

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/17/18

(Annulment Proceeding)

IN THE ANNULMENT PROCEEDING BETWEEN:

REPUBLIC OF MADAGASCAR

Applicant

-and-

(1) (DS)2 S.A.

(2) PETER DE SUTTER

(3) KRISTOF DE SUTTER

Respondents

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DECISION ON THE ANNULMENT APPLICATION

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

Dr Christopher Harris K.C., President  
Ms Melanie van Leeuwen, Member  
Mr Gabriel Bottini, Member

**Secretary to the *ad hoc* Committee**

Mr Benjamin Garel

*Date of dispatch to the Parties: 14 October 2022*

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## I. INTRODUCTION

1 This annulment proceeding relates to the Award dated 17 April 2020 (the “**Award**”) rendered in ICSID Case No. ARB/17/18 (the “**ICSID Arbitration**”) between (DS)2 SA, Mr Peter de Sutter and Mr Kristof de Sutter as claimants (in this annulment proceeding, the “**Respondents**”) and the Republic of Madagascar as respondent (“**Madagascar**” and in this annulment proceeding the “**Applicant**”). The ICSID Arbitration was commenced under the Accord entre l’Union Économique Belgo-Luxembourgeoise et la République de Madagascar concernant l’encouragement et la protection réciproques des investissements, which was signed on 29 September 2005, and which entered into force on 29 November 2008 (the “**BIT**”).

## II. THE PARTIES

2 The Applicant is represented by:

Professor Dr Makane Moïse Mbengue  
University of Geneva  
40, boulevard du Pont d’Arve  
1211 Genève 4  
Switzerland

Mr Eran Stoecker, Esq.  
5-49 Borden Ave, Apt. 2M  
Long Island City, NY 11101  
United States of America

3 The Respondents are represented by:

Mr Charles Dumont de Chassart  
DLA Piper UK LLP  
Avenue Louise, 106  
1050 Bruxelles  
Belgique

Mr Michael Ostrove  
Mr Theobald Naud  
Ms Sérena Salem  
Ms Audrey Grisolle (until end 2021)  
DLA Piper France LLP  
27, rue Laffitte

75009 Paris  
France

4 The Applicant and the Respondents are collectively referred to as the “**Parties**”.

### III. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY

#### A. Factual Background

5 An annulment proceeding is not the place to relitigate factual findings made by the Tribunal. With that said, before setting out the procedural history to this annulment proceeding, it is important to set out some key background facts that led to the ICSID Arbitration.

6 The underlying factual events at issue in the ICSID Arbitration took place following social unrest in Madagascar in January 2009, which led to violent protests and, on 27-28 January 2009, the ransacking and destruction of a factory at Mahajanga (the “**Factory**”) on land leased by SÀRL Polo Garments Majunga (“**PGM**”), a Malagasy company established by the Respondents.

7 Following these events, PGM attempted to claim under a policy of insurance from its Malagasy insurer, Ny Havana. When Ny Havana rejected PGM’s claim, PGM issued proceedings against Ny Havana in the Court of First Instance at Mahajanga in April 2010 (the “**Malagasy Proceedings**”). The Court held in PGM’s favour, and this judgment was confirmed by the Court of Appeal in July 2011. Ny Havana appealed to the Cour de Cassation. In April 2012, the Attorney-General of the Supreme Court of Madagascar filed an appeal in the interests of law (“un pourvoi dans l’intérêt de la loi”) against the execution of the Court of First Instance’s judgment, which execution was then suspended by the Supreme Court of Madagascar.

8 On 7 March 2013, the Respondents and PGM issued arbitration proceedings against Madagascar under the auspices of the International Chamber of Commerce (the “**ICC Arbitration**”) challenging the Attorney-General’s intervention in the Malagasy Proceedings and alleging a violation of several provisions of the BIT including of the Respondents’ right to fair and equitable treatment (Article 3(1) of the BIT), as well as

alleging abuse of rights, abuse of power, denial of justice and arbitrary and discriminatory treatment (Article 3(2) of the BIT).

9 On 29 August 2014, the sole arbitrator in the ICC Arbitration issued an award (the “**ICC Award**”) holding that the Applicant had violated Articles 3(1) and 3(2) of the BIT and awarding damages for the Respondents.

10 On 15 March 2016, the Paris Court of Appeal annulled the ICC Award on the Applicant’s application.

11 On 3 June 2016, in the Malagasy Proceedings, the Cour de Cassation of Madagascar overturned the July 2011 judgment of the Court of Appeal.

12 On 14 June 2017, the Respondents registered a request for arbitration with ICSID, thereby commencing the ICSID Arbitration.

13 On 17 April 2020, at the conclusion of the arbitral procedure, the tribunal in the ICSID Arbitration, comprising Professor Gabrielle Kaufmann-Kohler (President), Ms Carole Malinvaud and Professor Alain Pellet (the “**Tribunal**”), issued the Award, by which the Tribunal:

13.1 upheld its jurisdiction to determine the claim in respect of breach of the full protection and security (“**FPS**”) standard of the BIT and determined that that claim was also admissible;

13.2 determined that Madagascar had breached its obligation under article 3(2) of the BIT to provide FPS to the claimants’ investments;

13.3 ordered Madagascar to pay compensation to the claimants in the amount of €6,451,113.24 together with interest compounded annually at the rate of 12-month Euribor plus 2% from 28 January 2009 until payment in full;

13.4 ordered Madagascar to indemnify the claimants; and

13.5 ordered Madagascar to bear two-thirds of the costs of the ICSID Arbitration (thus requiring it to pay the sum of US\$348,243.61 to the claimants in this regard), but that each party should bear its own legal costs of the proceedings.

## **B. Procedural History**

- 14 On 16 August 2020, Madagascar submitted an application for annulment of the Award (the “**Application**”) pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and Rule 50 for the Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”).
- 15 On 21 August 2020, the Secretary-General of ICSID registered the Application and informed the Parties that the enforcement of the Award was provisionally stayed in accordance with Rule 54(2) of the ICSID Arbitration Rules.
- 16 On 3 November 2020, the Secretary-General of ICSID informed the Parties that the *ad hoc* Committee (the “**Committee**”) had been constituted, initially comprising Dr Raëd Fathallah (President), Ms Melanie van Leeuwen, and Mr Gabriel Bottini.
- 17 On 13 November 2020, the Committee informed the Parties that it had decided to extend *pro tempore* the provisional stay of enforcement of the Award until the Committee had had the opportunity to hear the Parties and to decide whether or not to continue the stay. The Committee established a briefing schedule for submissions on that issue.
- 18 On 18 December 2020, the Committee held its first session by video conference. Immediately before the session started, the Parties informed the Committee that they had reached agreement on the issue of stay of enforcement and requested their agreement to be recorded by the Committee in a procedural order.
- 19 On 22 January 2021, the Committee issued Procedural Order No. 1 (“**PO1**”), which established the procedure and timetable for deciding the Application.

- 20 On 27 January 2021, the Committee issued Procedural Order No. 2 (“PO2”) in which the Committee recorded the Parties’ agreement on the issue of stay of enforcement of the Award. In particular, PO2 recorded that the stay of the enforcement of the Award would continue until the Committee ruled on the Application or the proceeding was discontinued or the Application withdrawn, without prejudice to the rights of the Respondents to take steps towards the enforcement of the Award save any final step that would enable them to receive payment of the amount of the Award. PO2 also provided that the Respondents could take steps towards receiving payment of the amount of the Award in the event of Madagascar’s failure to pay all amounts due under the Award if 60 days passed without payment after rejection by the Committee of the Application, or of the Annulment proceeding being discontinued.
- 21 On 28 January 2021, the President of the Committee informed the Parties that he had tendered his resignation to the other members of the Committee as well as to the Secretary-General of ICSID, pursuant to ICSD Arbitration Rules 8 and 53.
- 22 On 11 February 2021, the Centre informed the Parties of its intention to propose to the Chairman of the Administrative Council of ICSID the appointment of Dr. Christopher Harris Q.C. as President of the Committee, to replace Dr. Fathallah, and transmitted to them certain disclosures made by Dr. Harris.
- 23 On 16 February 2021, the Applicant indicated that it had no comments on the proposal to appoint Dr. Harris.
- 24 On 18 February 2021, the Respondents indicated that they had no comments on the proposal to appoint Dr. Harris.
- 25 On 18 February 2021, the Centre confirmed to the Parties that it had proposed to the Chairman of the Administrative Council of ICSID the appointment of Dr. Harris as President of the Committee.
- 26 On 19 February 2021, the Centre informed the Parties of the appointment by the Chairman of the Administrative Council of ICSID of Dr. Harris as President of the Committee.

27 On 22 February 2021, the Centre informed the Parties that Dr. Harris has accepted his appointment and that the proceeding had resumed:

28 Thereafter and in accordance with PO1:

28.1 On 31 March 2021, Madagascar filed its Memorial on Annulment (“**Memorial**”).

28.2 On 31 May 2021, the Respondents filed their Counter-Memorial on Annulment (“**Counter-Memorial**”).

28.3 On 29 July 2021, Madagascar filed its Reply on Annulment (“**Reply**”).

28.4 On 30 September 2021, the Respondents filed their Rejoinder on Annulment (“**Rejoinder**”).

29 On 19 October 2021, a pre-hearing conference was held remotely to finalise arrangements for the hearing.

30 On 10 November 2021, the hearing of the Application took place remotely in accordance with PO1. The following persons attended the hearing:

The Committee:

- Dr Christopher Harris K.C., President of the Committee
- Ms Melanie van Leeuwen, Member of the Committee
- Mr Gabriel Bottini, Member of the Committee

From ICSID:

- Mr Benjamin Garel, Secretary to the Committee

For the Applicant:

- Ms Rajaobarielina Faratiana, Litigation Service of the Ministry of Foreign Affairs of Madagascar
- Mr Rajaonesy David, lawyer of the Prime Minister’s Office, Madagascar
- Professor Makane Moïse Mbengue, University of Geneva
- Mr Eran Sthoeger, Esq.



- Professor Eirik Bjorge, University of Bristol

For the Respondents:

- Mr Peter de Sutter, the Second Respondent
- Mr Michael Ostrove, DLA Piper
- Mr Théobald Naud, DLA Piper
- Mr Charles Dumont de Chassart, DLA Piper
- Ms Séréna Salem, DLA Piper
- Ms Audrey Grisolle, DLA Piper

Transcription:

- Christophe Bolduc (French) and Christopher Sidall (English), Arbitration Place

31 At the end of the hearing, the Parties were invited to discuss and agree on the format and timing of costs submissions.

32 On 23 March 2022, the Committee reminded the Parties that it had still not heard from them in this regard and requested an update by 4 April 2022.

33 In the continued absence of any response from the Parties, the Committee followed up on 6 April 2022. On the same day, counsel for the Respondents replied indicating that the Parties had agreed to lodge their costs submissions on 8 April 2022 in a simplified format simply setting out the amounts and elements of costs, without supporting evidence or arguments on the apportionment of costs.<sup>1</sup> Any comments on the opposing party's submission would be lodged on 15 April 2022.

34 On 8 April 2022, both Parties filed their costs statements in accordance with the agreed procedure. On 15 April 2022, both Parties indicated that they did not wish to make any comments on the costs statement filed by the other Party.

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<sup>1</sup> Counsel for the Respondents also informed the Committee of the departure of Ms Audrey Grisolle from its team.

## IV. THE POSITION OF THE PARTIES

### A. Introduction

35 By its Application, Madagascar requests annulment of the Award in its entirety on three bases. In summary, these are:

35.1 First, Madagascar contends that the Tribunal manifestly exceeded its power in terms of Article 52(1)(b) of the ICSID Convention, on the basis that it failed to decide whether it lacked jurisdiction to hear the Respondents' claims on the basis that the Respondents had elected under Article 12(3) of the BIT to arbitrate their dispute in the ICC Arbitration (the "**Jurisdiction Issue**").

35.2 Secondly, Madagascar contends that there was a serious departure from a fundamental rule of procedure in terms of Article 52(1)(d) of the ICSID Convention, on the basis that its right to be heard was violated because it did not have effective representation before the Tribunal (the "**Representation Issue**").

35.3 Thirdly (in the alternative to its second ground), and although not mentioned in its Application, Madagascar later relied upon a further ground, namely that there was a serious departure from a fundamental rule of procedure in terms of Article 52(1)(d) of the ICSID Convention, on the basis that the Tribunal effectively reversed the burden of proof (the "**Burden Issue**").

36 The Applicant further requests that the Respondents be ordered to pay the Applicant's costs of the annulment proceeding.

37 The Respondents request the Committee to reject the Application and to order that the Applicant pay the costs of this annulment proceeding.

38 The Committee will summarise the key points from the Parties' submissions on each of the Jurisdiction, Representation, and Burden Issues in turn, before setting out its own analysis and conclusions.

## B. The Jurisdiction Issue

### 1. The Applicant's Position

- 39 The Applicant contends that Article 52(1)(b) of the ICSID Convention, as elucidated in the jurisprudence, requires the annulment of an award if the tribunal (1) ignores a key jurisdictional issue; (2) fails to apply the law governing its jurisdiction; or (3) adopts an untenable interpretation or application of that law.<sup>2</sup>
- 40 The Applicant submits that a lack of a decision on jurisdiction should result in annulment, since a tribunal exceeds its powers where it ignores a question that requires its decision.<sup>3</sup> While a tribunal does not need to answer all of the arguments raised by a party, it does need to deal with all of the issues submitted to it.<sup>4</sup> The excess of powers should not only be obvious, but must also entail serious consequences for the Award,<sup>5</sup> and there is not a more serious consequence than the tribunal asserting a jurisdiction that it does not possess.<sup>6</sup>
- 41 The Applicant contends that its arguments before the Tribunal included that by initiating the ICC Arbitration, the Respondents chose the ICC Arbitration as the forum for their claims to be decided for the purposes of Article 12(3) of the BIT. Accordingly, argued the Applicant, the Tribunal lacked jurisdiction under the BIT to hear the Respondents' claims.<sup>7</sup> The Tribunal so lacked jurisdiction even though the ICC Award was annulled by the Paris Court of Appeals, because the annulment of the ICC Award did not impact on the Respondents' consent to arbitrate in the ICC, which remained valid and binding upon the Parties as a matter of the French *lex arbitri*.<sup>8</sup> In those circumstances, the appropriate course was for the Respondents to initiate a new ICC arbitration rather than to resort to ICSID arbitration.

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<sup>2</sup> Memorial, para 43.

<sup>3</sup> Memorial, para 39, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 87.

<sup>4</sup> Reply, para 16.

<sup>5</sup> Reply, para 22.

<sup>6</sup> Reply, para 23.

<sup>7</sup> Memorial, para 33.

<sup>8</sup> Memorial, para 47.

- 42 In the ICC Arbitration the Respondents (together with PGM) alleged, *inter alia*, violation of several provisions of the BIT, including of the Respondents' right to fair and equitable treatment (Article 3(1) of the BIT), as well as alleging abuse of rights, abuse of power, denial of justice and arbitrary and discriminatory treatment (Article 3(2) of the BIT). The Respondents and PGM alleged in the ICC Arbitration that the Applicant's conduct of the Malagasy Proceedings was unlawful.
- 43 The claims before the Tribunal in the ICSID Arbitration, following the annulment of the ICC Award, were likewise for breach of the obligation to provide fair and equitable treatment, denial of justice, breach of the obligation to avoid unjustified or discriminatory measures under Article 3(2) of the BIT in relation to the Malagasy Proceedings, as well as for indirect expropriation of the Respondents' investment in violation of Article 7 of the BIT. Those claims also included an allegation that the Applicant had failed to provide FPS in relation to the events at the Factory under Article 3(2) of the BIT.
- 44 The Applicant's primary case before the Tribunal was that the Respondents had made a choice of forum by submitting to the ICC Arbitration and that they were not entitled to submit their dispute to the Tribunal. The Applicant says that before the Tribunal it argued in the alternative that, if the Tribunal did not accept its primary objection based on Article 12(3) of the BIT with respect to the allegations of failure to provide FPS, the Applicant's objection was nevertheless applicable to allegations made in the ICC Arbitration in relation to Madagascar's intervention in the Malagasy Proceedings, which were also submitted to the Tribunal.
- 45 The Applicant says that it articulated the distinction between its primary and alternative argument at every juncture before the Tribunal.<sup>9</sup> In particular, the Applicant refers to the fact that the Tribunal, in summarising the Applicant's arguments, noted that the Applicant's position that the Tribunal did not have

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<sup>9</sup> Memorial, para 50.

jurisdiction in relation to the complaints about the Malagasy Proceedings, was an alternative argument.<sup>10</sup>

46 However, the Applicant says that the Tribunal used the Applicant's alternative argument as the "cornerstone" of its non-answer to the Applicant's objection on jurisdiction.<sup>11</sup> The Applicant claims that its alternative argument metamorphasised into an alleged "admission" that the Applicant had consented to the Tribunal's jurisdiction over the Respondents' FPS claims,<sup>12</sup> as typified by the fact that the Tribunal said in the Award that "*La compétence étant admise pour que le Tribunal se prononce sur les violations alléguées en lien avec le pillage et la destruction de l'usine*".<sup>13</sup>

47 The Applicant sets out the various potential reasons why it believes the Tribunal ignored its primary submission that the Tribunal had no jurisdiction over any of the Respondents' claims: (1) the Tribunal misunderstood the Applicant's position and concluded that its alternative argument was, in fact, its full submission on the Jurisdiction Issue;<sup>14</sup> (2) the Tribunal may have concluded that, in advancing its alternative argument, the Applicant was abandoning its primary submission;<sup>15</sup> (3) the Tribunal conflated the Applicant's *electa una via* submission (its fifth jurisdictional objection), that the pursuit of the Malagasy Proceedings breached Article 12(2) of the BIT and Article 26 of the ICSID Convention, with the Applicant's choice of forum submission (its sixth jurisdictional objection) that the Tribunal lacked jurisdiction over all the Respondents' claims (because both involved questions as to whether the proceedings before the Tribunal were the "same dispute" as prior proceedings (namely the Malagasy Proceedings and the ICC Arbitration)), meaning that the Tribunal's rejection of the *electa una via* objection resulted in rejection of the Applicant's primary position on the Tribunal's jurisdiction;<sup>16</sup> (4) the Tribunal may have considered that the Applicant implicitly agreed to the Tribunal's jurisdiction over the FPS claims;<sup>17</sup>

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<sup>10</sup> See Award, para 252, set out in full below at para 102.

<sup>11</sup> Memorial, para 52.

<sup>12</sup> Memorial, para 52.

<sup>13</sup> Award, para 262, set out in full below at para 106.

<sup>14</sup> Memorial, para 75.

<sup>15</sup> Memorial, para 76.

<sup>16</sup> Memorial, para 77.

<sup>17</sup> Memorial, para 78.

(5) the Tribunal implicitly considered that the Applicant's interpretation of Article 12 of the BIT was wrong.<sup>18</sup> The Applicant says that each of these five scenarios would result in the Tribunal's analysis being untenable.<sup>19</sup> The Applicant further says that the Tribunal's invocation of procedural economy to avoid deciding the Applicant's forum objection was likewise untenable.<sup>20</sup>

48 The Applicant rejects the contention that the Tribunal sought to deal with both its choice of forum objection and its *electa una via* objection together. The Award contains no reasoning as regards the choice of forum objection. The same logic does not apply to both objections – the *electa una via* objection was dismissed by the Tribunal because the parties in the ICSID Arbitration and the Malagasy Proceedings were different, whereas they were the same in the ICSID Arbitration and the ICC Arbitration, meaning the Tribunal's logic could not apply similarly.<sup>21</sup> The Tribunal could have held that the ICC and ICSID disputes were different and yet still agree that Article 12(3) of the BIT barred the Respondents from initiating the ICSID Arbitration, as was the Applicant's primary argument.<sup>22</sup>

49 In this regard, the Tribunal failed to apply Article 12(3) of the BIT, which is not mentioned in the Tribunal's analysis.<sup>23</sup> The Tribunal did not adopt an interpretation of Article 12(3) of the BIT at all.

50 The Applicant accepts that one possible interpretation of the Tribunal's words, "*La compétence étant admise*" is that the Tribunal was satisfied that jurisdiction over the FPS claims was established, rather than that it had been conceded by the Applicant.<sup>24</sup> However, the matters referred to at paragraph 40 above demonstrate that the Tribunal was clearly confused about the Applicant's choice of forum objection. Every other

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<sup>18</sup> Memorial, para 79. The Applicant goes on to suggest in this paragraph that if the Tribunal implicitly took this view, it would have been inconsistent with *Iberdrola v. Guatemala*, PCA Case No. 2017-41, Final Award, 24 August 2020, in which the Tribunal stressed that the underlying BIT (the Spain-Guatemala BIT) offered investors a "choice" between ICSID and UNCITRAL arbitrations, meaning that an investor could not file the same dispute before a second forum.

<sup>19</sup> Memorial, para 74.

<sup>20</sup> Memorial, para 81.

<sup>21</sup> Reply, para 61. The Committee notes that PGM was a party in the ICC Arbitration but not the ICSID Arbitration.

<sup>22</sup> Reply, para 62.

<sup>23</sup> Reply, para 68.

<sup>24</sup> Reply, para 51.

time the Tribunal used the term “*admise*” in the Award, this was followed by the Tribunal’s analysis of the corresponding issue, save for when it claimed that jurisdiction over the FPS claims was “*admise*”, where no reasons were given that would explain why the matter was “*admise*”.<sup>25</sup>

51 The Applicant contends that the Tribunal’s mere citation of the relevant parts of the Applicant’s Memorial cannot be regarded as indicating that the Tribunal understood the distinction between the primary and secondary strands of the Applicant’s sixth jurisdictional objection.<sup>26</sup>

52 The Applicant contends that its jurisdictional objection was an issue that could not be ignored by the Tribunal.<sup>27</sup> It raised a legal issue that defined the boundaries of the Tribunal’s powers. It was more than a mere argument, and the Respondents’ contention to the contrary is untenably formalistic.<sup>28</sup> The Tribunal was not free to uphold jurisdiction in general terms and thereby be regarded as having dealt with the Applicant’s objection.<sup>29</sup>

53 The Applicant submits that the Tribunal’s failure to deal with the Jurisdiction Issue was a manifest excess of its powers because it had a potentially determinative impact on the Award. Had the Tribunal adopted the Applicant’s interpretation of Article 12(3) of the BIT, it would have declined jurisdiction, and the dispute may or may not have been renewed before an ICC tribunal.<sup>30</sup> Accordingly it is speculative of the Respondents to contend that any failure by the Tribunal to decide the Jurisdiction Issue made no difference to the outcome.<sup>31</sup> The various hypotheses of what the Tribunal was intending to do in when it said that its jurisdiction over the FPS claims was “*admise*” illustrate that it is impossible to divine the Tribunal’s intentions; and there is no basis for saying that the Respondents’ position was endorsed<sup>32</sup> – hence there

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<sup>25</sup> Reply, para 53.

<sup>26</sup> Reply, para 59.

<sup>27</sup> Reply, para 38.

<sup>28</sup> Reply, para 40.

<sup>29</sup> Reply, para 43.

<sup>30</sup> Reply, para 75.

<sup>31</sup> Reply, para 75.

<sup>32</sup> Reply, para 88.

is a manifest excess of powers because the Tribunal's handling of the Jurisdiction Issue is unfathomable.<sup>33</sup>

54 The Applicant also notes that it has deliberately refrained from advancing a case for failure to state reasons under Article 52(1)(e) of the ICSID Convention.<sup>34</sup> This ground of annulment is closely linked with that in Article 52(1)(d), and the two are not mutually exclusive. Under Article 48(3) of the ICSID Convention, an award shall deal with every question submitted to the tribunal and shall state the reasons upon which it is based. Accordingly, having advanced the contention that the Tribunal failed to deal with a crucial question submitted to it, there was no need additionally to argue that the Tribunal also failed to state its reasoning, which it did.<sup>35</sup>

55 The Applicant submits that the Respondents are wrong to contend that the Applicant should have sought a supplementary decision from the Tribunal under Article 49(2) of the ICSID Convention.<sup>36</sup> Article 49(2) is directed at enabling a tribunal to correct mistakes, as opposed to Article 52(1), which is concerned with the integrity of proceedings and safeguards against violation of fundamental principles of law.<sup>37</sup> The *ad hoc* Committee's decision in *Cortec Mining v Kenya*,<sup>38</sup> on which the Respondents rely, is debatable and its reasoning does not apply in the present case which deals with factually difficult circumstances. In particular, unlike in *Cortec*, the Jurisdiction Issue was not inconsequential and the consequences of that issue were not discrete.<sup>39</sup>

56 The Committee should not exercise its discretion to refuse to annul the Award. No *ad hoc* Committee has taken this step. Nor is there any basis for saying either that the choice of forum objection had no chance of prevailing, or that an ICC tribunal would have come to the same conclusion as the Tribunal in the ICSID Arbitration.<sup>40</sup>

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<sup>33</sup> Reply, para 78.

<sup>34</sup> Reply, para 28.

<sup>35</sup> Reply, para 29.

<sup>36</sup> Reply, para 80.

<sup>37</sup> Reply, para 83.

<sup>38</sup> *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021.

<sup>39</sup> Reply, para 84.

<sup>40</sup> Reply, para 92.



## 2. The Respondents' Position

57 The Respondents say that the Applicant's argument rests upon an erroneous reading of the Award. In particular, the Applicant wrongly states that the meaning of "[l]a compétence étant admise" in that paragraph is that the Applicant had "admitted" that there was jurisdiction over the FPS claim. In fact, the meaning of "il est admis que" is, rather, "it is established that".<sup>41</sup> As such, the Tribunal was simply reciting its conclusion on the issue rather than recording a concession by a party.<sup>42</sup> The use of the French verb "admettre" to indicate something being established and not conceded is evidenced throughout the Award and in other arbitral decisions.<sup>43</sup> It is clear from the context that the Tribunal did not fail, as the Applicant asserts, to say that jurisdiction was "admise" – the statement in the Award to that effect is preceded by 10 paragraphs of analysis of the Applicant's jurisdictional objection.<sup>44</sup>

58 The Respondents also point to instances during the procedure before the Tribunal which make clear that the Tribunal well understood the Applicant's primary submission that the Tribunal had no jurisdiction over any of the claims as a result of commencement of the ICC Arbitration. In its Ordonnance de Procédure No. 3 dated 24 April 2018 declining Madagascar's application to bifurcate the proceedings and decide jurisdiction and admissibility as preliminary issues (the "**Bifurcation Decision**"), the Tribunal clearly set out both the Applicant's primary and secondary arguments on the Jurisdiction Issue.<sup>45</sup> Likewise the hearing transcripts demonstrate that the Tribunal understood the Applicant's submission that the Tribunal had no jurisdiction because of the Respondents' recourse to the ICC,<sup>46</sup> and also show that the Tribunal understood the distinction between the Applicant's *electa una via* (fifth) and choice of forum (sixth) jurisdictional objections.<sup>47</sup>

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<sup>41</sup> Counter-Memorial, para 91.

<sup>42</sup> Counter-Memorial, para 93. The Respondents give examples of the Tribunal using "étant admis[e]" with the meaning "being established" elsewhere in the Award: see Counter-Memorial, paras 95-100.

<sup>43</sup> Rejoinder, paras 57-64.

<sup>44</sup> Rejoinder, para 68.

<sup>45</sup> Counter-Memorial, paras 106-109.

<sup>46</sup> Counter-Memorial, para 110.

<sup>47</sup> Counter-Memorial, paras 110-112. See the exchange from the transcript for 2 July 2019 cited in para 111 of the Counter-Memorial, discussed further below at para 109. See also Counter-Memorial, para 113.

59 The Respondents also point to parts of the Award showing that the Tribunal understood the Applicant’s objection on the Jurisdiction Issue.<sup>48</sup> The Tribunal made an express reference to the Respondents’ submissions before the Tribunal, in which the Respondents directly addressed the Applicant’s submission that the Tribunal lacked jurisdiction over all of the Respondents’ claims.<sup>49</sup> The Tribunal included a reference to the written part of the Applicant’s arguments on this question.<sup>50</sup> It cannot be said that the Tribunal “ignored” those arguments because it referred to them only in a footnote and not by reproducing their text in full.<sup>51</sup>

60 The Tribunal was confronted with a choice between two possibilities – either the ICC Arbitration and the present Arbitration were distinct, or the Respondents submitted their grievance to ICC Arbitration and, notwithstanding the annulment of the ICC Award, there was no jurisdiction to proceed at ICSID.<sup>52</sup> The Tribunal endorsed the Respondents’ position.<sup>53</sup> The Tribunal did not elide the fifth and sixth objections of the Applicant.<sup>54</sup> However it is obvious from reading the Award that the Tribunal considered the same analysis to be applicable – the Tribunal considered that the Malagasy Proceedings involved different parties and different subject matter, and the same reasoning applied to the differences between the ICC Arbitration and the ICSID Arbitration.<sup>55</sup> The Tribunal was in no doubt of the distinction between the Applicant’s fifth and sixth objections, and it recorded this in the Bifurcation Decision.<sup>56</sup> The relevant part of the reasoning in the Award also referred to the Applicant’s “*objections relatives au principe du mode de règlement des différends*”, i.e. it acknowledged that there was more than one objection to be dealt with.<sup>57</sup> The Tribunal unambiguously rejected all of the Applicant’s jurisdictional arguments in the Award.<sup>58</sup> In doing so, contrary to the Applicant’s jurisdictional submissions, the Tribunal did not fail to analyse the

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<sup>48</sup> Award, para 254, cited in Counter-Memorial, para 115.

<sup>49</sup> Counter-Memorial, paras 116-117.

<sup>50</sup> Counter-Memorial, para 118.

<sup>51</sup> Counter-Memorial, para 119.

<sup>52</sup> Counter-Memorial, para 120.

<sup>53</sup> Counter-Memorial, para 121.

<sup>54</sup> Counter-Memorial, para 122.

<sup>55</sup> Counter-Memorial, paras 123-126 ; Rejoinder, para 50.

<sup>56</sup> Rejoinder, para 52.

<sup>57</sup> Counter-Memorial, para 122, referring to the heading in section 5 of the Award.

<sup>58</sup> Counter-Memorial, para 129-130, citing paras 263 and 482(a) of the Award.

Applicant's submissions, but rather devoted 30 pages of reasoning to them in the Award.<sup>59</sup>

61 The Respondents state that the Applicant is wrong to rely upon the proposition that while a Tribunal need not deal with every argument put to it, it must decide every issue that is put to it.<sup>60</sup> But in any event the Award shows that the Tribunal did decide the issue of jurisdiction.<sup>61</sup>

62 The Respondents submit that the Applicant concedes that the Tribunal understood Madagascar's choice of forum objection at the outset. It is unthinkable that the Tribunal, comprising highly experienced arbitrators, could have understood Madagascar's objection throughout the ICSID Arbitration, but ceased to understand it when drafting the Award.<sup>62</sup>

63 The Respondents disagree with the Applicant that the Tribunal never analysed the applicability of Article 12(3) of the BIT. The Tribunal reproduced Articles 12(2) and (3) of the BIT in their entirety. The Applicant is dissatisfied with the Award because the Tribunal did not agree with the Applicant's interpretation of Article 12(3), but that does not equate with the Tribunal failing to apply Article 12(3).<sup>63</sup> In this respect, the Respondents point out that the interpretation of treaties is not an exact science.<sup>64</sup>

64 The legal question before the Tribunal was not the interpretation of Article 12(3), but rather whether by commencing the ICC Arbitration, the Respondents had renounced the possibility of commencing ICSID Arbitration, including the question of deficiencies in the conduct of Malagasy state agents in the face of the imminent destruction of the Factory.<sup>65</sup> Once the Tribunal had decided that the ICC Arbitration

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<sup>59</sup> Rejoinder, para 56.1.

<sup>60</sup> Rejoinder, paras 74-75.

<sup>61</sup> The Respondents thus seek to distinguish *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, 17 September 2020, where an award was annulled where the tribunal had assumed jurisdiction while refusing to decide a jurisdictional objection of the applicant. See Rejoinder, paras 78-80.

<sup>62</sup> Rejoinder, para 31.

<sup>63</sup> Counter-Memorial, para 142.

<sup>64</sup> Counter-Memorial, paras 169-170.

<sup>65</sup> Rejoinder, para 86. See Transcript, p 60, line 22-p 61, line 5 ("...the interpretation of Article 12(2) of the BIT is not the legal question that the Tribunal had to answer. It just had to answer whether, after initiating the ICC Arbitration on the basis of the *pourvoi dans l'intérêt de la loi*, our clients waived their right to bring an ICSID

and the ICSID Arbitration concerned distinct matters, it was perfectly logical for the Tribunal not to develop its reasoning in relation to the interpretation of Article 12(3), as this rendered moot the question of whether the choice of ICC Arbitration was an irrevocable one.<sup>66</sup>

65 In any event, to the extent there was an excess of power, it was not manifest. It is insufficient that the Tribunal's decision simply is simply incorrect; rather, it must be untenable.<sup>67</sup> The Applicant must show that the Tribunal's excess of power is both obvious and entails serious consequences for the integrity of the ICSID system.<sup>68</sup> If the outcome is debatable, it is not amenable to annulment.<sup>69</sup> Here, there was no obvious failure to deal with an issue – the Tribunal's analysis of the Jurisdiction Issue was evident from its joint treatment of the Applicant's fifth and sixth jurisdictional objections, and from its reasoning in the Bifurcation Decision.<sup>70</sup> The Applicant has also not demonstrated a serious consequence that would flow from any alleged excess of power, as its submissions only go so far as to allege that the Tribunal "possibly" upheld a jurisdiction it did not possess.<sup>71</sup> While the Applicant argues that by starting the ICC Arbitration, the Respondents should have been required to renounce ICSID arbitration, the ICC Arbitration was concerned strictly with the question of Madagascar's intervention in the Malagasy Proceedings and was unrelated to the ICSID Arbitration. It was also wrong and contrary to the *lex arbitri* for Madagascar to assert that the ICC should have remained seised of the dispute notwithstanding the annulment of the ICC Award.<sup>72</sup> While the Applicant relies on "systemic differences" between the ICSID and ICC systems to assert that serious consequences flowed from

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Arbitration for a different claim. And the Tribunal decided that question by rejecting the objections to jurisdiction.") (Mr Ostrove).

<sup>66</sup> Rejoinder, para 87-88, citing *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 August 2020, para 325.

<sup>67</sup> Rejoinder, paras 97-105.

<sup>68</sup> Rejoinder, para 106.

<sup>69</sup> Counter-Memorial, para 146, citing *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para 99.

<sup>70</sup> Rejoinder, para 57.

<sup>71</sup> Rejoinder, para 117.

<sup>72</sup> Rejoinder, para 123.

the Tribunal's treatment of the Jurisdiction Issue, the Applicant has not explained what these are.<sup>73</sup>

66 The Applicant incorrectly relies on *Iberdrola v Guatemala*<sup>74</sup> to demonstrate that the Tribunal's reasoning is untenable. First, the *Iberdrola* decision is distinguishable because, as the tribunal found in that case, the investor was attempting to litigate in an UNCITRAL arbitration the same cause of action that had been rejected in an ICSID arbitration. However, in the present Arbitration, it is uncontested that the FPS violations relating to the Factory were never referred to in the ICC Arbitration.<sup>75</sup> Further, the treaty at issue in the *Iberdrola* case contains the word "or" between each of the various fora listed, whereas Article 12(3) of the BIT simply lists options without the word "or", denoting an absence of exclusivity.<sup>76</sup> The Respondents refer to arbitral decisions dealing with ostensible "fork-in-the-road" provisions in other bilateral investment treaties to show that in the absence of an express reference to an irrevocable choice for one forum at the exclusion of others, many such provisions in fact offer claimants a range of options of where to pursue their claim.<sup>77</sup>

67 While Madagascar invokes other bases for attacking the Tribunal's position (procedural incoherence, a lack of good faith, estoppel, and the doctrine of *venire contra factum proprium*), these have not been established.<sup>78</sup>

68 Further, even if there were an error, *ad hoc* Committees have a discretion not to annul in any event. The Applicant is wrong to say that no *ad hoc* Committee has exercised its discretion to refuse to annul an award.<sup>79</sup> They may exercise their discretion to refuse to annul an award where annulment is clearly not required to remedy any procedural injustice and would unjustifiably erode the binding force and finality of ICSID awards,<sup>80</sup> bearing in mind that it is a fundamental principle that all litigation

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<sup>73</sup> Rejoinder, para 130.

<sup>74</sup> *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 August 2020.

<sup>75</sup> Counter-Memorial, paras 163-164.

<sup>76</sup> Counter-Memorial, paras 165-168.

<sup>77</sup> Counter-Memorial, para 178.

<sup>78</sup> Rejoinder, para 124.

<sup>79</sup> Rejoinder, paras 133-135.

<sup>80</sup> Counter-Memorial, para 184, citing *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the *Ad Hoc* Annulment Committee, 14 December 1989, paras 4.09-4.10.

must come to an end unless there are strong reasons for it to continue.<sup>81</sup> In the event that the Committee considered that there was a manifest excess of power, it should exercise its discretion to refuse to annul the award in any event for two reasons:

68.1 First, given the terms of the BIT and the fact that the ICC Arbitration and the ICSID Arbitration did not have the same subject matter, there is no chance an ICSID tribunal considering the Applicant's objection would have accepted it. Accordingly, there is no chance that an ICSID tribunal would have declined jurisdiction to decide Madagascar's objection.<sup>82</sup>

68.2 Secondly, the Applicant's complaint is only that the dispute was decided by the Tribunal and not by a new ICC tribunal. This would have made no difference to the result – merely to the administering arbitral institution and the applicable arbitral rules – it did not affect the consent to arbitration, nor would it have prevented the same panel of arbitrators sitting constituted as an ICC tribunal,<sup>83</sup> which would have applied the same rules of law and likely reached the same conclusion as the Tribunal.<sup>84</sup>

69 According to the Respondents, the Applicant's true grievance is not that the Tribunal failed to decide the Jurisdiction Issue, but rather that it did not explicitly set out its reasoning for rejecting one of the Applicant's arguments. Article 52(1)(e) of the ICSID Convention provides that an award can be annulled where it fails to state the reasons on which it is based. The Applicant has not relied upon Article 52(1)(e) in its Application, which was its choice and it must bear the consequences.<sup>85</sup> In any event, several *ad hoc* Committees have held that a defect in reasoning is not a ground of annulment provided the reasoning is implicit or the *ad hoc* committee is able to explain it.<sup>86</sup>

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<sup>81</sup> Rejoinder, para 139.

<sup>82</sup> Counter-Memorial, para 186.

<sup>83</sup> Counter-Memorial, para 187.

<sup>84</sup> Counter-Memorial, para 188.

<sup>85</sup> Rejoinder, para 149.

<sup>86</sup> Counter-Memorial, paras 197-198, citing *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para

70 If the Applicant considered that the Tribunal had failed to deal with its objection, it should have relied upon Article 49(2) of the ICSID Convention following the issuance of the Award. The Applicant's failure to raise the matter prevents an invocation of the same alleged failure to deal with an objection as the basis of an annulment application under Article 52(1)(e) of the ICSID Convention.<sup>87</sup>

### C. The Representation Issue

#### 1. The Applicant's Position

71 The Applicant contends that the Award should be annulled in its entirety because there was a serious departure from a fundamental rule of procedure in terms of Article 52(1)(d) of the ICSID Convention, whose intention is to ensure that basic procedural principles, i.e. guarantees of due process, are observed.<sup>88</sup>

72 The right to be heard is a fundamental rule of procedure, as is clear from decisions of investment tribunals and the negotiating history of the ICSID Convention.<sup>89</sup> The right to be heard involves more than simply a party's physical presence in the proceedings or the fact its voice is heard in the literal sense – rather, it is the right to respond adequately to the other side's arguments and evidence. This requires representation by counsel. Accordingly, the right to be adequately represented or to have effective counsel is part and parcel of the right to be heard.<sup>90</sup>

73 The right to effective counsel or adequate representation is a fundamental rule of procedure by itself, and not just as a corollary of the right to be heard, and is an important rule of natural justice and due process and a general principle of law in terms of Article 38(1)(c) of the Statute of the International Court of Justice. In particular, the right to effective counsel is common to the community of nations. The

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24 and *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Annulment, 18 January 2006, para 264.

<sup>87</sup> Counter-Memorial Paras 201-209, relying on *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, paras 180-184.

<sup>88</sup> Memorial, para 112.

<sup>89</sup> Memorial, paras 93-96.

<sup>90</sup> Memorial, para 103.

right to counsel in civil and criminal proceedings has been recognised by many senior courts throughout the world and in various multilateral and human rights treaties.<sup>91</sup> The Applicant in particular points to jurisprudence from, *inter alia*, the United States Supreme Court,<sup>92</sup> and the European Court of Human Rights (in interpreting Article 6 of the European Convention on Human Rights).<sup>93</sup> It is compatible with fundamental principles of international law and is complementary to the right to counsel in criminal proceedings already recognised under human rights law. These authorities establish that the relevant right is not just one to counsel, but one to effective counsel, in particular because, as the European cases illustrate, for the right to counsel to be vindicated it must be effective.<sup>94</sup>

74 The Applicant contends that while a general principle of law does not necessarily qualify as a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention, it does so where the general principle reflects a procedural right of fundamental importance.<sup>95</sup>

75 The Applicant acknowledges that the parties bear responsibility for their choice of representatives, but contends that this does not absolve the Tribunal of its obligation to ensure that the fundamental rules of procedure are guaranteed.<sup>96</sup> The Applicant also acknowledges that the right to representation in Rule 18 of the ICSID Arbitration Rules does not *require* representation, but says that where that right is exercised, it must be rendered effective.<sup>97</sup>

76 According to the Applicant, the parties were not equally represented from the outset. The Respondents relied upon a legal team from the Paris and Brussel offices of DLA Piper, one of the largest and most prestigious firms in the world, while from 12

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<sup>91</sup> Memorial, paras 120-142.

<sup>92</sup> *McMann v. Richardson* 397 US 759 (1970), discussed at Memorial, para 120 and Reply, paras 100-102.

<sup>93</sup> Including *Sannino v. Italy*, Application No. 30691/03, Judgment of 27 April 2006; *Artico v. Italy* (1981) 3 EHRR 1; *Airey v. Ireland* [1979] 2 EHRR 305; and *Imbrioscia v. Switzerland* (1994) 17 EHRR 441.

<sup>94</sup> Reply, paras 106-109. In particular, the Applicant contends that *Airey v Ireland* [1979] 2 EHRR 305 “firmly stands” for the proposition that “States are required to ensure litigants are represented by competent counsel in some civil proceedings” (Reply, para 142).

<sup>95</sup> Reply, para 157.

<sup>96</sup> Memorial, para 161.

<sup>97</sup> Reply, paras 116-119.



September 2018 Madagascar was represented by a single counsel, Dr Walid Ben Hamida.<sup>98</sup>

- 77 The Tribunal's conclusions on the merits were based on a limited number of documents, and in particular on a contemporaneous report from January 2009 prepared by Georges Rafanomezantsoa, an officer of the security company employed by PGM, and a witness statement prepared by Mr Rafanomezantsoa a few weeks before he died. The Tribunal made its assessment based on Mr Rafanomezantsoa's accounts. Counsel for the Applicant failed to present any evidence to refute Mr Rafanomezantsoa's account.<sup>99</sup> The Tribunal specifically noted in the Award that the Applicant could have adduced evidence from police or others present at the Factory.<sup>100</sup> While the Tribunal was therefore aware of the Applicant's inadequate representation, it did not uphold its own responsibility to ensure adequate representation, i.e. by enquiring with the Applicant why it did not produce evidence of its own, or whether it understood that it carried the burden of producing evidence, or understood that the success of the case might hinge on the strength of the evidence. This was also evident when the Tribunal pointed out that Madagascar's counsel had failed adequately to evidence the Applicant's case on the authenticity of the insurance contract between PGM and Ny Havana (an issue the Tribunal ultimately did not decide).<sup>101</sup>
- 78 The Applicant failed to put forward any witnesses or experts, in contrast to the Respondents putting in a witness statement from Mr Peter de Sutter and an expert report from FTI Consulting. The Tribunal failed to draw the Applicant's attention to the consequences of not putting forward its own witness and expert evidence, which turned out to be detrimental to Madagascar's case.<sup>102</sup> The Applicant also points out

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<sup>98</sup> Memorial, para 162; Reply, para 170.

<sup>99</sup> Transcript, p 26, lines 8-16 ("The Respondents... say that the onus was on the Applicant to produce its own evidence to counter theirs, evidence which was undoubtedly sufficient in their view. It is undisputed that sole counsel for Madagascar in the underlying proceedings did no such thing. He did nothing, despite the fact that the case hinged on the facts alleged in this one witness account.") (Mr Sthoeger).

<sup>100</sup> Memorial, para 169, referring to Award, para 329.

<sup>101</sup> Memorial, para 176.

<sup>102</sup> Memorial, para 178.

that the Tribunal effectively cross-examined Mr de Sutter at greater length than the Applicant's counsel.<sup>103</sup>

79 Contrary to the Respondents' submission, the Applicant's counsel's failure to put forward the necessary evidence to rebut the Respondents' case was not a strategic choice.<sup>104</sup> The Tribunal recognised this by acknowledging the Applicant's counsel's inaction in the Award,<sup>105</sup> and by taking steps to cross-examine Mr de Sutter where counsel failed to do so.<sup>106</sup> The Respondents are running a contradictory argument by, on one hand, criticising Dr Ben Hamida during the ICSID Arbitration for the number of documents produced by him, and on the other referring to his labours as evidence of adequate representation.<sup>107</sup>

80 The potential impact of the departure from the right to adequate representation is manifest in that it directly contributed to the dispositive and the vast sums awarded to the Respondents by the Tribunal.<sup>108</sup> In any event, it need only be shown that there is a grave (i.e. serious) departure from a fundamental rule of procedure – a departure from the right to effective counsel is inherently serious unless it is insubstantial, and as such this should lead to the annulment of the award.<sup>109</sup> In any event, had the Tribunal ensured adequate representation, the Applicant would have had the opportunity to consider the production of factual evidence addressing the merits.<sup>110</sup>

## 2. The Respondents' Position

81 The Respondents contend there is no fundamental rule of procedure that parties have the right to effective counsel. The substance of the right to be heard is that the parties have the opportunity to present their respective cases.<sup>111</sup> Vindication of the right to be

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<sup>103</sup> Memorial, para 179.

<sup>104</sup> Reply, para 173.

<sup>105</sup> Reply, para 173.

<sup>106</sup> Reply, para 181.

<sup>107</sup> Reply, para 182.

<sup>108</sup> Reply, para 183.

<sup>109</sup> Reply, para 167, discussing *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019, para 180.

<sup>110</sup> Reply, para 173.

<sup>111</sup> Counter-Memorial, para 218-219 citing *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 28 January 2002, para 57 and *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para 82.

heard does not involve an assessment by the tribunal of the manner in which the parties avail themselves of their opportunity to be heard.<sup>112</sup> The Applicant cites no source for its proposition that in ICSID proceedings a party must be represented by counsel, and it is well-established in international arbitration that there is no principle of mandatory representation.<sup>113</sup> That representation is voluntary is reflected in ICSID Arbitration Rule 18. The Applicant misrepresents the content of arbitral decisions entitling each party to “respond adequately” – this simply means that each party is given an “adequate” opportunity to be heard, rather than involving a substantive assessment of whether a party has responded to an argument adequately.<sup>114</sup>

82 In contrast with the jurisprudence relied upon by the Applicant, ICSID Arbitration Rule 18 does not deal with the principle whereby the right to free legal representation must be afforded to impecunious parties.<sup>115</sup> Rather, it simply provides that the parties are free to choose to act through lawyers if they wish.

83 The Applicant relies upon a decision of the Supreme Court of the United States from 1970 for its proposition that a “non-efficient counsel is the equivalent of no counsel at all”.<sup>116</sup> That decision concerned the interpretation of Amendment VI of the United States Constitution, which affords accused persons the right to counsel in criminal prosecutions. It applies only in criminal proceedings and, in any event, nothing in *McMann* supports the idea that there is a right to effective counsel at international law as part of the right to be heard.<sup>117</sup>

84 The European jurisprudence upon which the Applicant relies likewise indicates that the assurance of the right to counsel does not involve an examination of the choice of arguments or evidence advanced by a party’s lawyer, but rather simply whether a lawyer has, in fact, represented a party.<sup>118</sup> None of the authorities on which the

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<sup>112</sup> Counter-Memorial, para 221, citing *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, para 225.

<sup>113</sup> Counter-Memorial, para 223.

<sup>114</sup> Rejoinder, paras 194-196.

<sup>115</sup> Rejoinder, para 169.

<sup>116</sup> Counter-Memorial, para 226, discussing *McMann v. Richardson* 397 US 759 (1970).

<sup>117</sup> Rejoinder, paras 185-186.

<sup>118</sup> Rejoinder, paras 179-181.

Applicant relies supports the proposition that a judicial authority should evaluate the persuasiveness of arguments deployed by counsel in ensuring the right to counsel.<sup>119</sup>

85 The Respondents also reject the proposition that the right to effective counsel is itself a fundamental rule of procedure by dint of being a general principle of law. For a norm to qualify as both a general principle of law and a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention, the norm must be immutable or absolute.<sup>120</sup> The alleged norm identified by Madagascar does not qualify. The Applicant has only referred to practice in certain jurisdictions and primarily in criminal matters and in cases concerning the grant of legal assistance to indigent persons.<sup>121</sup> The jurisprudence relied upon by the Applicant in support of its alleged right to effective counsel does not concern the quality of the legal services to which parties have a right. If there were the obligation for which Madagascar contends, Madagascar itself would be required by international law to vindicate it.<sup>122</sup> In this regard, rights to counsel are appropriate in circumstances where the state requires it of its own tribunals, but they are inapposite in a system like ICSID, where States have themselves voluntarily submitted to a system where they are tasked with their own representation.<sup>123</sup>

86 Even if the right to “effective” counsel were recognised, it would be unworkable in the international legal order – for example, it would require tribunals to judge the quality of representation without access to lawyer-client communications, and for tribunals to indicate to the parties where their deliberations were heading in order to ensure that parties are “aware of the significance of the evidentiary record and the consequences of [counsel inaction]”.<sup>124</sup> This would create an appearance of partiality.<sup>125</sup>

87 In any event, Madagascar was heard and adequately represented. Madagascar had several opportunities in the written phase of the ICSID Arbitration to present its

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<sup>119</sup> Rejoinder, para 189.

<sup>120</sup> Counter-Memorial, para 240-241.

<sup>121</sup> Counter-Memorial, paras 248-250; Rejoinder paras 211-219.

<sup>122</sup> Counter-Memorial, 261.

<sup>123</sup> Rejoinder, para 229.

<sup>124</sup> Rejoinder, para 226, referring to the submission made in the Reply, para 177.

<sup>125</sup> Rejoinder, para 227.

arguments,<sup>126</sup> and had the same (ample) opportunity to explain its position during the merits hearing.<sup>127</sup> Madagascar was represented by counsel – Dr Ben Hamida and, until he withdrew from the matter for personal reasons, Me Michel Berger – who were extremely proactive in defence of their client. Dr Ben Hamida is an experienced international arbitration lawyer who has served as a tribunal president and co-arbitrator in many international arbitrations, as well as counsel and expert. Madagascar put in voluminous written submissions and documentary evidence, and has been involved in three ICSID arbitrations before the present – it would be farcical to suggest the Tribunal was required to ensure that Madagascar’s counsel understood its role in these circumstances.<sup>128</sup>

88 The Applicant’s contention that the Tribunal acknowledged the ineffectiveness of its counsel in the Award is false.<sup>129</sup> While the Tribunal noted that Madagascar had failed to call evidence to rebut that of Mr Rafanomezantsoa, it made no adverse comment on counsel’s conduct. It cannot be seriously suggested that the Tribunal should have abrogated its role as an impartial decision-maker and advised one party as to how to conduct its defence,<sup>130</sup> and the Applicant cites no authority supporting this proposition. The Applicant had ample opportunity to rebut the evidence called by the Respondents. Its failure to address that evidence is its responsibility and was, without doubt, a strategic choice,<sup>131</sup> and if the Applicant wants a remedy in respect of that, it will need to bring civil proceedings against its counsel.<sup>132</sup> In reality if the Applicant did not advance contrary evidence, it is because there was no such evidence or, if there was, it was neither credible nor helpful.<sup>133</sup> If the Applicant’s position were accepted, then every time an unsuccessful party considered that its lawyers had not done their work, or could have adopted a different strategy, it could seek annulment of an award.

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<sup>126</sup> Counter-Memorial, para 264.

<sup>127</sup> Counter-Memorial, para 265.

<sup>128</sup> Rejoinder, para 240-241.

<sup>129</sup> Rejoinder, para 237.

<sup>130</sup> Counter-Memorial, para 284.

<sup>131</sup> Counter-Memorial, paras 292-293

<sup>132</sup> Counter-Memorial, paras 304, 316.

<sup>133</sup> Counter-Memorial, para 293.

This would go against the role of *ad hoc* Committees and the finality of ICSID awards.<sup>134</sup>

89 The Applicant is wrong to suggest that the Tribunal intervened to cross-examine Mr de Sutter on Madagascar's behalf – it merely exercised its discretion to intervene in the course of a witness's oral evidence, and to satisfy itself that it had sufficient information to decide the case.<sup>135</sup>

90 The Applicant is wrong to suggest that there are other alleged instances of the Applicant's lack of adequate representation. The Applicant criticises its counsel for failing properly to argue the issue of the authenticity of the insurance contract between PGM and Ny Havana, while recognising that the Tribunal did not find it necessary to decide the point. The Applicant's criticism of the Tribunal for not having asked the Applicant if it was aware of the consequences of not adducing witness or expert testimony is also without justification. The Tribunal was not obliged to ensure the parties understood the procedural rules regarding evidence, and if the Tribunal did not seek further evidence, that is because it did not require it. It is not for the Committee to evaluate that decision by the Tribunal. It is not untypical for there to be only one expert report on quantum, with the opposing party who has not retained an expert having the opportunity to give submissions on the report's contents.<sup>136</sup> Further, the Tribunal did not fully endorse the Respondents' quantum expert's analysis. By way of example, it refused to award financing costs, despite the absence of an opposing expert from the Applicant.<sup>137</sup>

91 The Applicant was represented by a lawyer who had primary responsibility for these decisions. There is nothing to say that the Applicant's counsel did not discuss with its client the possibility of putting in expert evidence, and it is not for the Committee to

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<sup>134</sup> Counter-Memorial, para 295.

<sup>135</sup> Rejoinder, para 238.

<sup>136</sup> Counter-Memorial, para 300.

<sup>137</sup> Counter-Memorial, para 300, quoting para 448 of the Award.

seek to shed light on this point and act as an authority policing communications between parties and their counsel.<sup>138</sup>

- 92 The Respondents contend that the Applicant is wrong to say it suffices, to establish a serious departure from a fundamental rule of procedure, that the departure “may have had an impact on the case”, and hence that the Applicant need not establish that the result would have been different but for the departure.<sup>139</sup> This is inconsistent with the relevant jurisprudence.<sup>140</sup> The Applicant has failed to establish that if it had produced evidence, that evidence would necessarily have persuaded the Tribunal to arrive at a different conclusion,<sup>141</sup> nor does it allege exactly what the Tribunal should have done differently once had it made enquiries as to whether Madagascar was being adequately represented.<sup>142</sup> There is no reason to think that evidence that could have changed the result in fact existed.<sup>143</sup>

#### **D. The Burden Issue**

##### 1. The Applicant’s position

- 93 In the alternative to contending that the Tribunal departed from a fundamental rule of procedure by failing to ensure the right to effective counsel, the Applicant contends that the Tribunal also departed from a fundamental rule of procedure by reversing the burden of proof.
- 94 It is the Applicant’s position that arbitral jurisprudence recognises that a failure properly to apply the burden of proof can be considered a serious departure from a fundamental rule of procedure, and if sufficiently egregious this constitutes a ground

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<sup>138</sup> Counter-Memorial, para 302.

<sup>139</sup> Counter-Memorial, para 308.

<sup>140</sup> Counter-Memorial, para 309, citing *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Application for Annulment, 6 December 2018, para 248 and para 311, citing *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019, para 180.

<sup>141</sup> Counter-Memorial, para 314.

<sup>142</sup> Counter-Memorial, para 315.

<sup>143</sup> Rejoinder, para 257.

for annulment.<sup>144</sup> Since a tribunal is unlikely explicitly to reverse the burden of proof, the Committee must draw a distinction between weighing the existing evidentiary record, and embarking upon a *de facto* reversal of the burden of proof, which is what occurred in this case.<sup>145</sup>

95 The Applicant contends that while the Tribunal stated in its Award that it assessed the evidence presented to it as a whole, this is not what it did in practice.<sup>146</sup> The Tribunal based its assessment and decision exclusively on the reports by Mr Rafanomezantsoa of events at the Factory in January 2009.<sup>147</sup> According to the Applicant, one of those reports was undated, and was likely prepared for the purposes of the Malagasy Proceedings. Mr Rafanomezantsoa's last written statement was prepared seven years after the events in question. Mr Rafanomezantsoa died before the ICSID Arbitration and was accordingly unable to be cross-examined. Notwithstanding these matters, the Tribunal pointed out that the Applicant could have adduced responsive evidence, including from the police.<sup>148</sup> In the circumstances this was a reversal of the burden of proof because it effectively required Madagascar to prove that the police responded adequately to the situation at the Factory rather than requiring the Respondents to prove their case with sufficient evidence.<sup>149</sup>

## 2. The Respondents' position

96 The Respondents submit that the Applicant is incorrect to describe the burden of proof as a fundamental rule of procedure. The three decisions cited by the Applicant for this proposition only suggest that the application of the burden of proof "may" be a fundamental rule of procedure,<sup>150</sup> and the Applicant is incapable of citing a single case

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<sup>144</sup> Memorial, paras 191-193, citing *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para 97; Reply, paras 192-195.

<sup>145</sup> Reply, para 197.

<sup>146</sup> Reply, para 199.

<sup>147</sup> Memorial, paras 165-166, 194.

<sup>148</sup> Memorial, para 169, citing Award, para 329.

<sup>149</sup> Memorial Para 199.

<sup>150</sup> Counter-Memorial, para 321, referring to *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, and *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019.



where an award was annulled on this basis.<sup>151</sup> In certain national and regional jurisdictions the principle of the burden of proof is codified and considered to be a substantive and not a procedural principle, which is subject to reversal when deemed just and cannot be considered a basic, invariable, and absolute element of the minimal standard of procedure.<sup>152</sup>

97 In any event, the Tribunal did not reverse the burden of proof. The Respondents put in evidence, notably documents emanating from Mr Rafanomezantsoa, and thereby discharged their burden of proof. If Madagascar wished to refute that evidence, it was incumbent upon it to submit contrary evidence, which fact Madagascar itself has recognised.<sup>153</sup> The Tribunal analysed the evidence before it in the light of all the circumstances. The evaluation of evidence is within the Tribunal's discretion, and it is established that *ad hoc* Committees should resist demands to interfere with that evaluation.<sup>154</sup>

## V. THE COMMITTEE'S ANALYSIS

### A. The Jurisdiction Issue

#### 1. The applicable legal test

98 In respect of this first ground of annulment advanced by the Applicant, the Committee must determine whether the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.

99 It is well established that if an ICSID tribunal asserts a jurisdiction that it does not have, this may be a manifest excess of powers under Article 52(1)(b). As the *ad hoc* Committee explained in *Micula v Romania*:

... there is an excess of power if the tribunal: (i) asserts its jurisdiction over a legal or natural person or a State in regard to whom it does not

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<sup>151</sup> Counter-Memorial, para 322.

<sup>152</sup> Rejoinder, para 263, citing *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, para 94.

<sup>153</sup> Counter-Memorial, para 327, citing Memorial, para 167.

<sup>154</sup> Counter-Memorial, paras 331-2, citing *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para 73.

have jurisdiction; (ii) asserts its jurisdiction over a subject-matter which does not fall within the ambit of the jurisdiction of the tribunal; or (iii) asserts its jurisdiction over an issue that is not encompassed in the consent of the parties. A deficiency in meeting any of these requirements would mean that there is no jurisdiction, which may constitute a manifest excess of powers if the excess of jurisdiction is manifest.<sup>155</sup>

100 It has also been held that a failure to decide a question entrusted to a tribunal may, in some circumstances, constitute an excess of powers, since the tribunal has in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement.<sup>156</sup> It is important to keep in mind in this regard the distinction which has been drawn by other *ad hoc* committees between "questions" and "arguments". A "question" is an issue which must be decided in order to determine all aspects of the rights and liabilities for the parties relevant to the case at hand. In making its case, a party may identify several distinct questions that need to be resolved by the tribunal in order to determine the parties' respective rights and liabilities. What does or does not constitute a question that has to be decided by the tribunal is an objective matter.<sup>157</sup> An ICSID tribunal has to deal with all questions submitted by the parties, but it is not required to address all arguments advanced by them, as is common ground in this arbitration.<sup>158</sup>

101 It is, of course, not sufficient for annulment to demonstrate that there has been an excess of powers. It must be shown that the excess of powers is "manifest". The Committee considers that "manifest" is to be accorded its natural and ordinary meaning – namely that the excess of powers must be, "clear", "plain", "obvious", or "evident".<sup>159</sup> Hence the Committee agrees with the test first posited by Professor Schreuer, which has been endorsed by more than one *ad hoc* Committee, namely that the word "manifest" in Article 52(1)(b):

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<sup>155</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para 125.

<sup>156</sup> *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para 97.

<sup>157</sup> *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para 346.

<sup>158</sup> Counter-Memorial, para 37; Reply, para 13.

<sup>159</sup> See *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para 39.

... relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.<sup>160</sup>

102 It follows that, if the existence of the alleged excess of powers is only arguable or is debateable, then it is not an excess of powers that is “manifest” which can give rise to annulment under Article 52(1)(b) of the ICSID Convention.<sup>161</sup> That is so for two reasons. First, if reasonable minds might differ on whether there has been an excess of powers, then excess cannot, by definition, be clear or obvious. Secondly, were the position otherwise, the practical effect would be to expand the scope of applications for annulment under Article 52(1)(b) into *de novo* appeals. As one *ad hoc* Committee has put it, in the context of discussing an excess of powers arising from an alleged error in failure to apply the applicable law:

If the tribunal’s legal interpretation is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law, the award must stand – otherwise the annulment procedure would expand into an appeal mechanism, in contravention of the clear wording of the Convention.<sup>162</sup>

103 At a more general level, annulment is an extraordinary remedy.<sup>163</sup> It is not rehearing or an appeal in which the *ad hoc* Committee is tasked with the correction of what it

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<sup>160</sup> See *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, 8 January 2007, para 36, and see *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para 68 (“The expression ‘manifestly’ in Article 52(1)(b) means ‘obvious’ rather than ‘grave’, and the relevant test is thus whether the excess of power ‘can be discerned with little effort and without deeper analysis’). The Committee notes the Respondents’ citation of *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para 40, in which the *ad hoc* Committee held that the word “manifest” also connoted the ‘substantive seriousness’ of the excess of powers (i.e. that the excess was capable of making a difference to the tribunal’s result). The Committee respectfully prefers the formulation of the *ad hoc* Committees in *Repsol* and *Azurix*, which adhere more closely to the text of Article 52(1)(b).

<sup>161</sup> See *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para 99.

<sup>162</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para 144.

<sup>163</sup> See ICSID, Note d’information mise à jour relative à l’annulation à l’attention du Conseil administratif du CIRDI, 5 May 2016, para 73 (referring to “Le caractère limité et exceptionnel du recours en annulation...”) and see *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para 34 (quoting Professor Schreuer, “Because of its focus on procedural legitimacy, annulment is ‘an extraordinary remedy for unusual and important cases’”).

perceives to be errors: annulment in the ICSID system is limited to the exhaustive grounds in Article 52(1). As the *ad hoc* Committee said in *SAUR v Argentina*:

Les motifs d'annulation cités à l'Article 52(1) sont stricts et en nombre limités. Compte tenu des motifs d'annulation prévus par la Convention, le recours en annulation apparaît comme un recours exceptionnel utilisé pour protéger l'intégrité de la procédure d'arbitrage et la légitimité de la sentence. Le rôle du Comité n'est donc pas par conséquent de corriger toute erreur de droit commise par le Tribunal ou l'analyse qu'il aura effectuée des faits ou encore son appréciation de la preuve. Le Comité ne peut substituer son appréciation des faits ou de la façon dont il aurait appliqué le droit applicable à celles du tribunal.<sup>164</sup>

104 The Committee accepts the Respondents' submission that this line of reasoning is particularly apposite in cases in which it is alleged that a tribunal has wrongfully held itself to have jurisdiction, in the light of Article 41(1) of the ICSID Convention, by which the "The Tribunal shall be the judge of its own competence".<sup>165</sup> *Ad hoc* Committees should be very cautious about departing from an ICSID tribunal's understanding of its own jurisdiction, unless that interpretation is obviously wrong. Thus, where a tribunal's interpretation of its own jurisdiction is not unreasonable, it should not be disturbed on an application for annulment.<sup>166</sup>

105 With these principles in mind, we turn to the Tribunal's treatment of the jurisdictional objections of the Applicant.

## 2. The Tribunal's approach to its jurisdiction

106 While the Applicant made a series of jurisdictional objections before the Tribunal, it was common ground in the debate before the Committee that two were relevant to the

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<sup>164</sup> *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Annulment, 19 December 2016, para 160.

<sup>165</sup> Counter-Memorial, para 73.

<sup>166</sup> See *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, para 44 ("In cases where the jurisdiction of the Tribunal is reasonably open to more than one interpretation, the *ad hoc* Committee will give special weight to the Arbitral Tribunal's interpretation of the jurisdictional instrument. The Committee will not intervene where the Tribunal's decision on its jurisdiction was not unreasonable.")

Application. These were the fifth and sixth jurisdictional objections concerning Articles 12(2) and 12(3) of the BIT respectively, which relevantly provide:

(2) A défaut de règlement amiable par arrangement direct entre les parties au différend ou par conciliation par la voie diplomatique dans les six mois à compter de sa notification, le différend sera soumis, au choix de l'investisseur, soit, le cas échéant à l'arbitrage national au sein de l'Etat où l'investissement a été réalisé, soit à la juridiction compétente de l'Etat où l'investissement a été réalisé, soit à l'arbitrage international.

A cette fin, chacune des Parties contractantes donne son consentement anticipé et irrévocable à ce que tout différend soit soumis à cet arbitrage international. Ce consentement implique qu'elles renoncent à exiger l'épuisement des recours administratifs ou judiciaires internes.

(3) En cas de recours à l'arbitrage international, le différend sera soumis à l'un des organismes d'arbitrage désignés ci-après, au choix de l'investisseur:

- au Centre international pour le Règlement des Différends relatifs aux Investissements (C.I.R.D.I.), créé par "la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats", ouverte à la signature à Washington, le 18 mars 1965, lorsque chaque Etat partie au présent Accord sera membre de celle-ci. Aussi longtemps que cette condition n'est pas remplie, chacune des Parties contractantes consent à ce que le différend soit soumis à l'arbitrage conformément au règlement du Mécanisme supplémentaire du C.I.R.D.I.;

- au Tribunal d'Arbitrage de la Chambre de Commerce Internationale, à Paris...

107 In the Bifurcation Decision, the Tribunal summarised the Applicant's fifth and sixth jurisdictional objections<sup>167</sup> in the following terms:

#### **v. L'incompétence en raison de la violation de l'exclusivité du recours**

La Défenderesse explique que l'article 12(2) du TBI subordonne le consentement de l'Etat à la condition que le litige n'ait pas été soumis à la juridiction de l'Etat où l'investissement a été réalisé. En l'espèce, les Demandeurs poursuivent dans le présent arbitrage « le même intérêt et le même préjudice » que celui dont les juridictions malgaches ont été

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<sup>167</sup> As there were at that time. They became the sixth and seventh jurisdictional objections by the time of the Applicant's Rejoinder in the underlying arbitration (see p.139). For convenience, the Committee will continue to refer to them as the fifth and sixth objections respectively.

saisies. En effet, la société PGM continue les procédures contentieuses locales et « pourrait obtenir gain de cause ». Par ailleurs, les Demandeurs violent l'exigence d'exclusivité posée à l'article 26 de la Convention CIRDI, violation qui ferme l'accès à l'arbitrage CIRDI et conduit à l'incompétence du Tribunal.

**vi. L'incompétence en raison de l'existence d'un accord bilatéral attribuant compétence à la CCI malgré l'annulation**

D'après la Défenderesse, les Demandeurs ont déjà soumis leur litige à la CCI en vertu de l'article 12(3) du TBI qui accorde un « choix exclusif ». Ce choix emporte l'incompétence du CIRDI, nonobstant l'annulation de la sentence CCI qui « laisse intact le consentement à l'arbitrage donné en faveur de la CCI ». A titre subsidiaire, le Tribunal devrait se déclarer incompétent pour examiner « les chefs de demandes déjà soumis à la CCI sur la régularité du pourvoi dans l'intérêt de la loi et le traitement devant les juridictions malgaches ».<sup>168</sup>

108 Thus the Applicant's relevant jurisdictional objections can be understood as follows:

108.1 the Tribunal had no jurisdiction by virtue of Article 12(2) of the BIT because the Respondents pursued before the Tribunal the same claims pursued in the Malagasy Proceedings; and

108.2 the Tribunal had no jurisdiction by virtue of Article 12(3) of the BIT:

108.2.1 over the dispute because the Respondents had already submitted to their dispute to ICC Arbitration, which choice survived the annulment of the ICC Award; or

108.2.2 alternatively, over the specific heads of claim already submitted for resolution in the ICC Arbitration (which did not include the FPS claims).

109 It is clear to the Committee from an exchange between the President of the Tribunal and counsel for the Respondents that the Tribunal understood that Applicant's fifth and sixth jurisdictional objections were distinct, and that it understood the scope of the Applicant's primary case on its sixth objection (and it was not in dispute before us

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<sup>168</sup> Ordonnance de Procédure No. 3, 24 April 2018, paras 15-16.

that we could on this Application have regard to the full record of the ICSID Arbitration and not solely to the Award). That exchange occurred on the first day of the merits hearing (2 July 2019) as follows:

**Mme la Présidente.**- [...] C'est vrai qu'il y a en fait deux questions, n'est-ce pas ? Il y a la question, d'une part, du choix de la CCI, et ensuite de la continuité ou de la Convention d'arbitrage qui a été conclue au moment du choix de CCI et sa survie après l'annulation de la Sentence ou non.

Donc, c'est en effet une question qui mériterait peut-être quelques explications supplémentaires, bien qu'elle soit déjà couverte dans vos écritures.

Cela comprend la question de fork-in-the-road. On est d'accord, n'est-ce pas ? Il y a la fork-in-the-road, c'est la première chose, et ensuite il y a la question de la survie qui est une deuxième chose, en tout cas, c'est comme cela que je le comprends.

**Me Ostrove.**- [...] Donc, il y a la question fork-in-the-road, c'est-à-dire l'option de porter les demandes devant les juridictions locales par rapport à l'arbitrage international qui a été soulevé par Madagascar, plus la question : une fois la CCI choisie, est-ce que c'est pour toujours que la CCI est choisie ? Donc, vous voulez nous entendre sur les deux points ?

**Mme la Présidente.**- Oui, je pense, absolument. Oui.<sup>169</sup>

110 It is clear to the Committee from Mr Ostrove's answer to the President's question (with which she expressed her assent) that the Tribunal understood that the Applicant's primary submission on its sixth jurisdictional objection was that, in a nutshell, "*une fois la CCI choisie... c'est pour toujours que la CCI est choisie*", and that this did not depend upon which specific heads of claim were submitted for decision in the ICC Arbitration. In addition, from the President of the Tribunal's remark that there was the further issue ("*une deuxième chose*") of whether the choice of ICC Arbitration survived the annulment of the ICC Award, it is evident that the Tribunal understood that the Applicant advanced two arguments in support of its sixth jurisdictional objection and considered those.

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<sup>169</sup> See the exchange from the transcript for 2 July 2019 cited in Counter-Memorial, para 111, and see also para 113.

111 The Tribunal’s analysis in the Award did not, however, fully replicate the Applicant’s arguments with the same clarity and detail as found in the Bifurcation Decision and in the transcript of the merits hearing. In the Award, the Tribunal grouped the Applicant’s various jurisdictional objections into five categories, with what we have referred to as the fifth and sixth jurisdictional objections falling within the fifth category entitled “Les Demandeurs violent le principe de l’exclusivité des voies de recours”.<sup>170</sup> In its analysis, the Tribunal deals with the fifth category of objections under the heading “5. Objections relatives au principe du mode de règlement des différends”.<sup>171</sup>

112 In particular, the Tribunal summarised the Applicant’s submissions on the sixth jurisdictional objection (choice of forum) as follows:

La Défenderesse estime par ailleurs qu’un accord bilatéral sur le recours à la CCI existe en ce qui concerne les questions relatives à la validité du pourvoi dans l’intérêt de la loi, nonobstant l’annulation de la Sentence CCI. Les Demandeurs ne peuvent donc pas soumettre ce même litige au CIRDI vu que l’accord formé en vertu de l’article 12(3) du Traité existe toujours.<sup>172</sup>

113 The Committee notes that in this paragraph, the Tribunal appears to have focused its summary on the Applicant’s alternative case on its choice of forum objection.<sup>173</sup> The Applicant’s primary case was not that the Respondents were not entitled to arbitrate before ICSID those matters relating to the Malagasy Proceedings that were submitted to the ICC Arbitration, though it necessarily included that point. Rather, it was a broader point that once the ICC Arbitration started, all claims needed to be arbitrated before the ICC such that no claims could then be brought in any other forum. Whilst the Tribunal’s summary in this paragraph is focused on the Applicant’s alternative argument, the Tribunal made a footnoted reference at the end of that paragraph to paragraphs 582 to 608 of the Counter-Memorial in the ICSID Arbitration, which

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<sup>170</sup> Award, para 115.

<sup>171</sup> Award, page 65.

<sup>172</sup> Award, para 252.

<sup>173</sup> As Professor Mbengue for the Applicant put it to us in oral argument: “Dans le paragraphe 252 de la sentence, l’objection principale, sans laquelle l’objection subsidiaire n’a plus aucun sens, disparaît comme par magie, laissant l’objection subsidiaire planer toute seule dans l’air” (French transcript, p 12, lines 19-23).



paragraphs addressed both the primary and subsidiary arguments advanced by the Applicant in relation to this objection.

- 114 The Tribunal next summarised the Respondents' arguments on jurisdiction. With respect to the Applicant's sixth (choice of forum) jurisdictional objection, the Tribunal recorded as follows:

L'arbitrage CCI est distinct du présent arbitrage, selon les Demandeurs. Ni les irrégularités procédurales et substantielles commises par la Cour de cassation dans le pourvoi au fond, ni les griefs entourant la destruction de l'usine et l'absence de protection de l'État, n'étaient soumis à l'arbitre CCI. Quant à l'introduction du pourvoi dans l'intérêt de la loi, les Demandeurs estiment que l'article 12(3) laisse le libre choix à l'investisseur et que ce choix n'est pas irrévocable. D'ailleurs, Madagascar n'a pas fait état d'un préjudice découlant du choix de saisir le CIRDI.<sup>174</sup>

- 115 The Tribunal thereby tracked very closely the arguments advanced by the Respondents in rebutting both the Applicant's primary and alternative cases. In particular, the Tribunal referred to paragraph 471 of the Respondents' Reply Memorial in the Arbitration which contained the Respondents' reply to both the general and alternative objections advanced by the Applicant. In essence, the Respondents' position was that they clearly could not be precluded from bringing the ICSID claim insofar as it sought different relief under a different cause of action resting on different facts, as was the case in its claims relating to the Applicant's failure to protect their factory and the procedural irregularities committed by the Malagasy Cour de cassation in the proceedings before it. Whilst that argument aligned with the Applicant's alternative argument, it was the Respondents' primary response to the general objection; the Respondents' case was that since they on no view could be precluded from bringing claims for different relief under different causes of action, the Applicant's primary case had to fail. The Respondents further submitted, addressing both the Applicant's primary and alternative cases, that they were also not precluded from bringing a claim before ICSID in relation to the pourvoi dans l'intérêt de la loi which had been argued before the ICC arbitrator. This was because (said the

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<sup>174</sup> Award, para 254.

Respondents) Article 12(3) of the BIT left the investor the free choice as to which forum to choose and that choice was not irrevocable.

116 The Tribunal began its analysis by first setting out the text of Articles 12(2) and 12(3) of the BIT.<sup>175</sup> It then dealt with the Applicant's fifth (*electa una via*) jurisdictional objection, rejecting it on the basis that (i) the procedural parties to the Malagasy Proceedings differed from those to the ICSID Arbitration; (ii) the cause of action in the Malagasy Proceedings was different, since it raised a contractual dispute, whereas the ICSID Arbitration was under the BIT; (iii) the subject matter of the Malagasy Proceedings (indemnity after materialisation of an insured risk) differed from that of the ICSID Arbitration (reparation for damages suffered due to the inaction of the Malagasy security forces and the government's attempt to influence the administration of justice).<sup>176</sup>

117 Then, in the paragraph of the Award which formed the centre of the debate before the Committee, the Tribunal said:

Enfin, le Tribunal n'estime pas nécessaire de se prononcer à ce stade sur la question de savoir si un accord bilatéral sur le recours à la CCI existe en ce qui concerne les questions relatives à la validité du pourvoi dans l'intérêt de la loi. La compétence étant admise pour que le Tribunal se prononce sur les violations alléguées en lien avec le pillage et la destruction de l'usine, le Tribunal traitera dans un premier temps cette prétention et déterminera ensuite s'il est nécessaire de se prononcer sur sa compétence pour traiter des autres violations alléguées en lien avec les immixtions alléguées dans la procédure judiciaire.<sup>177</sup>

118 Thus the Tribunal said that it would park the question of whether there was an agreement to ICC arbitration in respect of the validity of the "*pourvoi dans l'intérêt de la loi*" pending its analysis of the Respondents' FPS claim, over which the Tribunal stated that its jurisdiction was "admise". Much of the argument before us centred upon the precise meaning of this word. We return to that point below. The Tribunal further stated that it would determine after considering the FPS claims whether it was

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<sup>175</sup> Award, paras 255 and 256.

<sup>176</sup> Award, paras 258 to 261. See also Award paras 237-238.

<sup>177</sup> Award, para 262.

necessary to decide the claims in relation to the procedural irregularities in the Cour de cassation.

119 The Tribunal then said, in the following paragraph:

Pour ces raisons, et sous réserve de sa décision sur l'opportunité d'analyser la dernière objection à la compétence relative à l'existence d'un accord bilatéral CCI pour traiter le pourvoi dans l'intérêt de la loi, le Tribunal rejette les déclinatoires de compétence soulevées par la Défenderesse.<sup>178</sup>

120 Thus the Tribunal expressly reserved the part of the Applicant's jurisdictional objection relating to the matters that had been submitted to the ICC arbitrator, pending its analysis of the FPS claim, but dismissed all other jurisdictional objections. Given the Tribunal ultimately found the Applicant liable for breach of its obligation to provide FPS under Article 3(2) of the BIT<sup>179</sup>, it determined that it did not need to decide its jurisdiction over claims in relation to the procedural irregularities in the Cour de cassation and that it did not need to determine the issue of whether there was an agreement to ICC arbitration in respect of the validity of the "*pourvoi dans l'intérêt de la loi*".<sup>180</sup>

121 In the « Dispositif » at the conclusion of the Award, the Tribunal confirmed that for the reasons in the Award it "*Se déclare compétent pour trancher le grief relatif à la protection et la sécurité constante*"<sup>181</sup> whilst at the same time it would "*Rejette toutes autres demandes*".<sup>182</sup>

### 3. The Committee's Decision

122 Much of the argument before us concerned the precise meaning of the Tribunal's statement that its jurisdiction over the FPS claims was "admise". The Applicant's primary position was that it meant "admitted", whereas the Respondents contended

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<sup>178</sup> Award, para 263.

<sup>179</sup> Award, para 364-365.

<sup>180</sup> Award paras 468ff and 482.

<sup>181</sup> Award, para 482(a).

<sup>182</sup> Award, para 482(h).

it meant “established”. In its Reply, the Applicant accepted that “admise” could bear the meaning “established” attributed to it by the Respondents.<sup>183</sup>

123 The Committee is in no doubt that, with respect to the intended meaning of “admise”, the Respondents are correct. In the course of these annulment proceedings, it became common ground that the French verb “admettre”, could mean “to establish”. This is particularly so, in the Committee’s experience, when used in the formal, legal register. There is also no basis in any part of the Award or the written record of the ICSID Arbitration for the proposition that the Applicant conceded jurisdiction over the FPS claims, and accordingly there is no basis for suggesting that this was the Tribunal’s intended meaning.

124 The question raised by the Applicant is whether or not the Tribunal decided its sixth jurisdictional objection. A majority of the Committee considers that it did. The majority considers that the Tribunal’s statement in paragraph 262 of the Award that it was established that the Tribunal had jurisdiction at least to determine the FPS claims was an implicit determination rejecting the general objection that there was a continuing ICC arbitration agreement which barred any other claims at all. It cannot be understood otherwise – the Tribunal was determining that it had jurisdiction over claims not submitted to the ICC arbitration. That was the Respondents’ central argument against the Applicant’s general jurisdictional objection, which the Tribunal was thereby accepting. It was a determination that necessarily responded to and rejected the Applicant’s broader general jurisdictional objection. The alternative jurisdictional objection, to the effect that at least the matter which had been submitted to the ICC arbitrator (the “pourvoi dans l’intérêt de la loi” claim) could not be submitted to the ICSID Tribunal, was expressly parked by the Tribunal. Ultimately, the Tribunal held that it was unnecessary to decide that point and there is no challenge to that decision *per se*.

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<sup>183</sup> At the hearing of the Application, the Applicant further stated that it was “irrelevant” whether “admise” bore the meaning attributed to it by the Applicant or the Respondents (Transcript, p 65, lines 17-19 (Professor Mbengue)). As is clear from the Committee’s decision below, we agree that the result of the Application does not turn on the meaning of “admise”.

- 125 The reasons for that decision are, in the view of the majority of the Committee, clear, if not developed at length explicitly. It is not the function of this Committee to assess the cogency of those reasons or to impose its own views on the issues. That is all the more so since the Applicant expressly chose not to bring an application for annulment under Article 52(1)(e) for failure to give reasons. In view of the fact that this is a majority decision on the issue, however, and that Mr Bottini's dissent focuses principally on what he considers to be an absence of sufficient reasons, the majority will explain what it understands to be the reasons for the Tribunal's decision on the sixth jurisdictional objection, and why such reasons are present albeit implicit.
- 126 In short, the majority of the Committee considers that it is clear from the Award that the Tribunal accepted the Respondents' arguments in paragraph 471 of their Reply Memorial in the ICSID Arbitration, as summarised at paragraph 254 of the Award, that the ICC arbitration was distinct from the ICSID Arbitration and that there could be no exclusion of claims that were not presented to the ICC arbitrator at all. Whilst it would have been strongly preferable for the Tribunal to have set that out explicitly, it appears that having set out largely the same analysis in relation to the fifth jurisdictional objection in the immediately preceding four paragraphs, the Tribunal did not consider it necessary to repeat that process.
- 127 The Respondents say that it was clear from the Award that the Tribunal considered that its reasons for rejecting the fifth (*electa una via*) jurisdictional objection were directly applicable to the sixth (choice of forum) jurisdictional objection too. Just as the Tribunal held expressly that the ICSID Arbitration was different from the Malagasy Proceedings, so too did it implicitly endorse the Respondents' submission that the ICC arbitration and the ICSID Arbitration dealt with separate causes of action and subject matter, as it held that it had jurisdiction (at least) over any claims not submitted to the ICC. The Respondents say this led inexorably to the Tribunal's conclusion that its jurisdiction over the FPS claims (which were not submitted to the ICC tribunal) was "*admise*". The majority of the Committee agrees with this analysis; even if the point about the identity of the procedural parties was not directly applicable, the remaining analysis was and was sufficient to dispose of the sixth

jurisdictional objection. Further, the fact, relied upon by Mr Bottini<sup>184</sup>, that the fifth jurisdictional objection required a comparison between a contract-based and a treaty-based forum, whilst the sixth jurisdictional objection required a comparison between two treaty-based fora does not affect this analysis, since it was not relevant to the application of the triple identity test adopted by the Tribunal in view of the nature of the claims in issue.<sup>185</sup>

128 Mr Bottini does not agree with the majority's conclusion in respect of the Jurisdiction Issue. As he eloquently explains in his Dissenting Opinion, in his view the Tribunal did not decide the sixth jurisdictional objection either implicitly or explicitly and in fact simply overlooked what he refers to as the 'Primary Objection' – that the ICC arbitration agreement precluded the submission of any claims to the ICSID Tribunal.<sup>186</sup> Mr Bottini focuses on the absence of express reference to the 'Primary Objection' in the Award's summary of the Applicant's case<sup>187</sup> (though he acknowledges (i) that a footnote to paragraph 252 of the Award refers to the paragraphs of the Applicant's Counter-Memorial in the arbitration dealing with both the "Primary" and the 'Alternative' arguments advanced in support of its sixth jurisdictional objection and (ii) that the summary of the Respondents' case responds to both the 'Primary' and 'Alternative' arguments advanced by the Applicant<sup>188</sup>), and the absence of analysis of Article 12(3) of the BIT in the Award by the Tribunal<sup>189</sup>. Mr Bottini further disagrees that the Tribunal dismissed the sixth jurisdictional objection on the same basis as it dismissed the fifth objection, since the latter was based on Article 12(2) of the BIT and one of the determinative elements of the Tribunal's decision on the fifth jurisdictional objection could not have been applied to the sixth.<sup>190</sup> For the reasons we have set out above, the majority of the Committee has formed a different view of these matters.

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<sup>184</sup> Dissenting Opinion of Gabriel Bottini, para 48.

<sup>185</sup> Which may explain why it is a point that was not raised by the Applicant in these Annulment Proceedings..

<sup>186</sup> Dissenting Opinion of Gabriel Bottini, para 36.

<sup>187</sup> Dissenting Opinion of Gabriel Bottini, para 28.

<sup>188</sup> Dissenting Opinion of Gabriel Bottini, para 29.

<sup>189</sup> Dissenting Opinion of Gabriel Bottini, para 38.

<sup>190</sup> Dissenting Opinion of Gabriel Bottini, para 39.

- 129 In addition, Mr Bottini places reliance on paragraph 117 of the Award and its statement that the fifth jurisdictional objection, which under the Award’s classification in paragraph 115 grouped the objections relating to the local proceedings and to the ICC arbitration, “*comporte deux volets dont le second n’affecte pas la prétendue violation de la garantie de protection et sécurité constantes*”. In Mr Bottini’s opinion, “since the objection based on the local proceedings clearly applied to all the claims before the ICSID tribunal (see Award, paras 258–261), the Award seems to be saying that the ICC objection does not affect the full protection and security claim, which was true only of the ICC Alternative Objection but not of the ICC Primary Objection.”<sup>191</sup>
- 130 In the view of the majority of the Committee, the statement in paragraph 117 of the Award is ambiguous. Mr Bottini interprets it as an indication that the Tribunal had overlooked the general objection based on the ICC arbitration agreement, what he calls the Primary Objection. In the majority’s view, however, the statement is equally consistent with the Tribunal foreshadowing its subsequent decision that the ICC arbitration agreement cannot affect claims not submitted to the ICC arbitrator. Accordingly, the majority of the Committee does not consider that paragraph 117 is of particular assistance in resolving the dispute before it. In view of the different readings of paragraph 117 with the Committee, the Tribunal’s reasoning is in any case not obviously wrong, unreasonable or untenable; it is at best debatable. As such, it is not a sufficient basis to annul the Award.<sup>192</sup>
- 131 It follows that the majority of the Committee agrees with the Respondents that, although the Tribunal did not articulate its reasoning expressly, it did not manifestly exceed its powers in the sense of asserting a jurisdiction it obviously did not have. The record of the ICSID Arbitration is clear that the Tribunal had in mind the separate jurisdictional objections of the Applicant and the structure of the Applicant’s argumentation in support of the sixth jurisdictional objection. The dispositive at the

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<sup>191</sup> Dissenting Opinion of Gabriel Bottini, footnote 36.

<sup>192</sup> See also *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para 144; and *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, para 44.

Award's conclusion unambiguously upheld jurisdiction over the Respondents' FPS claims only, and dismissed all other claims and objections.

132 Similarly, the majority of the Committee is not persuaded that the Tribunal obviously failed to apply Article 12(3) of the BIT. The interpretation of Article 12(3) that the Respondents claim the Tribunal must implicitly have favoured (by which claims not submitted for resolution in the ICC Arbitration would be within the Tribunal's jurisdiction) would lead to a conclusion that there was jurisdiction over the Respondents' FPS claims. It cannot be said that that interpretation would have been obviously wrong (in that it could not be the subject of reasonable disagreement). The majority of the Committee accordingly agrees with the Respondents that the same logic by which the Tribunal dismissed the Applicant's fifth jurisdictional objection was the basis upon which the Tribunal dismissed the Applicant's sixth jurisdictional objection. This Committee is not mandated to determine whether that is right or not; what matters for present purposes is that it is not obviously wrong and that the Tribunal's cognitive process, leading to its decision on the sixth jurisdictional objection can be followed.

133 Accordingly, whilst recognising why the Applicant would wish for the Award to have been expressed in clearer terms in this regard and observing that the Award's treatment of this issue could have been better, the majority of the Committee concludes that there was no manifest excess of powers.

134 The Respondents also submitted that the proper course the Applicant should have adopted, if it felt that the Tribunal had not dealt with its jurisdictional objection, was to make a request to the Tribunal to decide the Jurisdiction Issue under Article 49(2) of the ICSID Convention. In principle, the Committee agrees. If a party arbitrating under the ICSID Convention and ICSID Arbitration Rules considers that a tribunal has failed to decide an issue put to it, Article 49(2) of the ICSID Convention (together with Rule 49 of the ICSID Arbitration Rules) provides a mechanism for a supplementary decision to deal with any such omission. That mechanism can and should be invoked if it will render a costly resort to the extraordinary remedy of annulment



unnecessary.<sup>193</sup> There seems to the majority a strong argument that parties should ordinarily be expected to exhaust their option for redress under Article 49(2) of the ICSID Convention before making an application for annulment. However, given the decision on the first aspect of this issue, it is not necessary for the Committee to decide whether the Application would ultimately have failed in any event as a result of the Applicant's failure to pursue a supplementary decision under Article 49(2).

135 Finally, the Respondents point out that the Applicant's submission in fact amounted to a criticism of the Tribunal for a failure to state reasons, which should have been pursued as a separate ground of annulment under Article 52(1)(e) of the ICSID Convention. While that course was open to the Applicant, it was not pursued and the Committee therefore does not find it a relevant consideration.

## **B. The Representation Issue**

136 The Applicant seeks annulment of the Award under Article 52(1)(d) of the ICSID Convention on the basis that the Tribunal committed a serious departure from a fundamental rule of procedure. The alleged fundamental rule of procedure relied upon is, as framed by the Applicant, the right to effective counsel. The Committee is not persuaded by the Applicant's submissions that such a fundamental rule of procedure exists.

137 The Applicant sought to establish a fundamental rule of procedure through a relatively sophisticated argument, which posited in turn that the right to effective counsel was (1) an incident of the right to be heard (which is a clearly established fundamental rule of procedure);<sup>194</sup> (2) a general principle of law recognised by civilised nations in terms of Article 38(1)(c) of the Statute of the International Court of Justice;

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<sup>193</sup> Hence in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, paras 182-183, the *ad hoc* Committee held that a failure to invoke Article 49(2) may preclude a subsequent annulment application under Article 52(1)(b) in cases where Article 49(2) provides an "available and sufficient remedy" (although the Committee accepts whether that is the case will depend ultimately upon the scope of the proposed annulment application). See also *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, 14 December 1989, para 5.12.

<sup>194</sup> *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, para 197.

and (3) a standalone fundamental rule of procedure. The Applicant also acknowledged that Article 18(1) of the ICSID Arbitration Rules provides that each party “may” be represented or assisted by agents, counsel or advocates.

138 The right to be heard ensures that each party is afforded the opportunity to present its case before an independent and impartial tribunal, to state its claim or its defence and produce supporting arguments and evidence, and to respond adequately to the arguments and evidence presented by its opponent.<sup>195</sup> While the Applicant submitted that to vindicate this right, a party must have effective counsel, no support was cited for this proposition in the ICSID context or an analogous context. Article 18 of the ICSID Arbitration Rules would be anomalous otherwise, as it contemplates parties in ICSID arbitrations proceeding without the assistance of counsel. In any event, the right to be heard is directed at ensuring that parties have the opportunity to be heard, whether using counsel or otherwise.

139 The Committee is not persuaded that there is support for a general principle of law that there is a right to effective counsel. While the Applicant embarked upon a detailed survey of jurisprudence, its citations invariably dealt with the specific context of rights of accused persons in criminal proceedings, or of indigent litigants to receive free legal representation. We do not consider the Applicant to have established that a right to effective (i.e. quality) legal representation is common to the principal legal systems of the world, such as to give rise to a general principle of law. While any vindication of a right must of course be “effective”, this means simply that the right must be effectively extended, so that litigants can avail themselves of it. It does not mean once a lawyer is acting, their client enjoys a fundamental procedural right for their advocacy of the client’s position to be “effective” too.

140 While the Applicant submitted that the failure to recognise a right to effective counsel as a general principle of law did not preclude it being a fundamental rule of procedure under Article 52(1)(d),<sup>196</sup> the Committee also considers there to be no basis for saying

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<sup>195</sup> *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceedings), 5 February 2002, para 57.

<sup>196</sup> Transcript, p 19, lines 10-17 (Mr Sthoeger).

that the right to effective counsel is a fundamental rule of procedure in ICSID proceedings. The Committee agrees with the Respondents that to hold otherwise would give rise to significant practical difficulties. Unsuccessful parties would routinely turn on their counsel in any annulment proceedings and claim they were ineffectively represented. Tribunals would be required to abrogate their role as impartial umpires in an adversarial system in order to give guidance and assistance to parties whose counsel were not taking steps the tribunal considered ought to have been taken. *Ad hoc* Committees would be left in an impossible position. For example, there was a dispute in this case as to whether Madagascar's decision not to call evidence responsive to Mr Rafanomezantsoa's account was a result of a strategic choice, or the negligence of counsel (and indeed, these two possibilities are not necessarily mutually exclusive). The Committee has no way of resolving that dispute,<sup>197</sup> and indeed the true position (which, again, the Committee cannot test) might be that there simply was no responsive evidence to be called. The Committee is not persuaded that any of the Tribunal's comments regarding the absence of responsive evidence, or its interventions in the cross-examination of Mr de Sutter, signify an acknowledgement on the Tribunal's part that Madagascar had retained ineffective counsel. Such comments and interventions are both common and legitimate – tribunals need to be free to intervene in the course of oral evidence and make comments on the existence and weight of evidence as they see fit.

141 The Committee accordingly rejects the Applicant's submissions on the Representation Issue and declines to annul the Award on that basis.

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<sup>197</sup> And neither did the Tribunal. As was submitted to us at the hearing, referring to paragraph 329 of the Award, where the Tribunal stated that Madagascar did not call responsive evidence to Mr Rafanomezantsoa's account (French transcript, p 39, lines 8-18) ("Il ne s'agit en aucun cas d'un jugement en valeur par le Tribunal du travail de monsieur Ben Hamida, c'est une simple constatation: il n'y a aucune preuve qui est produite par Madagascar, et la raison sous-jacente est totalement étrangère au Tribunal. Le Tribunal ne sait pas si les preuves existent, ou le Tribunal ne sait pas s'il s'agit là d'un choix stratégique ; par exemple, ces preuves existent mais elles étaient défavorables à la République de Madagascar, donc la République de Madagascar ne les produit pas.") (Me Grisolle).

### C. The Burden Issue

142 In the alternative to its argument on the Representation Issue, the Applicant seeks annulment of the Award under Article 52(1)(d) of the ICSID Convention on the basis that the Tribunal committed a serious departure from a fundamental rule of procedure by reversing the burden of proof, and in particular by basing its assessment of the evidential case on the reports of the underlying events produced by Mr Rafanomezantsoa.

143 The Committee agrees with previous *ad hoc* Committees that a reversal of the burden of proof could in principle lead to a violation of a fundamental rule of procedure, depending on the circumstances of the case.<sup>198</sup> However, there was no such reversal in the present case. By favouring the evidence emanating from Mr Rafanomezantsoa, the Tribunal effectively found that the Respondents had discharged their burden of proving their case. That is not a reversal of the burden of proof. To the contrary, it is the application of the burden of proof to the Respondents as claimants in the ICSID Arbitration. It may be that, in general terms, once the Respondents had adduced Mr Rafanomezantsoa's evidence, in practice an evidential onus shifted to the Applicant to rebut that evidence. It was evidently unable to do so – and as stated above the Committee is not able to enquire into the reasons it did not. But that does not change the fact that at all times the burden of proof rested on the Respondents, as claimants in the ICSID Arbitration.

144 The Applicant's submissions on the Burden Issue are rejected.

### VI. COSTS

145 Under Article 61(2) of the ICSID Convention –read in conjunction with Article 52 of the ICSID Convention and ICSID Arbitration Rules 47(1)(j) and 53– the Committee shall assess the expenses incurred by the Parties in connection with the proceedings,

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<sup>198</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para 97; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para 84.

and shall decide how and by whom those expenses, the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre shall be paid.

146 The Committee observes that Article 61(2) of the ICSID Convention gives wide discretion to the Committee to determine how to allocate the costs of the proceedings. The Committee will first fix the costs of the annulment proceedings and then allocate the costs and other reimbursable expenses between the Parties.

147 The costs of the arbitration, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):<sup>199</sup>

Committee's fees and expenses

Dr Christopher Harris KC	USD 72,555.13
Ms Melanie van Leeuwen	USD 39,500
Mr Gabriel Bottini	USD 61,923.14
ICSID's administrative fees	USD 112,518.86
Direct expenses	USD 14,693.01
<b>Total</b>	<b><u>USD 301,190.14</u></b>

148 By its statement of costs dated 8 April 2022, the Applicant claims the following costs totalling USD 489,782:

Annulment application fee	USD 25,000
Advance payments to ICSID	USD 300,000

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<sup>199</sup> The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received, processed and paid, and the account is final.

Attorney fees USD 164,782<sup>200</sup>

149 By their statement of costs dated 8 April 2022, the Respondents claim the following costs totalling EUR 250,366.65:

Professional fees of DLA Piper EUR 250,000

Disbursements EUR 366.65

150 The Committee will proceed to allocate the costs and other reimbursable expenses of the arbitration taking into account the success of the claims and defences of the Parties, as well as their procedural conduct, the reasonability and proportionality of the costs of legal representation and other circumstances of the case.

151 Whilst the Respondents have prevailed in their defences before this Committee, on the Jurisdiction Issue they have succeeded only by a majority of the Committee. The Jurisdiction Issue was complex and the issues it raised demanded the Committee's careful analysis, in particular because the Award was not as clearly drafted as it might have been in this regard. The Jurisdiction Issue was one that the Committee believes it was legitimate for the Applicant to raise, even if it has not succeeded. It was self-evidently not frivolous or manifestly unmeritorious. Nor was the Applicant dilatory in pursuing it – in fact both Parties are to be commended for the expedition and co-operation with which they pursued the Annulment Application process.

152 On the other hand, the Representation Issue and the Burden Issue were less complex and not points of obvious merit in the context of an annulment proceeding. They are accordingly not issues for which the Respondents ought to bear the costs. That said, because they were less complex, these issues occupied far less of the Committee's and the Parties' time than the Jurisdiction Issue.

153 In all the circumstances described above, the Committee considers that the appropriate costs order is for the Applicant to bear the costs of the annulment proceeding as

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<sup>200</sup> Claimed as the USD equivalent of EUR 150,000.

indicated above in paragraph 147 (*i.e.* USD 301,190.14), and for the Parties to bear their own costs of legal representation.

154 The Committee recalls that the costs of the annulment proceeding have been paid throughout the proceeding from the advances paid solely by the Applicant.

## **VII. DECISION OF THE COMMITTEE**

155 Based on the foregoing,

155.1 the Committee decides:

155.1.1 The application for annulment on the Article 52(1)(d) grounds (the Representation Issue and the Burden Issue) is dismissed.

155.1.2 The Applicant shall bear the costs of the annulment proceeding, which amount to USD 301,190.14.

155.1.3 The Parties shall each bear their own legal costs in connection with this annulment proceeding.

155.2 A majority of the Committee further decides:

155.2.1 The Application for Annulment on the Article 52(1)(b) ground (the Jurisdiction Issue) is dismissed, meaning that the Application for Annulment is dismissed in its entirety.

155.3 All other claims are dismissed.

[SIGNATURE]

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Melanie van Leeuwen

Member

Date:

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Gabriel Bottini

Member

Date:

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Christopher Harris K.C.  
President of the *ad hoc* Committee  
Date:



[SIGNATURE]

[Subject to the attached dissenting opinion]

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Melanie van Leeuwen

Member

Date:

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Gabriel Bottini

Member

Date:

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Christopher Harris K.C.  
President of the *ad hoc* Committee

Date:

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Melanie van Leeuwen

Member

Date:

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Gabriel Bottini

Member

Date:

[SIGNATURE]

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Christopher Harris K.C.  
President of the *ad hoc* Committee

Date: