International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceedings between

International Company for Railway Systems (ICRS)
(Claimant)

and

Hashemite Kingdom of Jordan
(Respondent)

(ICSID Case No. ARB/09/13)

Procedural Order No. 2
Concerning the Respondent's Request to Stay the Proceedings

Members of the Tribunal

Judge Patrick L. Robinson (President)

Mr Stanimir A. Alexandrov (Co-Arbitrator

Professor Bernard Audit (Co-Arbitrator)

I. PROCEDURAL HISTORY & BACKGROUND

1. On June 12, 2009 the Claimant, International Company for Railway Systems (hereinafter "ICRS") with Privatization Holding Company (hereinafter "PHC") filed a joint Request for Arbitration with the International Centre for the Settlement of Investment Disputes (hereinafter "ICSID") against the Government of the Hashemite Kingdom of Jordan (the Respondent"). The Respondent and the Public Transport Regulatory Commission (hereinafter "PTRC"), a juridical entity established under the laws of the Hashemite Kingdom of Jordan, concluded on 18 October 2007 the Implementation Agreement (hereinafter "IA") for the ICRS to build operate and transfer a light railway system (the LRS Project) connecting the Jordanian cities of Amman and Zarqa. The dispute requiring arbitration arose from ICRS' allegation that the Respondent, the Hashemite Kingdom of Jordan, "unlawfully and in bad faith terminated the IA, thereby depriving the Claimant of the profits, privileges and the commercial opportunities they would have enjoyed had the IA continued to be performed in accordance with its terms."[1] The Request for Arbitration was registered by the Secretary-General on July 16, 2009.

2. On February 26, 2010 the Tribunal held its first meeting in Paris where a provisional agenda for the proceedings was adopted. At that meeting the Respondent indicated its intention to file objections to the Tribunal's jurisdiction. On that same day, pursuant to PHC's Request for Withdrawal Under Rule 44 of the Arbitration Rules, the Tribunal adopted Procedural Order No. 1 by which the proceedings with respect to PHC were discontinued, but would continue in all other respects.

3. On April 30, 2010, pursuant to the schedule for filing submissions agreed to at the first meeting of the Tribunal, ICRS filed its Memorial on the Merits.

[1] Request for Arbitration, paragraph 86.

4. On June 4, 2010 the Respondent filed with the Tribunal a Request to Stay the Proceedings (hereinafter "Request") in which it requests that "the Tribunal stay these proceedings until the resolution of the first-instituted and now nearly identical ICC arbitration,[2] which Jordan and the Public Transport Regulatory Commission filed against the International Company for Railway Systems concerning the same contract dispute at issue in these ICSID proceedings."

5. On June 7, 2010 the Tribunal made an Order fixing 10:00 A.M., CET time, on June 21, 2010 as the time limit for Claimant ICRS to file its observations on the Respondent's Request. On June 8, 2010 ICRS submitted to the Secretary to the Tribunal a letter that it wished be transmitted to the Tribunal in which it, *inter alia*, requested that it be permitted to file observations on the Request after the submission of the Respondent's Memorial on Jurisdiction, considering that a decision on the Respondent's Request necessarily entails an enquiry into jurisdictional objections.

6. On June 10, 2010 the Tribunal made an Order reiterating that the Parties shall observe the agreed schedule for filing observations, unless and until the Tribunal orders a Stay of the Proceedings and that ICRS should file its observations on the Request by 10:00 A.M., CET time, on June 21, 2010.

7. On June 21, 2010 ICRS filed its Answer to Respondent's Request for Stay in which it opposed the Request. Following which, on June 24, 2010 the Respondent submitted a letter to the Secretary for communication to the Tribunal in which it requested an opportunity to file a brief Reply to Claimant's Answer to the Respondent's Request for Stay on the ground that the "Claimant's Answer contained a number of serious errors in law and fact."[3] It further requested that it be allowed until the 19th of July to file such a Reply and stated that it would not be opposed to a similar time-frame to allow ICRS to file a

[2] See Request to Stay, paragraph 14; The Respondent and PTRC jointly submitted a Request for Arbitration before the ICC on May 27, 2009.
[3] See Respondent's letter of June 24, 2010 to Secretary to the Tribunal.

Rejoinder. On June 28, 2010 the Tribunal made an Order denying the Respondent's June 24, 2010 request on the basis that "both Parties have made extensive submissions on the matter of the Request." Furthermore, the Tribunal considered "that additional submissions would be superfluous as it has sufficient information to make a decision on the Request."

8. The Tribunal has deliberated by various means of communication, and have taken into consideration the Parties' submissions on the Request.

II. SUBMISSION OF THE PARTIES

(a) Respondent's Submissions

9. The Respondent requests that this Tribunal should, pursuant to its inherent powers under ISCID Convention Article 44 and Arbitration Rule 19, stay these proceedings in favour of the first-instituted proceedings before an arbitral tribunal at the International Chamber of Commerce (hereinafter "ICC Arbitration"), because the ICSID proceedings are now nearly identical to the ICC Arbitration which itself and PTRC filed against ICRS on May 27, 2009. The Respondent's Request argued, *inter alia*:

a) That Clause 20.3 of the IA "provides that such disputes are to be resolved by ICSID ***unless*** for any reason the particular dispute in question cannot be settled in accordance with ICSID Convention and arbitration rules, whereupon the dispute must be resolved via an ICC arbitration"[4][Emphasis Respondent's]; that the clause "provides ***various*** reasons why resort to ICC could be made including ***but not limited to*** a decision from an ICSID Tribunal that the Centre lacks jurisdiction over the dispute"[5] [Emphasis Respondent's]; that "[n]owhere in the arbitration clause of the IA is there a requirement that a party must file and

[4] Request to Stay the Proceedings, paragraph 10.
[5] *Ibid.*

proceed through an ICSID arbitration before resorting to the ICC, particularly when it is manifest that ICSID cannot resolve the particular dispute at issue"[6] and that the dispute was properly submitted to the ICC because the dispute involved PTRC which is not amenable to ICSID jurisdiction and that it was not agreed by the Parties to treat ICRS, a Jordanian corporation, as a national of another contracting party for the purposes of the ICSID Convention;[7]

b) That the Claimant's submission of the joint Request for [ICSID] Arbitration with PHC, which included BIT claims, was a "thinly-veiled apparent attempt to distinguish its ICSID arbitration from the ICC Arbitration."[8] However, PHC left the dispute as hastily as it had entered, but only after the constitution of the Tribunal "apparently to continue as long as possible the ruse that the ICSID proceedings were materially different than the ICC Arbitration"[9]; that a consequence of PHC's withdrawal is that these proceedings "[have] now become a near mirror image of the ICC Arbitration"[10]; and therefore, the "dispute between ICRS and Jordan is now clearly based strictly on the terms and conditions of the IA"[11]; that as a result, there is no material distinction between the two proceedings as between Jordan and ICRS;[12]

c) That the doctrine of *lis pendens*, which "permits a court or arbitral tribunal to suspend its proceedings in light of a parallel proceeding between the same parties"[13] is applicable in international arbitration and ICSID arbitrations in particular; that its applicability to international arbitration has been recognised by both commentators and tribunals, including ICSID tribunals"[14]; and that the International Law Association has adopted recommendations on the application

[6] Request to Stay the Proceedings, paragraph 12.
[7] Request to Stay the Proceedings, paragraph 13.
[8] Request to Stay the Proceedings, paragraph 24.
[9] Request to Stay the Proceedings, paragraph 26.
[10] Request to Stay the Proceedings, paragraph 28.
[11] *Ibid.*
[12] Request to Stay the Proceedings, paragraph 29.
[13] Request to Stay the Proceedings, paragraph 30.
[14] Request to Stay the Proceedings, paragraph 33.

of *lis pendens* in international arbitration, which scholars have approved; as such there is an "overwhelming weight of relevant authority [that] demonstrates that *lis pendens* is applicable in international arbitration and ICSID arbitrations in particular"[15];

d) That the doctrine of *lis pendens* applies to the facts and circumstances of these proceedings because (1) the relief sought by ICRS and Jordan in both proceedings is the same, (2) the basis of the claims for both Jordan and ICRS is the IA, and (3) the parties to both proceedings are nearly identical, and PTRC not being a party to the ICSID proceedings should hardly prevent the application of *lis pendens*, on the contrary PTRC relies on the same contract at issue in these proceedings;[16] and additionally that PTRC rights will be serious impaired as it can only "present its case and seeks its own relief against ICRS in [the ICC] proceeding"[17];

e) Further, that "the same essential dispute is now pending in ICSID and the ICC Arbitration, except that the ICC Arbitration was instituted well before the ICSID arbitration and brings together all three parties with an interest in the dispute."[18] The fact that the ICC Arbitration was instituted first is, however, a critical factor"[19]; that the first-in-time rule should be determinative of this case in favour of the ICC Arbitration which is the only forum that can resolve the rights of all three Parties to this dispute. As a result, permitting these proceedings to continue would "run against the weight of authority supporting the doctrine of *lis pendens*," would be severely unjust to Jordan and, would reward ICRS for filing duplicative proceedings.[20]

[15] Request to Stay the Proceedings, paragraph 38.
[16] Request to Stay the Proceedings, paragraphs 41-43.
[17] Request to Stay the Proceedings, paragraph 53.
[18] Request to Stay the Proceedings, paragraph 44.
[19] *Ibid.*
[20] Request to Stay the Proceedings, paragraph 10

10. The Respondent also invokes the doctrine of *exception de connexité*, by which one court may be asked to decline jurisdiction in favour of another equally competent court where the proceedings are "different but so interrelated that the good administration of justice commands that they be examined and ruled together."[21]

11. Considering the submissions, the Respondent Requests that the Tribunal should in the first instance stay these proceedings until the ICC tribunal determines the question of its jurisdiction and in the second instance in the likely event that the ICC tribunal upholds jurisdiction these proceedings are to be stayed until that tribunal decides on the merits of the dispute.[22]

(b) Claimant's Submissions

12. The Claimant opposes the Request. While it does not dispute that the Tribunal has the inherent powers to stay the proceedings, it submits that the facts and circumstances of this case do not merit an exercise of such powers to accept the Request. The Claimant's Answer argued, *inter alia*:

a) That essentially, the Request is "calling upon this Tribunal to permit the ICC Tribunal to determine whether the ICSID Tribunal can exercise jurisdiction over this dispute. Hence the Request is to prevent this Tribunal from exercising jurisdiction vested in it and to instead call upon the ICC Tribunal to determine whether or not an ICSID Tribunal has jurisdiction over the dispute which is the subject matter of this arbitration"[23];

[21] Request to Stay the Proceedings, paragraph 58.
[22] Request to Stay the Proceedings, paragraph 60.
[23] Claimant's Answer to Request, paragraph 2.

b) That the Tribunal has the power to "resolve procedural issues in the event of there being a *lacuna* in the procedural rules," but submits that the Tribunal cannot exercise this power by "ignoring existing procedural rules"[24];

c) That there are explicit procedural rules which are "evidently applicable to the issues requiring consideration by this Tribunal"[25]; as a result, the Tribunal cannot exercise its inherent powers to stay the proceedings; that these explicit procedural rules are ICSID Convention Article 25 – vesting the Tribunal with the power to deal with all matters relating to jurisdiction and precluding a party from unilaterally withdrawing from the arbitration after having given its consent, Article 41 – vesting the Tribunal with the power to determine its own jurisdiction and competence, Article 26 – making ICSID an exclusive remedy for the parties consenting to ICSID arbitration and Article 36(3) – vesting the Secretary-General with the screening power to determine whether the dispute is manifestly outside the jurisdiction of the Centre[26];

d) Also, that the Respondent's reliance upon the principles of *lis pendens* is misconceived; that the essential ingredients of *lis pendens* are missing in the present case therefore it is inapplicable[27]; that *SGS Societe Generale de Surveillance v Pakistan* (Decision on Jurisdiction)[28] supports the view that in order for *lis pendens* to apply both tribunals should have concurrent jurisdiction.[29] Then, that Clause 20.3 of the IA stipulates a sequence of various alternative dispute settlement mechanisms – a hierarchical order of alternatives for dispute settlement, wherein resort to the dispute resolution under the ICC Rules is permitted only if the ICSID Tribunal did not take jurisdiction, consequently both *fora* are not on equal footing and cannot be treated as

[24] Claimant's Answer to Request, paragraph 3.
[25] *Ibid.*
[26] Claimant's Answer to Request, paragraphs 39-42.
[27] Claimant's Answer to Request, paragraphs 6 and 44.
[28] *SGS Societe Generale de Surveillance S.A. v Pakistan* (Decision on Jurisdiction) ICSID Case No. ARB/01/13, August 6, 2003.
[29] Claimant's Answer to Request, paragraphs 44; *See also* paragraphs 45-47.

exercising concurrent jurisdiction.[30] Therefore, "[t]he question whether the ICC is a tribunal of equally competent jurisdiction is not one that can be determined by means of the present Request without a decision on the matter of jurisdiction by this Tribunal, in exercise of its powers under Article 25 of the ICSID Convention, in view of Clause 20.3.2 of the IA"[31];

e) And that the Respondent and PTRC have always been treated as one and the same and that "no real separation of identity exists between PTRC and the Respondent for the purposes of this arbitration"[32] and that distinguishing PTRC as a separate entity is irrelevant to this dispute as the IA did not become effective and, *inter alia,* the Council for Ministers and the Minister of Transport has "overwhelming influence and control" upon the administration of PTRC,[33] the Request for [ICC] Arbitration "will make it manifest to this Tribunal that none of the contractual provisions relied upon by the Respondent and PTRC in that submission confers any right or obligation upon PTRC"[34] and that no specific relief has been requested by or on behalf PTRC in the ICC Arbitration, before the ICC Dispute Adjudication Board or ICSID.

13. The Claimant finally submits that the Request is not justified either in fact or law and should be rejected with costs.[35]

III. TRIBUNAL'S VIEWS

14. In concise terms, at issue in this Request is the Respondent's contention that this Tribunal should exercise its inherent powers and, in accordance with the *lis pendens* doctrine, stay these proceedings in favour of the first-instituted ICC Arbitration involving all three parties, whereas the Claimant opposes this

[30] Claimant's Answer to Request, paragraph 46.
[31] Claimant's Answer to Request, paragraph 47.
[32] Claimant's Answer to Request, paragraph 15.
[33] Claimant's Answer to Request, paragraph 23.
[34] Claimant's Answer to Request, paragraph 18.
[35] Claimant's Answer to Request, paragraph 75.

Request on the ground that to grant the Request would (1) prevent this Tribunal from determining its jurisdiction and competence as required by express provisions of the ICSID Convention and (2) strip the Claimant of its contractual right to have an ICSID Tribunal determine this dispute.

15. Putting the central issue another way, on the one hand, the effect of the Respondent's Request for an exercise of the Tribunal's inherent powers to stay these proceedings at this stage is that the Tribunal would be prevented from determining its competence and jurisdiction, in favour of a determination by the ICC Tribunal; while on the other hand, the Claimant contends that the Tribunal cannot exercise its inherent powers in such a way as to prevent itself from determining its competence and jurisdiction when there are express procedural rules requiring it to do so.

16. Having so characterised the matter at issue, the Tribunal considers that, in the first instance, it should determine the relationship between its inherent powers and the express ICSID rules. The Tribunal notes that it is common knowledge that the purpose of an inherent jurisdiction is to enable a Tribunal to conduct its proceedings in an effective and efficient manner for the good administration of justice[36] and that "[i]nherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case."[37] A tribunal's inherent powers should complement rather than conflict with its express powers. The Tribunal is fortified in this view by reference to ICSID Convention Article 44, which in relevant parts reads: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." [Emphasis added] The foregoing would suggest two things: (1) The Tribunal may resort to its inherent powers under Article 44 only in the absence of any

[36] See, *Nuclear Tests* Cases *(Australia* v *France)*, 1974 *I.C.J. Reports* 253, 258-259; *Prosecutor* v *Delalic et. al* Case No. IT-96-21A, Judgment on Sentence Appeal, Appeal Chamber, 8 April 2003.
[37] *Housing Co-Operative Ltd.* v *Baxter Student Housing Ltd.* (Supreme Court of Canada) [1976] 2SCR 475, 480.

express rule. (2) The inherent powers shall not apply so as to conflict with the express powers; the express powers take precedence over the inherent powers.

17. The Tribunal now moves to consider any relevant ICSID procedural rules that regulate its determination of its competence and jurisdiction.

(a) Relevant ICSID Procedural Rules

18. **ICSID Convention Article 25(1)**:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." [Emphasis added]

19. For these purposes, what is relevant is that the parties must have consented in writing to submit their dispute to arbitration under the ICSID Convention and Arbitration Rules and either party cannot unilaterally withdraw its consent.

20. **ICSID Convention Article 26**, in relevant part reads:

"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." [Emphasis added]

21. Put another way, where the parties consent to arbitration at ICSID, unless otherwise stated, they do so to the *exclusion of another remedy under another dispute settlement mechanism*. Consequently, when the parties give their consent to arbitration under the ICSID Convention and Rules they are *precluded* from resorting to any other dispute settlement mechanism (unless and until the

Secretary-General refuses to register the request for arbitration or the ICSID tribunal refuses to take jurisdiction).

22. **ICSID Convention Article 36(3)**:

"The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre." [Emphasis added]

23. It would appear to the Tribunal that, once the request for arbitration has been filed, the Secretary-General is required to make a determination on whether or not the dispute is manifestly outside the jurisdiction of the Centre. Where it is found that the dispute is not manifestly outside the jurisdiction of the Centre, the request for arbitration must be registered.

24. **ICSID Convention Article 41**:

"1) The Tribunal shall be the judge of its own competence.

2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute." [Emphasis added]

25. It is strictly the province of the Tribunal to determine its own competence and jurisdiction, not for any other person or body. Put another way, it is the Tribunal alone that can make a determination on objections as to whether a registered dispute is within the Centre's jurisdiction or the Tribunal's competence.

26. Having noted these provisions, the Tribunal considers that when read together they reveal a scheme by which both ICSID tribunals and ICSID case parties are bound. Firstly, the parties must have consented in writing to submit their dispute to ICSID arbitration. Secondly, consent to ICSID arbitration excludes recourse

to any other remedy. Thirdly, when a request for arbitration has been filed, the Secretary-General must make a determination on whether or not the dispute is manifestly outside the jurisdiction of ICSID. If it is not, she must register the request for arbitration. Fourthly, thereafter, the properly constituted Tribunal has the exclusive power to determine matters of its competence and jurisdiction as it relates to the dispute.

27. Therefore, it is this Tribunal's considered view that once the parties have consented in writing to submit their dispute to ICISD arbitration they are precluded from pursuing any other remedy until and unless the Secretary-General refuses to register the request for arbitration or the Tribunal refuses to take jurisdiction. The Tribunal now proceeds to apply these rules to the present issue in dispute.

28. Part 20 of the IA sets out the procedure for the settlement of any disputes, disagreements or differences relating to, or arising out of, this Agreement, including its termination, *inter alia.* As a first step – Clause 20.1 – once notice of a dispute has been given to the other party, in a stipulated time period, each party shall designate a senior representative responsible for the subject matter of the dispute with the authority to resolve the dispute. If the dispute cannot be resolved under Clause 20.1 as a second step – Clause 20.2 – the dispute shall be determined by a Dispute Adjudication Board (DAB) under the Dispute Board Rules of the International Chamber of Commerce. If either Party sends to the other Parties a written notice of dissatisfaction with the DAB's decision in accordance with the Rules or the DAB is disbanded, the dispute shall be resolved by arbitration. As a third step – Clause 20.3 – if the dispute is not resolved in accordance with Clauses 20.1 or 20.2 it shall be settled by arbitration in accordance with the ICSID Arbitration Rules at ICSID. If the dispute cannot be settled by ICSID arbitration it shall finally be settled by arbitration under the Rules of Arbitration of the ICC.

29. It is undisputed that the parties have put their consent to ICSID arbitration in writing and that the Request for Arbitration was registered by the Secretary-General on July 16, 2009 which means that there has been a determination that the dispute is not manifestly outside the jurisdiction of ICSID. Further, the Respondent has indicated its intention to file objections (on June 30, 2010) to the Tribunal's jurisdiction, and its own determination that this Tribunal manifestly lacks jurisdiction formed the basis for its submission of the ICC request for arbitration.[38] The Tribunal finds that these circumstances trigger the full effect of ICSID Convention Articles 26 and 41; consequently, it is now for this Tribunal to determine its competence and jurisdiction in relation to the dispute, and the parties are precluded from pursuing any other remedy until and unless this Tribunal refuses to take jurisdiction. Therefore, were these proceedings to be stayed in favour of the ICC proceedings this Tribunal would not have determined its competence and jurisdiction in accordance with the ICSID Convention. This situation must be avoided. For this reason alone the Tribunal would deny the Request.

30. Furthermore, a grant of stay in favour of the ICC proceedings at this stage would be contrary to the Parties' arbitration agreement. A decision on the Request will affect the determination of jurisdiction (i.e. which tribunal should determine jurisdiction, which tribunal gets to determine jurisdiction). Sub-clause 20.3.2 indicates that ICSID and ICC cannot have concurrent jurisdiction; it is a grant of exclusive jurisdiction to one or the other (with ICSID being the first option). When ICSID has jurisdiction, ICC does not and *vice versa.* Noting that ICSID arbitration is the Parties' first option, it is the ICSID Tribunal's contractually-vested duty to determine whether or not it has jurisdiction over this dispute, not the duty of an ICC Tribunal or any other body. ICC's jurisdiction, under Sub-clause 3, is triggered only when an ICSID tribunal (or the Secretary-General through non-registration) refuses to take jurisdiction in

[38] See Respondent's Request to Stay, paragraph 13 and Exhibit C-48 of Memorial on the Merits: Jordan's and PTRC's Joint Request for Arbitration before the ICC, paragraph 48.

accordance with the IA and the ICSID Convention. Therefore, to grant the Request to Stay the Proceedings would undermine this Tribunal's duty to determine its jurisdiction; also for this reason the Tribunal would reject the Request.

31. In view of the Tribunal's analysis and findings in paragraphs 18 to 32, it is not necessary to rule upon the Respondent's arguments concerning the application of the doctrine of *lis pendens*.

IV. TRIBUNAL'S DECISION

32. For these reasons the Respondent's Request to Stay the Proceedings is denied.
33. All questions concerning costs are reserved for subsequent determination.

For the Arbitral Tribunal,

[*Signed*]

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Judge Patrick L. Robinson
President of the Tribunal
Date: [July 9, 2010]