

Algeria defeats bid to revive “abusive” multibillion claim

Cosmo Sanderson
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Naguib

Sawiris

A company managed by Egyptian billionaire Naguib Sawiris has failed to revive a US\$4 billion ICSID claim against Algeria that was dismissed three years ago as an abuse of rights.

Luxembourg-registered Orascom TMT Investments saw its annulment application dismissed yesterday by an ICSID committee consisting of Slovakia's **Peter Tomka** as chair, Bahamian **Bertha Cooper-Rousseau** and German **Klaus Sachs**. The decision is available in English and French.

As in the arbitration, Orascom instructed White & Case, while Algeria used Shearman & Sterling.

Orascom had sought to revive a claim it originally filed in 2012 under Algeria's bilateral investment treaty with Belgium and Luxembourg, in which it accused the state of waging a campaign of harassment and interference in the business of Algerian mobile operator Djezzy.

A tribunal composed of Switzerland's **Gabrielle Kaufmann-Kohler**, **Albert Jan van den Berg** of the Netherlands and France's **Brigitte Stern** dismissed the case in 2017.

It ruled that the claim was inadmissible as it was almost identical to claims raised in a previous UNCITRAL arbitration by a company Orascom formerly controlled, OTH, which was settled in 2014 after three years of negotiations.

Orascom had time to address admissibility arguments

In the annulment application, Orascom argued that the tribunal had seriously breached a fundamental rule of procedure when it admitted Algeria's "untimely objections" on the admissibility of the claim, violating the company's right to be heard.

However, the committee found that the arguments Algeria had raised concerning parallel proceedings, the preclusion of claims and abuse of rights were mentioned "from the very beginning of the arbitration."

While the factual circumstances and the specific legal theories relied upon by the state evolved throughout the proceeding, the committee said the "broad legal nature of the objections remained unchanged." It did however note that Algeria's reliance on different factual circumstances in its closing statement "raises the question" of whether Orascom had the opportunity to defend itself.

On Orascom's argument that it did not have an opportunity to adduce witness or expert evidence on the admissibility, the committee said that the company had submitted new legal authorities on the issue later in the proceeding. "A party cannot object belatedly after having submitted some evidence on the ground that it now wishes it would have submitted more evidence," it said.

The committee dismissed an objection that the tribunal had not indicated the significance with which it viewed Algeria's new arguments. While the tribunal's decision on admissibility "might have come as a surprise" to Orascom, it said both parties had briefed the tribunal on these issues.

Reliance on principles of international law justified

Orascom contended that the tribunal manifestly exceeded its powers when it held that its jurisdiction under the BIT had been “extinguished” by OTH filing its a notice of dispute against Algeria.

The company argued that the tribunal failed to identify the law it applied to the admissibility issue and that its conclusion had no basis in the specific terms of the BIT, the ICSID Convention or in any applicable law.

While the tribunal did not expressly indicate the law it applied to the issue of admissibility, the committee said that the BIT allowed the panel to apply principles of international law.

The concept of admissibility in international law allows tribunals to decline to exercise jurisdiction where it would be “inappropriate” to do so, the committee said.

While Algeria had agreed BITs with various countries, it had “never agreed to be tried three times for one thing.”

The tribunal had explicitly relied on the purpose of investment treaty arbitration when it formulated a rule on possible inadmissibility of claims brought before it, which had been “a legitimate exercise by the tribunal of its function,” the committee said.

Settlement objection falls flat

Orascom complained that, in any case, the tribunal manifestly exceeded its powers and failed to state reasons when it found that the OTH settlement confirmed the inadmissibility of its claims.

The company argued it was not a party to the settlement or OTH’s share purchase agreement, and accused the tribunal of ignoring its submissions that the settlement was binding only on the parties involved.

The committee said it was not convinced that this reasoning was a manifest excess of powers, quoting the “key reasoning” of the tribunal on the issue: “what matters is that the claims arising from Algeria’s measures have ceased to exist due to the settlement agreement.”

While the annulment proceeding “is not concerned with the correctness of the reasons and conclusions,” the committee said that, “in any case, they appear reasonable and certainly not frivolous or absurd.”

Tribunal justified finding on abuse of rights

Orascom argued the tribunal failed to state reasons when it concluded that the claim constituted an abuse of rights and that the panel's decision to admit and accept Algeria's "untimely objections" on this issue should be annulled.

It also argued that the tribunal relied on legal authority not on the record.

The committee said that the tribunal had "devoted seven paragraphs" to the alleged abuse of rights. In the view of the tribunal, Orascom's abuse appeared to be bringing a claim with the knowledge that its old subsidiary OTH had already brought a claim in respect of the same measures.

"In the view of the committee, the tribunal's reasons are comprehensible and allow the reader to understand on what basis and how the tribunal reached its conclusion."

The committee added that there is "no obligation for a tribunal to address every legal argument submitted by a party if it considers it irrelevant in view of its conclusions based on other arguments and facts."

The committee said Algeria can now collect on US\$3.5 million that Orascom was ordered to pay in an adverse costs award.

On the costs of the latest proceeding, the committee said that while Orascom was not successful its arguments were not manifestly without merit, as alleged by Algeria. Orascom had raised important points in relation to "novel issues in the field of investment arbitration."

It accordingly ordered both parties to bear their own legal costs – US\$7 million for Orascom and US\$4.6 million for Algeria. Orascom was ordered to bear the costs of the annulment proceedings.

Reaction from counsel

Shearman & Sterling arbitration head **Emmanuel Gaillard** says the firm is delighted to have helped shield Algeria from the attempt by Orascom to "re-open a previously settled dispute."

"We are also immensely pleased that the committee confirmed the tribunal's landmark award and stance on the question of parallel arbitral proceedings abusively brought by different shareholders at different levels of an integrated corporate chain," says Gaillard.

He says that this sends a “very strong signal” to the investment arbitration community and will “contribute to reducing the growing number of instances of abuse in international arbitration.”

Yas Banifatemi, head of public international law at Shearman & Sterling, says the “well-reasoned” decision “confirms that deriving rules of inadmissibility from principles of international law” constitutes “a legitimate exercise of the tribunal’s function.

"This is a very welcome confirmation of the powers of investment tribunals and of their role in the development of investment law," she said.

White & Case partner **Carolyn Lamm** says the ad hoc committee overlooked that the tribunal had ignored the break in the vertical chain of the companies before the arbitration was filed, that “tribunal applied an amorphous ‘policy of investment law’ in the name of a newly-defined ‘admissibility’ ground without any basis in law or in the language of the treaty; and that the tribunal failed to consider a collusive settlement agreement in rejecting the claims as inadmissible.”

She said the committee “also selectively cites and thus ignores the evidence of the procedural posture of the case,” including Orascom’s inability to address in full the new arguments articulated by Algeria in its closing statement. “This alone will pose challenges for ICSID arbitration going forward.”

“Fundamentally, the legitimacy of the system must be considered. A system where tribunals ignore the facts and the law and decide cases in accordance with their own definition of ‘policy’ unchecked under Article 52 [of the ICSID Convention] is deeply troubling to all users of the system, parties, advocates and arbitrators.”

This is not the only recent success for Algeria at ICSID. In May, once again represented by Shearman & Sterling, it defeated a US\$46 million claim brought by a Spanish construction group over a project to build pre-fabricated homes.

Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35)

In the annulment proceeding

Annulment committee

- **Peter Tomka** (Slovakia) (chair)
- **Bertha Cooper-Rousseau** (Bahamian)
- **Klaus Sachs** (Germany)

Counsel to Orascom TMT

- White & Case

Partners **Carolyn Lamm**, **Brody Greenwald** and **Kristen Young** in Washington, DC; Partner **Andrea Menaker** in London; Partner **Noor Davies**, and associate **Hadia Hakim** in Paris; Legal consultant **Rocío Digón** in Rome.

Counsel to Algeria

- Shearman & Sterling

Partners **Emmanuel Gaillard**, **Yas Banifatemi** and **Benjamin Siino** and associates **Pierre Viguier** and **Teresa Vega** and **Peter Petrov** in Paris
In the arbitration

Tribunal

- **Gabrielle Kaufmann-Kohler** (Switzerland) (Chair)
- **Albert Jan van den Berg** (Netherlands) (appointed by Orascom TMT)
- **Brigitte Stern** (France) (appointed by Algeria)

Counsel to Orascom TMT

- White & Case (from July 2013)

Partners **Carolyn Lamm**, **Andrea Menaker** and **Brody Greenwald** with counsel **Frank Schwietzer** and associates **Noor Davies** and **Hadia Hakim** in Washington, DC

- Freshfields Bruckhaus Deringer (until July 2013)

Partner **Constantine Partasides**, senior associate **Lucy Martinez** and associates **Georges Chalfoun** and **Mark Wassouf** in London (all no longer with the firm)

Counsel to Algeria

- Shearman & Sterling

Partners **Emmanuel Gaillard**, **Yas Banifatemi** and **Benjamin Siino**, and associates **Pierre Viguier** and **Teresa Vega** in Paris; counsel **Tsegaye Laurendeau** in London and senior associate **Marina Matousekova*** in Milan

*No longer with the firm