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International Arbitration Case Law
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Award Name and Date: Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35) – Decision on Annulment – 17 September 2020

Case Report by: Aikaterini Strantzali**, Editor Ignacio Torterola***

Summary: Following the 2017 Award in *Orascom TMT Investments v. People's Democratic Republic of Algeria*, OTMTI initiated annulment proceedings under Article 52 of the ICSID Convention for its partial annulment. OTMTI argued that the Tribunal had seriously departed from fundamental rules of procedure, manifestly exceeded its powers and failed to state reasons upon which the Award had been based. These three reasons were raised in twin combinations with respect to the Tribunal's acceptance of the, allegedly, untimely raised objections, its holding that OTMTI's right to arbitrate had been extinguished given both OTH's (Orascom Telecom Holding S.A.E.) filing of a notice of dispute and the subsequent settlement in that arbitration and its dismissal of the Claimant's claims on the basis of abuse of rights. The *ad hoc* Committee denied OTMTI's request for partial annulment in its entirety.

Main Issues: Annulment proceedings – Serious departure from a fundamental rule of procedure – Manifest excess of powers – Failure to state reasons – Admissibility of claims – Abuse of rights – Multiple proceedings brought by one controlling shareholder of entities belonging to the same vertical corporate chain

Tribunal: H.E. Judge Peter Tomka (President of the *ad hoc* Committee), Ms. Bertha Cooper-Rousseau (Member of the *ad hoc* Committee) and Prof. Dr. Klaus Sachs (Member of the *ad hoc* Committee)

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Respondent's Counsel: Prof. Emmanuel Gaillard, Dr. Yas Banifatemi, Mr. Benjamin Siino, Mr. Pierre Viguier, Ms. Teresa Vega, Mr. Peter Petrov (Shearman & Sterling LLP, Paris)

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However, in case of doubt, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Katerina can be reached by email at: k.strantzali@gmail.com.

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Digest:

1. Procedural History

On 28 September 2017, Algeria filed an application seeking the partial annulment and stay of enforcement of the Award in the arbitration between Orascom TMT Investments S.à r.l., the Claimants in the original proceedings ('**OTMTI**' – formerly 'Weather Investments II', now the '**Applicant**') and the People's Democratic Republic of Algeria ('**Algeria**' or the '**Respondent**') and collectively referred to as the '**Parties**' (¶¶ 2-4, 6). The underlying arbitration, which concerned an investment to build a mobile telephone system in Algeria, was based on the 1991 Algeria-Belgium-Luxembourg Economic Union BIT ('BIT') (¶¶ 1, 74).

On 2 October 2017, the ICSID Secretary-General notified the Parties that the enforcement of the Award was provisionally stayed (¶ 7) and, on 26 October 2017, of the constitution of the *ad hoc* Committee composed of: Judge Peter Tomka (Slovakia), Ms. Bertha Cooper-Rousseau (The Bahamas) and Professor Klaus Sachs (Germany) (¶¶ 10-13). On 10 November 2017, the Applicant submitted its Request for Continuation of the Stay of Enforcement (¶ 22). On 24 November 2017, the Respondent filed its Response to the Request (¶ 30), on 1 December 2017, the Applicant its Reply (¶ 32) and, on 8 December 2017, the Respondent submitted a Rejoinder to the Applicant's Reply (¶ 34). A first hearing on the Request for Continuation of the Stay was held on 12 December 2017 (¶ 35). On 12 March 2018, the Committee issued its unanimous Decision on the Stay of Enforcement of the Award deciding the extension of the stay of enforcement of the Award until the Decision on the Annulment Application, subject to the provision of a letter of guarantee by Algeria (¶ 39).

On 15 March 2018, the Applicant filed its Memorial on Partial Annulment (¶ 40). On 15 June 2018, the Respondent filed its Counter-Memorial on Partial Annulment (¶ 50). The Applicant's Reply and the Respondent's Rejoinder on Annulment were filed respectively on 12 October 2018 and 15 February 2019 (¶¶ 54, 55). The Committee held a Hearing on Annulment on 27-28 May 2019 (¶ 66). On 6 and 20 August 2019, the Parties filed their Submissions and Replies of Costs and the proceedings were closed on 15 June 2020 (¶¶ 70, 71). The Decision on Annulment was dispatched to the Parties on 17 September 2020.

2. Relevant Facts and the Award

The Award was rendered on 31 May 2017 (¶ 73). The Tribunal focused solely on matters of jurisdiction and admissibility and the Respondent's preliminary objections and found that it was precluded from exercising jurisdiction deeming the claims inadmissible (¶ 75). The particular facts of the case were central to its decision (¶¶ 76, 89) and especially: *first*, the submission of two parallel notices of dispute by OTH and Weather Investments against Algeria and the subsequent settlement reached in the OTH arbitration and *second*, the fact that the person filing those notices, Mr. Sawiris, was the controlling shareholder of those entities, which constituted a vertically integrated chain of companies (¶¶ 80, 81). Taking these into consideration, the Tribunal concluded that the dispute in the three proceedings, as well as the damages sought, were effectively one and the same (¶¶ 80-85, 89).

The Tribunal decided that the Claimant shall reimburse the Respondent the amount the Respondent deposited with ICSID for the costs of the arbitration and pay 50% of the fees and expenses which the Respondent incurred in connection with the arbitration (¶¶ 5, 92).

3. Parts of the Award Relevant to the Annulment

The inadmissibility of the claims had been grounded on two premises, which the Applicant sought to reverse having raised no issue with the Tribunal's conclusions on jurisdiction (¶¶ 94, 95):

3.1 Preclusive effect of OTH's Notice of Dispute

The first premise was the fact that three companies of the vertical corporate chain, i.e. OTH, Weather Investments and OTMTI, had initiated arbitration proceedings against Algeria that dealt with the very same facts and measures (¶ 96).

While the Tribunal accepted that, in theory, each entity has an individual right to bring a dispute before an arbitral panel (¶ 98), in practice, its claims may become inadmissible, if the harm is fully repaired in proceedings brought by another member of the vertical chain (¶ 99). Considering the position of Mr. Sawiris as the controlling shareholder in the afore-mentioned companies, the Tribunal emphasised the importance of OTH's Notice of Dispute in declaring OTMTI's claims inadmissible (¶¶ 97, 100). Thereupon, the Tribunal assessed OTMTI's heads of damages to examine whether these concerned losses not incurred by OTH (¶ 101) reaching the conclusion that this was not the case (¶ 104). Lastly, the Award stated that the outcome in the OTH arbitration reinforced the conclusion on inadmissibility as the dispute arising from Algeria's measures ceased to exist in the wake of the settlement (¶¶ 105, 108) and that OTMTI's sale of indirect controlling shareholding in OTH to VimpelCom did not alter its conclusions, but on the contrary, reinforced them (¶ 109).

3.2 Abuse of rights

Furthermore, the Tribunal based its conclusion on the doctrine of abuse of rights (¶ 111). In light of a statement by Mr. Sawiris during the Hearing, the Tribunal opined that OTMTI's claims should be declared inadmissible as the entity had caused OTH and Weather Investments to bring or threaten to bring claims against Algeria and then, initiated in its own name arbitration proceedings in relation to the same measures and incurred losses (¶¶ 112-114).

In reaching its conclusion, the Tribunal placed emphasis on the particular facts of the case, namely the organisation of the companies in a vertical chain, their being under the control of the one and the same shareholder and the fact that the measures complained of and the damages sought being identical (¶ 115).

4. Discussion on the Applicable Legal Standards

4.1 General Framework for Annulment

The Committee recalled the Background Paper on Annulment for the Administrative Council of ICSID, which effectively summarizes all principles developed in the course of multiple annulment proceedings (¶ 128) and noted that the Applicant's partial annulment request

invokes three grounds for annulment: Article 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention (¶ 130).

4.2 Art. 52(1)(d): Serious departure from a fundamental rule of procedure

In the Applicant's view, Rule 41(1) of the Arbitration Rules had not been respected and by extension, the Applicant had not had the full opportunity to rebut an objection raised belatedly in the arbitration (¶¶ 131-133). The Respondent argued that Rule 41(1) has not been stringently applied by arbitral tribunals and *ad hoc* committees (¶ 135) and did not amount to a fundamental rule of procedure. Moreover, the Respondent set down the limits to the adversarial principle on the basis of a tribunal's powers and functions (¶ 136).

The Committee maintained that, while it was not in dispute that the right to be heard is a fundamental rule of procedure (¶ 144), a party cannot request an annulment arguing that it did not thoroughly elaborate on aspects of the applicable legal framework, as set down by the parties, on which the tribunal grounded its decision (¶¶ 145-147).

4.3 Art. 52(1)(b): Manifest excess of powers

The Applicant alleged that the Tribunal failed to both exercise its jurisdiction and apply the proper law and thus, there is an annullable error for manifest excess of powers (¶ 149). Among its arguments on the applicable law, the Applicant asserted that a tribunal cannot devise it and must prove the rules it applies to a dispute (¶¶ 149, 151). The Respondent opposed to that that an *ad hoc* committee is not vested with the power to review *de novo* a decision on jurisdiction inasmuch as its reasoning is "tenable" (¶ 153). Likewise, the Tribunal cannot be reproached for applying rules and principles from the body of law agreed upon by the Parties (¶ 154).

The Committee accepted as an instance covered by Art. 52(1)(b) the failure of a tribunal to exercise jurisdiction, when jurisdiction in fact exists (¶ 155). To establish an annullable error, the Committee needed to ascertain the grounding of the jurisdictional decision on legal reasons (¶ 157).

4.4 Art. 52(1)(e): Failure to state reasons

The Applicant maintained, inter alia, that a tribunal must address the arguments and evidence presented by the parties and most notably, those with the potential of becoming crucial to the decision (¶¶ 158, 160). Moreover, the Applicant highlighted that their summary in the award should not automatically mean that they have been taken into consideration (¶ 159). The Respondent stressed that a tribunal is under no obligation to distinctly address every argument and piece of evidence presented and that, in any event, this would not constitute a ground for annulment (¶¶ 161, 162).

The Committee observed that its powers do not extend to the control of the correctness or persuasiveness of a tribunal's reasoning, but rather intend to guarantee the existence of a rationale that enables the reader to grasp how a tribunal reached its outcome (¶¶ 165, 170).

5. Tribunal's Findings the Annulment of which is sought

5.1. The Acceptance of Respondent's "extinguishment" of rights and abuse of rights objections

The Applicant noted that the Tribunal seriously departed from a fundamental rule of procedure and failed to state reasons in accepting the Respondent's objections on the "extinguishment of OTMTI's rights" and abuse of rights (¶ 174). The Applicant argued that these objections had not been raised in a timely fashion as per the Tribunal's own prior instructions (¶¶ 175, 176) and that their acceptance in the post-hearing procedure resulted in limiting the Applicant's chances to sufficiently rebut them (¶ 179). What is more, the Applicant alleged that it had not waived its right to object to any annullable errors under Article 52(1)(d) considering that the departures were not fully known prior to the Award's issuance and the fact that the Applicant consistently objected to the Respondent's defences (¶¶ 182-184).

The Respondent contented that the adversarial principle and equal treatment of the Parties had been respected throughout the arbitral proceeding stressing the timely manner in which its objections had been raised (¶¶ 186, 187). Moreover, the Respondent stressed the Applicant's full knowledge of the admissibility objections and sufficient opportunity to defend against them (¶¶ 191, 192). Lastly, the Respondent alleged that the Applicant's right to object had been waived pursuant to Rules 27 and 53 of the ICSID Arbitration Rules (¶¶ 194-198).

First, the *ad hoc* Committee agreed that the Applicant could not be deemed to have waived its right to invoke procedural irregularities, as the view that the "extinguishment of rights" and abuse of rights objections were untimely had been emphasized in the Closing Statement, Post-Hearing Briefs and letter to the Tribunal (¶¶ 200-204). Second, the Committee considered that, even though the factual circumstances and legal theories -on which the objections had been based- had evolved in the course of the arbitration, the broader issues of parallel proceedings, preclusion of claims and abuse of rights had been discussed at several stages and hence, were not "new" (¶¶ 205-208). Finally, the Committee turned to the question of whether the right to be heard and of equal treatment had been violated on the basis of four allegations made by OTMTI (¶ 209). The Committee determined that the Applicant's defence had not been impaired, as it had been fully aware of the arguments advanced in the Closing Statement. The Applicant had the chance to brief the Tribunal on these on two occasions, namely the Post-Hearing and the Reply Post-Hearing Briefs, and adduce new evidence, irrespective of whether they chose to avail themselves of the opportunity (¶¶ 212-214, 216, 217). Regarding the citation of two authorities that were not on record, the Committee noted that these served only to establish and define the doctrine of abuse of rights, which was not a point in dispute (¶¶ 224-226). Further, the Tribunal had no responsibility to signal the importance of specific issues and arguments that would potentially weigh in its decision. Hence, the Committee concluded that there was no departure from a fundamental rule of procedure (¶ 232).

5.2 The OTH notice of dispute and the Claimant's right to bring this arbitration

The Applicant maintained that the Tribunal manifestly exceeded its powers and failed to state reasons in denying to exercise jurisdiction validly conferred upon it and ruling that the treaty claims were inadmissible in view of OTH's filing of a notice of dispute and that OTMTI's absence of right to act (¶ 233). Allegedly, the Tribunal did not identify the proper law, but instead, invented new "law", as it provided no legal basis for employing the notion of "*droit d'agir*" or "*intérêt pour agir*" (¶¶ 235, 236). Further, the Applicant submits that the reasons for the Tribunal's ruling were insufficient, contradictory, and internally inconsistent (¶ 237).

The Respondent argued that the Tribunal correctly identified the applicable law on the admissibility matter and upheld the objection and sufficiently established the existence and scope of the "*droit d'agir*" or "*intérêt pour agir*" notion (¶¶ 242-245). Turning to the Award's reasoning, the Respondent asserted that the Tribunal provided full and no contradictory reasons as to why it considered the Claimant to have lost its standing. As to the Applicant's allegation that the Tribunal did not address its arguments and evidence on the effect of OTH's notice of dispute, the Respondent believed that its mere purpose is to contest the reasoning on the merits (¶¶ 246-249).

After recalling the distinction between the notions of jurisdiction and admissibility (¶¶ 254, 255), the Committee clarified that, absent specific provisions on admissibility in the applicable legal instruments, international courts and tribunals have relied on general principles of international law and their inherent powers (¶¶ 256, 257). In the case at hand, it considered the derivation of the inadmissibility rule from the purpose of investment treaty arbitration, namely the full reparation of a qualifying investor for suffered damages, to be legitimate (¶¶ 261-262). Subsequently, the Tribunal found that the relief sought had been remedied in the OTH arbitration and thus that OTMTI's claims were inadmissible (¶¶ 265-267). Lastly, the Committee found that the Tribunal formed its views on admissibility having laid down all the elements and factual circumstances to be considered and its reasoning can be followed. Ergo, the Committee found no annullable error.

5.3 The OTH arbitration settlement and the inadmissibility of the Claimant's claims

The Applicant argued that the Tribunal manifestly exceeded its powers and failed to state reasons by holding that the settlement in the OTH arbitration confirmed the inadmissibility of OTMTI's claims (¶ 275), when the claims in the two arbitrations were allegedly distinct and OTMTI was neither party or privy to the settlement agreement or the Share Purchase Agreement entered into between OTH, VimpelCom and the Algerian *Fonds National d' Investissement* (¶ 276). The Applicant complained again that regarding this point no principle of international law had been invoked and that the Claimant's arguments and evidence had not been assessed by the Tribunal (¶ 277). Importantly, the Tribunal also allegedly failed to address the assertion of collusion between OTH, VimpelCom and Algeria and the related evidence, which provides an additional basis for the application of Art. 52(1)(e) (¶ 278).

The Respondent replied that the Award was fully reasoned and that it was within the Tribunal's powers to examine any potential effect of the OTH arbitration settlement in the case before it on the admissibility of claims (¶¶ 279, 282). Moreover, Algeria refuted the Applicant's argument that the Award disregarded certain of its allegations, among which the one of collusion that had been found to lack evidentiary basis and had been contradicted by evidence (¶¶ 279-281).

The Committee disagreed with the Applicant and contested that the Tribunal's statement regarding the effect of the settlement in OTH's arbitration on the admissibility of claims formed a distinct annulment ground (¶ 283). Said statement was solidly based on the Tribunal's prior findings and conclusions and merely confirmed those (¶ 284). Likewise, the Committee held that the Tribunal took into consideration the Parties' allegations, as shown by their summary in the Award, and rejected OTMTI's insinuations about the existence of a collusion (¶¶ 285, 286). In any event, under Rule 34(1) of the ICSID Arbitration Rules, it was not within the limits of the Committee's role to re-assess arguments or evidence and their probative value advanced

in the original proceedings (¶ 285). As such, the Committee ruled that the Tribunal neither manifestly exceed its powers nor failed to state reasons.

5.4 The Claimant's pursuit of this arbitration and abuse of its rights

The Applicant's final line of attack on the Tribunal's decision was that the Tribunal manifestly exceeded its powers and failed to state any reasons on the part of the Award concerning the alleged abuse of rights. It argued that the Tribunal did not establish the abuse of rights as a general principle of international law and thus, as part of the law applicable to the admissibility issue (¶¶ 290, 291). In dismissing the Claimant's claims, the Tribunal did not explain why it considered them as an abuse of rights. The Applicant argued that multiple notices of dispute cannot be deemed abusive and that, in any event, by the time OTH filed the notice of arbitration, the vertical corporate chain had been severed due to the sale of OTMTI's indirect controlling shareholding in OTH (¶¶ 292, 293). Therefore, the Applicant maintained that it pinpointed neither a legal basis nor reasons for the reached conclusion.

The Respondent observed that the Applicant recognised that the Tribunal endeavoured to apply the applicable law determining the abuse of rights to be among its principles even if, as the Applicant suggests, it was not sufficiently supported (¶ 295). Besides, as the Parties had agreed in the original arbitration that the abuse of rights constitutes a principle of international law, it is not possible for the Applicant to have a change of heart at this stage of the proceedings (¶ 296). The Respondent posited that the Applicant's complaints rather sought to control the Tribunal's evaluation and application of the principle (¶ 297). Regarding the alleged failure to state reasons, the Respondent countered that the reasoning's premises had been clear (¶ 299) and that the Claimant's arguments addressed (¶ 300).

The Committee found that the Tribunal cited authorities affirming that the abuse of rights doctrine might apply equally in a context other than that of an opportunistic restructuring of an investment (¶ 303) and that it acted within the limits of its authority in choosing to apply it (¶¶ 307, 308, 316). The Committee, withholding its views on the correctness of the principle's application (¶¶ 315-317), went on to opine that the Tribunal, by ruling in essence that "claimants who are aware of their lack of standing act abusively" (¶ 314), employed an objective standard considering the facts at hand (¶ 313). Finally, the Committee noted that the Tribunal summarised the Parties' arguments and took them into account, even if it did not explicitly refer to them in its analysis (¶ 319) and that the Award's conclusion followed from its premises (¶ 318). Ultimately, the request for partial annulment under Art. 52(1)(b) and 52(1)(e) was denied.

6. The Effect of the Decision

The Committee decided that Algeria was entitled to withdraw the amounts of USD 3,508,598.13 and EUR 58,382.16 due under the Award and deposited to an escrow account by OTMTI (pursuant to the Committee's Decision on the Stay of Enforcement of the Award and Decision Modifying the Conditions for the Continuation of the Stay of Enforcement of the Award) as the stay of enforcement lapsed (¶¶ 321-322).

7. Costs

The Applicant argued that the Respondent should bear the all costs incurred by the Applicant in connection with annulment proceedings, including fees of its counsel, its expert witnesses,

translation, travel and other costs, as well as the ICSID costs, amounting to USD 6,982,740.37 (¶ 323). Algeria requested that the Applicant bears all the costs and expenses of the annulment proceedings, including the Respondent's legal fees and expenses amounting to USD 4,627,031.21 (¶ 325).

Given that the Application for Partial Annulment was unsuccessful, the Committee decided that the Applicant would bear all ICSID costs (including the fees and expenses of the Committee Members) (¶ 330). The Committee further considered that each Party should bear its own costs for the legal representation and the expenses it incurred endorsing the EDF v. Argentina Committee's view that "[t]here is no general rule in ICSID proceedings that the losing party should pay the successful party's costs, nor is there even a presumption in favour of such an outcome". (¶¶ 332, 333).

8. Languages of the Proceedings and of the Decision

As had been the case in the Award (¶ 38), the annulment proceedings were conducted in English and French. The Committee added that, while the Decision was drafted in both languages, in the event of any discrepancy between the two versions, the former would be deemed to reflect the meaning intended by the Committee (¶ 334).

9. Decision

The Committee dismissed in its entirety OTMTI's Application for Partial Annulment.

The Committee decided that its Decision on the Stay of Enforcement of the Award would cease to have effect on the date of issue of the Decision on Annulment.

The Committee ordered the Applicant to bear all ICSID costs and each Party to bear its own legal costs and expenses incurred in connection with the annulment proceeding (¶ 335).