until the date on which the Committee issues its Decision on the Annulment Application submitted by the Applicant provided, however, that within sixty days from this Decision, the Applicant must provide an unconditional and irrevocable letter of guarantee issued by an internationally respected bank for the amount of US$ 3,508,598.13 and € 58,382.16, which may only be drawn upon by Algeria by presentation of a Decision on the *ad hoc* Committee rejecting the Annulment Application".

[3] Decision on the Stay of Enforcement of the Award, para. 73.

44. On May 4, 2018, the Applicant wrote to the Committee informing that "[i]n spite of OTMTI's best efforts, the banks uniformly have refused to issue a bank guarantee in favour of Algeria, in the terms and within the time limit […] imposed by the Committee". A statement of OTMTI's Chief Financial Officer, describing OTMTI's efforts to obtain the guarantee, was attached to the letter. The Applicant informed the Committee about its efforts to identify alternative solutions. The Applicant proposed two alternatives in order to comply with the Committee's decision:

(i) an undertaking in the form of a corporate guarantee from OTMTI that it would pay the amounts due under the Award, if the Award is upheld, or

(ii) an escrow arrangement with the Permanent Court of Arbitration (the "**PCA**"), which would hold the amounts due under the Award in escrow pending the outcome of the annulment proceeding.

In the event the second option was selected, the Applicant requested an extension of 30 days to finalize an escrow agreement and deposit the funds with the PCA.

45. On May 5, 2018, the Committee invited the Respondent to submit its comments on the Applicant's letter by May 8, 2018.

46. On May 8, 2018, the Respondent submitted its observations on the Applicant's letter of May 4, 2018.

47. On May 9, 2018, the Committee issued a Decision Modifying the Conditions for the Continuation of the Stay of Enforcement of the Award, whereby it decided to modify the operative clause (paragraph 73) of its Decision of March 12, 2018 as follows:

> (1) The stay of enforcement of the Award shall continue until the Decision of the Committee on the Application for Partial Annulment subject to the conditions specified in paragraph 14[4] above of the present Decision;

[4] Paragraph 14 reads as follows: "Accordingly, the Committee decides that the provisional stay of enforcement of the Award rendered on May 31, 2017, in *Orascom TMT Investments S.à.r.l.* v. *People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) shall continue until the date on which the Committee issues its Decision on the Annulment Application submitted by the Applicant provided, however, that the Applicant deposits, by June 15, 2018, at the latest, the amount of US$ 3,508,598.13 and € 58,382.16 due under the Award to an escrow account administered by the Permanent Court of Arbitration in The Hague and the above-mentioned amounts may only be drawn upon by Algeria by presentation of a Decision of the *ad hoc* Committee rejecting the Annulment Application".

(2) If the conditions set out above are not complied with, the stay of enforcement shall be automatically terminated; and

(3) The costs of this phase of the proceeding are reserved.[5]

48. On June 13, 2018, the Applicant informed the Committee, that in accordance with the Committee's Decision Modifying the Conditions for the Continuation of the Stay of Enforcement of the Award, the Applicant had reached an agreement with the PCA on the terms of a draft escrow agreement and requested that the Committee extend the deadline for it to deposit the funds into the escrow until June 29, 2018, to which the Respondent did not object.

49. On June 15, 2018, the Committee agreed to insert into Article 5, paragraph 1 (ii), an additional condition for the release of the funds from the escrow account, namely the Committee's written instruction to the PCA. The Committee further indicated that it did not consider necessary for the Respondent to be a party to the escrow agreement, but it should rather be a beneficiary if the conditions therein are met. Finally, it extended the time limit for establishing the escrow agreement and depositing the amounts due under the Award until June 29, 2018.

50. On June 15, 2018, the Respondent filed its Counter-Memorial on Annulment, together with Annex I, Legal Authorities RL-282 through RL-342 (the "**Counter-Memorial**").

51. On June 28, 2018, the PCA acknowledged receipt of funds in the amount of US$ 3,508,598.13 and € 58,382.16 deposited by the Applicant pursuant to the Escrow Agreement concluded on June 27, 2018.

52. On July 30, 2018, following further exchanges with the Parties, the Committee confirmed that the hearing on annulment would take place on May 27-28, 2019 in Paris.

53. On August 14, 2018, the Applicant informed the Committee that the Parties had agreed to revise the procedural calendar for their remaining written submissions, which the Committee agreed to on August 20, 2018.

[5] Decision Modifying the Conditions for the Continuation of the Stay of Enforcement of the Award, para. 15.

54. On October 12, 2018, the Applicant filed its Reply on Partial Annulment of the Award together with the Supplemental Expert Opinion of Professor Jan Paulsson, the fourth Expert Opinion of Professor Rudolf Dolzer and Legal Authorities CLA-454 through CLA-493 (the "**Reply**").

55. On February 15, 2019, the Respondent filed its Rejoinder on Annulment along with Legal Authorities RL-343 through RL-376 (the "**Rejoinder**").

56. On March 21, 2019, the Secretary of the Committee invited the Parties to (i) confer and revert to the Committee regarding the organization of the hearing, and (ii) indicate whether they considered that a pre-hearing call with the President would be needed.

57. On April 19, 2019, the Respondent informed the Committee that a pre-hearing conference call was necessary to resolve the Parties' disagreements. On April 20, 2019, the Applicant confirmed its agreement.

58. On April 22, 2019, the Committee circulated the draft agenda for the pre-hearing organizational meeting and invited the Parties to provide their comments by April 29, 2019.

59. On May 2, 2019, the Committee held a pre-hearing organizational meeting with the Parties by telephone conference.

60. On May 2, 2019, the Committee asked the Parties whether they would agree to the attendance of Mr. Weiler, an associate currently working at CMS Hasche Sigle in Munich with Professor Dr. Klaus Sachs, at the hearing on annulment. The Parties respectively agreed to his attendance on May 2 and 3, 2019, and the Secretariat transmitted Mr. Weiler's confidentiality declaration to the Parties on May 6, 2019.

61. On May 4, 2019, the Committee issued Procedural Order No. 2 concerning the organization of the hearing on annulment.

62. On May 14, 2019, the Respondent requested a leave to submit into the record as a legal authority a decision on the application for annulment rendered on March 18, 2019 by the *ad hoc* Committee in *Churchill Mining PLC and Planet Mining Pty Ltd.* v. *Republic of Indonesia* (ICSID Case Nos. ARB/12/14 and ARB/12/40).

63. In its letter of May 20, 2019, the Applicant did not object, in principle, to the introduction of that annulment decision into the record. However, it also requested a leave to submit into the record an article written by Mr. A. Escobar: "The Relative Merits of Oral Argument and Post-Hearing Briefs", published in 2010, arguing that the article discusses some of the same issues addressed by the *ad hoc* Committee in *Churchill Mining* v. *Indonesia*.

64. In its letter of May 22, 2019, the Respondent did not object to the above-mentioned Applicant's request.

65. On May 22, 2019, the Secretary of the Committee informed the Parties that the Committee had decided to grant the request of the Respondent and the request of the Applicant.

66. A hearing on annulment was held at the ICC Conference Centre in Paris on May 27-28, 2019 (the "**Annulment Hearing**"). The following persons were present:

Committee:

H.E. Judge Peter Tomka	President
Ms. Bertha Cooper-Rousseau	Member
Prof. Dr. Klaus Sachs	Member

ICSID Secretariat:

Ms. Aurélia Antonietti	Secretary of the Committee

For the Applicant:

Ms. Carolyn B. Lamm	White & Case LLP
Ms. Andrea J. Menaker	White & Case LLP
Ms. Kristen M. Young	White & Case LLP
Mr. Brody K. Greenwald	White & Case LLP
Ms. Noor Davies	White & Case LLP
Ms. Rocío Digón	White & Case LLP
Mr. Samy Markaboui	White & Case LLP
Ms. Hadia Hakim	White & Case LLP
Mr. Julien Huet	White & Case LLP
Mr. Jacob Bachmaier	White & Case LLP
Mr. Jeffrey Stellhorn	White & Case LLP
Mr. Achille Tenkiang	White & Case LLP
Mr. Oussama D. Nassif	Orascom Group

For the Respondent:

Prof. Emmanuel Gaillard	Shearman & Sterling LLP
Dr. Yas Banifatemi	Shearman & Sterling LLP
Mr. Benjamin Siino	Shearman & Sterling LLP
Mr. Pierre Viguier	Shearman & Sterling LLP
Ms. Teresa Vega	Shearman & Sterling LLP
Mr. Peter Petrov	Shearman & Sterling LLP
Ms. Barbara Blanchard	Shearman & Sterling LLP

Court Reporters:

Ms. Christine Rouxel-Merchet (French)	
Ms. Isabelle Questel (French)	
Mr. Trevor McGowan (English)	The Court Reporter Ltd.

Interpreters:

Ms. Sarah Rossi
Ms. Gabrielle Baudry
Mr. Manuel Malherbe

67. On June 7, 2019, the Committee issued Procedural Order No. 3 concerning procedural matters.

68. On July 3, 2019, the Parties filed Post-Hearing Briefs ("**A. PHB1**" and "**R. PHB1**").

69. On July 17, 2019, the Parties filed Post-Hearing Reply Briefs ("**A. PHB2**" and "**R. PHB2**").

70. The Parties filed their Submissions on Costs on August 6, 2019, and their Replies on Costs on August 20, 2019.

71. The proceeding was closed on June 15, 2020.

72. The Committee deliberated in Paris on May 29, 2019 and on December 9, 2019; it further exchanged views by various means of communication.

III. THE AWARD

1. GENERAL PRESENTATION OF THE AWARD

73. The 158-page Award (in English; 172-page in French) was rendered on May 31, 2017 by the Tribunal consisting of Professor Gabrielle Kaufmann-Kohler (presiding), Professor Albert Jan van den Berg and Professor Brigitte Stern. The Tribunal rejected the Respondent's objections to jurisdiction but decided that "the claims raised in this arbitration [were] inadmissible and the Tribunal [was] precluded from exercising jurisdiction over this dispute".[6]

74. The Award is divided into eight chapters. Chapter I introduces the Parties and provides a brief overview of the dispute which arose from "the Claimant's alleged investment to build a mobile telephone system in Algeria".[7]

75. Chapter II records the procedural history of the arbitration proceedings. Chapter III, entitled "Preliminary Matters", makes it clear that the Award addresses only preliminary objections to the Tribunal's jurisdiction and the admissibility of the Claimant's claims. It further specifies the law applicable to the Tribunal's jurisdiction. According to the Tribunal, its jurisdiction is governed by the ICSID Convention and the BIT.[8] No law is, however, identified in this chapter as governing the issue of admissibility of the Claimant's claims.

76. Chapter IV describes facts which the Tribunal considered relevant to jurisdiction and admissibility, namely the structure of the Weather Group, the origin of the Claimant's alleged investment in OTA and the acquisition of Wind Telecommunicazioni S.p.A. In the view of the Tribunal, these facts were relevant in particular to the Respondent's objection to the Tribunal's jurisdiction *ratione materiae* and the Respondent's objections to

[6] Award, para. 587.

[7] Award, para. 5.

[8] Award, para. 134.

jurisdiction and admissibility "in relation to the Claimant's status of indirect shareholder, the OTH Arbitration and settlement, and the sale of the Claimant's investment".[9]

77. The longest chapter of the Award, Chapter V, provides a summary of the Parties' arguments on the Respondent's objections to the Tribunal's jurisdiction and to the admissibility of the claims, the Tribunal's detailed analysis of these objections and its conclusions.

78. The Respondent raised an objection to the Tribunal's jurisdiction *ratione personae* arguing that the BIT requires the investor to have its "real seat" ("*siège réel*") in one of the Contracting States. The Respondent contended that the Claimant's real seat is not in Luxembourg, but in Egypt. After a detailed analysis[10] of the relevant provisions of the ICSID Convention and of the BIT, the Tribunal concluded, by majority, that "'*siège social*' in the definition of the BIT means '*registered office*' or '*siège statutaire*', in the sense of the 'seat' appearing in a corporation's constitutive documents".[11] Since the Claimant was constituted in accordance with Luxembourg law and has its registered office in Luxembourg, the Tribunal reached the conclusion that the Claimant is an investor within the meaning of Article 1(1)(b) of the BIT[12] and that it is also a national of a Contracting Party under Article 25 of the ICSID Convention.[13]

79. The Tribunal considered next the Respondent's objection to jurisdiction *ratione materiae*. The Respondent argued that the Claimant made no investment within the meaning of the BIT and Article 25(1) of the ICSID Convention. The Tribunal, after having considered the Parties' arguments, concluded that "the Claimant made a number of successive investments within the meaning of the ICSID Convention and the BIT"[14] and that "the Claimant's

[9] Award, para. 141.

[10] Award, paras. 257-324.

[11] Award, para. 314.

[12] *Ibid*. Arbitrator Stern disagreed with the Tribunal's analysis and succinctly expressed her view that "*siège social*" as referred to in the BIT can only mean "*siège réel*". See Award, fn. 356.

[13] Award, para. 315.

[14] Award, para. 380.

indirect shareholding in OTA constituted an investment pursuant to Article 1(2)(b) of the BIT and Article 25 of the ICSID Convention".[15]

80. The Tribunal subsequently dealt in the Award with the Respondent's several objections in relation to the Claimant's (former) status as an indirect investor and the parallel arbitral proceedings initiated by OTH. The Tribunal noted that "[t]he characterization of these objections in terms of jurisdiction or admissibility has somewhat changed in the course of the proceedings".[16] The Tribunal divided the Respondent's assertions that the Tribunal has no jurisdiction or that the claims are inadmissible into three groups:

(a) The Claimant is or was a "'very indirect' shareholder which is 'too far removed'" from the investment affected by the Respondent's measures;

(b) The Tribunal lacks jurisdiction or the claims are inadmissible as a result of the concurrent proceedings launched by OTH which resulted in a settlement between the parties to those proceedings; and

(c) The Claimant sold its investment before filing the Request for Arbitration and has thus lost or waived its right to bring arbitration proceedings against Algeria, which either deprives the Tribunal of jurisdiction or entails the inadmissibility of the claims.[17]

81. After having set out rather in detail the Parties' arguments on all these issues,[18] the Tribunal provided its analyses in paragraphs 485-548. It started with establishing the timeline of the main events, which it considered relevant to the objections under consideration.[19] It then examined the notices of dispute sent by OTH, Weather Investments, and the Claimant to Algeria. The Tribunal noted that while the companies giving notice and investment treaties invoked were different, the three notices concerned the same measures or events.[20] The Tribunal highlighted, in a table, what it considered to be the main passages from the three notices of dispute.[21] The Tribunal expressed its view that "while the parties to the dispute

[15] Award, para. 385.

[16] Award, para. 386.

[17] Award, para. 386.

[18] Award, paras. 387-484.

[19] Award, para. 485.

[20] Award, paras. 486 and 488.

[21] Award, para. 487 at pp. 121-128.

and the legal bases for the claims (the BITs) are different, the dispute being notified in the three notices is effectively one and the same".[22] It further stressed that the three notices were all sent by Mr. Sawiris and that he was the controlling shareholder of these companies.[23]

82. The Tribunal believed that these companies constituted the vertically integrated chain and "several entities could in theory, at least, bring arbitration proceedings against the Respondent".[24] It expressed, however, the view that "the existence of several legal foundations for arbitration does not necessarily mean that the various entities in the shareholder chain could make use of the existing arbitration clauses to assail the same measures and to recover the same economic loss under any circumstances".[25] And it continued by noting that, "[i]ndeed, the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host State's wrongful measures".[26] In its view, "[i]f the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances".[27]

83. The Tribunal found that "[i]n the circumstances of the present dispute […] the claims [we]re inadmissible on several counts".[28] It assigned "a decisive importance" to OTH's Notice of Dispute, noting that "the Claimant and its controlling shareholder, Mr. Sawiris, caused the corporate organs of OTH to crystallize the dispute at the level of OTA's direct investor".[29]

[22] Award, para. 488. Emphasis added.
[23] Award, para. 490.
[24] Award, para. 495.
[25] Award, para. 495.
[26] *Ibid*.
[27] *Ibid*. Emphasis added.
[28] Award, para. 496.
[29] *Ibid*.

84. The Tribunal observed that on November 2, 2010 (the date of the OTH Notice of Dispute), "the legal protection that was available at the various levels of the corporate chain was activated at the OTH level".[30] In the view of the Tribunal, "[b]y exercising its right to arbitrate against Algeria, OTH placed itself in the position of being made whole for the alleged harm".[31] The Tribunal continued by stating that "[t]o the extent OTH would have restored its company value through arbitration proceedings under the BIT, all of the companies higher up in the corporate chain, including the Claimant, would have been made whole as well".[32] In its view, "[i]f the value of OTH is restored, then the shareholders of OTH suffer no loss, unless they incurred a loss of their own which is independent of the value of OTH".[33]

85. The Tribunal subsequently proceeded to the review of the losses that the Claimant alleged to have suffered as a result of Algeria's measures, with a view to examining whether the Claimant requested a relief for losses that only itself suffered irrespective of the valuation of OTH.[34] It found that "the claims before the Tribunal in reality seek reparation for losses covered by the requests for relief raised in the OTH Arbitration or for losses that the Claimant […] must or should have factored into the sale of its investment to VimpelCom".[35] In light of the above, it concluded "that the claims are inadmissible".[36]

86. The Tribunal then considered the relevance of the settlement agreement between National Investment Fund of Algeria, OTH and VimpelCom. It opined that "the Claimant cannot bring claims in this arbitration that OTH decided to settle, as the settlement clearly resolved the dispute that the Claimant has brought before this Tribunal".[37] According to the Tribunal, "[i]n the absence of harm which it incurred itself to the exclusion of OTH, the

[30] Award, para. 497.
[31] *Ibid*.
[32] Award, para. 498.
[33] *Ibid*.
[34] Award, paras. 499-517.
[35] Award, para. 518.
[36] *Ibid*.
[37] Award, para. 524.

Claimant cannot take over the dispute that OTH has settled".[38] The Tribunal was convinced that "the settlement agreement […] confirms that the Claimant's claims are inadmissible".[39]

87. The Tribunal also considered the relevance of the sale of the Claimant's investment to VimpelCom three years before the settlement.[40] It did not accept the Claimant's arguments on this point. In the Tribunal's view, the fact that the Claimant sold its investment does not change the Tribunal's conclusions that the claims are inadmissible. According to the Tribunal, it even "reinforces them [i.e., these conclusions]".[41]

88. Moreover, the Tribunal found that "the Claimant's pursuit of its claims constitute[d] […] an abuse of rights under the circumstances".[42] In the Tribunal's view, this "constitute[d] a further ground for the inadmissibility of the Claimant's claims and preclude[d] the Tribunal from exercising its jurisdiction over the dispute".[43]

89. The Tribunal emphasized that its analysis concerned the admissibility of the claims, not of their merits in terms of liability or quantum. It pointed out that its conclusions on the inadmissibility of the claims "are the result of the peculiar facts of the case", in which:

(i) The group of companies of which the Claimant was part was organized as a vertical chain;

(ii) The entities in the chain were under the control of the same shareholder;

(iii) The measures complained of by the various entities in the chain were the same and thus the dispute notified to Algeria by those entities was in essence identical; and

(iv) The damage claimed by the various entities was, in its economic essence, the same.[44]

[38] *Ibid*.

[39] Award, para. 526.

[40] Award, paras. 527-538.

[41] Award, para. 527.

[42] Award, para. 539. The reasons are provided in paras. 540-545.

[43] Award, para. 545.

[44] Award, para. 546.

90. The Tribunal finally noted that "in the past [tribunals] have adopted different approaches in relation to constellations that may show some similarities with the present case".[45] It specifically referred to the tribunals in *CME* v. *Czech Republic* and *Lauder* v. *Czech Republic*, noting that the tribunals "then reached contradicting outcomes" which, in its view, "was one of the reasons for which these decisions attracted wide criticism".[46] The Tribunal, however, observed that in the past fifteen years "the investment treaty jurisprudence ha[d] evolved, including on the principle of abuse of rights (or abuse of process)".[47]

91. In view of its conclusion that the claims of Orascom TMT Investments are inadmissible, the Tribunal did not consider it necessary to deal with the remaining objections to jurisdiction, namely that the acts of ENTV (*Entreprise Nationale de Télévision*) are not attributable to Algeria[48] and that it does not have jurisdiction over the contract claims based on the Investment Agreement.[49] For the same reason, the Tribunal also considered that it was not necessary for it to deal with an additional objection to the admissibility of Claimant's umbrella clause claims.[50]

92. The short Chapter VI of the Award deals with the costs. The Tribunal decided that the Claimant shall bear the entirety of the costs of the proceedings, i.e., the fees and expenses of the Tribunal and the ICSID costs. It also decided that the Claimant shall reimburse 50% of the Respondent's fees and expenses incurred in connection with the arbitration.[51]

93. Although the Award was rendered both in English and French, the Tribunal specified in Chapter VII that in case of any discrepancy between the two versions, the English version

[45] Award, para. 547.
[46] Award, para. 547.
[47] Award, para. 547.
[48] Award, para. 556.
[49] Award, para. 566.
[50] Award, para. 576.
[51] Award, para. 585.

must be deemed to reflect the meaning intended by the Tribunal.[52] The final chapter, Chapter VIII, contains the Tribunal's decision.

2. PARTS OF THE AWARD THE ANNULMENT OF WHICH IS REQUESTED

94. The Applicant seeks the partial annulment of the Award. While it is satisfied and does not take any issue with the treatment of the Respondent's jurisdictional objections and their rejection by the Tribunal,[53] the Applicant challenges the part of the Award dealing with the issue of the admissibility of its claims and the conclusion of the Tribunal that the claims are inadmissible. Therefore, it seeks to annul the portions of the Award relating to admissibility and costs,[54] specifically paragraphs 485-585 and 587 of the Award.[55]

95. The Tribunal declared OTMTI's claims inadmissible on two grounds, namely the preclusive effect of the OTH's Notice of Dispute and the abuse of rights. In this section, the Committee will summarize the relevant parts of the Tribunal's reasons for its conclusions that OTMTI seeks to annul.

A. Preclusive effect of OTH's Notice of Dispute

(a) Comparison of the different Notices of Dispute

96. The Tribunal began its analysis by comparing the three Notices of Dispute sent by OTH, Weather Investments and OTMTI. After a textual analysis of the different notices, it found that they "concern the same measures or events"[56] and that both Weather Investments and OTMTI themselves "considered the dispute to be one and the same".[57]

---

[52] Award, para. 586.

[53] The Tribunal, having considered them, rejected the objections to its jurisdiction *ratione personae* and *ratione materiae*. In light of its conclusion that the Claimant's claims are inadmissible, the Tribunal did not consider it necessary to deal with Respondent's remaining objections to jurisdiction, namely whether the acts of ENTV are attributable to the Respondent and whether it has jurisdiction over the contract claims based on the Investment Agreement.

[54] Application, para. 7.

[55] A. PHB1, para. 1.

[56] Award, para. 486.

[57] Award, para. 489.

97. On the facts, the Tribunal also stressed that:

> There is no controversy that at the time when the OTH and Weather Investments Notices of Dispute were sent, Mr. Sawiris and his family were the ultimate beneficial owners and Mr. Sawiris was the controlling shareholder of these companies. There is equally no dispute that the Weather Group constituted a vertically integrated chain of companies, in which the companies higher up in the chain controlled and directed the companies further down. [58]

(b) Legal rule

98. The starting point of the Tribunal's legal analysis was the consideration that in a corporate chain, several entities could in theory initiate arbitration proceeding:

> In the vertically integrated chain that constituted the Weather Group, several entities could in theory at least bring arbitration proceedings against the Respondent. OTA could rely on the ICSID clause in the Investment Agreement. OTH as direct foreign shareholders could invoke the arbitration clause in the Algeria-Egypt BIT. Weather Investments as indirect foreign shareholder could claim on the basis of the arbitration provision in the Algeria-Italy BIT. And the Claimant, another indirect foreign investor, could start arbitration based on the Algeria-BLEU BIT. [59]

99. The Tribunal then described a legal rule that a claim of one entity of a corporate chain may become inadmissible if the harm was fully repaired in another arbitration involving other members of the vertical chain:

> In the Tribunal's view, the existence of several legal foundations for arbitration does not necessarily mean that the various entities in the shareholder chain could make use of the existing arbitration clauses to assail the same measures and to recover the same economic loss under any circumstances. Indeed, the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host state's wrongful measures. <u>If the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances</u>. [60]

[58] Award, para. 490. Footnote omitted.

[59] Award, para. 495. Footnote omitted.

[60] Award, para. 495. Emphasis added.

100. The Tribunal then went on to find OTMTI's claims inadmissible as the dispute had been activated by OTMTI at the level of OTH:

> OTH's Notice of Dispute assumes a decisive importance, in itself and in combination with the subsequent events. On 2 November 2010, the Claimant and its controlling shareholder, Mr. Sawiris, caused the corporate organs of OTH to crystallize the dispute at the level of OTA's direct investor. […] Thus, on 2 November 2010, the legal protection that was available at the various levels of the corporate chain was activated at the OTH level. By exercising its right to arbitrate against Algeria, OTH placed itself in the position of being made whole for the alleged harm. [61]

(c) Analysis of OTMTI's alleged losses

101. In the next step of its analysis, the Tribunal inquired whether OTMTI's claims were for losses that had not been incurred by OTH:

> The Tribunal will thus review the losses that the Claimant alleges to have suffered as a result of Algeria's measures, with a view to examining whether the Claimant requests relief for losses that only itself suffered irrespective of the valuation of OTH. In this respect, OTMTI contends that "at least part" of the losses for which it seeks compensation in this arbitration were not sustained by OTH. [62]

102. The Tribunal distinguished between five different heads of damages:

1. The Tribunal held that OTMTI's "claim for damages 'for the Claimant's realized losses on the sale of its investment' concerns the same economic harm as OTH's claim for diminution in value of its interest in OTA, which OTH raised in the OTH Arbitration". [63]

2. Regarding OTMTI's claim for its "share of the unlawfully blocked OTA dividends", the Tribunal first held that "[w]ithin a vertical chain of corporations, each entity may pay out dividends to its shareholder(s), namely to the company or companies at the immediate higher echelon in the chain" [64] before concluding that OTMTI's "claims for damages in

[61] Award, paras. 496-497. Emphasis added.

[62] Award, para. 499.

[63] Award, para. 505. Emphasis added.

[64] Award, paras. 506-507. Emphasis added.

relation to the dividends are identical to, and necessarily contained in, OTH's claims in the OTH Arbitration".[65]

3. Regarding OTMTI's claims for "damages due to incremental payments that Claimant was obligated to pay to certain private equity investors […] because of the decrease in the value of Weather Investments, of which Claimant was the majority owner",[66] the Tribunal considered these claims inadmissible "because these alleged losses derive primarily from the presence of put options in an agreement freely entered into by the Claimant".[67]

4. OTMTI's claim for consequential damages, which (according to OTMTI's expert) arose as a result of OTMTI's refinancing of its capital structure and measures to "prevent a collapse of the Weather Group",[68] was found inadmissible on two grounds: first, the Tribunal held that OTMTI did not establish that OTMTI, as opposed to other entities of the Weather Group, had incurred these losses; second, any losses to prevent a collapse of the Weather Group "must or should have been factored into the price when the Claimant sold Weather Investments".[69]

5. The Tribunal rejected OTMTI's claim for moral damages for alleged reputational harm as inadmissible because these losses "if any, [were] incurred either by OTH or by Mr. Sawiris and not by itself".[70]

103. The Tribunal noted that its analysis of the different heads of damages was informed by:

> [T]he Claimant's full memorial on the merits, the three expert reports presented by the Claimant's expert on valuation and damages analysis (two of which were filed specifically in the bifurcated phase dealing with the Respondent's preliminary objections), the extensive discussion on these issues at the Hearing, including the cross-examination of the Claimant's expert, as well as the record of the OTH Arbitration which has been produced in this arbitration.[71]

104. After assessing OTMTI's different heads of damages, the Tribunal concluded that:

> [T]he claims before the Tribunal in reality seek reparation for losses covered by the requests for relief raised in the OTH Arbitration or for losses that the

[65] Award, para. 508.

[66] Award, para. 509. Emphasis added.

[67] Award, para. 510.

[68] Award, para. 511.

[69] Award, para. 516.

[70] Award, para. 517. Footnote omitted.

[71] Award, para. 499.

> Claimant (owned and managed by an experienced businessman like Mr. Sawiris) must or should have factored into the sale of its investment to VimpelCom. Under the circumstances, the Tribunal cannot but conclude that the claims are inadmissible. [72]

(d) Relevance of the settlement agreement between FNI, OTH and VimpelCom

105. Regarding the settlement agreement of April 18, 2014 between FNI, OTH and VimpelCom, the Tribunal concluded that it "confirm[ed] that the Claimant's claims [we]re inadmissible". [73]

106. On the facts, the Tribunal noted that:

> After the closing of the share purchase (which occurred on 30 January 2015), OTA, OTH and Algeria finally put an end to the domestic courts and arbitral proceedings, waiving all their claims. […] On the same day, OTH and Algeria addressed the "Renunciation Letter" informing the PCA tribunal in the OTH Arbitration that they had "finally settled their dispute referred to arbitration" in that proceeding. On 12 March 2015, the PCA tribunal issued a consent award recording the above agreement between the parties, which put an end to the OTH Arbitration. [74]

107. The Tribunal found that OTH, as direct shareholder of OTA, was the most obvious party to conclude a settlement agreement:

> [I]t comes as no surprise that [the settlement agreement] was entered into, inter alia, by OTH who also undertook a number of obligations on behalf of OTA. As already mentioned, OTH was the "historical" controlling shareholder of OTA, to which the GSM License was granted in 2001 (in the name and on behalf of OTA) and which negotiated and concluded the Investment Agreement in 2001 (in the name and on behalf of OTA). Furthermore, it was OTH which in 2009-2010 objected to the measures taken vis-à-vis OTA and which sent the first Notice of Dispute on 2 November 2010. At all times, OTH was and remained the direct and controlling shareholder of OTA. For all of those reasons, it was thus entirely

[72] Award, para. 518.

[73] Award, para. 526.

[74] Award, para. 522. Footnotes omitted.

> logical for Algeria to negotiate with that foreign investor in the vertically integrated chain of companies.[75]

108. The Tribunal then went on to find that the settlement agreement is tantamount to an arbitral award in the OTH Arbitration and that it is irrelevant whether the content of the settlement is beneficial to OTH/OTA:

> In these circumstances, the Claimant cannot bring claims in this arbitration that OTH decided to settle, as the settlement clearly resolved the dispute that the Claimant has brought before this Tribunal as is shown by the comparison of the notices of disputes above. The existence of a settlement agreement does not change the Tribunal's conclusions in relation to the OTH Arbitration, as the settlement stands in lieu of the investment treaty tribunal's award which would have been forthcoming in that arbitration. The settlement agreement puts an end to the dispute arising from Algeria's measures in the same manner as the award would have ended the dispute. In the absence of harm which it incurred itself to the exclusion of OTH, the Claimant cannot take over the dispute that OTH has settled. In this respect, the content of the settlement, whether beneficial or detrimental to OTH/OTA, is irrelevant. What matters is that the claims arising from Algeria's measures have ceased to exist due to the settlement agreement.[76]

(e) Relevance of OTMTI's sale of its controlling shareholding in OTH to VimpelCom

109. Furthermore, the Tribunal held that the fact that OTMTI had sold its indirect controlling shareholding in OTH to VimpelCom does not change its previous conclusion on the inadmissibility of OTMTI's claims:

> The fact that the Claimant sold its investment does not change the conclusions reached above. If anything, it reinforces them. […] In the absence of harm it has suffered itself as opposed to OTH, any separate claims brought by the Claimant based on the same measures would have been inadmissible if it had remained in control of its investment. This being so, the sale of the investment cannot bestow on the seller more rights than it would have had if it had remained as a shareholder. […] [W]hen selling its investment, the Claimant could have carved out from the scope of the sale and reserved for itself the benefit of OTH's claim against Algeria. Absent such a carve out, the claim exercised by a subsidiary will benefit the buyer of the shares. In this case, by selling the shares in a company granting

[75] Award, para. 523. Footnotes omitted.

[76] Award, para. 524.

> control over OTH (Weather Investments), the Claimant sold the claim that was attached to the shares in OTH. [77]

110. The Tribunal supported its analysis of the sales' impact by examining Mr. Sawiris' testimony at the Hearing on Preliminary Objections from May 26 to 30, 2015 (the "**Hearing**") who, when asked by Algeria's Counsel, accepted that OTH's or OTA's claim was sold with the shares and "recognized that the price paid by the buyer must have included the claim to seek redress for Algeria's measures in relation to which OTH had already notified Algeria of a dispute". [78] Furthermore, the Tribunal briefly scrutinized the Risk Sharing Agreement and was "unable to find anything […] that would support the view that the Claimant reserved its claim in relation to past measures". [79]

B. Abuse of Rights

111. With regard to the doctrine of abuse of rights, the Tribunal found that:

> [A]n investor who controls several entities in a vertical chain of companies may commit an abuse [of rights] if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. […] In the Tribunal's opinion, this conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. [80]

112. On the facts, the Tribunal quoted Mr. Sawiris' statement at the Hearing:

> [MR. SAWIRIS:] So when I was defending the interests of Orascom Telecom [Holding] [OTH] only, we would use the Egyptian treaty, because that's the instance now that is corresponding, and it's the direct. […] Then when things start to go worse, you say, "Listen, guys, it's not go[ing] to end up there. There is an Italian treaty, so the mother company can go". Then

[77] Award, paras. 527-529.

[78] Award, para. 531.

[79] Award, para. 534. Emphasis omitted.

[80] Award, paras. 542-543.

> when I sell under the gun – and again I come to the different nature of my claim […] I used the Luxembourg treaty. [81]

113. The Tribunal then analyzed this statement concluding that:

> [A]s explained by Mr. Sawiris, the Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally – after selling the investment – it pursued yet another investment treaty proceeding in its own name for the same investment (its past shareholding in OTA) in relation to the same host state measures and the same harm. [82]

114. This led the Tribunal to find an abuse of rights "which constitutes a further ground for the inadmissibility of the Claimant's claims". [83]

C. Conclusive Remarks by the Tribunal

115. In its conclusive remarks, the Tribunal emphasized that:

> [Its] conclusions on the inadmissibility of the claims are the result of the peculiar facts of the case, in which (i) the group of companies of which the Claimant was part was organized as a vertical chain; (ii) the entities in the chain were under the control of the same shareholder; (iii) the measures complained of by the various entities in the chain were the same and thus the dispute notified to Algeria by those entities was in essence identical; and (iv) the damage claimed by the various entities was, in its economic essence, the same. [84]

[81] Hearing Tr. Day 2 (May 27, 2015) [E], 189:21-190:13.

[82] Award, para. 545.

[83] Award, para. 545.

[84] Award, para. 546.

IV. THE APPLICABLE LEGAL STANDARDS FOR ANNULMENT

1. GENERAL FRAMEWORK FOR ANNULMENT

A. Applicant's Position

116. The Applicant points out that the annulment mechanism under Article 52 of the ICSID Convention was designed to balance, on the one hand, the finality of awards and, on the other hand, the need to ensure the fundamental fairness and integrity of arbitration proceeding.[85] As such, ICSID awards are not entitled to any presumption of validity.[86]

117. An award should undergo greater scrutiny where the annulment challenge relates to conclusions on jurisdiction or admissibility.[87] *Ad hoc* committees do not have "full discretion" not to annul the award in these circumstances because any failure to exercise jurisdiction, where jurisdiction exists, is a manifest excess of power.[88]

B. Respondent's Position

118. The Respondent argues that one of the fundamental objectives of the ICSID Convention is to ensure the finality of arbitral awards, and the procedure of annulment is an exception made to this objective in order to protect the integrity and legitimacy of the proceeding and resulting award.[89] The purpose of annulment proceedings excludes any *de novo* review of the merits and any substantive review of the award.[90]

119. Moreover, the *ad hoc* committee's analysis must be based on the record that was before the Tribunal.[91] Even where it considers that a ground for annulment under Article 52(1) is materialized, *ad hoc* committees retain a discretion to annul the award. The Respondent cites with approval the view of the *ad hoc* Committee in *Tulip* v. *Turkey* that "[u]nder the

[85] Reply, para. 32.

[86] Reply, para. 34.

[87] Reply, para. 34, referring to two expert opinions of Professor Paulsson.

[88] Reply, para. 35.

[89] Counter-Memorial, paras. 209-210; Rejoinder, para. 206.

[90] Counter-Memorial, para. 213; Rejoinder, para. 208.

[91] Counter-Memorial, para. 215; Rejoinder, para. 209.

ordinary meaning of this provision, an *ad hoc* committee has some discretion and is not under an obligation to annul even if it finds that there is a ground for annulment listed in Article 52(1)".[92]

C. Committee's Analysis

(a) Function of Annulment under the ICSID Convention

120. The annulment under Article 52 of the Convention represents an exception to the principle of finality of the awards. That principle is embodied in Article 53(1) of the Convention according to which "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention". The only remedies, envisaged in Section 5 of Chapter IV of the Convention, are interpretation, revision and annulment of the awards. The annulment process is not an appeal, it differs from it. It is not concerned with the substantive correctness of the award but with the integrity of the decision-making and the process which has led to the decision.[93]

121. As the *ad hoc* Committee in *Tulip* v. *Turkey* explained that:

> In any review process, two potentially conflicting principles are at work: the principle of finality and the principle of correctness. Finality serves the purpose of efficiency in terms of an expeditious and economical settlement of disputes. Correctness is an elusive goal that takes time and effort, and may involve several layers of control, a phenomenon that is familiar from proceedings in domestic courts. In arbitration, the principle of finality typically takes precedence over the principle of correctness.[94]

122. The main goal of the ICSID Convention is to assure the finality of the ICSID awards.[95] Therefore, the drafters of the ICSID Convention opted for the model of a limited review.

---

[92] Counter-Memorial, para. 216, citing *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, December 30, 2015, para. 45 ("*Tulip* v. *Turkey*").

[93] See e.g., *MCI Power Group, L.C. and New Turbine, Inc.* v. *Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, October 19, 2009, para. 24 ("*MCI* v. *Ecuador*"); *Total S.A.* v. *Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Annulment, February 1, 2016, para. 179 ("*Total* v. *Argentina*").

[94] *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 40.

[95] Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, para. 71.

It is useful to recall what the *ad hoc* Committee in *CDC* v. *Seychelles* said about this review process:

> This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention's drafters' desire that Awards be final and binding, which is an expression of "customary law based on the concepts of *pacta sunt servanda* and *res judicata*," and is in keeping with the object and purpose of the Convention. Parties use ICSID arbitration (at least in part) because they wish a more efficient way of resolving disputes than is possible in a national court system with its various levels of trial and appeal, or even in non-ICSID Convention arbitrations (which may be subject to national courts' review under local laws and whose enforcement may also be subject to defenses available under, for example, the New York Convention). Procedural protections are, however, all the more necessary in order to ensure that the resulting award is truly an "award," i.e., a result arrived at fairly, under due process and with transparency, and hence in the basic justice of which parties will have faith. [96]

123. Annulment differs from appeal also in its possible outcome. The successful request for annulment may lead to the setting aside of the award, to its invalidation. The annulment committee has the power either to confirm the award or to annul it in whole or in part. It cannot substitute its decision for the decision under review that it has found to be deficient. [97] An appeal, if successful, leads to the modification of the decision. An appellate organ may substitute its decision for the decision which was subject of an appeal.

124. The distinction between annulment and appeal has been emphasized by many *ad hoc* committees. They have stated consistently that their functions are limited and that they do not have the powers of a court of appeal. [98] A decision to annul can be based on one or

---

[96] *CDC Group plc* v. *Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005, para. 36 ("*CDC* v. *Seychelles*"). Footnotes omitted.

[97] See e.g., *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile*, Decision on Annulment, March 21, 2007, para. 54 ("*MTD* v. *Chile*"); *Sociedad Anónima Eduardo Vieira* v. *Republic of Chile* (ICSID Case No. ARB/04/7), Decision on Annulment, December 10, 2010, para. 235 ("*Vieira* v. *Chile*").

[98] See e.g., *Klöckner Industrie-Anlagen GmbH and others* v. *United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment, May 3, 1985, paras. 3, 83, 118, 128, 177 ("*Klöckner* v. *Cameroon*"); *Amco Asia Corporation and others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, May 16, 1986, paras. 43 and 110 ("*Amco I* v. *Indonesia*"); *Maritime International Nominees Establishment* v. *Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, December 22, 1989, paras. 5.08, 6.55 ("*MINE* v. *Guinea*"); *Wena Hotels Limited* v. *Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, para. 18 ("*Wena* v. *Egypt*"); *Compañía de Aguas del Aconquija, S.A. &*

several of the five grounds listed in Article 52(1) of the ICSID Convention.[99] It is not the role of *ad hoc* committees to review tribunals' findings on facts or to control their interpretation of the applicable law.[100]

(b) Discretion to Annul

125. Another important aspect to keep in mind is that *ad hoc* committees retain a certain measure of discretion in exercising their power to annul an award. Under Article 52(3) of the ICSID Convention: "[t]he Committee shall have the authority to annul the award". Under the ordinary meaning of this provision, an *ad hoc* committee has some discretion and is not under an obligation to annul even if it finds that there is a ground for annulment listed in Article 52(1).[101] As the *ad hoc* Committee in *EDF* v. *Argentina* stated "[t]o say that a committee 'shall have the authority to annul the award' is very different from saying that a committee 'shall annul the award'".[102] Decisions on applications for annulment confirm

Compagnie Générale des Eaux v. *Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002, para. 62 ("*Vivendi* v. *Argentina (I)*"); *CDC* v. *Seychelles*, Decision on Annulment, June 29, 2005, paras. 35 and 36; *Repsol YPF Ecuador, S.A.* v. *Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, January 8, 2007, para. 38 ; *MTD* v. *Chile,* Decision on Annulment, March 21, 2007, para. 52; *CMS Gas Transmission Company* v. *Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, September 25, 2007, paras. 43-44 ("*CMS* v. *Argentina*"); *Hussein Nuaman Soufraki* v. *United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007, paras. 20 and 24 ("*Soufraki* v. *UAE*"); *Mr. Tza Yap Shum* v. *Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Annulment, February 12, 2015, para. 156.

[99] *Klöckner* v. *Cameroon*, Decision on Annulment, May 3, 1985, para. 3; *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, para. 17; *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, para. 62.

[100] *Klöckner* v. *Cameroon*, Decision on Annulment, May 3, 1985, paras. 61 and 128; *Amco I* v. *Indonesia,* Decision on Annulment, May 16, 1986, para. 23; *CDC* v. *Seychelles* Decision on Annulment, June 29, 2005, para. 45; *CMS* v. *Argentina*, Decision on Annulment, September 25, 2007, paras. 85 and 136; *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 44.

[101] For the discussion of this principle in early ICSID cases see: *Klöckner* v. *Cameroon*, Decision on Annulment, May 3, 1985, paras. 151 and 179; *Amco Asia Corporation and others* v. *Republic of Indonesia*, Decision on Annulment, December 3, 1992, para. 1.20 ("*Amco II* v. *Indonesia*"); *MINE* v. *Guinea*, Decision on Annulment, December 22, 1989, paras. 4.09-4.10; for more recent discussion see e.g., *Total* v. *Argentina*, Decision on Annulment, February 1, 2016, para. 167.

[102] *EDF International S.A., Saur International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment, February 5, 2016, para. 73 ("*EDF* v. *Argentina*").

that even if a ground listed in Article 52(1) exists, annulment will ensue only if the flaw has had a serious adverse impact on one of the parties.[103]

126. The *ad hoc* Committee in *Wena* v. *Egypt* stressed that a ground for annulment must have had an effect on the outcome of the award and must have led to a substantially different result in order to actually lead to annulment.[104] The *ad hoc* Committee in *Vivendi* v. *Argentina (I)* cautioned that it "must guard against the annulment of awards for trivial cause".[105] It stressed the discretion of committees and the practical significance of any error.[106]

127. If one of the grounds listed in Article 52(1) of the ICSID Convention is established, an *ad hoc* committee still has to consider whether that ground had a material impact on the party seeking annulment.

(c) Principles Governing Annulment

128. The principles governing annulment under the Convention, as elaborated by several dozens of annulment committees, have usefully been summarized in the updated Background Paper on Annulment For the Administrative Council of ICSID.[107] The *ad hoc* committees have affirmed the following six broad principles:

1. The grounds listed in Article 52(1) are the only grounds on which an award may be annulled;
2. Annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* committee is limited;
3. *Ad hoc* committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* committee cannot substitute the Tribunal's determination on the merits for its own;
4. *Ad hoc* committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards;

[103] *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 45.

[104] See *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, paras. 58 and 105.

[105] *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, para. 63.

[106] *Ibid.* at para. 66. In the same sense: *Soufraki* v. *UAE*, Decision on Annulment, June 5, 2007, paras. 24 and 27; *CDC* v. *Seychelles*, Decision on Annulment, June 29, 2005, para. 37.

[107] Updated Background Paper on Annulment For the Administrative Council of ICSID, May 5, 2016, p. 32, para. 74.

5. Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and

6. An *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full.

129. Article 52(1) of the ICSID Convention contains an exhaustive list of the following five grounds on which an award may be annulled:

(a) That the Tribunal was not properly constituted;

(b) That the Tribunal has manifestly exceeded its powers;

(c) That there was corruption on the part of a member of the Tribunal;

(d) That there has been a serious departure from a fundamental rule of procedure; and

(e) That the award has failed to state the reasons on which it is based.

(d) The Present Case

130. In this proceeding, the Applicant seeks the partial annulment of the Award invoking three grounds. According to the Applicant, the Tribunal seriously departed from a fundamental rule of procedure, the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award is based.[108] The Parties in the case at hand differ in their interpretation of the three grounds raised by the Applicant under Article 52 of the ICSID Convention. The Committee will follow in its analysis the sequence of the grounds for annulment as invoked by the Applicant.

2. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

A. Applicant's Position

131. The Applicant recalls that Article 52(1)(d) of the ICSID Convention provides that an award may be annulled when the tribunal seriously departed from a fundamental rule of procedure, and notes that one of such fundamental rules is the right to be heard.[109] As Professor Schreuer explains, "the principle that both sides must be heard on all issues

[108] Application, Section III – Grounds for Annulment, pp. 13-27, paras. 28-60.

[109] Application, para. 28.

affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings".[110] In *Wena* v. *Egypt*, the *ad hoc* Committee stated that the right to be heard "includes the right to state its claim or its defense and to produce all arguments and evidence in support of it".[111]

132. The full opportunity of presenting one's case includes the right of rebuttal.[112] Not allowing one party a full opportunity to address late-raised issues, submits the Applicant, warrants annulment of the resulting award.[113] In addition, "[w]hile *ad hoc* committees have thus annulled awards where the tribunal denied both parties an opportunity to be heard, the same fundamental principles apply with even greater force where a tribunal materially prejudices only one party by denying it an opportunity to be heard".[114]

133. The Applicant posits the scope of annulment for a serious departure from a fundamental rule of procedure must not be "artificially restrict[ed]", and in particular that the Applicant is not required to prove that there would have been a different outcome so as to annul the award.[115] According to the Applicant, the Committee does not need to decide that Arbitration Rule 41(1) is itself a fundamental rule in order to find an annullable error.[116] It asserts that numerous tribunals have dismissed untimely objections on the basis of Rule 41(1).[117]

B. Respondent's Position

134. In the Respondent's view, the Applicant does not contest that the test for a serious departure from a fundamental rule of procedure is two-fold: (1) the departure from the rule by the

[110] Application, para. 28, referring to C. H. Schreuer et al., *The ICSID Convention: A Commentary* (2009), p. 987, para. 305.

[111] Application, para. 29; *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, para. 57.

[112] Memorial, paras. 71-72; Reply, para. 71.

[113] Memorial, paras. 73-78.

[114] Memorial, para. 79. Emphases omitted.

[115] Reply, paras. 71-72.

[116] Reply, para. 73.

[117] Reply, para. 74.

tribunal must be serious; and (2) the procedural rule in question must be fundamental.[118] On the first part, *ad hoc* committees have identified quantitative and qualitative criteria to assess the departure from a rule, confirming this departure must be substantial. [119] On the second part, the fundamental rules of procedure envisaged by Article 52(1)(d) are only those which fall under principles of natural law. [120]

135. According to the Respondent, the Applicant is wrong in asserting that a violation of Rule 41(1) of the ICSID Arbitration Rules constitutes *ipso facto* a serious departure from a fundamental rule of procedure. [121] On the contrary, while no *ad hoc* committee has yet ruled on the question of whether the requirement of Article 41(1) amounts to a fundamental rule of procedure, it is clear from the jurisprudence that this requirement is applied flexibly by tribunals and committees. [122] In addition, *ad hoc* committees must also verify, in the light of the circumstances of each case, whether the adversarial principle has in fact been respected by tribunals. [123]

136. The Respondent stresses that the respect of the adversarial principle must be assessed in the light of the function and powers of arbitral tribunals and, in particular, that: tribunals are under no obligation to draw the attention of a party to the fact that it has not fully exercised its right to be heard; [124] tribunals can adopt a legal reasoning other than that of the parties so long as this reasoning falls into the "legal framework" constituted by them;[125] and tribunals cannot base their decisions on evidence or legal concepts that one or both parties have never had the opportunity to debate and which did not fall within the legal framework established by the parties and therefore could not have been anticipated by them. [126]

---

[118] Counter-Memorial, para. 224; Rejoinder, para. 231.

[119] Counter-Memorial, para. 225; Rejoinder, para. 232.

[120] Counter-Memorial, paras. 226-228; Rejoinder, para. 233.

[121] Counter-Memorial, para. 229; Rejoinder, paras. 235-236.

[122] Counter-Memorial, para. 229; Rejoinder, para. 236.

[123] Counter-Memorial, paras. 230-232.

[124] Rejoinder, para. 242.

[125] Rejoinder, para. 243.

[126] Rejoinder, paras. 244-246.

C. Committee's Analysis

137. The respect for the fundamental rules of procedure is an important guarantee for the integrity and legitimacy of the arbitration procedure. Article 52(1)(d) recognizes this by providing that a party may request annulment of the award on the ground that "there has been a serious departure from the fundamental rule of procedure". This provision thus sets two requirements for this ground for annulment. First, the rule concerned must be fundamental and, second, the departure must be serious.

(a) Fundamental Rule

138. Not every departure from a rule of procedure will warrant an annulment. The rule in question needs to qualify as "fundamental". It appears from the *travaux préparatoires* of the Convention that what the drafters had in mind are some basic principles — which may be called principles of natural justice — such as the parties' right to be heard, equal opportunity of each party to present its case and the opportunity to present its evidence and arguments and to respond to evidence and arguments of the other party.[127] As some *ad hoc* committees have emphasized, fundamental rules of procedure are principles that are essential to a fair hearing.[128]

139. It is to be recalled that the drafters of the Convention when proposing this ground for annulment were inspired by Article 35(c) of the Model Rules on Arbitral Procedure, prepared by the United Nations International Law Commission.[129] In the Commentary on the Draft Convention on Arbitral Procedure, this provision was described as "the principle that the tribunal must function in the manner of a judicial body and with respect for the fundamental rules governing the proceedings of any judicial body".[130] According to this

[127] *History of the ICSID Convention,* Vol. II, p. 480.

[128] See e.g., *Libananco Holdings Co. Limited* v. *Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Annulment, May 22, 2013, para. 85 ("*Libananco* v. *Turkey*"); *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 71.

[129] *Yearbook of the International Law Commission, 1958*, Vol. II, p. 86.

[130] Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session (A/CN.4/92), p. 109. (United Nations publications, Sales No.: 1955.V.1).

Commentary, "[t]he right to be heard, including due opportunity to present proofs and arguments"[131] is one of such fundamental rules of procedure.

140. The *ad hoc* Committee in *Wena* v. *Egypt* expressed the view that Article 52(1)(d) "refers to a set of minimal standards of procedure to be respected under international law".[132] It further elaborated that each party shall have "the right to state its claim or its defense and to produce all arguments and evidence in support of it".[133] And it continued: "[t]his fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other".[134]

(b) Serious Departure

141. The second requirement set forth in Article 52(1)(d) is that a departure from the fundamental rule of procedure must be "serious" in order to provide a basis for annulling an award. That view was already expressed by the International Law Commission according to which the rule concerns "serious departure from fundamental rules of procedure rather than minor departures".[135] Various *ad hoc* committees held that not every departure from a rule of procedure justifies annulment. Thus, according to the *ad hoc* Committee in *MINE* v. *Guinea* "the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide".[136]

142. Although some *ad hoc* committees examined whether the departure had a material impact on the outcome of the proceedings,[137] this Committee believes that it is more appropriate to adopt, as did some other *ad hoc* committees, a more flexible approach and to consider whether the award might have been substantially different, in other words to examine a

[131] *Ibid*. at p. 110.

[132] *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, para. 57.

[133] *Ibid*.

[134] *Ibid*.

[135] Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session (A/CN.4/92), p. 109. (United Nations publications, Sales No.: 1955.V.1).

[136] *MINE* v. *Guinea*, Decision on Annulment, December 22, 1989, para. 5.05.

[137] See e.g., *El Paso Energy International Company* v. *Argentina* (ICSID Case No. ARB/03/15), Decision on Annulment, September 22, 2014, para. 269 ("*El Paso* v. *Argentina*").

potential effect of the departure from the fundamental rule of procedure on the award.[138] This approach was also followed with approval by the *ad hoc* Committee in *Tulip* v. *Turkey* when it stated that "[t]o require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof".[139] And it continued: "[w]here a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome. Therefore, an applicant must demonstrate that the observance of the rule had the *potential* of causing the tribunal to render an award substantially different from what it actually decided".[140] It further added that "in order to be serious, the departure must be more than minimal. It must be substantial. It must have deprived the affected party of the benefit of the rule in question".[141]

143. A similar approach was taken by the *ad hoc* Committee in *TECO* v. *Guatemala*. It expressed the view that:

> Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine, however, is whether the tribunal's compliance with a rule of procedure could potentially have affected the award.[142]

(c) The Right to Be Heard

144. The Parties do not dispute that the right to be heard belongs to the category of the fundamental rules of procedure. In accordance with the right to be heard, the parties shall

[138] See e.g., *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, para. 61; *Victor Pey Casado and President Allende Foundation* v. *Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, December 18, 2012, para. 78; *Caratube International Oil Company LLP* v. *Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment, February 21, 2014, para. 99 ("*Caratube* v. *Kazakhstan*").

[139] *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 78.

[140] *Ibid*. Emphasis in the original.

[141] *Ibid*.

[142] *TECO Guatemala Holdings LLC* v. *Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, April 5, 2016, para. 85 ("*TECO* v. *Guatemala*").

be given the opportunity to present all the arguments and all the evidence that they deem relevant and to respond to arguments and evidence submitted by their opponent. In particular, each party must be given the opportunity to address every formal motion before the tribunal and every legal issue raised by the other party. The purpose of various provisions of the ICSID Arbitration Rules is to provide for and guarantee this right. [143]

145. The implications of this right are, however, sometimes disputed. For instance, *ad hoc* committees have had to deal with the question of whether there was a violation of a party's right to be heard if the tribunal had based its decision on a theory that the parties had not fully discussed. [144]

146. The *ad hoc* Committee in *Caratube* v. *Kazakhstan* stated that:

> [T]ribunals do not violate the parties' right to be heard if they ground their decision on the legal reasoning not specifically advanced by the parties, provided that the Tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal. [145]

147. That Committee also observed that "surprise [as far as the legal solution is concerned] does not give rise to a ground for annulment". [146] In support of its view, it relied on the statement of the *ad hoc* Committee in *Vivendi* v. *Argentina (I)* that:

> It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention. [147]

---

[143] See especially ICSID Arbitration Rules 20-21, 31-32, 37, 39-42, 44, 49-50, 54.

[144] *Klöckner* v. *Cameroon* (ICSID Case No. ARB/81/2), Decision on Annulment, May 3, 1985, paras. 89-91; *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, paras. 66-70; *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, paras. 82-85; *Caratube* v. *Kazakhstan*, Decision on Annulment, February 21, 2014, paras. 90-96; *El Paso* v. *Argentina*, Decision on Annulment, September 22, 2014, paras. 278-286.

[145] *Caratube* v. *Kazakhstan*, Decision on Annulment, February 21, 2014, para. 94.

[146] *Ibid*. at para. 96.

[147] *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, para. 84.

148. This Committee considers this approach reasonable and well-grounded in international judicial practice. [148]

3. MANIFEST EXCESS OF POWERS

A. Applicant's Position

149. The Applicant sets forth that a tribunal manifestly exceeds its powers, *inter alia*, if it fails to exercise jurisdiction where it exists or to apply the proper law. [149] An excess of powers is manifest when it can be discerned with little effort. [150] When applying the law, the Tribunal may not invent it or replace it with its own personal policy preferences. [151]

150. On the relevant standard under Article 52(1)(b), the Applicant makes the following observations: an excess of power can be manifest if it can "readily be discerned", although this may occasionally require an *ad hoc* annulment committee to undertake an "elaborate analysis"; [152] an *ad hoc* annulment committee is entitled to examine the "factual and legal premises" upon which the tribunal's decision is based; [153] and a tribunal commits an excess of powers by the "manifest and consequential non-exercise of [its] full powers". [154]

151. Furthermore, the Applicant contends that: a tribunal cannot assume but must prove the legal rules it applies; [155] an "egregious", "gross" or "extreme" misapplication of the proper law amounts to a failure to apply the proper law; [156] even if a tribunal's reasoning is "of a legal nature", its award may be annulled when the decision did not "remain[] within the

[148] See e.g., *Northern Cameroons (Cameroon* v. *United Kingdom)*, Judgment, I.C.J. Reports 1963, p. 15; *Nuclear Tests (Australia* v. *France)*, Judgment, I.C.J. Reports 1974, p. 253; *Nuclear Tests (New Zealand* v. *France)*, Judgment, I.C.J. Reports 1974, p. 457; *Maritime Dispute (Peru* v. *Chile)*, Judgment, I.C.J. Reports 2014, p. 3.

[149] Application, paras. 34-36; Memorial, para. 58.

[150] Memorial, para. 59.

[151] Memorial, paras. 62-64; Reply, para. 54; A. PHB1, para. 12.

[152] Reply, para. 39. Annulment Hearing Tr. Day 1 (May 27, 2019) [E] 21:13-19.

[153] Reply, paras. 40-41.

[154] Reply, paras. 42-43. Annulment Hearing Tr. Day 1 (May 27, 2019) [E] 22:15-21.

[155] Reply, paras. 44-46.

[156] Reply, paras. 47-49.

general limits of positive law or has substantially departed from it";[157] and a tribunal has the authority to fill gaps in the applicable law, but not to create or invent new legal rules to adjudicate the dispute.[158]

B. Respondent's Position

152. The Respondent argues that only a manifest excess of power which is "obvious, evident, clear" warrants the annulment of the award.[159] If a certain degree of analysis may be necessary to understand "what the tribunal has decided", an excess of power cannot be characterized as manifest when it is not "sufficiently clear and grave" or when it cannot "readily be discerned".[160]

153. With respect to the failure to exercise jurisdiction, the Respondent points out that the ICSID Convention does not permit a *de novo* review of the tribunal's jurisdictional ruling.[161] No *ad hoc* committee has ruled yet on whether an erroneous decision on admissibility may amount to an excess of power.[162] Yet, the Applicant fails to distinguish between situations where the subject-matter of the application for annulment is not the jurisdiction of the tribunal (and thus concerns the existence and scope of its powers), and the admissibility of the parties' claims (and thus concerns the exercise of its jurisdictional power).[163] In any case, an *ad hoc* committee cannot review the factual premises on which the tribunal based its decision;[164] and an *ad hoc* committee cannot annul an award if the tribunal's disposition of a question of law is "tenable".[165]

---

[157] Reply, paras. 50-52. Annulment Hearing Tr. Day 1 (May 27, 2019) [E] 24:6-7.

[158] Reply, paras. 53-55.

[159] Counter-Memorial, paras. 330-332, 334.

[160] Rejoinder, para. 381. Footnotes omitted.

[161] Counter-Memorial, paras. 338-340.

[162] Rejoinder, para. 390.

[163] Rejoinder, paras. 386-390; R. RHB1, para. 31.

[164] Rejoinder, paras. 392-395.

[165] Rejoinder, para. 396.

154. With respect to the failure to apply the proper law, the Respondent sets forth that an arbitral tribunal cannot be criticized for having applied the law agreed to by the parties,[166] especially when their agreement concerns a body of rules without setting a hierarchy between them.[167] Once the *ad hoc* committee has identified the law applicable to the question in debate, it must ascertain whether the tribunal has endeavoured to apply that law to the circumstances of the case[168] or whether it consciously ignored the applicable law.[169] The Respondent argues that the Applicant conflates, on the one hand, the control of the tribunal's endeavour to apply the proper law, and, on the other hand, the control of the tribunal's finding on the content of the applicable law.[170] The latter is impermissible in that it would constitute an appeal.[171]

C. Committee's Analysis

155. Under Article 52(1)(b) of the ICSID Convention, a party may request annulment of the award on the ground "that the Tribunal has manifestly exceeded its powers". The *travaux préparatoires* demonstrate that the intention of the drafters of the Convention was to cover the situation where the Tribunal's decision went beyond the terms of the parties' arbitration agreement.[172] This ground covers a situation when a tribunal decides the dispute although under the terms of the arbitration agreement it lacks jurisdiction over the claims submitted to it by a claimant. It may also cover a situation when a tribunal fails to exercise its jurisdiction. The *ad hoc* Committee in *Vivendi* v. *Argentina (I)*, in a frequently quoted passage, observed:

> It is settled […] that an ICSID Tribunal commits an excess of powers not only if it exercises jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is

[166] Counter-Memorial, para. 347.

[167] Counter-Memorial, paras. 348-349.

[168] Counter-Memorial, para. 350.

[169] Rejoinder, para. 430.

[170] Rejoinder, para. 409.

[171] Rejoinder, paras. 423-434.

[172] See *History of the ICSID Convention*, Vol. II, p. 517.

> capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b).[173]

Unless there is a legally relevant reason for a tribunal to refrain from exercising jurisdiction it possesses, a tribunal declining to exercise it exceeds its powers.

156. In the present case, while the Tribunal rejected the Respondent's objections to its jurisdiction *ratione personae* and *ratione materiae* in the reasoning part of the Award,[174] it decided that "[t]he claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute".[175]

157. The Committee will have to review whether there were indeed legal reasons for the Tribunal to refrain from the exercise of its jurisdiction in order to determine whether it has manifestly exceeded its powers as contended by the Applicant.

4. FAILURE TO STATE REASONS

A. Applicant's Position

158. The Applicant notes that Article 52(1)(e) of the ICSID Convention provides that an award may be annulled if it fails to state the reasons on which it is based. It refers to the *ad hoc* Committee in *MINE* v. *Guinea* which noted that the award must enable "one to follow how

[173] *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, para. 86. See also *Soufraki* v. *UAE*, Decision on Annulment, June 5, 2007, para. 43; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.* (*formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.*) v. *Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, September 5, 2007, para. 99 ("*Lucchetti* v. *Peru*"); *Fraport AG Frankfurt Services Worldwide* v. *Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, December 23, 2010, paras. 36-37 ("*Fraport* v. *The Philippines*").

[174] Award, paras. 314-315, 324, 385. As noted above (para. 91), the Tribunal in view of its conclusion that the claims are inadmissible did not consider it necessary to deal with the remaining jurisdictional objections that the acts of the State-owned television provider are not attributable to the Respondent and the "purely contractual claims" relating to the Investment Agreement do not fall within its jurisdiction.

[175] Award, Chapter VIII entitled Decision, para. 587(a). This formulation implicitly confirms that the Tribunal possessed jurisdiction over the dispute.

the tribunal proceeded from Point A. to Point B. and eventually to its conclusion".[176] The requirement to state reasons — "one of the central duties of arbitral tribunals"[177] — extends to the tribunal's duty to consider and to respond to the arguments presented by the parties, especially those highly relevant to their case.[178]

159. Referring to *Vivendi* v. *Argentina (I)*, the Applicant submits that annulment for failure to state reasons should occur if the following two conditions are present: "first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision".[179]

160. The Applicant emphasizes four points regarding the reasons requirement: missing reasons can be inferred or reconstructed, but only when there is a reasonable basis to do so in the specific terms of the award;[180] inadequate, frivolous, unintelligible, or contradictory reasons justify annulment;[181] arguments and evidence with "the *potential* to be relevant to the final outcome of the case" must be considered and addressed by the tribunal;[182] and a tribunal is *not* presumed to have considered the parties' arguments and evidence when they are accurately summarized in the award.[183]

B. Respondent's Position

161. The Respondent states that there is no cause for annulment under Article 52(1)(e) when the terms of the award allow the parties to understand the tribunal's reasoning.[184] In addition,

[176] Application, para. 52; Memorial, para. 65; *MINE* v. *Republic of Guinea,* Decision on Annulment, December 22, 1989, para. 5.09. Annulment Hearing Tr. Day 1 (May 27, 2019) [E], 93: 7-9.

[177] Application, para. 65, citing *Tidewater Investment SRL and Tidewater Caribe, C.A.* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment, December 27, 2016, para. 163.

[178] Application, para. 53.

[179] Memorial, para. 69, citing *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, para. 65. Emphasis omitted.

[180] Reply, para. 58.

[181] Memorial, para. 66; Reply, paras. 61-66.

[182] Reply, paras. 67-69, citing *TECO* v. *Guatemala,* Decision on Annulment, April 5, 2016, paras. 135 and 138. Emphasis in the original.

[183] Reply, para. 70; A. PHB1, para. 13.

[184] Counter-Memorial, paras. 429-431.

the reasons in the award are assessed in the light of the parties' arguments and evidence and can derive implicitly from the terms used in the award.[185] The tribunal is not obliged to address all arguments and documents submitted by the parties, in particular when these do not affect the decision or when the reasons provided by a tribunal directly contradict them.[186] Lastly, to be annullable, genuinely contradictory reasons must be incapable of standing together on any reasonable reading of the decision.[187]

162. The Respondent also makes the following three observations: Article 52(1)(e) does not empower *ad hoc* committees to sanction the allegedly "inadequate or defective" ("*inapproprié ou défectueux*") nature of the reasoning of an award;[188] the tribunal's reasoning can be implicit from a reading of the award as a whole;[189] and the failure of the award to deal with every question submitted to the tribunal is not a ground for annulment under Article 52(1)(e).[190]

C. Committee's Analysis

163. A tribunal has an obligation under Article 48(3) of the ICSID Convention to state the reasons upon which its award is based.[191] Failure to comply with this obligation is a ground for annulment under Article 52(1)(e).

164. The purpose of this provision is to guarantee that a tribunal gives reasons for its award. It has to explain to the reader, in particular to the parties, how and why the tribunal reached its decision. However, Article 48(3) does not require discussion of arguments which have no impact on the award.[192]

---

[185] Counter-Memorial, paras. 429-431.

[186] Counter-Memorial, paras. 434-435.

[187] Counter-Memorial, paras. 440-441.

[188] Rejoinder, paras. 507-512.

[189] Rejoinder, paras. 513-517.

[190] Rejoinder, paras. 518-523.

[191] This requirement is restated in ICSID Arbitration Rule 47(1)(i).

[192] *Standard Chartered Bank* v. *United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, November 2, 2012, paras. 273-275.

165. It is, however, to be observed that it is one thing to state the reasons in the award and to explain to the parties the basis for the tribunal's decision, and why and how it was reached, and quite another whether the reasons given would convince the parties, in particular the party which has not prevailed, about the correctness of the decision and the reasons given in its support. The correctness of the reasoning is not relevant for the purpose of annulment and the *ad hoc* committees are not expected to review this aspect of the reasoning. Otherwise they would act as an appellate body. The *ad hoc* Committee in *Vivendi* v. *Argentina (II)* stated that:

> [T]he issue before this Committee is not to assess the accuracy or quality of the reasons given by the Tribunal but rather to review whether these reasons enable the reader to understand why the Tribunal reached the conclusions that were determinative for its decision(s).[193]

A number of *ad hoc* committees have expressed a similar view.[194]

166. The classic formula for the requirements of reasons, which the Parties in the present annulment proceeding also referred to was provided by the *ad hoc* Committee in *MINE* v. *Guinea*:

> The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.

---

[193] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *Argentina* (ICSID Case No. ARB/03/19), Decision on Annulment, May 5, 2017, para. 154 ("*Vivendi* v. *Argentina (II)*").

[194] See *e.g.*, *MCI* v. *Ecuador*, Decision on Annulment, October 19, 2009, para. 82; *Vieira* v. *Chile*, Decision on Annulment, December 10, 2010, para. 355; *Joseph Charles Lemire* v. *Ukraine* (ICSID Case No. ARB/06/18), Decision on Annulment, July 8, 2013, para. 278; *Impregilo S.p.A.* v. *Argentine Republic* (ICSID Case No. ARB/07/17), Decision on Annulment, January 24, 2014, para. 180 ("*Impregilo* v. *Argentina*"); *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Annulment, November 2, 2015, para. 66; *Ioan Micula, Viorel Micula and others* v. *Romania* (ICSID Case No. ARB/05/20), Decision on Annulment, February 26, 2016, para. 135; *TECO* v. *Guatemala*, Decision on Annulment, April 5, 2016, para. 124.

> In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.[195]

167. Relying on these statements, the *ad hoc* Committee in *Tulip* v. *Turkey* explained that "the standard merely requires that the reader can understand what motivated the tribunal. As long as an *ad hoc* committee can follow the reasons, it is irrelevant what it thinks of their quality".[196]

168. The view to the same effect was expressed by several *ad hoc* Committees. Thus the *ad hoc* Committee in *Wena* v. *Egypt* wrote:

> The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in *MINE*, this ground for annulment refers to a "minimum requirement" only. This requirement is based on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e).[197]

169. The *ad hoc* Committee in *Vivendi* v. *Argentina (I)* said:

> [I]t is well accepted both in the cases and the literature that Article 52 (1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.[198]

---

[195] *MINE* v. *Guinea*, Decision on Annulment, December 22, 1989, paras. 5.08, 5.09.

[196] *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 101.

[197] *Wena* v. *Egypt*, Decision on Annulment, February 5, 2002, para. 79.

[198] *Vivendi* v. *Argentina (I)*, Decision on Annulment, July 3, 2002, para. 64. Emphasis in the original. Footnote omitted.

170. Subsequent *ad hoc* committees have since adopted this standard.[199] It follows that the role of this Committee under Article 52(1)(e) of the ICSID Convention is not to inquire whether the reasons provided by the Tribunal in its Award are correct as a matter of law or whether they are convincing but to satisfy itself that the reasons given enable the reader to understand how and why the Tribunal arrived at its decision.

V. TRIBUNAL'S FINDINGS THE ANNULMENT OF WHICH IS SOUGHT BY THE APPLICANT

171. The Applicant invokes the following three grounds for annulment under Article 52 of the ICSID Convention:

(i) That the Tribunal manifestly exceeded its powers (Article 52(1)(b));

(ii) That there was a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and

(iii) That the Award failed to state the reasons upon which it is based (Article 52(1)(e)).

172. These three grounds are invoked by the Applicant, in a twin combination, with respect to several findings of the Tribunal. According to the Applicant, the Tribunal:

1. By holding that OTMTI's right to arbitrate had been extinguished by OTH's filing of a notice of dispute manifestly exceeded its powers and failed to state reasons for this conclusion;[200]

---

[199] *CDC* v. *Seychelles*, Decision on Annulment, June 29, 2005, paras. 66-75; *Mr. Patrick Mitchell* v. *Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, November 1, 2006, para. 21; *MTD* v. *Chile*, Decision on Annulment, March 21, 2007, para. 92; *Soufraki* v. *UAE*, Decision on Annulment, June 5, 2007, para. 134; *Lucchetti* v. *Peru*, Decision on Annulment, September 5, 2007, paras. 127-128; *Azurix Corp.* v. *The Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Annulment, September 1, 2009, paras. 53-56, 178; *MCI* v. *Ecuador,* Decision on Annulment, October 19, 2009, paras. 82 and 86; *Fraport* v. *The Philippines*, Decision on Annulment, December 23, 2010, paras. 272 and 277; *Continental Casualty Company* v. *The Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011, para. 100; *Libananco* v. *Turkey*, Decision on Annulment, May 22, 2013, paras. 90-94; *Impregilo* v. *Argentina*, Decision on Annulment, January 24, 2014, paras. 180-181; *Caratube* v. *Kazakhstan*, Decision on Annulment, February 21, 2014, paras. 101-102; *Alapli Elektrik B.V.* v. *Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment, July 10, 2014, paras. 197-199; *El Paso* v. *Argentina*, Decision on Annulment, September 22, 2014, paras. 217 and 235; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi* v. *Turkmenistan* (ICSID Case No. ARB/10/1), Decision on Annulment, July 14, 2015, paras. 59-64.

[200] Memorial, paras. 80-110; Reply, paras. 75-122.

2. By dismissing OTMTI's claims on the basis of the abuse of rights manifestly exceeded its powers and failed to state reasons for this conclusion;[201]

3. By finding that the settlement of the OTH Arbitration confirmed the inadmissibility of OTMTI's claims exceeded its powers and failed to state reasons for this conclusion;[202] and

4. By accepting Algeria's "untimely" objections of extinguishment of rights and abuse of rights seriously departed from a fundamental rule of procedure and failed to state reasons for admitting these objections.[203]

173. In its Post-Hearing Briefs, which were authorized by the Committee upon the Applicant's request, the Applicant addressed, as the first ground for its request for the partial annulment of the Award, the alleged serious departure from the fundamental rule of procedure.[204] The Committee considers it useful to begin by addressing this issue, as it relates to the Appellant's complaint that the objections to the admissibility of its claims, which the Tribunal upheld, were raised belatedly and should not have been admitted.

1. THE ACCEPTANCE OF RESPONDENT'S "EXTINGUISHMENT OF RIGHTS" AND ABUSE OF RIGHTS OBJECTIONS

A. Applicant's Position

174. The Applicant submits that the Tribunal seriously departed from a fundamental rule of procedure and failed to state reasons when it accepted the Respondent's objections of "extinguishment of OTMTI's rights" and abuse of rights,[205] and thus the corresponding part of the Award should be annulled.

[201] Memorial, paras. 111-169; Reply, paras. 123-150.

[202] Memorial, paras. 170-187; Reply, paras. 151-168.

[203] Memorial, paras. 188-213; Reply, paras. 169-225.

[204] A. PHB1, paras. 14-36; A. PHB2, paras. 1-10.

[205] Memorial, paras. 188-189; Reply, paras. 169, 223. The Committee notes that the expression "extinguishment of OTMTI's rights" has been used by the Applicant; it is not the term used by the Tribunal in the Award. The Respondent used, in French, the expressions "*le défaut d'intérêt pour agir*" and "*le défaut de droit d'agir*", Hearing Tr. Day 5 (May 30, 2015) [E] 162:22-23, R. PHB1, para. 19.

(a) Admissibility of the Respondent's "Extinguishment of Rights" and Abuse of Rights Objections

175. The Applicant complains that the Respondent unveiled the two preliminary objections for the very first time in its Closing Statement at the Hearing: first, the filing of OTH's Notice of Dispute under the Egypt-Algeria BIT "extinguished" the Claimant's claims under the BLEU-Algeria BIT; and, second, the Claimant had abused its rights to initiate arbitration proceeding under the latter BIT.[206] At the Hearing, the Claimant stated that the Respondent's objections could not be taken seriously given how late in the proceeding they had been raised.[207]

176. The Tribunal, the Applicant contends, ignored its own prior instructions that the Respondent's preliminary objections should be stated at the latest in its Counter-Memorial.[208] The Tribunal admitted and accepted the Respondent's objections without acknowledging the Claimant's objection as to their timeliness.[209] The Respondent's two objections do not reflect an "evolution" or "refinement" of previously raised arguments (as the record shows),[210] and they could have been elaborated prior to the close of the Hearing (since the Respondent was at all times fully aware of the nature and extent of the control that the Sawiris Family exercised over every entity in the Weather Group).[211]

177. According to the Applicant, the Respondent does not dispute that the Tribunal failed to state reasons for admitting its two preliminary objections.[212] In addition, "even if [the Claimant] had not raised repeated objections to Algeria's untimely new defenses, the Tribunal still should have stated the reasons why it chose to admit the defenses well outside

[206] Application, para. 31; Memorial, para. 194; A. PHB1, para. 15.

[207] Memorial, para. 194, citing Hearing Tr. Day 5 (May 30, 2015) [E] 196:22-197:16.

[208] Memorial, para. 195, citing Procedural Order No. 2 of April 10, 2014, para. 32.

[209] Memorial, para. 195.

[210] Reply, para. 170.

[211] Reply, para. 182.

[212] Reply, para. 224.

of the time limits under ICSID Arbitration Rule 41(1) and in contravention of its own orders".[213]

178. Therefore, the Tribunal's decision to permit the Respondent to introduce new preliminary objections at such a late stage constitutes a ground for annulment under Article 52(1)(d) of the ICSID Convention.[214] In addition, the Tribunal's failure to consider the Claimant's objections to the admissibility of the Respondent's objections, or to state reasons for its decision to reject those objections, constitutes a ground for annulment under Article 52(1)(e) of the Convention.[215]

(b) The Claimant's Right to Be Heard and the Treatment of Parties

179. The Applicant complains that the post-hearing procedure did not afford it with an equal or adequate opportunity to address what ultimately were the dispositive issues in the Award.[216] The Claimant was "unfairly and improperly limited" to respond in the "materially abbreviated manner and timeframe" permitted by post-hearing submissions, and thus was not able to adduce factual evidence, testimony, or legal authorities (other than publicly available cases).[217] Moreover, the Tribunal failed to give the Claimant an adequate opportunity to address the Respondent's preliminary objections, as well as the opportunity to discuss the two authorities not in the record but cited in the Award, which it contends, had a particular significance to the outcome of the case.[218]

180. The Applicant further submits that the Claimant agreed to the post-hearing submissions before the Respondent made its new preliminary objections, and its first true opportunity to respond to the Respondent's objections came only in the post-hearing reply;[219] that the Tribunal's "expressly imposed significant constraints" on the post-hearing briefs precluded

[213] Reply, para. 225. Emphasis omitted.

[214] Reply, paras. 175-183.

[215] Memorial, para. 199.

[216] Application, para. 33; A. PHB1, para. 21.

[217] Application, para. 33; Memorial, paras. 200-204.

[218] Memorial, paras. 200-213.

[219] Reply, paras. 185-188.

the Claimant from adequately rebutting the very objections to which the Tribunal later accorded dispositive weight;[220] that the Tribunal's "expressed specific interest in other issues" and its proposed opportunities to address those underscore the inadequacy of the procedure with respect to the Respondent's new and untimely objections;[221] and that a tribunal's discretion based on the principle of *jura novit curia* to rely on authorities not in the record is subject to important limits.[222]

181. Against this backdrop, the Tribunal's decision to dismiss the Claimant's claims based on the Respondent's untimely objections violated the Claimant's right to be heard and seriously departed from a fundamental rule of procedure, and therefore this part of the Award is annullable.[223]

(c) Alleged Waiver of the Applicant's Right to Raise an Article 52(1)(d) Ground

182. The Applicant asserts it did not waive the right to object to the Tribunal's serious departures from a fundamental rule of procedure, relying on two bases.[224]

183. First, the Tribunal's serious departures were not fully known or knowable until the issuance of the Award: "[t]he weight that the Tribunal assigned to Algeria's late extinguishment of rights and abuse of rights objections—and the true nature and impact of the impairment of OTMTI's right to be heard on those issues—could not have been known until after the Award was issued".[225] Accordingly, there has been no waiver under Rule 27 of the ICSID Arbitration Rules of the right to seek annulment.[226]

184. Second, the Claimant repeatedly objected to the Respondent's defenses. The Claimant raised a Rule 41(1) objection to the admissibility of the Respondent's defenses in the

[220] Reply, paras. 189-191.
[221] Reply, paras. 192-198. Emphasis omitted.
[222] Reply, paras. 199-201.
[223] Memorial, para. 200.
[224] Reply, paras. 202-204.
[225] Reply, para. 207.
[226] Reply, para. 208.

arbitration.[227] In any event, the Respondent acknowledges, "[t]here is no requirement as to form [for objections] set out in Arbitration Rule 27".[228] Further, the Claimant repeatedly and consistently highlighted the fundamentally improper nature of the Respondent's late objections, including in the Hearing on preliminary objections, Post-Hearing Briefs, post-hearing correspondence, and submissions on costs.[229]

185. In consequence, the Applicant preserved its right to challenge the Tribunal's late admission of those defenses and related violations of its right to be heard.[230]

B. Respondent's Position

186. The Respondent contends that the adversarial principle and the equal treatment of the Parties were respected at each stage of the arbitration procedure, including at the Hearing and in the post-hearing phase, and thus the Tribunal did not seriously depart from a fundamental rule of procedure.[231] The Applicant's claims based on Article 52(1)(d) of the ICSID Convention should therefore fail.

[227] Application, para. 32; Memorial, paras. 194 and 217, citing Claimant's Post-Hearing Brief in the arbitration, para. 169; Claimant's Reply Post-Hearing Brief in the arbitration, paras. 91-92; Letter from OTMTI to the Tribunal dated November 28, 2015, at p. 2; Claimant's Submission on Costs in the arbitration, para. 12.

[228] Reply, para. 211; citing Counter-Memorial, para. 287, fn. 287 (quoting Thomas H. Webster, Handbook of Investment Arbitration, Sweet & Maxwell, 2012, p. 462, para. C-27-11).

[229] Reply, paras. 212-222. See also footnote 227 above.

[230] Reply, paras. 203-204.

[231] Counter-Memorial, paras. 220-223.

(a) Admissibility of the Respondent's Lack of Standing ("Défaut d'Intérêt pour Agir") and Abuse of Rights Objections

187. According to the Respondent, its preliminary objections to jurisdiction and admissibility were timely.[232] The Respondent's objections were made at the beginning of the procedure and then refined and fully developed in the course of the proceeding to take into account new evidence added to the record.[233]

188. In particular, the Respondent raised its concerns to the Tribunal regarding the situation of double recovery ("*situation de double emploi*") from multiple claims and the complete opacity of the Claimant regarding the vertical chain of ownership from the early stages of the arbitration proceeding up to the decision on bifurcation.[234] Notably, at the Hearing on Bifurcation, the Respondent answered the request of a Tribunal member by confirming it intended to bring forward an objection based on the abuse of rights depending on the evidence it would gather in the arbitration proceeding.[235] In response, the Claimant acknowledged that an abuse of procedure would need to be assessed in light of the specific facts of the case.[236]

189. Furthermore, the Respondent stresses that new evidence adduced throughout the arbitration proceeding and in particular that which emerged from the examination of Mr. Sawiris at the Hearing, uncovered the abuse of rights.[237] This evidence brought to light the situation of double recovery ("*situation de double emploi*") stemming from the submission to arbitration of the same dispute by the Mr. Sawiris at different levels of the vertically integrated corporate chain.[238] Mr. Sawiris acknowledged that when he sold the shares of OTH to VimpelCom, he also gave up the right of action of OTH against the Respondent

[232] Rejoinder, para. 284.

[233] Counter-Memorial, paras. 239-240; R. PHB1, para. 17.

[234] Counter-Memorial, paras. 241-243.

[235] Rejoinder, paras. 259-262, referring to Bifurcation Hearing Tr. (March 26, 2014) [F] pp. 20:15-22:32. In the transcript of the interpretation into English, the passage appears at 50:18-55:21.

[236] Rejoinder, para. 263, referring to Bifurcation Hearing Tr. (March 26, 2014) [E] 58:21 – 60:2.

[237] Counter-Memorial, paras. 245-247.

[238] Rejoinder, para. 285.

because the price included the evaluation of OTH's claim initiated by the Notice of Dispute dated November 2, 2010.[239]

190. As a result, from the Respondent's view, the Applicant cannot reasonably argue that the objections to admissibility upheld by the Tribunal were untimely and warrant partial annulment of the Award under Article 52(1)(d) of the ICSID Convention.[240]

(b) The Claimant's Right to be Heard and the Treatment of the Parties

191. The Respondent takes issue with the Applicant's characterization of the Hearing and the Post-Hearing Briefs, asserting that the Applicant had full knowledge of the objections to admissibility and had an adequate opportunity to rebut them.[241] At the Hearing, the Claimant did not object when its witnesses and experts were questioned on, among others, the existence of its own harm, the effect of the OTH settlement agreement, and the abuse of rights principle.[242] In its Closing Statement, the Claimant specifically addressed the abuse of rights principle, stating this argument was not "serious" in the present case.[243] At the end of the Hearing, the Tribunal and the Parties agreed on the submission of two post-hearing briefs and jointly determined the terms of these briefs, without complaint from the Claimant on any aspect of the arbitral procedure.[244]

192. Moreover, the Claimant had an adequate opportunity to address the objections in the Post-Hearing Briefs. The Respondent recalls that the *ad hoc* Committee in *Fraport* noted that "[a] full opportunity to present one's case does not preclude a tribunal from setting reasonable limits on the timing and scale of both parties' submissions, provided that, in so doing, it affords the parties equality of treatment".[245] In its Post-Hearing Briefs, the Claimant stated the OTH Arbitration was "irrelevant" and addressed the situation of double

[239] Rejoinder, para. 278, referring to Hearing Tr. Day 2 (May 27, 2015) [E] 170:3-14 and 173: 16-19.

[240] Counter-Memorial, para. 249; Rejoinder, para. 287.

[241] Counter-Memorial, para. 250; Rejoinder, paras. 228 and 288.

[242] Counter-Memorial, para. 254.

[243] Rejoinder, para. 293, referring to Hearing Tr. Day 5 (May 30, 2015) [E] 196:22 – 197:16.

[244] Counter-Memorial, paras. 256-257; Rejoinder, para. 297.

[245] Counter-Memorial, para. 260; Rejoinder, para. 299, citing *Fraport* v. *The Philippines*, Decision on Annulment, December 23, 2010, para. 265. Emphasis omitted.

recovery ("*situation de double emploi*"), even submitting sources of law in support of its contentions.[246] The Tribunal did not completely forbid the submission of factual evidence and legal authorities, as the Applicant incorrectly asserts, but only required that those be authorized by it beforehand.[247]

193. The Respondent also states that the Tribunal did ensure that the adversarial principle was respected at every stage of the arbitration proceeding, including at the Hearing and in the Post-Hearing Briefs.[248] Contrary to the Applicant's affirmation, the Tribunal did not have to warn the Parties that it was inclined to uphold two preliminary objections and to grant the Claimant an additional opportunity to present its arguments on these objections.[249] Moreover, the Respondent argues, in the many procedural incidents initiated by the Claimant in the arbitration proceeding, where the Claimant initially refused to comply with the Tribunal's instructions and subsequently alleged a violation of the adversarial principle, the Tribunal allowed both Parties to formulate their arguments under the same conditions.[250] As the Tribunal accepted the Claimant's argument that "the Tribunal may apply the maxim *jura no[v]it curia* (or *jura novit arbiter*) and rely on any applicable legal authorities it deems relevant to its analysis",[251] the Applicant cannot now reasonably criticize the Tribunal for having granted the Respondent's abuse of rights objection while referring, *inter alia*, to extracts from two scholarly publications which were not debated.[252] Consequently, in upholding the Respondent's objections, the Tribunal treated the Parties equally and respected the Claimant's right to be heard.

[246] Rejoinder, paras. 313-314.

[247] Rejoinder, paras. 316-317.

[248] Counter-Memorial, paras. 263-264, 275; Rejoinder, para. 320.

[249] Counter-Memorial, para. 267.

[250] Rejoinder, para. 326.

[251] Award, para. 140.

[252] Rejoinder, para. 327.

(c) Alleged Waiver of the Applicant's Right to Raise an Article 52(1)(d) Ground

194. In the Respondent's view, the Applicant failed to raise in due course its objections to the alleged procedural irregularities it now mentions in support of its request to partially annul the Award.[253] More precisely, the Applicant forfeited its rights to invoke these alleged irregularities pursuant to Rules 27 and 53 of the ICSID Arbitration Rules.[254]

195. The Respondent submits that in the absence of a procedural objection raised during the arbitration proceeding alleging a departure from a fundamental rule of procedure, where the party either requested the tribunal to remedy the situation or formulated a reservation, an applicant is deprived of its right to invoke this departure in support of its annulment application based on an Article 52(1)(d) ground.[255]

196. According to the Respondent, the Applicant mischaracterizes the record by affirming it formulated in the arbitration proceeding a request under Rule 41(1) of the ICSID Arbitration Rules to reject the Respondent's objections.[256] On the contrary, the Claimant limited itself to arguing that the Respondent's objections upheld by the Tribunal had been raised for the first time at the Hearing and then tried to show that these objections were unfounded, without any criticism of their admissibility.[257] Accordingly, the Applicant cannot fault the Tribunal for not having considered (or rejected without justification) a procedural objection that it never submitted to the Tribunal.[258]

197. The Applicant attempts to artificially qualify the extent of its knowledge of alleged violations, stating they "[w]ere [n]ot [f]ully [k]nown [o]r [k]nowable" during the arbitration proceeding, and only "became evident" when the Award was issued.[259] However, a party needs not to wait until the award is issued to realize that there was a

[253] Counter-Memorial, para. 283.

[254] Rejoinder, paras. 336-337.

[255] Rejoinder, para. 343.

[256] Counter-Memorial, para. 297.

[257] Rejoinder, para. 351.

[258] Rejoinder, para. 352.

[259] Rejoinder, para. 362. Emphasis omitted.

procedural violation in the conduct of the arbitration process and must promptly submit its objections (or, at least, before the rendering of the award).[260] Yet, the Claimant did not raise any objection during the various stages of the procedure which followed, nor expressed any reservation in this regard.[261]

198. The Respondent submits that, pursuant to Rules 27 and 53 of the ICSID Arbitration Rules, the Applicant is deprived of the right to invoke the alleged procedural irregularities in an attempt to characterize a serious departure from a fundamental rule of procedure. For the above reasons, the Applicant's partial annulment request based on Article 52(1)(d) can only be dismissed.[262]

C. Committee's Analysis

199. In the view of the Committee, three distinct issues arise in relation to the alleged serious departure from a fundamental rule of procedure:

(a) The issue of whether OTMTI is barred from invoking the alleged procedural irregularities by failing to promptly object to the conduct of the proceeding;

(b) The issue of whether Algeria's admissibility objections as to the lack of OTMTI's standing ("*défaut d'intérêt pour agir*") and the abuse of rights were untimely; and

(c) The issue of whether OTMTI was given sufficient opportunity to defend itself against these objections and whether its right to be heard was respected.

(a) Alleged Waiver of OTMTI's right to raise an Article 52(1)(e) ground complaining of the conduct of the proceeding

200. The Respondent argues that OTMTI shall be deemed to have waived its right to invoke the alleged irregularities in the conduct of the proceeding as a ground for annulment under Article 52(1)(d) of the ICSID Convention since it did not promptly state its objection to

[260] Rejoinder, paras. 366-369.

[261] Rejoinder, para. 370.

[262] Rejoinder, para. 374.

the alleged non-compliance with the Arbitration Rules, as required by Rule 27 of the ICSID Arbitration Rules.[263]

201. The Committee is not convinced that OTMTI waived its right to seek annulment under Article 52(1)(d) of the ICSID Convention in relation to the treatment by the Tribunal of the two objections raised by the Respondent with regard to the admissibility of the claims. First, counsel for the Claimant noted in her Closing Statement that "[w]e heard a couple of new arguments this morning: in part, that there are too many people that might be able to claim […] We also heard for the very first time today about the alleged abuse of rights".[264] When asked before the closure of the Hearing whether she had any complaints, counsel simply replied: "I am trying to remember all the procedural orders!"[265] Second, in its Post-Hearing Briefs, OTMTI emphasized again that the Respondent argued for the very first time at the Hearing that the commencement of the OTH Arbitration deprives the Tribunal of jurisdiction.[266] Although OTMTI did not refer specifically in this context to ICSID Arbitration Rule 41(1), it, however, expressly invoked that Rule when it addressed Respondent's argument, advanced according to the OTMTI "for the very first time" at the Hearing, that, because the "Claimant's investment at issue [was] 0.05 percent indirect shareholding in OTA […] on the date it submitted its claim to arbitration",[267] the Tribunal lacked jurisdiction. OTMTI considered this to be the "Respondent's newfound objection to the Tribunal's jurisdiction over the whole of Claimant's investment [which was] both untimely and legally baseless".[268] OTMTI, quoting ICSID Arbitration Rule 41(1),

[263] Counter-Memorial, para. 283. ICSID Arbitration Rule 27 provides that *"*[a] party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object".

[264] Hearing Tr. Day 5 (May 30, 2015) [E] 196:22-197:8.

[265] Hearing Tr. Day 5 (May 30, 2015) [E] 250:22-23. Counsel spoke in English. The transcript of the interpretation differs a little bit: "J'essaie de me souvenir de toutes les ordonnances de procédure pour voir si . . . Mais non !" Hearing Tr. Day 5 (May 30, 2015) [F] 94:18-19.

[266] Claimant's Post-Hearing Brief in the arbitration, para. 169.

[267] Claimant's Post-Hearing Brief in the arbitration, para. 154. Emphasis added.

[268] *Ibid*. Emphasis added.

expressed the view that the objection was untimely and therefore "should […] be rejected by the Tribunal on this ground". [269]

202. There can, therefore, be no doubt that the Tribunal was fully aware of the Claimant's position that the objections, which the Claimant considered "untimely", should be rejected.

203. Moreover, in a letter to the Tribunal, in which the Claimant reacted to the Respondent's request to exclude Claimant's resubmitted legal authority CLA-226 or provide Respondent a further opportunity to submit responsive legal authorities and argument, the Claimant emphasized that it relied in its Reply Post-Hearing Brief on the additional paragraphs of Mr. Wehland's monograph [270] (which was already referred to in its Counter-Memorial on Jurisdiction and Admissibility) "to respond to *a jurisdictional objection that Respondent raised for the very first time in passing during its Closing Argument*". [271] The Claimant argued that the additional pages from Mr. Wehland's monograph were produced "to show that there is no merit whatsoever to Respondent's new and untimely objection". [272] The Claimant stressed that "this new jurisdictional objection should be rejected not only because it is meritless, but also it is untimely and was raised in clear violation of the procedure set out in the ICSID Arbitration Rules". [273]

204. The Applicant argues that the Tribunal seriously breached a fundamental rule of procedure "as its decision to admit and accept Algeria's new and untimely objections violated OTMTI's right to be heard". [274] As noted above, OTMTI expressed the view several times in the arbitration proceeding that the "extinguishment of rights" and abuse of rights objections were untimely and therefore should have been rejected (also) on that ground. It

[269] Claimant's Post-Hearing Brief in the arbitration, para. 155. See also Claimant's Reply Post-Hearing Brief, para. 83 where reference is made to ICSID Arbitration Rule 41(1) in relation to another objection which the Claimant considered "untimely and devoid of any merit".

[270] H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford University Press 2013.

[271] Claimant's letter to the Tribunal, dated November 28, 2015, p. 2. Emphasis in the original.

[272] *Ibid*. Emphasis added.

[273] *Ibid*. Emphasis added.

[274] Memorial, para. 200.

cannot be said that it waived its right to seek the partial annulment of the Award under Article 52(1)(d) of the ICSID Convention.

(b) Alleged Untimeliness of Algeria's admissibility objections

205. Pursuant to Rule 41(1) of the ICSID Arbitration Rules, any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

206. Reviewing the procedural history of the arbitration, it appears that the issues of parallel proceedings, the preclusion of claims and abuse of rights have been mentioned from the very beginning of the arbitration. They were addressed and discussed at different stages of the proceeding:

a) At the First Session, Algeria pointed to the parallel proceedings initiated by OTH. [275]

b) In its Bifurcation Request, Algeria announced it would raise an admissibility objection based on the remote indirect investment of OTMTI. [276]

c) During the Hearing on Bifurcation, Algeria mentioned a possible abuse of procedure [277] which was expressly acknowledged by the Tribunal [278] and OTMTI. [279]

d) In its Memorial on Preliminary Objections, Algeria argued that OTMTI's claims are inadmissible as OTMTI lacked standing following the sale of its participation

[275] First Session in the arbitration Tr. (May 16, 2013) [E] 36:11, 38:3.

[276] Respondent's Bifurcation Request dated January 24, 2014, p. 15.

[277] Bifurcation Hearing Tr. (March 26, 2014) [E] 12:6, 15:10, 18:21-22, 19:14, 55:18-21.

[278] Bifurcation Hearing Tr. (March 26, 2014) [E] 50:18-20.

[279] Bifurcation Hearing Tr. (March 26, 2014) [E] 59:1-3, 62:7.

in OTH to VimpelCom and a legal interest following the settlement agreement.[280] OTMTI addressed this objection in its Counter-Memorial and Rejoinder.[281]

207. Although the above-mentioned issues have been pending throughout the arbitration, they have been discussed in relation to different points in time, i.e. whether the sale of Weather Investments to VimpelCom and/or the settlement agreement (but not OTH's filing of a notice of dispute and its exercise of the right to start arbitration against Algeria) would have preclusive effects. The preclusive effect of OTH's Notice of Dispute and any associated abuse of rights have indeed been first raised in Algeria's Closing Statement at the Hearing.[282]

208. However, the Committee does not consider that these were "new" preliminary objections in a technical sense as the admissibility of OTMTI's claims had been contested from the very outset of the proceeding. Whereas the factual circumstances as well as the specific legal theories relied upon evolved throughout the proceeding, the broad legal nature of the objections remained unchanged. Against this background, Algeria's argument that the objections were further developed and refined in the course of the proceeding[283] appears to be correct.[284] Nevertheless, Algeria's reliance on different factual circumstances in its Closing Statement raises the question whether the Claimant had the opportunity to defend itself (see below).

(c) OTMTI's rights to be heard and to equal treatment

209. OTMTI submits that its rights to be heard and to receive equal treatment were violated as a result of four alleged failures by the Tribunal:

[280] Memorial on Preliminary Objections, paras. 286 and 288.

[281] Counter-Memorial on Preliminary Objections, paras. 113-115; Rejoinder on Preliminary Objections, paras. 274-299.

[282] Hrg. Tr., Day 5 (May 30, 2015) [E] 143:16-21, 153:10-25, 154:1-4, 162:1-15, 163:17-22, 168:14-15.

[283] Counter-Memorial, para. 240.

[284] OTMTI's Counsel, in her first reaction to the Respondent's closing statement, referred to "a couple of new arguments [heard] this morning", not to "new objections". See para. 201 above and fn. 264.

(i) OTMTI was unable to adequately address Algeria's new arguments in its Post-Hearing Briefs due to "the materially abbreviated manner and timeframe permitted by post-Hearing submissions";[285]

(ii) OTMTI was unable to adduce new factual evidence, expert or witness testimony and severely limited in its ability to submit new legal authorities;

(iii) OTMTI did not have an opportunity to comment on two of the legal authorities eventually relied upon by the Tribunal in its Award; and

(iv) The Tribunal gave OTMTI no indication as to the significance it would ultimately attach to Algeria's new admissibility arguments.

210. The Committee shall address these four allegations in turn.

(i) OTMTI's alleged inability to adequately address Algeria's new arguments in the Post-Hearing Briefs

211. OTMTI argues that the modalities of the Post-Hearing Briefs (such as the page and time limits) had been agreed upon before Algeria revealed its new arguments in its Closing Statement.[286]

212. Yet the Parties agreed on a four-month deadline and a limit of 100 pages for the first Post-Hearing Brief. The Reply Post-Hearing Briefs were due another six weeks later and limited to 50 pages (later raised to 55 pages).[287]

213. The Committee is not convinced that these directions impaired OTMTI's ability to defend itself against Algeria's new arguments raised in the Closing Statement. During her own Closing Statement, Counsel for the Claimant observed that "it can't really be a very serious contention".[288] And she added "[s]o we reject it as clearly wrong", noting that "this is really our preliminary or initial look at some of the issues that have been raised, certainly, and we will rely for a fuller explication on our post-hearing submissions".[289] This shows that OTMTI was well aware of the Respondent's new arguments regarding the preclusive effect

[285] Memorial, para. 203.

[286] Memorial, para. 203.

[287] Procedural Order No. 10 of June 4, 2015, Sections IV.5 and IV. 6. The Order was issued five days after the closure of the Hearing on jurisdiction and admissibility.

[288] Hrg. Tr., Day 5 (May 30, 2015) [E] 197:7-16.

[289] Hrg. Tr., Day 5 (May 30, 2015) [E] 171:7-10. Emphasis added.

of OTH's Notice of Dispute and OTMTI's abuse of rights. Nevertheless, OTMTI commented only briefly on Algeria's new arguments in its further submissions, dedicating 4 pages out of its 94 in its first Post-Hearing Brief [290] and 4 pages out of 59 in its Reply Post-Hearing Brief to these objections, [291] considering them "baseless in fact and in law", or "meritless". [292] Nothing prevented the Claimant from devoting more attention to these arguments. It could have done so with some additional six pages without any need to request the Tribunal to expand the page limit for the Post-Hearing Brief.

214. Moreover, OTMTI did not seek leave from the Tribunal to raise the page limit to address Algeria's new arguments (despite the fact that the page limit regarding the Reply Post-Hearing Briefs was raised by the Tribunal due to the BIT's *travaux préparatoires* meanwhile received from the Kingdom of Belgium).

(ii) OTMTI's alleged inability to adduce new evidence

215. OTMTI argues that it "did not have the opportunity to adduce any witness or expert testimony in response to Algeria's untimely objections" and to "submit factual evidence of any kind or legal authorities, other than publicly-available awards and decisions". [293]

216. The Committee notes that Procedural Order No. 10 granted the Parties the opportunity to submit two rounds of further legal authorities prior to the Post-Hearing Briefs. [294] *Prima facie,* this did not seem to be limited to any specific issues. As part of this process, the Claimant submitted the new legal authorities CLA-270 up to CLA-299. In addition to that, the Parties were allowed to submit further additional international decisions and awards as

[290] Claimant's Post-Hearing Brief in the arbitration, pp. 80-84.

[291] Claimant's Reply Post-Hearing Brief in the arbitration, pp. 46-50. By email of October 20, 2015 the Tribunal informed the Parties that they were allowed five additional pages in their Reply Post-Hearing Briefs to address the *travaux préparatoires* received from the Kingdom of Belgium. It is unclear why OTMTI nevertheless submitted 59 pages instead of 55 pages (Algeria's Reply Post-Hearing Brief consisted of 55 pages).

[292] Claimant's Post-Hearing Brief in the arbitration, p. 81, paras. 169 and 178. See also Claimant's Reply Post-Hearing Brief in the arbitration, p. 47, para. 91 and p. 48, para. 94.

[293] Memorial, para. 203.

[294] Procedural Order No. 10 of June 4, 2015, Section III.

new legal authorities with the first Post-Hearing Brief to the extent that they addressed issues related to questions raised by the Tribunal.[295]

217. In its response to Algeria's new arguments on the preclusive effect of OTH's Notice of Dispute and OTMTI's abuse of rights, the Claimant, however, did not rely on any new legal authorities. Only in its Reply Post-Hearing Brief did the Claimant submit new excerpts from Mr. Wehland's monograph.[296]

218. While it is true that the Parties could only submit further additional international decisions and awards as new legal authorities with the first Post-Hearing Brief insofar as they related to the specific questions raised by the Tribunal,[297] it has not been shown whether this actually hindered the Claimant in its defence:

219. *First,* Algeria's new arguments were spelt out in sufficient detail by Algeria's Counsel in his Closing Statement so the Claimant did not have to wait for Algeria's first Post-Hearing Brief to understand the nature and scope of the new arguments.

220. *Second,* the Tribunal's limitations on the submission of new legal authorities with the Post-Hearing Briefs did not prevent the Claimant from submitting new excerpts from Mr. Wehland's monograph. Arguably, if it had intended to submit further legal authorities, it could and would have done so.

221. After Algeria's objection to the submission of additional excerpts from Mr. Wehland's monograph, the Claimant argued in its letter to the Tribunal that:

> [I]f the Tribunal is to consider Respondent's new jurisdictional objection rather than reject it as untimely under the ICSID Arbitration Rules, it would be extremely prejudicial to Claimant to exclude from the record portions of a legal authority that already was in the record, as this would deny Claimant the right to be heard and would result in a fundamentally unfair proceeding and unequal treatment of the Parties. Likewise, it would be unjustified and prejudicial to Claimant to permit Respondent at this late stage to seek to introduce new legal authorities to support a jurisdictional objection that

[295] Procedural Order No. 10 of June 4, 2015, Section IV.8.

[296] Claimant's Reply Post-Hearing Brief in the arbitration, para. 96. H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford University Press 2013, (CLA-226 (Amended)).

[297] Procedural Order No. 10 of June 4, 2015, Section IV.8.

Respondent failed to raise until its Closing Argument and did not elaborate until its Post-Hearing Brief. [298]

222. While the Claimant asserted that the exclusion of Mr. Wehland's monograph would violate its right to be heard, it did not state that it was in any other way hindered in its defence against Algeria's new arguments. To the contrary, it argued that the submission of new legal authorities by Algeria at this late stage of the proceeding would be "unjustified and prejudicial". It appears that the Claimant did not take issue with the post-hearing procedure prior to the Award.

223. *Finally*, as the *ad hoc* Committee in *Churchill Mining* v. *Indonesia* has stated, a party cannot object belatedly after having submitted some evidence on the ground that it now wishes it would have submitted more evidence. [299]

(iii) Claimant's inability to comment on some of the legal authorities relied upon by the Tribunal

224. The Tribunal cited two legal authorities that were not on the record: First, it quoted a book chapter by Professor Kolb stating that the prohibition of abuse of rights is a "general principle applicable in international law as well as in municipal law". [300] Second, it cited Sir Hersch Lauterpacht's statement that "there is no legal right, however well established,

[298] OTMTI's Letter to the Tribunal dated November 28, 2015, p. 2. The Tribunal rejected the Respondent's objection. See Award, para. 139.

[299] *Churchill Mining Plc and Planet Mining Pty Ltd* v. *Republic of Indonesia* (ICSID Case No. ARB/12/14 and ARB/12/40), Decision on Annulment, March 18, 2019, para. 186. Footnote omitted. ("The Applicants further contend that the Parties did not file evidence, which they contend was critical, on the due diligence practice of investors in the Indonesian mining sector in 2006-2010. They admit that they nonetheless did present arguments on due diligence, but allege that these were made for different purposes than addressing the *Minnotte* factors, including in support of their claim for estoppel based on the State's alleged recognition of the validity of the disputed licenses. However, the Applicants cannot object belatedly to the Tribunal's evaluation of the evidence they presented on the basis that they now wish they might have submitted more. The fact that Churchill and Planet did submit evidence and arguments on due care reflects the fact that they evidently had the opportunity to do so").

[300] Award, fn. 833, citing R. Kolb, *Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, General Principles of Procedural Law*, in: Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed. 2012), p. 904.

which could not, in some circumstances, be refused recognition on the ground that it has been abused".[301]

225. As is apparent, the two quotations from legal authorities that were not on the record only serve to establish and define the general doctrine of abuse of rights under international law. This, however, was undisputed between the Parties during the arbitration. In its two Post-Hearing Briefs in the arbitration, the Claimant had merely argued that the present scenario does not constitute an abuse of rights without contesting the existence of the doctrine under international law.[302]

226. In the Committee's view, the Tribunal was thus under no obligation to invite the Parties to comment on these legal authorities that did not concern a legal issue in dispute between them.

(iv) No indication by the Tribunal as to the significance of Algeria's new arguments

227. The Applicant argues that:

> [O]n several occasions at the end of the proceeding, the Tribunal expressed specific interest in other issues that it was weighing, and provided additional opportunities for the Parties to address them" and that "[t]he significant further opportunities to be heard that the Tribunal offered with respect to objections that it later dismissed underscore the inadequacy of the procedure with respect to the new and untimely objections on the basis of which the Tribunal dismissed OTMTI's claims.[303]

228. At the Hearing, the Tribunal identified the effects of the sale of OTH and the settlement agreement on OTMTI's claims in the arbitration and how they should be analyzed by the Tribunal, whether as a question of admissibility, standing or quantum, as the issues on

[301] Award, fn. 834, citing H. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 164.

[302] See Claimant's Post-Hearing Brief in the arbitration, para. 178 ("In these circumstances, there is no basis to argue, as Respondent does, that Claimant's exercise of its right under the BIT to initiate arbitration proceedings against Respondent constitutes an abuse of rights".); Claimant's Reply Post-Hearing Brief in the arbitration, para. 94 ("In these circumstances, there is no basis for Respondent to argue that Claimant's exercise of its right under the BIT to initiate arbitration proceedings against Respondent constitutes an abuse of process".).

[303] Reply, para. 192.

which the Parties may focus a little bit more in the Post-Hearing Briefs.[304] While the Tribunal did not single out OTH's Notice of Dispute as a particular point of interest, the Tribunal's remarks were made before Algeria's Closing Statement.

229. In its letter of February 12, 2016 (almost nine months after the Hearing), the Tribunal invited the Parties to comment on the requirement of *siège social* in the *Tenaris* v. *Venezuela* Award, issued two weeks earlier on January 29, 2016 and on the meaning of Article 1(1)(b) of the Dutch and Arabic versions of the BIT. It did, however, not invite the Parties to further comment on the preclusive effect of OTH's Notice of Dispute.

230. As the deliberations of a tribunal might advance[305] and take an unexpected turn even at a late stage, a tribunal cannot be expected to provide a comprehensive list of key issues when it invites the parties to comment on certain aspects at the hearing.

231. Moreover, as the Applicant admits,[306] there is no procedural rule requiring a tribunal to signal a likely basis for its decision or outcome to the parties. Neither does the Committee consider that a tribunal is required to seek additional comments of the parties on a relevant issue that one party has only briefly touched upon in its submissions as long as the tribunal considers itself sufficiently informed by the parties' submissions. The situation might be different if a party is completely unaware of, and therefore fails to address, one of its opponent's key arguments (which is clearly not the case here as OTMTI made submissions on the two admissibility issues).

232. Against this background, the Committee cannot find a serious departure from a fundamental rule of procedure in this regard. Although the Tribunal's admissibility decision might have come as a surprise to OTMTI, both Parties had briefed the Tribunal on these issues in two written submissions. Furthermore, OTMTI's legal expert, Professor Dolzer, was extensively examined on the issue of abuse of rights during the Hearing.[307]

---

[304] Hearing Tr. Day 4 (May 29, 2015) [E] 197:22-199:18.

[305] The Tribunal expressly stated in its letter that it was "making progress".

[306] Reply, para. 173.

[307] See e.g. Hearing Tr. Day 4 (May 29, 2015) [E] pp. 117-118.

2. THE OTH NOTICE OF DISPUTE AND THE CLAIMANT'S RIGHT TO BRING THIS ARBITRATION

A. Applicant's Position

233. The Applicant submits that the Tribunal manifestly exceeded its powers and failed to state reasons in holding that the Claimant's right to arbitrate under the BIT had been "extinguished" by OTH's filing of a notice of dispute, thus rendering Claimant's claims inadmissible.

(a) The Tribunal's Application of the Law

234. The Applicant contends that the Tribunal manifestly exceeded its powers in holding that the Claimant's right to act under the BIT had been "extinguished" by OTH's filing of a notice of dispute against the Respondent under the Egypt-Algeria BIT.[308] In inventing a "putative rule of law" depriving the Claimant of standing and in finding the claims inadmissible, the Tribunal relied on no legal authorities and found no support in the language of the ICSID Convention or the BIT.[309] The Applicant further contends that, neither the ICSID Convention nor the BIT contains a rule of forfeiture, waiver, or other legal limitations preventing so-called "parallel proceedings".[310] The Applicant submits that the Tribunal invented new law based upon on its own "purported policy 'views'" when it refused to exercise the jurisdiction conferred upon it.[311]

235. According to the Applicant, four points should also be considered in the present case when examining the Tribunal's non-application of the proper law: (1) the Tribunal did not identify "principles of international law" as the law applicable to the Respondent's admissibility objections, nor was there any agreement between the Parties that "principles of international law" applied to those objections;[312] (2) the specific terms of the Award provide no basis to ground the Tribunal's putative rule in the notion of "*droit d'agir*" or

[308] Application, paras. 38-40; Memorial, para. 80.

[309] Memorial, paras. 84-85, 87; Reply, paras. 75-77.

[310] Memorial, paras. 88-97.

[311] Memorial, para. 98; A. PHB1, para. 37.

[312] Reply, para. 85; A. PHB1, para. 41.

"*intérêt pour agir*";[313] (3) even if it relied on this notion, the Tribunal failed to establish that such a "notion" is a principle of international law, or that it applies to issues of legal standing or *ius standi* in an ICSID arbitration under the BIT;[314] and (4) the fact that the Applicant's legal experts understand why the Tribunal found the Claimant's claims inadmissible as a result of OTH's Notice of Dispute does not mean that the Tribunal identified or applied the proper law under Article 42(1) of the ICSID Convention or Article 9(4) of the BIT.[315]

236. The Applicant maintains that, while the *ad hoc* Committee cannot reopen debates on questions of fact, it can review the factual and legal premises underlying the Tribunal's Award.[316] In the Applicant's view, the Tribunal invented and imposed new "law" based upon nothing more than its own policy views and refused to exercise the jurisdiction validly conferred upon it under the BIT and the ICSID Convention, thus manifestly exceeding its powers.[317]

(b) The Tribunal's Reasons

237. According to the Applicant, the Tribunal failed to state reasons in holding that OTH's Notice of Dispute under the Egypt-Algeria BIT rendered the Claimant's claims inadmissible, as this part of the Award relies on insufficient, contradictory, and internally inconsistent reasons.[318] According to the purported rule of law, announced by the Tribunal, "[i]f the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances".[319] Yet, it is impossible to discern from the Tribunal's Award the rule "actually applied" because no claim of any entity in

[313] Reply, paras. 86-90; A. PHB1, para. 42.
[314] Reply, paras. 91-93.
[315] Reply, para. 94.
[316] Reply, paras. 95-97.
[317] Reply, para. 95; A. PHB1, para. 37.
[318] Application, para. 54; Memorial, para. 82; A. PHB1, para. 44.
[319] Award, para. 495.

the Claimant's group has been repaired in November 2010.[320] Moreover, the Tribunal's reasoning that the inadmissibility rule depends upon claims being "fully repaired" in a prior arbitration, while at the same time finding that the economics of the OTH Arbitration settlement was "irrelevant", is contradictory and internally inconsistent.[321]

238. In addition, the Applicant submits that the Tribunal's purported statement of reasons on the consequence of OTH's Notice of Dispute further requires partial annulment. The Tribunal failed to offer any legal analysis of how one entity's filing of a notice of dispute could "extinguish" independent treaty claims held by a separate entity.[322] The Applicant considers the Tribunal's explanations that the Claimant first caused one subsidiary to bring claims against Algeria and then it caused a different subsidiary in the chain to threaten to bring a different arbitration to the same dispute as contradictory and inconsistent.[323] Finally, the Tribunal's ruling on the Notice of Dispute does not account for the Claimant's highly relevant arguments to its case.[324]

239. On OTH's Notice of Dispute, the Applicant also makes the following observations: first, the specific terms of the Award provide no basis to import the "notion" of "*droit d'agir*" or "*intérêt pour agir*" into the Tribunal's reasoning;[325] second, a tribunal cannot be deemed to have considered the parties' arguments by simply summarizing them in the award and in this case the Tribunal's decision ignored the Claimant's legal argument;[326] and, third, the Tribunal did not ground its putative rule on the mere assertion of a claim for relief, but rather on the harm incurred being "fully repaired", which the Tribunal did not determine.[327]

[320] Memorial, para. 100. Emphasis omitted.
[321] Memorial, paras. 101-103; A. PHB1, para. 48.
[322] Memorial, para. 104; A. PHB1, para. 46.
[323] Memorial, para. 107.
[324] Memorial, paras. 108-109; A. PHB1, paras. 44 and 50.
[325] Reply, para. 104.
[326] Reply, para. 112; A. PHB1, para. 51.
[327] Reply, paras. 117-122.

240. In this context, according to the Applicant, the findings of the Tribunal on the OTH's Notice of Dispute should be annulled pursuant to Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention.

B. Respondent's Position

241. The Respondent contends that the Tribunal ruled within the limits of its powers and stated its reasons for finding the Claimant's claims inadmissible on the basis of its absence of a right to act ("*défaut de droit d'agir*") and thus this part of the Award should not be annulled.

(a) The Tribunal's Application of the Law

242. In the Respondent's view, the Tribunal applied the applicable law in declaring the Claimant's claims inadmissible. [328] In accordance with Article 9(4) of the BIT, the Tribunal correctly found that international law is applicable to the question of the admissibility of the claims in the arbitration proceeding. [329] The Tribunal then upheld the objection to the admissibility based on the Claimant's absence of a right to act ("*défaut de droit d'agir*") as a result of OTH's prior exercise of its right to arbitrate. [330]

243. The Respondent makes several arguments in this respect. First, the Tribunal adopted the Respondent's reasoning that the Claimant lost its interest to act ("*perte d'intérêt pour agir*"). The Tribunal followed the same factual premises, noting the vertically integrated corporate chain of companies chaired by Mr. Sawiris and the notices of dispute signed by him concerning the same measures and defining the dispute by reference to the previous notice(s). [331] The Tribunal then considered that by sending the Notice of Dispute in the name and on behalf of OTH, Mr. Sawiris had made the choice to crystallize "the one and the same" dispute at the level of OTH. [332] In addition, the Tribunal noted that the existence of this claim in OTH's patrimony meant other companies in the corporate chain were

[328] Counter-Memorial, para. 373.

[329] Counter-Memorial, paras. 374-383; Rejoinder, para. 437.

[330] Rejoinder, para. 442.

[331] Counter-Memorial, paras. 390-391.

[332] Counter-Memorial, paras. 393-394, citing Award, paras. 414, 496-497; Rejoinder, para. 446.

"satisfied" ("*remplies de leurs droits*"), except if they suffered an independent loss.[333] After a detailed analysis of heads of damage invoked by the Claimant, the Tribunal held that all alleged heads of damage were in fact "caused to … OTH" or were, for other reasons, inadmissible.[334]

244. Second, the Respondent notes that a comparison of the terms used by the Tribunal in the Award to summarize the objections based on the Claimant's loss of its interest to act ("*perte d'intérêt pour agir*") (Award, paras. 411-416) with those used by the Tribunal in its analysis (Award, paras. 495-498) confirms, if need be, that the Tribunal has accepted the Respondent's objection.[335] Moreover, the Applicant cannot seriously argue the Tribunal's reasoning is "[not] grounded in any way" on the notion of "*droit d'agir*" or "*intérêt pour agir*". For one, the Applicant admits that, in declaring the Claimant's claims inadmissible, the Tribunal upheld the Respondent's objections based on this notion.[336] The Applicant also used, both during the arbitration proceeding and in this annulment proceeding, the term "*standing*" to refer to its alleged interest to act.[337]

245. Furthermore, the Respondent takes issue with the new arguments raised by the Applicant in its Reply, criticizing the Tribunal for allegedly failing to establish the existence and scope of the notion of "*droit d'agir*" and "*intérêt pour agir*".[338] It notes that the Claimant never contested during the arbitration proceeding that a claimant must prove it has an interest to act.[339] The Tribunal also established the scope of the rule which it subsequently applied: if a claimant cannot actually claim any material loss, the conditions for the exercise of its right to act are not met.[340] The Applicant's further contention that the Tribunal's application of this rule to circumstances in which it had never been applied before warrants a partial annulment of the Award is similarly to no avail, as *ad hoc* committees are not

[333] Counter-Memorial, para. 396.
[334] Counter-Memorial, para. 397, citing Award, paras. 499-518.
[335] Rejoinder, para. 447.
[336] Rejoinder, para. 449.
[337] Rejoinder, para. 451.
[338] Rejoinder, para. 455.
[339] Rejoinder, paras. 456-459.
[340] Rejoinder, paras. 461-465.

entitled to scrutinize tribunals' interpretation of the applicable law or ascertainment of the facts.[341]

(b) The Tribunal's Reasons

246. The Respondent argues that the Tribunal fully justified its decision that the Claimant lost standing to bring the arbitration.[342] The Parties perfectly understand the Tribunal's reasoning, which the Applicant itself unwraps.[343] The Tribunal sought to determine whether the conditions for the Claimant's right to act ("*droit d'agir*") were met and, in particular, whether the Claimant had standing to bring these arbitration proceedings ("*intérêt pour agir*").[344] Based on the specific facts of the case, the Tribunal determined that the Claimant did not have standing, and thus that its claims were inadmissible.[345]

247. According to the Respondent, by claiming that the Tribunal did not refer to the Claimant's arguments and evidence alleging a notice of dispute has no effect, the Applicant is actually questioning the Tribunal's reasoning on the merits on this point.[346] In the arbitration, the Claimant itself did not refer to any relevant legal sources for its proposition that "OTH's Notice of Dispute […] has no legal significance other than to fulfill the procedural requirements under the Algeria-Egypt bilateral investment treaty".[347] In finding that the Notice of Dispute sent by Mr. Sawiris on behalf of OTH activated "the legal protection that was available at the various levels of the corporate chain", the Tribunal necessarily rejected the Claimant's argument that the notice had no effect.[348]

248. The Respondent submits that the reasons in the Award are not contradictory.[349] The pronouncement "[i]f the harm […] is fully repaired in one arbitration" (and not "[i]f the

[341] Rejoinder, para. 467.
[342] Counter-Memorial, para. 445.
[343] Counter-Memorial, para. 446, citing Memorial, para. 486; R. PHB1, para. 64.
[344] Rejoinder, paras. 530-532.
[345] Counter-Memorial, paras. 450-453.
[346] Rejoinder, para. 539.
[347] Rejoinder, para. 541.
[348] Rejoinder, para. 541.
[349] Counter-Memorial, para. 459; Rejoinder, para. 544.

harm [has been] fully repaired", as the Applicant suggests) does not refer to compensation already obtained in past arbitration proceedings, but rather to a party being in a position to fully assert its rights.[350] Since OTH had already exercised its right to act, the Tribunal could conclude that "OTH placed itself in the position of being made whole for the alleged harm".[351] The Tribunal thus did not have to make any ruling on the content of the OTH settlement agreement.[352] In any event, the Respondent argues that, when several interpretations of the reasons are possible, *ad hoc* committees must choose the interpretation which confirms the coherence of the Tribunal's reasoning.[353]

249. In view of the above, the Applicant's arguments alleging the part of the Award concerning the Claimant's absence of a right to act ("*défaut de droit d'agir*") should be annulled pursuant to Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention are plainly incorrect and should thus be rejected.

C. Committee's Analysis

250. The Committee first turns to the issue whether the Tribunal manifestly exceeded its powers when it held that "the claims before the Tribunal in reality seek reparation for losses covered by the requests for relief raised in the OTH Arbitration or for losses that the Claimant (owned and managed by an experienced businessman like Mr. Sawiris) must or should have been factored into the sale of its investments to VimpelCom" and, consequently, "the Tribunal cannot but conclude that the claims are inadmissible".[354]

251. The Applicant complains that the Tribunal did not identify the law it applied to the issue of admissibility of OTMTI's claims, and that its conclusion has no basis in the specific terms of the BIT or the ICSID Convention or in any applicable law.[355]

[350] Rejoinder, para. 545; R. PHB1, para. 65.
[351] Rejoinder, para. 547.
[352] Counter-Memorial, para. 447.
[353] Rejoinder, para. 550.
[354] Award, para. 518.
[355] Application, paras. 50-51; Reply, para. 76.

252. As already noted above,[356] the Tribunal explicitly determined only the law applicable to the issue of jurisdiction, noting that there was no dispute that its "jurisdiction is governed by the ICSID Convention and the BIT".[357] The relevant provision in the BIT on the law to be applied by the Tribunal provides as follows:

> The arbitration court shall rule on the basis of the national law of the contracting party that is a party to the dispute on whose territory the investment is located, including rules concerning conflicts of laws, the provisions of the present Agreement, the terms of the specific agreement that may have been made in relation to the investment, as well as the principles of international law.[358]

253. The Tribunal did not expressly indicate what law it would apply to the issue of admissibility of Claimant's claims. There are no specific provisions on admissibility of claims in the BIT and in the ICSID Convention. The Tribunal was, however, authorized by Article 9(4) of the BIT to apply "the principles of international law".

254. The Committee notes that the concept of admissibility of claims, or that of admissibility of an application, is recognized in international law; it has been accepted and applied by international courts and tribunals as will be shown below. It is distinct from the concept of jurisdiction although sometimes the same facts and arguments are presented by a party as relevant to jurisdiction and/or admissibility.[359]

255. It is not unusual in international litigation practice that the same preliminary objection is presented as an objection to jurisdiction and, at the same time, an objection to the admissibility of the claim. This happened, for instance, in *Application of the Convention*

---

[356] Para. 75.

[357] Award, para. 134.

[358] Article 9(4) of the BIT (in English translation). In the authentic French text, the provision reads as follows: "*Le tribunal arbitral statuera sur la base du droit national de la Partie contractante partie au litige sur le territoire de laquelle l'investissement est situé, y compris les règles relatives aux conflits de lois, des dispositions du présent Accord, des termes de l'accord particulier qui serait intervenu au sujet de l'investissement, ainsi que des principes de droit international*".

[359] The Tribunal noted that "[t]he Respondent has raised a number of objections in relation to the Claimant's (former) status as indirect investor and the parallel arbitral proceedings by OTH. The characterization of these objections in terms of jurisdiction or admissibility has somewhat changed in the course of the proceedings". Award, para. 386.

on the Prevention and Punishment of the Crime of Genocide case before the International Court of Justice. In this context, the Court explained:

> A distinction between these two kinds of objections is well recognized in the practice of the Court. In either case, the effect of a preliminary objection to a particular claim is that, if upheld, it brings the proceedings in respect of that claim to an end; so that the Court will not go on to consider the merits of the claim. If the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute. A preliminary objection to admissibility covers a more disparate range of possibilities. [360]

It then referred to its earlier pronouncement:

> Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits. [361]

The Court then added:

> Essentially such an objection consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the matter should be resolved in limine litis, for example where without examination of the merits it may be seen that there has been a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim. [362]

256. The concept of admissibility thus allows, in certain circumstances, an international court or tribunal to decline to exercise jurisdiction which has been conferred upon it. Jurisdiction of international courts and tribunals, including investment tribunals, is based on consent. Even when the consent has been granted, there may be situations in which it would be inappropriate for an international court or tribunal to exercise its jurisdiction. In the absence

---

[360] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia),* Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 456, para. 120.

[361] *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment, I.C.J. Reports 2003, p. 177, para. 29.

[362] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia),* Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 456, para. 120.

of specific provisions on admissibility in the applicable legal instruments, international courts and tribunals have derived the rules on admissibility from general international law, in particular from its principles. For instance, the International Court of Justice found that while it had jurisdiction conferred upon it by the common agreement of France, the United Kingdom, the United States of America and Italy, it could not exercise this jurisdiction to adjudicate on the claim submitted by Italy without the consent of a third State (Albania), since ruling on Italy's claim would have required the Court to determine whether that third State committed any international wrong against Italy. As the Court said:

> To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. [363]

Similarly, the Court concluded that it was not able to exercise its jurisdiction in the *East Timor* case because, as a prerequisite for considering the claims, it would have had to rule on the lawfulness of conduct of the third State (Indonesia) in the absence of that State's consent. [364]

257. Another basis for international courts and tribunals to refrain from exercising their jurisdiction may be found in their inherent powers. They may be precluded from exercising jurisdiction when exercising it would undermine a judicial function or serve no purpose. The International Court of Justice in the *Northern Cameroons* case stated:

> [E]ven if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are <u>inherent</u> limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. [365]

258. This seems to be, in the context of investment arbitration, the approach adopted by the Tribunal in *Phoenix Action Ltd.* v. *Czech Republic*. Although there is nothing explicitly

---

[363] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32, see also pp. 33 and 34.

[364] *East Timor (Portugal* v. *Australia)*, Judgment, I.C.J. Reports 1995, p. 105, para. 35 and p. 106, para. 38.

[365] *Northern Cameroons (Cameroon* v. *United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 29. Emphasis added.

stated to this effect in the ICSID Convention and the Czech Republic-Israel BIT, the Tribunal expressed the view that

> States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.[366]

259. Algeria accepted that it agreed to protect "genuine Belgian/Luxembourgish investors" under the BIT. It also agreed, through a different treaty, to protect Italian investors and through yet another treaty Egyptian investors. But it also argued that it "never agreed to be tried three times for one thing".[367]

260. The Tribunal, therefore, examined the three notices of dispute by OTH, Weather Investments and the Claimant to Algeria to conclude that they "concern the same measures or events".[368] This conclusion is well documented in the Award.[369]

261. In the view of the Committee, the Tribunal explicitly relied on the purpose of investment treaty arbitration when it formulated a rule on possible inadmissibility of claims brought before it. The relevant passage in the Award reads as follows:

> [T]he existence of several legal foundations for arbitration does not necessarily mean that the various entities in the shareholder chain could make use of the existing arbitration clauses to assail the same measures and to recover the same economic loss under any circumstances. Indeed, the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host state's wrongful measures. If the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the

---

[366] *Phoenix Action Ltd.* v. *Czech Republic* (ICSID Case No. ARB/06/5), Award, April 15, 2009, para. 106.

[367] Hearing Tr. Day 5 (May 30, 2015) [E] 164:12-20/ [F] 66:15-16: "*n'a jamais accepté de se voir poursuivre trois fois pour la même chose*". Algeria also argued that it "never […] agree[d] to protect three levels in one given chain of control under a vertical integration in which the organs are accountable to the top of the chain, as Mr. Nasr recognized" ("*n'a jamais consenti à protéger trois niveaux de la même chaîne de contrôle opérée suivant le principe d'intégration verticale dans laquelle les organes répondent au sommet de la chaîne, comme l'assume complètement M. Nasr*"), *ibid.*

[368] Award, para. 486.

[369] Award, paras. 487-490 at pp. 121-129.

> vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances.[370]

262. The Committee sees nothing wrong in presenting the issue of admissibility of claims this way. If the harm was fully repaired in one arbitration, then there is nothing to be repaired in another arbitration. Deriving the rule on admissibility from the purpose of investment treaty arbitration was a legitimate exercise by the Tribunal of its function.

263. The Tribunal endeavored to apply this rule to the circumstances of the case. It formed the view that "the legal protection that was available at the various levels of the corporate chain was activated [on November 2, 2010] at the OTH level".[371] That protection was activated by OTH's Notice of Dispute, which according to the Tribunal assumed "a decisive importance" because "[OTMTI] and its controlling shareholder, Mr. Sawiris, caused the corporate organs of OTH to crystallize the dispute at the level of OTA's direct investor".[372] The Tribunal stated that:

> By exercising its right to arbitrate against Algeria, OTH placed itself in the position of being made whole for the alleged harm. Indeed, if it succeeded on the merits, the harm caused by the litigious measures would be remedied.[373]

264. The Claimant criticizes the Tribunal for assigning this role to OTH's Notice of Dispute, and emphasizes that "a notice of dispute under a treaty does not initiate arbitration proceedings, nor does it have any legal effect other than to trigger the cooling off-period under the relevant treaty".[374] It is certainly correct to state that arbitration proceedings are instituted by sending of a notice of arbitration, not by sending of a notice of dispute. However, a notice of dispute plays an important role in the settlement of investment disputes. It makes a State aware of the investor's claims. Investor protests against the measures adopted by a State (or in some situations, of a failure to take measures, for instance of protecting the investment) as being contrary to the legal obligations of a host

[370] Award, para. 495.

[371] Award, para. 497.

[372] Award, para. 496.

[373] Award, para. 497.

[374] Annulment Hearing Tr. Day 1 (May 27, 2019) [E] 76.

State. When a notice of dispute is required in the BIT's article on settlement of disputes, it is a pre-requisite, a condition for instituting arbitration proceedings by sending a notice of arbitration if a dispute has not been settled by agreement.

265. Whether the Tribunal's view of the role of OTH's Notice of Dispute as "crystalliz[ing] the dispute at the level of OTA's director investor" is accurate and what this entails legally in the Tribunal's view is another matter. Critical to the Tribunal's finding was ultimately the question whether the harm caused by the measures complained of was remedied.

266. The Tribunal, in its analysis, was looking into the question whether the harm caused by the measures complained of was remedied. It stated that:

> To the extent OTH would have restored its company value through arbitration proceedings under the BIT, all of the companies higher up in the corporate chain, including the Claimant, would have been made whole as well. Indeed, their loss depends on the diminution in value of their shares in OTH, which depends on the value of OTH (which in turn is a function of OTA's value). If the value of OTH is restored, then the shareholders of OTH suffer no loss, unless they incurred a loss of their own which is independent of the value of OTH. [375]

267. The Tribunal thus considered that the harm caused to OTH was to be remedied in the arbitration instituted by OTH. That Arbitration led to a consent award [376] recording the settlement agreement reached on April 18, 2014. Therefore, the Tribunal focused its attention on reviewing the losses that OTMTI alleged to have suffered as a result of Algeria's measures to determine whether OTMTI requested relief for losses that only it suffered, irrespective of the valuation of OTH. It concluded that that was not the case. Rather, in the view of the Tribunal, the claims before it:

> [I]n reality [sought] reparation for losses covered by the requests for relief raised in the OTH Arbitration or for losses that the Claimant (owned and managed by an experienced businessman like Mr. Sawiris) must or should have factored into the sale of its investment to VimpelCom. [377]

---

[375] Award, para. 498.

[376] *Orascom Telecom Holding S.A.E.* v. *People's Democratic Republic of Algeria*, PCA Case No. 2012-20, Award on Agreed Terms, March 12, 2015.

[377] Award, para. 518.

That was the reason for the conclusion that the OTMTI's claims were inadmissible. The Tribunal did not need to postpone its examination of OTMTI's claims to the merits stage of the proceeding. It stressed in the Award that "[i]n carrying out its analysis, the Tribunal ha[d] the benefit of the Claimant's full memorial on the merits, the three expert reports presented by the Claimant's expert on valuation and damages analysis (two of which were filed, specifically in the bifurcated phase, dealing with the Respondent's preliminary objections), the extensive discussion on these issues at the Hearing, including the cross-examination of the Claimant's expert, as well as the record of the OTH Arbitration".[378] No purpose would have been served by continuing the litigation which the Tribunal knew was "bound to be fruitless".[379]

268. It may be recalled that the Tribunal in *Occidental Exploration* v. *Ecuador* also adopted the approach that an issue may already be dealt with at the admissibility stage of the proceeding when it is evident that a certain claim is unfounded.[380]

269. In view of the above, the Committee cannot uphold the request that it annul this part of the Award on the inadmissibility of OTMTI's claims for manifest excess of the Tribunal's powers.

270. The Committee now briefly turns to the allegation that the Tribunal failed to state reasons when it found that the claims were inadmissible in view of the above-stated considerations.

271. The Committee recalls that pursuant to Article 48(3) of the ICSID Convention a tribunal has an obligation to state reasons upon which the award is based. The statement of reasons is required in order to allow parties to understand how a tribunal has come to its conclusions. As the *ad hoc* Committee in *Tulip* v. *Turkey* stated "[a]s long as an *ad hoc* Committee can follow the reasons, it is irrelevant what it thinks of their quality".[381] The

[378] Award, para. 499.

[379] See *Nuclear Tests (Australia* v. *France),* Judgment, I.C.J. Reports 1974, p. 271, para. 58; *Northern Cameroons (Cameroon* v. *United Kingdom),* Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 38.

[380] The Tribunal stated: "A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility". *Occidental Exploration and Protection Company* v. *Republic of Ecuador*, LCIA Case No UN 3467, Final Award, July 1, 2004, para. 80.

[381] *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 101.

ad hoc Committee in *Vivendi* v. *Argentina (II)* adopted a relatively strict approach on this matter, holding that "the issue before [it] is not to assess the accuracy or quality of the reasons given by the Tribunal but rather to review whether the reasons enable the reader to understand why the Tribunal reached the conclusions that were determinative for its decision(s)" [382].

272. The Committee notes that the Tribunal, before it reached its conclusion on the inadmissibility of the Claimant's claims, set out the main elements which it considered "relevant to the objections". [383] It then examined the three notices of dispute sent to Algeria by OTH on November 2, 2010, Weather Investments on November 8, 2010 and by the Claimant on April 16, 2012. It highlighted their main passages in a seven-page chart. [384] Having compared the three notices of dispute, the Tribunal formed the view that "the three companies complain[ed] of the same measures taken by Algeria" and that "while the parties to the dispute and the legal bases for the claims (the BITs) are different, the dispute being notified in the three notices is effectively one and the same". [385] The Tribunal provided additional reasons why it considered the dispute notified in the three notices "to be one and the same". [386] The Tribunal then looked at the role of Mr. Sawiris in the three companies (parts of the vertically integrated chain of the Weather Group) in which he was the controlling shareholder. [387]

273. Although the Tribunal does not refer to any legal authority or precedent, it derives the rule according to which "[i]f the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances" from the purpose of investment treaty arbitration which, in the Tribunal's view "is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host State's

[382] *Vivendi* v. *Argentina (II)*, Decision on Annulment, May 5, 2017, para. 154.

[383] Award, para. 485.

[384] Award, para. 487 (pp. 122-128).

[385] Award, para. 488.

[386] Award, para. 489.

[387] Award, paras. 490-494.

wrongful measures".[388] The Tribunal thus took the view that whether the claims are inadmissible depends on the circumstances. To a reader of the Award, it is sufficiently clear on what factual circumstances the Tribunal bases its decision and it is not difficult to follow the reasoning of the Tribunal.[389] Whether the reasons provided by the Tribunal are convincing is another matter with which the annulment proceeding is not concerned.[390]

274. The Committee thus cannot accept the Applicant's submission that the Tribunal failed to state reasons for its finding that OTH's Notice of Dispute was of decisive importance in itself and in combination with the subsequent events in rendering the claims inadmissible.[391]

3. THE OTH ARBITRATION SETTLEMENT AND THE INADMISSIBILITY OF THE CLAIMANT'S CLAIMS

A. Applicant's Position

275. Assuming *arguendo* the Tribunal's findings with respect to the OTH Arbitration settlement were an independent ground for finding the Claimant's claims inadmissible under the BIT, the Applicant complains that, in any case, the Tribunal manifestly exceeded its powers and failed to state reasons in finding that this settlement confirmed the inadmissibility of the Claimant's claims. Thus, this part of the Award should also be annulled.[392]

276. The Claimant was not, and could not have been, bound by the terms of the OTH Arbitration settlement or the Share Purchase Agreement (SPA) because it was not a party or a privy to them.[393] Yet, "the Tribunal failed to address and instead ignored all of [the Claimant]'s submissions and legal authorities demonstrating that a settlement agreement is binding only

[388] Award, para. 495. Emphasis added.

[389] Award, paras. 496-518.

[390] See e.g., *Fraport* v. *The Philippines*, Decision on Annulment, December 23, 2010, para. 277, *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, paras. 99 and 104, *EDF* v. *Argentina*, Decision on Annulment, February 5, 2016, para. 328.

[391] Award, para. 496.

[392] Application, paras. 45-46, 60; Memorial, paras. 171-172; Reply, paras. 151-152.

[393] Memorial, paras. 172-174.

on the parties and privies thereto". [394] Even assuming that the economic harm and measures were the same, the Tribunal's determination was wrongly premised on the Claimant's claims under the BIT being the same as OTH's claims under the Egypt-Algeria BIT, but these claims were distinct. [395] Finally, the Applicant contends that the Tribunal ignored the Claimant's numerous submissions that the SPA was a deal between two self-interested parties who conspired to share the spoils of the significant losses that the Claimant suffered as a result of the Respondent's measures. [396]

277. The Applicant also submits that: (1) the Tribunal did not endeavor to apply, and did not apply, a principle of international law in determining the relevance of the settlement of the OTH Arbitration to OTMTI's claims; [397] (2) the Tribunal failed in its analysis to address any of the Claimant's arguments and legal authorities regarding the legal effect of a settlement agreement on non-parties and non-privies thereto; [398] and (3) the Respondent's contention that the Claimant's allegation of collusion was raised only in passing at the Hearing, and that the Claimant failed to draw any "legal consequences" from this allegation, are baseless. [399]

278. For the Applicant, there thus was not only a clear allegation of collusion between OTH, VimpelCom, and Algeria, but also significant evidence of such collusion, which the Tribunal entirely failed to address in its Award. This failure constitutes a further failure to state reasons requiring partial annulment under Article 52(1)(e) of the ICSID Convention. [400]

[394] Memorial, para. 174.
[395] Memorial, paras. 175-182.
[396] Memorial, paras. 183-186.
[397] Reply, para. 154.
[398] Reply, paras. 159-160.
[399] Reply, paras. 161-167.
[400] Memorial, para. 187.

B. Respondent's Position

279. The Respondent stresses that the part of the Award addressing the effect of the OTH settlement agreement is fully reasoned and the Tribunal applied the proper law.[401] It argues that the Applicant's assertion that the Tribunal ignored two of its arguments in ruling on the effect of the OTH settlement agreement on the Claimant's right to act ("*intérêt pour agir*") is manifestly unfounded.[402]

280. First, the Tribunal considered at length whether the sale of the investment could affect its previous conclusions regarding the absence of the right to act and the effect of the OTH settlement agreement, notably in an entire part of the Award devoted to "[t]he relevance of the sale of the Claimant's investment".[403] While it did not expressly address the case law cited by the Claimant, the Tribunal rejected its argument and fully justified this decision, concluding that the "Claimant's sale of its investment does not affect the Tribunal's conclusion on the inadmissibility of the Claimant's claims".[404]

281. Second, the Applicant's contention that the Tribunal ignored an alleged "collusion" between the Respondent and OTH is, according to the Respondent, also manifestly unfounded.[405] The Applicant complains that the Tribunal did not rule on an insinuation of conspiracy that it made on only one occasion at the Hearing, without any supporting evidence, and without drawing any legal conclusion from it.[406] In any event, this insinuation was contradicted by the evidence filed in the arbitration proceeding related to the OTH settlement agreement,[407] and the Tribunal expressly stated that it considered that the criticisms formulated by the Claimant in this regard were "irrelevant".[408] Therefore, the Tribunal's decision on the OTH settlement agreement is fully reasoned.

---

[401] Counter-Memorial, paras. 461-469.

[402] Rejoinder, para. 553.

[403] Counter-Memorial, para. 462, citing Award, paras. 527-538.

[404] Rejoinder, paras. 557-558, citing Award, para. 538.

[405] Counter-Memorial, para. 465.

[406] Rejoinder, paras. 561-563.

[407] Rejoinder, para. 561.

[408] Rejoinder, para. 565.

282. Furthermore, the Tribunal ruled within the limits of its powers in considering that the OTH settlement agreement "confirms and reinforces" the inadmissibility of the Claimant's claims.[409] Notably, the Tribunal found that this settlement "clearly resolved the dispute that the Claimant has brought before this Tribunal as is shown by the comparison of the notices of disputes above"[410] and "puts an end to the dispute arising from Algeria's measures in the same manner as the award would have ended the dispute".[411] Thus, the Tribunal drew the consequences of the existence of "one and the same" dispute.[412] The Respondent submits that the Applicant's partial annulment request under Article 52(1)(e) of the ICSID Convention can therefore only be rejected.

C. Committee's Analysis

283. In the Committee's view, the Tribunal's conclusion that "the settlement agreement entered into between the Algerian FNI, OTH and VimpelCom confirms that the Claimant's claims are inadmissible"[413], merely constitutes a confirmatory statement and is not a separate ground for the Tribunal's finding that OTMTI's claims are inadmissible. The Applicant stated that the Committee "need not examine the Tribunal's findings with respect to the OTH settlement, which were not dispositive".[414] Yet, the Applicant also maintains that "these findings also should be annulled for manifest excess of power and failure to state reasons".[415]

284. The Committee is not convinced that the Tribunal exceeded its powers, and certainly not manifestly, when it concluded that the settlement agreement confirmed its earlier findings that the Claimant's claims were inadmissible. When examining the relevance of the settlement agreement, the Tribunal pursued the same logic of the investment law rule which it derived from the purpose of investment treaty arbitrations. It defined that purpose as "to

[409] Rejoinder, para. 475.
[410] Award, para. 524.
[411] Award, para. 524.
[412] Rejoinder, para. 477.
[413] Award, para. 526. Emphasis added.
[414] A. PHB, para. 52, referring to Memorial, para. 270.
[415] *Ibid*.

grant full reparation for injuries that a qualifying investor may have suffered as a result of a host state's wrongful measures".[416] The Tribunal described the rule in the following way: "[i]f the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances".[417] In the context of the settlement agreement, the rule applied by the Tribunal could be stated as follows: the claim of a (former) indirect shareholder becomes inadmissible if and when a settlement agreement concerning the same measures and the same economic harm is concluded between the direct foreign shareholder and the host State.[418] According to this rule, the relevant point in time for rendering further claims based on the same economic harm inadmissible is thus the time when the settlement of a dispute is reached by way of an agreement. This is because a settlement agreement compensates for the loss incurred by an investor. Once the harm is compensated, an indirect investor higher up in the corporate chain can no longer demand payment for its loss of share value by the direct investor. Any such claim would fail at the merits stage; it may be said that absent any own loss,[419] the claim of the indirect investor is manifestly unfounded and therefore inadmissible.[420] Consequently, to the extent that the Tribunal relied on the settlement agreement to confirm and reinforce its prior conclusions on the inadmissibility of OTMTI's claims, it did not manifestly exceed its powers.

285. The Tribunal devoted eight paragraphs[421] to its analysis of the settlement agreement of April 18, 2014 between the Algerian FNI (acting on behalf of Algeria), OTH and VimpelCom. The Tribunal was fully aware of Claimant's arguments that the settlement of

[416] Award, para. 495.

[417] *Ibid*.

[418] See Award, paras. 524-525.

[419] The Tribunal stated that "if the value of OTH is restored, then the shareholders of OTH suffer no loss, unless they incurred a loss of their own which is independent of the value of OTH", Award, para. 498. The Tribunal then reviewed "the losses that the Claimant alleges to have suffered as a result of Algeria's measures, with a view to examining whether the Claimant requests relief for losses that only itself suffered irrespective of the valuation of the OTH, Award, para. 499. The review is contained in paras. 499-517. However, it is not the role of an annulment Committee to scrutinize whether that review is the correct one. This depends on the evidence and according to ICSID Arbitration Rule 34 the Tribunal shall be the judge of the probative value of the evidence.

[420] See para. 269 above and fn. 382.

[421] Award, paras. 519-526.

the OTH Arbitration was irrelevant to jurisdiction and admissibility as the Tribunal summarized them rather extensively.[422] Having already earlier concluded that it has jurisdiction, the Tribunal considered whether the settlement had any relevance for the issue of the admissibility of Claimant's claims. The Tribunal was not convinced that "the settlement was made in suspicious circumstances (such as that it was forced by Algeria upon OTH or was entered into by OTH's board in collusion with Algeria"[423] contrary to what was alleged by OTMTI in the original arbitration proceeding and is still maintained by it in the present annulment proceeding. However, it is not for an annulment committee to re-evaluate the evidence and arguments of the parties in the arbitration and to substitute its own view for the one formed by an arbitration tribunal. According to Rule 34(1) of the ICSID Arbitration Rules "[t]he Tribunal shall be the judge of the admissibility of any evidence and of its probative value".

286. Although the Tribunal did not address in writing each and every argument made by the Parties, it has shown by summarizing them that it took them into account during its deliberation. In the view of the Committee, the Tribunal provided sufficient reasons for its conclusions that "the Claimant cannot bring claims in this arbitration that OTH decided to settle"[424] and that "the settlement agreement entered into between the Algerian FNI, OTH and VimpelCom confirms that the Claimant's claims are inadmissible".[425] In the Tribunal's view, "the settlement clearly resolved the dispute that the Claimant has brought before this Tribunal as is shown by the comparison of the notices of disputes above".[426] For the Tribunal, "the settlement stands in lieu of the investment treaty tribunal's award" and thus "puts an end to the dispute arising from Algeria's measures in the same manner as the award would have ended the dispute".[427] In the view of the Tribunal, "[w]hat matters

[422] Award, paras. 452-463.

[423] Award, para. 523.

[424] Award, para. 524.

[425] Award, para. 526.

[426] Award, para. 524. The comparison of the three notices of dispute appears in para. 487 of the Award. The Committee considers that the plural in the term "disputes" in para. 524 of the Award is rather an inadvertent mistake as para. 487 refers to "three notifications of dispute" (in singular) and for the Tribunal "the dispute being notified in the three notices is effectively one and the same" (Award, para. 488.).

[427] Award, para. 524.

is that the claims arising from Algeria's measures have ceased to exist due to the settlement agreement".[428]

287. This is the key reasoning of the Tribunal for its conclusion on the relevance of the settlement agreement which supports its conclusion that the claims are inadmissible. To recall, the annulment proceeding is not concerned with the correctness of the reasons and conclusions. In any case, they appear reasonable and certainly not frivolous or absurd.

288. Accordingly, the Committee cannot accept the Applicant's request that this part of the Award be annulled for manifest excess of powers and for failure to state reasons by the Tribunal.

4. THE CLAIMANT'S PURSUIT OF ITS CLAIMS AS AN ABUSE OF RIGHTS

A. Applicant's Position

289. The Applicant submits the Tribunal manifestly exceeded its powers and failed to state reasons when it dismissed its claims on the basis of an abuse of rights.[429] The Tribunal's decision to admit and accept the Respondent's untimely objections and, in so doing, to rely upon legal authority not in the record, should be annulled under Article 52(1)(e) and Article 52(1)(d) of the ICSID Convention.[430]

(a) The Tribunal's Application of the Law

290. According to the Applicant, the Tribunal failed to apply the applicable law by disregarding the BIT and ICSID Convention,[431] assuming without demonstrating that the theory of abuse of rights is a general principle of international law,[432] and supporting its views on the purpose of investment treaties with no legal authority whatsoever.[433] Further

[428] Award, para. 524.
[429] Application, paras. 41-44, 57.
[430] Memorial, para. 189.
[431] Memorial, paras. 116-120.
[432] Memorial, paras. 121-123; Reply, paras. 123 and 133.
[433] Memorial, paras. 124-130.

disregarding the applicable law, the Tribunal failed to define abuse of rights with reference to clearly established and recognizable criteria,[434] to acknowledge the high standard of proof that must be met in abuse of rights cases,[435] and to follow the decisions of other tribunals finding that multiple proceedings do not give rise to an abuse of rights.[436]

291. Moreover, the Applicant submits that the Tribunal did not identify "principles of international law" as the law applicable to Algeria's admissibility objections, nor was there any agreement between the Parties to this effect;[437] even if this was the case, the Tribunal nonetheless was duty bound to prove, rather than assume, that abuse of right is a general principle of international law and thus part of the applicable law that it was bound to apply;[438] and that the Applicant is entitled to challenge the Tribunal's decision on abuse of right because it did challenge this theory in the underlying arbitration,[439] and the Applicant can rely on new expert evidence in support of its partial annulment application since this evidence is "specifically relevant".[440]

(b) The Tribunal's Reasons

292. It is the Applicant's view that the Tribunal failed to state reasons when it dismissed its claims as an abuse of rights. For one, the Tribunal did not explain how filing multiple notices of dispute, which invite negotiations with the State and preserve the right to bring arbitration, but do not themselves commence arbitration, could ever be abusive.[441] The only action attributed to the Claimant is OTH's filing a notice of dispute in November

[434] Memorial, paras. 132-136; Reply, para. 124.

[435] Memorial, paras. 137-140.

[436] Memorial, paras. 141-150.

[437] Reply, paras. 131-132.

[438] Reply, paras. 133-141. According to Applicant, it is not challenging the Tribunal's application of the theory of abuse of right to the facts of the case, but rather the Tribunal's failure to establish that the theory of abuse of right that it purported to apply is a principle of international law, the Tribunal's failure to identify the legal requirements for the application of the theory of abuse of right and the applicable standard, and the Tribunal's failure to consider the decisions of other courts and tribunals on these issues (*Ibid.* at para. 140).

[439] Reply, para. 142.

[440] Reply, para. 143.

[441] Memorial, para. 156.

2010.[442] When OTH commenced the OTH Arbitration through a notice of arbitration dated April 12, 2012, the Claimant had already sold Weather Investments to VimpelCom for a year and had thus broken the vertical chain.[443] In addition, the Tribunal failed to state reasons by failing to address the Claimant's arguments regarding the standard of proof applicable to abuse of rights objections.[444]

293. The Applicant further advances that the Tribunal's reasoning cannot be followed from its own putative legal rule to the Tribunal's conclusion, as the Applicant did not cause multiple entities within a vertical chain of companies to bring parallel claims against the Respondent, but rather only commenced the present arbitration against the Respondent. The Applicant takes issue with four of the Respondent's arguments on this point, and replies that: (1) there is no basis in the specific terms of the Award to conclude that the Tribunal considered and implicitly rejected the Claimant's arguments regarding the legal effect of a notice of dispute;[445] (2) the Tribunal's reliance on "circumstances" alone, without reference to legal rules of decision, is subject to annulment for both a manifest excess of powers and a failure to state reasons;[446] (3) not only did the Tribunal fail to address the Claimant's arguments regarding the high standard of proof, but it also failed to explain what, if any, standard it applied in assessing the evidence before it;[447] and (4) the Applicant is not contesting the soundness of the Tribunal's reasons, but rather the absence of *any* reasons on the abuse of right.[448]

[442] Memorial, para. 159.

[443] Memorial, para. 159.

[444] Memorial, paras. 166-169.

[445] Reply, para. 146.

[446] Reply, paras. 147-148.

[447] Reply, paras. 149.

[448] Reply, para. 150. Emphasis in the original.

B. Respondent's Position

294. The Respondent sets forth that the Tribunal ruled within the limits of its powers and stated its reasons when it ruled on the existence of an abuse of rights by the Claimant. The Respondent submits that the Applicant's contentions to the contrary are to no avail. [449]

(a) The Tribunal's Application of the Law

295. According to the Respondent, the Tribunal applied the applicable law and respected the limits of its powers by declaring the Claimant's claims inadmissible on the basis of the abuse of rights. First of all, the Applicant does not dispute in its submissions in these annulment proceeding that the Tribunal has endeavoured to apply the applicable law, which is in itself sufficient to conclude that it did not commit an excess of power. [450] The inquiry of an excess of power is indeed limited to determining whether the tribunal has endeavoured to apply the proper law to the circumstances of the case. [451] In this case, the Tribunal rejected the Claimant's claims on the basis of what it determined to be a "principle of international law" ("*principe de droit international*") under Article 9(4) of the BIT. [452] By stating that the Tribunal "assumed, without demonstrating, that the theory of abuse of right is a general principle of international law applicable in an ICSID arbitration under the BIT", [453] the Applicant admits that the Tribunal applied what it determined to be a principle of international law while criticizing it for not having sufficiently supported its decision on this point. [454]

296. Moreover, the Applicant raises new arguments at the annulment stage, which is not permitted. The Claimant's position on abuse of rights in the underlying arbitration—which can be identified from the examination of its expert Professor Dolzer, its Closing Statement at the Hearing, and its post-hearing briefs—was, among others, that this principle applied

[449] Counter-Memorial, paras. 412-424 and 470-478.
[450] Rejoinder, para. 485.
[451] Rejoinder, para. 486.
[452] Counter-Memorial, para. 414.
[453] Reply, para. 123.
[454] Rejoinder, para. 488.

primarily to the treaty-shopping situation found in *Phoenix Action*, but there was no abuse in the present case of an indirect shareholder asserting claims before the second forum.[455] However, the Applicant now contests the existence of the abuse of rights principle and, alternatively, that the "clearly established and recognizable criteria" and "legal requirements" of abuse of rights have been examined by the Tribunal in this case.[456] Since there was an agreement between the Parties that the abuse of rights principle forms part of international law, the Tribunal cannot be criticized for applying this principle to the present circumstances.[457]

297. Finally, the Respondent submits that the Applicant aims to question the soundness of the Tribunal's reasoning, which cannot constitute an excess of power. The criticisms addressed by the Applicant seek to challenge the Tribunal's assessment of the content of the applicable law and the manner in which the Tribunal applied the abuse of rights principle to the circumstances of the case.[458] For instance, the Applicant's contention, according to which "a consistent line of arbitral decisions finding that multiple proceedings do not give rise to an abuse of rights", seeks to criticize the Tribunal's appraisal of the scope of the abuse of rights principle.[459] However, as noted by the *ad hoc* Committee in *Venezuela Holdings,* while refusing to second-guess the tribunal's decision on abuse of rights, "it seems to the Committee beyond doubt that it has no legitimate power to control the Tribunal's specific findings on either of the two elements in its jurisdictional findings, i.e. either the legal theory which the Tribunal applied in order to distinguish between legitimate corporate planning and abuse of right, or the application of that theory to the particular circumstances of the case".[460]

[455] Counter-Memorial, para. 416; Rejoinder, para. 492.

[456] Counter-Memorial, para. 417.

[457] Counter-Memorial, para. 419.

[458] Counter-Memorial, para. 420; Rejoinder, para. 496.

[459] Counter-Memorial, para. 420. Emphasis omitted.

[460] Rejoinder, para. 498, citing *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.)* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, para. 114. Emphasis omitted.

298. In light of the foregoing, the Respondent concludes that the Applicant's arguments based on Article 52(1)(b) that the Tribunal allegedly committed a manifest excess of power must be rejected.[461]

(b) The Tribunal's Reasons

299. The Respondent asserts that the Tribunal fully justified its decision to find an abuse of rights in this case. For one, both the legal basis and the factual premises of the Tribunal's reasoning can be understood from the language used in the Award.[462] The Tribunal stated its reasons as follows: first, it established the legal basis of the general principle of abuse of rights (which the Applicant recognizes in its briefs exists in international law);[463] second, the Tribunal identified the special circumstances that may constitute an abuse of rights, noting it may be applied beyond the context of opportunistic investment restructuring and extend to situations where "an investor who controls several entities in a vertical chain of companies […] seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state";[464] third, the Tribunal applied the abuse of rights principle to the facts at hand in finding, among others, that the Claimant's actions were inconsistent with the objective of the investment treaty system (which has already been achieved when the investment protection was activated at OTH level).[465]

300. Furthermore, the Respondent takes issue with the Applicant's assertion that the Tribunal ignored its arguments on abuse of rights.[466] On the contrary, the Tribunal summarized the Claimant's arguments and implicitly rejected them, as it is entitled to do given the discretion ICSID tribunals possess in stating their reasons.[467] The Tribunal also held the abuse of rights principle was not limited to opportunistic investment restructuring and

[461] Rejoinder, para. 501.

[462] Counter-Memorial, paras. 475-477; R. PHB1, paras. 69-71.

[463] Rejoinder, para. 573, citing Award, paras. 540-541.

[464] Rejoinder, para. 573, citing Award, paras. 541-543.

[465] Rejoinder, para. 573, citing Award, paras. 544-545.

[466] Counter-Memorial, paras. 475-477; R. PHB1, para. 76.

[467] Rejoinder, para. 575.

detailed the "extraordinary circumstances" where it could apply.[468] Finally, the Tribunal emphasized in its concluding observations that the application of the abuse of rights principle was based on "the peculiar facts of the case".[469]

301. For the above reasons, the Respondent submits that the Tribunal fully stated its reasons for finding an abuse of rights in this case, and the Applicant's application on the basis of Article 52(1)(e) of the ICSID Convention can only be dismissed.[470]

C. Committee's Analysis

302. After briefly summarizing the arguments of the Parties[471] on the alleged abuse of rights by Mr. Sawiris' conduct who "sought to maximize his chances of success by introducing several arbitrations against the Respondent at different levels of the chain of companies",[472] the Tribunal devoted seven paragraphs to the consideration of the question whether the initiation of the proceedings by OTMTI also constituted an abuse of rights.[473]

303. The Committee notes that the Tribunal referred to the application of the "doctrine" of abuse of rights in investment jurisprudence mainly in situations where an investment was restructured to attract BIT protection at a time when a dispute with the host State had arisen or was foreseeable.[474] Relying on two academic writings,[475] the Tribunal noted, however, that the prohibition of abuse of rights as a general principle applicable in international law

---

[468] Rejoinder, paras. 577-578.

[469] Rejoinder, para. 579.

[470] Counter-Memorial, para. 478; Rejoinder, para. 580.

[471] Award, paras. 417-419 (Respondent) and 449-450 (Claimant).

[472] Award, para. 417.

[473] Award, paras. 539-545.

[474] Award, para. 540. In footnote 832 three decisions (all part of the record) of arbitral tribunals are referred to: *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holdings, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc* v. *Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) ("*Mobil* v. *Venezuela*"), Decision on Jurisdiction, June 10, 2010, paras. 169ff; *Renée Rose Levy and Gremcitel S.A.* v. *Republic of Peru* (ICSID Case No. ARB/11/17), Award, January 9, 2015, paras. 180ff (with further references to cases) and *Lao Holdings N.V.* v. *Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction, February 21, 2014.

[475] R. Kolb, "General Principles of Procedural Law" in A. Zimmermann, K. Oellers-Frahm, Ch. Tomuschat, Ch. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, (2nd ed. 2012), p. 904 and H. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 164. They were not part of the record.

as well as in municipal law "may equally apply in context other than [an opportunistic restructuring of investment]".[476]

304. The Applicant criticizes that this statement by the Tribunal as just an assertion without reference to any authority.[477] The Committee notes, however, that although there is no case-law referred to immediately after this statement, the Tribunal nevertheless, when referring to the monograph by Sir Hersch Lauterpacht "The Development of International Law by the International Court" in support of its view, adds that the same quote is cited by the Tribunal in *Mobil* v. *Venezuela*.[478] As noted above, that Decision was one of the decisions on which the Tribunal relied to confirm that "the doctrine [of abuse of rights] has found application in investment jurisprudence mainly in situations where an investment was [opportunistically] restructured".[479]

305. The Tribunal in *Mobil* v. *Venezuela* considered the law applicable to abuse of right in much more detail.[480] It observed that "in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to "good faith"("*bonne foi*"), "*detournement de pouvoir*" (misuse of power) or "*abus de droit*" (abuse of right)".[481] It referred to two judgments of the Permanent Court of International Justice in support of the existence of the concept of abuse of right in international law.[482] It also recalled that "ICSID tribunals had a number of occasions to consider whether or not the conduct of an investor does constitute 'an abuse of the convention purposes', 'an abuse of legal personality', an 'abuse of corporate form' or an 'abuse of the system of international investment protection'".[483] It concluded that "[u]nder

[476] Award, para. 541. Emphasis added.

[477] Memorial, para. 125.

[478] Award, fn. 834.

[479] Award, para. 540. Emphasis added.

[480] *Mobil* v. *Venezuela*, Decision on Jurisdiction, June 10, 2010, paras. 169-185.

[481] *Ibid*.

[482] *Ibid*. at paras. 173-174, referring to *Polish Upper Silesia*, P.C.I.J., Series A, Judgment No. 7, p. 30 and *Free Zones of Upper Savoy and District of Gex*, P.C.I.J., Series A/B No. 46, Judgment of June 7, 1932, [p. 167].

[483] *Ibid*., para. 176. Footnotes omitted.

general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all circumstances of the case".

306. The existence of the concepts of abuse of process and abuse of rights in international law was recently confirmed by the International Court of Justice in *Immunities and Criminal Proceedings* case.[484] The Court stated that "[i]n the case law of the Court and its predecessor, a distinction has been drawn between abuse of rights and abuse of process. Although the basic concepts of an abuse may be the same, the consequences of an abuse of right or an abuse of process may be different".[485] It expressed the view that "[a]n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings".[486] It also added that "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process".[487] Thus, circumstances of the case assume the critical importance and it is for a court or tribunal to consider them. In relation to abuse of rights, the Court noted that "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits".[488]

307. It is to be observed that the Tribunal gave its consideration to the issue of the use of the right granted to the investor under Article 9 of the BIT by the Claimant, in particular Mr. Sawiris who controlled the Claimant.[489] Article 9 of the BIT concerns the settlement of investment disputes between a contracting party and a national of the other contracting party.

308. Pursuant to Article 9(4) of the BIT, the Tribunal was authorized, when considering and deciding the dispute, to apply also "the principles of international law". Therefore, it cannot be said that when taking its decision on the Respondent's objection to the admissibility of

[484] *Immunities, and Criminal Proceedings (Equatorial Guinea* v. *France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292.

[485] *Ibid*. at p. 335, para. 146.

[486] *Ibid*. at p. 336, para. 150.

[487] *Ibid*.

[488] *Ibid*. at p. 337, para. 151.

[489] Award, paras. 544-545.

the claims based on the alleged abuse of rights, the Tribunal resorted to the law which was not applicable. Whether it was applied correctly is another matter.

309. As noted above, according to the jurisprudence, the abuse of rights has to be determined in each case in light of all circumstances of the case. That was also the approach adopted by the Tribunal.

310. The Tribunal began its factual analysis by stating that "Mr. Sawiris himself recognized that he used the protection granted by Algeria in the different treaties at the various layers of the chain, for strategic reasons depending on the circumstances".[490]

311. The Tribunal then went on to analyse Mr. Sawiris' testimony at the Hearing concluding that *"*as explained by Mr. Sawiris, the Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally – after selling the investment – it pursued yet another investment treaty proceeding in its own name for the same investment (its past shareholding in OTA) in relation to the same host state measures and the same harm".[491]

312. In its conclusive remarks, the Tribunal stressed that its findings are the result of the peculiar facts of the case, i.e., (i) the vertical integration of the group of companies of which OTMTI was part, (ii) the control of the same shareholder, (iii) the same disputed measures and (iv) the same economic harm.[492]

313. The Tribunal thus appears to have applied a predominantly objective standard. OTMTI's abuse appears to consist of first exerting its controlling influence in OTH and Weather Investments to make them threaten or bring claims and then later bringing its own claim.

314. In light of the above, and absent any further factual findings, OTMTI's abuse appears to be confined to bringing a claim in full knowledge of the fact that a previously controlled

[490] Award, para. 544.

[491] Award, para. 545.

[492] Award, para. 546.

entity had already brought a claim in respect of the same measures but was subsequently sold to a new owner. This means that whenever the previous owner of a claim (e.g. an assignor) knowingly brings this (then meritless) claim in his or her own name, s/he already commits an abuse of rights. In other words, claimants who are aware of their lack of standing act abusively.

315. The Committee, without expressing an opinion on the application of the doctrine of abuse of rights by the Tribunal, is not convinced that the Tribunal manifestly exceeded its powers and failed to state reasons when it found the claims inadmissible because it considered "the Claimant's pursuit of these claims [. . .] an abuse of rights under the circumstances".[493] The Tribunal viewed the conduct of the Claimant who availed itself of various treaties at different levels of a vertical corporate chain, as abusive since it was "using its rights to treaty arbitration and substantive protection in a manner that conflicts with the purposes of such rights and of investment treaties".[494]

316. The Tribunal relied on an established legal concept under international law and it did not invent any new legal concept in this regard. A finding of abuse of rights always involved a high margin of appreciation of the facts of the case which were of decisive importance.

317. It is not the role of the annulment Committee to review the Tribunal's specific findings on the relevant facts of the case to which the Tribunal applied the concept of abuse of rights. Neither is it the role of the annulment Committee to assess whether the evidence gathered by the Tribunal justify a finding of abuse of rights. This would transform the Committee into an appellate body.

318. In the view of the Committee, the Tribunal's reasons are comprehensible and allow the reader to understand on what basis and how the Tribunal reached its conclusion. The conclusions are based on the Tribunal's evaluation of the factual circumstances of the case which the Tribunal qualified as "peculiar".[495] The Tribunal stressed that its analysis "concern[ed] the *admissibility* of the claim for which relief [was] sought in this arbitration,

[493] Award, para. 539.

[494] Award, para. 545.

[495] Award, para. 546.

as opposed to the merits of the claims in terms of liability or quantum".[496] The "peculiar" facts of the case were described as follows:

> (i) the group of companies of which the Claimant was part was organized as a vertical chain; (ii) the entities in the chain were under the control of the same shareholder; (iii) the measures complained of by the various entities in the chain were the same and thus the dispute notified to Algeria by those entities was in essence identical; and (iv) the damage claimed by the various entities was, in its economic essence, the same.[497]

319. The Tribunal summarized the arguments of the Parties. It was thus aware of these arguments and considered them in its deliberations, even if it subsequently did not address them all in its legal analysis. There is no obligation for a tribunal to address every legal argument submitted by a party if it considers it irrelevant in view of its conclusions based on other arguments and facts.

320. The Committee concludes that it cannot uphold the request of the Applicant to annul part of the Award concerning the abuse of rights on the grounds invoked under Article 52(1)(b) and (e) of the ICSID Convention.

VI. THE EFFECT OF THE DECISION

321. The Committee, upon request of the Applicant, issued on March 12, 2018 the Decision on the Stay of Enforcement of the Award. According to that Decision "[t]he stay of enforcement of the Award shall continue until the Decision of the Committee on the Application for Partial Annulment subject to the conditions specified in paragraphs 70 [of the Decision on the Stay of Enforcement]".[498] On May 9, 2018, the Committee issued a Decision Modifying the Conditions for the Continuation of the Stay of Enforcement of the Award.[499]

---

[496] *Ibid*. Emphasis in the original.

[497] *Ibid*.

[498] See para. 39 above.

[499] See para. 47 above.

322. In accordance with the modified conditions the Applicant deposited the amount of US$ 3,508,598.13 and € 58,382.16 due under the Award to an escrow account administered by the PCA in The Hague (NL). These amounts may only be drawn upon by Algeria by presentation of the Decision of the *ad hoc* Committee rejecting the Annulment Application. As the Committee has now decided to reject the Application for the Partial Annulment, the stay of enforcement lapses and consequently Algeria is entitled to draw the amounts due by OTMTI under the Award and which were deposited to the escrow account administered by the PCA.

VII. COSTS

1. APPLICANT'S COST SUBMISSIONS

323. In its submissions on costs dated August 6 and 20, 2019, the Applicant argues that the Respondent should bear all costs incurred by the Applicant in connection with annulment proceedings, including fees of its counsel, its expert witnesses, translation, travel and other costs, [500] as well as the ICSID costs, totaling US$ 6,982,740.37, broken down as follows:

Category	**Total Costs (USD)**
White & Case LLP Fees White & Case LLP Expenses Total Legal Fees & Expenses	4,890,851.30 263,907.71 5,154,759.01
Expert Fees and Costs	239,200.81
ICSID Costs OTMTI Arbitration Costs	625,000.00 [501] 963,780.55
Total Incurred Costs	6,982,740.37

324. The Applicant believes that "an award of costs is warranted in the circumstances, because Algeria caused this annulment proceeding through its own significant procedural

[500] Applicant's Submission on Costs, paras. 2 and 11; Applicant's Reply Submission on Costs, para. 33.

[501] The Committee notes that the Applicant further paid another US$ 130,000, thus totaling the ICSID costs to US$ 755,000, including the lodging fee paid for the Application.

misconduct in the arbitration, which is the very subject of this annulment proceeding".[502] In the Applicant's view, Algeria "continuously — and inappropriately— expanded the scope of the Arbitration, asserting for the very first time in its Closing Argument at the Hearing on Jurisdiction new admissibility objections and urging that the Tribunal create new law without any basis in the BIT or the ICSID Convention".[503] The Applicant submits that "[h]ad Algeria raised its admissibility objections earlier, [...] [the Claimant] would have had the opportunity to present its evidence and law to defeat those objections as without any basis in law or fact and this annulment proceeding never would have been necessary".[504] The Applicant concludes that "[o]n this basis alone, an award of costs is warranted, irrespective of whether [it] prevails in its application for partial annulment".[505] The Applicant, however, believes that it "should prevail in this proceedings and therefore should be awarded its costs and legal fees insofar as they are reasonable".[506]

2. RESPONDENT'S COST SUBMISSIONS

325. In its submissions on costs, the Respondent submits that the Applicant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling US$ 4,627,031.21 (which also includes taxes).[507] The Respondent argues that the more recent practice of annulment committees has been to decide that the unsuccessful applicant for annulment shall bear all ICSID costs, including the fees and expenses of the Members of the *ad hoc* committee.[508] The Respondent further submits that its legal fees and expenses shall be fully reimbursed by the Applicant in view of the fact that the application for annulment is "manifestly unfounded" ("*manifestement infondé*")

[502] Applicant's Submission on Costs, para. 4.

[503] Applicant's Submission on Costs, para. 4.

[504] Applicant's Submission on Costs, para. 4.

[505] Applicant's Submission on Costs, para. 4.

[506] Applicant's Submission on Costs, para. 10.

[507] Respondent's Reply Submission on Costs, paras. 33 and 34.

[508] Respondent's Submission on Costs, paras. 8 and 9, with references to a number of annulment decisions rendered between 2007 and 2017.

and that the Applicant acted in "bad faith" ("*mauvaise foi*") and engaged in procedural "misconduct" ("*comportement déloyal*").[509]

3. COMMITTEE'S ANALYSIS

326. It is useful to recall the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules on the costs of the proceedings. Article 61(2) of the ICSID Convention, which is contained in its Chapter VI titled "Cost of Proceedings", provides:

> [T]he 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.

Rule 47(1)(j) of the ICSID Arbitration Rules implementing that provision states that "[t]he award shall be in writing and shall contain […] any decision of the Tribunal regarding the cost of the proceeding".

327. In accordance with Article 52(4) of the ICSID Convention, Article 61(2), being part of Chapter VI, "shall apply *mutatis mutandis* to proceedings before the Committee". Rule 53 of the ICSID Arbitration Rules specifies that these Rules "*s*hall apply *mutatis mutandis* to any procedure relating to the [...] annulment of an award and to the decision of the […] Committee".

328. Both Parties recognize that under the above-mentioned provisions the Committee enjoys discretion in allocating the costs.[510]

329. In accordance with Regulation 14(3)(e), the Applicant made the advance payments requested by ICSID to cover the costs of the annulment proceeding (costs and expenses of the Centre and fees and expenses of the Members of the Committee; "**ICSID costs**").

330. ICSID Administrative and Financial Regulation 14(3)(e) provides that:

---

[509] Respondent's Submission on Costs, para. 13.

[510] Applicant's Submission on Costs, para. 3 and Applicant's Reply Submission on Costs, para. 2; Respondent's Submission on Costs, para. 6 and Respondent's Reply Submission on Costs, para. 6.

> [I]n the event that an application for annulment of an award is registered […] the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceedings shall be paid.

As the *ad hoc* Committee in *MCI* v. *Ecuador* stated, the "consequence of this rule […] should normally be that the applicant, when annulment is refused, remains responsible for these costs".[511] The Applicant was not successful with its Application for Partial Annulment which the Committee decided to reject. As a consequence, the Committee decides that the ICSID costs (including the fees and expenses of the Committee Members) shall be borne by the Applicant.

331. Although the Application was not successful, the Committee does not share the Respondent's view that the grounds which it invoked were "manifestly without merit" ("*manifestement infondés*").[512] The Application was certainly not frivolous. It raised a number of important points in relation to two rather novel issues in the field of investment arbitration, namely the preclusive effect of the notice of dispute in the context when several notices of dispute were sent by the companies organized in the vertical chain, all being under the control of the same shareholder, and the abuse of rights which the Tribunal found in the circumstances of the case. The Committee further notes that counsel for the Applicant, while vigorously defending the interests of its client, acted in a professional and courteous manner.

332. The Committee shares the view of the *ad hoc* Committee in *EDF* v. *Argentina* that "[t]here is no general rule in ICSID proceedings that the losing party should pay the successful party's costs, nor is there even a presumption in favour of such an outcome".[513]

---

[511] *MCI* v. *Ecuador*, Decision on Annulment, October 19, 2009, para. 88. See also *Tulip* v. *Turkey*, Decision on Annulment, December 30, 2015, para. 230; *Poštová Banka, a.s.. and Istrokapital SE* v. *Hellenic Republic* (ICSID Case No. ARB/13/8), Decision on Annulment, September 29, 2016, para. 170.

[512] Respondent's Submission on Costs, para. 23. Emphasis added.

[513] *EDF* v. *Argentina,* Decision on Annulment, February 5, 2016, para. 389. In footnote 445 the Committee contrasted this to the position under Article 40 of the UNCITRAL Rules, under which the starting point is a presumption that the

333. In view of the above factors, the Committee decides that each Party shall bear its own costs for the legal representation and the expenses it incurred in connection with this annulment proceeding.

VIII. LANGUAGES OF THE PROCEEDING AND OF THE DECISION

334. The proceeding has been conducted in English and French. The Applicant made its submissions in English, and the Respondent in French. The Decision of the *ad hoc* Committee is issued in both languages, English and French, which are, in accordance with Rule 22(2) of the ICSID Arbitration Rules equally authentic. The Decision was originally drafted in English and subsequently translated into French. In case of any discrepancy between the two versions, the English version shall be deemed to reflect the meaning intended by the Committee.

IX. DECISION

335. For the reasons given above, the Committee unanimously decides:

(1) OTMTI's Application for Partial Annulment is rejected.

(2) In accordance with the terms of paragraph 73(1) of the Decision on the Stay of Enforcement of the Award that Decision will cease to have effect on the date of issue of the present Decision and accordingly Algeria is entitled to draw the amounts due by OTMTI under the Award which were deposited to the escrow account administered by the Permanent Court of Arbitration.

(3) OTMTI shall bear all ICSID costs incurred in connection with this annulment proceeding.

(4) Each Party shall bear the costs for its legal representation and its expenses in the annulment proceeding.

unsuccessful party must bear the whole costs of the Tribunal. It should be noted that the UNCITRAL Rules were originally drafted for commercial arbitration.

[signed]

Ms. Bertha Cooper-Rousseau
Member

Date: September 12, 2020

[signed]

Prof. Dr. Klaus Sachs
Member

Date: September 10, 2020

[signed]

H.E. Judge Peter Tomka
President

Date: September 11, 2020