

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Washington, D.C.

In a procedure between

**GETMA INTERNATIONAL, NCT NECOTRANS, GETMA INTERNATIONAL INVESTISSEMENTS, &
NCT INFRASTRUCTURE & LOGISTIQUE**

Claimants

versus

THE REPUBLIC OF GUINEA

Respondent

(Case: ICSID NO. ARB/11/29)

DECISION REGARDING JURISDICTION

Rendered by:

**Mrs. Vera Van Houtte, President
Mr. Bernardo M. Cremades, Arbitrator
Professor Pierre Tercier, Arbitrator**

Secretary of the Tribunal: Mrs. Mairee Uran Bidegain

Counsel for the Claimants: *Counsel for the Respondent:*

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Date sent to the Parties: December 29, 2012



Table of contents:

i.	THE PARTIES	3
a.	THE CLAIMANTS	3
b.	THE RESPONDENT	3
II.	THE ARBITRAL TRIBUNAL	4
III.	THE ARBITRATION CLAUSE	4
IV.	BRIEF STATEMENT OF THE FACTS	5
V.	BACKGROUND OF THE PROCEDURE	7
a.	BEGINNING OF THE PROCEDURE	7
b.	REQUEST FOR RECUSAL	8
c.	BIFURCATION OF THE PROCEDURE	8
VI.	THE PARTIES' REQUESTS CONCERNING JURISDICTION	9
a.	THE RESPONDENT	9
b.	THE CLAIMANTS	9
VII.	THE PARTIES' ARGUMENTS	10
a.	THE RESPONDENT'S ARGUMENT	10
b.	THE CLAIMANTS' ARGUMENT	14
VIII.	DISCUSSION	18
a.	INTRODUCTION— BIFURCATION	18
b.	ARBITRATION CLAUSE AS A "CONTRARY AGREEMENT"	19
c.	ARTICLE 32.5 OF THE CONCESSION AGREEMENT	22
d.	GETMA INTERNATIONAL'S REQUESTS IN THE CCJA ARBITRATION	26
e.	THE CONTRARY AGREEMENT OF THE 2ND, 3RD AND 4TH CLAIMANTS	33
IX.	DECISION	38



I. THE PARTIES

a. THE CLAIMANTS

1. The first Claimant is Getma International, a simplified joint stock company existing under French law, with registered offices at 66 rue Pierre Charron, 75008 Paris.
2. The second Claimant is NCI Necotrans, a joint stock company existing under French law with registered offices at 66 rue Pierre Charron, 75008 Paris.
3. The third Claimant is Getma International Investissements, a simplified joint stock company existing under French law with registered offices at 66 rue Pierre Charron, 75008 Paris.
4. The fourth Claimant is NCT Infrastructure & Logistique, a simplified joint stock company with registered offices at 66 rue Pierre Charron, 75008 Paris.
5. The Claimants are represented in the arbitration procedure by:
José Miguel Judice, Esq.
Tiago Duarte, Esq.
PLMJ-A.M. Pereira, Saragga Leal, Oliveira Martins, Judice e Associados, RL
Attorneys & Members of the Lisbon Bar Association
Avenida da Liberdade, 224
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And

Cédric Fischer, Esq.
Elisabeth Mahe, Esq.
Fischer, Tandeau de Marsac, Sur & Ass.
Attorneys & Members of the Paris Bar Association
67, Boulevard Malesherbes
75008 Paris
France

b. THE RESPONDENT

6. The Respondent is the Republic of Guinea, represented by the State Judicial Agency whose offices at POB 1005 Conakry, the Republic of Guinea (referred to hereinafter as the "Respondent" or the "Republic").
7. The Respondent is represented in this arbitration procedure by:

Laurent Jaeger, Esq.
Pascal Agboyibor, Esq.
Romain Sellem, Esq.
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Avenue Pierre 1er de Serbie
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And
Mamadou Traoré, Esq.
Cdasso Bayala, Esq.
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11 POB 721 CMS Ouagadougou
Place Naba Koom, 11
Burkina Faso

II. THE ARBITRAL TRIBUNAL

8. On November 14, 2011, the Claimants appointed as arbitrator, pursuant to Article 2 of the ICSID Regulations:
Mr. Bernardo M. Cremades
B. CREMADES Y ASOCIADOS
Goya, 18
28001 Madrid
Spain
9. On December 12, 2011, the Republic appointed as arbitrator, in accordance with Article 2 of the ICSID Regulations:
Professor Pierre Tercier
Chemin Guillaume Ritter 5
1700 Fribourg
Switzerland
10. On January 20, 2012, the Parties jointly appointed as President of the Arbitral Tribunal:
Mrs. Vera Van Houtte
STIBBE
Central Plaza
Rue de Loxum, 25
1000 Brussels
Belgium
11. On February 2, 2012, the Secretary General of the Centre appointed Mrs. Mairée Uran Bidegain, Legal Advisor at the ICSID, as Secretary of the Arbitral Tribunal.



III. THE ARBITRATION CLAUSE

12. Article 28 of Court Order no.00/PRG/87 of January 3, 1987, amended by law no.L/95/029/CTR in of June 30, 1995 governing the Investment Code of the Republic of Guinea (the "Investment Code") stipulates that:
 - "1) Disputes resulting from the interpretation or application of this Code are settled by the Guinean courts entertaining jurisdiction in accordance with the laws and regulations of the Republic.
 - 2) However, disputes between the Guinean State and foreign nationals, concerning the application or interpretation of this Code are, unless otherwise agreed by the parties involved, definitively settled by arbitration conducted:
 - o in accordance with the provisions of the Convention of March 18, 1985 for the "settlement of disputes concerning investments between States and nationals of other states"

established under the aegis of the International Bank for Reconstruction and Development, ratified by the Republic of Guinea on November A, 1986, or;

- *if the person or company concerned does not meet the nationality conditions stipulated in Article 25 of said Convention, in accordance with the provisions of the regulations of the additional mechanism approved on September 27, 1978 by the Administrative Council of the International Centre for the Settlement of Investment Disputes (ICSID)."*

IV. BRIEF STATEMENT OF THE FACTS

13. On September 22, 2008, the Republic of Guinea and Getma International concluded an agreement for the Concession of the container terminal of the port of Conakry, its extension and the building of a rail extension (the "Concession Agreement") (Exhibit C – 11). Under this agreement, the Republic of Guinea granted to Getma International a Concession to the public service of managing and operating the Conakry container terminal (the "Concession").
14. Pursuant to Article 7 of the Concession Agreement, Getma International was to create a company under Guinean law for the operation of the Concession. Pursuant to this provision, the *Société du Terminal à Conteneurs de Conakry SA* (the Conakry container terminal company) (the "STCC") was created on November 20, 2008 (Exhibit C – 13). 95% of the STCC is owned by Getma International Investissements, created on November 12, 2008, 51% by Getma International in its turn, and 49% by NCT Necotrans (Counter-Memorial no.2 § 219, Memorial no. 2 § 69).
15. On November 7, 2009, the Republic and Getma International concluded Additional Clause no. 1 to the Concession Agreement in order to specify the conditions for suspending and calculating the terms and deadlines contained in the Concession Agreement, the number of members in the monitoring committee, the nature of the activities granted, the share in the parking costs and fees ("Additional Clause no. 1") (Exhibit C – 12).
16. Through its French subsidiary NCT Infrastructure & Logistique, Getma International launched an international call for bids, closed in February 2011, for the construction of a new dock and the building of a new area of 120,000 m² (Counter-Memorial no. 2 § 219, Memorial no. 2 § 70).
17. On March 8, 2011, the President of the Republic adopted a Decree pursuant to which the Concession Agreement and its Additional Clause *were "terminated for failures to meet the Concessionary's obligations [...] effective immediately and without indemnification, at the expense and risk and based on the faults of the Getma International SAS companies [sic]* (the "Termination Decree") (Exhibit C – 19).
18. On March 9, 2011, the President of the Republic adopted a second Decree pursuant to which *"the Guinean State has decided to requisition, for a period of 60 days or more, beginning on the date of the signing of this Decree, the personnel, equipment, installations, real property and assets it deems necessary, belonging to the Getma International SAS company and to the Conakry container terminal company, which are located in the Conakry container terminal or elsewhere on the national territory of the Republic of Guinea"* (the "Requisition Decree") (Exhibit C – 21).

19. On May 10, 2011, Getma International submitted a request for arbitration to the common court of justice and arbitration (the "CCJA") of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (the "O.H.A.D.A.") (Organization for the Harmonization of Business Law in Africa) against the Guinean state, pursuant to the Arbitration Clause stipulated in Article 31 of the Concession Agreement (the "Arbitration Clause").

20. Pursuant to its request for arbitration of May 10, 2011, Getma International requested of the Tribunal created as a result of this request and composed of Messrs. Eric Teynier, Juan Antonio Cremades and Ibrahim Fadlallah (referred to hereinafter as "the CCJA Tribunal") to:

"State and rule that the termination of the Concession Agreement pursuant to the Decree of the President of the Republic of Guinea is null and void;

Establish that, due to the new Concession Agreement granted on March 11, 2011 to BAL, or to any other company in the Bollore group, a return to the "statu quo ante bellum" is henceforth impossible;

Sentence the Respondent to indemnify the Concessionary for the prejudice sustained due to the termination of the Concession Agreement, and comprising among other things and subject to adjustment (i) the all-inclusive termination indemnity, (ii) the termination indemnity, (iii) the unamortized amount of the entry ticket, (iv) the severance pay and (v) the additional prejudice, in addition to interest accruing at the legal rate from the date of the preliminary notice of a change of law;

To leave it up to the Respondent to pay all the costs, expenses and fees borne by the Claimant" (Exhibit R – 9).

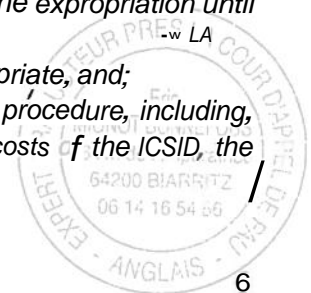
21. The CGA procedure is currently underway.
22. On September 29, 2011, the Claimants filed a request pursuant to Article 36 of the ICSID Convention as well as order no.00/PRG/87 of January 3, 1987, amended by law no..L/95/029/CTRN of June 30, 1995 pertaining to the Investment Code of the Republic of Guinea.
23. Pursuant to their arbitration request of September 29, 2011, the Claimants requested of the ICSID Tribunal (the Tribunal composed as mentioned in chapter 2 above, also referred to as "the Arbitral Tribunal"):

"a) to declare that the state of Guinea violated its investment laws and/or International law, in particular that it expropriated in a discriminatory manner the Claimants' investment, without prompt, just adequate compensation, in breach of Articles 5, 6 and 7 of the Investment Code and/or in breach of customary International law;

c) to order Guinea to indemnify the Claimant due to the breach of its investment laws and/or International law in an amount to be determined at the appropriate time in this procedure, in a freely convertible currency accepted by the Claimants, plus interest accruing at a reasonable commercial rate for the currency at issue from the date of the expropriation until full payment of the amount has been made;

d) To award all other compensation which the Tribunal considers appropriate, and;

e) to order the state of Guinea to pay all the costs of this arbitration procedure, including, without limitation, the fees and costs of the Tribunal, the fees and costs of the ICSID, the

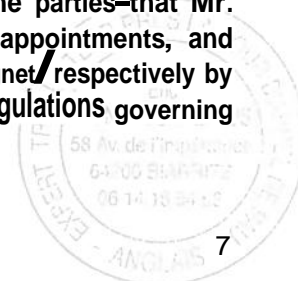


fees and costs pertaining to the Claimant's legal presentation and the costs and fees of any expert appointed by the Claimant or the Tribunal, plus the interest owed".

V. BACKGROUND OF THE PROCEDURE

a. BEGINNING OF THE PROCEDURE

24. On September 29, 2011, Getma International, NCT Necotrans, Getma International Investissements and NCT Infrastructure & Logistique (referred to hereinafter as the "Claimants") filed a request for arbitration ("the request") with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") against the Republic of Guinea.
25. The basis of the request is the convention for the settlement of investment disputes between states and nationals of other states (the "Convention" or the "ICSID Convention") as well as order no.00/PRG/87 of January 3, 1987, amended by law no. L/95/029/CTRN of June 30, 1995 governing the Investment Code of the Republic of Guinea.
26. On October 19, 2011, the ICSID Secretariat, in order to pursue the examination of the request, asked the Claimants to clarify the requesting parties' respective roles in the Concession and to explain the investment made by Getma International Investissements and NCT infrastructure & Logistique. According to the information submitted by the Claimants on October 28, 2011:
 - NCT Necotrans is the group's leading holding company owning directly or indirectly 100% of the three other Claimants, and financed the investment in Guinea;
 - Getma International was the Concessionary of the container terminal;
 - Getma International Investissements is an intermediary holding company controlled by Getma International and controlling the Guinean Company STCC which is the company which operates the terminal;
 - NCT infrastructure & Logistique is NCT Necotrans' technical subsidiary responsible for the work of extending the terminal.
27. In accordance with Article 36(3) of the ICSID Convention, ICSID's Secretary General registered the request on November 3, 2011.
28. In a letter of November 14, 2011, the Claimants proposed that the dispute be settled by the Tribunal composed of three members, one arbitrator appointed by each of the parties and the third appointed by common agreement. In this same letter, the Claimants confirmed the appointment as arbitrator of Mr. Bernardo Cremades, of Spanish nationality, whom they had already announced in the request.
29. In a letter of December 12, 2011, the Respondent accepted the Claimants' proposal concerning the method of appointing the Arbitral Tribunal and appointed Professor Pierre Tercier of Swiss nationality as arbitrator.
30. In a letter of December 20, 2011, the Centre's Secretariat informed the parties that Mr. Bernardo Cremades and Professor Pierre Tercier had accepted their appointments, and communicated to them the acceptance and independence statements signed respectively by the two arbitrators, in accordance with Article 6 (2) of the procedural regulations governing the ICSID's arbitration proceedings (the "Arbitration Regulations").



31. On January 20, 2012, the parties appointed jointly Mrs. Vera Van Houtte of Belgian nationality, as President of the Arbitral Tribunal. Mrs. Van Houtte accepted her appointment on February 2, 2012. On the same day, the Centre's Secretary General informed the parties that the three arbitrators had accepted their appointments and that in accordance with Article 6 (1) of the Arbitration Regulations, the Tribunal was considered was created and the proceedings commenced on such date, namely February 2, 2012. A copy of the statement signed by Mrs. Van Houtte was also communicated to the parties on the same day.
32. Mrs. Mairée Uran Bidegain was also appointed as the Tribunal's Secretary on same date.
33. In accordance with Article 13 of the Arbitration Regulations, the Arbitral Tribunal's first session was held in Paris with the parties on March 30, 2012. During this session, the Arbitral Tribunal established the specific rules for the procedure. A record of this session was approved by the parties as stated below.

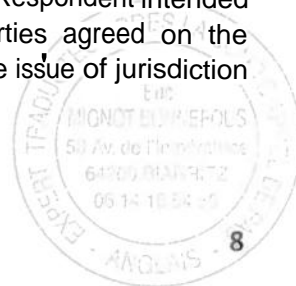
b. REQUEST FOR RECUSAL

34. On April 16, 2012, the Respondent submitted a request for recusal against Mr. Bernardo Cremades (the "request for recusal") pursuant to Article 57 of the ICSID Convention.
35. In a letter of April 18, 2012, the ICSID Secretariat informed the parties that in accordance with Article 9(6) of the Arbitration Regulations, the proceedings were considered as suspended on the date of the filing of the request, namely on April 16, 2012. The secretary of the Arbitral Tribunal communicated to them a draft record of the first session held on March 30, 2012, with the indication that the parties would be asked to confirm their agreement to various points on the agenda upon resumption of the proceedings.
36. After an exchange of memorials between the parties regarding the request for recusal and the filing of the observations of Mr. Bernardo Cremades, Mrs. Vera Van Houtte and Professor Pierre Tercier considered the request for recusal and put it to an immediate vote without the presence of Mr. Bernardo Cremades. Following a tie of the votes of the two arbitrators, the Chairman of the Administrative Council made the decision on June 28, 2012 regarding the request for recusal, in accordance with Article 58 of the ICSID convention. According to the decision of the Chairman of the Administrative Council:

- "1. *The request for recusal made by the Republic of Guinea on April 16, 2012 against Mr. Bernardo M. Cremades is rejected.*
2. *The costs incurred by the parties and the members of the Tribunal in examining this request for recusal will be the object of a subsequent decision by the Tribunal.*
3. *In accordance with Article 9(6) of the Arbitration Regulations, these proceedings are considered as having resumed on the date of this decision".*

c. BIFURCATION OF THE PROCEDURE

37. During its first session, the Arbitral Tribunal – after having noted that the Respondent intended to contest the jurisdiction of the Arbitral Tribunal and that the parties agreed on the bifurcation of the procedure – established the procedural calendar on the issue of jurisdiction as follows:
 - June 22, 2012: Respondent's Memorial on jurisdiction





- July 13, 2012: the Claimants' Counter Memorial on jurisdiction
- August 3, 2012: the Respondent's Replication
 - September 7, 2012: the Claimants' rejoinder
- September 28, 2012: Hearing

38. On June 7, 2012, the Arbitral Tribunal proposed that the parties not suspend the calendar of the procedure and maintain the dates established during the first session, notwithstanding the suspension of the procedure following the Respondent's request for recusal. The parties marked their agreement on June 8, 2012.
39. On June 22, 2012, the Respondent submitted its Memorial no. 1 on jurisdiction by email ("Memorial no. 1").
40. On June 28, 2012, the parties were asked to confirm their agreement regarding the draft record of the first session of the Arbitral Tribunal. The Claimants and the Respondent mark their agreement regarding the record respectively on July 4 and 12th 2012. On this occasion, the parties also stated that they were not opposed to the ICSID's publication of the decision of the Chairman of the administrative council regarding the request for recusal.
41. On July 13, 2012, the Claimants submitted their Counter Memorial no. 1 on jurisdiction by email ("Counter Memorial no. 1").
42. On July 30, 2012, the Respondent requested, pursuant to Article 26(2) of the ICSID regulations, a three-day extension to present its Memorial no. 2 on jurisdiction. Given the Claimants' agreement, the Arbitral Tribunal granted the requested extension. On August 6, 2012, the Respondent submitted its Memorial no. 2 on jurisdiction by email ("Memorial no. 2").
43. On September 7, 2012, the Claimants submitted their Counter Memorial no.2 on jurisdiction by email ("Counter Memorial no.2").
44. On September 28, 2012, a hearing on the jurisdiction of this Arbitral Tribunal was held in Paris, the record of which was submitted to the Parties and the arbitrators in draft form on the same day, and in its final form subject to possible corrections by the Parties or the arbitrators, on October 2, 2012.

VI. THE PARTIES' REQUESTS REGARDING JURISDICTION

a. THE RESPONDENT

45. In its Memorial no. 1 on jurisdiction of June 22, 2012 and its Memorial no.2 on jurisdiction of August 6, 2012, the Respondent requested that the Arbitral Tribunal:

- *declare that it entertains jurisdiction;*
- *sentence the Claimants to pay all of the arbitration costs including the costs and fees incurred by the Respondent for the purposes of its defense in the framework of this arbitration, the amount of which will be determined at the end of the procedure."*

b. THE CLAIMANTS

46. In their Counter Memorial no. 1 on jurisdiction of July 13, 2012 and their Counter Memorial no.2 on jurisdiction of September 7, 2012, the Claimants request that the Arbitral Tribunal:

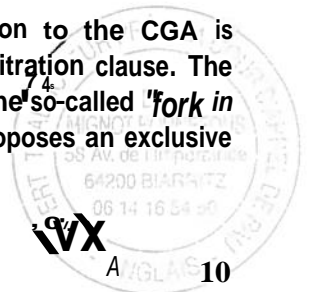
" declare that it entertains jurisdiction;
 " sentence the Republic of Guinea to pay all the costs incurred up until the present day, including the costs of arbitration pertaining to the objection to jurisdiction and the costs and fees of the Claimants' attorneys."

VII. THE PARTIES' ARGUMENTS

a. THE RESPONDENT'S ARGUMENT

i) *The Arbitration Clause as "a contrary agreement"*

47. The Respondent contests the jurisdiction of this Arbitral Tribunal, on the basis of Article 23 of the ICSID Convention. It contends that the parties did not grant their consent in writing to submit their dispute to the ICSID.
48. The Respondent claims that the ICSID arbitration proposal contained in the Investment Code is limited. Indeed, Article 28 of the Investment Code stipulates that *"Disputes between the Guinean state and foreign nationals concerning the application or interpretation of this code are, unless otherwise agreed by the parties involved, definitively settled by arbitration [ICSID]..."* (The Respondent's underlying) (Memorial no. 1 §§ 12 and 14).
49. The Respondent considers that Article 28 of the Investment Code must be interpreted objectively. It agrees to seek out the parties' common intent. According to the Respondent, Article 28 means that the ICSID entertained jurisdiction only failing the parties' choice of another court. The *"contrary agreement"* at issue must be a contractual agreement between the Guinean State and the foreign investor which has a result which is contrary to that of the appointment of the ICSID as the arbitration institution with authority to rule on their investment dispute. Such an agreement could be in the form of an exclusion clause or clause for the selection of the forum (Memorial no. 1 §§ 18-24).
50. The Respondent affirms that the parties concluded such a "contrary agreement" when they inserted the Arbitration Clause designating the CGA in their Concession Agreement. According to the Respondent, this Arbitration Clause encompasses all grievances and litigations resulting from the Concession Agreement regardless of their nature or legal grounds (Memorial no. 1 § 31).
51. Contrary to the Claimants' affirmations, the Respondent considers that the *"contrary agreement"* must not explicitly govern litigations concerning the interpretation and the application of the Investment Code. It affirms that the restrictive interpretation rule invoked by the Claimants is based on no rule or case law (Memorial no. 2 §§ 34-37). Assuming even that a specific contrary agreement were required, the Respondent specifies that Article 32.5 of the Concession Agreement clearly incorporates the protection afforded investors under the Investment Code. Indeed, this Article refers to the *"amendment of the Guinean Investment Code and of the laws in force [...]"*, namely acts of the State acting as legislator and not as a party to the Concession Agreement (Memorial no. 2 §§ 38-40).
52. The Respondent contends that the Parties' choice to grant jurisdiction to the CGA is irrevocable. It is based on the use of the term *"irrevocable"* in the arbitration clause. The Respondent claims that Article 28 of the Investment Code is identical to the so-called *"fork in the road"* clauses. Thus, like the *"fork in the road"* clauses, Article 28 proposes an exclusive



choice between the ICSID or another court and the choice – once made – is irrevocable (Memorial no. 1 §§ 47-51).

53. Furthermore, the Respondent alleges that the Parties' choice of the CCJA was confirmed by (i) the filing of Getma International's arbitration request before the CGA on May 10, 2011 and (ii) the signing of the minutes of the meeting of the CCJA Tribunal on March 12, 2012 which constitutes a valid Arbitration Clause (Memorial no. 1 §§ 54-55).

ii) Scope of the Concession Agreement and the Arbitration Clause

54. According to the Respondent, the requests made by the Claimants before the ICSID resulted directly from the Concession Agreement and are covered by the Arbitration Clause given that (i) the Concession Agreement constitutes the exclusive basis for the investment on which the Claimants are relying, (ii) the termination of the Concession Agreement constitutes the foundation for the Claimants' requests, and (iii) the prejudice for which the Claimants are requesting damages relies on the stipulations of the Concession Agreement (Memorial no. 1 §§ 35-37).
55. Regarding the investment, the Respondent alleges that according to the terms of the Claimants' arbitration request, the Concession Agreement is the exclusive basis thereof. The Claimants indeed affirmed that *"we are confronting a true investment [...]. Indeed, (i) the execution of the public service Concession contract implied a financial investment to be made by the Concessionary (investor)"* (Memorial no. 1 § 35).
56. Concerning the basis of the request, the Respondent quotes the Claimants' arbitration request according to which *"the termination of the contract represents [...] an act of the Public Authorities and not only a simple execution of the clause of the contract, thereby constituting a measure with an effect equivalent to expropriation"*. The Respondent specifies that Article 32.5 of the Concession Agreement governs explicitly litigations concerning acts of the Public Authorities contravening the investor's rights (Memorial no. 1 §§ 39-41, Memorial no. 2 § 23). If the expropriation is explicitly governed by the Concession Agreement, the Respondent considers that any litigation concerning an expropriation is a result of the Concession Agreement and falls into the scope of the Arbitration Clause. The Arbitration Clause and Article 32 moreover are contained in the same chapter in the Concession Agreement (Memorial no. 2 §§ 25-26).
57. Concerning the prejudice, the Respondent argues that the extra-contractual prejudice claimed by Getma International to warrant the jurisdiction of this Arbitral Tribunal (namely the *lucrum cessans*) is in fact the direct result of the termination of the Concession Agreement. According to the Respondent, the *"just, adequate compensation"* stipulated in the Investment Code can only be that which was agreed upon by the parties in the Concession Agreement. Indeed, the application of the *"usual rules and practices of International law"* to which the Investment Code refers leads to the application of the Concession Agreement via the *pacta sunt servanda* principle. The prejudice claimed by Getma International therefore indeed results from the Concession Agreement (Memorial no. 2 §§ 98-110).

iii) Parties to the Arbitration Clause

58. The Respondent specifies that the *"contrary agreement"* binds all the Claimants to this arbitration procedure. The Respondent bases its argument on the theory of groups of companies (established by the Paris Court of Appeal in the *Dow Chemical* case) to extend the effects of the Arbitration Clause to NCT Necotrans, Getma International Investissements and

NCT infrastructure & Logistique. The Respondent considers that the groups of companies theory applies in the case at issue because, pursuant to a material rule of the international law of arbitration acknowledged in the uniform act on the OHADA arbitration laws, the existence and effectiveness of an Arbitration Clause is appreciated on the basis of the parties' will, independently of any reference to a state law (Memorial no. 2 §§ 87-91).

59. According to the Respondent, the Claimants – belonging to the same group of companies – due to their participation in the conclusion and execution of the Concession Agreement and Additional Clause no. 1, manifested their wish to be bound by the Arbitration Clause. Indeed (Memorial no. 2 §§ 58-74):

- a) the Claimants all belong to the same group of companies (the Necotrans group) and share executives who are also officers in NCT Necotrans;
- b) the Claimants (with the exception of Getma International Investissements) participated and were personally represented during the negotiations of the Concession Agreement, which was signed by Mr. Talbot in his capacity as "president of the NCT Necotrans group";
- c) NCT Necotrans was in charge of obtaining the financing necessary for making the investments stipulated in the Concession Agreement. Getma International Investissements was created as the holding company vehicle for the Necotrans group's participation in the STCC and NCT Infrastructure & Logistique launched a call for bids for the construction of the new dock stipulated in the Concession Agreement for the account of Getma International;
- d) Additional Clause no. 1 to the Concession Agreement – which explicitly targets the Getma International Investissements company – was signed by the president of the Necotrans group and by the president of the STCC and of NCT Infrastructure & Logistique;
- e) The CCJA arbitration was initiated and pursued at the initiative and under the control of NCT Necotrans.

iv) *Identity between litigation brought before the COA Tribunal and the ICSID Tribunal.*

60. The Respondent contends that the CCJA Tribunal's record shows that the litigations and requests brought before the CCJA Tribunal and the ICSID Tribunal are identical and that the Arbitral Tribunal entertains jurisdiction to rule on the investment litigations. On the one hand, Getma International's presentation of the dispute quoted in the minutes of the meeting of the CGA Tribunal of March 12, 2012 is identical *verbatim* to the presentation made by the Claimants in their request for ICSID arbitration and, on the other hand, all the Claimants' requests were brought before the CGA Tribunal, including those governed by the legislation on investments (Memorial no. 1 § 77).

61. The Respondent specifies that the litigation brought before the CCJA concerns not only the contract but also the investment. The Respondent refers to an opening brief introduced by Getma International in the context of the CGA procedure which states that:

- a) The suit is based on International principles for the protection of investments. Getma International invokes the rules and principles of International law, the notion of a "*State Contract*", the general principles which apply to investments (such as good faith, legitimate expectations or just and equitable treatment) as well as doctrine in the domain of International investment law and ICSID case law (Memorial no. 1 §§ 80-84, Memorial no. 2 § 54).
- b) The litigation concerns the Termination Decree and the Requisition Decree which are acts of the Public Authorities. Getma International therefore acknowledges that the jurisdiction of the CGA Tribunal is not limited solely to contractual aspects but

encompasses all aspects linked to the illegal actions of the Public Authorities (Memorial no. 1 § 89, Memorial no. 2 § 49).

- c) The litigation concerns an expropriation. Getma International utilizes terms specific to this type of measure such as "*requisitioning [...] using the armed forces*" or "*manu militari*" and is requesting indemnification for this expropriation. The Respondent specifies that the CCJA entertains jurisdiction to rule on all of requests concerning the alleged expropriation, including the violation of investment laws (Memorial no. 1 §§ 92-97).
- 62. The Respondent refutes the Claimants' allegation that Getma International's requests before the CCJA Tribunal do not cover their entire prejudice.
- 63. As concerns the requisition of goods, the Respondent emphasizes that the indemnity claimed before the CGA Tribunal corresponds to the value of the goods. This indemnity covers therefore all the consequences of the requisition Decree and not only the consequences of the Republic's failure to meet its contractual obligation to minimize the prejudice sustained by Getma International in its capacity as Concessionary (Memorial no. 2 §§ 46-48).
- 64. As far as the loss of profit (*lucrum cessans*) is concerned, the Respondent contends that this item is included in the all-inclusive termination indemnity stipulated in Article 32 three of the Concession Agreement which is claimed by Getma International before the CGA Tribunal. Indeed, the all-inclusive indemnity is aimed at compensating the loss of activity and is based on revenue (Memorial no. 2 §§ 51-53).
- 65. The Respondent emphasizes that Getma International brought the case before the CGA freely with full knowledge of the facts. It was due to the CCJA's guarantees of independence and jurisdiction that Getma International allegedly accepted and confirmed the jurisdiction of this arbitration organization. On the other hand, the ICSID procedure stems from a "*forum shopping*" strategy on the Claimants' part (Memorial no. 1 §§ 64-65).

v) *Capacity as investor and the carrying out of the investment*

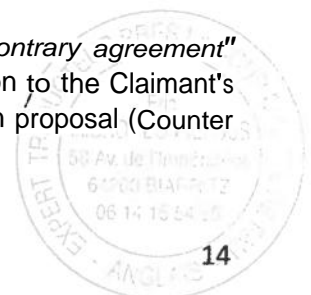
- 66. The Respondent alleges that neither NCT Necotrans nor Getma International Investissements, nor NCT Infrastructure & Logistique refers to any dispute presenting a direct connection with an investment. These companies do not specify the nature of their investment, the violations of the Investment Code or the facts they intend to invoke and do not prove their capacity as investor or the actual prejudice they allege they sustained. According to the Respondent, alleging a *treaty claim* does not suffice to warrant the jurisdiction of the ICSID. The Respondent quotes in this respect the court's decisions in the *SGS versus the Philippines* and *Impregilo versus Pakistan* cases, according to which it is necessary – at the jurisdiction stage – to determine whether the alleged facts are *prima facie* such that they constitute a violation of investment laws. It therefore requests that the Arbitral Tribunal establish that the *treaty claims* invoked by the NCT Necotrans, Getma International Investissements and NCT Infrastructure & Logistique companies are nonexistent (Memorial no. 2 §§ 113 and 122).
- 67. Finally, the Respondent contends that NCT Necotrans does not have the capacity of investor because it has made no investment in the Republic of Guinea as per the Investment Code. Indeed, only direct contributions to a company established in Guinea in exchange for company stock are considered as investments under Article 3.2 of the Investment Code, to the exclusion of indirect holdings. And according to the Respondent, NCT Necotrans is participating in this arbitration due solely to the fact of its control over Getma International (Memorial no. 2 §§ 129-131)



b. THE CLAIMANTS' ARGUMENT

i) Arbitration Clause as a "contrary agreement"

68. The Claimants contest the existence of a "*contrary agreement*" between the parties, as per Article 28 of the Investment Code, which would exclude the ICSID's jurisdiction for settling litigations concerning the interpretation and application of said code. According to the Claimants, only one agreement exists between one of them and the Respondent as concerns the method for settling contractual litigation (Counter Memorial no. 1 § 149).
69. The Claimants contend that in order to rule out the ICSID's jurisdiction pursuant to Article 28 of the Investment Code, the "*contrary agreement*" must be concluded by the Republic itself and all the investors concerned and must concern the same litigation, the same requests and the application of the same legal standards (Counter Memorial no. 1 §§17-18). The Claimants consider that this is not the case here.
70. The Claimants allege that the Arbitration Clause and Article 28 of the Investment Code do not have the same *ratione materiae* scope of application. According to the Claimants, Article 28 covers solely disputes concerning the interpretation or application of the Investment Code, while the Arbitration Clause covers disputes resulting from the Concession Agreement and its Additional Clauses (Counter Memorial no. 1 §§ 25-27).
71. The Claimants consider that the simple fact that an Arbitration Clause exists in the Concession Agreement is not sufficient for ruling out the existence of another arbitral agreement concerning the interpretation and application of the Investment Code (Counter Memorial no. 1 § 35). The Claimants referred to the case law of the Arbitral Tribunal according to which the method for settling litigations stipulated in a bilateral investment treaty cannot be excluded following the simple confirmation of an alternative forum in a contract. The Claimants quote in this respect the *Aguasdel Tunari versus Bolivia* and *Vivendi versus Argentina* cases (ad hoc committee) (Counter Memorial no. 1 §§ 33-39).
72. The Claimants consider indeed that it is exceptional that a contractual clause for settling litigations encompass also investment litigations. If such were the parties wish, the Claimants considered that it was necessary to express it in a clear unequivocal manner. And yet the Concession Agreement makes no reference to litigations concerning the interpretation and application of the Investment Code, to the parties wish to eliminate ICSID arbitration or to the fact that the Arbitration Clause is the "*contrary agreement*" as per the Investment Code. The scope of the application of the Arbitration Clause is narrow moreover in that it applies solely to disputes or litigations "*resulting from this agreement or its Additional Clauses*". (Counter Memorial no. 2 §§ 23-27).
73. The Claimants add that under Article 32.5 of the Concession Agreement, the parties stipulated explicitly the obligation to maintain the provisions of the Investment Code. In light of this explicit obligation, the Claimants consider that it is not reasonable to claim that the Parties wanted to implicitly exclude some of the most important clauses of the Investment Code (such as those pertaining to the limits on expropriations or to the method for settling disputes) (Counter Memorial no. 2 § 31).
74. According to the Claimants, the parties' conduct also shows that no "*contrary agreement*" exists. Thus, up until March 15, 2012, the Republic expressed no objection to the Claimant's letter of May 24, 2011 containing the acceptance of the ICSID arbitration proposal (Counter Memorial no. 2 §§ 41-42).



75. Even if one considered that a contrary agreement exists, the Claimants deem that it has not been proven that this agreement grants exclusive jurisdiction to the CCJA Tribunal to deal with investment litigations as opposed to a jurisdiction which is alternative to that of the ICSID. The Claimants establish an analogy with Article 26 of the ICSID Convention which stipulates that "unless otherwise agreed", consent to the ICSID's arbitration implies a waiver of the right to exercise any other recourse. In the case of the departure from the rule of the exclusive jurisdiction of the ICSID, the other four have a jurisdiction which is alternative to that of the ICSID which is nonetheless not excluded (Counter Memorial no. 2 §§ 48-56). The Claimants reject the Respondent's argument concerning the "irrevocable" nature of the choice of the CCJA arbitration or the analogy with the "fork in the road" clauses. The Claimants consider that the adjective "irrevocable" refers to the decision of the Arbitral Tribunal and not to the parties' choice of the CCJA Tribunal. The Claimants note moreover that it is always possible for the parties to amend an Arbitration Clause later on, so that the choice of the CGA arbitration is never irrevocable. As concerns the "fork in the road" clauses, the Claimants allege that Article 28 of the Investment Code does not offer a choice between several Tribunals but requires that the litigations concerning its interpretation or application be settled exclusively by an ICSID Tribunal (Counter Memorial no. 1 §§ 87-92 and 96-99).

76. As an explicit, unequivocal "contrary agreement" does not exist between the Parties, the Claimants consider that the Investment Code must be interpreted in a manner which protects the investors and, more specifically, which favors the jurisdiction of the ICSID (Counter Memorial no. 2 §§ 12-13).

77. The Claimants argue that at the jurisdiction stage, the Arbitral Tribunal must determine solely, *prima facie*, whether the facts alleged by the Claimants (in the event that they were to prove founded) are apt to constitute a breach of the Investment Code. The Claimants refer in this respect to the *AMCO versus Indonesia*, *Impregilo versus Pakistan* and *SGS versus Pakistan* cases. The Claimants recall that this latter case also concerned a contractual termination and that the Arbitral Tribunal acknowledged its jurisdiction, despite the fact that the contractual Arbitration Clause was broader than the Arbitration Clause in the case at issue (Counter Memorial no. 2 §§ 132-141 and §§ 90-94, 122 and 213).

ii) Scope of the Concession Agreement and the Arbitration Clause

78. Contrary to the Respondent's allegation, the Claimants object that the expropriations scheme is not governed by the Concession Agreement and that the requests concerning expropriations do not fall into the scope of the Arbitration Clause. The Concession Agreement indeed stipulates that an act of expropriation can lead to the termination thereof and to the payment of a contractual indemnification. But, according to the Claimants, this does not imply that the expropriation – as an act of the Public Authorities – cannot also constitute a breach of the Investment Code (which was not abrogated), as acknowledged by the court in the *SPP versus Egypt*, *Azurix versus Argentina* or *Impregilo versus Pakistan* cases (Counter-Memorial no. 2 §§ 65-73).

79. According to the Claimants, the Concession Agreement was not aimed at replacing the Investment Code. The reference to the expropriation was aimed solely at prohibiting the Republic from modifying in its legal order in order to permit, for example, that contractual terminations following expropriations not call for indemnification. According to the Claimants, the reference to the Investment Code proves that for Getma International the fact of maintaining the clauses of the Investment Code continued to constitute a useful guarantee (Counter Memorial no. 2 §§ 95-99).

80. As concerns specifically the indemnity, the Claimants object that the "just and adequate compensation" referred to in Article 5 of the Investment Code, is not defined by Article 32.5 of the Concession Agreement. According to them, a distinction exists between indemnification (due to the contractual termination) stipulated in the Concession Agreement and calculated according to the rules of stipulated in the contract on the one hand, and the compensation (due to the expropriation) stipulated in the Investment Code and calculated according to the usual rules and practices of international law, on the other hand. They add that the Investment Code does not permit the parties to depart from the evaluation criteria stipulated in Article 5 of the Investment Code and that the Concession Agreement makes no reference to Article 5 of the Investment Code (Counter Memorial no. 2 §§ 110-114). To illustrate the difference between contractual compensation for termination and legal compensation for expropriation, the Claimants contend that in the event of a partial expropriation not entailing the termination of the Concession Agreement, only the legal indemnification would be owed (Counter Memorial no. 2 §§ 146-149).

iii) Parties to the Arbitration Clause

81. The Claimants contend that only Getma International is party to the Arbitration Clause. They consider that the theory of the group of companies does not apply in the case at issue and in all events would not lead to the elimination of the ICSID arbitration (Counter Memorial no. 2 § 155).
82. On the one hand, the Claimants allege that the group of companies theory is far from being established and was even rejected in several countries. In all events, they consider that the crucial factor for applying the group of companies theory – namely the parties' common intention to bind non-signatories – has not been proven by the Respondent. They emphasize that the Respondent merely establishes that the Claimants are part of the same group of companies and alleges (without proving it) that they participated in the negotiation, conclusion or execution of the Concession Agreement. And yet, the "*negotiation, conclusion and execution*" can, according to the Claimants, merely indicate the parties' common intent. In the case at issue, the Claimants denied that it was their wish to be bound under the Arbitration Clause and, in particular, under an implicit "contrary agreement" liable to obviate an ICSID arbitration. The Claimants specify that Mr. Talbot's signing of the Concession Agreement is not relevant, inasmuch as this was necessary for Getma International's valid commitment (Counter Memorial no. 2 §§ 157-181, 190-197).
83. Moreover, the Claimants allege that the group of companies theory was never utilized in case law to eliminate an investor's right to resort to ICSID arbitration. The effect of this argument on the contrary, is to extend the rights of the creditors or members of the group of companies by involving non-signatories in the arbitration. As for the argument of the "*piercing of the corporate veil*", the Claimants consider that it can apply only if it is proven that the corporate veil is utilized for illegal purposes. However, the Claimants affirm that Getma International's signing of the Concession Agreement is not the result of an attempt to commit fraud or to derive undue benefit from any right whatsoever (Counter-Memorial no. 2 §§ 201-211).

iv) Identity between the litigation brought before the CCJA Tribunal and before the ICSID Tribunal

84. The Claimants contend that the CGA arbitration and the ICS IT arbitration are distinct, as they are dealing with different litigations, different requests and different grounds. Only the facts are the same (Counter Memorial no. 2 §§ 114-115); the Claimants allege that the Respondent

acknowledged moreover the existence of a contractual litigation and an investment litigation in paragraph 79 of its Memorial. They emphasize in this respect that contrary to that which the Respondent alleges, the investment litigation has not been brought before the CGA. This interpretation would seem to stem from a poor reading of the Memorial filed by Getma International in the CCJA procedure (Counter Memorial no. 2 §§117 and 130). In all events, the CCJA Tribunal could always decline its jurisdiction if requests concerning the application of the investment legislation were effectively brought before it (Counter Memorial no. 2 § 125).

85. The Claimants recall that international arbitral case law admits that the same series of facts can constitute simultaneously a breach of a contract and of a bilateral investment treaty (or *mutatis mutandis* of national legislation for the protection of foreign investments). The Claimants quote the decisions pronounced in the *Vivendi versus Argentina* case (award canceling the *ad hoc* committee), the *Bayindir versus Pakistan*, *Impregilo versus Pakistan*, *Vivendi versus Argentina* cases (Vivendi II) and the *Biwater versus Tanzania* case (Counter Memorial no. 1 §§ 57-67).
86. The Claimants contend that in the case at issue, the Termination Decree is an act of the Public Authorities which – incidentally – also resulted in a breach of the Concession Agreement (Counter Memorial no. 2 §§ 68-70). The Claimants emphasize that the Respondent itself acknowledges that the Termination and Requisition Decrees are acts of the Public Authorities and not merely acts on the part of a party to a contract (Counter Memorial no. 2 § 73).
87. The Claimants explain that the litigation brought before the ICSID Tribunal concerns precisely the extra-contractual effect of the act of the Public Authorities constituting an expropriation measure as per the Investment Code. The CGA Tribunal for its part has been asked to rule on the contractual effects of this Termination Decree which constitutes an act "*which impedes the proper functioning of the activities of the concession*" as per article 32.5 of the Concession Agreement (Counter Memorial no. 1 §§ 48-49, 78-80, Counter-Memorial no. 2 §§ 82-87).
88. Moreover, the Claimants allege that the grounds for the requests and the indemnification claimed before the CGA Tribunal and the ICSID Tribunal are distinct. In this regard, the Claimants quote the opening brief submitted by Getma International in the CGA procedure, in which the requests are based on the Republic's violation of its contractual obligation to minimize the effects of any change of law and acts of the Public Authorities which impede the proper functioning of the activities in the concession. In this same brief, Getma International also indicates that the damages claimed in its capacity as Concessionary correspond to "*the portion of its prejudice which was contractualized in the Concession Agreement*" but that "*the indemnification stipulated in article 32.3, paragraph 5, as well as that resulting from the breach of article 32.5, paragraph 3, of the Concession Agreement (cf. Section 5.5) is not such that it will indemnify Getma International for the entire prejudice it sustained in its capacity as an investor evicted as the result of an illegal act on the part of the Public Authorities amounting to an expropriation*" (Counter-Memorial no. 1 §§ 105-107, Counter-Memorial no. 2 §§ 125-130).
89. The Claimants add that they intend to request of the ICSID Tribunal a decision which places them in the economic and financial position in which they would have been had the Concession Agreement been pursued for the total 25-year period (*lucrum cessans*). This amount will be considerably higher than the amount requested, in the strictly contractual terms, by Getma International, and the CCJA arbitration (Counter Memorial no. 1 §§ 72-76, 109, 141-142).



90. The Claimants specify finally that the independence of the CGA and ICSID Tribunals, emphasized by the Respondent, is not called into question and is not relevant for resolving the issue of jurisdiction (Counter-Memorial no. 1 § 38).
v) Capacity as investor and the making of an investment
91. In a preliminary capacity, the Claimants note that the Republic acknowledges that Getma International and the Concession Agreement constitute respectively an investor and an investment. Concerning the other members of the group, the Claimants refer to their letter of October 28, 2011 to the ICSID's Secretariat, and contend that the investments they made respectively are the result of: (i) the signing of the Concession Agreement and Getma International's direct shareholding in the STCC Company, (ii) STCC's activity as operator, (iii) NCT Infrastructure Logistique's performance of the work of extending the container terminal, (iv) the shares owned directly or indirectly in the aforementioned companies by NCT Necotrans and Getma International Investissements (Counter Memorial no. 2 §§ 216-222).
92. The Claimants specify that the Investment Code does not restrict the scope of its application to certain types of investments. The Investment Code indeed does not stipulate that the litigations subject to the ICSID's arbitration must pertain to investments and does not contain a definition of the notion of investment (article 3.2 concerns only the "*investment of capital from abroad*"). According to the Claimants, under article 28 of the Investment Code, it suffices that the Claimant be a foreign investor and that the litigation pertain to the application and interpretation of said code, which is the case here (Counter Memorial no. 2 §§ 230-240).
93. Finally, the Claimants allege that each of them sustained a personal prejudice in direct conjunction with the Republic's actions, in their respective capacities as contracting parties to the Concession Agreement, a shareholder in the group's companies, financier of the investments, Concessionary, first ranking investor, STCC's money-lender and assistant project manager. They point out however that the grounds of the alleged counts of prejudice must be examined at the merits stage (Counter Memorial no. 2 §§ 248-265).

VIII. DISCUSSION

a. INTRODUCTION—BIFURCATION

94. During the first procedural meeting of March 30, 2012, as the Respondent had announced that it intended to contest the jurisdiction of the Arbitral Tribunal, the parties agreed on the bifurcation of the procedure and a procedural calendar which implemented this bifurcation.
95. The Arbitral Tribunal is therefore called upon at this stage to rule exclusively on its jurisdiction, without ruling on the merits of the litigation. However, as shall be discussed below, questions regarding the merits are or may be raised at this stage, during the analysis of the issue of determining whether the Claimants, and in particular the second, third and fourth Claimants, are "investors" or have made "investments" as per the Investment Code, and the issue of the relation between the material clauses of the Concession Agreement and those of the Investment Code, issues which inevitably arise in the analysis of the jurisdiction of this Arbitral Tribunal.
96. The arbitrators consider however that this decision regarding their jurisdiction can and must be made regardless of the possible ties with the merits of the litigation. Given the parties' agreement on the bifurcation, the Arbitral Tribunal is also of the opinion that its decision

regarding jurisdiction is to be made independently of any issue regarding the merits. The Arbitral Tribunal is therefore adopting the following decision regarding its jurisdiction, without prejudice to possible issues pertaining to the merits on which it will be called upon as the case may be to dwell at a later stage.

b. THE ARBITRATION CLAUSE AS A "CONTRARY AGREEMENT".

97. The jurisdiction of the Arbitral Tribunal (if it exists) relies on Article 28, para. 2, of the Investment Code quoted above in para. 12. This provision however reserves for the parties involved the right to conclude contrary agreements. Consequently, the Arbitral Tribunal would not entertain jurisdiction if it turned out that the Parties had concluded such a "contrary agreement".

98. The Arbitral Tribunal considers that the expression "contrary agreement":

- a) allows for a parallel jurisdiction: to exclude the ICSID's arbitration, it does not suffice to grant jurisdiction to another forum for the same litigations;
- b) implies the expression of a clear intent on the parties' part;
- c) places the burden of proof on the party who intends to claim such a contrary agreement.

99. It must then be determined whether Article 31 of the Concession Agreement, on which the Respondent bases its plea of lack of jurisdiction, constitutes a "contrary agreement of the parties involved" as per article 28 of the Investment Code.

100. Article 31 is the first article of section 4 of the Concession Agreement which covers *"the settlement of disputes and litigations, termination and indemnification"*. It stipulates that:

"this clause will survive the termination of the agreement

The OHADA treaty and its subsequent uniform act will apply to this agreement.

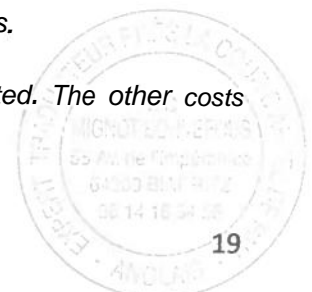
Any dispute or litigation resulting from this agreement or its Additional Clauses will be settled amicably.

Failing an amicable settlement within 3 (three) months following the protest, the parties may resort to arbitration in the manner stipulated below:

The grievance, dispute or litigation will be settled definitively and irrevocably following an arbitration procedure governed by the arbitration regulations of the OHADA Common Court of Justice and Arbitration (the "CCJA Arbitration Regulations").

The arbitral commission will be composed of 3 (three) arbitrators, one appointed by the Grantor, the second by the Concessionary, and the third by joint agreement of the two arbitrators. If one party fails to appoint an arbitrator within a period of thirty (30) days following receipt of a request to this effect from the other party, or the two arbitrators failed to agree on the choice of the third arbitrator within a period of thirty (30) days (beginning on the date of the appointment of the second arbitrator), the Common Court of Justice and Arbitration will replace the parties in accordance with the CCJA Arbitration Regulations.

Each of the parties will bear the cost of the arbitrator it has appointed. The other costs generated by the arbitration will be shared equally between the parties.



The arbitration will be conducted in the French language in Abidjan, the Republic of the Ivory Coast.

The granting authority explicitly waves its right to claim for itself or for its assets any sovereign immunity in order to defeat the execution of an award rendered by an arbitral commission made up in accordance with this clause." (Referred to hereinafter as "the arbitration clause").

101. The "contrary agreement" must be concluded between the "parties involved". It is not contested that the Concession Agreement was concluded between the signatory parties, namely the Guinean state and the first Claimant, Getma International. The Arbitral Tribunal will if necessary focus on the issue of determining whether the three other Claimants are also parties thereto, after having decided whether article 33 constitutes a "contrary agreement" concluded between the Guinean state and Getma International.
102. The arbitration clause establishes recourse to an Arbitral Tribunal according to the OHADA regulations (the "CCJA Tribunal") for:
 - a) any "dispute or litigation" (art. 31, para. 3), or "the grievance, dispute or litigation" (art. 31, para. 5), a formula which appears broad and certainly broader than "the disputes" which are the object of article 28. of the Investment Code;
 - b) "resulting from this Agreement and its Additional Clauses".
103. According to the Respondent, a contrary agreement between the parties "must lead to a result "contrary" to that of the designation of the ICSID as the arbitration institution with jurisdiction to rule on their investment litigation"² (Memorial no. 1 § 23). It considers that the arbitration clause designates "irrevocably" the CCJA Tribunal for all disputes resulting from the agreement and excludes the jurisdiction of the ICSID³ (Memorial no. 1 § 29).
104. The Tribunal cannot follow the Respondent's reasoning. For there to be a "contrary" agreement, the Arbitration Clause contained in Article 31 of the Concession Agreement must grant jurisdiction to a CGA Tribunal to settle all the claims which Getma International might infer from the Investment Code, thereby depriving the ICSID Tribunal of all the jurisdiction it would otherwise have to rule on this issue.
105. And yet the arbitration clause, by granting jurisdiction to the CGA Tribunal (i) did not specify that this jurisdiction replaces that of the ICSID, nor did it explicitly exclude the ICSID's jurisdiction; and (ii) did not specifically attribute jurisdiction to the CGA court to settle disputes "pertaining to the application and interpretation of the Investment Code". And the disputes "resulting from this agreement" are not *a priori* necessarily the same as those "pertaining to the application and interpretation of the Investment Code"
106. Contrary to that which the Respondent claims, the fact that all the litigations arising from the agreement must be brought before a CGA Tribunal, regardless of their nature or the legal grounds invoked by the parties (memorandum no. 1 § 31), does not prove that the arbitration clause applies also to (or to all the) disputes concerning the application and interpretation of the Investment Code and excludes the jurisdiction of the ICSID. The Respondent is thereby

² Our underlining.

³ Our underlining.



attempting to lump together⁴ the *contract claims* and the *treaty claims* (the different nature and grounds of which are nonetheless generally acknowledged by arbitral case law⁵) and denies the fact that a same given act can constitute both a breach of a contractual obligation and a violation of the Investment Code, and, as the case may be the subject to two different courts.

107. A literal reading of Article 28.2 of the Investment Code which mentions only the litigations arising from the Concession Agreement, in no manner constitutes a "restrictive interpretation" such as the Respondent claims (Memorial, ° 2 §§ 35-37).
108. Inasmuch as the jurisdiction of the ICSID Tribunal was not excluded, this Tribunal in theory entertains jurisdiction to settle disputes pertaining to the application and interpretation of the Investment Code. Inasmuch as an act of the state would constitute both a breach of the contract and a violation of the Investment Code, there would then be the parallel jurisdiction of the two Tribunals. However, it would not be competitive, given that the focus of the jurisdiction of each Tribunal would depend on the respective legal grounds of each request, the rights violated, the parties injured, the prejudice sustained and the entitlement to respective compensation under the Concession Agreement, or the Investment Code. The fact that the parallel jurisdictions can lead to a double collection of damages, does not mean that each court will not be called upon to exercise its own jurisdiction. It is in the handling of the merits and in particular at the time of the verification of the evidence of the prejudice, that the double collection of compensation shall be avoided.
109. Subject to that which is stated in subsection D below, the Tribunal rejects the Respondent's argument that Getma International chose irrevocably the CCJA Tribunal as the only Tribunal with jurisdiction by coming before it in the first place. Contrary to that which the Respondent claims (Memorial no. 1, §§ 44), the use of the term "irrevocable" in article 33 of the Concession Agreement does not mean that the choice of CGA arbitration excludes all other judicial or arbitral channels. It is clear upon reading the article that the terms "irrevocably" and "definitively" pertain to the manner in which the dispute arising from the agreement will be settled by the CGA Tribunal, namely without any possibility of appeal. The fact that the two terms are undoubtedly pleonasms does not permit one to interpret one of them as pertaining to anything other than the Tribunal's decision. The irrevocable nature of the choice between the two courts would imply moreover that the jurisdiction of the two (OHADA and ICSID) Tribunals is mutually exclusive. And yet it has not yet been proven that the jurisdiction of the CCJA Tribunal excludes that of the ICSID Tribunal for disputes concerning the interpretation and application of the Investment Code.
110. For the same reason, the Tribunal cannot follow the Respondent's argument according to which article 28 two of the Investment Code is comparable to a "*fork in the road*" clause. This comparison stems, according to the Respondent, from the nature of the "exclusive" choice the

⁴ Although it recognizes the distinction, given that, in its Memorial n° 2 it supposes that the Arbitration Clause includes not only the *contract claims*, but also the *treaty claims* (§§ 17 and the following).

⁵ *whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law (...)*" (Vivendi versus Argentina, annulment decision, Case ARB/97/3, § 96); *"treaty claims are juridically /sic/ distinct from claims for breach of contract, even where they arise out of the same facts"* (Bayindir versus Pakistan, decision on jurisdiction, Case. ARB/03/29, § 148); *"The fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct; and necessarily require different enquiries"*. (Impregilo versus Pakistan, decision on jurisdiction, April 22, 2005, Case. ARB/03/3, § 258).

Code offers the parties (Memorial no. 1 §§ 46-53, and in particular § 52). And yet up until now the analysis of the arguments proffered by the Respondent does not allow one to conclude that the arbitration clause excluded the ICSID's jurisdiction.

c. ARTICLE 32.5 OF THE CONCESSION AGREEMENT

111. The Respondent also invokes article 32.5 of the Concession Agreement in support of its argument that the CCJA arbitration agreement covers not only the *contract claims* but also the *treaty claims* and therefore excludes the ICSID's jurisdiction for the *treaty claims*.
112. Article 32.5 is part of the same section 4 ("*settlement of disputes and litigations, termination and indemnification*") as article 31. The Arbitral Tribunal recognizes that this circumstance could be relevant for interpreting the arbitration clause. This article stipulates:

"32.5 Changes of law and acts of the Public Authorities impeding the proper functioning of the activities in the concession

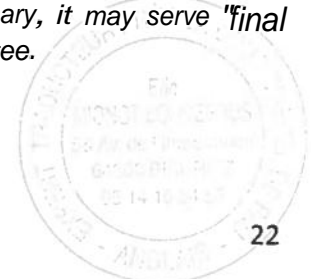
Any act, decision or absence of an act or decision, springing from the state, the dismemberment of the state or of the granting authority of a constitutional, legislative, regulatory or other nature, the direct or indirect effect of which is to prevent the Concessionary's proper execution of its obligations (a "change of law and acts of the Public Authorities impeding the smooth functioning of the activities granted in the concession"), and in particular:

- (i) Any unwarranted withdrawal, nonrenewal or non-issuing of any permit, license or other form of authorization necessary for the execution of the agreement, for the operation or management of the activities granted in the concession.*
- (ii) Expropriation, nationalization, gradual expropriation and gradual nationalization.*
- (Hi) Amendment of the Investment Code and of the laws in force.*
- (iv) Direct and indirect measures, the result of which is to discriminate against the Concessionary in favor of possible competitor(s) of the Concessionary, or to favor them to the Concessionary's detriment, in the port of Conakry.*

The Concessionary will send to the Grantor a "preliminary notice of change of law" within fifteen (15) days following the change of law, (or within forty-eight (48) hours following the becoming aware of the Change of Law if the Concessionary could not reasonably have become aware thereof beforehand.)

The Grantor will do its utmost to minimize the effects of any change of law or acts of the Public Authorities which impede the smooth functioning of the activities granted under the concession.

If, at the expiry of a period of sixty (60) days, the consequences of the change of law and acts of the Public Authorities impeding the smooth functioning of the activities granted in the concession have not been satisfactorily remedied for the Concessionary, it may serve "final notice of change of law" upon the Grantor and the Monitoring Committee.



In the event of a termination following a change of law and acts of the Public Authorities impeding the smooth functioning of the activities granted under the concession", the Concessionary will receive the indemnification stipulated in article 32.3 of the agreement."

113. This article therefore contains several provisions aimed at acts which constitute violations of the Investment Code such as:
- the withdrawal etc.... of any authorization whatsoever which is not warranted;
 - expropriation and nationalization (even gradual) (art. 5 of the Investment Code);
 - measures discriminating against the Concessionary in favor of its possible competitors or favoring these competitors to the detriment of the Concessionary (art. 6 of the Investment Code).
113. On the other hand, the act referred to in subparagraph (iii) consisting in amending the Investment Code, does not necessarily constitute a violation of this code. This is the case in particular when the guarantees benefiting the investor pursuant to the first book of the Code are not restricted by said amendment. Article 32.5 of the Concession Agreement for its part is aimed at the amendment of the Investment Code only inasmuch as its "direct or indirect direct effect is to prevent the Concessionary's proper execution of its obligations".
114. Furthermore, the other provisions of article 32.5 do not concern as is such violations of the Investment Code, but are aimed at them exclusively inasmuch as they prevent "the Concessionary's proper execution of its obligations". The article is aimed above all at the Concessionary's obligations and not its rights. If a change of law or an act of the Public Authorities prevents the Concessionary from meeting its obligations properly, article 32.5 confers upon the Concessionary the right to terminate the agreement after the mailing of two notices and the observance of a waiting period. Regarding this point, article 32.5 clearly departs from the Investment Code, which is aimed at maintaining the Concessionary's rights as an investor.
116. Article 32.5 also uses the term "impeding the smooth functioning of the activities granted in the Concession". The "activities granted in the Concession" however are operational activities, defined objectively (article 2, as well as article 6 of the Concession Agreement) and do not directly concern the conditions in which the Concessionary must execute them (subjective element in the operator's count). This confirms that article 32.5 is hardly preoccupied with the Concessionary's situation, except that it authorizes it to terminate the Concession Agreement with the financial consequences stipulated in another article (article 32.3) and identical to those which prevail in the case of a termination due to the Grantor's fault. Article 32.5 indeed does not establish a strict correlation between the change of law/act of the Public Authorities and the termination of the agreement. Even if this is not explicitly stipulated, it ensues from the preliminary and final notice procedure stipulated in article 32.5 that the decision to terminate the agreement following a change of law/act of the Public Authorities belongs to the Concessionary. Only this decision creates the right for the Concessionary to the indemnities stipulated in article 32.3 (which are identical to those stipulated in the case of termination due to the Grantor's fault).



117. According to the Respondent, (i) article 32.5 "introduces the expropriation dispute into the scope of the contract" and (ii) the combination of this provision and of article 31⁶ (which submits any litigation resulting from the Concession Agreement to the CCJA Tribunal) constitute an agreement contrary to the jurisdiction of the ICSID (Memorial no. 2, § 17). As expropriations are explicitly governed by article 32.5 and as this clause is in the same section 4 as the arbitration clause, the Respondent considers that *"this confirms that the parties intended to place expropriation disputes in the scope of the CCJA arbitration agreement."* (memorial no. 2 § 26).
118. The Tribunal accepts that *"the expropriation and its consequences are expressly governed by article 32.5 of the Concession Agreement. They therefore fall into the scope of the CCJA arbitration agreement"* (Memorial no. 2 § 31). However, this is true only inasmuch as the expropriation becomes the cause of the agreement's termination and therefore of a litigation as a result of the agreement. Article 32.5, like article 31, therefore covers only one particular aspect of expropriation, which is the termination resulting therefrom. It does not govern expropriation *per se*. This distinction was perfectly illustrated by the example of a partial expropriation given by the Claimants⁷: in the event that the State were to expropriate two cranes in the port of Conakry belonging to Getma International, without however impeding the Concessionary's proper execution of its obligations or the smooth functioning of the activities granted under the concession, both article 5 and article 28.2 of the Investment Code would continue to apply.
119. Thus, the Tribunal cannot follow the Respondent when it infers from the observation quoted at the beginning of paragraph 117 above, that the parties *"chose explicitly to grant jurisdiction to the CCJA for litigations concerning the Guinean Investment Code"* and that they *"intended to withdraw this litigation from the jurisdiction of the ICSID"* (Memorial no. 2 § 41). The jurisdiction granted to the CGA Tribunal concerns litigations resulting from the agreement, including those pertaining to the termination of the agreement following a change of law or an act of the Public Authorities which prevents the Concessionary's proper execution of its obligation or impedes the smooth functioning of the activities granted under the concession. However, it covers nothing else.
120. Article 32.5 of the agreement establishes a particular termination scheme following a change of law or other act on the part of the Public Authorities which applies subject to the respect of certain conditions of substance (impeding the smooth functioning of the activities granted under the concession and/or⁸ the direct or indirect effect of which is to prevent the Concessionary's proper execution of its obligations) and of form (two notices and two waiting periods). This particular scheme differs from the scheme which applies to termination as a result of the Grantor's fault (covered by article 32.3 of the agreement) due to:
- a double notice (preliminary notice of change of law and final notice of change of law), although in the case of a purely contractual fault, a single written notice specifying the list of the grievances put forth suffices;

⁶ The Tribunal notes that the Respondent acknowledges here implicitly that Article 31 alone does not suffice to conclude that the ICSID's jurisdiction is excluded by Article 31, conclusion of sub-section b. above.

⁷ Counter-Memorial n° 2 §§ 147-149.

⁸ It is an issue pertaining to the merits which must not be resolved at this stage, to determine whether "to impede the smooth functioning of the Activities granted under the concession" is the same condition as, or an additional condition to, or only an alternative condition compared to, the condition of "having as direct or indirect effect of impeding the Concessionary's proper execution of its obligations."

- a fixed 60-day correction period, while in the case of a purely contractual fault the period can be established by the Concessionary itself, although it cannot be under 60 days;
 - the 15-day period beginning on the date of the change of law (or 48 hours following the becoming aware of the change of law) for mailing the preliminary notice, while no time limit is imposed in the case of a purely contractual fault;
 - The intervention of the Monitoring Committee which must also receive the final notice of change of law.
121. On the other hand, the indemnity owed under the contract in the event of termination following a change of law or an act of the Public Authorities and that which is owed in the case of termination due to the Grantor's fault, are identical. This scheme is not illogical: by signing the agreement, the state acknowledges that any change of law or act on the part of the Public Authorities, without even being faulty or unwarranted, authorized the Concessionary to terminate the agreement and entitled it to an indemnity which was identical to that owed in the event of the Grantor's fault, if, and only if, the change of law or act on the part of the Public Authorities impeded the smooth functioning of the activities granted under the concession/or impeded, directly or indirectly, the Concessionary's proper execution of its obligations.
122. Litigations concerning the application of article 32.5, like those pertaining to the other articles of the agreement, obviously fall within the sole jurisdiction of the CCJA Tribunal.
123. The fact that the parties have specifically determined the impact which a change of law or act of the Public Authorities could have on their contract, does not in itself constitute a basis for contending that this contractual scheme replaces the legal scheme set forth in the Investment Code. Article 32.5 has its own specific contractual objective which cannot replace a general legal scheme. The reference, in article 32.5 of the Concession Agreement, to *"any act [...] on the part of the state"* cannot replace the Investment Code. As stated above, such acts are taken into account – and will be covered – by the agreement only if their *"direct or indirect effect is to prevent the Concessionary's proper execution of its obligations"* or if they impede *"the smooth functioning of the activities granted under the concession"*. The agreement governs the consequences of these acts on the agreement. Inasmuch as termination follows an act on the part of the Public Authorities, article 32.5 "contractualizes" the *treaty claims* which must, as a consequence, be brought before the CCJA Tribunal in accordance with article 31 of the agreement.
124. The question which remains then is to determine whether the agreement governs exhaustively the consequences of the acts fulfilling the conditions of article 32.5. The answer to this question would determine concretely whether the Concessionary, acting in its capacity as investor or otherwise, can – in the case of an expropriation leading to the termination of the agreement – claim other indemnities or indemnities higher than those stipulated in article 32.3, and before what court. This is an issue pertaining to the merits which must be solved by the court before which the requests concerning these additional indemnitees are brought.
125. This Arbitral Tribunal therefore concludes that there is a "contrary agreement" pursuant to which the jurisdiction of the CGA Tribunal replaces that of the ICSID, but the scope of the application of which is strictly circumscribed by the terms of article 32.5. There is therefore no jurisdiction which competes with the CGA Tribunal and the ICSID Tribunal for requests based on the termination of the agreement as a result of an act by the Public Authorities, but at the very most this Tribunal's additional jurisdiction if the Concessionary deems that an act of the Public Authorities constitutes a violation of the Investment Code and has entailed damaging consequences other than (those of) the termination of the agreement.

O. GETMA INTERNATIONAL'S REQUEST IN THE CCJA ARBITRATION

126. The Respondent contends that Getma International's filing of the request for arbitration before the CCJA of May 10, 2011 and the signing of the minutes of the meeting of the CGA Tribunal of March 12, 2012 confirm the parties' agreement to totally exclude the ICSID's jurisdiction for disputes concerning the application and interpretation of the Investment Code pursuant to the arbitration clause (Memorial no. 1 §§ 54 and the following).
127. It is therefore fitting to determine whether the first Claimant's conduct (i) proves its agreement to replace the ICSID's jurisdiction in its entirety (and not only for the act of the Public Authorities which causes the termination of the agreement) by that of the CCJA Tribunal, (ii) can constitute a waiver of the ICSID's jurisdiction or (iii) constitutes an obstacle (or estoppel) to its now denying that it accepted the jurisdiction of the CGA Tribunal for the *treaty claims* which "result from the agreement".
128. Referral to the CCJA Tribunal does not in itself prove Getma International's waiver of the ICSID's jurisdiction. In the case of parallel jurisdictions, each Tribunal exercises its own jurisdiction and the prior referral of a case to one of them does not deprive the other of its jurisdiction. Indeed, the "*fork in the road*" doctrine applies only in the case of competing jurisdictions.
129. On the other hand, the fact of submitting to one court requests which fall within the specific jurisdiction of another court could possibly constitute a waiver. In this regard, the Claimants statement of the requests made by Getma International before the CGA Tribunal (Memorial no. 1 §§ 54-97 and Memorial no. 2 §§ 44-56) is interesting. Indeed, it appears that the request for arbitration filed on May 10, 2011 by Getma International before the CGA Tribunal did not concern solely the contractual requests such as defined in article 32.3 of the Concession Agreement. Getma International requested in particular that the CCJA Tribunal sentence the Respondent to pay not only the "contractual prejudice" (para. 3.3.1) comprising the four indemnitees mentioned in article 32.3, but also the "additional prejudice", comprising, in addition to an indemnification for undermining its reputation, "*an indemnity equal to the loss of profit it could legitimately have expected for the entire duration of the Concession Agreement*" (para. 3.3.2) (exhibit R-9). The Tribunal notes that Getma International bases this request on article 104, para. 2 of the public contracts code of the Republic of Guinea.
130. It is remarkable that, notwithstanding this very clear language, the Claimants allege categorically, in their Counter Memorial no. 1, that "*in the CCJA - contractual- arbitration, Getma did not request compensation for the *lucrum cessans* which is unquestionably part of the prejudice sustained by the expropriated investors [...]*" (§ 109).
131. The requests made in the request for CGA arbitration were subsequently broadened, in particular in the minutes of the parties' meeting with the CGA Tribunal on March 12, 2012 (also called "*CCJA arbitration agreement*"). At this stage, Getma International intended to see the Respondent sentenced to pay the following, duly quantified, indemnities:
 - " - 20,894,966 € as an all-inclusive termination indemnity;

- €2,508,214 as a termination indemnity;

- €14,201,096 as an indemnity equal to the unamortized amount of the entry ticket;



- €13,606,721 as the indemnity owed for the requisitioned goods⁹
- €1,361,305 for the indemnity owed for initial capital expenditures and formation expenses;
- €110,557 as the indemnity owed for the current contracts;
- 0806,959 as the indemnity owed for the non-collection of the current assets;
- €87,124 as the indemnity owed for the costs of repatriating personnel;
- €279,863 as an indemnity owed for expenditures linked to crisis management;
- an indemnity to be quantified for the additional prejudice¹⁰ referred to in § 33.2 of the arbitration request;
- the interest accruing at the legal rate on all the preceding sums from the date of the preliminary notice of change of law" (exhibit R-10, p. 16).

132. Of the items on this list, only the first three items clearly pertain to the contractual indemnities stipulated in article 32.3 of the agreement; the sixth and eight items could represent the fourth contractual count of prejudice stipulated in article 32.3, namely *"the amount of the possible severance indemnities which the Concessionary might owe to its personnel"*. The "additional prejudice" is again claimed therein, but once more, without being quantified. Among the other new items, one draws particular attention: the amount of €13,606,721 claimed as an *"indemnity owed for the goods requisitioned"*.
133. Even if all the other new items, like the additional prejudice, could be considered as contractual counts of prejudice (notwithstanding the fact that they are not included in the all-inclusive indemnities established in article 32.3 of the agreement), the indemnity for the requisitioned goods is, for its part, clearly outside the scope of the application of the contract and constitutes without a doubt an investor's request based on the guarantees contained in article 5 the Investment Code.¹¹
134. Getma International's initial conduct could therefore cause one to conclude that it recognized or accepted the jurisdiction of the CCJA Tribunal, even for the treaty claims which are not explicitly referred to in article 32.5 of the Concession Agreement or, alternatively, waived the jurisdiction of the ICSID to rule on these claims. The Claimants however contest this conclusion
135. First of all, they place the accent on a letter sent by Getma International to the Guinean President on May 24th 2011 to confirm its consent to submit the disputes existing between the state concerning the application and interpretation of the Investment Code to the arbitration of the ICSID, and to accept the offer of arbitration made by the State in article 28 of the Investment Code (exhibit C-6). The Tribunal considers, along with the Respondent, that the

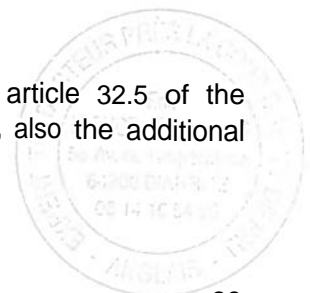
⁹ Our underlining.

¹⁰ Our underlining.

¹¹ Article 5 of the Investment Code: *"The Guinean State takes no measures of expropriation or nationalization impacting the investments made by persons or companies, subject to the cases of public utility established on the conditions stipulated by law. In the event of public utility, the expropriation measures must not be discriminatory and must provide just, adequate compensation the amount of which will be determined according to the usual rules and practices of international law."*

simple acceptance of the offer, without formulating the slightest request and without even referring to the "expropriation" (although it occurred on March 8, 2011 and was notified formally to Getma on March 18, 2012) cannot be considered as a referral of the case to the ICSID. The Claimants acknowledged this moreover implicitly when they asserted that: *"Document number C-6 is a very standard document. Its purpose is to no longer permit the Republic of Guinea to withdraw its offer which is in the Investment Code"* (record of the hearing on ICSID's jurisdiction, p. 54, lines 24-26). The Tribunal considers moreover that given that the jurisdiction of the CCJA Tribunal for treaty claims is limited to those which fall into the scope of article 32.5, thereby leaving additional jurisdiction to the ICSID, the Respondent had no reason to protest to the acceptance of the principle of the ICSID arbitration proposal.

136. Secondly, in their Counter Memorial no. 2, the Claimants distanced themselves from their requests for indemnification for the additional prejudice and the goods requisitioned. They have not responded to the argument developed by the Respondent in its Memorial no. 2 (§§ 44-56) according to which Getma International submitted its treaty claims to the CCJA Tribunal in its request for CCJA arbitration and in the CGA arbitration agreement. The Claimants deny having called upon the CGA Tribunal regarding the *lucrum cessans* and the indemnification for the requisition, not only by their silence regarding that which the request for CCJA arbitration and the CCJA arbitration agreement say, but also by the fact that the deny explicitly having presented a *treaty claim*: *"First of all, it is important to recall that, even if Getma International had presented a treaty claim to the COA Arbitral Tribunal – which is not the case – this would not mean that the COA Tribunal necessarily entertains jurisdiction to rule on this same claim"* (§ 125). They rely exclusively on the Memorial presented by Getma International in the framework of the CGA arbitration (Exhibit R-6) and charge the Respondent with not having referred to this Memorial in its statements on jurisdiction filed in the framework of this ICSID arbitration. They refer (§ 129) in particular to paragraph 571 of the CGA Memorial according to which *"despite its contractual obligation, the Guinean State not only did not believe it was its duty to minimize the prejudice it was deliberately causing Getma International. Worse even, it preferred to requisition all of Getma International's assets, goods and employees using the armed forces"*. They conclude (in § 130) that the legal basis for this request for indemnification is the breach of Art. 32.5 of the Concession Agreement, which stipulates that *"the Grantor shall take all useful measures for minimizing the effects of any Change of Law and Acts of the Public Authorities which impede the smooth functioning of the Activities granted in the Concession"*.
137. In order to grasp the Claimants' change of position, which they are attempting to deny – wrongly according to this Tribunal –, it is important to recall the chronology of the pertinent facts and acts of the procedure:
- March 8, 2011: Termination Decree of which Getma became aware from television (and communicated formally on March 18, 2011)
 - March 9, 2011: Preliminary Notice from Getma, with reference to Article 32.5, of a change of Law
 - March 9, 2011: requisition Decree
 - March 9 2011: Getma's final notice
 - May 10 2011: Getma's request for CGA arbitration, based on article 32.5 of the agreement and targeting, in addition to the contractual prejudice, also the additional prejudice (comprising the *lucrum cessans*) (exhibit R-9);



- May 24 2011: letter accepting the offer of ICSID arbitration in article 28.2 of the Investment Code (exhibit C-6).
 - June 22, 2011: Decree lifting the requisition of Getma's assets (exhibit C-26)
 - September 29 2011: request for ICSID arbitration and just, adequate indemnification which is not quantified for the breach of articles 5, 6 and 7 of the Investment Codes.
 - March 12, 2012: (report) CCJA arbitration agreement, comprising €13.6 million for the assets requisitioned and an unquantified indemnity for the additional prejudice (R-10)
 - March 30, 2012: minutes of the first session of this ICSID Tribunal
 - June 15, 2012: CCJA Memorial presenting the (highly reduced) indemnity for the goods requisitioned as an indemnity for the breach of a contractual duty and no longer claiming the *lucrum cessans* (exhibit R-6)
 - June 22, 2012: the Claimants' opening brief on jurisdiction in the ICSID arbitration
 - July 13, 2012: the Claimants' first Counter Memorial on jurisdiction in the ICSID arbitration
138. The Arbitral Tribunal notes that it is only after the first session of this Tribunal that the Claimants removed from their request before the CCJA Tribunal the indemnities for the *lucrum cessans* and for the requisitioned goods.
139. Indeed, page 119 of the CCJA Memorial contains, in conclusion the request to sentence the Respondent to pay a total amount of €42,245,208 for the following items (exhibit R-6):
- | | |
|--|-------------|
| - All-inclusive termination indemnity | €20,884,966 |
| - termination indemnity | €4,189,140 |
| - indemnity for the entry ticket | €14,201,096 |
| - indemnity linked to repatriated personnel | €172,874 |
| - indemnity pertaining to invoices to be issued | €589,418 |
| - indemnity pertaining to restituted goods | €1,974,885 |
| - indemnity pertaining to non-terminated contracts | €187,995 |
| - indemnity pertaining to crisis management costs | €258,834 |
140. On first site, these counts of request are similar to those appearing in the CGA arbitration¹³ agreement, (even if there are several differences, not only in the amounts, but also in their wording). However, the total amount of the requests is no longer €53,856,805 (as in the CGA arbitration agreement), but is reduced to €42,459,208. There is no longer a request for "an additional indemnity" (*lucrum cessans*). Moreover, the list no longer contains "*the indemnity owed for the assets requisitioned*" for the amount of €13,606,721, but rather and indemnity for the requisitioned goods "for an amount of €1,974,885. In paragraphs 568 – 572, it presents this request for indemnity pertaining to the requisitioned assets as based on a violation of the Respondent's contractual duty to minimize, after receipt of a preliminary notice, the effects of any change of law and acts of the Public Authorities. In paragraphs 592 to 623 of the same CGA Memorial, Getma International explains then that following the requisition Decree of March 9, 2011, its operating equipment and stocks were made unavailable and "*were returned*

¹³ See § 131 above.

only later" pursuant to a new Decree of June 22, 2011, for the purposes of lifting the requisition of these assets¹⁴. The costs entered into accounts concern the repatriation and repair of the equipment.

141. This new presentation of the facts and request leads us to the realization that, at least in the CGA Memorial, there are no longer, currently, any requests which could be considered as treaty claims.
142. During this Tribunal's hearing on jurisdiction in Paris, on September 28, 2012, one of the Claimants' attorneys specified that *"in the [CCJA] Memorial (...) Exhibit R-6 [...], The counts of prejudice are specified and quantified this time; it's paragraph 645. In all of these counts of prejudice, not one concerns the loss of future income¹⁵... On the other hand, in the request for arbitration before your Tribunal, the issue, which preceded the opening brief before the CCJA, is extremely precise. Even if the quantification has not been done at this stage, [...]"* (Record of hearing on ICSID jurisdiction, p. 58, line 26-p. 59, line 3).
143. The Tribunal then sought confirmation of Getma International's change of position in the CCJA arbitration:

"Professor P. Tercier.- (...) *In the current state of the CCJA procedure, you have no more requests based on the violation of the... Investment Code?*

Mr. C. Fischer.- *That is totally true. With one overtone; it's not that there are "no more" requests, there are none¹⁶. In my opinion there never were any explicit clear requests.*

Professor P. Tercier.- (...) *At the end there was a reference to number 332 regarding which we understood (...) that it was a prejudice which resulted this time from the breach of article 5, of articles 6 and of article 7 of the [mining] code.*

Is this a change in your position?

Mr. C. Fischer - *My reference to articles 5, 6 and 7 of the Investment Code was indeed in the request for ICSID arbitration.*

Professor P. Tercier,- *Alright. My question is obviously: at the CCJA, you no longer have any justified requests?*

Mr. C. Fischer- No, there are no more.

Professor P. Tercier.- *There are no more, to answer your question, because there were some, if I may say in the initial stage; is that true?*

Mr. C. Fischer.- *No, that is not our understanding of things."* (Record of hearing on ICSID jurisdiction, p. 60, line 8 – 26).

¹⁴ This Decree lifting the requisition is also mentioned on page 12 of the ICSID arbitration request.

¹⁵ Our underlining.

¹⁶ Our underlining.



144. Later on, another of the Claimants' attorneys made a similar statement:

"Mr. J.M. Judice.- [...] My strongest conviction is to the effect that we used explicitly the criteria of article 32.3 and no other criteria. We did not request lucrum cessans." (Record of the hearing on the ICSID's jurisdiction, p. 62, lines 25 - 27).

145. The question pertaining to that which the Tribunal could only consider as a change of Getma International's position-but which its attorneys were reluctant to acknowledge-was nonetheless brought back to the table in conjunction with the indemnity of €13.6 million owed for the requisitioned goods requested in the CCJA arbitration agreement, but no longer in the CCJA Memorial of June 15, 2012. At that moment, the Claimants acknowledged the change in the request and explained it as follows:

"Mr. C. Fischer.- [...] Second point, why did we slip, evolve as you said? That is perfectly true, because the question we were confronting was to determine whether the all-inclusive indemnity stipulated under the Concession Agreement was necessarily limited, in the contractual context, and could we request a higher sum or not? In other words, could we under the Concession Agreement, consider that the compensation stipulated in the contract exhausted all the prejudice for which we could request indemnification under the Concession Agreement?" (record of hearing on ICSID jurisdiction, p. 69, lines 20-27).

146. The Tribunal considers that it cannot settle for this answer. It is clear that Getma International indeed envisaged at the outset bringing all its requests resulting from the termination and the requisition, including that for indemnification for its *lucrum cessans* and for a substantial indemnification for the requisitioned goods before the CCJA Tribunal. The idea of basing certain requests on the Investment Code and of claiming them before an ICSID Tribunal was a second reflex. However, it was not implemented in a substantial manner:

- (i) the request for ICSID arbitration of September 29, 2011 brought before this Tribunal is-with the exception of (i) the description of the facts, which is practically identical to that of the request for CGA arbitration and (ii) the legal grounds²⁰ - very vague and in no manner quantifies the prejudice but plans to determine it "at the appropriate time in this procedure" (p.22, b) thereby allowing a doubt to remain regarding that which is requested in each of the two procedures and;
- Oii) even after the filing of the request for the ICSID arbitration, on March 12, 2012, Getma International again signed a report/CGA arbitration agreement which covers explicitly a request for indemnification for its *lucrum cessans* and for the requisitioned assets. It is only in its CGA Memorial of June 15, 2012, six weeks after the first session of this ICSID Tribunal, that Getma International appears²¹ to have reduced its request to the counts of request which it considers to be "contractual".

147. The evolution in the Claimants' procedural strategy however does not prevent the fact that this Tribunal must determine the parties' common intent at the time of the conclusion of the Concession Agreement and that this intent, if it was not explained, can also be inferred from

¹⁹ Our underlining.

²⁰ Which, in short, consist in stating that the termination of the contract was discriminatory, produce effects comparable to those of an expropriation (p. 14) and represent an act of the Public Authorities and not only a simple contractual execution or breach (p. 5 and 16).

²¹ Its being understood that this Tribunal is not required to rule on the nature of the requests before the CGA Tribunal and furthermore it does not have the means to do so.

the parties' execution of the contract. And the fact that Getma International included, in its request for CGA arbitration, requests which were not "strictly contractual" in the sense that they exceeded that which article 32.3 stipulated, but some of which (the indemnities for the *lucrum cessans* prejudice, for undermining its reputation and for the goods requisitioned) could, depending on their grounds, be contractual or based on the Investment Code, then became relevant.

148. If the *lucrum cessans* request no longer appears in the CGA Memorial of June 15, 2012, the question arises as to whether it still falls within the jurisdiction of the CCJA Tribunal. According to the Respondent's attorney, the arbitration agreement defines the perimeter of the CCJA Tribunal's mission and it matters little that Getma modified its position in its Memorial (record of hearing on ICSID jurisdiction, p. 63, lines 6 – 12). This Tribunal considers that the issue is one for the CCJA Tribunal, the only Tribunal with jurisdiction to determine the scope of the referral, particularly as the Respondent did not accept Getma International's rejection or waiver of the CCJA's jurisdiction for *lucrum cessans* and the requisition of the goods. This Tribunal must therefore accept as fact the initial referral of the case to the CCJA Tribunal for the *lucrum cessans* and requisition indemnities.
149. This Tribunal attempted during its hearing on jurisdiction on September 28, 2012, to clarify the parties' respective positions. It specifically questioned the Claimants regarding the legal interpretation to give to the limitation on their requests in the CCJA Memorial and in particular whether the requests which no longer appear therein had been abandoned before the CCJA Tribunal and if this waiver was then explicit and final (record of hearing on ICSID jurisdiction, p. 68, lines 24-31).
150. In response, the Claimants acknowledged that *"our analysis [...] has evolved and we considered that under the Concession Agreement a prejudice existed which had been contractualized and that, on the basis of the Concession Agreement, we do not have the grounds for requesting future profits for the loss of the contract [...]. Today things are very clear, although they were not clear previously, before the COA: we are no, and are no longer, requesting future profits, if it can be considered that we made such a request [...]. It was considered contractually that the prejudice for the loss of the contract [...] should not be assessed as a number of years of results, but should be lumped together in one year of revenue"* (record of hearing on IC jurisdiction, p. 69, line 28, – p. 70, line 20°;
151. It is then fitting to determine what the Claimants are requesting of this Tribunal. An analysis of the request brought before this Tribunal reveals that the Claimants consider that:
 - i. Having acted in a unilateral manner, the Guinean state violated the standards binding it through the Investment Code, in particular in the domain of expropriation, i.e. the most consolidated rules of customary international law (p. 13, 3rd para.);
 - ii. the decision to terminate the contract, in the terms in which it was carried out, was discriminatory inasmuch as it could not be applied to a Guinean investor (p. 14, 1st para.);
 - iii. Termination produced effects comparable to those of an expropriation (p. 14, 4th para.);
 - iv. The termination of the contract by the President represents an act of the Public Authorities (p.15, 4th para.) and exceeds the framework of the execution of the contract because:

1. the state is represented in the contract by the Transport Minister;
 2. the preliminary formalities for a contractual termination based on the Concessionary's fault, such for example as a formal notice and a 60-day correction period, were not carried out (p. 17);
- v. the requisition also produced effects equivalent to those of an expropriation, because no type of indemnification is provided for (p. 17);
- vi. the two Decrees constitute *jus imperii* acts, not merely acts carried out pursuant to a contract in force (p. 17, last para.).
152. *Prima facie* this Tribunal entertains jurisdiction for requests formulated in this manner, subject to the requests which the parties to the Concession Agreement had excluded from the ICSID's jurisdiction in their contrary agreement, in accordance with article 28.2 of the Investment Code. The scope of the application of this Tribunal's jurisdiction therefore does not include litigations resulting from the Concession Agreement, including its termination, even following an act of the Public Authorities. Indeed, Articles 32.5 and 31 of the Concession Agreement are also binding upon this Tribunal. However, it will not be until the time of the analysis of the Claimants' precise requests, their legal grounds, their factual causes and the damages, that this Tribunal can determine if and to what extent its jurisdiction, supplementary to that of the CCJA Tribunal, can be effectively implemented to rule on a "supplementary" indemnity for a "supplementary" prejudice, which exceeds the jurisdiction of the CCJA Tribunal.

e. **THE CONTRARY AGREEMENT OF THE SECOND, THIRD AND FOURTH CLAIMANTS**

153. This Tribunal must then determine what parties are bound by the arbitration clause. To do so, it is not enough to observe that the second, third and fourth Claimants all belong to the same group of companies and that they have shared executives. To appreciate whether these other three Claimants indeed intended to be bound by the arbitration clause, it is fitting to examine their respective roles during the negotiation, conclusion and execution of the Concession Agreement. This is what this Tribunal will do in an initial stage.

(i) *NCT Necotrans' signing of the Concession Agreement*

154. It is not contested that only Getma International signed the Concession Agreement. According to the introduction and the signature page (p. 27) of the Concession Agreement, Getma International was represented at the time of the conclusion of the agreement by its President, the NCT Necotrans company, represented in its turn by Mr. Richard Talbot in his capacity as chairman of NCT Necotrans' Board of Directors. The fact that Getma International was represented by its President appears normal²² and does not permit one to infer a desire on

²² According to Article 12 of the Articles of Association: "*the company is represented, managed and administered by a president, who can be a legal entity or natural person, of French or foreign nationality, a company shareholder or not. The president, if it is a legal entity, is represented by its corporate officers or by a representative appointed specifically for this purpose.*" (Exhibit R-12)

According to the excerpt from the Trade and Companies Register of September 12, 2011 for Getma International, Getma International's president was NCT Necotrans (Exhibit C-■).

The Tribunal notes that, according to the entry in the Trade and Companies Register of May 13, 2011 for NCT Necotrans, Mr. Richard Talbot was chairman of the Supervisory Board at the time, while the chairman of the Executive Board was Mr. Gregory Querel (Exhibit C-2). However this does not enable one to conclude that on September 22, 2008, the title utilized by Mr. Talbot was not correct (which neither party has raised for that

NCT Necotrans' part to be involved in the Concession Agreement in its own name. Even if article 15 of Getma International's Articles of Association stipulates that "*the president [i.e. NCT Necotrans] is vested in oil circumstances with oil the powers necessary for representing and managing the company*", this power is merely a power of representation and management "*as regards third parties*"²³ and does not permit one to conclude that the two companies are identical or one in the same.

155. If Mr. Talbot's signature implies the agreement of NCT Necotrans (of which he was a corporate officer) with the conclusion of the contract by its subsidiary Getma International, this still does not mean that NCT Necotrans, although a Getma International shareholder, is itself bound under the contract (as the Respondent claims in its Memorial^o 2, § 66).
156. Similarly, the fact that it be the chairman of NCT Necotrans' Executive Board, Mr. Querel, who signed it for NCT Necotrans acting in the capacity of Getma International's chairman, the special power of attorney granted to the Fischer and Judice firms to represent Getma International in the CCJA arbitration (exhibit R – 14), in no manner means that this power of attorney was granted by NCT Necotrans, and even less that it thereby became a party to the contract, or even to the procedure. There is no doubt that NCT Necotrans acted, in all of these instruments, as Getma International's president.
157. It appears that the NCT Necotrans company is the chairman of the Board of Directors, not only of the Getma International (exhibit C – one), but also of Getma International Investissements (Exhibit C-3). The signature of the president of NCT Necotrans can therefore, depending on the case, bind this company or one of its subsidiaries of which NCT Necotrans is the legal representative. It is therefore fitting to check each time in what capacity NCT Necotrans has affixed its signature. It is not proven that NCT Necotrans affixed its signature in a capacity other than as Getma International's president.

(ii) *joint address*

158. We note furthermore that NCT Necotrans, Getma International, Getma International Investissements and NCT infrastructure & logistique all four had their respective registered offices at the same address (66, rue Pierre shower all, 75008 Paris).
159. This same address, like the double functions, are apt to create a certain confusion between the various companies. However, they do not mean that the distinct identities of these various legal entities can be disregarded and that the rights and obligations of some with those of the others are lumped together. Third parties are required to recognize each company's specific identity, unless the companies themselves fail to respect it and create confusion in this regard.

(iii) *The role of NCT Necotrans' legal director in the COA arbitration*

160. The Respondent also invokes the direct participation of Mr. Sean Danielle Littler legal director of NCT Necotrans, in the CCJA arbitration, and in particular his presence at the hearing of March 12, 2012, as well as his signing of the CGA arbitration agreement (Memorial no. 2 § 74).
161. Mr. Littler was indeed present, but it was clearly in his capacity as "Legal Director of NCT Necotrans" (exhibit R – 10, last page). The mere presence of the legal director of a group's

matter). In all events, both of them were "corporate officers" of NCT Necotrans, which appears to suffice under article 12 of Getma's Articles of Association

²³ The Respondent omitted to quote these important words in § 60 of its Memorial n° 2.

holding company does not allow one to conclude that he represented one or several companies not party to the procedure at this hearing. It is common practice that a parent company provide services (i.e. legal services) to its subsidiaries²⁴. Nowhere in the record is it stated that Mr. Littler was present in any capacity other than that of the group's (and therefore also Getma International's) legal director, for example as legal representative of NCT Necotrans. Mr. Littler also signed the record of the hearing (Exhibit R-10), but it was clearly specified on page 1 of the record that he was (present as) "Legal Director NTC [sic] Necotrans".

162. The Tribunal concludes that the mere signing of the record by Mr. Littler does not bind NCT Necotrans anymore than his presence at the hearing.

(iv) Mr. Abdel Aziz Thiam's signature

163. The position as president of NCT Infrastructure & Logistique of Mr. Abdel Aziz Thiam, who is also Vice-Chairman of NCT Necotrans' supervisory board (Exhibit C-4), does not suffice either in itself to conclude that these two companies are bound under contracts concluded by Getma International.
164. Mr. Abdel Aziz Thiam cosigned (along with Mr. Richard Talbot) Additional Clause no. 1 to the Concession Agreement. As he is both chairman of the Board of Directors of the STCC operating company and president of the Board of Directors of NCT Infrastructure & Logistique, it is nonetheless clear that he signed this Additional Clause in his capacity as STCC's corporate officer: his signature proves that the operating company "read and approved" (as stated above his signature) Additional Clause no. 1 to which only Getma International and the Guinean State were parties. The preamble to Additional Clause no. 1 recalls that the operating company was (in accordance with the Concession Agreement) the "Concessionary's representative". It was in the capacity of contractual representative that it was present at the signing of the Additional Clause, as was the Conakry port authority which was there as "the Grantor's representative". None of these representatives however was party to Additional Clause no. 1.

(v) The negotiators of the Concession Agreement

165. The respondent also derives an argument from the fact that Mr. Abdel Aziz Thiam also directed Getma International's negotiation team, as confirmed by Getma International in its opening brief before the CCJA (exhibit R6- § 161). Getma International specified however that this same Mr. Aziz Thiam subsequently became Chairman of the Board of Directors of the operating company ("STCC") which was to be created in accordance with the obligations resulting from article 7.1 of the Concession Agreement. The Arbitral Tribunal considers that it is entirely normal that the person selected for managing the operating company, who has the technical knowledge pertaining to the concession operations, be a member, even the manager, of the negotiation team. One cannot infer solely from his presence on the team that the future operating company or NCT Necotrans was planning to be bound by the contract.
166. It is the same for the legal director and the assistant legal director of the NCT Necotrans group who were also part of the contract negotiation team. If NCT Necotrans delegates the negotiation to its legal directors, this does not necessarily imply that they represent their employer in these negotiations. As already noted above, these persons participated in negotiations as the group's legal experts whose legal services can be provided to all the companies in the group on the basis of intergroup service agreements. In such a case, these of

²⁴. Cfr. Also the presence of Mr. Littler at the hearing of this Tribunal of March 30, 2012.



services concern purely intellectual contributions and cannot be confused with a mandate to represent their employer.

167. "Mr. Michel Kerambrun, port expert intervening for the account of the subsidiary and NCT infrastructure & Logistique" and "Mr. Jean de Montmarin, project chief at NCT Infrastructure & Logistique" (opening brief before the CCJA Tribunal § 162 and Exhibit C-III p. 38) also participated in the negotiations. This observation alone however does not permit one to conclude that NCT infrastructure & Logistique became a party to the Concession Agreement. Indeed, according to the letter of October 28, 2012 from the Claimants to ICSID's Secretariat, NCT infrastructure & Logistique was a technical subsidiary of NCT Necotrans responsible as assistant project manager for the work of extending the container terminal. Under these circumstances, this company's mere delegation of its technical experts to the negotiations was not abnormal and did not necessarily mean that NCT Infrastructure & Logistique was becoming or had the intention of becoming party to the Concession Agreement itself.
168. It is in the same capacity that NCT Infrastructure & Logistique was able to execute a portion of the obligations resulting from the Concession Agreement, among others by launching, for the account of Getma International, the call for bids for the construction of the new dock stipulated under the Concession Agreement (ICSID arbitration request, p. 11). The position as assistant project manager can constitute the legal basis on which NCT Infrastructure & Logistique executed certain obligations under the Concession Agreement for Getma International, a basis which was therefore distinct from the contract binding Getma International to the Guinean state.
169. The Tribunal therefore concludes that, taken in an isolated manner, each of the interventions of the second, third and fourth Claimants in the negotiation, the signing and execution of the Concession Agreement - inasmuch as they are proven - is legally and/or factually warranted by and based on specific mandates. In themselves these interventions in no manner prove that they are due to the neglect of, or confusion between, the companies belonging to a given economic group, acting in breach of their legal identities and respective roles. The mandate and specific role of each company in the group, such as they appear in the file, prove that the second, third and fourth Claimants did not agree to be bound directly under the Concession Agreement. Subject to that which follows, the Tribunal notes that the respondent has not proven that the involvement of the aforementioned Claimants in the negotiation, the signing or execution of the agreement proves such an intent on their account.

(vi) *The Claimants' joint, concerted action*

170. The Arbitral Tribunal deems however that it is necessary to consider the Claimants' different interventions in this negotiation, signing and execution, not only separately, but also globally and in their context. An entirely different impression then emerges.
171. First of all, we note that the Claimants acknowledge that the investment which constitutes their basis for making their requests in this ICSID arbitration, is exclusively the product of each of their contributions to the execution of the Concession Agreement (Claimants' letter to ICSID's Secretariat of October 28, 2011). In their request for ICSID arbitration, the Claimants acknowledged that *"the execution of the public service concession contract implied a financial investment to be made by the Concessionary (investor)"* (ICSID arbitration request, p. 21). Therefore, this financial obligation of the contract was in fact not executed, or certainly not exclusively by the Concessionary, Getma International, but by NCT Necotrans, via the Concessionary Getma International, and by the intermediary holding company Getma International Investissements which was created specifically for the purpose of owning 95% of the STCC operating company. This Tribunal considers that Concession's financial structure

proves that NCT Necotrans' intervention in the execution of the Concession Agreement (and in particular its financial obligations) had been envisaged from the outset when Getma submitted its bid. This appears to be confirmed by the title of exhibit C - 15 in the index of the attachments to the ICSID arbitration request: *"excerpt from the NCT NECOTRANS group's financial proposal, [blank] GETMA INTERNATIONAL/TRANSAFRICA S.A., containing the summary of the investments made during the first two years of the Concession"*. NCT Necotrans' argument that it was not bound by the Concession Agreement can therefore not be followed.

172. The situation is comparable for NCT Infrastructure & Logistique which apparently had the necessary technical knowledge to meet other obligations of the Concession Agreement and in particular to become the assistant project manager appointed by Getma International for the extension of the terminal.
173. This being said, the participation of the representatives of NCT Necotrans and NCT Infrastructure & Logistique (even if individually they can also be considered as the representatives or legal or technical advisors of Getma International as stated above in subsection (v)) takes on a particular meaning: if they are viewed as a group, they are the representatives of the companies which planned from the outset of the negotiations (or even since the filing of the bid) to execute the Concession Agreement together. In fact, the list of the parties participating in the negotiation of the Agreement (attached thereto as appendix 10) makes no mention of any person representing the Concessionary, Getma International, alone. It is therefore fitting to consider Getma International, NCT Necotrans and NCT infrastructure & Logistique as an association or group whose members have undertaken jointly to execute the obligations of the Concession Agreement together.
174. Even if this joint and several commitment was not made in writing vis-a-vis the Respondent (regarding which the two Claimants could however not have ignored that they would derive assurances of the presence of the representatives of the various companies in the negotiations and the close ties between them²⁵), this Tribunal concludes that the participation in the negotiations on the part of natural persons with double roles, but representing in fact also companies who are clearly participating in the execution of the Agreement - which was effectively confirmed later on - warrants that these companies which did not sign the agreement be bound by the Agreement, if not jointly and severally, at least each for its part, and also by the Arbitration Clause.
175. Furthermore, without wanting to prejudge the capacity as investors of the second and third Claimant (NCT Necotrans and NCT Infrastructure & Logistique), the Tribunal considers that their affirmation, in their letter of October 28, 2011 to the ICS IDs Secretariat, that they are both investors (exhibit C-44) confirms that they were just as committed as Getma International, and on the same conditions, including the arbitration clause.
176. Inasmuch as the investment(s) made in Guinea constitute the execution of the Concession Agreement, this Tribunal cannot admit that the Claimants base their argument on their respective investment, i.e. their joint and several investment, while denying that they are bound under the agreement. It is inadmissible that they infer a right from the Investment Code on the basis of the same acts which constitute the execution of contractual obligations which they claim they did not take on. The duty of this Tribunal however is not to rule on the execution of the Concession Agreement, but only on the "contrary agreement" which

²⁵ This could be a confusion created on the count of a third party, which is discussed in § 158 above.

eliminated the jurisdiction of this ICSID Tribunal for the consequences of the termination of the agreement which ensues from an act on the part of the Public Authorities.

177. For the foregoing reasons, this Tribunal considers that NCT Necotrans and NCT Infrastructure & Logistique are bound by the arbitration clause in article 31 of the agreement.

(vii) Getma International Investissements

178. As concerns Getma International Investissements, the Tribunal noted that it was not created until November 12, 2008, as an intermediate holding company, in order to channel the investment which Getma International had undertaken to make in a Guinean operating company, itself created on November 20, 2008. This implies therefore that, contrary to the other Claimants, Getma International Investissements was not able to participate in the negotiations of the Concession Agreement or to express any wishes whatsoever regarding the Arbitration Clause. However, this does not suffice to maintain that this intermediate holding company is not bound by this Arbitration Clause.

179. Precisely because Getma International is merely an instrument created specifically for the purposes of fulfilling Getma's obligation to create an operating company (article 9 of the agreement) and constituted merely a "pass-through" for the capitalization of STCC by Getma International and NCT Necotrans, there is no reason to exclude it from the application of the Arbitration Clause which binds its two shareholders. The fact that the Arbitration Clause can be applied to it is confirmed by its shareholders meeting which decided on May 9, 2011, as did (i) NCT Infrastructure & Logistique's shareholders meeting, (ii) NCT Necotrans' executive board and (iii) Getma International's sole shareholder²⁶:

*"to initiate all judicial or arbitral procedures designed to obtain compensation for the prejudice sustained by the company following the termination of the Conakry container terminal Concession Agreement and the expropriation of which it was the victim, and in particular in the framework of arbitrations before the COA and the ICSID against the Guinean State as well as against the Bollere group."*²⁷

(viii) Conclusion

180. For the reasons stated above, as well as for the acknowledgment implicit in the decisions of their respective competent bodies of May 9, 2011, the wording of which, identical for each Claimant, is mentioned in paragraph 179 above, this Tribunal concludes that its jurisdiction to rule on disputes pertaining to the interpretation and application of the Investment Code is limited, with respect to the four Claimants, by the arbitration clause in article 31 of the Concession Agreement.

X. DECISION

For the reasons stated above, the Tribunal decides:

1. This Tribunal does not entertain jurisdiction to rule on the effects of the termination of the Concession Agreement as concerns the four Claimants.

²⁶ Documents n° 1, n° 2, n° 3 and n° 4, attached to the Claimants' letter to the ICSID Secretariat.

²⁷ Our underlining.

2. This Tribunal entertains jurisdiction to rule on the effects of the requisition and other alleged breaches of the Investment Code which do not fall into the framework of the Concession Agreement with respect to the four Claimants.
3. The costs incurred by the parties and the members of the Tribunal up until this date, including the costs of arbitration pertaining to the declining of jurisdiction will be the object of a subsequent decision of the Tribunal.

[Signature]
BERNARDO M. CREMADES
Arbitrator

[signature]
PIERRE TERCIER
Arbitrator

[Signature]
VERA VAN HOUTTE
President

