INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/17/18

(Annulment Proceeding)

IN THE ANNULMENT PROCEEDING BETWEEN:

REPUBLIC OF MADAGASCAR

Applicant

-and-

(1) (DS)2 S.A.

(2) PETER DE SUTTER

(3) KRISTOF DE SUTTER

Respondents

DISSENTING OPINION OF MR. GABRIEL BOTTINI

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14 October 2022

I. INTRODUCTION

1. While I agree with most of the reasons and conclusions in the Decision on the Annulment Application, I disagree with my esteemed colleagues on a fundamental point related to one of the jurisdictional objections made by the Republic of Madagascar ("**Madagascar**" and in this annulment proceeding, "**Applicant**") in the arbitration. The reason is that it is manifest that the Tribunal did not decide Madagascar's jurisdictional objection based on the existence of an arbitration agreement under the International Chamber of Commerce ("**ICC**") arbitration rules, which Madagascar argued prevented the claimants in the arbitration from resorting to ICSID arbitration in respect of the entire dispute.

2. The annulment of an arbitral award is a serious matter, as is an allegation that an arbitral tribunal does not have jurisdiction. Regardless of the merits of a jurisdictional objection,[1] the arbitral tribunal must decide the objection before exercising jurisdiction. Dealing with jurisdictional objections is not at the discretion of arbitral tribunals, but a necessary part of their mandate.

3. Here the Parties do not dispute that an arbitral tribunal exceeds its powers if it does not decide a jurisdictional objection that one of the parties has raised.[2] For the reasons explained below, the failure to decide a jurisdictional objection and the Tribunal's excess of powers were manifest in this case. Thus, the Committee should have annulled the Award.

II. THE ANNULMENT APPLICATION[3]

A. MADAGASCAR'S JURISDICTIONAL OBJECTIONS BASED ON THE ICC ARBITRATION

4. Madagascar objected to the jurisdiction of the arbitral tribunal, inter alia, based on Article 12(3) of the Accord entre l'Union Économique Belgo-Luxembourgeoise et la République de Madagascar concernant l'encouragement et la protection réciproques des investissements ("**BIT**") and the fact that the Respondents in this Annulment Proceeding ("**Respondents**") had initiated an ICC arbitration against Madagascar before resorting to ICSID.[4] As the Committee explained, "[t]he Applicant's primary case before the Tribunal

[1] Given the purposes of annulment under the ICSID Convention, I express no view about the merits of the jurisdictional objection in question.

[2] See Demande en Annulation et de Suspension d'Exécution d'une Sentence, para 34 (« *N'ayant pas examiné l'exception d'incompétence de la Demanderesse, le Tribunal a par conséquent manifestement excédé ses pouvoirs, à la fois pour défaut d'exercice de sa compétence à examiner ladite exception d'incompétence, et pour s'être déclaré compétent alors qu'il ne l'était pas.* »); and Contre-Mémoire des Défendeurs à L'Annulation (**"Counter-Memorial"**), para 47 (« *S'agissant de questions de compétence, il est patent qu'un tribunal arbitral doit se prononcer sur la demande qui lui est soumise. Il excède son pouvoir s'il ne tranche pas une question posée par les parties, alors qu'il était compétent pour le faire.* »).

[3] I only discuss Madagascar's annulment ground which the Committee describes as the Jurisdiction Issue (see Decision on the Annulment Application, §§ IV.B and V.A). I agree with the Committee that the other annulment grounds that Madagascar put forward should be rejected, for the reasons given in the Decision on the Annulment Application.

[4] See Requête de Bifurcation, paras 36–40; Contre-mémoire soumis par la République de Madagascar, paras 582–608; Mémoire en duplique soumis par la République de Madagascar, paras 585–604.

was that the Respondents had made a choice of forum by submitting to the ICC Arbitration and that they were not entitled to submit their dispute to the Tribunal" ("**ICC Primary Objection**").[5]

5. Madagascar argued that Article 12(3) of the BIT gave the Respondents a choice between ICC and ICSID arbitration, but that this choice was exclusive and once made it had to be respected.[6] In the words of Madagascar in the arbitration:

> Madagascar a exprimée une offre d'arbitrage générale portant sur "*Tout différend relatif aux investissements*" survenant entre elle et les demandeurs. Les demandeurs l'ont acceptée sans limite et sans réserve. Ils ont choisi pour régler leur litige avec l'Etat de Madagascar l'arbitrage CCI. Ainsi, dans la requête d'arbitrage CCI qu'ils ont introduit et sous la rubrique "convention d'arbitrage", les demandeurs affirment que "leur demande repose sur l'article 11.2 et 3. du TBI. Ils ont accepté ainsi l'arbitrage de la CCI sans limite et sans réserve en répondant à l'offre générale par une acceptation générale. Un accord arbitral sur le recours à la CCI a été formé. Cet accord porte sur « tout différend relatifs aux investissements » entre les requérants et l'Etat de Madagascar. Cet accord est toujours valable et n'a pas été affecté par l'annulation de la sentence. Il doit être respecté.[7]

6. In the alternative, Madagascar argued that the ICSID tribunal was not competent to rule on the claim that had been submitted to the ICC arbitration ("**ICC Alternative Objection**"). According to Madagascar, the ICSID Tribunal had to

> se déclarer incompétent pour examiner les chefs de demandes déjà soumis à la CCI sur la régularité du pourvoi dans l'intérêt de la loi. Les demandeurs d'ailleurs reconnaissent sans aucune ambiguïté que cette question est visé par la convention d'arbitrage visant la CCI.[8]

B. THE TRIBUNAL'S ANALYSIS

1. The Decision on Bifurcation

7. As described by the Committee, in its Ordonnance de Procédure No. 3 of 24 April 2018 ("**Bifurcation Decision"**), the Tribunal summarized Madagascar's jurisdictional objections based on Articles 12(2) (relating to the effect of proceedings before the Malagasy courts) and 12(3) of the BIT (relating to the effect of the prior ICC arbitration):

> **v. L'incompétence en raison de la violation de l'exclusivité du recours**
>
> La Défenderesse explique que l'article 12(2) du TBI subordonne le consentement de l'État à la condition que le litige n'ait pas été soumis à la juridiction de l'État où l'investissement a été réalisé. En l'espèce, les Demandeurs poursuivent dans le présent arbitrage « le même intérêt et le même préjudice » que celui dont les juridictions malgaches ont été saisies. En effet, la société PGM continue les procédures contentieuses locales et « pourrait obtenir gain de cause ». Par ailleurs, les Demandeurs violent l'exigence d'exclusivité posée à l'article 26 de la Convention CIRDI, violation qui ferme l'accès à l'arbitrage CIRDI et conduit à l'incompétence du Tribunal.

[5] Decision on the Annulment Application, para 44.
[6] Contre-mémoire soumis par la République de Madagascar, paras 582–583.
[7] Contre-mémoire soumis par la République de Madagascar, para 586 (footnote omitted).
[8] Mémoire en duplique soumis par la République de Madagascar, para 604 (footnote omitted).

> **vi. L'incompétence en raison de l'existence d'un accord bilatéral attribuant compétence à la CCI malgré l'annulation**
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> D'après la Défenderesse, les Demandeurs ont déjà soumis leur litige à la CCI en vertu de l'article 12(3) du TBI qui accorde un « choix exclusif ». Ce choix emporte l'incompétence du CIRDI, nonobstant l'annulation de la sentence CCI qui « laisse intact le consentement à l'arbitrage donné en faveur de la CCI ». A titre subsidiaire, le Tribunal devrait se déclarer incompétent pour examiner « les chefs de demandes déjà soumis à la CCI sur la régularité du pourvoi dans l'intérêt de la loi et le traitement devant les juridictions malgaches ».[9]

8. In its analysis whether to bifurcate, the Tribunal was again clear in distinguishing between the ICC Primary Objection and the ICC Alternative Objection:

> Selon la Défenderesse, l'article 12(3) du TBI aménage un choix exclusif que les Demandeurs ont déjà effectué en faveur de la CCI. Ainsi, le CIRDI ne serait pas compétent pour examiner le présent litige. À titre subsidiaire, la Défenderesse estime que le Tribunal devrait se déclarer incompétent sur les demandes déjà soumises à la CCI.10

9. However, after noting that "*à première vue*" the ICC Arbitration and the ICSID Arbitration had different subject matters,[11] the Tribunal concluded that neither the ICC Primary Objection nor the ICC Alternative Objection warranted bifurcation:

> Dans ces circonstances, une bifurcation n'apparaît pas propre à promouvoir l'efficacité de la procédure. Quant à l'objection subsidiaire tendant à une déclaration d'incompétence limitée aux demandes déjà soumises à la CCI, le Tribunal n'est pas en mesure de se prononcer à ce stade sur son bien-fondé. Cela étant, cette objection – à supposer qu'elle prospère – n'aboutirait pas à une réduction substantielle de l'objet du litige.[12]

2. The Award

10. Unlike the Bifurcation Decision, the Award classified Madagascar's jurisdictional objections in five categories and grouped the objections relating to the local proceedings and to the ICC arbitration in the fifth category: "*(v) Les Demandeurs violent le principe de l'exclusivité des voies de recours*."[13] Notably, the Tribunal observed that the fifth category "*comporte deux volets dont le second n'affecte pas la prétendue violation de la garantie de protection et sécurité constantes*."[14]

11. Paragraphs 251 and 252 of the Award described this fifth category as follows:

> **5. Objections relatives au principe du mode de règlement des différends**
> **a. Positions des Parties**
> **i. Position de la Défenderesse**

[9] Ordonnance de Procédure No. 3, 24 April 2018, paras 15–16.
[10] Ordonnance de Procédure No. 3, 24 April 2018, para 53.
[11] Ordonnance de Procédure No. 3, 24 April 2018, para 54.
[12] Ordonnance de Procédure No. 3, 24 April 2018, para 56.
[13] *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v Republic of Madagascar*, ICSID Case No. ARB/17/18, Award, 17 April 2020 ("**Award**"), para 115.
[14] Award, para 117.

> Selon la Défenderesse, l'identité de l'intérêt ou du préjudice fournit le critère d'applicabilité de la clause d'exclusivité de l'article 12(2) du Traité. En l'espèce, le litige est essentiellement de nature contractuelle vu qu'il vise le contrat d'assurance et que les Demandeurs réclament des droits appartenant à PGM avec une demande de réparation qui correspond au préjudice subi par PGM. Les Demandeurs ne respectent d'ailleurs pas l'article 26 de la Convention CIRDI en poursuivant leur demande devant les juridictions malgaches.
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> La Défenderesse estime par ailleurs qu'un accord bilatéral sur le recours à la CCI existe en ce qui concerne les questions relatives à la validité du pourvoi dans l'intérêt de la loi, nonobstant l'annulation de la Sentence CCI. Les Demandeurs ne peuvent donc pas soumettre ce même litige au CIRDI vu que l'accord formé en vertu de l'article 12(3) du Traité existe toujours.[15]

12. The Award recorded the Respondents' position on the effect of the ICC arbitration on the ICSID Tribunal's jurisdiction as follows:

> L'arbitrage CCI est distinct du présent arbitrage, selon les Demandeurs. Ni les irrégularités procédurales et substantielles commises par la Cour de cassation dans le pourvoi au fond, ni les griefs entourant la destruction de l'usine et l'absence de protection de l'État, n'étaient soumis à l'arbitre CCI. Quant à l'introduction du pourvoi dans l'intérêt de la loi, les Demandeurs estiment que l'article 12(3) laisse le libre choix à l'investisseur et que ce choix n'est pas irrévocable. D'ailleurs, Madagascar n'a pas fait état d'un préjudice découlant du choix de saisir le CIRDI.[16]

13. The Tribunal referred to the issue of the impact of the alleged ICC arbitration agreement on its competence in two paragraphs:

> Enfin, le Tribunal n'estime pas nécessaire de se prononcer à ce stade sur la question de savoir si un accord bilatéral sur le recours à la CCI existe en ce qui concerne les questions relatives à la validité du pourvoi dans l'intérêt de la loi. La compétence étant admise pour que le Tribunal se prononce sur les violations alléguées en lien avec le pillage et la destruction de l'usine, le Tribunal traitera dans un premier temps cette prétention et déterminera ensuite s'il est nécessaire de se prononcer sur sa compétence pour traiter des autres violations alléguées en lien avec les immixtions alléguées dans la procédure judiciaire.
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> Pour ces raisons, et sous réserve de sa décision sur l'opportunité d'analyser la dernière objection à la compétence relative à l'existence d'un accord bilatéral CCI pour traiter le pourvoi dans l'intérêt de la loi, le Tribunal rejette les déclinatoires de compétence soulevées par la Défenderesse.[17]

14. However, the Award finally never analysed the effect of the ICC arbitration agreement on the Tribunal's competence. Having found that Madagascar had breached the Full Protection and Security ("**FPS**") standard of the BIT in relation to the ransacking and destruction of the factory at Mahajanga,[18] based on the principle of judicial economy, the Tribunal found it unnecessary to examine all other claims, which would not yield higher damages.[19]

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[15] Award, paras 251–252 (footnotes omitted).
[16] Award, para 254 (footnotes omitted).
[17] Award, paras 262–263.
[18] Award, paras 283–365.
[19] Award, paras 468–471.

C. MADAGASCAR'S ANNULMENT GROUND RELATING TO THE JURISDICTION ISSUE

15. Madagascar contends that the Tribunal manifestly exceeded its powers in the sense of Article 52(1)(b) of the ICSID Convention by *inter alia* failing to decide its jurisdictional objection, primary and alternative, based on the Respondents' consent to ICC arbitration.[20] According to Madagascar

> The Tribunal was, obviously, free to decide the substance of Madagascar's choice of forum objection. The Tribunal was even free to reject this objection, and find that Article 12 of the BIT granted it jurisdiction over the entire dispute.
>
> [...]
>
> What the Tribunal was not at liberty to do, however, was to ignore the objection in its entirety. But that is precisely what it has done. The Award should be annulled because there is nothing for Madagascar to consider, respect, or contest to; there are no paragraphs to parse, no reasoning to criticise, no position to challenge. The Tribunal, quite frankly, never spelled out its interpretation of BIT Article 12(3), despite a clear debate on this issue during the proceedings.[21]

16. In the Reply on Annulment (**"Reply"**), Madagascar added that the legal question that the Arbitral Tribunal should have decided

> could be put in the following terms: "whether the Respondents' earlier choice to arbitrate under the ICC Rules bound them to that forum". While this issue required an answer from the Tribunal, the arbitrators were free to formulate that answer with or without reference to the specific arguments debated by the parties in this respect, such as their arguments regarding the proper interpretation of Article 12(3) BIT. As was explained in the Memorial and is reiterated in this Reply, the root of the Applicant's case is not that the Tribunal offered a disappointing answer to that legal question. It is that it failed to offer *any* answer and failed to resolve whether it had jurisdiction over the case.[22]

17. In the Reply, Madagascar also insisted that the Tribunal's excess of powers was manifest, arguing that

> there is no denying that the Tribunal did not address the choice of forum objection, let alone decide it. Whether the Tribunal side-stepped, ignored, or dramatically mischaracterized this objection is, ultimately, irrelevant.
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> To repeat, in the simplest terms, the Applicant's case: Madagascar invoked a crucial jurisdictional objection, the resolution of which is absent from the Award. The excess of powers could not be more manifest.[23]

III. ANALYSIS

A. THE FAILURE TO DECIDE A QUESTION AS A MANIFEST EXCESS OF POWERS

18. As already noted, the Parties in this case do not dispute that "a failure to decide a question

[20] Memorial on Annulment ("**Memorial")**, paras 58–64.
[21] Memorial, paras 61-62 (footnote omitted).
[22] Reply, para 39.
[23] Reply, paras 78-79.

entrusted to a tribunal may, in some circumstances, constitute an excess of powers, since the tribunal has in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement".[24] However, under Article 52(1)(b) of the ICSID Convention the excess of powers must be manifest which, as the Committee notes, requires that the excess of powers be "'clear', 'plain', 'obvious', or 'evident'".[25]

19. Furthermore, it is not disputed here that, while an ICSID tribunal is required to deal with all the questions the parties submit, it is not required to address all the arguments the parties put forward.[26] This is, however, "provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with".[27]

20. The duty of ICSID tribunals to deal with every question submitted to them is provided for in Article 48(3) of the ICSID Convention. In *EDF v Argentina* the *ad hoc* Committee clarified that

> Article 48(3) requires only that a tribunal decide every question submitted to it. A "question" within the meaning of Article 48(3) is an issue which must be decided in order to determine all aspects of the rights and liabilities of the parties relevant to the case in hand. In making its case in relation to such a question, a party may advance several distinct arguments and refer to one or more items of evidence and legal authorities in support thereof. A tribunal is not required to rule separately on each argument of law or point of fact on which the parties are in disagreement, so long as it decides the question to which those arguments relate. What does, or does not, constitute a question that has to be decided is an objective matter and not one which can be shaped by the way in which a party chooses to put its case or the emphasis which it places on any particular point.[28]

21. As to the meaning of the word "question", based on an analysis of ICSID decisions Schreuer *et al* conclude as follows:

> This practice makes it clear that **"question" in this context is to be understood objectively in the sense of a crucial or decisive argument.** An argument is crucial or decisive if its acceptance would have altered the tribunal's conclusions. Identification of that question or argument is objective. Such an argument may not be ignored but must

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[24] Decision on the Annulment Application, para 100 (citing to *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para 97). Aside from a manifest excess of powers, a failure to deal with every question may constitute a different ground for annulment under Article 52 of the ICSID Convention. See C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (New York: Cambridge University Press, 2nd ed., 2009), pp 1017–18.

[25] Decision on the Annulment Application, para 101. Failure to decide a jurisdictional objection is by definition "substantively serious". Thus, here I do not need to express a view as to whether the fact that the excess of powers was capable of making a difference to the outcome of the case may ever be a relevant consideration in determining whether the excess was manifest. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 115.

[26] Counter-Memorial, para 37; Reply, para 13.

[27] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 87 (cited in Memorial, fn 35, and in Counter-Memorial, para 40).

[28] *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, 5 February 2016, para 346 (emphasis added, footnote omitted).

> be addressed by the tribunal.[29]

22. Thus, under Article 48(3) a "question" is an issue submitted to the tribunal the determination of which affects the parties' rights and liabilities.[30] Whether an issue constitutes a "question" in this sense is a matter for objective determination by ICSID tribunals, regardless of how the parties have formulated the issue at stake.

23. ICSID *ad hoc* committees have taken the view that questions may be dealt with explicitly or implicitly. The decisions suggest that

> [i]f it can be implied from the reasons given why a particular argument cannot be supported, it is not necessary to address that argument explicitly. If an argument rests on premises that have been dismissed by the tribunal, the argument need not be addressed as long as the tribunal has stated reasons for dismissing the premises. Where one of several defensive arguments has been accepted and the claim has been dismissed, it may be superfluous to address the remaining arguments. The decisive criterion is whether the argument has the potential to alter the award's outcome.[31]

24. Relevantly, therefore, on this view an objection or defence that constitutes a "question" submitted to the Tribunal in the sense of Article 48(3) of the ICSID Convention may be rejected implicitly, provided the reasons provided deal with the premises on which the question is based.

25. Nevertheless, as regards jurisdictional objections in particular, Article 41(2) of the ICSID Convention provides that "[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal". Therefore, the combined effect of Articles 41(2) and 48(3) of the ICSID Convention is that ICSID tribunals have an obligation to both consider and decide any jurisdictional objection a party raises.[32]

B. WAS MADAGASCAR'S ICC PRIMARY OBJECTION DECIDED?

26. As noted above, Madagascar had objected to the Tribunal's jurisdiction based on the Respondents' prior recourse to an ICC arbitration. The Committee aptly described the ICC Primary Objection and the ICC Alternative Objection as follows:

> the Tribunal had no jurisdiction by virtue of Article 12(3) of the BIT:
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> 108.2.1 over the dispute because the Respondents had already submitted their dispute to ICC Arbitration, which choice survived the annulment of the ICC Award; or
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> 108.2.2 alternatively, over the specific heads of claim already submitted for resolution

[29] C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (New York: Cambridge University Press, 2nd ed., 2009), p 1020 (emphasis added).
[30] See also *CDC Group plc v Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para 57.
[31] C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (New York: Cambridge University Press, 2nd ed., 2009), p 1022 (drawing from the views of the *ad hoc* committees in *Klöckner I v Cameroon*, *MINE v Guinea*, and *Wena Hotels v Egypt*).
[32] See ibid, p 534.

in the ICC Arbitration (which did not include the FPS claims).[33]

27. Madagascar's jurisdictional arguments based on the ICC arbitration, as quoted above, were summarised by the Award in paragraph 252:

> La Défenderesse estime par ailleurs qu'un accord bilatéral sur le recours à la CCI existe en ce qui concerne les questions relatives à la validité du pourvoi dans l'intérêt de la loi, nonobstant l'annulation de la Sentence CCI. Les Demandeurs ne peuvent donc pas soumettre ce même litige au CIRDI vu que l'accord formé en vertu de l'article 12(3) du Traité existe toujours.[34]

28. Here Madagascar's objection is described as referring to a bilateral agreement to have recourse to ICC arbitration in respect of ("*en ce qui concerne*") the questions that had been submitted to the ICC arbitral tribunal. In other words, the paragraph itself refers only to the ICC Alternative Objection and not to the ICC Primary Objection, which applied to the entire investment dispute and not to the specific claims the ICC tribunal heard.[35]

29. On the other hand, the footnote in paragraph 252 refers to paragraphs 582 to 608 of Madagascar's counter-memorial in the arbitration, which discussed both the ICC Primary Objection and the ICC Alternative Objection. Furthermore, paragraph 254 of the Award, quoted above, and the paragraphs of Respondents' reply in the arbitration referred to in the footnotes in paragraph 254 appear to contain Respondents' joint response to the ICC Primary Objection and the ICC Alternative Objection (without, however, expressly distinguishing between the two).

30. As outlined above, the Bifurcation Decision clearly distinguished between the ICC Primary Objection and the ICC Alternative Objection. However, in particular in light of the Award's description of Madagascar's position on the effect of the ICC arbitration agreement, the extent to which the Tribunal was aware of the need to decide the ICC Primary Objection is not completely clear.[36] Be that as it may, for purposes at hand the decisive point is whether or not the Tribunal decided this jurisdictional objection.

31. The answer to this question lies, fundamentally, in one paragraph of the Award, paragraph 262, which reads as follows:

> Enfin, le Tribunal n'estime pas nécessaire de se prononcer à ce stade sur la question de savoir si un accord bilatéral sur le recours à la CCI existe en ce qui concerne les questions relatives à la validité du pourvoi dans l'intérêt de la loi. La compétence étant admise pour que le Tribunal se prononce sur les violations alléguées en lien avec le pillage et la

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[33] Decision on the Annulment Application, para 108.2.

[34] Award, para 252 (footnote omitted).

[35] Referring to this paragraph, the Decision on the Annulment Application observes the following: "The Committee notes that in this paragraph, the Tribunal appears to have focused its summary on the Applicant's alternative case on its choice of forum objection." Annulment Decision, para 113.

[36] Paragraph 117 of the Award also raises serious doubts in this respect. This paragraph states that the fifth jurisdictional objection, which under the Award's classification grouped the objections relating to the local proceedings and to the ICC arbitration, "*comporte deux volets dont le second n'affecte pas la prétendue violation de la garantie de protection et sécurité constantes*". Since the objection based on the local proceedings clearly applied to all the claims before the ICSID tribunal (see Award, paras 258–261), the Award seems to be saying that the ICC objection does not affect the full protection and security claim, which was true only of the ICC Alternative Objection but not of the ICC Primary Objection.

> destruction de l'usine, le Tribunal traitera dans un premier temps cette prétention et déterminera ensuite s'il est nécessaire de se prononcer sur sa compétence pour traiter des autres violations alléguées en lien avec les immixtions alléguées dans la procédure judiciaire.[37]

32. In this paragraph, the Tribunal starts by stating that it does not consider necessary to decide at that point the question of whether an agreement to have recourse to ICC exists "*en ce qui concerne les questions relatives à la validité du pourvoi dans l'intérêt de la loi*", which are the issues that had been submitted to the ICC tribunal.[38] Here again, the Award refers only to the ICC Alternative Objection, while being completely silent on the ICC Primary Objection.

33. Furthermore, the Parties have much debated the meaning of the beginning of the second sentence of paragraph 262: "La compétence étant admise pour que le Tribunal se prononce sur les violations alléguées en lien avec le pillage et la destruction de l'usine..." I agree with the Committee that what the Tribunal was saying here is that it had already decided that it was competent over that specific claim.[39] Yet, assuming the Tribunal was aware of the need to decide both the ICC Primary Objection and the ICC Alternative Objection, how could it affirm that its competence had been established with respect to a specific claim when the ICC Primary Objection referred to the Tribunal's competence in toto? Since the jurisdictional impact of the prior ICC arbitration had still not been considered, there is simply no basis to suggest that the ICC Primary Objection had already been decided, not even implicitly.

34. Paragraph 262 of the Award goes on to state that the Tribunal would first consider the claim over which it had already affirmed jurisdiction (i.e. the claim not submitted to the ICC arbitration) and would then consider whether it was necessary to decide if it was competent over the rest of the claims. Paragraph 263 of the Award confirms this point, as the Tribunal rejects Madagascar's jurisdictional objections "*sous réserve de sa décision sur l'opportunité d'analyser la dernière objection à la compétence relative à l'existence d'un accord bilatéral CCI pour traiter le pourvoi dans l'intérêt de la loi*" (again, clearly referring only to the ICC Alternative Objection).

35. As already noted, for reasons of judicial economy in the end the Tribunal did not find it necessary to analyse the effect of the alleged ICC agreement on its jurisdiction. The arguments based on the ICC arbitration apparently did not affect the FPS claim, which the Tribunal accepted, and analysing the rest of the claims would not have yielded higher damages.[40]

36. Since the Award nowhere explicitly considers, let alone decide, the ICC Primary Objection, is it possible to conclude that this jurisdictional objection was somehow implicitly dealt

[37] Award, para 262.
[38] See Bifurcation Decision, paras 16, 27.
[39] Decision on the Annulment Application, para 118. See also Counter-Memorial, para 102.
[40] Award, paras 468–471.

with? In my view, there is absolutely no basis to conclude that the ICC Primary Objection was implicitly decided, for the following reasons.

37. Firstly, the Award's judicial economy reason not to decide the effect of the alleged ICC arbitration agreement was simply not applicable to the ICC Primary Objection. It may have been unnecessary to decide a jurisdictional objection referring only to certain claims, as was the case of the ICC Alternative Objection, when the claims in question would not have yielded higher damages. However, the ICC Primary Objection applied to all claims before the Tribunal, including the FPS claim decided by the Tribunal. Thus, since the Award's judicial economy reason to decline to decide the ICC Alternative Objection did not apply to the ICC Primary Objection, such reasoning did not implicitly deal with this latter objection.

38. Secondly, the ICC Primary Objection (as well as the ICC Alternative Objection) was based on Article 12(3) of the BIT. According to Madagascar, under this provision, the Respondents' choice of an ICC arbitration was final and precluded them from subsequently resorting to ICSID arbitration. The Award did not consider the meaning of Article 12(3), which may be consistent with the Tribunal's conclusion that it was unnecessary to decide the ICC Alternative Objection. However, the absence of any interpretation of the provision on which the ICC Primary Objection was based is a further obstacle to concluding that this objection was implicitly dealt with.

39. In relation to Article 12(3) of the BIT, I cannot agree with the Committee's suggestion "that the same logic by which the Tribunal dismissed the Applicant's fifth jurisdictional objection was the basis upon which the Tribunal dismissed the Applicant's sixth jurisdictional objection".[41] Madagascar's fifth objection and the Tribunal's analysis of it were based on Article 12(2) of the BIT, not on Article 12(3). Furthermore, at least part of the reasons the Tribunal gave to reject the fifth jurisdictional objection[42] were not applicable to the sixth objection, not least because the parties in the ICC and the ICSID arbitrations partially overlapped and both arbitrations involved claims under the BIT.

40. Thirdly, for purposes of Articles 41(2) and 48(3) of the ICSID Convention the Tribunal's general affirmation of its jurisdiction cannot be accepted as an implicit rejection of a jurisdictional objection that the Award does not even discuss, particularly when, as in this case, the reasons provided do not apply to the objection that was not considered. Otherwise, little if anything would be left of ICSID tribunals' duty to consider and decide jurisdictional objections.[43]

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[41] Decision on the Annulment Application, para 132.
[42] See Award, paras 258–261.
[43] See also *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB//84/3, Decision on Jurisdiction, 14 April 1988, para 63 ("Clearly, then, there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine Egypt's objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties."); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para 9.2 ("Objections to the jurisdiction of an adjudicatory body cannot be ignored, if raised during the arbitral proceedings – delay notwithstanding.").

41. The Decision on the Annulment Application, however, states that "the Tribunal's statement in paragraph 262 of the Award that it was established that the Tribunal had jurisdiction at least to determine the FPS claims was an implicit determination rejecting the general objection that there was a continuing ICC arbitration agreement which barred any other claims at all"[44]. The Committee thus finds that the ICC Primary Objection was implicitly rejected. Even though, as already noted, the Tribunal had not considered this objection at all, the Committee appears to be saying that by affirming jurisdiction over a specific claim, the Award must have implicitly rejected a general jurisdictional objection affecting the Tribunal's jurisdiction as a whole.[45]

42. There is arguably a logical contradiction between asserting jurisdiction over a specific claim and a jurisdictional objection applying to all claims. However, if this kind of reasoning were enough to fulfil ICSID tribunals' mandate to consider and deal with jurisdictional objections, these tribunals could simply decide one specific jurisdictional objection and affirm jurisdiction, without even having to consider any other general jurisdictional objections that may have been raised (even if these other general objections were completely unrelated to the specific objection that was decided). Furthermore, ICSID Tribunals could simply affirm jurisdiction and decide the merits without considering any jurisdictional objection, either general or specific, since by deciding the merits the tribunal could be deemed to be implicitly rejecting any objection against its jurisdiction.

43. This reasoning is inconsistent with how ICSID *ad hoc* committees have dealt with allegations of questions being considered indirectly or implicitly.[46] To the extent that implicitly rejecting a jurisdictional objection may be consistent with Articles 41(2) and 48(3) of the ICSID Convention, it must at least be possible to infer from the reasons given in the award why the jurisdictional objection cannot be upheld.[47] If a jurisdictional objection is not expressly decided, as the Committee admits it is the case here, and the reasons given do not otherwise deal with the objection, there is simply no basis to conclude that an ICSID Tribunal fulfilled its (undisputed) duty to consider and deal with jurisdictional objections.

44. The Committee states that the reasons for implicitly deciding the ICC Primary Objection "are present albeit implicit".[48] According to the Committee, whilst it would have been

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[44] Decision on the Annulment Application, para 124.

[45] This suggestion, however, is not consistent with how the Tribunal dealt with all "general" jurisdictional objections (other than the ICC Primary Objection), which it expressly considered and decided. See Award, paras 151-196 (*ratione personae* objections), 197-233 (*ratione materiae* objection), and 234-239 (alleged lack of a direct link between the dispute and the investment).

[46] C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (New York: Cambridge University Press, 2nd ed., 2009), pp 1020-1023.

[47] Ibid, p 1022. The Decision on the Annulment Application states that "Mr Bottini's dissent focuses principally on what he considers to be an absence of sufficient reasons". Decision on the Annulment Application, para 125. I respectfully disagree. Given the Committee's findings that the ICC Primary Objection was implicitly rejected and that the reasons given in respect of another objection implicitly refer to the ICC Primary Objection, the following paragraphs show that these reasons are not relevant to and thus do not implicitly deal with the ICC Primary Objection. I express no view on the sufficiency, let alone the adequacy, of any reasons the Tribunal has given.

[48] Decision on the Annulment Application, para 125.

clearly preferable for the Tribunal to have explicitly set out that the ICC arbitration was distinct from the ICSID arbitration, "it appears that having set out largely the same analysis in relation to the fifth jurisdictional objection in the preceding four paragraphs, the Tribunal did not consider it necessary to repeat that process."[49]

45. I disagree with the Committee's finding, for the following reasons.

46. Firstly, the Committee's reasoning requires one to assume that the Tribunal not only considered it unnecessary to repeat the analysis set out in relation to another objection to deal with the ICC Primary Objection, but also considered it unnecessary to even refer to that analysis.

47. Secondly, what the Committee refers to as the "fifth jurisdictional objection" was based on the impact of local contract-based proceedings and article 12(2) of the BIT on the ICSID's Tribunal's jurisdiction. In contrast, the ICC Primary Objection was based on a treaty-based ICC arbitration and article 12(3) of the BIT. Despite these differences, and while recognising that the point about the (lack of) identity of parties between the local and ICSID proceedings, included in the analysis of the "fifth jurisdictional objection", did not directly apply to the ICC Primary Objection,[50] the Committee concludes that "largely the same analysis" applied in relation to the two objections.[51]

48. However, if one were to assume that the analysis of the jurisdictional objection based on the local proceedings implicitly applied to the ICC Primary Objection, one would have to disregard that the legal bases of the two objections were different, i.e. Articles 12(2) and 12(3) of the BIT respectively,[52] and that the legal bases of the proceedings against which the ICSID proceeding had to be compared in each objection were also different, i.e. contract in the case of the "fifth jurisdictional objection" and treaty in the case of the ICC Primary Objection. These are of course fundamental differences,[53] which make it impossible to conclude that the analysis of the local proceedings objection implicitly applied to the ICC Primary Objection. It is thus manifest that no reasoning contained in the Award deals with the ICC Primary Objection.

49. The Decision on the Annulment Application does not address the fact that the objection based on the Malagasy proceedings was based on a different provision of the BIT than the ICC Primary Objection. It also states that its analysis is unaffected by this Dissenting Opinion's observation based on the contract claims/treaty claims distinction because this distinction "was not relevant to the application of the triple identity test adopted by the Tribunal in view of the nature of the claims in issue".[54] However, the Award expressly

[49] Ibid, para 126.
[50] Ibid, para 127.
[51] Ibid, para 126.
[52] While, as already noted, the Tribunal never analysed Article 12(3) of the BIT, it did analyse Article 12(2). See Award, para 258.
[53] As regards the latter difference, James Crawford stated: "No issue in the field of investment arbitration is more fundamental, or more disputed, than the distinction between treaty and contract". Crawford, James, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arbitration International 351, p 351.
[54] Decision on the Annulment Application, para 127.

considered the contract claims/treaty claims distinction when deciding the local proceedings objection[55] and one otherwise fails to see how the triple identity test can ever be applied in investment arbitration without considering the legal bases of the claims being compared.[56] Thus, little else needs to be said about these two crucial differences between the two objections, which render the Award's analysis of the local proceedings objection inapplicable to the ICC Primary Objection (there being, on the other hand, no indication in the Award that this analysis was meant to also apply to the latter objection).

50. Furthermore, the distinction between questions and arguments is not decisive here. There can be little doubt that a jurisdictional objection is a question in the sense of Article 48(3) of the ICSID Convention, in that it "is an issue which must be decided in order to determine all aspects of the rights and liabilities of the parties".[57] Moreover, the ICC Primary Objection and the ICC Alternative Objection involve two different questions since their scope is different: if accepted, the former would entail that the Tribunal had no competence at all, while the latter would only affect the Tribunal's competence over certain claims. However, even assuming that the ICC Primary Objection and the ICC Alternative Objection constituted two different arguments in support of the same objection, it is not possible to conclude that it was unnecessary to consider the ICC Primary Objection. The reason is that the ICC Alternative Objection: (i) was the subsidiary argument, and (ii) was, in any event, not decided and for judicial economy reasons not relevant to the ICC Primary Objection.

51. In the end, under a "well-established principle"[58] as provided for in Article 41(1) of the ICSID Convention, the Arbitral Tribunal was "the judge of its own competence". This *Competence-Competence* principle provides "a safeguard against frustration of proceedings through unilateral determination of competence by a party".[59] The safeguard for both parties is that there is an impartial adjudicator, who has the power and the duty to decide whether or not the case must be heard.[60] Here, however, the Tribunal manifestly

[55] See Award, para 259 ("Ces deux litiges ne reposent pas non plus sur la même cause. Les Demandeurs réclament ici réparation pour des dommages prétendument encourus en raison de violations alléguées du TBI. Ceci ressort en effet de la lecture des conclusions des Demandeurs, dans lesquelles il est demandé au Tribunal de constater que Madagascar a violé les articles 3(1), 3(2) et 7 du TBI. Leurs prétentions ne visent aucunement le contrat d'assurance.").

[56] On the other hand, if the Committee is suggesting that the contract claims/treaty claims distinction was not relevant to the ICC Primary Objection because the ICC arbitration and the ICSID arbitration were both treaty-based, this would prove that the Tribunal's reasoning in relation to the local proceedings objection is not relevant to the ICC Primary Objection.

[57] *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, 5 February 2016, para 346.

[58] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para 38.

[59] ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Vol. I-IV (1970), Vol. II-1, pp 205–206.

[60] See *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para 148 ("Article 41 of the ICSID Convention is clear when it indicates that 'The Tribunal shall be the judge of its own competence.' Consequently, the ICSID Convention recognizes the 'Kompetenz-Kompetenz' principle and imperatively obligates the Arbitral Tribunal to decide the issues formulated on this subject.").

failed to exercise its power and duty to decide Madagascar's ICC Primary Objection, which was thus left without a judge.

IV. CONCLUSION

52. The Award in this case did not decide one of Madagascar's jurisdictional objections. The Committee's function is neither to determine why the ICC Primary Objection was not decided, which is completely unclear, nor to "form even a provisional view" on the merits of this objection.[61] The crucial point is that Madagascar "should not have been deprived of a decision, one way or the other" on an issue that could clearly have made a difference to the outcome of the case.[62] By failing to decide Madagascar's ICC Primary Objection, the Tribunal manifestly exceeded its powers in the sense of Article 52(1)(b) of the ICSID Convention, which should have resulted in the Award being annulled.

Gabriel Bottini

[61] See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision, 3 July 2002, para 112.
[62] Ibid, paras 86 and 114.