

# Exhibit 1



# Award



**ICC INTERNATIONAL COURT OF ARBITRATION**

**CASE No. 25820/AYZ/ELU**

**NAS AFGHANISTAN**

(Afghanistan)

**vs/**

**AFGHANISTAN CIVIL AVIATION AUTHORITY**

(Afghanistan)

**AFGHANISTAN MINISTRY OF TRANSPORTATION AND CIVIL AVIATION**

(Afghanistan)

**ARIANA AFGHAN AIRLINES CO. LTD.**

(Afghanistan)

This document is a certified true copy of the original of the Final Award rendered in conformity with the Rules of Arbitration of the International Chamber of Commerce.

**IN THE MATTER OF AN ARBITRATION UNDER THE 2012 RULES OF  
ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE**

**ICC CASE No. 25820/AYZ/ELU**

**NAS AFGHANISTAN (AFGHANISTAN)**

**CLAIMANT**

**vs/**

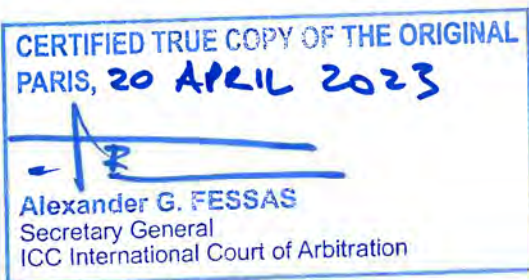
- (1) AFGHANISTAN CIVIL AVIATION AUTHORITY (AFGHANISTAN)**  
**(2) AFGHANISTAN MINISTRY OF TRANSPORTATION AND CIVIL AVIATION (AFGHANISTAN)**  
**(3) ARIANA AFGHAN AIRLINES CO. LTD. (AFGHANISTAN)**

**RESPONDENTS**

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**FINAL AWARD**

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**Arbitral Tribunal**

**Mr. Laurence Shore, Co-Arbitrator**  
**Professor Dr. Mohamed Abdel Wahab, Co-Arbitrator**  
**Ms. Caline Mouawad, Presiding Arbitrator**



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## ABBREVIATIONS

<b>ACAA</b>	Afghanistan Civil Aviation Authority
<b>Afghanistan</b>	The Islamic Republic of Afghanistan
<b>Airports</b>	Afghanistan's international airports in Kabul, Kandahar, and Herat
<b>Amadeus</b>	Amadeus IT Group S.A.
<b>Answer</b>	Respondents' Answer dated February 3, 2021
<b>Arbitration</b>	ICC Case No. 25820/AYZ/ELU
<b>Arbitration Agreement</b>	Clause 7.2 of the Basic Agreement
<b>Ariana</b>	Ariana Afghan Airlines Co. Ltd.
<b>Ariana Concession</b>	Concession awarded to Ariana by authorization of the Council of Ministers of the Government of the Islamic Republic of Afghanistan to Ariana on May 28, 2012, for exclusive GHS at the Airports
<b>Arinc</b>	Arinc Incorporated
<b>Assignment Agreement</b>	Assignment of Agreements between NAS Kuwait and NAS Afghanistan dated January 13, 2014
<b>Basic Agreement</b>	Agreement between Ariana, NAS Kuwait, the Ministry of Transportation, and ACAA dated December 10, 2013
<b>BRS</b>	Baggage Reconciliation System
<b>BRT</b>	Business Receipt Tax
<b>Claimants</b>	First Claimant and Second Claimant
<b>CUPPS</b>	Common Use Passenger Processing System
<b>Dubai Meetings</b>	Meetings held in Dubai on April 30 and May 1, 2014 between Ariana and NAS Afghanistan
<b>Equipment</b>	Ground Support Equipment
<b>First Claimant</b>	NAS Kuwait
<b>First Respondent</b>	ACAA





<b>GAAC</b>	GAAC Holding SPV Limited
<b>GHS</b>	Ground Handling Services
<b>Government</b>	The Government of the Islamic Republic of Afghanistan (today, the Islamic Emirate of Afghanistan)
<b>GSE</b>	Ground Support Equipment
<b>HKIA</b>	Kabul's Hamid Karzai International Airport
<b>ICC Court</b>	International Court of Arbitration of the International Chamber of Commerce
<b>ICC Guidance Note</b>	ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic
<b>ICC Rules</b>	ICC Rules of Arbitration dated January 1, 2012
<b>ICC Secretariat</b>	Secretariat of the ICC Court
<b>JVPA</b>	Joint Venture Partnership Agreement dated November 4, 2013, between NAS Kuwait and Ariana
<b>Management Fee</b>	Management fee paid to NAS Kuwait and/or its affiliates to provide support services to NAS Afghanistan, per the JVPA
<b>Ministry of Transportation</b>	Afghanistan Ministry of Transportation and Civil Aviation
<b>NAS Afghanistan</b>	NAS Afghanistan
<b>NAS Kuwait</b>	National Aviation Services W.L.L.
<b>Parties</b>	Claimants and Respondents
<b>Performance Guarantee</b>	USD 1 million performance guarantee issued on February 16, 2019, by Afghanistan International Bank
<b>PIL</b>	Afghanistan's Private Investment Law of December 21, 2005
<b>Post-Hearing Submission</b>	Parties' Post-Hearing Submissions
<b>President's Letter</b>	Letter from President Ashraf Ghani to the ACAA dated August 8, 2020
<b>Procedural Order No. 1</b>	Procedural Order No. 1 dated April 20, 2021



<b>Request</b>	Claimants' Request for Arbitration dated November 19, 2020
<b>Respondents</b>	First Respondent, Second Respondent, and Third Respondent
<b>RFP</b>	Ariana's Request for Proposal dated August 7, 2013
<b>Second Claimant</b>	NAS Afghanistan
<b>Second Respondent</b>	Ministry of Transportation
<b>Statement of Claim</b>	Claimants' Statement of Claim dated June 4, 2021
<b>Statement of Costs</b>	Parties' Statements of Costs dated July 7, 2022
<b>Tender</b>	Ariana's Tender No. FG/1392/GRH002
<b>Termination Notice</b>	Notice of Avoidance of the JVPA and NAS Services and Additional Grounds for Termination dated October 4, 2020
<b>Terms of Reference</b>	Terms of Reference dated April 18, 2021
<b>Third Respondent</b>	Ariana
<b>Valuation Date</b>	The date when Claimants were served with the Termination Notice—October 18, 2020



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1. This dispute concerns an agreement pursuant to which Claimants provided ground handling services at three airports in Afghanistan. Claimants allege that Respondents breached this agreement by, *inter alia*, failing to enforce Claimants' exclusive right to render these services, unlawfully terminating the agreement and taking over the equipment and operations, and cashing a performance guarantee. For the reasons set out in this Award, the Tribunal finds that Respondents breached their contractual obligations and grants Claimants' requested relief in part.

**I. BACKGROUND INFORMATION**

**A. THE PARTIES**

**1. Claimants**

2. First Claimant is National Aviation Services W.L.L., a company incorporated under the laws of Kuwait, with its registered office located at P.O. Box 301, Farwaniya 81014, Kuwait ("NAS Kuwait" or "First Claimant").
3. Second Claimant is NAS Afghanistan, an affiliate of First Claimant and a company registered under the laws of Afghanistan with its principal office located at Hamid Karzai International Airport, Kabul, Afghanistan ("NAS Afghanistan" or "Second Claimant").  
  
(together with NAS Kuwait, "Claimants").
4. Claimants are represented in this arbitration (the "Arbitration") by Gibson, Dunn & Crutcher UK LLP:

Cyrus Benson ([CBenson@gibsondunn.com](mailto:CBenson@gibsondunn.com))  
Sarah Wazen ([SWazen@gibsondunn.com](mailto:SWazen@gibsondunn.com))  
Nadia Wahba ([NWahba@gibsondunn.com](mailto:NWahba@gibsondunn.com))  
Gibson Dunn & Crutcher UK LLP  
Telephone House, 2-4 Temple Avenue  
London, EC4Y 0HB  
United Kingdom  
Tel: +44 (0)20 7071 4000  
Fax: +44 (0)20 7071 4244

**2. Respondents**

5. First Respondent is Afghanistan Civil Aviation Authority, with its address at Ansari Wat, Kabul, Afghanistan ("ACAA" or "First Respondent"), and initially represented by Head-Director Mr. Mohammad Qasim Wafayezada ([wafayezada@acaa.gov.af](mailto:wafayezada@acaa.gov.af)).





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6. Second Respondent is the Afghanistan Ministry of Transportation and Civil Aviation, with its address at Ansari Wat, Kabul, Afghanistan (“**Ministry of Transportation**” or “**Second Respondent**”), and initially represented by the Minister of Transportation and Civil Aviation Mr. Qudratullah Zaki ([qudrat.zaki@gmail.com](mailto:qudrat.zaki@gmail.com)).
7. Third Respondent is Ariana Afghan Airlines Co. Ltd., a company organized under the laws of Afghanistan with its principal office located at Char-rahi Shaheed, Shahr-e Naw, Kabul, Afghanistan (“**Ariana**” or “**Third Respondent**”) and initially represented by its President Mr. Alem Ibrahim ([president@flyariana.com](mailto:president@flyariana.com)).

Together, the ACAA, the Ministry of Transportation, and Ariana are hereinafter referred to as “**Respondents**.”

8. Claimants and Respondents are hereinafter jointly referred to as the “**Parties**.”
9. Hogan Lovells represented Respondents in this Arbitration from the outset until Hogan Lovells’s withdrawal effective September 23, 2021<sup>1</sup>:

Mr. Dennis H. Tracey III ([dennis.tracey@hoganlovells.com](mailto:dennis.tracey@hoganlovells.com))  
Ms. Irina Goga ([irina.goga@hoganlovells.com](mailto:irina.goga@hoganlovells.com))  
Hogan Lovells US LLP  
390 Madison Avenue  
New York, NY 10017  
United States  
Tel: +1 212 918 3000  
Fax: +1 212 918 3100

Mr. Kieron O’Callaghan ([kieron.ocallaghan@hoganlovells.com](mailto:kieron.ocallaghan@hoganlovells.com))  
Mr. Michael Taylor ([michael.taylor@hoganlovells.com](mailto:michael.taylor@hoganlovells.com))  
Hogan Lovells International LLP  
Atlantic House  
Holborn Viaduct  
London EC1A 2FG  
United Kingdom

10. By email dated September 22, 2021, Hogan Lovells shared with the Tribunal the contact details of the Respondents’ representatives with whom Hogan Lovells had been in communications on the eve of its withdrawal, namely: Mr. Muhib-Ullah Zahid ([mzahid.afg@gmail.com](mailto:mzahid.afg@gmail.com)), Mr. Fahad Afghan ([Fahad\\_afghan@live.com](mailto:Fahad_afghan@live.com)), Mr. Fahad

<sup>1</sup> See Email from Hogan Lovells dated September 15, 2021; see also *infra* ¶¶ 54-57.



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Momand ([fahad.momand@acaa.gov.af](mailto:fahad.momand@acaa.gov.af)), [s.hasib88@gmail.com](mailto:s.hasib88@gmail.com),  
[dg.administration@acaa.gov.af](mailto:dg.administration@acaa.gov.af); and [azimialiahmad@gmail.com](mailto:azimialiahmad@gmail.com).

11. By email dated October 1, 2021, Claimants' counsel advised that it had carried out inquiries in relation to Respondents' contact details and provided the following additional information: (1) for First and Second Respondents, Mr. Ahlaj Hamidullah Akhundzada, Minister of Transport and Head of Civil Aviation ([info@mot.gov.af](mailto:info@mot.gov.af)); and (2) for Third Respondent, Mr. Qari Rahmatullah Gulzad, CEO ([ceo@flyariana.com](mailto:ceo@flyariana.com), [info@flyariana.com](mailto:info@flyariana.com), [kabul@flyariana.com](mailto:kabul@flyariana.com)).
12. Since September 23, 2021, Respondents have not been represented by outside counsel.

**B. THE ARBITRAL TRIBUNAL**

13. The Arbitral Tribunal (hereinafter referred to as the "**Tribunal**") is composed of the following arbitrators:

**i) Mr. Laurence Shore** (nationality: United States, United Kingdom)

Bonellierede  
1 Via Barozzi  
20122 Milan  
Italy  
Tel: +39 02 771131  
Email: [laurence.shore@belex.com](mailto:laurence.shore@belex.com)

who was jointly nominated by Claimants on November 19, 2020, and confirmed by the International Court of Arbitration of the International Chamber of Commerce (hereinafter referred to as the "**ICC Court**") at its session of January 27, 2021.

**ii) Professor Dr. Mohamed S. Abdel Wahab** (nationality: Egypt)

Zulficar & Partners Law Firm  
Nile City Building  
South Tower, Eighth Floor  
2005A Corniche El Nil Street  
Cairo 11221  
Egypt  
Tel: +20(2) 24612-160  
Email: [msw@zulficarpartners.com](mailto:msw@zulficarpartners.com)

who was jointly nominated by Respondents on January 4, 2021, and confirmed by the ICC Court at its session of January 27, 2021.



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iii) **Ms. Caline Mouawad** (nationality: Lebanon, United States)

Chaffetz Lindsey LLP  
1700 Broadway, 33<sup>rd</sup> floor  
New York, NY 10019  
United States  
Tel: +1 212 257 6923  
Email: [caline.mouawad@chaffetzlindsey.com](mailto:caline.mouawad@chaffetzlindsey.com)

who was jointly nominated by the co-arbitrators, in consultation with the Parties, and confirmed as President of the Tribunal by the ICC Court at its session of March 2, 2021.

**C. THE AGREEMENT**

14. First Claimant NAS Kuwait, and Respondents Ariana, the Ministry of Transportation, and the ACAA entered into an agreement dated December 10, 2013 (the “**Basic Agreement**”), which is the subject of the Arbitration. As detailed below,<sup>2</sup> NAS Kuwait later assigned the Basic Agreement to NAS Afghanistan.

**D. THE ARBITRATION AGREEMENT**

15. Claimants rely on the arbitration agreement set out at Clause 7.2 of the Basic Agreement, which provides as follows:

**7.2 Resolution of Disputes**

Notice of dispute

*If any Dispute, issue or difference arises between the Parties out of or relating to this Agreement, either Party may give written notice to the other Party that a Dispute exists (“**Dispute Notice**”). The Dispute Notice must include full particulars of the nature of the Dispute and the Parties shall in the first instance in good faith and using all reasonable efforts seek to settle the Dispute amicably through negotiation according to the provisions of this Article.*

*If the matter has not been resolved within sixty (60) Working Days of the disputing Party’s notice, or if the Parties fail to meet within twenty (20) Working Days, any Party may initiate arbitration of the dispute as provided hereinafter in Article 7 of the Agreement.*

<sup>2</sup> See *infra* ¶ 120.





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Jurisdiction

*Courts located within the Jurisdiction shall not have jurisdiction to settle any Dispute between the Parties.*

*The Parties hereby mutually agree that irrespective the nationality of the Parties, the countries whereby the Services shall be executed, the currencies used for payment by the Parties or Users, the Governing Law as chosen by the Parties, or any other foreign or national element, any Dispute, controversy, claim or difference of any kind whatsoever arising or occurring between the Parties in relation to any issue or matter arising under, out of, or in connection with this Agreement including its interpretation, performance or non-performance, enforceability or breach, which was not resolved according to article 7 above shall be exclusively and finally settled by Arbitration according to the below provisions.*

*Unless otherwise mutually agreed between the Parties, any proceedings initiated by any of the Parties in front of any court located in the Jurisdiction, in breach of this Article 7 and the exclusivity granted to the Parties to settle the Dispute by Arbitration, shall be rejected by the designated court as to the form for lack of jurisdiction.*

ICC Arbitration

*In the event of any dispute, controversy, claim or difference of any kind whatsoever arising or occurring between the Parties in relation to any issue or matter arising under, out of, or in connection with this Agreement including its interpretation, performance or non-performance, enforceability or breach, which was not resolved according to the above, shall be exclusively and finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the 'ICC'), by a panel of three arbitrators appointed in accordance with such rules as in effect on the date hereof according to the below.*

*The arbitrators should speak, write and read English at the standard of a native English speaker. The primary factor in choosing an arbitrator must be the arbitrator's expertise in relation to the issues in dispute.*

*The seat and venue of such arbitration shall be in London, United Kingdom and all the hearings shall be held at this seat.*

*The language of arbitration, proceedings, any decisions or awards of the arbitrators and all documents prepared, filed or submitted for the purposes of said proceedings shall be English.*



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*The law governing any arbitration proceedings under this Agreement shall be the governing law set out in this Agreement, and not the principle of ex aequo et bono or otherwise.*

*The award of the arbitrators shall be final and binding upon the parties to the arbitration and all rights of appeal are hereby excluded. The award may be enforced by any court of competent jurisdiction or other competent authority.*

*Any determination, certification or award made pursuant to this Article shall, to the extent necessary to give effect to the terms of this Agreement and the interests of the Parties as set forth herein, apply retroactively to the time at which the circumstances giving rise to the underlying dispute or difference between the Parties arose. The arbitrators shall be entitled to award interest to either Party in whose favor such a determination, certification or award is made.*

*Enforcement of arbitral awards*

*In this Agreement the Parties expressly and mutually and independently agreed to refer their disputes to arbitration in accordance with the Article 34.4 above. Therefore Ariana confirms and acknowledges to NAS that (i) the choice of arbitration shall be valid and enforceable in the Islamic Republic of Afghanistan; and (ii) duly issued ICC arbitral awards are recognized and enforceable in the Islamic Republic of Afghanistan and would be recognized and upheld by the courts of Islamic Republic of Afghanistan without retrial or further review on its merits, provided that a leave to enforce (exequatur) is granted to said-award.<sup>3</sup>*

16. Claimants also invoke Article 30(5) of Afghanistan's Private Investment Law of December 21, 2005 (the "PIL"), which provides as follows:

*If a dispute arises pursuant to a contract or other agreement entered into between a Foreign investor or an Approved Enterprise with foreign equity ownership on one hand and an administration or organization of the State on the other with regard to a Foreign Investment, or [ ] if a claim is filed under Chapter 7 of this Law, the parties shall endeavor to settle such disagreement amicably by mutual discussions.*

*Failing such amicable settlement, and unless the parties to such dispute otherwise agree, the parties shall submit such dispute to:*

<sup>3</sup> Exhibit C-005, Basic Agreement, Clause 7.2 (emphases in original).





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*1. The International Centre for Settlement of Investment Disputes ('ICSID') for settlement, pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965;*

*2. Arbitration in accordance with UNCITRAL Rules if ICSID rules preclude [the Foreign Investor from] arbitrating before ICSID. The Government, in such cases, consents to the submission of any such dispute to ICSID for settlement by arbitration in accordance with Article 25(1) of the Convention.<sup>4</sup>*

17. For the reasons set forth below,<sup>5</sup> this arbitration provision is not relevant for purposes of this Arbitration, and the Tribunal's jurisdiction rests on the arbitration clause in the Basic Agreement quoted above.<sup>6</sup>

**E. SUBSTANTIVE APPLICABLE LAW**

18. Clause 7.1 of the Basic Agreement provides that it is “governed by, construed and interpreted in accordance with the laws of the Jurisdiction, unless the Parties agreed expressly otherwise herein.”<sup>7</sup> Accordingly, the laws of Afghanistan govern the Basic Agreement.

**F. APPLICABLE PROCEDURAL RULES**

19. The rules governing this Arbitration are the ICC Rules of Arbitration of the International Chamber of Commerce dated January 1, 2012 (the “**ICC Rules**”), the Terms of Reference, and the procedural rules issued by the Tribunal as reflected in its procedural orders.

**G. LANGUAGE OF THE ARBITRATION**

20. Pursuant to Clause 7.2 of the Basic Agreement, the language of the Arbitration is English.<sup>8</sup>

**H. THE PLACE OF THE ARBITRATION**

21. Pursuant to Clause 7.2 of the Basic Agreement, the place (or seat) of the Arbitration is London, United Kingdom.<sup>9</sup>

<sup>4</sup> Exhibit C-001, PIL, Art. 30(5).

<sup>5</sup> See *infra* ¶ 158.

<sup>6</sup> See *infra* ¶¶ 152-159.

<sup>7</sup> Exhibit C-005, Basic Agreement, Clause 7.1.

<sup>8</sup> *Id.*, Clause 7.2.

<sup>9</sup> *Id.*



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**I. MEANS OF COMMUNICATION**

22. To date, all written communications between the Parties and the Tribunal have been exchanged by e-mail, as allowed by Article 3(2) of the ICC Rules, agreed in paragraph 15 of the Terms of Reference and paragraph 2.3 of Procedural Order No. 1, and encouraged in paragraph 13 of the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (“**ICC Guidance Note**”). The ICC Guidance Note also requires that communications with and from the Secretariat of the ICC Court (“**ICC Secretariat**”) be in electronic form.

**II. PROCEDURAL HISTORY**

23. The ICC Secretariat received a Request for Arbitration from Claimants on November 19, 2020 (“**Request**”). Claimants jointly nominated Mr. Laurence Shore as co-arbitrator and proposed that the two co-arbitrators jointly nominate the President of the Tribunal within 30 days of the appointment of the second arbitrator.
24. The ICC Secretariat notified the Request to Respondents on December 4, 2020 by courier and email, and informed Respondents that they had 30 days to submit their Answer to the Request.
25. On December 10, 2020, Claimants provided an initial, provisional estimate of the value of their claims of approximately USD 40 million, noting that their losses have not been fully quantified at this stage of the proceedings.
26. On December 11, 2020, the ICC Secretariat invited comments from the Parties on Mr. Shore’s disclosures.
27. By letter dated December 22, 2020, Hogan Lovells:
- informed the ICC Secretariat that it had been instructed to represent Respondents;
  - requested an additional 30 days to serve the Answer, *i.e.*, until February 3, 2021;
  - confirmed that Respondents would nominate an arbitrator on January 4, 2021;
  - confirmed that Respondents had no objection to the appointment of Mr. Shore; and
  - agreed to Claimants’ proposal that the two co-arbitrators jointly nominate the President of the Tribunal within 30 days of the appointment of the second arbitrator.
28. Respondents jointly nominated Prof. Dr. Mohamed Salah Abdel Wahab as co-arbitrator on January 4, 2021.



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29. On January 6, 2021, the ICC Secretariat granted Respondents' request for an extension to submit their Answer and fixed February 3, 2021 as the new deadline.
30. The next day, the ICC Secretariat invited comments from the Parties on Prof. Dr. Abdel Wahab's disclosures. The Parties subsequently requested additional details regarding certain disclosures, and an exchange ensued between the Parties and Prof. Dr. Abdel Wahab in this regard. Ultimately, on January 22, 2021, the Parties confirmed that they had no objection to the appointment of Prof. Dr. Abdel Wahab.
31. By letter dated January 26, 2021, Respondents requested an additional 30 days to submit their Answer, *i.e.*, until March 5, 2021.
32. The ICC Court confirmed Mr. Shore and Prof. Dr. Abdel Wahab as co-arbitrators on January 27, 2021.
33. On January 28, 2021, the ICC Secretariat invited Claimants' comments on Respondents' request for an extension of time for their Answer, to which Claimants objected the next day. Accordingly, the ICC Secretariat confirmed the deadline of February 3, 2021 in its letter of February 1, 2021.
34. Respondents filed their Answer on February 3, 2021 ("**Answer**").
35. On February 17, 2021, the co-arbitrators informed the ICC Secretariat that, following a process of consultation with the Parties for the limited purpose of nominating the President of the Tribunal (as expressly agreed by the Parties), the co-arbitrators nominated Ms. Caline Mouawad as President of the Tribunal.
36. On February 22, 2021, the ICC Secretariat invited the Parties' comments on Ms. Mouawad's disclosures by March 1, 2021, and noted that it will consider the absence of comments from a party as meaning that said party does not object to her confirmation. On March 1, 2021, Respondents confirmed that they had no objection to her appointment. Claimants did not provide any comments.
37. Accordingly, on March 3, 2021, the ICC Secretariat informed the Parties of Ms. Mouawad's confirmation as presiding arbitrator. The ICC Secretariat also informed the Parties that the ICC Court fixed the provisional advance on costs at USD 145,000.
38. By email dated March 8, 2021, the Tribunal:
  - proposed to schedule the Case Management Conference by Zoom either on March 25 or April 9, 2021 and requested counsel's availability no later than March 11, 2021;





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- invited the Parties to confer on a proposed procedural timetable and Procedural Order No. 1 and to revert by March 19, 2021 either with a joint proposal or with their respective positions; and
  - invited the Parties to submit their respective Statement of the Claims, Issues, and Relief Sought (Art. 23.1(c)) of the ICC Rules) for inclusion in the Terms of Reference by March 19, 2021 and to limit their submission to no more than five pages.
39. On the same day, the Parties confirmed their availability for a Case Management Conference on April 9, 2021, which the Tribunal fixed for 9 a.m. (ET).
40. By letter dated March 12, 2021, the ICC Secretariat informed the Parties that the ICC Court fixed the advance on costs at USD 635,000.
41. On March 19, 2021, the Parties submitted their respective Statement of the Claims, Issues, and Relief Sought for inclusion in the Terms of Reference. The Parties also jointly requested a one-week extension (*i.e.*, until March 26, 2021) to revert on a proposed procedural timetable and Procedural Order No. 1, which extension was granted.
42. On March 24, 2021, the Tribunal shared with the Parties a draft of the Terms of Reference for their comments, which were invited by April 1, 2021. Two days later, on March 26, 2021, the Parties submitted their proposed procedural timetable and draft Procedural Order No. 1.
43. On March 30, 2021, the Parties provided their comments to the draft Terms of Reference.
44. On April 7, 2021, and in anticipation of the Case Management Conference, the Tribunal sent to the Parties (i) a revised draft Terms of Reference, incorporating the Parties' comments and further comments from the Tribunal; (ii) a revised draft Procedural Order No. 1 and procedural timetable, reflecting the Tribunal's proposed edits; (iii) redlines of both documents, comparing these versions to the version last exchanged with the Parties.
45. The Case Management Conference was held by Zoom on April 9, 2021 at 9 a.m., New York time. In attendance were (i) Mr. Benson, Ms. Wazen, and Ms. Wahba on behalf of Claimants; (ii) Messrs. Tracey and O'Callaghan on behalf of Respondents; (iii) Mr. Shore, Prof. Dr. Abdel Wahab, and Ms. Mouawad as the Tribunal. Following the Case Management Conference, the Parties were asked to revert on the revised procedural timetable by no later than April 16, 2021.
46. On April 14, 2021, Claimants submitted a revised procedural timetable, with which Respondents confirmed their agreement on the next day.



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47. By email dated April 19, 2021, the Tribunal issued the final, counter-signed Terms of Reference as signed by the Parties and Tribunal on April 18, 2021 (*i.e.*, the date on which the President of the Tribunal signed the Terms of Reference) (“**Terms of Reference**”). The next day, the Tribunal issued Procedural Order No. 1 (with procedural timetable) dated April 20, 2021 (“**Procedural Order No. 1**”) to the Parties.
48. In accordance with Procedural Order No. 1, Claimants filed their Statement of Claim on June 4, 2021, together with two witness statements, a quantum expert report, factual exhibits, and legal authorities (“**Statement of Claim**”).
49. Per Procedural Order No. 1, Respondents were due to file their Statement of Defense and Counterclaim on August 27, 2021. However, on August 18, 2021, Respondents’ counsel requested from the Tribunal a 60-day stay of the Arbitration in light of the change in the Government of Afghanistan so as to allow counsel “time to identify the correct contacts within the new government in order to seek instructions,” including on the instruction of replacement counsel, if any.
50. The Tribunal invited comments from Claimants, which were submitted on August 24, 2021. While noting their sympathy to the difficulties raised by Respondents’ counsel, Claimants expressed “serious concerns regarding the risk of spoliation of evidence relevant to this case in the event of a stay, which will inevitably increase with the passage of time.” Claimants stated that they were willing to consent to a 30-day stay, subject to clarification from Hogan Lovells “as to what steps it has taken to preserve documentary evidence in the hands of the former government and relevant custodians within the Respondents.”
51. By email dated August 25, 2021, Respondents’ counsel confirmed that it advised Respondents—both at the outset of the Arbitration and in light of recent events—“of the need to retain and preserve all relevant documentary evidence.” Respondents’ counsel further stated that it had not been able to contact representatives of the new government since no new government was formally in place yet, but that it had made efforts to reach out to its former client contacts so as to understand the current situation.
52. Having considered the Parties’ respective positions, and in light of Claimants’ consent to a 30-day stay subject to Respondents’ counsel’s assurances regarding the preservation of evidence—which were provided—the Tribunal granted a 30-day stay of the Arbitration effective as of the date of the email (*i.e.*, August 25, 2021) through September 23, 2021. The Tribunal further invited Respondents’ counsel to provide an update on the situation two weeks later, on September 8, 2021, and again on September 15 and 22, 2021, as applicable.
53. On September 8, 2021, Respondents’ counsel informed the Tribunal and Claimants that it was announced on that same day that the Taliban had formed an interim government.





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Respondents' counsel understood that, as part of this change, new individuals were appointed to head various bodies within the Government, including a new Director General of the ACAA. However, because this change had just taken effect, Respondents' counsel did not yet know who within the Government was responsible for overseeing this Arbitration and instructing counsel.

54. On September 15, 2021, Respondents' counsel informed the Tribunal and Claimants that it had not received any additional information on who within the Government was responsible for overseeing this Arbitration and instructing counsel. Respondents' counsel further noted that, in light of the continued uncertainty in Afghanistan and the absence of instructions from the new Government, it would resign from its representation of Respondents and would withdraw as counsel effective September 23, 2021. It also stated that it had requested Respondents to identify any successor counsel, but received no instructions in that regard.
55. The Tribunal acknowledged receipt of Respondents' counsel's communication on the same day, and requested that, with its next update, Respondents' counsel inform the Tribunal and the ICC of the contact details of Respondents' representatives with whom counsel had been communicating such that these representatives may be copied on future communications.
56. By email dated September 22, 2021, Respondents' counsel informed the Tribunal and Claimants that it had not received any additional information on who within the Government was responsible for overseeing this Arbitration and instructing counsel. As the Tribunal requested, Respondents' counsel copied in to its email the contact details of Respondents' representatives with whom it had been communicating so that they could continue to receive all correspondence pertaining to this matter, namely: Mr. Muhib-Ullah Zahid ([mzahid.afg@gmail.com](mailto:mzahid.afg@gmail.com)), Mr. Fahad Afghan ([Fahad\\_afghan@live.com](mailto:Fahad_afghan@live.com)), Mr. Fahad Momand ([fahad.momand@acaa.gov.af](mailto:fahad.momand@acaa.gov.af)), [s.hasib88@gmail.com](mailto:s.hasib88@gmail.com), [dg.administration@acaa.gov.af](mailto:dg.administration@acaa.gov.af), and [azimialiahmad@gmail.com](mailto:azimialiahmad@gmail.com). With its withdrawal effective as of September 23, 2021, Respondents' counsel asked to be removed from copy going forward.
57. On September 22, 2021, in light of Respondents' counsel's withdrawal and the 30-day stay of the Arbitration expiring the next day, the Tribunal invited Claimants to share their views on the path forward in this Arbitration by October 1, 2021, with Respondents' comments on such response invited by October 12, 2021. The Tribunal confirmed that, in the interim and pending receipt of the Parties' comments and views, the procedural calendar of the Arbitration remained suspended until further directions from the Tribunal in due course.
58. By email dated October 1, 2021, Claimants stated that, if Respondents did not resume their participation in the Arbitration by October 12, 2021, the Tribunal should lift the stay and



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proceed to the resolution of the matter. Claimants further advised that they had carried out inquiries in relation to Respondents' contact details and provided the following additional information: (1) for First and Second Respondents, Mr. Ahlaj Hamidullah Akhundzada, Minister of Transport and Head of Civil Aviation ([info@mot.gov.af](mailto:info@mot.gov.af)); and (2) for Third Respondent, Mr. Qari Rahmatullah Gulzad, CEO ([ceo@flyariana.com](mailto:ceo@flyariana.com), [info@flyariana.com](mailto:info@flyariana.com), [kabul@flyariana.com](mailto:kabul@flyariana.com)).

59. The Tribunal acknowledged receipt by email, with which it requested a "delivery receipt" and a "read receipt." From this point forward, every email correspondence from the Tribunal requested a "delivery receipt" and a "read receipt." To the best of the Tribunal's knowledge, the emails were relayed or delivered to all recipients, with the exception of [info@mot.gov.af](mailto:info@mot.gov.af) that consistently met with a "delivery failure" message.
60. Once the October 12, 2021 deadline passed with no response from Respondents, the Tribunal reverted to the Parties on October 15, 2021, in the following terms:

1. *The Tribunal directs Respondents to submit their views on the above [i.e., on the Tribunal's emails of September 22 and October 1, 2021] by **Sunday, October 31, 2021**. In particular, the Tribunal invites Respondents either to promptly file their Statement of Defense or to inform the Tribunal of the minimum reasonable time that they require to finalize and file it. It is the Tribunal's understanding that Respondents' prior counsel, Hogan Lovells, was poised to file Respondents' Statement of Defense on August 27, 2021, per the attached agreed procedural timetable at Annex A of Procedural Order No. 1 dated April 20, 2021, at the time when it sought to temporarily suspend the proceedings on August 18, 2021 in light of the change in the Government of Afghanistan.*

*If Respondents fail to respond by the extended deadline (i.e., October 31, 2021), the Tribunal must proceed with the arbitration in accordance with the ICC Rules, the Terms of Reference (attached), and Procedural Order No. 1, to which all of the Parties agreed, and may issue any further procedural orders as necessary and appropriate in the circumstances.*

2. *In parallel, and for practical reasons, the Tribunal encourages Claimants to re-serve on Respondents a full record of the case file (including this communication) to date (i) electronically, with delivery receipt, and (ii) in hard copy by appropriate means (e.g., expedited courier, DHL, etc.), and to submit evidence of service (or attempted service) at their earliest convenience. This invitation is without prejudice to the fact that, to date, Respondents have been duly served and properly notified in this arbitration by e-mail and in hard copy (as applicable) in accordance with Articles 2 and 3 of Procedural Order No. 1, to which Respondents agreed through their counsel representatives.*





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3. *In the interim, and pending the deadline for Respondents' comments, the procedural calendar of the arbitration remains suspended. The Tribunal shall issue further directions in due course at the appropriate time.*
  4. *The Tribunal seizes this opportunity to recall the Parties' duty to cooperate with the Tribunal towards an efficient conduct of the present proceedings, and hopes that Respondents will avail themselves of this further opportunity to respond.*
61. On October 29, 2021, Claimants confirmed that they had re-served the full case file record on Respondents by emails dated October 27 and 28, 2021 and on [info@mot.gov.af](mailto:info@mot.gov.af) on October 29, 2021 (which met with a "delivery failure" message), and submitted the email communications. Claimants indicated that they were arranging for re-service in hard copy/USBs and would update the Tribunal as soon as possible.
  62. The October 31, 2021 deadline passed with no response from Respondents.
  63. On November 30, 2021, Claimants confirmed that they had re-served on Respondents by hand (i) hard copies of the pleadings without exhibits (*i.e.*, the Request for Arbitration, the Answer to the Request for Arbitration, and the Statement of Claim; the Tribunal's Procedural Order No. 1 and Terms of Reference; the Tribunal's email of October 15, 2021 (with attachments); and (ii) USBs containing the entire case file record. Claimants stated that hard copies were re-served (i) on Ariana on November 11, 2021, as received by Mr. Yama Yousufi, the Chief of Staff of Ariana's President; and (ii) on the Ministry of Transportation and ACAA on November 16, 2021, as received by Mr. Zekrullah from the archive documents. Claimants submitted acknowledgements of receipt.
  64. The Tribunal acknowledged receipt on November 30, 2021, and invited the Parties to propose a procedural calendar for the remaining milestones in the Arbitration for the Tribunal's consideration, in anticipation of amending and replacing Annex A of Procedural Order No. 1 (*i.e.*, the procedural timetable). The Tribunal further reiterated its invitation to Respondents either to file their Statement of Defense promptly or to inform the Tribunal of the minimum reasonable time that they require to finalize and file it. The Tribunal stated its intention to proceed with the Arbitration after having given the Parties an opportunity to set forth their respective proposals. However, in the event that Respondents did not submit a proposal, the Tribunal invited Claimants to provide two alternative proposed calendars, one in case Respondents participated in the Arbitration and the other in case Respondents decided not to participate. The Parties were asked to submit their proposed procedural calendar by December 8, 2021 and to indicate their availability for a procedural call with the Tribunal on December 22, 2021 during the time slots of (i) 12pm-2pm CET, or (ii) 2pm-4pm CET.



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65. On December 8, 2021, Claimants submitted a proposed procedural calendar in the event that Respondents were to participate in the Arbitration, with a view to maintaining the existing hearing dates for the summer of 2022. In the event that Respondents chose not to participate in the proceeding, Claimants' stated position was that the Tribunal should proceed directly to a hearing at the earliest possible date mutually convenient for the Tribunal and Claimants. Claimants also confirmed their availability for a procedural call with the Tribunal on December 22, 2021 from 12pm-2pm CET.
66. Respondents did not submit a proposed procedural calendar by the deadline of December 8, 2021, nor did they respond to or otherwise acknowledge the Tribunal's previous emails of September 22, October 15, and November 30, 2021, even though these emails were duly delivered. In light of the foregoing, on December 10, 2021, the Tribunal informed the Parties of the following:

*On behalf of the Tribunal, I acknowledge receipt of Claimants' email of December 8, 2021 and confirm that Respondents have not submitted a proposed procedural calendar by the deadline of December 8, 2021. Respondents also did not respond or otherwise acknowledge the Tribunal's previous emails of September 22, October 15, and November 30, 2021, even though these emails were duly delivered. The various deadlines on Respondents—namely, October 12, October 31, and December 8, 2021—thus lapsed without their participation.*

*In light of the above, and as stated in the Tribunal's emails of October 15, and November 30, 2021 (re-attached for convenience), the Tribunal will proceed with the arbitration in accordance with the ICC Rules, the Terms of Reference, and Procedural Order No. 1, to which all of the Parties agreed. Accordingly, the Tribunal hereby lifts the stay of the arbitration and confirms that the arbitration will proceed directly to a hearing, unless Respondents confirm (by no later than December 13, 2021), their intention to file their Statement of Defense on or before January 7, 2022.*

*If Respondents do not confirm their intention to file their Statement of defense by the set deadline, the Tribunal proposes to hold a one- or two-day virtual hearing, via Zoom or analogous platform, on March 21-22, 2022. The Tribunal invites the Parties to indicate their availability on the proposed date no later than Monday, December 13, 2021.*

*In light of the above, and subject to any change in circumstances, the Tribunal does not foresee a need for a procedural hearing at this time.*





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67. On December 13, 2021, Claimants confirmed their availability for a virtual hearing on March 21-22, 2022. Respondents did not respond to the Tribunal's inquiry.
68. On December 14, 2021, Claimants shared with the Tribunal an email received from Third Respondent Ariana from the email address of [legal.adviser@flyariana.com](mailto:legal.adviser@flyariana.com), copying into the email the additional email addresses from Ariana. In this email, Third Respondent requested more time—in light of the regime change in Afghanistan—to address Claimants' allegations and more information regarding Ariana's actions since the President's office and the ACAA, not Ariana, terminated the agreement. Claimants took the position that this communication should not impact the Tribunal's directions of December 10, 2021.
69. On December 15, 2021, the Tribunal acknowledged receipt of Claimants' email, maintaining the additional Ariana email addresses in copy of its email. The Tribunal noted that Ariana's additional addressees have not appeared in this Arbitration or otherwise communicated to the Tribunal their intention to appear. Nonetheless, the Tribunal informed these addressees of the procedural posture of the case, namely: (i) the stay of the Arbitration was lifted on December 10, 2021; (ii) the Arbitration will proceed directly to a one- or two-day virtual hearing on March 21-22, 2022; (iii) the Tribunal set and extended numerous deadlines inviting Respondent's comments and participation, which all passed with no response from Respondents; and (iv) at the Tribunal's invitation and without prejudice, Claimants re-served on Respondents a full record of the case file electronically and in hard copy and, in particular, re-served Ariana electronically on October 28, 2021 and in hard copy on November 11, 2021, as received by Mr. Yama Yousufi, the Chief of Staff of Ariana's President. The Tribunal then invited Third Respondent Ariana's additional addressees to inform the Tribunal by no later than December 19, 2021 whether they intended to participate in this Arbitration on behalf of Third Respondent and, if so, whether they were prepared to file Ariana's Statement of Defense on or before January 7, 2022.
70. On December 18, 2021, Third Respondent ([legal.adviser@flyariana.com](mailto:legal.adviser@flyariana.com)) responded that it was not involved in the decision to terminate the agreements at issue, which were canceled directly by the Presidential Office of Afghanistan, the latter which has the relevant documents. It noted that it is "not in the position to take a proper decision, there for I have to refer it to AAA [Ariana Afghan Airlines] Management team I will share their decision with you in this regard ASP [sic]."
71. The Tribunal acknowledged receipt of this email and noted its content on the same day. The Tribunal reiterated its invitation to all Respondents to clearly inform the Tribunal by December 19, 2021 (i) whether they intended to participate in this Arbitration; and, if so, (ii) whether they intended to file a Statement of Defense on or before January 7, 2022.



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72. These deadlines lapsed without any response from Respondents. The Tribunal invited the Parties on January 10, 2022 to propose a draft procedural order and anticipated daily agenda for the March 21-22, 2022 hearing by January 24, 2022. The Tribunal noted that it will consider these proposals before issuing its procedural order on the hearing protocol. The Tribunal further confirmed, for the avoidance of doubt, that the procedural timetable at Annex A of Procedural Order No. 1 was vacated.
73. Claimants proposed a hearing agenda on January 20, 2022, subject to the Tribunal indicating how much time to reserve for Tribunal questions. The Tribunal responded on the same day that reserving 60 minutes for its queries should suffice, since the Tribunal expected to ask questions as the hearing proceeded.
74. On January 24, 2022, Claimants proposed a draft procedural order and anticipated agenda for the March 2022 hearing.
75. On the same day, January 24, 2022, an unsigned email from Third Respondent ([legal.adviser@flyariana.com](mailto:legal.adviser@flyariana.com)) requested a postponement of the final hearing on the merits set for March 2022.
76. The Tribunal invited Claimants' comments by January 26, 2022, which Claimants filed on January 25, 2022. Claimants contended that Third Respondent's email was a "vague, unsubstantiated and alleged 'force majeure' request by one Respondent for an indefinite stay of these Proceedings." Claimants submitted that Respondents were given every opportunity to participate in this Arbitration and that the current timetable should not be derailed.
77. On January 27, 2022, after having given due consideration to the Parties' respective positions, the procedural posture of the Arbitration,<sup>10</sup> and the multiple extensions granted to Respondents to date, the Tribunal denied the request purportedly sent on behalf of Third Respondent and confirmed that the March 2022 hearing would proceed. The Tribunal reiterated its invitation to all Respondents to participate in the Arbitration, to contribute to the anticipated agenda as soon as possible, and to participate in the hearing. Moreover, for the sake of good order, the Tribunal invited Third Respondent's interlocutory to communicate his name, position, and credentials, and to confirm that he was duly authorized to represent the Third Respondent—on official company letterhead.
78. On February 1, 2022, the Tribunal shared a draft procedural order for the hearing with the Parties and invited their final comments by no later than February 9, 2022. The Tribunal also invited Claimants to communicate the details for the various logistical arrangements at their earliest convenience.

<sup>10</sup> See Tribunal emails of December 10, 15, and 18, 2021, and January 10, 2022.





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79. Claimants submitted their final comments and the logistical details on February 9, 2022. Respondents did not provide comments. On February 10, 2022, the Tribunal issued Procedural Order No. 2 on the Organization of the Hearing.
80. Per Procedural Order No. 2, Claimants made available the Electronic Hearing Bundle on March 7, 2022.
81. The Hearing took place on March 21, 2022. The following individuals participated in the hearing: (i) Mr. Cyrus Benson, Ms. Sarah Wazen, Ms. Nadia Wahba, Ms. Ronit Wineman, and Mr. Paul Evans, as Claimants' counsel team; (ii) Mr. Joe Nasrallah as party representative for Claimants; (iii) Messrs. Hassan El-Houry and Mazen Qursha as witnesses on behalf of Claimants; (iv) Dr. Min Shi, Mr. Tom Davison, and Mr. Yuhao Zhou from the expert firm Oxera; (v) Ms. Sarah McGuire and Ms. Fran Voutiras from Epiq Global; (vi) Ms. Fiona Dermody and Mr. Matthieu Rouchouse from the ICC; and (vii) Mr. Laurence Shore, Prof. Dr. Mohamed Abdel Wahab, and Ms. Caline Mouawad as the Tribunal. A transcript of the Hearing was made available to all Parties (*i.e.*, including Respondents) and the Tribunal.
82. At the close of the Hearing, the Tribunal invited a post-hearing submission from Claimants in four weeks' time, *i.e.*, by April 18, 2022, of no more than twenty pages, together with a submission on costs. The Tribunal indicated that Respondents would be afforded equal time to submit their post-hearing submission, *i.e.*, until May 16, 2022.
83. On March 22, 2022, Third Respondent ([legal.adviser@flyariana.com](mailto:legal.adviser@flyariana.com)) communicated that Ariana had appointed Mr. Phillip James Walker as "Official Lawyer of the Islamic Emirate of Afghanistan." On the same date, Mr. Walker communicated that he was in discussion with Respondents "about representing AAA [Ariana] and ACAA in this matter," but that these discussions were "not yet final" and that he "will confirm my appearance in the case as soon as possible." Mr. Walker requested an emergency stay of the proceedings for one month so as to evaluate the case and proposed a status conference at the end of that month "to discuss a revised timeline for the case." Mr. Walker further stated his understanding that "there may have been communications failures such that AAA [Ariana] and ACAA may not have received full notice with respect to the case." Finally, Mr. Walker indicated that Ariana and the ACAA were "interested in seeking an amicable settlement to this case" and sought "some time" for the parties to explore settlement options.
84. On the same day, having conferred, the Tribunal invited Mr. Walker to submit a copy of his power of attorney, to confirm that he was in fact entering an appearance in this Arbitration, and to clarify for which Respondent(s) he was making such an appearance. The Tribunal reminded the Parties of the deadlines for post-hearing submissions. The Tribunal also recalled that it had repeatedly invited Respondents to participate in the Arbitration and granted them multiple extensions to make various submissions, which they



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never made. The Tribunal noted that it was not minded to grant further extensions or stays unless the Parties jointly proposed otherwise. With respect to amicable settlement, the Tribunal invited Respondents to reach out to Claimants directly, without copy to the Tribunal. Finally, for the sake of good order, the Tribunal reminded all Parties that Respondents had been duly served and properly notified in this Arbitration by e-mail and in hard copy (as applicable), in accordance with Procedural Order No. 1, to which Respondents agreed through their counsel representatives. At the Tribunal's invitation, and without prejudice to the foregoing, Claimants had re-served the full case file record electronically and in hard copy in October and November 2021. Indeed, an individual from Third Respondent (email address of [legal.adviser@flyariana.com](mailto:legal.adviser@flyariana.com)) had written to the Tribunal on multiple occasions.

85. The Tribunal again shared the Hearing transcript with all Parties on March 27, 2022.
86. On March 28, 2022, Claimants requested a four-day extension to file their post-hearing submission, agreeing to a commensurate extension for Respondents' submission. On the same day, the Tribunal granted Claimants' request to file their post-hearing submission on April 22, 2022, and extended Respondents' deadline to May 24, 2022.
87. On April 18, 2022, the President of the Tribunal received a letter from the Ministry of Transportation and Civil Aviation, sent by Mr. Muhib Ullah Zahid, who had been in copy of the emails in the Arbitration since Hogan Lovells withdrew as counsel. In this letter, signed by Capt. Ghulam Jailani Wafa, Deputy Minister for Operations, with the subject line "Request for a New Court Date," the Ministry of Transportation stated that the ACAA had been merged into the Ministry of Transportation. It further asserted that the regime change in Afghanistan interrupted the government's operations and adversely impacted "communication among and within government institutions," such that "most of the court's email communications did not reach to the leadership of the MoTCA." The Ministry of Transportation stated that it had been appointed to handle the case on behalf of the Islamic Emirate of Afghanistan, and that it had "enough evidences relevant to the case that may completely change the Tribunal's view." The Ministry of Transportation sought "to have the opportunity to present our arguments to ensure fair decisions made by the Tribunal."
88. The President of the Tribunal forwarded this correspondence to the co-arbitrators, Claimants, and all of Respondents' recipients to date, including those additional individuals who were copied in Mr. Zahid's email. The Tribunal invited Claimants' comments on this letter, which they submitted on April 21, 2022, opposing any amendment to the procedural timetable.
89. On April 21, 2022, having conferred, the Tribunal determined that the procedural calendar shall not be amended absent the Parties' joint agreement. The Tribunal reminded the Parties that the Arbitration was previously suspended to accommodate Respondents'.





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situation, and that Respondents were given several opportunities to appear and file their submissions. As noted in the Tribunal's March 23, 2022 email, the Tribunal repeatedly invited Respondents' participation in this Arbitration, including in relation to the procedural calendar and the March 21, 2022 Hearing, but Respondents elected not to participate in this proceeding. The Tribunal invited Respondents to take advantage of the opportunity to file a 20-page post-hearing submission on May 24, 2022, in response to Claimants' post-hearing submission.

90. Claimants filed their post-hearing submission on April 22, 2022 ("**Post-Hearing Submission**"), and requested leave to file their costs submission within one week of Respondents' post-hearing submission, which was granted.
91. By letter dated May 17, 2022, the ICC Secretariat confirmed that Claimants paid the entire advance on costs fixed by the ICC Court at USD 635,000.
92. On May 23, 2022, Second Respondent's Legal Advisor, Mr. Zahid, informed the Tribunal that RIAA Barker Gillette, Afghanistan, was appointed as its counsel representative and would be filing Second Respondent's post-hearing submission. Mr. Zahid requested a twenty-day extension to file its post-hearing submission. Mr. Zahid further requested "all documentation and information available on record with respect to these arbitration proceedings."
93. On the same day, the Tribunal advised the Parties of the following: (i) the Tribunal reminded the Parties of the various extensions that it granted to enable Respondents' participation since the regime change in August 2021;<sup>11</sup> (ii) the Tribunal granted Second Respondent's request for an extension to file its post-hearing submission, namely until June 13, 2022, and reminded Respondents that such submissions are limited to 20 pages and must not include any new evidence;<sup>12</sup> and (iii) although Claimants re-served Respondents the case file in October and November 2021, with Mr. Zahid in copy of the emails,<sup>13</sup> the Tribunal invited Claimants to re-serve on Respondents the case file to date, in electronic format only, at their earliest convenience.
94. Claimants re-served the case file electronically on May 26, 2022, without prejudice to their prior service to date.
95. On June 7, 2022, Second Respondent—through its legal advisor, Mr. Zahid—confirmed that it accessed the electronic case file.

<sup>11</sup> See *supra* ¶ 89.

<sup>12</sup> Hearing Tr. 130:9-131:17.

<sup>13</sup> See *supra* ¶ 84.



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96. Respondents did not file their Post-Hearing Submission by the deadline of June 13, 2022.
97. On June 14, 2022, Third Respondent—through its unnamed legal adviser—requested a three-month extension to file its post-hearing submission on the basis that it had not been able to find a law firm willing to accept the representation due to international sanctions. Shortly thereafter, Second Respondent—through its legal advisor, Mr. Zahid—also requested a three-month extension to file its submission. According to Mr. Zahid, in the absence of counsel, the Ministry of Transportation must refer matters to the Prime Minister’s Office for approval, which then refers it to the Economic Commission. Following review by the Economic Commission, the Prime Minister’s Office directs the Ministry of Transportation to take action: “That is why we are unable to respond to you in a timely manner.” Mr. Zahid further stated that, due to the force majeure situation in Afghanistan and its unrecognized international status, Second Respondent has been unable to “hire a credible international legal firm to represent our case before the tribunal” due to international sanctions and payment restrictions on Afghanistan, the non-recognition of the current Government of Afghanistan, the risk of damaging a firm’s “international credibility,” and prohibition against working with the current government of Afghanistan. Mr. Zahid concluded by saying that, given these obstacles and the Afghan Government’s “right to have a full discretionary access to hire a reputable international law firm,” a three-month extension was required so as not to deprive Second Respondent “of a fair decision.”
98. On the same day, June 14, 2022, the Tribunal invited Claimants’ comments on Respondents’ correspondence by June 16, 2022, which Claimants submitted in a timely manner.
99. Having conferred, the Tribunal advised the Parties of the following by email dated June 16, 2022:
1. *As the Parties are aware, to account for the regime change in Afghanistan and Hogan Lovells’s withdrawal of its representation of Respondents, the Tribunal stayed this arbitration for nearly four months. Since the arbitration resumed, the Tribunal repeatedly invited Respondents to participate in this arbitration and granted them multiple extensions to make their submissions, including, most recently, by extending their deadline for post-hearing submissions from May 24, 2022 to June 13, 2022.*
  2. *In requesting an additional three-month extension to file their post-hearing submissions, Respondents refer to the regime change and international sanctions as having impeded their ability to find international counsel to represent them in this arbitration and as justifying their extension request.*





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3. *These are not new circumstances, however. It has been nearly a year since the regime changed and international sanctions were imposed. The Tribunal accommodated the change when it stayed the arbitration from August to December 2021 and granted repeated extensions to Respondents.*
  4. *Respondents have had ample time to organize their defense. They have been copied on all correspondence in this arbitration, and were served the entire case file in electronic and hard copy formats in the fall of 2021, and again in electronic format in May 2022. Although Respondents have the option to retain their counsel of choice, the Tribunal is not persuaded that Respondents are unable to find means to be represented by appropriate counsel, whether internal, external, local or otherwise.*
  5. *Respondents also offer no assurances that the situation will be different in three-months' time or that they will not seek a further extension at that time.*
  6. *In these circumstances, the Tribunal deems that an extension is not warranted. Accordingly, the Tribunal denies Respondents' requests for a three-month extension.*
  7. *Nonetheless, the Tribunal will consider any post-hearing submission made by **June 30, 2022**, after which time any submission will be deemed inadmissible and out of time. Barring exceptional circumstances, this deadline will not be extended.*
100. On June 27, 2022, Mr. Zahid acknowledged receipt of the Tribunal's email, reiterated Second Respondent's request for a further three-month extension, and noted that "we still respect the decision made by the arbitration tribunal and we are doing our utmost and making every effort we can to make our post-hearing submission." On the same day, the Tribunal noted the contents of the email and stated that it looked forward to receiving Respondents' post-hearing submission on June 30, 2022, as directed.
101. By letter dated June 30, 2022 submitted by Mr. Zahid, Second Respondent reiterated its request for a further extension to submit its post-hearing submission. On the same day, the Tribunal responded that Second Respondent was seeking to reopen a matter that had already been considered and decided on June 16, 2022, without advancing any new circumstances that would warrant reconsideration of the Tribunal's earlier determination. The Tribunal reiterated that the Arbitration has proceeded fairly and with due process, and recalled (i) the suspension of the Arbitration for nearly four months to account for the regime change in Afghanistan and Hogan Lovells's withdrawal of its representation of Respondents, and (ii) the multiple extensions of deadlines inviting Respondents' comments and participation in the Arbitration, including by emails on October 15, November 30, December 10, 15, and 18, 2021, and May 23 and June 16, 2022. The Tribunal also



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reminded the Parties that their costs submissions were due within one week of Respondents' post-hearing submissions, *i.e.*, by July 7, 2022, at which point the proceedings would be declared closed shortly thereafter.

102. On July 7, 2022, Claimants filed their Statement of Costs ("**Statement of Costs**"). Respondents did not file their Statement of Costs.
103. On August 30, 2022, the Tribunal asked the Parties whether they would agree to the ICC Secretariat notifying them of the Tribunal's Final Award via email only. Although Claimants stated their agreement on August 31, 2022, Respondents never responded to the Tribunal's query. Accordingly, this Final Award will be notified by courier.
104. On October 10, 2022, the ICC Secretariat informed the Parties that, on October 6, 2022, the ICC Court approved the draft award.
105. On October 24, 2022, the Tribunal closed the arbitral proceedings pursuant to Article 27 of the ICC Rules and informed the Parties of the same. On October 27, 2022, the ICC Court extended the time limit for rendering the final award until November 30, 2022, on which date it extended the time limit to December 30, 2022 to allow sufficient time for the award to be notified to the Parties.

### III. FACTUAL BACKGROUND

106. The dispute relates to the ACAA's and the Ministry of Transportation's purported termination of a joint-venture partnership agreement dated November 4, 2013, between NAS Kuwait (later assigned to NAS Afghanistan) and Ariana (the "**JVPA**").<sup>14</sup> The JVPA concerned ground handling services ("**GHS**") provided by Claimants at Afghanistan's international airports in Kabul, Kandahar, and Herat (the "**Airports**").<sup>15</sup> Claimants claim that Respondents breached a related agreement—the Basic Agreement—into which the JVPA parties entered with the ACAA and the Ministry of Transportation when, *inter alia*, Respondents improperly terminated the JVPA and failed to guarantee NAS Afghanistan's exclusivity rights.
107. Below is a high-level summary of the key facts based on the documents and on the Parties' pleadings, with the clarification that Respondents' only written submission was their Answer containing a general denial of the facts without any substantive arguments or comments.<sup>16</sup> To avoid undue repetition, further details will be addressed in the course of the Tribunal's analysis in Section V, where appropriate.

<sup>14</sup> Claimants' Statement of Claim ¶ 2; **Exhibit C-003**, JVPA.

<sup>15</sup> Claimants' Statement of Claim ¶ 3.

<sup>16</sup> Respondents' Answer at ¶ 13.





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## A. THE TENDER PROCESS

108. Claimants are a leading provider of airport and ground handling services.<sup>17</sup> They currently operate in “more than 50 airports worldwide” and provide “services to many of the world’s top airlines.”<sup>18</sup>
109. In 2009, NAS Kuwait became interested in investment opportunities in Afghanistan<sup>19</sup> and incorporated NAS Afghanistan on March 20, 2010.<sup>20</sup>
110. On May 28, 2012, the Government of the Islamic Republic of Afghanistan (“**Afghanistan**” or the “**Government**”) awarded Ariana a concession for exclusive GHS at the Airports (“**Ariana Concession**”).<sup>21</sup> In the summer of 2013, Ariana issued tender No. FG/1392/GRH002 (the “**Tender**”) to identify a joint venture partner.<sup>22</sup>
111. Six companies were shortlisted, including NAS Kuwait, to which Ariana issued a Request for Proposal (“**RFP**”) on August 7, 2013.<sup>23</sup> On September 8, 2013, Ariana held a pre-bid meeting with the bidders, during which Claimants raised concerns regarding a “termination for convenience” clause in the proposed joint-venture agreement.<sup>24</sup> In an email dated September 15, 2013, Mr. Frough, Ariana’s Ground Handling advisor at the time, confirmed that Ariana would negotiate with the Ministry of Transportation to “remove this clause or amend it suitably.”<sup>25</sup> He further confirmed that “there [was] no proposed format of the JV relationship as once the winner is announced, [...] Ariana and the Winner will draft and sign a methodology of their mutual relationship.”<sup>26</sup>

<sup>17</sup> Claimants’ Statement of Claim ¶ 10.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶ 13.

<sup>20</sup> **Exhibit C-049**, NAS Afghanistan License, March 20, 2010; Claimants’ Statement of Claim ¶ 14.

<sup>21</sup> **Exhibit C-050**, Resolution of the Council of Ministers regarding concession of ground handling services granted to Ariana, May 28, 2012; Claimants’ Statement of Claim ¶ 15.

<sup>22</sup> Claimants’ Statement of Claim ¶ 17.

<sup>23</sup> **Exhibit C-051**, Ariana Bidding Documents & Request for Proposal for Joint Venture Partnership contract for Implementation of Ground Handling Services at Kabul, Kandahar, and Herat airports, August 2013, p. 2; Claimants’ Statement of Claim ¶ 20.

<sup>24</sup> **Exhibit C-052**, Ariana Minutes of Pre-bid meeting for Joint Venture Partnership contract for Implementation of Ground Handling Services at Airports, September 8, 2013, p. 3; Claimants’ Statement of Claim ¶ 21.

<sup>25</sup> **Exhibit C-053**, Email from W. Frough (Ariana) to W. Frough (Ariana) re Minutes further discussed, September 15, 2013; Claimants’ Statement of Claim ¶ 22.

<sup>26</sup> **Exhibit C-053**, Email from W. Frough (Ariana) to W. Frough (Ariana) re Minutes further discussed, September 15, 2013; Claimants’ Statement of Claim ¶ 23.



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112. On September 22, 2013, NAS Kuwait submitted financial and technical proposals, as did two other bidders, DeltaVector and DNATA.<sup>27</sup> On the technical proposals, Ariana's evaluation committee awarded NAS Kuwait the highest score (97.41), followed by DNATA (95.55) and DeltaVector (77.15).<sup>28</sup> On the financial proposals, the evaluation committee awarded NAS Kuwait the highest score (87).<sup>29</sup> DeltaVector was disqualified because it failed to provide the required bid security,<sup>30</sup> while DNATA was awarded a score of 51.<sup>31</sup>
113. In October 2013, Claimants were awarded the Tender.<sup>32</sup>

**B. THE CONCLUSION OF THE JVPA AND THE BASIC AGREEMENT**

114. On November 4, 2013, NAS Kuwait entered into the JVPA for the implementation of the GHS at the Airports.<sup>33</sup> Pursuant to the JVPA, the Parties agreed that NAS Kuwait would assign the JVPA to a locally-incorporated entity (*i.e.*, its affiliate, NAS Afghanistan), which would render the services contemplated:

*Whereas, NAS and Ariana are entering herein into the Agreement, however the Parties agree that NAS shall assign the Agreement to a company duly established in the Jurisdiction ('Company') according to the provisions of this Agreement and the Parties further agree that they shall not be required to form a separate legal entity in which they both hold shares in order to give effect to the terms of this Agreement;*<sup>34</sup>

[...]

*4.1(a) ...The Parties agree that NAS shall incorporate the Company in the Jurisdiction, which shall be fully owned by NAS and/or any of its Affiliates*

<sup>27</sup> **Exhibit C-055**, NAS Financial Bid, September 22, 2013; **Exhibit C-056**, NAS Technical Bid, September 22, 2013; *see also* **Exhibit C-054**, Ariana Minutes of Technical Proposal Opening, September 22, 2013; Claimants' Statement of Claim ¶ 24.

<sup>28</sup> **Exhibit C-057**, Ariana Ground Handling Technical Evaluation Report, October 2013, p. 15; Claimants' Statement of Claim ¶ 25.

<sup>29</sup> **Exhibit C-058**, Ariana Ground Handling Financial Evaluation Report, October 2013, p. 6; Claimants' Statement of Claim ¶ 26.

<sup>30</sup> **Exhibit C-059**, Email from W. Frough (Ariana) to W. Frough (Ariana) re Minutes of the "Financial Proposal Opening."

<sup>31</sup> **Exhibit C-058**, Ariana Ground Handling Financial Evaluation Report, October 2013, p. 6.

<sup>32</sup> **Exhibit C-002**, Email from W. Frough (Ariana) to H. El-Houry (NAS) and O. Altintas (NAS) re Notification of Award, October 7, 2013.

<sup>33</sup> **Exhibit C-003**, JVPA; *see id.* at Annex 1 (listing GHS to be provided).

<sup>34</sup> *Id.* at Preamble.





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*and Partners, and shall assign the Agreement to the Company as more detailed under Articles 7 and 8 herein.*<sup>35</sup>

[...]

7.1 *The Parties hereby acknowledge that, NAS and/or any of its Affiliates shall establish a Company under the Laws of the Jurisdiction, to be a 100% owned by NAS and/or any of its Affiliates and Partners for the purpose of executing the Services under this Agreement.*<sup>36</sup>

[...]

8.1.1 *Subject to the provisions of Article 7 here-above, NAS shall be entitled, at its own discretion, to assign the Agreement to the Company. The assignment shall occur by virtue of an Assignment Agreement mutually and duly signed by and between NAS and the Company, and shall be notified in writing to Ariana for its written approval. Ariana undertakes to promptly sign its approval on the Assignment Agreement. Ariana hereby, expressly agrees and approves on the Assignment Agreement provided that it is made in compliance with the provisions of this Article...*<sup>37</sup>

115. The Parties also agreed that NAS Kuwait and/or its affiliates would continue to provide NAS Afghanistan with support services in exchange for the payment of a management fee (the “**Management Fee**”).<sup>38</sup>
116. Claimants agreed to make an initial investment of USD 6 million.<sup>39</sup> Part of this planned investment included a fleet of Ground Support Equipment (“**GSE**” or “**Equipment**”—to perform the GHS—“consisting of a combination of current Ariana, new, used equipment,”<sup>40</sup> including air conditioning units, aircraft toilet service trailers, baggage carts, conveyor belts, crew buses, de-icing trucks, forklifts, main deck loader, passenger buses, and passenger stairs.<sup>41</sup>

<sup>35</sup> **Exhibit C-004**, Addendum ¶ 3 (amending Clause 4.1(a) of the JVPA).

<sup>36</sup> *Id.* at Clause 7.1.

<sup>37</sup> *Id.* at Clause 8.1.1.

<sup>38</sup> *Id.* at Clauses 2 and 4.3 (pursuant to which the Management Fee amounted to 9% of gross revenues generated from the GHS under the JVPA).

<sup>39</sup> *Id.* at Clause 10.1.

<sup>40</sup> *Id.* at Clause 10.5.

<sup>41</sup> *Id.* at Clause 10.5 and Annex 2.



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117. Claimants also agreed to comply with a revenue sharing arrangement pursuant to which a certain percentage of the revenue generated from the GHS would be paid to the Government through the Ministry of Transportation.<sup>42</sup> The Parties further agreed to a profit sharing arrangement of 59% for Ariana and 41% for Claimants.<sup>43</sup> Claimants were granted exclusive rights to provide GHS at the Airports “in return for the payment of the Net Profit Sharing.”<sup>44</sup> NAS Kuwait and Ariana agreed that the JVPA would remain in effect during the time period of the Ariana Concession (10 years), and would be “automatically renewed under the same terms and conditions upon the renewal” of the Ariana Concession for the same period for which the latter is extended.<sup>45</sup> The JVPA is governed by Afghan law and provides for ICC arbitration.<sup>46</sup>
118. NAS Kuwait and Ariana entered into an Addendum to the JVPA on December 10, 2013, which amended various terms of the JVPA, including the renewal and termination provisions.<sup>47</sup> The Addendum was “incorporated into the JVPA to constitute an integral part thereof.”<sup>48</sup>
119. Also on December 10, 2013, NAS Kuwait and Ariana (the JVPA parties) entered into the Basic Agreement with the ACAA and the Ministry of Transportation,<sup>49</sup> which is governed by Afghan law and provides for ICC arbitration.<sup>50</sup> The Basic Agreement restated the main terms of the JVPA<sup>51</sup> and included various undertakings and assurances by the ACAA and the Ministry of Transportation, including that NAS Kuwait would have exclusive rights to operate the GHS for the term of the JVPA.<sup>52</sup> The Basic Agreement also contemplated that NAS Kuwait would assign the JVPA to its locally-incorporated affiliate (*i.e.*, NAS Afghanistan):

*Whereas, Ariana and NAS have set out in the JVPA the terms and conditions of their understanding, obligations and rights governing the implementation of the*

<sup>42</sup> *Id.* at Clause 10.2.

<sup>43</sup> *Id.* at Clause 10.3.

<sup>44</sup> **Exhibit C-003**, JVPA, Clause 9.1; *see generally id.*, Clause 9.

<sup>45</sup> *Id.* at Clause 26.1.

<sup>46</sup> *Id.* at Clauses 34.1 and 34.4.

<sup>47</sup> **Exhibit C-004**, Addendum to the JVPA, ¶ 3.3.

<sup>48</sup> *Id.* at ¶ 5.1. “For the avoidance of doubt,” the Addendum further stipulated that the dispute resolution provision of the JVPA (Clause 34) “shall apply *mutatis mutandis* to this Addendum.” *Id.* at ¶ 5.3.

<sup>49</sup> **Exhibit C-005**, Basic Agreement.

<sup>50</sup> *Id.* at Clause 7.

<sup>51</sup> *Id.* at Clause 3.

<sup>52</sup> *Id.* at Clause 4.2.



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*Services including (i) the right to NAS to assign the JVPA to a company duly established in the Jurisdiction under the name of 'NAS Afghanistan' according to the provisions of the JVPA to implement the Services at the Airports, (ii) the Services to be provided under the JVPA, and (iii) other related matters related thereto;*<sup>53</sup>

[...]

*3.1(b) NAS shall incorporate NAS Afghanistan in the Jurisdiction, which shall be fully owned by NAS and/or any of its affiliates, and shall assign the JVPA to NAS Afghanistan which shall implement the Services in the Airports. Upon assignment of the JVPA, NAS Afghanistan shall be substituted to NAS under the JVPA and shall be bound by and comply with the provisions of the JVPA binding upon NAS, and shall assume all of its duties and obligations and shall enjoy all the rights and benefits of NAS under the JVPA.*<sup>54</sup>

120. In January 2014, the JVPA and the Basic Agreement were assigned from NAS Kuwait to NAS Afghanistan,<sup>55</sup> as contemplated in both the JVPA and the Basic Agreement.<sup>56</sup> Claimants informed Ariana of this assignment by letter dated January 14, 2014, and Ariana acknowledged receipt of such letter on the same date and accepted and agreed “to be bound by its content.”<sup>57</sup>
121. The Parties later negotiated certain amendments to the JVPA during meetings in Dubai on April 30 and May 1, 2014 (the “**Dubai Meetings**”).<sup>58</sup> Among other provisions, the renewal terms were amended to provide for renewal on mutual terms to be agreed.<sup>59</sup> Claimants agreed to reduce their profit sharing in proportion to delayed Equipment and to transfer the Equipment to Ariana after the expiry of the term of the concession.<sup>60</sup> As envisaged in the Tender, Claimants also agreed to invest (i) USD 6 million immediately in GSE, IT, and related services for the launch of GHS at the Airports, (ii) a further USD 2 million by the end of year 6 to maintain high operational standards, and (iii) to earmark USD 10 million

<sup>53</sup> *Id.* at Preamble.

<sup>54</sup> *Id.* at Clause 3.1(b).

<sup>55</sup> **Exhibit C-006**, Assignment of Agreements between NAS Kuwait and NAS Afghanistan, January 13, 2014.

<sup>56</sup> *See supra* ¶¶ 114, 119.

<sup>57</sup> **Exhibit C-007**, Letter of Assignment of the JVPA from NAS to Ariana, January 14, 2014.

<sup>58</sup> **Exhibit C-068**, Minutes of Dubai Meetings, April 30 and May 1, 2014; El-Houry WS ¶ 33.

<sup>59</sup> **Exhibit C-068**, Minutes of Dubai Meetings, Point 14 and Additional Point 3.

<sup>60</sup> *Id.* at Points 3 and 12.





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for investment in further opportunities of revenue generation (e.g., construction and management of a cargo village, an airline lounge, or an airport hotel).<sup>61</sup>

**C. THE PERFORMANCE OF THE JVPA AND THE BASIC AGREEMENT**

122. NAS Afghanistan launched its operations at Kabul's Hamid Karzai International Airport ("HKIA") in January 2014, and at the Kandahar and Herat airports in September 2014 and February 2015, respectively.<sup>62</sup> In 2016, NAS Afghanistan and Ariana formed an Advisory Board, which met regularly to discuss any issues or concerns arising from the partnership.<sup>63</sup>
123. NAS Afghanistan invested management time, know-how, and resources to provide GHS, including a Baggage Reconciliation System ("BRS") and Common Use Passenger Processing System ("CUPPS"), which were provided by Amadeus IT Group S.A. ("Amadeus") and Arinc Incorporated ("Arinc"), respectively.<sup>64</sup>
124. Starting in 2015, NAS Afghanistan raised concerns that the exclusivity provisions in the JVPA and the Basic Agreement were not being respected, in particular by Kam Air and Safi Airways—two airlines "well connected politically"—that were handling ground services themselves for their flights.<sup>65</sup> NAS Afghanistan sent multiple letters to the ACAA and to Government officials in this connection.<sup>66</sup>

<sup>61</sup> *Id.* at Point 6; *see also* Claimants' Statement of Claim ¶ 41.

<sup>62</sup> Claimants' Statement of Claim ¶ 44; El-Houry WS ¶ 35.

<sup>63</sup> Claimants' Statement of Claim ¶ 45; **Exhibit C-081**, Minutes of Meeting establishing JVPA Advisory board for GHS, March 12, 2016.

<sup>64</sup> Claimants' Statement of Claim ¶ 48; **Exhibit C-082**, Virtual Multi-User System Environment Agreement between NAS Afghanistan and Arinc, March 23, 2016; **Exhibit C-094**, Service Recipient Letter Agreement A-2, Amadeus Baggage Reconciliation Services (BRS) between Amadeus IT Group, SA and NAS Afghanistan, January 15, 017.

<sup>65</sup> Claimants' Statement of Claim ¶ 54; El-Houry WS ¶ 47.

<sup>66</sup> Claimants' Statement of Claim ¶ 55; *see also* **Exhibit C-075**, Letter from NAS to the ACAA re Exclusivity, June 6, 2015; **Exhibit C-080**, Email from S. Irwin (NAS) to Z. Khalifat (Safi Airways) and H. El-Houry (NAS) re Meeting between Safi and NAS, January 5, 2016; **Exhibit C-090**, Letter from NAS to the ACAA re Granting of NAS Exclusivity, October 2, 2016, p. 2; **Exhibit C-104**, Letter from NAS Afghanistan to the ACAA re Provision of Airport Services at the Airports, January 7, 2018, p. 3; **Exhibit C-128**, Ariana-NAS Advisory Board Meeting Minutes, Dubai, January 8, 2020, ¶ 6; **Exhibit C-106**, Ariana-NAS Advisory Board meeting Minutes, Delhi, February 9, 2018, ¶ 12; **Exhibit C-132**, Email from H. El-Houry (NAS) to A. Ahmady (Minister of Commerce & Industry) re Letter – Discussion Follow Up, *attaching* Letter from NAS to Minister of Commerce dated May 18, 2020, May 19, 2020, p. 3; and **Exhibit C-135**, Letter from NAS to Ariana re AAA letter dated June 27, 2020, July 4, 2020, p. 2.



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125. The ACAA responded that, as a third party to the JVPA, it was not responsible for issues related to the GHS.<sup>67</sup>
126. In September 2015, changes to Afghan tax laws raised the Business Receipt Tax (“BRT”) from 2% to 4%, which Claimants contend led to a direct negative financial impact on NAS Afghanistan of over USD 50,000 per financial year. NAS Afghanistan unsuccessfully sought contractual adjustments from Ariana.<sup>68</sup>
127. Claimants allege that, starting in 2015, Respondents repeatedly interfered with NAS Afghanistan’s management and performance of the GHS, including in relation to the pricing of such services,<sup>69</sup> and by conducting repeated audits and investigations.<sup>70</sup> Claimants argue that these demands “had a political context and were believed to emanate from President Ghani, who came to power in September 2014.”<sup>71</sup> Claimants further contend that each time Claimants sought to make additional investments in Afghanistan—such as the construction of a cargo village, an airport car park, and an airport hotel—Respondents “failed to engage (or engaged in a minimal way).”<sup>72</sup>

<sup>67</sup> **Exhibit C-105**, Letter No 4235 from the ACAA to NAS-Ariana, February 4, 2018, p. 1; *see also* Claimants’ Statement of Claim ¶ 56.

<sup>68</sup> **Exhibit C-003**, JVPA, Clause 32; **Exhibit C-004**, Addendum to the JVPA, ¶ 3.4 (amending Clause 32.2 of the JVPA); **Exhibit C-123**, Letter from NAS to Ariana, September 7, 2019; El-Houry WS ¶ 55; Claimants’ Statement of Claim ¶ 57.

<sup>69</sup> Claimants’ Statement of Claim ¶ 58; El-Houry WS ¶¶ 49, 53; **Exhibit C-071**, Letter No 1009/645 from Ariana to NAS-Ariana, May 10, 2015; **Exhibit C-073**, Letter from NAS to Ariana, May 20, 2015, p. 1; **Exhibit C-076**, Email exchanges between H. El-Houry (NAS) and D. Sharifi (Ariana) re NAS’s Financial Audit-2014, July 24, 2015.

<sup>70</sup> Claimants’ Statement of Claim ¶ 60; **Exhibit C-083**, Letter from Ariana to AGO, April 19, 2016; **Exhibit C-087**, Letter from AGO to Ariana, July 14, 2016; **Exhibit C-085**, Ariana-NAS Board Meeting Minutes, New Delhi, May 30-June 1, 2016; **Exhibit C-084**, Report of the Assigned Committee, May 10, 2016, p. 5; El-Houry WS ¶¶ 57-58.

<sup>71</sup> Claimants’ Statement of Claim ¶ 61; El-Houry WS ¶ 59.

<sup>72</sup> Claimants’ Statement of Claim ¶¶ 40, 63, 66; **Exhibit C-069**, Letter from NAS to the ACAA re Airport Hotel, May 31, 2014; **Exhibit C-070**, Letter from NAS to the ACAA re Cargo Village, May 31, 2014; **Exhibit C-086**, Letter from NAS to Senior Economic Advisor to the President re Kabul International Airport Cargo Village Concept Note, June 20, 2016; **Exhibit C-088**, Letter from NAS to the ACAA re Business Lounge – Cafeteria Scoom, July 24, 2016; **Exhibit C-093**, Email from H. El-Houry (NAS) to M. Qayoumi (Chief Advisor to the President) re WEF, YGL Contact Afghanistan, January 5, 2017, p. 2; **Exhibit C-089**, Letter from NAS to the ACAA re Parking A,B,C-, July 24, 2016; **Exhibit C-169**, Letter from O. Berni (NAS) to T. Hameedi (ACAA), undated; El-Houry WS ¶ 61; **Exhibit C-112**, Email from H. El-Houry (NAS) to M. Qayoumi (Minister of Finance) re Afghanistan Cargo Proposal, *attaching* Expression of Interest (EOI) for the development of Air Cargo Terminal at HKIA and presentation, February 14, 2019; **Exhibit C-119**, Letter from NAS to Ariana, May 4, 2019; **Exhibit C-132**, Email from H. El-Houry (NAS) to A. Ahmady (Minister of Commerce & Industry) re Letter – Discussion Follow Up, May 18-19, 2020; El-Houry WS ¶ 41.





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**D. THE TERMINATION OF THE JVPA**

128. Over the summer of 2020, Afghan Government officials met with the UAE Civil Aviation Authority, including on June 9 and August 11, 2020.<sup>73</sup> The Chief Legal Adviser to the President of Afghanistan Ashraf Ghani, Mr. Kabir Khan Isakhel, attended these meetings and also met with the Investment Facilitation Unit of Afghanistan and the ACAA on June 10, 2020.<sup>74</sup>
129. On August 8, 2020, President Ghani sent a letter to the ACAA (“**President’s Letter**”) stating as follows:

*All responsible person who changed the contract unilaterally shall be introduced to Attorney General Office. In consultation with Essa Khail the contract with (Kuwaiti Company) NAS shall be terminated. Mr. Nasib shall conclude with UAE companies. Is five years waste of time from lack of attention by previous and current responsables [sic] of civil aviation and Ariana justifiable? (Kuwaiti Company) NAS shall also be introduced to Attorney General Office and also the case shall be lodged against in international courts. Help shall be taken from international cooperators in meeting of Rule of Law High Council.*<sup>75</sup>

130. The President’s Letter attached two documents. First, it annexed a report from the ACAA to the Office of the President of Afghanistan dated July 28, 2020, in which the ACAA noted that the termination for convenience clause originally contained in the RFP was deleted in the JVPA ultimately concluded.<sup>76</sup> The ACAA recommended that the President of Ariana and the evaluation board at the time be “questioned and investigation that why and based on which reason they have changed the conditions in favor of NAS.”<sup>77</sup> The President’s Letter also annexed an order dated August 5, 2020, in which the ACAA requested the Airport directors “not to allow [NAS Afghanistan] to take the equipment out of” the Airports without Ariana’s written consent.<sup>78</sup>
131. On September 5, 2020, the President issued a decree granting authority to the new director of HKIA over all personnel and companies present in the airport, pursuant to which NAS

<sup>73</sup> Claimants’ Statement of Claim ¶ 78; **Exhibit C-133**, Tweet of IFU Afghanistan, June 9, 2020, <https://twitter.com/AIFUAOP/status/1270356961373159426> (last accessed June 3, 2021); **Exhibit C-139**, ACAA Website, August 11, 2020, [http://acaa.gov.af/fa\\_news/an/](http://acaa.gov.af/fa_news/an/) (last accessed June 3, 2021).

<sup>74</sup> Claimants’ Statement of Claim ¶ 78; **Exhibit C-134**, Tweet of IFU Afghanistan, June 10, 2020, <https://twitter.com/AIFUAOP/status/1270680384418779138> (last accessed June 3, 2021).

<sup>75</sup> **Exhibit C-138**, Letter from the Administrative Office of the President to the ACAA, August 8, 2020, p. 1.

<sup>76</sup> *Id.* at p. 2.

<sup>77</sup> *Id.*

<sup>78</sup> **Exhibit C-138**, Letter from the Administrative Office of the President to the ACAA, August 8, 2020, p. 6.



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Afghanistan was requested to submit monthly activity reports.<sup>79</sup> On October 10 and 11, 2020, Government agencies wrote to NAS Afghanistan, seeking extensive information regarding its employees in Afghanistan.<sup>80</sup>

132. On October 14, 2020, Ariana's CEO shared with Mr. Qursha a copy of a "*Notice of Avoidance of the JVPA and NAS Services and Additional Grounds for Termination*" dated October 4, 2020 (the "**Termination Notice**"),<sup>81</sup> which NAS Afghanistan officially received on October 18, 2020.<sup>82</sup> In the Termination Notice, the ACAA and the Ministry of Transportation declared the JVPA void and/or voidable, and alleged termination for material breach on the basis that the GHS had been materially deficient and NAS Afghanistan was in material default of its obligations under the JVPA.<sup>83</sup> The Termination Notice also alleged that the JVPA and related documents were in contravention of Afghan law and that NAS Afghanistan had been awarded the Tender as a result of corruption, fraud, and misrepresentation.<sup>84</sup> The Termination Notice further asserted that the JVPA would have "no further effect as of 4 November 2020" and that it expected NAS Afghanistan to "take immediate action to begin transfer of services to a provider designated by the Ministry."<sup>85</sup>
133. On October 21, 2020, the Deputy Minister – Planning and Policy of the ACAA, Mr. Amanzeb Ansari, emailed NAS Afghanistan and Ariana, demanding that they provide a "comprehensive transition plan for the ground handling services contract at earliest."<sup>86</sup>
134. On October 22, 2020, Gibson Dunn, on behalf of Claimants, wrote to Respondents challenging the validity of the Termination Notice, giving notice of disputes pursuant to the JVPA and the Basic Agreement, and inviting amicable settlement discussions.<sup>87</sup>

<sup>79</sup> **Exhibit C-142**, President's Decree No 84 on Management and Regulation of HKIA Affairs, September 5, 2020; Claimants' Statement of Claim ¶ 82.

<sup>80</sup> **Exhibit C-013**, Letter No. 8 from an AAA assigned audit committee to NAS, October 10, 2020; **Exhibit C-014**, Letter No. 9 from an AAA assigned audit committee to NAS, October 10, 2020; **Exhibit C-015**, Letter No. 79 from the Afghan Ministry of Labor to NAS, October 11, 2020; Claimants' Statement of Claim ¶ 82.

<sup>81</sup> Claimants' Statement of Claim ¶ 84; Qursha WS ¶ 26; **Exhibit C-012**, Termination Notice.

<sup>82</sup> Claimants' Statement of Claim ¶ 87; **Exhibit C-012**, Termination Notice.

<sup>83</sup> **Exhibit C-012**, Termination Notice, p. 4; Claimants' Statement of Claim ¶ 85.

<sup>84</sup> **Exhibit C-012**, Termination Notice, p. 4; Claimants' Statement of Claim ¶ 85.

<sup>85</sup> **Exhibit C-012**, Termination Notice, p. 4; Claimants' Statement of Claim ¶ 85.

<sup>86</sup> Claimants' Statement of Claim ¶ 90; **Exhibit C-016**, Email from A. Ansari (ACAA) to M. Qursha (NAS) and A. Ibrahim (Ariana), October 21, 2020.

<sup>87</sup> **Exhibit C-017**, Letter from Gibson Dunn on behalf of NAS to the ACAA, the Ministry and Ariana, October 22, 2020; Claimants' Statement of Claim ¶ 92.





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Respondents did not engage with this proposal.<sup>88</sup> Mr. Qursha also met with Government authorities, including the ACAA and a committee headed by the Deputy Minister of Transportation, the latter who showed Mr. Qursha a checklist for the purposes of implementing the transition.<sup>89</sup>

### E. THE HANDOVER

135. According to Claimants, the following events transpired between October 23, 2020 and November 4, 2020, the termination date, including:

- Mr. Qursha (a Jordanian national) was removed from his plane leaving for meetings in Dubai, and the National Department for Security detained and interrogated him.<sup>90</sup>
- The ACAA informed the airlines that, effective from November 5, 2020, it had terminated NAS Afghanistan's GHS operations and appointed a UAE service provider, GAAC Holding SPV Limited ("GAAC") to implement the GHS on behalf of the ACAA.<sup>91</sup>
- The Afghan Government entered into an allegedly "virtually identical" agreement<sup>92</sup> with GAAC and G42 for the airport concession,<sup>93</sup> allegedly as part of a "quid pro quo for the UAE government being the single largest donor to the Afghan 2019 presidential re-election campaign."<sup>94</sup>
- It was reported on November 4, 2020, that the Commission for transportation and communication of the Afghan Parliament found that the award of GHS to GAAC was illegal as it did not follow a proper bidding process.<sup>95</sup>

<sup>88</sup> Claimants' Statement of Claim ¶ 92.

<sup>89</sup> *Id.* at ¶ 94; **Exhibit C-020**, Draft Transition Checklist of GHS, Ariana-NAS, October 22, 2020; Qursha WS ¶ 32.

<sup>90</sup> Claimants' Statement of Claim ¶ 96; Qursha WS ¶¶ 35-37; El-Houry WS ¶ 76.

<sup>91</sup> **Exhibit C-029**, Letter from the ACAA to the Operating Airlines in HKIA, HIA and KDH International Airports, October 26, 2020; Claimants' Statement of Claim ¶ 104.

<sup>92</sup> Claimants' Statement of Claim ¶ 110; El-Houry WS ¶ 86.

<sup>93</sup> **Exhibit C-154**, Tweet of IFU Afghanistan, October 29, 2020, [https://twitter.com/Kabir\\_Isakhel/status/1321902464325554178](https://twitter.com/Kabir_Isakhel/status/1321902464325554178) (last accessed on June 3, 2021); Claimants' Statement of Claim ¶ 105.

<sup>94</sup> Claimants' Statement of Claim ¶ 108.

<sup>95</sup> **Exhibit C-041**, M. Haidar Shah Omid, *Parliament Commission Opposes Contracts for Airports Operations*, Tolo News, November 4, 2020, <https://tolonews.com/business-167539>; Claimants' Statement of Claim ¶ 110.





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- Despite assurances and a letter from the ACAA authorizing Mr. Qursha to travel, Respondents prevented Mr. Qursha from leaving Afghanistan until the transition was assured and the documents necessary for the handover were provided.<sup>96</sup>
  - On November 4, 2020, at midnight, the ACAA officially took over NAS Afghanistan's operations, including its Equipment and staff, and requested that NAS Afghanistan transfer all of its Equipment to GAAC by November 7, 2020.<sup>97</sup>
136. Given that it was no longer operating in the Airports, on November 8 and 9, 2020, NAS Afghanistan asked Amadeus and Aric to terminate the agreements relating to the BRS and CUPPS.<sup>98</sup> The systems were suspended on November 10/11, 2020, which prompted threats from M. Isakhel to Mr. El-Houry, including the use of Interpol on the basis of unspecified allegations of corruption from 2013.<sup>99</sup> NAS Afghanistan asked Arinc to resume the CUPPS services, due to concerns for the safety and security of NAS Afghanistan's CEO and employees.<sup>100</sup>
137. Later in the month, Ariana cashed NAS Afghanistan's USD 1 million performance guarantee ("**Performance Guarantee**").<sup>101</sup>
138. NAS Afghanistan understands that criminal proceedings have been launched in the Afghan courts against NAS and Ariana.<sup>102</sup>

<sup>96</sup> Claimants' Statement of Claim ¶¶ 112-118; El-Houry WS ¶¶ 87-92; Qursha WS ¶¶ 40, 42; **Exhibit C-026**, Email from H. El-Houry (NAS) to M. Q. Wafayezada (ACAA), October 26, 2020; **Exhibit C-028**, Email from A. Ansari (ACAA) to H. El-Houry (NAS), October 26, 2020; **Exhibit C-030**, Letter from NAS to the ACAA, October 27, 2020; **Exhibit C-152**, Trilateral meeting between the ACAA, NAS, GAAC, Key Decisions, October 28, 2020; **Exhibit C-031**, Email from H. El-Houry (NAS) to M. Q. Wafayezada (ACAA), October 29, 2020; **Exhibit C-032** (p. 4), Email from A. Ansari (ACAA) to H. El-Houry (NAS), October 30, 2020; **Exhibit C-033**, Letter from the ACAA to the Attorney General Office, October 30, 2020.

<sup>97</sup> **Exhibit C-043**, Letter from the ACAA to NAS Afghanistan, November 5, 2020; Claimants' Statement of Claim ¶ 124; El-Houry WS ¶¶ 95-98.

<sup>98</sup> **Exhibit C-044**, Letter from NAS Afghanistan to Amadeus, November 8, 2020; **Exhibit C-045**, Letter from NAS Afghanistan to Arinc, November 9, 2020; Claimants' Statement of Claim ¶ 126.

<sup>99</sup> **Exhibit C-047**, WhatsApp messages exchanged between H. El-Houry (NAS) and K. Isakhel (Government), October 29 to November 13, 2020, p. 3; Claimants' Statement of Claim ¶ 127; El-Houry WS ¶ 101.

<sup>100</sup> **Exhibit C-048**, Letter from NAS to Arinc, November 13, 2020; Claimants' Statement of Claim ¶ 128; El-Houry WS ¶ 101.

<sup>101</sup> **Exhibit C-159**, Letter from Gulf Bank to NAS, November 25, 2020; Claimants' Statement of Claim ¶ 131; see also **Exhibit C-113**, Performance Guarantee, issued on February 16, 2019.

<sup>102</sup> Claimants' Statement of Claim ¶ 133.



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## IV. THE PARTIES' POSITIONS

139. The following is an overview of the Parties' respective positions on the claims. A fuller summary of these positions is set forth in Section V below in the context of the Tribunal's analysis and findings.

## A. CLAIMANTS

140. Claimants aver that, in October 2020, the ACAA and the Ministry of Transportation "unlawfully declared that the JVPA was invalidated and/or terminated and, together with the purported termination thereof, took active and hostile steps to force NAS to surrender its assets and personnel to the Respondents."<sup>103</sup> According to Claimants, those steps included "the sudden imposition of a travel ban on NAS's expatriate employees, threats of criminal action and the use of 'the government's coercive power' against NAS in order to compel the 'handover.'"<sup>104</sup> Claimants allege that, as a result of Respondents' wrongful conduct in breach of the Basic Agreement and the PIL, Claimants suffered substantial loss and expropriation of their business for which they seek compensation.<sup>105</sup>
141. Specifically, Claimants argue that Respondents breached Clauses 4.1(i), 4.1(ii), and 4.2 of the Basic Agreement, which incorporated by reference the JVPA such that the First and Second Respondents also were required to honor the terms of the JVPA.<sup>106</sup> In addition to the improper termination of the JVPA and related conduct, Claimants also allege that Respondents further breached the Basic Agreement and the JVPA by, *inter alia*, improperly retaining Claimants' Equipment, drawing down on the Performance Guarantee, and breaching Claimants' exclusivity rights.
142. In their Statement of Claim, Claimants requested an award granting the following relief:
- (i) *A declaration that the Respondents' purported termination of the JVPA was wrongful and unlawful;*
  - (ii) *A declaration that the Respondents are in breach of the express and/or implied terms of the Basic Agreement (and the JVPA as incorporated therein), including Clauses 4.1(i), 4.1(ii) and 4.2 thereof, as well as Afghan law;*
  - (iii) *A declaration that the Respondents are in breach of their obligations under the PIL, including Articles 22, 23, 27 and 28;*

<sup>103</sup> *Id.* at ¶ 4.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at ¶ 138.





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- (iv) *An order that the Respondents compensate the Claimants in respect of all loss and damage suffered by the Claimants as a result of items (i) to (iii) above, in the amount (including pre-award interest to be updated) of:*
  - a) *USD 34.16 million for unlawful termination and related breaches of the Basic Agreement and the JVPA;*
  - b) *USD 16.25 million for breaches of NAS's exclusivity rights under the Basic Agreement and the JVPA;*
  - c) *USD 25.51 million for breaches of the PIL;*
- (v) *An order that the Respondents pay post-award interest on all sums awarded;*
- (vi) *An order that the Respondents bear the costs of the arbitration, including legal costs and fees, incurred by the Claimants; and*
- (vii) *Such further or other relief that the Tribunal considers appropriate.*<sup>107</sup>

143. Claimants restated their requested relief in their Post-Hearing Submission in the following terms:

- a. *A declaration that the First and Second Respondents' purported termination of the JVPA, and the Third Respondent's active participation therein—including in calling the Claimant's Performance Guarantee—was wrongful and unlawful in breach of the Basic Agreement (and JVPA as integrated therein);*
- b. *A declaration that the Respondents breached the Claimant's exclusivity rights under the Basic Agreement (and the JVPA as integrated therein);*
- c. *A declaration that the Respondents breached the "Change in Law" provisions under the Basic Agreement (and the JVPA as integrated therein);*
- d. *An order that the Respondents compensate the Claimant in respect of all loss and damage suffered as a result of items (a) to (c) above, in the amount of USD 48,435,760, comprised of:*
  - i. *USD 33,219,940 for the unlawful termination of the JVPA;*
  - ii. *USD 14,801,758 for breach of the Claimant's exclusivity rights;*
  - iii. *USD 414,062 for breach of the "Change in Law" provisions;**plus pre-award interest on the above amounts at LIBOR plus 2%.*
- e. *An order that the Respondents pay post-award interest on all sums awarded;*

<sup>107</sup> *Id.* at ¶ 202.





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- f. An order that the Respondents bear the costs of the arbitration, including legal costs and fees, incurred by the Claimant; and*
- g. Such further or other relief that the Tribunal considers appropriate.<sup>108</sup>*

**B. RESPONDENTS**

- 144. As stated above in Section II, Respondents filed an Answer on February 3, 2021.
- 145. In the Answer, Respondents pleaded that the Answer was initially required to be filed on January 4, 2021, but on December 22, 2020, newly-retained counsel (Hogan Lovells) sought an initial 30-day extension, which was granted.<sup>109</sup> When counsel sought a further 30-day extension of the February 3, 2021 deadline, however, Claimants opposed the request, and consequently the ICC Secretariat did not grant the extension.<sup>110</sup>
- 146. Respondents' Answer did not address each contention in the Request for Arbitration; rather, it denied Claimants' claims in their entirety.<sup>111</sup>
- 147. Respondents requested an award:
  - (a) dismissing the Claimants claims in their entirety;*
  - (b) ordering the Claimants to pay costs and expenses incurred by the Respondents in connection with this arbitration, including but not limited to:*
    - (i) all professional fees, including the fees and disbursements of the Respondents' experts, if any;*
    - (ii) all costs and expenses incurred by the Respondents' witnesses;*
    - (iii) all fees and expenses of the Tribunal and of the ICC;*
    - (iv) any other costs associated with these arbitration proceedings;*
  - (c) ordering the Claimants to pay pre- and post-award interest on such costs and expenses; and*
  - (d) granting such further and/or other relief as the Tribunal in its discretion determines appropriate.<sup>112</sup>*

<sup>108</sup> Claimants' Post-Hearing Submission ¶ 69.

<sup>109</sup> Respondents' Answer ¶¶ 6, 8-9.

<sup>110</sup> *Id.* at ¶¶ 11-12.

<sup>111</sup> *Id.* at ¶ 13.

<sup>112</sup> Respondents' Answer ¶ 15.



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148. Respondents further reserved their rights regarding the jurisdiction of the Tribunal to determine some, or all, of the claims asserted in the Request for Arbitration.<sup>113</sup>

## V. THE TRIBUNAL'S ANALYSIS AND DECISIONS

149. This section does not contain or purport to contain an exhaustive list or summary of the Parties' contentions, but rather summarizes their main arguments on each issue. In considering and deciding upon the claims before it, the Tribunal reviewed, accounted for, and considered all written and oral submissions and evidence from the Parties, whether or not summarized in this Award.

### A. JURISDICTION

150. Claimants invoke the arbitration agreement contained at Clause 7.2 of the Basic Agreement, which grants the Tribunal exclusive jurisdiction to decide "any dispute, controversy, claim or difference of any kind whatsoever arising or occurring between the Parties in relation to any issue or matter arising under, out of, or in connection with this Agreement including its interpretation, performance or non-performance, enforceability or breach."<sup>114</sup>
151. As noted above,<sup>115</sup> Respondents reserved their rights regarding the jurisdiction of the Tribunal to determine some, or all, of the claims asserted in the Request for Arbitration,<sup>116</sup> and did not actively participate in this Arbitration, despite being invited and given multiple reasonable opportunities to do so.<sup>117</sup>
152. The Parties to the Basic Agreement signed in December 2013 are Ariana, NAS Kuwait, the ACAA, and the Ministry of Transportation. As expressly contemplated in the JVPA and in the Basic Agreement,<sup>118</sup> NAS Kuwait assigned the "Assigned Documents" to NAS Afghanistan on January 13, 2014 ("Assignment Agreement").<sup>119</sup> The term "Assigned Documents" is defined as the JVPA, its addendum, and "any other document relating to the JVPA)...for the provision of ground-handling services and other related services as specified in the JVPA in Afghanistan."<sup>120</sup> NAS Kuwait thus became a "third-party to the

<sup>113</sup> *Id.* at ¶ 16.

<sup>114</sup> **Exhibit C-005**, Basic Agreement, Clause 7.2.

<sup>115</sup> *See supra* ¶ 148.

<sup>116</sup> Respondents' Answer at ¶ 16.

<sup>117</sup> *See supra* Section II.

<sup>118</sup> **Exhibit C-003**, JVPA, Clause 8.1; **Exhibit C-005**, Basic Agreement, Preamble and Clause 3.1(b).

<sup>119</sup> **Exhibit C-006**, Assignment Agreements, Clause 3.

<sup>120</sup> *Id.* at Preamble.





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Assigned Documents,” and NAS Afghanistan was substituted for NAS Kuwait in the Assigned Documents.<sup>121</sup> NAS Afghanistan thus assumed all “duties and obligations”—and “enjoy[ed] all the rights and benefits”—of NAS Kuwait “arising out of or under the Assigned Documents,”<sup>122</sup> and all references to NAS Kuwait in any of the Assigned Documents “shall be read and construed as if they were references to NAS Afghanistan, unless provided expressly otherwise.”<sup>123</sup>

153. In a letter dated January 14, 2014, NAS Kuwait and NAS Afghanistan informed Ariana of the Assignment Agreement.<sup>124</sup> Ariana acknowledged receipt of this letter and “accept[ed] and agree[d] to be bound by its content.”<sup>125</sup>
154. Accordingly, the parties bound by the arbitration agreement contained at Clause 7.2 of the Basic Agreement are NAS Afghanistan, Ariana, the ACAA, and the Ministry of Transportation. First Claimant NAS Kuwait is not bound by the arbitration agreement since it became a “third-party” to the relevant agreements, and Claimants have not argued otherwise. In fact, as Claimants confirmed in their Post-Hearing Submission, First Claimant NAS Kuwait is “withdrawn as a Party, with NAS Afghanistan remaining as the sole Claimant.”<sup>126</sup> The Tribunal thus has jurisdiction *ratione personae* over Second Claimant NAS Afghanistan, First Respondent ACAA, Second Respondent Ministry of Transportation, and Third Respondent Ariana.<sup>127</sup> The Tribunal does not have jurisdiction *ratione personae* over First Claimant NAS Kuwait.
155. The Tribunal turns next to its jurisdiction *ratione materiae*. Pursuant to Clause 7.2 of the Basic Agreement, the Tribunal may rule on any dispute relating to the Basic Agreement. Although Claimants do not assert an independent, standalone claim for breaches of the JVPA as such, Claimants contend that the terms of the JVPA were incorporated into the Basic Agreement such that the Tribunal has jurisdiction to decide whether Respondents’ conduct also breaches the JVPA (as incorporated).
156. The threshold question, therefore, is whether the terms of the JVPA are incorporated into the Basic Agreement. The Tribunal finds that Claimants’ position on incorporation is correct. The Basic Agreement clearly provides that the “Preamble of this Agreement and

<sup>121</sup> **Exhibit C-006**, Assignment Agreements, Clause 3.

<sup>122</sup> *Id.* at Clause 3(c).

<sup>123</sup> *Id.* at Clause 3(d).

<sup>124</sup> **Exhibit C-007**, Letter of assignment of JVPA from NAS to Ariana, January 14, 2014.

<sup>125</sup> *Id.*

<sup>126</sup> Claimants’ Post-Hearing Submission ¶ 5.

<sup>127</sup> The caption of the Arbitration in this Final Award is amended to reflect the Tribunal’s decision on jurisdiction.





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its appendices attached hereto shall constitute an integral part thereof.”<sup>128</sup> A copy of the JVPA is attached to the Basic Agreement as Appendix 1,<sup>129</sup> while the Preamble confirms the parties’ intention to set out “the main terms and conditions of the JVPA” in the Basic Agreement.<sup>130</sup> Various other provisions of the Basic Agreement confirm this integration of the two agreements.<sup>131</sup>

157. The Basic Agreement and the JVPA thus constitute an integrated agreement. Put differently, the Parties incorporated the JVPA in its entirety into the Basic Agreement, such that the Tribunal has jurisdiction to determine whether Respondents breached any of their obligations set forth in the Basic Agreement and the JVPA.
158. Claimants also invoke Article 30(5) of Afghanistan’s PIL, which is part of Afghan law (the governing law of the Basic Agreement), as a basis for the Tribunal’s jurisdiction.<sup>132</sup> Claimants’ counsel later confirmed at the March 2022 hearing that, “if you agree that the respondents did commit those breaches [of the Basic Agreement], you do not need to consider the breaches of the PIL.”<sup>133</sup> Because the Tribunal finds below that Respondents breached the Basic Agreement and the JVPA, the Tribunal does not need to examine whether there also has been a breach of the PIL, and thus whether it has jurisdiction under the PIL,<sup>134</sup> given that it has already established jurisdiction under the JVPA and the Basic Agreement. Accordingly, Article 30(5) of the PIL is not relevant for purposes of this Arbitration, and it is not necessary to consider arguments of investment law, as Claimant confirmed that investment protection did not need to be considered.

<sup>128</sup> **Exhibit C-005**, Basic Agreement, Clause 1.

<sup>129</sup> *Id.* at p. 1.

<sup>130</sup> **Exhibit C-005**, Basic Agreement, Preamble (“Whereas, the Second Party has reviewed and agreed on the terms and conditions of the JVPA; and Whereas, the First Party and the Second Party hereby wish to set out in this Agreement the main terms and conditions of the JVPA.”).

<sup>131</sup> *See, e.g., id.* at Clause 3 (setting out the “[m]ain terms and conditions of the JVPA for the provision of Services”), Clause 4.1(b) (“If the Islamic Republic of Afghanistan should ever cancel the First Party rights and the JVPA agreement, the Second Party [ACAA and Ministry of Transportation] agrees to abide with all terms and conditions of [the] JVPA, as well as all termination privileges and penalties”), and Clause 5 (“[t]his Agreement shall enter into force as of the Effective Date and shall be binding and remain in full force and effect as long as the JVPA is in force, unless agreed otherwise between the Parties.”).

<sup>132</sup> **Exhibit C-001**, PIL, Art. 30(5); *see generally* Claimants’ Statement of Claim ¶¶ 174-180.

<sup>133</sup> Hearing Tr. 47:17-22 (Wazen); *see also id.* 54:12-15 (Wazen) (“you do not need to consider these [PIL] breaches if you accept that the respondents have breached the basic agreement and wrongfully terminated the JVPA”). Moreover, Claimants claim PIL-based damages in the alternative to contract-based damages. *See* Claimants’ Statement of Claim ¶ 182 (“For the avoidance of doubt, the losses quantified under Sections A [breach of contract] and C [breach of PIL] are not cumulative”).

<sup>134</sup> *See* Claimants’ Statement of Claim ¶¶ 174-180 (setting forth Claimants’ argument regarding Respondents’ alleged breach of the PIL).



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159. The Tribunal thus has jurisdiction over Second Claimant NAS Afghanistan's claims against all three Respondents, arising under the Basic Agreement and the JVPA (as incorporated) on the basis of the ICC arbitration clause contained in the Basic Agreement.<sup>135</sup>

**B. ADMISSIBILITY**

160. Clause 7.2 of the Basic Agreement (quoted in full above at ¶ 15) requires that, in case of a dispute, written notice that such dispute exists must be given to the other party with "full particulars of the nature of the Dispute."<sup>136</sup> The Parties must use "all reasonable efforts" to settle the dispute through good faith negotiations, failing which a party may resort to arbitration if the matter has not been resolved within 60 working days of the dispute notice or if the Parties fail to meet within 20 working days.<sup>137</sup>

161. The Tribunal is satisfied that Claimants complied with the pre-arbitration condition contained in the arbitration agreement. On October 22, 2020, Claimants' counsel wrote to Respondents, challenging the validity of the Termination Notice, giving notice of disputes pursuant to the JVPA and the Basic Agreement, and inviting amicable settlement discussions.<sup>138</sup> There is no evidence in the record that Respondents responded to or accepted this invitation.<sup>139</sup> To the contrary, as detailed above,<sup>140</sup> the events that transpired from October 23, 2020 through the end of November 2020—*i.e.*, within 20 working days—show clearly that Respondents took steps that led to taking over NAS Afghanistan's operations. Accordingly, the Tribunal finds that Claimants complied with the pre-arbitration condition contained in the arbitration agreement and that their claims are procedurally admissible in accordance with Clause 7.2 of the Basic Agreement.

**C. LIABILITY**

162. The Tribunal now turns to the merits of the dispute. This section is organized topically, according to Respondents' alleged misconduct, rather than by contractual provision allegedly breached, namely: (1.) the termination of the JVPA, (2.) the failure to return NAS Afghanistan's Equipment, (3.) the cashing of the Performance Guarantee, (4.) the adverse impacts on NAS Afghanistan, (5.) the breach of the exclusivity provisions, (6.) the

<sup>135</sup> See *supra* ¶ 15.

<sup>136</sup> Exhibit C-005, Basic Agreement, Clause 7.2.

<sup>137</sup> *Id.*

<sup>138</sup> Exhibit C-017, Letter from Gibson Dunn on behalf of NAS to the ACAA, the Ministry and Ariana, October 22, 2020; Claimants' Statement of Claim ¶ 92.

<sup>139</sup> Claimants' Statement of Claim ¶ 92.

<sup>140</sup> See *supra* ¶¶ 135-138.





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interference with the management of the joint venture, and (7.) a change in the tax law. As noted above,<sup>141</sup> the facts and the Parties' respective positions on the claims are discussed more fully in this section, as appropriate.

163. Under Afghan law, the parties' agreement governs: "[c]ommercial disputes shall be settled in accordance with legally binding agreements and, in their absence, by reference to explicit or implicit meaning of commercial laws."<sup>142</sup> Moreover, Afghan law imposes a general duty of good faith in the performance of contractual obligations: "[p]arties to the contract shall perform their promises determined in the contract; these promises shall not be limited to those promises mentioned in the contract, and it also covers those matters of existing law, custom and practice to which the purpose and nature of good faith contract is related."<sup>143</sup> Accordingly, the terms of the Basic Agreement and the JVPA (as incorporated) govern the Parties' rights and obligations, which must be performed in good faith.

### 1. Termination of the JVPA

164. The ACAA issued the Termination Notice on behalf of itself and the Ministry of Transportation.<sup>144</sup> It asserted two independent grounds for terminating the JVPA. First, the Termination Notice informed NAS Afghanistan that "the Government declares the JVPA void pursuant to the laws of the State" because it was found to have been entered into by the parties contrary to the laws of Afghanistan and was "procured by fraud, misrepresentation and corruption in the Ariana Tender"<sup>145</sup> ("**Illegality Allegations**"). The Notice asserted that, in the tender process, NAS Afghanistan won the Tender by securing a score two percentage points higher than DNATA, but the latter was not awarded a preference percentage bonus to which it was entitled under the law: "Had DNATA received the preference per the Procurement Regulation, DNATA would have been selected by the Ariana Tender and considered for the [Ariana] [C]oncession. NAS, on the

<sup>141</sup> See *supra* ¶¶ 107, 139.

<sup>142</sup> **Authority CL-002**, Commercial Code of Afghanistan (1955), Article 2.

<sup>143</sup> **Authority CL-005**, Afghanistan Law on Commercial Contracts and Sale of Goods (2014), Article 44. See also *id.* at Article 6 ("[the] parties are bound to adhere in good faith to the process of contract negotiation and exercising their rights and responsibilities"); **Authority CL-002**, Commercial Code of Afghanistan (1955), Articles 56 ("Any deception and conspiracy in commercial affairs shall be prohibited.") and 591 ("A person who does not meet his commercial obligation by cheating or fault, or delays meeting it, he shall be obliged to compensate for damages the oblige has incurred and profits he has lost, after he has been, officially or by registered post, notified."); **Authority CL-003**, Civil Code of Afghanistan (1977), Article 697 ("Contract shall be valid on anything included therein and required by good faith. Also, contract binds parties to what is included therein as well as include all requirements of nature of obligation according to provision of law, custom and justice."); Claimants' Statement of Claim ¶¶ 139-145.

<sup>144</sup> **Exhibit C-012**, Termination Notice.

<sup>145</sup> *Id.* at p. 1.





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other hand, would not have won the Ariana Tender.”<sup>146</sup> The Notice also noted that the RFP issued as part of the Ariana Tender granted the Ministry of Transportation and the ACAA the right to terminate the contract for convenience<sup>147</sup> (in addition to termination for cause). Yet these provisions “were amended in favor of NAS, in a manner that prevents any act of unilateral termination by the Ministry...and instead contemplated payment by the Ministry of penalties for certain acts of termination.”<sup>148</sup> The JVPA also omitted other provisions required by the procurement law.<sup>149</sup> According to the Notice, the Government thus found that the JVPA and related amendments were drafted in contravention of the procurement law and procedure, and that NAS Afghanistan was awarded the Ariana Tender in breach of such law and procedure.<sup>150</sup> The Government concluded that these actions “occurred as the result of corruption in the procurement and contracting process, arising from fraudulent acts and/or misrepresentations by the parties involved in such process.”<sup>151</sup> The ACAA and the Ministry of Transportation gave thirty days’ notice and declared the JVPA void and of no further effect as of November 4, 2020.<sup>152</sup>

165. Second, the Termination Notice further informed NAS Afghanistan that its ground handling services “have been materially deficient, despite repeated notice from the ACAA, and Ariana-NAS/NAS is in material default of its obligations under the JVPA.”<sup>153</sup> The Notice referred to several letters sent by the ACAA to NAS Afghanistan and Ariana in 2014 and 2017, providing notice of material breaches, and further enumerated several ways in which NAS Afghanistan “has failed to adequately perform Services.”<sup>154</sup> Because the breaches were “unremedied for years,” the ACAA and the Ministry of Transportation also terminated the JVPA for material breach.<sup>155</sup>
166. Claimants dispute the reasons advanced by the ACAA and the Ministry of Transportation for termination<sup>156</sup> and argue that Respondents’ termination of the JVPA was unlawful and

<sup>146</sup> **Exhibit C-012**, Termination Notice, p. 3. According to the Termination Notice, DNATA was registered in Afghanistan at the time (while NAS Kuwait was not) and thus qualified for a percentage bonus that could range from 5 to 10 percent. *Id.*

<sup>147</sup> *Id.* at p. 2; *see also* **Exhibit C-051**, RFP, Art. 21.5 (“The Employer shall be entitled to terminate the Contract, at any time for the Employer’s convenience, by giving notice of such termination to the Joint Venture.”).

<sup>148</sup> **Exhibit C-012**, Termination Notice, p. 2.

<sup>149</sup> *Id.* at p. 3.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; *see also id.* at p. 4.

<sup>152</sup> *Id.* at p. 4.

<sup>153</sup> *Id.* at p. 1.

<sup>154</sup> *Id.* at pp. 5-6.

<sup>155</sup> *Id.* at p. 5.

<sup>156</sup> Claimants’ Statement of Claim ¶¶ 147, 162.



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in breach of Clauses 4.1(i) and (ii) of the Basic Agreement. Clause 4.1 of the Basic Agreement provides in full as follows:

4.1 *The Second Party hereby acknowledges and declares that:*

- (i) *the award by Ariana to NAS of the tender by virtue of which NAS shall have the exclusive rights to provide, in a joint-venture with Ariana, all Ground-Handling Services at all Airports in Afghanistan, is valid and consistent with the laws of the Jurisdiction and therefore such award is approved by the Second Party. If the Islamic Republic of Afghanistan should ever cancel the First Party rights and the JVPA agreement, the Second Party agrees to abide with all terms and conditions of JVPA, as well as all termination privileges and penalties.*
- (ii) *the terms of the JVPA are consistent with the laws of the Islamic Republic of Afghanistan, are valid and shall be binding to ACAA in all matters (including but not limited to the Services).<sup>157</sup>*

167. The question before the Tribunal thus is whether First and Second Respondents—the ACAA and the Ministry of Transportation, respectively—breached the Basic Agreement and the JVPA when they issued this Termination Notice. Before examining each termination ground, however, a few preliminary remarks are in order.
168. *First*, the JVPA clearly lists the grounds for termination. Clause 26.2(b) of the JVPA, as amended, provides that the Parties may terminate the JVPA by mutual written agreement, or unilaterally for cause, with six-month prior written notice, in certain specified circumstances.<sup>158</sup> One such circumstance is if a Party “commits a material breach to its obligations under this Agreement and fails to remedy such breach within a period of six (6) months as of receipt of a notice from the non-breaching Party in this respect,” at which point the non-breaching Party “shall have the right to terminate the Agreement at the end of the above mentioned period.”<sup>159</sup> The remaining provisions of Clause 26 of the JVPA “shall remain unchanged.”<sup>160</sup> This includes the provision that, during the term of the JVPA, “Ariana shall not be entitled to terminate the Agreement at will for whatever reason,”<sup>161</sup> *i.e.*, the JVPA expressly precludes termination for convenience. Because the

<sup>157</sup> Exhibit C-005, Basic Agreement, Clause 4.1.

<sup>158</sup> Exhibit C-004, Addendum to the JVPA ¶ 3.3, amending Clause 26.2(a) and (b) of the JVPA.

<sup>159</sup> *Id.* at ¶ 3.3, amending Clause 26.2(b)(v) of the JVPA.

<sup>160</sup> *Id.*

<sup>161</sup> Exhibit C-003, JVPA, Clause 26.2.





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JVPA terms are incorporated into the Basic Agreement, any termination for convenience also breaches the Basic Agreement.

169. *Second*, the Termination Notice was issued by the ACAA and the Ministry of Transportation, not by Ariana, NAS Afghanistan's co-contracting party in the JVPA.<sup>162</sup> Per the terms of the JVPA, however, neither the ACAA nor the Ministry of Transportation had any contractual entitlement to terminate the JVPA.<sup>163</sup> In fact, in a letter dated February 4, 2018, the ACAA admitted that it considers itself to be a third party to the JVPA: "as long as the contract [the JVPA] has been signed between the company [NAS Afghanistan] and AAA, Afghanistan Civil Aviation Authority is not responsible with respect to any problem raised on ground handling, financial/cash issues."<sup>164</sup>
170. Having said that, the Basic Agreement—to which the ACAA and the Ministry of Transportation are parties—incorporates the JVPA and imposes certain direct obligations on the ACAA and the Ministry of Transportation in relation to the JVPA. Pursuant to the Basic Agreement, the ACAA and the Ministry of Transportation agreed to "abide with all terms and conditions of JVPA, as well as all termination privileges and penalties," should Afghanistan "ever cancel" Ariana's and NAS Afghanistan's "rights and the JVPA agreement."<sup>165</sup> The ACAA and the Ministry of Transportation further agreed that the terms of the JVPA would be "binding to ACAA in all matters (including but not limited to the Services)," <sup>166</sup> e.g., the termination provision of the JVPA. A breach of the JVPA termination provision thus also constitutes an independent breach of Clauses 4.1(i) and 4.1(ii) of the Basic Agreement.
171. To assess the legality of the Termination Notice, the Tribunal now turns to each of the two termination grounds: (a.) the Illegality Allegations; and (b.) material breach.

*a. Illegality Allegations*

172. Citing (without quoting) to Article 26 of the 2014 Afghan Law on Commercial Contracts and Sale of Goods, the ACAA and the Ministry of Transportation declared that the JVPA was voidable as a matter of law on the basis that it was allegedly procured by fraud and

<sup>162</sup> See also *infra* ¶ 186.

<sup>163</sup> See also Hearing Tr. 50:18-22 (Wazen) ("Neither the ACAA nor the MoT was a party to the JVPA, and they had no entitlement to terminate the JVPA on the basis of clause 26.2. That contractual termination right could only be exercised by Ariana or NAS.").

<sup>164</sup> Exhibit C-105, Letter from the ACAA to NAS Afghanistan, Feb. 4, 2018.

<sup>165</sup> Exhibit C-005, Basic Agreement, Clause 4.1(i).

<sup>166</sup> *Id.* at Clause 4.1(ii).





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corruption.<sup>167</sup> Although fraud and corruption are not enumerated grounds for termination in Clause 26.2 of the JVPA, the Tribunal must examine any evidence that may pertain to the Illegality Allegations given the gravity of such allegations, and, if such evidence is found, must draw the appropriate legal conclusions.

173. As detailed in the following paragraphs, the Tribunal finds no evidence in the record supporting the Termination Notice's Illegality Allegations. To the contrary, the record shows that NAS Kuwait won the Tender by making the best technical and financial offers, negotiated the terms of the JVPA, and obtained the approval of the ACAA and the Ministry of Transportation on these terms. This evidence highlights the pretextual nature of this termination ground.
174. Per the RFP documents, six companies, including NAS Kuwait, were shortlisted and invited to participate in the RFP.<sup>168</sup> On September 22, 2013, NAS Kuwait submitted financial and technical proposals, as did two other bidders, DeltaVector and DNATA.<sup>169</sup>
175. On the technical proposals, Ariana's evaluation committee awarded NAS Kuwait the highest score (97.41), followed by DNATA (95.55) and DeltaVector (77.15).<sup>170</sup> The evaluation committee noted that NAS Kuwait's technical proposal "is on top in terms of responsiveness to the RFP," "is prepared in accordance with the RFP and is very well explained."<sup>171</sup> The committee further noted that NAS Kuwait is a "fully private entity with no connections or ownership by any government entities or airlines," which gave it the "very important advantage of being independent."<sup>172</sup> In terms of weaknesses, the committee noted "[n]il."<sup>173</sup>
176. Regarding DNATA, the evaluation committee made no mention of DNATA being registered in Afghanistan or being entitled to receive bonus percentage points (a key point that the Termination Notice raised). To the contrary, the committee noted, as a weakness,

<sup>167</sup> **Exhibit C-012**, Termination Notice, p. 4; *see id.* (citing to Article 26 of the 2014 Afghan Law on Commercial Contracts and Sale of Goods for the proposition that "[t]he voidable contract is a contract in which the consent of one of the parties is held by coercion, fraud or misrepresentation").

<sup>168</sup> **Exhibit C-051**, RFP, p. 2.

<sup>169</sup> **Exhibit C-055**, NAS Financial Bid, September 22, 2013; **Exhibit C-056**, NAS Technical Bid, September 22, 2013; *see also* **Exhibit C-054**, Ariana Minutes of Technical Proposal Opening, September 22, 2013.

<sup>170</sup> **Exhibit C-057**, Ariana Ground Handling Technical Evaluation Report, October 2013, p. 15.

<sup>171</sup> *Id.* at p. 13; *see also id.* at p. 16 ("The approach and methodology have been prepared in well detailed manner and very professionally.") ("The Technical Proposal submitted by the NAS is the best one among the bidders in terms of responsiveness to the RFP.")

<sup>172</sup> *Id.* at p. 13.

<sup>173</sup> *Id.* at p. 14.



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that DNATA is “100% owned by the Government of Dubai,” and that being part of the Emirates Group (which includes Emirati airlines) “can cause ‘conflict of interests’ with Ariana Afghan Airlines.”<sup>174</sup> In contrast, the committee noted that “NAS has already established a NAS investment company in Afghanistan which partly enables them to commence operations at the airports within 3 months of awarding the tender – faster than any other bidder.”<sup>175</sup>

177. On the financial proposals, the evaluation committee awarded NAS Kuwait the highest score (87).<sup>176</sup> DeltaVector was disqualified because it failed to provide the required bid security,<sup>177</sup> while DNATA was awarded a score of 51.<sup>178</sup>
178. There is thus no evidence in the RFP and the evaluation committee’s reports (or elsewhere in the record) that supports the claim in the Termination Notice that DNATA was entitled to additional percentage points, that such points would have been material to the outcome, and that such points were not awarded due to fraud or corruption or some other form of illegality.
179. With respect to the lack of a termination for convenience provision in the JVPA, the record shows that this element was specifically negotiated between the Parties. On September 8, 2013, before submitting its technical and financial proposals, NAS Kuwait raised concerns regarding the termination for convenience clause in the proposed joint-venture agreement.<sup>179</sup> Ariana followed up in a later pre-bid meeting on September 15, 2013 to confirm that it would negotiate with the Ministry of Transportation to “remove this clause or amend it suitably.”<sup>180</sup> It further confirmed that “there [was] no proposed format of the JV relationship as once the winner is announced, [...] Ariana and the Winner will draft and sign a methodology of their mutual relationship.”<sup>181</sup>
180. On November 4, 2013, Ariana and NAS Kuwait entered into the JVPA, which did not contain a termination for convenience clause (and in fact expressly excluded the possibility

<sup>174</sup> *Id.* at p. 13.

<sup>175</sup> *Id.* at p. 16.

<sup>176</sup> **Exhibit C-058**, Ariana Ground Handling Financial Evaluation Report, October 2013, p. 6.

<sup>177</sup> **Exhibit C-059**, Email from W. Frough (Ariana) to W. Frough (Ariana) re Minutes of the “Financial Proposal Opening.”

<sup>178</sup> **Exhibit C-058**, Ariana Ground Handling Financial Evaluation Report, October 2013, p. 6.

<sup>179</sup> **Exhibit C-052**, Ariana Minutes of Pre-bid meeting for Joint Venture Partnership contract for Implementation of Ground Handling Services at Airports, September 8, 2013, p. 3.

<sup>180</sup> **Exhibit C-053**, Email from W. Frough (Ariana) to W. Frough (Ariana) re Minutes further discussed, September 15, 2013.

<sup>181</sup> *Id.*





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of termination for convenience). A month later, on December 10, 2013, Ariana and NAS Kuwait amended the termination provision of the JVPA (Clauses 26.1 and 26.2) by entering into the Addendum to the JVPA. The Parties did not amend the termination provision to allow for termination for convenience, however.

181. The absence of a termination for convenience provision is thus the result of the Parties' negotiations, and not—as the Termination Notice contends—the result of fraud or corruption.<sup>182</sup>
182. Finally, with respect to the Termination Notice's allegations that the JVPA omitted various provisions required by the procurement law (*e.g.*, the requirements to specify remedies for breach of contract and to account for delay in contract performance),<sup>183</sup> the record shows that both the ACAA and the Ministry of Transportation—which issued the Termination Notice—specifically reviewed and agreed to the terms and conditions of the JVPA: the Basic Agreement clearly states that the ACAA and the Ministry of Transportation “reviewed and agreed on the terms and conditions of the JVPA.”<sup>184</sup> In other words, they signed off on the JVPA as is, *i.e.*, without the elements supposedly required under the procurement law (and, incidentally, also without a termination for convenience provision). If any such elements truly had been required and were missing from the JVPA, the ACAA and the Ministry of Transportation should have raised their concerns and voiced their disapproval of the transaction at that time. But the ACAA and the Ministry of Transportation did precisely the opposite. They repeatedly confirmed that the JVPA, the Addendum, and the Basic Agreement were valid and in compliance with the laws of Afghanistan:
  - On December 18, 2013, Ariana confirmed to NAS Kuwait that the Ministry of Transportation had “stamped” the JVPA and the Addendum, which were “officially submitted” to the ACAA.<sup>185</sup> Ariana also informed NAS Kuwait that the ACAA had written to Kabul's HKIA, instructing it to facilitate the transition of GHS to NAS Kuwait.<sup>186</sup>

<sup>182</sup> It should be noted that, prior to the Termination Notice, Ariana had sought to renegotiate the JVPA and specifically had sought to include a “termination at will clause,” to no avail. Claimants' Statement of Claim ¶¶ 69-71, 74; **Exhibit C-125**, Ariana-NAS Advisory Board Meeting Minutes, Dubai, November 25-27, 2019, Annex 1; El-Houry WS ¶¶ 60, 63.

<sup>183</sup> *Id.* at p. 3.

<sup>184</sup> **Exhibit C-005**, Basic Agreement, Preamble (“Whereas, the Second Party [ACAA and the Ministry of Transportation] has reviewed and agreed on the terms and conditions of the JVPA”).

<sup>185</sup> **Exhibit C-063**, Email from W. Frough (Ariana) to N. Kahimi (Ariana) re ACAA's Letter to KAIA's President Regarding Ground Handling Services by Ariana-NAS “Joint Venture,” *attaching* letter from the ACAA, December 18, 2013.

<sup>186</sup> *Id.*





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- In the Basic Agreement, both the ACAA and the Ministry of Transportation acknowledged and declared that the award of the services contract to NAS Afghanistan “is valid and consistent with the laws of the Jurisdiction and therefore such award is approved by [them]”<sup>187</sup> and that the terms of the JVPA “are consistent with the laws of the Islamic Republic of Afghanistan, are valid and shall be binding to ACAA in all matters (including but not limited to the Services).”<sup>188</sup>

183. Ariana also gave express assurances that the JVPA was valid as a matter of Afghan law.<sup>189</sup>

184. In sum, the First and Second Respondents—which argued in the Termination Notice that the JVPA was lacking certain required provisions (including a termination for convenience clause)—“reviewed and agreed on the terms of the JVPA”<sup>190</sup> and, together with Third Respondent Ariana, confirmed that the JVPA was valid and in compliance with Afghan law. The Illegality Allegations thus contradict the evidentiary record before the Tribunal as well as Respondents’ contemporaneous representations. Accordingly, the Illegality Allegations leveled at NAS Afghanistan as a ground to terminate the JVPA were unfounded and pretextual.

***b. Material Breach***

185. In the Termination Notice, the ACAA and the Ministry of Transportation also terminated the JVPA due to NAS Afghanistan’s purported failure to remedy alleged material breaches of the JVPA.<sup>191</sup> Claimants dispute that they received proper notice of alleged material breaches affording them a six-month period to cure the alleged breaches, as required by Clause 26.2 of the JVPA.<sup>192</sup> Among other things, Claimants argue that the supposed notice letters referenced in the Termination Notice were sent several years earlier, were issued by a non-party to the JVPA, and made no reference to Clause 26.2 of the JVPA.<sup>193</sup>

186. As noted above, Clause 26.2(b)(v) of the JVPA, as amended, allows Ariana to terminate the agreement with six-month prior written notice of a material breach if NAS Afghanistan

<sup>187</sup> **Exhibit C-005**, Basic Agreement, Clause 4.1(i).

<sup>188</sup> *Id.* at Clause 4.1(ii).

<sup>189</sup> **Exhibit C-003**, JVPA, Clause 35.8 (Ariana “confirm[ed] to NAS that the Agreement raises no red flags and is considered as legally binding and enforceable as none of its terms and conditions is in breach of the Jurisdiction’s public policy or public order and the prevailing Laws and regulations or any agreement entered into with any third party.”).

<sup>190</sup> **Exhibit C-005**, Basic Agreement, Preamble (“Whereas, the Second Party [ACAA and the Ministry of Transportation] has reviewed and agreed on the terms and conditions of the JVPA”).

<sup>191</sup> **Exhibit C-012**, Termination Notice, pp. 4-5.

<sup>192</sup> Claimants’ Statement of Claim ¶ 162.

<sup>193</sup> *Id.*



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fails to remedy such breach.<sup>194</sup> Here, although the 2014 and 2017 letters to which the Termination Notice refers do not appear to be in the record, the Tribunal has the following observation. According to the Termination Notice, the 2014 letter and the 2017 letter and email referenced therein were sent by the ACAA,<sup>195</sup> which is not a party to the JVPA. Although the ACAA has agreed to be bound by the terms of the JVPA,<sup>196</sup> it does not necessarily follow that it can issue a notice of material breach thereunder. In fact, as noted above,<sup>197</sup> the ACAA considers itself to be a third party to the JVPA.<sup>198</sup> Accordingly, as a third party to the JVPA, the ACAA could not issue a valid material breach notice pursuant to Clause 26.2(b)(v) of the JVPA, as amended, much less terminate the JVPA. The Termination Notice was thus issued in breach of Clause 26.2(b) of the JVPA.

187. Among the alleged breaches of the JVPA that the Termination Notice raised were (i) NAS Afghanistan's failure to invest timely the required \$6,000,000; (ii) NAS Afghanistan's refusal of audits from the ACAA; and (iii) NAS Afghanistan's failure to perform GHS for certain airlines (e.g., Kam Air and Safi Airways) in breach of its obligation to provide GHS to all airlines exclusively.<sup>199</sup> However, the record shows that, in accordance with the JVPA and the Basic Agreement, NAS Afghanistan (i) provided the ACAA with monthly operation reports;<sup>200</sup> (ii) formed an Advisory Board with Ariana, which met regularly to discuss any issues or concerns arising from the partnership;<sup>201</sup> (iii) was audited regularly;<sup>202</sup> (iv) provided passenger buses (Cobus) costing over USD 500,000 per bus,<sup>203</sup> specialized equipment to maneuver wheelchairs for reduced mobility passengers,<sup>204</sup> and a state of the art BRS and CUPPS, provided by Amadeus and Arinc, respectively;<sup>205</sup> (v) invested in a

<sup>194</sup> **Exhibit C-004**, Addendum to the JVPA ¶ 3.3, amending Clause 26.2(b)(v) of the JVPA.

<sup>195</sup> **Exhibit C-012**, Termination Notice, p. 4.

<sup>196</sup> **Exhibit C-005**, Basic Agreement, Clause 4.1(ii).

<sup>197</sup> *See supra* ¶ 169.

<sup>198</sup> **Exhibit C-105**, Letter from the ACAA to NAS Afghanistan, Feb. 4, 2018.

<sup>199</sup> **Exhibit C-012**, Termination Notice, pp. 4-5 and footnote 17.

<sup>200</sup> *See, e.g.*, **Exhibit C-115**, NAS Operational Report – Afghanistan, April 2019; **Exhibit C-118**, NAS Operational Report – Kabul, May 2019; *see also* Claimants' Statement of Claim ¶ 45.

<sup>201</sup> **Exhibit C-081**, Minutes of Meeting establishing JVPA Advisory board for GHS, March 12, 2016; *see also* Claimants' Statement of Claim ¶ 45.

<sup>202</sup> *See, e.g.*, **Exhibit C-098**, Deloitte, NAS Afghanistan AUP for 2014 and 2015, September 27, 2017; **Exhibit C-121**, BDO, NAS Afghanistan AUP for 2017, July 30, 2019; *see also* Claimants' Statement of Claim ¶ 45.

<sup>203</sup> El-Houry WS ¶ 40; Claimants' Statement of Claim ¶ 48.

<sup>204</sup> El-Houry WS ¶ 40; Claimants' Statement of Claim ¶ 48.

<sup>205</sup> **Exhibit C-082**, Virtual Multi-User System Environment Agreement between NAS Afghanistan and Arinc, March 23, 2016; **Exhibit C-094**, Service Recipient Letter Agreement A-2, Amadeus Baggage Reconciliation Services (BRS) between Amadeus IT Group, SA and NAS Afghanistan, January 15, 2017; *see also* Claimants' Statement of Claim ¶ 48.





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business class lounge at HKIA, the Pearl Lounge, which officially opened in November 2019;<sup>206</sup> and (vi) invested nearly USD 7 million by 2020.<sup>207</sup> Moreover, starting in 2015, NAS Afghanistan raised its concerns that the exclusivity provisions in the JVPA and the Basic Agreement—which imposed certain obligations on Respondents—were not being respected.<sup>208</sup> The exclusivity issue will be addressed separately below,<sup>209</sup> but for present purposes, it is sufficient to note that any purported failure by NAS Afghanistan to provide GHS to all airlines exclusively could not have been a material breach of the JVPA by NAS Afghanistan when the obligation to ensure exclusivity fell on Respondents.

188. In light of the foregoing, the Tribunal thus finds that the ACAA and the Ministry of Transportation unlawfully terminated the JVPA when they issued the Termination Notice. This unlawful termination constitutes a breach of Clauses 4.1(i) and 4.1(ii) of the Basic Agreement. First, as discussed above, pursuant to Clauses 4.1(i) and 4.1(ii) of the Basic Agreement, the ACAA and the Ministry of Transportation expressly recognized that the JVPA is valid and consistent with the laws of Afghanistan.<sup>210</sup> The Illegality Allegations of the Termination Notice contradict and breach this repeated representation contained in the Basic Agreement. Second, per Clause 4.1(i) of the Basic Agreement, the ACAA and the Ministry of Transportation agreed to abide by “all terms and conditions of JVPA, as well as all termination privileges and penalties.”<sup>211</sup> Thus, they must comply with the termination provision, including the manner in which a valid notice of material breach must be given, by whom, and on what bases. As discussed above, the Termination Notice was issued in breach of the termination provision of the JVPA, and this constitutes a breach of Clause 4.1(i) of the Basic Agreement. Finally, this unlawful termination of the JVPA also constitutes a separate breach of Clause 4.1(ii) of the Basic Agreement, in which both the ACAA and the Ministry of Transportation agreed that the ACAA shall be bound “in all matters” under the JVPA, including in termination matters.

<sup>206</sup> Claimants’ Statement of Claim ¶ 67; *see also* Exhibit C-109, Letter from NAS to the ACAA re Invite to Visit VIP Terminal and Diamond Lounge at Abu Dhabi Airport, November 18, 2018; El-Houry WS ¶¶ 41-42.

<sup>207</sup> CER-1, Oxera First Quantum Report ¶ 2.3 and Table 2.1; *see also* Claimants’ Statement of Claim ¶ 48.

<sup>208</sup> Exhibit C-075, Letter from NAS to the ACAA re Exclusivity, June 6, 2015; Exhibit C-080, Email from S. Irwin (NAS) to Z. Khalifat (Safi Airways) and H. El-Houry (NAS) re Meeting between Safi and NAS, January 5, 2016; Exhibit C-090, Letter from NAS to the ACAA re Granting of NAS Exclusivity, October 2, 2016, p. 2; Exhibit C-104, Letter from NAS Afghanistan to the ACAA re Provision of Airport Services at the Airports, January 7, 2018, p. 3; Exhibit C-128, Ariana-NAS Advisory Board Meeting Minutes, Dubai, January 8, 2020, ¶ 6; Exhibit C-106, Ariana-NAS Advisory Board meeting Minutes, Delhi, February 9, 2018, ¶ 12; Exhibit C-132, Email from H. El-Houry (NAS) to A. Ahmady (Minister of Commerce & Industry) re Letter – Discussion Follow Up, attaching Letter from NAS to Minister of Commerce dated May 18, 2020, May 19, 2020, p. 3; Exhibit C-135, Letter from NAS to Ariana re AAA letter dated June 27, 2020, July 4, 2020, p. 2; *see also* Claimants’ Statement of Claim ¶¶ 54-55; El-Houry WS ¶ 47.

<sup>209</sup> *See infra* ¶¶ 202-208.

<sup>210</sup> *See supra* ¶¶ 182-184.

<sup>211</sup> Exhibit C-005, Basic Agreement, Clause 4.1(i).



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## 2. Failure to Return the Equipment to NAS Afghanistan

189. Claimants further contend that Respondents' failure to return the Equipment to NAS Afghanistan breached the Basic Agreement and the JVPA as incorporated therein.
190. Clause 15.1 of the JVPA, as amended at the Dubai meetings, provides that "the equipment will be owned during the term of the JV by NAS Afghanistan and will be transferred to Ariana only at the expiry of the ten years concession term."<sup>212</sup> Moreover, Clause 26.3 of the JVPA sets forth the consequences of termination, and specifically provides that, "[u]pon the termination or expiry of the Agreement for any reason," "each Party shall immediately return to the other Party all property of the other Party."<sup>213</sup>
191. Here, because the ten-year Ariana Concession was improperly terminated early—and thus did not expire on its terms—the ownership of the Equipment did not transfer to Ariana, but remained the property of NAS Afghanistan. Ariana failed to return NAS Afghanistan's Equipment, while the ACAA (i) pressed NAS Afghanistan to support the transition of technologies and equipment,<sup>214</sup> (ii) took over NAS Afghanistan's operations, including equipment and staff, and (iii) requested that NAS Afghanistan transfer all of its equipment to the new concessionaire, GAAC, by November 7, 2020,<sup>215</sup> which NAS Afghanistan did.
192. Respondents' failure to return NAS Afghanistan's Equipment constitutes a breach of the JVPA as incorporated in the Basic Agreement (as detailed above,<sup>216</sup> the Basic Agreement and the JVPA constitute an integrated agreement), and thus a breach of the Basic Agreement. Per Clause 4.1(ii) of the Basic Agreement, the ACAA agreed to be bound by the terms of the JVPA "in all matters,"<sup>217</sup> while pursuant to Clause 4.1(i) of the Basic Agreement, the ACAA and the Ministry of Transportation agreed to abide by all "terms and conditions" of the JVPA, including "termination privileges and penalties" should the JVPA ever be cancelled.<sup>218</sup> Thus, the ACAA and the Ministry of Transportation were bound to respect the JVPA, including its termination-related provisions. The JVPA, as

<sup>212</sup> **Exhibit C-068**, Minutes of Dubai Meeting, Apr. 30-May 1, 2014, Point 12 at p. 5.

<sup>213</sup> **Exhibit C-003**, JVPA, Clause 26.3(i).

<sup>214</sup> **Exhibit C-021**, Email from the ACAA to NAS Afghanistan, Oct. 24, 2020; Claimants' Statement of Claim ¶ 99.

<sup>215</sup> **Exhibit C-043**, Letter from the ACAA to NAS Afghanistan, Nov. 5, 2020 ("we request form [sic] NAS Afghanistan to appoint their team to hand over the ground handling equipment to GAAC at the said three airport and start the handover of equipment on Saturday 7<sup>th</sup> November 2020 and accomplished the transition and handover process. Meanwhile, we are instructing ACAA Airports Department and Kabul Airport to coordinate the equipment handover from NAS to GAAC and reported back to this department."); *see also* Claimants' Statement of Claim ¶ 124; El-Houry WS ¶¶ 95-96.

<sup>216</sup> *See supra* ¶¶ 156-157.

<sup>217</sup> **Exhibit C-005**, Basic Agreement, Clause 4.1(ii).

<sup>218</sup> *Id.* at Clause 4.1(i).





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amended, clearly provides that NAS Afghanistan owned the Equipment during the term of the joint venture with Ariana, until the expiry of the ten-year concession when title would transfer to Ariana.<sup>219</sup> Here, the Ariana Concession did not expire on its terms, such that the Equipment remained the property of NAS Afghanistan. Per the JVPA, upon termination for any reason, “each Party shall immediately return to the other Party all property of the other Party.”<sup>220</sup> But all Respondents failed to respect these obligations and instead ensured that NAS Afghanistan’s Equipment and operational systems were transferred to the new concessionaire, GAAC.<sup>221</sup> Accordingly, the refusal to return the Equipment and systems to NAS Afghanistan constitutes a breach by Ariana of the JVPA (as incorporated in the Basic Agreement), and by the ACAA and the Ministry of Transportation of Clauses 4.1(i) and 4.1(ii) of the Basic Agreement.

### 3. Performance Guarantee

193. Claimants aver that Ariana breached the JVPA by cashing in the USD 1 million Performance Guarantee.
194. Pursuant to the JVPA, NAS Afghanistan was to provide a USD 1 million Performance Guarantee.<sup>222</sup> The JVPA provided that, within 25 business days “of the expiry of the Term or earlier termination of this Agreement, Ariana should return to NAS any Security held by Ariana except where Ariana has initiated a formal arbitration proceedings [sic] in accordance with Article 34.4 herein, in which case Ariana may retain the Security pending the resolution of the Dispute.”<sup>223</sup> This obligation to return the Performance Guarantee was reiterated as one of the consequences of termination: “In the event the Agreement is terminated by Ariana for any reason whatsoever... Ariana shall have the obligation to return to NAS the PG provided for under Article 10.4 herein.”<sup>224</sup>
195. Ariana thus was required to return the Performance Guarantee to NAS Afghanistan within 25 business days of the November 4, 2020 termination of the JVPA, unless formal arbitration was commenced. No such arbitration was commenced. Rather than return the Performance Guarantee, Ariana cashed it three weeks after the termination of the JVPA was effective and after Respondents took over NAS Afghanistan’s operations and

<sup>219</sup> **Exhibit C-068**, Minutes of Dubai Meeting, Apr. 30-May 1, 2014, Point 12 at p. 5.

<sup>220</sup> **Exhibit C-003**, JVPA, Clause 26.3(i).

<sup>221</sup> *See supra* ¶ 191.

<sup>222</sup> **Exhibit C-003**, JVPA, Clause 10.4(a).

<sup>223</sup> *Id.* at Clause 10.4(b).

<sup>224</sup> *Id.* at Clause 26.3.



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Equipment,<sup>225</sup> in breach of Clauses 10.4(b) and 26.3 of the JVPA as incorporated in the Basic Agreement.

196. Claimants contend that Ariana calling the Performance Guarantee was “part and parcel of the unlawful termination of the JVPA and designed to place maximum pressure on the Claimant to forfeit its business in Afghanistan,” such that the ACAA and the Ministry of Transportation must be deemed to have “directed this breach and are equally responsible for it.”<sup>226</sup> Claimants do not cite to any contractual or legal provision by which operation Ariana’s contractual liability could be ascribed to the ACAA and the Ministry of Transportation. Accordingly, the Tribunal has no legal basis on which to find that the ACAA and the Ministry of Transportation are responsible for Ariana’s breach of the JVPA.
197. Notwithstanding the foregoing, however, as noted above,<sup>227</sup> pursuant to Clauses 4.1(i) and 4.1(ii) of the Basic Agreement, the ACAA separately agreed to be bound by the terms of the JVPA “in all matters,”<sup>228</sup> and the Ministry of Transportation and the ACAA separately agreed to “abide with all terms and conditions” of the JVPA, including “termination privileges and penalties” should the JVPA ever be cancelled.<sup>229</sup> Thus, the ACAA and the Ministry of Transportation were bound to respect the JVPA, including its termination-related provisions. The JVPA clearly provides that the Performance Guarantee must be returned within 25 days of any termination, unless formal arbitral proceedings have been commenced,<sup>230</sup> which was not the case here. First and Second Respondents thus failed to abide by the terms of the JVPA, which required Ariana to return the Performance Guarantee, in breach of Clauses 4.1(i) and 4.1(ii) of the Basic Agreement.

#### 4. Adverse Impact

198. Clause 5.1(vii) of the JVPA states that each party represents and warrants that “it will not take any action which would adversely affect the rights of the other Party or constitute a breach of the other Party’s obligations hereunder.”<sup>231</sup>
199. Claimants argue that Respondents breached this obligation. Not only did Respondents’ unlawful termination have an adverse effect on NAS Afghanistan’s rights under the JVPA,

<sup>225</sup> **Exhibit C-159**, Letter from Gulf Bank to NAS, November 25, 2020; Claimants’ Statement of Claim ¶ 131; *see also* **Exhibit C-113**, Performance Guarantee, issued on February 16, 2019.

<sup>226</sup> Claimants’ Post-Hearing Submission ¶ 26.

<sup>227</sup> *See supra* ¶¶ 170, 192.

<sup>228</sup> **Exhibit C-005**, Basic Agreement, Clause 4.1(ii).

<sup>229</sup> *Id.* at Clause 4.1(i).

<sup>230</sup> *See supra* ¶ 194.

<sup>231</sup> **Exhibit C-003**, JVPA, Clause 5.1(vii).





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but Ariana's complicity in the termination of the JVPA and the takeover of operations, as well as its cashing of the Performance Guarantee, also breached this provision.<sup>232</sup>

200. The ACAA and the Ministry of Transportation "adversely affect[ed] the rights" of NAS Afghanistan under the JVPA when they issued the Termination Notice and unlawfully terminated the JVPA. As the Tribunal found above,<sup>233</sup> the terms of the JVPA are incorporated into the Basic Agreement, and a breach of the JVPA amounts to a breach of Clauses 4.1(i) and 4.1(ii) of the Basic Agreement. Again, as noted above, pursuant to Clause 4.1 of the Basic Agreement, the ACAA and the Ministry of Transportation agreed to "abide with all terms and conditions of JVPA," and the ACAA separately agreed to be bound by the JVPA "in all matters."<sup>234</sup> Moreover, and as noted above,<sup>235</sup> Afghan law imposes a general duty of good faith in the performance of contractual obligations.<sup>236</sup> Thus, the ACAA and the Ministry of Transportation were bound to respect the JVPA, which precludes adversely affecting NAS Afghanistan's JVPA rights. The ACAA and the Ministry of Transportation did not do so, and they actually took actions that were adverse to NAS Afghanistan's JVPA rights by purporting to terminate the JVPA and then disregarding NAS Afghanistan's rights triggered by such termination.
201. With respect to Ariana, the Tribunal does not need to decide that Ariana was complicit with the ACAA and the Ministry of Transportation (as Claimants contend<sup>237</sup>) in order to find that Ariana breached this provision. By calling the Performance Guarantee, instead

<sup>232</sup> Claimants' Statement of Claim ¶ 164(c).

<sup>233</sup> See *supra* ¶ 156.

<sup>234</sup> **Exhibit C-005**, Basic Agreement, Clauses 4.1(i) and 4.1(ii); see also *supra* ¶¶ 170, 192.

<sup>235</sup> See *supra* ¶ 163.

<sup>236</sup> **Authority CL-005**, Afghanistan Law on Commercial Contracts and Sale of Goods (2014), Article 44. See also *id.* at Article 6 ("[the] parties are bound to adhere in good faith to the process of contract negotiation and exercising their rights and responsibilities"); **Authority CL-002**, Commercial Code of Afghanistan (1955), Articles 56 ("Any deception and conspiracy in commercial affairs shall be prohibited.") and 591 ("A person who does not meet his commercial obligation by cheating or fault, or delays meeting it, he shall be obliged to compensate for damages the obligee has incurred and profits he has lost, after he has been, officially or by registered post, notified."); **Authority CL-003**, Civil Code of Afghanistan (1977), Article 697 ("Contract shall be valid on anything included therein and required by good faith. Also, contract binds parties to what is included therein as well as include all requirements of nature of obligation according to provision of law, custom and justice."); Claimants' Statement of Claim ¶¶ 139-145.

<sup>237</sup> Claimants ask the Tribunal to find that Ariana was complicit with the ACAA and the Ministry of Transportation in terminating the JVPA, based on a letter in which Ariana notes that "all evidences with supporting documents" were shared with the Government, the ACAA, and "(documenting anti-corruption department of general attorney's) office" to facilitate the termination of the JVPA. Claimants' Statement of Claim ¶ 164(c); **Exhibit C-011**, Letter from Ariana to Ministry of Finance, Sept. 19, 2020. However, as the letter states, Ariana submitted this information in response to specific instructions from the President of Afghanistan contained in presidential decree number 1899.



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of returning it to NAS Afghanistan, Ariana breached NAS Afghanistan's rights under the JVPA and thus "adversely affect[ed]" such rights in breach of Clause 5.1(vii) of the JVPA.

### 5. NAS Afghanistan's Exclusivity Rights

202. Both the JVPA and the Basic Agreement recognize NAS Afghanistan's rights to exclusivity and the fundamental nature of such rights, and all Respondents undertook the obligation to ensure the respect of such exclusivity.
203. In the representations and warranties of the JVPA, Ariana "acknowledge[d] and agree[d] that the exclusive and irrevocable Concession granted to NAS to provide the Services in accordance with the Agreement is fundamental to NAS, and that NAS would not have considered pursuing the Agreement without being granted this exclusivity."<sup>238</sup> Ariana undertook "to ensure that all local airlines and Users in the Jurisdiction, including Ariana Afghan Airlines, as well as any other third parties airlines using each of the Airports, be handled and serviced by NAS in application of this Agreement."<sup>239</sup> Ariana repeated these statements in Clause 9 of the JVPA, in which it "confirm[ed] and acknowledge[d] that during the Term of the Agreement it has granted NAS...the exclusive right in the Jurisdiction to (i) provide the Services within the Airports"<sup>240</sup> and that "the exclusive right granted to NAS under the joint venture by virtue of this Agreement is fundamental to NAS, and that NAS would not have considered pursuing the Agreement without being granted this exclusivity."<sup>241</sup> Ariana also undertook "to ensure that no local airline including [Ariana], nor any third-party airline or User, using any of the Airports, shall be entitled to self-handle itself or to seek any handling services, or Services from any third party including Ariana, and such for any reason whatsoever."<sup>242</sup>
204. In the Basic Agreement, the ACAA and the Ministry of Transportation "acknowledge[d] and declare[d] that...NAS shall have the exclusive rights" to provide GHS in the Airports.<sup>243</sup> The ACAA and the Ministry of Transportation undertook "to ensure (a) the exclusivity of [NAS Afghanistan and Ariana] to provide the Services at the Airports for the Term of the JVPA; (b) that no local airline including [Ariana], nor any third-party airline or User, using any of the Airports, shall be entitled to self-handle itself or to seek any handling services, or Services from any third party including Ariana, and such for any

<sup>238</sup> Exhibit C-003, JVPA, Clause 5.2.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at Clause 9.1.

<sup>241</sup> *Id.* at Clause 9.2.

<sup>242</sup> *Id.* at Clause 9.4.

<sup>243</sup> Exhibit C-005, Basic Agreement, Clause 4.1(i).





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reason whatsoever.”<sup>244</sup> The ACAA and the Ministry of Transportation further undertook “to provide support and assistance to [NAS Afghanistan and Ariana] for the provision of Services under and for the Term of the JVPA and for the development of the business of the First Party through the entering into new business opportunities related thereto.”<sup>245</sup>

205. Respondents thus understood that NAS Afghanistan had exclusivity rights to provide GHS and that such rights were fundamental to NAS Afghanistan. They also undertook to ensure NAS Afghanistan’s exclusivity in providing GHS, not only with respect to Ariana but with respect to all airlines using the Airports.
206. Claimants contend that Respondents breached the Basic Agreement and the JVPA (as incorporated in the Basic Agreement) by failing to ensure NAS Afghanistan’s exclusivity.<sup>246</sup>
207. As noted above, starting in 2015, NAS Afghanistan raised its concerns that the exclusivity provisions in the JVPA and the Basic Agreement were not being respected, in particular by Kam Air and Safi Airways—two airlines “well connected politically”—which were handling their own ground services for their flights.<sup>247</sup> NAS Afghanistan sent multiple letters to the ACAA and to Government officials in this connection and raised the issue in Advisory Board meetings, including on June 6, 2015,<sup>248</sup> October 2, 2016,<sup>249</sup> January 7,

<sup>244</sup> **Exhibit C-005**, Basic Agreement, Clause 4.2.

<sup>245</sup> *Id.*

<sup>246</sup> Claimants’ Statement of Claim ¶¶ 165-168.

<sup>247</sup> *Id.* at ¶ 54; El-Houry WS ¶ 47.

<sup>248</sup> **Exhibit C-075**, Letter from NAS to the ACAA, June 6, 2015 (“some airlines are self-handling and are not respecting the exclusivity granted to NAS to provide all the Services as per the JVPA...we appreciate your full support in order to secure such exclusivity as per the terms of the JVPA including but not limited to banning any self-handling by any other airline and provide NAS the sole right to handle all airlines including the upcoming Hajj Flights”).

<sup>249</sup> **Exhibit C-090**, Letter from NAS to the ACAA, October 2, 2016, p. 2 (“NAS is requesting ACAA to take correct and immediate measures to stop all other airlines or third parties involve on Ground Handling Services rather than NAS at Kabul, Kandahar and Herat Airports and grant us our exclusivity”).



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2018,<sup>250</sup> January 8, 2018,<sup>251</sup> February 9, 2018,<sup>252</sup> May 18, 2020,<sup>253</sup> and July 4, 2020.<sup>254</sup> Since this complaint occurred repeatedly over five years, these efforts appear to have been to no avail.<sup>255</sup> Indeed, as the ACAA and the Ministry of Transportation admitted in the Termination Notice, “[c]ertain airlines such as Kam Air, Safi Airways and Afghan Jet perform their ground handling service,”<sup>256</sup> *i.e.*, Respondents failed to “ensure” NAS Afghanistan’s exclusivity rights.

208. Accordingly, the Tribunal finds that all Respondents breached Second Claimant’s exclusivity rights, namely Ariana breached Clauses 5.2 and 9.4 of the JVPA (as incorporated in the Basic Agreement), and the ACAA and the Ministry of Transportation breached Clause 4.2(a) of the Basic Agreement.

### 6. Management of the Joint Venture

209. Pursuant to Clause 7.2 of the JVPA, the Parties agreed that “NAS shall maintain, directly or indirectly through its Affiliate, the exclusive control of the management of the Company, including the complete operational control for the Services offered, throughout the Term of the Agreement.”<sup>257</sup>

<sup>250</sup> **Exhibit C-104**, Letter from NAS Afghanistan to the ACAA, January 7, 2018, p. 3 (“we kindly request ACAA’s intervention and ask you to take adequate measures as soon as possible to put an end to such violations of NAS Afghanistan and Ariana rights and to fully implement the terms of the JVPA by assuring NAS Afghanistan’s exclusivity thereunder, to the mutual benefit of NAS and Ariana”).

<sup>251</sup> **Exhibit C-128**, Ariana-NAS Advisory Board Meeting Minutes, Dubai, January 8, 2020, ¶ 6 (“[Ariana] shall arrange a joint meeting of [ACAA],[Ariana] and NAS to discuss and agree on Kam Air self-ground handling and process for the taking over to implement the exclusivity of the JVPA.”).

<sup>252</sup> **Exhibit C-106**, Ariana-NAS Advisory Board meeting Minutes, Delhi, February 9, 2018, ¶ 12 (“[Ariana] will draft a letter to ACAA stating current situation and humbly would request ACAA to ensure exclusivity right to NAS-Afghanistan. The right to other ground handlers inside Afghanistan to operate their own ground handling, *i.e.* Kam Air, and Balkh ground handling services are in clear violation term of the contract as below”).

<sup>253</sup> **Exhibit C-132**, Email from H. El-Houry (NAS) to A. Ahmady (Minister of Commerce & Industry), May 19, 2020, p. 3, *attaching* Letter from NAS to Minister of Commerce dated May 18, 2020 (“At least two airlines have self-handled (and on continues until today) which is a violation of our agreement and even risks the operational integrity of the airport”).

<sup>254</sup> **Exhibit C-135**, Letter from NAS to Ariana, July 4, 2020, p. 2 (“NAS’ exclusivity is still being violated and this remains extremely detrimental to both NAS and [Ariana] in terms of lost revenues, profit shares and royalties. We kindly reiterate our request for AAA to intervene and put an end to such violations”).

<sup>255</sup> As Claimants noted in their Post-Hearing Submission, it is incumbent on Respondents to “present” and “prove”—before the hearing on the merits of the case—any objection to Claimants’ claim based on prescription. Claimants’ Post-Hearing Submission ¶¶ 34-37 (*citing* to Articles 114(5), 115, 118, 231, and 234 of the Afghan Commercial Procedure Code, CL-006). Here, Respondents failed to raise any such objection.

<sup>256</sup> **Exhibit C-012**, Termination Notice, p. 5.

<sup>257</sup> **Exhibit C-003**, JVPA, Clause 7.2.





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210. Claimants allege that Respondents interfered with NAS Afghanistan's management and performance of the GHS.<sup>258</sup>
211. Although Claimants refer to various audits that were conducted, the Tribunal is unable to determine—on the evidence submitted—whether such audits were excessive, inappropriate, or disruptive, and in breach of Clause 7.2 of the JVPA. This finding is of no practical consequence, however, given that the Tribunal has already found above that Respondents breached the Basic Agreement and the JVPA as incorporated in the Basic Agreement.

## 7. Change in Law

212. According to Clause 32.1 of the JVPA, if a party believes that a "Change in Law" "has or would have a material effect" on its obligations, that party must issue an adjustment notice to the other party within 25 days after such Change in Law.<sup>259</sup> Per Clause 32.2 of the JVPA as amended, if the Change in Law caused NAS Afghanistan to suffer "an increase in costs or reduction in net after tax return or other financial burden, loss, liability or damages" with an aggregate financial effect in excess of USD 50,000 in any financial year, NAS Afghanistan may propose amendments to the JVPA "so as to put NAS in the same financial position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden, loss, liability or damage as aforesaid."<sup>260</sup> Ariana and NAS Afghanistan are to meet within 30 days to attempt to agree on an amendment, failing which NAS Afghanistan "may notice in writing to Ariana propose new arrangements to implement the foregoing in order to put NAS in the same financial position it would have occupied had there been no such Change in Law."<sup>261</sup> If Ariana disputes the new arrangement, the parties' disagreement "shall be finally settled in accordance with the Dispute Resolution mechanism contained herein."<sup>262</sup>
213. Claimants contend that in September 2015, changes to Afghan tax laws raised the BRT from 2% to 4%, adversely impacting Claimants' financials by more than USD 50,000 per financial year.<sup>263</sup> In a letter dated September 7, 2019, NAS Afghanistan referred to Clause 32.2 of the JVPA, as amended, and informed Ariana of the negative financial impact

<sup>258</sup> Claimants' Statement of Claim ¶ 164(d).

<sup>259</sup> **Exhibit C-003**, JVPA, Clause 32.

<sup>260</sup> **Exhibit C-004**, Addendum to the JVPA, ¶ 3.4 (amending Clause 32.2 of the JVPA).

<sup>261</sup> *Id.* NAS Afghanistan also must submit supporting documents and evidence to Ariana. *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Claimants' Statement of Claim ¶ 56.



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resulting from the change in BRT.<sup>264</sup> NAS Afghanistan proposed to amend the JVPA and “alter the profit share to 51% for Ariana and 49% for NAS to ensure recovery of the \$324,571 (up to end of June 2019) that NAS is financially worse off as a result of the BRT law change,” with such proposed change taking effect as of October 2019.<sup>265</sup>

214. Dr. Min Shi’s expert report calculates the damages suffered by NAS Afghanistan as a result of the increase in the BRT from 2015 to 2020. Per Table 2.5 of Dr. Shi’s report, NAS Afghanistan suffered an impact of more than USD 50,000 in the financial years of 2016, 2017, 2018, and 2019.<sup>266</sup>
215. The Tribunal finds that Claimants are not entitled to their losses suffered by the Change in Law in the BRT. Pursuant to Clause 32.1 of the JVPA, if Claimants believed that the new BRT of 4% “has or would have a material effect” on their rights and obligations, they were required to issue an adjustment notice to Ariana within 25 days “after the occurrence of such Change in Law.” Here, however, the BRT increased from 2% to 4% in September 2015. There is no evidence in the record that Claimants ever issued an adjustment notice to Ariana, much less that they did so in a timely manner, *i.e.*, within 25 days of this Change in Law. Rather, Claimants waited four years, until September 2019, to propose an amendment to the profit sharing percentage, without notice. In such circumstances, Claimants’ claim for their losses resulting from the BRT change cannot be upheld.

#### D. QUANTUM

216. Having found that Respondents breached the Basic Agreement and the JVPA, as incorporated in the Basic Agreement, by unlawfully terminating the JVPA, keeping the Equipment, calling the Performance Guarantee, adversely impacting NAS Afghanistan, and failing to guarantee NAS Afghanistan’s exclusivity, the Tribunal now turns to the issue of compensation to Claimants.
217. As a matter of Afghan law, a party is entitled to compensation for losses suffered as a result of another party’s breaches of its obligations. Article 75 of the Afghanistan Law on Commercial Contracts and Sale of Goods provides that “[i]f one of the parties may not fulfill[] its promises in accordance with the conditions of the contract, or fulfills in a manner which shall be in contradiction with the conditions of the contract[,] [i]n this case, the party

<sup>264</sup> **Exhibit C-123**, Letter from NAS to Ariana, September 7, 2019; El-Houry WS ¶ 55; Claimants’ Statement of Claim ¶ 56.

<sup>265</sup> **Exhibit C-123**, Letter from NAS to Ariana, September 7, 2019.

<sup>266</sup> The losses suffered for each financial year are calculated as USD 71,308, USD 86,007, USD 98,569, and USD 105,995, respectively. Shi Expert Report ¶ 2.38 and Table 2.5.





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shall be considered violator of the contract and other party shall be entitled to compensate[ion] for the damage/loss incurred of such breach.”<sup>267</sup>

218. Claimants seek the following monetary damages:<sup>268</sup>

**Table 1.1 NAS' damages due to the Respondents' breaches (US\$)**

	Amount	Pre-award interest (up to 22 Apr. 2022)	Total
<b>Basic Agreement:</b>		<b>LIBOR+2%</b>	
NAS' lost investments	6,942,155	244,977	7,187,132
NAS' lost profits and management fees for the remainder of the concession period (i.e. Nov. 2020–Oct. 2023)	8,846,865	312,508	9,159,374
NAS' lost profits and management fees for the renewal term (i.e. Nov. 2023– Oct. 2033)	16,430,920	580,409	17,011,329
Performance guarantee	1,000,000	34,082	1,034,082
<b>Total</b>	<b>33,219,940</b>	<b>1,171,976</b>	<b>34,391,917</b>
<b>Clause 26.3 of the JVPA:</b>		<b>LIBOR+5%</b>	
NAS' investments	6,942,155	565,438	7,507,593
Management fees of 36 months	3,240,164	263,911	3,504,075
Performance guarantee	1,000,000	77,954	1,077,954
<b>Total</b>	<b>11,182,319</b>	<b>907,304</b>	<b>12,089,623</b>
<b>Increase in BRT rate:</b>		<b>LIBOR+2%</b>	
<b>Total</b>	<b>414,062</b>	<b>57,646</b>	<b>471,708</b>
<b>Exclusivity Rights:</b>		<b>LIBOR+2%</b>	
Losses during the current concession period (i.e. Jan. 2014–Oct. 2023)	10,416,050	1,611,046	12,027,096
Losses during the renewal term (i.e. Nov. 2023–Oct. 2033)	4,385,708	154,922	4,540,629
<b>Total</b>	<b>14,801,758</b>	<b>1,765,968</b>	<b>16,567,725</b>
<b>Afghan PIL:</b>		<b>LIBOR</b>	
<b>Total</b>	<b>25,466,667</b>	<b>128,020</b>	<b>25,594,687</b>

219. In examining the issue of compensation, the Tribunal first must decide (1.) whether such compensation should be predicated on a 10-year renewal of the JVPA, and (2.) the date as of which the compensation should be calculated. It then turns to the question of losses

<sup>267</sup> CL-005, Afghanistan Law on Commercial Contracts and Sale of Goods (2014), Article 75.

<sup>268</sup> Claimants' Post-Hearing Submission, Annex 1.



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suffered as a result of (3.) unlawful termination of the JVPA and (4.) breach of the exclusivity provision, before addressing (5.) the issue of interest.

### 1. Renewal Period

220. A preliminary issue is whether Claimants are entitled to compensation based on the assumption that the JVPA would have been renewed for a ten-year period (*i.e.*, 2023-2033), were it not for Respondents' unlawful termination.
221. The term and renewal language of the JVPA has evolved over time. Initially, the JVPA provided that the agreement shall be in force "as long as the Ariana Concession is in force," unless otherwise terminated, and "shall be automatically renewed under the same terms and conditions upon the renewal of the Ariana Concession for the same period for which the Ariana Concession has been extended."<sup>269</sup> This renewal language then was amended in the Addendum to the JVPA to state that the agreement "can be renewed by mutual agreement of the Parties on such, upon the renewal of the Ariana Concession and for the same period for which the Ariana Concession has been extended."<sup>270</sup> In the Dubai Meetings, the parties further tweaked the term and renewal language to provide that the agreement (i) "shall be binding and remain in full force and effect as long as the Ariana Concession is in force for a maximum period of 10 (ten) years (the "Term")," unless otherwise terminated, and (ii) "shall be renewed upon the mutual agreement of the Parties for a period and terms to be agreed upon in due time."<sup>271</sup>
222. As the language makes clear, what was once an automatic renewal of the same terms and conditions of the JVPA upon renewal of the Ariana Concession became an agreement to agree on renewal terms and conditions "in due time." At the hearing, Claimants' counsel accepted that this language in the JVPA as amended constitutes an agreement to agree.<sup>272</sup> Put differently, the 10-year renewal of the JVPA on its same terms and conditions was not guaranteed; rather, renewal required the parties to agree on the period and terms of any such renewal. Renewal of the JVPA thus was not certain, nor were the terms or the period of time of renewal known. For a loss to exist, an obligation must exist and must be breached. Here, the Tribunal finds that there was no obligation to renew the JVPA on the same terms for ten years. Accordingly, the Tribunal does not award compensation claimed for 2023-2033 under the various categories addressed in turn below. Specifically, as laid out in Annex 1 of Claimants' Post-Hearing Submission, reproduced in full in paragraph 218 above, the Tribunal denies compensation for the renewal term of November 2023

<sup>269</sup> Exhibit C-003, JVPA, Clause 26.1.

<sup>270</sup> Exhibit C-004, Addendum to the JVPA, ¶ 3.3 (amending Clause 26.1 of the JVPA).

<sup>271</sup> Exhibit C-068, Dubai Meetings, at p. 7 (amending Clause 26.1 of the JVPA).

<sup>272</sup> Hearing Tr. 22:20 (Benson) ("So it's accepted that's an agreement to agree"); *see also id.* at 24:11-12 (Benson).





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through October 2033 (i) for lost profits and management in the amount claimed of USD 16,430,920, and (ii) for losses relating to exclusivity rights in the amount claimed of USD 4,385,708.

## 2. Valuation Date

223. Claimants propose a valuation date of October 18, 2020 (“**Valuation Date**”) for losses suffered as a result of Respondents’ breaches of the Basic Agreement and the JVPA, as incorporated in the Basic Agreement. This Valuation Date is the date when Claimants were served with the Termination Notice.<sup>273</sup> The Tribunal finds that this is the relevant date for valuation purposes and therefore adopts it as the Valuation Date. Respondents’ Termination Notice was issued on October 18, 2020 in breach of the Basic Agreement and the JVPA (as incorporated). As detailed above,<sup>274</sup> the Notice ushered in a period of disruption of NAS Afghanistan and its operations, during which time Messrs. Qursha’s and El-Houry’s attention was diverted to multiple meetings and correspondence with government officials in connection with a transition plan and handover of operations.<sup>275</sup> Put differently, as of October 18, 2020, NAS Afghanistan focused its time and effort on managing the situation triggered by the unlawful Termination Notice. Consistent with Afghan law, which entitles a party to be compensated for any harm suffered due to a contractual breach,<sup>276</sup> the Tribunal considers that a Valuation Date of October 18, 2020 best ensures that NAS Afghanistan is compensated for any damage or loss suffered due to—and from the moment of—Respondents’ unlawful termination of the JVPA.

## 3. Losses Suffered as a Result of Respondents’ Unlawful Termination of the JVPA

224. Claimant NAS Afghanistan claims the following losses as a result of Respondents’ unlawful termination of the JVPA and related breaches of the Basic Agreement and JVPA:<sup>277</sup>

<sup>273</sup> Claimants’ Statement of Claim ¶ 185.

<sup>274</sup> See *supra* ¶¶ 133 *et seq.*; see also Claimants’ Statement of Claim ¶¶ 90 *et seq.*

<sup>275</sup> See, e.g., El-Houry WS ¶¶ 69 *et seq.*; Qursha WS ¶¶ 30 *et seq.*

<sup>276</sup> CL-005, Afghanistan Law on Commercial Contracts and Sale of Goods (2014), Article 75; see also *supra* ¶ 217.

<sup>277</sup> In the alternative, Claimants sought damages for termination of the JVPA under Clause 26.3 and for the unlawful expropriation of their investment in violation of the PIL. Claimants’ Post-Hearing Submission ¶¶ 59-62. Given that the Tribunal finds that the termination of the JVPA was unlawful, it does not need to address these alternative heads of loss, which are inapplicable. See also Hearing Tr. 58:22-59:16 (Wahba).



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	Amount
(i) Lost investments in equipment and system	USD 6,942,155 <sup>278</sup>
(ii) Lost profits and lost management fees until Oct. 2023	USD 8,846,865 <sup>279</sup>
(iii) Performance Guarantee	USD 1,000,000

225. Claimant NAS Afghanistan seeks these damages “jointly and severally against all Respondents, each of whom directed and/or actively participated in the unlawful termination/breaches that caused them.”<sup>280</sup>
226. As a preliminary matter, the Tribunal notes that Claimant NAS Afghanistan requested a finding of joint and several liability for the first time in its Post-Hearing Submission and without substantiating its request.<sup>281</sup> In such circumstances, the Tribunal dismisses this belated request as insufficiently pled or substantiated by Claimant NAS Afghanistan.
227. With respect to (i) (lost investments in equipment and system), as noted above, the Tribunal found that Respondents’ failure to return Claimants’ Equipment and systems breached the Basic Agreement and the JVPA, as incorporated in the Basic Agreement.<sup>282</sup> To calculate the sum claimed, Dr. Shi identified the equipment and systems invested by NAS Afghanistan on the basis of its fixed asset register and audited financial statements.<sup>283</sup> Dr. Shi noted that the majority of NAS Afghanistan’s investments are “in tangible assets, which consist of equipment and systems for providing ground handling and other services” at the Airports.<sup>284</sup> Dr. Shi excluded management time and industry expertise deployed “in the course of setting up and operating the ground handling service” at the Airports since these investments are not reflected in the asset register or audited financial statements.<sup>285</sup>
228. The Tribunal agrees with the latter, namely that management time should not be included in calculating the value of Claimants’ lost Equipment and systems. With respect to the valuation of NAS Afghanistan’s investments in the lost Equipment, the Tribunal considers that Dr. Shi’s analysis is reliable, as it is based on NAS Afghanistan’s fixed asset register

<sup>278</sup> Shi Expert Report ¶¶ 2.3-2.8; Claimants’ Post-Hearing Submission, Annex 1.

<sup>279</sup> Claimants’ Post-Hearing Submission ¶ 50.

<sup>280</sup> Claimants’ Post-Hearing Submission ¶ 50.

<sup>281</sup> Claimants’ Post-Hearing Submission ¶ 50; *see also id.* at ¶ 64.

<sup>282</sup> *See supra* ¶ 192.

<sup>283</sup> Shi Expert Report ¶ 2.3 and footnote 19.

<sup>284</sup> *Id.* at ¶ 2.3.

<sup>285</sup> *Id.* at ¶ 2.7.





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and audited financial statements.<sup>286</sup> Nothing in the record contradicts Dr. Shi's analysis—to the contrary, her valuation is consistent with a Schedule of Investment prepared by Deloitte for NAS Afghanistan in December 2017, in which Deloitte calculated NAS Afghanistan's investment in equipment as at November 30, 2017 in the amount of USD 6,066,851.60.<sup>287</sup> This is a contemporaneous document that predates the Termination Notice by three years, and is in line with Dr. Shi's valuation of the total investment in Equipment by 2020 as amounting to USD 6,942,155. The Tribunal thus finds that Claimant NAS Afghanistan is entitled to compensation in the amount of USD 6,942,155 for its lost investment in Equipment and systems.

229. With respect to (ii) (lost profits and lost management fees until October 2023), as noted above, the Tribunal found that the ACAA and the Ministry of Transportation issued the Termination Notice in breach of the Basic Agreement.<sup>288</sup> To assess this category of damages, Dr. Shi based her calculation on NAS Afghanistan's forecasted revenues for the Airports—*i.e.*, she deemed these forecasted revenues to represent the revenues that would have been earned, but-for Respondents' breaches of the Basic Agreement.<sup>289</sup> NAS Afghanistan forecasted that the 2021 and 2022 revenues would be 80% and 100%, respectively, of the 2019 revenues (*i.e.*, pre-pandemic level), and that the 2023, 2024, and 2025 revenues would make a full recovery to 110%, 115%, and 120% of the 2019 level, respectively, with a 5% annual growth rate from 2026 onward.<sup>290</sup>
230. Dr. Shi performed three cross-checks to assess the reasonableness of NAS Afghanistan's forecasted revenues by comparing: (a) NAS Afghanistan's forecasts to third-party forecasts;<sup>291</sup> (b) the impact of the pandemic on NAS Afghanistan's traffic in 2020 with the impact on Asia-Pacific countries;<sup>292</sup> and (c) NAS Afghanistan's forecasted revenue growth rate of 5% with its pre-pandemic revenue growth rates.<sup>293</sup> Based on these checks, Dr. Shi concluded that it was "reasonable to use NAS' forecasts of future revenues of the JV to assess the profits and the management fees that NAS would have had but for the Respondent's breaches of the Basic Agreement."<sup>294</sup>

<sup>286</sup> *Id.* at Section 2B; *see also generally* OX-4, NAS Afghanistan 2014-2019 audited financial statements.

<sup>287</sup> **Exhibit C-101**, Deloitte, NAS Afghanistan, AUP in relation Schedule of Investment as at 30 November 2017, December 11, 2017, p. 5 (Summary of Investment).

<sup>288</sup> *See supra* ¶ 188.

<sup>289</sup> Shi Expert Report ¶¶ 2.13, 2.19.

<sup>290</sup> *Id.* at ¶ 2.13 and Figure 2.1.

<sup>291</sup> *Id.* at ¶ 2.14.

<sup>292</sup> *Id.* at ¶¶ 2.15-2.16, Figures 2.2 and 2.3.

<sup>293</sup> Shi Expert Report ¶ 2.17.

<sup>294</sup> *Id.* at ¶ 2.18.



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231. Having calculated *but-for* revenues, Dr. Shi turned to calculating lost management fees and lost profits.
232. As provided in the JVPA, Dr. Shi calculated the management fees that NAS Afghanistan or its affiliate (NAS Kuwait) would have received as 9% of forecasted revenues.<sup>295</sup>
233. To calculate lost profits, Dr. Shi deducted from the forecasted revenues various costs, including “operating fees paid to MoTCA, management fees paid to NAS Kuwait, and profit shares paid to Ariana (51% [sic]<sup>296</sup> of the profits).”<sup>297</sup> Dr. Shi further accounted for investment costs (to replace old assets or to expand capacity), which would increase the depreciation and amortization of the joint venture, and thus reduce the profits of NAS Afghanistan.<sup>298</sup> Dr. Shi then estimated NAS Afghanistan’s lost profits “by multiplying its but-for future revenues with JV’s historical EBIT ratio,” *i.e.*, with EBIT (earnings before interests and taxes) reflecting “the JV’s profits after deducting both the operational costs and the depreciation and amortisation costs.”<sup>299</sup> Per Dr. Shi, NAS Afghanistan’s EBIT margins were “relatively stable and on average 21% during 2014-19,” and thus she assessed NAS Afghanistan’s lost profits by multiplying the forecasted revenues with the profit margin of 21%.<sup>300</sup>
234. Dr. Shi then discounted NAS Afghanistan’s lost management fees and lost profits to the Valuation Date by using a discount rate of 17.50%.<sup>301</sup> In calculating the discount rate, Dr. Shi added a separate risk factor to account for the fact that investing in Afghanistan “is likely to be more risky than in more developed markets.”<sup>302</sup> Given that most cash flows of NAS Afghanistan “are denominated in US dollars,” she estimated the cost of equity “in

<sup>295</sup> *Id.* at ¶ 2.20. Per Clause 4.3 of the JVPA, a management fee “amounting to nine percent (9%) of the Gross Revenues generated from the Services under the JVPA” was to be paid to NAS or any of its affiliates in consideration for support services relating to the Services under the JVPA. Exhibit C-003, JVPA, Clause 4.3; *see also id.* at p. 10 (defining “Management Fee” as “the management fee payable by the JVPA to NAS or any of its Affiliates, amounting to nine percent (9%) of the Gross Revenues generated from the Services under the JVPA (as defined under Article 4.3 herein), and such for NAS or any of its Affiliates’ support services to the Company in relation to the provision of the Services under this Agreement. Such Management Fee shall be payable on an annual basis as per the provisions of Article 4 herein.”).

<sup>296</sup> This reference to 51% of profit shares paid to Ariana appears to be an error. Earlier in her report, Dr. Shi states that Ariana’s profit sharing percentage is 59%, consistent with Clause 10.3.1 of the JVPA. Shi Expert Report ¶ 1.16. Moreover, Dr. Shi’s spreadsheet uses 41% as NAS Afghanistan’s profit share percentage, which is consistent with Ariana’s 59% percentage. *See OX-3*, tabs “NAS profit share” and “Profit share AFG Inv.”

<sup>297</sup> Shi Expert Report ¶ 2.21.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at ¶ 2.22.

<sup>300</sup> *Id.* at ¶ 2.23 and Figure 2.4.

<sup>301</sup> Shi Expert Report ¶¶ 2.25 *et seq.*

<sup>302</sup> *Id.* at ¶ 2.27.





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terms of the US currency” and used “the spot yield of 10-year U.S. treasury bonds as at 18 October 2020 (which is 0.75%) as the risk-free rate.”<sup>303</sup> For the purposes of the country risk premium, she used “the country risk premium of 7.96 – 14.00% for Afghanistan estimated by Duff & Phelps as at September 2020.”<sup>304</sup> Dr. Shi calculated the discount rate to be between 11.46% and 17.50% as of October 18, 2020, and adopted 17.50% “to be conservative.”<sup>305</sup>

235. Using this discount rate, Dr. Shi thus calculated the present value of the lost management fees and lost profits suffered by NAS Afghanistan for the period of November 2020 to October 2023 as USD 2,651,890<sup>306</sup> and USD 6,194,975,<sup>307</sup> respectively, for a total of USD 8,846,865.<sup>308</sup>
236. The Tribunal finds Dr. Shi’s assumptions and calculations to be reasonable and sufficiently certain, and adopts them. First, the Tribunal is satisfied that the various cross-checks that Dr. Shi performed to test NAS Afghanistan’s forecasted revenues<sup>309</sup> validated these forecasted revenues. These forecasted revenues served as the foundation for Dr. Shi’s other calculations, namely: (a) the lost management fees, calculated as 9% of the forecasted revenues; and (b) the lost profits, which are derived—as a first step—by subtracting various costs and expenses from the forecasted revenues. Second, the Tribunal accepts the use of a 21% profit margin to calculate lost profits since this percentage reflects NAS Afghanistan’s average profit margin in the years leading up to the termination.<sup>310</sup> Finally, the Tribunal is satisfied that using a discount rate of 17.50% to calculate the present value of NAS Afghanistan’s lost profits is conservative and appropriate. Not only was this number the high estimate calculated by Dr. Shi,<sup>311</sup> but it also exceeded the World Bank’s 15% discount rate “in its investment appraisal for Public-Private Partnership projects in Afghanistan in 2018.”<sup>312</sup> Accordingly, the Tribunal finds that Claimant NAS Afghanistan is entitled to compensation in the amount of USD 8,846,865 for its lost management fees and lost profits for the period of November 2020 to October 2023.

<sup>303</sup> *Id.* at ¶ 2.28.

<sup>304</sup> *Id.* at ¶ 2.30.

<sup>305</sup> *Id.* at ¶¶ 2.31-2.33.

<sup>306</sup> **OX-3**, “My assessment of NAS’ damages,” tab “Lost profits,” cell E87.

<sup>307</sup> *Id.* at cell E79.

<sup>308</sup> Claimants’ Post-Hearing Submission, Annex 1.

<sup>309</sup> *See supra* ¶ 230.

<sup>310</sup> Shi Expert Report ¶ 2.23 and Figure 2.4; *see also* **OX-3**, “My assessment of NAS’ damages,” tab “AR,” rows 49 and 50.

<sup>311</sup> Shi Expert Report ¶ 2.31 and Table 2.3.

<sup>312</sup> *Id.* at ¶ 2.32.



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237. With respect to (iii), the Performance Guarantee, the Tribunal found above that Ariana cashed the Performance Guarantee in breach of the JVPA as incorporated in the Basic Agreement,<sup>313</sup> and that the ACAA and the Ministry of Transportation also breached the Basic Agreement by failing to abide by the JVPA, including Ariana's obligation to return the Performance Guarantee.<sup>314</sup> Although the Performance Guarantee was cashed improperly and in breach of the relevant agreements, the Performance Guarantee was issued by NAS Kuwait. Indeed, the Performance Guarantee refers to the applicant as "National Aviation Services W.L.L.," *i.e.*, NAS Kuwait.<sup>315</sup> It further states that, at the request of NAS Kuwait, the Afghanistan International Bank irrevocably undertakes to pay to Ariana the sum of USD 1 million upon receipt of a written request.<sup>316</sup> Subsequently, when Ariana cashed the Performance Guarantee, the Gulf Bank of Kuwait informed NAS Kuwait that it had received Ariana's payment demand and that "[a]ccordingly, we shall honor beneficiary's demand by debiting your account with us."<sup>317</sup> Shortly thereafter, Gibson Dunn wrote to Ariana to challenge this action on behalf of "our client, National Aviation Services," *i.e.*, NAS Kuwait.<sup>318</sup> This means that NAS Kuwait—not Claimant NAS Afghanistan—paid the sum of USD 1 million out of its own account and thus was harmed by Respondents' breaches. However, since NAS Kuwait is no longer a claimant in this Arbitration, the Tribunal does not have jurisdiction to award it the sum of USD 1 million. And because Claimant NAS Afghanistan is not the party harmed by the breach, it cannot be compensated for damage that it did not suffer—doing otherwise would mean that NAS Afghanistan would receive USD 1 million for a Performance Guarantee that it did not pay. Accordingly, the Tribunal does not award the sum of USD 1 million pursuant to the Performance Guarantee.
238. In summary, the Tribunal finds the following: (i) all Respondents are liable to pay to Claimant NAS Afghanistan the sum of USD 6,942,155 for failing to return its Equipment and systems; and (ii) Respondents ACAA and Ministry of Transportation are liable to pay to Claimant NAS Afghanistan the sum of USD 8,846,865 in lost profits and lost management fees resulting from the Termination Notice and the unlawful termination of the JVPA.

<sup>313</sup> See *supra* ¶ 195.

<sup>314</sup> See *supra* ¶ 197.

<sup>315</sup> **Exhibit C-113**, Performance Guarantee, issued on February 16, 2019.

<sup>316</sup> *Id.* See also **OX-12** and **OX-13**, Swift notification of the Performance Guarantee issued by Gulf Bank, February 13, 2019 (in which Gulf Bank of Kuwait committed to pay USD 1 million to the Afghanistan International Bank in the event the Performance Guarantee is paid to Ariana).

<sup>317</sup> **Exhibit C-159**, Letter from Gulf Bank to NAS Kuwait, November 25, 2020.

<sup>318</sup> **Exhibit C-160**, Letter from Gibson Dunn to Ariana, December 2, 2020.





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**4. Losses Suffered as a Result of Respondents' Breach of NAS  
Afghanistan's Exclusivity Rights**

239. As noted above, the Tribunal found that Respondents breached Claimants' exclusivity rights under the Basic Agreement and the JVPA (as incorporated in the Basic Agreement) during the initial Concession period (*i.e.*, Jan. 2014-Oct. 2023).<sup>319</sup> Claimant NAS Afghanistan claims a loss of USD 10,416,050 for this breach,<sup>320</sup> to be assessed "jointly and severally against all Respondents."<sup>321</sup> This number is comprised of USD 2,551,124 representing the losses suffered from Safi Airways' self-handling,<sup>322</sup> with the balance of USD 7,864,926 representing the losses suffered from Kam Air's self-handling through November 3, 2023, *i.e.*, the expiry of the JVPA's ten-year term.<sup>323</sup> The damages relating to Safi Airways' self-handling cover the period from January 2014 to April 2017, when Safi Airways ceased operations.<sup>324</sup>
240. To calculate these lost profits damages, Dr. Shi set out to estimate the additional profits and management fees that NAS Afghanistan would have earned "both in the past and in the future, had all ground handling services for Kam Air and Safi Airways been provided by NAS."<sup>325</sup>
241. Her starting point was to estimate the revenues that the joint venture would have earned from such services "*but for* the Respondents' breach of the exclusivity clauses."<sup>326</sup> Dr. Shi based her revenue calculations on the information contained in NAS Afghanistan's January 7, 2018 letter to the ACAA regarding the number of flights operated by the two airlines from January 2016 through December 2017 and likely additional revenues from providing

<sup>319</sup> See *supra* ¶ 208.

<sup>320</sup> Claimants' Post-Hearing Submission, Annex 1.

<sup>321</sup> Claimants' Post-Hearing Submission ¶ 64.

<sup>322</sup> **OX-3**, "My assessment of NAS' damages," tab "Exclusivity losses," cell E90 ("NAS' losses 2014-1 excl. pre-award interest").

<sup>323</sup> This amount also is derived from Dr. Shi's spreadsheet (**OX-3**, "My assessment of NAS' damages") at the "Exclusivity losses" tab, namely the sum of the following components: (i) cell E50, *i.e.*, NAS Afghanistan's discounted losses for 2014-2020, excluding pre-award interest (*i.e.*, USD 5,635,017); (ii) cells L46 and M46, *i.e.*, NAS Afghanistan's discounted losses for 2021 and 2022, excluding pre-award interest (*i.e.*, USD 768,400 and USD 817,652 respectively); and (iii) cell N46 multiplied by (307 / 365), *i.e.*, NAS Afghanistan's discounted losses in 2023, excluding pre-award interest, pro-rated for 307 days of losses in 2023 (*i.e.*, USD 643,857).

<sup>324</sup> Claimants' Statement of Claim ¶ 56; Shi Expert Report ¶ 4.5.

<sup>325</sup> Shi Expert Report ¶ 4.5.

<sup>326</sup> *Id.* at ¶ 4.6.



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their GHS.<sup>327</sup> Dr. Shi then applied the gross profit margin that the joint venture would have earned on these revenues, namely a 70% gross margin.<sup>328</sup>

242. Dr. Shi calculated the lost management fees that NAS Kuwait would have earned on these lost revenues from Kam Air and Safi Airways, *i.e.*, 9% of the *but-for* revenues associated with Kam Air and Safi Airways.<sup>329</sup> She then deducted these management fees payable to NAS Afghanistan and its affiliates from the joint venture's *but-for* gross profits and then applied to it NAS Afghanistan's profit share percentage to estimate the additional profits that NAS Afghanistan would have earned.<sup>330</sup>
243. For losses incurred from November 2020 to November 2023, Dr. Shi again applied a 17.50% discount rate to estimate the present value of these damages as of the Valuation Date.<sup>331</sup> As noted above,<sup>332</sup> the Tribunal accepts a discount rate of 17.50% to assess the present value of damages as of the Valuation Date.
244. The Tribunal observes that Dr. Shi accepted the number of domestic and international flights operated by Kam Air and Safi Airways at the Airports as set out in NAS Afghanistan's 2018 letter,<sup>333</sup> without independently verifying these numbers. However, there is no contradictory evidence in the record. The Tribunal considers Dr. Shi's methodology and the steps that she followed to calculate lost profits to be reasonable and appropriate. The revenues that NAS Afghanistan lost from Kam Air's and Safi Airways' self-handling impacted NAS Afghanistan's profits, which in turn impacted NAS Afghanistan's 41% profit share and its management fees. The Tribunal thus accepts Dr. Shi's calculation of NAS Afghanistan's losses resulting from Respondents' breaches of its exclusivity rights, and accordingly finds all Respondents liable to pay Claimant NAS Afghanistan the sum of USD 10,416,050. As detailed above, Claimant NAS Afghanistan's belated request for joint and several liability is denied for being insufficiently pled and substantiated.<sup>334</sup>

<sup>327</sup> *Id.* at ¶ 4.8 (citing **Exhibit C-104**, Letter from NAS Afghanistan to the ACAA, January 7, 2018, p. 3); *see also id.* at ¶ 4.9.

<sup>328</sup> Shi Expert Report ¶¶ 4.6, 4.10 ("The gross margin of the JV reflects the direct cost of providing additional services (such as the labour costs), but not the costs associated with investments in the equipment as I understand that NAS would have been able to utilise existing capacity for providing ground handling services to Kam Air and Safi Airways").

<sup>329</sup> *Id.* at ¶¶ 4.11, 4.12, and 4.14.

<sup>330</sup> *Id.* at ¶¶ 4.6, 4.13, and Figure 4.1.

<sup>331</sup> Shi Expert Report ¶ 4.15.

<sup>332</sup> *See supra* ¶¶ 234, 236.

<sup>333</sup> **Exhibit C-104**, Letter from NAS Afghanistan to the ACAA, January 7, 2018, p. 3.

<sup>334</sup> *See supra* ¶ 226.





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\* \* \* \* \*

245. By way of an overall summary, the following table compares (i) the damages requested by Claimants for the categories where the Tribunal has found liability, (ii) with the damages that the Tribunal awards (exclusive of interest):

<b>Damages due to Respondents' Breaches</b>	<b>Claimants' Requested Amount (USD)</b>	<b>Damages Awarded by Tribunal (USD)</b>
<b>Basic Agreement</b>		
Lost investments in equipment and system	6,942,155	6,942,155
Lost profits and management fees for the remainder of the Concession period ( <i>i.e.</i> , Nov. 2020-Oct. 2023)	8,846,865	8,846,865
Lost profits and management fees for the renewal term ( <i>i.e.</i> , Nov. 2023-Oct. 2033)	16,430,920	0
Performance Guarantee	1,000,000	0
<b>Exclusivity Rights</b>		
Losses during the current Concession period ( <i>i.e.</i> , Jan. 2014-Oct. 2023)	10,416,050	10,416,050
Losses during the renewal term ( <i>i.e.</i> , Nov. 2023-Oct. 2033)	4,385,708	0

### 5. Interest

246. Claimant NAS Afghanistan argues that it is entitled to pre-award interest on these sums from the Valuation Date to the date of this Award at the rate of LIBOR + 2%.<sup>335</sup> According to Claimant, this rate is “reasonable given that it sits between the interest rate of LIBOR plus 5% envisaged at Clause 12.3 of the JVPA for late payments and the Afghan PIL interest rate of 12-month LIBOR.”<sup>336</sup> Dr. Shi was instructed to calculate the interest

<sup>335</sup> Claimants' Statement of Claim ¶ 201.

<sup>336</sup> Claimants' Post-Hearing Submission ¶ 68; *see also* Exhibit C-003, JVPA, Clause 12.3 (“If Ariana fails to settle such amounts within the time frame set in the notice, Ariana should pay to NAS in addition to the amounts due, late interests calculated from the day whereby the payment has become due until payment date at the interest rate of LIBOR + % (plus Five per cent)”; Exhibit C-001, PLI, Art. 28 (“Such compensation shall include interest at the one-year LIBOR rate for the period between the date of the expropriation and the date of complete payment of the compensation”).



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claimed by applying this interest rate of LIBOR + 2% to the damages resulting from Respondents' breaches of the Basic Agreement and the JVPA.<sup>337</sup>

247. The Basic Agreement does not specify an applicable interest rate; however, it grants the Tribunal the power to award interest within its discretion. Per the arbitration agreement at Clause 7.2, which Claimants invoked in commencing this Arbitration, "[t]he arbitrators shall be entitled to award interest to either Party in whose favor such a determination, certification or award is made."<sup>338</sup>
248. In the exercise of its discretion, the Tribunal finds that LIBOR + 2% is an appropriate pre-award interest rate to apply to the sums due under this Award, from the Valuation Date of October 18, 2020 to the date of this Award, annually, on a simple basis. As Claimants noted, this pre-award interest rate strikes a middle ground between competing possible rates. The Tribunal further notes that Respondent Ariana was prepared to pay interest on overdue sums at a rate of LIBOR + 5% under the JVPA such that it should not have any objection to the application of a lower interest rate on sums due. Since Claimant did not expressly request interest on a compound basis, the Tribunal awards pre-award interest on sums due on a simple basis.
249. Claimant NAS Afghanistan also requests that Respondents be ordered to pay post-award interest on all sums awarded.<sup>339</sup> Although Claimant does not propose an applicable interest rate, the Tribunal sees no reason to depart from the pre-award interest rate of LIBOR + 2%, annually, on a simple basis, from the date of this Award until payment in full.

## VI. FEES AND COSTS

250. Claimants seek their fees and costs in this Arbitration.<sup>340</sup> Claimants contend that "costs should follow the event" and that Respondents should bear the costs of the arbitration, including Claimants' legal fees and costs.<sup>341</sup>
251. Claimants seek (i) USD 635,000 in ICC costs, (ii) USD 1,856,382.47 in attorneys' fees and costs, and (iii) USD 359,193.31 in expert and other costs (such as the ICC's virtual hearing

<sup>337</sup> Shi Expert Report ¶ 1.28. Dr. Shi calculated the interest sums up to April 22, 2022 in Annex 1 of Claimants' Post-Hearing Submission.

<sup>338</sup> **Exhibit C-005**, Basic Agreement, Clause 7.2.

<sup>339</sup> Claimants' Statement of Claim ¶ 202(v); Claimants' Post-Hearing Submission ¶ 69(e).

<sup>340</sup> Claimants' Statement of Claim ¶ 202(vi); Claimants' Post-Hearing Submission ¶ 69(f); Claimants' Statement of Costs.

<sup>341</sup> Claimants' Statement of Costs ¶ 2.





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platform and court reporting services from Epic), for a total of USD 2,850,575.78.<sup>342</sup> Claimants also request post-award interest on all sums awarded from the date due until payment in full at an interest rate of LIBOR plus 2%, on a compounded basis.<sup>343</sup>

252. Article 37(4) of the ICC Rules requires that this Award “fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.” Article 37(1) of the ICC Rules defines the costs of the arbitration as “the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court...and the reasonable legal and other costs incurred by the parties for the arbitration.” Per Article 37(5) of the ICC Rules, in making its costs decision, the tribunal “may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.” Moreover, per Article 37(3) of the ICC Rules, “[a]t any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.”
253. Claimants’ claims were sustained in part, and Respondents, individually or jointly, were found liable to Claimants for the total amount of USD 26,205,070 (plus interest). This amount awarded represents approximately 50% of the damages that Claimants sought, *i.e.*, approximately 50% of USD 48,435,760.<sup>344</sup> Accordingly, in the exercise of its discretion under the ICC Rules, the Tribunal finds that Claimants are entitled to recover 50% of their fees and costs. Although the request for fees and costs was formulated as a request from both Claimants, the Statement of Costs was submitted after First Claimant NAS Kuwait withdrew as a party to this Arbitration, such that Second Claimant NAS Afghanistan was the sole Claimant<sup>345</sup> and thus the only party that could request—and be awarded—these fees and costs. Moreover, the Tribunal further concludes that Second Claimant NAS Afghanistan is entitled to these fees and costs because (i) it is the party that suffered the losses claimed,<sup>346</sup> and (ii) the facts alleged and the claims asserted by both Claimants were identical, such that (iii) the addition and subsequent withdrawal of First Claimant NAS Kuwait did not impact the scope of Claimants’ case or of the fees and costs incurred.
254. With respect to the ICC arbitration costs, the ICC Court fixed the ICC arbitration costs at USD 617,800 at its session of October 6, 2022, which Claimants paid in full, *i.e.*, Claimants paid their own share as well as Respondents’ share of the advance. This means that Respondents are liable (i) to reimburse Claimant NAS Afghanistan for Respondents’ share

<sup>342</sup> *Id.* at ¶ 3.

<sup>343</sup> *Id.* at ¶ 2.

<sup>344</sup> Claimants’ Post-Hearing Submission ¶ 69(d).

<sup>345</sup> *Id.* at ¶ 5.

<sup>346</sup> *Id.*



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of the advance on costs (USD 308,900), and (ii) to bear 50% of Claimant NAS Afghanistan's share of the advance on costs, namely USD 154,450, for a total of USD 463,350.

255. With respect to Claimants' legal and other costs, the Tribunal finds that such costs are reasonable given the complexity of the legal issues and the amount in dispute. This Arbitration entailed (i) Claimants' Statement of Claim, with two witness statements, an expert report, and accompanying exhibits; (ii) a virtual hearing, including opening statements, and testimony from Claimants' witnesses and expert; (iii) Claimants' Post-Hearing Submission; and (iv) their Statement of Costs. Claimants also took the lead on the hearing organization and logistics complying with Procedural Order No. 2. The Tribunal considers that Claimants' legal and other costs are commensurate with the work undertaken and the nearly USD 50 million at stake, and thus are reasonable.
256. Thus, Respondents are liable to Second Claimant NAS Afghanistan for (i) USD 463,350 of ICC arbitration costs, and (ii) 50% of Second Claimant NAS Afghanistan's attorneys' fees and costs, expert costs, and other costs, namely USD 1,107,787.89, for a total amount of USD 1,571,137.89.
257. With respect to Claimant's request to apply an interest rate of LIBOR + 2%, compounded, to these sums from the date of the Award to payment in full, the Tribunal sees no reason to depart from the pre-award interest rate of LIBOR + 2%, annually, on a simple basis, which shall apply to the costs award, from the date of this Award until payment in full.





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**VII. AWARD**

258. For the foregoing reasons, the Tribunal unanimously:

- a. DECLARES that it does not have jurisdiction over First Claimant National Aviation Services W.L.L. on the basis of the ICC arbitration clause contained in the Basic Agreement;
- b. DECLARES that it has jurisdiction over Second Claimant NAS Afghanistan's claims against First Respondent Afghanistan Civil Aviation Authority, Second Respondent Afghanistan Ministry of Transportation and Civil Aviation, and Third Respondent Ariana Afghan Airlines Co. Ltd., arising under the Basic Agreement dated December 10, 2013 and the Joint Venture Partnership Agreement dated November 4, 2013 (as incorporated) on the basis of the ICC arbitration clause contained in the Basic Agreement, and that such claims are admissible;
- c. DECLARES that First Respondent Afghanistan Civil Aviation Authority and Second Respondent Afghanistan Ministry of Transportation and Civil Aviation breached Clauses 4.1(i), 4.1(ii), and 4.2(a) of the Basic Agreement;
- d. DECLARES that Third Respondent Ariana Afghan Airlines Co. Ltd. breached Clauses 5.2 and 9.4 of the Joint Venture Partnership Agreement, as incorporated in the Basic Agreement;
- e. ORDERS First Respondent Afghanistan Civil Aviation Authority, Second Respondent Afghanistan Ministry of Transportation and Civil Aviation, and Third Respondent Ariana Afghan Airlines Co. Ltd. to pay to Second Claimant NAS Afghanistan damages in the amount of (i) USD 6,942,155 for failing to return its Equipment and systems; and (ii) USD 10,416,050 for NAS Afghanistan's losses resulting from Respondents' breaches of its exclusivity rights;
- f. FURTHER ORDERS First Respondent Afghanistan Civil Aviation Authority and Second Respondent Afghanistan Ministry of Transportation and Civil Aviation to pay to Second Claimant NAS Afghanistan damages in the amount of USD 8,846,865 in lost profits and lost management fees resulting from the Termination Notice and the unlawful termination of the Joint Venture Partnership Agreement;
- g. ORDERS First Respondent Afghanistan Civil Aviation Authority, Second Respondent Afghanistan Ministry of Transportation and Civil



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Aviation, and Third Respondent Ariana Afghan Airlines Co. Ltd. to pay interest on the amounts specified in subparagraphs (e) and (f) above at the interest rate of LIBOR + 2%, annually, on a simple basis, calculated from October 18, 2020 until payment in full;

- h. ORDERS First Respondent Afghanistan Civil Aviation Authority, Second Respondent Afghanistan Ministry of Transportation and Civil Aviation, and Third Respondent Ariana Afghan Airlines Co. Ltd. to pay to Second Claimant NAS Afghanistan the amounts of USD 463,350 as payment for the ICC arbitration costs, and USD 1,107,787.89 as payment for Claimant's attorneys' fees, expert fees, and other costs incurred in this Arbitration, for a total amount of USD 1,571,137.89; and
- i. ORDERS First Respondent Afghanistan Civil Aviation Authority, Second Respondent Afghanistan Ministry of Transportation and Civil Aviation, and Third Respondent Ariana Afghan Airlines Co. Ltd. to pay interest on the amounts specified in subparagraph (h) above at the rate of LIBOR + 2%, annually, on a simple basis, from the date of this Award until payment in full.

259. All other requests, claims, defenses, or allegations made in this Arbitration and not expressly granted in this Award are denied.





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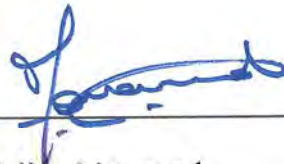
Place of the Arbitration: London, United Kingdom

Date: December 16, 2022

Arbitral Tribunal



Laurence Shore  
Co-arbitrator



Caline Mouawad  
President of the Tribunal



Mohamed S. Abdel Wahab  
Co-arbitrator

