

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, DC

MILLICOM INTERNATIONAL OPERATIONS B.V. AND SENTEL GSM SA

CLAIMANTS

V.

THE REPUBLIC OF SENEGAL

RESPONDENT

(ICSID CASE NO. ARB/08/20)

**Decision on the Application for provisional measures submitted by the
Claimants on 24 August 2009**

Arbitral Tribunal

Prof. Pierre Tercier, President
Judge Ronny Abraham, Arbitrator
Prof. Kaj Hobér, Arbitrator

Secretary of the Arbitral Tribunal

Ms. Aurélia Antonietti

The Arbitral Tribunal

In light of

- the Request for Arbitration submitted by the Claimants on 11 November 2008;
- the letter from the Respondent dated 5 December 2008;
- the letter from the Claimants dated 19 December 2008 and their Observations on jurisdiction of the Centre of the same date;
- the Minutes of the first session of the Arbitral Tribunal of 7 September 2009;
- Procedural Order No. 1 of 14 September 2009;
- the Provisional Measures Application submitted by the Claimants (hereinafter referred to as the “Application”) of 24 August 2009;
- The “Reply in response to the application for provisional measures” filed on 5 October 2009 by the Respondent (hereinafter referred to as the “Reply”);
- the hearing of 9 November 2009, held in Paris;

ruling on the Application for provisional measures submitted by the Claimants and applicant Parties,

after having set out

I. In fact

In this section, the Arbitral Tribunal will confine itself to providing a brief summary of the facts underlying the dispute, to the extent required for this decision.

A. The Parties

1. The first Claimant, **Millicom International Operations B.V.** (hereinafter referred to as “Millicom”, or “Claimant 1”, or alternatively “MIO”), is a limited liability company organised and existing under Dutch law.
2. The second Claimant, **Sentel GSM S.A.** (hereinafter referred to as “Sentel”, or “Claimant 2”) is a limited company with a share capital of 60,000,000 CFAF, organised and existing under Senegalese law. Sentel is a wholly-owned subsidiary of Millicom (see Request for Arbitration, no. 12), and has run a mobile telephony network in Senegal (“Tigo”) since 1999.
3. Both Millicom and Sentel are part of the *Millicom International Cellular S.A.* Group (hereinafter referred to as “MIC”), a company under Luxembourg law established in 1990, founded by Millicom acting in joint venture with another mobile telephone operator, Industriförvaltnings AB Kinnevik (Sweden). MIC is not a party to these arbitration proceedings.

MIC is a global telecommunications company. Via its subsidiaries, it provides telecommunication services in sixteen countries, in Asia, Latin America and Africa (Request for Arbitration, no. 12). According to the Claimants, Millicom (Claimant 1) is a wholly-owned subsidiary of MIC, and Sentel (Claimant 2) is a wholly-owned subsidiary of Claimant 1 (*idem*).

Claimant 1 and Claimant 2 shall be jointly referred to as the “Claimants”. They are represented by Messrs. Stephen Jagusch, Andrew Battison, and Mark Levy of the firm of Allen & Overy LLP, London.

4. The Respondent is the **Republic of Senegal** (hereinafter referred to as “Senegal” or the “Respondent”). It is represented by Mr. Abdoulaye Dianko, State Judicial Officer, Mr. Rémi Sermier, Esq., from the firm of Brandford-Griffith & Associés, Paris, Mr. François Sarr, Esq., SCP François Sarr & Associés, Dakar, and Professor Thomas Clay, Versailles.

B. Summary of the facts

5. On 3 July 1998, the Republic of Senegal granted Sentel a concession for its mobile telephony services entitled: “*Convention de concession entre l’Etat du Sénégal et la Société Sentel GSM S.A. pour l’exploitation d’un réseau public de radiotéléphonie mobile cellulaire numérique GSM au Sénégal*” (hereinafter the “Concession”; Claimants’ Exhibit C2).

This Concession was concluded under the Senegalese Telecommunications Code of 1996, which was in force at the time (Reply, no. 8). It granted Sentel the right to operate a (first) mobile telephony network in Senegal. Sentel undertook to abide by the terms and conditions of operation (Article 2) and to pay a licence fee to the Respondent (Article 9). The term of the Concession was set at twenty years, beginning on the publication of the Decree approving it (Article 1).

Decree no. 98-719 approving the Concession between *The State of Senegal and Sentel* (Exhibit C3) was published on 2 September 1998, so the Concession was intended to lapse on 2 September 2018.

6. On 17 July 2000, Sentel was given a formal warning by the Respondent for serious breaches of the Concession (Reply, no. 13; Respondent’s Exhibit R6). The document accused Sentel of having failed to pay the licence fee due on 1 January 2000; of being responsible for blatant violations of its obligation to provide technical, administrative and financial information; and of failing to respect the schedule for the radioelectric coverage of the National Territory (Exhibit R6). Sentel was given one month to respond to the allegations made against it.
7. On 29 September 2000, Mr. Bernard Sambou, Esq., bailiff, acting for the Respondent, visited the premises of Sentel to serve notice that, in accordance with Article 7.4 of the Concession, the Concession was being formally terminated, since Sentel had failed to comply within the period allotted to it in the formal warning and had failed to remedy the defects of which it was accused (Reply, nos. 14 and 15).

8. On 19 October 2000, Sentel informed the Judicial Officer of Senegal via Mr. Aloyse Ndong, Esq., bailiff, that it was formally contesting the reasons set out in the notice served on 29 September 2000 (Exhibit R8).
9. On 17 January 2001, the Respondent passed Decree no. 2001-23, intended to be the final stage in the proceedings terminating the Concession (Exhibit C5). This text has however still not been published.
10. On 13 March 2001, the Managing Director of Sentel filed an administrative appeal with the President of the Republic of Senegal against Decree no. 2001-23 of 17 January 2001. In this filing he contested the reasons for termination and emphasised that Sentel had respected all the terms and conditions of use of the Concession (Exhibit R11). On 15 March 2001, the Managing Director of Sentel sent to the Judicial Officer of Senegal a “preliminary application”, the contents of which were identical to the contents of the filing submitted to the President of the Republic of Senegal (Exhibit R12).

Neither of these letters received any response from the authorities to whom they were addressed. According to the Respondent, who is relying on Article 729 of the Senegalese Code of Civil Procedure, the silence kept for over four months by the authorities is equivalent to a decision of dismissal (Exhibit R21).

Still according to the Respondent, the Claimant Sentel allegedly accepted the end of the Concession, since it was fully aware of Decree no. 2001-23 and had failed to bring any court proceedings in respect of that Decree. This situation is alleged to have become definitive on 17 August 2001.

11. On 27 December 2001, the new Senegalese Telecommunications Code came into force (Application, no. 14). Its transitional provisions include the following (Article 76, Exhibit R4):

"Les titulaires de concession d'établissement et d'exploitation de réseaux de télécommunications ouverts au public et de fourniture de services de télécommunications en place à la date d'entrée en vigueur du présent Code, bénéficient de plein droit de l'exploitation des réseaux et services de télécommunication qui leur ont été concédés.

Ils bénéficient, en outre, des droits d'utilisation des fréquences radioélectriques relatives à l'exploitation de leurs réseaux et services visés ci-dessus. Cependant, ils sont soumis aux nouvelles conditions relatives aux licences notamment au paiement de contre partie financière, de redevances et de contributions prévues dans les cahiers de charge prévues par le présent Code. Toutefois, pour les besoins de la mise en œuvre du présent Code, l'ART peut procéder à des modifications des assignations de fréquences existantes.

Dans un délai de six mois, un cahier des charges, approuvé par décret, fixera les nouvelles conditions dans lesquelles les services de télécommunications seront rendus." (article 76).

12. On 9 August 2002, Senegal and MIC concluded an agreement, the content of which is as follows:

"Le Groupe Millicom International adhère à la politique de l'Etat du Sénégal relative à la modernisation et la régulation du secteur des télécommunications du Sénégal et

traduite récemment par la promulgation d'une nouvelle loi sur les télécommunications, la naissance d'une Agence de Régulation des Télécommunications et l'annonce de l'arrivée prochaine d'un nouvel opérateur.

Ainsi, soucieuse de se conformer à ce nouveau processus, le Groupe Millicom International accompagné de sa filiale Sentel a informé l'Etat du Sénégal de sa volonté de négocier de bonne foi les nouvelles conditions mutuellement acceptables devant régir ses opérations au Sénégal.

A la suite de cet engagement, le groupe Millicom International, à travers sa filiale Sentel continuera d'opérer en toute légalité sous le cadre juridique de la Convention de 1998."

This agreement, on whose scope the Parties have differing opinions, was signed by Abdoulaye Balde for Senegal and by David Kimche for MIC (Application, no. 14; Reply, no. 28; Exhibits C6 and R13).

13. Despite the documents that were served to it, Sentel has continued and is still continuing to operate the Concession, developing its service and extending its subscriber base. It claims that it also regularly paid Senegal the licence fee in connection with the subscriptions it received during this period, in accordance with the Concession of 1998.
14. On 24 September 2008, the Respondent wrote to MIC inviting it to submit a tender for a second licence, informing it that a reasonable tender would be around two hundred million USD (Exhibit C10). This amount corresponded to the amount that Sudan Telecom Company Ltd. (Sudatel) had accepted to pay, when the latter obtained a full licence in autumn 2007 (Decree no. 2007-1333 of 7 November 2007, Exhibit R15). Correspondence was subsequently exchanged (Exhibits R16 and C11).
15. On 10 October 2008, Sentel submitted a tender stipulating the payment of twenty-one million USD, in preparation for the improvement of the network covered by the Concession (Exhibit C4).

The Respondent informed MIC by letter dated 22 October 2008 that it rejected this offer. It added: "*[...] le Gouvernement a décidé de mettre fin à cette situation provisoire. Aussi je vous informe que, faute par vous de vous ressaisir et de nous proposer un montant de contrepartie financière tenant compte du prix plancher que représente le versement effectué par Sudatel pour une 3ème licence, la publication du décret n° 2001-23 du 17 janvier 2001, dont vous trouverez ci-joint une copie, interviendra au Journal Officiel de la République du Sénégal, le vendredi 31 octobre 2008.*" (Exhibit C12). Another exchange of correspondence took place following this (Exhibit R17 and Exhibits C15 and C16).

16. On 3 November 2008, Decree no. 2001-23 terminating the Concession (see no. 9 above) was published in the Official Journal (Exhibit R3).

That same day, the Respondent issued a press release stating that it had brought legal proceedings before the Dakar Regional Court to confirm the end of Sentel's licence (Exhibit C14).

17. On 11 November 2008, the Respondent brought proceedings against Sentel (Claimant 2 in these proceedings) and MIC (which is not a party to these proceedings) before the Dakar Regional Court (Exhibit C17A). It requested the Dakar Court on the one hand to order Sentel to cease and desist its illegal activity immediately and on the other hand to compel Sentel and MIC to pay damages for the harm that the two companies would have caused to the State, on the grounds that they allegedly used false promises to ensure that Senegal allowed Sentel to continue operating under a provisional framework since 2000 (Reply, nos. 59 and 60).
18. These proceedings continued as follows:
- On 28 January 2009, MIC and Sentel submitted their requests for relief to the Dakar Regional Court (Exhibit C17B). They confined themselves to contesting the Court's jurisdiction, and did not submit any arguments on the merits of the case. According to them, Article 11 of the Concession grants exclusive jurisdiction to international arbitration institutions, such as the OHADA Arbitration Court, ICSID or the ICC in Paris (Exhibit C17B, p. 6).
 - On 10 February 2009, the Respondent submitted its response (Exhibit C17C). With regard to jurisdiction, the Respondent replied to the Claimants' claims by alleging that Article 11 of the Concession did not contain an arbitration clause, and that if it did, the clause was not valid, and that in any event it fell to the Court before which proceedings were brought to rule on its own jurisdiction.
 - On 11 March 2009, MIC and Sentel submitted their reply, in which they confined themselves to confirming their jurisdictional objection of the Dakar Regional Court, without making any submissions as to the merits (Exhibit C17D).
 - On 7 April 2009, the Respondent filed its summary submissions in rejoinder (Exhibit C17E). It maintained its previous submissions with respect to the issue of jurisdiction of the Dakar Regional Court (Exhibit C17E).
 - On 13 May 2009, MIC and Sentel made their summary submissions in rejoinder (Exhibit C17F). They once again raised the lack of jurisdiction of the Dakar Regional Court in favour of ICSID.
 - On 27 May 2009, the Respondent made additional submissions with respect to the jurisdictional objection (Exhibit C17G). It concluded that the Dakar Regional Court had jurisdiction.
 - On 24 June 2009, MIC and Sentel indicated that they did not intend to reply to the latest Respondent's submissions on the grounds that it was merely a repetition. They stated that they were upholding all of their requests, allegations and claims as they had been set out in their previous written submissions (Exhibit C17H).

- At an unspecified date, the Dakar Regional Court is, according to the statements of the Respondent, alleged to have closed the proceedings (Transcript of the hearing of 9 November 2009, English version, p. 134).

The Dakar Regional Court had set a hearing for 23 September 2009. Under the rules of the Senegalese Code of Civil Procedure, the purpose of this hearing was to inform the parties that the judgement was being deliberated, which meant that the Court could issue its decision on a date that it would communicate to the Parties.

Following the joint interventions of the two Parties recommended by this Arbitral Tribunal during the first session held on 7 September 2009, the Dakar Regional Court accepted to postpone the hearing until 23 December 2009.

19. Notwithstanding these letters and proceedings, Sentel continues to operate the Concession.

V. Summary of Arbitration Proceedings

20. On 11 November 2008, the date on which the Respondent brought proceedings before the Dakar Court (see no. 17 above), the Claimants jointly submitted a “**Request for Arbitration**” (hereinafter the “Request for Arbitration”) to the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as the “Secretariat”).

In that Request they made the following requests for relief:

“The Claimants request the following relief:

- (i) a declaration that the Respondent has violated Articles 3, 4 and 8 of the Treaty;*
- (ii) a declaration that the Respondent has violated the Licence, as well as applicable rules of Senegalese and international law;*
- (iii) an order that the Respondent make full reparation to the Claimants for the injury or loss to their investment arising out of the Respondent’s violation of any of the Treaty, the Licence, and applicable rules of Senegalese and international law, such full reparation being in the form of damages or compensation paid to the Claimants in an amount to be determined, including interest thereon;*
- (iv) compensation for the moral damages done to the Claimants, in an amount to be determined by the Arbitral Tribunal;*
- (v) an order that the Respondent pay the costs of these arbitration proceedings including the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Claimants including but not limited to the fees of their legal counsel, experts and consultants as well as the Claimants’ own employees, on a full indemnity basis, plus interest thereon at a reasonable commercial rate; and*
- (vi) any other relief the Arbitral Tribunal may deem appropriate in the circumstances.”*

21. On 26 November 2008, the Secretariat asked the Claimants to provide additional information about Sentel’s incorporation in Senegal, Sentel’s representation,

Millicom's ownership of Sentel, Millicom's status as a "national" for the purposes of the Bilateral Investment Treaty between the Netherlands and Senegal (hereinafter ("BIT" or the "Treaty")) and the consent of Senegal to submit this dispute to the jurisdiction of the Centre.

22. On 5 December 2008, the Respondent asked the Secretariat to refuse to register the Request for Arbitration in the ICSID Arbitration Register on the grounds that the Centre has no jurisdiction. In response, the Claimants submitted a document entitled "Observations on the jurisdiction of the Centre" on 19 December 2008 (hereinafter referred to as "Observations on the jurisdiction of the Centre").
23. On 30 December 2008, the Secretariat received the information it had requested (see no. 21 above) and on 31 December 2008, it registered the Request for Arbitration.
24. On 14 January 2009, the Claimants proposed a method for constituting the Arbitral Tribunal. Following an exchange of correspondence dated 19 February, 23 February, 26 February and 2 March 2009, the Parties agreed to constitute a tribunal of three arbitrators, with each Party appointing an arbitrator and the two arbitrators thereby appointed nominating a President.
25. On 1 April 2009, the Claimants appointed Professor Kaj Hobér as an arbitrator, who accepted this appointment.
26. On 7 April 2009, the Respondent appointed Judge Ronny Abraham as an arbitrator, who accepted this appointment.
27. On 5 June 2009, the two co-arbitrators appointed Professor Pierre Tercier as President of the Arbitral Tribunal, who accepted this appointment.
28. On 12 June 2009, the Arbitral Tribunal was constituted.
29. On 24 August 2009, the Claimants submitted a "**Provisional Measures Application**" (hereinafter referred to as the "Application"; see no. 36 below).
30. On 27 August 2009, the Arbitral Tribunal held a telephone conference to discuss the Application submitted by the Claimants and the agenda for the first session of the Tribunal that it intended to hold.
31. On 1 September 2009, the Respondent informed the Arbitral Tribunal by letter that the Application submitted by the Claimants was the Claimants' latest tactic to gain time. However, the Respondent would not be opposed to postponing the hearing originally scheduled to be heard before the Dakar Regional Court on 23 September 2009 (see no. 18 above).
32. On 7 September 2009, the Arbitral Tribunal held its first session with the Parties, in Paris. With regard to the unresolved questions, it was agreed that the Arbitral Tribunal would take the necessary decisions in a procedural order (see Minutes of the session, p. 14).

With respect to the provisional measures regarding the proceedings before the Dakar Regional Court, the Arbitral Tribunal acknowledged that the Respondent was not opposed to a joint letter being drafted with the Claimants in order to apply to have the hearing scheduled for 23 September 2009 to be postponed. The Parties furthermore agreed that whichever of them would subsequently win would not enforce any decision from the Dakar Regional Court (see Minutes of the first session, p. 15).

That same day, the Respondent confirmed by letter the undertaking it had made during the first session.

33. On 14 September 2009, the Arbitral Tribunal issued its **Procedural Order No. 1**, in which it ruled as follows:

“1.

- *In principle, hearings of the Tribunal will take place in Paris, unless the Parties agree on another venue and inform the Arbitral Tribunal in a timely fashion.*

2.

- *The proceeding will be conducted simultaneously in French and in English. All documents from the Arbitral Tribunal or the Centre will be written in both languages and all hearings will be subject to simultaneous interpretation.*
- *Each Party is entitled to write its submissions (with annexes) and its correspondence in the language of its choice without having to provide a translation into the other language;*
- *The Arbitral Tribunal will decide at a later stage and in accordance with its assessment on the allocation of costs generated by this decision.*

3.

- *The Parties are invited to file a first round of written submissions limited to objections to jurisdiction;*
- *The Respondent is invited to submit its memorial on jurisdiction by October 29, 2009, at the latest;*
- *The Claimants are invited to file their counter-memorial within forty-five days upon receipt of the first submission, or by December 14, 2009, at the latest;*
- *Upon receipt of the counter-memorial, the Arbitral Tribunal will decide if it continues to address this issue as a preliminary matter or if it intends to address the case altogether;*
- *In either case, the Arbitral Tribunal will fix a timetable after consultation with the Parties.*

4.

- *The Parties' undertakings with regard to the proceeding pending before the Court in Dakar are noted.*

5.

- *The Respondent has until October 5, 2009, to respond to the request for provisional measures;*
- *If they so wish, the Claimants may file their comments on this response within ten days upon receipt of the response;*

- *If it so wishes, the Respondent may file its observations on these comments within ten days upon their receipt;*
 - *A hearing will take place in Paris on November 9, 2009, to hear the Parties' oral arguments on this issue."*
34. On 5 October 2009, the Respondent submitted its "**Mémoire en réponse à la demande de mesures conservatoires**" (hereinafter referred to as the "Reply"; see no. 37 below).
35. On 9 November 2009, the Arbitral Tribunal held a hearing in Paris with the Parties (see Transcript of the hearing of 9 November 2009). The representatives of the Parties were given the opportunity to submit their arguments orally and to respond to questions from the Arbitral Tribunal. Following this hearing, the representatives of the two Parties stated that they did not wish to formulate any new applications with regard to this stage of the proceedings.

During that same hearing, the Arbitral Tribunal discussed with the representatives of the Parties the potential timetables for the subsequent stages in the proceedings, depending on whether or not it decided to bifurcate the proceedings and address the jurisdictional objections and the questions on the merits in two successive phases; it should be recalled that this decision is to be taken in accordance with Procedural Order No. 1 (see no. 33 above) after having received a response from the Claimants regarding the jurisdictional objections that must be filed by 14 December 2009 at the latest. In that regard, it was agreed that if the Arbitral Tribunal were to order the "bifurcation" of the proceedings, the Respondent would submit its reply on the Tribunal's jurisdiction by 15 January 2010; the Claimants would submit their rejoinder by 15 February 2010; and the hearing would take place in Paris on 31 March and/or 1 April 2010 (see Transcript of the hearing of 9 November 2009 at the end).

II. In law

A. The Submissions of the Parties

36. In their Application (no. 29 above), the Claimants made the following requests for relief:
- “(a) *that the Respondent, the Republic of Senegal (**Senegal**), discontinues, or causes to be discontinued, the proceedings instituted by it in the Regional Court of Dakar, Senegal (the **Regional Court**) against Millicom International Cellular S.A. (**MIC**) (the ultimate parent of the Claimants) and Sentel, as described in section 2 below (the **Regional Court Proceedings**);*
 - (b) *in the alternative, that Senegal agrees to stay such proceedings, or causes them to be stayed, for the duration that the present ICSID arbitration proceedings under reference number ICSID Case No. ARB/08/20 (the **ICSID Arbitration Proceedings**) are pending;*
 - (c) *that Senegal does not seek to enforce, or cause to be enforced, any interim or final judgment of the Regional Court in relation to the Regional Court Proceedings while the ICSID Arbitration Proceedings are pending;*

(d) *that the parties refrain from conduct that might aggravate or further extend the dispute submitted to this Tribunal; and*

(e) *that the Tribunal recommends any further measures or relief that it deems appropriate in the circumstances to preserve the rights identified in section 3.4 below, including the maintenance of the status quo.» (Application, n° 1).*

37. In its Reply, the Respondent requested the following:

“On these grounds, the Republic of Senegal requests that it please the Arbitral Tribunal to reject in its entirety the application for provisional measures submitted by MIO and Sentel.” (Reply, p. 37).

B. The basis for the provisional measures

38. The principle of provisional measures is set out in Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as the “ICSID Convention” or the “Washington Convention”), on the basis of which these proceedings were opened and which stipulates:

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

Article 47 of the ICSID Convention is referred to, extended and developed by Rule 39 of the Arbitration Rules, which in its current version reads:

“(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.”

It should be added that provisional measures, which are temporary in nature and by definition, may be modified or cancelled at any time by the Arbitral Tribunal, do not have the same authority as an issue already judged (*res judicata*), are valid only for as long as the proceedings last and become automatically null and void if the Arbitral Tribunal rules that it does not have jurisdiction to hear the dispute.

In accordance with Rule 39(4) of the Arbitration Rules, the Arbitral Tribunal gave “each party an opportunity of presenting its observations”, and the Parties have had ample opportunity to express themselves both orally and in writing.

The Arbitral Tribunal is thus able to give an informed ruling on the Claimants’ Application.

C. Conditions

39. Provisional measures may be granted only on the following four conditions:

- The Arbitral Tribunal must be *prima facie* competent to hear the merits of the case (see ch. 1 below);
- The measure requested must intend to preserve the rights the protection of which has been sought (see ch. 2 below);
- The measure must be necessary (ch. 3 below); and
- The measure must be urgent (ch. 4 below).

The Arbitral Tribunal will examine each of these conditions below.

1. The *prima facie* jurisdiction of the Arbitral Tribunal

40. The Parties disagree as to the jurisdiction of the Arbitral Tribunal to rule on the Application for provisional measures.

- In short, the Claimants deem that the *prima facie* jurisdiction of the Arbitral Tribunal is chiefly established by the registration of the Request for Arbitration in accordance with Article 36 of the ICSID Convention (Application, no. 35); that the Arbitral Tribunal has jurisdiction over Sentel in application of Article 11 of the Concession; and that the Arbitral Tribunal has jurisdiction over MIO and Sentel in application of Article 10 of the BIT between Senegal and the Republic of the Netherlands.
- In short, the Respondent deems that the mere fact that the Request for Arbitration was registered is not sufficient to establish a *prima facie* jurisdiction, that Article 11 of the Concession does not contain an arbitration clause, and that Article 10 of the Treaty does not apply, since MIO is not an investor as defined by that provision and Sentel is not a national from another State.

41. The core of the debate centers around two provisions, whose content it is worth restating:

- Article 11 of the Concession states as follows:

“Les Parties feront tout leur possible pour régler à l’amiable tout différend résultant de l’exécution de la Présente Convention. Elles devront, au préalable si les lois et règlements en vigueur le permettent, recourir à tout organisme de conciliation de réglementation et d’arbitrage compétent en matière de télécommunications. Il en sera de même en cas de conflits entre opérateurs

notamment lors des accords d'interconnexion. Si le litige persiste, les parties pourront en définitive recourir à l'arbitrage d'organismes internationaux tels que la cour d'arbitrage de l'OHADA, le Centre International de règlement des différends sur les investissements (CIRDI) ou la Chambre de Commerce Internationale de Paris (CCIP) etc..."

- Article 10 of the Treaty between Senegal and the Netherlands states as follows:

"La Partie Contractante sur le territoire de laquelle un ressortissant de l'autre Partie Contractante effectue ou envisage d'effectuer un investissement, devra consentir à toute demande de la part de ce ressortissant en vue de soumettre, pour arbitrage ou conciliation, tout différend pouvant surgir de cet investissement au Centre institué en vertu de la Convention de Washington du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats."

42. It is accepted jurisprudence for the tribunals that have issued rulings based on the Washington Convention that the mere fact that a party contests the jurisdiction of an arbitral tribunal to which the case is referred is insufficient to deprive that tribunal of the jurisdiction to order provisional measures¹. If the contrary were to be accepted, it would be easy for a party to raise any jurisdictional objection in order to deprive in practice a large part of the institution's competence. It is also undisputed and indisputable that provisional measures form an essential part of the operation and the effectiveness of the ICSID arbitration system; while waiting for a decision to be given on the merits of a case and provided that the conditions have been met, the aim is to ensure as far as possible that no decisions can be taken that risk depriving that decision of its main effect in fact².

That said, on the other hand, it is not enough for one party to bring proceedings to establish the jurisdiction of the Arbitral Tribunal before which an application for provisional measures has been brought. The solution would be every bit as indefensible.

In order to take account of these conflicting interests, it is accepted practice for the Arbitral Tribunal to find that it holds at least *prima facie* jurisdiction to rule on the merits. This implies that the Arbitral Tribunal cannot and must not examine in depth the claims and arguments submitted on the merits of the case; it must confine itself to an initial analysis, i.e. "*at first sight*". For this, it is necessary and sufficient that the

¹ See for example *Victor Pey Casado and Fondation President Allende v. Republic of Chili*, ICSID Case no. ARB/98/2, Decision on provisional measures, 25 September 2001, para. 7: "*Aussi la jurisprudence internationale est-elle claire à cet égard : l'instance dont la compétence est contestée n'est nullement privée du pouvoir de décider des mesures provisoires.*" (hereinafter referred to as "*Pey Casado*").

² See for example, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003, para. 2: "*the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, and in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult*" (hereinafter referred to as "*Tokios Tokeles*"). See also *Pey Casado*, cited above., para 26: "*les mesures conservatoires ont, notamment ou principalement, pour but de préserver ou protéger l'efficacité de la décision à intervenir sur le fond, donc d'éviter de "porter préjudice à l'exécution de la sentence" et/ou d'empêcher que, de façon unilatérale, une Partie par action ou omission porte atteinte aux droits éventuels de la Partie adverse.*"

facts alleged by the applicant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyse them in depth.

43. It is in light of these principles that the Arbitral Tribunal intends to examine whether it has *prima facie* jurisdiction to rule on the requests submitted to it:

a) The Claimants base their argument on the fact that the ICSID Secretariat agreed to register the Request for Arbitration filed by the Claimants (see “In fact” above). It is correct that the Secretariat was entitled to refuse to register such a request, in application of Article 36(3) of the Washington Convention, which states as follows:

“The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”

For the Arbitral Tribunal, the mere fact that the Request for Arbitration has been registered might certainly constitute a sign of *prima facie* jurisdiction, but under no circumstances may it constitute a sufficient condition. The registration process is summary in nature and is intended solely to perform an initial check in order to dismiss immediately any requests manifestly outside the jurisdiction of the Centre. The decision is taken solely on the basis of the Request for Arbitration and the additional information provided by the requesting party, without waiting for or formally requesting any comments from the other party.

Requirements are necessarily stricter at the provisional measures stage, since the Arbitral Tribunal will have had the opportunity to receive additional information (whether unprompted or at its own request), which therefore enables it – still on a provisional basis, of course – to give an initial ruling on its own jurisdiction.

Registration as an argument is therefore insufficient in and of itself to establish the Arbitral Tribunal’s *prima facie* jurisdiction.

b) The Claimants then deem that the *prima facie* jurisdiction of the Arbitral Tribunal is established pursuant to Article 11 of the Concession, reproduced above. This jurisdiction may extend only to Sentel, which is a party to the Concession, but not to MIO, which is not.

According to the Arbitral Tribunal, the clause under Article 11 of the Concession is not without ambiguities. It seems to imply that recourse to arbitration is one possibility open to the parties (“*may*”) rather than the only option; it leaves open the issue of which institution will govern the proceedings; the list of institutions set out (OHADA, ICSID and ICC) is itself not exhaustive (“*etc.*”). As asserted by the Respondent, it is not impossible that this provision is intended as an invitation for the parties to agree on an arbitration agreement in order to refer the dispute to one of the institutions listed.

According to the Arbitral Tribunal, these arguments do not automatically exclude another interpretation. The provision does not actually make any reference to local

courts, and there would be good reasons for making disputes relating to concessions of this nature subject to the jurisdiction of international arbitration, under the auspices of the institutions mentioned. What is more, the clause contains a clear reference to arbitration, and it is not automatically excluded that the option given to the party refers not to the choice of proceedings but to the choice of the institution, as the Claimants maintain.

The fact is that the Claimants also contested the jurisdiction of the Dakar Regional Court, even going so far as to take the risk of renouncing to comment on the submissions made by the Republic of Senegal on the merits of the case before that Court.

In these conditions, the Arbitral Tribunal considers that it does have *prima facie* jurisdiction to rule on the Request for Arbitration, to the extent that the latter is based on the Concession.

- c) The Claimants finally maintain that the Arbitral Tribunal also has jurisdiction to rule on the issue by virtue of Article 10 of the Treaty, the text of which has been reproduced above. This jurisdiction would primarily extend to MIO, which maintains that it can avail itself of the Treaty, and only indirectly to Sentel, which is a Senegalese company.

According to the Arbitral Tribunal, its jurisdiction is not given from this perspective either, since it is incumbent on Claimant 2 to prove that it can benefit from this protection despite the fact that the Treaty appears to confine this protection to individuals, and it must also be established that the Claimant actually made an investment in Senegal as defined by the Treaty.

That said, the Arbitral Tribunal admits that there is room for doubt, since the phrasing of the Treaty is not without ambiguity, as it is possible that MIO made an investment in Senegal, via links that will be described below, in the form of its (direct or indirect) investment in Sentel's share capital.

What is more, it appears to the Arbitral Tribunal that, since it has acknowledged its *prima facie* jurisdiction over Sentel, it can acknowledge that same jurisdiction by analogy over MIO, especially as the provisional measures requested mainly relate to the continuation of the proceedings before the Dakar Regional Court, precisely because MIO is not a party to those proceedings.

2. Preserving rights the protection of which has been sought

44. The second condition required to grant provisional measures is that those measures must be necessary to preserve rights the protection of which is being sought in the proceedings brought on the merits.
- a) In the Claimants' view, granting the measures is directly linked to the rights that they are requesting be protected: the right to bring the dispute exclusively before the jurisdiction of ICSID, in accordance with Article 26 of the ICSID Convention, to the exclusion of any remedy under national, international, judicial or administrative law; and the right to continue bringing their claims without the

arbitration proceedings becoming meaningless owing to a judgement to the contrary passed by the Senegalese courts (Application, no. 42).

- b) In the Respondent's view, there is no link between the provisional measures requested and the dispute brought before the Arbitral Tribunal. In their Application, the Claimants request that the Arbitral Tribunal suspend the effective application of the decision in which the Republic of Senegal has decided to terminate the authorisation to operate enjoyed by Sentel. This is apparently a fundamental request, and examining it would require adopting a position on the merits of the case, and thus issuing a pre-judgement (Reply, no. 97). Furthermore, the Claimants apparently did not make a request for relief to the Arbitral Tribunal intended to annul the decision terminating their authorisation to operate (Reply, no. 99). With regard to the argument concerning Article 26 of the ICSID Convention, the Respondent alleges that the two disputes are not connected (Reply, no. 110). Allegedly, neither the parties nor the subject-matter of the proceedings is identical, since before the Dakar Regional Court the applications would be based exclusively on the behaviour of MIC and Sentel in the wake of the termination of the Concession (Reply, nos. 132 and 133). Finally, the causes of action in the two disputes are not identical (Reply, nos. 134 *et seq.*) A judgement from the Regional Court upholding the submissions of Senegal in their entirety would not by any means harm the interests that the Claimants intend to assert as part of these arbitration proceedings (Reply, no. 141).

45. According to the Arbitral Tribunal, the objections raised by the Respondent are not decisive:

- a) Although it is true that the requests for relief made by the Claimants thus far before the Arbitral Tribunal appear to be intended merely to obtain damages, nothing prevents the Claimants from modifying their requests during the proceedings. Such a measure is not by any means prohibited, provided it respects the principle of the right to be heard and the scope of the Arbitral Tribunal's jurisdiction. What is more, in spite of the phrasing of these requests for relief, as set out under paragraph 20 above, the argument developed refers to the possibility of claiming restitution (see no. 60 of the Request for Arbitration).
- b) It cannot be disputed that both sets of proceedings concern the same set of facts, i.e. the development of the status of the parties bound by the Concession for mobile telephony. In spite of the provisional or temporary phrasing of the requested relief, it is based or can be based on the same issue, namely the existence and continuation of the Concession. The outcome of any pecuniary submissions made in either circumstance depends directly on this.
- c) The Respondent states that the parties are different between the two proceedings, since MIC is a party to the State proceedings but not a party to these proceedings, whereas MIO is a party to these proceedings but is not a party to the Senegalese proceedings. This argument is not conclusive either, given that the status of the parties is not necessarily defined in the same way in both sets of proceedings. In particular, in so far as the other conditions have been met, Claimant 2 in these proceedings (MIO) has an obvious interest in the outcome of the Senegalese

proceedings, if it can claim the benefit of a protected investment by virtue of its interest in Sentel's capital.

- d) It is worth noting that the Arbitral Tribunal will not rule on the question of whether it would have the power to order restitution and the power to order the Republic of Senegal to respect the Concession, if the latter were to be held valid. Regardless of the requests for relief submitted, the essence of both proceedings concerns whether or not the Concession is valid.
- e) Finally, it is admitted that protected rights can also include procedural rights such as the general right to *status quo* and the right to non-aggravation of the dispute³.

3. Necessity

- 46. In order for an arbitral tribunal to be able to recommend provisional measures, they must also be necessary:
 - a) According to the Claimants, a judgement from the Dakar Regional Court would cause irreparable harm, if the Concession were to be held invalid (Application, no. 59).
 - b) According to the Respondent, the existence of irreparable harm has not been proven, due to the fact that if a judgement were passed that caused harm to the Claimants, the latter would be able to request the Arbitral Tribunal for equitable compensation measures in order to remedy the situation (Reply, no. 89). Furthermore, Millicom would not be affected by any judgement from the Dakar Regional Court, since it is not even party to the Senegalese proceedings. According to the Respondent, it would be unfair if the Arbitral Tribunal were to grant Millicom the right to cease all proceedings brought by Senegal against Sentel and MIC, on the sole ground that Millicom availed itself of the ICSID Convention and the Treaty between Senegal and the Netherlands despite the fact that Senegal had no means of bringing any claim whatsoever against that company (Reply, nos. 116 and 128). With regard to the harm suffered, the Respondent alleges that if the Dakar Regional Court were to uphold Senegal's requests in their entirety and sentence MIC and Sentel jointly and severally to pay all sums claimed by the State, MIC would be able to pay the sums required without placing its existence in jeopardy (Reply, no. 146).
- 47. According to the Arbitral Tribunal, it is correct that, strictly speaking, there is nothing preventing both sets of proceedings from taking place more or less simultaneously, a situation that has already occurred in other cases submitted to ICSID. This situation is admittedly far from perfect and may cause a range of practical difficulties, depending

³ See for example, *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, para. 60: "In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights", relying on other decisions. In the same sense, *Tokios Tokeles*, cited above. Procedural Order No. 3, 18 January 2005, para. 7: "Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID Arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy [. . .]."

on the speed adopted by the Court or the Tribunal. For this reason, two scenarios must be considered:

- a) It is probable that, if no specific measures are taken, the Dakar Regional Court will give its judgement before the arbitration proceedings have finished. It is admittedly possible that the party that would have lost, whether the Republic or Sentel, would file an appeal against that decision, or even an appeal to a higher authority after the decision of the Court of Appeal. According to the information given at the hearing of 9 November 2009, an appeal will suspend the enforcement of the judgement, unless the Dakar Regional Court orders provisional enforcement at the request of one of the parties, and such a request was made during the current proceedings.

Leaving these aspects aside temporarily, it is conceivable that the judgement of the Dakar Regional Court might be rendered before the award of the Arbitral Tribunal.

The Tribunal is certainly not bound by the decisions taken by national courts⁴. It is however true that the purpose of these arbitration proceedings is liable to change, since the Claimants might, depending on the circumstances, wish to incorporate the outcome of the Senegalese proceedings into their allegations, with regard to the Concession, or even to the Treaty.

Pursuing both sets of proceedings in parallel would necessarily involve complications, misunderstandings or even serious resistance at the stage of enforcing the decision, if the Arbitral Tribunal were to find in favour of the Claimants.

- b) It is theoretically possible that the arbitration proceedings will end before all potential legal remedies in Senegal have been exhausted. The difficulty in this situation, if the decision is not equivalent to the rulings of the Senegalese courts, will be to have that decision accepted and followed, since it would then have priority over the aforementioned rulings.

Either way, pursuing both sets of proceedings in parallel will generate difficulties, which would not necessarily be in the interests of either party, not to mention the misunderstandings or discontent that could occur as a result. The objective of the measure would thus be to guarantee the *status quo*.

In concrete terms, the response is heavily dependent on the time factor, which is why it is important to move onto examining the issue of urgency.

⁴ De facto, “The right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law”, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, 18 ICSID Rev.-FIJL (2003), p. 300.

4. The urgency of the decisions

48. It is undisputed that, in order to be admitted, the provisional measures must also be urgent. It must be proven that if the measures are not ordered rapidly, there are serious risks that the rights of the applicants will be jeopardized⁵.

In the case in question, it is likely that, subject to the reservations expressed above, the Dakar Regional Court will rule before the Arbitral Tribunal. If the difficulties that have just been set out are to be avoided, a measure must be taken to prevent the arbitration proceedings from losing the essential part of their scope in practice.

Such a measure, which would be provisional in nature, must not be unduly extended, owing to the uncertainty it will create. For this reason, it must be of a limited duration only. This precaution is especially justified in the present case given that it seems that the Arbitral Tribunal could rule quickly on the central issue at this stage, namely the issue of its own jurisdiction. The fact that this decision implies suspending proceedings before the Dakar Regional Court should not seem unacceptable to the Respondent: according to the Respondent and if the Respondent is right, the illegal situation has been going on for several years now, and asking it to endure that situation for another couple of months is not going to cause it irreparable harm, especially since if it were to emerge that it was entirely within its rights, it would retain the right to seek additional pecuniary damages.

D. Consequences

49. Since the conditions have been met, the Arbitral Tribunal accepts on principle the Application for provisional measures. According to the text of Article 47 of the ICSID Convention, an arbitral tribunal is entitled to issue "*recommendations*". It has nevertheless been held in certain decisions issued by tribunals formed on the basis of that Convention that the phrasing used does not prevent an arbitral tribunal from ordering such measures⁶. According to the Arbitral Tribunal, the question may remain undecided, since the nature of the measure required in the present case is scarcely compatible with imposing an injunction on the Parties:

- a) Suspending the proceedings may not be done unilaterally by the Respondent, since this can be done only by the Dakar Regional Court, on which this Tribunal has no power to command. What is possible, on the other hand, is to recommend to the Respondent that it request the Dakar Regional Court in a joint letter with the other Party to agree to suspend proceedings, in the interests of both sets of proceedings. This is the approach that was taken when applying for the hearing of 23 September 2009 to be postponed, and it was implemented perfectly.

⁵ See in this sense, *Passage through the Great Belt (Finland v. Denmark)*, Provisional measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 12, para 23: "*Whereas provisional measures under Article 41 of the Statute [model of Article 47 of the ICSID Convention] are indicated "pending the final decision" of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given.*"

⁶ See Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2009), Article 47, paras. 15-22 and *Pey Casado*, cited above, paras. 17-24.

- b) The Arbitral Tribunal is confident that the Respondent, which is aware of what is at stake, will agree to follow this new recommendation, and that it will not be necessary to order it to do so. The understanding displayed by the Republic of Senegal thus far foresees that it will react in the same way to this recommendation.
- c) Even if this were not the case, the Arbitral Tribunal is aware of the fact that, if the recommendation were not followed, any injunction it could issue – presuming that it had the power to do so – would not in any event be suitable for forced execution.

For these reasons, the Arbitral Tribunal will issue a recommendation.

50. As has been said above, if the Application is to be partially granted, the Arbitral Tribunal feels that the effects of its recommendation should be of a limited duration.

The crucial question in the case in question is the issue of whether the Tribunal itself has jurisdiction to rule on the requests for relief that have been submitted to it. If it were to decide that it had no jurisdiction, the measures would automatically lapse, and the Respondent could pursue the proceedings before the Senegalese judicial authorities. If, on the other hand, it were to decide that it did hold jurisdiction, it would be appropriate to re-examine the situation and decide, on request by one of the parties or on its own initiative, whether or not its recommendation should be extended or modified.

For this reason, the duration of the provisional measures must be limited to the decision that this Arbitral Tribunal will take as to its own jurisdiction.

51. In accordance with the decisions taken in the Order of 14 September 2009 (see ch. 3), the Arbitral Tribunal will have to decide, once it has received the reply from the Claimants, whether it intends to address all issues simultaneously or whether the issue of its jurisdiction should be resolved in the first place. In light of the developments connected with the provisional measures requested, however, the Arbitral Tribunal is of the view that it is justified in the present case in beginning by ruling on the objections raised to its own jurisdiction. It is important that the relationships that exist or that may exist between the pending proceedings be clarified as quickly as possible. The objections made by the Respondent require a decision to be taken quickly, even if they cannot be admitted in the absence of an in-depth examination.

During the hearing of 9 November 2009, the Arbitral Tribunal considered, together with the Parties, what the potential timetable might be if it were to decide to rule first and foremost on the objections raised to its own jurisdiction; it seems that the pace contemplated is rapid, which should enable the Arbitral Tribunal to decide before the summer. In its opinion, this finding also has the potential to ensure that the recommendation it is issuing to both parties, although chiefly to the Respondent, is acceptable.

As a result, and without waiting for the reply from the Claimants, the Arbitral Tribunal decides to bifurcate the proceedings, and that it will begin by ruling on the objections raised by the Respondent with regard to its own jurisdiction, in accordance with the timetable it had contemplated during the hearing of 9 November 2009 (Transcript of the hearing of 9 November 2009, English version, pp. 153-157). The details of this

timetable will be confirmed by a procedural order that will be sent to the Parties as soon as this decision has been notified.

E. The other applications

52. The Claimants have made other submissions in addition to those concerning the suspension of the proceedings before the Dakar Regional Court (see no. 36 above). The Arbitral Tribunal deems that it is not currently necessary to rule on the issue, in view of the scope of the recommendation issued to the Parties.

On these grounds, the Tribunal recommends the following:

- 1. The Respondent is invited to send jointly with Claimant 2, an application to the Dakar Regional Court to have the pending proceedings in Senegal suspended.**
- 2. This measure shall be valid until the decision of this Arbitral Tribunal is taken concerning its own jurisdiction.**
- 3. In modification to the Order it issued on 14 September 2009, the Arbitral Tribunal decides that it will rule in priority on the objections to jurisdiction raised by the Respondent; the timetable for this stage of the proceedings will be communicated to the Parties in an Order that will be sent to them once this decision has been notified, on the basis of the timetable envisaged during the hearing of 9 November 2009.**
- 4. The other applications will, if necessary, be examined later, upon the express request of the Claimants.**
- 5. The Tribunal reserves its ruling on the costs of the proceedings.**

Paris,
Date: 9 December 2009

[Signed]

On behalf of the Arbitral Tribunal
Pierre Tercier, President