

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, DC

MILlicom INTERNATIONAL OPERATIONS B.V. AND SENTEL GSM SA
Claimants

V.

The Republic of Senegal
Respondent

(ICSID CASE NO. ARB/08/20)

DECISION
ON
JURISDICTION OF THE ARBITRAL TRIBUNAL

Arbitral Tribunal

Prof. Pierre Tercier, President
Judge Ronny Abraham, Arbitrator
Prof. Kaj Hobér, Arbitrator

Secretary of the Arbitral Tribunal

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I. The Facts

The following presentation of the facts is intentionally summary in nature due, in particular, to the subject matter of the decision, which does not address the merits of the dispute. To the extent necessary certain material factual issues shall be discussed in greater detail in the Part “In Law”.¹

A. THE PARTIES

1. The first claimant, **MILlicom INTERNATIONAL OPERATIONS B.V.** (hereinafter referred to as “Millicom”, or “Claimant 1”, or alternatively “MIO”), is a limited liability company with authorized capital of 100 shares of 1,000 NLG each, of which only 40 have been issued and paid up, organized and existing under Dutch law. It has its registered address at Sockholm 26, 1993 LM Barendrecht, the Netherlands (Claim. 22.12.08, exhibit C-26).
2. The second Claimant, **Sentel GSM** (hereinafter referred to as “Sentel”, or “Claimant 2”) is a limited company with a share capital of 60,000,000 CFAF, organized and existing under Senegalese law (Claim. 11.11.08, no. 11; Claim. 12.02.10, exhibit C-50). It has operated a mobile telephony network in Senegal (“Tigo”) since 1999 (Claim. 14.12.09, no. 6).
3. Both Millicom and Sentel are part of the *Millicom International Cellular S.A.* Group (hereinafter referred to as “MIC”), a company established under Luxembourg law in 1990. It arose from the merger between Millicom, an American company, and Industriförvaltnings AB Kinnevik, a Swedish company, both active in the mobile telephone sector (Claim.14.12.09, exhibit C-42). MIC is not a party to these arbitration proceedings.

¹ The following abbreviations are used concerning the submissions and exhibits:

Claim. 11.11.08:	Claimants’ “Request for Arbitration” of 11 November 2008
Claim. 22.12.08:	Claimants’ “Response to ICSID’s letter dated 26 November 2008 and Clifford Chance’s letter dated 5 December 2008” of 22 December 2008
Claim. 24.08.09:	Claimants’ “Provisional Measures Application” of 24 August 2009
Resp. 05.10.09:	Respondent’s “ <i>Mémoire en réponse à la demande de mesures conservatoires</i> ” of 5 October 2009
Resp. 29.10.09:	Respondent’s “ <i>Mémoire sur l’incompétence</i> ” of 29 October 2009
Decision 09.12.09:	Decision of the Arbitral Tribunal on the Application for provisional measures of 9 December 2009
Claim. 14.12.09:	Claimants’ “Counter-memorial on jurisdiction” of 14 December 2009
Resp. 15.01.10:	Respondent’s “ <i>Mémoire en réplique sur l’incompétence</i> ” of 15 January 2010
Claim. 12.02.10:	Claimant’s “Rejoinder on jurisdiction” of 12 February 2010
Exhibit C-:	Exhibits produced by the Claimants
Exhibit R-:	Exhibits produced by the Respondent
Exhibit CL-:	Legal authorities produced by the Claimants
Transcript 09.11.09:	Minutes of the first session of 9 November 2009
Transcript 01.04.10:	Minutes of the hearing of 1 April 2010

MIC is a global telecommunications company. Via its subsidiaries it provides telecommunication services in sixteen countries, in Asia, Latin America and Africa (Claim. 11.11.08, no. 12). Millicom (Claimant 1) is a wholly-owned subsidiary of MIC, and Sentel (Claimant 2) is a wholly-owned (less one share) subsidiary of Claimant 1 (see no. 83 below).

Claimant 1 and Claimant 2 are jointly referred to as the “Claimants” in this decision.

4. The Respondent is the **Republic of Senegal** (hereinafter referred to as “Senegal”, “the Republic” or the “Respondent”).

B. SUMMARY OF THE FACTS

5. On 9 March 1998, the Republic of Senegal launched a call for tenders for “*l'autorisation d'établissement et d'exploitation de systèmes mobiles terrestres cellulaires numériques de télécommunications sur le territoire national*” (Claim. 14.12.09, exhibit C-34). Terms and Conditions were drawn up at this time (“*Cahier de Charges relatif à l'établissement d'un réseau de téléphonie publique terrestre sur le territoire national*”, Claim. 14.12.09, exhibit C-43).
6. In the month of April 1998, a consortium named “Sentel gsm” tendered a bid entitled “*Proposition pour un réseau de Télécommunications*” (Claim. 14.12.09, exhibit C-42). The Consortium tendering the bid was comprised of MIC to which, in particular, the Kinnevik Group belongs (“*Résumé administratif*”, p. 4, exhibit C-42), and Groupe Soserca/C.F.I. Soserca S.A. is a 100 percent Senegalese insurance company formed in 1978, whereas C.F.I. is a real estate company founded in 1926. Mr. Pape Abdoul Ba is the Chairman and Managing Director of Groupe Soserca/C.F.I. (Claim.14.12.09, exhibit C-42, “*Résumé administratif*”, ch. 2, p. 6).
7. On 18 June 1998, the Minister of Telecommunications informed the representatives of MIC that their bid had been provisionally accepted (letter of 18.6.98, Claim. 14.12.09, exhibit C-44). Negotiations were carried out in June and July 1998. They lasted approximately three weeks (Mr. Rosh Statement, p. 5) and were carried out based on a draft prepared by the Respondent (“*Projet de Concession entre l'Etat du Sénégal et la Société pour l'exploitation d'un réseau public de radiotéléphonie mobile cellulaire numérique GSM au Sénégal*” hereinafter the “Draft”, Claim. 14.12.09, exhibit C-41).
8. On 3 July 1998, the Republic of Senegal granted Sentel a concession for its mobile telephony services entitled: “*Convention de concession entre l'Etat du Sénégal et la Société Sentel GSM S.A. pour l'exploitation d'un réseau public de radiotéléphonie mobile cellulaire numérique GSM au Sénégal*” (hereinafter the “Concession”; Claim. 11.11.08, exhibit C-2).

The Concession was concluded “*entre le Gouvernement de la République du Sénégal et la société Sentel GSM S.A., filiale du Groupe Millicom International Cellular (MIC), élisant domicile au Sénégal [...]*” (Resp. 05.10.09, no. 8). It was signed for the Concessionaire by Mr. Youval Rosh, the Managing Director of Sentel GSM, and by Mr. Peter Macnee for the Chairman of Millicom International Cellular. It should be noted that at the time of signing the Sentel limited company had not yet been formally created but that the Concession had already been entered into in its name.

This Concession was concluded under the Senegalese Telecommunications Code of 1996, which was in force at the time (Resp. 05.10.09, no. 8). It granted Sentel the right to operate a (first) mobile telephony network in Senegal. Sentel undertook to abide by the terms and conditions of operation (Article 2) and to pay a part of the licence fee to the Respondent (Article 9).

The term of the Concession was set at twenty years, beginning as of the publication of the Decree approving it (Article 1). As “*Décret no. 98-719 portant approbation de la Concession entre l'Etat du Sénégal et la société Sentel*” was published on 2 September 1998 (Claim. 11.11.08, no. 18, exhibit C-6), the Concession was intended to lapse on 2 September 2018.

9. On 30 July 1998, “Sentel GSM” was created in Dakar (Resp. 15.01.10, exhibit R-32; Claim. 22.12.08, C-26) and was registered the following day (Claim. 22.12.08, exhibit C-23). Its share capital is 60,000,000 CFAF, divided into 6,000 shares of 10,000 CFAF each. Its shareholders were the following (Resp. 15.01.10, exhibit R-32; Claim. 22.12.08, exhibits C-26 and C-23; Claim. 12.02.10, exhibit C-50):
- “Tucan Corporation NV”, a company domiciled in the Netherlands Antilles, represented by Mr. Youval Rosh, which thereafter became “Millicom Senegal NV” (4,498 shares),
 - Mr. Peter Macnee (one share),
 - Mr. Mark Lewis (one share), and
 - Mr. Pape Abdoul Ba (1,500 shares).

The shareholding of the company and its subsequent changes shall be described in detail and discussed further on (see no. 83 below).

10. Since 1999, Sentel operated the Concession and has provided mobile telephone services to the Senegalese population under the “Tigo” brand (Claim. 11.11.08, no. 19).
11. On 17 July 2000, Sentel was given a formal warning by the Respondent for serious breaches of the Concession (Resp. 05.10.09, exhibit R-6). The document accused Sentel of having failed to pay the licence fee due on 1 January 2000; of being responsible for blatant violations of its obligation to provide technical, administrative and financial information; and of failing to respect the schedule for the radio electric coverage of the National Territory (Resp. 05.10.09, exhibit R-6). According to the Respondent, Sentel was given one month to respond to the allegations made against it (Resp. 05.10.09, no. 13).

12. On 29 September 2000, Mr. Bernard Sambou, bailiff, acting for the Respondent, visited the premises of Sentel to serve notice that, in accordance with Article 7.4 of the Concession, the Concession was being formally terminated, since Sentel had failed to comply within the period allotted to it in the formal warning and had failed to remedy the defects of which it was accused (Resp. 05.10.09, nos. 14 and 15).
13. On 19 October 2000, Sentel informed the Judicial Officer of Senegal via Mr. Aloyse Ndong, bailiff that it was formally contesting the reasons set out in the notice served on 29 September 2000 (Resp. 05.10.09, no. 16; exhibit R-8).
14. On 17 January 2001, the Respondent passed “*Décret no. 2001-23 mettant fin à la convention de concession entre l’Etat du Sénégal et la société SENTEL GSM S.A.*” (Resp. 05.10.09, exhibit R-3), intended to be the final stage in the proceedings terminating the Concession (Resp. 05.10.09, no. 17). This text was not however published at the time in the Official Journal. According to the Respondent, it was nonetheless announced in the press (Transcript 09.11.09, p. 26). According to the Claimants, this Decree was merely a draft which was never promulgated (Claim. 11.11.08, no. 20).
15. On 13 March 2001, the Managing Director of Sentel filed an administrative appeal (“*recours gracieux*”) with the President of the Republic of Senegal against Decree no. 2001-23 of 17 January 2001. He contested therein the reasons for termination and emphasized that Sentel had respected all the terms and conditions of use of the Concession (Resp. 05.10.09, no. 21; exhibit R-11). On 15 March 2001, the Managing Director of Sentel sent to the Judicial Officer of Senegal a “preliminary application”, the contents of which were identical to the contents of the filing submitted to the President of the Republic of Senegal (Resp. 05.10.09, no. 22; exhibit R12).

According to the Respondent, neither of these letters received any response from the authorities to whom they were addressed. According to the Respondent, who is relying on Article 729 of the Senegalese Code of Civil Procedure, the silence kept for over four months by the authorities is equivalent to a decision of dismissal (Resp. 05.10.09, no. 23; exhibit R-21).

Also according to the Respondent, Sentel allegedly accepted the end of the Concession, since it was fully aware of Decree no. 2001-23 (“*Décret n° 2001-23*”) and had failed to bring any court proceedings (“*recours contentieux*”) in respect of that Decree. This situation is alleged to have become definitive on 17 August 2001 (Resp. 05.10.09, no. 25).

16. On 27 December 2001, the new Senegalese Telecommunications Code came into force (Claim. 11.11.08, no. 22; Resp. 05.10.09, exhibit R-4). Its transitional provisions include *inter alia* the following:

“*Les titulaires de concession d’établissement et d’exploitation de réseaux de télécommunications ouverts au public et de fourniture de services de télécommunications en place à la date d’entrée en vigueur du présent Code,*

bénéficient de plein droit de l'exploitation des réseaux et services de télécommunication qui leur ont été concédés.

Ils bénéficient, en outre, des droits d'utilisation des fréquences radioélectriques relatives à l'exploitation de leurs réseaux et services visés ci-dessus. Cependant, ils sont soumis aux nouvelles conditions relatives aux licences notamment au paiement de contre partie financière, de redevances et de contributions prévues dans les cahiers de charge prévues par le présent Code. Toutefois, pour les besoins de la mise en œuvre du présent Code, l'ART [Agence de Régulation des Télécommunications] peut procéder à des modifications des assignations de fréquences existantes.

Dans un délai de six mois, un cahier des charges, approuvé par décret, fixera les nouvelles conditions dans lesquelles les services de télécommunications seront rendus.” (Article 76).

17. On 9 August 2002, Senegal and MIC concluded an agreement (Resp. 05.10.09, no. 26), the content of which is as follows:

“Le Groupe Millicom International adhère à la politique de l'Etat du Sénégal relative à la modernisation et la régulation du secteur des télécommunications du Sénégal et traduite récemment par la promulgation d'une nouvelle loi sur les télécommunications, la naissance d'une Agence de Régulation des Télécommunications et l'annonce de l'arrivée prochaine d'un nouvel opérateur.

Ainsi, soucieuse de se conformer à ce nouveau processus, le Groupe Millicom International accompagné de sa filiale Sentel a informé l'Etat du Sénégal de sa volonté de négocier de bonne foi les nouvelles conditions mutuellement acceptables devant régir ses opérations au Sénégal.

A la suite de cet engagement, le groupe Millicom International, à travers sa filiale Sentel continuera d'opérer en toute légalité sous le cadre juridique de la Convention de 1998.”

This agreement, with respect to the scope of which the Parties have differing opinions, was signed by Mr. Abdoulaye Balde for Senegal and by Mr. David Kimche for MIC (Claim. 11.11.08, no. 22; Resp. 05.10.09, no. 28; exhibits C-9; exhibit R-13).

18. Throughout this period and despite the documents that were served to it, Sentel has continued to operate the Concession, developing its service and extending its subscriber base (Resp. 05.10.09, nos. 51 *et seq.*; Transcript 01.04.10, French version, p. 25, English version, p. 56; Claim. 12.02.10, exhibit C-48, p. 2). Sentel claims that it also regularly paid Senegal a part of the licence fee in connection with the subscriptions it received during this period, in accordance with the Concession.

19. On 28 February 2008, a “credit facility agreement” was entered into between MIO and Sentel. The lender (MIO) granted a loan to Sentel in the amount of US\$ 19,115,250 (Claim. 12.02.10, exhibit C-48).
20. On 24 September 2008, the Respondent wrote to MIC inviting it to submit a tender for a second licence, informing it that a reasonable tender would be around two hundred million USD (Claim. 11.11.08, exhibit C-13). This amount corresponded to the amount that “Sudan Telecom Company Ltd. (Sudatel)” had accepted to pay, when the latter obtained a full licence in the autumn of 2007 (*Decree no. 2007-1333 of 7 November 2007*, Resp. 05.10.09, exhibit R-15). Correspondence was subsequently exchanged (Claim. 11.11.08, exhibit C-14 and Resp. 05.10.09, exhibit R-16).
21. On 10 October 2008, Sentel submitted a tender stipulating the payment of twenty-one million USD, in preparation for the improvement of the network covered by the Concession (Claim. 11.11.08, exhibit C-7).

The Respondent informed MIC by letter dated 22 October 2008 that it rejected this offer (Claim. 11.11.08, no. 29). It added: “[...] *le Gouvernement a décidé de mettre fin à cette situation provisoire. Aussi je vous informe que, faute par vous de vous ressaisir et de nous proposer un montant de contrepartie financière tenant compte du prix plancher que représente le versement effectué par Sudatel pour une 3ème licence, la publication du décret n° 2001-23 du 17 janvier 2001, dont vous trouverez ci-joint une copie, interviendra au Journal Officiel de la République du Sénégal, le vendredi 31 octobre 2008.*” (Claim. 11.11.08, exhibit C-15). Another exchange of correspondence took place following this (Claim. 11.11.08, exhibits C-19 and C-20 and Resp. 05.10.09, exhibit R-17).

22. On 3 November 2008, Decree no. 2001-23 terminating the Concession (see no. 14 above) was published in the Official Journal (Resp. 05.10.09, exhibit R-3).

That same day, the Respondent issued a press release stating that it had brought legal proceedings before the Dakar Regional Court requesting it to ascertain the termination of Sentel’s licence (Claim. 11.11.08, exhibit C-17).

23. On 11 November 2008, the Respondent brought proceedings against Sentel and MIC (which is not a party to these proceedings) before the Dakar Regional Court (Claim. 24.08.09, exhibit C-31A). It requested the Court on the one hand to order Sentel to cease and desist its illegal activity immediately and on the other hand to compel Sentel and MIC to pay damages for the harm that the two companies had caused the State, on the grounds that they allegedly used false promises to ensure that Senegal allowed Sentel to continue operating under a provisional framework since 2000 (Resp. 05.10.09, nos. 59 and 60).

It must be noted that on the same day, Millicom International Operations (MIO) and Sentel, the two Claimants, instituted these arbitration proceedings before ICSID (see no. 26 below).

Hence, Claimant 1 (MIO) is not a party to the proceedings before the Dakar Regional Court whereas MIC, which is a party to the proceedings before the Dakar Regional Court, is not party to these arbitration proceedings.

24. The proceedings before the Dakar Regional Court continued as follows in parallel to this proceeding:

- On 28 January 2009, MIC and Sentel submitted their requests for relief to the Dakar Regional Court (Claim. 24.08.09, exhibit C-31B). They confined themselves to contesting the Court's jurisdiction, and did not submit any arguments on the merits of the case. According to them, Article 11 of the Concession grants exclusive jurisdiction to international arbitration institutions, such as the OHADA Arbitration Court, ICSID or the ICC in Paris (Claim. 24.08.09, exhibit C-31B, p. 6).
- On 10 February 2009, the Republic of Senegal submitted its response (Claim. 24.08.09, exhibit C-31C). With regard to jurisdiction, the Respondent replied to the objections of MIC and Sentel by alleging that Article 11 of the Concession would not contain an arbitration clause, and that, if it did, the clause would not be valid, and that in any event it would fall to the Court before which proceedings were brought to rule on its own jurisdiction.
- On 11 March 2009, MIC and Sentel submitted their reply, in which they confined themselves to confirming their jurisdictional objection to the Dakar Regional Court, without making any submissions as to the merits (Claim. 24.08.09, exhibit C-31D).
- On 7 April 2009, the Republic of Senegal filed its summary submissions in its reply (Claim. 24.08.09, exhibit C-31E). It maintained its previous submissions with respect to the issue of jurisdiction of the Dakar Regional Court.
- On 13 May 2009, MIC and Sentel filed their summary submissions in their rejoinder (Claim. 24.08.09, exhibit C-31F). They once again raised the lack of jurisdiction of the Dakar Regional Court in favor of ICSID.
- On 27 May 2009, the Republic of Senegal made additional submissions with respect to the jurisdictional objection (Claim. 24.08.09, exhibit C-31G). It concluded that the Dakar Regional Court has jurisdiction.
- On 24 June 2009, MIC and Sentel indicated that they did not intend to reply to the Republic of Senegal's latest submissions on the grounds that they were merely a repetition of previous submissions. They stated that they were upholding all of their requests, allegations and claims as they had been set out in their previous written submissions (Claim. 24.08.09, exhibit C-31H).
- On 22 July 2009, the Dakar Regional Court, according to the statements of the Respondent, is alleged to have closed the proceedings (Transcript 09.11.09, French version, pp. 48 and 49, English version, p. 134).

The Dakar Regional Court had set a hearing for 23 September 2009. Under the rules of the Senegalese Code of Civil Procedure, during this hearing the parties would have been informed that the judgment was being deliberated, which meant that the Court could issue its decision on any date to be communicated to the parties. Following the joint interventions of the two Parties to this proceeding, recommended by this Arbitral Tribunal during the first session held on 7 September 2009 (see below no. 31), the Dakar Regional Court accepted to postpone the hearing until 23 December 2009.

Two successive postponements were thereafter accepted under the same conditions (see nos. 40 and 45 below):

- one on 23 December 2009, postponed to 26 May 2010 (e-mail from Mr. Sermier, dated 23 December 2009),
- the other on 23 May 2010, postponed to 28 July 2010 (letter from Mr. Sermier, dated 28 May 2010).

25. Notwithstanding the letters sent to it and the proceedings that were brought, Sentel continues to operate the Concession.

C. SUMMARY OF ARBITRATION PROCEEDINGS

26. On 11 November 2008, the date on which the Respondent brought proceedings before the Dakar Regional Court (see no. 23 above), the Claimants jointly submitted a “**Request for Arbitration**” (hereinafter the “Request for Arbitration”) to the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as the “Secretariat”).

In that Request they made the following requests for relief:

“The Claimants request the following relief:

- (i) a declaration that the Respondent has violated Articles 3, 4 and 8 of the Treaty;*
- (ii) a declaration that the Respondent has violated the Licence, as well as applicable rules of Senegalese and international law;*
- (iii) an order that the Respondent make full reparation to the Claimants for the injury or loss to their investment arising out of the Respondent’s violation of any of the Treaty, the Licence, and applicable rules of Senegalese and international law, such full reparation being in the form of damages or compensation paid to the Claimants in an amount to be determined, including interest thereon;*
- (iv) compensation for the moral damages done to the Claimants, in an amount to be determined by the Arbitral Tribunal;*
- (v) an order that the Respondent pay the costs of these arbitration proceedings including the costs of the arbitrators and ICSID, as*

well as the legal and other expenses incurred by the Claimants including but not limited to the fees of their legal counsel, experts and consultants as well as the Claimants' own employees, on a full indemnity basis, plus interest thereon at a reasonable commercial rate; and

- (vi) *any other relief the Arbitral Tribunal may deem appropriate in the circumstances.* “

They based their claims,

- with regard to Claimant 1, on Article 10 of the “*Accord relatif à l'encouragement et la protection des investissements entre le Royaume des Pays-Bas et la République du Sénégal du 3 août 1979*” (hereinafter the “*Accord*”), and
- with regard to Claimant 2, on Article 11 of the Concession,
- moreover, with regard to both Claimants, on the “*Convention (of Washington) of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States*” (hereinafter the “*ICSID Convention*” or the “*Washington Convention*”).

27. On 26 November 2008, the Secretariat invited the Claimants to provide additional information about Sentel’s incorporation in Senegal, Sentel’s representation, Millicom’s ownership of Sentel, Millicom’s status as a “national” in connection with the *Accord* and the consent of Senegal to submit this dispute to the jurisdiction of the Centre.

On 5 December 2008, the Respondent invited the Secretariat to refuse to register the Request for Arbitration in the ICSID Arbitration Register on the grounds that the Centre lacked jurisdiction. On 19 December 2008, the Claimants replied to the queries from the Secretariat in a document entitled “*Observations on the jurisdiction of the Centre*”. On 31 December 2008, the Secretariat registered the Request for Arbitration.

28. On 14 January 2009, the Claimants proposed a method for constituting the Arbitral Tribunal. Following an exchange of correspondence dated 19 January, 23 February, 26 February and 2 March 2009, the Parties agreed to constitute a tribunal of three members, the Respondent and the Claimants each appointing an arbitrator, and the two arbitrators thereby appointed, nominating a president. On 1 April 2009, the Claimants appointed Professor Kaj Hobér as an arbitrator, who accepted his appointment. On 7 April 2009, the Respondent appointed Judge Ronny Abraham as an arbitrator, who accepted his appointment. On 5 June 2009, the two co-arbitrators appointed Professor Pierre Tercier as president of the Arbitral Tribunal, who accepted his appointment. On 12 June 2009, the Arbitral Tribunal was constituted and this proceeding was deemed to have begun.

29. On 24 August 2009, the Claimants sent the Arbitral Tribunal an application for provisional measures (“**Provisional Measures Application**”), in which they requested the Arbitral Tribunal in particular to prohibit the Respondent from continuing the proceeding brought before the Dakar Regional Court, and in the

alternative, to invite the Respondent to stay such proceedings during the present proceedings.

30. On 27 August 2009, the Arbitral Tribunal held a telephone conference with the Parties to discuss the Provisional Measures Application submitted by the Claimants and the agenda for the first session that it intended to hold. On 28 August 2009, following a telephone conference between the members of the Arbitral Tribunal, the President invited the Respondent to apply to the Dakar Regional Court to postpone the hearing scheduled for 23 September 2009 (see above no. 24). On 1 September 2009, the Respondent informed the Arbitral Tribunal by letter that the Application submitted by the Claimants was the Claimants' latest tactic to gain time, but that it would not be opposed to postponing the hearing.
31. On 7 September 2009, the Arbitral Tribunal held its **first session** with the Parties, in Paris. It discussed various procedural issues with them, stating that it would settle them in its first procedural order (see Minutes of the session, p. 14).

With respect to the Provisional Measures Application, the Arbitral Tribunal acknowledged that the Respondent was not opposed to a joint letter being drafted with the Claimants in order to apply to have the hearing scheduled for 23 September 2009 postponed. The Parties furthermore agreed that whichever of them would subsequently win would not execute any decision by the Dakar Regional Court (see Minutes of the first session, p. 15). That same day, the Respondent confirmed by letter the undertaking it had made. Following the intervention of the Parties, the hearing scheduled for 23 September 2009 was in fact postponed (see no. 24 above).

32. On 14 September 2009, the Arbitral Tribunal issued its **Procedural Order no. 1**, in which it ruled as follows:

“1.

- *In principle, hearings of the Tribunal will take place in Paris, unless the Parties agree on another venue and inform the Arbitral Tribunal in a timely fashion.*

2.

- *The proceeding will be conducted simultaneously in French and in English. All documents from the Arbitral Tribunal or the Centre will be written in both languages and all hearings will be subject to simultaneous interpretation.*
- *Each Party is entitled to write its submissions (with annexes) and its correspondence in the language of its choice without having to provide a translation into the other language;*
- *The Arbitral Tribunal will decide at a later stage and in accordance with its assessment on the allocation of costs generated by this decision.*

3.

- *The Parties are invited to file a first round of written submissions limited to objections to jurisdiction;*

- *The Respondent is invited to submit its memorial on jurisdiction by October 29, 2009, at the latest;*
- *The Claimants are invited to file their counter-memorial within forty-five days upon receipt of the first submission, or by December 14, 2009, at the latest;*
- *Upon receipt of the counter-memorial, the Arbitral Tribunal will decide if it continues to address this issue as a preliminary matter or if it intends to address the case altogether;*
- *In either case, the Arbitral Tribunal will fix a timetable after consultation with the Parties.*

4.

- *The Parties' undertakings with regard to the proceeding pending before the Court in Dakar are noted*

5.

- *The Respondent has until October 5, 2009, to respond to the request for provisional measures;*
 - *If they so wish, the Claimants may file their comments on this response within ten days upon receipt of the response;*
 - *If it so wishes, the Respondent may file its observations on these comments within ten days upon their receipt;*
 - *A hearing will take place in Paris on November 9, 2009, to hear the Parties' oral arguments on this issue."*
33. On 5 October 2009, the Respondent submitted its "**Mémoire en réponse sur la demande de mesures conservatoires**". It concluded, in particular "*à ce qu'il plaise au Tribunal arbitral rejeter dans son intégralité la demande de mesures conservatoires présentée par MIO et Sentel.*"
34. On 29 October 2009, the Respondent submitted its "**Mémoire sur l'incompétence**" (see no. 52 below in respect of the requests for relief).
35. On 9 November 2009, the Arbitral Tribunal held **a hearing on the provisional measures** in Paris with the Parties (see Transcript 09.11.09). The representatives of the Parties were given the opportunity to submit their arguments orally and to respond to questions from the Arbitral Tribunal. Following this hearing, the representatives of the two Parties stated that they did not wish to make any new applications with regard to this stage of the proceedings.
36. On 7 December 2009, the Arbitral Tribunal rendered its **Procedural Order no. 2** in which the text of the corrected transcript from the hearing held on 9 November 2009 was approved (Transcript 09.11.09), based on the proposals made and positions taken by the Parties concerning the draft that had been submitted to them.
37. On 9 December 2009, the Arbitral Tribunal rendered its "**Decision on the Application for provisional measures submitted by the Claimants on 24 August 2009**" in which it was recommended:

1. *The Respondent is invited to send jointly with Claimant 2, an application to the Dakar Regional Court to have the pending proceedings in Senegal suspended.*
 2. *This measure shall be valid until the decision of this Arbitral Tribunal is taken concerning its own jurisdiction.*
 3. *In modification to the Order it issued on 14 September 2009, the Arbitral Tribunal decides that it will rule in priority on the objections to jurisdiction raised by Respondent; the timetable for this stage of the proceedings will be communicated to the Parties in an Order that will be sent to them once this decision has been notified, on the basis of the timetable envisaged during the hearing of 9 November 2009.*
 4. *The other applications will, if necessary, be examined later, upon the express request of the Claimants.*
 5. *The Tribunal reserves its ruling on the costs of the proceedings.”*
38. On 14 December 2009, the Arbitral Tribunal rendered its **Procedural Order no. 3**, in which it decided:
1. *As agreed at the first session, the Claimants will file their counter-memorial on jurisdiction by December 14, 2009.*
 2. *The Respondent will file its reply on jurisdiction by January 15, 2010.*
 3. *The Claimants will file their rejoinder on jurisdiction by February 12, 2010.*
 4. *A conference call will be held with the President of the Tribunal at a date to be determined to discuss with the Parties the organization of the forthcoming hearing.*
 5. *A hearing will take place in Paris on March 31 and/or April 1, 2010, it being specified that if the hearing lasts only one day, it will be held on April 1, 2010. ”*
39. On 14 December 2009, the Claimants submitted their “**Counter-memorial on jurisdiction**” (see no. 52 in respect of the requests for relief).
40. On 23 December 2009, the Respondent's counsel informed the Arbitral Tribunal that the Dakar Regional Court upheld the Respondent's request and postponed the matter to 26 May 2010.
41. On 15 January 2010, the Respondent submitted its “*Mémoire en réplique sur l'incompétence*” (see no. 52 below in respect of the requests for relief).
42. On 12 February 2010, the Claimants submitted their “**Rejoinder on jurisdiction**” (see no. 52 below in respect of the requests for relief).

43. On 1 April 2010, the Arbitral Tribunal held **the principal hearing on questions of jurisdiction** in Paris with the Parties. No witnesses were heard (see no. 49 below). The Parties' counsel were given the opportunity to present oral arguments. Following such hearing the Parties stated that they had no other applications to make concerning this phase of the proceeding (Transcript 01.04.10, French version, p. 58, English version, p. 140).
44. On 19 April 2010, the President of the Arbitral Tribunal invited the Parties' counsel to formulate their submissions concerning the costs of the proceeding for the case where it lacks jurisdiction. The Claimants did so in a letter dated 30 April; the Respondent in a letter dated 30 April 2010. On 7 May 2010 Claimants' counsel formulated objections to the list submitted by the Respondent.
45. On 11 May 2010, the Arbitral Tribunal requested the Respondent to request postponement of the hearing scheduled for 26 May 2010 before the Dakar Regional Court, in order to allow it sufficient time to render (in two languages) its decision on jurisdiction. The Respondent again accepted such request and informed the Arbitral Tribunal that the hearing of the Dakar Regional Court was scheduled for 28 July 2010 (letter of 28 May 2010 from Mr. Sermier; see no 24 above).

II. THE LAW

A. IN GENERAL

1. The arbitration proceeding and constitution of the Arbitral Tribunal

46. The Claimants submitted their Request for Arbitration on 11 November 2008 (see no. 26 below). This Request was registered by the Secretariat of ICSID on 31 December 2008 following receipt of additional information requested to the Claimants (see no. 27 above).

The Arbitral Tribunal was constituted on 12 June 2009 (see no. 28 above). Neither Party has raised any objections in this regard.

47. The proceedings have been conducted in accordance with the ICSID Rules.

In its Procedural Order no. 3 (see no. 38 above), the Arbitral Tribunal decided to rule specially and firstly on the issues involving its own jurisdiction. Accordingly, in this phase of the proceeding the Arbitral Tribunal shall rule on such issues only, deferring examination of the issues on the merits to a subsequent date in the event that it were to find it had jurisdiction.

48. As stated earlier (see no. 37 above), the Arbitral Tribunal already ruled on an application by the Claimants for provisional measures. The Parties had ample opportunity, both at that phase as well as the present phase, to make written and oral arguments.

49. The Claimants produced the testimony of six witnesses with their written submissions:

- Mr. Pape Abdoul Ba, the founder of SOSERCA (“*Attestation*” of 10 December 2009; “*Seconde Attestation*” of 12 February 2010),
- Mr. Youval Rosh, Senior Managing Director of Sentel from June 1998 to the year 2000 (“*Attestation*” of 9 December 2009; “*Seconde Attestation*” of 12 February 2010),
- Mr. Kemal Shefik, who worked for Netcom, a MIC group company, and who took part in preparing Sentel's tender (“*Witness Statement*” of 9 December 2009),
- Mr. Marc Beuls, CEO of MIC from 1 January 1998 to 1 March 2009, and a member of Sentel's board of directors from 2002 to 2003 (“*Witness Statement*” of 12 February 2010),
- Mr. Kevin Koch, “General Manager” of Sentel since April 2008 (“*Witness Statement*” of 12 February 2010), and
- Mr. Lars Svenningsson, “Corporate Secretary” of MIC since July 2007 (“*Witness Statement*” of 12 February 2010).

The Respondent waived producing witness statements. It also expressly waived cross-examination of the Claimants' witnesses who had submitted written witness statements.

50. Following the hearing held on 1 April 2010 the Parties expressly confirmed that they had no objections with respect to the proceedings up until then (Transcript 01.04.10, French version, p. 58, English version, p. 140).
51. In accordance with the decision of the Arbitral Tribunal in its Procedural Order no. 1 (see no. 32 above), the entire proceeding was conducted simultaneously in French and English. Furthermore, this decision was drafted in one of the languages and then translated into the other; consequently, both versions shall be deemed authentic.²

2. The submissions of the Parties and the structure of the decision

2.1. *The submissions of the Parties*

52. In their final versions, the Parties make the following requests for relief (the numbers in brackets have been added by the Arbitral Tribunal in order to facilitate the references thereto):

For the Respondent (Resp. 15.01.10, no. 393):

“Pour les raisons développées dans son déclinatoire de compétence et dans le présent mémoire, la République du Sénégal demande au Tribunal arbitral de :

- a. [Resp. 1] Se déclarer incompétent pour examiner la demande de Sentel et la demande de MIO ;*
- b. [Resp. 2] Condamner ces deux sociétés à payer à la République du Sénégal les frais de l'arbitrage ainsi que les frais engagés pour assurer sa défense.”*

For the Claimants (Claim. 14.12.09, no. 422):

“For the foregoing reasons, the Claimants request the following relief:

- (i) [Claim. 1] a declaration that the Tribunal has jurisdiction and is competent to decide the claims before it brought by Sentel ;*
- (ii) [Claim. 2] a declaration that the Tribunal has jurisdiction and is competent to decide the claims before it brought by MIO;*
- (iii) [Claim. 3] without prejudice to any final determination of the merits of the parties' dispute, an order that Senegal pays all costs incurred in relation to the objections to jurisdiction it raised,*

² Note of the Arbitral Tribunal: Texts that were originally drafted in French are hereinafter kept in their original language. However, for ease of reference, the Accord will also be referred to in its translated version in English.

including the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Claimants including but not limited to the fees of their legal counsel, experts and consultants as well as the Claimants' own employees, on a full indemnity basis, plus interest thereon at a reasonable commercial rate;

- (iv) [Claim. 4] *any other relief the Arbitral Tribunal may deem appropriate in the circumstances; and*
- (v) [Claim. 5] *order in respect of the procedure for the next phase of this case."*

2.2. *The subject matter and structure of the decision*

53. Save for the requests for relief concerning the determination and allocation of costs and expenses of the arbitration, the sole subject matter of this decision is to decide on the objections to jurisdiction raised by the Respondent concerning the claims instituted against it by the Claimants. The competence of the Arbitral Tribunal to so judge is undeniable, arising from Article 41(1) of the ICSID Convention pursuant to which “[t]he Tribunal shall be the judge of its own competence”.

As stated above (see no. 37 above), the Arbitral Tribunal decided to give priority to this issue: if it finds it has jurisdiction with respect to at least one of the claims, the proceeding shall continue; in the opposite case it shall end.

54. Based on the submissions the Arbitral Tribunal is justified in examining the issues in the following order:
- the jurisdiction of the Arbitral Tribunal in respect of MIO, Claimant 1 (B below),
 - the jurisdiction of the Arbitral Tribunal in respect of Sentel, Claimant 2 (C below),
 - the determination and allocation of costs and expenses (D below), according to the conclusions that the Arbitral Tribunal shall reach concerning the first two issues,
 - the determination in respect of the continuation of the proceeding (E below).

B. THE JURISDICTION OF THE ARBITRAL TRIBUNAL IN RESPECT OF MIO

1. The issue

55. According to the Respondent, the Arbitral Tribunal does not have jurisdiction in this matter in respect of Claimant 1, MIO, which allegation is contested by the Claimants.

The Respondent in fact makes the following request for relief [Resp. 1]:

*“[...] la République du Sénégal demande au Tribunal arbitral de:
Se déclarer incompétent pour examiner [...] la demande de MIO”.*

The Claimants put forward the following request for relief [Claim. 2], requesting that the Arbitral Tribunal make:

“a declaration that the Tribunal has jurisdiction and is competent to decide the claims before it brought by MIO”.

56. As concerns MIO, the Claimants base their allegations on Article 10 of the Accord, which is worded as follows:

“La Partie Contractante sur le territoire de laquelle un ressortissant de l'autre Partie Contractante effectue ou envisage d'effectuer un investissement, devra consentir à toute demande de la part de ce ressortissant en vue de soumettre, pour arbitrage ou conciliation, tout différend pouvant surgir au sujet de cet investissement au Centre institué en vertu de la Convention de Washington du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.”

(“The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national to submit, for arbitration or conciliation, any dispute that may arise in connection with that investment, to the centre established by the Washington Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States.”)

57. When the conditions of this Article are fulfilled, an investor alleging having been injured may rely on Article 25 of the ICSID Convention, whose first paragraph (sentence 1) is worded 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.”

- a) It is traditionally deduced therefrom, sometimes presented in different ways due to the inevitable cross-referencing between them, that an arbitral

tribunal to which a request is made based on such provision combined with the arbitration clause provided for in a treaty, has jurisdiction under the following conditions:

- (1) the claimant has consented in writing to the arbitration,
- (2) the State against which the action is brought has also agreed thereto in writing,
- (3) the claimant is a national of the other Contracting State,
- (4) it asserts a legal dispute that falls within the scope of the arbitration clause of the treaty, and
- (5) this dispute arises directly out of an investment.

b) The following conditions do not appear disputed and cannot be disputed:

- Claimant 1 consented in writing to the arbitration (condition 1). A long line of case law holds that such consent necessarily ensues from the request submitted by it to the Centre (in particular Chr. Schreuer et al. *The ICSID Convention, a Commentary*, 2nd edition, Cambridge 2009, article 25, nos 416 *et seq.* with references). Indeed, such measure cannot be understood otherwise.
- The Respondent does not dispute that Claimant 1 is a national of the other Contracting State, that is, the Netherlands where it is registered (condition 3). However, Respondent disputes that the protection extends to it, but for other reasons.
- Claimant 1 asserts a legal dispute (condition 4); it bases its action on the fact that the Respondent violated the rules of the *Accord*, in particular the prohibition on expropriation by terminating the Concession that had been granted to Sentel, which it indirectly owns. These facts are presumably not established at this stage, but they are at least alleged; the Arbitral Tribunal cannot rule on them as it has not carried out any investigation.

c) The Respondent, however, asserts that the other conditions necessary for the jurisdiction of the Arbitral Tribunal have not been fulfilled, namely that:

- it did not give its written consent to an action of the type which is brought against it (condition 2) (Resp. 29.10.09, nos. 17 *et seq.*), which issue shall be examined below under number 2; and
- Claimant 1 has not proved that it made a protected investment (condition 5) (Resp. 29.10.09, nos. 137 *et seq.*), which issue shall be examined below under number 3.

58. The answer to the issues posed requires that the Arbitral Tribunal interpret the *Accord* and the ICSID Convention. It must do so by applying the “Vienna Convention on the Law of Treaties of 23 May 1969” (hereinafter the “Vienna Convention”), to which the two States have acceded: the Netherlands on 9 May 1985, and Senegal on 11 May 1986.

The basic principle expressed in Article 31, paragraph 1 of the Vienna Convention states that “[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 light of its object and purpose*”. This principle, just as the other rules supplementing it, applies in a general manner to the interpretation of treaties, without it being necessary to make distinctions. Undoubtedly its first aim is the interpretation of treaties in order to resolve difficulties that could be generated by a provision, in relations between the States that are bound by it. Nothing, however, prevents it from also being raised by third parties, to which a treaty grants particular rights, as in the case at hand, the *Accord* and the ICSID Convention.

59. In the alternative, the Claimant invokes the most favored nation clause as expressed in Article 3 of the *Accord* and solutions established by other bilateral treaties entered into with Senegal, notably those entered into with Korea and the United Kingdom (Claim. 14.12.2009, no. 371; Claim. 12.02.2010, nos. 33 and 228; Transcript 01.04.10, French version, pp. 39-43, English version, pp. 96-107). The Respondent deems that this clause cannot be invoked in order to extend jurisdictional protection (Resp. 29.10.2009, nos. 94-109; Resp. 15.01.2010, nos. 332 *et seq.*; Transcript 01.04.10, French version, p. 11, English version, p. 18). The Arbitral Tribunal shall examine this argument only if the others do not suffice as a basis for its jurisdiction.

2. The existence of Senegal's consent to the arbitration

2.1. In general

60. The Arbitral Tribunal concurs with the Respondent (Resp. 29.10.2009, no. 19) that no presumption exists according to which a State would have consented to an ICSID arbitration. It is up to the party who so alleges to prove it and to the Arbitral Tribunal to convince itself thereof, *ex officio* if needed.

According to the Respondent, two arguments, both based on the *Accord*, militate against a finding that Senegal accepted to submit itself to ICSID jurisdiction in the present case:

- firstly, because consent would not arise solely from conclusion of the *Accord* but would require a specific manifestation in relation to the instituted proceeding; a specific consent would be missing in the present case (number 2.2 below);
- secondly, because the *Accord* would acknowledge the right of recourse to ICSID arbitration to natural persons only, to the exclusion of juridical persons, which MIO undeniably is (number 2.3. below).

2.2. *The requirement of specific consent*

61. a) *According to the Respondent*, no special consent was given for this arbitration. It bases its argument on the text of Article 10 of the *Accord*, asserting that in ratifying the *Accord* Senegal did not agree to submit its itself, in a general and abstract matter, to all proceedings that potential investors might bring against it, but that it would be necessary that it specifically consents to each of them when such request is made to it (Resp. 29.10.2009, nos. 29 *et seq.*).

It argues indeed that the text provides that the State, here Senegal, “[...] *devra consentir à toute demande de la part de ce ressortissant en vue de soumettre* [un différend], *pour arbitrage ou conciliation* [...]”. It deduces therefrom that a national who intends to act must first make a request to the State and that it would dispose of discretionary power to consent or not consent thereto (Resp. 1.01.2010, no. 316).

b) *According to the Claimants*, the Article cannot be interpreted otherwise than as a generic consent given by Senegal to submission to the Centre of all requests that could be made against it (Claim. 14.12.2009, no. 352; Claim. 12.02.2010, no. 198).

62. According to the Arbitral Tribunal, the interpretation of the provision according to the principles of the Vienna Convention requires all factors that express and explain the content thereof be taken into account. There is no hierarchy amongst such factors; they combine with each other and complete each other so as to give it the meaning that objectively best corresponds to the solution of the issue posed.

In the present case, the Arbitral Tribunal relies on the following factors:

63. a) *The wording of Article 10* is not unequivocal. Even if it is in principle possible to agree in a Treaty that an action is subjected to the prior consent of the contracting State, it seems appropriate to give the clause the meaning given by the Claimants. In the most restrictive version, the use of the verb “*devra*” (“shall”) (“*devra consentir*”) (“shall assent”) may be understood as meaning that it would certainly afford the Contracting State the power to specially decide, in view of “*la demande*” (“the request”) that the party which intends to act would make to it. Even in such hypothesis, however, it is prescribed that the State not only “*pourra*” (“may”) but “*devra*” (“shall”) give its consent. Nothing in the wording leads to the conclusion that such decision could be left up to the discretion of the State.

It is more likely that in spite of the wording of the rule, Senegal's ratification of the *Accord* entails consent to the ICSID arbitration system. The Arbitral Tribunal does not see why it would be necessary, as the Respondent asserts (Resp. 15.01.2010, no. 312), to adopt a two-step procedure pursuant to which, before submitting a request, the party intending to act would have to request authorization from the Contracting State which it would have no right to refuse, unless otherwise specifically stated. It is more reasonable to view this as a unilateral offer and a commitment by Senegal to submit itself to ICSID jurisdiction; the request of Claimant 1 constitutes the “*demande*” (“request”) and

amounts to acceptance of the offer made by the State; it does not create such consent, it consummates it.

64. *b) The origin of the rule*, according to the Claimants, confirms this interpretation (Claim. 14.12.09, nos. 359 *et seq.*). Indeed, the former Article 5 *ter* of the *Accord de 1965 sur la coopération économique* (as amended in 1972) provided for a moral obligation only that the text of Article 10 of the *Accord* has elevated to a legal obligation. This rule undoubtedly primarily establishes an inter-State obligation (Resp. 15.01.2010, no. 318), but there is no reason why the establishment by the new rule of its mandatory nature could not be extended to investors, who are precisely those for whom the provision concerning the resolution of disputes is intended.
65. *c) The spirit of the rule* confirms this interpretation. The purpose of a treaty such as that in question is indeed to guarantee efficient and full protection. This purpose is made clear, in particular, by Articles 3 and 4 of the *Accord*, whose objective is “*sécurité intégrale*” (“full security”) (Article 4, paragraph 1). Such objective, however, cannot be truly attained unless investors, the primary beneficiaries of the protection, dispose of legal means enabling them to obtain compliance therewith. To admit the contrary would amount to making the *Accord* a “*lex imperfecta*” whose application in the end would be left to the discretion of the State benefiting from the investment, since it could give or refuse its consent as it pleases. This could not have been the intention of the Contracting Parties.

Moreover, there is nothing extraordinary about the rule to the extent that it implies nothing else for the State involved except to agree to submit itself to an arbitration proceeding under the aegis of ICSID by independent arbitrators, in a proceeding during which it shall have every opportunity to defend its positions.

66. On the grounds that have just been set out, the Arbitral Tribunal concludes that in ratifying the *Accord*, the Republic of Senegal gave its general consent to any arbitration that could be subsequently instituted against it in an ICSID proceeding under the conditions prescribed by Article 10.

2.3. *Limitation of protection to natural persons*

67. *a) According to the Respondent*, even if its consent is deemed to have been given, it would not apply to juridical persons (Resp. 29.10.2009, no. 53). The Respondent bases its argument also on the text of Article 10 of the *Accord* in order to assert that its consent would be limited to natural persons. It argues indeed that the text of Article 10 grants protection to a “*ressortissant de l’autre partie*” (“national of the other party”). Article 1, paragraph 3 of the *Accord* provides a clear definition thereof: “*le terme ‘ressortissants’ comprend à l’égard de l’une et l’autre des Parties contractantes les personnes physiques ayant la nationalité de cette Partie contractante conformément à la législation de celle-ci.*” (“The term ‘nationals’ shall comprise with regard to either Contracting Party natural persons having the nationality of that Contracting Party in accordance with its law.”). As Claimant 1 is a company, it cannot rely on the rule for the resolution of disputes.

68. *b)* According to the Claimants, on the contrary, the omission of any mention of companies was an inadvertency that it would be up to the Arbitral Tribunal to correct. The protection aimed at by Article 10 should encompass companies, in accordance with the structure of the *Accord*, its purpose and its origin. Regardless, Article 8 of the *Accord* establishes the principle of the most favored nation, which, in light of the treaties subsequently signed by Senegal, would be an additional reason to broadly construe it (Claim. 14.12.09, nos. 191 *et seq.*).
69. According to the Arbitral Tribunal, the following factors must be taken into account:
70. *a)* The text of Article 10 of the *Accord*, combined with the definition provided in Article 1 would appear at first view at least to be clear: since the first Article mentions “*ressortissants*” (“nationals”) only and the second unambiguously defines such notion, the solution appears obvious.

Nevertheless, contrary to what the Respondent appears to assert (Resp. 29.10.2009, no. 64; Resp. 15.01.2010, no. 288), this conclusion, provided that it applies, is not conclusive in determining the meaning of the rule. Indeed, in accordance with Article 31, paragraph 1 of the Vienna Convention, the “*terms of the treaty*” must be interpreted “*in good faith*” in accordance with the meaning to be given them “*in their context and in light of its object and purpose*”. It follows therefrom that the text, even if apparently “clear”, is not the only factor to be used in interpreting a rule, which assertion is confirmed by the following paragraphs of the provision listing the factors that the interpreting party may and must take into account “*in addition to the text*”. Moreover, if needed, Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation, in particular when the interpretation made in accordance with Article 31 “*(b) leads to a result which is manifestly absurd or unreasonable*”.

The significance of the other factors available to the Arbitral Tribunal must be considered in light of these principles.

71. *b)* The function of Article 10 in the system of the *Accord* is fundamental. A provision cannot be understood unless integrated into the body of the text of which it forms a part and constitutes one of the parts. The Article establishes the only means contractually agreed to by the Contracting Parties to guarantee to investors the effectiveness of the rest of the *Accord*. All the material provisions – excepting one which shall be discussed below – affirm the granting of special protection both to “*ressortissants*” (“nationals”) (within the meaning of Article 1) as well as “*sociétés de l’autre Partie*” (“companies of the other Party”); all of them therefore place natural persons and companies on the same footing. It cannot be seen for what reason the principles extended to all investors, regardless of their nature, would justify judicial protection for natural persons only.

This function appears more clearly upon reading of other parts of the *Accord*:

- The Preamble of the *Accord* expressly affirms the intention of the Contracting Parties “*de créer des conditions favorables à l’investissement de capitaux par des ressortissants et des sociétés de l’un des deux Etats*”

sur le territoire de l'autre Etat ("creating conditions favourable to capital investments by nationals and companies of one of the two States in the territory of the other State"), without being able to detect the least intent to restrict such purpose to natural persons. Quite to the contrary, this Preamble, intended to summarize the object and purpose of the *Accord*, clearly militates in favor of the contrary intent by excluding any difference between the two types of investors.

- Article 4, paragraph 1 of the *Accord* is a perfect illustration of this, according to which "*les investissements de capitaux effectués par des ressortissants et des sociétés d'une Partie contractante jouiront, sur le territoire de l'autre Partie Contractante, d'une protection et d'une sécurité intégrale*" ("*capital investments made by nationals and companies of one Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party*") (underscored by the Arbitral Tribunal). It can be deduced therefrom (1) that there cannot be "*protection et de sécurité intégrale*" ("full protection and security") unless the functioning of the *Accord* is armed with the possibility for every investor to go before an arbitral tribunal if he alleges to be the victim of a violation, and (2) that this "*protection et sécurité intégrale*" ("protection and security") must be guaranteed both to natural persons and companies, without differentiation.
- It would also not be possible to reconcile the restrictive version of the Article with the text of Article 4, paragraph 2 of the *Accord* intended to protect "*les ressortissants et sociétés d'une Partie Contractante*" ("nationals and companies of one Contracting Party") against the risks of expropriation (sentence 1) and which expressly reserves in such context the possibility for (all) the specified entities to have recourse, in particular, to the proceedings provided for by Article 10 (sentence 3).
- It is true that the same distinction is made by the text of Article 9 of the *Accord*, the provision immediately preceding Article 10, relating to tax treatment; this rule also appears reserved to natural persons only since the only mention therein is of "*ressortissants*" ("nationals"). This is not the place to interpret such provision. At any rate, this exception is not sufficient to explain why Article 10 would deprive companies, which are expressly protected by the remainder of the *Accord*, of the only means available to them to obtain recognition of their rights.

c) *The object and the purpose of the rule* fully support this interpretation. The assimilation made in principle in the *Accord* between natural persons and juridical persons is fully understandable since one cannot see why an investment should be less protected depending on whether it is made by a natural person or a company. Furthermore, it would be established in practice that it is infinitely more frequent that investments made in the fields specified in the *Accord* are made by companies and not directly by natural persons. Furthermore, in its definition of juridical persons the *Accord* targets through them the "*ressortissants*" ("nationals") who directly or indirectly control them (see Article 1, paragraph 4, letter b). It would

therefore be possible for a natural person holding a few shares in an investment company to act, whereas a company having the same shares would be prohibited from so doing.

The general purpose is to encourage investments, regardless of who takes the risk. It shall furthermore be noted in passing that it would be surprising at the very least that a text that is precisely intended by its nature to prohibit any form of unfounded discrimination establishes one as fundamental as that one.

72. *d) The understanding of the rule* by the Kingdom of the Netherlands also confirms this analysis. Indeed, in support of their thesis, the Claimants invoked the “*travaux préparatoires*” having surrounded the adoption of the *Accord* by the Dutch Parliament (Claim. 14.12.2009, no. 358, “Explanatory Memorandum”, Claim. 22.12.08, exhibit C-30). It results therefrom that this was understood as acknowledging an equivalent protection for natural persons and companies. It is not necessary for the Arbitral Tribunal to determine whether, as alleged by the Respondent (Resp. 29.10.2009, no. 80; Resp. 15.01.2010, no. 325), no conclusive significance should be given to such documents since, although certainly linked to the adoption of the *Accord*, this was by one of the parties only. Nothing prohibits the Arbitral Tribunal from relying on them in order to confirm how this text was actually understood by one of the Contracting Parties.

73. *e) Finally, the relation of Article 10 with the ICSID system of arbitration* allows for completion of the understanding of the rule by the connection it creates with the ICSID Convention. The term “*ressortissant*” (“national”), as used in the first and third lines of the provision, must be put back in its immediate context by taking into consideration all of the terms of the Article, which comprise one and the same sentence. The term “*ressortissant*” (“national”) is used three times: the first two times to designate the person who, having made or intended to make an investment, may take the initiative to bring arbitration proceedings; the third time in the last line in the title of the Washington Convention which is reproduced. It is certain that the third time the term must encompass natural persons and juridical persons since what is mentioned are “*ressortissants*” (“nationals”) within the meaning of the Washington Convention. It is indeed the definition given by this Convention which is relevant, of which Article 25(2) provides a broad definition.

According to the Arbitral Tribunal, the use of the term “*ressortissants*” (“nationals”) in Article 10 must be understood in accordance with the general meaning of the Convention, and not the special meaning of Article 1, which is adapted to the other provisions of the *Accord*.

74. For these reasons, and without need to discuss the other arguments put forth by the Claimants in support of their position, the Arbitral Tribunal finds that the protection afforded by Article 10 of the *Accord* extends to companies and, consequently, MIO may rely on it.

2.4. Conclusion

75. It follows from the preceding discussion that the Arbitral Tribunal finds that the Republic of Senegal gave its consent to the actions brought against it by a

company before an ICSID Arbitral Tribunal. From this angle, and subject to the other conditions that shall still be examined, the Arbitral Tribunal holds that it has jurisdiction to rule on the submissions of the Claimants in the present proceeding.

For such reason, the Arbitral Tribunal finds that it would be superfluous to furthermore examine, but for the other arguments discussed, whether the same conclusion should not be deduced from the - disputed - consequences drawn from the application of the most favored nation clause.

3. The existence of a protected investment

3.1. In general

76. The Arbitral Tribunal has jurisdiction only if the action is based on the violation of the *Accord* relating to protected investments within the meaning of such *Accord* and the ICSID Convention.

a) According to the Respondent (Resp. 15.01.10, nos. 272 *et seq.* in respect of Sentel and nos. 359 *et seq.* in respect of MIO), this condition is not fulfilled for two reasons above all; indeed, the Respondent argues that:

- there would be no investment within the meaning of the texts on which the action is based, and
- even if this were to be the case, Claimant 1 could not be deemed as being the investor.

b) According to the Claimants (Claim. 12.02.10, nos. 156 *et seq.* in respect of Sentel and nos. 178 *et seq.* in respect of MIO), these two objections do not withstand scrutiny.

It is therefore up to the Arbitral Tribunal to rule on this by successively examining:

- if an investment exists within the meaning of the invoked texts (number 3.2 below.), and, if so,
- if MIO's investment is protected (number 3.3. below).

3.2. The existence of an investment

77. Detached from the other aspects relating to other conditions, the issue to be settled is whether the services that Claimant 1 claims to have carried out in relation with the Sentel company in Senegal constitute an investment within the meaning of the applicable texts. The Claimants affirm this (Claim. 14.12.2009, nos. 338 *et seq.*; Claim. 12.02.2010, nos. 29 and 178 *et seq.*), whereas the Respondent denies it (Resp. 15.01.10, nos. 369 *et seq.*).

78. a) *The facts* are not disputed concerning this point. Initially, it was indeed the MIC company that directly or by its Group's companies, set up the Sentel company. The launching and operation thereof was largely financed by it. It was able to establish and operate a mobile telephone network in Senegal through its subsidiary. This is not the place to discuss whether the conditions under which the operation and application of the Concession were carried out met relevant requirements; if the Arbitral Tribunal asserts jurisdiction, this may be the subject matter of the phase devoted to examining the issues on the merits. At this stage it suffices to note that the provision of services as such is not disputed.

It is true that MIC made this investment through one of its Group's companies and that the shares on which this investment is based were thereafter partially transferred. The Arbitral Tribunal shall come back to this further on (see no. 83 below). This does not change the fact that with respect to the issue now under discussion the MIC Group companies were the founders and are still the shareholders of the Sentel company.

It is admitted that in order for an investment to be protected, it must fulfill both the definition of the special Agreement entered into between the two Contracting States as well as that of the ICSID Convention. This was held, for example, in the award of 24 May 1999 in the case *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case no. ARB/97/4, *ICSID Rev.—FILJ* 251 (1999), pp. 14 *et seq.*, no. 68, exhibit CL-17).

79. b) *The Accord's* definition of an investment is extremely broad. According to Article 1, paragraph 1, "*le terme 'investissements de capitaux' comprend toutes les catégories de biens, y inclus toutes les catégories de droit*" ("*the term 'capital investments' shall comprise every kind of asset, including all kinds of rights*"). A foreign company setting up and financing a mobile telephone company that will operate a mobile telephone network obviously comes within the definition. It is evident that the services are also made for the purpose of drawing "*produits*" ("proceeds") therefrom that Article 1, paragraph 2 designates as "*les montants réalisés à titre de bénéfice ou d'intérêt sur l'investissement de capitaux*" ("the amounts realized from profit or interest on capital investment").

According to the Arbitral Tribunal, there can be no doubt about this conclusion and no additional arguments are called for.

80. c) *The ICSID Convention* also contains no definition of an investment. In general, in practice a broad concept is applied, even in decisions where special criteria have been used, such as those set out in the decision of 23 July 2001, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case no. ARB/00/4, *Journal du droit international* 196 (2002), p. 124, exhibit CL-27). This is also not the place for the Arbitral Tribunal to discuss the relevance of each of these conditions, since it appears obvious that, regardless of the list relied on, they are all fulfilled in the present case:

- there were contributions made by a party in the territory of Senegal; in the present case the setting up and financing of a company operating a mobile telephone network;

- these contributions were made for a certain duration since the Concession was granted to the local company for twenty years (Article 1, paragraph 5 of the Concession);
- these contributions were such as to generate income for the Concessionaire, and therefore indirectly for its shareholder or shareholders;
- these contributions contained a certain risk, going beyond a mere business risk;
- these contributions allowed for encouraging the economic development of Senegal through the concessionary company.

81. For these reasons, the Arbitral Tribunal finds that the setting up of Sentel, and its financing and operation by Claimant 1 fulfill the conditions of an investment both by virtue of the *Accord* as well as the ICSID Convention.

3.3. *The existence of a protected investment*

82. Even if the Arbitral Tribunal concludes that an investment exists, it must also be in a position to confirm, for MIO to rely on the *Accord*, that it was in fact MIO that made all or part of the investment.

- *According to the Respondent*, the investment was made by MIC, which is a Luxembourg company and not by MIO (Resp. 29.10.2009, no. 125); moreover, even if it were to appear in fact that it is MIO that indirectly controlled Sentel, at no time did it inform the Respondent of this, contrary to what the Concession prescribes, pursuant to which the Concessionaire has such an obligation.
- *According to the Claimants*, the investment was indeed made by a MIC Group company in which there was Dutch capital from the beginning (Claim. 12.02.2010, no. 233) and the only change that formally took place in the shareholding was formally notified to the Republic (Claim. 12.02.10, no. 171).

83. a) *The facts* surrounding the financing and the direct or indirect shareholding of Sentel are not easy to reconstitute based on the file. According to the Arbitral Tribunal, the transactions appear to have been made under the following conditions:

The shareholding of Sentel went through the following phases:

- On 30 July 1998 (Resp. 15.01.10, exhibit R-32; Claim. 22.12.08, exhibits C-26 and C-23; Claim. 12.02.10, exhibit C-50), *SENTEL GSM* was created in Dakar. Its share capital was 60,000,000 CFAF, divided into 6,000 shares of 10,000 CFAF each. At the time of its creation the shareholders were the following:

- for 4,498 shares, Tucan Corporation NV, a company incorporated in the Netherlands Antilles, which on 11 December 1998 became *Millicom Senegal NV*, a company also incorporated in the Netherlands Antilles;
 - for 1,500 shares, Mr. Pape Abdoul Ba;
 - for one share each, Mr. Peter Gordon Macnee (whose share was transferred on 9 October 1998 to Mr. Christophe Vivic), and Mr. Mark Christopher Lewis (whose share was transferred on 2 February 1999 to Mr. David Kimche).
- On 14 March 2006, Sentel informed the Minister for Postal Services, Telecommunications and New Information Technologies and Communication of a change in the shareholding: “*This change, which does not create any change in the control of the Sentel company, took place following the sale of 25% of the shares held by Mr. Abdoul Ba to the principal shareholder of Sentel gsm, Millicom Senegal N.V., pursuant to an agreement dated 14 March 2006*” (Claim. 12.02.2010, exhibit C-46).
 - In 2007, according to the report of Price Waterhouse Coopers concerning Sentel, 5,999 shares of Sentel were held by Millicom Senegal N.V. and one share by Mr. Pape Abdoul Ba (Claim. 12.02.10, exhibit C-47, p. 26).

The role of MIO in this structure went through the following phases:

- *Millicom Senegal N.V.* (formerly Tucan Corporation NV), the principal shareholder of Sentel, belonged to Holland Intertrust (Antilles) N.V. from 21 May 1992 to 22 June 1993, then to Millicom Holding B.V., and since 9 December 1999 to MIC Africa B.V., whose registered office is in Rotterdam. On 2 August 2002, Millicom Senegal N.V. was the owner of 5,984 shares of Sentel, presumably following a transfer of part of Mr. Pape Abdoul Ba's shares.
- *MIC Africa B.V.* (formerly named Keurslagerij B.V.), the principal shareholder of Millicom Senegal N.V., has authorized capital of 100 shares of 1,000 NLG each, of which only 40 have been issued and paid up. Twenty-five shares were issued as of 1987 and successively belonged to Mr. H. Veenstra from 1978 to 29 January 1997, to the Towerbridge B.V. company up until 4 December 1998 and to the Cardinal Holding B.V. company up until 29 April 1999.
- *Millicom Holding B.V.* (having its registered office at Westblaak 89, 3012 KG, Rotterdam) then became the owner of the 25 shares, as well as 15 others issued on 10 June 1999.
- On 3 February 2000, the 40 shares were transferred to *Millicom International Operations S.A.* (registered office in Luxembourg) pursuant to a “deed of distribution and transfer”.

- On 13 December 2000, the *Millicom International Operations B.V.* company (having its registered office at Locatellikade 1, 1076 AZ, Amsterdam), became owner of the 40 shares pursuant to a “deed of issue and contribution”.

b) In summary, it appears that Sentel is wholly owned (less one share):

- by *Millicom Senegal N.V.*, a company incorporated in the Netherlands Antilles,
- which is wholly owned by *Millicom Africa B.V.*, whose registered office is in Rotterdam,
- which is wholly owned by MIO, which also has its registered office in Rotterdam.

Thus, within the MIC Group, MIO is the general structure to which the business operating company in Africa (*Millicom Africa B.V.*) belongs, to which the business operating company in Senegal (*Millicom Senegal N.V.*) belongs, and which is the owner of Sentel.

c) *MIO's indirect control of Sentel* is undeniable. MIO is a Dutch company within the meaning of Article 1(4)(a) of the *Accord*. As the Netherlands is a Contracting State to the Washington Convention, MIO is a national of another Contracting State as required by Article 25 of the Washington Convention.

It is true that such control is indirect only since it goes through the African operating company then through the Senegalese operating company. But these two companies are also connected to the Netherlands; the first has its registered office in Rotterdam and the second in the Netherlands Antilles, which are also covered by Article 12 of the *Accord* (“*En ce qui concerne le Royaume des Pays-Bas, le présent Accord s’appliquera au territoire du Royaume situé en Europe et aux Antilles néerlandaises.*” (“*In the case of the Kingdom of the Netherlands, this Agreement shall apply to the territory of the Kingdom in Europe and to the Netherlands Antilles*”).

d) *As from the incorporation of Sentel*, its shares have been in the hands of companies connected to the Kingdom of the Netherlands. The fact was public knowledge since it appears from Sentel's formation and incorporation documents. The transfers that took place were between entities that were nationals of the Netherlands, which fact was also public knowledge.

MIC was indeed never the direct shareholder of Sentel, but always through other companies as intermediaries.

MIO is the owner of the aforementioned shares since December 2000, that is, a period prior to the institution of proceedings before the Dakar Regional Court and before this Arbitral Tribunal.

84. The Respondent also maintains that the purpose of MIO's acquisition of control of Sentel was very probably to “*créer artificiellement la compétence du CIRDI*”, for which reason its standing to bring an arbitration proceeding should not be recognized (Resp. 15.01.2010, no. 384). Violation of the principle of good faith – as a general principle of law – should lead the Arbitral Tribunal to sanction the conduct of the Claimants, as an investment must be made in good faith in order to be protected (Resp. 15.01.2010, nos. 385 *et seq.*).

It is a fact that the protection afforded by an agreement of the type which is invoked and by the ICSID Convention must be refused if contrary to good faith. The Arbitral Tribunal does not, however, deem it necessary to discuss here in detail situations in which such condition is fulfilled. It suffices, indeed, to find that, as from the creation of Sentel, its shares were held by subsidiary companies of the MIC Group, which were Dutch nationals that the transfers made involved only companies domiciled in the Netherlands, that these facts pre-date this proceeding by several years. Even if it is possible, or even likely that the choice of the subsidiaries was also made considering the protection that their domicile could afford them, this fact alone could not constitute an abusive solution, as long as circumstances have not been established which would demonstrate that such choice was made unknown to the other party and under artificial conditions; all conditions are not met in the present case.

85. For these reasons, and without need to discuss the other arguments put forth by the Claimants in support of their thesis, the Arbitral Tribunal finds that in the present case Claimant 1 made an investment entitling it to the protection afforded by the *Accord*.

4. Conclusion

86. It follows from the preceding discussion that:

The Arbitral Tribunal has jurisdiction to entertain the action that Claimant 1 is bringing against the Republic of Senegal.

C. THE JURISDICTION OF THE ARBITRAL TRIBUNAL IN RESPECT OF SENTEL

1. The issue

87. According to the Respondent, the Arbitral Tribunal would not have jurisdiction to rule on the requests for relief of Claimant 2, which the Claimants dispute.

The Respondent makes the following request for relief [Resp. 1]:

“ [...] *la République du Sénégal demande au Tribunal arbitral de : se déclarer incompétent pour examiner la demande de Sentel [...].*”

The Claimants make the following opposing request for relief [Claim. 1], inviting the Arbitral Tribunal to make:

“a declaration that the Tribunal has jurisdiction and is competent to decide the claims before it brought by Sentel”.

88. As concerns Sentel, the Claimants base their action on Article 11 of the Concession, whose wording is the following (the brackets have been added by the Arbitral Tribunal to facilitate the references thereafter):

“ [sentence 1] Les parties feront tout leur possible pour régler à l’amiable tout différend résultant de l’exécution de la présente convention. [sentence 2] Elles devront, au préalable si les lois et règlements en vigueur le permettent, recourir à tout organisme de conciliation de réglementation et d’arbitrage compétent en matière de télécommunications. [sentence 3] Il en sera de même en cas de conflit entre opérateurs notamment lors des accords d’interconnexions. [sentence 4] Si le litige persiste, les parties pourront en définitive recourir à l’arbitrage d’organismes internationaux tels que la cour d’arbitrage de l’OHADA, le Centre international de règlement des différends sur les investissements (CIRDI) ou la Chambre de Commerce international de Paris (CCIP) etc. “

Making use of the option which, according to them, this provision affords them, the Claimants seized this Arbitral Tribunal pursuant to Article 25 of the ICSID Convention, the text of which was reproduced above (see number 57 above). This Article indeed also allows an ICSID arbitration proceeding to be instituted provided that certain conditions are fulfilled.

89. The Parties' opinions totally differ concerning the fulfillment of these conditions. In particular, the Respondent disputes the fact that the rule of Article 11 of the Concession contains consent from the Republic of Senegal to an arbitration proceeding which, what is more, is an ICSID arbitration. Independently of this, it argues that in any event the conditions of Article 25 of the ICSID Convention are not fulfilled since Sentel is not a foreign investor.

It is therefore up to the Arbitral Tribunal to verify:

- whether the Respondent validly consented to an arbitration proceeding of this type (number 2 below.), and if so,
- whether Sentel is a foreign investor (number 3 below).

2. The existence of valid consent to the arbitration

2.1. In general

90. The first issue is therefore whether the 1998 Concession constitutes valid consent to the arbitration, which consent is necessary for Sentel's bringing an ICSID proceeding against the Respondent.

91. The Republic disputes this forthwith on the ground that the Concession would have ended as of 29 September 2000 and that the Claimants would have done nothing to object to this (Resp. 05.10.09, no. 24).

According to the Arbitral Tribunal the argument does not withstand scrutiny:

- Firstly, since it is undisputed that an arbitration clause is autonomous and that the end of a contract in which it is incorporated does not eliminate its effects; on the contrary, the arbitration which is agreed to therein also covers the principle and effects of the end of the contract. To admit the contrary would amount to depriving it of an important part of its practical effect since it would suffice for a party to abandon a contract in order to escape from it. This reasoning must apply also to the Concession.
 - Moreover, it has not at all been established that the Concession actually and validly ended; on the contrary, the issue is the crux of this dispute on the merits, and is disputed between the Parties; the Arbitral Tribunal might have to examine if it were to uphold its jurisdiction.
92. According to the Respondent (Resp. 29.10.09, nos.34 *et seq.*; Resp. 15.01.10, nos. 15 *et seq.*), Article 11 of the Concession would not contain a real consent and, if this were the case, such consent would not be valid since it would be contrary to the mandatory rules of Senegalese domestic law. The Claimants maintain opposing opinions in this regard (Claim. 11.11.08, no. 43; Claim. 14.12.09, nos. 235 *et seq.*; Claim. 12.02.10, nos. 37 *et seq.*).

It is therefore up to the Arbitral Tribunal to successively to examine:

- whether Article 11 of the Concession contains consent by the Republic of Senegal to an ICSID arbitration (number 2.2. below) and, if so,
- whether this consent is valid (number 2.3. below).

2.2. *The existence of consent*

93. a) *According to the Respondent*, Article 11 of the Concession does not constitute consent to arbitration but a “*simple clause indicative qui se contente[rait] de prévoir la possibilité d’un recours à l’arbitrage, parmi d’autres procédés, sans poser aucune obligation à la charge des parties au contrat*” (Resp. 29.10.2009, nos. 158 *et seq.* and no. 178; Resp. 15.01.2010, no. 67). The Parties did not agree either on the principle of recourse to arbitration nor on the arbitral body to be involved (Resp. 29.10.2009, no. 176).

b) *According to Claimant 2* on the contrary, Article 11 of the Concession could only be understood as a valid arbitration clause; the fact that there is ambiguous wording and above all the fact that it affords an option in respect of the choice of the institution is not an obstacle to its validity.

94. The Arbitral Tribunal relies on the following factors in reaching its conclusion:

95. a) *The origin of the rule.* The evidentiary proceeding established that the Parties began by negotiating their contractual relation based on a draft Concession prepared by the Respondent (hereinafter the “Draft”, exhibit C-41, see no. 7 above). Concerning the provision in question, it provided for the exclusive jurisdiction of the Dakar Regional Court: “*Si le litige persiste, le Tribunal régional de Dakar statuant en matière administrative sera compétent.*” (last sentence of Article 7 of the Draft).

During such negotiations the Claimants would have opposed the adoption of such provision. The issue would have been the subject of long discussions, which would have continued for several hours (one half day and a morning) (Mr. Rosh Statement, para. 17). The assertion seems plausible; otherwise one could not understand how it was possible for the Parties to go from the clear text of the Draft to the complex text of the Concession, without making numerous detours.

In particular, it was alleged that the Claimants refused to sign the Concession without a clause affording the Parties recourse to international arbitration (Claim. 14.12.2009, no. 283; Claim 14.12.2009, no. 285; Transcript, 01.04.10, p. 27 citing the testimony of Mr. Rosh). The assertion was confirmed by two witness statements produced by the Claimants:

- Mr. Rosh stated that: “*Je suis certain qu'au moment des négociations, tant le Sénégal que MIC entendaient conclure un engagement d'avoir recours à l'arbitrage international ayant force obligatoire.*” (Mr. Rosh Statement, para. 19);
- Mr. Pape Ba, in turn stated: “*Nous avons été très clairs sur le fait que nous ne voulions pas que les différends soient portés devant les juridictions de Dakar, car cela serait revenu à faire du Sénégal à la fois un juge et une partie.*” (Mr. Pape Ba Statement, para. 18).

The Respondent waived cross-examination of these witnesses; their statements appear plausible when comparing the version of the Draft with that of the final text and they were not formally contested by the Respondent. It results therefrom that indeed the Parties to the Concession Agreement agreed to eliminate the exclusive jurisdiction of the Dakar Regional Court, of which no further mention is made, and accepted a solution that, following unsuccessful negotiations, makes exclusive reference to arbitration. It is difficult to conclude therefrom that the consent finally given by the Claimants amounted to leaving the Respondent the right to unilaterally to decide to refuse any form of arbitration, as it sees fit, and consequently to maintain the jurisdiction of the Dakar Regional Court.

Indeed, the solution reached makes no further mention of State courts, but exclusively establishes two contractual means, both of which call upon, according to different methods it is true, conciliation bodies or bodies whose decisions are independent of any State structure and, *a fortiori*, Senegalese judicial authorities.

That said, it is evident that the text resulting from the negotiations is complicated, it mixes up the two procedures and, above all, it refers to arbitration in a manner which generated the controversies between the Parties to this proceeding.

In support of its thesis, the Respondent invokes the argument, which shall be examined later on (see no. 102 below) according to which its domestic rules prohibit it from being bound by an arbitration clause and that the purpose was to reserve what remained possible, namely recourse to a subsequent arbitration agreement (“*compromis arbitral*”) to settle existing disputes (Resp. 29.10.2009, no. 179). According to the Arbitral Tribunal, the argument is not decisive. The testimonies produced by the Claimants do not mention that that was the position taken by the Respondent during negotiations and that the text arrived at was the explanation thereof. On the contrary, they insist on the understanding of the rule that the individuals who directly and personally took part in the negotiation of the clause had of the rule (Mr. Pape Ba Statement, p. 4, Mr. Youval Rosh Statement, pp. 5-6; Mr. Kemal Shefik Statement, pp. 2-3). If the idea had been to exclude arbitration, whereas the entire spirit of the rule militates in favor of contractual solutions, in order to replace it by the mere reservation of a possible subsequent agreement, the text could and should have expressed this more clearly.

According to the Arbitral Tribunal, the origin of the rule, although not decisive, enables it to be established that the Claimants rejected a purely judicial solution and that they finally accepted a more complex, contractual solution.

96. *b) The system of the rule.* The dispute resolution system established by Article 11 of the Concession uses wording that is more and more widely used, which connects two complementary procedures over time (“multi-tiers procedure”):

- *Firstly, negotiations.* It appears from the first sentence of the provision that, “ [l]es parties feront tout leur possible pour régler à l’amiable tout différend résultant de l’exécution de la présente convention”. The statement is a classic one and does not call for any special comment at this stage.

In reality, the rule is more precise and complete to the extent that, in the following sentence [sentence 2], it obligates “*au préalable*” the Parties to turn, if permitted by law, to specialized bodies which would be competent to settle the dispute by conciliation and arbitration. “*Elles devront, au préalable si les lois et règlements en vigueur le permettent, recourir à tout organisme de conciliation de réglementation et d’arbitrage compétent en matière de télécommunications.*”. The significance of this last rule escapes the Arbitral Tribunal since it does not see what kind of body this would be; it would apparently follow from the rules governing telecommunications since it is furthermore specified in the following sentence [sentence 3], that the method would also apply to disputes between operators, which issue at first view is unrelated to the purpose of the Concession: “*Il en sera de même en cas de conflit entre opérateurs notamment lors des accords d’interconnections.*”

Without wishing to go further in the analysis of this rule which is not in question, two things can be deduced therefrom: on the one hand, it establishes contractual methods for the settlement of disputes outside of State procedures and, on the other hand, it affirms, at least at first view, that disputes arising between the Parties may be settled by arbitration without the State being able to rely on the prohibitions that it raises vis à vis the Claimants.

- *Arbitration thereafter.* In its last sentence [4], Article 11 treats arbitration as a natural supplement in case of a breakdown in negotiations; it is necessary but it suffices that “*le litige persiste*”. The procedure apparently comes within the scope of the prolongation and spirit of the negotiation procedure, without any reference to a judicial procedure which the Respondent today alleges would be the only procedure available absent an additional agreement between the Parties.

According to the Arbitral Tribunal, the system apparently selected by the Parties establishes a two-tier procedure, both of which are contractual, without any reference to a judicial solution.

97. c) *The wording of the rule.* As stated, the decisive part of the rule is the last sentence which reads as follows: “*Si le litige persiste, les parties pourront en définitive recourir à l’arbitrage d’organismes internationaux tels que la cour d’arbitrage de l’OHADA, le Centre international de règlement des différends sur les investissements (CIRDI) ou la Chambre de Commerce internationale de Paris (CCIP) etc...*”. Several of the terms or expressions used call for comments:

- “*pourront recourir [...] à l’arbitrage*”. The possibility indicated in the rule is understood by the Claimants as an option afforded to each of the Parties to initiate an arbitration proceeding, even without the agreement of the other (Claim. 14.12.2009, nos. 239 *et seq.*; Claim. 12.02.2010, no. 22 and no. 43), whereas the Respondent understands it as a possible option, not afforded to one party individually but to both Parties mutually, to enter into an agreement for the purpose of resolution of the dispute (Resp. 15.01.2010, no. 68).

The Arbitral Tribunal must concur with the Claimants that in the second version the rule is devoid of any practical significance. Without wanting to make any judgment, the Arbitral Tribunal does not see why and how the Republic of Senegal would agree to prefer arbitration over its own courts in a situation that became contentious. The practical, financial and psychological advantages clearly argue in favour of a judicial procedure. It is actually the choice made in its dispute with Sentel and MIC.

Moreover, the chosen wording does not establish such intent. The text does not provide that the Parties could “*convenir*” to have recourse to arbitration, but that they could “*recourir*” thereto, which implies that an additional agreement is not necessary. The solution provided is not presented as one of the options of an alternative of which the other would remain a judicial procedure which, in spite of the fact that according to the

Respondent constitutes the normal procedure, is not even mentioned although it was still in the Draft. The Claimants also raise the fact that other provisions of the Concession provide the Parties with the possibility to provide for a further agreement, albeit in other contexts, whereas this is not the case in an area as essential as the resolution of disputes.

- “*les parties*”. The Respondent makes an argument based on the fact that the text does not entitle each party (singular) of such right, but both parties (plural), which would establish that a concerted action by the two Parties is necessary. The argument is not decisive since the plural may also be understood as a right given not only to the two Parties, but unilaterally to each of them.
- “*en définitive*”. The expression, which means “when all is said and done” (“*en fin de compte*”), does not only signify the fact that this is a subsequent phase (already expressed by “*si le litige persiste*”), but the last phase, which would end a dispute. It is difficult to reconcile this wording with the idea that recourse to arbitration would be merely a possibility dependent on the agreement of the other Party.
- *the listing of the arbitration bodies*. The text clearly indicates that what is involved is not an *ad hoc* arbitration but institutional arbitration. On the other hand, it does not designate a particular body but lists several. According to the Respondent, the clause is a pathological clause to the extent that it lists several different institutions.

Nothing, however, prevents an arbitration clause from affording several options, from amongst which the party initiating the proceeding has the right to choose. The solution is current practice in investment treaties and its validity is not disputed since it is not contrary to the spirit of arbitration, especially since the mentioned bodies are all highly reputed. In the present case, Claimant 1 made use of this right by deciding to go to ICSID arbitration, which solution is expressly mentioned by the clause. Accordingly, it is not necessary to decide whether the choice by a party of an arbitration body which is not mentioned by the clause would be covered by it.

- *The open nature of the clause* expressed at the end of the sentence by “*etc...*” is invoked by the Respondent to establish that in any event the rule is incomplete and that it necessarily calls for a choice which the Parties could only make by means of an additional agreement. It cannot be denied that the wording is special even if it does not necessarily militate in favor of the suggested solution since this choice would in any event be limited to [international arbitration] *organisms* of an equivalent type and quality as those bodies which are mentioned.

In the view of the Arbitral Tribunal, the wording of the rule is awkward and leaves lingering doubts, but it does not unequivocally conflict with the results of the interpretation that the other factors dictate.

98. d) *The basis of the rule.* The Arbitral Tribunal cannot fail to take into account the international trend in respect of dispute resolution in agreements of the type involved, in particular given the general evolution that has occurred and is continuing. Three aspects may be pointed out in this respect:

- *The classic nature of the clause.* Even if arbitration had been considered to be an exceptional system for a long time, the recent evolution establishes that on the contrary this system has become the usual method of dispute resolution in international commerce. For such reason the requirements laid down in the wording of the clause which provides for the application thereof are not as strict as they might have been before. What matters, in fact, is ensuring that the parties have sufficiently clearly manifested their intention to submit themselves to arbitration and not to State courts. The fact that a clause is not absolutely clear, the fact that it contains omissions or uncertainties, does not suffice to make it inoperative.
- *The presumption in favor of arbitration.* Even if the expression may appear excessive, we can indeed speak, in case of serious doubts, of a presumption in favor of arbitration. This must, however, be assessed according to the specificities of the case. The principle will be more easily admitted if the parties involved are experienced in international business practices or if the nature of the agreement objectively calls for a solution of this type, provided always that the terms and conditions provided guarantee adequate protection of the parties.

In the present case, it is evident that what is involved is an agreement binding the Parties, who cannot be unaware of the importance, nature and risks of arbitration; the agreement in which the clause is inserted is of considerable importance, justifying recourse to a perfectly neutral mechanism for resolution of disputes. Even though it might appear differently, the business relation is international in nature for which recourse to arbitration appears adequate. As has been seen, due to its origin, system and wording, the clause can be understood as expressing the intent of the Parties to submit to arbitration.

- *The pathological nature of the clause.* In extension of the first principle arbitral tribunals and State courts, very much encouraged by learned writers, developed simple therapies to correct the imperfections of clauses referred to as pathological (“*in favorem arbitrii*”). It is necessary but it suffices *per se* that the principle of arbitration be recognized and that the additions and corrections may be made without distorting the original intent of the parties.

In the present case the Respondent raises two essential ambiguities:

- The first is in respect of the “*caractère éventuel*” (“possible nature”) of the clause and the use of the verb “*pouvoir*” (“can”); the Arbitral Tribunal has indicated the reasons for which the clause could and should be interpreted differently. The defect does not affect the recognition of the principle of the arbitration.

- The second is in respect of the “*caractère optionnel*” (“optional nature”) of the clause, which allows the party at whose initiative the action is taken to choose the institution under whose aegis the arbitration shall be carried out. It has been held for some time now that the existence of a choice is not contrary to the system, to the extent that at least each of the contemplated solutions affords a guarantee that is adequate. In the present case, the three specified institutions entirely fulfill these conditions and the choice of ICSID cannot reasonably call for any comment. The list is not exhaustive; even in such form, the choice of another institution could be envisaged if it afforded guarantees that were comparable to the other mentioned institutions. The issue, however, is not posed in the present case.
 - *The effectiveness of the clause.* Contrary to the Respondent (Resp. 15.01.2010, no. 114), the Arbitral Tribunal is of the opinion that preference must be given to the version which gives the rule real significance. In case of a dispute, it is always possible for parties to agree to submit it to arbitration, but it is obvious and the mention thereof superfluous if it is not accompanied at least by a moral, conditional or even legal commitment. If the meaning was indeed the Respondent’s one, it is hard to see why, following several hours of negotiations, the Claimants would have accepted a solution that grants them a prior guarantee of negotiation only, which obviously entails no mandatory effect for those parties who submit themselves to it.
99. The solution reached by the Arbitral Tribunal corresponds largely to *international case law* and other decisions taken by other courts and tribunals in cases that are very comparable. Contrary to the assertion of the Respondent (Resp. 15.01.2010, nos. 71 and 115; Resp. 05.10.2010, nos. 73-141), it cannot be seen why these decisions could not be invoked in the present case, since they all concern arbitration clauses included in agreements. In particular, the Arbitral Tribunal sees no reason why the fact that the present proceeding was instituted in the context of ICSID would justify any different conclusions. These decisions were amply commented on and approved by *doctrine*. In order to spare itself from a detailed review, the Arbitral Tribunal refers to one of the main authorities, Gary Born, in his most recent and undoubtedly complete publication (G. BORN, *International Commercial Arbitration*, Vol. I, London 2009, pp. 570 *et seq.*). More particularly, it is confirmed therein that in international matters there is a presumption of validity of clauses which is justified by contemporary tendencies in respect of methods of dispute resolution, which are very favorable to arbitration.
- According to the Arbitral Tribunal, the preceding arguments justify confirmation of the intent of the Parties to submit to ICSID arbitration if one of them takes the initiative for the action according to such procedure.
100. For these reasons, and without it being necessary to discuss the other arguments put forward by the Claimants in support of their thesis, the Arbitral Tribunal finds that in spite of the doubts justified by its wording, Article 11 can and must be

understood as consent by the Republic of Senegal to ICSID arbitration proceeding.

2.3. *The validity of the consent*

101. There is also the issue of whether Article 11 of the Concession, as construed by the Arbitral Tribunal, validly binds the Republic of Senegal.

In this respect, the Parties also maintain diametrically opposed positions.

a) *According to the Respondent* (Resp. 29.10.09, nos. 164 *et seq.*; Resp. 15.01.2010, nos. 148 *et seq.*), it would have been prohibited by Senegalese law from binding itself to an arbitration clause, and the international principles established in the area of international arbitration do not change this fact.

b) *According to the Claimants* (Claim. 14.12.2009, nos. 89 *et seq.*; Claim. 12.02.2010, nos. 105 *et seq.*), it would be inaccurate to assert that Senegalese domestic law is an obstacle to the validity of consent given by the Republic and that in any event the principles applied in international matters allow it to be ignored.

102. It is undisputed that, as expressly provided in Article 12, the Concession is governed first of all by Senegalese law. According to the Respondent, the law of Senegal in force at the time of the Concession excluded the possibility for the Republic of Senegal to validly enter into an arbitration clause concerning the subject matter of the Concession since it concerns prerogatives of public power, partially in any case (see in particular Article 11 of the Senegalese *Code sur les obligations administratives, law n° 65-51 of 19 July 1965*; Article 10 of the Senegalese *Code des obligations administratives*; Article 819-29 of the *Code de procédure civile*, in the version given it by *Decree n° 98-492 of 5 June 1998*; Article 826-3 of the *Code des obligations civiles et commerciales, law n° 98-30 of 14 April 1998*).

This conclusion is disputed by the Claimants. They furthermore note that Senegalese law has evolved over the last few years and that it is more and more amenable to the possibilities afforded the Republic to be bound by arbitration clauses (see Article 12 of the *Code des investissements*; Article 136 of the *Code des marchés publics*).

103. According to the Arbitral Tribunal, these rules are not decisive due to the principles developed in the area of international arbitration in this regard.

a) The Arbitral Tribunal starts from the assumption that this proceeding involves *an international arbitration*. The Respondent admittedly objects that Sentel is a company registered in Senegal (see no. 2 above). The Arbitral Tribunal will explain below (see no. 109 below) that this connection is formal in nature, required for the operation of the Concession, but that in reality the stakes are foreign due to the control that the MIC Group companies exercise over Sentel. Independently of this argument, it must be pointed out that even for the Respondent, the Concession is international in nature; it itself brought its action before the Dakar Regional Court not only against Sentel but also against MIC,

which it deems bound by the Concession. Moreover, the very wording of Article 11 of the Concession expressly refers to “*l’arbitrage d’organismes internationaux*”, mentioning institutions therein which are all international and of which certain, in particular ICSID, presupposes a foreign element.

b) *The principle* today is firmly established in international arbitration that a State is prohibited from invoking its own domestic law in order to avoid arbitration and its capacity to enter into arbitration clauses. Such an attitude would violate the principles of good faith and of “*international public policy*”. This rule has been admitted in various cases by international courts and tribunals as well as by numerous learned writers of doctrine (reference in relation with Claim. 14.12.2008, nos. 109 *et seq.*). Thus a famous award of 1971 held: “*L’ordre public international s’opposerait avec force à ce qu’un organe étatique, traitant avec des personnes étrangères au pays puisse passer ouvertement, le sachant et le voulant, une clause d’arbitrage qui met en confiance le co-contractant et puisse ensuite, que ce soit dans la procédure arbitrale ou dans la procédure d’exécution, se prévaloir de la nullité de sa propre parole.*” (ICC Case no. 1939 [1973] *Rev. Arb.* 145; exhibit CL-59). It has thereafter been regularly upheld (for example, *Cour d’Appel de Paris, 1^{ère} chambre, section C, 17 December 1991; Gatoil International Incorporate v. la Société National Iranian Oil Company*, no. 90-1957; exhibit CL-54; *Cour d’Appel de Paris, 1^{ère} chambre, section C, 24 February 1994, Ministère tunisien de l’Equipement v. société Bec Frères* [1995] *Rev. Arb.* 275; exhibit CL-56).

This solution has itself been confirmed by doctrine (for example J. PAULSSON, *May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration? Reflections on the Benteler v. Belgium Preliminary Award* [1986] 2 *Arb. Intl.* 90, exhibit CL-58). In other words, the domestic law of the State that invokes it in order to dispute the validity of an arbitration clause is “irrelevant” (GAILLARD/SAVAGE (eds.), *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, The Hague 1999, p. 61, exhibit CL-55).

104. In the present case it has already been found above that the Parties spent a long time negotiating Article 11 of the Concession (see no. 7 above). It has also been confirmed that the intent of the Claimants at the time of such negotiations was to insert an arbitration clause (see no. 95 above). The Claimants also alleged that during such negotiations the Respondent never invoked a prohibition against arbitration clauses. The Respondent waived “cross examining” the Claimants' representatives who were present at the time of such negotiations, and it has not adduced any evidence that would establish the contrary.
105. For these reasons, and without it being necessary to discuss the other arguments put forward by the Claimants in support of their thesis, the Arbitral Tribunal finds that even if domestic law prohibited the Republic of Senegal from being bound by an arbitration clause, this argument cannot be raised against Claimant 2 in the present case.

2.4. *Conclusion*

It follows from the preceding discussion that:

The Arbitral Tribunal has jurisdiction to entertain the action that Claimant 2 is bringing against the Republic of Senegal.

3. **Sentel as investor**

3.1. *The issue*

106. In order for ICSID and the Arbitral Tribunal constituted to settle a dispute under its aegis to have jurisdiction, the conditions of Article 25 of the ICSID Convention must also be fulfilled.

The Arbitral Tribunal shall not discuss again whether Sentel made an investment within the meaning found within such context; it suffices, in this respect, to refer to the discussion devoted thereto concerning the same subject relating to the indirect control that MIO exercises over Sentel (see no. 79 above).

On the other hand, a special verification must be made as to whether the Convention may be invoked in a proceeding brought by Sentel. In order to do so, the conditions of Article 25(2) of the ICSID Convention must also be fulfilled and a “*national of another Contracting State*” must exist.

107. As juridical persons are involved, the letter b of the same Article provides the following definition:

“any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

Only the second hypothesis must be analysed here since Sentel is indisputably registered in Senegal. We must therefore ascertain:

- that it is controlled by foreign interests (see number 3.2. below), and
- that the State party to the dispute consented to it acting on such basis (see number 3.3. below).

3.2. *The control of Sentel*

108. The Parties maintain fundamentally different opinions concerning this issue.

a) *According to the Respondent* (Resp. 29.10.2009, no. 186, nos. 121 and 188; Resp. 15.01.2010, no. 209 and nos. 250 *et seq.*), Sentel would be a Senegalese company registered as such in the territory of Senegal and would not

fulfill the conditions laid down by Article 25(2)(b) of the ICSID Convention. The Parties would have expressly desired and agreed to this by setting up the company. In addition, it would not been established that Sentel was under foreign control.

b) According to the Claimants, on the contrary, Sentel would be registered in Senegal solely for purposes of performance of the Concession. It would always been and is still controlled by foreign companies, of which the Respondent would always been informed. Furthermore, Respondent would have admitted submission to Article 25 of the ICSID Convention, in particular by agreeing to Article 11 of the Concession. Lastly, at no time would Sentel have acted in bad faith in respect of the constitution of its capital and the information it furnished the Respondent.

109. The idea that is at the basis of Article 25(2)(b) (second hypothesis) is obvious. For purposes connected to an investment in a foreign State, it may be expedient, necessary or even required that a company be incorporated in the territory of the other Contracting State. If a strict and formal interpretation of nationality were adhered to, it would not be possible in such cases to have recourse to the dispute resolution mechanisms afforded by the ICSID Convention since all the parties would be nationals of the same State.

However, the need to be protected may be at least as necessary if the company is in fact controlled by foreign interests. This is why in such case it may be necessary to extend protection. Without this addition, the Convention would have failed in its primary purpose since it would deprive investors that are forced *de facto* or *de jure* to have recourse to a local company from being protected (Claim. 14.12.2009, nos. 143 *et seq.*).

It is from this point of view that the first condition for application of the rule must be understood: that the company be controlled by foreign interests. The notion must be interpreted broadly. It is necessary, but it suffices that the major part of the means made available to the local company come from foreign funds. This indirect control by means of financing most often entails indirect powers of management assumed by those who have made the investment.

It would therefore have to be verified whether this condition was fulfilled in respect of Sentel. The Arbitral Tribunal may, however, limit itself to referring back to the facts and arguments that it set forth above relating to MIO's status (see no. 83 *et seq.* above). It is evident that as from the beginning, Sentel was for the most part held by foreign interests pertaining to nationals of ICSID Contracting States.

The entire issue thus becomes that of whether the Republic gave its consent.

3.3. The Respondent's consent

110. In order that Article 25(2)(b) of the ICSID Convention be invoked, it is lastly necessary that the State being sued gave its consent in order that a company, though a national of the same State but controlled by foreign interests, can sue it on this basis.

This implies first of all that the Respondent had knowledge thereof, and then agreed to submission to international arbitration.

111. In the view of the Arbitral Tribunal, the facts that have been established make it clear that the State could not have been unaware that Sentel was under foreign control:

a) *Since the tender* and the initial negotiations, the Republic of Senegal could not have been unaware that the Sentel company, which was in the process of being incorporated, was under foreign control since it was part of the Millicom Group and was under the control of MIC (Claim. 14.12.2009, nos. 165 *et seq.*; Claim. 12.02.2010, nos. 115, 127 *et seq.*). Messrs. Ba and Rosh maintain this position (cited Statements in Claim. 14.12.2009, nos. 166 *et seq.*). According to the tender, “*la réussite de Sentel gsm [serait] une étape importante de la stratégie d’expansion sur le continent africain, adoptée par MIC*” (Claim. 14.12.2009, no. 177); the tender is an integral part of the Concession (Annex 3) (Claim. 14.12.2009, no. 180).

b) After having been selected as the successful bidder, MIC was required to set up *a Senegalese company* in order to obtain the Concession, which was provided for by the 1996 *Code des Télécommunications*, appended to the Concession (Annex 4) (Claim. 14.12.2009, no. 157). Indeed, Senegal and MIC could not have legally entered into a concession agreement without MIC setting up a local company, since this is expressly required by Article 6 of the *Code des Télécommunications* (Claim. 14.12.2009, no. 158; Claim. 12.02.2010, no. 121). It was clearly stated in the bid documents that this company would be set up and controlled by foreign interests connected to the MIC Group.

c) *The terms of the Concession* themselves indicate the foreign control since mention is made of “*la société Sentel gsm SA, filiale du group Millicom International Cellular (MIC).*”

d) *In the tender process*, Senegal stated that it was looking for a foreign investor, which could alone satisfy the requirements of the bid; as evidenced by the fact that an “*expérience dans le développement des réseaux des Pays Tiers*” was expressly mentioned among the major criteria used in evaluating the bids (Claim. 14.12.2009, nos. 169 *et seq.*). The Sentel company was to become a member of the Millicom Group (Claim. 14.12.2009, no. 156).

e) The fact that the shareholding within the Group could have changed over the years is irrelevant in this respect and changes nothing to the basic finding, since it was well known from the beginning that Sentel was predominantly held by companies domiciled in the Netherlands or regions connected thereto (see no. 83 *et seq.* below). ICSID case law does not require that the nationality of such interests be mentioned in the agreement concerning nationality (Claim. 14.12.2009, nos. 140 *et seq.*).

f) Senegal confirmed by its *correspondence* its knowledge of the foreign control of Sentel. The Senegalese government continued to deal with MIC even

following Sentel's incorporation, which would confirm that it had knowledge of MIC's control of Sentel (Claim. 14.12.2009, no. 183).

112. In order for the provision to be applied it implies not only the existence of control, but also that the parties agreed to it, which implies the consent of each of them. Sentel's consent is not in question; it must now be verified whether the Republic also gave its consent. It disputes it, the Claimants affirm it.
113. It is undisputed that consent need not be in any special form. Consequently, consent may not only be explicit but also implicit. Consent in respect of nationality could be contained in the agreement concerning the investment or in a “*compromis*” or joint request under Article 1(2) of the Institution Rules. Such consent appears to exist when a State enters into an agreement with a local company containing an ICSID clause.
114. For this purpose, it appears in light of the circumstances that by its behavior the party involved manifested its consent or, failing this that its behavior justified that the other party had been convinced that it consented.
 - An initial argument resides in the fact that the Concession makes express reference in Article 11 to the jurisdiction of the ICSID tribunal, the mention of which makes no sense unless it is admitted that the Republic gave its consent to an action in accordance with the ICSID procedure (Claim. 14.12.2009, no. 190; Claim. 12.02.2010, nos. 16 and 115). As in the decision in the *LETCO v. Liberia* case (Claim. 14.12.2009, no. 189), no argument can be made – and the Respondent did not raise any – based on the fact that MIC could also be a party to the Concession and that in respect of it the condition of nationality would be fulfilled in any event.
 - The Respondent alleges that it was by design, and precisely to avoid such risk, that the Republic of Senegal required that the Concession be concluded with a company specially set up in Senegal for such purpose and incorporated in Senegal (Resp. 29.10.2009, nos. 188 *et seq.*; Resp. 15.01.2010, nos. 208 and 372). The argument is not convincing since the requirement of incorporation in Senegal was imposed by the Republic for reasons which are undoubtedly understandable, but nothing allows it to be concluded therefrom that this in fact amounted to intent to exclude recourse to an ICSID arbitral tribunal. On the contrary, it is due to the requirements of this sort, which are relatively common in practice, that with respect to nationality, the notion of protected investor had been extended by Article 25(2)(b) *in fine*. The fact that the incorporation also provided certain benefits for the Claimants is not an obstacle thereto.

3.4 Conclusion

115. In light of the preceding discussion:

The Arbitral Tribunal finds that it also has jurisdiction to entertain the action brought by Sentel against the Republic.

D. COSTS AND EXPENSES

116. In their pleadings, each of the Parties makes requests with respect to the costs and expenses of the arbitration.

The Respondent [Resp. 2] requests the Arbitral Tribunal to:

“condamner ces deux sociétés [les Demanderesses] à payer à la République du Sénégal les frais de l’arbitrage ainsi que les frais engagés pour assurer sa défense.”

The Claimants [Claim. 3] are expecting from the Arbitral Tribunal,

“without prejudice to any final determination of the merits of the parties’ dispute, an order that Senegal pays all costs incurred in relation to the objections to jurisdiction it raised, including the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Claimants including but not limited to the fees of their legal counsel, experts and consultants as well as the Claimants’ own employees, on a full indemnity basis, plus interest thereon at a reasonable commercial rate”.

117. In light of such requests for relief the Arbitral Tribunal invited the Parties, following this phase of the proceeding, to submit their submissions concerning the costs of the arbitration. They have produced them.
118. In light of the decisions made in this decision by the Arbitral Tribunal, the proceeding shall continue on the merits at the initiative of the Claimants. It is therefore not necessary at this stage to decide on the allocation and apportioning of the costs and expenses.

The Claimants deem nevertheless that even in the hypothesis where the Arbitral Tribunal would find that it has jurisdiction, which hypothesis has been found here to be true, it must make a determination in respect of the costs and expenses generated by this jurisdictional phase.

The Arbitral Tribunal considers that this is not appropriate. Firstly since it is difficult at this stage clearly to make the difference between the preparatory work and phases that are exclusively limited to jurisdiction. Thereafter and above all it is more natural that the Arbitral Tribunal makes decisions of this type at the end, taking all of the proceeding into account.

119. It ensues from this argument that:

The decisions concerning the determination and allocation of the costs and expenses of the arbitration shall be made by the end of the proceeding.

E. THE CONTINUATION OF THE PROCEEDING

120. In their submissions the Claimants made two other requests for relief:

“[Claim. 4] any other relief the Arbitral Tribunal may deem appropriate in the circumstances; and

[Claim. 5] order in respect of the procedure for the next phase of this case.”

121. The Arbitral Tribunal does not consider it necessary to order other measures with respect to the present decision.

It is true that the proceeding shall continue with respect to the merits and that the Arbitral Tribunal may jointly entertain both actions brought against the Respondent, one based on the Treaty and the other on the Concession, but based on the same facts. All Parties shall thus have the opportunity to make their cases in a complete manner and the Arbitral Tribunal shall decide after having carried out all necessary analysis.

The procedural rules in respect of this second phase and, in particular, the timetable, shall be determined in an additional procedural order that the Arbitral Tribunal shall render after consulting the Parties. Such order concerns the proceeding and is outside the scope of this decision.

The Arbitral Tribunal, however, is not competent to influence the outcome of the proceeding brought before the Dakar Regional Court.

122. Consequently:

The continuation of the proceeding shall be determined by the Arbitral Tribunal in an order after consultation with the Parties.

On these grounds, the Tribunal decides as follows:

- 1. The Arbitral Tribunal has jurisdiction to entertain the action that Claimant 1 is bringing against the Republic of Senegal.**
- 2. The Arbitral Tribunal has jurisdiction to entertain the action that Claimant 2 is bringing against the Republic of Senegal.**
- 3. The decisions concerning the determination and allocation of the costs and expenses of the arbitration shall be made by the end of the proceeding.**
- 4. The continuation of the proceeding shall be determined by the Arbitral Tribunal in an order, after consultations with the Parties.**

Date: 16 July 2010

[Signed]

Kaj Hobér

[Signed]

Ronny Abraham

[Signed]

Pierre Tercier