

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the annulment proceeding between

**MALICORP LIMITED**

**APPLICANT**

and

**ARAB REPUBLIC OF EGYPT**

**RESPONDENT**

**ICSID Case No. ARB/08/18**

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**DECISION ON THE APPLICATION FOR ANNULMENT OF MALICORP LIMITED**

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*Members of the ad hoc Committee*

Mr. Stanimir Alexandrov

Dr. Eduardo Silva Romero

Dr. Andrés Rigo Sureda (*President*)

*Secretary of the ad hoc Committee*

Mr. Paul-Jean Le Cannu

Date of Dispatch to the Parties: July 3, 2013

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**Representation of the Parties**

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**FREQUENTLY USED ABBREVIATIONS AND ACRONYMS**

Application	Applicant's Application for Annulment dated June 1, 2011
Annul. Tr. [E./F.], Dec. [6/7], [page:line]	Transcript in [English/French] of the December [6/7], 2012, Hearing on the Application for Annulment
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Arb. Tr., [page:line]	Transcript of the April 19-20, 2010, Hearing on Jurisdiction and the Merits in the Arbitration Proceeding
BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments of June 11, 1975
Counter-Memorial	Respondent's Counter-Memorial of June 5, 2012
Exh. [A-] [R-] [DA-]	Exhibit [Applicant] [Respondent] [Annulment Application]
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Malicorp's PowerPoint Presentation	Malicorp's PowerPoint Presentation submitted on November 27, 2012, in the Annulment Proceeding
Memorial	Applicant's Memorial of March 5, 2012
Rejoinder	Respondent's Rejoinder of October 5, 2012
Reply	Applicant's Reply of August 1, 2012
Report	Report on the Telephone Conference on the Organization of the Hearing of November 6, 2012

**I. Introduction and Procedural History**

1. On June 1, 2011, Malicorp Limited, a company incorporated under the laws of the United Kingdom of Great Britain and Northern Ireland (“Malicorp,” “Applicant,” or “Claimant”), filed an Application for Annulment (the “Application”) with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”). Malicorp sought annulment of the award rendered on February 7, 2011, in ICSID Case No. ARB/08/18 between the Arab Republic of Egypt (“Egypt” or “Respondent” or the “Republic”) and Malicorp (the “Award”). The Application was submitted within the time period provided for by Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).
2. The dispute arose under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments of June 11, 1975 (the “BIT”).<sup>1</sup> It related to the termination of a “Build-Operate-Transfer” contract, entered into by Egypt, then represented by the Egyptian Civil Aviation Authority, and Malicorp, for the construction, management, operation and transfer of the *Ras Sudr* International Airport (the “Contract”).<sup>2</sup>
3. The Award summarized as follows the views of Malicorp and Egypt (collectively, the “Parties”) as to why the Contract was terminated:

According to the Claimant, the Contract was terminated for reasons connected to national security (Claim. 23.07.2009, no. III-2, p. 12; Claim. 23.10.2009, no. III-2, p. 15; Respond. 08.01.2010, no. 133). That being so, such termination entitled it to compensation for the damage caused by unfair treatment and the expropriation of its investment (Respond. 08.01.2010, no. 151; Respond. 01.07.2009, no. 27).

According to the Respondent, the Contract was terminated for a reason contained in the Contract itself. Malicorp had allegedly produced false documents, had not fulfilled its obligation to set up an Egyptian company, had failed to provide the necessary guarantees and had failed to properly perform the Concession

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<sup>1</sup> See Award, para. 74.

<sup>2</sup> See Award, paras. 15 and 33.

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Contract (Respond. 08.01.2010, no. 133; Respond. 01.07.2009, no. 27).<sup>3</sup>

4. While Applicant argued that Egypt had acted in violation of the BIT's provisions on fair and equitable treatment and expropriation,<sup>4</sup> Respondent contended that "Malicorp's claim should be rejected, promptly as an improper attempt to use BIT rights to profit from its own fraud and negligence and its own failure to perform the Concession Contract."<sup>5</sup>
5. In its Award, the Tribunal, comprised of Professor Pierre Tercier (a national of Switzerland) (presiding), Professor Luiz Olavo Baptista (a national of Brazil), and Mr. Pierre-Yves Tschanz (a national of Switzerland), decided, *inter alia*, that:
  - (i) it had jurisdiction to rule on Applicant's claims;<sup>6</sup> and
  - (ii) "[...] the reasons on which the Respondent relied in order to bring the Contract to an end appear[ed] serious and adequate; the termination, justified in fact and in law, could not be interpreted as an expropriatory measure."<sup>7</sup>
  - (iii) Therefore, Applicant's submissions based on "the principle of compensation for expropriation [were] rejected."<sup>8</sup>
6. As indicated above, Malicorp filed its Application on June 1, 2011.
7. On June 13, 2011, the Secretary-General of ICSID registered the Application and notified the Parties of the registration in accordance with ICSID Arbitration Rule 50(2)(a) and (b).
8. On July 8, 2011, an *ad hoc* Committee composed of Mr. Stanimir Alexandrov (a national of Bulgaria), Dr. Eduardo Silva Romero (a national of Colombia and France), and Dr. Andrés Rigo Sureda (a national of Spain), as President, was constituted. Ms. Aurélia Antonietti was designated to serve as Secretary of the Committee (the "Secretary").

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<sup>3</sup> Award, para. 33.

<sup>4</sup> See Award, para. 121.

<sup>5</sup> Award, paras. 84, 94, and 121.

<sup>6</sup> See Award, para. 120, p. 47.

<sup>7</sup> Award, para. 143.

<sup>8</sup> Award, para. 143, p. 47.

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9. On December 5, 2011, the Committee held a first session with the Parties. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006.<sup>9</sup> The Parties confirmed that the Committee had been properly constituted and had no objections with regard to the declarations by its Members.<sup>10</sup> The Parties also agreed on a number of other procedural matters reflected in the Minutes of the First Session (the “Minutes of the First Session”), including the procedural language. The Parties and the Committee thus agreed that:

Each party may file its submissions, including correspondence, and plead in French or English without the need for translation.

Documents filed in French or English shall not be accompanied by a translation. Documents originally written in a language other than French or English must be translated into French or English.

The verbatim transcripts of the hearings shall be in French and English.

The procedural orders and the decision shall be given in French and English. As in the arbitration proceeding, the authentic language shall be French. It is specified that the Committee may refer in its decision to positions expressed by the Parties in French or English or to legal instruments in English without the need for translation into the other language.

The Centre shall correspond in French or English without translation.

The Parties agree that the minutes of this session shall be drawn up in French and English.<sup>11</sup>

10. The French and English versions of the Minutes of the First Session signed by the President of the Committee and the Secretary were circulated to the Parties on January 9, 2012.
11. On March 5, 2012, Applicant submitted its Memorial (the “Memorial”) requesting the annulment of the Award.
12. On June 4, 2012, Respondent submitted its Counter-Memorial (the “Counter-Memorial”), dated June 5, 2012.

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<sup>9</sup> See Minutes of the First Session of the Annulment Proceeding, held on December 5, 2011, para. 5 (“Minutes of the First Session”).

<sup>10</sup> See Minutes of the First Session, para. 1.

<sup>11</sup> Minutes of the First Session, para. 7.

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13. On August 1, 2012, Applicant submitted its Reply (the “Reply”).
14. On October 3, 2012, the Centre informed the Parties that Mr. Paul-Jean Le Cannu would henceforth replace Ms. Aurélia Antonietti as Secretary of the Committee.
15. On the same day, Respondent submitted its Rejoinder (the “Rejoinder”), dated October 5, 2012.
16. On November 6, 2012, the President of the Committee held a pre-hearing telephone conference with the Parties and the Secretary. The Parties agreed during the conference that PowerPoint presentations should be exchanged one week prior to the hearing if the Committee wished for such presentations to be made available. The President indicated that the Committee would revert to the Parties very soon to let them know whether it did wish for PowerPoint presentations to be made available.<sup>12</sup> On November 7, 2012, the Secretary circulated a Report on the Telephone Conference on the Organization of the Hearing of November 6, 2012 (the “Report”) to the Parties.
17. By email from the Centre of November 12, 2012, the Committee informed the Parties that they could use PowerPoint presentations if they so wished. While the Committee did not consider it essential that PowerPoint presentations be submitted, it requested that the Parties exchange their presentations within the time limit agreed at the pre-hearing telephone conference, if the Parties did contemplate using such presentations.
18. By email of November 27, 2012, Applicant submitted an electronic copy of its PowerPoint presentation (“Malicorp’s PowerPoint Presentation”), in accordance with paragraph 4 of the Report.
19. On December 6 and 7, 2012, a hearing was held at the World Bank’s offices in Paris, France.
20. On March 19, 2013, the Committee closed the proceeding.
21. The *ad hoc* Committee considers necessary to review briefly the history of the proceedings before the Tribunal and the related contractual arbitration. Malicorp filed a

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<sup>12</sup> See Report on the Telephone Conference on the Organization of the Hearing of November 6, 2012, para. 4.



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request for arbitration with the Cairo Regional Centre for International Commercial Arbitration (“CRCICA”) on April 20, 2004.<sup>13</sup> The proceedings were between Malicorp as claimant and three respondents (the Arab Republic of Egypt, the Egyptian Holding Company for Aviation, and the Egyptian Airport Company).<sup>14</sup> The CRCICA Tribunal was formed in May 2004<sup>15</sup> and issued its award on March 7, 2006.<sup>16</sup> It held that: (i) the arbitration agreement in the Contract was binding on the Republic; (ii) the Republic had been the victim of a fundamental error in signing the Contract in that it believed that Malicorp had a capital of £100 million; therefore (iii) the Contract was void; and (iv) respondents were ordered to reimburse Malicorp for certain costs in the amount of \$14.8 million.<sup>17</sup> The Tribunal found that the CRCICA Award was dispositive as far as Applicant’s contract claims were concerned, while it retained jurisdiction over the BIT (*i.e.* international) claims.<sup>18</sup>

**II. Overview of the Positions of the Parties**

22. Applicant requests that the Award be annulled under Article 52 of the ICSID Convention on the grounds that: (i) there has been a serious departure from a fundamental rule of procedure; (ii) the award failed to state the reasons on which it is based; and (iii) the Tribunal manifestly exceeded its powers.<sup>19</sup>
23. Applicant reviews the facts of the dispute, the previous proceedings, and the arguments submitted to the Tribunal by the Parties.<sup>20</sup> On that basis, Applicant argues that the Tribunal (i) violated the *principe du contradictoire* by allowing Respondent, over Applicant’s objections, to submit a hard copy of its PowerPoint slides to the Arbitral Tribunal during the April 20, 2011 hearing while denying Applicant the opportunity to file its *dossier de plaidoirie*;<sup>21</sup> (ii) contradicted itself on several occasions in the Award thereby failing to state reasons;<sup>22</sup> and (iii) manifestly exceeded its powers by failing to apply the

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<sup>13</sup> See Award, para. 44.

<sup>14</sup> See Award, para. 44.

<sup>15</sup> See Award, para. 45.

<sup>16</sup> See Award, para. 58.

<sup>17</sup> See Award, para. 58.

<sup>18</sup> See Award, para. 103.

<sup>19</sup> See Memorial, p. 2.

<sup>20</sup> See Memorial, Chapters I-II. See also Annul. Tr. F., Dec. 6, 4:22 – 14:29.

<sup>21</sup> See Memorial Chapter III. See also Annul. Tr. F., Dec. 6, 14:30 – 29:29.

<sup>22</sup> See Memorial, Chapter IV. See also Annul. Tr. F., Dec. 6, 29:39 – 38:7.

proper law and by unduly relying on a prior CRCICA Award on the same matter to reach its decision.<sup>23</sup>

24. After reviewing the structure and content of the Award,<sup>24</sup> Respondent contends that: (i) granting Applicant's claims would require the Committee to exceed the limits of its mandate by reviewing the facts of the case and the merits of the Award;<sup>25</sup> (ii) the use of modern methods such as PowerPoint Presentations in support of oral arguments does not *per se* constitute a departure from a fundamental rule of procedure, let alone a serious one;<sup>26</sup> (iii) the Tribunal neither failed to state reasons nor exceeded its powers because it rightfully considered that the contract issues addressed before the CRCICA Tribunal were *res judicata* and thus were not to be adjudicated *de novo*;<sup>27</sup> and (iv) the Tribunal's mandate was limited to ruling on Applicant's expropriation claim under the BIT.<sup>28</sup>
25. The Committee will first consider the legal framework applicable in this case before turning to a more detailed review of the Parties' arguments.

### **III. The Applicable Legal Framework: Article 52 of the ICSID Convention**

26. Article 52 of the ICSID Convention provides for the annulment of an award on the five specific grounds listed in its first paragraph. In the instant case, and as already noted, Applicant invokes three of the five grounds: serious departure from a fundamental procedural rule, failure to state reasons, and manifest excess of powers. The Committee will now consider the legal framework applicable to each of the grounds in the order in which Applicant raised them.

#### **A. Serious Departure from a Fundamental Rule of Procedure**

27. Adherence to proper procedures is of utmost importance because it ensures the "preservation of the integrity and legitimacy of the arbitration process."<sup>29</sup> Accordingly, the

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<sup>23</sup> See Memorial, Chapter V. See also Annul. Tr. F., Dec. 6, 38:9 – 46:32.

<sup>24</sup> See Counter-Memorial, paras. 8-40.

<sup>25</sup> See Counter-Memorial, paras. 1-7, 97. See also Rejoinder, para. 2.

<sup>26</sup> See Counter-Memorial, paras. 41-71. See also Annul. Tr. E., Dec. 6, 29:19 – 31:15; Annul. Tr. F., Dec. 6, 47:13 – 48:28.

<sup>27</sup> See Counter-Memorial, paras. 16-30. See also Annul. Tr. E., Dec. 6, 31:16 – 33:3, 34:1 – 42:2.

<sup>28</sup> See Counter-Memorial, paras. 77-79. See also Annul. Tr. E., Dec. 6, 24:11 – 25:6.

<sup>29</sup> Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY 979 (2009) (2d Ed.).

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ICSID Convention provides for annulment of an award where “there has been a serious departure from a fundamental rule of procedure.”<sup>30</sup>

28. For an award to be annulled on this ground, it must meet two tests: (i) there must be a violation of a “fundamental rule of procedure”; and (ii) the departure from that rule must be “serious.”<sup>31</sup> As is clear on the face of this provision, both criteria are mandatory.<sup>32</sup>
29. By referring to “fundamental rule[s] of procedure,” the drafters of the Convention intended to restrict annulment on this ground to violations of those principles that are essential to a fair hearing.<sup>33</sup> This is because, no matter how serious, a violation of a non-fundamental rule would not call into question the validity of an award and thus should not result in annulment.<sup>34</sup> Examples of such fundamental principles include the requirement that “both Parties must be heard and that there must be an adequate opportunity for rebuttal.”<sup>35</sup>
30. The *Wena ad hoc* Committee further interpreted the requirement that the procedural rule(s) in question be “fundamental” as referring “to a set of minimal standards of procedure to be respected as a matter of international law.”<sup>36</sup> Thus, the key question in annulment proceedings with respect to this ground is whether the procedure allegedly violated falls within the category of fundamental rules necessary to ensure a full and fair hearing.
31. Applicant submits that the Award should be annulled because the Tribunal violated the *principe du contradictoire*, which it defines as the concept that “chaque partie bénéficie des mêmes droits et des mêmes obligations.”<sup>37</sup> According to Malicorp, this includes the concept of “égalité des armes.”<sup>38</sup> In support of its claim, Applicant quotes the *Fraport ad*

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<sup>30</sup> ICSID Convention Art. 52(1)(d).

<sup>31</sup> ICSID Convention Art. 52(1)(d).

<sup>32</sup> See Schreuer, THE ICSID CONVENTION at 980.

<sup>33</sup> See Schreuer, THE ICSID CONVENTION at 980.

<sup>34</sup> See Schreuer, THE ICSID CONVENTION at 980.

<sup>35</sup> Schreuer, THE ICSID CONVENTION at 980 (*citing* HISTORY OF THE ICSID CONVENTION, Vol. II, p. 480).

<sup>36</sup> *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, para. 57 (“*Wena* Annulment Decision”).

<sup>37</sup> Memorial, p. 44.

<sup>38</sup> Memorial, p. 44.

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*hoc* Committee, which held that the “right to present one’s case” is a fundamental rule for the purposes of annulment proceedings under Article 52(1)(d).<sup>39</sup>

32. Respondent does not specifically disagree with the claim that the *principe du contradictoire* is a fundamental rule of procedure. Its argument, instead, is that the alleged violation of this rule, if any, was not sufficiently serious to merit annulment in this case.<sup>40</sup>
33. The second requirement for an award to be annulled due to a “departure from a fundamental rule of procedure” is that the violation be considered “serious.”<sup>41</sup> The *ad hoc* Committee in *MINE* stated:

In order to constitute a ground for annulment the departure from a “fundamental rule of procedure” must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.<sup>42</sup>

34. Relying on this definition, the *Wena ad hoc* Committee further concluded:

In order to be a “serious” departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.<sup>43</sup>

35. Both Parties highlight this requirement. Applicant does so by stating that “‘*l’inobservation grave*’ est nécessairement une violation consciente qui engendre des conséquences.”<sup>44</sup> Respondent relies on the *MINE* standard as set out by the *Continental Casualty ad hoc*

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<sup>39</sup> Memorial, p. 44, quoting *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, December 23, 2010, para. 202 (citations omitted) (“*Fraport* Annulment Decision”).

<sup>40</sup> See Counter-Memorial, para. 53.

<sup>41</sup> ICSID Convention Art. 52(1)(d).

<sup>42</sup> *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, December 22, 1989, para. 5.05 (“*MINE* Annulment Decision”).

<sup>43</sup> *Wena* Annulment Decision, para. 58.

<sup>44</sup> Memorial, p. 42 (emphasis in original).

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Committee that, to be serious, the departure must cause a substantially different result or must “deprive a party of the benefit or protection which the rule was intended to provide.”<sup>45</sup>

36. The Committee notes that the Parties agree on the substance of the *principe du contradictoire* and on the fact that it is a rule of procedure that ensures equality of the parties in an adversarial proceeding. The Committee further notes that this principle is closely related to the right to be heard. This right of parties to present their case has been recognized as part of that “set of minimal standards” considered fundamental for a fair hearing.<sup>46</sup> The Committee thus concludes that the *principe du contradictoire* is a fundamental rule of procedure.
37. The Committee also concludes that, to be serious, the departure from the procedural rule must have the consequences set out by the *ad hoc* Committees in *MINE*, *Wena*, and *Continental Casualty*. It is also the Committee’s view that the assessment of the seriousness criterion above should always be made on a case-by-case basis.

B. Failure to State Reasons

38. An award can also be annulled if it “has failed to state the reasons on which it is based.”<sup>47</sup> This ground for annulment is rooted in the understanding that “[a] statement of the reasons for a judicial decision is widely regarded to be a pre-requisite for an orderly administration of justice.”<sup>48</sup> This requirement is so fundamental that it cannot be waived:

A statement of reasons is a valuable element of the arbitration process. The Committee has noted that the Committee of Legal Experts, which was to advise the Executive Directors of the World Bank on the draft Convention, by a vote of 28 to 3 rejected a proposal which would allow the Parties to dispense with the requirement of a reasoned award (History of the Convention, Vol. II, p. 816). A waiver of the requirement in an arbitration agreement would therefore not bar a party from seeking an annulment for failure of an award to state reasons.<sup>49</sup>

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<sup>45</sup> Counter-Memorial, para. 43, quoting *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011, paras. 95-96 (“*Continental Casualty Annulment Decision*”).

<sup>46</sup> See Schreuer, THE ICSID CONVENTION at 987-91.

<sup>47</sup> ICSID Convention Art. 52(1)(e)

<sup>48</sup> Schreuer, THE ICSID CONVENTION at 996.

<sup>49</sup> *MINE* Annulment Decision, para. 5.10. See also Schreuer, THE ICSID CONVENTION at 996.

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39. The fundamental nature of this requirement does not mean, however, that it is an onerous one. In fact, “[t]he duty to state reasons refers only to a minimum requirement.”<sup>50</sup> As stated by the *ad hoc* Committee in *MINE*:

In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.<sup>51</sup>

40. Relying on this reasoning, the *Wena ad hoc* Committee added:

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

41. In this case, Applicant claims that the Tribunal failed to state reasons because it contradicted itself.<sup>53</sup> It is accepted that “contradictory reasons amount to a failure to state reasons” and thus can be grounds for annulment under Art. 52(1)(e).<sup>54</sup> For instance, the *ad hoc* Committee in *Klößner I* stated:

As for “contradiction of reasons,” it is in principle appropriate to bring this notion under the category “failure to state reasons” for the very simple reason that two *genuinely* contradictory reasons cancel each other out. Hence the failure to state reasons. The arbitrator’s obligation to state reasons which are not contradictory must therefore be accepted.<sup>55</sup>

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<sup>50</sup> Schreuer, THE ICSID CONVENTION at 997.

<sup>51</sup> *MINE* Annulment Decision, para. 5.09.

<sup>52</sup> *Wena* Annulment Decision, para. 79.

<sup>53</sup> See Memorial, Chapter IV.

<sup>54</sup> Schreuer, THE ICSID CONVENTION at 1011.

<sup>55</sup> *Klößner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment, May 3, 1985, para. 116 (“*Klößner* Annulment Decision”) (italics in original).

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42. Thus, although an award may be annulled based on contradictory reasoning, applicants face a high burden to prove that different parts of the tribunal's analysis are so contradictory as to cancel each other out entirely. The *Klöckner I ad hoc* Committee, for instance, went on to reject the annulment petition in so far as it was based on allegedly contradictory reasons because:

In reality, the two reasons are not contradictory, despite certain ambiguities in language. In neither case is the decision based on the existence or non-existence of the result, a deception, or on its possibility or impossibility. The complaint must therefore be rejected.<sup>56</sup>

43. *Ad hoc* committees have urged caution when considering annulment on this ground. The *Vivendi I ad hoc* Committee, for example, emphasized that the contradictions must be “genuine” and recommended restraint for all committees considering annulment on this basis:

[A]nnulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.<sup>57</sup>

44. Likewise, the *CDC ad hoc* Committee urged that:

In construing awards, as in construing statutes and legal instruments generally, one necessarily should construe the language in issue, whenever possible, in a way that results in consistency . . .<sup>58</sup>

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<sup>56</sup> *Klöckner* Annulment Decision, para. 123.

<sup>57</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (Formerly Compagnie générale des eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002, para. 65 (“*Vivendi I* Annulment Decision”).

<sup>58</sup> *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005, para. 81 (“*CDC* Annulment Decision”).

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45. Thus, when dealing with an annulment request based on an alleged failure to state reasons, an *ad hoc* committee must look beyond what may, at a first glance, appear to be a contradiction and seek to follow the logic and the reasoning of the award. In other words, an award must be upheld unless the logic is so contradictory as to be “as useful as no reasons at all.”<sup>59</sup>
46. Respondent does not dispute the fact that contradictory reasoning may lead to annulment, but strongly disagrees with Applicant’s contention that the Tribunal “erred by formulating three ‘contradictory motifs.’”<sup>60</sup>

C. Manifest excess of powers

47. Applicant’s third and last basis for seeking annulment is that the Tribunal allegedly exceeded its powers. Under the ICSID Convention, an arbitral award may be annulled if “the Tribunal has manifestly exceeded its powers.”<sup>61</sup> The most significant excess of powers, and the one at issue in this case, occurs when the Tribunal exceeds the limits of its jurisdiction.<sup>62</sup> This may be the case where a tribunal “exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.”<sup>63</sup> This is because “[i]t is not within the tribunal’s powers to refuse to decide a dispute or part of a dispute that meets all jurisdictional requirements of Art. 25.”<sup>64</sup>
48. Moreover, “[t]here is widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal.”<sup>65</sup> In their interpretation of this ground for annulment, *ad hoc* committees concur in that “a Tribunal’s complete failure to apply the proper law or acting *ex aequo et bono* without agreement of the Parties to do so as

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<sup>59</sup> Schreuer, THE ICSID CONVENTION at 1011.

<sup>60</sup> Counter-Memorial, paras. 75-76.

<sup>61</sup> ICSID Convention Art. 52(1)(b).

<sup>62</sup> See Schreuer, THE ICSID CONVENTION at 938.

<sup>63</sup> *Vivendi I* Annulment Decision, para. 86.

<sup>64</sup> Schreuer, THE ICSID CONVENTION at 947.

<sup>65</sup> Schreuer, THE ICSID CONVENTION at 955.



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required by the ICSID Convention could constitute a manifest excess of powers.”<sup>66</sup> In the words of the *Soufraki ad hoc* committee:

[O]ne must also consider that a tribunal goes beyond the scope of its power if it does not respect the law applicable to the substance of the arbitration under the ICSID Convention. It is widely recognized in ICSID jurisprudence that failure to apply the applicable law constitutes an excess of power. The relevant provisions of the applicable law are constitutive elements of the Parties’ agreement to arbitrate and constitute part of the definition of the tribunal’s mandate.<sup>67</sup>

49. Incorrect interpretation of the law, however, does not normally rise to the level of an excess of powers.<sup>68</sup> As the *Soufraki ad hoc* Committee noted, “ICSID *ad hoc* committees have commonly been quite clear . . . that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment.”<sup>69</sup> Allowing annulment committees to overturn incorrect applications of the law was specifically rejected by the drafters of the ICSID Convention because some delegates feared that this would call into question the finality of awards.<sup>70</sup> Incorrect application of the law is thus not a basis for annulment except in the most egregious cases where such misapplication “is of such a nature or degree as to constitute objectively (regardless of the Tribunal’s actual or presumed intentions) its effective non-application.”<sup>71</sup>
50. The ICSID Convention requires that an excess of power be “manifest” in order to qualify for annulment. Annulment committees have differed somewhat in interpreting the meaning of this term.
51. Some, such as the *Repsol ad hoc* Committee, have found that “exceeding one’s powers is ‘manifest’ when it is ‘obvious by itself’ simply by reading the Award, that is, even prior to a

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<sup>66</sup> Background Paper on Annulment for the Administrative Council of ICSID, para. 94. See *also* Schreuer, THE ICSID CONVENTION at 938.

<sup>67</sup> *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007, para. 45 (“*Soufraki* Annulment Decision”).

<sup>68</sup> See Schreuer, THE ICSID CONVENTION at 956, 959-964.

<sup>69</sup> *Soufraki* Annulment Decision, para. 85.

<sup>70</sup> See Antonio Parra, THE HISTORY OF ICSID 87 (2012).

<sup>71</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Resubmitted Case: Decision on Annulment, December 3, 1992, para. 7.19.

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detailed examination of its contents.”<sup>72</sup> The *Wena ad hoc* Committee likewise understood “manifest” to imply that the excess should be obvious or evident:

The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.<sup>73</sup>

Following suit, the *CDC ad hoc* Committee held that:

[I]f a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument “one way or the other,” is not manifest.<sup>74</sup>

52. Others, such as *Vivendi I*, have concluded that a tribunal has manifestly exceeded its powers if the excess of powers has clear and serious consequences:

[T]he Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest.<sup>75</sup>

53. The *Soufraki ad hoc* committee found that both approaches had merit and should apply:

[A] strict opposition between two different meanings of “manifest” – either “obvious” or “serious” – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.<sup>76</sup>

54. Applicant agrees with the standard as set out above. It cites the *Sempre ad hoc* Committee (“[an excess of power] must be quite evident without the need to engage in an

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<sup>72</sup> *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, January 8, 2007, para. 36 (emphasis in original).

<sup>73</sup> *Wena* Annulment Decision, para. 25.

<sup>74</sup> *CDC* Annulment Decision, para. 41.

<sup>75</sup> *Vivendi I* Annulment Decision, para. 115.

<sup>76</sup> *Soufraki* Annulment Decision, para. 40.

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elaborate analysis of the text of the Award”), and concludes that “pour être manifeste, l’excès de pouvoirs [sic] ne doit pas être discutable.”<sup>77</sup>

55. Respondent likewise agrees with the legal standard, but accuses Applicant of seeking appellate review of the Tribunal’s decision in violation of the limited scope of annulment proceedings.<sup>78</sup> In support of this proposition, Egypt cites the *ad hoc* Committee in *Compagnie d’Exploitation du Chemin de Fer Transgabonais*:

Le Comité tient ... à insister fermement [sic] sur le fait que l’annulation n’est certainement pas un moyen selon lequel une partie à une procédure d’arbitrage peut chercher à renverser des éléments de fond de la sentence arbitrale qui lui déplaisent.<sup>79</sup>

56. The Committee concurs with the *Soufraki* Annulment Decision and understands “manifest” to mean both obvious and serious. The Committee does not believe that these two terms are inconsistent to the extent that what has serious and substantial implications is also clear and obvious.
57. Having set out the legal framework applicable in this case, the Committee next turns to Applicant’s specific claims.

**IV. Serious Departure From a Fundamental Rule of Procedure**

58. The Parties’ respective positions on the alleged serious departure from a fundamental rule of procedure are summarized below.

A. Applicant’s Position

59. Applicant argues that the Tribunal violated the *principe du contradictoire*, thus seriously departing from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention and Arbitration Rule 50(1)(iii).<sup>80</sup>

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<sup>77</sup> Memorial, p.107, quoting *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Annulment, June 29, 2010, para. 123.

<sup>78</sup> See Counter-Memorial, paras. 4-5.

<sup>79</sup> Counter-Memorial, para. 5 quoting *Compagnie d’Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic* (ICSID Case No. ARB/04/5), Decision on Annulment, May 11, 2010, para. 19.

<sup>80</sup> See Memorial, p. 2.

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60. According to Applicant, a “serious departure” is a deliberate violation that entails consequences.<sup>81</sup> A “fundamental rule of procedure,” meanwhile, is one that goes to the essence of the procedure.<sup>82</sup> Without such a rule, equal right of access to a judge or an arbitrator would not be guaranteed.<sup>83</sup> Applicant further argues that the *principe du contradictoire* is universally seen as a fundamental rule of procedure<sup>84</sup> and applies to ICSID proceedings.<sup>85</sup> Relying on the *ad hoc* committee’s decision in the *Fraport* case, Applicant further argues that:

Le principe du contradictoire ne se résume pas à la prise en compte par les membres du Tribunal arbitral de l’argumentation de chacune des parties.

Le principe du contradictoire va bien au-delà, puisqu’il suppose que chaque partie bénéficie des mêmes droits et des mêmes obligations et ce, dans le moindre détail, afin qu’aucune des parties ne puisse prendre un avantage sur l’autre.<sup>86</sup>

61. Applicant contends that by admitting into evidence the PowerPoint slides used by Respondent at the April 2011 hearing and yet refusing to admit Applicant’s *dossier de plaidoirie*, the Tribunal violated the *principe du contradictoire*, which includes the principle of equality of arms.<sup>87</sup>
62. Applicant’s concerns regarding the admission of the PowerPoint slides are twofold. First, Malicorp argues that the slides and the *dossier* are equivalent advocacy documents, so that the Tribunal should have accepted both or neither.<sup>88</sup> According to Applicant, admitting the PowerPoint slides but not the *dossier* was a serious departure from a fundamental rule of procedure because it gave Respondent an additional opportunity to present its arguments. Applicant claims that this is a clear violation of the right to equality of arms.<sup>89</sup>

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<sup>81</sup> See Memorial, p. 42.

<sup>82</sup> See Memorial, p. 42.

<sup>83</sup> See Memorial, pp. 41-42.

<sup>84</sup> See Application, p. 4. See also Memorial, p. 43.

<sup>85</sup> See Application, p. 4. See also Memorial, p. 43. Applicant refers to ICSID Arbitration Rules 29-38 which in its view are designed to uphold the *principe du contradictoire*.

<sup>86</sup> Application, p. 5 (*citing Fraport Annulment Decision*, para. 202). See also Memorial, p. 44; Annul. Tr. F., Dec. 6, 16:1 – 16:5.

<sup>87</sup> See Memorial, p. 44. See also Annul. Tr. F., Dec. 6, 18:15 – 18:31.

<sup>88</sup> See Application, pp. 9-10. See also Memorial, pp. 49 and 71.

<sup>89</sup> See Memorial, pp. 49-50.

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63. Second, Applicant also objects to the admission of the slides because it believes that they were intended to mislead the Tribunal with regard to a key document, and that the arbitrators were in fact confused by them.<sup>90</sup> At issue specifically is slide 42, entitled “The Articles of Association of Malicorp.”<sup>91</sup> This slide shows two excerpts of scanned documents: (i) the signature block of a Mrs. M. JEYA, Registrar of Companies, showing that the document was executed at Companies House in Cardiff on September 15, 1999; and (ii) a single sentence, “5) The Company’s share capital is £100 million divided into one million shares of £100 each.”<sup>92</sup> The slide cites the source of the images as pages 91 and 94 of Respondent’s second exhibit.
64. According to Applicant, this slide presents purposefully truncated quotations meant to deceive the Tribunal and lead it to conclude that the two excerpts originate from the same document.<sup>93</sup> The error, in Applicant’s view, was the Tribunal’s mistaken conclusion that Malicorp’s Articles of Association, as attested by the Registrar, Mrs. M. Jeya, stated that the company’s share capital was £100 million.<sup>94</sup> In reality, there were two separate documents.<sup>95</sup> The paragraph with the signature of the Registrar was extracted from the “Certificate of Registration,” which does not make any reference to Malicorp’s capital; the reference to the company’s share capital came from a different, unsigned document that does not specifically refer to Malicorp.<sup>96</sup> Applicant refers to the combination of these extracts from two different documents on a single slide as “*montages photocopiques*.”<sup>97</sup>
65. Malicorp focuses on slide 42 because of the critical importance of this document for the Tribunal’s decision in this case. At issue is what happened between the Parties on January 3, 2000.<sup>98</sup> Both sides agree that a meeting took place between them on that day.<sup>99</sup> Applicant contends that it did not provide any document setting out its share capital

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<sup>90</sup> See Application, pp. 39-40. See also Memorial, pp. 83-84.

<sup>91</sup> Closing Submission of Respondent (PowerPoint presentation), Exh. DA-23, slide 42.

<sup>92</sup> Closing Submission of Respondent (PowerPoint presentation), Exh. DA-23, slide 42.

<sup>93</sup> See Memorial, pp. 73-74. See also Annul. Tr. F., Dec. 6, 24:8 – 24:15; Annul. Tr. F., Dec. 7, 9:48 – 10:41.

<sup>94</sup> See Memorial, pp. 73-74.

<sup>95</sup> See Memorial, pp. 73-74. See also Malicorp’s PowerPoint Presentation, slides 25-29, 46, 132-133.

<sup>96</sup> See Memorial, pp. 73-74.

<sup>97</sup> See Memorial, p. 72. See also Annul. Tr. F., Dec. 6, 24:8 – 24:15. See also Malicorp’s PowerPoint Presentation, slide 46.

<sup>98</sup> See Memorial, p. 6.

<sup>99</sup> See Memorial, p. 6. See also Counter-Memorial, para. 33 (citing Award, paras. 134-136).

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on that day and that any such document produced by Egypt was a forgery.<sup>100</sup> Applicant focuses on these alleged deceptions because it argues that the Tribunal ultimately found against Malicorp by relying on a forged document that was presented as genuine through those “*montages*.”<sup>101</sup>

66. Applicant insists that it repeatedly drew the Tribunal’s attention to Respondent’s procedural maneuvers during the arbitral proceeding and that it objected on numerous occasions to the admission of the PowerPoint slides.<sup>102</sup> In addition, Applicant points to its numerous letters to the Tribunal in which it highlighted the various “*montages photocopiques*” contained in Respondent’s PowerPoint presentation.<sup>103</sup> However, according to Applicant, the Tribunal neither addressed nor took into account these objections in the Award.<sup>104</sup>
67. Applicant claims that the admission of Respondent’s PowerPoint slides gave it an undue advantage by granting it an additional opportunity to convince the Tribunal, thus violating the principle of equality of arms.<sup>105</sup> Malicorp argues that this placed it at a procedural disadvantage, thus deeply undermining its trust in the Tribunal.<sup>106</sup>
68. Applicant further argues that if the Committee finds that the *principe du contradictoire* was violated, it need not consider whether the Tribunals’ outcome would have been different had the slides not been admitted.<sup>107</sup> This is because, according to Malicorp, “[I]’*inobservation grave*’ est nécessairement une violation consciente qui engendre des conséquences. Il ne peut y avoir d’*inobservation grave* sans conséquence concrète.”<sup>108</sup> In support of this proposition, Applicant refers to the case law of the European Court of Human Rights, according to which, where there was a violation of the principle of equality of arms or the *principe du contradictoire*, the Court held the State liable, regardless of the

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<sup>100</sup> See Memorial, p. 89. See also Annul. Tr. F., Dec. 6, 21:9 – 22:26.

<sup>101</sup> See Reply, pp.16-18

<sup>102</sup> See Memorial, Chapter III-3.2. See also Reply, pp. 13-14.

<sup>103</sup> See Application, pp. 30-37. See also Memorial, pp. 51-52, 71-80. See also Annul. Tr. F., Dec. 6, 27:7 – 27:12. Applicant argues that its letter of May 25, 2010, was held to be admissible by the Tribunal while those of May 26, June 14 and July 2, 2010, were not (Application, p. 38; Memorial, p. 81.).

<sup>104</sup> See Application, p. 37. See also Memorial, pp. 80-81.

<sup>105</sup> See Application, pp.9-10. See also Memorial, pp. 49-50.

<sup>106</sup> See Memorial, p. 45.

<sup>107</sup> See Memorial, p. 42. See also Annul. Tr. F., Dec. 6, 29:5 – 29:11.

<sup>108</sup> Memorial, p. 42.

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consequences of this violation.<sup>109</sup> Citing the *Rumeli* annulment decision, Applicant also argues that the Committee clearly has no discretion to decline to annul the Award because the *principe du contradictoire* is absolute and its violation in this case is flagrant.<sup>110</sup>

69. Applicant claims further prejudice resulting from having been forced to respond to Respondent's request for the admission of the slides at the hearing without preparation.<sup>111</sup> Applicant asserts that it was unprepared to defend itself against Respondent's sudden request and thus was not given the chance to properly plead its case, which once again violated the *principe du contradictoire*.<sup>112</sup>
70. Applicant finally contends that Respondent's suggestion that it should have requested a revision of the Award is surprising since the relevant facts, namely the "montages" meant to deceive the Tribunal, were discovered during the arbitral proceeding, so that they were not new evidence that might have led to a different result on revision.<sup>113</sup>

### B. Respondent's Position

71. Respondent submits that Applicant aims its attack at "the ways and means used by the Parties in pleading their case," and not at the Tribunal's Award.<sup>114</sup> Respondent further contends that such an approach is inconsistent with the limited and extraordinary nature of annulment, which is designed to "assure compliance with fundamental requirements of due process without interfering in the merits of the Arbitral Tribunal's ruling as stated in its Award."<sup>115</sup>
72. Relying on the decision rendered in *Continental Casualty Co. v. Argentina*, Respondent defines the concept of serious departure from a fundamental rule of procedure and emphasizes, *inter alia*, that in order to be "serious," a departure from a rule of procedure

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<sup>109</sup> See Reply pp.11-12. See also *Nideröst-Huber v. Switzerland*, 104/1995/610/698, Council of Europe: European Court of Human Rights, February 18, 1997. See also Annul. Tr. F., Dec. 6, 29:18 – 29:27.

<sup>110</sup> Memorial, Chapter, III-5.3, citing *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Decision of the *ad hoc* Committee on the Application for Annulment of March 25, 2010, para. 75. See also Annul. Tr. F., Dec. 6, 29:14 – 29:20.

<sup>111</sup> See Application, pp. 38-39. See also Memorial, pp. 81-82.

<sup>112</sup> See Application, pp. 38-39. See also Memorial, pp. 81-82.

<sup>113</sup> See Reply, p. 14.

<sup>114</sup> Counter-Memorial, para. 42.

<sup>115</sup> Counter-Memorial, para. 44.

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“must have caused the Tribunal to reach a result substantially different from what it would have awarded has [sic] such a rule been observed,” or must have been “such as to deprive a party of the benefit or protection which the rule was intended to provide.”<sup>116</sup>

73. Respondent also distinguishes this case from the award in *Fraport*, which was annulled because of the “Tribunal’s failure to permit the parties to make a fresh submission to it in the light of the new material introduced during the period after the closing of the proceeding [...]”<sup>117</sup> Respondent affirms that the present case can be distinguished because it merely relates to “an incident that took place throughout the oral hearing due to the difference in the methods of pleading [...],” that is pleading with or without electronic visual aids such as PowerPoint presentations.<sup>118</sup> Respondent emphasizes that when ICSID inquired whether counsel would make PowerPoint presentations at the hearing, counsel for Malicorp responded that he would not while counsel for Egypt indicated that he would.<sup>119</sup> This put Applicant on notice that opposing counsel planned to use visual aids in the form of a PowerPoint presentation at the hearing.<sup>120</sup>
74. In addition, Respondent clarifies that it did not file any new documents after the hearing.<sup>121</sup> Rather, it submitted printed copies of a presentation that had already been made before the Tribunal during the hearing and which contained only previously admitted documents.<sup>122</sup> Respondent argues that allowing one party to use PowerPoint slides while the other does not is not *per se* a departure from the rule of equal treatment of the Parties and right to be heard as long as the other party was given the chance to comment and raise objections.<sup>123</sup> Moreover, Applicant was given an equal opportunity to present its own PowerPoint presentation or to use other visual aids, but decided against it.<sup>124</sup>

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<sup>116</sup> Counter-Memorial, para. 43 (*citing Continental Casualty Annulment Decision*, para. 96) (emphasis in original). See also Rejoinder, para. 21.

<sup>117</sup> Counter-Memorial, para. 60.

<sup>118</sup> Counter-Memorial, para. 50.

<sup>119</sup> See Counter-Memorial, para. 52.

<sup>120</sup> See Counter-Memorial, para. 52.

<sup>121</sup> See Counter-Memorial, paras. 51 and 61.

<sup>122</sup> See Counter-Memorial, para. 61. See also Annul. Tr. F., Dec. 6, 47:28 – 48:13.

<sup>123</sup> See Rejoinder, para. 19.

<sup>124</sup> See Counter-Memorial, para. 52. See also Annul. Tr. F., Dec. 6, 47:19 – 47:27.



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75. Respondent also rejects Applicant's allegations that it submitted truncated or falsified documents during the proceedings in order to mislead the Tribunal.<sup>125</sup> According to Respondent, had Applicant's accusations had the slightest degree of veracity, it should have filed a request for revision upon obtaining proof of fraud or falsification.<sup>126</sup> Respondent claims that there is no proof to this day that the document presented at the January 3, 2000 meeting has been forged.<sup>127</sup>
76. Respondent further insists that Malicorp ignores the Tribunal's statement at paragraph 86 of the Award that "[d]urant cette procédure les Parties ont eu amplement l'occasion d'exposer leurs moyens par écrit et oralement. Á l'audience des 19 et 20 avril 2012, elles ont confirmé qu'elles n'avaient aucune objection à formuler à l'encontre de la procédure qui avait été suivie (cf. Transcript F 19/20.04.2010, p. 82 1.6 ss. et 29 ss)."<sup>128</sup> Respondent also points out that Applicant made no formal request for a new round of pleadings before the Award was rendered.<sup>129</sup> According to Respondent, "a simple 'protest', either oral or written, even if repeated hundred times, does not amount from Egypt's point of view to a formal request that generates the need to issue a given formal decision by the ICSID Arbitral Tribunal."<sup>130</sup>
77. On the basis of ICSID Arbitration Rule 27, Respondent argues that Applicant waived its claim of alleged violation of the *principe du contradictoire*:

[A] party that has failed to protest against a perceived procedural irregularity before the tribunal is precluded from claiming that this irregularity constituted a serious departure from a fundamental rule of procedure for purpose of annulment.<sup>131</sup>

78. Respondent submits that, in any event, Applicant has not proven that the Tribunal would have reached a substantially different result were it not for the alleged violation.<sup>132</sup> According to Respondent, the Tribunal carefully separated the "contract claims," already decided by the CRCICA Award of March 7, 2006, and the "treaty claims," *i.e.* those to be

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<sup>125</sup> See Counter-Memorial, para. 55.

<sup>126</sup> See Counter-Memorial, para. 55.

<sup>127</sup> See Rejoinder, para. 16.

<sup>128</sup> Counter-Memorial, para. 58

<sup>129</sup> See Counter-Memorial, paras. 52 and 61.

<sup>130</sup> Rejoinder, para. 11.

<sup>131</sup> Counter-Memorial, para. 62 (*citing* Schreuer, THE ICSID CONVENTION at 995). See *also* Rejoinder, para. 24.

<sup>132</sup> See Counter-Memorial, paras. 62-63.

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decided under the BIT, such as expropriation.<sup>133</sup> According to Egypt, in part because the Tribunal's mandate was rather narrow given that the contract claims had already been decided, there is no indication that the Tribunal would have reached a substantially different result had the PowerPoint slides not been admitted into the record.<sup>134</sup> In the view of Respondent, the admission of Malicorp's *dossier de plaidoirie* would likewise not have substantially changed the Tribunal's conclusions because arguably it would not have added new material to the record.<sup>135</sup>

79. Respondent concludes that Malicorp's decision not to use a PowerPoint presentation "was its own choice, and consequently it has to bear the consequences thereof without trying to use its negative attitude to imply that the Tribunal departed from the equality of treatment between the two Parties."<sup>136</sup> Respondent therefore submits that Applicant's petition for annulment of the Award for a serious departure from a fundamental rule of procedure must be rejected.<sup>137</sup>

C. The Committee's Analysis

80. The Committee will first turn to the question whether the Tribunal departed from a fundamental rule of procedure. Only if it so finds will the Committee consider whether such departure was serious.
81. Applicant contends that the Tribunal breached the fundamental principle of equality of arms (*principe du contradictoire*) by admitting into the record the set of slides presented at the hearing by Respondent while denying Applicant's request to also admit its *dossier de plaidoirie*.<sup>138</sup>
82. Egypt responds that there was no due process violation because its PowerPoint slides did not introduce new evidence into the record and thus there was not "rupture de l'égalité des armes."<sup>139</sup>

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<sup>133</sup> See Counter-Memorial, para. 64.

<sup>134</sup> See Counter-Memorial, paras. 13 and 67. See also Rejoinder, para. 13.

<sup>135</sup> See Rejoinder, para. 25.

<sup>136</sup> Counter-Memorial, para. 69.

<sup>137</sup> See Counter-Memorial, para. 71.

<sup>138</sup> See Memorial, p. 44.

<sup>139</sup> See Counter-Memorial, paras. 51 and 61.

83. In deciding whether the Tribunal violated the *principe du contradictoire*, it is useful to review the exchanges between the Parties on this point to understand the context in which the Tribunal made its decisions.

1. Timeline of Relevant Events

84. On March 10, 2010, the Secretary of the Tribunal wrote to the Parties to enquire, *inter alia*, whether they would be using PowerPoint presentations during the hearing.<sup>140</sup> By letter of March 24, 2010, counsel for Respondent indicated that he would use a PowerPoint presentation during the hearing.<sup>141</sup> The next day, counsel for Malicorp indicated that he would not do so.<sup>142</sup> Respondent's counsel once again confirmed his intent to use a PowerPoint presentation at the hearing during a March 29, 2010, conference call between the Parties and the President of the Tribunal.<sup>143</sup>

85. Respondent used a PowerPoint presentation as planned during the hearing in Paris on April 19-20, 2010. Towards the end of the last day of the hearing, Counsel for Respondent, Mr. Webster, asked whether a copy of his presentation could be admitted. The following exchange took place:

- . 32 Me Webster.- Non, pas du tout. Je voulais juste proposer de donner le PowerPoint avec
- . 33 les diapositives à supprimer. Je le donne à tout le monde en même temps...
- . 34 Me Brémond.- Non, Monsieur le Président.
- . 35 J'ai posé la question et j'ai demandé à Me Webster d'être présent quand je vous posais
- . 36 la question hier. J'ai bien demandé si un dossier de plaidoirie était remis au Tribunal.
- . 37 Tout le monde m'a dit : non, pas de dossier de plaidoirie. Vous le remettez, bien
- . 38 entendu, si vous voulez, aux dames qui ont pris votre plaidoirie -comme nous l'avons
- . 39 fait pour ce qui nous concerne-, mais je ne vois pas que cela puisse être remis au
- . 40 Tribunal. Nous-mêmes n'avons donc pas prévu de le remettre parce que vous m'avez
- . 41 répondu négativement hier.
- . 1 Me Webster.- Je suis désolé, je ne suis pas d'accord. Vous avez demandé s'il y avait un
- . 2 dossier de plaidoirie. Si mes souvenirs sont bons, le Tribunal a répondu : il n'y a pas de
- . 3 dossier de plaidoirie, mais il y a un PowerPoint. Et nous avons fait un PowerPoint,
- . 4 c'est absolument habituel. Nous avons systématiquement suivi le PowerPoint et nous
- . 5 avons supprimé, parce que je n'avais pas le temps, tout ce qu'il y avait à supprimer. J'ai
- . 6 même pris sur mon temps le temps de lire ce qu'il y avait dans le PowerPoint. Mais je
- . 7 crois que c'était présenté de cette façon, cela a pris pas mal de travail, c'était organisé

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<sup>140</sup> See Letter from the Secretary of the Tribunal to the Parties, March 10, 2010, p. 10, Exh. DA-04.

<sup>141</sup> See Letter from Thomas H. Webster to Secretary of the Tribunal, March 24, 2010, para. 4, Exh. DA-06.

<sup>142</sup> See Letter from Christian Brémond to Secretary of the Tribunal, March 25, 2010, para. 4, Exh. DA-5.

<sup>143</sup> See Minutes of the phone conference between the President and the Parties, March 29, 2010, p. 2, Exh. DA-7.

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- . 8 comme cela.
- . 9 Me Brémond.- Monsieur le Président, peut-on revenir en arrière une seconde ? Lorsque
- . 10 nous avons eu la conférence téléphonique le 29 mars, vous vous êtes fait préciser par les
- . 11 avocats qu'il n'y aurait plus de documents produits, et Me Webster a dit : il y aura une
- . 12 présentation PowerPoint. Il y a eu une présentation PowerPoint. Il n'était pas prévu une
- . 13 remise du PowerPoint. J'ai, moi aussi, un dossier de plaidoirie que j'ai fait, qui est
- . 14 énorme, avec quantité de documents. J'ai pris la précaution de vous poser la question
- . 15 hier pour qu'il n'y ait pas de doute. Je pense qu'il n'y avait pas de doute hier qu'il n'y
- . 16 avait pas de documents remis au Tribunal arbitral.
- . 17 M. le Président.- Je crois que nous sommes en présence à la fin, mais c'est très bien,
- . 18 d'un problème d'interprétation qui est en partie lié à la position prise par le Tribunal
- . 19 arbitral.
- . 20 Il est exact que lors de la conférence téléphonique, il a été dit qu'il n'y aurait pas de
- . 21 nouveaux documents. Il est exact également qu'il a été précisé par Me Webster -j'ai
- . 22 posé la question aux deux et vous aviez dit non- qu'il utiliserait une présentation
- . 23 PowerPoint.
- . 24 Maintenant, la question est celle de savoir si un dossier de plaidoirie avec cotes à la
- . 25 française équivaut à une présentation PowerPoint ou non, si ce sont deux choses
- . 26 différentes.
- . 27 Pour ne pas ternir le bel esprit de cette audience, je vous propose de garder au Tribunal
- . 28 l'occasion de se décider à ce sujet. Il est vrai qu'en pratique, la présentation PowerPoint
- . 29 qui est faite est accompagnée en général de la remise simultanée du document, en tout
- . 30 cas dans la pratique qui a été la mienne.
- . 31 Je comprends les hésitations qui sont formulées du côté de la Demanderesse. Je me
- . 32 propose, tranquillement, avec mes deux coarbitres -je suis peut-être responsable en
- . 33 partie du malentendu-, que l'on vous réponde gentiment. On aura le temps pour le faire
- . 34 tranquillement.
- . 35 Me Brémond.- Merci, Monsieur le Président.
- . 36 Me Webster.- Merci, Monsieur le Président.<sup>144</sup>

86. On April 22, 2010, the Secretary of the Tribunal wrote to the Parties:

Le Tribunal, après délibération, me charge de vous indiquer que, selon la pratique usuelle en matière d'arbitrage, la présentation PowerPoint de Me Webster est admise au dossier. Cependant et afin de s'assurer que celle-ci ne comprend pas de nouveaux documents et ne dépasse pas la plaidoirie de Me Webster, la partie défenderesse est priée d'en adresser une copie à la partie demanderesse et une copie par avance au Président (par l'intermédiaire du Centre) qui s'assurera que les conditions en sont remplies. Une fois établi que ce document ne contient aucun nouvel élément, il sera distribué à tous les membres du Tribunal arbitral.<sup>145</sup>

87. On May 18, 2010, the President communicated to the Parties the following:

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<sup>144</sup> Arb. Tr., 83-84, Exh. DA-8.

<sup>145</sup> Letter from the Tribunal's Secretary to the Parties, April 22, 2010, Exh. DA-9.

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Ainsi que je m'y étais engagé, j'ai vérifié le contenu de la présentation Powerpoint en rapport avec les transcrits. La version proposée ne sort pas du cadre fixé, après qu'ont été supprimés, à la demande du Tribunal arbitral, les passages qui en excédaient le cadre.

En conséquence, rien ne s'oppose à ce que la présentation Powerpoint soit transmise à mes co-arbitres.<sup>146</sup>

88. On May 25, 2010, Counsel for Applicant, Me Yassin, addressed a letter to the Tribunal on the application of Egyptian law and on the issue of the truncated and allegedly misleading slide for the first time. According to Me Yassin, the letter was necessary because:

[L]a lecture des transcrits des audiences de 19 et 20 avril 2010 ainsi que celle des "Power Ponts" [sic] remis par la Défenderesse au Tribunal Arbitral nous amènent à vouloir confirmer certains concepts du droit égyptien, applicable sur le Contrat de Concession objet du litige; concepts qui avaient toutefois été exposés dans les plaidoiries de la Demanderesse.

Or d'un coté, les transcrits n'ont probablement pas donné une idée assez précise que complète [sic] de ces concepts juridiques admis en droit égyptien.

D'autre part, les "Power Points" remis nous semblent comporter une certaine manipulation des textes et des concepts de ce même droit égyptien, de telle sorte que nous pensons devoir éclaircir cette ambigüité pour éviter tout malentendu sur les règles que le Tribunal appliquera sur le présent arbitrage...<sup>147</sup>

89. The next day, Applicant filed another letter with the Tribunal, this time from Me Brémond, once again highlighting the issue of the misleading documents:

Ces prémisses étant rappelés, la société MALICORP souligne qu'elle a eu à se plaindre dans ses mémoires auprès du Tribunal de ce que des citations qui étaient effectuées par la RÉPUBLIQUE ARABE D'ÉGYPTE dans ses propres mémoires étaient tronquées, sans qu'un signe typographique mentionne le ou les passages supprimés.

Cette pratique inusuelle, contraire aux règles habituellement pratiquées, avait provoqué la méfiance des Avocats de la société MALICORP, raison pour laquelle je m'étais prémuni de tout dépôt de document entre les mains des Arbitres postérieurement aux

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<sup>146</sup> Letter from the President to the Parties, May 18, 2010, Exh. DA-10.

<sup>147</sup> Letter from Applicant to the Tribunal, May 25, 2010, p. 2, Exh. DA-15.

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mémoires, en posant des questions précises au Président du Tribunal Arbitral le 29 mars et en réitérant à l'issue de la première audience le 19 avril.

J'ai donc été particulièrement désagréablement surpris de constater qu'il avait été envisagé la remise des slides Power Point établis par Maître WEBSTER, alors que ces slides concrétisent des montages photocopiques, des citations extraites de leur contexte où certains passages sont supprimés, des photocopies opportunément mal faites de certains documents, etc.<sup>148</sup>

90. On June 1, 2010, Respondent's counsel objected to the letters of Messrs. Yassin and Brémond. In his letter, Respondent complained that the Tribunal had not provided for post-hearing submissions and thus that Applicant's letters were not proper.<sup>149</sup> Respondent went on to say that Applicant had been on notice that it would use a PowerPoint presentation since the March 29, 2010, telephone conference, that the presentation included only previously admitted documents, and that the slides had been deemed admitted by the President on April 22, 2010, thus closing the matter.<sup>150</sup> Finally, Respondent noted that Me Brémond had not objected to the contents of the slides prior to the Tribunal's decision to admit them.<sup>151</sup>
91. In his June 14, 2010, reply, Me Brémond wrote, *inter alia*, that he had not objected to the admission of any slides during the hearing because he did not know what Respondent would argue and did not have the time to respond adequately:

[...] je ne vois pas non plus au nom de quel principe mon Confrère veut nous empêcher de soulever telle réplique à ce que nous avons entendu [...] lors de sa propre réplique dans laquelle il [Me Webster] a ajouté des réponses que nous ne connaissions pas et qu'il nous a fallu analyser, ce que nous n'avons pu faire dans les quelques secondes entre le moment où il a terminé et le moment où le Président nous a demandé si nous avons quelque chose à ajouter.<sup>152</sup>

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<sup>148</sup> Letter from Applicant to the Tribunal, May 26, 2010, pp. 1-2, Exh. DA-13.

<sup>149</sup> See Letter from Respondent to Tribunal, June 1, 2010, para. 1, Exh. DA-16.

<sup>150</sup> See Letter from Respondent to Tribunal, June 1, 2010, paras. 3-5.

<sup>151</sup> See Letter from Respondent to Tribunal, June 1, 2010, para. 6.

<sup>152</sup> Letter from Claimant to Tribunal, June 14, 2010, p. 1, Exh. DA-17.

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92. On June 17, 2010, the Tribunal rejected Claimant's request to reconsider its decision to admit the PowerPoint slides.<sup>153</sup> It reminded the Parties that no post-hearing briefs were to be filed and held that it did not consider the slides to be a post-hearing submission.<sup>154</sup>
93. The Tribunal invited Respondent's counsel to reply to Me Yassin's letter of May 25, 2010, which Mr. Webster did on June 28, 2010.<sup>155</sup> In that letter, Respondent argued that Applicant's opposition to the admission of the slides was not genuine and was nothing more than "a last-minute attempt to invent a new argument."<sup>156</sup>
94. On July 2, 2010, Me Brémond objected to the Tribunal's June 17 decision to reject his request for further pleadings, once again arguing that he had not had the chance to properly object to the slides at the hearing because of time constraints.<sup>157</sup>
95. On July 6, 2010, the Tribunal acknowledged that it had received a new request from Applicant to revisit its prior decision to admit the slides. It asked Respondent to weigh in on whether further briefing should be ordered.<sup>158</sup> In its response, Egypt made its views quite clear: "Malicorp's problem is not with the procedure. Malicorp's problem is with the substance."<sup>159</sup>

2. Analysis

96. During the hearing of April 19-20, 2010, the President of the Tribunal stated that it was customary for printed copies of PowerPoint slides used at the hearing to be admitted into the record.<sup>160</sup> The Committee agrees. Printed copies of slides or visual aids used at the hearing are routinely submitted to tribunals for ease of reference, provided they contain only information that is already in the record. There is no reason to believe that such printed copies would unduly influence the Tribunal or have any persuasive impact beyond the effect of the initial presentation. This is especially true given that the President ensured that slides not shown to the Tribunal because of the time constraints of the

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<sup>153</sup> Cited in Letter from Claimant to Tribunal, July 2, 2010, p. 1, Exh. DA-19.

<sup>154</sup> See Letter from Claimant to Tribunal, July 2, 2010, Exh. DA-19.

<sup>155</sup> See Letter from Respondent to Tribunal, June 28, 2010, Exh. DA-18.

<sup>156</sup> Letter from Respondent to Tribunal, June 28, 2010, para. 48, Exh. DA-18.

<sup>157</sup> See Letter from Claimant to Tribunal, July 2, 2010, p. 3, Exh. DA-19.

<sup>158</sup> See Letter from President of the Tribunal to the Parties, July 6, 2010, p. 1, Exh. DA-21.

<sup>159</sup> Letter from Respondent to Tribunal, July 12, 2010, para. 28, Exh. DA-22.

<sup>160</sup> Arb. Tr., 84:28-30 ("Il est vrai qu'en pratique, la présentation PowerPoint qui est faite est accompagnée en général de la remise simultanée de ce document.").

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hearing were deleted prior to Counsel's submission of the hard copies of the PowerPoint.<sup>161</sup> The admission of the PowerPoint slides was simply meant to facilitate the Tribunal's work in preparing the Award.

97. Because the President properly ensured that the PowerPoint presentation only contained previously admitted evidence,<sup>162</sup> the Committee is satisfied that Respondent was not given an unfair advantage by the admission of the printed copies of the slides into the record after the hearing.
98. Applicant's claim that its *dossier de plaidoirie* should also have been admitted does not advance its argument for annulment. Unlike a PowerPoint presentation, a *dossier de plaidoirie* is not meant to be a visual aid. Its purpose is to assist counsel in making his or her presentation.
99. Moreover, while a PowerPoint presentation is a visual aid that only includes previously admitted documents, the Tribunal had no way of knowing what was in Me Brémond's *dossier*.<sup>163</sup> Indeed, Me Brémond himself referred to his *dossier* as voluminous.<sup>164</sup> The Committee thus finds that it was well within the Tribunal's discretion to admit Me Webster's PowerPoint slides, which it had already seen, while refusing to admit Me Brémond's *dossier de plaidoirie*. It is undisputed that both Parties had the opportunity to use visual aids during the hearing. Applicant chose not to do so; it cannot complain now that it was placed at a disadvantage because of the choice it made.
100. Applicant further claims that the presentation should not have been admitted because it contained truncated and misleading documents. As previously discussed in Section A above, Applicant objects specifically to slide 42, entitled "The Articles of Association of Malicorp." This is because the slide shows two excerpts of scanned documents: (i) the

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<sup>161</sup> Letter from the President of the Tribunal to the Parties, May 18, 2010, Exh. DA-10 ("La version proposée ne sort pas du cadre fixé, après qu'ont été supprimés, à la demande du Tribunal arbitral, les passages qui en excédaient le cadre.").

<sup>162</sup> See Letter from the Tribunal's Secretary to the Parties, April 22, 2010, Exh. DA-9. See also Letter from the President of the Tribunal to the Parties, May 18, 2010, Exh. DA-10.

<sup>163</sup> See Respondent's Letter to the Tribunal, July 12, 2010, para. 22, Exh. DA-22 ("More generally, the Respondent's Power Point contains no new documents. All documents were submitted with the Respondent's memorials. Therefore, as regards the documents, there can be no issue as to due process.").

<sup>164</sup> Arb. Tr., 84:13-14 ("J'ai, moi aussi, un dossier de plaidoirie que j'ai fait, qui est énorme, avec quantité de documents.").



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signature block of a Mrs. M. JEYA, Registrar of Companies, showing that the document was executed at Companies House in Cardiff on September 15, 1999; and (ii) a single sentence, “5) The Company’s share capital is £100 million divided into one million shares of £100 each.”<sup>165</sup> The slide cites as the source of the images pages 91 and 94 of Respondent’s Exhibit R2. Applicant argues that this presentation could have led the Tribunal to conclude that the two excerpts came from the same document, while in fact the signature was extracted from the “Certificate of Registration,” which does not make any reference to Malicorp’s capital, and the second sentence came from an unsigned document that does not specifically refer to Malicorp.<sup>166</sup> Applicant refers to the combination of these two documents on a single slide as a “*montage photocopique*.”<sup>167</sup>

101. The Committee agrees that one might be confused by placing the excerpts from two separate documents on a single slide. It is the Committee’s view, however, that the confusion arises out of the fact that what was designated as Exhibit R2 included many different documents. Respondent displayed on one slide excerpts from Exhibit R2 and properly indicated the source as Exhibit R2. Applicant is correct that Respondent did not indicate that the excerpts came from two different documents. However, the Tribunal and the Parties must have been well aware that Exhibit R2 contained multiple documents (and Claimant never raised any objection to such designation). Respondent also clearly indicated the page numbers where the relevant excerpts could be found in Exhibit R2. Whether the Tribunal or Claimant nonetheless mistakenly concluded that the two excerpts came from the same document is a matter of fact that is beyond the scope of an annulment review.

102. Applicant’s counsel also argues that the Tribunal should not have admitted Respondent’s PowerPoint presentation because Me Brémond could not react swiftly enough during the hearing to properly register his objections to the slide. The Committee appreciates the pressure on counsel and the time constraints of an oral hearing. However, counsel’s failure to react or object quickly does not result in a departure from a fundamental rule of procedure. Further, Applicant had known well in advance of the hearing that Respondent

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<sup>165</sup> Closing Submission of Respondent (PowerPoint presentation), slide 42, Exh. DA-23.

<sup>166</sup> See Memorial, pp. 73-74.

<sup>167</sup> See Memorial, pp. 73-74.

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would use a PowerPoint presentation. There is, however, no record of Applicant asking for an advance copy of the slides.

103. The Committee likewise finds no ground for annulment on the basis that the Tribunal did not properly address Applicant's grievances because there is no reference in the Award to the post-hearing correspondence of the Parties with respect to the slides. The correspondence itself makes it clear that the Tribunal carefully considered the positions of the Parties when making the decision to admit the slides. That the Tribunal did not discuss in the Award the correspondence with respect to the slides does not detract from this conclusion. Given the extensive correspondence between the Parties and the Tribunal after the hearing, the Committee is satisfied that the Tribunal took into account Applicant's arguments.
104. Further, Applicant's request that the Committee second guess the Tribunal's conclusion to admit the PowerPoint presentation but not the *dossier de plaidoirie* is well outside of the Committee's mandate in an annulment proceeding. The concern of the Committee is the integrity of the process and whether the Parties had equal opportunity to present their case. The Committee is satisfied that the integrity of the process was preserved in this case. The Committee concludes that the Tribunal heard Applicant's objections, gave each Party a chance to fully explain its position, and ensured that no new evidence was placed into the record by virtue of admitting the slides.
105. Therefore, the Committee holds that no departure from a fundamental rule of procedure occurred in this case. Having reached that conclusion, there is no need for the Committee to address Applicant's allegation that the departure from a fundamental rule of procedure is prejudicial *per se* and mandates annulment. Similarly, there is no need for the Committee to consider Respondent's argument that Applicant waived its right to object to the slides by failing to make "any formal request to exclude Maître Webster's Slides from the record of the oral hearing."<sup>168</sup>

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<sup>168</sup> Counter-Memorial, para. 54.

**V. Failure To State Reasons**

106. Applicant contends that the Tribunal engaged in contradictory reasoning, which amounts to a failure to state reasons.<sup>169</sup> Applicant points to three contradictions in the Tribunal's reasoning and argues that they amount to a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention and Arbitration Rule 50(1)(iii).<sup>170</sup> Respondent sees no contradiction in the Tribunal's reasoning.

A. First Alleged Contradiction

1. Applicant's Position

107. According to Applicant, the Tribunal made a contradictory finding with respect to certain financial information Egypt claims to have received from Malicorp's representatives.<sup>171</sup> As described above in the discussion of the PowerPoint presentation, one of the central issues in this case was whether, during the January 3, 2000 meeting, Egypt received a document setting out Malicorp's capital.<sup>172</sup> In Malicorp's submission, this document was crucial for the Tribunal's analysis.<sup>173</sup>

108. Applicant asserts that the minutes of the January 3, 2000 meeting were not signed and no annex was included.<sup>174</sup> It is therefore very difficult, if not impossible, to know exactly what happened during the meeting or which documents, if any, Respondent received.<sup>175</sup> The document Egypt claims to have received stated that Malicorp's "share capital is £100 million divided into one million shares of £100 each."<sup>176</sup> Applicant argues that there is no evidence that it was Malicorp that gave this document to Egypt, and that the document submitted by Egypt in the arbitration was forged.<sup>177</sup>

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<sup>169</sup> See Memorial, Chapter IV.

<sup>170</sup> See Application, pp. 45-54. See also Memorial, pp. 93-103.

<sup>171</sup> See Memorial, pp. 93-99. See also Annul. Tr. F., Dec. 6, 31:16 – 35:4.

<sup>172</sup> See Memorial, p. 94 (quoting Award, para. 135).

<sup>173</sup> See Memorial, p. 95.

<sup>174</sup> See Memorial, p. 96.

<sup>175</sup> See Memorial, p. 96.

<sup>176</sup> Award, para. 135. See also Closing Submission of Respondent (PowerPoint presentation), Slide 42, Exh. DA-23.

<sup>177</sup> See Memorial, p. 96.

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109. Applicant further argues that the Tribunal made contradictory findings relating to this document, on the one hand, deciding that it could not establish “l’authenticité du document incriminé,”<sup>178</sup> while, on the other hand, concluding that this document had sufficiently misled Respondent so as to justify Respondent’s rescission of the Contract.<sup>179</sup>
110. In Applicant’s opinion, the Tribunal had three options: it could have concluded that Malicorp never gave the document to Egypt, that the document was forged, or that it did not have enough information and should have taken affirmative steps to obtain more evidence on this issue.<sup>180</sup> According to Applicant, the Tribunal’s finding that the authenticity of the key document could not be established (because “[m]ême s’il existe de sérieux indices, ils ne sont pas suffisants pour aboutir à une claire conclusion d’une importance aussi capitale”<sup>181</sup>) cannot be reconciled with its ultimate decision that “le motif principal avancé par la Défenderesse dans sa lettre d’annulation du Contrat avait un fondement suffisant et autorisait la Défenderesse à se départir du Contrat.”<sup>182</sup> In Applicant’s view, this represents an obvious contradiction; either (1) the document is authentic and capable of supporting Respondent’s argument that it rescinded the Contract because it was misled, or (2) it is unknown whether the document is authentic, and thus Respondent cannot credibly rely on it.<sup>183</sup> Applicant thus argues that the Tribunal contradicted itself by finding both (1) and (2).

2. Respondent’s Position

111. Respondent argues that the *MINE*,<sup>184</sup> *Vivendi I*,<sup>185</sup> and *Continental Casualty*<sup>186</sup> annulment decisions support the position that failure to state reasons should only be a ground for annulment where a tribunal does not state any reason for reaching its decision, not where

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<sup>178</sup> Memorial, pp. 96-97 (*citing* Award, para. 136).

<sup>179</sup> See Memorial, pp. 97-98 (*citing* Award, para. 136).

<sup>180</sup> See Memorial, pp. 95-99.

<sup>181</sup> Memorial, pp. 94-95 (*citing* Award, para. 135).

<sup>182</sup> Memorial, pp. 94-95 (*citing* Award, para. 137).

<sup>183</sup> See Memorial, pp. 98-99.

<sup>184</sup> *MINE* Annulment Decision.

<sup>185</sup> *Vivendi I* Annulment Decision.

<sup>186</sup> *Continental Casualty* Annulment Decision.

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it simply does not state convincing reasons.<sup>187</sup> Respondent further relies on the holding of the *Continental Casualty ad hoc* Committee, which stated:

[F]or genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. . . .

In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument. Nor is it the role of an annulment committee to express its own view on whether or not the reasons given by the tribunal are logical or rational or correct.<sup>188</sup>

112. In Respondent's view, the Tribunal did not base any of its conclusions regarding the termination of the Contract on the contested document.<sup>189</sup> According to Respondent, the Tribunal's reasoning was concerned with the "inter-relationship between the CRCICA arbitration proceedings and the ICSID proceedings."<sup>190</sup> Respondent explains that:

What the ICSID Tribunal did in its Award of February 7th, 2011, was in final analysis taking into consideration the outcome of the CRCICA arbitral proceeding, and undertook its mission under the BIT to decide that no expropriation was undertaken by the Host State in the exercise of its sovereign power, but simply a termination of a contract which lead to compensation by the proper forum contractually agreed upon by the Parties themselves to adjudicate their contractual disputes, and which has to be recognized as such.<sup>191</sup>

113. Respondent considers the above reasoning to be perfectly sound.<sup>192</sup>

### 3. The Committee's Analysis

114. The first alleged contradiction relates to the principal reason put forward by Respondent for its decision to rescind the Contract: the fact that "it had allegedly been misled by the submission of inaccurate documents concerning Claimant's financial capacities."<sup>193</sup>

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<sup>187</sup> See Counter-Memorial, para. 74. See also Rejoinder, para. 26.

<sup>188</sup> *Continental Casualty* Annulment Decision, para. 103.

<sup>189</sup> See Counter-Memorial, para. 77.

<sup>190</sup> Rejoinder, para. 28. See also Counter-Memorial, para. 79; Annul. Tr. E. Dec. 6, 38:15 – 38:23.

<sup>191</sup> Rejoinder, para. 29.

<sup>192</sup> See Rejoinder, para. 32.

<sup>193</sup> Award, para. 131 (emphasis in original).

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115. The Tribunal noted that the call for tender documents specifically required the submission of documents stating the “qualitative of finance and the issued capital.”<sup>194</sup> The Tribunal next looked at the Memorandum of Association Applicant submitted as part of its bid for the Contract. That document showed that Malicorp’s capital was £1,000 divided into 1,000 shares of £1 each. Malicorp was then asked to attend a meeting with Respondent to answer a number of questions, including “the details of the capital (issued and licensed).”<sup>195</sup>
116. Next, the Tribunal noted that the minutes of that January 3, 2000 meeting recorded that Applicant was a British company “with its capital of one hundred million Sterling pounds according to the attached commercial register which was reviewed by the Committee’s members.”<sup>196</sup> The Tribunal observed that “the statement would have been correct if it had made it clear that it referred not to the issued and paid-up capital as stated in the question, but to the authorised capital, which is obviously meaningless as long as the sources of financing of this capital are not given.”<sup>197</sup>
117. The Tribunal went on to analyze the key document allegedly given to Egypt by representatives of Malicorp during the meeting. It found that this document was “allegedly an extract made on 15 September 1999 of the ‘*Register of companies for England and Wales*,’ certifying that the company had been incorporated on 6 August 1997.”<sup>198</sup> Item number 5 in that document stated: “*The Company’s share capital is £100 million divided into one million shares of £100 each.*”<sup>199</sup> The Tribunal noted that “[n]owhere does the text make it clear which type of capital this is.”<sup>200</sup> Previously, the Tribunal had referred to the meaning of the term “capital”: “In practice, it could be said that in business dealings, the mention of ‘*capital*’ refers at least to capital that is subscribed if not paid-up, and not merely to authorised capital, this being only a measure prior to subscription.”<sup>201</sup>

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<sup>194</sup> Award, para. 132 (emphasis in original).

<sup>195</sup> Award, para. 134.

<sup>196</sup> Minutes of the January 3, 2000 meeting, as quoted in the Award, para. 134.

<sup>197</sup> Award, para. 134.

<sup>198</sup> Award, para. 135 (emphasis in original).

<sup>199</sup> Award, para. 135 (emphasis in original).

<sup>200</sup> Award, para. 135.

<sup>201</sup> Award, para. 134 (emphasis in original).

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118. Apparently, the Tribunal did not believe it necessary to determine “the authenticity of the suspect document” in order to reach its decision.<sup>202</sup> Instead, it first decided that, regardless of the exact knowledge gained by Respondent during the January 3, 2000 meeting, “the nature and content of the information supplied to the Respondent by Malicorp’s representatives was such as to give rise to an essential mistake.”<sup>203</sup> Next, the Tribunal found that the financial strength of Malicorp was of utmost importance given the large scale of the project: “for a project as monumental as that of the Ras Sudr airport, knowing whether the company awarded the project is an empty shell or a company with exceptional resources is obviously fundamental.”<sup>204</sup> Finally, The Tribunal concluded that:

In these circumstances, . . . the principal reason given by the Respondent in its letter rescinding the Contract was sufficiently well founded, and gave the Respondent the right to withdraw from the Contract.<sup>205</sup>

119. In sum, the Tribunal made findings of fact that did not depend on the authenticity of the disputed document. To reach its factual conclusions, the Tribunal had to balance conflicting considerations submitted by the Parties. Whether these findings of fact are correct or not is outside the scope of the Committee’s review. That Applicant disagrees with the factual findings and legal analysis of the Tribunal is not sufficient to annul the Award. Applicant must persuade the Committee that the Tribunal failed to state any reasons for its conclusions or that the Tribunal’s reasons are so contradictory as to cancel each other. Applicant has not met that standard. Whether the Committee would follow the same logic or reach the same conclusion in this case is of no consequence. The Committee thus holds that Applicant’s first alleged contradiction does not constitute sufficient basis for annulment.

B. Second Alleged Contradiction

1. Applicant’s Position

120. Applicant argues that the Tribunal also contradicted itself in paragraph 141 of the Award, where it stated that Malicorp had failed to prove that it took the necessary steps to

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<sup>202</sup> Award, para. 136.

<sup>203</sup> Award, para. 136.

<sup>204</sup> Award, para. 136.

<sup>205</sup> Award, para. 137.

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establish a local Egyptian company as required under the Contract.<sup>206</sup> Applicant claims that this statement is in direct contradiction with the Tribunal's prior findings in paragraphs 17 through 29 of the Award that Malicorp had in fact taken a number of concrete steps to set up the company.<sup>207</sup>

121. Applicant also asserts that the Tribunal's failure to understand Malicorp's position on this issue is explained by "l'absence de travail du Tribunal Arbitral sur les pièces produites."<sup>208</sup> Finally, Applicant claims that the Tribunal "invented" its reasoning instead of reviewing Malicorp's exhibits.<sup>209</sup>

### 2. Respondent's Position

122. According to Respondent, there is no contradiction in the Tribunal's reasoning on this point.<sup>210</sup> It was enough for the Tribunal to indicate that "there were multiple reasons which prevented the due incorporation of the local entity subject to [Egypt's] Investment Law, and the blame cannot be exclusively attributed to either party."<sup>211</sup>

123. Respondent argues that Applicant ignores the distinction between the treaty claim – *i.e.* expropriation – at stake in this case and the contract claims already decided by the CRCICA Tribunal.<sup>212</sup> Respondent also notes that Applicant has not acknowledged the fact that the Tribunal was justified to decline jurisdiction to adjudicate the factual and legal arguments pertaining to the Contract's termination that had already been decided in the CRCICA arbitration.<sup>213</sup>

### 3. The Committee's Analysis

124. The second alleged contradiction refers to the grounds for termination of the Contract based on the non-performance by Applicant. The Committee first observes that, according to the Tribunal, "[e]ven if the answer to the previous question [regarding Malicorp's financial status] is enough in itself to enable it to rule on the submissions before it, the

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<sup>206</sup> See Application, pp. 50-52; Memorial, pp. 99-102. See also Annul. Tr. F., Dec. 6, 35:5 – 36:39.

<sup>207</sup> See Application, p. 50. See also Memorial, p. 99.

<sup>208</sup> Memorial, p. 102.

<sup>209</sup> See Reply, pp. 20-21.

<sup>210</sup> See Counter-Memorial, para. 84.

<sup>211</sup> Counter-Memorial, para. 83. See also Annul. Tr. E., Dec. 6, 38:24 – 39:22.

<sup>212</sup> See Counter-Memorial, p. 77

<sup>213</sup> See Rejoinder, para. 32.



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Arbitral Tribunal deems it appropriate, out of an excess of caution, to briefly review these.”<sup>214</sup> Thus the Tribunal considered the non-performance of the Contract by Applicant only subsidiarily and could have decided the dispute without ruling on that question. Therefore, even if the Committee were to agree with Applicant’s argument, an annulment of this part of the Award would not affect the rest of the Award and the outcome of the arbitration.

125. Nevertheless, for the sake of completeness, the Committee will proceed to review whether the Tribunal contradicted itself in its analysis of the grounds invoked by Respondent to terminate the Contract. Applicant considers contradictory the reasoning of the Tribunal in paragraph 141 of the Award and the findings of fact in paragraphs 17-29. Paragraph 141 in relevant part reads as follows:

The fact remains, though, that at no time has the Claimant attempted to persuade the Arbitral Tribunal that it actually did, at the outset, take the significant legal, financial and most of all technical steps required to launch such a project. The delays in taking the first steps and the absence of any practical progress, especially where the potential partners were concerned, could well have added to the doubts and concerns of the Egyptian authorities. At no time, in fact, has the Claimant attempted to show that this last criticism was unfounded. . . .

126. In paragraphs 17 to 29 of the Award, the Tribunal started by pointing out that “[u]nder the Contract, Malicorp had to take a number of measures quickly.”<sup>215</sup> The Tribunal also noted that at an unknown date, Applicant instructed a major accounting firm to take the necessary steps for setting up the company.<sup>216</sup> The Tribunal listed the numerous notices of Respondent reminding Applicant of its obligation to set up the company and provide bank guarantees.<sup>217</sup>
127. After reviewing all of the evidence, the Tribunal was not persuaded that Applicant had taken the necessary steps as required under the Contract. This is a factual determination to be made by the Tribunal and it is not the Committee’s role to review that determination.

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<sup>214</sup> Award, para. 138.

<sup>215</sup> Award, para. 17.

<sup>216</sup> See Award, para. 17.

<sup>217</sup> See Award, paras. 18-33.

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128. Applicant also claims that the Tribunal failed to adequately consider two of its exhibits, namely a letter dated May 2000 from the Intelligence Service National Security stating that it did not object to Malicorp's proposed project and another dated July 22, 2001, in which the General Authority for Investment and Free Zones (GAFI), citing national security concerns, refused to grant Malicorp permission to build the airport.<sup>218</sup> Malicorp thus claims that the Tribunal did not make every effort to understand its position.<sup>219</sup> There are several difficulties with Applicant's argument. First, Applicant cannot reliably demonstrate that the Tribunal did not consider those exhibits. Second, whether the Tribunal "adequately" considered the exhibits is a matter of fact-finding within the discretion of the Tribunal and beyond the scope of this Committee's review. Third, this argument does not assert any contradictory reasoning; it relates to an alleged failure to consider specific documents.
129. Applicant further contends that the following sentence is contradictory: "Il est possible que la demande ait été par la suite retardée par les attermoiments de la Défenderesse, mais cette situation, si elle est avérée, n'est intervenue que tardivement dans le processus de résiliation, alors que le projet vacillait déjà."<sup>220</sup> Applicant affirms that the motivation of the Tribunal is "pure invention" and explains that the project did not progress precisely because of the procrastination of Respondent.<sup>221</sup>
130. It will be useful to consider the whole paragraph from which this sentence has been extracted. The following reasoning of the Tribunal precedes the allegedly contradictory sentence:

The first obligation concerned the setting up of the Egyptian company. It is not disputed that the incorporation did not take place in the time allowed. One primary reason is that the Claimant delayed in taking the necessary steps to set it up. Admittedly, for the Respondent, the incorporation of that company was critical. First, because the Contract had also been entered into in the name of the company to be formed (see above, no. 15); next, and most of all, because it had to show sufficient financial capacity to

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<sup>218</sup> See Memorial, p. 101.

<sup>219</sup> See Memorial, p. 101.

<sup>220</sup> Award, para. 140. (English version of the Award: "It is possible that the application was delayed by the Respondent's own procrastination, but that situation, while clearly the case, arose only later during the process of termination, by which time the project was already faltering.")

<sup>221</sup> See Memorial, p. 99.

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guarantee the solidity and reliability of the operation. The capital was subscribed by Malicorp, which, however, had not yet significantly increased its own capital.<sup>222</sup>

131. The Tribunal then went on to find that:

It is possible that the application was delayed by the Respondent's own procrastination, but that situation, while clearly the case, arose only later during the process of termination, by which time the project was already faltering.<sup>223</sup>

132. The Committee does not find these two conclusions – that Applicant breached its duties to incorporate the Egyptian company from the beginning and that Respondent also delayed matters – to be contradictory, let alone to cancel each other out.

C. Third Alleged Contradiction

1. Applicant's Position

133. Applicant's third claim of alleged contradiction relates to the Tribunal's rejection of Malicorp's request for compensation for expropriation. The Tribunal concluded that Respondent had not expropriated Malicorp's property.<sup>224</sup> The Award notes that the CRCICA Tribunal had similarly dismissed Applicant's expropriation claim, but had nonetheless awarded it some damages, finding that "Respondent must bear part of the costs and damages its decision generated for the Claimant."<sup>225</sup> The ICSID Tribunal, however, refused to award damages. Applicant calls attention to the Tribunal's reasoning in doing so: that "[e]ven if [the CRCICA Tribunal's damages] argument does not seem unreasonable, it is outside the scope of these proceedings, as the Claimant has not formally made any additional submissions on the subject."<sup>226</sup>

134. Applicant finds the following contradiction: (1) it was denied damages because it did not make any submissions on damages; and (2) it was denied the opportunity to make such submissions because the Tribunal had decided that claims for damages would be heard

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<sup>222</sup> Award, para. 140 (first sub-paragraph, emphasis in original).

<sup>223</sup> Award, para. 140.

<sup>224</sup> See Award, para. 143.

<sup>225</sup> Award, para. 143.

<sup>226</sup> Award, para. 143.

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and decided at a second phase of the arbitration if liability was established.<sup>227</sup> Applicant thus argues that the Tribunal's decision-making process was arbitrary and contradictory because it prevented Applicant from pleading damages while at the same time holding it against Applicant that it had not done so.

135. Applicant thus concludes that:

Il n'est donc pas possible, sauf à contredire le cadre dans lequel le Tribunal a voulu que les parties déposent leur mémoire et plaident, de reprocher à la société MALICORP de n'avoir pas conclu à une indemnisation partielle, dès lors que le quantum devait relever d'une seconde phase de la procédure arbitrale, et que le Tribunal n'a pas spécialement interrogé les parties de ce chef.<sup>228</sup>

2. Respondent's Position

136. According to Respondent, the alleged contradiction ignores two fundamental factors: (i) the only cause of action that would have given rise to Egypt's responsibility under the BIT is expropriation so that once this claim is dismissed, there was no other cause of action under which to award damages, and (ii) the Tribunal indicated that the CRCICA Award which dealt with the "contract claims" and awarded partial compensation to Applicant was *res judicata* and Applicant explicitly requested that such partial compensation be taken into consideration by the Tribunal to prevent double recovery.<sup>229</sup> Respondent finds no contradiction in the Tribunal's reasoning arising out of a decision to divide the arbitration proceeding into two phases and not following through with the compensation phase once all substantive claims were dismissed.<sup>230</sup>

137. It is Respondent's view that, in the final analysis, the Committee must establish whether it is impossible to understand the decision of the Tribunal, and none of the alleged contradictions raised by Applicant passes this test.<sup>231</sup>

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<sup>227</sup> See Memorial, pp. 102-04. See also Transcript of the First Session, July 31, 2009, para. 80.

<sup>228</sup> Memorial, p. 104. See also Annul. Tr. F., Dec. 6, 36:40 – 37:44.

<sup>229</sup> See Counter-Memorial, para. 86. See also Annul. Tr. E., Dec. 6, 39:23 – 41:6.

<sup>230</sup> See Rejoinder, para. 33. See also Annul. Tr. E., Dec. 6, 41:7 – 41:18.

<sup>231</sup> See Rejoinder, paras. 31-33.

3. The Committee's Analysis

138. The Committee finds no contradiction in the Tribunal's reasoning. It was within the discretion of the Tribunal to bifurcate the proceedings and hear jurisdiction and liability first, while hearing damages at a second phase, if necessary. It is thus obvious that if Claimant lost on liability, as it did, there would be no opportunity to put forward claims and arguments on damages.
139. The Tribunal concluded that "Claimant's submissions based on the principle of compensation for expropriation are rejected."<sup>232</sup> By dismissing Applicant's substantive claim, the Tribunal never reached the damages phase. Thus, the Tribunal never heard Claimant's arguments on damages because it found no violation of the BIT, for which compensation would be owed. Whatever the conclusions of the CRCICA Tribunal were with respect to liability for breach of the Contract and contractual damages, the BIT Tribunal could not have awarded any damages to Malicorp in the BIT arbitration because it found no violation of the BIT.
140. In sum, having considered and rejected each of the contradictions alleged by Applicant in support of its allegation that the Tribunal failed to state reasons, the Committee concludes that there is no basis for annulment for failure to state reasons.

VI. Manifest Excess of Powers

A. Applicant's Position

141. According to Applicant, the Tribunal manifestly exceeded its power by failing to apply the proper law – *i.e.* Egyptian law and the terms of the Contract.<sup>233</sup> Applicant refers to the following statement in the Award:

The first question, therefore, is whether the Republic had the right to discharge itself from the Contract pursuant to the private law rules governing it (see above, no. 93). If that is the case, it is unnecessary to examine whether the Respondent also took a measure under its public powers ("*measures [sic] de puissance publique*"), not as a party to the Contract but as a State, the effectiveness and conformity with the Agreement [the BIT] of

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<sup>232</sup> Award, para. 143.

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which would have to be examined. Indeed, the rescission of the Contract would not leave any subsisting breach of the umbrella clause nor, moreover, in the absence of a protected investment, of other clauses of the Agreement.<sup>234</sup>

142. Applicant argues that the Tribunal examined the facts and decided on the issues of law in a subjective manner and without any reference to the provisions of the Contract or Egyptian law. According to Applicant, the reference to the law of the Contract is not sufficient by itself “à supporter la totalité du raisonnement dès lors que celui-ci suppose que le droit égyptien autorise, dans de telles circonstances, l’invocation d’un vice du consentement.”<sup>235</sup> Applicant asserts that the Tribunal should have invoked specific provisions of Egyptian law to reach its conclusions.<sup>236</sup>
143. Applicant further argues that the Tribunal exceeded its powers when it applied a sanction that is not permitted by Egyptian contract law. The Tribunal determined that the misunderstanding, on the basis of which Respondent proceeded with the Contract after the January 3, 2000 meeting, was sufficient ground for the subsequent rescission of the Contract.<sup>237</sup> However, Applicant claims that the Tribunal did not have the power to reach such conclusion because, under Egyptian law, this may only be done by a competent court within three years from the date on which the grounds for rescission became known. Applicant contends that Respondent never requested a court to rule on the validity of the Contract and that the three years had expired. Applicant concludes that the Tribunal exceeded its powers under Egyptian law.<sup>238</sup>
144. Applicant also considers that the Tribunal exceeded its powers when it determined that Respondent had the right to terminate the Contract on grounds of non-performance. According to Applicant, under Egyptian law, only a judge may decide the rescission of a contract on grounds of non-performance not foreseen in the contract.<sup>239</sup> Applicant argues that, since the Contract did not include any clause related to the grounds advanced by Respondent to terminate the Contract, Respondent was obliged to request a competent

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<sup>233</sup> See Memorial, Chapter V.

<sup>234</sup> Award, para. 126.

<sup>235</sup> Memorial, p. 109.

<sup>236</sup> See Memorial, p. 109. See also Annul. Tr. F., Dec. 6, 39:46 – 41:20.

<sup>237</sup> See Award, para. 137.

<sup>238</sup> See Memorial, p. 110. See also Annul. Tr. F., Dec. 6, 42:34 – 45:23.

<sup>239</sup> See Memorial, p. 109. See also Annul. Tr. F., Dec. 6, 45:38 – 45:46.

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court, in this case the CRCICA Tribunal, to terminate the Contract pursuant to Article 147 of the Egyptian Civil Code. Applicant alleges that Respondent did not comply with Article 147 and terminated the Contract unilaterally in violation of that provision.

145. According to Applicant, the Tribunal determined that Malicorp's non-performance was sufficient to justify Egypt's rescission of the Contract without examining Egyptian law. Malicorp admits that the Tribunal identified the correct law, but argues that in fact it did not apply that law, which constitutes a manifest excess of powers.<sup>240</sup>

146. Applicant invokes as an example of the Tribunal's failure to apply Egyptian law the fact that the Tribunal did not know what concept to apply: annulment, rescission, or invalidation of the Contract. Applicant claims that the Tribunal used the term "*départir*" because:

[Les arbitres] n'ont pas concrètement vérifié le contenu du droit égyptien, et ne savaient donc pas quel terme appliquer, "*annulation*", "*résolution*" ou "*résiliation*", à l'acte par lequel la REPUBLIQUE ARABE D'ÉGYPTE avait décidé le 12 août 2001 de rompre les relations contractuelles avec la société MALICORP, d'autant que les diverses correspondances de la REPUBLIQUE ARABE D'ÉGYPTE ont utilisés les trois concepts.<sup>241</sup>

147. Applicant concludes that the Tribunal simply "made up" Egyptian law in reaching its decision:

[D]ès lors que les Arbitres ont déclaré vouloir appliquer le droit interne égyptien, et n'ont vérifié ni le droit pour une partie de rompre unilatéralement le contrat, ni l'incidence du manquement de la partie rompant le contrat à exécuter ses propres obligations, ni les conséquences d'une rupture non judiciairement prononcée, les Arbitres ont inventé la loi égyptienne, et ont nécessairement statué par voie d'excès de pouvoir.<sup>242</sup>

**B. Respondent's Position**

148. Respondent recalls in its Counter-Memorial that the Tribunal was only competent to consider treaty claims and that international law is the applicable law for such claims.

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<sup>240</sup> See Memorial, p. 109.

<sup>241</sup> Reply, p. 24 (emphasis in original).

<sup>242</sup> Reply, p. 24.

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Further, the contractual dispute was resolved by the CRCICA Tribunal, is *res judicata*, and was recognized as such by the Tribunal.<sup>243</sup> It is thus Respondent's contention that the Tribunal deliberately chose to avoid using domestic law concepts, and

within the exercise of its controlling power in appreciating what took place, the Tribunal use the wording "*départir du contrat*" in its process of analyzing the measure which took place to evaluate to what extent this measure can be considered justifiable from an International Law point of view; i.e. whether or not the termination would or would not amount to an "expropriation" engaging the State responsibility and requiring indemnification for a violation of an international obligation arising under the Egypt/United Kingdom BIT.<sup>244</sup>

149. According to Respondent, what Applicant is requesting amounts to

a tacit request calling the ICSID Tribunal to act as a Court of Appeal revising what the CRCICA Arbitration decided in application of the domestic legal system it was entrusted to apply, and at the same time explicitly requesting the *Ad hoc* Committee to re-arbitrate the case through a new trial focusing on *Malicorp's* own points of view in its pleadings in front of the two previous jurisdictions, and at the same time to substitute the International Law applicable to the "Expropriation Claim" by a selective reading of the Egyptian Civil Law which is claimed accordingly to acquire legal standing to be considered the "applicable law" governing "Treaty Claims", in contradiction to all established precedents since *AAPL/Sri Lanka*.<sup>245</sup>

150. In its Rejoinder, Respondent emphasizes that, pursuant to Article 42 of the ICSID Convention, the law to be applied is the law agreed between the Parties with

the compelling result that it is absolutely clear that MALICORP filed its case in front of the ICSID Tribunal in reliance on the BIT between Egypt and the United Kingdom, which absolutely means the applicability of the rules contained in that Treaty creating international law obligations on the Host State of the investment (in our case Egypt), and [*sic*] necessarily recognizing the international liability of Egypt in case the ICSID Tribunal declared itself competent and decides [*sic*] that a given treaty obligation has been violated.<sup>246</sup>

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<sup>243</sup> See Counter-Memorial, para. 95.

<sup>244</sup> Counter-Memorial, para. 95.

<sup>245</sup> Counter-Memorial, para. 97.

<sup>246</sup> Rejoinder, para. 37. See *also* Annul. Tr. E., Dec. 6, 42:3 – 42:18.



151. According to Respondent, the Committee has to approach its task with caution by

distinguishing primarily failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal, and at the same time by ensuring that the misapplication of the Law once identified should be so egregious as to constitute, in practice, non-application of the proper law.<sup>247</sup>

152. Respondent argues that the Tribunal stated it was applying Egyptian law and that, therefore, the inquiry should stop there.<sup>248</sup> According to Respondent, there is no reason to believe that the Tribunal would identify the proper applicable law only to proceed to apply a different law.<sup>249</sup> Respondent concludes that Applicant's manifest excess of powers claim must necessarily fail because the Committee is not empowered to review whether the Tribunal correctly applied Egyptian law.<sup>250</sup>

153. Respondent concludes that it is impossible to envision the annulment of the Award when Applicant has been unable to establish any failure to apply the relevant rules governing the international liability of Egypt for violation of its obligations under the BIT.<sup>251</sup>

C. The Committee's Analysis

154. The Committee agrees that it is not within its mandate to review whether the Tribunal correctly applied Egyptian law. However, the Committee cannot agree with Respondent's argument that the Tribunal's statement that it was applying Egyptian law is dispositive. The Committee must proceed to verify whether indeed the Tribunal applied Egyptian law. This is because it is possible that a tribunal would state that it is applying one law while in fact applying another. In this case, the Committee must examine whether the Tribunal identified Egyptian law as the proper law but went on to apply some other law instead. This is in fact the crux of Applicant's argument. Applicant asserts that even though the Tribunal identified Egyptian law as the proper law and claimed to apply it, it in fact did not

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<sup>247</sup> Rejoinder, para. 40.

<sup>248</sup> See Counter-Memorial, para. 97.

<sup>249</sup> See Counter-Memorial, para. 97.

<sup>250</sup> See Counter-Memorial, para. 97.

<sup>251</sup> See Rejoinder, para. 42.

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do so because its legal analysis does not refer to any provisions of Egyptian law or jurisprudence.<sup>252</sup>

155. Once the Committee is satisfied that the Tribunal in fact applied the proper law, however, the Committee need not examine whether the Tribunal applied that law correctly. As the *Soufraki ad hoc* Committee stated, it would be sufficient if the Tribunal in its Award “strive[d] in good faith to apply [Egyptian] law as it would have been applied by [Egyptian] courts.”<sup>253</sup> As set forth below, the Committee is satisfied that the Tribunal applied Egyptian law in good faith by relying on the analysis of Egyptian law in the CRCICA Award.
156. The Tribunal had before it two types of claims based on the same facts: contractual claims and treaty claims. The Tribunal decided the treaty claims, *i.e.*, the claims for violation of the BIT, by applying international law. There is no dispute between the parties that the Tribunal applied the proper law with respect to the BIT claims. However, to decide the BIT claims, the Tribunal had to decide a critical question: whether the Contract was properly rescinded. To resolve that question, the Tribunal had to interpret and apply Egyptian law. The Tribunal correctly identified Egyptian law as the proper law to be applied; the matter in dispute is whether the Tribunal actually applied it.
157. The same question – whether the Contract was rescinded in compliance with Egyptian law – had already been heard and resolved by the CRCICA Tribunal. There is no disagreement between the Parties that the CRCICA Tribunal resolved that question by applying Egyptian law. It was therefore perfectly reasonable for the BIT Tribunal to rely on, and accept, the CRCICA Tribunal’s analysis and conclusions. By doing so, the Tribunal in fact applied Egyptian law without performing *de novo* the entire review and analysis of Egyptian law performed by the CRCICA Tribunal.
158. The Tribunal relied on the analysis and conclusions of the CRCICA Tribunal with caution. It stated that it was not its task to rule on the validity of the CRCICA Award. The Tribunal noted that Applicant had waived “any attempt to have the award set aside, but has accepted its conclusions and is seeking to have it compulsorily enforced. The fact that, to

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<sup>252</sup> See Memorial, Chapter V-1.

<sup>253</sup> See *Soufraki* Annulment Decision, paras. 99, 101-02. See *also* Schreuer, THE ICSID CONVENTION at 963.

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date, it has not been successful before a national court does nothing to change that.”<sup>254</sup>  
On the other hand, the Tribunal referred to the fact that Respondent challenged the CRCICA Award:

[...] in the CRCICA arbitration proceedings [Respondent] firmly opposed arbitration as provided for in the Contract, a procedure whose validity it disputed; it appealed the decision of the CRCICA Arbitral Tribunal finding it had jurisdiction and won the case before the Egyptian state courts on first appeal, though that is the subject of a review currently (apparently) still pending before the Supreme Court (see above, no. 59).

The inevitable conclusion, therefore, is that by such attitude Respondent has rejected recourse to the avenues provided for in the Contract. For the Arbitral Tribunal, this raises a degree of uncertainty concerning the outcome of the commercial procedure, which makes it acceptable for the party claiming to have been injured to use the remedies afforded by the Agreement. There can be no question, on the other hand, of reopening the commercial proceedings.<sup>255</sup>

159. The Tribunal, therefore, did not simply adopt the conclusions of the CRCICA Tribunal. It examined the CRCICA Tribunal’s analysis, identified the questions arising under Egyptian law, reviewed the CRCICA Tribunal’s conclusions and, on that basis, reached its own conclusions:

The first question with respect to the first two grounds is whether the Contract was validly entered into, whether it was void from the outset because the circumstances in which it was concluded contravened the principle of good faith, or whether it was capable of being rescinded because of a defect in consent, namely misrepresentation or mistake. The answer depends, in the first place, on the rules applicable to it, in this case Egyptian civil law.

As has been seen (see above, no. 44 *et seq.*), these issues have already been examined and decided in the CRCICA arbitration proceedings instituted by the Claimant pursuant to the arbitration clause in the Contract. In its award of 7 March 2006, the CRCICA Arbitral Tribunal held, in particular, that there was no proof of forgery or fraud, but that it had, on the other hand, been established that Respondent had entered into the Contract while labouring under a mistake, and that, therefore, it had the right to discharge itself from it. That said, since it bore part of the

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<sup>254</sup> Award, para 103 d).

<sup>255</sup> Award, para 103 d).

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responsibility for that mistake, it was only fair that it should be made to bear part of the costs incurred by Applicant.

Having decided not to re-examine that decision, this Arbitral Tribunal could have limited itself to basing its ruling on the said decision. However, as has been seen (see above, no. 59) the Respondent refuses to submit to that decision or to accept its conclusions. The uncertainty that persists, therefore, justifies the Arbitral Tribunal in verifying, as a matter ancillary to the guarantees offered by the Agreement [the BIT], that, even if that award were to be set aside, the conclusions arrived at by this Arbitral Tribunal would be no different from those of the CRCICA Arbitral Tribunal. The fact is that, if the only conclusion to be drawn is that there were sufficient grounds for rescinding the Contract, there would be nothing left to protect.<sup>256</sup>

160. There is thus no question that the Tribunal applied Egyptian law in deciding whether the Contract was properly rescinded. The Tribunal followed the analysis of the CRCICA Tribunal, which undoubtedly also applied Egyptian law. It was fully within the Tribunal's power and discretion to rely on the CRCICA Award and accept its interpretation of the applicable Egyptian law. Whether the Tribunal should have subjected specific provisions of Egyptian law to closer scrutiny and analysis, or whether the Tribunal should have invoked and examined different provisions of Egyptian law, is not a question that should be dealt with in an annulment proceeding. The Committee thus concludes that the Tribunal applied the proper law and finds no errors committed by the Tribunal in that context that were "so egregious as to amount to a failure to apply the proper law."<sup>257</sup>

## **VII. Costs**

161. Each Party has pleaded that the fees and expenses of its legal representation, those of the Committee members and the charges for the use of the facilities of the Centre be borne by the other Party. Under Article 61(2) of the ICSID Convention and Arbitration Rule 47(1)(j) read together with Article 52(4) of the ICSID Convention and Arbitration Rule 53, the Committee has discretion in deciding the apportionment of fees and expenses of the parties, the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre.

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<sup>256</sup> Award, para. 130.

<sup>257</sup> *Soufraki* Annulment Decision, paras. 99, 101-02. See also Schreuer, THE ICSID CONVENTION at 963.

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162. In the circumstances of this case, the Committee considers that each of the Parties shall bear its own costs for legal representation and expenses and that Applicant shall bear the fees and expenses of the members of the Committee and the charges for use of the facilities of the Centre<sup>258</sup>, the exact amount of which shall be subsequently notified by the Centre.<sup>259</sup>

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<sup>258</sup> Dr. Eduardo Silva Romero is of the view that, given that the Annulment Application was groundless, Applicant should have been ordered by the Committee to bear the entirety of Respondent's costs incurred as a result of the annulment proceedings.

<sup>259</sup> The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as the account has been finalized.

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**VIII. Decision**

163. In light of the foregoing, the Committee rejects in its entirety Malicorp's Application for Annulment and declines to annul the Award.

The *Ad Hoc* Committee

[Signed]

[Signed]

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Mr. Stanimir A. Alexandrov  
Member  
Date: [June 17, 2013]

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Dr. Eduardo Silva Romero  
Member  
Date: [June 24, 2013]

[Signed]

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Dr. Andrés Rigo Sureda  
President  
Date: [June 28, 2013]