



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London  
International Arbitration Case Law

*Academic Directors: Ignacio Torterola, Loukas Mistelis\**

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**Award Name and Date:**

Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal (ICSID Case No. ARB/15/21) – Award on Jurisdiction – August 5, 2016

**Case report by:**

Nur Natalia Adnan \*\*, Julia A. Garza\*\*\*

**Summary:**

In its Decision on Jurisdiction, the Tribunal declined jurisdiction over the dispute between Menzies Middle East and Africa SA (incorporated in Luxembourg) and Aviation Handling Services International Limited (incorporated in British Virgin Islands) against Senegal under the Bilateral Investment Treaties between Senegal and the Netherlands and Senegal and the United Kingdom, through the operation of the Most Favored Nation clause contained in Article II of the General Agreement on Trade in Services; and the Bilateral Investment Treaty between Senegal and the United Kingdom, respectively. The dispute concerned actions taken by Senegal over AHS SA, a company in Senegal owned by Menzies Middle East and Africa SA and Aviation Handling Services International Limited, that the claimants alleged were tantamount to expropriation and had not been conducted according to the law. Claimants requested damages for lost profits, loss of market share and loss of opportunity to obtain new exploitation licenses, moral damages and intellectual property rights damages.

The Tribunal concluded that Senegal did not expressly and unequivocally consent to arbitration with nationals of Luxembourg and the British Virgin Islands. It further found that consent to investment arbitration cannot be deduced from a joint analysis of the Most Favoured Nation clause in Article II of the General Agreement on Trade in Services and the Bilateral Investment Treaties that Senegal entered into with third countries of which Claimants are not nationals. The Tribunal held that refusing to respect its obligations under the Most Favoured Nation clause of the General Agreement on Trade in Services was a sovereignty prerogative of Senegal for which appropriate mechanisms were created under the same Agreement. Further, the Tribunal noted that finding that investment arbitration was indeed covered by the scope of the Most Favoured Nation clause would only create a future obligation to offer arbitration to service providers of other member States, but not an obligation to arbitrate in itself or an extension of the offer to arbitrate contained in Bilateral Investment Treaties. The Tribunal also found that Aviation Handling Services International Limited could not avail itself of the arbitration article contained in the Bilateral Investment

Treaty between Senegal and the United Kingdom because said Treaty excludes the territories of the British Virgin Islands.

**Main issues:** jurisdiction *ratione voluntatis*, State sovereignty, consent to arbitration by States, offer to arbitrate by States, Most Favoured Nation clause, Article II of GATS

**Tribunal:** Mr. Bernard Hanotiau (President), Mr. Hamid Gharavi (Co-arbitrator), Mr. Pierre Mayer (Co-arbitrator)

**Claimants' Counsel:** Rasseck Bourgi, Paris, France; Yves Nouvel, Paris, France

**Respondent's Counsel:** Simon Ndiaye, Paris, France; François Meyer, Paris, France; Antoine Diome, Government of Senegal.

\* Directors can be reached by email at [ignacio.tortero@internationalarbitrationcaselaw.com](mailto:ignacio.tortero@internationalarbitrationcaselaw.com) and [loukas.mistelis@internationalarbitrationcaselaw.com](mailto:loukas.mistelis@internationalarbitrationcaselaw.com)

\*\* Nur Natalia Adnan is a Georgetown University Law Center LLM graduate with a major in International Arbitration and Dispute Resolution. Ms. Adnan completed her undergraduate legal studies at the University of Bucharest School of Law and a Bachelor of Economics degree at the Bucharest Academy of Economic Studies. Ms. Adnan also holds an LLM in International Banking Law from the University of London and is fluent in English, French and Arabic.

\*\*\* Julia A. Garza is an independent consultant on issues of international law with experience in both the public and private sector, admitted to practice in New York and Mexico. Ms. Garza is a Senior Research Associate at the Global Center for Development Law and Policy and a professor of Private International Law in Mexico City. She holds a Master's degree in International Commercial Law from Université Paris X, and an LL.M. in International Law and Justice from Fordham Law School. Ms. Garza is fluent in Spanish, English and French. She can be reached at [julia.a.garza@gmail.com](mailto:julia.a.garza@gmail.com).

## Digest:

### 1. Facts of the Case

Claimants are Menzies Middle East and Africa S.A. (“MMEA”), a company incorporated in Luxembourg; and Aviation Handling Services International Limited (“AHSI”), a company incorporated in the British Virgin Islands (¶¶ 1-2). Respondent is the Republic of Senegal (“Senegal” or “Respondent”) (¶ 4).

On 12 July 2002, Aviation Handling Services SA (AHS SA) was constituted under the law of Senegal for the provision of aviation handling services at airports by the brothers Ibrahim and Karim Aboukhalil, and Mamadou Pouye (¶36). In December 2002, AHS SA obtained a permit to conduct operations at several airports in Senegal (¶46). On 2 October 2003, MMEA and AHSI bought 99.98% and .01% of AHS SA respectively (¶¶41-42).

During the first semester of 2013, the Commission of Instruction of the Court of Repression of Illicit Enrichment (“CREI”), opened a file on the Aboukhalil brothers and M. Pouye (¶49). In June 2013, CREI designated an interim administrator for AHS SA, in order for AHS SA to comply with its legal duties and to block transfers of funds to MMEA and AHSI (¶51). Claimants argue that the procedure was not legally conducted, that it is not working properly and that the interim administration is tantamount to expropriation (¶¶52, 53, 56); while Respondent argues the interim administration was set up to prevent flight of capitals (¶54). In

March 2015, CREI found against the Aboukhalil brothers and Mr. Pouye for illicit enrichment and ordered the seizure of their assets, including their stock in MMEA and AHSI (¶57). The Aboukhalil brothers and Mr. Pouye attempted several legal resources without success (¶¶57-59). MMEA and AHSI now belong to the State of Senegal (¶63).

Claimants argue that the ICSID Tribunal's jurisdiction *ratione voluntatis* stems from the Most Favoured Nation clause ("MFN") in the General Agreement on Trade in Services ("GATS") which allows MMEA to benefit from the arbitration procedure established in Article 10 of the Bilateral Investment Treaty ("BIT") between Senegal and the Netherlands, or Article 8 of the BIT between Senegal and the United Kingdom ("UK"), given that those countries are also signatories of the GATS (¶65). Claimants also argue that AHSI has access to the BIT between Senegal and the UK through Article 12 of the Code of Investments of Senegal (¶66).

The Republic of Senegal ("Senegal" or "Respondent") argues that the ICSID Tribunal has no jurisdiction *ratione voluntatis* because there is no standing offer to arbitrate with the Claimants (¶67).

## **2. Procedural Background**

Claimants filed their Request for Arbitration on 17 April 2015, which was registered by the ICSID Secretariat on the 1<sup>st</sup> of June 2015 (¶¶ 6, 9). The Secretariat invited the Claimants to submit additional information on the MFN clause contained in Article II of the GATS and the BITs between Senegal and the Netherlands and between Senegal and the United Kingdom (¶ 7).

On 2 July 2015, pursuant to Article 37(2) of the ICSID Convention, Claimants nominated Hamid Gharavi as an arbitrator (¶¶10,11). On 26 July 2015, Respondent nominated Pierre Mayer as an arbitrator (¶12). On 11 September 2015, the Parties nominated Bernard Hanotiau as President of the Tribunal (¶13). On 14 September 2015 the Claimants submitted a Request on Provisional Measures, to which Senegal responded on 15 October 2015 (¶¶16, 20). During the first hearing in Paris on 19 October 2015, the Parties presented orally their Reply and Rejoinder on Provisional Measures (¶22). On 30 October 2015, the Tribunal issued a first procedural order on the bifurcation of the preliminary jurisdictional objections of the Respondent and the merits (¶24). On 2 December 2015, the Tribunal issued a second procedural order recommending the Respondent to abstain from aggravating the dispute or the development of the arbitration or to prevent the Claimants in any way from participating in the proceedings (¶26). On 1<sup>st</sup> December 2015, the Respondent submitted a Memorial on Jurisdiction, and its Reply on Jurisdiction on 19 February 2016 (¶¶27, 29). The Claimants submitted their Counter-Memorial and Rejoinder on Jurisdiction on 19 January 2016 and 21 March 2016, respectively (¶¶28, 30). The hearing on Jurisdiction was held in Paris, France, on 15 April 2016.

## **3. Analysis of Legal Issues by the Tribunal**

The Tribunal separately addressed the issue of jurisdiction to hear (1) MMEA's claims (¶¶129-151); and (2) AHSI's claims (¶¶ 152-157).

### 3.1 Jurisdiction over MMEA's Claims

MMEA argued that (1) the MFN clause in Article 2 of the GATS granted MMEA access to the offer to arbitrate as included in the two BITs invoked (¶114); and (2) the scope of the MFN clause of GATS includes the offer to arbitrate in BITs because it includes all measures that affect commerce of services (¶115). Further, MMEA argued that the two BITs invoked confer more favorable treatment to providers of similar services under GATS (¶119).

The Tribunal concluded that Senegal had not consented to arbitration with Luxembourg nationals and thus the Tribunal had no jurisdiction to hear MMEA's claims (¶129).

Claimants argument would found consent on a complex and equivocal mechanism of interplay between GATS and the BITs signed by Senegal with other GATS member States (¶131), whereas consent by States in international law in general and international investment law in particular must be clear and unequivocal (citing *ICS Inspection v. Argentina*, *Wintershall v. Argentina*, *Fireman's Fund v. Argentina*) (¶130).

The Tribunal noted that Article II of GATS is silent as to arbitration or dispute resolution and therefore there is no express and unequivocal consent. The Tribunal would be required to undertake a very complex analysis on the scope of Article II and that would still not suffice to establish jurisdiction (¶¶132, 133).

Further, the Tribunal noted that none of the BITs invoked by MMEA were entered into with Luxembourg. The Tribunal is asked to create consent by pasting dissimilar pieces between the MFN clause and arbitration offers in BITs with third States. That very request shows that the offer to arbitrate is in the very least equivocal and doubtful (¶¶134, 135).

In the Tribunal's view, even if it found that the scope of Article II of the GATS involves investment arbitration, that would only create an obligation to offer arbitration to service providers of those States in the future, not an extension of the offer to arbitrate contained in BITs already signed with different States. That obligation to offer arbitration in the future can be not complied with by States; States have that prerogative as sovereigns (¶¶136-144).

The Tribunal stated that the finding that service providers under GATS could benefit from offers to arbitrate in BITs with States they are not nationals of would have very serious consequences and that under the principles of the Vienna Convention, particularly the principle of good faith, such finding would have to be established with high certainty, which is not the case here (¶¶145, 146).

Lastly, the Tribunal noted that the issue of whether a service provider could benefit of an offer to arbitrate contained in a BIT through the application of the MFN clause of Article II of GATS arose during the negotiations of the latter but no conclusion was reached (and in any event no clear and unequivocal consent by States is to be found) (¶¶147-149). Those discussions took place during 1993-1994, long before ICSID was so used as it is today and thus the delegations would not have given through their discussions a clear and unequivocal consent to the application of the MFN clause to offers to arbitrate contained in BITs (¶149). The fact that GATS member States have signed so many BITs with an offer to arbitrate is a sign that no offer to arbitrate is contained in GATS through the application of the MFN clause (¶150).

### 3.2 Jurisdiction over AHSI's claims

The Tribunal concluded it did not have jurisdiction to hear AHSI's claims. AHSI may not benefit from the terms of the Senegal-UK BIT because it is incorporated in the British Virgin Islands, which are not included in the territorial scope of application of the BIT. Thus, for the purposes of that BIT, AHSI is not a national of the UK (¶¶152-154).

Article 12 of the Code of Investments of Senegal establishes that: "the disputes between foreign individuals or legal entities and Senegal related to the application of this Code will be settled in accordance to the procedure of conciliation or arbitration stemming from: either a common agreement by both parties; or, from agreements and treaties related to the protection of investments concluded between the Republic of Senegal and the State of which the investor is a national" (¶155).

For the Tribunal, AHSI's argument that it must be considered as British for the purposes of this arbitration because it is so regarded under general international law even though the BIT between Senegal and the UK does not cover the British Virgin Islands, would not be reasonable and would indeed be against the intention of Senegal and UK which decided not to extend the coverage of the BIT to that territory (¶156).

## 4. Decision

The Tribunal found that it had no jurisdiction over the claims of MMEA and AHSI because Senegal had not consented to arbitration. Thus the Tribunal did not analyze the other arguments by the parties, namely jurisdiction *ratione materiae* and *ratione personae* (¶158). The Tribunal noted that article 61(2) of the ICSID Convention gives it a margin of discretion as to the repartition of costs. It further noted that in its view the losing party should bear the arbitration expenses unless objective elements justify a different solution. The Tribunal held that was not the case here and that Claimants had not prevailed on their arguments to establish they had standing offers to arbitrate before ICSID their claims against Senegal. The Tribunal directed the Claimants to cover the arbitration expenses and to pay Senegal its legal costs (¶¶162-164).