

# **International Centre for Settlement of Investment Disputes**

ICSID Case No. ARB/12/35

**Orascom TMT Investments S.à r.l.**

Claimant

**v.**

**People's Democratic Republic of Algeria**

Respondent

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## **Award**

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*Arbitral Tribunal*

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Prof. Albert Jan van den Berg, Arbitrator

Prof. Brigitte Stern, Arbitrator

*Secretary of the Tribunal*

Ms. Aurélia Antonietti

*Assistant to the Tribunal*

Dr. Michele Potestà

Date of dispatch to the Parties: 31 May 2017

*Representing Orascom TMT Investments  
S.à r.l.:*

Ms. Carolyn B. Lamm  
Ms. Andrea J. Menaker  
Mr. Brody K. Greenwald  
Mr. Frank J. Schweitzer  
Ms. Noor Davies  
Ms. Hadia Hakim

WHITE & CASE LLP  
701 Thirteenth Street, NW  
Washington, DC 20005  
USA

Mr. Oussama Daniel Nassif  
ORASCOM GROUP

*Representing the People's Democratic Republic of  
Algeria:*

Prof. Emmanuel Gaillard  
Dr. Yas Banifatemi  
Mr. Benjamin Siino  
Ms. Marina Matousekova  
Mr. Tsegaye Laurendeau  
Mr. Pierre Viguiet

SHEARMAN & STERLING LLP  
7, rue Jacques Bingen  
75017 Paris  
France

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## LIST OF MAIN ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
April	April Holding
BLEU-Algeria BIT or the BIT or the Treaty	Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments signed 24 April 1991 (entered into force 17 October 2002), Exh. C-658
CA	Confidentiality Agreement
C-[#]	Claimant's Exhibit
CLA-[#]	Claimant's Legal Authority
C-PHB 1	Claimant's Post-Hearing Brief filed on 30 September 2015
C-PHB 2	Claimant's Reply Post-Hearing Brief filed on 18 November 2015
Claimant's Submission on Costs	Claimant's Submission on costs filed on 4 December 2015
Claimant's Reply Submission on Costs	Claimant's Reply Submission on Costs filed on 18 December 2015
Counter-Memorial	Claimant's Counter-Memorial on Preliminary Objections with Exhibits C-658 through C-854, and Legal Authorities CLA-163 through CLA-227 filed on 19 September 2014
Cylo	Cylo Investments Ltd.
Enel	Enel S.p.A.
Enel Investment	Enel Investment Holding B.V.
ENTV	<i>Entreprise Nationale de Télévision</i>
EPTV	<i>Établissement Public de Télévision</i>
FNI	Fonds National d'Investissement algérien
Hearing	Hearing on Preliminary Objections that took place in the World Bank Offices in Paris from 26 to 30 May 2015
ICJ	International Court of Justice
ICSID or the Centre	International Centre for Settlement of Investment Disputes
The ICSID Convention	The Convention on the Settlement of Investment Disputes between States and Nationals of other States dated 18 March 1965
ILC	International Law Commission
Investment Agreement	Investment Agreement entered into between OTH, Oratel (on behalf of OTA) and Algeria on 5 August 2001
LBO	Leveraged buyout
Memorial on the Merits	Claimant's Memorial on the Merits with Exhibits C-37 through C-657, and Legal Authorities CLA-1 through CLA-136 filed on 20 December 2013
Memorial on Preliminary Objections	Respondent's Memorial on Preliminary Objections with Exhibits R-3 through R-233 and Legal authorities RL-24 through RL-200 filed on 20 June 2014
Moga	Moga Holding Ltd.

MTN	Mobile Telephone Networks Holdings (Proprietary) Limited
Oratel	Oratel International Inc.
OS	OS Holding
OTA	Orascom Telecom Algérie S.P.A.
OTH	Orascom Telecom Holding S.A.E. (now Global Telecom Holding S.A.E (GTH))
OTH Arbitration	PCA Arbitration Case No. 2012-20 Orascom Telecom Holding S.A.E. v. People's Democratic Republic of Algeria
OTMTI or the Claimant	Orascom TMT Investments S.à r.l. (formerly Weather Investments II S.à r.l.)
OTSE	Orascom Telecom Services Europe
PCA	Permanent Court of Arbitration
The Respondent or Algeria	People's Democratic Republic of Algeria
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Rejoinder	Claimant's Rejoinder on Preliminary Objections with Exhibits C-855 through C-1081, and Legal authorities CLA-228 through CLA-268 filed on 24 April 2015
Request	Request for Arbitration filed on 24 October 2012
Reply	Respondent's Reply on Preliminary Objections with Exhibits R-234 through R-1112, and Legal Authorities RL-201 through RL-262 filed on 6 February 2015
R-PHB 1	Respondent's Post-Hearing Brief filed on 30 September 2015
R-PHB 2	Respondent's Reply Post-Hearing Briefs filed on 18 November 2015
Respondent's Submission on Costs	Respondent's Submission on Costs filed on 4 December 2015
Respondent's Reply Submissions on Costs	Respondent's Reply Submissions on costs filed on 18 December 2015
Sawiris Entities	April, OS and Cylo
SPA	Share Purchase Agreement entered into between VimpelCom, OTH (which had by then changed its name to Global Telecom Holding S.A.E., "GTH") and the Algerian <i>Fonds National d'Investissement</i> (the "FNI") on 18 April 2014
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
VCLT	Vienna Convention on the Law of Treaties
VimpelCom	VimpelCom Limited
WAHF	Wind Acquisition Holdings Finance S.p.A.
WCSP1	Weather Capital Special Purpose 1 S.A.
Weather Capital	Weather Capital S.à r.l.



Weather Capital Finance	Weather Capital Finance S.A.
Weather I	Weather Investments S.A.
Weather II [the Claimant, i.e. OTMTI, under its previous denomination]	Weather Investments II S.à r.l.
Weather Investments	Weather Investments S.p.A. (originally called Weather Investments S.r.l.; subsequently changed name into Wind Telecom S.p.A)
Wind Acquisition or WAF	Wind Acquisition Finance S.p.A.
Wind	Wind Telecomunicazioni S.p.A.

## **I. INTRODUCTION**

1. This is an arbitration brought before the International Centre for Settlement of Investment Disputes (“ICSID”) under the Convention on the Settlement of Investment Disputes between States and Nationals of other States dated 18 March 1965 (“ICSID Convention”) and the Agreement between the Belgo-Luxembourg Economic Union and the People’s Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments (the “BLEU-Algeria BIT” or the “BIT” or the “Treaty”).<sup>1</sup>

### **A. THE PARTIES**

#### **1. The Claimant**

2. The Claimant is Orascom TMT Investments S.à r.l. (the “Claimant” or “OTMTI”). OTMTI was incorporated in Luxembourg on 24 May 2005.<sup>2</sup> Until 29 November 2012, OTMTI was named Weather Investments II S.à r.l. (“Weather II”).<sup>3</sup> Its current registered office is at 31-33, Avenue Pasteur, L-2311 Luxembourg.<sup>4</sup>

#### **2. The Respondent**

3. The Respondent is the People’s Democratic Republic of Algeria (the “Respondent” or “Algeria”).

### **B. OVERVIEW OF THE DISPUTE**

4. This overview provides some basic background on the merits of the dispute and puts this Award in context. It is not an exhaustive description of all the events relating to the merits and it essentially relies on the account of the facts in the Claimant’s Memorial on the merits, as the Respondent has not submitted pleadings on the merits at this stage.
5. This dispute arises from the Claimant’s alleged investments to build a mobile telephone system in Algeria.
6. In May 2001, Algeria launched a public tender for bids for the award of a second *Groupe Spécial Mobile* License (“GSM License”) to develop a mobile telecom network for Algeria. The Egyptian company Orascom Telecom Holding S.A.E. (“OTH”, now Global Telecom Holding, “GTH”) made the winning bid for the GSM License in the amount of US\$ 737 million.

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<sup>1</sup> Agreement between the Belgo-Luxembourg Economic Union and the People’s Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, signed 24 April 1991 (entered into force 17 October 2002), Exh. C-658.

<sup>2</sup> Weather II Certificate of Incorporation, 31 May 2005, Exh. C-5.

<sup>3</sup> Extraordinary General Meeting of 29 November 2012, 29 November 2012, Exh. C-240.

<sup>4</sup> See Claimant’s letter to the Tribunal, 1 February 2016. The Claimant’s previous registered office was at 1, Boulevard de la Foire, L-1528 Luxembourg. See Weather Investments II S.à r.l., Registration of Change of Address (executed 11 December 2012), 11 January 2013, Exh. C-507.

7. OTH began operations through its Algerian subsidiary, Orascom Telecom Algérie S.P.A. (“OTA”), in 2002. OTA operated under the brand names *Djezzy* and *Allo*. The Claimant contends that after less than one year in business, OTA had 70% of the GSM market share.<sup>5</sup>
8. On 24 May 2005, Weather II, now known as OTMTI, was created and, so it submits, became the ultimate owner of OTA. The Claimant contends that Weather II, along with its subsidiaries (collectively the “Weather Group”), continued to make investments in OTA through 2011.<sup>6</sup> The Claimant also asserts that between 2008 and 2011, OTA invested US\$ 2.7 billion in Algeria and between 2004 and 2007 freely transferred dividends to OTH and its related entities.<sup>7</sup>
9. It is the Claimant’s argument that starting from 2008, Algeria began an unlawful campaign against OTA and its investors due to a political vendetta against the Egyptian businessman Naguib Sawiris, the Claimant’s ultimate controlling shareholder, and his family and as a result of a policy shift against foreign investment.<sup>8</sup> In particular, the Claimant submits that Algeria’s measures began in December 2008 through the issuance of tax reassessments for the year 2004, when OTA was tax exempt under its Investment Agreement.<sup>9</sup> Subsequently, so the Claimant contends, Algeria used the 2004 tax reassessment to block OTA’s dividend transfers to OTH, the Claimant and its related entities.<sup>10</sup>
10. The Claimant asserts that in 2009 the Respondent increased the pressure through a massive tax reassessment for the years 2005-2007, when OTA was tax exempt for the majority of this period under its Investment Agreement.<sup>11</sup> According to the Claimant, Algeria’s measures caused it to incur substantial damage bringing it to the brink of financial collapse.<sup>12</sup>
11. After the 2009 events, the Claimant started to pursue exit strategies and engaged consultants to attempt to find a willing buyer for its investment.<sup>13</sup> Deals to sell OTA through a sale of OTH’s shares were negotiated with South African telecom provider Mobile Telephone Networks Holdings (Proprietary) Limited (“MTN”) and VimpelCom Limited (“VimpelCom”). According to the Claimant, throughout the course of these negotiations, Algeria bombarded OTA with a series of coordinated measures.<sup>14</sup> In particular, the Claimant contends that the Respondent demanded full payment of the remaining 2005-2007 tax reassessments within three days over the Easter holiday, knowing that the Weather Group would have had no access to international banks.<sup>15</sup> The Claimant further submits that Algeria imposed an injunction freezing all of OTA’s bank accounts without prior notice and without any legal or

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<sup>5</sup> Memorial on the Merits, para. 6.

<sup>6</sup> Memorial on the Merits, para. 7.

<sup>7</sup> Memorial on the Merits, para. 8.

<sup>8</sup> Memorial on the Merits, paras. 9-12.

<sup>9</sup> Memorial on the Merits, paras. 13-16.

<sup>10</sup> Memorial on the Merits, paras. 17-18.

<sup>11</sup> Memorial on the Merits, paras. 19-21.

<sup>12</sup> Memorial on the Merits, paras. 23-28.

<sup>13</sup> Memorial on the Merits, para. 29.

<sup>14</sup> Memorial on the Merits, para. 29.

<sup>15</sup> Memorial on the Merits, paras. 30-31.

factual basis.<sup>16</sup> Moreover, the Claimant contends that a few days after the injunction, Algeria imposed a customs blockade over goods and supplies essential to run OTA's business.<sup>17</sup>

12. On 28 April 2010, according to the Claimant, Algeria announced that it would expropriate OTA if the Weather Group tried to sell OTA and to evade Algeria's pre-emption right (provided under the "Supplemental Finance Act" of 2009).<sup>18</sup> As a result, the negotiations with MTN collapsed.<sup>19</sup> The Claimant submits that shortly thereafter Algeria forced OTA to shut down its international communications network on "national security grounds".<sup>20</sup>
13. According to the Claimant, around the time when the Claimant was negotiating with VimpelCom (with a view to achieving OTA's sale through a merger of the Claimant's subsidiary, Weather Investments S.p.A. ("Weather Investments"), with VimpelCom), Algeria enacted the 2010 Supplemental Finance Act to attempt to thwart a sale of OTA effected through an upstream foreign entity. The Claimant submits that the effect of such law was that if the Claimant sold shares in any of its foreign companies to effect a sale of OTA, Algeria could buy back OTA's shares for a price selected by valuers chosen by Algeria.<sup>21</sup>
14. In September 2010, according to the Claimant, Algeria issued a further provisional notice of tax reassessment for 2008-2009 against OTA in the amount of US\$ 230 million.<sup>22</sup>
15. The deal with VimpelCom was concluded on 15 April 2011—according to the Claimant, for a substantially impaired consideration of approximately US\$ 6.486 billion as a result of Algeria's measures.<sup>23</sup> The Claimant sold its indirect shareholding in OTA to VimpelCom by selling its immediate subsidiary, Weather Investments.
16. On 16 April 2012, the Claimant sent a Notice of Dispute under the BIT to the Respondent.<sup>24</sup>
17. On 19 October 2012, the Claimant filed its Request for Arbitration, accompanied by Exhibits C-1 through C-36 (the "Request"). Through this arbitration, the Claimant seeks compensation for the loss it alleges to have incurred on the sale of its indirect interest in OTA to VimpelCom, its share of lost dividends between 2009 and 2011, and damages allegedly caused by Algeria that required the Claimant to obtain bridge loans as a result of the dividend delays and blockade and undertake capital restructurings to prevent the outright collapse of the Weather Group.<sup>25</sup>

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<sup>16</sup> Memorial on the Merits, para. 32.

<sup>17</sup> Memorial on the Merits, paras. 33-35.

<sup>18</sup> Memorial on the Merits, para. 36.

<sup>19</sup> Memorial on the Merits, para. 36.

<sup>20</sup> Memorial on the Merits, para. 36.

<sup>21</sup> Memorial on the Merits, para. 38.

<sup>22</sup> Memorial on the Merits, para. 40.

<sup>23</sup> Memorial on the Merits, paras. 42-43.

<sup>24</sup> Letter from Weather II to Algeria, 16 April 2012, Exh. C-30.

<sup>25</sup> Memorial on the Merits, para. 43.

## **II. PROCEDURAL HISTORY**

18. The Request was received by ICSID on 24 October 2012. The Centre acknowledged receipt of the Request and transmitted it to the Respondent on 25 October 2012. The Request was supplemented by the Claimant's letter of 14 November 2012.
19. On 15 November 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
20. By letters exchanged on 12, 18, and 26 December 2012, and 8 January 2013, the Parties confirmed their agreement on the method of constitution of the Tribunal as follows: A Tribunal consisting of three arbitrators, one appointed by each Party, and the third, presiding arbitrator appointed by agreement of the Parties.
21. On 9 January 2013, the Centre acknowledged the Respondent's appointment of Professor Brigitte Stern, a national of France, as arbitrator, and the Claimant's appointment of Professor Albert Jan van den Berg, a Dutch national, as arbitrator. On 24 January 2013, Professor Stern accepted her appointment as arbitrator nominated by the Respondent, and on 25 January 2013, Professor van den Berg accepted his appointment as arbitrator nominated by the Claimant.
22. On 31 January 2013, the Claimant informed the Secretariat of a change in its name from "Weather Investments II S.à r.l." to "Orascom TMT Investments S.à r.l.".
23. On 22 March 2013, the Centre informed the Parties that the two party-appointed arbitrators had selected Professor Gabrielle Kaufmann-Kohler, a Swiss national, as presiding arbitrator.
24. On 28 March 2013, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules") notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aurélia Antonietti, ICSID Senior Counsel, was designated to serve as Secretary of the Tribunal. In addition, with both Parties' agreement, Dr. Michele Potestà was designated as Assistant to the Tribunal on 11 October 2013, and a signed declaration was transmitted to the Parties.
25. On 16 May 2013, the Tribunal held a first session with the Parties in Geneva. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, and that The Hague (The Netherlands) would be the place of the proceeding.

26. As the Parties did not reach an agreement on the procedural language, they each selected one of the official languages of the Centre as a procedural language in this arbitration (in this case, English for the Claimant and French for the Respondent), in accordance with ICSID Arbitration Rule 22. It was agreed that the orders, decisions, and award of the Tribunal would be rendered and the record kept in both procedural languages (i.e. English and French), both versions being equally authentic.<sup>26</sup>
27. On 29 August 2013, the Parties agreed that Paris would be the hearing venue for all hearings in this matter.
28. On 9 September 2013, the Tribunal issued Procedural Order No. 1 embodying the Parties' agreement on procedural matters discussed during the first session.
29. On 20 December 2013, the Claimant filed a Memorial on the Merits with Exhibits C-37 through C-657, and Legal Authorities CLA-1 through CLA-136 ("Memorial on the Merits").
30. On 24 January 2014, the Respondent filed a Request for the bifurcation of the proceeding with Exhibits R-1 and R-2, and Legal Authorities RL-1 through RL-23.
31. On 21 February 2014, the Claimant filed a Response to the Respondent's Request for Bifurcation with Legal Authorities CLA-137 through CLA-162.
32. On 26 March 2014, a Hearing on Bifurcation took place by telephone conference.
33. On 10 April 2014, the Tribunal issued Procedural Order No. 2, by which it granted the Respondent's application for the bifurcation of the proceedings between a jurisdictional phase and a merits phase. As a consequence, the proceedings on the merits were suspended.
34. On 20 June 2014, the Respondent filed a Memorial on Preliminary Objections with Exhibits R-3 through R-233 and Legal authorities RL-24 through RL-200 ("Memorial on Preliminary Objections"), including materials related to the arbitration proceeding before the Permanent Court of Arbitration ("PCA") Case No. 2012-20, also referred to as the "OTH Arbitration".
35. On 11 August 2014, the Claimant requested that the Tribunal strike all materials related to the OTH Arbitration, including the exhibits submitted by the Respondent on 20 June 2014. The Claimant further requested that the Tribunal order the Respondent to disclose all submissions, documents, and exhibits filed in the OTH Arbitration in order to grant the Claimant an equal opportunity to respond to the documents submitted by the Respondent. Additionally, the Claimant requested that the Tribunal order the Respondent to disclose the Share Purchase Agreement entered into between VimpelCom, OTH (which had by then changed its name to Global Telecom Holding S.A.E., "GTH") and the Algerian *Fonds National d'Investissement* (the "FNI") on 18 April 2014 (the "SPA").

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<sup>26</sup> Accordingly, in this Award documents submitted in English and French are either referred to in their original language, without translation, or in a free translation made by the Tribunal. For the transcript of the Hearing, the Award refers to the original language.

36. On 18 August 2014, the Respondent rejected all of the above Claimant's requests, adding that the disclosure of the SPA was premature.
37. On 25 August 2014, the Tribunal issued Procedural Order No. 3 inviting *inter alia* the Respondent to supplement its letter of 18 August 2014 and setting out a schedule for the Parties' further submissions concerning the OTH Arbitration and the SPA.
38. On 26 August 2014, the Claimant requested a modification of the schedule for the submission of its Counter-Memorial. The Respondent commented on 28 August 2014.
39. On 29 August 2014, the Tribunal rejected any modification of the schedule for the written submissions.
40. On 2 September 2014, the Respondent reiterated that the disclosure of the SPA was premature, and confirmed that it did not have the authorization to produce it.
41. On 9 September 2014, the Claimant reiterated its requests formulated in its letter of 11 August 2014.
42. On 16 September 2014, the Respondent opposed the Claimant's request to strike the materials relating to the OTH Arbitration from the record.
43. On 19 September 2014, the Claimant filed a Counter-Memorial on Preliminary Objections with Exhibits C-658 through C-854, and Legal Authorities CLA-163 through CLA-227 ("Counter-Memorial").
44. On 1 October 2014, the Tribunal issued Procedural Order No. 4, ordering the Respondent to produce to the Claimant by 23 October 2014 all submissions, documents, and exhibits of the record of the OTH Arbitration and the SPA.
45. On 24 October 2014, the Respondent produced to the Claimant documents ordered by the Tribunal in Procedural Order No. 4.
46. On 24 October 2014, each Party filed a request for the Tribunal to decide on production of documents.
47. On 28 October 2014, the Claimant submitted that the Respondent had breached Procedural Order No. 4 and asked that the Tribunal take immediate action. The Respondent answered on 31 October and 3 November 2014. The Claimant replied on 3 November 2014.
48. Given that the SPA raised confidentiality issues, the Tribunal noted on 7 November 2014 the Parties' willingness to negotiate a confidentiality agreement and invited them to use their best efforts to conclude a Confidentiality Agreement ("CA") by 21 November 2014.
49. On 14, 15 and 28 November 2014, and 4 December 2014, the Parties objected to each other's requests for production of documents.
50. By letters of 25 November 2014, the Parties informed the Tribunal that they had not been able to agree on the terms of a CA.

51. On 8 December 2014, the Tribunal held a telephone conference with the Parties to discuss the terms of a CA.
52. On 12 December 2014, the Tribunal issued Procedural Order No. 5 on the Parties' respective requests for document production with corresponding Redfern Schedules, and ordering that documents be produced by 19 December 2014.
53. On 12 December 2014, the Tribunal issued Procedural Order No. 6, implementing further the confidentiality regime put in place in Procedural Order No. 1.
54. On 12 December 2014, the Tribunal further issued Procedural Order No. 7, a confidentiality order regarding the OTH Arbitration record and the SPA.
55. On 23 December 2014, with the Parties' consent, the Secretary of the Tribunal wrote to Dr. Brooks Daly, Deputy Secretary-General and Principal Legal Counsel of the Permanent Court of Arbitration, to designate him as Confidentiality Advisor to decide whether certain documents to be produced by the Respondent pursuant to Procedural Order No. 7 contained commercially sensitive information.
56. On 6 January 2015, the Respondent informed the Tribunal that the OTH Arbitration, which had been previously stayed, had resumed, and that consequently, the discussions with OTH's and VimpelCom's counsel regarding the production of documents from that arbitration into this arbitration had temporarily stopped.
57. On 8 January 2015, the Claimant requested that the Tribunal order the Respondent to immediately produce the OTH Arbitration record, the Schedules to the SPA (the "SPA Schedules"), and the documents concerning the valuation of OTA. Alternatively, the Claimant requested that all references to the OTH Arbitration and the SPA be stricken and that adverse inferences be drawn against the Respondent for its non-disclosure in violation of Procedural Orders Nos. 1, 4, 5, and 7.
58. On 21 January 2015, the Respondent contested the Claimant's production of documents made pursuant to Procedural Order No. 5 with regard to the redaction of certain documents relating to Board of Manager Meeting Minutes and Crédit Agricole Private Banking Bank statements, and requested that the Tribunal order the Claimant to produce said documents without redactions. The Claimant submitted its observations on 26 January 2015.
59. On 30 January 2015, further to the production by the Respondent of the OTH Arbitration record and the SPA Schedules, the Claimant requested that the Tribunal order that the Respondent's preliminary objections concerning the OTH Arbitration be deferred until the merits phase of the case. The Claimant further requested that the Tribunal order the Respondent to produce documents that had been redacted.
60. On 3 February 2015, the Tribunal decided on the Respondent's request of 21 January 2015 concerning the redaction of certain documents.



61. On 6 February 2015, the Respondent filed a Reply on Preliminary Objections with Exhibits R-234 through R-1112, and Legal Authorities RL-201 through RL-262 ("Reply").
62. On 11 February 2015, the Tribunal denied the Claimant's request of 30 January 2015 that certain of the Respondent's Preliminary Objections be joined to the merits.
63. On 9 February 2015, the Respondent wrote to the Tribunal regarding the redaction of the SPA Schedules, to which the Claimant answered on 16 February 2015. By letter of 18 February 2015, the Tribunal consulted the Parties as to the possible mandate of Dr. Daly if his services were to be required.
64. On 3 March 2015, after receiving both Parties' positions, the Secretary informed Dr. Daly that the Tribunal needed his advice as per ICSID's letter of 23 December 2014.
65. On 9 March 2015, the Claimant requested that the Tribunal order the Respondent to produce documents requested in its request for production of documents, namely the Framework Agreement and the Amended Framework Agreement between Cevital and OTH. The Claimant also requested that the Respondent be ordered to undertake additional searches in relation to Exhibit C-194 and the documents referenced therein.
66. On 12 March 2015, the Respondent objected to the Claimant's requests of 9 March 2015.
67. On 16 March 2015, the Tribunal denied the Claimant's requests of 9 March 2015.
68. On 16 March 2015, the Respondent supplemented its request of 21 January 2015.
69. On 17 March 2015, the Respondent filed a request for leave to submit additional Exhibits R-1113 to R-1123.
70. On 18 March 2015, the Claimant requested a three week extension to file its Rejoinder on Preliminary Objections.
71. On 19 March 2015, Dr. Daly issued a report in which he noted that certain of the SPA Schedules contained "a mixture of commercially sensitive information and information that is not commercially sensitive". The Claimant submitted its comments on Dr. Daly's report on 23 March 2015, and the Respondent on 24 March 2015.
72. On 23 March 2015, the Claimant filed observations on the Respondent's request to file additional documents dated 17 March 2015.
73. On 24 March 2015, the Respondent confirmed that it did not object to the Claimant's request for extension to file its Rejoinder on Preliminary Objections. The Respondent also submitted Exhibit R-307, the consent award rendered in the OTH Arbitration.
74. On 25 March 2015, the Tribunal granted the Respondent's leave to submit the additional documents mentioned in its letter of 17 March 2015, and granted the Claimant an extension until 24 April 2015 to file its Rejoinder on Preliminary Objections.

75. On 26 March 2015, the Claimant maintained its request that the Tribunal order the Respondent to undertake additional searches in relation to Exhibit C-194. The Respondent replied on 31 March 2015.
76. On 27 March 2015, the Tribunal informed the Parties that it would retain Dr. Daly's advice in relation to the Schedules that he found to be "a mixture of commercially sensitive information and information that is not commercially sensitive", by requesting that he redact all of the commercially sensitive information contained in the SPA Schedules, and that he review four additional documents, which were produced by the Claimant to the Respondent in redacted form, to determine whether they contained "commercially sensitive information".
77. On 1 April 2015, the Respondent filed a request for leave to submit additional Exhibits R-1124 to R-1127.
78. On 2 April 2015, Dr. Daly transmitted to the Parties the Schedules with the redactions he made pursuant to the Tribunal's directions of 27 March 2015.
79. On 3 April 2015, the Tribunal issued Procedural Order No. 8, a Confidentiality Order on Restricted Access Information which further implemented the confidentiality regime put in place in Procedural Orders Nos. 1, 6 and 7. By letter of the same date, the Tribunal ordered the Respondent to transmit unredacted copies of all of the SPA Schedules indicated, bearing the designation "restricted access information", to the Claimant's counsel by 7 April 2015.
80. On 7 April 2015, the Respondent transmitted to the Claimant the unredacted versions of the SPA Schedules, as ordered by the Tribunal on 3 April 2015.
81. On 7 April 2015, the Tribunal denied the Claimant's request of 26 March 2015 that the Respondent be ordered to undertake additional searches in relation to Exhibit C-194.
82. On 7 April 2015, the Claimant did not object to the filing by the Respondent of new exhibits as per its request of 1 April 2015.
83. Accordingly, on 9 April 2015, the Tribunal granted the Respondent leave to submit Exhibits R-1124 to R-1127.
84. On 15 April 2015, Dr. Daly issued a further Report, on which both Parties commented on 17 April 2015.
85. By letter of 20 April 2015, further to Dr. Daly's Report, the Tribunal ordered the Claimant to transmit to the Respondent unredacted copies of certain documents as well as documents bearing the designation "restricted access information" by 21 April 2015.
86. On 21 April 2015, the Claimant transmitted to the Respondent the documents ordered by letter of 20 April 2015.
87. On 24 April 2015, the Respondent requested leave to submit Exhibits R-118-bis, R-119-bis and R-120-bis.

88. On 24 April 2015, the Claimant filed its Rejoinder on Preliminary Objections with Exhibits C-855 through C-1081, and Legal authorities CLA-228 through CLA-268 ("Rejoinder").
89. On 28 April 2015, the Claimant indicated that it did not oppose the Respondent's submission of its new exhibits.
90. On 29 April 2015, the Tribunal granted the Respondent leave to submit additional Exhibits R-118-bis, R-119-bis and R-120-bis.
91. On 3 May 2015, the Respondent filed a request to produce an amended version of Exhibit R-1111.
92. On 6 May 2015, the Respondent filed a request for leave to submit new Exhibits R-1128 to R-1132. On the same date, the Claimant indicated that it did not object to the submission of Exhibit R-1111, subject to certain qualifications.
93. On 8 May 2015, the Tribunal granted the Respondent leave to submit its amended Exhibit R-1111 provided the amended exhibit contained no information that was not already part of the evidentiary record, and that it listed the sources in the record from which the information was derived.
94. On 8 May 2015, the Claimant filed a request for leave to submit a new Exhibit C-1082.
95. On 10 May 2015, the Tribunal granted leave to the Respondent to submit additional Exhibits R-1128 to R-1132. The Tribunal also granted leave to the Claimant to submit the Exhibit C-1082.
96. On 11 May 2015, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
97. On 15 May 2015, the Tribunal issued Procedural Order No. 9 on the organization of the hearing, confirming that a hearing would take place in Paris from 26 to 30 May 2015, and addressing all logistical questions.
98. On 15 May 2015, the Respondent filed a request for leave to submit Exhibits R-1133 to R-1135 (corresponding to the full copies of the exhibits filed by the Claimant as C-935, C-936 and C-937).
99. On 16 May 2015, the Respondent filed a request for leave to produce Legal Authorities RL-263 to RL-267.
100. On 18 May 2015 and 19 May 2015, the Claimant opposed the Respondent's request of 15 May 2015 and of 16 May 2015.
101. On 19 May 2015, the Tribunal granted leave to the Respondent to submit full copies of the exhibits filed by the Claimant as C-935, C-936 and C-937.
102. On 20 May 2015, the Tribunal denied the Respondent's request to submit the additional Exhibits RL-263 to RL-267, as the Respondent had not established that any exceptional circumstances existed warranting the admission of those additional documents.

103. From 26 to 30 May 2015, a hearing on Preliminary Objections took place in the World Bank Offices in Paris ("Hearing"). In addition to the Members of the Tribunal, the Secretary and the Assistant to the Tribunal, present at the Hearing were:

For the Claimant:

Ms. Carolyn B. Lamm	White & Case LLP
Ms. Andrea J. Menaker	White & Case LLP
Mr. Frank Schweitzer	White & Case LLP
Mr. Brody Greenwald	White & Case LLP
Ms. Noor Davies	White & Case LLP
Mr. Suyash Paliwal	White & Case LLP
Ms. Hadia Hakim	White & Case LLP
Mr. Anthony Bestafka-Cruz	White & Case LLP
Mr. Jeffrey Stellhorn	White & Case LLP
Mr. Timothy Perry	White & Case LLP
Ms. Erin Vaccaro	White & Case LLP
Mr. Michel Hubert	Orascom Group
Mr. Oussama Nassif	Orascom Group
Ms. Stephanie Soupeaux	Orascom TMT Investments S.à r.l.

For the Respondent:

Prof. Emmanuel Gaillard	Shearman & Sterling LLP
Dr. Yas Banifatemi	Shearman & Sterling LLP
Mr. Benjamin Siino	Shearman & Sterling LLP
Ms. Marina Matousekova	Shearman & Sterling LLP
Mr. Tsegaye Laurendeau	Shearman & Sterling LLP
Ms. Julie Esquenazi	Shearman & Sterling LLP
Mr. Pierre Viguier	Shearman & Sterling LLP
Ms. Armine Garcia Barker (Legal Assistant)	Shearman & Sterling LLP
Ms. Hassiba Benseffa	Director, State Authority of the Treasury, Ministry of Finances of the People's Democratic Republic of Algeria

104. The following persons were examined:

On behalf of the Claimant:

Mr. François Bourgon	Adomex
Mr. David Catala	Intertrust Luxembourg S.à r.l.
Prof. Dr. Rudolf Dolzer	University of Bonn
Ms. Laura Hardin	Alvarez & Marsal
Mr. Karim-Michel Nasr	Orascom Group
Prof. André Prüm	University of Luxembourg
Mr. Naguib Sawiris	Orascom TMT Investments S.à r.l.
Mr. Richard Tolkien	Independent Expert

On behalf of the Respondent:

Prof. Patrick Kinsch	Wurth Kinsch Azizi Association d'Avocats (Luxembourg)
Prof. Paul Alain Foriers	Simont Braun SCRL (Bruxelles)

105. The audio recording of the Hearing was made available to the Parties and the Members of the Tribunal.
106. On 4 June 2015, the Tribunal issued Procedural Order No. 10 on post-hearing matters.
107. On 4 June 2015, the Tribunal invited the Parties' comments on a draft letter it intended to address to the Kingdom of Belgium and the Grand Duchy of Luxembourg regarding the request for the *travaux préparatoires* of the BLEU-Algeria BIT, which the Respondent was unable to locate.
108. On 12 June 2015, the Parties informed the Tribunal that they approved the draft letter. The letter was sent by ICSID on the same date.
109. On 15 June 2015, each Party submitted its respective list of additional international decisions and awards, in accordance with Procedural Order No. 10; namely Legal Authorities CLA-270 to CLA-294 and RL-263 to RL-269, respectively.
110. On 22 June 2015, each Party submitted rebuttal authorities; namely Legal Authorities CLA-295 to CLA-299 and RL-270.
111. On 30 September 2015, each Party filed its Post-Hearing Brief.
112. By letter of 16 October 2015, the Centre transmitted to the Tribunal with copy to the Parties a hard copy of the documents of the *travaux préparatoires* in relation to the BLEU-Algeria BIT, that it had received on 14 October 2015 from Mr. Didier Reynders, Vice-Prime Minister and Minister of Foreign and European Affairs of the Kingdom of Belgium.
113. On 21 October 2015, the Claimant submitted a complete version of Exhibit C-855.
114. On 18 November 2015, each Party filed a Reply Post-Hearing Brief. The Claimant's Reply Post-Hearing Brief was submitted with amended Legal Authority CLA-226.
115. By letter of 25 November 2015, the Respondent objected to the Claimant's submission of amended Legal Authority CLA-226.
116. By letter of 28 November 2015, the Claimant requested that the Tribunal admit its resubmitted Legal Authority CLA-226 into the record and deny the Respondent's request to submit any responsive legal authorities.
117. On 4 December 2015, each Party filed a Submission on Costs (the "Claimant's Submission on Costs" and the "Respondent's Submission on Costs"). The Claimant filed Legal Authorities CLA-300 through CLA-306.
118. By letter of 7 December 2015, the Tribunal took note of the Parties' correspondence of 25 and 28 November 2015 regarding Exhibit CLA-226, and informed them that it would address the objection raised, if at all necessary, in its forthcoming decision or award.
119. By letter of 10 December 2015, the Respondent objected to the Claimant's submission of legal authorities with its 4 December 2015 Submission on Costs and asked the Tribunal to strike them from the record. By letter of the same date, the Claimant asked the Tribunal to deny the

Respondent's request to strike its new legal authorities from the record. By email of 14 December 2015, the Tribunal informed the Parties that it would address the objection raised, if at all necessary, in its forthcoming decision or award.

120. On 18 December 2015, each Party filed a Reply on Costs (the "Claimant's Reply Submission on Costs" and the "Respondent's Reply Submission on Costs").
121. On 1 February 2016, the Claimant informed the Tribunal that it had changed its *siège social* to a new address in Luxembourg.
122. On 12 February 2016, the Tribunal invited the Parties to provide their views on (1) the award issued on 29 January 2016 in *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26 ("*Tenaris and Talta*"; available on the ICSID website),<sup>27</sup> which discussed, among other issues, the requirement of *siège social* in the BIT applicable in that case, and on (2) the meaning of Article 1(1)(b), and in particular of the term "*siège social*", in the Dutch and Arabic versions of the Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments.
123. On 11 March 2016, each Party filed its observations. The Claimant also filed Exhibits C-1083 to C-1095. The Respondent filed two annexes.
124. In a letter of 13 March 2016, the Claimant objected to the Respondent's comments on jurisdiction *ratione materiae* made in its submission of 11 March 2006. The Respondent objected to that letter on 18 March 2016.
125. On 1 and 8 April 2016, the Tribunal clarified that each Party would have the opportunity to file a rebuttal submission, with the possibility of filing relevant additional exhibits and legal authorities and that sur-rebuttal documents with brief explanations would be allowed, to the exclusion of additional expert reports.
126. On 21 April 2016, each Party filed a rebuttal submission. The Claimant filed three new Legal Authorities numbered CLA-300 to CLA-302.<sup>28</sup> The Respondent filed Exhibits R-1136 to R-1139 and Legal Authorities RL-275 to RL-283.
127. On 28 April 2016, each Party filed a sur-rebuttal submission. The Respondent filed Legal Authorities RL-284 to RL-285.
128. On 29 April 2016, the Respondent requested that the Tribunal strike the Claimant's sur-rebuttal. The Claimant opposed that request on 30 April 2016. The Respondent replied on 3 May 2016.

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<sup>27</sup> *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 [hereinafter *Tenaris and Talta*].

<sup>28</sup> The Tribunal notes that the exhibit numbers CLA-300 to CLA-302 were used twice for different legal authorities.

129. On 13 May 2016, the Tribunal took note of the positions expressed in the Parties' letters of 30 April 2016 for the Claimant and of 29 April and 3 May 2016 for the Respondent, and deferred its determination of the Parties' requests to its forthcoming decision or award.
130. On 4 October 2016, the Tribunal informed the Parties that considering the number of the Respondent's preliminary objections and the complexity of some of the objections, the Tribunal expected to be able to complete the drafting of its Decision or Award in early 2017, after which ICSID would have to edit and translate the draft.
131. On 31 May 2017, the proceeding was declared closed.

### **III. PRELIMINARY MATTERS**

132. Prior to considering the merits of the Parties' positions, the Tribunal will address the scope of this Award (A); the law applicable to the jurisdiction of the Tribunal (B); and a number of outstanding requests from the Parties (C).

#### **A. SCOPE OF THIS AWARD**

133. The present proceedings were bifurcated between jurisdiction/admissibility and merits in PO2. The present Award thus addresses the Respondent's preliminary objections to the Tribunal's jurisdiction and the admissibility of the Claimant's claims.

#### **B. LAW APPLICABLE TO THE JURISDICTION OF THE TRIBUNAL**

134. It is not in dispute that the Tribunal's jurisdiction is governed by the ICSID Convention and the BIT, the relevant provisions of which are reproduced below when dealing with each jurisdictional objection.
135. Both Parties agree that the interpretation of the ICSID Convention and the BIT is governed by the customary international law principles on treaty interpretation as codified in the Vienna Convention on the Law of Treaties of 23 May 1969 ("VCLT").
136. It is also undisputed that the Tribunal has the power to rule on its own jurisdiction.<sup>29</sup>

#### **C. OUTSTANDING REQUESTS**

137. In this section, the Tribunal resolves a number of outstanding requests from the Parties.
138. With regard to the Respondent's request in connection with the Claimant's submission of 28 April 2016,<sup>30</sup> the Tribunal decides to strike from the record the Claimant's Sur-Rebuttal to Respondent's 21 April 2016 Submission, dated 28 April 2016, as, contrary to the Tribunal's

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<sup>29</sup> Art. 41(1) of the ICSID Convention.

<sup>30</sup> See Respondent's letters of 29 April and 3 May 2016; Claimant's letter of 30 April 2016; Tribunal's letter of 13 May 2016.

directions of 1 April 2016, the Claimant did not use this opportunity to “file simultaneous sur-rebuttal documents, if any, with brief explanations”, but instead provided additional comments on the relevance of *Tenaris and Talta* in reply to the Respondent’s 21 April 2016 submission. Furthermore, the Tribunal decides to deny the Claimant’s request not to admit Exh. RL-276,<sup>31</sup> which the Respondent introduced with its submission of 21 April 2016. The introduction of such legal authority complied with the Tribunal’s directions of 1 April 2016, which specifically invited the Parties to file rebuttal submissions “with the possibility of filing relevant additional exhibits and legal authorities”.<sup>32</sup> In this context, it appears irrelevant that at an earlier stage of the proceedings (namely days before the May 2015 Hearing) the Tribunal had rejected the introduction of this legal authority, as that ruling only found that *at that time* the circumstances for inclusion were not met.<sup>33</sup>

139. Furthermore, the Tribunal denies the Respondent’s request to exclude from the record the Claimant’s Legal Authority CLA-226,<sup>34</sup> resubmitted with the Claimant’s Reply Post-Hearing Brief. Indeed, the Claimant did not submit a new legal authority in violation of the Tribunal’s directions, but simply submitted additional portions of a book, excerpts of which were already in the record.
140. Finally, the Respondent requested that the Tribunal exclude Legal Authorities CLA-300 to CLA-306 which the Claimant submitted with its Submission on Costs dated 4 December 2015, arguing that these authorities were filed in violation of the Tribunal’s Procedural Order No. 10.<sup>35</sup> The Claimant, for its part, argued that it had complied with the Tribunal’s direction in Procedural Order No. 10, adding that “the Tribunal may apply the maxim *jura novit curia* (or *jura novit arbiter*) and rely on any applicable legal authorities it deems relevant to its analysis”.<sup>36</sup> The Tribunal generally agrees with the Claimant,<sup>37</sup> and in particular notes that its direction in Procedural Order No. 10 that “[n]o supporting document shall be appended” to the Parties’ cost submissions clearly referred to substantiation of the amount of the Parties’ costs, not to legal authorities concerning issues that neither Party had previously addressed. The Respondent’s request is thus rejected.

#### **IV. FACTS RELEVANT TO JURISDICTION AND ADMISSIBILITY: THE STRUCTURE OF THE WEATHER GROUP, THE CLAIMANT’S ALLEGED INVESTMENT IN OTA AND THE WIND ACQUISITION**

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<sup>31</sup> See Claimant’s Sur-Rebuttal to Respondent’s 21 April 2016 Submission, dated 28 April 2016, para. 3 (“[i]t would be procedurally unfair and prejudicial to Claimant to admit this same dictionary at this late stage”); Claimant’s letter, 30 April 2016, p. 2 (“[i]t would be procedurally unfair and prejudicial to Claimant to admit this same evidence at this late stage”).

<sup>32</sup> Tribunal’s letter, 1 April 2016.

<sup>33</sup> See Tribunal’s letter, 20 May 2015.

<sup>34</sup> See Respondent’s letter, 25 November 2015.

<sup>35</sup> Respondent’s letter, 10 December 2015.

<sup>36</sup> Claimant’s letter, 10 December 2015, p. 1.

<sup>37</sup> See also, amongst many, *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295.

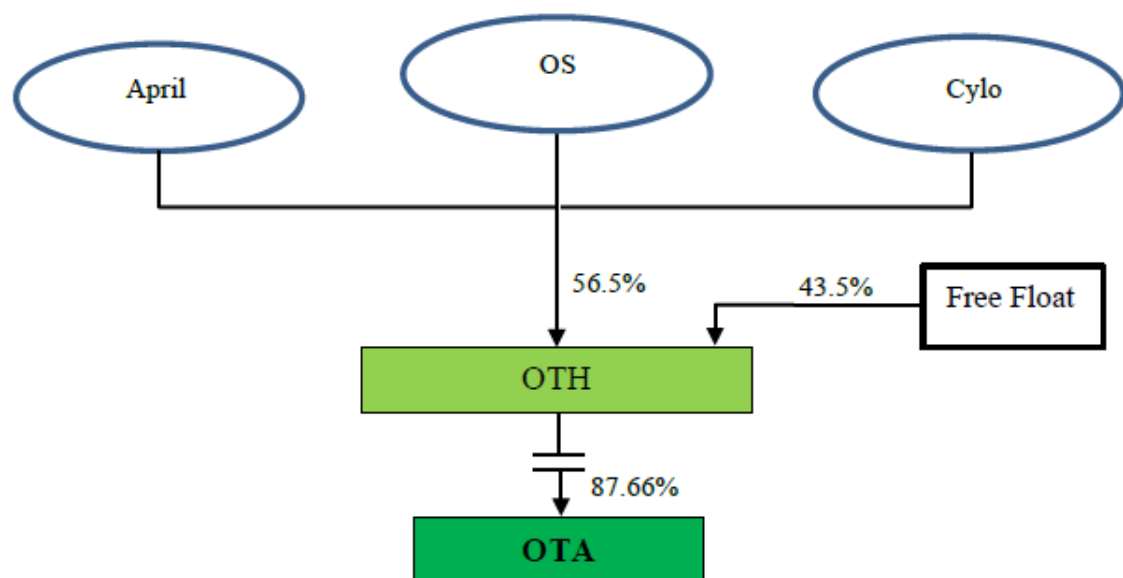


141. The following paragraphs provide a summary of the Parties' positions on the origin of the Claimant's alleged investment in OTA, the structure of the Weather Group, and the acquisition of Wind Telecomunicazioni S.p.A. ("Wind"). Some of these facts are in dispute between the Parties and are relevant to a number of jurisdictional or admissibility objections, in particular the Respondent's objection to the Tribunal's jurisdiction *ratione materiae* (see *infra* section V.C) and the Respondent's jurisdiction and admissibility objections in relation to the Claimant's status of indirect shareholder, the OTH Arbitration and settlement, and the sale of the Claimant's investment (see *infra* section V.D). The following summary does not reflect any finding of fact.

#### A. THE CLAIMANT'S POSITION

##### 1. OTMTI's acquisition of interest in OTA in August 2005

142. Prior to August 2005, 56.5% of OTH's shares were owned by three companies, April Holding ("April"), OS Holding ("OS"), and Cylo Investments Ltd. ("Cylo") (collectively, the "Sawiris Entities").<sup>38</sup> OTH, in turn, owned 87.66% of OTA, including through its subsidiary Oratel International Inc. ("Oratel"). This pre-August 2005 ownership structure is shown in the following chart:<sup>39</sup>



143. According to the Claimant, OTMTI's acquisition of an interest in OTA occurred in August 2005 as follows:<sup>40</sup>

<sup>38</sup> Tolkien Second Expert Report, para. 19.

<sup>39</sup> Reproduced from Tolkien Second Expert Report, para. 19.

<sup>40</sup> See esp. Tolkien Second Expert Report, Appendix 2, with further details on this set of transactions.

- a. The Sawiris Entities sold 50% plus one share of OTH to Weather Capital, a subsidiary of Weather Investments, in exchange for €3.5 billion in cash and a receivable under a subordinated loan (€1.2 billion in cash and €2.3 billion in the form of a loan).<sup>41</sup>
- b. The Sawiris Entities used this amount of €3.5 billion to subscribe shares in Weather Investments during a share offering.<sup>42</sup>
- c. OTMTI (then named Weather II) paid €294 million in cash to subscribe shares in Weather Investments during the share offering. The Italian utility company Enel S.p.A. (“Enel”) and twenty-two other companies and individuals paid an additional €510 million in cash to subscribe Weather Investments shares during this share offering.
- d. OTMTI then paid new OTMTI shares valued at €3.5 billion<sup>43</sup> to the Sawiris Entities in consideration for their shares in Weather Investments.
- e. As a result of these transactions, the Claimant contends that, as of 11 August 2005, OTMTI had paid €3.5 billion in new shares and over €294 million in cash to purchase Weather Investments shares. Because one of Weather Investments’ main assets was its indirect shareholding in OTA, OTMTI thus paid €3.794 billion in cash and shares to acquire its indirect interest in OTA.<sup>44</sup>

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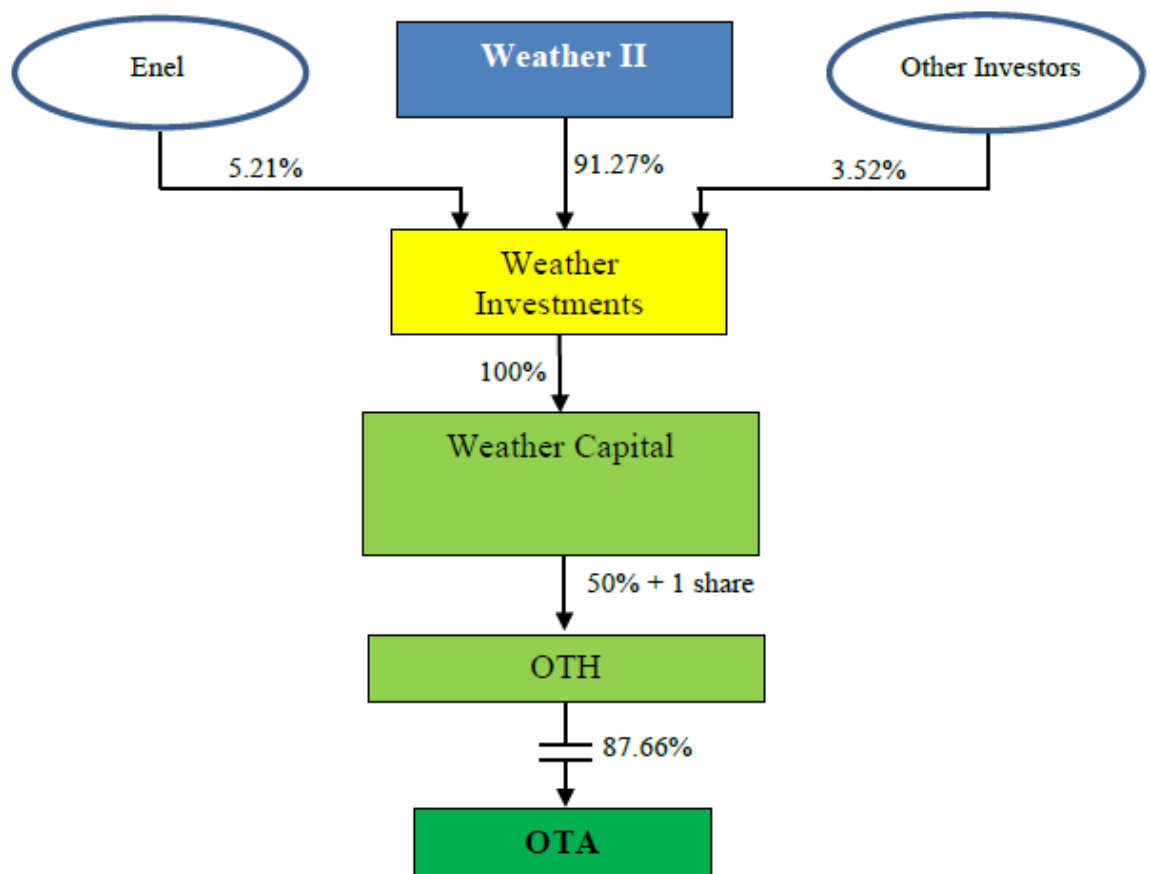
<sup>41</sup> Tolkien Second Expert Report, Appendix 2, para. 3. As part of the 1 August 2005 purchase agreements, the Sawiris Entities were required to use the proceeds from the sale to purchase the shares of Weather Capital's parent, Weather Investments, within 10 business days. Failure to use the proceeds to subscribe the shares of Weather Investments would render the sale null and void retroactively, and require the Sawiris Entities to return the funds to Weather Capital. See Tolkien Second Expert Report, Appendix 2, para. 5.

<sup>42</sup> A first increase of capital of Weather Investments was decided on 5 August 2005 for a total of €2.3 billion. To subscribe this share capital increase, the Sawiris Entities assigned to Weather Investments their receivable from the loan which they extended to Weather Capital. A second increase of capital of Weather Investments was approved on 10 August 2005 for a total of €2 billion. The Sawiris Entities subscribed €1.2 billion of this capital increase in cash.

<sup>43</sup> On 5 August 2005, OTMTI increased its capital in an amount of €2.3 billion. The Sawiris Entities purchased these shares through payment of the Weather Investments’ shares that they had purchased earlier that day. See Tolkien Second Expert Report, Appendix 2, para. 8. On 11 August 2005, OTMTI increased its capital by a further €1.2 billion. The Sawiris Entities subscribed this capital increase through a payment of the Weather Investments shares that they had subscribed the previous day. See Tolkien Second Expert Report, Appendix 2, para. 12.

<sup>44</sup> Tolkien Second Expert Report, Appendix 2, para. 13.

144. OTMTI's post-August 2005 ownership in OTA is shown in the following chart:<sup>45</sup>



## 2. OTMTI's acquisition of Wind

145. The following paragraphs summarize the acquisition of Wind, a matter which Algeria has raised in the context of its objections. For the Claimant, the acquisition of Wind is separate from OTMTI's acquisition of interest in OTH and OTA,<sup>46</sup> "though both acquisitions occurred as part of one set of transactions".<sup>47</sup>

146. In August 2005, Weather Investments' subsidiary, Wind Acquisition Finance S.p.A. ("Wind Acquisition"), purchased 62.75% of Wind from Enel Investment Holding BV ("Enel Investment") for €2.986 billion in cash. The funds for this purchase came from a loan secured by OTH's shares and future earnings (€1.2 billion), loans secured by Wind's shares and future

<sup>45</sup> Reproduced from Tolkien Expert Second Report, para. 21.

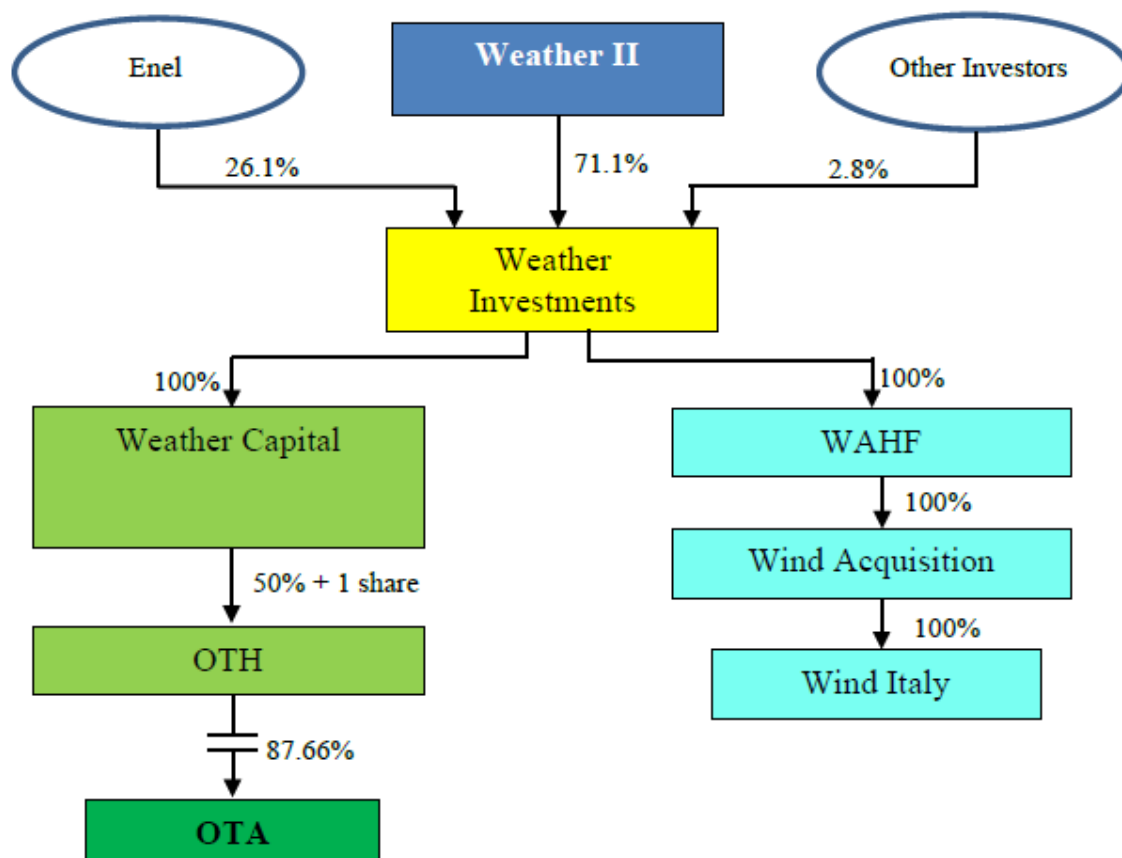
<sup>46</sup> Counter-Memorial, para. 52; Tolkien Second Expert Report, para. 25 (explaining that the two acquisitions occurred separately and were treated separately for financial and accounting purposes).

<sup>47</sup> Tolkien Second Expert Report, Appendix 3, para. 2. See also Rejoinder, para. 59 ("Claimant always has acknowledged that it acquired its indirect controlling shareholding in OTA in the context of acquiring an indirect controlling shareholding in Wind Italy and that it used shares of OTH as collateral to acquire Wind Italy. Claimant, however, also treated these transactions separately for financial and accounting purposes, and in fact established organizational structures to separate OTH and its subsidiaries from Wind Italy and its subsidiaries, which ensured that 'risks that faced one pillar would not necessarily affect the other pillar.'" Internal footnotes omitted).

earnings (€981 million), and a cash-based capital subscription of Weather Investments' shares (for the remainder).<sup>48</sup>

147. In February 2006, Weather Investments acquired the remainder of Wind from Enel for €328 million in cash and €1.665 billion in shares of Weather Investments.<sup>49</sup>

148. Following these transactions, the ownership of the Weather Group was structured as follows:<sup>50</sup>



149. For the Claimant and its expert, acquiring a company through debt secured by the acquired company's assets is a method commonly used and referred to as a leveraged buyout ("LBO"). In this case, one third of the purchase price came from debt secured by the target asset itself, while the remainder came from debt secured by assets of the acquirer.<sup>51</sup> Furthermore, in the Claimant's submission, there was nothing unusual about the use of loans collateralized by another asset - in this case, the shares of OTH - to acquire a new asset.<sup>52</sup>

<sup>48</sup> Tolkien Second Expert Report, paras. 26-27.

<sup>49</sup> Tolkien Second Expert Report, para. 28.

<sup>50</sup> Reproduced from Tolkien Second Expert Report, para. 28.

<sup>51</sup> Tolkien Second Expert Report, para. 29.

<sup>52</sup> Tolkien Second Expert Report, para. 31.

### **3. OTMTI's further purchases of Weather Investments shares**

150. The Claimant submits that, between December 2006 and January 2007, after acquiring Wind, it further increased its ownership interest in OTA through purchases of additional shares in Weather Investments:

- a. On 21 December 2006, OTMTI directly purchased 16.1% of Weather Investments from Enel for a consideration of €1.21 billion in cash and a loan (€248 million in cash<sup>53</sup> and €962 million in the form of a loan guarantee), which loan was repaid with interest in June 2008;<sup>54</sup>
- b. In December 2006 and January 2007, OTMTI purchased an additional 0.62% of Weather Investments shares from 17 Middle Eastern minority shareholders for €44.47 million;<sup>55</sup>
- c. Wind Acquisition Holdings Finance S.p.A. ("WAHF"), a subsidiary of OTMTI and Weather Investments, purchased the remaining 10% of Weather Investments shares from Enel for €751 million in cash.<sup>56</sup>

151. Furthermore, the Claimant alleges that it made regular payments from 2006 to 2010 directly to Weather Investments in an aggregate amount of approximately €2.48 million.<sup>57</sup>

### **4. OTMTI's ownership of OTA in 2011**

152. After 2007, OTMTI sold certain shares in Weather Investments.<sup>58</sup> It asserts, however, that at all times prior to its 2011 exit sale of Weather Investments to VimpelCom, it held about 70% or more of Weather Investments share capital.<sup>59</sup>

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<sup>53</sup> The Claimant directed its subsidiaries, Weather Investments and WAHF, to pay Enel from a dividend payment of €281 million that Weather Investments owed to the Claimant. See Rejoinder, para. 62.

<sup>54</sup> Rejoinder, para. 61; Tolkien Second Expert Report, paras. 38, 44.

<sup>55</sup> Rejoinder, para. 64; Tolkien Second Expert Report, paras. 38, 44.

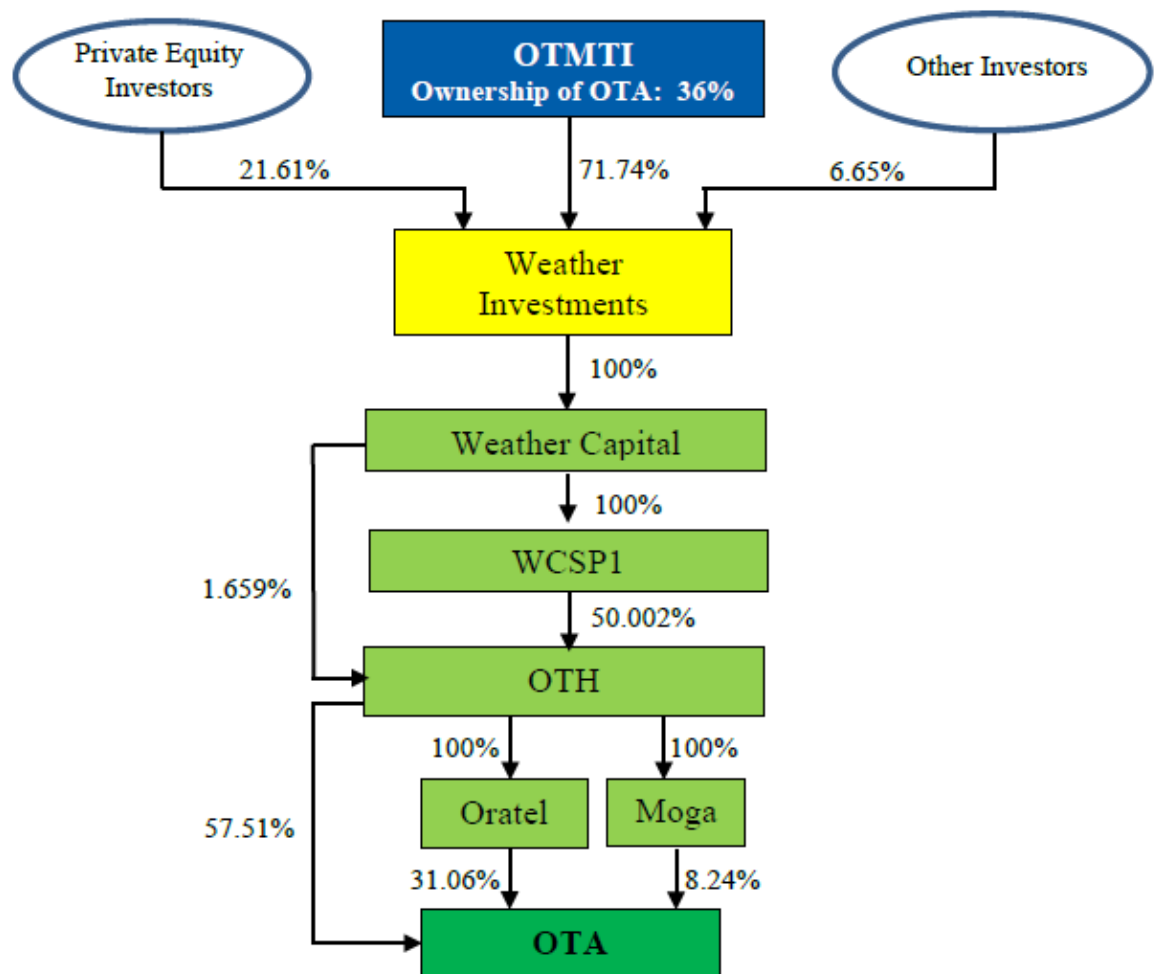
<sup>56</sup> Tolkien Second Expert Report, paras. 38, 44.

<sup>57</sup> Rejoinder, para. 241.

<sup>58</sup> Tolkien Second Expert Report, para. 39.

<sup>59</sup> Counter-Memorial, para. 55; Rejoinder, para. 69; Tolkien Second Expert Report, para. 6.

153. As of the beginning of 2011, prior to the sale of Weather Investments to VimpelCom, OTMTI's interest in OTA was structured as follows:<sup>60</sup>



## 5. Conclusion

154. In conclusion, the Claimant asserts that OTMTI paid a total of €5.1 billion in cash and shares, *inter alia*, to acquire its indirect investment in OTA through the acquisition of shares in Weather Investments.<sup>61</sup>

155. Because OTMTI controlled more than 50% of the shares at each link in the corporate chain between OTMTI and OTA, OTMTI controlled OTA.<sup>62</sup> OTMTI's control of OTA is also evidenced by the fact that Mr. Sawiris was the Chairman of OTMTI's Board, was elected by OTMTI as Chair of the Board of Weather Investments, and maintained his positions as Chairman of OTA and Executive Chairman of OTH's Board after OTMTI's creation.<sup>63</sup>

<sup>60</sup> Chart reproduced from Tolkien Second Expert Report, para. 7.

<sup>61</sup> Counter-Memorial, para. 47; Tolkien Second Expert Report, para. 44.b.

<sup>62</sup> Tolkien Second Expert Report, para. 44.

<sup>63</sup> Counter-Memorial, para. 58.

## **B. THE RESPONDENT'S POSITION**

156. The Respondent maintains that OTMTI (then Weather II) was created within the context and for the sole purpose of the acquisition of Wind, which presents no link with Algeria.<sup>64</sup> The Respondent contends that Mr. Sawiris decided to use the OTH shares in order to finance such acquisition. It is within such context that Weather II was created and thus became a very indirect shareholder in OTH and OTA.
157. The Respondent relies on a number of decisions rendered by the English courts between 2009 and 2013 in connection with the litigation opposing Mr. Alessandro Benedetti, an Italian businessman, on the one hand, and Mr. Sawiris, April, OS and Cylo, on the other hand, concerning the amount of the compensation due to Mr. Benedetti in consideration for his role in the closing of the purchase of Wind.<sup>65</sup> The Respondent relies in particular on the decision of the High Court of Justice of 15 June 2009, describing the genesis and the conditions of the acquisition of Wind.<sup>66</sup> On the basis of this narrative, the Respondent argues that the creation of Weather II, as well as the use of OTH's shares to finance the acquisition of Wind, were envisaged at the last moment by Mr. Sawiris; and that Weather II became a very indirect shareholder in OTH (which owned directly and indirectly OTA) for the sole purposes of the Wind transaction, and not for the purpose of investing in Algeria.

### **1. The genesis of the acquisition of Wind**

158. Until May 2005, Wind was owned 37.25% by Enel and 62.75% by Enel Investment. The Respondent argues that around 2002 Mr. Sawiris envisaged to acquire control over Wind by effecting an investment through Rain Investments S.p.A., a company created in Italy together with Mr. Benedetti.<sup>67</sup> At the end of 2004, however, the idea of using that vehicle was abandoned because Messrs. Sawiris and Benedetti had difficulties finding other investors.<sup>68</sup>
159. According to the Respondent, Mr. Sawiris then partnered with different financiers with a view to acquiring all of Wind's shares through the Luxembourg-incorporated Weather Investments S.A. ("Weather I").<sup>69</sup> This second project was similarly abandoned in April 2005, when Mr. Sawiris' financial partners decided to withdraw.<sup>70</sup> It is in this context, the Respondent contends, that Mr. Sawiris, who at that time did not wish and was not in the position to invest a substantial amount to purchase Wind, "at the last moment" decided to use OTH shares as collateral to finance the operation.<sup>71</sup> As a consequence, a new acquisition structure was put in

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<sup>64</sup> Reply, para. 15 ("*Weather II a été créée pour les seuls besoins de l'opération d'acquisition de Wind, qui ne présente aucun lien avec l'Algérie*").

<sup>65</sup> Reply, para. 15.

<sup>66</sup> Reply, para. 16, referring to the Decision of the High Court of Justice (Chancery Division) of London, 15 June 2009, [2009] EWHC 1330 (Ch), Exh. R-1105.

<sup>67</sup> Reply, paras. 20-24.

<sup>68</sup> Reply, paras. 19, 25.

<sup>69</sup> Reply, paras. 29-30.

<sup>70</sup> Reply, para. 31.

<sup>71</sup> Reply, paras. 19, 32-35.

place, which entailed the incorporation of the Luxembourg company Weather II on 24 May 2005, i.e. just two days before the conclusion of the sale purchase agreement of Wind.<sup>72</sup> The creation of Weather II was, for the Respondent, essentially linked to tax efficiency reasons.<sup>73</sup> The incorporation of Weather II followed a few days after the incorporation of another vehicle, Weather Investments, which had been constituted on 20 May 2005.<sup>74</sup>

160. On 26 May 2005, Enel and its holding company Enel Investment, on the one hand, and Mr. Sawiris, Weather II, April, OS and Weather Investments, on the other, signed the purchase agreement of Wind.<sup>75</sup>
161. On this basis, the Respondent considers that it cannot be disputed that the purpose of the creation of Weather II and the use of shares in OTH for the purposes of financing such transactions were to allow Mr. Sawiris to purchase Wind at the lowest price, and not to invest in Algeria.<sup>76</sup>

## **2. The acquisition of Wind**

162. At the moment of the closing of the purchase, the Sawiris Entities held 56.4% of OTH.<sup>77</sup> The Respondent alleges that pursuant to the share purchase agreement, the acquisition of Wind occurred in two steps. First, different vehicles (held directly and indirectly by Weather Investments) purchased 62.75% of the shares in Wind. At a second stage, the remaining 37.25% of the shares were purchased. Following such transactions, the Claimant then acquired further shares in Weather Investments to finalize the acquisition.

### **a. First phase: the purchase of 62.75% of Wind on 11 August 2005**

163. In May 2005, Mr. Sawiris and Banca IMI agreed to use the OTH shares as security for a loan of €1.2 billion financing the acquisition.<sup>78</sup> According to the Respondent, it is within this context and pursuant to the share purchase agreement of 26 May 2005, that Weather II became an indirect shareholder in OTH.<sup>79</sup>
164. On 1 August 2005, the Sawiris Entities sold 50% plus one share in OTH to Weather Capital (which was fully owned by Weather Investments) pursuant to two share purchase agreements providing that the purchase price (in the amount to €3.5 billion) was to be used by the Sawiris Entities to subscribe shares in Weather Investments.<sup>80</sup>

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<sup>72</sup> Reply, paras. 36-40.

<sup>73</sup> Reply, para. 41.

<sup>74</sup> Reply, para. 42.

<sup>75</sup> Reply, para. 44.

<sup>76</sup> Reply, para. 45.

<sup>77</sup> Reply, para. 48. See also *Organigramme des sociétés*, Exh. R-1111, p. 6.

<sup>78</sup> Reply, paras. 38, 51.

<sup>79</sup> Reply, para. 51.

<sup>80</sup> Reply, para. 52.



165. Weather Investments then increased its capital twice: on 5 and 10 August 2005, the Sawiris Entities subscribed shares in Weather Investments in consideration of a contribution in cash of €1.2 billion and of a contribution in kind of a credit amounting to €2.3 billion due by Weather Capital.<sup>81</sup>
166. Further, in the context of the capital increase of Weather Investments of 10 August 2005, Weather II and Enel made cash contributions in Weather Investments, which for the Respondents were one of the conditions precedent to the two collateral loans granted by Banca IMI.<sup>82</sup> In this connection, Weather II allegedly made its cash contribution of €294 million.
167. As part of the sequence of transactions, the Sawiris Entities sold their shares in Weather Investments to Weather II in consideration for new shares in Weather II (for a value of €3.5 billion, equal to the sales price of the OTH shares to Weather Capital). On 10 August 2005, Weather II could then give its 50% plus one share in Weather Investments as security for the two loans previously obtained by Weather Capital from Banca IMI.<sup>83</sup>
168. Therefore, Algeria submits that the use of the OTH shares allowed Mr. Sawiris to purchase Wind and that Weather II became an indirect shareholder of OTH during this first phase of the transaction for the purposes of financing the Wind transaction.

**b. Second phase: the purchase of 37.25% of Wind on 2 February 2006**

169. In February 2006, Weather Investments (through its subsidiary Wind Acquisition Finance S.p.A. (“Wind Acquisition” or “WAF”)) acquired the remainder of Wind from Enel by paying €328 million in cash<sup>84</sup> and €1.665 billion in form of its own shares.<sup>85</sup>
170. Following the closing of the Wind acquisition, Weather II owned 71.1% of Weather Investments; Enel 26.1%; and other investors 2.8%. Weather Investments owned 100% of WAHF, which owned 100% of Wind Acquisition, which owned 100% of Wind.<sup>86</sup>
171. Finally, on 21 December 2006, Enel sold the entirety of its 26.1% shareholding in Weather Investments to WAHF and Weather II.<sup>87</sup> Weather II then acquired further shares in Weather Investments (0.62%) from certain Middle Eastern investors, upon terms which the Claimant has allegedly refused to disclose.<sup>88</sup>

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<sup>81</sup> Reply, para. 53.

<sup>82</sup> Reply, para. 54.

<sup>83</sup> Reply, para. 56.

<sup>84</sup> Weather Investment's Italian subsidiary WAF acquired 6.26% of the shares in Wind from Enel. See Reply, para. 59.

<sup>85</sup> On 8 February 2006, Weather Investments issued shares for €1.665 billion, which were fully subscribed by Enel using the remaining 30.98% of its interest in Wind. Weather Investments then sold the 30.98% of Wind that it had received from Enel to Wind Acquisition in exchange for a payment of €1.665 billion. Weather Investments' ownership in Wind was then moved down to its subsidiary, Wind Acquisition, which now owned 100% of Wind.

<sup>86</sup> See *Organigramme des sociétés*, Exh. R-1111, p. 8.

<sup>87</sup> Reply, para. 63.

<sup>88</sup> Reply, para. 64.

172. Thus, the Respondent concludes, Mr. Sawiris and his family acquired control of Wind “with a minimum of cash whilst retaining a majority interest in the 50.1% stake in [OTH]”.<sup>89</sup> According to the Respondent, Mr. Sawiris is alleged to have stated that he managed to acquire Wind “for free”.<sup>90</sup>

## **V. OBJECTIONS TO THE TRIBUNAL’S JURISDICTION AND TO THE ADMISSIBILITY OF THE CLAIMS**

### **A. OVERVIEW OF THE OBJECTIONS AND THE PARTIES’ PRAYERS FOR RELIEF**

173. The Respondent has put forward the following objections to jurisdiction and to the admissibility of the claims:
- a. The Tribunal lacks jurisdiction *ratione personae*, because the BIT requires an “investor” to have its “real seat” in one of the Contracting States and the Claimant’s real seat is not in Luxembourg, but in Egypt.
  - b. The Tribunal lacks jurisdiction *ratione materiae*, because the Claimant made no investment within the meaning of the BIT and the ICSID Convention. Furthermore, Algeria’s offer to arbitrate contained in the BIT was not addressed to the Claimant at the time of filing of the Request for Arbitration on 19 October 2012, as at that time the Claimant owned an indirect shareholding in OTA equivalent to zero.
  - c. The Tribunal further lacks jurisdiction *ratione materiae*, because the Claimant is (or was) an indirect shareholder in OTA which is “too far removed” (*trop éloigné*) from the investment in OTA.
  - d. The Tribunal lacks jurisdiction or should declare the claims inadmissible because there is no dispute between the Claimant and Algeria within the meaning of Article 9 of the BIT. Moreover, the claims are inadmissible as a result of OTH’s exercise of its right to bring arbitration proceedings against Algeria which deprived the Claimant of standing to pursue its claims against the Respondent. Furthermore, Mr. Sawiris used his group of companies to seek to maximize his chances of success by introducing several arbitration proceedings against the Respondent at different levels of the chain of companies, which is an additional ground for the inadmissibility of the claims under the doctrine of abuse of rights. Finally, the Tribunal should decline jurisdiction or declare the Claimant’s claims inadmissible as a result of the Settlement Agreement which has resolved the disputes opposing OTA and OTH to Algeria.
  - e. The claims are inadmissible as the Claimant transferred its right to bring arbitration proceedings against Algeria when it sold its investment to VimpelCom.

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<sup>89</sup> Reply, para. 66, citing to Decision of the High Court of Justice (Chancery Division) of London, 15 June 2009, [2009] EWHC 1330 (Ch), Exh. R-1105, para. 27.

<sup>90</sup> Reply, para. 66, discussing Decision of the High Court of Justice (Chancery Division) of London, 15 June 2009, [2009] EWHC 1330 (Ch), Exh. R-1105, paras. 27 and 381.

- f. The acts of the state-owned television provider ENTV are not attributable to Algeria and the Tribunal should decline jurisdiction over the claims in relation to those acts.
- g. Finally, the Tribunal lacks jurisdiction over the “purely contractual claims” relating to the Investment Agreement, and the umbrella clause claims in relation to the Investment Agreement, the GSM Licence and the Investment Code are also inadmissible.

174. In its Reply Post-Hearing Brief, the Respondent has summarized its prayers for relief as follows:

La République Algérienne Démocratique et Populaire demande respectueusement au Tribunal arbitral de :

- SE DÉCLARER incompétent pour trancher le différend soumis par la Demanderesse ;
- DÉCLARER, à titre subsidiaire, les demandes de la Demanderesse irrecevables ;
- REJETER, en conséquence, l'ensemble des demandes de la Demanderesse;
- CONDAMNER la Demanderesse au paiement de l'intégralité des frais encourus par la Défenderesse dans le présent arbitrage, en ce compris les frais et honoraires des Membres du Tribunal arbitral, des conseils de la Défenderesse et de ses experts, ainsi que de toutes autres sommes exposées par la Défenderesse pour les besoins de sa défense.<sup>91</sup>

175. The Claimant has replied to the Respondent's jurisdictional and admissibility objections with the following arguments:

- a. The Claimant is a Luxembourgish investor within the meaning of Article 1(1)(b) of the BIT, because it was constituted in accordance with Luxembourg law and its *siège social* is and has always been in Luxembourg.
- b. The Claimant made numerous investments and reinvestments within the meaning of Article 1(2) of the BIT and Article 25 of the ICSID Convention.
- c. The Respondent is bound by the consent to arbitrate given in the BIT which expressly extends to “minority or indirect” investors, and the Respondent's suggestion that jurisdiction over indirect shareholders should be denied based on an asserted “cut-off point” is ill-founded.
- d. A dispute has existed between the Parties at all times since the Claimant's notification on 16 April 2012. Furthermore, OTH's commencement of a separate arbitration against the Respondent is irrelevant to this Tribunal's jurisdiction and to the admissibility of the claims in this arbitration. The Respondent's assertion that the claims should be dismissed under the doctrine of abuse of rights thus lacks merit. Similarly, the settlement of the OTH Arbitration is also irrelevant to jurisdiction and admissibility in this arbitration.

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<sup>91</sup> R-PHB 2, p. 55.

- e. The Claimant never sold or waived its right to bring arbitration against the Respondent; in effect, it expressly retained that right in the Risk Sharing Agreement which it concluded with VimpelCom on 15 April 2011.
- f. The Respondent's objection concerning the attribution of ENTV's actions pertains to the merits of the dispute and not to jurisdiction or admissibility. The Tribunal should thus postpone this issue until the merits phase.
- g. Finally, each of the claims relating to the Investment Agreement is for a violation of a specific provision of the BIT and the umbrella clause claims in relation to the Investment Agreement, the GSM Licence, and the Investment Code are all admissible, as the Claimant is entitled to rely upon the MFN clause in Article 10 of the BIT to invoke more favorable standards of protection in other investment treaties concluded by Algeria.

176. In its Reply Post-Hearing Brief, the Claimant has summarized its prayers for relief as follows:

[...] Claimant requests that the Tribunal dismiss Respondent's preliminary objections in their entirety and order Respondent to bear all costs and expenses incurred by Claimant in defending against Respondent's meritless preliminary objections, including all legal fees and disbursements. Claimant also requests such further or other relief as the Tribunal may deem appropriate.<sup>92</sup>

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177. As is clear from the preceding paragraphs, the Respondent has raised many preliminary objections. Some of these objections address closely related issues, although they are presented from different viewpoints. For a better structure and legibility of its analysis, the Tribunal deems it convenient to review the Respondent's objections in four main groups. First, the Tribunal will examine whether the Claimant fulfils the requirements *ratione personae* under the ICSID Convention and the BIT, in particular whether it is an "investor" pursuant to Article 1(1)(b) of the BIT (B). Second, the Tribunal will analyze whether the Claimant has made an "investment" within the meaning of Articles 25 of the ICSID Convention and 1(2) of the BIT (C). Third, the Tribunal will deal with the objections to the Tribunal's jurisdiction and/or the admissibility of the claims in connection with the Claimant's alleged status of (former) "very indirect" shareholder of OTA and the inter-relationship with the claims put forward by OTH in different proceedings, including the settlement of these claims. This group of objections also covers the consequences of the sale of the Claimant's alleged investment, the alleged sale, loss or waiver of its right to bring arbitration proceedings and the defense of abuse of rights (D). While the Parties have "dissected" each of these issues (and additional related sub-issues) in separate objections, the Tribunal considers that it is convenient to treat all of these issues within the same context as they are intertwined. Fourth and last, the Tribunal will deal with a number of miscellaneous objections, namely whether the acts of the state-owned television provider ENTV are attributable to Algeria (E), whether the Tribunal lacks jurisdiction

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<sup>92</sup> C-PHB 2, para. 121.

over the “purely contractual claims” relating to the Investment Agreement (F), and whether the umbrella clause claims in relation to the Investment Agreement, the GSM License and the Investment Code are admissible (G).

**B. JURISDICTION *RATIONE PERSONAE*: IS THE CLAIMANT AN INVESTOR UNDER ARTICLE 1(1)(B) OF THE BIT?**

**1. The Respondent’s position**

178. The Respondent argues that the BIT requires an “investor” to have its “real seat” in one of the Contracting States (a) and that the Claimant is not an investor under the BIT because its real seat is not in Luxembourg, but in Egypt (b). The Tribunal therefore lacks jurisdiction *ratione personae*.<sup>93</sup>

**a. To qualify as an investor under the BIT, the Claimant must have its real seat in Luxembourg**

179. The Respondent argues that Article 1(1)(b) of the BIT requires an “investor” to have its “real seat” in one of the Contracting States, which must be understood to mean “place of effective management” (*centre de direction effective*).<sup>94</sup>

**i. To qualify as an investor under the BIT, the Claimant must fulfil the two separate and cumulative conditions of incorporation and *siège social***

180. The Respondent contends that the absence of a definition of nationality of legal persons in the ICSID Convention leaves it to the Contracting States to define the criteria that determine such nationality under their investment treaties.<sup>95</sup> In this sense, it refers to Article 1(1)(b) of the BIT, which reads as follows:

Pour l'application du présent Accord,

1. le terme « investisseurs » désigne :

a) les « nationaux », c'est-à-dire, toute personne physique qui, selon la législation des Etats contractants, est considérée comme citoyen de la Belgique, du Luxembourg ou ayant la nationalité algérienne;

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<sup>93</sup> In its Memorial on Preliminary Objections and in its Reply, the Respondent also argued that, even if the Tribunal were to find that it has jurisdiction *ratione personae*, the Claimant’s claims are inadmissible, because the Claimant was not an investor at the time of the impugned acts (*faits litigieux*). See Memorial on Preliminary Objections, paras. 274-282; Reply, paras. 395-407. This admissibility objection rests on the same facts as the Respondent’s objection to the Tribunal’s jurisdiction *ratione personae*, although there is a different temporal element (with regard to the jurisdictional objection the Respondent contends that “*cette qualité [d’investisseur] s’apprécie au jour du dépôt de la Demande d’arbitrage*”, Memorial on Preliminary Objections, para. 106). The admissibility “facet” of this objection was not further pursued in the Respondent’s post-hearing submissions. The Claimant has not expressly addressed the Respondent’s objection to admissibility, but it argues that the Claimant “has always had” its seat in Luxembourg and that it “is and it has always been” an investor under the BIT.

<sup>94</sup> Memorial on Preliminary Objections, paras. 109-134; R-PHB 1, paras. 19-49; R-PHB 2, paras. 12-47.

<sup>95</sup> R-PHB 1, para. 23; Reply, para. 159.

b) Les « sociétés », c'est-à-dire, toute personne morale constituée conformément à la législation belge, luxembourgeoise ou algérienne, et ayant son siège social sur le territoire de la Belgique, du Luxembourg ou de l'Algérie.

181. According to the Respondent, to qualify as an investor under Article 1(1)(b) of the BIT, the Claimant must meet the following cumulative and distinct requirements: (a) it must be incorporated in accordance with the laws of one of the Contracting Parties and (b) its *siège social* must be located in the territory of that party.<sup>96</sup> For the Respondent, “simply incorporating a company in the territory of one of the Contracting Parties is not sufficient to meet the two nationality conditions provided in the BIT”.<sup>97</sup>
182. For the Respondent, this interpretation flows from the text of Article 1(1)(b) of the BIT, whose meaning is identical in the three official languages (French, Dutch and Arabic).<sup>98</sup> In particular, the Respondent contends that the Dutch and Arabic terms are the literal translation of the term “*siège social*”. By contrast, the term “statutory seat” (“*siège statutaire*”) does not appear in any of the three authentic versions of the Treaty.<sup>99</sup>
183. The Respondent contends that, in accordance with the principle of effectiveness, the criteria of incorporation and *siège social* cannot have the same meaning.<sup>100</sup> Because incorporation in one of the Contracting Parties entails a registered office (*siège statutaire*) on the territory of such Contracting Party, any interpretation that would attribute the same meaning to incorporation and *siège social* must be discarded.<sup>101</sup>
184. For the Respondent, it is undisputed that a company must have its statutory seat in a Contracting Party to be validly incorporated in that Contracting Party. The hypothetical presented by the Claimant in order to differentiate incorporation and statutory seat, i.e. the possibility of a transfer of the statutory seat abroad, is not pertinent to interpret the BIT which was concluded in 1991, as such possibility did not exist in 1991 and is “very rare” nowadays.<sup>102</sup>

**ii. The Claimant’s nationality under the BIT must be determined by reference to the domestic laws of the Contracting Parties, which point to the “real seat”**

185. The Respondent’s position on the applicable law to determine the meaning of *siège social* has somewhat evolved throughout its pleadings. In its Reply, the Respondent argued that the Claimant’s status as an investor under the BIT should not be based “on the principles of Luxembourg law relating to nationality” but rather on the meaning of *siège social* under

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<sup>96</sup> Memorial on Preliminary Objections, paras. 112-121; R-PHB 1, paras. 22-31.

<sup>97</sup> R-PHB 1, para. 30.

<sup>98</sup> See Letter from the Respondent, 11 March 2016, pp. 2-3.

<sup>99</sup> Letter from the Respondent, 11 March 2016, p. 3.

<sup>100</sup> Memorial on Preliminary Objections, paras. 121-122; R-PHB 1, paras. 26-28.

<sup>101</sup> R-PHB 1, para. 28.

<sup>102</sup> R-PHB 1, para. 27; R-PHB 2, fn. 42.

“principles of applicable international law”.<sup>103</sup> In its post-hearing submissions, however, the Respondent now submits that, in accordance with international law, the nationality of a company under Article 1(1)(b) is determined by reference to the domestic laws of the Contracting Parties, which adopt the notion of “*siège social réel*” as the connecting factor for purposes of nationality.<sup>104</sup>

186. The Respondent contends that Article 1(1)(b) of the BIT uses “*siège social*” as a connecting factor to determine nationality. With regard to nationality, international law leaves it to each state to decide to which entities it confers the status of subject of national law (*sujet de droit interne*).<sup>105</sup> For the Respondent, the *travaux* produced by Belgium confirm that the Contracting Parties intended that *siège social* be defined by national law.<sup>106</sup> The Tribunal must thus rely on the connecting factors of nationality provided in the domestic laws of the Contracting Parties.<sup>107</sup> According to the Respondent, while common law countries refer to “incorporation” as the relevant criterion for nationality, civil law countries, such as the Contracting States to the BIT, require a real connection (*rattachement réel*), i.e. the effective presence of the corporation on the territory.<sup>108</sup>
187. In any event, even if the Tribunal were minded to interpret the term *siège social* in an autonomous manner as a “requirement for nationality under the BIT”, it would reach the same outcome.<sup>109</sup>
188. With regard to the Claimant’s arguments on the ordinary meaning of the BIT term, the Respondent first contends that dictionaries “are of no use”, because “there is no international law dictionary with a definition of *siège social*”.<sup>110</sup> Second, the fact that the authentic English version of other BITs signed by the BLEU translates *siège social* as “registered office” is irrelevant to establish the Contracting Parties’ common intention in this BIT, as English is not an authentic language for this BIT. Furthermore, the Respondent submits that “[a]n analysis of the investment protection agreements signed by the Belgium-Luxembourg Economic Union

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<sup>103</sup> See Reply, paras. 156, 159-160 (“Conformément aux principes de droit international applicables, la notion du ‘siège social’ au sens de l’article 1(1)(b) de l’Accord s’entend du ‘siège social réel’ de la personne morale”; “Contrairement à la Demanderesse qui se fonde sur les principes de droit luxembourgeois relatifs à la nationalité, la Défenderesse soutient que l’absence de définition de la nationalité d’une personne morale dans la Convention CIRDI laisse le soin aux Etats contractants de définir, dans des accords de protection des investissements, les critères permettant de déterminer la nationalité d’une personne morale au sens desdits accords [...]” “Il convient donc de se reporter aux critères énoncés à l’article 1(1)(b) de l’Accord afin de déterminer si Weather II est un investisseur protégé au sens dudit Accord”). See also Reply, para. 190 (“La Demanderesse se limite à affirmer que la notion de siège social renvoie au siège statutaire de la société en considérant que seul le droit luxembourgeois est applicable. Bien que l’analyse de la notion de siège social réel au regard des droits nationaux des Parties contractantes n’est pas requise en l’espèce, le Tribunal constatera, à toutes fins utiles que la notion de ‘direction effective’ est également appliquée en Algérie, en Belgique et au Luxembourg (non seulement lors de conclusion de l’Accord, mais encore aujourd’hui”, (internal footnotes omitted)).

<sup>104</sup> R-PHB 1, paras. 32-43.

<sup>105</sup> R-PHB 1, para. 32; R-PHB 2, para. 21.

<sup>106</sup> R-PHB 2, para. 23.

<sup>107</sup> R-PHB 2, para. 22.

<sup>108</sup> R-PHB 1, para. 34. See also Memorial on Preliminary Objections, para. 118; Reply, para. 171.

<sup>109</sup> R-PHB 1, para. 37; R-PHB 2, para. 26.

<sup>110</sup> R-PHB 1, para. 38; R-PHB 2, para. 27.

fails to reveal an ‘ordinary meaning’ of the concept of ‘*siège social*’”, and “confirms conversely that there is no practice about how to translate the concept of ‘*siège social*’”.<sup>111</sup> For the Respondent, at the time of the negotiation of the BIT, there was no Belgo-Luxembourg practice to use the terms *siège social* and registered office interchangeably or to insert the criterion of *siège statutaire* in the definition of investor.<sup>112</sup> To the contrary, the “traditional formula” alluded to in the Explanatory Note submitted by the Belgian Government to the Belgian Senate on 8 November 1995 for purposes of ratifying the BIT must be seen as a reference to nationality in accordance with Belgian and Luxembourgish law.<sup>113</sup>

189. Second, the Respondent argues that “in the absence of an unequivocal ordinary meaning of the concept of *siège social* in international law, reference to the national laws of the Contracting Parties is justified in light of the principles stipulated in [Article 32 of] the Vienna Convention”.<sup>114</sup> In this case, all three Contracting Parties provide that the connecting factor to determine nationality of companies under their domestic laws is the *siège réel*.<sup>115</sup> This was true when the BIT was signed in 1991 and continues to be true now.<sup>116</sup> In this respect, so the Respondent notes, the fact that Luxembourg law in other contexts sometimes uses the term *siège social* to designate the company’s *siège statutaire* lacks relevance when interpreting the concept of *siège social* as a connecting factor to determine nationality.<sup>117</sup>
190. Furthermore, investment tribunals dealing with similar definitions of investor have also ruled that mere incorporation in a state is insufficient to establish the existence of a social seat. The Respondent cites *Alps Finance and Trade v. Slovakia*, where the tribunal noted that “[t]he fact that Article 1(1)(b) of the BIT requires a Swiss ‘seat’ as a distinct element in addition to ‘constitution and organization under Swiss law’ demonstrates that the mere incorporation in Switzerland is insufficient to constitute a ‘seat’ in the terms of the BIT”.<sup>118</sup>

### **iii. The *travaux* produced by Belgium confirm the Respondent’s interpretation**

191. For the Respondent, the *travaux préparatoires* produced by Belgium confirm the Respondent’s arguments. The Respondent notes that Algeria sought to exclude from the BIT’s scope of application individuals or companies of a Contracting Party who did not have their principal center of economic activities (*centre principal des intérêts économiques*) in Belgium or Luxembourg.<sup>119</sup> Algeria thus proposed the addition of such economic criterion which was

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<sup>111</sup> R-PHB 1, para. 39.

<sup>112</sup> R-PHB 2, para. 27.

<sup>113</sup> R-PHB 2, para. 27.

<sup>114</sup> R-PHB 1, para. 40.

<sup>115</sup> Memorial on Preliminary Objections, paras. 125-127; R-PHB 1, para. 42; R-PHB 2, para. 29.

<sup>116</sup> R-PHB 2, para. 29.

<sup>117</sup> R-PHB 1, para. 42; R-PHB 2, para. 30.

<sup>118</sup> Reply, para. 181 discussing *Alps Finance and Trade v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, Exh. CLA-4.

<sup>119</sup> R-PHB 2, para. 35.



independent from nationality, and was defined by reference to the investor's average turnover (*chiffre d'affaires moyen des investisseurs*). However, following exchanges between the Contracting Parties, the Algerian negotiators did not insist on their proposal.<sup>120</sup>

192. For the Respondent, the Claimant's argument that the criterion of *siège réel* was rejected during the BIT negotiations is ill-founded.<sup>121</sup> The Contracting Parties subjected the notion of investor, *inter alia*, to a nationality test consisting of the presence of the *siège social* on their territory by reference to their national legislation. Thus, it is clear that the Contracting Parties intended to provide for the "real seat" as it is known in their domestic laws.<sup>122</sup>
193. Finally, in connection with disclosure of the *travaux*, the Respondent opposes the Claimant's criticism by pointing to the numerous attempts made by the Respondent to retrieve such *travaux* during the proceedings.<sup>123</sup> In any event, the Claimant's request that the Tribunal draw adverse inferences against the Respondent has become moot after the production of the *travaux* by Belgium.<sup>124</sup>

#### **iv. "Real seat" means the company's place of effective management**

194. The Respondent argues that the notion of *siège réel* in civil law countries, including the BIT Contracting Parties, corresponds to the center of effective management of the company. It refers to Jean Corbiau's definition of the "heart and the brain" of the corporation, which in the Respondent's view is still valid today and conforms to recent Luxembourgish case law.<sup>125</sup>
195. To identify the real seat, it is necessary to verify the reality or effectiveness of the seat over the appearance created by the statutory seat.<sup>126</sup> For the Respondent, the presumption that the real seat is identified with the statutory seat is a simple presumption (*présomption simple*) which can be rebutted by any means.<sup>127</sup> The main test to localize the *siège réel* is the place where the company's important business decisions are taken (*lieu où sont prises les décisions importantes se rapportant à la marche de l'entreprise*).<sup>128</sup> While the Respondent agrees with the Claimant that the factors to be considered include the place where the meetings of the corporate organs are held, where the administrative services are provided, where the accounting is held, and to which correspondence is addressed or from which it is sent, the Respondent submits that one must take account of the effectivity of these factors.<sup>129</sup> Thus, the

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<sup>120</sup> R-PHB 2, para. 37.

<sup>121</sup> R-PHB 2, para. 38.

<sup>122</sup> R-PHB 2, para. 38.

<sup>123</sup> R-PHB 2, paras. 15-17.

<sup>124</sup> R-PHB 2, para. 14.

<sup>125</sup> R-PHB 1, paras. 44-45; R-PHB 2, paras. 39-40. See also Memorial, paras. 128-134.

<sup>126</sup> R-PHB 1, para. 46; R-PHB 2, para. 41. See also Reply, para. 172 ("in Algeria, Belgium and Luxembourg, national laws and practice enshrine the primacy of the *siège social réel* as an element of attachment and, in the event of an inconsistency between the *siège statutaire* and the *siège réel*, the latter will prevail").

<sup>127</sup> Reply, para. 193; R-PHB, para. 46; R-PHB 2, para. 41.

<sup>128</sup> R-PHB 1, para. 47.

<sup>129</sup> R-PHB 2, paras. 42-43.

place where the corporate meetings take place is relevant, but it is necessary to verify how those meetings take place.<sup>130</sup> Similarly, it does not matter where the accounting records are maintained, but where the accounting is effectively carried out.<sup>131</sup>

196. Finally, the certificates of residence issued by Luxembourg on which the Claimant relies are irrelevant, as such certificates are issued to any company having its statutory seat in Luxembourg.<sup>132</sup> In the absence of any official document attesting the Luxembourgish nationality of the Claimant, it is for the Tribunal to assess the totality of the factual elements, to decide whether the Claimant's real seat, namely its place of effective management, is situated in Luxembourg.<sup>133</sup>

**v. *Tenaris and Talta* confirms the Respondent's interpretation of *siège social***

197. In response to the Tribunal's invitation to the Parties to submit comments on the award issued on 29 January 2016 in *Tenaris and Talta*, the Respondent contends that such award confirms its interpretation of the BIT and the ICSID Convention.<sup>134</sup>
198. First, in the context of a similarly worded provision, the *Tenaris and Talta* tribunal interpreted *siège social* to mean *siège réel*. For the Respondent, the tribunal's conclusion is based on a reasoning and interpretation method similar to those advanced by Algeria in these proceedings. The Respondent points in particular to the tribunal's resort to the principle of effectiveness<sup>135</sup> and its conclusion that the conditions in Article 1(1)(b) of the applicable BIT "are, in substance, nationality requirements" which, in the Respondent's view, justifies referring to the applicable domestic law.<sup>136</sup>
199. Second, the Respondent highlights that, in determining whether *Tenaris* had its real seat in Luxembourg, the tribunal proceeded to analyse *in concreto* the facts of the case, taking into account all available factual elements and the particular circumstances of the case.<sup>137</sup> The Respondent contends that, contrary to Venezuela in *Tenaris and Talta*, it has established that the Claimant's real seat is located in Egypt.<sup>138</sup>

**b. The Claimant's real seat is in Egypt**

200. Algeria argues that the Claimant's real seat is in Egypt. In particular, the Respondent argues that the brain and the operational bodies of the Claimant are located in Cairo, from where Mr.

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<sup>130</sup> R-PHB 2, para. 43.

<sup>131</sup> R-PHB 2, para. 43.

<sup>132</sup> R-PHB 2, para. 46.

<sup>133</sup> R-PHB 2, para. 47.

<sup>134</sup> Letter from Respondent, 11 March 2016, pp. 4-12.

<sup>135</sup> Letter from Respondent, 11 March 2016, p. 5; Letter from Respondent, 21 April 2016, pp. 3-4.

<sup>136</sup> Letter from Respondent, 11 March 2016, p. 6; Letter from Respondent, 21 April 2016, p. 5.

<sup>137</sup> Letter from Respondent, 11 March 2016, p. 7.

<sup>138</sup> Letter from Respondent, 11 March 2016, pp. 8-12; Letter from Respondent, 21 April 2016, pp. 11-16.

Sawiris and his team effectively manage the company (i). Furthermore, the Board of Managers is not the true management organ of the company, and the fact that its meetings are formally held in Luxembourg does not establish that the Claimant's real seat is located there (ii).

**i. The Claimant's effective management is in Cairo**

201. The Respondent asserts that the Claimant's brain and the operational bodies are located in Cairo, from where Mr. Sawiris manages the company with the help of his team.<sup>139</sup> Mr. Sawiris takes all the strategic decisions from his headquarters in Cairo and is the "intellectual center around which all operations and activities of the company are organized".<sup>140</sup>
202. Furthermore, Mr. Sawiris' entire team is located in Cairo.<sup>141</sup> The Respondent notes that Ms. Wafaa Latif, an A Manager of the company, assists Mr. Sawiris from Cairo in the management of the business.<sup>142</sup> Moreover, most of the individuals involved in the negotiation and closing of the Claimant's transactions (in particular the sale of Weather Investments to VimpelCom) are close employees of Mr. Sawiris residing in Cairo.<sup>143</sup> Furthermore, the Respondent asserts that the company's accountants work in Cairo, as is proven by the Banca IMI statements addressed to the "Corporate Accounting Department" of the Claimant in Cairo.<sup>144</sup>
203. The Respondent further asserts that "the majority of the contracts signed by Weather II and the bank statements [...] between 2005 and 2007 indicated that the domicile of Weather II was the professional address of Mr. Naguib Sawiris in Cairo".<sup>145</sup> Moreover, the majority of the contracts concluded by the Claimant between 2005 and 2012 provide for notices to be sent by post or fax to Cairo.<sup>146</sup>
204. The Respondent also submits that the Claimant has attempted to increase its presence in Luxembourg for the needs of the arbitration. In particular, the Respondent notes that the Claimant filed its consolidated accounts for the years 2009-2011 for the first time in September 2012, i.e. three weeks before it filed its Request for Arbitration, and the accounts unlike its previous annual reports mention OTA. Furthermore, the Claimant set up a website (whose servers are located in Egypt) on 15 May 2013, the day before the Tribunal's First Session, where the only thing that appeared was the Claimant's logo.<sup>147</sup>

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<sup>139</sup> R-PHB 1, para. 51; R-PHB 2, para. 49.

<sup>140</sup> R-PHB 1, paras. 51-54.

<sup>141</sup> R-PHB 1, para. 56.

<sup>142</sup> R-PHB 2, para. 51.

<sup>143</sup> R-PHB 2, para. 51.

<sup>144</sup> R-PHB 1, para. 56.

<sup>145</sup> R-PHB 1, para. 57.

<sup>146</sup> R-PHB 1, para. 57; R-PHB 2, para. 56.

<sup>147</sup> Reply, paras. 118-120; R-PHB 1, para. 9.

**ii. The Board of Managers is not the true management organ of the Claimant**

205. The Respondent further argues that the Board of Managers is not the true management organ of the Claimant and does not fulfil the function assigned to it by the Articles of Association. As a result, the fact that its meetings are formally held in Luxembourg cannot be taken as an indication that the Claimant's real seat is in Luxembourg.<sup>148</sup>
206. First, the Respondent contends that the Board of Managers only ratifies decisions taken by Mr. Sawiris from Cairo.<sup>149</sup> Specifically, the B Managers have no decision-making power nor room to maneuver when approving resolutions.<sup>150</sup> Further, in light of the number of corporate positions held by each B Manager it is impossible for him or her to actually monitor the business of each company and to make enlightened decisions in respect of the resolutions submitted to the Board of Directors.<sup>151</sup> The Claimant's B Managers are not informed of the business of the company that they are supposed to be managing, because they do not participate in negotiating or concluding contracts of the company.<sup>152</sup>
207. Consequently, the Respondent observes that the Board of Managers does not fulfil its role as the body entrusted with the management of the company under the Claimant's Articles of Association.<sup>153</sup> For the Respondent, the requirement of exclusive and effective management of the company from Luxembourg, which is foreseen by the Articles of Association, is thus manifestly not respected.<sup>154</sup> The Board of Managers' role is rather limited to performing administrative tasks.<sup>155</sup> There is further no element showing that the place of effective management is located in Luxembourg.<sup>156</sup>
208. In conclusion, the Respondent submits that the Tribunal has no jurisdiction *ratione personae*, because the conditions of Article 1(1)(b) of the BIT are not fulfilled.<sup>157</sup> Indeed, they require that the investor's *siège social réel* be in Luxembourg while the Claimant's place of effective management is in Cairo.

**2. The Claimant's position**

209. The Claimant argues that the Tribunal has jurisdiction *ratione personae* because the Claimant is a national under Article 25 of the ICSID Convention and a protected investor under Article 1(1)(b) of the BIT.

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<sup>148</sup> R-PHB 1, paras. 59-79; R-PHB 2, paras. 58-60.

<sup>149</sup> R-PHB 1, paras. 62-70.

<sup>150</sup> R-PHB 1, paras. 61, 63; R-PHB 2, para. 58.

<sup>151</sup> R-PHB 1, paras. 67-68; R-PHB 2, para. 58.

<sup>152</sup> R-PHB 1, para. 65.

<sup>153</sup> R-PHB 2, para. 59.

<sup>154</sup> R-PHB 1, para. 76.

<sup>155</sup> R-PHB 1, paras. 77-78.

<sup>156</sup> R-PHB 2, para. 59.

<sup>157</sup> R-PHB 1, para. 79.

210. In sum, the Claimant contends that it was constituted in Luxembourg in accordance with Luxembourg law and that its registered office is and always has been in Luxembourg. The Claimant thus is an investor under the ICSID Convention and the BIT, because the ordinary meaning of “*siège social*” in the BIT is “registered office” (a). In the Claimant’s view, the BIT’s *travaux*, which were produced by Belgium, confirm this interpretation. In any event, even assuming that “*siège social*” means “place of effective management”, the Claimant submits that the Respondent has failed to meet its high burden of proving that the Claimant’s place of effective management is in Egypt, the evidence confirming that such place is situated in Luxembourg (b).

**a. “*Siège social*” means “registered office”**

**i. The BIT’s definition of “investor” is independent of and not modified by domestic nationality requirements**

211. The Claimant’s position has somewhat evolved throughout its pleadings. Initially, the Claimant argued that Luxembourg law applies to the determination of the Claimant’s nationality.<sup>158</sup> Starting from its Rejoinder and especially in its post-hearing submissions, the Claimant now submits that the BIT’s definition of “investor” is independent of and not modified by domestic nationality requirements.<sup>159</sup>

212. The Claimant argues that under Article 25(2) of the ICSID Convention, state parties enjoy wide latitude to agree on the criteria by which nationality (including corporate nationality) is determined.<sup>160</sup> It refers to Article 1(1) of the BIT which was quoted in its original French version above (at paragraph 180) and in its unofficial English translation submitted by Belgium to the United Nations Treaty Series provides as follows:

For the purposes of this Agreement,

1. The term "investors" shall mean:

(a) "Nationals", i.e. any natural person who, under the legislation of the Contracting States, is deemed a citizen of Belgium or Luxembourg or who has Algerian nationality;

(b) "Companies", i.e. any legal person constituted in accordance with Belgian, Luxembourg or Algerian legislation and having its registered office in the territory of Belgium, Luxembourg or Algeria.

213. On this basis, the Claimant contends that the BIT defines investor companies in clear terms, without referring to domestic nationality requirements. Indeed, while Article 1(1)(a) of the BIT

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<sup>158</sup> See especially Counter-Memorial, para. 13 (where the Claimant submits that: “[i]t is a well-established principle of international law that nationality is governed by the domestic law of the State which determines who will be a national of that State for purposes of the BIT. Algeria confirms this principle. Algeria also agrees that it is a State’s laws which determine whether a company has met the requirements of *siège social*. Thus, the law applicable to the question of whether OTMTI had its *siège social* in Luxembourg is the law of Luxembourg”).

<sup>159</sup> C-PHB 1, paras. 10-14; C-PHB 2, paras. 3-7.

<sup>160</sup> Rejoinder, paras. 140-142; C-PHB 1, para. 10.

defines “nationals” as “any natural person who, *under the legislation of the Contracting States*, is deemed a citizen of Belgium or Luxembourg or who has Algerian nationality”,<sup>161</sup> there is no reference to nationality under domestic law when it comes to “companies”.<sup>162</sup> Thus, so the Claimant argues, the BIT’s definition of investor is independent of domestic nationality requirements.<sup>163</sup>

214. The Claimant notes that, in *Barcelona Traction*, the International Court of Justice (“ICJ”) observed that “whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law”.<sup>164</sup> In this case, the BIT has “established its own rules” and there is therefore no basis to consider national law. Moreover, in *Barcelona Traction*, the Court was establishing nationality for the purposes of diplomatic protection, which is a different issue from the one at stake here.<sup>165</sup>

**ii. The ordinary meaning of the term *siège social* in the BIT is “registered office”**

215. The Claimant stresses that the BIT definition must be interpreted in accordance with the VCLT, which requires a treaty’s terms to 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 light of its object and purpose”. In this respect, the Claimant submits that the party invoking a special meaning has the burden of proving it; that the ordinary meaning may not be disregarded based on the object and purpose of the treaty; and that supplementary means of interpretation (such as the *travaux préparatoires*) may only be relied upon to clarify a treaty provision that is ambiguous or obscure or the ordinary meaning of which leads to a manifestly absurd or unreasonable result.<sup>166</sup> Investment tribunals confirm this understanding.<sup>167</sup>
216. For the Claimant, the ordinary meaning of “*siège social*” is “registered office”, i.e., the seat indicated in a company’s bylaws, for a variety of reasons.

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<sup>161</sup> BIT, Article 1(1)(a) (emphasis added).

<sup>162</sup> Rejoinder, para. 168; C-PHB 1, para. 13.

<sup>163</sup> C-PHB 1, para. 13; C-PHB 2, para. 3. The Claimant further submits that “this definition of nationality in the BIT takes precedence in assessing Claimant’s nationality and status as an “investor” for purposes of jurisdiction over any provision of domestic law of the three Contracting Parties concerning the nationality of juridical entities. This approach accords, moreover, with the domestic law of Claimant’s home State, Luxembourg, which provides that international treaties have binding force within Luxembourg and supersede national laws” (Rejoinder, para. 143, internal footnotes omitted).

<sup>164</sup> C-PHB 2, para. 6, referring to *Barcelona Traction, Light and Power Co., Ltd* (Belgium v. Spain), Judgment, 1970 ICJ Rep. 3, 5 February 1970, Exh. CLA-145, para. 38 [hereinafter *Barcelona Traction*].

<sup>165</sup> C-PHB 2, para. 6.

<sup>166</sup> Rejoinder, paras. 146-150.

<sup>167</sup> Rejoinder, paras. 149-150, discussing *Asian Agricultural Products LTD. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, Exh. CLA-126 [hereinafter *AAPL v. Sri Lanka*], para. 40; *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision on the Scope of the Respondent’s Preliminary Objections under Article 10.20.4, 18 December 2013, Exh. CLA-267, para. 231; and *Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, Exh. CLA-250, paras. 151, 169 [hereinafter *Churchill*].

217. The Claimant points to various legal dictionaries that define *siège social* as the statutory seat indicated in the company's articles of association, and dual language dictionaries translate it as "registered office".<sup>168</sup> These dictionaries also show that other terms (such as "*siège principal*" or "*siège de la direction d'une société*") are used to refer to a company's "head office" or "place of management".<sup>169</sup> It is well-established, according to the Claimant, that tribunals may rely on dictionary definitions to determine the ordinary meaning of a term, and tribunals have done so repeatedly.<sup>170</sup>
218. In response to the Tribunal's questions on the meaning of the term *siège social* in the other two authentic language versions of the BIT,<sup>171</sup> the Claimant submits that the authentic Dutch and Arabic versions of Article 1(1)(b) of the BIT confirm that *siège social* means registered office.<sup>172</sup>
219. First, according to the Claimant, the term "*maatschappelijke zetel*", which appears in the authentic Dutch version of the BIT, is commonly translated as "*siège social*" in Dutch-French dictionaries. The Claimant refers to a number of dictionaries that define the term as the place where the company is located and which is indicated in its articles of association.<sup>173</sup> The Claimant also argues that the Dutch term "*maatschappelijke zetel*" is also consistently used in the Belgium Company Code in contexts that clearly mean "registered office".<sup>174</sup> Furthermore, in the Belgium Tax and Revenues Code and the Belgium Judicial Code, the terms "*maatschappelijke zetel*" and "*siège social*" are used to mean "registered office" and are distinguished from other terms (such as "*principal établissement*", "*siège de direction*", "*siège d'administration*" and "*siège administratif*") that correspond to the seat of management or real seat.<sup>175</sup>
220. Second, according to the Claimant, the term "*maqaraho al ijtimaae*" (الإجتماعي مقره) which appears in the authentic Arabic version of Article 1(1)(b) of the BIT, similarly means "registered office".<sup>176</sup> The Claimant argues that the term "*maqaraho al ijtimaae*" found in Article 1(1)(b) of the BIT is not a common Arabic expression, but rather a literal translation of the French term "*siège social*" or "social seat". However, it submits that the more commonly used

<sup>168</sup> Rejoinder, paras. 152-153; C-PHB 1, paras. 17-20. The Claimant cites the following dictionaries: Le Petit Robert, Dalloz, Collins, Harrap's, Navarre.

<sup>169</sup> C-PHB 1, paras. 17-18; C-PHB 2, para. 8.

<sup>170</sup> C-PHB 1, para. 19.

<sup>171</sup> See para. 122 above.

<sup>172</sup> Claimant's Submission in response to the Tribunal's questions, 11 March 2016 ("Claimant's Submission in response to the Tribunal's questions"), paras. 76-90.

<sup>173</sup> Claimant's Submission in response to the Tribunal's questions, paras. 77-80.

<sup>174</sup> See Claimant's Submission in response to the Tribunal's questions, paras. 81-82, discussing Belgium Company Code, Exh. C-1088, Arts 536(1), 550(1)(2), 693(1), 728(1).

<sup>175</sup> Claimant's Submission in response to the Tribunal's questions, para. 83, Belgium Tax and Revenues Code, Exh. C-1089, Art. 2§1er(5)(b) and Belgium Judicial Code, Exh. C-1090, Art. 35.

<sup>176</sup> Claimant's Submission in response to the Tribunal's questions, paras. 84-90.

terms in Arabic, “*markaz al shareka al raesee*” or “*markaz al shareka*” have the same meaning as “*maqaraho al ijtimae*” (which is found in the BIT).<sup>177</sup>

221. Furthermore, for the Claimant, supplementary means of interpretation confirm that the ordinary meaning of *siège social* is registered office. In particular, the Claimant submits that although the BIT was concluded in French, Dutch, and Arabic, Belgium deposited an unofficial English translation of the BIT with the United Nations Treaty Series, which uses registered office for *siège social*.<sup>178</sup> Furthermore, the BLEU’s Model BIT provides in English that “[t]he term ‘investors’ shall mean ... the ‘companies’, i.e. any legal person constituted in accordance with the legislation of the Kingdom of Belgium, of the Grand-Duchy of Luxembourg or of \_\_\_\_\_ and having its registered office in the territory of the Kingdom of Belgium, of the Grand-Duchy of Luxembourg or of \_\_\_\_\_ respectively”.<sup>179</sup>
222. Furthermore, numerous other BITs demonstrate that *siège social* means registered office. The Claimant refers to the BLEU BIT practice and notes that from 1984 to 2009, the BLEU has concluded at least 26 treaties that define investors by referring to “registered office” in the authentic English text and “*siège social*” in the authentic French text.<sup>180</sup> Furthermore, the BLEU-Costa Rica BIT likewise uses “*siège social*” in the authentic French text and “*domicilio registral*”, which means “registered domicile”, in the authentic Spanish text.<sup>181</sup> Moreover, the BLEU-United Arab Emirates and the BLEU-Libya BITs demonstrate that *siège social* means registered office and not “place of management” or “residence”, which are referred to as “*siège de direction*” and “*domicile*” in the authentic French versions of those BITs.<sup>182</sup> And where the BLEU sought to impose additional requirements for purposes of defining investors under its treaties, it did so explicitly through terms that do not appear in Article 1(1)(b) of the BIT with Algeria.<sup>183</sup> Finally, the Claimant points to the 1991 double taxation treaty between Belgium and Algeria, which defines “resident of a Contracting State” by referring to the “place of

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<sup>177</sup> Claimant’s Submission in response to the Tribunal’s questions, para. 87.

<sup>178</sup> Rejoinder, para. 159; C-PHB 1, para. 21; C-PHB 2, para. 8.

<sup>179</sup> Rejoinder, para. 161; C-PHB 1, para. 23, referring to Model Agreement Between the Belgo-Luxembourg Economic Union, on the One Hand, and \_\_\_\_\_, on the Other Hand, on the Reciprocal Promotion and Protection of Investments, 2002, Exh. C-982, Article 1(1)(b).

<sup>180</sup> Counter-Memorial, para. 15; Rejoinder, paras. 160-161; C-PHB 1, para. 23; C-PHB 2, para. 8.

<sup>181</sup> Rejoinder, para. 161; C-PHB 1, para. 23, referring to Agreement between the Belgium-Luxembourg Economic Union and the Republic of Costa Rica on the Reciprocal Promotion and Protection of Investments, Exh. C-981.

<sup>182</sup> C-PHB 1, para. 24, discussing Agreement between the Belgium Luxembourg Economic Union and the United Arab Emirates on the Reciprocal Promotion and Protection of Investments, 8 March 2004, Exh. C-729 and Agreement between the Belgium Luxembourg Economic Union and the Great Socialist People’s Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments, February 2004, Exh. C-730.

<sup>183</sup> Rejoinder, para. 162, discussing Agreement between the Belgo-Luxembourg Economic Union and the Republic of Chile Concerning the Reciprocal Promotion and Protection of Investments, 15 July 1992, Exh. C-983; Agreement between the Belgium Luxembourg Economic Union and Croatia Concerning the Reciprocal Promotion and Protection of Investments, 31 October 2011, Exh. C-984; Agreement between the Belgium Luxembourg Economic Union and Bosnia-Herzegovina Concerning the Reciprocal Promotion and Protection of Investments, 31 October 2011, Exh. C-728, Art. 1(b)(ii); Agreement between the Belgium Luxembourg Economic Union and the United Arab Emirates On the Reciprocal Promotion and Protection of Investments, 8 March 2004, Exh. C-729; Agreement between the Belgium Luxembourg Economic Union and the Great Socialist People’s Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments, February 2004, Exh. C-730.



management” (*siège de direction*), rather than *siège social*.<sup>184</sup> The Claimant concludes on this point by stressing that the Respondent has failed to submit any treaty entered into by either Contracting Party that translates *siège social* as place of management or any other term that the Respondent seeks to read into the BIT to define *siège social*.<sup>185</sup>

223. Third, according to the Claimant, the term *siège social* is understood under Luxembourg law to mean “registered office”.<sup>186</sup> The Luxembourg Company Law and its only unofficial but widely used translation by Elvinger, Hoss & Prüssen confirm this understanding. For the Claimant and its experts, the term “*siège social*” or “*siège*” under Luxembourg law refer to a company’s statutory seat.<sup>187</sup> Indeed, Luxembourg law consistently uses the term *siège social* to refer to the seat indicated in the articles of association.<sup>188</sup> By contrast, when Luxembourg intends to mean the real seat it uses different terms, such as “*domicile*”, “*administration centrale*”, or “*siège d’opération*”.<sup>189</sup>
224. Furthermore, so says the Claimant, the Respondent’s argument that the BIT’s terms need to be understood at the time of its conclusion in 1991 (at which time, according to the Respondent, the term meant place of effective management under Luxembourg law) is incorrect. First, pointing to ICJ case law, the Claimant submits that the meaning of a term should not be confined to the meaning given at the time of the creation of the relevant instrument, and that the meaning of general terms in a treaty with continuing duration should be understood to evolve over time.<sup>190</sup> Second, even assuming *arguendo* that the term *siège social* should be interpreted at the time of the BIT’s conclusion in 1991, the Claimant and its expert, Prof. Prüm, consider that *siège social* has always meant the “statutory seat” as a matter of Luxembourg law.<sup>191</sup>
225. Finally, arbitral practice confirms that *siège social* means registered office.<sup>192</sup> The Claimant points to ICSID case law as well as to *Barcelona Traction*, where in the Claimant’s view the ICJ used the terms *siège social* and registered office interchangeably and distinguished the concept of *siège social* from place of management and center of control.<sup>193</sup> For the Claimant, *Alps v. Slovak Republic*, on which the Respondent relies, is inapposite because it does not refer to *siège social* and the BIT applicable in that case defined investors differently, i.e. as companies “which are constituted or otherwise duly organized under the laws of that

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<sup>184</sup> Rejoinder, para. 163, discussing Agreement between the People’s Democratic Republic of Algeria and the Kingdom of Belgium for the Avoidance of Double Taxation and the Establishment of Reciprocal Rules of Assistance with Respect to Taxes on Income and on Capital (1991), Exh. C-988, Art. 4(1).

<sup>185</sup> C-PHB 1, para. 26.

<sup>186</sup> Schmitt First Expert Report, para. 11; Prüm First Expert Report, paras. 10-14; Prüm Second Expert Report, para. 8.

<sup>187</sup> C-PHB 1, para. 28.

<sup>188</sup> C-PHB 1, para. 29, discussing in particular Article 27(3) of the Luxembourg Company Law which requires a company to list its *siège social* in its articles of association.

<sup>189</sup> Rejoinder, para. 154.

<sup>190</sup> Rejoinder, paras. 164-165; C-PHB 1, para. 31.

<sup>191</sup> C-PHB 1, para. 31.

<sup>192</sup> Counter-Memorial, para. 16; Rejoinder, paras. 171-176.

<sup>193</sup> Rejoinder, para. 175; C-PHB, para. 34, discussing *Barcelona Traction*.

Contracting Party, and have their seat, together with real economic activities, in the territory of that same Contracting Party”.<sup>194</sup>

**iii. The *travaux* confirm that the Contracting Parties intended to accord *siège social* its ordinary meaning of registered office**

226. The Claimant first notes that the Respondent obstructed any inquiry into the subjective intent of the drafters of the Treaty, as it failed to produce the *travaux* in connection with Article 1 of the BIT without valid reason in violation of Procedural Order No. 5.<sup>195</sup>
227. Second, the Claimant submits that the ordinary meaning of *siège social* is neither obscure nor ambiguous and would not lead to a result which is manifestly absurd or unreasonable.<sup>196</sup> However, in accordance with Article 32 of the Vienna Convention, the Tribunal may rely on the *travaux* “to confirm the meaning resulting from the application of article 31”.<sup>197</sup>
228. In this respect, the Claimant asserts that the *travaux* produced by Belgium show that the Contracting Parties “agreed to protect companies based on constitution in accordance with law and registered office in their territory”, and rejected all of Algeria’s proposals to impose additional requirements.<sup>198</sup>
229. The Claimant argues that Belgium’s earliest draft of the BIT defined investors from Belgium and Luxembourg as “‘Companies’, i.e. any legal person constituted in accordance with Belgian or Luxembourg legislation and having its registered office [*siège social*] in the territory of Belgium or Luxembourg”.<sup>199</sup> Subsequently, Algeria proposed a draft exchange of letters that would be attached to the BIT and that would define “[n]ational investors or companies” as “those that have their principal center of economic interest in Belgium or Luxembourg, under the Algerian legislation in force concerning investments by non-residents in Algeria”.<sup>200</sup> The Claimant argues that the BLEU rejected this proposal, and asked the Respondent to “abandon [its] amendment concerning the definition of investors”.<sup>201</sup> The Claimant underscores that the BLEU also expressed concern that Algeria continued to seek to “exclude from the benefits of the Agreement multinational companies and to give advantages to ... those which have their

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<sup>194</sup> Rejoinder, para. 176; C-PHB 1, para. 35, discussing *Alps Finance and Trade v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, Exh. CLA-4 and Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Reciprocal Promotion and Protection of Investments, 5 October 1990, Exh. C-1077.

<sup>195</sup> Rejoinder, para. 156. The Claimant notes that the Respondent sought to excuse this failure on the ground that “[t]he Agreement [BIT] was signed in 1991, 20 years ago and [...] months before the beginning of a conflict that plunged the country into a civil war until the end of the 1990s”. Rejoinder, fn. 507, referring to Respondent’s Reply to Claimant’s Request No. 1, Claimant’s Redfern Schedule, attached as Annex A to Procedural Order No. 5, 12 December 2014, at 2. See also C-PHB 1, para. 38.

<sup>196</sup> C-PHB 1, para. 37; C-PHB 2, para. 7.

<sup>197</sup> C-PHB 2, para. 15.

<sup>198</sup> C-PHB 2, paras. 15-22.

<sup>199</sup> C-PHB 2, para. 16, discussing Draft BIT dated September 1980, Art. 1(1) (*Travaux* at 2-16).

<sup>200</sup> C-PHB 2, para. 18.

<sup>201</sup> C-PHB 2, para. 18.

center of principal activities in the BLEU”.<sup>202</sup> A proposal by the BLEU that each party define its respective investors on its own terms was then rejected by Algeria.<sup>203</sup>

230. The Claimant further highlights that, in a letter dated one week prior to the BIT’s conclusion, the BLEU considered the Algerian proposal, consisting of “excluding investments made in Algeria by physical or legal persons of the BLEU that do not have their ‘principal center of economic interests’ in Belgium or in Luxembourg”, as “unacceptable”, because it would exclude from the BIT’s protection “investments that are made in Algeria” by “the numerous BLEU companies that realize the most important part of their activities abroad” and “the numerous BLEU companies that have capital held by shareholders of other countries”.<sup>204</sup> The Claimant also underscores that the BLEU expressly referred to excerpts from *Barcelona Traction* as reflecting a “traditional rule” requiring constitution in accordance with law and “registered office” in the home state.<sup>205</sup> The Claimant submits that the BLEU concluded “that the notions of ‘in accordance with the law of the country’ and of ‘*siège social*’ are sufficient to define companies, and that all restrictions that are added are not inscribed in the accepted practice of the juridical community and are discriminatory towards our companies that exercise part of their activities abroad or whose capital is held by foreign shareholders”.<sup>206</sup>
231. In sum, according to the Claimant, the *travaux* definitively confirm that the BLEU insisted – and Algeria agreed – to protect all companies that were constituted in accordance with the law and that have their “registered office” in the territory.<sup>207</sup>
232. For the Claimant, this conclusion is further reflected in the Explanatory Note submitted to the Belgian Senate on 8 November 1995 for purposes of ratifying the BIT. The Note records that during the negotiations, Algeria proposed “to exclude from the benefit of the treaty any investments made in Algeria by natural or juridical persons of the Belgium-Luxembourg Economic Union that did not have the ‘center of their economic activities in Belgium or in Luxembourg’”, but that “[t]his proposal was unacceptable” and the Belgian negotiators “were able to convince our Algerian partners to adopt our traditional formula for the definition of investors and the contents of the agreement reached faithfully reflects our current practice”.<sup>208</sup> For the Claimant, it is clear that Belgium’s “traditional formula” is to give the term *siège social* its ordinary meaning of “registered office”, as is shown by the BLEU’s Model BIT, which is in

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<sup>202</sup> C-PHB 2, para. 19, referring to Letter from Belgium Embassy in Algeria to “belex bru”, 19 March 1991 (*Travaux* at 139).

<sup>203</sup> C-PHB 2, para. 19, discussing Letter from Belgium Embassy in Algeria to “belex bru”, 19 March 1991 (*Travaux* at 139).

<sup>204</sup> C-PHB 2, para. 20, discussing Letter from Belgium Ministry of Foreign Affairs, 17 April 1991 (*Travaux* at 143-144).

<sup>205</sup> C-PHB 2, paras. 20-21, discussing Letter from Belgium Ministry of Foreign Affairs, 17 April 1991 (*Travaux* at 143-144) (which refers to *Barcelona Traction*, para. 70), and Telegram from Belgium Minister of Foreign Affairs to Belgium Ambassador in Algeria (*Travaux* at 145-146).

<sup>206</sup> C-PHB 2, para. 21, citing to Telegram from Belgium Minister of Foreign Affairs to Belgium Ambassador in Algeria (*Travaux* at 145-146).

<sup>207</sup> C-PHB 2, para. 22.

<sup>208</sup> Belgian Senate, Explanatory Memorandum to the Belgium-Luxembourg – Algeria BIT, 8 November 1995, Exh. C-979, at 2.

English, and by the 26 investment treaties that contain both authentic French and authentic English or Spanish texts, discussed above.<sup>209</sup>

**iv. Interpreting *siège social* as registered office does not render the term ineffective or superfluous**

233. The Claimant contends that interpreting *siège social* as registered office does not render the term ineffective or superfluous, contrary to what the Respondent asserts. For the Claimant, place of constitution or incorporation and registered office are separate legal concepts, as it also arises from *Barcelona Traction*.<sup>210</sup> Referring to the examination of its Luxembourg law expert, the Claimant explains that there can be circumstances in which the two conditions are not fulfilled at the same time, i.e. where a company is constituted in one state and has its registered office in another.<sup>211</sup> The Claimant points to the Explanatory Note to the Draft Law Modifying the Luxembourg Company Law in 2005 which states that “Luxembourg law is a rare exception in Europe in this regard [...] a Luxembourg company can validly transfer its *siège statutaire* abroad and change its *lex societatis* without being dissolved, on the condition that such transfer is unanimously approved by the shareholders and bondholders”.<sup>212</sup>
234. The reverse situation could also occur, i.e. a company incorporated in Luxembourg and having its statutory seat and real seat in Luxembourg, could decide to move its statutory seat (its *siège social*) abroad but still remain a Luxembourg company.<sup>213</sup> Arbitral tribunals have also observed that a company may move its registered office without dissolving and reconstituting.<sup>214</sup>
235. As a consequence, the Claimant contends that the Respondent’s *effet utile* argument must be dismissed. Were this not the case, the BLEU’s Model BIT, which is in English, and the 26 BLEU treaties with authentic English texts granting protection to companies based on the dual requirements of constitution and “registered office” would all run afoul of the principle of effective interpretation.<sup>215</sup> Finally, the Claimant notes the Respondent’s concession that a

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<sup>209</sup> Rejoinder, paras. 158-159.

<sup>210</sup> Counter-Memorial, paras. 17-19; Rejoinder, paras. 179-180; C-PHB 1, para. 41; C-PHB 2, para. 24, where the Claimant notes that in *Barcelona Traction*, the ICJ observed in the English text of its decision that “the traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office,” and “[t]hese two criteria have been confirmed by a long practice and by many international instruments” (citing to *Barcelona Traction*, para. 70).

<sup>211</sup> C-PHB 1, para. 42.

<sup>212</sup> C-PHB 1, para. 42, discussing Explanatory Note to the Draft Law, 23 Dec 2005, Exh. C-789 (Counsel’s translation).

<sup>213</sup> C-PHB 1, para. 43, discussing Tr. Day 3 (Prof. Prüm Questions from the Tribunal), 135:15-22.

<sup>214</sup> Rejoinder, para. 181; C-PHB 1, para. 44, discussing *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Objection’s to Jurisdiction, 21 October 2005, Exh. CLA-140, para. 172 (noting that Luxembourg law does not oppose the transfer of the registered office and place of effective management of a company to Luxembourg, in continuation of its legal personality); *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, Exh. CLA-264, para. 183.

<sup>215</sup> C-PHB 1, para. 45.

company may dissociate its registered office from its place of constitution in “very rare” circumstances, which is fatal to the Respondent’s effective interpretation argument.<sup>216</sup>

**v. The *Tenaris and Talta* tribunal’s interpretation of *siège social* in the BLEU-Venezuela BIT is inapposite to this case**

236. The Claimant submits that the *Tenaris and Talta* award confirms that the Claimant’s *siège social* is in Luxembourg and that the Tribunal should affirm jurisdiction.<sup>217</sup>
237. The Claimant first argues that *Tenaris and Talta* confirms that the BIT must be interpreted in accordance with the VCLT and principles of international law and that there is no basis to impose additional nationality requirements, based on domestic laws, which are not provided for in the BIT.<sup>218</sup>
238. However, so the Claimant contends, the *Tenaris and Talta* tribunal’s finding that *siège social* means “place of effective management” is erroneous and should not be relied upon by this Tribunal to interpret *siège social* in Article 1(1)(b) of the BLEU-Algeria BIT.<sup>219</sup> For the Claimant, the *Tenaris and Talta* tribunal failed to apply the ordinary meaning of *siège social*, which is registered office. While the Claimant agrees with the *Tenaris and Talta* tribunal’s observation that “a ‘term’ may have a number of ordinary meanings”,<sup>220</sup> the evidence shows that the ordinary meaning of *siège social* is “registered office” and that the term “place of effective management” is not an alternative ordinary meaning.<sup>221</sup>
239. The Claimant in particular notes that it does not appear that any of the dictionaries submitted into evidence in this arbitration were submitted to the *Tenaris and Talta* tribunal.<sup>222</sup> Further, the tribunal’s finding that only “a proportion of Belgo-Luxembourg BITs translate ‘*siège social*’ as ‘registered office’”, which in the tribunal’s view was not “sufficiently conclusive”, is not supported by the record of these proceedings.<sup>223</sup>
240. Moreover, contrary to the *Tenaris and Talta* tribunal’s conclusion on this point, interpreting *siège social* to mean “registered office” does not render the term ineffective, in violation of the principle of effectiveness. The Claimant submits that it is undisputed in these proceedings that a company may validly transfer its registered office outside of Luxembourg without reconstituting and, therefore, that constitution and registered office have different meanings. The expert testimony, documentary evidence, and submissions in these proceedings thus are

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<sup>216</sup> C-PHB 2, para. 26.

<sup>217</sup> Claimant’s Submission in response to the Tribunal’s questions, paras. 2-75.

<sup>218</sup> Claimant’s Submission in response to the Tribunal’s questions, paras. 7-12.

<sup>219</sup> Claimant’s Submission in response to the Tribunal’s questions, paras. 13-34.

<sup>220</sup> Claimant’s Submission in response to the Tribunal’s questions, para. 15.

<sup>221</sup> Claimant’s Submission in response to the Tribunal’s questions, para. 15.

<sup>222</sup> Claimant’s Submission in response to the Tribunal’s questions, para. 16.

<sup>223</sup> Claimant’s Submission in response to the Tribunal’s questions, para. 16.

fundamentally inapposite to the findings of the *Tenaris and Talta* tribunal and, indeed, are fatal to the view that the dual requirements of constitution and registered office are superfluous.<sup>224</sup>

241. According to the Claimant, the *Tenaris and Talta* tribunal's interpretation is further contrary to the *travaux* of the BLEU-Algeria BIT, which confirm the ordinary meaning of "registered office".<sup>225</sup>

**b. Even if *siège social* means *siège réel*, the Claimant's *siège réel* is and has always been in Luxembourg**

242. The Claimant submits that, even assuming *arguendo* that *siège social* means *siège réel* or place of management, OTMTI is an investor under the BIT because its place of management is in Luxembourg (i),<sup>226</sup> which is confirmed by the tribunal's finding in *Tenaris and Talta* (ii).

**i. The Claimant's *siège réel* is in Luxembourg**

243. In respect of the burden of proof, the Claimant considers that, under international and Luxembourg law, the Respondent bears a high burden of proving that the Claimant's real seat is dissociated from its registered office.<sup>227</sup> It is not up to the Claimant to demonstrate that its real seat is in Luxembourg; it is up to the Respondent to prove the contrary. Investment tribunals confirm this allocation of the burden of proof,<sup>228</sup> including with respect to nationality.<sup>229</sup>
244. The Claimant contends that Luxembourg has conferred nationality on the Claimant, through certificates of residence and other official documents stating that its *siège social* is in Luxembourg.<sup>230</sup> In accordance with international law, the Respondent must thus show through "convincing and decisive evidence" that this acquisition of nationality "was fraudulent or at least resulted from a material error".<sup>231</sup>
245. Furthermore, according to the Claimant, Luxembourg law establishes a presumption that the *siège réel* corresponds to the company's *siège social*.<sup>232</sup> Consequently, the Claimant is

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<sup>224</sup> Claimant's Submission in response to the Tribunal's questions, para. 29.

<sup>225</sup> Claimant's Submission in response to the Tribunal's questions, paras. 35-39.

<sup>226</sup> C-PHB 1, paras. 47-95; C-PHB 2, paras. 27-49.

<sup>227</sup> C-PHB 1, para. 48.

<sup>228</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, Exh. CLA-238, paras. 177-178. See also e.g., *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, Exh. CLA-263, para. 84; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, Exh. CLA-58, para. 94.

<sup>229</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, Exh. CLA-266, para. 87 [hereinafter *Ioan Micula, Viorel Micula and others v. Romania*].

<sup>230</sup> C-PHB 1, para. 49. See also Rejoinder, paras. 144, 186.

<sup>231</sup> Rejoinder, para. 186, citing to *Ioan Micula, Viorel Micula and others v. Romania*, para. 95.

<sup>232</sup> Rejoinder, paras. 188-189; C-PHB 1, para. 50; Prüm First Expert Report, para. 20. Art. 2 of Luxembourg's company law provides: "Until evidence to the contrary shall have been finally brought, the central administration of a company is deemed to coincide with the place where its registered office is located".

dispensed from proving a fact that the law presumes,<sup>233</sup> which the Respondent's experts do not dispute. This presumption "may be overturned only in exceptional situations in which it is flagrantly obvious that the *siège statutaire* is not where the company's central administration is located".<sup>234</sup> The burden of proof is thus high, in particular in the absence of a shareholder decision to move the *siège réel* abroad.<sup>235</sup>

246. In any event, the Claimant has established that its place of management is situated in Luxembourg. The only factors which are relevant to assess whether the Claimant's place of effective management is in Luxembourg are whether (a) the general meetings of shareholders and the meetings of the Board of Managers take place in Luxembourg (which, so says the Claimant, is the most relevant factor, as this is where the company's management decisions become effective); (b) the corporate and accounting records are maintained in Luxembourg; (c) administrative services are provided in Luxembourg; and (d) the company's correspondence is generally addressed to and sent from Luxembourg.<sup>236</sup> The Claimant also notes that these factors are relaxed for holding companies such as the Claimant,<sup>237</sup> and that Corbiau's abstract description of the real seat as "the heart and the brain" of a company is more poetry than law.<sup>238</sup>
247. In this context, the Claimant has further developed the following arguments. First, in its submission, it is established that all of the Claimant's general meetings of shareholders and meetings of the Board of Managers were held in Luxembourg.<sup>239</sup> In support, the Claimant refers to the minutes which confirm that such meetings took place in Luxembourg in accordance with Luxembourg law and the Claimant's Articles of Association.<sup>240</sup> The fact that shareholders were represented by proxies, or that the Board met by teleconference, or that the Board took decisions through circular resolutions does not alter this conclusion.<sup>241</sup> Luxembourg law and the Claimant's Articles of Association authorize these practices and provide that meetings held by teleconference or circular resolution are deemed to have taken place in Luxembourg.<sup>242</sup> The residence or travel itinerary of the Claimant's controlling shareholder, Mr. Sawiris (who, the Respondent notes, has travelled to Luxembourg on only two occasions) are irrelevant for the purposes of locating the place of the Board or shareholder meetings or of the Claimant's real seat.<sup>243</sup>

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<sup>233</sup> Schmitt First Expert Report, para. 15.

<sup>234</sup> Prüm First Expert Report, para. 40.

<sup>235</sup> Prüm First Expert Report, paras. 35, 39. See also Counter-Memorial, paras. 22-27.

<sup>236</sup> Rejoinder, para. 193.

<sup>237</sup> C-PHB 1, para. 58.

<sup>238</sup> C-PHB 1, para. 59.

<sup>239</sup> Rejoinder, paras. 194-196; C-PHB 1, paras. 60-73; C-PHB 2, paras. 29-40.

<sup>240</sup> Rejoinder, paras. 24, 26; C-PHB 1, para. 60.

<sup>241</sup> Rejoinder, para. 195.

<sup>242</sup> Rejoinder, para. 195; C-PHB 1, para. 61.

<sup>243</sup> Counter-Memorial, paras. 29-30; Rejoinder, paras. 196-197; C-PHB 2, paras. 32-33.

248. Further, contrary to what the Respondent and its expert, Prof. Kinsch, suggest, a company does not lose its nationality because its board meetings are “purely formal” or “passively recording decisions that are actually made abroad”. The decisions of the board are not purely formal; they bind the company and only these decisions may produce legal effects.<sup>244</sup> If the Respondent were right, a company’s *siège réel* would shift depending on the place where a shareholder or manager unilaterally takes decisions. This cannot be the meaning of Luxembourg law, which must fix the *siège réel* for the benefit of the company and third parties.<sup>245</sup>
249. In addition, the evidence reflects that the Board of Managers has managed the Claimant in accordance with Luxembourg law and the Articles of Association. The Claimant’s B Managers held a veto over any particular decision. They performed their obligations pursuant to their fiduciary duties, and reviewed and discussed each proposed transaction to determine whether it was in the company’s best interest.<sup>246</sup> The Claimant relies in particular on Mr. Bourgon’s testimony, who confirmed that he had no obligation to agree with Mr. Sawiris’ proposal and always had “the power to say no”.<sup>247</sup> For the Claimant, the Respondent has failed to point to any board decision not in the company’s best interest which the B Managers would have had to reject.<sup>248</sup> It is also very common in Luxembourg that professional managers serve on multiple boards and there is no limitation of the number of boards on which a professional manager may sit under Luxembourgish law.<sup>249</sup>
250. There is also nothing unusual about the Board’s decision to authorize Mr. Sawiris or other individuals to negotiate and conclude significant contracts, as such delegation of authority is provided in the company’s Articles of Association and reflects standard practice.<sup>250</sup>
251. Second, the Claimant’s corporate and accounting records are maintained at its registered office in Luxembourg.<sup>251</sup> The Claimant cites Mr. Bourgon’s evidence, according to which “[a]ll corporate and legal documents, such as the register of registered shares, the annual accounts, documents reflecting OTMTI’s securities, and minutes of the Board of Managers meetings are maintained at OTMTI’s registered office”.<sup>252</sup>
252. Third, from its inception, all of the Claimant’s administrative services, including book-keeping and accounting were provided in Luxembourg.<sup>253</sup> For the Claimant, the use of domiciliation agents (such as the company Intertrust, used by the Claimant from 2005 to 2010) is common in Luxembourg. In any event, from 2010, the Claimant acquired its own premises and hired its

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<sup>244</sup> Rejoinder, para. 198, discussing Schmitt Second Expert Report, para. 23.

<sup>245</sup> Rejoinder, para. 198, discussing Schmitt Second Expert Report, para. 27.

<sup>246</sup> Rejoinder, para. 199.

<sup>247</sup> C-PHB 1, paras. 65-67; C-PHB 2, para. 36.

<sup>248</sup> C-PHB 1, para. 67.

<sup>249</sup> Counter-Memorial, para. 36; C-PHB 1, para. 72; C-PHB 2, para. 37.

<sup>250</sup> Counter-Memorial, paras. 37-38; C-PHB 2, para. 39.

<sup>251</sup> C-PHB 2, para. 41.

<sup>252</sup> C-PHB 2, para. 41, discussing Bourgon Statement, para. 9.

<sup>253</sup> Rejoinder, para. 200; C-PHB 1, paras. 74-82; C-PHB 2, paras. 42-44.



own employees. It further retained and paid Luxembourgish lawyers, accountants, and other service providers to render administrative services.

253. Fourth, the Claimant's correspondence generally was sent to and from Luxembourg.<sup>254</sup> The Claimant emphasizes that, based on his review of the files, Mr. Catala confirmed that "all correspondence addressed to Weather Investments II" was received and archived at Claimant's registered office.<sup>255</sup>
254. Moreover, out of the contracts entered into by the Claimant, only five (signed in May or August 2005) provided for notices to be sent to an address in Egypt and one to an address in Italy. However, so the Claimant argues, the Claimant specifically represented in all of these contracts that it was domiciled in Luxembourg.<sup>256</sup> Additionally, it is not uncommon nor unlawful for companies to designate a location other than their registered office for purposes of receiving correspondence and notices pertaining to particular transactions.<sup>257</sup> And while, according to the Claimant, four of Banca IMI's statements mistakenly indicate that the Claimant's corporate accounting department was located in Cairo, Banca IMI sent all of its correspondence to the Claimant's registered office in Luxembourg.<sup>258</sup> Beyond these factors, none of the other elements cited by the Respondent are relevant to locate the Claimant's place of management.
255. Finally, no court in any of the Contracting BIT Parties has ever found that a company in the Claimant's situation had dissociated its real seat from its registered office.<sup>259</sup> This is particularly true for Luxembourg, where no court has ever found that a company constituted and having its registered office there lost its Luxembourg nationality by transferring its real seat abroad.<sup>260</sup> As to the Belgian cases relied upon by the Respondent, more than half concerned whether the company's real seat was in one rather than another Belgian city, and the Belgian courts have only deemed a company's real seat to be a fiction in extraordinary circumstances not present in this arbitration.<sup>261</sup> In the same vein, the Egyptian authorities have never contended that the Claimant is an Egyptian company.<sup>262</sup>

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<sup>254</sup> C-PHB 1, paras. 83-87; C-PHB 2, paras. 45-47.

<sup>255</sup> C-PHB 2, para. 45.

<sup>256</sup> C-PHB 1, para. 86.

<sup>257</sup> C-PHB 1, para. 87.

<sup>258</sup> C-PHB 2, para. 46.

<sup>259</sup> Rejoinder, para. 192; C-PHB 1, paras. 88-95; C-PHB 2, para. 48.

<sup>260</sup> C-PHB 1, para. 88.

<sup>261</sup> C-PHB 1, paras. 90-93, discussing Gand Court of Appeals, 2 October 1997, Exh. RL-166; Brussels Commercial Court, 10 November 1958, Exh. RL-158; Brussels Civil Court, 26 February 1923, Exh. RL-157.

<sup>262</sup> C-PHB 1, para. 95.

**ii. *Tenaris and Talta* confirms that the Claimant's *siège social* is located in Luxembourg**

256. The Claimant contends that *Tenaris and Talta* confirms that, if *siège social* were interpreted to mean real seat, the applicable test under Luxembourg law is flexible, particularly for holding companies such as the Claimant, and that the Respondent bears the burden of proving that the Claimant's real seat is located outside of Luxembourg. The Claimant in particular points to the factors that the *Tenaris and Talta* tribunal considered relevant in determining whether a company has its real seat in Luxembourg (namely, the places where the directors meet; the place where the shareholders meet (the "really decisive factor", according to that tribunal), and the place where the books and records of the company are being kept).<sup>263</sup> For the Claimant, it is undisputed that all of the Claimant's general meetings of shareholders have been held at its registered office in Luxembourg and the Claimant also holds its Board meetings and maintains its records in Luxembourg, thus satisfying all of the *Tenaris and Talta* factors. The Claimant also has retained Luxembourgish auditors and lawyers, and generally receives and sends its correspondence at its registered office. Thus, the Claimant has all of the same links to Luxembourg that were relied on by the *Tenaris and Talta* tribunal to determine that *Tenaris'* real seat is located in Luxembourg.<sup>264</sup>

**3. Analysis**

**a. Articulation between Article 25 of the ICSID Convention and the requirements *ratione personae* in the BIT**

257. The Tribunal begins by recalling that the Claimant must fulfil the jurisdictional requirements *ratione personae* under both the ICSID Convention and the BIT.<sup>265</sup> More specifically, Article 25(1) of the ICSID Convention requires that disputes submitted to arbitration be between a Contracting State and a national of another Contracting State. Article 9 of the BIT, in turn, provides for the settlement of "[a]ny investment dispute between one Contracting Party and an investor of the other Contracting Party".<sup>266</sup>

258. While the requirement *ratione personae* under Article 25 of the ICSID Convention has not formed the primary focus of the Parties' pleadings, which have chiefly addressed the definition of "investor" in the BIT, it is undisputed that the BIT Contracting Parties enjoy wide latitude in defining what entities are to be considered as nationals for the purpose of the ICSID Convention.

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<sup>263</sup> Claimant's Submission in response to the Tribunal's questions, paras. 46-48.

<sup>264</sup> Claimant's Submission in response to the Tribunal's questions, paras. 49-75.

<sup>265</sup> See also *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, Exh. RL-81, para. 96 [hereinafter *KT Asia*].

<sup>266</sup> BIT, Exh. C-658, Art. 9(1).

259. Thus, according to the Respondent:

L'absence de définition de la nationalité d'une personne morale dans la Convention CIRDI laisse le soin aux États contractants de définir, dans les accords de protection des investissements, les critères permettant de déterminer la nationalité d'une personne morale au sens desdits accords<sup>30</sup>.

<sup>30</sup> Voir Mémoire en Réponse, ¶ 159. Cette approche a été confirmée par plusieurs tribunaux : voir, par exemple, Pièce RL-69, *Romp petrol Group* (CIRDI ARB/06/3, 18 avril 2008), ¶¶ 81-82 ; Pièce RL-81, *KT Asia* (CIRDI ARB/09/8, 17 octobre 2013), ¶ 113. Voir également Pièce RL-224, *SOABI* (CIRDI ARB/82/1, 1er août 1984), ¶ 29 ; Pièce CLA-117, *Mobil Corp.* (CIRDI ARB/07/27, 10 juin 2010), ¶¶ 156-157.<sup>267</sup>

260. Similarly, the Claimant has argued that:

Article 25 of the ICSID Convention does not define “nationality.” Rather, ‘[a]s ICSID tribunals and commentators have regularly observed, the drafters of the Convention abandoned efforts to define ‘nationality’ for the purposes of Article 25, and instead left the States Parties wide latitude to agree on the criteria by which nationality would be determined.’

[...]

It is undisputed between the Parties that, under the ICSID Convention, the Contracting Parties had discretion to determine in the BIT the criteria for assessing a juridical entity’s nationality for purposes of the BIT.<sup>268</sup>

261. Indeed, as can be seen from the excerpts quoted above, both Parties have invoked the same legal authorities in this particular respect. In particular, both Parties rely on *Romp petrol* and *KT Asia*.

262. In *Romp petrol*, the tribunal observed as follows:

80. As ICSID tribunals and commentators have regularly observed, the drafters of the Convention abandoned efforts to define “nationality” for the purposes of Article 25, and instead left the States Parties wide latitude to agree on the criteria by which nationality would be determined. At the same time, it is also widely recognized that, as both Parties to this arbitration accept, Article 25 reflects objective ‘outer limits’ beyond which party consent would be ineffective.

81. In the Tribunal’s view, the latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their ‘nationals’ for the purposes of enjoying the benefits the BIT is intended to confer. Drawing on concepts of private international law, the Respondent says that there is no such thing as a ‘nationality’ of corporate entities in the same sense as for physical persons. To the extent that that were so, it would reinforce the point: not only does each Contracting Party have the sole authority to determine the status of juridical entities under its own law,

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<sup>267</sup> R-PHB1, para. 23. See also, in almost identical terms, Reply, para. 159.

<sup>268</sup> Rejoinder, paras. 140-142, citing to *The Romp petrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on the Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, Exh. RL-69, paras. 80, 81, 83, 92 [hereafter *Romp petrol*]; *KT Asia*, paras. 113, 121-122.

but the Contracting Parties jointly have the sole authority to determine the criteria by which juridical persons with a defined status under each other's law may enjoy the protections of their BIT.

82. To determine the criteria by which the Contracting Parties to a BIT have agreed that nationality would be determined for its purposes, we must look, of course, to the BIT itself. . [...] Given the latitude granted to States under the ICSID Convention to settle the applicable nationality criteria, there is nothing illogical in looking first of all to whether the nationality criteria set forth in the BIT are satisfied before going on to examine whether there is anything in Article 25 of the Convention which stands in the way of giving effect to that. In any event, the Tribunal cannot see that anything of substance turns on the order of the analysis – and certainly not in the circumstances of this case.

[...] Hence the question becomes simply, what did these two States themselves agree to of their own free will in concluding the BIT? The Tribunal therefore holds that the definition of national status given in The Netherlands-Romania BIT is decisive for the purpose of establishing its jurisdiction.<sup>269</sup>

263. In *KT Asia*, the tribunal observed as follows:

113. It is common ground that the ICSID Convention does not impose any particular test for the nationality of juridical persons not having the nationality of the host State, be it the place of incorporation, or the effective seat, or control. This leaves broad discretion to Contracting States to define nationality, and particularly corporate nationality, under the relevant BIT. Kazakhstan and the Netherlands have used that discretion by agreeing on the following definition of a “national” in Article 1 of the BIT [...].<sup>270</sup>

264. The tribunals in *Mobil v. Venezuela*<sup>271</sup> and *SOABI v. Senegal*<sup>272</sup> (both relied on by the Respondent) have taken similar views. Also according to Prof. Schreuer,

Definitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction are directly relevant to the determination of whether the nationality requirements of Art. 25(2)(b) have been met.

<sup>269</sup> *Rompetrol*, paras. 81-83, internal footnotes omitted.

<sup>270</sup> *KT Asia*, para. 113 (internal footnote omitted).

<sup>271</sup> See *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, Exh. CLA-117, paras. 156-157 [hereinafter *Mobil v. Venezuela*] (“156. The Tribunal observes that Article 25 fixes the “outer limits” of ICSID jurisdiction and that parties can consent to that jurisdiction only within those limits. 157. However Article 25 (b) (i) does not impose any particular criteria of nationality (whether place of incorporation, *siège social* or control) in the case of juridical persons not having the nationality of the Host State. Thus the parties to the Dutch-Venezuela BIT were free to consider as nationals both the legal persons constituted under the law 43 of one of the Parties and those constituted under another law, but controlled by such legal persons. The BIT is thus compatible with Article 25 of the ICSID Convention.”).

<sup>272</sup> *Soabi v. Republic of Senegal*, ICSID Case No. ARB/82/1, Decision on Objections to Jurisdiction, 19 July 1984, Exh. RL-224, para. 29 (“29. Le Tribunal a noté que la Convention ne contient pas de définition du terme “nationalité”, ce qui a pour conséquence de laisser à chaque Etat le pouvoir de déterminer si une société possède ou non sa nationalité. En règle générale, les Etats appliquent à cette fin ou bien le critère du siège social ou bien celui du lieu d’incorporation. Par contre, la nationalité des actionnaires ou le contrôle exercé par des étrangers autrement qu’en raison de leur participation au capital, n’est pas normalement un critère pour la nationalité d’une société, étant entendu que le législateur peut mettre ces critères en jeu pour des cas d’exception.”). See also *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, Exh. CLA-142, paras. 106 et seq. [hereinafter *Aucover*].

They are part of the legal framework for the host State's submission to the Centre. Upon acceptance in writing by the investor [...], they become part of the agreement on consent between the parties. Therefore, any reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal. This conclusion was expressly confirmed in *Tokios Tokeles v. Ukraine*.<sup>273</sup>

265. The same view was expressed by Aron Broches, the former General Counsel of the World Bank, who chaired the consultative meetings at which the preliminary draft of the ICSID Convention was discussed:

The purpose of [Article 25(2)(b)], as well as of Article 25 (1), is to indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible latitude to agree on the meaning of 'nationality' and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted.<sup>274</sup>

266. The Tribunal agrees with those authorities and considers that "while the ICSID Convention sets objective outer limits to jurisdiction by requiring nationality, it does not specify the test for nationality".<sup>275</sup> Hence, the Contracting States have – in Aron Broches' terms – the "widest possible latitude to agree on the meaning of 'nationality'", provided they use a "reasonable criterion".<sup>276</sup> Such meaning of nationality is agreed in the instrument granting consent to the jurisdiction of the Centre (a contract, a domestic legislation, or an investment treaty, as the case may be).
267. The question is thus whether - to use Prof. Schreuer's and Aron Broches' words – the instrument granting consent to the Centre (here the BIT) defines nationality by reference to a "reasonable determination" or "reasonable criterion" within the "outer limits" of Article 25 of the ICSID Convention. The Tribunal considers that the definition of nationality in the instrument of consent is reasonable "as long as the requirements are not deprived of their objective significance".<sup>277</sup> As noted by the tribunal in *KT Asia* in the excerpt quoted above, generally accepted criteria for the determination of nationality of a juridical person include the place of incorporation, the effective seat, and control.<sup>278</sup> Similarly, *Aucoven* noted that "[a]ccording to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office.

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<sup>273</sup> Schreuer, *Commentary*, p. 287.

<sup>274</sup> Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 331 (1972–II), pp. 360-361.

<sup>275</sup> *KT Asia*, para. 121 (internal footnote omitted).

<sup>276</sup> Aron Broches, *loc. cit.* in fn 274.

<sup>277</sup> See *Aucoven*, para. 99 (referring to the jurisdictional requirements in Article 25 of the ICSID Convention and noting that "to determine whether these objective requirements are met in a given case, one needs to refer to the parties' own understanding or definition. As long as the criteria chosen by the parties to define these requirements are reasonable, i.e. as long as the requirements are not deprived of their objective significance, there is no reason to discard the parties' choice").

<sup>278</sup> See *KT Asia*, para. 113.

Alternatively, the place of the central administration or effective seat may also be taken into consideration”.<sup>279</sup> Any of those determinations would thus be reasonable also for the purposes of jurisdiction under the ICSID Convention.

268. Therefore, in accordance with the approach endorsed by several tribunals and with which neither Party takes issue, the Tribunal will look “first of all to whether the nationality criteria set forth in the BIT are satisfied before going on to examine whether there is anything in Article 25 of the Convention which stands in the way of giving effect to that”.<sup>280</sup>

**b. The definition of “investor” under the BIT**

269. Under Article 1(1)(b) of the BIT, the Claimant must meet the following definition of “investor”, which is set out below in its three official languages, French, Dutch and Arabic, followed by the unofficial English translation submitted by Belgium to the United Nations Treaty Series:

*Pour l'application du présent Accord,*

*1. le terme « investisseurs » désigne :*

*a) les « nationaux », c'est-à-dire, toute personne physique qui, selon la législation des Etats contractants, est considérée comme citoyen de la Belgique, du Luxembourg ou ayant la nationalité algérienne;*

*b) Les « sociétés », c'est-à-dire, toute personne morale constituée conformément à la législation belge, luxembourgeoise ou algérienne, et ayant son siège social sur le territoire de la Belgique, du Luxembourg ou de l'Algérie.*

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*Voor de toepassing van deze Overeenkomst,*

*1. betekent het begrip “investeerders”:*

*a) de “onderdanen”, dit wil zeggen elke natuurlijke persoon die volgens de Belgische, Luxemburgse of Algerijnse wetgeving onderdaan is van België, van Luxemburg of die de Algerijnse nationaliteit heeft;*

*b) de “vennootschappen”, dit wil zeggen elke rechtspersoon die is opgericht overeenkomstig de Belgische, Luxemburgse of Algerijnse wetgeving en die zijn maatschappelijke zetel heeft op het grondgebied van België, van Luxemburg of van Algerije.*

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<sup>279</sup> *Aucoven*, para. 107.

<sup>280</sup> *Rompetrol*, para. 82 (quoted *supra*).

1- كلمة " مستثمرين " تشير الى:

(أ) " الوطنون " وتعني كل شخص طبيعي يعتبر حسب تشريع الدول المتعاقدة من رعايا بلجيكا ، اللكسمبورغ أو متمتع بالجنسية الجزائرية .

ب ( " الشركات " وتعني كل شخص معنوي أسس طبقا للتشريعات البلجيكية اللكسمبورغية أو الجزائرية ، وله مقره الاجتماعي على اقليم بلجيكا ، اللكسمبورغ أو الجزائر .

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For the purposes of this Agreement,

1. The term "investors" shall mean:

(a) "Nationals", i.e. any natural person who, under the legislation of the Contracting States, is deemed a citizen of Belgium or Luxembourg or who has Algerian nationality;

(b) "Companies", i.e. any legal person constituted in accordance with Belgian, Luxembourg or Algerian legislation and having its registered office in the territory of Belgium, Luxembourg or Algeria.

270. It is undisputed that, to be an "investor" under the BIT, a company must be (i) constituted in accordance with Luxembourg/Belgian/Algerian law (in this case, Luxembourg law) and (ii) have its *siège social* there. The disputed question is what *siège social* means.

271. The starting point is that the definition of investor is a requirement contained in a treaty and, as such, it is subject to the rules of interpretation codified in the VCLT. The Tribunal will interpret Article 1(1)(b) of BIT by applying those rules of interpretation pursuant to Article 31 (*infra* at i) and 32 (*infra* at ii) of the VCLT.

#### **i. Article 31 of the Vienna Convention**

272. According to Article 31 of the VCLT, 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". The starting point of the interpretation is the "ordinary meaning" of the text. The latter must be ascertained in the light of the context and the treaty's object and purpose, any subsequent agreement or practice of the Contracting Parties related to the interpretation of the treaty, and any other relevant rules of international law applicable in the relations between the Contracting Parties.<sup>281</sup>

273. The ordinary meaning of the term *siège social* is not univocal. In and of themselves, these terms merely refer to the seat of a corporation, as opposed to anything else, for instance an arbitral tribunal. Beyond that, a corporate seat or *siège social* can either be *statutaire*, referring

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<sup>281</sup> Article 31 of the VCLT.

to the seat appearing in the company's bylaws or statutes, or *réel*, referring to the effective seat where the company is actually managed. In that sense, the Tribunal agrees with the *Tenaris and Talta* tribunal that such term is "susceptible of either a formal or substantive meaning".<sup>282</sup>

274. To clarify the ordinary meaning of the term, one must take account of the fact that it may be used in different areas of the law. First, it may be used in national law for domestic purposes. For example, the Luxembourg Company Law normally uses the term *siège social* with the connotation of *siège social statutaire* having the same meaning as "registered office".<sup>283</sup> Further, the term may be used as a connecting factor in private international law to determine the nationality or the *lex societatis* of a company. In that sense, a number of countries define corporate nationality by reference to the place of incorporation, whereas others adopt the criterion of the effective seat or place of management. In addition, there may be further areas of domestic law referring to the nationality of corporations, such as those relating to the trade with enemy countries, sanctions, and taxation. A different area is that of customary international law dealing with nationality for purposes of diplomatic protection. Finally, still in international law, there are provisions in treaties defining "nationals" (including corporations) for the subject matters of these treaties. This is true of treaties for the protection on foreign investments, like the present BIT, and of certain bilateral tax treaties, peace treaties, agreements on reparation for war losses, and others.
275. Given the variety of these legal domains, it is important to recognize that the principles on the determination of nationality in one framework do not necessarily apply in another

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<sup>282</sup> *Tenaris and Talta*, para. 144.

<sup>283</sup> See, e.g., Article 27 Luxembourg Law of 10 August 1915 on companies ("*Loi luxembourgeoise sur les sociétés commerciales*"), as amended by the law of 21 December 2006 (hereinafter "Luxembourg Company Law"), Exh. C-726, which provides that the *siège social* is the seat stated in the "*acte de société*", i.e., the articles of incorporation. See also other references to the term *siège social* in the Luxembourg Company Law applicable to the Sàrl or the SA that refer to the *siège social* designated in Article 27, e.g., Articles 39, 70, 73, 76, 187, 198. See also the Explanatory Note to the 1999 Law, introducing the presumption that *siège réel* (*recte, administration centrale* or *principal établissement*, as it was then) is found at the statutory seat, where the Luxembourg legislature treated the term *siège social* as having the same meaning as *siège statutaire* and, conversely, distinguished *siège social* from "*principal établissement*":

*Le paragraphe (1) énonce une règle générale pour déterminer la situation du domicile de toute société, luxembourgeoise ou étrangère. [...] Elle consiste d'une part à retenir le principe, consacré par une jurisprudence et une doctrine ancienne et constants, que le domicile d'une société se trouve au centre de ses intérêts principaux, d'autre part à instaurer la présomption que ce centre des intérêts principaux est au lieu du siège statutaire.*

*Grâce à la présomption suivant laquelle le siège statutaire ou siège social, notion bien définie en droit et en fait grâce à son indication précise et obligatoire dans l'acte de société, se confond avec le domicile, la détermination de ce dernier n'est donc plus a priori une question de fait abandonnée à l'appréciation des tribunaux. Ceux-ci n'auront à tenir compte de l'existence éventuelle, au Luxembourg ou à l'étranger, d'un « principal établissement », notion de fait distinct du siège social, pour y fixer le domicile de la société, que s'il est prouvé que ce « principal établissement » constitue bien le centre des intérêts principaux, et partant le domicile de la société.*

See Explanatory Note to Bill No. 4328, Exh. C-732, at 8 (emphasis added).



framework,<sup>284</sup> which was not always apparent from the Parties' pleadings. Indeed, the meaning of a term in one framework may not be the same in other legal areas.

276. With this distinction in mind, the Tribunal has approached the threshold issue in dispute between the Parties, namely whether, pursuant to international law, the term *siège social* in the BIT must be interpreted by reference to nationality criteria under the applicable national law, as Algeria argues, or whether the BIT embodies an autonomous notion of investor nationality, as OTMTI submits.
277. If one were to follow the argument that "*siège social*" in Article 1(1)(b) of the BIT refers to domestic nationality requirements, it is undisputed by all experts, including the Claimant's Luxembourg law expert, Prof. Prüm,<sup>285</sup> that the nationality of a company under Luxembourg law is determined by the *siège de l'administration centrale* of the company (formerly, *principal établissement*), which is presumed to be at the *siège statutaire*.<sup>286</sup> This flows from Articles 159 and 2 of the Luxembourg Company Law, which provide as follows:

**Art. 159.**

(Loi du 25 août 2006)

«Toute société dont l'**administration centrale** est située au Grand-Duché, est soumise à la loi luxembourgeoise, bien que l'acte constitutif ait été passé en pays étranger.»

(Loi du 31 mai 1999)

«Lorsqu'une société a son **domicile** au Grand-Duché de Luxembourg, elle est de **nationalité** luxembourgeoise et **la loi luxembourgeoise lui est pleinement appliquée**.

*Lorsqu'une société a son domicile à l'étranger, mais qu'elle a au Grand-Duché de Luxembourg un ou plusieurs sièges quelconques d'opération, le lieu de son établissement le plus important au Grand-Duché de Luxembourg, qu'elle indique à cet effet dans la publication de ses actes prescrite par la loi, constitue le domicile secondaire de cette société au Grand-Duché de Luxembourg. »*

[...]

**Art. 2. :**

**Le domicile** de toute société commerciale est situé au **siège de l'administration centrale** de la société. L'administration centrale d'une

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<sup>284</sup> See also Vaughan Lowe, *Injuries to Corporations*, in *The Law of International Responsibility* (Crawford, Pellet and Olleson, Eds., OUP, 2010), pp. 1005-1021, at 1008.

<sup>285</sup> Prüm, Second Expert Report, para. 4.

<sup>286</sup> In 2006, the term "*administration centrale*" replaced that of "*principal établissement*" (found in the original text and which was applicable in 1991, date of the conclusion of the BIT). See Kinsch, First Expert Report, paras. 10-17. It appears undisputed that both terms are understood to indicate the *siège réel*. See Kinsch, First Expert Report, paras. 11, 15; Prüm, Second Expert Report, paras. 4, 9.

société est **présumée**, jusqu'à preuve du contraire, coïncider avec le lieu du **siège statutaire de la société**.<sup>287</sup>

278. This being so, in application of Article 31 of the VCLT, the Tribunal cannot agree that the requirement of *siège social* in Article 1(1)(b) of the BIT refers to domestic nationality requirements. The grammatical and syntactic structure of the provision and the context in which the term *siège social* is employed make it clear that for corporations the BIT provides its autonomous or treaty-specific requirement *ratione personae*. While Article 1(1)(a) of the BIT makes reference to domestic nationality requirements in respect of *individuals*<sup>288</sup> and Article 1(1)(b) also operates a similar *renvoi* to national law for the constitution of a corporation, no reference to national law applies to *siège social*.<sup>289</sup>
279. Had the Contracting Parties wished to refer to the domestic nationality criteria, they would have linked the BIT requirements *ratione personae* to their domestic law. For that they could either have taken the same approach as for individuals, i.e. they would have defined corporate investors as those which are deemed to have the nationality of a Contracting Party according to that State's laws, or referred directly to those connecting factors which, under their laws, define corporate nationality (e.g., for Luxembourg "*domicile*" or "*principal établissement*" as it stood in 1991, when the BIT was concluded or, in current terminology, "*administration centrale*").<sup>290</sup> Moreover, and importantly, under no reading of the BIT does the term *siège social* (whether *statutaire* or *réel*) correspond to the Contracting Parties' domestic law tests for the determination of nationality of corporations. Indeed, while the BIT defines "investor" by reference to both "constitution in accordance with law" and "*siège social*", under Belgian and Luxembourg law nationality is determined only by reference to *principal établissement* or *administration centrale*, the place of constitution playing no role in that determination. In reality, the role of the place of constitution is expressly disavowed for such purpose and the Belgian and Luxembourgish legislations recognize that place of constitution and *siège réel* (*recte*, *principal établissement* or *administration centrale*) may be located in different states.<sup>291</sup>

<sup>287</sup> Luxembourg Company law, Exh. RL-177, (emphasis added).

<sup>288</sup> See BIT, Article 1(1)(a) ("Nationals", i.e. any natural person who, under the legislation of the Contracting States, is deemed a citizen of Belgium or Luxembourg or who has Algerian nationality", emphasis added).

<sup>289</sup> This was also noted in *Tenaris and Talta* in respect of the similarly worded provision in the BIT applicable in that case. See *Tenaris and Talta*, para. 165. The requirement in Article 1(1)(b) that the company be "constituted in accordance with Belgian, Luxembourg or Algerian legislation [...]" only refers to incorporation modalities, not to the law governing nationality.

<sup>290</sup> See also in similar terms, Belgian *Code de droit international privé*, 16 July 2004, RL-139, Art. 110 (criterion of "*établissement principal*") and, previously, Belgian *Code des sociétés*, 7 May 1999, RL-136, Article 56 (criterion of "*siège réel*") and Belgian *Lois coordonnées sur les sociétés commerciales*, RL-138, Article 197 ("*principal établissement*"). Furthermore, as already noted *supra* in fn. 283, within the very context of determining nationality for purposes of domestic law, the Luxembourg legislature treated the term *siège social* as having the same meaning as *siège statutaire* and, conversely, distinguished *siège social* from "*principal établissement*" (or in the Parties' terminology *siège réel*). See Explanatory Note to Bill No. 4328, Exh. C-732, at 8.

<sup>291</sup> See Luxembourg Company Law, RL-177, Art. 159 ("Toute société dont l'administration centrale est située au Grand-Duché, est soumise à la loi luxembourgeoise, *bien que l'acte constitutif ait été passé en pays étranger*", emphasis added); Art. 197 des lois coordonnées sur les sociétés commerciales, Exh. RL-138 ("Toute société dont le principal établissement est en Belgique est soumise à la loi belge, *bien que l'acte constitutif ait été passé en pays étranger*", emphasis added), and Art. 56, *Code des sociétés*, 7 May 1999, Exh. RL-136 ("Une société dont le siège réel est en Belgique est soumise à la loi belge, *bien que l'acte constitutif ait été passé en pays étranger*", emphasis added).

This also confirms that the BIT Contracting Parties incorporated in the BIT a test that differs from the nationality tests under their domestic laws, providing instead for an autonomous notion “*for the purposes of this Agreement*”, as the *chapeau* of Article 1 expressly states.<sup>292</sup>

280. There is nothing unusual for contracting states to adopt an autonomous notion of a term used in a treaty that may differ from the meaning(s) under national law. The resort to autonomous notions or interpretations, that are independent from national legal concepts, is a technique often used to ensure the uniform application of a treaty, for example in treaties laying down uniform rules of private law or private international law rules. As Richard Gardiner notes, “[these] treaties are applied within national legal systems; but though the terms used in them are often drawn from concepts in use in national legal systems, once included in treaties they no longer attract the possibly varying character that they have nationally but assume a single meaning under the treaty, unless it states otherwise”.<sup>293</sup> A prime example of the development of autonomous interpretation of treaty terms is the jurisprudence of the Court of Justice of the European Union on the interpretation of private international law conventions, such as the 1968 Brussels Convention (subsequently replaced by Regulation 44/2001). This technique may also be used in investment treaties, and this is certainly so for this BIT for the reasons which the Tribunal has described above.
281. The Tribunal thus concludes that *siège social* has an autonomous meaning for the purposes of the BIT. As a consequence, the next task is to establish the actual meaning of that autonomous notion of *siège social*.
282. The BIT was concluded in French, Dutch, and Arabic, all three texts being equally authentic. Pursuant to Article 33(3) of the VCLT, “[t]he terms of the treaty are presumed to have the same meaning in each authentic text”. There is no dispute between the Parties that the term *siège social* in the French language version has the same meaning as the corresponding terms in the Dutch and Arabic versions.<sup>294</sup> The dispute is about what this term means. The Tribunal notes in this respect that, despite the three languages being equally authentic, initially both Parties presented arguments almost exclusively based on the French version of the BIT. It was only in reply to an invitation from the Tribunal after the Parties’ Post-hearing Briefs that they put forward materials and submissions on the Dutch and Arabic versions of the Treaty.<sup>295</sup> As is shown in the subsequent analysis, the Tribunal has considered all three language versions, although the French version has attracted particular focus as a result of the Parties’ pleadings and the fact that the BIT was negotiated in French (on which see *infra* at ii).

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<sup>292</sup> The specification that the BIT definitions are given “for the purposes of the BIT” also implies that they have no impact on the other contexts in which issues of nationality of corporations are relevant.

<sup>293</sup> See Richard Gardiner, *Treaty Interpretation* (OUP, 2008), at 32.

<sup>294</sup> Letter from Respondent, 11 March 2011, pp. 2-3; Letter from Respondent, 21 April 2016, p. 1; Claimant’s Rebuttal to Respondent’s 11 March 2016 Submission, 21 April 2016, para. 7.

<sup>295</sup> See letter from the Tribunal, 12 February 2016 (inviting the Parties’ comments on “[t]he meaning of Article 1(1)(b), and in particular of the term ‘*siège social*’, in the Dutch and Arabic versions of the [Treaty]”) and the Parties’ respective submissions on this issue, 11 March, 21 April, and 28 April 2016.

283. The record includes excerpts of a number of dictionaries to which the Parties, and especially the Claimant, have referred. It is well established that tribunals may rely on dictionary definitions to elucidate the ordinary meaning of a term<sup>296</sup> and a number of investor-state tribunals have done so.<sup>297</sup> With one exception,<sup>298</sup> the French and dual language dictionaries on record, establish that the ordinary meaning of *siège social* is “registered office” and that other terms, namely *siège principal* or *siège de la direction d’une société*, are used to define “head office” or “place of management”.<sup>299</sup>
284. Similarly, the term “*maatschappelijke zetel*”, which appears in the authentic Dutch version of Article 1(1)(b) of the BIT, is defined in one instance as the place “where the company is established,” which “must be indicated in the deed [of incorporation]”.<sup>300</sup> Another definition equates “*maatschappelijke zetel*” to the “[t]he seat of the company”, “*siège de la société*” and “statutory seat” and defines those terms as the place “which must be indicated in the [company] statutes, the address where the company is reachable”, and distinguishes the company’s “*maatschappelijke zetel*” from its “*werkelijke zetel [siège réel]*”. The latter is defined as the “place from which the company is actually conducted in light of where the board of directors and the general assembly meetings are held or where the bookkeeping is being kept”, or as the “connecting factor in private international law for the purpose of determining the law governing the company”.<sup>301</sup>
285. By contrast to the French and Dutch terms, the evidence with regard to the term “مقره الاجتماعي” in the authentic Arabic version of Article 1(1)(b) of the BIT, which appears to be a literal translation of *siège social*, is more limited and thus not helpful to the Tribunal.<sup>302</sup>

<sup>296</sup> See, e.g., *Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, Exh. CLA-292, para. 45; *Kasikili/Sedudu Island* (Botswana/Namibia), Judgment, I.C.J. Reports 1999, p. 1045, Exh. CLA-255, para. 30.

<sup>297</sup> See, e.g., *AMCO Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, Exh. CLA-294, para. 20; *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Exh. CLA-176, paras. 99-100; *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, Exh. RL-265, para. 6.2.9; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, Exh. RL-237, para. 347; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, Exh. CLA-87, para. 318; *Cargill, Incorporated v. The United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, Exh. CLA-17, para. 315; *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, Exh. RL-266, para. 166; *Ambiente Ufficio S.P.A and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, Exh. RL-239, para. 456; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, Exh. CLA-11, para. 360.

<sup>298</sup> See Gérard Cornu, *Vocabulaire juridique*, Presses Universitaires de France, 11th ed., 2016, Exh. RL-276, at pp. 966-967.

<sup>299</sup> See Dalloz, *Lexique des termes juridique*, Exh. C-976, at 573; Le Petit Robert 2014, Exh. C-975, at 2368; Dictionnaire économique et juridique, Exh. C-978, at 247; Collins Robert French Unabridged Dictionary, Exh. C-977, at 912; Harrap’s Dictionnaire Français-Anglais/Anglais-Français, Exh. C-779, at 764.

<sup>300</sup> Lycaeus Jurdisch Woordenboek, Exh. C-1085, (Tribunal’s translation), available at <http://www.juridischwoordenboek.be/woordenboekBelek.html#3850>.

<sup>301</sup> E. Dirix, B. Tilleman, P.V.Orschoven, De Valk Jurdisch Woordenboek (redactie), Exh. C-1083, at 364 (Tribunal’s translation).

<sup>302</sup> The Tribunal has reviewed the translators’ notes attached to the Respondent’s letter of 11 March 2016 and has not been assisted by them in its analysis of the Dutch and Arabic terms of the Treaty.

286. In conclusion, the dictionaries in the record indicate that the ordinary meaning of *siège social* is registered office. The Tribunal notes, however, that dictionary meanings are a helpful starting point though not the end of the Tribunal's interpretive inquiry. In particular, the Tribunal must look at the term *siège social* not in isolation but in its broader context of Article 1(1)(b) and in particular in correlation with the criterion of constitution mentioned in the same provision.
287. In this respect, the Parties have extensively discussed the principle of *effet utile* or effectiveness. Specifically, Algeria submits that interpreting *siège social* as registered office would render the term superfluous, since Article 1(1)(b) requires incorporation in one of the Contracting Parties and incorporation entails a registered office (*siège statutaire*) on the territory of such Contracting Party. In the same vein, the tribunal in *Tenaris and Talta* interpreted *siège social* in the applicable BIT as real seat essentially on the basis of the principle of effectiveness.<sup>303</sup> The Tribunal has extensively reviewed *Tenaris and Talta* and taken into account the Parties' comments on this award. It can, however, not subscribe to the interpretation in that decision, for the reasons discussed in this and the following section, and on the basis of the supplementary means of interpretation available to this Tribunal (*infra* at ii.).
288. It is undisputed, and rightly so, that the principle of effectiveness plays an important role in the interpretation of treaties. While not expressly included in the VCLT, this canon of interpretation is normally linked to the object and purpose of the treaty and to the principle of good faith,<sup>304</sup> and is deemed an integral part of the general rule of interpretation set in Article 31 of the VCLT.<sup>305</sup> The principle has often been applied by the ICJ<sup>306</sup> and investment tribunals.<sup>307</sup> So for instance, in *AAPL v. Sri Lanka*,

Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning [...]. This is simply an application of the more wider legal principle of "effectiveness" which requires favouring the interpretation that gives to each treaty provision "effet utile".<sup>308</sup>

289. While it acknowledges that in most instances the constitution of a company in a Contracting State implies the presence of the registered office in that State, the Tribunal does not consider

<sup>303</sup> See *Tenaris and Talta*, paras. 148-152.

<sup>304</sup> Final Draft, Introductory Commentary to Arts 27-28, 219 para. 6. See also Award in the Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, para. 49 ("Of particular importance is the principle of effectiveness: *ut res magis valeat quam pereat*. The relevance of effectiveness is in relation to the object and purpose of a treaty [...]").

<sup>305</sup> Final Draft, Introductory Commentary to Arts 27-28, 219 para. 6. See also WTO, Japan - Taxes on Alcoholic Beverages, Report of the Appellate Body, AB-1996-2, at 12.

<sup>306</sup> Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13; Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 24; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 25, para. 51.

<sup>307</sup> See e.g., *AAPL v. Sri Lanka*, para. 40; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, Exh. CLA-63, para. 50.

<sup>308</sup> *AAPL v. Sri Lanka*, para. 40.

that interpreting *siège social* as “registered office” renders such term meaningless. In its opinion, the Contracting Parties chose in Article 1(1)(b) to define corporate nationality for the purposes of the BIT by reference to the place of incorporation. They did so by naming the two elements normally part of the incorporation test, i.e. “constitution” and “registered office”. In other words, constitution in accordance with local law (i.e. the creation of a company as a legal person within a given system of municipal law) and registered office or *siège statutaire* in the respective State (i.e. the seat appearing in the corporation’s constitutive documents) are two elements of one single test (place of incorporation) and not two different tests.

290. The “combination” of the two conditions of incorporation and registered office as part of one single test was also notably made in *Barcelona Traction*. In the context of the discussion of nationality of corporate entities for purposes of diplomatic protection, the Court held that “[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is *incorporated* and in whose territory it has its *registered office*”.<sup>309</sup> The Court also noted that “[t]hese two criteria have been confirmed by long practice and by numerous international instruments”.<sup>310</sup>
291. In the commentary to the Draft Articles on Diplomatic Protection, the International Law Commission (“ILC”) referred to this passage and noted that:

Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection: *incorporation* and the presence of the *registered office* of the company in the State of incorporation.<sup>311</sup>

292. *Barcelona Traction* was of course concerned with nationality for the purposes of diplomatic protection under customary international law, which is not applicable in investment treaty arbitration.<sup>312</sup> As was stressed earlier, one must distinguish the different legal frameworks in which nationality issues arise. This is particularly so here, as the ICJ emphasized that it was dealing with the default position in customary international law *in the absence of a treaty*. Specifically, it stated that “whenever legal issues arise concerning the rights of States with

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<sup>309</sup> *Barcelona Traction*, para. 70 (emphasis added).

<sup>310</sup> *Barcelona Traction*, para. 70.

<sup>311</sup> Draft Articles on Diplomatic Protection with Commentaries, 2006, Exh. CLA-265, at 53 (emphasis added).

<sup>312</sup> This was held in many investment treaty decisions. See, e.g., *Rompetrol*, paras. 86-93 and many other cases, mainly in the context of the issue of shareholders rights, such as *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, paras. 43-45, available at <http://www.italaw.com/sites/default/files/case-documents/ita0183.pdf>; *LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004, p. 16, para. 52, available at <http://www.italaw.com/sites/default/files/case-documents/ita0458.pdf>. See also Zachary Douglas, *The Law of Investment Claims*, paras. 605-609 (“The rules for the nationality of claims in the general international law of diplomatic protection do not apply to issues of nationality in investment treaty arbitration”). But see, for a different view, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, LCIA Case No. UN 7927, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008, Exh. CLA-204, p. 34, para. 109 (“The fact that such treaties have substituted for diplomatic protection and may even prohibit its exercise by the States that are parties to them, does not mean that the basic principles have also been automatically derogated as it is rather the means for materializing an international claim that have changed but not in all aspects its substantive requirements”).

regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law”.<sup>313</sup> In the present case, international law has established its own rules, i.e. those set out in Article 1(1)(b) of the BIT.

293. The fact that the customary rules on diplomatic protection, as referred to in *Barcelona Traction*, are not directly applicable here does not mean that the Tribunal cannot take account of these rules in its interpretive process.<sup>314</sup> This is especially so here as the *travaux* show that the BIT terms were intended to reflect customary international law on corporate nationality for purposes of diplomatic protection.<sup>315</sup>
294. That said, the Tribunal returns now to the relevant passage of *Barcelona Traction*. The Court there first noted that the “traditional rule” for purposes of diplomatic protection was the one based on incorporation and registered office (*constitution* and *siège* in the French language version).<sup>316</sup> It is clear that in the context of the “traditional rule” the Court views “*siège*” as a reference to “*siège statutaire*”.<sup>317</sup> The Court then added that some States require “further or different links” to allocate nationality for purposes of diplomatic protection. In particular, the Court referred to States giving diplomatic protection to a company incorporated under their law “solely when it has its seat (*siège social*) or management or centre of control in their territory” (“*uniquement lorsque le siège social, la direction ou le centre de contrôle de cette société se trouve sur leur territoire*”) or “when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned”.<sup>318</sup> In other words, the Court referred to the three usual tests for nationality mentioned above (para. 267), i.e. incorporation, effective seat and control.
295. The Court then gave preference to the “traditional rule” of incorporation and found that the company had “manifold links” with Canada, the State where it was constituted and had its registered office.<sup>319</sup> These manifold links included the fact that the company had “maintained in Canada [...] its accounts and its share registers”, the fact that “board meetings were held there for many years” and that “it ha[d] been listed in the records of the Canadian tax authorities”.<sup>320</sup> The Court concluded that “a close and permanent connection” (“*lien étroit et*

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<sup>313</sup> *Barcelona Traction*, para. 38. See also *Rompétrol*, para. 91, discussing paragraph 90 of the *Barcelona Traction* and noting that “the Court in fact refers to multilateral or bilateral agreements between States for the protection of foreign investments, and to their provisions as to jurisdiction and procedure in the case of disputes over the treatment of corporate investors, and does so in terms which unmistakably connote that, where such an agreement is present, its terms would prevail”.

<sup>314</sup> See Article 31(3)(c) of the VCLT.

<sup>315</sup> See *infra* at V.B.3.b.ii.

<sup>316</sup> *Barcelona Traction*, para. 70.

<sup>317</sup> See *Barcelona Traction*, para. 71.

<sup>318</sup> *Barcelona Traction*, para. 70. Together with incorporation (and registered office), these two further tests are those generally advanced for nationality. See e.g. the excerpt from *KT Asia*, para. 113, quoted *supra* at para. 267.

<sup>319</sup> *Barcelona Traction*, para. 71.

<sup>320</sup> *Barcelona Traction*, para. 71.

*permanent*") had been established with Canada.<sup>321</sup> Incidentally, these are also the links that the Claimant has with Luxembourg in our case.

296. In any event, it results from the preceding discussion that the Court viewed "incorporation" ("*constitution*" in French) and "registered office" ("*siège*") as two elements of the same test, namely the one based on the place of incorporation, which it regarded as the "traditional rule" of nationality for the purposes of diplomatic protection.<sup>322</sup> The ILC, in the commentary quoted above, recognized that the Court "set two conditions" for the acquisition of nationality, although it acknowledged at the same time that "the laws of most States require a company incorporated under its laws to maintain a registered office in its territory". This being so, the Tribunal could not uphold an objection based on the lack of *effet utile* without implying that the mention of registered office in *Barcelona Traction* is meaningless, a step which the Tribunal is not prepared to take. Thus, like the Court set "two conditions" within the "traditional rule" of nationality for the purposes of diplomatic protection, so equally may a BIT provide for these same two conditions to describe its nationality requirement for purposes of investment treaty protection.
297. In light of this analysis, the Tribunal can dispense with addressing the Parties' arguments on whether the dissociation between the two requirements is possible or not under Luxembourg law, as the issue is inapposite in the framework of the BIT.
298. In conclusion, the context in which the term *siège social* is placed confirms that the term does not refer to domestic nationality rules, but embodies an autonomous treaty-specific meaning. A good faith interpretation of the ordinary meaning of Article 1(1)(b) suggests that *siège social* means *siège social statutaire* or registered office. The object and purpose of the BIT does not point to a different outcome. This conclusion is consistent with the principle of effectiveness as the BIT simply spells out the place of incorporation test by specifying the two elements generally associated with it (constitution in accordance with local law and registered office). This interpretation of Article 1(1)(b) of the BIT also takes into account the customary rules on nationality as stated in *Barcelona Traction*, which constitute the background against which the treaty's provision must be viewed, as is shown by the *travaux préparatoires*.

## **ii. Supplementary means of interpretation (Article 32 VCLT)**

299. The primacy of the text of the Treaty, viewed in its context and bearing in mind the Treaty's object and purpose under Article 31 of the VCLT, implies that recourse to supplementary means (including the *travaux préparatoires* and the circumstances of the Treaty's conclusion) is only allowed in limited circumstances. Pursuant to Article 32 of the VCLT, one may resort to

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<sup>321</sup> *Barcelona Traction*, para. 71.

<sup>322</sup> In *Diallo*, the Court relied on *Barcelona Traction* to conclude that despite the Guinean nationality of Diallo as the sole shareholder in the two companies in question, "the normal rule of the nationality of the claims" applied and that having regard to their place of incorporation, "[t]he companies in question have Congolese nationality". See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, Exh. CLA-160, p. 582, at 616, para. 94.



supplementary means of interpretation (i) to confirm the meaning resulting from the application of Article 31 or (ii) to determine the meaning when the interpretation according to Article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable”.

300. The following supplementary means are noteworthy as they confirm the interpretation of the term *siège social* to which the Tribunal has arrived by application of Article 31.
301. First, the unofficial English translation of the BLEU-Algeria BIT deposited by Belgium with the United Nations Treaty Series carries some weight, as it was submitted by one of the Contracting Parties to the BIT to the United Nations for purposes of publication in an important database of treaties. The English version submitted by Belgium translates *siège social* as registered office.<sup>323</sup>
302. Second, the BLEU Model BIT, which is in English, likewise refers to registered office.<sup>324</sup> Actually, Article 1(1)(b) of the BLEU-Algeria BIT faithfully reflects the BLEU Model BIT in that respect, as is also evidenced by the *travaux préparatoires* of the BLEU-Algeria BIT (see below).
303. Third, at least 26 BITs concluded by the BLEU, the official languages of which are both English and French, use *siège social* in French and registered office in English. In this respect, Algeria does not dispute that treaties on the same subject matter concluded by the Contracting Parties with third States may legitimately be considered as part of the supplementary means of interpretation, and rightly so.<sup>325</sup> However, it contends that such treaty practice is inconclusive. While the Tribunal has noted that not all BITs concluded by the BLEU in both English and French translate *siège social* with registered office (for example, the BIT between the BLEU and the Philippines translates *siège social* with “head office”),<sup>326</sup> the overwhelming majority of the BLEU BITs clearly indicates that the BLEU’s understanding of *siège social* in its own BITs is that of registered office.<sup>327</sup> Moreover, in many of those treaties, the English text prevails in the event of a discrepancy.<sup>328</sup>

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<sup>323</sup> See BIT, Exh. C-658, Art. 1(1)(b).

<sup>324</sup> See BLEU Model-BIT, Exh. C-982, Art. 1(1)(b).

<sup>325</sup> See e.g. *Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, ICJ Reports 1996, paras. 29, 47; *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment, ICJ Reports 1952, pp. 191-192; *AAPL v. Sri Lanka*, para. 40; *Churchill*, paras. 195 *et seq.*

<sup>326</sup> The Tribunal notes that the other two BITs invoked by the *Tenaris and Talta* tribunal in support of its conclusion that the BLEU BIT practice is not “sufficiently conclusive” were not concluded in French and English. See BLEU-Rwanda (1983) BIT and BLEU-Czech Republic BIT. Thus, the Tribunal does not consider these two BITs as helpful as those BITs in which English and French are both official languages.

<sup>327</sup> See BLEU-Armenia BIT, C-728, Art. 1(1)(b), at 9; BLEU-Barbados BIT, Exh. C-728, Art. 1(a)(ii), at 32; BLEU-Bosnia/Herzegovina BIT, Exh. C-728, Art. 1(a)(ii), at 55; BLEU-Belarus BIT, Exh. C-728, Art. 1(1)(b), at 77; BLEU-Ethiopia BIT, Exh. C-728, Art. 1(1)(b), at 100; BLEU-Guatemala BIT, C-728 Art. 1(1)(b), at 124; BLEU-Hong Kong BIT, Exh. C-728, Art. 1(2)(b), at 142; BLEU-India BIT, Exh. C-728, Art. 1(a)(i), at 156; BLEU-Kazakhstan BIT, Exh. C-728, Art. 1(1)(b), at 171; BLEU-Lebanon BIT, Exh. C-728, Art. 1(1)(b), at 185; BLEU-Lithuania BIT, Exh. C-728, Art. 1(a)(ii), at 199; BLEU-Macedonia BIT, Exh. C-728, Art. 1(2)(b), at 215; BLEU-Mauritius BIT, Exh. C-728, Art. 1(1)(b), at 236; BLEU-Mexico BIT, Exh. C-728, Art. 1(1)(b), at 258; BLEU-Nicaragua BIT, Exh. C-728, Art. 1(1)(b), at 280; BLEU-Saudi Arabia BIT, Exh. C-728, Art. 1(3)(b)(ii), at 313; BLEU-Slovenia BIT, Exh. C-728, Art. 1(2)(b), at 328; BLEU-South Africa BIT, Exh. C-728, Art. 1(3)(b), at 343; BLEU-Sudan BIT, Exh. C-728, Art. 1(1)(b), at 365; BLEU-Thailand BIT, Exh. C-728, Art. 1(1)(b), at 376; BLEU-Ukraine BIT, Exh. C-728, Art. 1(1)(b),

304. To conclude on this point, interpreting *siège social* as *siège social statutaire* or registered office is fully in line with the BLEU's treaty practice. The Respondent was unable to convincingly refute this conclusion by pointing to a different treaty practice from either the BLEU or Algeria. A contrary conclusion would, in the Tribunal's view, entail extraordinary and far-reaching consequences, as it would directly contradict the formulations of the requirements *ratione personae* in dozens of treaties.
305. The Tribunal has next reviewed the *travaux préparatoires* which it requested from Belgium and Luxembourg, with the agreement of the Parties, and which were produced by Belgium. The *travaux* fully support the Tribunal's understanding.
306. The BLEU, represented by Belgium, and Algeria started BIT negotiations in 1980. The earliest draft of the BIT defined investors from Belgium and Luxembourg like in the final version.<sup>329</sup> In fact, all later drafts proposed by Belgium contained the same definition of "investor".<sup>330</sup> The first exchanges between the Parties in 1987 to 1989, in which Belgium rejected certain proposals from Algeria as "for the most part, unacceptable", were not concerned with the definition of investor.<sup>331</sup> In November 1990, Belgium and Algeria held negotiation meetings and came to an agreement *ad referendum* "on all of the provisions", except for three issues, among which the definition of "investors". On this latter topic, Algeria undertook to engage in an exchange of letters.<sup>332</sup>
307. On 25 November 1990, Algeria proposed a draft exchange of letters that would be attached to the BIT and would define "[n]ational investors or companies" as "those that have their principal center of economic interest in Belgium or Luxembourg [*centre principal de leurs intérêts économiques*]", under the Algerian legislation in force concerning investments by non-residents in Algeria".<sup>333</sup> On 21 February 1991, Belgium stated that it was ready to sign the BIT, provided Algeria "abandons [its] amendment concerning the definition of investors".<sup>334</sup> On 25 February 1991, Algeria replied that the criterion of *siège social* was "more vague than the principal center of economic activities" and that the parties therefore needed to combine these

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at 404; BLEU-Uzbekistan BIT, Exh. C-728, Art. 1(1)(b), at 418; BLEU-Zambia BIT, Exh. C-728, Art. 1(1)(b), at 439; BLEU-UAE BIT, Exh. C-728, Art. 1(1)(b); BLEU-Libya BIT, Exh. C-728, Art. 1(1)(b); BLEU-China BIT, Art. 1(a)(ii), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/339>.

<sup>328</sup> See e.g., BLEU-China BIT. The Tribunal also notes that the BLEU-UAE and BLEU-Libya BITs show that when the BLEU wants to add different meanings, it does so expressly. See BLEU-UAE BIT, Exh. C-729, Art. 1(b) (defining company investors in the authentic English text as any legal person constituted in accordance with law "and having its registered office or place of management" in Belgium, Luxembourg, or the UAE, and which the authentic French text translates as "*siège social ou son siège de direction*"); BLEU-Libya BIT, Exh. C-730, Art. 1(b) (defining company investors in the authentic English text as any legal person constituted in accordance with law "and having its registered office and residence" in Belgium, Luxembourg, or Libya, which the authentic French text translates as "*siège social et son domicile*").

<sup>329</sup> *Travaux*, pp. 2-16.

<sup>330</sup> *Travaux*, pp. 76-93 (draft 1990) and pp. 106-124 (draft 1991).

<sup>331</sup> *Travaux*, pp. 46-48 and 50-53.

<sup>332</sup> *Travaux*, pp. 73-75 and 94.

<sup>333</sup> *Travaux*, pp. 96-98 (Tribunal's translation. All translations of the *travaux* in this section are the Tribunal's free translations).

<sup>334</sup> *Travaux*, p. 125.

criteria through an exchange of letters.<sup>335</sup> On 19 March 1991, Belgium refused Algeria's proposal and reasoning. Belgium was concerned that Algeria would seek to "exclude from the benefits of the Agreement multinational companies and to give advantages to the small-medium companies ('PME') (those which have their center of principal activities in the BLEU)". Belgium proposed in consequence that each party define its respective investors on its own terms, with the BLEU "considering as investors in Algeria the nationals and legal persons constituted in accordance with Belgian and Luxembourg legislation and having their *siège social* in the territory of the BLEU", while Algeria "could consider as investors in BLEU the physical and legal persons with their principal center of interests in Algeria". In reply, Algeria proposed to reverse this approach, which led Belgium to note that the parties were at "an impasse".<sup>336</sup>

308. On 17 April 1991, one week prior to the signature of the BIT, Belgium reiterated that its definition of investors was "the classic model of the BLEU and provides classic guarantees in this field", whereas "[t]he Algerian proposal [...] consists of excluding investments made in Algeria by physical or legal persons of the BLEU that do not have their 'principal center of economic interests' in Belgium or in Luxembourg". Belgium regarded Algeria's proposal as "unacceptable", because it excluded from the BIT's protection "investments that are made in Algeria" by "the numerous BLEU companies that realize the most important part of their activities abroad" and "the numerous BLEU companies that have capital held by shareholders of other countries". It further observed that Algeria's proposal did "not accord with international treaty practice", as reflected in the ICJ's decision in *Barcelona Traction*. It also emphasized that, in the words of the Court, "no absolute test of the 'genuine connection' has found general acceptance".<sup>337</sup> Thereafter, Belgium stated "that the notions of 'in accordance with the law of the country' and of '*siège social*' are sufficient to define companies, and that all restrictions that are added are not inscribed in the accepted practice of the juridical community and are discriminatory towards our companies that exercise part of their activities abroad or whose capital is held by foreign shareholders".<sup>338</sup> There are no subsequent communications on record indicating any different position of the Parties on this matter, and in particular no expression of disagreement by Algeria.

309. The BIT was then signed on 24 April 1991. On 8 November 1995, the Belgian Government submitted the Explanatory Memorandum for purposes of ratifying the BIT to the Parliament.<sup>339</sup> The Memorandum recounted that Algeria had proposed "to exclude from the benefit of the treaty any investments made in Algeria by natural or juridical persons of the Belgium-

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<sup>335</sup> See *Travaux*, pp. 127-128.

<sup>336</sup> *Travaux*, pp. 139, 145-146.

<sup>337</sup> *Travaux*, pp. 143-144.

<sup>338</sup> *Travaux*, pp. 145-146.

<sup>339</sup> The Explanatory Memorandum is of course not part of the *travaux préparatoires* as it was not originated during the treaty's preparation phase, but was generated by one of the Parties several years thereafter during the ratification process. It is mentioned here to the extent that it is as an additional element that sheds light on the *travaux préparatoires*.

Luxembourg Economic Union that did not have ‘their principal center of economic interest in Belgium or in Luxembourg’”. However, “[t]his proposal was unacceptable”, continues the Memorandum, and the BLEU was “able to convince our Algerian partners to adopt our traditional formula for the definition of Investors and the content of the agreement thus concluded faithfully corresponds to our current practice”.<sup>340</sup>

310. In the Tribunal's view, the *travaux* show the following points. First, it does not transpire from the *travaux* that there was a discussion whether *siège social* meant registered office or *siège réel*. Second, it is clear that the BIT under negotiation was based on the BLEU's treaty practice and on the BLEU Model BIT, as was repeatedly stated by Belgium.<sup>341</sup> Third, Algeria sought to add to the criteria of constitution and *siège social* a third requirement, namely the “principal center of economic interest” defined by reference to the average turnover of the company. Belgium firmly opposed this addition and insisted on its traditional formula based on constitution in accordance with law and *siège social*. It also dismissed Algeria's suggestion that *siège social* was a “vague concept” and instead argued that it had “a firm legal value and is less susceptible of interpretation than the concept of ‘principal center of economic activities’” (“*a une valeur juridique certaine et est dès lors moins susceptible d'interprétation*”).<sup>342</sup>

311. A passage from the *travaux* towards the very end of the negotiations is particularly enlightening to appreciate the BLEU's position, which was accepted by Algeria through the conclusion of the BIT:

[...] [the Algerian proposal to require a "principal center of economic activities" as part of the definition of "investor"] ne s'inscrit nullement dans la pratique conventionnelle internationale. Ainsi, l'arrêt *Barcelona Traction* rendu à l'encontre de la Belgique, le 05.02.70, par la Cour internationale de Justice stipule clairement (§70) que « la règle traditionnelle attribue le droit d'exercer la protection diplomatique d'une société à l'Etat sous les lois duquel elle s'est constituée et sur le territoire duquel elle a son siège ». Ces deux critères (repris dans notre projet) ont été confirmés par une longue pratique et par maint[s] instruments internationaux. Tout en constatant que certains Etats limitent quelque fois cette protection diplomatique lorsqu'il n'existe pas de lieu de « rattachement effectif » (p. ex. : absence d'organe de direction...) ce même arrêt poursuit cependant en soulignant qu' « aucun critère absolu applicable au lien effectif n'a été accepté ». <sup>343</sup>

312. Two observations arise from this passage. First, Belgium was of the view that the dual condition of constitution and *siège social* was generally reflective of international treaty practice. In particular, Belgium equated its proposal of constitution in accordance with local law and *siège social* to “the traditional rule” articulated by the ICJ in *Barcelona Traction*, quoting the ICJ decision *verbatim*. It is worth recalling that, in the quoted French original paragraph, the Court spoke of constitution and *siège*, which it translated as “registered

<sup>340</sup> Belgian Senate, Explanatory Memorandum to the Belgium-Luxembourg – Algeria BIT, 8 November 1995, Exh. C-979, at 2.

<sup>341</sup> See e.g. *Travaux*, p. 40.

<sup>342</sup> *Travaux*, p. 145.

<sup>343</sup> *Travaux*, p. 144. See also *Travaux*, pp. 145-146.

office”.<sup>344</sup> On this basis, Belgium confirmed that “these two criteria [i.e., “constitution in accordance with the law” and “*siège*”] [were] reproduced in our draft”, which shows beyond any doubt that Belgium intended to adopt the first test enunciated in *Barcelona Traction* based on the place of incorporation (with the two usually associated components) and no other.<sup>345</sup>

313. Second, Belgium expressly objected to conditioning protection upon the existence of a “genuine connection” (“*rattachement effectif*”) to the home State, such as the presence of a management body. This objection demonstrates that there is no basis for imposing a genuine or similar connection test under the BLEU-Algeria BIT. The express reference to the “absence of a management body” appears significant, as it shows that there is no room for a “place of effective management” or *siège réel* test, which is the test the Respondent seeks to import into the meaning of *siège social*.

### iii. Conclusion

314. In conclusion, the Tribunal considers that “*siège social*” in Article 1(1)(b) of the BIT means “registered office” or *siège statutaire* in the sense of the “seat” appearing in a corporation’s constitutive documents. Because there is no dispute that the Claimant was constituted in accordance with Luxembourg law and has its registered office in Luxembourg, the Tribunal concludes that it is an “investor” within the meaning of Article 1(1)(b) of the BIT.<sup>346</sup>
315. Finally, as already stated, a BIT criterion based on place of incorporation is an entirely reasonable criterion for the determination of nationality of juridical persons.<sup>347</sup> Thus, in light of the conclusion reached above in respect of the interpretation of Article 1(1) of the BIT, the Claimant is also a “national” of a Contracting Party under Article 25 of the ICSID Convention.

#### c. Even if *siège social* were to refer to *siège réel*, the Claimant would have its *siège réel* in Luxembourg

316. Even if, contrary to the Tribunal’s conclusion, *siège social* in Article 1(1)(b) of the BIT were to imply a reference to domestic nationality requirements and thus have the meaning of *siège social réel*, the Claimant would equally be an “investor” under the BIT, as it would be a national of Luxembourg under the laws of Luxembourg. While the Tribunal would not need to address this point given its conclusion on the meaning of *siège social* in the BIT, it will

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<sup>344</sup> The Tribunal notes that throughout the *Barcelona Traction* Judgment, the Court translated “*siège*” in the French version with “registered office” in the English version (see paras. 30, 31, 70, 71); “*siège social*” with “seat (*siège social*)” (para. 70); and “*siège statutaire*” with “registered office” (para. 71).

<sup>345</sup> The position adopted by the BLEU during the negotiations of the BLEU-Algeria BIT is in turn confirmed by the BLEU Model BIT and the overwhelming majority of its BITs with third States (analyzed *supra* at paras. 301-303), which in their English versions refer to a company “constituted in accordance with Belgian, Luxembourg or \_\_\_\_ legislation and having its registered office in the territory of Belgium, Luxembourg or \_\_\_\_”, which, once more, faithfully reflects the English text of para. 70 of the ICJ judgment in *Barcelona Traction*.

<sup>346</sup> To the extent that the Respondent has also advanced and maintained a separate admissibility objection (see *supra* note 93), this objection is likewise rejected as the Claimant has fulfilled the conditions of Article 1(1)(b) of the BIT at all relevant times.

<sup>347</sup> See *supra* para. 267.

nonetheless give brief reasons why a different interpretation of the term would not change the outcome of this jurisdictional objection.

317. In the Tribunal's view, if it were to engage in an analysis of the nationality of the Claimant under the BIT by reference to domestic nationality requirements, the Tribunal would have to analyze whether the Claimant is a "national" of the relevant Contracting Party according to the criteria set by that Contracting Party to determine corporate nationality. Here, the Tribunal would thus apply the requirements for corporate nationality under Luxembourg law *as they are applied in Luxembourg*. As already explained above, the nationality of a company under Luxembourg law is determined by the *siège de l'administration centrale* of the company (formerly, *principal établissement*), as is stated in Articles 159 and 2 of the Luxembourg Company Law, which provide as follows:

**Art. 159.**

(Loi du 25 août 2006)

«Toute société dont **l'administration centrale** est située au Grand-Duché, est soumise à la loi luxembourgeoise, bien que l'acte constitutif ait été passé en pays étranger.»

(Loi du 31 mai 1999)

«Lorsqu'une société a son **domicile** au Grand-Duché de Luxembourg, elle est de **nationalité luxembourgeoise** et **la loi luxembourgeoise lui est pleinement appliquée**.

[...]

**Art. 2. :**

Le **domicile** de toute société commerciale est situé au **siège de l'administration centrale** de la société. L'administration centrale d'une société est **présumée**, jusqu'à preuve du contraire, coïncider avec le lieu du **siège statutaire de la société**.<sup>348</sup>

318. While the place of the *administration centrale* determines the company's nationality, such place is, by virtue of Article 2(2) of the Company law, presumed to be at the *siège statutaire* or registered office. Under the presumption established by Luxembourg law, the Claimant would thus be a Luxembourgish national, as its *siège statutaire* is and has always been in Luxembourg.
319. The presumption encapsulated in Article 2(2) of the Luxembourg Company Law is, however, rebuttable. In this respect, the factors that Luxembourg law considers as relevant to determine where a company's *administration centrale* or *siège réel* is located are rather formal in nature. The Tribunal notes that there is no major disagreement between the Parties' Luxembourg law experts on these factors (at least in the abstract). The Tribunal discerns the following relevant factors: whether (a) the general meetings of shareholders and the meetings of the Board of

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<sup>348</sup> Luxembourg Company law, Exh. RL-177 (emphasis added).

Managers take place in Luxembourg; (b) the corporate and accounting records are maintained in Luxembourg; (c) administrative services are provided in Luxembourg; and (d) the company's correspondence is generally addressed to and sent from Luxembourg.

320. The Tribunal notes that the *Tenaris and Talta* tribunal considered similar criteria and found that the “elements indicative of the presence of an effective seat” in Luxembourg included the following elements: “the places where the Directors meet; the place where the Shareholders meet; and the place where the books and records of the company are being kept”.<sup>349</sup> In assessing whether the claimant in that case had an “effective seat” in Luxembourg, the tribunal also “consider[ed] it critical to take into account the actual nature of each company, and its actual activities”.<sup>350</sup> In particular, the tribunal noted that:

In so far as [such] entity is no more than a holding company, or a company with little or no day-to-day operational activities, its day-to-day ‘management’ will necessarily be very limited, and so will its physical links with its corporate seat. Put another way, it would be entirely unreasonable to expect a mere holding company, or a company with little or no operational responsibility, to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location. And yet holding companies, and companies with little or no operational responsibility, have ‘management’, and are certainly not excluded from the [BIT] in this case. Indeed, countries such as Luxembourg [...] clearly consider it to their respective benefit to attract such companies, and to maintain a corporate regulatory regime that allows for them.<sup>351</sup>

321. The *Tenaris and Talta* tribunal concluded on this point that “the test of actual or effective management must be a flexible one, which takes into account the precise nature of the company in question and its actual activities”.<sup>352</sup> By contrast, the tribunal also dismissed any relevance of other criteria advanced by Venezuela to argue that the company's real seat was elsewhere. In particular, it held that, in accordance with Luxembourg law, neither the “nationality and residence of senior management” nor the “number and location of any employees of a company” constitute valid criteria to assess the effective seat<sup>353</sup> and that “Tenaris does have a physical presence in Luxembourg” even though “under Luxembourg law, there is no need for a company to own or rent premises in Luxembourg”.<sup>354</sup>
322. In the Tribunal's view, applying the relevant criteria under Luxembourg law, as enumerated in the preceding paragraphs, there can be no doubt that the Claimant fulfills all of these criteria. First, all of the Claimant's general meetings of shareholders and meetings of the Board of Managers were held in Luxembourg. Second, the Claimant's corporate and accounting records are maintained at its registered office in Luxembourg. Third, from its inception, all of the Claimant's administrative services, including book-keeping and accounting, were provided

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<sup>349</sup> *Tenaris and Talta*, para. 176.

<sup>350</sup> *Tenaris and Talta*, para. 197.

<sup>351</sup> *Tenaris and Talta*, para. 199.

<sup>352</sup> *Tenaris and Talta*, para. 200.

<sup>353</sup> *Tenaris and Talta*, paras. 218-219.

<sup>354</sup> *Tenaris and Talta*, para. 221.

in Luxembourg. Fourth, the Claimant's correspondence was generally sent to and from Luxembourg. The Respondent's objections to the ways those meetings were held (i.e. by proxy, through teleconference or circular resolution) are unfounded as those practices are allowed under Luxembourg law (and the Claimant's Articles of Association). Moreover, the Respondent's insistence on Mr. Sawiris' rare appearances in Luxembourg or on his overall role in the company are misplaced as these facts play no role to establish a company's *siège réel* in Luxembourg. Furthermore, like Tenaris, OTMTI is a holding company and "has no operational activities of its own and its only function is to manage its portfolio of companies", which would necessarily require "relatively limited" management activity.<sup>355</sup> Thus, considering all of these circumstances, there can be no doubt that the Claimant has its *administration centrale* or place of effective management or *siège réel* in Luxembourg. The Tribunal considers that the Respondent has not been able to establish otherwise.

323. In conclusion, even if the Tribunal were to engage in an analysis as to whether, under Article 1(1)(b) of the BIT, the Claimant has its *siège réel* in Luxembourg (which would not be justified under the BIT), the Claimant would nonetheless fulfil the definition of "investor" of the BIT.

324. The foregoing analysis on the theoretical interpretation of Article 1(1)(b) of the BIT as well as the subsidiary analysis of the concrete existence of a *siège réel* is that of the Tribunal's majority. Arbitrator Stern is not in agreement with these analyses.<sup>356</sup>

## **C. JURISDICTION *RATIONE MATERIAE*: WHETHER THE CLAIMANT MADE AN INVESTMENT WITHIN THE MEANING OF THE BIT AND THE ICSID CONVENTION**

### **1. The Respondent's position**

325. The Respondent argues that the Claimant made no investment within the meaning of the BIT (a) and the ICSID Convention (b). The Respondent further objects that the alleged contracts concluded between OTA and MedCable are not investments of the Claimant (c).

#### **a. The Claimant made no investment within the meaning of the BIT**

326. While the Respondent concedes that OTH made an investment in Algeria,<sup>357</sup> the Respondent objects that the Claimant made no investment in the economy and on the territory of Algeria pursuant to the BIT. The Respondent has advanced a number of arguments in this respect.

<sup>355</sup> *Tenaris and Talta*, paras. 204-205.

<sup>356</sup> Arbitrator Stern considers that *siège social* as referred to in the BIT can only mean *siège réel*, if interpreted, as it should be according to the *Barcelona Traction* case (para. 50), by reference to the rules generally accepted by municipal laws. Moreover, for her, this case is a *cas d'école* where the *siège réel* does not coincide with the registered seat in the Netherlands and must be considered to be in Egypt, because M. Sawiris himself, an Egyptian national, insisted that he is "everything" in the corporate structure.

<sup>357</sup> See Tr. Day 5 (Respondent's Closing), 134:21-134:23 ("[...] OTH did carry out an initial investment; there's no dispute on that") and Tr. Day 1 (Respondent's Opening), 103:10-103:12 ("We are not saying that the former investors didn't invest ... The investment is still there from OTH"). See also R-PHB 2, para. 78 ("*Il n'est pas contesté par les Parties que, au début des années 2000, M. Naguib Sawiris et sa famille ont réalisé par le biais de la société OTH un investissement sur le territoire algérien au nom et pour le compte de la société OTA,*



327. As a preliminary matter, for the Respondent the mere holding of an indirect shareholding in OTA does not constitute an investment in the local economy or on the territory of Algeria pursuant to the BIT.<sup>358</sup> Because the Treaty's purpose, like that of any BIT, is to encourage investments on the territory of the Contracting Parties, an investor must establish that it has invested in the economy and on the territory of one of the Contracting Parties or at least establish a "territorial nexus" with that Contracting Party.<sup>359</sup>
328. For the Respondent, this means that when an investment is made in an indirect manner, the indirect investor must prove that it has effected the investment through one or more vehicles *established for the purposes of the investment*.<sup>360</sup> Here, the Claimant has made no investments or re-investments, whether at the time of acquiring Wind or thereafter. OTMTI became an indirect shareholder in OTH to finance the acquisition of Wind, not to invest in Algeria.<sup>361</sup> More specifically, the Respondent's argument is that the pledge of the OTH shares in the context of the Wind acquisition allowed Mr. Sawiris to obtain part of the funds necessary to acquire the Italian company through two "collateral loans" concluded with Weather Capital on 5 August 2005 for a total amount of €1.2 billion.
329. Algeria further submits that, even after the Wind acquisition, the Claimant made no investments under the BIT.<sup>362</sup> First, contrary to the Claimant's allegations, the share purchases of Weather Investments in December 2006 and January 2007 are not investments. In particular, the purchase from Enel of 26.1% of Weather Investments shares is the result of the sale of Wind, and was thus not made with a view to investing in the Algerian economy.<sup>363</sup> Furthermore, the purchase of 0.62% of Weather Investments shares from certain Middle Eastern investors does not constitute an investment either. In fact, these acquisitions were made within the context of the Wind acquisition, and present no links with Algeria,<sup>364</sup> which is the reason why the Claimant has refused to produce the related purchase agreements.
330. Second, the Respondent rebuts the Claimant's argument that it made a contribution "in services" to OTA through the French subsidiary Orascom Telecom Services Europe ("OTSE") and through Weather Investments.<sup>365</sup> For the Respondent, the alleged services performed by OTSE are grounded solely on statements from one of the Claimant's witnesses (Mr. Michel Hubert) and on one exhibit,<sup>366</sup> which is an incomplete document lacking any evidentiary

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*prenant la forme de l'acquisition de la Licence GSM (et de la conclusion de la Convention d'Investissement)", (internal footnotes omitted).*

<sup>358</sup> Memorial on Preliminary Objections, paras. 177-180; Reply, paras. 226-230; R-PHB 1, para. 97.

<sup>359</sup> Reply, para. 227.

<sup>360</sup> Reply, para. 228; R-PHB 1, para. 96.

<sup>361</sup> Reply, paras. 234-240; R-PHB 1, paras. 98-100.

<sup>362</sup> Reply, paras. 241; R-PHB 1, paras. 101-110.

<sup>363</sup> Reply, paras. 242-244; R-PHB 1, para. 102.

<sup>364</sup> Reply, paras. 245-248; R-PHB 1, para. 103.

<sup>365</sup> Reply, paras. 249-260, R-PHB 1, para. 105.

<sup>366</sup> OTSE Service Detail, 2006-2008, Exh. C-845.

value.<sup>367</sup> With regard to the alleged services rendered by Weather Investments between 2006 and 2010 (the Claimant's argument being that the Claimant made a payment of €2.48 million to Weather Investments, which in turn provided services to its subsidiaries, including OTA), the Respondent notes that the Claimant's annual reports do not specify the purpose of those payments. The Claimant has thus not established that such payments were intended to finance Weather Investments' services to OTA.<sup>368</sup>

331. Third, the Claimant has not shown that it made any "reinvestments" within OTA pursuant to the BIT.<sup>369</sup> In this respect, the Respondent contends that OTA's earnings were not reinvested in the local economy and on Algerian territory. The Respondent points to the minutes of the shareholders meeting of OTA, which allegedly confirm that OTA's shareholders voted for the distribution of almost all of OTA's returns as dividends.<sup>370</sup> Further, the minutes of the meetings of the Claimant's corporate organs do not evidence any decision to reinvest dividends in OTA.<sup>371</sup> In addition, the Claimant cannot rely on the expenses incurred by OTA ("*dépenses effectuées par OTA*"), as these expenses were necessary for OTA to operate and make profits and are therefore not dividends which shareholders would have left in the company.<sup>372</sup>

332. Furthermore, the Claimant has not established that it exercised any effective control over OTA. The Respondent contends that under Luxembourg law, if the Claimant had exercised effective control, it should have filed consolidated annual accounts starting from 2005, which it did not do.<sup>373</sup> The consolidated accounts drawn up from 2009 to 2011 were merely an attempt to manufacture control *ex post* for purposes of this arbitration.<sup>374</sup> Finally, the Claimant has not proven that it has taken any decision relating to OTA's activity in Algeria, as the minutes of its meetings contain no reference to OTA or to disputes between OTA (or OTH) and the Algerian authorities.<sup>375</sup>

**b. The Claimant made no investment within the meaning of Article 25(1) of the ICSID Convention**

333. For the Respondent, the Claimant must show that it has made an "investment" under the objective definition developed in the framework of the ICSID Convention. Such definition provides for three elements: a contribution made for a certain duration at a risk.<sup>376</sup> The Respondent underscores that the Claimant does not dispute that an investment in the sense

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<sup>367</sup> Reply, paras. 251-257; R-PHB 1, para. 105.

<sup>368</sup> Reply, paras. 258-260; R-PHB 1, para. 105.

<sup>369</sup> Reply, paras. 261-285; R-PHB 1, paras. 106-109.

<sup>370</sup> Reply, para. 265; R-PHB 1, para. 107; R-PHB 2, para. 90.

<sup>371</sup> Reply, para. 266.

<sup>372</sup> R-PHB 1, para. 108; R-PHB 2, para. 90.

<sup>373</sup> Reply, paras. 269-278.

<sup>374</sup> Reply, para. 279; R-PHB 1, para. 109.

<sup>375</sup> Reply, paras. 280-284; R-PHB 1, para. 109.

<sup>376</sup> Memorial on Preliminary Objections, paras. 206-213; Reply, paras. 286-287.

of Article 25 of the ICSID Convention necessarily entails a contribution or “commitment of resources”.<sup>377</sup>

334. As a general matter, the Respondent submits that the mere holding of shares in a company does not involve a contribution pursuant to Article 25 of the ICSID Convention. For these to be a contribution, the shareholder must have committed resources when purchasing the shares (or thereafter). It cannot benefit from a possible contribution made previously by the seller (*“l’actionnaire ... ne peut simplement se prévaloir d’une éventuelle contribution effectuée auparavant par le cédant”*).<sup>378</sup> Moreover, the shareholder’s contribution must be “substantial” and effected on the host state’s territory or, at least, “with a view to and within the framework of the project to be realized abroad” (*“en vue et dans le cadre du projet à réaliser à l’étranger”*).<sup>379</sup>
335. The thrust of the Respondent’s argument is that the Claimant has made no contribution on Algerian territory, as the *raison d’être* of its alleged payments was to acquire an Italian company (through a variety of investment vehicles), not to invest in Algeria.<sup>380</sup> More particularly, the Respondent makes the following observations in relation to each of the Claimant’s alleged “commitments of resources”.
336. First, in connection with the Claimant’s August 2005 issue of shares for a total value of €3.5 billion, such issue cannot be regarded as a contribution, as its purpose was not to buy a (very indirect) interest in OTA, but to fulfil a condition precedent (*“condition suspensive”*) for the acquisition of Wind:<sup>381</sup>
- a. The issue of the shares constituted the last step in the restructuring of the Sawiris family’s shareholding in OTH effected for the purposes of the Wind acquisition.<sup>382</sup> The transaction involved a mere “paper exchange” (the Sawiris Entities subscribed the entirety of the new shares issued by the Claimant in exchange of the shares they held in Weather Investments), as was admitted by the Claimant’s financial expert, Mr. Tolkien, at the Hearing.<sup>383</sup>
  - b. Such restructuring was economically neutral vis-à-vis OTA and Algeria.<sup>384</sup> It did not entail any cash flow in the direction or for the benefit of Algeria. Once again, the Respondent maintains that the Claimant’s financial expert conceded as much at the Hearing.<sup>385</sup> It also argues that the Claimant’s invocation of *Gold Reserve* is misplaced as

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<sup>377</sup> R-PHB 1, para. 113, referring to the Claimant’s Opening Statement, Tr. Day 1, 141:19-21.

<sup>378</sup> R-PHB 1, para. 114; R-PHB 2, para. 73.

<sup>379</sup> R-PHB 2, para. 73.

<sup>380</sup> Reply, para. 290.

<sup>381</sup> Reply, paras. 294-301; R-PHB 1, paras. 119-134; R-PHB 2, paras. 75-84.

<sup>382</sup> R-PHB 1, paras. 120-124.

<sup>383</sup> R-PHB 2, para. 82.

<sup>384</sup> R-PHB 1, paras. 125-133.

<sup>385</sup> R-PHB 2, para. 82.

the latter considered the share swap under the applicable BIT, not under the ICSID Convention.<sup>386</sup>

- c. The financing obtained in the context of the restructuring was neutral vis-à-vis Algeria: the “subordinated loan agreement” entered into by Mr. Sawiris was a mere accounting exercise (“*jeu d’écritures*”) without economic substance.<sup>387</sup> The “collateral loans” granted by Banca IMI in the amount of €1.2 billion were used by Weather Investments to finance the acquisition of a 62.75% stake in Wind from Enel on 11 August 2005, and not to invest in Algeria.<sup>388</sup>

337. Second, in connection with the contribution in cash of €294 million allegedly made by the Claimant to Weather Investments, the Respondent observes that such payment was a condition to obtain the collateral loans for the Wind acquisition.<sup>389</sup> Also that contribution was thus used to finance the acquisition of 62.75% of the shares in Wind. Therefore, it cannot be deemed a contribution in Algeria under Article 25 of the ICSID Convention.<sup>390</sup>

338. Third, the December 2006/January 2007 payments of €1.3 billion to purchase Weather Investments shares from Enel and the Middle Eastern investors are no contribution either, as their purpose was to complete the acquisition of Wind and not to acquire a new indirect interest in OTH.<sup>391</sup> In addition, the purchase of shares from Enel was financed by third parties and not by the Claimant, and it is not proven that the purchase of shares from the Middle Eastern investors was financed by the Claimant.<sup>392</sup>

339. Fourth, the other alleged contributions do not qualify as such under Article 25:<sup>393</sup>

- a. For the reasons already explained above,<sup>394</sup> OTA’s alleged reinvestments cannot be considered contributions.
- b. The services rendered by Weather Investments, by OTSE and by persons empowered by the Claimant are no contributions either.<sup>395</sup>

340. Fifth, the Respondent disputes that the inclusion of OTA in a “stronger group” following the restructuring may constitute a contribution, as the Claimant argues.<sup>396</sup> This argument is unfounded legally and factually, as the acquisition of Wind entailed a “negative contribution”

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<sup>386</sup> R-PHB 1, fn. 317; R-PHB 2, fn. 153.

<sup>387</sup> R-PHB 1, para. 131.

<sup>388</sup> R-PHB 1, paras. 132-133.

<sup>389</sup> Reply, paras. 302-306.

<sup>390</sup> R-PHB 1, paras. 136-137; R-PHB 2, para. 85.

<sup>391</sup> Reply, paras. 310-318; R-PHB 1, paras. 139-141; R-PHB 2, para. 86.

<sup>392</sup> R-PHB 2, para. 86.

<sup>393</sup> R-PHB 1, paras. 142-144.

<sup>394</sup> See *supra* para. 331.

<sup>395</sup> See *supra* para. 330.

<sup>396</sup> R-PHB 1, para. 145, discussing Claimant’s Closing Statement, especially Tr. Day 5, 187:4-9 (“Mr. Nasr in fact confirms this, confirmed the value of the contribution by Claimant to OTA. And it consisted of being part of a stronger group, with better access to know-how, better technology, better synergy and better access to financial investors”).

towards Algeria.<sup>397</sup> The various companies created in the framework of the transaction were deeply indebted,<sup>398</sup> which cannot give rise to a contribution.<sup>399</sup>

341. Sixth and finally, the Respondent highlights that the Claimant has not assumed any “risk” as required by the objective notion of investment under Article 25. In support, it calls attention to the decision of the High Court of Justice of London mentioning that the Sawiris “were able to obtain control of Wind through [Weather Investments] with a minimum of cash” and to a statement by Mr. Sawiris that he acquired Wind “for free”.<sup>400</sup>

**c. The alleged contracts between OTA and MedCable are not investments of the Claimant within the meaning of the BIT or the ICSID Convention**

342. For the Respondent, shares in a company incorporated in the United Kingdom, such as MedCable Ltd. (“MedCable”), do not fall within the definition of investment under Article 1(2) of the BIT (which applies to companies incorporated in the host state).<sup>401</sup> As a result, so says Algeria, the Claimant has changed its argument and now invokes certain purported contracts between MedCable and OTA as assets of OTA (“*un actif d’OTA*”).

343. To this changed argument, the Respondent objects that the existence and entry into effect of these contracts is not proven:<sup>402</sup>

- a. First, the so-called “Capacity Agreement IN”,<sup>403</sup> a service agreement between OTA and MedCable of 17 December 2007, provides that it will become effective on the date of conclusion of several so-called “Capacity Agreements OUT”.<sup>404</sup> Since the Claimant has only produced one Capacity Agreement OUT,<sup>405</sup> the Respondent requests that the Tribunal draw adverse inferences against the Claimant.<sup>406</sup> Further, the Capacity Agreement OUT produced by the Claimant is to become effective on the conclusion of a so-called “BF Lease Agreement”. This lease, produced with the Rejoinder,<sup>407</sup> was itself to become effective on the conclusion of a Consortium Agreement between MedCable and the “*Consortium Algérien de Télécommunications*”. However, the Consortium

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<sup>397</sup> R-PHB 1, para. 147; R-PHB 2, paras. 97-103.

<sup>398</sup> R-PHB 1, para. 150; R-PHB 2, paras. 101-103.

<sup>399</sup> R-PHB 2, para. 103.

<sup>400</sup> Reply, paras. 327-328, referring to the Decision of the High Court of Justice (Chancery Division) of London, 15 June 2009, [2009] EWHC 1330 (Ch), Exh. R-1105, para. 27.

<sup>401</sup> Memorial on Preliminary Objections, paras. 170-172; Reply, para. 214.

<sup>402</sup> Reply, paras. 216-218.

<sup>403</sup> Med Cable – Algerian Cable Term Sheet of the Capacity Lease Agreement In (Traffic Originating Outside of Algeria) between MedCable Ltd. and OTA, dated 17 December 2007, Exh. C-476.

<sup>404</sup> Reply, para. 217, discussing Med Cable – Algerian Cable Term Sheet of the Capacity Lease Agreement In (Traffic Originating Outside of Algeria) between MedCable Ltd. and OTA, 17 December 2007, Exh. C-476, p. 3.

<sup>405</sup> Med Cable – Algerian Cable Term Sheet of the Capacity Lease Agreement Out (Traffic Originating from Algeria) between MedCable Ltd. and OTA, 17 December 2007, Exh. R-250.

<sup>406</sup> Reply, para. 217.

<sup>407</sup> Med Cable – Algerian Cable Term Sheet of the Black Fibre Lease Agreement between OTA and Consortium Algérien de Télécommunications S.p.A., dated 19 October 2006, Exh. C-886.

Agreement produced by the Claimant<sup>408</sup> was concluded between MedCable and OTA, not the *Consortium Algérien de Télécommunications*. Therefore, so the Respondent concludes, it is not established that the Capacity Agreement IN, as well as the related agreements, have entered into force.<sup>409</sup>

- b. Second, according to the Respondent, the Claimant has attempted to establish the “right-of-use” or “IRU” over the cable (on which it relies in its briefs) only by reference to the Mason expert report and to a short excerpt from an internal power point presentation of OTA,<sup>410</sup> which documents are devoid of evidentiary value.<sup>411</sup> The Claimant has not produced the contract(s) providing for such right of use.<sup>412</sup> The Respondent thus requests that the Tribunal draw adverse inferences from the absence of these contracts.<sup>413</sup>

344. Further, in reliance on a majority position in arbitral decisions,<sup>414</sup> the Respondent submits that the property, contractual rights, and other assets of the company in which the investor is a shareholder cannot constitute an “investment” pursuant to the BIT and the ICSID Convention, because they are not assets of the investor.<sup>415</sup>
345. Finally, in the event that the Claimant were to succeed in establishing the Tribunal’s jurisdiction *ratione materiae* under the BIT, it would then have to prove that the measures interfering with the assets or contracts of the local company resulted in a loss of the value of the investor’s shares in the local company.<sup>416</sup>

## **2. The Claimant’s position**

346. The Claimant maintains that it made an investment that qualifies for protection under both the BIT (a) and the ICSID Convention (b). Specifically, the Claimant contends that OTMTI paid €5.1 billion in cash and shares to acquire Weather Investments and with it, *inter alia*, its indirect investment in OTA. The corporate restructuring of the Weather Group that enabled this acquisition greatly benefited OTA, given the contributions in management, know-how, procurement, and increased access to capital. In addition, the Claimant contends that OTA’s reinvestment of €1.2 billion in earnings into Algeria after the Claimant gained control over the company constitutes a further investment.

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<sup>408</sup> Med Cable Term Sheet, Consortium Agreement, dated 27 September 2006, Exh. C-887.

<sup>409</sup> R-PHB 1, para. 89.

<sup>410</sup> OTA Business Review Meeting, dated 18 January 2010, Exh. C-468, p. 51.

<sup>411</sup> R-PHB 1, para. 89.

<sup>412</sup> Reply, para. 217; R-PHB 1, para. 89.

<sup>413</sup> Reply, para. 217.

<sup>414</sup> Reply, paras. 219-223; R-PHB 1, para. 91.

<sup>415</sup> Reply, paras. 218-224.

<sup>416</sup> Reply, para. 223.

**a. The Claimant made an investment within the meaning of the BIT**

347. The Claimant asserts that it has made an investment within the meaning of the BIT. First, it submits that under the express terms of the BIT, an indirect shareholding in an Algerian company constitutes an investment.<sup>417</sup> The Respondent's argument that the indirect holding of shares in OTA does not constitute an investment in the local economy or in the territory of Algeria is contrary to the clear definition of "investment" in Article 1(2) of the BIT,<sup>418</sup> which reads as follows:

The term 'investments' shall mean any kind of assets or any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity whatsoever.

The following shall more particularly, though not exclusively, be considered as investments for the purposes of this Agreement:

[...]

b) Shares, company shares, and any other form of participation, including minority or indirect participation, in companies constituted in the territory of either Contracting Party; [...]<sup>419</sup>

348. For the Claimant, OTMTI's payment of €5.1 billion in cash and shares to acquire, *inter alia*, its indirect investment in OTA falls within the broad language of the chapeau.<sup>420</sup> Furthermore, OTA is a "compan[y] constituted in the territory of" Algeria and OTMTI acquired an "indirect" participation for cash and shares, which comes within the assets mentioned in Article 1(2)(b).<sup>421</sup>

349. The Claimant rejects the Respondent's argument that the BIT does not protect the passive holding of an indirect participation. The BIT does not require "active" involvement and protects "minority or indirect" shareholding.<sup>422</sup> The Claimant also underscores that, even in the absence of an express mention of indirect shareholdings, tribunals have consistently held that indirect investments are protected under the applicable treaty.<sup>423</sup> Similarly, the acquisition of an indirect interest after the initial contribution into the host state constitutes an investment entitled to BIT protection.<sup>424</sup>

350. The Claimant also discards the Respondent's argument that it has made no investment on the territory of Algeria within the meaning of the BIT as contrary to the express treaty terms.<sup>425</sup>

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<sup>417</sup> Rejoinder, paras. 206-211.

<sup>418</sup> Rejoinder, para. 206.

<sup>419</sup> BLEU-Algeria BIT, Exh. C-658, Article 1(2).

<sup>420</sup> Rejoinder, para. 207.

<sup>421</sup> Counter-Memorial, para. 65; Rejoinder, para. 207.

<sup>422</sup> Counter-Memorial, paras. 76-77.

<sup>423</sup> Rejoinder, para. 208.

<sup>424</sup> Counter-Memorial, paras. 74-75, discussing *Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, Exh. CLA-209; *Guaracachi America, Inc. & Rurelec Plc v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, 31 January 2014, Exh. CLA-169.

<sup>425</sup> Counter-Memorial, paras. 71-72.

This argument would defeat the Treaty's express references to "indirect" contributions, "indirect" investments, reinvestments, and "indirect" shareholdings.<sup>426</sup> Numerous tribunals have confirmed that a shareholding in a company that is active in the host state constitutes a protected investment, irrespective of whether funds financing the local operations flow into the host state or not.<sup>427</sup>

351. Second, the Claimant submits that the Respondent's overarching focus on the reasons for which the Claimant acquired its indirect shareholding in OTA is misguided, as subjective intent and motivation are not germane to determining whether the Claimant made an investment under the BIT.<sup>428</sup> It is for the Tribunal to assess objectively whether an investment was made, and no tribunal has ever held that a claimant's motivation is relevant to determine whether an investment exists.<sup>429</sup>
352. In any event, the Claimant alleges that in acquiring Weather Investments' shares, OTMTI meant to bring Weather Investments' assets, including OTA, under OTMTI's ownership and control.<sup>430</sup>
353. As is further explained below when discussing the Claimant's alleged contributions under the meaning of the ICSID Convention, the Claimant contends that it paid €3.794 billion in cash and shares in 2005 to acquire an indirect controlling participation in OTA.<sup>431</sup> The Claimant acknowledges that "it acquired its indirect controlling shareholding in OTA in the context of subsequently acquiring an indirect controlling shareholding in Wind Italy and that it used shares of OTH as collateral to acquire Wind Italy".<sup>432</sup> However, it asserts that there can be no dispute that it made an "investment" within the meaning of the BIT, when in August 2005 the Sawiris Entities transferred their shares in Weather Investments to the Claimant, in return for shares in OTMTI, for a total of €3.5 billion. OTMTI further contributed an amount of approximately €294 million to Weather Investments to subscribe an increase in the capital of Weather Investments through cash contributions.<sup>433</sup> The Claimant stresses that its bank records confirm that it paid Weather Investments €294 million in cash to buy shares in Weather Investments.<sup>434</sup>
354. The Claimant further explains that it subsequently increased its indirect stake in OTA through additional acquisitions of shares of Weather Investments.<sup>435</sup> Whether these transactions were

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<sup>426</sup> Rejoinder, para. 209.

<sup>427</sup> Counter-Memorial, para. 72.

<sup>428</sup> Rejoinder, paras. 212-215; C-PHB 1, para. 120.

<sup>429</sup> Rejoinder, para. 213.

<sup>430</sup> Rejoinder, para. 215.

<sup>431</sup> Rejoinder, paras. 216-217.

<sup>432</sup> Rejoinder, para. 216.

<sup>433</sup> Rejoinder, para. 217.

<sup>434</sup> Rejoinder, paras. 54 and 217, referring to Banca IMI, Weather II Regular Account Statement, 5 April 2006, Exh. C-894.

<sup>435</sup> Rejoinder, paras. 218-220; C-PHB 1, para. 111 (discussing the 2006 purchase of shares of Weather Investments from Enel, for which the Claimant alleges to have paid €248 million in cash to Enel; the loan in the



linked to the Wind transaction, as Algeria contends, or not, is irrelevant to assess whether they resulted in an investment under the BIT. For the Claimant, its acquisition of additional shareholding in OTA through a purchase of further shares in Weather Investments was an investment within the meaning of the BIT.<sup>436</sup>

355. Third, to counter the Respondent's argument that the property, contractual rights, and interests attached to the company OTA do not amount to an investment by the Claimant under the BIT, the Claimant submits that the BIT protection extends to both the ownership of the shares and of the assets of OTA.<sup>437</sup> For the Claimant, any assets and contracts of OTA fall within the specific definition of investment in the BIT (which includes a broad chapeau). Thus, the property and contractual rights of OTA are covered by the protection which the BIT affords to the Claimant.<sup>438</sup> Tribunals routinely find that a claimant with a controlling shareholding has standing to make claims for acts prejudicial to "the contractual rights of the company of which it was a shareholder",<sup>439</sup> and that the assets and the contractual rights of the company in the host state controlled by the claimant are protected "investments" for purposes of the treaty.
356. The Claimant specifies that it does not claim that the Tribunal has jurisdiction on the basis of its ownership of shares in MedCable. Rather, OTMTI's investment under the BIT is its indirect shareholding in OTA, as well as its ownership interest in OTA's rights and assets.<sup>440</sup> OTA leased and later purchased from MedCable the rights to use a submarine cable from Algiers and Annaba in Algeria to Marseilles in France under the Mediterranean Sea (the cable itself is also referred to as MedCable). Hence, OTA's right to use that submarine cable, pursuant to lease agreements with OTH's wholly-owned subsidiary, MedCable, falls within the BIT definition of "investments".<sup>441</sup> According to the Claimant, OTA perfected its lease agreements with MedCable on 17 December 2007. As these contracts were not covered by the Respondent's document production request, any adverse inferences sought by the Respondent in this respect should be denied.<sup>442</sup>
357. In any event, with its Rejoinder, the Claimant submitted the BF Lease Agreement, upon which the entry into force of the Capacity OUT Lease Agreement was contingent, as well as a Consortium Agreement, which conditioned the entry into force of the BF Lease Agreement.<sup>443</sup>

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amount of €962 million from Enel (repaid with interest totaling €1.025 billion in June 2008) and the €44.47 paid to certain Middle Eastern shareholders).

<sup>436</sup> Rejoinder, paras. 218-219.

<sup>437</sup> Rejoinder, paras. 221-225.

<sup>438</sup> Counter-Memorial, paras. 68-70; Rejoinder, para. 223.

<sup>439</sup> Rejoinder, para. 224, citing to *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, Exh. CLA-191, paras. 196, 219; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, Exh. CLA-155, paras. 111-15.

<sup>440</sup> Counter-Memorial, para. 78.

<sup>441</sup> Rejoinder, para. 222.

<sup>442</sup> Rejoinder, para. 225.

<sup>443</sup> See Rejoinder, paras. 75-76, discussing Med Cable – Algerian Cable Term Sheet of the Black Fibre Lease Agreement between OTA and Consortium Algérien de Télécommunications S.p.A., 19 October 2006, Exh. C-886 and Med Cable Term Sheet, Consortium Agreement, 27 September 2006, Exh. C-887.

Hence, the Claimant submits that the Capacity IN Lease Agreement and the Capacity OUT Lease Agreement became effective when OTA signed these agreements on 17 December 2007.<sup>444</sup>

358. Fourth and finally, the Claimant submits that it maintained control over its investment, OTA, from 2005 until its exit through the sale of Weather Investments in April 2011.<sup>445</sup> It exercised its direct majority ownership to control Weather Investments; which in turn exercised its majority ownership in OTH (through wholly-owned subsidiaries) to control OTH; which again exercised its majority ownership (directly and through wholly-owned subsidiaries) to control OTA.<sup>446</sup>
359. For the Claimant, investment tribunals have held that control over a corporation through controlling shareholding is sufficient. Where such control exists, there is no need to look for indicia of effective control.<sup>447</sup> While certain arbitral tribunals may have considered other elements to determine effective control over an entity *in the absence of a controlling share ownership*, those cases are not relevant in the present circumstances, as the Claimant held an indirect controlling shareholding in OTA.<sup>448</sup>
360. In addition, in respect of the Respondent's objection that the minutes of the OTMTI Board do not discuss OTA, the Claimant emphasizes that Weather Investments served as the operative entity for the Weather Group affiliates, including OTA, and that the Claimant routinely exercised its authority to appoint the members of the Weather Investments Board.<sup>449</sup> Discussions concerning business matters of the Weather Group appear in the minutes of the shareholder and Board of Managers meetings and in the financial reports of Weather Investments, rather than of the Claimant, with the Claimant controlling these decisions through its control over Weather Investments.<sup>450</sup>

**b. The Claimant made an investment within the meaning of the ICSID Convention**

361. The Claimant further submits that its investment in OTA constitutes an "investment" under Article 25(1) of the ICSID Convention.<sup>451</sup> First, the Claimant's shareholding in OTA, which qualifies as an investment under the BIT, also constitutes an investment under the ICSID Convention.<sup>452</sup> In light of the absence of a definition of investment in the ICSID Convention, a

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<sup>444</sup> Rejoinder, para. 76.

<sup>445</sup> Rejoinder, paras. 226-233.

<sup>446</sup> Rejoinder, para. 226.

<sup>447</sup> Rejoinder, para. 228.

<sup>448</sup> Rejoinder, paras. 229-230, discussing *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, Exh. CLA-175, and *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, Exh. CLA-142.

<sup>449</sup> Rejoinder, para. 231.

<sup>450</sup> Rejoinder, para. 231.

<sup>451</sup> Counter-Memorial, paras. 80-96.

<sup>452</sup> Counter-Memorial, paras. 80-83.

tribunal should look to the definition of “investment” in the BIT.<sup>453</sup> As OTMTI’s indirect shareholding in OTA constitutes an “investment” under the BIT, it also meets the requirement of an “investment” pursuant to the ICSID Convention.<sup>454</sup> Tribunals have generally recognized that the *Salini* criteria should be treated as non-binding, non-exclusive means of identifying (rather than defining) an investment under the ICSID Convention.<sup>455</sup> A tribunal would need strong reasons to disregard the contracting states’ definition of investment in a BIT.<sup>456</sup> Because the definition of “investment” in the BLEU-Algeria BIT is consistent with an understanding showed by numerous other states, there can be no doubt that OTMTI’s investment qualifies under Article 25 of the ICSID Convention.<sup>457</sup>

362. Second, even if the Tribunal were minded to consider the *Salini* criteria in determining the existence of an investment pursuant to Article 25(1) of the ICSID Convention, OTMTI’s investment in OTA would clearly fulfill these criteria as identified by Algeria, namely a contribution, a duration, and a certain risk.
363. The Claimant notes that there is no dispute about *duration*. Indeed, Algeria does not challenge that requirement, nor could it, as OTMTI held its indirect shareholding in OTA for nearly six years.<sup>458</sup>
364. With respect to *contribution*, the Claimant alleges that it made substantial contributions in cash, assets, services, know-how, and personnel in establishing and furthering its investment in Algeria:<sup>459</sup>
- As a first element of contribution, the Claimant made the following five contributions in the aggregate amount of approximately €5.1 billion in cash and shares to acquire, *inter alia*, its indirect shareholding in OTA:<sup>460</sup>
    - i. In August 2005, the Claimant contributed €3.5 billion in shares to acquire Weather Investments and, thereby, an indirect shareholding in OTA. For the Claimant a contribution towards an investment may be made by issuing shares.<sup>461</sup>
    - ii. Still, in August 2005, the Claimant paid €294 million in cash to acquire additional Weather Investments shares. The Claimant’s bank records evidence this payment<sup>462</sup>

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<sup>453</sup> Counter-Memorial, para. 80. See also C-PHB 1, paras. 100-103.

<sup>454</sup> Counter-Memorial, para. 80.

<sup>455</sup> Counter-Memorial, para. 82.

<sup>456</sup> Counter-Memorial, para. 82, discussing *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, Exh. CLA-3, paras. 313-14; *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, Exh. CLA-192; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Exh. CLA-137.

<sup>457</sup> Counter-Memorial, para. 83.

<sup>458</sup> Counter-Memorial, para. 90.

<sup>459</sup> Rejoinder, paras. 237-243.

<sup>460</sup> Rejoinder, para. 239.

<sup>461</sup> Rejoinder, para. 239.

<sup>462</sup> Banca IMI, Weather II Regular Account Statement, 5 April 2006, Exh. C-894.

and the fact that the Claimant borrowed this amount is irrelevant, as the commitment of borrowed capital may constitute a contribution.

- iii. In 2006, the Claimant paid €248 million in cash to acquire additional Weather Investments shares from Enel.
  - iv. In June 2008, the Claimant paid €1.025 billion in cash to acquire additional Weather Investments shares, by repaying with interest a loan amounting to €962 million previously taken from Enel.
  - v. The Claimant further made a €44.47 million cash payment to Middle Eastern investors to buy more Weather Investments shares, thereby acquiring additional indirect participation in OTA.
- For the Claimant, the evidence refutes the Respondent's characterization of the Claimant's acquisition of OTA as a mere "paper share exchange", implying a lack of value.<sup>463</sup> The value of the Claimant's shares that were tendered for Weather Investments' shares (and thus for indirect holding in OTH and OTA) was commensurate with the market value of OTH at the time, which amounted to US\$ 42 per share.<sup>464</sup> The "Claimant paid an amount equivalent to this fair market value when, as part of the restructuring of the Weather Group, it engaged in a share-for-share exchange through which the Sawiris family tendered OTH shares for Weather Investments shares and then Weather Investments shares for [the] Claimant's shares".<sup>465</sup> The shares that the Claimant contributed are assets and a contribution may take any form, including assets.<sup>466</sup> In support, the Claimant invokes *Gold Reserve v. Venezuela*, a case in which the tribunal upheld jurisdiction where the Canadian claimant had acquired indirect ownership in a Venezuelan subsidiary through a restructuring involving a share-to-share swap with no funds being exchanged in or moving through Venezuela.<sup>467</sup> An investment may be made in the host state without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the state itself. In fact, requiring a direct flow of funds into the host state would preclude a foreign investor from purchasing an existing investment from another foreign investor.<sup>468</sup>
  - Moreover, the fact that the Weather Group assumed debt and that the OTH shares were used as security in connection with the Wind transaction lacks relevance, as debt and

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<sup>463</sup> C-PHB 1, para. 112.

<sup>464</sup> C-PHB 1, para. 112; C-PHB 2, para. 62.

<sup>465</sup> C-PHB 1, para. 112.

<sup>466</sup> C-PHB 1, para. 114.

<sup>467</sup> C-PHB 1, para. 117, discussing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, Exh. CLA-276 [hereinafter *Gold Reserve*].

<sup>468</sup> C-PHB 2, paras. 57-58, discussing *Inmaris Perestroika Sailing Maritime Services GMBH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2005, Exh. CLA-174; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, Exh. CLA-3; and *Gold Reserve*, Exh. CLA-276.

borrowed funds can be used to finance an investment without undermining the existence of a contribution.<sup>469</sup>

- As a second element, the Claimant contributed over US\$ 1.2 billion through reinvested OTA earnings between 2005 and 2010, when the Claimant was OTA's indirect controlling shareholder.<sup>470</sup> It cites to its expert Mr. Tolkien who stated that "[d]eclaring and paying dividends after investments in assets have already been made does not alter the fact that retained earnings were already being reinvested".<sup>471</sup> Further referring to *OI European v. Venezuela*, the Claimant asserts that a shareholder who does not collect the profits of its company does make a monetary contribution to the company.<sup>472</sup>
- As a third element of contribution, the Claimant paid €2.48 million out-of-pocket to Weather Investments between 2006 and 2010 and Weather Investments provided financial assistance to the Weather Group companies, including OTA.<sup>473</sup>
- As a fourth element, the Claimant also indirectly contributed services to OTA through Weather Investments and OTSE. It is well established that the provision of a service constitutes a contribution for the purposes of ascertaining the existence of an "investment" under the ICSID Convention.<sup>474</sup>
- As a fifth and final element, the Claimant contributed personnel and know-how to the development of OTA's market leadership in Algeria's telecommunications sector, in particular through Mr. Sawiris.<sup>475</sup> The Claimant alleges that it contributed to OTA's improved creditworthiness, access to international capital markets, significant procurement savings and efficiencies, and inter-affiliate services and know-how, all of which were made available as a result of the Claimant's restructuring of the Weather Group.<sup>476</sup>
- In this context, the Claimant adds that the argument of a negative contribution is ill-conceived. By acquiring Wind and restructuring the Weather Group, OTMTI gained a foothold in developed as well as emerging markets when it became OTA's controlling shareholder, as a result of which OTA received the benefits of the Weather Group's synergies and market expansion, including know-how, efficient managerial resource allocation, increased access to capital, procurement advantages, and services.<sup>477</sup> Among these, the Claimant in particular stresses the provision of direct and indirect management

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<sup>469</sup> C-PHB 1, para. 118.

<sup>470</sup> Rejoinder, para. 240; C-PHB 1, paras. 121-125.

<sup>471</sup> C-PHB 1, para. 124, discussing Tolkien Third Expert Report, paras. 17-18.

<sup>472</sup> C-PHB 1, para. 123, discussing *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2005, Exh. CLA-272.

<sup>473</sup> Rejoinder, para. 241.

<sup>474</sup> Rejoinder, para. 242; C-PHB 1, paras. 148-149.

<sup>475</sup> Rejoinder, para. 243. See also C-PHB 1, paras. 134-138 (arguing that the Claimant's management of OTA through its subsidiaries is a contribution and an investment in Algeria).

<sup>476</sup> C-PHB 1, paras. 126, 139-147.

<sup>477</sup> C-PHB 1, para. 127.

expertise to OTA;<sup>478</sup> financing benefits (e.g., enhanced creditworthiness and borrowing power for OTA, access to top-tier banks and international capital markets);<sup>479</sup> and procurement savings (through the Claimant's networks of equipment providers and bargaining power).<sup>480</sup>

365. In respect of the third element of the notion of investment, the Claimant contends that OTMTI bore the same *risk* by holding an indirect shareholding in OTA that any shareholder bears, i.e., the risk that the value of OTMTI's shareholding may decline.<sup>481</sup> It challenges Algeria's argument that OTMTI did not bear any risk because intermediary companies were minimizing the risk. While OTMTI held its economic interest in OTA through a chain of companies, any change in OTA's value would flow through that chain as a function of the economic interest held at each level.<sup>482</sup>
366. Third and last, the Claimant contends that Algeria's attempt to impose a subjective element as part of the definition of investment under the ICSID Convention is untenable. Thereby, Algeria seeks to transform an *obiter dictum* taken out-of-context from *Quiborax v. Bolivia* into a new subjective factor for its "objective" test for an investment.<sup>483</sup> No tribunal has ever held that the claimant's subjective intent or motivation is relevant to assess the existence of an investment.<sup>484</sup> In any event, the evidence shows that OTMTI's motivation in acquiring Weather Investments shares precisely included placing its assets, most notably OTA, under OTMTI's ownership and control.<sup>485</sup>

### 3. Analysis

367. In this section, the Tribunal examines whether the Claimant made an investment under the ICSID Convention and the BIT. To this end, the Tribunal will first set out the articulation between the definitions of investment under Article 25 of the ICSID Convention and under the BIT (a). Thereafter, the Tribunal will assess whether the Claimant made any investments that meet those definitions (b).

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<sup>478</sup> C-PHB 1, paras. 134-138.

<sup>479</sup> C-PHB 1, paras. 139-142.

<sup>480</sup> C-PHB 1, paras. 143-147.

<sup>481</sup> Counter-Memorial, para. 91.

<sup>482</sup> Counter-Memorial, paras. 92-93.

<sup>483</sup> Counter-Memorial, para. 94.

<sup>484</sup> Counter-Memorial, para. 95; C-PHB 1, para. 120.

<sup>485</sup> Counter-Memorial, para. 96.

**a. Articulation between the definitions of investment under Article 25 of the ICSID Convention and in the BIT**

368. Article 25(1) of the ICSID Convention circumscribes the jurisdiction of the Centre as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. [...]

369. Article 9 of the BIT, entitled “Settlement of investment disputes”, limits the Contracting Parties’ consent to investor-state arbitration to “any *investment* dispute”.<sup>486</sup> The definition of the term investment is found in Article 1 of the BIT, which in pertinent part reads as follows:

For the purposes of this Agreement:

[...]

2. The term “investments” shall mean any kind of assets or any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity whatsoever.

The following shall more particularly, though not exclusively, be considered as investments for the purposes of this Agreement:

(a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights;

(b) Shares, company shares, and any other form of participation, including minority or indirect participation, in companies constituted in the territory of either Contracting Party;

(c) Bonds, claims and rights to any benefit having an economic value;

(d) Copyrights, industrial property rights, technical processes, registered trade names and business assets;

(e) Concessions granted under public law or under contract (including concessions for prospecting, cultivating, mining or development of natural resources) in respect of rights directly resulting from agreements concluded between the investor operating under a concession and the authority granting the concession.

Any change in the legal form in which assets and capital have been invested or reinvested shall not affect their status as investments for the purposes of this Agreement.

370. It is undisputed that, for the Tribunal to have jurisdiction over this dispute, the Claimant must establish that it has made an investment which is protected under both the BIT and the ICSID Convention.<sup>487</sup> Starting from the ICSID Convention, it is equally beyond dispute that the ICSID

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<sup>486</sup> BIT, Exh. C-658, Art. 9(1) (emphasis added).

<sup>487</sup> See, amongst many, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, Exh. CLA-38, para. 142 (“It is well known that in order to qualify for

Convention does not define the term “investment”. In the Tribunal’s view, the absence of a definition of “investment” under the ICSID Convention implies that the Contracting States intended to give to the term its ordinary meaning under Article 31(1) of the VCLT as opposed to a special meaning under Article 31(4) of the same treaty.<sup>488</sup> As held by a number of recent investment awards, this ordinary meaning of the term is an objective one,<sup>489</sup> and comprises the elements of (i) a contribution or allocation of resources, (ii) a duration; and (iii) risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return.<sup>490</sup> As noted by the tribunal in *Saba Fakes*, these requirements “are both necessary and sufficient to define an investment within the framework of the ICSID Convention”.<sup>491</sup>

371. The Tribunal considers that this “objective” or “inherent” meaning is also present in a bilateral investment treaty’s definition of “investment”, as was underscored by the tribunal in *KT Asia*.<sup>492</sup> The BIT applicable in this case defines an investment in the first sentence of Article 1(2) as both an “asset” and a “contribution”.<sup>493</sup> These two notions are in reality two sides of the same coin, as “assets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived”.<sup>494</sup> Or, in other words, the “contribution” refers to the economic act of allocating resources and the “asset” to the legal result of such act.
372. As is customary in definitions of investment contained in bilateral investment treaties, the BLEU-Algeria BIT then provides for a non-exhaustive list of “investments” protected under the Treaty.<sup>495</sup> The listed items normally exhibit the hallmarks of an “investment” in the objective sense seen above. But, if any of these items does not correspond to the inherent definition of “investment”, the fact that it falls within one of the categories listed in Article 1(2) does not transform it into an “investment”.<sup>496</sup> In other words, the use of the term “investment” in both the ICSID Convention and the BIT imports the same basic economic attributes of an investment derived from the ordinary meaning of that term, which comprises a contribution or allocation of resources, duration, and risk.

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protection under the ICSID/BIT mechanism, an investment has to satisfy the requirements of the definition of an investment both under the Washington Convention and the BIT.”).

<sup>488</sup> See also *KT Asia*, para. 165; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, Exh. CLA-196, para. 212 [hereinafter *Quiborax*].

<sup>489</sup> *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 108 [hereinafter *Saba Fakes*]; *Quiborax*, para. 212.

<sup>490</sup> See *Saba Fakes*, para. 110; *KT Asia*, para. 173; *Quiborax*, para. 227.

<sup>491</sup> *Saba Fakes*, para. 110.

<sup>492</sup> See *KT Asia*, paras. 165-166.

<sup>493</sup> See BLEU-Algeria BIT, Article 1(2), Exh. C-658, first sentence (“[t]he term ‘investments’ shall mean any kind of assets or any direct or indirect contribution in cash, in kind or in services, invested or re-invested in any economic activity whatsoever”, emphasis added).

<sup>494</sup> *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, Exh. RL-76, para. 110.

<sup>495</sup> See BLEU-Algeria BIT, Article 1(2), second sentence, Exh. C-658.

<sup>496</sup> *KT Asia*, para. 165 (which in particular quotes *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para. 207 (available on ITA website: <http://www.italaw.com/sites/default/files/case-documents/ita0716.pdf>)).



373. With those notions in mind, the Tribunal now turns to examining whether the Claimant made an investment under the ICSID Convention and the BIT.

**b. Did the Claimant make an investment within the meaning of the ICSID Convention and the BIT?**

374. While the Respondent concedes that *OTH* made an investment in Algeria,<sup>497</sup> it disputes that the *Claimant* made an investment in the economy and on the territory of Algeria.

375. At the outset, the Tribunal notes that the Claimant's alleged investment is its indirect shareholding in OTA, a company incorporated in Algeria, which held the GSM License granted by the Algerian Government for a price exceeding US\$ 700 million. The BIT includes, among the non-exhaustive list of "investments", "[s]hares, company shares, and any other form of participation, including minority or indirect participation, in companies constituted in the territory of either Contracting Party". Accordingly, OTMTI's investment fulfills that part of the BIT definition. It thus remains to be seen whether it also meets the objective definition of investment applicable under both the ICSID Convention and the BIT, as discussed above.

376. The Claimant does not deny that the acquisition of its indirect participation in OTA occurred through a corporate restructuring and, more specifically, in the context of a broader set of transactions, the main purpose of which was to acquire Wind and in which the OTH shares were used as collateral. In this respect, the Respondent's overarching objection is that the *raison d'être* of the Claimant's contributions towards the acquisition of OTA was to acquire Wind, rather than to invest in Algeria. The Tribunal does not consider this objection well-taken. The investor's motivations are irrelevant when assessing the existence of an investment in its objective meaning under Article 25 of the ICSID Convention and the BIT. Algeria's insistence on a passage from *Quiborax* taken out of context is unhelpful. In that case, the tribunal did not seek to elevate the *raison d'être* to an independent requirement of the definition of investment, but rather found that the claimant had made an investment irrespective of where the claimant had paid for the shares in an intermediary company, and noted in *obiter* that the *raison d'être* for the payment was to acquire mining concessions in Bolivia.<sup>498</sup> What matters for the purposes of the Tribunal's inquiry into the existence of an investment is whether the Claimant acquired OTA by making a contribution of resources, which entailed a certain duration and risk.

377. The acquisition of the Claimant's indirect stake in OTA occurred in different stages through a number of complex transactions. Having carefully reviewed them, the Tribunal comes to the

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<sup>497</sup> See Tr. Day 5 (Respondent's Closing), 134:21-134:23 ("[...] OTH did carry out an initial investment; There's no dispute on that.") and Tr. Day 1 (Respondent's Opening), 103:10-103:12 ("We are not saying that the former investors didn't invest ... The investment is still there from OTH"). See also R-PHB 2, para. 78 ("*Il n'est pas contesté par les Parties que, au début des années 2000, M. Naguib Sawiris et sa famille ont réalisé par le biais de la société OTH un investissement sur le territoire algérien au nom et pour le compte de la société OTA, prenant la forme de l'acquisition de la Licence GSM (et de la conclusion de la Convention d'Investissement)*", (internal footnotes omitted)).

<sup>498</sup> *Quiborax*, para. 229.

conclusion that the Claimant has made at least the following contributions towards the acquisition of OTA:

- a. First, the Claimant has established that it paid €294 million in cash to subscribe Weather Investments shares in August 2005, thereby increasing its indirect shareholding in OTA. On 10 August 2005, Weather Investments approved a capital increase and the Claimant (amongst other companies) subscribed directly to the share offering.<sup>499</sup> The payment of this amount is proven by the Claimant's bank records<sup>500</sup> and the Respondent does not deny that this payment was made.<sup>501</sup> The fact that the amount of the payment was borrowed from the Sawiris Entities and later repaid does not change its nature of "contribution". Furthermore, for the reasons already mentioned, the fact that this transaction was part of the acquisition of Wind is immaterial, the *raison d'être* of this contribution playing no role in this context.
- b. Second, the Claimant paid €248 million in cash when it purchased an additional 16.1% stake in Weather Investments from Enel. The Respondent's main objection in this connection is that the Claimant did not make a direct cash payment to Enel, but directed its subsidiaries, Weather Investments and WAHF, to pay Enel from a dividend payment of €281 million that Weather Investments owed to the Claimant.<sup>502</sup> The Tribunal agrees with the Claimant's expert Mr. Tolkien that "the satisfaction of OTMTI's obligation to pay cash to Enel for additional shares in Weather Investments by causing a dividend payment, which was due to OTMTI and would otherwise have been received by OTMTI, to be made to Enel was a legitimate corporate practice".<sup>503</sup> Thus, this amount, too, constitutes a contribution made by the Claimant.
- c. Third, the €1.025 billion cash payment made in June 2008 to acquire additional Weather Investments shares from Enel also constitutes a contribution which resulted in a further (indirect) shareholding in OTA. This transaction consisted in the repayment of a loan with interest.<sup>504</sup> Initially, Algeria's objection was that it "was not in a position to know whether the Claimant has wholly repaid these loans, nor the details of these potential repayments".<sup>505</sup> The Claimant then clarified that it had immediately repaid the bridge loans by tendering shares to the private equity investors that provided the bridge loans to

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<sup>499</sup> See Weather Investments Shareholders' Meeting, 10 August 2005, Exh. C-690, at 9-10 (resolving the capital increase, and mentioning that the Claimant would pay €294 million) and especially Banca IMI, Weather II Regular Account Statements, 5 April 2006, Exh. C-894 (confirming that the Claimant paid Weather Investments €294 million as cash "[p]ayment for purchase of sh[are]s[] [i]n W[eather] Inv[estments] Srl. by W[eather] Inv[estments] II Srl").

<sup>500</sup> See Banca IMI, Weather II Regular Account Statements, 5 April 2006, Exh. C-894 (confirming that the Claimant paid Weather Investments €294 million as cash "[p]ayment for purchase of sh[are]s[] [i]n W[eather] Inv[estments] Srl. by W[eather] Inv[estments] II Srl").

<sup>501</sup> At the Hearing, the Respondent acknowledged that "that is a sum which was paid". Tr. Day 5 (Respondent's Closing), 132:24-132:25.

<sup>502</sup> R-PHB 1, para. 140.

<sup>503</sup> Tolkien Third Report, para. 27.

<sup>504</sup> See Rejoinder, para. 61.

<sup>505</sup> Reply, para. 315.

the Claimant.<sup>506</sup> Faced with this explanation, Algeria argued that these amounts were not paid by the Claimant, but by third parties. To this argument, the Claimant has convincingly replied that it “repaid the loan of €962 million with interest – totaling €1.025 billion – using proceeds that it obtained from the sale of shares to other investors”.<sup>507</sup> The Tribunal thus considers this to be a contribution made by the Claimant towards the acquisition of OTA.

- d. Finally, the Tribunal is further satisfied that the Claimant paid €44.47 million in cash to acquire additional Weather Investments shares from the so-called “Middle Eastern investors”, thereby further increasing its indirect participation in OTA.<sup>508</sup> The method of financing of this amount with which the Respondent takes issue, is not relevant for the purposes of determining whether the Claimant made a contribution.

378. Accordingly, it is established that the Claimant made contributions exceeding at least €1.5 billion towards its acquisition of an indirect interest in OTA via the purchase of shares of Weather Investments. The requirement for the existence of a contribution as an element of an investment under the ICSID Convention and the BIT is thus fulfilled.
379. The requirement of duration does not appear disputed by the Respondent, and rightly so, as the Claimant held its indirect shareholding in OTA for almost six years. With regard to the element of risk, the Tribunal is equally satisfied that by acquiring and holding an indirect stake in OTA the Claimant bore the risk inherent in holding shares, namely the risk that the value of the shares may decline.
380. As a consequence, the three requirements for the existence of an investment, i.e. contribution, duration, and risk, are all met. In other words, the Claimant made a number of successive investments within the meaning of the ICSID Convention and the BIT.
381. Having reached this conclusion, there is no need to determine whether the following other transactions also constitute an investment: (i) the Claimant’s initial acquisition of its indirect shareholding in OTA in August 2005 through a share-to-share exchange between the Claimant and Weather Investments; (ii) the Claimant’s alleged contribution of US\$ 1.2 billion through “reinvested OTA earnings”; (iii) the €2.48 million alleged contributions from the Claimant to Weather Investments between 2006 and 2010, in exchange for Weather Investments’ financial assistance to the Weather Group companies; (iv) the Claimant’s alleged contribution in services to OTA through Weather Investments and OTSE; and (v) the Claimant’s alleged contribution in personnel and know-how to OTA. Similarly, it is not determinative of jurisdiction whether the assets and rights of OTA qualify as investments of the Claimant. Whatever the determination on these other alleged investments, it would not change

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<sup>506</sup> Rejoinder, para. 63.

<sup>507</sup> C-PHB 2, para. 63. See in particular Share Purchase and Investment Agreement between Weather II S.à.r.l. and PE Investors, 3 June 2008, Exh. C-618, Clauses 2.2-2.3, 3.2-3.3.

<sup>508</sup> Weather II Annual Accounts for 2006, Exh. C-670, p. 7.

the conclusion that the Claimant made investments in Algeria that fall under the protection of the BIT and the ICSID Convention.

382. The Respondent has raised a number of other objections in relation to the alleged lack of an investment. First, Algeria appears to argue that the Claimant must have purchased shares directly in Algeria for them to fall within the BIT's definition of "investment". The Tribunal cannot follow this argument, which is not supported by the text of the BIT. What is required is that the "investment" be located in the territory of Algeria – which is undoubtedly the case with respect to OTA, the local company "constituted on the territory of one of the Contracting Parties". In fact, as was observed by the tribunal in *Gold Reserve*, requiring a flow of funds directly into the host state would preclude a foreign investor from purchasing an existing investment from another foreign investor, because the purchase price would necessarily be paid to the foreign seller of the investment.<sup>509</sup> In response to a question from the Tribunal at the Hearing, the Respondent gave the following answer:

[If a buyer] buys from [a seller] a French company that has a subsidiary in Algeria, the operation takes place in France; [the buyer] enters Algeria because it buys from [the seller] a participation. Now, I don't deny that it is an investment in Algeria. [...]

383. The Tribunal has difficulty understanding why, in the Respondent's example, a third-party purchaser of shares of a company that operates in the host state would make an investment in the host state, but a related company purchasing the same shares through a corporate restructuring would not.<sup>510</sup>

384. Second, the Respondent submits that the BIT excludes from its protection the "simple holding of an indirect share". Again, the Tribunal cannot agree. No "active" involvement is required under the BIT, which protects both "minority or indirect" shareholding. Nor is there such a requirement under the ICSID Convention. As noted by the tribunal in *Phoenix*,

Shares or other participation in the capital of a company are usually considered as an investment. The Tribunal cannot accept the Respondent's contention that "mere ownership of shares does not automatically qualify as an "investment" under Article 25(1) of the ICSID Convention." [...] ICSID tribunals have not endorsed a distinction between full owners and majority or even minority shareholders, or direct or indirect control in the investment treaty, who necessarily play a less than decisive role in corporate governance.<sup>511</sup>

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<sup>509</sup> *Gold Reserve*, Exh. CLA-276, paras. 261-262 ("According to the ordinary meaning of the words, 'making an investment in the territory of Venezuela' does not require that there must be a movement of capital or other values across Venezuelan borders. If such a condition were inferred it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid outside Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business. Clearly, this was not the intention of the parties to the BIT and nor does it reflect the ordinary meaning of the definition").

<sup>510</sup> See also *Gold Reserve*, para. 270 (rejecting a similar objection).

<sup>511</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Exh. CLA-194, para. 121.

385. In conclusion, the Claimant's indirect shareholding in OTA constitutes an investment pursuant to Article 1(2)(b) of the BIT and Article 25 of the ICSID Convention.

**D. JURISDICTION AND ADMISSIBILITY OBJECTIONS IN RELATION TO THE CLAIMANT'S STATUS OF INDIRECT SHAREHOLDER, THE OTH ARBITRATION AND SETTLEMENT, AND THE SALE OF THE CLAIMANT'S INVESTMENT**

386. The Respondent has raised a number of objections in relation to the Claimant's (former) status as indirect investor and the parallel arbitral proceedings started by OTH. The characterization of these objections in terms of jurisdiction or admissibility has somewhat changed in the course of the proceedings. In sum, the Respondent maintains that the Tribunal has no jurisdiction or that the claims should be declared inadmissible on the following grounds: First, the Claimant is or was a "very indirect" shareholder which is "too far removed" from the investment affected by the Respondent's measures (1); Second the Tribunal lacks jurisdiction or the claims are inadmissible as a result of the concurrent proceedings launched by OTH which resulted in a settlement between the parties to those proceedings (2); Third, the Claimant sold its investment before filing the Request for Arbitration and has thus lost or waived its right to bring arbitration proceedings against Algeria, which either deprives the Tribunal of jurisdiction or entails the inadmissibility of the claims (3). The Tribunal will first set out the Parties' positions on all of these issues (1-3), and then proceed with its analysis (4).

**1. Does the Respondent's consent extend to "very indirect" shareholders that are "too far removed" from the investment affected by the Respondent's measures?**

**a. The Respondent's position**

387. The Respondent contends that the Claimant is (or was) an indirect shareholder in OTA "too far removed" (*trop éloigné*) from the investment in OTA. It invokes the need to fix a "cut-off point" in the corporate chain beyond which a tribunal lacks jurisdiction.

388. While the Respondent recognizes that past decisions have admitted claims by indirect shareholders based on BITs in order to protect "the real party in interest",<sup>512</sup> it points out that arbitral tribunals and scholars have also insisted on the importance of limiting the number of shareholders entitled to claim, especially taking into account the dangers associated with the proliferation of arbitral proceedings based on the same facts commenced by different shareholders.<sup>513</sup>

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<sup>512</sup> See Memorial on Preliminary Objections, para. 221, discussing *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, Exh. RL-49; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, Exh. CLA-144; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, 30 April 2004, Exh. RL-61; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, Exh. CLA-203.

<sup>513</sup> Memorial on Preliminary Objections, para. 222, discussing in particular *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, Exh. CLA-163,

389. For the Respondent, a cut-off point is necessary in this case, as otherwise Algeria would be exposed to the serious risk of multiple proceedings initiated by other shareholders invoking their indirect shareholding in OTA and challenging the same measures.<sup>514</sup> In particular, Algeria argues that (i) there was a large number of corporate entities between OTH and the Claimant; (ii) between 2008-2011, around 20 investors held shares in Weather Investments; (iii) at about the same time, around half of the share capital of OTH was traded on the Egyptian and London stock exchanges, which could give rise to an unlimited number of transactions and new shareholders.<sup>515</sup>
390. The Respondent submits that here, in addition to the OTH Arbitration which was brought against Algeria and then settled, the risk of multiple proceedings arising out of the same facts, with the ensuing possibility of conflicting outcomes and multiple recoveries, is aggravated by the fact that Weather Investments has reserved its right to bring an arbitration against Algeria by filing a notice of dispute under the Italy-Algeria BIT,<sup>516</sup> and OTA itself has reserved its rights under the Investment Agreement, which provides for ICSID arbitration.<sup>517</sup>
391. Algeria continues observing that arbitral tribunals have recognized that the state's consent to arbitration does not extend to "very indirect" (*très indirects*) shareholders which are too far removed from the investment allegedly affected by the state's measures.<sup>518</sup> To determine whether a state's consent extends to very indirect shareholders, a tribunal should consider a number of factors, such as (i) whether the claimant was invited by the host state to participate in the investment; (ii) whether the claimant controls the company which is the subject of the investment; and (iii) in the case of a chain of companies, whether such chain was specifically created for purposes of the investment.<sup>519</sup>
392. For Algeria, its consent to arbitrate does not extend to the Claimant for the following reasons:<sup>520</sup>
- a. The Claimant was created in 2005, i.e. after the investment was made in Algeria, and only OTH participated in the process of attribution of the GSM License to OTA;

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para. 50; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, Dissenting Opinion of José Luis Alberro-Semerena, Exh. CLA-140, paras. 8-9.

<sup>514</sup> Memorial on Preliminary Objections, para. 224.

<sup>515</sup> Memorial on Preliminary Objections, para. 224; Reply, para. 332.

<sup>516</sup> Memorial on Preliminary Objections, para. 226, referring to Letter from Weather Investments (Mr. Naguib Sawiris) to Prime Minister, 8 November 2010, Exh. R-13.

<sup>517</sup> Memorial on Preliminary Objections, para. 226, referring to Letter from OTA to the Central Appeals Commission, 9 March 2010, Exh. C-349; OTA Petition for Expedited Judicial Proceeding Before the Court of Sidi Mohamed, 17 May 2010, Exh. C-534; and Letter from OTA to the *Direction générale des entreprises*, 6 February 2011, Exh. C-615.

<sup>518</sup> Memorial on Preliminary Objections, para. 229, discussing *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, Exh. CLA-163, para. 52, and *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.a r.l. v. Republic of Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility, 29 July 2008, Exh. RL-70, paras. 100-101.

<sup>519</sup> Memorial on Preliminary Objections, para. 230.

<sup>520</sup> Memorial on Preliminary Objections, para. 231.

- b. The Claimant has not taken part in the negotiation and conclusion of the Investment Agreement in 2001 between Algeria, OTH and Oratel (acting on behalf of OTA);
- c. The corporate chain was constituted in 2005 in the context of the Wind acquisition, and the “*raison d’être*” of such transaction was to take over Wind, not to invest in Algeria;
- d. At the end of 2008, when the challenged measures began, there were no less than 8 companies, on 5 different levels, inserted in the corporate chain between the Claimant and OTA. Such a “remoteness” or distance (*éloignement*) between a claimant-indirect shareholder and the locally incorporated company, which is the subject of the investment as well as of the contested measures, has never been considered by any ICSID tribunal to date;
- e. The Claimant has not established that it was exercising effective control over OTA.

393. Moreover, the Respondent rebuts the Claimant’s argument that the measures directly targeted the Claimant. The only document which the Claimant addressed to Algeria between 2005 and 2010 is a letter dated 4 October 2010, in which the representatives of the Claimant and VimpelCom informed the Algerian Prime Minister of the execution of the merger agreement between the two companies.<sup>521</sup> Had the Claimant believed that the measures adopted between 2008 and 2010 targeted OTMTI, it would have objected to such measures at the relevant time, as was done by OTA, OTH and Weather Investments, but not by the Claimant.<sup>522</sup>

#### **b. The Claimant’s position**

394. The Claimant submits that the Tribunal has jurisdiction *ratione materiae*, as Algeria consented to arbitrate all disputes concerning the Claimant’s investment.<sup>523</sup>
395. According to the Claimant, Algeria is bound by the consent to arbitrate that it gave in the BIT, which expressly extends to “minority or indirect” investors.<sup>524</sup> The BIT defines “investments” to include “[s]hares, holdings and any other forms of participation, even minority or indirect, in the companies constituted on the territory of one of the Contracting Parties”.<sup>525</sup> Algeria offered to arbitrate “[a]ny dispute relating to investments between a Contracting Party and an investor of the other Contracting Party”<sup>526</sup> and OTMTI accepted this offer by filing its Request for Arbitration.<sup>527</sup>

<sup>521</sup> Reply, para. 335, discussing Letter from Weather II and VimpelCom Ltd. to Prime Minister Ahmed Ouyahia, 4 October 2010, Exh. R-12.

<sup>522</sup> Reply, para. 337.

<sup>523</sup> Counter-Memorial, paras. 97-115; Rejoinder, paras. 245-250.

<sup>524</sup> Counter-Memorial, paras. 98-112; C-PHB 1, para. 151.

<sup>525</sup> BIT, Exh. C-658, Article 1(2)(b) (“[I]es actions, parts sociales et toutes autres formes de participations, même minoritaires ou indirectes, aux sociétés constituées sur le territoire de l’une des Parties contractantes”).

<sup>526</sup> BIT, Exh. C-658, Article 9 (“Tout différend relatif aux investissements, entre une Partie contractante et un investisseur de l’autre Partie contractante...”).

<sup>527</sup> Counter-Memorial, para. 98.

396. The Claimant points to *Société Générale v. Dominican Republic*, where the claimant was six corporate layers and seven different companies removed from the investment and the tribunal nonetheless accepted jurisdiction based on the BIT's broad definition of "investment".<sup>528</sup> That tribunal stated that the BIT's inclusion of "minority or indirect" interests "necessarily implie[d] that there may be one or several layers of intermediate companies or interests intervening between the claimant and the investment".<sup>529</sup> The Claimant underscores that there were five corporate levels between OTMTI and OTA (two of which included wholly-owned subsidiaries); that OTMTI indirectly owned shares in OTA; and actually controlled OTA.<sup>530</sup> The Claimant also cites to other cases,<sup>531</sup> including *Mobil*, where the tribunal upheld jurisdiction over an indirect investment, holding that the BIT – which unlike the Treaty at issue here did not expressly cover "indirect investments" – did not require that no companies be interposed between the ultimate owner of the company and the investment.<sup>532</sup>
397. According to the Claimant, no tribunal has ever denied an indirect shareholder's claims based on an asserted "cut-off point", when the language of the treaty expressly covered indirect investments.<sup>533</sup> The Claimant criticizes the Respondent's reliance on the *obiter dictum* in *Enron* (stating that a "cut-off point" may be needed for an investor only "remotely connected" to the investment). That *dictum* lacks legal foundation and the tribunal's statement that an invitation by the state to participate in the investment can somehow create or reinforce privity runs contrary to basic investment treaty principles.<sup>534</sup> The Claimant also argues that the criteria suggested by Algeria to determine a cut-off point<sup>535</sup> are not supported by legal authority.<sup>536</sup>
398. In any event, even if the Tribunal were to accept the theoretical possibility of a cut-off point and the criteria proposed by Algeria, this would not bar jurisdiction here for the following reasons:
- a. OTMTI was the controlling shareholder of OTA holding a substantial 36% interest;<sup>537</sup>

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<sup>528</sup> Counter-Memorial, para. 100, discussing *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, Exh. CLA-204.

<sup>529</sup> Counter-Memorial, para. 100, referring to *Société Générale v. Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, Exh. CLA-204, para. 51.

<sup>530</sup> Counter-Memorial, para. 100.

<sup>531</sup> Counter-Memorial, para. 103, discussing *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, Exh. CLA-144, para. 56; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, Exh. CLA-203, paras. 137, 141; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 7, 214; *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.à r.l. v. Republic of Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction and Admissibility, 29 July 2008, Exh. CLA-139, paras. 100-101.

<sup>532</sup> C-PHB 1, para. 152, discussing *Mobil v. Venezuela*, Exh. CLA-117.

<sup>533</sup> Counter-Memorial, paras. 97, 101; Rejoinder, para. 246.

<sup>534</sup> Counter-Memorial, para. 101.

<sup>535</sup> See *supra*, para. 391.

<sup>536</sup> Counter-Memorial, para. 102.

<sup>537</sup> Counter-Memorial, para. 104.



- b. Algeria invited OTMTI's shareholders (the Sawiris family) to invest in Algeria without any limits on corporate organization; if a company's shareholders are not too remote to bring a claim, the company itself cannot be too remote either;<sup>538</sup>
  - c. The Respondent was aware that OTMTI owned and controlled OTA;<sup>539</sup>
  - d. Algeria dealt with Mr. Sawiris in connection with OTA in his capacity as Chairman of Weather Investments and Chairman of OTH, positions he held as a result of OTMTI's ownership of those entities;<sup>540</sup>
  - e. Algeria did not object that U.S. private equity investors, who were equally removed from OTA, were too remote to have their concerns addressed;<sup>541</sup> and
  - f. It was Algeria's measures that compelled OTMTI to bring this claim rather than an entity closer to OTA in the corporate chain.<sup>542</sup> In particular, it is because of the enactment of the Supplementary Finance Act of 2009 and the Finance Law of 2010, and because of the threats to expropriate OTA if its indirect ownership changed without Algeria's express consent, that OTMTI is the Claimant in this arbitration;<sup>543</sup>
  - g. With regard to the Respondent's argument that each of OTH, Weather Investments and the Claimant would be permitted to bring a BIT claim under the Egypt-Algeria, Italy-Algeria and BLEU-Algeria BITs respectively, but that they could not raise claims simultaneously, the Claimant opposes that it had no control over OTH's initiation or settlement of the OTH Arbitration, because OTH was no longer part of the Weather Group of companies when it raised these claims.<sup>544</sup>
399. Finally, the Claimant contends that it is unwarranted to apply an entirely new rule providing for a cut-off point based on alleged policy concerns, i.e., the need to avoid multiple proceedings arising out of the same facts.<sup>545</sup> Algeria accepted the possibility of multiple arbitrations deriving from the same facts by consenting to arbitration with minority or indirect investors.<sup>546</sup> Algeria did not include any limitations in the BIT to alleviate its purported policy concerns, such as a limitation of consent to shareholders with a controlling interest, or direct shareholders, or investors with which it signed investment agreements, or a denial-of-benefit clause.<sup>547</sup>
400. Furthermore, even a threat of multiple proceedings would not result in double recovery. If the harm to different claimants is distinct, there is no risk of double recovery. If the harm is not

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<sup>538</sup> Counter-Memorial, para. 105.

<sup>539</sup> Counter-Memorial, para. 106.

<sup>540</sup> Counter-Memorial, para. 107.

<sup>541</sup> Counter-Memorial, para. 107.

<sup>542</sup> Counter-Memorial, paras. 108-111.

<sup>543</sup> Counter-Memorial, para. 111. See also C-PHB 1, para. 150 ("Claimant could not bring its claim lower down the chain, because it had to sell the entire Weather Group as a result of Respondent's measures").

<sup>544</sup> C-PHB 1, para. 153.

<sup>545</sup> Counter-Memorial, paras. 113-115.

<sup>546</sup> Counter-Memorial, para. 113.

<sup>547</sup> Counter-Memorial, para. 113; Rejoinder, para. 208; C-PHB 1, para. 150.

distinct, tribunals have tools at their disposal to guard against double recovery.<sup>548</sup> Here, the Claimant contends that its harm is distinct from the harm allegedly suffered by any other party that has started arbitration against Algeria. Algeria's unlawful measures caused OTMTI to sell its interest in OTA for a price far below the one which it would have obtained without these measures. This harm is specific to OTMTI; no other party bringing claims against Algeria could recover compensation for this damage.<sup>549</sup> In any event, the mere possibility of double recovery is not a ground for denying jurisdiction.<sup>550</sup>

401. Finally, there is no risk of double recovery in this instance, so says the Claimant, because it did not benefit from the settlement with Algeria and because FNI's acquisition of an interest in OTA did not provide money to the Claimant nor did it compensate the harm for which the Claimant seeks reparation here.<sup>551</sup>

## **2. Objections to the Tribunal's jurisdiction or the admissibility of the claims in relation to the OTH Arbitration and the Settlement Agreement**

### **a. The Respondent's position**

402. The Respondent first argues that the Tribunal lacks jurisdiction or should declare the claims inadmissible because there is no dispute between the Claimant and Algeria within the meaning of Article 9 of the BIT (i). It further claims that OTH's exercise of the right to bring arbitration proceedings against Algeria deprived the Claimant of standing to pursue its claims against the Respondent (ii) and renders its claims inadmissible. Moreover, Mr. Sawiris used his group of companies to seek to maximize his chances of success by introducing several arbitrations against the Respondent at different levels of the chain of companies, which is a further ground for the inadmissibility of the claims under the doctrine of abuse of rights (iii). Finally, the Tribunal should further decline jurisdiction or declare the claims inadmissible as a result of the Settlement Agreement, which has resolved the disputes opposing OTA and OTH to Algeria (iv).

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<sup>548</sup> Counter-Memorial, para. 114.

<sup>549</sup> Counter-Memorial, para. 114.

<sup>550</sup> Counter-Memorial, para. 114, discussing *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, Exh. CLA-208, para. 51 (finding that awards may be fashioned to prevent double recovery and finding it unnecessary to correct for double recovery at the jurisdiction stage of the proceedings); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, Exh. CLA-122, paras. 253-54 (finding that the risk of double recovery "does not in any way constitute a restriction on the jurisdiction of this Tribunal"); *Nykomb Synergetics Technology Holding AB, Stockholm v. Republic of Latvia*, SCC Case, Award, 16 December 2003, Exh. CLA-190, at 9 ("[C]learly the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment."); *Camuzzi Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, Exh. CLA-148, para. 91 (finding that double recovery "is an issue belonging to the merits of the dispute"); *Pan American Energy LLC, and BP Argentina Exploration Co. v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, Exh. CLA-191, paras. 219-20 (stating that double recovery should be "address[ed] . . . during the merits phase."); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction, 11 May 2005, Exh. CLA-202, para. 102 (stating that "[double recovery] is an issue belonging to the merits of the dispute").

<sup>551</sup> Rejoinder, para. 249.

**i. There is no dispute between the Claimant and the Respondent under Article 9 of the BIT**

403. First, the Respondent submits that the Tribunal lacks jurisdiction over this dispute, which does not fall within the type of disputes covered by Article 9 of the BIT.<sup>552</sup> The Respondent relies on the definition of “dispute” in *Mavrommatis* – a “disagreement on a point of law or fact, a conflict of legal views or interests between two persons”<sup>553</sup> – and submits that a dispute requires a certain level of communication between the investor and the state leading to a disagreement.<sup>554</sup> Furthermore, for the Respondent, “the subject matter of the negotiations should be the same as the dispute that is brought before” the tribunal.<sup>555</sup>

404. The Respondent’s position is that the dispute which the Claimant submitted to arbitration on 19 October 2012 is not a “dispute” between OTMTI and the Algerian state pursuant to Article 9 of the BIT,<sup>556</sup> which reads as follows:

1. Any dispute relating to investments between a contracting party and an investor of the other contracting party shall be the subject of a written notification from the most diligent party.

As far as is possible, such a dispute shall be settled amicably between the parties to the dispute.

2. Should there be no amicable settlement by direct arrangement between the parties to the dispute or through conciliation by diplomatic means during the six (6) months from the notification thereof, the dispute shall be subject, at the request of one or other of the parties to the dispute, to arbitration by the International Centre for Settlement of Investment Disputes (ICSID) [...].

405. The Respondent advances various reasons in support of its argumentation. It contends that at the time of the Request for Arbitration there was no dispute between the Parties about *the measures adopted between 2008 and 2010 in connection with OTA*:

a. Between 2008 and 2010, the Claimant never criticized the measures adopted by Algeria vis-à-vis OTA, nor did it make any reservation of rights in this respect;<sup>557</sup>

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<sup>552</sup> Memorial on Preliminary Objections, paras. 233-241; R-PHB 1, paras. 153-163.

<sup>553</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (ser. A), No. 2, Exh. RL-38, p. 11.

<sup>554</sup> Memorial on Preliminary Objections, para. 237, discussing *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (ser. A), No. 2, Exh. RL-38, p. 11; *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on jurisdiction, 18 May 2010, para. 129, and *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, Exh. RL-50, para. 96. See also R-PHB 1, paras. 153-154.

<sup>555</sup> R-PHB 1, para. 154 (emphasis omitted), citing to *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, Exh. CLA-210, para. 123.

<sup>556</sup> Reply, para. 342; R-PHB 1, para. 155.

<sup>557</sup> Memorial on Preliminary Objections, para. 239; Reply, para. 343; R-PHB 1, para. 158.

- b. It is undisputed that there was no communication between the Parties before 2012<sup>558</sup> (except for the Claimant's letter of 4 October 2010 advising Algeria of the merger of OTMTI and VimpelCom);<sup>559</sup>
- c. OTA's situation was not mentioned in any of the meetings of the Claimant's corporate organs or in any of its annual reports;<sup>560</sup>
- d. While Mr. Sawiris objected several times to Algeria's measures in his function as representative of OTA and OTH,<sup>561</sup> the minutes of the corporate organs of OTMTI evince that the issue of OTA and OTH was raised for the first time at the meeting of the Board of Managers of 18 October 2012 at 11 pm, i.e. on the eve of the filing of the Request for Arbitration. At this meeting, Mr. Sawiris then asked the Board to ratify his decision to commence arbitration proceedings against Algeria.<sup>562</sup>

406. Second, the Respondent submits that there is no dispute between the Parties to this arbitration *in relation to the sale by OTMTI of its shareholding in Weather Investments to VimpelCom*:

- a. When the transaction closed, OTMTI expressed no reservations on the transaction and did not assert that Algeria's measures had caused it damage. To the contrary, Mr. Sawiris repeatedly stated his satisfaction about the sale in the media;<sup>563</sup>
- b. At the time of the closing, OTMTI represented that there was no "action taken or to be taken by Weather I or such Weather II Shareholder in connection with, or which seeks to enjoin or obtain monetary damages in respect of, the consummation of the transactions contemplated hereby";<sup>564</sup>
- c. There is no mention in the Notice of Dispute of 16 April 2012 of the sale to VimpelCom, whereas in this arbitration the Claimant submits that "the core of [the] Claimant's case" centers around the damage it suffered through Algeria's measures which forced it to sell its interest in OTA to VimpelCom.<sup>565</sup> Thus, the alleged dispute which Mr. Sawiris notified on 16 April 2012 on behalf of Weather II is not the one which gives rise to the claims brought in this arbitration;<sup>566</sup>

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<sup>558</sup> Reply, para. 343.

<sup>559</sup> Letter from Weather II and VimpelCom Ltd. to Prime Minister Ahmed Ouyahia, 4 October 2010, Exh. R-12.

<sup>560</sup> Reply, para. 343.

<sup>561</sup> Memorial on Preliminary Objections, para. 241.

<sup>562</sup> Reply, para. 343.

<sup>563</sup> Reply, para. 344.

<sup>564</sup> Reply, para. 344, referring to Share Sale and Exchange Agreement between Weather Investments II, VimpelCom and the Shareholders of Wind Telecom, 17 January 2011, Exh. R-252, Article 4.4.

<sup>565</sup> Reply, para. 344; R-PHB 2, para. 107.

<sup>566</sup> R-PHB 1, para. 161.

- d. Therefore, absent notification of a “dispute” arising from the sale of Weather Investments to VimpelCom at a reduced price, the Parties could not attempt to reach an amicable resolution of this “dispute” in accordance with Article 9(1) of the BIT.<sup>567</sup>

407. Third, the Respondent submits that, in the absence of any dispute between OTMTI and Algeria, Mr. Sawiris decided to take over for himself and the Claimant (“*a décidé de reprendre à son compte (et pour le compte de Weather II)*”) the disputes between OTA (and OTH) and Algeria:

- a. In his 16 April 2012 Notice of Dispute, Mr. Sawiris characterized his dispute with Algeria “by reference” to the letters that OTA, OTH and Weather Investments had sent at the time to the Algerian state, which referred to the measures impugned by these entities;<sup>568</sup>
- b. In its Request for Arbitration, OTMTI simply adopted the content of OTH’s Notice of Arbitration in the OTH Arbitration. Similarly, the Claimant’s Memorial presents several similarities with OTH’s Statement of Claim in that arbitration.<sup>569</sup>

408. Fourth, Mr. Sawiris has in reality introduced this arbitration on his own initiative and for personal reasons, in order to avenge himself of Algeria and to claim damages which he asserts to have suffered:

- a. The examination of the minutes of the Claimant’s Board of Managers and shareholders meetings confirm that Mr. Sawiris did not consult the corporate organs about the filing of the Notice of Dispute and that he communicated to the Board of Managers his decision to file for arbitration mere hours before the filing;<sup>570</sup>
- b. Mr. Sawiris has expressed his resentment against Algeria in the media; he blames the state for having “broken his dream”. The personal character of this arbitration is further confirmed by the claim for moral damage.<sup>571</sup>

409. Accordingly, continues the Respondent, the conditions of Article 9 of the BIT are not fulfilled. Mr. Sawiris has not notified a dispute between the Claimant and Algeria<sup>572</sup> and the dispute which he submits on behalf of OTMTI is not a “dispute [...] between a Contracting Party and an investor of the other Contracting Party”.<sup>573</sup>

410. In conclusion, for the Respondent, the absence of a dispute between the Parties to this arbitration on the day of the Notice of Dispute on 16 April 2012 deprives the Tribunal of jurisdiction over the dispute subsequently raised in the Claimant’s memorials.<sup>574</sup> By contrast, if the Tribunal were to consider that a dispute between the Parties existed then but that it was

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<sup>567</sup> R-PHB 1, para. 162.

<sup>568</sup> Memorial on Preliminary Objections, para. 242; Reply, para. 345; R-PHB 1, para. 158; R-PHB 2, para. 105.

<sup>569</sup> Memorial on Preliminary Objections, para. 243; Reply, para. 345.

<sup>570</sup> Reply, para. 346.

<sup>571</sup> Reply, para. 346.

<sup>572</sup> R-PBH 1, para. 157.

<sup>573</sup> Reply, para. 347; R-PHB 1, para. 159.

<sup>574</sup> R-PHB 2, para. 108.

not notified in accordance with Article 9(1) of the BIT, the claims arising from this dispute would be inadmissible.<sup>575</sup>

**ii. OTH's exercise of the right to start arbitration against Algeria deprived the Claimant of standing to sue the Respondent**

411. The Respondent contends that the Claimant's claims are inadmissible because the Claimant lost standing to bring arbitration proceedings (*intérêt pour agir*) against the Respondent, when Mr. Sawiris decided to exercise OTH's right to arbitrate (*droit d'agir*) by submitting a Notice of Dispute under the Egypt-Algeria BIT on 2 November 2010.<sup>576</sup>
412. From 2005 until 2011, when Weather Investments was sold to VimpelCom, so says the Respondent, the Claimant and its subsidiaries formed a vertically integrated group of companies (*une chaîne de sociétés verticalement intégrée*), in which the Claimant held an indirect controlling shareholding in OTA through a number of companies including Weather Investments and OTH. The Claimant, in turn, was owned by the Sawiris Entities, whose shareholders were certain trusts established for the benefit of Mr. Sawiris and his family.<sup>577</sup> The Respondent contends that as the subsidiaries in the group, including Weather Investments and OTH, were answerable to and controlled by OTMTI, the decisions taken by the former must be opposable to the latter.<sup>578</sup>
413. The Respondent further argues that in 2005 each of the companies interposed between the Sawiris Entities and OTA held a theoretical claim vis-à-vis Algeria, on different legal bases: (i) OTA on the basis of the Investment Agreement; (ii) OTH on the basis of the Egypt-Algeria BIT; (iii) Weather Investments on the basis of the Italy-Algeria BIT; and (iv) the Claimant on the basis of the BLEU-Algeria BIT.<sup>579</sup>
414. According to the Respondent, Mr. Sawiris chose to crystallize the dispute between OTA and Algeria at the level of OTA's direct shareholder, namely OTH.<sup>580</sup> From 2009 on, OTH started challenging the legality and effect of the measures adopted vis-à-vis OTA with the Algerian authorities. In particular on 2 November 2010, it notified the existence of a dispute on the basis of the Egypt-Algeria BIT.<sup>581</sup> Subsequently, on 8 November 2010, Mr. Sawiris, this time representing Weather Investments, notified the existence of a dispute under the Italy-Algeria

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<sup>575</sup> R-PHB 2, para. 108 ("*l'absence de différend opposant les Parties à l'arbitrage au jour de la notification du 16 avril 2012 entraîne l'incompétence du Tribunal arbitral pour trancher le différend soulevé ultérieurement par la Demanderesse dans ses écritures. Si le Tribunal arbitral devait considérer qu'il existait un différend entre les Parties au jour de la notification du 16 avril 2012 mais que ce dernier n'a pas fait l'objet d'une notification à l'État algérien conformément à l'article 9(1) de l'Accord, cela entraînerait l'irrecevabilité des demandes de la Demanderesse fondées sur ledit différend*", internal footnotes omitted).

<sup>576</sup> R-PHB 1, paras. 180-190; R-PHB 2, paras. 119-126.

<sup>577</sup> R-PHB 1, para. 181.

<sup>578</sup> R-PHB 1, para. 182.

<sup>579</sup> R-PHB 1, para. 183.

<sup>580</sup> R-PHB 1, para. 184.

<sup>581</sup> R-PHB 1, para. 184, discussing Letter from OTH to Algeria, 2 November 2010, Exh. C-24.

BIT.<sup>582</sup> And finally, on 16 April 2012, Mr. Sawiris, acting as the Chairman of the Claimant, notified the existence of a dispute under the BLEU-Algeria BIT.<sup>583</sup> Through these three notices, Mr. Sawiris contested the legality and effect of the same measures in the name and on behalf of three group companies.<sup>584</sup>

415. Mr. Sawiris' choice to crystallize the dispute between OTA and Algeria at the level of OTH by way of the first Notice of Dispute had the automatic effect (*a eu mécaniquement pour effet*), so argues Algeria, that any other company in the chain, including the Claimant, lost standing to sue (*intérêt pour agir*) the Algerian state.<sup>585</sup> For the Respondent, the Claimant's argument that OTH's Notice of Dispute has "no legal significance" and that it is OTH's notice of 12 April 2012 that matters is ill-founded. In investment treaty arbitration, the notification of the existence of a dispute constitutes the point of departure of any claim for damages grounded on a BIT.<sup>586</sup>
416. The Respondent also argues that Mr. Sawiris' choice to crystallize the dispute at the level of OTH allowed the Claimant to be made whole (*a permis à la Demanderesse d'être remplie de ses droits*).<sup>587</sup> In the OTH Arbitration, OTH claimed that its damage corresponded to the loss of value of its participation in OTA (*la perte de valeur totale de sa participation dans la société OTA*) caused by the measures adopted by the Algerian authorities. When Mr. Sawiris exercised OTH's right to file a claim (*droit d'agir*) under the Egypt-Algeria BIT, he substituted in OTH's assets the loss of value of the OTA shares with a claim for damages. Such claim sought reparation for the diminution in value of OTH's assets due to the loss in value of its shares in OTA from the tribunal under the Egypt-Algeria BIT.<sup>588</sup> Hence, to the extent the direct shareholder OTH was made whole by exercising its right to arbitration under the Egypt-Algeria BIT, all companies placed in the chain between OTH and the Sawiris Entities, including the Claimant, have been made whole, unless they incurred harm specific to their entity (*en l'absence de préjudice propre*).<sup>589</sup>

### **iii. Mr. Sawiris' conduct in the name and on behalf of the Claimant constitutes an abuse of rights**

417. The Respondent further asserts that the claims must be dismissed under the doctrine of abuse of rights.<sup>590</sup> Mr. Sawiris has sought to maximize his chances of success by introducing several arbitrations against the Respondent at different levels of the chain of companies. In doing so,

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<sup>582</sup> R-PHB 1, para. 184, discussing Letter from Weather Investments (Mr. Naguib Sawiris) to Prime Minister, 8 November 2010, Exh. R-13.

<sup>583</sup> R-PHB 1, para. 184, discussing Letter from Weather II to Algeria, 16 April 2012, Exh. C-30.

<sup>584</sup> R-PHB 1, para. 185.

<sup>585</sup> R-PHB 1, para. 186.

<sup>586</sup> R-PHB 2, para. 120.

<sup>587</sup> R-PHB 1, para. 187.

<sup>588</sup> R-PHB 1, para. 188.

<sup>589</sup> R-PHB 1, para. 189.

<sup>590</sup> R-PHB 1, paras. 191-196.

he has abused the protection offered by Algeria to foreign investors.<sup>591</sup> This is particularly unfair towards Algeria, as the claimants in the various proceedings need to succeed only once for the alleged harm to be remedied.<sup>592</sup>

418. The Respondent claims that, when it entered into BITs with Belgium/Luxembourg, Italy and Egypt, it did not intend to protect under different treaties shareholders who belonged to the same group and disputed the same measures.<sup>593</sup>
419. For the Respondent, the Claimant's argument that a state should be held to its offer to arbitrate in any circumstance and whatever the investor's conduct, is contrary to case law applying the doctrine of abuse of rights.<sup>594</sup> Here, the doctrine allows to limit the right of multiple shareholders in the same chain to bring arbitrations in order to avoid the proliferation of proceedings arising out of the same facts.<sup>595</sup>

**iv. The Tribunal should decline jurisdiction or declare the claims inadmissible as a result of the Settlement Agreement between OTA, OTH and Algeria**

420. It is the Respondent's further argument that the Tribunal may not rule on a dispute which ceased to exist because the parties to this dispute have settled it.
421. More specifically, on 18 April 2014, VimpelCom, OTH and the Algerian *Fonds National d'Investissement* (the "FNI") concluded a Share Purchase Agreement (the "SPA"), according to which OTH (now GTH) sold a 51% stake in OTA to the FNI for a price of US\$ 2.643 billion.<sup>596</sup> On the same day, OTH and Algeria suspended the OTH Arbitration in the wake of the closing of the share purchase pursuant to Article 7.4(a) of the SPA.<sup>597</sup>
422. In the following months, difficulties arose between the parties to the OTH Arbitration,<sup>598</sup> which culminated in OTH resuming the OTH Arbitration on 19 December 2014.<sup>599</sup> Further negotiations followed, leading to the closing of the share purchase between 28 and 30 January 2015.<sup>600</sup> On 31 January 2015, the PCA Secretariat forwarded the parties' "Renunciation Letter" to the PCA tribunal.<sup>601</sup> In the Renunciation Letter, the parties to the OTH

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<sup>591</sup> R-PHB 1, para. 193.

<sup>592</sup> R-PHB 1, para. 194.

<sup>593</sup> R-PHB 1, fn. 442; R-PHB 2, para. 129.

<sup>594</sup> R-PHB 2, para. 128.

<sup>595</sup> R-PHB 1, para. 196.

<sup>596</sup> Share Purchase Agreement between OTH, VimpelCom and the FNI, 18 April 2014, Exh. R-266. See also VimpelCom and OTH Joint Press Release, 18 April 2014, Exh. R-37.

<sup>597</sup> Joint Letter from the Parties of 18 April 2014 to the Arbitral Tribunal in PCA Case No. 2012-20, Exh. R-59.

<sup>598</sup> Reply, paras. 138-140.

<sup>599</sup> Letter from Counsel of OTH to the Arbitral Tribunal in PCA Case No. 2012-20, 19 December 2014, Exh. R-303.

<sup>600</sup> Reply, para. 142.

<sup>601</sup> Letter of Renunciation Addressed to the Arbitral Tribunal in PCA Case No. 2012-20 on 31 January 2015, Exh. R-306.



Arbitration informed the tribunal that they had “finally settled their dispute”.<sup>602</sup> The parties requested the PCA tribunal to record the following terms in a consent award:

- (1) all claims that have been raised in the Arbitration by GTH, on the one hand, and the People's Democratic Republic of Algeria, on the other hand, have been finally settled;
- (2) GTH, on the one hand, and the People's Democratic Republic of Algeria, on the other hand, waive definitively and irrevocably all claims that have been brought in the Arbitration and/or that could have been brought in the Arbitration as at the date of signing of the share purchase agreement (i.e., 18 April 2014) entered into between the Fonds National d'Investissement, GTH and VimpelCom Ltd. (the “SPA”) with respect to facts that formed the basis of the claims raised in the Arbitration, and further waive those claims that could have been brought in the Arbitration as at the date of signing of the SPA on the basis of the allegations of fact relating to the 3G license included in the parties' written submissions in the Arbitration;
- (3) This amicable settlement is concluded with no admission of guilt or liability with respect to the claims that are waived by GTH and the People's Democratic Republic of Algeria. [...] <sup>603</sup>

423. On 12 March 2015, the PCA tribunal issued a consent award recording the settlement agreement just quoted, which put an end to the OTH Arbitration.<sup>604</sup> In accordance with Article 7.4(c) and (d) of the SPA, OTA has also put an end to its disputes vis-à-vis the Algerian public administrations.<sup>605</sup>
424. In the Respondent's view, to allow a very indirect minority shareholder (or a former shareholder) of OTA to request an arbitral tribunal to rule on a dispute involving the legality of certain measures, which OTA and its parent company have decided to not further pursue, would circumvent a direct arrangement between the parties to the dispute and run counter to the BIT Contracting Parties' intention.<sup>606</sup> If such a course were admitted, a respondent state would never settle a dispute amicably as it would always face the risk that other shareholders circumvent the amicable settlement and bring proceedings over the (settled) dispute.<sup>607</sup>
425. For the Respondent, an arbitral tribunal cannot affirm jurisdiction over a dispute that has ceased to exist.<sup>608</sup> Algeria points to *Azpetrol v. Azerbaijan*, where the tribunal declined

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<sup>602</sup> Letter of Renunciation Addressed to the Arbitral Tribunal in PCA Case No. 2012-20 on 31 January 2015, Exh. R-306.

<sup>603</sup> Letter of Renunciation Addressed to the Arbitral Tribunal in PCA Case No. 2012-20 on 31 January 2015, Exh. R-306.

<sup>604</sup> See *Orascom Telecom Holding S.A.E. v. People's Democratic Republic of Algeria*, PCA Case No. 2012-20, Award on Agreed Terms, 12 March 2015, Exh. R-307.

<sup>605</sup> Reply, para. 145.

<sup>606</sup> Memorial on Preliminary Objections, para. 251; Reply, para. 349.

<sup>607</sup> Reply, para. 350; R-PHB 1, para. 223.

<sup>608</sup> Reply, para. 352, discussing Article 43(1) of the ICSID Rules (which provides that “[i]f, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding”).

jurisdiction after the parties had settled their dispute.<sup>609</sup> Citing further to *SAUR v. Argentina*, the Respondent maintains that a settlement agreement does affect the rights of the shareholder controlling the subsidiary which entered into the settlement.<sup>610</sup>

426. The Respondent recognizes that, in this case, Mr. Sawiris sold OTMTI's shares in Weather Investments to VimpelCom before the conclusion of the settlement agreement. However, it insists that it was for OTMTI to negotiate a better deal with VimpelCom then. It cannot complain now on the basis of the consideration received by OTA and OTH under the SPA.<sup>611</sup>
427. Alternatively, the Respondent submits that the Settlement Agreement between OTA, OTH and Algeria may be opposed to the Claimant, which renders the claims inadmissible.<sup>612</sup> Algeria contends that the claims of the indirect shareholder (the Claimant) are identical to those of the direct shareholder (OTH).<sup>613</sup> For the Respondent, both sets of claims are based on the same measures<sup>614</sup> and the Claimant has raised the same claims as those originally brought by OTH in the OTH Arbitration.<sup>615</sup> More specifically, the Claimant's claims relating to the loss in value of its indirect shareholding in OTA are necessarily contained in OTH's claim in the OTH Arbitration, where OTH sought damages based on the reduction in value of its shares in OTA.<sup>616</sup> The same is true of the claims concerning the dividends raised in the two arbitrations. Indeed, the Claimant held an indirect stake in OTA through OTH, and thus any dividend distributed by OTA to OTH would have been distributed further up by OTH to the Claimant.<sup>617</sup>
428. There are still other types of claims in this arbitration, so says the Respondent, which cannot be considered by this Tribunal. For example, the claims for consequential damages allegedly incurred by the "Weather Group" as a result of the need to refinance OTH cannot be invoked by the Claimant, as OTH and Weather Investments (not the Claimant) provided the funds for refinancing.<sup>618</sup> And the alleged "moral damage" connected to a reputational damage is made in consideration of Mr. Sawiris' reputation (not the Claimant's).<sup>619</sup>
429. As a result, it is clear for the Respondent that the claims in the two arbitrations are identical. The claims of the direct shareholder were settled in conditions which do not render the transaction dubious or otherwise subject to criticism. That settlement has put an end to all the

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<sup>609</sup> Reply, para. 353, discussing *Azpetrol Int'l Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award, 8 September 2009, Exh. RL-233.

<sup>610</sup> Reply, para. 357, discussing *SAUR Int'l SA v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, Exh. RL-238.

<sup>611</sup> Reply, para. 359.

<sup>612</sup> R-PHB 1, paras. 208-226. See in particular *ibid*, para. 226 ("*le règlement amiable des différends opposant OTA et OTH à l'État algérien doit nécessairement être opposable à Weather II, et les demandes de Weather II doivent en conséquence être déclarées irrecevables*").

<sup>613</sup> R-PHB 1, paras. 209-212.

<sup>614</sup> R-PHB 1, para. 209.

<sup>615</sup> R-PHB 1, para. 210.

<sup>616</sup> R-PHB 1, para. 210.

<sup>617</sup> R-PHB 1, para. 210.

<sup>618</sup> R-PHB 1, para. 211.

<sup>619</sup> R-PHB 1, para. 211.

disputes with OTA and OTH.<sup>620</sup> Indeed, the settlement was entered into by OTH in its own name and on behalf of OTA, OTH being the “historical” controlling shareholder of OTA, to which the GSM License was granted in 2001 and which negotiated and concluded the Investment Agreement in 2001. Furthermore, it was OTH which in 2009-2010 objected to the measures taken vis-à-vis OTA and which sent the first Notice of Dispute on 2 November 2010.<sup>621</sup>

430. For the Respondent, the Claimant cannot invoke its status of former indirect shareholder of OTA and OTH to establish jurisdiction and engage the Respondent’s liability for disputes opposing OTA and OTH to Algeria and, at the same time, pretend that the settlement of these disputes is not opposable precisely because of its status of former shareholder.<sup>622</sup> The amicable settlement must thus be opposed to the Claimant,<sup>623</sup> especially as the Claimant does not deny that it held a direct minority interest in OTH at the time of the conclusion and closing of the SPA.<sup>624</sup>
431. From the Respondent’s viewpoint, the settlement was intended to finally resolve the disputes of OTA and OTH with Algeria, in such a fashion that no other forum could rule on the legality of the measures adopted by the Algerian authorities vis-à-vis OTA and OTH.<sup>625</sup> To allow (former) direct and indirect shareholders of OTH to bring arbitration proceedings arising from the same facts and requiring thus to review the legality of Algeria’s measures would in practice nullify the settlement agreement.<sup>626</sup> This would expose Algeria to the concrete risk of multiple proceedings, considering the number of companies in the Weather Group and the fact that OTH was a listed company.<sup>627</sup>
432. By contrast, opposing the settlement agreement to the Claimant would be in line with scholarly views seeking to transpose domestic law principles on the limitations to shareholder’s claims within investment law.<sup>628</sup> Investment jurisprudence allowing indirect shareholders to claim for indirect damages resulting from measures taken by the host state against the local company is subject to criticism.<sup>629</sup> Rather than following this line, an investment treaty tribunal should adopt the approach chosen by the International Court of Justice and carefully examine the rules of municipal legal systems on shareholders’ claims. The Respondent refers to scholarly writings of Zachary Douglas and others.<sup>630</sup>

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<sup>620</sup> R-PHB 1, paras. 213-214.

<sup>621</sup> R-PHB 1, para. 219.

<sup>622</sup> R-PHB 1, para. 215.

<sup>623</sup> R-PHB 1, para. 218.

<sup>624</sup> R-PHB 2, para. 113.

<sup>625</sup> R-PHB 1, para. 220.

<sup>626</sup> R-PHB 1, para. 221; R-PHB 2, para. 116.

<sup>627</sup> R-PHB 1, para. 222; R-PHB 2, paras. 116-117.

<sup>628</sup> R-PHB 1, para. 224.

<sup>629</sup> R-PHB 2, paras. 133-134.

<sup>630</sup> Memorial on Preliminary Objections, paras. 323-327; Reply, paras. 451-461.

433. In reliance on generally accepted domestic rules, the Respondent submits that only claims for damages resulting from a violation by the host state of the rights tied to the quality of direct shareholder or of the commitments towards the shareholder (but not the local company) are admissible. By contrast, shareholders may not claim for damages suffered by the local company, which is the subject of the investment.<sup>631</sup> This is the case even if the direct or indirect shareholder invokes the loss of value of its shares in the local company as a result of the host state's measures.<sup>632</sup>
434. In this case, the Respondent notes that the Claimant invokes the loss resulting from the diminution of value of its indirect shareholding in OTA as a result of Algeria's allegedly wrongful measures against OTA. However, the Respondent observes, only OTA could bring claims for damages based on the loss of value of its assets (*sur la perte de valeur de son patrimoine*), which claims it has settled.<sup>633</sup>
435. Furthermore, the Respondent refutes the Claimant's submission that Algeria's measures damaged its right to receive dividends from 2009 to 2011. For the Respondent, that right only belongs to OTA's direct shareholders, such as OTH. Indirect shareholder have no entitlement for these dividends; otherwise Algeria would be required to compensate twice both the direct and indirect shareholders for the same damage.<sup>634</sup> In this respect, the Respondent notes that the Settlement Agreement provides as a condition precedent that OTA must effect a distribution of its dividends to its direct shareholders, including OTH. Consequently, the claims in this respect must be declared inadmissible.<sup>635</sup>

**b. The Claimant's position**

436. The Claimant submits that a dispute has existed between the Parties at all times since the Claimant notified the Respondent on 16 April 2012 (i). Further, OTH's commencement of separate arbitration proceedings against the Respondent is irrelevant to the Tribunal's jurisdiction or the admissibility of the claims in this arbitration, and the Respondent's invocation of the doctrine of abuse of rights is ill-founded (ii). Finally, the subsequent settlement of the OTH Arbitration is equally without pertinence to this tribunal's jurisdiction and to the admissibility of the claims before it (iii).

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<sup>631</sup> Memorial on Preliminary Objections, para. 324; Reply, para. 458.

<sup>632</sup> Memorial on Preliminary Objections, para. 324; Reply, para. 458.

<sup>633</sup> R-PHB 1, para. 224; Reply, para. 459.

<sup>634</sup> Memorial on Preliminary Objections, para. 326; Reply, para. 460.

<sup>635</sup> R-PHB 1, para. 224.

**i. There is a dispute between the Claimant and the Respondent under Article 9 of the BIT**

437. For the Claimant, a dispute has existed between the Parties at all times since the Claimant's notification on 16 April 2012.<sup>636</sup>
438. It is the Claimant's submission that the standard for the existence of a dispute, which is set out in *Mavrommatis* as well as in other ICJ and investment treaty cases, is met here. In particular, on 16 April 2012, the Claimant put Algeria on notice that there was an investment dispute between them under Article 9 of the BIT, arising out of a series of unlawful measures that the Respondent took against the Claimant's investment in OTA from 2008 on.<sup>637</sup>
439. The Claimant further alleges that it sent numerous additional letters to the Respondent during the following six months, repeatedly underscoring its readiness to seek a settlement.<sup>638</sup> On 20 September 2012, representatives for the Claimant and the Respondent met in Paris in an attempt to resolve the dispute amicably. By 17 October 2012, six months had elapsed since the Notice of Dispute of 16 April 2012 without an amicable solution being reached, and the Claimant filed its Request for Arbitration on 19 October 2012.<sup>639</sup> For the Claimant, it is clear that in correspondence and at the meeting of 20 September 2012, the Claimant specifically notified the Respondent of the existence of a dispute.<sup>640</sup>
440. The Claimant also stresses that the Notice of Dispute of 16 April 2012 was signed by Mr. Sawiris in his capacity as Chairman of Weather II.<sup>641</sup> The Respondent's assertion that there is no correspondence between the Parties to this arbitration prior to 2012 is unavailing, as the existence of a dispute does not presuppose correspondence between the parties regarding the state's unlawful measures before the investor notifies the state of the dispute.<sup>642</sup>
441. Addressing the Respondent's argument that the Claimant did not refer to the sale of Weather Investments to VimpelCom in its Notice of Dispute, the Claimant draws attention to the statement in the Notice of Dispute that Algeria's unlawful measures included "the interference in, and thwarting of, the sale of OTH to the MTN Group in 2010 through *inter alia*, the enactment of the 2009 Supplemental Finance Act".<sup>643</sup> The Claimant's significant losses then crystallized with the below-market sale of Weather Investments to VimpelCom.<sup>644</sup>

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<sup>636</sup> Rejoinder, para. 251, referring to the Letter from Weather II to Algeria, 16 April 2012, Exh. C-30.

<sup>637</sup> Rejoinder, paras. 253-254.

<sup>638</sup> Rejoinder, para. 255, discussing Letter from Claimant to Respondent, 15 May 2012, Exh. C-344; Letter from Claimant to Respondent, 27 June 2012, Exh. C-347; Letter from Claimant to Respondent, 11 July 2012, Exh. C-502; Letter from Claimant to Respondent, 17 July 2012, Exh. C-503; Letter from Claimant to Respondent, 18 July 2012, Exh. C-504; Letter from Claimant to Respondent, 1 August 2012, Exh. C-505.

<sup>639</sup> Rejoinder, para. 255; C-PHB 2, paras. 79-80.

<sup>640</sup> Rejoinder, para. 256.

<sup>641</sup> Rejoinder, para. 258.

<sup>642</sup> Rejoinder, para. 259; C-PHB 2, para. 81.

<sup>643</sup> Rejoinder, para. 260, discussing Letter from Weather II to Algeria, 16 April 2012, Exh. C-30, p. 2.

<sup>644</sup> Rejoinder, para. 260.

442. In any event, in its Request for Arbitration, so argues the Claimant, it specifically notified the Respondent that “in light of the devastating financial impact of the Measures on OTA and its stakeholders, [the Claimant] had no choice but to sell [...] a percentage of its indirect shareholding in OTA to third parties, at a distressed price”.<sup>645</sup> Investment treaty tribunals have confirmed that a request for arbitration which sets forth the facts and legal arguments on which the Claimant relies with respect to the parties’ rights and obligations under the applicable treaty is sufficient to establish the existence of a dispute.<sup>646</sup>
443. Finally, according to the Claimant, the Respondent’s objection that the dispute notified by Mr. Sawiris (on behalf of OTMTI) on 16 April 2012 and the one before this Tribunal are not the same<sup>647</sup> is both untimely, as it was raised by the Respondent for the very first time in its Post-Hearing Brief, and devoid of merit.<sup>648</sup> Investment tribunals have held that an investor is not required to spell out its case in detail in the notice of dispute. It is sufficient for the notice to inform the host state of a dispute which engages the state’s international responsibility under the applicable treaty.<sup>649</sup> Tribunals have declined jurisdiction over claims only in the rare circumstance where those claims were clearly separate and distinct from the matters raised in the notice of dispute.<sup>650</sup> In this case, so argues the Claimant, it has not raised any new claim. In its Request for Arbitration and Memorial on the Merits, it has merely explained the effect of the unlawful measures described in the Notice of Dispute, which, it argues, crystallized in losses of billions of dollars when the Claimant sold Weather Investments to VimpelCom.<sup>651</sup>

**ii. OTH’s commencement of separate arbitration proceedings is irrelevant to the Tribunal’s jurisdiction or the admissibility of the claims**

444. The Claimant submits that OTH’s commencement of separate arbitration proceedings against the Respondent is irrelevant to jurisdiction and admissibility in this arbitration.
445. First, it is the Claimant’s argument that OTH’s Notice of Dispute of 2 November 2010 has no legal significance other than to fulfil the procedural requirements under the Algeria-Egypt BIT.<sup>652</sup> At the time when OTH commenced the OTH Arbitration on 12 April 2012, the Claimant had sold its indirect controlling shareholding in OTH to VimpelCom, on whose board it never had a seat.<sup>653</sup> Hence, neither the Claimant nor Mr. Sawiris were involved in OTH’s decision to initiate the OTH Arbitration.<sup>654</sup>

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<sup>645</sup> Rejoinder, para. 261, discussing Request for Arbitration, 19 October 2012, para. 61.

<sup>646</sup> Rejoinder, para. 261-263, discussing *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, Exh. CLA-232, p. 188.

<sup>647</sup> R-PHB 1, para. 161.

<sup>648</sup> C-PHB 2, paras. 82-90.

<sup>649</sup> C-PHB 2, para. 85.

<sup>650</sup> C-PHB 2, para. 88.

<sup>651</sup> C-PHB 2, para. 90.

<sup>652</sup> C-PHB 1, para. 170.

<sup>653</sup> C-PHB 1, para. 171; C-PHB 2, para. 92.

<sup>654</sup> C-PHB 1, para. 171.

446. Further, the terms of the Respondent's consent as set forth in the BIT establish the scope of a tribunal's jurisdiction. Here, according to the BIT, the Respondent's consent expressly extends to any dispute with a Luxembourgish investor relating to that investor's minority or indirect shareholding in an Algerian company.<sup>655</sup> The Claimant contends that following the Claimant's establishment of the vertically integrated Weather Group in 2005, every entity in the chain had standing to submit claims against the Respondent arising out of the measures which the Respondent took starting in 2008.<sup>656</sup>
447. In the Claimant's view, where two entities in the same corporate chain bring parallel claims against the host state relating to the same measures, the only issue is the risk of double payment or recovery, which is not a bar to jurisdiction or admissibility.<sup>657</sup> The Respondent's contrary assertion that the commencement of the OTH Arbitration deprived the remaining affiliates in the Weather Group of standing to bring arbitration proceedings against the Respondent is unsupported by legal authority. To the contrary, investment tribunals confirm that indirect shareholders have standing to start arbitration against the host state, even if other entities in the same corporate chain have commenced separate proceedings relating to the same unlawful measures.<sup>658</sup>
448. In the absence of limitations in the BIT restricting an indirect investor's right to pursue arbitration against the host state, the commencement of the OTH Arbitration lacks any relevance for purposes of jurisdiction and admissibility in the present proceedings.<sup>659</sup>
449. Finally, the Claimant challenges the Respondent's reliance on the doctrine of abuse of rights. For the Claimant, this doctrine applies to situations where a company was incorporated after the dispute arose and similar circumstances. Here, the Claimant was incorporated and acquired its indirect controlling shareholding in OTA in 2005 – approximately three years before the Respondent's unlawful measures. Hence, there is no basis to argue that the exercise of the Claimant's right under the BIT to start arbitration constitutes an abuse of rights.<sup>660</sup>
450. Moreover, even assuming *arguendo* that the doctrine of abuse of rights could apply in the context of parallel proceedings relating to the same unlawful measures, investment treaty tribunals have repeatedly held that there must be extraordinary circumstances to justify a denial of treaty rights under such doctrine.<sup>661</sup> Where two claimants with related economic interests are not under common control, their insistence on conducting separate proceedings

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<sup>655</sup> C-PHB 1, paras. 172-173.

<sup>656</sup> C-PHB 2, para. 91.

<sup>657</sup> C-PHB 1, para. 176.

<sup>658</sup> C-PHB 2, para. 93.

<sup>659</sup> C-PHB 1, paras. 176-177.

<sup>660</sup> C-PHB 1, para. 178; C-PHB 2, para. 94.

<sup>661</sup> C-PHB 2, para. 95.

cannot *per se* constitute an abuse of process.<sup>662</sup> In this case, the Claimant and OTH were not in a position to assert their respective claims against the Respondent in the same proceedings, because the Claimant did not own or control OTH when OTH commenced arbitration against the Respondent.<sup>663</sup> Indeed, so the Claimant argues, it could not bring its claims lower in the chain, much less at the OTH level, because it had to sell the entire Weather Group as a result of the Respondent's unlawful measures.<sup>664</sup>

**iii. The Settlement of the OTH Arbitration is irrelevant to jurisdiction and admissibility**

451. The Claimant contends that the settlement of the OTH Arbitration does not dispose of its claims in this arbitration.
452. First, the Claimant contends that no action taken by either Party after the Request for Arbitration can deprive this Tribunal of jurisdiction or render the claim inadmissible.<sup>665</sup> Citing to *Vivendi II v. Argentina*, *CSOB v. Slovak Republic* as well as ICJ decisions, it maintains that jurisdiction must be determined by reference to the date on which judicial proceedings are instituted and that events taking place after that date do not affect a tribunal's jurisdiction.<sup>666</sup> Thus, any action by Algeria subsequent to the Claimant's Request for Arbitration of 12 October 2012 cannot deprive the Tribunal of jurisdiction over the present claims or render those claims inadmissible.<sup>667</sup>
453. Second, the Claimant submits that it is a non-party and non-privy to the SPA and is therefore not bound by such agreement or the settlement of the OTH Arbitration.<sup>668</sup> The fact that separate legal entities not owned or controlled by the Claimant have settled their dispute with Algeria by entering into an agreement with an investment fund owned and controlled by the Algerian state is legally irrelevant to the status of OTMTI's claims. Indeed, assuming that OTH had not agreed to withdraw its claim from arbitration and that the PCA tribunal had rendered an award in favor of OTH, that decision would have carried no *res judicata* with respect to the

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<sup>662</sup> C-PHB 2, para. 96, discussing Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Exh. CLA-226, at 7.51.

<sup>663</sup> C-PHB 2, para. 97.

<sup>664</sup> C-PHB 2, para. 97.

<sup>665</sup> Counter-Memorial, paras. 117-120.

<sup>666</sup> Counter-Memorial, paras. 117-120, discussing *Compañía de Aguas Del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, Exh. CLA-156, paras. 60 and 63; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, Exh. CLA-152, para. 31; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, 1998 ICJ Reports 115, 27 February 1998, Exh. CLA-181, paras. 36, 37, 43; *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment, 2002 ICJ Reports 3, 14 February 2002, Exh. CLA-150, paras. 23, 27-28.

<sup>667</sup> Counter-Memorial, para. 120.

<sup>668</sup> Rejoinder, paras. 275-284.



Claimant's claims and, consequently, would have no effect on the Tribunal's jurisdiction or on the inadmissibility of OTMTI's claims.<sup>669</sup>

454. Indeed, in the Claimant's opinion, the three conditions for *res judicata*, i.e. identity of parties, identity of subject matter or relief sought, and identity of legal grounds or causes of actions, are not satisfied. There is no identity of parties, as the Claimant is not a party to either the OTH Arbitration or the Settlement Agreement, and Algeria is not a party to the Settlement Agreement. There is no identity in the relief sought, as the relief sought in the PCA Arbitration was in excess of US\$ 16 billion, whereas approximately US\$ 4 billion is sought by OTMTI in this arbitration. Moreover, OTMTI seeks relief for losses that are unique to itself, i.e. the loss it suffered from having to sell its shares in OTA (via a sale of Weather Investments) at a depressed price due to Algeria's measures and the consequential losses it incurred as a result of having to refinance due to Algeria's measures. Finally, there is no identity of causes of action, as the OTH Arbitration involves a dispute under the Egypt-Algeria BIT, while this arbitration arises under the BLEU-Algeria BIT.<sup>670</sup>
455. For the Claimant, the Respondent's invocation of *Azpetrol v. Azerbaijan* is inapposite, because in that case the *parties to the arbitration* entered into settlement negotiations. In that context, the tribunal reviewed the communications between the parties following the adjournment of the proceedings, and found that the respondent had made an offer of settlement which was "unequivocally accepted" by the claimants and that both parties "were bound by the settlement agreement and neither side was free to withdraw".<sup>671</sup> Unlike in that case, Algeria never submitted a settlement offer to the Claimant and the Claimant never accepted any such offer.<sup>672</sup>
456. Further, contrary to the situation in *SAUR v. Argentina*, where the claimant owned a controlling interest in the local company that concluded a settlement agreement with the Argentinian authorities, the Claimant here sold its indirect controlling interest in OTH to VimpelCom three years before VimpelCom, OTH, and the FNI concluded the SPA.<sup>673</sup> In this context, the Claimant alleges that (i) it owned less than one percent of the share capital of OTH and VimpelCom at the time of the SPA; (ii) it did not own any shares in VimpelCom and owned less than one percent of OTH's share capital on 30 January 2015 when the FNI's share purchase of OTA's shares from VimpelCom and OTH closed, and on 12 March 2015 when the PCA tribunal issued the consent award terminating the OTH Arbitration.<sup>674</sup> Contrary to the

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<sup>669</sup> Counter-Memorial, para. 122.

<sup>670</sup> Counter-Memorial, para 123.

<sup>671</sup> Rejoinder, para. 280, discussing *Azpetrol Int'l Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award, 8 September 2009, Exh. RL-233, para. 101.

<sup>672</sup> Rejoinder, para. 280.

<sup>673</sup> Rejoinder, para. 282.

<sup>674</sup> Rejoinder, paras. 282, 290.

claimant in *SAUR*, OTMTI therefore did not obtain and could not have obtained compensation from the share purchase transaction.<sup>675</sup>

457. In fact, the Claimant contends that it notified the Respondent in its Notice of Dispute that it would not be bound by any settlement discussions between OTA, OTH, OTH's shareholders, and the Respondent.<sup>676</sup> Subsequently it again notified the Respondent on 15 May 2012 that "Weather II is broadly aware that there are ongoing negotiations between Algeria and at least some of OTA's shareholders (not including Weather II) in relation to the forced sale of OTA", but that "these negotiations do not involve, nor do they bind, Weather II".<sup>677</sup> The Respondent thus knew that its settlement discussions with OTH and VimpelCom would not bind the Claimant or have any effect on the latter's claims more than two years before the conclusion of the SPA.<sup>678</sup>
458. Third, there is no risk of double payment. As a preliminary matter, the Claimant submits that the risk of double recovery is not a bar to jurisdiction or admissibility, but is a matter for the merits, if at all relevant.<sup>679</sup>
459. Assuming *arguendo* that the risk of double payment or recovery could affect the admissibility of the claims, the Claimant contends that the loss it suffered is distinct from the one which OTH incurred, with the result that there can be no double payment or recovery. For the Claimant, the Respondent caused it to suffer damages of more than US\$ 4 billion, which were not incurred by OTH. At the Hearing, the Respondent did not dispute that OTH did not claim compensation for refinancing costs that the Claimant was compelled to incur as a consequence of the Respondent's unlawful measures, or for payments that the Claimant made to private equity investors following the forced sale of Weather Investments to VimpelCom.<sup>680</sup> Additionally, OTH did not sustain any loss from the collapse of the MTN deal or the resulting sale of Weather Investments to VimpelCom, because OTH was part of the company that was for sale.<sup>681</sup> Moreover, the non-payment of dividends was also, so the Claimant's expert Ms. Hardin confirmed, "a damage that was incurred only by the Claimant, who had – based on its membership on the board of directors of OTH and its role as the controlling shareholder – the ability to require a disbursement, at a minimum, of its share of dividends from OTH that were paid up from OTA".<sup>682</sup> It is thus undisputed that "at least part" of the losses for which the Claimant seeks compensation in this arbitration were not sustained by

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<sup>675</sup> Rejoinder, para. 282. The Claimant further argues that the Respondent did not rely on any legal doctrine such as *res judicata* or collateral estoppel, as those doctrines are clearly inapplicable. See Rejoinder, paras. 285-292.

<sup>676</sup> C-PHB 1, para. 183.

<sup>677</sup> C-PHB 1, para. 184, discussing Letter from Claimant to Respondent, 15 May 2012, Exh. C-344, at 2.

<sup>678</sup> C-PHB 1, para. 184; C-PHB 2, para. 105.

<sup>679</sup> Rejoinder, paras. 293-295; C-PHB 1, para. 190.

<sup>680</sup> C-PHB 1, para. 191.

<sup>681</sup> C-PHB 1, para. 192.

<sup>682</sup> C-PHB 1, para. 193.

OTH and, consequently, raise no concern with respect to double payment or double recovery.<sup>683</sup>

460. In any event, the Claimant alleges that Algeria never made any payment to the Claimant to compensate the harm that the latter suffered as a result of the unlawful measures. The Respondent did not compensate the Claimant by purchasing shares of OTA from VimpelCom, which in fact benefited from the unlawful measures that forced the Claimant to sell its indirect controlling shareholding in OTA at a significantly impaired price.<sup>684</sup> In reality, the Respondent never compensated any party for the harm inflicted through its unlawful measures. This is confirmed by the SPA, which does not purport to provide compensation for the Respondent's unlawful measures, but "sets forth the terms and conditions of the sale of 51% of the OTA shares by GTH to the FNI (the 'Transaction')", and specifies that the SPA was "concluded with no admission of guilt or liability with respect to the claims that are waived by GTH and the Algerian State".<sup>685</sup>
461. Neither did Algeria make any payment to acquire the FNI's majority shareholding in OTA as it arises in particular from Ms. Hardin's evidence. In fact, the Respondent retained US\$ 986 million in unlawful tax reassessments and penalties that it seized from OTA in 2010 and 2011 (which the Claimant values at US\$ 1.356 billion taking into account the time value of money); it also obtained payment from OTA of US\$ 1.1 billion in unwarranted foreign exchange fines; and received approximately US\$ 774 million in capital gains, withholding, and transfer taxes.<sup>686</sup> Thus, the Claimant submits that while the Respondent purportedly purchased OTA's shares for US\$ 2.643 billion, it in fact received a net inflow of cash totaling US\$ 564 million to acquire shares worth US\$ 5.172 billion prior to the Respondent's unlawful measures. In other words, "the Algerian Government acquir[ed] a 51 percent stake in an entity worth \$5.172 billion as at 15 April 2011 for essentially nothing"<sup>687</sup> and there can therefore be no question of double recovery. For the Claimant, Ms. Hardin's analysis of the economic terms of the SPA stands unrebutted.<sup>688</sup>
462. Fourth and last, the Claimant insists that not a single tribunal has dismissed a claim on the basis that a shareholder was entitled to claim only for so-called "direct" losses.<sup>689</sup> Citing to *Bogdanov v. Moldova*, the Claimant submits that a shareholder's claim is not limited to the damage directly affecting his or her rights as shareholder, but extends to losses affecting the assets of the local company.<sup>690</sup>

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<sup>683</sup> C-PHB 1, para. 191. See also C-PHB 2, para. 108 ("at least some of Claimant's claimed losses were not sustained by OTH").

<sup>684</sup> Rejoinder, para. 296.

<sup>685</sup> Rejoinder, para. 296, discussing Share Purchase Agreement, 18 April 2014, Exh. R-266, Recital J, Art. 7.4(b).

<sup>686</sup> Rejoinder, para. 297. See also Counter-Memorial, paras. 127-132.

<sup>687</sup> Hardin Third Report, para. 2.2.6.

<sup>688</sup> C-PHB 1, para. 195.

<sup>689</sup> Counter-Memorial, para. 139.

<sup>690</sup> Counter-Memorial, para. 138, discussing *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Arbitration, Award, 22 September 2005, Exh. CLA-146, para. 5.1.

463. Because the Claimant, by virtue of its indirect controlling shareholding in OTA, qualifies as an “investor” with “investments” under both the BIT and ICSID Convention, it may recover for any damage suffered by its investment on account of Algeria’s breaches of its obligations under the BIT. All of the Claimant’s claims, including any claims “based on the alleged injury suffered by OTA and its direct shareholder OTH” are therefore admissible.<sup>691</sup>

### **3. Jurisdiction and admissibility objections in relation to the Claimant’s sale of its investment**

#### **a. The Respondent’s position**

464. The Respondent contends that the Tribunal lacks jurisdiction because Algeria’s offer to arbitrate was not addressed to the Claimant at the time of the Request for Arbitration, as the Claimant no longer held its investment (i). Furthermore, the claims are inadmissible as the Claimant sold or waived its right to bring arbitration proceedings against the Respondent when it sold its investment to VimpelCom (ii).

#### **i. Algeria’s offer to arbitrate was not addressed to the Claimant at the time of the Request for Arbitration**

465. For the Respondent, it is undisputed that the Claimant purported to accept Algeria’s offer to arbitrate contained in the BIT when filing its Request for Arbitration of 19 October 2012.<sup>692</sup> However, at that time, the Claimant held a “very indirect” interest in OTA which was equivalent to 0.025% of the share capital, because it had sold almost all of its shares in VimpelCom between February and September 2012. As it does not present the sale of its shares to VimpelCom as a forced sale resulting from Algeria’s allegedly unlawful measures, the Claimant must establish that it was still holding an investment at the time when it accepted the offer to arbitrate under the BIT.<sup>693</sup> Because of its marginal shareholding in OTA at the time of the Request for Arbitration, the BIT’s offer to arbitrate was no longer addressed to the Claimant (*“elle ne lui était plus adressée”*), which could therefore not accept it.<sup>694</sup> As a consequence, the Tribunal must decline jurisdiction due to the Claimant’s lack of consent to arbitrate.<sup>695</sup>

466. The Respondent does not dispute that a claimant must be an investor at the time of the impugned acts. However, in order to benefit from the offer to arbitrate extended by Algeria, the Claimant had to hold an investment at the time when it was in a position to accept the offer

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<sup>691</sup> Counter-Memorial, para. 140.

<sup>692</sup> R-PHB 1, paras. 82-84.

<sup>693</sup> R-PHB 1, paras. 85-86; R-PHB 2, para. 69.

<sup>694</sup> R-PHB 1, para. 86; R-PHB 2, para. 69.

<sup>695</sup> R-PHB 1, para. 87; R-PHB 2, para. 70.

pursuant to the Treaty (*“au moment où elle [la Défenderesse] était en mesure d’accepter ladite offre selon les termes de l’Accord”*).<sup>696</sup>

467. For the Respondent, decisions discussing the requirement that the investor hold the investment at the time of the request for arbitration suggest that such requirement may only be dispensed with in the event of a forced sale or expropriation of the investment.<sup>697</sup>
468. From a procedural point of view, the Respondent considers that this jurisdictional objection is timely. Indeed, the Respondent had stated on several occasions in its briefs that the Claimant had sold almost the entirety of its indirect interest in OTA on the date of the Request for Arbitration.<sup>698</sup> It is also timely because at the Hearing the Tribunal invited the Parties to address the effect of the Claimant’s residual stake in VimpelCom (0.025%) at the time of the Request for Arbitration.<sup>699</sup>
469. Alternatively, Algeria argues that by deciding to sell virtually all of its shares to VimpelCom before 19 October 2012, the day of the Request for Arbitration in this arbitration, the Claimant lost any standing (*qualité pour agir*) to proceed against Algeria.<sup>700</sup>

## **ii. Whether the Claimant sold or waived its right to bring arbitration proceedings against the Respondent**

470. It is the Respondent’s submission that the Claimant sold its right to bring arbitration proceedings (*droit d’agir*) against Algeria when it sold its investment to VimpelCom. When a shareholder relies on an investment consisting of an indirect participation in a local company, the sale of that participation may, depending on the circumstances, entail the sale of the right to bring arbitration proceedings.<sup>701</sup> The sale of the right to arbitrate may cause the inadmissibility of the claims.<sup>702</sup> In this context, the Respondent cites to *El Paso*, according to which “the claim continues to exist, i.e., the right to demand compensation for the injury suffered at the hands of the State remains – unless, of course, it can be shown that it was sold with the investment”.<sup>703</sup> In other words, at the time of the sale, the Claimant had lost its right to

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<sup>696</sup> R-PHB 2, para. 67.

<sup>697</sup> R-PHB 1, fn. 221, discussing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, NAFTA, Award, 11 October 2002, Exh. CLA-118, para. 91; *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, Exh. CLA-37, para. 135; *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, Exh. CLA-188, para. 120. The Respondent argues that in *Daimler*, which in the Respondent’s view is the only case cited by the Claimant where a tribunal was faced with a situation where the investment had been sold before the start of the arbitration, the tribunal did not rule on the effects of such sale on the parties’ consent. See R-PHB 1, fn. 224, and R-PHB 2, fn. 116, discussing *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, Exh. CLA-158, paras. 133 and 145.

<sup>698</sup> R-PHB 2, para. 64.

<sup>699</sup> R-PHB 2, para. 65, referring to Tr. Day 4 (Tribunal’s Questions), 198-199. See esp. 198:10-12 (where the Tribunal discusses the question of the “incidence of the remaining marginal participation of Weather II in VimpelCom at the time of the Request for Arbitration”).

<sup>700</sup> R-PHB 1, para. 205; R-PHB 2, para. 125.

<sup>701</sup> Reply, para. 410.

<sup>702</sup> R-PHB 1, para. 197.

<sup>703</sup> Reply, para. 412, citing to *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, Exh. CLA-37, para. 135.

bring proceedings against Algeria (as a result of OTH's exercise of such right). Under such circumstances, the sales transaction could not revive a right that had ceased to exist.<sup>704</sup>

471. According to the Respondent, when the indirect shareholder in a chain of vertically integrated companies – which has lost its standing to bring arbitration because one of its subsidiaries has exercised such right<sup>705</sup> – sells its shares in the company which has started arbitration, that seller may contractually reserve for itself the benefit of the claim exercised by its subsidiary.<sup>706</sup> Unless it does so, the claim exercised by the subsidiary will inure to the benefit of the buyer of the shares.<sup>707</sup>
472. From an economic point of view, the Respondent argues that on 2 November 2010, the date of OTH's Notice of Dispute, OTH's assets comprised the claims for damages against Algeria which claims increased the value of OTH. In other words, the price for the acquisition of OTH paid by VimpelCom to Weather Investments reflected the value of the damage claims.<sup>708</sup> For the Respondent, Mr. Sawiris admitted as much at the Hearing.<sup>709</sup>
473. Finally, the Respondent notes that the Claimant has failed to produce the documents relating to the 2011 sale of Weather Investments to VimpelCom, which would allow the Respondent and the Tribunal to determine whether the Claimant has sold or waived its right to arbitrate against Algeria.<sup>710</sup> In particular, the Respondent complains that the Claimant refused to produce the minutes of the Board meetings of VimpelCom<sup>711</sup> and requests that the Tribunal draw adverse inferences from that refusal.<sup>712</sup> The Respondent further observes that the SPA does not reserve the Claimant's claims for damages vis-à-vis Algeria and that the Algeria Risk Sharing Agreement did not do so either.<sup>713</sup> As a consequence, the sale of Weather Investments necessarily entailed the transfer to VimpelCom of the claim for damages exercised by OTH.<sup>714</sup> The Respondent also stresses that the Claimant acknowledged the absence of any injury suffered at the time of the closing,<sup>715</sup> and subsequently omitted mentioning a damage in the Notice of Dispute of 16 April 2012.<sup>716</sup>
474. In conclusion, it is the Respondent's case that, even if the Claimant had not lost its right to start arbitration as a result of OTH's exercise of such right, it has lost it as a result of the sale of its investment to VimpelCom. This is especially so in the absence of harm specific to the

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<sup>704</sup> R-PHB 1, para. 202; R-PHB 2, para. 122.

<sup>705</sup> See *supra* V.D.2.a.ii.

<sup>706</sup> R-PHB 1, para. 199.

<sup>707</sup> R-PHB 1, para. 199.

<sup>708</sup> R-PHB 1, para. 201; R-PHB 2, para. 124.

<sup>709</sup> R-PHB 2, para. 124, discussing Tr. Day 2 (Sawiris Cross), at 170:3-14.

<sup>710</sup> Reply, paras. 414-417.

<sup>711</sup> Reply, para. 416.

<sup>712</sup> Reply, para. 418.

<sup>713</sup> R-PHB 1, para. 203.

<sup>714</sup> R-PHB 1, para. 204.

<sup>715</sup> Reply, para. 420.

<sup>716</sup> Reply, para. 422.

Claimant,<sup>717</sup> a matter which the Respondent has developed in connection with the relevance of the Settlement Agreement.

**b. The Claimant's position**

475. For the Claimant, the sale of the investment to VimpelCom does not deprive the Tribunal of its jurisdiction (i). Furthermore, the claims are admissible as the Claimant neither waived nor sold its right to bring arbitration proceedings against the Respondent when selling its investment to VimpelCom (ii).

**i. The sale of the Claimant's investment does not deprive the Tribunal of jurisdiction**

476. As a procedural matter, the Claimant considers the objection grounded on lack of jurisdiction because its indirect shareholding in OTA at the time of the Request for Arbitration was only 0.05% as untimely. Indeed, it was raised for the first time at the Hearing in violation of the ICSID Arbitration Rules, which require that a jurisdictional objection be raised at the latest at the time of the counter-memorial.<sup>718</sup>
477. On the merits, the Claimant views the objection as meritless. The relevant time to assess whether there is a protected investment is the time of the treaty breach, at which time the Claimant was holding its investment.<sup>719</sup> In the Claimant's opinion, an investor need not maintain ownership of its investment until it submits its claim to arbitration: were it otherwise, no claimant could submit a claim to arbitration where the respondent state nationalized or directly expropriated the claimant's investment.<sup>720</sup> In any event, the Claimant alleges that it sold its investment as a direct result of the Respondent's measures.<sup>721</sup>

**ii. The Claimant neither waived nor sold its right to bring arbitration proceedings against the Respondent**

478. The Claimant argues that Algeria has failed to proffer any evidence to support the erroneous speculation that the Claimant sold its right to bring proceedings against Algeria or waived its right to claim compensation for any damages that it has incurred.<sup>722</sup>
479. To the contrary, so says the Claimant, it has demonstrated that it never sold or waived its right to initiate arbitration against the Respondent, and expressly retained that right in the Risk

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<sup>717</sup> R-PHB 1, para. 206.

<sup>718</sup> C-PHB 1, paras. 154-155.

<sup>719</sup> C-PHB 1, para. 156.

<sup>720</sup> C-PHB 1, paras. 156-157; C-PHB 2, para. 75, discussing *EnCana Corp. v. Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, Exh. CLA-289; *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, Exh. CLA-188; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, Exh. CLA-166; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, NAFTA, Award, 11 October 2002, Exh. CLA-118.

<sup>721</sup> C-PHB 1, para. 99; C-PHB 2, paras. 76-77.

<sup>722</sup> Counter-Memorial, para. 135; Rejoinder, paras. 264-265; C-PHB 1, para. 160; C-PHB 2, paras. 99-100.

Sharing Agreement that the Claimant and VimpelCom concluded on 15 April 2011.<sup>723</sup> In the Risk Sharing Agreement, the Claimant and VimpelCom agreed that both parties may bring legal proceedings against the Respondent.<sup>724</sup> It is clear that, in such a scenario, the Claimant would bring claims for the harm that it already had suffered from the Respondent's unlawful measures, whereas VimpelCom or one of its privies would bring claims for harm that "may result" from actions that the Respondent had "threatened".<sup>725</sup>

480. Furthermore, the Claimant underlines that the Risk Sharing Agreement provides that "Weather II and VimpelCom will act jointly with respect to the commencement, conduct and termination of any Legal Proceedings"<sup>726</sup> and that "in case of disagreement relating to the commencement, conduct and termination of any Legal Proceedings, Weather II's decisions shall prevail".<sup>727</sup> The Risk Sharing Agreement also sets forth that, in the event of a settlement between VimpelCom and Algeria, the Claimant would not be bound to terminate any pending legal proceedings against the Respondent unless VimpelCom submitted a written settlement offer and the Claimant accepted it (which has not occurred in this case).<sup>728</sup>
481. The Claimant also puts forward that it could not have sold its treaty claims to VimpelCom. Doing so would have been impermissible treaty shopping, because VimpelCom did not have any investment in Algeria at the time of the Respondent's unlawful measures and thus would lack standing to file treaty claims relating to those measures.<sup>729</sup>
482. Moreover, the Claimant considers the Respondent's speculation that the Claimant's sale's price to VimpelCom reflected the value of OTH's claims against the Respondent totaling US\$ 15 billion to be ill-conceived. The payment that the Claimant received clearly did not include the value of OTH's US\$ 15 billion claim or otherwise remedy the billion-dollar harm that the Claimant had incurred as a result of the Respondent's measures.<sup>730</sup>
483. The Claimant also highlights that several investment tribunals have confirmed that an investor's choice to dispose of its investment does not amount to a waiver of the right to initiate arbitration against the state and is irrelevant to the tribunal's jurisdiction over claims deriving from the state's measures prior to such disposition.<sup>731</sup>

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<sup>723</sup> Rejoinder, paras. 110, 266, discussing Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230.

<sup>724</sup> Rejoinder, para. 266, discussing Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, para. 1.

<sup>725</sup> Rejoinder, paras. 112-113, 266, discussing Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, Recitals (B)-(C).

<sup>726</sup> Rejoinder, para. 267, citing to Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, para. 6.

<sup>727</sup> Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, para. 6.

<sup>728</sup> Rejoinder, paras. 114-115, 268, citing to Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, para. 3.4.

<sup>729</sup> C-PHB 1, para. 161.

<sup>730</sup> C-PHB 1, paras. 163-164; C-PHB 2, paras. 100-101.

<sup>731</sup> Rejoinder, para. 269, discussing *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, Exh. CLA-37, para. 135 (holding that "the right to demand compensation



484. Finally, in connection with the Respondent's requests that adverse inferences be drawn against the Claimant, the latter argues that it has produced all responsive documents relating to the sale of Weather Investments to VimpelCom, the acquisition of shares of VimpelCom, and the subsequent sale of those shares.<sup>732</sup> The Claimant, however, alleges that it has no possession, custody, or control of VimpelCom Board minutes, because it never had a seat on that board.<sup>733</sup> Rather, the fact that the Respondent did not obtain these minutes, despite VimpelCom's undertaking to "provide reasonable assistance" to Algeria in this arbitration, confirms that no minutes exist and that the Claimant retained its right to bring these arbitration proceedings against the Respondent.<sup>734</sup>

#### 4. Analysis

##### a. The main events underlying the dispute, the various Notices of Dispute and the relevance of the OTH Arbitration

485. The Tribunal finds it convenient to start by setting out the timeline of the main events relevant to the objections discussed in this section V.D, which assists in understanding the issues.

- a. The Claimant was incorporated in 2005 and, as detailed above in the context of the discussion of jurisdiction *ratione materiae*, started to acquire its investment that year.
- b. The disputed measures taken by Algeria date back to the years 2008 to 2011. By way of example, the tax assessments against OTA were issued between the end of 2008 and early 2011; the dividend restrictions vis-à-vis OTA were enacted between the end of 2008 and the beginning of 2010; and the Bank of Algeria's injunction restraining Algerian banks from engaging in foreign banking transactions on behalf of OTA was issued on 15 April 2010.
- c. On 2 November 2010, OTH notified Algeria of a dispute under the Egypt-Algeria BIT through a formal "Notice of Dispute" which triggered the 6-month waiting period under Article 7 of that treaty (the "OTH Notice of Dispute").<sup>735</sup> The OTH Notice of Dispute was signed by Mr. Sawiris as Executive Chairman of OTH.<sup>736</sup>
- d. Less than a week later, on 8 November 2010, Weather Investments notified Algeria of a dispute under the Italy-Algeria BIT through a formal "Notice of Dispute", which triggered the 6-month waiting period under Article 7 of that treaty (the "Weather Investments

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for the injury suffered at the hand of the State remains – unless, of course, it can be shown that it was sold with the investment"); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, NAFTA, Award, 11 October 2002, Exh. CLA-118, para. 91; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, Exh. CLA-166, paras. 117-124; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, Exh. CLA-38, para. 198; *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, Exh. CLA-188, para. 43.

<sup>732</sup> Rejoinder, para. 271.

<sup>733</sup> Rejoinder, para. 271.

<sup>734</sup> Rejoinder, para. 273.

<sup>735</sup> Letter from OTH to Algeria, 2 November 2010, Exh. C-24.

<sup>736</sup> Letter from OTH to Algeria, 2 November 2010, Exh. C-24, p. 6.

Notice of Dispute”).<sup>737</sup> The Weather Investments Notice of Dispute was also signed by Mr. Sawiris as representative of Weather Investments.<sup>738</sup>

- e. On 15 April 2011, the Claimant completed the sale of OTA to VimpelCom (through the sale of Weather Investments).<sup>739</sup> The Tribunal understands that between 2011 and 2012, the Claimant held a residual indirect participation in OTA of around 9.4% (through ownership of shares in VimpelCom).<sup>740</sup>
- f. On 12 April 2012, OTH followed up on the OTH Notice of Dispute by filing a Notice of Arbitration against Algeria under the UNCITRAL Rules and the Egypt-Algeria BIT (the “OTH Arbitration”).<sup>741</sup>
- g. Two days later, on 14 April 2012, the Claimant in this arbitration notified Algeria of a dispute under the BLEU-Algeria BIT through a formal “Notice of Dispute” which triggered the 6-month waiting period under Article 9 of that treaty (“the Claimant’s Notice of Dispute”).<sup>742</sup> The Claimant’s Notice of Dispute was signed by Mr. Sawiris as Chairman of OTMTI.
- h. On 19 October 2012, the Claimant filed its Request for Arbitration with ICSID under the BLEU-Algeria BIT, thus following up on the Claimant’s Notice of Dispute. The Tribunal understands that at that point in time the Claimant owned an indirect interest in OTA equivalent to 0.025%.<sup>743</sup>
- i. On 18 April 2014, the FNI, OTH and VimpelCom entered into an SPA, providing *inter alia* for the settlement of the OTH Arbitration.<sup>744</sup>
- j. On 15 March 2015, the PCA tribunal in the OTH Arbitration recorded the parties’ settlement in a consent award.<sup>745</sup>

486. In this context, it is important to further examine the notifications of dispute sent by OTH, Weather Investments, and the Claimant to Algeria. While the companies giving notice and the investment treaties invoked are different, it is notable that the three notices concern the same measures or events.

487. The following chart highlights the main passages from the three notifications of dispute:

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<sup>737</sup> Letter from Weather Investments to Algeria, 8 November 2010, Exh. R-13.

<sup>738</sup> Letter from Weather Investments to Algeria, 8 November 2010, Exh. R-13, p. 2.

<sup>739</sup> Amended and Restated Share Sale and Exchange Agreement, 15 April 2011, Exh. C-515.

<sup>740</sup> Respondent’s Demonstrative Exhibit No. 5, referring to Exh. R-329.

<sup>741</sup> OTH’s Notice of Arbitration, 12 April 2012, PCA Arbitration No. 2012-20, Exh. R-56.

<sup>742</sup> Letter from Weather II to Algeria, 16 April 2012, Exh. C-30.

<sup>743</sup> Respondent’s Demonstrative Exhibit No. 5, referring to Exh. R-331.

<sup>744</sup> Share Purchase Agreement between OTH, VimpelCom and the FNI, 18 April 2014, Exh. R-266.

<sup>745</sup> *Orascom Telecom Holding S.A.E. v. People’s Democratic Republic of Algeria*, PCA Case No. 2012-20, Award on Agreed Terms, 12 March 2015, Exh. R-307.

OTH Notice of Dispute <sup>746</sup> (2 November 2010)	Weather Investments Notice of Dispute <sup>747</sup> (8 November 2010)	Claimant's Notice of Dispute <sup>748</sup> (16 April 2012)
Subject: Orascom Telecom Algérie S.P.A. ("Djezzy") [...]	Subject: Orascom Telecom Algérie S.P.A. ("Djezzy") [...]	Subject: Orascom Telecom Algérie S.P.A. ("Djezzy") [...]
<p>We write with considerable alarm at recent developments in Algeria in relation to Djezzy [...].</p> <p>In particular, many of the incidents of mistreatment since 2008 remain unresolved despite the fact that we have brought them to the Government's attention through numerous letters (see our correspondence to the Government dated 17 August 2009, 23 November 2009, 28 March 2010, 27 May 2010, 1 July 2010 and 8 September 2010).</p>	<p>Reference is made to past correspondence sent on behalf of Weather Investments S.p.A ("Weather") and related meetings, including, <i>inter alia</i>, [...]</p> <p>(9) the joint letter from Weather Investment S.à. r.l. and VimpelCom Ltd to you, dated 4 October 2010;</p> <p>and</p> <p>(10) the various letters, from Orascom Telecom Holding SAE ("OTH") to the Algerian Government, <u>including OTH's letters of 28 March 2010 and 2 November 2010 [i.e. the OTH Notice of Dispute].</u></p>	<p>We write to give you notice of an investment dispute between an investor and the People's Democratic Republic of Algeria (Algeria). The investor is Weather Investments II S.à. r.l. (Weather II), a company incorporated in Luxembourg, hereinafter referred to as the Investor. The dispute arises out of certain measures taken by Algeria in breach of the protections provided to the Investor under the [BLEU-Algeria BIT].</p> <p>The dispute relates to the Investor's significant investments in Djezzy, a company incorporated in Algeria, through the Investor's shareholdings in Orascom Telecom Holding S.A.E. (OTH), a company incorporated in Egypt, which itself owns, directly or indirectly, 96.81% of the shares in Djezzy.</p> <p><u>As you are aware from the extensive previous correspondence with OTH and Djezzy, the dispute relates to an ongoing campaign of measures (the Measures) taken by Algeria in relation to Djezzy,</u></p>

<sup>746</sup> Letter from OTH to Algeria, 2 November 2010, Exh. C-24 (emphasis added).

<sup>747</sup> Letter from Weather Investments to Algeria, 8 November 2010, Exh. R-13 (emphasis added).

<sup>748</sup> Letter from Weather II to Algeria, 16 April 2012, Exh. C-30 (emphasis added).

<b>OTH Notice of Dispute<sup>746</sup></b> <b>(2 November 2010)</b>	<b>Weather Investments Notice of Dispute<sup>747</sup></b> <b>(8 November 2010)</b>	<b>Claimant's Notice of Dispute<sup>748</sup></b> <b>(16 April 2012)</b>
		<p>directly or indirectly, which have adversely affected - and continue to affect adversely- the Investor's investments in Algeria. <u>These Measures were described in detail in past correspondence from OTH and its shareholders to Your Excellency, including, for example, in letters dated 2 November 2010 and 8 November 2010 [i.e. the OTH Notice of Dispute and the Weather Investments Notice of Dispute].</u></p>
<p>To recapitulate, these disputes concern a series of unlawful actions, including (amongst others, and without limitation):</p> <ul style="list-style-type: none"> <li>• the arbitrary injunction of 15 April 2010 by the Bank of Algeria restraining all Algerian banks from engaging in any foreign banking transactions on behalf of Djezzy [OTA], which has had devastating effects on both Djezzy and its shareholders (including, amongst others, the rapid deterioration of the network due to the inability to import essential goods);</li> <li>• the subsequent threat of massive fines proposed to be imposed on Djezzy as a result of groundless allegations that it breached Algerian foreign exchange regulations;</li> <li>• the imposition of arbitrary and unjustified tax reassessments and penalties on Djezzy for the years 2004 - 2007 of more than USD 720 million;</li> </ul>	<p>We write to express our deep concern in relation to the issues summarised in the <u>attached letter from OTH dated 2 November 2010 [i.e. the OTH Notice of Dispute]</u>. The catalogue of arbitrary and unfair treatment that Djezzy and its shareholders have been subjected to are contrary to, <i>inter alia</i>, Articles 3. 4 and 5 of the [Italy-Algeria BIT].</p> <p><u>These extreme actions have resulted in very serious losses to Weather and its shareholders.</u></p>	<p><u>As explained in that earlier correspondence</u>, the Measures - all of which are unlawful, unjustified and arbitrary - include, but are not limited to:</p> <p>(a) the imposition of more than USD 950 million in unjustified tax reassessments and penalties on Djezzy for the years 2004-2009;</p> <p>(b) the blocking of Djezzy's payments of dividends to its foreign shareholders through the enactment of the Finance Act 2009 and the subsequent refusal to issue dividend transfer clearance certificates;</p> <p>(c) the failure to protect Djezzy during the football riots and violence against Djezzy's premises in November 2009;</p> <p>(d) the Bank of Algeria's injunction of 15 April 2010 (which remains in effect today), restraining all Algerian banks from engaging in any foreign banking transactions on behalf of Djezzy;</p>

<b>OTH Notice of Dispute<sup>746</sup></b> <b>(2 November 2010)</b>	<b>Weather Investments Notice of Dispute<sup>747</sup></b> <b>(8 November 2010)</b>	<b>Claimant's Notice of Dispute<sup>748</sup></b> <b>(16 April 2012)</b>
<ul style="list-style-type: none"> <li>• the blocking of the payment of dividends to the foreign shareholders of Djezzy through the enactment of the 2009 Finance Act and subsequent refusal to issue clearance certificates, notwithstanding that all taxes, including the arbitrary and unfair taxes levied for those years, have been paid (subject to protest);</li> <li>• the arbitrary customs freeze on Djezzy's importation of goods, which is crippling its ability to acquire essential goods (such as SIM cards) and network equipment;</li> <li>• the interference in, and thwarting of, the sale of OTH to MTN (through, inter alia, the enactment (at the same time) of the 2009 Supplemental Finance Act);</li> <li>• the interference with the rights of OTH through the enactment of the 2010 Supplemental Finance Act to attempt to grant Algeria preemption rights over Djezzy in the event of a sale of OTH;</li> <li>• the arbitrary shutdown of Medcable and VSAT networks on spurious national security grounds;</li> <li>• the failure to protect Djezzy during the football riots and violence against Djezzy's premises in November 2009;</li> <li>• the disproportionate sanctions enacted in the 2010 Supplemental Finance Act which are plainly targeted at Djezzy;</li> <li>• the discriminatory ban on Djezzy</li> </ul>		<p>(e) the customs blockade imposed on Djezzy, preventing it from importing goods and network equipment essential to the maintenance and stability of its telecommunications network;</p> <p>(f) the recent imposition of a US\$1.3 billion fine on Djezzy as a result of groundless allegations that it breached Algerian foreign exchange regulations, together with the threat of further massive fines to be imposed on Djezzy in the future;</p> <p>(g) the improper and unlawful targeting of Djezzy and OTH employees, including the initiation of a number of criminal investigations by the Bank of Algeria, and the recent improper and unlawful criminal sentence of imprisonment of an OTA senior executive, together with false allegations made to members of the Algerian press;</p> <p>(h) the interference in, and thwarting of, the sale of OTH to the MTN Group in 2010 through, inter alia, the enactment of the 2009 Supplemental Finance Act;</p> <p>(i) the interference with OTH's rights through the enactment of the 2010 Supplemental Finance Act in an attempt to grant Algeria pre-emption rights over Djezzy in the event of a sale of OTH;</p> <p>(j) the shutdown of the Medcable and VSAT networks on alleged national</p>

<b>OTH Notice of Dispute<sup>746</sup></b> <b>(2 November 2010)</b>	<b>Weather Investments Notice of Dispute<sup>747</sup></b> <b>(8 November 2010)</b>	<b>Claimant's Notice of Dispute<sup>748</sup></b> <b>(16 April 2012)</b>
<p>advertising on Algerian state television;</p> <ul style="list-style-type: none"> <li>• the recent spurious criminal investigation initiated by the Bank of Algeria, including false allegations in the press and unfair targeting of OTH employees;</li> <li>• the unfair and arbitrary preliminary tax reassessment for the years 2008 and 2009 amounting to USD 230 million (following a tax audit initiated immediately after the tax filing for 2009 in March 2010); and</li> <li>• the Government's publicised intent to "nationalise" Djezzy and other press statements, with a view to, amongst others, derailing the transaction between VimpelCom Ltd and Weather Investments S.p.A.</li> </ul> <p>The above-described measures are contrary to, <i>inter alia</i>, Articles 3 and 6 of the Investment Agreement of 5 August 2001 and international law, including, <i>inter alia</i>, Articles 3, 4, 5 and 6 of the [Egypt-Algeria BIT].</p> <p>These extreme actions have already caused losses of several billion US dollars <u>through the diminution in capital value of Djezzy</u> and other losses resulting from the Government's unlawful conduct. <u>These additional losses include, inter alia, hundreds of millions of dollars in costs incurred by Djezzy's shareholders when raising emergency funds to deal with the</u></p>		<p>security grounds;</p> <p>(k) the discriminatory ban on Djezzy advertising on Algerian State television;</p> <p>(l) the threat of unjustified sanctions as a result of the transaction between VimpelCom Ltd. and Wind Telecom S.p.A, concluded in mid-2011;</p> <p>(m) the blocking of Djezzy's commercial and marketing plans through: (i) refusal to approve its promotions and services; and (ii) forcing Djezzy to withdraw certain services, offers or promotions;</p> <p>(n) discriminatory and preferential treatment of Djezzy's competitors;</p> <p>(o) conducting a campaign to discredit Djezzy and OTH in Algeria, and encouraging violence towards and mistrust in these companies, their employees and representatives;</p> <p>(p) ongoing unilateral and unlawful breaches of the 2001 Investment Agreement between OTH and the Algerian Investment Promotion, Support and Monitoring Agency; and</p> <p>(q) the culmination of this campaign by Algeria against Djezzy, being an unlawful attempted "forced sale" of all or part of Djezzy to the Algerian State or a State entity.[FN1]</p> <p>[FN1] We understand that OTH and at least some of OTH's shareholders agreed</p>

<b>OTH Notice of Dispute<sup>746</sup></b> <b>(2 November 2010)</b>	<b>Weather Investments Notice of Dispute<sup>747</sup></b> <b>(8 November 2010)</b>	<b>Claimant's Notice of Dispute<sup>748</sup></b> <b>(16 April 2012)</b>
<p><u>DGE's unjustified tax reassessments and the Government's ban on dividend transfers out of Algeria.</u> We draw your attention to the fact that the shareholders of OTH attempted to mitigate the losses through a sale to MTN, notwithstanding the fact that they did not wish to sell OTH or Djazzy but had no choice in light of the Government's unfair actions against OTH's investment. This distressed sale attempt had priced OTH's shareholding in Djazzy at no less than USD 7.8 billion, net of the wrongful tax reassessments, and already at a significant undervalue owing to the Government's prior unfair treatment, but such attempted mitigation was thwarted by the Government.</p> <p>As a result of the Government's interference, <u>OTH and its shareholders have incurred significant losses</u>, including, but not limited to, loss of opportunities. The Government's recent actions and public statements have also had a detrimental effect on OTH's share price, and have <u>seriously impacted on OTH's and its shareholders' financial obligations</u>. [...]</p>		<p>to participate in this "forced sale" process, in the spirit of cooperation and in an attempt to mitigate their losses, under protest, reserving all of their rights, and without prejudice to their position as outlined in previous correspondence. We also understand that OTH has recently filed its own arbitration claim against Algeria, pursuant to the Egypt-Algeria bilateral investment treaty. For the avoidance of doubt, the past or future participation of OTH (and any of OTH's other direct or indirect shareholders) in the forced sale process was -and will remain -without prejudice to the rights of the Investor under the Treaty, including the Investor's right to have recourse to international arbitration if the dispute notified herein is not resolved within the six-month period of amicable negotiations referred to herein. Any offer, proposal, representation, heads of agreement, or agreement which may be exchanged or concluded between Algeria and OTH or Djazzy (or with any of OTH's other direct or indirect shareholders) shall not imply, nor shall it be interpreted as, a renunciation of any right of the Investor to have recourse to any national or international tribunal under Algerian and/or international law</p>
<p>We have repeatedly sought to resolve this dispute amicably for more than one year. We opened formal negotiations with</p>	<p>Once again, we urge the Government to cease all actions against Djazzy and its shareholders, and allow Djazzy to operate</p>	<p>These Measures, separately and together, constitute clear breaches of Algeria's obligations to the Investor under</p>

<b>OTH Notice of Dispute<sup>746</sup></b> <b>(2 November 2010)</b>	<b>Weather Investments Notice of Dispute<sup>747</sup></b> <b>(8 November 2010)</b>	<b>Claimant's Notice of Dispute<sup>748</sup></b> <b>(16 April 2012)</b>
<p>the Government through meetings which I held on 22 July 2009 with the Minister of Finance. That meeting was followed by further correspondence and discussions, although most of our letters remain unanswered. We also expressed our willingness to enter into good faith negotiations with the Government for the sale of Djezzy, when left with no alternative following the Government's clear statements that it would exercise a pre-emption right over any other sale (an entitlement which we dispute as expl[a]ined above). [...]</p> <p>In light of this, we are concerned that we will be left with no choice but to seek redress through international arbitration proceedings pursuant to Article 7 of the [Egypt-Algeria] Treaty, without further notice. [...]</p>	<p>without any unfair interference targeted against it, or pay the full and fair market value for Djezzy at a price which excludes the loss in value attributable to Algeria's unlawful conduct. In the meantime, we continue to reserve all our rights, including, under the Treaty and international law, and the right to seek redress through international arbitration pursuant to Article 8 of the [Italy-Algeria BIT], without further notice.</p> <p>[...]</p>	<p>the Treaty, and under international law generally [...].</p> <p>The Measures, for which Algeria is responsible under the Treaty, and under international law, have caused the Investor to suffer significant economic loss and damage.</p> <p>Article 9 of the Treaty provides that any dispute between a contracting party to the Treaty and an investor from the other contracting party, relating to investments under the Treaty, should, if possible, be resolved by amicable negotiation. In the event that the dispute is not resolved within six months from the time one party notifies the other of its existence, the investor may submit the dispute to international arbitration.</p> <p>Consequently, the Investor hereby notifies Algeria of the commencement of the six-month period of amicable negotiations provided for in Article 9 of the Treaty, and of its right, in the event that the dispute is not amicably resolved through negotiation, to commence international arbitration against Algeria before the International Centre for Settlement of Investment Disputes. [...]</p> <p>In the event that these negotiation efforts do not yield a solution within six months of the date of today's letter, 16 October 2012, the Investor reserves all of its rights, including the right to submit this</p>



OTH Notice of Dispute <sup>746</sup> (2 November 2010)	Weather Investments Notice of Dispute <sup>747</sup> (8 November 2010)	Claimant's Notice of Dispute <sup>748</sup> (16 April 2012)
		dispute without further notice to an international arbitral tribunal, seeking appropriate declaratory relief, specific performance and substantial damages. [...]
Naguib Sawiris Executive Chairman Orascom Telecom Holding	[signed Naguib Sawiris] Weather Investments SpA	Naguib Sawiris Chairman Weather Investments II S.à. r.l.

488. As is evident from the content of the three notices excerpted above, the three companies complain of the same measures taken by Algeria. All three companies refer, by way of example, to Algeria's tax reassessments against OTA, the limitations imposed on OTA's payment of dividends to its foreign shareholders, the Bank of Algeria's Injunction affecting OTA, the customs blockade imposed on OTA, the failure to protect OTA during the football riots and violence against OTA's premises, the shutdown of the Medcable and VSAT networks on alleged national security grounds, and the advertising ban on OTA, in many instances even using identical wording.<sup>749</sup> In the Tribunal's view, while the parties to the dispute and the legal bases for the claims (the BITs) are different, the dispute being notified in the three notices is effectively one and the same.
489. Each subsequent notice makes this identity of the dispute clear, as it defines the dispute *by reference* to the preceding notice(s). Thus, Weather Investments expressed its concern "in relation to the issues summarised in the [OTH Notice of Dispute]", which was attached to the Weather Investments Notice of Dispute. The Claimant's Notice of Dispute, for its part, referred to the dispute in the following terms: "*the dispute relates to an ongoing campaign of measures (the Measures) taken by Algeria in relation to Djezzy [OTA], directly or indirectly [...]. These Measures were described in detail in past correspondence from OTH and its shareholders to Your Excellency, including, for example, in [the OTH Notice of Dispute and the Weather Investments Notice of Dispute]*".<sup>750</sup> In other words, the reference to the description of the dispute contained in the OTH Notice of Dispute undoubtedly shows that both Weather Investments and, more importantly for these purposes, the Claimant considered the dispute to be one and the same.<sup>751</sup>
490. Moreover, the three notices were all sent by Mr. Sawiris. There is no controversy that at the time when the OTH and Weather Investments Notices of Dispute were sent, Mr. Sawiris and his family were the ultimate beneficial owners and Mr. Sawiris was the controlling shareholder of these companies.<sup>752</sup> There is equally no dispute that the Weather Group constituted a vertically integrated chain of companies, in which the companies higher up in the chain controlled and directed the companies further down. As explained by Mr. Nasr, one of the

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<sup>749</sup> In case of the Weather Investments Notice of Dispute, the aggrieved investor simply incorporated by reference the description of the issues made in the OTH Notice of Dispute. See Letter from Weather Investments to Algeria, 8 November 2010, Exh. R-13, p. 2 (referring to "the issues summarised in the attached letter from OTH dated 2 November 2010 [i.e. the OTH Notice of Dispute]").

<sup>750</sup> This was also confirmed by Mr. Sawiris at the Hearing:

[PROFESSOR GAILLARD]: So the dispute [in the Claimant's Notice of Dispute] is described by reference to earlier letters, right? Which I leave aside their characterisation as triggering letters or not. But that's the way you constructed the letter, right?

[MR SAWIRIS] Yes. Yes.

Tr. Day 2, 167:9-13.

<sup>751</sup> In view of the identity of the dispute, it is unsurprising that the subsequent Request for Arbitration filed in this case presents similarities to the Notice of Arbitration in the OTH Arbitration, as is shown by Exh. R-54, Comparative analysis of arbitration applications filed by OTH and Weather II against the Algerian State.

<sup>752</sup> See e.g. Procedural Order No. 5, Annex A, Claimant's Redfern Schedule, Claimant's Comments, Request No. 4, p. 48 (describing Mr. Sawiris as the "Claimant's controlling shareholder").

Claimant's key witnesses in this arbitration, who since the creation of the Weather Group "oversaw investments by Weather II and Weather Investments as Weather Investments' Corporate Finance Officer".<sup>753</sup>

From Weather II's creation forward, OTH and its subsidiaries, and Wind Italy and associated companies, were answerable to and controlled by Weather II. The operative entity on many matters was Weather Investment, which in turn was controlled by a majority of Board of Directors members appointed by Weather II. The managerial control exercised by the top of the Weather Group included, for instance, approval of OTH budgets and business plans, encompassing profit and dividend use, investment, and capital deployment. Operations in Algeria, including the ability to transfer dividends upstream, continued to be successful in the years following the creation of Weather Investments and Weather II.<sup>754</sup>

491. In its Counter-Memorial, the Claimant is equally clear in explaining the Weather Group's structure and Mr. Sawiris' role in it:

This control [of the Claimant over OTA] was "manifested most fundamentally in voting the shares and in putting the parent company's people or team into place to operate the subsidiaries." For example, Mr. Naguib Sawiris was the Chairman of OTMTI's Board, was voted by OTMTI to be the Chair of the Weather Investments Board (as Algeria acknowledges), and maintained his positions as Chairman of OTA and Executive Chairman of OTH's Board after OTMTI's creation. OTMTI's control over OTA and the Weather Group is also clearly seen by its loss of control following the sale of Weather Investments to VimpelCom, when Mr. Sawiris lost his chairmanships of both Weather Investments and OTH. Other employees of the Weather Group also were replaced following OTMTI's loss of control. It is thus very clear that "OTMTI controlled OTA".<sup>755</sup>

492. Thus, from 2005 until the Claimant's sale of OTA through the sale of Weather Investments in April 2011, the Claimant asserts to have "exercised its direct majority ownership to control Weather Investments, which similarly exercised its majority ownership in OTH (through wholly-owned subsidiaries) to control OTH, which exercised its majority ownership (directly and through wholly-owned subsidiaries) to control OTA".<sup>756</sup> As further confirmed by the Claimant's corporate finance expert Mr. Tolkien, from 2005 to 2011, "at each link in the corporate chain, OTMTI or its subsidiaries owned at least 50% of the voting shares of the next company in the chain".<sup>757</sup>

493. For his part, at the Hearing, Mr. Sawiris explained his role in the Weather Group in the following terms:

[W]hen I speak as Naguib, I speak for Weather II, for Weather and Orascom Telecom. I am the chairman across the board. So when I -- and I

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<sup>753</sup> Nasr Witness Statement, para. 37 (emphasis added).

<sup>754</sup> Nasr Witness Statement, para. 37.

<sup>755</sup> Counter-Memorial, para. 58.

<sup>756</sup> Rejoinder, para. 226.

<sup>757</sup> Tolkien Second Report, para. 11.

am the guy who is managing. I'm not just a -- you know, and most of the time I was chairman and chief executive officer. So when I speak, I speak as a chairman of OTA, chairman of Weather; you can choose whatever position you want to think. But I am also a shareholder, and I represent my family's interests also. So I have -- I am like the general assembly, you know, because I own the 51% through my family, and I am the chairman and I am chief executive officer. So if you want to say *I'm everything*, it's true.<sup>758</sup>

494. In other words, there is no doubt that, at the time when the dispute described in the two first notices arose, the Claimant controlled OTH (and Weather Investments). There was no situation of separate boards deciding independently. When OTH and Weather Investments sent their notices of dispute, complaining that, as a result of Algeria's measures "OTH *and its shareholders* have incurred significant losses",<sup>759</sup> that the Government actions had "seriously impacted on OTH's *and its shareholders'* financial obligations",<sup>760</sup> and caused "very serious losses to Weather and *its shareholders*",<sup>761</sup> those complaints were advanced by boards which "were answerable to and controlled by [the Claimant]".<sup>762</sup>
495. In the vertically integrated chain that constituted the Weather Group, several entities could in theory at least bring arbitration proceedings against the Respondent. OTA could rely on the ICSID clause in the Investment Agreement.<sup>763</sup> OTH as direct foreign shareholders could invoke the arbitration clause in the Algeria-Egypt BIT. Weather Investments as indirect foreign shareholder could claim on the basis of the arbitration provision in the Algeria-Italy BIT. And the Claimant, another indirect foreign investor, could start arbitration based on the Algeria-BLEU BIT. In the case of the latter, the Treaty expressly affords protection to indirect shareholding, i.e. investment that can be held through one or more intermediate companies.<sup>764</sup> In the Tribunal's view, the existence of several legal foundations for arbitration does not necessarily mean that the various entities in the shareholder chain could make use of the existing arbitration clauses to assail the same measures and to recover the same economic loss under any circumstances. Indeed, the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host state's wrongful measures. If the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances.

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<sup>758</sup> Tr. Day 2, 84:20-85:8 (emphasis added).

<sup>759</sup> OTH Notice of Dispute, Exh. C-24, p. 4 (emphasis added).

<sup>760</sup> OTH Notice of Dispute, Exh. C-24, p. 4 (emphasis added).

<sup>761</sup> Weather Investments Notice of Dispute, Exh. R-13, p. 2 (emphasis added).

<sup>762</sup> Nasr, Witness Statement, para. 37.

<sup>763</sup> Investment Agreement entered into on 5 August 2001 between OTH, Oratel (on behalf of OTA) and Algeria, and Executive Decree No. 01-416, 20 December 2001, published in the Official Journal of Algeria on 26 December 2001, including the full text of Investment Agreement, Exh. C-3, Art. 9.

<sup>764</sup> See Article 1(2) of the BIT. The Tribunal may dispense with determining whether it is appropriate to fix a cut-off point beyond which an investor is "too far removed" to have a claim. Indeed, that determination would not change the outcome in view of the conclusion that the claims are inadmissible on other grounds.

496. In the circumstances of the present dispute, the Tribunal finds that the claims are inadmissible on several counts. In this framework, OTH's Notice of Dispute assumes a decisive importance, in itself and in combination with the subsequent events. On 2 November 2010, the Claimant and its controlling shareholder, Mr. Sawiris, caused the corporate organs of OTH to crystallize the dispute at the level of OTA's direct investor. To the Tribunal, that choice is unsurprising: OTH was the direct shareholder of OTA and was the entity that, up to that point in time, had always contested the measures.<sup>765</sup> OTH was, moreover, the original investor which had been awarded the GSM License (for itself and on behalf of OTA)<sup>766</sup> and had signed the Investment Agreement with the Algerian Government (in its name and on behalf of OTA).<sup>767</sup>
497. Thus, on 2 November 2010, the legal protection that was available at the various levels of the corporate chain was activated at the OTH level. By exercising its right to arbitrate against Algeria, OTH placed itself in the position of being made whole for the alleged harm. Indeed, if it succeeded on the merits, the harm caused by the litigious measures would be remedied.
498. To the extent OTH would have restored its company value through arbitration proceedings under the BIT, all of the companies higher up in the corporate chain, including the Claimant, would have been made whole as well. Indeed, their loss depends on the diminution in value of their shares in OTH, which depends on the value of OTH (which in turn is a function of OTA's value). If the value of OTH is restored, then the shareholders of OTH suffer no loss, unless they incurred a loss of their own which is independent of the value of OTH.
499. The Tribunal will thus review the losses that the Claimant alleges to have suffered as a result of Algeria's measures, with a view to examining whether the Claimant requests relief for losses that only itself suffered irrespective of the valuation of OTH. In this respect, OTMTI contends that "at least part" of the losses for which it seeks compensation in this arbitration were not sustained by OTH.<sup>768</sup> In carrying out its analysis, the Tribunal has the benefit of the Claimant's full memorial on the merits, the three expert reports presented by the Claimant's expert on valuation and damages analysis (two of which were filed specifically in the bifurcated phase dealing with the Respondent's preliminary objections), the extensive discussion on these issues at the Hearing, including the cross-examination of the Claimant's expert, as well as the record of the OTH Arbitration which has been produced in this arbitration.

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<sup>765</sup> See, e.g., Letter from OTH to Minister of Industry and Investment, Algeria, 1 July 2009, Exh. C-104; Letter from OTH to Algerian Minister of Industry and Investment Development, 22 July 2009, Exh. C-652; Letter from OTH to Karim Djoudi, Algerian Minister of Finance, 17 August 2009, Exh. C-110; Letter from OTH to Algeria, 22 November 2009, Exh. C-11; Letter from OTH to Karim Djoudi, Algerian Minister of Finance, 28 March 2010, Exh. C-155; Letter from OTH to Karim Djoudi, Algerian Minister of Finance, 27 May 2010, Exh. C-19; Letter from OTH to Karim Djoudi, Algerian Minister of Finance, 1 July 2010, Exh. C-203; Letter from OTH to Algeria, 8 September 2010, Exh. C-20.

<sup>766</sup> GSM License and Executive Decree No. 01-219, dated 31 July 2001, Exh. C-2, Art. 1.

<sup>767</sup> Investment Agreement entered into on 5 August 2001 between OTH, Oratel (on behalf of OTA) and Algeria, and Executive Decree No. 01-416, 20 December 2001, published in the Official Journal of Algeria on 26 December 2001, including the full text of Investment Agreement, Exh. C-3, p. 1.

<sup>768</sup> C-PHB 1, para. 191. See also C-PHB 2, para. 108, where the Claimant asserts that "at least some of Claimant's claimed losses were not sustained by OTH".

500. The Claimant requests compensation for the following heads of damages. First, it claims “compensation for its realized losses on the sale of its investment”.<sup>769</sup> Second, it claims “compensation for its share of the unlawfully blocked dividends”.<sup>770</sup> Third, it claims damages due to payments made by the Claimant to private equity investors when it had to buy back shares in Weather Investments before selling Weather Investments to VimpelCom.<sup>771</sup> Fourth, the Claimant claims “compensation for consequential damages”.<sup>772</sup> Fifth and last, at least initially, it also claimed moral damages.<sup>773</sup> The Tribunal considers these categories of claims in turn.
501. The first category, the losses allegedly incurred on the sale of the investment, give rise to the Claimant’s main claim. While the Claimant’s Notice of Dispute did not contain any reference to the sale of its investment to VimpelCom at an alleged “distressed price”, during the course of the proceedings the “core of Claimant’s case” became “that Respondent’s measures caused Claimant to sell its interest in OTA to VimpelCom, which purchased OTA at an impaired price and, thus, benefitted from Respondent’s unjust measures that had deeply reduced OTA’s price”.<sup>774</sup> The Claimant’s expert refers to this category as the “[d]amages due to a loss in value of OTA which crystallized when Claimant sold Weather Investments to VimpelCom on 15 April 2011”,<sup>775</sup> and quantified them in an amount in excess of US\$ 2.349 billion.<sup>776</sup> As is clear from the Claimant’s own pleadings and the testimony of its valuation and damages expert, this head of damage is based on the alleged diminution of value of OTA. For example, the Claimant asserts that:

Claimant’s loss crystalized when it sold its interests in OTA to VimpelCom—along with a wide portfolio of other assets to make the acquisition of OTA manageable, from a risk perspective, to the buyer—on 15 April 2011 and suffered a realized capital loss on its share of the investment amounting to approximately \$2.349 billion. CRA [the Claimant’s quantum expert] determined Claimant’s compensable damage from this realized capital loss as Claimant’s share of the difference between (i) the but-for value OTA would have had in the sale to VimpelCom, and (ii) the actual value OTA can be estimated to have carried in the sale to VimpelCom.

[...]

Accordingly, the total damages relating to OTA’s loss in value, as reflected in the divestiture sale of OTA is the difference between the but-for value of OTA (\$10.142 billion) and its actual value (\$3.6 billion)-i.e., \$6.542 billion. At the time of the sale to VimpelCom, Claimant held 71.74% of Weather

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<sup>769</sup> Memorial, paras. 408-419.

<sup>770</sup> Ibid, paras. 420-421.

<sup>771</sup> Ibid., para. 418.

<sup>772</sup> Ibid., paras. 422-433.

<sup>773</sup> Ibid., paras. 434-437.

<sup>774</sup> Claimant’s Response to Respondent’s Application for Bifurcation, 21 February 2014, p. 3. See also Memorial, para. 43 (“Through this arbitration, Claimant now seeks full compensation for the substantial loss it incurred on the sale of its indirect interest in OTA to VimpelCom [...]”).

<sup>775</sup> Hardin Third Expert Report, para. 3.1.3.

<sup>776</sup> Memorial, para. 419.

Investments, the entity (sold to VimpelCom) containing OTA and the accompanying portfolio of assets. Claimant also indirectly held 51.7% of OTH, which in turn held 96.81% of OTA. Accordingly, Claimant's total indirect interest in OTA at the time of divestiture was 35.91%. Claimant's damage relating to the loss in value of its indirect interest in OTA as a direct result of Algeria's unlawful measures thus amounts to \$2.349 billion.<sup>777</sup>

502. The interconnection between the damage relating to the allegedly impaired price at which the Claimant sold its investment and the alleged diminution of OTA's shareholding value is further explained by the Claimant in the following terms:

It was hardly surprising that the sales price obtained by Claimant for its controlling interest in OTA was billions of dollars less than it would have been had Algeria not taken the aforementioned series of unlawful acts against OTA. In addition to the lost share value, Claimant also suffered damages from Algeria's unlawful prohibition on OTA's repatriation of dividends. [...] <sup>778</sup>

503. The damages relating to the diminution in value of OTA were, in turn, also the main head of damages claimed by OTH in the OTH Arbitration. In the OTH Arbitration, OTH asked the tribunal to quantify "the diminution in value of OTH's equity interest in OTA caused by the measures (i.e. the counter-factual value of OTH's equity interest as of the date of the Tribunal's award minus the actual value of that shareholding, if any, on that date)".<sup>779</sup> OTH claimed that its equity interest in OTA had been diminished as a consequence of the measures taken by Algeria against OTA (which, as seen above, are those of which the Claimant complains) and requested compensation in an amount between US\$ 9.1 and 12.5 billion.<sup>780</sup>

504. The examination of the Claimant's valuation and damages expert, Ms. Hardin, on the relationship of this head of damages claimed by the Claimant and those claimed by OTH was particularly enlightening:

[PROFESSOR GAILLARD]. Can you take your third report [...] here you note that OTH in the PCA arbitration is claiming for: "The diminution in value of OTH's shareholding in OTA, which was described as the difference between the counter-factual value of OTH's equity interest in OTA and the residual value of that shareholding, which OTH claimed was zero ..." So I will focus on this value of zero. If as a matter of principles of finance and damage theory, if OTH is right that the value of its ownership in OTA is zero, it must mean that above it's also zero, if they are right; because if OTH has an interest in OTA, the Algerian company, which is zero, then the shareholder above has a value which indirectly is zero, and then the shareholder even more above has a value which is still zero. Right? [...] if you are asked to assume that OTA, the company, is worth zero because of the measures -- but I am not asking you to take that as a fact; I am just asking you to take that as a hypothetical -- if it's worth zero, it

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<sup>777</sup> Memorial, paras. 411, 417 (internal footnotes omitted).

<sup>778</sup> Counter-Memorial on Preliminary Objections, para. 3 (emphasis added).

<sup>779</sup> See, e.g., OTH Statement of Claim, Exh. R-58, para. 480.

<sup>780</sup> OTH Statement of Claim, Exh. R-58, para. 488.

must mean that the shareholding of OTH in OTA is worth zero; and that, as a result, any indirect shareholding above is worth zero as well, if you accept my premise. Right? [...] And if that shareholding of OTH in OTA is worth zero, then anything above is worth zero as well, right? The indirect shareholding is -- it's axiomatic, isn't it? If the hypothetical is right, of course.

A. The assumptions in this case are --

THE PRESIDENT: Can I try it a little bit differently.

A. Yes, go ahead.

THE PRESIDENT: If the value of OTA is zero, then the value held by OTH as shares of OTA is zero, right; or not?

A. If you make an assumption --

THE PRESIDENT: No, no, the assumption is very simple.

A. The assumption is zero, that the value --

THE PRESIDENT: The value of OTA shares is zero. Then how much value does OTH hold for the shares of OTA?

A. If the value of OTA is zero, then the 36% holding of Weather Investments is zero, is also worth zero, if you're making that assumption, 100 --

THE PRESIDENT: So now you continue up the chain, and the value stays zero as you go up the chain; is that what you're saying? I think that's what I understood.

A. Yes, I think that would be accurate.<sup>781</sup>

505. The Tribunal concludes that the claim for damages “for the Claimant’s realized losses on the sale of its investment” concerns the same economic harm as OTH’s claim for diminution in value of its interest in OTA, which OTH raised in the OTH Arbitration.
506. A second category of damages for which the Claimant requests relief in this arbitration relates to damages “for the Claimant’s share of the unlawfully blocked OTA dividends”.<sup>782</sup> In this respect, the Claimant has argued that “Algeria’s obstruction of Claimant’s right to transfer dividends from OTA to the Weather Group and other harmful measures are in breach of Algeria’s obligations to Claimant under the BIT”.<sup>783</sup> It thus asks the Tribunal to “award Claimant its proportional share of dividends that OTA would have transferred upstream had Algeria not acted unlawfully”. It has quantified those damages at US\$ 485.8 million.<sup>784</sup> This category of damages was also claimed by OTH in the OTH Arbitration, where the claimant requested “OTH’s historical losses incurred as a result of the unlawful conduct up to the date

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<sup>781</sup> Tr. Day 4, 155:11-156:5; and 159:16-160:11.

<sup>782</sup> Memorial, para. 420 et seq.

<sup>783</sup> Memorial, para. 420.

<sup>784</sup> Memorial, para. 421, discussing Hardin First Expert Report paras. 104-106.



of the Tribunal's award, (in the form of dividends wrongfully denied to OTH from 2009 onwards and other related losses)".<sup>785</sup>

507. Within a vertical chain of corporations, each entity may pay out dividends to its shareholder(s), namely to the company or companies at the immediate higher echelon in the chain. Thus, OTH would have received OTA dividends; Weather Capital would have received OTH's dividends; Weather Investments would have received Weather Capital's dividends; and the Claimant would have received Weather Investments' dividends. Absent Algeria's allegedly unlawful measures, the "blocked OTA" dividends would thus have been paid to OTH, and not to the Claimant. This notwithstanding, the Claimant's expert, Ms. Hardin, has argued that the damage relating to the unpaid dividends are "a damage that was incurred only by the Claimant, who had – based on its membership on the board of directors of OTH and its role as the controlling shareholder – the ability to require a disbursement, at a minimum, of its share of dividends from OTH that were paid up from OTA".<sup>786</sup> According to Ms. Hardin, by contrast to the Claimant, "OTH did not sustain damages due to OTA's withheld dividend payments because it did not have ultimate control of those payments", based on the theory that "a key difference in this claim stems from the point of view of a controlling versus non-controlling shareholder and the role of each type of shareholder for the company".<sup>787</sup>
508. The Tribunal is unable to follow this argument. It is undisputed that the Claimant itself was controlled by other companies, April, OS and Cylo, whose shareholders were certain trusts constituted to the benefit of Mr. Sawiris and his family.<sup>788</sup> If one were to follow Ms. Hardin's theory, it would be those entities above the Claimant who would have had the ultimate decision-making power in relation to any dividend paid by companies further down in the chain. If this were so, then it would be the entities controlling the Claimant which suffered the damage; the Claimant – like OTH in the Claimant's theory – would have incurred no damage as it "did not have ultimate control of those payments" and would merely have transferred them upstream. The Claimant's and its expert's views that only the Claimant suffered harm as a result of the unpaid OTA dividends must thus be rejected. To the contrary, in the Tribunal's view, the Claimant's claims for damages in relation to the dividends are identical to, and necessarily contained in, OTH's claims in the OTH Arbitration. Absent Algeria's allegedly wrongful measures, any dividends would necessarily have been paid to the Claimant through OTH.
509. Third, the Claimant claims "damages due to incremental payments that Claimant was obligated to pay to certain private equity investors [...] because of the decrease in the value of

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<sup>785</sup> OTH Statement of Claim, R-58, para. 480. See also OTH Statement of Reply, Exh. R-301, para. 417.

<sup>786</sup> Hardin, Tr. Day 4, 141:6-11.

<sup>787</sup> Hardin Third Expert Report, para. 3.2.15. See also Tr. Day 4, 163:2-9 (Hardin) ("Weather II was the controlling shareholder. As the controlling shareholder [...] it has the ability to have dividends distributed, have them remain to be used for operations. They control the distribution of that dividend and they are the beneficiary of that dividend. In the end, OTH doesn't necessarily keep that money unless the controlling shareholder allows it").

<sup>788</sup> See in particular cross-examination of Mr. Sawiris, Tr. Day 2, 96 et seq.

Weather Investments, of which Claimant was the majority owner”.<sup>789</sup> The Claimant contends that, in order to effect the sale of Weather Investments to VimpelCom, it had to acquire approximately 30% of the remaining shares of Weather investments from the company’s other shareholders, as a result of change of control put options held by those other shareholders, and sell this stake to VimpelCom at a lesser value.

510. The Tribunal considers that the claims in relation to this category of damages are inadmissible because these alleged losses derive primarily from the presence of put options in an agreement freely entered into by the Claimant. In addition, when the Claimant sold the Weather Group to VimpelCom (via the sale of Weather Investments), the sales price must or should have reflected any difference between the price paid by the Claimant to the Weather Investments minority shareholders and the final purchase price paid to the Claimant by VimpelCom.
511. Fourth, the Claimant seeks “consequential damages”, which comprise a number of sub-categories. In Ms. Hardin’s words, these concern the Claimant’s “realized damages as a result of incurring various costs in order to refinance its capital structure and prevent a collapse of the Weather Group”.<sup>790</sup> Here again, these claims are inadmissible on several grounds.
512. The first ground is that the Claimant has not clearly alleged, let alone established, that it was the Claimant, as opposed to other entities of the Weather Group, including OTH and Weather Investments, which incurred these alleged losses.<sup>791</sup> Indeed, Ms. Hardin’s first financial and damages report, which discusses such “consequential damages” in greater detail,<sup>792</sup> treats these losses as losses of Weather Investments and OTH, not the Claimant. With regard to

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<sup>789</sup> Hardin Third Expert Report, para. 3.1.3.

<sup>790</sup> Hardin Third Expert Report, para. 3.2.19 et seq. See also Hardin First Expert Report, paras. 237 et seq.

<sup>791</sup> See e.g. Memorial, paras. 422 et seq. (“each injury described below *to the Weather Group*, of which Claimant was ultimate parent, is causally linked to Algeria’s unlawful acts” [...]. “To avoid what in Karim Nasr’s words would have been an ‘instant inferno’ *in the Weather Group*, OTH was compelled to obtain waivers from its financiers; without these waivers, OTH would be thrown into default” [...]. “WCSP1 [Weather Capital Special Purpose 1] *had* to participate in the OTH Rights Issue - otherwise, WCSP1 would have suffered an event of default and collateral call because the OTH shares it held would be worth substantially less after the OTH Rights Issue. To avoid its own default, WCSP1 had to participate in the OTH Rights Issue in the same proportion as its shareholding in OTH prior to the OTH Rights Issue” [...]. “*The Weather Group* had to finance its participation in the OTH Rights Issue [...] “CRA calculates the *damage associated with the Weather Group’s participation* in the OTH Rights Issue to be \$386.4 million” [...]. “Project Passat collapsed and *the Weather Group had to undertake Project Sunshine II*. Claimant refinanced a portion of the outstanding WCSP1 Collateralized Notes, €150 million, through Project Sunshine II, a portion that would have been refinanced through Project Passat (along with the entire outstanding amount of the WCSP1 Collateralized Notes)”. [...] “*Together with the damage relating to the Weather Group’s participation in the OTH Rights Issue and fees of Project Sunshine II*, CRA estimates the total damage to Claimant associated with Project Sunshine II to be \$648.6 million, as at the date of divestiture to VimpelCom” [...]. “The 2009 OTH waivers were caused by Algeria’s 2005-2007 Tax Reassessment. The attendant costs of these waivers, including, for instance, consent fees and increased margin requirements, *as well as the Weather Group’s costs of renegotiating with OTH’s financiers* constitute compensable damage to Claimant” [...]. “The costs OTH incurred in seeking and obtaining the waivers from its financiers in 2010 are compensable damage, which CRA calculates to be in the amount of \$5.1 million” [...]. “Claimant suffered damage relating to bridge loans taken *at the OTH level* in order to accommodate delays in dividends received from OTA” [...]. “Algeria intensified its interference with OTA’s ability to transfer dividends in 2009, compelling OTH to draw \$150 million from other bridge facilities” [...]. “In April 2010, Algeria levied the Injunction on OTA’s bank accounts, preventing OTA from making foreign currency payments. Consequently, as a direct consequence of Algeria’s unlawful measures against OTA, OTH was compelled to make payments on OTA’s behalf” (emphasis added, internal footnotes omitted).

<sup>792</sup> Hardin First Expert Report, paras. 237-284.

Weather Investments, Ms. Hardin states for instance that “[a]s a result of the lack of dividends from OTA to Weather Investments and the potential risk of loan defaults due to tax reassessments, *Weather Investments* had to undertake certain capital restructuring transactions”;<sup>793</sup> that “*Weather Investments* incurred significant transaction costs and incremental interest costs associated with restructuring transactions at OTH, WCF, WCSP1 and WAHF entities”;<sup>794</sup> that “in June of 2008, the [sic] *Weather Investments* retired EUR 646 million of the WCSP1 Collateralized Notes. Later on, in April of 2010 *Weather Investments* used proceeds from the PIK loan to retire additional EUR 150 million in principal”;<sup>795</sup> and that “[a]s part of the requirements for OTH to receive waivers from its lenders, [...] *Weather Investments* participated in [the OTH] Rights Issuance in the amount of EUR 308.4 million”.<sup>796</sup>

513. With regard to OTH, Ms. Hardin notes that “*OTH* incurred borrowing costs on bridge loans”;<sup>797</sup> that “[i]n order to prevent default and severe consequences, such as losing its GSM license, *OTH* made debt payments on OTA’s behalf”;<sup>798</sup> that “[b]ecause of the impending risk of defaults, *OTH* had to seek waivers from its lenders”;<sup>799</sup> that “[a]s part of the requirements for OTH to receive waivers from its lenders, *OTH* was required to raise approximately USD 800 million through issuance of new equity”;<sup>800</sup> and that as a result of the tax reassessment for 2008 and 2009, “*OTH* was required to obtain another round of waivers”.<sup>801</sup>

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<sup>793</sup> Hardin First Expert Report, para. 239 (emphasis added).

<sup>794</sup> Hardin First Expert Report, para. 241 (emphasis added).

<sup>795</sup> Hardin First Expert Report, para. 252 (internal footnote omitted, emphasis added). See also *ibid.*, para. 262 (“It is my understanding that *Weather Investments* participated in the Rights Issuance as required by bondholders in the amount equivalent to their ownership in OTH. The participation was funded by issuing a bond in two tranches (‘Project Sunshine II’ or ‘PIK Loan’). Some of these PIK Loan proceeds were used to refinance loans held by Weather subsidiary WCSP1 (the ‘WCSP1 Collateralized Notes’), internal footnotes omitted, emphasis added), and para. 266.

<sup>796</sup> Hardin First Expert Report, para. 267 (emphasis added).

<sup>797</sup> Hardin First Expert Report, para. 241 (emphasis added). More specifically, Ms. Hardin asserts that “[i]n 2008 and 2009, the Algerian government prevented or delayed the transfer of dividends from OTA to OTH. During this period *OTH did not receive cash when it had anticipated it and was required to finance operations and financing payments obligations through bridge loans*. But for the Algerian Measures, OTH would not have taken these loans and would not have incurred resulting interest costs. OTH utilized two bridge loans totaling USD 500 million during 2008. Proceeds from these loans were used to cover cash shortfall due to delay in transfer of dividends from OTA to OTH. In 2009, as part of the Algerian Measures, the Algerian government allowed OTA to transfer only 50 percent of total dividends which should have been paid in 2008. *OTH entered in three bridge loans totaling USD 150 million during this period*. Proceeds from these loans were used to cover cash shortfall due to delay in transfer of dividends from OTA to OTH” (*ibid.*, paras. 253-255, internal footnotes omitted, emphasis added).

<sup>798</sup> Hardin First Expert Report, para. 257 (emphasis added).

<sup>799</sup> Hardin First Expert Report, para. 261 (emphasis added).

<sup>800</sup> Hardin First Expert Report, para. 267 (emphasis added).

<sup>801</sup> Hardin First Expert Report, para. 280 (emphasis added). See also *ibid.*, para. 282 (adding that “as part of the requirements of the second round of waivers obtained from the two OTH notes and the OTH Guaranty, in December 2009, OTH was required to sell its 50 percent interest in Orascom Telecom Tunisiana [OTT] and use the proceeds to pay down and cash collateralize the two OTH notes”, internal footnote omitted).

514. Notably, in Ms. Hardin’s third report, filed after the Respondent had raised its jurisdiction and admissibility objections, the wording in respect of these heads of damages changed to refer indistinctly to the “Weather Group”.<sup>802</sup>
515. It is thus clear that consequential or refinancing losses, which may have been incurred as a result of Algeria’s measures, were incurred by Weather Investments and OTH, and not by the Claimant. Mr. Sawiris himself, when writing on behalf of OTH to the Algerian Minister of Finance on 28 March 2010, confirmed that Algeria’s tax reassessments and blockade of dividends had forced OTH to search for funds as substitution for dividend income and that “[t]herefore, *OTH and its Italian parent company, Weather Investments*, have had to raise hundreds of millions of U.S. dollars in interim funding at a significant cost”.<sup>803</sup> In line with those statements, it is thus unsurprising that OTH made claims for financing losses and for costs relating to the waivers in the OTH Arbitration.<sup>804</sup> To the extent those alleged losses were incurred by OTH, they cannot be (re)claimed in this arbitration for the reasons discussed above.
516. As a second reason for inadmissibility, assuming for the sake of the discussion that the Claimant did sustain some of these losses “to prevent a collapse of the Weather Group”, these losses must or should have been factored into the price when the Claimant sold Weather Investments (which was below the Claimant in the corporate chain and held the other companies forming the Weather Group) to VimpelCom. Indeed, assuming that the refinancing was necessary to avoid the collapse of the Weather Group, these recapitalization contributions increased the value of the group and thus of Weather Investments and such increase must or should have been reflected in the sale’s price. This fact is also implicit in the Claimant’s valuation and damages expert’s statement that “OTH was the beneficiary of the actions undertaken” to prevent the alleged “collapse of the Weather Group”.<sup>805</sup> If OTH benefitted from the refinancing measures undertaken to prevent the alleged collapse of the group, then the value of OTH increased as a result and such increase must or should have been reflected when OTH was sold (via the sale of its parent company) to VimpelCom.
517. Fifth and last, in its Memorial, the Claimant initially requested moral damages for alleged reputational losses, which were presented as “subject to further quantification”.<sup>806</sup> These

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<sup>802</sup> See, e.g., Hardin Third Expert Report, para. 3.2.21 (“[i]n order to prevent a default of OTH, waivers needed to be obtained from OTH’s creditors. To obtain waivers for OTH debt, *the Weather Group, on behalf of OTH*, was required to infuse equity capital into OTH by purchasing additional OTH shares (‘OTH Rights Issuance’) [...] “To prevent such a collateral call, *the Weather Group, through OTH’s immediate parent, WCSP1*, had no choice but to participate in the OTH Rights Issuance proportional to its ownership share” (emphasis added) and para. 3.2.23 (“OTH did not claim the same damages because the actions described previously were undertaken by OTMTI, *through the Weather Group*, to support OTH and prevent a collapse of the Weather Group”, emphasis added).

<sup>803</sup> Letter from OTH to Karim Djoudi, Algerian Minister of Finance, 28 March 2010, Exh. C-155, p. 2 (emphasis added).

<sup>804</sup> See OTH Statement of Claim, Exh. R-58, para. 517, listing among the “historical losses” claimed by OTH the “costs of waivers which OTH was required to obtain from its lenders as a result of the Tax Reassessments and the Injunction; and costs incurred by OTH in obtaining the SBLCs required to facilitate OTA’s payment of the 2005-2007 Tax Reassessment in April 2010”. See also *ibid.*, fn. 485.

<sup>805</sup> See Hardin Third Expert Report, para. 3.2.23.

<sup>806</sup> Memorial, para. 437

damages were not addressed in the Claimant's subsequent briefs on jurisdiction and admissibility and were not discussed in the reports of the Claimant's damages expert. In particular, they do not appear in Ms. Hardin's third expert report in the section devoted to the "damages that OTH did not sustain".<sup>807</sup> In the closing submissions at the Hearing, this category of damage was not further pursued either.<sup>808</sup> Nonetheless, in the absence of a formal withdrawal of its initial requested relief, the Tribunal shall address the Claimant's claim for moral damages. The Tribunal finds this claim inadmissible for the following reason. The Claimant seeks to recover for reputational harm, if any, incurred either by OTH<sup>809</sup> or by Mr. Sawiris and not by itself.<sup>810</sup> In Mr. Sawiris' own words, the Claimant is a mere holding company which "has the sole purpose of owning and having a legal state and a tax status", whose activity "does not require a website", *inter alia* because it does not wish to attract any attention.<sup>811</sup> Under these circumstances, the claim for moral damages must be deemed inadmissible.

518. In conclusion, despite the Claimant's attempts to depict the damages claimed as compensation for harm caused to itself, as opposed to OTH, the claims before the Tribunal in reality seek reparation for losses covered by the requests for relief raised in the OTH Arbitration or for losses that the Claimant (owned and managed by an experienced businessman like Mr. Sawiris) must or should have factored into the sale of its investment to VimpelCom. Under the circumstances, the Tribunal cannot but conclude that the claims are inadmissible.

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<sup>807</sup> See Hardin Third Expert Report, pp. 31-42.

<sup>808</sup> Tr. Day 5 (Menaker), 218:8-20 ("we have shown that in any event our damages are distinct. Of the four heads of damages for which we have claimed, there's no dispute that the damages that we incurred from refinancing as a result of Algeria's measures, and the damages that we incurred as a result of the increased payments made to the private equity investors, were not incurred by OTH and were not claimed by OTH in its arbitration. As for the other two heads of damages, there is a dispute between the parties as to whether the damages that we claim as a result of the forced sale and for the loss of dividends, whether they are the same damages that OTH claimed in its arbitration").

<sup>809</sup> See Memorial on Merits, para. 437, referring to "a highly successful telecommunications company renowned throughout the Middle East and in much of the developing world [...] an ethical and legitimate operator in the industry [...] [which] invested large amounts in Algeria when few foreign investors were willing to give the country a chance", which considering the facts of the case and the history of the Weather Group's investments in Algeria unquestionably refers to OTH.

<sup>810</sup> See Mr. Sawiris' complaint that Algeria's measures "destroyed his dream" (see *Le magnat des télécoms Naguib Sawiris attaque l'Algérie – S'estimant lésé dans la vente de Djeezy, l'Égyptien réclame 5 milliards de dollars de dommages à Alger*, Le Figaro, 19 November 2012, Exh. R-282; *L'homme d'affaires, Naguib Sawiris révèle les détails sur la société italienne et la situation de ses sociétés en Algérie*, video recording of an interview of Mr. Naguib Sawiris on BaladTV, 26 July 2014 (original in Arabic (audio) with unofficial translation of an extract in Arabic, accompanied by an unofficial translation in French), Exh. R-285.

<sup>811</sup> See Tr. Day 2 (Sawiris), 132:1-13 ("[MR. SAWIRIS] The nature of [the Claimant's] activity does not require a website. A website usually is required when you want to advertise activities or you want to advertise your operations or what you're doing. For a company that has the sole purpose of owning and having a legal state and a tax status, usually you will find that most of them don't like to have a website. You know, you're only attracting the people you don't want to attract.

[PROF. GAILLARD] You don't want to attract attention, right?

A. Me? I like to attract attention. I mean --

Q. You attract the attention, but not your companies, right?

A. Yes, not the companies; of course not.")

**b. The relevance of the settlement agreement between the FNI, OTH and VimpelCom**

519. The settlement agreement of 18 April 2014 between the Algerian FNI, OTH (whose name at that time had changed to GTH) and VimpelCom confirms and reinforces the conclusions thus reached. The settlement provides for the sale of 51% of OTA's shares to the FNI. In that context, the parties to the share purchase agreement also put an end to all disputes opposing OTA and OTH to Algeria.<sup>812</sup> On 18 April 2014, the day of the signing of the settlement agreement, OTH and the Republic of Algeria suspended the OTH Arbitration pending the closing of the transaction, pursuant to Article 7.4(a) of the settlement agreement.<sup>813</sup>
520. Specifically, the settlement agreement provides that at closing, OTA, OTH and Algeria would put an end to their disputes before the Algerian domestic courts and the OTH Arbitration. In particular:
- a. Pursuant to Article 7.4(b) of the settlement agreement, "all claims that have been raised in the [OTH] Arbitration by [OTH], on the one hand, and the Algerian State, on the other hand, have been finally settled; [OTH], on the one hand, and the Algerian State, on the other hand, waive definitively and irrevocably all claims that have been brought in the Arbitration and/or that could have been brought in the Arbitration as at the date of signing of this Agreement with respect to facts that formed the basis of the claims raised in the Arbitration [...]";
  - b. Pursuant to Article 7.4(c) (entitled "Bank of Algeria Dispute"), OTH undertook to procure that OTA discontinue and waive all disputes before the Algerian courts in relation to alleged breaches of Algerian exchange regulations and the actions of the Bank of Algeria;
  - c. Pursuant to Article 7.4(d) (entitled "Tax Disputes"), OTH undertook to procure that OTA discontinue and waive all disputes before the Algerian courts in relation to the tax reassessments.
521. The settlement further specifically addresses and resolves certain disputed issues also raised in this arbitration and discussed above, such as the distribution of the blocked OTA dividends. Thus, for example, the settlement provides as "*condition suspensive*" to the acquisition by the FNI of the majority of OTA's shares that OTA must effect a dividend distribution to its direct shareholders (amongst which OTH).<sup>814</sup>
522. After the closing of the share purchase (which occurred on 30 January 2015), OTA, OTH and Algeria finally put an end to the domestic courts and arbitral proceedings, waiving all their claims. In particular, OTA put an end to all disputes which it had with the Algerian authorities

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<sup>812</sup> See Share Purchase Agreement between OTH, VimpelCom and the FNI, 18 April 2014, Exh. R-266.

<sup>813</sup> Joint Letter from the Parties of 18 April 2014 to the Arbitral Tribunal in PCA Case No. 2012-20, Exh. R-59.

<sup>814</sup> See Share Purchase Agreement between OTH, VimpelCom and the FNI, 18 April 2014, Exh. R-266, Art. 8.1(c).

and withdrew on 31 January 2015 from the proceedings before the Algerian courts.<sup>815</sup> On the same day, OTH and Algeria addressed the “Renunciation Letter” informing the PCA tribunal in the OTH Arbitration that they had “finally settled their dispute referred to arbitration” in that proceeding.<sup>816</sup> On 12 March 2015, the PCA tribunal issued a consent award recording the above agreement between the parties, which put an end to the OTH Arbitration.<sup>817</sup>

523. There is no allegation by the Claimant that the settlement was made in suspicious circumstances (such as that it was forced by Algeria upon OTH or was entered into by OTH's board in collusion with Algeria). Moreover, it comes as no surprise that it was entered into, *inter alia*, by OTH who also undertook a number of obligations on behalf of OTA. As already mentioned, OTH was the “historical” controlling shareholder of OTA, to which the GSM License was granted in 2001 (in the name and on behalf of OTA)<sup>818</sup> and which negotiated and concluded the Investment Agreement in 2001 (in the name and on behalf of OTA).<sup>819</sup> Furthermore, it was OTH which in 2009-2010 objected to the measures taken vis-à-vis OTA and which sent the first Notice of Dispute on 2 November 2010. At all times, OTH was and remained the direct and controlling shareholder of OTA.<sup>820</sup> For all of those reasons, it was thus entirely logical for Algeria to negotiate with that foreign investor in the vertically integrated chain of companies.
524. In these circumstances, the Claimant cannot bring claims in this arbitration that OTH decided to settle, as the settlement clearly resolved the dispute that the Claimant has brought before this Tribunal as is shown by the comparison of the notices of disputes above. The existence of a settlement agreement does not change the Tribunal's conclusions in relation to the OTH Arbitration, as the settlement stands in lieu of the investment treaty tribunal's award which would have been forthcoming in that arbitration. The settlement agreement puts an end to the dispute arising from Algeria's measures in the same manner as the award would have ended the dispute. In the absence of harm which it incurred itself to the exclusion of OTH, the Claimant cannot take over the dispute that OTH has settled. In this respect, the content of the settlement, whether beneficial or detrimental to OTH/OTA, is irrelevant. What matters is that the claims arising from Algeria's measures have ceased to exist due to the settlement agreement.
525. A contrary conclusion would lead to unreasonable results. Indeed, if, despite a valid settlement reached between the host state and the direct foreign shareholder of the local company

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<sup>815</sup> See OTA's Memorial on the discontinuance of the proceeding before the Council of State, 28 January 2015, Exh. R-297; OTA's Memorial on withdrawal and renunciation to appeal, 29 January 2015, Exh. R-298.

<sup>816</sup> Letter of Renunciation Addressed to the Arbitral Tribunal in PCA Case No. 2012-20 on 31 January 2015, Exh. R-306.

<sup>817</sup> See *Orascom Telecom Holding S.A.E. v. People's Democratic Republic of Algeria*, PCA Case No. 2012-20, Award on Agreed Terms, 12 March 2015, Exh. R-307.

<sup>818</sup> GSM License and Executive Decree No. 01-219, dated 31 July 2001, Exh. C-2, Art. 1.

<sup>819</sup> Investment Agreement entered into on 5 August 2001 between OTH, Oratel (on behalf of OTA) and Algeria, and Executive Decree No. 01-416, 20 December 2001, published in the Official Journal of Algeria on 26 December 2001, including the full text of Investment Agreement, Exh. C-3, p. 1.

<sup>820</sup> See *Organigramme des sociétés*, R-1111.

affected by the disputed measures (also acting on behalf of the local company), an indirect shareholder could bring or continue separate investment claims in relation to the same facts and measures, a respondent state may well never settle a dispute amicably. Indeed, depending on the investment's ownership structure, it would face the risk that other shareholders, present and future, direct and indirect, involved in the dispute or not, could take over the settled dispute. In those circumstances, the provisions of investment treaties which invariably encourage the amicable settlement of a dispute between a state and foreign investors as a preliminary step to the commencement of arbitration proceedings,<sup>821</sup> may well remain dead letter.

526. In conclusion, the settlement agreement entered into between the Algerian FNI, OTH and VimpelCom confirms that the Claimant's claims are inadmissible.

**c. The relevance of the sale of the Claimant's investment**

527. The Claimant argues that the settlement agreement is not opposable to it, among other reasons because it sold its indirect controlling shareholding in OTH to VimpelCom three years before the settlement. The Tribunal cannot follow this argument. The fact that the Claimant sold its investment does not change the conclusions reached above. If anything, it reinforces them.
528. First of all, in the event that the Claimant had decided to remain in control of its investment and OTH had been successful in the OTH Arbitration (a procedure that the Claimant caused OTH to put in motion by causing OTH to send the OTH Notice of Dispute), the Claimant would have had an award rendered in respect of OTH. In the same vein, it would have had the settlement agreement entered into by OTH. In the absence of harm it has suffered itself as opposed to OTH, any separate claims brought by the Claimant based on the same measures would have been inadmissible if it had remained in control of its investment. This being so, the sale of the investment cannot bestow on the seller more rights than it would have had if it had remained as a shareholder.
529. Second, when selling its investment, the Claimant could have carved out from the scope of the sale and reserved for itself the benefit of OTH's claim against Algeria. Absent such a carve out, the claim exercised by a subsidiary will benefit the buyer of the shares. In this case, by selling the shares in a company granting control over OTH (Weather Investments), the Claimant sold the claim that was attached to the shares in OTH.

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<sup>821</sup> See for instance Egypt-Algeria BIT, Art. 7(1); Italy-Algeria, Art. 8(1); and BLEU-Algeria BIT, Exh. C-658, Art. 9(1).



530. This point was accepted by Mr. Sawiris at the Hearing:

Q. So you accept that you didn't need to sell OTH's claim or OTA's claim when you sold the shares; it goes with the shares, right?

A. Yes.<sup>822</sup>

531. Mr. Sawiris also recognized that the price paid by the buyer must have included the claim to seek redress for Algeria's measures in relation to which OTH had already notified Algeria of a dispute:

PROFESSOR GAILLARD: So as a businessman, if you sell a company which has a big claim in it, the company is worth more than if you sell the company with no claim in it, right?

MR. SAWIRIS: Yes, of course.

Q. Right. So in this particular case, you sold to VimpelCom a company -- or the shares giving control of a company, OTH, which had a big claim against Algeria; correct?

A. Yes.

Q. And that, by necessity, has an impact on the price at which you sell the company; correct?

A. Should be, yes.<sup>823</sup>

532. The same fact was acknowledged by the Claimant's financial and damages expert, Ms. Hardin:

PROFESSOR GAILLARD: And my next question, which is the question I'm asking now, is: when you sell the shares, just the shares -- with no contract, just the shares -- do you take into account when you value the company, as a matter of methodology, do you take into account the claims which exist in this company? Right? So it's a simple question; it can be answered by yes or no.

A. No, it can't, actually.

Q. I'm not going to ask you to evaluate a company like this, which we don't know anything about. As a matter of methodology, I'm just asking you whether, when you sell shares which represent the control of a company, you would sell them --

THE PRESIDENT: I find the question about a sale too close to a legal question. But let me ask it differently. When you value a company, do you take into account the claims as part of the assets that you value when you set a value on the company?

A. Certainly when you're valuing a company, you look at these things. But as far as the assets, you have to understand what's going to the new

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<sup>822</sup> Tr. Day 2, 173:16-19.

<sup>823</sup> Tr. Day 2, 170:3-14.

company and what's not going. I mean, there are potentials for carve-outs, that kind of thing. It's seldom a simple issue.

THE PRESIDENT: Obviously. Assume no carve-out, nothing special, just you value a company. Do you take the claims into account?

A. I would take the claims into account inasmuch as I understood who was going to end up with those claims, yes.<sup>824</sup>

533. This being so, the Parties disagree whether the Claimant retained the right to bring arbitration proceedings against Algeria arising from the events for which OTH had given notice of a dispute in the so-called "Algerian Risk Sharing Agreement" entered into between the Claimant and VimpelCom on 15 April 2011.<sup>825</sup>

534. The Tribunal is unable to find anything in the Algerian Risk Sharing Agreement that would support the view that the Claimant reserved its claim in relation to *past* measures, i.e. the measures that had occurred until April 2011 and which, as already noted several times, were the subject of all three notifications of dispute. By contrast, a plain reading of the agreement shows that the latter allocates risk concerning possible *future* events.

535. In particular, the Risk Sharing Agreement purports to address the scenario in which Algeria were to acquire shares of OTA. The recitals make this clear by expressing the object and purpose of the agreement in the following terms:

"B. The Algerian Government has initiated several actions against OTA and threatened to acquire shares of OTA"

"C. The Parties wish to hereby confirm certain agreements relating to allocation of risks that may result from the actions referred to in B".<sup>826</sup>

536. Other clauses in the agreement confirm that the agreement only relates to uncertain measures lying in the future, and not to past measures.<sup>827</sup> Pursuant to the Risk Sharing Agreement, in the event that Algeria had decided to acquire OTA *after* the sale of the investment by the Claimant to VimpelCom, a mechanism was provided whereby either party owed the other a certain amount of compensation depending on whether the price paid by Algeria was higher or lower than certain price ranges. Importantly, this mechanism of compensation could only be

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<sup>824</sup> Tr. Day 4, 182:18-183:21 (emphasis added).

<sup>825</sup> Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230.

<sup>826</sup> Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, Recitals (emphasis added).

<sup>827</sup> See e.g., Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, Section 1 (defining "Loss of Control Triggering Event" as follows: "the loss by OTH of title or control in respect of a controlling stake in the share capital of OTA or the loss of all or substantially all of OTA's assets as a result of any action by the Algerian Government ... For the avoidance of doubt, for purposes of the definition of Loss of Control Triggering Event, the termination or revocation of OTA's GSM licence, or the related frequency permissions, as a result of any action by the Algerian Government, shall constitute the loss of substantially all of OTA's assets, provided that such termination or revocation has become final and non-appealable in Algeria", emphasis added).

triggered by VimpelCom<sup>828</sup> and was provided for a limited period of 6 months.<sup>829</sup> It is undisputed between the Parties that this mechanism was never activated and thus lapsed.<sup>830</sup>

537. Thus, the Risk Sharing Agreement is not concerned with selling or retaining the right to sue for existing losses in relation to past measures. Therefore, the Tribunal's conclusions that the claim exercised by OTH was transferred to the buyer with the transfer of the shares is unaffected by the content of the Risk Sharing Agreement.

538. In sum, the Claimant's sale of its investment does not affect the Tribunal's conclusion on the inadmissibility of the Claimant's claims reached above.

**d. Whether the initiation of these proceedings also constitutes an abuse of rights**

539. In addition to the reasons discussed above, the Tribunal finds that the Claimant's pursuit of its claims in these proceedings constitutes an abuse of rights under the circumstances.

540. It is undeniable that "the doctrine of abuse has a role to play in the context of certain forms of conduct in investment arbitration", as Prof. Dolzer, the Claimant's international law expert, recognized at the Hearing.<sup>831</sup> The doctrine of abuse of rights prohibits the exercise of a right for purposes other than those for which the right was established. So far, the doctrine has found application in investment jurisprudence mainly in situations where an investment was restructured to attract BIT protection at a time when a dispute with the host state had arisen or was foreseeable.<sup>832</sup> No such situation is present here, as the restructuring of the Weather Group resulting in the Claimant's acquisition of the investment occurred in 2005, long before any dispute with Algeria was foreseeable.

541. However, as a "general principle applicable in international law as well as in municipal law",<sup>833</sup> the prohibition of abuse of rights may equally apply in contexts other than the one just mentioned. Indeed, in the words of Sir Hersch Lauterpacht, "there is no legal right, however

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<sup>828</sup> See Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, Section 2 ("VimpelCom shall have the option at any time and at its sole discretion, from the Closing Date to the six month anniversary of the Closing Date, to implement the Algerian Risk Sharing Mechanism with Weather II by sending a written notification to that effect to Weather II. If VimpelCom has not sent such written notification to Weather II within such period, the Algerian Risk Sharing Mechanism shall not apply.").

<sup>829</sup> See Algerian Risk Sharing Agreement by and between VimpelCom and Weather II, 15 April 2011, Exh. C-230, Section 2.

<sup>830</sup> C-PHB1, para. 168 ("VimpelCom decided not to implement the Risk Sharing Agreement and the agreement accordingly lapsed by its own terms"); R-PHB1, fn. 458.

<sup>831</sup> Tr. Day 4 (Dolzer), 91:14-15.

<sup>832</sup> See, among many, *Mobil v. Venezuela*, paras. 169 ff.; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, Exh. RL-268, paras. 180 ff (with further reference to cases); *Lao Holdings N.V. v. the Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, Exh. CLA-277.

<sup>833</sup> Robert Kolb, "Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, General Principles of Procedural Law" in A Zimmermann, K Oellers-Frahm, C Tomuschat, CTams, M Kashgar, D Diehl (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2<sup>nd</sup> ed. 2012), p. 904.

well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".<sup>834</sup>

542. In particular, an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state.<sup>835</sup> It goes without saying that structuring an investment through several layers of corporate entities in different states is not illegitimate. Indeed, the structure may well pursue legitimate corporate, tax, or pre-dispute BIT nationality planning purposes. In the field of investment treaties, the existence of a vertical corporate chain and of treaty protection covering "indirect" investments implies that several entities in the chain may claim treaty protection, especially where a host state has entered into several investment treaties. In other words, several corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm.
543. In the Tribunal's opinion, this conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled.<sup>836</sup> The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.
544. With these considerations in mind, the Tribunal reverts to the facts of this case. At the Hearing, Mr. Sawiris himself recognized that he used the protection granted by Algeria in the

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<sup>834</sup> Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 164, also cited in *Mobil*, Jurisdiction, para. 172.

<sup>835</sup> One could also refer to *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, Exh. RL-75, which although in a different context (treaty claims v. contract claims) and based on a different legal theory (collateral estoppel or issue preclusion known to common law jurisdictions), essentially relies on the same rationale of avoiding that claims involving the same economic damage be adjudged twice.

<sup>836</sup> This conclusion is without prejudice to the treaty protection that may be available to non-controlling, minority shareholders.

different treaties at the various layers of the chain, for strategic reasons depending on the circumstances:

[MR. SAWIRIS:] So when I was defending the interests of Orascom Telecom [Holding] [OTH] only, we would use the Egyptian treaty, because that's the instance now that is corresponding, and it's the direct. [...] Then when things start to go worse, you say, "Listen, guys, it's not go to end up there. There is an Italian treaty, so the mother company can go". Then when I sell under the gun – and again I come to the different nature of my claim [...] I used the Luxembourg treaty.<sup>837</sup>

545. Indeed, as explained by Mr. Sawiris, the Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally – after selling the investment – it pursued yet another investment treaty proceeding in its own name for the same investment (its past shareholding in OTA) in relation to the same host state measures and the same harm. Doing so, the Claimant availed itself of the existence of various treaties at different levels of the vertical corporate chain using its rights to treaty arbitration and substantive protection in a manner that conflicts with the purposes of such rights and of investment treaties. For the Tribunal, this conduct must be viewed as an abuse of the system of investment protection, which constitutes a further ground for the inadmissibility of the Claimant's claims and precludes the Tribunal from exercising its jurisdiction over this dispute.

**e. Conclusive remarks**

546. The Tribunal wishes to stress that the analysis carried out above concerns the *admissibility* of the claims for which relief is sought in this arbitration, as opposed to the merits of the claims in terms of liability or quantum. Furthermore, the Tribunal's conclusions on the inadmissibility of the claims are the result of the peculiar facts of the case, in which (i) the group of companies of which the Claimant was part was organized as a vertical chain; (ii) the entities in the chain were under the control of the same shareholder; (iii) the measures complained of by the various entities in the chain were the same and thus the dispute notified to Algeria by those entities was in essence identical; and (iv) the damage claimed by the various entities was, in its economic essence, the same.
547. It is true that tribunals in the past have adopted different approaches in relation to constellations that may show some similarities with the present case. In particular, the tribunals in *CME v. Czech Republic* and *Lauder v. Czech Republic* allowed the claims under different investment treaties to proceed, despite the fact that both sets of proceedings were based on the same facts and sought reparation for the same harm. The tribunals then reached contradicting outcomes, which was one of the reasons for which these decisions attracted wide criticism. This said, these cases should be placed in the context of their procedural history, in which the respondent had refused several offers to consolidate or otherwise

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<sup>837</sup> Tr. Day 2, 189:21-190:13.

coordinate proceedings.<sup>838</sup> Moreover, it cannot be denied that in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including on the application of the principle of abuse of rights (or abuse of process), as was recalled above. The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties.

548. In conclusion, for the reasons set out above, the Claimant's claims are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute. Given this holding, the Tribunal can dispense with examining the other objections presented by Algeria and summarized in section V.D.1-3 above, as a determination on those objections would not change the outcome of the case.

## **E. WHETHER THE ACTS OF ENTV ARE ATTRIBUTABLE TO ALGERIA**

### **1. The Respondent's position**

549. The Respondent contends that the acts of the state-owned television provider ENTV (also referred to as EPTV by the Respondent) are not attributable to Algeria.<sup>839</sup> ENTV is not an organ of the state pursuant to Article 4 of the ILC Articles on State Responsibility,<sup>840</sup> nor can it be considered an entity exercising elements of governmental authority under Article 5 of the ILC Articles.<sup>841</sup> It cannot be deemed either to have acted on the instructions of, or under the direction or control of the Algerian state pursuant to Article 8 of the ILC Articles.<sup>842</sup>
550. For the Respondent, questions of attribution concern jurisdiction and not the merits.<sup>843</sup> The Respondent invokes *Hamester v. Ghana*, where the tribunal noted that "the question of attribution looks more like a jurisdictional question".<sup>844</sup> The Respondent notes that the *Hamester* tribunal decided to deal with attribution at the merits stage solely for practical reasons.<sup>845</sup>

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<sup>838</sup> See *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, Exh. CLA-71; paras. 173, 178; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, Exh. CLA-22; para. 412.

<sup>839</sup> Memorial on Preliminary Objections, paras. 256-258; Reply, paras. 366-377.

<sup>840</sup> Reply, paras. 366-368.

<sup>841</sup> Reply, paras. 369-374.

<sup>842</sup> Reply, paras. 375-376.

<sup>843</sup> Reply, paras. 362-365.

<sup>844</sup> Reply, para. 362, discussing *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Exh. CLA-170, para. 143.

<sup>845</sup> Reply, para. 362, fn. 545, discussing *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Exh. CLA-170, para. 144.

551. The Respondent further argues that arbitral tribunals have confirmed that the issue of attribution must be examined at the jurisdictional stage where it may be resolved “based upon a limited enquiry” or has been sufficiently discussed by the parties.<sup>846</sup>

552. In this case, the attribution of the acts of ENTV to Algeria does not require the review of a large number of documents and can thus be easily dealt with.<sup>847</sup> For these reasons, the Respondent requests that the Tribunal decline jurisdiction over the claims involving acts of ENTV.<sup>848</sup>

## 2. The Claimant’s position

553. The Claimant’s position is that the objection concerning the attribution of ENTV’s actions pertains to the merits of the dispute and not to jurisdiction or admissibility, unless it is “manifest that the entity involved had no link whatsoever with the State”.<sup>849</sup>

554. In this case, the Claimant submits, the evidence shows that ENTV is a state-owned entity with close financial and operational ties with the state. It is, therefore, appropriate to deal with the attribution of ENTV’s acts with the merits of the dispute in order to allow an in-depth analysis of all of the parameters of its relationship with the state.<sup>850</sup> This is the more so as the assessment of the Respondent’s responsibility for ENTV’s conduct as a matter of international law will require a careful examination of many documents in their proper context.<sup>851</sup>

555. In these circumstances, the Claimant concludes that the Tribunal cannot decide this issue on the basis of the Parties’ submissions on preliminary objections without the benefit of further pleadings and evidence. The Tribunal should thus postpone this issue until the merits phase.<sup>852</sup>

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<sup>846</sup> Reply, para. 363, discussing *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, Exh. CLA-198, and *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, Exh. CLA-210.

<sup>847</sup> Reply, para. 364; R-PHB 1, para. 167.

<sup>848</sup> Reply, para. 377.

<sup>849</sup> Counter-Memorial, para. 147; and Rejoinder, paras. 300-301, discussing *Noble Energy, Inc. and Machalapower CIA. LTDA. v. Republic of Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, Exh. CLA-189, para. 166; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Exh. CLA-176, para. 85 (noting that “[a]tribution] is not for the Tribunal at the jurisdictional stage to examine” but that “[a]n exception is made in the event that it is manifest that the entity involved has no link whatsoever with the State”); *Saipem S.p.A. v. Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, Exh. CLA-261, para. 144 (confirming that “it is not for the Tribunal at the jurisdictional stage to examine whether the acts complained of give rise to the State’s responsibility, except if it were manifest that the entity involved had no link whatsoever with the State”); *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Exh. CLA-170, para. 144 (“In any event, whatever the qualification of the question of attribution, the Tribunal notes that, as a practical matter, this question is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State”); *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, Exh. CLA-215, paras. 276-278 (concurring with the observations of the tribunal in *Hamester v. Ghana*).

<sup>850</sup> Rejoinder, para. 301.

<sup>851</sup> Rejoinder, para. 305.

<sup>852</sup> Counter-Memorial, para. 147; Rejoinder, para. 306; C-PHB 2, para. 113.

### 3. Analysis

556. In light of the Tribunal's conclusion reached in section V.D.4 above according to which the Claimant's claims are inadmissible, the Tribunal can dispense with resolving this additional objection, as a determination on this point would not change the outcome of the case.

#### F. WHETHER THE TRIBUNAL HAS JURISDICTION OVER THE CONTRACT CLAIMS BASED ON THE INVESTMENT AGREEMENT

##### 1. The Respondent's position

557. The Respondent argues that the Tribunal lacks jurisdiction over the Claimant's "purely contractual claims" relating to the Investment Agreement.<sup>853</sup>

558. As a preliminary matter, the Respondent submits that it is generally accepted that a BIT tribunal has no jurisdiction over a pure contract claim.<sup>854</sup> This applies to the claims based on the tax reassessments initiated against OTA and the suspension of OTA's bank domiciliation by the Bank of Algeria, which are manifestly grounded on the obligations contained in the Investment Agreement.<sup>855</sup>

559. Specifically, the Tribunal lacks jurisdiction over these claims for three main reasons. First, the parties to the Investment Agreement, i.e. OTA and the Respondent, have finally settled the contract claims arising out of the Investment Agreement.<sup>856</sup> Second, the Tribunal's jurisdiction does not extend to breaches of a contract to which the Claimant is not a party.<sup>857</sup> Third, as the Respondent further explains in its separate admissibility objection, the claims cannot fall within the umbrella clause invoked by the Claimant, be it the one contained in the Treaty or an umbrella clause of a different investment treaty made applicable by operation of the Treaty's MFN clause. Indeed, an umbrella clause only covers contract obligations entered into with the foreign investor itself, and not with a subsidiary.

##### 2. The Claimant's position

560. The Claimant submits that each of its claims in connection with the Investment Agreement is for a violation of a provision of the BIT.

561. The Claimant does not dispute that a treaty tribunal has no jurisdiction over contract breaches that do not at the same time constitute breaches of the substantive standards of the BIT.<sup>858</sup> However, the claims in relation to the Investment Agreement are for violations of the Respondent's umbrella clause obligations under Article 2(3) of the Algeria-Denmark bilateral

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<sup>853</sup> Memorial on Preliminary Objections, paras. 259-269; Reply, paras. 378-391.

<sup>854</sup> Reply, para. 380.

<sup>855</sup> Reply, para. 378; R-PHB 1, para. 169.

<sup>856</sup> Reply, paras. 382-284.

<sup>857</sup> Reply, paras. 385-387, discussing *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, Exh. CLA-144.

<sup>858</sup> Rejoinder, para. 308.



investment treaty via the MFN clause in Article 10 of the BIT, as well as for violations of the Claimant's legitimate expectations with respect to the Investment Agreement as protected by the fair and equitable treatment standard in the BIT.<sup>859</sup>

562. The Claimant observes that investment tribunals have repeatedly held that an umbrella clause elevates contract claims to treaty claims.<sup>860</sup> The umbrella clause in Article 2(3) of the Algeria-Denmark bilateral investment treaty covers "any obligation [the state] may have entered into with regard to investments of investors". The Respondent's obligations under the Investment Agreement thus falls within the scope of the umbrella clause with the result that any breach of the Investment Agreement constitutes a breach of the BIT.<sup>861</sup>
563. The Claimant maintains that it is also well established that contractual commitments undertaken by the state may give rise to legitimate expectations protected under international law.<sup>862</sup> As the Respondent's measures in violation of the Investment Agreement frustrated the Claimant's legitimate expectations, they amount to a breach of the FET standard guaranteed in Article 3(1) of the BIT.<sup>863</sup>
564. Furthermore, the Respondent's argument that tribunals generally refuse to exercise jurisdiction over breaches of contract to which an entity other than the claimant is a named party is incorrect. The Claimant cites to *Continental Casualty v. Argentina* and *EDF v. Argentina* for the proposition that an umbrella clause may extend to contract obligations entered with persons or entities other than the foreign investor itself.<sup>864</sup>
565. Finally, the Respondent's position according to which the claims arising from the Investment Agreement have been settled by the parties to that agreement, i.e., OTA and Algeria, is unavailing, as the Claimant is not privy to that settlement. In addition, the Claimant seeks compensation for harm that was not suffered by OTA or OTH and could therefore not have been remedied by any settlement concluded between OTA or OTH and the Respondent.<sup>865</sup>

### 3. Analysis

566. In light of the Tribunal's conclusion reached in section V.D.4 above pursuant to which the claims before it are inadmissible, the Tribunal may dispense with resolving this additional objection, as a determination on this point would not change the outcome of the case.

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<sup>859</sup> Rejoinder, para. 308; C-PHB 2, para. 114.

<sup>860</sup> Rejoinder, paras. 309-311.

<sup>861</sup> Rejoinder, para. 311.

<sup>862</sup> Rejoinder, para. 312.

<sup>863</sup> Rejoinder, para. 312.

<sup>864</sup> Rejoinder, paras. 314-315, discussing *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, Exh. CLA-28, and *EDF Int'l S.A., SAUR Int'l S.A., and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, Exh. CLA-36. See also C-PHB 2, para. 116.

<sup>865</sup> Rejoinder, para. 316.

**G. WHETHER THE CLAIMANT’S UMBRELLA CLAUSE CLAIMS ARE ADMISSIBLE**

**1. The Respondent’s position**

567. The Respondent argues that the umbrella clause claims in relation to the Investment Agreement, the GSM License, and the Investment Code are inadmissible.

568. The Respondent first submits that the umbrella clause contained in Article 8(2) of the BIT only applies to commitments made by one of the Contracting Parties to the investors of the other Contracting Parties.<sup>866</sup> In other words, the umbrella clause in Article 8(2) protects specific as opposed to general commitments.<sup>867</sup> It is also limited to commitments made to the investor itself, rather than to its subsidiary or its investment.<sup>868</sup>

569. Algeria bases its argumentation on the wording of Article 8 of the BIT, entitled “specific agreements”, which reads as follows:

1. Investments made pursuant to a specific agreement concluded between one Contracting Party and investors of the other Party shall be governed by the provisions both of this Agreement and of the specific agreement.

2. Each Contracting Party shall at all times ensure respect for the commitments which it has made to investors of the other Contracting Party.<sup>869</sup>

570. The Respondent invokes investment awards, among which *Burlington*, for the proposition that the scope of an umbrella clause thus phrased does not extend to non-signatories to the specific agreement.<sup>870</sup>

571. In this case, neither the Investment Code (which is an instrument of general nature, and does not entail a specific commitment)<sup>871</sup> nor the Investment Agreement and the GSM License (which were signed with and granted to OTA) fall within the scope of the umbrella clause in Article 8(2) of the BIT.<sup>872</sup>

572. Moreover, it is the Respondent’s submission that the Claimant is not entitled to rely upon the MFN clause in Article 10 of the BIT to invoke the allegedly more favorable umbrella clause in the Algeria-Denmark bilateral investment treaty.<sup>873</sup> It considers that the scope of the MFN clause in Article 10 of the BIT is limited to “treatment of investments [...] in the territory of the other Party” and contends that “this restrictive language” distinguishes Article 10 from the MFN

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<sup>866</sup> Memorial on Preliminary Objections, paras. 295-307; Reply, paras. 436-439.

<sup>867</sup> Memorial on Preliminary Objections, paras. 298-301.

<sup>868</sup> Memorial on Preliminary Objections, paras. 302-304.

<sup>869</sup> BIT, Exh. C-658, Art. 8.

<sup>870</sup> Memorial on Preliminary Objections, paras. 305-306; R-PHB 1, para. 175.

<sup>871</sup> Memorial on Preliminary Objections, paras. 315-319.

<sup>872</sup> Memorial on Preliminary Objections, paras. 320-321.

<sup>873</sup> Memorial on Preliminary Objections, paras. 308-314; Reply, paras. 440-450.

clauses at issue in those cases in which tribunals have allowed the use of an MFN clause to import a substantive obligation in a different treaty.<sup>874</sup>

## **2. The Claimant's position**

573. The Claimant submits that it is entitled to rely upon the MFN clause in Article 10 of the BIT to invoke more favorable standards of protection in other investment treaties concluded by Algeria, including in particular the umbrella clause in Article 2(3) of the Algeria-Denmark bilateral investment treaty.<sup>875</sup>

574. For the Claimant, the question whether the MFN clause in Article 10 of the BIT applies to umbrella clause obligations is one of treaty interpretation and depends upon the specific terms of the relevant treaty.<sup>876</sup> The Claimant underscores that the Respondent omits crucial language in Article 10 of the BIT, which provides as follows:

In all matters relating to the treatment of investments, investors of each Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Party.<sup>877</sup>

575. Numerous tribunals have held, so says the Claimant, that the ordinary meaning of the terms “all matters” points to a broad interpretation. The reference to “all matters concerning the treatment of investments” confirms that the scope of application of Article 10 extends to all substantive standards in the BIT, including the umbrella clause in Article 8(2).<sup>878</sup>

## **3. Analysis**

576. In light of the Tribunal's conclusion reached in section V.D.4 above according to which the claims in this arbitration are inadmissible, the Tribunal may dispense with resolving this additional objection, as a determination on this point would not change the outcome of the case.

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<sup>874</sup> Reply, para. 448 (“*relatives au traitement des investissements [...] sur le territoire de l'autre Partie*”; “*Cette rédaction restrictive permet de distinguer l'article 10 des autres clauses*”).

<sup>875</sup> Counter-Memorial, paras. 142-143; Rejoinder, para. 317; C-PHB 2, paras. 119-120. Article 2(3) of the Denmark-Algeria BIT reads as follows:

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

See Agreement Between the Government of the Kingdom of Denmark and The Government of the People's Democratic Republic of Algeria Concerning the Promotion and Reciprocal Protection of Investments, signed 25 January 1999 (entered into force 15 July 2005), Exh. C-863, Art. 2(3).

<sup>876</sup> Rejoinder, para. 319.

<sup>877</sup> BIT, Exh. C-658, Art. 10.

<sup>878</sup> Rejoinder, paras. 320-323.

## VI. COSTS

577. Both Parties request an award of costs in respect of the legal fees and expenses and the costs incurred in connection with this proceeding and have filed submissions quantifying their fees and costs.<sup>879</sup>
578. The Claimant's legal fees and expenses, including expert fees and costs, amount to US\$ 20,673,811.30, out of which US\$ 10,144,900.68 were incurred in respect of the phase of the proceedings dealing with the Respondent's jurisdiction and admissibility objections (the "preliminary phase").<sup>880</sup> In addition, the Claimant has advanced US\$ 674,975.00 on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses. The Claimant requests that the Tribunal order the Respondent to bear all of the Claimant's costs incurred during the preliminary phase of this proceeding.<sup>881</sup>
579. The Respondent has incurred legal fees and expenses in the amount of US\$ 5,685,622.02 and expert fees and costs in the amount of €116,764.32.<sup>882</sup> In addition, it has advanced US\$ 674,975.00 on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses. The Respondent seeks an award of the entirety of these costs.<sup>883</sup>
580. The Claimant argues that a costs award is warranted because a prevailing party is entitled to such an award under the principle of costs follow the event and because the Respondent has conducted the arbitration in a manner which has led to delay and increased costs. In particular, the Claimant contends that the Tribunal should take into account the following factors in allocating costs in favor of the Claimant: (i) The Respondent repeatedly expanded the scope of the preliminary phase of these proceedings by raising new objections, even as late as in its Post-Hearing Brief;<sup>884</sup> (ii) the Respondent made numerous far-reaching document requests, which greatly increased the Claimant's costs;<sup>885</sup> and (iii) the Respondent failed to comply with the Tribunal's orders granting the Claimant's document requests.<sup>886</sup> The Claimant submits that in light of the history and the nature of the preliminary phase of this proceeding, its costs are reasonable and "not significantly higher than the costs Respondent incurred during the same period".<sup>887</sup>

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<sup>879</sup> See Claimant's Submission on Costs, 4 December 2015 ("Claimant's Submission on Costs"); Claimant's Reply Submission on Costs, 18 December 2015 ("Claimant's Reply Submission on Costs"); Respondent's Submission on Costs, 4 December 2015 ("Respondent's Submission on Costs"); Respondent's Reply Submission on Costs, 18 December 2015 ("Respondent's Reply Submission on Costs").

<sup>880</sup> See Claimant's Updated Costs, 3 March 2017, p. 1.

<sup>881</sup> Claimant's Submission on Costs, para. 23.

<sup>882</sup> Respondent's Updated Costs, 3 March 2017, para. 2.

<sup>883</sup> Respondent's Submission on Costs, para. 29.

<sup>884</sup> Claimant's Submission on Costs, paras. 9-12. Claimant's Submission on Costs, para. 9.

<sup>885</sup> Claimant's Submission on Costs, paras. 13-14.

<sup>886</sup> Claimant's Submission on Costs, paras. 15-20.

<sup>887</sup> Claimant's Submission on Costs, paras. 21-22; Claimant's Reply Submission on Costs, paras. 17-18.

581. For its part, the Respondent argues that the Claimant should bear all costs incurred by the Respondent on the basis of the “nature of the preliminary objections raised by the Respondent” and “the conduct adopted by the Claimant throughout the proceeding”.<sup>888</sup> In particular, the Respondent contends that, in allocating costs in favor of the Respondent, the Tribunal should take into account the Claimant’s conduct in the negotiation of Procedural Order No. 1, the document production phase, and the negotiation of the confidentiality agreement.<sup>889</sup>
582. Under Article 61(2) of the ICSID Convention, “the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid”. This provision establishes the Tribunal’s discretion in allocating ICSID arbitration costs and the Parties’ costs, including legal fees.
583. Two approaches have been adopted by ICSID tribunals in awarding costs. The first consists in apportioning ICSID costs in equal shares and ruling that each party shall bear its own costs. The second applies the principle “costs follow the event”, such that the losing party bears the costs of the proceedings, including those of the other party, or that the parties share in the costs proportionately to their success or failure.
584. In reaching its decision on costs in this case, the Tribunal has in particular considered the following circumstances. First, the outcome of the case is ultimately favorable to the Respondent, as the Tribunal has decided that all of the Claimant’s claims are inadmissible. Second, the Tribunal has also found that the Claimant’s pursuit of the claims in this arbitration amounts to an abuse of rights. These two reasons justify that at least a significant proportion of the overall costs be borne by the Claimant. At the same time, the Claimant has prevailed on the Respondent’s objections on *ratione personae* and *ratione materiae* jurisdiction. Considering the length of the submissions and the time devoted at the Hearing to those two objections, the costs incurred in relation to these two objections were certainly significant. While these objections were not frivolous and the Respondent was entitled to raise them, they were ultimately rejected, and it is thus fair that the outcome of such objections be taken into consideration in the Tribunal’s decision on cost allocation.
585. For the foregoing reasons, in the exercise of its discretion under Article 61(2) of the ICSID Convention, the Tribunal considers it appropriate to apportion the costs in the following manner. First, the Claimant shall pay the entirety of the costs of the proceedings, i.e., the fees and expenses of the Arbitral Tribunal and the ICSID costs. The Claimant shall thus reimburse the advances that the Respondent has made to ICSID. In this latter respect, it is noted that the ICSID Secretariat will provide the Parties with a statement of the case account in due course.

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<sup>888</sup> Respondent’s Submission on Costs, paras. 17, 26 (“*la nature des objections préliminaires soulevées par la Défenderesse et au comportement adopté par la Demanderesse tout au long de la procédure*”).

<sup>889</sup> Respondent’s Submission on Costs, para. 26.

Second, the Claimant shall pay 50% of the fees and expenses which the Respondent has incurred in connection with this arbitration, i.e. US\$ 2,842,811.01 plus ~~€~~58,382.16. In this respect, the Tribunal considers that the Respondent's costs appear reasonable considering the complexity of the case.

## **VII. LANGUAGES OF THIS AWARD**

586. In accordance with Section 8 of Procedural Order No. 1, the Tribunal renders this Award in both English and French. This being so, it notes that English is the language in which this Award was originally drafted. Hence, in the event of any discrepancy between the two versions, the English version must be deemed to reflect the meaning intended by the Tribunal.

## **VIII. DECISION**

587. For the reasons set forth above, the Tribunal decides as follows:

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



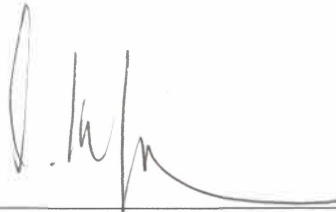
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Prof. Albert Jan van den Berg  
Arbitrator  
Date: May 13, 2017



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Prof. Brigitte Stern  
Arbitrator  
Date: May 19, 2017



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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal  
Date: May 25, 2017