Granville Wesley Fields
Translator Certified by the
Court of Appeal of Paris
37-39 rue Saint Sebastien • 75011 Paris, France
info@cabinetfields.com
SIRET: 398 383 836 00036 • URSSAF: 755 761244100001003

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THE REPUBLIC OF FRANCE
IN THE NAME OF THE PEOPLE OF FRANCE

COURT OF APPEALS OF PARIS
International Commercial Chamber

Section 5 - Chamber 16

RULING OF 12 OCTOBER 2021

(No. /2021, 25 pages)

Case number: **19/21625 - Portalis No. 35L7-V-B7D-CBBL2**

Decision on appeal before the Court: The arbitration award dated 24 October 2019

CLAIMANT IN THIS ACTION:

The Republic of Senegal
Represented by [A] , Minister of Finances and the Budget of the Republic of Senegal, rue René Ndiaye, BP 4017 Dakar, Senegal and the Judicial Agent of the Republic of Senegal, Ministry of Finances and the Budget of the Republic of Senegal, rue René Ndiaye, BP 4017 Dakar, Senegal
Represented by its legal representatives

Represented by Me [B], Esq., Barrister-at-Law admitted to the Paris Law Society (Law Society Membership No. [...])
Represented by trial barristers, Me [C], Esq., Barrister-at-Law admitted to the Paris Law Society (Law Society Membership No [...]); Me [D], Esq., Barrister-at-Law admitted to the Paris Law Society (Law Society Membership No. [...]); Me [E], Esq., Barrister-at-Law admitted to the Paris Law Society (Law Society Membership No. [...]).

RESPONDENT IN THIS ACTION:

[F]
Home address: [Adress 1]

Represented by [G], Esquire, Barrister-at-Law admitted to the Paris Law Society (Paris Law Society Membership No. [...]);
Represented by trial barrister, [H], Esq., Barrister-at-Law admitted to the Paris Law Society (Law Society Membership No. [...]).

MEMBERS OF THE BENCH:

Pursuant to the provisions of articles 804 and 907 of France's Civil Procedure Rules, the case was tried on 21 June 2021 at a hearing open to the public, the lawyers not being opposed thereto, before the Lord Justice of Appeal François Ancel, Presiding Justice, charged with the report and the Lord Justice of Appeal Fabienne Schaller, Associate Justice.

The following justices reported on the trial hearing during the deliberations of the Court:

Lord Justice of Appeal François Ancel, Presiding Justice
Lord Justice of Appeal Fabienne Schaller, Associate Justice
Lord Justice of Appeal Laure Aldebert, Associate Justice

Clerk: at the appellate trial hearing: Inès Vilbois.

RULING:

The ruling was handed down after adversarial proceedings and made available at the Court Registry Office, the parties having previously been notified as required by virtue of the second paragraph of Article 450 of France's Rules of Civil Procedure. The official copy of the ruling was signed by Lord Justice of Appeal François Ancel, the Presiding Justice and Najma El Farissi, the clerk to whom the official copy of the ruling was given by the justice who signed it.

I. STATEMENT OF FACTS AND PROCEEDINGS

1. [F] is a businessman who holds Senegalese, French and Lebanese citizenships and bills himself as a director of companies and a real estate developer.

2. In 2012, a special prosecutor at the Court of Repression of Illicit Enrichment (hereinafter the "CREI") in Senegal opened a preliminary investigation into [I] , a Minister, former public official and the son of former Senegalese President [...] because his assets were found to be disproportionate to his official income.

3. On 23 March 2015, the CREI found [I] guilty of illicit enrichment and Mr [F] guilty of complicity in illicit enrichment.

4. After the CREI ordered the confiscation of his property, Mr [F], as a French national, brought on 17 July 2015, pursuant to Article 3 of the Rules of Arbitration of the United Nations Commission on International Trade Law (hereinafter the "UNCITRAL"), arbitration proceedings at the ICC International Court of Arbitration against the Republic of Senegal on the basis of the Bilateral treaty on the reciprocal promotion and protection of investments signed in Dakar on 26 July 2007 between France and Senegal (hereinafter the "BIT").

5. On 8 April 2016, Mr [F] informed the arbitral tribunal of his arrest by the Senegalese gendarmerie. On 13 April 2016, the arbitral tribunal issued procedural order number 1, ordering the Republic of Senegal to take the appropriate steps to allow Mr [F] to leave Senegal and to travel to France in order to receive medical treatment required due to his state of health.

6. On 24 October 2019, the arbitral tribunal, consisting of [President], the President, and [Arbitrator 1] and [Arbitrator 2], his co-arbitrators, in a majority ruling on the question of jurisdiction, found that it had jurisdiction to decide the case and:

- Granted the request by Mr [F] to have the Republic of Senegal condemned for violating its commitments under the BTI (i) not to unlawfully expropriate a foreign investor under the BTI and (ii) to give him fair and equitable treatment;

- Order the Republic of Senegal to pay to Mr [F] a sum of EUR 12,976,553.75 for the harm caused by damage to his investment, EUR 5,000,000 for non-economic damage and EUR 225,323,411.32 (not immediately due and payable) for the harm caused by the threat of the forced enforcement of a fine and civil interest payments;

- Order the Republic of Senegal to pay to Mr [F] capitalised interest for each 6-month period, at the rate of 4.8% per annum, applied to the value of the investments, effective from, with respect to the value of the investment in Hardstand (EUR 3,403,601), its being put in interim administration on 3 June 2013 and, with regard to

the value of the investment in SCP Blue Infinity Holdings and Blue Horizon Holdings et Cap Ouest (EUR 8,318,385), the placing of their apartments in escrow on 27 September 213, until the date of the award;

- Order the Republic of Senegal to pay to Mr [F] capitalised interest for each 6-month period on the total amount it is ordered to pay under this award, at a statutory interest rate application in Senegal, until said amount is actually paid;

- Order the Republic of Senegal to pay 80% of the costs of the arbitration and, accordingly, to pay to pay to Mr [F] the amount of EUR 1,620,288;

- Dismiss all other claims, including the counterclaims of the Republic of Senegal.

7. On 24 October 2019, the Republic of Senegal filed an action for the annulment of this award.

II. CLAIMS OF THE PARTIES:

8. In its latest brief served electronically on 15 March 2021, the Republic of Senegal sought the following remedy from the Court:

Principally:

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal wrongly found that it had jurisdiction *ratione personae* concerning the claims made by a Senegalese investor against the State of his nationality, on the basis of Article 1520, paragraph 1, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal wrongly found that it had jurisdiction *ratione materiae* due to the impossibility of qualifying as a protected investment, within the meaning of Article 1 of the France-Senegal BIT, the investment made by a Senegalese national in Senegal, on the basis of Article 1520, paragraph 1, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal wrongly found that it had jurisdiction *ratione materiae* due to the illegality of the investment at the time it was made, on the basis of Article 1520, paragraph 1, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal wrongly found that it had jurisdiction to decide on actions attributed to Auditex and to hold the Republic of Senegal liable on this account, on the basis of Article 1520, paragraph 1, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds of the improper constitution of arbitral tribunal and the violation of its mission due to the lack of impartiality of its President, on the basis of Article 1520, paragraphs 2 and 3, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal the recognition or the enforcement of the Award is contrary to international public policy in that it gives effect to a complicity in illicit enrichment and money laundering operation, on the basis of Article 1520, paragraph 5, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal the recognition or the enforcement of the Award is contrary to international public policy in that it violates the sovereignty of the Republic of Senegal, on the basis of Article 1520, paragraph 5, of France's Rules of Civil Procedure;

- **ORDER** the total annulment of the Arbitration Award dated 24 October 2019 on the grounds that the arbitral tribunal the recognition or the enforcement of the Award is contrary to international public policy due to the excess of power exerted by the arbitral tribunal, on the basis of Article 1520, paragraph 5, of France's Rules of Civil Procedure;

In the alternative:

- **ORDER** the partial annulment of the Arbitration Award dated 24 October 2019 in that it ordered the Republic of Senegal to pay to Mr [F] the sum of EUR 3,403,601 in compensation for the value of his investment in Hardstand and EUR 8,318,385 in compensation for the value of his investment in SCP Blue Infinity Holdings and Blue Horizon Holdings et Cap Ouest, on the basis of Article 1520, 1st paragraph, of France's Rules of Civil Procedure;

- **ORDER** the partial annulment of the Arbitration Award dated 24 October 2019 in that it decided that the Republic of Senegal violated the commitment of fair and equitable treatment that it undertook in Article 4 of the France-Senegal BIT and decided that the Republic of Senegal was liable in this regard, on the basis of Article 1520, paragraph 1, of France's Rules of Civil Procedure;

- **ORDER** the partial annulment of the Arbitration Award dated 24 October 2019 in that it ordered the Republic of Senegal to pay to Mr [F] the amount of the fine and interest, or EUR 225,323,411.32 (CFAF 148,239,086,396) for the harm caused by the threat to enforce payment of this fine and interest and decided that this amount ordered would be due and payable upon the first act in furtherance of forced enforcement by the Republic of Senegal, on the basis of Article 1520, paragraphs 3 and 4, of France's Rules of Civil Procedure;

- **ORDER** the partial annulment of the Arbitration Award dated 24 October 2019 in that it ordered the Republic of Senegal to pay to Mr [F] the sum of EUR 1,620,288 as final reparation of the arbitration costs.

In any case:

- **ORDER** Mr [F] to pay to the Republic of Senegal the sum of EUR 100,000 by virtue of Article 700 of France's Rules of Civil Procedure.

- **ORDER** Mr [F] to pay all court costs and the cost of any subsequent action arising herefrom.

9. In his latest brief served electronically on 25 May 2021, Mr [F] sought the following remedy from the Court:

The grounds for the total annulment of the Award:

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground based on an alleged lack of jurisdiction *ratione personae* of the arbitral tribunal (Article 1520, 1st paragraph, of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground based on the alleged lack of jurisdiction *ratione materiae* of the arbitral tribunal due to the impossibility of qualifying the investment made by Mr [F] in Senegal as an "investment" within the meaning of Article 1 of the France-Senegal BIT (Article 1520(1) of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground based on the alleged lack of jurisdiction *ratione materiae* of the arbitral tribunal due to the alleged illegality of the investment made by Mr [F] in Senegal (Article 1520(1) of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground based on the alleged lack of jurisdiction *ratione materiae* of the arbitral tribunal to decide on the actions of Auditex and to attribute them to the Republic of Senegal (Article 1520(1) of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground based on an alleged improper constitution of the arbitral tribunal or the violation of its mission due to the lack of impartiality of the President of the arbitral tribunal (Article 1520(2) of France's Rules of Civil Procedure and Article 1520(3) of France's Rules of Civil Procedure);

- **DISMISS** the ground according to which the recognition or the enforcement of the Award would give effect to a complicity in illicit enrichment and money laundering operation (Article 1520(5) of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground according to which the recognition or the enforcement of the Award would violate the sovereignty of Senegal (Article 1520(5) of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground according to which the recognition or the enforcement of the Award would violate the sovereignty of Senegal (Article 1520(5) of France's Rules of Civil Procedure);

- **FIND INADMISSIBLE**, or alternatively **DISMISS**, the ground according to which the arbitral tribunal failed to act within the limits of its powers of jurisdiction (Article 1520(5) of France's Rules of Civil Procedure);

The grounds for the partial annulment of the Award:

- **DISMISS** the ground based on an alleged lack of jurisdiction of the arbitral tribunal to order compensation for damage to the indirect investments of Mr [F] in the Senegalese companies (Article 1520(1) of France's Rules of Civil Procedure);

- **DISMISS** the ground based on an alleged violation by the arbitral tribunal of its mission (Article 1520(3) of France's Rules of Civil Procedure);

- **DISMISS** the ground based on an alleged reclassification of the claim for reparation of the harm based on a violation of fair and equitable treatment (Articles 1520(3) and 1520(4) of France's Rules of Civil Procedure);

- **DISMISS** the claim for the annulment of the decision of the arbitral tribunal on the final reparation of the arbitration costs;

Consequently:

- **DISMISS** the action for annulment filed by the Republic of Senegal against the Award;

In any case:

- **ORDER** the Republic of Senegal to pay the sum of EUR 200,000 in compensation by virtue of Article 700 of France's Rules of Civil Procedure as well as all court costs.

III. GROUNDS FOR THE DECISION:

1. The claims for the total annulment of the arbitration award

1.1 The ground for annulment based on the lack of jurisdiction of the arbitral tribunal (Article 1520(1) of France's Rules of Civil Procedure)

10. The Republic of Senegal, which has argued for a dismissal of the ground of inadmissibility raised by [F], invokes, in the first place, the lack of jurisdiction *ratione personae* of the arbitral tribunal due to his dual citizenship based on the customary principle of prohibiting dual citizens from suing the State of which they hold nationality, a principle established by international treaties, the practice of States as well as international judicial decisions.

11. The Republic of Senegal argues the willingness to preclude dual citizens from protection stems from the very terms of the BIT, interpreted in light of the Vienna Convention on the Law of Treaties of 23 May 1969, as well as its general economy. It adds on a subsidiary basis that only an investor whose dominant and effective nationality is other than that of the host State can be afforded the benefit of the protection offered by the BIT and that such is not the case in this matter insofar as Mr [F] had much stronger and more significant economic, material and emotional ties to Senegal than to France as he never lived or worked in France and as he made the investments which were the subject of the arbitration proceedings as a Senegalese citizen and he prosecuted by the CREI as a Senegalese national.

12. The Republic of Senegal claims, in the second place, the lack of jurisdiction *ratione materiae* of the arbitral tribunal in that the alleged investments do not meet the definition set out in Article 1.1 of the BIT in that they were made by Mr [F] as a Senegalese citizen absent any economic flows between France and Senegal and that some of them were made indirectly through foreign companies.

13. The Republic of Senegal also deems that the alleged investments meet the condition of lawfulness required under the BIT in that they are the result of influence peddling, illegal financing and the illegal acquisition of the property tax base of Project Eden Roc.

14. On the basis of Article 8 of the draft articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, 2001, the Republic of Senegal contests, in the third place, the jurisdiction of the arbitral tribunal for attributing to it the actions of the Auditex accounting firm, appointed by the CREI as receiver of the companies of Mr [F], in order to hold it liable. The Republic of Senegal considers that the arbitral tribunal neither performed a test of effective control in order to conclude the attribution of the actions of Auditex to the State nor demonstrated how it acted on its instructions or under its control.

15. In response, Mr [F] maintains that the ground for annulment raised by Senegal in connection with the jurisdiction *ratione personae* of the arbitral tribunal is inadmissible in that it has to do with an interest in acting and therefore grounds relating to the admissibility of his claim and not grounds based on the lack of jurisdiction of the arbitral tribunal under Article 1520(1) of France's Rules of Civil Procedure. He contests moreover the existence of the rule prohibiting dual citizens from suing the State of which they hold nationality invoked by Senegal in that it pertains only to diplomatic protection.

16. Mr [F] bases himself on the principles borne out of case law and the obligation to interpret in good faith set out in the Vienna Convention as well as the interpretation based on the ordinary meaning and the context of the BIT to consider that even where the treaty does not address it, nothing should be added to the text that makes a distinction that the contracting parties did not intend to include therein, namely a distinction between investors who have French nationality and those who have dual French-Senegalese citizenship. Mr [F] explains that the possibility given by the BIT to sue one of the Contracting States before an arbitral tribunal constituted under the UNCITRAL rules, which does not preclude lawsuits by dual citizens, makes it possible to consider that the Contracting States did not want to exclude them from the protection of the BIT.

17. Mr [F] deems that the ground put forward by Senegal based on the jurisdiction *ratione materiae* of the arbitral tribunal with regard to his nationality is inadmissible in light of Article 1466 of France's Rules of Civil Procedure, since it was not raised before the arbitral tribunal. He also explains that this ground is ill-founded as he was born French and had French nationality at the time the investments were made. He argues that there is no requirement concerning the origin of the funds invested and the establishment of economic flows between the two countries to define the investment within the meaning of the BIT and adds that the indirect investments that he holds in the Senegalese SCP companies through Panama companies, which he personally wholly owns, are indirect investments as provided for in article 1 of the BIT.

18. With regard to the legality of his investments, Mr [F] deems that this ground raised by Senegal is inadmissible in that it would lead the Court make a new determination on the merits of the elements and decisions that are central to the question of determining whether the Republic of Senegal complied with its international obligations in terms of the protection afforded by the BIT. He considers in effect that to do so, the Court would have no other choice that proceed with a re-examination of the actions that go to the merits of the dispute, and therefore to proceed with a fresh investigation of the case, revisiting the determination by the arbitrators of the elements relating to the proceedings that culminated in ruling of the CREI—the testimony of witnesses by the investigative commission of the CREI or the report by the Auditex accounting firm retained by this same commission, which the principle of prohibiting a review on the merits prohibits it from doing.

19. Mr [F] claims that the ground based on the attributability of the actions of Auditex to the State is inadmissible in that it falls within a review on the merits of the dispute. He considers that the Court can rule, in case of the admissibility of this ground, only on the partial annulment of the Award. He adds that this ground is a superabundant finding of the motivation of the award that cannot have as an effect to result in the annulment of the award.

WHEREFORE:

20. Under Article 1520(1) of France's Rules of Civil Procedure, action for annulment is available if the tribunal wrongly found that it had or lacked jurisdiction.

21. In connection with an action for annulment based on Article 1520(1) of France's Rules of Civil Procedure, it is up to the court adjudicating the action for annulment to review the decision of the arbitral tribunal regarding its jurisdiction, whether it is found to have or to lack jurisdiction, by seeking all legal or factual information making it possible to assess the scope of the arbitration agreement.

The ground of inadmissibility raised by [F]

22. Whilst it is correct that the capacity to act is a question of the admissibility of the action and not a question of the jurisdiction of the arbitral tribunal that decides thereupon, and such a challenge does not constitute one of the limited cases of availability of an action for annulment enumerated in Article 1520 of the Rules of Civil Procedure, such is not the case of a ground that

challenges the ability of an arbitral tribunal to decide on a dispute in light of the scope of a bilateral investment treaty, which is indeed a question of jurisdiction and not admissibility.

23. In the case in point, the Republic of Senegal does not challenge Mr [F]'s ability to act before an arbitral tribunal but rather its jurisdiction to decide on the dispute that he wished to bring before it in light of the scope of the BIT which contains an offer of arbitration accepted by Mr [F] by the notification of arbitration that he addressed to the Republic of Senegal on 17 July 2015.

24. The ground of inadmissibility, which relies on a mistaken classification of the ground invoked, shall accordingly be rejected.

The jurisdiction ratione personae of the arbitral tribunal

25. When an arbitration agreement is the result of a bilateral investment treaty, the mutual will of the contracting parties to use arbitration should be determined based on all the provisions of the treaty such that the arbitral tribunal has jurisdiction to decide on a dispute only if it falls within the scope of the treaty and if it satisfies all the conditions for the treaty to apply.

26. In the case in point, Article 8 entitled "*Settlement of Disputes between an Investor and a Contracting Party*" of the BIT states the following:

"*Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled amicably between the two parties concerned.*

If such a dispute cannot be settled within six months from the date on which an amicable settlement was requested by either party to the dispute, it shall be submitted at the request of the investor to arbitration concerned:

a) An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on United Nations Commission on International Trade Law (UNCITRAL); or

b) The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965; or

c) The Common Court of Justice and arbitration established by the Treaty of the Organization for the Harmonization of Business Law of 17 October 1993 in Africa (OHADA), where the parties to the disputes under this Treaty.

Where the dispute is likely to give rise to responsibility for the actions or omissions of public authorities or agencies dependent by one of the two Contracting Parties, within the meaning of article 2 of the present Agreement, such public body or agency shall unconditionally give consent to resort to arbitration by the International Centre for Settlement of Investment Disputes (ICSID), within the meaning of article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965".

27. Furthermore, based on Article 1(2)(a) of the BIT, the term "investor" is defined as "*Nationals, i.e. natural persons having the nationality of one of the contracting parties*".

28. In finding that it had jurisdiction, the arbitral tribunal, by a majority, considered in paragraph 144 of its award that a "*binational is a person who fully and cumulatively has two nationalities. Article 1.2 of the BIT is therefore not an objective obstacle to its application. Only the willingness*

to treat binationals as different to those have only one nationality would justify that they be excluded from the general category of those who have the nationality of one of the contracting parties. That would require introducing a distinction in this latter category that is not included in the BIT and that is not essential rationally. Yet, precisely, one of the critical rules of interpretation is refraining from making a distinction where the text does not make a distinction. The arbitral tribunal can therefore not consider, for the application of the BIT, Senegalese-French binationals as a distinct category of French citizens when the BIT does not contain any such distinction and that it would be unjustified given the status of the binational. The arbitral tribunal, ruling by a majority of its members, is therefore of the opinion that the fact that the BIT does not address Senegalese-French binationals is not a loophole: Senegalese-French binationals fully satisfy the condition set out in Article 1.2 of the BIT, to wit having the nationality of one of the contracting parties".

29. It should be noted in fact that the BIT does not contain any provision concerning binationals.

30. Whilst, pursuant to Article 31 entitled "*General rule of interpretation*" of the Vienna Convention on the Law of Treaties, 23 May 1969 "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and that "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*", these rules do not state or suggest that a distinction should be made where the treaty does not make one.

31. Likewise, based on Article 32 of this treaty entitled "*Supplementary means of interpretation*" "*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable".

32. In the case in point, the ordinary meaning of the terms of the treaty, with no need to interpret the text, to refer to rules specific to diplomatic protection or to carry out an assessment of the dominant and effective nationality of the investor, cannot lead to excluding binationals from the application of the BIT, at the risk of adding a condition that is not provided.

33. Such an interpretation is moreover not contrary to the purpose and the goal of the treaty, which aims to "*enhance economic cooperation between the two States and to create favourable conditions for French investments in Senegal and Senegalese investments in France; convinced that the promotion and protection of such investments will stimulate the transfer of capital and technology between the two countries in the interest of their economic development*", just as the history of relations between France and the Republic of Senegal and the very large number of binationals of the two countries, estimated by the parties to be between 3.3 and 5 million, a consideration that cannot have escaped the signatory States.

34. As indicated by the arbitral tribunal (ruling by a majority) "*these objectives would not be fully achieved if binationals were excluded, even more so considering the shared history of the Republic of Senegal and France and the very large number of Franco-Senegalese binationals. The purpose of the BIT being to develop investments between the two States, an interpretation that includes binationals, increasing the flow of protected investments, must be preferred to the opposite interpretation that would restrict this flow*" (§ 146).

35. In this regard, the fact that the Washington Convention of 18 March 1965 creating the ICSID expressly recalls in Article 25(2)(a) that "'*National of another Contracting State' means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute*" is irrelevant in the case in point to the extent that it is well-established that the parties did not opt for ICSID arbitration but, as the BIT enabled them to do in Article 8 giving them the option, for arbitration under the aegis of the UNCITRAL, which, precisely, does not include any such rule.

36. Likewise, the fact that some of the articles of the BIT refer to the notion of a "*foreign investor*" (Article 1.5) or to an investor "*of the other contracting party*" (Articles 5, 6 and 8) does not preclude the jurisdiction of the arbitral tribunal to decide a dispute in favour of a binational; in addition, the fact that this question involves an assessment on the merits relating to the scope of the substantive (and not procedural) protection to be granted effectively to an investor relying on the provisions of the BIT and this circumstance cannot preclude the jurisdiction of the arbitral tribunal to adjudicate and decide on the possible benefit of any of the protective provisions as a function of their scope.

37. Based on the foregoing, the BIT, contrary to other international instruments, does not specifically distinguish the case of binationals so there is no need to add to the text a distinction that the contracting parties did not intend include therein.

38. In light of the foregoing, this claim shall be rejected.

The jurisdiction *ratione temporis* of the arbitral tribunal

The admissibility of the claim based on a requirement of the nationality of the investor at the time the investment was made

39. Under Article 1466 of the same rules, a party who, with full knowledge of the facts and with no legitimate grounds, fails to invoke an irregularity in a timely manner before the arbitral tribunal is deemed to have waived its right to invoke it.

40. When jurisdiction was debated before the arbitrators, the parties are not deprived of the right to invoke in relation to this question, before the court adjudicating the action for annulment, new grounds and arguments and to produce, to this end, new proof.

41. In the case in point, even though the Republic of Senegal may not have specifically involved before the arbitral tribunal the claim based on the nationality of the investor at the time the investment was made, this claim is indeed inadmissible before this Court insofar as it is not disputed that the ground based on lack of jurisdiction had in any case been raised before the arbitral tribunal.

The merits of the claim based on a requirement of the nationality of the investor at the time of the constitution of the investment

42. Under Article 1.1 of the BIT, "*The term 'investment' means all assets, such as property rights and interests of all kinds, and particularly but not limited to:... It is understood that such assets must be or have been invested in accordance with the law of the Contracting Party in the territory or maritime area in which the investment is made before or after the entry into force of this Agreement*".

43. No additional condition is required with respect to the date on which the person who invests has the nationality of the other contracting party.

44. In any case, Mr [F] being French by parentage since his birth, this condition, even assuming that it is required under the BIT, would be satisfied so the claim based on the lack of jurisdiction of the arbitral tribunal is without merit.

The notion of a protected investment

45. The Republic of Senegal maintains in substance that the arbitral tribunal wrongly found that it had jurisdiction, granting to Mr [F] the benefit of the BIT even through the alleged investment was made by a Senegalese investor in Senegal with no flows between France and Senegal, in part by Panama companies, and even through the investor did not assert his French nationality.

46. In this regard, it should be noted that such a condition relating to "flows", which should lead to granting protection only to investments made in Senegal with capital transferred from France, is not based on Article 1.1 of the BIT on the definition of the term "investment" which does not at all contain any such restriction and which specifies that this term also covers "*forms of participation, even indirect minority, or to companies established in the territory of one of the contracting parties*".

47. Nor is it based on the preamble of this treaty which specifies only that these two countries are "*desiring to enhance economic cooperation between the two States and to create favourable conditions for French investments in Senegal and Senegalese investments in France*".

48. Thus, it should be considered, on the one hand, that the investment can marshal resources generated in any territory and, on the other hand, it can fall within the scope of the BIT insofar as it comes from a person having French nationality, which is the case here, Mr [F] having acquired this nationality upon his birth.

49. Lastly, nor does Article 8 of the BIT relating to procedural protection (arbitration agreement) contain any conditions relating to the necessity of "flows" as alleged by the Republic of Senegal. In so doing, under cover of a ground of annulment based on the lack of jurisdiction of the arbitral tribunal, the Republic of Senegal seeks to call into question the decision aimed at granting to the investment of Mr [F] the substantive protection provided under the BIT, which is separate and distinct from procedural protection.

50. The arbitral tribunal thus considered in § 198 of its award that "*article 1 of the BIT does not require that there be flows and even less that there be flows from one of the Party States to the other, i.e., from France to Senegal. This reading is moreover consistent with arbitration practice in investment law*".

51. This claim shall accordingly be rejected.

The alleged illegality of the investment

52. In presence of a bilateral investment treaty, insofar as the jurisdiction of the arbitral tribunal is the condition of the consent of the State to the recourse to arbitration, the arbitral tribunal can adjudicate a dispute only if it falls within the scope of the treaty and if it satisfies all the conditions for the temporal, personal and subject matter application that is related to the jurisdictional power of the tribunal.

53. However, these conditions must not lead to depriving the arbitral tribunal from exercising its jurisdictional power and thereby make the jurisdiction of the tribunal contingent upon the admissibility of the claims submitted to it, or the examination of the effective benefit of the substantive protection to the disputed investment, the assessment of which is dependant only on an analysis of the merits of the dispute.

54. Thus, under cover of review of jurisdiction, the court adjudicating the action for annulment cannot replace the arbitrator in determining the validity or the legality of the disputed investment, which goes to the merits of the dispute and not the determination of the jurisdiction of the arbitral tribunal to adjudicate it.

55. What is more, when the arbitration agreement is the result of a bilateral investment agreement, the permanent offer of arbitration is separate and independent of the validation of the operation that gave rise to the investment or that supported it.

56. In the case in point, based on Article 8 of the BIT, the scope of the offer of arbitration is very broad since the specifies that "*Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled amicably between the two parties concerned*".

57. By serving notice of his request for arbitration on 17 July 2015, [F] therefore accepted the permanent offer of arbitration made by the Republic of Senegal, thereby manifesting the consent of the two parties to submit their dispute to the arbitral tribunal.

58. Thus, under cover of a ground of annulment based on the lack of jurisdiction of the arbitral tribunal, the Republic Senegal cannot lead the Court to reassess the legality of the investment of [F], which assumes proceeding with a fresh examination of the procedures and decisions that were handed down against Mr [F] by the CREI which found that there was evidence that he had engaged in criminal conduct, which play a role, according to Mr [F], in the violation by the Republic of Senegal of its obligations under the BIT, and constitutes precisely the primary subject matter of the dispute that was submitted to the arbitral tribunal.

59. This claim, irrelevant, shall accordingly be rejected.

The ground for annulment based on the lack of jurisdiction of the arbitral tribunal to decide on actions attributed to the Auditex accounting firm and to hold the Republic of Senegal liable

60. In the case in point, based on Article 2 of the BIT, "*For the purposes of this Agreement, it is understood that the Contracting Parties shall be responsible for the actions or omissions of their public authorities and their federated states, in particular regions, local authorities or other entity over which the contracting party exercises guardianship, representation or responsibility for its international relations or its sovereignty*".

61. Based on the evidence produced, in an order dated 3 June 2013, the investigative commission of the CREI put Hardstand in interim administration and appointed Auditex as the administrator of the company tasked with providing day-to-day administration or disposing of its assets on behalf of the company and, more generally, managing the company, taking legal action on behalf of the company, binding the company, acting in lawsuits involving the company and seeking redress on behalf of the company.

62. In addition, Auditex was appointed as receiver of the apartments owed by the companies associated with Mr [F].

63. In substance, the Republic of Senegal criticizes the tribunal for failing to show how Auditex was effectively under the control of the State of Senegal nor did it establish that, as administrator it was acting on instructions of the State, the only conditions, according to it, under which the actions of Auditex can be attributed to it and under which it can be found to have international liability for violating the BIT.

64. Based on this criticism, under cover of a ground based on jurisdiction, the Republic of Senegal is asking the court to determine whether the actions of Auditex could be attributed to the

Republic of Senegal and whether it could have international liability, so it intends to revisit the attributability of conduct to the Republic of Senegal and its international liability recognised by the arbitral tribunal, which is a question that touches on the merits of the dispute, on which the jurisdiction of the arbitral tribunal to adjudicate them is not contingent.

65. In fact, the arbitral tribunal settled this question as part of the examination of the "*claims on the merits*" in the third part of its award after having found in a preliminary section entitled "*The attributability of the conduct of Auditex to the Republic of Senegal*" that "*The parties do not contest that the actions and/or omissions of bodies of the Republic of Senegal (judicial bodies, Ministry of the Economy, Finance and the Plan, etc.) are attributable to the Respondent. The Respondent disputes however that the actions of Auditex are attributable to it*" (See § 324 of the award).

66. This claim shall accordingly be rejected.

67. In light of all of the foregoing, the ground for annulment based on the lack of jurisdiction of the arbitral tribunal shall be rejected.

1.2 The ground for annulment based on the lack of impartiality of the president of the arbitral tribunal (Article 1520(2) of France's Rules of Civil Procedure)

68. The Republic of Senegal invokes the annulment of the award due to lack of impartiality of the president of the arbitral tribunal. It deems that unlike the obligation of independence, a lack of impartiality of the arbitrator can only be established once the award is rendered and no waiver may be inferred from a failure to react by a party who was a victim thereof to find its ground based the lack of partiality of the president of the arbitral tribunal admissible.

69. The Republic of Senegal infers the partiality of the president from the decisions taken during the arbitration proceedings, upon the occasion of procedural orders 1 and 3 respectively only 13 April 2016 and 21 October 2016 authorising Mr [F]'s travel to France for medical purposes and rejecting the motion for the bifurcation of the proceedings.

70. The Republic of Senegal also maintains that the lack of impartiality of the president of the arbitral tribunal is based on his behaviour and the differential treatments in favour of Mr [F] during the hearings as well as the reading of the arbitration award.

71. In response, Mr [F] maintains that the ground for annulment based on the lack of impartiality of the president of the arbitral tribunal is inadmissible in accordance with Article 1466 of France's Rules of Civil Procedure for failing to raise it during the arbitration proceedings after the procedural orders contested by the Republic of Senegal. He considers that the impartiality of the arbitrator must be determined in an objective manner and that, in the case in point, Senegal failed to provide any specific and objective evidence so as to create in the mind of the parties a reasonable doubt about the impartiality of the president of the arbitral tribunal; the procedural orders, the conduct of the hearings and drafting of the arbitration award being the collective work of the arbitral tribunal.

WHEREFORE:

The admissibility of the ground for annulment

72. In the case in point, Article 11 of the (1976) UNCITRAL Arbitration Rules applicable to the arbitration proceedings provide that "*A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party*".

73. Furthermore, pursuant to Article 30 of these Rules, "*A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object*".

74. Likewise, pursuant to Article 1466 of France's Rules of Civil Procedure, a party who with full knowledge of the facts fails to exercise their right to bring a challenge within the time period provided for in the applicable arbitration rules based on any circumstance calling into question the independence or the impartiality of an arbitrator is deemed to have waived their right to do so before a court adjudicating the action for annulment.

75. In light of these statutes, it is up to the court to determine whether, in relation to each of the facts and circumstances alleged as constituting a breach of the arbitrator's impartiality requirement, the period of time allowed under the rules of arbitration to bring a challenge was observed or not.

76. In the first place, the Republic of Senegal considers that having permitted [F] to leave Senegal and that by rejecting the motion for bifurcation of the proceedings that it had made, the president of the arbitral tribunal, from the very outset of the case, exhibited his hostility toward the position that it defended on the jurisdiction of the arbitral tribunal well as vis-à-vis the decision of the CREI.

77. It should however be noted that these decisions were taken in two procedural orders number 1 dated 13 April 2016 and number 3 dated 21 October 2016.

78. It is not contested that the Republic of Senegal did not seek within 15 days after these two orders to challenge the president of the arbitral tribunal. It is therefore deemed to have waived its right thereto and therefore its claim based on them to characterise a lack of impartiality before the court adjudicating the action for annulment is inadmissible.

79. The Republic of Senegal criticises in the second place a lack of impartiality of the president of the arbitral tribunal during the hearings deeming that the "*most convoluted*" questions were reserved for it.

80. It should however be noted that, even though during one hearing (see the page 22, lines 6-25 of the transcript of the hearing on Thursday, 29 November 2018) its lawyer had questioned the president of the tribunal on his propensity to rephrase the questions she asked, thereby deeming that he did not let "*the opposite side answer clearly*" thereby "*perhaps*" avoiding "*leaving it in difficulty*", the Republic of Senegal did not deem it necessary to challenge the president about his partiality. It is therefore also deemed to have waived its right thereto and its claim based on the alleged attitude of the president of the arbitral tribunal during the hearings to characterise a lack of impartiality before the court adjudicating the action for annulment is inadmissible.

81. Lastly, the Republic of Senegal considers that the contradictions or differentiated treatments noted in the award also characterise a lack of impartiality of the arbitral tribunal.

82. To the extent that these circumstances were prior to the end of the hearings and were pointed out once the award was handed down, the Republic of Senegal cannot be considered to have waived its right thereto such that, for such circumstances, the ground must be found to be admissible in the court adjudicating the action for annulment.

The merits of the ground for annulment

83. The impartiality of the arbitrator assumes an absence of prejudice or bias liable to affect the arbitrator's judgment, which can be the result of multiple factors such as the nationality of the arbitrator, his or her social, cultural or legal environment.

84. However, to be taken into account these elements must create in the mind of the parties a reasonable doubt about his or her impartiality so the assessment of this lack of impartiality must be an objective approach.

85. Whilst such a doubt can possibly be the result of the award itself, to the extent that the content of the motivation of the arbitration award is not subject to the review of a court adjudicating the action for annulment, the doubt still must be based on specific elements with respect to the structure of the award or its very terms that suggest that the attitude of the arbitrator was partial or, at very least, could create the impression that it was.

86. In the case in point, the Republic of Senegal criticised the arbitral tribunal for, under cover of seeking to determine the most effective nationality of Mr [F], merely verified that he did indeed have French nationality and thereby refrained from any effort to determine the most effective nationality. It further criticises the arbitral tribunal for rejecting the red flags approach by refusing to take into account serious evidence of the commission of an act of corruption or similar offences by affirming that it had "*found that the Respondent [the Republic of Senegal] had failed to prove that the investment of the Claimant was illegal*".

87. Based on these claims, under cover of a lack of impartiality, these mere particulars are insufficient to characterise the criticism of the Republic of Senegal relates in actual fact to the motivation of the arbitral tribunal that it considers as insufficient to base its decision.

88. In light of the foregoing, this claim, which is not at all characterised, and accordingly this ground for annulment shall be rejected.

1.3 The ground for annulment based on a violation of international public policy (Article 1520(5) of France's Rules of Civil Procedure)

89. The Republic of Senegal explains that the recognition and the enforcement of the award is contrary to international public policy in that it gives effect to a complicity in illicit enrichment and money laundering operation.

90. It recalls that Mr [F] was found guilty of the offence of complicity in illicit enrichment and condemned by the Senegalese courts for the support and cooperation provided to [I] in secret operations and recalls that the repression of this criminal conduct falls under international public policy.

91. The Republic of Senegal maintains that the recognition and the enforcement of the arbitration award dated 24 October 2019, in that it annihilates the effects of a final criminal conviction in domestic law of Mr [F], thereby allowing him to retain unlawfully acquired properties, the fruit of criminal activities, is contrary to international public policy.

92. It adds that the values and principles enshrined in a treaty that is the subject of international consensus fall within international public policy and that the offence of illicit enrichment and complicity in the commission of this offence expressly form a part of the reprehensible behaviours targeted by this international consensus in that they are referred to in Article 20 of the United Nations Convention against Corruption signed in Merida, transposed in Article 163 bis of Senegal's Criminal Code.

93. The Republic of Senegal maintains that neither Article 20 nor Article 27(1) of the Merida Convention, which punishes respectively illicit enrichment and complicity in the commission of this offence, were the subject of reservations on the part of the signatory States so the ratification, the approval or the acceptance by these countries means, according to the rules of international public policy, that the 187 signatory States of the Merida Convention, including France, consented to be bound by its provisions.

94. The Republic of Senegal explains that the conditions under which the alleged investments by Mr [F] were made correspond to red flags, which, added together, should have led the arbitral tribunal to dismiss his claims because in particular they were made in large part by the payment of large sums in cash via foreign companies in order to make the fund transfers undetectable, then thanks to the influence of [I] , the son of the former president [...] and thanks to the close relations that Mr [F] maintained with public officials.

95. The Republic of Senegal considers that taking the red flags into account and ruling anew on the question of the illegality of Mr [F]'s investment, the Court can only recognise the existence of a body of serious, specific and corroborating evidence that casts doubt on the terms on which Mr [F] made the investment, the loss of which was indemnified by the arbitral tribunal.

96. It thus deems that by neutralising the sentences handed down by the CREI against Mr [F], the arbitration award allowed him to benefit from the proceeds of his criminal activities and, more generally, it gave him total impunity after receiving the protection of the BIT, the benefit of which he should not have been afforded due to the preponderance of his Senegalese nationality and of the domestic nature in Senegal of the dispute submitted to an international arbitral tribunal.

97. The Republic of Senegal further argues that the violation of international public policy is also the result of the violation of its sovereignty by the admission of the arbitral tribunal of the substantive denial of justice suffered by Mr [F], which consists of examining the merits of the CREI's decision taken by virtue of the state sovereignty when the review of the arbitral tribunal should have been limited to the procedural part of the denial of justice and not admit a substantive denial of justice.

98. It lastly criticises the arbitral tribunal for engaging in interference in the Senegalese justice system by overstepping its jurisdictional power and thereby violated its sovereignty by enjoining it, in procedural order number 1, the protective measure consisting of the requiring of the release of Mr [F] which is not proportional and does not fall within its jurisdictional power based both on the BIT and the UNCITRAL rules.

99. In response, Mr [F] maintains that the ground for annulment based on the violation of Senegal's international public policy relies on factual elements falling within an examination of the merits of the dispute by the arbitral tribunal which considered that the ruling of the CREI finding such elements constitutes a breach of the BIT by Senegal. He contends that the award did not break any rule, the observance of which is necessary to safeguard the social or economic organisation of the French State and that, on the contrary, the award preserves the fundamental principles of justice flouted by the CREI and the Republic of Senegal, such as the right to appear before one's judges and to take part in one's trial, the right to be represented by a lawyer, the fundamental guarantee of the lawful composition of the courts or the prohibition of inhuman or degrading treatment and despoilment, which are both a matter of international public policy and form an integral part of the France-Senegal BIT.

100. Mr [F] considers that the offence of illicit enrichment punished under Senegalese law is not part of France's international legal order. He purports that he was not the subject of a any criminal prosecution for the offences alleged by Senegal against him and that the Superior Court of Paris, and then the Court of Appeal of Paris, respectively on 26 September 2016 and 14 March 2018, refused to enforce in France the CREI ruling and denied an application for the enforcement in France of the confiscations ordered by the Senegalese authorities since the acts that he was alleged to have engaged in are not criminal offenses under French law.

101. Mr [F] maintains that the ground for annulment based on a denial of substantive justice is inadmissible in that it tends to a re-examination on the merits of the analysis of the arbitral tribunal. He contends that the arbitral tribunal appropriately ruled on a denial of

substantive justice to recognise the violation of Senegal of the fair and equitable treatment and recalls that in any case any defect affecting this claim may not have as an effect to result in the annulment of the award to the extent that it is a superabundant finding of the motivation of the award.

102. Mr [F] further maintains that the Senegal's ground for annulment relating to procedural order number 1 is inadmissible to the extent that a procedural act not referred to in the notice of appeal cannot be the subject of an action for annulment. He deems that the arbitral tribunal acted within the limits of its jurisdictional power in accordance with Article 1468 of France's Rules of Civil Procedure and Article 26 of the UNCITRAL rules when ordering provisional protective measures pending the outcome of the dispute on the merits, and this, in particular to preserve a situation in terms of facts, rights or proof. Mr [F] adds that Senegal has failed to show how an excess of power of the arbitrators would constitute a plain, effective and concrete violation of international public policy.

WHEREFORE:

103. Under Article 1520(1) of France's Rules of Civil Procedure, action for annulment is available if the recognition and enforcement of the award is contrary to international public policy.

104. International public policy on the basis of which the review of the court adjudicating the action for annulment is the conception that in France's international legal order, which is to say the values and principles the disregard of which it cannot accept even in an international context.

105. The review performed by the court adjudicating the action for annulment in the defence of international public policy only centres on examining whether the enforcement of the measures taken by the arbitrators clash in a plain, effective and concrete manner with the principles and values included in international public policy.

The claim that the award would give effect to an illegal investment

106. It should be recalled that the effect of the award in the case in point is to order the Republic of Senegal to pay to Mr [F] various sums corresponding, on the one hand, to the amount of the fine (plus interest) that Mr [F] was ordered to pay by the CREI for the harm caused by the threat of enforcing payment of this fine and, on the other hand, the amount of the loss caused by violating his investment (corresponding to the value of his direct or indirect investments in Hardstand and the SCP companies) and for the non-economic damage, the arbitral tribunal having considered that the Republic of Senegal had violated the commitment of fair and equitable treatment that it undertook in Article 4 of the BIT and it violated the commitment not to expropriate the investor unlawfully that it undertook in Article 6.2 of the BIT.

107. Thus, the tribunal considered that "*the decision of the CREI was rendered at the end of a process based on a flagrant violation of the requirements of fair trial. The claimant was tried and convicted despite his state of health and his inability to attend his trial when his lawyers were absent for a large part of the trial hearing, especially those devoted to the proof. At no time, however, did the claimant waive his right to appear in court or his right to be represented by a lawyer. These acts play a role in a procedural denial of justice*" (§ 416).

108. It thereby noted that "*the respondent inflicted inhuman or degrading treatment on the investor playing a role in the procedural denial of justice contrary to the international requirements of a fair and equitable trial*" (§ 444).

109. It should be recalled that it is up to the Court, as part of its review, to verify that the recognition or the enforcement of this award in France cannot have as an effect to allow Mr [F] to benefit from the proceeds of an activity of corruption or money laundering of which the protected investment would have been the instrument and/or the proceed.

110. On this point, it should be noted that the arbitral tribunal specifically considered this question in order to refute its relevance.

111. In the arbitration award handed down on 24 October 2019, the arbitral tribunal on the one hand considers that the illegality of the investment alleged by Mr [F] in terms of its goal (§§ 232-239) and due to the way it was made (§§ 240-268) was not proven and, on the other hand, rejected the objection to admissibility based on the violation of a transnational public policy rule in paragraphs 300 onwards.

112. In this regard, the arbitral tribunal found that:

- "*despite the assortment of offences mentioned, proof that the cash employed by the Claimant to finance Project Eden Roc, which was deposited into the bank account of Hardstand and for which deposit slips were regularly issued, is from a criminal offence was not produced by the Respondent, not even relevant indications*" (§ 260);

- the Republic of Senegal "*fails to provide the proof, the burden of which falls on it, of either the commission of criminal offences by either company of the [F] Group or to its detriment or of the fraudulent origin of the sums in the joint account of MM. [F] and that were wired to Hardstand's bank account*" (§ 264).

113. It should further be noted, as the arbitral tribunal recalled, that the Senegalese authorities did not prosecute Mr [F] for any such financial crimes.

114. Thus, the arbitral tribunal found that "*Moreover, the Senegalese judicial authorities, notified of all these elements as part of the investigation carried out by the investigative commission of the CREI, and in particular through the reports produced by the experts appointed by it, did not deem it appropriate to prosecute the Claimant on account of any of these alleged ordinary financial crimes. The representative of Senegal at the hearing recognised that there had been no such prosecution, which is at highly surprising given what Senegal is now describing as a 'variety' of financial crimes. Nor has the Respondent shown that that it had, through its appropriate administrative authorities, brought to the attention of the National Financial Information Processing Unit (CENTIF), a body that specialises in combating money laundering, the operations of Mr [F] suspected of constituting such a crime, due in particular to the massive use of cash*" (§ 264).

115. In this regard, at the hearing that was held on 26 November 2018, the Judicial Agent of the Republic of Senegal recognised that with respect to the crime of corruption that Mr Wage was accused of as well as complicity in corruption that Mr [F] was accused of, they were found not guilty and that was an "*objectively indisputable fact*" (lines 7 to 12 of p. 77).

116. Likewise, it is undisputed that the criminal complaint filed on 27 November 2012 by the Republic of Senegal against [I] and also against Mr [F] with the National Financial Prosecutor in France on charges of handling the proceeds from the appropriation of public funds, handling the proceeds from the misuse of company funds, handling the proceeds from breach of trust, handling the proceeds from corruption, corruption of public officials and of private individuals, aggravated money laundering committed as part of an organised crime group of the proceeds from criminal offences was dismissed with no charges ever being brought.

117. Lastly, it should be noted that whilst Mr [F] was convicted by the CREI for complicity in illicit enrichment within its meaning under Senegalese law and it ordered the confiscation of his property, the application for the enforcement of these measures in France was rejected by the Criminal Court of Paris on 26 September 2016, reaffirmed by a ruling from the Court of Appeal of Paris on 14 March 2018 on the basis of Article 713-37 of France's Rules of Criminal Procedure, which provides that an application for enforcement in France can be denied when the acts are not a criminal offence under French law.

118. These courts rules in this way after finding that the offence of illicit enrichment does not exist under French law and considered, after a review of the case, that the conduct in question could not be classified as any other criminal offence and specifically could not be likened to corruption, influence peddling, illegal conflict of interest or embezzlement and even money laundering.

119. For instance, based on these specific and corroborating elements, on the one hand, even though he was the subject of a criminal prosecution, Mr [F] was convicted of corruption and/or money laundering in connection with the investments that he made in Senegal and, on the other hand, the French courts refused to enforce the court order to confiscate his assets in France as part of his conviction for complicity in illicit enrichment since France does not have any such criminal offence and for disputed conduct that is liable to be classified as another criminal offence in France.

120. In so doing, the award, the effect of which is to sanction that failure by the Republic of Senegal to comply with its international commitment to provide a fair and equitable treatment of the investment of Mr [F] and to repair the harm that he sustained as a result of such violation, does not violate international public policy in a plain, effective and concrete manner, and it is not necessary to go through the evidence, piece by piece, alleged by the Republic of Senegal that should lead the court adjudicating the action for annulment to carry out a fresh criminal investigation of the allegations made against Mr [F] and that gave rise to the decision of the CREI.

121. This ground for annulment shall accordingly be rejected.

The claim based on the recognition of a substantive denial of justice by the arbitral tribunal

122. In substance, the Republic of Senegal criticises the arbitral tribunal for having, by reviewing the motivation of decisions of the CREI and of the Supreme Court, exceeded its powers by conducting itself as a veritable court of appeal reviewing domestic judicial decisions of the State of Senegal and, in so doing, violated its sovereignty.

123. However, under cover of international public policy, the Republic of Senegal in actual fact thereby criticises the grounds by which the arbitral tribunal considered that a judicial decision could constitute a denial of justice "*not only when the investor was denied the essential guarantees of a fair trial but also when the decision clearly discredits the court that handed it down (substantive denial of justice)*" (§ 478).

124. This claim cannot give rise to the annulment of the award and this all the more because, on the one hand, based expressly on the award, the examination by the arbitral tribunal of a substantive denial of justice was "*superabundant*", the arbitral tribunal having taken care to specify that the procedural denial of justice having been characterised, it was "*therefore superabundantly [that it] will examine presently the imputations of the claimant relating to the substantive denial of justice*" (§ 452).

125. On the other hand, the arbitral tribunal endeavoured to delineate its assessments, specifying that there "*is no question of it conducting itself as a court of appeal or a supreme court in respect of the decision and substituting its own assessment of the facts and rules applicable for that of a domestic court's judgment*" and endeavouring to make it clear that "*its review will focus on the motivation of the decisions of the CREI and of the supreme court, which must not be either summary or obscure or patently erroneous or unacceptable. Otherwise, the judicial decision would be considered as constituting a denial of justice, with the understanding that, in order to reach this threshold, a judicial decision must be manifestly unfair and inequitable in nature*" (§ 478) and adding that it was a review of the motivation and it must "only verify that the one issued by the Senegalese courts is not vitiated by patently arbitrary, by examining the motivation of their decisions" (§ 478)

126. In light of the foregoing, this claim shall be rejected.

The claim of interference in the Senegalese legal system

127. The Republic of Senegal in substance criticises the arbitral tribunal for its procedural order number 1 dated 13 April 2016 that ordered it to take all action within 21 days to ensure that Mr [F] be authorised to leave Senegal to travel to France in order to receive medical treatment.

128. However, on the one hand, the Republic of Senegal did not appeal this order.

129. On the other hand, based on the award, whilst Mr [F] did manage to travel to France to receive medical treatment, it was following, not the aforementioned order, but more specifically a decision taken by the sentencing judge of the Republic of Senegal who, on 31 May 2016, authorised him to leave the country and ordered the return of his passport.

130. In light of the foregoing, no plain, effective and concrete violation of international public policy rule is characterised.

131. This claim shall accordingly be rejected.

2. The claims for the partial annulment of the arbitration award

2.1 The lack of jurisdiction of the arbitral tribunal to order compensation for the loss of an investment made through Panama companies (Article 1520(1) of France's Rules of Civil Procedure)

132. The Republic of Senegal considers that the finding by the arbitral tribunal that it indeed had jurisdiction *ratione materiae* over the investment related to the equity in the Senegalese SCP companies goes beyond the terms of the BIT. It deems that only the direct or indirect investment of Mr [F]—assuming that he qualifies as a French investor—in a company organised in Senegal does qualify as a protected investment under the BIT. The Republic of Senegal maintains that the investment, made through Panama companies, does not meet the definition set out in Article 1.1(b) of the BIT so that arbitral tribunal does not have jurisdiction *ratione materiae*.

133. It thus contests the amount of EUR 8,218,385 that the arbitral tribunal awarded to Mr [F] as compensation for the loss of his investment via his indirect equity investments in the Senegalese SCP companies.

134. It considers that the tribunal in actual fact compensated Mr [F] for a 100% holding in these companies when he owns only a direct 2% stake in them and the amount that should have actually been awarded to Mr [F] was 2% of EUR 8,218,385, or EUR 166,367.70.

135. In response, Mr [F] concludes that the arbitral tribunal did have jurisdiction *ratione materiae* to order such compensation, recalling that he wholly owns (100%) the Panama companies that in turn own the Senegalese SCP companies and that the definition of the investment in Article 1.1(b) of the BIT covers indirect investments.

WHEREFORE:

136. Under Article 1520(1) of France's Rules of Civil Procedure, action for annulment is available if the tribunal wrongly found that it had or lacked jurisdiction.

137. In connection with an action for annulment based on Article 1520(1) of France's Rules of Civil Procedure, it is up to the court adjudicating the action for annulment to review the decision of the arbitral tribunal regarding its jurisdiction, whether it is found to have or to lack jurisdiction, by seeking all legal or factual information making it possible to assess the scope of the arbitration agreement.

138. However, on the one hand, with respect to jurisdiction *ratione materiae*, based on the definition in Article 1.1 of the BIT which covers "*all assets, … property rights and interests of all kinds*" and includes "*actions, issuing premiums and other forms of participation, even indirect minority, or to companies established in the territory of one of the contracting parties*", the arbitral tribunal did indeed have jurisdiction to rule.

139. Thus, the arbitral tribunal considered that "*the economic operations conducted by Mr [F] in Senegal satisfy the criteria of the definition of the investments set out in this provision…. Project Eden Roc was carried via local investment vehicles, namely Hardstand and the three Senegalese SCP companies Blue Infinity Holdings, Cap Ouest SCP and Blue Horizon Holdings in which he owned shares directly and/or, with respect to the SCP companies, controlled it through the Panama holding companies, i.e., Blue Infinity Holdings SA, Cap Ouest SCP SA and Blue Horizon Holdings SA. This structuring of the investment is authorised under the BIT, which, in Article 1.1(b), considers that actions, issuing premiums and other forms of participation, even indirect minority, or to companies established in the territory of one of the contracting parties falls within the scope of its protection*" (§ 192 of the award).

140. It is moreover established that Mr [F] directly owns 2% stake in the SCP companies and that the aforesaid Panama companies, which are wholly owned by Mr [F], have a 98% stake in these SCP companies.

141. Thus, it was within the jurisdiction of the arbitral tribunal to rule on compensation for Mr [F]'s indirect investments in the Senegalese SCP companies.

142. On the other hand, in the case in point, the arbitral tribunal considers that "*the economic harm sustained by the Claimant as a result of the loss of his investment is the value of his direct or indirect investments in Hardstand and the SCP companies, to the exclusion of the other heads of damage claimed*" (§ 628) and that Mr [F]'s investment consists of a "*49.96% stake in Hardstand, a 100% stake in the SCP companies Blue Infinity and Blue Horizon and a 99% stake in the SCP company Cap Ouest*" (§ 658).

143. Thus, the criticism relating to the quantum of damages of Mr [F] by the tribunal as a result of his investments via the Panama companies in the Senegalese SCP companies, falls within the determination on the merits of the tribunal which is not subject to review by the court adjudicating the action for annulment.

144. This ground for annulment shall accordingly be rejected.

2.2 The violation by the arbitral tribunal of its mission due to the reference to the European Convention on Human Rights (Article 1520(3) of France's Rules of Civil Procedure)

145. The Republic of Senegal criticises the arbitral tribunal for having applied the European Convention on Human Rights in examining the claim based on the violation of the fair and equitable treatment when Senegal is not a party to this treaty, which constitutes a violation of its mission by virtue of Article 1520(3) of France's Rules of Civil Procedure.

146. In maintains that the reference to the "*principles of international law*" in Article 4 of the BIT cannot be construed as the consent of a State to be bound by any and all of the hundreds of international treaties in force but mere as the acceptance by the State that the lawfulness of its conduct on the international stage be examined with reference to the overarching principles of customary international law.

147. In response, Mr [F] explains that the European Convention on Human Rights was taken into consideration by the arbitral tribunal among other sources of international law as part of its interpretation of the standard of fair and equitable treatment within the meaning of the BIT, although the arbitral tribunal did not directly apply said convention to this dispute.

WHEREFORE:

148. Under Article 1520(1) of France's Rules of Civil Procedure, action for annulment is available if the tribunal ruled without complying with the mission that was entrusted to it.

149. In the case in point, Article 4, paragraph 1, of the BIT holds that "*Each Contracting Party undertakes to provide, in its territory and in the maritime area, fair and equitable treatment in accordance with the principles of international law, to investments of investors of the other party and to ensure the enjoyment of the right thus recognized is hampered in either law or in fact*".

150. It was therefore within the scope of the mission of the arbitral tribunal to determine compliance with the commitment of the Republic of Senegal to provide fair and equitable treatment to Mr [F], and this "in accordance with the principles of international law".

151. In the case in point, it is not contested that the arbitral tribunal sometimes makes reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECHR") in its award.

152. Thus, in paragraph 412 of its award, to consider that "*the right to appear in person is a critical component of the right to a fair trial recognised in various international instruments*", the arbitral tribunal cites "*in particular Article 14.3 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10 of the Universal Declaration of Human Rights and Article 7.1 of the African Charter on Human and Peoples' Rights*". It adds that "*The European Court of Human Rights has recognised that this right includes the right to be present at a trial and to hear and follow the proceedings*".

153. Similarly, in paragraph 414 of its award, the arbitral tribunal recalls that "*When the European Court of Human Rights decided that there was no violation of Article 6.3(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, when the absence of a lawyer was the result 'of the free and voluntary choice' of the defendant, it was precisely a situation where the defendant had expressly refused to be represented by a lawyer*".

154. In addition, in paragraph 439 of its award, the tribunal explains that "*The prohibition on inhuman and degrading treatment is affirmed in various international instruments such as the African Charter on Human and Peoples' Rights (Articles 5 and 7), the Universal Declaration of Human Rights (Article 5), the European Convention on Human Rights (Article 3) and the International Covenant on Civil and Political Rights (Articles 7 and 10.1*".

155. Lastly, in its paragraph 442, the tribunal explains that it "*accepts that in reference to the case law of the European Court of Human Rights, Article 3 of the ECHR cannot be not analysed as 'a general obligation to release an inmate for health reasons' and that the 'care provided in the penitentiary system must be appropriate…, which means of a standard comparable to what the authorities of the State have pledged to provide to the population at large' although that does not imply 'that every inmate is guaranteed the same standard of medical care as the best healthcare facilities outside of the penitentiary system*".

156. However, these references are purely illustrative and are accompanied by a reference to other international instruments that do not support the conclusion that the tribunal settled the dispute by applying the ECHR in violation of its mission.

157. On the contrary, based on the award, the tribunal complied with its mission since, to decide that Mr [F] had been the victim of a procedural denial of justice on the part of the Senegalese authorities, the tribunal considered "*that there was a serious and clear violation of the internationally recognised rights of the defence that he could benefit from by the negation of: (1) his right to appear before his judges and to take part in his trial, (2) his right to be represented by a lawyer, (3) the fundamental guarantees of the lawful makeup of the courts and (4) subjecting him to inhuman and degrading treatment*".

158. The tribunal thereby considered that the Republic of Senegal had "*violated the commitments that it had undertaken under Article 4 of the BIT by failing to comply with the principles of international law applicable to the judicial protection afforded to the investor as part of the fair and equitable treatment*" (§ 452).

159. Based on these paragraphs, it is indeed by reference to the "*internationally recognised rights of the defence*" and to the commitment from Article 4 of the BIT that the Republic of Senegal was condemned, and not as it contends pursuant to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECHR").

160. Moreover, based on the award, the question of the scope of the reference to the "*principles of international law*" to determine the standard of fair and equitable treatment as "*abundantly argued*" by the parties, the Republic of Senegal maintaining that the standard of fair and equitable treatment ought to be limited to the minimum standard recognised by international custom whilst Mr [F] argues that this standard should be determined not only based on international custom but additionally in the principles of international law (§ 360).

161. The tribunal chose not to settle this question, having found that the minimum standard recognised by the Republic of Senegal includes in particular "*the prohibition of the denial of justice, that of arbitrary or discriminatory measures and the respect of good faith and legal procedures*" (§ 362) and that these are precisely the rules that Mr [F] alleges that the Republic of Senegal violated.

162. Similarly, even though not directly applicable to this dispute, the ECHR and the case law of the European Court of Human Rights contribute to the emergence standards for the protections under international law and thereby play a role in the formulating of the principles of international law that the aforesaid BIT makes reference. The fact that the Republic of Senegal has not ratified the ECHR did not therefore prohibit the arbitral tribunal from making reference

the convention in its award in its assessment of the content of the standard of fair and equitable treatment in light of the principles of international law, and even to the case law of the European Court of Human Rights, insofar as it does not rely specifically and exclusively on this convention to characterise the violation of the commitment made by the RS but only on the "*principles of international law*" and Article 4 of the TBI.

163. In light of the foregoing, the ground for annulment is without merit and shall be rejected.

2.2 The violation of the adversarial principle and the mission based on a failure to qualify the nature of the harm suffered by Mr [F] (Article 1520(3) and (4) of France's Rules of Civil Procedure)

164. The Republic of Senegal deems that the arbitral tribunal violated its mission as well as the adversarial principle by finding that Mr [F] incurred damage without characterising the nature of the harm that he sustained. It indicates that the legal characterisation of the harm determines the monetary assessment of and the calculation of the compensation required to repair such damage. It considers that it should have had an opportunity to make observations on this topic, which it was deprived of since the tribunal did not seek to characterise the damage.

165. In response, Mr [F] argues that the arbitral tribunal did indeed base the award of reparation on the internationally unlawful acts by Senegal stemming from its breach of the fair and equitable treatment engendered by the ruling of the CREI, in accordance with the claim made by Mr [F], and that the assessment of the characterisation of the harm sustained is not within the jurisdiction of the court adjudicating the action for annulment.

WHEREFORE:

The failure by the arbitral tribunal to comply with its mission

166. The mission of the arbitrators, defined in the arbitration agreement, is limited primarily by the subject matter of the dispute, as it is determined by the claims of the parties and not just the issues borne out in the terms of reference.

167. In the case in point, it is not contested that Mr [F] sought among other things injunctive relief from the arbitral tribunal to stop the Republic of Senegal from enforcing payment of the amount of the fine and interest which the CREI ordered him to pay and, additionally, to order the Republic of Senegal to pay to him "*the sum of €225,989,029.65 as reparation for the non-economic damage as a result of the disproportionate fine and interest ordered in the ruling of the CREI and, alternatively, to pay to him said sum as reparation of the harm arising from the loss of opportunity sustained as a result of the aforementioned fine and interest*" (§594).

168. Whilst the arbitral tribunal rejected the injunctive relief sought, it considered that the threat of enforcement of payment of the amount ordered by the CREI "*constitutes current damage, separate from the monetary loss that its actual enforcement would constitute*" (§ 610) and that "*the cause of this damage is the amount ordered by the CREI, which constitutes a denial of justice, which is to say an illegal act of the State in violation of its commitments made under Article 4 of the BIT. It is up to the arbitral tribunal to order the reparation of this damage with the understanding that an arbitral tribunal constituted pursuant to the BIT may not interfere in the exercise by the State of its sovereignty*" (§ 611).

169. The arbitral tribunal adds that "*the most appropriate reparation of the damage caused by the threat to enforce payment of the fine and interest consists of causing it to disappear…. Reparation thus consists of awarding to the investor a claim against the State, compensating him for the consequences of the enforcement of the judicial decision, if it were to occur*" (§ 612) and thereby ordered the Republic of Senegal to pay to Mr [F] the amount of the fine and

the interest, *i.e.*, EUR 225,323,411.32 and held that this order was contingent upon the enforcement by the Senegalese authorities of collection of the payment ordered by the CREI (§ 613).

170. In so doing, the arbitral tribunal passed judgment on the claims made by Mr [F] in the alternative and the mere fact that the arbitral tribunal did not expressly characterise this damage does not constitute a violation of its mission.

171. This claim shall accordingly be rejected.

The violation of the adversarial principle

172. Under Article 1520(1) of France's Rules of Civil Procedure, action for annulment is available if the adversarial principle is not observed.

173. The adversarial principle only requires that the parties have an opportunity to put forward their factual and legal claims and to cross-examine their adversary so that nothing that served as a basis of the decision of the arbitrators was not subject to the adversarial process.

174. It is not contested that the additional claim of Mr [F] was debated so the Republic of Senegal had an opportunity to make its arguments, with the understanding that the arbitral tribunal did not sua sponte substitute any basis of harm in ruling on this claim.

175. This claim shall accordingly be rejected.

176. In light of the foregoing, the award is not subject to a partial annulment either so the claim relating to the final sharing of the costs of the arbitration shall also be rejected.

Expenses and Court Costs:

177. The Republic of Senegal, the losing party, should be ordered to pay costs.

178. In addition, it must be ordered to pay to [F], who had to undertake unrecoverable expenses to assert his rights, compensation by virtue of Article 700 of France's Rules of Civil Procedure that it is only fair to set at EUR 150,000.00.

IV. DECISION

On these grounds, the Court:

1. Rejects the action for the annulment brought by the Republic of Senegal against the arbitration award handed down under the aegis of the UNCITRAL on 24 October 2019;

2. Orders the Republic of Senegal Yemen to pay EUR 150,000.00 to [F] by virtue of the provisions of Article 700 of France's Rules of Civil Procedure.

The Clerk **The Presiding Justice**

Najma El Farissi **François Ancel**

I, Granville Wesley Fields,
sworn translator,
French/English, certify that
the preceding is an exact
translation of the original
and of the attached copy
in French

This document is assigned
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Signed and stamped *ne varietur* in
Paris, France
on 31st December 2021