

# **EXCERPTS**

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**JOSEPH C. LEMIRE**

*Claimant*

v.

**UKRAINE**

*Respondent*

ICSID Case No. ARB/06/18

**ANNULMENT PROCEEDING**

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## **DECISION ON UKRAINE'S APPLICATION FOR ANNULMENT OF THE AWARD**

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### **Members of the *ad hoc* Committee**

Dr. Claus von Wobeser, President

Professor Azzedine Kettani

Dr. Eduardo Zuleta

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Dr. Hamid G. Gharavi

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Mr. Markiyani Kliuchkovskyi

Ms. Olga Putevets

Ms. Christina Khripkova

*Egorov Puginsky Afanasiev & Partners*

Kyiv, Ukraine

*Date of Dispatch to the Parties: July 8, 2013*

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## **LIST OF DEFINED TERMS**

**I. THE PARTIES**

**A. THE CLAIMANT (RESPONDENT ON ANNULMENT)**

1. Mr. Joseph Charles Lemire (“**Mr. Lemire**” or “**Claimant**”), a national of the United States, residing at 91 Saksagangsko St. Office 8, 01032 Kyiv, Ukraine.
2. Claimant has been represented in this Annulment Proceeding by:

Derains & Gharavi, Paris France  
Dr. Hamid G. Gharavi  
Mr. Stephan Adell  
Ms. Nada Sader  
25, rue Balzac  
75008 Paris, France

**B. THE RESPONDENT (APPLICANT)**

3. Respondent is Ukraine (“**Ukraine**” or “**Respondent**”).
4. Respondent has been represented in this Annulment Proceeding by:

White & Case LLP  
Mr. John S. Willems  
Mr. Michael A. Polkinghorne  
Ms. Olga Mouraviova  
Ms. Nathalie Makowski  
Ms. Noor Davies  
*White & Case LLP*  
Paris, France

Mr. Serhii Sviriba  
Mr. Markiyan Kliuchkovskyi  
Ms. Olga Putevets  
Ms. Christina Khripkova  
*Egorov Puginsky Afanasiev & Partners*  
Kyiv, Ukraine

**II. RELEVANT FACTS**

5. [...]

**A. UKRAINE’S RADIO LICENSES**

6. [...]
7. [...]

8. [...]

**B. THE INTERREGNUM PERIOD**

9. [...]

10. [...]

11. [...]

12. [...]

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13. [...]

14. [...]

15. [...]

16. [...]

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17. [...]

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**E. SECOND ARBITRATION: SECOND PHASE**

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35. [...]

### III. PROCEDURAL HISTORY

36. On July 26, 2011, pursuant to Article 52 of the **ICSID Convention** and Rule 50 of the Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), Ukraine filed an application requesting partial annulment of both<sup>27</sup> the Decision on Jurisdiction and Liability and the Award rendered in the arbitration proceeding between Mr. Lemire and Ukraine – (jointly the “**Parties**”). The Centre acknowledged receipt of the Application and forwarded it to Claimant on July 26, 2011.

37. In its Application, Respondent sought partial annulment of the Decision on Jurisdiction and Liability and of the Award on the following grounds as set forth in Article 52(1) of the ICSID Convention:

- a. the Majority manifestly exceeded its powers, Article 52(1)(b);
- b. the Majority seriously departed from a fundamental rule of procedure, Article 52(1)(d); and
- c. the Majority failed to state the reasons on which the Award was based, Article 52(1)(e).

38. Under Article 52(5) of the Washington Convention and Rule 54(1) of the Arbitration Rules, Ukraine’s Application contained a request for a stay of enforcement of the Award until the issuance of the annulment decision.

39. The Secretary-General of ICSID registered the Application on July 27, 2011, and on the same date, in accordance with Rule 50(2) of the Arbitration Rules, transmitted a Notice of Registration to the Parties. The Parties were also notified that, pursuant to

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<sup>27</sup> Respondent seeks partial annulment of both, the Decision on Jurisdiction and Liability and the Award. However, Respondent does not distinguish between both terms; instead, Respondent refers to both decisions as “Award”, even when addressing the content of one of them. In aim of practicality and clarity, this Committee distinguishes and addresses them individually: “Decision on Jurisdiction and Liability” on the one hand, and “Award” on the other hand.

Article 52(5) of the ICSID Convention and Rule 54(2) of the Arbitration Rules, enforcement of the Award was provisionally stayed.

40. By letter of October 7, 2011, in accordance with Rule 52(2) of the Arbitration Rules, the Parties were notified by the Secretary-General of ICSID that an *ad hoc* Committee had been constituted (composed of Dr. Claus von Wobeser as President, Professor Azzedine Kettani and Dr. Eduardo Zuleta) and that the annulment proceeding was deemed to have begun on that date. The Parties were also informed that Ms. Eloïse Obadia, Team Leader/Legal Counsel, ICSID, would serve as Secretary of the Committee in the temporal absence of Ms. Aïssatou Diop, Legal Counsel. From January 10 to September 28, 2012, Ms. Diop again served as Secretary of the Committee.

41. Pursuant to Arbitration Rule 54(2) and by letter of the Secretary of the Committee dated October 12, 2011, the Parties were informed of the Committee's decision on the continuation of the stay, while a final decision was reached.

42. The Parties timely filed the following submissions on the issue of the stay of enforcement of the Award:

- October 14, 2011: Respondent's Request for a stay of enforcement of the Award;
- October 21, 2011: Claimant's Response on Ukraine's Request for a stay of enforcement of the Award;
- November 4, 2011: Respondent's Reply on the stay of enforcement of the Award; and
- November 18, 2011: Claimant's Rejoinder to Respondent's Reply on the stay of enforcement of the Award.

43. Following different communications between the Parties and the Committee regarding the logistics of the First Session, by letter of October 18, 2011, the Committee proposed to the Parties to hold the First Session in Paris on November 25, 2011. Thereafter, the Parties confirmed their availability and agreed with the Committee's proposal.

44. The First Session was held in Paris, on November 25, 2011. During the session, the Parties expressed their views on the stay of enforcement of the Award and, also, different procedural matters were resolved.

45. Pursuant to the Minutes of the First Session of the Committee and Hearing on the Stay, the Parties agreed on the following schedule of submissions:

- February 3, 2012: Respondent's Memorial on Annulment;
- April 13, 2012: Claimant's Counter-Memorial on Annulment;
- June 8, 2012: Respondent's Reply on Annulment; and
- August 3, 2012: Claimant's Rejoinder on Annulment.

46. On November 28, 2011, Respondent submitted a letter complementing its response to a question formulated by the Committee during the First Session, regarding the legal basis under which Ukrainian courts could deny the recognition and enforcement of ICSID

awards. Claimant provided its views on Respondent's submission by letter dated November 30, 2011.

47. On January 12, 2012 the Committee issued its First Procedural Order in connection with the stay of the enforcement.

48. By communication of February 2, 2012, Respondent informed the Committee that the Parties had agreed on a modification to the schedule of submissions. Pursuant to their agreement, the new schedule was the following:

- February 7, 2012: Respondent's Memorial on Annulment;
- April 23, 2012: Claimant's Counter-Memorial on Annulment;
- June 18, 2012: Respondent's Reply on Annulment; and
- August 13, 2012: Claimant's Rejoinder on Annulment.

49. By communication of February 2, 2012, Claimant confirmed with Respondent's Counsel his agreement on the amendments to the deadlines. The Committee accepted the proposed schedule described on point 48 of this Decision.

50. On February 8, 2012, Ukraine submitted its Memorial on Annulment and accompanying documentation.

51. The Committee issued its Decision on Ukraine's Request for a Continued Stay of Enforcement of the Award on February 14, 2012 (the "**Decision on the Stay**"). The Committee unanimously decided that the stay of enforcement of the Award would continue in effect for the duration of this annulment proceeding and until the date on which a final decision on the annulment was rendered, provided however, that within 45 days of the Decision on the Stay, Ukraine posted an unconditional and irrevocable bank guarantee or security bond for the full amount of the Award rendered against it, inclusive of all interests accrued to the date of issuance of said irrevocable bank guarantee or security bond.<sup>28</sup>

52. The unconditional and irrevocable bank guarantee or security bond had to be issued by a first-tier reputable international credit institution (outside of Ukraine and with no principal establishment or branch in Ukraine) and had to be immediately payable to or cashable by Claimant upon the issuance of a decision rejecting annulment and in full satisfaction of the Award. If the annulment were to be partially accepted by this Committee, Claimant would be able to collect the sum corresponding to the portion of the Award which is not annulled, without prejudice to the possible continuation of the stay allowed by Rule 54(3) and Rule 55(3) of the Arbitration Rules.

53. By letter dated March 16, 2012, Claimant requested information regarding the posting of the security. In a communication dated March 19, 2012, Ukraine responded that no information could be provided in response to Claimant's request.

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<sup>28</sup> Decision on the Stay, February 14, 2012, ¶ 93.

54. By communication dated March 21, 2012, the Parties were informed that the hearing would take place in Paris on September 24 and 25, 2012.
55. By letter dated March 26, 2012, four days before the expiration of the deadline for the posting of the security pursuant the Decision on the Stay, Claimant invited Ukraine to comply with its obligations under the ICSID Convention and the Committee's Decision regarding the posting of security.
56. By letter of March 28, 2012, Ukraine manifested that it was not in a position to provide a bond in accordance with the conditions of the Decision on the Stay, within the available time and in light of the relevant legislation. Ukraine explained that the issues presented by the Decision on the Stay involved matters not previously encountered in Ukraine.
57. On April 2, 2012, the Committee notified Procedural Order No. 2 to the Parties, confirming the termination of the stay. Moreover, the Committee reserved its right to take into account, for the allocation of costs, Respondent's conduct in complying with the Decision on the Stay.
58. On April 23, 2012, Claimant submitted its Counter-Memorial on Annulment and accompanying documentation.
59. On June 18, 2012, Respondent submitted its Reply on Annulment along with accompanying material.
60. By letter dated August 7, 2012, Claimant requested a seven day extension, until August 20, 2012, to submit its Rejoinder on Annulment. Respondent subsequently agreed on such request by communication dated August 8, 2012.
61. In a communication of August 8, 2012, the Parties were informed about logistical arrangements for the hearing to be held on September 24 and 25, 2012.
62. On August 20, 2012, Claimant submitted its Rejoinder on Annulment and accompanying documentation.
63. On September 24, 2012, a hearing ("**Hearing on Annulment**") was held at the World Bank Paris Conference Center located in Paris, France, whereby both Parties presented arguments and submissions, and questions from the Members of the Committee were responded to.
64. On October 25, 2012, Claimant filed his statement of costs followed by Respondent's statement of costs on October 26, 2012.
65. By letter dated December 17, 2012, the Parties informed the Committee they were in negotiations to establish an escrow account before the Permanent Court of Arbitration ("**PCA**") whereby the funds relating to the Award would be held, pending the Decision on Annulment.

66. On December 21, 2012, the Parties provided the Committee with an executed version of the Escrow Agreement. The Parties agreed and jointly requested the approval of the Escrow Agreement and the arrangements set forth therein in the form of an order.

67. On December 21, 2012, the Committee notified Procedural Order No. 3 to the Parties, ordering a reinstatement of the stay of enforcement of the Award conditional upon Respondent's due performance of the terms of the Escrow Agreement.

68. On January 8, 2013, the proceeding was declared closed pursuant to Arbitration Rules 53 and 38 (1).

69. The Committee Members have deliberated by various means of communication and, in rendering this decision, have taken into consideration the Parties' entire written and oral arguments and submissions on Ukraine's Application for annulment of the Award.

#### **IV. GROUNDS TO RULE ON UKRAINE'S APPLICATION FOR ANNULMENT OF THE AWARD**

70. The Committee is bound to apply the provisions of Section 5 of the Washington Convention and the provisions of Chapter VII of the Arbitration Rules, regulating the annulment proceeding. The Committee considers that the application of these binding provisions may be guided, if justified under the circumstances, by paragraphs 41 to 43 of the Report of the Executive Directors on the Washington Convention.

71. Decisions of ICSID tribunals are not binding on the Parties or the Committee. Previous decisions by *ad hoc* Committees may have an illustrative value on how different cases, under singular factual circumstances and considerations, were resolved.

#### **V. PARTIES' POSITIONS WITH RESPECT TO UKRAINE'S APPLICATION FOR ANNULMENT OF THE AWARD**

72. The Committee summarizes below the respective positions of the Parties, taking into consideration all of the Memorials submitted:<sup>29</sup>

##### **A. RESPONDENT'S POSITION**

##### **1. Scope and purpose of the annulment proceeding**

##### *i. Article 52(1)(b) of the ICSID Convention*

73. [...]

74. [...]

75. [...]

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<sup>29</sup> This summary is not intended as an exhaustive and detailed narrative of all arguments of the Parties. Rather, its purpose is to simply provide the general context of this Decision.

76. [...]

*ii. Article 52(1)(d) of the ICSID Convention*

77. [...]

78. [...]

79. [...]

*iii. Article 52(1)(e) of the ICSID Convention*

80. [...]

**2. Reasons to partially annul the Award according to Respondent**

*i. The Tribunal found a breach of the BIT based on a claim which Ukraine did not have an opportunity to dispute*

- a. The Majority seriously departed from a fundamental rule of procedure by having found a breach of the BIT based on a claim Respondent did not have an opportunity to dispute<sup>40</sup>

81. [...]

82. [...]

83. [...]

84. [...]

85. [...]

86. [...]

*ii. The Award did not consider the implications of the Settlement Agreement and the res judicata effect of the Lemire I Award*

- a. The Majority manifestly exceeded its powers since it dismissed the waiver provided by Clause 12 of the Settlement Agreement<sup>48</sup>

87. [...]

88. [...]

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<sup>40</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 112. See also Respondent's Reply on Annulment, June 18, 2012, ¶¶ 59-78.

<sup>48</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 155-170. See also Respondent's Reply on Annulment, June 18, 2012, ¶¶ 92 and 93.

89. [...]  
90. [...]

b. The failure to apply the waiver provided by Clause 12 of the Settlement Agreement amounts to a non-application of the law and a manifest excess of powers<sup>56</sup>

91. [...]

92. [...]

93. [...]

94. [...]

c. The Majority disregarded the res judicata effect of Lemire I with respect to the illegal allocation of frequencies during the Interregnum Period and therefore acted in manifest excess of powers<sup>61</sup>

95. [...]

96. [...]

97. [...]

d. The Majority failed to state reasons in its Decision on Jurisdiction and Liability with respect to Clause 12 of the Settlement Agreement<sup>68</sup>

98. [...]

99. [...]

100. [...]

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<sup>56</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 171-182. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 84-96.

<sup>61</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 189-207. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 110-118.

<sup>68</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 183-188. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 97-109.

**iii. The Majority's determination of causation warrants annulment**

- a. The Majority manifestly exceeded its powers with respect to causation

101. [...]  
102. [...]  
103. [...]  
104. [...]  
105. [...]

- b. The Majority's ruling on causation warrants annulment because it seriously departed from a fundamental rule of procedure<sup>81</sup>

106. [...]  
107. [...]  
108. [...]

- c. The Majority failed to state reasons with respect to the existence of a causal link between Respondent's wrongful conduct and Claimant's alleged loss<sup>86</sup>

109. [...]  
110. [...]  
111. [...]  
112. [...]

**B. CLAIMANT'S POSITION**

**1. Scope and purpose of the annulment proceeding**

113. [...]  
114. [...]  
115. [...]

**i. Article 52(1)(b) of the ICSID Convention<sup>97</sup>**

116. [...]  
117. [...]

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<sup>81</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 216-226. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 152-168.

<sup>86</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 120.

<sup>97</sup> Claimant's Counter-Memorial on Annulment, April 23, 2012, ¶¶ 27-51. *See also* Claimant's Rejoinder on Annulment, August 20, 2012, ¶¶ 15-36.



118. [...]

119. [...]

120. [...]

*ii. Article 52(1)(d) of the ICSID Convention*<sup>106</sup>

121. [...]

122. [...]

*iii. Article 52(1)(e) of the ICSID Convention*<sup>113</sup>

123. [...]

124. [...]

125. [...]

126. [...]

**2. Reasons to deny partial annulment of the Award according to Claimant**

*i. Respondent presented its case on the breach of the FET standard during the Interregnum Period*<sup>119</sup>

127. [...]

128. [...]

129. [...]

130. [...]

*ii. The absence of annullable errors in relation to implications of the Settlement Agreement and the res judicata effect of the Lemire I Award*

131. [...]

- a. Claimant alleges there is no manifest excess of powers or failure to apply the waiver provided by Clause 12 of the Settlement Agreement

132. [...]

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<sup>106</sup> Claimant's Counter-Memorial on Annulment, April 23, 2012, ¶¶ 52-67. See also Claimant's Rejoinder on Annulment, August 20, 2012, ¶¶ 37-50.

<sup>113</sup> Claimant's Counter-Memorial on Annulment, April 23, 2012, ¶¶ 68-92. See also Claimant's Rejoinder on Annulment, August 20, 2012, ¶¶ 51-69.

<sup>119</sup> Claimant's Counter-Memorial on Annulment, April 23, 2012, ¶¶ 95-126. See also Claimant's Rejoinder on Annulment, August 20, 2012, ¶¶ 72-101.

133. [...]  
134. [...]

- b. Claimant alleges there is no failure to state reasons with respect to the interpretation of Clause 12 of the Settlement Agreement

135. [...]  
136. [...]  
137. [...]  
138. [...]

- c. Claimant alleges the Majority's finding in relation to the Interregnum Period did not disregard the res judicata effect of the Lemire I Award

139. [...]  
140. [...]  
141. [...]  
142. [...]

**iii. *The absence of annulable errors on the Tribunal's determination of causation***

- a. The Award explained the reasons for its finding of causation

143. [...]  
144. [...]  
145. [...]  
146. [...]

- b. The Tribunal did not manifestly exceed its powers in relation to causation

147. [...]  
148. [...]

- c. The Tribunal did not depart from a fundamental rule of procedure in relation to causation

149. [...]

150. [...]

**VI. ARGUMENTS DURING THE HEARING**

151. [...]

**A. RESPONDENT**

152. [...]

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160. [...]

161. [...]

162. [...]

**B. CLAIMANT**

163. [...]

164. [...]

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168. [...]

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171. [...]

172. [...]

## VII. THE COMMITTEE'S ANALYSIS ON THE LEGAL NATURE OF THE DECISION ON JURISDICTION AND LIABILITY IN THE CASE AT HAND

173. Based on the allegations presented by the Parties on this matter, it is clear that both agreed on the fact that under ICSID proceedings there is only one award that is final, binding and that can ultimately be subject to an annulment proceeding.<sup>180</sup> However, the Parties disagree on whether the Decision on Jurisdiction and Liability could have been amended by the Tribunal, upon request of Respondent.<sup>181</sup>

### A. DEFINITION OF AWARD UNDER THE ICSID CONVENTION AND THE ARBITRATION RULES

174. Pursuant to Article 52 of the ICSID Convention an annulment proceeding is exclusively for an award. Therefore it is necessary to define the nature of the Decision on Jurisdiction and Liability in order to determine whether it can be subject to this annulment proceeding.

175. The ICSID Convention and the Arbitration Rules are silent with respect to a definition of "award." However, the Committee considers that the meaning and scope of such term may be found by interpreting the provisions of the ICSID Convention and the Arbitration Rules pursuant to the *Vienna Convention on the Law of Treaties* (1969).

176. Article 48 of the ICSID Convention and Arbitration Rule 47 provide a list of elements that an award must necessarily contain. The express terms of Article 48 of the ICSID Convention are as follows:

#### *Article 48*

*(1) The Tribunal shall decide questions by a majority of the votes of all its members.*

*(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.*

*(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.*

*(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.*

*(5) The Centre shall not publish the award without the consent of the parties.*

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<sup>180</sup> Hearing on Annulment, Tr. 196:22.

<sup>181</sup> While Respondent argues that a preliminary decision has res judicata effect and that an award incorporates all previous decisions rendered by the tribunal so they can be ultimately subject of an annulment proceeding, Claimant argues that a preliminary decision stands as an independent decision, and of itself, that could be revisited and revised by request of any of the Parties.

177. In applying the general rule of interpretation set forth in Article 31 of the *Vienna Convention on the Law of Treaties*,<sup>182</sup> this Committee finds that the ordinary meaning to be given to Article 48 of the ICSID Convention, in its context and in light of its object and purpose, should be to reserve the term “award” for the final decision in writing, voted by the tribunal, whereby it makes a final disposition of the case, on all matters submitted by the parties, stating all the reasons on which it was based. No decision short of that standard should be considered an award under ICSID proceedings.

178. Arbitration Rule 47 offers further detail on the requirements an award must meet:

***Rule 47***  
***The Award***

*(1) The award shall be in writing and shall contain:*

*(a) a precise designation of each party;*

*(b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution; Arbitration Rules*

*(c) the name of each member of the Tribunal, and an identification of the appointing authority of each;*

*(d) the names of the agents, counsel and advocates of the parties;*

*(e) the dates and place of the sittings of the Tribunal;*

*(f) a summary of the proceeding;*

*(g) a statement of the facts as found by the Tribunal;*

*(h) the submissions of the parties;*

*(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and*

*(j) any decision of the Tribunal regarding the cost of the proceeding.*

*(2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.*

*(3) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.*

179. In all ICSID Arbitrations, the award must necessarily meet all of the elements set forth in the articles previously referred.

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<sup>182</sup> This provision states as follows: **Article 31 - General rule of interpretation:** **1.** A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. **2.** The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. **3.** There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. **4.** A special meaning shall be given to a term if it is established that the parties so intended.

180. Furthermore, in addition to the award on the merits, Arbitration Rules 43 and 41 provide for two possible types of awards:

- Arbitration Rule 43 provides that if the parties reach a settlement of the dispute in the course of a proceeding, the tribunal may embody such settlement in an award.<sup>183</sup> According to the provisions of the ICSID Convention, such award would be final, binding, recognized and ultimately enforced by the parties.<sup>184</sup>
- In addition, Arbitration Rule 41(6) provides that if the tribunal decides that the dispute is not within the jurisdiction of the Centre or its competence, or that all claims are manifestly without legal merit, the tribunal should render its decision in an award.<sup>185</sup> Such award would be subject to the remedies provided by the ICSID Convention, which include interpretation, rectification and ultimate annulment of the award.<sup>186</sup>

181. Another reason that supports that under the ICSID system there is only one final Award is that neither the ICSID Convention nor the ICSID Arbitration Rules expressly provide for the possibility of issuing partial awards during the course of the proceedings, as other arbitration rules do. For instance ICC Arbitration Rules expressly provide that both “partial” and “definitive” awards may be issued.<sup>187</sup> Likewise, the London Court of International Arbitration (LCIA) Rules expressly provide for the possibility of issuing interim as well as other awards.<sup>188</sup> Furthermore, under the UNCITRAL Arbitration Rules the tribunal is entitled to make interim, interlocutory or partial awards.<sup>189</sup>

182. The ICSID Convention and the Arbitration Rules are silent with respect to interim or partial awards, and instead, provide in Article 48 of the ICSID Convention and Arbitration Rule 47 the requirements that a decision must meet in order to be deemed an award.

183. Based on the above, under the ICSID system, there is only one award that is final and disposes of the case in its entirety. Consequently, in accordance with Article 52 of the ICSID Convention, a motion for annulment may only proceed against that award.

## **B. THE DECISION ON JURISDICTION AND LIABILITY WAS INCORPORATED INTO THE AWARD**

184. Based on the fact that there can only be one final award in the ICSID system, the Committee finds that an application for annulment concerning a decision issued prior to the award (*e.g. a decision on a challenge, a provisional measure, or a decision upholding*

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<sup>183</sup> Arbitration Rule 43: (2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

<sup>184</sup> Note C to Rule 43 of the 1968 edition of the Arbitration Rules.

<sup>185</sup> Arbitration Rule 41: (6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

<sup>186</sup> Note F to Rule 41 of the 1968 edition of the Arbitration Rules.

<sup>187</sup> ICC Arbitration Rules, Article 2.

<sup>188</sup> LCIA Rules, Article 26.7.

<sup>189</sup> UNCITRAL Arbitration Rules, Article 34.1.

*jurisdiction, a decision on liability*) cannot be challenged under a motion for annulment, unless and until it is incorporated in the final award.

185. The Background paper on Annulment for the Administrative Council of ICSID, prepared by the ICSID Secretariat, dated August 10, 2012, supports such position by stating that a prior decision, rendered during the course of the proceedings, can be subject to an annulment proceeding by virtue of its incorporation into the award:<sup>190</sup>

*The application for annulment must concern an ICSID award, which is the final decision concluding a case. Since there can be only one award in the ICSID system, the parties must wait until that award is rendered before initiating any post-award remedies. An application for annulment concerning a decision issued prior to the award (e.g. a decision on a challenge, a provisional measure, or a decision upholding jurisdiction) cannot be challenged before it becomes part of the eventual award, even if it raises issues that may constitute the basis for an annulment application.*<sup>191</sup>

(Emphasis added)

186. The act of incorporating a prior decision in the award is essential for it to constitute the basis for an annulment proceeding. Schreuer expressly confirms that any decision, prior to the issuance of the award may not be solely subject to an annulment proceeding:

*Other decisions of the tribunal prior to its award are also not subject to annulment. This applies to procedural orders (See Art. 44, paras. 50-53) or to decisions on provisional measures under Art. 47. To the extent that such interim measures are reflected in the award, they become subject to annulment.*<sup>192</sup>

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<sup>190</sup> The ICSID Secretariat prepared this paper to assist Contracting States with a matter raised by the delegation of the Republic of Philippines at the 45<sup>th</sup> Annual Meeting of the ICSID Administrative Council on September 23, 2011, as promised at that meeting. Specifically, the Republic of Philippines urged the Administrative Council to consider seriously the need to issue guidelines for use by *ad hoc* Committees to ensure fair and effective annulment proceedings. The Secretary-General undertook for the ICSID Secretariat to prepare a background paper on annulment for consideration by the Administrative Council, and, if requested by Contracting States, to facilitate meeting of representatives to look further into this subject. No other Contracting State commented on the presentation of the Philippines or the undertaking of the Secretary-General to prepare this background paper.

The ICSID Secretariat took no position on such paper as to whether a specific decision of an ICSID *ad hoc* Committee is correct or is within the proper scope of review allowed by Article 52 of the ICSID Convention. (paragraphs 1, 3 and 6 of the Background Paper on Annulment For the Administrative Council of ICSID dated August 10, 2012 Available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11>. (Last accessed April 1<sup>st</sup>, 2013)

<sup>191</sup> Background Paper on Annulment for the Administrative Council of ICSID, prepared by the ICSID Secretariat, dated August 10, 2012, p. 12, ¶ 35.

<sup>192</sup> CHRISTOPHE H. SCHREUER, "THE ICSID CONVENTION: A COMMENTARY," Cambridge University Press, 2001, p. 922, ¶ 64.

(Emphasis added)

187. Additionally, in previous ICSID cases, requests for annulment have been refused for proceeding against decisions that did not qualify as an award, nor were incorporated in the final award. For instance, in the case of *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, the Respondent filed an application for annulment of the tribunal's Decision on Preliminary Objections to Jurisdiction. The Acting Secretary-General of ICSID notified the Respondent of his decision not to register the application for annulment on the ground that the Tribunal's decision of April 14, 1988 was not an "award" under Article 52 of the ICSID Convention and Arbitration Rule 50.<sup>193</sup>

188. The above cited considerations rule out the possibility of solely challenging a decision, without having it incorporated into the Award.

189. In the case at hand, both Parties allege that the Award somehow incorporated the Decision on Jurisdiction and Liability. Specifically, Respondent argues that:

*The awards incorporate, formally speaking the holdings that had been rendered before them in prior decisions, and that's how a decision gets subjected to review in an annulment context; that's what happened here. But that does not indicate anything about when the decision itself became binding.*<sup>194</sup>

(Emphasis added)

190. Claimant also agrees to the Decision on Jurisdiction and Liability being incorporated into the Award in the following terms:

*So the Tribunal has the right, as per Article 48 (3), to substantiate its holding in the award. And sometimes you see some decisions on jurisdictions that are just one line, and then you find in the final award when they go into the merits and incorporate the decision on Jurisdiction, all the grounds for the decision on jurisdiction. It is one way of doing it, and it is possible.*

*[...]What the Tribunal must consider when ruling as to whether there must or not be an annulment is to consider the award with the decision, including all the substantiations given by the award.*<sup>195</sup>

(Emphasis added)

191. From the above, it is clear that both Parties manifest the possibility of having awards that incorporate prior decisions (i.e. a decision on jurisdiction and liability).

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<sup>193</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Case No. ARB/84/3, Award on the Merits, p. 334, ¶ 26.

<sup>194</sup> Hearing on Annulment, Tr. 207:2.

<sup>195</sup> Hearing on Annulment, Tr. 113:6.



According to the Parties, the Decision on Jurisdiction and Liability was incorporated into the Award, so that it can be subject to this annulment proceeding.

192. The Committee notes that under the ICSID Convention and the Arbitration Rules there is no provision regarding the incorporation of a prior decision in the award so that it can be subject to a motion for annulment. There is no specific test to determine whether a prior decision was ultimately incorporated into the award.

193. In addition, there are no previous decisions by *ad hoc* Committees that may have an illustrative value in this regard. Annulment decisions by other *ad hoc* Committees have not addressed nor analyzed this issue specifically. Instead, they “automatically” treat prior decisions as part of the award without stating the reasons to support such finding.<sup>196</sup>

194. In the case at hand, the Committee considers that the Award incorporated by reference the Decision on Jurisdiction and Liability. Specifically, Section V “Decision”, page 106 of the Award supports such incorporation: “*On the basis of the reasons given both in its First Decision and in the present Award, the Tribunal, by majority decision, hereby:[...].*” (Emphasis added)

195. Based on the above, the Tribunal incorporated the prior decision to the Award. Consequently both decisions comprise the Award, which may be subject to this annulment proceeding.

### C. THE AWARD IS FORMED BY TWO DECISIONS

196. In the present case, the Award was formed by two juridical acts, issued at different procedural times that complement each other: (i) the Decision on Jurisdiction and Liability issued on January 14, 2010 and (ii) the Award issued on March 28, 2011.

197. The formal terminology given by the Tribunal to the “Decision on Jurisdiction and Liability” and to the “Award” is of no importance to the Committee because what matters is the substance and content of the decisions. The Committee finds that the Tribunal disposed of the case in its entirety through both decisions jointly considered, notwithstanding they were issued at different procedural times. Based on such premise, the Award should be envisioned as composed by two separate decisions that complement each other: (i) the decision on jurisdiction and liability, (ii) and the decision on causation and quantum.

198. Since it is undisputed that the Award incorporates the Decision on Jurisdiction and Liability, all the provisions of the ICSID Convention and the Arbitration Rules that concern the drafting, content and issuance of the award apply to both decisions.

199. Under such statement, the decisions, jointly considered, constitute the Award and therefore, are subject to grounds for annulment under Article 52 of the ICSID Convention.

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<sup>196</sup> E.g. *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Republic of Gabon*, ICSID Case No. ARB/04/5.

**D. RESPONDENT’S RIGHT TO OBJECT THE CONTENT OF THE DECISION ON JURISDICTION AND LIABILITY WAS WAIVED IN ACCORDANCE WITH ARBITRATION RULE 27**

200. Respondent seeks the annulment of both the Decision on Jurisdiction and Liability and of the Award. However, the Committee considers that Respondent’s right to claim the annulment of the Decision on Jurisdiction and Liability deems waived in light of Arbitration Rule 27. The express terms of Arbitration Rule 27 are as follows:

*A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.*

(Emphasis added)

201. The waiver, provided by Arbitration Rule 27 applies with respect to the following claims:

- i. The Tribunal found a breach of the BIT based on a claim which Ukraine did not have an opportunity to dispute.
- ii. The Award did not consider the implications of the Settlement Agreement (i.e. disregarded and failed to apply the waiver provided by Clause 12 of the Settlement Agreement). Additionally the Award disregarded the res judicata effect of the Lemire I Award.
- iii. The Majority failed to state reasons in its Decision on Jurisdiction and Liability with respect to Clause 12 of the Settlement Agreement

202. The claims previously referred entail (i) a procedural violation (*not having an opportunity to dispute a claim*) and (ii) a violation of a procedural rule or principle applicable to the Decision on Jurisdiction and Liability in light of the analysis above and incorporated in Article 48(3) of the ICSID Convention<sup>197</sup> and Arbitration Rule 47(1)(i).<sup>198</sup>

203. The waiver provided by Arbitration Rule 27 applies to the case at hand on the basis that Respondent knew or should have known about such violations since the moment the Decision on Jurisdiction and Liability was issued on January 14, 2010. Consequently, Respondent should have objected to such violations and should have reserved its rights to claim these objections in a subsequent annulment proceeding. There was no reason for Respondent to remain silent and wait until the Award was issued to object to the terms and

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<sup>197</sup> Article 48(3): “The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”

<sup>198</sup> Arbitration Rule 47(1)(i): “The award shall be in writing and shall contain: (...) the decision of the Tribunal on every questions submitted to it, together with the reasons upon which the decision based (...).”

content of the first decision. Respondent's silence amounts to a waiver of its rights to object to the Decision on Jurisdiction and Liability at the present stage.

204. Below, the Committee substantiates the applicability of Arbitration Rule 27 with respect to each of Respondent's claims.

**1. The Tribunal found a breach of the BIT based on a claim which Ukraine did not have an opportunity to dispute**

205. According to Respondent, the Majority seriously departed from a fundamental rule of procedure by having found a breach of the BIT based on a claim asserted for the first time in Claimant's Post-Hearing Memorial on jurisdiction and liability that Respondent did not have an opportunity to dispute.

206. With respect to such claim, Respondent could have objected to such new allegation and could have requested from the Tribunal an opportunity to comment on it immediately after the Post-Hearing Memorial was submitted and even during the Hearing on remaining issues.<sup>199</sup> Despite having the procedural opportunity to raise such objections and reserve its rights, Respondent did not object.

207. Moreover, Respondent alleges feeling aggravated by the Decision on Jurisdiction and Liability because, according to Respondent, it is based on a claim (violation of the BIT (FET standard) for the illegal out-of-tender allocation of frequencies) it did not have the opportunity to dispute. In this respect, Respondent could have objected to the Decision on Jurisdiction and Liability before the Tribunal after its issuance, prior to the issuance of the Award, thus preserving its rights under Rule 27. Even more so when 14 months passed between the issuance of the Decision on Jurisdiction and Liability (January 14, 2010) and the Award (March 28, 2011).

208. Additionally, at the end of the Hearing on remaining issues, Respondent was given a sufficient opportunity to raise any objections with regard to the procedure (i.e. the Decision on Jurisdiction and Liability):

*The Chairman: [...] So I will finalize this by asking both parties if, at this stage, they are aware of any breach of due process; and if they are aware of any breach of due process, they are kindly asked to state that, so that the Tribunal can take any corrective action.*

....

*The Chairman: Thank you very much Mr. Gharavi, Mr. Willems do you have—I know after this introduction it's difficult now to suddenly say, 'Yes, we have a basic problem of due process'. But please do feel free, if there is any problem of due process, it is the moment now to state it and we will take the corrective actions which are appropriate.*

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<sup>199</sup> In the underlying arbitration, the parties filed simultaneous post-hearing briefs regarding jurisdiction and liability on March 4, 2009. The Tribunal rendered its Decision on Jurisdiction and Liability on January 14, 2010. Afterwards, the Second Phase Arbitration on the remaining issues began. On July 12, 2010 the hearing on remaining issues took place.

*Mr. Willems: We have no objections to assert. We likewise join the warm spirit of cordiality and thank everyone here.*<sup>200</sup>

209. Notwithstanding the clear opportunity given to Respondent by the Tribunal, to object to any procedural irregularity, thus preserving its rights under Rule 27, Respondent failed to raise the procedural violation of not having the opportunity to object to a new claim. The sanctions in the Arbitration Rules for the non-observance of time limits are of a procedural nature and entail the loss of the right to object. Such sanction is in the interest of procedural efficiency and avoids dilatory behavior of the parties.

210. In the case at hand, if Respondent felt aggravated by the Decision on Jurisdiction and Liability for resolving an allegation Respondent did not have the opportunity to dispute, Respondent should have objected and reserved its rights immediately after issuance of the Decision and until the Award was issued, including during the Hearing on remaining issues. By not raising objections, this Committee finds that, according to Arbitration Rule 27, Respondent waived its right to object to the decision's contents at the present stage.

211. Schreuer's Commentary on Arbitration Rule 27, included in the discussion of Article 52 of the ICSID Convention is consistent with such determination. He states that a party that is aware of a procedural violation should react immediately objecting its violation. Otherwise, its failure to do so will be interpreted as a waiver to object at a later stage of the proceedings:

*[...] a party that is aware of a violation of proper procedure must react immediately by stating its objection and by demanding compliance. Under Arbitration Rule 27 failure to do so will be interpreted as a waiver to object at a later stage. (See para. 60 supra). Rule 27 does not refer to annulment proceedings expressis verbis, but Rule 53 extends the applicability of the Arbitration Rules to annulment in general terms. It follows that 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 fundamental rule of procedure for purposes of annulment. **To hold otherwise would mean that a party could leave a procedural irregularity unopposed to keep it in store as ammunition against a possible unfavourable award in annulment proceedings** (see also paras. 124-129, 174 supra)[...].*<sup>201</sup>

(Emphasis added)

212. Moreover, Schreuer states that a party that has failed to object to a violation of procedure before the tribunal may not rely on this violation as a ground for annulment:

*Ad hoc committees have held that a party that has failed to object to a violation of procedure before the tribunal may not rely on this violation as*

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<sup>200</sup> Hearing on remaining issues, Tr. 274:6.

<sup>201</sup> SCHREUER, "THE ICSID CONVENTION: A COMMENTARY," p. 983, ¶ 262.

*a ground for annulment. In Klockner I, the ad hoc Committee remarked in the context of an alleged violation of Article 52(1)(d) that an application for annulment “...[cannot] be used by one party to complete or develop an argument which could and should have made during the arbitral proceeding...”. More specifically, in the context of an alleged violation of the right to be heard (see paras. 309-311 supra), the ad hoc Committee said:*

*...it suffices to note that the Claimant has not established that it made a timely protest against the serious procedural irregularities it now complains of. Subject to what will be said later, Rule 26 [now Rule 27] of the ICSID Rules of Procedure for Arbitration Proceedings would therefore rule out a good part of its complaints.<sup>202</sup>*

213. This Committee finds that Respondent failed to object to a procedural violation (i.e. *not having an opportunity to dispute a claim asserted for the first time in the Post-Hearing Memorial*) before the tribunal and consequently may not rely on this violation as a ground for annulment.

214. In the Annulment case of *CDC Group plc v. Republic of Seychelles* the committee noted that the Republic had the opportunity to raise its objection prior to the issuance of the award, and since it did not, its objection was deemed waived. Expressly, the committee stated that:

*As an initial matter, the Republic’s allegation appears vulnerable to the point that it failed to challenge Sir Anthony’s alleged improper conduct at any time prior to the issuance of the Award, even though all of the conduct to which objection now is made (excluding the fact of the Award itself) occurred not later than during the preliminary hearing. It is arguable that a timely objection or challenge under Article 57 of the Convention and ICSID Arbitration Rule 9 would have been the appropriate remedy and that this complaint effectively has been waived and is therefore simply inadmissible. This conclusion is confirmed by Note B. to ICSID Arbitration Rule 9 (last published in 1975 as part of ICSID/4/Rev.1 (“ICSID Regulations And Rules”): A proposal to disqualify an arbitrator must be filed promptly, and under any event before the proceeding is declared closed (see Rule 38). Promptness must be measured relative to the time when the proposing party first learns of the grounds for possible disqualification. If it receives this information so late that it can no longer make a proposal before the proceedings is declared closed, its remedy is to request an annulment of the award pursuant to Article 52 of the Convention (Rule 50). In the absence of having challenged Sir Anthony on the basis now asserted at any time during the 147 days that followed the conclusion of the preliminary hearing on July 23, 2003 and issuance of*

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<sup>202</sup> *Ibid.*, p. 983, ¶ 263.

*the Award on December 17, 2003 the Republic must be deemed to have waived any such objection...*<sup>203</sup>

215. The above-cited case illustrates how objections regarding a procedural irregularity should be filed timely, if not, pursuant to procedural economy, they deem waived.

216. Respondent had no reason to wait to complain about procedural irregularities (i.e. not having the opportunity to dispute a claim) that were known to it since the issuance of the Decision on Jurisdiction and Liability on January 14, 2010. To hold otherwise would be against procedural economy and would mean it was correct for Respondent to leave such procedural irregularity as future ammunition against a possible unfavorable award.

**2. The Decision on Jurisdiction and Liability did not consider the implications of the Settlement Agreement (i.e. disregarded and failed to apply the waiver provided by Clause 12 of the Settlement Agreement) and disregarded the res judicata effect of the Lemire I Award**

217. The waiver provided by Arbitration Rule 27 applies to the claim related to the absence of consideration in the Decision on Jurisdiction and Liability of the implications of the Settlement Agreement and the res judicata effect of the Lemire I. To explain how the waiver applies with respect to this claim, the Committee observes that Arbitration Rule 27 provides certain prerequisites that have to be met in order for the waiver to apply:

- i. *A party which knows or should have known*
- ii. *that a provision of*
  - (1) *the Administrative and Financial Regulations,*
  - (2) *of these Rules,*
  - (3) *of any other rules or agreement applicable to the proceeding,*
  - (4) *or of an order of the Tribunal*
- iii. *has not been complied with*
- iv. *and which fails to state promptly its objections thereto.*

218. In the case at hand, the Committee finds that the previous prerequisites were met, based on the following reasons:

- i. ***A party which knows or should have known:*** First, the Parties knew from the moment the Tribunal issued the Decision on Jurisdiction and Liability (on January 14, 2010) that the Award was going to be constituted by two independent juridical acts, issued at different procedural times.

The previous fact was known to the Parties from the content of the Decision on Jurisdiction and Liability in the following terms:

*The Tribunal agrees with Respondent that the changes suffered by the Ukrainian and the world economy since the dates when the expert reports*

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<sup>203</sup> Exhibit RAL-5, *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of June 29, 2005, ¶ 53.

were prepared, and its effects on the quantum of the damage, require further investigation. Furthermore, the assumptions underlying the experts' reports do not coincide with the conclusions reached by the Tribunal in this Decision and the quantum evidence therefore requires recalibration in accordance with the present decision. Consequently, the question of the appropriate redress of the breach, including the quantification of the damages, will be addressed in a short second phase of this arbitration. After hearing the parties, the Tribunal will issue a Procedural Order for the continuation of the procedure.<sup>204</sup>

- ii. **that a provision of these Rules:** Respondent and Claimant knew that the Decision on Jurisdiction and Liability was already part of the Award and therefore said decision had to comply with the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(j), specifically because said decision resolved in its entirety all the jurisdictional and liability disagreements between the Parties and therefore, in this Committee's view, such ruling had to resolve all the questions submitted to the Arbitral Tribunal on these two issues and had to express all the reasons on which it was based.
- iii. **has not been complied with:** From Respondent assertions it is clear that Ukraine contends a violation of the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i), specifically, as mentioned, to the requisites consisting in (i) the Award having to deal with every question submitted to the Tribunal and (ii) the Tribunal having to state the reasons upon which their findings were based.
- iv. **and which fails to state promptly its objections thereto:** Respondent felt that the Decision on Jurisdiction and Liability violated the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i), however it failed to state promptly its objections thereto.
- v. **Waived its right to object:** Based on Respondent having failed to state promptly its objections, Respondent right to object the contents of the Decision on Jurisdiction and Liability is deemed to be waived.

219. Taking into consideration the above, the specific reasons that justify the applicability of the waiver with respect to each of the claims asserted by Respondent are the following:

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<sup>204</sup> Decision on Jurisdiction and Liability, January 14, 2010, ¶ 425.

i. ***The Majority manifestly exceeded its powers since it dismissed the waiver provided by Clause 12 of the Settlement Agreement.***<sup>205</sup>

220. According to Respondent, Clauses 10 to 12 of the Settlement Agreement<sup>206</sup> were not even addressed nor considered by the Majority in the Decision on Jurisdiction and Liability. Moreover, Respondent argues that paragraph 185 of the Award, summarily dismissed Respondent's arguments regarding the waiver contained in Clause 12 of the Settlement Agreement.<sup>207</sup>

221. Additionally, Respondent claims that the Majority did not analyze the terms of Clause 13(b) of the Settlement Agreement<sup>208</sup> or considered the letter from Mr. Aksenenko,<sup>209</sup> which demonstrated Claimant's awareness of the practice taking place during the Interregnum Period.

222. The Committee observes that this claim regards a violation of the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i); specifically, the Decision on Jurisdiction and Liability not dealing with every question submitted to the Tribunal (*i.e. Applicability and scope of Clauses 10 to 12 of the Settlement Agreement*). Such violation should have been objected to earlier, not at the present stage of the annulment.

ii. ***Failure to apply the waiver provided by Clause 12 of the Settlement Agreement***<sup>210</sup>

223. Respondent alleges that the Majority failed to apply the waiver provided by Clause 12 of the Settlement Agreement and therefore argues that it is a non-application of the law and a manifest excess of the Tribunal's powers.<sup>211</sup>

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<sup>205</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 155-170. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 92 and 93.

<sup>206</sup> **Exhibit RA-23**, Settlement Agreement dated March 20, 2000, Clause 10: "*The Parties agree and confirm that all claims, complaints and requests contained in the Consent to Arbitrate, Notice for Arbitration, Ancillary Claims and all other official letters of the Claimant to the Respondent or ICSID, as well as other correspondence of the Claimant addressed to third parties are hereby settled*".

Clause 11: "*By such settlement the Parties, in the event of compliance with this Agreement, exclude all of the claims referred to in item 10 of Section II "Settlement of the Dispute" from any further judicial or arbitration settlement.*"

Clause 12: "*The Parties acknowledge the absence of any claims or misunderstandings between them as on the date of signing this Agreement.*"

<sup>207</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 166.

<sup>208</sup> **Exhibit RA-23**, Settlement Agreement dated March 20, 2000, Clause 13(b): "*As a good-will gesture, the Respondent agrees to fulfill the following additional conditions of the Claimant for the purpose of this settlement under the schedule below. (b) By May 15, 2000 the Respondent, in person of the State Committee on Communications and Information Technology, agrees to use its best possible efforts to consider in a positive way the application of the Gala Radio to provide it with the licenses for radio frequencies (provided there are free frequencies bands) in the following cities Kharkiv, Lviv, Donetsk Zaporizhyya, Lugansk, Simpheropol, Dnepropetrovsk, Odessa, Vynnytsya, Kryviy Rog, Uzhgorod.*"

<sup>209</sup> **Exhibit RA-22**, Letter from National Council Member Mr. S. Aksenenko to Vice Prime Minister of Ukraine Mr. S. L. Tyhypko, September 28, 1999.

<sup>210</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 171-182. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 84-96.



224. The Committee observes that this claim regards a violation of the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i); specifically, the Decision on Jurisdiction and Liability not dealing with every question submitted to the Tribunal (*i.e. Applicability and scope of Clauses 10 to 12 of the Settlement Agreement*). Such violation should have been objected to earlier, not at the present stage of the annulment.

**iii. *The Majority disregarded the res judicata effect of Lemire I with respect to the illegal allocation of frequencies during the Interregnum Period and therefore manifestly exceeded its power.***<sup>212</sup>

225. Respondent alleges that the Majority disregarded the res judicata effect of the award rendered in Lemire I and claims that it amounts to a non-application of international law and a manifest excess of powers.<sup>213</sup>

226. Again, the Committee observes that this claim regards a violation of the procedural rule or principle recognized in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i); specifically, the Decision on Jurisdiction and Liability not dealing with every question submitted to the Tribunal (*i.e. Applicability and scope of Clauses 10 to 12 of the Settlement Agreement*). Such violation should have been objected to earlier, not at the present stage of the annulment.

**iv. *The Majority failed to state reasons in its Decision on Jurisdiction and Liability with respect to Clause 12 of the Settlement Agreement.***<sup>214</sup>

227. Respondent argues that the Majority did not explain nor provide reasons to reject the waiver provided by Clause 12 of the Settlement Agreement.<sup>215</sup>

228. This claim regards an express violation of the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i); specifically, the prerequisite that the Decision on Jurisdiction and Liability had to state the reasons upon which its findings were based. Such violation should have been objected to earlier, not at the present stage of the annulment.

229. Respondent's failure to object to the violations of the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i) at any time during the 14 months that followed the issuance of the Decision on Jurisdiction and Liability (January 14, 2010) until the Award (March 28, 2011) amounts to a waiver of its rights to object at the present time. And therefore, all annulment claims made in

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<sup>211</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 181. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶ 91.

<sup>212</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 189-207. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 110-118.

<sup>213</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 204.

<sup>214</sup> Respondent's Annulment Memorial, February 8, 2012, ¶¶ 183-188. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶¶ 97-109.

<sup>215</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 186.

connection with the Decision on Jurisdiction and Liability are dismissed per Arbitration Rule 27.

230. The above conclusion makes unnecessary and moot any analysis regarding Respondent's argument that the Decision on Jurisdiction and Liability did not consider the implications of the Settlement Agreement (i.e. disregarded and failed to apply the waiver provided by Clause 12 of the Settlement Agreement) and disregarded the res judicata effect of the Lemire I Award. However, the decision on this issue would have still favored Claimant, as the Committee considers that such allegation is without merit in light of the very high standards established in Article 52 of the ICSID Convention.

**E. WHETHER THE DECISION ON JURISDICTION AND LIABILITY ACQUIRED RES JUDICATA EFFECT IS IRRELEVANT TO THE APPLICATION OF ARBITRATION RULE 27**

231. During the hearing, the Parties disagreed on when the Decision on Jurisdiction and Liability became res judicata (meaning final and binding). In this respect, Claimant claims that such decision became final or binding once it was incorporated in an award, while Respondent alleges that the Decision on Jurisdiction and Liability had res judicata effect from the moment it was issued.

232. The Committee considers irrelevant whether the Decision on Jurisdiction and Liability acquired res judicata effect because under Arbitration Rule 27, if Respondent felt that the Decision on Jurisdiction and Liability violated the procedural rule or principle incorporated in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i), Respondent should have objected to its terms or reserved its rights before the Tribunal immediately after the issuance of the Decision and prior to the issuance of the Award. No other conclusion can be derived from a strict application of Arbitration Rule 27.

**VIII. THE COMMITTEE'S ANALYSIS ON THE CLAIMS REGARDING THE ANNULMENT OF THE AWARD**

**A. THE SCOPE OF AN ANNULMENT PROCEEDING**

233. The fundamental goal of the ICSID system is to assure the finality of the ICSID arbitration award.<sup>216</sup> In this respect, the Committee agrees with Claimant that the annulment proceeding concerns serious procedural irregularities in the decisional process rather than an appeal on the merits. The limited and exceptional nature of the annulment remedy provided by Article 52 of the ICSID Convention forbids an inquiry on the substance of the case, on the misapplication of the law or on mistakes in analyzing the facts.<sup>217</sup>

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<sup>216</sup> Background Paper on Annulment for the Administrative Council of ICSID, prepared by the ICSID Secretariat, dated August 10, 2012, p. 29, paragraph 72.

<sup>217</sup> Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twentieth Annual Meeting 3 (October 2, 1986): "The history of the Convention makes it clear that the draftsmen intended to: (i) assure the finality of the ICSID awards; (ii) distinguish carefully an annulment proceeding from an appeal; and (iii) construe narrowly the ground for annulment, so that this procedure remained exceptional.

234. Based on the above, this Committee will exercise its jurisdiction under a narrow and limited mandate, restricted to analyzing only the legitimacy of the Award and not its correctness.<sup>218</sup>

235. In the case at hand, Respondent relied on three grounds set forth in Article 52 of the ICSID Convention to request the annulment of the Decision on Jurisdiction and Liability together with the Award: (i) *manifest excess of powers*; (ii) *departure from a fundamental rule of procedure*; (iii) *failure to state reasons*.

236. It is important to stress that this Committee will only address the grounds and claims presented by Respondent regarding the annulment of the Award (decision on causation and quantification). The other claims regarding the annulment of the Decision on Jurisdiction and Liability ought to be disregarded based on the reasons set forth in Section VII of this Decision.

### 1. Manifest excess of powers: Article 52(1)(b)

237. A manifest excess of powers as a ground for annulment relates either to jurisdiction or to the failure to apply the proper law.<sup>219</sup> With respect to the latter, prior *ad hoc* committee decisions have determined that the Tribunal's acting *ex aequo et bono* without agreement of the parties to do so could also constitute a manifest excess of powers.<sup>220</sup> Nonetheless, an erroneous application of the law cannot amount to a basis for annulment.<sup>221</sup>

238. With respect to the content of the Award (decision on causation and quantum) Respondent argues that the Majority's failure to apply the legal test for causation it had itself enunciated amounted to a non-application of the proper law and that the Tribunal therefore acted *ex aequo et bono* without the agreement of the Parties. Secondly, that the Majority's determination on causation went beyond the scope of liability defined in the Decision on Jurisdiction and Liability.

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<sup>218</sup> **Exhibit CAL-22**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment ¶ 24

<sup>219</sup> Background Paper on Annulment for the Administrative Council of ICSID, prepared by the ICSID Secretariat, dated August 10, 2012, p. 42, ¶ 82.

<sup>220</sup> **Exhibit RAL-1**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, May 16, 1986, ¶¶ 23 and 28; **Exhibit RAL-3**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, December 3, 1992, ¶ 7.28; **Exhibit RAL-13**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on Annulment, May 3, 1985, ¶ 79; **Exhibit RAL-16**, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, April 29, 1988, ¶ 5.03; **Exhibit RAL-9**, *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, July 30, 2010, ¶ 218; **Exhibit RAL-15**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Decision on Annulment, March 21, 2007, ¶ 44; **Exhibit RAL-6**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007, ¶ 49.

<sup>221</sup> **Exhibit RAL-9**, *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, July 30, 2010, ¶ 320 (k). See also Background Paper on Annulment for the Administrative Council of ICSID, prepared by the ICSID Secretariat, dated August 10, 2012, p. 45, ¶ 91.

239. The Committee considers that Respondent’s claims are inadmissible within the framework of Article 52(1)(b).

240. *Ad hoc* committees have identified an approach to determining whether there has been a manifest excess of powers. It is a two-step analysis, that Respondent duly invoked, which consists in determining whether there was an excess of powers and, if so, whether the excess was manifest.<sup>222</sup> In the case at hand, this Committee finds, under the first step of the analysis that there was no excess of powers. This finding obviates the need for the Committee to perform the second step of the analysis, regarding whether the excess was “manifest.”

*i. The Majority’s failure to apply its own theory of causation amounts to non-application of the proper law*

241. In order to determine whether there was a manifest excess of powers regarding the applicable law, the Committee deems important to determine what is understood by “applicable law.” In this respect, Article 42(1) of the ICSID Convention provides that:

*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

242. In the case at hand, the Committee believes that the Tribunal did identify the applicable law with regards to the standard of causation, *i.e.* *International Law Commission’s Article 36.1 on Responsibility of States for Internationally Wrongful Acts*. The Tribunal even cited such general principle in the Award: “*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby.*”<sup>223</sup>

243. The Tribunal further provided that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State’s conduct, and that the causal relationship is sufficiently close (*i.e.* not “too remote”). The Tribunal additionally stated that it was left to arbitrators to define and give content to the specific elements required for causation:

*But beyond this general principle, the ILA Articles remain silent on the particulars of the issue. It is therefore left to judges and arbitrators to define and give content to the specific elements required. The supplementary guidance is provided in Article 39 of the ILC Articles entitled “Contribution to the injury” which states...”[i]n the*

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<sup>222</sup> **Exhibit RAL-35**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for Annulment of the Award, June 29, 2010, ¶ 212; **Exhibit RAL-10**, *Fraport Ag Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, December 23, 2010, ¶ 40; **Exhibit CAL-36**, *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision on the Application for Annulment, June 29, 2012, ¶ 32.

<sup>223</sup> Award dated March 28, 2011, ¶ 155.

*determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity to whom reparation is sought.*<sup>224</sup>

244. Then, the Tribunal defined and addressed each of the elements required for causation:

- a. In paragraphs 158 to 160 of the Award<sup>225</sup> the Tribunal addressed the initial cause, and then in paragraphs 161 and 162 of the Award the Tribunal addressed the “effect” element.<sup>226</sup>
- b. As for the causal link, the Tribunal held that two links in the causal chain had to be proven: (i) that assuming the tenders were decided in a fair and equitable manner and Claimant had participated in them, Claimant could have won the disputed frequencies; and (ii) if with such frequencies, Mr. Lemire would have been able to grow Gala into the broadcasting company he had planned.<sup>227</sup>
- c. In this regard, the Tribunal held that it was likely that Gala Radio would have been awarded licenses if the National Council had proceeded legally.<sup>228</sup> At paragraphs 205 to 207 of the Award, the Tribunal held that Gala Radio was a reasonably funded company that had the financial strength and know-how to develop Gala Radio into the successful broadcasting company Mr. Lemire had planned.<sup>229</sup>

245. In light of the above, the Committee finds that the Tribunal identified the applicable legal standard with respect to causation. Furthermore, the Committee considers that what Respondent is really contending is that the Tribunal incorrectly applied the test that it had itself enunciated, not that it failed to apply it.

246. In this line of thought, the Committee notes that the Tribunal in paragraphs 173 to 202 of the Award analysed whether, assuming that the tenders were decided in a fair and equitable manner and Claimant had participated in them, Claimant could have won the frequencies required to create a national FM broadcaster and an AM channel for talk radio. In analysing this issue, the Tribunal concluded, *inter alia*: (1) that of 80 plus licences that were awarded during the Interregnum Period, Gala Radio should have received, no later than January 1, 2001, at least the 14 frequencies required to create a national FM broadcaster; and (2) that if the May 26, 2004, National Council Decision had been properly adopted, Gala Radio, by far the best qualified of the three competitors in the tender, should have been the winner.<sup>230</sup>

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<sup>224</sup> Award dated March 28, 2011, ¶ 155.

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<sup>227</sup> Award dated March 28, 2011, ¶ 171.

<sup>228</sup> The reasons for its determination were that Gala Radio it was one of the most successful radio operators in Kyiv and because it met the criteria set forth in the Law.

<sup>229</sup> Award dated March 28, 2011, ¶¶ 205-207.

<sup>230</sup> Award dated March 28, 2011, ¶¶ 173 to 202.

247. Moreover, the Committee notes that the Tribunal in paragraphs 203 to 207 of the Award also analysed whether having received the frequencies referred to in the paragraph above, would have enabled Gala Radio to develop into the successful broadcasting company that Mr. Lemire had planned. In analysing this issue, the Tribunal concluded, *inter alia*, that Gala Radio was a reasonably well funded corporation and that it had the financial strength and the necessary know how to successfully operate the two radio channels.<sup>231</sup>

248. Based on the above analysis, the Tribunal concluded that Claimant was able to prove that the initial cause (Ukraine's wrongful acts) and the final effect (Claimant's frustration to fulfil his business plans) are linked through a chain of causation, and that this chain is proximate and foreseeable.

249. Now, the Committee finds that Respondent disagrees with the above analysis of the Tribunal, in that, according to Respondent, the Tribunal should have particularized "*which frequencies, in which cities, with which power, and pursuant to which tenders (won against which competitors) Gala Radio would have probably won [...]*"<sup>232</sup> In other words, Respondent considers that the application of the causation test enunciated by the Tribunal required a more detailed and specific analysis that should have included, *inter alia*, an analysis of the frequencies, the cities, the power of each frequency, the circumstances of each tender, etc.

250. It is clear to the Committee that Respondent's arguments in regards to this matter refer to a difference of criteria as to the proper application of the Tribunal's causation test, which does not amount to a non-application of the law and much less to a manifest excess of powers (Article 52(1)(b)). Therefore, Respondent's allegations must fail in the context of this annulment proceeding.

251. The Committee's finding is consistent with the findings of previous *ad hoc* committees that have stated that the "*error in iudicando*" cannot in itself be accepted as a ground for annulment without indirectly allowing an appeal against the arbitral award.<sup>233</sup>

252. Furthermore, with respect to the argument related to the fact that the "*Majority's determination on causation went beyond the scope of liability defined in the Decision on Jurisdiction and Liability and therefore the Tribunal acted ex aequo et bono, without party authorization and in a manifest excess of its powers,*"<sup>234</sup> the Committee finds that the Tribunal did not determine the issue of causation *ex aequo et bono*.

253. A tribunal acts *ex aequo et bono* when it decides on equity while it is required to decide in law. In the present case, the Tribunal decided in law and even acted in accordance with Respondent assertions:

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<sup>231</sup> Award dated March 28, 2011, ¶¶ 203 to 207.

<sup>232</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 275. *See also* Annulment Memorial, February 8, 2012, ¶ 249.

<sup>233</sup> **Exhibit RAL-13**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on Annulment, May 3, 1985, ¶ 61.

<sup>234</sup> Respondent's Reply on Annulment, June 18, 2012, ¶ 121.

*The Tribunal agrees with Respondent that it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not "too remote"). The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act.*<sup>235</sup>

(Emphasis added)

254. Based on the above, the Tribunal did not act *ex aequo et bono* but in accordance with the law and consistent with Respondent's position.

255. Following the Committee's conclusion that the Tribunal did not fail to apply the proper law, the Committee finds no need to address Respondent's arguments that (1) the application of the proper law would have made a difference to the outcome,<sup>236</sup> or (2) the Tribunal committed an egregious misapplication of the proper law.

**ii. *The Majority's findings in relation to causation disregarded the res judicata effect of the Decision on Jurisdiction and Liability***

256. Respondent alleges that the Majority concluded in the Award that under the hypothesis that Respondent's wrongful acts had not occurred, Gala Radio should have received, no later than January 1, 2001, at least the 14 frequencies required to operate a nationwide FM music network. This holding in the Award, according to Respondent, is inconsistent with the Majority's findings on liability in the Decision on Jurisdiction and Liability.

257. To support its allegation, Respondent claims that the 14 frequencies identified by Claimant during the Hearing on remaining issues corresponded to radio frequency licenses allocated by the State Committee to other broadcasters during the Interregnum Period, and that these 14 frequencies were not awarded by the National Council during the tender announced on January 1, 2001.

258. In addition, Respondent claims that the Award determined that Gala Radio would have obtained these 14 additional frequencies "[i]f the National Council had proceeded properly to award the new licenses" in accordance with the applicable law, and that Gala Radio was "well placed" to win the relevant tenders. This determination, according to Respondent, necessarily assumes that the five tenders pursuant to which these 14 frequencies were allocated did not comply with the Law on Broadcasting, and somehow fell short of the FET standard in the BIT.

259. Respondent concludes by stating that the Decision on Jurisdiction and Liability did not find that any of these five tenders had been carried out in violation of the BIT. Therefore, continues the Respondent, the Majority's determination on causation

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<sup>235</sup> Award dated March 28, 2011, ¶ 155.

<sup>236</sup> Respondent's Reply on Annulment, June 18, 2012, ¶¶ 16-20.

disregarding the res judicata effect of the Decision on Jurisdiction and Liability manifestly exceeded its powers.

260. In this respect, the Committee considers that the underlying issue in Respondent's allegation is whether the 14 frequencies that the Tribunal considered Gala Radio would have secured to achieve a national FM coverage (but for Respondent's wrongdoing) are the same frequencies identified by Claimant during the Hearing on remaining issues. According to Respondent, the frequencies identified by Claimant during the Hearing on remaining issues were allocated in tenders that were not found to be in violation of the BIT in the Decision on Jurisdiction and Liability.

261. The Committee finds that the Tribunal did not determine that the 14 frequencies identified by Claimant in the Hearing on remaining issues are the same 14 frequencies it considered Gala Radio would have secured to operate a nationwide FM network, but for Respondent's wrongdoings. The Tribunal simply asserted, *inter alia*, that "Claimant has averred – and Respondent has not disputed – that with additional licences in 14 locations, Gala Radio would have been able to cover the whole country." Such 14 frequencies, according to the Tribunal, should have been awarded to Gala Radio no later than January 1, 2001 and are part of the 80 plus frequencies that were issued by the Executive Branch of the Government during the period between March 16, 1999 and June 9, 2000, when the National Council was not operative.

262. The Committee finds that to analyse whether Respondent's allegations in this matter merit annulment, it would have to agree with Respondent that the 14 frequencies referred to by the Tribunal in its analysis of causation are the same 14 frequencies that, according to Respondent, were identified by Claimant in the Hearing on remaining issues. The Committee finds that the Award does not support this contention and must therefore dismiss this ground for annulment.

**2. Serious departure from a fundamental rule of procedure:  
Article 52(1)(d)**

***i. The Majority's ruling on causation warrants annulment  
because it seriously departed from a fundamental rule of  
procedure***

263. The Committee agrees with Claimant that to trigger Article 52(1)(d) the departure must be serious and must relate to a fundamental principle of natural justice.<sup>237</sup> *Ad hoc* committees have consistently held that not every departure from a fundamental rule of procedure justifies annulment. Within the examples of fundamental rule of procedure identified by *ad hoc* committees are: (i) the equal treatment of the parties;<sup>239</sup> (ii) the right to be heard;<sup>238</sup> (iii) an independent and impartial tribunal;<sup>240</sup> (iv) the treatment of evidence and burden of proof;<sup>241</sup> and (v) deliberations among members of the Tribunal.<sup>242</sup>

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<sup>237</sup> Claimant's Counter-Memorial on Annulment, April 23, 2012, ¶¶ 53 and 55.

<sup>239</sup> **Exhibit RAL-1**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, May 16, 1986, ¶¶ 87 and 88.

<sup>238</sup> **Exhibit RAL-3**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, December 3, 1992, ¶¶ 9.05-9.10; **Exhibit RAL-18**, *Wena Hotels*



264. In the case at hand, Respondent alleges a violation of the right to be heard, arguing that during the Hearing on remaining issues, Claimant advanced a new theory on causation that Respondent did not have an opportunity to dispute through Mr. Kurus' rebuttal testimony. Consequently, Respondent claims that paragraphs 186 and 187 of the Award support Claimant's new arguments that Ukraine did not have an opportunity to dispute.

265. From the Hearing Transcripts, it is clear that Claimant did not introduce a new theory but rather gave an example of how a national network would be built with a single combination, out of many.<sup>243</sup> The Committee believes that Claimant's argument regarding the 14 frequencies was a mere example that did not change nor had an influence on the Parties' positions and the Tribunal's determination.

266. Despite the above, the Committee finds that the question of whether the 14 frequencies was an example of a hypothetical network is irrelevant for the proceedings at hand. The real issue to be determined by the Committee is whether Claimant had an opportunity to rebut such arguments. And the Committee believes it did, based on the following reasons.

267. First, Claimant asserts that Respondent addressed Claimant's arguments<sup>244</sup> on the 14 frequencies made during the Hearing on remaining issues.<sup>245</sup> In this respect, the

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*Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, ¶ 57; **Exhibit RAL-12**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007, ¶ 71; **Exhibit RAL-10**, *Fraport Ag Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, December 23, 2010, ¶ 197.

<sup>240</sup> **Exhibit RAL-13**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on Annulment, May 3, 1985, ¶ 95; **Exhibit RAL-18**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, ¶ 57; **Exhibit RAL-5**, *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of June 29, 2005, ¶¶ 51-55.

<sup>241</sup> **Exhibit RAL-1**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, May 16, 1986, ¶¶ 90 and 91; **Exhibit RAL-14**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on Annulment, May 17, 1990, ¶ 6.80; **Exhibit RAL-18**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, ¶¶ 59-61.

<sup>242</sup> **Exhibit RAL-13**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on Annulment, May 3, 1985, ¶ 84; **Exhibit RAL-5**, *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of June 29, 2005, ¶ 58.

<sup>243</sup> Hearing on remaining issues, Tr. 23-24:24-10: "That means that with 14 of the frequencies of the 38 we mentioned, we would have been able to cover the whole country, and with seven, two-thirds of the country. **This is only one example** that we just wanted to bring the Tribunal's attention to, because **there are multiple other possibilities**. If we hadn't been excluded, we could have applied to many other frequencies and have many other combinations. **We just wanted to give a proper example** with the seven frequencies for the two-thirds of the coverage, and seven more with 100% of the coverage". (Emphasis added)

<sup>244</sup> Hearing on remaining issues, Tr. 23-24: 16-2: "I kindly ask you to turn to tab 9. You will see in tab 9, which R-209 is, that to complement its network in fact claimant has identified seven frequencies which would have enabled it to cover two-thirds of the population. That's highlighted in yellow. We stayed

Committee considers that in fact Respondent's counsel, Ms. Mouraviova, did refer to such arguments in the following terms:

*MS. MOURAVIOVA:*

*The third element of the review of these charts by the claimant that **came out in the opening statement—and was new—is that claimant highlighted seven frequencies in yellow and seven frequencies in green in the exhibit bundle chart under number 9, which is also respondent Exhibit R-209, and said that either seven green frequencies or seven yellow frequencies could have allowed him to have national coverage defined by him as two-thirds of the population covered. In fact none of these frequencies were put to tender on January 1<sup>st</sup> 2001, but for other tenders, from 2001 to 2003 actually, and therefore Gala Radio could have participated to these tenders, but again did not participate. Therefore the fact that Gala Radio did not receive any of these frequencies was not caused at all, let alone proximately caused, by the breach of the FET standard of the BIT as decided by the Tribunal.***<sup>246</sup>

(Emphasis added)

268. The above transcription proves that Respondent referred to the 14 frequencies that, according to Claimant, should have been allocated to Gala Radio.

269. Second, the Committee finds the Tribunal's denial of Mr. Kurus' rebuttal direct examination was consistent with the Procedural rules previously agreed by the Parties and the Tribunal.<sup>247</sup> The Parties agreed during a Pre-hearing conference held on July 2, 2010, on the rules regarding the cross-examination of witnesses (*i.e. witnesses could not testify in direct examination beyond their witness statement*). In this regard, the Parties consented to and were aware of the procedural framework applicable to the examination of the witnesses. Therefore, admitting such rebuttal would have necessarily violated the procedural rules agreed by the Parties and the Tribunal.

270. Third, the Committee agrees with Claimant that despite the fact that paragraphs 186 and 187 of the Award were supported only by Claimant's Opening Statement, it does

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conservative, because we can also add that what's highlighted in green, in tab 9, still, is seven more frequencies that would have allowed Gala to cover that time 100% of the country. That means with 14 of the frequencies of the 38 that we mentioned, we would have been able to cover the whole country; and with seven, two-thirds of the country."

<sup>245</sup> Claimant's Counter-Memorial on Annulment, April 23, 2012, ¶ 234.

<sup>246</sup> Hearing on remaining issues, Tr. 260-261:25-16.

<sup>247</sup> Hearing on remaining issues, Tr. 100-101:4-24: "In this specific case---and I was anticipating that we would end up in this situation, we have been speaking about this in our telephone conversation—I think at the end that justice is best served if we stick to the three principles which would have been adhering to throughout the procedure. The first one is that witnesses are not examined on points which are not in their witness statement; secondly, that they are just introduced by their counselor who has presented them; and the third point, which I think is important, is that factual assertions by lawyers do not carry any weight in themselves, but they only carry the weight which is proven by the record.

[..] but I think that we should stick to the traditional way we have handled witnesses throughout this arbitration."

not prove that the Tribunal relied solely on such arguments to reach its conclusions. The Tribunal was aware that “[...] *factual allegations will be checked by the Tribunal. If they are proven by the record, they will be taken as proven by the record.*”<sup>248</sup> Tribunals are not obliged to cite and refer to every exhibit on the record in support of their conclusions.<sup>249</sup> Therefore the Committee cannot assume with total certainty that the Tribunal did not analyze all the record to make such determination, but would have exclusively relied upon Claimant’s Opening Statement.

271. Finally, assuming that the Tribunal did commit a procedural violation, Respondent did not make use of the opportunity given by the Tribunal at the Hearing on remaining issues to object to it:

*The Chairman: [...] So I will finalize this by asking both parties if, at this stage, they are aware of any breach of due process; and if they are aware of any breach of due process, they are kindly asked to state that, so that the Tribunal can take any corrective action.*

*Mr. Willems: We have no objections to assert. We likewise join the warm spirit of cordiality and thank everyone here.*

272. By not making a timely protest against what it now alleges is a serious procedural violation, under Article 27 of the ICSID Convention, such violation is deemed waived.<sup>250</sup> In this respect, Schreuer’s Commentary on Arbitration Rule 27, included in the discussion of Article 52 of the ICSID Convention, previously cited in paragraphs 213 and 214 of this Decision, supports this determination. It clearly provides that a party that is aware of a procedural violation should react immediately by objecting to the violation. Otherwise, failure to do so will be interpreted as a waiver of the right to object at a later stage of the proceedings.<sup>251</sup> Moreover, it states that a party that has failed to object to a violation of procedure before the arbitral tribunal may not rely on this violation as a ground for annulment.

273. Respondent refers to *Fraport v. Philippines* to assert that he could not have forfeited its right to complain in the annulment proceeding because it did not know the eventual significance of these allegations, before reading the Award. The Committee considers that the circumstances of *Fraport v. Philippines* are not applicable to the case at hand.<sup>252</sup> In this case, Respondent did not need to wait until the Award to realize that there was an alleged procedural violation.

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<sup>248</sup> Hearing on remaining issues, Tr. 99:18-21.

<sup>249</sup> **Exhibit RAL-9**, *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision of July 30, 2010, ¶ 222; **Exhibit CAL-2**, *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision of September 16, 2011, ¶ 98.

<sup>250</sup> Arbitration Rule 27: *A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.*

<sup>251</sup> SCHREUER, “THE ICSID CONVENTION: A COMMENTARY,” pp. 983, 994-996, ¶ 262.

<sup>252</sup> *Fraport v. Philippines* regards the presentation and analysis of new evidence, once the proceedings are closed by the Tribunal. The case at hand regards a “procedural violation” that Respondent was aware of and given the case, Respondent should have objected at the end of the Hearing on remaining issues.

274. Moreover, Arbitration Rule 27 does not state that parties should only object to those procedural irregularities the eventual significance of which is known to the parties. Rather, its wording is broad and encompasses any procedural violation.<sup>253</sup>

275. The Committee considers contradictory that on the one hand, Respondent alleges that it was unfairly precluded from rebutting Claimant's allegations by not being allowed to directly examine Mr. Kurus. But on the other hand claims that he could not have known the significance that the Tribunal would grant to Claimant's allegations (that Mr. Kurus was intended to rebut).

276. Based on the above, the Committee rejects Respondent's request for partial annulment of the Award on the grounds of a serious departure from a fundamental rule of procedure.

*ii. Failure to state reasons: Article 52(1)(e)*

277. Failure to state reasons as a ground for annulment is intended to ensure that parties can understand the reasoning of the Tribunal, meaning that parties can understand the facts and law applied by the Tribunal in coming to its conclusion:

*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.*<sup>254</sup>

278. Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. The correctness of the reasons is irrelevant in terms of this ground for annulment.

279. In the Committee's view, annulment 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.<sup>255</sup>

280. In the present case, Respondent challenges the Tribunal's finding on causation because Respondent claims a failure to state the reasons for the Tribunal's key determination regarding Gala Radio having been able to secure at least 14 radio stations to create a nationwide music radio network.

281. Specifically Respondent alleges that the failure to particularize the relevant tenders and to examine the causal link to the alleged damages constituted a significant *lacuna* in the Award. According to Respondent, the Majority's determination concerning Gala

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<sup>253</sup> Respondent's Reply on Annulment, June 18, 2012, ¶ 166.

<sup>254</sup> **Exhibit RAL-16**, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, April 29, 1988, ¶ 5.09.

<sup>255</sup> **Exhibit RAL-7**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, ¶¶ 64-65.

Radio's possibility of securing 14 FM frequencies was made without considering if there were pre-existing broadcasting rights of competitors, technical parameters of the frequencies allegedly required to obtain a national network, and Gala Radio's absence of participation in relevant tenders.<sup>256</sup> Furthermore Respondent alleges that the Award is based on insufficient or inadequate reasons that warrant the annulment of the Award.<sup>257</sup> In regard to such arguments, the Committee believes that what Respondent is really alleging, is the correctness or incorrectness of the causal link, not the failure to state the reasons.

282. In this regard, the Committee considers that the Award addressed causation in a comprehensible manner. In the Award, the Tribunal concluded that Claimant was able to prove that the initial cause – Respondent's wrongful acts – and the final effect – Claimant's frustration to fulfill his plans and operate a nationwide FM network plus an AM informational channel – were linked through a proximate and foreseeable chain of causation.<sup>258</sup>

283. The Committee believes that the causal link is clearly set out in the Award. The Tribunal's reasoning on the question of the causal link is perfectly understandable as to how the Tribunal arrived from point A – the breach of the FET standard by Ukraine – to point B – that without such breach it was probable that Claimant would have been able to have a national coverage.

284. The causal link is set forth from paragraph 163 to 179 of the Award. Whether it was right or wrong, that is not for the Committee to determine.

285. [...]

<sup>259</sup>

286. Moreover, it made it clear that the circumstances of the case required two links in the chain of events to be analyzed and proven: (i) whether the tenders had been hypothetically decided in a fair and equitable manner and, if Claimant had participated in them, whether it was probable that he would have won the disputed frequencies; and (ii) whether such frequencies would have enabled Gala Radio to achieve national coverage.<sup>260</sup>

287. Finally, the Tribunal decided that if the 80 frequencies during the Interregnum Period had been awarded legally, it is likely that Claimant would have won 14 of the required licenses to create a national FM network. The Tribunal based its opinion on the undisputed fact that at the time of the Interregnum Period, Gala Radio was one of the most successful radio operators in Kyiv and also met the criteria set forth in the Law.<sup>261</sup>

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<sup>256</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 266. *See also* Respondent's Reply on Annulment, June 18, 2012, ¶ 145.

<sup>257</sup> Respondent's Annulment Memorial, February 8, 2012, ¶ 267.

<sup>258</sup> Award dated March 28, 2011, ¶ 208.

<sup>259</sup> Award dated March 28, 2011, ¶ 169.

<sup>260</sup> Award dated March 28, 2011, ¶ 171.

<sup>261</sup> Award dated March 28, 2011, ¶ 179.

288. Such reasoning is clear and comprehensible. It was sufficient for the Tribunal to determine the likelihood of Gala Radio winning frequencies, based on objective factors. It is clear that Respondent's arguments are aimed not so much at the absence of reasons, but at the reasons themselves.

289. In view of the foregoing conclusion, it is unnecessary to consider Respondent's argument regarding a contradiction in the Award, since the Committee finds that the reasons stated were not contradictory but sufficiently clear for the Parties to understand the Tribunal's findings.

290. Based on the above, the Committee rejects Respondent's application for partial annulment of the Award on the ground of failure to state reasons.

## **IX. COSTS**

291. Respondent alleges that in view of the *bona fide* nature of Respondent's annulment application, the *ad hoc* Committee should order the equal sharing of costs. On the other hand, Claimant claims that the costs incurred in this proceeding should follow the general rule that "costs follow the event" on the ground that Respondent's application for annulment was in fact an appeal.

292. This Committee considers that Ukraine's case before this Committee was not frivolous. Further, the Committee believes that Claimant's allegation regarding "costs follow the event" is not a mandatory principle the Committee is bound to apply. According to Articles 52(4) and 61(2) of the ICSID Convention, the Committee has discretion to decide how and by whom fees and expenses of the Members of the Tribunal and the charges and fees of the Centre shall be paid. Further, pursuant to Procedural Order No. 2<sup>262</sup> and Article 61 of the Washington Convention, the Committee shall take into account for the allocation of costs, Respondent's conduct in complying with the Decision on the Stay. Although Respondent did not post the security ordered in such decision within the timeframe established by the Committee, it finally entered with Claimant in an Escrow Agreement that guaranteed the payment of the Award in the event its annulment claim was denied.

293. In light of the above, the Committee decides that each party shall bear its own legal fees and expenses, and Respondent shall bear the ICSID fees.

## **X. DECISION**

294. For the foregoing reasons, the Committee DECIDES that:

- (a) The Decision on Jurisdiction and Liability cannot be subject to this annulment proceeding based on the reasons set forth in this Decision.
- (b) Respondent's claims regarding the annulment of the Award on the basis of a

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<sup>262</sup> Procedural Order No. 2: "Based on Article 61 of the Washington Convention, at the time the costs of this proceeding are allocated to the Parties, the Committee will take into account Respondent's conduct in complying with the Decision [*Decision on Ukraine's Request for a Continued Stay of Enforcement of the Award, dated January 14, 2012*].

manifest excess of powers, departure from a fundamental rule of procedure and failure to state reasons, are rejected based on the reasons set forth in this Decision.

- (c) In accordance with the terms of Procedural Order No. 3, the Committee orders the immediate lift of the stay of enforcement of the Award and the immediate payment of the amount owed to Claimant, per the terms of section 5.1(a) of the Escrow Agreement between the Parties.
- (d) Each of the Parties shall bear its own legal fees and expenses, and Respondent shall bear the ICSID fees.

Dr. Claus von Wobeser  
President

[Signed]

Professor Azzedine Kettani

[Signed]

Dr. Eduardo Zuleta

[Signed]





**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
**JOSEPH C. LEMIRE (*Claimant*) v. UKRAINE (*Respondent*)**  
**ICSID CASE NO. ARB/06/18**

**ANNULMENT PROCEEDING**  
**CONCURRING OPINION**  
Eduardo Zuleta

I respectfully submit that:

1. I concur with the decision of my distinguished colleagues of the Committee that:
  - (a) The Decision on Jurisdiction and Liability cannot be object of this annulment proceeding.
  - (b) Respondent's claims regarding the annulment of the Award on the basis of a manifest excess of powers, departure from a fundamental rule of procedure and failure to state the reasons, must be rejected.
  - (c) In accordance with the terms of Procedural Order No. 3, the Committee orders the immediate lift of the stay and the immediate payment owed to Claimant, per the terms of section 5.1(a) of the Escrow Agreement entered between the Parties.
  - (d) Each of the Parties should bear its own legal fees, expenses and its own share of the ICSID fees including other expenses.
  
2. However, I am not persuaded by the analysis resulting in the application of Arbitration Rule 27 to the allegations by Respondent that (a) the Award did not consider the implications of the Settlement Agreement; (b) the Award disregarded the res judicata effect of the Lemire I Award; and (c) the Majority failed to state reasons in its Decision on Jurisdiction and Liability with respect to clause 12 of the Settlement Agreement.
  
3. Based on the allegations of Respondent and on a strict interpretation of Arbitration Rule 27, the waiver provided for therein should have been applied only to the grounds for annulment invoked by Respondent as arising from (a) the submission in the post hearing memorials of a claim Respondent did not have the opportunity to dispute; and (b) the refusal to hear the testimony of Mr. Kurus, refer to events where rules of procedure may have been violated.
  
4. I consider, thus, that the allegations by Respondent mentioned under 2 above should have not been rejected based on Arbitration Rule 27, but that an analysis on the merits of each one was required.
  
5. I must note, however, that such analysis on the merits would have likely led to the conclusion that the claims related to the Settlement Agreement and the Lemire award had no merit, and therefore the final decision, not to annul the Award, would have been the same.

[Signed]

Eduardo Zuleta