ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 19359/MCP/CA/ASM

FRANCE CÂBLES ET RADIO S.A. (ORANGE) V. THE STATE OF EQUATORIAL GUINEA

AWARD

---

08 July 2014

Tribunal:
José Rosell (Appointed by the investor)
Horacio A. Grigera Naón (President)
Alejandro Alonso Dregi (Appointed by the State)

Table of Contents

Award 1
I. INTRODUCTION 1
II. THE PARTIES' POSITIONS AND ALLEGATIONS, AS WELL AS THE DECISIONS THEY ARE SEEKING 5
A. The Claimant 5
B. The Respondent 8
III. THE ARBITRAL TRIBUNAL'S ANALYSIS AND CONCLUSIONS 14
A. On procedure and jurisdiction 14
(a) Notification procedures as regards the Request 15
(b) Regarding the allegation that Mr. Marc Rennard lacked sufficient authority to sign the Agreement 16
(c) Regarding the allegation, founded upon the CEMAC law, the OHADA law, and Equatoguinean law, that (i) the Agreement and (ii) Article 11 thereof, which incorporates an arbitration agreement, are invalid 22
(i) The Respondent's arguments 22
(ii) The Claimant's response to the arguments 23
(iv [sic]) The Arbitral Tribunal's decisions 24
B. On the merits of the Parties' claims and arguments 30
C. On the arbitration costs 37
D. On interim enforcement 38
IV. DECISIONS 39

Award

I. INTRODUCTION

(i) On March 22, 2013, the Claimant filed an arbitration request with the Secretariat of the ICC's International Court of Arbitration (the "Secretariat") against the Respondent (the "Request").

(ii) The Claimant referenced, among other documents, the November 4, 2011 Settlement Agreement between FCR and the Respondent (the "Agreement") as well as the November 4, 2011 Shareholders' Pact between FCR and the State (the "New Pact").

(iii) This arbitration was initiated on the basis of the arbitration clause stipulated in Article 11 of the Agreement:
"Arbitration agreement

If the conciliation procedure prescribed in Article 10 above fails, the Parties agree that any dispute arising from or related to the Agreement shall be definitively settled in accordance with the ICC's Rules of Arbitration in accordance with this regulation. The arbitral tribunal shall consist of three (3) arbitrators and shall take place in Paris.

The arbitral tribunal shall apply to the substantive issues in the dispute Equatoguinean law, with the exception of its rules of conflict. The languages used shall be French and/or Spanish for written communications, and hearings shall be held in French.

The Parties pledge to maintain the strictest confidentiality with respect to the content of the arguments (be they oral or written) and the existence of the proceeding.

The arbitral tribunal can order provisional or emergency measures that the Parties pledge, as of now, to execute.

Arbitration costs shall be set by the arbitral tribunal and covered, equally, by the Parties. The arbitral tribunal shall determine their final costs.

The arbitral award shall definitively bind the Parties.

To the extent needed, the State expressly waives its right to any immunity from jurisdiction and enforcement. However, this waiver shall not allow the use of executive measures against State assets reserved exclusively for administrative, military or diplomatic use, or those pertaining more generally to the State's sovereignty."

(iv) FCR is a public company incorporated under French law with headquarters at 78, rue Olivier de Serres, 75015 Paris, France. Telephone: +33 1 44 44 85 55. Fax: +33 1 45 32 69 45. Email: gerald.mazziotto@orange.com.

(v) The Republic of Equatorial Guinea is a sovereign state represented by the following authorities:
His Excellency Dr. Juan Olo Mba Nseng, Deputy Minister of Justice, Worship and Penitentiary Institutions, Ministry of Justice, Worship and Penitentiary Institutions, Malabo II, Malabo, Republic of Equatorial Guinea, and His Excellency Dr. David Nguema Oblang, Attorney General of the Republic, Office of the Attorney General of the Republic/Palacio de Justicia, Avenida de la Independencia s/n Malabo.

(vi) The Claimant's attorneys are as follows: Mr. Benoit Le Bars and Mr. Ghjuvana Luigi, Lazareff Le Bars, AARPI, 22, rue du General Foy, 75008 Paris, France. Telephone: + 331 80 18 25 30. Fax: +331 47 20 86 53. Emails: b. lebars@lazareff-lebars.com ; g.luigi@lazareff-lebars.com.

(vii) The Respondent's attorneys are as follows: Dr. Sergio Esono Abeso Tomo and Dr. Francisco Evuy Nguema, Gabinette y Agencia "T & E," Banapa s/n Malabo, Republic of Equatorial Guinea. Telephone: + (240) 222 25 78 01 / 222 000 606. Emails: sergio dumu@yahoo.fr, davidnguema@live.com, juanolomba47@gmail.com.

(viii) In the Request, the Claimant named Mr. José Rosell as co-arbitrator.

(ix) On April 29, 2013, the Respondent filed a *"Memorandum Contesting FCR's Arbitration Request against the Republic of Equatorial Guinea"* (the "Response").

(x) In the Response, the Respondent named Dr. Alejandro Alonso Dregi as co-arbitrator.

(xi) Via letter dated May 31, 2013, the Secretariat notified the Parties, as well as Mr. José Rosell and Dr. Alejandro Alonso Dregi, that the Secretary General of the International Chamber of Commerce's International Court of Arbitration (the "Court") has confirmed Mr. José Rosell and Dr. Alejandro Alonso Dregi as co-arbitrators.

(xii) On June 7, 2013, the Claimant filed a Memorandum of Response.

(xiii) On June 9, 2013, the Respondent filed a Reply to the Memorandum of Response.

(xiv) Following his nomination by the Court during the July 18, 2013 hearing, the Arbitral Tribunal's formation was completed with the appointment by the Court of Mr. Horacio A. Grigera Naón as the President of the Arbitral Tribunal (Article 13 (4) of the International Chamber of Commerce's Rules of Arbitration (2012) (the "Rules").

(xv) The names and addresses of the Arbitral Tribunal's members are as follows:
Mr. José Rosell, Hughes Hubbard & Reed LLP, 8 rue de Presbourg, 75116 Paris, France. Telephone: +331 45 05 80 61. Fax: +331 45 53 15 04. Email: rosell@,hugheshubbard.com.

Dr. Alejandro Alonso Dregi, Salans FMC SNR Denton Europe Abogados SL, Calle José Ortega y Gasset, 29-6th. Madrid 28006, Spain. Telephone: +34 91 436 33 25. Fax: +34 91 436 33 29. Email: alejandro.alonso@dentons.com. Via email dated May 16, 2014, Dr. Alejandro Alonso Dregi informed the ICC, the other members of the Tribunal and the Parties, of his new business address, from then on located at Paseo de la Castellana 53, 8th, Madrid 28046.

Mr. Horacio A Grigera Naón, 5224 Elliott Road, Bethesda, Maryland 20816, USA. Telephones: +1 301 229 1985/1 202 436 4877. Fax: +1 301 320 31316. Emails: hgnlaw@gmail.com, hgrigeranaon@.yahoo.com.

(xvi) On August 21, 2013, the Parties and the Arbitral Tribunal's members held a telephone conference where the Parties had the opportunity to express their respective opinions on the language of the arbitration and the organization of the proceeding, and reached some agreements regarding the latter issue.

(xvii) On August 30, 2013, the Arbitral Tribunal issued Procedural Order No. 1 pertaining, among other matters, on the language of the arbitration. On this issue, and as specified in the Terms of Reference, the Arbitral Tribunal decided the following:
"(i) The Parties are free to use French or Spanish in their written exchanges or communications with each other or with the Arbitral Tribunal, and there shall be no need to accompany these exchanges or communications with a translation into the other language.

(ii) Hearings shall be held and conducted in French.

(iii) Accordingly, during the hearings: a) The Parties' counsel shall have to speak in French (however, the Respondent's counsel shall be allowed, if needed, to briefly speak in Spanish if he encounters particular difficulty in expressing himself or making himself understood in French). b) The hearing transcript shall be prepared in French. c) The members of the Arbitral Tribunal shall speak in French, unless it is absolutely necessary to also speak in Spanish in order to make themselves better understood. d) Witnesses or experts may speak either in French or in Spanish. e) Translation and simultaneous interpretation services into both languages shall be arranged by the Parties.

(iv) All communications, directives, procedural orders, awards and, generally, any document issued or developed by the Arbitral Tribunal, or one requiring its intervention, shall be prepared and issued or communicated in French.

(v) Spanish or French documents, filings or exhibits submitted during the proceedings shall not be translated into the other language."

(xviii) On October 2, 2013, the Arbitral Tribunal issued Procedural Order No. 2, which specifically pertains to the procedural rules applicable to this arbitration, as well as to witness statements, expert reports, and the manner wherein witnesses and experts shall be cross-examined during the hearing.

(xix) On October 14, 2013, the Respondent submitted *"Memorandum No. 2 on the Arbitral Tribunal's lack of jurisdiction."*

(xx) On October 15, 2013, the Claimant submitted a Statement of Claim.

(xxi) Via communication dated October 23, 2013, the Arbitral Tribunal settled certain issues concerning finalization of the Terms of Reference and the production of exhibits.

(xxii) On November 18, 2013, the Arbitral Tribunal issued Procedural Order No. 3 deciding, among other matters, to reject incorporation into the arbitral proceeding of certain exhibits accompanying the Respondent's Memorandum and presenting its arguments, as well as *Memorandum No. 3 on the Arbitral Tribunal's lack of jurisdiction,* because incorporating these exhibits and that Memorandum would be inconsistent with the Arbitral Tribunal's procedural directives and orders.

(xxiii) On November 19, 2013, the Arbitral Tribunal sent a letter to the Respondent, with a copy sent to the Claimant, responding to certain clarifications that the Respondent requested concerning the Arbitral Tribunal's Procedural Order No. 3.

(xxiv) On November 21, 2013, the Parties and members of the Arbitral Tribunal finalized signature of the Terms of Reference.

(xxv) On November 26, 2013, the Claimant submitted a Memorandum of Response on Jurisdiction.

(xxvi) Via communication dated November 29, 2013, the Secretariat confirmed receipt of the Terms of Reference.

(xxvii) With respect to the applicable law, the Terms of Reference stated that:
"The Agreement's arbitration clause stipulates that Equatoguinean law is the law applicable to the merits.

Moreover, in its Response to the Request, the Respondent indicated that Spanish positive law is directly applicable in the matter of the law of contracts and obligations as follows: "The Equatoguinean law of obligations and contracts is identical to that of the Kingdom of Spain." *It then went on to demonstrate the foundation of French positive law. For its part, in its letter dated August 12, 2013, the Claimant indicated its agreement to the application of the Spanish positive law of contracts and obligations. It also confirmed that position during the August 21, 2013 telephone conference.*

Accordingly, by mutual agreement of the Parties, the laws applicable to the substantive issues are the Equatoguinean law, the OHADA law, and for interpretation purposes, the Spanish positive law of obligations and contracts."

(xxviii) On December 19, 2013, the Arbitral Tribunal issued Procedural Order No. 4 wherein it decided not to bifurcate the proceeding in order to rule on the Respondent's objections to the Arbitral Tribunal's jurisdiction, set up a schedule for the submission of additional memoranda by the Parties, and propose dates for the hearing on the jurisdiction issue and the substantive claims.

(xxix) In light of the Respondent's December 23, 2013 filing (*"Request for Clarification of Procedural Order No. 4 dated December 19, 2013"*), on December 30, 2013, the Arbitral Tribunal sent a communication to the Parties wherein it duly noted the Respondent's decision not to comply with Procedural Order No. 4, emphasized that this Order is clear and unambiguous, and rejected the Respondent's requests for its modification or for suspension of the arbitration proceeding.

(xxx) The Respondent reiterated its objections to the Arbitral Tribunal's jurisdiction and its opposition about Procedural Order No. 4. It also refused to submit a memorandum on the substantive claims as prescribed in said Order. As a result, on January 15, 2014, the Arbitral Tribunal issued Procedural Order No. 5 wherein it decided to cancel the exchange on memoranda on the substantive claims prescribed in Procedural Order No. 4, and proposed new dates for the hearing wherein oral arguments would be presented in Paris.

(xxxi) On January 24, 2014, the Arbitral Tribunal issued Procedural Order No. 6 on organization of the hearing. Therein, it confirmed the dates for that hearing, and authorized the presentation of written statements by the Claimant's proposed witnesses, Mr. Marc Rennard and Mr. Gerald Mazziotto.

(xxxii) In its February 14 and 18, 2014 communications, the Arbitral Tribunal decided not to summon Mr. Rennard and Mr. Mazziotto to the hearing as witnesses because of the Respondent's decision not to cross-examine them. It also settled various issues concerning organization of the hearing.

(xxxiii) On March 7, 2014, a hearing for oral arguments was held in Paris during which the Parties had the opportunity to present their positions on the jurisdiction issue and the substantive claims, and to respond to their respective opponent's presentation.

(xxxiv) The members of the Arbitral Tribunal attended the hearing. It was also attended by the following for the Claimant: Mr. Benoit le Bars and Mr. Ghjuvana Luigi from the Office of Lazareff Le Bars, assistants Mr. Romilly Holland and Mr. Stéphane Lheure from that office, Mr. Gerald Mazziotto, FCR's General Manager, Mr. Marc Rennard, Chairman of FCR's Board of Directors, as well as Ms. Cécile Arnayen and Mr. Laurent Labarta from Group Orange's legal department. In addition, the hearing was attended by the following for the Respondent: Dr. Sergio Esono Abeso Tomo, Mr. Francisco Evuy Nguema and Ms. Emilia Ayang from the Office Gabenite y Agencia T&E, Mr. Juan Olo Mba, the Deputy Minister of Justice, Mr. David Nguema Oblang, Attorney General of the Republic, Ms. Librada Ela, Assistant at the Office Gabinete y Agencia T&E, and Mr. Pantaleón Mayiboro Miko, Counsel at the Embassy of Equatorial Guinea in Paris.

(xxxv) On April 7, 2014, the Parties submitted their respective filings on the expenses associated with their defense as a result of this arbitration.

(xxxvi) At different times, the Court extended the deadline for issuance of a final arbitral award in this arbitration. The Secretariat provided notice of the last extension on June 30, 2014 letter (Article 30 of the Rules).

(xxxvii) The Arbitral Tribunal communicated closure of the debates via letter dated May 17, 2014 (Article 27 of the Rules).

(xxxviii) The fact that the Arbitral Tribunal does not reference, in this Final Arbitral Award, all of the evidence or other exhibits presented by the Parties does not imply that the Arbitral Tribunal did not consider them. During its deliberations, and in order to arrive at its conclusions and decisions, the Arbitral Tribunal analyzed and studied the entire case file, including all of the filings and exhibits, as well as all of the evidentiary elements submitted by the Parties.

II. THE PARTIES' POSITIONS AND ALLEGATIONS, AS WELL AS THE DECISIONS THEY ARE SEEKING

A. The Claimant

1. The State and FCR own 60% and 40% stakes, respectively, in the corporate capital of Telecomunicaciones Sociedad Anonima (GETESA), a company incorporated under Equatoguinean law with headquarters in Malabo.

2. The Claimant referenced the various disputes that arose between the Parties, their reciprocal relations as GETESA shareholders, as well as the amiable and arbitral settlement procedures initiated following these disputes. More specifically, the Claimant referenced violations of the Parties' contractual agreements or GETESA's by-laws, which it blamed on the Respondent, including: (i) The State's use of its powers and regulatory bodies to violate the sharing of responsibilities in managing GETESA to the detriment of FCR, which lead to total disorganization at that company and a lapse in its governance; (ii) the State's involvement in GETESA's operational management; (iii) an abuse of powers by the Deputy General Manager and the Chairman of the Board of Directors of GETESA, who were named at the State's recommendation, to the detriment of the powers and functions of GETESA's General Manager, who was named at FCR's recommendation.

3. On November 4, 2011, the Parties concluded the Agreement and the New Pact whose specific goal was to end to the Parties' disputes arising from their reciprocal claims or accusations due to their contractual relations concerning GETESA or their position as shareholders in that company.

4. Pursuant to Article 9 of the Agreement, the Respondent made the Claimant an irrevocable promise to purchase all GETESA shares owned by FCR (the "Promise"). According to that article, FCR could act on this Promise, one time, (i) between January 1, 2014 and December 31, 2015 unconditionally; and (ii) at any time in the event of the occurrence of specific events, and particularly in the event a telecommunications license is granted to a third party in the Equatoguinean territory.

5. In this article, the Parties also agreed on the price at which FCR would exercise the Promise, if it decided to do so. This price would be equal to the sum of (i) 40% of 6.5 times GETESA's EBITDA (i.e. net annual earnings before interest, duties, taxes, depreciation and amortization, prepared on the basis of GETESA's certified annual financial statements) for the year preceding the year in which FCR exercises the Promise, or the highest EBITDA in the years 2009 and 2010, which ever is higher, plus (ii) 40% of the dividends distributable in the fiscal year during which FCR provides notice that it is exercising the Promise.

6. The Claimant emphasized that, at the end of December 2011, the State granted a new license to a new telecommunications operator, Guinea Ecuatorial de Comunicaciones Sociedad Anónima ("GECOMSA"). So, consistent with the terms and conditions of the Agreement, FCR decided to act upon the Promise and notified the State thereof on May 16, 2012. In that letter, FCR sent it the price of 131,992,915 euros, calculated consistent with the stipulations of the Agreement, but received no response from the State. Because the State did not contest it, the price became final between the Parties upon expiration of the timeframe prescribed by the Agreement, i.e. July 23, 2012. Therefore, the Parties are bound by a final sale contract pertaining to sale of the entirety of FCR's stake in GETESA's corporate capital to the State at a price totaling 131,992,915 euros (the "Contract").

7. In application of the Agreement's stipulations, the physical procedures for transferring the shares

and paying the aforementioned agreed upon price had to occur simultaneously no later than August 22, 2012.

8. However, these physical procedures for transferring the shares and paying the aforementioned agreed upon price did not occur because the State failed to execute its obligations under the Agreement and the Contract. Therefore, a new dispute arose between the Parties.

9. Consequently, FCR initiated (both non-institutional and institutional) procedures for amicable settlement of its dispute with the State on August 29, 2012. The parties were unable to reach any agreement because of what the Claimant characterized as the Respondent's bad faith and dilatory strategies, and so the Claimant filed its Claim on March 22, 2013 thereby initiating this arbitration proceeding.

10. Therefore, and principally with respect to the substantive claims, the Claimant asked the Arbitral Tribunal (as prescribed in the Terms of Reference) to issue the following decisions in a final arbitral award:
(a) State and rule that the Agreement was validly concluded between the Parties;

(b) State and rule that the Promise is valid and was validly exercised by FCR;

(c) State and rule that the price totaling 131,992,915 euros became final between the Parties on July 23, 2012;

(d) State and rule, in light of the foregoing, that sale of the entirety of FCR's stake in GETESA's corporate capital to the State at a final price totaling 131,992,915 euros occurred on August 22, 2012 (deadline for completion of the physical procedures associated with the sale, specifically payment of the price and transfer of the shares) and that the Parties were therefore bound by a Contract in that regard;

(e) State and rule that the State violated its obligations under the Agreement, the Promise, and the Contract by failing to pay the final price and complete the formalities pertaining to sale of the shares;

(f) Order forced enforcement of the Contract, and specifically order payment as well as immediate and complete fulfillment of the final price totaling 131,992,915 euros by the State to FCR;

(g) Order payment of the late interest due to the failure to pay the final price in a timely manner, with this interest commencing as of August 22, 2012;

(h) Order, as of payment of the price totaling 131,992,915 euros by the State to FCR, signature by FCR and the State of a share transfer receipt noting transfer of FCR's entire stake in GETESA's corporate capital to the State;

(i) State that, as of payment of the price totaling 131,992,915 euros to FCR, the State must record or cause to be recorded the sale of FCR's shares to the State in the GETESA Share Movements Register and in the Shareholders' Register, and in the event the State cannot locate these registers, do so in all new registers that it decides to open for that purpose, and, more generally, publish or cause to be published any notices related to this sale; and

(j) More generally, order indemnification of all emotional and physical damages, including all damages related to the State's failure to make the payment on a timely basis.

11. With respect to jurisdiction, the Claimant asked the Arbitral Tribunal to issue the following decisions in the final arbitral award:
(k) State and rule that the arbitration clause is valid and was validly concluded by the Parties;

(l) Decide that it does have the jurisdiction to rule in this proceeding with respect to all claims made by the Parties; and

(m) Reject all of the Respondent's claims about jurisdiction.

12. The Claimant also asked, alternatively and in the rare event the Arbitral Tribunal decides to grant the Respondent's invalidity arguments, to indemnify FCR for all of the damages suffered as a result of the errors committed by the Respondent during enforcement of all of its contractual obligations. The Claimant withdrew this alternative request during the hearing held in Paris on March 7, 2014 (transcript, pages 55-56), and the Respondent did not object thereto. Therefore, the Arbitral Tribunal does not rule on this alternative request, whose withdrawal is accepted.

13. In any event, the Claimant asked the Arbitral Tribunal to:
(n) Order the Respondent to reimburse the Claimant for the fees the latter incurred for its defense in this arbitration proceeding, and in the amicable settlement phase, including the fees for legal assistance and representation, whose amount shall be determined at the end of the proceeding in accordance with Article 37 of the Rules;

(o) Order the Respondent to pay the expenses of the arbitration that the Claimant initiated, including the arbitrators' fees and expenses, the ICC's other administrative fees, as well as the fees and expenses of the experts named by the Arbitral Tribunal if necessary, whose amount shall be determined at the end of the proceeding in accordance with Article 37 of the Rules;

(p) Order the Respondent to pay the Claimant interest in the total amount ordered as of the date of signature of the Arbitral Tribunal's award in accordance with the Rules;

(q) Order interim enforcement of the award issued; and

(r) Reject all of the Respondent's substantive claims as well as its claims about the Arbitral Tribunal's lack of jurisdiction.

B. The Respondent

14. On June 1, 1994, the State and FCR decided to create GETESA, a telecommunications company. Indeed, the company's by-laws were signed by His Excellency Mr. Antonio Fernando Nve Ngu, the Minister of Transportation, Information and Communication on behalf of the Republic of Equatorial Guinea, and by Mr. Gilles Vaillant, Resource Director, on behalf of FCR, as duly tasked with doing so

by Mr. Alain Profit, Chairman of FCR's Board of Directors.

15. On the same day, the Shareholders' Pact (the "Pact") and the Management and Technical Assistance Contract (the "Management Contract") were also signed by His Excellency Mr. Antonio Fernando Nve Ngu, the Minister of Transportation, Information and Communication on behalf of the Republic of Equatorial Guinea, and by Mr. Gilles Vaillant, Resource Director, on behalf of FCR, as duly tasked with doing so by Mr. Alain Profit, Chairman of FCR's Board of Directors.

16. Pursuant to Article 3.1 of the Management Contract, FCR is entitled to name: (a) a French citizen as both GETESA's General Manager and its Financial Manager, as well as (b) two French citizens as supervisors for technical management of GETESA. According to the Respondent, these members of GETESA's personnel prevented the adoption of internal regulations and a functional organizational structure in an effort to marginalize the Equatoguinean personnel. Moreover, when the General Manager was absent, he never delegated his functions to the Deputy Manager, who is Equatoguinean, but instead delegated these functions to any French employee.

17. Therefore, all key positions at GETESA were essentially under the control of French personnel named by FCR, and these personnel were the only ones who had the power to purchase materials and authorize the corresponding payments, which resulted in fraudulent management of GETESA by FCR, particularly through double-billing for the operating products supplied to GETESA, whose amount constituted the basis for calculating FCR's remuneration of 3% of the billed amounts (Article 8 of the Management Contract).

18. Also, due to the poor quality of the telecommunications service and the fraudulent conduct of FCR's personnel in managing GETESA, the Central African Economic and Monetary Community ("CEMAC") pressured the State into adopting domestic legislation incorporating the community legislation on competition law.

19. CEMAC's competition law (CEMAC Regulation No. 1/99/UEAC-CM-369 on the regulation of anti-competitive practices, dated June 25, 1999) is identical to the European Union's law preceding the European Commission's Regulations of December 16, 2002 pertaining to Articles 81 and 82 of the European Union Treaty. CEMAC Regulation No. 4/99/UEAC-CM-639, dated August 18, 2009, on state practices affecting trade between member states is also intended to combat anti-competitive practices. Specifically, the June 25, 1999 Regulations prescribe sanctions (fines and imprisonment) applicable to operators or persons who violate these provisions.

20. The Respondent argued that while Equatoguinean legislation at the time of creation of GETESA was compatible with the existence of a monopoly in the telecommunication sector, it became incompatible with CEMAC's communal and supranational standard on competition law. The State thus had to bring its telecommunications legislation into compliance with CEMAC's competition law.

21. The State brought its domestic telecommunications legislation into compliance with CEMAC's law by promulgating Law No. 7/2005 of November 7, 2005 on the General Telecommunications Law (the "Telecommunications Law"). This law ended GETESA's monopoly in the telecommunications sector in Equatorial Guinea.

22. The entry into effect of CEMAC's aforementioned regulations essentially repealed the

Equatoguinean telecommunications legislation existing at that time. This legislation became inapplicable due to the primacy of CEMAC's communal law over the Member States' domestic law. For this reason, GETESA's monopoly in the telecommunications market was no longer allowed and the State found it was obligated to adapt its domestic law to CEMAC's new competition rules.

23. In any event, Articles 8, 26, 27 and 28 of Law No. 1/995, dated January 10, 1995, reforming the Fundamental Law of the Republic of Equatorial Guinea: 1) require the State to comply with the obligations arising from the international bodies to which it is a party; and b) detail the State's obligations concerning the regulation of markets with the goal of protecting and promoting free competition.

24. On October 13 and November 9, 2006, in Paris and in Malabo respectively, FCR unilaterally amended the Management Contract through an amendment signed by Mr. Gerald Mazziotto, FCR's General Manager, and Mr. Daniel Dauchat, GETESA's General Manager, who the Respondent argued was essentially an FCR employee in light of the technical assistance [contract]. In that amendment, GETESA was treated like FCR's affiliate. Therefore, all decisions about this company's operation were adopted without input from the Equatoguinean party. A second amendment to the Management Contract was signed in Paris and in Malabo respectively on March 21 and April 2007, by Mr. Gerald Mazziotto, FCR's General Manager, and Mr. Daniel Dauchat, GETESA's General Manager (the Respondent noted that Mr. Dauchat is an FCR employee), pursuant to the technical assistance [contract]. Article 2 of the second amendment amended Article 3 of the first amendment, which unilaterally set the price of the Management Contract, the BLA Orange agreement, and the corresponding license.

25. The Respondent argued that, after unilaterally amending the price of the Management Contract, the BLA Orange agreement and the corresponding license, FCR marked its opposition to the CEMAC and Equatoguinean legislation eliminating monopolies in the Equatoguinean telecommunications sector through a series of actions that gave rise to this arbitration.

26. On July 30, 2010, FCR notified the Prime Minister and the Chairman of GETESA's Board of Directors of its decision to initiate a conciliation proceeding in Paris pursuant to Articles 10.1 of the Pact and 16.1 of the Management Contract. FCR wanted the State to pay a sum totaling 80,000,000 euros for the loss of its monopoly in the Equatoguinean telecommunications market under the provisions of the General Telecommunications Law.

27. In response to FCR's allegations, the Government hired an American firm (Cybercom MEA) to perform a technical and financial audit of GETESA. The results of the audit showed the poor quality of the telecommunications network managed by FCR under the Management Contract. The audit also indicated that GETESA controlled 90% of the Equatoguinean telecommunications market, and thus the deficiencies in the Management Contract were serious and flagrant.

28. Despite the fraud revealed by the American firm Cybercom MEA's audit, the State decided to pursue its relationship with FCR. Indeed, the State wanted, above all, to preserve its good relationship with the French State because GETESA had been the fruit of the excellent cooperative relationship between the Republic of Equatorial Guinea and France.

29. On November 4, 2011, the Agreement between FCR and the Republic of Equatorial Guinea was

signed. The latter was represented by His Excellency Mr. Mauricio Bokung Asumu, who was duly authorized to sign the Protocol by the Prime Minister and Head of the Government on October 24, 2011. FCR was represented by Mr. Marc Rennard, in his capacity as the Chairman of FCR's Board of Directors. Mr. Marc Rennard, who lacked the authority and special power of attorney to represent FCR, replaced Mr. Gerald Mazziotto, who was unavailable due to obligations in Niamey, Niger.

30. The Agreement and the New Pact were intended to end the disagreements between FCR and the State arising from the abnormal operation and multiple instances of fraud observed in FCR's management of GETESA under the Management Contract.

31. Alleging that the State had granted a third telecommunications operator license to GECOMSA pursuant to Article 26 of the Telecommunications Law, FCR initiated a mediation proceeding in accordance with the ICC's ADR Rules. The ADR proceeding was not completed because the Parties decided to terminate it on March 18, 2013. After notifying the International Chamber of Commerce's ADR Secretariat that the Parties had terminated the proceeding on March 22, 2013, FCR filed the Request.

32. According to the State, in the Request, FCR contested the validity of the ministerial resolution granting the license and argued, on the basis of Article 9 of the Agreement, that it could not be granted without FCR's consent.

33. In the Response, the State objected to the Arbitral Tribunal's jurisdiction, and argued that the arbitration clause is absolutely invalid given that it was signed by the Chairman of FCR's Board of Directors instead and in place of its General Manager, who is the only person with the authority to validly and legally commit a public company under the French law applicable to this matter.

34. The State also argued that the arbitration clause is invalid because it is inconsistent with Article 30 of the OHADA Uniform Act on Simplified Recovery and Enforcement Procedures ("AUPOSRVE"), which requires that any legislation or contract whose objective is to waive immunity from enforcement is invalid vis-a-vis corporate entities that enjoy that immunity.

35. In addition, the State argued that the arbitration clause is invalid because the granting by the State, which was exercising its prerogatives of public power, of a telecommunications operator license is not arbitrable.

36. Finally, the State argued that the arbitration clause is invalid because it is inconsistent with CEMAC's competition law.

37. Based upon the foregoing, the State argued that the Agreement, its arbitration clause, and FCR's exit clause in Article 9 are absolutely invalid because they were signed by one and the same person - Mr. Marc Rennard - with lacked the authority to do so, and because they are incompatible with Equatoguinean administrative law, CEMAC's competition law, and Article 30 of the AUPOSRVE, as well as the State's sovereign rights. Specifically, the Respondent asserted that:
(a) The Agreement, its Article 9, and its Article 11 are absolutely invalid because they were signed by the Chairman of FCR's Board of Directors rather than by FCR's General Manager, the only position authorized by French law to legally and validly commit a public company;

(b) Article 9 of the Agreement is absolutely invalid given that (i) it preserves the autonomy of this article vis-a-vis the other stipulations of the Agreement, the November 4, 2011 Shareholder's Pact, or any other contract between the State and FCR, because an autonomous clause, like the arbitration clause, and Article 9 on the exit clause (as well as Article 11) must be treated as autonomous contracts and declared invalid separately by virtue of the principle of autonomy or separability of these clauses not only from the principal contract but also from the other clauses in the principal contract; and (ii) Article 9 excludes the non-arbitrability of exercise of the State's authority to grant licenses to operators in the telecommunications sector; and

(c) Article 11 of the Agreement is invalid because it is contrary to CEMAC's community law on competition and Article 30 of AUPOSRVE, which preclude any interim or conservatory measure or any forced enforcement against persons who have immunity from enforcement. The Respondent indicated that Article 30 is in the public interest.

38. Consequently, the State argued that the arbitration clause set forth in Article 11 of the Agreement is invalid, as are the exist clause for the benefit of FCR prescribed in Article 9 of the same Agreement and its appendices, and the New Pact. In addition, the State objected to the authority of the ICC's International Court of Arbitration, the jurisdictional competence of the Arbitral Tribunal, and this arbitration proceeding for the following reasons:

(a) The request was not served on the State via the diplomatic means applicable pursuant to the immunity from notification enjoyed by the State, which is prescribed in French law (Article 684 of the French Code of Civil Procedure, referred to hereinafter as the "C.P.");

(b) According to applicable French law, the individual who signed the Agreement and the arbitration clause on FCR's behalf lacked the power or authority to do so. Consequently, the Agreement (including Article 9 thereof and the arbitration clause stipulated as an autonomous agreement vis-a-vis the principal contract), and the appendices to the Agreement are invalid;

(c) According to applicable French law, Article 1466 of the C.P. states that: *"A party that, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity;"*

(d) According to the CEMAC's law, any agreement aimed at granting monopoly status to a company within the CEMAC zone is invalid because it violates the community law on competition, which prohibits a monopoly as well as the abuse of a dominant position. The Agreement was intended to grant monopoly status and a dominant position to FCR in a portion of the CEMAC market. Thus, it is contrary to the CEMAC's competition law; and

(e) According to the OHADA law and Equatoguinean law, the recourse to arbitration is possible when the matter pertains to rights that are freely available to the parties. According to Equatoguinean law, the rights arising from the State's public domain are not arbitrable. This public domain extends to the radio-electric space, the milieu or sector governed by Equatoguinean administrative law wherein the circulation or transmission of telecommunications lies. Given that granting concessions or licenses to operate in this space pertains to the public domain and its use rather than to rights that are freely available to the parties, the rights and obligations arising therefrom and the validity of any contractual clause limiting the State's right to grant these licenses or concessions (such as Article 9.3 of the Agreement) are not arbitrable. Moreover, these concessions or licenses are unilateral administrative acts by the State, and their subject matter is unavailable, Therefore, the rights related thereto cannot be arbitrated. For these reasons, the arbitration clause contained in Article 11 of the Agreement infringes on the OHADA's public policy as well as the Republic of Equatorial Guinea's public policy.

39. Consequently, the Respondent argues that according to CEMAC's competition law and the Telecommunications Law, the State's authority or power to grant the concessions or licenses to the new telecommunications operators is not arbitrable, and any question or dispute concerning exercise of this power or authority is subject, according to Article 16 of the *Ley Organica No. 5/2009 of May 10, 2009,* exclusively to the jurisdiction of the courts of the Republic of Equatorial Guinea.

40. Moreover, on February 28, 2013, the Minister of Transportation, Technologies, Mail and Telecommunications of the Republic of Equatorial Guinea petitioned CEMAC's Court of Justice for an opinion on the Agreement's compatibility with CEMAC's competition law by. Via Opinion No. 004/2012-13, dated June 26, 2013, this Court decided that *"all of the agreements or decisions made in connection with prohibited anti-competitive trade practices are legally invalid"* and that *"like all other CEMAC member States, the Republic of Equatorial Guinea must take all actions necessary to bring its national legislation into conformity with the communal standards."*

41. In any event, referencing Article 1466 of the CP, the Respondent declared that it would never waive its right to argue the invalidity of the arbitration clause based upon which this arbitration proceeding was initiated, and that it would continue to argue that invalidity, before the Arbitral Tribunal and the judge issuing the award, until it obtains a decision sustaining its objections to the Arbitral Tribunal's jurisdiction.

42. Consequently, the Respondent asked the Arbitral Tribunal (as stated in the Terms of Reference) to declare that:
(i) The Request's notification procedure is invalid;

(ii) The arbitration clause is invalid because it was signed by the Chairman of FCR's Board of Directors instead and in place of its General Manager, and that the arbitration clause is invalid because it is inconsistent with Article 30 of the AUPOSRVE, and because granting a telecommunications operator license, which is only legally possible when exercising public power prerogatives, is not arbitrable. Finally, the State argued that the arbitration clause is invalid because it is contrary to CEMAC's competition law;

(iii) The Agreement is invalid for the same reasons as those invalidating the arbitration clause;

(iv) Article 9 of the Agreement is invalid for the same reasons as those invalidating the arbitration clause;

(v) The Arbitral Tribunal lacks jurisdiction because of the absolute invalidity of the arbitration clause; and

(vi) The courts of the Republic of Equatorial Guinea have jurisdictional competence because the

Agreement is an act of sovereignty by the Equatoguinean State, and only the State's administrative courts do have the jurisdiction to rule on the legality of an administrative act.

43. The Arbitral Tribunal notes that during the hearing held in Paris on March 7, 2014, the Respondent's counsel asserted that *"... we are not arguing that the Agreement or the Promise is invalid, that is another issue. We are arguing that the arbitral clause is invalid..."* (Transcript, page 64). This seems to contradict the position that the Respondent took on this issue during the proceeding. In any event, the Arbitral Tribunal will analyze the Parties' arguments concerning the validity of the Agreement and its Article 9 - issues that also pertain to the substantive issues in the case - and also consider this assertion by the Respondent's counsel.

III. THE ARBITRAL TRIBUNAL'S ANALYSIS AND CONCLUSIONS

A. On procedure and jurisdiction

44. Based upon the foregoing, the Respondent bases its objections with respect to these issues on the following points:

(a) The Request was not properly served on the Respondent;

(b) Mr. Marc Rennard lacked sufficient legal authority to sign the Agreement, Articles 9 and 11 thereof, as well as the New Pact;

(c) Given that they are contrary to the OHADA law, Equatoguinean law and the State's obligations:

(i) The Agreement is invalid;

(ii) The arbitration clause (Article 11 of the Agreement) is invalid; and

(iii) FCR's exit clause (Article 19 of the Agreement) is invalid.

45. It is worth noting that when objecting to the Arbitral Tribunal's jurisdiction, the Respondent often made arguments of fact and of law concerning the validity of the Agreement as well as Article 9 thereof and, consequently, concerning exercise of the rights or enforcement of the substantial obligations contained therein. As a result, it is not always possible to separate the issues concerning the Arbitral Tribunal's jurisdiction from those concerning the merits of the disputes submitted thereto and referenced directly or indirectly by the Respondent. For this reason, when examining and ruling on objections to its jurisdiction, the Arbitral Tribunal must necessarily analyze and settle issues touching upon the merits of the case, draw conclusions pertaining thereto. This is because of the close link between the issues pertaining to the Arbitral Tribunal's jurisdiction and those concerning the merits of the case.

46. With respect to jurisdiction, the Arbitral Tribunal notes that neither party has challenged, or even questioned, the Arbitral Tribunal's authority to rule on its own jurisdiction, which it possesses

consistent with Article 6(5) of the Rules as well as the law of the site or location of this arbitration, i.e. Article 1465 of the C.P.[1] (since French law on international arbitrations is applicable due to the fact that the arbitration is taking place in France, since the conditions defining the international nature of an arbitration proceeding is prescribed in Article 1504 of the C.P.[2], and since determining the application of Title II of the C.P. is deemed to have been fulfilled in this case).

(a) Notification procedures as regards the Request

47. Based upon Article 684, second paragraph, of the C.P., the Respondent argues that the Request should have been served upon it via the special procedure prescribed for that purpose when a foreign State is involved (i.e., through the Minister of Justice for the purpose of service via diplomatic means). The Respondent stresses the public policy nature of that article. According to the information provided by the Secretariat, the Secretariat sent the Request on March 29, 2013 and, according to the carrier's information, it was delivered to the Respondent's addresses (i.e., to Mr. Francisco Mba Olo Bahamonde, the Minister of Telecommunications, Ministry of Transportation, Technology, Postage and Telecommunications, Malabo, Equatorial Guinea, and Ms. Mariola Bindang Oblang, the Ambassador of the Republic of Equatorial Guinea in France, at 29, boulevard de Courcelles, 75008 Paris, France), on April 1 and 3, 2013.

48. Since the Secretariat sent the Request was sent to it via the private means prescribed in Article 3 of the Rules,[3] the Respondent alleged that the notification was invalid because it is contrary to French public policy.

49. However, the arbitration clause in Article 11 of the Agreement expressly states that this arbitration is governed by the Rules and, consequently, that the corresponding provisions on notifications (contained in Article 3 thereof) are fully applicable to the parties, without differentiation of state parties from non-state parties. The Respondent has not proven the existence of jurisprudence that demonstrates that this Article 684 - which we do not find under Title II of the C.P. (applicable to the case because the arbitration is taking place in France) - is part of international French public policy and that based thereupon, it is applicable to an international arbitration taking place in France and having a State as a party thereto. Moreover, we note that none of the provisions of Title II, Volume IV, of the C.P. references Article 684 of the C.P.

50. In any event, since the principle of party autonomy to define the arbitration procedure in an international commercial arbitration is obligatory for the Arbitral Tribunal (Article 1509 of the C.P.;[4] Article V(1) (d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral

---

[1] Article 1465 of the CP: *"The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdictional authority."*

[2] Article 1504 of the CP: *"An arbitration is international when international trade interests are at stake."*

[3] Article 3(2) and (3) of the Rules:
"(2) All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.
(3) A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2)."

[4] Article 1509 of the CP: *"An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules."*

Awards, ratified by France and Equatorial Guinea), the Arbitral Tribunal would surely fall short of its duties (Article 1520 (3) of the C.P.)[5] - thus undermining the validity and efficacy of these decisions - if it were to accept the Respondent's arguments without sufficient reasons or evidence that international French public policy prevents application of Article 3 of the Rules to the Respondent.

51. Under these circumstances, there is no valid reason to refrain, in this case, from respecting the Parties' autonomy with respect to choosing the rules that would govern the arbitration proceeding and, subsequently, to subjecting the Respondent to the service procedures for the Request against the State, which are prescribed in the Rules. This is, naturally, to the extent, the arbitration clause referencing the Rules is not itself invalid; an issue that will be addressed later on in this Final Arbitral Award.

(b) Regarding the allegation that Mr. Marc Rennard lacked sufficient authority to sign the Agreement

52. The Respondent argued that Mr. Marc Rennard, the Chairman of FCR's Board of Directors, lacked sufficient authority to sign the Agreement and the New Pact in FCR's name and on its behalf. According to the Respondent, Mr. Gerald Mazziotto, FCR's General Manager, was the only one authorized to do so. Therefore, the Agreement, the New Pact, the arbitration clause prescribed in Article 11 of the Agreement, as well as clause 9 pertaining to the exit available to FCR, were all invalid. In addition, the Respondent indicated that the notary who prepared the document containing filing of the documents signed or submitted due to conclusion of the Agreement and the New Pact, incorporated the Minister's authorization constituting his authority to sign these documents in the State's name and on its behalf, but did not incorporate the documents proving that Mr. Rennard had the authority to do so in FCR's name and on its behalf. Consequently - the Respondent argues that - the latter's powers, even if they had existed, would be completely ineffective in proving that Mr. Rennard was duly authorized to bind FCR, because that occurred purely verbally.

53. The Respondent asserted that, according to French Commercial Law, a public company's board of directors, which lacks management powers, cannot delegate these powers and that a public company's manager, who occupies a position subordinate to that of the chairman of the board of directors, cannot delegate powers to the latter, who is his superior. In any event, the Respondent specifically referenced Article L-225-56, paragraph 2, of the French Commercial Code, and argued that only a public company's general manager can bind it vis-a-vis third parties.
The text of that article is as follows:

"I. - The general manager shall be invested with the most extensive powers to act on behalf of the company in all circumstances. They shall exercise their powers subject to those that the Law allocates explicitly to shareholders' meetings and to the board of directors.

They shall represent the company in its dealings with third parties. The company shall be bound

[5] Article 1520: *"An award may only be set aside where:*
(...)
3. The arbitral tribunal has ruled without complying with the mandate conferred upon it."

even by those acts of the general manager not covered by the purpose of the company unless it is able to prove that the third party was aware that the act exceeded these objects or that could not have known it in view of the circumstances, the simple publication of the memorandum and articles of association being excluded from constituting this proof.

Provisions in the memorandum and articles of association and decisions of the board of directors limiting the powers of the managers resulting from this article shall not be demurrable with respect to third parties.

II. - In agreement with the general manager, the board of directors shall determine the scope and the term of the powers conferred upon the assistant general managers.

The assistant general managers shall have the same powers as the general manager with respect to third parties."

54. Finally, during the March 7, 2014 hearing, the Respondent questioned the authenticity of the minutes of FCR board of directors' October 19, 2011 meeting, which authorized Mr. Rennard to sign the Agreement and the New Pact, and suggested that this document is a fake.

55. The Arbitral Tribunal notes that the Respondent's arguments do not actually bring into question the company's authority (governed by, *lex societatis*) but rather the existence of the representation powers of a party claiming to be acting in its name and on its behalf. Regardless, the Parties have - both - based their respective positions regarding this issue on French law (we note that the law applicable to corporate managers' powers is governed by *"lex societatis"*). Therefore, the Respondent invokes French law in order to maintain that: (a) Mr. Mazziotto could not delegate his powers to represent FCR; (b) in any event, that such a delegation would not be valid because it was only done verbally; and (c) that Mr. Rennard lacked the powers to bind FRC.

56. In response to the Respondent's arguments, FCR indicated that under French law, in order to validly bind a company, it is sufficient for the co-contractor to legitimately believe that the signatory had sufficient powers to conclude one of the company's day-to-day management tasks. Moreover, given Article 14 of the Agreement, which guarantees that the signatories representing each Party have the powers or authorizations necessary to bind it, and the State's belief in this guarantee, because it did not ask Mr. Rennard to prove his power, it is clear that FCR was validly bound by Mr. Rennard's signature (Memorandum of Response to the Lack of Jurisdiction, paragraphs 67-70). Consequently, there is no reason to conclude that the validity of the Agreement was vitiated due to lack of consent by one of the parties.

57. The Claimant also referenced Articles L.225-35 and R.225-29 of the French Commercial Code concerning the boards of directors of companies, as well as Article 18-1 of FCR's by-laws in order to maintain that FCR's Board of Directors had sufficient authority to delegate to Mr. Rennard the powers necessary to sign the Agreement and the New Pact, and to bind FCR under the arbitration clause prescribed in Article 11 of the Agreement. It argued that this delegation occurred via a decision by the Board of Directors on October 19, 2011,[6] which authorized the General Manager and President of FCR to, among other things, sign the transactional agreements with the State.

[6] Exhibit C-64.

Consequently, the Claimant affirmed that Mr. Rennard had the mandate and sufficient powers to sign the Agreement and the New Pact.

58. According to the minutes of the Board of Directors' October 19, 2011 meeting, the mandate was as follows:
"The Board of Directors hereby tasks the General Manager and the President, with the option of acting jointly or separately, to finalize the negotiations of the new agreements with the State of Equatorial Guinea, expedite all actions necessary within the context of the arbitration before the ICC, and sign if needed, in FCR's name and on its behalf, new agreements (shareholders' pact and transactional agreement) with the State of Equatorial Guinea."

59. In any event, the Claimant granted authority, which was given by Mr. Gerald Mazziotto to Mr. Marc Rennard on November 27, 2011, within the context of the aforementioned general mandate whereby it authorized Mr. Rennard to sign the Agreement and the New Pact. [7]

60. Article L.225.35 of the French Commercial Code prescribes the following:
"The board of directors determines the broad lines of the company's business activities and ensures their implementation. Without prejudice to the powers expressly invested in meetings of the shareholders, and in so far as the memorandum and articles of association permit, it deals with all matters relating to the conduct of the company's business and decides all pertinent issues through its deliberations. In its dealings with third parties, the company is bound even by acts of its board of directors which do not come within the purview of the company's corporate mission, unless it can prove that the third party knew that a specific action was extraneous to that mission or, given the circumstances, could not have been ignorant of that fact."

For its part, Article R.225-29 of the French Commercial Code states that:

"The board of directors can task one or more of its members, or third parties, whether shareholders or not, all special mandates for one or more specific objectives."

61. Article 18-1 of FCR's by-laws stipulates that:
"The board of directors' jurisdiction extends to all of the company's acts of administration and even of disposition that are not expressly reserved for the general assembly by the law and by these by-laws. The board of directors can delegate to any representative it chooses all powers subject to the limit on the powers granted to it by the law and these by-laws."

62. In light of the provisions of the French Commercial Code cited by FCR, as well as its by-laws, the Arbitral Tribunal concludes that the board of directors validly tasked Mr. Rennard with signing the Agreement and its appendices. It also concludes, in any event, that this delegation - including the delegation of powers to sign the arbitration clause contained in Article 11 of the Agreement - do not exceed FCR's corporate purpose and do not exceed normal or day-to-day management of FCR. Moreover, given the ample powers - *"...the broadest..."* powers - granted to the general manager under Article L-225-56, which was cited by the Respondent, it is difficult to comprehend why Mr. Mazziotto could not grant Mr. Rennard the power to sign the Agreement and the New Pact,

[7] Exhibit C-65.

particularly when we note that he did so by referencing the mandate already granted by FCR's board of directors to Mr. Rennard on October 19, 2011, for the same purpose. Therefore, the power granted by Mr. Mazziotto to Mr. Rennard is thus merely an expression of that mandate and of the will of FCR's board of directors.

63. Moreover, the Arbitral Tribunal finds nothing in Article L.225-56 of the French Commercial Code that would allow one to argue that the general manager is the only person with the power to represent a public company, or that its board of directors cannot also represent it. The very text of Article L.225-35 of the aforementioned Commercial Code prevents such a conclusion. Articles L.225-56 and L.225-35 state the same thing and pursue the same objective: specifically, to prevent powerful public companies from evading their obligations vis-a-vis third parties that are acting in good faith, even when their directors or bodies act beyond the limits of the corporate purpose, by alleging that they did not validly consent to their contractual commitments because, for example, their directors or boards lacked sufficient powers or statutory facilities to bind them. Indeed, that is the exact opposite of the objective sought by the Respondent, which is, based upon the supposed absence of authority or mandate to Mr. Rennard, to neutralize FCR's consent, even if the latter deems itself validly bound under the Agreement and the New Pact.

64. Moreover, it is clear that under the Rules (Article 6(9))[8] and the French law of the arbitration location (Article 1447 of the CP),[9] the arbitration clause is independent of the contract containing it. As decided by the Court of Cassation, the autonomy of the arbitration clause is a material rule of international arbitration law, and requires that any determination about the existence of the arbitration agreement be assessed on the basis of the parties' will.[10]

65. The facts that have been presented to the Arbitral Tribunal in this arbitration proceeding, as well as the preamble to the Agreement, demonstrate that the Agreement was concluded in order to end a series of serious disagreements and antagonistic positions between GETESA's shareholders concerning its management and on-going for several years. These disputes and the increasing degradation in the relations between the shareholders gave rise, before signature of the Agreement, to a conciliation proceeding, an arbitration request, as well as a technical and financial audit ordered by the State that, according to the State, proved the Claimant's shortcomings with respect to management of GETESA.

66. The text of the Agreement itself (Article 1: PURPOSE) states that its objective is specifically to put an end to the respective claims of the Parties with respect to the reciprocal accusations:
"Waving determination of each Party's possible liability concerning genesis of the situation described in the preamble, the Parties hereby agree that this Agreement shall end any litigation that has arisen or may arise from enforcement, modification and/or termination of the Initial Pact between the Parties as well as their consequences, and from all contractual relations between them.

---

[8] Article 6(9) of the Rules: *"Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void."*

[9] Article 1447 of the C.P.: *"An arbitration agreement is independent of the contract to which it relates. It shall not affected if the latter is void. If an arbitration clause is void, it shall be deemed not written."*

[10] Court of Cassation, 1st Civil Chamber, *Municipalité de Khoms el Mergeb c/société Dalico,* December 20, 1993, Revue de l'arbitrage No. 1, 116-117 (1994).

It shall also end all litigations between them and/or any relationship of fact or law that may exist between them regarding these past events.

Moreover, this transaction is intended to definitively settle the amount of the indemnities, regardless of their nature, that FCR and the State believe they should receive as reparation for the previous harm caused by the litigation that has arisen or may arise as indicated above."

67. These objectives are specifically addressed in other stipulations of the Agreement:
"Article 2: Transactional Indemnity. As a purely transactional matter, and without acknowledgment of fault by either Party, the Parties accept, as a transactional indemnity, to compensate exactly all amounts they believe the other Party owes them under the dispute covered by this Agreement.

This compensation shall occur on the day the Agreement is signed and shall completely fulfill the Parties' rights concerning the relations covered by the Agreement."

"Article 5: Abandonment - The Parties' Obligations. The Parties consider, without exception or reservation, that all accounts, disagreements, disputes or litigations that may exist on this day between them for any reason whatsoever, as set forth in the preamble, are definitively and irrevocably settled and extinguished. To that effect, the Parties definitively abandon all lawsuits and actions initiated against each other in connection with the Initial Pact.

FCR also expressly abandons, as well as freely, knowingly irrevocably and definitively puts an end to any right, action, lawsuit, claim, allegation, request or indemnity of any kind whatsoever, that has arisen or may arise, and that it may pursue against the State for any reason whatsoever as mentioned in the preamble of the Agreement, and specifically due to enforcement of the Pact.

Consequently, the Parties hereby declare that they shall discontinue the action that FCR initiated under the contractual dispute resolution mechanism set forth in the Initial Pact.

Finally, FCR abandons any action founded upon facts related to GETESA's management, prior to signature of the Agreement, and initiated against a GETESA corporate manager, director, member of the board of directors, or executive manager who was named or elected at the State's recommendation. In addition, the State abandons any action founded upon facts related to GETESA's management, prior to signature of the Agreement, and initiated against a GETESA corporate manager, director, member of the board of directors, or executive manager who was named or elected at FCR's recommendation, as well as against the expatriate personnel that FCR made available to GETESA."

68. There is no doubt that, pursuant to the aforementioned text of the Agreement, the Parties had the clear desire to undertake commitments in order to end a long series of disputes. There is nothing in the case file allowing one to believe that both Parties' decision to undertake commitments via the Agreement was not firm or well thought out, or that it only pertained to some of its stipulations, to the exclusion of others, even those stipulations deemed autonomous, such as the arbitration clause in Article 11 of the Agreement and Article 9, which stipulated an exit from GETESA for the benefit of FCR.

69. The same applies to FCR, given the ample scope of the mandate granted to Mr. Rennard and Mr.

Mazziotto on October 19, 2011. With respect to the Respondent, this firm desire is reflected by the fact that it signed the Agreement, without any reservations, via the Republic of Equatorial Guinea's Minister of Telecommunications. Even if one were to assume that Mr. Rennard lacked sufficient authority to sign the Agreement, there is no indication that FCR did not want to be bound by all of the stipulations and appendices or that it intended to wriggle out of them by claiming that Mr. Rennard lacked sufficient authority to sign it. Quite the contrary, by exercising its rights under Article 9 of the Agreement, filing the Request under Article 11 of the Agreement, and prior thereto initiating a procedure to amicably settle the disputes under Article 10 of the Agreement, FCR objectively demonstrated that it considered itself bound by all of its stipulations.

70. As already indicated, the foregoing also applies to interpretation of all of the Agreement's stipulations, including the arbitration clause in Article 11 thereof. In light of the Court of Cassation's aforementioned jurisprudence, it seems indisputable that both Parties wanted to be bound by the arbitration clause and, consequently, to be subject to this arbitral proceeding and this Arbitral Tribunal's jurisdiction. The principle of good faith is respectful of the legitimate attempts by the Parties, which are protected by the international public policy that the Court of Cassation's decision references in the *Dalico* case. This principle is also acknowledged by Articles 7(1) and 1258 of the Spanish Civil Code.[11] It leads to the same outcome and, necessarily, to rejection of the Respondent's objection to the Arbitral Tribunal's jurisdiction; an objection that is based upon the argument that the person who signed, in FCR's name and on its behalf, the document containing the arbitration clause on which this arbitration is based lacked the authority to legally represent FCR.

71. Ultimately, based upon the French law provisions mentioned above, and mentioned by the Parties, as well as FCR's by-laws, the Arbitral Tribunal finds that FCR did delegate to Mr. Rennard sufficient authority to sign the Agreement and the New Pact, and to validly bind FCR by all of its stipulations, including the arbitral clause contained in Article 11 of the Agreement and the FCR exit clause in Article 9 thereof. In any event, even absent such a delegation, the principle of appearance mentioned by the Claimant - which applies under French corporate law in light of the provisions of the aforementioned Commercial Code, and which has not been denied by the Respondent - would have been sufficient to validly bind FCR through sole signature of Mr. Rennard. This is because the Respondent has not contested that signature of the Agreement, each of its stipulations, its appendices, or the New Part, fall within the scope of FCR's corporate purpose or in the sphere of managing that company's day-to-day operations.

72. During the March 7, 2014 hearing, the Claimant rejected the Respondent's allegations, made by the latter for the first time during the hearing, that the minutes of the FCR Board of Directors' October 19, 2011 meeting, which resulted in Mr. Rennard's mandate, are not authentic and that they are false. The Claimant also noted the lack of any evidence supporting the Respondent's statements. Merely suggesting that the minutes are false, and failing to accompany that suggestion with any indication allowing one to have a reasonable doubt about the authenticity of this document or the existence of the delegation of authority reflected therein, cannot constitute sufficient reason to deny the existence of that delegation or to contest the date on which it was granted.

73. Consequently, there is reason to conclude that: (a) FCR is validly bound by the Agreement (the

---

[11] Article 7(1) of the Spanish Civil Code states: *"Rights must be exercised in accordance with the requirements of good faith."* Article 1258 of the Spanish Civil Code states: *"Contracts are perfected by mere consent, and since then bind the parties, not just to the performance of the matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, custom and the law."*

arbitration clause contained in Article 11 thereof, and the FCR exit clause included therein), and the New Pact through the signature of Mr. Marc Rennard; and (b) the Respondent's objection to the validity of the Agreement, as well as Articles 9 and 11 thereof, or to the Arbitral Tribunal's jurisdiction, based upon a supposed lack of sufficient authority on the part of Mr. Marc Rennard to bind FCR, under the Agreement, the arbitration clause in Article 11 thereof, or the FCR exit clause in Article 9 thereof, must be rejected.

(c) Regarding the allegation, founded upon the CEMAC law, the OHADA law, and Equatoguinean law, that (i) the Agreement and (ii) Article 11 thereof, which incorporates an arbitration agreement, are invalid

(i) The Respondent's arguments

74. In order to challenge the validity of the Agreement, Articles 9 and 11 thereof, as well as the arbitrability of the issues presented to the Arbitral Tribunal, the Respondent mentioned the following provisions of Equatoguinean law, CEMAC law, and OHADA law:
(a) Provisions of Equatoguinean law based upon which the Respondent argued that the concession or license granting rights - whose exercise requires use of the public telecommunications domain, given the lawfulness of these rights, licenses or concessions - are inalienable because they preclude the authority to transact via private act. In any event, granting these rights, licenses or concessions imperatively requires prior administrative authorization, i.e. the issuance of an administrative document. Since granting such a right, license or concession is up to the State that is governed by Equatoguinean law, exercising it cannot be linked to an obligation to notify a non-beneficiary private party of issuance of the telecommunications license or concession. The Respondent also argued that, in this context, notification by the State to FCR of any new telecommunications operator license prescribed in Article 9.3 of the Agreement - triggering the exit mechanism established in that article -would violate Equatoguinean public law because it would limit the Council of Ministers' sovereign rights to even meet and make decisions about issuing new licenses. Consequently, none of these matters is arbitrable, can be the purpose of a transaction or, due to that fact, be subjected to this arbitral proceeding: (Article 338 of the Civil Code; Articles 1 et al, Article 55, Articles 96 et al, Article 126 of the *Patrimonial Law of the State*, articulated Text approved by Decree *1022/1964 dated April 15;* Article 29.1 b) of the *Fundamental Law of the Republic of Equatorial Guinea;* Article 26 of the Telecommunications Law, as well as Article 3 and 4 of Law No. 5/2006 of November 2 on the administrative procedure);

(b) Provisions of Equatoguinean law based upon which the Respondent argued that, due to their nature, the Parties' disputes in this arbitration are subject to the exclusive jurisdiction of the State courts (*Organic Law No. 5/2009 of May 10* as amended *Judiciary Organic Law No. 10/1984* ("LOPJ"), Article 16; and the *Juridical Regime of the Central Administration of the State Law* ("Central Law"), Article 56(3) and 58.

(c) Imperative provisions or public policies of the CEMAC law, which were violated by Article 9.3 of the Agreement, prohibiting the maintenance or abuse of a dominant position in the common market if that prevents the State from granting telecommunications operator licenses in the Equatoguinean territory (CEMAC Regulation No. 04/99/UEAC-CM-639 of August 18, 1999, Article 8.2; CEMAC Regulation No. 1/99-UEAC-CM-SE of June 25, 1999, Articles 4, 15, 16; CEMAC's Court of Justice Opinion No. 004/2012-13, dated June 27, 2013); and

(d) Provisions of OHADA, which constitute communal public policy, and according to which Article 11 of the Agreement is invalid because it pertains to waiver of the State's sovereign immunities in violation of the Uniform Act on Simplified Recovery and Enforcement Procedures (AUPOSRVE), whose application is obligatory in all OHADA Member States: (Article 10 of the OHADA Treaty; Articles 30 and 336 of the AUPOSRVE; as well as OHADA Common Court of Justice and Arbitration (CCJA) Decision No. 043/2005 of July 5, 2005).

(ii) The Claimant's response to the arguments

75. In response to the Respondent's argument that the Arbitral Tribunal lacks jurisdiction because, according to Equatoguinean law, it cannot rule on the issuance or validity of concessions or licenses concerning the public telecommunication domain, the Claimant indicated that the purpose of this arbitration is to settle the disputes concerning exercise of the purchase promise contained in Article 9 of the Agreement, which the State signed in its capacity as a private party, and which does not pertain to the issuance of licenses or concessions in the telecommunications field in Equatorial Guinea or to the legality of the administrative procedures underlying issuance of these concessions or licenses. The Claimant also referenced French law, as well as the OHADA Uniform Act on Arbitration Law and the Principle of Good Faith, and indicated that, as a state entity, the Respondent cannot reference application of its domestic law in order to evade the arbitration clause it has signed. Since the arbitration clause is autonomous from the contract containing it, the Claimant refuted the Respondent's arguments on the Arbitral Tribunal's lack of jurisdiction, which would automatically result from invalidity of the arbitration clause following the alleged invalidity of the Agreement.

76. The Claimant noted that Article 9.3 of the Agreement does not prohibit the State from exercising its powers or prerogatives under public law to issue concessions or licenses in the telecommunications sector. Article 9.3 merely stipulates that issuing these concessions or licenses would trigger the mechanism of offering FCR's stake in GETESA for sale to the State, and its only goal is to allow FCR to withdraw from GETESA. The Claimant indicated that it did not exercise its right under Article 9.3 of the Agreement to be notified in advance by the Respondent if the latter decided to issue a new telecommunications license in the Equatoguinean territory (notification that, in any event, was never done), because it learned of the license issued to GECOMSA (triggering exercise of the purchase promise) from the press. For this reason, this notification does not at all limit, in fact or in law, the Respondent's public law prerogatives to issue concessions or licenses in the telecommunications sector.

77. In any event, the Claimant denied that the Agreement and the sale promise constitute acts of public

authority or that the State, by signing the Agreement, exercised powers of public authority. It noted that the Respondent never referenced any provision of Equatoguinean law prohibiting use of arbitration concerning telecommunications licenses or concessions, and that the license issued to GECOMSA contains an arbitration clause thereby proving the contrary.

78. Having denied that the Agreement is an administrative contract or document, the Claimant also denied the application of LOPJ or Central Law to the Agreement and, consequently, Equatoguinean courts' exclusive jurisdiction to settle disputes arising therefrom. The Claimant argued that the Agreement is a transactional agreement under private law, and thus the arbitration clause inserted therein is fully valid.

79. The Claimant also rejected the argument that the Agreement and its arbitration provisions are contrary to CEMAC's public policy.

80. First, the Claimant argued that, as indicated in its text, Regulation No. 04/99/UEAC-CM-639 of August 18, 1999 only applies to state practices affecting trade between Member States, and that since its provisions apply exclusively to the conduct of Member States, it does not in any way apply to private companies. This Regulation is intended to require Member States to adjust their conduct to its provisions with respect to anti-competitive practices, but does not directly invalidate contractual agreements with third parties that may encompass these practices.

81. The Claimant also indicated that the Respondent erroneously argued that this Regulation condemns monopolies, when, in fact, it merely defines them. In any event, since the Claimant is a minority shareholder in GETESA (which is controlled by the State), and is not an operator in the Equatoguinean telecommunications market, it does not have a monopoly or dominant position in that market. Moreover, CEMAC Regulation No. 1/99/UEAC-CM-SE 639 of June 25, 1999 only punishes abuse of a dominant position (rather than mere occupation of such a monopoly position) by private persons. The Claimant also emphasized that this Regulation does not punish monopolies or even dominant positions, but rather the act of abusively exploiting them. The Claimant added that since the Respondent has not proven that the Claimant holds a dominant position in the Equatoguinean telecommunications markets, it can undoubtedly not prove that the Claimant abused it. In any event, at the time the Agreement was signed, a second company, HITS, operated in this market. This shows that even GETESA was not a monopoly in the Equatoguinean telecommunications market at that time, and precludes any possibility of believing that FCR held, even indirectly, a monopoly position in this market.

82. Finally, the Claimant disputed the Respondent's claim that the arbitration clause is invalid on the grounds that Article 11 of the Agreement is inconsistent with the provisions of the AUPOSRVE. The Claimant noted that the State could not validly reference the AUPOSRVE, which is part of its domestic law, to contest the validity of the arbitration clause. The Claimant added that application of Article 336 of AUPOSRVE is irrelevant because it is limited to abrogating the provisions of the Member States' domestic law when contrary thereto, and does not invalidate contractual clauses that do not adjust to its provisions. Moreover, this provision cannot be applicable to matters of arbitration because the arbitrators do not have the option of executing its decisions on the property of state entities or individuals subject to their jurisdiction.

(iv [sic]) <u>The Arbitral Tribunal's decisions</u>

83. The Arbitral Tribunal notes that the very text of the Agreement (for example, its preamble and its Articles 1, 2 and 5) as well as the text of the New Act (for example, the amendments pertaining to GETESA's board of directors and its management committee, introduced by Article 6 of the latter), show that they are contractual texts aimed at reflecting the transactional agreements between FCR and the State in order to end their disputes as shareholders of a private public company - GETESA - or disputes concerning the technical, commercial or financial management of GETESA.

84. There is no reference in the Agreement or in its appendices to the principle that the State holds or has reserved for itself the exorbitant public law prerogatives pertaining to the exercise of rights or the enforcement of obligations resulting from the Agreement or its appendices. To the contrary, a simple reading of Article 7 of the Agreement shows that, by signing it, the Parties intended to conclude a private contract governed by Equatoguinean and French civil laws, and not by the Republic of Equatorial Guinea's administrative law.
"The aforementioned provisions, which the Parties have freely discussed and agreed to, and which represent their reciprocal concessions, constitute a transaction within the meaning of Articles 1809 et al of the Equatoguinean Civil Code, and Articles 2044 et al of the French Civil Code pursuant to which the transactions between the Parties are deemed res judicata and cannot be revoked on the grounds of error of law or injury."

85. Moreover, the Agreement and its appendices did not pertain to the licenses or concessions granted by the State to GETESA in the Equatoguinean telecommunications sector, or to the position GETESA occupied in the markets corresponding to that sector. In fact, whether or not GETESA occupied a monopoly position in these markets could not depend on exercise of the rights or enforcement of the obligations under the Agreement. Even conceding that GETESA's role was to provide a public service regulated by Equatoguinean public or administrative law, the disputes submitted to the Arbitral Tribunal do not pertain to the public service GETESA provided in the Equatoguinean telecommunications sector after the date of the Agreement, but rather on the rights and obligations of GETESA's shareholders under the Agreement, which have nothing to do with this service.

86. It is also clear that the Agreement and the New Pact have nothing to do with issuance or withdrawal of licenses or concessions in the telecommunications markets. These agreements do not address the licenses or concession, or GETESA's position in that market, and do not contain any provisions pertaining to the areas reserved for administrative procedures on the issuance or withdrawal of these licenses or concessions. Moreover, there is no dispute that FCR neither holds concessions or licenses in that sector, nor operates therein.

87. In these circumstances, it is unclear how the Arbitral Tribunal could conclude, only on the basis of the general legal texts of Equatoguinean public law or administrative law cited by the Respondent, that the Agreement or the New Pact are administrative contracts or administrative documents under Equatoguinean law. One cannot requalify these private law contracts as such merely because the State is a party thereto. Also for these reasons, the Arbitral Tribunal concludes that the Respondent has failed to prove that the Republic of Equatorial Guinea's courts have exclusive jurisdiction over disputes arising from the Agreement or the New Pact. Consequently, the

Respondent's objections to the validity of the arbitration clause and to the Arbitral Tribunal's jurisdiction based upon application of Equatoguinean public law or administrative law to the Agreement or the New Pact, as well as the Respondent's claim that Equatoguinean courts have exclusive jurisdiction over this matter, must be rejected.

88. For these same reasons, the Claimant's exercise of the exit right under Article 9 of the Agreement, i.e. FCR's right as a shareholder to sell its stake in a public company (GETESA) and the corresponding obligation for the State to purchase that stake, has nothing to do with the regime for issuing or withdrawing telecommunications licenses or concessions under Equatoguinean law, does not constitute issuance or withdrawal of these licenses or concessions, does not in any way limit the State's law or prerogative to issue or withdraw licenses or concessions in that sector, does not govern the presence of GETESA in the telecommunications market, and does not pertain to GETESA's relations with other telecommunications operators in this market. It is difficult to imagine how exercising this right could limit the State's sovereign authorities to pursue policies promoting openness of the telecommunications sector by facilitating access to these new operators or to competition among multiple operators. These powers are not precluded or limited by the provisions of paragraph 9.3 of this article, which asks the State to notify FCR upon issuing new licenses, and is exclusively intended to trigger FCR's exit mechanism within the context of the private transactional agreements between FCR and the State, without limiting or precluding the State's prerogative or authority to issue licenses or concessions. Consequently, there is no basis for concluding that Article 9 of the Agreement is invalid, denying the arbitrability of the disputes arising therefrom, contesting the Arbitral Tribunal's jurisdiction over these disputes, or preventing FCR from asserting its rights under this article.

89. It is worth noting that if one were to develop the arguments raised by the Respondent based upon Equatoguinean public and administrative law, as well as imperative provisions or public policy of CEMAC and OHADA, one would have to conclude that, by signing the Agreement, the Respondent's Minister of Telecommunications acted either beyond his authority or in violation of the limitations on the State's ability to contractually bind itself. If one were to accept these arguments, it would be easy to conclude that the Respondent's Minister of Telecommunications could not sign the Agreement - including Articles 9 and 11 thereof - or, at minimum, could not accept that disputes arising from interpretation or application of its provisions (including Article 9) would be submitted for arbitration consistent with Article 11 thereof. This is either because the applicable public law or public policy prevents him from acting in this manner and so, by signing the Agreement or accepting the arbitration clause, the Minister exceeded his authorities, or because the State, validly represented by its Minister, (knowingly or unknowingly) ignored its own public law or public policy, which limits its ability to submit itself to arbitration under the Agreement or, in other words, evade the exclusive and imperative jurisdiction of its national courts.

90. Naturally, one must first note that the Respondent did not at any time claim that the Minister lacked the authority to sign the Agreement or Article 9 thereof. On the contrary, it affirmed that the Minister had sufficient authority to do so. In any event, the aforementioned Article 14 of the Agreement guarantees that the Minister has that authority. Absent evidence to the contrary, one must exclude the possibility that the Minister exceeded the limits of his authority or powers when he signed the Agreement.

91. Moreover, the Respondent has not claimed that the State cannot sign the arbitration clause

contained in the Agreement or the Agreement itself, either because, as generally indicated by the Claimant, the international arbitration is being held in France and one must thus consider the Paris Court of Appeal's jurisprudence, which requires the application of French material law thereby undermining the effects of the objections to the validity of the arbitration clause that is based upon the domestic law of the State raising these obejctions,[12] or because a different conclusion would be contrary to good faith (see paragraph 70 above) and to the Parties' legitimate attempts, based upon that same jurisprudence. In any event, the Respondent's counsel adheres to these principles, because he asserted during the hearing that: *"...we have never said that the State referenced its domestic law. Nowhere in our filings has the State mentioned its domestic law. To the contrary, we are saying that the Equatoguinean minister had the authority to sign"* (transcript, page 40), and later on, *"it was never an issue of referencing Equatoguinean domestic law to contest the arbitrability of the dispute or the State's ability to arbitrate"* (transcript, page 58).

92. In light of these elements, one cannot comprehend how the State can not only take advantage of its public and administrative law, or that of the international organizations to which it is a party, in order to challenge the validity of the Agreement's arbitration clause by alleging that under these laws matters governed by the Agreement are not arbitrable, but also affirm that it does not allege lack of authority by its representative or its own inability to sign an arbitration clause in the Agreement violating - according to its own words - its public law and order.

93. Regardless, the aforementioned concept of good faith - which is part of international public policy - is particularly important in this context. If, by chance, the State had alleged and demonstrated that by accepting arbitration under Article 11 of the Agreement for future disputes concerning the provisions of the latter, one would have to conclude that the State misunderstood, either intentionally or due to its representative's ignorance, application of the imperative standards of the public policy of its own laws, or failed its obligation to respect the public policy of its own country, in these cases, the State would have either intentionally violated its own law, or failed its obligations to educate those who represent it about the judicial rules intended to protect the State's higher interests, and about not concluding agreements that violate its own public policy. In either case, the State cannot mention, without violating the principle of good faith, its prohibitive rules in order to evade the obligations arising from Article 11 of the Agreement or the Arbitral Tribunal's jurisdiction, even in the event of disputes over exercise of the exit clause in Article 9 of the Agreement. The same reason, based upon good faith, becomes applicable if the State argues the invalidity of Article 9 of the Agreement based upon the absence of the Minister's authority or the State's inability to subscribe thereto.

94. In light of the elements of fact and law we just mentioned - as well as the statements of the Respondent's counsel - it is appropriate to conclude not only that the State's representative signed the Agreement and its appendices within the limits of his authority, but also that the State cannot raise its own law in order to evade the arbitration clause in Article 11 of the Agreement. As such, this representative bound the State without exceeding his legal authority under its own law. As a result, we cannot accept that the Agreement, its provisions or its appendices violated Equatoguinean public law or the provisions of CEMAC or OHADA, which are part thereof.

---

[12] Paris Court of Appeals (1st Supplemental Chamber), *Société Gatoil c/ National Iranian Company,* December 17, 1991, Revue de l'arbitrage [Arbitration Review] No. 2, 281-287 (1993); (1st Civil Chamber) *Société KFTCIC c/ Société Icori Estero et al,* Revue de l'arbitrage [Arbitration Review] No. 2, 250-258 (1997).

95. The Arbitral Tribunal finds that the provisions of CEMAC's law or public policy do not prevent or limit its jurisdiction over the disputes submitted to it. For the same reasons, the Arbitral Tribunal does not find in CEMAC's law, which is raised by the Respondent, a basis for concluding that the Agreement, including its Articles 9 and 11 or its appendices, are invalid based upon CEMAC's public policy or imperative provisions.

96. As indicated earlier, as a GETESA shareholder, FCR did not hold licenses or concessions in the Equatoguinean telecommunications market and, as a minority shareholder in GETESA, could not, absent proof from other events experienced following signature of the Agreement, unilaterally determine the course of GETESA's business activities. The Respondent [sic: Claimant] also demonstrated that it was personally neither an operator in the Equatoguinean telecommunications market nor a holder of licenses or concessions to operate in this market. Consequently, as argued by FCR, all indications are that since the latter did not hold a monopoly or dominant position in this market, it could not have abused such a position.

97. It is worth noting that CEMAC Regulation No. 1/99/UEAC-CM-639 of June 25, 1999 (the "June 25 Regulation") only punishes abuse of a dominant position or inter-company concentrations affecting the common market rather than punishing the existence of a monopoly situation or a dominant position. For example, the preamble of this Regulation indicates: *"The community law must... include provisions governing the practices of companies including, agreements, abuse of a dominant position, and concentrations that may significantly impede effective competition in the common market or part thereof..."* The Respondent has provided no evidence indicating that the Claimant abused a dominant position in the CEMAC common market or even in the local Equatoguinean market, or that it is part of an agreement or concentration listed in this Regulation.

98. For example, Article 8 of CEMAC Regulation No. 04/99/UEAC-CM-639 of August 18, 1999 (the "August 18 Regulation"), far from punishing monopoly situations or a dominant position, defines the practices constituting an abusive or anti-competitive practice that would violate its provisions (bundled sales, imposition of unjustified discriminatory conditions, unjustified termination of trade relations, use of revenues from monopoly activities to subsidize sales in other sectors). However, the Respondent has not proven or attempted to prove that the Claimant engaged in these practices or similar practices.

99. The Respondent has not refuted the fact that the June 25 Regulation and the August 18 Regulation are inapplicable to non-interstate relations, or to activities that do not concern common markets or trade between Member States, i.e., activities solely concerning local markets.

100. Several of the June 25 Regulation's provisions indicate that it only applies to relations between Member States or to anti-competitive practices affecting trade between Member States. For example, Article 3 refers exclusively to *"...decisions by company boards, and all concerted practices that may affect trade between Member States and that have the effect of restricting or distorting competition..."* Also, Article 6(1) on concentrations, states that

"*This Regulation applies to all community-level operations."* Moreover, Article 16 prohibits the abuse of a dominant position, and states that *"...in the event where trade between Member States may be affected..."* In any event, the beginning of the preamble clearly states that the objective sought is *"...the phasing out among Member States of restrictive trade practices..."* Another portion of this preamble is set forth above and also shows that it only applies to competitive practices affecting the common market or a portion thereof.

101. With respect to the August 18 Regulation, its title alone indicates that this Regulation is aimed at: "*... state practices affecting trade between Member States..."* This is confirmed by the other provisions of the Regulation, such as Article 2 concerning Member States' assistance to private companies that *"... affect exchanges between Member States..."*

102. The Respondent has provided no convincing argument or proof demonstrating that the Agreement only pertains to Equatorial Guinea's local markets. Also, as indicated by the foregoing, the Claimant has sufficiently demonstrated that these Regulations do not apply to the Agreement and its appendices because they pertain exclusively to the conduct of CEMAC's Member States.

103. Opinion No. 004/2102-13 of June 27, 2013, issued by the CEMAC's Court of Justice at the request of the Respondent's Minister of Transportation, Technology, Postage and Telecommunications, prevents one from reaching different conclusions. The request was made to solicit the Court's opinion on the incompatibility of the Agreement with the provisions of the June 25 Regulation. Therein, the Court clearly indicated that it was not ruling on the validity of the Agreement or its provisions:
"The transactional agreement mentioned in the Request for Opinion does not constitute a community judicial document within the meaning of Article 21 of the Addendum to the Treaty, but rather the parties' law.

Therefore, CEMAC's Court of Justice cannot validly rule on it."

On the merits, the Court's opinion stated that:

"All agreements or decisions made in connection with prohibited anti-competitive trade practices are legally invalid.

Like all other CEMAC Member States, the Republic of Equatorial Guinea must take all actions necessary to bring its national legislation into conformity with the communal standards."

Therefore, this opinion is general in scope, does not affect the Agreement or its stipulations, and does not pertain to their validity or efficacy from a CEMAC law perspective. Moreover, this opinion confirms that the Agreement is *"... the parties' law..."*

104. In any event, the Respondent has provided no other elements of fact or law that would allow one to conclude that, pursuant to the provisions of the CEMAC law, the Arbitral Tribunal lacks the jurisdiction to rule on the merits of the disputes covered by this arbitration, including those arising from interpretation or application of Article 9.3 of the Agreement. For the same reasons, the Respondent has not demonstrated that the Agreement or Article 9, stipulating the conditions for FCR's exit from GETESA's capital, is invalid because it violates CEMAC's law or public policy.

105. Finally, there is no merit to the Respondent's objections to the Arbitral Tribunal's jurisdiction on the

grounds that subjecting the State to the arbitration clause contained in Article 11 of the Agreement would violate OHADA public policy, and is thus invalid.

106. The text of the Agreement referenced by the Respondent (Article 11, last paragraph) states the following:
"To the extent needed, the State expressly waives its right to any immunity from jurisdiction and enforcement. However, this waiver shall not allow the use of executive measures against State assets reserved exclusively for administrative, military or diplomatic use, or those pertaining more generally to the State's sovereignty."

107. The first paragraph of Article 30 of the AUPSRVE, cited by the Respondent in support of its argument about invalidity of the arbitration clause, states the following:
"Forced enforcement and conservation measures are not applicable to parties benefiting from immunity from enforcement."

108. Given that the Arbitral Tribunal has neither the authority nor the jurisdiction to order forced enforcement of its decisions or awards on the property of parties subject to private law or public law, it cannot use this waiver by the State of its immunity from enforcement, a waiver that, as indicated in the last paragraph of Article 11 of the Agreement, is in any event partial. One must, therefore, concluded that this waiver is exclusively intended vis-a-vis state courts, who alone have the requisite authority to seize and dispose of the property of state entities or parties, and against which the State can always argue invalidity of the waiver contained in this disposition, without affecting the validity of the arbitral clause or the Arbitral Tribunal's jurisdiction arising from that arbitral clause.

109. In addition, Article 10 of the OHADA, which Respondent mentioned, merely refers to the application of OHADA acts, such as the AUPSRVE, whose aforementioned Article 30 only addresses immunity from enforcement, but does not prohibit waiver of the State's jurisdictional immunity. The Respondent does not reference any text from the OHADA law prohibiting Member States from waiving the immunity from jurisdiction. Therefore, one must conclude that the last paragraph of Article 11 of the Agreement does not violate the provisions of the AUPSRVE or of OHADA's public order, and, consequently, since the arbitral clause prescribed in this article is valid, the objection to the Arbitral Tribunal's jurisdiction raised on the basis of violation of OHADA's public policy and the AUPSRVE's provisions must be rejected.

110. Since the Arbitral Tribunal has decided that the Respondent's objections to its jurisdiction shall be rejected, it must now address the allegations and arguments that the Parties submitted to it.

B. <u>On the merits of the Parties' claims and arguments</u>

111. As already noted, the Respondent's objections to jurisdictional competence, and particularly to the validity and efficacy of the Agreement and its appendices, are closely related to the merits of the case. Clearly, all of the Respondent's objections in terms of the Claimant's consent to the Agreement, its validity, or the validity of its provisions with respect, if necessary, to French law, Equatoguinean

law, CEMAC's public policy, or OHADA's public policy on the Arbitral Tribunal's jurisdiction, also pertain to the validity and exercise of the Parties' rights and obligations under the Agreement and its stipulations, particularly Article 9 thereof, and directly pertain to the underlying substantive claims.

112. Despite the numerous opportunities offered to it by the Arbitral Tribunal (including during the hearing), the Respondent refused to present its position and arguments on the Claimant's substantive claims. Prior to and particularly after Procedural Order No. 4, the Respondent clearly indicated that it would not address the substantive claims. The Respondent's position on this matter was most recently expressed in a memorandum containing remarks about the March 7, 2014 hearing transcript. Therein, it asserted that:
"Indeed, the respondent has not presented arguments on the substantive claims. These are simply the respondent's remarks about the invalidity of the arbitration agreement because there can be no arguments on the substantive claims in the presence of an invalid arbitration clause."

113. In light of these circumstances, the Arbitral Tribunal must conclude that the Respondent's arguments and defenses with respect to the substantive claims, to the extent one can glean them from its filings and interventions during the hearing, are the same as the arguments and defenses it submitted regarding the Arbitral Tribunal's jurisdiction, and that have already been analyzed and adjudicated as indicated in Chapter III.A of this Final Arbitral Award.

114. It is true that in its filings the Respondent extensively referenced alleged deficiencies in FCR's management of GETESA and fulfillment of its obligations arising from its relations with the State within this context. It is also true that the Claimant has referenced, with as much detail, the State's deficiencies within the context of the same relations. However, the Respondent has not filed any cross-claim based upon these deficiencies. Moreover, the disputes over these deficiencies, which predate the Agreement, were covered by the transactions contained therein and, for that reason, if one concludes that the Agreement and its provisions are valid and effective, one must also conclude, to the extent the Parties comply with its stipulations, that the Agreement has ended these disputes. Consequently, the Arbitral Tribunal must first rule on the validity and efficacy of the Agreement.

115. Yet, as just indicated above, the Respondent has raised no objections to the existence, validity or efficacy of the Agreement, including Article 9 thereof, or objections related to the merits of the disputes submitted to the Arbitral Tribunal, which can be differentiated from those raised by it to contest the Arbitral Tribunal's jurisdiction. Furthermore, its counsel has indicated that the Respondent does allege the Agreement is invalid(paragraph 43 of this Final Arbitral Award). In light thereof, and for the same reasons underlying the Tribunal's rejection of the Respondent's objections to the Arbitral Tribunal's jurisdiction, the latter rejects the objections to the validity and efficacy of the Agreement and its appendices, as well as the transactional agreements contained therein. Accordingly, the Claimant's substantive arguments on the validity and efficacy of the Agreement, its stipulations including Article 9, and its appendices by virtue of French and Equatoguinean law, as well as the provisions of CEMAC and OHADA, must be accepted.

116. Based upon the foregoing, the Arbitral Tribunal must now determine whether or not, in light of the provisions of the Agreement, the Claimant's other substantive claims must be accepted. These claims are summarized below.

117. Principally, the Claimant asked the Arbitral Tribunal to: (i) declare that the Respondent violated the obligation to purchase FCR's stake in GETESA, i.e. that the Respondent failed to fulfill its obligations under the irrevocable promise made under Article 9 of the Agreement to purchase the Claimant's stake in GETESA's capital; (ii) issue a decision ordering forced enforcement of Article 9 of the Agreement and the sale option prescribed therein, and specifically order the State to pay the sum of 131,992,915 euros as the final amount of the purchase price for FCR's stake in GETESA, plus late interest as of August 22, 2012 and, once these payments are made, jointly sign with FCR a transfer slip for the entirety of FCR's stake in GETESA's capital, and record the sale of these shares with the State in the GETESA share transfer register as well as in GETESA's shareholder accounts or, if these accounts and registers cannot be found by the State, in new registers or accounts created for that purpose.

118. Alternatively, and if the Arbitral Tribunal rejects the aforementioned claims, the Claimant asked the Arbitral Tribunal to order the State to compensate FCR for the entirety of its damages arising from the State's failure to fulfill its contractual and legal obligations. As already indicated, in light of the Claimant's withdrawal of this alternative request, without objection from the Respondent, the Arbitral Tribunal shall not rule on this matter.

119. The text of Article 9 of the Agreement, which constitutes the principal basis for the Claimant's claims, is as follows:
"Article 9: FCR's exit clause:

9.1: The State makes FCR, which accepts, an irrevocable promise to purchase all GETESA shares held by FCR, i.e., the 40% stake, subject to the conditions and price defined below.

9.2: The price for exercising this promise (referred to hereinafter as the "Sale Price") with respect to FCR's entire stake in GETESA shall be equal to the sum of:

- 40% (forty percent) of 6.5 times (six and one half times) GETESA's EBITDA (1) for the year preceding the year in which FCR exercises the promise, or the highest EBITDA in the years 2009 and 2010, which ever is higher, plus:

- 40% (forty percent) of the dividends distributable in the fiscal year during which the notice mentioned in Article 4.3 below is sent to the State, on a pro rata basis.

9.3: FCR can act upon this promise, one time, via notice to the State:

- At any time during the period commencing on the day after closure on December 31 of GETESA's second fiscal year as of signature of the Agreement and expiring on December 31, 2015.

- After one of the following events has occurred, subject to a minimum advance notice of three (3) months, subject to notice no later than nine months after that event occurs, and provided that event occurs before expiration of the Pact:

i) If GETESA uses an international telecommunications operator brand that does not belong to the France Telecom Group.

ii) If GETESA terminates the new technical assistance contract specified by Article 15 of the Pact.

iii) If the State approves a new telecommunications operator license in the Equatoguinean territory, or acquires a financial stake in the capital of a new telecommunications network operator active in the territory of the Republic of Equatorial Guinea.

The term "telecommunications network operator" excludes:

- The construction or operation of networks that are not marketed to all or part of the public, and that are dedicated to routing the communications of the State or its bodies and divisions such as, for example, networks connecting military, judicial, police, academic institutions, etc.

- Political, legislative or regulatory activities associated with telecommunications.

If the State decides to grant a new telecommunications operator license in the Equatoguinean territory, or acquires a stake in the capital of a telecommunications network operator active in Equatorial Guinea, it shall provide FCR with advance notice about that decision.

9.4: Sale of the shares shall be subject to the following conditions:

- Without any guarantee other than that the shares exist, that they are fully possessed and owned by the seller, and that there is no right, lien, preferential or succession right to the benefit of a third party,

- Calculation of the EBITDA and Sale Price shall be prepared by FCR and notice thereof shall be sent to the State at the same time as the notice of acting upon the promise.

The State shall have a period of forty-five (45) workdays from the date of notification of exercise of the promise to communicate its approval or refusal of the EBITDA and/or Sale Price calculation.

If the State communicates its refusal, the Parties shall have a period of twenty (20) workdays to reach an agreement regarding calculation of the Sale Price.

If no agreement is reached, an independent expert chosen through common agreement between the Parties shall calculate the EBITDA and/or the Sale Price in a definitive and non-appealable manner. If the Parties cannot agree on this choice within fifteen (15) workdays of receipt of the notice of refusal from the State, the ICC's International Center for Expertise shall choose said independent expert in accordance with the provisions on the nomination of experts set forth in the expertise regulations of the International Chamber of Commerce in Paris, and the expertise proceedings shall proceed indifferently in French and Spanish.

Transfer of the shares and payment of the price shall occur concurrently, and no later than thirty (30) days following definitive determination of the Sale Price.

This purchase promise clause is independent of the other stipulations in the Agreement, the Pact or any other contract between FCR and the State. Thus, it shall maintain its effect even if the other provisions of the Pact are deemed inapplicable or are executed in a manner inconsistent with the Pact, regardless of whether that is due to the actions of one Party or the other.

(1) EBITDA ("EBITDA") means net annual earnings before interest, duties, taxes, depreciation and amortization, prepared on the basis of GETESA's certified annual financial statements."

120. Via letter dated January 24, 2012 [13], FCR informed the State that it had learned of the latter's issuance of a new telecommunications operator license to a company called GECOMSA, and asked it, if that was indeed the case, to provide it with the notification prescribed in aforementioned Article 9.3.

121. There is no dispute that the Respondent failed to provide the Claimant with this notification, failed to respond to FCR's communication, and failed to object to the content of this letter. The State has also not contested the fact that it failed to respond to FCR's February 22, 2012 letter wherein FCR (a) again referenced the announcement made in the press concerning the State's issuance of a telecommunication license to GECOMSA, and reiterated its request that GETESA's Board of Directors be convened in order to examine this matter; and (b) asked the State to provide it with a copy of the license and the notification to GECOMSA [14]. The Respondent did not respond to these letters either.

122. There is also no dispute that:
(a) Via letter dated May 16, 2012, FCR notified the State of (i) FCR's decision to exercise its right under Article 9.3 to exercise the purchase promise, and to do so consistent with Article 9.2 of the Agreement; (ii) the Sale Price for FCR's entire stake in GETESA, which totaled 131,992,915 euros; and (iii) the EBIDTA considered for calculation of the Price pursuant to this article [15]. In the same letter, FCR reminded the State that it had forty-five (45) days from the date of the letter *"... to provide notice of its approval or refusal of the EBIDTA and/or Sale Price calculation..."* [16];

(b) Via letter dated July 25, 2012 to the State, FCR noted that the State had (i) failed to respond to FCR's May 16, 2012 letter, and had not objected thereto based upon Article 9 of the Agreement regarding the prescribed deadlines, the Sale Price calculation or its amount totaling 131,992,915 euros; (ii) failed to provide banking instructions for the Sale Price, which became final and payable to FCR; (iii) failed to indicate, in application of the stipulations of Article 9 of the Agreement, that the shares would be transferred and the price would be paid concurrently no later than August 22, 2012; and (iv) received a proposal from FCR for a meeting with a State representative to proceed with transfer of FCR's stake in GETESA to the State [17]; and

(c) The State failed to respond to any of the Claimant's letters, or object to their content.

123. The Respondent did not deny receiving the Claimant's letters or communications mentioned in paragraphs 120-122 above.

124. In light of the Respondent's silence and failure to respond to the various aforementioned letters, as well as the Respondent's failure to pay the Sale Price, which was due to the Claimant under this

---

[13] Exhibit C-55.

[14] Exhibits to appendix C-56.

[15] The Sale Price, as communicated in its letter, is also the sum of:
"- 40% (forty percent) of 6.5 times (six and one half times) GETESA's EBITDA for the year 2010, i.e. a sum of one hundred twenty nine million seven hundred six thousand one hundred eighty (129,706,180) euros, with an EBIDTA of forty nine million eight hundred eighty six thousand nine hundred ninety two (49,886,992) euros, and
- 40% (forty percent) of the dividends distributable in 2013 for the fiscal year closed as of December 31, 2012, estimated at two million two hundred eighty six thousand seven hundred thirty five (2,286,735) euros according to the assumption that the dividends distributable in 2013 for the 2012 financial statements are identical to those distributed in 2011 pursuant to the 2010 financial statements, and that sale of FCR's shares to the State would take place in mid 2012."

[16] Exhibit C-57.

[17] Exhibit C-58.

article on August 22, 2012, the Claimant notified the Respondent, via letter dated August 29, 2012, that there was a dispute, and it initiated the pre-arbitral amicable settlement procedure prescribed in Article 10 of the Agreement [18].

125. The State responded to that letter on September 12, 2012, and requested an extension on initiation of this amicable settlement procedure [19]. FCR responded via letter dated September 28, 2012, and proposed to the State that a joint mechanism be set up for this phase before November 5, 2012, which was the deadline for the first phase of the amicable settlement procedure. This phase and the ICC ADR conciliation process that followed (ADR/147) did not result in an amicable settlement of the disputes between the Parties. Therefore, the ICC's ADR Secretariat decided to close this procedure via communication dated March 22, 2013 [20].

126. Since the amicable settlement phase of the Parties' disputes, prescribed in the Agreement, was respected, FCR initiated this arbitral proceeding.

127. Given that the Arbitral Tribunal has already ruled on the validity and efficacy of the Agreement and Article 9 thereof, the Agreement and its provisions are - like any contract - binding on the Parties by virtue of applicable law, including, for interpretation purposes, Spanish positive law on obligations and contracts [21], as well as the expression of their common will. Since the purpose of the Agreement and its stipulations, specifically to end the Parties' reciprocal claims arising from their relationship as GETESA's shareholders, is a lawful purpose and was freely agreed to by the Parties, there is reason to acknowledge all of the judicial effects of these stipulations (Articles 1274 [22] and 1275 [23] of the Spanish Civil Code, also applicable to the Agreement). These provisions of applicable law specifically allow acknowledgement of the validity of Article 9 of the Agreement and all of the effects resulting therefrom, due to its autonomy and validity, independently from the Agreement's other stipulations or appendices list in the last paragraph of that article.

128. In that regard, it is clear that Article 9 of the Agreement is a cornerstone and central element of the transactional agreements stipulated by the Parties. It is difficult to believe that the Claimant would have signed the Agreement without this stipulation, which ensures its exit from GETESA. Had the clause been considered ineffective or inapplicable, FCR's legitimate attempts based thereupon would not have been satisfied and this would have required interpretation of this stipulation according to the principle of good faith mentioned in Article 1258 of the Spanish Civil Code.

129. By adjusting to the provisions of Article 9.2 of the Agreement, the Claimant satisfactorily demonstrated, in its May 16, 2012 letter the bases for calculation of the Sale Price and of the value

---

[18] Exhibit C-59.

[19] Exhibit C-59.

[20] Exhibit C-62.

[21] According to Article 1809 of the Spanish Civil Code, the settlement is a contract: *"Settlement is a contract whereby the parties, by each giving, receiving or retaining something, prevent a lawsuit or end one which has already begun."* Consequently, Article 1258 of the Spanish Civil Code is fully applicable to the Agreement: *"Contracts are perfected by mere consent, and since then bind the parties, not just to the performance of the matters expressly agreed therein, but also to all consequences which, according to their nature, are in accordance with good faith, custom and the law."*

[22] *"In onerous contracts the prestation or promise of a thing or services by the other party is understood as a cause for each contracting party; in remuneratory contracts, the services or benefits remunerated, and in those of pure beneficence, the mere liberality of the benefactor. "*

[23] *"Contracts without a cause or with an illicit cause are of no effect. The cause is illicit when it is contrary to laws or morals."*

of FCR's stake in GETESA, which was used to calculate the Sale Price, as well as the figures resulting from these calculations following application of this article. According to Article 9.4 of the Agreement (see text above), the State had forty-five workdays to voice its disagreement with these calculations and with the Sale Price. Via the aforementioned July 25, 2012 letter, the Claimant showed that this period, starting on the date of receipt of the May 16, 2012 letter, had elapsed without objection on the part of the Respondent, and indicated, consequently, that as of July 23, 2012 (the last day of the timeframe), the Sale Price had become final. The Respondent has provided no evidence or claim to the contrary in order to refute the statements or evidence used by the Claimant on these issues. Since the Arbitral Tribunal has accepted that the Agreement is valid and binding, it later notes that, absent evidence to the contrary from the Respondent, the conditions triggering the purchase offer under Article 9 have been met, computation of the Sale price for FCR's stake in GETESA has been adjusted pursuant to the conditions prescribed in that article, and the State has failed to pay the Sale Price within the timeframes stipulated, despite FCR's readiness to concurrently transfer its stake in GETESA to the State as of enforcement of Article 9. In any event, the State has neither denied nor refuted the issuance to GECOMSA of the license that triggered the purchase mechanism, or alleged that this issuance is not the event addressed in Article 9.3 (iii) of the Agreement and allowing the Claimant to assert its rights prescribed in Article 9.

130. In light of these circumstances, Article 9 of the Agreement, the applicable law (paragraph xxvii) of this Final Arbitral Award), and the evidence provided to the Arbitral Tribunal, it hereby concludes that:

(i) The Claimant has proven that it exercised its exit rights under Article 9 of the Agreement and of the option contract governed by its stipulations as prescribed, and that the Claimant did so within the contractual timeframes for exercising its rights;

(ii) As of July 23, 2012, the date on which the Sale Price became final, the sale option contract (the "Option") became fully binding between FCR and the State by virtue of the stipulations of Article 9 of the Agreement.

(iii) The Claimant asked the Arbitral Tribunal to order the Respondent to pay the late interest due to its failure to pay the final Sale Price in a timely manner. However, the Claimant did not indicate the interest rate applicable, and the Respondent did not opine on this issue or the date as of which this price would be augmented by the interest. Since the Claimant's July 25, 2012 letter, wherein it sought payment of the Sale Price that would become final on August 22, 2012, validly notified the Respondent that if this Price were not paid within the timeframe arising from Article 9 of the Agreement, i.e., no later than August 22, 2012 (Article 1100 of the Spanish Civil Code[24]) [interest would apply], and since the State failed to pay this Price within the requisite timeframe, the Claimant is owed late interest as of that date on the final Sale Price denominated in euros, without opposition from the Respondent, which necessitates that the applicable interest rate be consistent with the European nature of the payment currency; and

(iv) The Respondent has violated its obligations under Article 9 of the Agreement and the Option, and specifically its obligation to pay FCR the final Sale Price totaling 131,992,915 euros. Therefore, the Arbitral Tribunal can, consistent with Article 1098 of the Spanish Civil Code[25], impose forcible

[24] The pertinent part of Article 1100 of the Spanish Civil Code states: *"Persons obliged to deliver or to do something shall incur in default from the time on which the creditor judicially or extra-judicially demands performance of their obligation."*

[25] The pertinent part of this article is as follows: *"If the obligor does not do something, be will be ordered to execute it at his cost".*

enforcement on the Respondent of its obligations under Article 9 of the Agreement and the Option, including:

(a) Payment to FCR of the sum of 131,992,915 euros in exchange for sale to the State of FCR's stake in GETESA;

(b) Payment to FCR of the late interest on the 131,992,915 euro amount as of August 22, 2012, at the simple twelve-month interest rate regularly published by the European Central Bank for financing operations, and to do so until complete payment of the sums owed to FCR; and

(c) Signature, together with the Claimant, of a slip confirming transfer to the State of the entirety of FCR's stake in GETESA's capital and, consistent with Article 764 of the OHADA Uniform Act Relating to Commercial Companies and the Economic Interest Group[26], registration, as of payment of the Sale Price by of the State, of the sale of these shares in GETESA's Share Transfer Register and in the Shareholders' Accounts, or, if they cannot be found, in any new registers or accounts the State shall decide to open for that purpose and, more generally, to publish or have published any publications regarding this sale.

C. On the arbitration costs

131. Given that (i) the Claimant has prevailed with respect to the Respondent's objections to the Arbitral Tribunal's jurisdiction, and with respect, principally, to its substantive claims, and (ii) the Arbitral Tribunal finds no reason, based upon the Respondent's procedural conduct or the foundation of its arguments, not to reflect these outcomes when deciding who is responsible for paying the arbitration costs, the Arbitral Tribunal hereby decides that the Respondent shall pay the entirety of the arbitration costs (Article 37 (4) and (5) of the Rules).

132. The arbitration costs include the arbitrators' fees and expenses, as well as the ICC's administrative costs, which were set by the Court at a sum of US $835,000.00. They also include the reasonable expenses incurred by the Parties in their defense as a result of this arbitration (Article 37(1) of the Rules). Based upon its filings in this case, the Claimant has incurred costs totaling 1,830,613.79 euros. Moreover, according to the Respondent, its costs have totaled US $600,000. The Arbitral Tribunal notes that the costs associated with the Parties' defense in this arbitration, as declared by the Parties respectively, are reasonable, and have not been challenged by either party.

133. In light of what was decided in paragraphs 131 and 132 above, the Respondent shall: (a) pay the Claimant the sum of 1,830,613.79 euros corresponding to the costs that the Claimant has had to incur to defend its rights; and (b) cover the costs of its own defense. Given that the Respondent has already paid the ICC one-half of the arbitration costs set by the latter, it shall have to reimburse the Claimant the sum of US $417,500.00 corresponding to one-half of the costs which the ICC has already received from the Claimant.

[26] The pertinent part of this article states that: *"In principle, shares shall be freely transferable. The transfer of shares shall be carried out according to the following procedure: 1) for companies not launching a public issue: - by transfer on the registers of the company, for registered shares; the holder's rights result from the single registration on the company's registers..."*

134. In the Terms of Reference (paragraph 16), the Claimant asked the Arbitral Tribunal to order the Respondent to pay interest on the arbitration costs as of the date of the arbitral award. However, it did not opine on the applicable interest rate. The provisions of the Agreement do not address these matters. Moreover, the Respondent has not addressed the date as of which the arbitration costs should be augmented by interest or what the applicable interest rate should be. The Arbitral Tribunal sees no reason not to grant the Claimant's request or not to set the corresponding interest rate. For the same reasons set forth above (paragraph 130 (iii)), the amounts corresponding to the arbitration costs denominated in euros shall be augmented, as of the date of this Final Arbitral Award, by interest at the simple twelve-month interest rate regularly published by the European Central Bank for financing operations. With respect to the arbitration costs denominated in US dollars, they shall be augmented, as of the date of this Final Arbitral Award by the twelve-month simple interest rate of the London Interbank Offered Rate (LIBOR) as set by the ICE Benchmark Administration (IBA) at 11:00 am (London time) on January 1st, for the amounts that remain unpaid.

D. On interim enforcement

135. The Claimant asked the Arbitral Tribunal for interim enforcement of the Final Arbitral Award because the Respondent has repeatedly stated that it would have overturned any award rendered by this Arbitral Tribunal that does not sustain its objections to the Arbitral Tribunal's jurisdictional competence.

136. The Arbitral Tribunal notes that the Respondent essentially stated its reservations in the Terms of Reference - i.e., before any decision by the Arbitral Tribunal on the State's arguments regarding FCR's claims - and subsequently reiterated them on multiple occasions. The Respondent also objected to the Arbitral Tribunal's decisions not to bifurcate the proceeding, and to decide on the merits of the case without first addressing the jurisdiction issues raised by the Respondent.

137. The Respondent is obviously entitled to petition competent state courts in an attempt to overturn this Final Arbitral Award. However, the Arbitral Tribunal notes that: a) this Final Arbitral Award *"...is binding"* and that *"[B]y subjecting their dispute to the Rules,"* the Parties *"... undertake to carry out the upcoming award without delay..."* (Article 34(6) of the Rules); b) the Respondent has stated, since the beginning of this arbitration, that it would appeal any decision by the Arbitral Tribunal for the sole reason of being unfavorable, i.e., without considering the bases of fact and law underlying that decision; c) the Claimant has prevailed with respect to all of its claims; and d) in light of the Respondent's statement that it will seek to overturn the Award, there is a certain risk that enforcement of this Final Arbitral Award will be delayed for reasons whose justification, at this time, is difficult to anticipate.

138. In light of these circumstances, and in exercise of its authorities consistent with *lex arbitri* (i.e., arbitration taking place in France, paragraph 2 of Article 1484 of the C.P.[27] referenced by Article 1506 of the C.P.[28]), the Arbitral Tribunal concludes that the request for interim enforcement is appropriate and well-founded, and that there is cause to order it without having it constitute a

---

[27] Article 1484 of the C.P.: *"As soon as it is rendered, the arbitral award shall be res judicata with regard to the claims adjudicated in that award.*

[28] Article 1506 of the C.P.: *"Unless the parties have agreed otherwise, and subject to the provisions of the present Title, the following articles shall apply to international arbitration: (...) 4)...1484 (paragraphs 1 and 2)..."*

guarantee, because the Respondent has raised no issue casting doubt on the Claimant's solvency in the event the latter were required to pay damages and interest as a result of undue interim enforcement.

IV. DECISIONS

139. For the foregoing reasons, the Arbitral Tribunal hereby decides to:
(i) Reject the Respondent's objections to the validity of the notification of the Request;

(ii) Reject any objection by the Respondent to the Arbitral Tribunal's jurisdiction, and declare that it does have the jurisdiction to resolve all disputes submitted to it by the Parties in this arbitration;

(iii) Note that the Agreement, each of its stipulations (including Article 9 and 11) and appendices, as well as the New Pact are valid and were validly concluded by the Parties; and reject any argument by the Respondent that (a) it did not validly give its consent during conclusion of the Agreement, or that it did not specifically consent to the stipulations contained in Articles 9 and 11 of the Agreement, and to the New Pact, or (b) the Agreement, including Article 9 and 11 thereof as well as its appendices are invalid;

The award may be declared provisionally enforceable.

It shall be served via a certificate of service, unless the parties agree otherwise."

(iv) Note that the Promise was validly exercised by FCR consistent with Article 9 of the Agreement;

(v) Note that the Option became fully obligatory as of July 23, 2012, the date on which the Sale Price as prescribed in the Agreement became final;

(vi) Note that the Respondent violated its obligations under Article 9 of the Agreement and of the Option, specifically with respect to payment of the Sale Price whose final amount is 131,992,915 euros pursuant to the Promise;

(vii) Order the Respondent to fulfill its obligations under Article 9 of the Agreement and under the Option, specifically with respect to:

(a) Payment to FCR of the sum of 131,992,915 euros in exchange for sale to the State of FCR's stake in GETESA;

(b) Payment to FCR of the late interest on the 131,992,915 euro amount as of August 22, 2012, at the simple twelve-month rate regularly published by the European Central Bank for financing operations, and do so until complete payment of the sums owed to FCR; and

(c) Signature, together with the Claimant, of a slip confirming transfer to the State of the entirety of FCR's stake in GETESA's capital, and registration, as of payment of the Sale Price by of the State, of the sale of these shares to the State in GETESA's Share Transfer Register and in the Shareholders' Accounts, or, if they cannot be found, in any new registers or accounts the State shall decide to open for that purpose and, more generally, to publish or have published any publications regarding this sale.

(viii) Order the Respondent (Article 37 of the Rules) to pay the Claimant:

(a) The sum of 1,830,613.79 euros corresponding to the costs that the Claimant has had to incur to defend its rights;

(b) The sum of US $417,500.00 corresponding to one-half of the arbitration costs, which the ICC has set at US $835,000.00;

(c) As of the date of this Final Arbitral Award, the interest on the euro amount mentioned in paragraph (viii) (a) above, at the simple twelve-month interest rate regularly published by the European Central Bank for financing operations, and do so until complete payment to FCR of the sums that are owed and unpaid; and

(d) As of the date of this Final Arbitral Award, the interest on the US dollar amount mentioned in paragraph (viii) (b) above, at the twelve-month LIBOR simple interest rate for US dollars as set by the ICE Benchmark Administration (IBA) at 11:00 am (London time) on January 1st, for the amounts that remain unpaid;

(ix) Order the Claimant to cover its own costs for the defense of its rights;

(x) Order interim enforcement of this Final Arbitral Award (second paragraph of Articles 1484 C.P., which is referenced by Article 1506 C.P.);

and

(xi) Reject any other request, defense or claim submitted in this arbitration that the Arbitral Tribunal has not granted in this paragraph 139, with the exception of the substantive claim that the Claimant formulated as an alternative and ultimately withdrew.

Location of the arbitration: Paris, France.

This Final Arbitral Award was rendered and signed in seven French originals, all of which are equally authentic, on July *8,* 2014.