INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Government of Canada

(ICSID Case No. ARB/16/6)

ANNULMENT PROCEEDINGS

PROCEDURAL ORDER NO. 2

Submission of New Evidence

Members of the Tribunal
Professor Mónica Pinto, President of the Tribunal
Professor Lawrence Boo, Arbitrator
Ms. Dyalá Jiménez, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti, ICSID

February 4, 2021

I. Procedural Background

1. On January 13, 2021, the Government of Canada filed a request for the Committee to decide on the submission of new evidence pursuant to Procedural Order No. 1 ("PO 1"), paragraph 15.1 ("Canada's Application").

2. Canada requested permission from the Committee to introduce into the record in these proceedings new evidence on Canadian domestic law that is not already included in the record of the original arbitration proceeding, in particular the Ontario Business Corporations Act ("the OBCA"). Canada explains that: (i) the Committee has the authority to admit new evidence; (ii) the proper standard to admit the evidence is whether it is relevant to the grounds for annulment pled by Canada; and (iii) Canada's request meets this standard. According to Canada, the introduction of this evidence into the record will allow the Committee to exercise its role as a control mechanism over the arbitral proceeding and to consider properly Canada's grounds for annulment under Article 52(1) of the ICSID Convention.

3. On January 14, 2021, the Committee invited Global Telecom Holding S.A.E. ("GTH") to reply to Canada's Application on the Submission of New Evidence, which it did on January 28, 2021.

II. Position of the Parties

a) The Government of Canada

4. The Government of Canada submits that the Committee has the authority to admit new evidence in these proceedings according to PO 1, paragraph 15.1. It further states that "while, in principle, the disputing parties should generally rely on evidence that was before the Tribunal, Arbitration Rule 34(1) and paragraph 15.1 of PO 1 permit the introduction of new evidence under certain circumstances".[1]

5. According to the Government of Canada, "[t]he proper standard to admit new evidence into the record in these proceedings is whether the evidence is relevant to one of the grounds for annulment pled by the applicant (in this case, Canada)". It provides legal authority and arbitral case-law supporting its submission, especially the decisions taken by the *ad hoc* Committees in *Micula*[2], *Sempra*[3] and *Libananco.*[4]

6. The Government of Canada differentiates the approach shown above from that requiring a more onerous standard of "exceptional circumstances", which it contends should not be adopted by the Committee.[5] It supports its views on the absence of that requirement in paragraph 15.1 of PO 1 and on the consideration that it would unduly constrict the Committee's discretion to admit new evidence under Arbitration Rule 34(1) and paragraph 15.1 of PO 1, and would hinder the Committee's role as a control mechanism.

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[1] Canada's Application, p. 2.
[2] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016, RL-357 ("*Micula*"), para. 79.
[3] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010, RL-345 ("*Sempra*"), paras. 17-18.
[4] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, May 22, 2013, RL-358 ("*Libananco*"), paras. 14-16.
[5] Canada's Application, p. 3.

7. Canada refers to the grounds for annulment it raised in its Application and contends that the Arbitral Tribunal failed to consider the relevant domestic laws of Canada regarding what constitutes an acquisition of a share of an enterprise or an acquisition of an enterprise.[6] On those grounds it requests permission to introduce the relevant domestic law and the related case-law that is not already included in the record of the original arbitration proceeding.

b) Global Telecom Holding S.A.E.

8. On its side, Global Telecom Holding S.A.E. rebuts Canada's Application stating that it must fail because "it falls short of meeting any standard for the submission of evidence in annulment proceedings" and requests that the Committee deny Canada's application.

9. GTH submits that PO 1 records the well accepted rule that no new evidence shall be admitted in annulment proceedings except in "exceptional circumstances". It argues that the introduction of new evidence that was available to the Parties during the original arbitration and which goes only to the merits of the Parties' original claims, plainly does not meet this high standard[7]. It supports the argument with the decision by the Committee in *Sempra v. Argentina*, endorsed by many others, that "[n]ew arguments or evidence on the merits will . . . be irrelevant for the annulment process, and therefore not admissible".[8]

10. GTH contends that "[b]y relying on this vague '*relevance'* standard Canada effectively asks this Committee to find that all new evidence connected to an objection or claim in the original proceeding should be admitted as long as such objection or claim relates to a ground for annulment", transforming annulment proceedings into retrials in direct contravention of the ICSID Convention.[9]

11. According to GTH, "Canada is seeking to adduce evidence that it could have submitted to the Tribunal, but chose not to, and does not even attempt to claim that there are exceptional circumstances that explain this choice (nor could there be). On this basis alone, Canada's Application must fail and the Committee's analysis can stop here".[10] It insists in that "Canada cannot credibly contend that this new evidence, never put before the Tribunal, to support an argument never presented to the Tribunal, is relevant to its grounds for annulment challenging the Tribunal's construction of Article II(4)(b) of the Egypt-Canada BIT".[11]

12. GTH rebuts the case-law Canada invoked in support of its Application, pointing out that in *Libananco v. Turkey* the evidence in question were "standalone expert reports admissible "*only to the extent that they were relevant to the grounds for annulment*," not to the merits of the underlying case".[12]

[6] Canada's Application, pp. 4-5.
[7] GTH's Reply, para. 6.
[8] *Ibid*.
[9] GTH's Reply, para. 7.
[10] GTH's Reply, para. 9.
[11] GTH's Reply, para. 11.
[12] GTH's Reply, para. 12 (italics in the original).

13. Finally, GTH requests that the Committee reject Canada's Application and reserves the rights to seek its costs arising from this Application at the appropriate stage in the proceedings.[13]

III. The Tribunal's reasoning

14. The *ad hoc* Committee agrees with the Government of Canada in that "annulment is concerned with the dispute that was put before the tribunal. It is not an opportunity to raise new arguments on the merits or introduce new contemporaneous evidence".[14] In fact, the annulment does not result in the *ad hoc* Committee substituting itself to the Arbitral Tribunal and rewriting, if so, its award as an appeal body would do, instead the power of the *ad hoc* Committee is restricted to void the whole award or part of it.[15] This means that there is no room in the annulment proceeding to evaluate whether elements which have not been brought to the original proceeding would have better fit in the contested decision.[16] The annulment proceeding is aimed at assessing whether the decision resulted from a legitimate process, meaning one which supersedes the grounds embodied in Article 52(1) of the ICSID Convention, and not whether the decision is correct.

15. The competence of this *ad hoc* Committee to deal with Canada's Application is grounded on Article 52(4) of the ICSID Convention and Rule 34(1):

> *Article 52(4) – ICSID Convention*
> *The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.*
>
> *Rule 34(1)*
> *The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*

16. There is no dispute between the Parties regarding such competence. The Parties do not dispute either that

> *"Given the nature of an annulment proceeding, in principle, no evidence outside of the original arbitration proceeding shall be admitted in these proceedings. Should either party wish to introduce new documents or other evidence, other than legal authorities or expert reports, that party shall file a request to the Committee to that effect. The Committee will promptly decide on the admissibility of these new documents and/or evidence, after hearing from the other party"*, as provided for in PO 1, paragraph 15(1).

[13] GTH's Reply, para. 14.
[14] *The ICSID Convention: A Commentary*, Christoph Schreuer et al. (Cambridge University Press, Second Edition 2009), RL-355, p. 902.
[15] "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal", David D. Caron, *ICSID Review*, Spring 1992, RL-359 ("Caron"), p. 23: "In appeal, the decision under review not only may be confirmed, it more generally may be modified. In annulment, on the other hand, the decision under review only may be invalidated in whole or in part, or be left to stand if the plea for annulment is rejected".
[16] Caron, RL-359, p. 24: "Annulment, on the other hand, and particularly in the case of arbitration, focuses not on the correctness of the decision, but rather more narrowly considers whether, regardless of errors in application of law or determination of fact, the decision resulted from a legitimate process".

17. The differences between the Parties relate to the standard that should be met for the introduction of new evidence, whether exceptional circumstances should be assessed for its admission, as contended by GTH, or not, as submitted by Canada.

18. As put by Canada, new evidence may be permitted under certain circumstances.[17] The Committee finds that the admission of new evidence should be restricted to very specific and uncommon circumstances, which should assist the *ad hoc* Committee in assessing whether the process was legitimate. All other evidence, even if related to the substance of different arguments made in front of the Arbitral Tribunal is not pertinent because it has no relationship with the *ad hoc* Committee's task. This is the common view that emerges from caselaw, including the one provided for by the Parties here.

19. Canada referred to legal authorities indicating that, in an annulment proceeding, "the parties may, however, submit narrow categories of new evidence related to the grounds for annulment at issue".[18] However, it failed to consider that the same text goes on saying that "[t]he *ad hoc* committee in *Sociedad Vieira v. Chile* clarified that new evidence on the merits of the case is irrelevant and inadmissible in an annulment proceeding, but acknowledged that certain evidence, particularly expert evidence, might be admissible in exceptional cases if relevant to the grounds for nullification invoked".[19]

20. In the same vein, in the annulment proceeding in the case of *Sempra v. Argentina*, the Respondent notified the Committee of its intent to adduce additional written testimony into the proceeding as it had a bearing on the allegation that a serious departure from a fundamental rule of procedure had occurred.[20] "The Committee, however, noting that the ambit of its review was strictly limited to questions of law relating to the grounds for annulment exhaustively listed in the Convention, rejected Argentina's application to adduce additional testimony. Specifically, the Committee considered that the proposed evidence could not contribute to elucidating whether or not the Tribunal dealt with certain evidentiary matters in such a manner as to constitute a serious departure from a fundamental rule of procedure".[21] Later on, in its Decision, as pointed out by GTH,[22] the Committee dealt with the scope of the review to be undertaken, and explained that "[n]ew arguments or evidence on the merits will therefore be irrelevant for the annulment process, and therefore not admissible. It cannot be excluded, however, that evidence, particularly expert evidence, may exceptionally be accepted in annulment proceedings insofar it is specifically relevant for the annulment grounds listed in Article 52(1) of the Convention (insofar invoked by a party)".[23]

21. The same reasoning was followed by the *ad hoc* Committee in *Libananco v. Turkey* regarding the introduction by the Claimant of new expert reports together with its Application for Annulment. The Respondent submitted that "[f]iling the expert reports for the first time in the annulment proceeding was, according to Respondent, meant to reopen the subject matter of the dispute before the Tribunal, countering the purpose of the annulment process". The Committee ruled on the admissibility of the (new) expert

[17] Canada's Application, p. 2.
[18] *The ICSID Convention, Regulations and Rules: A Practical Commentary*, Julien Fouret et al. (Edward Elgar Publishing Limited, 2019), RL-356, p. 573.
[19] *Ibid*.
[20] *Sempra*, RL-345, para. 14.
[21] *Sempra*, RL-345, para. 18.
[22] GTH's Reply, para. 6.
[23] *Sempra*, RL-345, para. 74.

reports and made a *prima facie* finding that they might have some bearing on whether the Tribunal manifestly exceeded its powers.[24]

22. In *Micula v. Romania*, the *ad hoc* Committee denied admission of new evidence because it was not directly relevant to the grounds of annulment pleaded in the Application.[25]

23. The point at stake then is whether the new evidence that Canada proposes to introduce in these proceedings regards the merit of the case or the grounds for annulment with which this *ad hoc* Committee has to consider; the latter being the kind of evidence that an *ad hoc* Committee may be able to accept provided certain circumstances exist.

24. As indicated above, Canada requests to enter into the record in these proceedings new evidence that it alleges is directly relevant to the grounds for annulment identified in its Application for Partial Annulment dated July 27, 2020. It further explains that, in that Application, it points to a conclusion of the Arbitral Tribunal and stresses that the Tribunal reached this conclusion "without considering Ontario law, the relevant domestic law under which the corporation is constituted which governs such share conversions and informs the interpretation of the Amended and Restated Shareholder's Agreement". Canada also states in the Application that because Ontario law is the applicable law, it requests the admission of the Ontario Business Corporations Act and other relevant legislation, Canadian court decisions, and scholarly writings that address acquisitions of an enterprise or a share of an enterprise under Canadian law.[26]

25. As a matter of principle, the *ad hoc* Committee considers that the introduction of one or more pieces of legislation by a party which considers it should have been the applicable law in the original arbitration but which did not submit it in that arbitration is not pertinent during the annulment proceeding. The annulment proceeding does not provide another instance to litigate the same questions but a completely different one as shown in paragraph 14 above.

26. In the light of the criteria set for the admission of new evidence, the *ad hoc* Committee does not find Canada's arguments plausible. No argument has been made regarding any exceptional circumstance and, as shown above, the introduction of the requested new evidence is not pertinent at this stage.

IV. Order

27. Having considered the Parties' submissions on this issue and after due deliberation, the *ad hoc* Committee decides to:

a) dismiss the Government of Canada's Application for the submission of new evidence;

b) reserve its decision on cost for the Decision on Annulment.

On behalf of the *ad hoc* Committee

[24] *Libananco*, RL-358, paras. 14 and 16.
[25] *Micula*, RL-357, para. 79.
[26] Canada's Application, pp. 3-5.

[Signed]

Prof. Mónica Pinto
President of the Committee
Date: February 4, 2021