

**COMMON COURT OF JUSTICE AND ARBITRATION OF OHADA**

**CASE NO. 001/2011/ARB**

**Between**

**GETMA INTERNATIONAL**

**Claimant**

**and**

**The Republic of GUINEA**

**Respondent**

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**Table of Contents**

THE PARTIES	5
THE ARBITRAL TRIBUNAL	6
GENERAL OVERVIEW	7
ARBITRATION CLAUSE	8
PROCEDURE	9
FACTS	17
THE CONCESSION AGREEMENT	25
THE REQUESTS	32
GETMA INTERNATIONAL	32
REPUBLIC OF GUINEA	33
THE ISSUES UNDER DISCUSSION	33
DISCUSSION	36
I. Concerning corruption	36
A. Relevance of the evidence	38
B. The belated nature of the request	39
C. Confidentiality of exhibit R 107	40
II. Applicable law	40
Claimant’s position	41
Respondent’s position	42
The arbitral tribunal	43
The stipulation concerning choice of law	43
Article 31 of the Agreement	43
Article 5 of the Specifications	44
The uselessness of resorting to the notion of State contract	45
In conclusion	46
III. The validity of the termination	46
Position of the Parties	46
a) The claimant’s arguments	46
b) The Respondents grounds of defense	48
1) The false partnership with GETMA	49
2) False financial information	49
3) Manipulation of the bidding process	50
4) Amendment No. 1	50
5) The work delay	51
6) The inability to finance the investments	51

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

7) Commitment relating to the opening up of transport from or to Mali	51
8) The Republic of Guinea’s acquisition of a stake in the capital of STCC	
A – The conditions for implementing termination	52
B – The basic termination conditions	56
1/The deceitful actions or actions contrary to the principle of good faith	57
1. The competence of the arbitral tribunal	57
2. The allegations of fraud invoked by the Republic of Guinea	58
From a legal standpoint: general observation	58
a) The false partnership of GETMA and M.S.C.	59
Position of the parties	59
The arbitral tribunal	61
b) The false financial information	66
b1) The fictitious bank comfort letter	66
Position of the parties	66
The arbitral tribunal	67
b2) The Business Plan	69
Position of the parties	69
The arbitral tribunal	71
c) Manipulation of the bidding process (Inros Lackner)	72
Position of the parties	72
The arbitral tribunal	72
d) Amendment No. 1	73
Position of the parties	73
The arbitral tribunal	74
2/The breaches of contract	75
1. The work delay	75
Position of the parties	75
The arbitral tribunal	77
2. GETMA’s inability to finance the work	80
Position of the parties	80
The arbitral tribunal	82
3. The commitments relating to the economic involvement of the Malian shippers	84
Position of the parties	84
The arbitral tribunal	85
4. GETMA’s commitment to open the capital of STCC to the Republic of Guinea	86
Respondent’s position	86
Claimant’s position	87
The arbitral tribunal	87
COMPENSATION REQUESTED BY GETMA	89
I. COMPENSATION PROVIDED BY THE CONCESSION AGREEMENT	90

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

A.	Lump-sum termination compensation	91
	Payment currency	92
	Exchange rate	93
B.	Termination compensation for the property granted under concession	93
	1/Expansion and restoration of the CT	93
	The exchange rates	94
	Absence of invoices	94
	Undocumented expenses	95
	a. TSM GUINEE	96
	b. ML GUINEE	96
	c. SOGUICO	97
	d. A PUB DECO	97
	e. CONSORTIUM NORD SUD	97
	f. SOGEFEL	98
	g. BARRY M. LAMARA	98
	h. FMR	99
	i. SETRAG	99
	j. ABI	99
	k. MR. KERAMBRUN’s EXPENSES	99
	l. MR. KOUYATE	100
	2/Other property granted	100
	C. Compensation for the Entry fee	102
II.	OTHER COMPENSATION REQUESTED BY GETMA	103
	A – Compensation for repatriated staff	104
	B – Compensation for invoices to be issued	104
	C – Compensation for returned property	105
	1/Equipment repatriation expenses	106
	2/Repair expenses for returned equipment	106
	3/Inventories	107
	D. Compensation for non-terminated contracts	107
	E. Compensation for crisis management expenses	108
III.	INTEREST	108
	ARBITRATION EXPENSES	109
	OPERATIVE PROVISIONS	111

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AND ARBITRATION OF OHADA  
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**THE PARTIES**

1. The Claimant is GETMA INTERNATIONAL, SAS with capital of €16,000,000.00, registered in the Register of Commerce and Companies RCS of Paris on March 6, 1991, under No. B 350 701 272, and headquartered at 40, Avenue George V, 75008 Paris (the “Claimant” or “GETMA”). It belongs to the NCT NECOTRANS Group.

The Claimant is assisted and represented by:

Cédric Fischer, Esq.  
Elisabeth Mahé, Esq.  
FISCHER, TANDEAU DE MARSAC, SUR & ASSOCIES  
67, Bd Malesherbes,  
75008, Paris  
France

And

José Miguel JUDICE, Esq.  
Tiago DUARTE, Esq.  
PLMJ A.M. PEREIRA, SARAGGA LEAL, OLIVEIRA MARTINS, JUDICE e ASSOCIADOS,  
RL  
Avenida da Liberdade,  
224, 1250-148, Lisbon,  
Portugal

Their powers, dated February 2, 2012, were forwarded to the tribunal.

2. The Respondent is the Republic of Guinea, represented by the State Judicial Officer, electing domicile at PO Box 1005, Conakry, Republic of Guinea (the “Respondent” or “Guinea”).

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

The Respondent is assisted and represented by:

Laurent JAEGER, Esq.  
Romain SELLEM, Esq.  
Pascal AGBOYIBOR, Esq.  
ORRICK RAMBAUD MARTEL  
31, Avenue Pierre 1er de Serbie  
75782, Paris, Cedex 16  
France

and

Mamadou TRAORE, Esq.  
Edasso Rodrigue BAYALA, Esq.  
MAMADOU S. TRAORE  
11 Place Naba Koom.  
11 PO Box 721 CMS Ouagadougou  
BURKINA FASO

Their powers, dated November 30, 2011, were forwarded to the tribunal.

**THE ARBITRAL TRIBUNAL**

3. The arbitral tribunal is made up of:

Juan Antonio CREMADES, Esq.  
Calle Antonio Maura, No. 10  
28014 Madrid,  
Spain

arbitrator appointed by the Claimant;

Eric TEYNIER, Esq.  
SCP Teynier, Pic & Associates  
56, rue de Londres  
75008 Paris  
France

arbitrator appointed by the Respondent;

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No. .... Date.....

Professor Ibrahim FADLALLAH  
61, rue la Boétie  
75008 Paris  
France

President of the arbitral tribunal, appointed jointly by the two Co-arbitrators.

The Common Court of Justice and Arbitration of OHADA confirmed the appointment of Messrs. Juan Antonio Cremades, Eric Teynier and Ibrahim Fadlallah by decisions rendered respectively on November 28, 2011 (No. 65/2011), December 7, 2011 (No. 68/2011) and January 25, 2012 (No. 001/2012), in accordance with articles 2 and 3 of the Arbitration Rules (hereinafter Rules).

With the agreement of the Parties, the arbitral tribunal appointed Mrs. Marie SFEIR SLIM Secretary of the arbitral tribunal.

**GENERAL OVERVIEW**

4. On September 22, 2008, the Republic of Guinea signed a *“Concession Agreement for the Container Terminal of the Port of Conakry, its expansion and the development of a railway station.”* (hereinafter the Concession Agreement or the Concession). Amendment No. 1 to this concession was signed on November 7, 2009.

By decree of March 8, 2011, signed by the new President, Mr. Alpha CONDE, the Republic of Guinea terminated this concession *“for failure by the Concessionary to fulfill its obligations” “with immediate effect”*. The Concession was immediately awarded to the Bolloré Group.

This dispute results from the termination of the Concession Agreement.

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**ARBITRATION CLAUSE**

5. Article 31 of the Concession Agreement stipulates:

*“This clause will survive the termination of the agreement.*

*The OHADA treaty and its subsequent uniform acts apply to this agreement.*

*All disputes or differences arising from this agreement or its amendments will be settled amicably.*

*If no amicable settlement can be reached within 3 (three) months following the dispute, the Parties may resort to arbitration in the manner stipulated below:*

*The claim, dispute or difference will be permanently and irrevocably settled through arbitration proceedings subject to the Arbitration Rules of the Common Court of Justice and Arbitration of the OHADA (“The CCJA Arbitration Rules”).*

*The arbitration commission will be made up of 3 (three) arbitrators, one appointed by the Grantor, the second by the Concessionary and the third by mutual agreement of the two arbitrators. If a Party does not appoint an arbitrator within thirty (30) days of receipt of a request to do so from the other Party, or if the two arbitrators cannot agree on the selection of the third arbitrator within thirty (30) days (of the appointment of the last arbitrator to be appointed), the Common Court of Justice and Arbitration will substitute for the Parties in accordance with the CJA arbitration rules.*

*Each of the Parties will bear the cost of the arbitrator it appoints. The other costs incurred for arbitration will be shared equally by the Parties.*

*The arbitration will be conducted in French in Abidjan, Republic of Côte d’Ivoire.*

*The Granting Authority expressly waives claiming any sovereign immunity for itself and for its property in order to evade the enforcement of an award rendered by an arbitration commission set up in accordance with this clause.”*

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**PROCEEDINGS**

6. A request for arbitration was submitted by GETMA INTERNATIONAL to the General Secretariat of the Common Court of Justice and Arbitration (CCJA) of OHADA on May 10, 2011. It appointed Juan-Antonio CREMADES SANZ-PASTOR, Esq. as arbitrator.

This request was sent to the Ministers of Transportation and of Public Works on May 10, 2011, and to the Guinean State on May 26, 2011.

7. The Republic of Guinea did not answer the request for arbitration, but on December 1, 2011, appointed Eric TEYNIER, Esq., as arbitrator.

8. The tribunal was set up as indicated (above No. 3).

9. The CCJA sent the arbitral tribunal the case file on January 27, 2012 and informed the Parties, on the same day, that the tribunal had been set up and referred the case by reference to article 8, paragraph 2, of the Rules.

10. The Parties' attorneys sent the Arbitral Tribunal their respective powers on the dates indicated earlier.

11. In accordance with article 15 of the Rules, a first hearing was held in Paris on March 12, 2012, in the presence of the Parties and the arbitrators, in the chambers of the President of the arbitral tribunal. During this hearing, a first meeting report, drawn up in accordance with article 15 of the Rules of Arbitration of the Common Court of Justice and Arbitration (CCJA) of OHADA dated March 11, 1999, was signed. On the same date, a projected Calendar of the Proceedings was drawn up.

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12. The report of the First Meeting states that this arbitration is governed by the provisions of Title IV of the OHADA Treaty, the Rules of arbitration of the Common Court of Justice and Arbitration of the OHADA of March 11, 1999, the Rules of Procedure of the Court and their annexes. It contains a summary presentation of the Parties' claims and requests. It confirms, in particular, that the seat of arbitration is Abidjan, Republic of Ivory Coast, but states that hearings and meetings may be held in any location that the tribunal deems advisable, that the language of arbitration is French, that the law applicable to the Concession Agreement is the OHADA Treaty and its subsequent uniform acts, as well as the laws, regulations and agreements in force in the Republic of Guinea. It also stipulates that the tribunal will apply the Rules of the CCJA of OHADA of March 11, 1999 to the proceedings. If these rules do not address an issue, the tribunal will apply the rules it deems appropriate.

13. The Claimant filed the following written submissions, accompanied by exhibits (C1) to (C256):

- a. A Statement of Claim on June 18, 2012;
- b. A Statement in reply dated January 7, 2013;
- c. A Statement in response, limited to the counterclaim on April 22, 2013;
- d. An additional PWC report concerning the damages (C234), on April 30, 2013;
- e. A summary statement of claims on July 1, 2014;
- f. A statement of expenses and costs on July 26, 2013, as well as the addition to this statement of expenses on December 20, 2013.

14. The Respondent filed the following written submissions, accompanied by exhibits (R1) to (R107):

- a. A statement in response and counterclaim, on October 18, 2012;
- b. A rejoinder concerning the principal requests and reply concerning the counterclaims on March 24, 2013;
- c. A summary statement of claims on July 1, 2013

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- d. A statement of expenses and costs on July 26, 2013, as well as the addition to this statement of expenses dated December 27, 2013, rectified by letter dated December 27, 2012.

Exhibit R 107 (see below No. 63 and s.) was also the subject of an exchange.

15. Concerning the discovery process, the Parties filed the following written submissions, during the proceedings:

a. The Claimant:

- i. A letter dated November 3, 2012;
- ii. A letter dated November 7, 2012 with exhibits C57 and C169;
- iii. A response to the Respondent's application for production of documents dated November 21, 2013, with exhibits C170 to C180;
- iv. An application for production of documents on November 30, 2012;
- v. A rejoinder to the application for production of documents dated December 5, 2012, with exhibits C181 and C182;
- vi. A letter dated December 17, 2012, confirming that GETMA INTERNATIONAL no longer has any access to the documentation relative to Terminal 5M (Luanda) in which it transferred its interest on December 5, 2011 with exhibit (C183);
- vii. A first application for production of documents, dated December 21, 2012;
- viii. A reply to its first application to produce documents on January 7, 2013;
- ix. A response to the Respondent's letter of February 1, 2013 dated February 14, 2013;
- x. A letter dated April 4, 2013;
- xi. A response to the application to produce exhibit (C231), on May 24, 2013;
- xii. A letter related to the production of documents from the bid file, on June 18, 2013;
- xiii. A letter dated June 25, 2013, accompanied by exhibits (C236 ) to (C256);

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b. The Respondent

- i. An application to produce documents on November 5, 2012;
- ii. A response to the Claimant's application to produce documents dated November 28, 2012
- iii. A response to the Claimant's application to produce documents dated December 28, 2012;
- iv. A rejoinder to the Claimant's first application to produce documents, on January 11, 2013;
- v. A letter with production of exhibits (R50), (R51) and (R52), on February 1, 2013
- vi. A letter dated February 27, 2013, with exhibit (R52) in its entirety and (R31) legible;
- vii. A response to the Claimant's letter of April 4, 2013, dated April 5, 2013;
- viii. An application to produce exhibit (C 231) relating to the financial situation of the NECOTRANS Group, on May 23, 2013;
- ix. A response to the letter relating to the production of documents from the bid file, on June 21, 2013.

16. During the proceedings, the Claimant sent the arbitral tribunal a copy of the award concerning the competence of the arbitral tribunal formed under the authority of the ICSID, dated December 29, 2012 (Exhibit C 184). At the request of the arbitral tribunal (PO No. 3), the Parties sent their respective comments concerning the ICSID decision, on January 17 and March 24, 2013 (Rejoinder).

17. In order to organize the proceedings, and particularly the production of exhibits, eight procedural orders were issued and signed by the President of the arbitral tribunal following consultation of the co-arbitrators.

18. By procedural order No. 1 dated November 7, 2012, the arbitral tribunal organized the production of the exhibits requested by the Republic of Guinea, giving the Parties deadlines for producing the

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exhibits and comments.

19. By procedural order No. 2 dated December 10, 2012, the arbitral tribunal, after having examined the respective positions of the Parties, ruled on the application to produce exhibits filed by the Republic of Guinea and ordered GETMA INTERNATIONAL to produce the contracts potentially signed by it or by another company of the NECOTRANS Group for the design, funding and construction of Terminal 5M Luanda (Angola) or to indicate that these documents do not exist or are not under its control. The tribunal also noted that GETMA INTERNATIONAL agrees to request authorization from MSC to produce the contracts signed under and as follow-up to the MOU in §12 of its rejoinder of December 5, 2012, and the proposal of GETMA INTERNATIONAL to write to MSC or to EUROPE TERMINAL in order to ask them to produce any relevant document to justify their role in certain terminals mentioned by GETMA INTERNATIONAL in §38 of its response of November 21, 2012.

20. By procedural order No. 3 dated January 4, 2013, the arbitral tribunal established that the discovery process was continuing and gave the Parties a deadline for their pleadings concerning the decision on the competence of the tribunal set up under the authority of the ICSID of December 29, 2012.

21. By procedural order No. 4 dated January 22, 2013, the arbitral tribunal, after having examined the Parties' respective positions, ruled on GETMA INTERNATIONAL's application to produce exhibits and ordered the Republic of Guinea to produce: the Report of the World Bank audit performed by magistrates of the French Government Accounting Office; all the legal opinions issued concerning the technical assistance agreement, the Bolloré Agreement, the Bolloré Amendment or their respective drafts; all the opinions/technical, financial and economic analyses issued or performed concerning the feasibility of the Bolloré bid; the documents from the technical and legal departments tending to justify the termination of the concession agreement; the opinions of the technical and legal departments that formed the basis for President Alpha Condé's decision to terminate the Agreement and, finally, a complete version of the

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technical note of the Autonomous Port of Conakry (PAC) of September 15 and 16, 2008 (R19), a legible version of exhibit (R31) and a signed version of exhibit R17, or to indicate that these documents do not exist or are not under its control.

By procedural order No. 5 dated April 8, 2013, the arbitral tribunal, given that the Republic of Guinea's rejoinder of March 25, 2013 included important new evidence likely to play a role, granted GETMA INTERNATIONAL an additional deadline to produce the exhibits relating to the damages and gave the Republic of Guinea a deadline for producing any potential response. The deadline for producing the list of witnesses and experts for the hearing of May 27-29, 2013 was set as May 2, 2013. This list was sent by GETMA INTERNATIONAL on May 2, 2013 and b the Republic of Guinea on April 3 and May 2, 2013.

22. By procedural order No. 6 dated May 29, 2013, the arbitral tribunal rejected the Republic of Guinea's application to produce exhibit (C231) in its entirety due to its confidential nature and the lack of relevance of the period that it covers for the resolution of the dispute, as explained in procedural order No. 6.

By procedural order No. 7, dated May 30, 2013, the arbitral tribunal set a new schedule for the production of summary statements of claim and for the hearing

23. Witnesses and experts were examined in Paris on May 27, 28 and 29, 2013. Mrs. Julie MANGIANTE, Messrs. André WILTZER, Grégory QUEREL and Sory CAMARA, as well as the experts Mrs. Dominique PERRIER and Mr. Jean-Luc GUITERA were examined. The witnesses were examined and cross-examined separately, and then the expert witnesses were examined and cross-examined together, in each other's presence, and confronted concerning the same issues. All the witnesses answered the arbitral tribunal's questions. Several procedural issues were raised during this hearing. A Record and a Transcript were drawn up.

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24. A hearing was held in Paris on July 8, 2013. The Parties' counsel presented their arguments. Several procedural issues were raised during this hearing. A Record and a Transcript of this hearing were drawn up.

When asked by the President at the end of the hearing, the Parties stated that they had been able to express themselves fully and that they had no criticisms or reservations to make concerning the regularity of the arbitral proceedings (see Transcript, July 8, 2013, p. 84, l. 24 and 27).

A final hearing was held in Paris on December 16, 2013, devoted to examining Mr. Steven Fox and to the comments of the Parties' counsel related to this examination. This hearing gave rise, for its organization, to three procedural orders Nos. 8, 9 and 10 (see below. No. 63 and following). A transcript of the hearing was drawn up.

When asked by the President at the end of the hearing, the Parties also confirmed that they had no objection concerning how the proceedings had been conducted.

By Procedural Order No. 11, dated January 8, 2014, the Arbitral Tribunal decided to reserve its decision on the Republic of Guinea's application to obtain a 4-month period to gather evidence of the corruption it alleges, to present new evidence and to modify its requests subsequently. By this same order, it closed the proceedings by reference to article 15.4 of the CCJA Rules (OHADA).

Following receipt of the order closing the proceedings, the Respondent asked the Arbitral Tribunal by letter dated January 15, 2014, to reconsider its decision to close the proceedings on the ground that this closure was premature and deprived the Republic of Guinea of the possibility of producing evidence that was determining for its defense.

By letter dated January 21, 2014, the Claimant protested the Republic of Guinea's unfair behavior contrary to the CCJA arbitration rules of procedure on the ground that this application seriously

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disregards the terms of Procedural Order No. 11. The Claimant also noted, in this letter, that the Respondent obtained authorization to produce all the exhibits it wishes through Procedural Order No. 8, that it only produced a single exhibit (R 107) on the basis of which a hearing was held on December 16, 2013 during which Mr. FOX was examined. It recalled that at the end of this hearing, the Respondent stated that it had “*no comments or objections of any kind to make concerning how the proceedings were conducted.*”

Pursuant to article 23 of the CCJA (OHADA) Rules, a draft final award was sent by the Arbitral Tribunal to the General Secretariat of the CCJA on January 13, 2014.

By decision dated March 31, 2014, the Common Court of Justice and Arbitration of the OHADA decided, following deliberation during its Plenary Session of March 27, 2014, to extend the initial 90-day deadline for drafting and signing the award by two months, beginning on April 8, 2014.

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<b>FACTS</b>
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25. The facts presented here are intended to ensure comprehension of the dispute. They will be completed later as needed for the purposes of discussion.

26. By Agreement dated September 1, 1992 (C 32), the Société Nationale du Port Autonome de Conakry [Autonomous Port of Conakry], a public industrial and commercial establishment created by Decree of February 17, 1988, granted Conakry Terminal Services (CTS), a local consortium of stevedore operators, the infrastructures of the Conakry Container Terminal (CT) that dated from the beginning of the century.

27. To promote the expansion of the Guinean economy, a third port development project was launched in 1997 by the Autonomous Port of Conakry. The objective was to improve the positioning of the Port of Conakry compared to competing ports (Dakar, Abidjan), particularly by attracting clients from neighboring countries without any maritime access (Mali; Burkina Faso). To do that, it was necessary to improve the port's storage capacities and operating conditions. The termination of the loan agreements by the institutional funding agencies as a result of the instability of the situation in the country led to the decision to grant an operating concession for the Container Terminal accompanied by an obligation for the Concessionary to finance the construction work.

On February 13, 2008, the Council of Ministers of the Republic of Guinea decided to launch a call for bids for "*work item No. 1 pertaining to the expansion of the Container Terminal.*" The Autonomous Port of Conakry was assigned the job of developing the Specifications (R 15). During the first half of March 2008, a call for expression of interest was initiated by the Ministry of Transportation of the Republic of Guinea to identify the candidates likely to participate in the call for bids. It was intended "*exclusively for candidates with lengthy and solid experience in designing, financing, building, operating and maintaining container terminals.*" (C 36).

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28. GETMA International responded favorably to the call for expression of interest on March 28, 2008, stating in its transmittal letter that it was sending:

- \* *“the letters of intent of the client and partner ship owners and the NECOTRANS brochure;*
- \* *the commitment to set up a company organized under Guinean law whose activity will be devoted to the expansion and management of the container terminal.” (C 37).*

An enclosed document introduced GETMA. It included a letter on Mediterranean Shipping Company S.A. (MSC) letterhead stationery addressed to the General Manager of GETMA. This letter indicated that the planned concession of the CT of the Port of Conakry came within the framework of the partnership between GETMA and MSC. It stated:

*“This partnership covers all the areas of competence and eligibility specifically required for this project (technical assistance, consulting, designs, organization, implementation, etc.).*

*We authorize you to mention and present MSC in your final bid as jointly and severally liable partner of GETMA International in accordance with the Bidding Terms and Conditions (Article 4).” (C 38).*

29. GETMA International was informed that it had been short-listed and was invited to submit a bid on April 7, 2008 by the General Manager of the Autonomous Port of Conakry (C 40).

Three other groups were short-listed:

- Africa marine (Group maritime TCB);
- Bolloré;
- Maersk (APM terminal)

The bid opening was held in the presence of the bidders’ representatives on July 31, 2008 by the National Commission for Major Supply Contracts. This Commission was made up of representatives of various Ministries and administrations (Economy and Finance; Plan and Cooperation; Transportation; Administration and Control of Large-Scale Projects) as well as two members of the Autonomous Port of Conakry. During the session, the President of the Commission recalled the objectives of the project, consisting in:

*“creating the conditions so that the Port of Conakry can i) cope with the development of the*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*national economy by taking the mega mining projects into account, ii) capture a large share of the market of landlocked countries, particularly the Republic of Mali and iii) be an effective transshipment hub in the sub-region.” (R 17).*

30. The National Commission for Major Supply Contracts selected GETMA International as provisional successful bidder. The Minister of Transportation of the Republic of Guinea informed GETMA of its selection by letter dated August 27, 2008. It invited GETMA to begin negotiations the following September 2 in view of signing the Concession Agreement.

The negotiations took place in Conakry between representatives of GETMA International, various companies of the NCT NECOTRANS Group and Consultants, on the one hand, and representatives of various ministries of the Republic of Guinea, of the Presidency of the Republic and the Autonomous Port of Conakry, on the other.

On September 19, 2008, the Parties were in agreement concerning the stipulations of the Concession Agreement for the Container Terminal of the Port of Conakry, its expansion and the Development of a Railway Station.

Mr. TALBOT, Chairman of the Board of Directors of NCT NECOTRANS, itself President of GETMA International, signed the Agreement on September 22, 2008 (C 2). Mr. Cheikh TOURE, in his capacity as Minister of Transportation, signed the Agreement in the name of the Guinean State. The Agreement was filed with the records of Moussa SY SAVANE, Esq., a notary in Conakry, on September 23, 2008 along with the copy of the check for €7,500,000 to the order of the Public Treasury of the Republic of Guinea to be written when the Agreement was signed (C 126). This check represented the first half of the agreed upon entrance fee.

31. The entry into effect of the Agreement is, according to article 39, subordinated to the satisfaction of various conditions precedent within 90 days following its signing.

32. In accordance with its article 7, an operating company for the Container Terminal was to be set up in Guinea and controlled by GETMA International for a period of at least fifteen years.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

Therefore, as a first step, on November 12, 2008, GETMA International and NCT NECOTRANS created the French company GETMA International Investissements, held respectively at 51% and 49% by the founding companies (C 112). GETMA International Investissements and TRANSAFRICA (itself held at 65% by GETMA International) set up the Société du Terminal à Conteneurs de Conakry [Conakry Container Terminal Company] (STCC) a Guinean company of which they respectively held 95 and 5% of the capital, on November 20, 2008.

Since all the other conditions precedent stipulated in article 39 of the Agreement had been satisfied, the representative of the Minister of Transportation countersigned the letter recapitulating the satisfaction of the conditions on December 16, 2008<sup>1</sup> (C 47). The Agreement took effect on this date.

33. Even before the Agreement took effect, GETMA's selection and the contents of the Agreement were subject to sharp criticism in the press (R 21 to R 26), reports (R 29; R 30) and internal Government correspondence (C 49).

34. On December 22, 2008, the President of the Republic of Guinea, Mr. Lansana CONTE, died. The next day, the Government was dissolved and the Constitution was suspended. A National Council for Democracy and Development was established by the members of the Army. On December 24, 2008, Captain Moussa DADIS CAMARA was named President of the Republic.

35. The day Mr. Lansana CONTE died, the Minister of Transportation had sent NCT NECOTRANS a letter indicating that the Council of Ministers had approved the Agreement signed by it and the State. However, the Minister stated, the Council "*instructed the Department of Transportation to meet with the Port of Conakry in order to take certain comments and suggestions made after the Agreement was signed into account.*"

<sup>1</sup> The handwritten notes predates the printed note by one day.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

A commission was therefore established and a working meeting with NCT NECOTRANS was envisaged. In the meantime, the Minister of Transportation wished “to defer the effective date of the Agreement to allow the Council of Ministers to confirm the results of the work of this Commission.” (C 51).

On December 31, 2008 and January 2, 2009, the Board of Directors of the Autonomous Port of Conakry met during an extraordinary session. Mr. CHALLOUB was absent, “[his] presence [having] been deemed inexpedient for the majority of votes by the directors present given the agenda.” Drawn up by Mr. Guillaume CURTIS, representative of the Ministry of Mines, replacing the Chairman, the minutes note:

*“The extraordinary session of the BD of the PAC, following deliberation, decides to purely and simply cancel the concession agreement for the terminal of the Port of Conakry and strongly recommends to the competent authorities that the concession process for the Container Port of the Port of Conakry be resumed.”* (C 53).

A Commission to re-examine the Agreement was created on January 9, 2009 by President Dadis Camara in order to re-examine the Agreement, Then, by Decree No. 009, on the declared date of January 14, 2009, without GETMA having been notified, the President of the Republic decreed:

*“Any application of the agreement relative to the construction of the Container Terminal of the Autonomous Port of Conakry and any legal proceedings to cancel this agreement are suspended until further notice.”* (C 56).

On March 26, 2009, the Commission submitted its report, which concluded with a request that the Grantor urgently invoke article 37 of the Concession to obtain its modification (C 169).

The suspension was lifted by Presidential decree on April 9, 2009. The General Director of the Autonomous Port asked GETMA “to take all necessary steps to effectively begin [its] activities at the Container Terminal” (C 61). However, the Container Terminal was not effectively made available until June 1, 2009 (C 63).

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No. .... Date.....

36. Amendment No. 1 to the Agreement was signed on November 7, 2009. In particular, it adjusted the time frames stipulated in the Agreement:

*“Aside from those relating to events that have already occurred, all the time frames expressed in the Concession Agreement and in all the documents that make up the annex or the addition, particularly the specifications and the technical and financial bid, begin running for the deadline specified in the Concession Agreement as of the date Amendment No. 1 is signed (the “Amendment Date”).*

*Therefore, all deadline relating to events that have not occurred on the Suspension Date begin running, for the entire length of time expressed in the Concession Agreement, as of the Amendment Date.”* (C 4. Art. 3).

The amendment provided for the Grantor’s potential stake in the capital of STCC:

*“The Parties agree that, in compliance with article 7 of the Concession Agreement and article 6 of the Specifications, the Grantor may acquire a fifteen percent (15%) stake in the capital stock of STCC in accordance with the conditions set forth by the provisions of the Uniform Act on Commercial Companies and Economic Interest Groups and the provisions of the articles of association of STCC.”* (C 4. Art. 5).

Various stipulations, without any impact on the dispute at issue here, were added to the Amendment. It was declared effective immediately (C 128).

37. In December 2009, Moussa Dadis CAMARA, the victim of an assassination attempt, was replaced as President of the Republic by General SEKOUBA KONATE.

The presidential elections organized by him led to the election of Professor Alpha CONDE in December 2010.

On January 4, 2011, the new Minister of Transportation summoned the concessionary to a meeting to “review the Agreement” (C 71). During the meeting, held on January 14, 2011, GETMA presented the steps of the bidding procedure for the Terminal expansion work (C 72 and R 53).

The Director of Technical Services of the Autonomous Port of Conakry, asked to prepare a report in view of the revision and renegotiation of the Agreement or its termination, concluded, on February 9, 2011,

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

that the work to be done had been delayed. For reasons of greater effectiveness, he declared that termination of the Agreement proved to be necessary (R 39 and C 80). The meeting of the Board of Directors of the PAC, held on February 11, 2011, made the following recommendation in particular:

*“The Board supports the termination of this Agreement and recommends that the PAC initiate, when the time comes, discussions with the company that was ranked 2<sup>nd</sup> following the bidding procedure that had been held for this project, pursuant to the application of the findings of the legal experts.” (C 81).*

38. Persistent rumors that the Concession was being reconsidered proved to be true: by decree dated March 8, 2011, President Alpha CONDE decided:

*“Article 1: Agreement No. 2008/001/of September 22, 2008 and Amendment No. 1 of November 7, 2009, granting a concession agreement for the Container Port of the Autonomous Port of Conakry, its expansion and the development of a railway station, signed by the Guinean State and the company GETMA International SAS are terminated for non-fulfillment of the Concessionary’s obligations.*

*Article 2: This Agreement and its Amendment are terminated with immediate effect and without compensation, at the expenses, risks and faults of GETMA International SAS.*

*Article 3: The Guinean State reserves its rights to refer the matter to the competent courts in order to obtain reparation of its damages and the pronouncement of all the legal and regulatory provisions in force.” (C 11).*

39. Based on article 32.5, paragraph 2, of the Agreement, GETMA proceeded by bailiff’s process dated March 8, 2011 with a “preliminary notification of change of law” that received no response (C 17).

On the same day, the President of the Republic requisitioned the employees, equipment, facilities, buildings and property of GETMA and STCC. All employees of these companies were prohibited, under supervision of the Guinean armed forces, from entering the Terminal facilities and their offices.

On March 18, 2011, GETMA received official notification of the termination and requisition decrees. It sent the Minister of Public Works and Transportation notice of protest served on March 22, 2011 (C 82). The protest received no response.

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INCOMING MAIL  
No. .... Date.....

40. In the meantime, on March 10, 2011, the Autonomous Port of Conakry and the company SDV Guinée, represented by its General Manager, Mr. VAN HOEVEL, had signed a Technical Assistance Agreement by which SDV would assist the Autonomous Port, to which the granted property had reverted, with managing the public service (C 84).

Finally, on March 11, 2011, still before GETMA was notified of the termination of the Agreement, the Autonomous Port of Conakry and the French company S.A. BOLLORE signed a “*Concession Agreement for the Container Terminal, the Expansion of the Container Terminal at the Port of Conakry, a storage platform and a dry Port in KAGBELEN*” (C 85), amended by an amendment dated April 26, 2011 (C 87).

GETMA vainly reiterated its protests (C 18; C 88; C 93).

41. On May 9, 2011, GETMA had a “*Final Change of Law Notification*” delivered to the Minister of Transportation. Referring to the facts and documents mentioned above, and to formal notice dated May 4, 2011, GETMA:

“1. **officially notes that:**

*A The Grantor has not remedied the consequences of the Change of Law and Acts of Public Authority within the sixty (60) day deadline following the preliminary Notification;*

*B The Grantor has not done its utmost to minimize the effects of the Change of Law and Acts of the Public Authority;*

*C The Grantor has refrained from proceeding with an amicable settlement of the dispute arising from the Termination Decree;*

*D The Grantor has refrained from paying the Concessionary the compensation set forth in article 32.3 of the Concession Agreement.*

2. **sends to the Grantor**, in accordance with the provisions of article 32.5, paragraph 4, of the Concession Agreement, the Final Change of Law Notification.

3. **iteratively gives the Grantor notice** to pay the Concessionary immediately the compensation set forth in article 32.3 of the Concession Agreement without prejudice to all interest and other amounts owed.

4. **expressly reserves** all of its rights.”  
(C 19).

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MAY 26, 2014  
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No. .... Date.....



42. As all attempts to reach an amicable settlement had failed (C 12), GETMA International resorted to arbitration. It filed its request with the CCJA on May 10, 2011.

43. At the same time, on September 29, 2011, GETMA International, NCT NECOTRANS, GETMA International Investissement and NCT Infrastructure et Logistique filed a request for arbitration against the Republic of Guinea with the ICSID. By award concerning competence dated December 29, 2012, the arbitral tribunal decided:

*“1. This tribunal is not competent to rule on the effects of the termination of the Concession Agreement with regard to the four Claimants.  
2. This tribunal is competent to rule on the effects of the requisition and other alleged violations of the Investment Code that do not come within the framework of the Concession Agreement with regard to the four Claimants.*

### THE CONCESSION AGREEMENT

44. Only the stipulations of the Agreement useful to understanding and resolving the dispute between the Parties are presented here.

The documents making up the concession are, in order of priority (Art. 4):

- 1/The Concession Agreement, its annexes and amendments;
- 2/the Specifications and their annexes;
- 3/the technical and financial bid.

45. According to article 1 of the Agreement:

*“Through this Agreement, the Guinean State grants exclusively in the Perimeter Granted, to the Concessionary, who accepts, the concession of the public service relating to the management and operation of the container terminal of the Port of Conakry (hereinafter “the Concession”) with as obligation for the Concessionary to proceed with:*

- *its restoration, its equipment and its maintenance;*
- *its expansion, through the construction of a new 300 (three hundred)- meter long quay with a depth of 13 (thirteen) m Z.P. in front of the quay and the development of an area of around 120,000 m<sup>2</sup> (one hundred twenty thousand square meters);*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

- *the development of a storage platform of approximately 11,000 m<sup>2</sup> (eleven thousand square meters) near the railway station.”*

The management and operating activities granted are detailed in article 6. In substance, they concern the unloading of containers from ships, storage, forwarding by sea, road or rail, stripping and stuffing.

The obligations to improve the infrastructures mentioned in article 1 consisted, in substance, in modernizing the existing terminal (A in the illustration below) expanding its waterfront footprint (B on the illustration below) and in creating a large storage area near the railway station (C in the illustration), two kilometers away. The additional business that the improvement and the expansion of the Terminal were to generate called for more storage capacity:

[See original for illustration]

46. Article 7 required GETMA International to carry on the activities granted through a Guinean company to be set up:

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MAY 26, 2014  
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No. .... Date.....

**“7.1 Creation of the Operating Company**

*The Concessionary is required to set up a company to operate the Concession within a maximum of three months following the date the Agreement is signed (hereinafter “the Operating Company”).*

*This Operating Company must be a business corporation [société anonyme] organized under the laws of Guinea in which the Concessionary will exercise control.*

*The Grantor may acquire a stake in the capital of this company.*

*The Operating Company must have high skills as stevedore operator and shipping agent to carry out the Granted Activities, in accordance with the regulations in force.*

**7.2 Control of the Operating Company**

*The Concessionary is required to request the Grantor’s prior agreement for any change in the stake of the shareholders, the composition of its capital or the distribution of its voting rights likely to change the control of the Operating Company. In any event, the Concessionary must guarantee that it will hold a stake in the capital for at least fifteen years.”*

47. Various stipulations relate to the operation of the activities (art. 14, 17, 19 to 24).

The Agreement also contains significant financial obligations for the concessionary.

Article 13 concerns investments:

*“The Concessionary agrees to make the investments set forth in the Investment Program validated by the Parties to this Agreement.*

*The investment program includes:*

- *the firm investment program;*
- *the additional investment program*
- *and the conditional investment program*

*as defined in the Specifications, in annex 1 and in the technical and financial bid.”*

The firm investment program is the program of the technical and financial bid. The additional program commits the concessionary to investing in programs defined jointly with the grantor at the end of an

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initial 5-year period and by 5-year periods (Annex 1 of the Agreement; art. 9.1.2 of the Specifications). The conditional program comes under the technical and financial bid.

To ensure the execution of these investment programs, article 16.1 stipulates, under the title “*performance bond*”:

*“In order to guarantee the due performance of the firm Investment Program, the Concessionary will give the Grantor, prior to the Effective Date of this Agreement, a bank bond in the amount of 6,000,000 (six million) Euros issued by a first-rate local bank in accordance with the sample provided in annex 3.*

*The amount of the bond will be revalued after each investment phase recorded by notice of receipt and will represent a maximum of ten (10)% of the amount of the firm Investment Program still to be fulfilled.*

*The Grantor will be entitled, after written notice specifying the list of allegations against the Concessionary has had no effect for 60 (sixty) days, to call the bond mentioned above.*

*This bank bond is returned within 30 (thirty) days following the end of the firm Investment Program, at the written request of the Concessionary.*

*The additional and conditional Investment Programs will give rise to the establishment of performance bonds under similar conditions.”*

48. Article 15 provides for the payment of fees consisting of the “*entrance fee or operating fee for the Activities granted*” and the annual fee:

***“15.1 An entrance fee or operating fee for the Activities Granted***

*This fee is set at 15,000,000 Euros (Fifteen million Euros) payable as follows:*

- *50 (fifty)% when the Agreement is signed;*
- *50 (fifty)% six months at the latest after the date the Agreement is signed.*

***15.2 An annual fee consisting of a fixed part and a variable part***

***15.2.1 Fixed part***

*A fixed part, comparable to a fee for occupying port property, whose amount will be 10 Euros (Ten Euros) per m2 and per year for the port platform with existing berth and defined as such in*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*the list of Property Granted in article 3.2.1, as of the Effective Date of the Agreement;*

*A **fixed part**, comparable to a fee for occupying port property, whose amount will be 10 Euros (Ten Euros) per m2 and per year for the storage platform near the railway station and defined as such in the list of Property Granted in article 3.2.2, as of its service startup date;*

*A **fixed part**, comparable to a fee for occupying port property, whose amount will be **5 Euros (Five Euro)** per m2 and per year for the part of the container terminal expansion mentioned in article 3.2.2 as of its service startup date;*

*The corresponding fee is payable in advance, quarterly, no later than 30 (thirty) days following the date of receipt of the invoices. Fractions of quarters are billed on a prorated basis.*

### **15.2.2 Variable part**

*A **variable part of 10 Euros (Ten Euros)** per full and empty TEU (import, export, transit, transshipment) and per unit load or metric ton for other goods, except for the goods listed in annex 7 for which the fee in force at the commercial quay will be applied. The variable part is billed monthly in light of the information provided by the Concessionary, no more than 30 (thirty) days after the end of the month.*

*The payments must be made 8 (eight) days at the latest following the date the invoice is received.*

*The fee rates will be revised periodically in accordance with the conditions set in article 29 of this Agreement.*

*The Concession fees are to be distinguished for:*

- *the existing container terminal;*
- *the container terminal expansion;”*

Article 16.2 ensures the due fulfillment of these obligations:

*“In order to guarantee the due fulfillment by the Concessionary of the financial obligations of the Agreement that may become due pursuant to this Agreement, the Concessionary will provide the Grantor, before the Effective Date of the Agreement, with a bank bond in the amount of 110,000 (one hundred ten thousand) Euros, representing one-twelfth of the annual amount of the fixed fee set forth in article 15.2.1 of the Agreement, issued by a first-rate local bank in according with the template provided in Annex 4. This bond will be provided for successive 1 (one) year periods until the Agreement ends.*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*The amount of the bond set forth in the section above will be revalued annually at the proposal of the Monitoring Committee.*

*The Grantor will be entitled, following written notice specifying the list of grievances against the Concessionary, that has had no effect for 60 (sixty) days, to call the bond mentioned in the preceding section to obtain payment of all sums owed to the Grantor by the Concessionary pursuant to the financial obligations incumbent on it according to this Agreement.*

*This bank bond is returned within 30 (thirty) days following the end of the Concession, at the Concessionary's written request, after the accounts have been finalized and any potential disputes have been settled."*

49. Under the financial obligations, the concessionary was also to pay, in Guinean francs, fees on goods and parking fees at the Autonomous Port of Conakry (art. 15.3 and 15.4).

50. Article 18, "Late penalties," stipulates:

*"Penalties are applied in the following cases:*

- *Late payment of sums owed as Fixed Fee to the Grantor after the required deadline;*
- *Delay in starting the work detailed in the Investment Program set forth in Annex 1 and/or in the operational startup of the Concession.*

*The amount of late payment penalties will be equal to 1,500 (one thousand five hundred) Euros per day and may not exceed the sum of 90,000 (ninety thousand) Euros.*

*The amount of service startup penalties for the structures will be equal to 3,500 (three thousand five hundred) Euros per day and may not exceed the sum of 210,000 (two hundred thousand) Euros.*

*Late penalties will be owed by the Concessionary following written notice, detailing the list of allegations, sent to the Concessionary.*

*After that, article 32.2 of the Agreement will apply."*

51. The grantor, for its part, agrees to:

*"make available to the concessionary on the Effective Date of this Agreement all of the property, equipment and structures allocated to the operation of the Terminal." (art. 25, paragraph 1).*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

It guarantees the concessionary exclusive operation and possession (art. 26).

Finally, exercise by the Concessionary, particularly of control of compliance with the investment program, is included in its obligations along with the commitment to set up a Monitoring Committee with equal representation of the Parties to “*examine all issues relating to the performance of the Agreement and requiring consultation between the Parties*” (art. 28 and 29).

52. Article 31 relative to the settlement of disputes and differences stipulates that:

*“The OHADA Treaty and its subsequent uniform acts apply to this Agreement.”*

The arbitration clause that is stipulated in it was cited earlier (Above No. 5).

53. Article 32 concerns the termination of the Agreement. Four sections deal with or mention termination:

- termination by mutual agreement (art. 32.1);
- termination due to the concessionary’s fault (art. 32.2);
- termination due to the grantor’s fault (art. 32.2).

These three articles specify the conditions for termination, its implementation and its effects.<sup>2</sup>

54. Article 32-5 concerns “Changes of Law and Acts of Public Authority impeding the smooth operation of the Activities Granted.” It stipulates in particular:

*“In case of termination resulting from a Change of Law and Acts of Public Authority impeding the smooth operation of the Activities granted, the Concessionary will receive the compensation set forth in article 32.3 of the Agreement.”*

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<sup>2</sup> Article 32-4 concerns forfeiture of the concessionary’s rights in case of dissolution, court-ordered recovery or liquidation.

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MAY 26, 2014  
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No. .... Date.....

These stipulations are at the center of the arbitration proceedings. Their analysis will be expanded later.

<b>REQUESTS</b>
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55. The requests of the two parties evolved over the course of the proceedings. In their latest pleadings, the parties submitted the following requests.

GETMA INTERNATIONAL

56. GETMA asks the arbitral tribunal to:

***“Decide and rule that the termination of the Concession Agreement by the President of the Republic of Guinea is illegal and null and void;***

***Find that, because of the new Concession Agreement granted on March 11, 2011 to BAL, or to any other company of the Bolloré group, a return to the “status quo ante bellum” is now impossible:***

***Dismiss the counterclaim of the Republic of Guinea.***

***Order the Respondent to compensate the Concessionary for the damages suffered as a result of the termination of the Concession Agreement, and order it to pay the sum of €42,005,221 broken down as follows:***

- Lump-sum Termination Compensation	€20,884,966
- Termination compensation (relative to the Property Granted)	€3,616,394
- Compensation for the Entrance Fee	€14,201,096
- Compensation for repatriated employees	€172,874
- Compensation relating to invoices to be issued	€589,418
- Compensation relating to the property returned	€2,095,790
- Compensation relating to the contracts not terminated	€185,849
- Compensation relating to crisis management expenses	€258,834

***all with interest compounded annually at the Central European Bank rate plus one point as of March 9, 2011;***

***Award to the Respondent all expenses, costs and professional fees, particularly attorneys’ fees and other advisors’ fees borne by the Claimant for the Arbitration proceedings.”***

(Summary statement of claim of July 1, 2013)

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GETMA withdrew its initial request to this tribunal for reparation of lost profits (Transcript, July 8, 2010, p. 15, l. 13 and 14) The Respondent issued reservations.

REPUBLIC OF GUINEA

57. The Republic of Guinea asks the arbitral tribunal to:

*“Find and rule the immediate and uncompensated termination of the Concession Agreement for the Container Terminal of the Port of Conakry and of its Amendment No. 1 regular and justified;*

*Dismiss all of the requests made by Getma International against the Republic of Guinea; Order Getma International to assume all costs of these arbitration proceedings, including attorneys’ fees and all other expenses incurred by the Republic of Guinea for the needs of its defense.”*

(Summary statement of claim of July 1, 2013)

During the hearing of December 16, 2013, the Republic of Guinea also requested:

- a 4-month period to gather evidence of GETMA’s alleged corruption;
- the possibility of requesting at a later date authorization to submit new evidence and to modify the requests

58. The grounds and positions of the parties will be presented during the discussion.

**THE ISSUES UNDER DISCUSSION**

59. The issues to be resolved make it possible to identify the main lines of the Parties’ positions. Without going into detail, presented in the discussion (below), we can summarize the respective arguments of the parties as follows:

GETMA International asserts that the *“failures to fulfill the concessionary’s obligations”* referenced by

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No. .... Date.....

the Decree terminating the Concession Agreement are merely a pretext for the decision of the President of the Republic of Guinea to award the concession to a *“friend.”*

GETMA notes that the Termination Decree is a legal act imposed on it (Summary statement of claim No. 833) with immediate effect and without any possible return to the prior *status quo* because of the signing of a contract with a new concessionary. The direct effect of the Decree thus prevented the concessionary from fulfilling its contractual obligations. Based on this analysis, the Claimant applied the provisions of article 32.5 of the Agreement relative to *“Changes of Law and Acts of Public Authority impeding the smooth operation of the Activities Granted.”* It therefore proceeded with a Preliminary Notification of Change of Law, to which the Republic of Guinea did not respond, then with a final notification, after the 60-day period set forth in article 32.5.

Therefore, GETMA International requests the application of the stipulation of article 32.5, which states that:

*“...In case of termination resulting from a change of Law and Acts of Public Authority impeding the smooth operation of the Activities Granted, the Concessionary will receive the compensation set forth in article 32.3 of the Agreement.”*

It thus requested payment of the compensation listed in article 32.3 and compensation for violation of article 32.5, paragraph 3, which required the Grantor to minimize the effects of the Change of Law and of the Acts of Public Authority.

60. In the last version of its arguments, the Republic of Guinea justifies the immediate termination of the Agreement by the seriousness of GETMA’s behavior.

In fact, at the bidding stage, GETMA allegedly deliberately invoked a false partnership with MSC Europe Terminal and provided inaccurate financial information about its financial capabilities and the profitability of the project to favor its chances of being selected as the successful bidder. At the time of Amendment No. 1, it allegedly refrained from indicating its inability to raise the financing. The bidding procedure was thus manipulated.

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No. .... Date.....

These tactics constitute fraud that the Respondent invokes *in fine* solely for the purpose of strengthening the argument that GETMA International was unable to finance the expansion of the Container Terminal due to the lack of MSC's support. GETMA therefore allegedly failed to fulfill its investment obligations and delayed the expansion work for the terminal.

Given the seriousness of GETMA's behavior when the Agreement was signed and during its performance, termination without prior notification was justified and did not call for any compensation from the Respondent.

The Republic of Guinea has cited the corruption in view of obtaining the Concession from the start of the proceedings and returned to it in 2013 to ask for time to produce proof of the corruption invoked.

Alternatively, the Republic of Guinea contests the principle and/or the amount of the damages for which GETMA is requesting reparation.

61. After having indicated their agreement concerning the applicable law (see No. 12 above), the Parties evolved toward a disagreement concerning the application of the notion of State Contract.

62. The respective arguments of the Parties lead the arbitral tribunal to rule on:

- the corruption;
- the applicable law;
- the validity of the termination of the Agreement;
- the right to compensation;
- the amount.

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<b>DISCUSSION</b>
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**1. Concerning corruption**

63. The Republic of Guinea has, from the start of the proceedings, invoked an argument of corruption concerning the alleged illegality in the manner in which GETMA INTERNATIONAL won the Concession. In its latest written submissions, the Republic of Guinea does not seek the invalidity of the Concession Agreement either for fraud or corruption. In the same way, until its letter of November 4, 2013, the Republic of Guinea did not produce or offer to produce any proof of the alleged corruption.

64. However, on November 4, 2013, the Republic of Guinea sent a letter by which it reveals to the tribunal that it has obtained specific and detailed information and evidence relative to the acts of corruption that occurred at the time the Concession Agreement for the CT of the Port of Conakry was signed. It therefore asked the tribunal to suspend its deliberations, to authorize it to submit new evidence and to modify its request, if necessary. It also asked that the confidentiality of the information provided be protected and that a hearing relating to this issue be held.

65. By letter dated November 5, 2013, GETMA, after having refuted the allegations of corruption made by the Respondent, did not object to holding such a hearing, provided that it first received all of the evidence alleged by the Respondent that implicates the people involved in the acts of corruption by name.

66. On November 7, 2013, the tribunal, by Procedural Order No. 8, set deadlines for the parties for one to produce its evidence and for the other to comment on this evidence.

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67. By letter dated November 14, 2013, the Republic of Guinea provided an affidavit in English from Mr. Steven FX which reveals, according to the Republic of Guinea, a vast corruption scheme involving numerous participants (exhibit R 107). The French translation of Mr. Fox's affidavit was provided on December 3, 2013.

68. By letter dated November 29, 2013, GETMA stressed the lack of novelty of the evidence provided by the Republic of Guinea, the lack of credibility of Mr. Steven FOX's testimony, the unlikely nature of the content of exhibit R 107, the falseness of the belated allegations of corruption and their clearly dilatory aim and asked the tribunal not to grant the request of the Republic of Guinea and not to allow it to change its requests.

69. On December 2, 2013, the tribunal decided, by Procedural Order No. 9, that a hearing would be held on December 16, 2013, devoted solely to exhibit R 107, and charged the Parties with organizing this hearing.

70. By letters dated December 6, 2013, the Parties submitted their disagreements concerning the organization of the hearing of December 16, 2013 to the tribunal.

71. By Procedural Order No. 10 dated December 6, 2013, the tribunal organized the hearing of December 16, 2013.

72. By letter dated December 14, 2013, the Republic of Guinea informed the tribunal that in connection with the criminal investigation opened in Guinea as a result of Mr. FOX's investigations, the judicial authorities of the Republic of Guinea had affidavits produced from Messrs. CONDE and KOUROUMA, acknowledging the acts of corruption alleged against them. It asked the tribunal for authorization to produce this new evidence during the hearing of December 16, 2013.

73. A hearing was held on Monday, December 16, 2013, at 2:30 pm at the ICC Hearing Center in Paris. It was devoted to the examination of Mr. Steven FOX and to the examination of exhibit R.107.

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74. The tribunal has now been asked to deal with the following request of the Republic of Guinea:
- \* a 4-month period to gather the evidence that will no doubt appear concerning corruption;
  - \* the possibility of requesting at a later date authorization to present new evidence and to modify its requests.

To answer this question, the tribunal will examine the relevance of the new evidence (1) and the belatedness of the request made by the Republic of Guinea (2).

**A. The relevance of the evidence**

75. GETMA vigorously contests the alleged evidence produced. The Republic of Guinea itself admits that its evidence needs to be completed (Transcript, December 16, 2013, p. 19, l. 34 – 35) and relies on the credibility of Mr. Steven FOX (Transcript December 16, 2013, p. 21, l. 12 to 46).

76. The tribunal notes that Mr. Steven FOX was not a direct or indirect witness of the acts of corruption that he reports. He refers to unreported statements from witnesses, which he characterizes as direct or indirect and whose identity he refuses to reveal. He does not refer to any documents. He does not directly challenge GETMA and does not make any reference to any account it held that was used to make illegal payments. Now, the tribunal must judge by itself and not delegate its power to Mr. FOX, however credible he may be. The same applies to the adversarial principle and the right of the other party to ensure its best defense.

Mr. FOX's omissions do not make it possible to verify his sources, his methods and the content of the information he reports. They make his allegations unverifiable by the tribunal.

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No. .... Date.....

Exhibit R 107 does not make it possible to grant the slightest relevance to the particularly serious allegation of corruption. The same is true for the very last-minute affidavits proposed that the Republic of Guinea recognizes were prepared on December 13, for the hearing of December 16 (Transcript, December 16, 2013, p. 22, l. 15 to 23).

77. Under these circumstances, the tribunal must reject the requests of the Republic of Guinea in relation with the allegation of corruption.

**B. The belatedness of the petition**

78. As GETMA rightly points out, even though the issue of corruption has been raised since the start, the Republic of Guinea waited several months after the end of the hearings to submit new evidence to the tribunal.

GETMA also pertinently points out that, during discovery, it had requested several documents or items of information that were of interest only with respect to the issue of corruption, but that the Republic of Guinea had refused its cooperation.

79. However, above all, it is necessary to find that everything that is being produced today could have been produced before. Thus, Mr. Steven FOX was not contacted until October 4, 2013 (Transcript, December 16, 2013, p. 6, l. 5) and made his report a few weeks later (on November 14, 2013, 4:22 pm, New York time, Transcript, December 16, 2013, p. 11, l. 1 to 4). The statements dated December 13, 2013 could have been produced years earlier.

80. Delaying the production of evidence deemed important and that could have been produced within the normal time frame of the proceedings constitutes a breach of the proper administration of justice and the adversarial principle but does not necessarily demonstrate a deliberate intent to stall or a lack of procedural fairness. Granting the Republic of Guinea a four-month deadline would mean, in terms of

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respect for the right to a fair trial and regular exchange, an extension of the proceedings of close to one year. Accepting such a delay would amount to leaving the proceedings to the whims of one of the parties and depriving the other party of its legitimate right of access to justice.

81. The Republic of Guinea indicated that if it found evidence, it would be forced to submit a counterclaim for damages and/or invoke the invalidity of the Agreement. However, a counterclaim, when belated, does not justify freezing the principal request. A fortiori this is the case when this request is still potential. Finally, any counterclaim or objection of invalidity may be submitted separately in other proceedings if the Republic of Guinea feels that it has gathered the evidence to support it.

82. For all these reasons, the tribunal feels that it must reject the new requests.

### **C. Confidentiality of exhibit R 107**

83. The Republic of Guinea has requested that exhibit R 107 be kept confidential. GETMA feels that it cannot allow itself to be attacked without responding.

The tribunal feels that, insofar as exhibit R 107 is produced only in these arbitration proceedings, it is covered by the confidentiality of arbitration. It nevertheless reserves GETMA's rights of defense, which are basic rights.

### **II. Applicable law**

84. The Parties have devoted substantial developments to the applicable law even though, during the meeting held on March 12, 2010, both had accepted that:

*“In accordance with article 31 (2) of the Concession Agreement, the OHADA Treaty and its subsequent uniform acts apply to the concession agreement.*

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MAY 26, 2014  
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No. .... Date.....



*Furthermore, in accordance with article 5 of the Specifications, the Concession remains subject to the laws, regulations and agreements in force in the Republic of Guinea.”*

### **Position of the claimant**

85. The claimant, basing itself on an opinion issued by Professor Mathias AUDIT, maintains that the Concession Agreement at issue is an internationalized State contract whose termination cannot be governed by internal Guinean law. It cites in support a resolution of the International Law Institute (Athens, 1979; Rev. crit. DIP 1980.427), which states that, if such is their desire, the parties to a State contract may decide to exclude it from the exclusive application of a determined internal law, particularly for problems of contractual liability raised by the exercise by the State of its sovereign powers against a commitment that it made toward the co-contractor (C 202).

The desire to place the Concession Agreement under the State contracts regime results, according to the Claimant, from the express reference of the Agreement to the OHADA Treaty, coming under public international law, the wording of the *electio juris* clause, which gives precedence to the stipulations of the Agreement and relegates Guinean law to a subsidiary role and, above all, article 32.5 of the Agreement, which subjects the exercise of the State’s normative power to compensation.

The Parties thus agreed to apply the contractual stipulations and the principles of international law, including the principle of good faith and the principle “*venire contra factum proprium*.” The Claimant cites legal doctrine relating to international investment (C. McLACHLAN, L. SHORE, M. WEININGER, R. DOLZER and C. SCHREUER, E. GAILLARD) and case-law (Ioannis KARDASSOPOULOS v. GEORGIA (ICSID), SPP v. EGYPT (ICSID), INNARIS v UKRAINE, DESERT LINE PROJECT v. YEMEN (ICSID), FRAPORT v. PHILIPPINES (ICSID)).

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

86. For the Claimant, internal Guinean law can be found applicable only alternatively. In this case, the claimant recalls that internal law must be applied in compliance with the scope of application of the implementing laws and rules over time (Summary statement of claim No. 421-440).

**Position of the respondent**

87. The Republic of Guinea claims that article 17 of the CCJA Arbitration Rules establish the autonomy of the Parties concerning the determination of the law applicable to the merits of the dispute. This law was specified in article 31 of the Agreement, which stipulates that the OHADA Treaty and its subsequent uniform acts apply and in article 5 of the specifications, which subject the concession “*to the laws, regulations and agreements in force in the Republic of Guinea.*” This information was reiterated in section X of the arbitration agreement of March 12, 2012.

GETMA did not indicate any reservations concerning the designation of the applicable law when this agreement was signed. Also basing itself on the above-mentioned ILI Resolution, the Respondent stresses that the Parties are subject to the rules of law that they chose and may, in this regard, designate in the contract. The Resolution mentions the possibilities of choice: “*either one or several domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law.*” Now, the Agreement and the Arbitration Agreement do not refer to the principles of international law. GETMA therefore ignores the law expressly formulated – Guinean law – and privileges ignored general principles of the agreements concerning the applicable law.

The reference to the OHADA Treaty does not exclude Guinean law. The OHADA Uniform Acts are, in reality, directly incorporated into the internal law (Art. 10 of the OHADA Treaty) in the limited domain of business law. This is not a complete system of standards that could be substituted for Guinean law or internationalize the contract.

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MAY 26, 2014  
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No. .... Date.....

88. The Respondent cites the legal controversies relating to the State contract, which can be assimilated to an internal legal act to a “*third legal order*” or “*transnational order*” (Kanto, R 71) or a contract with no governing law (P. Mayer, C 148).

Furthermore, since the parties have a choice, it is unanimously accepted that it is the law chosen that must apply (E Gaillard, C 215).

89. Finally, the Republic of Guinea maintains that the argument relative to the State contract is a hollow debate: the termination of the Concession is based on GETMA’s serious breaches, at the time of the award and performance of the Agreement, and not on the procedural irregularities that GETMA indicates were “*committed by the one [the State] that seeks to profit from them.*”

**The arbitral tribunal**

90. The arbitral tribunal does not intend to deal with the controversial issue of the State contract for two decisive reasons.

- \* the stipulation of choice of law is clear (1)
- \* the notion of State contract is not necessary to the aim pursued by the party who invokes it (2).

**The stipulation of choice of law**

91. The stipulations relative to the applicable law are the following:

**Article 31 of the Agreement**

*“The OHADA Treaty and its subsequent Uniform Acts apply to this Agreement.”*

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MAY 26, 2014  
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No. .... Date.....

**Article 5 of the Specifications**

*“In addition to the stipulations of the Agreement and the requirements of these specifications, the Concession remains subject to the laws, regulations and agreements in force in the Republic of Guinea.”*

The above-mentioned stipulations clearly refer to Guinean law, whether this concerns the OHADA Uniform Acts that constitute pieces of uniform legislation incorporated in the internal law of the OHADA member states, or *“the laws, regulations and agreements in force in the Republic of Guinea.”* No other legislation, no other normative system is mentioned.

GETMA argued that if the parties had intended to subject the Agreement to Guinean law, the *electio juris* clause would have read as follows:

*“The Agreement is subject to the laws, regulations and agreements in force in the Republic of Guinea.”*

By specifically and as a matter of priority mentioning the stipulations of the Agreement and the requirements of the Specifications (*“In addition to the stipulations...”*), article 5 of the specifications simply takes into account the place granted to the contract by Guinean law itself. According to article 668, paragraph 1, of the Guinean Civil Code: *“Legally formed agreements serve as law for those who have made them.”* The wording of article 5 does not relegate Guinean law to a subsidiary position that would open the door to the priority application of principles governing State contracts.

Even assuming that there was the slightest ambiguity, the wording of article 31 of the Agreement, applicable as a matter of priority, would dispel it: this stipulation refers only to the OHADA Treaty and subsequent Uniform Acts that the Republic of Guinea rightly indicates are incorporated in internal Guinean law.

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MAY 26, 2014  
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No. .... Date.....

**The pointlessness of the appeal to the notion of State contract**

92. Given the objective sought by the claimant, it does not appear necessary to resort to the notion of State contract and to the general principles declared applicable to it to rule on the issues in dispute.

GETMA maintains, in fact, that the Republic of Guinea is not entitled to invoke the alleged insufficiencies of the bidding procedure and the negotiations prior to signing the Concession Agreement that it organized itself to justify this termination. In other words, the claimant is seeking to apply the adage *nemo contra suum factum venire potest* to the respondent effectively, an adage commonly applied to States in accordance with the theory of State contracts.

93. It does not appear useful to the arbitral tribunal to appeal to the State contract theory to apply the adage *nemo contra suum factum*. The Republic of Guinea has admitted that Guinean law was greatly inspired by French law (Transcript, July 8, 2013, p. 48, lines 18 to 22 in particular). It also based itself on French case-law to support its right to terminate the Concession Agreement immediately as a result of unfair or fraudulent behavior (R 98 and R 99).

It is true that the codification did not adopt the adages in use in France. Nevertheless, many of them have survived and are commonly applied ("*nemo auditur...*," "*in pari causa turpitudinis...*"). The numerous applications of the principle of coherency in France illustrate the persistence of the adage "*nemo contra suum factum*." This is, in reality, a basic ethical rule that has been demonstrated to apply, in one form or another, in all legal systems and, especially in laws resulting from Roman law (Prof. Hernan Corral Taleani: *La raiz historica del adagio "venire contra factum proprium non valet*, Cuadernos de Extension, 18, U. de las Andes 2010, p. 19-33); Gaillard: *L'interdiction de se contredire au detriment d'autrui comme principe general du droit du commerce international* [The prohibition on contradicting oneself to the detriment of others as general principle of international commercial law], Rev. Arb. 1985, p. 241, which confirms the numerous bases that justify the application of the principle).

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MAY 26, 2014  
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No. .... Date.....

**In conclusion**

The arbitral tribunal finds that the Concession Agreement is subject to the laws, regulations and Agreements of the Republic of Guinea.

**III. Validity of the termination****Position of the Parties**

94. The Parties exchanged briefs No. .... and .... [blank spaces in original text] including summary statements of case following the examination of the witnesses and experts as well as summary "PowerPoint" documents during the final hearing. Throughout the written submissions, the arguments of the Republic of Guinea evolved, which, incidentally, it acknowledged (Transcript, July 8, 2013, p. 25, lines 18 to 22). It is the final arguments of the two parties that call for responses from the arbitral tribunal, since the arbitral tribunal took into consideration all of the written submissions and oral demonstrations that shaped the final arguments.

95. After abandoning its counterclaim, the Respondent limited itself to presenting its grounds of defense against the principal claim. The Claimant's arguments (1) and the Respondent's grounds of defense (2) are presented below.

**a) The Claimant's arguments**

96. The claimant maintains that:

*"As soon as Professor Alpha Condé was elected president of the Republic of Guinea, persistent rumors reached Getma International that the newly elected president had personally decided to reconsider the Concession Agreement in order to award it to the companies of his friend Vincent Bolloré, who had supported him financially during his opposition years, and during the election campaign."*(Summary statement of case No. 284).

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MAY 26, 2014  
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No. .... Date.....

97. To justify its allegations, GETMA claims that President Alpha CONDE himself confided, during a France 24 interview that prior to his election he had told the friends that had supported him that he would cancel the Agreement.

However, the Grantor had no reason to terminate the Concession. GETMA cites as proof the testimonials of the director of the merchant marine (C 10) indicating his satisfaction, sent on January 25, 2011, after a meeting to present the project called by the new Minister of Transportation.

Nonetheless, as soon as the Agreement was signed, the Autonomous Port of Conakry had demonstrated its hostility. GETMA sees the likely cause of this hostility in this organization's perception of "*having been dismissed/spurned*" (Pleadings, p. 141 and following). In the minutes of the meeting of the Audit Committee held on February 8, 2011 (R 39), the Director of Technical Services is, in fact, asked to prepare a complete file including the technical arguments for the next meeting:

*"The Director of Technical Services was instructed to take the useful and necessary steps to prepare a complete file including the technical arguments for the next meeting:*

- *revision of the Agreement and its renegotiation emphasizing the central role of the PAC*
- *or termination, instructing the PAC to find another partner with whom it must conduct new negotiations.*

*Along the same lines, the Legal Counsel of the PAC was asked to reread the Agreement to be better prepared to deal with the legal consequences in cases of this type."*  
(R 39).

The desire to restore the prerogatives of the PAC is reaffirmed in the minutes of the extraordinary session of its Board of Directors (C 81). Although the PAC had considered maintaining the Agreement until February 8, 2011, it decided that it was necessary to terminate it during the meeting of its Board of Directors held on February 11, 2011, following receipt, on the same date, of a mysterious letter from the Minister of State, not produced by the Respondent (R. 40; Final Pleadings of July 8, 2013).

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MAY 26, 2014  
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No. .... Date.....

GETMA stresses that the PAC had always excluded it from its discussions concerning the concession and characterizes the various interventions of the PAC as “*tactics*” (Summary statement of case, No. 2.6.3).

98. The claimant states that none of the oral or written contacts made with individuals in charge to justify its actions could deter President Alpha Condé from the announced decision. The January 21, 2011 meeting between Mr. Pierre-André WILTZER, a GETMA consultant, and Mr. Guillaume CURTIS, appointed by the President and the President’s nephew according to the Claimant (Final pleadings, p. 18) was a sham: Mr. CURTIS was precisely the person who had called the meeting of the Board of Directors of the PAC on December 31, 2010, in order to deliberate in view of cancelling the Agreement.

Mr. CURTIS, to whom important documentation had been provided, never got back to Mr. WILTZER, even after follow-up, despite the commitment made in respect thereof.

GETMA feels that the termination decision, made without prior notification, was illegal.

It compares the termination that occurred to a change of law and act of public authority impeding the smooth operation of the granted activities (art. 32.5 of the Agreement), entitling it to the compensation set forth in article 32.5 of the Agreement.

**b) The Respondent’s grounds of defense**

99. In the Summary Statement of Case of July 1, 2013, the Republic of Guinea cites the seriousness of GETMA’s behavior when the Concession Agreement was signed, then throughout its performance.

100. The respondent criticizes GETMA first of all for having committed three acts of fraud **at the bidding stage**.

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No. .... Date.....



**1) The false partnership with GETMA**

101. GETMA misled the Guinean authorities by claiming to have entered into a partnership with MSC, one of the world leaders in maritime transport, for the performance of the Concession Agreement. However, the Technical Partnership Agreement (C 170) signed by GETMA and Europe Terminal, a subsidiary of MSC, was abandoned while article 4 of the Bidding Terms and Conditions (R16) required the joint and several commitment of the partners to perform the Agreement. The Republic of Guinea stresses the necessity of this partnership for the performance of the Agreement, a necessity it claims is proven by the fact that GETMA then sought to set up a partnership with a subsidiary of MAERSK, another international leader in maritime transport.

The technical partnership agreement referred to the “*bidder*” cloaking it in MSC’s experience.

In substance, the respondent claims that the partnership helped GETMA International make its bid credible even though it never existed “*either on paper or as a matter of fact.*”

**2) False financial information**

102. The respondent stresses that almost all of the investments, concentrated over the first three years, represented about 100 million Euros. The GETMA Business Plan (Table 14) anticipated funding amounting to 20 million Euros through equity capital.

To show the impossibility of funding, GETMA did not provide the certificate of financial capacity required by the Bidding Terms and Conditions: the certificates from Société Générale and Natixis provided by GETMA simply attested to the good relationship maintained by the bank and its client.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

103. Furthermore, GETMA is alleged by the Republic of Guinea to have provided false information concerning the profitability of the project in its Business Plan. The sales figures are marred by various gross errors and inaccuracies. However, the profitability predictions convinced the Evaluation Commission of the availability of the necessary funding.

### 3) Manipulation of the bidding

104. The Republic of Guinea denounces the conflict of interest of the German engineering and design firm Inros Lackner. In its expression of interest dated March 10, 2008, GETMA had indicated that it was able to successfully conclude all large-scale projects “(...) *by relying on partnerships established with specialized firms such as (...) INROS LACKNER (port projects (...))*.” However, the Bid Evaluation Commission sought assistance from Inros Lackner

Inros Lackner subsequently effectively provided GETMA with project management services (C168, Annexes 8 and 9).

The respondent argues that “*the intervention of Inros Lackner in the capacity of Consultant of the Bid Evaluation Commission was made for the benefit of Getma.*”

### 4) Amendment No. 1

105. Finally, still with regard to fraudulent acts, the respondent claims that GETMA renewed its commitment to make investments in full knowledge of its inability to finance them, given the Group’s indebtedness, its ineligibility for a dedicated bank loan and the depletion of equity funds.

106. At the Agreement performance stage, the respondent maintains that GETMA did not honor its commitments.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

**5) Work delay**

107. The Republic of Guinea claims, in substance, that all the work experienced delays and, in particular, the new Terminal for which the delay was, on the date of termination of the agreement, 5 or 11 months depending whether the execution schedule is calculated based on GETMA’s bid or the work schedule appended to the Agreement.

**6) The inability to finance the investments**

108. The respondent maintains that GETMA was unable to obtain the dedicated loan that would have allowed it to finance the several hundred millions of Euros it agreed to obtain during the first three years of the Concession Agreement. The indebtedness of the NCT NECOTRANS Group interfered with granting such a loan. Nor did its equity funds and the lack of financial support that the promised partner could have provided also made this impossible.

**7) Commitment relative to the opening up of transport from or to Mali.**

109. The Republic of Guinea further claims that GETMA breached its commitments relative to Malian carriers. In its expression of interest and in its bid, GETMA relied on a protocol signed with the Malian carriers to implement the conditions for the opening up of Mali through various modes of access to Conakry for Mali’s imports and exports. However, nothing was done even though the evaluation report had taken these commitments into consideration. In particular, GETMA did not allow the Malian carriers to acquire a stake in STCC.

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 No. .... Date.....

**8) The Republic of Guinea’s acquisition of a stake in the capital of STCC**

110. Finally, GETMA’s commitments concerning the acquisition by the Republic of Guinea of a stake in STCC were not fulfilled. Article 7 of the Agreement stipulates that the grantor may acquire a stake in the operating company.

The Minister Secretary General of the Presidency wrote on May 19, 2009 that “*the Guinean State intends to acquire a 25% stake in this company,*” then Amendment No. 1 provided that “*the grantor may acquire a 15% stake in STCC.*” On April 29, 2010, the General Manager of the PAC gave GETMA notice to take all steps for the effective acquisition of a stake in STCC by the Republic of Guinea within 8 business days. In vain.

111. The arguments summarized here and developed later concern the terms and conditions for implementing the termination in form and substance.

The arbitral tribunal therefore rules on the validity of this termination in light of its conditions of implementation (A) and substance (B).

**A – The conditions for implementing the termination**

112. Article 32.2 of the Concession Agreement stipulates:

*“The Parties agree that except for cases of Force Majeure, this Agreement may be terminated by the Grantor due to the Concessionary’s fault in case the Concessionary fails to fulfill any of the obligations incumbent on it pursuant to this Agreement and the Specifications.*

*First, the Grantor must enjoin the Concessionary through written notification, specifying the list of allegations invoked, so that it can remedy these established breaches within a deadline, which, beginning on the date of receipt of the notification, may not, except under exceptional circumstances, be shorter than (60) sixty days.*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*If at the end of the deadline granted to it, the Concessionary has not begun to satisfy the obligations for which it has defaulted in a manner acceptable to the Grantor, notice of termination may be given.”*

113. According to the terms of article 32.2, termination must be preceded by an injunction, through notification, to remedy the established breaches, specified in the notification. This notification therefore constitutes an essential formality since its receipt starts the 60-day period granted to the concessionary to “begin to fulfill the obligations for which it is in default.” It is only if the concessionary has not satisfied the start of execution that notice of termination may be given to it. The Agreement thus gives the concessionary a double right: to be able to contradict these allegations in full knowledge of the allegations claimed and remedy the alleged breach(es).

114. In this case, the decree of the President of the Republic of Guinea dated March 8, 2011, delivered to GETMA on March 22, 2011 (C 14) states:

*“Article 1: Agreement No. 2008/001/of September 22, 2008 and Amendment No. 1 of November 7, 2009, granting the concession of the Container Terminal of the Autonomous Port of Conakry, its expansion and the development of a railway station, signed by the Guinean State and the company GETMA International SAS are terminated for breach of the Concessionary’s obligations.*

*Article 2: This Agreement and its Amendment are terminated with immediate effect and without compensation, at the expenses, risks and faults of the Companies GETMA International SAS.*

*Article 3: The Guinean State reserves the right to bring the matter before the competent courts to obtain reparation for its damages and the pronouncement of all the legal and regulatory provisions in force.”*

The decree was made under the “resolutions of the Board of Directors of the Autonomous Port of Conakry in its extraordinary sessions held on December 31, 2008, January 2, 2009 and February 11, 2011.

115. It is an accepted fact that the decree terminating the Concession Agreement was not preceded by any notification of the list of GETMA’s breaches enjoining it to remedy them and that the termination

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

took effect immediately. Given the substantial nature of the required formalities, necessary to comply with GETMA's contractual rights, the termination is illegal.

116. Although article 32.2, paragraph 2 expressly states that "*the list of allegations*" must be specified in the required notification, the arbitral tribunal tried to determine if the approval of the resolutions of the Board of Directors of December 31, 2008 and January 2, 2009 as well as of February 11, 2011 to which the decree refers, could be considered an acceptable substitute.

This is not the case:

- The only minutes of the extraordinary sessions of the Board of Directors of the PAC admittedly make reference to the termination of article 32.2, but to declare "*excessive and one-sided*" the clause that requires the grantor "*to compensate [the Concessionary for laying off its employees but also for the sums borrowed by [the concessionary]].*" The minutes therefore conclude for "*pure and simple cancellation.*" Furthermore and above all, all the allegations of the Board of Directors target the bidding process development procedure, the insufficiency of the documents able to demonstrate GETMA's experience and capability in designing and managing container terminals and the conditions of the Agreement signed with it that were too favorable to the Concessionary (C 53). At no time was there any question of "*non-performance by [the Concessionary] of any of its obligations incumbent on it pursuant to this agreement and the Specifications.*" (art. 32.2, paragraph 1 – C2).

Additionally, the suspension of the Agreement, decided on following the above-mentioned resolutions by decree of President Dadis CAMARA on January 14, 2009, was lifted by presidential decree dated April 9, 2009. This tends to demonstrate that the allegations of the Board of Directors of the PAC were not deemed sufficiently serious to challenge the Agreement, even assuming that these grievances are attributable to GETMA.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

- the minutes of the extraordinary session of the Board of Directors of the PAC dated February 11, 2011 (C 81 and C 67) deal largely with the irregularities and the formal defects of the bidding and Agreement negotiation process. Neither the sections devoted to “*the legal aspect*,” “*the technical aspect*” and the “*financial aspect*” (for the legible parts) of the concomitant document of the extraordinary session of the PAC explaining the causes for termination of the Concession Agreement (C 67) cite violations of GETMA’s contractual obligations, even if a simple allusion is made to a “*doubt concerning the financial capacity of GETMA International*,” which does not suffice to constitute the expression of a contractual breach. Finally, under the “*operation aspect*,” heading, the Board of Directors deplores the absence of any volume objectives for the terminals in the Agreement, without reproaching the Concessionary for this lack, and deplores the lack of functioning of the Monitoring Committee, this committee being set forth in article 29 of the Agreement, that is under the title “*Chapter 3: obligations of the Grantor*.” These minutes cannot seriously be considered as the statement of the Concessionary’s failures to fulfill its obligations.

117. From the analysis of the decree of March 8, 2011 and of the documents to which it refers, the arbitral tribunal concludes that the termination does not satisfy the legal requirements. The failure to comply with the procedure required of the grantor was also recognized by the witness presented by the Republic of Guinea (Transcript, May 28, 2013, p. 54, lines 36 to 44 and p. 55, lines 1 to 2).

118. The Republic of Guinea objected that the 60-day period between the notification of allegations and the notification of termination did not need to be observed given the seriousness of the fraudulent breaches the Concessionary was guilty of as maintained by the Republic of Guinea in its summary statement of claim (No. 780 and following) and its oral explanations:

*“The issue of fraud is important (...) because it justifies the termination and it justifies the conditions under which the termination was carried out, namely, without notice.”* (Transcript, July 8, 2013, p. 25, lines 36-37).

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

The Tribunal cannot accept this argument.

119. In fact, the Republic of Guinea could not terminate without granting deadline, even if the concessionary had seriously failed to fulfill one of its obligations, which will be examined later. Nothing dispenses the grantor from specifying the breach criticized. The few, non-restrictive examples of breaches listed in article 32.2, paragraph 4, may, for some, be characterized as serious. They are, nevertheless, mentioned as causes of termination "*following notice*." Even if the claimant had been duly informed of the alleged breaches, the deadline to be observed could not be discarded because article 32.2 provides for a deadline shorter than 60 days only under "*exceptional circumstances*." The termination decree makes no allusion to the existence of such circumstances.

120. For all of these reasons, the tribunal is of the opinion that the decree terminating the Concession Agreement is doubly inconsistent with the legal requirements because it does not cite the alleged contractual breaches and does not observe the deadline stipulated in favor of the concessionary.

### **B – The substantive conditions of termination**

121. The refusal to take into consideration the substantive conditions for implementing the termination suffices to declare the termination illegal. Out of a concern for thoroughness, the arbitral tribunal will nevertheless rule on the substantive conditions of the termination, bitterly disputed by the parties.

122. In the latest version of its arguments, presented in the summary statement of claim of July 1, 2013 and in the oral and written explanations of the following July 8, the respondent ranks among the substantive conditions leading to the termination of the Agreement failures to fulfill the contractual obligations and acts declared fraudulent, deceptive or contrary to good faith:

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....



*“...There are both failures by GETMA to fulfill expressly formulated contractual obligations (...). This is a first category of breaches (...). Then, and this is where fraud comes in (...), these are breaches of contractual good faith and of the duty of fairness.”* (Transcript, July 8, 2013, p. 47 lines 21 to 34).

123. The Republic of Guinea rightly distinguishes the two types of allegations that it makes against GETMA, However, more than separate due to the express nature and not the obligation violated, the allegations to be examined are of different natures.

Therefore, the arbitral tribunal will first examine the fraudulent act, or acts contrary to good faith (1), then the failures to fulfill the obligations of the Concession Agreement (2).

1./The fraudulent acts or acts contrary to good faith

124. The arbitral tribunal will first examine the objection of incompetence of the arbitral tribunal raised by GETMA, then the grievances invoked (2).

1. The competence of the arbitral tribunal

125. GETMA claims that the fraud, if it existed, was prior to signing the Agreement. Therefore, the dispute does not arise from the Agreement. The arbitral tribunal is therefore incompetent to rule on the alleged fraud and its effects.

126. The scope of application of the arbitration clause included in article 31 of the Concession Agreement concerns:

*“Any dispute or difference stemming from this Agreement or from its amendments.”*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

127. The claimant gives the term “*to stem*” an exclusively chronological meaning implying that only disputes based on facts posterior to signing the Concession Agreement could be subject to arbitration.

However, the term to stem also expresses a natural or logical link for which the term “*to result*” is a synonym accepted by lexicographers (see Larousse; Robert, etc.). This is precisely the meaning that the arbitral tribunal considers appropriate.

Therefore there must be a cause and effect relationship, or it suffices that such a relationship exists or is alleged, between the fraudulent acts and the Concession Agreement in order to fall within the scope of application of the arbitration clause. Any other interpretation would result in an irrational dispersion of the dispute.

For these reasons, the arbitral tribunal rejects the objection of incompetence raised by GETMA (Final pleadings, p. 202).

2. The grievances related to fraud invoked by the Republic of Guinea

128. The acts alleged by the Republic of Guinea concern:
- \* GETMA’s false partnership with M.S.C.;
  - \* the false financial information;
  - \* the manipulation of the bidding process;
  - \* the deceitful concealment in Amendment No. 1.

The law: general observation

129. After having requested the cancellation of the Concession Agreement due to the facts declared fraudulent above, the Republic of Guinea maintains that these same facts must be sanctioned by termination of the Agreement for breach of contractual good faith.

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

The arbitral tribunal notes that the same facts cannot be sanctioned indiscriminately on the basis of fraud in the formation of the contract and the failure to perform the contract in good faith. In fact, sanction for failure to perform in good faith necessarily presupposes the existence of a valid contractual obligation in whose performance the wronged co-contractor has an interest. Conversely, sanction of fraud in the formation of the contract tends to discard the contractual obligations distorted by the deceitful tactics. To the extent that the allegations that follow are based on the allegation of deceit concerning the existence of a contractual obligation, contractual termination does not appear to be the appropriate sanction.

It matters little that the French Supreme Court, in a decision dated September 23, 2008 (R 99), declared that the co-contractor wronged by serious breaches of good faith “*both at the time of the birth of the contractual relations and during their pursuit*” may terminate the contract at its risk. This decision concerns a serious breach of good faith that persisted during performance of the contract, so that it is dangerous to assume that fraudulent acts prior to the contract can, under any circumstances, even when the fraud persisted, be sanctioned by termination of the contract at the initiative of the co-contractor. As for the Supreme Court decision of October 13, 1988, also produced, it does not concern fraud (R 98).

Out of a concern for thoroughness, the arbitral tribunal will, however, attempt to determine if the allegations of unfairness are founded in fact.

a) The false partnership of GETMA and M.S.C.

**Position of the parties**

130. According to the respondent, GETMA knew that the single and essential selection criterion focused on the concessionary’s experience as operator and as builder in the field of ports. It misled the Guinean authorities by claiming to have formed a partnership with MSC, one of the world leaders in

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

maritime transport, for the performance of the Concession Agreement. Article 4 of the Bidding Terms and Conditions (R.16) required that the partners jointly and severally agree to perform the Agreement. However, the Technical Partnership Agreement (C 170) signed by GETMA and EUROPE TERMINAL, a subsidiary of MSC, was abandoned, according to GETMA, since it alone was short-listed (C 225) and that it was not necessary to create a joint company since MSC was already a shareholder of GETMA International (Transcript May 27, 2013, p. 41). The Republic of Guinea underscores the necessity of this partnership for the performance of the Agreement, a necessity proven by the fact that GETMA then attempted to set up a partnership with a subsidiary of MAERSK, another international leader in maritime transport.

The technical partnership agreement referred to the “*bidder*” attributing MSC’s experience to it.

In substance the respondent claims that the partnership helped GETMA International make its bid credible even though it never existed “*either on paper or as a matter of fact.*”

131. GETMA replies that it is bound with MSC by a partnership that goes back to 2005 concerning the possibility for MSC to hold up to 50% of the capital of GETMA INTERNATIONAL, perform port cargo handling operations and participate jointly in port projects in Africa (C 222). It is within the framework of this agreement (MOU) that MSC expressly authorized GETMA to present it as a joint and several partner, except for the management of the concession, GETMA being the majority shareholder of STCC. However, only GETMA was designated provisional successful bidder and not the consortium represented by GETMA. GETMA and MSC then felt that MSC’s participation in the project was sufficiently assured by the shareholder relationship that they maintained. In fact, NECOTRANS held a 50.02% stake in GETMA INTERNATIONAL and GETMA ITALIA SPA, wholly-owned by the holding company of the MSC Group, held a 49.98% stake.

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

**The arbitral tribunal**

132. The facts must be recalled here precisely:

- following the Republic of Guinea's call for expression of interest on March 9, 2008, GETMA sent it a letter expressing its interest dated March 28, 2008, accompanied by a file including the information requested by the Guinean State (C 37 – C 38). The file included a letter from MEDITERRANEAN SHIPPING COMPANY (MSC) addressed to GETMA INTERNATIONAL, dated March 5, 2008, referring to the "general agreements binding MSC and GETMA." In this letter, MSC expressed its interest in the planned concession of the Container Terminal of the Autonomous Port of Conakry and its intention to provide all necessary support. MSC expressly authorized GETMA to mention its letter in its final bid.

133. Article 4 of the bidding terms and conditions included in the bid documents of the Republic of Guinea states:

*"This Invitation to Bid is reserved for the candidates selected following the call for expression of interest. The term "Bidder" used hereinbelow, applies strictly to the candidates selected.*

*It is understood that no consortium formed between the candidates selected following the call for expression of interest is authorized from this point forward.*

*At the end of the Bidding Procedure one Bidder possessing the required competencies will be selected (..).*

*The Bidder's bid (single entity or consortium of companies) must contain all the documents and information listed below (...):*

- *one of the members of the consortium must be designated as joint representative and this appointment must be substantiated by the presentation of a power of attorney issued by the duly authorized signatories of each member of the consortium. The joint representative must necessarily be a container terminal operator;*
- *the joint representative must be authorized to assume the responsibilities and to receive instructions on behalf and in the name of each member of the consortium for the entire Concession period.*
- *all the members of the consortium must be jointly and severally liable, vis-à-vis the Grantor,*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*for the performance of the Concession. A declaration to this effect is included in the appointment mentioned above and in the bid (...)” (R 16).*

A short-list notice dated April 7, 2008 was sent to the general manager of Transafrika-Guinée, representing GETMA INTERNATIONAL, which was short-listed to bid (C 40).

GETMA INTERNATIONAL submitted its bid on July 2, 2008. The technical bid was presented on letterhead stationery of GETMA INTERNATIONAL and TRANSAFRICA S.A., a subsidiary of GETMA INTERNATIONAL.

The technical bid indicated:

*“GETMA INTERNATIONAL is the privileged partner of Europe Terminal, a subsidiary of the Mediterranean Shipping Company Group (MSC) with which it has signed a comprehensive port cargo handling contract for the principal ports of the West Coast of Africa. Therefore, GETMA INTERNATIONAL benefits from the total support of EUROPE TERMINAL.*

*Its references for the installation and management of a container terminal are presented below:*

*“.....”*

*The technical partnership agreement binding GETMA INTERNATIONAL and EUROPE TERMINAL is appended as annex OT2.II.” (C170, technical bid, p. 9).*

Under the title “*CONTRACTUAL PARTNER,*” the activity of EUROPE TERMINAL was detailed subsequently, the presentation concluding as follow:

*“Europe Terminal therefore has the proven capabilities to successfully complete any new container terminal project, from design to physical operation of the tool including its financing and its construction.*

*Europe Terminal offers all guarantees of technical expertise and professionalism in the operation of its container terminals (...).”*

Finally, the technical bid stated that:

*“GETMA INTERNATIONAL/TRANSAFRICA SA will be the majority shareholder of the future Operating Company of the Conakry Terminal (as set forth in the Specifications of the Bid File) in a proportion that cannot be less than 51%.*

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*The rest of the capital will be divided between Europe Terminal and its parent company Mediterranean Shipping Company with the possibility of offering stakes to other local and/or regional economic operators directly involved in the Port of Conakry.”*

134. As announced, a technical partnership agreement between EUROPE TERMINAL and GETMA INTERNATIONAL dated March 6, 2008 was appended to the technical bid. It stipulated in its preamble:

*“The purpose of this agreement is to specify the parties’ role in connection with the bidding process launched by the Port of Conakry (...) to which GETMA INTERNATIONAL wishes to respond.”*

It also stipulated in article 7 that the agreement would remain in force:

*“If the Bid is not accepted, until the date of notification by the Grantor that the Bid has been rejected;*

*If the Bid is accepted, until the Contract between the Grantor and GETMA INTERNATIONAL is signed.”*

135. However, article 2 expanded the purpose of the agreement beyond the development of the bid:

*“The purpose of the Agreement is to define the conditions and terms according to which the Parties will collaborate in order to develop and submit the Bid to the Grantor and, if the Parties are awarded the Project, to negotiate the Contract with the Grantor and to carry out the Project.”*

Articles 4 and 5 also defined the roles of GETMA and EUROPE TERMINAL if the Project was carried out, defined as the awarded concession. GETMA INTERNATIONAL was to have the role of representative, responsible for management (Art. 4) and EUROPE TERMINAL the role of “*technical partner to allow the execution of the Project.*” (Art. 5).

136. On August 22, 2008, the Minister of Transportation of the Republic of Guinea informed GETMA INTERNATIONAL that following the evaluation of the bids, it had been selected as provisional successful bidder by the National Commission for Major Projects.

The tribunal must therefore determine whether the alleged deception is, in fact, established and if it was the cause of the termination.

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No. .... Date.....

137. Having recalled these facts, it is necessary to determine their significance. The existence of a partnership between NECOTRANS and MSC in 2005 is an accepted fact, and it is irrelevant that MSC refused to produce the Memorandum of Understanding, declared confidential. This is framework in which the specific partnership envisaged by the MSC letter dated March 5, 2008 must be viewed. The desire to join forces to carry out the project bid out by the Republic of Guinea is also clear from reading exhibit C 172 entitled *“Technical partnership agreement.”*

The agreement provided, first of all, that *“the parties will collaborate to develop and submit the Bid to the Grantor.”* It also set forth the assumption that *“the Parties were the successful bidders for the Project, to negotiate the Contract with the Grantor and to carry out the Project.”* The desire of GETMA and MSC to establish a partnership was all the more certain since the parties abided by the requirements of the Bidding Terms and Conditions. The agreement provided that GETMA would be the representative, as required by article 4 of the Bidding Terms and Conditions. EUROPE TERMINAL, a subsidiary of MSC, reserved the technical portion, as demonstrated by article 5 of the Agreement:

*“In general, the mission of the Technical Partner is to provide technical support in order to allow the completion of the Project.*

*The Technical Partner is more specifically responsible for the following tasks:*

- engineering design (dimensioning of the infrastructures, sampling, etc.)*
- traffic analysis and projections;*
- proposal concerning the handling equipment required;*
- preparation of the documents necessary for the Project.*

*The Technical Partner authorizes the Representative to mention its technical support on behalf and in the name of the Parties.”*

In accordance with the Grantor’s requirements, the joint and several commitment of the parties was accepted:

*“If, at the Grantor’s request, the Parties accept the principle of a “joint and several” commitment toward the Grantor for the completion of the Project, the joint and several liability is excluded from the relations with others as well as for the relations of the Parties between themselves, which are governed exclusively by the provisions of the Agreement.”*

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....



138. The claimant explained that the parties to the technical partnership agreement had not been “successful bidders for the Project” since the latter of April 7, 2008 only invited GETMA and not GETMA as representative of the consortium, to submit a bid for award of the project in accordance with the terms of the agreement, so the partnership logically ended when the Concession Agreement was signed.

139. The tribunal has no reason to assume that the partnership agreement constituted deceitful behavior.

If the Republic of Guinea had declared the GETMA INTERNATIONAL/EUROPE TERMINAL consortium the provisional successful bidder, the partnership agreement would have been effective. And if it felt that there was any ambiguity, it was perfectly free to ask GETMA to indicate the specific intention of the parties to the technical partnership agreement.

140. Furthermore, if, because it was not the successful bidder, MSC did not acquire a stake in the operating company STCC, it nonetheless indirectly held 49.98% of the capital of GETMA INTERNATIONAL until August 2010. Therefore, it was, *de facto*, involved in the execution of the project.

141. Even assuming that GETMA had tried to mislead the Republic of Guinea concerning the existence of a partnership with MSC, it would still need to be determined if the absence of the partnership could, in fact, be the cause of the termination of the Concession Agreement on March 8, 2011. Neither in the Agreement, nor in the Specifications, nor in the “*Critical analysis of the Concession Agreement for the Container Terminal of the Autonomous Port of Conakry*” of March 26, 2009 that preceded the lifting of the suspension of the Agreement by a few days, is there any allusion to an obligation to act in partnership with MSC. Mr. Sory CAMARA’s understanding to the contrary, expressed during his examination, is not based on any verifiable information<sup>3</sup>: no document prior to the termination criticizes GETMA for the lack of a partnership with MSC, not even the resolutions of the board of directors of the

<sup>3</sup>“my understanding was that after the Concession Agreement was signed with Getma, Getma got together with MSC to determine between them the terms and conditions for financing the execution and the operation of the Container Terminal” (Transcript, May 28, 2013, p. 29, lines 34 to 36).

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

Autonomous Port of Conakry, which were, nevertheless, mentioned in the termination decree. Therefore, this allegation is unfounded from a legal and factual standpoint.

142. In its statement in response filed in October 2012, the Republic of Guinea has also claimed that GETMA had misled it by claiming a false partnership with MSC, misleading it concerning its experience and its capabilities. During the final hearing of July 8, 2013, the Republic of Guinea changed direction and insisted on the deception concerning GETMA's financial capabilities, which were insufficient to complete the project successfully without MSC's support.

143. The preceding lines provide sufficient demonstration that the partnership was not false. Furthermore, the arbitral tribunal feels that the capabilities and experience specific to each partner is sufficiently specified, regardless of the small number of counter-examples offered by the Republic of Guinea.

The issue of GETMA's inability to meet its financial commitments will be dealt with later (see below, No. 176 and following).

b) The false financial information

144. According to the respondent, GETMA knowingly misled the Republic of Guinea concerning its financing capabilities by withholding certain information (the financial certification) and by providing false information (the Business Plan).

b1) The fictitious financial attestation

**Position of the parties**

145. The respondent recalls that the firm two-year investment program on which GETMA embarked concerned the amount of 92.7 million Euros. Almost all of the investments, concentrated over the first three

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

years, represented some 100 million Euros and of which, according to the GETMA Business Plan (Table 4), it intended to finance 20 million Euros through equity capital.

146. GETMA was aware that the indebtedness of the NECOTRANS Group at that time made the financing of the investments of the Agreement illusory. This is why it did not provide the comfort letter required by the Bidding Terms and Conditions: instead of indicating the loans that GETMA might have available and its financial capabilities, the attestations of Société Générale and Natixis, provided by GETMA, simply attest to the good relations maintained by the bank and its client.

147. GETMA does not deny that the Bidding Terms and Conditions (C 141) required the bidder to provide a bank comfort letter using a pre-drafted form (appended to the Specifications) (C 126, p. 61). The non-conformity of the letter was noted during the examination of the bidders' bid documentation (R 52) and sanctioned by lowering the score awarded. Therefore, no dissimulation can therefore be noted.

### **The arbitral tribunal**

148. According to GETMA's proposal, the firm investments amounted to €109,033,000 to be made from 2008 to 2010. The bid documents required it, like any bidder, to provide a comfort letter from a first-rate bank proving the candidate's capability to make the investments. The bank was thus to certify that the bidder had access to the loans necessary for the investments and for the management of the Concession.

149. GETMA provided two comfort letters. Société Générale certified:

*"(...) that GETMA International SA (...) has had an account with us since 1993 that has been operating to our entire satisfaction. We maintain an excellent relationship with this company, which, to date, has never made any commercial or financial commitments that it was unable to honor (...)."*

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*SOCIETE GENERALE has already participated in infrastructure investments similar to those planned by the Autonomous Port of Conakry in connection with specific financing.*

*This letter cannot cause our Establishment to be held liable in any way. It is issued for all legal purposes.”*

Natixis certified:

*“that GETMA INTERNATIONAL (...) has had an account with us for many years that operates very satisfactorily and we maintain a very good relationship with this company.*

*GETMA INTERNATIONAL has always honored all of its commitments toward us. We feel that the GETMA INTERNATIONAL Group is a recognized specialist in its businesses, particularly in the port cargo handling field.”*

150. It is indisputable that the comfort letters were not “*equivalent to a true guarantee provided by the signatory bank*” as required by the bid documents according to the respondent.

151. However, the lack of conformity to the template does not suffice to establish GETMA’s deceit for several reasons:

First of all, it is clear from the technical evaluation table for the bids that the Evaluation Commission was perfectly aware of the non-conformity of the certifications provided by GETMA: it awarded it 1 point out of a maximum of 3 points possible, accompanied by this comment:

*“The certifications concerning financial capacity were submitted by the banks Natexis and Société Générale. The Commission notes that these bank certifications do not conform to the template provided in the Bid Documents.”*

The respondent cannot maintain that the attestations provided constitute deception since the non-conformity was obvious and was noted by the Evaluation Commission.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

Furthermore, it cannot allege that they are “fictitious,” since the attestations criticized were not deemed completely devoid of interest, unlike other attestations from competing bidders.

Therefore, the arbitral tribunal finds the claims of providing fictitious certifications and deception unfounded.

b2) The Business Plan

**Position of the parties**

152. According to the Republic of Guinea, GETMA appended to its financial bid the profitability projections for the concession based on its commitments. Table 13 breaks down the sales by type of service for the duration of the concession. The projections, analyzed by the firm KPMG, were based on grossly erroneous information that leads to an over-evaluation of sales and of the pre-tax earnings of the concession. These projection errors, associated with the use of a scanner, concern the on-board stevedoring of 20 ft. containers and the parking income from 40 ft. containers undergoing transshipment.

153. Other errors were detected by KPMG (transshipment of 40 ft. containers, daily storage rate). According to KPMG’s analysis, GETMA’s business plan was overvalued by €222.8 million. The project’s internal rate of return, after correction of the errors, drops from 15.6% to 11.1%. The Net Present Value of the project, after correction of the errors and rectification of the discount rate that is not justified and that is contrary to the one announced in the GETMA documents, is overvalued by €184,861,311, or a 69% overvaluation of the value of the project.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

154. The Republic of Guinea stresses that the gross errors “*all lead to an increase in sales, earnings and the value of the project (tripled) cannot be the result of an error.*” It adds that these errors “*are part of a deliberate plan to deceive the Republic of Guinea.*”

155. GETMA does not contest the errors pointed out by KPMG. It did not assign PWC the mission of verifying them. However, the business plan was neither “*false*” nor intentionally falsified. Mr. GUITERA, an expert with the firm KPMG, appointed by the Republic of Guinea, admitted himself that 95 or 96% of the discrepancy, and therefore the error, was due to the scanner.

On the other hand, it asked PWC to proceed with the analysis of the impact of the errors noted on the selection of the successful bidder. PWC concluded that these errors had no influence on the selection of the successful bidder. To reach this conclusion, PWC based itself on the file recording the perusal of the bids. The only analysis criteria indicated are, according to PWC, the growth rate of traffic and the income from the annual traffic for the TEU fee (Import-Export Transshipment per unit), which corresponds to the income anticipated by the Grantor. On the other hand, no mention of the earnings anticipated by the Concessionary was found. PWC stresses that these results are close to 100 million Euros even after correction of the errors by KPMG.

156. This formal analysis is contested by the Republic of Guinea. It maintains that “*each criterion could be assessed in relation to the entirety of the project presented.*” It cites as proof the reduction in the calculation of the points awarded to GETMA, justified by an unrealistic assessment of the duration of execution of the new Container Terminal. The Republic of Guinea concludes from this that the projected profitability necessarily had an influence on the selection of the successful bidder in that it constituted a guarantee of financial soundness of the project through the easy procurement of financing and the assurance of payment of substantial fees.

157. Finally, GETMA points out that the so-called gross errors are associated with the use of a scanner, an activity that it has proposed in its bid. The Republic of Guinea did not select this proposal and the activity was granted to a third-party company.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

Furthermore, for the year 2010, the only full year of performance of the contract, the volume achieved was 121,000 TEU. Now, GETMA had issued three assumptions ranging from 114,118 to 125,023 TEU for the first year.

**The arbitral tribunal**

158. The tribunal finds that GETMA does not deny the errors contained in the Business Plan.

However, to be fraudulent, GETMA's wrongdoing must have the aim of deceiving. Now, deception has not been established. Mr. GUIERA, an expert appointed by the Republic of Guinea, has admitted that "*if we take out the scanner, we will be very close to the corrected business plan that I calculated in terms of sales. Yes.*" (Examination of J. GUIERA, p. 81, lines 4 and 5). It is therefore the rejection of GETMA's proposal to add a scanning activity that distorted the business plan. The intent to deceive has not been established.

159. Furthermore, the fraud alleged against GETMA must be assessed here in light of the regularity of the termination. To justify this termination, it must therefore have been discovered before the termination. The Republic of Guinea stated that this was not the case:

*"The firm KPMG, initially commissioned by the Republic of Guinea to analyze the financial claims made by Getma in connection with the arbitration, discovered that Getma had provided grossly erroneous information in the Business Plan appended to its Financial Bid, leading to a substantial over-evaluation of the projected sales and of the pre-tax earnings of the concession. The Republic of Guinea produces as an annex a report from the firm KPMG concerning the financial information presented by Getma in connection with its bid submission."*

Therefore, the intent to deceive has not been demonstrated and, even assuming that it had been demonstrated, it could not be the cause of the termination given its revelation after this termination.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

c) Manipulation of the bidding (Inros Lackner)

**Position of the parties**

160. The Republic of Guinea denounces the conflict of interest of the German engineering firm Inros Lackner. In its expression of interest dated March 10, 2008, GETMA had indicated that it was able to complete all large-scale projects “(...) *by relying on partnerships established with specialized firms such as (...) INROS LACKNER*” (Port projects, C 38, p. 2/14). However, the Bid Evaluation Commission received assistance from Inros Lackner.

Inros Lackner effectively subsequently provided GETMA with project management services (C1 68, Annexes 8 and 9).

The respondent therefore alleges that “*the intervention of Inros Lackner as Consultant of the Bid Evaluation Commission benefited Getma.*”

161. GETMA denies any manipulation of the bids associated with the known assistance of INROS LACKNER.

**The arbitral tribunal**

162. The arbitral tribunal feels that the Bid Evaluation Commission availed itself of the competencies of Inros Lackner in full knowledge of the facts.

The evidence provided establishes that GETMA did not hide its collaboration with INROS LACKNER. In fact, the expression of interest dated March 10, 2008 cites in boldface and capital letters partnerships with specialized firms including INROS LACKNER for port projects (C 38, p. 2/14). The technical bid submitted by GETMA also refers to INROS LACKNER (C 170).

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....



Therefore, the Republic of Guinea cannot seriously maintain that the subsequent selection of the specialized and internationally known firm INROS LACKNER, for which there is no evidence implicating GETMA, resulted from a manipulation of the bids attributable to GETMA.

d) Amendment No. 1

**Position of the parties**

163. The Republic of Guinea maintains that “*when GETMA renewed its investment commitments when Amendment No. 1 was signed, it knew that it will not be able to keep the commitments it made in the firm Investment Program. In fact, the indebtedness of NECOTRANS on December 31, 2009, close to three times higher than its shareholders’ equity, would not allow it to finance the investment.*”

However, it did not inform GETMA of this when reiterating its commitment to finish the new Container Terminal within 35 months.

During his examination, Mr. QUEREL acknowledged that that he did not inform the Republic of Guinea and having to resort to dedicated funding. However, this funding was compromised by the unstable political situation in Guinea.

The Republic of Guinea supports its allegations by stating that, after Amendment No. 1 was signed, the dedicated financing was not found. The acquisition of MSC’s stake and the grant of dividends to the NECOTRANS shareholders ended up compromising the financing of the investments.

164. To the belated invocation of fraudulent concealment allegedly constituted by the renewal of the investment commitments of Amendment 1, GETMA responded with general considerations concerning the impossibility of terminating the Agreement for fraud (Document produced during the hearing of July 8, 2013, p. 190-192) and factual considerations relative to the absence of deception, particularly the

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

absence of proof of an actual inability to satisfy the contractual investment obligations (see below No. 176 and following).

**The arbitral tribunal**

165. The tribunal notes first of all that the aim of Amendment No. 1 was not to “*renew the investment commitments*” Signing the Concession Agreement committed GETMA to proceed with these investments. There was no reason to renew them. The amendment’s main objective was to take into consideration the suspension of the Agreement imposed by the Republic of Guinea in order to readjust the schedule of work. Therefore, even assuming that there was fraudulent concealment affecting Amendment No. 1, it would not have affected the Concession Agreement itself.

166. Furthermore, the claim made against GETMA of “*fraudulent concealment at the time of Amendment No. 1* must be proven. That supposes demonstrating the certainty that GETMA was aware that it was not able to finance the investments on the date the Amendment was signed, November 7, 2009. However, in its final explanations during the oral arguments, the Respondent indicated: “*GETMA knew when it signed Amendment No. 1 that obtaining project financing would be difficult.*” By the Republic of Guinea’s own admission, there was therefore no proven impossibility of financing on November 7, 2009, the date the amendment was signed, but a difficulty. Nothing demonstrates that GETMA could consider this difficulty insurmountable.

Finally, the Loan Agreement on which the Republic of Guinea relies to demonstrate the difficulty or the impossibility of financing the investments is dated December 18, 2009. It is therefore posterior to the signing of Amendment No. 1, as were the acquisition of MSC’s stake and the distribution of dividends.

The tribunal therefore finds that the allegation of fraudulent concealment at the time of Amendment No. 1 is not supported by any relevant or convincing evidence.

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

167. In conclusion, none of the allegations of fraudulent acts according to the Republic of Guinea stand up to analysis.

**2./The breaches of contract**

168. GETMA’s failures to fulfill its contractual obligations, according to the Republic of Guinea, concern:

- \* the work delay (1);
- \* the inability to assume the financing of the investments (2);
- \* the non-fulfillment of the commitments relating to the opening up of Mali (3);
- \* the non-fulfillment of the commitments related to the Republic of Guinea’s stake in the capital of STCC (4).

1. The work delay

**Position of the parties**

169. The Republic of Guinea claims, in substance, that all the work was delayed. The new Terminal for which the delay was, on the date of termination of the agreement, 5 or 11 months depending on whether the execution time frame was calculated based on GETMA’s bid or the work schedule of the financial bid appended to the Agreement.

Concerning the restoration work for the existing Terminal, less than 70% of this work was completed on the date of termination, even though it should have been completed on February 7, 2011 according to GETMA’s bid and on April 7, 2010 according to the work schedule.

As for the site development work for the storage platform, it was to take four months, according to the bid

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and the work schedule. The Republic of Guinea acknowledges that making the platform available delayed the start of the work as planned by the contract documents. The platform was made available on March 23, 2010. The work was not completed on the date of termination of the Agreement, more than eleven months later. The respondent feels that the applicable work schedule is the schedule in GETMA's bid, mentioned in the Agreement. This is the schedule that must be used to measure the delays.

In its oral observations of July 8, 2013, it insists on the importance of the new CT for the launch of the Autonomous Port of Conakry that makes its execution essentially in the agreed periods.

170. According to GETMA, the work progress must be measured against the execution deadlines accepted by the Commission, namely: 15 months for the restoration, 6 months for the rail platform and 35 months for the new Container Terminal. The start date of the period set down by Amendment No. 1 on the date it was signed - November 7, 2009 - supposed that that platform would be delivered on the stipulated date: December 7, 2009. This platform was indispensable to the expansion and restoration work. Now, 1 platform was not delivered until March 23, 2010, the date on which Mr. Morlaye CAMARA considered as the "*date of entry into effect*" of the Agreement. Starting from this date, GETMA considers that:

- the restoration, a term of 15 months, should have been completed on June 23, 2011. Now, on the termination date, March 8, 2011, 70% of the work had been completed;
- the platform, a term of 6 months, should have been completed on September 24, 2010. But the late delivery delayed the work during the rainy season. If one takes into account the term of the rainy season, the completion date is April 30, 2011. Now the platform was completed on the termination date and operational when the BOLLORE Group took possession of the site. The Licensor did not however notify GETMA;
- the expansion of the Container Terminal, a term of 35 months, should have been completed on February 23, 2013. The design and the call for bids were supposed to be completed in eleven months for the execution to begin on February 23, 2011. On the termination date, the bid solicitation was completed. A month's delay could possibly be observed.

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AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

But, for this delay, penalties were provided in the form of contract penalties and a bond of six million Euros had been signed by GETMA in favor of the Licensor.

GETMA adds that this work required a clearance/storage area outside the area granted (Friguia space). The authorities never made this area available to the Licensee. On the other hand, the BOLLORE Group enjoyed such a provisioning. Finally, no notice was sent to GETMA by the Republic of Guinea.

**The arbitral tribunal**

171. The progress of work must be evaluated compared to the contract work schedule. Two schedules were initially proposed by GETMA.

The schedule of the financial offer provides that:

*“For work beginning in January 2009:*

- *Phase 1A, restoration work of the existing Terminal, end of work May 2009;*
- *Phase 1B, preparation of the former rail platform, end of work May 2009;*
- *Phase 2, new container terminal, end of work January 2011.”* (R. 34, p. 2).

In the tender:

- restoration of the existing Terminal: 15 months from the entry into effect of the Agreement;
- Platform: 6 months after the entry into effect of the Agreement;
- new Container Terminal: 35 months after the entry into effect of the Agreement (R. 52)

According to the Republic of Guinea, the contractual terms of work to be considered are those of the financial offer to which the Concession Agreement refers. It is true that

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Article 4 of the Concession Agreement classifies the technical and financial offer under the documents constituting the Concession.

172. However, the tender was sent July 28, 2008, after the financial offer. The evaluation report of the offers indicated, under the title

**“GETMA INTERNATIONAL Financial Offer:**

*b.1 Commitment on the commencement and completion of work: 8 points*

*b.1.1 Restoration and equipment of the existing Container Terminal: 3 points*

- *Commencement: 3 months after the entry into effect of the agreement*
- **Completion: 15 months after the entry into effect**
- *Note: 3/3 points*

*b.1.2 Design and execution of a platform at the level of the rail station: 1 point*

- *Commencement of work: 2 months after the entry into effect of the agreement*
- **Completion of work: 6 months after the entry into effect of the agreement**
- *Note: 1/1 point*

*b.1.3 Design and execution of the expansion of the container terminal: 4 points*

- *Commencement of work: 11 months after the entry into effect of the agreement*
- **Completion of work: 35 months after the entry into effect of the agreement**
- *Note: 4/4 points.” (R 52).*

Thus, the Offer evaluation committee was required to adjust the financial offer. It is this adjusted offer that is referred to in the Concession Agreement. Moreover, the Republic of Guinea admits as much in its submissions (see Pre-trial brief, Nos. 382 to 416).

173. According to Article 3 of Amendment No. 1:

*“Apart from those concerning events that have already been executed, all of the periods stated in the Concession Agreement and in all the documents that constituent Appendix or the supplement and in particular the terms and conditions and the technical and financial offer, begin to run the terms specified in the Concession Agreement starting on the signing date of Amendment No. 1 (the “Amendment Date”). (C 128).*

However, as this work involves the availability of storage area, it was agreed that:

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

*“the Licensor shall make available to the Licensee the Storage area, in a period of thirty (30) days from the Amendment Date” (C 128).*

174. Although the interpretation of the provisions in question can be discussed, the Director of Technical Services, Mr. Morlaye CAMARA, himself deduced that the date of entry into effect of the Agreement was postponed to March 23, 2010 (C 80). GETMA emphasizes that this date is indirectly confirmed by the testimony of Mr. Sory CAMARA who shared the concern of the Republic of Guinea in the meeting of January 14, 2011:

*“It was already ten months and no one could see anything behind [it].” (Transcript, p. 51 (9-43) and 52 (1-4).”*

The period of ten months referred to March 2010 for all of the work.

Setting on March 23, 2010 the starting point of the execution periods of work phases 1 A, 1 B and 2, thus one finds that at the time of the termination (March 2011) of the Agreement, the progress of work was the following:

- restoration of the existing terminal (1 A): more than 70% completion, according to the Republic of Guinea. Taking the date of 3 to 15 months after the entry into effect of the Agreement (June 23, 2010), nothing demonstrated that the remaining 30% of the work for phase 1 A would not have been completed in the provided period.
- platform (1 B). Mr. Sory CAMARA admitted that the platform was operational on the day when S.A. BOLLORE took possession of the premises (Transcript, p. 48 (lines 42-46) and 49 (1-6). If one calculates the term of work, 2 to 6 months starting on March 23, 2010, the work should have been completed by September 24, 2010. GETMA emphasizes that this period coincides with the rainy season, which the statistics appear to corroborate (C 236). It is however pointless to research the occurrence of rain, as the Republic of Guinea only mentioned constructions delays after the termination of the Agreement.
- expansion of the Container Terminal (2): this phase was provided to begin 11 months and be completed 35 months after the entry into effect.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

Thus, the bid solicitation operations had to be completed 11 months after the entry into effect of the Agreement, or February 23, 2011.

The execution had to be completed 24 months at the latest, or February 23, 2013.

On March 8, 2011, termination date of the Agreement, the bid solicitation process was at the stage of the selection of the tenderer. Even if the Claimant concedes the possibility of approximately a one month delay the arbitral tribunal considers that on March 8, 2011, nothing allowed the Republic of Guinea to consider that GETMA had been behind on the work schedule which it itself had contributed to delay.

175. The arbitral tribunal finds above all that the specific sanctions of the delay in the beginning of the detailed work in the Investment Program (...) and/or the implementation of the Concession "*were not implemented by the Republic of Guinea.*" Article 18 of the Agreement however allowed the Licensor to apply daily delay penalties. It provided, furthermore, a bank completion bond of 6 million Euros (Article 16 of the Agreement). The fact that the Licensor has never sought to implement these sanctions, nor ever sent any notice or notification of work performance delays, decisively vouch for the Claimant's argumentation according to which the deficiencies the Licensee is accused of, including performance delays, constitute termination reasons stated *ex post facto*.

## 2. GETMA's inability to finance the work

### **Position of the parties**

176. According to Respondent, GETMA's inability to finance the work - and especially the new terminal which represents 97% of their total amount - is the reason for the construction delay:

*"deprived of the financial capacity of the MSC Group and the guarantee that a group of this scope could contribute, Getma was incapable of financing only the construction of the new Terminal and, a fortiori*

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No. .... Date.....



*the Firm Investment Program that represented an amount of €92.7 million before being invested in the first two years of the concession (pre-trial brief No. 422).*

The negotiations conducted for the buying of APMT, subsidiary of the MAERSK group, into the capital of STCC in September 2010, show the necessity of the partnership on the financing plan.

The inability to finance the work was first of all established by the refusals of the representatives of GETMA, and particularly the project manager, to justify the financing of the work at the meeting of January 14, 2011. The silence which later surrounded this question which GETMA knew was crucial for the Licensor, corroborates the inability to bring together the necessary financing.

Subsequently, the analysis of the Credit Agreement (C-133) to which Mr. Quérel referred as financing source, established that the purpose of the Agreement was to refinance the debt of the Necotrans group. Even if new investments could enter within the framework of the Agreement, those that concerned the Conakry Terminal were expressly excluded. For the Terminal in question, GETMA had to resort to dedicated financing. Now, at the beginning 2011, the file that was created to obtain the financing had not been set up and thus not been instituted by the banks. The obtaining of financing was improbable: the condition of political stability, required by the banks, was not present beginning in 2011, when President Alpha Condé assumed office.

The Republic of Guinea adds that the decisions taken by GETMA in 2010 had also definitively compromised the execution des investments. The NECOTRANS Group had, in fact, bought back the 49.9% stake held by the MSC Group in GETMA INTERNATIONAL. The indebtedness of the NECOTRANS Group thus grew from 281.3 million Euros to 291 million Euros between the end of 2009 and the end of 2010.

During the same year, NECOTRANS had distributed to its shareholders dividends totaling 9.5 million Euros.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

177. Concerning deficiencies in the execution of the Agreement, GETMA denies that it did not meet its commitments to finance investments and performing work in the agreed periods.

The restructuring agreement of the NECOTRANS debt did not involve resorting only to project financing as Respondent alleges: 30 million Euros could be taken from this agreement.

Added to this were the *cash flows freed from the operation* of the Concession and the companies of the NECOTRANS Group. Then, after 2010, Mr. TALBOT, controlling 100% of the Group from August 2010, could lend to GETMA. Finally, the agreement being negotiated with MAERSK would have brought the proceeds of a share purchase in SCTT or a capital increase.

The Republic of Guinea cannot take advantage of the unanswered questions on GETMA's ability to invest at the meeting of January 14, 2011: the goal of the meeting was purely technical, which Mr. Sory CAMARA admitted. Mr. CURTIS, contacted by Mr. WILTZER in the name of GETMA to address all of the aspects of the concession that required explaining, refrained from returning to it.

### **The arbitral tribunal**

178. The first manifestation of concern by the Republic of Guinea on GETMA's ability to finance the firm investments to which it was committed was during the meeting of January 14, 2011, called on January 4, 2011, several days after Mr. Alpha CONDE became president of the Republic. The purpose of this convocation was "*to review the Agreement.*"

The GETMA technical team, which was the only one to move, considered that it was not its responsibility to respond to the questions posed on the financing of the investments, which resulted in the PAC representatives leaving the meeting.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

Mr. Guillaume CURTIS, member of the Board of Directors of the PAC from 2008 to 2010, appointed by the new President of the Republic in January 2011 for examiner the file, was contacted by letter by Mr. WILTZER, a GETMA emissary, on January 22, 2011, to clarify all the questions he deemed expedient, Mr. CURTIS did not respond, which makes one think that the question of the financing did not actually concern the PAC, nor Mr. CURTIS (Transcript, p. 27, 1.5 to 21).

179. At the beginning of 2011, a period close to the termination of the concession, the financing requirement for the fixed investment program for the Conakry Terminal was 77.7 million Euros. The arbitral tribunal admits that the financing search by GETMA was not easy. It is true that the Credit Agreement signed on December 18, 2009 stipulated the use of tranche A (25 million Euros) of the credit permitted for the repayment of the refinanced credits, the use of tranche B (31 million Euros) being contentious.

It is also true that Article 20.21 of this Agreement stipulates:

**“20.21 Financing Plan**

*Considering the Conakry Concession and the progress of work with respect to the Signing Date, the Lender agrees on his own account and on the account of his Subsidiaries to:*

- *submit to the Lenders, on June 30, 2010 at the latest, a plan to finance the work linked to the Conakry Concession incorporating coverage of the investments to be implemented by dedicated medium-term financing resources and to inform the Lenders of the approaches undertaken to obtain financing from specialized lessors;*
- *submit to the Credit Agent, on June 30, 2010 at the latest, an updated business plan incorporating the Conakry Concession indicating the specific elements of the Conakry Concession, the capacity of the Lender and its Subsidiaries to respect its commitments under the Agreement and in particular the Financing Ratios considered in the Conakry Concession.” (C 133).*

These specific loans, repaid from the anticipated revenue from the concession, were also required to observe the financiers ratios imposed by the Credit Agreement, in particular the indebtedness/own funds ratio.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

It is common practice that, at the end of 2010, this dedicated medium-term credit had not been found. Mr. QUEREL, manager of the financial direction of GETMA, expressly admitted it (Transcript, May 27, 2013, p. 78).

The instability of the political situation in the Republic of Guinea in no way facilitated the obtaining of investment credits.

180. However, Respondent has not demonstrated in a certain fashion GETMA's failure in its obligation to finance investments. It recognizes as much, moreover, when it wrote "*In reality, obtaining a dedicated financing is an unlikely event*" (PowerPoint presentation submitted to the oral hearing on July 8, 2013, p. 37). Moreover Mr. QUEREL had recalled that at the time the Agreement was terminated, GETMA negotiated the buying of APMT, a MAERSK subsidiary, into the capital of STCC (C 232; Quérel Transcript, p. 72 (19-35) and 73 (1-20)). Respondent may not, at the same time, impute to the absence of a partnership with MSC the impossibility for GETMA to guarantee by itself the financing of work and neglect the capital contribution that would have generated a partnership with the MAERSK Group. Respondent does not given additional consideration to the free cash flow which the Concession would have generated if it had been ended by termination, nor the financing capacity of the NCT NECOTRANS group (C 231).

The termination can only be based on confirmed breaches of contract, the arbitral tribunal finds that the inability to finance investments has not been established satisfactorily.

### 3. The commitments relating to the economic involvement of the Malian shippers

#### **Position of the parties**

181. In its pre-trial brief, the Republic of Guinea accused GETMA of having breached its commitments aimed at involving the Malian economic players with it during the performance of the Agreement.

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MAY 26, 2014  
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No. .... Date.....

It states that to support its offer, GETMA asserted the agreements entered into with the Malian Shippers, liable to an “almost immediate” implementation, in the Evaluation Report (R 17). However, under the title “*failure by Getma to observe its commitments with the Malian carriers*,” the Republic of Guinea only criticizes the exclusion of the Malian Union of Shippers from the capital of STCC, both for the founding of the company and for subsequent modifications.

182. GETMA did not respond to the grievance formulated by the Republic of Guinea in its final pre-trial brief.

### **The arbitral tribunal**

183. The Republic of Guinea rightly stresses that, in its offer, GETMA indicated:

*“Getma international moreover signed contacts with the principal players of Malian transportation (...)...and plans to open the capital of the management company of the future terminal to the Malian Union of Shippers (CMC) in order to permanently involve the Malian carriers.”* (R 43).

The Offer Evaluation Report refers to the contacts signed by GETMA with the Malian Shippers:

*“The bidder agrees to the study and implementation of multimodal solutions with the objective of making Conakry into a major port integrating the hinterland countries and in particular of Mali. To do so, it signed contacts with the principal players of the Malian transport (Malian Shippers Union and the Malian of Road Haulers).”* (R 17, p. 37).

Concerning the plan to structure the capital of the operating company, the report indicates:

*“The Bidder reserves the right to be majority shareholder in the capital of the future operating company, as provided in the terms and conditions, in a proportion not less than 51%. The balance of the capital will be divided between EUROPE TERMINAL and its parent company MEDITERRANEAN SHIPPING COMPANY with possibility of opening to other local and/or regional economic operators directly impacted by the port of Conakry.”* (R 17, p. 40).

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

This report, the Concession Agreement and the terms and conditions show that no firm commitment was made with respect to the Republic of Guinea to defer to the wish of the Malian Union of Shippers to buy into the capital of STCC.

The arbitral tribunal notes moreover that it has not been demonstrated that the Malian Union of Shippers made a request to buy into the capital of STCC. The exhibit on which the Republic of Guinea has founded this allegation is not from the body concerned but from the General Secretary of the President of the Republic of Guinea and se borne to specify that "*The Malian State, for its part, is interested in becoming a 5% shareholder in the capital [of the operating company].*"

Consequently, no firm commitment for access to the capital of STCC by the Malian Shippers Union has been demonstrated. Consequently, no breach of contract has been established.

#### 4. GETMA's commitment to open the capital of STCC to the Republic of Guinea

##### **Respondent's Position**

184. The Republic of Guinea asserts that, on May 19, 2009, the Minister General Secretary of the President's Office sent a letter to Mr. TALBOT stating that "*the State of Guinea intends to acquire a 25% share in the capital of said company.*" (R 37). GETMA agreed to sell 5% of the capital of STCC (Minutes of the meeting of May 27, 2009, C 63). It did not honor this commitment.

Amendment No. 1 of November 7, 2009 reduced to 15% the maximum stake of the Republic of Guinea (C 128: Art. 5). On April 29, 2010, GETMA was notified to take, in a period of eight business days, the measures necessary for the State of Guinea to buy into the capital of STCC by the General Manager of the PAC (R 38). The notice produced no result.

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MAY 26, 2014  
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No. .... Date.....

**Claimant's position**

185. The Claimant asserts that, by a letter dated June 17, 2009 (C 130), GETMA proposed to the Guinean State to buy into the capital of STCC, newly formed, by application of Article 7 of the Agreement. Amendment No. 1 specifies the amount of the stake that will be possible for the Republic of Guinea to hold in the capital of STCC. It was only in the letter of the General Manager of the PAC dated April 29, 2010 that the request to purchase a stake was repeated in threatening tone and for purposes of intimidation. This letter was meant to be diversion and was not followed up nor can it be considered as a notice.

**The arbitral tribunal**

186. The arbitral tribunal ascertains that Article 7.1 of the Concession Agreement provided that *"the Licensor may acquire a share of the capital of said company [STCC]"* without providing the level of the stake which the Republic of Guinea can claim.

In a letter dated June 17, 2009, the Chairman of the Board of Directors of STCC wrote the Presidency of the Republic stating:

*"Concerning the State of Guinea, we confirm that in conformity with the commitments of Article 7.1 of the Concession Agreement, it can always avail itself of the right to own a share of the capital inventory of STCC. We further confirm to you a necessary the indications provided at the meeting of the May 27, 2009 under whose terms GETMA wishes to sell to the State of Guinea at any time 5% of the capital that it holds in the company STCC, it being specified that this sale will be done on the basis of the par value of the shares."*

The letter indicated that STCC remained *"fully open to negotiations."*

187. Amendment No. 1 of November 7, 2009 opened to the State of Guinea the possibility of a 15% stake of the capital of STCC. The previously admitted 5% request, which was not used for a number of months, could not be renewed after the signing of the Amendment.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

On April 29, 2010, the Director of the PAC, who moreover did not represent the State of Guinea under the terms of the Concession Agreement (C 2), nor under Amendment No. 1 (C 128), sent notice to GETMA “*to take all diligent measures for the effective buying by the State of Guinea into the structure of the capital of the Operating company of the Container Terminal, STTC SA, in a period of eight (8) business days.*” This request, accompanied by a sanction promise, which does not specify either the percent which the State planned to buy into the capital of STCC, nor the subscription price, could not realistically implemented in the period of eight days. The notification appears to make the circumstance more certain that it was in response to a protest by the Project Manager on the procedure for taking possession of the storage platform. There was no follow-up of the PAC or of the Minister of Transportation. Evidently, the letter of April 29, 2010 that was not pursued cannot be qualified as notification pursuant to Article 32.2 of the Concession Agreement.

**In conclusion**, the arbitral tribunal finds that the conditions of the termination, as agreed by the parties are not met in the form, which is sufficient to find that the termination was not valid.

They are not established on the merits. As skillful as it is, the *a posteriori* reconstitution of causes justifying termination again points out calculations rather an irrefutable demonstration.

The arbitral tribunal finds in this regard that the testimony submitted by the Republic of Guinea admitted that the contractual conditions of the implementation of the termination were not observed so that GETMA could not oppose the granting of the concession to the BOLLORE company (Transcript, May 28, 2013, p. 54, lines 36 to 44 and p. 55, lines 1 to 3).

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No. .... Date.....



<b>COMPENSATION REQUESTED BY GETMA</b>
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188. GETMA requests the compensation expressly provided by the Concession Agreement (I) and other compensation (II). These will be examined sequentially.

189. Before considering them however, the tribunal must rule on the withdrawal of the request by GETMA of compensation for loss of earnings "*lucrum cessans*" confirmed at the hearing of July 8, 2013 (Transcript, July 8, 2013, p. 15, 1.13 to 14). The Respondent issued reservations. It declared (Ibid p. 25, 1.5 to 14):

*"(...) we consider that Getma international is perfectly free to drop the requests, but not to modify the area of the seizing of the arbitral tribunal which was agreed by the minutes of March 15, 2012 signed by all the Parties, and which can only be modified with the agreement of all the Parties.*

*On the subject, I wish to be clear that we consider that this is the tribunal which is petition for the request concerning lost income and that Getma international cannot withdraw jurisdiction from this tribunal in order to assign it to another tribunal.*

*Moreover I would say that it is desirable for the same tribunal to rule at the same time on the question of the lump-sum compensation, which corresponds to 12 months of sales, and on the lost profit because there is an evident similarity between these two loss items."*  
(Transcript, July 8, 2013, p. 25, 1. 5 to 14).

190. The arbitral tribunal finds that GETMA withdrew on its own volition its compensation request for lost income. It cannot, under penalty of *ultra petita*, rule on the withdrawn request. It is the responsibility of the tribunal petitioned for such a request to consider the pertinence that its possible similarity with the damage counts invoked in the present matter.

191. It is shown by the previous statements by the Republic of Guinea terminated the Concession Agreement without observing the law to which it has submitted.

To the degree that the Licensor has violated the obligations of the Agreement to which he was obligated, it must be held to all the contract compensation resulting from the

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termination so that all compensation petitioned before this tribunal and based on negligence or legal liability of the Licensor.

The Republic of Guinea disputes GETMA's right to indemnification across the board. More specifically it disputes the quantification by PWC.

### **I. COMPENSATION PROVIDED BY THE CONCESSION AGREEMENT**

192. Article 32.5 of the Concession Agreement ("Changes of law and Act of Public Authority impeding the proper functioning of the Granted Activities"), on which GETMA bases its compensation requests, provides that "*In case of termination due to a Change of law and Acts of Public Authority impeding the property functioning of the Granted Activities, the Licensee shall receive the compensation provided under Article 32.3 of the Agreement.*" Article 32.3 provides the compensation due to the Licensee in case of "termination of the concession by the misconduct by the Licensor":

- "Lump-sum termination compensation aimed at compensating lost business (the lump-sum termination compensation)" equal:
  1. to the sales realized in the course of the preceding 12 (twelve) months if the termination occurred more than 12 (twelve) months after the entry into effect of the Agreement;
  2. to the sales of the first year anticipated in the realistic business plan referenced in Appendix 8 if the termination occurs in the course of the first 12 (twelve) months following the entry into effect of the Agreement.
- Compensation equal to the Part of the Terminal and the property granted under concession financed by the Licensee which will be considered as if they had not been amortized. This compensation will be equal to the duly documented expenses, incurred by the Licensee, for the work existing at the termination of the Agreement except for deduction for each work of the part at its amortization value taken by the Licensee ("termination compensation").
- Compensation equal to the unamortized amount of the entry fee exploitation right of the granted Activities. The amortization term taken shall be equal to the term of the Agreement.

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MAY 26, 2014  
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No. .... Date.....

- The amount of possible termination compensation which the Licensee shall be owed to its personnel under the laws and regulations in effect in the Republic of Guinea and considering the conditions in which the resumption of exploitation by the Licensor will occur. This compensation paid to the personnel will be reimbursed to the Licensee in a period of 6 (six) months, provided that he has paid them, in the period of 3 (three) months starting from the date notification of the termination.”

193. So there are four types of compensation: the lump-sum termination compensation (A), the termination compensation, for the property granted under concession (B), the compensation for the entry fee (C) and the amount of any termination compensation. GETMA has made no claims for termination compensation. The other three will be discussed below.

**A. Lump-sum termination compensation**

194. Lump-sum termination compensation is provided by Article 32.3 of the Concession Agreement. It is “aimed at compensating the loss of business”: According to the Concession Agreement, this compensation is equal to the sales realized during the twelve months prior to the termination date of the Concession Agreement, that is, between March 8, 2010 and March 8, 2011, termination date of the Agreement (C.11).

195. The experts of the two Parties, PWC on the one hand (C 168, C 221, C 233, C 234, and KPMG (R 65 and R 66) on the other, are in agreement in indicating that this sales figure consists of cargo handling, invoiced by STCC to GETMA International, that re-invoices the ship owners, and the port handling, invoiced by STCC in Guinean Francs to the stevedore companies. The port services were quantified at €9,444,338 by PWC. Neither the Republic of Guinea nor its expert challenge this figure (Respondent’s Pre-trial brief of July 1, 2013, Article 803).

196. On the other hand, the port services, quantified by PWC in Guinean Francs 84,936,025, a figure moreover shared by the two experts, are the subject of an objection between the Parties as to

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

the payment currency and the exchange rate. The Republic of Guinea considers that this item, must, if it is due, be paid in Guinean Francs. It considers again that PWC wrongly used the exchange rate in effect on the invoice date (mean rate 1€ = 7.434 Guinean Francs), because according to it and its expert, one should have used the exchange rate in effect on the termination date (i.e. 1€ = 10.3872 Guinean Francs).

### **Payment currency**

197. To determine the payment currency, we have to observe that we are dealing with a port Concession Agreement attributed to the follow-up of an international bid solicitation. The investments made by GETMA were in Euros (PWC Reports, exhibits C 168, C 221, C 223 and C 234). The Agreement itself provides the Euro as currency, apart from exceptional cases.

That is why the entry fee is in Euros, (Article 15.1 of the Concession Agreement), as well as fixed and variable annual income and the port charges (Articles 15.2 and 15.3). Only the revenue in goods and parking fees are provided in Guinean Francs. The bonds are in Euros (Article 16) as are the delay penalties (Article 18). Thus, one can consider in general that the currency of the Agreement is Euros, unless otherwise indicated.

198. Concerning more specifically the port handling income, it is customary for it to be invoiced to the local stevedore companies in local currency, though that does not mean that the termination compensation must be in this currency: port services constitute a reference for sales and a payment in Guinean Francs of lump-sum termination compensation is inappropriate because it is not in an internationally used and usable convertible currency, and it would be meaningless for GETMA, a French company, to keep it after the termination of the Agreement. The principle of the effective reparation, recognized by Guinean law and international law, thus imposes to order the payment in Euros. Notwithstanding, the Republic of Guinea admitted the conversion in Euros of a loss that will be incurred in Guinean Francs (Pleadings, p. 102).

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MAY 26, 2014  
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No. .... Date.....

**The exchange rate**

199. The experts and the Parties disagree on the exchange rate. GETMA and its expert use the exchange rate in effect on the invoice date, or an average rate of 1 € = 7.434 Guinean Francs, because the Republic of Guinea and its expert use the rate in effect on the day of the termination, now 1€ = 10.3872 Guinean Francs.

200. The tribunal will use the rate in effect on the date of the invoicing because that is the accounting standard used by OHADA. It is a matter of considering the sales figure that will be used as reference. The conversion of sales, to reflect the economic reality of the business, is done on the invoice date (PWC Report of April 30, 2013, Exhibit C 234, p. 4, No. 26). Thus, for the port services the court uses sales of €11,424,836.

201. GETMA thus has a right to a lump-sum termination compensation of €20,869,174. of this amount, we have to deduct the invoices that were supposed to be issued on February 28, 2010 (and which show a year before the reference year or €205,981) and to add to them those that were still to be issued on February 28, 2011 is €221,763. We thus arrive at a total lump-sum termination compensation of €20,884,966 which will be granted to GETMA.

**B. Termination compensation for the property granted under concession**1/Expansion and restoration of the CT

202. Termination compensation is also provided by Article 32.3. This compensation is equal to *“the Part of the Terminal and the property granted under concession financed by the Licensee which will be consider common as they have not been amortized. This compensation will be equal to the duly documented expenses incurred by the Licensee, for the work existing at the termination of the Agreement except for deduction for each work of the*

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MAY 26, 2014  
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No. .... Date.....

*portion of its amortization value taken by the Licensee (the termination compensation).”*

203. GETMA requests, as this termination compensation, the amount of €3,616,394, resulting from the last adjusted PWC report, on April 30, 2013 (C 234).

204. The Republic of Guinea disputes this amount in a number of respects, which it believes must be lowered by €1,274,023, for the following reasons (Pleadings, p. 109):

- Absence of invoices: €313,216
- Undocumented expenses: €613,602
- Adjustment of exchange rates: €252,766

These challenges will be examined in turn. The tribunal will indicate the deductions it considers documented with respect to the requested amount of €3,616,394.

### **The exchange rates**

205. As relates to the exchange rates, the tribunal has already ruled (above) to eliminate the termination date, all the more if it involves compensating an investment expense.

### **Absence of invoices**

206. The amount corresponding to the missing invoices equals, according to the last status of the entries and the claims of the Parties, €313,216.

207. The Republic of Guinea states that the amount of payments not covered by invoices cannot be considered. GETMA responds that the payments were made and confirmed by PWC. PWC in turn indicates that the search for invoices with the suppliers has been unsuccessful. GETMA explains the disappearance of the invoices by the requisition period.

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No. .... Date.....

208. The tribunal will not use the expenses not supported by invoices. In fact, a payment by oneself does not prove a great deal if its object is not established. Now GETMA has the burden of proof. And demonstrates neither the amount of the invoices, nor the circumstances of their loss, nor the responsibility in this regard by the Republic of Guinea.

209. **So the amount of €3,616,394 claimed by GETMA will be reduced by €313,216.**

**Undocumented expenses**

210. PWC had presented, on the expenses which the Republic of Guinea considers to be undocumented, a summary table valid as of April 30, 2013 (exhibit C 234, p. 18), followed by comments by KPMG. PWC made a number of adjustments but did not accept all of KPMG's comments.

211. The final claim by the Republic of Guinea equals €613,602 which it considers to be undocumented. A summary of these charges are shown in the following (Respondent's Pre-trial brief of July 1, 2013, p. 152, No. 829). The various items will be discussed below.

Supplier	Claimed amount	Challenge	Challenged amount
TSM Guinée	€670,273	Two of the invoices submitted have not been paid by TSM Guinée because they are invoices sent by TSM Guinée to the Sogefel company.	€59,835
ML Guinée	€21,499	The invoices do not contain any indication of the nature of the goods. Also, no information makes it possible to establish a link with the restoration work of the CT.	€21,499
Soguico	€18,848	A work statement of account on plain paper is not valid as proof of investment.	€4,336
A Pub Deco	€87,005	The invoices do not indicate any connection with the restoration work of the CT.	€75,801

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MAY 26, 2014  
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No. .... Date.....

Consortium Nord Sud	€7,461	Two invoices do not mention the recipient of the invoice and the place of performance of work is vague. They do not have a sufficient connection to the restoration work of the CT.	€4,750
Sogefel	€364,188	Three invoices are incomplete which prevents establishing the existence of the corresponding expenses.	€135,519
Barry M. Lamara	€145,563	Some expenses do not correspond to investments, instead to site maintenance expenses. The other expenses have no connection with the restoration work of the CT.	€145,563
FMR	€20,613	The invoices do not make it possible to establish a link with the restoration of the CT.	€3,525
Setrag	€61,767	GETMA does not present any proof.	€24,588
ABI	€151,800	PWC overvalues the time spent by Mr. Kerambrun on the project.	€98,116
Mr. Kerambrun's expenses	€37,253	There is nothing to connect Mr. Kerambrun's expenses to the title of the Agreement.	€35,070
Mr. Kouyate	€5,000	The nature of the service is not specified.	€5,000
			<b>€613,602</b>

**a- TSM GUINEE**

212. The amount deducted by KPMG corresponds to two invoices for work advances, €12,162 and €47,673 respectively. These two invoices were set by TSM GUINEE to SOGEFEL. The Republic of Guinea maintains that they have not been paid. PWC nonetheless confirmed that the payment of these invoices was done by STCC and corresponds to expenses covered by the termination compensation. The error in the wording of the invoice in the name of SOGEFEL is considered material. The reduction on this item, an amount of €59,835, will be refused.

**b- ML GUINEE**

213. The Republic of Guinea disputes these expenses of €21,499, for the reason that they are not sufficiently identified and that their connection with the restoration work of the CT has not been established. But PWC established that the docking expenses in question correspond to the

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MAY 26, 2014  
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No. .... Date.....



transport of equipment and parts concerning the dock defenders purchased by STCC and charged to the Conakry CT project. Thus, they are an integral part of the investment. The deduction will be rejected.

**c- SOGUICO**

214. The Republic of Guinea wrongly rejects this expense, for the amount of €4,336, for the reason that the invoice has no letterhead, while it has “SOGUICO” and “authorized for payment” stamps. So the reduction will be rejected.

**d- A PUB DECO**

215. These invoices, totaling €75,801, were rejected by KPMG because on the one hand, they do not involve the restoration and expansion work of the CT and on the other, they carry the words “Clinique Project.”

216. Now, the supplemental investigations conducted by PWC respond to these concerns by showing that the first invoice, the most important one, concerns the confection of two posts for advertising use supporting part of the signage of the CT and that the mention “Clinique Project” corresponds to the construction of a health center for the employees working on the Terminal. Here as well, the reduction will be rejected.

**e- CONSORTIUM NORD SUD**

217. The Republic of Guinea disputes the invoices, with the amount €4,750, for lack of specificity. Now, they indicate very specifically that these invoices pertain to the “construction of a guard/watchman’s booth and tile” as part of the work on the “Port container,” with the stamps “STCC” and “Conakry Terminal project.” The reduction will be refused here as well.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

**f- SOGEFEL**

218. Here again, the Republic of Guinea disputes the completeness of the invoices, an amount of €135,519, and the proof provided. Now, the invoices are produced and demonstrate, in particular, the payment of a 30% advance on an important work contract. GETMA deducts from the advance payment the amount of the repayment received due to the work stoppage. The reduction will be rejected here as well.

**g- BARRY M LAMARA**

219. The Republic of Guinea initially disputes some invoices as corresponding to maintenance and cleaning, thus constituting current management charges. But in this case, it involves important cleaning work of the site, necessary to the execution of work. So these are investments.

220. The Republic of Guinea again rejects the cement purchase invoices, because they were prior to the selection of suppliers for the expansion of the Terminal. But the challenged invoices, as well as what is shown by the PWC Reports and their Appendices (Appendix 10 to the PWC Report of January 7, 2013, C 221 and Appendix 19 to the PWC Report of April 30, 2013, C 234) demonstrate that the cement was intended for the railroad station platform, to supplement the self-locking stones installed on the ground (PWC Report of April 30, 2013, p. 13, C 234).

221. Finally, the Republic of Guinea criticizes the procurement invoices due to their late date (August 2011), i.e., after the termination of the concession. But the sudden termination, followed by the requisition, removed for a time STCC from its relations with its suppliers. The Republic of Guinea consequently required that all of the outstanding invoices were paid, in order to authorize the repatriation of the port agents. It is in these circumstances that STCC sent to its supplier, Mr. LAMARA, and obtained the last invoices that correspond to earlier expenses, in relation with the restoration of the CT. Here as well, the objection will be rejected.

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MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....

**h- FMR**

222. The Republic of Guinea rightly observes that this expense is not part of the termination compensation as defined in Article 32.3 of the Concession Agreement. Thus, it will be examined at the same time as the other property granted under concession (see below).

**i- SETRAG**

223. The objection by the Republic of Guinea, for an amount of €24,588, is admitted. This amount is not in fact backed by an invoice. The reference by PWC to the 2010 Grand Suppliers Book (Appendix 20 to the PWC Report of January 7, 2013, C 221) is not sufficiently illuminating on the nature of this expense, with regard to the restoration work and expansion of the Conakry CT.

**j- ABI**

224. In vain the Republic of Guinea disputes the time spent by Mr. KERAMBRUN (maritime consultant) on the project in 2010 and 2011. The fees were calculated using a daily rate that corresponds closely to the time spent, reduced after negotiation and returned to 80% of its value. So there is no exaggeration. This objection will be rejected.

**k- MR. KERAMBRUN'S EXPENSES**

225. The Republic of Guinea rightly disputes the consideration of Mr. KERAMBRUN's moving expenses totaling €35,070. In vain GETMA claims through PWC that a number of questions needed to be resolved after termination. These expenses do not belong to those covered by the termination compensation provided by the Agreement. GETMA does not assert any other basis for its request. This reduction will be allowed.

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**1- MR. KOUYATE**

226. The Republic of Guinea disputes the compensation by €5,000 to Mr. KOUYATE, logistics advisor, for the reason that the type of service is not specified. PWC indicates nonetheless that Mr. KOUYATE worked on a development project of the supply routes for the goods passing through the Terminal. Nonetheless, the invoice issued by Mr. KOUYATE (Appendix P of Appendix 9 to the PWC Report of January 7, 2013, C 221) is dated March 31, 2011.

227. It is not possible, in the absence of other evidence concerning the period compensated by this payment, to imputed it to the investment made before termination, and that all the more so because GETMA invokes confidentiality as the reason for not having produced Mr. KOUYATE's contract (PWC Report of April 30, 2013, p. 12, note 8, C 234). Thus, the claim will be admitted.

228. **SUMMARY:**

The admitted reductions are those concerning SETRAG (€24,588), to the expenses of Mr. KERAMBRUN (€35,070) and Mr. KOUYATE (€5,000). They thus equal the sum of €64,658. In addition, the FMR claim for €3,525 was sent to be examined under "*other property granted under concession.*"

2/Other property granted

229. Under the title "other property granted under concession," GETMA requests the unamortized value of the work done in the operating premises. These essentially consist of the supply and installation of a generating set, other electrical installations, construction of administrative offices and general installations. (PWC Report of January 7, 2013, p. 19, C 221).

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No. .... Date.....

230. This property is useful, i.e., necessary for operation, and are not simply works of convenience. The Licensor benefits from them on termination. Thus, they are party to property granted under concession as defined in Article 12 of the Concession Agreement: “property included in the area of the Terminal.”

231. KPMG indicates that it understands that PWC includes them under the termination compensation (KPMG Report of March 22, 2013, pp. 25-26, Section 159, exhibit R. 66). However, as KPMG indicates, expenses not supported by invoices cannot be considered, the text requiring that the expenses must be “duly documented.” These total €82,415, which is an amount already deducted because it is included in the amount of €313,216 deducted above. Thus, there is no need to withdraw another amount as other property granted under concession.

232. Concerning the FMR invoices (€3,525), the involve expenses for domiciles of the expatriates and which, by PWC’s admission, cannot be linked to the CT (PWC Report of April 30, 2013, p. 14, No. 56, exhibit C 234). They cannot belong to “other property granted under concession” that concerns “the area of the Terminal.” Also, one does not see how this property can be refunded to the Licensor. Thus, the expenses in question will be rejected.

233. SUMMARY

- Amount requested: €3,616,394
- Amounts to deduct on objection by the Republic of Guinea:
  - Expenses not documented by invoices: €313,216 (this amount includes the amount for other property granted under concession)
  - Other expenses not documented by property granted under concession: €64,658
  - FMR invoices: €3,525 to deduct
  - Total amounts to deduct:  $313,216 + 64,658 + 3,525 = €381,399$
- TOTAL granted:  $3,616,394 - 381,399 = €3,234,995$

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No. .... Date.....

234. Consequently, the Republic of Guinea will be ordered to pay to GETMA International, as termination compensation (restitution of the property granted under concession), the sum of €3,234,995.

**C. Compensation for the Entry fee**

235. An entry fee of 15 million Euros was paid by GETMA to the Republic of Guinea.

236. Article 32.3 provides, at the termination of the Concession Agreement, “compensation equal to the amount unamortized of the entry fee or right to operate the Activities granted. The held amortization term shall be equal to the term of the Agreement.”

237. Amendment No. 1 of November 7, 2009 sets the date of entry into effect of the Agreement as November 7, 2009 (Amendment No. 1, Article 4, Exhibit C 128). The Agreement itself sets the term of the Concession at 25 years from its entry into effect (Exhibit C 126, Article 5). PWC amortizes the period from November 7, 2009, entry into effect date of the Agreement, to March 8, 2011, date of the termination. It results in an amount of €14,201,096 claimed by GETMA.

238. The Republic of Guinea requests that the amortization term goes back to June 1, 2009, that is, according to it, at the beginning of the operation of the CT. It results in a revised amount of €13,958,445. But this thesis is contrary to the text of the Agreement and its Amendment. For that reason it will be discarded.

239. Consequently, the Republic of Guinea will be ordered to pay to GETMA the sum of €14,201,096 for the amount unamortized of the Entry fee.

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No. .... Date.....

**II. OTHER COMPENSATION REQUESTED BY GETMA**

240. GETMA further requests the following compensation:

- Compensation for repatriated staff
- Compensation for invoices to be issued
- Compensation for returned property
- Compensation for non-terminated contracts
- Compensation for crisis management expenses

241. GETMA relies for this purpose on the stipulation of Article 32.5 of the Concession Agreement which provides, in case of a change in the law, that “the Licensor shall do everything in his power to minimize the effects of any “Changes of law and Act of Public Authority impeding the proper functioning of the Granted Activities.”

242. GETMA also sets forth in the development of its claims the abruptness of the breaking of the Concession Agreement. It also denounces the bad faith of the Republic of Guinea and reports the occurred requisition.

243. The Republic of Guinea responds that Article 32.5 of the Concession Agreement does not have the purpose that GETMA attributes to it, that the obligation to minimize the damage supposes, according to this Article, that a preliminary notification of change of law occurred and governs the period that precedes the final notification of this change. The Republic of Guinea also reports that, in case of termination, Article 32.5 refers to Article 32.3. It maintains that this text exhaustively enumerates the compensation which the Licensee can claim for termination.

244. The tribunal holds that Article 32.3 actually specifies the only compensation permitted in case of termination where termination is the sole basis for the compensation sought. But, this text [of Article 32.3] does not exclude compensation claimed on a basis other than termination. Thus, the tribunal will reject the compensation claimed that is due to termination alone.

245. GETMA, although it alludes to the requisition, does not request compensation for this requisition before this tribunal.

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MAY 26, 2014  
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No. .... Date.....

246. Today the obligation to minimize loss is a principle in international contracts and the restriction to this obligation, taken by the Republic of Guinea, is not pertinent. Again GETMA must demonstrate those specific facts by the Republic of Guinea, beyond the termination and of the requisition, which caused it a loss. In light of these principles, the tribunal will examine below GETMA's compensation claims.

**A - Expenses of repatriating personnel**

247. The expenses for repatriating expatriated personnel are a normal consequence of the termination. They are covered by Article 32.3 of the Agreement. They will not be granted.

248. GETMA further requests the amount of €65,456, representing the salaries of the personnel repatriated during the "latency period," that is a six month period before GETMA was able to reclassify this personnel. GETMA attributes this period to the abruptness of the termination.

249. But on the one hand, if the termination had not been abrupt, GETMA would have had a right to notice of sixty days, not six months. On the other, this loss is indirect in nature and consequently not eligible for compensation, due to the fact that it rests on a number of decisions taken by GETMA itself concerning the sort of its staff.

The request will be rejected in full.

**B - Compensation due to invoices to be issued**

250. GETMA claims, on this basis, an amount of €599,418 for invoices it was unable to issue for transactions prior to March 8, 2011. It attributes this failing to the termination and to the occupation of its offices in Conakry, offices it is not permitted to access.

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MAY 26, 2014  
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No. .... Date.....



251. The Republic of Guinea disputes that it has prevented any invoicing and holds that GETMA could have invoiced the prior translations after the termination.

252. The tribunal agreed with the expert Ms. Dominique Perrier (PWC, Transcript, May 29, 2013, p. 48), that the invoicing of forward operations is itemized for a great many transactions, and that it requires a stream of information to which GETMA maintains it no longer had access. But GETMA does not demonstrate that it is the Republic of Guinea which prevented it from collecting this information. It does not demonstrate, in particular, that it notified the Republic of Guinea after the termination, to allow it access to its documentary and accounting data.

The amount requested will be rejected in full.

### **C - Compensation for returned property**

253. GETMA maintains that the Republic of Guinea, by requisitioning the equipment and the inventories and not having them taken over by the new Licensee, worsened its loss instead of minimizing it.

254. The Republic of Guinea considers that GETMA requests compensation “for own requisitioned property.” It finds that the requisition is a consequence of the termination, necessary for assuring the continuity of public service. Thus, the loss would be covered by the compensation provided under Article 32.3 of the Concession Agreement and GETMA will not be founded in requesting supplemental compensation.

255. The tribunal has to find the accord of the Parties on the fact that this request must be attached to the requisition. It is possible that in fact, as the Republic of Guinea maintains, the requisition is a necessary consequence of the termination to insure the continuity of public service. But these are legal institutions distinguished by their regimes and their sanctions. However it is not contestable that the Licensee, whose equipment and inventory were requisitioned, has a right to just compensation,

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MAY 26, 2014  
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No. .... Date.....

in the limit of the loss that would be chargeable to the requisition. On the other hand, GETMA cannot reproach the Republic of Guinea, which did not have the obligation, for the new Licensee not having taken back the equipment and the inventory.

1/Equipment repatriation expenses

256. The equipment repatriation expenses are a consequence of the termination and not of the requisition, as well as of the choice of repatriation done by GETMA. Thus, it cannot be imputed to the requisition. They are included in the compensation of Article 32.3 of the Concession Agreement.

2/Repair expenses for returned equipment

257. GETMA claims an amount of €1,151,508 for Repair expenses for returned equipment, cranes and lifting equipment. It imputes the necessity of this restoration to the utilization of these cranes and lifting equipment during the requisition. The Republic of Guinea disputes this causality and finds that it is not demonstrated.

258. The tribunal begins by considering that the equipment was used by the new Licensee during the requisition period, awaiting the arrival of its own equipment. Unfortunately, no adversarial record was produced at the time of the requisition. The description established by adversarial expertise, took place in Lomé from August 22 to 26, 2011, although the Republic of Guinea, duly convened, did not judge it opportune to participate (GEXCO Expert Report, C.140).

259. Three expert opinions were performed in Lomé (GEXCO, C 140; FRANCETRUCK and RAOUL NEVEU: Appendix 18 to the PWC Report of June 11, 2012, C 168). None of them make it possible to attribute the damages found in the requisition period instead of the prior period. Since GETMA has the burden of proof, the request will be rejected.

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MAY 26, 2014  
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No. .... Date.....

260. GETMA does not request before this tribunal, compensation for using its equipment during the requisition.

3/Inventories

261. GETMA also claims an inventory consisting primarily of individual parts and fuels, oils and fats, for an amount of €210,070. This inventory, intended for daily use, was returned to GETMA, though only partially.

262. The Republic of Guinea considers that it only owe the value if it is demonstrated that GETMA was unable to obtain restitution by the new Licensee.

263. The tribunal finds that the responsibility for the restitution of the requisitioned property rests on the author of the requisition.

264. As these are items intended for current use, their non restitution is comparable to their utilization. The value of these items, in the absence of a physical inventory valued at March 8, 2011, was established by PWC according to the financial statements as of December 31, 2010, closing date of the last year, and corrected by the movements until 8 March 2011 (PWC Report of January 7, 2013, p. 27 and see Exhibit C 221). The Republic of Guinea has not seriously challenged these values, or offered to restore the entire Inventory. So the amount claimed by GETMA, €210,070, will be awarded to it.

**D. Compensation for non-terminated contracts**

265. GETMA claims compensation of €185,849 for the termination of bank security contracts, leasing of equipment and/or IT and telecommunications services. It alleges that it had to continue to bear its cost, not being able to terminate abruptly and without notice. It attributes this loss to the suddenness of the break.

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MAY 26, 2014  
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No. .... Date.....

The Republic of Guinea disputes the reasons for these expenses, their existence and their amount.

266. The tribunal finds that the expenses cited correspond to the management of the termination. They are covered by Article 32.3. Furthermore, GETMA does not demonstrate another cause imputable to the Republic of Guinea. GETMA's request will be rejected.

**E. Compensation for crisis management expenses**

267. GETMA requests an amount of €258,834 for management expenses for the crisis linked to the termination and the requisition. These expenses consist of communication expenses and legal expenses.

268. But these expenses are included in the compensation of Article 32.3. GETMA does not demonstrate any special expense that would be due, outside of the termination, to a specific fault by the Republic of Guinea.

The request will be rejected.

**III. INTEREST**

269. GETMA requests the application of Article 23 of the Terms and Conditions (C 126, p. 53) that stipulates that the payments made with delay by the Licensee to the Licensor are charged interest "at the discount rate of the central bank of the country of the payment currency plus one percent," that is the payment being in Euros, the discount rate of the European Central Bank.

270. The Republic of Guinea did not make a particular observation on this rate.

271. The tribunal will grant GETMA the requested interest pertaining to the rulings in its favor, and this from the arbitration petition, May 10, 2011, until complete payment.

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MAY 26, 2014  
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**ARBITRATION EXPENSES**

272. Each of the Parties requests that the other be ordered to compensate it for all of its arbitration expenses.

273. These expenses equal for Claimant a total amount of €1,404,047.16 (including VAT), divided as follows:

- a. Attorney fees: €1,098,476.68 (including VAT);
- b. PWC fees: €254,090.20 (including VAT)
- c. Legal Consultation: €27,747.20 (including VAT)
- d. Hearing expenses (renting halls, transcription): €23,737.08 (including VAT)

274. These expenses equal for Respondent the total amount of €1,338,931 (excluding tax, except for transportation), divided as follows

- a. Attorney fees: €1,031,564 (excluding tax) + €68,890.75 (excluding tax) = €1,100,454.75 (excluding tax);
- b. KPMG fees: €118,613 (excluding tax)
- c. Expenses for transporting witnesses: €30,307
- d. Hearing expenses (renting halls, transcription, translation): €2075 (excluding tax) + €633.75 (excluding tax) + €2,250 (excluding tax) = €4,958.75 (excluding tax)
- e. Veracity Worldwide fees: €77,587.50 (excluding tax)

275. The arbitration expenses are set by the Court à the global sum of CFA Francs 100,480,332, including the fees of the three arbitrators set at CFA Francs 40,480,332.

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MAY 26, 2014  
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276. The arbitration clause inserted in the Concession Agreement contains the following paragraph: “*Each Party shall bear the cost of the arbitrator it names. The other costs generated by the arbitration shall be divided equally between the Parties.*”

This clause is imposed on the Parties and the arbitral tribunal (Section 10 of the OHADA Uniform Act on Arbitration).

277. Therefore, firstly that regardless of the respective merits of the Parties in this arbitration, the definitive charge of expenses must be carried equally by them. Therefore, secondly, that each party must carry their own legal costs (attorneys, consultants, experts, witnesses).

278. Each Party who has carried more than its share is authorized to claim the surplus from the other Party.

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### OPERATIVE PROVISIONS

The arbitral tribunal:

1 - Dismisses the request by the Republic of Guinea to be granted a period of four months to collect the evidence of corruption alleged against the company GETMA international SAS;

Ruling on the merits,

2 - Declares illegal the termination of the Container Terminal Concession Agreement signed on September 22, 2008 between the Republic of Guinea and the company GETMA International SAS;

3 - Finds that, due to the new concession agreement signed on March 11, 2011 with BAL or any other company of the BOLLORE Group, it is now impossible to return to the *status quo ante*;

4 - Orders that the Respondent compensate the company GETMA International SAS for the loss suffered due to the termination, which is broken down as follows:

- a. A lump-sum termination compensation of €20,884,966;
- b. A termination compensation for the property granted under concession of €3,234,995;
- c. The unamortized amount of the entry fee of €14,201,096;

5 - Further orders Respondent to pay to GETMA compensation for the unreturned inventory of €210,070;

6 - Dismisses all other claims for compensation requested by GETMA International SAS;

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MAY 26, 2014  
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No. .... Date.....

7 - Orders that the amounts awarded in paragraphs 4 and 5 above to accrue interest at the discount rate of the European Central Bank plus one percent, from the date of the arbitration request dated May 10, 2011, until complete payment;

8 - Maintains the confidentiality of Exhibit R 107, for the purposes of the arbitration proceeding, subject to the rights of defense;

9 - On the expenses:

- Leaves to each Party the charge of its legal costs (attorneys, consultations, experts, witnesses);
- Orders that the Parties carry equally the other arbitration expenses;
- Find that the Court has set the arbitration costs at CFA Francs 100,480,332, CFA Francs 40,480,332 of which as fees for the arbitrators;
- Orders that the Party who has paid more than his share has the right to request that the other party repay the surplus;

10 - Dismisses all other requests by the parties.

[Stamp]:  
COMMON COURT OF JUSTICE  
AND ARBITRATION OF OHADA  
ARBITRATION CENTER  
aknarcis.ccja@ohada.org  
The General Secretary  
Narcisse AKA [handwritten text]

[stamp]:  
COMMON COURT OF JUSTICE  
AND ARBITRATION OF OHADA  
MAY 26, 2014  
INCOMING MAIL  
No. .... Date.....



Place of arbitration: Abidjan.

Date: [hw:] *April 29, 2014*

[signature]  
Juan Antonio CREMADES  
Co-arbitrator

[signature]  
Eric TEYNIER  
Co-arbitrator

[signature]  
Ibrahim Fadlallah  
Presiding

[Stamp]:  
COMMON COURT OF JUSTICE  
AND ARBITRATION OF OHADA  
ARBITRATION CENTER  
aknarcis.ccja@ohada.org  
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