ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 16342/EC/ND

1. THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN
   (represented by THE MINISTRY OF TRANSPORT)
   (Jordan)

2. THE PUBLIC TRANSPORT REGULATORY COMMISSION
   (Jordan)
   vs/

INTERNATIONAL COMPANY FOR RAILWAY SYSTEMS
   (Jordan)

This document is an original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.
INTERNATIONAL COURT OF ARBITRATION
OF THE
INTERNATIONAL CHAMBER OF COMMERCE

IN THE PROCEEDINGS BETWEEN

THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN
(REPRESENTED BY THE MINISTRY OF TRANSPORT).
(First Claimant)

AND

THE LAND TRANSPORT REGULATORY COMMISSION
(Second Claimant)

VS.

INTERNATIONAL COMPANY FOR RAILWAY SYSTEMS
(Respondent)

(ICC Case No. 16342/EC/ND)

Final Award

Members of the Tribunal:
Mr. Bernardo M. Cremades
Mr. Stanimir A. Alexandrov
Mr. Bernard Audit

Secretary to the Tribunal
Sonsoles Huerta de Soto

Representing the Claimants
Salaheddin Al Bashir, Esq.
Lana Alamat, Esq.
Jawad Zeidat, Esq.
International Business Legal Associates
and
Ricardo E. Ugarte, Esq.
Vanessa Alarcon Duvanel, Esq.
Brandon Swider, Esq.
Winston & Strawn LLP

Representing the Respondent
Farrukh Karim Qureshi, Esq.
Atique Tahir, Esq.
Nudrat Piracha, Esq.
Samdani & Qureshi
Firas Bakr, Esq.
Ibrahim Bakr Law Office.
INDEX
I. PARTIES.-

1. The Claimants are:

(i) **THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN** represented by the Ministry of Transport, Um Uthaina, Saad Bin Abi Waqqas Street, P.O. Box No. 35214, Amman 11180, Jordan (hereafter the "Government of Jordan", the "Government", "GOJ" or the "First Claimant"), and

(ii) **THE LAND TRANSPORT REGULATORY COMMISSION**, a juridical entity established under the laws of the Hashemite Kingdom of Jordan, having its office at Dahiat al-Rasheed, Hamadan Street, P.O. Box No. 1830, Amman 11118, Jordan (hereafter the "LTRC" or the "Second Claimant").

2. The Claimants were represented in this arbitration by:

(i) Salaheddin Al Bashir, Lana Alamat, Islam Smadi, and Jawad Zeidat, Esqs. International Business Legal Associates, Al Rabieh Circle-Seqalieh Street, Salem Center (Bldg. 17)-1st Floor, Amman, Jordan. (Tel: +962 6 552 5127; Fax: +962 6 552 7052; Email: sbashir@iblaw.com.jo, lalamat@iblaw.com.jo, ismadi@iblaw.com.jo, jzeidat@iblaw.com.jo), and

(ii) Ricardo E. Ugarte, Winston & Strawn LLP, Grand-Rue 23 1204, Geneva, Switzerland (Tel: +41 (0)22 317 7576; Fax: +41 (0)22 317 7500); 35 West Wacker Drive, Chicago Illinois, 60601-9703, U.S.A (Tel: +1 312 558 5600; Fax: +1 312 558 5700, Email: rugarte@winston.com).

3. The Respondent is the **INTERNATIONAL COMPANY FOR RAILWAY SYSTEMS**, a private shareholding company incorporated under the laws of the Hashemite Kingdom of Jordan under registration number 379 with its registered office at Abu Firas Al Hamadani Street, Building No. 41, 4th Circle, Jabel

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1 LTRC is the successor to the Public Transport Regulatory Commission (PRTC) by virtue of the Temporary Law No. 34 of 2010, which has assumed all rights and obligations of its predecessor. The Tribunal will make no distinction between the two and will only refer to LTRC.
Amman, Amman 11181, Jordan (hereafter the "Respondent", the "Company", or "ICRS").

4. The Respondent was represented in this arbitration by Farrukh Karim Qureshi, Nudrat Piracha and Zain ul Abideen Qureshi, Esqs. Samdani & Qureshi, 32-A Street no. 38, Main Nazimuddin Road, Sector F-10/4, Islamabad, Pakistan (Tel: +92 51 211 1595-8; Fax: +92 51 210 8011; Email: fkw786@gmail.com, nudratpiracha@gmail.com, z.qureshi9434@gmail.com).

5. The Claimants and the Respondent are jointly referred to as the "Parties".

II. REFERENCE TO ARBITRATION.

6. The present dispute arises from the Implementation Agreement (hereafter the "IA" or the "Agreement") relating to the Light Rail System from Amman to Zarqa, Jordan and signed by the Parties on October 18, 2007; and its Addendum signed by the Parties on February 2, 2008. The arbitration agreement is contained in Clause 20 of the IA, which reads as follows in its relevant part:

"...20.2 Determination by Dispute Adjudication Board

20.2.1 If the Parties are unable to resolve a Dispute in accordance with Clause 20.1 [Amicable Resolution by the Parties] within the time period specified therein, then either Party may refer the Dispute for resolution thereof to the DAB which the Parties hereby agree to establish in accordance with the Dispute Board Rules of the International Chamber of Commerce (the Rules). The DAB shall have three (3) members appointed in accordance with the Rules.

20.2.2 All Disputes not resolved by the Parties in accordance with Clause 15.1 shall be submitted to the DAB in accordance with the Rules. For any given Dispute the DAB shall issue a Decision in accordance with the Rules.

20.2.3 If any Party sends a written notice to the other Parties and the DAB expressing its dissatisfaction with a Decision, as provided in the Rules, or if the DAB does not issue the Decision within the time limit provided for in the Rules, or if the DAB is disbanded pursuant to the Rules, the Dispute shall finally be settled by arbitration in accordance with Clause 20.3.

20.2.4 If any Party fails to comply with a Decision when required to do so under the Rules, the other Party may refer the failure itself to arbitration in accordance with Clause 20.3."
20.3 Arbitration

20.3.1 If the Parties are unable to resolve a Dispute in accordance with Clause 20.1 and Clause 20.2, the Parties agree to settle the Dispute by arbitration in accordance with the Rules of Procedure for Arbitration Proceedings (the ICSID Rules) of the International Centre for Settlement of Investment Disputes (the Centre) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Convention).

20.3.2 If for any reason the Dispute cannot be settled under the Convention in accordance with the ICSID Rules, whether due to any failure to implement the Convention, or the Company should not be agreed to be a foreign controlled entity, or the request for arbitration proceedings is not registered by the Centre, or the Centre fails or refuses to take jurisdiction over such Dispute, or otherwise, such Dispute shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the ICC Rules) by one (1) or more arbitrators appointed in accordance with the ICC Rules.

20.3.3 Unless otherwise agreed upon by the Parties, the venue of arbitration shall be Dubai, United Arab Emirates.

20.3.4 All Disputes shall be definitively and irrevocably resolved by arbitration and the Parties pledge from the outset to abide by the arbitrator(s) decisions."

7. The Claimants submitted a Request for Arbitration pursuant to Clause 20.3 of the IA to the International Court of Arbitration (hereafter the “Court”) of the International Chamber of Commerce (hereafter the “ICC”) on May 27, 2009. Several jurisdictional issues arose between the Parties, which will be subsequently addressed in the following Sections of the present Award.

8. Clause 20.3.3 of the IA provides that “Unless otherwise agreed upon by the Parties, the venue of arbitration shall be Dubai, United Arab Emirates.” Despite that provision, the Parties were in agreement that the “venue” referred to in Clause 20.3.3 did not refer to the seat of the arbitration but rather to the place where the arbitration hearing was to take place. There was no agreement between the Parties regarding the seat of the arbitration². Hence according to Article 14(1) of the ICC Rules, by communication of the ICC Secretariat of

² See the Claimants’ Request for Arbitration, May 27, 2009, Section VI and the Respondent’s Request for Extension of Time for Filing of the Answer and for the Determination of Jurisdiction by the Court/Tribunal as a Preliminary Matter under article 6(2) of the ICC Rules of Arbitration dated January 01, 1998 (the “ICC Rules”) of July 6, 2009, Section V.
August 21, 2009, the seat of the arbitration was fixed by the Court as being Zurich, Switzerland.

9. In accordance with Clause 20.5 of the IA "This Agreement and the rights and obligations of the Parties hereunder shall be governed and construed in accordance with the Applicable Law", which was defined in Clause 1.1 of the IA as the "laws of Jordan."

10. The language of this arbitration is English per agreement of the Parties\textsuperscript{3}. The applicable version of the ICC Rules is that of 1998.

III. PROCEDURAL HISTORY.-

11. The Claimants submitted a Request for Arbitration and supporting exhibits pursuant to Clause 20.3 of the IA to the Court by submission dated May 27, 2009.

12. On June 12, 2009, the Respondent submitted a Request for Arbitration to ICSID against the Hashemite Kingdom of Jordan.

13. By letter of June 22, 2009, to the ICC the Claimants jointly nominated Professor Bernard Audit as co-arbitrator (55, boulevard Murat, 75016, Paris, France). By communication of the same date the ICC informed the Parties that the time limit for the Respondent to file its Answer to the Request for Arbitration expired on July 7, 2009.

14. On July 6, 2009, the Respondent filed with the ICC Secretariat a Request for the determination of Jurisdiction by the Court/Tribunal as a preliminary matter under Article 6(2) of the ICC Rules. In the same submission the Respondent requested an extension of time for the filing of its Answer and Counterclaim and that such time should commence from the date when a final decision with regard to

\textsuperscript{3} See the Claimants' Request for Arbitration, May 27, 2009, para. 69; and the Respondent's Request for Extension of Time for Filing of the Answer and for the Determination of Jurisdiction by the Court/Tribunal as a Preliminary Matter under article 6(2) of the ICC Rules of July 6, 2009, Section VII.
assumption of jurisdiction was taken by the Court or the Arbitral Tribunal, whichever was later.

15. By communication to the Parties of July 9, 2009, the ICC Secretariat requested the Claimants to submit their comments regarding the Respondent's jurisdictional objections within 10 days of the receipt of this letter. In the same communication, the ICC granted the Respondent an extension until August 10, 2009, for the filing of its Answer.

16. On July 16, 2009, the Respondent's Request for Arbitration to ICSID against the Hashemite Kingdom of Jordan was registered by ICSID pursuant to Article 36(3) of the ICSID Convention.

17. On July 17, 2009, the Claimants submitted their comments to the ICC Secretariat regarding the Respondent's jurisdictional objections.

18. The Respondent filed its Answer to the Request for Arbitration with the ICC Secretariat by submission dated August 10, 2009. The Respondent reserved the right to submit a Counterclaim in the event the ICC Court or the Arbitral Tribunal, as the case might be, held that the present arbitration could proceed.

19. By communication of August 21, 2009, the ICC Secretariat informed the Parties that the Court had decided in its session of August 20, 2009, in accordance with Article 6(2) of the Rules, that this arbitration should proceed.

20. By letter to the ICC dated December 30, 2009, the Respondent nominated Mr. Stanimir A. Alexandrov as co-arbitrator (Sidley Austin LLP, 1501 K Street, N.W., Washington D.C. 20005, United States of America).

21. By communication to the Parties of March 16, 2010, the ICC Secretariat referred to its letters dated February 17 and March 3, 2010, by which the Parties were invited to provide any comments on the disclosures made by Messrs. Audit and Alexandrov, noting in this regard that the Parties did not object to the nomination of Mr. Audit or Mr. Alexandrov.
22. By communication of April 1, 2010, to the Parties, the ICC Secretariat referred to the exchange of emails between the Parties on March 26, 2010, and the Claimants' Counsel's email dated March 30, 2010, noting that the Parties agreed to nominate jointly Mr. Patrick Lipton Robinson as the Chairman of the Arbitral Tribunal.

23. On May 10, 2010, the Secretary General of the ICC Court, in accordance with Article 9(2) of the ICC Rules, confirmed Mr. Bernard Audit as co-arbitrator upon joint nomination of the Claimants and Mr. Stanimir Alexandrov as co-arbitrator upon nomination of the Respondent.

24. On July 2, 2010, the ICC Secretariat informed the Parties that the ICC Court had decided at its session of July 1, 2010, pursuant to Article 12(1) of the ICC Rules to accept the resignation of Mr. Patrick Lipton Robinson, acting as Chairman of the Arbitral Tribunal, and pursuant to Article 12(4) of the ICC Rules, directly appointed Mr. Bernardo M. Cremades as Chairman of the Arbitral Tribunal (B. Cremades y Asociados; Calle Goya 18, 2nd floor, 28001, Madrid, Spain).

25. By letter dated July 12, 2010, addressed to the Chairman of the Arbitral Tribunal the Respondent invited the attention of the Arbitral Tribunal to the fact that there was a pending arbitration before an ICSID Tribunal bearing ICSID Case No. ARB 09/13 in relation to the same dispute. The Respondent informed the Arbitral Tribunal that the Government of Jordan had filed a Request for Stay of the ICSID arbitration in favour of the ICC arbitration, which was denied by the ICSID Tribunal through Procedural Order No. 2 (hereafter "ICSID P.O. 2") dated July 9, 2010. In view of the ICSID Tribunal's P.O. 2 the Respondent stated that it was unable to participate in the ICC proceedings until the ICSID Tribunal had determined its jurisdiction, and requested the Arbitral Tribunal to pass an appropriate order in light of the said P.O. 2.

26. By letters dated July 22, 2010, the First and Second Claimant submitted to the Arbitral Tribunal their comments regarding the ICSID Tribunal's P.O. 2.
27. On October 5, 2010 the Respondent sent a communication to the Chairman of the Tribunal stating the Respondent's withdrawal from its jurisdictional objections and its intention to submit a Counterclaim of approximately USD 8 million.

28. In accordance with Article 18(4) of the ICC Rules, and after consultation with the Parties, the Arbitral Tribunal established a provisional timetable for the arbitration and certain procedural issues in its Procedural Order № 1 (hereafter "P.O. I") dated October 18, 2010. The Arbitral Tribunal drew up Terms of Reference for the arbitration dated November 2, 2010, that were duly signed by the Parties and by the Arbitral Tribunal in accordance with Article 18 of the ICC Rules. At paragraph 42 of the Terms of Reference, Ms. Sonsoles Huerta de Soto was designated as the Administrative Secretary to the Tribunal (B. Cremades y Asociados; Calle Goya 18, 2nd floor, 28001, Madrid, Spain).

29. The Claimants filed their Statement of Claim, supported by documentary exhibits, legal authorities and witness statements, by submission dated December 27, 2010.

30. The Respondent filed its Statement of Defence and Counterclaim, supported by documentary exhibits, legal authorities and witness statements by submission dated March 14, 2011.

31. The Claimants filed their Reply and Answer to the Counterclaim, supported by documentary exhibits, legal authorities and witness statements, by submission dated May 16, 2011.

32. By communication to the Parties of June 16, 2011, the Arbitral Tribunal after consultation with the Parties fixed Madrid as the place for the hearing, without prejudice to Zurich being the designated seat of the arbitration, and established that the hearing would start on October 13, 2011. The Arbitral Tribunal further informed the Parties that the duration of the hearing would be fixed at a later stage in the proceedings.
33. The Respondent filed its Statement of Rejoinder and Reply to Counterclaim supported by documentary exhibits, legal authorities and witness statements, by submission dated July 15, 2011.

34. By letter of July 19, 2011, the Claimants requested the Arbitral Tribunal an opportunity to respond to Chapter 3.C of the Respondent's Rejoinder in writing.

35. By letter of July 21, 2011, addressed to the Chairman of the Arbitral Tribunal, the Respondent submitted its response to the Claimants' letter of July 19 and stated that it had no objection to the request made by the Claimants. By communication of the same date the Arbitral Tribunal, in light of the Parties' agreement, informed the Parties that it had no objection to the Claimants' request contained in the letter of July 19, 2011.

36. The Claimants filed their Rejoinder to the Counterclaim and their Sur-Reply to Chapter 3.C of the Respondent's Rejoinder, supported by documentary exhibits and legal authorities, by submission dated August 9, 2011.

37. By letter of August 23, 2011, the Claimants requested the Arbitral Tribunal to resolve a document production issue pursuant to paragraph 8 of P.O. 1. By communication to the Parties of the same date the Arbitral Tribunal requested the Respondent to submit a response to the Claimants' letter of August 23 and to complete the Referral attached thereto with its objections to the Claimants' document production request on or before August 24.

38. On August 29, 2011 the Respondent submitted its response to the Claimants' letter of August 23, its objections to the Claimants' document production request and a document production request of its own accompanied by exhibits C-27, C-28 and C-29. By communication to the Parties of the same date the Arbitral Tribunal requested the Claimants to make their objections to the Respondent's document production request on or before August 31, 2011.

39. By communication to the Chairman of the Arbitral Tribunal of August 31, 2011 the Claimants filed the exhibit list regarding the final submission of new exhibits.
and authorities submitted by the Claimants pursuant to the deadline established in P.O. 1 and informed the Arbitral Tribunal that hard copies would be shipped. By communication of September 1, 2011, to the Arbitral Tribunal, the Claimants filed their objections to the Respondent’s document production request, together with exhibit CEX-66 and legal authority CLA-35 attached thereto.

40. By communication to the Parties of September 12, 2011, the Arbitral Tribunal pursuant to paragraph 10 of P.O. 1 issued Procedural Order No 2 (hereafter “P.O. 2") enclosing the Tribunal’s decision on document production.

41. By communications of September 16, 2011, both Parties informed the Tribunal of their lists of attendees to the hearing, identifying all the individuals that would be present at the hearing for each part.

42. By communications of September 23, 2011, the Parties submitted to the Tribunal their respective proposals regarding the organization of the hearing. In light of the Parties' proposals and pursuant to Article 21 of the ICC Rules, the Arbitral Tribunal sent the Hearing Schedule to the Parties on September 28, 2011.

43. A hearing took place in Madrid on the 13th and 14th of October 2011. The Parties made their opening statements on October 13. On October 14, the following witnesses proposed by the Parties gave oral evidence and answered the questions from Counsel for the Parties and the Arbitral Tribunal: Mr. Alaa Batayneh, Mr. Amer Hadidi, Mr. Aftab Siddiqui and Mr. Ramiz Barghouti. The Tribunal identified certain questions during the hearing that the Parties were invited to address in their closing submissions. At the end of the hearing the Parties agreed to submit written closing submissions pursuant to the Hearing Schedule of September 28, 2011.

44. By letter of October 26, 2011 the Arbitral Tribunal sent to the Parties a CD with the audio recording of the hearing. By communication of November 2, 2011, the Arbitral Tribunal sent to the Parties an electronic copy of the transcripts of the hearing.
45. With the Tribunal’s permission, the Parties submitted their Closing Submissions and Submissions on Costs by submissions dated December 22, 2011. By communication of December 23, 2011 the Respondent requested to file a Supplementary Submission in light of the new legal authorities and exhibits filed with the Claimants’ Post-Hearing Brief. After seeking comments from the Claimants, the Tribunal decided on December 30, 2011, to disregard all of the new exhibits and legal authorities but for two documents the content of which was already in the record; accordingly no further submission from the Respondent was required.

46. In accordance with Article 22(1) of the ICC Rules the Arbitral Tribunal declared the proceedings closed on February 6, 2012. The ICC Court duly extended the time limit for rendering the Award in accordance with Article 24(2) of the ICC Rules and the current deadline is March 30, 2012. The Award was approved by the Court in its session of February 23, 2012.

IV. SUMMARY OF THE FACTS.-

A. The Light Railway System Project.-

47. As stated above the present dispute arises from the IA relating to the Light Rail System Project signed by the Parties on October 18, 2007, and its Addendum signed by the Parties on February 2, 2008.

48. The project consisted in the construction of a 26-kilometer Light Railway System (hereafter the “LRS Project” or the “Project”) that would connect two of the most populous cities in Jordan, Amman and Zarqa. The Project was of significant economic and environmental importance to Jordan, as the two cities were linked only by a 25-kilometer highway, and thousands of passengers commuted between them daily in small buses that were unsatisfactory in terms
of passenger safety and comfort, as well as environmental impact. The Project therefore carried a high public profile.

49. The Project was intended to be undertaken by a private sector entity through a build, operate, and transfer (hereafter "BOT") arrangement, and in light of the high priority placed on its successful implementation, the Government of Jordan offered a substantial capital subsidy and numerous other incentives to ensure that the Project would be attractive to potential bidders.


50. The LTRC initiated the bidding process for the Project on October 19, 2006 by distributing a Request for Expressions of Interest. On November 8, 2006, retired Brigadier Atab Ahmed Siddiqui (hereafter “Mr. Siddiqui”), the CEO of Infrastructure Development Company Ltd. (hereafter “IDC”), submitted an Expression of Interest on behalf of a group consisting of IDC, Saadullah Khan & Brothers (hereafter “SKB”), Hycarbeex American Energy Inc. (hereafter “Hycarbeex”), China Electronics Technology Group Company, and Changchun Railway Vehicle Co. Ltd. By letter dated November 27, 2006, the LTRC informed IDC that it had been prequalified to submit a tender for the Project.

51. The LTRC sent out to IDC and other prequalified bidders the formal Request for Technical and Financial Proposals (hereafter “RFP”) for the Project in December 2006. Among other details, the RFP established the financial support that the Government committed to the investor, including various tax and duty exemptions, an annual minimum revenue guarantee of JD 7.7 million adjusted to 2006 prices, and a capital subsidy of JD 60 million to offset the Project capital investment costs. The RFP also required each bidder to provide a bid bond of

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5 See DAB Decision, May 4, 2009, paras. 8.3 and 8.4, CEX-42.
7 See Letter from Mr. Siddiqui to Dr. Al-Masseld, November 8, 2006, CEX-8.
8 See Letter from Dr. Al-Masseld to IDC, November 27, 2006, CEX-9.
9 See Request for Technical and Financing Proposals, December 2006 (hereafter the “RFP”), Sections 1.7.1, 1.7.3, 1.7.6 and 1.7.8, CEX-5.
JD 500,000 to the LTRC. In the case of the preferred bidder, the bid bond would be forfeited: (i) if the bidder withdrew its proposal during the period of proposed validity; (ii) if the bidder's proposal was found to contain any false statement or material misrepresentations; or (iii) if, after signing the Concession Agreement, the bidder failed to either incorporate or secure financing.  

52. On April 26, 2007, IDC submitted a bid proposal on behalf of a consortium consisting of IDC, SKB, and Hycarbex (collectively referred to as the "IDC Consortium" or the "Consortium"), which was accompanied by a Proposal Security in the amount of USD 725,000. By letter of May 6, 2007, the LTRC informed the Consortium that its Technical Proposal had received a passing score, and two days later, notified the Consortium that it had been selected as the preferred bidder for the Project. On the same day, May 8, 2007, the LTRC and the Consortium concluded a Memorandum of Understanding (hereafter the "MOU") stating that they were to commence negotiations as soon as possible with the aim of executing the Construction and Operating Agreement (later known as the Implementation Agreement) for the Project.

2. Negotiations toward the Implementation Agreement.

53. Between the signing of the MOU on May 8, 2007 and the execution of the IA on October 18 of the same year, the LTRC and the Consortium engaged in intensive negotiations and activity. The Respondent states that the activities undertaken by the Consortium in furtherance of the Project were intense, lengthy, and time-consuming, involving program management, travel between the Middle East and China, presentations, stakeholder interaction, and market research and analysis. During the hearing, the Respondent's witness Mr. Siddiqui stated that such activities had included signing an engineering, procurement, and construction
(hereafter "EPC") contract as well as an operations and maintenance (hereafter "O&M") contract.  

54. A point of contention between the Parties is whether and to what extent the Consortium made efforts to secure external financing during this early period. The Claimants contend that despite repeated requests by the Government that the Consortium bring potential lenders to the negotiating table, it neglected to do so, largely delaying lender involvement in the Project until after the IA was executed. According to the Claimants, Section 3.1 of the RFP expressly stated the need for the selected bidder to immediately obtain financing for the Project's realization, a requirement the Consortium failed to fulfil.

55. Mr. Siddiqui, who headed the Consortium, counters that in making every endeavour to secure financing within the limited time frame set by the IA, the Consortium had commenced discussions with local and international lending institutions and potential equity partners while the negotiations to finalise the IA were ongoing. The Respondent points to two indications of these endeavours: (i) a guarantee by the National Industries Group (hereafter the "NI Group") dated August 18, 2007, in which the NI Group undertook to secure the financing required for the Project, and (ii) a draft term sheet obtained from the Housing Bank for Trade and Finance (hereafter "HBTF") dated September 12, 2007 (which was followed by a Mandate Agreement that was signed on October 23, 2007, after the execution of the IA). In any event, the Respondent

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17 See Hearing Transcript, October 14, 2011, pp. 85, Mr. Siddiqui: "we had even signed the EPC contract, which doesn't happen during the currency of BOT projects. Now having signed that I had a lot at stake. We had signed the operation contract for O&M (sic) which was to follow two years later. We had actually done everything."
19 See the Claimants' Statement of Claim, December 27, 2010, para. 23, citing Request for Proposals, Section 3.1 (CEX-5).
20 See Witness Statement of Mr. Aftab Siddiqui, RWS-1, para. 33; the Respondent's Statement of Defence, para. 20.
22 See Letter of Commitment from NI Group, August 18, 2007, CEX-20. The NI Group was the holding company of the Kuwait Privatization Projects Holding Company, which would become one of the Founder Shareholders of the Project. See Witness Statement of Mr. Mithqal Sarfawi, RWS-3, para. 5.
23 See Draft Term Sheet from HBTF, September 12, 2007, CEX-45.
24 See Mandate Agreement between ICRS and HBTF, October 23, 2007, REX-5.
points out, the Consortium had no contractual obligation to bring lenders on board before the IA was executed.\textsuperscript{25} Section 3.1 of the RFP obligated the Consortium only to "take into consideration that the investor/operator is expected to obtain financing,"\textsuperscript{24} and not to "immediately" obtain financing as the Claimants contend.

56. Any early differences over lenders notwithstanding, the Government, the LTRC, and the Consortium initialied the final draft of the IA on September 13, 2007. The Respondent, the International Company for Railway Systems, was incorporated on October 9,\textsuperscript{27} and the IA was executed shortly thereafter, on October 18, 2007.\textsuperscript{28}

57. The total cost of the LRS Project was to be JD 154,000,000 to be provided as follows:

(a) The GOJ was to provide JD 60,000,000, or the actual cost of execution of the works, whichever was lower, in the form of capital subsidy.

(b) The shareholders of the Company were to invest JD 28,000,000 in the form of equity and subordinated loan in the Company.

(c) The remaining JD 66,000,000 were to be procured through external financing\textsuperscript{29}.

3. Implementation Agreement.-

58. While the IA was signed by the Parties on October 18, 2007, Clause 2.1 of the IA stipulated that:

\textsuperscript{25} See the Respondent’s Statement of Defence, March 14, 2011, para. 20.
\textsuperscript{24} See Request for Proposals, Section 3.1, CEX-5.
\textsuperscript{27} See ICRS Company Certificate of Registration, CEX-2.
\textsuperscript{28} See Implementation Agreement Relating to Light Rail System, October 18, 2007 (hereafter "IA"), CEX-001. Although left unexplained by the Parties, the IA inadvertently referred to the Company as the "Jordan Rail Transport System Company." This error was corrected through the Addendum entered into on February 2, 2008. See Addendum to the Implementation Agreement, February 2, 2008, CEX-3.
\textsuperscript{29} See Company’s Counterclaim, March 14, 2011, para. 20.
"Except for Part 1, this Part 2, Part 13, Part 16, Part 17, Part 18, Part 20, Part 21, Part 22, Clauses 3.12, 7.8 and 11.1 and Sub-clauses 3.4.4, 9.1.2, 9.2.1, 9.2.3 and 9.5.1(a) which shall come into full force and effect on the Date of Execution, this Agreement in its entirety shall come into full force and effect in accordance with Clause 2.2 and shall remain in full force and effect until the Expiration Date, unless terminated in accordance with the provisions of this Agreement."

59. Clause 2.2 referred to the conditions precedent to be compiled with by the Parties for the full effectiveness of the IA and provided as follows:

"... (a) the Company has:

(i) delivered to the PTRC:

(1) certified copies of its Memorandum and Articles of Association;

(2) certified copy of the Certificate of registration of the Company issued by the Controller general of Companies; and

(3) a certificate from the Controller General of Companies evidencing that the Company has paid-up a share capital of Jordanian Dinars ten million (JOD 10,000,000);

(ii) delivered to the PTRC the Performance Bond; and

(iii) (1) delivered to the PTRC signed copies of the Financing Documents evidencing that it has secured financing necessary to implement the LRS; and (2) procured from the Lenders or their authorised representative, a written confirmation of the signing of such Financing Documents.

(b) the GOJ has:

(i) procured from its Council of Ministers a Resolution pursuant to Article 5 of the Temporary Law No. 68 (2003) granting the Company and its Contractors the exemptions and privileges specified in Part A of Schedule 1;

(ii) procured from its Ministry of Finance a comfort letter in favour of the Company in the form attached hereto as Schedule 7;

(iii) (1) acquired the Land; (2) entered into the Lease Agreement with the Company; and (3) given vacant and unhindered possession of the Land to the Company, free of any and all Liens and without interference by any third party in order for the Company to commence timely implementation of the Project;

(iv) used its best efforts to cause the JHR Company to: (1) enter into the JHR Lease Agreement with the Company; and (2) give vacant and
unhindered possession of the JHR Land to the Company, free of any and all Liens and without interference by any third party in order for the Company to commence timely implementation of the Project;..."

60. Performance of the tasks enumerated in Clause 2.2 was bound by certain time restrictions as prescribed in Clause 2.4.1:

"If within one hundred twenty eight (128) Days from the Date of Execution (or a longer time period if the Parties so agree), any of the conditions precedent specified in Clause 2.2 have not been fulfilled or waived by the Parties, this Agreement shall terminate and the Performance Bond, if already delivered to the GOJ by the Company in accordance with Clause 15.1, shall be returned to the Company."

61. Thus, the effectiveness of the major part of the Agreement was subjected to both Parties’ fulfilment of various conditions precedent not waived within 128 days from October 18, 2007, i.e., February 22, 2008, or a later date if the Parties so agreed.

4. Addendum to the Implementation Agreement.-

62. Soon after the IA was executed, the Respondent entered into negotiations with the Claimants to amend the Agreement in order to make it more attractive to the Project’s lenders.\textsuperscript{30} This Addendum to the IA (hereafter the "Addendum") was executed on February 2, 2008.\textsuperscript{31} As noted above, the Company had also in the meantime entered into a Mandate Agreement for a Syndicated Term Loan with HBTF.\textsuperscript{32}

63. The Claimants and the Respondent agree that there was an unreasonable delay in executing the Addendum, but they attribute it to different causes. The Claimants contend that the Respondent and its lenders requested substantial changes that demanded a significant amount of time from the Government and the LTRC. The Claimants identify as particularly problematic the Company’s request that the definition of the term Project in the Agreement also include "the carrying out of the Other Commercial Activities", which was rejected by the Government.

\textsuperscript{30} See Mr. Siddiqui Witness Statement, RWS-1, para. 36.
\textsuperscript{31} See Addendum to the IA, CEX-3.
\textsuperscript{32} See Mandate Agreement between ICRS and HBTF, October 23, 2007, RX-3.
and the LTRC because the broader definition requested could have posed unacceptable consequences for the Government, e.g., a potential broadening of the scope of contractors and subcontractors exempted from taxes and duties under Clause 10 of the IA.\textsuperscript{33}

64. By contrast, the Respondent’s account is that the Government was effectively responsible for the delay in the Addendum negotiations because it had insisted on executing the IA despite fully knowing that the IA in its current form and substance would not be acceptable to prospective lenders (with whom the Company had only been allowed to share the tenth draft of the IA), and that it would have to be amended afterward to take into consideration HBTF’s terms and conditions.\textsuperscript{34} What is undisputed by both Parties, however, is that the Addendum was essential to make the Project financeable and was signed a mere three weeks before the initial deadline for the entry into full force and effect of the IA, February 22, 2008.

65. The executed Addendum made a number of significant changes to the IA. Most notably, it added to the conditions precedent listed in Clause 2.2 the requirement that a “Direct Agreement” be concluded by the Government, the Company, and the lenders’ Agent to govern the financing supplied to the Project by the lenders.\textsuperscript{35} Clause 14 of the Addendum also inserted a new Clause 21.5 in the IA, which provided as follows:

"The Company shall deliver to the PTRC, a copy of the proposed Financing Documents at least ten (10) Business Days prior to date scheduled for the signing thereof. The Company shall not sign the Financing Documents if the PTRC has notified the Company of objections to the Financing Documents in accordance with Sub-clause 21.5.2. The PTRC shall not object to the Financing Documents if the terms thereof do not conflict with the terms of this Agreement and/or the Direct Agreement as the case may be. The Company shall not make any modifications or amendments to the Financing Document without the prior approval of the PTRC if such modifications or amendments would conflict with the terms of this Agreement and/or the Direct Agreement as the case may be."

\textsuperscript{33} See the Claimant’s Statement of Claim, December 27, 2010, para. 36; E-mail from IBLAW to Samdani & Qureshi, December 16, 2007, CEX-23.

\textsuperscript{34} See the Respondent’s Statement of Defense, March 14, 2011, para. 25.

\textsuperscript{35} See Addendum to the IA, Annexure 2, Clause 4, CEX-3.
66. Upon signature, the amended IA was delivered to HBTF, the lead arranger and underwriter of the loan, which, two days later, distributed the Information Memorandum and related documentation that would allow lenders to commence due diligence on the Project and to form the syndicate that would provide the necessary external financing.36

5. Extension of the Deadline.-

67. On February 12, 2008, the Company submitted to the LTRC drafts of the Financing Documents that were in the process of being finalised with the lenders, namely the Account Bank Agreement, Founder Shareholders’ Support Agreement (hereafter the “Founder Shareholders’ Agreement”), and Project Term Loan Agreement (hereafter the “PTLA”).37 By letter dated February 19, 2008, the LTRC informed ICRS that the Financing Documents were found to be incomplete, and that, therefore, the LTRC reserved its right pursuant to Clause 21.5 of the IA to review and approve the Financing Documents once received in their complete form.38

68. By letter dated February 19, 2008, HBTF expressed concern with the current timeline stipulated for the finalization of the Financing Documents and informed the Consortium that an additional four to six weeks would be needed before the Financing Documents could be finalised and signed.39 In the meantime, HBTF offered to provide a letter of commitment for the comfort of the Government as well as an undertaking to provide the term loan to the Project Company subject to fulfilment of the conditions contained within.40 Accordingly, the Company on HBTF’s behalf requested an extension of four weeks effective from February 22, 2008.41 The Respondent states that this was agreed to by the Minister of Transport during a meeting of the Parties convened on February 20, 2008, to consider HBTF’s extension request, in light of HBTF’s February 19 undertaking

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36 See E-mail from HBTF to the Respondent’s Counsel, February 04, 2008, REX-9; Information Memorandum Circulated by HBTF, January 02, 2008, REX-10.
37 See E-mail from the Respondent’s Counsel to Dr. Al-Massad, February 12, 2008, CEKX-43.
to make available to the Company a long-term loan amounting to JD 66 million. The time period for fulfilling the conditions precedent specified in Clause 2.2 of the IA was thus amended to be 156 days from the Date of Execution – i.e., March 22, 2008. The Parties agreed, however, that since March 22, 2008 fell on a public holiday, the deadline would be extended to March 23, 2008.


69. Complete drafts of the Financing Documents were furnished to the Claimants for their approval on March 12, 2008, and the Claimants note that this contravened Clause 14 of the Addendum, which required the Respondent to deliver the Financing Documents to the LTRC at least ten business days prior to the scheduled signature date. The Claimants further state that upon their review of the Documents, they discovered that several aspects conflicted directly with the IA as well as the terms of the Direct Agreement agreed upon and appended to the Addendum. First, the Financing Documents revealed to the Claimants that a Special Purpose Vehicle (hereafter “SPV”) established in Mauritius named Metro AZ Limited (hereafter “Metro AZ”) had been made a shareholder in the Company in place of two of the Initial Shareholders defined in Clause 1.1 of the IA, namely Hycarflex and SKB; second, the Financing Documents contained a definition of the Project that differed from the scope of the Project as defined in Clause 1.1 of the IA. These two issues later became the central cause of the

42 See the Respondent’s Statement of Defence, March 14, 2011, para. 36; Mr. Siddiqui Witness Statement, RWS-1, para. 40.
43 See Letter from Minister of Transport to ICRS, February 23, 2008, CEX-27.
44 This was pursuant to Clause 1.2(f) of the IA, which stated, “If a Party is required to take an action pursuant to this Agreement and the day on which such action becomes due is not a Business Day, then such action shall be taken on the next day that is a Business Day.” Implementation Agreement at Clause 1.2(h), CEX-1; see also Hearing Transcript, October 11, 2011, pp. 13, Mr. Ugarte: “So by agreement of the parties and pursuant to clause 1.2(f) of the implementation agreement the deadline by default became March 23, 2008 . . . .”
45 See E-mail from the Respondent’s Counsel to LTRC, March 12, 2008, CEX-28.
46 See the Claimants’ Statement of Claim, December 27, 2010, para. 44, citing Addendum to the IA, Clause 14 (CEX-3).
47 See the Claimants’ Statement of Claim, December 27, 2010, para. 45.
48 See Implementation Agreement, Clause 1.1, CEX-1.
49 Id.
breakdown in the Parties’ relationship and thus merit a more detailed discussion, as follows below.

(a) Difference Between Initial Shareholders and Founder Shareholders

70. Clause 1.1 of the IA provided a definition of the Initial Shareholders of the Company, which referred to:

"(a) Infrastructure Development Company (Private) Limited, a company incorporated and existing under the laws of the Islamic Republic Pakistan or any Person holding shares in the Company for and on its behalf;

(b) Saeedullah Khan & Brothers, a partnership registered and existing under the laws of the Islamic Republic of Pakistan or any Person holding shares in the Company for and on its behalf; and

(c) Hycarlex-American Energy, Inc, a corporation incorporated and existing under the laws of the State of Texas, United States of America or any Person holding shares in the Company for and on its behalf."

71. Thus, the Initial Shareholders were the three entities comprising the Consortium that had submitted the bid proposal for the Project in response to the Government’s RFP or "any Person holding shares in the Company for and on [their] behalf." The significance of the identity of the Initial Shareholders was expressed in Clause 21.4.2 of the IA, which governed restrictions on the transfer of shares in the Company. That provision prohibited any Initial Shareholder from transferring any shares owned by it at any time before the Project commenced or for a period of three years after it commenced, except for transfers made under specifically limited circumstances.50

72. The conflict identified by the Government was that the Parties to the Founder Shareholders’ Agreement51, which was presented by the Respondent to the

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50 See Implementation Agreement, Clause 21.4.2, CEX-1. These circumstances were: (a) a transfer to an Affiliate or another Initial Shareholder; (b) a transfer resulting from the creation or enforcement of a security interest in or over any Shares in accordance with any of the Documents; (c) a transfer required by any Applicable Law or by the operation of the Applicable Law or by order of a court, tribunal, or Competent Authority with appropriate jurisdiction; and/or (d) a transfer to which the Government of Jordan has given its prior written approval.

51 See Draft Financing Documents, C27-C47 (Founder Shareholders’ Support Agreement), CEX-28. In addition to owning a stake in Metro AZ, IDC was listed separately as a Founder Shareholder in the
Claimants on March 12, 2008, were inconsistent with the Initial Shareholders, including, in particular, Metro AZ, an SPV incorporated in Mauritius whose sole shareholders were the Initial Shareholders of the Company.  

The Claimants took issue with this arrangement on March 16, 2008, insisting that the three companies comprising the Initial Shareholders “shall be founder shareholders in the Company in order for the Parties to the IA to implement their intention in restricting the disposal of their shares in the Company,” and requesting clarification of this inconsistency.  

73. In its e-mail response of March 17, 2008, the Company explained that under current State Bank of Pakistan regulations and procedures, the Initial Shareholders would have to comply with extremely onerous requirements for the transfer of funds to the Company, which would have resulted in considerable delays and negative tax implications. The SPV was therefore established to facilitate the Initial Shareholders’ equity investments in the Company, and the lenders had circulated the Financing Documents to the syndicate based on this arrangement. As Mr. Siddiqui also explained, the Company’s financial expert had advised the use of such an investment vehicle even prior to the Consortium being awarded the Project, and Metro AZ had been incorporated on August 23, 2007, shortly after the Consortium was informed that its bid had been successful.

74. The Company further offered to address the concerns of the Government and the LTRC by providing an undertaking to the effect that the Initial Shareholders would remain shareholders of Metro AZ throughout the period stipulated in the IA, with documentary evidence of this fact to be supplied annually to the Government and the LTRC. In response, the LTRC informed the Company that the proposed undertaking was not consistent with the agreed terms and
conditions of the IA, and thus, the Company was expected to fully comply with
the IA in this regard. 58

b) Expanded Definition of Project

75. The second conflict identified by the Claimants was a definition of the term
"Project" in the draft Financing Documents that, in the Claimants' view,
unacceptably broadened the scope of the same term as defined in the IA. The IA
defined in Clause 1.1 the term Project as follows:

"(a) the design, finance, supply, construction, insurance, commission,
operation, maintenance and transfer of the LRS and all other activities
necessary or incidental thereto; and
(b) the design, finance, construction, development; lease, licence operation,
maintenance, and transfer of the Commercial Real Estate and all other
activities necessary or incidental thereto." 59

76. The PTLA in the Financing Documents was substantially similar to this
definition, but added two sub-provisions:

"(c) the activities described in Clause 9.4 of the IA; and
(d) all other activities necessary or incidental to the above." 60

77. Clause 9.4 of the IA, which governed Other Commercial Activities, allowed the
Company to "carry out any such commercial activities as it may deem fit,
including without limitation, lease, license or otherwise provide advertising
spaces and hoardings" in the LRS, its stations and terminals, and the land. It
also entitled the Company to, inter alia, retain all revenues derived from

58 See Letter from LTRC to ICRS, March 18, 2008, CEX-35.
59 See Implementation Agreement, Clause 1.1, CEX-1. "LRS" and "Commercial Real Estate" were also
defined terms in the IA, with "LRS" meaning "the light rail system between Amman and Zaraq, to be
designed, financed, supplied, constructed, insured, commissioned, owned (to the extent envisaged by the
Agreement), operated, maintained and transferred by the Company in accordance with this Agreement,
and including the LRS Infrastructure and the Rolling Stock"; and "Commercial Real Estate" meaning
"the property on, above or below the stations, the depots, the stabling areas, the maintenance areas and
any other areas on the Land, the JHR Land and any Additional Land to be designed, financed,
constructed, developed, leased, licensed, operated, maintained and transferred by the Company which
may include the development of shops, offices and residential dwellings." See id.
60 See Draft Financing Documents, C61 (Project Term Loan Agreement, Clause 1.1), CEX-28.
sponsorship of station names and all other rights in relation to the use and exploitation of such names.

78. The Claimants state that although they had expressly rejected the Respondent’s previous attempt to redefine the Project scope to include "the carrying out of the Other Commercial Activities," the Respondent again attempted to do so through the draft Financing Documents. The Claimants contend that they found such a broad definition of the Project unacceptable because it would have exposed the Government to risks and liabilities that it had not agreed to under the IA. In particular, if the Respondent were to default on its loan from HBTF and the Government assumed its liabilities pursuant to the terms of the Direct Agreement, an expanded definition of the Project would make the Government liable not only for the Respondent’s debts with respect to the LRS and its accompanying Commercial Real Estate (the sole components of the Project under the IA), but also for all other commercial activities in which the Respondent engaged. Apparently with these risks and liabilities in mind, the Claimants rejected once again the Respondent’s proffered redefinition of the Project.

79. By letter dated March 18, 2008, the LTRC informed the Company that in conformity with the extension granted by the Minister of Transport on February 23, 2008, the signing of the Financing Documents “must be made not later than March 22, 2008.” The next day, HBTF informed the Minister of Transport that it had received the LTRC’s comments on the Financing Documents; because HBTF would need to communicate the agreed changes to the lending banks for approval prior to any initialling or signing of the Documents, it proposed that the signing ceremony be set for March 31, 2008. HBTF’s proposal notwithstanding, the Parties apparently agreed to meet on March 23, 2008, the extended deadline agreed upon by the Parties, to sign the Financing Documents.

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61 See the Claimants’ Statement of Claim, December 27, 2010, paras. 50-51.
62 Id. para. 51. At the hearing, the Claimants’ witness Mr. Hadidi opined that the Government had been concerned that the Company would also be able to set up stores across the distance of the light rail system, that would both deprive neighbouring stores of revenue and, being tax-exempt, reduce the Government’s tax receipts. See Hearing Transcript, October 14, 2011, pp. 57-58, Mr. Hadidi.
63 See Letter from Dr. Al-Masaeid to Mr. Siddiqui, March 18, 2008, Exhibit CKX-60.
7. Termination of the Implementation Agreement.

80. On the morning of March 23, 2008, Minister of Transport Mr. Alaa' Batayneh held a meeting in his office with a representative of the Company, during which the Minister noted that several issues remained outstanding that would need to be resolved before the Financing Documents and the Direct Agreement could be signed, namely, the issues regarding the Initial Shareholders and the Project definition. According to Minister Batayneh, he insisted that the Parties agree on all of the issues in order to proceed, and that they meet in his office at 5 p.m. on the same day with the HBTF representatives and others. For the next few hours, the Parties’ lawyers convened at HBTF’s office to attempt to resolve the outstanding issues, while Mr. Siddiqi waited in his hotel to be called to sign the Financing Documents.

81. Later that afternoon, a joint meeting of the Parties to execute the Financing Documents was convened in the Minister’s office, attended by several Members of the Government’s Steering and Technical Committees for the Project, LTRC representatives, Messrs. Siddiqi and Qureshi on behalf of the Company, and the team of lenders that Mr. Siddiqi had been invited to bring with him. The witnesses for each Party offer somewhat diverging accounts of this afternoon meeting.

82. By Minister Batayneh’s account, he inquired as to whether the outstanding issues had been resolved, to which the Company stated its disagreement with the Government and LTRC’s views and made no offer to amend the Financing Documents in accordance with those views. HBTF then informed the Parties...

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63 See Witness Statement of Mr. Alaa’ Batayneh, WS-2, para. 11. Minister Batayneh clarified during the hearing that whereas he had testified before the DAB that he had met with Mr. Qureshi, he now believed this was incorrect and that he had in fact met with another person, most likely Mr. Siddiqi. See Hearing Transcript, October 14, 2011, pp. 5, Mr. Batayneh.
64 See Batayneh Witness Statement, WS-2, para. 12.
65 See Hearing Transcript, October 14, 2011, pp. 77, Mr. Siddiqi.
66 See the Claimants’ Statement of Claim, December 27, 2010, para. 57, nos. 72-74; Batayneh Witness Statement, WS-2, para. 13. The Claimants list the Members of the Steering Committee as Minister of Transport Mr. Alaa’ Batayneh, Minister of Industry and Trade Mr. Amer Hazlid, and Secretary General of the Ministry of Transport Mr. Mohamad Qudah. See also the Respondent’s Statement of Defence, March 14, 2011, para. 77; Mr. Siddiqi Witness Statement, RWS-1, para. 46.
67 See Batayneh Witness Statement, WS-2, para. 14. During the hearing, Mr. Batayneh clarified that "if I think if I recall correctly, one of the issues regarding the SPV, they were sort of flexible about saying, of..."
that it would only sign the Financing Documents once all outstanding issues were resolved.70 While Mr. Qureshi, the Company’s Counsel, suggested that the Parties sign the Financing Documents and the Direct Agreement and then proceed to resolve the outstanding issues through the IA’s dispute resolution mechanism, this suggestion was rejected by the Government parties and HBTF.71 At this juncture, the talks reached an impasse, and Minister Batayneh dismissed the meeting.72

83. Mr. Siddiqui, in contrast, reports that the Respondent’s representatives and the team of lenders were kept waiting for a substantial amount of time.73 When the Minister arrived, he expressed objections to the Financing Documents as being in conflict with the IA on the issues of the Initial Shareholders and the Project definition.74 In response, the lenders’ representative, Mr. Inab Saadi, and their Counsel explained that no conflict existed in either case and that the Documents should therefore be signed. According to Mr. Siddiqui, Mr. Saadi then pointed out that the Initial Shareholders were, in any event, “locked in” as shareholders of the Company by virtue of other agreements. Mr. Siddiqui also recalls being informed by Mr. Qureshi that in a meeting among Counsel earlier that day at HBTF’s offices the Claimants’ Counsel had suggested that the disagreement over the Project definition could be removed by modifying the wording of the engineer’s certification with respect to loan drawdowns.75 After a discussion of these two issues, however, the Minister adjourned the meeting by stating that a subsequent meeting would be held the following day in order to proceed.

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70 Id. para. 16.
71 Id.
72 Id. para. 17.
73 See Hearing Transcript, October 14, 2011, pp. 87, Mr. Siddiqui.
74 See Mr. Siddiqui Witness Statement, RWS-1, at para. 46.
75 See Mr. Siddiqui Witness Statement, RWS-1, para. 46. According to Clause 3 of the Direct Agreement, the Company could not drawdown loaned funds until the Project Engineer had certified that: (i) the Company had invested or irrevocably committed the funds to the Project; (ii) the Company was entitled to the proceeds of the funds in accordance with the Financing Documents; and (iii) for all drawdowns other than the first drawdown, the progress of work was in accordance with the Detailed Program (i.e., the construction schedule of the works submitted by the Company to the Engineer). See Addendum to the IA, Annexure 2, Clause 3, CEX-3.
further.\textsuperscript{76} It was also noted during the meeting that the Minister of Finance was absent.\textsuperscript{77}

84. Mr. Siddiqui states that he left with the impression that the meeting participants had been persuaded by the Company and lenders' reasoning, and that the meeting had been adjourned only because the Minister of Finance was not present at the meeting to sign the Financing Documents.\textsuperscript{78} No impression, the Respondent maintains, was given to the Respondent that the failure to reach agreement that evening would result in the IA's termination.\textsuperscript{79} In fact, because of the Respondent's commitment to implementing the Project and expectations of earning generous returns, had it been made aware that not amending the Financing Documents would lead to termination of the IA, the Respondent would have willingly accommodated the Government's objections.\textsuperscript{80} The Respondent further notes that at about 10:30 p.m. that night, the Secretary of the LTRC visited the Respondent's Counsel to deliver the Jordan Hejaz Railway (hereafter "JHR") Lease Agreement.\textsuperscript{81} A scanned copy of the same was e-mailed by the Claimants' Counsel to the Respondent's Counsel shortly after midnight, accompanied by the following message:

"Mr. Farrukh,

I just realized that PTRC has not delivered to you a signed copy of the executed [JHR Lease Agreement] on Feb 21, 2008. I just urged them to deliver your signed copy to you and they are on their way. I'm also sending you a scanned copy thereof.

Thank you and see you tomorrow inshallah."\textsuperscript{82}

85. These events appear to have reinforced the Respondent's belief that the Financing Documents would be signed the following day.\textsuperscript{83}

\textsuperscript{76} See the Respondent's Statement of Defence, March 14, 2011, para. 79; Mr. Siddiqui Witness Statement, RWS-1, para. 47.
\textsuperscript{77} See Hearing Transcript, October 14, 2011, pp. 87, Mr. Siddiqui.
\textsuperscript{78} See Mr. Siddiqui Witness Statement, RWS-1, para. 47.
\textsuperscript{79} See the Respondent's Statement of Defence, March 14, 2011, para. 79.
\textsuperscript{80} See Mr. Siddiqui Witness Statement, RWS-1, para. 48.
\textsuperscript{81} See the Respondent's Statement of Defence, March 14, 2011, para. 79.
\textsuperscript{82} See E-mail from the Claimants' Counsel to the Respondent's Counsel, March 23, 2008, REX-19.
\textsuperscript{83} See the Respondent's Statement of Defence, March 14, 2011, para. 79.
86. Minister Batayneh denies ever having stated that the Parties would meet the following day to proceed with the signing or that the Government ever agreed to extend the deadline beyond March 23, 2008.\(^{84}\) He avers, to the contrary, that it had been "very clear to [him] that the Respondent had no intention of resolving the conflicts contained in the financing documents," and consequently, while the Minister of Finance was available and standing ready to join the meeting at any time to sign the Direct Agreement, he had not requested him to do so.\(^{85}\) He admitted at the hearing that he had not made it clear to the Respondent's representatives that the Agreement would expire that night or that the IA would be terminated. He told them only that he had to report the situation to the Steering Committee and that he would "come back" to the Respondent "[I]f something miraculous comes up."\(^{86}\)

87. While Minister Batayneh further testifies that he had called a meeting of the Steering Committee later that evening to inform its members of the status of the negotiations,\(^{87}\) the discussion that took place remains somewhat opaque. According to Mr. Hadidi, the Secretary General of the Ministry of Transport at the time, the members of the Steering Committee discussed the outcome of the meeting and exchanged views that the Parties were unlikely to reach agreement, but that the deadline should nonetheless be adhered to.\(^{88}\) They apparently did not make any decision as to the course of action for the remainder of March 23,\(^{89}\) nor could Mr. Hadidi recall whether the meeting had been recorded in minutes.\(^{90}\)

88. As to why the Government had delivered the JHR Lease Agreement to the Respondent's Counsel later that night, Minister Batayneh insists that this was done only to evidence that the Government had timely satisfied all of its conditions precedent under Clause 2.2(b) of the IA, ensuring that the Respondent

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\(^{84}\) See Batayneh Second Witness Statement, WS-3, paras. 6-7.

\(^{85}\) Id. para. 7.

\(^{86}\) See Hearing Transcript, October 14, 2011, pp. 31, Mr. Batayneh: "We had the evening meeting. Did we see eye to eye? No. What can we do? Nothing. Can we sign and go to arbitration? No. We were silent for a few minutes, you know, looking at each other. What am I supposed to do? Then I was like, ok, thank you very much. I have to put the Steering Committee in the picture. If something miraculous comes up I will come back to you."

\(^{87}\) See Hearing Transcript, October 14, 2011, pp. 21, Mr. Batayneh.

\(^{88}\) See Hearing Transcript, October 14, 2011, pp. 41 and 64, Mr. Hadidi.

\(^{89}\) See Hearing Transcript, October 14, 2011, pp. 65, Mr. Hadidi.

\(^{90}\) See Hearing Transcript, October 14, 2011, pp. 65, Mr. Hadidi.
would be prevented from pursuing claims against the Government after the IA was terminated.\footnote{See Baznaech Second Witness Statement, WS-3, para. 6.}

89. In any case, it is undisputed that Mr. Siddiqui was called to the Minister's office on the morning of March 24, 2008, and immediately upon his arrival, was delivered a letter from the Minister notifying the Respondent that the IA had been terminated.\footnote{See Mr. Siddiqui Witness Statement, RWS-1, para. 49; the Claimants' Statement of Claim, para. 59.} The letter identified the two issues of the Initial Shareholders and the Project definition as being the outstanding issues that had prevented the Financing Documents from being signed, and stated that the failure to sign the Documents on the due date was considered a failure by the Company to meet the conditions precedent stipulated in Clause 2.2(a) of the IA.\footnote{See Letter from Minister of Transport to ICRS, March 24, 2008, CEX-36.} The letter further reserved the Government's right to execute the Company's Proposal Security in accordance with the terms of Clause 2.4.2.\footnote{See Letter from Minister of Transport to ICRS, March 24, 2008, CEX-36. Clause 2.4.2 of the IA provided that a failure by the Company to fulfill the conditions precedent specified in Clause 2.2(a) within the period set in Clause 2.4.1 (i.e., 156 days from the Date of Execution) would entitle the Government to execute the Proposal Security (unless the Government waived this right), provided that the failure was not due to: (a) the acts or omissions of the Government, the PTC, or the JHR Company; or (b) the failure of the Government, the PTC, or the JHR Company to perform any of their obligations under the Project Documents. See Implementation Agreement, Clause 2.4.2, CEX-1.} According to Mr. Siddiqui, he received this letter "under protest," and wrote to the Minister on March 25 disputing the termination and requesting an amicable settlement.\footnote{See Mr. Siddiqui Witness Statement, RWS-1, para. 50; Letter from the Respondent to Ministry of Transport, March 25, 2008, REX-31. As discussed in the subsequent section, this letter also acted as the Company's "Dispute Notice" required under Clause 20.1.2 of the IA for the amicable resolution of dispute. See Implementation Agreement, Clause 20.1.2, CEX-1.} Notwithstanding such protests, the LTRC executed the Proposal Security of USD 725,000 in April 2008.\footnote{See Letter from the Respondent to the Ministry of Transport, April 02, 2008, REX-33.}

90. After these events, Mr. Siddiqui appealed to various quarters for assistance with resolving the dispute. He visited the Pakistani ambassador in Amman, as well as the Chinese ambassador because the EPC contractor for the Project had been a Chinese company.\footnote{See Hearing Transcript, October 14, 2011, pp. 86, Mr. Siddiqui.} With the Pakistani ambassador's help, the Respondent's representatives were able to meet with Mr. Basem Awadallah, the Chief of the Jordanian Royal Court, who, in turn, arranged a meeting with the Prime Minister.
of Jordan on March 31, 2008. According to Mr. Siddiqui, both meetings were encouraging, with Mr. Awadallah opining that the objections raised by Minister Batarseh "were not deal breakers," and the Prime Minister expressing surprise at the different accounts of the events given to him by the Ministry and the Company, and promising to organise a meeting with the Steering Committee to resolve the dispute. Despite these promising outcomes, however, no such meeting was convened.

B. ICC Dispute Adjudication Board-

91. The Respondent first invoked Clause 20.1 of the IA in its letter to the Minister of March 25, 2008, deeming its letter a Dispute Notice pursuant to this provision and designating Mr. Siddiqui as its representative vested with the authority to resolve the dispute. The Government responded swiftly with its own Dispute Notice, which recited in detail the various conditions precedent that the Company had allegedly failed to fulfil and designated the Minister as the Claimants’ representative in the dispute. Accordingly, the Company proposed that a meeting be held between the Parties’ representatives to resolve the dispute according to the procedures set out in the IA; it does not appear, however, that the Government responded to this proposal or that any such meeting was convened. The Company subsequently applied to the ICC on June 27, 2008, for the appointment of a DAB, which was duly constituted on December 16, 2008.

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98 See Hearing Transcript, October 14, 2011, pp. 86, Mr. Siddiqui; the Respondent’s Counterclaim, March 14, 2011, para. 50.
99 See Mr. Siddiqui Witness Statement, RWS-1, para. 52; Mr. Sartawi Witness Statement, RWS-3, para. 10; Hearing Transcript, October 14, 2011, pp. 85, Mr. Siddiqui.
100 See Mr. Siddiqui Witness Statement, RWS-1, para. 53; Hearing Transcript, October 14, 2011, pp. 86, Mr. Siddiqui.
101 See Mr. Siddiqui Witness Statement, RWS-1, para. 53; Hearing Transcript, October 14, 2011, pp. 87, Mr. Siddiqui. The Respondent has also attached to Mr. Siddiqui’s witness statement a letter from the Company to the Prime Minister on May 15, 2008, reminding him of his promise to organise a meeting with the Steering Committee. See Mr. Siddiqui Witness Statement, RWS-1, Annexure P.
106 See DAB Decision, paras. 5.1 and 5.4, CEX-42. A detailed account of the DAB proceedings can be found in paragraphs 5-7 of the DAB Decision.
92. The DAB issued its Decision in the Company’s favour on May 4, 2009, finding, *inter alia*, that the Government and the LTRC were in breach of contract for refusing to perform their obligations under the IA, and awarding to the Company a total of JD 1,816,639.06 in respect of its claims and costs.\(^\text{107}\) By letter dated May 26, 2009, the Claimants submitted to the DAB their Notice of Dissatisfaction,\(^\text{108}\) which appears to have been followed by the Respondent’s own Notice of Dissatisfaction on May 27.\(^\text{109}\)

C. **Merger of Hycarbbox American Energy, Inc.**

93. The Claimants state that, in or around June 2009, after the IA’s termination and the DAB Decision, they discovered that one of the Initial Shareholders of the Company, Hycarbbox American Energy, Inc., which had been represented as being a U.S. corporation incorporated and existing under the laws of the State of Texas (hereafter “Hycarbbox, Texas”), had in fact ceased to exist after being merged into a Nevis corporation of the same name (hereafter “Hycarbbox, Nevis”) on January 17, 2006.\(^\text{110}\) According to the Claimants, the Respondent fraudulently — or, at a minimum, grossly negligently — misrepresented the existence of Hycarbbox, Texas on numerous instances during the bidding process despite its duty to act in good faith and to provide complete and accurate information to the Government and the LTRC.\(^\text{111}\) These duties were imposed in the RFP by Clause 6.6, which required any bidder to rectify any information that the bidder later established to be incorrect, and by Clause 3.5.7, which mandated the forfeiture of a bid bond if the bidder’s proposal was found to contain any

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\(^{107}\) See DAB Decision, para. 51, CEX-42.

\(^{108}\) See the Claimants’ Notice of Dissatisfaction to DAB, May 26, 2009, CEX-4.

\(^{109}\) See Letter from the Respondent to the Claimants, May 27, 2009, C-13. Whether the Respondent did, in fact, submit a Notice of Dissatisfaction is open to some question. In his letter addressed to the Claimants’ Counsel (on which the DAB was carbon copied), the Respondent’s Counsel first urges the Government to withdraw its Notice of Dissatisfaction and implement the DAB Decision. He then states that “[i]n the event that the Government fails to reciprocate the Company’s good faith attempt to prevent a second round of litigation the Company, hereby, notifies the Government that this letter be deemed to be the Company’s Notice of Dissatisfaction in accordance with the IA and the Rules.”


\(^{111}\) See the Claimants’ Statement of Claim, December 27, 2010, para. 67. The Claimants had initially argued that the Respondent’s non-disclosure of the merger constituted fraud but, in later submissions, allowed for the possibility that it could have been the result of grossly negligent conduct. See the Claimants’ Reply, May 16, 2011, paras. 127 and 143.
false statement or material misrepresentations. Moreover, the Claimants allege, the Respondent continued in this fraud or gross negligence by procuring the IA on the basis of this false information.

94. The Respondent denies all allegations of fraud, claiming that Mr. Siddiqui had no knowledge of the merger of the Hycarbex entities. In his witness statement, Dr. Iftikhar Zahid, currently the CEO of Hycarbex, Nevis, testified that he had not informed Mr. Siddiqui of the merger through an oversight and that he had been the CEO of both Hycarbex entities before the merger. Dr. Zahid also affirmed that the financial records submitted as part of the bid proposal had been those of the Islamabad branch office of Hycarbex and thus accurately depicted Hycarbex, Nevis' good financial standing at the time. Dr. Zahid attested that, had he noticed the incorrect description of Hycarbex at the time he had signed the bid documents prepared by Mr. Siddiqui, he would have rectified the error immediately. In any event, the Respondent maintains, no injury or damages resulted to the Claimants as a direct consequence of the non-disclosure of the merger, and therefore, neither fraudulent misrepresentation nor grossly negligent conduct can be established.

D. Summary of the Parties' Claims and Defences.

95. The Claimants allege in their Statement of Claim that the Respondent failed to fulfil nearly all the conditions precedent referenced in Clause 2.2(a) of the IA by the extended deadline of March 23, 2008, mainly those provided for in Clauses 2.2(a)(iii), 2.2(a)(i)(3) and 2.2(a)(ii).

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112 See Request for Proposals, Clauses 6.6 and 3.5.7, CEX-5.
113 See the Claimants' Statement of Claim, December 27, 2010, para. 68.
114 See the Respondent's Statement of Defence, March 14, 2011, paras. 91-96.
115 See Witness Statement of Mr. Iftikhar Zahid, RWS-4, para. 2.
116 See Mr. Zahid Witness Statement, RWS-4, para. 4. The Respondent also notes that Hycarbex continues to operate this branch office today under the permission of the Board of Investment of the Government of Pakistan. See the Respondent's Statement of Defence, March 14, 2011, para. 91; Certificate of the Board of Investment, September 28, 2010, REX-34.
117 See Mr. Siddiqui Witness Statement, RWS-1, at para. 10; Zahid Witness Statement, RWS-4, para. 2.
96. In particular the Claimants allege that the Respondent breached Clause 2.2(a)(iii) of the IA because the Initial Financing Documents were never signed. The reason for the non-signature of the Initial Financing Documents was that the Respondent delivered to the Claimants draft Initial Financing Documents that were in conflict and inconsistent with the IA and/or Direct Agreement, which was contrary to the requirement under Clause 21.5.1 of the IA as amended.

97. The conflicts between the draft Initial Financing Documents and the IA were two: 1) the introduction of Metro AZ as a shareholder in ICRS instead of two of the Initial Shareholders, which conflicted with the definition of Initial Shareholder in Clause 1.1 of the IA; and 2) the draft Initial Financing Documents contained a definition of the term Project which conflicted with the scope of the term Project as defined in Clause 1.1 of the IA.

98. The Claimants further allege that the Respondent breached Clause 2.2(a)(i)(3) because the Respondent failed to provide by March 23, 2008, a certificate from the Controller General of Companies evidencing that the Company had a paid-up share capital of JD 10,000,000; as well as Clause 2.2(a)(ii) because the Respondent failed to provide a Performance Bond to the Claimants by March 23, 2008. Finally, the Claimants allege that due to the introduction of Metro AZ as a shareholder of the Company, the Respondent failed to satisfy the condition referenced in Clause 2.2(a)(i)(1) which required the timely submission of the certified copies of the Company’s Memorandum and Articles of Association.

99. The Claimants conclude on those issues that the Respondent’s failure to fulfil the conditions precedent by the extended deadline of March 23, 2008, automatically entailed termination of the IA by operation of Clause 2.4.1 of the IA in accordance with Jordanian law.

100. The Claimants further allege that the Respondent acted in gross negligence with respect to the securing of financing for the Project and in fraudulent misrepresentation and bad faith, deceiving the Claimants with respect to the legal status of one of the three members of the IDC Consortium and one of the Initial Shareholders of the ICRS, i.e., Hycarlex Texas. Consequently, the Claimants
allege that they are entitled to damages under Jordanian law resulting both from the Respondent's fraud and from the Respondent's gross negligence leading to its failure to achieve several conditions precedent of Clause 2.2(a) of the IA. By way of relief the Claimants seek a decision that includes:

"a. a declaration that the Implementation Agreement and the Addendum terminated, irremediably lapsed, and were no longer enforceable, when the Respondent failed to fulfil one or more of the conditions of Clause 2.2 of the Implementation Agreement by the designated deadline in accordance with Clause 2.4.1 of the Implementation Agreement;

b. a declaration that the conditions of Clause 2.2 of the Implementation Agreement were not fulfilled by the designated deadline due to the Respondent's acts, fraud, misrepresentations and omissions;

c. a declaration that Claimants did not breach the Implementation Agreement nor its Addendum;

d. a declaration that Claimants were entitled to encash the proposal security;

e. a declaration that Claimants' conduct was lawful;

f. a declaration that Claimants are not liable to the Respondent for any damages;

g. a declaration that the Respondent is liable for its acts, fraud, misrepresentations and omissions;

h. an order that the Respondent pay damages to Claimants, including, but not limited to, direct/compensatory damages, lost profit, moral damages plus the fees, expenses and costs incurred in relation to the DAB and ICSID proceedings in an amount exceeding JD 9 million, the exact amount to be determined in the course of the proceedings;

i. an award of interest from the date of the Request for Arbitration;

j. an award that all the costs of this arbitration, inclusive of attorneys' fees be borne by the Respondent; and

k. an award of such other relief as the Tribunal may deem just and appropriate."

101. The Respondent in its Statement of Defence alleges that the Respondent was prevented by the Claimants from fulfilling the requirements of Clause 2.2(a) of the IA by March 23, 2008. Regarding Clause 2.2(a)(iii), the Respondent had secured all the necessary financing by the deadline but the Claimants did not approve the Initial Financing Documents for unjustified reasons. There was no
real conflict between the Initial Financing Documents and the IA and/or the Direct Agreement because 1) the introduction of Metro AZ as a Shareholder in ICRS instead of two of the Initial Shareholders did not conflict with the definition of Initial Shareholder in Clause 1.1 of the IA as Metro AZ was, as stipulated in Clause 1.1 of the IA, a person legally entitled to hold shares in the Company for and on behalf of the Initial Shareholders; and 2) the draft Initial Financing Documents contained a definition of Project that did not conflict with the scope of Project as defined in Clause 1.1 of the IA, as such definition did not increase the liability of the Claimants.

102. With regard to Clause 2.2(a)(i)(3), the Respondent’s auditor Ernst & Young certified on March 19, 2008 that the Respondent’s paid-up capital was JD 10,000,000. This statement was submitted to the Controller General of Companies who issued a certificate on March 24, 2008. With regard to Clause 2.2(a)(ii), the Performance Bond was issued on March 23, 2008, by HBTF and would have been delivered to the GOJ simultaneously with the signing of the Initial Financing Documents had the signing actually taken place.

103. The Respondent alleges that the Claimants’ unilateral termination of the IA based on Clause 2.4.1 of the IA was in direct violation of Jordanian law, in particular but not exclusively of Articles 245, 246 and 202 of the Jordanian Civil Code (hereafter the “JCC”).

104. Regarding the Claimants’ allegation of fraud, the Respondent states that the Tribunal has no jurisdiction over such claim and that in any event the Respondent’s conduct does not amount to a fraud but at best to an event of default under Clause 18 of the IA. The Respondent alleges that Claimants have failed to prove their allegations of fraud and gross negligence and that the Claimants cannot base their case in tortious liability as the relationship between the Parties is based on a contract. The Respondent requests the Tribunal to dismiss the Claimants’ claim in its entirety with costs.

105. The Respondent alleges in its Counterclaim that the Claimants acted unlawfully, in breach of contract, in bad faith and with abuse of their right to object to the...
Financing Documents as the conflict between the IA and the Initial Financing Documents was not such as to render the IA inoperable, nor had any adverse effect upon the rights and interests of the Claimants. The act of unlawful termination by the Claimants constituted a fundamental breach of the IA and Jordanian law. The Respondent further alleges that the execution of the Proposal Security was in violation of Clause 2.4.2 of the IA as the Initial Financing Documents were prevented from being signed by the GOJ itself for reasons that had no legal or contractual justification. Consequently, the Respondent alleges that it is entitled to damages. For the first time, the Respondent puts into question the Claimants' compliance with Clauses 2.2(b)(iii) and (iv) of the IA, which make reference to the execution of the Lease Agreement and JHR Lease Agreement with the Company, as well as to the vacant and unhindered possession of the Land and JHR Land to be given by the GOJ to the Company.

By way of relief the Respondent seeks a decision that includes:

"(i) That the description of Founder Shareholders, as set out in the Founder Shareholders Support Agreement, is not in conflict with the definition of Initial Shareholders set out in the IA.

(ii) That definition of the term Project as contained in the PTLA is not in conflict with the IA.

(iii) That termination of the IA by the GOJ is in violation of Applicable Law and contractual terms and conditions.

(iv) The GOJ/LTRC did not act fairly, equitably and in good faith in placing reliance upon the alleged inconsistency between the IA and the Initial Financing Documents as sufficient legal justification for termination of the IA.

(v) That the LTRC had no contractual justification for encashment of the Proposal Security furnished by IDC Consortium.

(vi) That GOJ and LTRC are liable to pay to the Company such amount as this Tribunal may consider reasonable on account of the direct damages inflicted on the Company as a result of unlawful termination of the IA.

(vii) That GOJ/LTRC pay to the Company the sum of Jordanian Dinars 7,063,787.00, on account of the actual costs and expenses incurred by the Company in the expectation of constructing and operating the Project.

(viii) That GOJ pay to the Company such amount as this Tribunal may consider reasonable on account of general damages."
(c) That GOJ pay to the Company interest at an annual rate of 9% on the amount awarded by the DAB with effect from June 05, 2009 and on the amount awarded by this Tribunal with effect from the date of institution of the action.

(c) That GOJ pay all the costs and expenses incurred by the Company in relation to the legal proceedings."

106. The Claimants maintain in their Reply to the Statement of Defence that the Respondent engaged in a fraudulent misrepresentation or at a minimum, behaviour constituting gross negligence with regard to Hycarbet, Texas, and further allege that under these circumstances Jordanian case law permits the Claimants to bring their tort claims against the Respondent. The Claimants clarify that by referencing the Jordanian Criminal Code they are not seeking that the Tribunal impose criminal sanctions. The Claimants reference the Jordanian Criminal Code because arguably the Respondent’s conduct violated its provisions and this determination can be made as a preliminary question. The Claimants allege that it is too late for the Respondent to assert a jurisdictional objection since it agreed, with full knowledge of the contents of the Claimants’ submissions concerning fraud, to arbitrate this dispute before the ICC. The Claimants include by reference the prayers for relief of the Statement of Claim and specify that their requests for a declaration regarding the Respondent’s acts, fraud, misrepresentation and omissions shall encompass a request regarding the Respondent’s gross negligence.

107. The Claimants argue in their Statement of Defence to the Respondent’s Counterclaim that the Claimants did comply with the conditions precedent in Clause 2.2(b). Regarding Clause 2.2(b)(iii), the GOJ was absolutely in a position to provide the Respondent with vacant and unhindered possession of the Land on March 23, 2008. Regarding Clause 2.2(b)(iv), the GOJ used its best efforts according to the IA to deliver the JHR Land to the Respondent. The Claimants allege that they acted lawfully, according to contract and in good faith, and that their conduct cannot be portrayed as unreasonable for having let the IA terminate, as the Parties had clearly reached an impasse over serious conflicts between the Initial Financing Documents and the IA. The Claimants further allege that they were entitled to execute the Proposal Security upon the lapse of
the IA in accordance with Clause 2.4.2 of the IA because the Respondent failed to fulfil several conditions precedent. Finally the Claimants state that the Respondent's quantification of damages is vastly exaggerated. Consequently, the Claimants request the Tribunal to reject the Respondent's Counterclaim in its entirety and find that the Respondent is not entitled to any of the relief and damages it seeks.

108. The Respondent further alleges in its Statement of Rejoinder that the IA expressly provided that approval of the Initial Financing Documents should not be unreasonably withheld by LTRC, which constitutes an express provision of good faith. The Respondent further alleges that the Claimants have not produced documentary evidence to show that Clause 2.2(b)(i) of the IA had been complied with by the publication of the relevant Resolution of the Council of Ministers in the Official Gazette. The Respondent submits that the Claimants are not entitled to payment of any damages or costs and that their claim should be rejected in its entirety. The Respondent further submits in the Company's Reply to the Claimants' Statement of Defence to the Counterclaim that the Claimants have failed to demonstrate that they had fulfilled all the obligations assumed by them under Clause 2.2(b) of the IA and requests the Tribunal to make an award in the terms of the Respondent's prayer as set out in the Counterclaim.

109. The Claimants in their Rejoinder to the Respondent's Counterclaim further elaborate on their arguments in their Statement of Defence to Counterclaim and assert that they did comply with Clause 2.2(b)(i) as publication in the Official Gazette was not a requirement under such Clause. The Claimants request that the Tribunal rejects the Respondent's Counterclaim in its entirety, and finds that the Respondent is not entitled to any of the relief and damages it seeks. In their Sur-Reply to Chapter 3.C of the Respondent's Statement of Rejoinder the Claimants further elaborate on their legal analysis of the termination of the IA under Clause 2.4.1 of the IA. The Claimants include by reference the prayers for relief of the Statement of Claim as amended by the Reply to the Statement of Defence.

110. In their Post-Hearing Submissions the Parties present their conclusions on the case based on the evidence and oral arguments adduced during the hearing.
answer the questions addressed by the Tribunal to the Parties during the hearing, and refer to the prayers for relief in their previous submissions. The Parties summarise their costs in their respective Submissions on Costs.

V. JURISDICTION.-

111. In its submission of July 6, 2009, the Respondent filed with the ICC Secretariat a request for the determination of jurisdiction by the Court/Tribunal as a preliminary matter under Article 6(2) of the ICC Rules. In this submission the Respondent based the lack of jurisdiction of the Arbitral Tribunal on the non-compliance by the Claimants of the multi-tier dispute resolution clause in Part 20 of the IA, particularly and exclusively on the non-compliance by the Claimants of Clause 20.3.1 of the IA, i.e. arbitration by an ICSID Tribunal as a prior requirement to ICC arbitration.

112. The Respondent decided to withdraw its objections to the ICC jurisdiction and to participate in the present proceedings by communication to the Arbitral Tribunal of October 5, 2010 stating that: "We have now received instructions from our client to withdraw the jurisdictional objections previously raised by us and to submit a counter claim, which shall be approximately USD 8 million, for determination by this Tribunal..." agreeing for the dispute to be resolved through ICC arbitration\(^\text{119}\). Accordingly, the Respondent requested on its communication of October 5 to the Arbitral Tribunal that the "Provisional Timetable may kindly be modified to reflect the above development" and the Tribunal removed the jurisdictional phase from the provisional timetable. Therefore the objections to jurisdiction filed by submission of July 6, 2009 have become irrelevant for the purposes of the present arbitration. No further jurisdictional objections have been included in the subsequent prayers for relief filed by the Parties in the present proceedings, which relate only to the merits of the dispute.

113. Nevertheless, the Respondent has made in its submissions several arguments that appear to question the jurisdiction of the Tribunal and/or the admissibility of certain of the Claimants' claims.

114. Firstly, the Respondent submitted that the Parties must comply with the DAB decision prior to the submission of the dispute to arbitration. The Tribunal rejects this argument for the following reasons.

115. The Parties agree that the DAB decision is not binding in any way on the Tribunal. The Arbitral Tribunal has the power and duty to address the underlying issues ex novo.

116. If a Party expresses dissatisfaction with a DAB decision, the decision is provisionally and contractually binding on the Parties unless and until the dispute is finally settled by arbitration or by a court. Article 5.2 of the ICC Dispute Board Rules provides that: "A Decision is binding on the Parties upon its receipt. The Parties shall comply with it without delay, notwithstanding any expression of dissatisfaction…"

117. A failure to comply with a DAB decision entitles the other party to refer such failure to arbitration, in accordance with Article 5.4 of the ICC Dispute Board Rules ("If any Party fails to comply with a Decision when required to do so pursuant to this Article 5, the other Party may refer the failure itself to arbitration, if the Parties have so agreed...") and Clause 20.2.4 of the 1A ("If any Party fails to comply with a decision when required to do so under the Rules, the other Party may refer the failure itself to arbitration in accordance with clause 20.3").

118. Therefore, a DAB decision is not a final resolution of the dispute; rather the case is finally decided by arbitration. Failure to comply with a DAB decision is a

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120 See the Respondent's Statement of Rejoinder, July 15, 2011, paras. 11-12.
breach of contract for which the aggrieved party can seek enforcement in the appropriate forum.

119. Under Article 5.6 of the ICC Dispute Board Rules: "If any Party submits such a written notice expressing its dissatisfaction with a Decision...the Dispute in question shall finally be settled by arbitration, if the Parties have so agreed..." In line with Article 5.6 Clause 20.2.3 of the IA provides that: "If any Party sends a written notice to the other Parties and the DAB expressing its dissatisfaction with a Decision, as provided in the Rules...the Dispute shall finally be settled by arbitration in accordance with Clause 20.3." Therefore neither the ICC Dispute Board Rules nor the dispute resolution clause of the IA requires that the DAB decision is complied with prior to commencing arbitration; to the contrary, pursuant to the ICC Dispute Board Rules and the Parties' dispute resolution clause, the submission of a notice of dissatisfaction is the prerequisite for the initiation of arbitration.

120. In accordance with Article 5 of the ICC Dispute Board Rules and Clause 20.2 of the IA, the Claimants filed a notice of dissatisfaction with the DAB decision on May 26, 2009. The Claimants subsequently filed a Request for Arbitration on May 27, 2009.

121. In this case, the Tribunal finds that the completion of the DAB proceedings and the service of a notice of dissatisfaction is sufficient, and compliance with the DAB decision is neither required for nor excused by the commencement of arbitration.

122. Secondly, the Arbitral Tribunal will address the Respondent's argument that the Claimants are estopped from introducing, agitating and/or arguing any dispute in these arbitration proceedings that was not raised before the DAB in accordance with Clause 20.2 of the IA\(^\text{122}\). The Tribunal rejects this argument for the following reasons. As stated above, in its submission of July 6, 2009, the Respondent filed with the ICC Secretariat a request for the determination of

\(^{122}\text{See the Respondent's Statement of Defence, March 14, 2011, para. 8.}\)
jurisdiction basing the lack of jurisdiction of the Arbitral Tribunal on the non-compliance by the Claimants of Clause 20.3.1 of the IA, i.e. arbitration by an ICSID Tribunal as a prior requirement to ICC arbitration. The Respondent, however, expressly stated that “While the first two mandatory tiers [amicable settlement, Clause 20.1 of the IA and determination by DAB, Clause 20.2 of the IA] with respect to the dispute resolution mechanism...have, admittedly, been exhausted by the Parties...” The Respondent made this admission after the filing by the Claimants of the Request for Arbitration on May 27, 2009, and with full knowledge of the Claimants’ prayer for relief. Therefore it is not credible to argue ex post that the Claimants did not comply with any of the first two tiers of Clause 20 of the IA.

123. In any event, according to arbitral practice the non-compliance with a multi-tier dispute resolution clause is not an issue of jurisdiction but of admissibility. The Tribunal has full discretion to decide upon the admissibility of the claims and counterclaims submitted by the Parties in this arbitration. This discretion is ruled by diverse factors such as, for example, the principle of procedural efficiency and the principle of efficacy in the resolution of the disputes between the Parties.

124. Moreover, the Respondent decided to withdraw its objections to the ICC jurisdiction and to participate in the present proceedings by communication to the Arbitral Tribunal of October 5, 2010, agreeing for the dispute to be resolved through ICC arbitration.

125. For the reasons stated above the Arbitral Tribunal finds it has jurisdiction to give a final and binding decision over the merits of all the civil claims and counterclaims alleged by the Parties in the present arbitration. Moreover, the Tribunal finds that these claims and counterclaims are admissible, on the one hand because compliance with the DAB decision is neither required for nor

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124 The Tribunal notes that criminal claims fall out of its jurisdiction and therefore will not consider the claim of criminal fraud alleged by the Claimants with regard to the merger of Hycarbe, Texas and Hycarbe, Navis. See Section VI.B of the Award.
excused by the commencement of arbitration; and on the other hand on the basis of the principle of procedural efficiency to ensure that all claims and counterclaims regarding the same dispute are decided in the same forum.

VI. MERITS.-

126. Having reviewed the relevant facts, the Tribunal will now turn to the legal claims raised in these proceedings. The Tribunal takes the view that this dispute revolves primarily around (i) the causes, and (ii) the circumstances of the IA’s termination. Thus, the Tribunal will begin with an examination of the two issues of the Initial Shareholders and the Project definition that caused the breakdown in the Parties’ negotiations, addressing as well the other conditions precedent in Clause 2.2 of the IA. The Tribunal will then analyse the legal consequences of non-compliance with the conditions precedent of the IA. The Tribunal will finally examine the Claimants’ allegations regarding the Respondent’s fraud and/or gross negligence.

A. Issues Causing the Termination of the Implementation Agreement.-

127. Both in their written submissions and during the hearing, the Parties argued extensively over the two issues on which the termination of the IA had been grounded: (1) the difference between the Initial Shareholders listed in the IA and the Founder Shareholders listed in the Financing Documents; and (2) the expanded definition of the term Project. In this section, the Tribunal analyses those arguments, followed by a less extended discussion of the other conditions precedent under Clause 2.2 that the Claimants allege the Respondent also failed to fulfil.

1. Difference Between the Initial Shareholders and the Founder Shareholders.-

128. This alleged conflict arises from the introduction by the Respondent of an SPV named Metro AZ in the draft Founder Shareholders’ Support Agreement as a
shareholder in ICRS instead of two of the Initial Shareholders defined in Clause 1.1 of the IA. 125

129. Clause 1.1 of the IA provides that:

"Initial Shareholders mean:
(a) Infrastructure Development Company (Private) Limited, a company incorporated and existing under the laws of the Islamic Republic of Pakistan or any Person holding shares in the Company for and on its behalf;
(b) Saadullah Khan & Brothers, a partnership registered and existing under the laws of the Islamic Republic of Pakistan or any Person holding shares in the Company for and on its behalf; and
(c) Hyconex-American Energy, Inc, a corporation incorporated and existing under the laws of the State of Texas, United States of America or any Person holding shares in the Company for and on its behalf."

130. The Founder Shareholders’ Support Agreement defines the Founder Shareholders of ICRS as including: Metro AZ, IDC, Kuwait Privatization Project Holding Co. (K.S.C) (hereafter “KPPHC”) and United Jordanian Company for Railways (hereafter “UJC” or “UJC Rail”). 126

131. Firstly, the Tribunal considers it important to analyse the issue from a commercial perspective. As indicated by the Respondent during the hearing, it is common in BOT Projects of this magnitude for the sponsors of the investment to invest in the Project through an SPV. This may be done for several reasons. In the case at issue the Respondent has stated that the incorporation of Metro AZ was based upon advice of the financial advisor 127 with the objective of ensuring the injection of equity in the Project Company in a timely and tax efficient manner 128. There is nothing in the record that persuades the Arbitral Tribunal to believe otherwise.

125 The PTLA for its part defined in its Clause 1.1 “Founder Shareholders” as “those shareholders of the Company who are a party to the Founder Shareholders’ Support Agreement...”, CEX-28.
126 See the Respondent’s Technical Proposal of April 2007, which expressly identified as the Equity Investors of ICRS the three members of the IDC Consortium. It also identified “other potential equity investors” including: KPPHC (Kuwait), Investment Unit of the Social Security Corporation (Jordan) and United Jordanian Contractors; C-2, pp. 7.
127 See Mr. Siddiqui Witness Statement, RSW-1, para. 17.
128 See the Respondent’s Statement of Rejoinder, July 15, 2011, para. 28, the Respondent’s email to the Claimants of March 17, 2008, CEX-30. See also para. 73 of the present Award.
132. The Tribunal is persuaded by the Respondent’s argument that the purpose of the Respondent’s proposal during negotiations of the IA to include the expression “or any Person holding shares in the Company for and on its behalf” in the definition of Initial Shareholders of Clause 1.1 of the IA was to legally entitle the IDC Consortium members (IDC, Saadullah Khan & Bros., and Hycarbeex-American Energy Inc.) to articulate their investment in ICRS through an SPV, that was to be considered as an Initial Shareholder of the Project.

133. The Tribunal bases its finding on the following facts:

   a) Firstly Metro AZ was incorporated during the negotiations of the IA, on August 23, 2007.  
   
   b) The only shareholders in Metro AZ were IDC, Saadullah Khan & Bros., and Hycarbeex-American Energy Inc.

   c) Subsequently and prior to the execution of the IA the sponsors of the Project Company signed on September 7, 2007 the Head Terms Agreement. This Agreement was signed between the three members of the IDC Consortium, KPHC and UJC. This Agreement in its paragraph 3 identifies as the principal investors in ICRS the three members of the IDC Consortium as well as KPHC and UJC.

134. Paragraph 4 of the Head Terms Agreement provides that:

    “IDC, SkB [Saadullah Khan & Bros.] and HAE [Hycarbeex-American Energy Inc.] shall invest in the paid-up share capital of NewCo [ICRS] in a block of 40% (forty percent) led by IDC through a special purpose vehicle established either in Pakistan or an off-shore jurisdiction ("IDC SPV"). IDC may additionally hold shares in its own name and/or may designate the name of a special purpose vehicle duly incorporated in Pakistan or Mauritius, provided, however that the IDC SPV and IDC shall collectively own a maximum of 40% (forty percent) of the paid up share capital of

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129 See Certificate of Incorporation of Metro AZ, RSW-1, Exhibit G.
130 See Register of Members of Metro AZ issued on March 26, 2008, REX-24; and HBTF Information Memorandum of February 2, 2008, Section 1.5; REX-10 (This Memorandum was circulated by HBTF within the prospective lenders to seek financing. Section 1.5 clearly identifies the shareholding structure of ICRS and expressly states that Metro AZ consists of “Hycarbeex American Energy Inc (USA), IDC and Saadullah Khan and Brothers (Pakistan).”)
131 See Head Terms Agreement, RWS-1, Exhibit L.
135. The terms of the Head Terms Agreement were to be reflected in a subsequent Shareholders’ Agreement to be executed by the sponsors of the Project within 30 days of the Head Terms Agreement.\textsuperscript{132}

136. On October 9, 2007 ICRS was incorporated by IDC and KPPHC\textsuperscript{133} and on October 18, 2007 the IA was signed between the Parties.

137. On November 15, 2007 the Shareholders’ Agreement\textsuperscript{134}, was signed between the sponsors of the Project (Metro AZ, IDC, KPPHC and UJC) and ICRS. The Shareholders’ Agreement defines Shareholders as including Metro AZ, KPPHC and UJC and states that “KPPHC, IDC and the sponsors of MZL [Metro AZ] and UJC Rail entered into a Head Terms Agreement dated 7 September 2007 (the "Head Terms Agreement") which agreement contemplates the entering into of this Agreement...” This Agreement was entered into between the Company and the Shareholders “in order to set out the terms and conditions relating to the shareholding, management and operation of the Company and their relationship inter se”\textsuperscript{135}.

138. The Tribunal finds that the facts reveal that the members of the IDC Consortium intended since even before the IA was signed to articulate their investment in ICRS through an SPV. Steps were taken by the sponsors of the Project to this effect. A financing vehicle, Metro AZ, was created. The Head Terms Agreement and Shareholders’ Agreement were signed. The Respondent expressly asked the Claimants during the negotiations of the IA that the definition of Initial Shareholders in Clause 1.1 of the IA be amended to include the expression “or any Person holding shares in the Company for and on its behalf”, which was not objected by the Claimants.

\textsuperscript{132} See Head Terms Agreement, RWS-1, Exhibit L, para. 1.
\textsuperscript{133} See Shareholders’ Agreement, REX-25, pp.1.
\textsuperscript{134} See Shareholders’ Agreement, REX-25.
\textsuperscript{135} Id. pp. 2.
139. With regard to the legal interpretation of the expression “or any Person holding shares in the Company for and on its behalf” the Tribunal is persuaded chiefly by the Respondent’s argument that the IA’s definition of Initial Shareholders as any of the three entities of the IDC Consortium “or any Person holding shares in the Company for and on its behalf” would also cover Metro AZ, which entity existed for the sole purpose of channelling the investment of the IDC Consortium members in the Project which were the only shareholders in Metro AZ and which coincided completely with the Company’s Initial Shareholders. The Claimants take notable pains to distinguish between mere holding of shares on behalf of another person and beneficial ownership of shares on one’s own behalf, and argue that the designation of Metro AZ in the Financing Documents as a Founder Shareholder indicates that the SPV was in fact the legal and beneficial owner of the Company’s shares. However, the Tribunal is not convinced that Metro AZ was anything more than a highly ordinary investment vehicle created for the benefit and convenience of the three IDC Consortium members investing in the Company.

140. The Tribunal concludes that the IA enabled the investment to be channelled through an SPV. The sole purpose of the SPV was to articulate the investment of the IDC Consortium members into ICRS in a tax and time efficient manner. The SPV was a financing vehicle for the initial sponsors of the Project to invest in ICRS. All three members of the IDC Consortium were investors in ICRS either directly or through Metro AZ. The Tribunal therefore rejects the Claimants’ argument that there was a conflict between the definition of Initial Shareholders in Clause 1.1 of the IA and the Founder Shareholders’ Support Agreement as only one of the Initial Shareholders provided in Clause 1.1 of the IA was a shareholder in ICRS under the Founder Shareholders’ Support Agreement and the rest consisted of three new entities including an SPV.

136 See, e.g. the Claimants’ Reply, para. 70.
137 KPPHC had already been identified by the Respondent as a potential equity investor of ICRS along with Investment Unit of the Social Security Corporation (Jordan) and United Jordanian Contractors, in the Respondent’s Technical Proposal of April, 2007.
138 See the Claimants’ Reply, May 16, 2011, para. 59.
141. Secondly, the Tribunal notes that the GOJ expressed its concern regarding this issue in the Claimants' email to the Respondent of March 16, 2008 stating that: "As you may know, it is the intention of the parties to have these three companies' [IDC, SKB, HAE] ownership of the Shares in the Project Company locked up for three years after the Commencement Date of the project during which period those three companies cannot transfer shares in the Company unless in accordance with the provisions of the IA. Accordingly, those three companies shall be founder shareholders in the Company in order for the Parties to the IA to implement their intention in restricting the disposal of their shares in the Company as provided in the IA."

142. The GOJ's concern regarding the introduction of Metro AZ as a shareholder in the Project Company was over a risk that the three members of the IDC Consortium would not be locked into the Project for the first three years of the Project as required by Clause 21.4.2 of the IA. The Claimants alleged during the hearing that these years were the critical stage when equity capital would be needed because the construction of the LRS would take place during the first two years after securing financing.

143. Clause 21.4.2 of the IA provides that:

"No Initial Shareholder shall transfer any Shares owned by it at any time prior to the Commencement Date or for a period of three (3) Years after the Commencement Date, except for:

(a) a transfer to an Affiliate or another Initial Shareholder;

(b) a transfer resulting from the creation or enforcement of a security interest in or over any Shares in accordance with any of the Document;

(c) a transfer required by any Applicable Laws or by the operation of the Applicable Law or by order of a court, tribunal, or Competent Authority with appropriate jurisdiction; and/or

(d) a transfer to which the GOJ has given its prior written approval."

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139 See REX-20.
140 See Hearing Transcript, October 13, 2011, pp. 13, Mr. Ugarte.
144. In this respect the Tribunal finds from the record that the Shareholders’ Agreement of November 15, 2007\textsuperscript{141}, assured the locking in of Metro AZ (as a financing vehicle of the IDC Consortium members) in the Project for at least the first three years of the Project.

145. Section 6.1 of the Shareholders’ Agreement provides that:

\textbf{6.1.1.} If any Shareholder wishes to transfer any or all of its Shares (in such capacity, a “Transferor”), then the Transferor may only do so in accordance with this part VI, subject, however, to the restrictions contained in this Agreement, the Implementation Agreement and the Initial Financing Agreements.

\textbf{6.1.2} No Transferor shall transfer (either directly or through the transfer of beneficial interests) any or all of its Shares at any time prior to the Commencement Date or for a period of five years following the Commencement Date, except for:

(a) a transfer to an Affiliate or another Shareholder;

(b) a transfer resulting from the creation or enforcement of a security interest in or over any Shares in accordance with any of the Initial Financing Agreements;

(c) a transfer required by the laws of Jordan or by the operation of the laws of Jordan or by order of a court, tribunal, or governmental authority or agency with appropriate jurisdiction; and

(d) a transfer to which the Company has given its prior written approval."

146. The Shareholders’ Agreement stipulated a lock-in period of five years for all shareholders, including Metro AZ. This Agreement further established that the transfer of shares would be subject to the restrictions contained in the IA. Hence the Tribunal considers that the three members of the IDC Consortium were in principle locked into the Project for at least the three first years of the Project as required by Clause 21.4.2 of the IA.

147. In addition, the Respondent through its email to the Claimants of March 17, 2008,\textsuperscript{142} and in order to address the Claimants’ concerns as expressed in their email of March 16, offered to further guarantee a lock-in of the IDC Consortium members in Metro AZ "for the period stipulated in the IA" and to provide

\textsuperscript{141} See REX-25.
\textsuperscript{142} See CEX-30.
evidence to this effect on an annual basis, to assure that the IDC Consortium members' involvement in the Project continued for at least the period stipulated in the IA. An arrangement to this effect between the Parties would have fully addressed the Claimants' concerns regarding the locking in of the IDC Consortium members in the Project.

148. Nevertheless, the Claimants answered through their email to the Respondent of March 18, 2008\(^{143}\) stating that "...kindly note that your proposal does not go in line and [is] inconsistent with the agreed terms and conditions of the Implementation Agreement, and therefore we cannot accept the said proposal and we hereby expect your full compliance with the agreed terms and conditions of the Implementation Agreement in this regard."

149. The Tribunal finds that the locking in of Metro AZ in the Project as a financing vehicle of the IDC Consortium members, and hence in principle of the IDC Consortium members themselves, was sufficiently and adequately guaranteed by the IA and the Shareholders' Agreement. In addition the Tribunal finds that any further assurance in regard of the locking in of the IDC Consortium members in Metro AZ could have been granted by the Respondent.

150. Thirdly, the Arbitral Tribunal finds from Mr. Batayneh's witness statement during the hearing that the concern of the GOJ regarding the Initial Shareholders issue was rather the lack of transparency and late timing in the introduction of Metro AZ as a shareholder of ICRS than the actual articulation of the investment through an SPV. Mr. Batayneh stated during the hearing regarding the GOJ's concern over the SPV that "...the issue of transparency and all these issues about these big sized projects and international companies and Mauritius and probably if it was cleared from day one and they were qualified accordingly and I don't think there would have been a problem but apparently it came up late into the project."\(^{144}\) Mr. Hadidi testified that "there was a lack of transparency on this issue which resulted really in the conviction that there was something not correct in this whole thing. It might have been a common practice

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\(^{143}\) See CEX-35.

\(^{144}\) See Hearing Transcript, October 14, 2011, pp. 34, Mr. Batayneh.
internationally, but as far as we are concerned, we deal with a certain entity, you are awarding a bid based on certain facts and if there is anything that changes these facts, it becomes something we need to discuss."

151. It was only 7 business days before closing that the Claimants were given the draft Founder Shareholders’ Support Agreement, which contemplated that Metro AZ should be a shareholder in the Project Company. At that time the GOJ had no clear information as to how this SPV actually worked and the details of how it related to the IA.

152. The Arbitral Tribunal agrees with the DAB in the fact that the circumstances of the introduction of Metro AZ as a shareholder in ICRS, in particular the timing and its Mauritius jurisdiction, were unfortunate and hence the GOJ’s concerns in this respect are understandable.

153. Nevertheless, the Arbitral Tribunal agrees with the Respondent in that it was for the sponsors of the Project to decide how to articulate and channel the investment in ICRS. The Initial Financing Documents were to be signed between ICRS and the lenders. Clause 1.1 of the IA defined Initial Shareholders as the three entities comprising the IDC Consortium “or any Person holding shares in the Company for and on its behalf”. From an international commercial perspective it was not unforeseeable that the investment in a Project of this size could be channelled through an SPV.

154. The GOJ expressed its concern regarding the SPV through its email of March 16, 2008. The Respondent answered by its email of March 17, 2008, and gave an undertaking addressing the Claimants’ concerns. The Respondent’s proposal was rejected by the Claimants.

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143 See Hearing Transcript, October 14, 2011, pp. 64, Mr. Hadidi.
147 The Initial Financing Documents were defined in the Addendum to the IA as “the Financing Documents entered into between the Company and any Lenders (other than a shareholder of the Company, including without limitation, an Initial Shareholder or Affiliate of an Initial Shareholder) prior to the Effective Date.”

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155. The Tribunal notes that the Respondent could have informed the Claimants about the existence of Metro AZ at an earlier stage and that by not doing so the Respondent took a risk which materialised in a controversy between the Parties on financial close with regard to the Initial Shareholders issue.

156. Nevertheless, the record before the Tribunal shows that Metro AZ was exclusively owned by the IDC Consortium members\textsuperscript{146}, that the IA permitted the investment to be channelled through an SPV such as Metro AZ (see para. 132, 139 and 140 above) and that the locking in of the IDC Consortium members in ICRS was sufficiently guaranteed by the IA and the Shareholders' Agreement (see paragraph 146 above). Neither the financing of the Project, nor the rights, liabilities or financial obligations of the Claimants under the IA and/or the Direct Agreement have been shown to be affected by the introduction of Metro AZ as a shareholder in ICRS. Therefore the Tribunal considers that there was no conflict with regard to the Initial Shareholders issue that justified the termination of the IA.

2. Expanded Definition of Project.—

157. This alleged conflict arises from the introduction by the Respondent in the draft PTLA of a broader definition of the term Project than that provided for in Clause 1.1 of the IA, i.e., as including the commercial activities contemplated in Clause 9.4 of the IA.

158. Clause 1.1 of the IA defines the term Project as:

"... (a) the design, finance, supply, constructions, insurance, commissioning, operation, maintenance and transfer of the LRS and all other activities necessary or incidental thereto; and

(b) the design, finance, construction, development, lease, licence operation, maintenance, and transfer of the Commercial Real Estate and all other activities necessary or incidental thereto."

159. The draft PTLA defines the term Project as:

\textsuperscript{146} See Register of Members of Metro AZ, issued on March 26, 2008, REX-24.
“(a) the design, development, engineering, project management/supervision, finance, construction, commissioning, operation, maintenance, and transfer of the LRS; 

(b) the design, development, finance, construction, operation, maintenance and transfer of the Commercial Real Estate; 

(c) the activities described in Clause 9.4 of the Implementation Agreement and 

(d) all other activities necessary or incidental to the above."

160. Clause 9.4 of the IA reads as follows:

"9.4.1 The Company may, from the Effective Date to the Expiration Date, carry out any such commercial activities as it may deem fit, including without limitation, lease, license, or otherwise provide advertising spaces and hoardings in the LRS, including the Rolling Stock, on the Land, the Curve Alignment Land and the JHR Land, the Rashedan terminal, the Zarqa Terminal and Maintenance Depot and all other stations of the LRS and the Company shall, subject to Applicable Law, be entitled to all revenues arising therefrom.

9.4.2 The Company shall be entitled to name all stations of the LRS and to retain all revenues derived from sponsorship of such station names and the Company shall retain all other rights in relation to the use and exploitations of such names (to the extent property exists in such names) including the right to apply for registration of such names as trademarks or domain names anywhere in the world."

161. After reviewing the facts and evidence put before this Tribunal, the Arbitral Tribunal has found that the essence of the dispute lies in the Respondent’s incorrect interpretation of the term Project as it appears in the IA.

162. The Respondent alleges that the interpretation of the term Project under the IA demands that it be considered as including the commercial activities which appear in Clause 9.4 of the IA. The Respondent expressly states in its Statement of Defence that: "The IA specifically envisaged and permitted the Respondent to undertake Other Commercial Activities pursuant to Clause 9.4 of the IA which were to be transferred to the GOJ upon expiration/termination of the IA,"
therefore, such activities fell within the definition of the term "Project" is the correct interpretation of the IA."\textsuperscript{149}

163. The Respondent further alleges that: "The fact that the IA specifically envisaged and permitted the Company to undertake Other Commercial Activities pursuant to Clause 9.4 of the IA is evidence of the Parties' intention that the Company would commit finances to such activities."\textsuperscript{150}

164. Mr. Qureshi further explains in his email of March 22, 2008 to the LTRC\textsuperscript{151} that:

"We have replicated the definition of the Project as stipulated in the Implementation Agreement dated 18 October 2008 (as amended on 2 February 2008) (the "IA"), and maintained the addition of a reference to Clause 9.4 in the IA because advertising activities are an integral part of the Project as acknowledged/allowed by such a Clause.

We would also like to point out that since the Direct Agreement stipulates that all equity must be committed to the "Project" prior to the first disbursement of the term loan (Equity First concept), the only funds that the Company will have after the first disbursement are loan proceeds. Accordingly, since the Company will not have any of its own funds left, it is imperative that it be able to apply loan proceeds to fund the advertising component of the Project, otherwise it would for all practical purposes not be able to carry out advertising activities..."

165. In view of the above and under this interpretation of the term Project in the IA the Respondent's first argument is that there was no conflict between the term Project as contemplated in the IA, which was to be read as including other commercial activities, and the definition of Project in the PTLA. The latter merely contained a more comprehensive definition of the term Project that added nothing to the rights and obligations of the Parties under the IA.\textsuperscript{152}

166. The Respondent's second argument is that given that these commercial activities, specifically advertising, form part of the Project under the correct interpretation of the IA, they are to be financed accordingly with the monies for the Project, in concrete with loan proceeds.

\textsuperscript{150} See Company's Counterclaim, March 14, 2011, para. 76.
\textsuperscript{151} See REX-22.
\textsuperscript{152} See Company's Counterclaim, March 14, 2011, para. 74 in fine.
167. The Respondent further argues that: "As the source for the finances to be utilized for purposes of the said activities would have been Equity and/or proceeds of an Advance made pursuant to the PTLA, therefore, definition of the term "Project" had to include Part (c) to ensure that the Company would not be in breach of any provision of the Initial Financing Documents in the carrying out of Other Commercial Activities under Clause 9.4 of the IA...had the definition not included Part (c) the Company would have been prevented from undertaking Other Commercial Activities under the PTLA. The Respondent also explains that in order to permit utilization of any part of an Advance under the PTLA for purposes of the above commercial activities, the lenders considered it necessary to ensure that the definition of the term Project did encompass such activities. Additionally the Respondent argues in its Statement of Rejoinder that: "...in order for the Lenders to ensure that all revenues received by the Respondent were fully secured for purposes of operations of the Respondent, as well as, repayments under the PTLA necessitated inclusion of other commercial activities in the definition of the term Project in the PTLA." 

168. In view of the previous paragraph the Respondent’s third argument is therefore that the inclusion of the activities provided for in Clause 9.4 of the IA within the term Project was necessary in order to prevent a breach of the PTLA by the Company when it carried out and financed under the PTLA Other Commercial Activities, as expressly permitted in the IA. In addition, the lenders, on the one hand, considered it necessary to include the activities of Clause 9.4 with the same end (preventing a breach of the PTLA), and on the other hand insisted on this expanded definition of the term Project because they were interested in securing the revenues of these activities for the repayment of the their loan.

169. Firstly, the Tribunal does not agree with the Respondent’s interpretation of the IA and hence cannot accept the arguments developed by the Respondent based on this interpretation. The Tribunal cannot subscribe to the propositions above in

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132 Id. paras. 76-77.
133 Id. para. 75 in fine.
134 See the Respondent’s Statement of Rejoinder, July 15, 2011, para. 17.
support of the conformity of the PTLA to the IA. The statements that "The IA specifically envisaged and permitted the Respondent to undertake Other Commercial Activities pursuant to Clause 9.4 of the IA which were to be transferred to the GOJ upon expiration/termination of the IA, therefore, such activities fell within the definition of the term "Project" is the correct interpretation of the IA" and that the "advertising activities were an integral part of the Project as acknowledged/allowed by Clause 9.4 of the IA" are a misinterpretation of the IA based on an ambiguous use of the term Project. The definition of the Project under the IA is not to be found in Clause 9.4 of the same but in its Clause 1.1 and it does not include the Company's commercial activities. All that could be said, at most, is that the commercial activities were part of the LRS project in the broadest sense, in that the Company was authorised to exercise such activities along the railroad on an independent basis; but by no reasoning could that make the PTLA's own definition of Project consistent with that of the IA. There is no controversy between the Parties in that the Respondent had a right under Clause 9.4 of the IA to carry out Other Commercial Activities. Nevertheless, Clause 21.5.4 of the IA as amended, which enabled the Respondent to obtain financing for such other activities, expressly specified "in addition to the financing procured under the Initial Financing Documents" which was to be devoted exclusively to the Project.

170. In the IA, which constituted the agreement of the Parties, the commercial activities that the Company was allowed to undertake were clearly separated from the building, operation and transfer of the LRS and related Commercial Real Estate, and were to be kept so. In particular, the proceeds of the external funding - the banks' loan - were to be exclusively applied to the two activities described under the definition of the Project under Clause 1.1 of the IA: the building, operation and transfer of the LRS and related Commercial Real Estate. The monies could certainly not be used for activities comprised in an enlarged definition of the Project agreed between the Company and the lenders for their own purposes.\(^{156}\)

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\(^{156}\) Under Article 3 of the PTLA, the Company was to apply the proceeds of the advances towards, among others, "any purpose in relation to the Project mutually agreed upon with the Agent", the Project being here the one defined by the PTLA.
171. The IA defined in Clause 1.1 the term Financing Documents as "the agreement or agreements to be entered into between the Company and the Lenders for the purpose of providing funds necessary to implement the Project or any part thereof", and the PTLA is one of them. There can be no discussion that the meaning ascribed to the word Project in that sentence was the one given in Clause 1.1 of the IA; and, therefore, that it could be no other in the Financing Documents if those were to conform to the IA. The direct implication of the definition of the term Financing Documents in Clause 1.1 of the IA is that the loan proceeds from the banks to be disbursed under the provisions of the PTLA were to be used only to finance the Project as defined in Clause 1.1 of the IA, which did not include the commercial activities provided for in Clause 9.4 of the IA.

172. Secondly, the Tribunal notes that apart from distorting the meaning of the term Project as specified in Clause 1.1 of the IA, the new and broader definition of the term Project introduced by the Respondent in the PTLA directly affected the financing of the Project because it could potentially put at risk the financing of the building, operation and transfer of the LRS and/or the related Commercial Real Estate. The Tribunal notes in this respect the Claimants’ observation that nowhere in the PTLA is there a hierarchical structure that requires the Respondent to apply the loan proceeds first to build the LRS and afterward to finance the Respondent’s Other Commercial Activities157.

173. Moreover, the Tribunal rejects the Respondent’s argument that under Clause 3 of the Direct Agreement158 the engineer would exercise a control function and guarantee that all the proceeds were devoted to the Project as defined in the IA159 for the following reasons:

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158 See Addendum to the IA, Annexure 2, CEX-3.
159 See the Respondent’s Statement of Defence, March 14, 2011, para. 66.
174. According to Clause 1.1 of the Direct Agreement the term Project was to have the same meaning ascribed thereto in the IA. Clause 3 of the Direct Agreement in its relevant part provides that:

"3.1 The Lenders' Agent undertakes to ensure that the first Drawdown under the Finance Documents shall not take place till such time as the Engineer has:

a) certified that the Company has, in the opinion of the Engineer, invested and/or has irrevocably committed to the Project an amount not less than the sum of (JD ); and

b) In the opinion of the Engineer, the Company is entitled to the proceeds of the first Drawdown in accordance with Finance Documents.

3.2 For any subsequent Drawdown thereafter, the Lenders' Agent undertakes to ensure that any Drawdown under the Finance Documents shall not take place till such time as the Engineer has certified that:

a) the amount of the previous Drawdown has been invested and or irrevocably committed to the Project;

b) The progress of Works is in accordance with the Detailed Program; and

c) In the opinion of the Engineer, the Company is entitled to the proceeds of the next Drawdown in accordance with the Finance Documents..."

175. The Tribunal finds that the Respondent makes this argument under the wrong premise that the term Project in the IA includes Other Commercial Activities (see paragraphs 161 to 165 above). Further, the Tribunal agrees with the Claimants in that the broader definition of Project in the PTLA would have introduced an important element of confusion for the engineer. This confusion created a risk that the engineer would decide to apply the PTLA's definition instead of the IA's definition of Project, which would mean that the engineer would approve the financing of the Respondent's commercial activities devoting part of the Project's financing to activities which were not part of the Project as defined under the IA.160

176. Thirdly, the Tribunal agrees with the Claimants in that the definition of Project as contained in the PTLA could in fact amount to an increase of the GOJ's liabilities with respect to the lenders. The GOJ was not a signatory party of the

160 See Hearing Transcript, October 13, 2011, pp. 64, Mr. Ugarté.
PTLA. The GOJ's legal relationship with the lenders was regulated by the Direct Agreement. Nevertheless, under the Direct Agreement the GOJ had a right to repay the lenders any amounts outstanding under the PTLA in the event the Respondent defaulted in the repayment of the loan.

177. Clause 2.5 of the Direct Agreement provides that:

"The Lenders' Agent hereby acknowledges and agrees that in case of the occurrence of an event of default on part of the Borrower under the Finance Documents, and if the Borrower fails to cure such event of default in accordance with the provisions thereof, the Lenders' Agent shall notify the GOJ in writing of the occurrence of such event of default provided the Lenders' Agent shall not be entitled to take any legal action whatsoever against the Borrower, its properties, its assets and/or its interest in the Project, unless and until the GOJ defaults in fulfilling its obligations to pay the total amount outstanding under the Financing Documents."

178. Clause 2.7 of the Direct Agreement states that:

"Notwithstanding any provision of this Agreement or the Implementation Agreement to the contrary, the Parties hereby agree that in the event of termination of the Implementation Agreement in accordance with the terms and conditions set forth therein, the GOJ shall, within the time period specified in Clause 2.6, have the option to:

(a) assume the responsibilities of the Borrower under the Finance Documents; or

(b) substitute the Borrower with such other Person as the GOJ may deem fit and as are acceptable to the Lenders."

179. And according to Clause 2.10 of the Direct Agreement:

"Nothing in this Agreement or the arrangements contemplated hereby shall:

(a) increase the liabilities of the GOJ under the Implementation Agreement; or

(b) except to the extent expressly provided herein, affect the rights of the GOJ under the Implementation Agreement."

180. The Tribunal agrees with the Claimants in that under articles 2.5, 2.7 a) and 2.10 b) of the Direct Agreement the GOJ had a right to repay the lenders for all amounts outstanding under the Financing Documents (including the PTLA) to prevent the lenders from taking legal action against the Respondent's interests in
the Project in case of default of the Respondent in the repayment of its loan, which directly affected the GOJ’s liabilities with regard to the lenders. Clause 2.10 b) provides inadequate protection for the GOJ in this respect. The fact that the GOJ’s liabilities under the IA and Direct Agreement were not in principle affected by the terms of the PTLA (being capped by the amount of the total loan, i.e., JD 66 million) does not eliminate the risk that the loan proceeds might be devoted to Other Commercial Activities, and that in the event of default of the Respondent the GOJ would have been liable for the total loan of JD 66 million including the part of it devoted to the Respondent’s other commercial activities.

181. Moreover, as pointed out by the Claimants’ Counsel during the hearing\(^{161}\), in case of termination of the IA as a result of an Event of Default on the part of the Company, the Claimants were contractually obliged under Clause 18.5 and Schedule 5 of the IA to pay to the Company “the outstanding principal amount payable to the Lenders under the Financing Documents in accordance with the Financing Documents.”\(^{162}\) The Tribunal agrees with the Claimants’ conclusion that the introduction of a broader definition of Project in the Financing Documents could directly increase the Claimants’ liabilities under the IA.

182. Finally, the Tribunal would like to make the following remark. The disagreement between the Parties over the expansion of the definition of Project appeared for the first time in December 2007 when the Company sent to the LTRC a draft Addendum to the IA. As recited above the IA itself enunciated a definition of the Project comprising two elements: the building, operation and transfer of the LRS and related Commercial Real Estate. In the draft it prepared, the Company expressly requested the definition to be amended in order to add “the following new part: (c) the carrying out of the Other Commercial Activities” which the Company was allowed to pursue under Clause 9.4 of the IA, but as an independent activity. The Claimants opposed that suggestion\(^{163}\). Returning a marked up version of the draft, they wrote: “We cannot have this definition

\(^{161}\) See Hearing Transcript, October 13, 2011, pp. 75, Mr. Al Bashir.

\(^{162}\) See Clause 18.5 and Schedule 5 of the IA, CEX-1.

\(^{163}\) The Tribunal notes that neither Party has objected to the admissibility of this evidence.
added to the definition of the Project. Changing the definition of the Project may have unacceptable implications.\textsuperscript{164}

183. In February 2008, the Company sent draft Financing Documents to the LTRC for review. On 19 February, the LTRC responded, pointing to various deficiencies of the draft by way of a template attached. In one column, again the LTRC stated with reference to Clause 3.1.1 of the PTLA that: "Explicit reference should be made to IA. This is important as it will ensure that funds distributed under the PTL Agreement can only be used for the purposes of the Project, as defined in the IA"\textsuperscript{165}.

184. In the final draft Financing Documents that the Company sent on March 12, 2008, the PTLA contained its own definition of Project but it was not that of the IA. It contained the third element that the Company had asked to include in relation to the IA in December 2007. The LTRC sent its ‘Comments’ again in the form of a template. In a column labelled “Issue” it stated again its objections to the reference to “the activities described in Clause 9.4 of the Implementation Agreement“, in the following terms: “This is not part of the Project as defined under the IA and the financing required is required to implement the Project as defined in the IA”. The LTRC formally asked the Company to amend the definition accordingly.\textsuperscript{166} In addition, two lines below, the LTRC restated its objections to Clause 3.1.1 of the PTLA already formulated one month before (see preceding paragraph) and which had been maintained as was.

185. In view of all of the above, the Tribunal concludes that the definition of the term Project introduced by the Respondent under the PTLA did materially conflict with the IA. The definition of the Project under the PTLA expanded the meaning of the term Project; in addition, it potentially put at risk the financing of the Project and directly affected the liabilities of the GOJ under the IA and could potentially increase the GOJ’s liabilities with respect to the lenders. The GOJ

\textsuperscript{164} See CEX-23. Mr. Siddiqui declared, however, in his oral testimony, not being sure of the issue of the Project being discussed before March 23, 2008, the day set for the signing of the Financing Documents (See Hearing Transcript, October 14, 2011, pp. 71 in fine).
\textsuperscript{165} See REX-17.
\textsuperscript{166} LTRC’s Comments on Revised Financing Documents March 12, CEX-34.
had a legitimate right to object to the PTLA under Clause 21.5 of the IA and it was reasonable for it to do so under the circumstances. The Claimants informed the Respondent of this conflict as early as December 2007 but the Respondent failed to acknowledge its significance.

3. **Securing of Financing by the Respondent by March 23, 2008.**

186. The Tribunal is mindful that the Company negotiated with the banks in order to submit Financing Documents for the LRS Project by the closing date, and that it spent energy, time and money in preparing for the implementation stage. That, however, does not overcome the fact that the financing was to conform to the terms of the IA and that it did not. The purpose of a compliance with the conditions to be satisfied, as in any industrial project, was to avoid any discussion as to the Parties’ respective rights and obligations once the Project would reach the performance stage. The proposed Financing Documents contained one inconsistency with the IA that the GOJ was entitled to raise. The GOJ made its objections known to the Company immediately as it became aware of the conflict, i.e. three months before March 23; but the Company maintained its position until the date of closing. The Financing Documents it presented on the day of financial closing did not conform to the terms of the IA. There was a material conflict between the Financing Documents and the IA and the GOJ had a right to object to the Financing Documents under Clause 21.5 of the IA. The lenders on their part did not want to sign the Financing Documents without the GOJ’s approval. Hence the Tribunal cannot conclude that the Respondent secured financing with sufficient certainty by March 23, 2008 and the Respondent cannot be considered to have complied with the condition precedent established under Clause 2.2(a)(ii) of the IA.

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188 See Hearing Transcript, October 14, 2011, Mr. Batzyně’s redirect examination, pp. 29-30.
4. **Other Conditions Precedent**

187. In addition to the alleged conflicts discussed above, the Claimants also make two other claims with respect to the conditions precedent in Clause 2.2(a) of the IA.\(^{169}\)

188. The Claimants contend that the Respondent failed to provide to the Claimants by the deadline: (i) a certificate from the Controller General of Companies evidencing that the Company had a paid-up share capital of JD 10,000,000; and (ii) a Performance Bond.\(^{170}\) A certificate of paid-up share capital had already been produced by the Respondent’s auditors Ernst & Young on March 19, 2008, and the Controller General of Companies issued its own certificate on March 24.\(^{171}\) The Performance Bond was issued by HBTF on March 23 and would have been delivered to the Claimants simultaneously with the signing of the Financing Documents.\(^{172}\)

189. The record makes clear that neither of these conditions precedent was an issue in dispute between the Parties until after the IA had been terminated. They do not appear in the Minister’s termination letter of March 24;\(^{173}\) the first mention of these conditions precedent is made only in the Minister’s letter of March 31 issuing a Dispute Notice to the Company.\(^{174}\) Accordingly, the Tribunal considers that any breach of these two conditions precedent was of a merely technical or transitory nature, was not given significance by the Parties at the time, and did not justify the termination of the IA.

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\(^{169}\) With regard to the Claimants’ allegation of the Respondent’s breach of Clause 2.2(a)(1)(i) of the IA, the Tribunal notes that this allegation was mentioned by the Claimants in their Statement of Claim but was not developed any further in subsequent submissions nor mentioned during the hearing; therefore the Tribunal understands that no argument is developed by the Claimants under Clause 2.2(a)(1)(i).

\(^{170}\) See the Claimants’ Statement of Claim, December 27, 2010, para. 55.

\(^{171}\) See Ernst & Young Certificate, March 19, 2008, REX-26; Companies Control Department Certificate, March 24, 2008, REX-29.


\(^{173}\) See Letter from Minister of Transport to ICRS, March 24, 2008, CEX-36.

5. Legal Analysis: Clause 2.2 of the IA stipulated conditions.

190. In this Section the Tribunal analyses the legal consequences of non-compliance with the conditions in Clause 2.2 under the IA and Jordanian law.

191. The IA reads, in part:

"Clause 2.2 Conditions Precedent
Subject to Clause 2.1, this Agreement shall come into full force and effect on the date the following conditions precedent have been met or waived by the Parties (the Effective Date):
a) the Company has:
...ii) (1) delivered to the PTRC signed copies of the Financing Documents evidencing that it has secured financing necessary to implement the LRS, and (2) procured from the Lenders or their authorized representative a written confirmation of the signing of such Financing Documents..."

192. Clause 2.4 of the IA reads, in part:

"2.4 Non-fulfilment of Conditions Precedent
2.4.1 If within one hundred twenty eight [sic] (128) Days from the Date of Execution (or a longer time period if the Parties so agree), any of the conditions precedent specified in clause 2 have not been fulfilled or waived by the Parties, this Agreement shall terminate and the Performance Bond, if already delivered to the GOJ by the Company in accordance with Clause 15.1 shall be returned to the Company..."

193. As recited above, the Parties actually agreed to extend the deadline specified at the beginning of the provision so that it would expire only on 22 March 2008.

194. In the Addendum to the IA, executed on 2 February 2008, the Parties agreed to insert a new Clause 21.5 which reads in part:

"21.5 Approval of the Financing Documents
21.5.1 The Company shall deliver to the PTRC, a copy of the proposed Financing Documents at least ten (10) Business Days prior to date scheduled for the signing thereof. The Company shall not sign the Financing Documents if the PTRC has notified the Company of objections to the Financing Documents in accordance with Sub-clause 21.5.2. The PTRC shall not object to the Financing Documents if the terms thereof do not conflict with the terms of this Agreement and/or the Direct Agreement as the case

173 There is no disagreement between the Parties that March 22 being a holiday, the actual date had to be postponed to March 23 pursuant to the contractual provisions.
may be. The Company shall not make any modifications or amendments to the Financing Document without the prior approval of the PTRC if such modifications or amendments would conflict with the terms of this Agreement and/or the Direct Agreement as the case may be.

21.5.2 The PTRC shall notify the Company of any objections to the Financing Documents as soon as reasonably possible, and in any case within seven (7) Business Days of receipt thereof. If the PTRC does not object to the Financing Documents or on before the end of the period provided for above, the PTRC shall be deemed not to object to the Financing Documents.

21.5.3 Unless the terms of the Financing Documents conflict with the terms of this Agreement and/or the Direct Agreement as the case may be, if the signing of the Financing Documents is delayed due to any objection of the PTRC, the GOJ shall defend, indemnify and hold harmless the Company from and against any and all Losses incurred by the Company as a result of such delay."

195. In relation to this issue the Respondent's argumentation often relied on the DAB decision, including direct citations of the DAB reasoning. The Respondent contends that, as the DAB found, "the 'conditions precedent' in Clause 2.2 are obligations and not conditions". Having so re-characterised Clause 2.2 the DAB went on to apply the provisions of the Jordanian Civil Code (hereafter "JCC") on termination for breach of an obligation. It specifically relied on Article 246, which requires - absent the parties' intention to the contrary - notice of the alleged breach and an opportunity to cure it, notwithstanding that the notice and cure period set out in Clause 18 of the IA did not apply where the basis of termination would be the non-fulfilment of a condition precedent under Clause 2. The Tribunal rejects this legal analysis based on the characterisation of the conditions precedent in Clause 2.2 as obligations as contrary to the unambiguous provisions of the IA and of Jordanian law: Clause 2.2 lays down conditions (a), the operation of which is different from that of a breach of contract (b).

a) The Securing of External Financing Under Clause 2.2 Was a Condition

196. Before going into its reasoning the Arbitral Tribunal notes that, generally speaking, a condition, as the concept is understood in the civil law is a modality of an obligation. A condition is a future possible event the fulfilment of which predicates the existence or the elimination of an obligation. It is known as a suspensive condition or condition precedent in the first case, and as a resolutory

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176 See Explanatory Note to JCC, Chapter 3, at 460, CLA-4.
condition or condition subsequent in the second case. A distinction should be
drawn between the concepts of “condition” and “obligation” but they should not
be put in contradiction with each other because they are perfectly compatible; in
fact a condition, as a modality of the obligation, cannot exist without it.

197. The Respondent argues that the JCC does not expressly refer to the notions of
“condition precedent” and “condition subsequent” because they were not part of
the Islamic legal tradition. However, the Tribunal notes that Article 393 JCC,
defining the concept of condition, clearly embodies the distinction in substance if
not in terms by stating: “The condition is a future obligation on the fulfilment of
which legal effect subsists or terminates”. (Emphasis added).

198. The fact that the Parties regarded the requirements of Clause 2.2 as legal
conditions is attested firstly by the title to Clause 2: “Condition precedent”. The
characterisation of “Condition” in Clause 2 expressed the binding agreement of
the Parties in clear language as to the nature of these legal requirements. In
laying down guidelines on the “Interpretation Of Contracts”, the JCC states: “If
the words of the contract are clear, it shall not be permissible to deviate from
them by way of interpretation in order to ascertain the intention of the two
parties”177. Only “if there shall be scope for interpretation” does para. 2
introduce some qualification, and the Tribunal does not find that it is the case
here.

199. The Tribunal finds from the terms of the IA that the IA clearly provided for
conditions in Clause 2.2 of the IA. These conditions were to operate as
conditions resolutory with regard to the obligations of the Parties that were in
full force and effect since the date of execution of the IA, i.e., only those that
could be derived if any from Part 1, Part 2, Part 13, Part 16, Part 17, Part 18, Part
20, Part 21, Part 22, Clauses 3.12, 7.8, 11.1 and Sub-clauses 3.4.4, 9.1.2, 9.2.1,
9.2.3, and 9.5.1(a). The Parties’ agreement to stipulate conditions resolutory with
regard to the obligations in full force and effect since the date of execution is
confirmed by the sub-clause regarding the consequences of their possible non-

177 See Article 239, para. 1, JCC.
fulfilment. The wording of the Clause clearly mirrors in structure and language Article 399 of JCC that lays down the consequences of the fulfilment or non-fulfilment of a condition resolutory under the law.

200. Article 399 JCC reads:

"The disposition shall terminate if the condition to which it was subjected was fulfilled and the creditor shall return what he has received and if that shall be impossible for a cause due to him, he shall be liable for damages".

201. Turning to Clause 2.4.1 of the IA, one reads:

"If within one hundred twenty eight (sic) (128) Days from the Date of Execution (or a longer time period if the Parties so agree), any of the conditions precedent specified in Clause 2 have not been fulfilled or waived by the Parties, this Agreement shall terminate and the Performance Bond, if already delivered to the GOI by the Company in accordance with Clause 15.1 shall be returned to the Company."

202. The conditions of Clause 2.2 of the IA at the same time were to operate as suspensive conditions with regard to the obligations which did not come into full force and effect on the date of execution of the IA, i.e., the majority of the obligations under the IA. The wording of Clause 2.2: "Subject to Clause 2.1, this Agreement shall come into full force and effect on the date the following conditions precedent have been met or waived by the Parties..." mirrors Article 398 JCC that lays down the consequences of the fulfilment of a suspensive condition under the law.

203. Article 398 of the JCC reads:

"The disposition which is subject to a condition not contravening the contract shall not be effective unless the condition is fulfilled."

204. The fact that there were conditions to be met on both sides does not make them obligations, as the Respondent suggests. The parties' obligations under a bilateral contract are by definition reciprocal. As such, they may also be regarded as interdependent in that, for instance, non-compliance by one party of its obligations will allow the other to suspend performance of its own; such is
indeed expressly the case under Jordanian law (Article 203 JCC). However, the fact that each party undertakes to fulfil several conditions can be no justification for characterising conditions as obligations. That the parties’ obligations under a bilateral contract are by definition reciprocal will have no bearing whatsoever on the legal characterisation of a condition, and even less for its characterisation as an obligation. As indicated above (para. 196), the concepts of obligation and condition simply are not interchangeable.

205. The principal condition to be fulfilled by the Company for the full implementation of the IA, under Clause 2.2(a)(iii), was the securing of external financing – the largest source of financing for the Project – according to the terms of the IA. Generally speaking, this is a typical condition in the strictest legal sense as the concept is understood in the civil law and recalled by the explanatory note to the JCC. That the Company would have secured the financing was to be established by certain documents, and the documents were to conform to the provisions of the IA and the Addendum.

206. With regard to Clause 2.2(a)(iii) of the IA, during the hearing the question of whether a condition could be valid if it was made dependent on the will of the counterparty (in this case the Claimants) arose. Both Parties have addressed this question in their Closing Submissions of December 22, 2011.

207. The Respondent for its part argues in its closing submission that when a contract or a contractual obligation is made dependent upon an event or a condition precedent that is itself dependent on the discretion or judgment of the other contracting party, one cannot apply sections 393 to 399 of the JCC. Such a condition cannot be construed as a condition precedent because the fulfilment of such a condition is made entirely dependent on the other party’s intention to be bound by the agreement. The Respondent further argues that a condition which makes the formation of a legal relationship entirely dependent on the will of only one of the parties to the contract is null. The Respondent alleges that the

176 See Explanatory Note to the JCC, Chapter 3, at 460, CLA-4.
177 See Hearing Transcript, October 14, 2011, pp. 111.
fulfilment of the Respondent's obligation relating to providing non-conflicting Initial Financing Documents was dependent solely upon the will of LTRC.

208. The Claimants argue in their closing submission that conditions that involve the will of the creditor are valid under Jordanian law and that Jordanian law only considers null and void a suspensive condition that depends solely on the pure will of the debtor. The Claimants contend that the Respondent does not challenge the suspensive capacity of the conditions precedent in Clause 2.2. The Claimants further argue that this condition did not depend on the pure will of LTRC as the will of the lenders was also involved. Moreover, LTRC's right to approve the Financing Documents was carefully circumscribed to simply ensure that the Financing Documents conform to the Parties’ contract. Had the Respondent abided by the terms of the IA and the Addendum, LTRC's will would have played no role in the fulfilment of this condition and its review right would have become a mere formality.

209. The Tribunal accepts that a condition cannot be valid when it is made solely dependent on the will of the party whose commitment under the contract is dependent upon the condition (a "purely potestative" condition). However, such is not the situation here. The Claimants' stated position that the condition relating to the financing of the Project was not met (and the IA consequently terminated) does not in any way mean that the fulfilment or non-fulfilment of the condition was entirely in the hands of one party and, consequently, does not raise an issue as to the validity of the condition in that respect. The fulfilment of the condition relating to the financing involved the will of the Respondent to seek financing (not the will of the Claimants), as well as that of prospective lenders to grant it (as such, it was a "mixed condition", the validity of which is not disputed as a matter of law). The refusal by the Claimants to consider the condition relating to the financing as being met can have no bearing whatsoever in the characterisation of the condition from that perspective. The only legal issue raised by such denial is whether the Claimants were entitled or not to that conclusion, not the validity of the condition.
210. The Tribunal finds that the condition under Clause 2.2(a)(iii) was actually unfulfilled due to the broader definition of the term Project introduced in the Financing Documents, which affected the Claimants' liabilities under the IA and with regard to the lenders. Consequently, the Claimants were entitled in holding it so and in terminating the IA. The Respondent's argument to the contrary is dismissed.

211. The Respondent further makes the arguments that it actually had secured financing as of February 19, 2008, so that from February 23, 2008, the Parties were not at a pre-contractual stage: the IA had become effective in essence as of that date, rendering Articles 393 and 399 JCC inapplicable. The Tribunal rejects those arguments for the reasons stated below.

212. Firstly, the Respondent alleges that if the Tribunal holds that Clause 2.2(a)(iii) is a condition the same was fulfilled as of February 19, 2008 upon the Government being furnished by HBTF the letter of commitment evidencing the securing of financing. The Tribunal finds that the record does not support the Respondent's position that the Claimants agreed to consider the letter of commitment by HBTF as a compliance with Clause 2.2(a)(iii). Moreover, the Respondent's argument is inconsistent with its own request for an extension of time for the finalisation of the Financing Documents and with the fact that the commitment letter was made conditional on the "Final revision of the Financing Documents by Lenders after taking into consideration the comments received from the GOJ's financial and legal consultants to ensure that the Financing Documents are not in conflict with the Implementation Agreement, the Addendum and the Direct Agreement. The Lenders' comments and amendments will not impose any additional liabilities on the GOJ or the PTDC."

213. Secondly, the Respondent alleges that the Parties entered into an amended contract by virtue of the letter of commitment of February 19, 2008 by HBTF to

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1 See the Respondent's Post-Hearing Submission, December 22, 2011, para. 47 in fine.
3 See letter from HBTF to the Minister of Transport of February 19, 2008, REX-15; letter from HBTF to Mr. Siddiqui of February 19, 2008, REX-13; and letter of Mr. Siddiqui to the Minister of Transport of February 21, 2008, CEX-26.
finance the Project and the Claimants' letter of February 21, 2008\textsuperscript{183} granting the 
extension requested by the Respondent under the premise that the timelines for 
the completion of the construction of the Project were not affected. The 
Respondent argues that the fact that the Claimants in their letter of February 23 
expressly conditioned the extension granted on the requirement that the essential 
timelines for the completion of construction should not be affected amounts to 
the IA becoming effective in essence and valid and obligatory in the remaining 
parts relating to the implementation of the Project. The Tribunal does not agree. 
The fact that the Claimants required that the completion of construction of the 
Project should not be affected by the extension granted for the compliance of the 
conditions precedent does not mean that the IA became effective on February 23 
but rather that, notwithstanding the extension granted, the commencement of 
construction should not be delayed, actually amounting to a shortening of the 
timelines for the completion of construction from the new Effective Date, i.e., 

214. The inescapable conclusion is that the Parties did intend the relevant stipulations 
of Clause 2.2 to operate as conditions. The intention of the Parties in this respect 
is further confirmed, if need be, by the letter of February 23, 2008 whereby Mr. 
Alaa' Batayneh, then the Minister of Transport, notified the Company that its 
request for a four-week extension of the initial deadline to finalise the Financing 
Documents had been granted. The Minister expressly recalled that the period of 
time in question was the one "within which the conditions precedent specified in 
Clause 2.2 of the IA shall be fulfilled or waived", the very formula in the IA 
echoing Article 399 of the Civil Code.\textsuperscript{184}

215. Consequently, holding that "the 'conditions precedent' in Clause 2.2 are 
obligations and not conditions", as the Respondent requests the Tribunal to do, 
firstly is not logical because it puts these concepts in a false contradiction (given 
that a condition is actually a modality of an obligation and they can both coexist 
together); and secondly, it wrongly identifies the Parties' obligations under the 
IA with the conditions to which these obligations are made subject. This

\textsuperscript{183} See CEX-27. 
\textsuperscript{184} Id. 

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statement is simply wrong and tantamount to re-writing the contract for the Parties. The same goes with the sentence "this Agreement shall terminate", to which the Tribunal now turns.

b) Clause 2.2 Does Not Call for Notice or Court Intervention

216. The Company holds that, even assuming that Clause 2.2 stipulated conditions that did not dispense the Claimants from complying with two requirements before they could regard the IA as terminated: a formal notification of the alleged "breach" and a petition to the Court to have its rights vindicated. To that end, the Company relies on Clause/Part 18 of the Agreement or, alternatively, on Article 246 JCC.

217. Firstly, the Company submits that "for purposes of this arbitration Part 18 of the IA is relevant to the extent that the conduct complained of falls within the ambit of Part 18". Part 18 ("Termination") is an elaborate provision (six pages, single-spaced) that deals with the events for termination of the IA for a reason other than the occurrence of the Expiration Date or termination in accordance with Part 16 (Sub-clause 18.1). In particular, it deals with the termination of the Agreement by one party in the event of default by the other: termination by the GOJ in case of default by the Company (Sub-clause 18.2) and termination by the Company in case of default by the GOJ (Sub-clause 18.3). Each sub-clause details at length the events which may be considered as defaults. Sub-clause 18.4 specifies in great detail the steps to be followed in case a party raises an event of default, which involve a notice of intent to terminate, a termination consultation period of no less than 45 days in order to allow the possibility for the defaulting party to cure the default and, if this is not successful, the deliverance of a termination notice. Eventually, Sub-Clause 18.5 details the payments that may be owed by one party to the other depending on the circumstances that have caused the termination. The Respondent further alleges, somewhat inconsistently referring to Articles 202, 245 and 246 of the JCC, that "the GOJ was under a legal obligation to serve upon the Respondent a

\[185\text{ See the Respondent's Statement of Defence, March 14, 2011, para. 102.} \]
notice calling upon it to remedy the alleged inconsistency in the Initial Financing Documents. In any event, the Respondent states: "Clause 2.4.1 of the IA, as drafted and agreed upon by the Parties, did not confer upon the Claimants the right to treat the IA automatically terminated without prior notice/warning in writing being served upon the Respondent by the GOJ." Therefore, under the Respondent's argument based alternatively on Part 18 of the IA or the provisions of the JCC, the Claimants should have issued a notice of dissatisfaction regarding the condition, stating their intent to consider the IA terminated, and petitioned a court for a declaration to that effect. The Tribunal notes that the Respondent did not argue that the entire procedure detailed in Part 18 should have been followed, including the consultation period of no less than 45 days and, finally, pursuant to the dispute resolution clause of the IA, the possible substitution of an arbitral tribunal for a court under Article 246 JCC.

218. The Tribunal first finds that the language of Clause 2.4.1, stating that "this Agreement shall terminate" in relation to the stipulated conditions, like that of Article 399 JCC from which it borrows, is devoid of any ambiguity and does not leave any room for qualification or addition (it is "straightforward English", as a non-lawyer witness put it). In particular, it need not read "shall terminate ipso facto", as the Company argued. If need be, another code provision on the interpretation of contracts goes against introducing a qualification in the application of Clause 2 as the Company asks. Under Article 218 JCC, "The absolute shall take effect as such unless there is proof to the contrary". The Tribunal, therefore, cannot endorse the Company's arguments that Clause 2.4.1 did not provide for automatic termination and that it was "not clear, not express, not unequivocal".

219. The Tribunal further notes, ex abundante cautela, that Clause 2.4.1 and Clause 18 are located in distinct Parts of the IA. There is no reference whatsoever in the former to the latter, no indication that the Parties intended one to be read in correlation with the other and no justification for doing so. To the contrary, just

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186 Id. para. 108.
187 Id. para. 111.
188 See Hearing Transcript October 14, 2011, Mr. Betsarah’s redirect examination, pp. 28.
as Clause 2.4.1 of the IA was manifestly drafted in reference to Article 399 JCC, Clause 18 was manifestly drafted with an eye on Articles 245 and 246 of the JCC. Mixing Clauses 2 and 18, as the Respondent asks, would be a clear deviation from the Parties’ intention, in contradiction with Article 239 JCC: "If the words of a contract are clear, it shall not be permissible to deviate from them by way of interpretation in order to ascertain the intention of the two contracting parties". The Tribunal, therefore, need not engage in a discussion of whether the requirements of Article 246 were set aside by the Parties as permitted under Article 245 JCC, by the wording of Clause 2; Articles 245 and 246 JCC simply have no application in the situation.

220. Moreover, the contrast between Clauses 2.4.1 and 18 on the matter is not merely one of form but one of substance. Like most industrial projects, the one in question was divided into stages, some preliminary, others of implementation, divided by milestones. The date when the various conditions stipulated under Clause 2.2 would be fulfilled was to mark, under its own terms, the entry into "full force and effect of the Agreement" and was expressly designated in the Clause as the "Effective Date". The difference between Clause 2.4.1, stipulating the termination of the Agreement if a condition precedent was not fulfilled, and Clause 18, calling for a detailed and lengthy procedure if a party would complain of a breach of contract on the part of the other, essentially (but not exclusively) during the implementation of the Project once effective, is easily understandable. If for some reason a condition precedent were not fulfilled in the preparatory stage, the Project would stop and the Government could turn to other options without further delay.

221. Secondly, the Company further contends that the JCC did not distinguish between a condition and an obligation, and that a condition "is not an uncertain future event" with the consequence that all provisions in the JCC dealing with obligations should be applied when dealing with a condition. Specifically, the argument goes, Article 399 JCC does not supersede Article 246 JCC that requires a party complaining of a breach to notify the other of its grievances and

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199 See para. 199 above.
190 See Hearing Transcript, October 13, 2011, pp. 38.
to petition to the Court for a declaration of termination. The Company concludes that even under the characterisation of Clause 2.2 of the IA as a condition, the Government could not dispense with the requirements of Article 246.

222. The Tribunal notes that the notion that "obligation" and "condition" would be coterminous is hardly compatible with the fact that the JCC like most (if not all), civilian codes dedicate a distinct section to "The Condition". As noted by the Tribunal in para. 196 above a condition is traditionally defined not as an obligation but as a modality of an obligation.

223. Based on the standards of legal interpretation, it cannot be held that Articles 393 JCC and 399 JCC "do not address the need for a notice as prescribed by the law", as the Company argued. Article 399 simply does not prescribe a notice because the failure of a condition is different from the breach of an unqualified obligation. This finding is reinforced by Article 401 JCC, which reads: "Effect shall be given to the condition to the extent possible". There is no justification for reading a reference to Article 246 in Article 399 where there is none. As a practical matter, and in any event, such a construction would also in fact be tantamount to applying Part 18 of the IA, in outright violation of the Parties' intention as found above.

224. The Company, however, argued that even if Clause 2.2 were to be regarded as stipulating a condition with respect to the securing of a loan, the condition was fully satisfied and the Government unreasonably withheld the approval of the Initial Financing Documents. The Tribunal has already found in Section VI.A.3 above that the Respondent cannot be considered to have complied with the condition relating to the securing of financing as established under Clause 2.2(a)(iii) of the IA. Under these circumstances, Clause 2.4.1 of the IA, in conformity with Jordanian law, authorised the Government to consider the IA as terminated, without need for notice or Court intervention. In addition the

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191 See Hearing Transcript, October 13, 2011, pp. 38.
192 The Tribunal therefore does not need to pass judgment on whether Clause 2 qualified as an agreement to depart from the requirements of Article 246 JCC as allowed under Article 215 JCC.
Claimants were entitled to execute the Proposal Security in accordance with Clause 2.4.2 of the IA.

B. Allegations of Fraud and/or Gross Negligence

225. The Tribunal will address now the Claimants’ allegations of fraud and/or gross negligence against the Respondent. On the one hand, the Claimants allege that the Respondent’s conduct was fraudulent or at best grossly negligent for its nondisclosure of the merger between Hycarbex, Texas and Hycarbex, Nevis. On the other hand, the Claimants allege that the Respondent’s conduct was grossly negligent throughout its relationship with the Claimants, leading to its failure to achieve financial closing. The Claimants contend that the Respondent’s conduct has led to its failure to comply with several conditions precedent.

226. The Claimants attach great significance to their discovery of the merger between Hycarbex, Texas and Hycarbex, Nevis and argue that the Respondent’s concealment of this information has two major implications.

227. The Claimants first contend that the Respondent procured the IA in breach of its duty of good faith, in violation of the RFP, and if fraudulently, in violation of Jordanian criminal law, which expressly prohibits a party from submitting false information to procure a contract. According to the Claimants, had the Government and the LTRC been aware during the bidding process that one of the Initial Shareholders had ceased to exist, they would never have awarded the Project to the IDC Consortium in the first place, and thus, the Respondent enjoyed no entitlement to or rights arising out of the IA.

228. The second implication, the Claimants contend, is that because one of the Initial Shareholders was a non-existent entity, the Respondent never had the ability to fulfill the condition precedent of delivering to the LTRC signed copies of valid Financing Documents. Even assuming that the Respondent had been able to

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193 See the Claimants’ Statement of Claim, December 27, 2010, para. 68.
194 Id. para. 70.
195 Id. para. 71.
timely satisfy the other requirements of Clause 2.2(a), the IA would nonetheless have terminated on March 24, 2008 because it was factually impossible for the Respondent ever to sign valid Financing Documents.

229. The Respondent vigorously denies that any fraud was committed by it or by any member of the Consortium and that the award of the Project was the result of any fraudulent conduct.\textsuperscript{196} The Respondent argues that a criminal claim is not arbitrable under the law of Jordan and frames the Claimants' allegation in the civil context referring to civil fraud or deceit\textsuperscript{197}. It points out that civil fraud necessarily involves an intent to deceive, and that both civil fraud and gross negligence entail injury to the other party, no element of which the Claimants have been able to establish.\textsuperscript{198} The Respondent acknowledges that the merger took place, but states that Dr. Zahid, the CEO of Hycarbex (both before and after the merger), had simply neglected to inform Mr. Siddiqui of this fact through an overnight. Mr. Siddiqui, for his part, reasonably and in good faith relied upon the information provided to him by Dr. Zahid, and the due diligence conducted by Mr. Siddiqui's company had revealed no evidence of the merger.\textsuperscript{199} Most importantly, however, the financial records submitted to and evaluated by the LTGC were those of the Islamabad branch office of Hycarbex and not of either Hycarbex, Texas or Hycarbex, Nevis.\textsuperscript{200}

230. The Claimants further argue that the Respondent's conduct was "\textit{strikingly inefficient, reckless, and at best grossly negligent}" throughout its relationship with the Claimants, particularly with regard to the securing of financing for the Project.\textsuperscript{201} Despite the repeated requests by the Claimants to the Respondent to engage potential lenders as early as possible during the negotiations of the IA the Respondent waited for more than seven months before identifying its first potential lender, and the Claimants had to spend a significant amount of time negotiating the terms of the Addendum to the IA with the lender.\textsuperscript{202}

\begin{footnotes}
\item[196] See the Respondent's Statement of Defence, March 14, 2011, para. 85.
\item[197] Id. paras. 88-90.
\item[198] Id. paras. 89, 134 and 135.
\item[199] Id. paras. 91-93.
\item[200] Id. para. 95.
\item[201] See the Claimants' Statement of Claim, December 27, 2010, para. 155.
\item[202] Id. para. 135.
\end{footnotes}
231. The Respondent, according to the Claimants, also made several misrepresentations to the Claimants. The Respondent submitted an alleged draft Term Sheet from HBTF on September 12, 2007 which quoted several dates and provisions of the final draft of the IA which had not been finalised by the Parties yet. On February 2008, the Respondent requested an extension alleging it merely needed to finalise certain formalities with its potential lenders when in fact it was far from completing its obligation to secure financing.\textsuperscript{205}

232. Finally, the Claimants hold, the Respondent was grossly negligent in introducing Metro AZ as a shareholder of ICRS only 7 business days before the expiration of the extended deadline.\textsuperscript{204}

233. The Respondent for its part alleges that it acted diligently and efficiently in the securing of financing, and lists the milestones achieved through its efforts during the course of the process related to the securing of financing. The Respondent highlights the undertaking of the NI-Group to finance the Project dated August 18, 2007; the Mandate Agreement whereby HBTF undertook to underwrite 100% of the financing of the Project dated October 23, 2007, and the letter of commitment from HBTF confirming its commitment to finance the Project dated February 19, 2008.\textsuperscript{206} In any event, the Respondent's conduct does not meet the standard of gross negligence under Jordanian law.\textsuperscript{206} The Respondent denies that the Term Sheet circulated on September 13, 2007, was suspect and states that it underwent review and revision by the Respondent's financial advisor, Counsel and HBTF over several weeks.\textsuperscript{207}

234. The Respondent further argues that it had an express right under the IA to bring its investment through an SPV. If the Claimants had been acting reasonably they
would have accepted the Respondent’s proposal to furnish such information and/or undertakings as would address the concerns of the Claimants. 208

235. In addition to the above allegations, the Parties elaborate several arguments on the issue of whether the Claimants can bring a claim in tort when there is a contractual relationship between the Parties. 209

236. As stated above in Section V the Tribunal will only address the claims of fraud under civil law as it has no jurisdiction over criminal claims. The Tribunal finds that the evidence provided by the Claimants does not substantiate their allegations of civil fraud/deceit or gross negligence with regard to the merger between Hycarbeq, Texas and Hycarbeq, Nevis or of their allegations of gross negligence in the Respondent’s relationship with the Claimants, in particular with regard to the securing of financing. In particular this evidence does not demonstrate an intent to deceive on the part of the Respondent as required by deceit 210 or a lack of due diligence 211. The Tribunal accepts the Respondent's submissions that the Respondent did not act unreasonably or in bad faith when it failed to give notice of the merger between Hycarbeq, Texas and Hycarbeq, Nevis 212 and that it acted with expertise and diligence in securing financing for the Project. 213 Nevertheless the Tribunal concluded in Section VI.A.3 above that the Respondent did not actually achieve financial closure by March 23, 2008 because there was a conflict between the draft Initial Financing Documents and the IA which remained unresolved between the Parties on the date of closing.

237. In light of the previous paragraph the Tribunal finds that it is not required to engage in an analysis of the Parties’ arguments with regard to the issue of

208 See the Respondent’s Statement of Rejoinder, July 15, 2011, paras. 129.
209 See the Respondent’s Statement of Defence, March 14, 2011, paras. 127 to 129, and 137 to 138; see the Claimants’ Reply, May 16, 2011, at Section V.A; see the Respondent’s Statement of Rejoinder, July 15, 2011, para. 131.
210 As per Article 143 of the ICC.
211 Under Jordanian law the standard of gross negligence is established by applying an objective test according to which the conduct of the defendant is assessed against that of a reasonable and experienced person under the same circumstances. See CLA-10, Court of Cassation, Case No. 7/7/2005 and CLA-11, Court of Cassation, Case No. 3/11/2005.
212 See Respondent’s Statement of Defence, March 14, 2011, paras. 95 and 96.
213 Id. paras. 123 and 124.
whether the Claimants can bring a claim in tort when there is a contractual relationship between the Parties.

238. In view of the above the Tribunal dismisses the Claimants’ claims that the conditions of Clause 2.2 of the IA were not fulfilled by the designated deadline due to the Respondent’s acts, fraud, misrepresentations, omissions and gross negligence and that the Respondent is liable to the Claimants for its acts, fraud, misrepresentations, omissions and gross negligence.

VII. COUNTERCLAIM: THE VALIDITY OF THE TERMINATION.

239. The Tribunal will now turn to the Respondent’s Counterclaim in connection with the Government’s termination of the IA.

240. The Company argues that the termination was invalid firstly because the Minister of Transport should have agreed to the Financing Documents as submitted. As he did not, the Company adds, the Claimants should at least have granted an extension of the deadline of March 23, if only by a few days, to allow the disputed issues to be sorted out. Moreover, the Government acted in a deceptive manner in not even giving notice on March 23 that it would consider the IA terminated at the end of the day if no agreement was reached, thereby demonstrating its true intention of breaking up relations with the Company and turning to the second bidder; had the Government warned of its intention, the Company states it would have complied with the request and removed the conflicts in the Documents.

241. Firstly, the Tribunal notes that the Respondent, in its written submissions, makes allegations of bad faith on the part of the Claimants for the termination of the IA, highlighting that the Claimants themselves did not comply with several of the conditions precedent of Clause 2.2(b) of the IA.
242. Principally, the Respondent alleges that (i) the Claimants failed to deliver vacant and unobstructed possession of the Land and the JHR Land to the Respondent\textsuperscript{214}, and (ii) that the Claimants failed to produce evidence of the publication of the relevant Resolution of the Council of Ministers in the Official Gazette granting the Company and its Contractors the exemptions and privileges specified in Part A of Schedule \textsuperscript{215}.

243. The Tribunal finds no evidence indicating that the Claimants acted unlawfully in the course of their interactions with the Respondent. In no way did the pressure exerted and various requirements imposed on the Respondent during the negotiations ever amount to illegal or unlawful behaviour. Similarly, the Claimants appear to have consistently engaged with the Respondent in good faith: from its selection of the Consortium as the winning bidder to the Respondent's submission of the finalized Financing Documents, nothing in the record suggests any acrimony or hostility among the Parties throughout this period. Mr. Siddiqui also testified at the hearing that "at no point in time" during the negotiations over the IA and the Addendum had he "had a feeling that there is a lack of trust or a lack of faith" and that he "didn't have any doubt that there was any problem of trust or (sic) faith."\textsuperscript{216}

244. In addition the Tribunal notes that the Respondent's allegations with regard to the Claimants' compliance with Clause 2.2(b) of the IA are not relevant in order to determine whether the Claimants acted unlawfully, in breach of contract and in bad faith when they considered the IA as terminated on March 24, 2008. The Tribunal is satisfied that any acts or failure on the part of the Claimants to perform the conditions precedent of Clause 2.2(b) of the IA did not affect the Respondent's failure to fulfill the conditions precedent of Clause 2.2(a) nor the

\textsuperscript{214} See the Respondent's Counterclaim, March 14, 2011, paras. 68-69 and the Company's Reply to the Claimants' Statement of Defence to the Counterclaim, July 15, 2011, paras. 4-8.

\textsuperscript{215} See the Company's Reply to the Claimants' Statement of Defence to the Counterclaim, July 15, 2011, para. 5 and the Respondent's Statement of Rejoinder, July 15, 2011, para. 114. Counsel for the Claimants during the hearing identified a possible third condition precedent (Clause 2.2(3)(ii)) allegedly not complied with by the Claimants stating: "And finally, just to be on the safe side, it is unclear as to if they are alleging that we failed to produce a comfort letter from the Ministry of Finance in a timely fashion under clause 2.2h, as we will take that as well...." See Hearing Transcript, October 13, 2011, pp. 67, Mr. Ugera.

\textsuperscript{216} See Hearing Transcript, October 14, 2011, pp. 99, Mr. Siddiqui.
Claimants' right to execute the Proposal Security under Clause 2.4.2 of the IA. Moreover, the Tribunal notes that the Respondent and the lenders had come to the meeting of March 23, 2008 prepared to sign the Documents, and financial close would have been achieved but for the Respondent's failure to fulfill the condition provided in Clause 2.2(b)(iii). Therefore, it is clear from the record that on March 23, 2008 the Respondent and the lenders considered that the Claimants had complied with Clause 2.2(b) for all practical purposes. For the above mentioned reasons the Tribunal does not consider it necessary to go into the merits of Clause 2.2(b) of the IA.

245. Secondly, the Tribunal has already found in Section VI.A.2 and 5 above that the Claimants' objections to a definition of the term 'Project' in the PTLA different from that of the IA were reasonable and were justified, and therefore it was legitimate for the Claimants to consider the IA terminated under Clause 2.4.1 of the IA and Jordanian law. Accordingly, the Claimants were entitled to execute the Proposal Security under Clause 2.4.2 of the IA.

246. Thirdly, turning to the Company’s grievances as to the way the Government acted before and when declaring the IA terminated, the Tribunal finds that the Minister of Transport was not in a position to waive his objections on March 23 (A) and that it was not reasonable for the Company to believe that an extension would be granted on March 23, 2008 (B). As to the Company’s assertion that it would have agreed to amend the Documents if it had been expressly warned that day that the Government would regard the IA as terminated, the assertion finds no support in the record (C).

A. **The Minister of Transport Was Not in a Position to Waive His Objections on March 23.**

247. Given the deadlock that existed regarding the definition of the term 'Project' on the eve of March 23, the date of the closing, only two avenues were open on that day: either the Documents would be amended, as the Government requested, or the Government would agree to proceed with the Documents as they were.
248. The Tribunal finds that, given the nature of the conflict between the Financing Documents and the IA, the Minister of Transport could not possibly agree to the latter course and that it was unrealistic – or wishful thinking – for the Company to expect him to do so on the closing date. The Minister could hardly be expected to suddenly waive objections to an inconsistency that had been raised by the Claimants immediately upon becoming aware of it, namely three months before. The Company, for its part, in maintaining its own stance until the end of the meeting on 23 March, failed to take into account that the Government’s objections were not frivolous. Contrary to what it stated before the Tribunal, the Company was fully aware before March 23 – notably by the 18 March Comments on the draft Financing Documents and the exchanges that followed in the short time before the closing date – that the Government was not willing to agree to the Documents if the inconsistencies it had pointed out were not eliminated. According to testimony, the Company suggested that the Parties should sign the Documents as they were and then go to arbitration to solve their differences. A government official could hardly be expected to ratify Documents under such terms, not to mention that this would necessarily have put the Project on hold pending litigation that could be protracted. Indeed, the leaders themselves declared that they would not sign the Documents if there remained a difference between the Government and the Company.\footnote{As the Minister insisted before the Tribunal, had the Company agreed to amend the documents, there was no way he could have declined signing them (See Hearing Transcript, October 14, 2011, pp. 19, 23, 28, 58).} Even further, it is hard to imagine the Minister of Transport reporting to the Cabinet two days later that he had approved the Documents notwithstanding his repeated and ongoing objections to their content, subject to further discussion and, if necessary, litigation in order to ensure that the Documents as approved did not affect the GOJ’s rights and obligations.

249. Under those circumstances, the Company was faced on March 23, 2008, with the alternative of either eliminating the inconsistency that the Government had already notified it deemed unacceptable – even under protest and reserving its rights, if it wished – in order to save its position; or risk termination of the IA.\footnote{See Hearing Transcript, October 14, 2011, Mr. A. Botuyeh’s cross-examination, pp. 19, 30.}
In choosing to remain uncompromising after being given the opportunity to change its stance during the day, the Company took a risk, which materialised as the Government declared termination. The Company argues, however, that in doing so the Government acted hastily and in bad faith.

B. The Claimants Had No Obligation to Extend the Deadline.

250. The Company complains that the Government acted in a brutal and excessive manner on March 23-24 in declaring the IA terminated rather than granting at least a short extension of the March 23 deadline in order to allow further discussion on the relevance of the inconsistency that it deemed existed. The lending banks had sent a letter on March 19 asking the Minister of Transport to postpone the signing by one week but there was no response.

251. Clause 23.1 of the IA reads: "Variations in Writing. This Agreement may not be amended, supplemented, or otherwise modified, other than pursuant to an instrument in writing duly executed by the Parties." The provision is devoid of ambiguity. Like that of Clause 2.4.1 discussed earlier, it does not call for interpretation and, as a matter of principle, the Tribunal is no more entitled to set it aside than it was to disregard Clause 2.4.1. The fact is that the Parties did not agree in writing to an extension of the IA, in contrast to what happened in February 2008 when the Respondent requested an extension that was granted by the Minister of Transport. By March 23, 2008 there was a clear impasse between the Parties with regard to the conflict existing between the Financing Documents and the IA, which explains the fact that no agreement was signed between the Parties to extend the deadline of March 23. Under these circumstances the Claimants had no obligation to grant an extension.

252. Moreover, the two Ministers involved testified before the Tribunal that the Project was widely publicised and its progress closely followed by public opinion, a great number of people having being displaced to make room for the
construction of the railway. The need to respect the deadline was recalled to the Company on March 18 when the LTRC Director wrote to Mr. Siddiqui: "the signing of the Financing Documents must be made no later than March 22, 2008, as agreed by virtue of the extension granted to you in accordance with the Minister of Transport letter No. 4/67/2190 dated February 23, 2008". The conclusion follows that the Company could not reasonably expect that an extension would be granted on March 23.

253. With a view to mitigating the consequences for the Company of the strict enforcement of the deadline by the Government, the Company called the Tribunal's attention to the possibility, under Jordanian law, of introducing equitable considerations in the application of legal rules. The Company relied on two provisions of the JCC. The Tribunal, however, finds that the conditions for their application are not met in the present case.

254. The first provision is Article 2 JCC, which deals with the application of its rules generally. Paragraph 3 does allow a Court applying Jordanian law, in some circumstances, to resort to equity. But a plain reading of Article 2 shows that paragraph 3 is an ancillary provision to those of the first two paragraphs, rendering resort to equity a last recourse device where there is a gap in the law in the largest sense. This can only happen "if the Court shall find no provision in this Code" not in Moslem jurisprudence (para. 2). To the contrary, the basic principle under Article 2 is that "where there is a provision, there shall be no scope for discretion" by the Court (para. 1). There is no question in the present case that adequate JCC provisions apply to the situation under discussion, as the arguments exchanged between the Parties amply show.

255. The second provision put forward by the Company is Article 100, para. 2, JCC according to which:

"If a dispute concerning the matters not agreed upon [between the parties to a contract] arises, the Court shall determine them in accordance with the nature of the transaction and the provisions of the law, custom and equity".

See Hearing Transcript, October 14, 2011, Mr. Batayneh's redirect examination, and Mr. Haddid's cross-examination, pp. 36, 50 respectively.
256. Under this provision the Tribunal could arguably find that a disagreement between the Company and the Government regarding the materiality of a conflict between the Financing Documents and the IA was not contemplated by the IA; and, consequently, the Tribunal could arguably find an implied term in the IA that the complaining party (the Government) should allow some time for the matters in dispute to be settled. The finding of an implied term by a Court, possibly based on equity, under Article 100, para. 2, however, is only possible, by the terms of the provision:

“If the two parties agree to all the basic matters in the contract and leave matters of detail to be agreed upon thereafter and if they do not stipulate that the contract shall not be deemed made when no agreement is reached on the said matters the contract shall be deemed made.”

257. Such is not the situation here: the Parties did not leave the matter of the consequence of a conflict between the Documents and the IA on the signing date as an outstanding question in the IA; far from that, they stipulated that, if the stipulated condition was not met, the contract “shall terminate”. It would be an outright disregard of the plain terms of Clause 2 of the IA to find that the matter was not covered and to purport to fill a gap by rules based on equity. As to the requirement of notice and Court intervention, they certainly cannot be seen as “matters of detail” and – as the Tribunal already noted – the fact that they were not deemed so by the Parties is attested to by Part 18 of the IA which stipulated a detailed procedure to sort out differences, in a different context.

C. The Absence of Notice of Termination.

258. Assuming that there was no requirement of a formal notice of termination, the Company also blames the Government for not conveying its position on March 23 that it would consider the IA terminated at the end of the day if the Company did not agree to amend the Documents. The Company “strongly denies” that it or the lenders “were at any time given even the slightest hint that if modifications, as desired by the Claimants, were not incorporated into the Initial Financing Documents the IA would be terminated, let alone deemed terminated
automatically". By failing to state its intention, the Company argues, the Government left the impression on the evening of March 23 that there was room for further discussion; as a consequence, the letter of termination handed out the following day came as a complete surprise to the Company. According to the Company, had the Claimants expressed that they would consider the IA terminated at the end of the day on March 23, the Documents would have been modified. Actually, the Company argues, the Parties did part on March 23, 2008, with the understanding that discussions would resume the following day. The Company further contends that the Government concealed its intentions purposely, in order to ensure that the deadline passed, so that it could turn to the second bidder to carry out the Project.

259. Firstly, as already found, Clause 2.4.1 of the IA, providing that the Agreement "shall terminate" in case of a condition not being fulfilled does not include a requirement for notice, formal or informal. The Company's argument, like the previous one, is an implicit call to the Tribunal to inject equitable considerations into its decision. As a matter of law, it calls for the same answer. As to the facts, while it can be said that the Government officials could have been explicit on March 23 that this was the final opportunity for the Company to agree to amend the Documents, the declaration of termination could not come as a surprise to the Company (a) and the Company gave no hint, for its part, that it would be ready to compromise (b).

260. a) The Government notified the Company in no equivocal terms five days before the deadline that the Documents should be amended. As already quoted, commenting on March 18 on the Revised Initial Financing Documents submitted by the Claimants on March 12, the LTRC wrote under the title “Comment / Action”:

"The definition of the "Project" includes the other commercial activities. This is not part of the project as defined under the IA and the financing of the project is required to implement the project as defined in the IA."

261. That comment was followed by:

261 See the Respondent's Statement of Defence, March 14, 2011, para. 75; also para. 7.
"Amendment should be dated to this definition in order to guarantee that Financing is not directed to anything else but the project as defined in the Id." (underlining added)

262. The Tribunal finds that these communications, coming a few days before the closing and reiterating earlier statements, were sufficient to convey that the Government was not prepared to sign the Documents as they were.

263. b) At no time before, on or even after the date of March 23 did the Company itself give any indication that it was, or would be, prepared to amend the Documents. On March 22, it adamantly reiterated in writing its position that the Documents were in conformity with the IA. On March 23, it did not hint that it was prepared to amend the Documents with regard to the Project conflict in order to avoid termination at the end of the day. After the letter of termination was handed to it on March 24, the Company wrote to the Minister the following day complaining of the "purported termination" of the IA and stating that the Company had "rendered full and complete compliance with the terms and conditions of the IA." Such words can hardly be read as evidencing willingness to compromise; indeed, the March 25, 2008, letter just quoted was considered a dispute notice initiating the DAB procedure. The Tribunal further notes that a decision by the Company to amend the Financing Documents in order to bring the definition of the Project in line with that of the IA by the deletion of commercial activities was not so much in its hands as those of the lending banks at the request of which the broader definition had been inserted. Not only had the banks declined earlier to make those amendments but persuading the various entities involved to change their minds would have required more than a few days.

264. Secondly, the Company argues that it was understood between the Parties at the end of the day of March 23, 2008, that they would meet again the following day

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222 See Mr. Qureshi's letter to ITRC, REK-23.
223 See Hearing Transcript, October 14, 2011, pp. 29, Mr. A. Batsheva.
225 When advised on March 19, 2008, of the Government's objections, the lending banks requested that the date of the signing of documents be postponed to March 31, 2008 (See Hearing Transcript, October 13, 2011, pp. 30).
to further discuss the outstanding issues in order to reach an agreement. The Government denies such understanding. The Tribunal notes that even with the knowledge that key issues remained outstanding between the Parties, the Respondent left the March 23 meeting with a mere "understanding" and "presumption" that the Financing Documents were to be signed the next day. The Respondent did not seek, at a minimum, an oral assurance that the Parties would be permitted to sign the Financing Documents after March 23. The Company further relies on an e-mail sent in the evening by Mr. Jawad Zeidat, legal Counsel to the Minister of Transport, to Mr. Qureshi, legal Counsel to the Company. The e-mail was accompanying documents that the GOJ was to deliver in order to satisfy its own conditions under the IA. It ended with the words "Thank you and see you tomorrow inshallah". The Company sees the document not only as confirming the agreement to postpone the meeting to the next day but as satisfying the requirement that an amendment to the deadline should be in writing. The Government denies that the e-mail could have such a meaning, its Counsel having no authority to speak on the Minister's or his office’s behalf and never having had the responsibility of arranging meetings.

The Minister testified that all he could do after the meeting was to inform the Steering Committee of the situation, which he did, while the Company still could have contacted him later in the evening to advise that it had eventually agreed to sign the Documents. As Mr. Hadidi, then Minister of Trade and a member of the Steering Committee, put it: "We waited to the next day, nothing happened so in effect the contract was terminated".

265. Thirdly, the Company asserts that the Government’s "deceptive conduct" was in fact meant to entrap the Company because the Government had made the decision to get rid of it and turn to the second bidder; the inconsistencies in the

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226 See Hearing Transcript, October 14, 2011, Mr. Batayneh’s cross-examination, pp. 20.
227 See Hearing Transcript, October 14, 2011, pp. 79, Mr. Elbidquiri: "Now how do I presume that it's contrary to the fact that things were coming to a close? ... At the end of the meeting sir, our understanding was that things are still going on, so that is why probably we've been called again tomorrow ... ".
228 See RE-19.
229 See Hearing Transcript, October 14, 2011, pp. 20, 32. The Minister explained the words used as those addressed to a person with whom the underwriter had had daily relationships during the last months.
230 See Hearing Transcript, October 14, 2011, pp. 31, 38.
231 See Hearing Transcript, October 14, 2011, pp. 50.
Documents found by the Government were mere pretexts to achieve that end.\textsuperscript{232} The record, however, does not support the allegation. The Government first agreed to negotiate the Addendum to the IA in order to facilitate the Company's efforts to secure financing. When the Company later requested an extension of the deadline for securing the financing of the Project only one month before March 23, the Government granted the request; it would have been easy for the Government at the time to reject it and to declare the IA terminated on the date initially set for the securing of bank financing, thereby saving one month (if, as the Company contends, the Government had the intention of replacing it by the second bidder). As to the documents submitted by the Company reporting negotiations between the Government and the second bidder, they are dated after March 25\textsuperscript{233}. The Minister testifying before the Tribunal characterised the failure of the Project as "a black spot in the achievements of the Government." The Tribunal concludes that the evidence does not support the assertion that the Government was primarily minded to put an end to its relationship with the Company.

266. The Tribunal concludes that the Government insisted on the importance that the signing should take place on the stipulated date (which it had agreed to postpone once upon the request of the Company) and expressly invited the Company to amend the Documents before March 23; but the Company expressly declined to do so. The Minister was not in a position on March 23 to waive the Government's objections nor had the Claimants an obligation to extend the deadline. A full and complete fulfilment of the principle of good faith and fair dealing would arguably have required the Minister to expressly represent to the Company on March 23 that the IA would be regarded as terminated at the end of the day. Nevertheless, the Company did not seek at a minimum an oral assurance that the Parties would be permitted to sign after March 23 nor sought assurance from the GOJ that negotiations between the Parties were still going on after

\textsuperscript{232} E.g. the Respondent's Rejoinder, July 15, 211, para. 66: "the Machiavellian strategy adopted by the Claimants evidences their bad faith in that the objections raised by the Claimants in relation to the Initial Financing Documents clearly lacked any contractual justification...".

\textsuperscript{233} See REJ-4.

\textsuperscript{234} See Hearing Transcript, October 14, 2011, pp. 37. Mr. A. Hadidi added that it was in the interest of the owners of all three on the Government's side to have the Project move forward (See Hearing Transcript, October 16, 2011, pp. 69).
March 23, and the Company gave no indication that it was prepared to amend the Documents with regard to the Project conflict rather than risk termination of the IA; in fact, it later reaffirmed that it did not consider that it had an obligation to do so. Under these circumstances, Clause 2.4.1 of the IA, in conformity with Jordanian law, authorised the Government to declare the IA terminated, without need for notice or Court intervention. Therefore there was no breach of contract, bad faith, abuse of right, unreasonable or unlawful conduct by the GOJ when it decided to declare the IA terminated. The Tribunal further finds that there was no bad faith or deceitful conduct on the part of the GOJ for not giving an express indication to the Company that the IA would be terminated at the end of the day.

267. In view of all the above the Tribunal dismisses the Respondent’s counterclaims that the definition of the term Project as contained in the PT LA is not in conflict with the IA, that the termination of the IA by the GOJ was in violation of Applicable Law and contractual terms and conditions, that the GOJ/LTRC did not act fairly, equitably and in good faith in placing reliance upon the alleged inconsistency between the IA and the Initial Financing Documents as sufficient legal justification for termination of the IA and that the LTRC had no contractual justification for the execution of the Proposal Security furnished by the IDC Consortium.

VIII. DAMAGES.

268. For the reasons explained above the Tribunal dismisses the Claimants’ requests for declarations that the conditions of Clause 2.2 of the IA were not fulfilled by the designated deadline due to the Respondent’s acts, fraud, misrepresentations, omissions and gross negligence and that the Respondent is liable for its acts, fraud, misrepresentations, omissions and gross negligence (see Section VI.B). The non-fulfilment by the Respondent of condition 2.2(a)(iii) of the IA by March 23, 2008 has already been compensated by the execution of the Proposal Security by Claimants in April 2008. Therefore, the Claimants’ damages’ claim is dismissed.
269. The Tribunal dismisses the Respondent’s counterclaims that the termination of the IA by the GOJ was in violation of Applicable Law and contractual terms and conditions (Section VI.A.5 and VII above) and the GOJ/ITRC did not act fairly, equitably and in good faith in placing reliance upon the alleged inconsistency between the IA and the Initial Financing Documents as sufficient legal justification for termination of the IA (Section VII above). Therefore there is no need to award damages in favour of the Respondent and the Respondent’s counterclaims for damages are dismissed.

270. Given that the Tribunal is not awarding damages, there is no basis for any award of interest and therefore the Claimants’ interest claim and the Respondent’s interest counterclaim are dismissed.
X. AWARD.–

279. In light of all of the above and on the basis of both the submissions of the Parties in this arbitration and Section C. List of issues to be determined, of the Terms of Reference dated November 2, 2010, signed by the Parties and the Arbitral Tribunal, the Tribunal:

- With regard to its jurisdiction:

1. declares that it has jurisdiction to give a final and binding decision over the merits of all the civil claims and counterclaims alleged by the Parties in the present arbitration and that these claims and counterclaims are admissible;

- With regard to the Claimants’ claims:
2. declares that the IA and the Addendum terminated, irremediably lapsed, and were no longer enforceable by midnight of March 23, 2008 when the Respondent failed to fulfill the condition precedent in Clause 2.2(iii) (iii) of the IA by the designated deadline in accordance with Clause 2.4.1 of the IA;

3. declares that the Claimants did not breach the IA or its Addendum;

4. declares that the Claimants were entitled to execute the Proposal Security;

5. declares that the Claimants' conduct was lawful;

6. declares that the Claimants are not liable to the Respondent for any damages;

7. dismisses all other claims of the Claimants;

   - With regard to the Respondent's counterclaims:

8. declares that the description of Founder Shareholders, as set out in the Founder Shareholders' Support Agreement, was not in conflict with the definition of Initial Shareholders as set out in the IA; and

9. dismisses all other counterclaims of the Respondent;

   - With regard to the Parties' claims on costs:

10. dismisses the Claimants' claim on costs, except for the part that refers to the costs of the ICSID proceedings, and the Respondent's counterclaim on costs;

11. decides that the Respondent shall be responsible for the ICSID administrative costs and legal fees and expenses as it has increased the cost and length of time of the proceedings by filing for a duplicative ICSID arbitration after the ICC arbitration had commenced, subsequently withdrawing from the ICSID arbitration; accordingly, the Respondent shall reimburse the Claimants


96
12. decides that each Party shall bear the costs and legal expenses incurred by it in this ICC arbitration and the administrative costs and arbitrators' fees and expenses fixed by the Court shall be borne equally between the Parties.

Seat of arbitration: Zurich, Switzerland.

Date: 2nd March 2012

Signature:

[Signatures]

Prof. Bernard Audit
Arbitrator

Dr. Stanimir A. Alexandrov
Arbitrator

Prof. Bernardo Cremades
Chairman