Analysis: Split ICSID tribunal reviews allegations of illegality with respect to failed project for development of public park in Algiers; tribunal majority allows the claim to proceed and finds that the state failed to perform the contract in good faith, awarding 228.5 million USD to the investors

Published: May 18, 2023 | By: Damien Charlotin

As we reported, an ICSID tribunal in Société des Parcs d'Alger (SPA) and Emirates International Investment Company (EIIC) against Algeria has recently issued its award, with the arbitrators splitting over the admissibility of the case in view of Algeria's allegations of illegality.

The May 9, 2023 Award, which was rendered under an investment agreement between SPA and an Algerian state-owned entity, remains unpublished. Nevertheless, we are able to provide a detailed analysis of the arbitrators' reasoning below.

In the nearly 400-page award, the tribunal notably split with respect to Algeria's contention that the project, which related to a public park-cum-real estate development in the outskirts of Algeria's capital, had been obtained through corrupt means.

A tribunal majority of Klaus Sachs (chair*) and Stephen Drymer (claimants' appointee) saw insufficient evidence that the claimants' hiring of a consultant, Gallea, which had been paid 14.75 million USD for unclear work, evidenced improper conduct. Instead, the majority considered that these facts rather lent credence to the claimants' counter-narrative that they had been conned by Gallea, which had acted as a front for some of their former employees – as EIIC had argued in the context of Swiss criminal proceedings.

The "diametrically opposed conclusions" of Charles Poncet (Algeria's appointee) are spelled out in his 31-page dissenting opinion, which examines in detail the "thick forest" of red flags that he saw in this case. Mr. Poncet particularly stressed the shady nature of Gallea's principals and activities, as well as the fact that the sums paid by EIIC had been disbursed to offshore accounts without any clear beneficiaries. For the dissenter, these red flags should have led the tribunal to dismiss the claims at the jurisdictional stage.

All three arbitrators, however, concurred in ruling that they lacked jurisdiction over EIIC, which was not a party to the Investment Agreement. The tribunal saw no evidence that Algeria had intended for EIIC to be a party to the Agreement, and it disagreed with the claimants' reading that the Agreement had conferred EIIC the right to arbitrate under the provisions of the Algeria-United Arab Emirates bilateral investment treaty (BIT).

In the merits analysis (from which Mr. Poncet abstained), the tribunal majority then found that Algeria had failed to perform its obligations under the Investment Agreement, further determining that the state had breached its domestic law obligation to perform the contract in good faith. In the arbitrators' analysis, these breaches had caused the project to stall. The state's counterclaims were dismissed.

This finding on the merits resulted in an award of 228.5 million USD in favour of the claimants, with the tribunal majority relying on contemporary business plans that had been approved by both parties – but with a significant discount to account for the project's high risks.

The claimants were represented by King & Spalding in London, Paris, New York, as well as Meltem Avocats in Marseilles, with BRG on *quantum*. Algeria relied on GBS Disputes, assisted by Accuracy as damages expert.**

Background: Real estate project stumbles after investor fails to obtain land rights

The case relates to a long-standing project to build a metropolitan park and associated real estate in the heart of Algiers, the Parc des Grands Vents. In 2006, Algeria had declared the project to be of public interest given its national and strategic importance, meaning that it could benefit from a derogatory investment regime.

EIIC, an Emirati company ultimately owned by Abu Dhabi's ruling family, made an investment proposal to the Algerian authorities, which was preferred over a separate bid from a Saudi investor. Algeria's agreement with EIIC was set out in a July 2007 Memorandum of Understanding (MoU), which was soon amended to include an agreement that the land dedicated to the project's real estate component would be sold to EIIC at the symbolic price of 1 dinar (DZD) per square meter. Shortly thereafter, EIIC incorporated SPA in Algeria, indirectly owning 99% of its shares.

After extended negotiations, an Investment Agreement between SPA and an Algerian state body was signed in March 2011, setting out the parties' rights and obligations, and including an ICSID arbitration clause.

In the background, EIIC had contracted Gallea, an entity incorporated in the British Virgin Islands, for consulting services to assist with the project. While EIIC paid 14.75 million EUR to Gallea after securing the rights to the project, it later sought to recover these sums, arguing that at that point no "definitive agreement" with the Algerian authorities had been reached. The Emirati investor would later lodge criminal proceedings in Switzerland against Gallea's principal and some of its former employees, all of which were eventually acquitted in a

The project ultimately failed to take off, with the investors alleging that this was the result of Algeria's failure to deliver concession rights over the project's lands. In the investors' narrative, this failure had prevented SPA from completing its plans and from obtaining various permits from various Algerian public entities. From mid-2013 on, the Algerian authorities ceased to cooperate with the claimants, which were barred from accessing the facilities in 2016.

SPA and EIIC lodged arbitration proceedings in 2018, relying on the Agreement's ICSID arbitration clause, and seeking up to 2.75 billion USD in compensation.

Use of red flags and "pragmatic eye" is proper approach to discern corrupt conduct

, Algeria had first argued that the Investment Agreement was null and void since EIIC had allegedly secured the project on favourable terms as a result of influence peddling.

As a first step, the tribunal noted that the parties disagreed on the applicable standard of proof, with the claimants favouring a "clear and convincing" standard, while Algeria considered that its allegations merely needed to be evidenced as a matter of balance of probabilities.

In this context, the tribunal nodded to the claimants' submission that most tribunals, in the jurisprudence, have adopted a heightened standard of proof for corruption allegations. At the very least, the tribunal added, the jurisprudence disproved Algeria's contention that there was a consensus to prefer a "balance of probabilities" standard.

For the arbitrators, this issue covered two distinct points:

- The "degree of certainty of the allegation", which, in civil matters, although related to criminal acts, should not be as high as in criminal matters. A majority of Messrs. Sachs and Drymer, however, added that Algeria's allegations needed to rely on "compelling evidence".
- The "type and nature of the evidence required", with the full tribunal being satisfied that a focus on circumstantial evidence and "red flags", viewed with a "pragmatic eye" and "by reading between lines where necessary", was a proper approach. The tribunal noted that this approach was "consistent with the global efforts to tackle corruption" – provided, the majority added, that this evidence remained "sufficiently clear and convincing".

(In contrast, the tribunals in Penwell v. Kyrgyzstan – on which Mr. Sachs also sat – and BSG Resources v. Guinea (1) were unconvinced that a heightened standard of proof should govern allegations of illegal conduct.)

As for the burden of proof, the tribunal majority disagreed with Algeria that it should shift to the claimants once the state had provided sufficient *prima facie* evidence of corrupt acts. Instead, the arbitrators held, the burden was on Algeria to prove its allegations, however difficult this may be in matters of corruption.

Allegations pertain to influence peddling, an offence that can "encompass conduct widely considered to be legal"

These illegality allegations gave rise to very different narratives from the two parties, with the state contending that Gallea had been used as a conduit to illegally secure the project's rights, while the claimants countered that it had been the victim of a fraudulent scheme by its former employees, who had been hiding behind Gallea.

The tribunal first observed that Algeria was not pleading bribery, but "influence peddling", i.e., the act of procuring an undue advantage from the influence of non-officials on governmental matters. While this offence had been incorporated into Algeria's anticorruption law, following the model of the United Nations Convention against Corruption, the tribunal noted that it was not as well defined as bribery – and thus potentially wider.

(The tribunal in BSG Resources v. Guinea (1) ruled that the prohibition against influence peddling was part of international public policy, seemingly disagreeing with the tribunal in Kim v. Uzbekistan on this issue.)

Majority finds that payment to Gallea was not disproportionate

Under Algerian law, a finding of influence peddling in this case required proof of: (i) an "undue advantage" to Gallea; (ii) whose purpose was for Gallea to use of its influence; (iii) so as to obtain, in return, an "undue advantage" for EIIC.

The tribunal majority of Messrs. Sachs and Drymer was unconvinced that any of these criteria was met.

Starting with the 14.75 million EUR paid to Gallea (including a 2.25 million EUR bonus), the tribunal majority noted that, "after eight years of proceedings", the Swiss criminal court had found that Gallea had performed some work for EIIC, thus justifying payment. And while this work had not covered all the items contemplated by the contract, the tribunal majority noted that Gallea's main obligation of result (i.e., that EIIC would obtain the rights to the project with an agreement on the land price) had been met.

Still in line with the Swiss ruling, the tribunal majority found that the remuneration was not "disproportionate", given "the importance of the Project and the several months of work involved" and the fact that Gallea had incurred significant risk not to be paid at all.

In this context, the arbitrators acknowledged that the individuals who had testified in the Swiss proceedings had not participated in the arbitration, but they reckoned this did not diminish the criminal record's probative value.

(Likewise, the tribunal in BSG Resources v. Guinea (1) relied on Swiss criminal records although the key individual had not been produced as a witness in the arbitration. The tribunal in MOL v. Croatia (1) clarified that evidence from a witness involved in the arbitration would, nevertheless, carry more weight.)

Algeria's failure to point to corrupt public officials undermines case of influence peddling

Turning to Algeria's allegation that the payments to Gallea had been designed to benefit from its influence over local authorities, the tribunal noted that it was uncontested that Gallea had been hired in view of its principal's local network and knowledge.

Yet, for the tribunal majority, "regular interaction and acquaintance with local authorities is not improper or illegal, unless an abusive influence is exerted" – of which the majority saw no evidence. (The tribunal majority in UFG v. Egypt likewise considered that lobbying, *per se*, is not illegal.)

In this context, it proved relevant that Algeria had failed to identify "a single decision maker in the Algerian government as the potential object or target of the alleged trading in influence". At best, the majority noted, the state had pointed to a single example of Gallea's governmental connections, a lower-level official at the Ministry of Tourism, whose influence over the process of awarding the project's rights was unestablished.

(This contrasted, the majority held, with the situation in Metal-Tech v. Uzbekistan, where the consultants' connection with the brother of the Prime Minister was a crucial "red flag".)

For the arbitrators, evidence was thus lacking that Gallea had sufficient influence over the governmental body that awarded the project to EIIC, which had been presided by Algeria's Prime Minister and included eight distinct ministries.

Tribunal majority sees no undue advantage obtained by EIIC

Lastly, the majority of the tribunal was unconvinced that the contract with Gallea had proceeded from EIIC's intention to obtain an "undue advantage" from the Algerian authorities. The parties agreed that an "undue advantage", in this context, was a favour or contractual terms that would not have been granted but for the intermediary's influence.

Algeria had argued that Gallea's role had been critical in awarding the project to EIIC over a competing proposal from a Saudi investor. The tribunal's majority, however, saw insufficient evidence that this choice had not been made on the merits by the Algerian authorities, which, at the time, had considered that EIIC's project included more financial guarantees than its competitor's proposal. Algeria, the arbitrators noted, had failed to offer any witness to challenge this contemporary explanation.

As for the reduction of the price for the project's land from 3,000 to 1 DZD per square meter, the tribunal majority was not ready to assume that Algeria would have agreed to a disadvantageous term without reasons. In fact, contemporary evidence indicated that the authorities had been satisfied that this discounted price would be compensated by a 10% stake in the project' future profits. The tribunal majority further agreed with the claimants' legal expert that this price reduction was legal under Algerian law.

Lastly, the two arbitrators were not convinced that EIIC had received an undue advantage when Algeria agreed that the Emirati investor could contribute only one quarter of SPA's share capital upon incorporation, since this was allowed by default under Algeria's corporate laws, and thus did not require any state approval. It was irrelevant, in this respect, that EIIC had failed to abide by the domestic law obligation to contribute the remainder of the capital within five years.

Additional red flags do not suffice to convince majority of influence peddling

Finally, the majority reviewed a range of "red flags" put forward by the respondent, but it ultimately saw insufficient evidence that these proved that the project had been obtained unlawfully.

For instance, the tribunal majority was unmoved by the fact that Gallea was an offshore company, a fact that could be explained by Algeria's local currency controls. (The tribunals in Niko v. Bangladesh (1) and (2) likewise saw nothing suspicious in the fact that the consultants involved in that case hailed from an offshore jurisdiction.)

Further, the – admittedly, false – statement in the consultancy contract that Gallea had experience in assisting investment projects was readily explainable, for the majority, by the fact that this had referred, indirectly, to the experience of Gallea's principal, a well-connected Algerian businessman.

The two arbitrators acknowledged that Gallea's wiring of the monies to various individuals other than its principals, including EIIC's former local director, raised questions. Yet, for the majority, if anything, this supported the claimants' case that *they* had been defrauded – not Algeria. In this context, the majority was not satisfied that the bonus portion of the remuneration had served as a bribe, seeing no evidence that these monies had been "channelled through Algeria or any Algerian entity."

And while the timing of the Gallea contract (a few days before Algeria had to decide on which investor to entrust with the project), its confidential aspect, and the involvement of a "strawman" in signing the consultancy contract were "suspicious", the majority considered that these elements were insufficient, in themselves, to uphold Algeria's illegality objection.

Accordingly, the majority concluded that the Investment Agreement was not null and void on grounds of illegality.

Dissenter sees litany of suspicious events involving unjustified payments to the offshore accounts of shady characters – and concludes that such red flags should have led the tribunal to decline jurisdiction

Mr. Poncet opened his dissenting opinion by noting that he saw "malfeasance all over the file", and deploring that the majority had upheld jurisdiction "in a time when international arbitral tribunals have recognized their clear duty to take a stern view of trading in influence and/or corruption and to show zero tolerance."

As a preliminary matter, Mr. Poncet opined that the majority read too much into the Swiss proceedings whose only purpose had been to decide EIIC's allegations of fraud by Gallea. Since these allegations were logically incompatible with a scenario in which EIIC had used Gallea as a corrupt intermediary, the Swiss authorities did not pursue nor discuss that alternative theory – all the more so since influence peddling is not a crime under Swiss law.

By contrast, the dissenter noted that the Swiss proceedings were particularly instructive as to what had happened to the monies paid to Gallea. These facts, for Mr. Poncet, added to a "litany of suspicious events" associated with the project's grant to EIIC. Citing abundantly from the record of the Swiss proceedings, the dissent emphasised the unclear role of Gallea, its principals, and the various individuals who, without any invoice or evidence of work performed, had been paid significant sums from EIIC's monies.

This included 6 million USD paid to the offshore account of one individual, a local "notaire" (and, therefore, a public official), whose role in the process had been deliberately hidden by Gallea's principal to "protect" him – with the dissenter wondering "against what?". (In Spentex v. Uzbekistan, another tribunal considered that the payment of a same sum to a "consultant" was indicative of corruption, despite no evidence that this sum had reached Uzbek officials.)

Against this background, Mr. Poncet stressed that the individuals involved in this scheme had pointedly obfuscated either their role in obtaining the project, or even their links to the various offshore entities and bank accounts that had received the suspicious payments – in contravention, notably, of Swiss law obligations on the reporting of beneficiaries. For the dissenter, "[w]hen people start making false statements as to who is the beneficial owner of an offshore company receiving or paying millions, they must be deemed to be doing so for no legitimate purposes unless satisfactorily proved otherwise." In the same vein, the dissenter deplored the majority's decision to gloss over the role of the strawman that had signed the Gallea consulting contract, an individual that no one had ever met.

Mr. Poncet further disagreed with the majority that EIIC had obtained no "undue advantage" from these shenanigans: in itself, the 1 DZD/m² price for the land was a significant advantage, given that Algeria had disbursed over 200 million USD to expropriate the project's land. The dissenter further noted that the claimants themselves had considered that the project would be viable with any price under 30 USD/m² – a figure several hundred times over the price they had ultimately secured from Algeria. The explanation offered to the Swiss prosecutors, according to which this price had been obtained after direct negotiations with an unnamed minister, without any written record, struck the dissenter as "highly implausible". It was in this context, Mr. Poncet pointed out, that Gallea's principal had secured a 3 million USD "bonus" from EIIC.

Concluding, the dissent held that "[o]ne could even talk of an *imbalance of improbabilities* that the transaction was beyond suspicion", a fact that should have led the tribunal to dismiss the claims.

State did not agree to extend Investment Agreement to non-signatory, as evidence indicates that local subsidiary was in charge

As a second jurisdictional objection, Algeria had contended that EIIC was not a party to the Investment Agreement, meaning that it had no standing in the arbitration. For the claimant, EIIC's status as a beneficiary of the Agreement derived from Algeria's conduct, which allegedly demonstrated the state's implicit consent in this respect.

The tribunal reckoned that the Investment Agreement's drafting history confirmed that the parties had deliberately excluded EIIC from the contract. The state had indeed proposed a draft removing EIIC from the picture, and SPA had not pushed back against that choice. It was irrelevant that EIIC had been invited by Algeria to join the authorities for the signature, since this merely indicated that EIIC kept a role in the project – just not as a party to the Investment Agreement.

Against that background, the tribunal held that "compelling evidence" would be needed to establish that, through its conduct, Algeria had nonetheless implicitly agreed to consider EIIC as a signatory. The arbitrators saw no such evidence.

Notably, most of the Investment Agreement's obligations fell upon, or had been performed by, SPA – not EIIC, although the Emirati entity may have lent a hand or supported the project "at a higher-level". Most meetings with the authorities had been attended only by SPA, with EIIC sporadically appearing. References to EIIC in correspondence between the parties usually tied it to SPA, the tribunal added.

In light of this evidence, the arbitrators concluded that Algeria had not agreed that EIIC should be covered by the Investment Agreement or have a right to resort to the Agreement's arbitration clause.

Parties did not intend to grant Emirati investor a right to claim under investment treaty

Alternatively, the claimants had argued that the Investment Agreement included a *stipulation pour autrui* under Algerian law – i.e., an agreement by both contracting parties to provide a third party with certain rights. For the claimants, Article 13 of the Investment Agreement, which referred to the rights available to EIIC under the

Algeria-UAE BIT,*** qualified as such a *stipulation*. (While the BIT is in force, it requires the agreement of both Algeria and the UAE for any investor-state dispute to proceed to arbitration.)

For the arbitrators, one requirement for the *stipulation* to be valid under Algerian law was met: SPA did have an interest in extending rights and protections to EIIC, its parent.

The claimants' argument stumbled, however, on the second requirement, as the arbitrators were unconvinced that EIIC had obtained any "direct right" against Algeria from the Investment Agreement.

Indeed, the tribunal agreed with Algeria's argument that Article 13 was a boilerplate clause that merely restated the protections already available to EIIC. As such, the Investment Agreement did not create any "new right" for EIIC to "acquire" – as required under Algerian law.

This reading was supported by the use of the present tense "benefit" to describe how these rights related to EIIC. The contract's negotiating history further indicated that Article 13 had been adopted in response to EIIC's request to obtain more protection – with the investor ultimately accepting language that Algeria had used in other investment agreements.

In this context, the tribunal was unconvinced that reading Article 13 as a mere restatement of existing rights would violate the *effet utile* interpretative principle. The arbitrators pointed out that several other provisions in the Investment Agreement also merely reminded the parties of existing rights and obligations.

Consequently, the tribunal concluded that it lacked jurisdiction over EIIC.

Algeria did not prevent the investor from obtaining local financing, and Investment Agreement did not contain general clause to support the project

On the merits, SPA had argued that the project's demise was, ultimately, a result of Algeria's obstructions and lack of diligence, resulting in breaches of the Investment Agreement.

(Given the arbitrators' split as to Algeria's influence peddling allegations, the Award's reasoning on the merits was adopted by the tribunal majority, with Mr. Poncet abstaining.)

While the majority of Messrs. Sachs and Drymer ultimately agreed with the claimants' conclusion, it did not adopt all of SPA's arguments.

For instance, the arbitrators were unconvinced that Article 1 of the Investment Agreement ("Purpose of the Agreement") incorporated an obligation for Algeria to support the project; instead, that article explicitly provided that the Agreement's purpose was to specify the SPA's parties' rights, advantages, and guarantees in connection to the project.

The tribunal majority further dismissed SPA's allegations that Algeria had put up hurdles affecting its ability to resort to local financing after officials told it, during a 2012 meeting, that Algerian banks would not participate in the project. The arbitrators noted that other Algerian authorities had later backtracked on that position (since a right to benefit from local financing had been included in the Investment Agreement), and that SPA, in any event, had negotiated local financing with Algerian banks.

Failure to convey full concession rights to SPA was a contractual breach, as this was an "essential step" of the project

By contrast, the majority was satisfied that Algeria had failed to perform its obligation to convey concession rights over the project' land to SPA – with the arbitrators agreeing that this was "an essential step" before the investor could proceed with planning and construction, and obtain the required permits.

The tribunal majority acknowledged that the Agreement provided no deadline for Algeria to comply with this "fundamental obligation" and that the claimant's suggestion that two or three months would have sufficed was implausible (given "the scale of the Project and the complexity of the expropriation operations" under domestic law). As such, the majority did not consider that Algeria was in breach when, in July 2013, two years after signing the Investment Agreement, the state had conveyed only 58% of the land to SPA.

What made it a breach, however, was that no further concession rights were conveyed to SPA past that point. Algeria's lack of diligence in this respect was compounded by the fact that it could, alternatively, have granted a temporary mandate to SPA over the remaining land – but failed to do so. In this respect, the arbitrators accepted the claimant's evidence that Algeria had stopped to perform the expropriations after mid-2013, at a time when the authorities had become noticeably less supportive of the project.

(As an example of that change of attitude, the majority noted that, "in March 2015, the Respondent directed SPA – which was attempting to develop a Project of national interest – effectively to stand in line at the public counter on Mondays between 8:30 and 12:00 pm in order to seek government help with the Project".)

This change in attitude likely explained why Algeria had further breached its obligation, under the Investment Agreement, to operate a "one-stop shop" Facilitation Committee, designed to assist and support the project. While that committee had met and proved useful in early 2013, it later ceased to be operational. This, the majority reckoned, also amounted to a breach of the Investment Agreement.

State failed to perform necessary steps for the project to take off, resulting in breach of good faith obligation under Algerian law

The claimants had further argued that Algeria had failed to act in good faith in relation to the project, as required under the state's civil code. The majority accepted, in this context, that this obligation required the parties to perform additional steps and actions, "in the spirit of cooperation", even if such steps were not contractually required.

For instance, the arbitrators found that removing pre-existing gas and electricity infrastructure from the project's site (and connecting external utility networks to it) were necessary steps that fell upon Algeria, regardless of the Investment Agreement's silence on that point. The record indicated that Algeria had offered to assist with these issues – but ultimately failed to act, resulting in a breach of the obligation of good faith.

Likewise, the tribunal majority took issue with Algeria's refusal to grant necessary permits to SPA, over allegations that the investor needed to revise a Master Plan that had already been approved "without reserves" by the competent officials. For the arbitrators, this new and unexpected requirement, which had completely stopped the project in its track, was unreasonable, especially since SPA's subsequent efforts to be flexible and cooperate had received the cold shoulder from the Algerian authorities.

In particular, the majority found that Algeria had acted unreasonably and unjustifiably when refusing to grant a real estate developer licence to SPA, on grounds that the entity was not 51%-owned by domestic interests, following a 2009 reform that introduced that rule. The arbitrators noted that SPA had been shielded against such legislative changes, since the Investment Agreement did contemplate that the firm would engage in real estate activities.

State unjustifiably repudiated the Investment Agreement, as project's failure is not to blame on the investor

Finally, the tribunal majority decided that Algeria had unjustifiably repudiated the Investment Agreement.

The arbitrators emphasized that under Algerian law, contracts should in principle be terminated in accordance with their terms. While the Investment Agreement contemplated that SPA would lose its rights and guarantees if it failed to perform, Algeria had never invoked that provision.

Instead, the Algerian authorities had unilaterally terminated the Agreement, the arbitrators averred. Such repudiation was evidenced by a 2016 interview of the relevant Minister, who had unequivocally stated that the partnership with the Emirati investors was terminated, and that no construction would take place on the project's site – which was now meant to be redesigned as a green space.

In this context, the tribunal majority dismissed Algeria's defence that SPA had abandoned the project in 2013 and that the claimant had failed to perform its own obligations: the record instead indicated that what had felled the project was Algeria's own non-performance. SPA, for its part, "continued to show interest in developing the Project, while calling for the Respondent's performance of its obligation under the Investment Agreement for the Project moving forward".

In particular, the arbitrators disagreed with Algeria's assertion that SPA would have lacked financing to carry the project to its term, given its Emirati backers, or that its alleged lack of experience was material, since EIIC and SPA had been able to retain "world-class external consultant to assist them".

Accordingly, the majority concluded that Algeria had breached the Investment Agreement – entitling SPA to terminate it and seek damages.

Counterclaims fail as project's hiccups arose from Algeria's inaction and lack of diligence

In view of the parties' agreement on that point, the tribunal noted that it had jurisdiction over Algeria's counterclaims, since they were covered by the arbitration agreement (which applied to "any dispute" between the parties), and were "closely connected" with the investors' claims.

Ultimately, however, none of these counterclaims persuaded the tribunal majority.

First, the two arbitrators repeated that they saw insufficient evidence of influence peddling in this case. Accordingly, Algeria's contention that it should be compensated for the harm resulting from the claimants' alleged fraudulent conduct was moot.

Second, the majority dismissed Algeria's counterclaim that it could terminate the Investment Agreement on account of the claimant's alleged failure to perform. The two arbitrators notably disagreed with Algeria that SPA had failed to invest sufficient funds in the project: the committed funds had been sufficient to cover the early stages of the project, which had stalled not because of insufficient financing, but due to Algeria's own inaction.

Likewise, had Algeria continued to operate the Facilitation Committee, then the parties might have resolved the state's (otherwise unreasonable) request that SPA revise its Master Plan. Finally, the arbitrators were unconvinced that the project had failed to integrate an "ecological" orientation, as argued by the state.

Tribunal majority sees issues with both parties' valuation approaches, declining to award damages based on DCF analysis or based on sunk costs

With respect to *quantum*, SPA had sought an award of 2.75 billion USD, based on a discounted cashflow (DCF) analysis, while Algeria had countered that the claimant was only entitled to its sunk costs, amounting – in the state's calculations – to 10 million USD.

For the tribunal majority, Algeria had rightly relied on investment arbitration precedents (such as in [Wena Hotels v. Egypt] and [Metalclad v. Mexico]) to contend that "the DCF method tends not to be appropriate for the valuation of an almost wholly unrealised project – a project not even constructed, let alone operated sufficiently to allow one to determine with a degree of reasonable certainty the expected future cash flows."

In this respect, the tribunal majority distinguished the valuation cases relied upon by the claimant, such as in Tethyan Copper v. Pakistan (also chaired by Mr. Sachs): in these mining cases, a DCF had been appropriate for still-born projects since the price of commodity products made it easier to predict future cash flows.

Accordingly, given the project's very early stage, the tribunal considered that an award of lost profits based on a DCF analysis was unwarranted. Likewise, the tribunal rejected the claimants' alternative valuation for loss of opportunity (for 854.1 million USD), which also hinged on a DCF analysis.

On the other hand, the majority of the tribunal also turned down Algeria's suggestion that it should rely on a sunk costs approach, as this "would not adequately capture the value of SPA's rights to develop the Project". The same conclusion attached to the claimants' alternative proposal to consider sunk costs with an added premium, with the arbitrators seeing difficulties in calculating such a premium.

Contemporary business plans, although preliminary and hypothetical, offer an appropriate basis for valuation; arbitrators apply discount to reflect higher risks than anticipated

Instead, the tribunal majority preferred to rely on two business plans prepared by the claimants in 2010 and 2013, which had forecast the project's net present value (NPV) as amounting to, respectively, 74 and 381 million USD.

The two arbitrators noted that Algeria had accepted the 2010 business plan without cavil, even though it had been in the interest of the state (who would hold a stake in the project) to probe its assumptions and conclusions. The 2013 plan – which concluded to a higher NPV given higher expectations of real estate sales – had been prepared at Algeria's request, and the latter had not commented on it or requested further modifications.

During the arbitral proceedings, both sides had agreed that these business plans could be relevant to the investment's valuation, though they had disputed some of the underlying assumptions and calculations. The majority reckoned, in this context, that the plans were, by their nature, "preliminary and hypothetical", and had relied on a DCF analysis.

Nevertheless, the arbitrators ultimately considered that the business plans offered the "best estimate of the financial results of the Project […] *in tempore non suspecto*", and thus could offer a basis for valuation.

The tribunal majority further noted, however, that the 2013 plan's NPV of 381 million USD was "subject to a series of assumptions and estimates that were far from being certain", including assumptions that Algeria would hold its side of the bargain. As such, for the arbitrators, the plan did not sufficiently factor in the project's risks.

Accordingly, the majority ultimately held that the plan's 2013 estimated project NPV should be reduced by 40% to "reflect the aforementioned risks and uncertainties", resulting in a compensation totalling nearly 228.5 million USD.

No compound interest, given prohibition under governing domestic law

As for interest, the tribunal majority agreed that "pre-award interest properly reflects the time value of money", and was therefore due from the time Algeria's international responsibility became engaged, in July 2013. The arbitrators considered that a "commercial rate" of 3-month USD LIBOR, +2%, would be adequate.

Post-award interest would accrue on the same rate, although the majority declined to order that this interest be compounded, in view of prohibition against compound interest under Algerian law, which governed the Investment Agreement.

The arbitrators added that, should LIBOR become unavailable, it should be replaced by the SOFR rate.

Algeria is ordered to cover 75% of the costs

The claimants sought the equivalent of around 9 million EUR in costs and expenses, while Algeria's costs totalled around 6.5 million EUR. The costs of the arbitration reached nearly 1.3 million USD.

Adopting the principle that costs should follow the event, the tribunal majority noted that SPA had prevailed against Algeria's illegality objection, and on the merits. However, the tribunal had declined jurisdiction over EIIC, and eventually awarded only 8% of the claimants' primary *quantum* case.

In light of this outcome, the tribunal majority ruled that Algeria should cover 75% of the costs of the arbitration, and the same portion of the claimants' legal costs, together with simple interest on these costs at the same rate as for the damages owed to SPA.

* While the parties originally appointed Laurent Levy as chair, the latter was not able to accept the appointment. Mr. Sachs was then appointed by the Chair of ICSID's Administrative Council, from the ICSID Panel of Arbitrators. (While the claimants would have preferred a ballot procedure, Algeria opposed this option.)

** On domestic law issues, Algeria relied on an expert report by Ali Bencheneb, whom the state would after pick as its appointee in United Agencies Limited SA v. Algeria – an ICSID case that resulted in an unpublished award; see our report here.

*** Article 13 of the Investment Agreement read: "In addition to the guarantees granted by the legislation in force, the foreign shareholders [of SPA] shall benefit from the guarantees granted to investments in Title III of the above-mentioned ordinance 01-03 as amended and supplemented, and from the guarantees, rights and privileges that are granted to them by the agreements for the promotion and protection of investments signed between the Algerian State and the State(s) of which there are nationals."