INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In proceedings between

AHS NIGER AND MENZIES MIDDLE EAST AND AFRICA SA

Claimants

and

THE REPUBLIC OF NIGER

Respondent

ICSID Case No. ARB/11/11

AWARD

Tribunal members
Mr. Fernando Mantilla-Serrano, Chairman
Mr. Patrick Hubert
Mr. Gaston Kenfack-Douajni

Tribunal Secretary
Mrs. Aurélia Antonietti

Date sent to Parties: July 15, 2013

PARTY REPRESENTATION

The Claimants are represented by:

Me Rasseck Bourgi,
10, rue du Chevalier de Saint George
75001 Paris
France

The Respondent was represented until March 14, 2012, by:

Me. Ibrahim M. Djermakoye
4, rue de la Tapoa, Ancien Plateau
BP 12651 Niamey
Niger

and by

The Minister of Transport
and the Director of Transport
Immeuble Caisse Nationale de Sécurité Sociale
(Quartier Terminus) Niamey
BP 12.130 Niamey
Niger
and
The Director of State Litigation
Government General Secretariat BP
550 Présidence de la République
Niamey
Niger

Since March 13, 2012, the Respondent has been in default.

GLOSSARY

AHS	Aviation Handling Services S.A.
AHS Niger	Aviation Handling Services Niger S.A.
Decree 1	Decree no. 000001/MT/AC/DAC of January 5, 2010
Decree 2	Decree no. 000002/MT/AC/DAC of January 5, 2010
Decree 15	Decree no. 015/MT/T/DAC of February 19, 2004
Decree 16	Decree no. 016/MT/T/DAC of February 19, 2004
Decree 66 or Specifications	Decree no. 066 MT/DAC of December 30, 2003 "*containing Specifications for the conducting of assistance or self-assistance ground handling activities in airports in Niger*".
Decree 103	Decree no. 103/MTT/A/DAC of December 14, 2010
Decree 104	Decree no. l04/MTT/A/DAC of December 14, 2010
Decree 105	Decree no. l05/MTT/A/DAC of December 14, 2010
Decree 106	Decree no. 106/MTT/A/DAC of December 14, 2010
Decree 108	Decree no. 00108/MTT/A/DRF/M of December 29, 2010
C	Claimants' Exhibit
ICSID or the Center	International Center for Settlement of Investment Disputes
Investment Code	Investment Code of the Republic of Niger of December 8, 1989, amended by decrees in 1997, 1999 and by a law in 2001
ICSID Convention or Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965
Investment Agreement	Investment Agreement signed on December 15, 2004, between AHS Niger and the Republic of Niger
Decision on Jurisdiction	Decision on Jurisdiction in ICSID Case no. ARB/11/11, sent to the Parties on March 13, 2013
Decision 799	Decision no. 00799/MTT/A/DAC of December 14, 2010
Respondent	Niger
Def. Memorial	Respondent's Memorial of April 6, 2011
Claimants	AHS Niger and Menzies Middle East and Africa S.A., jointly
Plaint. Mem.	Claimants' Memorial of November 14, 2011
Claim. Mem., updated	Claimants' Memorial of April 11, 2013
MAG	Menzies Aviation Group
MMEA	Menzies Middle East and Africa S.A. (entitled Menzies Afrique S.A. before March 18, 2011)
Niger	Republic of Niger
R	Respondent’s exhibit
Arbitration rules	Rules of procedure for ICSID arbitration proceedings
Request	Claimants' request for arbitration dated March 4, 2011

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Center for Settlement of Investment Disputes ("ICSID") on the basis of the Investment Agreement concluded in 2004 between AHS Niger and the Republic of Niger ("Investment Agreement"), the Investment Code of the Republic of Niger of December 8, 1989, amended by decrees in 1997, 1999 and by a law in 2001 ("Investment Code") and on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, in force since October 14, 1966 (the "ICSID Convention"). The dispute concerns the legality of the withdrawal by the Republic of Niger of a license granted to AHS Niger to provide ground handling services at Niamey international airport, and the validity of the termination of the Investment Agreement.

2. The Claimants are Aviation Handling Services Niger S.A. ("AHS Niger") and Menzies Middle East and Africa S.A. (named Menzies Afrique S.A. before March 18, 2011) ("MMEA") (hereinafter jointly referred to as the "Claimants"). The registered office of AHS Niger is at Aéroport International de Niamey, BP 10006[1]; MMEA's registered office is at 127, rue de Mühlenbach, L-2168, Luxembourg[2].

3. The Respondent is the Republic of Niger (hereinafter "Niger" or the "Respondent") in the person of the Minister of Transport, the Director of Transport and the Director of State Litigation.

4. The Claimants and the Respondent will hereinafter be collectively referred to as the "Parties". The respective representatives of the Parties and their addresses are mentioned above.

5. The Tribunal has read and analyzed all the allegations and evidence submitted by the Parties and will confine its award to such facts, allegations and evidence which it considers most relevant to explain its conclusions and reasoning.

6. The Tribunal will first present a background to the proceedings (II) and a review of the facts (III). The Tribunal will then present its analysis of the parties' arguments on the merits (IV), and on damages (VI), interest (VII) and costs (VIII).

[1] Exhibits C1 and C44.
[2] Exhibits C2 and C36

II. HISTORY OF THE PROCEEDINGS

7. On March 11, 2011, ICSID received a request for arbitration dated March 4, 2011, from AHS Niger and Menzies Afrique SA against the Republic of Niger, accompanied by exhibits C1 to C30 and exhibits JP1 to JP10 (the "Request").

8. By means of letters dated March 16 and 30, 2011, the Center put questions to the Claimants in connection with the examination of the Request. The Claimants replied by letter dated March 21, 2011, with exhibits C31 to C35 and JP11 and JP12, and by letter dated April 5, 2011, with exhibits C36 to C42 and JP13 to JP16.

9. On April 6, 2011, Mr. Ibrahim M. Djermakoye submitted on behalf of Niger a "Defense Memorial" "*seeking to demonstrate the lack of jurisdiction of the CIRDI to hear the dispute* " accompanied by exhibits 1 to 9 ("Respondent's Memorial").

10. The Claimants replied through letters dated April 7 (accompanied by new exhibits C43 to C45) and April 18, 2011, and Niger replied by letter dated April 15, 2011.

11. On April 26, 2011, the Secretary-General of the Center registered the Request in accordance with Article 36(3) of the ICSID Convention. The Parties were notified of this registration on the same day. In the Notification of Registration, the Secretary-General invited the Parties to proceed as soon as possible with the constitution of the Arbitral Tribunal in accordance with Article 7 of the Institution Rules.

12. The Parties agreed, in accordance with Article 37(2)(a) of the ICSID Convention, that the Tribunal would be composed of three arbitrators, with each Party appointing one arbitrator and the Chairman being appointed by the co-arbitrators. The Claimants appointed Mr. Patrick Hubert, of French nationality, who accepted his appointment. The Respondent nominated Dr. Gaston Kenfack-Douajni, of Cameroonian nationality, who accepted the nomination. Mr. Hubert and Mr. Kenfack-Douajni appointed Mr. Fernando Mantilla-Serrano as Chairman of the Tribunal. Mr. Mantilla-Serrano, of Colombian nationality, accepted his appointment.

13. In accordance with Article 6(1) of the Rules of Procedure for ICSID Arbitration Proceedings ("Arbitration Rules"), the Secretary-General notified the Parties on July 22, 2011, that the three arbitrators had accepted their appointment, and that the Tribunal was deemed to be constituted and the proceedings commenced on that date. The Parties were also informed that Ms. Aurélia Antonietti, Legal Counsel at ICSID, was the Secretary of the Tribunal (the "Secretary").

14. On September 15, 2011, the Tribunal held its first session with the Parties. It was agreed that each party would be represented at the first session, but on the eve of the session, September 14, 2011, the Director of State Litigation informed the Center that no representative of the Republic of Niger would be present at the session, referring to a letter addressed to AHS Niger S.A. on September 13, 2011, indicating the Respondent's willingness "*to enter into direct negotiations with AHS-NIGER with a view to an amicable and consensual settlement of the dispute between them, and at the same time requesting a suspension of the arbitration proceedings initiated before ICSID to enable the parties to conclude as soon as possible an agreement safeguarding their respective interests*". Counsel for the Claimants objected by e-mail on the same day to the suspension of the proceedings and the postponement of the session. On September 14, 2011, the Secretary informed the Parties by e-mail that the Tribunal had decided to maintain the session for the following day. On September 15, 2011, the Tribunal held its first session in the presence of the Claimants' representatives and discussed the items on the agenda that had been communicated to the Parties on August 2, 2011. In a letter from the Center dated September 19, 2011, draft minutes of the first session were sent to the Parties for comment. By means of letters dated September 20 and 30, 2011, the Claimants submitted their comments, and the Respondent submitted its comments by a letter dated September 30, 2011. The final minutes of the first session dated October 5, 2011, signed by the Chairman and the Secretary were sent to the Parties on October 6, 2011.

15. The minutes of the first session state that the Parties noted that the Tribunal had been properly constituted and that they had no objections to the declarations of its members. It was also agreed that the applicable Rules of Arbitration would be those that came into force in January 2003, that the place of proceedings would be Washington, DC, and that the proceedings would be conducted in French.

16. Insofar as the Respondent had not yet indicated whether it intended to formally raise an objection to jurisdiction, the Tribunal decided that the timetable for the exchange of pleadings would be as follows:

- The Claimants would file their Memorial on the merits before November 15, 2011.
- The Respondent would file its Counter-Memorial on the merits and/or any objection to jurisdiction before January 16, 2012. It would indicate in its Memorial whether it requested bifurcation of the proceedings.
- No later than January 30, 2012, the Claimants would respond to any request for bifurcation. The Tribunal would then promptly decide on bifurcation.

17. On November 14, 2011, the Claimants filed their Memorial on the Merits ("Claimants' Memorial") together with exhibits C46 to C72, case law A17 to A20, the witness statement of Mr. Pierre Agbogba, the witness statement of Mr. Rachid Riffi, the witness statement of Mr. Forsyth Black, the report of Mr. John S. Willis and the legal opinion

of Prof. Serge Sur.

18. On January 15, 2012, the Republic of Niger did not make a submission. On January 17, 2012, the Center received a letter from the Secretary-General of the Government dated January 13, 2012, requesting additional time to organize its defense. Niger was then asked to kindly inform the Center how many days it would need to present its written submissions. On January 25, 2012, Niger was again asked to indicate as soon as possible the basis for its extension request and the duration of the requested extension.

19. On January 27, 2012, the Claimants filed a request for a declaration of default by the Respondent and for the issuance of a ruling pursuant to Article 42 of the Arbitration Rules. This request was officially notified to Niger by letter from the Center dated February 1, 2012. In the same letter, the Respondent was invited to indicate by February 6, 2012, the basis for its extension request, the number of extension days required, and whether it intended to assert its claims in these proceedings. The Tribunal indicated that it was anxious for this procedure to proceed in the presence of all the parties. By letter from the Center dated February 7, 2012, the Tribunal noted the absence of any reaction from the Republic of Niger within the time limit set. In these circumstances, and pursuant to Article 42(2) of the Arbitration Rules, the Tribunal set a deadline of February 29, 2012 for "[t]*he Respondent to file its Counter-Memorial on the merits and/or any rejection of jurisdiction and also to indicate whether it requires the proceedings to be bifurcated*", in accordance with the minutes of the first session of the Arbitral Tribunal of September 15, 2011.

20. By letter dated March 13, 2012, the Tribunal noted the Respondent's failure to file its Counter-Memorial on the merits and/or a rejection of jurisdiction. In these circumstances, the Tribunal indicated:

- that it would grant the Claimants' request dated January 27, 2012, to declare the Respondent in default and issue a ruling pursuant to Article 42 of the Arbitration Rules;
- that if the party in default fails to appear or present its case, it will not be deemed to have acquiesced to the other Party's claims;
- under the terms of Article 42(3) and (4) of the Arbitration Rules, it would therefore examine whether or not the dispute fell within its jurisdiction and, if so, whether the conclusions were well-founded in fact and in law; and
- that it could, at any time, ask the Claimants to submit observations, new evidence or oral explanations.

21. By letter dated March 14, 2012, Mr. Djermakoye, counsel for the Respondent, informed the Tribunal of his withdrawal from the case on March 8, 2012.

22. By letter dated April 18, 2012, the Centre informed the Parties that the Tribunal intended to get back to the Parties regarding the status of its work and with any questions.

23. By letter dated August 10, 2012, the Tribunal asked the Parties nine questions to which they were invited to reply by September 3, 2012. The Claimants replied on August 31, 2012, and submitted exhibits C73 to C76 and A21 to A23.

24. By letter dated September 25, 2012, and in order to ensure that the Respondents had the complete file on this case, the Centre sent a hard copy of all correspondence exchanged in this file by e-mail since the beginning of 2012 to the Minister of Transport and the State Litigations Department, copying in the Niger Embassy in Washington, DC, so that the latter could forward the file to the relevant departments of the State of Niger. In letters dated November 5 and 29, 2012, counsel for the Claimants confirmed the changes in the Government.

25. By letter dated October 23, 2012, the Claimants sent the Tribunal a copy of the ruling of the Niger State Court, Administrative Chamber no. 12-054 of October 10, 2012, and its notification, which will be discussed below.

26. In a letter dated January 16, 2013, the Claimants reiterated their request that the "*Arbitral Tribunal should rule only on the heads of claim submitted to it*" by the Claimants in all their pleadings.

27. The Decision on Jurisdiction (see *supra*, § 88) was sent to the Parties by ICSID's letter of March 13, 2013, by which ICSID requested that the Parties set forth their observations by March 28, 2013, on the organization of further proceedings and indicate whether they wished to make further submissions and be heard orally.

28. By letter dated March 15, 2013, the Claimants replied, stating that they did not intend to make any further submissions and that they were at the Tribunal's disposal should it deem it necessary to hear the Parties, asking the Tribunal to rule on the merits as soon as possible.

29. The Respondent did not react to ICSID's letter of March 13, 2013.

30. By letter dated April 1, 2013, addressed to the Parties, the Arbitral Tribunal invited the Claimants to discuss and elaborate on the effects of Ruling No. 12-054 of October 10, 2012, of the Niger State Court, Administrative Chamber, and gave them until April 16, 2013, to do so. The Tribunal indicated that the Respondent would then have an equivalent period, i.e., until 1 May 2013, to respond.

31. On April 11, 2013, the Claimants submitted their updated Memorial on the Merits in which they referred to and elaborated on the effects of Ruling No. 12-054, accompanied by new exhibits C77 to C82.

32. The Respondent, duly notified of this Memorial, did not reply.

33. By letter dated May 3, 2013, addressed to the Parties, ICSID, on behalf of the Tribunal, once again took note of the Respondent's default.

34. By letter dated May 6, 2013, the Claimants again asked the Tribunal to apply the provisions of Article 42 of the Arbitration Rules by ruling only on the heads of claim submitted by the Claimants in their pleadings entered in the debate.

35. By letter dated May 16, 2013, the Claimants submitted a copy of ruling no. 13-028 of the Niger State Court, Administrative Chamber (Exhibit C83). By letter dated June 4, 2013, the Claimants submitted a copy of the notification of this ruling by the Chief Registrar of the Court of State, Administrative Chamber (Exhibit C84).

36. By letter dated June 24, 2013, the Parties were invited, in accordance with Article 28(2) of the Arbitration Rules, within a time limit expiring on July 8, 2013, to communicate to the Arbitral Tribunal a statement of the expenses they had incurred or borne in the course of the proceedings. The Claimants filed a Memorial and an Additional Memorial on Arbitration Costs and Fees, with supporting documents, on June 25 and 28, 2013. Niger has not communicated anything to the Arbitral Tribunal concerning the costs and expenses incurred by Niger.

37. By letter dated July 8, 2013, the Parties were informed, in accordance with Article 38 of the Arbitration Rules of the closure of the proceedings.

III. FACTS

III.1 AHS Niger Approval and Investment Agreement

38. The Tribunal will review the facts as they emerge from the Claimants' pleadings, the Respondent's Memorial submitted prior to the filing of the Request and the exhibits submitted.

39. In December 2003, following the bankruptcy filing in January 2002 of Air Afrique, which was in charge of ground handling, notably at Niamey airport, the State of Niger

launched an international tender invitation for ground handling services at Niger's airports (hereinafter the "Tender Invitation").[3]

40. By Decree no. 066/MT/DAC of December 30, 2003 (hereinafter referred to as "Decree 66"), establishing the Specifications for the provision of ground handling or self-handling services at Niger airports, the Minister of Transport defined, inter alia, the services to be provided and the conditions for approval of service providers. The approval period for ground handling services was set for 5 years, and 3 years for self-handling services[4].

41. In a letter dated January 29, 2004, the Menzies Aviation Group-AHS consortium submitted its technical and financial bids.[5] In its bid, the group undertook to:

- invest 1.7 billion CFA francs;
- purchase the equipment of the former Air Afrique for 295 million CFA francs;
- take on former Air Afrique employees needed to run the business and who have not reached the age limit; and
- pay the State 5% of its gross sales as a concession fee.

42. In a letter dated January 26, 2004, Menzies Aviation Group-AHS requested that the license be for a period of 10 years, the length of time required for the amortization of the investment.[6]

43. In a letter dated February 8, 2004, the Minister of Transport informed the Group that it had been declared the successful bidder.[7]

44. In accordance with the tender documents, a company incorporated under Nigerien law was to be set up to provide the services covered by the tender. AHS Niger was thus incorporated on February 18, 2004.[8] Its main shareholder was MMEA (75%). The remaining 25% was held by two Nigerien shareholders, with AHS International Limited owning just one share.[9]

45. On February 19, 2004, Decree No. 015/MT/T/DAC (hereinafter "Decree 15") was issued for ground handling and self-handling services at Niger airports, amending the 2003 specifications. This decree stipulated that approval would be valid for ten years and limited the number of approved service providers to a single service provider for ground handling at Niamey airport.[10] This decree specified that "[t]he *number of*

[3] Exhibit C4.
[4] Exhibit C6.
[5] Exhibits C8 and C31.
[6] Exhibit C46.
[7] Exhibit C48, addressed to the President of Aviation Handling Services S.A. (AHS S.A.) in Dakar, stating that: "*Your group has been awarded the contract*".
[8] Exhibit C1.
[9] Exhibit C33.
[10] Exhibit C5.

approved service providers on this platform may be modified by ministerial decree if the number of passengers exceeds [sic] *five hundred thousand (500,000) per year and subject to the absence of particular constraints in terms of space or facility capacity and compliance with airport and passenger safety and security constraints.*"

46. On the same day, Decree No. 016/MT/T/DAC (hereinafter "Decree 16") approving a 10-year approval to "*Aviation Handling Services Niger S.A. (Menzies Aviation Group Partner) to provide ground handling services at Niamey's Diori Hamani international airport*" was issued.[11] It stated that the ground handling activity included passenger, baggage, freight and mail handling, ramp operations, aircraft cleaning and servicing, line maintenance, flight operations and crew administration, air transport, and catering. This decree stipulated that "the *period of validity of the approval is ten (10) years, renewable.*"[12]

47. On December 15, 2004, the Government of the Republic of Niger and AHS Niger signed an Investment Agreement, the purpose of which was "... *to define the conditions under which AVIATION HANDLING SERVICES NIGER S.A. will carry out its activities, as well as the commitments of the two contracting parties* (sic), *namely the Government of the Republic of Niger and AVIATION HANDLING SERVICES NIGER S.A.*"[13]

48. According to the Claimants, in accordance with the terms of the Specifications,[14] AHS Niger applied for and obtained an operating license for the ground handling business.[15]

49. Under the Investment Agreement, AHS Niger has undertaken to:

> *"invest a minimum amount of one billion, seven hundred sixty-seven million, two hundred thirty-two thousand, one hundred fifty-seven (1,767,232,157) CFA francs excluding taxes and working capital;*
>
> *- create at least 83 permanent jobs;*
>
> *- provide the Ministry of Industry with financial statements at the end of each financial year;*
>
> *- enable officials from the Ministry of Industry and the Ministry of Finance to monitor compliance with the terms and conditions of this Investment Agreement;*

[11] Exhibit C3.
[12] Exhibit C3, section 4.
[13] Exhibit C7, section 1.
[14] Exhibit C6, sections 3 and 13-18.
[15] Claim. Mem., updated, § 52.

- *comply with Niger's social regulations."*[16]

50. According to the Claimants, over the first five years, from December 15, 2004, AHS Niger invested 2,418,500,792 CFA francs, created 101 jobs and complied with its accounting and financial obligations.[17]

51. According to the Claimants, AHS Niger has "perfectly" fulfilled its obligations.[18] The Claimants also emphasize the benefits to Niger of AHS Niger's activities, namely the injection of more than 7.6 billion CFA francs into the country's economy as salaries, license fees and taxes, among other things.[19]

52. According to the Claimants, AHS Niger has not been accused of any breach of its obligations[20] and no formal notice has been served on AHS Niger.[21]

53. Consequently, according to the Claimants, AHS Niger's license was renewed every year since 2005.[22] The last renewal took place on March 8, 2010.[23]

III.2 **Withdrawal of approval and termination of the Investment Agreement**

54. By means of Decree No. 000001/MT/AC/DAC of January 5, 2010 (hereinafter "Decree 1") amending Decree 16, the duration of the Investment Agreement was reduced to 5 years and all previous provisions to the contrary were repealed.[24] A second decree of the same date, No. 000002/MT/AC/DAC (hereinafter referred to as "Decree 2"), amended and supplemented Decree 66 of 2003, by setting, inter alia, the number of service providers at Niamey airport at three (ground handling, freight and post handling, and self-handling).[25]

55. In a letter dated January 6, 2010, addressed to AHS Niger, the Minister of Transport, citing "*...contradictions in the texts governing the ground handling and self-handling activities*" in Niamey, indicated that, in accordance with the 2003 Specifications, the number of service providers was three (ground handling, freight and post handling, and self-handling) and that the duration of the Investment Agreement was 5 years....[26]. The same letter asked AHS Niger to take the necessary steps to renew its approval, which expired on February 18, 2009.

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[16] Exhibit C, section 4.
[17] Request, § 27.
[18] Claim. Mem., updated, §§ 53-64.
[19] Claim. Mem., updated, §§ 63-64.
[20] Claim. Mem., updated, § 59.
[21] Claim. Mem., updated, § 62.
[22] Claim. Mem., updated, § 60. With the exception of the 2010 license (Exhibit C43), the other licenses have not been submitted.
[23] Exhibit C43.
[24] Exhibit C12.
[25] Exhibit C13.
[26] Exhibit C11.

56. AHS Niger objected to this measure in a letter dated January 25, 2010.[27]

57. AHS Niger continued to operate the ground handling service, allegedly with the agreement of the Government, and on March 8, 2010, obtained a renewal of the annual operating license for the 2010-2011 period.[28]

58. According to the Respondent, "[i]*n December 2010, an inspection carried out by the transitional authorities concluded that the granting of approval to AHS Niger S.A. was irregular, that its commitments to the State of Niger had not been honored and that Nigerien legislation had not been respected, among other deficiencies identified.*"[29]

59. On December 14, 2010, Niger's Minister of Transport issued Decree No. 106/MTT/A/DAC (hereinafter referred to as "Decree 106")[30] immediately repealing Decree 16, as well as decision No. 00799/MTT/A/DAC (hereinafter "Decision 799") terminating the Investment Agreement.[31] According to the Claimants, these two documents were notified to AHS Niger by hand delivery on December 15, 2010.

60. The following decrees have also been issued:

- Decree No. 103/MTT/A/DAC of December 14, 2010 (hereinafter "Decree 103") "*creating a ground handling unit at Niamey's DIORI HAMANI International Airport* [the Cellule d'Assistance en Escale]." It was specified that this unit would be responsible for ensuring, under the direction of a management committee, the continuity of public services in terms of aircraft assistance;[32]
- Decree No. 104/MTT/A/DAC of December 14, 2010 (hereinafter "Decree 104") "*requisitioning the personnel from the company AHS dedicated to providing ground handling assistance at Niamey's DIORI HAMANI International Airport;* "[33]
- Decree No. l05/MTT/A/DAC of December 14, 2010 (hereinafter "Decree 105") "*requisitioning the ground handling equipment made available to AHS;*"[34]
- Decree No. 00108/MTT/A/DRF/M of December 29, 2010 (hereinafter "Decree 108") "*establishing and assigning a committee responsible for the financial management of ground handling resources at Niamey's DIORI HAMANI International Airport.*"[35]

[27] Exhibit C14.
[28] Exhibit C43.
[29] Claim. Mem., p.3.
[30] Exhibit C17.
[31] Exhibit C18.
[32] Exhibit C21.
[33] Exhibit C22.
[34] Exhibit C23.
[35] Exhibit C24.

61. On December 15, 2010, according to the Claimants, they were expropriated from their investment.

62. The Claimants state that, on that date, the Acting Director of Civil Aviation called a meeting of the staff of AHS Niger, informing them that he was now the new General Manager of the Ground Handling Unit.

63. They also claim that, on the same day, the Managing Director of AHS Niger, Mr. Rachid Riffi, a Moroccan national, was threatened and forced to leave his workplace and, that, accompanied by a delegation including the former head accountant of AHS Niger, the Managing Director of ASECNA[36] (a member of the cell's management committee), two bailiffs, a gendarme, and AHS Niger's lawyer (who had arrived on the scene in the meantime), he was forced to visit the banks in which accounts had been opened in the name of AHS Niger in order to obtain account balances, signatures on the accounts and the right of access to the accounts. This, he refused to do. He was then expelled from his office and his company vehicle was seized.

64. According to the Claimants, since December 15, 2010, "*AHS Niger has no longer had access to its headquarters and equipment, and the Cellule d'Assistance en Escale has confiscated AHS Niger's accounting documents and records, making it physically impossible for AHS Niger to meet its tax obligations.*"[37]

65. The Claimants go on to assert the following:

> *"92. In addition, for the purposes of this expropriation, the Cellule d'Assistance en Escale is making use of AHS Niger materials and equipment.*
>
> *93. In a vain attempt to conceal its activities, the Cellule d'Assistance en Escale had all AHS logos and markings removed from AHS Niger equipment in early 2011, even though it had been operating the same equipment with MENZIES-AHS logos and markings.*
>
> *94. However, the Cellule d' Assistance en Escale and all staff continue to operate in AHS Niger uniforms with AHS-MENZIES group insignia, in flagrant violation of the latter's property rights which reserve them exclusive use of the group's registered name and sign.*
>
> *95. Since that date, no measures have been taken by the State of Niger to remedy these various infringements.*"[38]

[36] Agency for Air Navigation Safety in Africa and Madagascar.
[37] Claim. Mem., updated, § 116.
[38] Claim. Mem., updated, §§ 118-121.

III.3 **Recourse in Niger**

66. On December 17, 2010, AHS Niger filed two requests for review against Decree 106 and Decision 799.[39] On January 12, 2011, AHS Niger filed four requests for review against the other four decrees mentioned above (see § 60 above).[40] All these appeals were addressed to the Minister of Transport, Tourism and Crafts of the Republic of Niger.

67. Having received no response from the Government, in May 2011 AHS Niger filed three requests with the Administrative Chamber of the State Court, within the two-month time limit following the Government's implicit rejection of the appeals, for abuse of power against Decree 106, Decision 799 and the four other decrees mentioned above.[41]

68. Ruling no. 12-054 of October 10, 2012, sent by the Claimants on the same day, states that the appeals for annulment against Decree 106, Decision 799, Decrees 103, 104, 105, and 108 were deemed admissible by the Administrative Chamber of the Niger State Court, and that the appeal for annulment against the implied rejection by the Minister of Transport was declared inadmissible. On the merits, the Court annulled Decree 106 for having been issued "*without grounds, in violation of Articles 4 and 5 of the investment agreement and Article 9 of Decree No. 066/MTT/A/DAC of December 30, 2003*" relating to the Specifications. Accordingly, Decrees 103, 104, 105, 106, 108, and Decision 799 were also annulled by the Court, which also ordered the Treasury to pay the costs.

69. On November 6, 2012, Niger filed an appeal to set aside this ruling.[42] On May 8, 2013, by Ruling No. 13-028, the Niger State Court, Administrative Chamber, dismissed this appeal.[43]

70. The Claimants stated in their Memorial of April 11, 2013, that "*since December 2010, the Cellule d'Assistance en Escale set up by the Respondent has continued to operate the equipment and use the personnel of the said Claimants to continue the ground handling activity at Niamey's Diori Hamani International Airport*"[44] and that "*for more than two years, the State of Niger has also been using the expertise of the Claimants, which is internationally recognized in this field, to collect fees from airlines.*"[45] Niger does not contest these allegations. As a result, to date, there has been no reinstatement of the Investment Agreement, nor any return, even partial, of the assets which the Claimants consider expropriated.

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[39] Exhibits C19 and C20.
[40] Exhibit C25.
[41] Exhibits C50 and C52.
[42] Exhibit C79.
[43] Exhibit C83.
[44] Claim. Mem., updated, § 328; Exhibit C82.
[45] Claim. Mem., updated, § 329.

IV. SUMMARY OF THE PARTIES' POSITION

IV.I Position of the Claimants

71. As far as the Claimants are concerned, the Investment Code, Tender Regulations, 2003 Specifications, 2004 Decrees, and the Investment Agreement are particularly applicable in this dispute.

72. The Claimants consider that Niger has reneged on the Investment Agreement and withdrawn the approval for the exercising of ground-handling and self-handling activities in an irregular, unfounded and wrongful manner, thus violating the Investment Agreement, applicable law and customary international law.[46]

73. Niger has failed to comply with the contractual and legal prerequisites, i.e., prior written notice, the possibility of suspending approval and then withdrawing it, and, in any event, seeking an amicable resolution to the dispute.[47]

74. Withdrawal of the approval order should only take place after two months' formal notice to remedy deficiencies, followed (if necessary) by a six-month temporary suspension.[48]

75. Furthermore, the Claimants note the absence of any justification on the merits for the above-mentioned reneging and withdrawal.[49] They believe that AHS Niger has not breached any of its obligations under the Investment Agreement, Investment Code and Specifications.

76. Niger has manifestly violated its obligations, thereby committing an abuse of power[50] and has implemented these measures by means of coercion, in violation of Articles 2 and 7 of the Investment Code.[51] A “voie de fait” is an unlawful administrative act defined as "*conduct perpetrated when the administrative authority takes a decision or commits an action that is manifestly unlikely to be linked to a legislative or regulatory text. It is therefore the seriousness of the irregularity that distorts the administration's action, to the point of taking it outside the scope of the administrative field.*"[52] It occurs when the Administration's action causes serious damage to property and involves an irregularity.

[46] Claim. Mem. updated, § 321.
[47] Claim. Mem. updated, §§ 256-270.
[48] Claim. Mem. updated, §§ 271-292.
[49] Claim. Mem. updated, §§ 294 *et seq*.
[50] Claim. Mem. updated, § 338.
[51] Claim. Mem. updated, § 339.
[52] Claim. Mem., updated, § 357 citing the legal opinion of Prof. Sur.

77. AHS Niger was expropriated for no good reason.[53]

78. The Claimants emphasize that the Tribunal has jurisdiction to assess the financial and material consequences notwithstanding the existence of a request for review,[54] which was implicitly rejected and annulled, along with the contested decision, by the Niger State Court (see § 68 above).

79. The Plaintiffs were entitled to operate the ground handling and self-handling business for another four years.

80. They are entitled to full compensation for their material and non-material loss, which can be broken down into economic loss (loss of earnings and loss of property), non-material loss, infringement of their intellectual property rights, and reimbursement of costs related to the arbitration, including counsel and expert fees.[55]

81. The valuation of the loss of earnings is based on a projection of expected net profits for the period from December 15, 2010, to February 2014, resulting, inter alia, from turnover growth projections for the years 2011 to 2014, i.e., a total of 2,634,302,000 CFA francs (€4,015,967.51).[56]

82. The valuation of the loss due to the expropriation of the investments made by the Claimants (i.e., 2.1 billion CFA francs over the period 2004-2010) is based on the net book value of the Assets and on the Receivables estimated at the overall sum of €944,336.95, i.e. 619,444,433 CFA francs, broken down into 410,382,837 CFA francs for the net book value of the Assets and 209,061,596 CFA francs for the Receivables.[57]

83. Amounts due in respect of advances and loans to employees are equivalent to 40,758,174 CFA francs, or €62,135.44.[58]

84. The Claimants also claim compensation for damage to their image and commercial reputation. They also claim infringement of their intellectual property rights (acronyms and trade names) in connection with the exploitation by Niger of equipment and uniforms bearing the names and initials of Menzies and AHS. This loss is estimated at €2,200,000.[59]

[53] Claim. Mem., updated, § 343-351.
[54] Claim. Mem., updated, § 341.
[55] Claim. Mem., updated, § 359.
[56] Claim. Mem. updated, §§ 374-375.
[57] Claim. Mem. updated, §§ 376.
[58] Claim. Mem. updated, §§ 378.
[59] Claim. Mem., updated, §§ 398-435.

IV.2 **Claimants' claims**

85. The Claimants in their Memorial of April 11, 2013, ask the Tribunal to:

> *"441. Find the Respondent in default, in accordance with Articles 45 of the ICSID Convention and 42 of the ICSID Arbitration Rules, and, consequently, rule only on the heads of claim submitted to it by the Claimants in their Memorial on the merits dated November 14, 2011, as updated in this Memorial as well as in all of their pleadings which preceded the said Memorial;*
>
> *442. Acknowledge the irregular, unfounded and wrongful reneging on the Investment Agreement by the State of Niger;*
>
> *443. Acknowledge the irregular, unfounded and wrongful withdrawal of the Approval Decree by the State of Niger;*
>
> *444. Find that the Claimants have fully complied with their contractual obligations under the Investment Agreement;*
>
> *As a result,*
>
> *445. Declare that the State of Niger has failed to comply with its contractual obligations under the Investment Agreement;*
>
> *446. Declare that the State of Niger has also violated its legal obligations under both the Investment Code and the Specifications;*
>
> *447. Declare that the State of Niger has improperly and without cause reneged on the Investment Agreement and revoked the Approval Decree;*
>
> *448. Consequently, order the State of Niger to pay the sums covering all the damages suffered by AHS Niger and MMEA:*
>
> - *Four million, fifteen thousand, nine hundred sixty-seven euros and fifty-one cents (€4,015,967.51) as compensation for the loss of earnings suffered by AHS Niger and MMEA as a result of the irregular, unfounded and wrongful early termination of the Investment Agreement and the sudden and immediate cessation of AHS Niger's and MMEA's activities;*
> - *Nine hundred forty-four thousand, three hundred thirty-six euros and ninety-five cents (€944,336.95) as compensation for the loss suffered by AHS Niger and MMEA, consisting of the repayment of the net book value of the expropriated Assets and the lost Receivables;*
> - *Sixty-two thousand one hundred thirty-five euros and forty-four cents (€62,135.44) as compensation for sums owed by AHS Niger staff requisitioned by the State of Niger, in respect of advances and loans granted by AHS Niger;*
> - *Two million two hundred thousand euros (€2,200,000) as compensation for the moral prejudice suffered by AHS Niger and MMEA as a result of the damage to their image and reputation on the African continent and in the Middle East, as well as to their intellectual property rights;*
> - *Interest with capitalization on the aforementioned amounts from December 14, 2010, the date of repeal of the Approval Decree;*
> - *All costs related to the arbitration, including lawyers' fees, as well as the costs*

of any expert, in particular financial and legal experts, engaged by AHS Niger and MMEA in connection with the present proceedings."

IV.3 **Respondent's position**

86. In its Memorial of April 6, 2011, submitted prior to the registration of the Request, Niger objected to the Center's registration of the Request, on the grounds that the dispute manifestly exceeded the Center's jurisdiction.

87. As noted by the Arbitral Tribunal on several occasions, Niger has been in default since March 13, 2012. The Tribunal must therefore make an award in accordance with Article 42 of the Arbitration Rules.

V. ANALYSIS OF THE ARBITRAL TRIBUNAL

88. The Tribunal recalls that, by virtue of its Decision on Jurisdiction, which forms an integral part of this award, it decided that:

1. the Tribunal has jurisdiction over the claims of the Claimants against the Republic of Niger;

2. the costs of the arbitration will be decided by the Tribunal at the end of this procedure; and

3. the organization of the next phase of the proceedings will be the subject of a procedural order from the Tribunal.

89. The jurisdiction of the Arbitral Tribunal is based, in particular, on article 6 of the Investment Agreement and the Investment Code.

90. Article 6 of the Investment Agreement of December 15, 2004, states:

> "Disputes arising from the interpretation or application of this Protocol shall be settled amicably. Failing amicable agreement between the 2 parties, disputes shall be settled by arbitration in accordance with the provisions in force in Niger concerning the settlement of investment disputes".

91. Article 6 of the 1989 Investment Code states:

> ***"Art. 6*** *– The settlement of disputes relating to the validity, interpretation or application of the act of approval and to the determination of a possible indemnity due to the breach or non-observance of the undertakings will be subject to one of the following arbitration procedures to be determined in the act of approval.*
>
> *1)* [ad hoc and *ex aequo bono* arbitration].
>
> *2) The possibility for non-nationals to have recourse to the International Center for Settlement of Investment Disputes (ICSID) created by the International Bank for Reconstruction and Development (IBRD) convention of March 18, 1965*".

92. The Tribunal must therefore determine whether there has been a breach of the Investment Agreement and, where applicable, of the Investment Code, and if so, the consequences of such breaches.

V.1 Termination of the Investment Agreement

A. Duration of the Investment Agreement

93. With regard to its duration, the Investment Agreement stipulates in Article 2:

> "a). During the investments phase:
>
> - total exemption from the charges and taxes collected by the State excluding the statistical tax including Value-Added Tax (VAT) for the materials, tools and production equipment and contributing directly to the approved program;
>
> - exemption from the charges and taxes collected by the State, including VAT, for the services, work and tasks contributing directly to the execution of the approved investment program.
>
> However, if equivalent, locally made products should be unavailable, the importing of materials, tools and equipment will not give rise to an exemption.
>
> The investments phase is set as five (5) years.
>
> b). During the operating phase, total exemption for five (5) years:
>
> - from the "patente" [license to carry out a business activity];
>
> - from property tax;
>
> - from the tax on industrial and commercial profits (BIC);
>
> - from the minimum lump-sum tax (IMF)"[60] (emphasis added).

94. According to the Claimants, this provision should be interpreted as an acknowledgement that the term of the Investment Agreement is ten years:

> "In this regard, we wish to remind you that, on top of the provisions in the Investment Agreement concluded on December 15, 2004, between AHS NIGER and the State of

[60] Exhibit C7, section 3.

Niger, the agreed term of which is set as ten (10) years, the two investment and operating phases are each set as five years."[61][61].

95. The duration of the Investment Agreement is also determined by the regulatory context (see §§ 45 to 46 above). At the time of the call for tenders, Menzies-AHS had requested that the duration of the agreement be extended to ten years, given the scale of the investments to be made. With Decree 15, Niger amended articles 7 and 19 of the Specifications (Decree 66). The duration of the approval was extended to ten years. This is confirmed by Decree 16, which stipulates that "*the period of validity of the approval is ten (10) years, renewable*". It should be recalled that, in its Decision on Jurisdiction (§ 166), the Tribunal concluded "*that the 'act of approval' referred to in article 6 of the Investment Code can only be the Investment Agreement*".

96. Thus, the Tribunal finds that Niger has undertaken, through the Investment Agreement, to grant to AHS Niger the rights covered by this agreement for at least ten years, i.e., until December 15, 2014.

97. According to the Respondent, "on January 05, 2010, owing to the contradictions observed in the texts governing the ground handling and self-handling activities in the Airports of Niger, the Minister of Transport introduced Decree no. 001/MT/ACIDAC through which the approval validity duration was switched to five (05) years"[62]. The Respondent thus seems to suggest that Decrees 15 and/or 16 are affected by certain irregularities.

98. However, the Respondent does not provide any evidence of such irregularities. Nor does the Respondent put forward any reasons justifying the suspension or withdrawal of the approval through Decree 16.

99. Consequently, the Investment Agreement had not yet expired on December 14, 2010, when the Minister of Transport issued Decree 106 and Decision 799 terminating the Investment Agreement.

100. As the Investment Agreement did not expire on December 14, 2010, it is for the Tribunal to determine whether it was validly terminated.

[61] Claim. Mem. updated, § 69.
[62] Letter of 6 April 2011, p. 2.

B. Termination of the Investment Agreement

1. Investment Agreement, Article 5

101. The Claimants consider that the termination of the Investment Agreement was unfounded[63]. Moreover, such termination would not have satisfied the procedure set forth in the Specifications (Decree 66)[64].

102. The Tribunal will therefore consider the substantive and procedural aspects of this issue in turn.

a) *Background*

103. The "[c]*onditions for reneging from*" the Investment Agreement are set forth in Article 5:

> *"Non-compliance with all or part of the above commitments mentioned in Article 4 may result in the termination of this agreement by the State of Niger. In this case, the company will reimburse the State for all duties, taxes and levies, normally due, which have been exempted."*[65]

104. In turn, Article 4 of the Investment Agreement stipulates that AHS Niger undertakes to:

> *"invest a minimum amount of one billion seven hundred sixty-seven million two hundred thirty-two thousand one hundred fifty-seven (1,767,232,157) CFA francs, excluding taxes and working capital;*
>
> *- create at least 83 permanent jobs;*
>
> *- provide the Ministry of Industry with financial statements at the end of each financial year;*
>
> *- enable officials from the Ministry of Industry and the Ministry of Finance to monitor compliance with the terms and conditions of this Investment Agreement;*
>
> *- comply with Niger's social regulations."*[66]

105. According to the Claimants, AHS Niger has "*perfectly*" fulfilled its obligations.[67]

106. In this arbitration, the Respondent merely asserted that:

> *"In December 2010, an inspection carried out by the transitional authorities concluded that a license had been wrongly granted to AHS NIGER S.A.,*

[63] Claim. Mem., updated, §§ 306-321.
[64] Claim. Mem., updated, §§ 256-270.

[65] Exhibit C7, section 5.
[66] Exhibit C7, section 4.
[67] Claim. Mem., updated, §§ 53-64.

owing to its failure to meet its commitments to the State of Niger and failure to comply with Nigerien legislation, among other deficiencies.

In compliance with the recommendations of the inspection mission and in application of Article 5 of the Investment Agreement of December 15, 2004, the Minister of Tourism reneged from the said agreement."[68]

107. This allegation reproduces language similar to that expressed in Decision 799:

"[...] *it has come to my attention, in light of the various inspections of which you have been the subject, that AHS has not fulfilled any of its commitments, as defined in Article 4 of the said Agreement.*

Furthermore, I would remind you of the terms of Article 5 of the same text, which stipulates that failure to comply with all or part of the above-mentioned commitments may result in the termination of this Investment Agreement by the State of Niger [...].

The Government of the Republic of Niger, through me, hereby denounces the Investment Agreement signed with AHS and considers said Agreement null and void."[6969]

108. Niger has not provided the slightest proof of these inspections actually having been conducted or of any breach by AHS Niger of its obligations under the Investment Agreement.

109. On the contrary, the Claimants have demonstrated to the satisfaction of the Arbitral Tribunal that AHS Niger has complied with the Investment Agreement.

110. Thus, with regard to the obligation to "*invest a minimum amount of one billion seven hundred sixty-seven million two hundred thirty-two thousand one hundred fifty-seven (1,767,232,157) CFA francs excluding taxes and working capital,*" the Claimants have provided evidence that *"over the first five (5) years from December 15, 2004, the effective date of the Investment Agreement, AHS Niger invested 1.8 billion and nearly 2.1 billion over the period 2004 to 2010. These amounts are evidenced by AHS Niger's certified accounts.*[70]

111. With regard to the obligation to "*create at least 83 permanent jobs,*" the Claimants maintain that "*the establishment of AHS Niger has resulted in the creation of 101 jobs, i.e., eighteen (18) positions more than the objective of 83 agents set by the Investment Agreement.*"[71]

[68] Letter of April 6, 2011, p. 3.
[69] Exhibit C18.
[70] Claim. Mem., updated, §§ 53 and 309, and exhibits C10 and C71.
[71] Claim. Mem., updated, §§ 54 and 313.

112. With regard to the obligation to "*provide the Ministry of Industry with financial statements at the end of each financial year,*" the Claimants noted that:

> *"... with regard to compliance with accounting obligations, the certification of AHS Niger's financial statements by the competent departments established by the State of Niger constitutes irrefutable evidence of the compliance of AHS Niger's accounting with the accounting system in force in Niger."*[72]

This is corroborated by the auditor's general and special reports, which the Tribunal considers sufficient to substantiate these claims.[73]

113. Lastly, the Tribunal has no evidence to suggest that AHS Niger failed in its obligation to "*allow officials of the Ministry of Industry and the Ministry of Finance to monitor compliance with the terms of this Investment Agreement*" and to "*comply with Niger's social regulations."*

114. In light of the foregoing, the Tribunal is of the opinion that the termination of the Investment Agreement was unfounded.

b) *Procedure*

115. Decree 16 stipulates that:

"Approval may be suspended or withdrawn in the event of non-compliance with the provisions of Articles 9 and 11 of Decree No. 066/MT/DAC of December 30, 2003, containing Specifications for the exercising of the ground handling activity."[74]

116. Articles 9 and 11 of Decree 66 (the Specifications) stipulate:

> *"Article 9: SUSPENSION OF APPROVAL*
>
> *If, for reasons attributable to it, the holder of the approval no longer meets the criteria defined in Articles 4 and 5, the Minister of Civil Aviation will send to the interested party, if necessary, at the request of the airport manager or the Civil Aviation Authority, formal notice to take the necessary corrective measures to remedy the deficiencies observed.*
>
> *In the event of persistent failure to comply within two months of formal notice, the Minister of Civil Aviation shall suspend approval for a maximum period of six months. Prior to such a suspension, the interested party will be given formal notice to present its observations.*
>
> *Approval may be suspended immediately for a maximum of six months in the event of a serious risk to the safety or security of aircraft, persons or property.*

[72] Claim. Mem., updated, § 55.
[73] Exhibit C10.
[74] Exhibit C3, Section 5.

"Article 11: WITHDRAWAL OF APPROVAL

Approval shall be withdrawn by the issuing authority if the necessary corrections have not been made by the end of the suspension period.

Approval may also be withdrawn in the following cases:

- in the event of bankruptcy

- in the event of judicial liquidation

- in the event of conviction for any penalty whatsoever for acts that run contrary to commercial integrity

- in the event of cease of trading operations for more than six months

- in the event of repeated equipment and/or personnel failures

Approval may be withdrawn by the Minister of Civil Aviation without prior notice on the basis of a reasoned report from the civil aviation authority or airport manager in the event of a repeat offence, a serious risk to the safety or security of aircraft, persons or property, or non-payment of fees."[75]

117. Niger has not provided any evidence that the procedure set forth in the Specifications was followed. Niger did not even identify (let alone prove) any breaches of the Investment Agreement or of the criteria set forth in Articles 4 and 5 of the Specifications. Consequently, Niger was not entitled to suspend or withdraw approval.

118. In addition, with regard to the procedure set forth in the Specifications, the Tribunal notes that this issue was addressed by the Niger State Court, Administrative Chamber, in ruling no. 12-054 of October 10, 2012[76], which annulled Decree 106 and Decision 799. This element can only support the position of this Arbitral Tribunal in its conclusion that the termination of the Investment Agreement is unfounded.

C. **The Tribunal's Conclusion**

119. Given that the Investment Agreement had not yet expired on December 14, 2010, when Niger claims to have terminated the Investment Agreement, and that such termination was unfounded and irregular, the Tribunal concludes that Niger has breached its undertakings under the said Agreement.

120. This analysis is confirmed by the aforementioned ruling of October 10, 2012, whereby the Administrative Chamber of the Niger State Court annulled the termination of the Investment Agreement.

[75] Exhibit C6.
[76] Exhibit C77, pp. 5-7.

V.2 **Expropriation**

121. According to the Claimants, Niger has taken several measures that could be qualified as expropriation in violation of the Investment Agreement: the reduction by decree of the duration of Decree 16 and its subsequent withdrawal, the termination of the Investment Agreement and requisition measures for AHS Niger equipment and personnel[7777].

122. The Investment Agreement stipulates that: "the Government of the Republic of Niger guarantees to the company AVIATION HANDLING SERVICES NIGER s.a. that no expropriation or nationalization measure will be adopted against its investments"[78]. The Tribunal notes that this is consistent with the Investment Code, which states in article 7:

> *"Except in cases of public utility provided for by law, the Republic of Niger guarantees that no expropriation or nationalization measures will be taken in respect of companies that have already set up operations or that may do so in the future.*
>
> *Any expropriation or nationalization measures shall give rise to the right to fair and equitable compensation*[79].

123. Even in the event of termination, the Investment Agreement does not allow Niger to requisition AHS Niger's equipment or personnel:

> *"Failure to comply with any or all of the undertakings set forth in Article 4 above may result in the termination of this Agreement by the State of Niger. In this case, the company will reimburse the State for all duties, taxes and levies, normally due, which have been exempted."*[80]

124. The Tribunal has already concluded that the termination of the Investment Agreement was unfounded.

125. Moreover, such termination has been annulled by the Niger State Court. In any event, therefore, there is no legal basis for the requisition of AHS Niger's assets, equipment and personnel. According to the Claimants, these measures persisted even after the annulment of the termination.

126. The Tribunal also agrees with the Claimants that the requisitioning of AHS Niger's assets, equipment and personnel – all of which have been proven and are not contested by Niger – had the effect of depriving the Claimants of the control, ownership, use and

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[77] Claim. Mem., updated, §§ 333-352.
[78] Exhibit C7, Section 2.
[79] Exhibit C32, Article 7; see also Article 2 ("*The Republic of Niger ensures constant protection from both a legal and judicial standpoint to all private investments participating in the realization of its economic and social development programs*").
[80] Exhibit C7, Section 5.

enjoyment of their investment and therefore constitute an expropriation[81] contrary to the undertakings given by Niger in the Investment Agreement and the Investment Code.

127. Niger must therefore compensate the Claimants.

VI. DAMAGES

128. The Tribunal agrees with the Claimants and [the Claimants' legal expert] that the damage caused by the breach must be made good[82]. The Tribunal will therefore verify whether the heads of damage alleged by the Claimants were indeed caused by breaches of the Investment Agreement.

129. In their Memorial on the merits dated November 14, 2011, the Claimants alleged that they had suffered material and non-material damage[83]. As noted above (§ 66), the Claimants indicate in their Memorial of April 11, 2013, that this prejudice is ongoing. They thus claim that the annulment of Decree 106 and the other measures challenged by Ruling no. 12-054 would have "no effect on the amount of damages and interest that may be granted to the Claimants in these proceedings"[84].

130. The Claimants have indicated that the heads of damage "have been the object of a provisional evaluation that will be fine-tuned"[85]. However, having had the opportunity to supplement their written submissions, the Claimants did not consider it appropriate to revise the calculation of their damages. The Tribunal therefore takes this provisional assessment as the definitive assessment of the Claimants' loss.

VI.1 Economic Loss: Lost Earnings and Seized Assets

131. According to the Claimants, on the basis of Article 1149 of the Niger Civil Code ("*the damages due to the creditor are in general the loss it has suffered and the earnings of which it has been deprived...*"), they suffered two types of economic loss: (A) lost earnings, and (B) the loss of seized property. The Tribunal considers that the Investment Code, by referring in Article 7 to "*fair and equitable compensation*", provides for full reparation of the loss suffered by the Claimants.

A. On the lost earnings

132. According to the Claimants, by terminating the Investment Agreement on December 14, 2010, Niger prevented AHS Niger from continuing with its ground handling activities. Without this termination, AHS Niger would have been able to

[81] See *Metalclad Corporation v. United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award of August 30, 2000, § 103.
[82] Plaint. Mem., updated, § 315; Legal Opinion of Prof. Sur, § 36.
[83] Plaint. Mem., updated, § 316. See generally Plaint. Memorial update, §§ 362-435.
[84] Plaint. Mem., updated, § 115.
[85] Plaint. Mem., updated, § 360.

continue this activity for at least ten years, until February 2014[86].

133. According to the Claimants, they would have made profits during the four years remaining until 2014 when the Agreement was terminated[87]. Also, according to the Claimants, they are entitled to claim compensation for this lost profit, even if it cannot be established with absolute certainty[88].

134. In fact, the Tribunal must order full compensation for the loss suffered and, as such, put the Claimants in the position they would have been in had the Investment Agreement been executed to its full term.

135. Legal doctrine and certain arbitration decisions cited by the Claimants support the Tribunal in this approach.

136. Thus, it has been argued that "[w]*hile arbitrators refuse to compensate for possible damage, they do not make compensation conditional on the existence of absolutely certain damage. Several obstacles stand in the way of a requirement of absolute certainty [...]. First of all, in order to establish exactly the lost profit that extends into the future, we come up against an 'irreducible uncertainty' linked in particular to the difficulty of exactly grasping the evolution of external circumstances likely to have an impact on the damage (national growth, deflation, disappearance of a competitor, discovery of new outlets, etc.). In the event of a breach of contract, the arbitrator can never be absolutely certain that a profit might have been earned if the contract had been performed normally. There are too many uncertainties affecting this type of damage* [...]. *By its very nature, prospective analysis excludes the idea of certainty* [...]. *If arbitrators were to make compensation conditional on the certainty of the damage in the strictest sense of the term, it would very often be impossible to award compensation for lost profit and non-material damage. Theoretical and practical considerations have therefore led international arbitration case law not to apply the requirement of certainty of damage so rigorously*"[89].

137. Similarly, in *Maritime International Nominees Establishment (Liechtenstein) v. Republic of Guinea*[90] the Tribunal held that:

> *"... the general principle that* [the contracting party] *is entitled to compensation for the profits it would have made if* [the host state] *had not*

[86] Plaint. Mem., updated, § 374 ("term of the license envisaged until February 2014") and Exhibit C43.
[87] Plaint. Mem., updated, § 370.
[88] Plaint. Mem., updated, §§ 362-370.
[89] Exhibit A17 – J. Ortscheidt, The awarding of damages in 'international commercial arbitration, Dalloz, 2001, p. 37, nos. 55 to 62 (emphasis added).
[90] Exhibit A19 – *Maritime International Nominees Establishment (Liechtenstein) v. Republic of Guinea*, ICSID Case ICSID ARB/84/4, Award of January 6, 1988, YCA, XIV (1989), no. 17, p. 82, extract translated by the Claimants, original: "*The Tribunal accepts the general principle that MINE is entitled to be compensated for the profits that it would have earned if Guinea had not breached the Convention. The lost profits need not be proven with complete certainty, nor should recovery be denied simply because the amount is difficult to ascertain*".

breached the contract. Lost profits need not be proved with complete certainty, and compensation should not be refused simply because the quantum is difficult to determine".

138. Or the 1990 ICC Award[91]:

although the burden of proof rests on the claimant in such a situation, the damage does not need to be established with absolute certainty. As long as sufficient elements are put forward from which damages can be roughly assessed, all reasonable methods of calculation are admissible".

139. In the present case, the Tribunal considers that the evidence provided by the Claimants is sufficient to establish the loss of profit suffered by the Claimants. For the assessment of lost profits, the Claimants rely on the report of their expert, Mr. Willis[92]. Mr. Willis' valuation is based on a projection of expected net profits for the period from December 15, 2010, to February 2014, resulting, inter alia, from sales growth projections for the years 2011 to 2014. This valuation was calculated by Mr. Willis as 2,634,302,000 F CFA[93] which corresponds to 4,015,967.51 euros, the amount requested by the Claimants[94].

B. On the value of seized goods

140. The Claimants also claim to have suffered a loss as a result of the requisition of AHS Niger's assets, equipment and personnel.

141. The Claimants estimate this loss as 619,444,433 F CFA, or 944,336.95 €. This sum can be broken down into (i) 410,382,837 F CFA for the net book value of assets, (ii) 209,061,596 F CFA for receivables, and (iii) 40,758,174 FCFA equivalent to sums owed by AHS Niger staff in respect of advances and loans granted by AHS Niger[95].

142. With regard to the claims, the Claimants do not explain how the termination of the Investment Agreement and the withdrawal of approval prevent AHS Niger from turning to its creditors for payment of its claims. They do not provide any proof (nor even allege) that AHS Niger's creditors have paid these amounts to the State of Niger. Consequently, the Tribunal is not in a position to take these amounts into account in calculating the damages suffered by the Claimants.

[91] Exhibit A19 – ICC Case no. 5946, 1990, YCA, XVI (1991), no. 45, p. 97.
[92] Plaint. Mem., updated, §§ 373-334.
[93] Willis Report, p. 7.
[94] Plaint. Mem., updated, §§ 375 and 448.
[95] Plaint. Mem., updated, §§ 376-378 and Exhibit C72.

143. As regards the amounts corresponding to the sums owed by AHS Niger employees in respect of advances and loans granted by AHS Niger, the Claimants do not justify how these loans and advances were necessary for the operation of the concession. The Tribunal considers that these loans and advances establish a legal relationship between AHS Niger and these employees, by virtue of which these employees are obliged to repay these amounts to AHS Niger. AHS Niger does not explain how the measures taken by Niger are such as to prevent it from seeking recovery of these debts from these employees. Consequently, the Tribunal is not in a position to take these amounts into account in calculating the damage suffered by the Claimants.

144. Finally, concerning the value of the assets, the Tribunal has no doubt that the measures taken by Niger resulted in the dispossession of AHS Niger's assets. The value of these assets was certified by the expert, Mr. Willis', report[96]. The Arbitral Tribunal considers Mr. Willis' Report – which was not disputed by Niger, nor was its author summoned by Niger for cross-examination – to be credible. The Arbitral Tribunal considers that the amounts set forth in the Report are explained in a coherent manner and appear reasonable. Niger must therefore reimburse the Claimants for the value of these assets, i.e., 625,624.64 euros (410,382.837 F CFA)[97].

145. Consequently, in terms of lost profits and seized assets, the economic loss suffered by the Claimants is 4,641,592.15 euros (i.e., 4,015,967.51 plus 625,624.64).

VI.2 **Moral Prejudice**

146. According to the Claimants, they have suffered two types of non-material damage: damage to image and reputation, and damage to intellectual property rights[98] (A). They are claiming €2,200,000.00 in global compensation for these two counts[99] (B).

[96] Willis Report, p. 8 and Appendices E and F of this report.
[97] Plaint. Mem., updated, § 376.
[98] Plaint. Mem., updated, § 380.
[99] Plaint. Mem., updated, §§ 434-435.

A. **Damages**

147. Generally speaking, the Claimants invoke various legal theories in support of their claim for compensation for non-material damage. According to the Claimants:

- this damage was caused by the Respondent's breach of its obligations[100];
- the fault committed by the Respondent is "*equivalent to the administrative offence of 'voie de fait'*" in view of *"the gravity of the offence committed"* and *"the arbitrary conduct'"*"[101]and
- this compensation is supposedly advocated by French legal doctrine to "*enable courts to go beyond merely evaluating the material loss suffered*" and *"introduce a punitive element into the compensation*"[102].

148. With regard to the alleged damage to image and reputation, the Claimants submit as their sole evidence extracts from articles in the Nigerien press in which the Minister of Transport is alleged to have made statements that the Claimants characterize as "*baseless and characterized as defamatory*"[103]. The Claimants do not explain how any prejudice caused by these remarks are related to, or result from, violation of the Investment Agreement, rather than defamation in respect of which the Tribunal would lack jurisdiction.

149. The Arbitral Tribunal also considers that, on the basis of the evidence provided, it is unable to determine the actual damage to the image and reputation of the Claimants.

150. With regard to the alleged infringement of intellectual property rights, the Claimants state that they have obtained registration of trade names and trademarks in the area of the African Intellectual Property Organization ("OAPI"), of which Niger is a member[104]. The Claimants allege that the 'Ground Handling Cell continued to operate the ground handling business using staff uniforms and equipment bearing these names and acronyms[105]. The Claimants acknowledge that, since the beginning of 2011, *"All acronyms and trade names bearing the AHS name* have been removed from the equipment seized from AHS Niger[106].

151. However, the Claimants' argument in relation to this use is not sufficient to establish a right to the compensation claimed.

[100] Plaint. Mem., updated, §§ 353-355, 359.
[101] Plaint. Mem., updated, § 382; see also §§ 357-358 (citing Sur Report, pp. 22-23).
[102] Plaint. Mem., updated, § 385 (citing Véronique Wester-Ouisse, Exhibit A20).
[103] Plaint. Mem., updated, §§ 388-397; Exhibits C57 (illegible) and C58.
[104] Plaint. Mem., updated, §§ 398-404.
[105] Plaint. Mem., updated, §§ 411-418.
[106] Plaint. Mem., updated, § 417.

152. On the one hand, they suggest – but do not explicitly state – that such use would be in violation of the Bangui Agreement of March 2, 1977[107]. The Claimants state that Niger ratified this Agreement in 1977[108] but fail to explain its relevance to these arbitration proceedings. In particular, they do not explain how this Tribunal would have jurisdiction to hear these arguments. In this respect, the Tribunal notes that Article 47 of Annex III of the said Agreement stipulates, with regard to "*Competent Jurisdictions*", that:

> "*(1) Civil actions relating to trademarks shall be brought before the civil courts and judged as summary matters.*
>
> *(2) In the case of proceedings instituted by way of criminal proceedings, if the accused raises in its defense questions relating to the ownership of the trademark, the competent court shall rule on the objection.*"[109]

153. Secondly, they allege that the use of their names and brands misled users of ground handling services, leading them to believe that AHS Niger was responsible for an ostensibly degraded service operated by the Ground Handling Cell. The implication is that doing so would have damaged their reputation[110].

154. They rely on an audit of services carried out by the DHL company of the 'Ground Handling Cell[111]. However, they do not suggest that this audit revealed any confusion between the 'Ground Handling Cell and AHS Niger. On the contrary, according to the Claimants, the audit revealed that "*Cellule Assistance en Escale (CAEE) has assumed the role for ground handling of DHL aircraft at Diori Hamani International Airport (NIM) from Aviation Handling Services (AHS)*."[112]

B. Compensation

155. Insofar as the Tribunal did not grant the claims relating to non-material damage, it is not necessary to examine the quantification of the compensation claimed in this respect.

VII. INTEREST

156. The Claimants requested the request of interest with capitalization on the amounts claimed, as from December 14, 2010[113]. However, they did not consider it useful to provide the Tribunal with a reference rate.

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[107] Plaint. Mem., updated, §§ 405-406.
[108] Plaint. Mem., updated, § 398.
[109] Exhibit C64, Article 47 of Appendix III.
[110] Plaint. Mem., updated, §§ 419-430.
[111] Plaint. Mem., updated, § 430.
[112] Plaint. Mem., updated, § 430.
[113] Plaint. Mem., updated, § 448.

157. Having found that the Claimants are entitled to full reparation for the loss suffered, the Arbitral Tribunal can only note that it is entirely free to decide both the rate and the starting date of interest. The Tribunal considers that this compensation would not be complete if the Claimants (once their loss has been determined) were not awarded interest until the awards made by the Arbitral Tribunal have been fully satisfied. Accordingly, the Tribunal considers that simple interest is due on the amounts fixed by this award from the date of its notification until their full payment.

158. As far as the interest rate is concerned, the Arbitral Tribunal considers that interest must not become a means of enrichment, much less be punitive in nature. In order to preserve the compensatory nature of the interest awards made in this arbitration, the Arbitral Tribunal considers that the appropriate rate should be one that has a real link with the currency of the largest awards, the Euro, as set by its monetary authority, the European Central Bank – ECB. The Arbitral Tribunal therefore considers that the marginal lending facility set by the ECB is the appropriate rate.

VIII. COST OF PROCEEDINGS

159. The Claimants claim that Niger should be ordered to pay the costs of the proceedings, including the fees and expenses of the experts and those incurred by the Claimants in defending their interests[114].

160. In this respect, in accordance with Articles 60(1) and 61(2) of the ICSID Convention and Article 28 of the ICSID Arbitration Rules, the Arbitral Tribunal has broad discretion in determining the costs of arbitration and defense incurred or borne by the Parties and in apportioning the payment of such costs, as well as the costs fixed by the Secretary General of ICSID, by the Parties.

161. The Center will notify the Parties of the exact amount of the arbitration costs, including the costs and fees of the members of the Tribunal and the ICSID fees, at a later date. These fees, expenses and charges have been advanced, in their entirety, against payments made by the Claimants exclusively. Niger has not responded to any of ICSID's requests in this respect.

162. With regard to defense costs, Niger has not provided the Arbitral Tribunal with any figures. On the other hand, the Claimants have provided supporting documents showing that they have spent the following amounts: Attorney's fees - €141,000, Expenses - €3,652.57, Prof. Sur's fees and expenses - €8,000, and Mr. Willis' fees and expenses - £4,491.04 (i.e., €5,254.51); for a total of €157,907.08.

[114] Plaint. Mem., updated, §§ 436 to 439.

163. The Arbitral Tribunal considers that these amounts are reasonable in view of the complexity of the dispute and the work carried out by the Claimants' counsel throughout the arbitration proceedings.

164. In deciding on the distribution of arbitration and defense costs, the Arbitral Tribunal considered the outcome of the claims presented by the Parties as well as their conduct during the arbitration.

165. Niger's objections to the jurisdiction of ICSID and this Arbitral Tribunal were rejected. These objections, and the fact that Niger had defaulted in the arbitration proceedings, have made the proceedings more cumbersome and have been a source of additional work for the Arbitral Tribunal. On balance, the Claimants were successful on most of their claims, but the compensation awarded by the Tribunal was less than they had asked for.

166. Consequently, the Arbitral Tribunal decides that the entire arbitration costs (the amount of which will be communicated to the Parties by ICSID within 90 days of the date of this award) must be borne by the Respondent, and that the Respondent must also contribute €118,000 (representing nearly 75% of the total) to the defense costs incurred by the Claimants.

IX. OPERATIVE PART OF THE AWARD

167. For these reasons, the Arbitral Tribunal:

1. Declares that the Republic of Niger has failed to fulfil its obligations under the Investment Agreement and the Investment Code and that, as a result, it is liable vis-à-vis AHS Niger and Menzies Middle East and Africa SA;
2. Decrees the Republic of Niger to pay damages in the amount of €4,641,592.15;
3. Decrees the Republic of Niger to pay the costs of the arbitration, including the costs and fees of the members of the Arbitral Tribunal and the ICSID costs (which will be communicated to the Parties by ICSID within 90 days of the date of this award);
4. Decrees the Republic of Niger to pay €118,000 in defense costs incurred by AHS Niger and Menzies Middle East and Africa SA;
5. Decrees the Republic of Niger to pay simple interest on the amounts of the awards provided for in paragraphs 167.2, 167.3 and 167.4 above at the annual marginal lending rate as set by the European Central Bank (ECB) from the date of notification of this award (and from the date of notification by ICSID of the amount due in respect of the sums referred to in paragraph 167.3) until such sums are paid in full; and
6. Rejects all other claims of the Parties.

[signed]

Patrick Hubert
Arbitrator
(HW: July 10, 2013)

[signed]

Gaston Kenfack-Douajni
Arbitrator
(HW: July 8, 2013)

[signed]

Fernando Mantilla-Serrano
Chairman
(HW: July 10, 2013)