INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

RASIA FZE AND JOSEPH K. BORKOWSKI

v.

REPUBLIC OF ARMENIA

(ICSID CASE NO. ARB/18/28)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated January 20, 2023.

Meg Kinnear
Secretary-General

Washington, D.C., January 20, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RASIA FZE AND JOSEPH K. BORKOWSKI

Claimants

and

REPUBLIC OF ARMENIA

Respondent

ICSID Case No. ARB/18/28

AWARD

Members of the Tribunal
Ms. Jean E. Kalicki, President
Mr. John Beechey CBE
Mr. J. Christopher Thomas KC

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the Tribunal
Dr. Joel Dahlquist

Date of dispatch to the Parties: 20 January 2023

REPRESENTATION OF THE PARTIES

Representing Rasia FZE and Joseph K. Borkowski:

Mr. Mark McNeil
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United States of America
and
Mr. Varoujan Avedikian
Mr. Martin Stepanyan
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Republic of Armenia

Representing the Republic of Armenia:

Mr. Yeghishe Kirakosyan
Ms. Kristine Khanazadyan
Ms. Mariam Tarverdyan
Mr. Liparit Drmeyan
Ms. Parandzem Mikayelyan
Mr. Alan Grigorian
Office of the Representative on International Legal Matters
Prime Minister's Office of the Republic of Armenia
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Mr Jacob Kaplan
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and
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Russia

*(at Skadden, Arps, Slate, Meagher & Flom LLP in New York from September 2022)

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Aabar	Aabar Investments PJSC
Aabar Term Sheet or Term Sheet	A term sheet prepared by Mr. Tappendorf for Aabar's purchase of 100% of the shares of Rasia, dated 18 December 2014
ADB	Asian Development Bank
April Hearing	Second part of the Hearing on Jurisdiction and the Merits, held 26-27 April 2021 by video conference
April Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the April hearing
Arabtec	Arabtec Holding PJSC, a subsidiary of Aabar
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment, signed on 23 September 1992 and entered into force on 29 March 1996
C-[#]	Claimants' Exhibit
CCCC	China Communications Construction Company Ltd.
CCECC	China Civil Engineering Construction Corporation Ltd.
China EximBank	Export-Import Bank of China
CL-[#]	Claimants' Legal Authority
Claimants	Rasia FZE and Mr. Joseph K. Borkowski
Cl. First PHB	Claimants' First Post-Hearing Brief, 19 April 2021
Cl. Mem. or Memorial	Claimants' Memorial on the Merits, 7 June 2019

Cl. Second PHB	Claimants' Second Post-Hearing Brief, 28 June 2021
Cl. Reply or Reply	Claimants' Reply on the Merits, 24 July 2020
Concessions or Concession Agreements	2012 Railway and Road Concessions
CSCEC	China State Construction Engineering Corporation Ltd.
EDB	European Development Bank
EPC	Engineering, Procurement and Construction
February Hearing	First part of the Hearing on Jurisdiction and the Merits, held 16-20 February 2021 by video conference
February Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the February hearing
FIL	Law of the Republic of Armenia on Foreign Investments of 31 July 1994
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial	Claimants' Memorial on the Merits, 7 June 2019
NSRC	The North-South Armenian Road Corridor
R-[#]	Respondent's Exhibit
Railway Concession	2012 Southern Armenia Railway Concession Agreement, 28 July 2012
Rasia-CCCC Framework Agreement	Framework Agreement between Rasia and China Communications Construction Company Ltd., dated 30 September 2012
Resp. Counter-Mem. or Counter-Memorial	Respondent's Counter-Memorial on the Merits, 9 December 2019
Resp. Rej. or Rejoinder	Respondent's Rejoinder on the Merits, 28 December 2020

Resp. First PHB	Respondent's First Post-Hearing Brief, 19 April 2021
Resp. Second PHB	Respondent's Second Post-Hearing Brief, 28 June 2021
RL-[#]	Respondent's Legal Authority
Road Concession	2012 Southern Armenia High Speed Road Concession Agreement, 28 July 2012
SCR	South Caucasus Railway Closed Joint-Stock Company
Tribunal	Arbitral tribunal constituted on 23 January 2019
VCLT	Vienna Convention on the Law of Treaties (1969)

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of:

   (i) the 2012 Southern Armenia Railway Concession Agreement, 28 July 2012 (the "**Railway Concession**");[1]

   (ii) the 2012 Southern Armenia High Speed Road Concession Agreement, 28 July 2012 (the "**Road Concession**");[2]

   (iii) the Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment, which was signed on 23 September 1992 and entered into force on 29 March 1996 (the "**BIT**");[3] and

   (iv) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimants are Rasia FZE ("**Rasia**"), a company incorporated in the United Arab Emirates, and Mr. Joseph Borkowski ("**Mr. Borkowski**"), a natural person having the nationality of the United States of America (together, the "**Claimants**").

3. The Respondent is the Republic of Armenia ("**Armenia**" or the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. Rasia submits a dispute with Armenia under the Railway Concession and Road Concession (together the "**Concessions**"), which contain the following identical provisions at Article XVII, Section 66:

[1] C-1, Railway Concession.
[2] C-2, Road Concession.
[3] CLA-1, BIT.

> 66.1 The Parties shall first attempt amicably to settle all disputes arising out of or relating to this Agreement.
>
> 66.2 Should the Parties not be able to do so within 30 (thirty) days of the declaration of a dispute, then they shall refer the matter for resolution to the Minister of Transportation and Communication of the Republic of Armenia and Chief Executive Officer of the Concessionaire.
>
> 66.3 Should the Minister of Transportation and Communications of the Republic of Armenia and the Chief Executive Officer of the Concessionaire not be able to resolve the dispute within 30 (thirty) days, the Government and the Concessionaire stipulate that the transaction to which this Agreement relates is an investment and hereby consent to submit to the International Centre for Settlement of Investment Disputes ("ICSID") any dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Arbitration") ....[4]

6. Mr. Borkowski submits a dispute with Armenia under Art. VII of the BIT, which provides as follows:

> 1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
>
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
>
> (a) to the courts or administrative tribunals of the Party that in a Party to the dispute; or
>
> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
>
> (c) in accordance with the terms of paragraph 3.
>
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or

[4] C-1, Railway Concession, Article XVII, Section 66; C-2, Road Concession, Article XVII, Section 66.

company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a Party to such Convention; or

(ii) to the Additional Facility of the Center, if the Center is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

II. PROCEDURAL HISTORY

7. On 24 July 2018, ICSID received a request for arbitration dated 19 July 2018 from Rasia and Mr. Borkowski against Armenia (the "**Request for Arbitration**"), along with exhibits C-1 through C-60 and legal authority CL-1.

8. On 3 August 2018, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal

as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

9. By letters of 31 July 2018 (Claimants), 28 August 2018 (Respondent), 6 September 2018 (Claimants), 13 September 2018 (Respondent), 24 September 2018 (Respondent) and 25 September 2018 (Claimants), in accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed that Tribunal would consist of three arbitrators, to be appointed as follows:

> The Claimants shall appoint an arbitrator as soon as possible and notify the Respondent of the appointment.
>
> The Respondent shall appoint its arbitrator and notify the Claimants of the appointment within 45 calendar days of the Claimants notifying the Respondent of the appointment of their arbitrator. In the event the Respondent fails to appoint an arbitrator within 45 calendar days of receipt of [ICSID's letter of September 20, 2018], the Claimants may request the Chairman of the Administrative Council of ICSID to make an appointment on the Respondent's behalf. The Claimants will entertain any reasonable request for an extension of time before making such a request.
>
> Within 30 calendar days of the appointment of the Respondent's arbitrator, the two party-appointed arbitrators shall attempt to agree on the appointment of a third arbitrator to serve as the President of the Tribunal, with each party-appointed arbitrator consulting with the party having made the appointment; and
>
> In the absence of agreement between the two party-appointed arbitrators within 30 calendar days as described in paragraph (3) above (or such other period agreed by the parties), the parties shall, through the Secretary-General, jointly request in writing that the Chairman of the Administrative Council designate an arbitrator to be the President of the Tribunal.

10. By letter of 6 September 2018, the Claimants appointed Mr. John Beechey CBE, a British national, as arbitrator. On 28 September 2018, after the Parties had confirmed their agreement on the method of constitution of the Tribunal, ICSID sought the acceptance of Mr. Beechey's appointment. By letter of 12 October 2018, ICSID informed the Parties that Mr. Beechey had accepted his appointment.

11. By letter of 18 October 2018 (received by the ICSID Secretariat on 22 October 2018), the Respondent requested an extension of time to appoint its arbitrator. By letter of 22 October 2018, ICSID invited the Parties to communicate any agreement on such extension made pursuant to paragraph (2) of the Parties' agreement on the method of constitution of the Tribunal. The Parties did not revert regarding any agreement, however, the Claimants did not object to an extension.

12. By letter of 5 November 2018, the Respondent appointed Mr. J. Christopher Thomas KC, a national of Canada, as arbitrator. By letter of 12 November 2018, ICSID informed the Parties that Mr. Thomas had accepted his appointment and that, in accordance with the Parties' agreed method, the co-arbitrators would proceed with the appointment of the President of the Tribunal.

13. By email of 26 December 2018, Armenia informed ICSID that it was revoking the power of attorney previously granted to Cleary Gottlieb Steen & Hamilton LLP and appointing Baker & McKenzie LLP as counsel. An updated power of attorney was provided.

14. By email of 20 January 2019, the co-arbitrators informed the Parties of their appointment of Ms. Jean E. Kalicki, a national of the United States, as President of the Tribunal. On 22 January 2019, ICSID sought Ms. Kalicki's acceptance of her appointment.

15. On 23 January 2019, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the Secretary-General of ICSID notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Milanka Kostadinova, ICSID Senior Legal Adviser, was designated to serve as Secretary of the Tribunal.

16. The Tribunal is thus composed of Ms. Jean E. Kalicki, President, appointed by her co-arbitrators; Mr. John Beechey, appointed by the Claimants; and Mr. J. Christopher Thomas, appointed by the Respondent.

17. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 4 March 2019, by teleconference.

18. Following the first session, on 13 March 2019, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules are those in effect from 10 April 2006, that the procedural language is English, and that the place of proceeding is Frankfurt, Germany. Procedural Order No. 1 also set out the agreed schedule for the proceedings.

19. In accordance with the agreed procedural calendar, on 7 June 2019, the Claimants filed their Memorial on the Merits (the "**Memorial**") with the expert report of Kiran Sequeira, including appendices A through E and exhibits KS-1 through KS-189; the witness statement of Andrew Thornber; the witness statement of Chad Tappendorf with exhibits CT-1 through CT-10; the

witness statement of Joseph Borkowski with exhibits JB-1 through JB-4; exhibits C-61 through C-222; and legal authorities CL-2 through CL-70.

20. The procedural calendar contemplated that the Respondent file any request for the bifurcation of the proceeding relating to issues of jurisdiction and admissibility by 15 July 2019. On 15 July 2019, the Respondent confirmed that it would not submit such a request.

21. By letter of 2 December 2019, the Claimants informed the Tribunal that Quinn Emanuel Urquhart & Sullivan LLP would replace Sherman & Sterling LLP as counsel of record. By letter of 9 December 2019, ICSID transmitted additional disclosures from Ms. Kalicki and Mr. Beechey based on the Claimants' notification of new counsel.

22. On 9 December 2019, the Respondent filed its Counter-Memorial on the Merits (the "**Resp. Counter-Mem.**") with the expert report of John H Winner with appendices 1 through 4 and exhibits JW-1 through JW-59; the witness statement of Artur Arakelyan with exhibits AA-1 through AA-7; exhibits R-1 through R-63; and legal authorities RL-1 through RL-58.

23. By letter of 13 January 2020, the Tribunal asked the Parties to confirm, by 21 January 2020, if they would consent to the appointment of Dr. Joel Dahlquist as Assistant to the Tribunal. The Parties confirmed their agreement to the appointment of Dr. Dahlquist by emails of 24 January 2020 (Claimants) and 25 January 2020 (Respondent). By email of January 28, 2020, ICSID transmitted Dr. Dahlquist's signed declaration.

24. Following exchanges between the Parties concerning their respective requests for production of documents, the Parties' completed schedules were transmitted to the Tribunal on 17 February 2020.

25. On 26 February 2020, the Tribunal issued Procedural Order No. 2 concerning the production of documents. Annex A to the Order set out the Tribunal's decisions on the Claimants' requests and Annex B set out the decisions on the Respondent's requests.

26. By letter of 31 March 2020, the Parties informed the Tribunal that, due to the COVID-19 pandemic, they had agreed to extend the time limits for document production and their remaining submissions. Additionally, the Claimants requested the Tribunal to (i) order the Respondent to comply with Procedural Order No. 2 with regard to the organization of document production; and (ii) approve the Claimants' appointment of Dr. Aram Orbelyan, a former Deputy Minister of Justice of the Republic of Armenia, as co-counsel.

27. By letter of 1 April 2020, the Tribunal approved the revised calendar and invited the Respondent's observations on the Claimants' two applications by 8 April 2020.

28. By letter of 8 April 2020, the Respondent filed its observations, objecting to the Claimants' applications. In response to the Tribunal's invitation, on 16 April 2020, the Claimants submitted their reply. On 17 April 2020, the Respondent sought the Tribunal's permission to submit to the Tribunal only an allegedly privileged document relevant to the application concerning Dr. Orbelyan. By email of 20 April 2020, the Claimants stated that they were content for the Tribunal to review the document proposed by the Respondent to determine its relevance to the case and whether it properly was subject to privilege.

29. Based on the Claimants' consent, by letter of 21 April 2020, the Tribunal invited the Respondent to provide the proposed document to the Tribunal for *in camera* review in connection with its privilege claims. On 22 April 2020, the Respondent provided the document, a 29 December 2011 email from Dr. Orbelyan, in English and Armenian, and indicated the portions that it contended were subject to privilege.

30. By letter of 23 April 2020, the Tribunal upheld the claim to privilege on certain portions of the document and directed the Respondent to produce it (redacted for the privileged portions) to the Claimants. The redacted document was produced to the Claimants on the same date.

31. On 27 April 2020, the Tribunal issued Procedural Order No. 3, denying the Claimants' two applications of 16 April 2020 and deferring to a later stage in the proceeding the Respondent's request for a decision on costs concerning the Claimants' applications.

32. By letter of 19 May 2020, the Claimants requested that the Tribunal order the Respondent to produce a further limited category of documents. By letter of 22 May 2020, the Respondent objected to the Claimants' request. On 2 June 2020, the Tribunal ordered the Respondent to produce, by no later than 12 June 2020, three of the categories of documents requested by the Claimants. The remainder of the Claimants' requests were denied.

33. By letter of 25 June 2020, the Claimants requested that the Tribunal (i) invite the Respondent to call Messrs. Gagik Grigoryan and Gagik Beglaryan as witnesses or, should the Respondent decline to do so, compel their testimony as non-party witnesses; and (ii) direct the Respondent to explain whether it had searched the files of Messrs. Grigoryan and Beglaryan to identify documents responsive to the Tribunal's order of 2 June 2020 for the production of documents.

34. By letter of 1 July 2020, the Respondent asked the Tribunal to deny the Claimants' requests of 25 June 2020 and requested the Tribunal to order the Claimants to provide information with respect to their own document searches. After seeking leave to do so, the Claimants filed further observations on these matters by letter of 7 July 2020.

35. On 10 July 2020, the Tribunal issued Procedural Order No. 4 in which it (i) denied the Claimants' request concerning Mr. Beglaryan; (ii) called upon the Respondent to locate Mr. Grigoryan, but deferred its decision on whether he should be called to provide testimony until after completion of the written phase of the proceedings; (iii) denied both Parties' requests for further document production orders or regarding compliance with previous orders; and (iv) deferred until a later stage in the proceedings both Parties' requests that costs be awarded in connection with these matters. In accordance with the Tribunal's directions, the Respondent subsequently informed the Tribunal that Mr. Grigoryan was residing in Yerevan, Armenia.

36. On 13 July 2020, the Respondent filed a Request for Security for Costs with exhibits R-64 through R-66 and legal authorities RL-59 through RL-64. The Tribunal invited the Claimants' comments on the Request for Security for Costs by 30 July 2020.

37. By letter of 19 July 2020, the Claimants informed the Tribunal that the Parties had agreed to a three-day extension for the filing of the Reply and Rejoinder on Jurisdiction and the Merits until 23 July 2020 and 24 December 2020, respectively. The Tribunal approved the extension on 20 July 2020.

38. On 24 July 2020, the Claimants filed their Reply on Jurisdiction and the Merits (the "**Reply**") with the expert report of Thomas Harrison with exhibits TH-1 through TH-83; the second expert report of Kiran Sequeira with appendices F through I and exhibits KS-190 through KS-245; the second witness statement of Andrew Thornber with exhibits AT-1 through AT-8; the second witness statement of Chad Tappendorf with exhibits CT-11 through CT-13; the second witness statement of Joseph Borkowski with exhibit JB-5; exhibits C-223 through C-318; and legal authorities CL-71 through CL-132.

39. On 30 July 2020, the Claimants filed their Response on Security for Costs with legal authorities CL-133 through CL-137.

40. Following leave granted by the Tribunal, on 6 August 2020, the Respondent filed a Reply on Security for Costs with the witness statement of Van Krikorian with exhibit VK-1, and legal authority RL-61.

41. The Claimants were also granted leave to file a Rejoinder on Security for Costs and submitted it on 13 August 2020, together with the third witness statement of Joseph Borkowski with exhibits JB-6 through JB-19; exhibit C-319; and legal authority CL-138.

42. After considering a request from the Respondent to file further comments on security for costs and the Claimants' objection to the request, the Tribunal granted a final, short round of submissions on security for costs.

43. On 19 August 2020, the Respondent filed its Further Comments in Support of Respondent's Request for Security for Costs with the second witness statement of Van Krikorian with exhibits VK-2 and VK-3; exhibits R-67 through R-69; and legal authorities RL-65 and RL-66.

44. By email of 21 August 2020, on the date due for its further comments on security for costs, the Claimants stated that they were awaiting a final piece of evidence and asked the Tribunal for an extension until 25 August 2020. The Tribunal granted the Claimants' request.

45. On 26 August 2020, the Claimants filed their Further Comments in Response to the Respondent's Request for Security for Costs with the fourth witness statement of Joseph Borkowski with exhibits JB-20 through JB-33; exhibits C-320 and C-321; and legal authorities CL-139 through CL-145.

46. By email of 14 September 2020, the Tribunal asked the Parties to provide their comments on the possibility of holding the hearing on jurisdiction and the merits by remote video conference technology, in light of "ongoing developments in relation to COVID-19, including both health and safety developments and various governmental and other restrictions on movement and gatherings that have been put in place in the various countries in which counsel for the Parties and members of the Tribunal reside." The Tribunal offered additional days should a hearing by video conference prove necessary.

47. On 14 September 2020, the Tribunal issued Procedural Order No. 5 with its Decision on the Respondent's Request for Security for Costs. The Tribunal denied the Respondent's request and deferred the question of costs for a later stage in the proceedings.

48. By joint email of 7 October 2020, the Parties confirmed their availability for a remote hearing and asked that the Tribunal add 16, 20 and 27 February 2021 as possible hearing dates. The Parties asked that ICSID nevertheless proceed with arrangements for an in-person hearing in Frankfurt in case travel restrictions were lifted by February 2021.

49. By email of 8 October 2020, the Tribunal confirmed that, in accordance with the Parties' agreement, it had reserved the additional hearing dates and instructed ICSID to proceed with in-person arrangements in Frankfurt. It expected to make a final decision on the format of the hearing by late November 2020.

50. By email of 23 November 2020, the Tribunal informed the Parties that due to ongoing travel restrictions and the Frankfurt International Arbitration Centre's inability to host a hearing in compliance with local health regulations, it would proceed with plans for a remote hearing.

51. By email of 18 December 2020, the Tribunal circulated a draft Procedural Order No. 6 to facilitate the Parties' discussions on the organization of the hearing and invited the Parties to file comments by 8 January 2021.

52. By email of 24 December 2020, the Respondent requested an extension to file its Rejoinder until 28 December 2020 and stated that the Claimants had agreed to this request. By email of the same date, the Tribunal granted the extension.

53. On 28 December 2020, the Respondent filed its Rejoinder on the Merits (the "**Rejoinder**") with the second expert report of John H. Winner with appendices 7 and 8 and exhibits JW-60 through JW-81; the witness statement of Gagik Grigoryan with exhibits GG-1 through GG-7; the second witness statement of Artur Arakelyan with exhibits AA-8 through AA-10; exhibits R-70 through R-150; and legal authorities RL-67 through RL-91.

54. On 11 January 2021, the Parties notified the Tribunal of the witnesses they intended to call for cross-examination at the hearing.

55. By joint email of 15 January 2021, following an extension granted by the Tribunal, the Parties submitted their points of agreement and disagreement on draft Procedural Order No. 6.

56. On 20 January 2021, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference. Following the meeting, on the same date, the Tribunal issued directions

concerning the hearing and invited the Parties to confer and revise draft Procedural Order No. 6 considering the discussions at the meeting and the Tribunal's directions.

57. By letter of 27 January 2021, the Claimants requested (i) the deferral of the testimony of Mr. Thomas Harrison and Mr. John Winner to April 2021; (ii) leave to submit additional documents into the record, and (iii) that the Tribunal order the Respondent to stop using confidential information submitted in the arbitration to conduct discovery against the Claimants. The Tribunal invited the Respondent's comments on the Claimants' 27 January 2021 letter by 1 February 2021.

58. By letter of 28 January 2021, the Secretary-General of ICSID informed the Parties that due to Ms. Milanka Kostadinova's upcoming retirement from the Centre, Ms. Martina Polasek, ICSID Deputy Secretary-General, would take over as Secretary of the Tribunal in this case.

59. By email of 29 January 2021, the Parties submitted a revised draft Procedural Order No. 6, with a point of disagreement concerning the order of witnesses who would testify at the hearing.

60. By email of 30 January 2021, the Tribunal directed the Parties on the order of the witnesses, noting that each side was free to determine the order of its witnesses and experts.

61. By letter of 1 February 2021, the Respondent objected to the Claimants' application of 27 January 2021 and requested the Tribunal to order Mr. Borkowski to permit KPMG to respond to a request for information made by the Respondent.

62. By email of 2 February 2021, the Claimants requested permission to respond to the Respondent's letter of 1 February 2021. The Tribunal granted the Claimants until noon ET on 3 February 2021 to provide their comments.

63. By email of 2 February 2021, ICSID asked the Parties to provide further details about the organization of the hearing, including their agreement regarding the use of a 360-degree camera and their availabilities for a Zoom test call.

64. On 2 February 2021, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing.

65. By letter of 3 February 2021, the Claimants provided their comments on the Respondent's letter of 1 February 2021. On the same date, the Respondent sought permission to respond to the Claimants'

letter. The Tribunal granted the Respondent until noon ET on 5 February 2021 to submit its comments. The Respondent filed its comments accordingly.

66. On 6 February 2021, the Tribunal issued Procedural Order No. 7: (i) admitting certain documents proposed by the Claimants into the record; (ii) admitting one item subject to the fulfillment of certain conditions (including the filing of a witness statement by Mr. Weixin and making him available for cross-examination), to be accepted by the Claimants by 9 February 2021; and (iii) granting the Respondent's request to have KPMG confirm the authenticity of exhibit JB-17.

67. On 8 February 2021, ICSID, FTI, the court reporter, interpreters and the Parties held a test video conference on Zoom.

68. On 8 February 2021, the Claimants submitted documents responsive to paragraph 34(b) of Procedural Order No. 7 and stated they would revert as soon as possible on paragraphs 34(a) and (d). By email of 9 February 2021, the Claimants asked for an extension until 10 February 2021 to file these documents. The Tribunal granted the extension.

69. On 10 February 2021, the Claimants filed their documents responsive to paragraphs 34(a) and (d) of Procedural Order No. 7. On the same date, the Respondent noted that the Claimants had indicated that they would not submit a witness statement or make available for cross-examination Mr. Weixin, contrary to the condition for admitting certain of the documents. The Respondent therefore requested that the Tribunal not admit into evidence exhibits C-344 through C-362. The Claimants responded to the Respondent's objections on the following day.

70. On 11 February 2021, the Tribunal issued Procedural Order No. 8, in which it (i) admitted exhibits C-344 through C-346, exhibits C-350 through C-360, and exhibit C-362 into the record; (ii) invited the Respondent to file any responsive evidence to these exhibits by 11 March 2021; (iii) invited the Parties to confirm their availability for an additional Hearing Day on 29 April 2021 to allow additional time for the examination of Mr. Borkowski on Exhibit C-231 and the evidence in paragraph 21 of the Order, as well as any potential testimony by Mr. Weixin and the evidence in paragraph 19 of the Order; (iv) requested the Claimants to provide the ICSID Secretariat with Mr. Weixin's contact details immediately upon receipt of the Order to enable the Secretary of the Tribunal to invite Mr. Weixin to testify as the Tribunal's witness; and (v) directed Mr. Borkowski to refrain from any contact with Mr. Weixin until Mr. Weixin had either declined to testify or concluded his testimony at the April Hearing.

71. By email of 12 February 2021, the Respondent informed the Tribunal that it was not available for an additional hearing day on 29 April 2021. The Respondent requested permission to cross-examine Mr. Borkowski on the newly admitted documents in February rather than April.

72. By email of 12 February 2021, the Tribunal took note that the additional hearing day in April would not be necessary.

73. A hearing on jurisdiction and the merits was held by video conference in two parts, the first from 16-26 February 2021 (the "**February Hearing**") and the second on 26 and 27 April 2021 (the "**April Hearing**"), see paragraphs 88 and 89 below. The following persons were present at the February Hearing:

Tribunal:	
Ms. Jean E. Kalicki	President
Mr. John Beechey CBE	Arbitrator
Mr. J. Christopher Thomas KC	Arbitrator
ICSID Secretariat:	
Ms. Martina Polasek	Secretary of the Tribunal
Ms. Elizabeth Starkey	Paralegal
Mr. Oscar Figueroa	ICSID Intern
Assistant to the Tribunal:	
Dr. Joel Dahlquist	Assistant to the Tribunal
For the Claimants:	
Mr. Mark McNeill	Quinn Emanuel
Ms. Hanna Roos	Quinn Emanuel
Ms. Laila Hamzi	Quinn Emanuel
Ms. Ashley Hammett	Quinn Emanuel
Ms. Athina Manoli	Quinn Emanuel
Mr. James Phillips	Quinn Emanuel
Mr. Varoujan Avedikian	TK & Partners
Mr. Martin Stepanyan	TK & Partners
Ms. Larisa Gevorgyan	TK & Partners
For the Respondent:	
Mr. Grant Hanessian	Hanessian ADR, LLC
Ms. Kristina Fridman	Baker & McKenzie LLP
Ms. Marlena Harutyunyan	Baker & McKenzie LLP
Mr. Victor Dumler	Dumler & Partners
Mr. Hayk Pogosyan	HAP LLC
Mr. Hayk Hovhannisyan	HAP LLC
Mr. Yeghishe Kirakosyan	Party Representative

Mr. Liparit Drmeyan	Party Representative
Ms. Kristine Khanazadyan	Party Representative
Ms. Mariam Tarverdyan	Party Representative
Ms. Parandzem Mikayelyan	Party Representative
Mr. Alan Grigorian	Party Representative

Court Reporter:

Ms. Laurie Carlisle Hendrex	Court Reporter (February 16, 2021)
Ms. Diana Burden	Court Reporter (February 17-26, 2021)
Ms. Ann Lloyd	Assistant to the Court Reporter

Interpreters:

Ms. Elena Edwards	Interpreter
Ms. Helena Bayliss	Interpreter

FTI Hearing Coordinators:

Mr. Jamey Johnson	FTI
Mr. David Brodsky	FTI

74. During the February Hearing, the following persons were examined:

On behalf of the Claimants:

Mr. Joseph K. Borkowski	Party and Witness
Mr. Andrew J. Thornber	Witness
Mr. Chad L. Tappendorf	Witness
Mr. Kiran Sequeira	Expert
Mr. Thomas Harrison	Expert

On behalf of the Respondent:

Mr. Artur Arakelyan	Witness
Mr. Gagik Grigoryan	Witness
Mr. John H. Winner	Expert
Mr. Pamy J. S. Arora	Expert

75. By email of 15 March 2021, the Parties informed the Tribunal that the Parties had agreed to a schedule for post-hearing submissions.

76. By email of 1 April 2021, the Parties informed the Tribunal of their agreement on certain adjustments to the post-hearing submission deadlines. By email of the same date, the Tribunal agreed to the Parties' modifications.

77. By emails of 9 April 2021, the Parties transmitted their respective demonstrative exhibits.

78. By further email of 9 April 2021, the Claimants, on behalf of the Parties, submitted the Parties' agreed and disputed corrections to the transcripts.

79. By email of 13 April 2021, the Claimants informed the Tribunal that the Parties had agreed to postpone the deadline for their first post-hearing briefs until 19 April 2021 and sought the Tribunal's approval of the adjustment. By email of the same date, the Tribunal confirmed its agreement.

80. By email of 18 April 2021, the Claimants submitted legal authorities CL-147 through CL-150, as well as a revised version of legal authority CL-5.

81. On 19 April 2021, the Tribunal issued Procedural Order No. 9 concerning the Parties' disputed transcript corrections.

82. On 19 April 2021, the Parties submitted their First Post-Hearing Briefs ("**Cl. First PHB**" and "**Resp. First PHB**").

83. By email of 20 April 2021, ICSID requested the Parties' comments on the organization of the remainder of the hearing including, *inter alia*, a revised schedule.

84. By emails of 22 April 2021 (from the Respondent) and 23 April 2021 (from the Claimants), the Parties provided their responses to ICSID's 20 April 2021 email.

85. On 24 April 2021, the Claimants filed a request for the Tribunal to decide on the admissibility of new evidence. By email of the same date, the Tribunal requested the Respondent's comments by 3 pm EST on 25 April 2021. By email of the same date, the Respondent objected to the Claimants' request. By email of 25 April 2021, the Respondent provided further comments on the Claimants' request.

86. By email of 25 April 2021, the Claimants responded to the Respondent's emails of 24 and 25 April 2021 and reiterated their request to submit new evidence.

87. On 25 April 2021, the Tribunal issued Procedural Order No. 10 denying the Claimants' 24 April 2021 application.

88. The April Hearing, the second part of the hearing on jurisdiction and the merits, was held on 26-27 April 2021 by video conference. The following persons were present at the April Hearing:

Tribunal:

Ms. Jean Kalicki	President
Mr. John Beechey CBE	Arbitrator

Mr. J. Christopher Thomas KC	Arbitrator
ICSID Secretariat:	
Ms. Martina Polasek	Secretary of the Tribunal
Ms. Elizabeth Starkey	Paralegal
Assistant to the Tribunal:	
Dr. Joel Dahlquist	Assistant to the Tribunal
For the Claimants:	
Mr. Mark McNeill	Quinn Emanuel
Ms. Hanna Roos	Quinn Emanuel
Ms. Laila Hamzi	Quinn Emanuel
Ms. Ashley Hammett	Quinn Emanuel
Ms. Athina Manoli	Quinn Emanuel
Mr. James Phillips	Quinn Emanuel
Mr. Varoujan Avedikian	TK & Partners
Mr. Martin Stepanyan	TK & Partners
Ms. Larisa Gevorgyan	TK & Partners
Mr. Joseph K. Borkowski	Party Representative
For the Respondent:	
Mr. Grant Hanessian	Hanessian ADR, LLC
Ms. Kristina Fridman	Baker & McKenzie LLP
Ms. Marlena Harutyunyan	Baker & McKenzie LLP
Mr. Victor Dumler	Dumler & Partners
Mr. Hayk Pogosyan	HAP LLC
Mr. Hayk Hovhannisyan	HAP LLC
Mr. Yeghishe Kirakosyan	Party Representative
Mr. Liparit Drmeyan	Party Representative
Ms. Kristine Khanazadyan	Party Representative
Ms. Mariam Tarverdyan	Party Representative
Ms. Parandzem Mikayelyan	Party Representative
Mr. Alan Grigorian	Party Representative
Court Reporter:	
Ms. Diana Burden	Court Reporter
Ms. Ann Lloyd	Assistant to the Court Reporter
Interpreters:	
Ms. Elena Edwards	Interpreter
Ms. Helena Bayliss	Interpreter
FTI Hearing Coordinators:	
Mr. Jamey Johnson	FTI
Mr. Jeff Herzka	FTI

89. During the April Hearing, the following persons were examined:

On behalf of the Claimants:

Mr. Chad L. Tappendorf	Witness
Mr. Andrew J. Thornber	Witness
Mr. Thomas Harrison	Expert
Ms. Frances Hale	Expert
Mr. Kiran Sequeira	Expert
Ms. Yelena Aleksandrovich	Expert
Ms. Caroline Wilczynski	Expert
Mr. Greg Johnson	Expert

On behalf of the Respondent:

Mr. John H. Winner	Expert
Mr. Pamy J. S. Arora	Expert

90. By email of 17 May 2021, the Parties submitted their agreed corrections to the transcripts.

91. By email of 20 May 2021, the Parties informed the Tribunal that they had agreed to a 25,000-word limit for their second post-hearing briefs, to be submitted on 18 June 2021, and a 2 July 2021 deadline for their costs submissions. By email of the same date, the Tribunal confirmed its approval.

92. By email of 13 June 2021, the Claimants informed the Tribunal that the Parties had agreed to an extension until 28 June 2021 for the filing of their second post-hearing briefs and until 12 July 2021 for the filing of their costs submissions. By email of 14 July 2021, the Tribunal confirmed its agreement to the extensions.

93. By email of 27 June 2021, the Claimants sought to add Article 289 of the Armenian Civil Code onto the record as legal authority CL-151. By email of 28 June 2021, the Respondent confirmed its agreement. On 29 June 2021, the Tribunal confirmed its approval of the Parties' agreement.

94. On 28 June 2021, the Parties filed their Second Post-Hearing Briefs ("**Cl. Second PHB**" and "**Resp. Second PHB**").

95. By email of 8 July 2021, the Respondent informed the Tribunal that the Parties had agreed to a one-week extension for the filing of their costs submissions. By email of the same date, the Tribunal confirmed its agreement.

96. The Parties filed their submissions on costs on 19 July 2021.

97. The proceeding was closed on 18 January 2023.

III. FACTUAL BACKGROUND

98. The following is a summary of the facts as pleaded by the Parties or established by the evidence, without prejudice to any legal conclusions by the Tribunal, which will be addressed in later sections. The summary is not intended to be exhaustive, and the absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered all evidence submitted to it in the course of these proceedings.

99. The present dispute concerns two separate projects, one for road construction in southern Armenia (the "**Road Project**") and the other for a railway in the same part of the country (the "**Railway Project**"). These two projects are collectively referred to as the "**Projects**" in this Award.

A. COUNTRY CONTEXT – THE IMPORTANCE OF IMPROVED NORTH-SOUTH TRANSPORT

100. Well prior to Armenia's discussions with Rasia, the Government of Armenia had been exploring ways of developing better transport routes to link the north of the country (which borders Georgia) and the south (which borders Iran). As a result of international conflicts, Armenia's borders to the east (with Azerbaijan) and the west (with Turkey) have been closed since the early 1990s. As a result, the only borders open to Armenia are with Georgia and Iran.[5]

101. The southern region of Armenia has been particularly affected by these events. Although the border with Iran remains open to road traffic, there is no current rail access to Iran; the railway network in the rest of Armenia, which is operated by the South Caucasus Railway Closed Joint-Stock Company ("**SCR**"), a subsidiary of Russian Railways OJSC, does not extend to the Iranian border. As for road traffic, the existing road from the capital Yerevan to Meghri at the Iranian border (about 385 km) is not suitable for high speed traffic. For these reasons, Armenia has long aspired to build both a north-south railway and a modern high speed road connecting the north and south of the country.[6]

102. With respect to road development, well before the events at issue in this case, Armenia was in discussion with international development banks about the "North-South Road Corridor" ("**NSRC**"), an ambitious road development project for which Armenia required outside funding. In 2009, Armenia obtained multi-tranche facility financing of up to USD 500 million from the

[5] Resp. Counter-Mem. ¶¶ 21-22.

[6] *Id*. ¶¶ 24-26.

Asian Development Bank ("**ADB**").[7] The NSRC was to be carried out in different tranches, of which the southern portion (Tranche 4) was considered to be the most difficult.[8] In 2009, the ADB approved a loan of $60 million for Tranche 1, and a feasibility study for subsequent tranches.[9] In May 2010, PADECO Co. Ltd ("**PADECO**") prepared a report for ADB in which, among other things, it proposed a private-partnership model to finance Tranche 4 in a manner that would limit Armenia's financial exposure and its need to borrow from ADB and/or other development banks.[10] This possibility of involving the private sector in the financing of the southernmost portion of the NSRC provides background to the discussions that ultimately progressed between Armenia and Rasia in connection with the Road Project.

B. THE BACKGROUND TO THE CONCESSION AGREEMENTS (2011-2012)

103. The initial steps towards the Projects were taken in 2011. On 3 October 2011, Rasia signed a confidentiality agreement with Armenia, represented by the then-Minister of Transport and Communication (hereafter the "**Minister/Ministry of Transport**"), Mr. Manuk Vardanyan. The confidentiality agreement was signed "[i]n connection with the pursuit of the development and financing of a road and railway in Armenia."[11] Later that same month, Mr. Borkowski and Minister Vardanyan met in Armenia, together with then-Prime Minister Mr. Tigran Sargsyan, to discuss the Projects.[12]

104. Also in late October 2011, Mr. Borkowski approached Mr. Chad Tappendorf and Mr. Brandt Mowry, representatives of the United Arab Emirates sovereign wealth fund, Aabar Investments PJS ("**Aabar**"), about potentially involving Aabar as an investor in the Projects. Aabar and Rasia had previously collaborated on a number of potential investment opportunities, including proposed deals to acquire an NBA basketball team and a Formula One racetrack in New Jersey (neither of

[7] R-4, ADB, Proposed Multitranche Financing Facility and Administration of Cofinancing, Republic of Armenia: North-South Road Corridor Investment Program, September 2009.

[8] First Arakelyan Statement ¶¶ 12-13.

[9] C-265, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching Letter from Mr. J. Borkowski to Mr. G. Beglaryan), p. 6 (attaching 18 March 2014 letter from Mr. D. Dole of ADB to Mr. J. Borkowski).

[10] R-5, PADECO Co., Ltd., Armenia: Preparing the North-South Road Corridor Development Project, May 2010, ¶¶ 128-129.

[11] C-85, p. 1.

[12] First Borkowski Statement ¶¶ 14-18.

which came to fruition), and the restructuring of Gobi Coal, a portfolio company with interests in a coal mining venture in Mongolia.[13]

105. Armenia and Rasia entered into a framework agreement on 30 December 2011 (the "**Framework Agreement**"),[14] in which Rasia was defined as the "Sponsor" and Mr. Borkowski was identified as Rasia's CEO.[15] Under the Framework Agreement, each Party undertook to "negotiate in good faith with the other on an exclusive basis" with respect to the Projects, with the goal of developing a concession agreement, with associated engineering, financial and environmental feasibility studies, all of which "must be bankable."[16]

106. With respect to the Road Project, the Framework Agreement recited that Armenia "wishes to grant a concession to design, build, finance, operate and maintain … a new high speed road from Sisian to Megrhi."[17] The Framework Agreement stated that the terms of a future concession agreement for this new high speed road "may include (i) road availability payments from the Ministry of Transport and Communications, and/or (ii) tolls," with the concession agreement accordingly also addressing "the Sponsor's right to freely fix … tolls, in reasonable profit margins considering Project circumstances."[18]

107. With respect to the Railway Project, the Framework Agreement referred to a potential concession "to design, build, finance, operate and maintain a new railway link between the existing operating railway system in central Armenia and the Southern Armenia border near Meghri."[19] The terms of a future concession agreement for the railway would have to address "the Sponsor's right to freely fix … freight rates … in reasonable profit margins considering Project circumstances," as well as "the terms applicable to … passenger rail transportation, if any," which "may include cost sharing payments" from the Ministry of Transport.[20]

108. Mr. Borkowski and the Government of Armenia (the "**Government**") then engaged in negotiations during the first half of 2012 over the terms for two concessions for the Projects. During these

[13] First Borkowski Statement ¶¶ 11, 26; First Tappendorf Statement ¶¶ 17-22; First Thornber Statement ¶ 18; Resp. Counter-Mem. ¶¶ 48-50; February Tr. Day 5 Tappendorf 829:22-8:31:25.

[14] C-52, Framework Agreement between the Republic of Armenia and Rasia FZE, 30 December 2011.

[15] *Id*. p. 1; Resp. Rej. ¶ 294.

[16] C-52, Framework Agreement, ¶¶ 2, 3, 6.

[17] *Id*. p. 1.

[18] *Id*. ¶¶ 3(k), (m).

[19] *Id*. p. 1.

[20] *Id*. ¶¶ 3(k), (l).

negotiations, Armenia's lead representative was Minister Manuk Vardanyan, while Rasia, in addition to Mr. Borkowski, was assisted by several law firms, as well as by representatives from Aabar. Rasia contends that during this period, the Government requested an official letter of support from Aabar that would confirm Aabar's interest in investing in the Projects, and it performed national security checks on Aabar.[21]

109. On 21 May 2012, Mr. Chad Tappendorf of Aabar wrote directly to Minister Vardanyan.[22] Mr. Tappendorf was then an Investment Associate at Aabar, responsible for "analyzing business proposals, building presentations and supporting" Mr. Brandt Mowry, then Aabar's Chief Financial Officer ("**CFO**") and Chief Investment Officer ("**CIO**"), in connection with "deal execution and balance sheet restructuring initiatives."[23] Mr. Tappendorf's letter to Minister Vardanyan stated that "[t]his letter serves as a reference of support for Rasia." He referred to past Aabar dealings with Rasia, stated Aabar's awareness of Rasia's "investments … into and outside of Armenia, specifically in the infrastructure and mining industries," and added that "we provide our support with Rasia wherever projects are economically appealing."[24]

110. In June 2012, Minister Vardanyan was replaced as Minister of Transport by Mr. Gagik Beglaryan, the former mayor of Yerevan. According to Rasia, Mr. Beglaryan requested a second letter of support from Aabar.[25] Mr. Tappendorf provided the second letter on 26 June 2012, describing Aabar's history of "working closely" with Rasia on "investment and co-investment opportunities worldwide," and noting Aabar's awareness of Rasia's discussions with Armenia about the potential Projects. Mr. Tappendorf then stated as follows: "I aim to review the railway and road development projects with a focus on economic feasibility and investment and either directly or through our affiliates consider equity investments and/or lending." Mr. Tappendorf also stated that "either directly or through our affiliates, I will be focused on considering substantial investments … in ancillary industries such as agriculture, mining and real estate development."[26]

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[21] First Borkowski Statement ¶ 63; Second Borkowski Statement ¶ 160; Cl. Mem. ¶¶ 64-65, 105; Cl. Reply ¶¶ 88, 243; Resp. Rej. ¶¶ 34-36.

[22] C-10, Letter from Mr. C. Tappendorf to Minister M. Vardanyan.

[23] First Tappendorf Statement ¶ 11. In December 2012, following Mr. Mowry's departure from Aabar, Mr. Tappendorf was promoted to the position of Senior Investment Advisor to the Chairman of Aabar, Khadem Abdullah al-Qubaisi. *Id.* ¶ 13.

[24] C-10, Letter from Mr. C. Tappendorf to Minister M. Vardanyan.

[25] First Borkowski Statement ¶ 63; Cl. Mem. ¶¶ 65-74. 105; Resp. Rej. ¶ 294; First Tappendorf Statement ¶ 30.

[26] C-11, Letter from Mr. C. Tappendorf to Minister G. Beglaryan, 26 June 2012.

111. Mr. Borkowski testified that in his view, the "essence of [the] bargain" he thereafter struck with Armenia was that "Aabar was to be the anchor equity investor in the Projects once their feasibility had been established."[27] Mr. Tappendorf notes that in July 2012, around the time of the Concession Agreements, Mr. Borkowski appointed him to Rasia's Investment Advisory Board, in which role he "provided guidance on the projects on behalf of Aabar."[28]

112. Armenia observes, however, that neither of Mr. Tappendorf's 2012 letters actually reflected any commitment on the part of Aabar to invest in the Projects,[29] much less "remotely suggest[ed]" or "could possibly be said to put Armenia on notice" that Aabar intended to buy Rasia from Mr. Borkowski.[30] This debate becomes relevant to the case for reasons discussed further below.

113. As also will be shown below, from the Armenian side, Mr. Beglaryan (the new Minister of Transport) was to be a significant actor in the lead-up to the present dispute.

C. THE 2012 CONCESSION AGREEMENTS

114. On 28 July 2012, Armenia and Rasia signed two concessions (collectively, the "**Concession Agreements**" or the "**Concessions**") – one for the Road Project (the "**Road Concession**") and one for the Railway Project (the "**Railway Concession**"). The Concessions were signed for Armenia by Minister Beglaryan, and for Rasia (defined as the "**Concessionaire**"), by Mr. Borkowski, who was identified as Rasia's CEO and "Sole Shareholder." The Concession Agreements provided the framework for the development of the Projects.

115. The Concession Agreements are at the heart of this dispute, and the relevance of various provisions is discussed further below. For present purposes, and without prejudice to the Tribunal's legal analysis, the Tribunal sets out here the provisions that have been discussed in this Arbitration. Some of these are worded identically or very similarly in both Concessions, while others are specific to either the Railway Concession or the Road Concession.

(1) Purpose of Concessions

116. The Preamble of both Concessions stated that the Government "deems it advantageous to have private sector participation in the improvement of its transportation infrastructure so as to benefit

[27] Second Borkowski Statement ¶ 31.

[28] First Tappendorf Statement ¶ 12.

[29] February Tr. Day 4, Hanessian/Borkowski, 660:11-663:13.

[30] Resp. Rej. ¶¶ 34-36.

from private sector know-how, business connections and capital."[31] For this purpose, the Government has asked Rasia to implement a project for "financing, designing, building, rehabilitating, possessing, commissioning, operating and maintaining," respectively, (a) a "new high speed road" between Sisian and Meghri and/or Armenia's southern border near Meghri (the "**High Speed Road**"),[32] and (b) a "new railway" between the existing operating central railway system and Armenia's southern border near Meghri (the "**Railway**").[33]

117. The Preamble of the Concessions also stated that based on preliminary estimates, the budget for constructing the "new high speed road" will be "no less than USD 1.1 billion,"[34] and for the new railway will be "no less than USD 1.7 billion."[35] The Concessions acknowledge that "in addition to any equity investment that Rasia FZE is willing to arrange," the Projects implied at least 75% debt financing through secured lending, "without which implementation of the project may not be feasible" for Rasia. Successfully attracting such debt financing would substantially depend on Rasia's ability to grant "legally reliable" security interests, "as well as on the availability of a favorable and stable legal framework."[36]

(2) Subject of Concessions

118. With respect to the Road Project, Section 3 of the Road Concession (entitled "Grant of Concession") provided in relevant part, and defined collectively as "the Project," the following:

> The Concessionaire shall have the right and obligation at its own cost and risk:
>
> (a) to finance and carry out the Feasibility Study from its own funds;
>
> (b) to implement from its own funds and attracted Project Financing, the following:
>
> > (i) finance, design, build, rehabilitate, possess, commission, operate and maintain the Southern Armenia High Speed Road;

[31] C-1, Railway Concession, Preamble; C-2, Road Concession, Preamble.

[32] C-2, Road Concession, Preamble. Consistent with the Preamble, Article 1 of the Road Concession defined the "Southern Armenia High Speed Road" to mean "a new high speed road between (i) the city of Sisian and (ii) the city of Meghri and/or the [sic] Armenia's southern border near the city of Meghri …." *Id.*, Article 1.

[33] C-1, Railway Concession, Preamble.

[34] C-2, Road Concession, Preamble. As will be discussed later, Mr. Borkowski testified at the February Hearing that "this was a number pulled out of thin air," because "[i]t wasn't possible for us at that time to have an accurate number." February Tr. Day 2, Borkowski, 354:1-12.

[35] C-1, Railway Concession, Preamble.

[36] *Id.*; C-2, Road Concession, Preamble.

> (ii) finance, design, rehabilitate, possess, commission, operate and maintain as part of the Southern Armenia High Speed Road any and all infrastructures and facilities in the Concession Territory[37] currently or formerly used in the operation of any road …; and
>
> (iii) finance, design, build, rehabilitate, possess, commission, operate and maintain all utilities required or advisable for building, operating and maintaining the Southern Armenia High Speed Road, …;
>
> (c) to do all such other things and carry out all such other businesses as may be necessary or reasonably advisable for any of the above;
>
> (d) to pay to the Government a variable concession fee pursuant to Article 4 [Concession Fee];
>
> (e) to rehabilitate and hand over to the Government the existing toll free road between Sisian and Meghri as reflected in Schedule B within the budget of USD 80 millions (eighty million US dollars); and
>
> (f) to rehabilitate and hand over the Southern Armenia High Speed Road in good working order to the Government at expiration or termination of the Concession ….[38]

119. As discussed further herein, the Parties dispute whether, and to what extent, Section 3(b) of the Road Concession required Rasia to work to deliver two *separate roads with separate routes* (a new High Speed Road as well as the existing road, rehabilitated), or, alternatively, only *one road* (with some stretches of new construction on new routes, and other stretches simply connecting with the existing road, rehabilitated). The Tribunal returns to this debate in due course.

120. As for the corresponding Railway Concession, Section 3 of that agreement provided in relevant part, and defined collectively as "the Project," the following:

> The Concessionaire shall have the right and obligation at its own cost and risk:
>
> (a) to finance and carry out the Feasibility Study from its own funds;
>
> (b) to implement from its own funds and attracted Project Financing, the following:
>
> > (i) finance, design, build, rehabilitate, possess, commission, operate and maintain the Southern Armenia Railway;

[37] The "Concession Territory" was defined in the Road Concession as "the territory of the Republic of Armenia south of the city of Sisian." C-2, Road Concession, Section 1.

[38] C-2, Road Concession, Section 3.

(ii) finance, design, rehabilitate, possess, commission, operate and maintain as part of the Southern Armenia Railway any and all infrastructures and facilities in the Concession Territory currently or formerly used in the operation of a railway …;

(iii) finance, design, build, rehabilitate, possess, commission, operate and maintain all utilities required or advisable for building, operating and maintaining the Southern Armenia Railway, …; and

(iv) acquire, lease or otherwise arrange the Rolling Stock necessary or advisable for the operation of the Southern Armenia Railway;

(c) to haul freight on the Southern Armenia Railway …;

(d) to carry passengers on the Southern Armenia Railway …;

(e) to do all such other things and carry out all such other businesses as may be necessary or reasonably advisable for any of the above;

(f) to pay to the Government a variable concession fee pursuant to Article 4 [Concession Fee]; and

(g) to rehabilitate and hand over the Southern Armenia Railway in good working order to the Government at expiration or termination of the Concession ….[39]

(3) Concession Fees

121. Pursuant to Section 3(f) of each Concession Agreement, it was anticipated that Rasia would pay concession fees to the Government with respect to each Project. Section 4 of the Concession Agreements described this as a "fixed concession fee" of 100,000 Armenian Drams per year for the first 10 years of operation of each Project, followed by a "variable concession fee" based on a percentage of the "annual gross revenue earned" from the operation of the "Southern Armenia High Speed Road" and the "Southern Armenia Railway" respectively. The percentage of annual gross revenue would start at 0.1% in year 11 and would increase by 0.1% in each ensuing year, until it reached a maximum of 2% per year, at which point, it would "remain unchanged thereafter."[40]

(4) Duration of Concessions

122. The duration of the Concessions (identical in both cases) was set out in Section 12 of the Concessions. Essentially, the duration was an aggregate of four periods: (a) a "Feasibility Study

[39] C-1, Railway Concession, Section 3.

[40] *Id*., Section 4; C-2, Road Concession, Section 4.

Period," running from the date of the Concession Agreements "until final acceptance of the Feasibility Study by [Rasia] and confirmation of the Corridor by the Government" (both points addressed further below); (b) a "Project Financing Period," running from the end of the Feasibility Study Period and until Rasia received its first project financing disbursement; (c) a "Construction Period," running from the end of the Project Financing Period and until commissioning of, and grant of permission to operate, the High Speed Road and the Railway, respectively; and (d) an "Operations Period," which would run for 30 years, with an option for Rasia to extend for an additional 20 years (i.e., 50 years in total). If Rasia exercised the extension option, the Parties were to "negotiate in good faith with respect to making amendments to this Agreement, which are necessary or desirable in the view of any of the Parties."[41]

(5) Conditions Precedent and Waiver Thereof

123. Both Concessions stated certain conditions precedent – both to construction (in Section 9) and to operation (in Section 10). Certain of the Section 9 conditions precedent are of particular relevance to this dispute.

124. In the Road Concession, the "Conditions Precedent to Construction" included, *inter alia*, the following:

> Construction of the Southern Armenia High Speed Road shall commence when each of the following conditions has been satisfied or waived:
>
> (a) …;
>
> (b) Agreement between the Government and the Concessionaire regarding the payment of availability payments by the Government to the Concessionaire (such availability payments when combined with tolls charged by the Concessionaire must, among other things, be sufficient to enable the Concessionaire (i) to repay debt and interest incurred to design and build the Southern Armenian High Speed Road, (ii) to pay for the operation, maintenance and rehabilitation of the Southern Armenian High Speed Road, and (iii) to generate a rate of return on equity sufficient to attract equity investors);
>
> (c) …;
>
> (d) Feasibility studies prepared by one or more first-class specialized firms confirming the technical, commercial, financial, environmental and social feasibility of the Project (collectively, the "Feasibility Study") and final acceptance thereof by the Concessionaire. The Feasibility Study shall,

[41] C-1, Railway Concession, Section 12; C-2, Road Concession, Section 12.

> inter alia, (i) reflect the territory (the "Corridor"), in respect of which the Concessionaire shall have free preferred right-of-way or free preferred right of use, (ii) include working designs, as well as (iii) reflect the construction and commissioning milestones for the Southern Armenia High Speed Road and (iv) analyze the benefit of using the existing North-South Road for certain categories of traffic.;
>
> (e) Confirmation of the Corridor by the Government;
>
> (f) Grant by the Government to the Concessionaire the rights to the Corridor, as provide at Section 22.2 [Corridor Acquisition and Grant];
>
> (g) …;
>
> (h) …;
>
> (i) Execution of the financing agreements for the implementation of the Project sufficient for Concessionaire, among other things, (i) to carry out its obligations under the Construction Agreements, and (ii) to operate and maintain the Southern Armenia High Speed Road until such time as it generates income sufficient to meet its obligations as they become due ("Project Financing"); and
>
> (j) …..[42]

125. As discussed below, several of these conditions precedent proved central to the dispute, including the approach to funding the Road Project (the relationship between potential self-funding through tolls paid by users and Government funding through "availability payments"); the expectations of the feasibility study, including regarding working designs and the proposed "Corridor" for the Road; and the provisions for project financing in support of Rasia's obligations for construction and initial operation of the High Speed Road.

126. In a section of the Road Concession entitled "Benefit of Conditions Precedent" (Section 11), these various conditions precedent were classified into one of three categories, and provision was made for the possibility of waiver of one or more of the conditions:

> 11.1 Each condition precedent shall be classified into one of the following categories:
>
> (a) Conditions for the benefit of both Parties;
>
> (b) Conditions for the exclusive benefit of the Government; or
>
> (c) Conditions for the exclusive benefit of the Concessionaire.

[42] C-2, Road Concession, Section 9.

> 11.2 A Party who benefits from a condition may waive such condition. Conditions for the benefit of both Parties may be waived only mutually.
>
> 11.3 Conditions precedent provided at Sections 9(d), 9(h), 9(i), 10(a) and 10(b) are for the benefit of both Parties.
>
> 11.4 Conditions precedent provided at Sections 9(a), 9(b), 9(c), 9(e), 9(f) and 9(g) are for the benefit of the Concessionaire.
>
> 11.5 In case the Parties mutually agree on other conditions precedent in accordance with Sections 9(j) and 10(c), the Parties will indicate, for the avoidance of doubt, the benefit of such conditions precedent.[43]

The interpretation of these waiver provisions is also a subject of dispute.

127. The Railway Concession followed a similar approach, so far as the conditions precedent were concerned. Section 9 of the Railway Concession included, *inter alia*, the following conditions precedent to construction:

> Construction of the Southern Armenia Railway shall commence when each of the following conditions has been satisfied or waived:
>
> (a) Agreement between "South-Caucasian Railway" closed joint stock company and the Concessionaire regarding rail linkages between their respective railways …;
>
> (b) Agreement(s) between the Concessionaire and railway operators from bordering countries, as agreed between the Concessionaire and the Government, regarding rail linkages between their railways … ;
>
> (c) … ;
>
> (d) …;
>
> (e) Feasibility studies prepared by one or more first-class specialized firms confirming the technical, commercial, financial, environmental and social feasibility of the Project (collectively, the "Feasibility Study") and final acceptance thereof by the Concessionaire. The Feasibility Study shall, inter alia, (i) reflect the territory (the "Corridor"), in respect of which the Concessionaire shall have free preferred right-of-way or free preferred right of use, (ii) include working designs, as well as (iii) reflect the construction and commissioning milestones for the Southern Armenia Railway;
>
> (f) Confirmation of the Corridor by the Government;

[43] C-2, Road Concession, Section 11.

(g) Grant by the Government to the Concessionaire the rights to the Corridor, as provided at Section 22.2 [Corridor Acquisition and Grant];

(h) …;

(i) …;

(j) Execution of the financing agreements for the implementation of the Project sufficient for Concessionaire, among other things, (i) to carry out its obligations under the Construction Agreements, and (ii) to operate and maintain the Southern Armenia Railway until such time as it generates income sufficient to meet its obligations as they become due ("Project Financing"); and

(k) ….[44]

128. In turn, Section 11 of the Railway Construction provided the following, with respect to the "Benefit of Conditions Precedent":

> 11.1 Each condition precedent shall be classified into one of the following categories:
>
> (a) Conditions for the benefit of both Parties;
>
> (b) Conditions for the exclusive benefit of the Government; or
>
> (c) Conditions for the exclusive benefit of the Concessionaire.
>
> 11.2 A Party who benefits from a condition may waive such condition. Conditions for the benefit of both Parties may be waived only mutually.
>
> 11.3 Conditions precedent provided at Sections 9(e), 9(i), 9(j), 10(a) and 10(b) are for the benefit of both Parties.
>
> 11.4 Conditions precedent provided at Sections 9(a), 9(b), 9(c), 9(d), 9(f), 9(g) and 9(h) are for the benefit of the Concessionaire.
>
> 11.5 In case the Parties mutually agree on other conditions precedent in accordance with Sections 9(k) and 10(c), the Parties will indicate, for the avoidance of doubt, the benefit of such conditions precedent.[45]

[44] C-1, Railway Concession, Section 9.

[45] *Id*., Section 11.

(6) Feasibility Studies and Acceptance Thereof

129. As noted above, one of the key conditions precedent to the Projects moving ahead was the preparation of feasibility studies "confirming the technical, commercial, financial, environmental and social feasibility of the Project," and the "final acceptance thereof" by Rasia.[46]

130. Sections 17-20 of both Concessions provided more detail about the preparation and acceptance of these "Feasibility Studies." Section 17 addressed the timing within which Rasia was to commence the Feasibility Studies.[47] Section 18 required that such studies were to be prepared taking into account, *inter alia*, the project parameters defined in an attached schedule; Armenian legislation; World Bank environmental, health and safety guidelines for "toll roads" and railways respectively; the practices, methods and standards of care and safety that would both reasonably be expected of a "prudent, skilled and experienced foreign investor" and consistent with "good industry practices"; and the "terms of reference" for conducting the feasibility studies.[48]

131. Section 19 of both Concessions in turn described the requirements for the "Terms of Reference" for the Feasibility Studies, including both their required content and the process by which the Terms of Reference would be proposed by the Government and either commented on or deemed accepted by Rasia.[49]

132. With respect to the acceptance of the Feasibility Studies themselves, both Concessions provided as follows in Section 20:

> 20.1 The Feasibility Study shall be completed within 18 (eighteen) months from its commencement, and in case of being preliminarily acceptable for the Concessionaire, it shall be submitted to the Government in English together with an Armenian translation.
>
> 20.2 Within 30 (thirty) days from the date of receiving the Feasibility Study, the Government shall submit its reasoned comments, objections and suggestions, which should be considered by the Concessionaire prior to the final acceptance of the Feasibility Study. Those comments of the Government, which are not attributed to legal, technical or environmental unfeasibility, shall not be obligatory for the Concessionaire.

[46] C-1, Railway Concession, Section 9(e); C-2, Road Concession, Section 9(d).

[47] C-1, Railway Concession, Section 17; C-2, Road Concession, Section 17.

[48] C-1, Railway Concession, Section 18; C-2, Road Concession, Section 18.

[49] C-1, Railway Concession, Section 19; C-2, Road Concession, Section 19.

> 20.3 If the Government does not submit comments within the aforementioned period, the Feasibility Study shall be deemed finally accepted by the Concessionaire.
>
> 20.4 If the Feasibility Study proves the Project unfeasible from technical, commercial, financial, environmental and social standpoint (including in view of the Government's obligatory comments), then upon the Concessionaire's written request made within 15 (fifteen) days the Parties shall undertake negotiations in good faith on such reasonable measures, which may make the Project feasible.[50]

133. The timing of the presentation and acceptance of the Feasibility Studies was important for various other provisions of the Concessions. As discussed above in connection with Section 12, "final acceptance" of the Feasibility Studies by Rasia was a trigger for the ensuing "Project Financing Period" and subsequent periods for construction and operation. In addition, Section 36.2 of the Concessions provided strict deadlines within which Rasia was to present construction designs to the Government, running from "the end of the Feasibility Study." In the case of the Road Concession, Rasia was required to submit construction designs with 6 months; for the Railway Concession, Rasia was required to submit construction designs within one year.[51]

(7) Corridor Confirmation, Acquisition and Grant

134. A further condition precedent listed in Section 9 of the Concessions related to the "Corridor," which was defined in that Section as the territory over which Rasia would have a preferred right-of-way for the Road and Railway, respectively. As noted above, Section 9(d) listed two conditions precedent to construction, with respect to the Corridor: (a) the Feasibility Studies were to "reflect" the proposed Corridor, and (b) the Government was to "confirm[]" that Corridor.[52]

135. The definitions section of the Road Concession (Section 1) defined "Corridor" to have "the meaning ascribed thereto in Section 9(d) [Conditions Precedent to Construction]." It also cross-referenced a map attached as Schedule B, stating that "[a]s indicatively shown on the map presented in Schedule B, it is envisaged that the Corridor shall start at the city of Sisian."[53] The map in Schedule B was cross-referenced in two other places in the Road Concession: (a) Section 3(e), which set out Rasia's obligation to "rehabilitate … the existing toll free road between Sisian and Meghri as reflected in Schedule B," in addition to its separate obligations in Section 3(b) with

[50] C-1, Railway Concession, Section 20; C-2, Road Concession, Section 20.

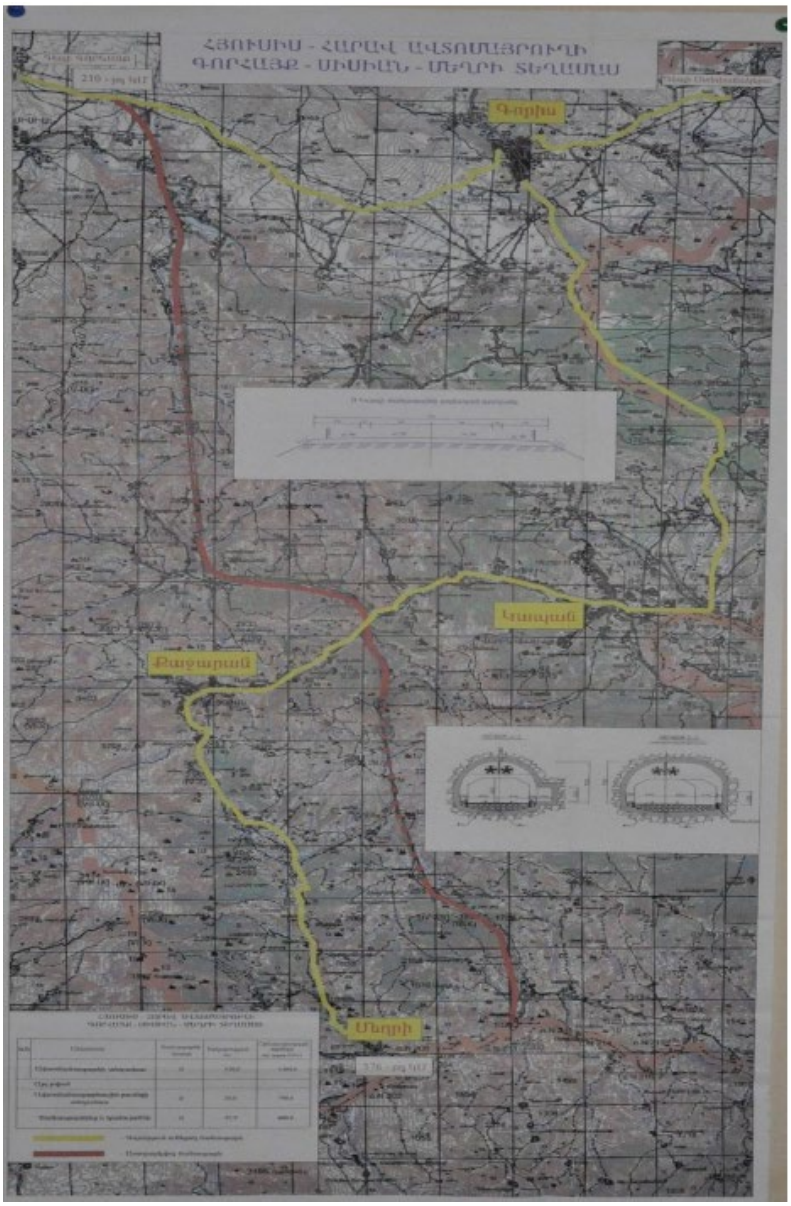
[51] C-1, Railway Concession, Section 36.2; C-2, Road Concession, Section 36.2.

[52] C-1, Railway Concession, Section 9(e), (f); C-2, Road Concession, Section 9(d), (e).

[53] C-2, Road Concession, Section 1.

respect to a new high speed road, and (b) Section 15, which confirmed, "[f]or the avoidance of doubt," that the existing road between Sisian and Mehri "as reflected in Schedule B shall continue to be in use and toll free."[54]

136. The "indicative[]" map in Section B of the Road Concession is reproduced below[55]:



[54] C-2, Road Concession, Sections 3(e), 15.

[55] R-63, Schedule B, Southern Armenia High Speed Road Concession Agreement Preliminary Map of Southern Armenia High Speed Corridor; *see also* C-2, Road Concession, Schedule B.

137. For greater clarity, the Tribunal also reproduces below a more readable, color illustration drawn from the Respondent's Counter-Memorial, which shows both the existing toll-free roads that were reflected in Schedule B of the Road Concession (in yellow), and the proposed route of the new High Speed Road that was reflected in the same Schedule B (in red)[56]:

Figure 5: The Proposed vs Existing and Required Routes[138]

138. The Concessions contained more detail about the process of confirmation, acquisition and grant of the Corridors. Section 21 of both Concessions provided that if, first, the Feasibility Study for each Project confirmed that the High Speed Road or the Railway (respectively) was "technically, commercially, financially, environmentally and socially feasible," and, second, if the Feasibility Studies were "finally accepted" by Rasia, then Rasia "shall request the Government to confirm the Corridor recommended by the Feasibility Study." If the recommended Corridor complied with the requirements of Section 18 (described above), then the Government "within 90 (ninety) days of its receipt of the Feasibility Study, as finally accepted by [Rasia], shall confirm the Corridor and shall

[56] Resp. Counter-Mem. p. 32, Figure 5. The Tribunal discusses separately below the significance of the black line in this Figure 5, which is said by the Respondent to reflect a different route that Rasia proposed for the road in its later feasibility study.

recognize the exclusive prevailing public interest in respect of the lands and immovables in the Corridor."[57]

139. Section 22 of the Concessions in turn addressed the Government's duty to acquire the Corridor lands for purposes of construction. It provided, *inter alia*, that "[o]nce the Corridor is confirmed by the Government," it shall "within a reasonably short period" acquire at its costs all lands and immovables in the Corridor, "on a timely basis so as not to delay the commencement of construction."[58] Having acquired these properties, the Government would then grant Rasia rights of access, occupation and use to implement the Project, for the entire period of the Concession.[59]

(8) Consortium Approach and Project Financing

140. Sections 5 of both Concessions provided, with similar wording, that "for the purpose of implementing the Project [Rasia] may adopt a consortium approach," under which it "will likely attract investors, international financial institutions, institutional and other lenders," as well as "first-class specialized developers" for building and operating the Road and Railway. Nonetheless, while Rasia may be "called upon to closely cooperate" with these various entities, Rasia alone "shall always remain fully liable before the Government for the performance of obligations under this Agreement."[60]

141. Both Concessions also contained similar provisions on the use of external finance providers. Section 31 provided that once the Feasibility Study has "confirmed that the Project is technically, commercially, financially, environmentally and socially feasible and the Concessionaire has finally accepted the Feasibility Study," then Rasia shall have up to 12 months to obtain the requisite project financing.[61]

142. However, Section 33 of both Concessions provided the following deadlines for the presentation of letters of interest from potential finance providers:

> 33.1 The Concessionaire undertakes to present to the Government not later than within [Railway Concession: "12 (twelve)"] [Road Concession: "6 (six)"] months from the date of final approval of the Feasibility Study, letters of interest from one or more credible and reputable potential

[57] C-1, Railway Concession, Section 21; C-2, Road Concession, Section 21.

[58] C-1, Railway Concession, Section 22.1; C-2, Road Concession, Section 22.1.

[59] C-1, Railway Concession, Sections 22.2, 22.3; C-2, Road Concession, Sections 22.2, 22.3.

[60] C-1, Railway Concession, Section 5; C-2, Road Concession, Section 5.

[61] C-1, Railway Concession, Section 31.1; C-2, Road Concession, Section 31.1.

> investors, Financing Parties and other finance providers as described in Section 31.2, according to which such potential investors, Financing Parties and other finance providers are prepared to make investments in the equity or quasi-equity of the Concessionaire and provide debt financing in the aggregate amount not less than the total financing envisaged by the Feasibility Study.
>
> 33.2 The Government may within 30 (thirty) days of the receipt of such letters of interest present its written objections to the Concessionaire based on criteria set forth in Section 8 [Control of Concessionaire]. If the Government does not provide its written objections within the mentioned period of time, the candidacies of investors shall be deemed approved, which does not limit, however, the Concessionaire's rights to attract other further parties not objectionable to the Government as per the above procedure.
>
> 33.3 In case of any objections from the Government, the Concessionaire may present additional letters of interest within additional [Railway Concession: "6 (six)"] [Road Concession: "3 (three)"] months.

(9) Control of Rasia

143. Sections 8 of each Concession regulated any potential "alienation" of Rasia, the direct or indirect shareholding interest in Rasia, and Rasia's "rights and assets related to the Project." Any such alienation was subject to various conditions, including the acceptability of the acquiror to the Government on grounds of national security, and confirmation that the acquiror would be able to provide continuity and proper progress on the Project.[62] In addition, Section 8.2(e) of both Concessions provided the Government with certain rights of first refusal, as follows:

> (e) the Government shall enjoy rights of first refusal in acquiring shareholding interest in the Concessionaire, including in case of increase of the equity capital, except for any acquisition of the shareholding interest through open auction or any other public tender process.[63]

A material breach of these rights of first refusal, or of any of Rasia's obligations related to transfer of control of it or its shares, would provide the Government with a right of early termination of the Concession.[64]

[62] C-1, Railway Concession, Section 8.2(a), (b), (c); C-2, Road Concession, Section 8.2(a), (b), (c).

[63] C-1, Railway Concession, Section 8.2; C-2, Road Concession, Section 8.2.

[64] C-1, Railway Concession, Section 8.3; C-2, Road Concession, Section 8.3.

(10) Exclusivity of Concession

144. The Road Concession contained a provision – a similar version of which was included also in the Railway Concession – included under the heading "Competing Transportation Systems":

> **15 NO GRANT**
>
> In order to induce the Concessionaire to enter into this Agreement and to assume substantial financial and commercial risks in connection with the implementation of the Project, the Government shall not at any time grant to any person, including any State Authority, any concession or other right or privilege to finance, design, construct, possess, commission, rehabilitate, operate and/or maintain any road at the southern border of Armenia or connecting with Meghri or territories adjacent to the southern border of Armenia, including any road not in service on the date of signing this Agreement. For the avoidance of doubt, the existing road between Sisian and Meghri which is in service on the date of signing this Agreement as reflected in Schedule B shall continue to be in use and toll free.

(11) Early Termination

145. Finally, both Concessions contained similarly worded clauses on early termination based on negative results from a Feasibility Study:

> 59.1 If the Concessionaire has not accepted the Feasibility Study by the [Railway Concession: "third (3rd)"] [Road Concession: "second (2nd)"] anniversary of the commencement of the Concession, then the Government may terminate this Agreement with a notice issued within 5 (five) working days following the second (2nd) anniversary of the commencement of the Concession or within 5 (five) working days following any consecutive [Railway Concession: "two-month"] [Road Concession: "one-month"] period thereafter (provided that the Government is not notified by then about the Feasibility Study being finally accepted by the Concessionaire).
>
> 59.2 If the Agreement is terminated due to the Feasibility Study not being finally accepted by the Concessionaire or, prior to the completion of the construction designs, due to the Concessionaire Event of Default, then the Concessionaire shall promptly transfer to the Government free-of-charge the Feasibility Study and all results of the design works, and the Government shall have the right to freely dispose of those at its own discretion.
>
> 59.3 Unless the Concession is effectively terminated by the Government's notice, the Feasibility Study works may continue and the Feasibility Study may be accepted by the Concessionaire at any time with a notice to the Government.

D. RASIA'S 2012 DISCUSSIONS WITH AABAR AND FRAMEWORK AGREEMENT WITH CCCC

146. On 31 July 2012, three days after the Concession Agreements were signed, Rasia sent a letter to the Government, stating that it had met Aabar to discuss "the prospects of equity investments" in connection with the Railway Project. Rasia also mentioned calls with several entities "to discuss turnkey solutions for railway and road development," requests for "competing feasibility study proposals from two prominent multinational companies," and an aim to "engage world class contractors … to develop the engineering designs in parallel with the feasibility study," rather than addressing engineering "separately from and after completing the feasibility study," which "could substantially alter project costing, corridor location, and other primary project attributes." Rasia requested the Government to begin developing the "terms of references (*sic*) for feasibility studies."[65]

147. Starting in August and September 2012, Rasia sought to identify a Chinese firm to assist with engineering, procurement and construction ("**EPC**") works. It ultimately concluded a Framework Agreement on 30 September 2012 with China Communications Construction Company Ltd. ("**CCCC**" and the "**Rasia-CCCC Framework Agreement**," respectively).[66] The decision to involve a Chinese EPC firm was made on advice from Aabar's Mr. Tappendorf, who had authored the May and June 2012 letters to the Government about Rasia discussed in Section III.B above, and by his then-superior Mr. Brandt Mowry, who was Aabar's CFO and CIO until he retired from the firm in December 2012. Rasia appointed these two individuals to its Advisory Board in September 2012.[67]

148. The Rasia-CCCC Framework Agreement stated that Rasia "ha[d] decided in favor of appointing CCCC as its exclusive transportation infrastructure development company and as the lead member of its Consortium to carry out the Feasibility Studies and the subsequent design, procurement, construction, and completion of the Projects."[68] The Rasia-CCCC Framework agreement also referenced various deadlines in the Concession Agreements with respect to the Feasibility Studies;[69] noted the advantage of beginning discussions about potential project financing with

[65] C-91, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 July 2012.

[66] R-8, Framework Agreement between Rasia and CCCC ("**Rasia-CCCC Framework Agreement**"); Cl. Mem. ¶¶ 76-80; Cl. Reply ¶¶ 91-92; First Tappendorf Statement ¶¶ 35-39.

[67] Cl. Reply ¶ 238; Second Thornber Statement ¶¶ 19-21; Second Tappendorf Statement ¶ 38.

[68] R-8, Rasia-CCCC Framework Agreement, Section 7.

[69] The Rasia-CCCC Framework Agreement stated that the Feasibility Study for the Railway Project "must be created, delivered and accepted by" Rasia within 24 months from the 2 August 2012 date of Armenia's approval of the Railway

"such China financial institutions as China Development Bank and The Export-Import Bank of China" ("**China EximBank**"); and agreed that Rasia and CCCC would work together to propose to the Government of Armenia "selected favorable changes to the Concession Agreements in order for the Projects to remain bankable or to enhance their bankability."[70]

149. As discussed further below, the Parties dispute whether Rasia and CCCC ever obtained any commitments from Chinese banks for debt financing for the Projects. Rasia maintains that CCCC proceeded, during the second half of 2013, to secure financing commitments from China Development Bank and China EximBank.[71] Armenia disputes that the evidence demonstrates that any such commitments were obtained from Chinese banks.[72]

E. THE ROAD PROJECT (LATE 2012): CCCC'S SITE VISIT, THE TERMS OF REFERENCE, AND THE CCCC ROAD COMMERCIAL AGREEMENT

150. Shortly after CCCC concluded its Framework Agreement with Rasia, it began to organize its investigation of the Road Project, focusing on the work required to complete the feasibility study required by the Road Concession. Its preliminary steps included a trip to Dubai from 3-5 November 2012 to meet with Mr. Borkowski of Rasia and Mr. Tappendorf, who was employed at the time by Aabar, but whom CCCC evidently understood to be a "senior director" of Rasia.[73] The group then flew to Armenia for a "working conference" on 7 November 2012 with officials and engineers from the "Road Authority" of the Ministry of Transport, followed by a three-day field investigation of the proposed Road Project from 8-10 November 2012.[74]

151. On 10 November 2012, at the conclusion of the Road Project site visit, Rasia and the Republic of Armenia (represented by its Minister of Transport, Mr. Beglaryan) agreed on the "Terms of Reference for Feasibility Study of the Southern Armenia High Speed Road" (the "**Road Terms of Reference**").[75] In the Road Terms of Reference, the Road Project was described "[a]s defined in Section 3 […] of the [Road Concession]," which, as recounted above, provided for a new "High

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Concession, and the Feasibility Study for the High Speed Road Project "must be created, delivered and accepted by" Rasia within 18 months of Armenia's 2 August 2012 approval of the Road Concession. R-8, Rasia-CCCC Framework Agreement, Section 5.

[70] R-8, Rasia-CCCC Framework Agreement, Section 6.

[71] Cl. Mem. ¶ 107-108; First Borkowski Statement ¶¶ 65-66; Second Borkowski Statement ¶¶ 127-131.

[72] Resp. Counter-Mem. ¶¶ 152-153.

[73] C-96, CCCC, "Site Visit Report: Southern Armenia High Speed Road Project," November 2012, p. 1.

[74] *Id*., pp. 3-4.

[75] C-98, Road Terms of Reference.

Speed Road" and the rehabilitation of an existing toll-free road between Sisian and Meghri.[76] The objective of the Road Terms of Reference was stated to be to "specify the Feasibility Study requirements; reflect main value of the Feasibility Study and the Project, their technical and economic requirements, quality standards, paperwork composition and guidelines on milestones as well as other special terms and conditions" and to "reflect the Project limitations including the Corridor limitations on environmental, natural resources use, national security and strategic grounds."[77]

152. The Road Terms of Reference also set out the purpose of the Road Feasibility Study:

> As defined in Section 9(e) [Conditions Precedent to Construction] of the Southern Armenia High Speed Road Concession Agreement "... confirming the technical, commercial, financial, environmental and social feasibility of the Project (collectively, the 'Feasibility Study') and final acceptance thereof by the Concessionaire. The Feasibility Study shall, inter alia, (i) reflect the territory (the 'Corridor'), in respect of which the Concessionaire shall have free preferred right-of-way or free preferred right of use, (ii) include working designs, as well as (iii) reflect the construction and commissioning milestones for the Southern Armenia High Speed Road". Working designs are preliminary designs that are normally required for establishing project feasibility.[78]

153. Among other things, the Road Terms of Reference also specified that the Road Project would involve "New construction,"[79] and that while the Corridor for the Road Project was as "indicatively shown on the map" in Schedule B of the Road Concession, Rasia could consider variations in the Corridor during the Feasibility Study Period defined in Section 12(a) of the Concession, including certain specified variations.[80] The Road Terms of Reference also provided that the road "should meet the requirements" for a Class II category road as defined in Armenia's Construction Norms. They listed certain "selected technical parameters … in order to provide flexibility to [Rasia] in determining the optimal technical parameters during the Feasibility Study."[81] The technical parameters that were singled out were the following:

> A maximum vertical/longitudinal gradient of 40‰ (per mil)

[76] C-98, Road Terms of Reference, Section 2.

[77] *Id.*, Section 3.

[78] *Id.*, Section 4.

[79] *Id.*, Section 7.

[80] *Id.*, Section 9.

[81] *Id.*, Section 10.

> A minimum radius of 600 meters for horizontal curves, 8,000 meters for vertical convex curves, and 4500 meters for vertical incurved curves.
>
> Design speed to be determined under the Feasibility Study.[82]

154. The Road Terms of Reference also set out certain requirements for the "structure and contents" of the Road Feasibility Study to be delivered by Rasia,[83] as well as a provision stipulating that "[t]he estimated cost of construction shall be carried out in accordance with international best practices."[84] The Road Feasibility Study was also to estimate "investment efficiency in accordance with international best practices," including calculations of net present value, internal rate of return, and payback period.[85]

155. As will be explained further below, the Parties disagree as to whether the Road Feasibility Study that Rasia delivered to Armenia met these requirements.

156. Meanwhile, following the conclusion of its site visit on 10 November 2012, CCCC wrote up a report of its site visit, which made no reference to the Road Terms of Reference that Rasia signed on that date. The CCCC site visit report described its understanding that the project was expected to involve the "upgrading" of an existing 110 km highway, but with certain bypasses to improve travel, including a bridge or viaduct over the Tatev valley, a detour around the city of Kapan (involving a new 7 km stretch of highway) and a possible tunnel through a mountain in Kajaran. CCCC indicated that it had proposed a "preliminary alignment" for the project on the basis that "[i]t is mainly an existing road reconstruction and improvement project," with "new-build part[s]" only in these three sections. CCCC opined that "most of the sections" can reach a "Class II highway" construction standard, restrained by terrain conditions in certain areas.[86] The CCCC report did not specify which Class II standard it had in mind, although as noted above, the Road Terms of Reference signed on 10 November 2012 specified that the relevant reference should be to Armenian standards.[87] The difference between Armenian and Chinese Class II highway construction standards becomes relevant later in this case.

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[82] C-98, Road Terms of Reference, Section 10.

[83] *Id.*, Section 23.

[84] *Id.*, Section 24.

[85] *Id.*, Section 25.

[86] C-96, CCCC, "Site Visit Report: Southern Armenia High Speed Road Project," November 2012, pp. 1, 6, 7, 12.

[87] C-98, Road Terms of Reference, Section 10.

157. On 10 December 2012, Rasia and CCCC concluded a "Commercial Agreement for Feasibility Study" for the Road Project (the "**CCCC Road Commercial Agreement**"), which they agreed would become an "integral part" of the Rasia-CCCC Framework Agreement they had completed on 30 September 2012. The CCCC Road Commercial Agreement was signed by Mr. Borkowski for Rasia, and witnessed by Mr. Mowry, formerly Aabar's CEO but now identified as "Vice Chairman" of Rasia.[88] According to this Agreement, CCCC was to prepare a feasibility study to "serve the very purpose of obtaining Project financing," and as a prelude to a "subsequent EPC contract" with CCCC.[89] CCCC's work on the feasibility study was to be divided into two stages: (a) a "Stage One" delivery of a "Pre-Feasibility Study" focused on establishing the economic model and base technical requirements for the High Speed Road Project and the selection of the desired road corridor," and (b) a "Stage Two focused on completing the Feasibility Study to a bankable status based on the outcome of Stage One."[90] CCCC would front all the costs associated with both stages, but Rasia undertook to pay CCCC a "Services Fee" of $5 million over time, according to a gradual payment schedule which envisioned only $500,000 being paid (in two tranches) in connection with "Stage One" (the "Pre-Feasibility Study"), with the rest of the fee deferred until work on and delivery of the "Stage Two" Feasibility Study.[91] CCCC would retain ownership of, and all intellectual property rights in, both studies, with these rights gradually transferred to Rasia in percentages reflecting the actual payments made to CCCC. In this fashion, "any CCCC work that has been completed, but not paid for, will remain its property."[92]

F. THE RAILWAY PROJECT (LATE 2012-EARLY 2013): THE TERMS OF REFERENCE, CCCC RAIL COMMERCIAL AGREEMENT, AND SCR TRILATERAL MOU

158. On 10 November 2012, the same day Rasia and Armenia signed the Road Terms of Reference, they also executed a "Terms of Reference for Feasibility Study" for the Railway Project (the "**Railway Terms of Reference**," and collectively with the Road Terms of Reference, the "**Terms of Reference**").[93]

[88] R-68, Commercial Agreement for Feasibility Study on the Southern Armenia High Speed Road, 10 December 2012, p. 8.

[89] *Id.*, ¶ 3.4.

[90] *Id.*, ¶ 4.

[91] *Id.*, ¶ 4 & Appendix 1.

[92] *Id.*, ¶ 5.1.

[93] C-99, Terms of Reference for the Feasibility Study on the Southern Armenia Railway between the Republic of Armenia and Rasia FZE, 10 November 2012.

159. The two Terms of Reference documents were structured in similar ways. The Railway Terms of Reference also described the Railway Project with reference to the Railway Concession,[94] and contained a provision describing the objective of the Terms of Reference identical to that contained in the Road Terms of Reference.[95] The provisions defining the purpose of the Feasibility Studies – Section 4 in both Terms of Reference – were also identical for both Terms of Reference, save for the project names.

160. On 10 December 2012, Rasia and CCCC concluded a "Commercial Agreement for Feasibility Study" for the Railway Project (the "**CCCC Railway Commercial Agreement**"),[96] which was substantively similar to the CCCC Road Commercial Agreement. In particular, CCCC's work was to be divided into two stages, the first a "Pre-Feasibility Study" focusing on the economic model, base technical requirements, and the "selection of the desired railway corridor," and the second on "completing the Feasibility Study to a bankable status."[97] CCCC would again front all the costs, with Rasia undertaking to pay a "Services Fee" of $10 million, most of it after the second stage of work.[98] Again, CCCC would retain ownership of (and intellectual property rights in) its work until Rasia paid its fee.[99]

161. On 21 December 2012, Rasia notified Armenia that it had selected CCCC to prepare the feasibility studies for both Projects.[100] Rasia emphasized not only CCCC's design and construction experience, but also its "favorable financing allocations for overseas railway and road projects" from China Development Bank and China EximBank, with which CCCC had already begun discussions. Rasia explained that "[t]he China government is the only feasible source of major loan financing for the [Railway Project] in particular," and that "[n]o other government, private or international financing institution either alone or jointly" would be able and willing to finance the Railway Project without most of the financing coming from Chinese government banks.

[94] C-99, Terms of Reference for the Feasibility Study on the Southern Armenia Railway between the Republic of Armenia and Rasia FZE, 10 November 2012, Section 2.

[95] *Id.*, Section 3.

[96] R-67, Commercial Agreement for Feasibility Study on the Southern Armenia Railway, 10 December 2012.

[97] *Id.,* ¶ 4.

[98] *Id.,* ¶ 4 & Appendix 1.

[99] *Id.,* ¶ 5.

[100] C-101, Letter from Mr. J. Borkowski to Minister G. Beglaryan (Unofficial Translation and Armenian Original), 21 December 2012, pp. 1-2.

Accordingly, Rasia explained, "[w]orking with a China contractor, such as CCCC, is a mandatory prerequisite for seeking the required China government financing."[101]

162. The Parties jointly announced the Projects at a media event on 18 January 2013.[102] Both Mr. Borkowski and Mr. Beglaryan spoke at the event; Mr. Tappendorf also attended.

163. During the event, a trilateral Memorandum of Understanding (the "**SCR Trilateral MoU**") was signed by Rasia, the Armenian Ministry of Transport and the SCR, which was the operator of the existing railway network in Armenia and, as noted at paragraph 101 above, a subsidiary of Russian Railways OJSC.[103] The Trilateral MoU set out the broader context of the Railway Concession, essentially as follows:

- In 2009 and 2010, the Ministries of Transport of Armenia, Russia and Iran discussed the importance of coordinating development of a direct railway line to connect Armenia's existing rail network and Iran's existing rail network, which would mean covering 316 km in Armenia and 60 km in Iran;[104]
- They also discussed the importance of integrating this new railway connection into existing international corridors, which would involve coordinating technical parameters, including the width of railroad gauge;[105]
- "In order to ensure the implementation of the Armenian Segment" of the new railway, Armenia had granted Rasia a concession "to implement the feasibility study and to design, finance, construct and operate the Armenian Segment";[106]
- The SCR Trilateral MoU was a "non-binding agreement solely intended to outline the framework of understanding" regarding development of the Project.[107]

164. In the SCR Trilateral MoU, the three signatories agreed to "cooperate in the sharing of technical, trade, economic, social, environmental, and other feasibility and design related information so as to enable [Rasia] to deliver complete feasibility studies for the Southern Armenia Railway in

[101] C-101, Letter from Mr. J. Borkowski to Minister G. Beglaryan (Unofficial Translation and Armenian Original), 21 December 2012, pp. 2, 4.

[102] C-107, Transcript of Welcoming Speech of Minister of Transport and Communication Gagik Beglaryan (Unofficial Translation and Armenian Original), 18 January 2013; C-108, Government of Armenia, "The Projects 'Southern Armenia Railway' and 'Southern Armenia High-Speed Road' are Launched" (Unofficial Translation and Armenian Original), 18 January 2013.

[103] C-103, Memorandum of Understanding Between Ministry of Transport, SCR and Rasia, 18 January 2013.

[104] *Id.*, pp. 3-4.

[105] *Id.*, p. 4.

[106] *Id.*, p. 4.

[107] *Id.*, p. 5.

accordance with the Concession Agreement."[108] Construction was intended to start from Armenia's border with Iran (hopefully in parallel with work on the "Iranian Segment") to "allow for the earliest possible commencement of commercial operation," even prior to connecting the new "Armenian Segment" to the existing Armenian railway network operated by SCR.[109] However, in exchange for SCR's cooperation, it would be provided a first preference right for future operation, management and maintenance of the Southern Armenia Railway, including prior to the connection of that new railway to the existing Armenian rail network.[110]

G. THE FEASIBILITY STUDIES (2013-EARLY 2014)

(1) Payment for the Feasibility Studies

165. The feasibility studies that Rasia eventually delivered to Armenia for the Road and Railway Projects (respectively, the "**Road Feasibility Study**" and the "**Railway Feasibility Study**," and collectively, the "**Feasibility Studies**") form a crucial part of this case. Before delving into their delivery and content, however, it is important to identify one threshold factual dispute, which becomes relevant to some of the Parties' legal contentions discussed further herein.

166. As discussed above, each of the CCCC Road Commercial Agreement and the CCCC Railway Commercial Agreement provided that CCCC would fund the development of both a "Stage One" "Pre-Feasibility Study" and a subsequent "Stage Two" "Feasibility Study," but that Rasia would pay CCCC for its work over time. Once all such payments had been made, Rasia would become the owner of the Feasibility Studies, with a right to all the intellectual property reflected therein. Although Mr. Borkowski submitted a witness statement in which he maintained that "Rasia had commissioned and paid for" the Feasibility Studies,[111] he conceded at the Hearing that Rasia had yet to pay CCCC anything.[112] The extent to which Rasia remains indebted to CCCC for its Feasibility Study work is disputed in this Arbitration. The evidence on that issue is discussed further in Sections III.I and V.A.3, including in connection with the Parties' dispute over whether Claimants have demonstrated a cognizable investment for purposes of the ICSID Convention.

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[108] Memorandum of Understanding Between Ministry of Transport, SCR and Rasia, 18 January 2013, p. 5.
[109] *Id.*, p. 6.
[110] *Id.*, pp. 7-8.
[111] Second Borkowski Statement ¶ 87; *see also* Cl. Reply ¶ 488.
[112] February Tr. Day 4 Kalicki/Borkowski, 581:25-582:2; Beechey/Borkowski, 675:12-16.

(2) Rasia's Summaries of the Feasibility Studies to Armenia and Aabar

167. Mr. Borkowski informed the Ministry of Transport on 17 June 2013 that CCCC had completed the "Stage One feasibility studies" for both Projects on 7 June 2013,[113] but that the documents were available only in Chinese, and were awaiting translation into English. Mr. Borkowski stated that Rasia would provide comments on the English-language versions, once received, and then "officially submit and present the final Stage One feasibility studies for Rail and Road to the Ministry."[114]

168. On 27 August 2013, Mr. Borkowski requested to "briefly meet" with Mr. Grigoryan to provide a "brief summary of findings" from the Feasibility Studies.[115] The following day, 28 August 2013, Mr. Borkowski met with officials from the Ministry of Transport, including Mr. Grigoryan.[116] The Parties describe the discussions differently. According to Mr. Borkowski, he presented a summary of the findings reflected in the draft Road Feasibility Study and made clear that they revealed that it would not be feasible to proceed with a toll road. Mr. Borkowski stated that Mr. Grigoryan was not surprised to hear that a toll road was not a feasible proposition and that, instead, he encouraged Mr. Borkowski to proceed with the Road Project on the basis of so-called "availability payments."[117]

169. Mr. Grigoryan's recollection of the 28 August meeting differs from Mr. Borkowski's. According to Mr. Grigoryan, Mr. Borkowski "may have stopped by" in August 2013, but there was no "formal presentation" or "extensive discussion" of any preliminary results. Mr. Grigoryan also denies having authorized Mr. Borkowski to finalize the Road Feasibility Study on the basis solely of availability payments.[118] However, Armenia has not expressly disputed that Mr. Borkowski informed the Government, at this meeting, that he no longer considered a toll road to be feasible.[119]

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[113] By this time, CCCC had completed at least one other site visit to Armenia, in February and March 2013. *See generally* C-112, CCCC, "Site Visit Report: Southern Armenia Railway," March 2013, p. 10.

[114] C-327, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 17 June 2013.

[115] C-328, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 27 August 2013.

[116] C-118, Letter from Mr. J. Borkowski to Prime Minister T. Sargsyan, 19 September 2013, which refers to a meeting "at the end of August" when Rasia provided "the key results of the feasibility studies for the Southern Armenia Railway and High Speed Road projects."

[117] Second Borkowski Statement ¶ 46; February Tr. Day 4, Hanessian/Borkowski, 590:23-591:7.

[118] Grigoryan Statement ¶ 22.

[119] Armenia assumed during cross-examination of Mr. Borkowski at the February Hearing that Mr. Borkowski did take this position at the meeting (see below para. 196). *See also* Resp. Counter-Mem. ¶ 75.

170. When, soon after the meeting, Mr. Borkowski forwarded an English-version executive summary of the Railway Feasibility Study, he wrote in the accompanying email that an executive summary of the Road Feasibility Study would follow two days later, "in print and by email as well."[120] It is not clear if this was ever sent. However, on 3 September 2013, Mr. Borkowski invited Minister Beglaryan and Armenia's Prime Minister to visit CCCC's headquarters for a "briefing of the railway and road feasibility study results," together with a "presentation and summary of the alignment along with a positive announcement that the railway is feasible and the road will be a free road."[121]

171. Mr. Borkowski, CCCC representatives and Armenian representatives, including Prime Minister Sargsyan, then met in Dalian, China on 10 September 2013 (the "**Dalian Meeting(s)**").[122] At the meeting(s), the Prime Minister was briefed on the preliminary results of both Feasibility Studies and provided with estimated future financing steps and timeline. With respect to the Road Project, a slide from Mr. Borkowski's presentation at the meeting indicated as a "key result" that the Road Project was "not feasible as Toll Road; Feasible as Free Road w/Government."[123] Another slide reflected, as "Key Needs Remaining" for the fourth quarter of 2013, the need, first, to translate the final feasibility studies into English and formally to submit them to the Government, and, second, to begin "pre-construction fundraising of $100 million," including initiating talks with the Eurasian Development Bank ("**EDB**") and the government of China, for which an "Armenian Guaranty" would be "[r]equired." The slide also anticipated, as "Key Needs" for the first quarter of 2014, obtaining "Concession Amendments" regarding a "Corridor extension," having the Government "review and confirm corridor for railway and road," and having the Government "assemble and transfer land to Southern Armenia Railway for use."[124]

172. Roughly a week later, on 19 September 2013, Mr. Borkowski followed up with a letter to Armenia's Prime Minister Sargsyan and Transport Minister Beglaryan, in which he reiterated that a "toll road structure is not feasible" for the Road Project, so financing and construction would have to be either "on a government-to-government basis with long-term, low cost financing from China and the construction handled by CCCC," or "[a]lternatively, Rasia can proceed forward with the road

[120] C-329, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 28 August 2013.

[121] C-331, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 3 September 2013.

[122] Mr. Borkowski and Mr. Grigoryan seem to disagree as to whether one or several meetings took place in Dalian. *Cf.* Second Borkowski Statement ¶ 46 *with* Grigoryan Statement ¶ 23.

[123] C-117, "Southern Armenia Railway and High Speed Road – Summary of Key Results From Feasibility Studies" (Rasia), slide 3.

[124] *Id.*, slide 4.

project using availability payments from the Armenian government." With respect to the Railway Project, Rasia stated that, having ascertained that it was feasible, it would soon "move into the financing stage" after it had submitted the "final translated versions of the feasibility studies and the recommended alignment for review" by the Ministry of Transport. Rasia requested Armenia to "instruct the [EDB] to begin reviewing" the project.[125]

173. While Mr. Borkowski was communicating these points to Armenia, Rasia also wrote to Aabar. On 13 September 2013, Mr. Borkowski emailed Aabar's CEO, Mr. Mohamed al-Husseiny (with Mr. Tappendorf in copy), describing the Railway Project as a "government-to-government project with very high level support from China, Armenia, Russia, and Iran." He requested "pre-construction funding of $35 million to take me through the next 3 years building a team and working to complete the project financing from the regional governments and China." Mr. Borkowski stated that "[c]onstruction will ultimately be government-government funded when [it] begins in 2016," but "Rasia requires pre-capex funding of $35 million to fund a development team and complete the project level financing over the next 3 years," for which he considered it would be "possible to get Armenia government guaranty."[126]

174. In a subsequent email six weeks later, on 28 October 2013, Mr. Borkowski wrote to Mr. al-Husseiny about the Railway Project, again with Mr. Tappendorf copied. He claimed that Rasia had already had "many discussions with the [ADB], EBRD, [and the] Eurasian Development Bank"; that "both the Russian and the Chinese govt's will likely be debt partners and operators"; and that he "would like to now find an equity partner that could help drive this forward with some preliminary funding."[127] When questioned at the Hearing, Mr. Borkowski said that the "preliminary funding" he sought through these emails did not refer to the Railway Project as such, but rather to potential ancillary mining and agricultural ventures along the route of the railway.[128]

175. On 29 October 2013, Mr. Borkowski sent a proposal to Aabar's CEO outlining a transaction that would enable Aabar's subsidiary, Arabtec Holding PJSC ("**Arabtec**"), to "own and control [this] strategic railway by issuing shares" to Rasia. The proposal described this as an opportunity for Arabtec to become "Master Developer, Contractor [and] Railway Owner," controlling "100% of [the] Project," which Mr. Borkowski described as a "Massive project ($3.2bn EPC)" for which

[125] C-118, Letter from Mr. J. Borkowski to Prime Minister T. Sargsyan, 19 September 2013.

[126] JB-4, Email from Mr. J. Borkowski to Mr. M. al-Husseiny and Mr. C. Tappendorf, 13 September 2013.

[127] CT-5, Email from Mr. J. Borkowski to Mr. M. al-Husseiny and Mr. C. Tappendorf, 28 October 2013.

[128] February Tr. Day 3, Hanessian/Borkowski/Thomas, 529:24-531:18, 533:8-538:2.

Rasia had been awarded a "public-private project[] from Armenian Gov't with monopoly rights and unregulated tariffs for 50 years." Mr. Borkowski further identified the benefits to Arabtec as enabling it to "own and control a … major energy transport corridor railway" and to "[a]dd an exclusive $3.2 billion EPC railway project to its pipeline with the ability to partner with China company," all with "minimal to no cash investment from Arabtec," because "[s]ignificant financing can come from 3rd parties (up to 85% [C]hina banks and 15% ADFD and Eurasian Development Bank)."[129] The proposal to Aabar made no mention of Rasia's prior agreement with CCCC to appoint it (CCCC) "as the lead member of its Consortium and exclusive EPC for developing" the Railway Project.[130]

176. The Claimants say that at some point in late October 2013, the Aabar CEO confirmed his interest in investing in both Projects, which was communicated to Mr. Borkowski through Mr. Tappendorf.[131]

(3) Rasia's Delivery of the Feasibility Studies

177. Mr. Borkowski met again with Armenian Government representatives, including Minister Beglaryan and Mr. Grigoryan, on 7 October 2013, this time in Yerevan. A few hours before this meeting, Mr. Borkowski submitted a letter to Minister Beglaryan, stating that he would deliver at the meeting certain "key feasibility study materials" for both Projects. For the Railway Project, this included an English-language final Railway Feasibility Study, as well as engineering drawings and a "profile for the recommended alignment" of the Railway. Mr. Borkowski requested feedback on these documents and "confirmation of the Corridor." He also asked Armenia to "urgently enter[] into" a trilateral Memorandum of Understanding with Rasia and the Government of Iran, "that is essential for the success of the Southern Armenia Railway project."[132] The Tribunal returns to the Iran issue later below.

178. Mr. Borkowski's 7 October 2013 letter did not promise to deliver a final Road Feasibility Study at the meeting that day. Instead, the letter referred only to submitting certain drawings showing recommended routes, on which Mr. Borkowski requested feedback and "confirmation of the

[129] C-121, "Southern Armenian Railway – An Energy Corridor Linking Asia to Europe" (Rasia, 29 October 2013).

[130] R-8, Rasia-CCCC Framework Agreement, p. 2 and Section 7.

[131] First Borkowski Statement ¶ 69; First Tappendorf Statement ¶ 47.

[132] C-119, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), 7 October 2013.

Corridor." In the meantime, Mr. Borkowski requested as follows with respect to financing of the Road Project:

> Considering that a toll road structure is not feasible for the Southern Armenia High Speed Road project, feedback on whether the Government will prefer to proceed with guaranteed availability payments for the Financing of the Project or to work on a Government-to-Government basis for the Financing and Construction periods with CCCC – this feedback is required in order to complete and submit the final Southern Armenia High Speed Road feasibility study.[133]

179. Whereas there seems to be no dispute that the Railway Feasibility Study was submitted to the Government (first the English version on 7 October 2013, and then an Armenian translation on 31 December 2013[134]), the Parties have different versions of the chain of events by which Rasia made the Government aware of the results of the Road Feasibility Study, including what was discussed in Yerevan on 7 October 2013.

180. The use of so-called availability payments as a funding model for the Road Project was discussed at the meeting. Mr. Borkowski recalled that he explained to Minister Beglaryan that "Armenia had agreed to the availability payments provision under the road concession, and knew from our negotiations of the concessions that the road could not be financed based on tolling alone"; he said that Minister Beglaryan was upset over this arrangement, to the extent that he threatened to terminate the Road Concession if the Government had to make any availability payments to fund it. Mr. Borkowski says that Minister Beglaryan and Mr. Grigorian did not suggest that Mr. Borkowski's proposal contradicted the Road Concession, nor that a toll element was required under the concession.[135]

181. Mr. Grigoryan has presented a different account, saying that he does not "know what Mr. Borkowski is talking about." According to his recollection, Mr. Borkowski did not – at the 7 October 2013 meeting or thereafter – submit any details about how his proposed availability payment funding scheme would work. Instead, it became clear around this time that Mr. Borkowski's idea of the future of the Road Project differed from the Government's.[136] In particular,

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[133] C-119, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), 7 October 2013.

[134] C-116, Railway Feasibility Study; C-127, Email from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2013.

[135] First Borkowski Statement ¶ 53; Second Borkowski Statement ¶¶ 9, 50-51, 85; February Tr. Day 3, Borkowski, 409:5-14; February Tr. Day 4, Borkowski, 725:22-24.

[136] Grigoryan Statement ¶¶ 25-27.

Mr. Grigorian says he told Mr. Borkowski that "Armenia is not interested in spending its limited budget funds to finance the Road Project as presented by Rasia." He stated that his perception at the time was that Mr. Borkowski understood that Rasia's proposal for the Road Project was "unworkable and unacceptable on its face."[137] Mr. Grigorian testified that he and Minister Beglaryan explained during the October 2013 meeting that progressing without a tolling element was not possible: "We discussed his proposals, and we said that this option was not acceptable for the project which was the subject of the Concession which he had signed."[138]

182. Following a telephone call on 25 October 2013, Mr. Borkowski sent Mr. Grigoryan certain revised pages of a PowerPoint presentation he had used at the earlier October 2013 meetings. This presentation emphasized again that while Rasia considered the Railway Feasibility Study to be "preliminarily acceptable" to it, a "Toll Road Structure" for the Road Project "is not [e]conomical," whereas a "[f]ree [r]oad w/ Government Availability Payments is Feasible" from Rasia's perspective. The presentation stated that the "Objective" for the Road Project therefore was "to adopt feasibility studies and route by end of 2013 and to complete negotiation of agreement on availability payments to implement project."[139]

183. Mr. Borkowski ultimately submitted the Road Feasibility Study to the Government on 24 January 2014.[140] In the accompanying email, Mr. Borkowski wrote that "[g]iven the low traffic volume forecasts, this version assumes for now that there is no tolling on the Project (i.e. that this is a free road). Instead, following the adoption of the recommended corridor and the feasibility study, Rasia FZE will rely on availability payments from the government as provided in the concession agreement." He added that Rasia nonetheless would explore "potential tolling and levy strategies for the entire North-South Road Corridor and the Armenian road network to offset the cost of the availability payments" required to fund the Southern Armenia High Speed Road project.[141] This reference to the "*entire* North-South Road Corridor" must be taken to mean the broader NSRC road development project that Armenia had been exploring for years with international development banks. From this document, it appears that Mr. Borkowski's proposal at this point was that tolling should not be attempted on the southern Road Project for which Rasia had the Road Concession, but, rather that tolling should be explored on *other* portions of the NSRC, and other Armenian roads

[137] Grigoryan Statement ¶ 28.

[138] February Tr. Day 8, McNeill/Grigoryan, 1435:12-24.

[139] C-334, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 25 October 2013.

[140] C-122, Road Feasibility Study; C-130, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 24 January 2014.

[141] C-130, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 24 January 2014.

for which Rasia had no concession rights, in order to help the Government fund the full costs of construction for the Road Project.

184. As will be developed further below, this issue of how the Road Project would be financed became a critical stumbling block in that Project's moving forward. The Respondent says that the Road Feasibility Study submitted by Rasia did not comply with the Road Concession because it proposed that all costs be borne by the government through availability payments,[142] as opposed to at least in part by tolls, which the Respondent says was required by the Road Concession.[143] Rasia disagrees with this reading of the Road Concession; it contends that it permitted, but did not require, the use of tolls.

185. Separate from the issue of financing, the Parties also dispute whether the Road Feasibility Study complied with various other requirements of the Road Concession and the Road Terms of Reference. For example, the Parties dispute whether there was an agreement to merge the "two-road" Project set out in the Road Concession into a "single road" project later described in the Road Feasibility Study. They also dispute whether the Road Feasibility Study met some of the technical standards that had been agreed between the Parties in the Road Terms of Reference.[144] These disputes are discussed further below.

H. THE FAILURE OF THE PROJECTS

186. Neither the Road Project nor the Railway Project ultimately came to fruition. The reasons and timelines for the failure of the two Projects differ. In this section, the two Projects are discussed separately, beginning with the Road Project.

(1) The Road Project

187. A running theme in this Arbitration is the Claimants' contention that the Respondent engaged in a campaign to undermine the Road Project by seeking to develop a competing southern road in violation of Rasia's exclusive rights under the Road Concession – a characterization which the Respondent denies. The Parties also dispute what was agreed between them with respect to the type

[142] C-122, Road Feasibility Study, p. 125 (stating that it is "currently anticipated that the Project Costs … will be borne by the government of the Republic of Armenia through the provision of availability payments").

[143] Resp. Counter-Mem. ¶¶ 76-81; *see also* ¶¶ 510-518 below.

[144] For example, the Respondent contends that the Road Feasibility Study used a Chinese technical standard for roads, rather than the applicable Armenian technical standard stipulated in the Terms of Reference, with the result that the Feasibility Study proposed a much lower design speed than the Terms of Reference had anticipated (60 and 40 km/hour rather than 100 and 90 km/hour for different types of terrain).

of road(s) to be built, how this relates to the broader NSRC project, and how the Road Project was to be financed. The facts underlying these disputes are briefly outlined below.

a. Exclusivity and the NSRC project

188. On the Claimants' case, the Respondent's parallel campaign to develop a competing southern road had begun already in November 2012, when Armenia requested additional financing from the ADB.[145] As discussed above, the ADB had agreed in 2009 to provide a multi-tranche financing facility for various NSRC projects.[146] On 22 November 2012, Armenia submitted a periodic financing request to the ADB,[147] for which the ADB approved certain financing in an "Advance Contracting Notice" issued on 16 January 2013. The financing approved in this notice was for roadwork on Tranche 3 of the NSRC, but also to enable Armenia to "undertake feasibility and detailed design of Tranche 4," the southernmost portion of the NSRC.[148] On 18 June 2013, Armenia notified the ADB that it would require less funding from the ADB than previously discussed, because it had successfully obtained alternative financing from the European Investment Bank for part of the Tranche 3 work. However, Armenia stated that:

> as part of preparing the Tranche 4 of the ADB [Multilateral Financing Facility], we intend to request the ADB to take over the construction of approximately 55-60km of Category 1 road from Artashat to the southern direction …. Meantime, by doing the feasibility study of the whole of the southern part of the North South Road, we increase the chances for the Government to attract additional co-financing, or parallel financing, from such potentially interested lending agencies as the Eurasian Development Bank (EBD), JICA, etc.[149]

[145] Cl. Mem. ¶ 154; Cl. Reply ¶¶ 309, 371, 386(i); Cl. First PHB ¶ 4.

[146] R-4, ADB, Proposed Multitranche Financing Facility and Administration of Cofinancing, Republic of Armenia: North-South Road Corridor Investment Program, September 2009.

[147] C-134, Loan Agreement for the North-South Corridor Investment Program – Project 3 between the Republic of Armenia and the ADB, 11 March 2014, Preamble.

[148] C-276, Advance Contracting Notice from the ADB to the Ministry of Transport regarding the NSRC Investment Program, 16 January 2013; *see also* C-265, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching Letter from Mr. J. Borkowski to Mr. G. Beglaryan), p. 6 (attaching an 18 March 2014 letter from Mr. D. Dole of the ADB to Mr. Borkowski).

[149] C-295, Letter from D. Sargsyan, Minister of Finance of the Republic of Armenia, to K. Gerhaeusser, Director General, ADB, 18 June 2013.

189. Armenia and the ADB ultimately concluded a $100 million loan agreement on 11 March 2014, Schedule 1 of which describes the loan as covering, *inter alia*, the "preparation of feasibility study for Artashat-Qajaran section (304 km) of the North-South corridor."[150]

190. The Claimants say they were not aware at the time of the Respondent's dealings with the ADB about the southern road, which they claim was part of the territory for which Rasia held exclusive rights under the Road Concession. Mr. Borkowski and Mr. Tappendorf say that they first learned about Armenia's funding request when they met with ADB themselves on 12 July 2013.[151]

191. When Mr. Grigoryan and Minister Beglaryan met with Mr. Borkowski in Yerevan to discuss the preliminary results of the Feasibility Studies in October 2013, Mr. Borkowski also recalls asking whether Armenia was seeking separate ABD funding for the Road Project, which he says Mr. Grigoryan and Minister Beglaryan denied. Mr. Grigoryan does not agree with this version of events, and says that no attempts were made to hide from Rasia the Government's work with the ADB.[152]

192. However, according to the Respondent, the road stretch for which it sought ADB financing does not overlap in any event with the Concession Territory covered by Rasia's exclusive rights under the Road Concession. The request for ADB financing was triggered by the completion of preparatory works on Tranche 3, a different part of the NSRC, to which the "overwhelming majority" of the funds related, the Respondent says. The references to Tranche 4 are explained by the fact that Tranche 4 of the NSRC is longer than the Concession Territory,[153] and a small part of the work for which Armenia also sought financing covered a part of Tranche 4 which did not overlap with Rasia's rights. In any event, the Respondent observes, it is undisputed that the ADB loan agreement was not signed until 11 March 2014, by which time (on the Respondent's version of events), Rasia already had defaulted on its Road Project obligations.[154]

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[150] C-134, Loan Agreement for the North-South Corridor Investment Program – Project 3 between the Republic of Armenia and the ADB, 11 March 2014, Schedule 1, ¶ 3(c).

[151] First Borkowski Statement ¶ 48; Cl. Reply ¶ 372; Cl. First PHB ¶¶ 4, 34-45.

[152] First Borkowski Statement ¶ 53; Second Borkowski Statement ¶ 85; Grigoryan Statement, ¶¶ 25-28; Resp. Rej ¶¶ 224, 246; February Tr., Day 3, Borkowski, 409:5-14; February Tr. Day 5, Borkowski, 725:22-24.

[153] Resp. Counter-Mem. ¶ 71; Resp. Rej. ¶ 285.

[154] Resp. Second PHB ¶¶ 69-72; C-113, ADB, Periodic Financing Request Report, ¶¶ 4, 18-19, 31 and Tables 2 and 4.

b. Type(s) of road(s) and the financing thereof

193. As explained at paragraph 118 above, Section 3 of the Road Concession defined as the Road "Project" work on two separate roads. Rasia was "to implement from its own funds and attracted Project Financing" the design and build of a new "high speed road" (Section 3(b)) and was also "to rehabilitate and hand over to the Government the existing toll free road between Sisian and Meghri … within the budget of USD 80 millions" (Section 3(e)).[155]

194. It is undisputed that instead of the two roads contemplated by the Road Concession, Rasia proposed a single road project, financed by so-called "availability payments" from the Government instead of any tolls, on the basis that traffic volumes would be too low to sustain a toll road as a commercial undertaking. However, the Parties are in dispute as to the timing and implications of these developments, in particular, with respect to what was to be built instead of the toll road and how it was to be financed.

195. According to the Claimants, the Parties agreed to a one-road solution in November 2012, during the CCCC site visit to Armenia, a contention which the Respondent disputes.[156] The Claimants observe that the map contained in the site visit report reflects only one road.[157] The Claimants also contend that the Road Terms of Reference, signed on 10 November 2012, also consistently refer to a single road.[158] At the same time, the Respondent notes, Article 2 of the Road Terms of Reference describes the Road Project "[a]s defined in Section 3 […] of the [Road Concession]," which, as recounted above, provided for two roads.[159]

196. It appears undisputed that when Mr. Borkowski presented the preliminary findings of the Road Feasibility Study to the Armenian Government in August 2013, he told the government representatives that a new toll road was not feasible.[160] As mentioned above, Mr. Borkowski also wrote a letter to the Prime Minister on 19 September 2013 to the same effect.[161] The Road

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[155] C-2, Road Concession, Section 3; *see also Id.*, Section 1 (defining "Project" as having "the meaning ascribed thereto in Section 3").

[156] Cl. First PHB ¶ 84; Resp. First PHB ¶ 29.

[157] C-96, CCCC, "Site Visit Report: Southern Armenia High Speed Road Project", November 2012, p. 3; Cl. First PHB ¶¶ 96-104.

[158] C-98, Road Terms of Reference, *see* for example Section 9, Section 10 and Section 21.

[159] *Id*., Section 2.

[160] February Tr., Day 4, Hanessian/Borkowski, 590:23-591:7.

[161] C-118, Letter from Mr. J. Borkowski to the Prime Minister, copied to Minister Beglaryan, 19 September 2013 (thanking him for meeting with representatives of China Poly and Mr. Borkowski at Dalian, China, on 10 September 2013, and informing him of the general results of the Feasibility Studies for both projects)

Feasibility Study dated 2013 and submitted to the Government on 24 January 2014 states as follows regarding projected financing for the Road Project:

> It is currently anticipated that that the Project Costs including the Administrative, Operation and Maintenance Costs; the Principal and Interest costs from the debt financing; and the required Equity Return to equity investors, if applicable, will be borne by the government of the Republic of Armenia through the provision of availability payments. Based on the availability payments, it is anticipated that the Project should be able to secure loans from the Export-Import Bank of China or China Development Bank for approximately 60-85% of the Project investment requirement …. The remaining 15-40% of the funds are anticipated to be loans from an active international financial institution in Armenia with a history of financing or interest in financing the North-South Road Corridor program. It is not anticipated that equity investment will be required for the Project financing other than the equity invested for the feasibility study and other related works leading up to completion of the Project financing.[162]

197. A separate dispute between the Parties involves the Road Feasibility Study's compliance with the agreement in the Road Terms of Reference that the design "should meet the requirements" for a Class II category road as defined in Armenia's Construction Norms.[163] The Road Feasibility Study makes reference to "the Armenian requirements for the technical standards of the Project," but also refers to "the highway class selection" in a publication that describes the Chinese highway standards.[164] The distinction becomes important, because the Road Feasibility Study proposed design speeds of 60 and 40 km/hour based on terrain (which is consistent with the Chinese Class II standard), whereas the Armenian Class II standard involves higher design speeds of 90-100 km/hour.[165] As will be discussed further, Armenia raised questions in mid-2014 about the design speed reflected in the Road Feasibility Study.

c. Further NSRC developments in the south

198. On 2 October 2013, the Armenian Government issued a tender for "construction supervision of Tranche 3 and feasibility study, preliminary design and about 60km detailed design of Tranche 4" of the NSRC, to be financed by the ADB as discussed above. The tender described the Tranche 4 feasibility and design work as covering the "Artashat-Qajaran road section … of southern part of

[162] C-122, Road Feasibility Study, p. 125.

[163] C-98, Road Terms of Reference, Section 10.

[164] C-122, Road Feasibility Study, p. 9.

[165] *Id*.; April Tr. Day 1, Hanessian/Harrison, 1666:3-22.

North-South road."[166] The tender was won by a joint venture between Spea Ingegneria Europea S.p.A. and IRD Engineering SrL,[167] which later, on 30 March 2015, signed a contract with the Government for a feasibility study and design works for the Artashat to Kajaran road section of Tranche 4.[168] The feasibility study work was completed on 2 May 2016.[169]

199. Separately, on 5 February 2014, Armenia's Ministry of Transport signed an agreement with the French company Egis International ("**Egis**"), which had been providing consultancy services to the Ministry on other aspects of the NSRC project under a Consultancy Services Contract concluded on 24 September 2010. The 5 February 2014 document, entitled "Agreement No. 8," was said to be based on an "agreement of [ADB] issued on 16.10.2013," and assigned to Egis "the performance of the following new tasks," including preparation of a "[c]omprehensive [f]easibility [s]tudy of Qajaran-Agarak 50km southern section" of the NSRC, based on "Category 1 highway standards."[170] Egis commenced work for the studies on 17 February 2014, carried out a site visit from 21-23 February 2014 and issued the final version of its feasibility study on 15 May 2014.[171]

200. The Claimants contend that the work performed by the Spea/IRD joint venture and by Egis was done in respect of territory covered by the Road Concession. The Respondent says it was clear to the Government that the Road Project had failed, and that Rasia was in "default," before this work was commissioned.[172]

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[166] C-156, NSRC Investment Program, Consulting services for construction supervision of Tranche 3 and feasibility study, preliminary design and about 60km detailed design of Tranche 4, http://northsouth.am/en/procurement/show/13, 3 April 2015, p. 5.

[167] First Arakelyan Statement ¶ 59.

[168] C-299, Contract for Consultant's Services: Time-Based with Lump-Sum Component for North-South Road Corridor Investment Program – Tranche 3 between the Ministry of Transport and Communication of Republic of Armenia and its Agent "Organization for Implementation of North-South Road Corridor Investment Program" (SNCO) and Joint Venture of Spea Ingegneria Europea S.p.A. and IRD Engineering S.r.L.

[169] R-41, J/V SPEA Engineering-IRD Engineering, Feasibility Study for Tranche 4 - Section Artashat South to Kajaran, 2 May 2016.

[170] C-298, Agreement No. 8 on Consulting Services Contract No. 02-CS-002 between Egis International and North-South Road Corridor Investment Program Implementation Organization (SNCO) – Agent of Ministry of Transport and Communication, 5 February 2014, Preamble, ¶¶ 1.1, 1.3.1 & attached Variation Order No. 5, ¶¶ 1.1, 3.2.

[171] R-23, Egis International, Feasibility Study for the Southern Section of NS Corridor from Qajaran to Agarak, 15 May 2014, pp. 8, 26.

[172] Cl. Reply ¶¶ 386(iii), 387(iii); Resp Second PHB ¶ 76; First Arakelyan Statement ¶ 59 (stating that by the time of the tender in October 2013, "[a]s for the Road Project with Rasia […] we had not the slightest doubt that it was closed and all that was needed was to sign the relevant paperwork. So we felt free to take any steps we considered appropriate to continue with the North-South Program.").

d. The status of the Road Project in 2014

201. It is undisputed that, in contrast with the Railway Feasibility Study, Rasia never formally accepted the Road Feasibility Study.[173] The Claimants maintain that the Road Feasibility Study was automatically accepted under Section 20 of the Road Concession in March 2014, following the expiry of the commenting period provided by that provision.[174]

202. It is also undisputed that Armenia did not establish an inter-agency Working Group to study the Road Feasibility Study,[175] in the way that it did with the Railway Feasibility Study. In the Claimants' submission, the Government "ignored" the Road Feasibility Study,[176] a contention which the Respondent rejects, primarily with reference to a series of meetings in February 2014.

203. These meetings took place in Yerevan between Mr. Borkowski, government officials and representatives from both CCCC and China EximBank, between 6-24 February 2014 (the "**February 2014 Yerevan Meetings**"). These Meetings have been the subject of extensive pleadings by the Parties. Among other things, they disagree as to whether the Road Project was discussed at all during the meetings (see Section III.H.2 for relevance to the Railway Project).

204. According to the Respondent, the Parties discussed the Road Feasibility Study during the February 2014 Yerevan Meetings. Both Mr. Arakelyan and Mr. Grigoryan have recalled that government representatives made clear to Mr. Borkowski that the Road Project, as proposed by Rasia in the Road Feasibility Study, was unworkable. Both men had the impression – and the Respondent has argued – that Mr. Borkowski understood at the Meetings that the Road Project would not proceed.[177] In fact, at the February Hearing, Mr. Arakelyan went so far as to say that it was his understanding that the Parties mutually agreed to terminate the Road Concession during these meetings.[178] By contrast, Mr. Borkowski says that his repeated attempts to present the results of the Road Feasibility Study were cut off.[179]

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[173] February Tr., Day 3, Hanessian and Borkowski, 412:13-20.

[174] Cl. First PHB ¶¶ 8, 249; *See also* February Tr., Day 3, Borkowski, 411:21-25-412:1-7; February Tr., Day 5, Thornber, 956:5-10.

[175] February Tr., Day 8, McNeill/Grigoryan, 1448:21-1449:6.

[176] First Borkowski Statement ¶ 74.

[177] First Arakelyan Statement, ¶ 52; Second Arakelyan Statement ¶ 72; Grigoryan Witness Statement, ¶¶ 34-35; Resp. Counter-Mem. ¶ 82; Resp. Rej ¶ 257.

[178] First Arakelyan Statement ¶¶ 42-49; Grigoryan Statement ¶ 30; Resp. First PHB ¶ 152; February Tr., Day 6, Arakelyan, 1033:25-1034-7.

[179] Second Borkowski Statement, ¶¶ 58, 71; Cl. Reply ¶ 354.

205. During the February 2014 Yerevan Meetings, Mr. Borkowski says he also suggested that the Road Project be financed by CCCC, either by a loan against availability payments or on a government-to-government basis, and that he presented a draft Memorandum of Understanding (MOU) for the purposes of negotiating Chinese financing for the Road Project on either of these two bases.[180] By Mr. Borkowski's account, Minister Beglaryan was "non-responsive," but Mr. Arakelyan has said that he told Mr. Borkowski that a loan from a Chinese bank was not an option.[181]

206. Mr. Borkowski alleges that Minister Beglaryan solicited a bribe during the February 2014 Yerevan Meetings, by suggesting that the payment of a personal contribution to the Minister would secure his support for the Projects. According to Mr. Borkowski, Minister Beglaryan raised the subject at a separate meeting in his private office on 17 February 2014, which was also attended by Mr. Grigoryan acting as English-Armenian translator. During this meeting, Minister Beglaryan allegedly insisted that Mr. Borkowski drop the Road Project, and threatened that Rasia would also lose the Railway Project if Mr. Borkowski persisted with pursuing the Road Project. According to Mr. Borkowski, Mr. Grigoryan then said that "the Minister wants to know what's under the paper," and further explained that "he wants to know what's in it for him."[182] Both Mr. Arakelyan (who Mr. Borkowski says "with 100% certainty" did not attend the meeting in question[183]) and Mr. Grigoryan have denied Mr. Borkowski's account. Mr. Arakelyan says that no discussion of the kind Mr. Borkowski describes took place, while Mr. Grigoryan, who denies having been present at the alleged meeting, says there was "absolutely nothing," either during the February 2014 Yerevan Meetings or afterwards, that would support Mr. Borkowski's allegations in this respect.[184]

207. Two days after the alleged bribery request, Mr. Borkowski reported to Mr. Tappendorf about the February 2014 Yerevan Meetings. In his report, while he was "in middle of war on [the] road," he expected "a victory on that soon," and in the meantime had scored a "[b]ig win" with respect to the Railway Project, in the sense that Armenian officials had been impressed with his detailed presentation.[185] Mr. Borkowski admits that he never told Aabar about the bribery request he now alleges took place at this time.[186]

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[180] Cl. Reply ¶ 358; Second Borkowski Statement ¶ 103.

[181] Second Borkowski Statement ¶¶ 97-98; First Arakelyan Statement ¶ 43.

[182] Second Borkowski Statement ¶¶ 18, 66-80.

[183] *Id*., ¶ 76.

[184] First Arakelyan Statement ¶ 54; Second Arakelyan Statement ¶ 71; Grigoryan Statement ¶¶ 12, 31-32.

[185] CT-6, Email from Mr. J. Borkowski to Mr. C. Tappendorf, 19 February 2014.

[186] February Tr. Day 3, Hanessian/Borkowski, 430:24-433:5.

208. Be that as it may, immediately after the February 2014 Yerevan Meetings, Mr. Borkowski wrote to ADB. He did so, because he says that he had been told at those Meetings that Rasia might be able to participate in the broader ADB-financed NSRC road program, involving a Category 1 road (which the Respondent denies).[187] In a 20 February 2014 email to Mr. David Dole of the ADB, Mr. Borkowski submitted what he described as a "request for approval from [ADB] to continue our activities."[188] The attached letter stated as follows:

> Following our presentation of the Southern Armenia Railway, the Prime Minister requested that Rasia and CCCC contact [ADB] to seek [ADB] approval in order to participate in the North South Road Corridor program.
>
> Pursuant to this instruction, we are pleased to submit our formal request for Rasia and CCCC, together and individually, to continue existing works on the Southern Armenia High Speed Road project as well as to consider additional new works regarding feasibility, design, financing and construction proposals between CCCC, the China Banks such as China Export Import Bank and China Development Bank, and the Government of the Republic of Armenia potentially extending from Ararat to Agarak. In all cases, we aim to coordinate closely with [ADB] and request your approval by letter to the Minister of Transport and Communication, Mr. Gagik Beglaryan, to work directly with the Government of the Republic of Armenia.
>
> Kindly advise of any questions or required clarifications to this letter and we hope to secure your approval/consent to continue our road related works soon.[189]

209. On 3 March 2014, Mr. Borkowski reported to Mr. Weixin of CCCC that ADB was finalizing a letter to Minister Beglaryan "that would enable CCCC to move forward on the road project MoU," integrating the CCCC Road Project into the broader NSRC.[190]

210. On 18 March 2014, however, ADB responded without making any commitments. The transmittal email to Mr. Borkowski said the ADB was "requesting the govt's advice on how they would like us to work with Rasia…. [w]e are kicking this back to the govt."[191] The attached ADB letter stated that while ADB "is interested in cooperating with all potential partners on Armenia's North-South Road Corridor Investment Program, and is glad to hear of Rasia's interest in the southern sections of the North-South road … [a]ll work on the North-South road, involving ADB or others … is

[187] Second Borkowski Statement ¶ 95; February Tr. Day 3, Borkowski, 441:1-5; Resp. Rej. ¶ 256.

[188] R-90, Email from Mr. D. Dole to Mr. J. Borkowski, 4 April 2014, p. 3.

[189] R-15, Letter from Mr. J. Borkowski to Mr. D. Dole, 20 February 2014.

[190] R-85, Email from Mr. J. Borkowski to Mr. B. Weixin, 3 March 2014.

[191] R-90, Email from Mr. D. Dole to Mr. J. Borkowski, 4 April 2014, p. 2.

coordinated by" the Armenian Ministry of Transport. ADB instructed Rasia to "coordinate directly" with Armenian officials "to discuss Rasia's interest in financing the North-South road …."[192]

211. On 19 March 2014, Mr. Weixin of CCCC expressed confusion about ADB's role in the "upcoming sections of North-South Corridor project," because "[i]t seems that ADB still wants to be the leading party." Mr. Borkowski explained that "[w]e are submitting a formal letter to the Armenia government today requesting the Minister to enter into the MoU directly with CCCC." Mr. Borkowski's explanation was that "if China is providing 70-85% of the funding, the other 15-30% has to come from the government of Armenia, which means ADB or Eurasian Development Bank."[193]

212. The next day, on 20 March 2014, Mr. Borkowski sent a letter to Minister Beglaryan, in which he professed to have "received a positive response letter" from ADB regarding "mutual cooperation with the Government of the Republic of Armenia for the North-South Road including [the Road Project]." The letter also attached the same draft CCCC MoU Mr. Borkowski allegedly raised with Armenia at the February 2014 Yerevan Meetings, pursuant to which Armenia and CCCC would seek to integrate the proposed road into the NSRC initiative and begin negotiating Chinese financing. Mr. Borkowski proposed in his letter to Minister Beglaryan that "CCCC and Rasia FZE, at our own cost, […] modify the existing feasibility study and the recommended alignment of the road project to the standards of the North-South Road Corridor."[194]

213. Several days later, on 24 March 2014, Mr. Borkowski reported to ADB that in a meeting with Mr. Grigorian of the Ministry of Transport, he was told that "the Armenian government has agreed to borrow funds from ADB that also covers a feasibility study from Arthashat to Kajaran." Mr. Borkowski queried why "the government is paying for another FS when we have already paid CCCC" for one. Nonetheless, he said, "[w]e are waiting to modify our FS from the road directorate technical input/standards to the NSRC technical standards."[195] The next day, ADB confirmed that it "has about $170 million left to lend for the NS road, and will prefer to continue from Artashat to however far south we can" with that sum, but it required instructions from the Government

[192] C-265, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching Letter from Mr. J. Borkowski to Minister G. Beglaryan), 21 March 2014, p. 6 (attaching 18 March 2014 letter from Mr. D. Dole to Mr. J. Borkowski).

[193] R-89, Email from Mr. B. Weixin to Mr. J. Borkowski, 26 March 2014.

[194] R-19, Email from Mr. J. Borkowski to Minister G. Beglaryan, 20 March 2014 (attaching Letter from Mr. D. Dole to Mr. J. Borkowski, 18 March 2014, and Draft Memorandum of Understanding between Armenia and CCCC, 20 March 2014); C-239, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 21 March 2014 (attaching Letter from Mr. J. Borkowski to Minister G. Beglaryan).

[195] R-88, Email from Mr. J. Borkowski to Mr. D. Dole, 26 March 2014, p. 3.

regarding Rasia's participation. ADB did report "good news for you," which was that "[t]he final version of the govt's development strategy mentions your railway and road projects." Mr. Borkowski welcomed the news and stated that "[h]opefully I can sort out the road matter and CCCC can continue their work."[196]

214. Mr. Borkowski's optimism was misplaced, however. One week later, on 1 April 2014, Mr. Beglaryan informed the ADB that the Road Feasibility Study submitted by Rasia "is inefficient and does not comply with the overall strategy, and therefore it cannot be considered" within the broader NRSC project. Specifically, he complained as follows:

> [I]n the feasibility study represented by Rasia is proposed a reconstruction of the existing road option by providing Category II road where the design speed is 60 km/h and 40 km/h and the carriageway is 2 lanes as well as is intended horizontal curves with small radius and large longitudinal slopes. Taking into account the main conditions of North-South road corridor now feasibility study is being carried out for about 5 alternatives, where approval is expected to be given to the construction of the Category I road where the speed will be mostly 80km/h and carriageway will be 4 lanes, as well as the new road construction will give an opportunity to shorten the existing about 50km road section. At the same time for intending carriageway with 2 lanes for upstream and downstream it's necessary to have additional lanes for traffic, otherwise problems may arise in the presence of large trucks. On the Qajaran to Agarak section … [i]t should also be noted that the radiuses of horizonal curves, longitudinal slopes and other technical parameters are more secure and creates favorable conditions for traffic.

Mr. Beglaryan added, however, that while Rasia's Road Feasibility Study could not be considered within the NSRC project, "Rasia, if [it wishes], can be involved into the implementation" of any road construction resulting from alternative feasibility studies developed by the ADB in future.[197]

215. On 4 April 2014, Mr. Dole of the ADB informed Mr. Borkowski that he believed the Government did not understand that "the govt and any financier can do a separate deal themselves and ADB does not have to be involved" in all financing for the North-South road. Mr. Borkowski agreed that "in my discussions with the [Ministry of Transport], the key aspect the[y] have not been understanding is the 'separate deal' part."[198] Mr. Borkowski had tried to explain to the Government that Rasia wished to continue "with our project," and to work with ADB on co-financing "only

[196] R-88, Email from Mr. J. Borkowski to Mr. D. Dole, 26 March 2014, pp. 2-3.

[197] C-294, Letter from Minister G. Beglaryan to Mr. D. Dole, 1 April 2014.

[198] R-90, Email from Mr. D. Dole to Mr. J. Borkowski, 4 April 2014, p. 2.

where we meet the necessary standards/requirements, but we also want to be able to explore all financing alternatives (Exim, China Development Bank, etc) that may also not involve ADB in the financing …. I think they are learning as things go but they seem to have good intentions." ADB replied that "[o]ne part of the govt's argument makes sense – they want to follow one set of rules for the whole road."[199]

216. Roughly five weeks later, on 12 May 2014, Mr. Borkowski sent a follow-up email to Mr. Grigoryan at the Ministry of Transport. He stated that "CCCC … asked about the road project and would love to be able to sign the MoU," so that Rasia could "get the Chinese banks working with the Minister of Finance on very special loan packages."[200] It is undisputed that Armenia never signed a Memorandum of Understanding with CCCC.[201]

217. On 23 May 2014, Armenia requested a US$150 million loan from the EDB.[202] The EDB approved the loan on 2 July 2014,[203] and the final loan agreement was executed on or about 14 April 2015.[204] The Claimants argue that the road stretch for which the loan was sought overlaps with the exclusive territory in the Road Concession, a contention which the Respondent disputes.[205] The Claimants also argue that while the formal request for the EDB loan took place in May 2014, Armenia took several earlier steps, beginning with a preliminary application in December 2012, to seek this financing.[206] According to the Respondent, the precise section of the road for which the government sought EDB construction financing had not been defined in December 2012. In any event, the Respondent says, first, that the stretch for which it sought EDB financing did not overlap with the road envisioned by the Road Concession, and, second, the loan agreement with EDB was not

[199] R-90, Email from Mr. D. Dole to Mr. J. Borkowski, 4 April 2014, p. 1.

[200] R-97, Email from Mr. J. Borkowski to Staff of the Ministry of Transport, 12 May 2014.

[201] February Tr., Day 8, McNeill/Grigoryan, 1440:16-19.

[202] C-139, "Eurasian Fund for Stabilization and Development Website: "Armenian Ministry of Finance Applies to EDB for New Investment Finance From the ACF," https://efsd.eabr.org/en/press-center/news/armbanks-am-armenian-ministry-of-finance-applies-to-edb-for-new-investment-finance-from-the-acf/, 29 May 2014; C-140, Eurasian Development Bank – Resources Manager of EurAsEC Anti-Crisis Fund, "Appraisal of Application of Republic of Armenia for Investment Loan to be provided by the EurAsEC Anti- Crisis Fund for the project 'Construction of the North-South Road Corridor (Phase 4)' in the amount of US$ 150 million," June 2014;

[203] C-128, Eurasian Development Bank, "Eurasian Fund for Stabilization and Development – Annual Report 2014," 2014, p. 16.

[204] C-297, Agreement on an Investment Loan Extended Using the Funds of the Anti-crisis Fund of the Eurasian Economic Community to Finance the Project Titled Construction of the North-South Road Corridor (4th Stage) between Armenia and EDB, April 2015.

[205] Cl. Mem. ¶ 154; Resp. Rej ¶ 291.

[206] Cl. First PHB ¶¶ 57-60; C-140, EDB Appraisal of Application of Armenia for Investment Loan for the project "Construction of the NSRC (Phase 4), June 2014, pp. 6, 23.

executed until 14 April 2015,[207] long after Rasia had defaulted on the Road Project (and over a year after the ADB loan discussed above).[208]

218. On 16 June 2014, Deputy Minister Arakelyan wrote a letter to Mr. Borkowski which emphasized technical differences between the two projects, along the same lines as Mr. Beglaryan's 1 April 2014 letter to the ADB. The letter noted, for example, that Rasia had submitted a Road Feasibility Study which provided for "reconstruction of the existing road option by providing Category II road where the design speed is 60 km/h and 40km/h and carriageway is 2 lanes as well as is intended horizontal curves with small radius and large longitudinal slopes." This proposal was contrasted with the "main conditions" of the NSRC feasibility study now being carried out with ADB assistance, "where approval is expected to be given to the construction of the Category I road where "the speed will be mostly 80km/h and carriageway will be 4 lanes," with "radiuses of horizontal curves, longitudinal slopes and other technical parameters [that] are more secure and create[] favorable conditions for traffic." Mr. Arakelyan invited Rasia to be involved in the future "implementation of the Project," subject to ADB approval.[209]

219. The Parties dispute whether the Road Concession was ever effectively terminated. While the Respondent has suggested that the Concession was orally terminated at the February 2014 Yerevan Meetings, it has conceded that the formal termination was delayed.[210] The Ministry of Transport prepared a draft decision authorizing Minister Beglaryan to rescind the Road Concession. It was submitted to the Ministry of Justice for legal review, and on 5 December 2014 also submitted to the Chief of the Staff of the Government for consideration.[211] However, the formal termination decision was not sent to Rasia "solely for bureaucratic reasons," the Respondent says.[212] Instead, Mr. Borkowski says, he was informed by Mr. Grigoryan in a phone call "on or around 29 December 2014" of the Government's decision to terminate the Road Concession.[213]

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[207] C-157, North-South Road Corridor Investment Program, Investment Agreement Signed with Eurasian Development Bank, 14 April 2015, http://northsouth.am/en/news/show/79/70.

[208] Resp. Second PHB ¶ 73; February Tr. Day 2, Fridman, 258:3-16.

[209] R-26, Letter from Mr. A. Arakelyan to Mr. J. Borkowski, 16 June 2014.

[210] Resp. First PHB ¶ 155.

[211] R-31, Letter from Mr. Beglaryan to Mr. D. Harutyunyan (attaching Draft Decision on Making Amendments to the Decision of the Government of the Republic of Armenia No. 982-AG of 2 August 2012), 5 December 2014.,

[212] First Arakelyan Statement ¶¶ 49-50; Resp. First PHB ¶ 155.

[213] Second Borkowski Statement ¶ 89.

220. On 31 December 2014, Mr. Borkowski wrote to Minister Beglaryan that Rasia was "still waiting for confirmation that the Southern Armenia High Speed Road Concession Agreement has been terminated."[214] The letter expressed disappointment about this outcome, but it did not allege any breach of contract or other wrongdoing on the part of Armenia.

221. After this letter, the record contains no further written correspondence between the Parties about the Road Project for the next 18 months, until the Claimants' Notice of a Dispute under the BIT on 25 June 2016.[215]

e. Alleged Road Project arrangements with CCECC and other entities

222. In the meantime, the Claimants say, Armenia took steps to develop the Road Project with entities other than Rasia. Specifically, the Claimants say that Armenia signed an MoU on Tranche 4 of the NSRC with China Civil Engineering Construction Corporation Ltd. ("**CCECC**") on 23 December 2014. This alleged MoU (the "**Alleged CCECC MoU**") has not been produced as evidence in this Arbitration, but the Claimants contend that its existence is evident from a briefing prepared for the Armenian President, before his visit to China in March 2015.[216] The Respondent says this reflects a mistake in making reference to a December 2014 MoU.[217] An MoU undisputedly was signed on 31 January 2015 between the Armenian Ministry of Transport and the CCECC, but this was for the design and construction of just a 22 kilometer road section south of Kajaran, including a 4.7 km tunnel, and not any broader stretch of Tranche 4 (the "**CCECC MoU**").[218]

223. Following the CCECC MoU, a CCECC delegation visited Armenia in January and February 2015 to investigate the road, as well as the Southern Railway Project (railway issues discussed separately below). The resulting site visit report has not been produced as evidence in this Arbitration, but the Claimants again contend that the site visit is evident from the same March 2015 briefing prepared for the Armenian President. In the absence of the site visit report, the precise stretch of the road investigated by CCECC is not clear.[219]

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[214] C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014.

[215] C-53, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 25 June 2016.

[216] C-306, Presentation, "Construction of the Southern Railway Passing through Armenia's Section of the Silk Road," 2015, p. 7 (stating that "[o]n 23 December 2014 the Minister of Transport and Communication of the RA signed a Memorandum on Tranche 4 of the North-South highway" with CCECC).

[217] Resp. Rej, ¶ 197.

[218] AA-5, MoU, Ministry of Transport and CCECC, 30 January 2015.

[219] Cl. First PHB ¶ 61; C-306, Presentation, "Construction of the Southern Railway Passing through Armenia's Section of the Silk Road", 2015, p. 7.

224. In 2015 and 2016, the Claimants say that the Armenian Government took further actions to develop the Road Project with entities other than Rasia.[220] Those steps included:

(i) an announcement, by President Sargsyan on 11 December 2015, that Armenia would soon issue an invitation for bids for the construction of the Kajaran-Agarak section of the NSRC;[221]

(ii) Armenia's signing on 18 July 2016 of a Memorandum of Understanding with Sinohydro, a large Chinese engineering and construction company, for the completion of the entirety of Tranche 4 of the NSRC;[222]

(iii) a meeting hosted by Minister Beglaryan in Yerevan on 25 July 2016 in order to provide information about the tender for the design and construction of the Kajaran-Agarak section of Tranche 4;[223]

(iv) an August 2016 tender for the Kajaran-Agarak road section;[224] and

(v) a May 2020 announcement that an Italian company would begin work on the Kajaran-Agarak road section of Tranche 4.[225]

(2) The Railway Project

225. On 13 December 2013, Armenian Prime Minister Sargsyan issued a decree creating an "interagency working group" to "examine the feasibility study on the proposed draft project of the Armenian South Railroad" (the "**Working Group**").[226] Officials from nine different agencies participated in the Working Group with Mr. Beglaryan as one of its two heads.[227]

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[220] Cl. Reply ¶¶ 386-387; Cl. First PHB ¶ 61.

[221] C-173, President of the Republic of Armenia Press Release, 11 December 2015.

[222] C-14, North-South Road Corridor Investment Program Website: Memorandum of Understanding Between the RA Ministry of Transport and Communication and Chinese Sinohydro Corporation Ltd. (http://northsouth.am/en/news/show/126/20), accessed on 11 July 2018, 18 July 2016.

[223] C-182, "Meeting held regarding the competition for the design and construction of the Qajaran - Agarak section", 26 July 2016; C-173, President of the Republic of Armenia Press Release, 11 December 2015.

[224] C-185, Presentation titled "North-South Road Corridor Investment Program: Republic of Armenia", 26–27 October 2016, Slide 9.

[225] C-254, "NSRC project's works in southern Armenia to be transferred to Italian company", 7 May 2020.

[226] C-300, Prime Minister of the Republic of Armenia Decree No. 1157-A on Creating Interagency Working Group (Unofficial English Translation and Armenian Original), 13 December 2013.

[227] *Id.*, p. 2.

226. As noted in Section III.G.3 above, Rasia then submitted the Armenian version of the Railway Feasibility Study on 31 December 2013. It appears undisputed that the Armenian Government did not provide written comments to Rasia on the Railway Feasibility Study. The Respondent argues (as discussed further herein) that, pursuant to Sections 20.2-20.3 of the Railway Concession, this means that the Railway Feasibility Study was deemed to have been "finally accepted" on 30 January 2014, thirty days from the date of the Government's receipt,[228] with the result that the time periods for Rasia's obligations under the Railway Concession with respect to further phases of the Project began running from then.

227. Notwithstanding the absence of written comments provided to Rasia, the Railway Feasibility Study was the subject of study and discussion within the Armenian Government. On 17 February 2014, the governmental Working Group sent a summary of its recommendations to the Ministry of Transport. One recurring concern mentioned by several ministries was that the project cost calculated at $3.2 billion did not include the acquisition cost of lands required for construction. Working Group members also wished to learn more about the projected loan terms for the 60% of the project that was to be debt financed, and about the "procurement sources" of the other 40% of the project cost.[229] In this regard, the Railway Feasibility Study had stated only as follows:

> The Project allows for loans from the Export-Import Bank of China (interim) of at least 60% with a bank loan APR of 3.5% as well as self-raised funds of 40% with the participation of regional governments benefiting substantially from the development of the Project.[230]

228. The Railway Project was then discussed extensively at the February 2014 Yerevan Meetings, when Mr. Borkowski, together with a CCCC team, presented the results of the Railway Feasibility Study in more detail to representatives from the Working Group.[231] Rasia's PowerPoint presentation reported that financing would be "[h]ighly dependent on China bank negotiations and Armenia involvement during 2-year Project Financing period," but stated that Rasia's "[p]reliminary discussions with China banks assumed" they would finance 60% of the estimated $3.2 billion

[228] C-1, Railway Concession, Section 20; Resp. First PHB ¶ 74.

[229] C-279, Letter from A. Shahnazaryan, Railway Construction Directorate, to A. Arakelyan, Deputy Minister of Transport, enclosing summary sheet of recommendations of the interagency working group (Unofficial English Translation and Armenian Original), 17 February 2014.

[230] C-116, Railway Feasibility Study, pp. 12, 15; *see also Id.*, p. 168 ("[i]t is currently anticipated that loans will be secured from the Export-Import Bank of China (interim) for approximately 60% of the Project Cost … implying that the remaining 40% of funds will need to be secured from regional governments and international financial institutions").

[231] First Borkowski Statement ¶¶ 74-77; Second Borkowski Statement ¶¶ 53-57; First Arakelyan Statement ¶¶ 24-25.

Project cost at a fixed rate of 3.5%, with the "[r]emaining 40% likely to be sourced from traffic volume Origin and Destination countries along Corridor," from whom regional freight volume guarantees might be sought.[232]

229. The Minutes of the governmental Working Group meeting on 19 February 2014, attended by Rasia, reflect that the Working Group recommended the Government approve a draft decision which in turn would approve the "preliminary alignment of Southern Armenia Railway construction … and the draft feasibility study (technical and economic rationale) and submit it to the Prime Minister of the Republic of Armenia."[233] The reference to the proposed alignment as being only "preliminary" at this stage is explained further below.

a. February-August 2014 correspondence about corridor alignment

230. After the February 2014 Yerevan Meetings, the Parties corresponded about next steps for the Railway Project. On 3 March 2014, apparently in response to the Government's request,[234] Mr. Borkowski provided Armenia with a two-year "Roadmap to Construction," which among other things calculated a "Feasibility Study Deadline" of 30 June 2014, based on a "Feasibility Study Start[]" date of 31 December 2012. The Rasia roadmap also referred to "Year 1 (2014-2015)" steps as including a "Government Decree – Feasibility Study/Alignment" and a "Land Acquisition Plan for Project Areas." The land acquisition plan was to be developed in Year 1 *before* the detailed engineering work, with the acquisition of lands slated to take place in Year 2.[235]

231. On 13 March 2014, the Government promulgated a Decree approving an action plan for 2014-2017 measures implementing national road transportation security. This action plan anticipated, *inter alia*, that the Railway Feasibility Study would be jointly approved by the Government and Rasia in the second quarter of 2014.[236]

232. On 21 March 2014, Mr. Borkowski wrote to the Ministry of Transport, stating that Rasia was looking forward to receiving copies of the Government decrees "reflecting the adoption of the

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[232] C-131, "Southern Armenia Railway Project and Southern Armenia High Speed Road Project" (Razia FZE), February 2014, p. 15.

[233] R-14, Minutes of the session of the inter-departmental working group established for the purpose of examining the proposed alignment of the Southern Railway of Armenia, 19 February 2014.

[234] R-85, Email from Mr. J. Borkowski to Mr. B. Weixin, 3 March 2014.

[235] R-16, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 3 March 2014.

[236] R-17, Decision of the Government of the Republic of Armenia, No. 305-N, On Approving Plan-Schedule of 2014-2017 Measures Guaranteeing Implementation of National Strategy Provisions on Ensuring the Transport Security of the Republic of Armenia, 13 March 2014.

feasibility study and recommended alignment so that we can begin the financing period" under the Railway Concession.[237]

233. As discussed in Sections III.C.6 and III.C.7 above, the Railway Concession had provided that the Feasibility Studies were to "reflect" the proposed land corridor on which construction would take place, and that the Government was to "confirm the Corridor recommended by the Feasibility Study" within 90 days of Rasia's final acceptance of the Feasibility Study. The Government's confirmation of the corridor would in turn constitute its recognition of "the exclusive prevailing public interest in respect of the lands and immovables in the Corridor," and would trigger its duty to acquire the Corridor these lands and immovables "within a reasonably short period," so as not to delay the start of construction.[238]

234. Respondent claims that in early April 2014, Mr. Grigoryan wrote to Rasia noting that the company had not provided sufficiently detailed information regarding the corridor to allow the Government to begin taking the steps required for it to acquire all lands and immovables in the Corridor, as required by the Railway Concession.[239] While this particular communication does not appear to be in the record, it does seem clear from other correspondence that the Government raised the issue of detailed coordinates with Rasia in early April 2014. On 13 April 2014, Mr. Borkowski asked Mr. Weixin of CCCC for "[a]ny news on the … railway GPS or other coordinates," advising him that "[w]e need responses as quickly as possible to avoid dragging this project timeline out."[240] Mr. Weixin responded on 14 April 2014 that "absolute coordinates," as opposed to the "relative coordinates" already in place, would be necessary for further design work for the Railway Project," a response that Mr. Borkowski interpreted as meaning that the more detailed coordinates could not be provided until the engineering stage.[241]

235. On 21 April 2014, Mr. Borkowski reported to the Ministry of Transport that he had met with CCCC and "spoke extensively about the alignment" question the Ministry had raised. Specifically, "[r]egarding your request for coordinates," he attached the coordinates he had, but advised that "[a]s is standard in railway engineering design and construction, these coordinates are considered relative (versus absolute) at this stage since they may be varied as the route scheme is optimized ...

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[237] C-265, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching Letter from Mr. J. Borkowski to Minister G. Beglaryan), 21 March 2014.

[238] C-1, Railway Concession, Section 9(e), (f); Section 21; Section 22.1.

[239] Resp. First PHB ¶ 109.

[240] R-94, Email from Mr. B. Weixin to Mr. J. Borkowski, 14 April 2014.

[241] *Id*.

during the design and construction stage." Mr. Borkowski added that "the variation may be controlled in a few hundred meters in either direction," and suggested that "[t]his process is iterative and becomes more specific as the project progresses." Mr. Borkowski requested the Government proceed to provide its decrees approving the Railway Feasibility Study and the "macro alignment adoption" for the railway corridor.[242]

236. Mr. Grigoryan responded on 30 April 2014 that the coordinate data Rasia had supplied "cannot be processed by the State Committee of the Real Estate Cadastre," which required submission of information in the "WGS-84 coordinates system," for it to identify "all the necessary data on the adjacent area to the alignment." On 5 May 2014, Mr. Grigoryan wrote again to Mr. Borkowski, expressing concern that "the coordinates already provided might not be correct as the unofficial viewing showed deviations varying from a few meters to several kilometers." Given these significant discrepancies, he again requested submission of coordinates in "the WGS-84 coordinates system," and expressed the hope that "they will be completely correct."[243] Mr. Borkowski replied the same day, repasting his 21 April 2014 response and insisting that only "relative coordinates" could be provided at this point, and that "[t]he government must adopt the FS and macro alignment for us to move forward …. [T]he government should not begin allocating land now." He also emphasized that "we should make amendments to the concession agreement based on the actual developments we experience together over time which can never match the anticipated steps in the concession agreement."[244]

237. On 23 May 2014, Mr. Borkowski wrote again, emphasizing that the coordinates provided were "relative coordinates" (although already in a WGS format), and reiterating CCCC's view that "we do not recommend that the government use these coordinates to immediately transfer the land at this stage because the route scheme and therefore the coordinates are expected to be optimized during the EPC … stage." He advised that "[t]he land cadastre should not take any further actions" until Rasia provided further information at a later stage. Mr. Borkowski proposed that once the Government had "confirm[ed] the feasibility study and macro alignment" based on the information provided, "we can simultaneously agree to various concession agreement modifications including that the land assemblage will take place later following the start of the EPC works."[245]

[242] R-20, Email from Mr. J. Borkowski to Mr. A. Arakelyan and Mr. G. Grigoryan, 21 April 2014.
[243] R-22, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 5 May 2014.
[244] C-340, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 5 May 2014.
[245] R-24, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 23 May 2014.

238. On 31 May 2014, Mr. Borkowski contacted his ADB correspondent, Mr. Dole (with whom Rasia was already in touch about the Road Project), to suggest that ADB might be able to assist Armenia with "the financial support (i.e. soft loans) and expertise to fulfill the GoA obligations related to the … railway (such as identifying the exact parcels of land most suitable for the project, assisting with the land assemblage, and developing social and environmental analyses not currently required under the concession agreements)."[246] Mr. Borkowski expressed concern that "[a]t the moment, the GoA … wants me to tell them the exact parcels of land required for the project now so that they can assemble and transfer them to the project; something that CCCC and I communicated would not be necessary until post engineering survey and pre-construction rather than now."[247]

239. On 16 July 2014 the Chairman of Armenia's State Committee of the Real Estate Cadastre informed Mr. Beglaryan that the Cadastre could not agree to the proposed draft Government decision approving the "initial right-of-way of construction" of the Railway Project. The Cadastre advised that once it received appropriate "measurement data," it would be possible for the Cadastre to provide information on "the surfaces, designated purpose and ownership entities of the land parcels located on the adjacent territories of the right of way."[248]

240. Rasia maintains that it formally accepted the Railway Feasibility Study in a letter to Minister Beglaryan several days later, on 20 July 2014. That letter stated that "[b]y this Notice, … we finally accept" the study, and "look forward to receiving the government decrees … that will officially adopt both the … feasibility study as well as the recommended railway alignment so that we may begin our Project Financing period."[249] As noted in para. 226 above, the Respondent maintains, by contrast, that Rasia should be deemed to have accepted the Railway Feasibility Study automatically almost six months earlier, on 30 January 2014, through application of Section 20 of the Railway Concession.[250]

241. Be that as it may, on 7 August 2014, Armenia promulgated Protocol No. 33-26, "on Approving the Preliminary Alignment and the Feasibility Study of the Southern Armenia Railway Construction" (the "**7 August 2014 Protocol**"). This Protocol accommodated Rasia by replicating its proposed

[246] R-99, Email from Mr. J. Borkowski to Mr. D. Dole, 31 May 2014. At the Hearing, Mr. Borkowski admitted that the latter part of this statement was incorrect; the Railway Concession had made Rasia responsible for social and environmental analyses. *See* February Tr. Day 3, Hanessian/Borkowski, 540:6-16.

[247] R-99, Email from Mr. J. Borkowski to Mr. D. Dole, 31 May 2014.

[248] R-106, Letter from M. Sarsyan to Minister G. Beglaryan, 16 July 2014.

[249] C-141, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 20 July 2014.

[250] Resp. First PHB ¶ 74; C-1, Railway Concession, Section 20.

language approving the "preliminary alignment" of the Railway, but it went on to make clear that the Government intended to act with dispatch in performing its side of the Concession Agreement's terms on land assemblage. In particular, the 7 August 2014 Protocol instructed the Cadastre to provide information on the purpose and value of lands that would be impacted by the Railway, two months after receiving the coordinate measurement date from Rasia, and within a few months thereafter, the Government was to consider any proposed changes to the preliminary alignment and prepare a list of actions needed to move forward to a final alignment and land acquisition mechanisms.[251]

242. The following day, 8 August 2014, Mr. Borkowski requested the Government to issue a formal notice approving the Railway Feasibility Study and the preliminary alignment, based on the understanding that detailed coordinates would be provided later. He stated that he needed this document to move to the next stage on financing arrangements,[252] even though he had previously written that the Concession Agreements provide for "automatic adoption" of Feasibility Studies, in the absence of Government comment.[253]

243. Following another request from Mr. Borkowski on 15 August 2014,[254] Minister Beglaryan formally communicated the Government's decision to approve the Railway Feasibility Study in a letter to Mr. Borkowski on 19 August 2014. It stated as follows: "[t]he preliminary alignment … has also been approved …. Rasia may now proceed to the Project Financing Period under the [Railway Concession] while also determining the final detailed coordinates for the recommended alignment of the Southern Railway."[255]

244. The issue of coordinates was not resolved by these communications. Before addressing disputes that subsequently arose, the Tribunal summarizes below a separate issue connected to the Railway Project, involving uncertainties about railway connections at the Iranian border and the relationship between such connections and the availability of potential project financing.

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[251] C-288, Protocol Decree 33/-26 on Approving the Preliminary Alignment and the Feasibility Study of the Southern Armenia Railway Construction (Unofficial English Translation and Armenian Original), 7 August 2014.

[252] R-27, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching Letter from Minister G. Beglaryan to Mr. J. Borkowski, 18 August 2012), 15 August 2015.

[253] R-20, Email from Mr. J. Borkowski to Mr. A. Arakelyan and Mr. G. Grigoryan, 21 April 2014.

[254] R-27, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching Letter from Minister G. Beglaryan to Mr. J. Borkowski, 18 August 2012), 15 August 2015.

[255] C-143, Letter from Minister G. Beglaryan, to Mr. J. Borkowski, 19 August 2014.

b. The Iranian connections

245. As discussed above, the existing railway network in Armenia did not extend south to the Iranian border. Nor, for that matter, did the existing Iranian railway network extend north to the Armenian border. For the two networks to connect, new track would have to be laid on both sides of the border. Armenia and Iran had discussed the need for improved transport connectivity between the two countries for several years prior to the initiation of the Railway Project.[256]

246. The establishment of a connection to the Iranian railway system was a critical factor for the feasibility of the Railway Project, since the Project was expected eventually to generate revenue from freight traffic, and more than half of the eventual traffic projected by the Railway Feasibility Study consisted of oil shipments to the Black Sea.[257] Mr. Borkowski himself was acutely aware of the importance of the Iranian connection. A year before he delivered the Railway Feasibility Study to Armenia,[258] Mr. Borkowski advised Minister Beglaryan that CCCC and the China Development Bank had "requested with great emphasis to demonstrate strong regional cooperation with Russia and Iran regarding the railway development by signing a tripartite memoranda of understanding." With respect to Iran, Mr. Borkowski emphasized that in order "to successfully develop the railway, it is mandatory … that Rasia has an initial commitment from … Iranian party regarding the 60 km railway development on its territory …."[259]

247. On 19 April 2013, Mr. Borkowski wrote to Minister Beglaryan, again highlighting the need for Iranian cooperation:

> Our work on the feasibility studies requires the immediate technical cooperation of the Islamic Republic of Iran Railways (IRI Railways). We kindly ask the Ministry of Transport and Communication to send a letter to IRI Railways requesting a technical team meeting with CCCC and Rasia in Beijing, Yerevan or Teheran.
>
> We also need to sign the Memorandum of Understanding (MoU) with Iran to demonstrate the important political support and cooperation with Iran for the project.[260]

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[256] Arakelyan Statement ¶ 34; Resp. Counter-Mem., ¶ 112.

[257] C-116, Railway Feasibility Study, p. 29.

[258] C-127, Email from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2013 (delivering Armenian language version of Railway Feasibility Study).

[259] C-101, Letter from Mr. J. Borkowski to Minister G. Beglaryan (Unofficial Translation and Armenian Original), 21 December 2012, p. 6.

[260] JB-3, Letter from Mr. J. Borkowski to Ministry of Transport, 19 April 2013.

248. The viability of an Iranian extension of the Railway was threatened by the fact that another cross-border railway link was already under construction in Azerbaijan, with Iranian support, constituting a competitive threat to Rasia's Railway Project. Mr. Borkowski identified this threat as an "exceptionally important matter" in a letter to Minister Beglaryan on 27 November 2013, expressing concern that "[t]he Azeri railway would ruin the South Armenia Railway as a private project and only the Armenian government will be able to develop it if the Azeri's [sic] develop their project." Mr. Borkowski added:

> We must secure the previously desired exclusivity/monopoly from Iran for the north-south railway through Armenia for 20-30 years. Only Russian leadership (Putin or Yakunin) can persuade Iran not to build the Qazvin-Astara link [through Azerbaijan]. I see that President Putin is coming to Armenia on December 2nd. It is absolutely essential for the Southern Armenia Railway that President Sargsyan request that President Putin and/or Vladimir Yakunin give a clear and public political signal to Iran that the north-south railway must be built through Armenia and not Azerbaijan […][261]

249. In a separate letter two days later, Mr. Borkowski re-emphasized the importance of having President Sargsyan try to persuade Russia to signal to Iran that the link be built through Armenia and not Azerbaijan, because "the north-south railway through Azerbaijan would ruin the feasibility of the Southern Railway as a private project. The Southern Armenia Railway requires up to 30 years of exclusivity from Iran for the north-south transport traffic through Armenia and therefore no development of the [Azerbaijan] link."[262] President Sargsyan did meet with Russia's President Putin on 2 December 2013, during which plans to "build a [rail] transport link-up through Iran" were discussed.[263] However, Iran ultimately did not agree to abandon the Azerbaijan link, which remained a threat to the feasibility of the Railway Project.

250. The issue of Azerbaijan continued to worry Mr. Borkowski, who asked Mr. Grigoryan on 23 January 2014 to try persuade Iran – in the context of an Iran-Armenia-Rasia trilateral memorandum of understanding that was then under discussion – "to include the same No Grant provision (monopoly rights) to the Iran section as in the Armenia concession to Rasia." Mr. Borkowski explained that this was important "considering that Iran's construction of an alternative competing

[261] R-9, Email from Mr. J. Borkowski to Minister G. Beglaryan, 27 November 2013.

[262] R-10, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 29 November 2013, p. 2.

[263] R-78, The President of the Republic of Armenia, Press conference of President Serzh Sargsyan and President Vladimir Putin on the results of the meeting, https://www.president.am/en/interviews-andpress-conferences/item/2013/12/02/President-Serzh-Sargsyan-pressconference-with-the-President-of-Russian-Federation/, 2 December 2013.

railway to Astera will cause the Iran-Armenia railway to be unable to attract financing and fail."[264] On 27 April 2014, Mr. Borkowski bemoaned an "announcement from the Iran president regarding railway communication with Georgia through Azerbaijan," stating that "[I]ran is not helping our project with these types of pro-Azeri announcements."[265]

251. The connection between a viable Iranian railway link and Rasia's ability to obtain outside financing for the Railway Project within Armenia was clear from the beginning. Mr. Borkowski candidly admitted during the Hearing that without the link to an Iranian rail segment to enable cross-border freight traffic, the proposed Armenian track sections would become a proverbial "railway to nowhere."[266] This was consistent with Mr. Borkowski's contemporaneous statements to the Ministry of Transport, such as his statement in February 2014 that there was a "[t]erminal risk to Project from Iran railway section" (either because of "no construction or competing construction to Astara"),[267] and his October 2014 that "the Iran cooperation is absolutely critical for any further progress to be made."[268]

252. Yet just as Iran proved unwilling to forswear a potential future railway link through Azerbaijan, it also proved unwilling to commit to construction of a railway segment connecting to Armenia, until there first was meaningful progress in constructing the corresponding Armenian sections. Mr. Borkowski had predicted just such a problem in late May 2014, when he expressed concern to the ADB that "I believe Iran will only undertake to construct its 80km railway link … when it sees construction activities on the Armenia side of the border."[269] His instinct proved correct: this predicate condition was expressly reflected in the final Memorandum of Understanding that Iran, Armenia and Rasia signed on 10 November 2014 (the "**Iranian Trilateral MoU**"), in which Iran

[264] R-12, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 23 January 2014.

[265] R-21, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 30 April 2014.

[266] February Tr. Day 2, Borkowski, 325:8-9.

[267] C-131, "Southern Armenia Railway Project and Southern Armenia High Speed Road Project" (Razia FZE), February 2014, p. 20.

[268] R-108, Email from Mr. J. Borkowski to A. Arakelyan, 13 October 2014.

[269] R-99, Email from Mr. J. Borkowski to Mr. D. Dole, 31 May 2014, p. 3. In the same letter to the ADB, Mr. Borkowski expressed a hope that Armenia "should borrow from ADB and make a controlled equity investment" into the Railway Project, because "[a] unified project, ADB involvement, and Armenia government direct ownership are the critical aspects to getting this north-south railway project up to the EPC/construction phase." *Id.* Mr. Borkowski admitted at the Hearing that this was a new idea – that Armenia should participate directly in the financing of the Railway Project, even though it was not required to do so under the Concession Agreements. He also insisted that by this time, he was confident that he already had sufficient financing support for the Railway Project, consisting of 60% China EximBank financing (referenced in the Railway Feasibility Study) and a deal in principle with Aabar to supply the additional 40%. *See* February Tr. Day 3, Borowski, 542:3-6; 545:23-546:7.

"expressed its readiness to undertake construction of … Iran segment of the railways when [the Railway Project] progress by value achieves 30% in the Republic of Armenia territory."[270]

253. Mr. Borkowski sought to persuade Iran to consider a private funding model for a future Iranian segment of the railway. Iran alluded in the Iranian Trilateral MoU to the possibility that "[i]n its sole discretion, [it] could choose Rasia as an alternative … in the form of finance, build, lease and transfer," but made no commitments in that regard.[271]

254. Nonetheless, soon after the Iranian Trilateral MoU, Mr. Borkowski began to focus on efforts to obtain outside financing for possible EPC work on the Iranian side. On 24 November 2014, he approached China Poly Group ("**China Poly**"), a Chinese firm with which Mr. Borkowski had previous connections, explaining that "[t]he objective is to bring Poly into the project exclusively on the Iranian side," in the first instance to prepare a "bankable feasibility study and designs for the Iran section." He explained that Iran might be willing to provide "various sovereign and resource guarantees and payments" to support the eventual railway construction, whereas "Armenia is too poor to provide a sovereign guaranty or payments" for the work on its side of the border. Nonetheless, Mr. Borkowski referred to the possibility of future amendments to the Railway Concession with Armenia, "such that the project involves a government guaranteed lease payment to service debt and pay a profit" to outside financers.[272]

255. Further correspondence followed in December 2014, with China Poly expressing preliminary interest "if the Iran side can provide a proper guarantee" and a solution to current sanctions issues could be found.[273] China Poly continued to ask various questions, to which Mr. Borkowski provided answers in January 2015. Among his statements to China Poly was the boast that "Rasia can ensure Poly gets exclusivity [on the Iranian side] because Rasia is the concessionaire on the Armenia side and controlling the entire Armenia-Iran railway cooperation between the Armenia and Iran governments." He acknowledged the challenge that "[t]he Iran government wants to see the

[270] C-12, Unofficial Trilateral Memorandum of Understanding Between the Holding Company for Construction and Development of Transport Infrastructures of the Ministry of Roads and Urban Development of the Islamic Republic of Iran, the Ministry of Transport, and Rasia, 10 November 2014, Article 3.

[271] *Id.*, Article 4.

[272] R-118, Email from Zhaodi to Mr. J. Borkowski, 21 January 2015, pp. 10-11.

[273] *Id.*, p. 9.

Armenia side constructed at the same time," but stated that "it is our decision to determine the best way by the completion of the FS and preliminary design works."[274]

256. In January and February 2015, Mr. Borkowski continued to engage with China Poly and to seek possible support from Iranian government agencies for Rasia and China Poly involvement on the Iranian segment of the railway. One such agency, Iran's Construction and Development of Transportation Infrastructures Company (CDTIC), cautioned that "[a]ll of our projects have the government and Central Bank of Iran guarantees."[275]

257. In July 2015, Mr. Borkowski arranged for China Poly representatives to meet with officials in Tehran.[276] On 10 August 2015, China Poly told Mr. Borkowski that Iranian officials "are very concerned about the feasibility of railway in Armenia," and had "made it clear that 30% of the railway or investment in Armenia has to be done to activate the project in Iran. … The question is how the Armenia side would like to finance their project …." China Poly's inquiry about Armenian financing of the Railway Project is curious, given that Mr. Borkowski had already informed China Poly some eight months previously that "Armenia is too poor to provide a sovereign guaranty …."[277] In any event China Poly further reported that it had asked Iranian officials if Iran might provide a guarantee for the Armenian railway, to which Iranian officials responded that any such request would have to come officially from the Armenian government. China Poly made no commitment of its own in this communication.[278] Following another meeting in September 2015 (which Mr. Thornber of Aabar apparently attended), Rasia promised to send China Poly a "draft non-binding framework agreement giving Poly exclusivity and conditional on conversion of the Rasia agreements into G2G cooperation in Iran and Armenia."[279]

258. On 14 October 2015, Mr. Borkowski reported as follows to the Armenian Government regarding Rasia's meetings with China Poly:

> In July and August 2015, Rasia organized meetings with China Poly Group [and Iranian officials] that resulted in the China Poly Group confirming its willingness to finance, design and construct this part of the

[274] R-118, Email from Zhaodi to Mr. J. Borkowski, 21 January 2015, pp. 6-8.

[275] R-122, Email from Zhaodi to Mr. J. Borkowski, 2 February 2015, p. 3.

[276] R-128, Email from D. Ning to Mr. J. Borkowski, 21 July 2015; R-129, Email from Mr. J. Borkowski to D. Ning, 26 July 2015.

[277] R-118, Email from Zhaodi to Mr. J. Borkowski, 21 January 2015, pp. 10-11.

[278] R-134, Email from Mr. J. Borkowski to D. Ning, 22 September 2015.

[279] R-132, Email from Mr. J. Borkowski to D. Ning, 17 September 2015; R-133, Email from Mr. J. Borkowski to D. Ning, 21 September 2015.

> Railway with the support of an Iranian Government guarantee. Iran also offered a Government guarantee for the Project in Armenia provided the request was made through official Armenian channels.
>
> Based on these efforts, which render the Railway and Armenia's participation in the International North-South Transportation Corridor feasible, Rasia secured further interest from China Poly Group to contribute and arrange financing to cover the full cost of the Southern Armenia at even more attractive rates.[280]

259. Between 19 and 21 January 2016, Minister Beglaryan led an Armenian delegation to Iran to discuss potential cooperation on road and railway infrastructure, as well as communications technology. According to the after-action mission report he prepared, Mr. Beglaryan stated that Iranian and Russian "investments … into implementation of the project would be justified and would be in the interest of all," and the Iranian Minister of Roads and Urban Development "offered to select an independent consulting company to conduct … feasibility studies of the railway project," stating that "with guarantees from the Government … of Armenia, Iran can assist in securing funds from international organizations." Mr. Beglaryan clarified that a feasibility study already had been conducted "by a Chinese company."[281] In a separate meeting with the First Vice President of the Islamic Republic, Mr. Beglaryan congratulated Iran on the lifting of international sanctions and said that with respect to "joint transport projects" between the two countries, "Armenia wanted to use the capacity of the Iranian companies and contractors for project implementation since they had extensive experience in implementing such projects."[282] During the visit, the delegations signed a memorandum of understanding on the "Unification of the Railway Systems of the Two Countries."[283]

260. The Respondent has situated these meetings as very general and high-level, in the context of the securing cooperation between the two countries following the lifting of international sanctions on

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[280] C-35, Letter from Mr. J. Borkowski to Prime Minister H. Abrahamyan (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), 14 October 2015, p. 4.

[281] C-308, "Mission report on the results of the delegation visit headed by the Minister of Transport and Communication of the Republic of Armenia" submitted by Minister G. Beglaryan to D. Harutyunyan, Chief of Staff of the Government of the Republic of Armenia (Unofficial English Translation and Armenian Original), 25 January 2016, p. 4.

[282] *Id.*, p. 6.

[283] R-38, Memorandum of Understanding between Ministry of Transport and Communication of Armenia and Ministry of Road and Urban Development of Iran on Joining Two Countries' Railway Networks, 20 January 2016; *see also* C-308, "Mission report on the results of the delegation visit headed by the Minister of Transport and Communication of the Republic of Armenia" submitted by Minister G. Beglaryan to D. Harutyunyan, Chief of Staff of the Government of the Republic of Armenia (Unofficial English Translation and Armenian Original), 25 January 2016; p. 7; C-33, Republic of Armenia, "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of the Armenia Railway Project," p. 5.

Iran; the Respondent says there were no concrete discussions of the Railway Project.[284] By contrast, the Claimants assert that the mission report indicates that Minister Beglaryan intended to exclude Rasia from implementation of the Railway Project, by instead involving Iranian companies and contractors.[285]

261. On 18-19 April 2016, an expert meeting was held in Iran, with representatives of Armenia, Bulgaria, Greece and Iran, regarding international transport and transit issues.[286] In an email two weeks earlier, on 5 April 2016, Mr. Grigoryan had informed Mr. Borkowski of the upcoming meeting, writing that "in case the Southern Railway Construction project issues are considered, Rasia FZE will be duly notified in prior, in order to ensure the potential participation."[287] The Iran-Armenia meetings in April 2016 resulted in the signing of a protocol between the four governments on "Establishing the International Transport and Transit Corridor/Persian Gulf-Black Sea.[288]

262. On 20 July 2016, the Armenian Ministry of Transport and the Iranian Ministry of Roads and Urban Development signed a further MoU, "regarding railway links," and agreed to hold "expert meetings to coordinate viewpoints and technical information." At a "technical experts" meeting the following week, the Armenian delegation shared certain information about "the preliminary studies" prepared by "the company," and "the Iranian side presented … its views regarding corrections and additions on the important issues of the study," which the Armenian delegation stated it would study and then forward to "the company for them to incorporate the necessary changes into the preliminary investigative plans."[289] Although Rasia was not mentioned by name, it appears likely that this discussion referred to the Railway Feasibility Study which Rasia had provided, and therefore to forwarding Iranian comments on the study to Rasia for consideration. The minutes of the technical meeting also stated that "in addition to assessing and investigating the suggestions presented by the Iranian side, the Armenian side will be involved in the selection of the investor and shall present all obtained information to the Iranian side through official channels."[290] Based on the structure of these passages – the first one referring to Iranian feedback to the "company" involved with Armenia, and the second one referring to Armenian input to Iran on "the investor" – it appears

[284] Resp. Counter-Mem. ¶¶ 176-177.

[285] Cl. Reply ¶¶ 448-449.

[286] C-43, Letter from Mr. G. Grigoryan to Mr. J. Borkowski, 17 June 2016.

[287] C-176, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 5 April 2016.

[288] C-43, Letter from Mr. G. Grigoryan to Mr. J. Borkowski, 17 June 2016.

[289] C-305, Meeting minutes of the Iran-Armenian-Iranian Technical Experts Subcommittee (Unofficial English Translation and Armenian Original), 27 July 2016, p. 1.

[290] *Id.*, p. 2.

likely that the reference to an "investor" concerned Iran's possible use of private investment for the railway segment in its country, not the replacement of Rasia in the Railway Project on the Armenian side.

c. Disagreements between mid-2014 and early 2015

263. Returning to the chronology of the Parties' disputes, the Tribunal recalls that on 19 August 2014, in response to Rasia's request for a formal notice, Minister Beglaryan formally communicated to Rasia that the Government had accepted the Railway Feasibility Study and approved "[t]he preliminary alignment," which authorized Rasia to "now proceed to the Project Financing Period under the [Railway Concession] while also determining the final detailed coordinates for the recommended alignment of the Southern Railway."[291]

264. As discussed in Section III.H.2 above, Iran had indicated during the Tehran meetings in November 2014 – and in the official Iranian Trilateral MoU signed at those meetings – that it would not commit to a railway segment on its territory unless concrete progress was first made on the segment in Armenia's territory.[292] Mr. Borkowski, however, recognized that substantial financing would be required to progress the Armenian segment, and that funders would be looking for some form of government guarantees, which Armenia had not offered in the Railway Concession and which Mr. Borkowski understood it was "too poor to provide." Nonetheless, by November 2014, Mr. Borkowski was already alluding to the possibility of seeking amendments to the Railway Concession to provide for some form of government guarantees that would appeal to outside financers.[293]

265. Mr. Borkowski was not alone in considering possible amendments to the Railway Concession. During the Tehran meeting in November 2014, the Government provided him with a draft "Treatment" document which would amend certain provisions of the Railway Concession (the "**Draft Railway Amendments**").[294] Among other things, the proposed amendments would shift to Rasia the cost of financing the land acquisition for the railway corridor.[295] On 21 November 2014,

[291] C-143, Letter from Minister G. Beglaryan, to Mr. J. Borkowski, 19 August 2014.

[292] C-12, Unofficial Trilateral Memorandum of Understanding Between the Holding Company for Construction and Development of Transport Infrastructures of the Ministry of Roads and Urban Development of the Islamic Republic of Iran, the Ministry of Transport, and Rasia, 10 November 2014, Article 3.

[293] R-118, Email from Zhaodi to Mr. J. Borkowski, 21 January 2015, pp. 10-11.

[294] C-18, Ministry of Transport, Proposed Treatment – "On 'Making Amendments and Supplements to the Southern Armenia Railway Concession Agreement'", November 2014.

[295] *Id.*, Sections 1.1, 1.2.

Mr. Shahnazaryan of the Armenian Railway Construction Directorate reminded Mr. Borkowski about this proposal in writing, stating that "[a]s you have mentioned you would like to make some amendments/supplements to the Concession Agreement as well," and asking him to provide comments as soon as possible.[296]

266. On 26 November 2014, Mr. Shahnazaryan wrote again to Mr. Borkowski, requesting the previously sought "measurement data with WGS-84 coordinate system" for the proposed alignment of the railway, so the Cadastre could "give details on land significance" and acquisition price of the properties that would have to be acquired to move forward with the Project. The information was requested "within the shortest possible time in order to facilitate the further work."[297] It is undisputed that Mr. Borkowski did not respond to this request in writing. He explained at the Hearing that he felt nothing further was needed from Rasia from this time, and that the more important objective from his perspective was arranging project finance.[298]

267. On 4 December 2014, Mr. Shahnazaryan wrote again to Mr. Borkowski, with a "kind reminder" that the Government had not received Rasia's "comments and amendments" on the draft "Treatment" document proposing amendments to the Railway Concession. On 10 December 2014, Mr. Borkowski replied, rejecting Armenia's proposed amendments as "unacceptable on th[e] basis" that "[a]ll amendments should improve the feasibility and the financing attractiveness" of the Railway Project, and promising to send soon Rasia's own proposed amendments to the Railway Concession for the Government's consideration.[299]

268. On 11 December 2014, the day after receiving Mr. Borkowski's rejection of the Government's proposed amendments, the Government amended its prior 7 August 2014 Protocol, to extend the time for various governmental bodies to take actions with respect to the Railway Project.[300]

269. On 31 December 2014, Mr. Borkowski wrote again to reject Armenia's position on both the detailed land coordinates and Armenia's proposed Draft Railway Amendments. With respect to the former, Mr. Borkowski stated that "[i]t would not be reasonable to commence complex railway

[296] R-29, Letter from A. Shahnazaryan to Mr. J. Borkowski, 21 November 2014.

[297] R-30, Letter from A. Shahnazaryan to Mr. J. Borkowski, 26 November 2014.

[298] February Tr. Day 3, Borkowski, 462:8-20.

[299] AA4, Email from Mr. J. Borkowski to Ashot Shahnazaryan, 10 December 2014.

[300] R-114, Excerpts from the Minutes of the Sitting of Government of Republic of Armenia, On Making Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 17 December 2014.

design works prior to the signing of respective official agreements, receipt of technical input, and full cooperation…." With respect to the latter, Mr. Borkowski expressed confusion that "the Armenian government seeks to avoid any investment … and to further try to pass along its obligatory minimal investment responsibility" to Rasia. He complained that "[t]hese actions cast a shadow over the Armenia government's support" of the Project. Mr. Borkowski further stated that "[f]or future reference, any proposed amendments to the [Railway Concession] must enhance the feasibility and bankability of the project … and will generally be proposed by Rasia FZE."[301] As an example of such a proposed counter-offer, Mr. Borkowski stated that "if the government of Armenia would like to … eliminate the government responsibility for acquiring the corridor land at its own cost," then Rasia "would be glad to discuss" Armenia's exercising its right of first investment under the Railway Concession by investing $100-150 million of its own funds in the Railway Project.[302]

270. The Armenian Government seemingly never responded to this counterproposal,[303] and has stated that it considered the issue of amendments to the Railway Concession closed.[304] On 26 February 2015, the Armenian Government promulgated another decree (the "**February 2015 Decree**"), further extending the time to organize the land corridor. The third paragraph of the February 2015 Decree shows that the Government expected that negotiations would be held with Rasia, to "submit a proposal to the government of the Republic of Armenia on the principles and mechanisms for the construction of the Southern Armenia Railway by May 30, 2015." [305]

271. As discussed further below (see para. 318), the Claimants maintain that the Government's proposed amendments came at a sensitive time when Rasia was trying to arrange financing, and were one of the main reasons why the Chairman of Aabar in January 2015 put on hold any purchase of Rasia.[306] The Respondent contests this assertion, explaining that its proposal was aimed at creating more flexibility to move forward with the project at a time when Rasia was proposing amendments also,

[301] C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014, pp. 1-2.

[302] *Id*., p. 3.

[303] February Tr. Day 2, Borkowski, 315:14-15.

[304] First Arakelyan Statement ¶ 40.

[305] R-124, Excerpt from the Minutes of the Meeting of the Government of the Republic of Armenia, On Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 26 February 2015.

[306] Second Tappendorf Statement ¶ 14.

and that after Mr. Borkowski rejected the Government's proposed amendments, it did not return to the issue again.[307]

272. It is undisputed that neither Rasia, nor the Government of Armenia communicated with the other at all between January and mid-October 2015. Meanwhile, through the summer of 2015, Mr. Borkowski focused his efforts on the Iranian section of the Railway as discussed in Section III.H.2 above, through negotiations with China Poly and arranging a meeting for China Poly with the Iranian government.

273. The Claimants now contend, as discussed in Section III.I below (from para. 292), that the Railway Project was effectively destroyed in 2015 by Armenia's alleged dealings with third parties in China, which caused CCCC to "abandon" the Railway Project in mid-March 2015.

d. Mutual complaints between August and December 2015

274. On the Armenian side, in a letter of 14 August 2015, Mr. Shahnazaryan of the Armenian Railway Directorate wrote to Mr. Arakelyan, advising that Rasia's "failure … to fulfil its obligations" had negatively impacted implementation of various actions approved by the Government. In particular, he advised that for nearly a year, Rasia had not submitted coordinate measurement data in a form that the Cadastre could use to perform its work. He also stated that Rasia had not submitted a plan for completion of construction works, which by his reading of Section 36.2 of the Railway Concession, Rasia was required to do "within one year after the end of the feasibility study." He advised that pursuant to Article XII of the Railway Concession, "the Government … is entitled to terminate [the Railway Concession] prematurely" for these reasons, and he suggested that the Ministry of Transport write immediately to Rasia about the legal consequences that could flow from its asserted failures.[308] It appears that the Ministry of Transport did not, however, take the steps that Mr. Shahnazaryan advised.

275. Rather, after a long period of silence between the Parties, the next communication came from Rasia. On 14 October 2015 Mr. Borkowski wrote a letter addressed to Minister Beglaryan[309] – which was also sent in copy to Prime Minister Abrahamyan[310] – in which Mr. Borkowski expressed his

[307] February Tr. Day 7, McNeill/Arakelyan, 1324:18-1330:11.

[308] R-130, Letter from Mr. A. Shahnazaryan to Mr. A. Arakelyan, 14 August 2015.

[309] C-34, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 14 October 2015.

[310] C-35, Letter from Mr. J. Borkowski to Prime Minister H. Abrahamyan (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), 14 October 2015.

concerns over "recent reports in the media" suggesting that the Ministry of Transport had invited "third parties" in China to participate in the Railway Project without consulting Rasia. That, "[i]f true, … would constitute a blatant repudiation" of the Railway Concession "which establishes Rasia as the exclusive Concessionaire."[311] These issues are addressed further below.

276. In the same letter, Mr. Borkowski contended that for its part, Rasia had "delivered on all of its obligations to date under the Concession Agreement, and ha[d] made contributions far in excess of its contractual duties that have been decisive to the continued success of the Project and of relations between the governments of China, Armenia and Iran."[312] He asked the Government to confirm by 19 October 2015 that (i) the Government intended "to fully honour its obligations to Rasia under the terms of the Concession Agreement," and (ii) to provide "all documents and information regarding publically-disclosed [*sic*] offers from China; any agreements or understandings signed or reached; and any detailed explanations regarding its interaction with CCECC, China Export-Import Bank and the China Premier during the recent working visit regarding Rasia's Project."[313]

277. Minister Grigoryan replied to Mr. Borkowski's letter on 19 October 2015, stating that the Government "has caused no disruption whatsoever to the implementation" of the Railway Project and "has been meeting all the obligations and responsibilities set forth in the Concession Agreement, nor has it in any way restricted or stepped over the rights of Rasia." Mr. Grigoryan asserted that to the contrary, the Project "has recently been put at risk by the improper handling of a number of issues by Rasia, and the Government has undertaken steps to ensure the Project is implemented smoothly and as a whole." He indicated that further details would be provided soon.[314] On 28 October 2015, Rasia rejected the allegations in Mr. Grigoryan's 19 October 2015 letter, stating that the letter "confirms the Armenian Government's breach and/or repudiation" of the Railway Concession.[315]

278. The Parties corresponded further in November and December 2015. Mr. Arakelyan wrote to Mr. Borkowski on 17 November 2015, explaining that while the Government did not seek to remove Rasia from the Railway Project – and denied having "signed any agreement with any other organization, which might violate the contractual rights of Rasia" – it remained "seriously

[311] C-34, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 14 October 2015, p. 1.

[312] *Id*., p. 4.

[313] *Id*., p. 5.

[314] C-36, Letter from Mr. G. Grigoryan to Mr. J. Borkowski, 19 October 2015.

[315] C-169, Letter from Mr. J. Borkowski to Prime Minister H. Abrahamyan (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), 28 October 2015.

concerned" about what it viewed as Rasia's material breach of the Railway Concession. In particular, the Government pointed out (i) that Rasia owed it concession fees as per Section 4 of the Railway Concession; (ii) that Section 33 of the Railway Concession obligated Rasia to present the Government with letter(s) of interest from credible and reputable potential investors within 12 months of the date of approval of the Railway Feasibility Study, which Rasia had failed to do; (iii) that Rasia had failed to submit alignment coordinates for the Railway corridor in accordance with international standards; and (iv) that Rasia had not submitted design for the construction work, which Section 36 of the Railway Concession required Rasia to do within one year after the completion of the Feasibility Study.[316]

279. Mr. Borkowski's response, on 16 December 2015, reiterated Rasia's concerns that the Government had taken "concrete steps to remove Rasia and its consortium partners from the Project," with reference to the Government's interactions with CCECC and the Chinese government (discussed in Section III.I below). Rasia also rejected the four alleged breaches of the Railway Concession, and concluded the letter with a formal declaration of a dispute pursuant to the Concession Agreement's dispute resolution clause, and a request for a prompt answer from the Government.[317]

e. The March 2016 meeting and the June 2016 Notice of Dispute

280. The Parties met in Armenia on 18 March 2016 ("**the March 2016 Meeting**") to discuss the Railway Project. The initial initiative for the meeting seems to have come from Armenia on 15 February 2016, to which Mr. Borkowski responded on 16 March 2016, proposing to meet two days later, when he would be in Armenia.[318] At the March 2016 Meeting, the Armenian Ministry of Transport was represented by Mr. Grigoryan and Mr. Arakelyan, as well as by Mr. Hasmik Aharonyan and a Ministry lawyer.

281. The Parties' versions of the March 2016 Meeting differ. Mr. Borkowski says he explained that Aabar had decided to withdraw from the Projects; according to the Respondent, this was the first time it was informed of this, while Mr. Borkowski claims he had told Mr. Grigoryan a year earlier that Aabar would no longer participate. Mr. Borkowski says he also explained that CCCC no longer could be relied upon for the financing of the Railway Project, because of its concerns that Armenia's meetings with Chinese government officials had elevated the Railway Project to an

[316] C-37, Letter from Mr. Artur Arakelyan to Mr. J. Borkowski, 17 November 2015.

[317] C-38, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 16 December 2015.

[318] C-39, Letter from Minister G. Beglaryan to Mr. J. Borkowski, 15 February 2016; C-40, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 16 March 2016.

intergovernmental level, which in turn had involved a different Chinese company, CCECC. The Respondent says that its representatives informed Mr. Borkowski that Armenia's meetings with the Chinese government were high-level and diplomatic in nature and did not involve details about financing or otherwise; they were intended to encourage Chinese support for the Railway Project, not to replace Rasia as the concessionaire; and that Armenia had not asked CCECC, or any other entity, to prepare an alternative feasibility study as Rasia had alleged.[319]

282. There is both an audio recording and a transcript of the March 2016 Meeting.[320] According to the transcript, the meeting closed with Mr. Arakelyan's suggestion to "close this [dispute] and go forward," with a further meeting (perhaps the next day) to discuss a "plan of action" that Mr. Grigoryan would prepare for potential next steps on the Railway Project.[321] That further meeting did not occur, however. Instead, the March 2016 Meeting was followed by various exchanges of correspondence between the Parties which concerned, among other things, these records of the Meeting.

283. By letter of 29 March 2016, Mr. Borkowski confirmed that he had received the draft minutes of the March 2016 Meeting and promised to comment on them in early April.[322] On 5 April 2016, Mr. Grigoryan asked for feedback on the draft minutes, and also on a "sample time-line on the completion of the next steps and the obligations of the [Railway Concession]," which the Ministry had shared with Mr. Borkowski following the March 2016 Meeting.[323] That draft time-line had (a) asked Rasia to specify a date by which it would submit Railway "coordinates meeting the international standards in accordance with the feasibility study"; (b) pledged that the Government would approve the Corridor and exercise eminent domain over the applicable lands within six months of receiving appropriate coordinates; and (c) asked Rasia to specify the dates by which it

[319] Second Borkowski Statement ¶¶ 175-176; February Tr. Day 3, Borkowski, 562:15-21; First Arakelyan Statement ¶¶ 69-77; Resp. Counter-Mem. ¶¶ 180-182.

[320] R-40, Transcript of the Meeting between Messrs. A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016; AA-6, Audio Recording of the Meeting between Messrs. A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016.

[321] R-40, Transcript of the Meeting between Messrs. A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016, p. 8.

[322] AA-7, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 29 March 2016.

[323] C-176, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 5 April 2016.

would ensure financing of the Project by submission of appropriate letters of interest; and (d) asked Rasia for the date by which it would submit the design of construction civil works.[324]

284. In the same email in which Mr. Grigoryan invited Mr. Borkowski's comments, he also informed Mr. Borkowski of upcoming discussions with Iran on a range of transportation issues "during the end of April or the beginning of May, 2016." He said that Rasia would be notified in advance if the agenda was to include any discussion of the Railway Project in particular. (As discussed in Section III.H.2.b above, this meeting took place in Iran on 18-19 April 2016.)

285. Mr. Borkowski responded on 29 April 2016, without commenting on the draft minutes or proposed timeline of next steps, but requesting the audio recording of the March 2016 Meeting. He also expressed concern about media reports that the competing Iran-Azerbaijan railway had commenced, which (as discussed in Section III.H.2.b above) had long been considered a threat to obtaining support for the Railway Project.[325]

286. On 17 June 2016, Mr. Grigoryan in turn expressed concern that Mr. Borkowski still had provided no feedback either on the minutes of the March 2016 Meeting, or on the "plan-deadline" for moving forward with the Railway Project. He suggested that Mr. Borkowski's failure to submit these items was "hindering the fulfillment of the agreement obtained during the meeting, which is the confirmation of the plan-deadline in order to set clear dates to ensure the natural process of the project implementation." He set a deadline of 25 June 2016 for Rasia to provide information on its progress in "integrating potential investors for the funding of the Project," including "justified documents (memorandums, initial agreements, etc.). Finally, Mr. Grigoryan informed Mr. Borkowski of two recent events: (a) the expert meeting between Armenia, Bulgaria, Greece and Iran that had taken place on 18-19 April 2016, and that had resulted in a joint protocol on an international transport and transit corridor, and (b) the Chinese Vice Premier's visit to Armenia on 6 June 2016, at which the Railway Project was discussed along with other infrastructure projects in the fields of industry, energy, agriculture, science, transport, technology and culture.[326]

287. In response to the 17 June 2016 letter, on 25 June 2016, Mr. Borkowski sent the Government a notification of a dispute under the US-Armenia BIT (the "**Notice of Dispute**"). The Notice of

[324] C-174, The Republic of Armenia's "Time-line on the Fulfilment of the Next Steps and the Obligations of the Parties under the Concession Agreement on the Construction of the Southern Armenia Railway", March 2016.

[325] C-177, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 29 April 2016.

[326] C-43, Letter from Mr. G. Grigoryan to Mr. J. Borkowski, 17 June 2016.

Dispute recorded Rasia's surprise at having learned only after the fact about Armenia's meetings with Iran and China, which in Rasia's view provided "further irrefutable evidence that Armenia has excluded Rasia and its contractor and lead member of Rasia's consortium, [CCCC], in total disregard for the exclusive rights granted to Rasia under the 2012 Concession Agreements." The Notice of Dispute also said that CCCC had recently informed Rasia that it intended to "terminate contractual agreements with Rasia due to Armenia's coordination and conclusion of agreements with third parties and its exclusion of Rasia as concessionaire and consortium leader from the Railway and Road Projects."[327]

I. CCCC'S INVOLVEMENT AND WITHDRAWAL FROM THE PROJECTS

288. Given the importance of CCCC to the facts of this case, it is useful to recap here the main facts about its involvement in, and withdrawal from, the Projects. (In the next section, the Tribunal provides a similar summary regarding Aabar's involvement and withdrawal, which provides the sole basis for the theory of damages the Claimants have presented in this case.)

289. As already mentioned, CCCC was involved at the outset of the Projects, pursuant to the Rasia-CCCC Framework Agreement which envisioned that CCCC would prepare both Feasibility Studies; that it would become the "exclusive EPC" contractor for developing both Projects; and that it would assist Rasia with debt financing by approaching China EximBank and China Development Bank.[328] It is suggested that CCCC's subsequent withdrawal from the Projects, and Rasia's related failure to obtain Chinese bank funding through CCCC, was a significant factor contributing to the collapse of the Projects. Below, the Tribunal briefly summarizes the facts relevant to CCCC's withdrawal.

290. The Railway Feasibility Study provided a preliminary estimate of Project investment of about $3.2 billion, and stated that "[i]t is currently anticipated that loans will be secured from the Export-Import Bank of China (interim) for approximately 60% of the Project cost at an annual interest rate of 3.5% implying that the remaining 40% of funds will need to be secured from regional governments and international financial institutions."[329] Citing this passage of the Railway Feasibility Study, the Claimants contend that "[d]uring the second half of 2013," CCCC had

[327] C-53, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 25 June 2016, p. 8.

[328] R-8, Rasia-CCCC Framework Agreement.

[329] C-116, Railway Feasibility Study, p. 168.

actually "secured commitments" from China EximBank to this effect.[330] Mr. Borkowski testified at the Hearing that the inclusion of this sentence in the Railway Feasibility Study prepared by CCCC, together with contemporaneous discussions he had with Armenia, was sufficient to satisfy the Railway Concession's requirement that Rasia provide Armenia, within 12 months of final approval of the Feasibility Study, with "letters of interest from … potential … finance providers … prepared to … provide debt financing …."[331] Yet this contention of "commitments" already having been secured from China EximBank is somewhat at odds with Mr. Borkowski's slide presentation during the February 2014 Yerevan Meetings, which stated that the Railway Project would be "highly dependent on China bank negotiations," following certain "preliminary discussions with China banks."[332] That contemporaneous document seems to confirm that no actual funding commitments had yet been secured at that time.

291. The facts are similar for the Road Project. The Road Feasibility Study "[a]nticipated that the Project should be able to secure loans from the Export-Import Bank of China or China Development Bank for approximately 60-85% of the Project investment requirement an annual interest rate to be determined based on the negotiation of the availability payments contract."[333] The phrasing "should be able to secure" no doubt suggested optimism by CCCC, but it does not support the Claimants' contention that by this time CCCC had actually "secured commitments" to finance the Project.[334] The record does not reflect any actual documents from China EximBank, or any other Chinese bank, demonstrating such a commitment.[335]

292. Claimants contend that by mid-March 2015, Mr. Weixin of CCCC informed Mr. Borkowski that CCCC was withdrawing from the Railway Project, allegedly because the Chinese Ministry of Commerce had "ring-fenced" the Project for CCECC, another Chinese entity.[336] There is no documentary evidence of this conversation between Mr. Weixin and Mr. Borkowski, but as discussed above, there are indications that CCECC did engage in discussions with Armenia. The

[330] Cl. Mem. ¶ 109; First Borkowski Statement, ¶ 66.

[331] C-1, Railway Concession, Section 33.1; February Tr. Day 3, Hanessian/Borkowski, 510:6-20.

[332] C-131, "Southern Armenia Railway Project and Southern Armenia High Speed Road Project" (Razia FZE), February 2014, p. 15.

[333] C-122, Southern Armenia High Speed Road Feasibility Study, p. 125.

[334] Cl. Mem. ¶ 109.

[335] Resp. Counter-Mem. ¶¶ 152-153.

[336] Cl. First PHB ¶¶ 244, 246, 271; February Tr. Day 2, Hanessian/Borkowski, 313:20-314:3, 314:9-18.

Parties dispute the exact nature of what was discussed, and what implications that may or may not have had for CCCC's willingness to participate in the Projects.

293. On 18 March 2015, Armenian officials, led by Minister Beglaryan, met with CCECC. The Parties' characterizations of this meeting differ, with the Claimants suggesting it centered on CCECC's involvement in the Railway Project and the Respondent contending that the meeting had been initiated by the "Chinese side," with a broad agenda.[337] Handwritten notes from the Ministry of Transport's information service suggest that "[d]uring the meeting, the Chinese party expressed interest in the construction project of the South railroad due to its crucial role in the region. Gagik Beglaryan and [CCECC managing director] Hao Jiyong discussed the possibility that this major Chinese company may participate in the implementation of the above project."[338] A Ministry of Transport press release also stated that the two men "discussed the possibility of the Chinese largest company's participation in the implementation" of the Southern railway.[339]

294. Later in March 2015, during his state visit to China, Armenian President Sargsyan called for "active participation of Chinese companies in the construction of the Armenia-Iran railway."[340] Claimants cite this statement as evidence of the "steps [by the Government] to establish an entirely different consortium" than the one Rasia had established with CCCC.[341] Press coverage of President Sargsyan's speech expressly mentioned CCCC's feasibility study and Rasia's existing 30-year concession, however,[342] and Respondent describes the President's remark as simply a high-level, general statement made in the context of a diplomatic visit.

295. In June 2015, further meetings took place between CCECC, represented by its chairman Vu Van Liang, and Armenia, represented by Mr. Beglaryan. Armenian press releases record that at the meeting, CCECC "reaffirmed [its] wish … to take part in the construction program of the Armenian Southern Railway," "submitted some possible mechanisms for the program financing," discussed

[337] Cl. Mem. ¶ 165; Cl. Reply ¶¶ 404-405; Resp. Counter-Mem. ¶ 159; First Arakelyan Statement ¶ 63.

[338] C-277, Minutes attached to Speech of President Serzh Sargsyan at Boao International Economic Forum, 18 March 2015, p. 3.

[339] C-20, Ministry of Transport Website: Gagik Beglaryan Receives Representatives of Chinese Company (http://mtcit.am/pages.php?lang=3&id=5831&page_name=news), 18 March 2015, accessed on 11 July 2018.

[340] C-155, "Yerevan Expects Chinese Support For Iran-Armenia" (Azatutyun), 27 March 2015.

[341] Cl. Mem. ¶ 165(ii).

[342] C-155, "Yerevan Expects Chinese Support For Iran-Armenia" (Azatutyun), 27 March 2015.

"[s]ome issues concerning the railway construction," and "thoroughly discussed the implementation specialities" of the Southern Railway program.[343]

296. On 24 August 2015, Minister Beglaryan wrote to CCEEC:

> The Ministry of Transport and Communication of Armenia presents its compliments to the China Civil Engineering Construction Corporation.
>
> We have been contemplating the possibility of our cooperation for the realization of priority projects in the transport infrastructure for a while now. More specifically this concerns the North-South Highway and the Southern Railway projects as part of the Silk Road.
>
> In order to discuss these projects in more details and to speed up the process of clarifications on your potential participation in their implementation, herewith I would like to invite you to Yerevan some time at your own convenience within the upcoming month, prior to the Armenian Delegation visit to Beijing in September.[344]

297. The Armenian visit to Beijing which was foreshadowed in Mr. Beglaryan's letter took place in September 2015. The Ministry of Transport's participation was part of a broader delegation, led by Armenia's Prime Minister and including also senior leaders from the Ministries of Economy, Finance and Foreign Affairs, as well as the Central Bank. An internal meeting summary from the Armenian Ministry of Foreign Affairs confirms that "[d]uring the meeting, discussions were held on the Iran-Armenia rail line, investments and construction of the North-South Corridor Expressway," and the Chinese Prime Minister "reaffirmed the interest of the Chinese side …."[345]

298. Again, the Parties' versions of the meeting differ and, in particular, the Claimants assert (and the Respondent denies) that Armenia asked for further railway feasibility studies.[346] The agenda for the meeting anticipated that the following issues would be open for discussion:

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[343] C-21, Ministry of Transport Website: Gagik Beglaryan Receives "CCECC" Chinese Company Representatives (http://mtcit.am/pages.php?lang=3&page_id=1&id=5935&page_n ame=news), 23 June 2015, accessed on 11 July 2018; *see also* C-161, "CCECC's Wish to Participate in the Construction Project of Armenia's Southern Railway" (Aysor), 23 June 2015. C-162, "Armenia's Minister of Transport Receives CCECC Delegation" (Tert.am), 23 June 2015; C-302, Ministry of Foreign Affairs of the Republic of Armenia, Annual Report Summary of the Asia, Oceania, and Africa Committee, Year 2015, p. 3 (summarizing CCECC visit to Yerevan on 22 June 2015).

[344] C-307, Letter from Minister G. Beglaryan to Yan Li, President of CCECC, 24 August 2015.

[345] C-302, Ministry of Foreign Affairs of the Republic of Armenia, Annual Report Summary of the Asia, Oceania, and Africa Committee, Year 2015, providing report of state visit of Prime Minister H. Abrahamyan to the People's Republic of China on 22–24 September of 2015 (Unofficial English Translation and Armenian Original), p. 3.

[346] Cl. Reply ¶ 412; Resp. Counter-Mem. ¶ 164.

> 1. The issue regarding the involvement of Chinese companies in construction and funding of the South Railway program of the Republic of Armenia.
>
> 2. The issue regarding the involvement of Chinese private and public capital in the funding and construction of specific sections of the railway (tranches) and the possibility of construction of toll roads, tunnels, and bridges apart of the public-private partnership "Investment Program of the North-South Transport Corridor".[347]

299. While the discussions between Armenia and CCECC – whatever their scope – were taking place, Rasia's separate discussions with China Poly (as discussed above at paras. 254 and 272) proceeded in September 2015. On 6 September 2015, Mr. Dai Ning of China Poly wrote to Mr. Borkowski to let him know that he had been "approached by some companies regarding the railway in Armenia connecting Iran very recently. It seems that Armenia government is inviting some companies to participate and provide financing to the project. I just wonder if you have any update on this project and what shall we do at this moment?"[348] Mr. Borkowski replied on 17 September 2015, thanking Mr. Dai Ning for taking time to meet with Aabar representatives in Beijing, and promising to send a "draft non-binding framework agreement giving Poly exclusivity and conditional on conversion of the Rasia agreements into G2G cooperation in Iran and Armenia."[349] Four days later, Mr. Borkowski wrote to inform Mr. Dai Ning of the Armenian Prime Minister's visit to Beijing, which he stated was arranged by CCEEC along with China EximBank "and is in relation to my railway project." Mr. Borkowski complained that the Prime Minister "had accepted the CCECC invite without coordinating with me, but rather than tell the PM how he should be coordinating the Armenia railway project affairs, I will discuss this with the PM and Minister in Armenia following his visit. I will provide an update afterwards including how it will affect cooperation we might have on the Armenia rail link. The Iran side has not changed its approach."[350] The next day, Mr. Borkowski wrote another email to Mr. Dai Ning, attaching the link to a news article seemingly reporting from the state visit in Beijing, and stating that "I will get a summary of the visit and

[347] C-303, "List of Issues Proposed for Discussion at the Meeting between Hovik Abraamyan, Prime Minister of the Republic of Armenia, and Li Keqiang, Premier of the State Council of the People's Republic of China" (Unofficial English Translation and Russian Original), undated.

[348] C-271, Email from Dai Ning to Mr. J. Borkowski, 6 September 2015.

[349] R-132, Email from Mr. J. Borkowski to D. Ning, 17 September 2015; R-133, Email from Mr. J. Borkowski to D. Ning, 21 September 2015.

[350] R-133, Email from Mr. J. Borkowski to D. Ning, 21 September 2015.

remind [the Armenian Prime Minister] that we control the railway project and that Poly is our preferred partner including on a G2G or government guaranty basis."[351]

300. According to the Respondent, the correspondence between Mr. Borkowski and China Poly at this time demonstrates Rasia's intention to replace CCCC with China Poly as financier for the Railway Project.[352] The Claimants say that their discussions with China Poly concerned only the Iranian portion of the Railway, for which Rasia intended to bring in China Poly, through a framework agreement, alongside CCCC working on the Armenian segment.[353]

301. While in Beijing, on 23 September 2015 the Armenian Prime Minister also met representatives of China EximBank. According to press reports from the meeting, the Prime Minister "said the possibility of implementing large-scale investment projects, including construction of South Railway of Armenia, were discussed in the past few years with the Chinese side."[354]

302. In November 2015, during a workshop on Chinese-Armenian cooperation connected to the Silk Road Economic Belt, the Chinese ambassador to Armenia reportedly told the press that "at the current stage two Chinese companies are conducting the feasibility study of the project on a non-repayable basis to see the expediency of the Iran-Armenia railway project," following which it would be possible to hold real discussion about potential Chinese investments and implementation. The press article reporting this statement referred specifically to a feasibility study developed "[i]n cooperation with Dubai-based investment company, Rasia FZE," but did not identify which Chinese companies were working on feasibility studies.[355]

303. Later, in its early 2016 discussions with Iran (see above paras. 259-261) Armenia stated that a railway feasibility study "had been conducted by a Chinese company,"[356] which in the Claimants' submission, could refer either to the Railway Feasibility Study CCCC prepared on behalf of Rasia

[351] R-134, Email from Mr. J. Borkowski to D. Ning, 22 September 2015.

[352] Resp. Rej. ¶ 209, 409.

[353] Cl. Reply ¶ 411.

[354] C-31, "Iran-Armenia Railway to Play Role in Regional Development" (Armenian News), 23 September 2015.

[355] C-23, "Ambassador of China: It Will Be Possible to Speak of Expediency of Iran-Armenia Project after Preparation of Feasibility Study" (ArmInfo), 16 November 2015.

[356] C-308, "Mission report on the results of the delegation visit headed by the Minister of Transport and Communication of the Republic of Armenia" submitted by G. Beglaryan, Minister of Transport, to D. Harutyunyan, Chief of Staff of the Government of the Republic of Armenia, 25 January 2016 (Unofficial English Translation and Armenian Original), p. 4.

(evidencing that Armenia relied on this Feasibility Study as valid in early 2016), or to a separate one prepared by CCECC (suggesting that a competing study indeed had been prepared).[357]

304. As for CCCC, the record does not contain any contemporaneous documentation indicating the reasons for its withdrawal from the Railway Project, which Mr. Borkowski testified was communicated to him in mid-March 2015.[358] The last communication prior to that date was an exchange from 8 February 2015, in which CCCC asked for an update on the Project and Mr. Borkowski responded as follows:

> Yes good improvement on the railway project but mostly on the Iran side. On the Armenia side, they need the WGS 84 coordinates in order to progress but I cannot get those without the next stage. I am working on the Iran side now.
>
> On the road, the project is failing and is stopped with the Spanish EPC problems.

Mr. Borkowski indicated he would send "a more detailed update soon."[359] There is no record evidence of that update, but as noted above, Claimants contend that by mid-March 2015, Mr. Weixin informed Mr. Borkowski that CCCC was withdrawing from the Railway Project, because the Chinese Ministry of Commerce had reserved the Project for CCECC.[360]

305. The only other correspondence in the record from CCCC is a series of letters, dated between 2018 and 2021, which the evidence demonstrates were drafted by Mr. Borkowski for Mr. Weixin's approval, ostensibly to satisfy Rasia's auditors that Rasia remained indebted to CCCC for preparing the feasibility studies.[361] The 2018 letter Mr. Borkowski prepared (and Mr. Weixin approved) states that CCCC remains "fully entitled" to $15 million for the feasibility studies, for which remuneration was "deferred … on the basis of Rasia's commitment … to involve CCCC in the project EPC works" for both the Railway Project and the Road Project.[362] The 2020 and 2021 versions of the letter that Mr. Borkowski prepared have slightly different wording, claiming that the debt was "originally intended to be either paid out from an Aabar … acquisition of the [Projects] or rolled into the project financing stage with Aabar … equity and China Exim Bank debt for the CCCC

[357] Cl. Reply ¶ 414.

[358] Cl. First PHB ¶¶ 244, 246, 271; February Tr. Day 2, Hanessian/Borkowski, 313:20-314:3, 314:9-18.

[359] R-123, Email from Mr. J. Borkowski to Mr. B. Weixin, 8 February 2015.

[360] Cl. First PHB ¶¶ 244, 246, 271; February Tr. Day 2, Hanessian/Borkowski, 313:20-314:3, 314:9-18.

[361] Fourth Borkowski Statement ¶ 33; C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021.

[362] C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021, pp. 3-6.

EPC works," and that "CCCC "has not called on the debt" because of the pending Arbitration and the "sensitivity of bilateral government relations between China and Armenia as well as China and the UAE," but that "CCCC will, in due course, seek repayment."[363] The Tribunal returns to the significance of these letters in Section V.A.3 below.

J. AABAR'S INVOLVEMENT AND WITHDRAWAL FROM PURCHASING RASIA

306. Claimants contend that in addition to losing CCCC in mid-2015 as the intended EPC contractor for the Projects, it also lost the support of Aabar as the intended equity investor in Rasia. The withdrawal of Aabar's interest in investing in Rasia is critically important for this case, as the projected value to Rasia of that investment forms the sole basis for Rasia's calculation of damages in this Arbitration.

307. To recall points about Aabar discussed above, Mr. Borkowski testified that in his view, the "essence" of his bargain with Armenia was that "Aabar was to be the anchor investor in the Projects once their feasibility had been established."[364] In June 2012, Mr. Tappendorf (then of Aabar) had written to Armenia, promising "to review the railway and road development projects with a focus on economic feasibility and investment and either directly or through our affiliates consider equity investments and/or lending."[365] On 31 July 2012, three days after the Concession Agreements were signed, Rasia advised the Government that it had met with Aabar to discuss "the prospects of equity investments" in connection with the Railway Project.[366] On 29 October 2013, Mr. Borkowski proposed to Aabar's CEO an equity transaction that would allow it to "own and control [this] strategic railway," which he said would enable Aabar's subsidiary Arabtec to become "Master Developer, Contractor [and] Railway Owner." Mr. Borkowski also described the Railway Project as benefiting from "[s]ignificant financing" coming from "3rd parties (up to 85% [C]hina banks and 15% ADFD and Eurasian Development Bank)."[367] Although the proposal to Aabar referenced "the ability to partner with China company,"[368] it made no specific mention of Rasia's prior agreement

[363] C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021, pp. 7-8, 10-11; *see also* C-231, Letter from Mr. B. Weixin to Mr. J. Borkowski, 6 March 2020.

[364] Second Borkowski Statement ¶ 31.

[365] C-11, Letter from Mr. C. Tappendorf, Aabar to Minister G. Beglaryan, 26 June 2012.

[366] C-91, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 July 2012.

[367] C-121, "Southern Armenian Railway – An Energy Corridor Linking Asia to Europe" (Rasia, 29 October 2013).

[368] *Id.*

to appoint CCCC "as the lead member of its Consortium and exclusive EPC for developing" the Railway Project.[369] The Claimants say that at some point in late October 2013, the Aabar CEO confirmed his interest in investing in both Projects, which was communicated to Mr. Borkowski through Mr. Tappendorf.[370]

308. The Claimants say that but for the Respondent's acts that led effectively to Rasia and CCCC's ouster from the Projects by March 2015, the deal with Aabar – by which it or one of its subsidiaries would have purchased 100% of the shares of Rasia – would have closed in April 2015. The Parties agree that the Aabar deal failed to materialize, but they disagree as to the reason(s) for the failed deal. The facts underlying these disputes are recounted below.

309. In April 2014, Mr. Tappendorf prepared a presentation about the Projects for the Aabar chairman H.E. Khadem Al Quibaisi, (the "**Tappendorf Presentation**"). Mr. Tappendorf suggested there would be significant value in Aabar's acquisition of the Projects, including "Arabtec as EPC partner alongside CCCC," with Arabtec described as "joint EPC" and the suggestion that Aabar could "add 10% to EPS for [its] management of project."[371] The Tappendorf Presentation also stated that Aabar could "significantly reduce cost of capital for project financing through G2G arrangement," including for the Railway Project a "G2G de-risking" and for the Road Project an "Armenian government guaranty through availability payments" expected to cover "principal, interest, returns."[372] The Presentation also listed the "key future milestones required from Rasia" before the Projects could be at the stage at which Aabar would invest, including Armenia's acceptance of the Feasibility Studies, a "trilateral co-operation agreement between Armenia-Rasia-Iran on railway linkages," an agreement between Aabar and Rasia on acquisition terms, and "definitive documents and standard due diligence."[373] According to Mr. Tappendorf's witness statements in this Arbitration, the Aabar Chairman reacted positively and expressed a wish to complete the deal once the identified milestones had been reached.[374]

[369] R-8, Rasia-CCCC Framework Agreement, p. 2 and Section 7.

[370] First Borkowski Statement ¶ 69; First Tappendorf Statement ¶ 47.

[371] C-135, "Armenia Strategic Infrastructure Projects, Chairman Summary" (Aabar), April 2014, pp. 2, 4.

[372] *Id.*, pp. 2, 4.

[373] *Id.*, p. 5; First Tappendorf Statement ¶ 61.

[374] First Tappendorf Statement ¶ 62.

310. There are two related letters dated 21 September 2014 on the record, both written by Mr. Tappendorf.[375] The first[376] is a memo written to Mr. Al Quibaisi, which contained an update on the progress on both Projects since the Tappendorf Presentation in April 2014. It stated that Armenia had accepted the Railway Feasibility Study, but had not yet accepted the Road Feasibility Study. The memo further said that "Rasia remains willing to pursue a sale of both projects with [A]abar and involving Arabtec and has agreed with the high end of our previously discussed April terms." It also stated that Armenia had requested an "expression of interest from a 3rd party in support of Rasia for financing the remaining 40%" Railway Project, and that Rasia had requested proceeding "with the sale of both projects to [A]abar." Under the heading "Concerns of [A]abar/potential risks," Mr. Tappendorf also wrote the following:

> - July media of other parties willing to fund the road project
> - No feedback from Armenia to Rasia on the road project feasibility study
> - Competing feasibility study and/or design works having been granted to other parties.

The memo concluded with a recommendation that Aabar drop the acquisition of the Road Project, and instead focus solely on the Railway Project. Mr. Tappendorf suggested that the drafting of definitive agreements for the latter should start in early 2015, "after the planned signing of trilateral cooperation between Armenia-Rasia-Iran, ensuring Iran linkages will be in place." Mr. Tappendorf also recommended that Aabar issue a "soft" Expression of Interest letter to Rasia, to be shown to the Armenian Government.[377]

311. The second letter dated 21 September 2014, which Mr. Tappendorf has said that he drafted later in the day after having written to, and then met with, Mr. Al Quibaisi,[378] was addressed to Mr. Borkowski. The letter had the subject "Expression of Interest, Southern Armenia Railway (Armenia-Iran Railway)." The letter noted that the Railway Feasibility Statement had stated "the China contractor's initial indications of interest" from China EximBank for funding "at least of 60% of the project … without a sovereign guaranty," and stated that Aabar believed it had the

[375] C-13, Letter from Mr. C. Tappendorf to Mr. J. Borkowski, 21 September 2014; CT-7, Memorandum from Mr. C. Tappendorf to H.E. K. Al Qubaisi, 21 September 2014.

[376] At the February Hearing, Mr. Tappendorf testified that he drafted CT-7 before C-13, February Tr. Day 5, Hanessian/Tappendorf, 855:18-856:15.

[377] CT-7, Memorandum from Mr. C. Tappendorf to H.E. K. Al Qubaisi, 21 September 2014.

[378] February Tr. Day 5, Hanessian/Tappendorf, 855:18-856:15.

ability "to arrange the remaining 40% financing in the form of similar low cost debt along with playing the management role" in the EPC contract through Arabtec. Aabar would require that Rasia sell "100%" of the Railway Project "at a standard multiple (i.e. 5-7x) of the $10 million base feasibility study and alignment design expense," and would require that Rasia remain involved during the duration of the EPC works "in exchange for a market comparable consulting fee (i.e. 5% of the EPC contract). This would enable all flows to equity to be for the benefit of Aabar Investments with all of the EPC profits benefitting Arabtec Construction."[379]

312. As will be developed further below, the Parties dispute precisely what type of undertaking Aabar made in this letter. The letter was subsequently delivered in person by Mr. Borkowski to Mr. Arakelyan on 10 November 2014.[380]

313. Mr. Tappendorf testified that by late November 2014, he considered that the milestones he identified in April 2014 had been met.[381] In a memorandum dated 22 December 2014, Aabar Chief Financial Officer (and a witness in this Arbitration) Mr. Andrew Thornber sent a memo to the Aabar Finance and Investment Committee, recommending the 100% purchase of Rasia shares, for which USD 105 million (plus a USD 5 million contingency) was to be allocated. The memo stated that Rasia had contributed "100% of the equity investment of USD 15 million" towards the Feasibility Studies and working designs, and accordingly that "the 100% ownership is maintained by Joseph Borkowski." Both projects were said to have been "completed with a positive result," with the "major project being the railway [which] was formally accepted by Armenia."[382] As for the Road Project, the memo reported that Aabar's legal team considered it automatically accepted under the Road Concession's terms, even though Armenia had not provided any written acceptance, and Aabar's investment team believed that the Aabar acquisition of Rasia would convince the Government to support the Road Project as well.

314. Attached to Mr. Thornber's 22 December 2014 memo was, among other things, an 18 December 2014 term sheet that Mr. Tappendorf had prepared, reflecting what he considered had been agreed with Rasia for the purchase of 100% of its shares (the "**Aabar Term Sheet**" or the "**Term Sheet**"). The Aabar Term Sheet was an internal document, and it was not signed by either Aabar or Rasia.

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[379] CT-7, Memorandum from Mr. C. Tappendorf to H.E. K. Al Qubaisi, 21 September 2014. As discussed below, Mr. Borkowski testified during the February Hearing that the reference to Arabtec enjoying all of the EPC profits was a "drafting error," which the Respondent disputes.

[380] Second Borkowski Statement ¶ 78; First Arakelyan Statement ¶ 39.

[381] First Tappendorf Statement ¶ 68.

[382] C-146, Memorandum from Mr. A. Thornber to Aabar Finance and Investment Committee, 22 December 2014.

It reflected a proposed purchase price of USD 105 million, to be paid upon closing of the transaction which was expected "no later than 30 April 2015." The terms of the sale provided that it would be on an "as is" basis, free "from charges or liabilities except as disclosed," with a footnote providing that "Rasia to repay USD 15m credit with CCCC." Furthermore, under the heading "Conditions Subsequent to Closing," it was provided that Aabar and Rasia were to "enter into EPC consulting agreement with Joseph Borkowski … for value equal to 5% of the EPC for the Southern Armenia Railway only and to be paid proportionately as EPC works are completed." A separate "operations consulting agreement" with Mr. Borkowski was to provide him "3% of the total annual sales" for the Railway, for the first 30 years of the concession.[383]

315. Mr. Thornber has testified that Aabar's Finance and Investment Committee approved the proposed transaction "shortly after" his 22 December 2014 memo,[384] although there is no decision as such on the record. Mr. Thornber also testified that he proceeded to "ring-fence" the funds necessary for the purchase, so by the end of December, "all internal approvals for the transaction had been obtained."[385]

316. According to the Respondent, Mr. Borkowski never informed it of the plan to sell Rasia to Aabar, which the Respondent argues was a violation of Sections 8.2(e) of both Concessions, which gave Armenia a right of first refusal to acquire Rasia's shares. The Respondent maintains that it was only at the March 2016 Meeting that Armenia was informed of the potential equity transaction and the failure of the same.[386]

317. In any event, the Rasia-Aabar transaction never took place. The Parties have different versions of the events that transpired beginning in early 2015 that led to Aabar's withdrawal in March 2015.

318. In early January 2015, Aabar put the transaction on hold. In the Claimants' telling, this decision, as well as Aabar's ultimate withdrawal in March 2015, was prompted by various actions by the Respondent. According to Mr. Tappendorf, Aabar's chairman expressed concern over Armenia's attempts unilaterally to terminate the Road Project, as well as the Government's stance on the financing of the Railway Project. The Claimants say that by this time, it had become clear that both Projects were under threat. That had prompted the Aabar chairman to instruct Mr. Tappendorf to

[383] C-145, Aabar, Term Sheet, 18 December 2014.
[384] First Thornber Statement ¶ 36.
[385] *Id.*, ¶ 36.
[386] Resp. Counter-Mem. ¶¶ 134, 150.

put the acquisition temporarily on hold in January 2015, in order to "better assess the situation in Armenia."[387]

319. In late February 2015, two articles appeared in Armenian press (the "**Press Reports**"), which, the Claimants argue, informed Aabar's decision to withdraw from acquiring Rasia. These news reports recount remarks from Minister Beglaryan about a two-month postponement of the deadline for adopting a Government measure related to amendments of the Railway Concession and action plans for construction of the Railway Project. The Press Reports state that Mr. Beglaryan attributed the delay to a "negative posture on some matters by the concessionaire."[388] One report also quotes an economist, Mr. Ashot Yeghiazaryan, as saying that Rasia "prevents the construction of the Iran-Armenia railway."[389]

320. The Claimants say that these Press Reports prompted Aabar's ultimate decision to withdraw. In Mr. Tappendorf's recollection, in March 2015, Mr. Al-Qubaisi instructed him that "Aabar must withdraw from the investment" as a reaction to the recent news of the Government's stance, which had rendered the Projects "too risky and politically sensitive."[390]

321. According to the Respondent's version of events, Aabar's failure to follow through on the proposed deal with Rasia was not motivated by any action or inaction on Armenia's part, but instead was part of the fallout of the so-called "**1MDB Scandal**," a large-scale fraud involving the Malaysian sovereign wealth fund 1MDB and Aabar's parent company International Petroleum Investment Company ("**IPIC**"), which ultimately led to Aabar's collapse. In April 2015 Mr. Al-Qubaisi, whom Mr. Tappendorf had advised about the potential Rasia acquisition, was removed as Aabar chairman in connection with the 1MDB Scandal. In June 2015, he was arrested and subsequently sentenced to 15 years in jail for his involvement in the Scandal.[391] The Respondent says that even before these

[387] First Tappendorf Statement ¶ 73; Second Tappendorf Statement ¶¶ 76-77; Cl. Reply ¶¶ 253-256; Cl. First PHB ¶ 250.

[388] C-151, "The First Obstacle of the Iran-Armenia Railway is the Concessionaire of the Armenian Railway" (Aravot), 28 February 2015; *see also C*-150, "The Prime Minister too has no Hope of Iran-Armenia Railway" (Aravot), 26 February 2015 ("Beglaryan connected postponement … [with] having a negative attitude caused by the concessionaires").

[389] C-151, "The First Obstacle of the Iran-Armenia Railway is the Concessionaire of the Armenian Railway" (Aravot), 28 February 2015.

[390] First Tappendorf Statement ¶¶ 73-77; *see* also Cl. Reply ¶¶ 253-256.

[391] R-42, B. Hope and N. Parasie, Abu Dhabi Sovereign Wealth Fund Gets Entangled in Global 1MDB Scandal, The Wall Street Journal, https://www.wsj.com/articles/malaysian-money-trail-leads-to-themiddle-east-1480614247, 1 December 2016.

events, there were "questions about 1MDB," as evidenced by press reports in February 2015 and news spreading in Malaysia even in 2014.[392]

322. The Claimants dispute the Respondent's linkage of the 1MDB Scandal with Aabar's withdrawal from acquiring Rasia. They argue that the key events of that scandal – including Mr. al-Qubaisi's resignation – transpired after the Rasia-Aabar deal already had fallen through for unrelated reasons in January-March 2015, and as such, it could not have had any impact on the intended transaction.[393]

K. POST-NOTICE OF DISPUTE DEVELOPMENTS

323. The Parties disagree as to exactly when the formal dispute between them arose (see below at Section V.D). However, it seems to be common ground that by the time of the 25 June 2016 Notice of Dispute, the existence of a dispute was known to both sides. The Respondent replied to the Notice of Dispute on 9 September 2016, in a letter signed by Minister Beglaryan, stating that in Armenia's view, the Claimants had breached both Concessions.[394] Mr. Borkowski responded to Minister Beglaryan's 9 September 2016 letter on 20 October 2016. In his letter, this time addressed to Mr. Vahan Martirosyan, who by then had replaced Mr. Beglaryan as Minister for Transport, Mr. Borkowski disagreed with Armenia's characterization of Rasia's performance under the Concessions, and he confirmed his intention to proceed to ICSID arbitration.[395]

324. In the intervening period between this exchange and the Claimants' Request for Arbitration on 19 June 2018, there were further developments which are relevant to the factual background of the dispute.

325. In late 2016 and early 2017, the Armenian Government solicited foreign investors with the aim of attracting investment in the country's infrastructure, including its rail and road networks. On 10-11 October 2016, Mr. Arakelyan presented the Southern Armenia Railway Project at the Armenian

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[392] Resp. Counter-Mem. ¶¶ 147-151, 243, 297; Resp. Rej ¶¶ 184-193; R-42, B. Hope and N. Parasie, Abu Dhabi Sovereign Wealth Fund Gets Entangled in Global 1MDB Scandal, The Wall Street Journal, https://www.wsj.com/articles/malaysian-money-trail-leads-to-themiddle-east-1480614247, 1 December 2016; C-240. R. Ramesh, 1MDB: The inside story of the world's biggest financial scandal, The Guardian, https://www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia, 28 July 2016.

[393] Cl. Reply ¶¶ 247-257; Second Tappendorf Statement ¶¶ 76-85.

[394] C-183, Letter from Minister G. Beglaryan to Mr. J. Borkowski, 9 September 2016.

[395] C-184, Letter from Mr. J. Borkowski to Minister V. Martirosyan, 20 October 2016.

Investment Forum in New York.[396] According to the Claimants, the presentation incorporated findings from the Railway Feasibility Study, and offered prospective investors rights that conflicted with Rasia's exclusive rights under the Railway Concession.[397] In a separate presentation later that same month to the Group of Experts on the Euro-Asian Transport Links, the Government confirmed that it was considering further financing for Tranche 4 of the NSRC from various institutions, including EDB and ADB.[398] On 11 January 2017, the Armenian Ministry of Foreign Affairs distributed an information package entitled "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of the Armenia railway project." Among other things, the material invited prospective investors to "become party to a tripartite agreement with [Rasia] and the Republic of Armenia," about which Rasia claims not to have been aware. The Claimants allege that this marketing material also incorporated findings from the Railway Feasibility Study.[399]

326. On 6 February 2017, Mr. Borkowski contacted ADB with a request for further details about correspondence between Armenia and ADB related to both Projects. The ADB response clarified that most of the requested documents were in the possession of the Armenian Government, to which Mr. Borkowski was referred.[400] On 5 March 2017, Mr. Borkowski lodged a Request for Information Pursuant to Armenian Law on Freedom of Information with the Ministry of Transport, asking for access to specific documents relating to both Projects and the Respondent's alleged breaches.[401] On 14 March 2017, Mr. Grigoryan responded to the request on behalf of the Government, informing Mr. Borkowski that "the entire requested information has been posted to the official websites of the President of the Republic of Armenia, the Government of the Republic of Armenia and the [Ministry of Transport] of Armenia."[402]

327. During the course of 2017, the Parties engaged in settlement discussions. The Claimants first offered to settle all disputes between the Parties in a 7 February 2017 letter which contained two

[396] C-44, Republic of Armenia, "Investment Projects", Armenia Investment Forum, New York, 10-11 October 2016.

[397] Cl. Reply ¶¶ 437-438.

[398] C-185, "North-South Road Corridor Investment Program" (Republic of Armenia). 26-27 October 2016.

[399] C-33, Republic of Armenia, "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of the Armenia Railway Project", 11 January 2017; Cl. Reply ¶¶ 144-151; 212; 216; 389(i); 439-443.

[400] C-29, Letter from Mr. J. Borkowski to Mr. V. Karapetyan, Organization for Implementation of North–South Road Corridor Investment Program of the Republic of Armenia, 5 March 2017.

[401] C-24, Letter from Mr. J. Borkowski to Minister V. Martirosyan, 5 March 2017; C-26, Letter from Mr. J. Borkowski to Mr. R. Harutyunyan, Armenian-Chinese Joint Commission on Trade and Economic Cooperation, 5 March 2017.

[402] C-30, Letter from Mr. G. Grigoryan to Mr. J. Borkowski, 14 March 2017.

alternative proposals for settlement. The first proposal involved Armenia's payment of $40 million to Rasia for mutual termination of both Concessions; the second proposal involved Armenia's contribution of $150 million to a new joint venture company established to undertake the Railway Concession only, which would be owned 51% by Rasia and 49% by Armenia.[403]

328. On 9 June 2017, Minister Martiroysan replied that Armenia did not see any ground for a dispute regarding the Road Project, while not mentioning the Railway Project. The Minister nevertheless invited Mr. Borkowski to the Ministry for a meeting.[404] Mr. Borkowski confirmed, on 14 June 2017, his willingness to meet on 3 July 2017. In the same letter, Mr. Borkowski also noted that Mr. David Harutyunyan had recently been appointed Minister of Justice of Armenia, and suggested this raised potential conflicts of interest given Mr. Harutyunyan's prior involvement in advising Rasia at earlier stages of the Projects.[405] In a further letter on 27 June 2017, Mr. Borkowski requested the audio recording from the earlier March 2016 Meeting, as well as a written response to the 6 February 2017 settlement offer. He also asked that the meeting be audio recorded.[406]

329. The settlement discussions took place in Yerevan on 3 July 2017. The following individuals were present at the meeting, according to the transcript of the audio recording: Mr. Borkowski, Mr. Martirosyan (Minister of Transport), Mr. Harutyunyan (Minister of Justice), Mr. Grigoryan, and Mr. Ashot Boghossian (advisor to the Ministry of Transport).[407] No concrete progress was made in terms of a potential settlement at the meeting. Among other things, the Government stated that the two Concessions remained in force. It complained that Mr. Borkowski had not submitted any action plan to restart the Railway Project, as the Government had requested at the March 2016 Meeting discussed in Section III.H.2. Mr. Borkowski emphasized that this was an "unreasonable" request to which he had not agreed, since his "consortium" (which he described as involving financing "pulled together … between China Exim Bank and the Abu Dhabi government") "was dismantled already," as he had explained at the March 2016 Meeting. The meeting closed with Minister Harutyunyan saying that Armenia would review its position with respect to the Projects and revert back to Mr. Borkowski.[408]

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[403] C-48, Letter from Mr. J. Borkowski to Minister V. Martirosyan, 7 February 2017.

[404] C-200, Letter from Minister V. Martirosyan to Mr. J. Borkowski, 9 June 2017.

[405] C-201, Letter from Mr. J. Borkowski to Minister V. Martirosyan, 14 June 2017.

[406] C-202, Letter from Mr. J. Borkowski to Minister V. Martirosyan, 27 June 2017.

[407] C-318, Transcript of 3 July 2017 Meeting, 3 July 2017.

[408] *Id*., pp. 5:20-26; 13:12-15; 14:9-36; Cl. Reply ¶ 246; Cl. First PHB ¶¶ 105; 111-114.

330. On 27 July 2017, Minister Martirosyan sent two letters to Mr. Borkowski, following up on the 3 July 2017 settlement meeting. In one letter, the Minister wrote that "[t]he record clearly shows that Rasia, by its own admission, has failed to perform its responsibilities under the Agreements and is therefore in breach." It went on to outline the Government's view of Rasia's failure to perform under both Concessions, and it concluded that "Rasia is free to file a claim against the Government with ICSID."[409]

331. The other letter from Minister Martirosyan contained a settlement offer, "open for [Mr. Borkowski's] acceptance until August the 25th, 2017." The offer limited Rasia's future role to potentially receiving fees from "invest[ing] any prior work performed and paid for by Rasia or you" into the Projects, should the Government find any new parties "who are willing and able to develop the Projects, which Rasia was commissioned to develop, but failed to do."[410]

332. Mr. Borkowski responded to the two letters on 1 August 2017, in a letter denying the allegations contained therein and rejecting the Government's settlement offer.[411]

333. After the Parties failed to reach a settlement, Armenia proceeded to pursue the involvement of other entities in the Projects. Separately, on 7 November 2017, the Transport Ministry published a message on its web site which explained that the Government intended to proceed with the Railway Project without the Claimants:

> The Government has been patient with RASIA FZE, but the company has not met the deadlines and other contractual obligations.
>
> Taking into consideration the abovementioned and the strategic significance of this Program for the Republic of Armenia, the Government of RA is undertaking efforts to complete the railway separately from RASIA FZE.[412]

334. Also in November 2017, Armenia sought further investments in the Sisian-Kajaran road (which overlaps with the Road Concession), in marketing documents which also noted that the

[409] C-49, Letter from Minister V. Martirosyan to Mr. J. Borkowski, 27 July 2017.

[410] C-50, Letter from Minister V. Martirosyan to Mr. J. Borkowski, 27 July 2017.

[411] C-51, Letter from Mr. J. Borkowski to Minister V. Martirosyan, 1 August 2017.

[412] C-57, Ministry of Transport Website: On the Implementation Process of the Concession Agreement of Southern Railway of Armenia (http://www.mtcit.am/pages.php?lang=3&id=6834&page_name=news#), 9 November 2017, accessed on 11 July 2018.

Government would contribute about USD 200 million for the construction of this portion of the road.[413]

335. In March 2018, the Transport Ministry reached a framework agreement with the Italian company Anas International, allowing the company to conduct feasibility studies for the construction and operation of the Sisian-Kajaran road. In June 2018, the Government also invited tender bids for the construction of this part of the road.[414]

336. The Armenian Government sought Chinese involvement in the NSRC, and to this end met with Chinese officials in November 2018 and with the China Railway Group in May 2019. Also in May 2019, the State's Deputy Minister of Transport presented the construction of Tranche 4 to a delegation from the United Kingdom.[415]

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

337. The Claimants in the Arbitration request the Tribunal to render an award:

(i) DECLARING that Armenia has violated its obligations under the Treaty and international law and, in particular, has expropriated the Claimants' investments in violation of customary international law and, in respect of the second named Claimant, in violation of Article III(1) of the Treaty, has failed to accord the second named Claimant's investments, and the

[413] C-46, Republic of Armenia, "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of Sisian- Kajaran Section, Tranche 4, of North-South Road Corridor Investment Program", 11 January 2017. Claimants' Memorial states that this undated document was issued in November 2017 (Cl. Mem. ¶ 156).

[414] C-210, "Italy's Anas International to explore construction of Sisian- Kajaran section of North-South Road Corridor" (ArmenPress), 14 March 2018; C-211, Ministry of Transport Website: "The Italian company will carry out a study of the Sisian-Qajaran road section under the signed agreement"(http://www.mtcit.am/pages.php?lang=3&page_id=1&id=6949&pa ge_name=news#), 14 March 2018, accessed on 5 June 2019; C-212, Ministry of Transport Website: "Chinese company interested in Armenia's road construction projects" (http://mtcit.am/pages.php?lang=3&page_id= 1&id=7020&page_name=news#), 13 June 2018, accessed on 5 June 2019.

[415] C-216, Ministry of Transport Website: "Acting Minister Received Ambassador Extraordinary and Plenipotentiary of China" (http://mtcit.am/pages.php?lang=1&id=7193&page_name= news#), 12 November 2018, accessed on 5 June 2019 (Unofficial English Translation and Armenian Original); C-217, Transport Project Implementation Organization Website: "The constructions issues of the North-South Road discussed with the representatives of the 'PowerChina'" (https://tpio.am/en/news/inner/News_24.11.2018), 24 November 2018, accessed on 5 June 2019: C-218, "Armenia's North-South Road Corridor viewed as part of road linking Persian Gulf to Black Sea" (Armenia News), 14 May 2019; C-219, Ministry of Transport Website: "Minister Hakib Arshakyan met with Vice President of the Chinese rail way organization Ren Hongheng" (http://www.mtcit.am/pages.php?lang=1&id=7347&page_name=news), 14 May 2019, accessed on 5 June 2019 (Unofficial English Translation and Armenian Original); C-220, Ministry of Transport Website: "Possibilities of cooperation in the fields of high technologies and road construction were discussed with Mark Pritchard" (http://mtcit.am/p ages.php?lang=1&page_id=1&id=7357&page_name=news#), 24 May 2019, accessed on 5 June 2019 (Unofficial English Translation and Armenian Original).

management, enjoyment, operation and disposal thereof, treatment that is fair and equitable, non-arbitrary and non-discriminatory in violation of Articles II(2)(a) and II(2)(b) of the Treaty, and has failed to observe its obligations with regard to the second named Claimant's investments in violation of Article II(2)(c) of the Treaty;

(ii) DECLARING that Armenia is in material breach of its obligations under the Railway and Road Concession Agreements, and its obligations arising under the Foreign Investment Law of Armenia;

(iii) ORDERING Armenia, by way of satisfaction, to issue a public apology to the Claimants for violation of its obligations under the Treaty, international law, the Concession Agreements and Armenian law with respect to the Claimants' investment in a form to be determined by the Tribunal following further submissions;

(iv) ORDERING Armenia to pay the Claimants compensation in the amount of US$225 million, or in such other amount sufficient to wipe out the consequences of Armenia's wrongful acts and omissions, to be paid in a freely convertible currency;

(v) ORDERING Armenia to pay interest on any compensation awarded, at a commercial rate and compounding interval to be determined by the Tribunal following further submissions, accruing from 18 March 2015 until payment in full;

(vi) ORDERING Armenia to pay all costs in connection with these proceedings, including the costs of the Tribunal and of ICSID, as well as legal and other expenses incurred by the Claimants including the fees of their legal counsel, experts and consultants, in accordance with Article 61(2) of the ICSID Convention; and

(vii) ORDERING such other or additional relief as the Tribunal considers appropriate under the applicable law or as may otherwise be just and proper.[416]

338. The Respondent, on the other hand, requests the Tribunal to issue an Award:

(i) Dismissing Claimants' claims on the grounds that the Tribunal lacks jurisdiction;

(ii) In the alternative, dismissing Rasia's claims for breach of the Concession Agreements and Mr. Borkowski's claims for breach of the umbrella clause of the Treaty as time-barred;

(iii) In the alternative, dismissing Claimants' claims on the merits in their entirety;

[416] Cl. Second PHB ¶ 177.

(iv) In the alternative, declaring that Claimants are not entitled to any damages;

(v) Ordering the Claimants to separately and together pay all costs incurred in connection with these arbitration proceedings, including their own costs, the costs of the arbitrators and ICSID, and the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts, and consultants, as well as the Respondent's own officials and employees on a full indemnity basis, plus interest thereon at a reasonable rate; and

(vi) Granting such further relief against the Claimants as the Tribunal deems fit and proper.[417]

V. JURISDICTION AND ADMISSIBILITY

339. The Respondent submits that the Tribunal does not have jurisdiction to hear this dispute.[418] Specifically, the Respondent argues that the Claimants did not make a qualifying investment under Article 25 of the ICSID Convention (Section A),[419] and that Mr. Borkowski cannot assert umbrella clause claims on behalf of Rasia under the BIT's umbrella clause (Section B).[420]

340. The Respondent further argues that, even if the Tribunal were to assume jurisdiction, it would not suffice for the Claimants' case to proceed since the claims are not admissible.[421] In this respect, the Respondent contends that the Claimants are seeking to profit from an illicit scheme (Section C)[422] and that the Claimants' claims under the Concessions are time-barred (Section D).[423]

341. In the sections that follow, the Tribunal summarizes the Parties' respective positions regarding these various jurisdictional and admissibility issues, then provides its analysis and conclusions.

[417] Resp. Second PHB ¶ 180.
[418] Resp. Counter-Mem. ¶ 191.
[419] *Id*.; Resp. Rej. ¶ 328.
[420] Resp. Counter-Mem. ¶ 207.
[421] *Id*. ¶ 210.
[422] *Id*. ¶¶ 213, 219.
[423] *Id*. ¶ 223; Resp. Rej. ¶ 340.

A. WAS THERE A QUALIFYING INVESTMENT UNDER THE ICSID CONVENTION?

(1) The Respondent's Position

342. Armenia submits that the jurisdiction of an ICSID tribunal is dependent on the existence of a qualifying investment within the meaning of both the applicable BIT and the ICSID Convention.[424] Therefore, it is not sufficient to satisfy the definition of an investment under the BIT alone.[425] Armenia contends that Article 25 of the ICSID Convention contains an objective standard, which requires a substantial contribution or allocation of resources, duration, and risk in the relevant host State.[426] The Respondent argues that the Claimants have made no qualifying investment since they do not meet this objective standard; in particular, they have made no economic contribution in Armenia.[427]

343. First, the Respondent submits that the Tribunal should apply the *Salini* test, which requires a significant economic contribution to the host State.[428] In the Respondent's view, this requirement applies to both the BIT and the ICSID Convention.[429] The Respondent contends that the objective standard under the ICSID Convention must be met regardless of the definition of investment in the BIT.[430] It is a double-barreled test, and the Claimants must satisfy the definition of investment in both the BIT and the ICSID Convention.[431]

344. According to the Respondent, a State and a private party cannot create ICSID jurisdiction simply by stating in an agreement (such as the Concessions) that a given transaction constitutes an investment.[432] The Respondent argues that, while a contractual provision could create a presumption that a transaction is an investment, such a contractual definition cannot supersede the

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[424] Resp. Rej. ¶¶ 303, 305.

[425] *Id*. ¶ 300.

[426] Resp. Counter-Mem. ¶ 194; Resp. Rej. ¶¶ 301, 304; Resp. First PHB ¶ 158.

[427] Resp. Counter-Mem. ¶¶ 194–95; Resp. Rej. ¶¶ 311, 315.

[428] Resp. Counter-Mem. ¶ 193 (citing RL-38, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001 ("***Salini***"), ¶ 52).

[429] Resp. Rej. ¶ 305.

[430] *Id*. ¶ 304 (citing RL-35, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("***Quiborax***"), ¶ 211).

[431] CL-50, *Koch Minerals SARL and Koch Nitrogen International SARL v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017 ("***Koch***"), ¶ 6.50 (quotation omitted).

[432] Resp. Rej. ¶ 310 (relying on RL-37, *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009 ("***RSM***"), ¶ 235).

objective meaning of investment under the ICSID Convention.[433] Armenia relies on *Joy Mining v. Egypt*, *Michell v. Congo,* and *OI European Group BV v. Venezuela* for the contention that the Concession provisions alone, without any actual significant contribution, do not satisfy the requirements on jurisdiction.[434]

345. Second, the Respondent submits that the proper test to assess the Claimants' alleged investment is whether there is a contribution or allocation of resources, risk, and duration.[435] Furthermore, a portion of the contribution must be made in the country concerned and should bring with it economic value.[436] Armenia submits that the tribunal in *Quiborax* addressed this point and found that a shareholder with no evidence that it had paid for its shares in the investment vehicle or that it had made a subsequent contribution did not have a qualifying investment.[437]

346. The Respondent contests the Claimants' interpretation of *RSM* and argues that the tribunal in that case found jurisdiction because the claimant spent US$400,000 during the pre-exploration phase of an oil and gas concession, conducted several preliminary studies, and applied for an exploration license.[438] Furthermore, the Respondent argues that the tribunal in *RSM* found the concession to be an investment because of the risks of failure and capital required during the exploration stage.[439] By contrast, the Claimants in the present case neither expended funds nor took any risk.[440] According to the Respondent, the Claimants admitted they paid nothing for the Feasibility Studies

[433] Resp. Counter-Mem. ¶ 197 (citing RL-12, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 ("***CSOB***"), ¶¶ 66, 68); *see also* Resp. Rej. ¶ 306.

[434] Resp. Counter-Mem. ¶ 199; Resp. Rej. ¶ 307 (citing RL-73, *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 ("***Joy Mining***"), ¶ 50; RL-78, *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2016, ¶ 31; and RL-75, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 229).

[435] Resp. Rej. ¶ 313 (citing RL-74, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 ("***KT Asia***"), ¶ 173; RL-76, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017 ("***Orascom***"), ¶ 372; RL-35, *Quiborax*, ¶ 219).

[436] *Id*. ¶ 313 (relying on RL-15, *Consortium Groupement L.E.S.I – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award. 10 January 2005 ("***LESI***"), ¶ 73(i)).

[437] *Id*. ¶ 314 (citing RL-35, *Quiborax*, ¶¶ 232–33, 237).

[438] *Id*. ¶ 315 (citing RL-37, *RSM*, ¶¶ 51, 168–72, 231, 246, 249).

[439] *Id*. ¶ 316 (citing RL-37, *RSM*, ¶¶ 243–45).

[440] Resp. Counter-Mem. ¶ 196; Resp. Rej. ¶¶ 315–16, 318.

prepared by CCCC and the Claimants make no claim in this case (as Mr. Borkowski expressly confirmed) for any costs or out-of-pocket expenditures allegedly incurred.[441]

347. The Respondent also challenges the Claimants' assertion that Rasia financed the Feasibility Studies at its own risk by incurring debt to CCCC, and that the debt/liability itself qualifies as a contribution.[442] In the Respondent's view, CCCC performed the Feasibility Studies at its own risk, and the Claimants have provided no evidence of Rasia's alleged debt to CCCC; rather, Mr. Borkowski conceded that CCCC never requested payment.[443] According to the Respondent, Mr. Borkowski's attempts to evidence the debt's existence through emails with Mr. Weixin are of no avail, since not only were these based on misrepresentations but also were made during this arbitration.[444] In any event, CCCC has no legal recourse against Rasia on any supposed debt, since the statute of limitations regarding CCCC's debt claims has expired.[445] Thus, according to the Respondent, even if such debt obligation to CCCC for the Feasibility Studies ever existed, it has been extinguished and cannot be considered a contribution.[446] The Respondent also submits that CCCC did not appear in this arbitration to be questioned on the matter despite Armenia's request and the Tribunal's invitation.[447]

348. The Respondent rejects the Claimants' argument that the Feasibility Studies are in themselves the Claimants' contributions. The Respondent acknowledges that know-how, if it has economic value, may constitute a contribution.[448] However, the Respondent argues that the Feasibility Studies were not accepted by Rasia and therefore have no value.[449] It argues that CCCC's commercial agreements with Rasia expressly provide that CCCC owns all intellectual property, which ownership will be transferred upon payment; thus, since Rasia never paid for them, CCCC still owns the intellectual property in the Feasibility Studies.[450]

[441] Resp. Rej. ¶ 318; Resp. First PHB ¶ 159; Resp. Second PHB ¶ 24.
[442] Resp. Rej. ¶ 319; Resp. First PHB ¶¶ 161–63.
[443] Resp. Rej. ¶ 319; Resp. First PHB ¶ 164; Resp. Second PHB ¶ 24.
[444] Resp. First PHB ¶¶ 164–68.
[445] Resp. Rej. ¶ 320.
[446] *Id*. ¶¶ 321–22.
[447] Resp. First PHB ¶ 163; Resp. Second PHB ¶ 24.
[448] Resp. Counter-Mem. ¶ 200.
[449] *Id*. ¶ 203.
[450] Resp. Rej. ¶ 323; Resp. First PHB, ¶ 162.

349. The Respondent also disputes Claimants' alternative argument that they do not need to establish ownership *stricto sensu* over each element of the contributions of their investment operation in Armenia.[451] While the Respondent acknowledges that services of Rasia's subcontractors could be deemed as Rasia's contributions, it argues that the Claimants provide no support for their assertion that Rasia has in fact retained subcontractors.[452] Since CCCC performed the Feasibility Studies at its own risk and owns the intellectual property in them, the Claimants have no legal basis to claim them as their contribution.[453]

350. Furthermore, the Respondent argues that any contribution the Claimants made was akin to a commercial transaction, which does not qualify as an investment.[454] In the Respondent's view, Mr. Borkowski acted as a commercial broker or intermediary of a transient nature, since he admitted that he intended to sell the Concessions from the outset. According to the Respondent, it is well established that pure commercial transactions do not qualify as investments.[455]

351. Finally, the Respondent argues that the Feasibility Studies included information provided by Armenia, including referencing previous studies that contained completely unrealistic projected traffic flows of Iranian oil; the incorporation of this information cannot be viewed as an investment by Claimants.[456]

(2) The Claimants' Position

352. The Claimants argue that the Concessions, and their rights and obligations under the Concessions, constitute protected investments under Article I of the BIT and Article 25 of the ICSID Convention.[457] Alternatively, the Claimants submit that they have made substantial contributions, as they say Article 15 of the Concessions indeed confirms.[458]

353. First, the Claimants stress that the BIT and the Concessions are the starting point to assess whether the Claimants have made a qualifying investment under Article 25 of the ICSID Convention.[459]

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[451] Resp. Rej. ¶ 324.
[452] *Id*.
[453] *Id*.
[454] *Id*. ¶ 327.
[455] *Id*. (relying on RL-73, *Joy Mining*, ¶ 52; and CL-50, *Koch*, ¶ 6.57).
[456] Resp. Counter-Mem. ¶ 205.
[457] Cl. Mem. ¶ 352; Cl. Reply ¶ 478; Cl. Second PHB ¶ 15.
[458] Cl. Mem. ¶ 352; Cl. Reply ¶ 478; Cl. First PH ¶ 297; Cl. Second PHB ¶ 22.
[459] Cl. Reply ¶ 464; Cl. First PHB ¶ 295.

The Claimants argue that their assets qualify as investments under Articles I(1)(a)(iii) and (v) of the BIT, as they constitute claims to money or performance having economic value and rights conferred by contract.[460] Moreover, Armenia and Rasia recognized that the transactions to which the Concessions relate are investments and they agreed to ICSID arbitration as reflected in Articles XVII, Section 66.3, of both Concessions.[461]

354. The Claimants reject the Respondent's argument that an asset that constitutes an investment under the BIT and/or the Concessions does not necessarily constitute an investment under the ICSID Convention.[462] The Claimants submit that Article 25 of the ICSID Convention does not contain an investment definition precisely because the drafters wanted Contracting States to have discretion in referring disputes to ICSID.[463] In the Claimants' view, the ICSID Convention gives considerable freedom and deference to States regarding the definition of an investment.[464] As such, Armenia exercised this discretion by qualifying the Claimants' rights under the Concessions as investments under both the Concessions and the BIT, and by expressly referring to ICSID arbitration disputes arising out of or relating to the Concessions.[465] According to the Claimants, a tribunal should not disregard the definitions of investment agreed in a treaty and incorporated into a contract between an investor and a State, unless there are compelling reasons to do so (*e.g.*, a risk that a particular definition would capture economic activity clearly falls outside the ICSID Convention).[466]

355. The Claimants challenge the Respondent's reliance on the "*Salini test*," which they argue is inapposite and does not represent the correct construction of the ICSID Convention.[467] The Claimants rely on *Biwater v. Tanzania*, in which the tribunal gave more weight to the parties' agreement than to the "strict, autonomous definition" represented by the *Salini* test.[468] According

[460] Articles I(1)(a)(i) and I(1)(a)(iv) of the BIT (quotations omitted); Cl. Second PHB ¶ 15.

[461] Cl. Reply ¶ 465; Cl. First PHB ¶ 295; Cl. Second PHB ¶ 15.

[462] Cl. Reply ¶ 466.

[463] *Id*. ¶ 467.

[464] *Id*. ¶ 469 (relying on CL-76, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶ 133 (quotations omitted); CL-75, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 ("***Inmaris***"), ¶ 130, and CL-77, *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2019, ¶¶ 73–74).

[465] *Id*. ¶ 467; Cl. First PHB ¶ 295; Cl. Second PHB ¶ 15 (citing CL-78, *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, CL-78 ("***RSM***"), ¶¶ 235–36)

[466] Cl. Second PHB ¶¶ 18–20 (relying on, *e.g.*, CL-75, *Inmaris*, ¶¶ 130–31; RL-73, *Joy Mining*, ¶¶ 44, 52, 60).

[467] Cl. Reply ¶ 471.

[468] *Id*. (relying on CL-34, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 317).

to the Claimants, the correct approach is to elucidate the meaning of investment by reference to the parties' agreement.[469]

356. The Claimants also contend that Armenia's reliance on *RSM v. Grenada* is misleading.[470] In *RSM*, the tribunal held that the parties' agreement, which provided that the underlying transaction constituted an investment, gave rise to a presumption that an investment had been made.[471]

357. The Claimants acknowledge that not all categories of disputes can be referred to ICSID.[472] However, they argue that the key question is not whether the definition of investment in the BIT and the Concessions meets the *Salini* test, but rather whether such definition exceeds the scope of the ICSID Convention.[473] In this respect, the Claimants rely on *Garanti Koza v. Turkmenistan*, where the tribunal analyzed an identical definition of investment in the Turkmenistan-United Kingdom BIT. The tribunal found the BIT definition of an investment, which included claims to money or to performance having economic value, as well as the concession rights under certain concession agreements, to be within the scope of "investment" under Article 25 of the ICSID Convention.[474]

358. In any event, the Claimants submit that they have made substantial contributions as agreed under Article 15 of the Concessions, thus complying with Armenia's asserted threshold.[475] The Claimants submit that *RSM* is analogous to the present case.[476] In *RSM*, the tribunal rejected Grenada's argument that the investor made no contributions, as the existence of actual expenses was not deemed to be dispositive for the purposes of the investor's contribution.[477] Rather, the relevant criterion was found to be the commitment to bring in resources toward the performance of the license.[478] Accordingly, the Claimants contend that the relevant question is whether the Claimants

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[469] Cl. Reply ¶ 471.

[470] *Id*. ¶ 473.

[471] *Id*. (citing CL-78, *RSM*, ¶¶ 235–36).

[472] *Id*. ¶ 475.

[473] *Id*. (relying on CL-79, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶ 94; and CL-74, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 94).

[474] *Id*. ¶ 477 (relying on CL-81, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 12 December 2016, ¶¶ 189, 245).

[475] *Id*. ¶ 478; Cl. First PHB ¶ 297.

[476] *Id*. ¶ 480.

[477] *Id*. (citing CL-78, *RSM*, ¶ 223).

[478] *Id*.

made commitments to bring in resources toward the performance of their duties under the Concessions.[479] In the Claimants' view, their commitments under the Concessions to bring in resources were substantial, and Rasia even reached milestones that made the Projects investment worthy for Aabar.[480] By way of illustration of their commitments, the Claimants identify, *inter alia*, their undertaking towards: (i) the financing of the Feasibility Studies; (ii) the financing of the Railway Project and the Road Project; (iii) the carrying of passengers on the Railway; and (iv) the payment of concession fees to Armenia.[481] The Claimants contend that these obligations were invoked and acknowledged by the Respondent on multiple occasions.[482]

359. The Claimants further submit that they incurred debt to CCCC, in the amount of US$ 15 million plus compound interest, to comply with their commitments towards Armenia by financing the Feasibility Studies.[483] The Claimants therefore reject the Respondent's suggestion that the Feasibility Studies are of no value.[484] According to the Claimants, the Feasibility Studies were essential to the bargain and economic equilibrium of the Concessions and constituted their know-how.[485] While CCCC performed the Feasibility Studies, the Claimants argue that they were provided to the Respondent and paid for by Rasia, which also incurred debt to CCCC for that purpose.[486] The Claimants further argue that the fact that CCCC has not yet formally demanded repayment—or that the debt was in the form of a secured loan—is nothing to the point, since that reflects a temporal fallacy vis-à-vis the question of investment.[487] According to the Claimants, there is no doubt that the debt exists: Mr. Borkowski and CCCC recognized its existence on several occasions; it is not for Armenia to cast doubt on it; and the Tribunal should not base its jurisdiction on CCCC's commercial, fiscal and political assessment as to whether or not to seek to collect on the debt.[488]

[479] Cl. Reply ¶ 481.
[480] *Id*.; Cl. Second PHB ¶¶ 20–24.
[481] Cl. Reply ¶ 481.
[482] *Id*. ¶ 483.
[483] *Id*.¶ 485; Cl. First PHB ¶ 298; Cl. Second PHB ¶ 28.
[484] Cl. Reply ¶ 486.
[485] *Id*. ¶ 487.
[486] *Id*. ¶ 488.
[487] Cl. First PHB ¶¶ 298–99; Cl. Second PHB ¶¶ 29, 31, 35.
[488] Cl. First PHB ¶¶ 298–99, 301–05; Cl. Second PHB ¶¶ 30–32, 36–37.

360. Moreover, in the Claimants' view, it is not necessary to establish ownership *stricto sensu* over each element of their overall investment to find a contribution.[489] The Claimants submit that having arranged for the performance of their obligations through the services of Rasia's subcontractors (*i.e.*, CCCC), such services are to be deemed Rasia's contributions, since there would be no contribution by the sub-contractor independent of the Claimants' efforts.[490] In the Claimants' view, it was their prerogative to arrange how to perform their obligations, and their decision to involve subcontractors cannot affect the conclusion that they made contributions.[491]

(3) The Tribunal's Analysis

361. The Tribunal is constituted under the ICSID Convention, and thus its jurisdiction must be established in accordance with that Convention. In construing the terms of the ICSID Convention – as with the terms of the BIT – the Tribunal is guided by the interpretative principles reflected in the Vienna Convention on the Law of Treaties ("**VCLT**"). In particular, under VCLT Article 31, the provisions of the Convention and the BIT are to be interpreted and applied in accordance with the "ordinary meaning" of their terms, in the "context" in which they occur and in light of the treaties' "object and purpose."[492] The relevant "context" for construing the provisions of a treaty can include the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help to illuminate its object and purpose.[493] In accordance with Article 32 of the VCLT, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of its conclusion," but only "to confirm the meaning" resulting from the textual approach required by Article 31, or in the event the textual approach leaves a meaning "ambiguous or obscure" or would lead to a result that is "manifestly absurd or unreasonable."[494] The ICJ has explained (in a case preceding the VCLT but cited by the International Law Commission in preparing the VCLT) that "a decisive reason" (such as unmistakable evidence of the State Parties' intentions from

[489] Cl. Reply ¶ 490.

[490] *Id*.

[491] *Id*.

[492] VCLT, Article 31(1).

[493] *See generally Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award ¶ 5.2.6 (2 July 2013) ("Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty […].").

[494] VCLT, Article 32.

supplementary materials) would be required "[t]o warrant an interpretation other than that which ensues from the natural meanings of the words" of a provision.[495]

362. For purposes of the jurisdictional analysis, the Tribunal follows the framework established by Article 25(1) of the ICSID Convention. This establishes jurisdiction over "any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." In this case, there is no dispute about the qualifying nationality of the Parties: Armenia has been a Contracting State since 1992; Rasia is a juridical national of the United Arab Emirates, which has been a Contracting State since 1982; and Mr. Borkowski is a national of the United States, which has been a Contracting State since 1966.[496] Accordingly, for purposes of this case, there are two central conditions for jurisdiction under Article 25(1): (a) that the Parties have "consent[ed] in writing" to ICSID jurisdiction, and (b) that the dispute "aris[es] directly out of an investment" by the Claimants. These two requirements are discussed separately below.

a. "Consent in writing"

363. The first requirement of Article 25(1) of the ICSID Convention, namely that the Parties have "consent[ed] in writing" to submit the relevant class of disputes to ICSID jurisdiction, requires the examination of different instruments of consent for the two different Claimants.

364. For Rasia, which presents only contractual claims under the Road Concession and the Railway Concession (not any treaty claims), the issue is whether these Concessions reflect mutual consent to ICSID arbitration. There is little question that they do. Article XVII, Section 66.3 of both Concessions states that "the Government and the Concessionaire … hereby consent to submit to [ICSID] any dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, for settlement by arbitration pursuant to" the ICSID Convention.[497] ICSID arbitration is the only dispute resolution forum provided in the Concessions, and Section 66.3 clearly demonstrates in writing the consent by both Rasia and Armenia to submit contractual disputes to ICSID arbitration.

[495] *Admission of a State to Membership in the United Nations* (Charter, Art.4), Advisory Opinion: 1948 I.C.J Reports 57, p. 63.

[496] Cl. Mem. ¶¶ 352(iii), (iv). Respondent has not disputed the Claimants' qualifying nationality.

[497] C-1, Railway Concession, Article XVII, Section 66.3; C-2, Road Concession, Article XVII, Section 66.3.

365. Mr. Borkowski is not a party to the Concession Agreements, and he therefore relies for consent on the BIT. Art. VII.1 of the BIT begins by defining an "investment dispute" as including, *inter alia*, a dispute between "a Party and a national … of the other Party arising out of or relating to … an alleged breach of any right conferred or created by this Treaty with respect to an investment." Article VII.3(a) of the BIT then authorizes "the national … concerned" to choose among several dispute resolution *fora*, including ICSID arbitration, and Article VII.4 provides that each Party to the BIT "hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with" the national's choice of forum under Article VII.3. To avoid any doubt, Article VII.4 further confirms that these provisions "shall satisfy the requirement for … written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) …."

366. In other words, the BIT clearly provides Armenia's written consent for U.S. nationals like Mr. Borkowski to submit to ICSID jurisdiction any claims alleging BIT violations, provided that such alleged violations are "with respect to an investment." Deferring until the next section a discussion of the objective meaning of the term "investment," the Parties to the BIT subjectively defined the term broadly, to "mean[] every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service *and investment contracts* …."[498] The BIT also includes, in an illustrative list of covered investments, "any right *conferred by … contract*."[499] These statements reflect the BIT parties' shared understanding and intention that disputes alleging BIT violations with respect to "investment contracts," entered into between Armenia and companies owned or controlled by U.S. nationals, would qualify for ICSID jurisdiction.

367. Accordingly, the Tribunal finds that both the Concession Agreements and the BIT identify ICSID arbitration as an available forum for resolving disputes of the nature now presented. Based on these provisions, the Tribunal concludes that the first requirement of ICSID Convention Article 25(1), namely that the Parties to a dispute have "consent[ed] in writing" to submit the relevant class of disputes to ICSID jurisdiction, is satisfied.

[498] Article I(1)(a) of the BIT (emphasis added).

[499] Article I(1)(a)(v) of the BIT (emphasis added).

b. "Investment" by the Claimants

368. However, this is not the end of the interpretative exercise. Armenia contends that irrespective of any written consent to ICSID arbitration reflected in the Concessions and/or the BIT, the Claimants cannot establish the second predicate for arbitration under Article 25(1) of the ICSID Convention, which is that they must establish that the dispute has "arise[n] directly out of an investment." Armenia contends, essentially, that the objective meaning of the term "investment" cannot extend to a circumstance where a foreign national concluded an investment agreement with a State, but (as Armenia contends in this case) thereafter made no real contribution of resources in implementation of that agreement. The Claimants disagree with this contention, both as a matter of law and with respect to Armenia's factual predicate, namely that they purportedly made no cognizable contribution of resources following execution of the two Concessions. The Tribunal addresses below, first, the applicable legal standard, and then the application of that standard to the circumstances of this case.

(i) The objective meaning of "investment"

369. As a starting point, the Tribunal agrees with Armenia that – by contrast with the consent requirement of Article 25(1), which examines the existence of the Parties' *subjective intent* to submit disputes to ICSID jurisdiction – Article 25(1)'s additional requirement that such disputes "arise[] directly out of an investment" involves an *objective* (rather than subjective) assessment. The two inquiries cannot be collapsed into one.[500] Stated otherwise, parties to a contract or treaty do not have unlimited discretion under the ICSID Convention to define as an "investment" a transaction that objectively has no such nature.[501] This is consistent with the 1965 Report of the Executive Directors on the Convention, which stated that "[w]hile consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto."[502]

370. Accordingly, ICSID tribunals may not simply defer to subjective characterizations by the parties; they must undertake their own independent review of the asset that is purported to qualify as an

[500] The separateness of the inquiry, requiring satisfaction of the ICSID Convention's requirements as well as the requirements of the underlying treaty or other instrument of consent, has often been described as a "double keyhole" or "two-fold" approach. *See, e.g.,* RL-74, *KT Asia*, n.58 (citing cases).

[501] *See, e.g.,* RL-12, *CSOB*, ¶ 68; RL-37, *RSM*, ¶ 235; RL-73, *Joy Mining*, ¶ 50.

[502] CL-130, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and nationals of Other States, 18 March 1965, ¶ 25.

investment, to confirm that it meets the objective definition of that term. At the same time, tribunals should not lightly conclude that a dispute which the parties subjectively intended to be placed before ICSID for resolution lacks the essential characteristics of investment to permit it to be entertained. The Tribunal accepts that a joint stipulation that a given asset should qualify as an investment ordinarily will give rise to a presumption that it objectively does so, but that presumption remains subject to rebuttal in appropriate circumstances.[503]

371. Thus, while the ICSID Convention does not contain any express definition of "investment," this does not mean, as Claimants contend, that the term should be deemed co-extensive with the meaning that parties to a given contract or treaty choose to ascribe to it.[504] Rather, the lack of an express definition simply leaves the term "investment" in the ICSID Convention to be interpreted like any other undefined term in a treaty, namely in accordance with VCLT interpretative principles (including ordinary meaning, context and object and purpose).[505]

372. Importantly, the same proposition – that the term "investment" has an objective, inherent meaning for purposes of the ICSID Convention – also applies to the term as used in the BIT at issue in this case. That conclusion flows from the structure of the BIT's definition of investment, which begins in Article I(1)(a) with a *circular statement* (that "'investment' means every kind of investment"), before providing an *illustrative but non-exhaustive list* of assets ("such as …; and includes …").[506] The clear implication of the latter step is that the Contracting Parties to the BIT expected that assets falling within the list would have characteristics that satisfied their understanding of the word "investment" that preceded the list. Since one of the examples given is "investment contracts," this aspect of the text gives rise to a presumption (as stated above) that such contracts entered into with a State, by entities "owned or controlled directly or indirectly by nationals or companies of the other Party," will be entitled to the BIT's protections. In the great majority of cases, this will be the

[503] *See* RL-19, *Georg Gavrilovic and Gavrilovic D.O.O. v. Republic of Croatia,* ICSID Case No. ARB/12/39, Award, 26 July 2018 ("***Gavrilovic***"), ¶ 192 (concluding that the judgment of BIT parties as to which economic activities constitute investments "should be given considerable weight and deference," and that a tribunal "would need compelling reasons to disregard such a mutually agreed definition of investment"); CL-75, *Inmaris*, ¶ 130 (same); CL-78, *RSM*, ¶¶ 236, 238 ("the agreement to the jurisdiction of ICSID in a transaction between a state and a foreign private party thus can be viewed as a presumption that the transaction is indeed an investment …. [O]nly where the economics of the disputed transaction are clearly lacking one or more of the recognized characteristics of an investment should an ICSID tribunal decline to enforce the parties' will and find that it has no jurisdiction….").

[504] Cl. Reply ¶ 467 (arguing that the absence of an express definition of investment "was precisely in order to defer to Contracting State parties' discretion in referring disputes to ICSID").

[505] *See* RL-74, *KT Asia*, ¶ 165; RL-35, *Quiborax*, ¶ 212.

[506] Article I(1)(a) of the BIT.

end of the matter, because there will be no dispute about whether a particular investment agreement was based on or led to the making of any actual contribution by the investor.

373. However, jurisprudence often involves the examination of atypical and disputed circumstances. In such circumstances, it must be recognized that the existence of an illustrative list of assets in a BIT, and a presumption of a cognizable investment when a particular asset is included in that list, is not conclusive. Presumptions can be rebutted if the evidence warrants, and specifically, a BIT's illustrative list of assets expected to qualify as investments cannot trump the objective, ordinary meaning of the word "investment." This is both because words in a treaty do have an ordinary meaning, which VCLT Article 31 requires to be taken into account, and because of the very fact that the list of assets in Article I(1)(a) is framed as non-exclusive. The latter point was well explained in a case that was discussed in several of the Parties' cited authorities, *Romak v. Uzbekistan*.[507] As the *Romak* tribunal and others have observed, unless the term "investment" is given some inherent meaning, the non-exclusive nature of the asset list in most BITs provides no benchmark by which a tribunal could evaluate the qualifications of other forms of assets outside the illustrative list.[508] Without any such benchmark, the circularity of the rest of Article I(1)(a)'s definition of "investment" (that the term "'investment' means every kind of investment") provides no guidance whatsoever as to the evaluation of non-listed assets. The same is true for the common formulation in other BITs, which defines "investment" sweepingly as "every kind of asset." Unless some intrinsic meaning is assigned to the term, such general formulations risk permitting even transactions that bear none of the traditional hallmarks of investment to qualify as such.[509]

374. Accordingly, the Tribunal concludes that the word "investment" must be given an inherent, objective meaning, for purposes not only of the ICSID Convention (which contains no definition of the term), but also of the BIT (which contains only an illustrative list of assets, with no stated

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[507] *Romak S.A. v. Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009 ("***Romak***") (discussed in RL-74, *KT Asia*, ¶¶ 165-66; see also RL-35, *Quiborax*, ¶¶ 198, 216; RL-76, *Orascom*, ¶ 496).

[508] *See Romak*, ¶¶ 178-180 (rejecting claimant's argument that it "should simply confirm that [its] assets fall within one or more of the categories listed," because this approach would "deprive[] the term 'investments' of any inherent meaning," an outcome which is inconsistent with the non-exhaustive nature of the categories enumerated; the tribunal explained that "there may well exist categories different from those mentioned in the list," and "[a]ccordingly, there must be a benchmark against which to assess those non-listed assets … in order to determine whether they constitute an 'investment' within the meaning of" the BIT).

[509] *See Romak*, ¶¶ 184-185 (explaining that a "mechanical application of the categories listed" in the BIT "would eliminate any practical limitation to the scope of the concept of 'investment," and "render meaningless the distinction between investments, on the one hand, and purely commercial transactions on the other"); RL-19, *Gavrilovic*, ¶ 193 (suggesting that "the *Salini* test may be useful in certain circumstances; for instance, where a tribunal is concerned that a BIT or contract definition of investment is so broad and overreaching as to capture transactions that manifestly are not investments under any acceptable conception").

guidance as to what shared characteristics bring the listed assets, and potentially other non-listed assets, within the qualifying term).

375. Beginning with the VCLT command to look to the "ordinary meaning" of the term, the Tribunal observes that according to common dictionary definitions, the noun "investment" means variously:

- the outlay of money usually for income or profit: capital outlay"[510];
- "the act of putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time, etc. used to do this"[511]; or
- "the act of investing money in something," or "the money that you invest, or the thing that you invest in."[512]

376. In other words, inherent in the ordinary meaning of "investment" is some *contribution of resources* which is made in an attempt to earn a return over *a period of time*, a process that necessarily involves the possibility or *risk* of not earning a return. Many other tribunals, employing similar "ordinary meaning" analyses, have found these three basic elements to be inherent in any objective definition of "investment." Although some tribunals have reached this conclusion solely through an analysis of the ICSID Convention, others have stated – as does this Tribunal – that the same interpretation of the word "investment" applies independently to investment treaties, whether or not a case is proceeding at ICSID.[513]

377. Looking beyond the ordinary meaning of Article 1(1)(a), do any other provisions of the BIT (forming the relevant "context" for VCLT purposes) cast further light on the intended scope and

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[510] Merriam-Webster, https://www.merriam-webster.com/dictionary/invest.

[511] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/invested.

[512] Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/invest.

[513] *See, e.g.,* RL-74, *KT Asia*, ¶¶ 164-166 (observing that the claimant was right not to even argue that "the mere fact of holding an asset which falls within the scope of [the BIT's illustrative list] is sufficient to conclude that a person has made an investment under the BIT," because the word "investment" has an inherent ordinary meaning, "irrespective of the application of the ICSID Convention"; that meaning "presuppose[s] … a commitment of resources," without which "the asset belonging to the claimant cannot constitute an investment within the meaning of … the BIT"); RL-35, *Quiborax*, ¶ 215 (noting cases concluding that "the objective meaning was inherent to the term investment, irrespective of the application of the ICSID Convention"); *Romak,* ¶ 207 ("The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in … the BIT," because the term in the BIT "has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk …"); RL-76, *Orascom*, ¶ 372 ("the use of the term 'investment' in both the ICSID Convention and the BIT imports the same basic economic attributes of an investment derived from the ordinary meaning of that term, which comprises a contribution or allocation of resources, duration, and risk").

interpretation of the term "investments"? The preamble of the BIT sets forth its object and purpose, which is "to promote greater economic cooperation between" the United States and Armenia "with respect to investment by nationals and companies of one Party in the territory of the other Party, in recognition that "agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties." The reference to "investment *by*" nationals and companies "*in* the territory" of the host State, together with the reference to capital flows leading to economic development, tends to affirm that the purpose of the BIT was to encourage and protect investments in the ordinary sense, namely those that involved some actual making of contributions. The same is true for the preamble of the ICSID Convention, which refers in its first sentence to "the need for international cooperation for economic development, and the role of private international investment therein." Nothing in either preamble suggests an intent on the part of the drafters to protect transactions that do not involve the making of any contribution of value by the putative investor, or any assumption by it of a concomitant risk that its contribution will not be returned.

378. Based on this analysis, the Tribunal finds that the objective definition of "investment" requires some contribution of resources of cognizable value. For avoidance of doubt, however, this notion of value is focused on whether the resources contributed are of a *nature that could be expected* to be of value, not on whether such contributions *ultimately achieved* any benefits for the host State's development. While certain States have suggested that a contribution to host State development is an additional requirement of the objective definition of investment, the Tribunal does not agree. Rather, it agrees with the *KT Asia* tribunal that, while "such a contribution may well be the consequence of a successful investment … if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment" in the first place.[514]

(ii) Whether Claimants made a "contribution of resources"

379. With this understanding of the applicable legal standard, the Tribunal turns to the facts of this case. There is no dispute that Armenia entered into two "investment contracts" with Rasia, as those terms are used in Article I(1)(a) of the BIT: namely, the Road Concession and the Railway Concession. Nor is there any dispute that the two Concessions envisioned the eventual design, build, operation and maintenance in Armenia of (respectively) a functioning high speed road and a railway in Southern Armenia. Both of these infrastructure developments, if eventually delivered, would have

[514] RL-74, *KT Asia*, ¶ 171; *see also* RL-35, *Quiborax*, ¶¶ 220-225 (citing other cases).

been considerable contributions. There is likewise no dispute that Mr. Borkowski (a U.S. national) owned and controlled Rasia, such that any cognizable contribution Rasia made in Armenia towards fulfillment of the Concessions would qualify under the BIT as an investment "owned or controlled directly or indirectly by nationals … of the other Party …."[515]

380. In other words, the dispute does not turn on whether the course of works *envisioned* by the two Concessions would involve contributions that would satisfy the objective definition of investment in both the ICSID Convention and the BIT. That much appears to be agreed. Rather, the question is whether, beyond the "words on the paper" (*i.e.*, the Concession Agreements themselves), the Claimants *actually made* any contributions following execution of the Concessions.

381. In Armenia's view, the Claimants cannot qualify as having made any "investment" within the objective definition of that term, because they did not pay anything to obtain the Concession Agreements, did not establish a legal entity within Armenia to implement the Concessions, and did not provide evidence of any actual expenditure related to either Project.[516] By contrast, the Claimants assert that the Concession Agreements themselves satisfy the meaning of "investment," and even if a further contribution of resources is required, this was satisfied (a) by the Claimants' "financing and procurement of the Feasibility Studies," with the related risk that such studies would conclude that one or both Projects were not feasible,[517] and (b) more generally, by the Claimants' various efforts to implement the Concession Agreements, including their arranging for work to be done by others (*e.g.,* CCCC) whom Claimants analogize to "subcontractors."[518] The Claimants contend that these efforts were of meaningful value and cannot be ignored, particularly in circumstances where the success of the Projects was ultimately stymied (in Claimants' view) by Armenia's conduct rather than by their own.

382. The Tribunal notes that this debate about what is required to satisfy the objective requirement of an "investment" is, to some extent, prefigured in the ambiguous language the Parties used in the Concession Agreements to cross-reference the ICSID Convention. Section 66.3 of both Concessions stipulates that "the transaction to which this Agreement relates is an investment" for

[515] Article I(1)(a) of the BIT (emphasis added).

[516] Resp. Counter-Mem. ¶ 195; Resp. Rej. ¶ 318.

[517] Cl. First PHB ¶¶ 296-297.

[518] Cl. Reply ¶ 490 (contending that "services of Rasia's subcontractor *are* to be deemed contributions of the main contractor. … That is because, 'but for' the Claimants, there would have been no contribution. … It was the Claimants' prerogative to arrange how best to perform their various contributions: directly or with the involvement of subcontractors.").

purposes of the ICSID Convention.[519] Claimants equate this statement to an agreement by Armenia, in advance, that the Convention's "investment" requirement would be satisfied *by the Concessions* themselves, which (as "investment contracts") constitute assets that fall within the BIT's express list of those entitled to protection.[520] Armenia emphasizes instead Section 66.3's reference to a "*transaction*" to which each Concession "*relates*," and argues that this envisions some post-Concession commitment of resources to implement the Concessions, before any "investment" could be said to have been made for purposes of the ICSID Convention.[521]

383. The fact that this is even a debate reinforces the unusual nature of this case. The Tribunal expects that in most cases involving major concession contracts with a State, the concessionaire will have no difficulty evidencing some outlay of funds, either to *obtain* its qualifying investment (*e.g.,* the purchase of shares in a local company or title to local assets), or to *enhance the value or functioning* of the investment it holds (*e.g.,* the injection of funds into a local company or operation). What makes this case unusual, among other things, is that the Claimants have presented no evidence of any kind regarding out of pocket expenditures.

384. The closest the Claimants have come to claiming an actual financial contribution in connection with the Concessions is the assertion that Rasia undertook contractually to reimburse CCCC, in the amount of US$15 million, for the two Feasibility Studies that CCCC prepared initially at its own expense. This arrangement was documented in the CCCC Road Commercial Agreement and the CCCC Railway Commercial Agreement, both of which were agreed to form an integral part of the broader Rasia-CCCC Framework Agreement, which envisioned CCCC's eventual retention as lead EPC contractor for the Projects.[522] The Claimants describe this arrangement as Rasia having "financed the Feasibility Studies through a secured loan,"[523] and contend that Rasia's assumption of this contractual liability for the costs of the Feasibility Studies qualifies as a contribution of resources. Armenia focuses, by contrast, on the fact that after the Projects' collapse, CCCC never called upon Rasia's debt, so accordingly Rasia has paid nothing yet – and in the absence of payment, CCCC rather than Rasia continues to own any intellectual property delivered to Armenia through the Feasibility Studies. Armenia further disputes that CCCC ever will call on Rasia's debt,

[519] C-1, Railway Concession, Article XVII, Section 66.3; C-2, Road Concession, Article XVII, Section 66.3.

[520] Cl. First PHB ¶ 295.

[521] Resp. Second PHB ¶¶ 18-19.

[522] R-68, Commercial Agreement for Feasibility Study on the Southern Armenia High Speed Road, 10 December 2012, ¶ 4 & Appendix 1; R-67, Commercial Agreement for Feasibility Study on the Southern Armenia Railway, 10 December 2012.

[523] Cl. First PHB ¶ 298.

casting doubt on the *bona fides* of the 2018-2021 Borkowski-Weixin correspondence which purports to confirm the continued existence of the debt, notwithstanding CCCC's decision to defer calling on it.[524]

385. As a threshold matter, the Tribunal agrees with Armenia that the 2018-2021 correspondence, initiated by Mr. Borkowski and apparently drafted by him for Mr. Weixin's signature,[525] is of little or no evidentiary weight. The correspondence was not issued in the ordinary course of dealings between the Parties; rather, CCCC was told the letters were required only for purposes of an audit that Rasia was facing.[526] The Claimants have not presented any documentary evidence of such an audit, and Mr. Borkowski's testimony regarding these events was far from persuasive. In any event, the correspondence on its face does not reflect any effort by CCCC to collect on the debt from Rasia. At best, the wording that Mr. Weixin accepted (based on Mr. Borkowski's draft) indicates that CCCC had chosen to defer any decision to call the debt, initially because it was waiting for the EPC contracts to materialize,[527] and later because of this pending Arbitration and the "sensitivity of bilateral government relations between China and Armenia as well as China and the UAE."[528] The latter reference, referring to important political sensitivities, casts doubt on the general statement in one of the ghostwritten letters that "CCCC will, in due course, seek repayment."[529] The Tribunal does not accept that this correspondence demonstrates any real intent by CCCC ever to call on the debt. The record is also devoid of any demonstration that Rasia would have had the wherewithal to pay.

386. At the same time, the Tribunal acknowledges the logic of Claimants' argument that the existence of ICSID jurisdiction should not turn on "a third party's decision (based on its own commercial, fiscal, political or other reasons) as to when it should seek to enforce a loan debt."[530] The Tribunal also notes that that Armenia apparently knew, or at least eventually became aware, that CCCC

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[524] C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021; *see also* C-231, Letter from Mr. B. Weixin to Mr. J. Borkowski, 6 March 2020.

[525] Resp. First PHB ¶ 164 (citing Tr. 480:11-21; C-350, Email from J Borkowski to Mr. B. Weixin, 29 April 2018; C-355, Email from Mr. B. Weixin to Mr. J. Borkowski, 17 May 2018 (attaching Rasia Confirmation Letter of 1May 2018).

[526] C-350, Email from J Borkowski to Mr. B. Weixin, 29 April 2018; C-355, Email from Mr. B. Weixin to Mr. J. Borkowski, 17 May 2018 (attaching Rasia Confirmation Letter May 1, 2018); C-359, Email from Mr. J. Borkowski to Mr. B. Weixin, 28 August 2020; C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021.

[527] C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021, pp. 3-6.

[528] *Id*., pp. 7-8, 10-11; *see also* C-231, Letter from Mr. B. Weixin to Mr. J. Borkowski, 6 March 2020.

[529] C-344, Email from Mr. J. Borkowski to Mr. B. Weixin, 15 January 2021, pp. 7-8, 10-11; *see also* C-231, Letter from Mr. B. Weixin to Mr. J. Borkowski, 6 March 2020.

[530] Cl. Second PHB ¶ 32.

(rather than Rasia) was bearing the cost of the Feasibility Studies.[531] There is no evidence that Armenia made any objection to this arrangement. To the contrary, so long as the arrangement did not involve any expectation that *it* would be asked to pay anything for the Feasibility Studies, Armenia's interests would appear unaffected by any internal payment arrangements as between Rasia and the third party (CCCC) that Rasia retained, with Armenia's knowledge, to prepare these technical reports.

387. Certainly, had the Feasibility Studies proved *substantively* satisfactory to Armenia,[532] allowing the Projects to move forward to the next stage, Armenia would have benefited from the technical work reflected therein, (a) regardless of whether Rasia had paid for the work upfront or incurred a contractual obligation to pay for it later, and (b) regardless of whether CCCC later called on that debt. Rasia's contribution in that scenario might have been *qualitative* (delivering technical studies that it had arranged for CCCC to prepare) rather than *quantitative* (paying for the underlying work), but it nonetheless would have been a provision of value to the Projects. The fact that, as it transpired, the Feasibility Studies were not satisfactory to Armenia, and that the Projects did not move forward for that and a number of other reasons, is a matter for the merits. It cannot be permitted, with 20-20 hindsight, to erase the fact that Rasia arranged, through its efforts, for the preparation and delivery of two lengthy Feasibility Studies at no cost whatsoever to Armenia.

388. This analysis in turn introduces a broader question: as a matter of law, does a contribution by a putative investor have to be *monetary in nature*, in order to satisfy the objective definition of investment in the ICSID Convention and the BIT? Armenia appears to suggest that it does, in arguing that the absence of any outlay of funds by Rasia is conclusive of the absence of any contribution.[533] The Tribunal is not convinced, however, that this necessarily is the case. First, the phrase used in most cases discussing the requirement of a contribution to establish an investment is that there must have been a "*commitment of resources*"[534]; textually, this is not necessarily

[531] C-23, "Ambassador of China: It Will Be Possible to Speak of Expediency of Iran-Armenia Project after Preparation of Feasibility Study" (ArmInfo), 16 November 2015 (public remarks by the Chinese Ambassador to Armenia, during a joint event attended by Armenian officials to discuss the Railway Project, that "Chinese companies are conducting the feasibility study of the project on a non-repayable basis"; the press article reporting this statement referred specifically to a feasibility study developed "[i]n cooperation with Dubai-based investment company, Rasia FZE").

[532] Claimants argue that notwithstanding Armenia's criticisms of the Feasibility Study, Armenia until recently has "continued to use" them to attract new investors. Cl. Second PHB ¶ 27. Respondent contests this proposition. The Tribunal does not consider this debate necessary to the resolution of the jurisdictional issue.

[533] *See, e.g.,* Resp. Second PHB ¶ 20 ("since there is no claim that Claimants spent *any* funds on either Project, Claimants have made no investment under the objective criteria of Article 25 of the ICSID Convention") (emphasis in original).

[534] *See, e.g.,* RL-74, *KT Asia*, ¶ 166, 170; RL-35, *Quiborax*, ¶ 219.

limited to an expenditure of money. To the contrary, various tribunals have suggested, albeit sometimes in *dicta*, that an investment can be created through the contribution of non-monetary resources.[535] The Tribunal considers this approach reasonable, so long as the contribution of such resources is of a nature expected to meaningfully advance the project in question. Among other things, this approach is consistent with at least some of the dictionary definitions of "investment" which help to illustrate the ordinary meaning of the term.[536]

389. In the Tribunal's view, the sufficiency of a particular form of contribution made by a given investor must be assessed, at least in part, against the expectations that the State contemporaneously had of that investor – at least in the context where the State entered into a concession contract or similar investment agreement precisely to regulate their respective obligations. In this case, it is notable that the preamble to both Concession Agreements recited that the Government of Armenia "deems it advantageous to have private sector participation in the improvement of its transportation infrastructure so as to benefit from private sector know-how, business connections and capital."[537] According to this sentence, Armenia evidently considered that each of these contributions – including the deployment of "private sector know-how" and "business connections," in addition to the expenditure of "capital" – would provide a "benefit," in the sense of helping to advance the development of two highly complex, long-term, multi-step transportation infrastructure projects.

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[535] *See, e.g.,* RL-13, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, ¶ 125 ("Contributions to the host State can take several forms, not only financial"); RL-8, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 116, 119-120, 131 (finding that the investor had contributed in the form of "know-how, equipment and personnel," in addition to making financial contributions in the form of certain bank guarantees); RL-15, *LESI*, ¶ 14(i) (finding that contributions could "consist of loans, materials, works, services, as long as they have an economic value. In other words, the contractor must have committed some expenditure, in whatever form, in order to pursue an economic objective"); RL-37, *RSM*, ¶ 249 (noting, in the context of a dispute over the denial of an oil and gas exploration license to the claimant notwithstanding the existence of an exploration agreement, that the existence of an investment in the pre-exploration phase "is not dependent on the amounts actually spent by the alleged investor, and that an investment 'may be financial or through work,' including know-how or industry") (citations omitted). *See also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 297 (referring to the possibility of investment through contribution of "know-how, equipment, personnel and resources," as referenced in several of the Parties' cited authorities, *e.g.*, RL-13, *Doutremepuich*, ¶ 125); *Romak*, ¶ 214 (interpreting the term "contribution" to include "[a]ny dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance …In other words, a 'contribution' can be made in cash, kind or labor.").

[536] *See, e.g.*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/invested (referring to non-monetary contributions as one of the forms an investment can take: "the act of putting money, *effort, time*, etc. into something to make a profit or get an advantage, or the money, *effort, time*, etc. used to do this") (emphasis added).

[537] C-1, Railway Concession, Preamble; C-2, Road Concession, Section 12(d), Preamble.

390. As to which of these benefits Rasia itself would provide, as opposed to arranging for others to provide, the record also reflects that from the outset (predating the Concession Agreements), Rasia's role in the Projects was described as that of "Sponsor."[538] Logically, that role involved the responsibility to coordinate the deployment of a range of technical and financial services in support of the Projects. There is no evidence, however, that Armenia believed Rasia *itself* (much less Mr. Borkowski personally) had either the technical or the financial resources to perform or finance the design, build, operation and maintenance work envisioned by the Concession Agreements. To the contrary, the Concession Agreements seemed to envision that Rasia would arrange the provision of "private sector know-how … and capital" by third parties, presumably utilizing the "business connections" which the preamble of both Agreements described as a distinct "benefit" that also would be "advantageous" for the Government to receive.[539]

391. With respect to technical know-how, this understanding is express in both Concessions, which obligated Rasia to supply "[f]easibility studies prepared by one or more first-class specialized firms."[540] There is no suggestion in this passage that Armenia understood Rasia itself to be a "specialized firm" in the construction of either roads or railways, so this passage necessarily envisioned that Rasia's role was to procure and supply suitable feasibility studies from third parties. That procurement in turn constituted an important part of Rasia's expected contribution under the Concessions. With respect to capital, Armenia was aware even before the Concessions of Rasia's plan to seek backing from Aabar, the U.A.E.'s sovereign wealth fund.[541] The Concessions themselves acknowledged that "in addition to any equity investment that Rasia FZE is willing to arrange," the Projects implied at least 75% debt financing through secured lending, "without which implementation of the project may not be feasible" for Rasia.[542] In other words, there was no expectation that Rasia itself would be a primary source of funds, although the Concessions did refer generally to Rasia's implementing the Projects "from its own funds and attracted project finance."[543]

392. It was precisely because Rasia was to draw on the services of third parties that the Concessions expressly authorized it to adopt a "consortium approach" for both financing and development,

[538] C-52, Framework Agreement, p. 1.

[539] C-1, Railway Concession, Preamble; C-2, Road Concession, Section 12(d), Preamble.

[540] C-2, Road Concession, Section 9(d); C-1, Railway Concession, Section 9(e).

[541] *See, e.g.*, C-11, Letter from Mr. C. Tappendorf, Aabar to Minister G. Beglaryan, 26 June 2012.

[542] C-1, Railway Concession, Preamble; C-2, Road Concession, Section 12(d), Preamble.

[543] C-2, Road Concession, Section 3(b); C-1, Railway Concession, Section 3(b).

under which it "will likely attract investors, international financial institutions, institutional and other lenders," as well as "first-class specialized developers" for building and operating the Road and Railway.[544] At the same time, the Concessions were quite clear that Rasia "shall always remain fully liable before the Government for the performance of obligations under this Agreement,"[545] regardless of how many third parties it might pull together to achieve the considerable deliverables Rasia promised to Armenia.

393. In other words, even if Rasia's main contribution as "Sponsor" was expected to be its use of "business connections" to pull together the required specialized know-how and capital of others, the Parties accepted that this role involved its directly undertaking substantial risk. The Concession Agreements each explicitly recognized that Rasia would "assume substantial financial and commercial risks in connection with the implementation of the Project."[546] Such risks were particularly pronounced for long-term infrastructure projects as ambitious as these two Projects, which involved obligations that would take years to implement and were susceptible of failure at numerous junctures.

394. Against this backdrop, the debate between the Parties about whether Rasia had made any *monetary* contributions to the implementation of the Projects, by the time the Projects fell apart, does not capture the full picture of its expected role. The nature of that role encompassed expected substantial contributions of a non-monetary nature as well. Having contracted for such non-monetary contributions, including specifically Rasia's use of its "business connections" to offer Armenia the "advantage[s]" of specialized know-how and capital from third parties, it would not be appropriate to find that Rasia made no cognizable investment, simply because it has not demonstrated any out-of-pocket outlay during the period before the two Projects fell apart.

395. The Tribunal acknowledges that there are serious questions about whether Rasia ever managed to *successfully* deliver on any of the other contributions it promised, separate from the issue of monetary contributions. There is debate, for example, over the compliance of the two Feasibility Studies with the Concessions' requirements. There is debate also about whether Rasia ever obtained, or ever had the realistic prospect of obtaining, actual financial commitments in support of the two Projects. But that debate cannot be answered without venturing deeply into the merits of

[544] C-1, Railway Concession, Section 5; C-2, Road Concession, Section 5.
[545] C-1, Railway Concession, Section 5; C-2, Road Concession, Section 5.
[546] C-1, Railway Concession, Section 15; C-2, Road Concession, Section 15.

the dispute, to determine whether either party to the Concessions ultimately performed as promised and if not, why not.

396. For purposes of the jurisdictional analysis, there is no question, at the most basic level, that both Rasia and its principal Mr. Borkowski did expend significant *effort* attempting to implement the Projects[547] – or at least some form of road and railway projects, if not precisely the form reflected in the Concessions. The record reflects substantial effort by Rasia and Mr. Borkowski, expended over a period of several years. This includes not only its negotiations with CCCC and Aabar, but also efforts to broker agreements with railway operators from bordering countries (such as Iran), which was a further obligation that Rasia undertook under the Concessions.[548] Given that these efforts were deployed in attempted implementation of Rasia's main role under the Concessions – that of "Sponsor," procuring and coordinating deliverables from various other actors – it would be odd to conclude that the steps taken were not of a nature that the Parties (at the time) understood as having cognizable value to the Projects as a whole.

397. Such a conclusion would be particularly odd in the context of these Concessions, under which Armenia and Rasia expressly agreed to submit any disputes over performance to ICSID arbitration for resolution. It must be recalled that the ICSID Convention was negotiated at a time when investment contracts (and not investment treaties) were expected to be the principal form in which consent to ICSID jurisdiction was expressed. The Tribunal has been shown nothing in either the wording or history of the Convention to suggest that its drafters intended ICSID tribunals to reject jurisdiction over disputes about investment contract performance, in circumstances where both the State and its contract partner expressly agreed that they should exercise jurisdiction, simply because the disputes arose early in the implementation of contractual performance, at a juncture when the "contributions" of the partner were still relatively inchoate and comparatively minor to what was ultimately envisaged to result from the contract's implementation. Provided that some efforts were undertaken to implement contractual performance,[549] consistent with the basic obligations the contractual party was expected to perform, a tribunal in these circumstances should not lightly set aside the parties' specific agreement to submit disputes to ICSID arbitration.

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[547] The Claimants describe this as investing "time, energy, resources and reputation." Cl. Mem. ¶ 254.

[548] C-1, Railway Concession, Section 9(b).

[549] The Tribunal distinguishes this situation from that in *Romak*, where the parties executed a "Protocol of Intention" under which claimant pledged to perform certain services for Uzbekistan, but in fact "made no contribution in furtherance of the Protocol of Intention, which … seems never to have evolved from the status of a mere statement of aspiration and was never acted upon by the Parties." *Romak*, ¶ 214.

398. For these reasons, and in the very particular context of these Concession Agreements, the Tribunal concludes that Rasia's efforts to implement the transactions contemplated by those Agreements were a minimally sufficient "contribution of resources" (albeit in non-monetary form) to constitute an investment for purposes of the ICSID Convention. Armenia's objection *ratione materiae* is therefore denied.

B. CAN THE CLAIMANTS ASSERT UMBRELLA CLAUSE CLAIMS?

(1) The Respondent's Position

399. The Respondent submits that neither Mr. Borkowski nor Rasia can assert umbrella clause claims.

400. With respect to Mr. Borkowski, the Respondent argues that he cannot assert any umbrella clause claim since he is not a party to the Concessions and does not have standing.[550] According to Armenia, citing the award in *WNC Factoring*, only a party to an agreement may bring an umbrella clause claim for a breach of that agreement.[551] In the Respondent's view, the umbrella clause under the BIT is not broad enough to allow Mr. Borkowski—a non-party to the Concessions—to assert claims under the Concessions on behalf of Rasia.[552]

401. The Respondent relies on several cases to argue that the umbrella clause in the BIT is not broad enough to permit Mr. Borkowski to rely on it. In *CMS*, which dealt with a similar umbrella clause under the US-Argentina BIT, the *ad hoc* Committee annulled the portion of the award where the tribunal found jurisdiction over CMS's umbrella clause claims, since CMS was not a party to the relevant agreement.[553]

402. The Respondent further contests the Claimants' reliance on *EDF v. Argentina*, arguing that the tribunal in that case relied on umbrella clauses broader than the umbrella clause in the US-Argentina and US-Armenia BIT.[554] The Respondent also challenges the Claimants' interpretation

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[550] Resp. Counter-Mem. ¶ 207; Resp. Second PHB ¶ 14.

[551] Resp. Counter-Mem. ¶ 208 (citing RL-48, *WNC Factoring Ltd. v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017 ("***WNC Factoring***"), ¶ 325.

[552] Resp. Rej. ¶¶ 330, 338.

[553] *Id*. ¶¶ 331–32 (citing RL-14, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 "***CMS* Annulment Decision**"), ¶¶ 96–97).

[554] *Id*. ¶ 335 (citing *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012 ("***EDF***"), ¶¶ 937–38).

of *Continental Casualty* and notes that the question of whether the claimants could bring an umbrella clause claim on behalf of their subsidiary was never decided in that case.[555]

403. With respect to Rasia, the Respondent submits that a U.A.E. entity cannot bring a claim under the US-Armenia BIT.[556] The Respondent contends that, while Rasia could possibly assert an umbrella clause claim under a suitable BIT based on the Concessions, the BIT invoked in this case does not afford Rasia any protection as a U.A.E. entity.[557]

(2) The Claimants' Position

404. The Claimants reject the Respondent's umbrella clause objection regarding Mr. Borkowski, because it is an issue for the merits rather than jurisdiction, and because (in any event) the Concessions constitute Mr. Borkowski's investments. The Claimants do not dispute the Respondent's umbrella clause objection regarding Rasia.

405. First, the Claimants argue that while Mr. Borkowski's entitlement to invoke the umbrella clause of the BIT is a substantive rather than a jurisdictional issue,[558] he may do so, regardless of the fact that he is not personally a party to the Concessions. That is because, under Article II(2)(c) of the BIT, Armenia undertook to "observe any obligation it may have entered with regard to investments."[559] Accordingly, the issue before the Tribunal is whether Article II(2)(c) of the BIT confers rights on Mr. Borkowski, for the determination of which, the Tribunal must interpret the clause in accordance with Article 31(1) of the VCLT.[560]

406. According to the Claimants, the Respondent fails to engage in a textual interpretation of the umbrella clause of the BIT.[561] Article II(2)(c) of the BIT is a broad umbrella clause. It offers protection against the breach of any obligation entered into "with regard to investments," including contracts entered into by the State, the Claimants say.[562] Furthermore, there is no privity requirement under the provision; the threshold is whether Armenia entered into any obligation

[555] Resp. Rej. ¶ 337 (citing CL-85, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/09, Award, 5 September 2008 ("***Continental Casualty***"), ¶¶ 302–03).

[556] Resp. Counter-Mem. ¶ 208.

[557] Resp. Counter-Mem. ¶ 208.

[558] Cl. Reply ¶ 492 (citing CL-82, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, 29 April 2019, ¶¶ 282–84).

[559] Cl. Mem. ¶ 278 (quoting US-Armenia BIT, CL-1, Article II(2)(c)).

[560] Cl. Reply ¶ 496.

[561] *Id*. ¶ 493.

[562] Cl. Mem. ¶¶ 279–81.

"with regard to investments" and not whether the investor himself entered into the obligations in question. The Claimants argue that in *Enron*, the tribunal held that the phrase "any obligation" refers to obligations regardless of their nature, including contractual obligations. Those obligations are limited by their object: "with regard to investments."[563] In the Claimants' view, the type of undertaking covered by such a broad umbrella clause includes contracts entered into by the State.[564]

407. Second, the Claimants submit that Armenia's obligations under the Concessions were entered into "with regard to investments" of Mr. Borkowski.[565] They invoke the *EDF* tribunal's decision that EDF was entitled to assert an umbrella clause claim in respect of obligations owed to EDF's local subsidiary.[566] The Claimants note that the umbrella clause in the *EDF* case was worded similarly to that in issue in this case – "in connection with investments" – and the tribunal's finding relied on that broad wording. This interpretation, according to the Claimants, was further confirmed by the tribunal in *Continental Casualty*,[567] which held that umbrella clauses may apply to obligations in force between a State and the claimant's subsidiary.

408. The Claimants also reject the Respondent's reliance on *WNC Factoring*. They argue that in that case, the applicable umbrella clause expressly provided that an agreement must exist between the investor and the host State. In the Claimants' view, the analysis of that clause is irrelevant in the present context, where the relevant umbrella clause has different wording.[568]

(3) The Tribunal's Analysis

409. As a threshold matter, there is no dispute between the Parties regarding Rasia, in connection with Article II(2)(c) of the BIT. Rasia is a U.A.E. company, and as such has no standing to invoke any of the substantive protections of the BIT, which protects only nationals of the United States and Armenia. Claimants do not contend otherwise. Accordingly, there is only one Claimant, Mr. Borkowski, who seeks to assert claims under the BIT, and whose authority to do so is disputed.

410. Moreover, the resolution of this debate will have far less impact on the scope of the case than in most other cases where the reach of umbrella clauses has been disputed. That is because Mr.

[563] CL-29, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 274.
[564] Cl. Mem. ¶ 281.
[565] Cl. Reply ¶ 494.
[566] *Id*. ¶ 495 (citing CL-84, *EDF*, ¶¶ 938–39).
[567] CL-85, *Continental Casualty*, ¶ 297.
[568] Cl. Reply ¶ 497.

Borkowski's invocation of an Article II(2)(c) violation is articulated solely in connection with Armenia's alleged breach of its two Concessions with Rasia, and the Tribunal has already found that Rasia has jurisdiction to assert a breach of contract claim directly against Armenia, pursuant to the dispute resolution clauses of those Concessions. The Claimants have not suggested that Mr. Borkowski's umbrella clause claim under the BIT is any broader than Rasia's breach of contract claim under the Concessions. This is not a case, for example, where a foreign investor alleges that a State entered into *separate* obligations with respect to its investment, arising from commitments made outside the framework of a particular investment agreement.

411. In these circumstances, one might query the necessity even of deciding the disputed issue. The Tribunal accepts, however, that a party may have practical reasons for seeking to bring a treaty claim under its own name, even where that claim appears factually almost identical to a contract claim that its 100% subsidiary is already asserting. Claims brought under the two different legal instruments may (if successful) be subject to different enforcement regimes, and any relief obtained may (if collected by one claimant or the other[569]) be subject to different tax consequences. In any event, the fact remains that Mr. Borkowski has asserted an umbrella clause claim under the BIT, to which Armenia has objected as a matter of jurisdiction. Under the ICSID Convention, the Parties are entitled to a ruling with respect to that jurisdictional objection.

412. The resolution of the issue dispute turns entirely on treaty interpretation. The relevant BIT clause, Article II(2)(c), is short. It provides in entirety as follows:

> Each Party shall observe any obligation it may have entered into with regard to investments.

413. Some investment treaty tribunals have interpreted similar or identical clauses as giving standing to foreign investors to bring umbrella clause claims, even where the State "obligations" in question were "entered into" through contracts with the claimant's subsidiary rather than with the claimant itself. These tribunals have generally emphasized the breadth of the phrase "*with regard to* investments" (emphasis added). For example, the *Continental Casualty* tribunal held that "provided that these obligations have been entered '*with regard*' to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary … is not in principle excluded."[570] The *EDF* tribunal likewise reasoned,

[569] It goes without saying that there could be no valid basis for double recovery, both by a subsidiary on its contract claims and by its shareholder on umbrella clause claims.

[570] CL-85, *Continental Casualty*, ¶ 297 (emphasis added).

albeit under umbrella clauses that were worded somewhat differently,[571] that "[a] clear and ordinary reading of these dispositions covers … [c]oncession agreements granted to foreign investors for specific investments," even if the agreement in question was signed with a local subsidiary.[572] The *EDF* decision survived an annulment challenge based on this finding, even though (as discussed below) an earlier decision in *CMS*, which likewise allowed a foreign investor to assert umbrella clause claims based on a State contract with its subsidiary, was annulled for failure to state reasons on this point.[573]

414. Another argument commonly presented in support of allowing investors to assert umbrella clause claims asserting a breach of State contracts with their subsidiaries is that many BITs – like this one, in its Article 1(1)(a) – define "investments" as including those "owned or controlled directly *or indirectly* by nationals … of the other Party" (emphasis added). This was a point emphasized by Professor Orrego Vicuña in his dissent in *Burlington*,[574] which was cross-referenced in the majority decision discussed by the Parties.[575] If this textual element is combined with the "with regard to investments" element emphasized in *Continental Casualty* and *EDF*, an argument could be made

[571] *See* CL-84, *EDF*, ¶ 938 (interpreting one clause that covered commitments "undertaken with respect to investors of the other Party" and another covering any "commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party"). On annulment, an ICSID *ad hoc* committee acknowledged that these clauses were different from those in the *CMS*, *Azurix* and *Burlington* cases discussed further below, which all involved clauses obligating each State to "observe any obligation it may have entered into with regard to investments" – the exact wording in the BIT before this Tribunal. However, the *EDF* annulment committee found the differences in wording to be inconsequential, and "therefore proceeded on the basis that the umbrella clauses in the present case are substantially the same as those in the *CMS*, *Azurix* and *Burlington* cases." *See* RL-71, *EDF International S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Annulment Proceeding, Decision, 5 February 2016 ("***EDF* Annulment Decision**"), ¶¶ 270-273.

[572] CL-84, *EDF*, ¶ 938. The *EDF* tribunal emphasized, in addition to the "broadly worded" form of the umbrella clause, that the contract with EDF's subsidiary made explicit mention of shareholders. *Id.*, ¶ 942.

[573] RL-71, *EDF* Annulment Decision ¶¶ 264, 276-277 (distinguishing the *CMS* Annulment Decision on the basis that the *EDF* tribunal had sufficiently stated its reasoning, which emphasized both the respondent's dealings directly with the claimants "as prospective foreign investors" and "the broad language of the umbrella clauses … which spoke of commitments undertaken (or entered into) with regard to *investments*, rather than with *investors*") (emphasis in original).

[574] Dissenting Opinion of Arbitrator Orrego Vicuña, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 ("***Burlington* Dissent**"), ¶¶ 7-9 ("Article 1 of the Treaty expressly protects both direct and indirect investments. The obligations to which the umbrella clause refers are also those relating to investments. … I regret not to be able to agree with the Decision's conclusion that while some Treaty provisions protect both direct and indirect investments, such as expropriation, on other matters, such as the umbrella clause, the scope of the protection is different and does not apply to indirect investments lacking the privity requirement. The Treaty does not make that distinction and if this had been the intention it would have had to be spelled out…. It is the submission of this arbitrator that the right conclusion should have ben that the entity whose interest in the investment is protected under the treaty is also entitled to benefit from the protection of an umbrella clause devised to ensure the observance of obligations concerning that investment. This is often the case when the contract is signed by an investment vehicle … channeling the investment.").

[575] *See* RL-69, *Burlington*, ¶ 220.

that the umbrella clause requires the host State to "observe any obligation it may have entered into," not only *directly* with the foreign investor, but also "*with regard to*" the investor's *indirect* investments, *i.e.,* involving investments in the host State by companies that the investor owns or controls. In this case, there is no question that Mr. Borkowski qualifies as a "national … of the other Party," nor that he owns and controls Rasia. Rasia in turn, entered into Concession Agreements, which anticipated that it would make investments in Armenia, and by which Armenia granted Rasia certain rights. The Claimants accordingly say that the Concession Agreements qualify as obligations that Armenia "entered into *with regard to*" Mr. Borkowski's indirect investment in Armenia, even though Armenia did not enter into the Concession Agreements directly "*with*" Mr. Borkowski.[576]

415. However, a number of other awards have reached a contrary conclusion, based on a different reading of similar or identical umbrella clauses. First, in a ruling that was explained in a single paragraph, the *Azurix* tribunal concluded that since Argentina's contract was with Azurix's subsidiary rather than with Azurix itself, Azurix could not invoke the relevant umbrella clause, because "there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT."[577] The same conclusion was reached the next year in the *Siemens* case, based on a similarly brief analysis.[578] However, more textual analysis was provided in subsequent cases, first in the *CMS* Annulment Decision,[579] and subsequently in the *Burlington* majority decision[580] and the decision in *WNC Factoring*, [581] both of which discussed the prior case law in some depth.

416. A common feature in these three decisions is a textual focus on the word "obligation" in the relevant umbrella clauses. As the *CMS ad hoc* committee explained, obligations arising from contracts exist in a particular legal framework that is provided by their governing law. They "are not entered into

[576] Cl. Reply ¶ 493.

[577] CL-93, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ("***Azurix***"), ¶ 384.

[578] CL-94, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 ("***Siemens***"), ¶ 204 (observing that "[t]he Claimant is not a party to the Contract and [its subsidiary] SITS is not a party to these proceedings," and finding that for purposes of the umbrella clause, "to the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor").

[579] RL-14, *CMS* Annulment Decision, ¶¶ 89-98.

[580] RL-69, *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, 14 December 2012 ("***Burlington***"), ¶¶ 210-234.

[581] RL-48, *WNC Factoring*, ¶¶ 312-341.

erga omnes but with regard to particular persons," such that performance is owed by a particular obligor to a particular obligee:

> The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.[582]

417. The *Burlington* majority echoed this approach, stating that "[t]he word 'obligation' is thus the operative term of the umbrella clause," and that "[a]n obligation entails a party bound by it and another one benefitting from it, in other words, entails an obligor and an obligee. Second, an obligation does not exist in a vacuum," but requires "municipal law to give it content." Yet under most systems of law, companies have independent legal personality, and "the non-signatory parent of a contract party may [not] directly enforce its subsidiary's rights."[583] As for the phrase "entered into *with regard to* investments" (emphasis added), while this denotes a "link between the obligation and the investment," the link "does not replace but qualifies" the notion of obligation: -- and "[i]f there is no obligation in the first place, there is nothing to qualify." The *Burlington* majority acknowledged that the definition of investment in the relevant treaty covered both direct and indirect investment, but it stated that this did not make the parent company a co-obligee of the State's obligations under the relevant contracts: "Broad as the definition of investment in the Treaty may be, it cannot compensate for the absence of an 'obligation.'"[584]

418. In *WNC Factoring*, the umbrella clause was quite different from the one in this case: it began by referring to "specific agreements" that "[i]nvestors of the Contracting Party may conclude with the other Contracting Party," before stating that each Party "shall, with regard the investments of investors of the other Contracting Party, observe the provisions of these specific agreements." The tribunal found that this language limited a "specific agreement" to those a State concluded with an "investor," defined as the qualifying foreign national, and that this *prima facie* excluded umbrella clause protection for agreements entered into with its subsidiaries.[585] Nonetheless, the *WNC Factoring* tribunal went on to state that it would have found privity to be required even had it been faced with a more typical umbrella clause,[586] because "an undertaking" is something owed to "the

[582] RL-14, *CMS* Annulment Decision, ¶ 95.

[583] RL-69, *Burlington*, ¶¶ 214-215.

[584] RL-69, *Burlington*, ¶¶ 216-217.

[585] RL-48, *WNC Factoring*, ¶¶ 317-318, 320.

[586] *Id.*, ¶ 335 ("If it were necessary to do so, the Tribunal would uphold the requirement of privity even for generally worded umbrella clauses").

identified beneficiary of the undertaking," and "[u]nder international law, merely because a State may owe an obligation to observe an undertaking given to a company does not mean that the State also owes that same obligation … to that company's shareholders."[587] After canvassing other decisions to similar effect (including *Azurix, Siemens,* the *CMS* Annulment Decision and *Burlington*),[588] the *WNC Factoring* tribunal stated that it was not persuaded by the contrary reasoning of either *Continental Casualty* or *EDF*.[589] In the tribunal's view, umbrella clauses "are intended to give effect to legal commitments entered into by the host state with regard to investments, not to change their scope or content."[590] It added that since the contract at issue "imposes no obligation on the Claimant, the Claimant and the Respondent cannot be said to have a relationship of obligor and obligee."[591]

419. Some critics of the "contractual privity" decisions have suggested that by denying a foreign investor the ability to assert an umbrella clause claim arising from a State's alleged breach of a contract with its subsidiary, the "privity" approach undermines the object and purpose of BITs. This is said particularly to be the case in circumstances where the host State required the foreign investor to invest *through a local company*, which accordingly could not on its own invoke umbrella clause protections.[592] That particular concern has no relevance here, where Rasia is not an Armenian company, and there is no evidence that Armenia expressed any preferences at all regarding the nationality of its Concession counterparty. Presumably, it was Mr. Borkowski who chose to pursue

[587] RL-48, *WNC Factoring*, ¶¶ 322-323.

[588] *Id.*, ¶¶ 325-329, 336-337. The tribunal considered these cases to reflect "the dominant view … that in respect of contractual obligations, only parties entitled to enforce the obligation under the proper law of the contract may sue," resulting in a "requirement of privity under umbrella clauses." *Id.*, ¶ 325.

[589] *Id.*, ¶¶ 331-333 (discussing *Continental Casualty*), ¶¶ 338-339 (discussing *EDF*).

[590] *Id.*, ¶ 335.

[591] *Id.*, ¶ 339. This point about reciprocity of obligations echoed another concern of the *CMS ad hoc* Committee with the broad interpretation the *CMS* tribunal had rendered of the umbrella clause. Specifically, the Committee observed that "[t]he obligation of the State covered by [the umbrella clause] will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, although apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, *e.g.* as to dispute settlement." RL-14, *CMS* Annulment Decision, ¶ 95(d).

[592] *See, e.g., Burlington* Dissent, ¶¶ 9-10 (reasoning that "[w]hen the use of such vehicles or local companies is required by the host State by means of legislation or regulation," it becomes "imperative" to conclude that the foreign investor is also entitled to benefit from the protection of an umbrella clause. "An interpretation to the effect that only the corporate entity having signed the contract can rely on the protection of the umbrella clause will inevitably lead to a negation of the protection in question depriving the treaty of all meaning in this context."); *cf.* RL-48, *WNC Factoring*, ¶ 340 (noting Claimant's argument that a restrictive interpretation of the umbrella clause would enable a State "to circumvent the BIT by prescribing domestic incorporation" as a condition of a transaction, but rejecting that argument: "as the seller in an open tender process, the Respondent was free to impose such a condition, and any potential bidder was free not to bid on those terms. It cannot be said that, if a foreign investor voluntarily enters into an agreement which is clearly excluded from the plain terms of an umbrella clause, there is a manifestly absurd result.").

the Concessions through a U.A.E.-incorporated company, rather than incorporating (for example) a U.S. company for that purpose. In any event, as certain cases have noted,[593] the object and purpose of BITs must be read holistically, and they would hardly be defeated by the "privity" approach to umbrella clauses, when other treaty protections indisputably may be invoked by foreign shareholders without concern for contractual privity.

420. In the end, the Tribunal is faced with a BIT provision which (under other BITs with identical language) has been interpreted in two very different ways. The Tribunal agrees with the *EDF* Annulment Decision that both approaches are "arguable," and that in these circumstances a conclusion in either direction cannot be considered a manifest excess of powers.[594] On balance, however, the Tribunal considers the approach reflected by the *Burlington* majority to represent the more natural and convincing interpretation of Article II(2)(c). In particular, the Tribunal is persuaded that every contract must be considered within the legal regime from which it derives its existence and with specific regard to the identity of the parties to the contract. Mr. Borkowski was not a co-obligor or a co-obligee of Rasia under the Concessions, and he derived no rights either to enforce them or to have them enforced against him. On this basis, the Concessions cannot be said to be obligations that Armenia "entered into" with Mr. Borkowski. As for the reference in Article II(2)(c) to "obligation[s] … entered into *with regard to investments*," the Tribunal observes that Mr. Borkowski's investment was in the shares of Rasia, a U.A.E. company. There is no suggestion that Armenia entered into (much less breached) any obligations with regard to such shares. Rather, Armenia entered into obligations with regard to Rasia's potential investments in Armenia, not Mr. Borkowski's investment in Rasia.

421. The Tribunal of course accepts that a shareholder's status as an indirect investor in a host State will often entitle it to bring other types of investment treaty claims in its own right. Mr. Borkowski accordingly has standing to assert, in his own name, the other Treaty claims he pleads: fair and equitable treatment, arbitrary measures, and indirect expropriation. But umbrella clauses are generally different, in that they *posit a key precondition*, in the form of an "obligation" that the host State "entered into" through an instrument (generally a contract) *other* than the investment treaty

[593] *See, e.g.,* RL-69, *Burlington*, ¶ 218 ("The umbrella clause is only one of the various substantive protections that the Treaty bestows upon investors, with the scope of protection depending on the terms of each specific provision. Other Treaty provisions unquestionably protect both direct and indirect investments, such as for instance the expropriation clause. The object and purpose of the Treaty do not impose that all standards of protection have the same scope."); RL-48, *WNC Factoring*, ¶ 340 (noting that the privity approach to umbrella clauses "would not preclude the investor from recourse to other protections open to it *qua* investor under the BIT").

[594] RL-71, *EDF* Annulment Decision, ¶ 279.

itself. Absent unusual treaty language, a shareholder who has no rights under such a contract, under that contract's own governing law, may not step into the shoes of the contracting entity for purposes of an umbrella clause, collapsing all corporate formalities established under the governing law and claiming contractual benefits directly for its own account.

422. For these reasons, the Tribunal accepts the Respondent's objection that Mr. Borkowski has no standing under the Treaty to assert a claim under Article II(2)(c) with regard to the contractual obligations that Armenia entered into with Rasia. Hypothetically, if there were an applicable U.A.E.-Armenia BIT that contained a comparable umbrella clause, then Rasia might well have standing to bring an umbrella clause claim in its own name for breach of obligations that Armenia "entered into with regard to" its investments, namely the Concessions. But Mr. Borkowski has no derivative right to invoke the U.S.-Armenia BIT's umbrella clause with respect to contracts to which he was never a party, and under which he has neither rights, nor obligations as a matter of Armenian law. The umbrella clause claims accordingly are dismissed.

C. ARE THE CLAIMS ADMISSIBLE?

423. The Respondent contends that, even if the Tribunal were to uphold jurisdiction, the claims are inadmissible.[595]

(1) The Respondent's Position

424. The Respondent submits that the Claimants' claims for damages are based on the alleged "Borkowski-Aabar" transaction under which Aabar would purchase Rasia from Mr. Borkowski and make further payments.[596] The Respondent alleges that the Claimants have engaged in an illicit scheme from which they seek to profit through their claim for damages in this case.[597] The Respondent alleges that Mr. Borkowski, Mr. Tappendorf and Aabar's chairman (Mr. Al-Qubaisi), who allegedly approved the Borkowski-Aabar transaction, were involved in a scheme to defraud Aabar.[598] The Respondent contends that this is evidenced by Mr. Al-Qubaisi's arrest in connection with the 1MBD Scandal, in which Aabar was defrauded, as well as Aabar's and Rasia's supposed

[595] Resp. Counter-Mem. ¶ 210.
[596] *Id*.
[597] *Id*. ¶ 219.
[598] *Id*. ¶ 213.

earlier work together on the Gobi Coal mine in Mongolia, an investment vehicle involved in the 1MDB Scandal.[599]

425. The Respondent submits that the parties to the Borkowski-Aabar transaction knew at the time of the alleged transaction that the Projects under the Concessions could not succeed.[600] As such, the Respondent contends that Mr. Borkowski was the beneficiary of an illegal scheme to defraud Aabar and used Rasia as its instrumentality.[601] According to the Respondent, international tribunals will not grant assistance to a party that engages in an illegal act.[602]

(2) The Claimants' Position

426. The Claimants reject the Respondent's allegations that Mr. Borkowski engaged in a scheme to defraud Aabar and they argue that the Respondent has failed to provide any evidence of the alleged fraud and illicit scheme. According to the Claimants, fraud allegations are held to a high standard of proof, and the evidence must be clear and convincing. [603]

427. The Claimants further contend that neither Mr. Borkowski, nor Mr. Tappendorf had any contemporaneous knowledge about the unrelated activities of Aabar's former CEO, which led to his imprisonment. They argue that Armenia's guilt-by-association arguments rest on Mr. Borkowski and Mr. Tappendorf's supposed knowledge about those activities, yet the Respondent does not meet the standard of proof in respect of allegations of fraud. They also note that the events giving rise to the 1MDB Scandal predate Mr. Borkowski's involvement in the Gobi Coal project in Mongolia.[604]

428. Moreover, the Claimants submit that, for an illegality-based objection to succeed, "illegality in the creation of the investment has to be demonstrated." In the Claimants' view, Armenia needs to demonstrate that the conclusion of the Concessions was unlawful or contrary to public policy. Any

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[599] Resp. Counter-Mem. ¶¶ 213, 219.

[600] *Id*. ¶ 212.

[601] *Id*. ¶ 213.

[602] *Id*. ¶ 215 (citing RL-49, *World Duty Free v. Kenya*, ICSID Case No. ARB/00/07, Award, 4 October 2006, ¶¶ 157, 179; RL-21, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 ¶¶ 247-48; and RL-33, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ("***Plama***"), ¶¶ 144, 146).

[603] Cl. Reply ¶¶ 499–500 (quoting CL-88, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, , ¶ 326 (quotation omitted); CL-89, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 479 (quotation omitted)).

[604] *Id*. ¶ 502.

alleged subsequent conduct cannot bear upon the admissibility of the Claimants' claim. Accordingly, the Claimants allege that Armenia's allegation is not only baseless but also irrelevant.[605]

(3) The Tribunal's Analysis

429. The Tribunal notes that during the Respondent's opening argument, it appeared to resile from any contention that it had established the existence of a scheme by Mr. Borkowski, Mr. Tappendorf and Mr. Al-Qubaisi to defraud Aabar, in connection with the proposal that Aabar purchase Rasia. The highest this was put in the opening argument was that it was a "potential" scenario that might have existed, and that the possibility was "not outlandish" to postulate. Specifically, Respondent's counsel stated as follows:

> Now, we don't know what happened here, obviously. I have no idea what happened here. And we have suggested this potentially could have been some sort of a fraud on Aabar, but of course we don't know anything like that, but it is not outlandish, under the circumstances, given that they were actually imprisoned for this Virgin fraud and there was this 4.5 billion 1MDB fraud which got a lot of attention.[606]

430. The Tribunal considers that Respondent was correct not to persist in its original assertion that the proposed acquisition of Rasia was part and parcel of a scheme to defraud Aabar. While there are any number of reasons to doubt the success of the Road Project and Railway Project, there is a qualitative difference between Claimants' advocating that Aabar undertake this risky investment and their seeking to defraud it. The Respondent has not presented sufficient evidence to demonstrate an intent to defraud.

431. In any event, even assuming *arguendo* that there was some misrepresentation to Aabar regarding the benefits and risks of acquiring Rasia, it is not clear how this would render illegal *the Claimants' investment in Armenia*, which they have defined as the Concession Agreements and the rights to the Road and Railway Projects granted therein. At most, the Respondent's theory of a fraud on Aabar might undermine Claimants' attempt to *quantify damages* from an alleged Respondent breach of the Concessions and the BIT, by pegging them to the value of the failed Aabar acquisition that they say otherwise would have proceeded. But even a party which propounds an untenable theory of damages may still have standing to pursue declaratory relief, such as that which, *inter alia,* Claimants have sought here. The Respondent has not demonstrated why any alleged plan to

[605] Cl. Reply ¶ 503.

[606] February Tr. Day 2, Hanessian, 227:13-21.

defraud Aabar should render inadmissible Claimants' underlying claims that Armenia breached its obligations to Rasia and Mr. Borkowski under the Concessions and the BIT respectively.

432. The inadmissibility defense accordingly is denied in its entirety.

D. ARE THE CLAIMS UNDER THE CONCESSIONS AND UMBRELLA CLAUSE TIME-BARRED?

(1) The Respondent's Position

433. The Respondent contends that the Claimants' claims under the Concessions are time-barred under Armenian Law (the governing law of the Concession Agreements).[607] The Respondent argues that the statute of limitations for contract claims is three years, running from the date that a person learns, or should have learned, of the violation of its rights.[608] In this case, the Respondent says, the limitations period began to run on 18 March 2015, which is the date by which Claimants contend Armenia had repudiated the Concession Agreements, and the date Claimants select as the "valuation date" for their damages claim. Accordingly, the Respondent contends, the limitations period expired on 18 March 2018.[609] However, since the Claimants commenced this arbitration only on 19 July 2018, more than three years after the alleged "repudiation" date of 18 March 2015, any claim under the Concession Agreements is time-barred.[610] In the Respondent's submission, the Tribunal must take the applicable statute of limitations under Armenian law into account.[611]

434. The Respondent disputes the Claimants' assertion that the statute of limitations was interrupted by Rasia's letter to Armenia on 16 December 2015 by which it notified the dispute.[612] According to the Respondent, this argument misrepresents the wording of Article 340 of Armenia's Civil Code and is not supported by Armenian case law.[613] Conversely, the Respondent submits that the correct interpretation is that a claim must be filed judicially in order to interrupt the running of the statute of limitations.[614] The Respondent submits that this interpretation is supported by Armenia's highest court.[615]

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[607] Resp. Counter-Mem. ¶ 223; Resp. First PHB ¶¶ 171, 221; Resp. Second PHB ¶¶ 27–28.
[608] Resp. Counter-Mem. ¶ 223.
[609] *Id*.
[610] *Id*.; Resp. Rej. ¶ 340; Resp. Second PHB ¶ 29.
[611] Resp. Rej. ¶ 344.
[612] *Id*. ¶ 340; Resp. Second PHB ¶¶ 30–31.
[613] Resp. Rej. ¶¶ 340–41.
[614] *Id*. ¶ 342.
[615] *Id*. ¶ 341; Resp. Second PHB ¶ 31.

435. The Respondent also challenges the Claimants' arguments that (i) Armenia's wrongful acts did not stop before 19 July 2015, that (ii) the statute of limitations does not apply to umbrella clause claims,[616] and that (iii) Armenia acknowledged a debt to Rasia.[617]

436. Regarding the first aspect of the Claimants' argument, the Respondent acknowledges that if later breaches by Armenia of the Concessions were demonstrated, then the statute of limitations objection should fail.[618] The Respondent contends, however, that the Claimants did not articulate how Armenia had allegedly continued to breach its obligations after 19 July 2015,[619] nor did they submit any evidence to sustain their argument regarding such later breaches.[620] Moreover, the Respondent argues that the Claimants did not articulate what, if any, damages might flow from these alleged later breaches.[621]

437. Regarding the second aspect of the Claimants' argument—that the Armenian statute of limitations does not apply to umbrella clause claims—the Respondent submits that the Claimants did not cite any law for that proposition.[622] The Respondent argues that, while the statute of limitations under Armenian law would not apply to other treaty claims, umbrella clause claims are different.[623] That is because the content of the underlying obligation to which an umbrella clause claim relates, including the scope and parties to the undertaking, must be interpreted in accordance with the governing law of the contract (Armenian law).[624] Since any claim for breach of the underlying obligation is time-barred under Armenian law, a claim for violation of the umbrella clause by virtue of such breach also must be time-barred, the Respondent argues.[625]

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[616] Resp. Rej. ¶¶ 343–44.

[617] Resp. Second PHB ¶ 32.

[618] Resp. Rej. ¶ 343.

[619] Resp. Counter-Mem. ¶ 224.

[620] Resp. Rej. ¶ 343.

[621] Resp. Counter-Mem. ¶ 224.

[622] Resp. Rej. ¶ 344.

[623] *Id*. ¶ 345.

[624] *Id*.

[625] *Id*. (relying on RL-14, *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 95(c)).

438. Regarding the third aspect of the Claimants' argument, the Respondent rejects the Claimants' suggestion that Armenia ever acknowledged a debt to Rasia.[626] Rather, the Respondent submits that Armenia's position has always been that Rasia, not Armenia, breached the Concessions.[627]

(2) The Claimants' Position

439. The Claimants reject the Respondent's interpretation and understanding of the statute of limitations under Armenian law, as well as its argument regarding the date of expiration of the time period to bring relevant claims.

440. First, the Claimants contend that Article 340 of Armenia's Civil Code provides that the statute of limitations "shall be interrupted by the filing of a claim in the prescribed manner."[628]According to the Claimants, the prescribed manner does not necessarily entail a court or a judicial filing as the Respondent suggests.[629] In this respect, the Claimants note that the "prescribed manner" in this case is set out in the Concessions' dispute settlement provisions;[630] Article XVIII of both Concessions provides that the dispute shall be referred first to the Minister of Transport and Communications and to the CEO of Rasia.[631] According to the Claimants, the dispute settlement mechanism was therefore triggered at the latest by Rasia's letter to Armenia on 16 December 2015,[632] such that the statute of limitations period for the Concessions' claims was interrupted by Rasia's invocation of the Concessions' dispute resolution mechanism. Pursuant to Article 340(2) of Armenia's Civil Code, the "[r]unning of the term … shall restart after the interruption. The time which has elapsed before the interruption shall not be calculated within the new term."[633]

441. The Claimants further argue that Armenia's acknowledgment of its obligations under the Concessions can also interrupt the running of the statute of limitations.[634] According to the Claimants, the Respondent's selective quotation of Article 340(1) of Armenia's Civil Code omitted to draw attention to that point.[635] The Claimants submit that, even if recourse to Armenian law were

[626] Resp. Second PHB ¶ 32.
[627] *Id*.
[628] Cl. Reply ¶ 602 (quoting Armenian Civil Code, Article 340).
[629] *Id*. ¶ 605; Cl. First PHB ¶ 294.
[630] Cl. Reply ¶ 603.
[631] *Id*.
[632] *Id*.
[633] *Id*. ¶ 604 (quoting Armenian Civil Code, Article 340(2)).
[634] Cl. First PHB ¶¶ 307–09.
[635] *Id*. ¶ 307.

appropriate, Armenia acknowledged its obligations under the Concessions after 18 March 2015[636] on at least three occasions (15 February 2016, 18 March 2016, and 3 July 2017), thereby interrupting the statute of limitations.[637]

442. Alternatively, the Claimants contend that Mr. Borkowski's umbrella clause claims under the BIT and the consequences of Armenia's breaches are governed by customary international law and not by Armenian law.[638] By breaching its obligations under the Concessions, Armenia violated its international obligations under the BIT. The Claimants submit that international law on State responsibility, which governs Armenia's wrongful acts, does not contain a statute of limitations period.[639]

443. Finally, the Claimants argue that the Respondent's contention that the statute of limitations started to run on 18 March 2015 is wrong in any event, since Armenia's illegal acts did not stop before 19 July 2015—three years before the Claimants submitted their Request for Arbitration.[640] According to the Claimants, Armenia continued to disregard the Claimants' rights under the Concessions as late as 2017.[641] Consequently, the Claimants state that, with respect to Armenia's breaches after 19 July 2015, the Respondent's time-bar objection must be rejected.[642]

(3) The Tribunal's Analysis

444. The Respondent's statute of limitations defense seeks to defeat Rasia's claims for breach of the Concession Agreements, and Mr. Borkowski's umbrella clause claim under the BIT. The Respondent does not assert any limitations defense with respect to Mr. Borkowski's other BIT claims (fair and equitable treatment, arbitrary treatment, and expropriation), so these claims would proceed regardless of the Tribunal's ruling on the timeliness of the contract and umbrella clause claims.

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[636] Cl. First PHB ¶¶ 307, 309.

[637] *Id*. ¶ 308.

[638] Cl. Reply ¶ 606.

[639] *Id*. ¶ 606 (citing CL-108, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013 ("***AES v. Kazakhstan***"), ¶ 431).

[640] *Id*. ¶ 607.

[641] *Id*.

[642] *Id*.

a. Rasia's breach of contract claims

445. The Tribunal begins with Rasia's breach of contract claims, which the Parties agree are governed by Armenian law. The Parties also agree that the applicable provisions of the Armenian Civil Code are the following:

> **Article 332. General terms of statute of limitations**
>
> General terms statute of limitations shall be three years.
>
> **Article 337. Calculation of the terms for statute of limitations**
>
> 1. The statute of limitations shall start running on the day when the person learns or should have learned of the violation of his or her right. ….
>
> **Article 340. Interruption of the running of the term for the statute of limitations**
>
> 1. Running of the statute of limitations shall be interrupted by the filing of a claim in the prescribed manner, as well as by performing actions evidencing the acknowledgement of the debt by the person obliged.
>
> 2. Running of the term for the statute of limitations shall restart after the interruption. The time which has elapsed before the interruption shall not be calculated within the new term.[643]

446. None of the Parties has presented an expert on Armenian law to interpret these Civil Code provisions, nor has any Party presented any commentary by Armenian legal scholars to shed light on their application. Nor do the Parties rely, with one exception, on judicial practice.[644] Thus, the Tribunal is left largely on its own to interpret the relevant Civil Code provisions, based on the apparent ordinary meaning of the terms used.

(i) Accrual of the limitations period

447. The first question is when the three-year statute of limitations began running. Article 337(1) provides that time begins to run "when [Rasia] learn[ed] or should have learned of the violation of [its] right." The Claimants accuse the Respondent of breaching the Concession Agreement by "a series of measures that undermined the Claimants' rights and ultimately destroyed their investments."[645] In general, the Claimants' case is that "[f]irst in respect of the Road Project and later in respect of the Railway Project, Armenia sought to exclude Rasia and its EPC contractor and

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[643] RL-1, Armenian Civil Code (excerpts), 5 May 1998, Articles 332, 337 and 340.

[644] The exception is a single Court of Cassation case which the Respondent presents to support its interpretation of one aspect of Civil Code Article 340. *See* RL-86, The Court of Cassation of the Republic of Armenia, Case No. EAND/0052/02/11, 25 December 2012. The Claimants do not comment on the applicability of this case.

[645] Cl. Mem. ¶ 143.

establish its own consortium using Rasia's feasibility study and work product."[646] The Claimants allege, however, that Armenia's initial dealings with third parties were "covert[]" and "unilateral,"[647] allegations which have some bearing on the question as to when Rasia learned (or should have learned) of the alleged breach. With respect to the Road Project, the Claimants say that they "have since learned more details about the secret road project that [Armenia] was seeking to establish, in blatant breach of Rasia's exclusive concession," including various actions undertaken on dates ranging from November 2012 through May 2019.[648] With respect to the Railway Project, the Claimants say that Armenia took steps "to establish an entirely different consortium to continue the works," in violation of Rasia's exclusivity rights, beginning with project meetings with others between March and August 2015.[649] The Claimants say that they "were excluded entirely from these meetings and only learned of them after they had already occurred."[650] The Claimants complain of subsequent dealings in September and November 2015 allegedly in violation of their exclusivity rights with respect to the Railway Project,[651] but they say that Armenia withheld much of this information from them.[652]

448. In short, it is the Claimants' case that their investments "were destroyed by Armenia through a series of acts beginning in November 2012," and that "[t]here is no single event which constituted the total loss of the Claimants' investments." However, acknowledging that "it is nevertheless necessary to select a valuation date" for purposes of calculating damages, the Claimants "submit that the most appropriate date is 18 March 2015," which they describe as "the date by which Armenia had *made clear its intention* to eliminate the Railway Project as well as the Road Project,"[653] by publicly announcing a meeting in Yerevan between Minister Beglaryan and CCECC.[654] It is Claimants' case that 18 March 2015 was also "the date on which the Claimants were *substantially and irreversibly* deprived of their investments,"[655] because the news of Armenia's "negative conduct towards the Projects" led Aabar in March 2015 to withdraw from its

[646] Cl. Mem. ¶ 143.
[647] *Id*. ¶ 144.
[648] *Id*. ¶¶ 153-156.
[649] *Id*. ¶¶ 164-165.
[650] *Id*. ¶ 166.
[651] *Id*. ¶¶ 167-168.
[652] *Id*. ¶ 169.
[653] *Id*. ¶ 320 (emphasis added).
[654] *Id*. ¶ 165(i).
[655] *Id*. ¶ 320 (emphasis added).

alleged deal to purchase Rasia in order to obtain equity in the Railway and Road Projects,[656] after having previously placed the acquisition on hold in January 2015 to "better assess the situation in Armenia."[657] It is the Claimants' case that this deal otherwise would have closed "no later than 30 April 2015,"[658] notwithstanding Aabar's general freeze on new investment activities in April 2015 following the resignation of its Chairman, because Aabar had already approved this particular deal and effectively ring-fenced the necessary funds in December 2014.[659]

449. In other words, the Claimants have staked their claim of irreversible harm on the loss of the Aabar acquisition, and they have tied that loss to Aabar's concern about events in Armenia that it allegedly knew to have occurred by mid-March of 2015. In these circumstances, the Claimants' pleading that Armenia took additional steps in breach of the Concessions *after* Claimants already had been "irreversibly deprived of their investments" in March 2015[660] does not alter the accrual date for purposes of the statute of limitations analysis. The Respondent, meanwhile, has not presented arguments in support of any *earlier* accrual date than 18 March 2015. Tribunal accordingly finds that, for purposes of Article 337(1) of the Armenian Civil Code, the three-year statute of limitations on breach of contract claims began running no later than 18 March 2015, which was the day that Claimants say they learned of the most significant violation of Rasia's Concession rights, which caused "irreversibl[e]" loss to their investment.

(ii) Interruption of the limitations period

450. The next question is whether the running of the three-year period was "interrupted" for purposes of Article 340 of the Armenian Civil Code, with the effect that the clock thereafter "restart[s]" and any "time which has elapsed before the interruption shall not be calculated within the new term."[661] Article 340(1) sets out two different bases for interrupting the running of the statutory period. The first is by "the filing of a claim in the prescribed manner"; the second is when "the person obliged" "perform[s] actions evidencing the acknowledgment of the debt." The Tribunal examines these in turn.

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[656] Cl. Mem. ¶ 186.

[657] First Tappendorf Statement ¶ 73.

[658] Cl. Mem. ¶ 186.

[659] First Thornber Statement ¶ 36.

[660] Cl. Mem. ¶ 320 (emphasis added).

[661] RL-1, Armenian Civil Code (excerpts), 5 May 1998, Article 340(2).

1. Interruption by "filing of a claim in the prescribed manner"

451. Beginning with interruption by "the filing of a claim in the prescribed manner," the question is whether Rasia's letter of 16 December 2015 qualifies under Armenian law. As a threshold point, that letter referred to the Railway Concession only, and thus could not (under any scenario) constitute an interruption of the limitations period for claims under a separate contract, the Road Concession. The Claimants have not pointed to any equivalent letter that Rasia might have sent regarding the Road Concession and which they contend satisfies the terms of Article 340(1) of the Armenian Civil Code.

452. As for the Railway Concession, Rasia's letter of 16 December 2015, which was addressed to Mr. Beglaryan as Minister of Transport and Communication, (a) declares Armenia to have committed "material breaches" of the agreement, (b) "formally declares there to be a dispute between the parties," and (c) "request[s] … a response from the Government that addresses our concerns … in order that we might attempt amicably to settle our dispute, in accordance with the terms of Article XVII of the Concession Agreement."[662] There is no question that this letter qualifies as the initiation of the dispute resolution process agreed in Article XVII of the Railway Concession, which begins (in Section 66.1) with a requirement that "[t]he Parties shall first attempt amicably to settle all disputes arising out of or relating to this Agreement."[663] Conceivably, by virtue of the letter being signed by Mr. Borkowski as CEO of Rasia, and addressed to the Minister of Transport and Communication of Armenia, it could be said also to jump to the second step in the agreed dispute resolution process, which provides (in Section 66.2) that "[s]hould the Parties not be able to [amicably settle disputes] within 30 … days of the declaration of a dispute, then they shall refer the matter for resolution" jointly to the Minister and to Rasia's CEO.[664] The third and final step in the agreed process is that should the Minister and Rasia's CEO not be able to resolve a dispute within 30 days, both Parties "consent to submit" the dispute to ICSID arbitration for resolution.[665]

453. For purposes of the statute of limitations issue, the question is whether Rasia's initiation of the agreed dispute resolution process qualifies as "the filing of a claim in the prescribed manner," in keeping with Article 340(1) of the Armenian Civil Code, or whether only the eventual submission of a claim to ICSID would satisfy that provision. The Respondent contends the latter, emphasizing

[662] C-38, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 16 December 2015.

[663] C-1, Railway Concession, Section 66.1.

[664] *Id*. Section 66.2.

[665] *Id*. Section 66.3.

the ordinary meaning of the words "filing of a claim." The Claimants say the former, emphasizing the Civil Code's reference to "the prescribed manner," which they argue in this instance means initiating the multi-step dispute resolution process in the Railway Concession. The Tribunal has been provided with only one Armenian legal authority in connection with that question, namely excerpts from a 2012 Court of Cassation decision that relates to the initiation of a judicial proceeding, not an arbitration.[666] There is no indication in the excerpts that the case involved a contractual dispute resolution provision, much less one requiring preliminary steps before a claim could be submitted to the agreed forum. In these circumstances, the decision is not authoritative on the matter in question. Nonetheless, it does suggest that in the judicial context, what matters for purposes of interrupting a limitations period is the "initiati[on] of a lawsuit," the date of which "can be found out by examining the registration stamp on the document received in court, as well as the date of receipt."[667]

454. On balance, and absent any other guidance as to how to interpret Article 340(1) of the Armenian Civil Code in the context of a multi-step arbitration clause, the Tribunal considers that the relevant act is the filing of a Request for Arbitration before ICSID. This is the equivalent formality to the filing of a lawsuit in Armenian court. Moreover, it is consistent with Article 340(1)'s focus on "the filing of a claim," which connotes the commencement of a legal proceeding by lodging the initial paperwork before a decision-making body. The following phrase which Claimants invoke – "in the prescribed manner" – is a dependent phrase, which *qualifies* the primary reference to a "filing," rather than *supplants* it. In other words, it conveys that a "filing" which does not comply with the applicable rules would *not* stop the clock for purposes of the statute of limitations. It does not convey, in the Tribunal's view, that simply following prescribed pre-requisites for a filing (such a written request for amicable dispute resolution) can somehow obviate the need for a filing itself, in order to stop the running of the clock.

455. For these reasons, the Tribunal concludes that Rasia's letter of 16 December 2015 did not interrupt the running of the three-year statute of limitations for contract breach claims, which commenced on 18 March 2015.

[666] RL-86, The Court of Cassation of the Republic of Armenia, Case No. EAND/0052/02/11, 25 December 2012.
[667] *Id*.

2. Interruption by actions "evidencing the acknowledgment of the debt"

456. The second question posed by Article 340(1) of the Armenian Civil Code is whether the limitations period was interrupted by Armenia's taking any actions "evidencing the acknowledgment of the debt." The Parties have not submitted any authorities to assist in interpreting this Civil Code provision. In these circumstances, the Tribunal considers the likely purpose of the provision along with its literal text. Presumably, an "acknowledgment of [a] debt" by an obligor to an obligee may reasonably lead the obligee to consider a dispute resolved at least at the level of principle, without the need to initiate a legal proceeding. In these circumstances, the running of the limitations period is interrupted, and would begin anew only when the obligee "learns or should have learned" of a new violation of his or her rights, within the meaning of Article 337 of the Armenian Civil Code. The logical reason for such a provision is to prevent an obligor from encouraging the obligee's forbearance on filing a claim, in good faith reliance on the obligor's "acknowledgment of the debt," and then turning around and invoking the limitations period as having been running all the time notwithstanding the acknowledgment.

457. Taken in its most literal meaning, of course, this case does not involve a "debt," in the sense of a financial obligation owed by one party to the other. Nonetheless, the Tribunal interprets the phrase in Article 340(1) more broadly, to include an acknowledgment of an outstanding contractual obligation to another, which is either intended to, or would have the natural effect of, encouraging a counterparty to refrain from initiating legal action.

458. The Claimants contend that this requirement was satisfied by the Respondent's statements on three occasions (15 February 2016, 18 March 2016, and 3 July 2017), each of which accordingly interrupted the statute of limitations.[668] The Tribunal has examined these statements closely. Several points emerge.

459. First, none of the Respondent's statements on these occasions can be said to include any acknowledgment of wrongdoing on Armenia's part; to the contrary, they consistently defend Armenia's conduct, deny any breach on its part, and contend that Rasia was the party responsible for the failure of either Project to proceed.[669]

[668] Cl. First PHB ¶ 308.

[669] *See generally* C-39, Letter from Minister G. Beglaryan to Mr. J. Borkowski, 15 February 2016; R-40, Transcript of the Meeting between A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016; and C-318, Transcript of 3 July 2017 Meeting, 3 July 2017.

460. Second, and notwithstanding the Respondent's complaints about Rasia's performance, the Respondent consistently maintained on these occasions that the Concessions had not been terminated, but they remained in effect.[670]

461. Third, if taken in isolation, several of the Respondent's statements in early 2016 could be viewed as encouraging the Claimants to engage in practical discussions to revive at least the Railway Project, rather than declaring an end to the Parties' dealings. For example, the Respondent's 15 February 2016 letter – by which it responded to Rasia's 16 December 2015 invocation of the Railway Concession's dispute resolution procedure – stated that the Government "is willing and ready to solve the existing disagreements, while denying the existence of an actual dispute"; reaffirmed that "[e]ach provision of the [Railway] Agreement is important to the Government of RA, hence … it would like to clarify the process of the Company's and its own Agreement obligations"; and invited Rasia to a meeting "in order to restore the natural workflow as intended by the Agreement, during which [both Parties] will also deliver on the Project developments, derived from [their respective] Agreement obligations …."[671] Similarly, during the meeting in March 2016, the Respondent "highlight[ed] that we are ready to continue the fulfillment of our obligations undertaken by our agreement concluded between us…. I suggest to cooperate and revive our relationships."[672] Shortly thereafter, on 5 April 2016, the Respondent asked Rasia to provide a "sample time-line on the completion of the next steps and the obligations of the [Railway Concession],"[673] and pledged that after receiving appropriate Corridor coordinates from Rasia, the Government would perform its reciprocal obligations, namely approving the Corridor and exercising eminent domain over the applicable lands.[674]

462. The record is thinner regarding any encouraging statements by the Respondent about reviving the Road Project. It must be recalled that Mr. Borkowski first became concerned in December 2014

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[670] *See* C-39, Letter from Minister G. Beglaryan to Mr. J. Borkowski, 15 February 2016, ¶ 1 (stating that Armenia's actions "do not release the Company from the Agreement obligations"), ¶¶ 2-4 (calling upon Rasia to take certain next steps under the Railway Concession); R-40, Transcript of the Meeting between A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016, p. 1 (affirming that "certain rights within the project belong to" Rasia), p. 8 ("we signed an agreement with you, at the end it is in force"); C-318, Transcript of 3 July 2017 Meeting, 3 July 2017, p. 5 ("Yes, we have still a legally binding agreement"), p. 7 (stating that both Concessions were still in force "at the moment").

[671] *See* C-39, Letter from Minister G. Beglaryan to Mr. J. Borkowski, 15 February 2016, pp. 3-4.

[672] R-40, Transcript of the Meeting between A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016, p. 1.

[673] C-176, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 5 April 2016.

[674] C-174, The Republic of Armenia's "Time-line on the Fulfilment of the Next Steps and the Obligations of the Parties under the Concession Agreement on the Construction of the Southern Armenia Railway", March 2016.

that the Government was treating the Road Concession as effectively terminated,[675] and Claimants now claim that by March 2015, Armenia had "made clear its intention" to eliminate the Road Project.[676] For a substantial time after that date, there was no correspondence at all between the Parties regarding the Road Project, and thus nothing that even arguably could be invoked as an event of interruption. The Respondent's letter of 15 February 2016, which the Claimants' invoke as the first communication satisfying the interruption standard, is entirely focused on the Railway Project, and does not mention the Road Project at all.[677] As for the March 2016 meeting, there is only one passage referring to roads, in which the Respondent explained that CCECC had expressed interest in investing in both railway and road projects in Armenia, to which the Government had responded that it already had an agreement in force with Rasia. The minutes indicate that the Government's representative then stated to Mr. Borkowski: "we are very interested in cooperation with you, because without you … we cannot move forward, because you have only the rights to go and implement the project."[678]

463. If the evidence had suggested that the Claimants took any of these early 2016 statements seriously and delayed moving forward with legal claims as a result, then the Tribunal might accept the situation to fall within the spirit, if not the letter, of Article 340(1) of the Armenian Civil Code. While not an "acknowledgment of a debt" in the narrowest reading of Article 340(1) of the Armenian Civil Code, statements acknowledging both Parties' ongoing contractual obligations to one another and professing a willingness to move forward could be seen as fulfilling the implicit broader purposes of the "interruption" provision, namely, to stop a limitations period from running while one party continues to encourage and promise mutual performance rather than a resort to litigation.

464. The insurmountable problem for the Claimants is that it is abundantly clear they did not rely on the Respondent's statements in any way. First, Claimants do not contend that they viewed the Respondent's words as providing any practical path forward to reviving the Projects. To the contrary, Mr. Borkowski testified that at the March 2016 meeting, he emphasized that the Projects had already lost the support of both of Rasia's would-be partners (Aabar and CCCC), without which

[675] Second Borkowski Statement ¶ 89; *see also* C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014.

[676] Cl. Mem. ¶ 320.

[677] C-39, Letter from Minister G. Beglaryan to Mr. J. Borkowski, 15 February 2016.

[678] R-40, Transcript of the Meeting between A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016, pp. 7-8.

Rasia practically could not proceed.[679] For that reason, Mr. Borkowski claims to have told the Government during the March 2016 meeting that its request for an action plan to restart the Railway Project was "unreasonable."[680]

465. Second, the record is equally clear that the Claimants did not view any of the Respondent's statements in early 2016 as a basis for forbearance in pursuing legal claims. Rather, the Claimants' response was consistent with a plan to push forward with litigation. For example, on 29 April 2016, Mr. Borkowski provided no comment on the Respondent's request for a proposed timeline of next steps, but instead expressed further complaints and demanded the audio record of the March 2016 meeting.[681] Less than two months later, on 25 June 2016, Mr. Borkowski sent the Government his Notice of Dispute under the US-Armenia BIT.[682]

466. As for the period following the Notice of Dispute, the only event the Claimants invoke as allegedly meeting the grounds for interruption of the limitations period is the 3 July 2017 Meeting, during which Armenia's Minister of Justice stated, in response to repeated questions by Claimants' representatives, that he considered both Concessions to still be in force "at the moment."[683] In the Tribunal's view, however, this statement falls far short of satisfying the requirements for interrupting the limitations period, when it was not accompanied either by any acknowledgment of the Respondent's wrongdoing or by any call for the Parties to revive the Projects. In the context of both Parties accusing the other of contract breach, and neither side proposing to resume contractual performance, a mere statement that contracts have not yet been formally terminated by either side cannot be seen as an inducement to defer filing legal claims. That is particularly the case when there were no meaningful discussions thereafter about possibly reviving either the Road Project or the Railway Project.

467. In conclusion, the Tribunal sees no basis in the evidence for finding, pursuant to Article 340(1) of the Armenian Civil Code, an "interruption" in the running of the statute of limitations for Rasia's breach of contract claims under either Concession. Those claims were not filed until 19 July 2018, far more than three years after 18 March 2015, which is the date the Claimants themselves identify

[679] Second Borkowski Statement ¶¶ 175-176; February Tr. Day 3, Borkowski, 562:15-21.

[680] C-318, Transcript of 3 July 2017 Meeting, 3 July 2017, p. 5 (claiming that he had explained this at the March 2016 meeting).

[681] C-177, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 29 April 2016.

[682] C-53, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 25 June 2016.

[683] C-318, Transcript of 3 July 2017 Meeting, 3 July 2017, p. 7; *see also Id.,* p. 5 ("Yes, we have still a legally binding agreement").

as when they were "substantially and irreversibly deprived of their investments."[684] Accordingly, the Tribunal finds that Rasia's breach of contract claims under both Concessions are time-barred.

b. Mr. Borkowski's umbrella clause claims

468. The Tribunal likewise finds that Mr. Borkowski's corresponding umbrella clause claims under the BIT are time-barred as well.

469. As a threshold point, neither Claimants nor Respondent have cited any prior case that determines the source of the statute of limitations applicable to umbrella clause claims. The only authority advanced in this context is *AES v. Kazakhstan*, but in that case, the specific issue was not resolved: the tribunal rejected an umbrella clause claim as unfounded, and therefore found that "the question of limitation period under Kazakh law is irrelevant" in the context.[685] It went on to say, in the next paragraph which the Claimants cite, that "[a]s to claims based on alleged breaches of substantial protection standards under the ECT and BIT, it is undisputed that time limitations applicable under national law do not apply to such treaty claims."[686] Read together, the *AES v. Kazakhstan* holding is best understood as not saying anything about the law applicable to the time-bar for umbrella clause claims (because it did not have to resolve that issue), but that time-bars for "pure" treaty claims would be governed by international rather than domestic law.

470. The Respondent does not cite any cases specifically on point either. Instead, it advances the more general notion, supported by the *Burlington* majority decision and the *CMS* Annulment Decision, that umbrella clauses do not transform the content or proper law of the underlying obligations, even if they permit claims for liability to be brought in a treaty forum.[687] Neither of these cases addressed the issue of statutes of limitation.

471. On consideration, the Tribunal observes that Mr. Borkowski's claims under Article II(2)(c) of the BIT are predicated on Armenia's alleged failure to observe contractual obligations into which it entered with Rasia. Once Rasia no longer has contractual rights it could assert (because, for example, it has allowed the limitations period to lapse), it would be an oddity to allow Rasia's sole shareholder, Mr. Borkowski, in essence to revive those expired rights. Umbrella clauses may provide a path to an international dispute resolution forum, constituted under treaty, but they do not

[684] Cl. Mem. ¶ 320 (emphasis added).
[685] CL-108, *AES v. Kazakhstan*, ¶ 430.
[686] *Id*., ¶ 431.
[687] Resp. Rej. ¶ 345 (citing RL-69, *Burlington*, ¶¶ 214-215, and RL-14, *CMS* Annulment Decision, ¶ 95(c)).

transform the nature of the underlying contractual rights and obligations; those underlying rights and obligations are still capable of extinguishment in accordance with the laws under which they initially were established. In this case, nothing in Article II(2)(c) of the BIT suggests an intention by the Contracting State Parties to allow foreign investors to assert treaty claims, derived from contract breaches, in circumstances where the right to pursue those same contract breaches has already lapsed as a matter of their own governing law. The Tribunal has already found that the claims based directly on alleged breaches of the contractual rights and obligations are time-barred under the applicable Armenian law, and accordingly the umbrella clause claims based on those same rights and obligations are also time-barred.

c. Further observations

472. Given the Tribunal's finding that both Rasia's contract claims and Mr. Borkowski's umbrella clause claims regarding the Concessions are barred under the applicable statute of limitations, one might query why the Tribunal proceeds to discuss the underlying contractual issues in the Liability section that follows. This is not just because the Parties have devoted substantial time to briefing these issues and may wish to know whether the contract claims would have succeeded, had they not been time-barred. More fundamentally, it is because the time bar for these particular claims does not dispose of the case: Mr. Borkowski asserts a number of other treaty claims under the BIT, which are not subject to an equivalent time bar derived from Armenia's limitations period for breach of contract claims.[688] Yet the Parties have presented those treaty claims as very much interwoven with the question of whether, and to what extent, Rasia and/or Armenia performed their respective contractual obligations. Given the way the treaty claims have been presented, the Tribunal considers it appropriate to provide its general views on the underlying contractual claims, as a prelude to considering the BIT claims that remain for resolution.

VI. LIABILITY

473. The Claimants claim that the Respondent is in material breach of its obligations to Rasia under the Railway and Road Concessions, and that these breaches trigger an entitlement to compensation of Rasia under the Concessions or alternatively under the Foreign Investment Law of Armenia. The Claimants also contend that Armenia breached its obligations to Mr. Borkowski under the BIT and international law, triggering a separate entitlement to compensation. Specifically, they contend that

[688] CL-108, *AES v. Kazakhstan*, ¶ 431.

the Respondent expropriated Mr. Borkowski's investments and failed to accord his investments treatment that is fair and equitable, non-arbitrary and non-discriminatory. The Respondent, on the other hand, contests the Claimants' claims in their entirety, and argues that the substantive claims lack merit and should be dismissed.

474. For clarity of exposition, and because many of the treaty claims in this case are predicated on contentions about compliance or non-compliance with underlying rights and obligations arising from the Concession Agreements, the Tribunal begins below with a summary of the Parties' positions regarding alleged breach of contractual obligations, followed by the Tribunal's analysis of these issues (Section A). This is followed by a summary of the Parties' positions regarding alleged violation of obligations under the BIT and international law, followed again by the Tribunal's analysis (Section B). Issues of causation arising from any findings of breach are deferred until the following Section VII.

A. RASIA'S CLAIMS UNDER THE CONCESSION AGREEMENTS

475. The Claimants argue that the Respondent breached its obligations to Rasia under the Concession Agreements. They state that the Respondent's core obligations of the Concessions included the following:

a. *Exclusivity*: Armenia promised not to grant to any other person any "concession or other right or privilege to finance, design [or] construct" a competing roadway near its southern border (Section 15);

b. *Cooperation and non-interference*: Armenia had an obligation to "cooperate with the Concessionaire [and] its contractors […] in carrying out the Project" (Section 38) and to "do or cause the doing of all things reasonably required to give full effect to this Agreement" (Section 74); it also committed to letting the Concessionaire "carry out its activities without any interference from the Government" (Section 39(a) of the Concessions);

c. *Transparency*: Armenia committed to providing "on a timely basis, all data (in whatever form) in the possession of the Government […] relevant to the Project (Section 38);

d. *Stability of policies and legal framework*: Armenia promised to provide and maintain a "favourable and stable legal framework" (Section 32(j));

e. *Confidentiality*: Armenia committed to not disclosing to any third party any of Rasia's "proprietary or confidential information (including specifications, plans and drawings) provided to or arising or acquired by [Armenia]" (Section 70); and

f. *Transferability*: Rasia could sell or assign the Concessions at any time (Section 73(1)).[689]

476. The Claimants contend that the evidence confirms multiple breaches by the Respondent beginning from the third month after the Agreements entered into force. Some of the arguments concerning a breach of contractual obligations are similar to the allegations that the Respondent acted arbitrarily in violation of the BIT, which are set forth further below.[690] The Claimants also contend that Armenia's defenses are meritless and unsupported by the record or by applicable law.[691]

477. The Respondent contests the Claimants' allegations that it breached either of the Concession Agreements in any respect.

478. In the discussion that follows, the Tribunal organizes content by Project, meaning that it first summarizes (and then analyzes) the Parties' positions on liability with respect to the Road Project, and then does the same for the Railway Project.

(1) The Road Project

a. The Claimants' Position

479. The Claimants contend that the Respondent first breached the Road Concession by securing a loan from ADB in November 2012 and signing a variation order in a separate government contract for the procurement of a feasibility study for road works falling within the Claimants' exclusive concession territory, in violation of Rasia's exclusive right under the Road Concession to design, build and operate the Road Project within the concession area for a period of up to 50 years.[692] The Claimants also argue that the Respondent's engagement directly with third parties, including CCECC with respect to both the Road and Railway Projects, breached Rasia's exclusivity rights under the Concession Agreement, which were essential to Rasia's debt financing arrangements.[693]

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[689] C-1, Railway Concession, and C-2, Road Concession; Cl. Second PHB ¶ 40.

[690] Cl. First PHB ¶¶ 21, 32.

[691] *Id*. ¶ 293.

[692] *Id*. ¶¶ 21–23, 26-27, 31, 34-37, 48-58; Claimants' Second PHB ¶¶ 46-56; Cl. Mem., ¶¶ 3, 13, 49. (relying on C-2, Road Concession, Preamble, Art.1.1).

[693] Cl. Second PHB ¶¶ 40, 61, 260–61, 263, 265–68.

480. According to the Claimants, the Respondent's subsequent MOU with CCECC had the effect of "ring-fencing" the Projects in favor of CCECC to the exclusion of CCCC.[694] The Claimants further contend that in consequence of the Respondent's cumulative actions which initially targeted the Road Project, but eventually affected both the Road and Railway Projects, Aabar terminated its proposed acquisition of both the Rail and Road Projects, while CCCC withdrew from the consortium, thereby contributing to the loss of the entire investment.[695]

481. The Claimants contest the Respondent's submission that the ADB loan was in respect of a road project outside the Concession Territory, arguing that it is speculative. The Claimants further argue that (i) the location of the design work covered by the ADB loan was unassigned as of December 2012 and was to be determined based on results of an anticipated feasibility study, (ii) the feasibility study referred to in the ADB loan documents could only possibly refer to a section of the road project overlapping Rasia's concession territory,[696] and (iii) the route was subsequently identified in the Egis Feasibility Study, commissioned in October 2013, as running from Kajaran to Agarak, which falls within the Concession territory.[697]

482. With respect to the Respondent's argument that the ADB loan was executed only in March 2014, the Claimants argue that the evidence confirms that the Respondent issued its tender for a feasibility study on 2 October 2013, and ADB's letter to Rasia dated 25 January 2014 confirms that the loan for a road feasibility study within Rasia's Concession territory had already been obtained.[698]

483. The Claimants also argue that upon securing the loan and feasibility study from third parties, the Respondent began stonewalling the Road Project by (i) rejecting the availability payments contained in the Road Concession,[699] and (ii) refusing to review and provide comments on the Road Feasibility Study prepared by CCCC.[700] The Claimants also argue that the Respondent set out to destroy Rasia's consortium and block Aabar's acquisition by taking steps to replace Rasia/CCCC/Aabar with a new government-to-government consortium.[701]

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[694] Cl. First PHB ¶¶ 271–72.
[695] *Id*. ¶¶ 17–20, 62, 246–47, 250, 269; Cl. Second PHB ¶ 25, 128–31.
[696] Cl. First PHB ¶¶ 38–41, 59; Cl. Second PHB ¶ 55.
[697] Cl. First PHB ¶¶ 48, 60.
[698] Cl. Second PHB ¶¶ 52–54.
[699] Cl. First PHB ¶¶ 24, 65, 67, 73.
[700] *Id*. ¶¶ 24, 74–75; Cl. Second PHB ¶ 75.
[701] Cl. Second PHB ¶ 92.

484. The Claimants argue that the Respondent rebuffed or ignored their efforts to engage it in discussions regarding availability payments to implement the Road Project.[702] The Claimants also contend that the Respondent refused to sign the MOU which would have enabled CCCC and Chinese banks to collaborate with the Respondent's Ministry of Transport and Ministry of Finance over the quantum and terms of availability payments. According to the Claimants, the Respondent's refusal to sign the MOU was due to Minister Beglaryan's decision not to make any availability payments, because the Respondent had written off the Road Project after it became clear there would be no tolling. The Respondent's refusal to make availability payments, in the Claimants' view, also constitutes a breach of Armenia's obligation to cooperate with the Claimants and to give full effect to the Concessions under Section 74 of the Road Concession.[703]

485. With respect to the Respondent's refusal to review the Road Feasibility Study, the Claimants argue that the Respondent refused to constitute an inter-ministerial working group to examine it and prevented Rasia and CCCC from presenting the Feasibility Study results during the February 2014 Yerevan meetings.[704] According to the Claimants, the Respondent's only written feedback on the Road Feasibility Study was its rejection of the study, because it preferred a Category I Road over the Category II Road that had been agreed in the Road Concession.[705] Citing the Report of the November 2012 Site Visit in Yerevan, and the Road Terms of Reference dated 10 November 2012, the Claimants argue that the Respondent, Rasia and CCCC had all proceeded on the assumption that the Road Feasibility Report would feature a single Category II toll-free road.[706]

486. The Claimants also argue that after Rasia refused to sign amendments unilaterally demanded by the Respondent, which would have altered core financial terms and imposed additional costs on the Claimants of between US$ 100-150 million, the Respondent initiated a smear campaign and took other pernicious actions against Rasia. According to the Claimants, these actions by the Respondent included its purported termination of the Road Concession on 29 December 2014 and (as discussed further below) its cooperation with CCECC on the implementation of the Railway Project with a view to replacing Rasia, in breach of Rasia's right to exclusivity under the Railway Concession.[707]

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[702] Cl. First PHB ¶ 69.

[703] *Id*. ¶¶ 71–73 (relying on C-2, Road Concession, Article X, Section 38 & 39, Article XVIII, Section 74).

[704] *Id*. ¶¶ 74–76.

[705] *Id*. ¶ 79.

[706] *Id*.¶¶ 97–100, 263, 265–68; Respondent's Second PHB ¶ 54.

[707] Cl. First PHB ¶¶ 256–60.

487. The Claimants contend that the Road Concession was never rescinded or terminated by operation of law, whether unilaterally, by agreement of the Parties or implicitly by conduct of both or either of the Parties. First, in response to the Respondent's submission that the Road Concession was terminated by oral agreement of the Parties in February 2014, prior to the Respondent's engagement with third parties, the Claimants argue that Armenian law does not provide for oral termination of a written contract.[708] Further, the Respondent's Minister of Justice admitted during a settlement meeting held on 3 July 2017 that the Road Concession remained in force as of that date.[709]

488. Second, the Claimants contend that the purported termination of the Road Concession on 29 December 2014 is invalid because as of that date, the Respondent was only in the process of seeking State approval for an agreement to rescind the Road Concession. Thus, the Respondent understood that any termination would require a formal State approval as well as an agreement on termination.[710] According to the Claimants, the Respondent's draft proposal for State approval to terminate the Road Concession was never approved.[711]

489. Third, the Claimants contest the Respondent's contention that it was entitled to terminate, and justified in terminating, the Road Concession once CCCC confirmed in its Road Feasibility Study that tolling was uneconomic owing to low traffic volume.[712] According to the Claimants, Section 9(b) of the Road Concession expressly provided for availability payments, but not for tolling, as a condition precedent to construction. Consequently, availability payments were meant to meet the agreed threshold if tolling was deemed uneconomic. The Claimants further argue that tolling was not essential to the feasibility of the entire Concession, because the provision for tolling in the Road Concession was made only as a measurement for determining whether returns are "sufficient."[713]

490. Furthermore, the Claimants contend that (i) the Respondent failed to provide the formal termination notice required by Armenian law, and (ii) the Respondent's letter rejecting the Road Feasibility Study made no reference to any purported agreement to terminate. Further, the concerns raised in the letter rejecting the Road Feasibility Study, namely the Respondent's preference for a toll road

[708] Cl. First PHB ¶¶ 64; 110, 116; Cl. Second PHB ¶ 79.

[709] Cl. First PHB ¶¶ 111–14.

[710] *Id*. ¶ 119 (relying on R-31, Letter from Minister G. Beglaryan to D. Harutyunyan (attaching Draft Decision on Making Amendments to Decision of the Government of the Republic of Armenia No. 982-AG of 2 August 2012), 5 December 2014).

[711] *Id*. ¶ 114.

[712] *Id*. ¶¶ 86, 105–08.

[713] *Id*. ¶ 107.

and issues with certain slopes and turns proposed in that Study, had never been raised with Rasia prior to June 2014.[714] In sum, the Claimants argue that there is no evidence that the Road Concession was terminated in accordance with the procedures set by Armenian law.[715] Therefore, the Road Concession remained in force and the Respondent was not free to engage with third parties concerning any other road project within Rasia's exclusive concession territory.

b. The Respondent's Position

491. In connection with the Road Project, the Respondent argues that contrary to Rasia's claim to have an exclusive right to build or rehabilitate *any* road in Southern Armenia, the terms of the Road Concession are unequivocal as to their requirement of the construction of two specific roads – a $1.1 billion "Category II" toll road and a $80 million rehabilitation of existing roads.[716] These terms, according to the Respondent, were neither waived, nor amended at any time by the Respondent.[717] The Respondent therefore submits that the Claimants' proposal in CCCC's Road Feasibility Study of a single $690.5 million road, which would be neither a high speed road, nor a toll road, was contrary to the requirements of the Road Concession.[718]

492. The Respondent also contends that while private investment and generation of revenue through tolls was a critical component of the high speed road project, the Feasibility Study made no provision for revenue generation and instead proposed that all costs would be borne by the Respondent.[719] The Respondent also argues that Mr. Borkowski's testimony that the Parties agreed to proceed with a single road is not corroborated by the evidence on record.[720] Moreover, the Respondent says, the Claimants themselves conceded that the two roads required in the Road Concession were not feasible.[721]

493. The Respondent submits that Armenia repeatedly rejected the single toll-free road proposal.[722] Because Rasia's single-road proposal fell short of the technical requirements of the Concession Agreement, the Respondent communicated its rejection of the proposal to the Claimants first in

[714] Cl. First PHB ¶ 121.
[715] *Id*. ¶ 116.
[716] Resp. First PHB ¶¶ 25–26, 132–39, 144, 148, 150; Resp. Second PHB ¶ 45; Resp. Counter-Mem. ¶¶ 78–81.
[717] Resp. First PHB ¶¶ 27–29, 145; Resp. Second PHB ¶ 59.
[718] Resp. First PHB ¶¶ 146–48; Resp. Second PHB ¶¶ 34–35, 38, 41; Resp. Rej., ¶ 4.
[719] Resp. First PHB ¶¶ 140–42; Resp. Counter-Mem. ¶¶ 72–73, 75–80.
[720] Resp. First PHB ¶¶ 30, 53.
[721] *Id*. ¶¶ 24–26.
[722] Resp. Second PHB ¶ 54.

October 2013, and again in February 2014.[723] The Respondent also contends that while it delayed formally terminating the Road Concession for purely bureaucratic reasons, this Agreement was effectively terminated in 2014.[724] In the Respondent's view, it was entitled thereafter to explore alternative options for road projects in Southern Armenia, including procurement of a feasibility study for a North-South Road Corridor (NSRC) project which geographically overlapped with Rasia's concession, and procurement of a loan for that purpose.[725]

494. The Respondent also contests the Claimants' assertion that Armenia breached the Claimants' right to an exclusive concession even before Rasia concluded its Feasibility Study. Specifically, the Respondent argues that it did not execute any loan agreement or feasibility study for a road project which overlapped geographically with Rasia's concession until February 2014, after the Claimants had failed to perform the Road Concession.[726] The Respondent contends that the loan applications it made prior to February 2014 were merely requests to be pre-qualified for future loans, and that it made no actual commitments to borrow any funds with respect to road projects overlapping with Rasia's concession until March 2014.[727] Further, the Respondent argues that the Claimants knew of the NSRC project and loan agreements, but they raised no issues or objections in 2013 or 2014.[728]

495. The Respondent contends that the Road Concession was terminated in at least one of several ways. First, the Respondent argues that having informed the Claimants of the Respondent's rejection of Rasia's single toll-free road proposal, the Road Concession could be deemed terminated under its Section 59.[729] Second, the Respondent says that the Road Concession was rescinded by operation of Armenian law in consequence of Rasia's failure to perform, *i.e.*, when Rasia concluded that the high speed toll road envisioned by the Concession was not feasible.[730] Alternatively, the Respondent contends that Mr. Borkowski's participation in a different road project within the same geographic area for a broker fee, his letter dated 31 December 2014 seeking confirmation that the Road Concession had terminated, and his silence afterwards on the matter until 25 June 2016, can

[723] Resp. First PHB ¶¶ 31, 150–52; Resp. Second PHB ¶¶ 66–68.
[724] Resp. First PHB ¶¶ 155-56; Resp. Counter-Mem. ¶¶ 82, 86.
[725] Resp. First PHB ¶¶ 33, 222–23, 237.
[726] *Id*. ¶¶ 226, 238; Resp. Second PHB ¶¶ 9, 75-76; Resp. Counter-Mem. ¶¶ 87–89.
[727] Resp. First PHB ¶¶ 227, 229–30.
[728] *Id*. ¶ 242.
[729] *Id*. ¶ 236; Resp. Counter-Mem. ¶¶ 7, 82.
[730] Resp. First PHB ¶¶ 237-38; Resp. Second PHB ¶¶ 60–66; Resp. Counter-Mem. ¶¶ 7, 82.

be construed as a termination of the agreement by verbal agreement of the Parties.[731] Under any of these termination scenarios, the Respondent asserts, its participation in the NRSC program did not constitute a breach.[732]

496. The Respondent denies the Claimants' allegation that Minister Beglaryan demanded a bribe from them. It argues that the alleged bribery demand, which Mr. Borkowski confirmed at the February Hearing that he had not mentioned to anyone at the time,[733] is not supported by any contemporaneous evidence. The Respondent also contends that the allegation was not corroborated by the testimony of Mr. Tappendorf, and that both Mr. Grigoryan and Mr. Arakelyan denied in their witness statements that there had been any such demand for a bribe.[734]

497. With respect to Mr. Borkowski's testimony, the Respondent rejects as baseless his additional assertions that: (i) CCCC agreed to pay him 5% of the US$3.2 billion it stood to be paid for construction services; (ii) the reason CCCC never requested payment for the Feasibility Studies was because Chinese firms like CCCC do not send invoices; and (iii) the reference in Aabar's 21 September 2014 letter to all EPC profits going to Arabtec was a drafting error. The Respondent also contends that neither Mr. Borkowski's witness statements, nor the evidence on record supports his testimony that CCCC withdrew from the Project on account of the Respondent's alleged breach, its issuance of an RFP, or its subsequent MoU with CCECC.[735]

c. The Tribunal's Analysis

(i) Delivery of, and comment upon, the Road Feasibility Study

498. The Tribunal begins by recalling that in the sequence of events contemplated under the Road Concession, the first duty was on the part of Rasia to complete and deliver to the Government a feasibility study meeting the object and requirements set forth in the Concession. Under Section 20 of the Road Concession, the delivery of the feasibility study "in English together with an Armenian

[731] Resp. First PHB ¶ 238 (relying on R-19, Email from Mr. J. Borkowski to Minister G. Beglaryan); C-318, Transcript of 3 July 2017 Meeting; February Tr. 10:24–11:5; C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, pp. 2–3, C-53, Letter from Mr. J. Borkowski to Minister G. Beglaryan; and February Tr. 336:4–337:5); Resp. Counter-Mem., ¶¶ 89, 229–31.

[732] Resp. First PHB ¶ 239.

[733] February Tr. Day 3, Hanessian/Borkowski, 430:24-433:5.

[734] Resp. First PHB ¶ 54(xiii); Resp. Rej. ¶ 254; Resp. Counter-Mem. ¶ 110 (relying on February Tr. 430:24–433:5; Second Arakelyan Witness Statement ¶ 71; and Grigoryan Witness Statement, ¶¶ 12, 32).

[735] Resp. First PHB ¶¶ 10, 53, 217.

translation"[736] triggered certain deadlines for comments and acceptance of the study. Acceptance of the study in turn triggered deadlines for various next steps, including a project financing period and a construction period.

499. In accordance with this defined process, the Tribunal considers that Rasia delivered the Road Feasibility Study to the Government on 24 January 2014. Although Claimants provided certain briefings on preliminary results prior to this date, including at the Dalian Meeting(s) in September 2013, it acknowledged in the course of those briefings that the final feasibility studies had not yet been translated into English or formally submitted to the Government.[737] While the Railway Feasibility Study was submitted to the Government first in English on 7 October 2013, and then in Armenian translation on 31 December 2013,[738] it appears that the Road Feasibility Study was finally submitted to the Government on 24 January 2014.[739]

500. Under the contractually defined process, delivery of the final Road Feasibility Study triggered a 30-day period for Government "comments, objections and suggestions," which Rasia was then obligated to consider prior to providing its own "final acceptance" of the Study.[740] If those comments led to a conclusion that the Road Project was "unfeasible," then upon Rasia's request, the Parties were to undertake negotiations about measures that "may make the Project feasible."[741] By contrast, if the Government submitted no comments with the 30-day period, then the Feasibility Study would be "deemed" to have been finally accepted by Rasia in the form originally provided.[742]

501. Claimants contend that in accordance with the latter provision, the Road Feasibility Study should be deemed to have been accepted by Rasia by March 2014, following expiration of the Government's comment period.[743] The Tribunal however disagrees with the Claimants' premise, which is predicated upon the absence of any Government reaction in the interim. In fact, the evidence suggests that the Government did provide feedback, albeit not in formal written comments. First, the Government communicated "objections" during meetings even prior to

[736] C-2, Road Concession, Section 20.1.

[737] C-117, "Southern Armenia Railway and High Speed Road – Summary of Key Results From Feasibility Studies" (Rasia), slide 4.

[738] C-127, Email from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2013.

[739] C-130, Email from Mr. J. Borkowski to Mr. G. Beglaryan, 24 January 2014.

[740] C-2, Road Concession, Section 20.2.

[741] *Id*. Section 20.4.

[742] *Id*.

[743] Cl. First PHB ¶ 8.

Rasia's delivery of the final study, based on Rasia's October 2013 reports that the study had confirmed that "a toll road structure is not feasible for the Southern Armenia High Speed Road project,"[744] leaving only the option of a "[f]ree [r]oad" funded by Government availability payments.[745] While recollections of the precise Government response differ, a common thread was that the Government was upset by this conclusion, to the point of questioning the continued viability of the Project.[746] It appears that similar objections were voiced during meetings in February 2014, following Rasia's delivery of the final Road Feasibility Study, although again recollections differ as to the precise contours of the response.[747] Whatever the wording used during the meetings, Mr. Borkowski clearly understood that the Road Feasibility Study had not been well received, as he reported to Mr. Tappendorf that he was "in the middle of war on [the] road."[748] Indeed, by late February and early March 2014, Mr. Borkowski appeared to shift the focus of his energies to exploring the possibility of a somewhat revised road project, which might involve some form of integration of the Rasia-CCCC project into the broader ADB-financed NSRC road program.[749] In mid-March 2014, Mr. Borkowski acknowledged that this would require modifications to the existing Road Feasibility Study, including to the "recommended alignment of the road project to the standards of the" NSRC.[750]

502. In the Tribunal's view, these exchanges do not point contractually to the absence of Government comment of the original Road Feasibility Study, leading to that study being "deemed" accepted by Rasia pursuant to Section 20.4 of the Road Concession.[751] Rather, the evidence is more consistent with Rasia considering the Government's objections and undertaking negotiations about "such reasonable measures, which may make the Project feasible,"[752] pursuant to Section 20.4 of the Road Concession. In these circumstances, the Road Concession simply imposed an obligation to

[744] C-119, Email from Mr. J. Borkowski to Mr. G. Grigoryan (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), 7 October 2013.

[745] C-334, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 25 October 2013.

[746] *See supra* ¶¶ 180-181.

[747] *See supra* ¶¶ 204-205.

[748] CT-6, Email from Mr. J. Borkowski to Mr. C. Tappendorf, 19 February 2014.

[749] *See supra* ¶¶ 208-209.

[750] R-19, Email from Mr. J. Borkowski to Minister G. Beglaryan, 20 March 2014 (attaching Letter from Mr. D. Dole to Mr. J. Borkowski, 18 March 2014, and Draft Memorandum of Understanding between Armenia and CCCC); C-239, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 21 March 2014 (attaching Letter from Mr. J. Borkowski to Minister G. Beglaryan).

[751] C-2, Road Concession, Section 20.4.

[752] *Id*.

negotiate in good faith,[753] not an obligation to implement the Road Feasibility Study in the form proposed.

(ii) The Road Feasibility Study differed materially from that agreed

503. This conclusion is particularly warranted, given the content of the Road Feasibility Study, which differed materially from that agreed in the Road Concession. In several respects, Rasia failed to propose a Road Project which complied with the core object of the Road Concession. As discussed further below, that object was to develop two roads in Southern Armenia, one of which – the new "High Speed Road" mentioned in the title of the agreement – would be capable of revenue generation through tolls, to differentiate it from more traditional government-funded road projects. Yet the Road Feasibility Study departed significantly from this concept.

504. First, the Road Concession clearly envisioned a two-road scheme. Section 3, entitled "Grant of Concession," used two separate subparagraphs to describe these two roads. First, Section 3(b) obliged Rasia as Concessionaire to "design" and "build" (*inter alia*) the "Southern Armenia High Speed Road," while Section 3(e) obliged Rasia to "rehabilitate … the existing toll free road" within a budget that was separately defined (USD 80 million).[754] While the Road Concession contemplated that some "infrastructure and facilities … currently or formerly used" in existing roads might be "incorporated in the Southern Armenia High Speed Road,"[755] nothing suggested that this provision in Section 3(b) could obviate entirely the plan to deliver to the Government of Armenia, at the end of the Project period, two separate roads. To the contrary, the Road Concession referred in several places to a map included as Schedule B, which was said to "indicatively show[]" the placement of the "Corridor" for the new "High Speed Road," while it also "reflected" the route of the existing road.[756]

505. The Tribunal does not accept the Claimants' contention that the Parties agreed to vary this central feature of the Road Concession during the CCCC site visit in November 2012.[757] While CCCC's site visit report did describe its own understanding that the project was to involve the "upgrading" of an existing road with "new build" only in certain limited bypass sections,[758] this report notably

[753] C-2, Road Concession, Section 20.4.
[754] *Id*., Sections 3(b)(i), (e).
[755] *Id*., Section 3(b)(ii).
[756] *See supra* ¶¶ 135 et seq.
[757] Cl. First PHB ¶ 84.
[758] C-96, CCCC, "Site Visit Report: Southern Armenia High Speed Road Project," November 2012, pp. 1, 6, 7, 12.

failed to reference the Road Terms of Reference that Rasia signed at the conclusion of the site visit, which described the Road Project as "defined in Section 3" of the Road Concession.[759] Nothing in either document reflected an express agreement by the Government to abandon the original two-road scheme in favor of a plan that would result only in one southern road, albeit one with certain bypasses and improvements. They certainly did not reflect agreement on the significant route revision that would result from the one-road construct reflected in the Road Feasibility Study.

506. As shown in the Respondent's illustration reproduced at paragraph 137 above, Schedule B of the Road Concession had set forth a proposed route that (a) started out almost directly south from Sisian and Agitu, significantly to the west of the meandering existing road, and that (b) would cross the existing road (and head east of it) somewhere between Gehi and Kapan, and then (c) continue south to the southern border roughly in parallel with the existing road. This proposed route, as appended to the Road Concession, was entirely distinct from the existing road south of Sisian.[760] The Tribunal accepts that the Road Concession described Schedule B as "indicatively show[ing]" the proposed Corridor for the Road,[761] a phrase which disclaims absolute precision and naturally allows for some variation. Nonetheless, the word "indicative" cannot be divorced of all meaning: it naturally requires that Schedule B provide a *reasonable sign or suggestion* of what will follow.

507. Yet the evidence shows that Mr. Borkowski did not consider himself bound even indicatively by the route shown in Schedule B of the Road Concession. To the contrary, he ultimately admitted during the February Hearing that this route was "pulled out of thin air" for purposes of Schedule B, without his having given any prior consideration to the associated practicalities.[762] That astonishing admission does not, however, change the terms of the Parties' agreement, which had never envisioned a single-road project with a route that largely tracked the existing road. Indeed, the subsequent Road Terms of Reference again referenced the Corridor for the Road Project as the one "indicatively shown on the map" in Schedule B of the Road Concession.[763] Yet the Road Feasibility Study that Rasia ultimately delivered to the Government abandoned the two-road concept in its entirety, proposing only a rehabilitation of the existing road with bypasses in certain discrete areas.

[759] C-98, Road Terms of Reference, Section 2.

[760] Resp. Counter-Mem. p. 32, Figure 5.

[761] C-2, Road Concession, Section 1.

[762] February Tr. Day 2, Hanessian/Borkowski 354:1-12.

[763] C-98, Road Terms of Reference, Section 9.

508. In addition to these significant departures from the Road Concession, the Road Feasibility Study also incorporated technical criteria which dramatically departed from the concept on which the Parties originally had agreed. From the outset (as reflected in the Framework Agreement), the object for Armenia was to grant a concession which would result in a "new high speed road."[764] The Road Concession contained the phrase "High Speed Road" in its title.[765] While the Road Concession did not define the technical parameters to qualify as "High Speed," Rasia and the Government subsequently agreed on certain principles in the Road Terms of Reference, the purpose of which was stated expressly to be to "specify the Feasibility Study Requirements," including "technical … requirements."[766] Among the agreed parameters were that (a) the new road "should meet the requirements: for a Class II category road as defined in Armenia's Construction Norms, and (b) was to have certain maximum gradients and minimum curve radiuses.[767] Yet the Road Feasibility Study as delivered used the specifications matching a Chinese Class II road, rather than the applicable Armenian Class II specifications, and in several respects significantly departed from the maximum gradients and minimum curve radiuses on which the Parties had agreed.[768] The result was a proposed design speed of 40-60 km/hour depending on terrain, rather than the 90-100 km/hour design speed that the Parties had jointly referenced in the Road Terms of Reference.[769]

509. The Claimants maintain that these technical objections to the Road Feasibility Study were manufactured *post-hoc* for purposes of the arbitration.[770] That argument is belied by the record, which demonstrates that the Government had concluded by 1 April 2014 that the Road Feasibility Study "is inefficient," proposing a "design speed [of] 60 km/hr and 40 km/h … as well as … horizontal curves with small radius and large longitudinal slopes."[771] This view was shared with the ADB, with which both Mr. Borkowski and Mr. Beglaryan were separately in touch in late March and early April 2014, in connection with Mr. Borkowski's own proposal that the Parties

[764] C-52, Framework Agreement, p. 1.

[765] C-2, Road Concession, p. 1.

[766] C-98, Road Terms of Reference, Section 2.

[767] *Id*.

[768] For example, the Road Terms of Reference had referenced a maximum vertical/longitudinal gradient of 4%, but the Road Feasibility Study proposed a 6.9% gradient. Similarly, the Road Terms of Reference had indicated a minimum curve radius of 600 meters, but the Road Feasibility Study included curves with a tight 45 degree radius, resulting in what colloquially could be described as "hairpin turns" and "switchbacks." *Cf.* C-98, Road Terms of Reference, Section 10 *with* C-122, Road Feasibility Study, p. 9; Harrison Report, 23 July 2020, ¶¶ 5.7.2, 5.7.23.

[769] C-122, Road Feasibility Study, p. 9; April Tr. Day 1, Hanessian/Harrison, 1666:3-22; *see also* Resp. First PHB ¶¶ 148-149 (chart displaying the relevant technical differences).

[770] Cl. First PHB ¶¶ 115, 121.

[771] C-294, Letter from Minister G. Beglaryan to Mr. D. Dole, ADB, 1 April 2014.

consider a modified deal under which Rasia and CCCC might help implement an ADB-supported southern tranche of the NSRC, with appropriate modifications to the Road Feasibility Study. On 16 June 2014, the Government wrote directly to Mr. Borkowski, emphasizing technical concerns along the same lines as Mr. Beglaryan's 1 April 2014 letter to the ADB.[772]

510. Finally, and perhaps most importantly, the project described in the Road Feasibility Study departed dramatically from the Road Concession in terms of the funding model. The Claimants suggest that the Parties had always left open the possibility that the Road Project might have to be 100% Government-funded, first by providing in the Framework Agreement that "the terms applicable to the high speed road … *may* include (1) road availability payments from the Ministry of Transport and Communications, *and/or* (ii) tolls,"[773] and second by providing in the Road Concession that construction would commence only after Rasia and the Government reached agreement "regarding the payment of availability payments by the Government to the Concessionaire," with the proviso that "such availability payments when combined with tolls charged by the Concessionaire" would be sufficient to cover the costs of the road, including financing costs and return on equity.[774] In the Tribunal's view, this interpretation is incorrect. As a threshold point, the Framework Agreement was expressly terminated upon execution of the Concessions,[775] so the "and/or" formulation adopted in it did not continue to be the operative contractual language. As for Section 9(b) of the Road Concession, this must be read in the context of other provisions of the Road Concession, and in the broader context of the transaction. In that context, the Section cannot reasonably be read as authorizing Rasia to propose a project to be entirely funded by Government payments.

511. It must be recalled, as a start, that before Armenia ever entered into discussions with Rasia, it had initially contemplated financing the North-South road development on the basis of loan facilities from international development banks, including the ADB. In May 2010, a consultant for the ADB (PADECO) suggested that Armenia consider a private-partnership model to finance Tranche 4, to limit Armenia's financial exposure and its need to borrow so much from development banks.[776] This provides useful background to understand why Rasia's eventual proposal to Armenia must have appeared both refreshing and appealing. That proposal rested on the central plank, described in Section 3 of the Road Concession, that Rasia would "at its *own cost* and risk … implement from

[772] R-26, Letter from A. Arakelyan to Mr. J. Borkowski, 16 June 2014.
[773] C-52, Framework Agreement, ¶ 3(m) (emphasis added).
[774] C-2, Road Concession, Section 9(b).
[775] C-52, Framework Agreement, ¶ 11.
[776] *See supra* ¶ 102.

its own funds and attracted Project Financing," the two-road Road Project described therein.[777] The preliminary estimate of Rasia's "budget for constructing the new high speed road" was stated to be "no less than USD 1.1 billion."[778] Although Mr. Borkowski later admitted that "this was a number pulled out of thin air,"[779] there is no evidence that he disclosed that fact to Armenia. The use of a number of that magnitude, together with language referring to Rasia's "own cost" and implementation from "its own funds" (together with project financing), clearly could be expected to connote something other than ultimate Government financing of the entire Road Project.

512. Obviously, both Rasia and whichever project financiers Rasia arranged to advance these significant funds would expect to be paid back eventually, with an appropriate return. But the Road Concession is replete with indications that at least some of this pay-back was expected to come from revenue that the new high speed road itself would generate. It makes no sense to use the term "revenue," in terms of the road, unless some form of tolling was implicit in the agreement.

513. The notion of the new High Speed Road generating revenue, particularly from the use of tolling, is reflected in numerous provisions of the Road Concession. This includes Section 3(f), which anticipated that Rasia would pay concession fees to the Government, and Section 4, which described such fees as fixed for the first 10 years but thereafter variable, based on a percentage of the "*annual gross revenue earned*" from the Road operation.[780] Obviously, if the Road was not expected to generate revenue, this provision makes no sense whatsoever; as Mr. Borkowski conceded on cross-examination, there is no reason the Parties would contract for Rasia to pay concession fees back to the Government out of funds the Government had advanced in their entirety in the first place.[781]

514. Next, as discussed above, Section 9(b) of the Concession Agreement contemplated a later agreement on the amount of Government availability payments that would be necessary, "*when combined with tolls* charged by the Concessionaire," to allow repayment of debt with interest and a sufficient return on equity.[782] Nothing in this phrasing suggests that it was optional whether to use tolls at all. That would render without purpose Section 18's requirement that the Road

[777] C-2, Road Concession, Section 3(b) (emphasis added).
[778] *Id.*, Preamble.
[779] February Tr. Day 2, Hanessian/Borkowski 354:1-12.
[780] C-2, Road Concession, Sections 3(f), 4 (emphasis added).
[781] February Tr. Day 2, Kalicki/Borkowski, 364:2-11.
[782] C-2, Road Concession, Section 9(b) (emphasis added).

Feasibility Study take into account the World Bank's environmental, health and safety guidelines for "toll roads."[783] It would also be inconsistent with Section 9(i) of the Concession Agreement, which predicated moving forward on a precondition that financing agreements would be "sufficient" for Rasia to operate and maintain the road "until such time as it *generates income* sufficient to meet its obligations as they become due ('Project Financing')."[784] In other words, the notion that the road would "generate[] income" at least to some extent was baked into the Road Concession's definition of Project Financing.

515. The Tribunal also observes that Section 39(c) of the Road Concession granted Rasia the discretion to "fix all tolls," provided that passenger vehicle tolls would be fixed at half of that of commercial vehicles.[785] The fact that Rasia had the freedom to set the *level* of tolls underscores that the Road Project ultimately was to be at its own cost and risk; it could decide whether revenue would be best generated by higher toll levels that might result in lower traffic volume, or by lower toll levels that might encourage higher traffic volume. But entrusting Rasia with these supply-and-demand considerations with respect to toll levels does not imply that Rasia could decide unilaterally to dispense with tolls in their entirety, and thereby with the notion of revenue generation, leaving the Government to bear the full burden of road construction and maintenance.

516. Claimants note that Section 9(b), which refers to an eventual agreement between the Parties on the use of availability payments in combination with tolls, was classified in Section 11.4 as a "[c]ondition precedent … for the benefit of the Concessionaire."[786] From this language, the Claimants conclude that Rasia was free unilaterally to decide to waive any use of tolls.[787] Of course, this argument is inconsistent with the fact that Section 9(i), which refers to the road eventually becoming income-generating, is designated in Section 11.3 as a condition precedent "for the benefit of both Parties."[788] More fundamentally, the Tribunal considers that the overall purpose of Section 11 is to allow a party to waive a benefit it is to receive, but not a burden or cost it is expected to bear. Claimants however seek to use the Section in the opposite way, to waive only a *selected portion* of Section 9(b) (the words "when combined with tolls"), while continuing to insist on the benefit conveyed by another portion of the same section that is directly linked ("availability

[783] C-2, Road Concession, Section 18.
[784] *Id.*, Section 9(i) (emphasis added).
[785] *Id.*, Section 39(c).
[786] *Id.*, Section 11.4.
[787] February Tr. Day 1, McNeil, 29:12-18.
[788] C-2, Road Concession, Section 11.3.

payments … when combined"). Nothing in Section 11 permits a party unilaterally and selectively to edit a particular provision of the Road Concession, in order to alter the balance achieved by the agreed text in a way that is more favorable to its position.

517. As for Claimants' further suggestion that the Parties subsequently agreed during the CCCC site visit to abandon any tolling element,[789] this is belied by the Road Terms of Reference, which Rasia and Armenia signed after CCCC completed its site visit. That agreement provided that the forthcoming Road Feasibility Study would estimate "investment efficiency" for the Road Project, including, *inter alia*, calculations of "Net Present Value (NPV), Internal Rate of Return (IRR), and Payback Period"[790] – terms which, by definition, assume some revenue generation. Mr. Borkowski conceded under cross-examination that all of these provisions dealing with a return on investment would be rendered otiose by an "all availability payments" scheme,[791] which he also conceded was "just another word for the government pays for the road."[792] Yet the Road Feasibility Study did not in the end provide any estimates of "net present value, internal rate of return [or] payback period," precisely because it assumed no revenue generation from the road at all, contrary to the parameters agreed in both the Road Concession and the Road Terms of Reference.

518. For all of these reasons, the Tribunal concludes that the Parties' agreements were predicated on the use of tolls to generate revenue that would be used to defray, at least to some extent, the costs of the Road Project. This is not to say, however, that tolls were ever expected to cover the *full* costs of the Road Project. It seems clear, not least from Section 9(b) of the Road Concession, that the Government was expected to have to cover some portion of the costs as well, through availability payments that would augment the revenues generated by tolling, and which in combination would enable the payback of the financing arranged for the Project. But nothing in the Road Concession or the Road Terms of Reference contemplated that the Road Project would be financed on an "all availability payments" basis, which effectively would shift the full financial burden of the Project from the Concessionaire to the Government. Indeed, without at least some notable revenue generation from tolls, it is unclear what benefits a private financing model would offer Armenia, beyond the development bank financing model it was already exploring through the broader ADB-financed NSRC project.

[789] Cl. Reply ¶¶ 321, 336; February Tr. Day 2, Borkowski, 339:17-23.

[790] C-98, Road Terms of Reference., Section 25.

[791] February Tr. Day 3, Hanessian/Borkowski, 383:13-384:1.

[792] February Tr. Day 2, Hanessian/Borkowski, 358:10-14.

519. In short, notwithstanding the Road Concession's reference to a two road project, involving delivery of a $1.1 billion Armenian Category II toll road and a $80 million rehabilitation of existing roads, undertaken initially at Rasia's "own cost" with the expectation that at least some of those costs would be reimbursed by tolls, Rasia's Road Feasibility Study proposed a much smaller ($690 million) single-road project, entailing a rehabilitation of the existing road (35% of the cost) with certain new bypasses (65% of the cost),[793] to be financed in its entirety by the Armenian Government. This was a material departure from the terms of the Road Concession.

(iii) Armenia had no duty to accept the Road Project as re-envisioned

520. Given that the project described in the Road Feasibility Agreement differed materially from that which had been described in the Concession Agreement and Road Terms of Reference, the Respondent had no obligation to accept the Road Project as now re-envisioned.

521. As discussed above, the Road Concession provided, in Section 9(b), that construction could commence after "the following condition[] has been satisfied or waived": an "Agreement between the Government and the Concessionaire" regarding the applicable combination of availability payments and anticipated toll revenue that would cover project costs.[794] Implicit in this wording is the possibility that the parties might not arrive at such an agreement. There has been no evidence adduced as to whether Armenian law recognizes the concept of an "agreement to agree," but even if the clause could be read to amount to such, it cannot be read to oblige the Government to agree to a financial structure that involved *no combination at all* of the two elements, but solely of availability payments without any revenue generation from tolls. To accept such an argument would be to turn the financing structure of the Road Concession Agreement on its head, negating among other things the Agreement's provision on a "variable concession fee" to be based on the annual gross revenue earned by operation of the road. Other clauses of the Agreement, discussed above, would likewise have to be ignored.

522. The Claimants concede that the Concession Agreement would have had to be amended to reflect the significant changes in the Project that Rasia proposed.[795] They also concede that the

[793] April Tr. Day 1, Harrison, 1608:4-10 (providing the 65% and 35% allocation).

[794] C-2, Road Concession, Section 9(b).

[795] Cl. First PHB ¶ 84 (contending that the "one-road solution," which Claimants say was jointly agreed during the November 2012 site visit, "would likely have been the subject of an Amendment to the Concession Agreement …").

Government was not legally obliged to accept proposed amendments to the Agreement.[796] In fact, Mr. Borkowski's conduct *vis-à-vis* the Government's own proposed changes to the Railway Concession Agreement (discussed further below) showed that any amendment to either agreement required the consent of both Parties.[797]

523. In sum, it was *open* to the Government to agree to the major changes wrought by the Road Feasibility Study (two roads rather than one, Chinese Class II speeds rather than Armenian Class II speeds, and the abandonment of tolling). But the Government was not *obliged* to do so. The Government was thus within its rights to decline the proposal to proceed on the new basis Rasia proposed. Its decision not to accept the Road Feasibility Study on the terms proposed by the Claimants did not constitute a breach of contract.

524. The Claimants nonetheless complain that the Government refused to "constitute an interagency working group to review the Road Feasibility Study," as it had done for the Railway Feasibility Study, and declined to "provide a single technical comment" during February 2014.[798] In the Claimants' view, this constituted a breach of the Government's obligation under Sections 38 and 74 of the Road Concession to "cooperate with the Concessionaire … in carrying out the Project," and to "do or cause the doing of all things reasonably required to give full effect to this Agreement."[799] The Tribunal disagrees.

525. First, as a legal matter, the Road Concession made no reference to (much less, imposed an obligation regarding) the establishment of an interagency working group. Moreover, it had always envisioned a possibility that the Government would not provide timely feedback on the Road Feasibility Study. It provided specific consequences for such a contingency, namely that absent Government comment for Rasia to address in a further iteration, the Study would be deemed accepted by Rasia in its present form.[800] Nothing in the Road Concession suggests that this

[796] February Tr. Day 3, Hanessian/Borkowski, 405:7-13 (Mr. Borkowski agreeing that the Government was under no obligation to amend the Road Concession to provide for one free road in lieu of the two-road scheme initially described).

[797] C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014 (criticizing the Government's proposals and stating that these "proposed amendments cannot be accepted by Rasia FZE," while indicating that Rasia might propose amendments of its own in future).

[798] Cl. First PHB ¶¶ 24, 65, 74-76.

[799] *Id*. ¶ 66; C-2, Road Concession, Sections 38 and 74.

[800] C-2, Road Concession, Sections 20.2 and 20.3.

contractually anticipated scenario would itself constitute a breach of other provisions in the contract.

526. Second, as a factual matter, the Tribunal has found that the Government did react to Rasia's abandonment of the key concept of a toll road – the most basic principle of the Road Feasibility Study – as soon as Rasia informed it of that proposal in October 2013. The Government voiced "objections" immediately to that revision, and indicated that it threatened the continued viability of the Project.[801] The Government voiced similar objections during meetings in February 2014, following Rasia's delivery of the final Road Feasibility Study,[802] and Mr. Borkowski clearly understood the critical nature of the Government's concerns, as he reported to Mr. Tappendorf that he was "in the middle of war on [the] road."[803] In these circumstances, with the concept central to the Road Project cast in doubt, the Government was not obligated to take further steps to evaluate the Road Feasibility Study until such time as Rasia reverted with a Study that matched the core object of the Road Concession. The Claimant's re-interpretation of the Road Project was so distant from what had been agreed in the Road Concession that the Government was entitled to say so in October 2013 and February 2014, and to decline to proceed further.

(iv) Counterproposals and disinterest in negotiations are not a breach

527. The Claimants also contend that the Respondent breached the Road Concession when Minister Beglaryan purportedly declared, in October 2013, that the Government was unwilling to make any availability payments at all.[804] Any such declaration must be seen, however, in the context of Mr. Borkowski first having informed Minister Beglaryan that Rasia was abandoning the notion of any tolling to generate revenue, meaning it expected the Government to bear the full costs of the Road Project. It is understandable that when confronted with Rasia's starkly revised approach, the Minister reacted correspondingly, denying any interest in the Government's financing the revised Road Project. It is also understandable that when Mr. Borkowski attempted to push his re-interpreted version of the Road Project at the February 2014 meeting in Yerevan, without any element of tolling and now involving a single-road rather than a two-road project, his efforts were rebuffed.[805]

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[801] *See supra* ¶¶ 180-181.

[802] *See supra* ¶¶ 204-205.

[803] CT-6, Email from Mr. J. Borkowski to Mr. C. Tappendorf, 19 February 2014.

[804] Cl. First PHB ¶¶ 24, 65, 67.

[805] February Tr., Day 6, McNeill/Arakelyan, 1031:25-1032:23.

528. The same point applies to the Claimants' complaint that the Respondent refused to sign a draft MOU by which Armenia and CCCC would seek to integrate CCCC's proposed single road into the broader NSRC initiative. As Mr. Borkowski himself described this proposal, it would require modification of the existing Road Feasibility Study and its proposed road alignment.[806] This simply underscores that the project as proposed by Rasia in that Study had been materially adjusted in a manner that was inconsistent with the terms of the Concession Agreement, and that the Concession Agreement would have had to be modified further to fit into the NSRC. The Government was not in breach of the Road Concession by declining to pursue the matter further.

(v) Armenia did not effectively terminate the Road Concession

529. From the above analysis, the Tribunal concludes that the Respondent would have been entitled to terminate the Road Concession. The difficulty is that it did not complete the required steps to do so, leaving the Road Concession formally in place, albeit not actively pursued (after a time) by any Party.

530. As previously discussed, a draft decision authorizing contract termination was prepared within the Ministry of Transport in December 2014 and submitted to the Ministry of Justice and the Chief of the Staff of the Government for consideration.[807] But for reasons that remain unexplained, the formal termination decision was never signed or sent to Rasia.[808] Instead, there were certain informal communications about the matter. Mr. Borkowski says he was informed by telephone "on or around 29 December 2014" of the Government's decision to terminate the Road Concession,[809] and on 31 December 2014, he wrote that he was "still waiting for confirmation that the Southern Armenia High Speed Road Concession Agreement has been terminated."[810] Although the Government apparently did not follow up with that confirmation, all participants effectively let the matter go. There were no further communications about the Road Project for 18 months, until Mr. Borkowski sent his Notice of Dispute under the BIT in June 2016.

531. In other words, the Government did not employ the means available to it to protect its interests under the Agreements and Armenian law. This meant that although the evidence shows that the

[806] R-19, Email from Mr. J. Borkowski to Minister G. Beglaryan, 20 March 2014 (attaching Letter from Mr. D. Dole to Mr. J. Borkowski, 18 March 2014, and Draft Memorandum of Understanding between Armenia and CCCC).

[807] R-31, Letter from Mr. G. Beglaryan to Mr. D. Harutyunyan, 5 December 2014 (attaching Draft Decision on Making Amendments to the Decision of the Government of the Republic of Armenia No. 982-AG of 2 August 2012).

[808] First Arakelyan Statement ¶¶ 49-50; Resp. First PHB ¶ 155.

[809] Second Borkowski Statement ¶ 89.

[810] C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014.

Road Project was understood practically to be at an end, it was open *as a matter of law* for the Claimants to contend that the Road Concession was never terminated. The Claimants' contention in this respect was aided by the Minister of Justice's affirmation, during settlement meetings, that both Concessions remained in force as of July 2017.[811]

532. The Tribunal is not persuaded by the Respondent's contention that, notwithstanding the Minister of Justice's statement in July 2017, the Road Concession should be treated as having been terminated by agreement of the Parties in February 2014.[812] Under Article 466 of Armenia's Civil Code, a contract may indeed be terminated "upon the agreement of parties, unless otherwise provided for by law or the contract."[813] The contract in this case however expressly set out the Parties' agreement regarding rights of termination. It provided that the Government could terminate the Road Concession either: (a) for Rasia's breach of the Government's rights of first refusal or other obligations related to changes in "Control of Concessionaire" (Section 8.3); (b) "[u]pon occurrence of a Concessionaire Termination Event" (Section 48), or "based on negative result of feasibility study" (Section 59.1).[814] It is not contended that either of the "Control of Concessionaire" or "Concessionaire Termination Events" occurred.[815] As for Section 59.1, this provided the Government with a right to terminate the Road Concession if Rasia "ha[d] not accepted the Feasibility Study" within two years after commencement of the Concession, but only upon issuance of a notice.[816] The same is true of a "Concessionaire Event of Default," addressed in Section 59.2; this is defined as occurring only when Rasia is in "material breach of its obligations" *and* such material breach continues for 30 … days after written notice thereof from the Government."[817] In other words, the Parties agreed that the Government was required to provide notice of termination in order to activate its termination rights.

533. The Tribunal does not accept that the Government provided any such notice of termination in February 2014. While it certainly communicated its objections to the Road Feasibility Study, this is not the same as declaring the Road Concession itself to be at an end. Indeed, the Government

[811] C-318, Transcript of 3 July 2017 Meeting, 3 July 2017, pp. 5, 7.

[812] Resp. First PHB ¶ 236.

[813] RL-1, Armenian Civil Code (excerpts), 5 May 1998, Article 466.

[814] C-2, Road Concession, Section 47(e).

[815] The Road Concession defined a "Concessionaire Termination Event" as meaning Rasia's inability to pay debts, the appointment of a receiver, its entry into bankruptcy or insolvency, or its taking of a decision to wind-up its affairs. *See id*. p. 5.

[816] *Id*. Section 59.1. The same is true of a "Concessionaire Event of Default," addressed in Section 59.2.

[817] *Id*., p. 5.

appeared contemporaneously to understand as much, since in December 2014, it commenced the internal processes required to approve issuance of a formal notice of termination. That the Government did so in December 2014 (while ultimately not completing that process) is obviously inconsistent with the Respondent's contention now that the Parties had already terminated the Road Concession by agreement ten months earlier, in February 2014.

534. As for the oral discussions in December 2014, Mr. Borkowski's letter of 31 December 2014 stated that "Rasia FZE is still waiting for confirmation that the [Road Concession] has been terminated" (using the past tense). This certainly reflects his understanding that the Government was not supporting the revised Project, but it also constitutes a request for written affirmation by the Government of whatever message had been conveyed orally. It is possible that Mr. Borkowski was told that documentation of termination was being prepared at this time within the Government. In any event, no confirmation of the sort requested was ever provided. As noted above, the Minister of Justice later stated in settlement discussions that the Road Concession remained in force.

535. In short, there is no evidence of any effective termination of the Road Concession in 2014, or for that matter, thereafter. The most that can be said is that it is to be inferred from the Parties' conduct that they tacitly understood the Project not to be moving forward,[818] without either Party taking the initiative required formally to terminate it.

(vi) Armenia breached the "No Grant" term of the Road Concession

536. Given that the Road Concession was not formally terminated, the Government remained obligated to respect the exclusivity rights granted to Rasia under Section 15, entitled "No Grant" (and falling within Article V, entitled "Competing Transportation Systems"). The operative prohibition in this Section was as follows:

> [T]he Government shall not at any time grant to any person, including any State Authority, any concession or other right or privilege to finance, design, construct, possess, commission, rehabilitate, operate and/or maintain any road at the southern border of Armenia or connecting with Meghri or territories adjacent to the southern border of Armenia, including any road not in service on the date of signing this Agreement….

[818] Clearly, the Road Project did not proceed beyond the "feasibility study period" described in the Road Concession. Section 12(a) of the Concession states that such period would end upon the occurrence of two events: "final acceptance of the Feasibility Study by the Concessionaire," and "confirmation of the Corridor by the Government." *See* C-2, Road Concession, Section 12(a). It is common ground that in contrast to the Railway Feasibility Study, Rasia did not formally accept the Road Feasibility Study; Mr. Borkowski conceded this. February Tr., Day 3, Hanessian/Borkowski, 411:21-412:7. Nor, for its part, did the Government ever confirm the proposed Road Corridor.

537. Although this provision is broadly worded, it is not so broad as to proscribe exploratory discussions with third parties. The provision proscribes only an actual "grant" of a "concession or other right or privilege." Such rights include, however, rights of finance and rights of design for a road at or adjacent to the southern border of Armenia – two rights that are directly at issue in this case.

538. The Claimants have adduced persuasive evidence that the Government did not respect the exclusivity of the territorial grant. First, on 24 October 2013 – soon after Rasia informed the Government that its re-interpretation of the Road Project was proposed to be undertaken at Armenia's own cost, and the Government voiced its objections – Armenia approved Variation Order No. 5, extending a contract with Egis to perform a feasibility study for the Kajaran to Agarak road section.[819] Egis's services for this feasibility study commenced in February 2014, soon after Rasia's 24 January 2014 delivery of the Road Feasibility Study, which confirmed its no-toll road proposal.[820] The Egis site visit to Armenia was from 21-23 February 2014, towards the end of the February 2014 Yerevan Meetings between Rasia, the Government and CCCC to discuss the Road Feasibility Study.[821] Egis issued its feasibility study for the Kajaran to Agarak section in April 2014.[822] Agarak is situated on the southern border of Armenia, meaning this study fell within the territorial scope of Section 15 of the Road Concession ("any road at the southern border of Armenia or connecting with Meghri or territories adjacent to the southern border of Armenia").

539. It might be debated whether contracting for a feasibility study constitutes a "grant" of a "concession or other right or privilege" within the meaning of Section 15 of the Road Concession, in circumstances in which the Government did not commit to Egis that it would actually implement any of the Egis design suggestions. Arguably, this could be seen as merely another exploratory study, without any grant of legal rights (other than the right to a fee in exchange for the study services). However, given that the Road Concession itself started with a critical feasibility study stage, the Tribunal considers that a contract for a competing feasibility study, intended to generate designs, falls within the spirit of the "no grant" provision.

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[819] C-298, Agreement No. 8 on Consulting Services Contract No. 02-CS-002 between Egis International and North-South Road Corridor Investment Program Implementation Organization (SNCO) – Agent of Ministry of Transport and Communication, 5 February 2014 (attaching Variation Order No. 5).

[820] R-23, Egis International, Feasibility Study for the Southern Section of NS Corridor from Qajaran to Agarak, 15 May 2014, p. 8.

[821] February Tr. Day 6, McNeill/Arakelyan, 1085:5-10.

[822] R-23, Egis International, Feasibility Study for the Southern Section of NS Corridor from Qajaran to Agarak, 15 May 2014, p. 2.

540. In any event, even if there were some ambiguity as to this point, there is no similar ambiguity regarding Armenia's efforts to arrange funding for *construction* of this section of the NSRC road. On 23 May 2014, Armenia formalized its request for US$150 million in funding from the EDB (co-financing with the ADB) for construction of the Kajaran to Agarak section, and the EDB approved this construction loan on 2 July 2014.[823] This constituted a "grant" of a "right or privilege to finance" road work within the territory defined in the Road Concession, in violation of the "No Grant" provision in Section 15.[824]

541. The Respondent's witness, Mr. Arakelyan, contended that such acts did not contravene the intended purpose of the "No Grant" clause, because (in his view) that provision was intended to grant exclusivity only regarding the use of private investment for road development, not international bank loans entailing public debt.[825] But the Road Concession makes no such distinction. Certainly, the definition of Concession Territory in Section 1 does not carve out any exception for NSRC development.

542. In the Tribunal's view, if the Government had formally terminated the Road Concession – as it indeed considered doing in December 2014 – then it could have returned to the international development banks and arranged for the financing and design of an NSRC road in southern Armenia, including in the area over which Rasia had previously been granted exclusive rights. But the Government did not take the formal steps necessary to protect itself against claims arising under the dormant (but not yet terminated) Road Concession. Having moved forward nonetheless with grants of rights to ADB and Egis that were inconsistent with the Road Concession's exclusivity provision, the Government was in breach of that provision.

543. By contrast, it is less clear that Armenia's subsequent January 2015 MOU with CCECC for construction of a 22-kilometer section of the road south of Kajaran,[826] and its March 2015 contract

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[823] C-128, Eurasian Development Bank, "Eurasian Fund for Stabilization and Development – Annual Report 2014," 2014, p. 16.

[824] The Tribunal does not accept the Claimants' contention that a breach occurred earlier, because Armenia had "set in motion" the potential financing of this road section in December 2012. *See* Cl. First PHB ¶ 58. While the ADB had extended financing in January 2013 that *could* be used by Armenia to "undertake feasibility and detailed design of Tranche 4," and Armenia notified the ADB in June 2013 that it "*intend[ed]* to request the ADB to take over the construction" of part of a southern road," this was not yet a grant by Armenia of any definitive rights with regard to the financing or design of the southern road. Indeed, the Claimants themselves concede that "[t]he precise road section for which construction funding was sought had not been defined as of December 2012, but would be defined … thereafter based on the results of the feasibility study to be performed by Egis," and that the route was not in fact defined until October 2013. *Id.*, ¶¶ 59-60.

[825] February Tr. Day 6, Kalicki/Arakelyan, 1014:14-18.

[826] AA-5, MoU, Ministry of Transport and CCECC, 30 January 2015.

with Spea Ingegneria Europea for design works of the Artashat to Kajaran road section of Tranche 4,[827] violated Section 15 of the Road Concession. As noted above, the territorial reach of the exclusivity in Section 15 was for roads at or adjacent to the southern border of Armenia. The limited road works addressed in the CCECC MOU and the Spea contract did not approach the southern border.

(vii) Breach does not itself equate to causation of loss

544. For the reasons outlined above, had Rasia brought contract breach claims within three years of their accrual, pursuant to the applicable statute of limitations in Armenian law, the Tribunal would have been prepared to find the Government in breach of Section 15 of the Road Concession. In the absence of a timely claim, however, the only relevance of the Tribunal's findings regarding the Road Concession – as explained in paragraph 472 above – is the extent to which they may inform the analysis of Mr. Borkowski's BIT claims, which are not time-barred. The Tribunal turns to those BIT claims in Section VI.B, after first assessing the Parties' respective contractual performance of the Railway Concession.

545. However, for avoidance of doubt, the Tribunal emphasizes here that a breach of contract (even if timely asserted) does not itself equate to causation of harm. For the reasons elaborated more fully in Sections VI.B.4 and VII, the Tribunal does not consider Claimants to have proven the core causative link they allege, namely that the Respondent's conduct deprived them of the value of their Concession rights by leading Aabar in March 2015 to abandon plans to acquire Rasia, and their "consortium" thereafter to collapse. Accordingly, even if the breach of contract claims were not time-barred, the Tribunal still would not have awarded damages on account of the particular breach (of Section 15 of the Road Concession) that the Tribunal has found.

(2) The Railway Project

a. The Claimants' Position

546. With respect to the Railway Project, the Claimants allege that the Respondent breached the Railway Concession through the following specific alleged acts:

[827] C-299, Contract for Consultant's Services: Time-Based with Lump-Sum Component for North-South Road Corridor Investment Program – Tranche 3 between the Ministry of Transport and Communication of Republic of Armenia and its Agent "Organization for Implementation of North-South Road Corridor Investment Program" (SNCO) and Joint Venture of Spea Ingegneria Europea S.p.A. and IRD Engineering S.r.L.

a. Armenia's "demand" in November 2014 that the Railway Concession be amended to transfer the costs of the Railway Directorate and land acquisition to the Concessionaire;[828]

b. A "smear campaign" by Government officials, through comments published in the Armenian press in February 2015, which criticized Rasia for having a "negative posture" towards the Government, characterized it as the "first obstacle" to a successful Railway Project and blamed Rasia for supposed delays in construction;[829]

c. Minister Beglaryan's meeting with CCECC representatives in Yerevan in March 2015, and meetings in China attended by senior government officials;[830] and

d. Armenia's subsequent requests for proposals and MOUs regarding the Railway, from Chinese companies other than CCCC.[831]

547. The Claimants argue that for its part, Rasia implemented the Railway Concession in accordance with its terms, by (i) constituting a consortium for the purpose of implementing the Railway Project, (ii) establishing the Railway Project's feasibility, which was approved by the Respondent, and (iii) securing a low-cost financing arrangement for the Railway Project that would have driven its implementation to a timely and final completion.[832] The Claimants argue that Armenia never objected to the adequacy of its financial partners' expression of interest to finance the Project, or to Rasia's assurances to Aabar about a future contractual arrangement with Arabtec,[833] which the Claimants say was not inconsistent with its commitment to CCCC that it would be the main EPC contractor. CCCC was never expected to be the sole member of the consortium, the Claimants say, and would have had to hire subcontractors, a process in which Aabar was to be involved. Therefore, the Claimants contend, Aabar proceeded on the assumption that its subsidiary, Arabtec, would be a partner alongside CCCC, sharing in the EPC arrangement.[834]

548. The Claimants reject the Respondent's contention that they were delayed in submitting detailed coordinates for the Railway Project, arguing that such coordinates were not required as part of the

[828] Cl. First PHB ¶¶ 9-11, 251-253.
[829] *Id*. ¶¶ 11, 253, 259.
[830] *Id*. ¶¶ 260, 266-268.
[831] *Id*. ¶ 265.
[832] *Id*. ¶¶ 122–25, 129–30, 135, 167.
[833] Cl. Second PHB ¶¶ 119, 124.
[834] Cl. Reply ¶ 239; Cl. Second PHB ¶¶ 124, 127.

Railway Feasibility Study. The Claimants argue that the routes were bound to change as the design advanced, thereby making it sensible to supply detailed coordinates during the detailed design and engineering phase.[835] The Claimants argue in the alternative that if the Respondent believed Rasia had breached the Railway Concession by failing to provide detailed coordinates, the Respondent failed to exhaust the contractual processes for notification and rectification of an alleged breach, and strictly to follow the provisions relating to termination, as contained in the Railway Concession.[836]

b. The Respondent's Position

549. With respect to the alleged breaches of the Railway Concession, the Respondent first argues that its proposal to amend the Railway Concession to the effect that Rasia would bear the cost of land acquisition did not amount to a breach. The proposed amendment was necessitated by Rasia's delay in providing detailed coordinates for the railway corridor, which impaired the Respondent's ability to plan and secure budget approval for the land acquisition.[837] According to the Respondent, the Claimants' assertion that its proposal to amend the Railway Concession caused Aabar to withdraw is not supported by any evidence on record.[838]

550. Second, the Respondent contends that Ministry of Transport officials were justified in making statements about Rasia's responsibility for delays, given that its delay in providing detailed route coordinates in turn delayed the Respondent's performance of its land acquisition obligation. According to the Respondent, these remarks were in no way suggestive of an intention to terminate the Concessions, as shown by the Government's decision to grant Rasia an extension of time to comply with its obligations. Further, the Respondent argues that its meetings with Chinese officials and its MoU with CCECC concerned broad subjects that were distinct from Rasia's Railway Concession.[839]

551. The Respondent contends that the Claimants brought this case only having failed to secure funding for the Railway Project in the hope of extracting some money from the Respondent. According to the Respondent, the Claimants' attempts to promote the Railway Project were marred by financial

[835] Cl. Second PHB ¶ 113.
[836] *Id*. ¶ 116 (relying on C-1, Railway Concession, Art.1).
[837] Resp. First PHB ¶¶ 180–81.
[838] *Id*. ¶¶ 191–93; Resp. Counter-Mem. ¶¶ 242–43.
[839] Resp. First PHB ¶¶ 205, 214; Resp. Counter-Mem. ¶¶ 159–60, 164–67, 242–43.

difficulties, as well as by their lack of experience, lack of adequate due diligence regarding freight traffic and lack of technical assistance, all of which posed tremendous risks to investors.[840]

552. The Respondent submits that by October 2015, funding from Aabar seemed unlikely. Further, funding from China EximBank was conditioned on construction of the Iranian railway link, and the construction of Iran's portion of the Iranian link was, in turn, conditioned on completion of 30% of the Armenian Railroad.[841] The Respondent argues that Mr. Borkowski's own letter of 14 October 2015 acknowledged that the Claimants' inability to secure funding from China EximBank was due to the unviability of the Iranian link, and not to any act of the Respondent.[842]

553. The Respondent argues that Rasia breached the Railway Concession by its failure to provide, within one year of Rasia's acceptance of the Railway Feasibility Study, (i) coordinates for the railway corridor for the purpose of the Respondent's land acquisition in the corridor, as required under Sections 9(e), 21.1, 21.2 & 22.1 of the Agreement, (ii) letters of interest from financing parties, as required under Section 33 of the Agreement; and (iii) the "design for the construction works," as required under Section 36.2 of the Agreement.[843]

554. The Respondent contends that the Claimants have failed to provide any written evidence of their alleged partners' expression of interest in funding the project, as required by the terms of the Railway Concession. The Respondent argues that Aabar's purported letter of interest fell short of what was required by the Railway Concession and was bereft of details about the financing that would be provided.[844] The Respondent also argues that, even if the Aabar letter were considered to have been sufficient, it ceased to be effective as of March 2015 when Aabar, according to the Claimants' own assertion, allegedly withdrew its interest in the Projects.[845] Further, the Respondent argues that Rasia failed to provide a letter of interest from China EximBank.[846]

555. The Respondent submits that the terms of Rasia's financing arrangement with Aabar were in apparent conflict with those of China EximBank and CCCC. According to the Respondent, Aabar

[840] Resp. First PHB ¶¶ 14–16, 41–47, 123–29; Resp. Counter-Mem. ¶¶ 4, 8, 11, 42.

[841] Resp. First PHB ¶¶ 17, 104, 126–31; Resp. Counter-Mem. ¶ 119.

[842] Resp. First PHB ¶¶ 103, 131 (relying on C-35, Letter from Mr. J. Borkowski to H. Abrahamyan, p. 3).

[843] Resp. First PHB ¶¶ 19–21, 67–72; Resp. Second PHB ¶ 87 (relying on C-1, Railway Concession, Art. VII, Sections 9(e), 21, 22, 33 and 36.2; C-99, Terms of Reference for Feasibility Study of the Southern Armenia Railway, November 2012, p. 6).

[844] Resp. First PHB ¶¶ 80–84; Resp. Second PHB ¶¶ 96–107; Resp. Counter-Mem. ¶¶ 130–35.

[845] Resp. First PHB ¶¶ 79–80, 93.

[846] *Id*. ¶ 95; Respondent's Second PHB ¶ 90; Resp. Counter-Mem. ¶¶ 130–35.

was expecting all the EPC profits of the Railway Project to be retained by Arabtec, whereas 60% of the financing for the Railway Project was supposedly coming from China EximBank based on Rasia's contract with CCCC, which expressly guaranteed CCCC the exclusive rights to the same EPC contract.[847] The Respondent further contends that there is no evidence on record that Arabtec's involvement was discussed with CCCC, even though Mr. Borkowski represented to Aabar that Arabtec would have a substantial interest in the EPC Contract.[848]

556. The Respondent also contends that, by Mr. Borkowski's own admission, there is no evidence on the record to support his testimony that he proposed an MOU which was essential to the provision of letters of interest by Chinese banks, which the Respondent refused to sign.[849] In the same vein, the Respondent says, the Claimants' assertion that Rasia secured further interest in financing the Railway Project from China Poly with the involvement of CCCC is unsupported by any evidence on the record from either China Poly or CCCC. In addition, the Respondent argues that all new investments from Aabar were frozen when its Chairman, Khadem Abdulahi al-Qubaisi, was removed in early 2015 when he became implicated in an alleged fraud in an unrelated transaction, effectively ending any possibility of Aabar's investment.[850]

557. With respect to the Claimants' failure to provide Railway corridor coordinates, the Respondent argues that Mr. Borkowski's insistence that the provision of detailed coordinates could be deferred until the design and construction phase is contrary to the requirements of Section 21.1 of the Railway Concession, which required the Railway Feasibility Study to be sufficiently detailed as to enable the Respondent to fulfil its contractual obligation to acquire land for the corridor. According to the Respondent, the preliminary coordinates based on the preliminary results of the feasibility study were imprecise, and were approved by the Respondent only based on Mr. Borkowski's agreement to provide the required detailed coordinates shortly after.[851] The Respondent submits that on account of the Claimants' failure to provide detailed coordinates, it could not acquire the land in the corridor within the expected timeframe, despite its good faith extension of time for relevant ministries to act.[852]

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[847] Resp. First PHB ¶¶ 85–86; Resp. Counter-Mem. ¶¶ 139–40.

[848] Resp. First PHB ¶¶ 88–92; Resp. Counter-Mem. ¶ 9.

[849] Resp. First PHB ¶¶ 53(vi), 105; Resp. Counter-Mem. ¶¶ 155–57.

[850] Resp. First PHB ¶¶ 20–21, 93; Resp. Counter-Mem. ¶¶ 6, 149–51.

[851] Resp. First PHB ¶¶ 106, 111–13; Resp. Second PHB, ¶¶ 109–19; Resp. Counter-Mem. ¶¶ 100–03, 120 (relying on C-1, Railway Concession, Section 21.1).

[852] Resp. First PHB ¶¶ 110, 117–18, 121; Resp. Second PHB ¶¶ 136–38.

558. In regard to the Claimants' failure to provide the construction designs, the Respondent submits that the feasibility study period ended on 31 December 2013 pursuant to the Concession Agreement, and that Rasia had failed to submit the required design for construction within that period.[853] In the Respondent's view, Mr. Borkowski's testimony that the requisite designs were submitted along with the Railway Feasibility Study confuses "working designs," which are required to be provided along with the Railway Feasibility Study under Section 9 of the Railway Concession, with "designs for construction works," which were required within a year after the end of the feasibility study under Section 36.2 of the Agreement.[854]

c. The Tribunal's Analysis

559. Before turning to the four specific breaches of the Railway Concession on the part of the Respondent that the Claimants allege, it is necessary to address certain predicate disputes, beginning with the acceptance of the Railway Feasibility Study and the ensuing deadline, under the Railway Concession, for Rasia to provide (and the Government thereafter to confirm) land coordinates for the Railway Corridor. These issues are addressed in the first two sub-sections below, followed by a discussion of the specific acts that are alleged to constitute breaches of the Railway Concession.

(i) Delivery and acceptance of the Railway Feasibility Study

560. As discussed above in connection with the Road Project, the sequence of events under both Concessions began with Rasia's delivery to the Government of a feasibility study "in English together with an Armenian translation."[855] Rasia delivered the English-language Railway Feasibility Study to the Government on 7 October 2013, followed by an Armenian translation on 31 December 2013.[856]

561. Under the contractually defined process, delivery of the Railway Feasibility Study triggered a 30-day period for Government "comments, objections and suggestions," which Rasia was then obligated to consider prior to its providing its own "final acceptance" of the Study.[857] If the Government submitted no comments with the 30-day period, then the Feasibility Study would be

[853] Resp. First PHB ¶¶ 123–24.

[854] *Id*. ¶ 125.

[855] C-1, Railway Concession, Section 20.1.

[856] C-119, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 7 October 2013 (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan); C-127, Email from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2013.

[857] C-1, Railway Concession, Section 20.2.

"deemed" to have been finally accepted by Rasia in the form originally provided.[858] The acceptance date was important under the Railway Concession as it triggered certain subsequent obligations regarding the provision of Corridor coordinates, financing and construction.

562. When Mr. Borkowski first delivered the English-language version of the Railway Feasibility Study on 7 October 2013, he also showed a PowerPoint presentation (sent again by email on 25 October 2013), which described the Railway Feasibility Study as "preliminarily acceptable" to Rasia.[859] This language reflected the terminology in Section 20.1 of the Railway Concession, which described Rasia's submission of the Study to the Government once it was "preliminarily acceptable for the Concessionaire."[860] As noted above, however, Rasia did not submit the Armenian translation until 31 December 2013, which the Railway Concession deems the relevant date for delivery.

563. It is undisputed that the Armenian Government did not provide written comments to Rasia on the Railway Feasibility Study, so according to the strict language of Section 20.4 of the Railway Concession, Rasia could be "deemed" to have finally accepted that Study on 30 January 2014, thirty days from the Government's receipt of the Armenian translation. This is the position advocated by the Respondent,[861] and it accords with Rasia's own contemporary understanding of how the Concession Agreements worked.[862] However, Rasia contends that with respect to the Railway Feasibility Study, the deadline for its final acceptance was tacitly deferred by both Parties, based on the Government's indication that it would be forming a governmental Working Group to provide feedback to Rasia prior to a joint approval of the Railway Feasibility Study.[863]

564. On this issue, Rasia's position is supported by contemporaneous evidence. It includes the minutes of a governmental Working Group meeting on 19 February 2014, which Rasia attended, which reflect a recommendation that the Government approve the Railway Feasibility Study and submit it to the Prime Minister.[864] It is implicit in that recommendation that the Government did not believe its own deadline for considering the Study had yet run, much less that the Study already had been

[858] C-1, Railway Concession, Section 20.4.

[859] C-334, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 25 October 2013.

[860] C-1, Railway Concession, Section 20.1.

[861] Resp. First PHB ¶ 74.

[862] R-20, Email from Mr. J. Borkowski to A. Arakelyan and G. Grigoryan, 21 April 2014 (noting that the Concession Agreements "call for automatic adoption" of the feasibility studies).

[863] February Tr. Day 4, Borkowski, 614:6-11.

[864] R-14, Minutes of the session of the inter-departmental working group established for the purpose of examining the proposed alignment of the Southern Railway of Armenia, 19 February 2014.

"deemed" finally accepted by Rasia in the absence of Government feedback. The point is even clearer from subsequent evidence. On 3 March 2014 Mr. Borkowski provided Armenia with a "Roadmap" document that referred to a "Feasibility Study Deadline" of 30 June 2014, as well as a forthcoming "Government Decree – Feasibility Study/Alignment."[865] Ten days later, on 13 March 2014, the Government promulgated a Decree approving an action plan which anticipated that the Railway Feasibility Study would be jointly approved by the Government and Rasia in the second quarter of 2014.[866] On 21 March 2014, Mr. Borkowski wrote that Rasia was looking forward to receiving the Government decrees "reflecting the adoption of the feasibility study."[867] These communications suggest that neither Rasia nor the Government believed, at the time, that the Study had already been "deemed" accepted at the end of January 2014, as the Respondent now insists for purposes of this arbitration. To the contrary, they support Rasia's contention of a tacit agreement to extend the Government's timetable to comment, and accordingly Rasia's obligation to consider those comments prior to providing its own "final acceptance" of the Study, until the end of June 2014.[868]

565. During the second quarter of 2014, the Government conveyed specific concerns to Rasia about the inadequacy of the land coordinates reflected in the Railway Feasibility Study. That feedback qualifies as Government "comments, objections and suggestions," within the meaning of Section 20.2 of the Railway Concession, and therefore Rasia was obligated to consider it prior to its providing its own "final acceptance" of the Study.[869] Rasia did take the Government's questions back to CCCC, and conveyed CCCC's responses back to the Government, as discussed in Section III.H.2 above. Nonetheless, Mr. Borkowski insisted that "[t]he government must adopt the FS" in its present form.[870]

566. The Government did not issue the promised decree by the end of the second quarter of 2014. On 20 July 2014, without waiting for it further, Rasia wrote formally and "finally [to] accept" the Railway Feasibility Study. Rasia's letter stated that it "look[s] forward to receiving the government

[865] R-16, email from Mr. J. Borkowski to Mr. G. Grigoryan, 3 March 2014.

[866] R-17, Decision of the Government of the Republic of Armenia, No. 305-N, On Approving Plan-Schedule of 2014-2017 Measures Guaranteeing Implementation of National Strategy Provisions on Ensuring the Transport Security of the Republic of Armenia, 13 March 2014.

[867] C-265, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 21 March 2014 (attaching Letter from Mr. J. Borkowski to Minister G. Beglaryan).

[868] C-1, Railway Concession, Section 20.2.

[869] *Id*.

[870] C-340, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 5 May 2014; R-24, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 23 May 2014.

decrees … that will officially adopt" the Railway Feasibility Study.[871] Again, nothing in the Government's response suggested that it believed Rasia already had been "deemed" to have accepted the Feasibility Study back in late January 2014 (the Respondent's position in this arbitration). To the contrary, on 7 August 2014, Armenia promulgated its Protocol 33-26, which approved the Railway Feasibility Study from its perspective.[872] Minister Beglaryan formally communicated this approval to Mr. Borkowski on 19 August 2014.[873]

567. Based on this sequence of events, the Tribunal accepts that the relevant date of Rasia's final acceptance of the Railway Feasibility Study was 20 July 2014, after a tacit agreement extended the deadline to 30 June 2014 for the Government to submit comments and Rasia to consider them. The next section examines the implications of Rasia's acceptance date for next steps under the Railway Concession, including, in particular, with respect to Corridor coordinates.[874]

(ii) Rasia's failure to provide sufficient Corridor coordinates

568. Under the Railway Concession, several important deadlines run from the Concessionaire's final acceptance of the Railway Feasibility Study.

569. Notably, the Railway Feasibility Study was to have "reflect[ed] the territory" in respect of which Rasia was to have right of use for purposes of the Railway.[875] On that predicate, under Section 21 of the Railway Concession, the Government had 90 days from Rasia's final acceptance of the Railway to "confirm the Corridor and … recognize the exclusive prevailing public interest in respect of the lands and immovables in the Corridor."[876] This in turn triggered a duty for the Government to acquire all lands and immovables within the Corridor, "within a reasonably short period." While the period for land acquisition was not specifically defined, it was described as required "on a timely basis so as not to delay the commencement of construction."[877] Section 9(g) in turn required Armenia to grant Rasia "the rights to the Corridor" as a precondition to

[871] C-141, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 20 July 2014.

[872] C-288, Protocol Decree 33/-26 on Approving the Preliminary Alignment and the Feasibility Study of the Southern Armenia Railway Construction (Unofficial English Translation and Armenian Original), 7 August 2014.

[873] C-143, Letter from Minister G. Beglaryan, to Mr. J. Borkowski, 19 August 2014.

[874] The implications for a second set of deadlines, related to confirmation of the availability of outside finance, are discussed separately in Section VI.A.2.

[875] C-1, Railway Concession, Section 9(e).

[876] *Id.*, Section 21.

[877] *Id*., Section 22.1.

construction, which logically meant the Government first had to be able to identify the Corridor and acquire the lands.[878]

570. Moreover, the construction process had its own deadline, with Rasia required to supply construction designs to the Government within one year of its final acceptance of the Feasibility Study.[879] Logically, the preparation of construction designs would require knowledge, in advance, of the specific route and terrain over which the Railway would be constructed. This provides further context to the Railway Concession's requirement that the Corridor would be reflected in the Railway Feasibility Study, and that the Corridor would be confirmed by the Government within 90 days of Rasia's final acceptance of that Study.

571. The evidence suggests that Rasia itself originally expected the Railway Feasibility Study to contain detailed Corridor coordinates. First, on 31 July 2012, three days after the Concession Agreements were signed, Rasia informed the Government that it was inviting "world class contractors … to develop the engineering designs in parallel with the feasibility study," precisely because deferring engineering until "after completing the feasibility study … could substantially alter … corridor location, and other primary project attributes."[880]

572. Second, in September 2013, when Rasia, CCCC and Government representatives met in Dalian to discuss the preliminary results of CCCC's work, Mr. Borkowski presented a slide indicating his expectation that the Railway Feasibility Study would be submitted to the Government in the fourth quarter of 2013, and that in the next quarter (*i.e.,* the first quarter of 2014), the Government not only would "review and confirm [the] corridor," but also would "assemble and transfer land to Southern Armenia Railway for use."[881] Obviously, land could not be acquired by the Government until the Corridor coordinates were specified in detail.

573. Third, after Mr. Borkowski learned from CCCC in March 2014 – in response to the Government's request for more detailed coordinates – that the Feasibility Study CCCC had prepared set forth only "relative coordinates," and not the "absolute coordinates" that ultimately would be needed for

[878] C-1, Railway Concession, Section 9(g).

[879] *Id*., Section 22.1. Within the same one-year period, Rasia was to provide letters of interest from potential investors and finance providers, confirming that they were "prepared to make investments in the equity or quasi-equity of the Concessionaire and provide financing in the aggregate amount … envisaged by the Feasibility Study." *Id.*, Section 33.1.

[880] C-91, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 July 2012.

[881] C-117, "Southern Armenia Railway and High Speed Road – Summary of Key Results From Feasibility Studies" (Rasia), slide 4.

"further design work,"[882] he did not attempt to argue that this was consistent with the letter of the Railway Concession. To the contrary, while Mr. Borkowski admitted to the Government on 21 April 2014 that the final Corridor might vary as much as "a few hundred meters in either direction" from that shown in the Road Feasibility Study, he defended this position on the basis that it was "standard in railway engineering design and construction,"[883] not on any reading of the Railway Concession itself.

574. Indeed, on two subsequent occasions Mr. Borkowski candidly admitted that the Railway Concession might have to be "amended" in order to reflect Rasia's new understanding that precise Corridor coordinates would be provided only at a later date. The first occasion was on 5 May 2014, after Mr. Grigoryan expressed concern that "the coordinates already provided might not be correct as the unofficial viewing showed deviations varying from a few meters to several kilometers." [884] Mr. Borkowski replied that "the government should not begin allocating land" on the basis of the "relative coordinates" included in the Railway Feasibility Study, and suggested that "we should make amendments to the concession agreement based on the actual developments we experience together over time which can never match the anticipated steps in the concession agreement."[885] Mr. Borkowski made the same point on 23 May 2014, recommending against any Government acquisition of land based on the Road Feasibility Study ("because the route scheme and therefore the coordinates are expected to be optimized during the EPC … stage"), and suggesting that "various concession agreement modifications" could be agreed later, including that the land assemblage will take place later following the start of the EPC works."[886]

575. The Tribunal acknowledges the Claimants' argument, supported by expert testimony from both sides,[887] that it is practical and customary to defer route optimization until engineering work is more developed. But that point only reinforces the Tribunal's view that neither Mr. Borkowski, nor the representatives of the Armenian Government, were experienced in major infrastructure projects of this sort. It does not change the terms of what they contractually agreed. That agreement was that the Railway Feasibility Study would "reflect[] the territory" over which Rasia was to have right of

[882] R-94, Email from Mr. B. Weixin to Mr. J. Borkowski, 14 April 2014.

[883] R-20, Email from Mr. J. Borkowski to A. Arakelyan and G. Grigoryan, 21 April 2014.

[884] R-22, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 5 May 2014.

[885] C-340, Email from Mr. J. Borkowski to Mr. G. Grigoryan providing clarification regarding Railway coordinates and requesting that the RA Government adopt the Feasibility Study and macro alignment, 5 May 2014.

[886] R-24, Email from Mr. J. Borkowski to Mr. G. Grigoryan, 23 May 2014.

[887] Harrison Report, ¶ 4.4.7; First Winner Report, ¶ 167.

use for purposes of the Railway, in order that the Government within 90 days could "confirm the Corridor and … recognize the exclusive prevailing public interest in respect of the lands and immovables in the Corridor," taking steps "within a reasonably short period" thereafter to acquire these lands and immovables and make them available for the Railway Project.[888]

576. Rasia did not comply with this agreement, but rather delivered a Railway Feasibility Study in which the land coordinates were imprecise and indicative only. Given the Government's own contractual duties, which included significant land identification, acquisition and transfer obligations on tight deadlines, it is understandable that it was concerned about Rasia's approach, and that it repeatedly pressed Rasia for more precise corridors.

577. Rasia is, however, correct that the Government at the time did not give any formal notification of breach of contract, much less threaten contract termination absent a prompt cure.[889] This left the Government's own contractual obligations still in force. Nonetheless, the Government's disappointment in Rasia's refusal to provide precise coordinates as agreed, and Rasia's candid admission that the alternate approach it intended to follow would require a contract amendment, arguably did set the stage (together with other factors) for events that followed. These issues are discussed below.

(iii) Armenia's November 2014 request for amendments was not a breach

578. Claimants contend that the Government's first breach of contract was its "demand," in November 2014, that the Railway Concession be amended to transfer the cost of land acquisition and of certain Railway Directorate personnel to Rasia.[890] The Tribunal does not agree.

579. First, the Government's proposal was made in the context of Rasia already having indicated its view, in several ways, that contract terms were open to adjustment. They included Rasia's major proposed revision of the Road Concession to eliminate any revenue generation requirement and therefore any concession fee payments to the Government, as discussed in Section VI.A.1 above.

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[888] C-1, Railway Concession, Sections 9(e), 21, 22.1.

[889] Cl. Second PHB ¶ 116. The first evidence of such a legal analysis on the Armenian side was on 14 August 2015, more than a year after Rasia formally accepted the Railway Feasibility Study on 20 July 2014. In an internal Government document, Mr. Shahnazaryan of the Armenian Railway Directorate advised Mr. Arakelyan that Rasia's "failure … to fulfill its obligations" (including not submitting appropriate coordinates, and not submitting construction plans which were required a year after the Feasibility Study) entitled the Government to terminate the Railway Concession. R-130, Letter from Mr. A. Shahnazaryan to Mr. A. Arakelyan, 14 August 2015. There is no evidence that the Government took the steps he advised.

[890] Cl. First PHB ¶¶ 9-11, 251-253.

With respect to the Railway Concession, they also included Rasia's suggestion, discussed above, that the Railway Concession be amended to defer its obligation to supply detailed land coordinates. On 21 November 2014, Armenian officials expressly placed their proposed Concession amendment in the context of Rasia's own prior proposals for the Railway Concession, stating that "[a]s you have mentioned you would like to make some amendments/supplements to the Concession Agreement as well."[891] Mr. Borkowski's 10 December 2014 response rejected Armenia's proposed amendments, but promised that he would soon send Rasia's proposed amendments for the Government's consideration.[892]

580. This context suggests jockeying for position by both sides if contract terms were to be reopened. It does not suggest the presentation of an ultimatum by the Government. There is no evidence that the Government refused to perform any contractual obligations or that it predicated its performance of any existing contract obligations on Rasia's agreement to the suggested new terms. To the contrary, the day after receiving Mr. Borkowski's rejection of the Government's proposed amendments, the Government took steps to extend the time for various bodies to take action with respect to the Railway Project.[893] That is not the conduct of a party which intends to terminate a project.

581. Second, and perhaps for this reason, Rasia never contemporaneously characterized the Government's proposal as a breach. While it did contend on 31 December 2014 that the request "cast a shadow" over the Project, it did not allege that the Government had actually breached any obligations under the Railway Concession. Instead, it simply insisted that "[f]or future reference, any proposed amendments … will generally be proposed by Rasia FZE."[894]

582. Given the adoption by Rasia of the position that it was free to propose contract amendments, it cannot logically contend that it was unlawful for the Government to do so as well. Indeed, Mr.

[891] R-29, Letter from Mr. A. Shahnazaryan to Mr. J. Borkowski, 21 November 2014.

[892] AA4, Email from Mr. J. Borkowski to Mr. A. Shahnazaryan, 10 December 2014.

[893] R-114, Excerpts from the Minutes of the Sitting of Government of Republic of Armenia, On Making Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 17 December 2014.

[894] C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014.

Borkowski conceded during the February Hearing that it was not a breach of contract for either side to make proposals or counterproposals regarding Concession amendments.[895]

583. Third, there is no documentary evidence showing that after Rasia sent its 31 December 2014 letter, the Government made any further attempt to persuade Rasia to amend the Concession Agreement to address the cost allocation issues it had raised in November 2014. The documentary record thus supports Mr. Arakelyan's testimony that "we prepared these amendments, we sent it to him [Mr. Borkowski], had his reaction, and closed the issue."[896] On 26 February 2015, the Government further extended the time to organize the land corridor, given Rasia's position that it was not yet prepared to provide detailed coordinates.[897]

(iv) The February 2015 press articles do not show breach

584. The next plank of the Claimants' alleged contract breach concerns the alleged "smear campaign" in February 2015, consisting of negative comment by Government officials about Rasia in the press.[898] However, the comments attributed to officials in the press articles are likely explained by the disagreement between the Parties about how to proceed on the land assemblage question, for which the Tribunal has found the Respondent had the more accurate interpretation of the Railway Concession's terms. As Mr. Arakelyan explained at the Hearing, the Government was frustrated by Rasia's delay in providing final coordinates, because "without coordinates, we cannot even plan the expenditures for land acquisition," a process which required formal approval of funds from the State budget.[899] As noted above, the Government reacted to the delay by several times extending (through official Protocols and Decrees) the Government's time to engage in the necessary activities regarding the Corridor and to negotiate the way ahead with Rasia. The February 2015 Decree anticipated that these negotiations would be completed by 30 May 2015.[900]

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[895] February Tr. Day 4, Hanessian/Borkowski 688:22-689:5 ("MR HANESSIAN: So they make a proposal, you make a counterproposal, correct? MR BORKOWSKI: Correct. MR HANESSIAN: They are not breaching the Concession Agreement by making a proposal, and you are not breaching the Concession Agreement by making a counterproposal, correct? MR BORKOWSKI: Correct. By proposal, that is correct.").

[896] February Tr. Day 7, Arakelyan, 1329:4-5.

[897] R-124, Excerpt from the Minutes of the Meeting of the Government of the Republic of Armenia, On Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 26 February 2015.

[898] Cl. First PHB ¶¶ 11, 253, 259.

[899] February Tr. Day 7, Arakelyan, 1328:22-1329:3.

[900] R-124, Excerpt from the Minutes of the Meeting of the Government of the Republic of Armenia, On Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 26 February 2015.

585. This provides context for the statements in the press articles which reported on the February 2015 Decree and quoted the Prime Minister and Minister Beglaryan as being frustrated with Rasia's delays in implementing the Project.[901] As a general observation, there are few direct quotes in the articles on which the Claimants rely. The articles and the headlines are written by third parties and cannot themselves be attributed to the State, but in any event, the statements do not demonstrate a campaign to smear Rasia; rather they reflect frustration at the lack of progress being made on a project of national importance.

586. The first article, entitled "*The Prime Minister too has no hope of Iran-Armenia Railway*," stated:

> The terms of building the Southern Railway is postponed again. Today, the Minister of Transport and Communications Gagik Beglaryan said that the terms for accepting respective legal acts on making amendments in the Concession agreement and the list of actions required for building Armenia's Southern Railway (Iran-Armenia railway) is postponed for two months. The Minister talked about it with Prime Minister of Armenia Hovik Abrahamyan at the cabinet session.
>
> Gagik Beglaryan connected postponement for building the railroad by having a negative attitude caused by the concessionaires. He said that their recommendations for amendments to the contract are in the final stage and will be presented additionally. Today, it was decided through negotiating with the concessionaire to submit a proposal to the Government of Armenia until May 30, 2015 regarding the principles and mechanisms of building Armenia's southern railway. In response, Hovik Abrahamyan noted, we hope. Gagik Beglaryan said that they always have hope. "We are not going to live a hundred years on hope," said Hovik Abrahamyan in response.[902]

587. Nothing in these statements amounts to a breach of contract. The article records the Government's frustration at delays, but it adverts to ongoing negotiations of contractual amendments with Rasia and in no way suggests an unwillingness on the Government's part to continue with the Railway Project. In fact, the February 2015 Decree specifically prescribed an extension to 30 May 2015 of the Government's previously set deadlines for meeting *its* side of the obligations to progress the project.[903] That is not consistent with an intention to damage the project.

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[901] C-150, "The Prime Minister too has no Hope of Iran-Armenia Railway" (Aravot), 26 February 2015; C-151, "The First Obstacle of the Iran-Armenia Railway is the Concessionaire of the Armenian Railway" (Aravot), 28 February 2015.

[902] C-150, "The Prime Minister too has no Hope of Iran-Armenia Railway" (Aravot), 26 February 2015.

[903] Mr. Borkowski testified that he did not even know of the February 2015 Decree when it was promulgated (nor did he know of the previous decrees of August and December 2014, which had extended the periods for the Government agencies to comply with Sections 22 and 23 of the Railway Concession), and only learned of these matters during the arbitration. February Tr. Day 3, Hanessian/Borkowski, 502:8-19.

588. The second article, entitled "*The first obstacle the Iran-Armenia railway is the concessionaire of the Armenian railway*," was an interview with an economist, Ashot Yeghiazaryan, evidently not an official of the State, who commented on the ministerial statements about delays. It too is innocuous:

> Today, the Armenian railway concessionaire first of all prevents the construction of the Iran-Armenia railway", such opinion was expressed by economist Ashot Yeghiazaryan in the conversation with Aravot.am, commenting on the Government's yesterday's decision pertaining to the Southern Railway. Minister of Transport and Communications Gagik Beglaryan reported the Prime Minister at the Government session that the terms for accepting respective legal acts on making amendments in the Concession Agreement and the list of Action Plans required for the construction of Southern Railway (Iran-Armenia) of Armenia is delayed for two months. Gagik Beglaryan had associated the delay of the railway construction by having a negative posture on some matters by the concessionaire.
>
> To our question that some politicians are convinced that the Iran-Armenia railroad will never be built and actually, the construction of the railway is a "myth", Ashot Yeghiazaryan assured that it is a non-profitable project for the "South Caucasus Railway", which is the operator of the Armenian railway. "It is a nonprofitable project not only financially, but also requires huge investments, which requires long years of compensation. In addition, Russia's today's concessionaire (sic) is not competitive and it is unable to provide competitive railway services." According to him, no new concessionaire can emerge under these conditions, as railway transport and energy are very important geo-economic infrastructures, with the help of which Russia is able to keep the post-Soviet countries to be dependent. The economist believes that the way to Iran definitely is not beneficial for Russia geoeconomically and geopolitically, because Armenia having alternative routes would mean lessening the dependence.[904]

589. In sum, although the titles of the articles were pessimistic and Rasia was criticized for delay, the articles did not demonstrate any intention by the Government not to comply with the Railway Concession. To the contrary, the thrust of the articles was that the Concessionaire was moving too slowly in implementing the Railway Project. It is overstating the facts to contend that this amounted to a "vicious smear campaign."[905]

590. Finally, it warrants noting on this point that there is no contemporaneous documentary evidence of any complaint by Mr. Borkowski. Indeed, the record of this case contains no correspondence whatsoever from Mr. Borkowski to the Government between 4 January 2015 and 14 October 2015.

591. In sum, the Tribunal sees no basis for finding that the comments in the press amounted to a breach of the Railway Concession. That Agreement required the Government to "cooperate with the

[904] C-151, "The First Obstacle of the Iran-Armenia Railway is the Concessionaire of the Armenian Railway" (Aravot), 28 February 2015.

[905] Cl. First PHB ¶ 11.

Concessionaire … in carrying out the Project," and to let the Concessionaire "carry out its activities without any interference from the Government."[906] It did not bar the Government from complaining, publicly or otherwise, when it believed the Concessionaire was moving too slowly in fulfilling its commitments.

(v) Armenia's March 2015 dealings with CCECC were not a breach

592. Claimants' third plank in alleging a breach of the Railway Concession involves the allegation that in March 2015, "Armenia was directly engaging with CCECC to implement the Railway Project to the exclusion of Rasia and CCCC." Claimants say that the revelation of this alleged direct engagement in March 2015 cast "[t]he final blow to the Projects."[907] The Tribunal turns later to Claimants' case on causation, in the context of Mr. Borkowski's claim that Armenia's conduct expropriated the value of his rights in the Concession.[908] For present purposes, it suffices to explain that the evidence does not support Claimants' case that Armenia breached the Railway Concession in March 2015, by virtue of dealings with CCECC.

593. First, as to the March 2015 meeting in Yerevan between Minister Beglaryan and representatives of CCECC, the press release issued by the Ministry of Transport stated as follows:

> Gagik Beglaryan Receives Representatives of Chinese Company
>
> The RA Minister of Transport and Communication Gagik Beglaryan on March 18 received the Chinese 'CCECC' company representatives headed by the Board Member and Management Director Hao Yijong.
>
> Gagik Beglaryan welcomed the guests and stressed the importance of the Chinese company's visit to Armenia.
>
> At the meeting the Chinese party expressed its interest in the Southern Railway Construction program which has a most important role for the region. Gagik Beglaryan and Hao Yijong discussed the possibility of the Chinese largest company's participation in the implementation of the mentioned program.[909]

594. The press statement is brief and does not lend itself to much in the way of forensic analysis. However, the word "received" seems to support the Respondent's claim that the meeting took place at the request of the Chinese Ambassador. The statement records that CCCC "expressed interest"

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[906] C-1, Railway Concession, Sections 38, 39(a).

[907] Cl. First PHB ¶ 16.

[908] *See* Section VI.B.4 *infra*.

[909] C-20, Ministry of Transport Website: Gagik Beglaryan Receives Representatives of Chinese Company (http://mtcit.am/pages.php?lang=3&id=5831&page_name=news), 18 March 2015, accessed on 11 July 2018.

in participating in the Southern Armenia railway, rather than suggesting that the Ministry entreated it to participate. What can be said is that the parties "discussed the possibility" of CCECC's participation "in the implementation of the mentioned program."[910]

595. The Tribunal considers reasonable the Respondent's testimonial evidence that it received numerous delegations expressing interest in this sort of infrastructure project. Mr. Arakelyan and Mr. Grigoryan both testified that Chinese contractors frequently requested meetings with Ministry officials to discuss possible participation in projects, often at the Ambassador's request.[911] This does not seem implausible, and the Ministry's receiving such visitors does not (on its own) indicate nefarious intent.

596. Second, with respect to the Armenian President's March 2015 visit to China, the Claimants exhibit a speech given at Beijing University. It states at the beginning:

> President Serzh Sarkisian on Friday called for an "active" Chinese involvement in the realization of his government's ambitious plans to build a railway connecting Armenia with neighboring Iran.
>
> Speaking on the third day of his state visit to Beijing, Sarkisian said the 305-kilometer railway could be part of a transnational "Silk Road economic zone" which China would like to set up along a vast geographic area.
>
> "In this regard, Armenia expects an active participation of Chinese companies in the construction of the Armenia-Iran railway," he said in a speech at Peking University.
>
> "That will ensure the region's even development, which is fully in tune with China's 'peace for development' motto." "At the same time, that would ensure China's strong presence in the South Caucasus region and give impetus to bilateral China-Armenia relations," added Sarkisian.[912]

597. Nothing in the President's speech can be construed as evidencing a plan to grant rights to companies in violation of Rasia's Concession. While the President did encourage an "active participation of

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[910] C-20, Ministry of Transport Website: Gagik Beglaryan Receives Representatives of Chinese Company (http://mtcit.am/pages.php?lang=3&id=5831&page_name=news), 18 March 2015, accessed on 11 July 2018.

[911] *See* February Tr. Day 7, Arakelyan, 1295:5-16 ("...CCECC company was one of a huge number of companies which came to Ministry and expressed interest about participation in our big infrastructure projects. So this company was most active and they were interested in participation in tenders for the North-South and another huge road project that we were trying to implement and made some announcement. And during these discussions they also told us that they are very experienced and they are very interested in participation in railway project also."); February Tr. Day 8. Thomas/Grigoryan, 1453:17-1454:4 ("Now I do not recall who initiated the meeting, but usually the Chinese companies visiting Armenia would arrive with the help of the Chinese Embassy, and the Ambassador was a very active individual, and he would usually arrange such meetings. I believe that was one of those cases. That is what I believe, because I don't recall exactly.").

[912] C-155, "Yerevan Expects Chinese Support For Iran-Armenia" (Azatutyun), 27 March 2015.

Chinese companies in the construction of the Armenia-Iran railway," there is no mention of any company by name. Moreover, the reporter covering the speech expressly mentioned both CCCC's feasibility study and Rasia's existing concession, which suggests that certain background information was made available to the press in connection with the remarks. In particular, the reporter stated as follows:

> A Chinese firm, China Communications Construction Company (CCCC), is already involved in the extremely ambitious project, having conducted a feasibility study and recommended a cost-effective route for the rail link. The study was commissioned in 2013 by Rasia FZE, a Dubai-based investment company. The latter had in turn a received a 30-year Armenian government concession to build and manage the 305-kilometer section of the railway that would pass through Armenia.[913]

598. The article then continued, mentioning that Rasia itself had been in discussions with potential Chinese investors:

> Earlier this year, Armenia's Deputy Transport Minister Artur Arakelian said that Rasia has been holding "very active negotiations" with unnamed Chinese investors interested in financing work on the Armenian section, which would cost an estimated $3 billion.
>
> Visiting Yerevan in late January, Iran's Foreign Minister Mohammad Javad Zarif spoke of further progress made towards the construction of the railway. "There have been very good trilateral discussions and good decisions and we hope that [the project] will quickly move forward," Zarif said without elaborating.
>
> According to Sarkisian's press office, the railway project was on the agenda of the Armenian president's talks with Chinese Premier Li Keqiang held on Thursday. The office did not report any concrete agreements to that effect reached by the two men.
>
> Addressing Peking University students and professors, Sarkisian touted Armenia's "dynamically developing friendly relations" with China that were underlined by his joint declaration with Chinese President Xi Jinping adopted on Wednesday. Closer ties with Beijing are "one of the priorities of Armenia's foreign policy," he said.[914]

599. There is no evidence of Rasia's exclusion from the project (in fact it is expressly mentioned as having held "very active negotiations" with "unnamed Chinese investors interested in financing work on the Armenian section"). The focus of the article is on the Iran link and China's interest generally in the project.

600. The Claimants rely on two other documents to demonstrate Armenian dealings with CCECC in March 2015 with respect to the railway. First, as discussed in Section III.H.1, the Ministry undisputedly signed an MoU with CCECC on 31 January 2015 for construction of a 22 kilometer

[913] C-155, "Yerevan Expects Chinese Support For Iran-Armenia" (Azatutyun), 27 March 2015.
[914] *Id.*

road section near Kajaran.[915] The title of the CCECC MOU is "Regarding the Highway Including 4.7 KM Tunnel On the Southern Section of Tranche 4 of North-South Court or of Armenia With Total Length of 22 KM," and the "whereas" clause describes the project as entirely focused on road works:

> MTC has plan to construct the highway including 4.7 km tunnel on the southern section of tranche 4 of Northern-southern court or of Armenia with total length of 22 km (hereafter referred to as the Project) with CCECC.[916]

The only reference to a "railway" in the CCECC MOU is in its description of CCECC as a "Chinese international leading contractor in railway and highway engineering…."[917] This supports the Respondent's contention that the only MOU the Ministry concluded with CCECC at this time was that which related to roadworks and not to any railway work.

601. However, a PowerPoint presentation which appears to have been produced in March 2015, to provide background about Southern Armenian Railway efforts in preparation for the Armenian President's state visit to China,[918] suggests that the CCECC site visit to Armenia in late January and early February 2015 was not simply to explore the road section covered by the CCECC MOU, but also "to explore the South Railway Project."[919] In the absence of any site visit report, it is not possible to determine the extent to which the CCECC delegation may have engaged with Armenian officials about the railway (as opposed to the road) during their visit. Nonetheless, the description of the visit in the March 2015 briefing materials supports the Claimants' contention that the visit did encompass more than just the road works,[920] even though the terms of the MOU are restricted to such works.

602. Even taking this as true, however, it does not demonstrate any breach by Armenia in March 2015 of the "No Grant" provision of the Railway Concession. As discussed in Section VI.A.1 in connection with the Road Concession, the "No Grant" provision in the Railway Concession did not proscribe exploratory discussions with third parties, which is the most that the evidence suggests

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[915] AA-5, MoU, Ministry of Transport and CCECC, 30 January 2015.

[916] *Id*., p. 1.

[917] *Id*., p. 2.

[918] C-306, Presentation, "Construction of the Southern Railway Passing through Armenia's Section of the Silk Road," 2015; Cl. First PHB n. 53.

[919] C-306, Presentation, "Construction of the Southern Railway Passing through Armenia's Section of the Silk Road," 2015, p. 7 ("Between 28 January and 8 February 2015 CCECC had sent a 13-person delegation, to explore the South Railway Project and the tunnel and bridge section of Tranche 4 of the North-South highway.").

[920] Cl. First PHB ¶¶ 260-265.

had occurred with any Chinese company other than CCCC by March 2015. Rather, Section 15 of the Railway Concession (like the equivalent provision in the Roadway Concession) proscribes only an actual "grant" of a "concession or other right or privilege," in this case "to finance, design, construct, possess, commission, rehabilitate, operate and/or maintain any railway" in southern Armenia.[921] Whatever may have been discussed during the CCECC site visit to Armenia in late January or early February, there is no evidence of any such grant of a "concession or other right or privilege" with respect to the railway in March 2015.

603. Nor does the evidence demonstrate a firm intention by the Government in March 2015 to oust Rasia from the Railway Project, even if not actually implemented by a formal "grant" until later. As discussed above, on 26 February 2015 the Government promulgated a Decree extending the time for its agencies to organize the land corridor for Rasia's use in the Railway Project, laying out a schedule for working out a progress plan with Rasia which went to the end of May 2015.[922] In addition, although Mr. Borkowski testified at the February Hearing, for the first time, that Mr. Weixin of CCCC told him, in March 2015, that the PRC Ministry of Commerce had "ring-fenced" the railway work for CCECC (allegedly leading CCCC to withdraw from the project that month),[923] there is no contemporaneous evidence of any such events, much less of Armenian Government commitments or conduct which might have led to them.

604. Indeed, Mr. Borkowski later told Armenian officials that "things were going well until about August" of 2015.[924] As detailed in Section III.H.2 above, he continued throughout this time actively to work on the Iranian link problem, the resolution of which was critical to the success of the Railway Project. These actions are inconsistent with his allegedly learning in March 2015, from Mr. Weixin, that the Armenian Government had entered into some form of understanding with Chinese officials or companies that effectively ousted Rasia or CCCC from the Railway Project. The Tribunal returns to this point later in Section VI.B.4 below, when examining in more detail the Claimants' claim that Armenia's actions culminating in March 2015 were responsible for the failure of the Projects and by extension the expropriation of Rasia's property rights in the Concessions.

[921] C-1, Railway Concession, Section 15.

[922] R-124, Excerpt from the Minutes of the Meeting of the Government of the Republic of Armenia, On Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 26 February 2015.

[923] February Tr., Day 2, Borkowski, 314:9-18.

[924] R-40, Transcript of the Meeting between A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016, p. 4.

605. For the reasons set out above, the Tribunal concludes that the evidence does not support the Claimants' contention that Armenia took steps in March 2015 that breached its contractual obligations under the Railway Concession.

(vi) Armenia's later dealings with CCECC circumvented Rasia

606. By contrast with the March 2015 evidence, the record does demonstrate that Armenia began engaging with CCECC in earnest about the Railway later in 2015.

607. According to Armenian press releases, Minister Beglaryan met with CCECC's chairman in June 2015, during which CCECC "reaffirmed [its] interest and wish" to participate in the Southern Armenia Railway program," "submitted some possible mechanisms for the program financing," "discussed [s]ome issues concerning the railway construction," and "discussed the implementation specialties (*sic*)" of the Southern Railway program.[925] The coverage of these meetings primarily focuses on Armenia's "receiving" the delegation and noting CCECC's expressions of interest, but it does suggest that the Armenian side was beginning to take more seriously the possibility of working with CCECC. In particular, one article describes the Minister as "express[ing] hope that the discussed issues and acquired agreements during that kind of meetings" would contribute to Armenia's infrastructure development.[926] This statement may be seen as dangling to CCECC the possibility that a contractual agreement might emerge from further exploratory discussions.

608. By mid-August 2015, the Ministry of Transport had decided to organize a delegation to visit China in order to discuss railway issues in more detail. It appears that at this time the Ministry remained mindful of its existing Railway Concession with Rasia. But while it knew CCCC had prepared the existing Railway Feasibility Study, it considered itself free to explore proposals for other Chinese companies to become involved, possibly within the rubric of a continuing Rasia concession. Thus, an article dated 13 August 2015, quoting Minister Beglaryan, described the situation as follows,

[925] C-21, Ministry of Transport Website: Gagik Beglaryan Receives "CCECC" Chinese Company Representatives (http://mtcit.am/pages.php?lang=3&page_id=1&id=5935&page_n ame=news), 23 June 2015, accessed on 11 July 2018; *see also* C-161, "CCECC's Wish to Participate in the Construction Project of Armenia's Southern Railway" (Aysor), 23 June 2015; C-162, "Armenia's Minister of Transport Receives CCECC Delegation" (Tert.am), 23 June 2015; C-302, Ministry of Foreign Affairs of the Republic of Armenia, Annual Report Summary of the Asia, Oceania, and Africa Committee, Year 2015, p. 3 (summarizing CCECC visit to Yerevan on 22 June 2015).

[926] C-21, Ministry of Transport Website: Gagik Beglaryan Receives "CCECC" Chinese Company Representatives (http://mtcit.am/pages.php?lang=3&page_id=1&id=5935&page_n ame=news), 23 June 2015, accessed on 11 July 2018.

referring both to the Rasia concession, to CCCC's past work on the project, and to upcoming Government discussions directly with Chinese companies:

> Chinese companies have shown interest in a project calling for the construction of a railway link between Armenia and Iran, Minister of Transport and Communications Gagik Beglaryan told a Cabinet session today. According to him, an Armenian delegation that will visit China soon will discuss this issue in detail with Chinese peers.
>
> "This issue is in our spotlight as it is very important for our country. In September, an Armenian delegation will fly to China, where we will discuss this issue. We have received offers from many Chinese companies, but we have chosen two companies with good reputation," said Beglaryan.
>
> "We have received very good proposals from our Chinese partners and we will consider them," said Beglaryan.
>
> The agreement on the construction of the rail link was approved by Armenian and Iranian governments in 2009. In 2012, the Dubai-based Rasia FZE Investment Company was granted a 50-year concession by the Armenian government to build and manage the 305-kilometer railway from Armenia to Iran, to be named the Southern Armenian Railway (SAR).
>
> By late 2013 Rasia FZE contracted the China Communications Construction Company (CCCC) to develop a feasibility study for the project, estimated to cost $3.5 billion. The high cost is explained by mountainous terrain through which itis supposed to pass. Specifically, the 305 km-long railway will have 19.6 km-long 64 bridges and 60 tunnels of 102.3 kilometers.
>
> The railway is to run from Gagarin station in Armenia's Gegharkunik province to Agarak in southern Syunik and may transport up to 25 million cargos a year.
>
> According to an Armenian government statement, the Southern Armenia Railway will create the shortest transportation route from the ports of the Black Sea to the ports of the Persian Gulf and establish a major commodities transit corridor between Europe and the Persian Gulf region." There were media reports saying Chinese companies were ready to finance 60% of the project.[927]

609. On 24 August 2015, the Minister of Transport wrote specifically to the President of CCECC, inviting him to meetings to discuss CCECC's "potential participation in implementation" of the Railway Project. The letter stated as follows:

> We have been contemplating the possibility of our cooperation for the realization of priority projects in the transport infrastructure for a while now. More specifically this concerns the North-Highway and the Southern Railway projects as part of the Silk Road.

[927] C-163, "Chinese companies show interest in Armenia - Iran railway link-minister," 13 August 2015.

> In order to discuss these projects in more details and to speed up the process of clarifications on your potential participation in their implementation, herewith I would like to invite you to Yerevan some time at your own convenience within the upcoming month, prior to the Armenian Delegation visit to Beijing in September.[928]

610. By 22 September 2015, a press article suggested that senior Armenian officials would soon have detailed discussions in Beijing specifically with CCECC:

> Chinese Premier Li Keqiang and his visiting Armenian counterpart Hovik Abrahamian reportedly discussed China's possible involvement in an ambitious project to build a railway connecting Armenia with Iran when they met in Beijing on Tuesday.
>
> "The Chinese premier reaffirmed the Chinese side's interest in the issue," the Armenian Government said in a statement. It said the two men discussed the matter "in detail" but did not elaborate.
>
> The official Chinese Xinhua news agency made no specific mention of the Armenian-Iranian project in its report on the talks. "The Chinese government supports Chinese companies to participate in major infrastructure projects in Armenia, such as highways and nuclear power plants," it quoted Li as telling Abrahamian.
>
> Transport and Communications Minister Gagik Beglarian (sic) said last month that a Chinese company has presented Yerevan with "very good proposals" regarding the railway's construction, which would cost an estimated $3 billion. Beglarian refused to disclose those proposals, saying only that Armenian and Chinese officials will hold substantive talks on them in September.
>
> Abrahamian's press office said over the weekend that while in Beijing the Armenian premier will meet not only with top Chinese government officials but also senior executives from the China Civil Engineering Construction Corporation (CCECC). The state-run Corporation is engaged in railway construction in and outside China.
>
> Another firm, China Communications Construction Company (CCCC), has already conducted a feasibility study on the railway project. The study was commissioned in 2013 by a Dubai-based investment company that had received a 30-year Armenian government concession to build and manage the 305-kilometer-long Armenian section of the railway.
>
> President Serzh Sarkisian called for "active" Chinese involvement in the projects implementation when he made a state visit to China in March. The issue is on the agenda of Sarkisian's talks with Li.…[929]

611. In other words, in the second half of 2015, and certainly by the third quarter of that year, Armenian officials were seeking active engagement directly with CCECC, without involving Rasia in these discussions or apparently giving consideration to whether this might undermine any commitments Rasia had given to CCCC.

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[928] C-307, Letter from Minister G. Beglaryan to Yan Li, President of CCECC, 24 August 2015).

[929] C-166, "China/Armenia in 'Detailed"' Talks on Iran Railway," 22 September 2015.

(vii) By that time, Rasia itself had failed to perform

612. This conduct however must be seen in the relevant context, which included the following:

a. No progress had been made on the Corridor lands coordinates issue since February 2014.

b. Mr. Borkowski had not been in written communication with Armenia since December 2014.

c. There had been no further negotiations on amending the Railway Concession, as contemplated by Mr. Borkowski in his letter of 31 December 2014 and by the Ministry in its Decree of 26 February 2015.[930]

613. In addition, by this time, the Railway Concession's deadlines for Rasia to demonstrate sufficient outside financing had expired. Section 31.1 of the Railway Concession provided that the "Project Financing Period" would be one year from Rasia's acceptance of the Railway Feasibility Study, and Section 33.1 imposed the same deadline for submission of letters of interest from investors, demonstrating that they were "prepared to make investments in the equity or quasi-equity of the Concessionaire and provide debt financing in the aggregate amount not less than the total financing envisaged by the Feasibility Study."[931] Even accepting the Claimants' contention that the Railway Feasibility Study was not deemed accepted by Rasia until it did so formally on 20 July 2014, because of a tacit agreement to extend the Government's timetable to comment and the Parties' joint deadline to provide acceptances, the "Project Financing Period" had expired no later than 20 July 2015.[932] Yet by then, Rasia had not provided Armenia with any documentation by which investors stated that they were actually "prepared to" provide equity or debt financing in the aggregate amounts required by the Railway Feasibility Study ($3.2 billion).

614. The Claimants contend that this obligation was satisfied, first, in the form of the Railway Feasibility Study itself (referring to Chinese debt financing),[933] and, second, in Aabar's letter to Rasia of 21

[930] C-19, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 31 December 2014; R-124, Excerpt from the Minutes of the Meeting of the Government of the Republic of Armenia, On Amendments to the Protocol Decision Approved by Paragraph 26 of Protocol No. 33 of the Government of the Republic of Armenia dated August 7, 2014, 26 February 2015.

[931] C-1, Railway Concession, Sections 31.1, 33.1.

[932] The Respondent seems to accept this as the relevant time period, contending that "the one-year period to provide evidence of financing had ended in 2015." Resp. Rej. ¶ 364.

[933] February Tr. Day 2, Hanessian/Borkowski, 321:2-13, and Day 3, Hanessian/Borkowski, 510:6-20.

September 2014, of which Mr. Borkowski says he made Armenia aware on 10 November 2014.[934] The Tribunal disagrees that either of these documents meets the contractual requirement. First, with respect to the Railway Feasibility Study, all it stated was that the Project as described therein "allows for loans" from China EximBank, and that it was "currently anticipated" that loans would be secured from that source.[935] This statement of CCCC's expectations, unaccompanied by any explanation of the basis for that optimism, did not constitute a contractually adequate "letter of interest" from an outside investor confirming that it was "prepared to make investments" in the Railway Project.[936] Moreover, Mr. Borkowski's slide presentation during the February 2014 Yerevan Meetings held to discuss the Feasibility Studies stated that the Railway Project would be "highly dependent on China bank negotiations," following certain "preliminary discussions with China banks" which "assumed" they would finance 60% of the estimated $3.2 billion Project cost.[937] That contemporaneous document seems to confirm that no funding commitments had yet been secured from China Eximbank or any other Chinese bank. The record does not contain or reference any documents ever issued by any Chinese bank.

615. Second, while Aabar's September 2014 letter to Rasia (shared with Armenia in November 2014) stated that it could arrange financing for the remaining 40% of the Railway Project, that proposal was on the understanding not only that China EximBank would be covering 60% of the costs, but also that Aabar's affiliate, Arabtec, would "play[] the management role" in the EPC contract and that "all of the EPC profits [would] benefit[] Arabtec Construction."[938] Aabar seemed unaware that Rasia had already committed contractually to giving CCCC the "exclusive" EPC role,[939] or that Rasia had told Armenia that "working with a China contractor, such as CCCC, is a mandatory prerequisite for seeking the required China government financing."[940] Indeed, it is notable that as of three months later, when Aabar prepared a list of the documentation supposedly reviewed in its

[934] Cl. Mem. ¶¶ 128-130.

[935] C-116, Railway Feasibility Study, pp. 12, 15, 168. The statements in the Road Feasibility Study were even more attenuated: "[i]t is currently anticipated that the Project costs … will be borne by the government of the Republic of Armenia through the provision of availability payments," and "[b]ased on the availability payments*, it is anticipated* that the Project *should be able* to secure loans from the Export-Import Bank of China or China Development Bank …." C-122, Road Feasibility Study, p. 125 (emphasis added).

[936] C-1, Railway Concession, Sections 31.1, 33.1.

[937] C-131, "Southern Armenia Railway Project and Southern Armenia High Speed Road Project" (Razia FZE), February 2014, p. 15.

[938] C-13, Letter from Mr. C. Tappendorf to Mr. J. Borkowski, 21 September 2014.

[939] R-8, Rasia-CCCC Framework Agreement, p. 2 (stating that Rasia "desires to appoint CCCC as the lead member of its Consortium and exclusive EPC for developing" both the Road and Railway Projects).

[940] C-101, Letter from Mr. J. Borkowski to Minister G. Beglaryan (Unofficial Translation and Armenian Original), 21 December 2012, pp. 1-2.

due diligence investigation of the Projects, there is no reference to the Rasia-CCCC Framework Agreement at all.[941] In this context, the Tribunal cannot accept the explanation, which the Claimants' witnesses appeared to have coordinated for the hearing, that Aabar's reference in the September 2014 letter to its interest being predicated on Arabtec's playing the central EPC role was simply a "drafting error."[942]

616. In other words, standing alone, the Aabar letter might qualify as an expression of interest within the meaning of the Railway Concession. But its terms conflicted directly with the putative terms on which CCCC had agreed to work with Rasia, including assisting with obtaining Chinese bank financing. The Railway Concession had required Rasia to present letters of interest demonstrating a collection of investors who together were "prepared to make investments" in an "*aggregate amount* not less than the *total financing* envisaged by the Feasibility Study."[943] This obligation could not be satisfied by promising the same consideration (a lead EPC role and control of EPC profits) to multiple recipients, in circumstances in which moving forward with one putative consortium partner would almost certainly prompt another to reconsider its participation.

617. The Tribunal does not accept the Claimants' suggestion that the fundamental inconsistency between Rasia's promises to CCCC and Aabar could be resolved simply by designating Arabtec as a subcontractor to CCCC. CCCC had been promised the "exclusive" EPC role, which carried with it the right to select its own subcontractors. There is no reason to imagine that CCCC would have been willing to forgo working with Chinese subcontractors, and accept instead that a major "management role" and "EPC profits" opportunity be hived off to a U.A.E. company. Nor is there any reason to believe that Aabar would have been willing to provide financing on the basis that Arabtec became a mere subcontractor to a Chinese lead EPC contractor. Most importantly, there is no evidence that Rasia even brought this conflict to the attention of Aabar and CCCC, let alone tried to mediate it, much less that it had arrived at some consistent understanding with CCCC and Aabar on the basis of which both China EximBank (with which Rasia was not even in direct contact) and Aabar would be prepared to finance the Railway Project. Certainly, Rasia did not present Armenia with any other "letters of interest" before the expiration of the Project Financing Period in July 2015, which might have demonstrated that it had actually lined up a consortium of

[941] C-145, Aabar, Term Sheet, 18 December 2014.

[942] February Tr. Day 3, Hanessian/Borkowski, 549:14-50:5 (offering this explanation during cross-examination, without explaining how he could speak for Aabar's intentions on this point); Feb. Tr. Day 5, Hanessian/Tappendorf, 867:19-869:18 (subsequently volunteering without prompting that this passage of his letter was "poorly written" on this point of exclusivity).

[943] C-1, Railway Concession, Sections 31.1, 33.1 (emphasis added).

investors prepared to move forward with funding on terms that, realistically, Rasia could promise, and upon which it could deliver, to both. The Claimants' repeated reference to having such a "consortium" appears more like wishful thinking, on the basis of a series of negotiations which had shown some promise but were far from crystallizing into a realistic package of commitments on which the Railway Project could move forward.

618. The Tribunal addresses separately, in Section VI.B.4 below, the Claimants' contention that Aabar nonetheless would have proceeded to acquire Rasia in April 2015, but for the conduct of Armenia culminating in March 2015. For the reasons there set forth, the Tribunal does not accept this contention. And certainly, after March 2015, the Claimants themselves concede they no longer had a workable "consortium" to move the Railway Project forward either technically (through CCCC) or financially (through a combination of Aabar and Chinese bank financing allegedly arranged by CCCC).

619. In other words, the factual reality is that by the second half of 2015, when Armenia began actively to solicit interest from CCECC in the Southern Armenia Railway, Rasia had already missed several important deadlines under the Railway Concession, and the Railway Project was already in serious straits. Armenia's actions must be seen in that context. At the same time, neither the Government, nor Rasia had taken any steps affirmatively to terminate the Railway Concession. In consequence, the Concession remained legally in force, as Armenia's Minister of Justice conceded in July 2017.[944]

(viii) Armenia's approach to CCECC breached its duty of cooperation

620. Against this backdrop, it appears that Armenia started to explore in earnest the possibility that CCECC might construct the Southern Armenia Railway, without coordinating this approach through Rasia. This conduct may be seen as akin to the Government's actions with respect to the Road Concession (discussed in Section VI.A.1 above), where it eventually began seeking other avenues for progress on the Southern Armenia road, after becoming disillusioned with Rasia, but without formally terminating the Concession still in force between them.

[944] C-318, Transcript of 3 July 2017 Meeting, 3 July 2017, pp. 5, 7. The Minister's 2017 acknowledgment that the Railway Concession remained a legally binding document, together with the fact that the Concession provided a specific mechanism for termination based on breach, lays to rest the Respondent's argument, in this arbitration, that the Concession should be treated as having been rescinded either by party agreement or as a matter of law, under Article 466 of the Armenian Civil Code. *See* Cl. Reply ¶¶ 608-612; Resp. Rej. ¶¶ 349-351.

621. As previously discussed, the Government's mere holding of exploratory discussions was not a breach of the "No Grant" provision (Section 15) of the Railway Concession, in the absence of any evidence that Armenia actually granted "any concession or other right or privilege" to CCECC or any other entity. It is undisputed, as the Respondent notes, that "Armenia never established a parallel consortium or otherwise entered into any agreements with anyone other than Rasia" for the Railway Concession.[945] On the other hand, the Claimants contend that the Government's conduct still breached its separate contractual duties under the Railway Concession to act in good faith towards Rasia and to give "full effect" to the Railway Concession.[946] Armenia also had a general obligation under the Railway Concession to "cooperate with the Concessionaire, its contractors and sub-contractors … in carrying out the Project."[947]

622. The Tribunal accepts, at the level of principle, that a contract party may breach such "soft" contractual obligations by holding public negotiations with potential competitors, even if such efforts do not immediately (or ever) bear fruit in the form of a grant of competing legal rights. In this case, given that neither Armenia, nor Rasia had ever taken steps to terminate the Railway Concession, Armenia's conduct in the third quarter of 2015 – seeking new Chinese construction partners without coordinating these efforts with Rasia or its contractor CCCC – can be seen as breaching its subsisting general duties of cooperation under the Railway Concession.

(ix) Again, breach does not equate to causation of loss

623. However, and as noted in the context of the Road Concession, a finding of breach does not necessarily equate to the causation of harm. As discussed further in Section VI.B.4, the Tribunal does not accept Claimants' contention that any breach of the Railway Concession (or of the Road Concession) had the effect of "causing the termination of the Aabar acquisition and dismantling of the Rasia consortium," and thereby of "render[ing] … completely worthless" contractual rights that otherwise had value as of the time of the breach.[948] Without such causation, Rasia would not be entitled to recovery of any damages, even if its breach of contract claims had been timely asserted (which the Tribunal has found they were not, *see* Section V.D.3 above).

624. Before turning to these issues of causation and loss, however, the Tribunal first examines below the remaining liability claims in this case. They were presented by Mr. Borkowski, and allege

[945] Resp. Rej. ¶ 432.
[946] Cl. First PHB ¶ 274.
[947] C-1, Railway Concession, Section 38.
[948] Cl. First PHB ¶ 274.

violations by Armenia of various BIT obligations that are distinct from its contractual obligations to Rasia under the Concessions.

B. MR. BORKOWSKI'S CLAIMS UNDER THE BIT AND INTERNATIONAL LAW

(1) Breach of the Umbrella Clause (Article II(2)(C) of the BIT)

a. The Claimants' Position

625. The Claimants contend that the breach of terms of the Concessions amounts to a violation of the "umbrella clause" in the US-Armenia BIT, which has the effect of elevating the Respondent's contractual obligations to international law obligations. According to the Claimants, Article II(2)(c) of the BIT, which offers protection against "any obligation" that the Respondent may have entered into "with regard to investments," is among the broadest of umbrella clauses in investment treaty practice and covers contractual obligations entered into by the State.[949] Consequently, the Respondent's alleged breach of contractual obligations under the Railway and Road Concessions also constitutes an independent cause of action that the Claimants have against Armenia by virtue of the BIT's umbrella clause.[950]

b. The Respondent's Position

626. The Respondent argues that the Claimants' umbrella clause claims are time-barred by Armenia's statute of limitation for contract claims. In any event, the Respondent says, it was Rasia (and not the Respondent) that breached its contractual obligations under the Concessions, and consequently, the Claimants' contractual and umbrella clause claims have no merit.[951]

c. The Tribunal's Analysis

627. The Tribunal already has found, in Section V.D above, that Mr. Borkowski's umbrella clause claim is time-barred. It has also found, in Section V.B, that even if this were not the case, Mr. Borkowski would not have standing to assert such a claim in circumstances where Armenia entered into the underlying obligations with Rasia, and Rasia itself has no standing to invoke the BIT at all. In these circumstances, there is no need to discuss the merits of the Claimants' argument that Article II(2)(C) of the BIT elevates the Respondent's breach of the Concessions into an independent treaty

[949] Cl. Mem. ¶¶ 279, 281.

[950] *Id*. ¶¶ 278–82, 301.

[951] Resp. First PHB ¶ 171–72, 221; Resp. Second PHB ¶¶ 27–34.

cause of action, for failure to "observe any obligation it may have entered into with regard to investments."

(2) Breach of Fair and Equitable Treatment (Article II(2)(a) of the BIT)

a. The Claimants' Position

628. The Claimants argue that the Respondent breached its obligations to accord the Claimants' investment fair and equitable treatment ("**FET**) in accordance with Article II(2)(a) of the US-Armenia BIT, which provides that "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[952] The Claimants argue that while the Treaty does not define FET, its meaning—as understood from the preamble of the BIT and tribunal decisions and practice—encompasses objective requirements of good faith, due process, non-discrimination and proportionality. In addition, FET requires that States act in a manner that is just, even-handed, unbiased, legitimate and consistent with legitimate expectations of investors.[953]

629. The Claimants argue that legitimate expectations of investors may arise from contracts with the State and from the undertakings and representations (implicit or explicit) made by the host State. According to the Claimants, legitimate expectations typically include the provision of a stable and predictable environment and the expectation that host States will not arbitrarily revoke pre-existing decisions on which the investor relied to make its commitments.[954]

630. The Claimants contend that, in making their investments, they relied on guarantees in relevant agreements as well as written and verbal commitments from the highest levels of the Armenian State, all of which were intended to induce them to undertake substantial risks in connection with the Railway and Road Projects.[955]

631. Specifically, Claimants refer to various alleged promises and assurances, without which (they say) they would not have made such investments. They include (i) a personal invitation from the Prime Minister of Armenia to undertake the Projects during a 14 October 2011 meeting,[956] (ii) an 8 November 2011 letter from the Armenian Minister of Transport and Communications underscoring

[952] Cl. Mem. ¶¶ 221–22 (citing BIT Art. II(2)(a)); Cl. First PHB, ¶ 21.
[953] Cl. Mem. ¶¶ 223–27; Cl. Second PHB ¶ 40.
[954] Cl. Mem. ¶ 227.
[955] *Id*. ¶¶ 230, 234.
[956] *Id*. ¶ 231(i) (relying on Borkowski's First Witness Statement ¶ 14).

the Respondent's enthusiasm about the Projects,[957] (iii) the Respondent's undertaking to grant to the Claimants a 50-year concession under the Framework Agreement for the Railway and Road Projects,[958] and (iv) promises to the Claimants under the Concessions, including the Respondent's promise to grant Rasia exclusivity, to cooperate with Rasia and to promote the Projects;[959] and (v) the Respondent's assurances of the strategic importance of the Projects after signing the Concessions, including in remarks by Minister Beglaryan at a media event on 18 January 2013 (when Mr. Beglaryan stated with respect to the Projects that "[o]ur State pays special attention to the implementation of these important programs and is ready to do everything for their safe and mutually beneficial implementation … their implementation is considered one of the largest strategic prospects of the country"), and in a 25 December 2012 letter by which the Respondent promised to provide necessary support for the conduct of the Feasibility Studies.[960]

632. The Claimants contend that the breach of the FET standard in this case arose from a series of governmental acts and measures,[961] including the Respondent's failure to provide a stable and consistent environment for the Claimants' investments, and the Respondent's breach of its core obligations under the Concessions.[962] Specifically, the Claimants refer to (i) the Respondent's exploration of alternative financing arrangements shortly after signing the Road Concession;[963] (ii) the Respondent's implementation of a competing road project and unilateral implementation of the Railway Project through a new government-to government consortium;[964] (iii) the Respondent's refusal to constitute an inter-ministerial working group to review the feasibility study submitted for the Road Concession;[965] (iv) the Respondent's refusal to make the availability payments required

[957] C-87, Letter from Minister M. Vardanyan to Mr. J. Borkowski, 8 November 2011.

[958] C-52, Framework Agreement between the Republic of Armenia and Rasia FZE, 30 December 2011, Preamble, § 3(g).

[959] Cl. First PHB ¶ 28; Cl. Second PHB ¶ 40; C-1, Railway Concession, Preamble; C-2, Road Concession, Preamble.

[960] Cl. Mem. ¶¶ 231–232 (relying on C-107, Transcript of Welcoming Speech of Minister of Transport and Communication, 18 January 2013; C-108, Government of Armenia, "The Projects 'Southern Armenia Railway' and 'Southern Armenia High-Speed Road are Launched," 18 January 2013 (Unofficial English Translation and Armenian Original).

[961] *Id*. ¶¶ 228–29; Cl. Second PHB ¶ 38.

[962] *Id*. ¶¶ 235–36.

[963] Cl. First PHB ¶¶ 65–66, 260–61; Cl. Second PHB ¶¶ 43, 76–77.

[964] Cl. First PHB ¶¶ 23–25, 246–48; Cl. Second PHB ¶¶ 43, 76–77, 92.

[965] Cl. Mem. ¶¶ 237–39, Cl. First PHB ¶¶ 74-75.

under the Concessions;[966] and (v) the Respondent's refusal to sign the MoU needed to begin negotiations over terms of availability payments with CCCC and Chinese banks.[967]

633. The Claimants further submit that the Respondent's efforts to undermine their rights and to displace the Claimants' Rasia/CCCC/Aabar consortium under the Concessions frustrated the Claimants' legitimate expectation to receive a valuable return through Aabar's proposed acquisition of the Railway and Roads Projects.[968] According to the Claimants, the Respondent's argument that it was entitled to take these actions, because the Claimants had already breached the Concessions is untenable; the Respondent never invoked any of the Concessions' terms for notification of defective performance or termination, but rather expressed support for the Projects and satisfaction with their implementation.[969]

634. According to the Claimants, a breach of contract which fundamentally alters the economic equilibrium of a State contract amounts to a treaty breach. In this case, the Claimants submit that the Respondent not only violated an "essential element" of the Concessions, but it completely upended their rights under the Concessions.[970] In particular, the Claimants say, their right to exclusivity was deliberately disregarded for years, as Armenia continued to deal with third parties on the Railway and Road Projects.[971]

b. The Respondent's Position

635. The Respondent denies any breach of the FET provision in the BIT. With respect to the issue of legitimate expectations, the Respondent argues that both parties' legitimate expectations must be considered, and not just those of the investor. Moreover, the expectations to be taken into account are those existing at the time of the investor's decision to invest in the host State,[972] which by definition excludes consideration of subsequent acts. Therefore, the determination of the Claimants' FET claim in this arbitration must be based on the specific assurances upon which Rasia

[966] Cl. First PHB ¶¶ 67–70.
[967] *Id*. ¶¶ 71–73.
[968] Cl. Mem. ¶ 240; Cl. First PHB ¶ 246; Cl. Second PHB ¶ 92.
[969] Cl. Mem. ¶ 243.
[970] Cl. Reply ¶ 579.
[971] *Id*. ¶ 580.
[972] Resp. Counter-Mem. ¶¶ 277-78.

says it relied when it decided to enter into the Concessions.[973] The Respondent submits that in this case, none of the Claimants' legitimate expectations was breached.[974]

636. First, the Respondent argues that due to the inherent high risks of the Road and Railway Projects, the uncertainty of railway traffic volume and the provisions in the Concession Agreements for termination based on negative feasibility results, the Claimants could have had no reasonable expectation of a return on investment.[975] The Respondent contends that there was no expectation or understanding that the Projects would generate a reasonable rate of return, and that no unfavorable change in Armenian legislation within the meaning of the Concession Agreements occurred during Rasia's performance of the Concessions. Further, the Respondent submits that nothing in the Concessions created a legitimate expectation that the Respondent would mitigate delays or other commercial risks to which the Claimants predictably would be exposed.[976]

637. Second, the Respondent argues that the Concessions specifically exclude any right to consequential/indirect damages or lost profits. Consequently, such putative rights could not be made the subject of an FET claim in this arbitration.[977] Third, the Respondent argues that the alleged contractual breaches are not so egregious as to constitute an FET violation.[978] Finally, the Respondent argues that it acted transparently by duly responding to Rasia's Freedom of Information Act requests, even though it did not respond directly to Rasia's requests for the Respondent's preferred financing for the Road Project.[979]

638. The Respondent also argues that (i) it neither implemented any legal decision, nor entered into any agreement with CCECC regarding the Railway or Road Project which had the effect of terminating the Claimants' Concessions;[980] (ii) it neither retained any contractor, nor executed any loan agreement for any part of the NSRC road project that overlapped with Rasia's Concessions until February 2014, after Rasia had breached the Concessions;[981] (iii) the Road Concession expressly made provision for private investments and revenue earnings and did not limit its financing

[973] Resp. Counter-Mem. ¶ 279.
[974] *Id*.
[975] *Id*. ¶¶ 280–84; Respondent's First PHB ¶¶ 37–41, 51.
[976] Resp. Rej. ¶¶ 422–28.
[977] Resp. Counter-Mem. ¶¶ 285–87; Resp. Rej ¶ 430.
[978] Resp. Counter-Mem. ¶ 288; Resp. Rej ¶¶ 384–89.
[979] Resp. Counter-Mem. ¶¶ 235–37, 288–89.
[980] *Id*. ¶ 235; Resp. First PHB ¶¶ 205, 208–16.
[981] Resp. First PHB ¶ 226.

exclusively to availability payments;[982] (iv) the Claimants presented no draft MOU between Armenia and CCCC necessary to attract financing from a Chinese bank to the Respondent for its signature;[983] and (v) the Concessions did not provide any particular process for comments by the Respondent. In any event, the Respondent says, Mr. Borkowski confirmed at the February Hearing that by 7 October 2013 he was well aware of the Respondent's position that Rasia's single toll-free road proposal was not acceptable.[984]

639. Further, the Respondent argues that Armenia's MOU with Iran was to facilitate cooperation between Iran and Armenia, not to displace Rasia. The Respondent argues that its meetings with Iran were held transparently and with a view to (i) expanding international and transit traffic at the Norduz-Agarak border checkpoints; and (ii) exchanging views on the progress of railway construction and reaching more detailed agreements on the actualization of the project.[985] These objectives did not breach any FET obligations owed to the Claimants, the Respondent says.

c. The Tribunal's Analysis

640. II(2)(a) of the US-Armenia BIT provides that "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[986]

641. As the Parties' submissions recognize, the fair and equitable treatment standard has been interpreted as involving several different elements, which may take on differing degrees of importance in different disputes, depending on the facts and the nature of the wrongs alleged. In this case, there is no need to enunciate any overarching definition of the standard. The Tribunal instead examines the specific theories of an FET breach that Claimants present. As discussed below, they are not proven, based on the facts established in this case.

642. First, Claimants argue that Armenia "created and reinforced the Claimants' legitimate expectations through express commitments" in the Concession Agreements, and "then frustrated those expectations by continuously breaching those commitments …."[987] As a threshold matter, while a State contract with an investor is certainly a form of "express commitment," this does not mean

[982] Resp. First PHB ¶¶ 138–142; Resp. Second PHB ¶¶ 47, 52–53.
[983] Resp. First PHB ¶¶ 104–05.
[984] *Id*. ¶ 234.
[985] Resp. Counter-Mem. ¶¶ 255–56.
[986] CL-1, BIT Art. II(2)(a).
[987] Cl. Mem. ¶ 229.

that every breach of contract will constitute a breach of legitimate expectations.[988] Various factors may be relevant to the analysis, including, *inter alia,* (a) the nature of the contract (was it commercial or concluded in exercise of State powers?), (b) the importance or irrelevance of the particular contract provision to inducement of the underlying investment; (c) the nature of the breach (did it repudiate the contract as such, was it taken arbitrarily or in bad faith, etc.?) and (d) the context of the breach (*e.g.*, did it occur when the object of the contract otherwise was moving forward, or in the context of the investor's own failure to perform?).

643. Here, there is no doubt that the Concessions were more than ordinary commercial contracts: they involved the use of sovereign authority to grant exclusive rights to develop transportation infrastructure, subject to the Concessionaire's demonstration of the feasibility of the projects described in the Concession and of the availability of funding to deliver on those projects. It also seems clear, as the Claimants contend, that the right to exclusivity was an essential element of the bargain reflected in the Concessions.[989] But again, this was contingent on the Concessionaire's demonstration of its own ability to perform.

644. However, the Claimants have not proven their theory of either continuous or egregious breaches of the Concessions, nor have they proven that Rasia itself had performed at the time those asserted breaches took place. To the contrary, the Tribunal has found in Section VI.A.1, with respect to the Road Concession, that Armenia breached the "No Grant" provision by contracting with third parties for funding, design and construction works of certain road sections near the Armenian border – but only after Rasia had admitted that the Road Project as originally envisioned (one that would generate revenue through tolls and pay concession fees to the State) was not feasible, and it had presented a study that contemplated a very different road scheme than that contractually envisaged (one road rather than two, meeting Chinese Class II specifications rather than Armenian Class II specifications).[990] With respect to the Railway Concession, the Tribunal has found in Section VI.A.2 that Armenia breached its duty of cooperation when it began exploring whether CCECC might work on the Railway Project, without coordinating this approach through Rasia (which had

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[988] *See, e.g.,* RL-30, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 344 ("The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law.").

[989] Cl. Reply ¶¶ 579-580.

[990] For the same reason, the Tribunal cannot accept the Claimants' further argument that Armenia breached its obligation under the Road Concession to negotiate in good faith on reasonable measures to render the Road Project Feasible. *See* Cl. Reply ¶ 575. As the Respondent notes, Rasia itself refused to budge from the core element that rendered the original conception of the Project not feasible, namely that there would be no revenue generated by tolling and therefore no sharing of the burden of financing the road costs. *See* Resp. Rej. ¶ 429.

committed to a different subcontractor, CCCC). But this, too, occurred only after Rasia had failed to deliver the detailed Corridor coordinates promised under the Concession, failed to demonstrate that outside investors were prepared to fund the full costs of the Railway Project and had not communicated with Armenia for many months.

645. In essence, Armenia had a good faith basis to conclude in both instances that the Projects were not moving forward with Rasia. Its fault lay in failing to take the formal legal steps required under the Concessions to notify Rasia of these conclusions, and to terminate the Concessions as it could have done, before taking steps to explore alternative projects with third parties. While this does constitute a breach of contract, given that the Concessions remained legally in force, it does not represent the kind of fundamental repudiation necessary to establish frustration of legitimate expectations under the fair and equitable treatment standard. A party that fails to deliver its own promised performance under a contract does not have an internationally protected legitimate expectation that its counterparty will remember to execute the required contract formalities to bring the arrangement officially to an end.

646. The Claimants' second framing of an FET violation is that "Armenia's actions ultimately frustrated the Claimants' legitimate expectation to receive a reasonable return on their investments," including by a sale or assignment of the Projects to a third party.[991] Any expectation at the time of the Concession Agreements that the particular projects described therein would generate returns for Rasia was not objectively reasonable. The two projects described were inherently risky, as the Concession Agreements themselves noted: Rasia was "assum[ing] substantial financial and commercial risks."[992] There were no assurances given that either project would prove sufficiently feasible from a technical perspective, or sufficiently attractive from a financing perspective, to move forward at all. Rather, what Rasia obtained through the Concessions was an opportunity, over a specified period of time, to *try* to demonstrate feasibility and bankability. The risk was always on Rasia that it might not be able to do so.

647. Third, the Claimants argue that Armenia violated its FET obligation by "fail[ing] to provide a stable and consistent environment for their investments."[993] Such claims usually are put forth in cases

[991] Cl. Mem. ¶ 240.

[992] C-1, Railway Concession, Section 15; C-2, Road Concession, Section 15.

[993] Cl. Mem. ¶ 235.

involving changes in national law or regulations, but no such changes are alleged in this case.[994] Rather, the record reflects at most the cooling of the Respondent's enthusiasm for working with Rasia, after the latter proved unable to follow through in the manner anticipated, first, with respect to a high speed toll road under the Road Concession and then with respect to detailed Corridor coordinates for the Railway Concession. The Respondent no doubt responded to these developments by proposing certain Concession amendments that were unlikely to be received well by Rasia. But hard-nosed counterproposals are neither a breach of contract, as noted above, nor the basis for finding an FET violation.

648. Fourth, the Claimants contend that Armenia breached a FET obligation to provide a "transparent legal framework," by not providing Claimants with information regarding project status and by conducting "secret negotiations" with ADB, CCECC and other third parties.[995] In the Tribunal's view, the Claimants' complaint is not about transparency of a "legal framework" at all: there is no allegation that Armenia applied some obscure law or regulation to block the Concessions from moving to fruition. Rather, the Claimants seek to rely on the *Tecmed* concept of transparency, which would imply into FET standards an obligation to act "free from ambiguity and totally transparently in its relations with the foreign investor."[996] The Tribunal considers that statement to be one of aspiration, rather than a reflection of what international law actually requires. Moreover, on the facts of this case, the Tribunal sees imperfect communications by *both* sides, including extended periods during which Rasia itself went silent vis-à-vis Armenia, regarding any activities it might be taking to progress the Road and Railway Projects.[997]

649. The Claimants' allegation of "secret negotiations" with CCECC is also inconsistent with its concomitant complaint that Armenia demonstrated bad faith by deliberately making *public* statements about its engagement with CCECC, in a "move … calculated to scare off any investor."[998] More generally, the Claimants allege that Armenia violated FET by various acts undertaken, they say, in bad faith; as they would have it, Armenia "*intended* to defeat the Claimants' investments, and set about achieving that outcome shortly after the conclusion of the

[994] For that reason, the Tribunal need not enter into a jurisprudential debate about the extent to which legal stability is (or is not) part of the FET standard.

[995] Cl. Mem. ¶ 244; Cl. Reply ¶ 592.

[996] Cl. Reply ¶ 593 (quoting CL-21, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154).

[997] *See* Resp. Counter-Mem. ¶ 168 (noting that "Mr. Borkowski … simply disappeared after 31 December 2014").

[998] Cl. Reply ¶¶ 585-586.

Concessions."[999] As to why Armenia conceivably would so intend – which is counter-intuitive, if Rasia really were in a position to deliver the Projects "at its own cost and risk"[1000] – the Claimants present only one theory. That is that "Armenia's attempt to exclude Rasia and steal its work product … appears to have been motivated (at least in the first instance) by a renegade minister [Minister Beglaryan] who … was angered that his request for bribes had been refused."[1001] The Tribunal was unable to hear testimony from Minister Beglaryan, who is no longer under the Respondent's direction and control.[1002] Nonetheless, Respondent's other Ministry of Transport witnesses have denied any knowledge of such a bribery request.[1003] Perhaps more compelling, Rasia presents no contemporaneous evidence corroborating Mr. Borkowski's testimony about the bribery solicitation, such as file notes or internal correspondence. As Respondent notes, Mr. Tappendorf (who claims to have communicated with Mr. Borkowski after the meeting in question) does not mention the alleged bribe request at all.[1004] Given the demanding standard for proving corruption and illegality, as well as Mr. Borkowski's observed penchant for exaggerating evidence to try to advance his case (discussed further in Section VI.B.4 below), the Tribunal declines to accept the alleged bribery request as proven, based solely on Mr. Borkowski's uncorroborated testimony that it occurred. As for the Claimants' broader allegation that Armenia "*intended* to defeat the Claimants' investments,"[1005] the Tribunal agrees with the Respondent that this is inconsistent with Armenia's decision on several occasions to extend Rasia's deadline for providing detailed Corridor coordinates under the Railway Concession.[1006]

650. Finally, the Claimants contend that Armenia violated its FET obligation to accord investors due process by treating the Concessions as effectively concluded without complying with the contractually prescribed notice of termination.[1007] The Tribunal has found that Armenia's actions constitute a breach of contract, but they do not rise to the level of a due process failure capable of constituting a violation of FET.

[999] Cl. Reply ¶ 582 (emphasis in original).
[1000] C-1, Railway Concession, Section 3; C-2, Road Concession, Section 3.
[1001] Cl. Mem. ¶ 241.
[1002] *See* Procedural Order No. 4, ¶¶ 16, 19.
[1003] First Arakelyan Statement ¶ 54; Second Arakelyan Statement, ¶ 71; Grigoryan Statement, ¶¶ 12, 32.
[1004] Resp. Counter-Mem. ¶ 110 (citing First Tappendorf Statement ¶¶ 48-49).
[1005] Cl. Reply ¶ 582 (emphasis in original).
[1006] Resp. Rej. ¶ 440.
[1007] Cl. Reply, ¶¶ 569, 589.

(3) Arbitrary Measures (Article II(2)(b) of the BIT)

a. The Claimants' Position

651. The Claimants also argue that the Respondent subjected their investments to arbitrary measures, contrary to Article II(2)(b) of the US-Armenia BIT, which prohibits the Respondent from "impair[ing] by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal" of the Claimants' investments.[1008] The Claimants argue that while the BIT does not expressly define "arbitrary" measures, the term in its ordinary meaning, and as interpreted by tribunals, includes within its ambit actions carried out capriciously, without reason, motivated by inappropriate considerations or based on "excess of discretion" rather than by objective reason or legal standards. It also connotes willful disregard of due process of law.[1009]

652. According to the Claimants, the Respondent acted arbitrarily when Minister Beglaryan allegedly demanded a "personal consulting fee" from the Claimants and refused to agree to a financing arrangement for the Road Project, unilaterally imposed changes to the Concessions, ejected the Claimants from the Road and Rail Projects and publicly denigrated the Claimants' commitments to the Projects.[1010] They contend that their arbitrary exclusion from the project, the repudiation of the Respondent's obligations and its smear campaign against the Claimants were motivated by bad faith on the part of the Respondent's Minister Beglaryan, because the Claimants had refused his alleged request for a bribe.[1011] The Claimants further submit that the Respondent purported unilaterally to amend and eventually to terminate the Concessions in blatant disregard of the agreed processes under the Concessions, thereby subjecting the Claimants' investments to arbitrary measures.[1012]

b. The Respondent's Position

653. The Respondent contests the Claimants' argument that it acted arbitrarily by willful breach of the provisions of the Concession Agreements. First, the Respondent argues that there is no record suggesting that the Claimants were pressured, harassed, or bullied over the Respondent's proposed

[1008] Cl. Mem. ¶ 248.
[1009] *Id*. ¶¶ 249–50.
[1010] *Id*. ¶ 253; Cl. First PHB ¶ 7, 11, 20; Cl. Second PHB ¶¶ 4(iii), 95, 128, 251–60.
[1011] Cl. Mem. ¶¶ 240–41.
[1012] *Id*. ¶ 254; Cl. First PHB ¶ 13, 256; Cl. Second PHB ¶ 99–100.

amendment.[1013] The Respondent argues that although it followed up on its proposal to the Claimants for amendment, there was no improper conduct, bad faith or breach of the Concessions or BIT on its part in this connection.[1014]

654. Second, the Respondent contends that the statements made by Ministry of Transport officials about the delay in performance of the Railway Concession did not suggest an interest in terminating the Railway Concession. The Respondent argues that these statements in fact were justified by Rasia's delay in providing the detailed coordinates for the railway corridor which were required for Armenia to acquire the necessary land for the project. The Respondent also argues that it is not responsible for the comments of independent media organizations or third parties.[1015] Further, the Respondent contends that the Claimants have not proven their allegations of bad faith, such as an alleged demand for a bribe and steps supposedly taken by the Respondent to frustrate the Concessions.[1016]

c. The Tribunal's Analysis

655. Article II(2)(b) of the BIT prohibits the State Parties from "impair[ing] by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal" of covered investments.

656. The Tribunal considers arbitrary measures within the framework of the ICJ's definition in *ELSI*, according to which "arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[1017] The Tribunal also draws guidance from the *Plama* definition of arbitrary measures as "those which are not founded in reason or fact but on caprice, prejudice or personal preference,"[1018] and from the definition in *AES v. Hungary*, which examines first "the existence of a rational policy, which is one "taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter," and second whether the challenged act was itself reasonably related to the policy, in the sense of "an appropriate

[1013] Resp. First PHB ¶¶ 183–87.

[1014] *Id*. ¶¶ 184–89, 196.

[1015] *Id*. ¶¶ 200–204; Resp. Counter-Mem. ¶¶ 159–60, 164–67.

[1016] Resp. Counter-Mem. ¶ 289; Resp. First PHB ¶ 53(iii).

[1017] CL-15, *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment, 20 July 1989, ICJ Reports 1989, ¶ 128.

[1018] RL-33, *Plama*, ¶ 184.

correlation between the state's public policy objective and the measure adopted to achieve it."[1019] As otherwise stated by the *El Paso* tribunal, citing both *ELSI* and dictionary definitions of the word "arbitrary," "there are always several methods for dealing" with challenging circumstances in a country, but the issue of arbitrariness examines not "whether the measures taken were or were not the best, but simply whether they were "based on a reasoned scheme" that was itself reasonably connected to "the aim pursued."[1020]

657. In support of their claims of arbitrariness, the Claimants invoke the same events that the Tribunal has already addressed in the context of FET. The Tribunal does not consider the Respondent's acts, within the context in which they occurred, to have been taken arbitrarily, in the sense of without reason. At worst, the Tribunal has found, the Government (a) made aggressive counterproposals for contract amendments after Rasia itself had failed to meet contract terms, by providing a Road Feasibility Study that was inconsistent with the Road Concession and by failing to provide detailed Corridor coordinates for the Railway Project within the applicable contractual deadlines; (b) complained about delays occasioned by Rasia's performance, while simultaneously extending the applicable deadlines (on the Corridor coordinates issue); and (c) ultimately "jumped the gun" by moving on to deal with other potential partners (in the case of the Railway, after a long period of not hearing from Rasia at all), without following the contractually required mechanisms for terminating the Concessions. While the latter was a breach of contract under both Concessions, it was not irrational or capricious. One can understand logically how Government officials might have considered the Projects with Rasia essentially "dead in the water," such that they overlooked procedural requirements for contract termination and began to explore potential alternatives in the public interest of improving transportation corridors in Southern Armenia. The Claimants have not proven that the Government's actions were due alternatively to personal *animus* or prejudice, such as that alleged on the part of Mr. Beglaryan after his purported solicitation of a bribe was rejected.

[1019] *AES Summit Generation Limited and AES-Tisza Eromu Kft v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 10.3.7-10.3.9; *see similarly* RL-39, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 460 (examining whether State conduct "bears a reasonable relationship to some rational policy").

[1020] RL-17, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/14, Award, 31 October 2011, ¶¶ 319-322, 325.

(4) Indirect Expropriation (Article III of the BIT)

a. The Claimants' Position

658. The Claimants also argue that the Respondent indirectly expropriated their investments in breach of Article III of the BIT.[1021] The Claimants contend that the investments expropriated by the Claimants include contractual rights under the Concession Agreements, notably, the specific know-how furnished by the Claimants for the Projects and rights to exclusivity and transferability, the right to use property and other rights to implement the Projects, which constitute "property rights" capable of sale for value and indeed capable of expropriation.[1022] According to the Claimants, the Respondent's breach of the Concessions and other actions were pervasive, repudiatory and deprived the Claimants of control and of the value of these investments, thereby amounting to an indirect expropriation.[1023]

659. Relying on *Metalclad v Mexico*, the Claimants submit that the determinative factor in finding expropriation is the effect of the expropriating measures, in terms of amounting to substantial deprivation of the benefit of the investment, rather than the underlying intent behind the measures. Thus, according to the Claimants, the threshold for expropriation of contractual rights is that the state's interference with such rights amounts to a deprivation of the investor's economic use and enjoyment of such contractual rights.[1024]

660. The Claimants argue that the Respondent committed a creeping expropriation through an aggregation of acts that included (i) its unilateral implementation of the Projects with other parties in breach of Claimants' exclusive rights under the Concession Agreements,[1025] (ii) the exclusion of the Claimants from bilateral negotiations with Iran concerning the Iran extension of the Railway, and (iii) the dissemination of the Claimants' confidential feasibility study materials to prospective investors without the Claimants' knowledge or consent. These acts, along with other arbitrary actions by the Respondent, are said to have repudiated the Railway Concession, frustrated the prospective acquisition of the projects by Aabar and caused CCCC to withdraw from the transaction.[1026] The Claimants argue that the withdrawal of Aabar and CCCC destroyed the

[1021] Cl. Mem. ¶¶ 255–64.
[1022] Cl. Reply ¶¶ 508, 530–31.
[1023] Cl. Mem. ¶¶ 265–69; Cl. Reply ¶¶ 508, 516–19.
[1024] Cl. Reply ¶ 539.
[1025] Cl. First PHB ¶¶ 269–272.
[1026] Cl. Mem. ¶¶ 270–76, 283–303; Cl. Second PHB ¶¶ 4; 128–31.

projects, because both State-owned firms were strategic avenues to low-cost debt financing of the Railway and Road Projects.[1027] According to the Claimants, CCCC had access to low-cost debt from Chinese banks, while Aabar, a sovereign wealth fund with access to an AA credit rating and an indirect subsidiary of the Government of Abu Dhabi, had access to low-cost financing.[1028]

b. The Respondent's Position

661. The Respondent contests the Claimants' argument that Armenia expropriated Rasia's contractual rights by breaching the Concessions. The Respondent argues that the Claimants have failed to meet the burden of showing (i) a link between the measures in question and substantial deprivation of Claimants' investment or repudiation of rights, and (ii) the occurrence of an effective repudiation of rights or interference with the contract through the exercise of sovereign authority.[1029] The Respondent further argues that the *Metalclad* test and the *Waste Management* case (on which the Claimants also rely) are inapposite to this case, and it contends that mere non-performance of a contractual obligation does not amount to expropriation.[1030]

662. On the facts, the Respondent argues that Aabar's withdrawal had nothing to do with any action on the part of Armenia.[1031] In addition, the Claimants failed to establish that the Respondent misappropriated and disclosed Rasia's confidential Feasibility Study Results to potential investors. According to the Respondent, the Claimants also failed to demonstrate that the studies had any quantifiable value, and how in any event their alleged misappropriation could amount to expropriation rather than a simple breach of contract.[1032] In addition, the Respondent argues that Mr. Borkowski's testimony that the CCCC Feasibility Studies are properties of Rasia is contradicted by the terms of the Agreement between CCCC and Rasia, to the effect that the feasibility studies are properties of CCCC until paid for by Rasia.[1033] In the same vein, the Respondent submits that Mr. Borkowski's prior assertion in his second witness statement that he

[1027] Cl. First PHB ¶ 246.
[1028] *Id*. ¶¶ 159–60; Cl. Second PHB ¶¶ 125, 150.
[1029] Resp. Rej. ¶¶ 390–91.
[1030] Resp. Counter-Mem. ¶¶ 267–70; Resp. Rej. ¶¶ 384–89.
[1031] Resp. First PHB ¶¶ 217, 220; Resp. Rej. ¶¶ 411–12.
[1032] Resp. Counter-Mem. ¶¶ 257, 275; Resp. Rej. ¶¶ 413–21.
[1033] Resp. First PHB ¶ 53(ix).

had paid for the CCCC Feasibility Studies is contradicted by his subsequent testimony at the February Hearing that he had not yet paid for them.[1034]

c. The Tribunal's Analysis

663. The Tribunal begins with a reminder of general principles, namely that the doctrine of expropriation involves deprivation of protected rights in property. As the tribunal in *Emmis* observed, the origin of the term expropriation is the Latin word *expropriat*, from the verb *expropriare*, which contains the root *proprium* (property) as well as the prefix *ex* (out or from). In consequence, a finding of expropriation must be premised on a showing that "Claimants must have held a property right of which they have been deprived."[1035]

664. The Parties agree in principle that property rights may emanate from a State contract,[1036] but also that not every breach of contract (or poor performance of a contract) results in expropriation of a property right.[1037] They appear to agree that a State's effective repudiation of a contract may give rise to an expropriation, at least when undertaken in an exercise of sovereign authority rather than as an ordinary contract counterparty.[1038] A fundamental requirement is that the State conduct must have deprived the investor of the right in question, or have rendered the right effectively useless by depriving it of all benefit or value.[1039] The latter proposition inherently incorporates an element of causation.

665. In this case, the Claimants claim that the Respondent expropriated two separate types of property rights comprising an investment under the BIT: (a) the Concessions as a whole, which were capable of sale or transfer for value, and (b) independently, the "specific know-how" that Rasia purportedly developed and conveyed pursuant to the Concessions, reflected in the Feasibility Studies and in its "consortium approach."[1040] The Claimants say that Armenia's actions deprived them of the control

[1034] Resp. First PHB ¶ 54 (referring to Second Borkowski Statement ¶ 87; Cl. Reply ¶ 488; February Tr. 581:25–582:2 and 675:11–15).

[1035] *Emmis International Holding, B.V., et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 159.

[1036] Cl. Mem. ¶ 262; Cl. Reply ¶¶ 508, 530; Resp. Counter-Mem. ¶ 269; Resp. Rej. ¶ 381.

[1037] Cl. Reply ¶¶ 531-32, 534; Resp. Counter-Mem. ¶ 269; Resp Rej. ¶ 388.

[1038] Cl. Reply ¶¶ 514-15, 531-33; Resp. Counter-Mem. ¶ 269; Resp. Rej. ¶¶ 381, 388.

[1039] Cl. Mem. ¶ 263; Cl. Reply ¶¶ 539-540; Resp. Counter-Mem. ¶¶ 267-268.

[1040] Cl. Mem. ¶¶ 266-268.

and value of these separate property rights, in violation of Article III(1) of the BIT.[1041] The Tribunal discusses these claims in turn below.

(i) No expropriation of property rights in the Concessions

666. The Claimants' primary expropriation claim concerns the rights reflected in the Concessions. They contend that these rights were not only capable of sale for value, but actually were poised to be sold to Aabar until the Respondent's acts caused the loss of the consortium that Claimants had assembled, and thus deprived the Concessions of the value which was reflected in the Aabar deal price. Specifically, Claimants identify three components that resulted in the deprivation of the value of their investments:

> (i) Armenia's measures caused Aabar to abandon its plan to purchase the Railway and Road Projects in early 2015 when it became apparent that Armenia was intent on excluding the Claimants from the Projects.
>
> (ii) Armenia's discussions with the Chinese Government and Chinese entities have irrevocably disrupted the Claimant's efforts to secure debt financing for the Projects by usurping the communication protocol through which the Claimants were to enter into financing agreements with China EximBank.
>
> (iii) Armenia's engagement with other Chinese state entities, notably CCECC, caused the Claimant's turnkey contractor, CCCC to withdraw from the Projects. CCCC was to be the Claimant's avenue to lose-cost debt financing from Chinese export banks. The loss of low-cost Chinese debt financing has rendered the Projects unfeasible.[1042]

667. According to the Claimants, all of this occurred in or around March 2015: "Aabar terminated its completion of the acquisition of Rasia in March 2015, and CCCC withdrew from Rasia's consortium shortly thereafter. … Their withdrawal was the death knell for the Projects."[1043] The significance of the March 2015 date cannot be overlooked, because the Claimants' expropriation theory is pegged directly to the loss of the Aabar transaction,[1044] and Mr. Tappendorf was adamant that Aabar ceased to have any interest in the Projects in March 2015.[1045] Mr. Tappendorf insists that the transaction was not abandoned as a result of the 1MDB Scandal,[1046] even though a halt on

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[1041] Cl. Mem. ¶ 269.

[1042] *Id*. ¶ 275.

[1043] Cl. Reply ¶ 551.

[1044] *See* Cl. First PHB ¶ 329 ("The purpose of the Aabar transaction was to transfer to Aabar all of the property rights associated with the Concessions. Thus, when the Claimants' investments were expropriated by Armenia, the Claimants had nothing to transfer to Aabar, let alone to derive a fruit from.").

[1045] Second Tappendorf Statement, ¶ 14 (referring to "[t]he Aabar Chairman's decision in January 2015 first to freeze the acquisition of Rasia, and the in March 2015 to withdraw from the acquisition altogether").

[1046] *Id*.

non-essential deals was imposed in April 2015 or shortly thereafter.[1047] The Claimants insist that, but for Armenia's actions culminating in March 2015, the Aabar deal would have closed, notwithstanding these developments, because it had already been approved by Aabar's Finance and Investment Committee and the necessary funds had been "ring-fence[d]."[1048]

668. This places a temporal limit on the measures which are said to have led to the alleged expropriation. They must have occurred by March 2015, in order to have caused the impact that the Claimants allege.

669. In examining this proposition, the Tribunal starts with a reminder that the Concessions by no means assured the success of the Projects described therein. They simply conveyed rights to try to put together the Projects, at Rasia's "own cost and risk."[1049] Looking at the big picture of the Projects, there are several striking improbabilities about the whole venture. First is the notion that a one-man company could develop two massive infrastructure projects, financed at least initially at no cost to the Government, when the company in question had no prior experience in any projects of this sort. The Tribunal is left with the clear impression that Rasia was out of its depth in terms of project design and management, industry and engineering expertise, financial means, and the related processes of maintaining ongoing communication and coordination with its counterparty.

Some of Mr. Borkowski's testimony bordered on the astonishing, such as his concession that the "no less than $1.1 billion" cost of the high speed road promised in the Road Concession was a "number pulled out of thin air," just like the route of the proposed road plotted on the map appended as Schedule B to the Road Concession.[1050] He admitted that he was "learning on the fly" about the process of identifying coordinates for land acquisition purposes, despite having promised such coordinates to the Government at an early stage in the Railway Concession.[1051] He disclaimed knowledge about technical matters such as the specifications promised to the Government for a Class II road or the freight volumes anticipated for the railway,[1052] but either could not afford, or did not see fit, to retain engineering or other industry expertise to assist him before offering the

[1047] First Tappendorf Statement ¶ 21; *but see* Second Tappendorf Statement, ¶ 84 (contending that the freeze was only implemented for certain deals in April 2015, and gradually extended to all activity in the autumn of 2015). The English High Court puts the freeze in "early 2015." RL-88, *Edgeworth Capital (Luxembourgh) S.A.R.L. v. Aabar Investments PJS*, [2018] EWHC 1627, ¶ 32.

[1048] First Thornber Statement ¶ 36.

[1049] C-1, Railway Concession, Section 3; C-2, Road Concession, Section 3.

[1050] February Tr. Day 2, Hanessian/Borkowski, 354: 1-12.

[1051] February Tr. Day 4, Hanessian/Borkowski, 640:7-10.

[1052] February Tr. Day 2, Borkowski, 346:3-13, 347:11-14; February Tr. Day 3, Hanessian/Borkowski, 453:13-15.

Government projections or commitments.[1053] When it became clear he needed additional support, he asked Aabar to provide him with the funds required "to fund a development team" to enable him to obtain and deliver the project financing promised in the Railway Concession.[1054] There is nothing in this document to support Mr. Borkowski's explanation at the Hearing that the funding request was for ancillary mining projects along the Railway corridor.[1055]

670. The contemporaneous documents reveal Mr. Borkowski's propensity to make claims of support that he had not actually arranged. For example, in the same 13 September 2013 email to Aabar by which he requested funding for his development team, he described the Railway Project, without factual foundation, as already having "[s]trong government support from Armenia, China, Russia, Georgia and Iran with *public statements of funding support* by Armenia President Sargsyan, Russian President Putin, Georgian PM Ivaishvili, Chinese Premiere."[1056] The same document described the Railway Project as a "government-to-government project" in which "[c]onstruction will ultimately be government-government funded" and for which he considered it "possible to get Armenia government guaranty."[1057] Mr. Borkowski's explanation at the February Hearing that by "government-government funded" he did not mean to imply Armenian government funding, but was referring to potential funding by Chinese banks and Aabar (the Abu Dhabi sovereign wealth fund),[1058] was not credible. The whole purpose of the letter was to solicit Aabar's support, so it is illogical that he would describe the project as already having government funding from Abu Dhabi. As for the notion of Russian government support, which Mr. Borkowski repeated to Aabar six weeks later,[1059] Mr. Borkowski's explanation on cross-examination that he meant to refer only to SCR as equipment operator,[1060] and not to actual "funding support" as described in the 13

[1053] February Tr. Day 3, Hanessian/Borkowski, 394:5-395:6; February Tr. Day 4, Hanessian/Borkowski, 609:7-12, 628:25-629:16.

[1054] JB-4, Email from Mr. J. Borkowski to Mr. Mr. Al Husseiny and Mr. C. Tappendorf, 13 September 2013 ("Rasia requires pre-capex funding of $35 million to fund a development team and complete the project level financing over the next 3 years").

[1055] February Tr. Day 3, Borkowski, 529:24-531:18, 533:8-538:2.

[1056] *Id.* (emphasis added).

[1057] JB-4, Email from Mr. J. Borkowski to Mr. M. Al Husseiny and Mr. C. Tappendorf, 13 September 2013.

[1058] February Tr. Day 3, Borkowski, 531:3-5 (claiming that "[t]he government-to-government reference I was referring to China, Abu Dhabi, and the affiliated consortium being government-related").

[1059] CT-5, Email from Mr. J. Borkowski to Mr. M. Al Husseiny and Mr. C. Tappendorf, attaching Southern Armenian Railway Feasibility Study, 28 October 2013 (claiming that "both the Russian and the Chinese govt's will likely be debt partners and operators").

[1060] February Tr. Day 4, Borkowski, 622:11-18.

September 2013 email, is further evidence of his propensity to stretch the facts as needed to suit the circumstances.

671. It is difficult to avoid the conclusion that Mr. Borkowski saw the Road and Railway Projects not as ventures he would see to completion, but rather as opportunities to be promoted and sold on as soon as possible.[1061] The problem was that he could not sufficiently advance the Projects to a state that there was in place a credible consortium competent and sufficiently resourced to take the Projects off of his hands and to enable him to cash out. Although there was much talk from Mr. Borkowski about his "consortium," no consortium agreement was ever negotiated and executed. His dealings with CCCC and Aabar strongly suggest that it would have been difficult to form an actual consortium between two companies that both believed they were going to profit from an exclusive EPC contract.

672. Nonetheless, Mr. Borkowski's claim for expropriation rests on the proposition that he had already lined up the requisite financing commitments before, on his version of events, the Government's conduct, culminating in March 2015, caused both CCCC's withdrawal (and therefore the loss of any path to China EximBank financing) and the collapse of the acquisition to which Aabar had already committed. As noted above, the Claimants' case is that "as a result of a series of measures taken by Armenia between the end of 2014 and March 2015 both Aabar and CCCC withdrew from Rasia's consortium."[1062] But this proposition is not supported by the chronologies relevant either to CCCC/China EximBank or to Aabar.

673. First, on the Chinese side, Mr. Borkowski claimed in his first witness statement that "during the second half of 2013, CCCC informed me that it had *secured* commitments from China EximBank" for 60% of the Railway financing.[1063] As discussed above, however, the Railway Feasibility Study that CCCC prepared did *not* state that any commitments had been secured, only that the Railway Project "allows for" and "currently anticipated" securing such loans.[1064] The loose basis for this anticipation was made clear in Mr. Borkowski's February 2014 presentation to the Government, which was attended by CCCC, which stated that "[p]reliminary discussions with China banks *assumed*" 60% financing, but that such financing would be "[h]ighly dependent on China bank

[1061] Mr. Borkowski claimed that *sub silentio* he and CCCC had built a 5% fee for himself into the $3.2 billion budget for the Railway Concession, which he acknowledged to an "agency fee," "broker fee" or "consulting fee." February Tr. Day 3, Hanessian/Borkowski, 550:6-25.

[1062] *See* Cl. First PHB ¶ 250.

[1063] First Borkowski Statement ¶ 66 (emphasis added).

[1064] C-116, Railway Feasibility Study, pp. 12, 15, 168.

negotiations" that were still to come.[1065] Beyond this presentation, there is no documentation in the record showing any interest being expressed by a Chinese bank, much less any commitment given by one.

674. Second, there is no evidence in the record (beyond Mr. Borkowski's testimony) that CCCC's withdrawal of interest was in March 2015, and that it was triggered by Armenia's dealings with CCECC. Mr. Borkowski claimed that CCCC's Mr. Weixin told him by telephone that CCCC was withdrawing because the PRC's Ministry of Commerce had "ring-fenced" the Railway Project for the benefit of CCECC.[1066] The assertion figures prominently in the Claimants' Post-Hearing Brief.[1067] But this testimony is the only evidence on this point; Mr. Borkowski acknowledged there is no contemporaneous evidence of this March 2015 conversation.[1068] Given the evident importance of such a development, and particularly given that Mr. Borkowski says he retained outside counsel around this time to advise him on what he says was a ripening dispute,[1069] one would have expected some contemporaneous notation or reaction to Mr. Weixin's bombshell announcement.[1070] Moreover, notwithstanding the obvious relevance and materiality to this arbitration of such a March 2015 conversation (if it occurred), it was not mentioned in any of Mr. Borkowski's witness statements prior to his cross-examination, nor in the Claimants' pleadings until their Post-Hearing Brief. It defies credulity that Mr. Borkowski only remembered his March 2015 conversation with Mr. Weixin in the midst of his hearing testimony. The closest Mr. Borkowski came prior to his hearing testimony to attributing "CCCC's eventual withdrawal" to the Ministry's meeting with CCECC in March 2015 was in his second witness statement. But the evidence he cited there was

[1065] C-131, "Southern Armenia Railway Project and Southern Armenia High Speed Road Project" (Razia FZE), February 2014 p. 15 (emphasis added).

[1066] February Tr. Day 2, Borkowski, 314:9-18. Mr. Borkowski also claimed that Mr. Weixin informed him that a "formal RFP from the Armenian Ministry of Finance went out to the China Ministry of Commerce requesting for all Chinese companies to participate in making proposals for the railway project and resulting in MoUs being signed with CCECC for both of our projects, the Ministry issued an RFP." *Id.*, 313:20-314:18, 332:10-20. This is a detailed allegation, for which there is no documentary evidence in the record, either of a "formal RFP" or of a CCECC MoU for the Railway Project.

[1067] Cl. First PHB ¶¶ 244, 246, 271.

[1068] February Tr. Day 2, Hanessian/Borkowski, 313:20-314:3.

[1069] February Tr. Day 2, Borkowski, 290:19-291:3.

[1070] The Respondent observes that the Claimants were able to adduce various emails from Mr. Weixin leading up to 8 February 2015, but there is a complete absence of documentary evidence pertaining to Mr. Borkowski's interaction with Mr. Weixi until 2018. Resp. First PHB ¶ 12.

not the claimed telephone call with Mr. Weixin, but rather the Ministry's website's report of the meeting.[1071]

675. Furthermore, neither the meeting with CCECC, nor the claimed resulting withdrawal of CCCC in March 2015 was raised in any letter of complaint to the Ministry at the time. To the contrary, Mr. Borkowski later told Armenian officials that "things were going well *until about August*" of 2015.[1072] Moreover, Mr. Borkowski's 25 June 2016 Notice of Dispute to Armenia, written some 15 months after the alleged critical events of March 2015, stated that CCCC "*recently* informed that it intends to terminate contractual agreements with Rasia …."[1073]

676. The claimed withdrawal of CCCC in March 2015 also stands at variance with Mr. Borkowski's letter of 14 October 2015, where he stated that "Rasia was in the process of negotiating a Framework Agreement with China Poly Group *and involving CCCC* in September 2015…."[1074] First, Mr. Borkowski's suggestion in this letter that he continued to have dealings with CCCC on the Railway Project through September 2015 is inconsistent with the Claimants' contention in the arbitration that the Ministry's announcement of its March 2015 meeting with CCECC "clearly signaled to the world, and to any prospective purchaser of Rasia's Projects, that a decision had been taken at the highest governmental levels in Yerevan and Beijing that Rasia and CCCC were out, CCECC was in."[1075] Moreover, it beggars belief that if Mr. Borkowski really understood the Armenia Railway Project to be cratering in March 2015 on account of the withdrawal of CCCC from his "consortium," that he would have continued to devote energy beyond that date to trying to develop an Iranian railway link to connect at the Armenian border. Nonetheless, that is what he did: in July 2015, Mr. Borkowski arranged for China Poly to visit Iran for nine days to discuss the possibility of an EPC contract with Iran.[1076]

[1071] Second Borkowski Statement, ¶ 131 (claiming that "Armenia was responsible for CCCC's eventual withdrawal …. Any prospect of securing debt financing from China EximBank was destroyed when in March 2015 Armenia publicly sought to solicit CCECC, a competitor of CCCC," and citing C-20, Ministry of Transport Website: Gagik Beglaryan Receives Representatives of Chinese Company (http://mtcit.am/pages.php?lang=3&id=5831&page_name=news), 18 March 2015, accessed on 11 July 2018).

[1072] R-40, Transcript of the Meeting between A. Arakelyan, G. Grigoryan, H. Aharonyan, L. Voskanyan, J. Borkowski and A. Karapetyan, 18 March 2016, p. 4 (emphasis added).

[1073] C-53, Letter from Mr. J. Borkowski to Minister G. Beglaryan, 25 June 2016.

[1074] C-35, Letter from Mr. J. Borkowski to Prime Minister H. Abrahamyan, 14 October 2015 (attaching letter from Mr. J. Borkowski to Minister G. Beglaryan), p. 4.

[1075] Cl. First PHB ¶ 20.

[1076] R-128, Email from D. Ning to Mr. J. Borkowski, 21 July 2015; R-129, Email from Mr. J. Borkowski to D. Ning, 26 July 2015.

677. In short, the contemporaneous evidence does not support Mr. Borkowski's oral testimony that he was notified of CCCC's withdrawal of interest in the Railway Project in March 2015. Given this fact, as well as Mr. Borkowski's propensity for overstatement as revealed in other respects, the Tribunal does not accept as reliable his uncorroborated testimony about these events.

678. As for the alleged destruction of the Aabar transaction in March 2015, the evidence likewise leaves many questions about whether Aabar really was poised to buy Rasia in April 2015, as Claimants contend; whether it really would have proceeded to close on such a deal notwithstanding the general halt on new Aabar investments resulting from the 1MDB Scandal; and whether it really withdrew its interest *because* of the Respondent's acts, which is the central proposition underlying Mr. Borkowski's expropriation claim.

679. First, the claim that Aabar was poised to purchase all of Rasia's equity rests largely on the testimony of Messrs. Tappendorf and Thornber. It is clear that Mr. Tappendorf, at least, was not a disinterested witness. From July 2012, he was a member of Rasia's Investment Advisory Board,[1077] and evidently was presented to CCCC as part of Rasia's team, not as a representative of a potential arms' length acquiror; CCCC understood him to be a "senior director" of Rasia.[1078] Mr. Borkowski communicated with Mr. Tappendorf (and with his superior Mr. al-Husseiny) through their private Gmail accounts, rather than their Aabar accounts.[1079] Given the absence of official Aabar emails, and Aabar's winding up following the 1MBD scandal which landed Messrs. al-Husseiny and al-Qubaisi in prison for fraud,[1080] there is no way to verify the authenticity of the documents proffered as representing Aabar's contemporaneous readiness to invest in Rasia.

680. Moreover, Mr. Tappendorf's testimony about the reasons for Aabar's withdrawal of interest in purchasing Rasia is inconsistent with other evidence. For example, Mr. Tappendorf testified in his first witness statement that the main reason Aabar's Chairman first put the Rasia purchase on hold in January 2015 was that Armenia had demanded, in November 2014, that the Railway Concession be amended to shift the cost of land acquisition to Rasia.[1081] Yet Mr. Tappendorf conceded he knew about this request *before* he presented the proposed acquisition to Aabar's Investment Committee

[1077] First Tappendorf Statement ¶ 12.

[1078] C-96, CCCC, "Site Visit Report: Southern Armenia High Speed Road Project," November 2012, p. 1.

[1079] Resp. Rej. ¶ 193 (citing emails).

[1080] R-52, B. Hope, Alleged 1MDB Co-Conspirators Sentenced to Prison, The Wall Street Journal, January 16, 2019, https://www.wsj.com/articles/alleged-1mdb-co-conspirators-sentenced-to-prison-11560677550.

[1081] Second Tappendorf Statement ¶ 14.

in December 2014,[1082] but he had recommended the deal anyway. Either Mr. Tappendorf attributed little significance to Armenia's request at the time – which weakens the claim that this was a serious contributor to Aabar's growing concerns – or he did not see fit to bring it to the attention of the Investment Committee in asking them to approve the acquisition. As already discussed, it does not appear that the Investment Committee was ever told about a more basic reason for doubting the wisdom of the investment, namely that Rasia had already committed to give the exclusive EPC role to CCCC (and thus could not commit the same role to Arabtec).[1083] This issue would have immediately come to a head had they sought to negotiate an actual consortium agreement among the potential partners.

681. There are other oddities about the proposition that the Respondent's acts culminating in March 2015 were responsible for the Aabar acquisition not moving forward. For example, Mr. Tappendorf had recommended back in September 2014 that the drafting of any definitive agreements with Rasia be deferred until the signing of a trilateral cooperation memorandum between Rasia, Armenia and Iran, "ensuring Iran linkages will be in place."[1084] This was a logical precondition given that the value of the Railway Project clearly depended on being able to carry freight traffic into Iran.[1085] Yet although Iran signed the Iranian Trilateral MOU in November 2014, that document did not come close to "ensuring" an Iran link for the Southern Armenian Railway. To the contrary, Iran stated in that document that it would undertake to build a railway segment on its territory only after "the project progress by value achieves 30% in the Republic of Armenia territory."[1086] This created a difficult "chicken and egg" problem: to obtain financing for the Southern Armenian Railway, Rasia needed to show the certainty of a Iranian link, but the Iranian link would not be undertaken

[1082] February Tr. Day 5, Hanessian/Tappendorf, 889:11-18.

[1083] C-145, Aabar, Term Sheet, 18 December 2014 (not identifying the Rasia-CCCC Framework Agreement as one of the documents reviewed). Mr. Tappendorf testified that there nonetheless were "quite extensive communications" about Arabtec and CCCC working together, which is not credible, among other things because Mr. Borkowski testified that there were never any such communications. *Cf.* February Tr. Day 3, Borkowski, 553:17-22; Day 5, Mr. Tappendorf, 844:25-845:7.

[1084] CT-7, Memorandum from Mr. C. Tappendorf to H.E. K. Al Qubaisi, 21 September 2014.

[1085] *See, e.g.,* C-101, Letter from Mr. J. Borkowski to Minister G. Beglaryan (Unofficial Translation and Armenian Original), 21 December 2012, p. 6 (emphasizing that in order "to successfully develop the railway, it is mandatory" that Iran commit to "railway development on its territory"); C-131, "Southern Armenia Railway Project and Southern Armenia High Speed Road Project" (Razia FZE), February 2014, p. 20 (warning that there was a "[t]erminal risk to Project" if the Iran railway section was not built); R-108, Email from Mr. J. Borkowski to A. Arakelyan, copy to MOT Staff (subject blank), 13 October 2014 (reiterating that "the Iran cooperation is absolutely critical for any further progress to be made").

[1086] C-12, Unofficial Trilateral Memorandum of Understanding Between the Holding Company for Construction and Development of Transport Infrastructures of the Ministry of Roads and Urban Development of the Islamic Republic of Iran, the Ministry of Transport, and Rasia, 10 November 2014, Article 3.

until the Southern Armenian Railway had progressed substantially. There is no persuasive explanation of why Aabar – which in September 2014 had identified the importance of "ensuring Iranian linkages will be in place" before moving forward with any Rasia deal – would have been willing to move ahead anyway on the deal in April 2015, despite this impasse remaining in place. The evidence also indicates that both Mr. Borkowski and Mr. Thornber of Aabar continued even in September 2015 – months *after* the purported destruction of Rasia's investment in March 2015 – to explore ways of generating movement on the Iranian railway segment, by meeting together with China Poly about its potentially becoming the exclusive EPC contractor for the Iranian segment.[1087]

682. As for Rasia's contention that the Aabar deal with Rasia would have closed in April 2015, notwithstanding the general halt in new Aabar investment put in place at that time, the Claimants overlook a final critical fact: that pursuant to the Concession Agreements themselves, Rasia's ability to close on any equity transaction, by which its shares would be sold to any third party, was contractually subject both to Armenian Government review[1088] and an Armenian Government right of first refusal.[1089] There is no evidence that Rasia ever notified the Government that it had reached an agreement in principle with Aabar, much less that it requested the Government to review the proposed transaction and to waive its right of first refusal. Yet both of these processes would have had to be concluded in order for Aabar to proceed with any acquisition of Rasia. And certainly, once the 1MBD scandal engulfed Aabar, the Armenian Government could not reasonably be faulted for objecting to Aabar as its putative new Concession partner, even if (*arguendo*) Aabar itself might have been willing to proceed despite its overall turmoil.

683. In short, the evidence does not support the Claimants' contention that the Project rights bestowed by the Concessions had substantial value as of 2015, which Rasia would have realized through the Aabar transaction, but for the Government's alleged wrongful acts. Rather, it appears that the Projects collapsed for other reasons. With respect to the Road Project, CCCC concluded that

[1087] R-132, Email from Mr. J. Borkowski to D. Ning, 17 September 2015 (referencing a meeting "with me and the aabar Investments CFO").

[1088] C-1, Railway Concession, Section 8.2 (regulating any potential "alienation" of Rasia, the direct or indirect shareholding interest in Rasia, and Rasia's "rights and assets related to the Project," and subjecting any such alienation to conditions including acceptability of the acquiror to the Government on grounds of national security, and confirmation that the acquiror would be able to provide continuity and proper progress on the Project); C-2, Road Concession, Section 8.2 (same).

[1089] *Id.* ("the Government shall enjoy rights of first refusal in acquiring shareholding interest in the Concessionaire, including in case of increase of the equity capital, except for any acquisition of the shareholding interest through open auction or any other public tender process").

projected usage did not support the use of tolling to generate revenue, which was a central feature of the original Project conception, and without that feature, the Government had no obligation to move forward. There is no causal link between the Government's moving forward with alternative road projects (even though that breached the Road Concession in the absence of any effective contract termination) and the Road Project's underlying failure. With respect to the Railway Project, Rasia was presented with a Gordian knot which tied the fate of financing to Iran's willingness to move forward, which Iran in turn tied to seeing concrete progress on the Armenian side. This contradiction proved impossible to resolve. It was the main reason for the Railway Project's failure. In these circumstances, there was no expropriation by Armenia of any inherent or residual value of the two Projects, whether reflected through an Aabar acquisition price or otherwise. Simply put, Armenia's conduct did not destroy any Project rights of cognizable value.

(ii) No expropriation of property rights in the Feasibility Studies

684. The Claimants assert that independent of the alleged expropriation of the Project rights, the Respondent expropriated "the Claimants' work product." This allegedly occurred well after the Projects collapsed – "[i]n October 2016 and January 2017" – when Armenia "appropriated, repackaged and widely disseminated the Claimants' confidential feasibility study information in order to attract new investors to the Projects."[1090] More precisely, the Claimants say that they "furnished specific know-how" by "commissioning feasibility studies and assembling a consortium to deliver the Projects,"[1091] but Armenia subsequently used for other purposes "key financial data, technical specifications and the proposed railway alignment" from the Railway Feasibility Study."[1092] In addition, the Respondent is said to have expropriated the Claimants' "consortium approach," by "proceeding to engage with Chinese entities" like CCECC to prepare a feasibility study, and thus "usurp[ing] the communications protocol with Chinese banks."[1093]

685. The second contention is easy to dispose of. The Claimants had no property right in the idea of working with Chinese construction companies on an infrastructure project, in order to harness the connections of such companies as a pathway to obtain Chinese bank financing.

686. The Claimants' first contention, about the Respondent's alleged collateral use of technical information set out in the Railway Feasibility Study, requires more discussion. First, the Claimants

[1090] Cl. Mem. ¶ 274

[1091] *Id*. ¶ 267; Cl. Reply ¶ 558.

[1092] Cl. Mem. ¶ 274.

[1093] Cl. Reply ¶¶ 561-562, 566.

are correct that the Railway Concession did not grant the Respondent the right to use any "proprietary or confidential information (including specifications, plans and drawings)" provided to the Government pursuant to the Concession.[1094] The Respondent's obligations of confidentiality did not apply to information that was "already lawfully in [its] possession or lawfully known" to it prior to disclosure.[1095]

687. The evidence demonstrates that in October 2016, Mr. Arakelyan used some of the same data contained in the Railway Feasibility Study in a presentation he provided to the Armenian Investment Forum in New York. Specifically, as the Claimants note, his presentation contains the same figures about predicted freight volumes, passenger traffic and transit cargo.[1096] The presentation also used the same figures that had appeared in the Railway Feasibility Study in respect of the Railway Project's projected financial internal rate of return and a financial net present value.[1097] However, before setting out any of this data, the October 2016 presentations explicitly (though inaccurately) referred to the Government's Railway Concession with Rasia, and to CCCC's Railway Feasibility Study prepared under contract with Rasia.[1098] The presentation therefore may be said to have attempted to give Rasia and CCCC attribution for the data used, even if the Government did so without seeking Rasia's advance permission.

688. Similarly, in January 2017, the Armenian Ministry of Foreign Affairs distributed certain marketing material that contained the same projections of annual investment for each year of the anticipated construction period and the same calculations of financial internal rate of return.[1099] The material also contained the same freight volume forecasts and transit forecasts as were incorporated in the Railway Feasibility Study.[1100] Again, however, the January 2017 presentation mentioned Rasia's

[1094] C-1, Railway Concession, Section 70.1.

[1095] *Id*., Section 70.2(e).

[1096] Cl. Mem. ¶ 172 (comparing C-116, Railway Feasibility Study, pp. 28, 29 and 31, with C-45, Ministry of Transport, "Connectivity: Your Emerging Transit Partner," Armenian Investment Forum, 10-11 October 2016, pp. 14 and 15).

[1097] *Id*. (comparing C-116, Railway Feasibility Study, p. 176 with C-45, Ministry of Transport, "Connectivity: Your Emerging Transit Partner," Armenian Investment Forum, 10-11 October 2016, p. 14).

[1098] C-45, Ministry of Transport, "Connectivity: Your Emerging Transit Partner," Armenian Investment Forum, 10-11 October 2016, p. 13 (referring to a 2012 concession agreement "with the Russia FZE company" [*sic*], which had contracted with "China's Communicating Company (CCC" [sic] for a feasibility study).

[1099] Cl. Mem. ¶¶ 174-176 (comparing C-116, Railway Feasibility Study, pp. 168, 176, with C-33, Republic of Armenia, "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of the Armenia railway project," 11 January 2017, pp. 6-7).

[1100] *Id*. ¶¶ 177-178 (comparing C-116, Railway Feasibility Study, pp. 28-29, with C-33, Republic of Armenia, "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of the Armenia railway project," 11 January 2017, pp. 8-9).

2012 Railway Concession, although it did so in the context of inviting "interested investor(s) to become the party to the tripartite agreement with the 'Rasia FZE' and the Republic of Armenia,"[1101] an invitation for which they had not sought Rasia's permission.

689. The Respondent contends that at least some of this information, such as traffic volume and freight estimates, was based on Armenian Government data that it provided to CCCC in the first place, and that therefore was exempted from any duty of confidentiality under the Railway Concession.[1102] The Claimants seem to acknowledge this sourcing point, by stating that Armenia cannot reasonably question "the traffic volume and freight estimates that it was instrumental in providing to CCCC in the first place."[1103] At the same time, the Respondent does not contend that *all* of the information duplicated in its 2016 and 2017 presentations was sourced originally from Government data. In the absence of any evidence about CCCC's sources for the figures in the Railroad Feasibility Study, the Tribunal cannot make particularized findings about which figures resulted from its independent analysis and which did not. The Tribunal however accepts in principle that at least *some* of the information likely did so, and the Government then used that information in its presentations, without Rasia's prior consent.

690. However, even assuming *arguendo* that the Government breached its contractual duty of confidentiality to Rasia under the Railway Concession, this does not establish expropriation of intellectual property comprising an "investment" of Rasia's under the BIT. While intellectual property is capable of expropriation, the property in question *must belong to the investor* protected by the BIT. The BIT does not provide standing for U.S. investors to assert expropriation claims regarding property owned by third party nationals. In this case, while the Claimants often loosely referred to the data in question as *their* know-how, the more accurate description is that reflected in their statement that they "furnished" know-how by "commissioning" studies by others, namely CCCC.[1104] However, the terms of the "commissioning" in question – defined by the CCCC Railway Commercial Agreement – expressly provided that CCCC would retain ownership of the Railway Feasibility Study, and all intellectual property rights in that Study, until Rasia paid an agreed "Services Fee" to acquire such rights. The fact that Rasia incurred a debt to pay this fee in future did not provide it with any present rights to the content of the Study; the CCCC Railway

[1101] C-33, Republic of Armenia, "Public-Private Partnership Opportunities and Financial Resources Necessary for the Construction of the Armenia railway project," 11 January 2017, p. 4.

[1102] Resp. Rej. ¶ 415.

[1103] Cl. Reply ¶ 146.

[1104] Cl. Mem. ¶ 267.

Commercial Agreement is explicit that "any CCCC work that has been completed, but not paid for, will remain its property."[1105]

691. As discussed in Section V.A.3 above, Rasia has never paid CCCC for either of the Feasibility Studies. It therefore is not the owner of any intellectual property rights reflected in those Studies. In these circumstances, the Claimants have not proven that any breach by the Respondent of its contractual confidentiality obligations amounted to an expropriation of property rights that belonged to Mr. Borkowski, in violation of Article III of the BIT.[1106]

VII. CAUSATION AND DAMAGES

A. THE CLAIMANTS' POSITION

692. According to the Claimants, but for the Respondent's acts that led to Rasia's and CCCC's ouster from the Projects by March 2015, Aabar would have acquired and financed the Projects and led their successful construction and long-term operation.[1107] The Claimants argue that Aabar's withdrawal resulted in the loss of the acquisition and of the favourable financing terms that Aabar would have been able to secure, and that the Claimants are entitled to full reparation equivalent to the value of the Projects.[1108]

693. The Claimants state that their compensable losses equate to the fair market value ("**FMV**") of the Projects as of March 2015, which they quantify at US$225 million.[1109] This is derived from the price at which Aabar agreed to acquire the Projects through acquiring Rasia, discounted to present value and "to account for the uncertainty of future EPC and royalty fees being paid."[1110] The Claimants rely on the Aabar Term Sheet dated 18 December 2014 in this respect and claim that it represents the best evidence of the Projects' FMV.[1111] The Claimants argue that, pursuant to the Aabar Term Sheet, they would have received US$70 million for the Railway Project (seven times

[1105] R-67, Commercial Agreement for Feasibility Study on the Southern Armenia Railway, 10 December 2012, ¶ 5.

[1106] For avoidance of doubt, the Tribunal also finds that Mr. Borkowski cannot sidestep his lack of ownership of the underlying information, by defining the property right allegedly expropriated as simply his contractual right to confidentiality under the BIT. A contractual right to confidentiality regarding intellectual property owned by third parties does not constitute a separate "investment" akin to intellectual property itself.

[1107] Cl. Second PHB ¶ 132.

[1108] Cl. First PHB ¶ 313.

[1109] *Id*. ¶ 311; Cl. Opening Presentation (CD-1), slide 139; Cl. Second PHB ¶ 133.

[1110] Cl. First PHB ¶ 311.

[1111] Cl. Mem. ¶ 318; C-145, Aabar, Term Sheet, 18 December 2014.

the cost of the Railway Feasibility Study) and US$35 million for the Road Project upon closure of the transaction, *i.e.* US$105 million in cash (the "Upfront Payment").[1112] In addition, the Claimants would have received US$139 million over a six-year period by virtue of a 5% consulting fee on the value of CCCC's EPC contract, as well as US$475 million over a 30-year period in revenue royalties, corresponding to 3% of the total annual revenue for the railway.[1113] The Claimants' expert, Mr. Sequeira, discounted the forecasted cash flows to Rasia of these amounts to 18 March 2015.[1114]

694. According to Mr. Sequeira, an arms-length offer by a sophisticated and informed purchaser made close in time to the valuation date and based on significant due diligence represents highly reliable evidence establishing the value of an investment.[1115] In addition, Mr. Sequeira indicated that visibility into the due diligence and strategic value drivers for the investor are also needed as evidence of the value of the investment. The Claimants submit that Aabar's vetting process meets these criteria.

695. The Claimants state that the reliability of the acquisition price agreed by Aabar is supported by: (i) Aabar's intimate involvement in the establishment and organization of the Projects for over three years; (ii) internal documents showing financial modelling and strategic assessments, investment memoranda and other evidence concerning the due diligence process, including Mr. Tappendorf's and Mr. Thornber's testimony at the February Hearing, to the effect that Aabar carefully assessed the anticipated risks and returns of the Projects; (iii) CCCC's reliance on the Respondent's own data with regard to its NPV estimate and key assumptions; (iv) CCCC's assessment regarding railway traffic volumes in the Feasibility Study, which was corroborated by third-party evidence, *e.g.*, a projection by SCR; (v) the fact that Aabar had insight into, and control over, future oil volumes by virtue of IPIC's ownership of Spain's CEPSA, one of the largest European importers of oil from Iran, thus giving confidence that the Railway Project could meet the transit volume projections in the Feasibility Study; and (vi) Mr. Sequeira's confirmation of Aabar's and CCCC's NPV assessments, based on comparisons with other railways in the region.[1116] The Claimants add that the Tribunal can adjust the Aabar offer price to the extent that it considers any adjustment

[1112] Cl. Mem. ¶¶ 322, 330; Cl. Second PHB ¶ 145.
[1113] Cl. Mem. ¶ 323.
[1114] *Id*. ¶ 327.
[1115] Cl. Second PHB ¶ 134.
[1116] *Id*. ¶¶ 135–44.

appropriate "to reconcile the particularities of the Aabar acquisition terms to its perception of the hypothetical fair market price."[1117]

696. The Claimants refute the Respondent's suggestion that Aabar's acquisition was lightly taken and therefore that its contemplated purchase price cannot be accepted as a reliable measure of FMV. In the Claimants' view, the Respondent's expert's, Mr. Winner's, reassessment of the Railway Project as having a negative NPV is fatally flawed, as (i) he made arbitrary reductions to the railway traffic volumes and tariff rates that are not supported by any evidence or analysis; (ii) he wrongly assumed that the Railway Project would be owned and operated by private sector investors, as opposed to an Abu Dhabi sovereign wealth fund; (iii) his model relied on a distorted WACC, which was not the financing contemplated by Aabar and did not take into account financing by an Abu Dhabi sovereign wealth fund; and (iv) he had double-counted costs and made other major substantive modelling errors in his financial analysis of the Railway Project, as highlighted by Mr. Sequeira.[1118]

697. According to the Claimants, they seek damages for the direct loss that they suffered arising from deliberate acts by Armenian officials and say they do not seek damages for the loss of profit with regard to the Aabar acquisition.[1119] The Respondent therefore cannot rely on Section 57 of the Concession Agreements, which purports to exclude "profit loss, indirect and consequential losses."[1120] The Claimants' loss is the totality of their property rights in the Concessions and the destruction of their value, as the Claimants were left with nothing to transfer to Aabar after the investments were expropriated by Armenia.[1121]

698. The Claimants argue that the breaches of the Concessions were intentional and therefore compensable under Article 417(4) of the Armenian Civil Code (1998).[1122] Even if Armenia did not purposefully seek to harm the Claimants by destroying the value of the Projects, by voluntarily choosing illegal conduct, its actions constitute intentional breaches under Armenian law.[1123] The Claimants contend that these intentional breaches have been proven beyond any doubt at the February Hearing.[1124] However, even if the Claimants' damages claim were deemed to be a demand

[1117] Cl. First PHB ¶ 323.
[1118] Cl. Second PHB ¶¶ 146–75.
[1119] Cl. First PHB ¶ 328.
[1120] *Id*. ¶ 327.
[1121] *Id.* ¶ 329.
[1122] *Id.* ¶ 332.
[1123] *Id.* ¶ 333.
[1124] *Id.* ¶ 334.

for "profit loss" or indirect or consequential losses within the meaning of the exclusion in the Concession Agreements, they contend that the indemnification clauses of the Concessions cannot limit the Respondent's obligation to provide full compensation to the Claimants.[1125] Article 9 of the Foreign Investment Law of Armenia provides that unlawful State action "shall be subject to immediate compensation" for "damages, including lost profits." This is *lex specialis* and cannot be contracted out of under general contract law, as confirmed by Article 437(4) of the Civil Code of Armenia.[1126]

699. With regard to pre-award interest, the Claimants state that they are entitled to compound interest calculated as Armenia's sovereign cost of debt, said to be LIBOR plus 4%.[1127]

B. THE RESPONDENT'S POSITION

700. According to the Respondent, the Claimants have not suffered any damages. Even if there were a breach of the Concessions or the Treaty, the Claimants have failed to show that, but for Armenia's actions, the Projects would have gone forward.[1128]

701. The Respondent argues that Aabar's withdrawal from the acquisition had nothing to do with Armenia. As testified by Mr. Tappendorf, in April 2015, Aabar froze all its new investment activities because of the resignation of its Chairman, Mr. al-Qubaisi. This was independent of the Projects and ended any possibility of Aabar's investment.[1129] Therefore, the Respondent contends the Claimants' damages claim "must fail for lack of causation."[1130]

702. The Respondent submits that the Claimants' damages claim is an attempt to recover putative profits that Mr. Borkowski says he would have earned had he been able to sell Rasia to Aabar. Such indirect or consequential damages are barred by the Concessions and Armenian law.[1131] Pursuant to Article 17 of the Armenian Civil Code, "[a] person whose right has been violated may demand full compensation for the losses caused to it unless statute or contract provides for compensation

[1125] Cl. First PHB ¶ 336.
[1126] *Id*.
[1127] Cl. Mem ¶¶ 311, 315; The Claimants state that the interest amounts to US$ 106 million as of 1 July 2015, Cl. Second PHB, fn. 187.
[1128] Resp. Second PHB ¶ 139.
[1129] *Id*. ¶ 140.
[1130] *Id*. ¶¶ 140-141.
[1131] *Id*. ¶ 142.

for losses in a lesser amount."[1132] In this respect, the Concession Agreements specify at Section 57 that "profit loss, indirect and consequential losses of the indemnified Party" are excluded.[1133]

703. The Respondent contends that, under Armenian law, Aabar's offer is just an "assumption" or "speculation" of events in the future and cannot be characterized as "actual damages."[1134] It is incorrect to say that the consideration paid for the Concessions would have substituted for the assets in Claimants' hands and cannot be seen as mere "profit," as Aabar was going to buy Rasia, and only indirectly the Projects, and the Claimants paid nothing for the Concessions.[1135] The Claimants also cannot rely on Article 9 of the Foreign Investment Law for damages in this case, as that Law provides that "other legislation of the Republic of Armenia and international treaties" apply.[1136] In the Respondent's submission, the Foreign Investment Law cannot override the limitation in the Concessions, as Article 437(4) of the Armenian Civil Code (which the Respondent argues is applicable as such "other legislation" referenced in the Law) provides that parties are free to contract otherwise, as the Parties in this case have done in the Concessions.[1137] In addition, the Respondent notes that the Claimants have not brought any claim under the Foreign Investment Law. Accordingly, any damages must be limited to any direct, actual damages suffered by the Claimants, which are not supported by any evidence.

704. According to the Respondent, Mr. Borkowski is also precluded from claiming damages under the BIT. To the extent that the Tribunal finds that there is an investment, such investment is the Concession Agreements, governed by national law. Mr. Borkowski's bundle of rights and his damages for Treaty claims must therefore be limited in the same manner as under the Concessions and Armenian law.[1138]

705. In any event, according to the Respondent, the Claimants' claim for damages is too speculative, as it relies on a single, uncommunicated and unconsummated, non-binding indicative offer.[1139] The Respondent says that the Claimants' expert, Mr. Sequeira, agrees that the only document exchanged

[1132] RL-82, Excerpts of the Civil Code of the Republic of Armenia, 1 January 1999.

[1133] Resp. Rej. ¶ 467.

[1134] *Id*. ¶ 470, referring to the Court of Cassation of the Republic of Armenia, Case No. EKD/3296/02/14, 27 December 2017, RL-87.

[1135] *Id*. ¶ 474.

[1136] *Id*. ¶ 477; RL-80, The Law of the Republic of Armenia on Foreign Investments, 31 July 1994, Art. 2.

[1137] Resp. Rej. ¶ 477.

[1138] *Id*. ¶ 484.

[1139] Resp. Second PHB ¶ 146.

between Aabar and Rasia was Aabar's letter of 21 September 2013 entitled "Expression of Interest."[1140] According to Mr. Sequeira, this offer was later formalized in the Aabar Term Sheet, but the sheet was never provided to Mr. Borkowski, as admitted by Mr. Tappendorf.[1141] The Respondent submits that there was no independent due diligence nor evidence in support of the allegation that the transaction was near completion, and the Claimants cannot rely on the Aabar Term Sheet given the preliminary status of the transaction.[1142] The Respondent argues there is no precedent to award damages on the basis of a single non-binding unconsummated indicative offer, and distinguishes cases relied on by the Claimants in this respect.[1143]

706. The Respondent also takes issue with the DCF analysis used by the Claimants, as it considers that such analysis is appropriate only for a going concern with a history of profits, which Rasia was not.[1144]

707. The Respondent further argues that Aabar's indicative offer to purchase Rasia cannot reflect the market value of the Projects, as (i) it is based on unreasonable conclusions in CCCC's Railway Feasibility study, which were not supported by any documentary evidence of due diligence made beyond modelling different debt assumptions, and which took into account tariff rates that were too high to be competitive; (ii) the Road Project was not projected to generate revenue; (iii) the railway had a USD 1.9 billion negative NPV and 1.05% negative Internal Rate of Return; (iv) there is no commercial precedent for a privately-financed Railway Project without any form of State guarantee, due to revenue risks associated with railway projects; (v) the valuation method reflected in the Aabar offer – multiplying the alleged cost of CCCC's feasibility studies by seven to arrive at an upfront payment of $105 million – was arbitrary and there is no evidence that it reflected market terms; (vi) there is no evidence that the additional 5% construction fee and the 3% revenue fee on the Railway Project reflected market terms; (vii) the damages calculation did not appropriately discount the Aabar offer to take into account associated risks; and (viii) it was not a market offer, which the Claimants effectively concede as they state that Aabar was uniquely placed to acquire the Projects and invite the Tribunal to adjust their claim for factors unique to Aabar.[1145]

[1140] C-13, Letter from Mr. C. Tappendorf to Mr. J. Borkowski, 21 September 2014.

[1141] February Tr., Day 5, Hanessian/Tappendorf 879:8-11. Resp. Rej. ¶¶ 543-545.

[1142] Resp. Second PHB ¶¶ 150–51.

[1143] *Id*. ¶ 160.

[1144] Resp. Rej. ¶ 542.

[1145] Resp. Second PHB ¶¶ 161–75; Resp. Rej. ¶ 513.

708. Finally, according to the Respondent, the Claimants have not alleged that they have spent anything on the Projects and they therefore do not have any costs or cognizable damages.[1146] Moreover, Rasia's damages are different than Mr. Borkowski's, as shown by the Aabar Term Sheet, which provided that after closing, Aabar and Rasia would pay construction fees and revenue royalties to Mr. Borkowski, meaning that these payments "were always going to be a cost, not revenue, for Rasia and therefore cannot be a part of Rasia's damages," the Respondent contends.[1147] The Respondent further notes that the Claimants claim no damages with respect to their assertions of additional breaches occurring after March 2015.[1148]

C. THE TRIBUNAL'S ANALYSIS – AND CONCLUDING REMARKS

709. In Section VI.A.1 above, the Tribunal found that Armenia breached the "No Grant" provision of the Road Concession in late 2013 and again in 2014, when it granted certain rights to third parties for the financing and design of a road in southern Armenia, without first terminating the (then-dormant) Road Concession as it would have been entitled to do. In Section VI.A.2, the Tribunal found that Armenia breached its duty of cooperation under the Railway Concession beginning in the third quarter of 2015, when it began exploring in earnest the possibility that CCECC might construct the Southern Armenia Railway, without coordinating this approach through Rasia (which had promised EPC rights to CCCC). At the same time, the Tribunal found in Section V.D.3 that Rasia presented its claims for breach of contract too late for them to be actionable, under the statute of limitations reflected in the Armenian Civil Code.

710. With respect to Mr. Borkowski's claims under the BIT, the Tribunal has found the umbrella clause claims to be time-barred (*see* Section V.D.3), and that Mr. Borkowski has no standing to assert such claims in any event, given that Armenia's obligations were not entered into with respect to him (*see* Section V.B.3). With respect to the other BIT claims that Mr. Borkowski properly may assert, the Tribunal has found no conduct by Armenia that violates its obligations under the BIT with respect to American investors or their investments. In essence, Armenia's fault lies in concluding (for good reason) that the Projects were not moving forward with Rasia, but then failing to take the formal legal steps required to terminate the Concessions as Armenia could have done, before taking steps to explore or undertake alternative projects with third parties. While this does constitute a breach of contract, given that the Concessions remained in force, it does not represent

[1146] Resp. Rej. ¶ 553.
[1147] *Id*. ¶¶ 555-556.
[1148] *Id*. ¶ 557.

the kind of arbitrary or unreasonable conduct necessary to establish a violation of the BIT's fair and equitable treatment or arbitrary measures clauses, as explained in Sections VI.B.2 and VI.B.3. As for expropriation, the Tribunal does not equate a breach of failing but still formally persisting Concessions with a taking of an investment, in circumstances where the Concessions simply conveyed rights to try to put together certain Projects, and the Concessionaire ultimately proved itself unable to do so according to the applicable terms. As explained in Section VI.B.4, Mr. Borkowski has not proven that the Respondent's acts were responsible for Aabar's decision not to go forward in April 2015 with an acquisition of Rasia's shares. Nor has he proven that Rasia had any viable alternative way of obtaining value from its Concession rights. In other words, no expropriation occurred, because Armenia did not destroy any rights of cognizable value.

711. For the avoidance of doubt, the Tribunal nonetheless confirms that even if the Tribunal had not found the breach of contract claims to be time-barred, it would not have found causation of any damages, for the same reasons explored in the expropriation analysis. The Respondent's decision eventually to explore alternative road and railway projects with third parties was not the reason why the Projects contemplated in the Concessions collapsed, nor were they the reason why Aabar did not end up acquiring Rasia's shares. The Claimants have not presented any other theory of damages, because they adduced no evidence that they ever expended any funds on either Project. Thus, in the absence of any proven causation, there would be no basis for any award of damages, even if Rasia's contract claims had been timely asserted (*quod non*).

VIII. COSTS

A. THE CLAIMANTS' COST SUBMISSIONS

712. The Claimants seek an award ordering the Respondent to pay all costs they incurred during this arbitration proceeding. These costs (as of the time of the Claimants' submission on costs) amounted to £9,189,670.18 and included the Claimants' counsel and expert fees, the lodging fee and advances paid to ICSID, and all other disbursements related to the proceeding.[1149]

713. In their submission on costs, the Claimants detail these costs as follows:[1150]

[1149] Cl. Sub. on Costs, ¶¶ 1–2.

[1150] The table is reproduced from the Claimants' submission. Cl. Sub. on Costs, p. 2, Annex A: Claimants' Schedule of Costs.

	Particulars	Claimants' Total Invoiced Costs (£)	Claimants' Total Paid or Immediately Payable Costs (in the invoiced currency)	Claimants' Total Paid or Immediately Payable Costs (£)
A	Quinn Emanuel and S&S Professional Fees	7,583,360.30	US$2,056,593.25 and £2,332,219.67	3,791,680.15
B	Local Professional and Legal Fees	32,275.88	€6,680.00 and US$ 35,783.00	32,275.88
C	Costs of the Arbitration (ICSID Filing Fee and Advance Deposits)	317,900.17	US$425,000.00[1151]	317,900.17
D	Independent Expert Fees	969,619.98	US$ 965,646.55 and GBP£ 201,399.51	969,619.98
E	Disbursements	286,513.84	US$ 100,938.39 and £208,164.78	286,513.84
	Total:	**£9,189,670.18**		**£5,397,990.02**

714. According to the Claimants, their "Total Invoiced Costs in these arbitration proceedings is £9,189,670.18" but their "Total Paid or Immediately Payable Costs in these arbitration proceedings is £5,397,990.02 [. . .] after a 50% contingency agreement with each of Quinn Emanuel Urquhart & Sullivan LLP and Shearman & Sterling LLP."[1152] The Claimants state that the remaining 50% of Quinn Emanuel and Shearman & Sterling combined legal fees of £7,583,360.30, amounting to £3,791,680.16, "is payable upon and subject to a favorable decision for the Claimants in these arbitration proceedings."[1153]

715. Since the Claimants' submission on costs, the Claimants advanced an additional US$50,000 to ICSID to cover the arbitration costs.

B. THE RESPONDENT'S COST SUBMISSIONS

716. The Respondent seeks an order that the Claimants pay all costs related to these proceedings, including the costs of the Tribunal and ICSID, and all of the Respondent's costs.[1154] As of the time

[1151] This amount includes ICSID Lodging Fee of USD 25,000.00 and ICSID Advances of USD 400,000.00. Cl. Sub. on Costs, p. 3, Annex A: Claimants' Schedule of Costs.

[1152] Cl. Sub. on Costs, ¶ 2.

[1153] *Id*.

[1154] Resp. Sub. on Costs, ¶ 6(iv).

of the Respondent's submission on costs, its costs in the proceedings amounted to US$3,601,441, of which it has paid US$1,686,965.[1155] The Respondent breaks down these costs as follows:[1156]

	Type of Cost	Incurred	Paid
1	**Arbitration Costs**		
1.1	Fees advanced by Armenia to ICSID re costs of the proceeding	$ 400,000	$ 400,000
2	**Outside Counsel**		
2.1	All Outside Counsel	$ 2,619,285	$ 750,000
3	**Expert**		
3.1	Harral Winner Thompson Sharp Klein, Inc.	$ 511,275	$ 476,990
4	**Government**		
4.1	Time spent by Government Personnel	$ 59,975	$ 59,975
5	**Costs**		
5.1	Costs incurred by counsel	$ 10,907	$ -
		$ 3,601,441	**$ 1,686,965**

717. The Respondent states that it entered into an agreement under which it would pay US$750,000 to its counsel during the arbitration, that it would claim the "full value" of counsel's fees and expenses, and that "in the event the Tribunal awards counsel fees and expenses in excess of the amount paid by Armenia, counsel will recover its remaining fees and expenses."[1157] The "full value" of counsel fees and expenses amounts to US$2,619,285.

718. According to the Respondent, this type of "success fee arrangement" permits smaller States to defend themselves, and such fees are frequently awarded to claimants and respondents in ICSID cases.[1158]

[1155] *Id*., ¶ 2.

[1156] The table is reproduced from the Respondent's submission. Resp. Sub. on Costs, Annex 1.

[1157] Resp. Sub. on Costs, ¶ 3.

[1158] *Id*, ¶ 5 (citing, *e.g.*, CL-36. *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 604, 625, 630; *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award, 3 May 2018, ¶¶ 267–71, 274; Global Arbitration Review, *Damages and costs in investment treaty arbitration studied for a third time, 3 June 2021*).

719. Since the Respondent's submission on costs, the Respondent advanced an additional US$50,000 to ICSID to cover the arbitration costs.

C. THE TRIBUNAL'S DECISION ON COSTS

720. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

721. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

722. Given the outcome of this proceeding, the Tribunal considers it appropriate that the Claimants bear the full costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, and ICSID's administrative fees and direct expenses. These amount to the following (in USD):

Arbitrators' fees and expenses	$439,005.66
Ms. Jean Kalicki	$204,562.50
Mr. John Beechey CBE	$76,037.76
Mr. J. Christopher Thomas KC	$158,405.40
Assistant's fees and expenses	$43,793.75
ICSID's administrative fees	$210,000.00
Direct expenses (estimated)	$161,500.27
Total	$854,299.68

723. The above costs have been paid out of the advances made by the Parties in equal parts.[1159] As a result, each Party's share of the costs of arbitration amounts to US$427,149.84. Accordingly, the Tribunal orders the Claimants to reimburse the Respondent US$427,149.84 for the expended portion of the Respondent's advances to ICSID.

[1159] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

724. The Tribunal also considers it appropriate that the Claimants reimburse the Respondent for 75% of the Respondent's legal fees and expenses, excluding category 1 of the claimed expenses (the Respondent's advances to ICSID, which are addressed in the prior paragraphs) and category 4 of the claimed expenses (the claim for US$59,975 on account of the time spent by Government personnel, which the Tribunal does not consider warranted). The Tribunal does not award the Respondent full recovery of its other categories of legal fees and expenses, because it has found that Armenia breached the Concessions in some respects, even if Rasia asserted its contract claims too late and no damages have been proven to flow from the particular breaches of which it complained. Taking all factors into account, the Tribunal orders the Claimants to reimburse the Respondent for 75% of categories 2, 3 and 5 of its legal fees and expenses, namely 75% of US$3,141,467, an amount of US$2,356,100.25.

IX. AWARD

725. For the reasons set forth above, the Tribunal decides as follows:

(1) Armenia's objection *ratione materiae*, on the basis of the non-existence of an investment, is denied;

(2) Rasia's claims for breach of the Concession Agreements are denied as time-barred under the statute of limitations applicable to those agreements;

(3) Mr. Borkowski's claim for breach of Article II(2)(c) of the BIT (the umbrella clause) is denied as similarly time-barred and also because Armenia did not enter into any obligations with Mr. Borkowski, and he has no standing to assert a claim under Article II(2)(c) with regard to obligations entered into with Rasia;

(4) Mr. Borkowski's claims for breach of Articles II(2)(a), II(2)(b) and III of the BIT (fair and equitable treatment, arbitrary measures and expropriation) are denied on the merits;

(5) Accordingly, the Claimants' claims for damages on account of alleged breaches of the Concession Agreements and the BIT are denied;

(6) Orders that the Claimants pay the Respondent US$2,783,250.09, comprising US$427,149.84 for the expended portion of the Respondent's advances to ICSID and US$2,356,100.25 towards the Respondent's legal fees and expenses; and

(7) Denies all other relief sought by both Parties.

John Beechey
Arbitrator

Date:

J. Christopher Thomas KC
Arbitrator

Date:

Jean E. Kalicki

Jean Kalicki
President of the Tribunal

Date: 18 January 2023

John Beechey
Arbitrator

Date: 18 January 2023

J. Christopher Thomas KC
Arbitrator

Date:

Jean Kalicki
President of the Tribunal

Date:

John Beechey
Arbitrator

Date:

J. Christopher Thomas KC
Arbitrator

Date: 18 January 2023

Jean Kalicki
President of the Tribunal

Date: