Neutral Citation Number: [2016] EWHC 405 (Comm)

Case No: 2012 FOLIO 000537

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 02/03/2016

Before:

THE HONOURABLE MR JUSTICE FLAUX

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Between:

(1) REPUBLIC OF DJIBOUTI **(2) AUTHORITE DES PORTS ET DES ZONES FRANCHES DE DJIBOUTI** **(3) PORT DE DJIBOUTI S.A.**	**Claimants**
- and -	
(1) MR ABDOURAHMAN MOHAMED MAHMOUD BOREH **(2) BOREH INTERNATIONAL FZE** **(3) ESSENSE MANAGEMENT LIMITED** **(4) NET SUPPORT HOLDINGS LIMITED**	**Defendants**

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Lord Falconer of Thoroton, Mr Philip Brook-Smith QC, Ms Jennifer Haywood, Mr Giles Robertson and Ms Amy Proferes (instructed by **Gibson Dunn & Crutcher LLP**) for the **Claimants**
Mr Dominic Kendrick QC, Mr Richard Waller QC, Mr Jocelin Gale and Mr Keir Howie (instructed by **Byrne & Partners LLP**) for **First to Third Defendants**

Hearing dates: 8th, 12th - 14th, 21st, 22nd, 26th - 30th October, 2nd - 6th, 9th - 12th, 17th - 19th, 23rd November, 2nd, 7th and 8th December 2015 with additional written submissions from the First to Third Defendants on 21st December 2015

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Judgment

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Mr Justice Flaux:

(1) Introduction

1. The first claimant in this action, the Republic of Djibouti (to which I will refer as "the Republic") is a small country in the Horn of Africa with a population of less than one million. It was formerly a French colony, known as the French Territory of the Afars and the Issas, before gaining its independence in 1977. Its strategic importance in the region is that, at least since the hostilities between Ethiopia and Eritrea began in 1998, the Republic and specifically its port facilities have provided the only access to the sea for otherwise land-locked Ethiopia.

2. In the last fifteen years, a new port and free zone complex has been built at Doraleh, to the south of Djibouti City, on what was previously waste land on which the local population eked out a precarious existence. In that period, the area has been transformed, with about half a billion U.S. dollars of investment in the complex, making it the leading port in the region with a new oil terminal and one of the largest container terminals in the region, capable of receiving the new generation of deeper draught container ships.

3. Before this transformation, the old port facilities at Djibouti City were out of date and run down. The port was too shallow for modern container ships and there was no room for expansion. The existing oil storage tanks and piping, some of which had been constructed in the 1930s, leaked and posed a threat to the environment. The management of the port authority, the third claimant, to which I will refer as "PAID", was inefficient and corrupt.

4. The driving force behind the development of the new port facilities at Doraleh was the first defendant, Abdourahman Boreh (to whom I will refer as "Mr Boreh") a prominent local businessman who initially made his money through regional representation of British American Tobacco ("BAT"), but who by the late 1990s had diversified into many other industries, including construction, through his company Soprim Construction S.A.R.L ("Soprim").

5. The first stage of the development was the creation of Djibouti Dry Port SAZF ("DDP") in two phases, the first a large container yard hub and warehouse facility outside the existing port, for the trade into and out of Ethiopia, and the second the development of office and warehouse space for companies to enjoy free zone status, modelled on the facilities at Jebel Ali in Dubai, owned and operated by Dubai Ports International, part of the DP World group of companies. Save where the context requires otherwise I will refer in this judgment to the Dubai Ports entities which became involved in the running of the facilities in Djibouti as DP World.

6. DDP was Mr Boreh's idea. It represented a type of venture which was new in Djibouti, a public/private collaboration, a private company in which the government also held a minor shareholding in return for the provision of land. The largest single private investor was Mr Boreh, through his principal company Boreh International, the second defendant. DDP was a considerable success, increasing the throughput of Ethiopian trade in the port and bringing new business and employment to the country. Although the Republic originally made a series of claims against the defendants in relation to DDP, those claims had all been abandoned by the end of the trial.

7. After he first met Sultan bin Sulayem, the chairman of DP World in 1999, Mr Boreh developed the idea of outsourcing the entire management of the port of Djibouti to DP World, thereby avoiding all the problems of inefficiency and corruption which had beset it in the past. In 2000, a Concession Agreement for the management of the port was entered into between PAID and DP World. With the transfer of management control to DP World, the port became much more efficient and its profits increased and have continued to increase.

8. Since 1999, the President of the Republic has been Ismail Omar Guelleh (to whom I will refer as "the President"). Until sometime in the second half of 2008, the President and Mr Boreh were good friends and, although Mr Boreh never held a formal position in Government, he was a close and influential adviser of the President. In one email, Mr David Hawker, an employee of DP World who was CEO of PAID from November 2004 described Mr Boreh in these terms: *"Mr Boreh is the King Maker in Djibouti and is both a fairly close business associate and friend/acquaintance of Sultan and many other Dubain (sic) businessmen. He was responsible for getting Dubai involved in Djibouti in the first place and continues to actively expand that involvement at any opportunity."*

9. However, although in this litigation, the Republic has sought to paint Mr Boreh as an *eminence grise* exerting a malign influence over a malleable President, the totality of the evidence in the case has demonstrated that this is far from the true position. The President emerges as a shrewd politician with considerable commercial acumen, who always took a keen interest in the commercial development of the port facilities of the Republic. All important decisions to do with the new port facilities were clearly taken by the President personally. This is only to be expected, since it is he who is the sole effective ruler of the Republic and who dictates Government policy. It was quite clear that all the witnesses called by the Republic at trial, all of whom were present or former Government ministers or high-ranking civil servants, were in fear of the President and were not prepared to say anything in their oral evidence which might contradict the position which the President has adopted towards Mr Boreh in this litigation, of which the President is clearly in ultimate control.

10. One aspect of the development of new port facilities in which the President took a particular interest was the construction of a new oil terminal at Doraleh. Since the mid-1990s, the Republic had tried, without success, to persuade the three oil majors who had the existing facilities in Djibouti City, Total, Mobil and Shell, to move and build new facilities outside the existing port. From 2000 onwards, when Mr Boreh met Mr Hussain Sultan, the Chairman of the Emirates National Oil Company ("ENOC"), another Dubai entity, and introduced him to the President, negotiations began for the construction of an oil terminal and tank farm at Doraleh. The company which owned the terminal, Horizon Djibouti Terminals Limited was one in which ENOC, the Kuwait oil company Independent Petroleum Group ("IPG") and Mr Boreh through his companies had the principal shareholdings. As with DDP, the Republic provided the land and had a minority shareholding of 10%. DP World paid for the construction of the terminal jetty, for which it has been repaid from the management fees earned by it from management of the port. The Ruler of Dubai, Sheikh Mohammed, as a gift to the Republic, paid for the new roads linking the terminal to both Djibouti City and the highway leading to Ethiopia.

11. Much of the construction work on the terminal and the infrastructure, including the roads, was undertaken by Mr Boreh's company, Soprim. The Republic advanced claims against the defendants in respect of some of the construction work undertaken, including the road link, but by the end of the trial, all those Soprim claims had been abandoned.

12. The oil terminal and tank farm ultimately became operational in late 2005. The amount of business through the terminal, which includes a contract for storage of oil on behalf of the United States Navy, far exceeds that which passed through the old facilities and the venture has proved profitable. One of the principal claims which continues to be advanced against the defendants in this litigation concerns the shareholdings held by the Boreh companies in Horizon (25% held by Boreh International and 5% by the third defendant (to which I will refer as "Essense").

13. It will obviously be necessary to look at this claim and how it has developed in much greater detail later in the judgment, but for the present, it is simply to be noted that, as advanced by the end of the trial, the claim is that no-one in the Government, including the President, knew that Mr Boreh had his own shareholding(s), that the Republic would have purchased all these shareholdings for itself if the President had known they were on offer, but that Mr Boreh dishonestly told the President that 10% was the largest shareholding that the Republic would be able to have in Horizon. This claim is strenuously denied by Mr Boreh, whose case is that the President and others in Government were well aware that, as with DDP, Mr Boreh was taking a substantial private shareholding in Horizon. His case is that the President decided on the amount of the Republic's shareholding, 10%, and that the President did not want a greater shareholding for the Republic. Mr Boreh denies that he ever told the President that only 10% was available.

14. After the construction of the Horizon terminal began, the next stage of development of the new port facilities was the Free Zone. The Djibouti Free Zone Authority ("DFZA") was created by Presidential Decree in June 2002, although at that stage it had no functions and Mr Boreh was not involved with it. He was appointed as unpaid Chairman of the Board of Directors by a Presidential Decree dated 29 May 2003. The other directors were public officials such as Mr Aden Douale. Under Article 4 of the Decree, the DFZA operated under the direct authority of the President, with complete autonomy from any ministry. By a further Decree in October 2003, it changed its name to the Djibouti Ports and Free Zone Authority ("DPFZA", the second claimant) although no new powers were conferred on it.

15. In April 2004, a Free Zone law was passed under which the DPFZA would be the sole authority to administer the Free Zone, to operate as a one stop shop and to sign an administration agreement with the Jebel Ali Free Zone Authority ("JAFZA", another entity in the DP World group). It was Mr Boreh who brought in JAFZA to manage the Free Zone, which opened up for business in June 2004. Under JAFZA management, the enterprise was extremely successful with demand for office and warehouse space such that a major expansion was required. Again the construction work was carried out by Soprim. The claimants originally advanced a claim against the defendants in respect of that construction work, but that too was abandoned.

16. The final stage of the development of the new facilities at Doraleh was the construction of the Doraleh Container Terminal ("DCT") which cost some U.S. $400

million. DP World committed to obtaining the finance for its construction. Mr Boreh negotiated the terms of the concession, procuring a two thirds shareholding for PAID in the joint venture company which was to own the DCT, the minority one third shareholding being owned by DP World. However, as with the old port and DDP, DP World was to be in exclusive control of the management of the DCT, with PAID and the Government having no right to exercise any control. It is Mr Boreh's case that it was the fact that DP World was to have exclusive control of the management of the DCT without any political interference which enabled DP World to raise some U.S. $263 million on non-recourse terms.

17. The DCT opened in December 2008. It has been a tremendous success, with a turnover of some U.S. $160 million a year and net profits of U.S. $70 million, with the Republic receiving U.S. $35 million or more in dividends each year, together with a royalty (which is set at a minimum of U.S. $6 million per year). The investment of the Republic, through PAID, in the DCT was paid back in some four years. Notwithstanding that success and the funds it has received, the Republic claims against Mr Boreh, alleging that the terms of the various agreements which were negotiated by Mr Boreh were disadvantageous to the Republic, in effect "soft terms" which he agreed with DP World, in return for bribes or the promises of bribes in the form of a shareholding in the joint venture company and payments under various Consultancy Agreements with another of his companies S Flame, which the Republic contends were in effect sham agreements designed to disguise the true nature of the payments as bribes. The Republic claims damages against Mr Boreh for loss suffered because the terms of the DCT agreement were less advantageous than they should have been. It also seeks the disgorgement by Mr Boreh of what it alleges were the bribes paid to him by DP World.

18. In parallel with its claim against Mr Boreh to that effect in the current litigation, in about July 2014, the Republic sought rescission of the Concession Agreement and Joint Venture Agreement with DP World and commenced LCIA arbitration against DP World, alleging that the Agreements had been procured on terms which were unfavourable to the Republic through bribery and corruption of Mr Boreh. The Court has not had sight of the pleadings in that arbitration, which remains confidential, although it is apparent that the allegations are strenuously resisted by DP World. The arbitration hearing was originally due to be heard during the same period of time as the present trial, but was eventually adjourned, as I understand it due to the logistical difficulties of witnesses who were due to give evidence in the arbitration being required to give evidence at the trial.

19. Mr Boreh's case in the litigation is that there is no question of his having been bribed to negotiate soft terms or terms which were unfavourable to the Republic, but that he obtained terms which were in fact extremely favourable to the Republic, particularly as regards the majority shareholding for PAID and the royalty. To the extent that the Republic's complaint is about the so called "reserved matters" giving exclusive management control to DP World, he contends that neither it nor its financiers and political risk insurers would have agreed to anything less than complete control without any interference from the President or ministers. The President was well aware of the terms of the Agreements with DP World and approved the deal, passing those Agreements into law.

20. Mr Boreh says that he never received any shareholding and that the Consultancy Agreements under which he was paid were genuine Agreements or, at least, he was being paid for genuine services he had provided to DP World. The Agreements were made long after the terms of the various DCT Agreements were negotiated and had nothing to do with the terms he had negotiated. There were certainly not soft terms which were procured by bribes.

21. The friendship between the President and Mr Boreh seems to have begun to wane some time in 2008. Although the Republic would not admit as much, it seems clear that the cause of the breakdown was the President's perception of Mr Boreh as a political rival or, at least, as someone who would not support the President changing the constitution so as to permit him to run for a third term as President in 2011. It will be necessary to consider this issue in more detail later, but it does seem clear that it was the fact that Mr Boreh would not support President Guelleh standing again which led to the breakdown of their relationship when Mr Boreh left Djibouti in October 2008.

22. Mr Boreh's case is that, from that moment onwards, with no expense spared, and no holds barred, the President has been waging a campaign against Mr Boreh whom he sees as a political rival and that the present litigation is part of that campaign. Mr Boreh contends that the claims being advanced against him are not bona fide claims but are politically motivated, motivated by the malice the President has for Mr Boreh whom he sees as a rival to be destroyed. Normally, the motivation for bringing a claim is of no particular relevance. The claim is either a good one or a bad one. If it is a good one, then it will succeed and the fact that the claimant brought the claim out of malice is irrelevant and will not prevent the success of the claim. If the claim is a bad one it will fail and the fact that it was motivated by malice will only be relevant to the question whether the claimant should be liable to pay the defendant's costs on the indemnity basis.

23. Mr Dominic Kendrick QC submits on behalf of Mr Boreh that, in the present case, the fact that the litigation is part of a relentless political campaign against Mr Boreh is of forensic relevance in a number of inter-related ways. First, it explains why the President, in the name of the Republic has brought a number of claims with no prospect of success, many of which were abandoned in the claimants' opening and during the course of the trial. Second, it provides an explanation for why the witnesses called by the Republic lied, specifically about their knowledge of Mr Boreh's shareholding in Horizon, because once the President denied knowledge, they had to follow suit. Third, the political campaign had its sinister side, namely Mr Boreh's conviction in his absence of an offence of terrorism on the basis of false evidence. As detailed in my judgment setting aside the freezing injunction ([2015] EWHC 769 (Comm)), there was an attempt when this was discovered to justify the conviction by reference to concocted evidence. This called into question the bona fides of Mr Sultan, the State Inspector General, who was the person in charge of the present litigation and, although Lord Falconer on behalf of the claimants had said at the hearing to set aside the freezing injunction that Mr Sultan would be replaced and someone else would be put in charge of the litigation, this had not occurred. Fourth, Mr Kendrick QC submits that the political campaign demonstrates the extreme country risk of investment in Djibouti under the current regime, fully justifying the control provisions that DP World insisted on in the DCT agreements.

24. These are obviously serious matters and I make detailed findings later in the judgment in relation to the various matters relied upon by Mr Boreh in support of his case of political persecution.

(2) The claims

25. As already noted, this is a case in which the claimants have made a whole series of detailed claims against Mr Boreh in relation to a number of Soprim construction contracts, DDP, various consultancy and commission payments and security contracts, thirteen claims in all, which were abandoned either during the claimants' opening or during the trial or in the claimants' closing submissions. In so far as those claims were ever quantified, they exceeded U.S. $35 million. Many of them involved allegations of dishonesty: serious breaches of duty or receipt of bribes. Some of the matters complained of continue to have a twilight existence in the sense that the claimants still rely upon some of them (specifically the ZPMC commission, the circumstances in which Soprim obtained the Horizon civil works contract, the Horizon consultancy payments and the Dry Port finder's fee) as evidence that Mr Boreh was dishonest and/or of a corrupt relationship with DP World. It will be necessary to consider those matters at appropriate points in this judgment.

26. In their written closing submissions, the defendants' counsel said this in relation to the claims which have been abandoned:

> *"In our collective experience as counsel, we cannot recall a case where so many detailed claims have been asserted, and then dropped either just before trial, during trial, and at the end of trial. They are listed in Appendix D to these submissions. This goes to far more than costs. One is left with the distinct feeling that the lawyers have advised one thing, but up to the last possible moment, the client has insisted on another course. As a result, claims with no prospect of success have been brought and have had to be abandoned. This goes directly to the bona fides of the Claimants in bringing this whole action, let alone the dropped claims."*

27. In my judgment, there is considerable force in these points. Like counsel, I cannot recollect a case in which so many claims (let alone ones involving allegations of dishonesty) have been pursued with such vigour and then abandoned at trial. No proper explanation has been advanced as to why they were pursued and then abandoned. I am left with the distinct impression that the Republic was intent on pursuing a scattergun approach against Mr Boreh of throwing as much mud as it could in the hope that something would stick, even though many of the matters were not ones in respect of which the Republic could have had a legitimate or sustainable claim.

28. This cynical approach to litigation is indicative of the political motivation which Mr Boreh contends lies behind this litigation. As I have said, I will consider the issue of political motivation later in the judgment, but for the present simply record that the cavalier approach adopted by the Republic of pursuing and then abandoning claims must lead the Court to subject the remaining extant claims to close scrutiny. In particular, it is important to ensure that the claimants' case is kept within the

parameters of what is pleaded, a point which assumes particular significance in relation to the way in which Lord Falconer put his case on the Essense 5% shareholding in Horizon in closing.

29. The two principal remaining extant claims are the Horizon share claim and what I will describe in shorthand as the DCT "soft terms" claim. So far as the former is concerned, the pleaded case in [89] of the Re-Re-Re Amended Particulars of Claim is that Mr Boreh represented the Republic in the negotiation and execution of the Horizon Terminal project, specifically in the allocation of shares and the representation of the Republic on the board of HDTL. As such it is contended that he was the Republic's agent or *mandataire* under French and Djibouti private law (the claimants' primary case), alternatively that he was an *agent public* in French and Djibouti public or administrative law, with parallel duties to that of a *mandataire*.

30. In [94] of the pleading it is said that it is to be inferred that Mr Boreh acquired the 30% shareholding (25% in Boreh International and 5% in Essense) wholly or partly because of his role as the claimants' agent in breach of private law duties owed by a *mandataire* and/or public law duties owed by an *agent public*. Reliance is placed in particular upon his position as President of the Board of the DPFZA, through which he is said to have significant influence over activities in the Free Zone, including the Horizon Terminal and a representative role for the Republic with HDTL.

31. The private law duties relied upon are those set out in [7]-[9] of the pleading, that is the duties owed by a *mandataire* under Articles 1991 to 1993 of the French Civil Code which forms part of Djibouti law. The foundation for the allegation that Mr Boreh was the claimants' agent is that he was appointed the President of the Board of Directors of the DPFZA (the second claimant) and because the DPFZA administered PAID, he was the agent of PAID (the third claimant).

32. The public law duties also arise from his appointment as President of the Board of Directors of the DPFZA [9A of the pleading]. Those duties are said in [11A]-[11B] to include the duty to be fully dedicated to the public service, the duty to avoid conflicts of interest, the duty of impartiality and the duty of probity. It is said that a public law agent owes the same duties by analogy as a *mandataire* in private law. Further or in the alternative, it is alleged in [94A] of the pleading that Mr Boreh and/or Boreh International misappropriated part of the value of the land contributed by the Republic in breach of the same private law and/or public law duties.

33. In the circumstances, it is contended that Mr Boreh, Boreh International and Essense are liable under Article 1993 of the French Civil Code to account to the claimants for the shareholding and any dividends and other gains made from it, alternatively to compensate the Republic in damages under Article 1991 or pursuant to public law. In the alternative, it is contended that in breach of Article 1382 of the French Civil Code (the general provision dealing with delict or tort) Mr Boreh intentionally or negligently caused harm to the Republic, whose interests he represented, and that he is liable to compensate it in damages accordingly. A parallel claim under Article 1382 is made against Boreh International and Essense.

34. The damages claimed at the end of the trial consist of (a) the shortfall in the shareholding which the claimants contend they should have acquired; (b) U.S. $1,938,000, alternatively U.S. $262,000; (c) U.S. $171,724 from the proceeds of the

Horizon land plus interest and (d) the amount of additional interest paid on the inter-shareholder loans that would not have been required but for Mr Boreh's dealings with the land. The figure of U.S. $1,938,000 is claimed as the total amount set off by Mr Boreh in respect of the Soprim debt, on the basis that Mr Boreh had no entitlement to set off the Soprim debt against the land proceeds and the alternative figure is the difference between that figure of U.S. $1,938,000 and the U.S. $1,676,000 set out in the second MOU and is claimed on the basis that, even if, contrary to the claimants' primary case, Mr Boreh was entitled to set off the U.S. $1,676,000, he was not entitled to set off the additional U.S. $262,000. The U.S. $171,624 represents the amount of the land value credited to Mr Boreh in cash minus the amount of the calls he paid on behalf of the Republic from the proceeds.

35. The DCT "soft terms" claim has developed both before and during the trial in an unsatisfactory manner. The pleaded case in section G of the Re-Re-Amended Particulars of Claim headed: "Agreements with DP World" is that there were bribes and secret commissions paid to Mr Boreh by DP World, by way of a shareholding in DCT and payments under the S Flame Consultancy Agreements. It is said: *"In the circumstances, it is to be inferred that the benefits paid pursuant to the above agreements were bribes or secret commissions, paid with the intention of the defendant acting in the best interests of the DPI Group rather than in the claimants' best interests."* The relief then sought so far as relevant is in paragraphs 131J-131L, that Mr Boreh is liable: (i) under Article 1993 of the Civil Code to account for the benefits received by him from DP World; (ii) under Article 1991 of the Civil Code or public law to pay compensation for breaches of his duties as an agent; (iii) under Article 1382 of the Civil Code to compensate the claimants for the loss and damage suffered as a result of his actions.

36. At a case management conference on 14 April 2015, I ordered a split trial, with issues of liability to be determined at the present trial and issues of quantum to be stood over for determination at a stage two trial. At the time that I made that Order, neither I nor Mr Kendrick QC appreciated that the claim being made by the claimants included a substantial claim that Mr Boreh had been induced by bribes to agree "soft terms" in the various DCT Agreements with DP World. The split trial came about because of the quantum issues raised by the claim then being pursued by the Republic that it had suffered a loss as a consequence of Mr Boreh's company Soprim having procured the various construction contracts. However, given that the claimants were already running their "soft terms" case in the DP World arbitration, for some unexplained reason, they seem to have decided not to plead out that case in these proceedings.

37. In that case management Order, I did order "high level" construction experts' reports to be exchanged to deal with the claimants' allegation that there was a disparity between Soprim's contribution to the DCT project and its profit and to address the related question whether it could be inferred from any such disparity that the DCT could have been constructed for substantially less, with other quantum issues being deferred to the stage two trial. As Mr Kendrick QC said in his closing submissions, the reason for ordering those high level reports was to illuminate the issue of liability as to whether, as the claimants alleged, the Soprim contracts had been procured by corruption.

38. Mr Kendrick QC informed me that it was not until the claimants served their witness statements, specifically that of Ms Zeinab Ali, that he appreciated that the claimants

were alleging that by virtue of the bribes, Mr Boreh had not procured as advantageous terms in the DCT Agreements as he should have done. What the claimants' case was became clearer from a letter from Gibson Dunn, the claimants' solicitors, of 19 August 2015 in which they said: *"Our clients' case is not simply that Mr Boreh brought in DP World for personal gain. Our clients' case is that your client did not promote the Claimants' interests to the best of his ability, and to the exclusion of his own interests and DP World's interests, because of his conflict of interest. As a result of your client's conduct, our clients did not obtain as advantageous terms as they might have done."* However, no particulars were given of the respects in which it was said the terms were less advantageous to the claimants than they should have been.

39. Correspondence ensued between the solicitors as to whether particulars should be provided, culminating in a letter from Gibson Dunn on 8 September 2015, shortly before the pre-trial review on 11 September 2015, in which Gibson Dunn stated: *"There may be scope for detailed issues arising as to loss to our clients concerning the points addressed above, and in particular what "reasonable" terms might have been, but such detailed issues do not (yet) arise in these proceedings. The forthcoming trial concerns liability only. Any issues as to loss fall not to be resolved unless our clients are successful. What will be determined is whether our clients are in principle entitled to damages (and if so, the date of assessment) upon liability being established. Establishment of an entitlement to damages in principle requires no more than the analysis we have set out above."*

40. At the pre-trial review, Mr Kendrick QC submitted that, in a case of fraud, it is not sufficient to contend that the terms of the DCT agreements might or would have been different had it not been for the corruption of Mr Boreh, but it was incumbent on the claimants to identify in what precise respects it is said that the terms were different from those which should have been obtained. Mr Kendrick QC submitted that this was not just a pleading point, but that in fairness to Mr Boreh, he was entitled to know precisely what the case against him was as to "soft terms" and to have that case put to him in cross-examination at the liability trial. Mr Kendrick QC also submitted that it would be unsatisfactory for the court simply to say that it was to be inferred that soft terms were given, but leave the enquiry as to the respects in which they might have been disadvantageous to a stage two trial, which might be conducted by a different judge. There was a risk of inconsistent judgments if the second judge then concluded that none of the terms were disadvantageous. In those circumstances, Mr Kendrick QC asked for an Order that the claimants set out in a letter the respects in which the terms would have been more advantageous but for the bribes.

41. Although that application was resisted by Lord Falconer on the basis that Mr Boreh already knew the case he had to meet, I ruled against the claimants and ordered them to set out in a letter within 14 days what the terms of the various Agreements were, which they allege would have been more advantageous to them if Mr Boreh had not been bribed, and in what respects those terms were not as advantageous as they might otherwise have been. As I said in the ruling I made on that occasion, my reasons for making that Order were twofold: (i) in a case in which bribery is being alleged, before the court could conclude that there was a bribe, the court is entitled to know what the case is as to what terms would or might have been obtained, in order to assess whether or not there has in fact been a bribe; and (ii) where serious allegations of this kind are being made, the defendant is entitled to know exactly what case it is that is

being put against him, and not have to face points put for the first time in the witness box.

42. Of course, having to set out in a letter what their case was as to what terms should have been obtained, had it not been for the alleged bribes, cannot have presented any difficulty for the claimants, since they have been running the arbitration against DP World since July 2014, in which as I understand it, they are making precisely the same allegations. Indeed, not only were many of the same witnesses due to be called, but the parties in that arbitration have exchanged expert evidence on the issue of whether the terms were "soft" and what terms should have been obtained, although the court has not seen the experts' reports.

43. In accordance with my Order, the claimants served the letter on 25 September 2015. In relation to those "soft terms" which were still being pursued at the end of the trial, that letter set out the claimants' position as follows:

(1) In relation to the royalties payable to the Republic/PAID of 5% of gross revenue, or a minimum of U.S. $6 million per annum, the claimants contend: *"The payments provided to Djibouti are disadvantageous in that they are too low and with no fixed rental component. A reasonable royalty would have been in the region of 40% of Gross Revenue, defined in a way that captured all the economic revenue of the terminal, disregarded discounts offered by DP World to its customers, and made reference to a traffic level or revenue target."*

(2) In relation to the management fee payable to DP World of 5% of gross revenue, the claimants contend: *"The fee is disproportionately high by comparison with the royalty to Djibouti and has no minimum performance standards. A reasonable fee would have been fixed per year (the Claimants are unable to specify precisely what a reasonable fee would be but estimate approximately US$1.3m), alternatively if based on Gross Revenue would have been benchmarked/related to throughput or traffic targets."*

(3) In relation to the length of the concession, 30 years plus two ten year extensions at the option of DP World, the claimants contend: *"An effective term of 50 years is disadvantageously long. In the region of 30 years would have been reasonable."*

(4) In relation to the degree of management control given by the DCT agreements to DP World, the claimants say: *"The Claimants accept it was reasonable to require DCT SA to engage DP World (or its affiliates) as the manager. However: (a) The setting of tariffs (or at least minima and maxima thereof) should have been reserved to the Republic or its emanations. (b) The principle of DP World managing the terminal being acknowledged, the other provisions giving DP World exclusive control (and in particular over the board and budget, of DCT, the appointment of the contractor to construct it, and of the rights of its shareholders) were unnecessary and disadvantageous."*

44. Reading those various contentions, it would seem that, at least in part, they are likely to be based upon the expert evidence which the Republic/PAID are deploying in the arbitration rather than simply being lawyers' constructs. In their opening Skeleton Argument for the trial, the claimants identified the three issues the court had to decide as being (a) whether the S Flame Consultancy Agreements between DP World and Mr

Boreh are explicable on a non-culpable basis; (b) whether the DCT Agreements were disadvantageous to PAID and (c) whether Mr Boreh was at fault for those disadvantages. The Skeleton then went on to set out the respects in which the Agreements were said to have been disadvantageous by reference to evidence which the claimants were seeking to adduce as to terms agreed by DP World in relation to other terminals they operate elsewhere in the world. For example, in relation to the royalty, the claimants contended: *"No minimum traffic level is included in the calculation of the royalty and, under a Concession Agreement with a term of up to 50 years, the payments do not increase with inflation. By contrast DP World pays 65% at the Jeddah South terminal, another operator pays 48% at Jeddah North; at Dakar DP World paid US$93m upfront, a fee of $1/sqm of land conceded per year, and royalties per container handled (see Concession Agreement, clauses 11.2.1 and 11.2.2; at Algiers, €16m upfront, €4/sqm of land; 4% of container revenues and 15% of other revenues."*

45. It certainly appeared from that Skeleton that the claimants were proposing to argue out at the present trial the respects in which the terms were disadvantageous because of the bribes, and Mr Kendrick QC addressed those matters in his own Skeleton Argument and, indeed, in his written closing submissions. He called Mr Qureshi of DP World (whose statement was served on 19 October 2015 during the trial) to deal with the allegation that the terms of the DCT Agreements were not as favourable as they might have been. The claimants did not call any evidence on those matters, other than that of Ms Ali, who was not really qualified to give evidence about technical matters such as royalties, management fees and the length of the concession. In particular, the claimants did not call any expert evidence on these issues.

46. As I said in closing argument, at the time that I made my ruling at the pre-trial review I did not intend that the issue as to what the terms of the various Agreements should have been would be determined at this trial, since had I thought it was to be decided, I would have enquired at the pre-trial review whether it was proposed to call expert evidence. However, by the end of the trial, I was very troubled by the unsatisfactory limbo in which the serious issue of whether Mr Boreh had been bribed to agree to "soft terms" had been left. Lord Falconer submitted in his oral closing submissions that, if the court concluded that Mr Boreh had been bribed, then all I should decide at this stage was whether, on the balance of probabilities, that bribery caused some loss to the claimants. If I concluded that it did, then all issues as to what terms would have been agreed were for another day at the stage two trial. This did seem to be something of a climb down from the position in the claimants' opening Skeleton and from the cross-examination of Mr Qureshi.

47. Mr Kendrick QC, on the other hand, submitted as strenuously as he could that both proper case management and justice to Mr Boreh required that I should decide now, not only whether Mr Boreh was bribed by DP World, but the issue of causation, as to whether that bribery has caused the Republic any loss, in other words, whether the Republic/PAID became bound under the DCT Agreements on worse terms than would otherwise have been agreed. He urged me against taking the course advocated by Lord Falconer of just deciding whether, if there was bribery, it had caused some loss, leaving the detail of any loss to a stage two trial, where Mr Kendrick QC pointed out, as he had done at the pre-trial review, that another judge might decide, for example, that DP World would never have agreed any other terms than the ones

which were agreed, so that there had not in fact been any loss. He submitted that the allegations put forward in the claimants' opening Skeleton, particularly the comparisons with other terminals operated by DP World must have come from the expert evidence in the arbitration, which it seems to me must be right.

48. In those circumstances, there is considerable force in Mr Kendrick QC's final submissions on this question:

> *"So what you should do now is this: it's time to resolve liability once and for all, they have run a case of betrayal and commercial treason, justice and case management requires the case should properly be resolved now, and you should make no such finding unless you are sure on the balance of probabilities. If they have not brought expert evidence, or applied for it, they must live with that decision. There may well be very sound tactical reasons for it, but in any event your job is to decide, just as their opening skeleton required you to do, on the basis of the material before you."*

49. I have thought long and hard about this question since the conclusion of the trial and have concluded that it is not satisfactory simply to determine whether there was bribery and, if there was, whether, on the balance of probabilities, it caused some loss to the Republic/PAID, leaving the issue of whether the terms of which complaint is made were disadvantageous to a stage two trial. Whilst it can no doubt be said on behalf of the claimants that they have not called their expert evidence, it seems to me that they could have made an application to do so, given that the relevant evidence has already been prepared for the purposes of the DP World arbitration. In any event, I agree with Mr Kendrick QC that expert evidence of comparisons with other container terminals would be unlikely to be of any real assistance, since the DCT and the Agreements relating to it are in a very real sense unique. I have concluded that, both in the interests of justice and of proper case management, I have to decide now, not only whether there was bribery, but whether if there was, it caused the terms of the DCT Agreements to be less advantageous to the Republic/PAID than they would otherwise have been and in what respects.

(3) The evidence

50. The events with which this litigation is concerned took place between 1998 and 2008. The claims involve serious allegations against Mr Boreh and his companies, essentially of fraud. In those circumstances, Mr Kendrick QC submits that the contemporaneous documents and the inherent probabilities are likely to be a better guide to establishing the truth than the necessarily defective recollection of witnesses giving evidence so many years later, even where those witnesses are endeavouring to tell the truth. He relied upon the famous passage in the judgment of Robert Goff LJ (as he then was) in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57:

> "[It is] essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the

> case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence ... , reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

51. That approach to the evidence is one which I have adopted as my overall approach, given that many of the most significant events in the case took place more than ten years ago. However, there are two caveats in relation to that approach. The first is that, in some respects, the contemporaneous documentation is thin, particularly in relation to the negotiations with ENOC of the Horizon agreements, so that there is not always contemporaneous documentation against which to test the recollection of witnesses. The second is that, in a very real sense, this case is a "swearing match" between two protagonists, the President and Mr Boreh, with Mr Boreh maintaining that the President was well aware of Mr Boreh's personal interests in the various ventures of which complaint is now made, specifically his shareholding in Horizon, all such matters having been discussed orally between them and agreed by the President. The President on the other hand denied all such knowledge.

52. In those circumstances, the nature of the case was such that it was always essential that both protagonists were called to give oral evidence. I had indicated at the pre-trial review that it was essential that the President, from whom two witness statements were served by the Republic, attend court in person to give evidence, not simply give evidence by video link from abroad. In the event, Mr Boreh did give evidence at the trial and was cross-examined by Lord Falconer on behalf of the Republic for four and a half days. I had the opportunity to observe Mr Boreh in the witness box, not just in terms of the evidence he gave but the way in which he gave it, which was of invaluable assistance in assessing the extent to which he was an honest and reliable witness.

53. However, I was deprived of that opportunity in relation to the President. Instead, on 6 October 2015, just before the trial began, the President wrote a letter to the Court stating that he would not be attending to give evidence at the trial. His explanation for that decision was as follows:

> *"I am fully aware of the comments that you have made concerning the importance of my testimony, and I have, as you know, submitted two written witness statements. However, I have come to the conclusion, having given much thought to the consequences of my presence and the precedent that it might create, that it would be inappropriate for me to do so. I have not taken this decision lightly, and this does not reflect any lack of respect either towards you or the English court. However, the higher interests of my country, which are the main reason for this lawsuit, do not allow me to do so.*
>
> *As you will see in the coming weeks, the actions of Mr Boreh have seriously damaged the interests of Djibouti. The facts presented to you will reveal this and therefore it must be the*

> *actions of Mr Boreh, not of me personally, that remain the focus of this case.*
>
> *Indeed, it is my primary duty as Head of State to protect the interests of the people of Djibouti and to maintain the dignity and sanctity of the interests of the Republic. The damage suffered by Djibouti pursuant to Mr Boreh's actions is unprecedented. And the sophistication of the mechanism employed as well as the size of the fraud that we continue to suffer to date formally demonstrate that neither my administration nor I could have been aware of it. Furthermore, beyond his own statements, Mr Boreh has no proof in this regard. Therefore, in my opinion, it is not up to me to come and deny hearsay and unfounded statements.*
>
> *Mr Boreh also has launched a media campaign focused on your recent observations concerning my testimony. So be it. I cannot give in to his provocations against me that would be contrary to my duty. I therefore ask you, and the Court, to accept my apologies, while understanding the position in which I find myself and the struggle in which I am engaged for my country, which is the main victim of this shameless obstinacy by Mr Boreh and his partners."*

54. With the greatest respect to the President, as an explanation, this is both inadequate and misconceived. It is the Republic which has chosen to commence private civil litigation before the English courts against Mr Boreh and his companies. In circumstances where the essence of the defence is that the President was well aware and condoned the matters of which complaint is made, it was incumbent on the Republic to call the one witness who could deal with that defence, the President himself, or run the risk that the Court would draw adverse inferences from the Republic's failure to call the President, *a fortiori* where it is clearly he who is in ultimate control of the litigation. Given that this is the Republic's claim, which it has to prove on a balance of probabilities, but to the heightened standard applicable in cases of fraud, alleged concerns about the precedent that would be set by a foreign head of state having to give evidence before an English court have a somewhat hollow ring and are simply not credible. If the President were telling the truth about his lack of knowledge about the matters of which complaint is made, then it is difficult to see what he would have to fear by coming to England to give evidence.

55. In the circumstances, it seems to me that the principle stated by Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] Lloyds LR (Medical) 223 at 227 comes into play:

> "…in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action."

56. Lord Falconer relied upon the exception to that general principle identified in *R v Inland Revenue Commissioners Ex parte TC Coombs & Co* [1991] 2 AC 283 at 300, approved by Lord Sumption JSC in *Prest v Prest* [2013] 2 AC 415 at [44]:

> "…if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

57. However, since for the reasons I have already identified, I do not consider the President's explanation for his failure to give evidence adequate or credible, this exception is inapplicable. In the circumstances, it does seem to me appropriate to draw adverse inferences against the Republic from its failure to call the President to give evidence, especially since he is clearly in ultimate control of the litigation, that this was due to an unwillingness to have exposed through cross-examination in a public forum: (a) the extent to which, contrary to the bland denials in the witness statements served from him, he was aware of and condoned the matters of which the Republic now complains, specifically Mr Boreh's shareholding in Horizon; (b) the extent to which the claims are not *bona fide* claims, but politically motivated and driven by personal animosity towards Mr Boreh and (c) the extent to which the President himself was implicated in corruption.

58. Furthermore, in circumstances where the issues in the case turn upon the credibility of the parties' respective principal witnesses, as they so clearly do in the present case, witness statements put in under hearsay notices pursuant to the Civil Evidence Act, as were the President's statements in the present case, are to a large extent evidentially worthless. As Brandon J (as he then was) famously said in *The Ferdinand Retzlaff* [1972] 2 Lloyd's Rep 120 at 127:

> "... matters of this importance, in a case of this kind, should be proved by oral evidence ... I cannot think that the Civil Evidence Act 1968 was intended, in general, to change the long-established system by which seriously disputed central issues in civil cases are tried on oral evidence, given on oath and capable of being tested by cross-examination, and to substitute for it a system of trial on unsworn documents brought into existence by parties to the proceedings post litem mortam, and I do not think the Act should be used, or rather abused, so as to produce such a result".

59. In any event, quite apart from that salutary warning about not abusing the trial process by reliance on hearsay statements, the actual witness statements served from the President are inadequate and simply fail to grapple with some of the most difficult issues in the case so far as the Republic is concerned. In particular, in relation to the two principal remaining claims: (i) he fails to deal adequately with the meeting he had with ENOC in September 2002, the note of which records him as saying that: "*it is estimated that Govt. of Djibouti may like to have an equity participation of 10 to 15%. This could be in the form of value of plot allotted for the project.*" In his first statement, he purports not to remember this meeting, essentially dismissing it as part of a "courtesy visit"; and (ii) he deals in an entirely perfunctory manner, in his statements, with the terms of the DCT Agreements. He fails to deal at all with his own

involvement in agreeing the terms and ratifying the Agreements, notwithstanding the evident misgivings of some of his advisers.

60. Lord Falconer sought forensically to avoid the consequences of not calling the President to give evidence, by launching a detailed and sustained attack in his closing submissions on Mr Boreh's honesty and credibility as a witness, evidently designed to persuade the Court to disbelieve Mr Boreh's evidence as to the extent to which the President was aware of and condoned the matters of which complaint was made, notwithstanding that the President had declined to attend to be cross-examined himself. I was not so persuaded. Having had the opportunity to see Mr Boreh give evidence over a considerable period of time and to assess his demeanour, I considered that, whilst there were aspects of his evidence which were unconvincing and defensive (for example his evidence about the Horizon consultancy payments) and other aspects of his evidence which were exaggerated, he was an essentially honest witness who was telling the truth about the issues which really mattered in the case. The picture which Lord Falconer sought to paint of a thoroughly corrupt businessman simply did not correspond with my assessment of Mr Boreh.

61. It is also important to remember two points about Mr Boreh as a witness. The first is that he gave his evidence in English. Although he speaks extremely good English, it is not his mother tongue and there were occasions when his answers to questions came across rather oddly because of his use of the English language. The second and related point is that Mr Boreh suffers from dyslexia, which causes some difficulty in processing information. Although Lord Falconer's cross-examination was a model of fairness and clarity, I considered that there were occasions when Mr Boreh was having difficulty following what he was being asked about and gave confused answers. What the claimants submit were evasive answers seem to me better categorised as being confused, particularly when Mr Boreh was tired.

62. In my judgment, it is also important to maintain a sense of perspective about many of the allegations of corruption made by the Republic against Mr Boreh in those closing submissions. With the exception of the allegation that he received bribes from DP World in return for negotiation of "soft terms" on the DCT Agreements, all the matters raised are ones in relation to which the Republic no longer maintains any claim against Mr Boreh, whether in relation to the Horizon success fee or consultancy payments, the DDP finders' fee, the ZPMC commission, the procuring of Nomad security contracts or the procuring of construction contracts for Soprim. Those claims are no longer pursued against Mr Boreh or his companies because the Republic could not sustain an argument that it had suffered a loss. Had it been able to do so, one can be sure these claims would have been maintained, given the Republic's relentless pursuit of Mr Boreh.

63. Where no actual claim is still pursued in relation to these matters, I consider the Court should be cautious in drawing adverse inferences against Mr Boreh and careful not to judge the conduct of the parties by reference to English law, which has no application to this case. Whatever the true nature of the relationship between the Republic and Mr Boreh, (and I will consider in more detail hereafter whether Mr Boreh was a *mandataire* in private law and/or an *agent public* in public law), that relationship is governed by Djibouti law. Obviously, to the extent that Mr Boreh's conduct amounted to a breach of a private law or public law duty as a matter of Djibouti law which has caused the Republic loss, then the Republic's claim will succeed. Whilst there can be

no question of the Court condoning corruption, the Court is concerned with the claims still advanced, not those now abandoned.

64. Turning to an assessment of the witnesses who were actually called by the Republic, as I have already observed, they were all former ministers or high ranking civil servants. In my judgment, there are three reasons for approaching with considerable circumspection the evidence of all the Republic's witnesses. First, they all exhibited a marked reluctance to say anything in evidence which might contradict or question the President's stance in the litigation, which is of course that of the Republic. At its most extreme, this meant that, because the President's stance was that he did not know that Mr Boreh had a shareholding in Horizon, all the witnesses called had to claim that they were equally ignorant of the shareholding at the time, even though Djibouti is a small place where everyone knows everyone else's business, particularly in the case of anyone of prominence such as Mr Boreh. There was something unreal, which would have been comic were it not for the seriousness of the allegations made by the Republic, in former ministers and high ranking civil servants avowing ignorance of the shareholding, when the fact that Mr Boreh held a shareholding was reported several times in Africa Intelligence, an internet media service and in Wikileaks cables from the U.S. Ambassador which showed that she was aware that Mr Boreh had invested in Horizon. Indeed, the most farcical aspect of this was that, in one such cable, Mr Tani, the cabinet director, who was one of the Republic's witnesses, was quoted by the Ambassador as saying *"of course"* Mr Boreh had shares. His attempt to explain this away, as relating to Mr Boreh's interest through Soprim in the construction of the terminal, was thoroughly unconvincing and contradicted what he had clearly told the Ambassador.

65. The second reason for approaching the evidence of the Djibouti witnesses with considerable caution is that it was quite obvious that they had had witness training and been carefully prepared for giving evidence. Mr Douale admitted as much. Mr Kendrick QC relied upon two matters as demonstrating such preparation. First, that although a number of the witnesses, specifically Mr Douale and Ms Zeinab Ali, are pretty fluent in English, they all insisted on giving their evidence in French, with simultaneous translation. I did not regard that as necessarily indicative of over-preparation or "schooling" as Mr Kendrick QC described it, as it seems to me that even someone who is apparently fluent in a foreign language may misinterpret the nuances of questions in that language and, if they wish to do so, should be entitled to give their evidence in their mother tongue.

66. The second matter on which Mr Kendrick QC relied as evidence of careful preparation of the witnesses had considerably more force. None of them accepted (with the exceptions of minor corrections) anything said in his or her witness statement as being wrong. The most extreme example of this was in the cross-examination of Mr Douale, when Mr Kendrick QC put to him two completely inconsistent paragraphs in his witness statement, one where he said he always believed that Mr Boreh was working for the good of Djibouti and the other where he claimed that Mr Boreh had told him that, if they signed the DCT contract with DP World, they would both be rich for life. Mr Douale seemed incapable of recognising the inconsistency, although tellingly whilst he insisted that the paragraphs were not versions or stories, but were facts, he continued: *"and they have gone off the rails"*

which seemed to me to be an admission that something had gone wrong with his carefully crafted witness statement.

67. Whilst I am not suggesting that witness training in itself is improper, (provided that it does not amount to coaching of a witness as to what to say, which would be improper) it is to be discouraged, since, as this case demonstrates, it tends to reflect badly on the witness who, perhaps through no fault of his or her own, may appear evasive because he or she has been "trained" to give evidence in a particular way.

68. The third reason for approaching the evidence of the Republic's witnesses with considerable circumspection is related to what I found, in my judgment setting aside the freezing injunction ([2015] EWHC 769 (Comm)), was the improper conduct of the Republic and, specifically, of Mr Sultan, the State Inspector General and Mr Djama Ali the Attorney General, who had prosecuted Mr Boreh, in the wake of the discovery that Mr Boreh's conviction for terrorism was based on the misdated telephone transcripts in: (a) seeking to concoct false evidence of other terrorist acts; (b) continuing to rely upon my judgment granting the freezing injunction in September 2013 even though they knew it was based upon a misapprehension; (c) continuing to rely upon what they knew were misdated telephone transcripts in seeking the extradition of Mr Boreh and the maintenance of the Interpol Red Notice and (d) seeking, through Kroll to place improper commercial pressure on Mr Boreh to settle this litigation (see in particular [56]-[67], [130]-[141] and [215] of that judgment). At [246] I said this:

> "There are other aspects of Djibouti's conduct which can only be described as reprehensible and which inevitably bear upon the question whether it would be appropriate to grant a fresh freezing injunction: (i) their continued use of my judgment internationally notwithstanding that they knew it was based on a misapprehension; (ii) the so-called evidence they have produced of a grenade attack on 3 March 2009 when they can have no genuine belief that there ever was such an attack; (iii) the continued reliance upon the unsafe conviction and the unreliable confession in their criminal complaint in Dubai in June 2014, after their extradition request had failed and (iv) the thoroughly improper pressure put upon Mr Boreh by Kroll on behalf of Djibouti to settle the litigation. These are four particularly egregious examples of reprehensible conduct, all of which fall a long way short of the standards of behaviour which the court is entitled to expect of a sovereign state."

69. That reprehensible conduct of the Republic called into question the good faith of those responsible for the conduct of the litigation, specifically, Mr Hassan Sultan, the State Inspector General. At the hearing of the application to set aside the freezing injunction, Lord Falconer on behalf of the Republic stated that the case was under new management as regards both the Republic and Gibson Dunn, which was understood by both the court and mr Boreh's counsel as meaning that Mr Sultan would be replaced. However, although Mr Philip Rocher took over the conduct of the case at Gibson Dunn, Mr Sultan has remained in charge of the litigation answering to the President for this trial. Given that he and Mr Djama Ali, the Attorney General, have previously been implicated in the concoction of false evidence, as set out in my

earlier judgment, it gives the Court no confidence that the evidence which has been produced on behalf of the Republic whilst Mr Sultan has remained in charge of the litigation is all genuine and honest evidence.

70. For all those reasons, I approached the evidence of the Djibouti witnesses with considerable circumspection. I turn to my assessment of the individual witnesses.

71. Mr Aden Douale was a civil servant in Djibouti for almost thirty years prior to his retirement in July 2011. Prior to May 2000 he was Director-General of PAID, but after the concession agreement for the management of the port was signed with DP World he became the Government Representative to PAID, sitting on its board and on the board of the DPFZA after 2003. He was also a member of the board of DDP after January 2002, representing the interest of PAID, which became a shareholder in DDP at that time. I found his evidence to the effect that he did not know about Mr Boreh's investment in Horizon most unconvincing. He accepted that he knew about Mr Boreh's interest in Soprim and DDP and it seems to me that, given his role at all material times as one of the cadre of influential people in Djibouti with responsibility for the port, it is inconceivable that he did not know about Mr Boreh's shareholding in Horizon. Indeed, there was a telling moment in cross-examination when he said: *"I felt rather that Mr Boreh was working on a parallel line for his own business and also Djibouti's interest, that's what I could note."* He clearly intended that as a smear on Mr Boreh to suggest that he had acted in conflict of interest, but it seemed to me to suggest he did know about Mr Boreh's interest in Horizon.

72. I found a number of other aspects of his evidence unsatisfactory. I have already alluded to his adherence to his witness statement, even when there were demonstrably inconsistent paragraphs in it, both of which could not be true. Two further examples are (i) his evidence in his witness statement that he did not know, until the meeting with the Arab Funds in February 2002, that ENOC was going to fund the oil terminal, which was demonstrably untrue, notwithstanding which, as he put it: *"that's what I say in my witness statement and I will stick with that"*; (ii) his evidence when asked whether everyone in the Government knew how much control they were giving up to DP World under the DCT Agreements and the President had to decide whether to approve it or not. He persisted in stating what the claimants' case was, namely that as majority shareholder PAID should have had control, without answering the question. Generally, I do not accept Mr Douale's evidence save where it is consistent with the contemporaneous documents and Mr Boreh's evidence.

73. Mr Yacin Bouh is a French qualified lawyer. After serving as a high ranking civil servant, he was the Finance Minister from 1999 to 2005 and Minister of the Interior from 2005 to 2011. A number of aspects of his evidence were unsatisfactory. I refer to two by way of example. In his witness statement, he said that the only work carried out by Soprim at the Presidential Palace for which any invoice was outstanding at the time of the sale of the land for Horizon was relatively minor electrical work following fire damage. This was clearly designed to give the impression that nothing like the U.S. $1,676,000 which was the amount off-set against the sale proceeds in the second MOU in respect of the Soprim debt was in fact due, the implication being that Mr Boreh had misappropriated that amount. In fact the outstanding invoices which he had approved exceeded U.S. $1.5 million and additional work had been carried out since the last invoice, amply justifying the amount of the off-set. Mr Bouh accepted these invoices were correct when confronted with what he had approved in cross-

examination, but would not accept that what he had said in his statement was wrong, shifting his ground to saying that he had known about the invoices, but not known about the agreement for their payment in the second MOU. I found this prevarication unconvincing.

74. The other example of how Mr Bouh's evidence was unsatisfactory concerns his evidence about the meeting on 28 October 2003 with Mr Boreh and the notary for the signature of the sale agreement for the land. The sale agreement which Mr Bouh signed referred to a *"protocol d'accord"* (memorandum of understanding) which was a reference to the document which set out the agreement between ENOC and the Government as to the sale proceeds (including that U.S.$1,676,000 of those proceeds would be used to pay the Government debt to Soprim). In his evidence, Mr Bouh maintained that he had neither looked at nor asked the notary for the MOU. This was an unsustainable stance, as it is inconceivable (for reasons I set out in detail in the relevant section of my findings of fact) that the notary would not have ensured that the MOU was produced to and read by the parties, before the sale agreement was signed. It is equally inconceivable that, as a lawyer, Mr Bouh would not have read all the documents with which he was presented very carefully. This evasive piece of evidence on Mr Bouh's part was obviously designed to avoid the Court concluding that he had been aware at the time of the terms of the so called second MOU.

75. Mr Fahmi El Hag had been a member of the National Assembly for some thirty years and has been the President's Adviser for Investment Projects since 1999. In that position, he is clearly a great exponent of the Arab Funds and his evidence at times felt like an extended advertisement for the Funds. Whether it was through inexperience of the English adversarial system or because he had been carefully prepared or both, he had a tendency to seek to give a presentation or lecture about the Funds rather than answer the questions he was being asked and for that reason I did not regard him as a particularly reliable witness.

76. Mr Dileita Mohamed Dileita was Prime Minister under the President from 2001 to 2013, having previously been the Ambassador to Ethiopia. The particular areas on which he gave evidence of any significance concerned his visit to Dubai and meeting there with Mr Boreh, almost certainly in 2007. His oral evidence about this was evasive at times, particularly his denial that he had been sent by the President to Dubai to sound out Mr Boreh's intentions and his attempt to deny that he had come away from the meeting thinking that Mr Boreh would not support the President standing for a third term of office, when it is pretty clear from [13] of his witness statement that that was his understanding. He was also (perhaps understandably given his closeness to the President) reluctant to accept the evidence, from international monitoring of the 2011 election, which referred to the President's harassment of opponents and crackdown on anti-Government protesters.

77. Mr Ismail Tani was the former Director of the Government newspaper La Nation and Secretary General of Information. From 1999 to 2008, he was Director of the Cabinet of the President, which meant in terms of Djiboutian politics that he was an adviser to the President. I regarded his inconsistent evidence about the extent to which media reports in Africa Intelligence would have been read in Djibouti as particularly evasive. He clearly knew about Mr Boreh's shareholding in Horizon in 2004, not least because, when asked about it by the U.S. Ambassador, he said of course Mr Boreh had shares, but when confronted in cross-examination with the relevant Wikileaks

cable from the Ambassador reporting her discussion with him, he simply told a bare-faced lie to the effect that the discussion was about Soprim.

78. One of the claimants' principal witnesses was Ms Zeinab Ali. She was a board member of the DPFZA from October 2003 until January 2012 and Executive Director of the DPFZA from January 2005 to September 2014. She is a Djiboutian qualified lawyer, who studied in France and who previously worked for the Djiboutian national water authority. Before setting out my assessment of her as a witness, I shall summarise what has happened to her since Mr Boreh left Djibouti in October 2008, since this has some bearing on her reliability as a witness.

79. One of the matters I shall return to in detail later in the judgment is the issue of political motivation for the present claims. For the present, I simply refer to a press report in Africa Intelligence in June 2011 which alleged that the Secretary-General of the Presidency, Mr Abdillahi, had issued a confidential note to the Minister of the Interior, Mr Bouh, which appeared to call for "*precautionary measures*" to be taken against the families and contacts of Mr Boreh. In cross-examination, Mr Bouh said he knew of the allegation and of the note but denied its authenticity, a denial he maintained, even after a copy of the note was obtained and put to him. The note certainly looks genuine and I agree with Mr Kendrick QC that it and the press report have the ring of truth given what happened to Ms Ali.

80. It is tolerably clear that her career suffered because of her association with Mr Boreh. In August 2013 she wrote an impassioned confidential note (almost certainly sent to the First Lady, although Ms Ali denied this) in defence of her conduct and against those who were accusing her of being too close to Mr Boreh, which also contained lavish praise of the President. One passage from the note will sufficiently give its flavour. Dealing with her involvement in the negotiation of the DCT agreements with DP World, she says:

> *"Furthermore, I diligently cooperated with all legal firms dealing with this dossier and I explained time and again the reports that had already been filed as well as what was said at the time of the negotiations on the DCT concession, in particular on the question of "reserved matters" and the weak position of the State as a shareholder in the Shareholders' Agreement with DP World.*
>
> *The work emails that were exchanged with the group of lawyers hired by the partners in Dubai, with only me to respond to them, provide proof that I always worked only in the national interest.*
>
> *My mistake was that I did not take the precaution of getting myself a "griot" [town crier] to boast about my qualities, because I was so convinced that the boss was doing his work and praising the person under him, which was me. Nevertheless, deep inside myself, I secretly held out hope that I would be publicly acknowledged, or receive a medal for my loyal work (work that created an entire institution with regulations and procedures, all written by me, monitoring and*

> *achieving the projects for the container terminal and the petroleum terminal, as well as managing the oil companies' move to Doraleh...) and especially to show the people who had tried to besmirch my professional integrity what my true motives were: to serve the State, and I will add to serve Ismael Omar Guelleh. I owe a lot to this man, my studies, my respectability because he respects me, but above all, he is a man whose human qualities I admire, and a man whose political actions I applaud, a man whom I would like to work with as he strives to lift Djibouti out of this vile and servile poverty."*

81. Ms Ali was then dismissed from the DPFZA in September 2014, on false charges of corruption. Although the charges were withdrawn, as she said in cross-examination the damage had been done. However, as Mr Kendrick QC puts it, there was a *"lucky redemption"*. The Republic needed her assistance in an arbitration in which it was being pursued by Soprim and she provided a witness statement in November 2014. In what clearly was a reward for her cooperation, in January 2015, the Prime Minister wrote a memorandum assigning her to the Ministry of Transport, but with a year's backdated pay to January 2014. However, she explained in evidence that she no longer wanted to be a civil servant and wanted to be a lawyer in private practice. This apparently requires a decree from the president licensing a lawyer to practice and there are only about fifty such lawyers in Djibouti. Before her statement was served in the present proceedings in July 2015, the President passed a Decree licensing her to practice as a lawyer. I have no doubt that this was the reward for her continued cooperation.

82. In these circumstances, I found assessing her as a witness somewhat problematic. She is clearly a serious and conscientious person and appeared to be by far and away the most straightforward and honest of the Republic's witnesses. However, equally clearly she is in thrall to the President and was anxious not to say anything in evidence which might offend him, which is perfectly understandable given her roller-coaster experience since Mr Boreh fell out of favour. However, inevitably it means that I have to approach her evidence with considerable caution. Like many of the other witnesses she was intent on following what might be described as the "party line" of the claimants' case, although when pressed she was prepared to accept that she had considered that the DCT Agreements were commercially very advantageous for the Republic, as indeed they were. She also made some other concessions in her evidence. On balance though, I formed the view that where her evidence contradicted that of Mr Boreh, I preferred his evidence.

83. Mr Said Abane is the assistant director of the Tax Inspectorate in Djibouti. A statement was served from him, ostensibly to counter what Mr Boreh had said about the seizures of Soprim equipment in October 2008 being politically motivated and having nothing to do with any genuine tax dispute, presumably on the basis that he was the person appointed to oversee the subsequent seizures in January 2009. However, as I will discuss in more detail later in dealing with the issue of political motivation, as a counter attack on what Mr Boreh said, this rather backfired on the claimants. What emerged in cross-examination is that he had known nothing of the October 2008 seizures and that the fundamental procedures for a lawful seizure had

not been followed. As for his demeanour as a witness, this was somewhat aggressive. He appeared to be bemused as to why he had been called as a witness. When confronted with documents which demonstrated the excessive and unjustified demands of the tax authorities against Djibouti Mix, another of Mr Boreh's companies, he became very heated and defensive. I did not regard him as a satisfactory witness.

84. Apart from the President, the other notable absentee from the witnesses for the claimants was Mr Osman Moussa, the Minister of Presidential Affairs at all times relevant to the events relevant to this litigation. He was clearly someone who was close to and advised the President. Mr Mark Handley of Gibson Dunn produced his twentieth witness statement dated 6 October 2015 to explain what steps had been taken to interview Mr Moussa and to produce a witness statement from him. In summary, the position was said to be as follows.

85. On 19 December 2012, lawyers from Gibson Dunn had a meeting with Mr Moussa at the Kempinski hotel in Djibouti to discuss his assisting them in the litigation. They produced a fairly detailed seven page note of the meeting in which he dealt with various aspects of the case, although it is apparent that he was unclear whether he wanted to assist or not, given that, as recorded, he had his own strategies in place and did not want to compromise them. A further meeting between lawyers from Gibson Dunn and Mr Moussa took place at a restaurant in Djibouti. The meeting was conducted in French and no note was taken although the file note suggests he presented difficulties for the lawyers, since they would ask a question and he would answer about something else.

86. A further meeting between Sana Marchant and Peter Gray of Gibson Dunn, Mr Hassan Sultan and Khawar Qureshi QC, the claimants' then leading counsel, took place at the Kempinski hotel in Djibouti on 12 December 2013. According to the note of the meeting, Mr Moussa took offence at the questions being asked and declined to answer them, being uncooperative and angry. Mr Qureshi QC recommended to Mr Sultan that he advised the President to have Mr Moussa medically treated in France.

87. Mr Handley had meetings with Mr Moussa in Djibouti scheduled for May 2014, but he failed to appear. A further meeting with Gibson Dunn was arranged for 24 September 2014 and Gibson Dunn prepared a draft witness statement in advance of that meeting. In the event he did not turn up on 24 September but a meeting did take place on 25 September 2014 at the Kempinski hotel. It is evident from the note of the meeting prepared later that he was distant and uncooperative. The lawyers had a sense that he resented the position he was now in. He certainly did not sign a witness statement.

88. In January 2015, the Government sought Mr Moussa's cooperation in relation to disclosure of documents that Mr Boreh's solicitors, Byrne & Partners, were concerned might be retained by Mr Moussa. A representative of the IGE attended his house but he apparently locked himself in his bedroom. There was increasing concern about his state of mind.

89. On 9 September 2015, Mr Handley and two other lawyers from Gibson Dunn met Mr Moussa in Paris. Mr Handley says that the purpose of the meeting was to assess whether he would be capable of recalling events truthfully under the stress of

questioning. Mr Handley says that Mr Moussa's reactions and responses were odd, awkward and sometimes aggressive. He refused thereafter to attend a meeting with a psychiatrist.

90. The information provided to Mr Handley by the Republic was that although Mr Moussa has continued to be an adviser to the President since 2011, he has not been actively involved and has no more than what Mr Handley describes as an honorary role. However, rather curiously, a matter of only a few days after the meeting in Paris, there was a press report dated 11 September 2015 from Djibouti Who's Who that Mr Moussa was about to return to active work on the President's staff. The report stated:

> *"Moussa's new job will be to offer financial advice to the president following the death of Djibouti's ambassador to Washington, Roble Olhaye Oudine, who had managed the Djibouti leader's investment in the United States and Caribbean. Moussa had worked closely with Oudine before his ministerial-rank job was interrupted by illness in 2008. Yet his return to a high-profile post was also due to the fact he belongs to the Issa/Odahgob community. He shares those origins with Djibouti businessman Abdourahman Mahmoud Boreh, who is now in the opposition. The president is counting on Moussa to win support for him in the ethnic community in the event that a case against Boreh for fraud is revived."*

91. Although Mr Handley says on instructions that this report is not correct and that Mr Moussa's role remains a purely honorary one, it does give some pause for thought as to how genuine Mr Moussa's reluctance to assist Gibson Dunn was. I am not seeking to doubt what Mr Handley says about the lawyers' assessment of Mr Moussa's demeanour, but there must be some question as to whether Mr Moussa's reluctance and lack of cooperation was staged. I suspect that, if the Republic had wanted to, it could have procured his cooperation and called him to give evidence, particularly since, in my judgment, after the President, he was the most crucial potential witness from the Government. I have little doubt that, if had suited the Republic's purposes, Mr Moussa would have given evidence.

92. So far as the witnesses called by the defendants other than Mr Boreh are concerned, three witnesses were called, all of them past or present employees of DP World. Mr Sarmad Qureshi is the director of finance Europe and Russia Region. He has been employed by DP World since September 2006 and whilst not involved in negotiating the commercial terms of the DCT agreements with the DPFZA/PAID, he was involved in negotiating the finance in 2007. He was a measured and straightforward witness whose evidence I accept.

93. Mr John Fewer has a long career in port management, including with what is now DP World, having been operations director of Jebel Ali and Dubai then International Operations Director from 1999 to 2004. He then retired, but has remained a consultant. He was one of the original delegation from DP World who visited Djibouti in 1999 to assess the viability of Doraleh as a new port. He spent considerable periods of time in Djibouti between 1999 and 2004, although he was never resident there. He did not return until 2008 when he spent a few months in Djibouti ensuring the

completion of the DCT. He was an impressive and careful witness, whose evidence I accepted.

94. Mr David Hawker was employed by DP World. He managed the airport in Djibouti for two years from 2002, then he became chief executive officer of PAID in November 2004, remaining in that position until December 2006 when he left Djibouti. Other than in one respect, his evidence was given in a straightforward manner. As detailed in the relevant part of the chronology, the one area where he was less than impressive was in relation to the draft agreement produced in November 2006 to pay Mr Boreh a percentage of the net profits of PAID as a *"finder's fee"*. He was defensive and evasive, I suspect because he knew that he would have been prepared to countenance something which would have been wrong. Apart from that, I considered him to be a truthful witness and I certainly do not think that he is someone who would have been prepared to bribe Mr Boreh to agree soft terms on the DCT contracts.

95. The claimants were critical that there were a number of important witnesses from DP World who were not called, specifically, Mr Mohamed Sharaf, the CEO, Mr Sultan bin Sulayem, the Chairman and Mr Kruijning, director of port operations at the time. In my judgment, these criticisms are unrealistic. DP World is fighting the arbitration against the Republic/PAID, in which it has its own interests and agenda which are not necessarily aligned with those of Mr Boreh, which might make it reluctant to make witnesses available in the Court proceedings. Mr Kendrick QC said that they, meaning Mr Boreh's legal team, had not had access to the higher echelons of DP World and I see no reason not to accept that statement. In my judgment, no adverse inference is to be drawn from the fact that Mr Boreh was only able to call limited evidence from DP World.

96. The claimants invite the court to draw an adverse inference from the failure of Mr Boreh to call senior ENOC witnesses, specifically Mr Hussain Sultan, that they were unable to support Mr Boreh's case. I decline to draw any such inference. ENOC is an independent entity which is not a party to either these proceedings or the DP World arbitration. There may be any number of reasons why its senior personnel might not want to become embroiled in this dispute, not least the commercial one that ENOC is running the Horizon terminal and may not want to fall out with the President and the Republic. Furthermore, to the extent that it is being said by the claimants that Mr Boreh has not called any evidence to corroborate oral discussions he says took place, the short answer is that he was prepared to come and be cross-examined about those discussions, whereas the President, who was involved in most of those discussions, was not.

(4) Chronological findings of fact

(A) The Djibouti Dry Port (DDP) and DP World management of the port

97. Although the Republic no longer pursues any claim in relation to the DDP, its creation and operation and Mr Boreh's involvement in the project are an important part of the background to the extant claim in respect of the Horizon shares. As Mr Moussa is recorded as saying in interview with Gibson Dunn: *"to understand Horizon one has to understand DDP"*. Although this is a somewhat enigmatic comment, in my judgment it gives an insight into the true position. The DDP was the first

private/public project in Djibouti, followed by the Horizon project. Just as Mr Boreh was, as the Government knew, a private investor in the DDP, so he was also a private investor in Horizon, as was well known to the Government.

98. The DDP was Mr Boreh's brainchild. On 22 December 1998, he wrote on the letterhead of Dry Port Invest SARL, a company in the process of incorporation, to the then Minister of Transport Mr Miguil and to Mr Moussa, copied to Mr Douale as Director-General of PAID, on the subject of Djibouti Dry Port, the creation of a private warehouse in Djibouti City. This followed on from earlier correspondence proposing DDP, a part government owned joint venture in which Dry Port Invest would own 51% of the share capital and PAID 10 to 20% depending upon its capital contribution. Although the letter does not state who would own the remaining shares, this was to be Societe Immobiliere de Djibouti ("SID") a part government owned company dealing in real estate.

99. The original purpose of DDP was to operate a private warehouse and container yard, outside the existing port, in a new free zone at Salines West a few kilometres away. This would provide storage space for containers for the Ethiopian trade, but there was a large space adjacent to the container storage area suitable for use for free zone warehouses and offices. On incorporation of DDP, Dry Port Invest owned 74.8% of the shares in DDP, having invested U.S. $4 million in cash. Dry Port Invest in turn was owned 33% by Mr Boreh and 17% by Essense, the third defendant, one of his companies. Mr Boreh's evidence was that Essense, a Hong Kong company was set up to hold investments which the President might be interested in acquiring in due course when he retired. The remaining 50% of Dry Port Invest was owned by Finafo, in turn owned by various Italian businessmen.

100. On incorporation, the remaining shares in DDP were owned by SID, which contributed 200,000 square metres of undeveloped land. PAID was not a shareholder at the outset, despite Mr Boreh's proposal to that effect in his letter of 22 December 1998. After the election of President Guelleh, the Government's attitude changed and following a further request from DDP for PAID to participate, on 23 November 1999, Mr Abdillahi, variously described as Secretary General of the Government or of the Presidency, wrote to Mr Douale, Director-General of PAID stating (in translation):

> *"The activities of this company [DDP] are incorporated within the framework of the governmental policy which, on the one hand, aims to make of Djibouti a "great international maritime and financial city" and, on the other hand, aims to create a dynamic private sector likely to boost economic growth.*
>
> *The plan of the company, which consists in the creation and operation of a storage area including warehouses and embankments, takes on a high degree of interdependence with the activities of the PAID."*

101. The letter goes on to invite PAID to take the necessary steps to participate in DDP by way of a 15% shareholding. It shows the President at the outset of his Presidency already taking a keen interest in the development of new port facilities in Djibouti through public/private partnership. In his witness statement, Mr Douale says that it was clear from his efforts to promote DDP to PAID, that Mr Boreh was a key driving

force behind the dry port project and would be a private investor in it. As Mr Dileita, who was the Prime Minister, accepted in cross-examination, DDP was the first public-private investment in Djiboutian history and was a high profile deal.

102. The President's two witness statements are curiously silent about whether he knew that Mr Boreh had a shareholding in DDP, although he denies any knowledge of the purpose of Essense (in the context of its 5% shareholding in Horizon to which I return below). In my judgment, if Mr Douale knew about Mr Boreh's shareholding, as did Mr Boubaker, Director-General of SID, it is inconceivable that the President did not know about it as well, given that this was a high profile venture into public-private investment for the first time.

103. Although it was proposed that PAID would subscribe U.S. $1 million in capital to DDP, pursuant to a document signed by Port Invest, SID and PAID dated 27 January 2000, PAID was given 12 months in which to make its subscription. Although in his closing submissions, Lord Falconer submitted that PAID was profitable from 1998 onwards, the contemporaneous documents show that PAID was unable to pay its subscription within that timescale and only made that payment in November 2001, becoming a shareholder in DDP with effect from 11 February 2002.

104. Although there had been a mission headed by Mr Ragueh sent by the previous President to the UAE in October 1998 (which did not include Mr Boreh), which had discussions with Sultan bin Sulayem (the chairman of DP World) about possible cooperation in relation to setting up a free zone in Djibouti, it was Mr Boreh who had the idea of outsourcing the management of the existing port to DP World, which he knew, from his business interests in Dubai, to be professional and well-run.

105. He had a meeting with Sultan bin Sulayem and Mr Jamal bin Thaniah (the vice chairman) at the offices of DP World in late October 1999. He explained that he was vice chairman of the Djibouti Chamber of Commerce, with business interests in Dubai and a warehouse in the Jebel Ali Free Zone. He explained that the port at Djibouti needed professional management and asked if DP World was interested in taking over the management. During the meeting, Mr bin Sulayem asked if Mr Boreh could put him in touch with the President and Mr Boreh said yes, he would call him immediately. Mr Boreh then spoke to the President on his mobile phone and told him that he was with the chairman of DP World. He asked the President to invite Sultan bin Sulayem to Djibouti and handed over his phone to Mr bin Sulayem for them to speak directly. There was a short discussion between Mr bin Sulayem and the President, after which Mr bin Sulayem told Mr Boreh that the President had invited him to visit Djibouti.

106. There were then a number of visits by Mr bin Sulayem to Djibouti before the negotiations for what became the 2000 Concession Agreement for the management of the port took place over three days in Dubai at the end of March 2000. Mr Boreh's evidence was that the negotiations were led on the Djibouti side by Mr Douale and he was there more as an observer. In his witness statement the impression was created that he had been present throughout, but in his oral evidence he said that he thought that he was only there for some of the time, the President having sent him to see what was going on because there were problems with the negotiations. Understandably, nearly sixteen years after the event, Mr Boreh was somewhat vague as to the precise sequence of events.

107. It seems to me more likely that Mr Boreh was only present at the negotiations for some of the time. This accords with Mr Douale's evidence, both in the report of the negotiations he prepared contemporaneously (which does not mention Mr Boreh's presence at all), and in his witness evidence, from which emerged that a sticking point was that the Djibouti representatives wanted a joint venture with DP World, which would involve it making a financial investment, but DP World just wanted to manage the port. DP World was also interested in managing DDP. Mr Douale confirmed that negotiations reached an impasse, so he arranged for Mr Boreh, who was in Dubai, to join the negotiations, after which they proceeded much more smoothly. Mr Boreh supported DP World's proposal that it should manage the port and that it should have complete control in doing so.

108. For present purposes, it does not seem to me to matter whether Mr Boreh was asked to join the negotiations by the President (as he recalls) or by Mr Douale. What matters is that, contrary to what the claimants suggested in their closing submissions, he did not have a formal role in the negotiations with DP World that culminated in the 2000 Concession Agreement. He was, as Mr Douale described him in his witness statement and confirmed in cross-examination, a facilitator, with no formal authority to negotiate on behalf of the Republic.

109. A good picture of the chaotic and congested state of the old port of Djibouti immediately prior to the commencement of the 2000 Concession Agreement for DP World to manage the port is to be found in the contemporaneous report of Mr Fewer, who was one of the management team from DP World who visited Djibouti on 19 May 2000 in preparation for the handover. Having noted the congestion and lack of space in the existing container terminal, Mr Fewer makes some graphic comments about general cargo operations:

> *There are high levels of delays caused by Customs. Often, these delays are arbitrary and without explanation. The port needs to meet with Customs to discuss areas of cooperation in order to assure a more commercial approach to the inspection and clearance of cargo.*
>
> *There are high levels of congestion throughout the port as a result of trucks from Ethiopia being allowed into the terminal prior to the port being ready to load or to unload a truck. Trucks, waiting in the port, are often required to wait several days before the contractors work them. Additional parking space, outside of the port, must be provided to reduce the congestion in the terminal and improve the low level of security that now exists.*
>
> …
>
> *It was noted that there are many people sleeping in the port. In addition, there appears to be a large number of people wandering around the port without any clear purpose. Action must be taken to control the persons that are allowed to be in the port. Improved security is needed.*

…

> *The Zone Franche [i.e. the Free Zone in the old port] is heavily congested. The congestion is causing delays to the delivery of cargo as well as poor handling and storage of the cargo in the custody of the Zone Franche. An additional long-term cargo storage area is required. The proposed Djibouti Dry Port (DDP) has been well designed and should ease the current congestion. The DDP must be allowed to operate free of government bureaucracy."*

110. Mr Douale accepted, when I put it to him during cross-examination, that what Mr Fewer described there in relation to congestion in the existing free zone represented the true position at the time when the 2000 Concession Agreement was negotiated. It was the inadequacy of the existing free zone facilities which led Mr Boreh to consider using the land adjacent to the DDP container yard as a new Free Zone modelled on Jebel Ali with its first class Dubai management. I return to the development and construction of that new Free Zone below, but before doing so, I should just deal with the conclusion of the 2000 Concession Agreement with DP World.

111. As appears from a fax from Mr Sharaf of DP World to Mr Boreh of 1 May 2000, there was to be a visit to Dubai by the President himself for the signing of the Agreement. Mr Sharaf asked Mr Boreh for the full name and designation of the person who will be signing on behalf of the Republic. It seems to me that, contrary to the Republic's submissions, this fax and other correspondence at the time does not indicate that DP World thought that Mr Boreh was a representative of the Government, as opposed to being a convenient go-between, with whom they were comfortable, because they shared the same commercial and entrepreneurial approach, between themselves and the Republic.

112. In the event, the 2000 Concession Agreement was signed in Dubai on about 7 May 2000 by Mr Djama, the Minister of Transport, on behalf of the Republic and by Mr bin Sulayem on behalf of DP World. Under that Agreement, DP World was to have complete control over the management of the port for a period of twenty years, without any interference from PAID. The core management team for running the port was to be recruited and selected solely by DP World. Tariffs were to be set by DP World. Thus, many of the features of which the Republic complains in relation to the DCT Agreements with DP World, such as complete management control without any Government interference, formed an integral part of the original agreement for the management of the existing port from 2000 onwards. It is not suggested by the Republic that the terms of the 2000 Concession Agreement were agreed on behalf of the Republic by Mr Boreh or that those terms were somehow influenced by bribes paid to Mr Boreh.

113. On any view, the management by DP World of the existing port in Djibouti was a success. Lord Falconer submitted in his closing submissions that PAID was already profitable before DP World took over the management, specifically that it was profitable from 1998 onwards with the advent of the Ethiopian trade, relying upon Annex C to Mr Kendrick QC's written opening submissions, which set out the gross revenue and net profit of PAID from 1994 onwards. It is certainly correct that in 2000, the year that DP World took over the management the net profit dropped, but

this is no doubt due to extra expenditure in that year (since the gross revenue in 2000 was U.S. 38.2 million, up U.S. $2.5 million from the previous year). However, in all subsequent years both the gross revenues and net profits were far in excess of those in the years before DP World management. For example, in 2003, the gross revenue of PAID was U.S. $64.6 million (compared with U.S. $35.7 million in 1999) and the net profit was U.S. $11.5 million (compared with U.S. $6.4 million in 1999).

114. As already noted above, Mr Boreh saw the availability of a large area adjacent to the DDP container yard as an opportunity to develop a new Free Zone modelled on that at Jebel Ali. In fact, the development of free zones which would attract both private and foreign investment was part of the socio-economic development plan of the President when he came to power, as is stated in a Feasibility Study by the United Nations Development Programme in early 2000:

> *The Government of Djibouti intends to pursue on a new basis its policy for economic and social development, via a programme of economic reforms to create a favourable environment for private investment. The liberalisation of economic activity and the privatisation of public enterprises form part of this programme. Another key aim of this new policy is to give preponderant weighting to the development of the private sector in commercial, industrial and services activities as vectors for the stimulation and re-launching of growth so as to ensure lasting economic and human development.*
>
> *In order to achieve such aims, the government is planning, inter alia, to develop free zones (FZ) oriented towards the export of manufactured goods, as an instrument of economic development policy. The free zones will consequently be called upon to reinforce the commercial, manufacturing and service sectors capable of having major economic and social impact and providing multiple benefits for the country, namely the creation of new jobs, a reduction in the balance of trade and payments deficit, the transfer of technology and know-how, the entry of foreign currency and reduction in social deficit."*

115. The President issued a Decree on 11 June 2000 granting the land owned by DDP free zone status. Mr Boreh's evidence was that, in about late 2000 he discussed and agreed with the President that, as with the port management, it would be a good idea to outsource the management of the new Free Zone to JAFZA, another DP World entity, which managed the Jebel Ali Free Zone. The President does not deal with this issue in either of his witness statements.

116. On 19 September 2000, the President and Mr Douale had a meeting with Mr Fewer of DP World, at which (according to Mr Fewer's note), having expressed his appreciation for the improvements in the port already achieved in only three months under DP World management, the President recommended that DP World start operating the Dry Port as soon as possible, that one of its Free Zone experts should make a survey as there were companies in Djibouti and international markets which needed the free zone facility and that the Italian shareholders, Finafo, should be

bought out, so that *"only Djibouti and DPI interest own the facility"*. The *"Djibouti interest"* would of course consist of the existing shareholders i.e. SID and Mr Boreh, plus PAID once its contribution to share capital was paid up. As I have already found, the President must have known about Mr Boreh's shareholding in DDP.

117. This plan was implemented, after PAID provided its share capital and became a shareholder in February 2002, and construction of the new free zone facilities began then. The construction work was carried out by CosMezz and Soprim, at the same unit prices as agreed for the original Dry Port, with the approval of the DDP shareholders including PAID. No complaint is made by the claimants about this Soprim contract. The construction of this new free zone occurred before Mr Boreh was appointed as President of the Board of Directors of the DPFZA in May 2003, and is thus an example of his having been involved as a private investor in a commercial joint venture with state owned companies, as was known to the President at the time. I deal later in the judgment, in the context of considering the Horizon share claim, with Mr Boreh's appointment as President of the Board of the DPFZA.

118. JAFZA was appointed by DDP to manage the new free zone project in June 2003. The management fee under the agreement (which was approved by the DDP shareholders, including PAID in November 2003) was 7½ % of gross revenue. Thereafter, Mr Boreh took steps to replace Finafo with JAFZA according to the President's wishes as expressed to Mr Fewer. Mr Boreh bought Finafo's shares in Port Invest for U.S. $6 million in January 2004 and sold them for the same price to JAFZA in July 2004.

119. The new Free Zone at DDP was opened on 5 June 2004. In her report summary, Ms Marguerita Ragsdale, the U.S. Ambassador to Djibouti, who attended the inaugural event, stated:

> *"Djibouti and its United Arab Emirates investor, Dubai International (DI), inaugurated June 5 the new Djibouti Free Zone (DFZ) with the participation of President Guelleh, cabinet officials, heads of diplomatic missions, and potential DFZ investors. The project, billed "the first of its kind in Africa," is expected to change Djibouti's economic face and create a virtual Dubai in the Horn of Africa. Ambitious to some, and a saving grace to others, the project -- along with the new Doraleh port coming on line in 2005 -- is seen as the gateway for trade to the African continent. The DFZ offers pre-built warehouse units, open storage sheds, and land plots with benefits to include 100 per cent foreign ownership, the absence of corporate taxes, duties, and currency restrictions, 100 percent repatriation of capital and profits, world class management practices, professional administrative support, and good quality logistics infrastructure. Fifty-eight per cent of available warehouse space has been leased in the project's first phase, with Phase II and III to be completed by 2006."*

120. Later in her report she refers to the fact that the "*key Djiboutian investor Abdurahaman Boreh participated in the inaugural event*" and stated that: "*Much of the activity surrounding the DFZ is being driven by Abdurahaman Boreh, the hard-*

charging, pragmatic, and results-orientated Djiboutian businessman with close ties to President Guelleh".

Abandoned DDP claims

121. The claimants originally advanced a number of claims in relation to DDP, specifically, a claim in relation to management expenses paid by DDP to Mr Boreh of some U.S. $720,000 for the period 1998 to 2004, a claim in respect of the U.S. $6 million which JAFZA paid Mr Boreh for the shares in Port Invest and a claim in relation to the Soprim construction contract for phase two of the Free Zone. All those claims have now been abandoned and it is unnecessary to say anything about them in this judgment, save that the claimants' pleaded case, that the U.S. $6 million paid by JAFZA for the shares was a bribe or secret commission, was utterly hopeless and should never have been advanced. Given that JAFZA paid Mr Boreh the same price as he paid Finafo, he made no gain. The DDP claims also included a claim in respect of a "finder's fee" in respect of the Dry Port originally sought by Mr Boreh from Mr Fewer of DP World in 2004, with the request being renewed to Mr Fewer in July 2006. In the event, no finder's fee was paid and Mr Boreh did not pursue his request thereafter. The claimants' claim in so far as it relates to the finder's fee has been abandoned, but the claimants still rely upon the circumstances in which it was discussed as indicative of the corrupt relationship between Mr Boreh and DP World. I will consider the finder's fee later in the context of the DCT claims.

(B) The Horizon Oil Terminal

Overview of inherent probabilities

122. The Republic's case is that, in breach of his private law or public law duties to it: (i) Mr Boreh took a 30% shareholding in the company which developed and then operated the Horizon Terminal without the knowledge of the President and the Government, (ii) that shareholding should rightfully have been handed over to the Republic but was concealed from the Republic by Mr Boreh and (iii) Mr Boreh misled the President into thinking that a shareholding of only 10% was available in Horizon for the Republic.

123. That case raises a number of questions in relation to which it is necessary to make detailed findings of fact, primarily: (i) were the President and the Government unaware of Mr Boreh's shareholding in Horizon; (ii) what shareholding was the Republic prepared to take in the Horizon venture; (iii) what, if anything, did Mr Boreh tell the President about the shareholding which was available. Before analysing the evidence on these questions and making my detailed findings, it is as well to start by looking at the inherent probabilities, in line with the approach of Robert Goff LJ in *The Ocean Frost*. The background is that it was well known to those in Government, including the President, that Mr Boreh was one of the private investors in the DDP. In those circumstances, what reason would Mr Boreh have for concealing his shareholding in Horizon from the Government? Why not simply inform them about it, as he had with the shareholding in DDP? On this basis, concealing the shareholding makes absolutely no sense. Furthermore, it was a high risk strategy to seek to conceal it or mislead the Government as to what shareholding was available for the Government, since in a small country like Djibouti, where everyone in a position of authority knows each other's business, it was bound to come out that Mr Boreh had a

substantial personal shareholding in Horizon. Indeed it did come out, since the U.S. Ambassador knew and so did Africa Intelligence. It is not suggested that Mr Boreh sought to conceal his shareholding in Horizon from the Ambassador or from the media. On analysis, the Republic's case of a "secret shareholding" in Horizon is inherently improbable.

The initial impetus for a new oil terminal came from the Government

124. It is common ground that by 2000, the existing oil facilities in Djibouti City were a danger to the environment. The underground pipes were leaking and causing sub-surface pollution and tankers ran through the city causing an environmental hazard and a safety risk. The facilities, some of which had been built in the 1930s, but all of which were of considerable age, were owned and operated by the oil majors, Total, Mobil and Shell. As Mr Douale agreed in cross-examination, the oil trade had always been a private one, in other words, the Government did not engage in oil storage. Prior to the construction of the Horizon Terminal, the port dues on hydrocarbons made up only a small proportion of PAID revenue which was mainly derived from container business.

125. By early 2000, the construction of a new oil terminal was seen by the Republic as part of an ambitious plan to create new oil, container and bulk goods terminals and a free zone at Doraleh, as appears from a study produced by PAID in February 2000. A briefing paper for the Ministry of Energy in April 2000 refers to the Government looking for funding to build a new hydrocarbons storage facility for the benefit of Société Internationale des Hydrocarbures de Djibouti ("SIHD") described as a private company which: *"reflects the concern of the government in the domain of hydrocarbon fuels and the protection of the environment and is in the process of privatisation and disengagement of the State."* This briefing paper was forwarded to the President by the Minister of Energy, together with a paper on the search for a donation of oil for a year from a friendly oil producer. I suspect that it is to the latter proposal that the power of attorney given by the President to Mr Boreh in December 2000 (to which I refer below) relates. At all events, what the briefing paper demonstrates, as is borne out by other documents subsequently, is that it was never intended that the oil storage business to be established at Doraleh should be Government run. Rather the Government policy was one of privatisation pursuant to its agreements with the IMF, as Mr Bouh (who was Minister of Finance from 1999 to 2005) accepted in cross-examination. I accept Mr Kendrick QC's submission that the relevant political environment at the time that the Horizon Terminal was being proposed and subsequently constructed was one in which the Government was seeking to cut public spending and borrowing (as required by the IMF) and reduce, not expand, its commercial ventures.

126. Due to the significance to Djibouti of the whole project for the development of a new port at Doraleh, including the oil storage terminal, the President was closely involved in the project and took a keen interest. Mr Douale stated in November 2000 that the project was headed by the Office of the President. Mr Dileita (who was Prime Minister at the time) refers to the Doraleh project (including the Horizon Terminal) as: *"a special project under the supervision of the Presidency."* Mr Boreh said in cross-examination when Lord Falconer put to him that he was authorised by the Government to have discussions with ENOC: *"I was a go-between, I was a facilitator, and all decisions was made by the President himself, and this was*

something he had very close to his heart, he was not going to leave this kind of after opportunity for me to make it happen or not happen. He followed it very carefully, my Lord."

127. The President's keen interest in the Horizon Project is also evident from the meeting the President had with Mr Fewer of DP World on 19 September 2000. In addition to pressing for the development of a new Free Zone as soon as possible, the President asked DP World to *"re-contact [ENOC] to renew discussions"* for the development of the Doraleh area for oil storage and distribution. The President referred to the fact that the Kuwait Oil Company wanted to develop a refinery, but the Arab Investment Bank said this was too ambitious, and whilst it was prepared to fund the development, it wanted to see a more practical usage. Mr Fewer's note refers to the fact that the Government wanted to relocate the oil majors' existing facilities away from the existing port because of their environmental impact.

128. In fact, the President had written to Mr Douale as the director of PAID earlier, in March 2000 referring to oil spillage in the existing port and stating (in translation): *"Having regard to the extremely dangerous nature, both for all of the facilities located within and outside the [PAID] and for the city of Djibouti, 1 would ask that you kindly consider, as soon as possible, the total transfer of the hydrocarbon and derivatives storage areas and construction for that purpose, and with financing by the [PAID], of a jetty and associated infrastructure at Doraleh. In this regard, all of the companies concerned must immediately undertake the necessary arrangements for their facilities at the new site in Doraleh."* This suggests that a major objective of the Government in seeking the construction of a new oil terminal was the elimination of pollution at the old facilities.

129. Mr Douale accepted in cross-examination that the Government's idea at that time was that it would give the land to the oil majors for nothing if they would build a terminal and the Government for its part would get financing for the jetty and the infrastructure. As is apparent from a later letter in November 2001 from the Office of the President to the Kuwaiti Fund (in the context of seeking funding from the Arab Funds for the construction of the terminal which was to be operated by ENOC) this remained the Government's position at least until that time in late 2001. Paragraph 4 of that letter states: *"The Government of Djibouti will make the ground areas required for the proposed project available at no cost to the operator. The operator, DPI, will have control of the facility within the guidelines laid down from time to time by the Government of Djibouti. The oil installation operator ENOC will be responsible to DPI for the safe and efficient operation of the oil facility."* Mr Douale accepted in cross-examination that the President's idea at that time (in November 2001) was that if ENOC built the terminal, they would get the land for free. This all strongly suggests that, from at least early 2000 to late 2001, the Government had no intention of taking any shareholding in the oil terminal or the company which ran it. The land would be provided for free, not in return for a shareholding.

130. It was the Government which sought to employ a technical consultant to produce a report on the technical and financial feasibility of the entire Doraleh project. Thus, in July 2000, Mr Moussa sent the director of PAID a draft of an invitation to tender as consultant on the project. In the event, the consultant chosen was Technital, which produced a Master Plan and Preliminary Design document in late 2000. This envisaged the construction of separate terminals for oil and containers at Doraleh and

a new Free Zone and recognised that if traffic at the port increased under DP World management, the existing facilities would be inadequate to cope with demand. Given that it was Mr Moussa, the Minister for Presidential Affairs, who commissioned this report, it seems clear that the impetus to proceed with the oil terminal project came from the Government and, specifically, the President.

The initial discussions with ENOC in 2000 leading up to the July 2001 MOU

131. In the light of the paucity of surviving documentation, it is unclear what discussions took place with ENOC in 2000. Mr Boreh's evidence was that he first met Mr Sultan, the chairman of ENOC, when the latter accompanied Mr bin Sulayem of DP World on a visit to Djibouti in early 2000. Mr Fewer recollected Mr Boreh urging DP World to set up meetings with ENOC. Furthermore, the President made a similar request to Mr Fewer at the meeting on 19 September 2000 and the fact that he referred to *"re-contact"* suggests there had already been some contact between the Government and ENOC. In cross-examination Mr Boreh said that he and the President in fact met Mr Sultan on the same day. In their written closing submissions, the claimants appear to be suggesting that this was after the President met Mr Fewer on 19 September 2000, but that cannot be right given the reference to *"re-contact"* and *"renewing discussions"*. The likelihood is that the initial meeting between Mr Sultan, Mr Boreh and the President took place earlier in 2000, but nothing came of that original contact.

132. Following the President's request to Mr Fewer in September 2000, there must have been further discussions with ENOC, but no record of these is available. In about November 2000, the legal department of ENOC produced a draft Memorandum of Understanding between it and the Republic. The preamble stated that: *"The Government and ENOC wish to design, construct and operate petroleum related facilities including a petroleum products storage and distribution terminal ('the proposed facility') in the Doraleh area (which is to be designated a Free Zone) for the purposes of receiving, storing and distributing petroleum products to Djibouti and neighbouring countries. The parties wish to enter into this memorandum of understanding to summarise their commercial objectives and provide a framework for further negotiations."* The draft memorandum of understanding provided under *"Ownership"* that: *"The proposed facility will be owned by the Government, ENOC and any third party approved by the Government and ENOC."*

133. Lord Falconer suggested to Mr Boreh in cross-examination that this draft memorandum must have been sent to him and discussed by him with ENOC, but I have considerable doubts about that. There is no documentary evidence that this draft was ever sent to or seen by either Mr Boreh or the President and Mr Boreh's initial reaction when Lord Falconer mentioned a memorandum of understanding from November 2000 was that no such document existed.

134. The claimants also suggest in their closing submissions that Mr Boreh accepted that about this time in 2000, the President appointed him to negotiate with ENOC on behalf of the Republic. They quote a passage in cross-examination:

> *"LORD FALCONER: And once the introduction was made, the obvious person for the President to turn to for the purpose of*

representing the Republic in any subsequent discussions with ENOC was you?

MR BOREH: That was his choice".

135. However, that quotation needs to be put in the context of the questions and answers which immediately follow it:

"Q. And he chose to appoint you to do that?

A. I don't understand exactly what he has appointed me to do, because what was happening was, I introduced him, I was a go-between, you know, to facilitate, like I did for the Dubai people, and he was, he has already the initiative like I see now to work with ENOC to see whether he can find a way of putting -- an oil refinery they say here, I'm not understanding exactly what the refinery was all about, but it was something that he wanted to do.

Q. No, but what I am putting to you is: he is saying to DPI "I want to talk to ENOC about the Doraleh project", he then asks you to talk to ENOC to try to progress it, the idea being that ENOC and the Republic of Djibouti will together develop something at Doraleh; that's right, isn't it

A. At that time, the idea was only to talk to ENOC, whether they will go themselves alone and build the oil terminal, not together with the Djibouti Government. It was premature to think of that.

Q. He wanted you to talk to ENOC about the development, on behalf of the Republic of Djibouti?

A. To convince them, to introduce them, to bring them to promote the idea whether they will come and replace the majors, because the majors have just ignored the President to go to Doraleh. Okay?

Q. Go on, yes.

A. Yes. So he was looking for other prospective investors who would replace the majors and go and invest in Djibouti.

Q. I am right, though, am I not, in saying you were the person who was going to talk on behalf of the Djiboutian Government to ENOC?

A. You know, I don't want you to put me into a thing which engages me in a way that I don't understand. I was a go-between, I was introducing them to each other, then there was discussions that will take place, but it was not like I brought

> *them and I was only responsible for doing whatever you are implementing. I don't understand the implication.*
>
> *Q. Well, if you are going to attract a major investor to build a storage terminal in Doraleh, if you are the Republic of Djibouti, somebody has to negotiate on behalf of the Republic of Djibouti the terms upon which that investment will be made, and somebody has to talk on behalf of the Republic of Djibouti with the prospective investor; isn't that right?*
>
> *A. You know, there is different kind, as a businessman now, I will talk as a businessman. When you send someone, you say you go and negotiate, normally what you do is you give him a guidelines of what you want to do, you tell him if you want to buy and how much you want to buy, whether you have high attitude for investment, low or medium, you give them directions. I have not been given any such responsibility to go -- the way you put it, to go and negotiate. What do you exactly mean by "go and negotiate"? I introduced them, they were talking face-to-face to each other. Everything, all the cards were on the table."*

136. In my judgment, taking that evidence as a whole and on any fair reading of it, far from accepting that he was appointed to negotiate with ENOC, Mr Boreh was denying any such suggestion and making the point that once he had introduced the parties, the Government was in a position to negotiate for itself. He also makes the perfectly valid point that, if he had been appointed by the Government to negotiate an agreement with ENOC, he would expect some guidelines, in other words some form of formal written authority.

137. In that context, it is instructive to look at this stage of the analysis at how the claimants' case on the appointment of Mr Boreh to act on its behalf in negotiations with ENOC has changed over time. Although that case obviously seeks to cover the entire period from early 2000 through until the various agreements were concluded in December 2002, if the claimants are right that Mr Boreh was appointed by the President in 2000 to negotiate with ENOC, then that appointment would hold good through the period until December 2002 (there being no allegation of a revocation of authority). Conversely, if the claimants' case that the President appointed Mr Boreh in 2000 to negotiate with ENOC on behalf of the Republic is a bad one, it will remain bad for the period through until December 2002, it not being alleged by the claimants that there was some separate or fresh appointment by the President of Mr Boreh in 2001 or 2002.

138. The original pleading in what became [89] in the Re-Re-Re-Amended Particulars of Claim said nothing about Mr Boreh being appointed to represent the Republic in the negotiations with ENOC. The case that the acquisition of the Horizon shareholding was a breach of duty by Mr Boreh was based solely upon his appointment as President of the Board of the DPFZA. The difficulty with that plea, as detailed further below, is that to the extent that the agreement for the shareholding was made in December 2002, it antedated Mr Boreh's appointment to the DPFZA in May 2003.

139. By re-re-amendment to [89] served in October 2013 the claimants pleaded that Mr Boreh "*represented the First Claimant in relation to the allocation of the First Claimant's equity stake in HDTL*". The defendants sought further information of that allegation which the claimants initially refused to provide, but were ordered to do so by Burton J on 22 November 2013. The answer was provided on 3 December 2013: that Mr Boreh "*was appointed to represent the Republic of Djibouti in relation to the Horizon project in or around May 2000 by exercise of Presidential authority in an oral conversation*". Then, on 20 October 2014, there was a re-re-re-amendment to [89] to the current pleading that: "*the Defendant represented the First Claimant in relation to the allocation of the First Claimant's equity stake in HDTL, pursuant to Delegation of Power No.272 Pre granted by President Guelleh on 12 December 2000.*"

140. There is an obvious inconsistency between these two particulars of the nature of the appointment, which Gibson Dunn were asked to clarify. In correspondence they stated that the reference to the oral conversation: "*was made on our clients' instructions that the President has orally instructed a power of attorney to be drawn up. The delegation to which the proposed amendment refers reflects those instructions.*" However, when the witness statement of the President was served in July 2015, it made no mention of any such oral conversation or of any oral instruction to draw up a power of attorney giving Mr Boreh authority to negotiate with ENOC in relation to the construction and operation of an oil terminal at Doraleh, whether in May 2000 or at any other time.

141. On the contrary, what the President did say seems more consistent with Mr Boreh's own evidence both in his witness statement and in cross-examination, that he was a go-between or facilitator between the Dubai interests and the Republic. At [10] of his statement, what the President said was:

> *"In the hope that Dubai could become a strategic partner, I visited Dubai in 2000. Mr Boreh was part of my delegation in his capacity as Vice President of the Chamber of Commerce. He told me that, because of his cigarette business in Dubai, he had a small office in the Jebel Ali Free Zone and he presented himself as someone having connections with important people in Dubai and being familiar with their way of operating. He claimed he could facilitate business between Djibouti and Dubai. Given that, and the fact that he spoke English and Arabic, and had excellent interpersonal skills, I made the mistake of putting my confidence in him. From 2000, Boreh presented himself as being an important player in the implementation of Public Sector activity in the development of the port, thanks to his proximity to me and his position in the Chamber of Commerce."*

142. The Delegation of Powers no. 272 granted by the President on 12 December 2000 referred to in the re-re-re-amendment was produced in the original Arabic by the claimants. It did not refer to negotiating with ENOC any agreement for construction of the oil terminal but only to signing contracts for crude oil. The claimants originally produced an incorrect translation into French which stated that it related to "*les contrats et la négociation avec la société ENOC*". However, a more accurate English

translation was subsequently produced which stated that the President: "*hereby authorize[s] Mr. Abdourahman Mohamed Mahmoud Boreh and grant him the right to sign our name on the crude oil contracts with ENOC.*" This is borne out by the official correspondence register from the Presidential Palace which refers to 272 as: *"Delegation de signature a [M Boreh] pour signer les documents relative au contrat de carburant brut avec la ste. ENOC."*

143. In his witness statement, the President accepts that the power of attorney dated 12 December 2000 related to the acquisition of products from ENOC. He stated at [12]:

> *"I instructed Mr Boreh in 2000 to negotiate the acquisition of refined oil products from the ENOC. In fact, we wanted to lessen the effect of the rise in petrol prices at local market level and we thought that we could acquire stock at more tolerable prices from the Public companies of those countries in the Gulf with whom we were friends. In order for him to negotiate with ENOC, I gave him a Power of Attorney* [He then refers to the power of attorney dated 12 December 2000]. *Mr Boreh also told me that ENOC wanted to invest in the new oil port which we wanted to build in Doraleh."*

144. In fact, the power of attorney related to the acquisition of crude oil rather than refined products. This is consistent with the reference in the briefing paper from the Ministry of Energy in April 2000 to seeking a year's supply of oil from a friendly oil producer. It may not matter whether it was crude or products. What the power of attorney does not refer to is the construction of an oil terminal. Although the President refers in this paragraph to Mr Boreh telling him that ENOC wanted to invest in the new terminal, this is expressed in a way which clearly demonstrates that it was an additional matter discussed. The President is not suggesting that the power of attorney related to the construction of the terminal. Thus, the evidence put forward by the Republic from the President did not support its pleaded case.

145. Mr Boreh's evidence in his witness statement was to the same effect as the President's. At [160] he referred to this power of attorney:

> *"The document has nothing to do with the Horizon project, and concerns a minor 'one-off' matter. It states that I had the power to sign contracts for crude oil with ENOC on behalf of the Government. I do not remember the particular document but I do recall the general background. At the time, Djibouti was begging for oil from overseas, as charity to a poor nation. The President presented me with the letter because I had developed a good relationship with ENOC, and so he thought that I might be able to help by persuading ENOC to grant aid to the Government of Djibouti in the form of crude oil."*

146. This is also consistent with the briefing paper from the Ministry of Energy. Given the agreement between the President and Mr Boreh in their respective witness statements that the power of attorney related to the acquisition of oil, one might have thought that the pleaded case would have to be abandoned. In the claimants' written opening submissions, reference was made to this power of attorney in vague terms as being

"in relation to oil", but as Mr Kendrick QC submits, vague language cannot make a bad point good. In cross-examination, Mr Tani, who was Director of the Cabinet of the President at the relevant time, accepted that the power of attorney related to crude oil not to the construction of the oil terminal. That should have been the end of the point.

147. However, somewhat surprisingly, given the evidence of the President and Mr Tani, Lord Falconer put to Mr Boreh in cross-examination that the reference to crude oil was: *"very odd…because there were no crude oil contracts with ENOC, this was part of a picture whereby you had been entrusted with the discussions on behalf of the Government of Djibouti with ENOC?"* In his answer, Mr Boreh reiterated that this power of attorney related to crude oil. I agree with Mr Kendrick QC that the reference to crude oil is not odd in the slightest. It is the claimants' own President who says that he wanted cheap oil from public oil companies in friendly Gulf states and for once, he and Mr Boreh agree about that.

148. Notwithstanding that this is a thoroughly bad point, the claimants in their written closing submissions still seek to cling onto it. Referring to this passage in Mr Boreh's cross-examination, they say this:

> *"Mr Boreh gave a telling response when it was put to him that the written delegation of power dated 12 December 2000 demonstrates that he had been entrusted by the Republic with the discussions with ENOC. Rather than simply give a straight denial, he said that he "did not ask for the power". He accepted that despite the document referring to signing "crude oil contracts with ENOC" it cannot have been anything to do with crude oil contracts, and he confirmed that he showed the delegation to ENOC and discussed it with them."*

149. With the greatest respect to the claimants' counsel, this is a complete misinterpretation of Mr Boreh's evidence on this point. He did not accept that the document had nothing to do with crude oil, on the contrary he maintained (entirely correctly) that it related to crude oil. Nor did he confirm that he showed the power of attorney to ENOC and discussed it, but even if he had, the discussion would have been about the acquisition of cheap crude oil.

150. Given the continuing reliance on this bad point, it is worth quoting the evidence given by Mr Boreh to demonstrate that he maintained the position throughout that this power of attorney related to crude oil:

> *LORD FALCONER: Give us a translation of the Arabic?*
>
> *A. It's crude oil.*
>
> *LORD FALCONER: It's crude oil. Okay.*
>
> *A. Then it is brought that by Article number 43 that the President has, I mean, you know corporates don't care which Article you have, you know, these are businesspeople, so they*

didn't understand, they will tell you what is this Article, it has nothing to do with you.

Q. Is it not right that, although everybody agrees it's very odd, the reference to crude oil, because there were no crude oil contracts with ENOC, this was part of a picture whereby you had been entrusted with the discussions on behalf of the Government of Djibouti with ENOC?

A. You know, to be honest, I did not ask for this power, I didn't know anything about the crude oil contracts, I know that the President was getting crude oil as help, as aid from Kuwait and other Arab countries, and in fact it was an embarrassing letter to go and beg for crude oil, you know, for prospective investors?

Q. But you weren't going to beg for crude oil from ENOC, they didn't have any?

A. Yes --

Q. So it's nothing to do with that.

A. Yes, but I didn't ask for it, I didn't ask for this power.

….

Q. And there is a delegation of authority to you that misses the point?

A. Which I did not ask and which I did not know why as well, because I couldn't deliver this, I didn't know how to do this.

Q. Well, you couldn't, because they didn't have any crude oil. After the –

A. Yeah, but if you pay money, they can get you crude oil, I can send you crude oil any time.

MR JUSTICE FLAUX: They may not have been crude oil manufacturers, but I don't know whether there is any evidence that ENOC couldn't have obtained crude oil if that's what they were asked to do, in the same way as any other --

A. Yes, they have huge refineries, my Lord.

MR KENDRICK: They run refineries.

MR JUSTICE FLAUX: They have a refinery, they must be refining crude oil.

> *LORD FALCONER: Nobody has ever suggested that what they do is trade in terms of selling on.*
>
> *MR JUSTICE FLAUX: No, no, no I appreciate they don't have, as it were, a trading business, but it doesn't mean that if they were asked to supply some crude oil, for whatever reason, they wouldn't have been able to do so."*

151. In my judgment, any continued reliance by the claimants on the 12 December 2000 power of attorney as authority given to Mr Boreh to represent the Republic in the negotiations with ENOC for an agreement for the construction and operation of the Horizon terminal is wholly misconceived. The claimants' pleaded case to that effect is unsustainable.

152. In their closing submissions, the claimants nonetheless maintain that the President, on Mr Boreh's advice, gave him responsibility to represent the Republic in negotiations with ENOC, with the instructions to get the best deal he could for the Republic. This case is founded upon an allegation that emerged during the course of the trial that the President gave Mr Boreh a *"wide oral mandate"*. That allegation emerged in this way. Following a direction by the Court that, in order to assist the experts on French and Djibouti law, the claimants should set out the factual findings they would ask the Court to make, Gibson Dunn wrote on 13 November 2015 stating (in relation to Mr Boreh's authority) that:

> *"The Claimants seek a finding that Mr Boreh was given authority to represent the Republic in relation to the commercial aspects of a number of port ventures from 2000 onwards. In particular, Mr Boreh was entrusted to agree the terms governing:*
>
> *(i) the management of PAID, Dry Port and Freezone by DPI;*
>
> *(ii) the funding, construction and ownership of the Horizon Terminal; and*
>
> *(iii) the funding, ownership and management of the DCT Terminal.*
>
> *Mr Boreh was given a wide oral mandate, and when he required a written delegation of authority for a particular purpose and sought accordingly by Mr Boreh, he was granted the written delegation of authority reflecting the wider mandate."*

153. As Mr Kendrick QC correctly submitted, there are many flaws in that case. Contrary to Gibson Dunn's suggestion at the outset of their letter that it was not intended to change the pleaded case, this particular allegation is not pleaded, nor was it alleged prior to the letter. Even more fundamentally, there is simply no evidence that the President conferred any such oral mandate to agree the terms governing the various port projects, let alone the construction of the Horizon Terminal specifically. The President does not suggest anywhere in either of his witness statements that there was

any such oral agreement and, even if he did, I would not accept that evidence, since he declined to attend Court to be cross-examined and Mr Boreh's consistent evidence was that he was not appointed by the President to negotiate the agreement in respect of the terminal with ENOC.

154. This concept of some general wide oral mandate seems to have emanated from the claimants' French private law expert, Professor Delebecque. In [36] of his first report he set out the six specific delegations of powers (i.e. powers of attorney) granted by the President to Mr Boreh, starting with that of 12 December 2000 (which he misinterprets as being some general authority to negotiate and sign contracts with ENOC as opposed to being limited to contracts for crude oil). The next he refers to is the power of attorney dated 30 November 2002 to attend meetings of what became HDTL, followed by that of 16 June 2004 to participate in the General Meeting of HDTL of 2 July 2004 and *"do the necessary"*. The other three specific powers of attorney are dated October 2006 and October and December 2007 and relate to signing the DCT agreements, not to Horizon. At [38], Professor Delebecque infers the existence of a general mandate to conclude the Horizon transaction from these specific powers of attorney in these terms:

> *"Also, these mandats are not independent from each other. They concerned the same Horizon Terminal transaction. They all formed part of this transaction and give support to the view that Mr. Boreh had received from the Republic of Djibouti powers to enter into the legal acts necessary for that transaction. Also, it is clearly and expressly stated in one of the mandats (16 June 2004) that Mr. Boreh has the power to "do the necessary" to complete the transaction, which gave him authority to carry out all acts necessary for the successful conclusion of the transaction.*
>
> *It can be inferred from these various successive delegations in relation to the same transaction and which in themselves constitute as many mandats, the existence of an overall mandat to finalise the Terminal Horizon transaction."*

155. Even if this were properly a matter for an expert witness on French law, which it is not, it is immediately apparent that his analysis is based on a misconception that the powers of attorney all related to Horizon, when they clearly did not. Only three did, two of which post-dated the alleged negotiation on behalf of the Republic and the third, that of 30 November 2002 in fact related to one meeting. When this was put to him in cross-examination by Mr Waller QC, he conceded that you could not infer a general mandate:

> *"Q…Mr Boreh is said to have negotiated and acquired shares for the Republic of Djibouti in late 2002. So if one stops the clock in late 2002, all we have is the mandate of 30 November 2002, which a moment ago you agreed with me was confined to attending one meeting. If one stops the clock in late 2002, one has no basis for inferring the existence of some general mandate. That must be obvious?*

A. If you stick exclusively to one mandate, one delegation, I share your interpretation, absolutely."

156. In my judgment, it follows that there is no basis for inferring the existence of some general oral mandate in the period early 2000 to December 2002, such as contended for by the Republic, from the specific powers of attorney granted by the President. This must be the case for two other related reasons. First, if such a wide general mandate had been granted, it would have been extremely important, granting Mr Boreh extensive powers in relation to several multi-million dollar projects. It is inconceivable that such a mandate would not have been committed to writing, particularly in circumstances where the President committed the delegation to represent the Republic at a particular meeting to writing. Second, if there had been such a wide general mandate, the specific mandates would have been unnecessary. As Mr Kendrick QC correctly submitted, if there had been a wide oral mandate, it would have been perverse for Mr Boreh to ask for a whole series of narrow delegations of power. He would simply have asked for the wide oral mandate to be committed to writing. Accordingly, the claimants' case, that there was some wide oral mandate granted by the President to Mr Boreh at some unidentified time to negotiate the terms of the Horizon agreement with ENOC, is simply unsustainable.

157. Returning to the position at the end of 2000, I have already dealt with the fact that, in all probability, the November draft MOU prepared by ENOC's legal department was not seen by Mr Boreh or the claimants and that the 12 December 2000 power of attorney does not relate to the Horizon Terminal at all.

158. So far as events leading up to the actual signing of a memorandum of understanding between the Republic and ENOC on 8 July 2001 are concerned, there is precious little contemporaneous documentation. Mr Boreh accepted in cross-examination that he continued to have discussions with ENOC during that period. On 3 April 2001, ENOC sent Mr Boreh a draft of a letter which it proposed that the Government should send to ENOC granting it a licence to own and operate the proposed oil terminal and to market petroleum in Djibouti. Mr Boreh explained that this was ENOC wanting to test the market before committing itself to building the facility. However, contrary to the claimants' submissions, this is not Mr Boreh acting as the representative of the Government: he had no authority to grant such a licence and would simply have passed this on to the Government. He could not recall whether he did so.

159. What does emerge, from a letter which Mr Douale wrote to the President on 6 June 2001, is that the Government was already looking for financial backers to fund that part of the Doraleh project for which the Government was responsible. A meeting had originally been arranged with the Arab Funds in Djibouti for February 2001, but this had been postponed to March, then May and finally June 2001. In the context of the fact that Technital had still not been paid for the Master Plan and Preliminary Design study in relation to the oil terminal, Mr Douale complained that in consequence the Doraleh project was falling behind schedule. He urged the President to set up a meeting with DP World: *"Mr President, it is important that you bring about a meeting at our level, with the participation of DPI, in order to define a new strategy regarding the implementation of this important project."* After some reluctance, in cross-examination Mr Douale accepted, in answer to a question from me, that this was him asking the President to get DP World involved in the funding.

160. In his witness statement and in cross-examination, Mr Boreh said that, at some stage in June 2001, he and the President went to Dubai for an official meeting with ENOC and Mr Sultan. He said in cross-examination that ENOC made a presentation setting out its proposals for the project. The President's involvement encouraged ENOC to move forward and the President told ENOC to follow up the next steps with Mr Boreh who would report to him. On 26 June 2001, Mr Boreh wrote to Mr Sultan as follows:

> *"We take this opportunity to thank you for your hospitalities accorded to us. We welcome your visit to Djibouti by the 7th July and we will be pleased to make all arrangements for you to visit His Excellency the President and sign the Letter of Understanding to build the storage tanks.*
>
> *Please let us know your flight details in order to make all necessary arrangements."*

161. Mr Sultan visited Djibouti subsequently to sign the Memorandum of Understanding on 8 July 2001, a matter I return to below. However, Lord Falconer put to Mr Boreh that the President had not gone to Dubai in June 2001 and submitted that this evidence had been made up by Mr Boreh to bolster his case that the President was involved in the negotiations with ENOC. In their submissions, the claimants point to the fact that Mr Boreh's letter of 26 June 2001, although it thanks Mr Sultan for the hospitalities accorded to *"us"*, does not mention the President having been there and that, in the note of the meeting with ENOC which Mr Douale attended on 15 July 2001, mention is only made of Mr Sultan having come to Djibouti the previous week and met the President. No mention is made of the President having visited Dubai in June 2001. The claimants also submit that if the President had gone to Dubai and had the detailed discussions which Mr Boreh suggests, it is difficult to see why Mr Sultan would have visited Djibouti.

162. So far as the President's own witness statements are concerned, in his first statement he refers in rather vague terms to having met ENOC's representatives in 2001 to encourage them to invest in Djibouti, although he does go on to say: *"I know that they signed a Memorandum of Understanding during their visit"*, suggesting that he is referring to Mr Sultan's visit to Djibouti on 8 July 2001. In his second statement he refers to the passage in Mr Boreh's statement where Mr Boreh said that his recollection was that the President visited Dubai in June 2001 and says: *"I do not recall visiting Dubai on the exact date in June 2001, although, when I do travel (to Dubai or elsewhere) it is customary that certain people (investors or other) pay me a courtesy visit in my hotel."*

163. That can hardly be regarded as a resounding denial that he did go to Dubai in June 2001 with Mr Boreh and of course, since he did not attend to be cross-examined, Mr Kendrick QC did not have the opportunity to put to him why, in the light of Mr Douale's request to him to raise with the Dubai interests their investing in the Doraleh project, he would have been anxious to impress upon the Dubai interests (which included ENOC) the strong personal interest he took in bringing the whole Doraleh project (including the Horizon oil terminal) to fruition. That would have been an incentive for the President to go to Dubai personally. Also, it seems to me inherently unlikely that he would have met them to encourage them to invest in Djibouti and they would have signed a MOU on the same occasion. It is far more likely that there

was indeed a general meeting in Dubai with a presentation and broad agreement to proceed, with the President leaving the follow up to Mr Boreh who would report to him, and then Mr Sultan coming to Djibouti to sign the MOU.

164. There is nothing in the point about the note of the meeting of 15 July 2001 not mentioning the President going to Dubai. It does not refer to the signature of the MOU either. It was in fact a meeting with Mr Liberati of Technital, the main purpose of which seems to have been to discuss their views about the feasibility of the project with ENOC. Technital had produced a first interim report in March 2001.

165. In the circumstances, I accept Mr Boreh's evidence and find that the President did indeed go to Dubai in June 2001. In reply to Mr Boreh's letter of 26 June 2001 the following day, Mr Sultan gave him details of the flight and continued: *"Tomorrow I will fax to you the MOU previously discussed, with the request that you revert with any changes you require so that I can have final copies for signature at Djibouti"*. In my judgment, this was not a reference to having discussed the draft MOU of November 2000 (on which of course the July 2001 MOU was largely based) with Mr Boreh at the time in November 2000, but to having discussed with Mr Boreh recently, probably when they met in Dubai in June 2001, the fact that a draft MOU had already been prepared by the ENOC legal department. If, as the claimants contend, the November 2000 draft had already been sent to Mr Boreh by ENOC and discussed by ENOC with him, there would hardly have been any need to send the draft again. Rather, Mr Sultan would have asked Mr Boreh to provide comments on the draft he already had.

166. Mr Sultan then sent Mr Boreh the draft MOU on 28 June 2001 and asked for any comments he had. Mr Boreh's evidence was that he then discussed the MOU with the President. Mr Boreh went back to Mr Sultan on 2 July 2001 with three proposed changes. In relation to clause 2.2.1 which referred to the levelling of the land on which the terminal was to be built and its transfer to the joint venture company, which it was proposed was to construct and operate the terminal, Mr Boreh proposed the addition after *"level and transfer to the company"* of the words *"at agreed rent"*. He said in cross-examination that these words were inserted after his discussion with the President who had said that they should be inserted. I see no reason not to accept that evidence which seems to me to accord with the inherent probabilities. As I have found, contrary to the claimants' submissions, Mr Boreh was not a representative of the Government. In those circumstances, it is more than likely that he did discuss the draft MOU with the President and that it was the President who wanted the words *"at agreed rent"* to be inserted.

167. The second change Mr Boreh proposed was to clause 2.2.2. That provided: *"The Government undertakes that it will: construct the jetty to an agreed specification and standard and transfer it to the Company"*. Mr Boreh proposed adding a sentence stating: *"Utilization of the jetty to be discussed and agreed with Dubai Ports International"*, making it clear that DP World should decide upon utilisation of the jetty. Again, it seems to me highly unlikely that Mr Boreh would have put forward this provision under which, in effect, the jetty for the construction of which the Government was responsible was to be managed by DP World, without first discussing the provision with the President and procuring his agreement.

168. The third proposed change was an addition to clause 10.2. That clause (which was headed "Good Faith") provided: "*The Parties agree that during the term of this MOU they will not negotiate or enter into any agreement with any other party in relation to a project similar to that which is the subject of this MOU within the territory of the Republic of Djibouti."* Mr Boreh proposed to add a sentence to this provision reading: *"The pilot of the project will be ENOC. Any third party interested in the project will be asked to contact ENOC and ENOC should consider to accept them as partner provided they satisfy all the terms and conditions of partnership."* Mr Boreh agreed in cross-examination that this provision was inserted so that he could become an investor in Horizon, so that this provision was being negotiated for himself and not in any sense on behalf of the Government.

169. Mr Boreh's consistent evidence was that, from the outset of his discussions with Mr Hussain Sultan, he had made it clear that he was interested in investing personally in the oil terminal project. In their closing submissions, the claimants challenge this and submit that Mr Boreh was not understood by either the President or ENOC to be entering into discussions as a private investor. I will return below to the position of the President, but so far as ENOC is concerned, what is said by the claimants is that he was not the type of third party investor ENOC would have encouraged to participate in the construction and ownership of the oil terminal. He was not an oil trader nor did he have any expertise in the petroleum business.

170. In my judgment, this misses the point. The significance and utility of Mr Boreh was not as an oil trader, but as a local partner. It is quite clear that he got on extremely well with both Mr bin Sulayem of DP World and Mr Sultan of ENOC. He was perceived as a dynamic local businessman who was vice-chairman of the Chamber of Commerce and who was close to and had the ear of the President. As Mr Boreh said in his witness statement:

> *"I believe that they saw me as an ideal local partner. I had capital of my own and commercial experience; I had considerable local knowledge and expertise and I was also well regarded by the Government and close to the President. I was therefore someone who could deal with issues created by the Government and local issues on a day to day basis. Also the simple fact that as a wealthy Djibouti businessman I was prepared to commit my own funds to the project encouraged ENOC."*

171. As I have already held, the oil terminal was part of an ambitious strategic plan by the Government for a new port at Doraleh in which the President took a keen personal interest. However, it was never intended by the Government that the terminal would be state owned and operated. Rather, this was part of the overall programme of privatisation and private investment which the President was pursuing with the agreement of the IMF. In all probability, this would have been known to the Dubai interests, including ENOC. Contrary to the claimants' submissions, I consider that Mr Boreh and his companies were precisely the type of investor for whom ENOC would have been looking, local and with political influence and an ability to get things done despite Government bureaucracy, as indeed proved to be the case.

172. The claimants suggested that it cannot have been the case that Mr Boreh had made it clear to ENOC from an early stage, that he was interested in investing personally in the Horizon project, because the draft MOU produced by ENOC at the end of June 2001 simply referred to ENOC and the Government incorporating and owning a joint venture company and made no mention of third party investors. This is correct as far as it goes, but on the other hand the November 2000 draft MOU also produced by the legal department had contained a clause 3 providing: *"the Proposed Facility will be owned by the government, ENOC and any third party approved by the Government and ENOC."* That provision demonstrates that, at that stage, ENOC had in mind possible third party investors who may well have included Mr Boreh. Subsequently, in July 2001, Mr Boreh asked for the inclusion of the additional wording in clause 10.2 of the then draft MOU, referring to third party investors and ENOC did not cavil at that, which suggests that ENOC had not changed its mind about third party investors such as Mr Boreh. It is much more likely that the omission by ENOC from its first draft in June 2001 of a provision equivalent to clause 3 in the November 2000 draft, was an oversight. In the circumstances, I see no reason not to accept Mr Boreh's evidence that, from an early stage, he had discussed with Mr Sultan the fact that he would be interested in investing personally in the Horizon project.

173. The claimants' case is that Mr Boreh asked for clause 10.2 in the July 2001 MOU to be changed, to delete the reference to third party investors having to be approved by the Government, as part of a plan to conceal from the Government the fact that he was intending to make a personal investment in the Horizon project. This was put to Mr Boreh as part of the claimants' case that he had also concealed his intention to invest personally from the Arab Funds at the meeting with them in February 2002 (to which I refer in more detail below). Lord Falconer put that clause 3 in the draft MOU produced by the ENOC legal department in November 2000 suggested that ENOC were happy for the Government to be involved in the approval of any third party investor. Mr Boreh had then put into the July 2001 MOU a provision that any third party investor only had to be approved by ENOC. The suggestion that this was done deliberately was refuted by Mr Boreh:

> *"Q. So we have a position where it would appear that ENOC produced a draft saying "Any third party has to be agreed between ENOC and Djibouti", you then in the next MOU put in something that it's only got to be agreed with ENOC; correct?*
>
> *A. I don't know what you mean by it was --*
>
> *Q. Okay, I will go on. Then when the Arab Funds ask questions that you regard as reasonable, you become cross with them?*
>
> *A. Oh, that's a very nice conspiracy. I don't agree with you, my Lord."*

174. Lord Falconer then put to him that he had suggested the addition to clause 10.2 of words which only required the approval by ENOC of any third party investor, whereas the previous draft MOU from ENOC in November 2000 had included reference to approval by the Government as well, the implication being that he deliberately excluded any reference to Government approval because he wished to

conceal his intended investment from the Government. Given that the claimants contend that Mr Boreh's evidence at this point in cross-examination was dishonest, it is important to consider it in full:

> *"LORD FALCONER: If you look at 10.2, those words, from "The pilot of the project will be ENOC" were put in at your suggestion?*
>
> *A. Yes, I did suggest that there will be private and other traders, if accepted by ENOC to be potential investors, subject to their approval, yes.*
>
> *Q. That was put in in order to help you, it was in your interests to put that in?*
>
> *A. Of course it was. I am not saying it wasn't. I was talking there as an investor, and I was putting in the MOU, when they presented this MOU, so that the Government themselves can see that there will be third party and private people as investors. It was not a secret. So the Government knew on 8 July 2001 that there will be third party or private people like myself, which the President knew personally, and I've told him and he was encouraging me to invest. So it wasn't anything as a conspiracy to stop the Funds and to do all these ideas that you are telling me.*
>
> *Q. But you don't say that any third party should be with the agreement of the Government of Djibouti?*
>
> *A. Because the Government of Djibouti cannot decide on behalf of business people.*
>
> *Q. Why not?*
>
> *A. That's how, the way they looked at it. It's not for me to answer these legal questions, but I think the legal department of ENOC preferred that the decision for investing should be kept in the management level, and at the majority level, or at the promoter level. They were the specialists, they were the ones who will do all the due diligence and they will check which partner to accept and which partner they will not accept.*
>
> *Q. Are you suggesting –*
>
> *A. It's not the role of the Government.*
>
> *Q. Are you suggesting –*
>
> ….

> *I am not sure whether you are speculating or whether you are saying that you recall it was the legal department of ENOC that wanted this change?*
>
> *A. I'm speculating, and this was their draft -- all this, at this stage everything is just a draft, it's ideas, and you don't see any input from the Government saying "We want to do it this way or that way". If maybe the Government was going to dictate terms, who will be a shareholder, then maybe ENOC would not have been happy. Here you are talking about a government who's desperate, very keen, to have this project made. That was their preoccupation, and they wanted anyone who will put that investment, and ENOC and their team was a good team, and like I said yesterday, there was not a queue of investors at that time."*

175. In my judgment, the claimants' characterisation in their written closing submissions of Mr Boreh giving deliberately false evidence that the change to delete any requirement for approval was something the ENOC legal department wanted because he knew that *"the very purpose of the insertion was to keep his interest hidden from government sight"* is unfair and I reject it. The submission that there was some deliberate "change" by Mr Boreh from clause 3 of the November 2000 draft to his proposed addition to clause 10.2 of the July 2001 draft only has any force if Mr Boreh had seen and was aware of the November 2000 draft, which, as I have held, he was not.

176. Furthermore, the highest it can be put is that this part of his evidence was confused. It is not as if he was trying to conceal that it was he who made the suggestion that the additional words should be added to clause 10.2 for his benefit as a potential private investor. He accepted more than once in cross-examination that it was his suggestion. It seems to me that his speculation about the views of ENOC concerning approval of third party investors, was really to do with why ENOC would have been happy to accept his addition to clause 10.2, rather than inserting something equivalent to clause 3 in the November 2000 draft, namely that ENOC may have considered that it was not for the Government to dictate to ENOC as businessmen who else invested in the Horizon project. That was essentially the point Mr Boreh was making in the long final answer quoted above and, in commercial terms, it seems to me to be a perfectly fair point.

177. Lord Falconer was also highly critical of the evidence given by Mr Boreh that at this time in July 2001, he did not think that the Government was going to take a shareholding in Horizon, the Government's priority being to get the jetty and the infrastructure. Lord Falconer pointed out that this evidence was inconsistent with the terms of the July 2001 MOU which contemplated that ENOC, the Government (and any approved third party investor) would execute a shareholders' agreement in respect of the joint venture company which would own and operate the terminal within six months of the signing of the MOU.

178. However, although the MOU was signed, it was not legally binding save as regards the terms on costs, confidentiality, law and jurisdiction and the requirement to negotiate a shareholders' agreement within six months was never complied with. As

Mr Boreh said about the position in July 2001: *"nothing was in concrete, it was just a framework"*. There does not seem to have been any discussion contemporaneously in 2001 about potential shareholdings. The first time this was discussed was much later, in about September 2002.

179. The Government's focus was on moving forward with ENOC and getting the terminal built. The President himself in his witness statement does not suggest that, as at July 2001, he was looking to take a shareholding on behalf of the Government in the company which would construct and operate the terminal. Rather, what he says, in the context of his decision (to which I return below) not to pursue funding from the Arab Funds is: *"Thus, I thought that the plan for the terminal could progress more quickly if Dubai Ports could arrange financing instead of the Arab Funds. However, I was on the look-out for any partner capable of commencing the construction of the oil port."* In fact, as the letter in November 2001 from the Office of the President to the Kuwait Fund which I quoted at [129] above demonstrates, and as Mr Douale accepted in cross-examination, even after this July 2001 MOU was signed, the President's idea remained that, if ENOC built the terminal, it would get the land for free. On that hypothesis, the Government might well not have taken a shareholding in Horizon.

180. It follows that Mr Boreh's evidence, that he did not think at that time in July 2001 that the Government was going to take a shareholding, was not nonsensical as Lord Falconer suggested, let alone false evidence. As for the question of whether the President knew at the time that the July 2001 MOU was agreed that Mr Boreh was proposing to invest in the Horizon Terminal project himself, Mr Boreh's consistent evidence was that, from the outset of the discussions with ENOC, he made this clear to the President. Thus, in his witness statement he said:

> *"Naturally, I told the President about my involvement in these preliminary discussions and that I would be interested in investing in a new terminal — and he was more than happy for me to do this. My involvement would help secure the investment by ENOC. At this time, the President felt he was losing face with the oil majors. He had been telling them from the time he first got elected (echoing pressure which started about 1995) to close the oil terminal down and go to Doraleh. They simply ignored him, which he felt was humiliating. So if the time came when ENOC were to lead this project and he no longer had to turn to the oil majors in Djibouti to help, it would give him great personal pleasure."*

181. Mr Boreh repeated in cross-examination this evidence about the President always having been aware of his intention to invest personally in the project and having encouraged Mr Boreh to do so, for example in the passage cited at [174] above: *"It was not a secret. So the Government knew on 8 July 2001 that there will be third party or private people like myself, which the President knew personally, and I've told him and he was encouraging me to invest."*

182. Contrary to the claimants' submissions, in my judgment this all has the ring of truth about it. Mr Boreh demonstrated his commitment to the Doraleh project by, amongst other things, his investment in DDP, of which the President was clearly aware, so he had no reason to conceal his intention to invest in the Horizon Terminal from the

President. Mr Boreh's commitment to the project, including through his personal investment, was something which clearly encouraged the Dubai interests (DP World and ENOC) to invest in Djibouti, which was what the President wanted at that time. It is quite clear that the President's priority, so far as the oil terminal was concerned, was to find a company such as ENOC which was prepared to construct and run a new terminal in Doraleh, in circumstances where the oil majors had refused to do so. The claimants' case that the President or the Republic was ever interested at any relevant time in taking a shareholding in Horizon which was more than "symbolic" (to use Mr Moussa's telling description in his interviews with Gibson Dunn) or concerned about either the fact or the scale of Mr Boreh's investment is, as Mr Kendrick described it, "reverse engineering", thought up after the event to support a claim against Mr Boreh after the President had fallen out with him.

183. At various stages in his closing submissions, Lord Falconer sought to make much of Mr Boreh's inability to identify a specific occasion on which he had informed the President that he intended to make a personal investment in Horizon and the President had approved and encouraged this. I was not impressed with this point. Frankly, I would have been far more sceptical about Mr Boreh's evidence that his intention to invest was discussed with the President if, after fifteen years or more, Mr Boreh could recall a specific time and place when such an oral discussion took place. I am quite satisfied that, at some stage during the preliminary negotiations with ENOC in 2000 or early 2001, Mr Boreh did tell the President that he intended to invest in the new oil terminal personally and that the President encouraged him to make such an investment.

184. Even if, contrary to that finding, Mr Boreh did not tell the President about his proposed shareholding until much later, in my judgment, the suggestion that, as early as July 2001, Mr Boreh had formulated some fraudulent plan to conceal the shareholding he proposed to take in the oil terminal from the President and the Republic is fanciful in the extreme. As Mr Kendrick QC submitted, this would have been a far sighted conspiracy, dreamt up and implemented before any detailed discussions about shareholdings took place. The suggestion that he had that fraudulent plan has to be predicated upon his concealing the intended shareholding from the President because the President would not have allowed it. There is no reason for the President to be against private investment by Mr Boreh. As I have found, the President was well aware of Mr Boreh's substantial investment in DDP and raised no objection to it, so there would be no rhyme or reason to his objecting to the Horizon investment and certainly no reason for Mr Boreh to think that he would.

185. Returning to the signature of the July 2001 MOU, Mr Boreh's suggested changes to the draft MOU were acceptable to ENOC. Mr Sultan came to Djibouti for the signing of the MOU on 8 July 2001. The MOU was signed on behalf of the Republic by Mr Moussa. It is evident that, before doing so, he must have read it carefully, not only because he initialled the bottom of every page but because he made a manuscript amendment. Clause 2.2 in the document presented to him read:

> *"2.2 The Government undertakes that it will:*
>
> *2.2.1 level and transfer to the Company at an agreed rent the land identified as necessary for the Proposed Facility;*

> *2.2.2 construct the jetty to an agreed specification and standard and transfer it to the Company. Utilisation of the jetty to be discussed and agreed with Dubai Ports International;*
>
> *2.2.3 designate the Proposed Facility at Doraleh as a Free Zone area; and*
>
> *2.2.4 provide the Company with all governmental, administrative and other permits, licences or similar that the Company needs to lawfully undertake its business in the Republic of Djibouti."*

186. Mr Moussa deleted the words *"and transfer it to the Company"* in clause 2.2.2. That change was consistent with Mr Boreh's proposal (by the additional sentence he had suggested adding to the clause) that DP World should determine utilisation of the jetty, a further indication that Mr Boreh had discussed that proposed change with the President. In my judgment, it is also extremely unlikely that Mr Moussa, who was the Minister for Presidential Affairs, would have signed the MOU, let alone made that manuscript deletion, without discussing the terms of the MOU with the President, not only because of the political reality in Djibouti, which is that the President is in overall control of everything, but because the oil terminal project was one in which the President took a keen personal interest. Furthermore, given that, when Mr Sultan came to Djibouti to sign the MOU, he had a meeting with the President (as recorded in the note of the meeting between ENOC and Mr Douale and Mr Liberati of Technital on 15 July 2001), it is likely that at that meeting, they discussed the terms of the MOU.

187. The President then had a meeting with DP World on 29 July 2001. There is no note or minute of that meeting, but there is an agenda for the meeting evidently prepared by the Office of the President. The overall purpose of the meeting seems to have been to discuss in detail the current and projected performance of the port. As Mr Kendrick QC correctly submits, the sheer detail of the agenda is revealing. It shows that the President was deeply involved in matters concerning the port and Horizon, which is scarcely surprising given how critical the success of the existing port and of the Doraleh project was to the economy of his country. In relation to the Doraleh project, the MOU with ENOC was on the agenda for discussion, together with a proposed storage area for EPE, the Ethiopian Oil Company, Ethiopian Petroleum Enterprise. Also for discussion were issues concerning the financing of the project, specifically finance from the Arab Funds and the possible intervention of Dubai to obtain financing. There is no reason to suppose that the matters on the agenda were not discussed between the President and DP World. It is striking that the President does not deal with this meeting at all in either of his witness statements.

Discussions with the Arab Funds

188. The July 2001 MOU contemplated that the Republic would rent the land to the proposed joint venture company rather than sell it and it was for the Republic to level the land and construct the jetty. Accordingly, the Republic was looking for funding to pay for the infrastructure. The estimated cost of this was U.S. $39.5 million. There was no question of PAID being able to fund that much finance itself. As at the end of 2001, the pre-existing reserves of PAID were equivalent to U.S. $5.9 million and the

contractual reserves which it was obliged to build up under the 2000 Concession Agreement with DP World were equivalent to U.S. $1.1 million. By the end of 2002, the combined reserves were equivalent to about U.S. $11.5 million, in neither case anything like sufficient to fund the cost of building the jetty infrastructure.

189. It was in those circumstances that the President sought financial assistance from the Arab Funds. The Funds are a group of institutional lenders, led in relation to Djibouti by the Kuwait Fund, which focus on promoting economic and social development in poorer Arab countries, including in particular by financing public and, to a lesser degree, private investment projects. Loans from the Arab Funds are provided on favourable terms, including low interest rates and generous repayment periods. They are typically given in sectors like utilities, transport, communications, health care and education, with an emphasis on projects which have priority in national development plans.

190. The Funds had financed the container terminal in the old port in about 1982 and had approved in principle U.S. $32 million of funding for phase 4 of the development of the old port. However, as appears from a report dated 19 June 2001 headed "Clarification on the Development of the Doraleh Project" prepared by Mr El Hag (who was the President's Advisor for Investment Projects and an enthusiastic supporter of the Arab Funds), DP World (who were now managing the old port) considered that phase 4 was useless and recommended the development of Doraleh instead. Accordingly, on the instructions of the President, Mr El Hag had approached the Funds and asked them to agree to transfer the U.S. $32 million of funding to the Horizon project. Mr El Hag's report records that, following receipt of the Technital preliminary study, the Kuwait Fund agreed to attend a meeting in Djibouti in early June 2001, but the other Funds wanted to discuss this at their coordination meeting in Kuwait on 6 June 2001. At that meeting the other Funds thought that, since the study was incomplete, it was premature to have a meeting with DP World, although the Funds gave their agreement in principle to the Doraleh project.

191. Not everyone was as enamoured of the Arab Funds as Mr El Hag. As I have already found at [159] above, as early as 6 June 2001, Mr Douale had written to the President complaining that, because the meeting with the Arab Funds originally scheduled for February 2001 had been put back to March, then May, then June 2001, the Doraleh Project was falling behind schedule. Mr Douale urged the President to set up a meeting with DP World to discuss funding. As already noted, the President discussed the financing by the Arab Funds at his meeting with DP World on 29 July 2001, following the signing of the July 2001 MOU, as well as the possibility of Dubai obtaining financing. In the event, there was even further delay in arranging a meeting with the Arab Funds, which did not take place until February 2002.

192. It was suggested by the claimants in opening that the Republic was seeking funding from the Arab Funds for the entire Horizon Project including the financing of the construction of the terminal. However, this is contrary to the evidence. As both Mr Douale and Mr El Hag accepted in cross-examination, the Funds were only being asked to finance the jetty and related infrastructure, including the road link, not the terminal itself, the funding of which would be the responsibility of ENOC. This is clear from the contemporaneous documents as well, such as a letter to the Kuwait Fund from the Office of the President in November 2001 which asks them to fund the infrastructure (including the causeway, jetty, and approach roads), while "*the entire*

costs of the new tank farm and its associated oil related equipment would be borne by the operator (ENOC)".

193. The only exception is a letter from Mr bin Sulayem to the Abu Dhabi Fund in October 2001 which invites them to discuss: "*available capabilities to finance the construction of the oil terminal as well as the accompanying civil works*". This letter was drafted in English by Mr Hawker on 23 October 2001. The draft stated: *"we would wish to meet you in order to discuss the possibility of your funds being utilised to finance the construction of the oil jetty and associated civil works."* The letter was then translated into Arabic, but incorrectly translated *"oil jetty"* as *"oil terminal"* and Mr bin Sulayem signed that incorrect version on 24 October 2001. Clearly this was an error. I am quite satisfied that the Republic was only ever seeking funding for the construction of the jetty and related infrastructure from the Arab Funds and, to the extent that the claimants maintained a case that funding was being sought for the entire project, that case is wrong and against the weight of the evidence.

194. The claimants' principal case in closing in relation to the Arab Funds is that the reason why funding by the Funds did not proceed was that DP World and Mr Boreh *"did not want to subject their arrangements to the level of scrutiny which the Arab Fund financing would entail"*. This is an extremely serious allegation which requires a detailed examination of the course of negotiations with the Arab Funds to see if there is anything in the allegation.

195. An official request was made by Mr Bouh, the Finance Minister, to the Kuwait Fund for funding on 8 October 2001. The Fund responded in its letter of 24 November 2001 confirming its interest but seeking further information, including economic analysis, to be provided as quickly as possible, in order to carry out a *"feasibility evaluation of this project"*. Mr Boreh readily accepted in cross-examination that this request for further information was reasonable.

196. In the event, the meeting between the Arab Funds and the Republic, also attended by representatives of DP World, took place in Djibouti on 10 and 11 February 2002. There was a large delegation with three representatives from the Kuwait Fund, two from the Saudi Fund and one each from the Arab Fund and the Abu Dhabi Fund. The Annex to the minutes record the other attendees as the Minister of Transport, the Minister for Presidential Affairs (Mr Moussa), and Mr El Hag for the government, Mr Douale for PAID, Mr Hawker and Mr Fewer for DP World and Mr Liberati for Technital. Mr Boreh is not recorded as attending the meeting either in the Annex or in the minutes themselves, although it is common ground that he did attend some of the time.

197. The minutes record that: "*The Arab Funds confirmed their interest in the project, since they are traditional partners of Djibouti Government development endeavours since Independence in 1977*". Mr El Hag's evidence was that the Arab Funds emphasised that they were interested in supporting the Republic even in a public-private venture and that, on the first day, they referred to the Port of Salalah in Oman as a model example of their financial support for a public-private joint enterprise. This was confirmed by Mr El Hag's letter to the President of 18 February 2002.

198. The minutes also record that the Funds asked for certain documents and information, including a draft management agreement between the Republic and the proposed

manager, a proposal for setting up an administratively and financially "*Autonomous Authority*" for overseeing Horizon, and a draft concession agreement between the Government of Djibouti and "*the Concessionaire*" which would be providing the necessary superstructure. This agreement was expected to list the rights and obligations of each party. A request was also made for financial documents estimating the port revenues and estimated project costs.

199. Mr El Hag's evidence in his witness statement was that the context in which the Funds were asking about the proposed management agreement with DP World was that, on the first day of the meeting, they wanted to know whether the management fees which DP World would pay would be sufficient to pay off the loan made by the Funds. Mr Hawker was not in a position to give an immediate answer and, although the Funds asked him to speak to Dubai overnight, he had no answer in the morning. Mr El Hag's evidence was that at that point on the second day, Mr Boreh came into the meeting uninvited. He continued in his witness statement that: *"He had a letter in his hand and said something like 'You are annoying us with your questions; we don't need your money. Sultan bin Sulayem will finance the port'. I tried to lead [Mr Boreh] out because I felt he was being rather rude. In fact, I was shocked by both Mr Boreh's disparaging remarks and his behaviour on that day."* The implication of that evidence was that neither Mr Boreh nor DP World wanted the Arab Funds enquiring too closely into the existing concession agreement.

200. I was not convinced by this evidence of Mr El Hag. To begin with, he does not speak English, so that, because the meeting was in English, he participated with an interpreter. As I have already said, Mr El Hag was a great exponent of the Arab Funds and was clearly annoyed that, after what he saw as his efforts to secure funding from them, that funding had not been taken up. It seemed to me that, as I have already noted in my assessment of him as a witness, he regarded his function in giving evidence as being to make what he described as a "presentation" about his efforts to secure the funding from the Arab Funds and how reasonable the funds were. He was not prepared to countenance any criticism of the Funds and, accordingly, I concluded that his evidence lacked objectivity and thus credibility.

201. It is also apparent that his view that the Arab Funds were keen to fund the Doraleh project was not shared by others, particularly DP World and PAID. Mr Fewer (who I regarded, in contrast to Mr El Hag, as an impressive and objective witness) thought that the Arab Funds were delaying having a meeting. On 19 November 2001, he wrote an internal memo to Mr bin Sulayem:

> *"Hanady has provided a translation of the letter addressed to you in response to the request for meeting with the Arab Fund concerning the Doraleh Project. The Fund has advised it is still studying the documents received by them and they are not ready to meet. We are, of course, concerned that the project continues to be delayed.*
>
> *Is there any possibility of your telephoning the right people at the Arab/Kuwait/Abu Dhabi Fund in order to speed up the process and arranging for a meeting?"*

202. Mr Douale, the government representative on PAID, also thought that the Arab Funds were not interested in funding the project. On 11 December 2001, Mr El Hag wrote to Mr Douale stating that the Kuwait Fund had just contacted him requesting that an answer be given quickly to their request for further information. Mr Douale responded on 13 December 2001 in these terms:

> *"The Arab Funds seem to be in quite a hurry to receive a response to their letter, but on the other hand take their time in replying to us.*
>
> *A bit of good will on their part would have avoided all this delay. The establishment of additional funds would have allowed for financing of the feasibility study, which would have answered most of the questions asked.*
>
> [He goes on refer to the fact that DP World proposed to use Standard Bank in London to prepare financial models to assist in the dealings with the Arab Funds and to look for other potential investors, then continues]
>
> *We will do everything necessary to ensure that this project succeeds. A few working meetings with the Arab Funds backers would have enabled us to resolve all these issues. Unfortunately, we get the impression that this project doesn't interest them."*

203. It is quite clear that there was a great deal of tension between Mr Douale and Mr El Hag, as became clearer after the meeting with the Arab Funds in February 2002. Mr Douale's witness statement does not really address his contemporaneous concerns about the Arab Funds, although he gives evidence about the meeting. Like Mr El Hag he suggests that Mr Boreh interrupted the meeting:

> *"Mr. Boreh interrupted the meeting and made a comment to the effect of "We'll do the project anyway". His comments were to the effect that finance for the Doraleh developments had already been found. He mentioned that Dubai was interested in funding the oil terminal. I cannot recall if he mentioned ENOC or Dubai Ports specifically. This was the first time I had heard this, and the representatives of the Arab Funds questioned why they had been invited to the meeting if this was the case."*

204. He then goes on to describe a discussion after the meeting with Mr Boreh, Mr El Hag, Mr Fewer and Mr Hawker:

> *"Mr. Boreh objected to the level of disclosure which was required by the Arab Funds and was resistant to the idea of their involvement. I believe David Hawker agreed with him. I recall someone saying that if the 2000 Concession Agreement was not provided to the Arab Funds, then their financing would not go ahead. Mr. Boreh said that we did not need the funds to*

> *help us if they were going to make it so difficult, and he repeated his statement to the effect that we did not need the Arab Funds' money as the project would be funded by Dubai."*

205. Once again, the clear implication of this evidence is that neither DP World nor Mr Boreh wanted the Arab Funds to see the 2000 Concession Agreement or to examine the arrangements with DP World, because they had something to hide. I simply do not accept that evidence. As I have said, I did not regard Mr Douale as a reliable witness. The passage I have just quoted where he says that the first he knew about Dubai interests funding the oil terminal was when Mr Boreh mentioned it at the meeting was simply not true. It is quite clear from earlier contemporaneous documents that he already knew that ENOC was going to be funding the construction of the oil terminal. When he was confronted with this in cross-examination, he stuck to what he said in his witness statement, even though it was not true, in a distinctly unimpressive manner.

206. Mr Boreh's evidence as to why he went to the meeting on the second day was that the President was concerned that the Arab Funds were taking too long to make their decision. He accepted in cross-examination that Mr Hawker may have told him overnight about the fact that the Arab Funds were asking about the 2000 Concession Agreement, but denied that that was the reason for attending the meeting, maintaining that the reason why he attended was that the President had asked him to do so. Although the claimants contend that this evidence about the President being concerned about delay on the part of the Arab Funds is not true, I do not agree. In my judgment, Mr Boreh's explanation is consistent with the contemporaneous evidence. Mr Douale had expressed concern about delay by the Arab Funds as long ago as June 2001 and now, eight months later, things were still at a preliminary stage, the Funds were still asking for information (however reasonable their requests were) and there was no commitment. The President himself does not deal with this aspect of the evidence in either of his witness statements although he acknowledges that he knew that obtaining financing from the Arab Funds *"would be a slow process"*.

207. Understandably, Mr Boreh cannot remember exactly what he said to the Arab Funds more than thirteen years ago, but it was something to the effect that there was already a commitment from ENOC to build the terminal, and that a firm commitment was therefore needed from the Arab Funds, rapidly, on the infrastructure. As he put it in cross-examination:

> *"And what I really said here is it is important that if the construction of the private oil storage facility will commence, then it is very important that the jetty part and the Government infrastructure is also financed and start the implementation, otherwise we will have a white elephant. There was a risk of building the oil terminal without having any firm commitments on the jetty part. So we were worried, as an investor I was worried on that part, and I needed a concrete answer whether they will invest or not. That's all I wanted to know."*

208. Mr Boreh as a dynamic businessman clearly found the rather slow bureaucratic approach of the Arab Funds frustrating and no doubt he expressed himself forcefully. However, having observed him giving evidence over a number of days, he is someone

of considerable personal charm and I very much doubt whether he was offensive in the way in which Mr El Hag and Mr Douale suggest. Neither Mr Hawker nor Mr Fewer (both of whom were at the meeting) could recall Mr Boreh having been disruptive or offensive. Mr El Hag's own contemporaneous report to the President on 18 February 2002 only mentions Mr Boreh in passing, reserving his fire for an extended complaint about Mr Douale:

> *"The unhealthy climate that prevailed during this conference, due to the negative attitude of Mr Doualeh and Mr Abdourahman Boreh, is to be deplored. In addition to the discourteous language used with the financial backers, I too was poorly treated, to the point that it was difficult for me to manage the meetings. 1 feel that this situation has diminished the credibility of my country. 1 have been seeking for many months, in vain, to coordinate my position with that of Mr Doualeh, underlining each time the need to communicate to the financial backers the economic and financial information requested. Unfortunately, Mr Doualeh harbours suspicions and prejudices against me, as well as the managers of Dubai Port, e.g.: (email sent to the consultant and to Doualeh asking them to not provide Mr Fahmi with a copy of the project study)."*

209. It was suggested by Lord Falconer to Mr Boreh in cross-examination that he had deliberately held back from the Arab Funds that he was proposing to invest in the Horizon Project personally. This was refuted by Mr Boreh, but the claimants maintain the case that he was impatient with the Arab Funds and wanted the finance for the project to be found elsewhere because he did not want questions to be asked about his potential investment. In my judgment this conspiracy theory is fanciful in the extreme. As the defendants submit, the Arab Funds were not asking questions about who was going to invest in the oil terminal and in what shares and Mr Boreh had no reason to be embarrassed about wanting to invest. Common sense suggests that, just as the Dubai interests were encouraged by Mr Boreh's enthusiasm for the project to the extent of being prepared to make a personal investment, so too would the Arab Funds have been. The suggestion that he and the Dubai interests were engaged in some dishonest conspiracy for him to make a secret personal investment and he would have been prepared to wreck the funding initiative with the Funds as part of that conspiracy is frankly nonsensical.

210. Furthermore, that case was not put in cross-examination to the witnesses from DP World who were at the meeting with the Arab Funds, Mr Fewer and Mr Hawker. Mr Hawker gave, in his witness statement, a balanced and sensible commercial analysis of the attitude of the Arab Funds at the meeting in which he referred to the fact that the Funds seemed to be focussed on the 2000 Concession Agreement which had nothing to do with the proposed financing:

> *"However, DPI was, I believe, fairly enthusiastic about the meeting because we considered there was a reasonable chance we might obtain some financing from the Arab Funds for the Horizon terminal. I made a presentation regarding the feasibility of the project as a whole at the meeting. However, although the Arab Funds gave some general expression of*

> *interest in the project, their overall feedback was not particularly positive, and they had many questions about it which they wanted to address before proceeding.*
>
> *The proposal put to the Arab Funds had nothing to do with the 2000 Concession Agreement for the management of the old Port of Djibouti, but focussed instead on the development of Doraleh and in particular, the Horizon Terminal. As such, it puzzled me that at the meeting (and subsequently) the Arab Funds requested details and copies of that agreement. I thought that the Funds had the wrong focus and I believe I said so. My overall impression from the discussion at the meeting was that the Funds were preoccupied with the possibility of a private enterprise profiting from the project, when they were more accustomed to purely public or sovereign investments. In saying that, if I had received an instruction from either Djibouti or my superiors to provide the Arab Funds with copies of the 2000 Concession Agreement, I would have had no problem doing so. In the absence of that authority, the Funds' continued insistence on seeing the agreement seemed like a delaying tactic to me."*

211. None of that was challenged in cross-examination, nor was it suggested to Mr Hawker that DP World did not want to disclose the Concession Agreement or anything to do with its dealings with Mr Boreh to the Arab Funds. To the extent that the claimants' conspiracy theory seeks to implicate ENOC, in my judgment there is simply no justification for any such allegation. It is one thing for the Republic to make serious allegations amounting to dishonesty against DP World, with whom it has a current dispute in arbitration, but quite another to make allegations against ENOC which is a reputable oil company and is not a party to the present proceedings and has therefore had no opportunity to refute the allegations and set out its own case. I reject in their entirety these allegations that Mr Boreh and the Dubai interests effectively saw off the Arab Funds because they had something to hide.

212. After Mr El Hag sent his report to the President complaining about Mr Douale's conduct, Mr Douale hit back, writing to the President on 1 April 2002, complaining that Mr El Hag was interfering in the Doraleh project. The President clearly understood that there was infighting between the two of them since he wrote a note on the letter addressed to Mr Moussa asking him *"to arbitrate and calm the situation."*

213. Following the meeting with the Arab Funds, it appears that Mr Liberati of Technital wrote to Mr Moussa, evidently about carrying out the economic and financial analysis which the Funds had asked for at the meeting. Mr Moussa wrote back on 13 March 2002, confirming that Technital should start the economic and financial analysis and stressing the urgency: *"It is unnecessary to remind you how urgent this is and how important this project is to the development of our country. We therefore count on your precious collaboration and hope to obtain this study as soon as possible, and in view of the urgency, no later than May 2002"*.

214. This direct contact between the Government and Technital seems to have caused DP World some consternation possibly because it was DP World which had engaged

Technital in the first place. Thus, on 31 March 2002, Mr Hawker wrote to Mr Liberati in these terms:

> *"Last month agreements were reached in Djibouti relating to the Doraleh project, the Arab Funds, and the immediate task for DPI, Technital, and ENOC, and the way to proceed.*
>
> *We hear a rumour that notwithstanding these agreements, Technital has made certain proposals directly to the Government of Djibouti without either consulting with DPI, the appointed project managers, or notification to them.*
>
> *If this is true then we must protest most strongly at this action and request that you notify us immediately, as the project managers what those proposals are."*

215. In their closing submissions, the claimants sought to characterise this as DP World wanting to retain control over negotiations with the Arab Funds, the implication appearing to be that DP World wanted to control the provision of information to the Arab Funds, in other words that this was part of DP World and Mr Boreh not wanting their arrangements subjected to the level of scrutiny that financing by the Arab Funds would entail. None of that was put to Mr Hawker and I would be most reluctant to conclude that this was all part of some conspiracy, since there may be a perfectly innocent explanation.

216. Furthermore, the claimants' suggestion, that DP World did not want its arrangements subject to scrutiny from third party financiers, is belied by Mr Hawker's unchallenged evidence in his second witness statement that DP World did seek finance for the project from a number of entities, including the IMF, the World Bank and the United States Trade and Development Agency ("USTDA"), all of whom might well have wanted detailed analyses of the existing and proposed management agreements. In the event, as Mr Hawker says, the IMF and the World Bank decided not to invest, but the USTDA provided partial funding in relation to a feasibility study for the DCT.

217. On 14 May 2002, DP World sent a letter to the Kuwaiti Fund attaching Technital's latest report, a draft act to establish the oil terminal port authority, a draft concession agreement between the Government and DP World for the management of the new port; and the 8 July 2001 MOU between the Republic and ENOC. The Kuwait Fund responded to this in a letter dated 8 June 2002 to Mr Hawker and Mr El Hag. The Fund found the economic aspects of the appraisal satisfactory, but raised various queries about the other documents. Specifically the Fund was concerned about the management of the new port facilities at Doraleh being entrusted to DP World in terms of what they would charge, and asked whether better terms could not be obtained from other service providers, saying that a more balanced draft for port management was needed.

218. In their closing submissions, the claimants contend that the Fund's concern was the lack of clarity regarding the identity of the investors and the division of costs and benefits. It seems to me that this somewhat misstates the specific concern. What the Fund said was:

> *"As you know, the viability of the infrastructure work would be confirmed only with the identification of concessionaire(s) who would be willing to invest in superstructure plan equipment and other services. It is for this reason that the minutes of the February meeting required the furnishing to the funding institutions of certain documents, including a draft concession agreement to construct and operate the superstructure facility.*
>
> *The draft MOU between the government and the Emirates National Oil Company (ENOC) does not adequately satisfy this requirement, as it contains no indication of the scope of the equity contribution that ENOC would be willing to commit towards the construction of the petroleum facility. In fact, as it refers to the establishment of a joint venture, it assumes an equal obligation for the provision of equity on the part of the government. Clarification of this matter is essential to identify the scope of government obligation under the project and, hence, to establish its economic viability from its own perspective."*

219. This was not expressing concern about the identity of the investors, but about how much equity contribution ENOC as concessionaire of the terminal was prepared to make, and whether the Republic would be expected to make an equal contribution. As already noted, the July MOU was silent about the amount of any equity contribution. The concern was that the Republic should not be required to make a 50% equity contribution which would have an adverse effect upon the economic viability of the project. In my judgment, this had nothing at all to do with any personal investment by Mr Boreh. Indeed, to the extent that investment by private investors such as him would reduce the equity contribution that the Republic was expected to make, it appears that would have allayed some of the Fund's concern.

220. Following receipt of that response from the Kuwait Fund, Mr Hawker wrote to Mr Douale in these terms:

> *"We are now in possession of the reply received from the Arab Fund in Kuwait that is asking for more detailed information than was contained within the Technital report.*
>
> *At this time we feel that it would be prudent to appoint a Financial Adviser who would advise on the overall financing of the project and in this connection we would wish to recommend the Standard Bank of London.*
>
> *This is a bank skilled in the management of project finance in the developing world with whom both DPA and the Government of Dubai have had dealings in the past.*
>
> *We feel that the appointment of such a professional organization would enhance our joint credibility in this venture. We shall of course negotiate the best possible rates for the account of the Seaport."*

221. Contrary to what the claimants seem to be implying, I do not regard that as in any sense the reaction of a party who does not wish to disclose matters to the Arab Funds. Rather DP World was recognising that the Arab Funds were slow and bureaucratic, that they might not lend and that if the project was to be given some impetus, it was appropriate to involve commercial lenders. This is borne out by the letter Mr Fewer of DP World wrote to Mr Roger Brown of Standard Bank in London on 29 June 2002:

> *"I refer to our discussions regarding Standard Bank's interest in participating in the Dorale Port Project in Djibouti. The Government of Djibouti is continuing to identify potential financial support for the Project. The Arab/Kuwait Fund is continuing to evaluate the project and we are hopeful of a successful response from those 2 funding organizations. However, the potential exists that the Arab Fund may choose to not move forward with the funding and/or the Government of Djibouti may not be willing to accept the terms and conditions offered by those funds. It is, therefore, in everyone's best interest to seek alternative funding solutions."*

222. Whilst Mr Fewer accepted in cross-examination that the requests from the Funds were reasonable and that, since he was not a financial man, he did not know what was the norm in finance, as an operations man, he thought this process was taking a very long time. In fact, on 11 September 2002, Mr El Hag had a meeting with the Kuwait Fund at which he evidently indicated that the Government needed more time to respond to the Fund's letter of 8 June 2002. The Fund wrote to him the same day after the meeting, confirming their: *"agreement to consider the appraisal of the Project during the first half of 2003, once the required clarifications are received and agreed by the funding institutions."* In other words, the Funds were proposing that their appraisal of the Project might take another nine months and there was no time frame provided during which any finance would be made available, on any view a considerable further delay, beyond the delay which had already occurred.

223. I agree with Mr Kendrick QC's submission that the Arab Funds were bureaucratic and had time consuming procedures. That is not to say that their requests were unreasonable, it was simply an aspect of seeking a substantial loan from what are in effect charitable funds. However, it remains the case that, as the President himself says in his witness statement: *"I knew that obtaining financing from them would be a slow process."* The one thing the Government did not have was time to allow the Arab Funds to take their somewhat leisurely course, since there was a definite sense of urgency about the Doraleh project, including the oil terminal, as Mr Moussa is recorded as saying in his meetings with Gibson Dunn. Mr Fewer said that the Government was *"desperate for a new oil terminal to be built"* and Mr Dileita confirmed in cross-examination that the Government was *"in a rush"* and *"things had to be dealt with quickly"*.

224. The time pressure in relation to the Doraleh project is perhaps put most graphically by Mr Douale in a meeting of the cabinet at a slightly later stage on 28 April 2003 to discuss the Doraleh project generally where he is recorded as saying:

> *"It has become more than an imperative, even a question of life and death, to construct the complex of the Port of Doraleh as*

> *quickly as possible. Any delay in the schedule would be fatal, particularly as the Port of Assab is in the process of privatisation, and Aden may well re-establish stability. All these ports share, with Djibouti, the advantages of the geo-strategic position of the Gulf of Aden and of the Bab el-Mandeb Strait."*

225. Although the risk of competition from these other ports was more acute in the context of the proposed container terminal, the oil terminal was always the preliminary stage of the Doraleh project, as Mr Douale goes on to say:

> *"The preliminary phase will see the construction of the Oil Terminal by relocation of oil companies currently based at the Port of Djibouti. The reason for the move is that the subsoil of the Port of Djibouti is saturated with heating oil, which, along with the tankers (travelling bombs) moving between the Port and the city, constitutes a real fire risk."*

226. Given that, as at the summer of 2002, there was no funding from the Arab Funds immediately in prospect, the President clearly had to decide whether to continue pursuing the possibility of funding from the Arab Funds or seek finance elsewhere from the private sector and, specifically, finance which DP World was able to procure. He chose the latter. As he says in his witness statement (in a passage I have already cited):

> *"Thus, I thought that the plan for the terminal could progress more quickly if Dubai Ports could arrange financing instead of the Arab Funds. However, I was on the look-out for any partner capable of commencing the construction of the oil port."*

227. Mr El Hag confirmed in cross-examination that it was the President who made the decision to pursue private sector funding instead of the Arab Funds. His evidence in re-examination was that this decision was taken some time in the period July to September 2002 following discussions with ENOC and DP World, after they had involved Standard Bank. However, the decision was clearly taken by the President and there is no basis for any suggestion that in doing so, he was influenced by anything said to him by Mr Boreh.

228. The securing of independent third party funding rather than what might be seen as charitable handouts from the Arab Funds was something of which the Republic was justly proud, as Mr Dileita accepted in cross-examination:

> *"Q… you were proud to be moving away from that form of funding and moving to what you describe as a real partnership approach; is that right?*
>
> *A. Yes, it is. Yes, absolutely."*

229. Given that it was the President who made what was a strategic and, in a sense, commercial decision to seek private sector finance rather than loans from the Arab

Funds, it is strictly unnecessary to consider whether in fact the Funds would have provided finance or whether the Republic's default on its other loans from the Funds would, as the defendants contend, have posed a serious obstacle to such finance. However, I will deal with the point briefly.

230. There was a meeting of senior Government officials (including Mr Douale and Mr El Hag) and Ministers on 22 May 2002 to discuss the existing debts owed by the Republic to the Arab Funds. Mr Dileita, the Prime Minister, is recorded as opening the meeting by saying:

> *"In collaboration with the President of the Republic, I was adamant that this meeting be held so that our past due external debt payments be paid as quickly as possible to the Islamic and Arab Financial Institutions. This is henceforth an essential condition for the approval of substantially all of the projects benefitting the Republic of Djibouti."*

231. Mr El Hag is recorded as pointing out to the meeting that: *"this issue of our payment in arrears to the Islamic and Arab Financial Institutions is a major obstacle towards the funding of our development projects."* As Mr El Hag accepted in answer to me, the honouring of these external debts was a condition of the continuing support for Djibouti by the IMF. A specific problem identified at the meeting was loans outstanding to the Islamic Development Bank in respect of the international airport, as a consequence of which that Bank was refusing to advance a U.S. $5 million loan in respect of education. It appears from what Mr Douale is recorded as saying that, to the extent that arrears were being paid off, it was PAID which was providing the funds. This picture of the port subsidising other areas of the economy of Djibouti was not new and is a further indication that any suggestion by the claimants that PAID could have funded the construction of the jetty is unreal.

232. Notwithstanding that statement by Mr El Hag at the meeting and his acceptance in cross-examination that: *"It would have been impossible for us to be granted a new financing if we had delays in payment"*, he maintained that these problems with outstanding loans had nothing to do with the Arab Funds and that any refusal by the Funds to finance the oil terminal and container terminal had nothing to do with this but was due to the fact that DP World did not want to supply the information requested. That evidence was unconvincing.

233. As Mr Kendrick QC submitted, the problem was not confined to the specific loans which were in arrears. Arab Funds loans typically contained cross-default provisions such as Article 5 of the loan for phase 4 of the old port which entitled the Funds to suspend withdrawals in the event of default not only under the loan agreement in question but *"under any other agreement by virtue of which [the Republic] has or shall have received a loan from the Fund"*.

234. Mr El Hag was quite emphatic in his denial in cross-examination that Article 5 was ever invoked:

> *"A. So therefore there was never any suspension of finance, never, never ever.*

> *Q. Was it threatened?*
>
> *A. You know, as soon as a repayment is not made, automatically -- and of course it's computerised --there is a letter, a reminder that's sent to all the countries that haven't honoured their commitments, and it's something that's automatic. Once they don't pay on time, then you get sent this letter, this reminder letter. But at no moment was the financing suspended and at no moment the projects underway that were being financed were stopped, and that was because of our privileged links with those countries. We have always honoured our commitments, for sure, and I say this, and I recognise this, that it could happen that we had difficulties to pay, we may pay two months or three months later, and in fact we could never have mobilised the 350 million in 2007 if we had a debt as far as they were concerned. It would have been impossible for us to be granted a new financing if we had delays in payment."*

235. However, late disclosure made by the Republic after Mr El Hag had given evidence demonstrated that this evidence was simply not true. Draw-downs were suspended in April 2001 due to arrears on various Kuwait Fund loans including one in respect of the port and this occurred again in August 2001. In September 2002, at around the time when the President was in all probability making his decision to seek finance by way of private sector funding rather than from the Funds, the Republic was in arrears again on various loans from the Kuwait Fund which was threatening to invoke Article 5 to suspend further payments. Even later still in May 2003, the Republic was said to be in need of funds to reactivate a frozen loan from the Abu Dhabi Fund.

236. The fact that Mr El Hag's evidence about the Republic not being in default and the Funds never having suspended loans proved to be untrue casts doubt upon the credibility of much of his evidence about the willingness of the Funds to provide the finance for the jetty and infrastructure. I have considerable doubts as to whether ultimately the Funds would have been prepared to provide the finance, but that point was not reached, because the President made the decision to seek private sector finance.

The 19 September 2002 meeting

237. This decision to seek private sector finance resulted in a discussion of the commercial terms of the proposed deal between the President and ENOC. A meeting between them took place on 19 September 2002. Mr Nair of ENOC sent his colleague Mr Phillliskirk an email the same day after the meeting, which stated:

> *"We had a meeting with President of Djibouti and have an in principle agreement to proceed with a terminal there. I have attached details of the points discussed.*
>
> *HMS [Mr Sultan] desires, we should fast track handling the following*

> *1) Form a new company for the project.*
>
> *2) Lease agreement*
>
> *3) Agreement with the Govt. for setting up the company and the project.*
>
> *4) Management agreement.*
>
> *All the documentation need to be in French. We are targeting for the first draft to be sent to them by the 10th of Oct. We could modify the Fujairah documentation."*

238. The note attached of the details discussed is an important document, since it demonstrates the extent to which the President was the master of the detail of the proposed project, both as regards what might be regarded as strategic decisions for the Government (such as whether the land would be leased or sold to the proposed joint venture company and whether the Government would take a shareholding and if so in what proportion) and commercial matters (such as the financing of the construction of the jetty and infrastructure and the fees to be charged to users of the terminal).

239. I propose to set out the text of the note in full:

> *"1. A new offshore company will be formed. ENOC and Govt. of Djibouti will be shareholders. Additional shareholders will be brought in based on discussions with multi-national companies and other traders.*
>
> *2. ENOC will identify potential partners and will finalize the equity participation.*
>
> *3. It is estimated that Govt. of Djibouti may like to have an equity participation of 10 to 15%. This could be in the form of value of plot allotted for the project.*
>
> *4. While the land requirement for all phases of the project will be 500mtrs. x 500mtrs., for the first phase it is estimated the requirement to be 150,000 sq.mtrs.*
>
> *5. Suitable land will be identified after carrying out necessary site survey.*
>
> *6. Govt. of Djibouti will provide necessary infrastructure for the project. However if so desired by Govt. of Djibouti, the new company will provide funding and arrange for the infrastructure. Cost of this infrastructure will be reimbursed through any fees due to the Government.*
>
> *7. If the land is allotted on lease basis, the lease rental will be fixed for an initial period of 10 years, with a provision for escalation not exceeding 50% of the initial rent.*

8. As a part of infrastructure development, utilities such as power, water, telephone, etc. need to be provided by the Government. In addition, direct road access to the Ethiopian highway also needs to be provided.

9. One dedicated jetty will be initially required for the facility. This could be built by the company on an open book basis. Throughput fee collected for product movement; will be utilized for recovery of the cost of the project.

10. Infrastructure will be also inc1ude way leave between the terminal and jetty for providing pipeline and vehic1e access.

11. Land development within the boundary of the terminal will be carried out by the company.

12. The company will have a free zone status with exemption from corporate tax, personal tax, duties and other levies, both for men and material utilized for the project and its operations.

13. Government will provide visas, permits, etc. for expatriate staff for the project and for the terminal operations.

14. ENOC will provide management of the Terminal subject to Directives of the Board. For this service ENOC will not charge any service fee, but will be reimbursed actual expenses.

15. ENOC will design, construct, commission, operate and maintain the facility.

16. The terminal will be working as an independent terminal and necessary licenses, permits for operation of the terminal will be provided by the Government.

17. The Government will also ensure no other similar facilities are established during the first 15 years of its operation.

18. Remaining land (land identified for future expansion) will be kept reserved for the exclusive use of the company. If in future the plot so reserved is required for any other activity by the Government; the company will have the first right of refusal.

19. Payment of rental (if it is a lease hold land) will commence from 3 months after commercial operation.

20. Government will provide all marine support facilities including tugs, berthing un-berthing, pilotage and other associated marine vessels support activities.

21. Throughput fee will be categorized into three types;

> *a) Product imported for local consumption/distribution. Standard charges as decided by the Government will apply.*
>
> *b) Transit cargo for Ethiopia and other countries to be delivered by road/rail- Rates as fixed by the Government will apply.*
>
> *c) Terminalling cargoes - products received, stored and exported through marine vessels. A charge of US 25 cents/metric ton will be levied. This is to ensure that the total cost to a trader/strategic storage user is kept competitive compared to other marine locations."*

240. The covering email makes it crystal clear that these were points discussed with the President, not with anyone else. It is not suggested in the email or the note that Mr Boreh was there nor did he recall attending. I find that he was not at the meeting and that, even if the President had other advisers there (such as Mr Moussa), it was the President with whom the discussions were taking place and with whom agreement in principle on points discussed (such as throughput fees) was reached.

241. In his witness statement, the President deals with this meeting and the note of it in an entirely perfunctory and inadequate manner, saying no more than:

> *"I have been shown an email describing a meeting between representatives from ENOC and myself in September 2002. I do not really remember this meeting but it may have been the case that I agreed to meetings whilst the large investors were visiting Djibouti. These courtesy visits are a chance for me to encourage them to invest in Djibouti and they generally last between thirty to forty-five minutes. It is the responsibility of the technical departments and those in charge of the files to negotiate with foreign partners."*

242. On any view, the meeting the note of which I have set out in full above was more than some "*courtesy visit"* and must have lasted a good deal longer than thirty to forty five minutes. No doubt if the President had attended to be cross-examined, it would have been put to him that this paragraph in his witness statement was inadequate and evasive and that, even if he could not remember the meeting before he read the note of it, once he had read it, he must have recalled what was, clearly, an important and detailed meeting, at which, as I have said, he discussed both strategic and commercial matters with ENOC. I do not consider that the President's failure to attend to be cross-examined should enable the Republic to avoid the conclusion that he had this detailed discussion with ENOC and was well able to discuss the detail of the project.

243. Paragraphs 6, 8 and 9 of the note reflect the President's decision to seek private sector finance in relation to the cost of the construction of the jetty and infrastructure, which was the responsibility of the Government. As Mr Kendrick QC submits, in paragraph 6 can be seen the origin of the eventual agreement reached between the Government, ENOC and DP World: DP World paid for the construction of the jetty, which it managed and recouped its investment from the dues and Sheikh Mohammed, the Ruler of Dubai paid for the road links as a gift to Djibouti. Thus, the Republic gained

considerably from proceeding down the private finance route, rather than taking out a loan from the Arab Funds (even assuming such a loan would have been forthcoming), since it received the entire infrastructure from Dubai for no more than an offset against future cash flow.

244. What the note also demonstrates is that no final decision had yet been taken by the President as to whether to lease or to sell the land to the new company. In relation to the shareholding which the Government might take in the new company, what the President is recorded as saying is: "*It is estimated that Govt. of Djibouti may like to have an equity participation of 10 to 15%. This could be in the form of value of plot allotted for the project*". In their written closing submissions, the claimants sought to argue that the words "*it is estimated that"* were inconsistent with an expressed desire to take that level of shareholding. However, the obvious difficulty with that submission is that, if the President wanted to give evidence that he was not telling ENOC what level of shareholding the Government wanted to take, he could and should have said so in his statement and come to be cross-examined about it. It seems to me the most likely explanation of the use of the words *"It is estimated that"* is that no final decision had been taken by the President as to whether to have an equity participation at all. Given that he tied any equity participation to the value of the land, if the decision eventually reached was to lease the land, the Government might not take a shareholding. What he was not saying was that, if the Government took a shareholding, it might be more, but rather he was saying that if it did so, it would be no more than 10 or 15%.

245. In my judgment, although the Republic contends that, if only it had known about Mr Boreh's shareholding, it would have wanted to take a much larger shareholding, up to 40%, this statement of the President's wishes is flatly contrary to that contention. It demonstrates that, in line with the Government's earlier position, at least until late 2001, that it would give away the land for free if an oil company would construct and run a new oil terminal at Doraleh, the Government's main interest was to shut down the old, polluting facilities in the city and have a new oil terminal at Doraleh and the shareholding was a means to that end.

246. I do not accept the Republic's submissions that it could and would have taken a larger shareholding if it had known about Mr Boreh's shareholding. Quite apart from the fact that, as I have found, the President knew from an early stage in 2000 that Mr Boreh was proposing to take a shareholding in the oil terminal and certainly knew that by the time of this meeting in September 2002, the Republic clearly did not have the appetite for taking any larger equity share in the project than the President indicated, which is scarcely surprising since it was a high risk project. The Republic would not have wanted to take the risk of having to make substantial contributions as a shareholder if the project went wrong, as it might have done. Contrary to the picture which Lord Falconer sought to paint, Djibouti was not a rich country, as the defaults on the Arab Funds loans demonstrate and, at the relevant time, still required assistance from the IMF. At a meeting of the Council of Ministers chaired by the President on 19 December 2001, at which the state budget for 2002 was discussed, one of the goals of that budget was said to be: "*Diligence in controlling public spending by limiting expenses to the real revenues of the State"*, reflecting the demands of the IMF.

247. Furthermore, that it was only ever intended to make the modest equity participation which the President indicated, is borne out by what Mr Moussa told Gibson Dunn at their meeting in December 2012: *"the 10% shareholding was symbolic, as the government needed to be represented to avoid attracting criticism from Shell, Total and Exxon Mobil."* The claimants sought to avoid the consequences of that glimpse of the true intention of the President to only take a modest shareholding which the note of the meeting provides by suggesting, not only that the President must have previously discussed with Mr Boreh the matters discussed at the meeting with ENOC, but that the President said what he did about the shareholding the Government might take because Mr Boreh had misled him in those earlier discussions into believing that a 10-15% shareholding for the Government was the best that could be done.

248. Lord Falconer cross-examined Mr Boreh on the basis that he must have had discussions with ENOC between July 2001 and September 2002, that the figure of 10-15% for the Government came out of those discussions and that he had told the President that was the best he could do. Mr Boreh could not remember what discussions he had had with ENOC in that period, but denied emphatically that the figures of 10-15% had come out of that discussion or that he had told the President that was the best he could do:

> *"Q. What discussions had you had with ENOC between July 2001 and September 2002 about the Horizon project?*
>
> *A. There were so many discussions, I cannot remember which, what type of discussion I had with them.*
>
> *Q. Is that "I can't remember" or "I had many discussions but I can't remember the detail of them"?*
>
> *A. Yeah. Maybe I don't -- I had a lot of discussions, that's for sure, but I don't remember exactly what was decided because this came as a -- something quick that came out, but I don't really recall what I have said before, or even what I have said after.*
>
> *Q. Well, there is very little documentation indicating what contact you had with ENOC between July 2001 and September 2002. I put to you that the position was that you did have discussions with them in which the levels of shareholding were discussed. Is that right?*
>
> *A. You know, at this stage there was no level of shareholding discussed, because that was not in any of the agenda or any of the discussion. There was only the willingness of the potential investors, but there was no shares discussed. I don't recall any discussion on that part.*
>
> *Q. And that the figure of 10 to 15% came as a result of discussions between you and ENOC and not anything that the Government of Djibouti itself suggested?*

> *A. I don't agree with you completely.*
>
> *Q. And that you told the President that the best that could be done was 10 to 15%?*
>
> *A. I don't agree completely, I disagree with you.*
>
> *Q. It's right, is it not, that the President would be relying upon you for advice on the terms of any Horizon Terminal deal with ENOC?*
>
> *A. He first relies on himself and he has a lot of advisers, including Moussa, he has a whole department of investments, the President knew what he was doing and he was happy with the 10%.*
>
> *Q. Because you told him that was the best that could be done?*
>
> *A. I didn't tell him anything.*
>
> *Q. Did you give advice as to whether more could be obtained than 10 to 15%?*
>
> *A. I didn't give any advice on this subject, it was his decision.*
>
> *Q. You gave no advice?*
>
> *A. Not on this one, it was his decision."*

249. Lord Falconer went on to put that he must have discussed with the President before the meeting on 19 September 2002 the matters which the President then discussed with ENOC in the meeting. What emerged is that Mr Boreh obviously had had some discussions with the President, but that he could not recall the detail, and it seemed to me highly unlikely that the President had had a detailed discussion with Mr Boreh of all the matters referred to in the note of the meeting. As Mr Boreh pointed out, the President had other advisers, including Mr Moussa, and as is clear from the materials relating to the discussions with the Arab Funds, there was no shortage of people providing him with advice other than Mr Boreh, such as Mr El Hag and Mr Douale. Furthermore, the submission that there must have been prior discussions between Mr Boreh and the President faces the obvious difficulty that the President does not even begin to suggest that in his witness statement. Indeed, as I have already said, in effect he avoids dealing with the 19 September 2002 meeting at all. In those circumstances, it seems to me that it is simply not open to the claimants to run a case that what the President said to ENOC at the 19 September 2002 meeting was somehow fed to him by Mr Boreh, but even if that case were open to them, I reject it.

250. In closing submissions, Lord Falconer was critical of what he described as: *"Mr Boreh has declined to give any account of discussions he had with ENOC between July 2001 and September 2002 that resulted in his being allocated 20%"*, submitting that it was implausible that there were no such discussions and that the Court should infer from Mr Boreh's failure to reveal those discussions that a truthful account of them would confirm that he appropriated shares that should have gone to the

Republic. I did not consider this a fair criticism of Mr Boreh, who can be forgiven for not recalling any detail of discussions with ENOC thirteen to fourteen years ago, where no documents have survived which would assist his memory. I decline to draw the inference which the claimants invite me to draw. It seems to me far more likely that, as Mr Boreh said, whilst he had indicated to ENOC that he would take a shareholding, at the time of the meeting, the precise amount of any shareholding to be taken by the investors had not been determined. The probability is that the size of his shareholding was discussed between him and ENOC later, at some point before the agenda for the first shareholders meeting on 1 December 2002 was produced by ENOC on 28 November 2002.

251. The conclusion that the shareholdings had not been fixed as at September 2002 is also consistent with the first two paragraphs of the note of the meeting, particularly the statement: *"ENOC will identify potential partners and will finalize the equity participation."* There is simply no basis for supposing that ENOC was misleading the President about what it intended to do or that it was party to some conspiracy with Mr Boreh to conceal his shareholding from the Republic. In the circumstances, it is inherently unlikely that there had been any discussion between ENOC and Mr Boreh before the meeting with the President of what extent of shareholding the Republic might take.

252. In their closing submissions, the claimants contended that the reference in paragraph 1 of the note of the meeting of 19 September 2002: *"Additional shareholders will be brought in based on discussions with multi-national companies and other traders"* was not intended to be a reference to Mr Boreh whom they categorised as a cigarette trader. They contended that the traders that the parties (i.e. ENOC and the President) would have had in mind were oil traders who would use the facilities, such as other oil companies. I do not accept that submission. Whilst it is true that other oil companies, such as Independent Petroleum Group ("IPG") the Kuwaiti oil company, were interested in investing and did, indeed, invest, it is clear that, as I have found, ENOC was aware that Mr Boreh wanted to invest and was encouraged by that. His business interests by now extended beyond cigarette trading, including his substantial investment in DDP, and he would have been seen as exactly the sort of dynamic local businessman who had the ear of the President and could make things happen whom ENOC would have wanted as an investment partner. Since, as I have also found, by this stage the President was well aware that Mr Boreh intended to invest in Horizon, it seems to me that both ENOC and the President had in mind that the *"other traders"* would include Mr Boreh.

253. The submission that Mr Boreh dishonestly misled the President into believing that 10-15% was *"the best that could be done"* and thereby induced the President into telling ENOC that the Republic wanted a 10-15% shareholding, faces considerable difficulty. Whilst it is true that in his witness statement the President states: *"Mr Boreh told me that a 10% shareholding was "the best that he could do" for Djibouti. He said that Djibouti did not have to make any additional investment"*, that comes at a point in his statement after he has dealt with the agenda and delegation of powers for the meeting with ENOC on 1 December 2002 (referred to below) and Mr Boreh's appointment as President of the Board of the DPFZA in 2003, suggesting that, if this was said at all, it was at a later stage than the September 2002 meeting. The statement is in no sense said to have induced what the President said at the meeting with ENOC in September

2002, which is not surprising, since the President does not give evidence about what he said at that meeting at all, let alone suggest that what he said was induced by some misrepresentation by Mr Boreh. On that ground alone, I am not prepared to accept the claimants' submission, since there is absolutely no evidential foundation for it.

254. Furthermore, I do not consider that the President's evidence about what Mr Boreh said to him is to be believed. I agree with Mr Kendrick QC that it is contrived, appearing to be designed to blame Mr Boreh for the President's own decision that the Republic should only take a 10% shareholding and to suggest that he wanted more shares. No doubt now that the Horizon terminal has proved extremely profitable, the Republic wishes that it had taken a 40% shareholding but that is not what the President wanted or what he said he wanted at the time in 2002 or 2003. The only record of the President ever telling anyone contemporaneously what shareholding the Republic wanted is the 10-15% he referred to at the September 2002 meeting. In any event, the second sentence of this section of the President's statement: *"He said that Djibouti did not have to make any additional investment"* is telling, since that suggests that Mr Boreh told the President that the Republic did not have to invest more than 10-15% equity, which then begs the question as to what the President means by *"the best"*. Does he in fact mean the biggest shareholding or the safest as Mr Kendrick QC put it? Since the President did not come to be cross-examined about this, I do not consider that the Court should simply assume in the claimants' favour that this passage in his evidence has anything to do with what he said at the meeting on 19 September 2002.

255. There is also the question of the inherent probabilities. The claimants' case is that Mr Boreh had formulated his fraudulent plan to take a secret shareholding in Horizon as early as July 2001, when the July 2001 MOU was signed. I have already dealt with the implausibility of that case when making my earlier findings in relation to the July 2001 MOU, but in summary, it makes no sense in circumstances where the alleged concealment has to be predicated on Mr Boreh thinking that the President would object to his having a shareholding in Horizon. However, there would be no reason for the President to have such an objection (let alone for Mr Boreh to think that he had) in circumstances where, as I have also found, the President was well aware of Mr Boreh's investment in DDP and raised no objection to that. Given that Mr Boreh was not a government employee, there could have been no objection in principle to his private investment and no motive for concealing it. Indeed, given that the intention of Mr Boreh to invest in the terminal would have encouraged ENOC to invest itself, the President would surely have been pleased since this all helped to get the Doraleh oil terminal, which he regarded as so critical, constructed.

256. The claimants' case that what the President said about the Republic's shareholding at the September 2002 meeting was induced by a misrepresentation by Mr Boreh that the most that ENOC would allow the Republic to have by way of shareholding was 10-15%, also entails Mr Boreh telling a different story to each of ENOC and the President. As Lord Falconer put it in cross-examination (albeit in the context of the meeting with the President and Mr Sultan in December 2002, to which I will return later, but the point would be equally applicable to the position at the time of the meeting in September 2002):

> *"Q. You told one of them one thing and you told the other another. You were the person who in effect set this up?*

A. I don't agree, my Lord.

Q. You told the President that only 10% was available?

A. I don't agree, my Lord.

Q. And you told Mr Sultan that the President was happy with that?

A. I don't agree, my Lord.

Q. And you never told the President the amount that you were taking?

A. No. The President knew how much I was investing."

257. On any view, telling different things to each of ENOC and the President would have been an incredibly high risk strategy, particularly in the event that (as happened in September 2002) they had a meeting at which he was not present. How could Mr Boreh ever have thought that ENOC would not tell the Government who its partners were? On this hypothesis, if the truth came out (as it almost certainly would) and they discovered he had told each of them something different, he would be in serious trouble. Furthermore, why would he take such an incredible risk? As I have already said, this whole case is predicated upon the President objecting to Mr Boreh's investment in Horizon if he learnt about it. Quite apart from the fact that, as I have held, the President did know about Mr Boreh's proposed investment in 2000 or early 2001 and raised no objection to it, even if he had not known about it, why would he have objected, given that he was already aware of and did not object to Mr Boreh's substantial investment in DDP and the private investment by Mr Boreh in Horizon clearly encouraged ENOC to invest?

258. In my judgment, what is far more inherently probable is that the President opted for the 10-15% shareholding, not because of anything which Mr Boreh had told him, but because it made perfect sense to take only this symbolic shareholding for the Republic. It meant that ENOC would commit to building the much needed oil terminal without the Republic having to make any financial commitment. This would have been attractive to the Republic given that it was, as I have found, short of money.

259. There is an issue as to whether PAID could have provided the funds so as to justify a larger shareholding. Whilst it is correct that, as I have held, PAID had reserves, as at the end of 2002, those reserves would not have been sufficient to fund the entire Horizon project. Furthermore, PAID was an essential source of income for the Government, which borrowed against its future income from PAID, and also drew excessive advances on its future dividend stream, which then had to be compensated out of the reserves, thereby depleting the reserves.

260. This practice continued right the way through until at least 2006, as is apparent from a report prepared by Mr Guido Heremans, who was successively the chief financial

officer and the chief executive officer of PAID, on 17 November 2006 indicating that the pre-concession reserves were close to running out:

> *"As soon as I took the position of CFO in Sept. 2004, I found out that there was never a compensation done between the dividend and the so called "advances against dividend". Furthermore the dividends announced to the board were calculated on a wrong basis at amounts largely exceeding the reality. After having rectified the calculations and having identified and documented all expenses advanced to the government, we now had a clean basis to calculate Dubai's profit share (plus USD 1.383.000) and the government's dividends (less USD 2.907.000).*
>
> *The above anomalies resulted in an overall overpayment of dividends of USD 6.650.000 for the period 2000 up to 2003. During the board meeting held at Oct. 28th 2004 a resolution was drafted to compensate the overpayments against the government's free reserves. [i. e. the accounting reserves held in the balance sheet and constituted out of the carried forward results prior DP World's involvement]*
>
> *Although technically the accounts were clean as from Jan 1st 2004, and the message was made clear towards the Government's Representative and the President of the DPFZA, the systematically over estimating of dividends and the "advances paid against dividends" are continuing until today.*
>
> ….
>
> *During the board meeting of Aug.27th 2006 a second compensation was agreed. This time the overpayments for the years 2004 and 2005 reached the amount of USD 3.898.000. After the second compensation the free reserves of the PAID are reduced to USD 4.398.000 only.*
>
> ***The "advances against dividend" for the current year 2006 are already USD 3.000.000!!! In other words to say it clearly; the show is almost over!"***

261. In any event, in so far as PAID funds were theoretically available for use, as Mr Hawker said in re-examination:

> *"Q. My general question to you is: is it the case there were lots of funds available from these dividends for lots of projects? What was the position on the ground?*
>
> *A. The position on the ground was that the funds could be available but they couldn't do all the -- they obviously couldn't do all of the projects that were going to be coming up, it had to*

> *be prioritised somewhere along the line and an allocation made."*

It was hoped, when investment in the Horizon project was being considered by the President in late 2002, that the Horizon terminal was only the first stage of an ambitious project at Doraleh which would culminate in the construction of the DCT for which the PAID reserves were needed. If they had been spent on investment in Horizon, they would not be available for the DCT.

262. Even if the PAID reserves could in theory have been spent on investment in Horizon, I agree with Mr Kendrick QC that the claimants would still have to show that the President would have wanted to use the PAID reserves to invest in Horizon. It is striking that, in neither of his witness statements does the President say that he would have used the PAID reserves to finance in part the purchase of an equity participation in Horizon. The closest he comes to it is in a passage in his second statement dealing with the Republic's finances generally where he says: *"Furthermore, PAID had substantial cash reserves at this time which might have been used, and we had always been able to secure financing for infrastructure projects from the Arab Funds."* This falls a long way short of establishing that he would ever have used PAID reserves to finance a larger shareholding than the 10-15% he intimated to ENOC at the meeting on 19 September 2002.

263. As at the end of 2002, the total PAID reserves were only U.S. $11.5 million and the estimated cost of constructing the terminal, (as opposed to the jetty and infrastructure), as set out in an annex to the notes of the meeting with the Arab Funds in February 2002, was U.S. $41 million. I consider it highly unlikely that the President would have wanted to deplete the reserves by taking a larger investment in the terminal than the one he intimated. The Republic had never been in the business of operating an oil terminal, as the old tank facilities in the city were owned and operated by the oil majors. In my judgment, the President, who knew full well at the time of the meeting in September 2002, that Mr Boreh was proposing to make a private investment in Horizon, never wanted the Republic to take any part of Mr Boreh's investment, whether by use of the PAID reserves or otherwise. He was content to take the small symbolic share he intimated to ENOC, exactly as Mr Moussa described the shareholding: *"the 10% shareholding was symbolic, as the government needed to be represented to avoid attracting criticism from Shell, Total and Exxon Mobil."*

The first shareholders meeting on 1 December 2002

264. Following that meeting with the President on 19 September 2002, Doraleh Terminals Limited (the Bahamian holding company which became HDHL) was incorporated. The directors were Hussain Sultan and Yusr Sultan. The First Resolution of the Directors dated 2 October 2002 resolved to commence business and to issue 50,000 shares to ENOC. Thereafter, there was to be what was described by Mr Jerome Gelineau of ENOC in an email to, amongst others, Mr Boreh, on 28 November 2002, as "the first shareholders' meeting" of Djibouti Tank Terminal Limited (which became HDTL), to be held on 1 December 2002 in Dubai. As Mr Boreh said in his witness statement, this description was premature, since shareholder percentages had not yet been fixed. The email (which was also sent to IPG, but not separately to the Government) enclosed the agenda for the meeting. The claimants suggested that because the agenda was sent to Mr Boreh, but not to the Government, this

demonstrated that ENOC regarded Mr Boreh as the representative of the Government. In my judgment, that overstates the position. All that sending the agenda to Mr Boreh, but not separately to the Government, demonstrates is that ENOC regarded Mr Boreh as a convenient conduit through which to pass on information to the Government, as indeed he was.

265. The agenda included the following items relevant for present purposes:

> *"1. Establishment of DTTL (Djibouti Tank Terminal Ltd) and granting of free zone status and of tax exemption on Corporate and Personnel income and on equipment imported.* [The agenda said this was a matter for Boreh International and ENOC to be completed by 10 December 2002]
>
> *2. MOU to be signed between ENOC (Doraleh TerminaIs Ltd) and the Government of Djibouti.*
>
> *3. Delineation and pre-evaluation of land (16 Ha) inc1uding a sale agreement to DTTL and an exc1usivity right of use of the jetty to be built.*
>
> *4. Shareholders*
>
> *a. Govt of Djibouti* *15%*
>
> *b. Boreh International* *20%*
>
> *c. ENOC* *55%*
>
> *d. IPG* *10%*
>
> *6. Jetty. Government of Djibouti to own the jetty but design and management according to ENOC specifications.*
>
> *7. Jetty royalty limited to 1.50 USD/MT on product quantity unloaded in the terminal.*
>
> *8. Other authorization, permit, etc ... to be obtained by the end of January 03.*
>
> *9. Market survey, Financial and technical feasibility studies (EPC).*
>
> *10. Financing from local/international banks*
>
> *13. Terminal expected to be operational on 1 July 04"*

266. The agenda stated that items 2, 3 and 4 were to be completed by 15 December 2002 and said that 2 and 3 were for Boreh International and 4 was for ENOC. No date was against item 6 but this was said to be for ENOC. Item 7 was to be completed by 15 January 2003 and item 8 by 31 January 2003, and these were both said to be for Boreh International and ENOC. Item 9 was to be completed by 15 January 2003 and item

10, obtaining finance, which was for ENOC, by 31 January 2003. There was thus a tight and ambitious timetable with the terminal operational in just over eighteen months, which of course proved unrealistic, but demonstrates that there was a sense of urgency at the time. Although certain items were said to be for Boreh International, it is self-evident that many of these (such as item 3, delineation and valuation of land to be sold to the terminal company, item 7 the limit on the jetty royalty and item 8 the obtaining of necessary permits) could only be achieved by Mr Boreh consulting with the Government and ENOC must have known that this is what would happen. Equally, although item 2, the signing of the MOU between the Government and ENOC, was said to be for Boreh International, clearly what ENOC had in mind was that Mr Boreh would arrange the necessary meeting for signature. This is all a further indication that ENOC regarded Mr Boreh as a go-between with the Government, not that it thought he had authority to determine such matters for the Government. In any event, as I have held, he had no such authority; there was no wide oral mandate as alleged by the claimants.

267. So far as the proposed shareholdings are concerned, the 15% for the Government is obviously the upper limit of the range which the President had told ENOC, at the meeting on 19 September 2002, the Government might like to take. It is evident from the reference to IPG taking 10% that ENOC had been in discussion with IPG and this figure had, at least provisionally, been agreed. Equally, the fact that the shareholding for Boreh International is stated to be 20% means there must have been some discussion between ENOC and Mr Boreh about this level of shareholding before the end of November 2002. It is extremely unlikely that ENOC would have arrived at this figure unilaterally.

268. Unsurprisingly, given that there was no document prior to the agenda to assist his recollection, Mr Boreh could not recall what discussions he had with ENOC before the meeting on 1 December 2002. At one point in their written closing submissions, the claimants say that his evidence was that he had no discussions with ENOC about the shareholding in advance of December 2002 and, at another point, they say that he declined to give evidence about the subject. I have already said at [250] above that I regard that latter criticism as unfair and equally, I consider the suggestion that his evidence was that he had no discussions about his shareholding with ENOC a complete mischaracterisation of his evidence. On any fair reading of his evidence in cross-examination some of which I have quoted at [248] above, he could not recall the discussions he had. He was certainly not suggesting there had been no discussions.

269. As I have said, it seems to me that the likelihood is that, at some stage between the meeting which ENOC had with the President on 19 September 2002 and the production of the agenda by Mr Gelineau on 28 November 2002, Mr Boreh had a discussion with ENOC about the extent of shareholding which Boreh International would take in Horizon and that was provisionally agreed at 20%.

270. On 30 November 2002, the President signed a Delegation of Powers (Power of Attorney) to Mr Boreh in these terms (in translation from the French):

> *"I grant authority to Mr ABDOURAHAMAN MOHAMED MAHAMOUD BOREH, to represent the Government of the Republic of Djibouti at the 1st meeting of shareholders of the*

> *Company "Djibouti Tank Terminal Limited" (DTTL) which will be held on 1 December 2002 in DUBAI (U.A.E.)."*

271. As is apparent from its terms, the Power of Attorney is limited in its scope and only authorises Mr Boreh to represent the Republic at the meeting on 1 December 2002. Contrary to the claimant's submission in closing that this was: *"consistent with, and to evidence, his existing delegation of authority"*, there was, as I have held, no wide oral mandate or existing delegation of authority and the limited Power of Attorney is completely inconsistent with there being such existing wide delegation, as if there were, it would have been unnecessary.

272. In his witness statement Mr Boreh said that he was going to be in Dubai at the time of the meeting and he thought the President gave him the Power of Attorney because it was convenient, rather than having anyone fly out from Djibouti. Mr Boreh went on to say that he was sure that the President saw the agenda (and so knew and approved his 20% shareholding), as the President would not have given Mr Boreh the Power of Attorney without seeing what was to be discussed at the meeting. If he was in Dubai when he received the agenda, he would have asked one of his employees in Djibouti such as Mr Mehta to print it out and deliver it to the Presidential Palace.

273. The President's evidence about this was in his first statement, where he says:

> *"I am told that Mr Boreh claims that he discussed with me the agenda … He did not do this. I had not seen this document until Gibson Dunn showed it to me. I did not know that he was intending to take a 20% shareholding in the company when I gave him a delegation of power…for attending a meeting with ENOC which took place on 1 December 2002…At no point at that time had anyone told me Mr Boreh would be a shareholder of this project. I only authorised Mr Boreh to represent the interests of the State alone, and no other interest."*

274. In cross-examination, Lord Falconer put to Mr Boreh that his evidence that the President gave him the Power of Attorney because he was going to be in Dubai and it was convenient for him to attend, was disingenuous because he knew that he was the person being invited by ENOC to attend the meeting. Mr Boreh refuted that suggestion in strong terms:

> *"No, ENOC saw me as a major partner, and someone who have a contact with the President and who is a go-between between ENOC and myself in terms of Horizon and the President of Djibouti. But you know, the way you are presenting this, I don't know, the way I understand is you are presenting as if the President didn't know anything or he didn't have the capacity to understand anything, or the whole Government was just sitting there doing nothing. That's not the case. They run a country. That's why I'm here. They know everything."*

275. Given the nature of the President's regime, this evidence has the ring of truth to it and I accept it. The allegation that Mr Boreh was being disingenuous is repeated in the

claimants' closing submissions, but is not improved by the repetition. It is based upon the premise that Mr Boreh had some pre-existing delegation of authority to act for the Government which he clearly did not, nor does the President suggest that he did in his evidence.

276. Lord Falconer then challenged Mr Boreh's evidence about an employee taking a copy of the agenda to the Presidential Palace, pointing out that no fax or email had been disclosed from Mr Boreh to Mr Mehta or anyone else, enclosing the email. Whilst Mr Boreh could not explain that, he was absolutely firm that he had discussed the agenda with the President before the President gave him the Power of Attorney. If Mr Boreh was in Dubai, the discussion of the agenda would have been over the telephone. The claimants' position as explained by Lord Falconer in cross-examination and repeated in closing, is that there probably was some discussion between Mr Boreh and the President but not by reference to the agenda, which the President never saw and that there certainly was no discussion of Mr Boreh's 20% shareholding, about which the President was not aware.

277. In my judgment, it is inconceivable that the President would have given Mr Boreh the Power of Attorney for the meeting without seeing the agenda for the meeting and discussing it with him. After all, the President had had a meeting with ENOC on 19 September 2002, at which strategic and commercial matters had been discussed in detail, so the President was clearly interested and involved in the project. He would have wanted to know what was being discussed at the meeting, to see how it tied in with what he had discussed with ENOC in September and in order to brief Mr Boreh as to what he, the President, wanted to achieve and ensure that what Mr Boreh discussed or agreed at the meeting was in accordance with the President's objectives.

278. The claimants' suggestion that there was a discussion, but not by reference to the agenda is implausible. It seems to me that, once the President asked what was going to be discussed at the meeting, Mr Boreh would have had to say there was an agenda and to disclose it. The idea that they could have discussed what was going to be raised at the meeting without it emerging that there was a written agenda is fanciful and, once the President knew there was an agenda, as I have said, it is inconceivable that he would have given Mr Boreh a Power of Attorney without seeing the agenda and discussing it with him.

279. A further problem with the claimants' case is that it is not supported by any evidence. The President does not say in his witness statement that he had a discussion with Mr Boreh about what was to be raised at the shareholders meeting but without having seen the agenda. He simply denies having seen the agenda and states blandly that he gave Mr Boreh the Power of Attorney. The impression he is no doubt seeking to create is that he left it all to Mr Boreh, but that is implausible. Given the extent to which the President was involved with the detail at the meeting in September 2002, if he was going to delegate power to Mr Boreh, he would surely have wanted to know what was going to be discussed.

280. As for Lord Falconer's point that there is no email or fax from Mr Boreh sending the agenda to Djibouti, there is equally no email or fax from the President's Office to Mr Boreh enclosing the Power of Attorney or from the President's Office to Mr Hussain Sultan enclosing the Power of Attorney. Yet, in both the first draft minutes of the meeting and the approved minutes, Mr Sultan is recorded as having: "*acknowledged*

receipt of the proxy from the government of Djibouti authorizing Mr. A. Boreh to represent it." He must have received it either from Mr Boreh (who, if he was in Dubai when the Power of Attorney was signed, would have had to be sent it by the President's Office) or direct from the President's Office by email or fax.

281. It seems to me that there are two possible explanations. The first is that, if Mr Boreh was in Dubai when the agenda was sent to him and the Power of Attorney was signed by the President, the emails or faxes by which Mr Boreh sent the agenda to his staff in Djibouti and by which Mr Boreh received the Power of Attorney from the President's Office, are examples of documents which have been mislaid and which are not available after such an extensive period of time. There are plenty of other examples of documents missing from the chronological sequence. The other possibility, which may be more likely, is that Mr Boreh is either mistaken in his recollection (which was not in any sense firm) that he was in Dubai when he received the agenda, rather than Djibouti, or that, whether in Dubai when he received it, either way he took it to the President's Office and their discussion was face to face, followed by the President giving him the Power of Attorney.

282. However, whatever the explanation for why there is no written communication from Mr Boreh to his staff enclosing the agenda or from the President's Office to either Mr Boreh or Mr Sultan enclosing the Power of Attorney, I am quite satisfied that the President did see the agenda and discuss it with Mr Boreh, prior to signing the Power of Attorney. Once that conclusion is reached, it must inevitably follow that the President saw that Mr Boreh was taking a 20% shareholding. Either he did not discuss it further with Mr Boreh because he did not need to as it accorded with what he knew already, that Mr Boreh was going to make a substantial personal investment, or they had a discussion and the President agreed to Mr Boreh taking that level of shareholding. Either way, the President knew about the 20% shareholding when he saw the agenda and before he gave Mr Boreh the Power of Attorney and did not object to it. As Mr Kendrick QC rightly submits, at the time, the interests of Mr Boreh as a private investor and the Republic as a public investor were aligned. The President had decided that he wanted no more than 10-15% for the Republic and it is striking that his reaction to seeing what shareholding Mr Boreh was taking was not to ask for a larger shareholding for the Republic, as is contended for now, many years later. The proper inference to be drawn and I draw it, is that, at the time, the President was quite happy for Mr Boreh to invest, since the involvement of a dynamic local businessman in the project would undoubtedly encourage ENOC to proceed with the project, as indeed it seems to have done.

283. The meeting took place on 1 December 2002. Apart from Mr Boreh, (recorded in the minutes as representing both Boreh International and the Republic, by proxy) Mr Hussain Sultan, Mr Yusr Sultan, Mr Karim and Mr Gelineau were present from ENOC, together with two representatives of IPG. After the meeting Mr Gelineau produced a draft of the minutes which he sent on 9 December 2002 to Mr Sultan and other ENOC personnel, to IPG and to Mr Boreh (but not direct to the Government) asking for their comments as soon as possible. Under Item 4 Shareholders, that draft recorded as follows:

> *"H. Sultan mentioned that we may have to reserve shares for Majors, the Ethiopian government and DPI.*

> *W. Hadeed mentioned that IPG would like to have more shares as well. He also mentioned that IPG is studying a pipeline from Djibouti to Awash-city (where there is a 120 km3 terminal presently supplied by trucks from Djibouti) in Ethiopia and that eventually it would become a major user of the terminal for its distribution to Ethiopia. He also mentioned that IPG managed to obtain a green light for their pipeline project from the Ethiopian government.*
>
> *Provisionally shares will be attributed as follows:*
>
> *-Djiboutian interest 35%*
>
> *-ENOC 50%*
>
> *-IPG 15%*
>
> *By the 25th Dec 2002 ENOC will seek the answers from the different Majors potentially interested in the project. In case interest in the offer is declined, Djiboutian interests and IPG will each receive an additional 5% from ENOC shares and the definitive breakdown of shares will be as follows:*
>
> *-Djiboutian interest: 40%*
>
> *-ENOC :40%*
>
> *-IPG :20%"*

284. Lord Falconer put to Mr Boreh in cross-examination that because, by referring to *"Djiboutian interest"*, Mr Gelineau treated the Republic's and his interests as one block (which Mr Boreh accepted), ENOC was utterly indifferent as to whether it was Boreh International or the Government which got the 40% shareholding and was willing to part with the 40% to Djiboutian interests generally, in other words it would have given a 40% shareholding to the Government. Mr Boreh refuted that suggestion, saying in answer to the question that ENOC could not have cared less whether the Djibouti investor was public or private:

> *"They cared a lot, because they cared whether Djibouti will be able to put the shares on the table, that was very important for them. They needed a partner who could pay the cash calls, and they knew Djibouti didn't have the money at that time. It was a normal knowledge that everybody knew about the financial situation of Djibouti in 2002."*

285. I consider that on this point Mr Boreh was right. ENOC wanted paying partners who could pay the cash calls, whereas the Republic was not going to put up cash for its shares but provide the land. This is reflected in Mr Gelineau's email to Mr Boreh slightly later, in January 2003, expressing appreciation for Mr Boreh having taken a 5% shareholding in Essense because it: *"increased the cash brought by the paying shareholders from 85% to 90%"*. In the circumstances, I very much doubt whether

ENOC would have ever been prepared to agree to the Republic having a 35% or 40% shareholding in Horizon.

286. Subsequently, in the final approved minutes which Mr Gelineau produced on 24 December 2002 *"Djiboutian interest 35%"* is corrected to *"Government of Djibouti: 15% , BIL: 20%"* and *"Djiboutian interest 40%"* is corrected to *"Government of Djibouti: 15%, BIL: 25%"*. There is no document emanating from Mr Boreh after the first draft was produced in which he commented on the minutes or asked for that correction to be made. Mr Boreh's evidence in cross-examination was that he did not comment on the first draft minutes and that he did not suggest the change to the reference to *"Djiboutian interest"*. In their closing submissions, the claimants refer to an internal ENOC email of 18 December 2002 from "Dianne" to Mr Gelineau saying that Mr Hussain Sultan was quite happy with the draft minutes. That email was not put to Mr Boreh, but they submit that it is likely that it was Mr Boreh who asked for the change. That does not necessarily follow, given the number of people within ENOC to whom the draft minutes were sent for comment and I see no reason not to accept Mr Boreh's evidence that he did not ask for the change, although at the end of the day I am not sure it matters much.

287. As regards other shareholders, it is clear from the minutes which I quoted above that IPG was provisionally taking 10% but was keen to take as large a shareholding as possible. Mr Hadeed explained that IPG had the go ahead on a pipeline project linking Djibouti to Ethiopia, so that it would become a major user of the terminal. However, despite IPG's enthusiasm, ENOC was evidently not keen that IPG should have too large a shareholding. Although ultimately this went up to 20%, ENOC was not prepared for IPG to be on anything like equal footing with ENOC. This was no doubt for sound commercial reasons, that ENOC did not want IPG to be in a position to dictate how the terminal was run.

288. Mr Hussain is recorded as saying that shares might have to be reserved for the oil majors, DP World and the Ethiopian government (evidently a reference to EPE). In the event the oil majors were not interested and appropriate terms could not be agreed with EPE. I will deal with the negotiations with those other potential shareholders later in the judgment. So far as I can tell DP World never pursued any interest in a shareholding.

289. The minutes of the meeting otherwise follow the agenda. Under item 2: *"MOU to be signed between ENOC and the Government of Djibouti"*, Mr Gelineau is recorded as saying that to speed things up ENOC had set up an offshore company, Doraleh Terminals Limited (what became HDHL), to hold the interests of ENOC in the project. It is then said that, after some discussion: *"it was agreed that the shareholders will use Doraleh Tank Terminal Ltd vehicle as the counterpart for all documents to be signed with the Government of Djibouti but that ultimately the commercial name of the terminal will be Djibouti Tank Terminal, as the name Djibouti is better known to the oil/shipping industry than the name Doraleh. The MOU will be amended to reflect this change and handed over to A. Boreh for further forwarding to the Government of Djibouti…"* In other words, the use of HDHL to hold the shares of the private shareholders other than the Government was not some device dreamt up by Mr Boreh to conceal his shareholding but was agreed between the private shareholders, including IPG.

290. Under item 3: *"Delineation and pre-evaluation of the land & exclusivity right on the jetty"*, the minutes record that there was a discussion about the amount of land required for the terminal. Mr Gelineau produced a plan which showed that 16 hectares was required, but after discussion it was decided to go for 20 hectares because of expansion plans. Mr Boreh said that the Government's contribution to the equity would be in the form of the land. After some discussion, the value of the land was estimated as between U.S. $8 and 10 per square metre, which was agreed to be: *"a good bargain as it represents a onetime down payment."*

291. Under item 10: *"Financing"* the minutes state:

> *"The shareholders agreed that the first phase of the project will be based on maximum amount of USD 25.0 millions and on a 70/30 debt/equity ratio if achievable. ln that respect the total equity would be USD 7.5 millions. The shareholders agree to call 10% of the equity by the 31st of Dec 2002."*

Discussions between Mr Boreh and the President in December 2002

292. As I have said, Mr Gelineau circulated the first draft of the minutes of the meeting on 9 December 2002 and the legal department of ENOC was drafting a MOU, which was to be signed during a visit of an ENOC delegation to Djibouti, which was fixed for 19 to 21 December 2002. Mr Boreh's evidence in his witness statement was that, after the shareholders' meeting, but before the delegation arrived, he discussed with the President on a number of occasions the issues raised by the shareholders meeting and the draft MOU. He reiterated this in cross-examination, but it was not clear whether he was saying he could recall showing the draft minutes to the President. The relevant evidence was as follows:

> *"Q…you didn't send those minutes when you got them to the President, did you?*
>
> *A. I don't recall, but after the 1 December meeting, I did travel to Djibouti, I went there to give him the feedback of what happened in that meeting, because he gave me a power of attorney, so I went back, I gave him those minutes of the meeting, where it shows clearly that I was getting shares, and I've also expressed my concern that the other shareholders found the price value 8 to 10 as being a bargain and I have also suggested to the President maybe you could get more, so I did report to the President that, you know, that's what was said in that meeting, and gave him the minutes.*
>
> *Q. Sorry, did you say you did send him the minutes?*
>
> *A. I went there, I went to Djibouti --*
>
> *Q. You went to Djibouti?*

> *A. Yes, and gave him a whole briefing on how the minute went.*
>
> *Q. You didn't tell him about your prospective interest?*
>
> *A. I did tell him about my prospective partnership in the company, yes.*
>
> *Q. And he had no idea that you were taking a share?*
>
> *A. He had a fantastic idea that I was taking a share, and if he's not been telling you, maybe he is not telling you everything."*

293. I consider that, on a fair reading of that evidence, he was confusing having given the President a full debriefing on the meeting and having handed over to him the draft minutes. I rather doubt whether he gave the President the draft minutes, but it seems to me highly likely that he did give the President a full debriefing about the meeting. The claimants challenge the suggestion that there was a full debriefing, pointing out that no mention was made of this in Mr Boreh's pleaded case. Of course there is force in this point, but since there was no mention in the pleadings at all of his attending the shareholders meeting on 1 December 2002 with a Power of Attorney to represent the Government, and yet he undoubtedly did attend that meeting in that capacity, I prefer to consider the inherent probabilities rather than place too much emphasis on what was or was not pleaded. It is true that there have been changes in his pleaded case, but the same is equally true of the claimants' pleaded case.

294. Given that, as I have found, Mr Boreh discussed the agenda for the first shareholders meeting with the President and the President had given him a Power of Attorney to represent the Republic at that meeting, it seems to me the overwhelming probability is that the President would have wanted to know exactly what had been discussed and resolved at the meeting. Even if he did not ask to see the minutes, he would have wanted to have a full discussion about the meeting with Mr Boreh. The President's attempt in his witness statement to give the impression that he had no involvement in any of the discussions leading up to the signature of the two MOUs is not credible. I find that Mr Boreh did go to Djibouti after the shareholders meeting to discuss in detail with the President what had been discussed at the meeting.

295. Mr Boreh's evidence was that they discussed the cost of the project and the Republic's cost exposure, which the President was not happy about. If all went well the project was estimated to cost U.S. $25 million and only 30% of that would have to come from the shareholders' equity, but if finance was not found or if the project cost more than U.S. $ 25 million, a 15% share might expose the Republic to calls of U.S. $3.75 million. Lord Falconer made the perfectly valid point that, if finance had not been obtained by ENOC the project would not have gone ahead, but that is not a certainty and, as a matter of common sense in a venture of this kind, the larger the shareholding, the larger the exposure to cash calls.

296. Furthermore, the estimate of U.S. $25 million as the cost of construction might well prove an underestimate (as indeed it did). I suspect that, if the President had attended Court to be cross-examined, he would have had to accept that the U.S. $25 million

estimate was somewhat optimistic, given that a figure of U.S. $41 million as the cost of construction of the terminal had been given to the Arab Funds earlier in the year. That may explain why he was worried about cost exposure. Of course, the Government might theoretically have obtained finance to cover that exposure, but it had no experience of doing so. As Mr Boreh said: *"…we did not have finance and the Government was not ready to go and borrow money from outside banks and they have never done it before, they only deal with institutional financiers."*

297. A 10% shareholding would lead to exposure of U.S. $2.5 million on the U.S. $25 million estimate which, on the figures for the value of the land discussed at the shareholders' meeting, would exceed the value of the land which it was intended would be the Republic's contribution to the equity. However, Mr Boreh's evidence was that, since the shareholders had thought that the price of U.S. $ 8-10 per square metre was a good deal, he believed that the price could be pushed up, so that the value of 200 hectares (200,000 square metres) would cover the U.S. $2.5 million exposure. He recommended to the President that they should seek a higher price. Given that a higher price of U.S. $12 per square metre had been agreed by the time that the MOUs were signed on 21 December 2002 and the impetus for a price increase in all probability came from the Republic rather than ENOC, I see no reason not to accept that evidence.

298. It was also Mr Boreh's evidence that, in those circumstances, it was the President who decided that the Republic's shareholding should be limited to 10%. Again, it seems to me that it is overwhelmingly likely that it was the President who made that decision. Given that Mr Moussa signed the second MOU on 21 December 2002, which referred to the Republic's shareholding as 10%, it seems to me inconceivable that, as Minister of Presidential Affairs, he would have signed that MOU without checking with the President first that 10% rather than 15% or some other figure was the amount of the shareholding that the President wanted for the Republic. I will return to the signature of the MOUs a little later, but in the present context simply find that the signature of that MOU with the 10% figure in it is compelling evidence that it was the President who decided on 10% and that he was content with that.

299. Lord Falconer suggested to Mr Boreh that it was at this stage, (in other words at the time that the decision to take 10% rather than 15% was made in December 2002), that he had told the President that 10-15% was the best that could be done for the Republic. Mr Boreh denied this, saying: *"I did not say to the President the way you are putting it. The President have decided himself, and this happened after this meeting, when the delegation came to Djibouti, he sat with them face-to-face and he made his own decisions."* In their closing submissions, the claimants described this as Mr Boreh being unable to respond with a straight answer to a straightforward question. I regard that criticism as extremely unfair. My recollection is that Mr Boreh was understandably somewhat bemused by the repeated suggestion that he had said this to the President. I consider that his reference to not having said something to the President: *"the way you are putting it"* was making the point that, whilst they had had a discussion about the size of the Republic's shareholding, he had never told the President that 10% was the most that would be available for the Republic. I accept that evidence.

300. Furthermore, I agree with Mr Kendrick QC's submission that the allegation that Mr Boreh told the President in December 2002 that 10% was the best he could do makes

even less sense at this point in the chronology than earlier. As I have found and as the note of the 19 September 2002 meeting records, the President had already decided that the range of any shareholding the Republic would take was 10-15% and had told ENOC that at the meeting, uninfluenced by anything Mr Boreh had said. It is simply not credible that Mr Boreh would have sought to persuade the President that only 10% for the Republic was on offer, given that the 10-15% range had been discussed by the President in person with ENOC in September 2002 and ENOC representatives were about to come to Djibouti later in December 2002 and any reduction would need to be discussed with them.

301. In my judgment, what happened in December 2002 when Mr Boreh discussed the shareholders' meeting with the President is that they discussed the options and the cost exposure and the President made up his own mind. He did so in the full knowledge that Mr Boreh would be taking a shareholding of 20% or 25%, and without any suggestion on his part that the Republic wanted some or all of that shareholding for itself. The claimants' submission that, if only the President had known about Mr Boreh's shareholding, he would have wanted it for the Republic (quite apart from the fact that the whole case is defeated by his actual knowledge of the shareholding), is simply not credible. It is, as Mr Kendrick QC submits, reverse engineering, an attempt to take advantage many years later of what has turned out to be an extremely successful venture, but which at the time was risky and speculative, so that the President only wanted a small symbolic shareholding.

302. Part of that reverse engineering is the claimants' reliance in their closing submissions on the point that a 40% shareholding would only have exposed the Republic to U.S. $12,800,000 of cash calls in the period 2003 to 2006 which could have been easily met from PAID reserves. That is no doubt mathematically correct, but it is looking at the matter with the benefit of hindsight. At the time the Horizon project was seen as risky and speculative and the Government had no experience of commercial investment. Hence the President was only ever interested in taking a symbolic shareholding which he decided should be 10%.

303. It is also striking that in neither of his somewhat exiguous witness statements does the President actually say that, if he had known that Mr Boreh was taking a 20 or 25 or 30% shareholding, he would have wanted to take it for the Republic. All that he says in his second statement, in the context of the issue of the 5% shareholding in Essense, with which I will deal a little later in the judgment, is:

> *"I was in no way wanting to arbitrarily limit the Republic's shareholding to a figure such as 10%. It is therefore evident that I would not have told Mr Hussein Sultan that Mr Boreh would be purchasing 5% of the shares instead of the Republic (as alleged at paragraph 185.4 of Mr Boreh's witness statement). As already mentioned in my First Witness Statement (at paragraph 27), the Republic had sufficient means available to pay for the shares."*

304. He then goes on to say: "*Moreover, it was always my view that the entirety of the value of the Doraleh land contributed by the Republic was for the Republic's shares."* As discussed below, that assertion is wholly inconsistent with the second MOU signed by Mr Moussa, of which the President must have been aware at the time, but

even if I accepted the President's assertion, which I do not, it falls a long way short of supporting the case the claimants seek to put forward at this trial that the Republic would have taken a shareholding of up to 40% in Horizon if it had known that it was available.

The Essense shareholding and the Soprim debt

305. Essense was incorporated in Hong Kong in June 1998 as a shelf company and its shares were transferred to Mr Boreh's nominees in November 1998. Mr Boreh's evidence in cross-examination was that the company was acquired either just before or during the President's first election campaign, as the President wanted Mr Boreh to look after his interests. The intention was to use Essense to hold investments which, if they were profitable, the President would buy from Mr Boreh when he retired. As Mr Kendrick QC submitted, the spur for acquiring a nominee company to give effect to this plan is likely to have been the imminent formation of DDP. The initial letter of intention for DDP was signed shortly after this on 5 December 1998. Mr Boreh's evidence was that he involved Maitre Martinet, the Djiboutian lawyer who also acted for the President. Contemporaneous documents in December 1998 demonstrate that the nominees of Essense sent Me Martinet the power of attorney for Mr Mehta (Mr Boreh's employee) to sign on behalf of Essense to acquire shares in Port Invest.

306. In his second witness statement, the President denied that this was the purpose for which Essense was used, saying: *"[Mr Boreh] asserts that he used his company, Essense Management, to purchase and hold assets which would be made available for me to purchase when I retired from my position as President of the Republic. I cannot speak for what Mr Boreh planned. I never knew anything about Mr Boreh's supposed plans to purchase and hold assets for me which I could purchase at a later date."* However, the President did not come to be cross-examined about his knowledge of Essense.

307. Lord Falconer put to Mr Boreh in cross-examination that he had never told the President about Essense, but Mr Boreh was very indignant that the President had known: *"I did tell him, and I have told him, and he knows very well about Essense Management, and I wish you could ask him the same thing…. He knew of the existence of Essense, my Lord. The President is not telling you the truth."* Despite the claimants' attempt to pour scorn on Mr Boreh's evidence about the use of Essense to hold investments that, if successful, the President would acquire in due course, I consider that this is an example of an aspect of the evidence where the court was entitled to expect the President to attend for cross-examination about an issue that is obviously a delicate one so far as the President is concerned. His failure to attend speaks volumes on this issue, as on many others, about his knowledge of Mr Boreh's investments. I see no reason not to accept Mr Boreh's evidence as to why Essense was acquired and as to the President's knowledge of the company and its use to hold investments on his behalf.

308. Mr Boreh's evidence was that the 5% shareholding which he took in Horizon in the name of Essense was one of the investments he made on behalf of the President. He said that it was during their discussions in December 2002, when the President had decided that the Republic's shareholding in Horizon would only be 10%, that the President asked him to take the residual 5% shareholding in Essense. In his witness statement, he said:

> *"The President wanted the Djiboutian interest to remain the same, so he told me I should buy the remaining 5% in the name of Essense. I was very uneasy with this idea. Because of the calls which would be made in the future, the shares were expensive, although I hoped that they would give rise to large profits. But most importantly, the proposal was unattractive because I knew what it might mean. If the venture went badly I would be left with the loss on the 5% shares on top of the losses on my other shares which made it very heavy: if the venture went well, the President might demand all the dividends on the 5% and perhaps the shares themselves. Furthermore, at the same time, I was getting quite frustrated about not being paid debts due to my company Soprim from the Government."*

309. Lord Falconer cross-examined Mr Boreh on the basis that he had never told the President about Essense (a point I dealt with above) and that his evidence about the discussion where the President asked him to take 5% in Essense was not true. Mr Boreh insisted that the discussion had taken place and made the point that, if it had not been for the request, he would surely have taken the shareholding in Boreh International: *"No, I mentioned it because it's very true, and if you look very carefully, I didn't take that 5% and put it in Boreh International, I kept it separately, and that was the instruction of the President. Otherwise it will have been in Boreh International, like my other companies."* This seems to me to be a compelling point: there would simply have been no sense in putting the additional 5% in Essense rather than simply increasing the shareholding held by Boreh International, unless it was held separately for a particular reason. The claimants have not advanced any other reason, so it seems to me more probable than not that Mr Boreh kept it separate because it was, potentially, earmarked for the President.

310. In their written closing submissions, the claimants contend that: *"When it was put to Mr Boreh that this part of his story was not true, once again he was unable to respond with a straight answer and his evidence placed reliance on the President having seen a fax sent by ENOC to Mr Moussa's office, thereby confirming that he had not told the President about having an ownership interest in advance of 21 December 2002."* They then cite a passage from slightly later in cross-examination:

> *"I said that the President is – maybe have forgotten or has no good memories or is not telling all the truth. I don't understand. But this was something decided in one afternoon and the next day the MOU was signed and he saw that he was getting 10%, and in January, a few days later, there was an email – a fax or an email sent to the President's office which is Moussa and he saw that Boreh International was going to have 20% or 25% for the cash call and it was very clear that the President knew seven days later. So why is he making a problem today?"*

311. This is somewhat selective, in the sense that the suggestion that he did not give a straight answer in relation to the truth of his evidence about the President asking him to put the 5% in Essense, ignores the fact that he had given a clear and straight answer slightly earlier, when he made the point that, had it not been for the request, he would

have added the shareholding to his Boreh International holding. When one looks at the passage in cross-examination cited in the previous paragraph in context, what Mr Boreh was actually dealing with was the fact that the President had known that the Government shareholding was 10% and, if he did not know before (which as I have found he did), he knew about the Boreh International shareholding through Mr Moussa within days. As I read his evidence as a whole, the suggestion that in this passage he was: *"confirming that he had not told the President about having an ownership interest in advance of 21 December 2002"* is a complete mischaracterisation of his evidence, which was clearly and consistently to the effect that the President had known that Mr Boreh was proposing to take a shareholding in Horizon from an early stage of discussions with ENOC in 2000 or 2001 and that the President was aware that the Boreh International shareholding was to be 20% or 25%, at the time that he decided to fix the Republic's shareholding at 10% in December 2002. I see no reason not to accept that evidence.

312. In this context, it is also striking that there would appear to have been rumours in Djibouti that the President had a shareholding in Horizon. In her cable of 21 June 2004, Ambassador Ragsdale reports what seems likely to have been a reference to this Essense holding: *"Boreh told Ambassador he owned 40 per cent of the Doraleh project, with ENOC owning the remaining 60 percent. Some place Boreh's holdings at 20 percent, with the rest of the 40 per cent share divided equally between the Government of Djibouti and President Ismail Omar Guelleh."*

313. A further piece of evidence which supports Mr Boreh's case about the Essense shareholding is that when, later in the project in 2006, Boreh International, Essense and the Republic received loans from ENOC and IPG to fund their cash calls, the loans given to Essense and the Republic were on more favourable terms than those given to Boreh International, which demonstrates that Essense was recognised as in a different category from Boreh International's interest.

314. On the basis of my findings about the Essense shareholding, the unpleaded case which the claimants pressed hard in their closing submissions that, if, contrary to their primary case, the President did ask Mr Boreh to take a 5% shareholding in Essense, which should otherwise have gone to the Republic, that was a corrupt scheme between the two of them which improperly preferred their personal interests over those of the Republic, simply does not arise. The President quite properly and honestly decided to fix the Government shareholding at 10%, not 15% without there being any question of his having been misled into doing so because Mr Boreh told him only 10% was available. There is no evidential basis for any suggestion by the claimants that the decision of the President that the Republic should only take 10% was improperly influenced by a desire that the other 5% should be taken for him by Mr Boreh into Essense, not least because the President's own evidence is that he did not know about Essense at all. I agree with Mr Kendrick QC that the President's subsequent pressure on Mr Boreh to acquire through Essense the 5% which the Republic did not want (and which might or might not find its way to the President at some stage in the future) does not give the claimants any rights against Mr Boreh in respect of that 5%. In the circumstances, the difficult issue of whether, on the assumption there was a corrupt scheme between the two of them, in effect to steal the 5% shareholding from the Republic, the knowledge of the President should be attributed to the Republic, does not arise on the facts.

315. Mr Boreh also referred in his witness statement to being frustrated, at the time that the President asked him to take the additional 5% in Essense, that the Government had not paid the debt owed to Soprim. As Mr Kendrick QC says, the contemporaneous evidence shows that the Republic owed substantial sums to Soprim for work on the Presidential Palace. A letter from Soprim to the Minister of Presidential Affairs on 14 August 2000 enclosed a bill for the renovation work. The work done was extensive and the amount outstanding was just over DJF 225,000,000 (about US$1.27 million). The covering letter noted that no payment had been made since the start of the work in June 1999. On 29 December 2001, Mr Moussa sent a fax to Mr Boreh, acknowledging that the Government owed Soprim DJF 270,000,000 (just over $1.5 million) for renovation work to the Presidential Palace. The fax enclosed the formal "private contract by mutual agreement" dated 25 January 2001 for that renovation work to the Palace, signed by Mr Moussa and by the Finance Minister, Mr Bouh. The work carried out by Soprim did not stop there, but was continuing and, at the time that the off-set was made against the purchase price for the land later in 2003 (which I deal with below), nothing had been paid and the amount outstanding was in excess of the amount off-set.

316. In the circumstances, the statement by the President in his first witness statement that: *"I was not aware that the State owed any money to Soprim for work on the Presidential Palace"* is almost certainly untrue. It is inconceivable that the President did not know that Soprim had not been paid for the extensive work it had undertaken at his Palace. The attempt by the Republic to deny that a substantial sum was outstanding to Soprim was demonstrated by Mr Bouh's witness statement, which referred to another smaller invoice for the equivalent of about U.S. $125,000 in respect of electrical work in May 2002 after fire damage at the Palace. Initially in cross-examination, Mr Bouh maintained that he had only known about that smaller invoice being outstanding, but when confronted later with the acknowledgment of the debt of DJF 270 million, he agreed that that was the amount due at the time.

317. It is against the background of the invoices for the work at the Presidential Palace remaining outstanding at the time of his discussions with the President in December 2002, that Mr Boreh was reluctant to commit to the Essense shareholding. As he said in his witness statement: *"If I was being asked to take on this new exposure, it seemed to me that the Government should at least pay off the old exposure first. But it had no money to do it. This put me in a difficult position. I could threaten not to invest at all, and if that happened Hussain Sultan would probably walk away, but all my work and the project would then fall apart."* His recollection was that this issue was left hanging until the weekend that the ENOC delegation came to Djibouti.

The visit of the ENOC delegation and signing of the two MOUs

318. On 12 December 2002, Mr Gelineau emailed Mr Boreh asking: *"Will you be representing the Govt of Djibouti when we sign the MOU on the 19th in Djibouti? If so you need a new Proxy as the one we used for the first shareholders meeting does not cover this kind of delegation."* This was doing no more than pointing out that, if Mr Boreh was going to represent the Government at the signature meetings, he would need a new Power of Attorney, as the earlier one had only covered representing the Government at the shareholders meeting and had thus expired. This is wholly inconsistent with ENOC thinking that Mr Boreh had any sort of general authority to represent the Government. Mr Boreh's evidence in cross-examination was that he did

not ask the President for another Power of Attorney, because the ENOC representatives were coming to Djibouti and someone from the Government could sign, as indeed Mr Moussa did.

319. On 15 December 2002, Mr Gelineau sent Mr Boreh a draft MOU which ENOC expected to sign when they came to Djibouti a few days later. As with the July 2001 MOU, it said nothing about shareholdings. The appendices included a map showing the land required for Phase 1 and Phase 2 of the project. The MOU itself proposed only the purchase of the land specified by points A to D on the map which corresponded to the Phase 1 land only. The definition of the land area in the MOU had been discussed earlier that day by Mr Gelineau and Mr James Small of the ENOC legal department, and they decided to leave it as drafted. In the email accompanying the draft MOU, Mr Gelineau asked Mr Boreh for any comments, presumably on the basis that he would pass on any comments the Government had. In fact he said in evidence that he felt no need to do so. Since ENOC were coming to Djibouti soon, they could discuss it with the President in person.

320. The delegation from ENOC, which included Mr Hussain Sultan and Mr Gelineau arrived in Djibouti on 19 December 2002. On that day Mr Small, who was in Dubai, sent an email to Mr Gelineau enclosing a French translation of the draft MOU which Mr Gelineau had sent to Mr Boreh. As a matter of common sense, the most likely explanation for having a French version was to discuss the draft with French speakers, who would include the President and any relevant ministers.

321. Mr Boreh says that there were discussions over two days. There is no minute of the discussions, but on Mr Boreh's evidence, that is understandable, since he says the main terms not previously agreed were agreed at a long khat-chewing session at the President's majlis (the private place for entertaining at the Presidential Palace) on the afternoon of Friday 20 December 2002, attended by him, Mr Sultan and the President. The significance of khat-chewing sessions to Djibouti political life would not be obvious to the uninitiated, but there is an illuminating explanation from Mr Moussa in his discussions with Gibson Dunn:

> *"The development of Djibouti was always discussed during informal meetings between government officials and [the President], which took place in the afternoons and were often a continuation of the morning's official meetings. Although informal, these meetings were still important as business is often conducted at such meetings. [The President], the Minister of Finance and Mr Boreh would take part in this type of discussion and talk about State issues. Often one's social status is determined by who one chews qat with in the afternoons"*

322. Mr Boreh says that three principal matters were agreed at this khat-chewing session: (i) the increase in the price of the land to U.S. $12 per square metre; (ii) the shareholding percentages and, specifically, the Government's shareholding of 10% and (iii) the use of the balance of the value of the land above U.S. $2.5 million to pay off the outstanding debt of the Government to Soprim. The circumstances were a relaxed and informal discussion between the President, Mr Sultan and Mr Boreh, the

flavour of which emerges from Mr Boreh's evidence about the agreement of the land price:

> *"Q. Who negotiated the increase up to $12 per square metre?*
>
> *A. I don't think there was, you know, a negotiation as such where you come and go and consultants are involved and people, you know, different people are involved. Hussein Sultan was there, the President was there. I suggested that this was a bargain, and I maybe have said "Why not we go to 12?" The President said "Yes, why not 12?" And Hussein accepted, then it just took maybe two minutes, then it was decided.*
>
> *Q. So it was a negotiation with the three of you, that's what you are saying?*
>
> *A. Well, I was there in that meeting, I have suggested to the President that he could get more for his land, that's what I suggested, and I have advised the President that he should go for more, and Hussein Sultan was in good mood, he accepted, so it was decided very quickly. There was no negotiation coming and going, that's what I'm trying to say."*

323. Mr Boreh's evidence was that it was in the meetings with Mr Sultan before the MOU was signed that the President made his final decision that the Government's shareholding should be 10%:

> *"A…I don't know exactly when, and as you see in different meetings the shares were changing, until it was decided in December nothing was concrete, and that was decided face-to-face with the President and myself and Hussein Sultan.*
>
> *Q. So the percentage shares, you are saying, were agreed between yourself, Mr Sultan and the President at the meetings between 19 and 21 December.*
>
> *A. Before that it was only discussions and suggestions and some scenarios, but it was not cast in iron…*
>
> *You know, when I sit with the President, I explain and I give advice, okay? Hussein Sultan was there and he was also talking. This was the first time that something like this was happening. It was -- and it happened very quickly. But the decision, if I advised the President in a way by telling him and doing the calculation for him that he would need 3.75, the President was really concerned about cash calls, he did not want to put any cash calls. Okay? So with 10% he was giving himself the comfort of having his 10% and even regardless of the amount of the project, if it went to 60 or 100 million, he was still going to maintain his 10%, and that's exactly how it happened."*

324. Likewise, Mr Boreh's evidence was that it was he who raised the outstanding Soprim debt at the khat meeting: *"On that Friday afternoon, when the land value -- when the land size became bigger, and there was more money, I said to the President "I want to be paid my share, I want to be paid the money you owe me".* Mr Boreh's evidence was that the use of the value of the land above U.S. $2.5 million to pay off the Soprim debt was then incorporated into the second MOU which was signed by Mr Moussa the following day on the President's instruction:

> *"This is a Government fonctionnaire, a very high Government official, and he will only prepare such documents and sign such documents because the President will have given him direct instruction. It was on a Friday afternoon, and this document was signed on the 21st, which is a Saturday morning, and government people don't work that fast unless the President himself gives that instruction."*

325. The claimants contend that Mr Boreh's evidence about matters being agreed at the khat chewing sessions is pure invention. They submit that, even in his Re-Re-Amended Defence, Mr Boreh does not refer to these meetings or to his having participated in them and that this picture of agreement at the khat session only emerged in his witness statement, being elaborated to a considerable extent in cross-examination. With respect, that is a false point. The fact of the three way discussions and what was agreed at them was clearly pleaded in the Re-Amended Defence served on 5 December 2014 in two paragraphs:

> *"61.3G Further discussions took place in December 2002 between the President, the Defendant and representatives from ENOC about shareholdings, the land required for the project and the value to be attributed to the land. It was also agreed that the value of the land would not be used solely to acquire an equity interest in the Horizon project but also pay off debts due to the Boreh Group for construction work carried out on the Presidential Palace.*
>
> *61.5…In particular, prior to the signing of the MOUs on 21 December 2002, the Defendant discussed with the President and ENOC the fact that he wanted the First Claimant to use the value which the Defendant could persuade ENOC to pay for the land to pay off the debt due to the Boreh Group for the work done on the Presidential Palace. The Defendant was able to persuade ENOC to pay $12 per square metre for the land. ENOC was also prepared to purchase more land for the purpose of future expansion. Once the debt due to the Boreh Group was deducted, the residual land value for the purpose of the First Claimant's equity in the Horizon project was US$2.5 million which, given the value of the project, justified a maximum 10% equity interest. This was discussed and agreed between the Defendant, the President and ENOC."*

326. The claimants also submit that this khat chewing session and the agreement at it are not referred to in any of the contemporaneous correspondence in the immediate

aftermath of the visit of the ENOC delegation and the signature of the MOUs or thereafter, nor were the President or Mr Moussa consulted for clarification. There is some force in that point and it will be necessary, as I go through the rest of the chronology, to analyse the contemporaneous correspondence carefully, but ultimately I have to consider the inherent probabilities. If, as I have concluded (for reasons elaborated below), the second MOU (in which formal written agreement on these matters is set out) is genuine and was signed by Mr Moussa on behalf of the Republic, with the full knowledge and consent of the President, then the various matters must have been discussed and agreed in principle with the President by Mr Boreh and/or Mr Sultan at some stage during the visit of the delegation.

327. It seems to me (in the light of Mr Moussa's explanation of the significance of khat chewing sessions) inherently probable that these matters would have been discussed and agreed at the sort of relaxed informal meeting which Mr Boreh described. They cannot simply have appeared from nowhere so far as Mr Moussa, who signed the second MOU on behalf of the Republic, is concerned. It is inconceivable that Mr Moussa as Minister for Presidential Affairs would have signed the second MOU on Mr Boreh's say-so, which seems to be the claimants' case, without consulting the President and satisfying himself that the President had agreed the matters covered by it. If those matters had not previously been discussed with and agreed by the President, it is pretty obvious that when Mr Moussa showed the second MOU to the President, he would have queried what it was all about and would not have permitted it to be signed. Once it is recognised that the second MOU was, as Mr Kendrick QC put it; *"a valid and properly authorised document"*, the matters in it must have been previously discussed and agreed with the President and Mr Boreh's evidence as to the circumstances in which the matters covered by it came to be discussed and agreed with the President by himself and Mr Sultan makes perfect sense.

328. The President himself scarcely deals with the visit of the ENOC delegation at all in his witness statements. In his first statement, all he says is this:

> *"I did not discuss matters directly with ENOC in December 2002. I relied on Mr Boreh.*
>
> *I did not know that Osman Moussa had signed a Memorandum of Understanding in December 2002. I recall that the terms of this agreement complied with document [ROD_ 0000541 [JOG 1-25-30]* [a curious reference to the French translation of the first MOU also signed by Mr Moussa]. *Gibson Dunn had also shown me another document* [the second MOU]. *I never authorized an agreement of this kind and I had never seen this prior to 2011."*

329. This is frankly so evasive as to be incredible. The suggestion that the chairman and other representatives of ENOC, with whom he had had a detailed meeting in September 2002 about proposed terms for the Horizon project, came to Djibouti in December to finalise those terms and sign the MOUs and yet he had no discussion with them, did not see the first MOU and did not know Mr Moussa had signed the second MOU on behalf of the Republic, beggars belief.

330. It is striking that in his second statement, dealing with Mr Boreh's evidence about the discussions with Mr Sultan, the President does not say that this did not happen; rather he says he cannot remember. All he denies, and then in a very guarded way, is talking to Mr Sultan about what became the Essense shareholding:

> *"I do not remember attending a meeting with Mr Boreh and Hussein Sultan in Djibouti in December 2002 as set out at paragraphs 184-187 of Mr Boreh's witness statement. Similarly I do not recall calling Osman Moussa as alleged at paragraph 188.*
>
> *20. I was in no way wanting to arbitrarily limit the Republic's shareholding to a figure such as 10%. It is therefore evident that I would not have told Mr Hussein Sultan that Mr Boreh would be purchasing 5% of the shares instead of the Republic (as alleged at paragraph 185.4 of Mr Boreh's witness statement)."*

331. I consider that it is more likely than not that the three way discussions at the khat chewing session as described by Mr Boreh did take place and that it was at that session that matters such as the price of the land, the Government shareholding and the off-setting of the Soprim debt were finalised. Mr Boreh's evidence, which I also accept, is that: *"At the end of this Friday session, the President phoned Osman Moussa to tell him what had been agreed, and instruct him to work on preparing the MOU with the ENOC delegation so it could be signed before ENOC left on Saturday 21 September 2002."*

332. Two MOUs were then signed by the parties in Djibouti on 21 December 2002. Mr Moussa signed both on behalf of the Government with an official stamp and Mr Sultan signed on behalf of Doraleh Terminals Limited (HDHL). The first MOU which Mr Moussa signed was in French. It was a translation of the one which Mr Gelineau had sent to Mr Boreh in draft the previous week, with some minor changes. Its structure very much follows that of the July 2001 MOU, save that what is proposed is that the land on which the terminal was to be built would be transferred to the new joint venture company (HDTL), with no rent being payable. Given the dispute, in the context of the contract for the sale of the land signed later by Mr Bouh which referred to a MOU, as to which MOU was being referred to, I propose to set out some of the provisions of that first MOU (in translation).

333. The preamble provided as follows:

> *"WHEREAS*
>
> *A) The Parties wish to incorporate a Company by Participation in the Republic of Djibouti, called "Djibouti Tank Terminals Limited (the "Company"), designed for the construction and thereafter the management of an independent storage warehouse in the Republic of Djibouti which will include tanks, jetties and accessories (the "Depot").*

B) The Government has consented to be a shareholder in the said Company for the reasons mentioned above and to grant a lease to the Company for a site located west of the port of Djibouti, at Doraleh, extending approximately over an area of 348,000 m2 and having a coastline of approximately 870 metres and the adjacent tidal zone ("Tidal Zone") and the maritime area ("Maritime Zone") ("Site") to establish the future piers and jetties as described more specifically in paragraphs B, I, K and F on the map attached as Annex A and the map attached as Annex B.

C) The Parties wish to establish this Memorandum of Understanding to summarise their business goals and provide a framework for their subsequent negotiations."

334. Clauses 1 and 2 of the first MOU then provided as follows:

"IT IS AGREED as follows:

1. ESTABLISHMENT OF THE COMPANY:

1.1 The Parties hereby confirm their intention to negotiate and execute a shareholders agreement ("Shareholders' Agreement") governing the Company (including, without limitation, matters relating to the establishment, financing, management and control of the Company) within six (6) months from the date of this Memorandum of Understanding.

1.2 The establishment of the Company will enable it to undertake all activities including, without limitation, the construction, operation and maintenance of the Depot, storage and handling of hydrocarbons, vegetable and animal oils, chemicals and chemical gases, GPL, marketing (retail, wholesale and commercial) of all oil products, bunkering, F jet fuel sourcing, manufacturing and blending.

2. OBLIGATIONS OF THE PARTIES

To facilitate the development of the Depot, each Party undertakes as follows:

2.1 DTL undertakes to perform the following by priority:

2.1.1 establish a feasibility study for the Depot;

2.1.2 determine the technical specifications of the Depot;

2.1.3 determine the land requirements for the Depot;

2.1.4 negotiate and implement its share of the funding for the project which will be proportional to its share in the capital of the Company;

> *2.1.5 establish an appropriate structure and negotiate agreements to hold and manage the property in the Depot; and*
>
> *2.1.6 initiate discussions with potentially interested third parties to become shareholders of the Company; such discussions shall be conducted with the knowledge and consent of both Parties.*
>
> *2.1.7 comply with the regulations of the Djibouti Free Zone when they come in force.*
>
> *2.2 The Government undertakes to use its best efforts to:*
>
> *2.2.1 transfer the land to the Company which will form its share in the capital of the Company;*
>
> *2.2.2 negotiate and implement its share of the funding for the project which will be proportional to its share in the capital of the Company;*
>
> *2.2.3 confer the status of Free Zone on the Depot;*
>
> *2.2.4 provide the Company with all governmental permits, administrative, regulatory and other licences or similar authorizations which the Company legally requires to exercise its purpose of business in the Republic of Djibouti;*
>
> *2.2.5 exempt the Company, its employees and consultants contracted, from any corporation tax on the income of individuals, or any other tax, duty or fee; and*
>
> *2.2.6 at the request of the Company, issue work permits for foreign employees, without limitation, for the control, construction and operation of the Depot.*
>
> *2.3 It is understood between the parties that no new capital call will be made to the Government of the Republic of Djibouti until the called capital of the Company has reached the sum of twenty five (25) million American Dollars."*

335. That last clause 2.3 was one which was added after the discussions in December 2002 and was, as Mr Kendrick QC described it the *"insurance policy"* by reference to the 10% shareholding, that it would only if and when the cash calls exceeded U.S. $25 million, that there would be any cash call made on the Government. However, anyone within the Government who read this would have appreciated that if the cost of construction of the terminal exceeded U.S. $25 million, which was always a risk, given that this was a much more optimistic figure than the U.S. $41 million given in the presentation to the Arab Funds, there would be cash calls on the Republic. It seems to me this must have been appreciated by Mr Moussa and the President, since Mr Moussa signed it and in all probability read it carefully and discussed it with the President before signing it.

336. Clause 11, headed *"Good Faith"*, provided as follows:

> *"11.1 The Parties will conduct all negotiations up to the end of this Memorandum of Understanding in good faith and reach a final and binding agreement based on the principles outlined in this Memorandum of Understanding.*
>
> *11.2 The Parties recognise that during the term of this Memorandum of Agreement they will not negotiate or will conclude any agreement with any third party on a similar project to that which is the subject of this Memorandum of Agreement in the territory of the Republic of Djibouti. The pilot of the project will be DTL."*

337. Clause 8 provided that the MOU would remain in force for six months or until the execution of a shareholders agreement, whichever was the earlier. The MOU was subject to French law and ICC arbitration in Paris. As with the July 2001 MOU, it provide that save as regards the provisions on expenses, confidentiality and law and jurisdiction, the MOU was not intended to constitute a legally binding obligation.

338. The second MOU was signed in both English and French versions by Mr Moussa for the Government and Mr Sultan for HDHL. It dealt with the matters that had been agreed between the President, Mr Sultan and Mr Boreh the previous day. Paragraphs A and B of the preamble were identical to those in the first MOU. Paragraph C of the preamble and the remainder of the second MOU then provided as follows:

> *"C) The Parties wish to draw up a Sales Agreement to set the terms & conditions under which the present sale is granted and those in accordance with which the price shall be paid.*
>
> *IT IS AGREED as follows:*
>
> *1.1 The Parties agree to a fixed price per square metre of land sold (348,000 m2) set at twelve (12) US Dollars.*
>
> *The Parties agree to estimate the cost of Phase 1 of the project at twenty five (25) million US Dollars.*
>
> *The Parties will do everything possible to fund the project by means of a (60) sixty cent loan and a shareholder contribution of forty (40) per cent.*
>
> *The Parties agree to allocate to the Republic of Djibouti Government ten (10) per cent of the Company's shares in exchange for the sale of the aforementioned land.*
>
> *The value of the shares allocated to the Republic of Djibouti Government shall amount to two million five hundred thousand (2,500,000) US Dollars.*
>
> *The balance, one million six hundred and seventy six thousand (1,676,000) US Dollars, between the land's value*

> *of four million one hundred and seventy six thousand (4,176,000) US dollars and the value of the shares, two million five hundred thousand (2,500,000), shall be paid to SOPRIM, a company subject to Djibouti law, under terms & conditions to be decided directly between Doraleh Terminals Limited and SOPRIM.*

339. As with the first MOU, this second MOU was subject to French law and ICC arbitration in Paris. It then provided:

> *"Each of the Parties hereby waives all entitlement they may have to government immunity of any kind, relating both to legal matters, service of notice and prosecution of legal procedures, as well as enforcement of judgements given by a French court."*

340. Two matters are noteworthy about this MOU, in contrast to the first MOU. First, apart from the reference to clause 1.1 at the outset, it contains no numbering of the provisions. Second, it does not contain any provision limiting the extent to which it is legally binding. In the circumstances, if it is a valid document, it constitutes a contract which is legally binding on the Republic.

341. The claimants' formal pleaded position in the Reply is that they do not admit that either of the MOUs is genuine, which is a somewhat forlorn plea given that Mr Moussa signed both on behalf of the Republic. A number of contemporaneous documents refer to both memoranda, so they are clearly genuine. For present purposes it is only necessary to refer to a fax dated 9 February 2003 from Mr Small of the ENOC legal department to Me Martinet enclosing signed copies of both MOUs in French. The cover sheet stated:

> *"Please find attached the two Memorandums of Understanding executed in French and entered into between the Government of the Republic of Djibouti and Doraleh Terminals Limited on 21st December 2002 concerning, amongst others, the sale of the land in the Djibouti free zone."*

342. The claimants have run, with varying degrees of enthusiasm, other arguments designed to circumvent the second MOU. In their letter dated 13 November 2015 setting out the factual findings the claimants sought, as ordered by me the previous day, prior to the expert evidence of French law, Gibson Dunn say: "*The Claimants seek findings that Mr Boreh represented the Republic in negotiations for contracts of which the government was not aware, and which were not in the best interests of the Republic. These include the Second Horizon MOU…"* That point is utterly hopeless, given that, on any view, Mr Moussa signed the second MOU on behalf of the Republic.

343. The claimants also run an unpleaded case that, as set out in their opening Skeleton Argument, Mr Boreh: "*used his perceived relationship with the President to get Mr Moussa to sign the Second Memorandum*". Lord Falconer put this to Mr Boreh in cross-examination on the basis that Mr Moussa signed the second MOU because Mr Boreh told him to. Mr Boreh was understandably dismissive of that suggestion. I have

already quoted part of his evidence to the effect that Mr Moussa would not have signed the MOU without the President's direction to do so, but it merits repetition given that the claimants persist in this point:

> *"Q. The person who signed it was not the President, it was Mr Moussa?*
>
> *A. He has full power to sign on behalf of the President, he's the only one who have the signature of the President.*
>
> *Q. And Mr Moussa signed it because you told him to?*
>
> *A. Well, if that's what you think, I don't agree, and I could not give instruction to Mr Moussa, I don't have that power, and Mr Moussa is not a friend, a friendly guy or he is not my friend, so he could not just sign me these kinds of documents.*
>
> *Q. The position is that you were a much more significant influence in Djibouti, because of your relationship with the President at this time, which is December 2002, than Mr Moussa was?*
>
> *A. Yes, but this is a –*
>
> *Q. Is that a yes?*
>
> *A. Not in that sense, the way you are putting it, there is not a yes or a no answer. This is a Government fonctionnaire, a very high Government official, and he will only prepare such documents and sign such documents because the President will have given him direct instruction. It was on a Friday afternoon, and this document was signed on the 21st, which is a Saturday morning, and government people don't work that fast unless the President himself gives that instruction."*

344. In my judgment, the suggestion that Mr Moussa signed the second MOU because Mr Boreh told him to is as hopeless as the suggestion that the Government was unaware of the second MOU. There is simply no evidential basis for the suggestion. Mr Moussa does not make this suggestion at any point in the interview in December 2012. There is no sensible basis for drawing an inference to that effect. Mr Moussa was a senior Government minister and official and it is inconceivable that he would simply have signed something because Mr Boreh told him to. As Mr Kendrick QC rightly submits, even on the extremely unlikely basis that Mr Boreh persuaded Mr Moussa to sign, by telling him that the President had agreed the MOU when, on this hypothesis, he had not, the risk of Mr Boreh being found out by the President was overwhelming. I found Mr Boreh's answer to a question from me on this point compelling:

> *"MR JUSTICE FLAUX: …What counsel is suggesting is that at this time in December 2002 you were a much more significant figure in terms of power in Djibouti, because of your*

> *relationship with the President, than Mr Moussa, who was, as you put it, just a functionary. I think that's what's being put anyway.*
>
> *LORD FALCONER: That is exactly what I'm putting, my Lord.*
>
> *A. Yes. You know, my Lord, it depends what he means by "influential". You know, if it means influential by being "administratif", you know, signing and engaging governments, I couldn't do such things. My only influence came by talking to the President, lobbying, and then the President taking -- giving the instructions. I could not instruct Moussa to sign documents that I wanted him to sign on my behalf. And even if he did, it will have been found out, it is not something that will have been sustained until such a long time, the next day -- this is a Government, so in January, like I said, they received the cash calls and the President must have seen the documents, and then eventually they went on and we signed the sales documents based on that MOU for the land."*

345. There is no question of Mr Boreh having agreed something with ENOC and then sought to get it signed by Mr Moussa on behalf of the Government by exerting some sort of persuasion or influence over him. I consider that the genesis of the second MOU is exactly as described by Mr Boreh. It dealt with those matters finally agreed between the President, Mr Sultan and Mr Boreh on the afternoon of 20 December 2002 and the President then instructed Mr Moussa to prepare and sign the second MOU. This also provides the answer to the suggestion by the claimants in their closing submissions that there is no proper explanation as to why two MOUs were signed on the same day. Quite apart from the fact that, given that the MOUs were signed by the Government representative, Mr Moussa, so that in a sense it is for the Republic, not Mr Boreh, to provide the explanation, the explanation becomes apparent. The second MOU dealt with certain matters only finally agreed on the day before and rather than rewrite the first MOU, a second MOU was prepared and signed.

346. Lord Falconer also sought to suggest to Mr Boreh in cross-examination that the second MOU was nothing to do with the value of the land on which the terminal was to be built, but was an unrelated side agreement for a loan from ENOC to Mr Boreh in respect of the debt owed to Soprim. However, this point seems to be based on a misunderstanding on the part of Mr Gelineau in January 2003 as to what had been agreed, and Mr Boreh clarified with him at a meeting at the end of January 2003 (to which I return below) that he did not need a loan. Slightly later in cross-examination, Lord Falconer put that all the sale proceeds from sale of the land should have gone to the Republic, but that is inconsistent with what the second MOU says. The MOU is quite clear: of the U.S. $4,176,000 sale proceeds generated by sale of 348,000 square metres at U.S. $12 per square metre, U.S. $2.5 million would be applied towards the Republic's 10% shareholding in Horizon. The balance of U.S. $1,676,000 was to be paid to Soprim in discharge of the Government's debt on terms to be sorted out with HDTL.

347. I agree with Mr Kendrick QC that, once it is recognised that the second MOU is a valid and authorised document, its implications are devastating for the claimants' case. In particular, it demolishes any suggestion that Mr Boreh secretly siphoned off the proceeds of sale of the land to cover the Soprim debt when they should have been put towards additional shares in Horizon for the Republic. As I have found, the second MOU reflected what had been agreed with the President on the afternoon of 20 December 2002 and Mr Moussa must have confirmed with the President prior to signing it that it accorded with what the President had agreed and that it was authorised.

The first cash call

348. On 22 December 2002, the day after the MOUs were signed, Mr Gelineau emailed Mr Small referring to the fact that the two agreements had been signed *"after our different meetings in Djibouti."* The claimants sought to rely upon the fact that he does not refer to any meeting with the President as evidence that such a meeting did not take place, but I regard his reference to *"different meetings"* as entirely consistent with there having been the meeting on the Friday afternoon of which Mr Boreh gave evidence. He may not have made express reference to a meeting with the President simply because he was not in attendance.

349. It is of some significance that Mr Gelineau describes the second MOU as: *"A Sales/Purchase agreement regarding the Land"* which is not entirely accurate. It is evident from a number of communications later in 2003, that Mr Gelineau apparently did not understand what had been agreed in the second MOU, although its terms are relatively simple. For reasons explored hereafter, I consider there is a real question as to how genuine that apparent misunderstanding was.

350. On 5 January 2003, Mr Gelineau emailed Mr Mehta, saying that for the first cash call ENOC needed a name of the Government representative and a fax number to which to send the call, even though no cash was required because the Government was paying through land. Mr Mehta replied the following day giving Mr Gelineau the name and fax number of Mr Moussa and stating: *"he confirmed that you can put his name"*, an indication that he had spoken to Mr Moussa who would therefore have been expecting the cash call. That was issued by ENOC the following day, 7 January 2003. It was sent to the shareholders by fax, including to the fax number for Mr Moussa which Mr Mehta had given to Mr Gelineau. The Republic has disclosed a copy of the fax from the file of the Ministry of Presidential Affairs, so it was clearly received by Mr Moussa and there is absolutely no reason to suppose that he did not read it.

351. The fax provided as follows:

> *"The Board of Directors of DTL at the meeting held at Dubai on 01 December 2002 have approved the first Cash Call of the Company for a total amount of US $750,000(United States Dollars Seven Hundred Fifty Thousand only).*
>
> *Please make the respective payment as below on or before 10 January 2003:*
>
> *Government of Djibouti Nil**

Boreh International Limited: US$187,500.00 (25% of US$ 750,000)

ENOC: US$375,000.00 (50% of US$ 750,000)

IPG: US$112,500.00 (15% of US$ 750,000)

Total: US$ 675,000.00

*(*As discussed and agreed by the Board, Government of Djibouti will pay for its shares in the equity of the Company by bringing in land for the project.)"*

352. In fact, as Mr Boreh pointed out in response to the cash call, the Boreh International holding was 20%, with the remaining 5% in Essense, but for present purposes nothing turns on that. Of course, this cash call would not have told Mr Moussa, or for that matter the President, anything they did not know already. However, if it really had been the case that Mr Moussa did not already know that Mr Boreh was making a substantial private investment in Horizon or what the extent of that investment was, then that information would have jumped off the page at him. In circumstances where, on that hypothesis, he (and therefore the Government) did not already know that Mr Boreh was taking a shareholding or the extent of that shareholding, it is inconceivable that Mr Moussa would not have contacted the President. Indeed, it seems to me likely that, even if he did already know about the shareholding, he would have passed on the information to the President to check that he was aware of the extent of the shareholding.

353. The President does not deal in either of his witness statements with this cash call, nor does he deny that he saw it. It seems to me that, if it really had been the case that, as the President would have the Court believe, he and the Government did not know, even in January 2003, about Mr Boreh's shareholding in Horizon and would have wanted a larger shareholding for the Government, the discovery of it through this cash call would have provoked a veritable storm. The President would have complained to Mr Boreh, to put it at its lowest, and insisted on increasing the Government shareholding. None of that happened and no complaint was made about Mr Boreh's shareholding until long after the President had fallen out with Mr Boreh in late 2008. The reason is not hard to discern: the President and the Government did know about the shareholding at the time and not only approved of it but were not interested in increasing the Government shareholding. Accordingly, the claim now pursued is, as Mr Kendrick QC said, reverse engineering.

354. In response to the cash call, Mr Boreh thought that the proportion of the land value allocated to the Soprim debt could be used to off-set his other companies' liability to pay the cash call. In an email on 8 January 2003, Mr Mehta passed on Mr Boreh's comments:

"-Boreh International is not 25 % percent shareholder it is only 20 %

> *-The 5 % percent represents Essense Management Ltd.*
>
> *-All Djibouti Government/Boreh Int'l/Essence Management share value represents land value."*

355. Contrary to the claimants' submission, this was not Mr Boreh seeking to appropriate the land value to himself, but, as he explained in his witness statement, simply making a practical suggestion that, rather than have Boreh International and Essense pay monies to HDTL by way of cash calls and then have HDTL in effect later repay those monies to Soprim, as contemplated by the second MOU when the sale proceeds for the land became payable, it would be simpler for the amount of the cash call, which was only U.S. $187,500, to be set off against the U.S. $1,676,000 which would be paid to Soprim in due course. There is nothing sinister in this; it makes obvious practical sense.

356. However, in his reply on 9 January 2003, Mr Gelineau disagreed with the suggestion. He said:

> *"1- Ok we will split the cash call for Boreh companies between Boreh International and Essences Management.*
>
> *2-The point was clearly discussed between the shareholders during the meeting held in Dubai on the 1st Dec and during our visit in Djibouti on the 19th Dec 2002.*
>
> *Thanks to confirm point number 2 by return."*

357. Mr Gelineau returned to this issue in his email to Mr Boreh on 14 January 2003, when he said:

> *"When we met in Dubai and in Djibouti I personally raised the issue of the cash equity to be paid by Boreh Group of Companies (BGC) whatever the solution regarding the money owed to BGC by the Government of Djibouti (GoD) would be because this money was/is essential to the proper funding of the project.*
>
> *You are aware that at that time the funding of the project (25.0 M$) was based on*
>
> *• Debt /equity ratio of 60/40% and*
>
> *• BGC-20% and GoD-15% with GoD paying its equity in nature (land).*
>
> *Therefore the total cash equity paid up was estimated to 8.5 M$ (25.0 x 40% x 85%).*
>
> *Having GoD share reduced to 10% was actually a very good move and we thank you for your input in that achievement as well as for the larger piece of land we obtained, a good thing for future developments in Doraleh. Another advantage was*

> *that it increased the cash brought by the paying shareholders from 85% to 90%.*
>
> *However if BCG with 25% is not paying its cash equity, the net cash received goes down to 6.5 M$ (25.0 x 40% x 85%).*
>
> *The resulting gap in the financing of the project is 2.0 M$ which cannot be solved."*

358. Lord Falconer cross-examined Mr Boreh about the reference to his "*input*" in the reduction of the Republic's shareholding, suggesting that Mr Boreh had persuaded the President to drop the Republic's shareholding from 15 to 10%. If that was what Mr Gelineau meant, Mr Boreh was unable to explain where he got it from. Since Mr Gelineau was not party to any discussions between the President and Mr Boreh, he may well have thought that, because 5% was being taken by Essense in circumstances where the President had previously indicated that the Republic might take up to 15%, Mr Boreh had persuaded the Republic to take less than that and only take 10%. However, whatever Mr Gelineau thought, what matters is the discussion Mr Boreh actually had with the President. After all, as will be seen in relation to the Soprim debt, Mr Gelineau was quite capable of getting the wrong end of the stick. As I have held, Mr Boreh did not persuade the President to reduce the Republic's shareholding. Rather the decision to take only 10% was the President's own decision.

359. The next section of Mr Gelineau's 14 January 2003 email was headed: "*DTL loan to Soprim*" and provided:

> *"On an another hand we agreed in Djibouti that Doraleh Terminals Ltd will take the responsibility/liability of a sum of USD 1.676 million owed by GoD in favor of SOPRIM (part of BGC) according to the following terms and conditions and according to the conditions set forth in the MOU signed between DTL and the Government of Djibouti.*
>
> *Amount identification (=Loan)*
>
> *Land value (348,000 m2 x 12.00 $) = 4,176,000 $*
>
> *GoD share (25.0 M$ x 10%) = 2,500,000 $*
>
> *Loan to SOPRIM = 1,676,000 $*
>
> *Period: 1 year, starting immediately after the grace period.*
>
> *Grace period: 1 year, starting on the first day of the month following the month of incorporation of the Doraleh FZ company.*
>
> *Installment: 2 of 838,000 USD each, respectively payable at the end of the 18th month and at the end of the 24th month following the month of incorporation of the Doraleh FZ company.*

> *Interest: 2% per year on all unpaid money payable at the end of each 6 month period, starting on the day of incorporation of the company (interest are paid during the grace period).*
>
> *We are presently drafting the loan agreement that would be signed between DTL and SOPRIM and will submit it to your appraisal."*

360. In their closing submissions, the claimants rely upon this part of the email as impossible to reconcile with the conversations Mr Boreh alleged he had with the President and Mr Sultan in December 2002, in other words, the claimants rely upon this email as setting out what was in fact agreed. However, this completely overlooks the second MOU, which is not talking about a loan to Soprim, but about the liability of the Government to Soprim being discharged by HDTL. What the second MOU clearly contemplated was that in so far as the value of the land to be transferred to HDTL exceeded the U.S. $2.5 million value of the Government's 10% shareholding by U.S. $1,676,000, rather than that sum being paid to the Government, it would be paid to Soprim. The debt owed by the Government to Soprim would be thereby discharged.

361. As Mr Kendrick QC correctly put it, Mr Gelineau's idea of a loan was half-baked. The only possible relevance of a loan would be as a stop gap until the sale proceeds for the land were actually payable, but there was no suggestion from Mr Boreh that he required a loan until the sale proceeds were paid over. Much more likely is that Mr Gelineau had completely misunderstood what the second MOU required or that he was being deliberately obstructive (a point to which I return below). Either way, the Republic's reliance upon the email reflecting that misunderstanding in their closing submissions is misplaced.

362. As Mr Boreh explains in his witness statement, he discussed the issue of setting off the cash call with Mr Gelineau at a meeting they had in Dubai at the end of January 2003. He explained that, if the cash call had to be paid, he did not need a bridging loan for Boreh International and Essense to meet their capital calls. Mr Gelineau indicated that the cash call would have to be paid and Mr Boreh said he was willing to do so. This part of his evidence was not challenged in cross-examination. After that meeting, on 2 February 2003, Mr Gelineau sent Mr Boreh an email stating: *"Following our meeting in Dubai last week, can you instruct your bank to send us 187,500 usd representing the first cash call from the shareholders of the company. 20% = 150,000 usd for BI, 5% = 37,500 usd for Essences Management. Total = 187,500 usd."* Mr Boreh's bank transferred those funds the following day.

363. The claimants rely upon the fact that, five minutes after the email from Mr Gelineau on 2 February 2003 asking for payment of the cash call, Mr Gelineau sent Mr Boreh another email which provided: *"I am preparing the document regarding the success fee to be paid by Doraleh Terminals Limited to (name of company) for its services in obtaining the necessary licences for the construction and operations of the terminal. Thanks to send me a name."* The claimants submit that it is to be inferred that both the cash call and the success fee had been discussed at the meeting in Dubai a few days earlier and that, in effect, the success fee was the *quid pro quo* for payment of the cash call.

364. Mr Boreh said in his witness statement that this suggestion of a success fee came from Mr Gelineau and that he certainly did not suggest it himself. He was concerned to be seen by ENOC as a true local partner, not as merely a service provider, so he did not agree to receive a success or finder's fee, nor was he ever paid any such fee. He reiterated this in cross-examination:

> *"Believe me, we have not discussed about success fee. At that meeting we were talking only about the cash calls and I was explaining to him that I was going to get some of the revenue from the sales proceeds of the land, and I was asking him that: was it necessary that I pay in advance? This was his idea, which I was not happy with, and I was not going to treat this as someone who was just going to be paid a success fee. I didn't want a success fee, I wanted to be a strategic partner, and I wanted to consider myself as a partner. You know a success fee is maybe 150,000/200,000. I'm not interested in this."*

365. Mr Boreh was very insistent in cross-examination that this had come from Mr Gelineau out of the blue and that it had not been previously discussed. The claimants submit that this is implausible, but what is striking is that no success fee was ever paid. Although the claimants seek to keep alive the possibility that it was paid as part of the consultancy fees, those only came some four years later and there is no evidential basis for any suggestion that Mr Boreh was ever paid a success fee by ENOC, which is no doubt one of the reasons why the claim in respect of the Horizon success fee has been abandoned. Furthermore, in their letter of 7 July 2015, ENOC's solicitors, Baker Botts (UK) LLP, confirmed that the discussion about the success fee in February 2003 was abandoned and no fee was paid.

366. It seems to me that, although there is obvious force in the claimants' point that it is implausible that Mr Gelineau came up with the idea of the success fee out of the blue without any previous discussion, it is even more implausible that, if the fee had been discussed previously with Mr Boreh and ENOC was willing to pay it, Mr Boreh did not follow up and press for payment. The fact that he did not is consistent with his evidence that he was not interested in the idea of a success fee. On balance I consider it more likely that there had been no previous discussion, but even if there had been, it is clear that Mr Boreh thought better of receiving a success fee, so that the scope for any criticism of him on this score by the claimants is limited.

367. The apparent confusion within ENOC as to whether there was to be a loan to Soprim continued for a little longer. On 26 February 2003, Me Martinet (who according to Mr Boreh was acting for DTL (HDTL)) wrote to Mr Small of ENOC, pointing out a contradiction between the two MOUs signed on 21 December 2002, that one referred to a lease with no rent and the other to the Government being allotted 10% of the shares in return for the sale of the land. He put forward three possible solutions to the contradiction, the details of which do not matter for the present.

368. In relation to whether a sale agreement for the land was necessary Me Martinet said: *"We don't think that it is necessary to prepare a sale agreement for the land because D.T.T S.A.Z.F.* [i.e. HDTL] *will not pay the sale price. In our understanding, the land is the contribution of the government to D.T.T. S.A.Z.F. and they are not asking for being paid for the price of this land."* He also made express reference to the payment

of U.S. $1,676,000 to SOPRIM asking: *"We have also to know if the payment by D.T.T. S.A.Z.F. to SOPRIM of the difference of 1,676,000 US$ has to be mentioned in the shareholders agreement or if you need a separate agreement."*

369. In reply on 13 March 2003, Mr Small stated that ENOC preferred the third solution. He indicated that ENOC wanted a sale agreement drawn up: *"As to the issue of the land please be advised that, despite the apparent contradiction between the two MOUs signed on 21st December 2002, it was agreed that the Government of Djibouti would sell the land to the Company in return for obtaining a 10% stake in that Company. Accordingly, please would you prepare a sale agreement governing the sale of the land so that ownership may not be disputed at a later date."* In relation to the outstanding SOPRIM debt, Mr Small said: "*Regarding the repayment of the "loan" by the Company to SOPRIM, this will need to take the form of a separate agreement; since it involves parties in addition to those who will execute the Shareholders Agreement of the Company. We are currently waiting instructions on the terms of the "loan" document and will forward the same to you upon receipt."*

370. Me Martinet wrote in response to this on 19 March 2003. That response is somewhat confused, but again the detail does not matter. One paragraph read: *"It seems, from the MOU, that the land will be sold to D.T. Terminal SAZF for a formal price of 1 USD but under the conditions that D.T. Limited Bahamas have invested 22 500 000 USD and that D.T.T SAZF reimburse SOPRIM 1 676 000 USD, in a certain delay. If correct please confirm the delay and we can· prepare a sale agreement with such suspensive conditions. When the conditions will have been performed, the land automatically will be owned by SAZF."* Lord Falconer cross-examined Mr Boreh on the basis that Me Martinet thought that Soprim was going to receive a loan from HDTL. I am not sure that can be right and the fact that Mr Small refers to a "loan" in inverted commas suggests that he was aware that this was not in truth a loan.

371. As I pointed out at this stage of the cross-examination, what was required cannot have been a loan, as the second MOU contemplated reimbursement of Soprim from the sale proceeds of a debt owed by the Government not a loan to Soprim. In other words, as I said at the time, the obligation is pointing the other way and the reference to a loan is very confused. Lord Falconer said he completely agreed with that. Given that agreement, it is somewhat surprising that the claimants appear to be trying to cling on to this point about there being a loan to Soprim in their written closing submissions. The short answer is that the agreement reflected in the second MOU was never one for a loan and references by Mr Gelineau and Mr Small to a loan are a complete misconception. At least so far as Mr Gelineau is concerned, there is a real question mark as to whether this misconception was genuine, since subsequent internal ENOC correspondence referred to below, demonstrates that Mr Gelineau wanted to stall on the sale of the land and on settlement of the Soprim debt, which he clearly understood did involve a debt owed to Soprim rather than some loan to Soprim.

Mr Boreh's appointment to the DPFZA

372. In terms of the overall chronology, the next significant event was Mr Boreh's appointment as Chairman of the Board of Directors of the DFZA in May 2003, which became the DPFZA in October 2003, although that appears to have had nothing whatsoever to do with any ongoing negotiations between the Government and ENOC,

as there were none. The commercial deal for the Horizon project had been concluded with the two MOUs in December 2002.

373. I have already set out the background to the creation of what became the DPFZA at [14] and [15] above. In a note to the Secretary General for Presidential Affairs on 17 August 2008, Ms Zeinab Ali describes the role of the DPFZA:

> *"As a hybrid entity because of comprising various prominent people from the business community and the government, the rationale for the Ports and Free Zones Authority and its purpose under a government mandate (as it was placed under the authority of the Presidency of the Republic) was to be a go-between for the experts of DP World and of JAFZA Int. by facilitating their work and above all to convey instructions from the President of the Republic regarding the conduct of port strategies. Such is the substance to date of the role of the Ports and Free Zones Authority."*

374. In his witness statement, Mr Boreh said that he was appointed Chairman of the Board of the DPFZA precisely because he was a private businessman. This was "*a deliberate policy aimed at maximising private sector investment in the redevelopment of the Port*". This coincides with Ms Ali's description of the role of the DPFZA in her note. As she put it in cross-examination: "*this entity was going to be autonomous, free from the control of ministries, and the quality of the man who was in charge, that's what mattered.*"

375. The President accepts in his witness statement that he took the decision to nominate Mr Boreh as Chairman of the DPFZA in order to encourage the Dubai partners to invest in the Port project. However, he maintains that Mr Boreh asked to become the Chairman of the DPFZA and for the scope of its authority to be extended. In cross-examination, Mr Boreh was insistent that he had not asked to be appointed. He thought that maybe Mr Sultan had asked the President to appoint him because the Dubai interests were not happy with the incumbent, Mr Bahdon, and Mr Boreh was someone they felt they could deal with. At the end of the day, it may not matter much, but on balance it seems to me more likely that the Dubai interests asked the President to appoint Mr Boreh than that he asked himself.

376. In his witness statement, the President says: "*He said that he would act as Head of the Authority without asking for a salary because he wanted to promote and protect the interests of Djibouti. I agreed, although it was up to him to set his salary if he wanted. I did not know that he intended to become an investor in the companies relating to the new terminal when I agreed that he should become Chairman of the Djibouti Port and Free Zones Authority ("DPFZA").*" That last sentence is simply untrue. The President clearly knew about Mr Boreh's investment in DDP, where he was the major shareholder, and he was also well aware that Mr Boreh was taking a 25% or 30% shareholding in Horizon (including the 5% through Essense). The President also knew that Mr Boreh was the principal shareholder in Soprim which was involved in construction work in the Free Zone and would be involved in such work at Horizon. He also knew that it was Mr Boreh who had brought in DP World to manage the Port and who was responsible before he was appointed Chairman of the

DPFZA for obtaining all necessary permits and licences on behalf of the Dubai interests.

377. In the circumstances, Mr Boreh was appointed Chairman of the DPFZA by the President in the full knowledge that he had and would continue to have business interests in the Port and Free Zone and was closely associated with bringing Dubai investors to Djibouti. As the claimants' Djibouti lawyer, Me Dini accepted in cross-examination, this was a lawful appointment the President could make:

> *"Q. The President in his wisdom thought it would be better to use a businessman who had interests in the Ports and Free Zone, rather than using a bureaucrat who did not, and the President thought that was in the public interest. Make that assumption. Now, on those assumptions, that was an appointment that the President could lawfully make; correct?*
>
> *A. Yes, of course."*

378. Me Dini also accepted in cross-examination that the fact that Mr Boreh had business interests in the Ports and Free Zone, given that he was appointed by the President in the knowledge that he had such interests, would not put him in breach of any public law duty in Djibouti law.

379. Of course, at the time that the President appointed Mr Boreh Chairman of the DPFZA, he was also well aware of Mr Boreh's interest in Soprim, which would be bidding for construction work on the new projects. He did not require Mr Boreh to give up his interest. Although he says in his statement that he asked Mr Boreh "*to give up his involvement in the management of Soprim to avoid a conflict of interest*" I simply do not accept that evidence. Me Dini accepted in cross-examination that, with the President's knowledge of Mr Boreh's interest in Soprim, if he retained that interest following his appointment to the DPFZA, he would not be in breach of any public law duty.

380. As Mr Kendrick QC says, no European Government would dream of appointing a businessman with interests in the Port and Free Zone to the position of head of the DPFZA, but the appointment made sense in commercial terms since, with those continuing interests and his links with both the President and Dubai, Mr Boreh could get the Port project and the Free Zone moving in a dynamic way, under the close personal control of the President. That purpose of his appointment was reflected in one of the roles that he fulfilled, as described by Ms Ali in her 17 August 2008 note to the Secretary General for Presidential Affairs: "*the Chairman of the Board of Directors in his current position has separate powers outside the Board: the power to negotiate with Dubai's partners and the power to act as a spokesperson and go-between.*" This was a power which Mr Boreh exercised when instructed by the President, under his control, outside any Decree. A relevant example of the exercise of this power derived from the President is when he charged the DPFZA with negotiating the DCT concession with DP World, to which I will turn later in the judgment.

381. The other principal functions of the DPFZA were twofold. First it administered the Free Zone, the model being Jebel Ali, whereby the President tried to avoid ministerial

interference, as described by Ms Ali in the passage in her 17 August 2008 note which I quoted at [373] above. Second, the DPFZA sat as the board of PAID, which did not have a functioning board since the ministers who had been on the board were no longer permitted to sit, once the Port was under the management of DP World pursuant to the 2000 Concession Agreement. However, that Agreement required the approval of the budget of PAID, so that the DPFZA sat as the board of PAID to approve the budget.

382. In practice, this was all under the control of the President, both before and after the DPFZA took over as the board of PAID. As Mr De Jong, the General Manager of the Port appointed by DP World said in an email to Mr Fewer in October 2003 when the board of the DPFZA was set up: "*From my GM position, l fear little will change as all the hot issues that remain without a solution have gone from me to Aden to the president in the past anyway, without the transport minister. Running it through a 5 person board, with some not knowledgeable in ports/shipping is not going to change that it is ultimately the president who will decide on the main issues such as financing etc.*"

383. That email gives an interesting insight into the extent to which the President himself decided all the major issues in relation to the Port, both before and after the board of the DPFZA was constituted. This was eventually confirmed in cross-examination by Mr Douale. After an extraordinary reluctance to accept what Mr De Jong was saying in this email, he did accept that, as before, he and Mr Boreh between them had kept the President informed about everything which was going on:

> *"Q. Through a combination of your information and Mr Boreh, the President knows everything important that is going on to DPFZA, doesn't he?*
>
> *A. That's true, sir."*

384. This evidence demonstrates that, as Mr Kendrick QC put it, the President took full hands-on control for deciding all important Port and Free Zone issues throughout. He relied on information not only from Mr Boreh, whom he saw nearly every day when Mr Boreh was in Djibouti, but also in writing from Mr Douale and later, in relation to DCT, from Ms Ali. Mr Boreh described in vivid terms in cross-examination the way in which the President kept control by obtaining information and advice from a variety of sources:

> *"I want to tell you, my Lord, that I was one key adviser, but there were other advisers, I was not the only adviser. So he had a lot of people to listen with, and he comes from the background of the intelligence, he was a security person. So he always put one against the other, for example, me and Douale will cross each other and make sure that we all report to the President. So he has his way of control. But what I liked was at least he was listening to my version and not the other ones, and when he started listening to the other ones, you saw what happened."*

385. In my judgment this evidence about how, even after the setting up of the DPFZA board, the President retained overall control in relation to the Port and Free Zone and took all the important decisions personally, has the ring of truth and fits in with the nature of his regime. It contrasts with the totally false impression which he seems to me to be seeking to convey in his witness statements that he was not involved in any of the detail and left everything to Mr Boreh.

386. In terms of the relevance of Mr Boreh's appointment as head of the DPFZA to the claim in respect of the Horizon shareholding, as I noted earlier in the judgment when summarising the claims, the claim against Mr Boreh in respect of the Horizon shareholding, that he was in breach of private law duties as a *mandataire* or public law duties as an *agent public* is in large measure founded upon the fact that he was appointed as the head of the DPFZA and therefore represented the Republic. Indeed, as I noted in [138] above, the originally pleaded case that the acquisition of the Horizon shareholding was a breach of duty by Mr Boreh was based solely upon his appointment as President of the Board of the DPFZA.

387. That case faced two obvious difficulties. First, the Presidential Decree dated 29 May 2003, setting up the DPFZA and appointing Mr Boreh as Chairman, sets out the duties of the Board in Article 3. These do not include any duty to negotiate the agreement with ENOC for the Horizon oil terminal which is not mentioned at all, an extraordinary omission if Mr Boreh was supposed to be representing the Republic in those negotiations. The second difficulty is that, since the agreement that Mr Boreh would take a shareholding was made in December 2002, before he was appointed the President of the DPFZA, taking the shareholding cannot have been a breach of any duty he owed as a consequence of that appointment.

388. The claimants seek to overcome the latter difficulty by contending that arrangements continued to evolve during 2003 and by focusing on what they characterise as Mr Boreh's illicit acquisition of the proceeds of the sale of the land, which occurred after his appointment. It will be necessary to examine the sequence of events carefully to establish if there is any force in these allegations. However, as I have already held, the fact that Mr Boreh was taking a 25% shareholding (including the 5% through Essense) was known to the President months before Mr Boreh was appointed by him as President of the Board of the DPFZA. The fact that the debt owed by the Government to Soprim was going to be repaid through U.S. $1,676,000 of what was to be paid for the sale of the land was set out in the second MOU, which as I have also held, was signed by Mr Moussa with the authorisation and knowledge of the President.

389. Since the 1983 Law on Civil Servants in Djibouti (which I will deal with in detail in the section of the judgment on French and Djibouti law) permits even *fonctionnaires* to have private business interests provided they are disclosed to the President, it follows that, even if Mr Boreh had been a *fonctionnaire*, his shareholding in Horizon and off-setting of the Soprim debt would not have been a breach of any duty he owed as a consequence of being Chairman of the DPFZA. That must be *a fortiori* the case since, as I find below, he was an *agent public*, not a *fonctionnaire*.

Events leading up to the conclusion of the land sale

390. On 23 and 24 February 2003, Mr Boreh had meetings with DP World and ENOC to commence planning for construction of the road link and infrastructure. At the latter meeting Mr Fewer reported that the President had had a meeting a few days earlier with the Ruler of Dubai and that their chairman Sultan bin Sulayem had advised the President that the Doraleh project would be started on completion of studies. He also reported that DP World wanted to start on the approach road, earth works and jetty. Mr Gelineau reported that ENOC were in the final stages of purchasing the land for the tank farm and hoped the operation would be ready to start in July 2004.

391. In the first meetings with the oil majors in March 2003, they were told that: *"ENOC is now ready to go ahead with the new Oil Terminal at Doraleh"*. Similarly, on 26 March 2003, Mr Fewer emailed Mr Toujas-Bernate at the IMF (copied to Mr Douale who had recently met the IMF to discuss the project), saying that ENOC would be starting construction in a couple of months once topographical and geological studies were complete. On 1 April 2003, Mr Fewer emailed Mr Gnandou at the World Bank about a proposed delegation to the World Bank from Djibouti. He referred to the commitment of ENOC to build the new tank farm.

392. On 21 April 2003, Mr Douale wrote to the President stating: *"We took advantage of the fact that the President and CEO of DPA, Sultan Bin Sulayem, was passing through Washington, to introduce him to the institutions of Bretton Woods and to express to them the wishes of Dubai to participate in the financing and achievement of the port complex of Doraleh."* Mr Douale goes on to report on the meeting on 10 April 2003 at the offices of Societe Financiere Internationale, which he had attended with Sultan Bin Sulayem and Mr Fewer, together with representatives of Societe Financiere Internationale and the World Bank, to discuss possible financing.

393. The letter concluded with a ringing endorsement of the commitment of the Dubai interests to investment in the Doraleh project:

> *"The involvement of Sultan Bin Sulayen with the World Bank and Societe Financiere Internationale therefore served to prove how serious the intentions of our strategic partner, Dubai, really are. The Sultan informed me, upon leaving the meeting, that we should not worry and that Dubai had firmly decided to make this project happen. He also shared with me that the Islamic Bank was ready to participate in financing it. However, I insisted that an action plan be implemented. Instructions were given on this by the Sultan to John Fewer. The Sultan reminded me that the visit of Sheikh Mohammed to Djibouti in the month of December of last year represented a symbol of the unequivocal commitment of Dubai towards Djibouti."*

394. In May 2003, the draft shareholders agreement for HDHL was circulated for approval. The shareholders were ENOC (in fact through a new vehicle Horizon Terminals Limited), Boreh International, Essense and IPG. An email from Mr Gelineau on 14 May 2003 explained the decision to set up Horizon Terminals Limited: *"to meet the requirements, regional and international, for independent terminalling facilities and management."* The email then set out the shareholders in HDHL whilst noting that: *"Shareholders equity may vary according to potential last minute newcomers (presumably Majors operating ex Djibouti)"*. I deal with efforts to interest the oil

majors and EPE, the Ethiopian oil company, in taking a shareholding in the terminal, in the next section of the judgment. The email then stated that DTL, the operating company in the Free Zone, had changed its name to HDTL and that the shareholders in HDTL were HDHL and the Government. This arrangement whereby HDTL was the terminal company in the free Zone with HDHL acting as the vehicle for the private investors and owning 90% of the shares in HDTL, the Government owning the remaining 10% had been agreed in principle at the first shareholders meeting on 1 December 2002, as set out above.

395. It appears that certain ministers and functionaries in Djibouti had involved themselves in a rival project to build a terminal and, indeed, a refinery, with a South African company, Samex. Lord Falconer relied upon the existence of that rival project to suggest to Mr Boreh that the Horizon project was so little publicised that the ministers who involved themselves in that rival project had not known about Horizon. He put to Mr Boreh a witness statement from Souad Idriss Farah (who was not required to attend for cross-examination), who was in charge of that project and who signed a joint venture agreement with Samex, which was announced in the Djibouti state newspaper La Nation in June 2003.

396. Lord Falconer suggested that this demonstrated that the Government was entering into an alternative arrangement. Mr Boreh explained how this was all political rivalry, which the President was not happy about:

> *"Q. So the Government is entering into a joint venture to do in part what you had agreed to do in the memoranda of understanding executed in December 2002?*
>
> *A. Well, it depends what you mean by the Government because there is other ministries and there is the President of the Republic, and maybe those people had their own agenda, the Prime Minister and the Minister of Energy…*
>
> *I was not happy with this thing that was going to -- you know, you cannot compete on the same thing. There was already an engagement by the President at a very high level, and I think she* [Ms Farah] *was misled, and I told her, "You have made a mistake", I told the President, "Fine, let those people do it, we will just stay where we were and we will tell ENOC", because ENOC was worried, and they had an exclusivity, they had an exclusivity, at the highest level."*

397. Lord Falconer put that Ms Farah had not known that the deal with the South Africans would be inconsistent with the Horizon deal, again in an attempt to demonstrate that the Horizon project was not common knowledge. Mr Boreh refuted that suggestion in a convincing manner:

> *"Maybe she didn't know, and I said maybe. I could not talk on her behalf what she knew then, but Saad* [Mr Chaik another Djiboutian businessman involved in that rival venture] *knew because this is in June, and already ENOC people were coming and going, it was the talk of the town, although there was no*

> *publication, so he wanted to create this, and immediately, as you can see, she was blamed because somebody like the President have, you know, given this instruction to make sure that she really pulls out, and poor -- I mean, she really was pushed, because she couldn't be blamed, because she just executed the instruction from her Minister."*

398. In fact, as Mr Kendrick QC pointed out during an intervention, there was no evidential basis for the suggestion that Ms Farah had not known about Horizon, as she said in her witness statement that she had known about negotiations with ENOC. At all events, this was clearly all spoiling tactics by rival groups in the Government with their own agenda. The President stepped in and stopped the rival project. As Mr Boreh put it, again in what I regard as a convincing piece of evidence:

> *"But at the end of the day, what counts is what the top decision-maker of the Government will decide, and that's what really happened here. Because this was a project which was very, very closely watched by the Head of State, it was his project and he didn't want anybody else to interfere or to complicate things, and he wanted to build that confidence with the investors. They have failed previously to make a refinery, they have failed to make this pipeline, because Djibouti does not have crude oil, and it will not work and it will not be wise to build a refinery which then you have to transport the crude, refine it and then re-ship it again."*

399. On 1 September 2003, the Articles of Association for HDTL and a Shareholders Agreement between HDTL and HDHL were signed. In each case, Mr Moussa signed on behalf of the Government. This was with the full knowledge of the President who had told Me Martinet on 22 July 2003 that these documents would be signed by Mr Moussa. Then, later in September 2003, at the request of Mr Sultan, Mr Moussa provided a tax exemption for the Horizon project.

400. On 9 September 2003, the second shareholders meeting of HDTL took place in Dubai. In the minutes Mr Boreh is recorded as being in attendance for both Boreh International and the Government. The meeting was mainly concerned with the costs of the site development and jetty works. Although Lord Falconer put to Mr Boreh in cross-examination that he had not passed on the minutes of this meeting to the President, it was not being suggested that he had deliberately withheld them and, as he said, if what was discussed was important, he would pass it on to the President. This meeting was about routine matters to do with infrastructure works undertaken by Soprim, which are no longer the subject of any claim by the claimants.

401. On 22 September 2003, Mr Iyer of HDHL made a further cash call to the shareholders (who did not of course include the Government, since their shareholding was in HDTL) for U.S. $1.2 million. Despite Lord Falconer putting the point to Mr Boreh in cross-examination that this cash call was not sent to the Government as if there were something sinister in that, the Government was not a shareholder in HDHL so there would have been no basis for a cash call against them.

402. The next stage was to conclude the land sale, which seems to have been delayed as a consequence of the approach adopted by Mr Gelineau. In a letter to Mr Hussain Sultan on 23 October 2003, Mr Boreh complained that Mr Gelineau had not produced a document for signature to regularise the position as promised at a meeting on 21 October 2003. It is apparent from this letter that he and Mr Gelineau were at odds with one another and Mr Boreh had lost confidence in him, as he asked for him to be removed from the project. Mr Boreh also made the point that ENOC was in possession of the land and was carrying out work on site and yet there was no formal legal basis for this:

> *"Of primary concern is the manner in which the land issue is being handled. We have agreed, as evidenced by the Memorandum of Understanding signed with the Djibouti Government, that the value of the land will be accepted as the Djiboutian contribution to the Project. Mr Jerome Gelineau had promised that the document to regularize this matter would be made available for signature at our meeting on the 21st October. However I regret to inform you, that, in the same manner as he has systematically side-stepped most of his other undertakings, he made sure that this document was not ready. Although the land has been in your possession and work is going on, there is still no legal basis to formalize the interest of the Djibouti shareholders. The continuing lack of a Lease or Purchase Agreement in respect of the land is seriously compromising my position as Chairman of the Djibouti FZ A, it being my responsibility to secure rent or sale proceeds. Mr Gelineau has practically ignored your instructions to purchase the land."*

403. The obstructive attitude of Mr Gelineau disclosed by this letter seems to have been going on for a while. Following the exchange with Me Martinet in February and March 2003 to which I have already referred, in a meeting between Mr Gelineau and Mr Small to discuss the project on 23 March 2003, Mr Gelineau had concerns about any commitment to purchase the land: *"JG stating that the critical issue in this matter was that Djibouti SAFZ should not become the owner of, or be contractually bound to purchase, the land until such time as a feasibility study into the project together with all necessary authorisations, licenses etc. for that project had been received. JG did not want Djibouti SAFZ to acquire the land but then find itself unable to deal with the same due to some technica1/administrative or other reason. Furthermore, JG did not want Djibouti SAFZ to become bound to repay the debt of US$ 1.6 million to SOPRIM in the event that it was unable to deal with the land."*

404. As Mr Small pointed out at that meeting: *"these stipulations were not present in either of the two MOUs executed on the 21st December 2002."* Nonetheless, despite the fact that this was effectively placing a gloss upon what had been agreed in the two MOUs, Mr Gelineau seems to have maintained his obstructive attitude. At a meeting on 7 September 2003, Mr Boreh asked about the contract, evidently a reference to the contract for the sale of the land, and Mr Gelineau said it was being finalised by the ENOC legal department and he would get back as soon as possible when it was ready to be signed. However, nothing was forthcoming and, although Mr Gelineau had

promised something to be signed for their meeting on 21 October 2003, as Mr Boreh complained in his letter to Mr Sultan of 23 October 2003, nothing had been produced. This obstructive and foot-dragging attitude on the part of Mr Gelineau inevitably casts doubt on the genuineness of his apparent misunderstanding as to what the second MOU provided in terms of discharge of the Soprim debt.

405. Mr Boreh's letter to Mr Sultan of 23 October 2003 states that: "*We have now instructed Managers, Dubai Ports International, to proceed directly with you in the matter of the land.*" As I put to Mr Boreh in cross-examination and he agreed, this was him saying to ENOC that it had put Mr Boreh in an invidious position because it had neither leased the land nor paid for it, so now he had asked the people who were actually running the Port and Free Zone, JAFZA/DP World (who Mr Boreh said were the same) to deal with ENOC directly.

406. In their written closing submissions, the claimants relied upon dictation notes and an earlier draft of the letter to Mr Sultan of 23 October 2003 to suggest that Mr Boreh's real concern was his own cash flow. These earlier drafts were not put to him in cross-examination and I was unimpressed by whatever point the claimants were seeking to make. It is true that Mr Boreh does not seem to have brought the attention of the Government to there being an issue about finalising a contract for the sale of land. However, although the claimants seem to be trying to read something sinister into that, I do not consider that there is anything remiss in Mr Boreh not escalating matters to the Government, unless and until other efforts to finalise a contract through the Dubai interests failed.

407. In accordance with the indication in the letter to Mr Sultan, on 25 October 2003, Mr Chuck Heath of JAFZA wrote to Mr Gelineau in these terms:

> *"As I'm sure you are aware, Jebel Ali Free Zone International (JAFZI) has been appointed by Presidential Decree to manage and administer all free zones in the Republic of Djibouti and as such we are the sole point of contact between the users and owners of the zones.*
>
> *We understand that your firm, Horizon Terminals Ltd, has been allocated land in Doraleh of 320,000 square meters to construct a tank facility. We also understand your agreement with the Government of Djibouti is for the land to be purchased by yourselves at a rate of USD 21 per square meter. As manager of the Doraleh Free Zone, we request payment in the amount of USD 6,720,000 no later than Saturday, November 8, 2003. Unless we receive payment of this amount by this date, we will assume you no longer are interested in a purchase option and that you prefer to enter into a long-term lease for 20 years with the option to renew for an additional 20 year period. The annual lease rate is USD 9 per square meter per year or USD 2,880,000 per year.*
>
> *Please advise which option you intend to proceed with so that I can prepare the necessary and appropriate documents by the given date."*

408. In cross-examination, Mr Boreh said that in fact JAFZA had raised the issue of non-payment by HDTL for the land first, before he raised it with JAFZA. The claimants are highly critical of that evidence in their written closing submissions, suggesting that this is implausible. However, the tone of Mr Heath's letter of 25 October 2003 suggests that JAFZA was raising the issue of non-payment for the land of its own volition, as the body responsible for managing the area where the terminal was to be built. In any event, whether the demands in this letter were being raised by JAFZA of its own volition or at the behest of Mr Boreh, there is no reason to suppose that the demands were not genuine. I did not understand the claimants to be suggesting that this was not a genuine request by Mr Heath for payment of the sale price or of rent on behalf of the Government.

409. It is worth pausing at this point to examine the claimants' case as to what was happening. The claimants contend that Mr Boreh was: *"setting in chain a series of transactions that would deliver the proceeds of the land to Mr Boreh out of sight of the Government"* and later that there was *"no genuine intention for JAFZA to secure the sale proceeds for the Government"*, that point being made by reference to the proposal to pay the proceeds to JAFZA then have them repaid within a week. It seems to me this theory cannot work unless ENOC management were "in on" Mr Boreh's plan, since it appears that the proposal came from them and, even if it did not, they agreed with it. As with Mr Boreh's intervention at the meeting with the Arab Funds in February 2002 being part of some plot to avoid the Funds enquiring too closely into the relationship between Mr Boreh and the Dubai interests, this would involve imbuing Mr Boreh with a Svengali like quality, whereby he was able to persuade the people with whom he did business to act in an unethical manner in order to assist him. This does not seem very likely and the obvious question is, why would Mr Boreh need to devise such a plan, given the clear terms of the second MOU? Furthermore, there is no pleaded case that DP World or ENOC were party to some conspiracy to deceive the Government at this point in time and there is no evidential basis for it.

410. There was a meeting of HDTL attended by Mr Hussain Sultan on 26 October 2003 in Dubai, to discuss outstanding issues such as the signature of the shareholders agreement and the purchase of the land. The agenda gave the target date for the latter as 29 October 2003, so that it was obviously regarded as urgent. There is manuscript notation on the agenda, although not in Mr Boreh's handwriting. At the bottom of the document is written *"Chuck Heath"* although I doubt whether it is his handwriting, since there would seem to be no reason for him to be at the meeting. Against item 1: *"Payments of U.S.$4,176,000 for the land"* there are two notations. The first appears to read: *"$12* [obviously a reference to the price per square metre] *to obtain a letter for correct value from JAFZA to execute payment"* with above that *"along with bank details and how money should be paid"*. This appears to be a reference to the fact that Mr Heath's letter had set out the wrong price per square metre (U.S. $21 rather than U.S. $12). Despite Lord Falconer's submission that U.S. $21 was the right price if you added in the rent of U.S. $9 per square metre referred to in Mr Heath's letter, I consider that the notation demonstrates that those at the meeting thought Mr Heath had got it wrong, which given that the first MOU said no rent would be payable, he had. The notation also demonstrates that, assuming this was discussed at the meeting, those at the meeting thought that the demand for payment would be coming from JAFZA.

411. The second notation is unclear. Lord Falconer put to Mr Boreh that it read: "*money to be paid to JAFZA + repaid within 1 week + JPG will pay"*, with "*JPG"* being a reference to Mr Gelineau. However, this makes no sense, since Mr Gelineau was not due to pay anything towards the purchase price and, in any event, his initials are JFG. It seems to me more likely that it says: "*IPG will pay"* i.e. the other shareholder. This makes sense since, of course, IPG would be liable to make a pro rata contribution, particularly to the imminent cash call (referred to below).

412. It is not clear whether Mr Boreh was at this meeting, although since this copy of the agenda comes from his disclosure, that suggests that he was and that the handwriting was written on at the time. Certainly, against item 2: "*Deed for the purchase of land. Target date 15 November 2003"* in the same handwriting is written: "*Board resolution that AB to sign on their behalf*". Although there is no board resolution, there is a letter also dated 26 October 2003 from Mr Sultan on behalf of HDTL, authorising Mr Boreh to enter into a land sale/purchase agreement on behalf of HDTL with the Government and/or DPFZA for the price of U.S. $4,176,000. That letter was copied to IPG.

413. In their opening Skeleton Argument, the claimants stated that this authorisation to Mr Boreh to sign for HDTL was: "*presumably so that Mr Boreh could persuade the Minister of Finance to sign without asking questions*", a reference to the signature of the sale and purchase agreement by Mr Boreh for HDTL and Mr Bouh, the Finance Minister, for the Republic which took place at a meeting before a notary in Djibouti on 28 October 2003. In my judgment, this is taking the conspiracy theory to extremes. Given that the Government knew the land was being sold on the terms of the second MOU, it is difficult to see what questions Mr Boreh is supposed to have prevented Mr Bouh from asking. It is striking that the suggestion that he had procured the authorisation for that purpose or that he had prevented Mr Bouh from asking any questions at the formal meeting before the notary, were not matters which were put to Mr Boreh in cross-examination.

414. Lord Falconer did put to Mr Boreh in cross-examination that it had been his idea that the payment should be made to JAFZA and then repaid within a week. He denied this, reiterating what he had said in his witness statement, that what had happened is that, although HDTL had wanted to pay the purchase price through JAFZA, he had been concerned that JAFZA was going to take a 7½ % service charge on the monies even though he pointed out that the agreement for the purchase (i.e. the second MOU) was made on 21 December 2002, before JAFZA management of the Free Zone had started. He spoke to the President who was concerned about losing money through that service charge and they agreed he should ask JAFZA for the money back. He then wrote to Mr Sharaf [managing director of DP World] asking for the money to be returned, and the money was returned.

415. The claimants challenge the truthfulness of that evidence. They point out that, under the management agreement with JAFZA, not only did JAFZA not have any jurisdiction over the land, but land sales were exempt from the agreement. The claimants contend that there was no contemporaneous reference to JAFZA taking a management fee and there is no reason to accuse Mr Heath of trying to extract an unwarranted fee. The claimants' case is that Mr Boreh did propose payment to JAFZA then repayment in a week, as recorded in the manuscript on the agenda, and

that this was part of the subterfuge by which he got the sale proceeds out of sight of the government.

416. In my judgment there are a number of problems with that case. First and foremost, given that the second MOU was authorised by the President, so that it had been agreed by the Government that the Soprim debt would be repaid from the sale proceeds in the amount of U.S. $1,676,000, it is difficult to see what Mr Boreh's motive would have been in suggesting payment to JAFZA then payment back. There is also the fact that someone other than Mr Boreh made the manuscript notation on the agenda. On the basis that this was someone at HDTL (i.e. ENOC) that suggests that that person was suggesting the payment and repayment and that others at the meeting agreed. Unless they were parties to some nefarious plan with Mr Boreh (for which as I have said, there is no evidential basis) there must have been some genuine reason for the proposal.

417. It seems to me that what needs to be remembered is that, pursuant to the terms of the second MOU, U.S. $2,500,000 represented the value of the Government shareholding in HDTL, in return for which the Government was contributing the land. This represented the Government 10% share of the anticipated building costs of U.S. $25 million referred to in the MOU. Even if paid to the Government, it would have been required for payment of cash calls up to that amount of U.S. $2,500,000. The balance of U.S. $1,676,000 was to be paid by HDTL to Soprim in discharge of the Government's debt. However, two matters arose in late October 2003. First, JAFZA made demand in Mr Heath's letter on 25 October 2003 for immediate payment of the purchase price failing which only a 20 year lease would be available, so I can see that HDTL may well have thought full payment had to be made to JAFZA in the first instance. Second, ENOC/HDTL must have known at the time of that meeting that a further cash call was imminent. It was in fact made by Mr Iyer of ENOC on 4 November 2003. The amount due from the Government was U.S. $855,000. Of course this would be covered by the U.S. $2,500,000 which the Government was contributing by making the land available, but if the full purchase price was paid to JAFZA, then that amount at least would have to be paid back immediately to cover the cash call.

418. In the circumstances, it seems to me that the most likely explanation for the notation is not that this was part of some nefarious plan of Mr Boreh's but that, as Mr Kendrick QC submits, ENOC/HDTL saw this as a way of getting a good discharge for the purchase of the land by paying all the proceeds to JAFZA which would then repay the money for application against the imminent calls and discharge of the Soprim debt, then when IPG paid, ENOC would have all the money due from the shareholders for the cash calls. That this was a genuine arrangement on the part of ENOC/HDTL rather than some charade to assist Mr Boreh is borne out by the fact that, as contemplated by the other notation on the agenda, a letter for the correct price was sent by JAFZA on 3 November 2003.

419. Another problem with the claimants' case that this was all part of some subterfuge on the part of Mr Boreh, is that he did send a letter to Mr Sharaf (copied to Sultan bin Sulayem and Mr Heath) on 12 November 2003 as he said in evidence. That letter provided:

> *"We would appreciate it if you would remit the amount of USD 4,176,000 received from Horizon Djibouti Holdings Limited to ENOC without any deductions at your earliest convenience.*
>
> *Kindly note that this is an exceptional sale transaction agreed to by the Government of Djibouti and Doraleh Terminals Limited in the MOU dated 21 December 2002 prior to the commencement of the management agreement. Hence the above amount is not deductible and should be remitted in full."*

420. In my judgment, there is no reason to conclude that letter was not genuine. What it demonstrates is that Mr Boreh clearly was concerned that JAFZA/DP World was going to make some deduction from the proceeds hence his reference to not making a deduction. From that reference and his telling Mr Sharaf that this was an exceptional transaction agreed prior to the management agreement, it seems to me that he was addressing the possibility of DP World/JAFZA deducting a management fee and that his evidence about this was truthful. I will return to the payment and repayment of the money below, after I have dealt with the signing of the sale agreement.

421. The contract for the sale of the land was signed before the notary on 28 October 2003. This is another document which presents considerable difficulties for the claimants' case. In fact a draft of the contract was considered by Ms Ali who had just been appointed a board member of the DPFZA. In cross-examination, she said the document was drafted by the notary and Mr Boreh asked her to review it. During the course of doing so, she made some manuscript amendments, specifically (i) in Article 1 where she changed *"cet immeuble"* to *"ce terrain"* picking up that what was being sold was the land not a house; (ii) in Article 2 headed *"Protocol d'Accord"* (Memorandum of Understanding) where she changed the date of the MOU from 21 December 2003 to 2002; and (iii) in Article 4 the Price, where she changed: *"Lequel prix a ete paye"* (has been paid) to *"sera paye"* (will be paid). She accepted that she must have had the MOU in front of her to make those changes (in the event the third one was not incorporated in the final sale agreement). In my judgment, that has to have been the second MOU which refers to the sale of the land and the price for the land, rather than the first MOU.

422. The sale contract was signed before the notary in Djibouti on 28 October 2003 by Mr Boreh for HDTL, pursuant to the authorisation Mr Sultan had given him and by Mr Bouh, the Finance Minister, for the Republic. It was also signed by the notary. In cross-examination Mr Bouh agreed that the land in question at Doraleh could not be sold without the consent of the President. He also accepted, after a certain amount of prevarication, that the U.S. $4,176,000 payable under this contract was the highest price paid for a purchase of land in Djibouti and that the sale related to a project which was extremely important to the country.

423. So far as relevant for present purposes, the contract provided as follows (in translation):

> *"ARTICLE 1: DESIGNATION*
>
> *This relates to land located to the west of the port of Djibouti in Doraleh of a surface area of 348,000 m2 having a sea frontage*

> *of approximately 876 metres and adjacent tidal area, as moreover the land exists, with all its appurtenances, without exception or reservation, as it is described and demarcated on the title deeds and on the plan.*
>
> *MEMORANDUM OF UNDERSTANDING*
>
> *The Government of the REPUBLIC OF DJIBOUTI and HORIZON DJIBOUTI TERMINALS LTD SAZF, through a memorandum of 21 December 2002, have agreed (article 1-2.1.5) on the sale of land to the company designated above.*
>
> *ARTICLE 2: OWNERSHIP AND USE*
>
> *HORIZON DJIBOUTI TERMINALS LTD SAZF will have full ownership and use of the land hereby sold from the day of signing this agreement.*
>
> *ARTICLE 4: PRICE*
>
> *Furthermore, this sale is granted and accepted in return for the principal price of four million one hundred and seventy-six thousand (4,176,000) American dollars, namely at the price per square metre of the land sold at twelve American dollars.*
>
> *Which price has been paid out of the sight of the undersigned notary by the purchaser to the seller."*

424. Each page of the contract was signed by Mr Bouh and Mr Boreh. Mr Bouh accepted in answer to me that this meant that he had read through the contract. When I put to him that in those circumstances, he must surely have seen the reference to the Memorandum of Understanding and asked to see that document, if it had not been produced by the notary, he said he thought it was obvious that the contract he was signing was simply an application of the MOU, so he did not ask to see the MOU and he was not shown it. I do not consider that evidence was truthful.

425. To begin with, since Djibouti notarial practice follows that of France, it is inconceivable that the notary would have drafted the contract referring to an MOU without sight of that document or that he would have signed or permitted the parties to sign the contract referring to the MOU, without ensuring that the MOU was available and was seen and read by the parties. Ms Ali (a Djiboutian lawyer) confirmed this notarial practice in answer to me during cross-examination. Even if that were not so and Mr Bouh had not already been shown the MOU by the notary at the signing meeting, I consider that in reading through the sale contract and seeing the reference to an MOU, he would inevitably have asked to see the MOU and would have read it.

426. The obvious question is then, which MOU was being referred to, given that there were two MOUs dated 21 December 2002. Mr Kendrick QC put to Mr Bouh that it was a reference to the second MOU and it seems to me that must be right. As he says, the reference to an MOU containing "*article 1-2.1.5*" relating to an agreement

relating to the sale of land does not make sense on a literal reading of either MOU. The first MOU contains articles numbered in that way, but neither the MOU itself nor specifically those articles deal with the sale of land. Article 1 deals with the setting up of the company and Articles 2.1.1 to 2.1.5 deal with obligations of HDTL in relation to matters such feasibility studies and funding. On the other hand, the second MOU does relate to the sale of the land but contains no numbering at all other than of Article 1. However, as Mr Kendrick QC submits, if one adds the numbers 2.1.1 to 2.1.5 to the currently unnumbered paragraphs in the second MOU which follow Article 1, it is precisely those paragraphs which deal with all the arrangements for the sale of the land.

427. There is another piece of evidence which points clearly to it being the second MOU which was being referred to in the sale agreement and which was produced and read at the signing meeting. Mr Bouh accepted in cross-examination that the tick against the price in Article 4 demonstrated that one of his civil servants must have checked that the price was right. However, he or she can only have checked against some other document and this must have been the MOU referred to, unless there was some other government record which is not suggested. This is a further indication that it was the second MOU which contains the price which was produced and which was being referred to in the sale agreement.

428. Accordingly, I find that, at the time that he signed the sale agreement, Mr Bouh saw and read the second MOU, from which he saw, if he did not know already, that the sale price was U.S. $4,176,000, U.S. $2,500,000 of which represented the value of the 10% shareholding in Horizon allocated to the Republic and the balance of which U.S. $1,676,000 was to be paid to Soprim in discharge of the debt owed to it by the Government. It follows that he must have appreciated that no actual monies would be received by the Government.

429. If any of this had come as a surprise or if the Government was expecting to receive actual monies, no doubt Mr Bouh would have raised an issue about that and refused to sign until he had clarified the position with the President, particularly in a situation where the amount at stake was so large and his civil servants were checking that the price was right. The fact that he did not raise an issue demonstrates that none of this came as a surprise and the overwhelming likelihood as I see it, is that as Finance Minister, he already knew what the deal was in the second MOU, from discussions with the President or otherwise.

430. If the claimants were right in their case that Mr Bouh did not know that U.S. $1,676,000 of the proceeds of sale were to be used to discharge the Government debt to Soprim, it is inconceivable, given how high profile this transaction was and the amount of money involved, that the Government would not have been astute after the sale agreement was signed to follow up what had happened to the money. Although Mr Bouh denied any personal knowledge, he accepted in cross-examination that one of his civil servants must have checked this. He said the state auditor would also have had responsibility to do so. The fact that there was never any outcry about the Government not receiving any sale proceeds at all, speaks volumes and demonstrates clearly that the second MOU was known about and approved by the Government.

431. The claimants sought to counter this conclusion in their closing submissions:

> *"Mr Boreh's signature merely recorded the agreement already made by Mr Boreh on the Republic's behalf. Although it was suggested that Mr Bouh should have checked whether the price was correct, or what happened to the proceeds of sale, Clause 2.2.1 of the First Memorandum provides that the government shall transfer the land to the Company which will form its share in the capital of the Company. No money would have been expected, and Mr Boreh would have assured Mr Bouh that the government had got its shares."*

432. Quite apart from the fact that that submission is predicated upon the Government not knowing about the second MOU, a case which I have rejected in the findings I have already made, with respect it makes no sense. Even if I accepted (which I do not) that Mr Bouh did not know the extent of the shareholding, the President clearly knew that the 10% shareholding was valued at U.S. $2,500,000. After all, a critical part of the claimants' case is that the value of the land actually sold would have enabled the Republic to take a much bigger shareholding, but Mr Boreh told the President that 10% was the best he could get. In those circumstances, on the claimants' case the President must have been expecting to get the balance, U.S. $1,676,000, paid in cash. Even if Mr Bouh did not check what had become of the purchase price, he accepted that his staff and the state auditor would have done, in which case it would have quickly emerged that the government had not received its money.

433. Equally, even if the claimants' version of events were correct and the Government was not expecting any cash, because it thought the shareholding was equivalent to the entire value of the land, there must still have been a check by the civil servants in the Ministry of Finance and the state auditor. The idea that the functionaries employed by the Government never checked up to satisfy themselves as to the disposition of over U.S. $4 million in sale proceeds beggars belief. That check would have revealed that Mr Boreh was retaining money against future cash calls. If this had not been authorised by the President, no doubt complaint would have been made. The fact that none was made is a strong indication that what Mr Boreh did was authorised.

434. There is a further point which makes the Republic's whole case that the Government did not know how the proceeds of sale were being used implausible. That is the position of Mr Moussa, who had signed the second MOU in December 2002 and who signed the shareholders' agreement in September 2003. As I said during the course of the cross-examination of Mr Boreh on the basis that he had concealed the cash calls from Mr Moussa, it is a little surprising that Mr Moussa did not come back at some stage and ask where the U.S. $4,176,000 was. In their closing submissions, the claimants seek to counter that by saying that so far as the Government was concerned, the land was being exchanged for shares. Leaving to one side the President's knowledge that the 10% shareholding was valued at U.S. $2,500,000 so that there was a surplus of U.S. $1,676,000, Mr Moussa was the person who had signed the second MOU which set all this out. If, as the claimants contend, that second MOU was not authorised, they cannot simply ignore the fact that he signed it and, on that hypothesis, one might have expected him to make enquiry as to the whereabouts at least of the U.S. $1,676,000.

435. As already noted, on 3 November 2003, Mr Heath wrote to Mr Gelineau setting out the correct price for the land: *"As per your MOU with the government of Djibouti, it*

was agreed that you are purchasing 348,000 square meters of land at a rate of USD 12 per square meter. This equates to USD 4,176,000 and payment should be made to our account as follows as administrator for the Djibouti Free Zone Authority". It is evident that, as contemplated by the notation on the agenda of the 26 October 2003 meeting, someone had given Mr Heath the correct price, possibly Mr Gelineau in his "*prompt reply*" referred to in the first paragraph of Mr Heath's letter, but not currently available.

436. On 4 November 2003, Mr Iyer of ENOC sent the shareholders an updated status report on the project which included the third cash call. It referred to the land sale having been concluded and requested payment by 10 November. The cash call was for U.S. $1,615,000 from Boreh International, U.S. $323,000 from Essense and U.S. $855,000 from the Government of Djibouti, totalling U.S. $2,793,000.

437. On 5 November 2003, HDTL paid the land sale money to JAFZA. Then, again as already set out above, on 12 November 2003, Mr Boreh wrote to Mr Sharaf asking for the proceeds to be returned, without deductions. The proceeds were duly returned on 18 November 2003. There was then a meeting of HDHL on 23 November 2003 which records that: "*[Mr Iyer] gave an update on the status of the latest call made to the shareholders. He mentioned that the funds were not yet received from Boreh International FZE, Essense Management and the Djibouti Government. The shareholders were informed by Abdourahman Boreh that the funds have been transferred and would be in the account of the company within the next one or two days."*

438. The claimants' case appears to be that JAFZA knew that the monies should not have been paid back to HDTL. Thus, in their written closing submissions, the claimants say: "*Instead of the money returning within a week to HDHL (as per the agreement of 26 October 2003), there was a delay. It is the Claimants' case is that this was because JAFZA realised that there was no basis for transferring all of the Republic's money back to HDHL…The issue was not whether JAFZA should take a fee; the issue was that the money should have been paid to the Treasury (or at the very least) into a segregated government account held by JAFZA or PAID or HDHL. Mr Heath would have known that there was no reason to repay the land proceeds to HDHL in the absence of any evidence that it was liable to pay that amount… for whatever reason, Mr Sharaf acceded to Mr Boreh's request that the whole of the money be returned to HDHL's main account on 18 November 2003."*

439. The difficulty with this case is that it, unless once again it involves Mr Boreh using his Svengali-like powers to persuade JAFZA and DP World to do something improper, for which there is simply no evidential basis, it is inconceivable that, if as he had said in the earlier correspondence Mr Heath thought that it was for JAFZA to collect the sale proceeds on behalf of the Republic, he would simply have handed the money back to HDTL at their request, without checking with the Government that this was permitted.

440. In his second witness statement, the President seeks to distance himself from what JAFZA were doing in an unconvincing manner:

> "*The detailed progress of the Horizon terminal was not a topic which I discussed. I have too many other roles and*

> *responsibilities to be concerned with detailed points on the delivery of a project. Mr Boreh is simply wrong to say that I was informed or involved in issues such as delays in the sale of the land, or concerns about Jerome Gelineau. Nor was I told about the payment request made by JAFZA for the sale proceeds of the Horizon land."*

441. I do not accept this evidence. As I have already held, the President took a close interest in this project which he kept under close supervision and away from the interference of ministers, so that he would have ensured that he was kept informed of the progress of the project, including the fact that JAFZA had requested payment of the sale proceeds, had received them and was now handing them back. The claimants' case involves the implausible proposition that this all happened behind some sort of screen with the Government being blissfully unaware of the disposition of the proceeds of this high profile transaction, involving the highest price for a land sale ever in Djibouti.

442. On 7 December 2003, Mr Boreh wrote to Mr Iyer in response to his letter of 4 November 2003 setting out the cash calls. Mr Boreh pointed out that the total cash calls due from Boreh International, Essence and the Republic, which totalled U.S. $2,793,000 as set out above, were covered by the land transfer monies and he asked for the balance of U.S. $1,383,000 to be repaid to Boreh International.

443. In his witness statement, Mr Boreh describes agreeing with the President how the proceeds would be used in practice:

> *"The sale price of the land was US$4.176 million, whereas the amount owed in cash calls by BI, Essense and the Government of Djibouti was US$2.793 million. This meant there was a balance left of US$1.383 million to be paid out of the proceeds. Given the Government's perpetual cash shortage and huge debts, it made no sense for the land sale proceeds to be paid to the Treasury as the money would have immediately been swallowed up and would never have been available to pay for future cash calls. The President and I therefore both agreed that it was best if I held the excess cash and used it for the payment of future calls. The President trusted me, and so the excess cash was paid to my company to use to pay calls for both my companies and for the Government."*

444. In cross-examination Lord Falconer put to Mr Boreh that he had simply misappropriated the balance of U.S. $1,383,000 and that this is what had been agreed between himself and Mr Sultan at the meeting on 26 October 2003. Mr Boreh denied this, giving essentially the same explanation as in his witness statement:

> *"You know, my Lord, this was exactly as per the MOU where the money was going to be split 2.5 million for the Government and 1.67 for Soprim, which was my company, and when the money went back to Horizon, we told them to deduct the maximum of the cash calls that all of the three -- you know, the two parties, the Government party and the Boreh Group party*

> *to be deducted, and there was a balance of 1.3. The Government had the option to send it -- ENOC has the option to send it directly to the Ministry of Finance, and the Ministry of Finance will have just gone in the coffers of the Treasury, and it will have been very difficult to continue paying the cash calls. The President gave me the instruction to make sure that the 2.5 million is paid and that you collect this money and you keep it for the future payments. And I have informed the President, and I would not write such a letter, okay, without talking to the President clearly. And what happened after that, my Lord, in the next six, seven months, the money was paid back on behalf of the Djibouti Government for their shares."*

445. In his second witness statement, the President denies in a generalised way that he authorised the retention of the funds by Mr Boreh against future cash calls:

> *"I was certainly not told about an increase in the project costs of Horizon as alleged… It follows from this, that I was never informed about an obligation by the Republic to pay shareholder cash calls. The agreement that I thought had been concluded was that the Republic's land contribution precluded the Republic from having to pay further. This is not because the Republic could not afford to make such payments, but because that was the deal that I thought had been made. It further follows that I did not agree to Mr Boreh holding money on behalf of the Republic to pay future cash calls from those funds, as he alleges."*

446. Again, I do not find that convincing. In my judgment, the inherent probabilities point to Mr Boreh's explanation being the correct one. The President was interested in the success of the project and anxious to keep the whole Horizon project away from the interference of other ministers. In fact, at a shareholders meeting of HDHL in Dubai on 13 November 2003, at which it was stated that the project cost was now U.S. $58.4 million, Mr Gelineau hand delivered to Mr Boreh a copy of the 4 November 2003 status report containing the third cash call for Mr Boreh to give to Mr Moussa. Lord Falconer put to Mr Boreh in cross-examination that he had deliberately not passed on that cash call to Mr Moussa, so that the Government would not find out that he had been using the land sale proceeds to finance his own cash calls. Mr Boreh denied that, saying that if he was given something to pass on to Mr Moussa he would have done so. I accept that evidence. It seems to me inherently improbable that he would take such a huge risk given that, at some stage it was likely that ENOC would find out that he had not passed on important documents.

447. Furthermore, the position had now been reached where, with the project cost having more than doubled to nearly U.S. $60 million, the Republic's 10% shareholding was likely to expose it to cash calls over and above the total value of the land in any event. It is difficult to see what motive Mr Boreh would have had for not telling the President about the increased cost of the project. It was in no sense his fault that this increase had occurred. The claimants' case that Mr Boreh deliberately kept everything secret from the President and the Government might have some force, if Mr Boreh had simply stolen the U.S. $1,383,000 or used it for some extraneous purpose, but he

did not. He used it over time to pay the cash calls which were due from the Republic and the idea that he did that without informing the President makes no sense.

448. It seems to me that the likelihood is that Mr Boreh did give the status report to Mr Moussa, as requested by Mr Gelineau and that Mr Moussa reported to the President, following which there was a discussion between Mr Boreh and the President, as Mr Boreh said. The fact that Mr Boreh did not get back to Mr Iyer about the cash calls until 7 December 2003 suggests that he had been having discussions since the board meeting on 13 November 2003. It also seems to me more likely than not that Mr Boreh did discuss with the President the retention by Mr Boreh of the balance of the proceeds to be used for subsequent cash calls. The President's anxiety to avoid interference by ministers is likely to have included the Treasury and, if the monies were paid to the Treasury they might very well not have been available thereafter, given the propensity of the Government to use monies derived from the activities of the Port for other pressing commitments. The claimants suggest that it is unlikely that he President would have been prepared for Mr Boreh to keep the monies in an unsegregated account rather than for example with HDTL. The short answer is that Mr Boreh was his friend and he trusted him. Much better to have the money with Mr Boreh so that, if any cash call was contested, he would not pay it over, rather than leave it with the entity which was making the cash call and which might just appropriate the money required for a particular cash call.

449. Accordingly, I find that, whether through the discussions between Mr Boreh and the President or through checks carried out by civil servants and the state auditor or both, the Government was well aware that Mr Boreh had retained the balance of the sale proceeds and would use them to pay the subsequent cash calls.

450. On 14 December 2003, Mr Gelineau sent Mr Heath a letter enclosing Mr Boreh's letter of 7 December 2003 and requesting:

> *"In view of the fact that JAFZA has been appointed to administer and manage the Free Zone at Djibouti we request you to:*
>
> *a) Send us an official receipt for USD 4,176,000 towards full payment of the cost of the land at Djibouti.*
>
> *b) Confirm that the above adjustments could be made as detailed in the letter dated December 7 2003 from the amount of USD 4,176,000 paid by to HDHL.*
>
> *c) Confirm that the balance amount of USD 1,383,000 can be refunded to the account of Boreh International FZE."*

451. Mr Heath responded on 22 December 2003, providing the confirmation sought in paragraph (a) but saying that since JAFZA was not party to the agreement HDTL had, it was not in a position to confirm points (b) and (c). Contrary to the implication in the claimants' submissions, it does not seem there was anything sinister in JAFZA not providing confirmation in relation to matters which were outside their knowledge.

452. Mr Gelineau and Mr Iyer then prepared a Note for Approval of the Shareholders of HDHL dated 23 December 2003, which set out the terms of the second MOU and then the recent correspondence with Mr Boreh and JAFZA culminating in Mr Heath's letter the previous day. They noted that there were differences between the second MOU and Mr Boreh's letter of 7 December 2003 and said:

> *"ln view of the differences between the MOU and the letter received from Boreh International FZE the shareholders are requested to note and approve the following actions:*
>
> *i) A receipt in favour of Horizon Djibouti Terminals Limited SAZF to be obtained from the Djibouti Government for US$ 4,176,000 in full settlement of the cost of the land at Djibouti.*
>
> *ii) Letter to be obtained from the Djibouti Government concurring to adjust out the monies paid by back by JAFZA the share call monies due from Boreh International FZE (US$ 1,615,000), Essense Management Limited (US$ 323,000) and Djibouti Government (US$ 855,000) and refund the difference of US$ 1,383,000 to Boreh International FZE as per the letter dated December 7, 2003 received from Boreh International FZE.*
>
> *As per the MOU the difference should have been paid to the Djiboutian Soprim Company as per the terms to be determined between HDHL and Soprim. The shareholders approve that on receipt of the above documents stated in (i) and (ii) above to immediately pay US$ 1,383,000 to Boreh International FZE considering the overall interest of the project."*

453. Thereafter, although the *"belt and braces"* suggested by Mr Gelineau and Mr Iyer of a receipt and letter from the Government were not obtained, the adjustments set out in Mr Boreh's letter of 7 December 2003 were approved by the shareholders of HDTL in a document headed: *"Approval for Adjustments to be made from the payment made for purchase of land at Djibouti by HDTL."* Mr Boreh signed that document on behalf of Boreh International and on behalf of the Government of Djibouti, adding *"Ports & Free Zone A"* below. IPG signed that document on 7 January 2004. Mr Boreh's evidence was that he did not need a written delegation of authority, as the President had instructed him orally. For the reasons I have already given, I consider it more likely than not that the President had approved the off-set.

454. In cross-examination, Lord Falconer challenged Mr Boreh in relation to his use of the U.S. $1,615,000 and U.S. $323,000 for the cash calls due from Boreh International and Essense respectively from the sale proceeds of the land. In their written closing submissions, the claimants quoted one part of Mr Boreh's evidence which they described as telling:

> *"Q: On what possible basis could 1.9 million of the Government's money, because that's their entitlement to the money for the land ... be attributed to your companies?*

> *Because even on your own case, the most that could be attributed was 1.6 million.*
>
> *A: I agree entirely with you, my Lord. The only thing, it was just convenience. Instead of receiving money and then sending money back to them, it was just easier, this is the way I thought, because there was no harm by doing it, and that's how I felt. And eventually, like I said, the cash calls was paid back on behalf of the Government to Horizon, and it was not something – I financed the government for four years without interest for the money they owed me. So there is nothing special with it, there is no issue, I don't see the real problem, it was just to avoid this movement of money, receiving money and sending it back again. It was already in their books, I just paid the balance".*

455. The claimants were very critical of this evidence, saying that it reflected the fact that Mr Boreh felt perfectly entitled to use the Government's assets as it suited him and that his statement that he had financed the government for four years was untrue. If this answer is taken in isolation, the submission has forensic force, but this was by no means the totality of his evidence on this issue. When Lord Falconer returned to the same point a few minutes later, Mr Boreh made it clear that what had been done had been on the instruction of the President:

> *"Q. The Government's money is being used to pay for your cash calls to the sum of $300,000, and you are holding on to the balance of 1.3 million?*
>
> *A. Yes.*
>
> *Q. And you explain that by saying it was just convenient to do it that way?*
>
> *A. On the instruction of the President.*
>
> *Q. Why –*
>
> *A. He knew about it.*
>
> *Q. I put it to you that the President never agreed to that, and why would the President ever agree to that?*
>
> *A. The reason is if the money was sent to the Treasury, like I have explained in my witness statement, there would have been a lot of difficulties to send it back at the right time when the cash call was called. So the President didn't want to mix these two things, he didn't want the money to go back to the Ministry, where there was already a lot of deficit, he preferred to keep this thing safe, away, and to make sure that I just respected the cash calls; and I did respect the cash calls, and money, my*

> *Lord, was paid on behalf of Djibouti to Horizon on calls, on time, without any delays.*
>
> *Q. He could easily have put the money in a separate account?*
>
> *A. He has the option. If he has given me the instruction to send it to the Ministry, I would have done that.*
>
> *Q. Why should you be holding over $1 million of the Government's money?*
>
> *A. It's not a big thing. I was not going to disappear. I'm worth more money for the 1.3, I have assets in Djibouti and the President knew I could be trusted with this kind of money. It's not a big -- it's not something that was going to be for a long time. Already the next month we started paying, and then two months later we started paying. It was a temporary, maybe I hold it for six months, seven months, I don't recall."*

456. Despite the claimants' stringent criticism of Mr Boreh and the evidence he gave, I consider that this explanation is inherently more probable than the claimants' case to the effect that Mr Boreh "pocketed" some U.S. $3 million of funds, which they contend were due to the Government, without the Government ever becoming aware that this had happened. I regard that case as incredible. As I have already held, if this had not been agreed with the President as Mr Boreh said, it was bound to have been found out by the civil servants and/or the state auditor. The President of course has not come to be cross-examined on his knowledge of and consent to all these matters.

Attempts to involve the major oil companies and EPE in the Horizon project

457. This is a convenient point in the chronology to deal with the various attempts made by the shareholders in Horizon to interest the oil majors and EPE, the Ethiopian oil company, in taking a shareholding in the terminal, since those attempts straddle this period during which the sale of the land took place.

458. On 11 March 2003 a meeting took place with the three oil majors with facilities in Djibouti City. Although three sets of minutes were produced, there was only one meeting. In addition to the representatives of Shell, Total and Mobil, Mr Boreh was in attendance with representatives of ENOC, Mr Douale for PAID and Mr Hawker for DP World. Mr Boreh described the plans for the new terminal and said that ENOC was now ready to go ahead with the terminal. The three majors were invited to participate in the project as partners through a joint venture and as users of the terminal. If they did not wish to participate, they would be offered land at Doraleh to build their own facilities.

459. All three majors were asked to provide expressions of interest in principle by 31 March 2003. None of them did so and a year passed before there were any further discussions. They apparently did not believe that the project would get off the ground. On 10 May 2004 Mr Boreh, as President of the DPFZA, wrote to Shell, giving it official notice that the existing oil terminal would be closed with effect from May 2005 for security and environmental reasons. Thereafter services would be provided

by the new terminal at Doraleh and the letter reiterated the option of participation in the project. The Minister of Transport wrote a similar letter to Mobil in May 2004.

460. There was then a meeting with the majors also in May 2004, as appears from a letter from Mr Douale to the President written the following week. He deprecates: "*the negative attitude of these three petroleum companies, which have not even bothered to negotiate with ENOC. They seem to be expecting everything from us without having to make the least effort themselves.*" Representatives of DP World also met the oil majors on 27 May 2004 to discuss the practicalities of moving to Doraleh. Mr Hawker was critical of their attitude: "*it would appear that the three oil companies are emulating the typical Djibouti attitude. It's not up to me to ask any questions, it's up to you to know what I need to know and then to tell me the answers to the questions I should have asked."*

461. The President wrote an instruction to Mr Tani on the letter from Mr Douale that he should see the majors with Mr Boreh. Mr Tani duly saw them and found them obstructive, saying in cross-examination that they: "*did all they could to denigrate the construction of these infrastructures*" and were hostile to Horizon.

462. Mr Boreh's evidence was that the oil majors were reluctant to invest in Horizon because of the political risk in Djibouti. In my judgment that assessment was entirely correct: all the country analyses identify this as a risky part of the world, which is one of the things that makes the commitment of the Dubai interests generally to investment in Djibouti and the success they have made of that investment, all the more remarkable. Mr Boreh also identified another major concern of the oil majors as the possibility that Assab in Eritrea might reopen to tanker traffic. As he said: *"Because if the Ethiopian market for one reason goes to Assab, then you end up with this infrastructure and you don't know what to do with it. So it's a very risky business, that's why they were very reluctant."* A related issue was that the oil majors had built their existing facilities many years ago and a new terminal might struggle to be competitive.

463. So far as the attitude of the individual oil companies is concerned, Mobil was only prepared to discuss investment if the Government would pay it compensation for its existing assets, which was clearly never going to happen. By July 2004, Mobil had commenced litigation against the Government seeking to annul the notice requiring it to move from the existing facilities and the Government was contemplation litigation against Mobil to recover the costs of the clean-up of pollution. In the event, Mobil sold its Djibouti assets to Total and withdrew from the country.

464. Shell wanted compensation for leaving its existing facilities and was not interesting in taking a shareholding unless it was involved in the operation of the Horizon terminal, which is understandable but equally one can see why that would be unacceptable to ENOC. In the event, Shell decided not to stay in Djibouti and sold out to Libyan interests.

465. Total was the most positive of the majors, possibly because of its position as the oil company of the former colonial power. Its existing tanks were the most modern and it proposed a basis of contribution which involved treating the existing tanks as a contribution in kind to any joint venture. It also wanted compensation for closure of its existing facility. Mr Boreh's recollection was that it also wanted control of the

venture. In the event, although, unlike the other majors, Total remained in Djibouti, it did so on the basis of taking a storage contract.

466. The overall picture which emerges is that, despite the best efforts of Mr Boreh and HDTL to persuade the oil majors to take shareholdings in the Horizon project, none of them had any real interest in that proposal and simply used it as leverage on the Government to seek to persuade it to provide compensation for loss of the existing facilities. The truth is, as Mr Kendrick QC submits, that the oil majors would rather wind up their operations in Djibouti than take a shareholding. None of this assists the claimants' case that the reason why the majors did not invest was the reluctance of the existing investors to countenance outside investment. That case is unsustainable: the contemporaneous correspondence demonstrates that HDTL and Mr Boreh did everything they could to persuade the majors to invest. Their reasons for not doing so were those set out above, which had nothing to do with any alleged reluctance of the existing shareholders to allow further outside investment.

467. So far as EPE is concerned, the minutes of the first shareholders meeting on 1 December 2002 record Mr Sultan saying: *"we may have to reserve shares for Majors, the Ethiopian government and DPI"* which suggests some reluctance on the part of ENOC to involve EPE. That reluctance became more marked. Mr Gelineau visited Addis Ababa on 17 September 2003, to discuss the project. EPE asked if shares were available. Mr Gelineau said no, but the question would be raised at board level. It was raised at the board in October 2003 and rejected.

468. Mr Boreh's evidence was that the Ethiopians were not really interested in taking shares in the terminal and had expressed no such interest at the governmental level. The claimants challenged that evidence in cross-examination. They refer in their closing submissions to an inter-governmental meeting in March 2003 which records: *"The Ethiopian side raised the issue of oil storage tank construction around Dorale and showed its interest to know the status of the study in order to allocate budget for pre planning purposes."* The claimants submitted that the reference to needing to allocate a budget is only consistent with Ethiopia either becoming a partner or building its own facility. I am not sure I accept that. The context appears to be the amount of storage that would be available and I suspect the pre-planning and budget were to do with a potential long term storage contract.

469. It appears that there was a renewed request from EPE about shares in about May 2004. Mr Gelineau is recorded as saying that, in view of the nature of EPE and the benefits it could bring to the project, the shareholders had decided to put the issue on the agenda for the next board meeting in June 2004. The President seems to have been keen for EPE to become a shareholder and Mr Boreh had discussions on the subject with ENOC. On 18 May 2004, Mr Boreh sent the President a note of those discussions under cover of a fax saying: *"After discussions with ENOC this is the best scenario that could be reached"*. The note referred to the fact that *"10% of the shares of the projects are parked with IPG (5%) and BI (5%)"*, once again informing the President that Boreh International had a shareholding, a point I return to below. The note indicated that HDTL/ENOC would be willing for EPE to become a shareholder but only on the basis that it enter into a long term storage and handling agreement for a minimum capacity of 75,000 m3 at 6.0 USD/m3/month with 12 throughputs included.

470. Mr Boreh's evidence in cross-examination was that EPE wanted its own berth and its own land in Doraleh, which would of course provide Ethiopia with a corridor to the sea, but that made the Government of Djibouti nervous for strategic reasons. That is borne out by what Ambassador Ragsdale said in a cable in June 2004. I return below to the significance of what the U.S. Ambassador knew or was told about Mr Boreh's investment in Horizon, but in relation to investment in the project, she reported:

> *"Boreh told Ambassador he owned 40 per cent of the Doraleh project, with ENOC owning the remaining 60 percent. Some place Boreh's holdings at 20 percent, with the rest of the 40 per cent share divided equally between the Government of Djibouti and President Ismail Omar Guelleh. In addition, at the May 18-20 meeting in Djibouti of the Ethiopia-Djibouti Economic and Commercial Ministerial Working Group, Ethiopia requested land at Doraleh to invest in and build a petroleum depot to accept petroleum products in transit to Ethiopia. The Djiboutian side explained to the Ethiopians that, for security reasons, it preferred to place petroleum activities at Doraleh in the hands of ENOC. After much discussion of this issue, Djibouti rescinded and agreed to include Ethiopia in the project because of the two countries' "strategic partnership." It is unclear if Ethiopia will follow through on its request and also unclear as to which partner would provide the percentage to Ethiopia."*

471. The question of offering a shareholding to EPE was discussed at the shareholders meeting of HDHL on 21 December 2004 when Mr Boreh said that any offer should be limited in time, which was agreed. It was still a condition of the offer that EPE should enter into a three year storage contract. The offer made required a response by the end of January 2005. EPE rejected the offer and continued talks just for a storage contract. It appears that the rejection was based on "*the importance of the investment and the location being outside of Ethiopia*" but there may also have been concerns about the throughput price. Thus, ultimately, EPE, like the majors, decided not to invest in Horizon, as Mr Boreh correctly said in his second witness statement.

472. Since there was no interest in investing from the majors or EPE, Boreh International and IPG each received an additional 5% shareholding, as it had been agreed at the first shareholders meeting on 1 December 2002 would happen in that event. There was nothing underhand or suspicious about this.

The Information Memorandum

473. Before returning to the chronology of the Horizon project after December 2003, I will deal with the detailed Information Memorandum prepared by ENOC/Horizon for the purposes of raising finance, which provides further evidence, if any were needed, of the Government's knowledge of Mr Boreh's investment in Horizon. The Information Memorandum was sent out to a number of potential investors: Standard Bank, BNP Paribas, Abu Dhabi Commercial Bank, Dubai Islamic Bank, Standard Chartered Bank, Arab Petroleum Investment Corporation and Emirates Bank International. The Information Memorandum was sent to the shareholders including the Government (for the attention of Mr Moussa) under cover of a letter from Mr Gelineau as Chief

Operating Officer of Horizon Terminals Limited dated 9 November 2003. There is no suggestion in the letter that Mr Gelineau sent it to Mr Moussa via Mr Boreh, nor was it suggested to Mr Boreh in cross-examination that he had kept it back from the Government.

474. In fact, in an internal email within the Boreh Group on 11 November 2003, Mr Wahdwani asked Mr Mehta for the postal address and contact details for Mr Moussa, which were being requested by ENOC who wanted to courier him some documents. Given the length of the Information Memorandum, the likelihood is that they wanted to send him that and the covering letter. Mr Mehta provided full details by return and, contrary to the suggestion by Lord Falconer in cross-examination of Mr Boreh that these contact details were never passed on to ENOC, I see no reason not to conclude that, in the ordinary course, ENOC was given the contact details. The suggestion that, having asked for the details and obtained them, Mr Wahdwani then did not pass them on, makes no sense at all.

475. One of the points made by Lord Falconer in cross-examination as to why the contact details were not passed on was that, at the meeting in Dubai on 13 November 2003 to which I referred at [446] above, Mr Gelineau had hand-delivered to Mr Boreh a copy of the updated status report of 4 November 2003 containing the third cash call for him to deliver to Mr Moussa. The suggestion was that this would not have been necessary if Mr Wahdwani had already passed on Mr Moussa's contact details. It seems to me that that may be a false point because of the timing. The exchange between Mr Wahdwani and Mr Mehta where Mr Mehta gave all the contact details was on 11 November and even if they were passed on to whoever he was dealing with (and there is no reason to suppose it was Mr Gelineau) the following day, I do not regard Mr Gelineau giving Mr Boreh something to deliver to Mr Moussa as inconsistent with someone else at ENOC having been given his contact details the day before. The likelihood is that, if having asked Mr Wahdwani for his contact details, they had not been provided as Lord Falconer suggests, ENOC would have chased for the contact details and ultimately protested that they had not been provided. The absence of any chaser or protest points to the details having been provided. In the circumstances, I find that the Information Memorandum was provided to Mr Moussa.

476. The Information Memorandum on its title page identified the "sponsors" of the project i.e. the shareholders as including the Government and Boreh International. In the section dealing with the profile of the sponsors, the document says this about Boreh International: *"BIFZ is an investment company wholly owned by Mr. Abdul Rahman Boreh. Mr. Boreh is a high profile and high net worth entrepreneur of Djibouti. He is perceived as a highly influential person with contacts in various Government quarters. The present opportunity has been identified by him keeping in view the "energy hungry situation" of Djibouti and the re-export potential to the other parts of Eastern Africa."* That is a telling passage which demonstrates the high regard in which ENOC held Mr Boreh as a local investor, not just a cigarette trader as the Republic seeks to portray him.

477. Section 3 of the Information Memorandum is headed "*Management and Shareholding Pattern*". It begins with an explanation of the HDTL/HDHL structure: *"Horizon Djibouti Terminals Limited SAZF (HDTS), the new operating company, through which the present project is being implemented, has been set up in the free zone of Djibouti with two shareholders. Horizon Djibouti Holdings Limited (HDHL)*

will hold 90% of the share capital in this company and the balance 10% will be held by the Djibouti Government." This open description of the structure gives the lie to the suggestion which seemed to be being made in the claimants' submissions that HDHL was some sort of device to keep Mr Boreh's personal investment away from the eyes of the Government.

478. There is then a section headed: "*Shareholding Pattern of HDHL"*, which provides as follows:

> *"Horizon Djibouti Holdings Limited ("HDHL") is a company which has been incorporated in the Bahamas with an authorized share capital of US$ 750,000*. The shareholding pattern is as follows:*

Shareholder	*%*	*US$*	*Effective holding in HDTS*
Horizon Terminals Limited (HTL)	*44.44*	*333,333*	*40%*
Independent Petroleum Group SAK(IPG)	*22.22*	*166,667*	*20%*
Boreh International FZE	*27.78*	*208,333*	*25%*
Essense Management	*5.56*	*41,667*	*5%*

Limited			
Total	*1 0 0*	*750 ,00 0*	*90%*

> ** Since the equity capital of HDTS is estimated at around USD 18.6 million it is felt that the authorised share capital of both HDHL and HDTS would require to be increased. However, in case the shareholders 50 decide, they can bring in the additional equity in the form of interest free subordinated loans."*

479. The next section of the Information Memorandum is headed: *"Provision for a new investor"* and provides:

> *"There is a clause in the shareholders agreement that the shareholders agree to use their respective reasonable endeavours to seek and obtain the investment of a third party purchaser who shall become a shareholder in HDHL. In such an event BI and IPG shall each transfer to such a third party purchaser 41,667 Shares (5.56%) in HDHL.*
>
> *If a third party purchaser is found prior to 31st December 2003, or such later date as may be agreed between all the Shareholders in writing, the transfer of the shares in the Company from BI and IPG to the third party purchaser, as contemplated above shall be at no less than their par value.*
>
> *If a third party purchaser is found subsequent to 31st December 2003 the transfer of the shares in HDHL from BI and IPG to the third party purchaser, as contemplated above shall, unless otherwise agreed to in writing by an the shareholders, be at a fair value determined on the basis of a sale between a willing buyer and a willing seller contracting on arm's length terms, having regard to the net tangible assets and goodwill of HDHL at that date but without taking into account the size of the shareholding, any option, lien, encumbrance charge or other restriction on the transfer of such Shares."*

480. It follows that any recipient of this Information Memorandum (whether a potential investor or a shareholder) who read it would know straight away: (i) that the shareholdings of Mr Boreh's companies were in HDHL; (ii) what the size of those shareholdings was and the effective holding in HDTL to which it corresponded and (iii) that, in the event that an additional investor came on board, the Boreh International shareholding would reduce by 5.56%. I see no reason to conclude that Mr Moussa did not receive this important document and read it. Accordingly, I consider that the information contained in this document was known to the Government. As with the first cash call, if there had been anything in it which took

Mr Moussa by surprise, it seems to me inevitable he would have raised it with the President.

Subsequent events in relation to Horizon

481. As I have already held, there was no question of Mr Boreh making off with the proceeds of the sale of the land. Rather, they were used to honour the cash calls due from the Government. After the proceeds were used to pay the third cash call due of U.S. $855,000 in December 2003, Mr Boreh subsequently paid cash calls 4, 5 and 6 on behalf of the Government in a total amount of U.S. $1,146,000 in April, July and October 2004. This was accepted by Lord Falconer in cross-examination, but he put to Mr Boreh that the emails containing the cash calls had not been sent by him to Mr Moussa and that this had been done deliberately, so that the Government would not find out that Mr Boreh had been using the proceeds of sale to pay his own cash calls. At this point on the fourth day of his cross-examination Mr Boreh repeated his evidence that this had all been agreed with the President and became understandably agitated and bemused:

> *"…it has been agreed with the President what was going to happen, and that Soprim was going to receive on behalf of the Government on custody for their future calls, because of the reasons I have explained yesterday. So this was in agreement with the President. That is what is important here. So there is no other motive that I had to deceive or to not inform Osman [Moussa]. That's really not fair. I feel it's not fair. I have been through a lot, you know, and I'm tired of, you know, accusation after accusation after accusation. I am sorry, my Lord, that I feel like this, but please, I apologise."*

482. In fact, as noted above in the context of the Information Memorandum, ENOC almost certainly had Mr Moussa's contact details and there is no reason to suppose that it did not send copies of the cash call demands to him. The Republic has not produced any evidence that he did not receive the cash calls and the President's contention in two sentences of his second witness statement (which I have already quoted above), that he was never informed about either the increase in project costs or the requirement for the Government to pay cash calls, is implausible in the extreme. In any event, the theory that Mr Boreh withheld the cash calls to conceal his own use of the sale proceeds to pay his calls makes little sense. The U.S. $1,383,000 would have been exhausted by the April 2004 payment, which was U.S. $1,616,000 in all (including the Government's share) and in July 2004 and October 2004, the total amounts paid out by Mr Boreh (inclusive of the Government's share) were U.S. $2,224,000 and U.S. $746,400 respectively, so that there is no question of Mr Boreh having used the proceeds of sale to fund those later cash calls.

483. The claimants seek to make much in their written closing submissions of the request by HDTL's auditors for confirmation of balances as at 31 December 2003 from Boreh International, Essense and the Government. These were emailed to Mr Boreh on 26 February 2004, with a request for assistance in obtaining the confirmation from the Government. The request for confirmation of balances from the Government treated the U.S. $855,000 cash call in November 2003 as: *"Long Term Loan to Horizon Djibouti Terminals Ltd SAZF USD 854,000, Share Capital USD 1,000"*. The

claimants suggest that Mr Boreh could not disclose this to the Government, because no-one there knew that the Government was being treated as having contributed U.S. $855,000 to cash calls or that Mr Boreh had taken the proceeds. Reliance is placed upon the fact that, on 25 May 2004, ENOC sent a follow up email to Boreh International saying that it had still not received the confirmation from the Government.

484. Mr Boreh's evidence was that he probably had told the Government one way or another including the President, but the claimants challenge that, saying if it were true the confirmation would have been signed in quick order. The claimants asserted in their opening Skeleton Argument that, in effect, it was this conundrum about the confirmation being required, but Mr Boreh having to keep the fact that he had used the proceeds of sale to pay the cash calls, which led him to request the Power of Attorney which the President gave him in June 2004, referred to below. However, as Mr Kendrick QC points out, that is wrong: the confirmation he signed pursuant to the Power of Attorney was for the 2004 financial year produced in February 2005 and there is no evidence that he signed the 2003 confirmation.

485. The claimants seek to characterise Mr Boreh's request in June 2004 for the Power of Attorney as part of his scheme to conceal from the President and the Government what he was doing with the proceeds of sale. In my judgment it was nothing of the sort. The idea of a Power of Attorney came from Me Martinet who was acting for ENOC. He drafted the Power of Attorney and sent it to ENOC on 10 June 2004 saying:

> *"Corporate law in Djibouti, as French law, is a little formalist and it is necessary to respect these formalities. For example:*
>
> *-financial statements of the Company, together with the Auditor's report and Director's report have to be sent to shareholders 15 days at least before the yearly general meeting;*
>
> *-a special "Procès Verbal" must be issued after the meeting with the adoption of the resolutions and special mention that all legal formalities have been respected.*
>
> *Even if the minority shareholder (the Government) seems not to be interested by the management of the Company, 1 would insist on the necessity to respect these formalities to avoid future problems. However, the Power of Attorney signed in favour of Abdourahman Boreh should clarify the situation."*

486. The Power of Attorney which Me Martinet drafted provided that the Republic, represented by the Minister of Presidential Affairs, Mr Moussa, and owner of a 10% share in HDTL, granted Mr Boreh authority: *"to represent [the Republic] at the General meetings of shareholders of said company whenever they are convened, to get acquainted with all documents and information, attend meetings, issue all votes, sign all acts and documents and generally do the necessary."* The Power of Attorney in this form was signed by the President on 16 June 2004.

487. In his fax to the President of that date requesting the Power of Attorney, Mr Boreh also said: *"I would also like to bring to your kind attention that the above investment is currently still under the Ministry of Investment rather than the Ministry of Finance. A letter by the Ministry of Investment giving instructions to transfer the investment under the Ministry of Finance and Societe Internationale Des Hydrocarbures De Djibouti should be sufficient to effect this change."*

488. Mr Boreh's explanation for this request in cross-examination is that it was because he thought Mr Moussa was not the right person within the Government to be in charge of the project, because he was busy on other matters for the President and did not have time to focus on the project. In their written closing submissions, the claimants assert that it is far more likely that the real reason for Mr Boreh seeking to have the investment transferred from one department to another in June 2004, was that it might resolve the audit issue, as a new department would have to accept his word. This is fanciful in the extreme and was not in fact put to him in cross-examination. As Mr Kendrick QC submitted, if Mr Boreh was a fraudster trying to keep his dealings secret, it would be foolish to encourage the involvement of other ministries who might take more interest than Mr Moussa in the project.

489. Although the claimants were critical of Mr Boreh's explanation, it resonates with what Me Martinet had said about the Government not seeming to be interested in the management of the company and I accept that explanation. At all events, the President does not seem to have agreed with Mr Boreh, as no change was made and Mr Moussa remained the person in charge at the Government.

490. On 11 November 2004, pursuant to the Power of Attorney, Mr Boreh wrote to HDTL on behalf of the Republic in relation to a proposed further reallocation of U.S. $400,000 of the sale proceeds of the land, in these terms:

> *"As per the MOU dated 21st December 2002 the purchase price of the land was fixed at USD 4,176,000 to construct the terminal at Doraleh. The cost of land will be adjusted towards following:*
>
> *1. Govt. of Djibouti contribution USD 2,100,000*
>
> *2. Boreh International Ltd USD 2,076,000*
>
> *(Settlement of dues of Boreh International Ltd from Govt. of Djibouti)*
>
> *The contribution from Govt. of Djibouti in excess of USD 2,100,000 will be made by Boreh International Ltd and be adjusted from the future dividend share of Govt. of Djibouti payable from Horizon Djibouti Terminals Limited. Further if any contribution paid on behalf of Govt. of Djibouti by any shareholders namely Horizon Terminals Ltd, Boreh International Ltd, Independent Petroleum Group and Essense Management will also be settled from the future dividend share of Govt. of Djibouti payable from Horizon Djibouti Terminals Limited.*

> *After the adjustments of all the dues to all other shareholders (contributed on behalf of Govt. of Djibouti) the balance dividend, will be directly paid to Govt. of Djibouti"*

491. Mr Boreh's evidence in his witness statement was that this adjustment related to additional work carried out by Soprim on behalf of the Government:

> *"I spoke to the President and asked his permission to use an additional part of the land value as a way of paying for Soprim's work. I reminded him that ENOC had already agreed that the Government's future cash calls could be funded by low interest loans from ENOC to be set off from future dividends. The President asked whether this would affect the Government's 10% in the Horizon Terminal. When I confirmed that it would not, the President told me that I could go ahead. I would not have signed the letter if the President did not give me permission to do so. This is not something which could have been concealed. The President was bound to find out, because the arrangement in due course would reduce the amounts that the Government received in dividends."*

492. He repeated in cross-examination that this was done on the authorisation of the President, who told him to use the existing Power of Attorney and that he would never have carried out this reallocation without the permission of the President as it was bound to come to light. There is a general denial by the President in his second witness statement that he agreed this reallocation: *"Contrary to Mr Boreh' s claims, I would not have agreed to limit the value of the Republic's contribution by using some of the value of the public land to pay an amount to Mr Boreh's construction company Soprim. For the same reasons, Mr Boreh is wrong to say (at paragraph 244) that I agreed to the further diminution of the value of the Republic's contribution that Mr Boreh engineered in late 2004."* However, in my judgment is inconceivable that Mr Boreh would have carried out this reallocation without the permission of the President. The claimants' case that it was unauthorised involves Mr Boreh taking this step in circumstances where, as he says, it was almost bound to come out in due course.

493. By June 2005, Mr Boreh had become concerned about the way in which the project had been managed and about the cost overrun. At a HDHL board meeting on 10 July 2005, Mr Gelineau reported that, since the last board meeting in December 2004, the project costs had increased by U.S. $6 million and were now U.S. $99.3 million. He gave the reasons for the increase as higher construction costs and mechanical and piping costs as well as higher project management costs and financial costs caused by the delay in construction. Mr Boreh is recorded in the minutes as saying:

> *"AB said that Government of Djibouti (GD) is not going contribute any further funds and Boreh International and Essence Management will also not pay their contribution until they are satisfied about the basis of increase in the cost of the civil works of the project."*

494. It seems to me inherently unlikely that he would have said this without having discussed the costs of the project with the President. Later in the minutes, reference is made by Mr Boreh to a letter the Republic had written saying if the terminal was not complete by 31 December 2005, it might take action against HDTL. It would seem likely that there had been discussion about cost overrun with the President in that context. Mr Sultan proposed a meeting with the Government on 21 July 2005 to assure it the terminal would be available by the end of the year. It was not clear from the evidence whether that meeting took place.

495. Following that refusal by the Republic, Boreh International and Essense to pay any more cash calls, ENOC and IPG funded the project themselves for a while, but then resolved the impasse by entering into loan agreements with each of the Republic, Boreh International and Essense, in order to fund the cash calls. Mr Boreh's evidence was that he saw the loans as a way of getting ENOC and IPG to make good their mistakes in project management, by ensuring that they were the ones who bore the immediate cost of the cost overrun.

496. Mr Boreh signed the loan agreements on behalf of both his companies and the Republic. His evidence was that he did so with the express knowledge and authority of the President. He explained in cross-examination what had happened and how the President had approved the loans:

> *"If you look at the amount we borrowed from the banks, my Lord, it was, I think, $60 million, and the project was around 100 million, so let's say the equity was 40 million, and Djibouti Government 10% of the equity will have been $4 million. Their initial money was 2.5, which was reduced to 2.1, so they needed at least another 1.9 million as cash calls. This was purely equity after we got the loan. It was the interest of Djibouti to not be diluted because they have no cash to pay as a normal business, and I talked to the President and I made the issue with Hussein, and that's where Hussein Sultan said "Please don't worry, Djibouti is a strategic partner, we will give them soft loan without interest and they will not be diluted, they will have their shares and everything will go well and it will be deducted from future dividends. And when I told the President, he was extremely pleased with all that, and he gave me the instruction to go and sign it on behalf of the Government, and they benefitted from this action. I didn't borrow money on their behalf to put it in my pocket. It was for their benefit, it was something that they will benefit from it."*

497. As with so many other issues, in his witness statement the President simply gives a brief denial of any knowledge of these loan agreements, as part of his assertion that he thought the land was the Republic's only contribution: *"I never knew that the Republic was being asked to contribute money, nor was I aware of any loan agreements. If needed, the Republic would have paid the necessary contribution. I understood, however, that the land was Djibouti's only contribution."* I find this denial of all knowledge of the cash calls and the loans thoroughly unconvincing. The project was one in which the President took a close personal interest and it was delayed with cost overruns. This evidence involves what seems to me the absurd

proposition that the Government knew about the delay and wrote complaining about it (as recorded in the minutes of the shareholders meeting in July 2005), but did not know about the overruns and hence about the Republic's liability to pay cash calls. The absurdity of this position would, no doubt, have been put to the President if he had come to be cross-examined.

498. Accordingly, I find that the loans were known about and approved by the President, who authorised Mr Boreh to sign on behalf of the Republic. As I have already noted, when dealing with the Essense shareholding above, the Republic and Essense received loans on more favourable terms than Boreh International, in that whilst the loan to Boreh International was to be repaid on presentation of the completion certificate or 31 December 2006 whichever was the earlier, the loans to the Republic and Essense were to be repaid later, from any dividends.

499. In their opening Skeleton Argument, the claimants made two points about these favourable terms. First, apparently in an effort to deal with the fact that ENOC treated the Republic and Essense on the same footing, they asserted that Mr Boreh must have lied to Mr Sultan about the Essense shareholding being for the President, but that, as Mr Kendrick QC says, is verging on the perverse and, in any event, the point was not put to Mr Boreh in cross-examination. Second, it is asserted that ENOC gave these loans on soft terms because it knew that Mr Boreh had not been authorised to deal with the land as he did, and was corruptly colluding with him to hide this from the Republic. This is a serious allegation which seeks to implicate ENOC, which is not a party to these proceedings. The point is unpleaded and, if it was to be made, it should have been pleaded and ENOC should have been informed that it was being suggested that it had acted in bad faith so that it could respond if it saw fit. This point too was not put to Mr Boreh in cross-examination. I have assumed that neither of these points is being pursued, since they do not seem to be referred to in the claimants' written closing submissions. However, if I am wrong about that, I consider both points wholly without merit and reject them.

500. The Horizon terminal opened on 26 February 2006. Mr Boreh describes in his witness statement how there was an opening ceremony attended by the President, who insisted that all his ministers attend as well. As appears from the press report of the opening ceremony, by this stage a storage contract had been entered into with the U.S. Navy. Ambassador Ragsdale was in attendance and the ceremony culminated in a reception on board the USS Vicksburg. There were other foreign diplomats present as well. Mr Boreh made a speech as Chairman of the DPFZA.

The Horizon consultancy agreement

501. Mr Boreh refused to repay the loans to Boreh International due to his continuing concerns about poor project management. This impasse was resolved in June 2007. Mr Boreh's evidence in his witness statement is that he agreed to repay the loans if HDTL reimbursed him for substantial out of pocket expenses he had incurred earlier in the project in moving graves at Doraleh and relocating local residents. These massively exceeded his original estimate and came to about U.S $1 million.

502. Mr Boreh describes what was agreed with Mr Sultan in these terms in his witness statement:

> *"Hussain Sultan told me that whilst ENOC were in principle willing to accept this proposal, as a matter of company policy ENOC could not reimburse me for these costs without invoices or receipts — which I did not have.*
>
> *Hussain Sultan discussed the problem with some of his colleagues, and then told me that, in order to get around this problem, we could sign a consultancy agreement between HDTL and Boreh International, under which Boreh International would be paid US$150,000 per year for work I had done since 2003. I was told that this sum was the maximum annual sum that ENOC could pay me. We expected the agreement to continue until I had been paid an amount equivalent to what I had spent on moving the graves and relocating residents, plus interest (which is why a further US$150,000 payment was made under the agreement the following year). This was an artificial way of doing things, because most of the expenses had been incurred earlier, and not at a precise rate of US$150,000 per year. However, ENOC wanted to draw up the agreement in this way, and provided that I received payment for my expenses, I did not greatly mind what form the agreement took."*

503. The Consultancy Agreement for payments of U.S. $150,000 a year starting on 1 January 2003 was approved by the Board of HDTL at a directors' meeting on 4 June 2007. The Consultancy Agreement itself provided that the Consultant was to provide services as defined, which included analysis of the local oil market, acting as an interface between HDTL and the Government, petitioning the Government to invest in the infrastructure, identifying contractors and obtaining permits and consents and advising on recruitment. As Mr Kendrick QC demonstrated in Appendix C to his closing submissions, Mr Boreh had performed these services, although clearing graves and relocating residents are not listed in the definition of the services.

504. On 3 July 2007, payments totalling U.S. $750,000 were made by HDTL to Mr Boreh, covering the years 2003 to 2007. An email the same day from HDTL demonstrates that these payments were linked to the repayment of the loans, as Mr Boreh had said in his witness statement:

> *"Further to our telephonic conversation, please find enclosed the scanned copy of the payments to Boreh International as per the consultancy agreement. There are 2 payments enclosed herewith.*
>
> *(1) A transfer letter dated 12th July 2007 for the value of US$ 600,000 towards the past period services rendered as per the consultancy fee 2003 to 2006*
>
> *(2) Cheque dated 14th June 2007 for the value of US$ 150,000 towards 2007 consultancy payment.*

> *As per our discussion, could you please arrange for the repayment of the Loan (principal amount) provided to Boreh International as per the agreement dated 7th February 2007 of US$ 2,281,250 at the earliest."*

505. The Republic's pleaded case was that the entering of the Consultancy Agreement was a breach by Mr Boreh of his duties as the claimants' agent (private or public) and that he was liable to account for monies received under the Agreement pursuant to Article 1993 of the Civil Code. The defence pleaded was that the payment was for genuine services rendered to HDTL and that, if the Consultancy Agreement had caused any loss, it was a loss suffered by HDTL alone, not by the Republic. Unsurprisingly, the claim in respect of the monies received by Mr Boreh under the Consultancy Agreement had been abandoned by the end of the trial. However, the claimants still rely upon the Consultancy Agreement in support of their case that he was not a truthful witness and has the propensity to enter into corrupt relationships with the Dubai interests.

506. The claimants submit that the Consultancy Agreement is a sham agreement and that the paragraph from Mr Boreh's witness statement which I quoted at [502] above admits as much. They also submit that this has been effectively admitted by ENOC. They rely on the exchange of correspondence between Mr Boreh's solicitors, Byrne & Partners and ENOC's solicitors, Baker Botts (UK) LLP. On 3 July 2015 Byrne & Partners wrote setting out Mr Boreh's recollection of the purpose of the Consultancy Agreement and asking ENOC to confirm whether this was correct:

> *"With regards to the Consultancy Agreement, Mr Boreh's recollection is that the Consultancy Agreement with HDTL related to services he had been, was and/or might be able to provide to HDTL, and reimbursed him for the personal out-of-pocket costs that he had incurred to clear the land on which the terminal was to be built (including the costs to relocate residents and the cemetery that was located there)."*

507. Baker Botts replied on 7 July 2015: *"We further confirm that your client's recollection of the purpose of the Consultancy Agreement, as set out in the penultimate substantive paragraph of your letter, is consistent with our clients' understanding."* I do not consider it fair to say that ENOC were thereby accepting that the Consultancy Agreement was a sham. The use of that word as I pointed out in argument has connotations of Diplock LJ's famous definition of "sham" in *Snook v London and West Riding Investments Limited* [1967] 2 QB 786 at 802C-E:

> "As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one

> thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* (1882) 21 Ch. D 309 and *Stoneleigh Finance Ltd. v. Phillips*, [1965] 2 QB 537) that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived."

508. It does not seem to me that ENOC was admitting in that solicitors' letter that the Consultancy Agreement was a sham in that sense or at all. On the contrary, Baker Botts were confirming on behalf of ENOC that the Consultancy Agreement related to services which Mr Boreh had provided, was providing or might be able to provide in the future. That seems to me to be saying that it was a genuine agreement, not a sham one. Furthermore, I would be most reluctant to conclude that ENOC had participated in a dishonest arrangement with Mr Boreh. This is another instance of the Republic being prepared to make a serious allegation implicating ENOC, where it is not pleaded that the Consultancy Agreement was a sham and ENOC was not put on notice that such a serious allegation was being made.

509. In his oral closing submissions, Lord Falconer sought to downplay the allegation of sham in an attempt to avoid the implications of *Snook*, by saying that his point was that both Mr Boreh in his witness statement and ENOC through Baker Botts' letter were accepting that the Consultancy Agreement was not what it purports to be. I do not consider that diluted allegation is correct either. Both Mr Boreh and ENOC were saying that the Agreement related to services that he had performed, was performing or was going to perform in the future. Mr Boreh's point about artificiality in his witness statement is not an admission that the Agreement was a sham or not what it purported to be, but the much narrower point that the services he had performed could not be valued at precisely U.S. $150,000 a year, but that ENOC had wanted the Agreement framed this way. He clearly was not concerned with the detail, provided he got paid for the services, many of which he had provided as defined in the Agreement, as Mr Kendrick QC says in his Appendix C, the correctness of which I accept.

510. The claimants made much in their written closing submissions of Mr Boreh's evidence in cross-examination, when he was challenged about the Horizon Consultancy Agreement. It is certainly true that his evidence about the cost of moving graves and relocating residents and having handed out over U.S. $1 million in cash was somewhat unconvincing, but it did not lead me to conclude, as the claimants submitted, that his evidence was completely untrue. He had spent money moving graves and relocating residents, but had no evidence of how much or documentation in support. It was in those circumstances that ENOC came up with the idea of the Consultancy Agreement, as Mr Boreh said in cross-examination: *"there are no receipts whatsoever, because you know the thing we were doing, and in fact that's the reason ENOC could not just pay, because there was no receipts, and they found this compromise by doing this consultancy agreement, it came from their side, because*

they have a system to pay for consultancy, and they have that autonomy or power to do it, that's why they found the solution."

511. Mr Kendrick QC's submission about the Horizon Consultancy Agreement in his oral closing submissions was that:

> *"…it is so obviously a compromise of a shareholder dispute, Mr Boreh is being asked to repay a loan of over 2 million, his point is the costs have got way too high and out of control on this, "and on the other hand look at all the work I have done for you". ENOC consider it and say "Yes, that's got some force", they effectively give a discount. The consultancy is discussed openly in the board meeting, it's openly there in the accounts, it's there for all to see. This is not some under the counter corrupt payment."*

512. That submission seems to me an accurate assessment of the true nature of the Consultancy Agreement. The claimants sought to meet the point about the Agreement being openly discussed and agreed at the board meeting by saying that there is nothing in the minutes to suggest that the board was told the agreement was a sham. That argument is predicated upon the claimants' case that the agreement was a sham or not what it purported to be, but I have already rejected that case. Also, given that the director present apart from the two Mr Sultans and Mr Boreh was Mr Wadeed of IPG, this argument necessarily involves the allegation that ENOC and Mr Boreh misled Mr Wadeed as to the true nature of the agreement. Quite apart from the inherent implausibility of that argument, since it is difficult to see what motive ENOC would have for doing that, this is another serious unpleaded allegation against ENOC of which it has had no notice. Furthermore, as Mr Kendrick QC correctly points out, the existence of the Consultancy Agreement is openly referred to in the HDTL accounts, so that, if it was not genuine as the Republic suggests, it would seem that ENOC must have misled the accountants as well, all thoroughly implausible.

513. The claimants were also critical of Mr Boreh's evidence as to whether he told the President about the Consultancy Agreement. His pleaded case was that he showed the minutes of the board meeting to the President, although he did not give evidence about this in his witness statement or suggest that he had told the President about the Consultancy Agreement. When cross-examined about this, he said he could not remember whether he showed the President the minutes or whether he told him about it verbally. He said that the President knew that it was Mr Boreh who had arranged for the clearing of the land, which seems likely. In those circumstances, it is difficult to see that it would take the President by surprise that Mr Boreh was seeking reimbursement for the cost of doing so.

514. It is also striking that, although the claimants sought to make something of the fact that no Government representative is recorded as present at the board meeting, Mr Moussa had given a written authorisation on behalf of the President for Mr Abdourahman Abdillahi, described as *"the legal adviser to the President"* to attend the board meeting in Dubai on 3 June 2007. If he was intended to attend it would be surprising if he did not do so. Whether he did or not, a copy of the minutes of the meeting was disclosed by the claimants from his file. This demonstrates that he knew about the Consultancy Agreement and the likelihood is that he would have told the

President about it, so that one way or another, the President knew about the Consultancy Agreement. However, whether the President knew about the Consultancy Agreement or not, I do not consider that it gives the Republic any legitimate basis for complaint against Mr Boreh or criticism of him. It is, as Mr Kendrick QC correctly put it, irrelevant.

The Government's knowledge of Mr Boreh's shareholding in Horizon

515. At this stage of the chronology, before turning to the chronology in relation to the DCT, it is appropriate to draw together the various pieces of evidence which clearly demonstrate that the Government and the President knew about Mr Boreh's shareholding in HDHL at the time.

516. As I have already found, I accept Mr Boreh's evidence that he told the President that he intended to invest in Horizon and that, in December 2002, he told the President that he was taking 20%. I am quite satisfied that the President knew from an early stage in 2000 or at the latest 2001, that Mr Boreh was intending to invest and that the President was quite happy for him to do so, as his commitment would encourage the Dubai interests to invest in Doraleh. I am also quite satisfied that in their discussions in December 2002, Mr Boreh told the President that he was taking 20% or 25% (depending on whether further investors were obtained) and the President asked Mr Boreh to take an additional 5% through Essense. Quite apart from the fact that I accept Mr Boreh's evidence about this, the President has not come to be cross-examined about his knowledge and I would if necessary draw the adverse inference that at least one reason why he did not come is concern that his knowledge of Mr Boreh's business interests, including his shareholding in Horizon, would be exposed.

517. In a sense, that is sufficient in itself to establish that the President knew about Mr Boreh's shareholding and raised no contemporaneous complaint, from which it must follow that Mr Boreh was not in breach of any duty owed to the Republic and that the Republic's claim in these proceedings in respect of the shareholding must fail. However, I will summarise the other pieces of evidence which clearly establish that the Government knew about the shareholding at the time.

518. Quite apart from Mr Boreh's evidence about the President knowing about the shareholding, which I accept, there is documentary evidence that the President was told by Mr Boreh in 2004 about the shareholding. First, there is the fax dated 18 May 2004 referred to at [469] above enclosing the note of Mr Boreh's discussion with ENOC about EPE which states that: "*10% of the shares of the [Horizon] projects are parked with IPG (5%) and BI (5%)*" As the defendants say in their written closing submissions, whilst this does not refer to the totality of Mr Boreh's interest, it is consistent with Mr Boreh having been open with the President about his shareholding, and it would be unlikely that he would send a note referring to Boreh International having shares if he was trying to conceal the fact that he had a shareholding at all.

519. On 29 December 2004, Mr Boreh sent a letter to the President on the letterhead of another company he had established, Djibouti Investment and Development ("DID") introducing the company and a proposed five star hotel to be constructed in partnership with foreign investors. The letter gave a brief presentation of the shareholders in the new company, including Boreh International, which it described as: "*the primary investor in Horizon Oil Terminal, the company in charge of building*

the oil terminal in Doraleh and a Horizon investor in Singapore" and Essense, which it described as*: "one of the primary founding members of Dry Port, having invested in the present Dry Port managed by Dubai Port International, and holds stakes in Horizon Oil Terminal."*

520. The President must have read that letter since he passed it to Mr Moussa for action, with an explanation of its contents. This is wholly inconsistent with Mr Boreh wanting to keep his interest in Horizon secret and with the President not already being well aware of the shareholding, since otherwise an alarm bell would have rung at this point. In their opening Skeleton, the claimants sought to address this point by suggesting that, following the meeting at which the US Ambassador discussed Mr Boreh's shareholding with Mr Tani (referred to below), questions were being asked about Mr Boreh's interest in Horizon and that, by December 2004, Mr Boreh was taking the risk of referring to it in passing, as a 'double bluff,' in the hope of creating a paper trail to suggest in future years that his interest had been disclosed. This suggestion is nonsensical. The overwhelming likelihood is that Mr Boreh referred to his investment in Horizon because he had always been open with the President about it.

521. Another compelling reason for concluding that the President and the Government were well aware of Mr Boreh's shareholding in Horizon by 2004 at the latest is that Mr Moussa was clearly aware of the shareholding. The claimants have sought to downplay the significance of Mr Moussa, but he was the Minister of Presidential Affairs and a key adviser to the President, effectively his second in command as the defendants put it. He was the Government appointed director of HDTL. The evidence that he knew about Mr Boreh's shareholding and interest in the proceeds of the sale of the land is overwhelming and, like the President, he has not come to give evidence to explain his role or to gainsay the conclusion to which the documents lead, that he was well aware of the shareholding and interest in the proceeds of sale from as early as December 2002. I consider that the claimants could have called Mr Moussa to give evidence had they wanted to. If necessary I would draw the adverse inference that they did not want to do so, because he would be forced in cross-examination about documents he received, to accept that he knew about Mr Boreh's shareholding and the offset of the Soprim debt against the proceeds of the sale of the land.

522. To begin with, Mr Moussa signed the second MOU on 21 December 2002 on behalf of the Government, which referred to the Soprim debt and entitlement to a share of the land proceeds. The suggestion that somehow Mr Boreh hoodwinked him into signing it is clearly nonsense. As I have found, it was signed on the instruction and with the knowledge of the President, following his meeting with Mr Hussain Sultan and Mr Boreh the previous day. Within a matter of days, on 7 January 2003, ENOC sent Mr Moussa a fax setting out the first cash call on all the shareholders, with Boreh International referred to as a paying party as well as the Government. If Mr Moussa had not previously known about the shareholding, he knew now and would surely have raised it with the President if he had any concern. The claimants clearly appreciate that this cash call presents them with difficulty, and in their opening Skeleton speculated that Mr Boreh may have told Mr Moussa there was a mistake. This fanciful suggestion was not put to Mr Boreh in cross-examination.

523. As I have also found, Mr Moussa received the Information Memorandum sent out by ENOC to potential financiers in November 2003. That told him: (i) that the

shareholdings of Mr Boreh's companies were in HDHL; (ii) what the size of those shareholdings was and the effective holding in HDTL to which it corresponded and (iii) that, in the event that an additional investor came on board, the Boreh International shareholding would reduce by 5.56%. If any of that was news to him, it seems to me inevitable that he would have raised it with the President. I have also found that, in all likelihood, Mr Boreh did provide Mr Moussa with the status update report dated 4 November 2003 containing the third cash call as requested by Mr Gelineau. That made clear what sums were required from all the shareholders including Boreh International and Essense. It is also likely that Mr Moussa discussed this with the President, following which Mr Boreh and the President had a discussion in which it was agreed that the balance of the proceeds of the sale of the land should be retained by Mr Boreh to pay cash calls.

524. A year later in December 2004, Mr Moussa received from the President a copy of Mr Boreh's DID letter about the hotel project with instructions to deal with the matter. That referred in terms to the investment of Boreh International and Essense in Horizon. Again, if any of that had taken Mr Moussa by surprise, it seems to me inevitable that he would have discussed it with the President.

525. Later in the story, on 5 February 2007, Mr Moussa attended a board meeting of HDTL as the representative of the Government, at which Mr Boreh was also present as the representative of Boreh International and Essense. It must have been perfectly obvious to Mr Moussa that Mr Boreh was a shareholder, even if he not already known it. There was no surprise expressed or suggestion that there was anything untoward. Again, as already noted above, for the next board meeting in June 2007, at which the Consultancy Agreement was approved, Mr Moussa on behalf of the President authorised Mr Abdillahi, legal adviser to the President to attend the meeting in his stead. It would be a little surprising if, having gone to the trouble of providing that written authorisation, Mr Abdillahi had not attended that meeting. Although it is fair to say that the minutes do not record his having been there, the minutes of the subsequent meeting on 25 February 2008 referred to below do not refer to his having been at that meeting either, although it is pretty clear he was. If he was not there at the June 2007 meeting, given that he had been given the authorisation, there is all the more reason to suppose that he would have read the minutes of the meeting which have been disclosed by the claimants from his file and communicated their contents to Mr Moussa and the President.

526. A final piece of evidence in relation to Mr Moussa's knowledge of Mr Boreh's shareholding comes later, but casts important light on what his knowledge and that of the President was at an earlier time. At the subsequent board meeting of HDTL on 25 February 2008, there was consideration of dividend distribution for the first time. The amount proposed for immediate distribution was U.S. $443,000, so the Government share was a modest U.S. 44,300. The board was asked to approve the dividend policy. The minutes record Mr Boreh having said: *"the share of the dividend for the Government of Djibouti (GD) should be allotted to Boreh Int'l (BI) for the reason that BI has paid the share capital of the GD. He added that though there may not be a written agreement between the GD and BI, there is evidence of payment."* Lord Falconer suggested in cross-examination that he was misrepresenting the position to the board, but his explanation, which I see no reason not to accept, was that he mistakenly thought at the time that he had overpaid, but was content for the matter to

be checked. The minutes continue that NH [Mr Haider the finance director of HDTL] replied "*that a review of the loan agreements between shareholders and any relevant documents will be conducted for the purpose of dividend distribution.*" There is no reason to suppose there was not a review. Since this matter was raised openly by Mr Boreh at the meeting, there is no basis for the suggestion he was improperly seeking to take money due to the Government.

527. According to Mr Moussa in his interview with Gibson Dunn, Mr Abdillahi was at the meeting and, when Mr Boreh asked for the Government dividends to be paid to him, Mr Abdillahi stopped the meeting and rang Mr Moussa to discuss it. Mr Moussa says he remembers Mr Abdillahi telling him that Mr Boreh's point was based on: "*non-payment by the national treasury of invoices Mr Boreh had raised.*" Mr Moussa then wrote a letter to Mr Haider on 6 March 2008 saying that the Government would not accept any reduction in its dividends. What is striking about this is that there was no protest by Mr Moussa or the Government at that point about Mr Boreh having a shareholding and no threat of legal action.

528. The claimants sought to maintain the case that Mr Boreh had deliberately not forwarded documents to Mr Moussa, as part of their thesis that he sought to conceal the shareholding and his use of the land proceeds to pay cash calls. That was not in fact part of their pleaded case and, since Mr Moussa did not come to give evidence, there is no evidence to support it. Although the claimants are critical of Mr Boreh's evidence about this in their closing submissions, in my judgment a fair assessment of what he was saying is that he had done his best to send all important documents to Mr Moussa. Furthermore, Mr Mehta provided Mr Gelineau with Mr Moussa's fax details in January 2003 and there is simply no basis whatsoever for the suggestion that having gone to the trouble of obtaining Mr Moussa's contact details from Mr Mehta, at ENOC's request on 11 November 2003, Mr Wahdwani did not pass those details on to ENOC. I suspect there is a lot in Mr Boreh's point that Mr Moussa had more pressing things to deal with than the Government's share in Horizon, so that it was difficult to get him to concentrate on the detail of Horizon related matters. This is reflected in what Me Martinet said in June 2004 and by Mr Boreh's suggestion to the President that other ministries become involved.

529. On the basis that the President and Mr Moussa clearly knew about Mr Boreh's shareholding and about the off-set in relation to the Soprim debt, it seems to me inconceivable that other members of the Government and senior civil servants involved with the project did not also know about the shareholding in general terms, even if they did not know all the detail. To begin with, there is evidence from Mr Dileita and Mr Tani that Djibouti is a country where everyone knows everyone else. As Mr Tani accepted in cross-examination: "*Djibouti is a country where everybody knows everybody, and also everybody is interested in other people's business, particularly people who are close to the President.*" To the extent that those members of the Government and civil servants who gave evidence maintained the position in the witness box that they did not know about Mr Boreh's shareholding in Horizon, I do not accept that they were telling the truth. Rather, they were all intent on being consistent with the President, whom they dare not contradict and who of course maintains untruthfully in his witness statements that he did not know about the shareholding.

530. The assertion made by most of those witness that they did not know about the shareholding until sometime in 2008 (with the exception of Ms Zeinab Ali who says now that she found out in April 2006) involves the somewhat incredible proposition that they did not know in 2004 and 2005 what was known to the U.S. Ambassador and the media. A number of the cables from Ambassador Ragsdale show that she was well aware of Mr Boreh's shareholding in Horizon. Thus, in a cable on 17 May 2004, following notification to Mobil that the existing oil storage facilities were to be closed, she describes Mr Boreh as "*a prominent Djiboutian businessman with a 40 per cent stake in Doraleh port. Construction of Doraleh port is being managed by Emirates National Oil Company…*" A few days later in a cable on 23 May 2004 she describes him as: "*40 percent partner in the new port of Doraleh*" and "*40 percent shareholder in Doraleh ports.*"

531. I have already quoted the cable of 21 June 2004 where she records that: "*Boreh told Ambassador he owned 40 per cent of the Doraleh project, with ENOC owning the remaining 60 percent. Some place Boreh's holdings at 20 percent, with the rest of the 40 per cent share divided equally between the Government of Djibouti and President Ismail Omar Guelleh.*" Whilst the detail may have been wrong, there is no question but that Mr Boreh was quite open publicly about his shareholding and that there was some public debate in Djibouti about his shareholding. In their opening Skeleton, the claimants sought to explain this away as Mr Boreh being: "*unable to stop himself from bragging*" about his shares, but that involves the frankly ludicrous proposition that he boasted about it to the American Ambassador whilst, on the claimants' case, seeking to conceal it from the President and the Government. That makes no sense: what was going to happen if the Ambassador spoke to someone in the Government?

532. In fact, another cable on 13 July 2004 demonstrates clearly what did happen when the Ambassador raised Mr Boreh's shareholding with a member of the Government. Unsurprisingly, it emerged that he was well aware of the shareholding. The Ambassador reports a discussion of the Doraleh project with Mr Tani. She says: *"Asked about Boreh's share in the project, Tani responded 'of course, Boreh has his personal interest in the port and owns some shares'."* When he was asked about this in cross-examination, Mr Tani simply lied in a completely farcical manner: "*It's highly likely that by saying that it was to indicate that Mr Boreh, as a businessman, had in hand the subcontracting for the building of the oil terminal. I didn't have an official document or a legal document demonstrating that he was shareholder. If I used that term, maybe it was erroneous, but there was an aspect of interest as a company that was dealing with subcontracting of the construction of the project."* The discussion had nothing at all to do with Soprim carrying out the civil works, it was to do with Mr Boreh's shareholding in Horizon. This piece of evidence seemed to me to typify the lengths to which the Republic's witnesses would go in ensuring that they did not contradict the President. What the cable clearly demonstrates is that Mr Tani not only knew about the shareholding, but did not see it as in the slightest bit surprising or untoward.

533. By 2005, the media were aware that Mr Boreh had a shareholding in Horizon. This is apparent from a number of reports in Africa Intelligence, an internet news service. In an article dated 21 May 2005, they described Mr Boreh as: "*a minority shareholder in the firm Horizon Terminals Ltd which is building the Djibouti oil terminal in the new port of Doraleh.*" In an article dated 1 October 2005, they report that the reason why

Mr Boreh would not want to upset the Dubai interests in relation to an industrial dispute is: "*as he is himself a shareholder in one of them, the firm Horizon Terminals, which built the Djibouti oil terminal*". Finally, an article on 12 November 2005 on Djiboutian businessmen says of Mr Boreh that he has "*a stake in a subsidiary of the Emirates National Oil Company.*"

534. Both in their submissions and in their evidence, the claimants sought to downplay the significance of Africa Intelligence. However, I agree with Mr Kendrick QC that Mr Tani overplayed his hand on this: he asserted both that the publication is known by everyone in Djibouti to be unreliable and also that ordinary people did not read it. Mr Tani was a former journalist and Director of the Government newspaper La Nation and he was Secretary General of Information between 1986 and 1999, with responsibility for publishing press communiques and liaising with the press and the public. Despite denying that he bothered to read Africa Intelligence because it was not accurate, I suspect that, with his background, he followed it closely. Whilst it was not always entirely accurate, it seemed to get the essential points right, as over Horizon. Given that it is one of the few publications to report Djiboutian politics and business in any depth, I agree with Mr Kendrick QC that it is inherently likely that it is widely read there. As he rightly points out, the journalists must have got their information about Mr Boreh's shareholding from someone in Djibouti, belying the claimants' suggestion that no-one knew about it or that Mr Boreh tried to keep it secret.

535. Given that the U.S. Ambassador and the media knew about the shareholding, it seems to me implausible in the extreme that it was not widely known about in Government circles and amongst the senior civil servants. Precisely who knew does not matter, given my conclusion that both the President and Mr Moussa knew. There is simply no question of Mr Boreh having tried to conceal from the President or the Government the shareholdings held by his companies in Horizon.

536. Whenever exactly individual witnesses called by the claimants actually found out about Mr Boreh's shareholding in Horizon, it is striking that there is no evidence at all of any contemporaneous expression of surprise, let alone of complaint, which to say the least is extremely surprising if, as the claimants contend, he was in breach of private and/or public law duties in taking such a shareholding. Even when the President and the Government turned against Mr Boreh in the autumn of 2008 and litigation was commenced in Djibouti, it related to tax matters, not to the shareholding. The first hint of any complaint about the shares was after Gibson Dunn were instructed and the present proceedings were commenced in 2012.

537. In his oral closing submissions, Lord Falconer floated the suggestion that Mr Boreh might have put pressure on ENOC to allow him to take a large shareholding, in effect saying to ENOC: *"I am such an influential person in Djibouti that this deal will not go ahead unless you give me 30%"* which Lord Falconer submitted would amount to corruption, what he described as: *"pay to play"*, the implication being that this was not something Mr Boreh disclosed to the President. That is not a pleaded case, nor was it ever put to Mr Boreh in cross-examination. When I pointed this out to Lord Falconer, he submitted that it would still be open to the court to reach the conclusion on the facts that this was how Mr Boreh had procured such a large shareholding for himself. In my judgment, that submission is somewhat heterodox. It involves the proposition that where a party alleges fraud on a particular basis, which is denied, it is open to that party to invite the court to find fraud on the evidence, on a different,

unpleaded basis. I am not prepared to proceed on that basis. However, in any event, I am entirely satisfied that Mr Boreh did not obtain the shareholding he did because of any such improper basis. He obtained it entirely properly for commercial reasons and ENOC was happy to have him as an investor because it held him in high regard, as evidenced, for example, by what was said in the Information Memorandum, quoted at [476] above.

538. In my judgment, it is clear that Mr Boreh told the President and Mr Moussa about the shareholdings at the time that he agreed to take them and thereafter and that other members of the Government knew about his shareholdings in the period 2002 to 2005. No objection was ever raised at the time. Furthermore, as I have found, there is no question of Mr Boreh having misled the President into believing that only 10% was available for the Republic. The decision to take only 10% was the President's decision, uninfluenced by any representation by Mr Boreh. Equally, he did not seek to expropriate the Government's land or the proceeds of sale. The set-off of the Soprim debt was agreed by the President, Mr Moussa and Mr Bouh and the retention of sale proceeds to pay cash calls was known to and agreed by the President. In the circumstances, there is no question of his being in breach of any private or public law duty owed to the claimants.

(C) The Doraleh Container Terminal

Overview of the inherent probabilities

539. The Doraleh Container Terminal ("DCT") is the most technically advanced container terminal in Africa. It was built at a cost of around US$400 million, and its facilities cover an area equivalent to about 50 football pitches. Its quay is more than a kilometre long, with three berths; and it is built in deep water, where the 18 metre draught can accommodate the latest generation of container vessels. The facility is computerised and has cutting-edge modern cranes. Its current capacity is 1.6 million TEU.

540. The DCT is owned and operated by a joint venture company, Doraleh Container Terminals SA, in which PAID has a majority shareholding of 66.66% and DP World Djibouti ("DPWD"), a subsidiary of DP World, owns 33.33%. Of the total construction cost of U.S. $400 million, the shareholders invested about US$130 million in the project. PAID's contribution came from the reserves of the old Port, which had accumulated under the successful management of the Port by DP World pursuant to the 2000 Concession Agreement, and through the transfer of its container equipment from the old container terminal. DPW also contributed its share of the reserves from the old Port, plus about US$15 million of its own cash. The balance of some U.S. $260 million came from a syndicated bank loan arranged by DP World through Standard Chartered Bank and Dubai Islamic Bank. Somewhat extraordinarily, given the inherent risks in the project, that loan was obtained on non-recourse terms.

541. As Mr Kendrick QC points out, the construction and operation of the DCT represents the culmination of the vision of the President and, indeed, of Mr Boreh, from about 2000 onwards for improvement of the existing facilities and a new port complex at Doraleh. The DCT is integrated with the other schemes: it connects with the highway built for the Horizon Terminal, and with the container yard at DDP for further storage, and local customers have premises at the Free Zone on DDP's land. It has become

the leading container terminal in the region, and is used not only for Ethiopian cargo, but also as a major hub for transhipment. At the outset, however, as Mr Kendrick QC rightly submits, the project required a leap of faith. At the time when plans for constructing the DCT started to be progressed seriously in 2004, the Horizon oil terminal, which was the first stage of the transformation of Doraleh into a major new port complex, was still in the process of construction and the costs had spiralled. The DCT was on any view a speculative, high risk investment, which required a bold commitment from DP World.

542. DP World operates the DCT pursuant to a Concession Agreement signed in October 2006. The negotiations for that Agreement were conducted on behalf of the Republic by Mr Boreh in his capacity as President of the Board of Directors of the DPFZA, together with others, including Mr Douale and Ms Ali. In particular, Mr Boreh negotiated a majority shareholding in the DCT for PAID of 66.66%, recognised at the time not least by Ms Ali as a considerable achievement. There were a number of terms, primarily as regards control of the management of the terminal and absence of interference from the Government upon which DP World insisted. Those terms were controversial, so far as some of the President's advisers were concerned, and before he approved the suite of interlocking Agreements and they were ratified by Parliament and by Decree, he was receiving advice from his legal and other advisers not to enter into Agreements on terms which effectively impugned the sovereignty of Djibouti in relation to a terminal operated in its territory. However, notwithstanding those objections, the President approved those Agreements and they were ratified.

543. As with the size of the shareholding in Horizon, the decision was his alone, made with his eyes open, knowing the extent to which control was being ceded to DP World, but as part of his strategy to develop a major new port complex in partnership with the Dubai interests. That decision was no doubt made for sensible commercial reasons which have been fully vindicated by the fact that the DCT has proved very successful and profitable for the Republic. Within four years of the DCT becoming operational in December 2008, the original investment had been repaid. PAID's combined dividends and royalties from DCT are more than US$46 million per year in relation to a terminal with a life of between thirty and fifty years. After a great deal of fencing in answer to a question from me as to whether she accepted that the terminal had been a great success, Ms Ali accepted that it had:

> *"MR JUSTICE FLAUX: …I am not asking you to tell me what your case is, I know what the case is. I am asking you, as a Djiboutian with experience of this matter, whether you accept that the container terminal has been a great success for Djibouti? Yes or no.*
>
> *A. I would say yes."*

544. Notwithstanding that success, what is now said by the Republic is that Mr Boreh was induced by bribes or the promise of bribes from DP World to "go soft" in the negotiations and to agree terms which favoured DP World. It will be necessary to examine: (i) the negotiations in detail to see whether there is anything to support the suggestion that Mr Boreh negotiated soft terms; (ii) the various agreements and documents which are said to amount to bribes or the promise of bribes; and (iii) the process of approval of the various agreements by the President to see whether he was

relying in effect upon the advice of Mr Boreh in approving the agreements. I will also analyse later what legal principles are applicable, but it is worth noting now that I agree with Mr Kendrick QC that the issue of the effect of bribes is one for Djiboutian law, not English law.

545. In the circumstances, the presumption in English law that a payment of a bribe in relation to a contract causes loss does not apply for the reason given by Andrew Smith J in *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm) at [98]:

> "English law presumes that the payment of a bribe or secret commission in relation to a contract causes loss. The claimants rightly did not argue that they could rely upon the presumption made by English law in support of a claim based upon article 1064 [of the Russian Civil Code]. The so-called presumption of English law, being irrebuttable, is not a matter of procedure for the lex fori, but a matter of substantive law for lex causae: see Dicey, Morris & Collins, loc cit, para 7-029, 030."

546. As a matter of French and hence Djiboutian public law (which is applicable to the DCT claim), it is common ground between the public law experts that even in the case of a bribe, there is no right to disgorgement of the gain. As Me Savoie, the defendants' expert puts it:

> *"…it is clear as a matter of French administrative law that a court cannot simply require a public official to disgorge any benefits derived from a 'faute'; rather, the purpose of an award of damages is solely and exclusively to compensate the victim for those certain losses directly resulting from the official's fault. As a result, at administrative law, a claimant cannot recover a bribe paid to a public official but only damages for any loss suffered as a result of the bribe."*

Accordingly, even if the claimants establish that bribes or secret commissions were paid to Mr Boreh, they still have to establish causation and loss. Thus, what the Republic has to establish to make good its case is that: (a) the payments which Mr Boreh received under the various Consultancy Agreements or the promise of shares or a success fee were bribes or the promise of bribes which (b) caused Mr Boreh corruptly to recommend or agree terms which were less favourable than they would otherwise have been and (c) that the claimants thereby suffered loss.

547. In most cases where a contract has been induced by bribes, it is clear, at least with the benefit of hindsight that the contract is a bad bargain so far as the party which has suffered a loss as a consequence of a bribe is concerned. An obvious example is provided by *The Ocean Frost* [1985] 1 Lloyd's Rep 1, where, as Robert Goff LJ said at 58-59, the relevant charterparty was of an "*extraordinary nature"* and "*possessed remarkable features"*, not least a secrecy provision that kept its existence secret from the chartering and operations departments of the ostensible charterer.

548. In the present case, as I have said, even with the benefit of hindsight, the DCT agreements have been a great success, both commercially and financially, for the Republic and PAID. Since the DCT commenced operations, the net profit of PAID

has increased and was over U.S. $61 million in 2014. One of the principal reasons for that success was the fact that Mr Boreh pressed for and succeeded in obtaining a 66.66% shareholding for PAID. That was accepted by Mr Douale in answer to questions from me:

> *"Q. What I am suggesting is that Mr Boreh took a bold move that transformed expectations on your side and on DP World's side?*
>
> *A. I repeat, sir, that this proposal couldn't have happened without a directive being issued by the Djiboutian Government, and whether Boreh took this initiative on his own …*
>
> *MR JUSTICE FLAUX: I don't think that's an answer to the question, with respect. The question that's being put to you is whether you accept that it was Mr Boreh who came up with the Government, through PAID, having a two-thirds share in the container project, in the container terminal?*
>
> *A. I acknowledge that.*
>
> *MR JUSTICE FLAUX: Yes. I understand that the Government would have to approve whatever was done, but the issue is who came up with the idea, and I think you accept that it was Mr Boreh? Thank you.*
>
> *A. Yes, that's true."*

549. Whilst it is theoretically possible that Mr Boreh pressed for and obtained an outstanding deal so far as the shareholding is concerned but deliberately soft pedalled on other terms to the disadvantage of the claimants, it seems to me that is inherently improbable. It is also important to have in mind that the context of these negotiations was not some one-off deal between an unsophisticated party and a hard-nosed trader, but a long term and successful partnership between the Government and DP World from 2000 onwards, with DP World managing the old Port successfully and building and running the Horizon jetty, with its affiliate JAFZA as successful managers of the Free Zone. The Ruler of Dubai had also shown his commitment to the Doraleh project by donating the road links. Ms Ali confirmed all those positive aspects of the relationship in cross-examination and said that she was proud that this was not just asking for and getting aid, but a *"south/south"* partnership.

550. I agree with Mr Kendrick QC that, given that past successful relationship, which was clearly one of trust and which the claimants do not suggest was tainted by bribery, it is inherently improbable that DP World, in the context of what was to be an even longer term relationship lasting possibly for fifty years, would breach that trust and take a cynical advantage of the claimants by entering into a deliberately one-sided agreement, let alone employ bribery to procure such an agreement. It is far more likely that the agreement reached was a fair one. The evidence of Ms Zeinab Ali (who is a lawyer of some acuity) was that the negotiations were friendly and co-operative.

551. At the time of the negotiations Ms Ali prepared, at the request of Mr Boreh, a report dated 21 March 2006 which was a summary of the terms of what had been negotiated, to be given to the President. In cross-examination, after a great deal of fencing as to whether the views expressed were hers or Mr Boreh's, she accepted in answer to me that, in sending this to the President, she was expressing her own opinion about the proposed agreement. That opinion included this analysis of the advantages of what was proposed:

> *"Through the creation of the Doraleh Container Terminal (DCT) part-public part-private enterprise, 66.66% of whose capital is owned by the PAID, the principle of a partnership of equals in the aforesaid project is established. In fact, in consideration of the total cost of the project, the PAID shall make a contribution in kind to the value of 25 million dollars corresponding to the current book value of equipment (gantries) and a cash contribution of 25 to 30 million US dollars existing as reserves, that is to say a total contribution of the order of 50 to 60 million US dollars. However, the valuation of PAID equipment shall be made by expert accountants; also, the licensee shall reserve the right not to be obliged to use the aforesaid equipment.*
>
> *[This] Point is crucial: the licensee is a company subject to Djibouti law constituted by the PAID majority public shareholding acting in partnership with Dubai International (Djibouti), which has a 33.34% capital shareholding. The licensor, which is the Government of the Republic of Djibouti, shall consequently oversee preservation of the authority of the Djibouti state over the port structure.*
>
> *From a purely commercial point of view, this configuration is in every respect advantageous for the PAID, Port of Djibouti, which shall recover in dividends what it loses in receipts and revenue derived from the operation of the current container terminal. Furthermore, the Government of the Republic of Djibouti shall receive royalties for granting the franchise as detailed hereinafter."*

552. There is no suggestion in any of the documents of DP World which have been disclosed that it was trying to take unfair advantage of the Republic. On the contrary, its lawyers say at one point that they: "*have tried to draft a more or less balanced document*", which is entirely what you would expect of a party which was about to invest a substantial proportion of its own money in a joint venture with the Government in circumstances where, if the Government thought that it was not being dealt with fairly, there was, as Mr Kendrick QC rightly says, a risk of expropriation. Furthermore, it is difficult to discern what motive DP World would have had for bribery, a matter to which I return in more detail below.

553. In my judgment, the inherent probabilities all point away from this being a series of Agreements which were disadvantageous to the Republic, where DP World knew that to be so and bribed Mr Boreh to recommend terms which favoured DP World. I

propose to make findings first about the negotiations for the DCT and the series of Agreements entered into in relation to it, then to make findings about the allegations made that Mr Boreh received bribes or the promise of bribes. Finally I will make findings about whether any of the terms now complained of are "soft terms" which were disadvantageous to the Republic and whether DP World would have been prepared to agree different terms.

The 2004 Concession Agreement

554. DP World had had an interest in developing a container terminal at Doraleh for some years. For example, in a letter to the Abu Dhabi Fund in October 2001, they had spoken of the overall project at Doraleh, envisaging not just the oil terminal but a deep water container terminal and a Free Zone.

555. By the end of 2003, there had been a feasibility study and an estimate prepared in relation to a new container terminal by Royal Haskoning, as appears from an email exchange between Mr Douale and Mr Sharaf of DP World on 18 December 2003. Mr Sharaf told Mr Douale that they were preparing a new Concession Agreement for the Government to sign, covering the existing port and the Doraleh project and Free Zone and that Mr Douale would be provided with a draft before it went to the Government. It appears that a draft Concession Agreement was produced on 21 December 2003, but it has not survived. Mr Boreh commented on it in a fax to Mr Sharaf on 21 January 2004.

556. Also on 21 January 2004, Mr Boreh sent Mr Sharaf a fax informing him that "*today the council of ministers has passed the decree of the perimeter of the port and free zone domain, as per your request ... The terms and conditions, as well as the rules and regulations for the future concession agreement, will be negotiated by the concerned authority*". This was evidently a reference to the land on which the container terminal would be built in due course. A few days later on 25 January 2004, the President signed the Decree setting aside the land at Doraleh where the new container terminal was to be built.

557. On 9 February 2004, a framework Concession Agreement was signed between the Government and the DP World subsidiary, Dubai International Djibouti ("DID"), granting DID rights to construct, finance and manage the jetty, a new container terminal and a new free zone. It was signed on behalf of the Government by Mr Boreh and his unchallenged evidence in his witness statement was that he did so on the instructions of the President. He explained in his statement the background to this agreement as follows:

> *"As Recital F of this agreement put it, it was necessary to give Dubai International (Djibouti) full and exclusive authority over the project in order to attract investment, achieve a world class and commercially successful development, ensure profitability and best operating standards, and compete with other international ports. I spoke to the President about this and we were in agreement. DPI was looking for a long term concession to justify the commercial risks they were taking. Dubai was showing world class standards in developing ports, and it was prepared to invest heavily in Djibouti and put its reputation on*

> *the line for this ambitious project, when no one else would. It made total sense to give this reassurance and commit to a long term, exclusive concession.*
>
> *I was authorised by the President to sign this agreement and he was fully aware of and approved its key features before I signed it. I recall that the President was very insistent that whatever other terms there might be, he did not want to get less than the current income from the existing old port. I recall that I had to fight very hard with DPI to get this. Their view was that they were going to invest a lot of money and they needed years to amortise their investment before they started giving Djibouti profits but we were asking for income from Day 1 regardless of whether they made profits. In the end, DPI gave in and agreed that the Government would get no less than the net profit it received from the old port for the Calendar Year 2004 (Clause 13).”*

558. None of that evidence was challenged in cross-examination. There is a lack of any documentation relating to the negotiation of the 2004 Concession Agreement, but I agree with Mr Kendrick QC that it is clear that Mr Boreh stood up for the Republic’s interests, not only in insisting that the remuneration it received would be no less than the net profit from the old Port in 2004 (which in the event was U.S. $9.7 million, of which some 60-70% came from the container trade) but more favourable terms as to the rate at which and duration for which DP World’s investment would be repaid, together with much tighter relinquishment terms than DP World had been looking for. Clause 14.02 provided that the Republic would be entitled to renegotiate the terms if development of the new container terminal had not started by the end of 2005. This was a major improvement on what DP World had wanted, which was an eight year period during which renegotiation would be precluded. Given that the time frame of the end of 2005 which Mr Boreh had secured was not met, that provides the background for the further negotiation in 2006. In fact this clause 14.02 and the fact that it had not been complied with was expressly referred to in the meetings in Dubai on 14 and 15 February 2006, at which the principal terms of the 2006 Concession Agreement were negotiated.

559. I agree with Mr Kendrick QC that it is instructive to look at the commercial structure of the 2004 Concession Agreement to see what was already set in place or agreed in principle when it came to the negotiations in 2006. At the outset of the agreement, it was recognised in Recital E that DID should have: “*full and complete authority with respect to the Project*”, defined as the development of a *“greenfield port and free zone complex at the Doraleh site”*. DID was granted the exclusive right to develop and operate the Project and had a number of specific development rights. The term of the agreement was thirty years renewable for two further periods of ten years each, subject to the relinquishment provisions in clause 14.02. The Republic was also to lease the land to DID for the term of the concession on terms to be agreed.

560. Clause 13.0, to which Mr Boreh had referred in his witness statement provided:

> *“Subject to the favourable conclusions of the Master Plan with respect to timing and viability, the Government shall receive*

> *the following compensation (but in no event shall such compensation in the aggregate be less than the net profit from the present port that the Government shall receive in Calendar Year 2004).”*

561. Mr Boreh’s evidence was that this provision was the genesis of the U.S. $6 million minimum royalty figure which found its way into the 2006 Concession Agreement and, although he was challenged about that in cross-examination on the basis that that figure did not appear in clause 13.0 of the 2004 concession agreement, his point has some logic to it. Given that between 60-70% of the profit of PAID came from the container trade, the minimum compensation that clause 13.0 would have secured on 2004 net profits of U.S. $9.7 million was around U.S. $6 million. However, whether his recollection about that is correct or not, what he did say in re-examination, in a spontaneous way which had the ring of truth to it, when Mr Kendrick QC drew his attention to the terms of clause 13.0, was:

> *“A. That's absolutely right, that's why I was looking to find the 6 million, I couldn't, but this is correct, I already put -- and this was the input from the President.*
>
> *Q. Whose idea was this clause?*
>
> *A. It was the President, because he was worried that he would not make -- he would lose revenue because of the container terminal going to the other side in Doraleh, and it was an issue, and I advised him and we jointly agreed that we should not lose any revenues that we are making now because of the Doraleh ...”*

562. As Mr Kendrick QC correctly says, there are two aspects of this 2004 Concession Agreement which are of significance. First, some of the terms of the 2006 Concession Agreement which are now alleged to have been procured by bribery had actually been agreed in the 2004 Concession Agreement, in particular the length of the concession, of up to fifty years and that DP World through DID would have complete management control over the project. Yet, there is no pleaded case that the 2004 Concession Agreement was procured by bribery. Notwithstanding the absence of any pleaded case, at one point towards the end of his cross-examination of Mr Boreh, Lord Falconer suggested that Mr Boreh had sold shares in DDP to DP World for U.S. $6 million: *“And in exchange for selling the shares to DPI for $6 million in DDP, you promised that you would do everything in your power to try to make the concession agreements between DP World and Djibouti as favourable as possible to DP World?”*

563. The reference to the sale of the shares was a reference to the claimants’ pleaded case (since abandoned) that the U.S. $6 million paid by JAFZA/DP World for the shares in DDP/Port Invest was a bribe or secret commission. Lord Falconer then put to Mr Boreh the letter of 17 April 2004 to him from Mr Sharaf which set out the terms upon which DP World was prepared to buy the shares in DDP for U.S. $6 million and which then continued: *“In addition to the above it is our understanding that both parties shall endeavour to change the terms of the current concession of the port of Djibouti to the satisfaction of DPI.”*

564. Mr Boreh refuted the suggestion that this was some indication that the quid pro quo for buying the shares was that he should assist DP World to change the terms of the Concession Agreement in their favour: *"I don't know what Mr Mohammed Sharaf was talking about. Here we are trying to sell him my shares, I bought it at 6 million, and I have sold it at 6 million. What favour did [he do] for me that I have to do any favours for him? In fact, in 2004, in the board meeting, I have pressed DP World to reduce the 22.5% profit that they were making in the audit meeting."* This was a reference to the fact that, in late 2004, Mr Boreh sought to renegotiate the 2000 Concession Agreement to reduce DP World's profit share and increase the Government's dividend.

565. As Mr Kendrick QC said in his opening Skeleton, put in its context, what Mr Sharaf said in the letter of 17 April 2004 was not an attempt to bribe Mr Boreh, but was asking for any renegotiation of terms to be done in good faith and to the reasonable satisfaction of DPW, so as to make the project more of a success. However, even if it was an attempt to bribe Mr Boreh, it failed since, as I have said, he was actually trying to reduce DP World's profit from the 2000 Concession Agreement. As Mr Kendrick QC pointed out, this issue came up again at the beginning of 2006. Again Mr Boreh would not approve the PAID budget because he felt that the Government's dividend was too low and DP World was making too much profit from the Port, as set out in an email from Mr Hawker to Mr Raj of 31 January 2006: *"PAID budget has been submitted to ARB but like last year's budget he is not accepting. The stumbling block is once again the government's dividend which he feels is too low and that Dubai is making too much profit from PAID."* This tough stance was being taken by Mr Boreh a matter of days before he was negotiating the 2006 Concession Agreement with DP World on behalf of the Government, hardly consistent with his taking bribes to negotiate "soft" terms.

566. In fact the suggestion that the purchase of the DDP shares by DP World was some sort of bribe does not, so far as I can tell, feature in any of the claimants' closing submissions. It would appear, wisely, to have been abandoned, but to the extent that it is still pursued, the point is utterly hopeless.

567. The second aspect of the 2004 Concession Agreement which is of significance is that it envisaged a very different basis for the Government to profit than that eventually agreed in 2006. There was no idea of a joint venture or of the Government or PAID having a shareholding. The entire concession was to be owned by DID, which would pay rent at a level to be agreed. The Government would receive a royalty, but only on net profits and after DP World had been repaid. The deal which Mr Boreh negotiated in 2006 was far more favourable to the Republic and PAID.

568. The claimants' stance on the 2004 Concession Agreement is curious. Predictably, the President in his witness statements denies any knowledge of the 2004 Concession Agreement. In his first statement he says no more than: *"Nobody ever showed me or discussed with me any so-called "concession agreement" signed by Mr. Boreh with DP World in 2004."* In his second statement he denies discussing it with Mr Boreh or authorising him to sign it. Mr Douale also said in his witness statement that he was ignorant of the Agreement at the time though he recalled: *"discovering it later on"*. The implication of these witness statements was that this was some secret deal negotiated by Mr Boreh without authorisation. However, the contemporaneous documents give the lie to any such implication.

569. Mr Douale of course knew from his email exchange with Mr Sharaf on 18 December 2003 that DP World were drafting a new Concession Agreement and would have been expecting to receive a copy. The suggestion that the President was not told that such an Agreement was being negotiated, at the time that he signed the Decree setting aside the land on which the container terminal would be located, is frankly farcical. As Mr Kendrick QC pointed out, the Secretary-General of the Government sent out the Decree by fax on 9 February 2004, the day the Concession Agreement was signed, showing that the Government clearly linked the Decree to the Concession Agreement. As for Mr Douale only finding out about the agreement *"later on",* the *"later on"* was on 17 February 2004, a week after it was signed, when Mr Bilkey of DP World told him about it and, when Mr Douale asked to see it, promised to forward a copy immediately. In cross-examination, Mr Douale thought he did receive a copy and, in all probability, he did.

570. Ms Ali's witness statement had also sought to maintain the impression that this was some secret, unauthorised deal by saying that she did not see it until 2008/2009. She corrected that in evidence in chief, saying she saw the 2004 Concession Agreement during the later negotiations in 2006. As Mr Kendrick QC says, that retreat was inevitable, since the Agreement was openly discussed at the meetings in Dubai in February 2006 which she attended and of which she took the contemporaneous note.

571. As I have said, Mr Boreh was not cross-examined about the paragraphs of his witness statement in which he talked about discussing the terms of the proposed Concession Agreement with the President and the President authorising him to sign it. Notwithstanding that, the claimants' written closing submissions breezily assert in a footnote as if it were of no moment: *"Consistent with Mr Boreh's description of this agreement as a "framework document", the Republic's position is that this agreement is unenforceable for lack of essential terms and that it was entered into without its authority."*

572. The suggestion that the 2004 Concession Agreement was entered without authority is contrary to Mr Boreh's unchallenged evidence, which I accept. I simply do not accept the President's contrary evidence which is inherently implausible, given that Mr Douale knew it was being negotiated and, in all probability, received a copy of it not long after it was signed. The suggestion that it is unenforceable for lack of essential terms may be a point taken now by the Republic's lawyers, but it is not what those representing the Republic in the negotiations in February 2006 (who included not just Mr Boreh, but Mr Douale and Ms Ali, a lawyer) thought at the time. Ms Ali's note of the meeting in Dubai records a discussion about the terms of the 2004 Concession Agreement which is wholly inconsistent with any suggestion that it is unenforceable or that it was entered into without authority:

> *"5 On the concession contract dated 9 February 2004*
>
> *- Validity of the contract maintained and recognised by both parties, although substantial provisions have not been respected such as, for example, the provisions relating to domestication of the contract by law (Art. 1.05) and to execution of the project of construction of the Doraleh Terminal Container before the end of December 2005 (Art. 14.02); in addition, this contract does not contain any*

> *remuneration structure; this goes unheeded in most of its provisions.*
>
> *Note: In any case, if these proposals of partnership within the context of DCT are adopted, this contract must be amended and the party DID shall become DCT."*

Negotiation of the 2006 Concession Agreement

573. In their closing submissions, the claimants focus on the negotiations from February 2006 onwards and Mr Boreh's role in them, no doubt for the sensible forensic reason that their case is that it is in that period that Mr Boreh started receiving or being promised bribes, a matter to which I will turn later in the judgment. However, matters did not stand still following the 2004 Concession Agreement, so it is necessary to look at events prior to the February 2006 meeting in Dubai.

574. After the conclusion of the 2004 Concession Agreement, DP World started work on the detailed master plan contemplated by that Agreement. The President was informed of the master plan, for example in a letter from Mr Douale of 18 April 2004, referring to a meeting he and Mr Boreh had had with DP World in Dubai on 10 April 2004, at which the master plan was discussed with the chosen consultant. The minutes are not available, but this is another piece of evidence that the President must have known about the Concession Agreement.

575. The work on the master plan was funded in part by the U.S.T.D.A, but it took time and was not published until 25 October 2005. It confirmed the viability of the project, but indicated there were still significant risks. The forecast for local container traffic for Ethiopia was modest, so that the real profit would lie in transhipment. On that, competing ports were improving their infrastructure and because modern container ships were too large for the old container terminal, the business was going elsewhere. The plan said that without a new terminal, Djibouti would handle "*no more than minor volumes of relay traffic (mainly for very small ports around the Red Sea)*". However, that new terminal would obviously face competition from other hub ports, not least Salalah in Oman where Maersk Sealand run the terminal. The assessment was that a number of major shipping lines might not be willing to use Djibouti. Mr Douale accepted in cross-examination that, at the time, there was uncertainty as to the volume of business which DCT would achieve. As the master plan said, the development of the terminal before any contractual commitment from the major shipping lines was: "*an inherently risky undertaking*".

576. In parallel with the completion of the master plan, DP World was preparing for upcoming negotiations of concession terms with the Republic. On 10 June 2005, an internal email from Mr Raj to Mr Sharaf set out the financial model for the DCT on various scenarios. The assumptions included a royalty of 5% and management fee of U.S. $2.4 million per annum payable to the Government, but did not apparently include any assumption that the Government would have a shareholding in the terminal company and therefore would receive dividends. Hence he makes the point that whilst the model looks acceptable for DP World, the problem would be meeting the expectations of the Government. He set out revenue and expense figures for PAID on the basis of the 2005 budget which showed the profit at the existing port for

container activities of U.S. $16.8 million but a loss for non-container activities of U.S. $5.7 million, thus giving an overall profit of U.S. $11.1 million.

577. He then says: *"If the Container Activities were to move from the existing port to Doraleh, The Govt of Djibouti will lose annually USD 6 million. Even if we consider a Royalty of 5% of Gross Revenue (about USD 2.6 Million per Annum) as royalty from container terminal in Doraleh, the Govt of Djibouti does not stand to benefit from this move…It is imperative we get them to understand the implications of moving the container terminal to Doraleh. I do not see Govt of Djibouti willing to lose its current earnings of USD 11.1 million in profit and start incurring a loss of USD 3 million per annum."* As Mr Kendrick QC submitted in closing, that passage demonstrates that there was no intention on the part of DP World to deceive or take advantage of PAID in negotiations for a new container terminal.

578. The earliest draft of a new Agreement for discussion with the Republic prepared by DP World is undated but was probably produced in November/December 2005. It was certainly produced before 19 December 2005 when, at Mr Boreh's request, Ms Ali and Mr Douale produced a joint memo commenting on it. She said in cross-examination that the memo was produced in advance of an initial meeting with DP World in late December 2005. Mr Douale said that it was given to the President, so that he could take decisions and give instructions in relation to negotiations.

579. In the memo, their comments included that total exclusivity of management being given to DP World (which had been in the 2004 Concession Agreement and was replicated in this draft) was absurd when you thought about the rule of law and political and economic sovereignty. Ms Ali confirmed in cross-examination that she was making a constitutional law point. She also commented on the length of the proposed contract (30 years with 10 year extensions as in the 2004 concession agreement) as too long because a normal tenancy agreement would normally be for 20 years. She agreed in this cross-examination that this draft (like the 2004 Concession Agreement) does not contemplate the terminal being operated by a joint venture company in which the Government has a shareholding, which only came up in February 2006.

580. In their written closing submissions, the claimants alight upon one of Ms Ali's comments on the draft Concession Agreement. Against a provision that all movable assets at the existing container terminal should be transferred to DP World free of cost, she has commented (in translation): *"NO, after evaluation of the market value of the equipment[s], it must constitute a contribution in kind of the participating shares for PAID [in the] BOT"*. She makes the same point in another note dated 2 January 2006 (after the meeting in Dubai referred to in the next paragraph) commenting on the draft Agreement. The claimants suggest that this demonstrates that she either did not understand the draft Agreement or thought that it would involve PAID having an equity stake. Ms Ali does not deal with this specific point in any of her evidence, and the claimants' point is inconsistent with the evidence she did give referred to above that the draft Agreement does not contemplate PAID having a shareholding.

581. There was then a meeting in Dubai in late December 2005, attended by Mr Boreh and Ms Ali with Mr Sharaf. No minute was prepared and Ms Ali had a very limited recollection of it. In her witness statement, she said that the discussion focused on matters such as royalties and the implications for Djibouti of a move of container

operations to Doraleh in terms of lost revenue, which would be consistent with Mr Raj's email in June 2005. It is probable that Mr Boreh made it clear, as he had done with the 2004 Concession Agreement, that it was imperative that the Republic did not lose money from the move and should have a minimum guaranteed return. There is no evidence that there was any discussion of a possible joint venture with the Government taking a shareholding. It follows that, even if Ms Ali had thought that PAID would have a shareholding as the consideration for making existing container equipment available as the claimants suggest, she kept that thought to herself and did not raise it at the meeting.

582. The main commercial negotiations of the terms of the Concession Agreement took place at meetings in Dubai on 14 and 15 February 2006. In advance of the meetings, DP World's lawyers Economic Laws Practice produced a note of the issues for negotiation. It is striking that in that note the *"Structure of the Concession"* is described as: *"BOT v BOOT, BOOT preferred."* BOT stands for "Build, Operate, Transfer" and is a form of contract under which a private sector entity in the position of DP World builds a facility, operates it for a period of time and then transfers it to the Government. BOOT stands for "Build, Own, Operate and Transfer" and is a form of contract similar to BOT, except that during the period of operation, the private sector entity also owns the facility prior to its transfer to the Government for whatever price is agreed. These are both forms of Concession Agreement which do not envisage the Government having a shareholding at all, *a fortiori* in the case of the preferred option, BOOT.

583. However, it is clear that, following the meeting with Mr Sharaf in late December 2005, Mr Boreh had been rethinking the proposed Agreement more generally, with a view to procuring for the Republic a greater share of the profits. He says in [295] of his witness statement that before the meeting in February 2006, he discussed with the President the issues that were going to come up. He says he advised that it would be better to have a partnership with a share of the profits than have a situation where they would not see money for years and had also lost complete control to DP World. He says the President agreed and wanted him to see if he could negotiate a 50% stake in the project for the Government, although he was willing to settle for less. Mr Boreh says that, as the President explained his objectives, this was the most important issue.

584. In his second witness statement, the President denies this part of the discussion, saying:

> *"In his paragraph 295, Mr Boreh alleges that I asked him to try to get 50% of the shares in DCT for the Republic, but that I was willing to accept a smaller portion. This is untrue. There is no way that I would have wanted to limit the Republic's share, when the new terminal was going to be taking some of the shipping traffic away from the 100% state owned PAID. The only way this could have been acceptable was if the Republic had as large a share as possible of DCT."*

585. Interestingly, although Lord Falconer cross-examined Mr Boreh about that paragraph of his witness statement, he did so in the context of suggesting that Mr Boreh had known that profits would not be made for some time, so that a deal which involved the Republic getting a dividend was not a good deal. He did not put to him that he and

the President had not had the discussion described by Mr Boreh. I accept Mr Boreh's evidence about this, rather than the President's.

586. In their closing submissions, the claimants suggest that it was always contemplated that the Republic would have a share in the DCT and seek to downplay the achievement of Mr Boreh in obtaining a majority shareholding. They rely upon the fact that 50% of PAID's annual profits had been earmarked as contractual reserves for investment in the container terminal. Mr Hawker said in cross-examination that this had been done informally since 2003-2004. As Mr Kendrick QC said in an intervention during the cross-examination of Mr Hawker, these reserves were earmarked for DCT, not Horizon. At a PAID board meeting on 20-23 September 2004, it was agreed: "*that 50% of the profit after tax would be kept in an investment reserve account to be used for investment in capital equipment and infrastructure in the port.*" Of course, it does not follow from the earmarking of those funds for the development of DCT that the Republic or PAID would necessarily take a shareholding in the terminal company.

587. The claimants also rely upon what the President says in his second witness statement, as set out above, about wanting as big a share as possible for the Republic and they submit that there is no persuasive evidence that DP World wanted more than a one third shareholding, pointing out that by June 2006, DP World was apparently contemplating releasing 5% of its shareholding to Mr Boreh, part of the claimants' case on bribes, to which I return below.

588. The obvious forensic purpose of these submissions is to suggest that Mr Boreh's case that, by obtaining a 66.66% shareholding for the Republic/PAID, he obtained an extremely favourable deal for the Republic, inconsistent with taking bribes, is incorrect and that DP World would always have agreed to the Republic having that size of shareholding, if not more. The problem with those submissions is that they are inconsistent with the contemporaneous evidence in three respects.

589. First, if, as seems to be being suggested, the President had always envisaged a large shareholding for the Republic/PAID, why did he not raise this earlier? After all, Mr Douale's evidence was that the memo of 19 December 2005 which he and Ms Ali prepared, was sent to the President for him to make decisions and give instructions about negotiations. If the President already had it mind that the Republic should seek to obtain a large majority shareholding in the terminal company, once he read the memo, it would have been apparent that: (a) the draft concession agreement was not offering the Republic any shareholding at all and (b) his civil servants Mr Douale and Ms Ali had failed to spot this critical point in the comments they made. In those circumstances, one would have expected, at the very least, clear instructions to them and to Mr Boreh prior to the meeting with Mr Sharaf at the end of December 2005, that they should press in the negotiations for a large shareholding. Yet it is clear that there can have been no such instructions, since Ms Ali does not say that issue was discussed at the December meeting.

590. It is quite clear that neither Ms Ali nor Mr Douale sought to question this and that the first they knew about any proposal that the Republic/PAID should have equity in the terminal was when Mr Boreh raised it at the meeting in February 2006. In my judgment the true position is that it was not the President who thought of seeking a shareholding in the terminal company, but Mr Boreh and that it was after their

discussion immediately prior to the meeting in February 2006, that the President indicated that he wanted Mr Boreh to see if he could negotiate a 50% shareholding, although he was prepared to settle for less.

591. Second, it is clear from the contemporaneous evidence of the draft Concession Agreement sent out in November/December 2005 and the note of issues to be discussed for the February meeting that what DP World was intent on procuring was a straightforward Concession Agreement with no equity for the Government, even though it was envisaged PAID would make a cash contribution to the cost of the terminal from the contractual reserves. When Lord Falconer put to Mr Hawker that, if the PAID contractual reserves were earmarked for building the terminal, it must have been envisaged that PAID or the Government would have a substantial ownership stake in the terminal, Mr Hawker was unable to say, because he was never present at any relevant discussions about PAID or the Government having a stake. There is certainly no evidence, in the context of the accrual of the contractual reserves, of any discussion between DP World and PAID or the Republic about PAID/the Republic having an equity interest in the container terminal if built, let alone what size such an interest might be.

592. In a subsequent internal DP World memo dated 17 November 2006 from Mr Guido Heremans, recently appointed CEO of PAID, dealing with the Government drawing excessive advances against its future dividends (to which I have already referred at [260] above), it is stated: *"In view of the financial obligations the government has in DCT, this cash drainage has to stop. The government has to assume its responsibilities, especially as PAID will be a 66.6% shareholder in DCT and not up to 20% as proposed in the initial studies. The 66.6% translated in equity equals Usd 65.200.000."* This provides a clear indication that, although right the way up to the meeting in February 2006, DP World had not offered any equity participation, internally it was anticipating having to cede up to 20% to the Government, which would of course have left DP World with a substantial majority interest.

593. No doubt appreciating that this piece of evidence contradicts their thesis that DP World would have been prepared, even before the February 2006 meeting to cede a substantial majority shareholding to the Government, the claimants do their best in their written closing submissions to suggest that this evidence should be disregarded: *"The context for this statement is unknown, and there is no evidence from Mr Heremans to explain it. DP World had sight of these studies and Mr Boreh has been working closely with DP World's lawyers throughout this case, yet the studies are not in evidence. Given the lack of context and the inability of the Court to assess these studies, the Court should reject Mr Boreh's claim that 20% was ever seriously under consideration."*

594. Frankly, if the criterion for rejecting evidence were the absence of documentation, both parties in this case would find much of their evidence rejected or discounted. There is no basis for any suggestion that Mr Boreh has deliberately failed to disclose some document which would contradict what Mr Heremans said and certainly no basis for drawing any adverse inference from his not having called Mr Heremans to give evidence. Mr Heremans is not Mr Boreh's employee and not in any sense in his control. I see no reason not to accept what Mr Heremans said (he having no reason at the time, so far as I can discern, for being anything other than frank with fellow DP

World staff) and conclude that internally DP World had catered for the possibility of having to cede up to 20% of the shares in DCT, certainly nothing like 66.66%.

595. Furthermore, this piece of evidence is entirely consistent with the evidence of Mr Qureshi of DP World in cross-examination that the default position of DP World in all negotiations is to seek majority ownership for itself. This is borne out by the notes to DP World's most recent accounts which show that DP World is the majority owner of most of its concessions, and the sole owner of many. Accordingly, in my judgment, the claimants' thesis that DP World would always have been prepared to cede a substantial shareholding is not borne out by any contemporaneous evidence.

596. Third, the suggestion that this majority shareholding was in effect there for the asking and Mr Boreh achieved nothing or nothing much, is inconsistent with the contemporaneous evidence of Ms Ali's note of the meetings on 14 and 15 February 2006 and all the other evidence, even of the Republic's own witnesses, that this was a significant gain for the Republic, achieved through Mr Boreh's efforts. It is to those meetings that I now turn.

597. Ms Ali's note records that, in attendance at the meetings were Mr Boreh with Ms Ali and Mr Douale for the DPFZA and Mr Ganesh Raj for DP World, together with Ms Shruti Sahu from DP World's lawyers, Economic Laws Practice. Mr Hawker was also in attendance in his capacity as DP World's manager of the Port. Mr Boreh explained in evidence what his role was in the negotiations with DP World: *"I was the lead negotiator, but I was not the only one. I also had my other colleagues with me, and the Government was informed on daily basis, every step was very important for the Government, and it was something very, very important for all of us."*

598. The involvement of others in the negotiations is confirmed by the note, which records that, on the first day, 14 February 2006 from 09.30 to 15.00, negotiations on the legal aspects of the proposed agreement were conducted by Ms Ali. On the second day, 15 February 2006, from 1100 to 17.00 negotiations on the commercial and technical aspects were conducted by Mr Boreh. The agenda of issues to be discussed prepared by Economic Laws Practice was appended to the note. The note also records that its main purpose was to record the points discussed which represented stumbling blocks for the negotiators for both parties, an indication that the points discussed were in no sense a formality or a foregone conclusion. It is important to bear in mind in that context that a four page note of nearly twelve hours of negotiations cannot reflect all the ebb and flow of negotiation and discussion.

599. Under the heading of the first section: *"On the legal configuration of the developer of the Doraleh Container Terminal project",* Ms Ali records Mr Boreh's argument for a majority shareholding for the Government as follows:

> *"Mr Boreh's basic argument: DPI is today the second largest international port operator. Djibouti represents the symbol of its development, on the understanding that Djibouti was one of its first partners. The objective of the Government of the Republic of Djibouti is quite simply to also develop. It was also proposed to participate as equal partners in the project and to draw mutual benefit from it, with, as a priority, respect of the*

> *requirement inherent in the sovereignty of the State of Djibouti to not alienate its Port.*
>
> *The port structures constitute the hub of the economy of the Republic of Djibouti, and whatever the merits and economic development objective of the project, this sovereignty must be protected. Reference to Ethiopians' wish for access to the sea, considering their situation as a landlocked country."*

600. After that, Ms Ali notes what was proposed: *"Proposal: creation of Doraleh Container Terminal (DCT), a free zone company with participation in share capital according to a percentage to be determined (50/50 or 60/40 between the PAID and DID). The PAID's capital made up of 25 to 30 million US dollars existing in reserves and 25 million US dollars."*

601. An issue arises as to whether the 66.66/33.33% split was agreed at the meeting or afterwards. Clearly, if it was afterwards, as Mr Hawker speculated in cross-examination, it must have been very soon, as the split appears in the draft agreement produced by DP World on 18 February 2006. As I said during cross-examination of Ms Ali, there is no documentary evidence of any further increase in the shareholding during the intervening three days. It may well be that the note of the meeting is slightly inaccurate and that the 66.66/33.33% split was agreed at the meeting on 15 February 2006. Understandably, Ms Ali really had no recollection beyond the note of a meeting nearly ten years before she gave evidence. If there was some further movement in the shareholding between 15 and 18 February 2006, it was in favour of the Republic, inconsistent (as set out in more detail below) with Mr Boreh having been bribed by DP World.

602. The contemporaneous view expressed by Ms Ali in the report she prepared on 21 March 2006 at Mr Boreh's request, to be sent to the President, was that this equity share was a significant gain for the Republic. I have already referred in [551] above to Ms Ali's statement that: *"From a purely commercial point of view, this configuration is in every respect advantageous for the PAID, Port of Djibouti, which shall recover in dividends what it loses in receipts and revenue derived from the operation of the current container terminal."* She accepted ultimately in cross-examination that this was her honest view at the time. This report was indeed sent to the President and there is no evidence that he disagreed. There is no reason to suppose he would, as the deal looked excellent at the time and has proved more profitable since than was thought. No doubt, like Ms Ali, the President was proud that this was not just asking for and getting aid, but a *"south/south"* partnership with Dubai, a country with which he and Mr Boreh had forged close links.

603. Unfortunately, the Court is not in a position to assess what the President really thought at the time as opposed to reverse engineering with hindsight, since he did not come to be cross-examined. What he does say in his witness statements about the DCT is exiguous in the extreme. In his first statement in relation to what has become, at the hands of the Republic's lawyers, a detailed criticism of the agreements reached, as having been made on terms deliberately disadvantageous to the Republic, all he says is this:

> *"I understood that Dubai would finance the construction of the container terminal. I counted upon Mr Boreh to negotiate the details of these arrangements on behalf of Djibouti. He had my complete trust. I could not imagine him signing such unfair agreements for his country. Some of these agreements are sometimes completely absurd, like the finance contract transferring the container terminal revenue to Standard Chartered Bank in London. I discovered, in 2010, that the arrangements relating to the new terminal had led to a drastic reduction in the flow of income in the Djiboutian banking system. I was unaware of the impacts of these arrangements prior to this.*
>
> *At no point was I aware that Mr Boreh had become a personal shareholder in this terminal."*

604. Neither of the points he makes were pursued in cross-examination of Mr Boreh or in closing submissions by the claimants. All that the President says that is of any relevance to the DCT in his second witness statement is the paragraph I already quoted at [584] above. It is striking that the President does not deal at all with the fact that he was kept informed of the negotiations (see for example Ms Ali's report of 21 March 2006) or with the fact that it was he who made the decision to approve and ratify these agreements, apparently after they had been considered in detail by his legal and other advisers, and notwithstanding that they seem to have advised him against ceding so much control to DP World. In view of the seriousness of the allegations now pursued in these proceedings, the failure to deal with any of those matters in the witness statements of the one man who could and did approve these agreements is frankly astonishing and inevitably casts doubt upon the *bona fides* of the claim.

605. Mr Douale's evidence about the obtaining of the shareholding in his witness statement is to say the least somewhat unsatisfactory. He does not deal specifically with the February 2006 meetings at all, notwithstanding that he was present. Having said that Mr Boreh was very keen on the deal going ahead, he then refers to being invited to Mr Boreh's house and Mr Boreh asking him to help Mr Boreh convince the Government to go with the Dubai plan and saying that, if they signed a contract with Dubai, they could develop a container terminal and would both be so rich they would be satisfied for life. This is the paragraph which Mr Douale seemed incapable of recognising as completely inconsistent with his evidence, elsewhere in his statement, that he always believed that Mr Boreh was working for the good of Djibouti. His reaction when confronted with this inconsistency that something *"had gone off the rails"* speaks for itself. In my judgment, the suggestion that Mr Boreh sought to corrupt him at a private meeting at Mr Boreh's house, is a complete invention on his part.

606. Mr Douale then says, in his witness statement that, prior to the incorporation of DCT in June 2006, he sent a report to the President in which, having heard that the Republic had only obtained a small shareholding in Horizon, he advised the President that the Government needed to be a majority shareholder in the container terminal, because it would be bringing traffic to the DCT as well as contributing two thirds of the funding. He says that he no longer has a copy of the report. He was asked about this in cross-examination and maintained that he had sent the report and that it could

be found in the PAID archives and in the archives of the Presidency. Despite extensive searches it has not been found. I consider this evidence about the report is another invention. Quite apart from the fact that the alleged report has not been disclosed, the suggestion that it was he who came up with the idea of a majority shareholding is completely inconsistent with his acceptance in cross-examination that it was Mr Boreh who came up with the idea of the Government having a two thirds share in the container terminal, and also inconsistent with Ms Ali's note of the February 2006 meetings and with the draft Concession Agreement dated 18 February 2006, with a provision for the split of shareholdings 66.66/33.33%.

607. Nothing daunted in its attempt to demonstrate that, contrary to the contemporaneous views of its own employee, Ms Ali, the majority shareholding secured for PAID was not in fact a good deal for the Republic, the Republic sought to make much of the provision in the agreements eventually signed, about the possible issue of up to 15% of shares to a shipping company prepared to participate in the development of the container port. In principle this was obviously a sensible idea, seeking to emulate the involvement of Maersk at Salalah. The point made by the Republic in its closing submissions is that, whereas the draft Agreement circulated on 18 February 2006 after the February 2006 meeting in Dubai, contemplated the issue of further equity shares, in which event both shareholders' shareholdings would be diluted, the Joint Venture Agreement eventually signed on 22 May 2007 contained a buy-out clause, pursuant to which DP World could require the sale of up to 15% of PAID's shares to a shipping company at any time during the period of the concession agreement.

608. Complaint is made that this could require the sale of the shares at their 2007 acquisition cost, rather than market value, so that overall the position of PAID became worse than under the draft Agreement following the February 2006 meeting. In my judgment, this is a false point. The preamble to the Joint Venture agreement stated: "*the Shareholders shall use their best endeavours to bona fide and diligently exercise their rights and fulfil their obligations under this agreement in their mutual best interests and those of the Company.*" It would not have been open to DP World to act in bad faith and change the capital structure in a way adverse to the Government, to "*dilute Djibouti down to nothing*" as the claimants suggested in their opening Skeleton Argument. Even if a shipping line had come in and taken 15%, PAID would still have had a majority shareholding of 51.66% and if a shipping line had taken correspondingly less, PAID's shareholding would have been correspondingly higher.

609. Furthermore, even if there were anything in this point, whilst it is correct that the Joint Venture Agreement dated 22 May 2007 was signed on behalf of PAID by Mr Boreh, it is quite clear that the terms of the Agreement, as with the other Agreements in the suite were the subject of detailed scrutiny and approval by the President and the Parliament (a matter to which I return in more detail below). Despite the written submissions now made by the Republic, it was not put to Mr Boreh in cross-examination that he had agreed terms as regards sale of a proportion of the PAID shareholding to a shipping company which were less advantageous than those proposed in February 2006, because he had been bribed and, in any event, I decline to make any such finding.

610. At the time, the possibility of a sale of shares to a container operating shipping company was seen as a distinct advantage. In her report of 21 March 2006, which was sent to the President, Ms Ali comments on this provision in favourable terms, saying

in a footnote: *"The idea here is to guarantee the growth of the container terminal's transhipment traffic; the choice of maritime agent shall be made on the licensee's recommendation."* As Mr Boreh said in evidence: *"So Djibouti had 51% plus 15% as per the concession agreement to go to those shipping lines to get more business in Djibouti and to add value."* In his witness statement he described how they had carried out roadshows and appointed a consultant to carry out market research, but no shipping company felt adventurous enough to participate. According to Mr Boreh, the President has in fact sold this 15% shareholding to China Merchants which is not a shipping company.

611. Returning to the terms negotiated and agreed at the February 2006 meeting in Dubai, apart from the shareholding, there are four matters of which the Republic still makes complaint and in relation to which it is contended that there was in reality no negotiation by Mr Boreh at all, simply agreement with DP World on terms which were advantageous to DP World but disadvantageous to the Republic, because Mr Boreh had been bribed or promised bribes by DP World: (i) the royalty payable to the Republic; (ii) the management fee payable to DP World; (iii) the length of the concession granted to DP World and (iv) the level of management control ceded to DP World. Of course these allegations made by the claimants will need to be considered slightly later in the judgment in relation to the Agreements eventually signed, which were approved by the President and ratified by Parliament and, at this stage, I am essentially concerned with the extent to which there is any force in the claimants' suggestion that there was no negotiation of these terms in February 2006, but Mr Boreh simply agreed whatever DP World proposed.

612. Taking the points in turn, the Republic is highly critical of the royalty for the Republic of a minimum of U.S. $6 million or 5% of gross revenues whichever was the greater. It was submitted that Mr Boreh should have procured a much greater royalty of 40% given the profits made by the container business in the old port in 2005 of U.S. $16.85 million and the loss of tax revenues from container traffic because the DCT is essentially tax exempt. The Republic contended that Mr Boreh should have negotiated a much higher royalty which would have been of much greater value to the Republic than the notional dividend to be obtained from a venture which might take years to generate a profit (and thus a dividend for the shareholders). It was submitted that there was no contemporaneous record of the royalty having been negotiated and that the 5% which was agreed was in effect what DP World had been prepared to agree in June 2005, so that this was an example of supine inactivity by Mr Boreh, indicative of his having been bribed by DP World.

613. The reference to June 2005 was to the internal email from Mr Raj to Mr Sharaf of 10 June 2005 setting out the financial model for DP World on various scenarios with an assumption of a royalty payable of 5% of gross revenues. However, whilst that may have been the assumption being made internally by DP World, the royalty was only payable immediately on one of the four scenarios. On the other three, any payment was deferred for three years. Furthermore, the heavy reliance which the claimants' counsel placed on this document as somehow demonstrating what should have been negotiated was misplaced for two reasons.

614. First, any sort of direct comparison with that financial model is inappropriate, because that model did not include any equity interest for PAID at all. The extent to which the equity interest of 66.66% transformed the position and made the DCT profitable for

the claimants is demonstrated by the later financial model referred to at [623] below. Second, what DP World may have recognised internally that, on one scenario, it might have to pay from the outset, was not necessarily what it was prepared to offer in negotiations. Indeed, in the December 2005 draft of the Concession Agreement, DP World was offering the Republic a fixed fee for granting the concession and a royalty on net profits, not on gross revenue. That appears to have remained its position immediately prior to the February 2006 meeting, since the agenda or "Issues for Negotiation" which was produced dated 14 February 2006 has the words *"throughput based revenues"* crossed out and replaced by *"net profit share"* so that the provision in relation to royalty read: *"Royalty Share on net profit share earned from Container Handling services -quantum of royalty and manner of payment?"* That agenda also contemplated not that the Republic would receive a minimum royalty figure (as eventually agreed) but that it would share the market risks with DP World, so that if the Ethiopian trade declined, the fixed fee and the royalty would reduce.

615. Ms Ali's somewhat elliptical note of the meeting does not appear to record any discussion of royalty as such. What it does say is:

> *"The aggregate amount does not take into account the State's actual revenues in taxes.*
>
> ***Proposal: the State must earn half of all of its revenues in dividends plus taxes; the lost half may be justified by the effort in economic development and shall be found in other ways; this should make around 7.5 million US dollars.***
>
> *Take into consideration the fact that the State is losing its revenues to the Port of Djibouti."*

616. It may be that, as Mr Kendrick QC suggested, the word *"dividends"* in the highlighted passage would make more sense if it read *"royalties"*. Lord Falconer is quite right to say that this interpretation was not put to Ms Ali in cross-examination, although given her inability to recall the meeting other than through the note, I doubt whether she could have cast any light on the point. However, whether that interpretation of the note is right or not, the fact that the draft agreement produced by Economic Laws Practice on 18 February 2006 a few days after the meeting contained in Article 11 the provision that the Republic should be paid a royalty of whichever was the greater of U.S. $6 million or 5% of gross revenue, is strongly suggestive that the royalty was discussed and negotiated at the meeting, as Mr Boreh said in evidence. Lord Falconer invited the Court to be sceptical of Mr Boreh's evidence that he had fought for the royalty that was agreed and that he had negotiated it verbally, on the basis that he was unable to say what DP World's starting point was on royalty.

617. I was unimpressed with that submission. Mr Boreh's inability to recall details after nearly ten years, in circumstances where the claimants' allegations have only recently been made, was scarcely surprising and, whether he could remember or not, the starting point of DP World is pretty clear from the agenda for the meeting to which I have referred. Lord Falconer also relied upon the fact that Mr Hawker, who was at the February 2006 meeting, said in cross-examination that he was never present at any discussion of the royalty. However, whether Mr Hawker was present when any specific discussion took place, that there must have been some discussion and

negotiation is apparent, as I have said, from the fact that Article 11 in the 18 February 2006 draft is more favourable to the Republic than the provision DP World had in mind in the agenda. Furthermore, at the end of his cross-examination, Mr Douale accepted that both the management fee payable to DP World and the royalty payable to the Republic had been negotiated and agreed at the February 2006 meeting in Dubai. In the circumstances, I see no reason not to conclude that it was Mr Boreh who pressed for and obtained the U.S. $6 million minimum royalty in the February negotiations.

618. This is also borne out by two other pieces of evidence. First, Article 11 in the 18 February draft Concession Agreement erroneously stated that the U.S. $6 million was payable per month, not per annum. This error was evidently picked up by Ms Ali, when she read through the draft and was passed by her to Mr Raj, who passed it on to Economic Laws Practice the following day, 19 February 2006. This is a further indication that, as Mr Douale accepted when that document was put to him, there had been discussion and agreement of the royalty at the meeting. Second, in the report dated 21 March 2006 prepared by Ms Ali and sent to the President, a footnote to the reference to the amount of royalty payments states: *"Acquired during the Dubai negotiations, the proposal put forward by the Djibouti party consists of the following position: the Djibouti State must receive half the current total revenue from dividends plus taxes; the other half lost must be justified by the economic growth effort and must be recovered in other ways"*, a yet further indication that the royalty figures were discussed and agreed at the meeting.

619. Contrary to the Republic's submissions, these two documents are a near contemporaneous record of the royalty having been negotiated and agreed at the meeting, quite apart from Mr Boreh's evidence about it, which I accept. In my judgment there is no basis for the suggestion that in some way he deliberately sold the Republic short on royalty at the meeting because he had been bribed.

620. In the circumstances it is probably not necessary to determine the genesis of the U.S. $6 million minimum royalty. As I have already said at [561] above, Mr Boreh's recollection was that it derived from clause 13.0 of the 2004 Concession Agreement, which reflected the concern of the President that the Government should not lose money from the move to Doraleh. However, when Mr Kendrick QC put this point to Mr Douale in cross-examination, he said that the figure was intended to compensate for the Republic's loss of tax revenues from the container business at the old Port. Whoever is right about the reason for the U.S. $6 million minimum, it was clearly designed to cover the Republic and PAID for the loss of revenues from container business at the old Port.

621. As Mr Douale agreed, that was the point being made by Mrs Roda, a Government lawyer used to help advise about the agreements, in an email of comments on the draft concession agreement she sent to Mr Douale on 16 March 2006, in which she said:

> *"Royalties are fixed at $6 million or at 5% of an intermediate result. It is necessary to obtain from the franchisee a business plan which will include a provisional financing plan for the project which is as precise as possible. This will enable the estimation of the share of dividends expected on this project by the Port or the Djiboutian state. The royalties and dividends*

> *will correspond more or less to the annual incomes expected by the Port and the Djiboutian state. These could in fact constitute the "direct" financial returns of the project because at this stage we cannot get a precise idea of the economic benefits for the country."*

622. It is of some significance that there is no hint here of the criticisms now levelled against Mr Boreh for procuring a dividend plus royalty structure for the State as opposed to a much greater royalty. As that email from Mrs Roda demonstrates, the Government was clearly quite content with the proposal for dividends plus a royalty which it considered would cover any loss of revenue from the old Port. If (as is now suggested) the Government had wanted a larger royalty figure, it could have suggested that to DP World, but there is nothing to suggest that those within the Government were not perfectly happy with what had been negotiated at the meeting.

623. Furthermore, that the provision in relation to royalty represented a good deal overall for the claimants is demonstrated by the financial model spreadsheet used by DP World at the financial closing in 2009 which showed projected revenue for PAID in the first year that the DCT was operational of U.S $13.339 million, U.S. $6 million of which was the minimum amount of royalty and U.S. $7.339 million of which was cash flow from the 66.66% shareholding. Those projections showed the cash flow increasing year on year and the minimum royalty being paid until the 5% projected share exceeded U.S. $6 million from 2013 onwards. On the basis that these projections were achieved (and my understanding is that in fact they have been exceeded) the combined effect of the U.S. $6 million minimum royalty and the 66.66% shareholding negotiated by Mr Boreh was far more advantageous to the claimants than the financial model being discussed internally by DP World in June 2005 where a 5% royalty without an equity share was predicted to generate about U.S. $2.6 million per annum which would not have compensated the claimants for the loss of U.S. $5.7 million on non-container activities at the old Port once container activities had moved out.

624. So far as the management fee payable to DP World is concerned, the claimants contend that this was not the subject of any negotiation by Mr Boreh at all. They contend that, although the internal DP World email of 10 June 2005 from Mr Raj to Mr Sharaf, setting out the financial model for DP World on various scenarios, envisaged a management fee payable to DP World of U.S. $2.4 million, what was actually agreed, in the Management Services Agreement signed by Mr Boreh on 6 December 2007, was more advantageous to DP World, because the management fee agreed was U.S. $2.4 million or 5% of gross revenue per annum, whichever was the higher. The claimants say that only Mr Boreh was involved in the negotiation of that Agreement, and that he agreed that management fee, because he had been bribed and thought he was going to gain personally, because of the 15% shareholding he was promised, from the profits made by DP World.

625. The fallacy in this series of allegations is that the management fee was not agreed in December 2007, but had already been agreed at the meeting in Dubai in February 2006. Although neither the early draft of the Concession Agreement produced by DP World in about December 2005, nor the agenda for the meeting, refer to the management services agreement or the management fee, Ms Ali's note of the meeting records that management of the port would continue to be carried out by DP World.

626. The draft of the Concession Agreement produced by Economic Laws Practice on 18 February 2006, just after the meeting, contained at clause 10.2 a provision for the management service agreement and the level of fee:

> *"10.2 Management Services Agreement*
>
> *10.2.1 The Concessionaire shall be entitled to appoint DPI or any of the Affiliates of DPI as the Manager for the Project. For this purpose, the Concessionaire shall enter into a Management Services Agreement with the Manager.*
>
> *10.2.2 The Manager appointed by the Concessionaire shall be entitled to annual management fees under the Management Services Agreement, provided that such management fees do not exceed the higher of the following amounts:*
>
> *(i) US$ 2.4 million (US Dollars Two Million and Four Hundred Thousand) per Year, increased by 5% every 5 (Five) Years; or*
>
> *(ii) 5% (Five Percent) of the Gross Revenues earned by the Concessionaire by the levy of Tariffs in the Year under consideration."*

627. The fact that this detailed provision appears in the 18 February 2006 draft Agreement but not in the December 2005 draft suggests that there was indeed some discussion and agreement of the management fee at the February 2006 meeting in Dubai. As already noted above, Mr Douale agreed at the end of cross-examination that both the royalty and the management fee had been negotiated and agreed at the February 2006 meeting.

628. It is fair to say that Mr Boreh's evidence in his witness statement was that he could not remember much about negotiating the management services agreement. He said:

> *"I have seen early drafts of the DCT Concession and the DCT JVA circulated some time in February 2006. These drafts proposed a Management Fee being the higher of US$2.4 million or 5% of the Gross Revenues — in other words, exactly what was eventually agreed. I think that I believed that this was a fair amount to pay DP World for their expertise, and in light of the other concessions which I had focused upon and secured, I did not challenge this figure. If the revenues far exceeded expectations, I had no doubt we could revisit the management fee. I had previously done the same in relation to the management fee for PAID in late 2003."*

629. In cross-examination, when challenged about the fact that the management fee had gone up from the U.S. $2.4 million DP World were thinking about in June 2005 to 5%, Mr Boreh said: *"And 5% was equal to what Djibouti was getting, in terms of -- you know, this was a company. One had 66% and the other one 33%. So one was asking royalties and the other one was asking the management fees, so that's how it was decided."* In their written closing submissions, the claimants criticise this

evidence as wholly unsatisfactory, pointing out that Mr Qureshi's evidence was that the management fee and the royalty were conceptually two different things.

630. However, in my judgment, the alleged failure of Mr Boreh to challenge or negotiate down the management fee only assumes a sinister connotation if Mr Boreh was bribed by DP World, so that he was supine on issues where he should have challenged DP World. If, as I find for reasons set out in detail below, the issue of whether he was to have a shareholding in DCT had not been raised between him and DP World at the time of the February 2006 meeting and, in any event, any offer of shares was not a bribe, nor had he been bribed or promised a bribe, then the fact that he did not challenge the level of management fee is not in any sense sinister. His assessment that it was a fair amount for DP World to charge and that, if revenues exceeded expectations, it could be revisited as he had done with the fees under the 2000 Concession Agreement, seems to me to be entirely reasonable.

631. It is also striking that, at the time, Ms Ali, Mr Douale and Mrs Roda do not appear to have considered that the management fee was unreasonable. Upon receipt of the 18 February 2006 draft Agreement, Ms Ali evidently produced some comments on it which she sent to Mr Raj. Unfortunately, for whatever reason, these have not been disclosed, but his email passing them on to Economic Laws Practice on 19 February 2006 has. From that, it is apparent that her only query was why the management services section was being included in this Concession Agreement: *"Why do we bring the management service agreement into this concession document? It should form part of the JV agreement between DID and PAID."* There is no suggestion that the management fee was excessive.

632. Likewise, in her 21 March 2006 report which was sent to the President, Ms Ali makes no adverse comment about the management fee under this Concession Agreement. She simply notes that the 2000 Concession Agreement, under which DP World managed the old Port, would not apply to DCT and that the fees under that Agreement would be revised to reflect the loss of container and oil revenue at the old Port. Mrs Roda's email to Mr Douale of 16 March 2006 makes no comment about the management fee, adverse or otherwise.

633. The position with regard to the length of the concession is that the 30 year period plus two ten year extensions at DP World's option replicated the period contemplated in the 2004 Concession Agreement and the draft agreement produced in about December 2005. There is simply no question of Mr Boreh having been induced by bribes to agree that period. In the agenda or "issues for negotiation" document produced by DP World for the February 2006 meeting under the section headed "Concession Period" DP World simply said: *"30 + 10 + 10 option to continue to lie with the Concessionaire"*. It is tolerably clear that DP World was unlikely to shift on the length of the concession and at whose option any extension should be. Whilst Ms Ali had commented that the length of the concession was too long in her note of 19 December 2005, that was based on a misapprehension that an analogy with a tenancy agreement was appropriate and she does not seem to have repeated that concern at the meeting.

634. What appears to have concerned those representing the Republic at the meeting was that, at the end of the repayment of the financing required, ownership of the land

should revert to the government and that this would not be linked in any way to the period of the concession. Thus Ms Ali's note of the meeting records:

> *"**Recovery of ownership of the Port as and when repayment is made***
>
> *That is, **ownership of the land shall come back to the Government** at the end of repayment of the loan and shall not in any event be linked to the concession of 30 years plus 10 plus 10. At the start of the project, the land shall be granted under concession to DCT with return, as from repayment, to the property of the State; however, the facilities shall remain the property of DCT up until the date of transfer of the container terminal."*

635. Ms Ali made precisely the same point in her report of 21 March 2006, sent to the President: *"…in other words, **transfer of ownership of the land to the government** shall take place within thirty days of completion of the loan repayment and shall under no circumstances be tied to the 30-year franchise renewable every ten years."* Elsewhere in her report she simply states that the period of the concession would be 30 years with renewal every ten years, with no adverse comment.

636. When she was cross-examined about the passage from her note of the meeting which I quoted in the previous paragraph, she agreed that the length of the concession had been agreed at the meeting:

> *"Q. So do you think that the 30 plus 10 plus 10 was agreed at the meeting?*
>
> *A. If it's written in the minutes, it can only be that, your Honour.*
>
> *Q. Because that's a change from the earlier draft, isn't it? Okay?*
>
> *A. Your Honour, if it's in the minutes, then I confirm it 100%."*

637. In their closing submissions, the claimants rely upon the fact that, because in his comments upon the draft 2004 Concession Agreement in a fax to Mr Sharaf of 21 January 2004, Mr Boreh stated: "*the duration of the concession for fifty years is a very long period; we believe twenty-five is acceptable with a clause allowing for tacit extension*", he appreciated that the fifty year term was a particularly long one. The claimants submit that the difference between his position in January 2004 and his position in February 2006 is that by the later date, he was expecting to become a shareholder in DCT (by way of bribe) and thus had a personal interest in the period of the concession being as long as possible.

638. Because the draft Concession Agreement upon which Mr Boreh was commenting in January 2004 has not survived, it is unclear whether the provision in relation to the term was the same in the 2004 Agreement as signed. However, whether it was or not, the 2004 Agreement as signed contained the provision for a thirty year term

renewable for two further ten year terms, in materially identical terms to the provision in the draft Concession Agreement of 18 February 2006 produced after the February 2006 meeting. It is clear that, whether Mr Sharaf took any account of Mr Boreh's views about the length of the concession in January 2004, DP World's consistent position was that it wanted the period to be 30 years with two 10 year extensions at its option and in my judgment, it would not have been prepared to shift from that position. As I have already said, although the claimants now complain about the length of the concession, no-one acting for the Government appears to have regarded it as controversial at the time in February 2006. Furthermore, in any event, as I have found, Mr Boreh was not induced to agree the length of the concession at the meeting in February 2006 by any bribe or promise of a bribe.

639. The provision in the Agreements signed of which most complaint is made by the claimants is the provision about DP World having autonomy and complete control over management of the DCT with no interference from the Government and the so-called "reserved matters", to which I will return in more detail later. The essential complaint is that it is completely anomalous that PAID should have a majority shareholding, but that the minority shareholder should have complete management control. However, it is absolutely plain that DP World was only prepared to embark on the DCT venture if it had complete management control, with no interference from the Djiboutian Government. That was its consistent position throughout in relation to its investment in Djibouti, in the 2000 Concession Agreement for the management of the old Port, in the 2004 Concession Agreement, in the draft Concession Agreement produced in about December 2005, in the discussions in February 2006 and in the suite of Agreements eventually signed in relation to the DCT. The President and his advisers were well aware of this and the commercial reasons for it. They may not have liked it and some of his advisers recommended insisting on a level of control for the Government, but ultimately the President made a commercial decision with his eyes open to approve and ratify those Agreements giving that level of control to DP World. For reasons I will develop later, the fact that he did so is fatal to the claimants' case against Mr Boreh in relation to DCT.

640. So far as the proposed Concession Agreement for DCT is concerned, the agenda for the meeting contemplated that the concession would be structured on either a BOT or BOOT basis, either of which would involve control of the DCT by DP World as contemplated by the 2004 Concession Agreement. It is quite clear that, even after DP World agreed at the February 2006 meeting that PAID was to have a majority shareholding, so that the structure of the concession changed from what was contemplated by the agenda, DP World still required full management control, without interference by the Government. As I have said, this had been its consistent position throughout.

641. Thus, in the draft Concession Agreement produced on 18 February 2006, after the meeting, clause 3.2 dealt with the grant of the concession and made it clear that control would rest with DP World:

> *"3.2 Grant of the Concession*
>
> *3.2.1 Subject to the terms of this Agreement and in consideration, inter alia, of the payment of the Royalty by the Concessionaire, the Grantor hereby grants to the*

> *Concessionaire the sole and exclusive right and authority to develop the Project and to undertake the Operations and to let out sub-concessions in respect of the Project, including the right to provide services to the Users at the Site on such terms and conditions as it deems fit, and do all things incidental or related thereto or which the Concessionaire considers desirable and appropriate to be carried on in connection therewith, during the Concession Period.*
>
> *3·2.2 (i) The Grantor acknowledges, confirms, represents and warrants that during the Concession Period, the Concessionaire shall have the exclusive right and authority to act as the governing body at the Site and towards this end, is permitted to set rules and regulations, including internal rules, regulations or procedures as necessary to undertake the Project and the Operations, subject to the terms of this Agreement.*
>
> *(ii) Additionally, the Grantor grants to the Concessionaire the sole and exclusive right to set all standards, rules and regulations as appropriate for the safety, security, investment, establishment, operation or maintenance of the Project/ the Site, including those related to employment of labour both national and foreign, subject to the terms of this Agreement.*
>
> *3.2.3 The Grantor further acknowledges, confirms, represents and warrants that during the Concession Period, the Concessionaire shall be entitled to freely set, amend, levy, collect and appropriate Tariffs for and take the benefits and revenues of all Operations and activities performed at the Site and from all activities that are incidental or related thereto or which the Concessionaire considers desirable and appropriate to be carried on in connection therewith."*

642. The presence of that provision suggests that the question of management control by DP World was discussed at the meetings in February 2006. That the issue of management control was discussed at these meetings in February 2006, is confirmed by the exchanges between Ms Ali and DP World and Economic Laws Practice in February and March 2007 referred to below. It follows that, in the discussions in February 2006, all the main commercial terms of the deal eventually signed between the Republic/PAID and DP World (and certainly those matters of which complaint is now made by the claimants) had been agreed in principle in the discussions in February 2006, all at a time, as I have found, when there is no question of Mr Boreh having been bribed or promised a bribe.

643. Furthermore, there is no question of Mr Boreh having kept the negotiations at the meeting in February 2006 and the draft Concession Agreement of 18 February 2006 which emerged from those negotiations, secret from the President. His evidence, which I see no reason not to accept, was that when he went back to Djibouti after the meeting and told the President about the 66.66% shareholding for PAID, the President was delighted and congratulated him warmly. Furthermore, on 25 March 2006, Ms

Ali sent to the President her report of 21 March 2006 on the salient points of the Concession Agreement, together with a marked up copy of the 18 February 2006 draft Concession Agreement, with her comments on it. She did so on the instructions of Mr Boreh, as she said in evidence. Accordingly, the President was being kept informed of the progress of the negotiations. It is striking that neither the report nor the marked up copy contained any adverse comment about clause 3.2, which would give management control to DP World. The obvious inference is that Ms Ali was aware that DP World required such management control, which was effectively non-negotiable.

644. As the 21 March 2006 report said (and as Ms Ali accepted in evidence was her honest view at the time): *"From a purely commercial point of view, this configuration [the majority shareholding] is in every respect advantageous for the PAID, Port of Djibouti, which shall recover in dividends what it loses in receipts and revenue derived from the operation of the current container terminal. Furthermore, the Government of the Republic of Djibouti shall receive royalties for granting the franchise as detailed hereinafter."*

645. Whatever the complaints now made, at the time the commercial terms negotiated with DP World and the negotiations themselves were viewed favourably. As Ms Ali said in cross-examination: *"If we go back to the meeting of 14 and 15 February, yes, the atmosphere at these meetings between DP World, the partner, and between the Djibouti side, I mean, it was a very friendly atmosphere, I could say."* One has no sense of DP World having been trying to "rip off" the Republic. On the contrary, as DP World's own lawyers stated on 23 February 2006 about the draft Concession Agreement: *"we have tried to draft a more or less balanced document."* I see no reason not to accept that statement at face value.

The period between February 2006 and approval and ratification of the agreements

646. Some ten days after the draft Concession Agreement was prepared, on 28 February 2006, Economic Laws Practice produced a first draft of the Joint Venture Agreement, which DP World emailed to Mr Boreh on 2 March 2006 *"for your perusal"*. This contained at clause 9 a provision as to the management of the container terminal operating company with twelve reserved matters, where, as the claimants point out, PAID's director was not required to vote in accordance with the wishes of the DP World directors, so that PAID's rights on the board were protected. The claimants make a point in their closing submissions that this draft agreement was discussed with DP World by Mr Boreh alone, the implication being that he was conducting some form of clandestine negotiations with the entity which was bribing him. Nothing could be further from the true position. Quite apart from the fact that there had yet to be any discussion about any shareholding for Mr Boreh in DCT, even if it was a bribe, which it was not, the President and the Government were well aware of DP World's requirement for management control.

647. The claimants also contrast that draft of the Joint Venture Agreement with the one eventually signed which contained thirty eight reserved matters, a considerable tightening up of complete management control. However, it is to be noted that the first draft of the Joint Venture Agreement included amongst the reserved matters the declaration or payment of a dividend, one of the matters of which particular complaint is now made by the claimants. The claimants submit that it is unlikely that the

increase in the number of reserved matters was required by the financiers of the project, but say that if they were, Mr Boreh is at fault for not insisting that these matters were only reserved until the finance was repaid. The only witness from DP World who cast any light on this was Mr Qureshi who said in cross-examination that the lenders had sought amendments to the terms of the Concession Agreement and Joint Venture Agreement and that it was the implicit understanding with the lenders that they expected DP World to take control of the DCT. The claimants are critical of this evidence in their written closing submissions, pointing out that this was not mentioned in his witness statement. However, since he was involved in the finalisation of the financing from early 2007 onwards, I see no reason not to accept his evidence. He was a perfectly straightforward witness.

648. In the absence of any evidence from the banks themselves, it is not possible to say which particular provisions in the Joint Venture Agreement they required. What can be said with confidence, however, is that both the banks and MIGA, the political risks insurers, required the management of the DCT to be in the control of DP World, without the possibility of any interference from the Government. I suspect that the original clause 9 of the first draft of the Joint Venture Agreement which provided that the reserved matters were not to be carried out without the approval of both the DP World and Government directors or shareholders was exactly the sort of reservation of a degree of control with the Government that the banks would not have wanted. Whilst it may not be possible to say which of the reserved matters was required by the banks and which by DP World itself, under the Common Terms Agreement dated 17 December 2007 with the banks, it was an event of default for there to be any change of control from that set out in the Joint Venture Agreement. It follows that it would have been an event of default under the financing arrangements for DP World to relinquish any of the reserved matters.

649. Ultimately however, in my judgment, it does not matter whether it was the banks, the insurers or DP World themselves who insisted on the thirty eight reserved matters, since DP World made it quite clear that this was the basis upon which they were prepared to finalise the deal and the President and the Government were well aware of the reserved matters provisions which were not concealed from them by DP World or Mr Boreh. It is the chronology of the scrutiny of the various draft agreements by the President and the Government to which I now turn.

650. It is evident that the President and his advisers considered the draft Concession Agreement sent by Ms Ali under cover of her letter of 25 March 2006, since on 9 April 2006, Ms Ali sent an email to Mr Kruijning of DP World raising two "*crucial points that have been raised by the Government before we can proceed to the signature of the contract and submit this document for approval by the parliament*". It is striking that neither of these "*crucial points"* is the subject of any complaint now pursued against Mr Boreh. One of them was about berthing dues, the other about dredging for which the government refused to bear the cost. Ms Ali agreed in cross-examination that by this stage in early April 2006 the only outstanding matters to be resolved before signature were the terms as to dredging and port dues.

651. The cost of capital and maintenance dredging was for a while a major sticking point. Ms Ali suggested in her witness statement that Mr Boreh had been bribed to concede this point in favour of DP World. However, in cross-examination it emerged that she was just the mouthpiece for the point on which she could give no evidence, she had:

"*no competence to talk about dredging*". The allegation was rightly abandoned. As Mr Kendrick QC pointed out, DP World conceded the point at the time and, in any event, the issue was always academic as Doraleh is very deep and not subject to silting. Dredging was not discussed further.

652. What needed to be sorted out were the legal formalities and what was undoubtedly a slow and bureaucratic process of finalisation of the documentation and their approval and ratification. This was really Ms Ali's area of expertise and, as the correspondence demonstrates, it was she who took the lead in procuring the necessary approval and ratification, not Mr Boreh. As Ms Ali said in the context of the control provisions: *"I was the only person to negotiate on these questions, and it was my opinion, that to grant such a -- to grant autonomy and control didn't mean that the other shareholders had to disappear totally, particularly if we're talking about the State, that is where I had a big question."*

653. In cross-examination, Lord Falconer sought to criticise Mr Boreh for not seeking external legal advice on the various agreements, whereas DP World had Economic Laws Practice and then Allen & Overy and the banks had Lovells. That criticism was misplaced. As Mr Boreh said: *"It was not on my domain, and I did not follow it carefully, it was not in my part…we were negotiating the important terms, and the legal aspect was left for Djibouti and Mohamed Hassan of the President's office and all the legal people, I didn't get involved in that."* It was up to Ms Ali in the first place and ultimately the President, not Mr Boreh, what if any external legal advice was sought by the Republic.

654. In an email to Ms Sahu of Economic Laws Practice of 16 April 2006, Ms Ali explained that the concession agreement would have to be approved by the Council of Ministers: "*This parliamentary approval is a token of the execution of the contract by the governmental authorities*". Then, on 29 April 2006, Ms Ali wrote to Mr Kruijning saying that subject to some outstanding points: "*the Government of the Republic of Djibouti is ready as of today to submit to the Parliament the Law or Act concerning the ratification of the concession agreement*" and that "*The office of the President is on its way of passing the law starting next week, Tuesday the 2nd of May 2006*". In cross-examination, Ms Ali confirmed that this letter was sent to the Secretary General of the Government under cover of a letter from her enclosing two laws she had drafted, one concerning the creation of the joint venture company and the other the ratification of the Concession Agreement.

655. From a letter from Ms Ali and Mr Boreh to Mr Kruijning on 15 May 2006 it is clear that the formal process of review by the Government was underway: "*Since the 2nd of May [2006], the government of the Republic has been examining during a session of the Council of Ministers two projects of Law which respectively deal with the creation of the company named [DCT] and the ratification of the Concession Agreement*". On 22 May 2006, Ms Ali sent a so-called Exposé de motifs du projet or Explanatory Memorandum to the Office of the President in relation to the establishment of the joint venture company which described the Government's strategy of establishing public/private partnership since 2000 in relation to the management of the port, the airport and the free zones and then said that after six years: "*the time is right for the state of Djibouti to benefit from the first positive spinoffs of this partnership and commit itself financially as an equal partner alongside Dubai investors."*

656. Another Explanatory Memorandum was sent by Ms Ali to the Office of the President in relation to the draft law ratifying the Concession Agreement. Ms Ali explained in evidence that such explanatory memoranda were: "*always sent before a document or a decree that has to be signed by the President or the presidential power*". The draft law referred in terms to the fact that the concession was for thirty years with ten year extensions. As with Ms Ali's report of 21 March 2006, this Explanatory Memorandum emphasised the commercial and economic advantages of the joint venture with DP World from the perspective of the Republic:

> *"Before any development on the merits of the principal contractual provisions of the concession agreement, it is important to emphasise the key place of the project for this new container terminal both in the national economy and in the interest of investments and commercial trade of the sub-region, with a dock length of 2,000 m, which will be implemented in two phases, the Doraleh container terminal, erected on the site of a natural deep water port, will be able to accommodate the 3rd generation ships that are currently under construction. This technical data is not in itself negligible since it will be the way to develop the transhipment activity of the Port of Doraleh. The promotion of the strategic position of the port infrastructure of the country will ensue, and the first expected beneficial results, beyond the Ethiopian market which currently operates the IAPD to the level of 70%, will be the worldwide maritime operators that will be users of our Port of Doraleh as principal port."*

The Explanatory Memorandum then goes on to set out and comment on some of the salient terms of the Concession Agreement, essentially in the same terms as Ms Ali's 21 March 2006 report.

657. A board meeting of the DPFZA and PAID took place on 27 August 2006, attended by Mr Boreh as Chairman, Ms Ali, Mr Douale and Mr Bahdon, as well as Mr Hawker and Mr Heremans. Mr Boreh made a presentation about the DCT project which the minutes of the meeting record in these terms:

> *"The chairman continued with a report on the development of the container terminal project in Doraleh. He questioned the directors and the PAID managers on the need for a profitable collaboration with a view to successfully moving forward this project of key national economic interest. The Authority has negotiated a PAID 66.6% majority stake in the licensee company for the container terminal. This is a success for the Djibouti side, which is happy about this and which is grateful to the Dubai partner, the Port manager, because it was this good management that today enables us to be given the financial means to take up this challenge. Having said this, management of the containers terminal will be totally private and granted to DP World, entirely autonomously and without interference or involvement by the Djibouti side. We must therefore prepare ourselves within this perspective."*

658. It is apparent from this that the principle of DP World having management control was being openly discussed and there is simply no question of Mr Boreh having agreed something in secret. Ms Ali agreed in cross-examination that what Mr Boreh said was a fair summary of the position, in line with the way she had summarised it in her 21 March 2006 report. When it was put to Mr Douale in cross-examination that he had not made any comment at the meeting on DP World having control, his evidence was telling:

> *"A. Your Honour, it doesn't call upon any comment, it's in the logic of what the Government wanted, they wanted the DCT terminal to be managed by DP World.*
>
> *Q. Under their control, entirely autonomously, and without interference from the Djibouti side; correct?*
>
> *A. That was logical, your Honour, because DCT was no longer an independent, autonomous company, it was a company into which the Djibouti State couldn't intervene."*

659. The minutes of the board meeting also record that it was agreed that the PAID reserves taken with the value of the container equipment to be transferred to DCT from the old container terminal would be used to pay for the 66.66% shareholding. Mr Boreh is recorded as saying: *"The chairman requested to the director that the Authority be informed officially and in writing of the PAID reserves, since this amount of $35 million US combined with the value of equipment (estimated at $22 million US) will constitute the State contribution within the DCT share ownership structure."*

660. Mr Kendrick QC characterised this decision to use the PAID reserves on the new container terminal as follows in his closing submissions:

> *"…he could not stay with the old port, as we saw from the original reports in 2005; it would stagnate. You need a new container port for larger ships and deeper draught and larger berths. Mr Boreh makes the business decision to pour out all the reserves into the profitable arm, the container side; he leaves little, very little left indeed for developing the old port for bulk cargoes or indeed putting money into infrastructure. How wise that was, we say. The container was the profitable end of the market, and the bulk lost money. So entrepreneur as he is, he has put all the money -- bet the house, almost --on the container, and that has generated the money to develop the unprofitable arm."*

This seems to me to be an accurate description of the business acumen which Mr Boreh brought to this project and the extent to which he has been vindicated by events.

661. At the end of October 2006 a signing ceremony took place which Ms Ali said was largely to publicise the Concession Agreement and which she accepted was an important occasion, which was attended by the President, given that this was a

landmark project. In anticipation of that ceremony, on 29 October 2006, Ms Ali on behalf of the DPFZA sought from Mr Abdillahi, the Secretary General of the Government authority for Mr Boreh to sign the Concession Agreement on behalf of the Republic. The following day, 30 October 2006, the President signed a Power of Attorney for Mr Boreh to sign the Concession Agreement on behalf of the Republic. It seems extremely unlikely, given that the President and his advisers had by this stage had five months to scrutinise the terms of the Concession Agreement, that he would have granted that Power of Attorney unless he was satisfied that this Concession Agreement was in the best interests of the Republic. Ms Ali's evidence was that despite this well-publicised signing ceremony, the formal ratification of the Concession Agreement by the President was not until sometime later on 18 December 2006.

662. Thereafter, discussions continued in relation to the finalisation of the other Agreements which needed to be signed. On 18 February 2007, Ms Ali emailed Mr Mohta of DP World about the articles of association of the joint venture company but in terms that were obviously equally applicable to the Joint Venture Agreement which was the next Agreement to be signed: *"I am fully aware of all the motivations that led to the writing of provisions regarding the reserved matters voting process and the search for a guarantee by DP World, considering risk taken by investing in a foreign country. However, we have to lessen the leonine aspect implied by these provisions; we have to make sure that decisions are taken in accordance with the national interest."*

663. In cross-examination, she explained that by *"leonine"* she meant that the provisions in the contract about reserved matters were one-sided, preserving the rights of DP World to the detriment of the Republic. However, she also accepted that she was not seeking to challenge the principle that DP World should have management control. Her concern was a legal and constitutional one; *"a question of legality and adhering to Djiboutian law…the legislation applicable to DCT."*

664. By 1 March 2007, Ms Ali had copies of the drafts of the Joint Venture Agreement (in fact a draft with forty four reserved matters in it) and Port Services Agreement and French versions were being prepared with the assistance of Me Martinet. On that day, she emailed Mr Kruijning and others at DP World and Ms Sahu at Economic Laws Practice about a number of matters, including her concern that the reserved matters provisions in the Joint Venture Agreement were leonine and might be denounced by the Republic during the term of the contract, as it transpires, a prescient concern:

> *"To my mind, one major remark remains to be solved so we could close the JV and Status procedure: it's the 'Reserved Matters' question. All provisions related to the Reserved Matters are leonine and therefore in contradiction to the "Ordre Public". Based on that, they could be denounced / exposed at any time by the Government during the execution period of the contract. Also, keeping such conditions which only preserve the interest of DP World and disregarding those of the Government. Such situation might put some doubts to the strength of that partnership which is based on a double winners strategy. I would like to insist on the fact that these text if*

> *submitted that way, will lead to debates during the Council of Ministers, unfavourable to our purposes and project."*

665. The response of Ms Sahu on behalf of DP World on 6 March 2007 was that it had been agreed in February 2006 that DP World would need to retain management control and that this was a requirement of the lenders and of MIGA:

> *"Mme. 1 am not very clear as to what aspects you find 'leonine' - as you have not clearly pointed out the provisions of the Joint Venture Agreement/the Articles that you find unpalatable. In any event, I have been instructed by DPW to inform you that it was agreed with DPFZA in February 2006 itself that DPW would need to retain management control over Doraleh Container Terminal SA, in order to obtain non-recourse financing from the lenders and in order to have the ability to construct, develop, operate, manage and maintain in accordance with international standards. This fact has been reiterated by Mr. Anil Mohta in his mail of March 6, 2007 to me where he has stated as follows: '…these DPW control provisions have strengthened the non-recourse financing prospects and dilution of the same will adversely impact the non-recourse financing. You can let her know that the JV Agreement is already provided to MIGA based on which they are doing their due diligence...'"*

666. Ms Ali's response of 15 March 2007 clearly recognised that management control by DP World was required. It is worth quoting that response extensively, since it demonstrates that the complaint now made by the claimants about the inequitable effect of the reserved matters was being made by Ms Ali at the time. Yet, as will be seen below, DP World was essentially unmoved and the President approved the Agreement with all the reserved matters in it:

> *"I would like to comment on the fourth point in the issues that were addressed in our correspondences, namely the subject of 'Reserved matters'. First and foremost let me reassure you that I for one believe and understand the importance of our partnership with DP WORLD. I remain convinced of the magnitude of this project for our government and the ever enduring commitment of DP WORLD to the development of our ports and free zones infrastructures.*
>
> *It is certainly agreed that DPW must and will retain the management control of Doraleh Container Terminal, as we are convinced you have the profile and the know-how, an international label that are essential to our up and coming port facilities. Furthermore this management control will no doubt allow us certain facilities in financing. Therefore my comments were no attempt to question the management control of our esteemed partner DP WORLD.*

> *In our contracts we must ensure the right equilibrium and we must set a win win situation as I am sure you will agree with that point. In my interpretation of our draft joint venture it transpires that the Djibouti Government represented by PAID despite its majority interests (66.66% shareholder) has limited control over the Board of Directors decision making process. And we agreed with. The provisions in the joint venture referring to the reserved matters are numerous and, my intention is not to go on details but to emphasize a general view which can be resumed as follows; in the Article 11 entitled reserved matters are listed and we have 44 matters that might be considered reserved matters and the last one reads 'ss. Any additions, deletions or amendments to the list of Reserved matters under this agreement'. Therefore this list of 44 matters is by no way comprehensive and can be changed at all times as reserved matters.*
>
> *Furthermore all these reserved matters shall be determined by the board however according to our interpretation of clause 8.5 in the section Powers of directors and proceeding of the Board, this provision specifies that on these matters a resolution shall be passed only and only if the DPW director has voted in favour of the matter. It is also specified that if a reserve matter is presented by the DPW Director, the shareholders shall cause their Directors to vote in accordance to the DPW Director. Where it becomes necessary for the resolution to be passed by the Shareholder, all the directors shall vote in favour of the reserved matters. These provisions disregards the right of the other shareholders, today it only affects the Djibouti Government. Where for a list of important matters the majority shareholder has no real decisional power and where his right to vote is greatly diminished; 1 find that the provisions to be 'léonin'. And to leave no any other alternatives to the Government of Djibouti to preserve its national interest if the case occurs, seems to be inequitable."*

667. Following receipt of that email. Ms Sahu had a meeting on 28 March 2007 with Mr Kruijning to discuss the scope of the reserved matters provision. She then responded to Ms Ali making the one change to Article 11 to which Ms Ali had specifically referred but pointing out that DP World had included this extensive list of reserved matters because of concerns that decisions to do with the DCT project should not be subject to interference from the Government:

> *"We appreciate your "win-win" approach in operating a joint venture between the Government of Djibouti and DPW for the creation of international quality container terminal infrastructure at Doraleh and respect the fact that the Government of Djibouti is a majority shareholder.*
>
> *In deference to your point below, we have deleted the item (ss) in Clause 11 in order to very clearly define the scope of all*

> *Reserved Matters. As discussed during our various meetings in 2006, DPW is seeking to retain management control (including at the Board level) for the following reasons: (a) to ensure that the required funding is obtained for this Project in an efficient and optimum manner; (ii) to protect the revenue stream of both equity partners from the Project; (iii) to ensure that the Project is developed, operated and maintained in a fair and equitable manner, without any road blocks being created by the Government. It is also DPW's concern that decisions regarding the Project should not be adversely affected by any potential political conflicts in Djibouti. For all of the above reasons, we have drafted a rather large list of Reserved Matters and have also made a few minor changes to Ver 13.0 of the JV Agreement. Please find attached c1ean and marked up versions of Version 14.0 of the JV Agreement."*

668. Ms Ali wrote at the top of that email: *"Response of DP World but not satisfactory."* In early April 2007, there were meetings in Djibouti attended by Mr Kruijning, Ms Sahu, Mr Boreh and Ms Ali as well as Me Martinet. Ms Ali's evidence was that at that meeting, she persisted in objecting to the list of reserved matters, which she said the Government would not agree. Her evidence was that Mr Boreh asked her to step outside the meeting room and said words to the effect: *"Thank you, Zeinab, the President is grateful for your work, but we need to go forward and sign the contract"*. Mr Boreh denied ever having taken her out of the meeting or said that, but whether he did or not, it did not dissuade her. As she said in cross-examination: *"I didn't give up, your Honour, because Mr Boreh didn't give -- tell me 'Give up, Zeinab', he just said the President wants us to move forward, so I carried on doing my work, I wasn't given the order to stop, I wasn't told 'Stop'"*.

669. On 10 April 2007, there was a meeting in Djibouti between DP World, representatives of MIGA and the World Bank and Ms Ali and Mr Boreh. As recorded in an email from Mr Gilfillan of DP World thanking Ms Ali, it was a positive meeting. Ms Ali agreed in cross-examination: *"Yes, indeed, it was a positive meeting, your Honour, since the people from MIGA and the World Bank had lots of questions regarding that vagueness, regarding the byelaws, who was the Minister of Transport, who was DPFZA, what was the interface, and through the discussion and my presentation they had a clear representation of what was the role of the State in that area. And I also gave them the important points in the partnership, and I explained on what foundation we were working with DP World."*

670. After the meetings in Djibouti, on 11 April 2007, in an email to Ms Sahu, Ms Ali attempted again to persuade DP World to allow the Government a clause providing that in no circumstances could a decision in relation to the reserved matters go against the national interest:

> *"I have received your last message concerning our previous comments on the Joint Venture agreement. And I appreciate the fact that you have taken out point ss in sub clause 11. Indeed we interpreted this as a broad clause giving incommensurate margins to DP WORLD to permit the addition of any matter as a reserved matter. Indeed, we believe in DPWORLD*

> *management getting all the necessary margins to operate DCT in the most suitable manner for our common interests. However I must pursue the "reserved matters" further and I am obliged to point out that point (ss) is equally unacceptable from the Djibouti government's stand point as it reads reserved matter may be: 'Any other matters required to be determined by or decided at the discretion of the Company under the Concession Agreement and all other Transaction Documents.' Furthermore we would like to add the Notion of National Interest or general public interests that must also be preserved in the calling of a reserved matter. I suggest to be inserted in the general disposition, that under no circumstances the decision taken under the govern of the 'Reserved Matters' decisional process could not go against or cause any risk what so ever to the Djiboutian Government and the Nation's interest, as well as to its sovereignty. Consequently where a decision holds aspects that allude to the above-mentioned interests, DP World's administrator will come to term with the Government Administrator's position. I hope you understand my concerns and that you will review that point."*

671. In cross-examination, Ms Ali agreed that this was the only provision she put forward to get round the problem: *"Yes, for me that's the means to go round that concession, I was told to stop but I still carry on and I try, I keep trying, it's my position -- it's not my position with all the reservations I have, but it's still a way of going forward while doing some concession."* Mr Kendrick QC suggested to her that if such a provision had been inserted in the contract, the whole deal would have collapsed: none of DP World, the lenders or the political risks insurers would have been prepared to proceed.

672. It seems to me that is clearly correct and that a reservation of that kind would have raised a red flag for DP World and other investors. Ms Ali accepted as much in answer to me:

> *"MR JUSTICE FLAUX: …I understand how strongly you feel about this, but the question you were asked was a question – what Mr Kendrick put to you is that: if you had reserved to the Republic of Djibouti in the joint venture agreement the right to veto anything in the national interest, that is a very, very wide concept, undefined, and the point that he was making is, I know you might find it unacceptable, but the fact is that DP World wouldn't have bought it, the banks wouldn't have bought it and the political risks insurers wouldn't have bought it. That's all he was putting to you; do you accept that or not?*
>
> *A. Very likely, your Honour, but I didn't have an interface allowing me to define what I had in mind through that notion of national interest, what's your definition, can we define what it means? I had a locked door in front of me.*
>
> *MR JUSTICE FLAUX: I understand that but I think you accept the point that I was trying to get you to focus on, which is that,*

> *whether you like it or not, concepts of national interest inserted into commercial contracts throw up red flags for international investors, for obvious reasons, we don't need to spell them out.*
>
> …
>
> *A. Yes, it can be the case, you are right."*

673. In those circumstances, it is quite clear DP World were never going to agree such a provision. They were unmoveable on the issue of complete management control, although the number of reserved matters in clause 11 of the Joint Venture Agreement eventually signed fell from forty four to thirty eight. That agreement was signed on 22 May 2007 by Mr Boreh on behalf of PAID, Mr Kruijning on behalf of DP World Djibouti and Mr Heremans on behalf of DCT. An Addendum to the Concession Agreement (to do with Islamic funding arrangements) and the Port Services Agreement were signed on the same day. The various other Agreements which formed the overall suite of Agreements were signed on various dates thereafter by Mr Boreh on behalf of PAID: the Engineering, Procurement and Construction Contract on 25 November 2007, the Management Services Agreement on 6 December 2007 and various finance agreements later in December 2007.

674. However, as Ms Ali accepted in cross-examination in relation to the Joint Venture Agreement, although these Agreements were signed, they still had to be approved by the President and the Council of Ministers. Any Agreement of this kind had to be approved by Decree. Accordingly the President and his advisers had ample opportunity to review the Joint Venture Agreement and other Agreements as signed before they were formally approved and ratified.

675. The first stage in that review process was a DPFZA memorandum prepared by Ms Ali dated 29 May 2007. This began by emphasising the need to amend the by-laws of PAID, something of a favourite topic of Ms Ali's. She then went on to describe the structure for the establishment of the DCT and concluded with this summary:

> *"Summary: With respect to Doraleh, DP World is both a shareholder and manager; the legal entity DCT shall sign the management contract with DP World; With respect to Doraleh and PAID, DP World is manager and in consideration for such management shall receive financial payment as provided in the concession agreement. Only those financial terms contained in the agreement dated June 2000 shall remain as unchanged, as PAID has lost its main business of TC. A port services agreement in relation to such business shall be entered into between PAID and the DCT company which shall then be endorsed by decree. DCT, distinguishing features: even though the State has a major shareholding, administration and management of the terminal and the company is conferred to DP World. The State of Djibouti, acknowledges the importance of, and the risk associated with DP World's investment, and leaves all managerial autonomy to DP World in exchange for output and a fee (payment of dividends) up to 66.66%."*

676. On 6 June 2007, Ms Ali sent the Secretary General of the Government a file of draft Decrees and Explanatory Memoranda relating to the Joint Venture agreement, the Addendum to the Concession Agreement and Port Services Agreement (all signed by Mr Boreh on 22 May 2007). As she explained in evidence these Explanatory Memoranda would accompany draft Decrees which went to the President for his approval. The Explanatory Memorandum in relation to the Joint Venture Agreement makes quite explicit to anyone in Government reading it, that DP World was to have complete, autonomous management control with wide ranging decision making powers (i.e. the reserved matters) and why that was required:

> *"The purpose of this decree is accordingly to ratify the articles of association of the company DCT SA as well as the Joint Venture Agreement, otherwise known as the participation contract governing the relationship concluded between the PAID and DP World.*
>
> *In recognition of the need for efficient management of the Doraleh container terminal, the objective of which is to increase transhipment traffic as well as traffic dominating transit to Ethiopia, the Djibouti party accords DP World the management of the Doraleh container terminal. Despite its majority shareholding, it grants the company every freedom to manage and very wide-ranging decision-making powers. The objective of the State is to avoid any interference by itself in the private operator's management so as ultimately to secure better profitability and greater productivity.*
>
> *All the privileges that reinforce the decision-making powers of the minority shareholder DP World are motivated by concern to make the funding project bankable. Since the Dubai partner has taken huge risks in making the investment and bearing in mind funding requirements, the issue of the reserved matters placed under their control provides the crucial guarantee granted by the State of Djibouti in the context of this project."*

677. Ms Ali confirmed in cross-examination that the decision to grant complete management control to DP World was being taken because of the considerable risks they were taking in making the investment in the DCT:

> *"I've re-read and I can confirm that's what's written there and that's what was decided upon. It had to be validated because there are enormous risks which are accepted by the Dubai partner, and that's to show that, in spite of my effort -- and I am not criticising anyone or anybody in particular, but in spite of my position on reserved matters, it doesn't belong to me, the final decision, and the final decision is to say "We have to swallow it and let it go", on the basis of the financing project, and because of the enormous risk taken -- accepted by the Dubai partner. In fact it was DCT taking the risk, not Dubai."*

678. As that passage makes clear the ultimate decision as to whether to accept the reserved matters, as she put it *"to swallow it and let it go"*, was not for her but for the President and Parliament. She explained that the ratification procedure was that the particular agreement had to be approved by the President, then the Parliament, then by the President again.

679. After those documents were submitted to the General Secretary of the Presidency, there was some delay in response, so (as Ms Ali explained in an email to Mr Kruijning on 17 September 2007) she and Mr Boreh had a meeting with the General Secretary on 11 September 2007. At that meeting the General Secretary expressed concern about the reserved matters and said the Government would like its board representative's vote to be considered when it came to Djibouti related issues. As she put it: *"Furthermore, The Presidency would like to remind its decision which consist in not to interfere in DP World management autonomy, but they would like to have an active participation to the decision process when it comes to the preservation of the governmental interest. They would like a specific attention for the Djiboutian vote on specifics cases."* It is clear from this that the President and his advisers (who at this stage are not alleged to include Mr Boreh) had subjected the issue of reserved matters in the Joint Venture Agreement to adverse scrutiny.

680. According to her email to Mr Kruijning, the other issue raised by the Presidency was that they wanted the Port Services Agreement, which was between two Djiboutian entities, PAID and DCT S.A., to be subject to Djibouti law and jurisdiction. She explains that: *"Along with Mr Boreh, we explained to the Presidency the requirements expressed by the financiers of the project, but they maintained their position saying that they also need to be able to preserve their vote and therefore adjust the decision making process, considering the length of the concession period 30+ 10+ 10 (which exceeds the loan reimbursement period).* She says that if these points could be resolved, the file could be discussed at the next meeting of the Council of Ministers on 23 September 2007.

681. The information in this email clearly not only surprised but infuriated Mr Kruijning, who replied: *"1 must admit that this message comes as quite a surprise since all these agreements have been executed as far back as May 2007 and re-opening them will again create quite a delay in the financing agreement, which we were about the to close at the end of this month and effectively meant that we could finalize the remaining agreements as well. Is this what you are suggesting? We can't re-open this without disclosing it to out lenders and I can guarantee you that this will delay the financial closure and needless to say what impact this will have on the contractors."*

682. As the email of 17 September 2007 from Mr Kruijning also indicates, the financing of the project by the international banks had been secured by then and the various financing agreements had been drafted. Ms Ali responded to Mr Kruijning in apologetic terms: *"First, I would like to mention that I understand your surprise because we felt the same. But, the legal procedure at the Presidency level requires more precisions and renegotiations before the signing of the President of the Republic. Despite the agreement we reached on May 07, the President of the Republic's legal advisors expressed the argumentation we transferred to you in the previous email. The file is no more at my level and I cannot directly discuss about the file with the President of the Republic. Mr Boreh is the only one allowed to do so. However, I would suggest letting the Presidency hear from the financiers through Mr*

Boreh so they can have a better idea of the situation. They will be able to determine the financial impacts of a renegotiation of the 'Reserved Matters'."

683. Mr Kruijning replied on 23 September 2007 in very firm terms:

> *"I appreciate what you are trying to re-iterate but our position is that the Government of Djibouti was represented through Mr. Boreh, who was fully authorized by the President of the Republic to sign and agree the said terms when signing the various agreements.*
>
> *It is very unclear why the legal procedure at the presidency level would require more précising or renegotiations if all these agreements have been construed in accordance with Djiboutian law, which has been confirmed and agreed with by various legal sources, including yours and Mr. Martinez.*
>
> *Hence l see absolutely no reasons to address this at this moment and certainly not before financial closure has been reached with the lenders.*
>
> *Suggest we address this after this has been concluded and even then l disagree with the nature of the changes that are suggested apart from the law change in the Port Services agreement, which l believe was an oversight to begin with since all other agreements are in construed under this to begin with."*

684. That email seems to me to be the clearest possible contemporaneous indication that DP World would not have been prepared to engage in any further negotiation on the issue of management control and reserved matters, any more than they had been before the Joint Venture Agreement was signed in May 2007. Furthermore, they were clearly incredibly reluctant to go back to the banks and seek to renegotiate anything. Mr Qureshi described in re-examination how difficult it had been for DP World to secure the finance for this venture:

> *"Q. Can you help me on this: was raising finance for the Djibouti project from banks an easy thing to do, a difficult thing to do, a routine thing to do?*
>
> *A. I think it was an extremely difficult thing to do. DP World had to put a lot of pressure on its relationship banks to step up to the plate, even then after we did that, one of them who promised to underwrite the project actually stepped down in terms of their commitment. Luckily for us, the two other relationship banks were able to take over their share of commitment. What happened subsequent to financial close was that we found that the banks who had underwritten the project, when they went out to the market to syndicate down and sell down the debt they found that there were no takers, so there was actually a very difficult circumstance that we only -- and*

> *we were very fortunate we were able to use our leverage on our relationship banks to --*
>
> *MR JUSTICE FLAUX: The two relationship banks are the Standard Chartered Bank and the Dubai Islamic Bank; is that right?*
>
> *A. Yes, and the third one was West LB who reduced their commitment.*
>
> *MR JUSTICE FLAUX: So West LB reduced their commitment?*
>
> *A. Yes.*
>
> *MR JUSTICE FLAUX: And Dubai Islamic Bank and Standard Chartered increased their commitment?*
>
> *A. Yes.*
>
> *MR JUSTICE FLAUX: But they had had difficulty in syndicating the loan?*
>
> *A. Exactly."*

685. Unlike with the Republic's shareholding in Horizon, it was not suggested to Mr Boreh in cross-examination that, at this stage, he had spoken to the President about the reserved matters or any other terms of the DCT agreements and somehow misled the President into thinking that the terms set out in the various agreements were the best that Mr Boreh could do on behalf of the Republic. Even if such a suggestion had been put, there would have been no evidential basis for it. As I have said, the President fails to deal at all with this process of approval and ratification in either of his witness statements.

686. Indeed, it is striking that, although the claimants contend in their closing submissions that Mr Boreh was bribed into agreeing the "soft terms" of the various Agreements he signed, they do not identify any contemporaneous documentary evidence that he was involved in an ongoing process of negotiation with DP World after the main commercial terms were agreed in February 2006. His own evidence in his second witness statement was: *"several further agreements relating to the container terminal were entered into after the 2006 Concession Agreement – most notably the DCT JVA and the Management Agreement, which were signed in May and December 2007 respectively. These agreements covered further practical issues which had not been addressed in the 2006 Concession Agreement. As the main commercial terms of the deal had been finalised and these agreements were largely about the legal details, I took a back seat and essentially left Ms Ali to finalise them."* That evidence was not challenged in cross-examination and, in any event, it is borne out by the contemporaneous documentation I have been analysing, from which it is clear that it was Ms Ali, as a lawyer, who was involved most closely in discussions with DP World and, specifically, Mr Kruijning. Whilst Mr Boreh was present at some of the meetings, there is simply no basis for any suggestion that he was engaged in some

continuing process of negotiation with DP World, in which he should have spoken out against the various provisions of which complaint is now made by the claimants.

687. What appears to have happened is that, following that exchange of emails between Ms Ali and Mr Kruijning in September 2007, the President decided that he would approve the various Agreements, notwithstanding the reservations of his advisers, including the General Secretary of the Presidency, Mohammed Hassan. Thus, on 2 October 2007, the President granted Mr Boreh a Power of Attorney to sign the financing agreements, which he then did. Although Ms Ali had suggested in her witness statement that Mr Boreh had been involved in obtaining the finance with DP World, she accepted in cross-examination that he had not been involved in negotiations with Standard Bank and the other banks. His only involvement was to sign the agreements which had been negotiated by DP World. This is confirmed in his own evidence in his second witness statement, which I accept: *"I was not personally involved in negotiating the finance arrangements, which were handled by DP World, but my understanding at the time was that the banks agreed to loan the money on the basis that DP World would have management control. This was to be expected. DP World had a proven track record of operating ports efficiently and profitably, whereas Djibouti was a country with a very low investment rating, the Government of which was known for inefficiency, nepotism and corruption. The need to obtain financing meant that the project would not have gone ahead unless DP World was in control."*

688. After the finance agreements were signed, the president then ratified the other Agreements, issuing Decrees in December 2007 confirming approval of the Joint Venture Agreement and the Port Services Agreement, as well as the allocation of the land for the project. Thus the President and the Republic approved the various agreements with full knowledge of the reserved matters and the degree of management control which was being given to DP World, as well as of the other provisions of which complaint is now made. After some reluctance to commit herself, Ms Ali accepted during cross-examination in answer to questions from me, that the Agreements containing the provisions of which complaint is now made had all been approved by the President and that those Agreements had been very profitable for Djibouti:

> *"MR JUSTICE FLAUX: Those terms that you are complaining about were all agreed by the President, weren't they, at the highest level?*
>
> *A. I confirm that these documents were all validated through decrees.*
>
> *MR JUSTICE FLAUX: And these agreements have been extremely profitable for Djibouti, haven't they?*
>
> *A. That's a question I cannot respond to, your Honour.*
>
> *MR JUSTICE FLAUX: These agreements, the DCT agreements with DP World have been extremely profitable for Djibouti?*

> *A. I do not know, your Honour, because after the negotiation I wasn't involved in the management of DCT --*
>
> *MR JUSTICE FLAUX: Well, you live in Djibouti, you must know that the container terminal is a great success, isn't it? It has a huge amount of business, doesn't it?*
>
> *A. Your Honour, I cannot be affirmative in that question, because the only expectation, if we want to know my feeling, although I wasn't involved in the management of DCT--*
>
> *MR JUSTICE FLAUX: I am not interested in your feelings and having -- I mean, you just trotted out, if you don't mind my saying so, your Government's case in these proceedings. I am not asking you to tell me what your case is, I know what the case is. I am asking you, as a Djiboutian with experience of this matter, whether you accept that the container terminal has been a great success for Djibouti? Yes or no?*
>
> *A. I would say yes."*

689. What emerges from the contemporaneous documents is that, despite Ms Ali's optimism in April and May 2006 that any Agreements would be ratified fairly quickly, it was in fact a long, tortuous process taking another 18 months before all the Agreements were approved and ratified. However, what is quite clear is that the President and his legal and other advisers had the opportunity to scrutinise and did scrutinise all the various Agreements in detail. They thus would have been able to raise whatever concerns they had (and did indeed raise concerns about the reserved matters and other matters such as questions of governing law and jurisdiction) but nonetheless, at the end of the process, the Agreements were approved and ratified by the President and by Parliament.

690. As Mr Boreh put it in cross-examination when it was put to him that the degree of control given to DP World was not what was required for efficient management: "*You know, I don't know what you mean by 'degree of control'. In a company there is one ship in a captain. You cannot have two different people pulling each other on the same company and managing it. So the best interests of Djibouti and the President agreed with that, and it took them one and a half years or one year to discuss backwards and forwards, I have seen all the correspondence between Zeinab and Mohamed Hassan and all these reserve matters and all these things, and they went in with their eyes wide open, so it was not something I decided on behalf of anybody. They could have refused and the project would just not happen. It's very easy.*"

The alleged bribery

691. The claimants rely upon four separate matters in support of their case that DP World bribed Mr Boreh so that he would agree terms in the DCT Agreements which were favourable to DP World: (i) they rely upon discussions about a so-called "DDP finder's fee", which Mr Boreh had first asked for in 2004 and in relation to which he repeated his request in 2006. They contend that, although no finder's fee was ever actually paid or agreed, DP World was disposed to pay one to Mr Boreh if necessary,

which was strongly indicative of a corrupt relationship between DP World and Mr Boreh; (ii) they contend that from February 2006 onwards, DP World was promising Mr Boreh a shareholding in the terminal company and again, although no shareholding was actually transferred to him, this was a promise of a bribe; (iii) the claimants contend that the S-Flame Consultancy Agreements entered into between Mr Boreh and DP world from May 2007 onwards were shams pursuant to which no genuine consultancy services were provided and that the payments ostensibly made pursuant to the Agreements were in truth bribes rewarding Mr Boreh for having negotiated DCT Agreements which were favourable to DP World. These bribes had been promised to him at the time of the earlier negotiations; (iv) the claimants contend that the S Flame Security Services Agreement was another sham agreement between Mr Boreh and DP World which was a bribe.

692. I will consider each of these series of allegations in turn below, but before doing so, I should address the other matters upon which the claimants rely as evidence of corruption on the part of Mr Boreh, even though none of the matters relied upon involves DP World or is still pursued as a claim against Mr Boreh.

693. The first in point of time is the ZPMC commission. On 13 August 1998, the Chinese company ZPMC and Mr Boreh entered into an agency agreement under which he was to be paid 10% of the purchase price of two cranes, the purchase of which from ZPMC was being negotiated at meetings in China. The claimants contend that, on the same day, the Republic entered into a contract with ZPMC for the supply of the two cranes, so that Mr Boreh had done nothing to introduce ZPMC to the claimants or to negotiate the contract. The claimants contend that during his visit to China as part of the relevant trade delegation, Mr Boreh gave the impression that he was a minister and persuaded ZPMC that, in order for there to be a binding agreement (there having previously been only a letter of intent), ZPMC would have to pay him "commission", in other words that this was not a genuine agency agreement but bribery or corruption. Mr Boreh's case is that he had visited ZPMC in China and negotiated a keen price for the purchase of the cranes, with soft loan terms, and that this was a genuine agency agreement.

694. The contention that he gave ZPMC the impression that he was a minister is based on the fact that the letter to him from ZPMC of 14 August 1998 is addressed to *"Dear Mr Minister"*. In my judgment, this is a flimsy point, since the addressee of the letter is Mr Boreh as *"Vice President, International Chamber of Commerce and Industry, Djibouti"* which was in fact his role. That suggests that "minister" is being used as a courtesy title, not because he had held himself out as a minister. Furthermore, contrary to the claimants' contention, there was no concluded agreement made in China, but only an agreement in principle which would require Presidential approval in Djibouti, the terms of which were improved thereafter so far as the Republic was concerned (particularly payment by instalments over some ten years) through further negotiation after the visit to China.

695. The purchase price for the cranes was indeed paid by the claimants in instalments over many years and, according to an email from ZPMC to Byrne & Partners of 5 July 2013, a total of U.S. $1,496,000 by way of commission was paid to Mr Boreh. That email states in terms that Boreh International had an agency agreement with ZPMC for that project and that the commission was *"properly received"*. Thus, whatever criticism the claimants make of Mr Boreh in relation to his agreement with

ZPMC in 1998, it is striking that ZPMC itself appears to regard this as a genuine agency agreement. In the circumstances, even if that agreement were one in respect of which the claimants had a claim (which they do not), I would be reluctant to conclude that this was bribery or corruption, certainly in circumstances where ZPMC is not a party to the proceedings. Furthermore, it seems to me that the subsequent refusal of ZPMC to pay Mr Boreh commission on the later 2007 contracts, with which he and his company had had no involvement, even though they were still paying or had only recently stopped paying commission to him under the 1998 contract, is inconsistent with a corrupt relationship or with the commission under the 1998 contract being anything other than genuine commission.

696. Mr Boreh contends that, not long after the President came to power in April 1999, at a time when Mr Boreh had only received U.S. $224,000 in commission, he asked Mr Boreh to pay him upfront a sum equivalent to all the outstanding ZPMC commission, on the basis that his election expenses were heavy, and Mr Boreh would be recouped in time when ZPMC paid the later instalments of commission. Mr Boreh agreed to this and the sum of U.S. $1,271,393 representing the total outstanding commission less bank charges was paid by Boreh International to a personal account of the President at a Paris bank. That bank returned the money because of concern about such a large sum being paid to a serving head of state. The President then demanded payment in cash and on 20 October 1999, Boreh International transferred U.S. $2 million to Red Sea Central, another Boreh company, on 20 October 1999, to pay cash to the President. Mr Boreh produced a bank statement from Credit Agricole Indosuez showing the beneficiary of the transfer of U.S. $1,271,393 as "*Ismail Guelleh*", the return of the same sum the same day and the transfer to Red Sea Central days later.

697. The claimants seek to make much of the fact that Mr Boreh alleges he agreed to transfer money years before he was paid, that his oral evidence about all this was somewhat confused and that he could not identify when the cash was allegedly withdrawn and paid over to the President. These forensic points all had force, but they do not really answer the fact that Mr Boreh's case as to what he was asked to transfer is borne out almost exactly by what was transferred to the President on 11 October 1999, the difference most likely being accounted for as bank charges. The remainder of his case on this issue is borne out by the bank statement and, despite Lord Falconer's criticism, it is not surprising that he cannot identify exactly when cash was transferred to the President. What is also striking, despite the criticism, is that the President has provided no explanation whatsoever as to the reason for the transfer and re-transfer unless it was for the reason Mr Boreh gives.

698. The significance of this payment of commission to the President in 1999 is the light it casts on what happened when other contracts were made with ZPMC in May and November 2007, in which Mr Boreh was not involved and on which he was not expecting to receive commission. Mr Boreh's case is that when the President learnt that two new contracts for cranes had been made with ZPMC, he refused to believe that Mr Boreh had not been paid commission and he and the First Lady accused Mr Boreh of *"eating"* the commission. Accordingly, Mr Boreh belatedly demanded commission on the contracts on the basis that he was ZPMC's agent in Djibouti. Emails from Mr Boreh and his employees to ZPMC about adding commission to the contract price contain scarcely veiled references to the President's demands: "*we have*

third party who involve in this business" and "*we have engagements with other interested parties and commitments which have to be honoured*".

699. ZPMC refused to agree to pay Mr Boreh commission, on the basis that, unlike in the case of the 1998 contract, these latest contracts had been negotiated without any intervention by Mr Boreh or his company. He sought to involve DP World, as he admitted in cross-examination. Although the claimants suggested in their closing submissions that DP World then threatened ZPMC that "*if the matter is not resolved amicably, this will reflect on the delivery schedule of the* [cranes]", this does not seem to me to be a threat, but simply a realistic recognition of the possible effect of any dispute. I do not consider that DP World brought improper pressure to bear on ZPMC or did anything which is indicative of a corrupt relationship with Mr Boreh.

700. The claimants contend that, in his email of 25 March 2008, Mr Boreh personally threatened ZPMC: *"Please understand that in order to maintain its reputation with its partners, Boreh International will have to show that they are doing everything in their power to recover what is rightfully due. As such we inform you that we will take whatever action required to secure our rights. These measures could turn out to be very embarrassing and expensive to parties"*. Even if this was a threat, the obvious question is why on earth was Mr Boreh demanding payment of commission on contracts where he knew that none had been agreed and his companies had not been involved. It seems to me that the most likely explanation is the one he gave, that he was coming under increasing pressure from the President and the First Lady in late 2007 and 2008 to make payments to them. In any event, threat or not, ZPMC would not budge and refused his demands. I agree with Mr Kendrick QC that none of this is indicative of a corrupt relationship between Mr Boreh and ZPMC; quite the contrary.

701. The second matter relied upon by the claimants concerns the circumstances in which Soprim procured the sub-contract with Belleli, in relation the Horizon civil works. The claimants persist in their allegation that Mr Boreh procured that sub-contract through an abuse of his position, even though any claim in respect of the civil works has been abandoned. The circumstances were as follows. The original bids for the civil works contract received by ENOC in August 2003 were higher than expected and the various contractors, including Belleli, were invited to retender. The lowest revised bid came from Belleli and, on 14 October 2003, ENOC produced a detailed memorandum for the board of HDTL recommending that the contract be awarded to Belleli of whom ENOC had previous good experience.

702. Mr Boreh wrote to Mr Sultan on 23 October 2003 following a meeting he had had with Mr Gelineau on 21 October 2003. In that letter he raised various complaints about Mr Gelineau, one of which concerned the Belleli re-tender about which he wrote:

> *"It is interesting that Belleli Energy, on their re-tender, which they made after the Odebrecht tender, and Mr Gelineau's visit to Italy, have engineered a 21 million dollar reduction. Something is wrong. I request access to all tender documents received up to now, including amendments and variations, from Belleli Energy, Dodsal, and Odebrecht, with a view to arrange a full review. It is necessary that the Directors and the Members of the Technical Committee renegotiate separately*

> *with each of these companies with a view to achieving a further reduction. It is imperative that Djibouti interests have representation on the Technical Committee through myself or my nominee for the best interest of the business and in order to ensure payback."*

703. Contrary to the claimants' suggestion that this was engineered by Mr Boreh to procure a sub-contract from Belleli, it seems to me to be raising a genuine concern as to the circumstances in which Belleli had managed to drop its price. As appears from Mr Iyer's memorandum of 4 November 2003 requesting the third cash call, at the meeting of HDTL on 26 October 2003 a decision had been made to require re-tendering. On 30 October 2003, Mr Boreh approached Mr Garrone, the CEO of Belleli about Soprim having a sub-contract from Belleli for the works. It was put to him in cross-examination that he had said that, unless Belleli agreed to Soprim having the sub-contract, there would be a re-tender which he was initially inclined to agree, though he went on to say:

> *"No, what I meant is if we do re-tendering, because our prices are cheaper, because now we know the job description, because during the tender they were revising the documents and complicating the others to compete. There was an understanding because Belleli had a lot of friends in ENOC, so as a shareholder I was just doing business, and this is business, to say "Look, we want you to reduce the price, we are cheaper than Sands", Sands' price was 15 million, ours was 9 million, so 6 million was cheaper only on the civil work, and that was the interest of Horizon, which I held 30%. So if he didn't want to accept, yes, I was going to ask for re-tender, to renegotiate with everybody, and see whether we can reduce the price, and that is business."*

704. In fact, as Mr Kendrick QC points out, although the email from Mr Garrone to Mr Boreh on 30 October 2003 referred to their agreement in the event that there was no re-tendering, Mr Garrone added that he understood HDTL was "*still intending to go forward with rebidding*", which was of course the position. On 1 November 2003, Mr Boreh asked Mr Garrone for an engagement letter on the basis of their conversation, in order to avoid a re-tender. Mr Garrone sent a letter of intent on 5 November 2003, which was subject to Belleli being granted the EPC contract and also subject to Soprim entering a joint venture with an experienced civil works contractor acceptable to Belleli. In due course the joint venture was formed with Sands.

705. The claimants allege that Belleli's agreement to sub-contract with Soprim was not made on the merits, but because of what they allege was abusive behaviour by Mr Boreh to gain a commercial advantage for Soprim. They characterise Mr Garrone sending the letter of intent as conceding defeat. What that allegation appears to completely overlook is that, as Mr Garrone had anticipated in his email of 30 October 2003, Horizon proceeded with a further re-bid anyway. The new bids had been received by 13 November 2003, when at the HDHL shareholders meeting, Mr Sultan asked Mr Nair to evaluate the bids and report as soon as possible.

706. A further shareholders meeting took place on 23 November 2003, at which Mr Sultan represented ENOC, Mr Boreh his companies and Mr Hadeed IPG. Mr Nair reported on the re-tenders, of which Belleli was again the cheapest, having achieved a modest reduction of its previous figure. Earlier that day, Belleli had written to Mr Gelineau confirming that if its bid succeeded, it would sub-contract the civil works to a joint venture between Soprim and a UAE company i.e. Sands. That letter was tabled at the meeting and, since Belleli was again the cheapest, the shareholders resolved that the contract should be awarded by HDTL to Belleli (in the full knowledge that Belleli was sub-contracting the civil works to a joint venture that included Soprim).

707. I agree with Mr Kendrick QC that there was in fact no abuse of position by Mr Boreh to get an unfair advantage for Soprim. Whatever he may have said to Mr Garrone about avoiding a re-bid, he had no power to do so unless his fellow directors agreed and, in the event, there was a re-bid despite what he said. Belleli sub-contracted to the joint venture which included Soprim, notwithstanding the re-bidding process that it was required to go through. The re-bid led to a further modest saving which was in the best interests of HDTL.

708. Furthermore, although the claimants assert that Belleli did not choose Soprim on the merits, there is no evidence to support that assertion. As Mr Kendrick QC points out, working with a local contractor would lead to cost savings, Soprim was already mobilised at Doraleh for site development works and Mr Yusr Sultan in later correspondence refers to Soprim's involvement having been approved: "*in view of the importance of this work to the local economy*". As Mr Kendrick QC submits: *"Creating employment for local Djiboutians, rather than overseas contractors, was in the best interests of HDTL (for public relations reasons) and the Republic (for policy reasons)"*. In all the circumstances, I reject any suggestion that Mr Boreh abused his position in relation to Soprim being awarded the sub-contract.

709. The third matter relied upon by the claimants as corruption by Mr Boreh is the Horizon Consultancy Agreement. I have already dealt with that allegation in detail at [501] to [514] above and have rejected the claimants' case that it was a sham or corrupt.

The DDP finder's fee

710. In their closing submissions, the claimants place particular reliance and emphasis on the DDP "finder's fee", which they contend demonstrates the complicity between DP World and Mr Boreh in entering corrupt transactions, his tendency to place his own interests before those of the claimants and DP World's willingness to placate him when he complained about his position.

711. The first documentary reference to the so-called finder's fee is in an email of 3 July 2006 from Mr Fewer (by then back in Dubai) to Mr Hawker stating: *"I received a phone call today from Abdour Rahman Boreh asking if I remember our agreement to share some of the Dryport profits once it became successful. I told him I remember we agreed to discuss it at an appropriate time given he provided the initial "seed money" to build the facility. He asked me to contact you to confirm such a conversation existed - even if a formal agreement was never put in place. I told him I'd get a hold of you to let you know there was such a discussion and I had indicated DPI would be*

willing to discuss his sharing a percentage of the profits some time in the future when there were profits."

712. Mr Fewer was asked in cross-examination about the earlier approach from Mr Boreh, which was at some stage in 2004, before Mr Fewer ceased being International Operations Director for DP World, with overall responsibility for managing the port including the DDP. Mr Fewer said that there had been no agreement in 2004. Mr Boreh had asked about a share in the profits of the DDP, but Mr Fewer had said it was too early in the operation to discuss that. If and when it was profitable in the future, Mr Boreh should come back and discuss it, but anything which was proposed would have to be cleared with Dubai. This earlier discussion is of some relevance because, on any view, it precedes the DCT negotiations by eighteen months or more and has nothing to do with Mr Boreh agreeing soft terms. If Mr Fewer and Mr Boreh had agreed a finder's fee for Mr Boreh in relation to DDP in 2004, it could not conceivably be described as a bribe, let alone a bribe to agree soft terms in Agreements which lay in the future. In cross-examination, it was not suggested to Mr Fewer, who was clearly an honest witness, that he had acted improperly or corruptly.

713. The whole issue seems to have then lain dormant, until Mr Boreh raised it with Mr Fewer on the telephone in July 2006. The claimants contend that the timing of this call is critical, as it came at the time of the DCT concession negotiations. In fact, at that time, there were no negotiations ongoing. The draft of the Concession Agreement was with the President and the Government for approval, so there is no connection with any negotiations. In my judgment this is no more than Mr Boreh reviving a previous request in relation to the DDP, which had nothing to do with the DCT. He was seeking a reward for services provided years previously in relation to the DDP, on the grounds that DP World was making a large profit from his idea of the DDP, probably some U.S. $5 million per annum by 2006. Mr Boreh's evidence was that he did not regard this as fair. He was certainly not seeking a bribe to "go soft" on the terms of the DCT agreements.

714. Again, there was a lull and Mr Boreh did not raise the issue of the finder's fee with DP World again until the morning of 26 November 2006, when he spoke about it again in a telephone conversation with Mr Hawker and Mr Heremans (the financial controller of DP World), as recorded in an email from Mr Hawker to Mr Gilfillan: *"During a conversation with Abdourahman Boreh this morning he again referred Guido and I to a verbal agreement made between himself and John Fewer to the effect that he should receive a finders fee, or referral fee for the ideas and the investment that he personally introduced in the form of the Dry port."*

715. Mr Heremans then drafted a short form contract which would have given Mr Boreh a "finder's fee" equal to 3% of PAID's gross revenues from DDP. Mr Hawker forwarded the draft to Mr Gilfillan for approval, saying: *"I have no problem with the princip[le] of the idea, it was his and he otherwise makes nothing directly from the DDP. Attached is a suggested contract that would achieve this, cost will be in region of $ 240,000 per year."* Mr Gilfillan responded: *"I guess this is what we need to do to remain a preferred business partner in Djibouti. I am not comfortable with advance payments as they cause the sorts of problems we are seeing with the PAID. See if we can have an agreement which pays after the audited results are in. Is 3% what was agreed by John Fewer?"* Mr Hawker replied: *"John recalls discussions but has no recollection of a definite %age or a firm decision having been made. I am sure*

Abdourahman will agree to being paid after the years results are known, but our auditors are ridiculously slow in the last couple of years to produce their final results."

716. Mr Hawker's evidence about this was defensive and evasive. He was clearly embarrassed, I suspect because he realised that, despite his having been prepared to agree this in principle, it would have been wrong to agree to pay Mr Boreh a percentage of the profits which would otherwise have gone to PAID, as Mr Fewer had accepted in cross-examination. Mr Hawker's evidence in cross-examination was originally that the draft contract had turned up on his desk in a pile of documents his secretary had put there for signature and he had no idea how his secretary had got it. He then described the draft contract as: "*merely a document that was drafted by I know not who"*. Later in cross-examination, when it was put to him that it was Mr Heremans who had drafted it and that he and Mr Heremans had been happy to go ahead, subject to approval from higher up in DP World, he accepted that that was correct. Although his contemporaneous email had indicated that he was prepared to agree this in principle, in cross-examination, he agreed that he would not have agreed to a percentage agreement and that it would have been wrong and not in PAID's interest for Mr Boreh to be receiving payment from funds that would otherwise have gone to PAID.

717. The claimants sought to make much of the timing of this request by Mr Boreh, relying upon the fact that in cross-examination, Mr Hawker accepted that negotiations in relation to the DCT agreement were taking place at that time in November 2006. Lord Falconer put to him that he was extremely keen to keep Mr Boreh favourable to DP World. His response was; "*not more so than usual*", what was usual being: "*an open-handed approach"*. The claimants appear to be seeking to imply from this that Mr Hawker was trying to "keep Mr Boreh sweet" for the purposes of the DCT negotiations and they tie all this in with what Mr Gilfillan said: *"I guess this is what we need to do to remain a preferred business partner in Djibouti"* to suggest that in effect what was being proposed was some sort of bribe.

718. In my judgment, that is not a fair assessment of the situation. It overlooks the fact that when Lord Falconer suggested to Mr Hawker that an open-handed approach meant giving with open hands, evidently equating it with bribery, Mr Hawker denied that, saying that what he meant was that:

> *"There was no change in any of the situations relating to the personnel involved in this. The two things were not, in my mind, directly related...I can see no reason why they should be.*
>
> *Q. I put it to you that they were related and this was part in effect of paying off Mr Boreh?*
>
> *A. I am sorry, sir, that's your interpretation, not mine."*

719. Although, as I have said, there were aspects of Mr Hawker's evidence about the finder's fee that were unsatisfactory, I see no reason not to accept his evidence that what was being proposed was not a bribe. I am quite satisfied that neither Mr Hawker nor Mr Fewer would ever have agreed to pay a bribe. Equally, I agree with Mr Kendrick QC that Mr Gilfillan's assessment that this is what they needed to do to

remain a preferred business partner in Djibouti was the wrong end of the stick. Mr Boreh's request for a finder's fee contained no threat, express or implied that if DP World did not agree it they would fall out of favour. Mr Gilfillan had only recently arrived at DP World from Australia and he was in fact unfamiliar with Djibouti, having spent little time there other than a familiarization trip.

720. In any event, whatever Mr Gilfillan's view, the effect of Mr Hawker's response to him was that the decision as to whether to sign an agreement and on what terms rested with Mr Gilfillan. He appears to have decided not to make any agreement, as the matter proceeded no further. Mr Boreh's evidence was that he did not know that any draft agreement had been drawn up and, clearly, the issue of whether he would wait to be paid after the audit was never in fact raised with him. Mr Boreh did not return to the subject and no payment was ever made. The relations between himself and DP World remained unchanged. In my judgment, the characterization of this issue of the finder's fee as complicity between them in entering into corrupt transactions is unwarranted. Even if any agreement had been made, which it was not, it would have had nothing whatever to do with the negotiations of the DCT agreements and would not have been a bribe.

The 5% shareholding in DCT

721. The claimants' case is that, at the time of the meetings with DP World in February 2006, Mr Boreh had already been bribed by DP World, by the promise of a shareholding in the terminal company. For reasons which I will set out in detail, that seems to me to be inherently improbable. The first reference in any document to any possible shareholding is in an internal DP World memo of 22 June 2006 headed *"Company set-up brief"* on the setting up of DP World Djibouti FZCO, the company which was to operate the container terminal. That refers to the company being set up as a free zone company: *"as there is the possibility a 3rd party share holder for DPWD (this mechanism is being used to allow for a split distribution of dividends received from DCT)."* The memo continues that: *"it is intended that DPWD entity will own 33.3% of DCT"* and states under *"Ownership"*: *"85% by DP World FZE, 15% by DPI World Terminals FZE (note: this is a parking holder)."*

722. This is a reference to a possible shareholding to be held by a Boreh company, as Mr Boreh accepted in cross-examination, but it is only a possibility, suggesting either that there had been some discussion prior to this memo but no agreement, or that DP World were discussing participation by Mr Boreh internally, but had not yet offered him anything. It is important to note that there is no suggestion that this shareholding would be a gift rather than something he would pay the market price for.

723. It is improbable in the extreme that DP World had already offered Mr Boreh this 5% shareholding in the DCT joint venture company at the time of the February 2006 meetings, whether as some sort of bribe or generally. As I have found, DP World went into those meetings not having offered the Government any shareholding at all and the 66.66/33.33% split of shareholding did not emerge until Mr Boreh had persuaded DP World, on the second day of the meetings,` that the Government/PAID should have a large majority shareholding. Indeed, if the position reached at the meeting was a 60/40 split, as the note and some of the witness evidence suggests, then there was an increase in the Government's share by 6.66% shortly after the meeting. It is unlikely that DP World would have offered Mr Boreh a 5% shareholding before it

knew precisely what its own share would be and equally unlikely that, if Mr Boreh was already being bribed to get the best terms for DP World, he would have pressed for such a large equity share for PAID, let alone increased it by 6.66% if that is what happened. As Mr Kendrick QC put it: *"This is the opposite movement from what is likely to have occurred if a bribe were involved"*.

724. In cross-examination of Mr Boreh, Lord Falconer suggested that he had agreed with DP World at the time of the negotiations in February 2006 that he would receive a 5% shareholding. It is clear from his answer that Mr Boreh did not accept that suggestion:

> *"Not exactly at that time, no, but in general, if I will explain to you, my Lord, whatever investment Dubai did in Djibouti, let me explain, if we start even the hotel I was involved, I was involved in the DDP as a shareholder with them, I was involved with them in the oil terminal, so for them I was their strategic partner from the private sector and that's why they wanted me to be their partners, because Government are government but they also need private sector people to be with them, to help them eventually, if there is a kind of conflicts, because sometimes when you have a dispute with the Government you don't know what language to talk, we don't talk the same language."*

725. The claimants suggest that, when it was put to him again that the agreement with DP World had been made at the time of the February meetings, he obfuscated and did not provide an answer. That is extremely unfair. He had already indicated twice that no agreement had been made at the time of the February meetings, not just in the passage I have just quoted, but in the evidence which immediately followed, in which he also denied that any offer of a shareholding was a bribe:

> *"Q. You were given in effect 15% of Dubai's interest in the container terminal, which was 5% overall, and that was a bribe to you, wasn't it?*
>
> *A. No, it wasn't a bribe because it was not for free, it's not a bribe, and I don't take bribe, and I explained to you –*
>
> *Q. You don't take bribes?*
>
> *A. No, I don't take bribes.*
>
> *Q. That was agreed in about February 2006, when the deal with Djibouti was agreed?*
>
> *A. No. For me, as far as I'm concerned, we have -- I've talked to them after that, it was I think the end of 2006 or early 2007, and then it went on until 2008, and it never materialised because, as far as I understand, I was going to invest a lot of money, and I was going to take the risk with them, and that was this agreement, because it was just a normal pattern that they*

> *consider me as their strategic partner, but nothing to do with bribe."*

726. That last answer is entirely correct. As set out below, the agreement with Mr Boreh about the shareholding was not made until October 2006 and discussions about it continued thereafter, but never materialized. In the allegedly obfuscatory answer (which was not obfuscatory at all) Mr Boreh simply explained why it never materialized:

> *"Q. We know by June 2006 that they were considering that you would own 15%, we know that the split between Djibouti and Dubai at 66 to Djibouti and 33 to Dubai had been agreed in February; when do you say it was agreed that you would get 15% of the Dubai share?*
>
> *A. You know, my Lord, if really I wanted to push for this and get my shares, I would have done it very quickly and it will have done by now. But I didn't do it, because for me it was just an idea at the beginning, okay? But I was not very -- I was not very much interested in terms, because I could already, my Lord, see the pressure that I was getting from Djibouti, and the way they were acting, these tax accusations and the terms between me and the Government was not -- was started to deteriorate a lot, and I was not -- I was reluctant, really, to go and invest in this investment. That's why it did not happen. But it wasn't anything to do with bribe."*

727. The first reference to there being an agreement in principle to Mr Boreh taking a shareholding in DCT, is in an internal DP World email from Mr Mehta to Mr Grant Gilfillan, after he had provided an update on the progress on financing with the various banks: *"You must be aware that 15% stake in DPW company will be taken by ARB but this is strictly confidential, hence I have removed Mark on copy."* Mark was Mr Ripka, evidently another DP World employee, so that in context the reference to confidentiality, which Mr Gilfillan said in his reply that he appreciated, was to do with internal politics within DP World and (contrary to the claimants' submissions) nothing to do with keeping any shareholding secret from the Republic. I agree with Mr Kendrick QC that this email is consistent with the proposed shareholding of 5% in DCT having only been recently agreed. By that stage the terms of the Concession Agreement had already been agreed (as set out above, it was signed by Mr Boreh pursuant to a Power of Attorney granted by the President at a signing ceremony in Djibouti at the end of October 2006), so that it seems to me extremely unlikely that any agreement to provide a shareholding to Mr Boreh was part of a campaign of bribery.

728. Nothing further seems to have been done about this shareholding for the best part of a year until 20 September 2007, when a Share Purchase Agreement was signed by Value Additions Limited, one of Mr Boreh's companies whereby DP World would transfer 15% of DPWD to Value Additions in consideration of payment of U.S. $1. Although that agreement was only signed by Value Additions, contemporary documentation indicates that it was intended that the agreement would be executed. In the event it was not. The claimants point out that although Mr Boreh's pleaded case

was that he believed that the reference to U.S. $1 consideration indicated that it was only a draft, his evidence in his witness statement was that it was either a mistake or a placeholder. The inference which the claimants appear to be seeking to draw is that this was in effect a gift of shares to Mr Boreh by DP World, coming as it did after the Concession Agreement and Joint Venture Agreement had been signed to their satisfaction.

729. In my judgment, this suggestion that what was proposed was a gift, as a reward for having agreed soft terms which were favourable to DP World is simply not justified. If that had been the explanation, then it is difficult to see why Mr Boreh would not have executed the Share Purchase Agreement and share transfers, as his nominees chased him to do, particularly if he only had to pay U.S. $1 to obtain the shares. Instead he did nothing and the matter lay dormant. It was revived at the end of March 2008 when, without any further negotiation having taken place, a further Share Purchase Agreement was signed, under which the consideration to be paid by Value Additions was U.S. $6.56 million, equivalent to the cash calls paid to date attributable to that shareholding.

730. The claimants contend that this massive increase in the consideration payable was because Mr Boreh's influence in Djibouti was in decline and *"DP World may well have reconsidered its willingness to give such a large benefit to Mr Boreh for nothing"*. I have to say that this seems to me an implausible explanation for the increase, not least because, in June 2008, DP World entered the second S Flame Consultancy Agreement with Mr Boreh (referred to below), hardly indicative of their thinking his influence was in decline. In any event, even if that were the explanation, it would be wholly inconsistent with an agreement to sell shares for over U.S. $6.5 million being some sort of bribe or reward for corrupt actions. Mr Kendrick QC submitted that the fact that this price was not renegotiated makes perfect sense if it was always intended that, if Mr Boreh took a shareholding, he would have to pay the cash calls and that this was the explanation as to why the original draft had a price of U.S. $1. Although the claimants were critical of this explanation, saying that it did not correspond with Mr Boreh's evidence, it does seem to me the most likely explanation for the apparent change of price is that it was always contemplated that Mr Boreh/Value Additions would be liable for the relevant proportion of the cash calls, a further indication that this would have been a commercial transaction, not a bribe.

731. At all events, whatever the explanation for the increase, there never was any transfer of shares in DPWD to Value Additions or Mr Boreh. Although, as Mr Kendrick QC put it in the written closing, *"Mr Boreh showed flashes of enthusiasm to his Singapore agents"* in April 2008 and despite those agents having chased about payment in July and October 2008, he did not make payment and the shares were never transferred. The claimants have sought to maintain that it is not clear whether he did acquire the shares. They rely upon an asset disclosure schedule produced by Mr Boreh's lawyers in Singapore in November 2013 in response to the Worldwide Freezing Order which acknowledged the Share Purchase Agreement. However, as Mr Kendrick QC points out, they noted that: *"Value Additions has not received the new share certificate(s) and the updated share register"* and that DP World had been contacted about this without response. The reason is that the price of U.S. $6.56 million was never paid by Mr Boreh or his company and so the shares were never transferred.

732. Mr Boreh's explanation as to why the purchase of shares was never completed was as follows. When the Concession Agreement was signed in October 2006, the President was very pleased but was convinced that Mr Boreh would be receiving millions personally from the deal and, as with DDP and Horizon previously, pressed Mr Boreh for his share. Accordingly, the agreement to purchase a stake in DCT was to meet the President's demands. In late 2007, the President started making further demands for commission (as he had in 1999) in relation to cranes being supplied by the Chinese company ZPMC. These demands are referred to in scarcely veiled references in emails from Mr Boreh and his employees to ZPMC about adding agency fees: "*we have third party who involve in this business*" and "*we have engagements with other interested parties and commitments which have to be honoured*".

733. Mr Boreh's evidence was that the fact that the shareholding was to be in effect part of the "fund" for the President is the explanation for the delay in completing the transaction. Mr Boreh was uncomfortable with the transaction. He had not planned to be a private investor in DCT and by October 2008, when he left Djibouti and the Soprim equipment was seized by the Government, it was clear that there was an irreconcilable rift with the President and there was no point in continuing to appease him. Accordingly, Mr Boreh did not go through with the transaction.

734. The claimants rightly point out that, at least to the extent that this explanation involves Mr Boreh saying that he had not planned to be a private investor, it is inconsistent with his oral evidence that it was always understood that he would take a share in any DP World project in Djibouti and was to be DP World's local partner. However, the fact remains that if, as the claimants contend, the shareholding was a bribe of Mr Boreh or a reward for having agreed soft terms, it is very difficult to see why he would not have completed the transaction as quickly as possible and paid the price, particularly since, had he taken a shareholding, it would have made him a very substantial profit.

735. In my judgment, it is not necessary to reach a final conclusion as to why Mr Boreh did not proceed with the acquisition of the shares in DPWD, although I consider that the most likely explanation is that it would have been part of a "fund" for the President, which is why there was no point in proceeding with the acquisition by the autumn of 2008, when relations between them had irretrievably soured. In any event, even if Mr Boreh/Value Additions had acquired the shares, it would not have been a bribe. As Mr Kendrick QC rightly submits, DP World had a legitimate interest in Mr Boreh having a shareholding in DCT. He would act as a go-between with the Government and would be of assistance in avoiding any disruption of the project.

The S-Flame Consultancy Agreements.

736. The claimants contend that the three Consultancy Agreements between DP World and S Flame, another of Mr Boreh's companies, were sham agreements created to provide a paper justification for what were in fact bribes paid to Mr Boreh for having assisted DP World in the negotiation of the DCT Agreements. In the alternative, the claimants have a fall-back case that, even if the Agreements were genuine and not part of a campaign of bribery, the claimants can recover the sums paid to Mr Boreh pursuant to the Agreements on the basis that, as stated by Gibson Dunn in the letter of 13 November 2015, the consultancy fees were earned by Mr Boreh: "*in whole or in part by using his capacity as Chairman of the DPFZA for his private gain.*"

737. The first Agreement was signed in April 2007 and payment of the U.S. $500,000 under it was made on 1 May 2007, in respect of historical services provided in the preceding twelve months from 1 April 2006 to 31 March 2007 (the Agreement has a start date of 31 April 2006 but, since it is for the twelve months to 31 March 2007, that is clearly a typo). The claimants made some faint attempt to suggest that the first Agreement was misdated and had been made at an earlier date, since it was effective as of 31 April 2006, but the word processing date on it is 19 April 2007 and it is expressed to be for: *"historical services…from the Effective Date"*, so it was clearly made in April 2007. The signatories were a director of DPWD and Mr Manish Wadhwani, one of Mr Boreh's employees on behalf of S Flame.

738. The second Agreement was entered into as of 1 April 2007 for 12 months to 31 May 2008, with a word processing date on the first page of 19 April 2007 as with the first Agreement, suggesting that that page at least may have been prepared at the same time, although the other pages have a word processing date of 17 September 2007, establishing that this second Agreement cannot have been signed until September 2007. It was signed by Mr Anil Wats, chief operating officer of DP World and by Mr Wadhwani on behalf of S Flame. This Agreement was clearly intended to follow on from the first and provided for two payments for the services rendered under the Agreement, U.S. $250,000 on 30 September 2007 and U.S. $250,000 at the end of the term on 31 May 2008. In the event, the first payment was made in November 2007 and the second in March 2008.

739. The third Agreement was entered into as of 1 June 2008 (although the word processing date on it is 27 February 2008), for advisory and consulting services to be provided for three years from 1 June 2008 to 31 May 2011, with two payments annually on 30 September and 31 May of U.S. $250,000 each, although only one payment was ever made under it, U.S. $250,000 in November 2008. The signatories were as before.

740. Each of the Agreements was in the same short form drafted by DP World. They were all subject to Dubai jurisdiction and governed by Dubai law. The preamble provided that the consultant, S Flame would provide:

> *"advisory and consulting services to the Company [DPWD] as shall reasonably be requested from time to time by the Company's Officers to assist the Company in managing its existing marine terminals, airport and other business handled by the Company or other related DP World entities in Djibouti including potential future projects (collectively referred to as the "Djibouti Business")".*

741. Clause 2.1 of each of the Agreements then provided:

> *"2.1 Duties of Consultant. During the term hereof, Consultant shall render such advisory and consulting services pertaining to (i) general business strategies to be adopted and implemented by Company; (ii) overall business operations and development; (iii) general management of Company's resources, interests, properties and personnel; (iv) determination and coordination of general goals and policies*

> *of Company; (v) government laws, regulations, customs, practices and relations and (vi) other services relating thereto or with respect to one or more projects as shall reasonably be requested from time to time by Company's officers (collectively, the "Consulting Services").”*

742. In his witness statement Mr Boreh explained that these Agreements were nothing whatsoever to do with preferring DP World's interests over those of the Republic in the negotiation of the DCT Agreements, on the basis that the commercial terms of the DCT Agreements had been negotiated in February 2006. Rather they came about because of the exorbitant and increasing financial demands being made against him by the President and the First Lady. He says:

> *“I believed that it was unfair for me to have to shoulder these demands alone. I was able to offset this burden by persuading Mr Sharaf to pay me in recognition for the work I had done for DP World in Djibouti and in ensuring that their relations with the Government, and in particular the President, were and remained good and for the substantial work I had done to promote DP World's business in other African countries out of my own pocket. Mr Sharaf agreed to pay me for the services I had performed for DP World. DP World set the figure of US$500,000. I was not in a position to negotiate.”*

743. Mr Boreh provided a further explanation of this in cross-examination:

> *“What I said is I was doing a lot of works for [DP World], I was travelling with them, I was spending my own money and I was getting a lot of pressure at the same time from the President because of them. He believed, in one way or the other, that they were just giving me millions without end. He just believed that, and there was no words to convince him that this is done properly, this is a proper company, there are proper tenders, there are proper negotiation, everything is well made. And it just -- he couldn't believe. So he wanted -- so what do I do? I am under pressure and that's what I say in my statement, that's how I felt.”*

744. In cross-examination, Lord Falconer suggested that the *“potential future projects”* referred to in the preamble would include the DCT project which it would be inappropriate for him to be paid for whilst negotiations were ongoing. Mr Boreh denied that this was the case saying: *“That is wrong. This consultancy agreement came much later on, the negotiation with the Djibouti Government has ended in February 2006, all the major points and all the important negotiation has finished, this was extra work that I was doing for DP World.”* He went on to describe how it covered work promoting DP World both inside and outside Djibouti.

745. Lord Falconer suggested that because the first Agreement covered the period after April 2006, it encompassed the negotiation of the DCT Agreements. Mr Boreh denied this, saying: *“I don't agree completely. This is not the idea of this consultancy. It was signed by Manish, I was not there. It was drawn by DP World, maybe some person*

from DP World legal department, but it was nothing to do with the work that I did to negotiate on the DCT contract…Because here the story is: I was a chairman[of the DPFZA], I didn't know exactly what my role was, I was not paid by Djibouti Government, I was travelling and giving a lot of services for DP World, I was receiving delegations, I was introducing them to different heads of State in Africa, I was flying sometimes with my own aircraft afterwards and, you know, these are legitimate out of pocket costs, you know."

746. In their written closing submissions, the claimants characterise this as Mr Boreh having accepted that he did not provide the services described in the Agreements to DP World. In my judgment, that is an unfair characterisation. He was doing no more than denying strenuously that the Agreements were bribes for negotiating the DCT Agreements in a manner favourable to DP World. I do not read that evidence as any such acceptance as alleged. Viewing his evidence in cross-examination about these Agreements as a whole, I agree with Mr Kendrick QC that his evidence was that he provided the consultancy services (whether historically or prospectively) in relation to three matters: (i) work done for DP World in Djibouti; (ii) work done to promote DP World both inside and outside Djibouti and (iii) ensuring relations between DP World and the Government and President remained good. In answer to me he accepted readily that the third of these, ensuring smooth relations, was the most important, so far as DP World were concerned:

> *"MR JUSTICE FLAUX: What's being suggested to you, I think, is that the most important thing, so far as DP World were concerned, was ensuring that they had smooth relations with the Government and the President in particular, and that that's really what was being paid for here, your ability to act, as you put it, as a go-between; would that be fair?*
>
> *MR BOREH: Yes, my Lord."*

747. Mr Boreh identified in his evidence a number of services performed for DP World both inside and outside Djibouti. It is not necessary to set out all of these, so I just give a few examples. Services outside Djibouti included chartering a plane to take Mr Sharaf to Libreville in Gabon to study the possibility of developing the port there, introducing officers of a DP World company to the President of Rwanda with the intention of investing in the hotel business there and making a speech at the London Stock Exchange in 2008, taking part in a BBC interview about the benefits Djibouti has enjoyed from Dubai investment.

748. Services within Djibouti included arranging for Mr bin Sulayem to meet a delegation of US senators and congressmen who were in Djibouti to consider the budget for a new U.S. Embassy building and an expansion of the Camp Lemonier military base and receiving a delegation from the Senegalese government and showing them the technology used in the port by DP World, who subsequently won the tender to operate the port at Dakar.

749. Whilst it is correct, as Lord Falconer points out, that the terms of the services to be provided pursuant to the Consultancy Agreements do not encompass services provided outside Djibouti, I consider that both the services provided inside Djibouti of the sort which Mr Boreh describes and the ensuring of smooth relations with the

President and the Government fall within the scope of the services envisaged by the preamble to and clause 2.1 of the Consultancy Agreements. In those circumstances, it is impossible to characterise the Agreements as being a sham. I set out at [507] above Diplock LJ's classic definition of a sham in *Snook v London and West Riding Investments Limited*. In the case of the S Flame Consultancy Agreements, the parties intended to create the rights set out in the Agreements. As Mr Kendrick QC rightly submits, the fact that an additional service was overlooked, because of the definition of *"Djibouti business"*, does not begin to suggest a sham.

750. On the basis that these are genuine Agreements, as I find they are and not a sham, that militates very strongly against their being bribes. There are a number of other matters which run contrary to the suggestion that these were part of a campaign of bribery, not least the timing of the Agreements and the fact that there are three such Agreements. Try as the claimants may to link the dates when the Agreements were made with the provision of "services" which consisted of agreeing soft terms in the DCT Agreements, there is no such correlation. Whilst it is correct that the first Agreement signed in April 2007 related to services provided by Mr Boreh in the twelve months from April 2006, as I have already held, the essential commercial terms of the DCT deal with DP World had been negotiated by Mr Boreh at the meetings in Dubai in February 2006. In so far as anyone on behalf of PAID was involved in further negotiation of the terms of the Concession Agreement produced in draft by DP World immediately after those meetings, this was Ms Ali rather than Mr Boreh. By April 2006, the process of approval by the Government and the legal formalities were under way and those matters were the responsibility of Ms Ali rather than Mr Boreh.

751. By the time that the first Consultancy Agreement was signed on about 19 April 2007, the discussions which had taken place between Ms Ali and DP World which I have set out in detail in the previous section of the judgment had made it clear that DP World was not prepared to make any further concessions in relation to its management control and the reserved matters under the Joint Venture Agreement, beyond the very limited concessions which it made in March/April 2007. There is no basis for the suggestion that Mr Boreh "went soft" on that issue at any of the meetings he attended, let alone that the Consultancy Agreement was a bribe or reward for agreeing the control provisions. The idea that he could in some respect have extracted concessions from DP World, if only he had tried harder, makes no sense and is against the weight of the evidence, which is that DP World was always going to insist on these provisions, irrespective of what Mr Boreh or the Republic said.

752. The connection between the subsequent Consultancy Agreements made in September 2007 and June 2008 and the negotiation of the terms of the DCT Agreements is even more tenuous than in the case of the first Agreement. By September 2007, not only were the negotiations long concluded but the principal Agreements (certainly those of which any complaint is now made about the unfairness of the terms) had been signed. The Joint Venture Agreement in particular had been signed on 22 May 2007. The somewhat slow and bureaucratic process which led to the approval and ratification of the DCT Agreements by the President and the Parliament was in train. There was no question of any further negotiation of the terms of the Agreements, as the angry emails from Mr Kruijning of DP World which I have quoted at [681] and [683] above demonstrate. There was no ongoing process of negotiation in relation to which there would have been any sense in paying Mr Boreh bribes. The suggestion, which seems

to be being made in the claimants' closing submissions, that there were other negotiations between DP World and Mr Boreh, before the various Agreements were signed, is contrary to the contemporaneous documentary record and I reject it.

753. The claimants are therefore reduced to contending that the Agreements are in effect a reward for past "services" provided by Mr Boreh in agreeing "soft terms". That contention must involve there having been some promise made to Mr Boreh during the course of the negotiations in February 2006 that he would receive a reward, if he acted in the best interests of DP World and against the interests of the Republic in the negotiations or, at least some understanding to that effect between Mr Boreh and DP World. In my judgment, this contention is hopeless. It faces three principal difficulties. First, there is simply no evidence of any such promise or understanding. Indeed, such evidence as there is, for example the internal email within DP World's lawyers on 23 February 2006 saying that they had tried to draft a more or less balanced document, points away from the negotiations having been in any sense one-sided because of some promise or understanding.

754. Second, there is the question of timing. If, as the claimants contend, there had been some promise or understanding that Mr Boreh would receive a reward, the obvious question is why did he not receive it at the time that he signed the Concession Agreement in December 2006 or the Joint Venture Agreement in May 2007. The timing of the Consultancy Agreements, dated as they were in April 2007, September 2007 and June 2008, makes no sense in that context. Nor does the fact that three separate Agreements were signed, the final one of which was for three years from 1 June 2008. As Mr Kendrick QC said, the latter two Agreements point to a continuing relationship in the future and have no connection with what had been negotiated 18 months or 2 ¼ years previously. If, as the claimants suggest, these Agreements were a reward for past corrupt services, the fact that there were three Agreements spread out over fourteen months makes no sense at all. Surely such reward would have been given in one Agreement. Also if these were bribes, there is a question as to why only one payment was made under the third agreement. The obvious answer is that these were not bribes, but that after November 2008, Mr Boreh no longer had any influence in Djibouti and so could no longer provide any useful consultancy services to DP World.

755. Third, there are the inherent probabilities. I have already dealt with these to an extent at the beginning of the section of the judgment dealing with the Doraleh Container Terminal and do not propose to repeat everything I said there. I merely emphasise four points. First, unlike in the usual case of agreements procured by bribes, there is nothing about the suite of DCT Agreements which sticks out as what Mr Kendrick QC described as *"a white elephant"*, the clearly disadvantageous contract such as the charterparty in *The Ocean Frost*. Despite the best efforts of the claimants' legal team to demonstrate that these Agreements were disadvantageous to the Republic and PAID, the evidence of the financial success of the DCT proves otherwise. I deal briefly below with whether the terms were "soft".

756. Second, it is difficult to see what motive DP World would have had for bribing Mr Boreh, given that whatever he might or might not agree with DP World, any Agreements entered into would be subject to the scrutiny and approval process of the President and his advisers as well as Parliament. The obvious example of this is the so-called reserved matters, on which DP World was unmoveable. It is quite clear that,

if the President had decided that he could not agree to DP World having the level of complete control it required and had insisted on a "national interest" clause such as Ms Ali and the General Secretary of the Presidency advised, the deal would have fallen through completely, as DP World, the banks and the political risks insurers would never have agreed to that. I suppose it is theoretically possible that DP World could have made some contingent promise to Mr Boreh to reward him if the President agreed its terms, but that seems extremely improbable, since on that hypothesis, Mr Boreh would not have provided DP World with any real service at all, given that the securing of the deal ultimately depended on the President's decision, not Mr Boreh's. Given that both the first two Consultancy Agreements were concluded before the President had in fact approved and ratified the DCT Agreements, it would make no sense for DP World to bribe Mr Boreh, since the successful ratification of the Agreements was by no means guaranteed.

757. Third, DP World had an existing relationship with the claimants and had entered two previous Agreements, the 2000 Concession Agreement for management of the old Port and the 2004 Concession Agreement, and its associated company JAFZA had a Management Agreement to run the Free Zone. There is no suggestion that any of those Agreements (with the negotiation of some of which Mr Boreh was also involved) was procured by bribery of Mr Boreh and it makes no sense for DP World to start bribing him now seven years after the first of those Agreements.

758. Finally, there is the position of Mr Boreh himself. The claimants seek to portray him as a greedy, unscrupulous, corrupt businessman, who would stop at nothing to make himself money, including the betrayal of his country by agreeing soft terms in the DCT Agreements. That is not the man I observed giving evidence in the witness box for four and a half days. Yes, on occasions his evidence was exaggerated, yes there are aspects of his behaviour which do not do him credit (such as asking for finder's fees) but overall, I simply refuse to accept the claimants' picture of him as a traitor, who sold his country short for what, given his wealth, was the very modest amount of U.S. $1,250,000 paid under the S-Flame Consultancy Agreements. As Mr Kendrick QC put it, he is a patriot. He has a strong desire to improve his country and is justly proud of what has been achieved at Doraleh through his and the Republic's cooperation with Dubai. He is not a man who would take bribes to sell his country short.

759. The claimants devoted much forensic outrage in their written and oral closing submissions to the point that Mr Boreh admitted that the most important aspect of the consultancy for DP World was ensuring smooth relations with the President and the Government. A flavour of this can be found in this paragraph of their written closing submissions:

> *"This is a remarkable admission for Mr Boreh to make, and it is surprising that it has been adopted by his counsel. It would be wholly improper for Mr Boreh, an official whom the Claimants entrusted with very significant authority in the DCT negotiations against DP World, to receive funds from DP World to keep the Government and the President 'on side'. It would be equally inappropriate for DP World to pay him for such a thing."*

760. Once the suggestion that the Consultancy Agreements were part of a campaign of bribery of Mr Boreh so that he would agree "soft terms" in the DCT Agreements is rejected, as I have rejected it, this point only goes to the claimants' fall-back case that the fees paid under the Consultancy Agreements are recoverable by the Republic on the basis that Mr Boreh used his position as chairman of the DPFZA for his own personal gain.

761. In my judgment, the forensic outrage is misplaced. The starting point is that, it was because he could ensure smooth relations between the Republic and the Dubai investors, that the President had used Mr Boreh to negotiate with DP World, just as previously he had asked him to deal with ENOC. Mr Boreh could speak the same language as the Dubai investors, not only linguistically (he spoke good English, whereas many in the Government could not) but commercially. This was the reason why he was appointed the Chairman of the DPFZA in the first place. Even the President admits in his witness statement that he took the decision to nominate Mr Boreh as Chairman of the DPFZA in order to encourage the Dubai partners to invest in the Port project.

762. Equally, the Dubai investors, whether ENOC or DP World saw Mr Boreh as a well-placed local partner who could advise on local politics and business and lobby those with influence, including the President himself. As Mr Kendrick QC puts it, accurately: *"He had, literally, a hot-line to a President who wielded virtually complete power and kept a keen interest in the Port, as the source of much of the Government's income."* Mr Boreh was able to raise issues direct with the President and by-pass ministers and functionaries who often had their own agenda. As ENOC said in the Information Memorandum to potential investors in Horizon in November 2003: he was: "*a high profile and high net worth entrepreneur of Djibouti. He is perceived as a highly influential person with contacts in various Government quarters.*" It is important to have in mind that he had this lobbying power with the President independently of and irrespective of his role as chairman of the DPFZA.

763. Mr Boreh also assisted DP World in relation to its broader interests such as the interest of their affiliate Nakheel in the luxury hotel business, both within Djibouti where they had opened the Kempinski Palace and outside, such as in Rwanda.

764. As is apparent from the Africa Intelligence reports and the cables from the U.S. Ambassador, during the period from about 2000 until his final rift with the President in 2008, Mr Boreh was recognised as an important highly influential local businessman who had invested personally in public/private ventures in Djibouti, specifically DDP and Horizon. As I have found, this was known to the President and others in Government. Equally importantly for present purposes, Mr Boreh was seen by the business world in the region as a consultant for the Dubai interests. Thus, an Africa Intelligence report of 21 May 2005 headed: "*The essential Abdourahman Boreh in Djibouti"* describes him in these terms: "*The Djiboutian Abdourahman Mahamoud Boreh is a veritable travelling salesman for Dubai companies in Djibouti, where he is managing a new project for one of them. Boreh, who is incidentally chairman of the ports and export processing zones authority in Djibouti, is representing the promoters of a hotel to be built on Heron beach."*

765. In a later Africa Intelligence report of 12 November 2005, headed: *"Spotlight on the business community"* Mr Boreh was described in these terms: "*The man from Dubai.*

The businessman closest to the Djibouti President is Abdourahman Mahamoud Boreh whose influence has grown along with the companies he has brought with him from Dubai. He is the son of a notable Issa and owns a wide range of companies (import-export, construction), has a foothold in Dubai, a stake in a subsidiary of the Emirates National Oil Company and is the agent for another Dubai firm in a hotel project in Djibouti. He adds this to his official function of chairman of the Autorite des ports et des zones franches de Djibouti and of honorary Consul of Poland." As I said in the context of the Horizon claim, it is inconceivable that what was in the press and other media was not well-known to the elite in Government in Djibouti, including the President himself.

766. In their closing submissions, the claimants seek to make much of the point that Mr Boreh admitted in cross-examination that he had not shown the S Flame Consultancy Agreements to the President or told him the terms of the Agreements, the implication being that he deliberately kept secret from the President his corrupt relationship with DP World. However, Mr Boreh did say that he had informed the President that he was acting as a consultant for DP World, (something the President surely knew from what was in the public domain as set out in the previous two paragraphs):

> *"I have told the President that I was also doing consultancy job for DP World. That I have told him. But I did not give him the terms and the amount and the company. That I didn't, because I don't think that was necessary…So I was doing my own business, I was not just doing on day-to-day basis as a chairman of the Ports and Free Zone Authority. What I was doing most of the time was doing my own business, travelling, and doing this consultancy, and I do and I have informed Aboubaker [Mr Hadi, who was the Commercial Director of PAID at the time and is now chairman of the DPFZA] and I have informed the President that I was also a consultant for DP World and I was travelling with them doing this, yes."*

767. The President denies in his witness statement that he knew anything about Mr Boreh acting as a consultant for DP World, but, as Mr Kendrick QC says, if the President had come to give evidence, the extent of his real knowledge could have been explored in cross-examination. Despite the President's denials in his witness statements, I find both that Mr Boreh did tell the President that he was providing consultancy services to DP World and that the President knew that Mr Boreh was paid for those services, not least since the President and his wife had demanded payments from Mr Boreh over the years, including a share of anything he received from DP World, as Mr Boreh said in the evidence which I have quoted at [742] and [743] above. Furthermore, even if, contrary to that finding, the President was not putting financial pressure on Mr Boreh, what was in the public domain would have told the President that Mr Boreh had a consultancy role for DP World. Given that Mr Boreh's position as Chairman of the DPFZA was unpaid, I rather doubt whether, had he come to be cross-examined, the President could have sustained the position that he was not aware that Mr Boreh was carrying out consultancy services for DP World and being paid for those services. In the circumstances, I find that Mr Boreh complied with any obligation to disclose to the President his interest in the Consultancy Agreements.

768. Of course, as Mr Kendrick QC rightly says, to an English lawyer, there would be issues of conflict of interest with the chairman of the DPFZA, who sat on the Board of PAID and determined contentious matters regarding the Free Zone as well as approving the budget, also acting as a consultant to DP World. However, this is not an English law case and strict English standards do not apply. The starting point would never be reached in this country: no Government here would appoint a businessman and investor in companies such as Horizon, DDP and Soprim as the head of the government body which was administering the Free Zone, let alone then appoint him to conduct negotiations for the DCT with DP World. To an English lawyer, the conflicts of interest are manifold. As Mr Kendrick QC put it, so long as Sir Richard Branson is an investor in Virgin rail, he will never be appointed to the Office of the Rail Regulator.

769. However, in Djibouti, the position is different. As set out in more detail hereafter, in Djibouti there is no duty on a public servant to avoid a conflict of interest. Even a *fonctionnaire* may have an interest in a private company, provided he discloses it to the President, so that the President can take whatever steps he chooses to safeguard the public interest. Someone who is not a *fonctionnaire* such as Mr Boreh, who was an unpaid *agent public*, would not even be under a duty to disclose his interest in a private company to the President. The only relevant duty as a matter of Djibouti public law, is the duty of probity, which requires an *agent public* to act loyally and not disloyally.

770. At the time with which these proceedings are concerned, the period from 2000 to 2008, the President and the Government pursued a pro-Dubai policy, encouraging the significant investment which Dubai was prepared to make in Djibouti and, specifically, Doraleh, pursuant to public/private partnership. This was the President's ambition from the outset of his Presidency and it was a source of real pride, as the Prime Minister Mr Dileita said in evidence, that Djibouti was moving away from dependence on aid and soft loans to a real partnership, to an alliance between south/south entities as Ms Ali put it. Mr Boreh was the local partner whose interests were aligned with those of both Djibouti and Dubai.

771. He brought new business to Djibouti as well as much needed employment. As Mr Hawker said in cross-examination: *"I would have said that because he was a successful businessman, with numerous business interests, providing significant employment for a large number of the population, he was perceived as being somebody of great power, yes."* That objective of increasing employment for local people was one expressly raised at the meetings in February 2006 and recorded in Ms Ali's note: *"No interest in maintaining the provisions of the code reserving a percentage of jobs for Djibouti staff because in reality, this percentage will be quickly exceeded. It is preferable to put in a general provision stating that, with equivalent skills, Djiboutian staff will be favoured".*

772. Mr Kendrick QC encapsulated the position graphically in his oral closing submissions:

> *"…you have to forget about comparisons between Whitehall, Westminster and Djibouti. It's a different universe there. They need development and they needed it fast, and so the President cut corners to speed Dubai investment up, and he creates*

> *conflict after conflict, but the investment in the major infrastructure comes pouring in. So far, so totally conflicted, but it's economically rational and none of the players concerned -- the President, Mr Boreh, and Dubai – are corrupt for using this approach."*

773. It is striking that, apart from the allegation that Mr Boreh agreed deliberately soft terms in the DCT Agreements, the claimants have not identified any particular instance where, through acting in a consultancy role for DP World, Mr Boreh acted disloyally to the detriment of the claimants or caused them loss. Generalised allegations in cross-examination such as that the payments under the consultancy agreements were made as bribes "*so you would keep the President favourable to DP World*", quite apart from the fact that this was convincingly denied by Mr Boreh, who said: *"I don't agree with that as well. The President always has his ways to get whatever he wanted"*, ignore the fact that, at the relevant time in 2006 to 2008, the President and Dubai were not in conflict, but were partners working together. Mr Boreh promoted a mutually beneficial relationship. In my judgment, there is no evidence that any of the work Mr Boreh did for DP World conflicted with or harmed the interests of the Republic and therefore no question either of his being in breach of the duty of probity or of the claimants having suffered any loss as a consequence of such breach.

774. The claimants placed considerable reliance on a number of emails from Mr Grant Gilfillan who worked as a senior vice-president of DP World from about August 2006 until March 2007. The first was an exchange with Mr Hawker on 10 and 11 September 2006 concerning the purchase of the presidential yacht, Gulf of Tadjoura. In his second witness statement, Mr Boreh sets out the background to this (on which he was not challenged in cross-examination). The purchase monies were initially provided by one of Mr Boreh's companies, but he asked Mr Hawker on the instructions of the President to arrange reimbursement by PAID which would pay from its future dividends from the port. When Mr Hawker presented the invoice for the yacht to Mr Gilfillan, the latter's response was:

> *"I have yet to appreciate the relationship with Mr Boreh, but this whole process seems irregular. We have internal processes for approving capital and no one outside of Dubai should be able to issue an instruction to bypass them. Is this something we need, had planned etc.*
>
> *Can you supply more background detail please on how this has occurred, what has happened in the past, and obviously any special issues 1 may need to know. I still have an open mind, albeit a nervous one. Is it still possible to politely decline this instruction until we have done further analysis?"*

775. As that email indicates, Mr Gilfillan was not familiar with the relationship between the President and Mr Boreh or the role played by Mr Boreh. Accordingly, Mr Hawker explained the position in his response:

> *"Mr Boreh is the King Maker in Djibouti and is both a fairly close business associate and friend/acquaintance of Sultan and*

> *many other Dubain businessmen. He was responsible for getting Dubai involved in Djibouti in the first place and continues to actively expand that involvement at any opportunity.*
>
> *He is also the President of the Djibouti Ports and Free Zones Authority who retain complete control of the Port Autonome International de Djibouti, which is a Djibouti Publicly owned organisation. DP World only has a contract to manage the port (and the airport) at this time and has no actual equity in the port.*
>
> *Instructions have been regularly received over the years, frequently from the President and relayed through Boreh to buy various things or make strategic government investments.*
>
> …
>
> *The landing craft has been built in Dubai for the government of Djibouti with the knowledge and assistance in some form I believe of Sultan and is now ready for movement to Djibouti once it is paid for. The government wishes to use a portion of their expected dividend for 2006 to pay for it and the port has no difficulty in financing this deal. Technically, and contractually, DP World, as managers of the port can refuse to make the money available prior to the dec1aration of dividends for 2006 but as with the recently purchased housing units I feel this would be an extremely unpopular move and I would require a direct instruction from Dubai to do so. My advice would be that we make the payment with all possible speed."*

776. As Mr Kendrick QC put it in closing, this was Mr Hawker saying*: "I am not going to incur the presidential wrath for putting him off from one of his pet projects unless I get direct instructions from Dubai."* Mr Hawker was asked about his description of Mr Boreh as the "Kingmaker in Djibouti" in cross-examination:

> *"Q. And Warwick, as you know, ran and determined who the king should be in England prior to his death. That's what you meant?*
>
> *A. That's putting it a little stronger than I would have put it.*
>
> *Q. How would you?*
>
> *A. I would have put it that Mr Boreh supported the President. Certainly throughout the time I was there, Mr Boreh supported the President, he carried out works within the country which generally benefitted the country, (a) as a country and (b) it benefitted the population in giving them work; and as a result of ---partly as a result of that and his connections, perceived or otherwise, with the President, he continued to drive the overall*

> *prosperity of the country which helped keep the President in power."*

777. There is nothing here which shows Mr Boreh in a corrupt light. Rather, as Mr Hawker said, he supported the President and carried out his instructions, as well as improving conditions for the people of Djibouti. If there was anything untoward, as Mr Gilfillan appears to have thought, in the method of payment for the yacht (which was not put to either Mr Boreh or Mr Hawker in cross-examination) that cannot be blamed on Mr Boreh. The instructions to deal with the matter in this way came from the President himself.

778. Another email exchange with Mr Gilfillan upon which the claimants placed reliance was on 11 March 2007, and concerned the possible engagement of a consultant for the airport by Mr Boreh. This irritated Mr Gilfillan: *"I know you have been in discussions with Boreh, but I wasn't aware he was now running the airport and engaging consultants? What would the Minister of Transport think of all this? Does he even know?"* The response from Mr Thierry Vandenkerckhove was: *"No of course the Minister of Transport is not aware of this. No I did not see him about it (diplomacy, due to the relationship between the two persons and sensible subject on who's running what here ..."*

779. Mr Gilfillan then sent an email to Mr Anil Wats, the Chief Operating Officer of DP World stating: "*background info on Boreh involvement in Airport - it may cause some rumblings further down the track as he seems to want to take control of this as well, and the Minister of Transport is currently in charge - protocol sensitivities must be followed*." As Mr Kendrick QC rightly points out the reference to protocol sensibilities having to be followed simply demonstrates Mr Gilfillan's lack of appreciation of how things are done in Djibouti. It would no doubt be necessary to involve the Minister of Transport in Australia where Mr Gilfillan comes from, but that was not how things operated in Djibouti. Indeed, the whole point of the law setting up the DPFZA was that the DPFZA would operate autonomously of and bypass ministers (who would often have their own agenda and engage in spoiling tactics, as with the South African scheme to open an oil refinery at Doraleh). The President wanted to ensure direct communication with him.

780. It was no doubt these sorts of considerations which prompted Mr Sharaf's somewhat terse response:

> *"I remember very well that I had asked Grant and the team specifically we do not talk to the minister about our business. We do not take his permission for anything which is in our contract. If we have anything outside our contract we go to Mr. Boreh NOT to THE MINISTER. I am surprised to note we are in dialogue with the minister directly. Please make sure we do not send wrong signals and put our interest at risk. Anything to do with the airport is discussed and agreed internally (dp world) than we take it to Mr. Boreh for his input than we go to the minister (if Mr Boreh recommends) otherwise it goes to the people which Mr. Boreh recommends or we want."*

781. Again, there is nothing in this email exchange to show Mr Boreh acting disloyally to the President or corruptly. He was acting as a go-between for DP World, as he did for ENOC, who was influential, spoke the same commercial language and could advise the Dubai entities as to which was the best way to proceed, whether via a minister or by another route, to achieve what was required expeditiously and efficiently. Far from this being disloyal to the President, this is what the President intended. As Mr Boreh put it in cross-examination:

> *"I have a decree which says that [DP World] have only to deal with the chairman of the Ports and Free Zone Authority and it says that I report directly to the President, and it's clearly -- says that no Minister should interfere. That decree is clear … when the President put ports, my Lord, he also included the airport and anything which have to do with ports. So I was helping at the airport in fact …"*

782. The final email from Mr Gilfillan upon which the claimants place particular reliance is the one he sent on 16 April 2007, when he had decided to resign from DP World, because his management style did not fit in with that of the organisation. In a long email explaining his feelings to a colleague, he says: *"I was finding the compromises in my own values and ethics too stressful and it was starting to affect my wellbeing. I have seen things going on in Djibouti between certain emirat[i]s and local businessmen which are so far outside my values frame of reference that 1 have difficulty believing people would do that."*

783. Lord Falconer put to Mr Boreh in cross-examination that this was a reference to corruption between him and DP World. Mr Boreh's answer was: *"Well, that's his, what he is saying, and he is saying local businessmen, I was not referred as a local businessmen, I was the chairman of the Ports and Free Zones Authority and they call me Mr Boreh, so I was not involved with any of this."* In their closing submissions, the claimants were highly critical of this answer, submitting that it was not a denial, but a clever answer trying to find a way round the point forensically, which in fact was completely inconsistent with his whole case previously, in which he described himself as a businessman. I consider that submission is somewhat unfair. Mr Boreh did deny that this was about corruption between him and DP World: *"I was not involved with any of this"* and, as I understood what he was saying, it was no more than if Mr Gilfillan had been referring to things going on between him and Emiratis within DP World, he would have specifically identified Mr Boreh, which is surely a fair point.

784. In my judgment it would be a mistake to read too much into that email. Although the claimants served a Witness Summary for Mr Gilfillan and apparently served a witness summons on him, he was unwilling to assist, ostensibly because of confidentiality obligations owed to his former employers DP World. Nothing can or should be made of that, but the fact remains that the court does not have his explanation of exactly what he meant. For example, who were the *"businessmen"* in the plural and which Emiratis was he referring to? It is difficult to see that he can have meant Mr Sharaf, since elsewhere in the same email, he says, in a rather condescending way, that: *"I think that with the right coaching, Mohammed will be a fine CEO one day. At present he is being fed advice, filtered information, from a small circle of predominantly Indian "spin doctors" and it is all very distressing to watch it happen and to see the*

sorts of poor decisions being made. Most others just keep their heads down and learn to cope with it, but I have never been able to do that. Get rid of the Indians and this could be a very different and better company." That is a completely different point, but certainly does not suggest that he thought Mr Sharaf was corrupt. In the circumstances, despite the claimants' strenuous submissions to that effect, I decline to conclude that this email is evidence of corruption between DP World and Mr Boreh.

The S Flame Security Services Agreement

785. The claimants contend that Mr Boreh (through S-Flame) and DP World entered into a sham agreement on 13 June 2007 purportedly for the provision of "security consultancy services". The fee under the agreement was U.S. $6,000 per month payable from 13 June 2007 to 29 September 2008. The total amount involved is thus U.S. $93,000. The services were said in the agreement to relate to: "*the Security systems and security intelligence for optimisation of Operations at the Port of Djibouti."* An issue arises as to whether the agreement was in fact signed in June 2007 or, as Mr Kendrick QC submitted, much later, in September 2008. He relied upon the fact that in March 2008 the accounts department of PAID raised with DP World the fact that there were invoices for security services which should be paid, but they only had a draft MOU for U.S. $6,000 per month (in fact between Port Secure a security company owned jointly by DP World and the DPFZA and Soprim Logistics, another Boreh company) and needed an executed contract before payment could be authorised. This suggests that the Security Services Agreement had not been signed at that stage.

786. Internal emails within DP World on 17 September 2008 attach the agreement and state: "*The agreement is for the period from 13 June 2007 to 29 Sep 2008 (15 ½ months). Kindly remit USD93000 for this period against the attached agreement before the end of this month. Although, this amount can even be directly remitted to the S Flame bank account while we just pass book entries to reflect the same, I suggest for the purpose of maintaining a proper trail and to avoid any confusion it is better that DPW FZE raises an invoice on Port Secure and recovers the money on one hand, and processes the payment to S. Flame separately, on the other hand."*

787. That again suggests that the Security Services Agreement had been executed recently, as does the fact that the U.S. $93,000 was paid in one lump sum in October 2008. It is true, as the claimants point out that Mr Boreh's evidence in cross-examination was to the effect that the agreement was made in June 2007, but it is possible that he was mistaken or that the agreement was in draft, but not signed until later. Either way, the fact that payments of U.S.$6,000 per month were being openly discussed and recognised to be due by the accounts department of PAID subject to an executed contract, points away from the agreements being a sham or the payment being a bribe.

788. The general background to the agreement was summarised succinctly by Mr Kendrick QC in his written closing submissions in terms which I see no reason not to accept and adopt. Originally, Mr Boreh had started his own security company, Nomad. However, contrary to Mr Boreh's hopes, Port Secure emerged as the main security contractor at Doraleh, using as sub-contractors: Nomad for some personnel and Hart Security, an international organisation, to help obtain Class and IMO accreditation. Later still, Nomad dropped out altogether as security providers of personnel at Doraleh, although they continued to provide security services to hotels and at the US

army base at Camp Lemonier in Djibouti. However, Mr Boreh continued to assist Port Secure on intelligence matters and this is the reason for the monthly payment. In fact the payment of the small sum of U.S. $6,000 per month for security services can be traced back to 2005 with payment made in occasional lump sums. For example Soprim Logistics invoiced Port Secure on 22 May 2006 for U.S. $36,000 for the period 12 December 2005 to 12 June 2006.

789. Although the claimants are critical of Mr Boreh's evidence about the purpose of the agreement, in my judgment that criticism is unjustified. In his witness statement, Mr Boreh said:

> *"The intention behind this agreement was to reimburse me for some of the expenses I incurred in keeping the Doraleh container terminal site secure. The site had problems. In particular, Djibouti is a very poor place with high levels of unemployment, and therefore a new building site attracts a lot of unwanted attention. On many occasions, hundreds of people gathered outside the construction site and demanded jobs. Some of those people caused trouble and were violent. Nomad's security guards could not deal with this problem alone. I therefore spent significant amounts of my own money on various things to ensure that the site was secure, for the ultimate benefit of DCT including DP World. For example, I paid a number of well-informed locals (typically those who had retired from the military or the police force) to gather intelligence regarding security risks.*
>
> *I wanted to recover some of the money I spent, and therefore I spoke to Mr Sharaf and asked for DP World to reimburse me. After discussions, we agreed to sign the 2007 agreement. The money was payable to S Flame rather than Nomad because I had paid for the expenses from my own pocket."*

790. Mr Boreh expanded on this in cross-examination: "*what happened, my Lord, is when we started the container terminal, the construction of the DCT, we had thousands of people coming to look for a job, and there were a lot of rioting, and there was a lot of unsettlement in the -- at the construction site. And there was a serious issue of security, and this contract was made so that we could have a small amount of 6,000 to employ people to get information, as it says, and to make sure that we defuse all the problems which can arise in terms of security. It covered a lot of things, getting information, taking care of the opinion leaders, the elderly people of Doraleh, and all that things."*

791. In cross-examination, Lord Falconer invited Mr Boreh to calculate how much each person providing information in this impoverished nation would have to be paid to reach U.S. $6,000, the implication being that the security services had not been paid at all. I agree with Mr Kendrick QC that that exercise was a futile one, as useful information has a value which is fixed by reference to its importance to its recipient.

792. It is also worth noting that, amongst the many claims which the claimants have abandoned in this case are a number of unquantified claims in relation to the Nomad

security contracts and a claim relating to the transfer of funds from one of the Nomad companies, Nomad FZE. Accordingly, the whole issue of security in the Port of which complaint was originally made was not fully examined in the evidence. In all the circumstances, I reject the claimants' case that the U.S. $93,000 paid to S Flame in October 2008 can be construed as a bribe for agreeing soft terms or otherwise as a corrupt payment and I accept Mr Kendrick QC's submission that this represented the payment of a small monthly sum for genuine local services paid for and provided by Mr Boreh.

Conclusion on bribery and corruption

793. For all the reasons set out above, I have concluded that neither the payments made to Mr Boreh or his companies by DP World, nor the proposed shareholding in DCT (never in fact transferred) nor the finder's fee for DDP (never in fact paid) constituted a bribe or a promise of a bribe to negotiate or agree soft terms in the DCT agreements. Furthermore, none of those matters alleged by the claimants establishes that these were corrupt payments for Mr Boreh's personal gain which harmed the interests of the Republic.

Allegedly soft terms

794. As I said in the section of the judgment setting out the various claims, I have concluded that justice and proper case management require that, even though I have concluded that there was no bribery of Mr Boreh by DP World to agree soft terms in the DCT agreements, I should determine whether the terms of which the Republic complain were less advantageous to the Republic than they might otherwise have been.

795. Although the letter from Gibson Dunn of 25 November 2015 setting out the claimants' case on soft terms pursuant to my Order at the pre-trial review raises a number of provisions in relation to which the claimants say that Mr Boreh could have achieved more advantageous terms if he had acted honestly, only four of those were still being pursued at the end of the trial: (i) the royalty; (ii) the management fee; (iii) the length of the concession and (iv) the extent of control given to DP World and the reserved matters. In his closing submissions, Lord Falconer referred to two other related matters, the shareholding and the entitlement to dilute the shareholding by assigning shares to a shipping line. Those additional matters are not identified in the letter of 25 September 2015 as they should have been. However, leaving that point to one side, the suggestion that the terms as regards the shareholding procured through the efforts of Mr Boreh were anything other than extremely advantageous for the claimants, let alone any suggestion that he did not achieve the best he could because he was being bribed or promised bribes is completely hopeless. I have dealt comprehensively at [586] to [610] above with why the complaints now made are without merit and do not propose to repeat what is said there.

796. Before analysing the particular provisions about which the claimants still complain, it should be emphasised that the claimants' case on soft terms adopts a blinkered approach of looking at provisions in isolation. In my judgment, this is a flawed approach, since it is important to look at the various Agreements as part of the overall deal, not at particular provisions in isolation. Ultimately, in my view, the critical question is whether the overall deal was advantageous or disadvantageous to the

Republic. When that question is asked, it allows of only one answer, that this has been advantageous, even more profitable than DP World's financial model predicted.

Royalty

797. By far and away the most significant complaint is about the size of the royalty payable to the Republic which was set at the higher of U.S. $6 million or 5% of gross revenues per year. The claimants' case is that, if it had been negotiated honestly, it would have been 40% of 'notional' gross revenue, that is without any discounts being permissible, so that if, for good commercial reasons, DP World gave a discount for volume to a large container line, the royalty would need to be calculated ignoring that discount and DP World would have to make good the shortfall. I agree with Mr Kendrick QC that this is commercially unreal and wholly inconsistent with a joint venture. A 40% royalty on notional gross revenue would amount to a huge tax before profit, dramatically reducing the profits of the container terminal and, of course, the dividends payable to both DP World and PAID. As Mr Kendrick QC says this would be incredibly inequitable to DP World, which was not just the manager, but a joint venturer, supplying 1/3 of the equity and paying 1/3 of the cash calls. The payment of a 40% up-front royalty on gross revenue to the Republic/PAID would mean that in a poor year there would be profit and no dividend as the return for DP World's investment.

798. The basis for the 40% royalty appears to be Jeddah, but that is a terminal built and paid for by the Saudi government, in what is regarded as a safe country, where the manager of the terminal is no more than a manager, not an investor taking a 'country risk'. The contrast with Djibouti could not be greater. It is difficult to see what incentive DP World would have had to invest in and operate the DCT at all in those circumstances, particularly when this point about royalty is combined with the claimants' further point that the management fee for DP World was excessive and should have been no more than a fixed figure of U.S. $1.3 million per annum. Furthermore, the marginal profitability that this royalty and reduced management fee would have produced would have made this project impossible to finance. The evidence called on behalf of Mr Boreh from Mr Qureshi dealt with this issue.

799. He explained that with a 5% royalty, the debt service cover ratio ("DSCR") for the project in the early years (when the loan would remain outstanding) was about 1.7, where the usual threshold required by the banks is 1.5. As Mr Kendrick QC submits, in broad terms, that suggests that the royalty was about as high as the lenders could tolerate. Lord Falconer put to him in cross-examination that the banks would be willing to go below the 1.5 threshold from time to time, to which his answer was: *"Possibly, but in very, very limited circumstances."* Significantly, it was not suggested to him that such circumstances were present in the case of the DCT project and any such suggestion would have been hopeless. This project was clearly at the high end on the scale of risk and I have already referred above to Mr Qureshi's evidence that, even on the basis of the terms agreed in the DCT agreements, obtaining the necessary finance was difficult.

800. Mr Qureshi calculated that a 40% royalty would have reduced the DSCR to less than 1 for some years, in other words, the DCT would not have made enough money in those years to repay the loan required to finance the transaction. Unsurprisingly, Mr Qureshi's evidence in his witness statement that "*the banks would therefore not have*

been prepared to lend under such circumstances" was unchallenged. Given the challenges faced by the principal banks in syndicating the loan on the terms actually agreed, I have no doubt that his evidence is correct.

801. As Mr Kendrick QC correctly observed, the claimants appear to be backing away from their case that, but for the bribe, a royalty of 40% of gross revenue would have been agreed. Thus, it was suggested to Mr Qureshi in cross-examination that the banks would only be interested in the position during the financing period, so that the royalty could have increased after the period of the loan. His answer was: *"Predominantly, but they do recognise that they might not have their debt paid over that period, so they have to look beyond a ten-year term."* Of course this suggestion of a fluctuating royalty is inconsistent with the claimants' case that, had Mr Boreh not been bribed, the royalty could and would have been 40% of gross revenue from the outset. It has all the air of a clever lawyers' construct to get over the obvious difficulty that a 40% royalty at the outset would not have been acceptable to the financing banks.

802. In any event, this attempt to argue for some unspecified fluctuating royalty is pure speculation. The reality is that, in circumstances where, as part of a joint venture, DP World were making a one third investment, obtaining finance which was difficult to obtain, supervising the design and construction of the terminal, generating the business there and repaying the debt, I consider that DP World would never have agreed some fluctuating royalty arrangement under which, once the debt was repaid, the Republic would acquire an unfair proportion of the rewards through a substantial royalty on gross revenue, thereby emasculating the dividend available to DP World.

803. The suggestion that there should be a 40% royalty first emerged in the present proceedings in Gibson Dunn's letter of 25 September 2015. At the time of the relevant contractual negotiations in February 2006 and the approval and ratification of the various agreements by the President and the Parliament between May 2006 and December 2007, no-one on behalf of the Republic once suggested that the royalty should be higher than was agreed. As Mr Kendrick QC submits with considerable force, if there were anything in this point it would have been contended and pleaded a long time ago.

Management fee

804. The claimants then contend that the management fee of the higher of U.S. $2.4 million or 5% of gross revenue was disproportionately high by comparison with the royalty to the Republic and should have either been fixed at U.S. $1.3 million or benchmarked against traffic targets. As I found above, as with the royalty, the management fee was agreed in the negotiations in February 2006. The same point as just made in relation to the royalty applies with equal force: at the time no-one on behalf of the Republic suggested that the fee agreed was excessive or unreasonable.

805. Much is made by the claimants of the point in Mr Qureshi's evidence that management fees and royalties are conceptually different things. That is no doubt correct, but in the present case which was one of a partnership, the two were intended to be essentially equal, as Mr Boreh confirmed in evidence. In so far as there is a difference, it favours the Republic, since the minimum baseline of U.S. $6 million was much higher than the U.S. $2.4 million baseline for the management fee.

806. In my judgment the management fee agreed was not some excessive fee agreed because of bribery and corruption of Mr Boreh, but a fair fee reflecting the skill and experience of DP World. As stated in the preamble to the Joint Venture Agreement, DP World had: "*vast international experience in developing, managing, operating and maintaining container terminals on a project finance basis*". Proof that this skill and experience was needed here is that DP World was able to arrange finance in difficult circumstances because of its established relationships with Dubai Islamic Bank and Standard Chartered Bank. The DCT was then constructed without delay and has operated under DP World management as an extremely profitable enterprise.

807. In fact the 5% management fee is no more than or less than fees paid for other management in the port which is not alleged to be tainted by bribery or corruption: JAFZA charged DDP a management fee of 7 ½ % of gross revenue and DP World's own fees for managing the old port earned them far more than either U.S. $1.3 million or 5% of gross revenue, yet no complaint is made about that. Since those fees would diminish significantly with the transfer of container traffic from the old Port to the DCT, DP World would be legitimately entitled to expect to recover substantially the same, if not more, from managing the DCT.

808. The comparison which the claimants sought to draw with Algiers where DP World is paid in the region of €900,000, is misplaced as that is an established port with a proven track record and less need for DP World expertise. When counsel for Mr Boreh relied upon the fact that the management fee charged by DP World at Dakar was the same as at the DCT, 5% of annual turnover, the claimants' riposte was that there was corruption there as well. No evidence was put forward to support that assertion and it seemed to me indicative of the lengths to which the claimants were prepared to go in their campaign against Mr Boreh.

809. Traffic targets were not mentioned in the negotiations in February 2006 or at any stage by anyone on behalf of the Republic. Mr Boreh made the perfectly valid point that DP World would want to increase the traffic because that would increase both gross revenue and net profits, i.e. the 5% management fee and the dividends, but it would be unfair to demand firm commitments, given the nature of the business, evidence which seems to me both reasonable and making commercial sense:

> *"Q. The management services agreement contains no targets or performance measures as against Dubai World?*
>
> *A. You know, when you say really targets, if you look at the figure today, 2015, they already lost 20, 30% of their trans-shipments, they already lost it because of this litigation. Already Djibouti is losing money. You cannot forecast on trans-shipments, people can come and go like this, and it's very difficult to commit on such things, it is not a captured market that we are talking about.*
>
> *Q. Do you agree there is no targets in the management services agreement?*
>
> *A. They could not target, they could not give any target, they could not guarantee the targets.*

> *Q. And you were willing to agree no targets of any sort?*
>
> *A. Look, they will do their utmost to increase their revenue, but they cannot commit themselves on the targets because they will not have the ability to compete, this is an emerging market, they cannot really commit themselves on targets, it is not fair to ask your partner these things."*

810. By contrast with the incentive to DP World to increase the amount of traffic of which Mr Boreh is speaking in this passage, a fixed management fee of U.S. $1.3 million would have provided no incentive at all. As Mr Kendrick QC said, it would have had a chilling effect, particularly when combined with the sort of royalty for which the Republic contends. Furthermore, it is simply not appropriate to look at terms such as the royalty and the management fee in isolation from the other terms of the deal, which was advantageous overall to the Republic in relation particularly to the equity share and was perceived to be so at the time.

811. From the nature of the cross-examination of Mr Qureshi, it seems the claimants may be seeking to run a case that the overall profitability of the deal for DP World was excessive because the internal rate of return ("IRR") was predicted to be more than DP World's hurdle rate for investment, so that it should be inferred the deal was corrupt. If that point is being made (or reserved for a stage two trial) there is nothing in it. To begin with, the financial model used by DP World about which Mr Qureshi was cross-examined forecasts an IRR for DP World of 31.97% and for PAID of 29.35%, broadly equal and thus consistent not with this deal being disadvantageous to PAID because of Mr Boreh's corruption but with it being a long term partnership in which Mr Boreh's efforts had secured PAID a majority shareholding.

812. The fact that the predicted IRR exceeded the hurdle rate for investment does no more than tell one that the project qualifies for investment, it does not, contrary to what Lord Falconer suggested to Mr Qureshi in cross-examination, mean that there was *"considerable room for further negotiation if required"*. As Mr Qureshi said in answer to that suggestion: *"I don't think that's correct, because this doesn't take into account risk within the project."* He went on to explain that this financial model was supplied by DP World to the banks for the purpose of raising finance: *"a very aggressive case which was presented to the banks, which they financed on, so this would be, I would say, the financiers' case rather than necessarily a risk adjusted case."* In the light of that evidence, which I see no reason not to accept, it seems to me that a more cautious IRR for DP World's own internal purposes, which took account of the various risk factors, would have been lower. The suggestion that the IRR in this financial model meant that there was room for downwards negotiation is a false point.

Length of the concession

813. The length of the concession was 30 years, with the option for two further 10 year extensions. As set out above, it was the consistent position of DP World from the 2004 Concession Agreement onwards (long before it is suggested there was any bribery) that the term of the Concession Agreement should be 30 years with two 10 year extensions in their option. Ms Ali in her comments in her report of 19 December 2005 on the draft Concession Agreement said that the term was too long because 15-

20 years was the normal duration of a tenancy agreement. That was a misconception, since this was never a normal tenancy relationship and her comment was also made before it was agreed that PAID would have a substantial shareholding. It is striking that she does not seem to have repeated her criticism at the meeting in February 2006 or in her report to the President of 21 March 2006.

814. The claimants now say, in Gibson Dunn's letter of 25 September 2015, that the term should have been 30 years. However, as Mr Kendrick QC points out, this is not a case where DP World is simply the manager of the terminal, it is an investor which put in one third of the equity and was responsible for financing the project. It was investing for the life of the terminal. In any event, there is nothing unusual or excessive about the term of 30 years with two 10 year extensions. Mr Qureshi's unchallenged evidence in his witness statement confirmed this:

> *"…from my knowledge of DP World operations globally, I can confirm that a 30 plus 10 plus 10-year concession period is not out of line with other concession arrangements. Many of DP World's concessions are for at least a 30-year period, but many are longer. I am aware that we hold some concessions in perpetuity (i.e. we hold the freehold), some are for as many as 99 years, and I am aware of many operations with concession periods, including rights to renew, of 50 years or more, across, the Far East, sub-continent, Africa, Europe and the Americas. 11 Of course, every concession will have its own specific considerations, but the 30 plus 10 plus 10 arrangement in Djibouti is certainly not an outlier. In DP World's annual report for 2014, it was explained:*
>
> > *'The key features of our business model are as follows: (1) High Barriers to Entry. We operate our container terminals through long-term concession arrangements with the owner of each port. These concessions average 40 years but they are effectively perpetual, as historically concessions have always been renewed. This creates very high barriers to entry and allows us to build strong relationships with port authorities, shipping lines and joint venture partners'."*

815. In my judgment, any suggestion that the term providing for the length of the concession was a "soft term" procured by bribery of Mr Boreh, is completely hopeless.

Control and reserved matters

816. In cross-examination of Mr Boreh, Lord Falconer was particularly critical of what the claimants characterise as his failure to negotiate any of the control provisions in the Republic's favour, indicative of his having been bribed to do nothing and to allow DP World unfettered management control of the terminal. Although this point loomed large in cross-examination, the complaint really seems to come down to two or possibly three points, which are all aspects of the same fundamental point that the reserved matters gave complete control to DP World with no reservation for the "national interest" for the Government: control of the board, fixing of dividends and

possibly setting of tariffs. In my judgment, nothing could be further from the true position than the suggestion that Mr Boreh allowed DP World to take complete control of the board and the management without trying to persuade them to take less because he had been bribed.

817. The starting point is that the general practice of the President and the Government by 2006 was to give control of the new projects in the Port and Free Zone to the Dubai entities which were going to manage and operate those projects, without there being any suggestion of bribery or impropriety. As set out in detail above, DP World had been given extensive control under the 2000 Concession Agreement in the management of the old Port. Nevertheless DP World still encountered problems with residual government interference, as for example with the budget evidenced by Mr Heremans' exasperated note in November 2006 referred to at [592] above. Mr Douale said in re-examination that Mr Boreh had told him that: *"DP World wanted to control the board of directors to prevent the Government from getting involved in the management of DCT, and avoid thus the type of problem they had had with PAID."*

818. The old Port had done extremely well under DP World's management. Mr Douale agreed that, from a very early stage of the management, the President was delighted with the results. Mr Douale also agreed, by reference to the minutes of the meeting of the cabinet of 28 April 2003 at which he spoke: *"I recognise that DP World certainly was advantageous for Djibouti and improved its efficiency."*

819. An identical level of management control was given to JAFZA at the Dry Port and Free Zone, where of course Mr Boreh was a shareholder. Mr Douale agreed in cross-examination that the Management Agreement was not unfair to Mr Boreh as majority shareholder in DDP in giving the exclusive right to manage the Dry Port to JAFZA. In a telling piece of evidence, Mr Douale not only agreed that it was appropriate for JAFZA to be given exclusive management control without interference because it was the expert, but that that was what he wanted it to do. The control given to JAFZA, via its special purpose vehicle, DIM included *"full and exclusive right"* to set rules, regulations, tariffs and standards in the free zone.

820. As with the management of the old Port, the management by JAFZA was a great success. In her cable of 9 June 2004 reporting on the inauguration of the Free Zone, Ambassador Ragsdale noted the optimism of investors. She said: *"After the inauguration, Abdurahman Boreh hosted a lunch for the visiting entourage and potential participants. The event reportedly secured commitment to the project from a number of UAE and Djiboutian business persons. That commitment was conditioned, Post was told, on DPI's continued management and operation of the DFZ as well as Djibouti's air and sea ports."*

821. In those circumstances, there is nothing surprising or untoward in DP World having exclusive management and board control of the DCT. Not only was this the established and financially successful model, but this is what the Government wanted, as Mr Douale admitted, as set out in [658] above, in relation to what Mr Boreh said at the board meeting of PAID on 27 August 2006 about DP World having complete control.

822. What is so odd about this aspect of the claimants' case is that the extent of the control being given to DP World and, specifically, the reserved matters were extensively

debated within the Government in 2006 and 2007. Ms Ali raised a number of concerns vociferously as did the General Secretary of the Presidency. They wanted some "national interest" exception to the reserved matters. As she put it: "*under no circumstances could the Reserved Matters go against or cause any risk whatsoever to the Djiboutian Government and the Nation's interest, as well as to sovereignty.*" However, there are two principal reasons why any suggestion that Mr Boreh allowed DP World to have this complete control because he had been bribed (even if he had been, which I have found he was not) caused the claimants any loss, is hopeless.

823. The first is that it is quite clear that DP World was unmoved and unmoveable on the reserved matters. Apart from the small concession to Ms Ali to remove (ss) made at the end of March 2007 referred to in [667] above, DP World did not concede any of the reserved matters. In addition, as I have found, the banks would not have financed this project unless DP World had complete control and the risk of government interference was eliminated. Even then, as Mr Qureshi said, the relationship banks had difficulty in syndicating the loan. The fact that any change in the control provisions would have been an event of default under the finance documentation is a clear indication of the attitude of the banks.

824. Furthermore, to obtain the financing for the project, it was necessary to obtain political risks insurance as well, as Mr Mohta of DP World noted on 24 August 2006: "*we would require political risk insurance (PRI) in order to obtain financing for Doraleh*". This was also reflected in the indicative term sheet from Dubai Islamic Bank and Standard Chartered Bank under which it was a condition precedent to drawdown that there was:

> *"Political risk cover to cover, to the extent available, the full amount of outstanding senior debt at any time (including any hedging or rate protection liabilities) provided by the Islamic Corporation for the Insurance of Investments and Export Credit (ICIEC) and/or the Multilateral Investment Guarantee Agency (MIGA) (or any other acceptable insurance company) covering (on the terms customary for the relevant organization):*
>
> *Nationalization, Expropriation and Contract Frustration.*
>
> *This protects against losses arising from actions of the Djibouti Government that might reduce or eliminate ownership (or control) over DCT. This also covers 'creeping' expropriation."*

825. The level of political risk associated with a project of this nature in a country like Djibouti was on any view a high one. The political risk insurance was provided by MIGA, a department of the World Bank, rather than by commercial insurers, for whom the project was almost certainly too risky. As part of their due diligence, MIGA reviewed the Joint Venture Agreement. This was noted by Mr Mohta when at the end of February 2007, Ms Sahu of Economic Law Practice referred to him Ms Ali's email saying that the reserved matters provision was "leonine": "*These DPW control provisions have strengthened the non-recourse financing prospects and dilution of the same will adversely impact the non-recourse financing ... the JV Agreement is already provided to MIGA based on which they are doing their due diligence.*" Also, on 10

April 2007, as noted at [669] above, there was a meeting with MIGA in Djibouti attended by Ms Ali at which the insurers were asking about the role of the state in the Port projects. If the Joint Venture Agreement had been amended to permit political interference, I have little doubt the insurers would have refused to insure against political risks.

826. In all the circumstances, the suggested "national interest" exception would obviously never have been agreed by DP World, the banks or the political risks insurers, as Ms Ali accepted in cross-examination as set out at [672] above, and is quite apparent from Mr Kruijning's angry emails of 17 and 23 September 2007 referred to at [681] and [683] above. Thus, even if Mr Boreh had tried to negotiate some concession or exception, as Ms Ali did, he would have failed, as she did.

827. The second reason why the suggestion is hopeless that it was Mr Boreh's supine inactivity in not negotiating something different in relation to the control provisions, because he had been bribed by DP World, which caused the claimants loss, is that, on the basis of the concerns expressed by his advisers, the President was faced with a stark choice: either to insist upon a "national interest" exception in the interests of national sovereignty (as the Secretary General of the Presidency and Ms Ali were urging), in which case the deal would undoubtedly have collapsed, or to take a commercial decision to proceed with the DCT Agreements as signed and live with the reserved matters; as Ms Ali put it: *"to swallow it and let it go."* The President took the latter decision and approved and ratified the DCT Agreements. The decision was his alone and there is no evidence that, in doing so, he was in any way influenced by, let alone being advised by, Mr Boreh. It necessarily follows that, if the claimants have suffered any loss as a consequence of entering the DCT Agreements, which seems highly unlikely given how profitable they have been, then in terms of causation, that loss was caused not by Mr Boreh's breach of a duty of probity or loyalty, but by the President's own commercial decision to approve and ratify the Agreements.

828. In a real sense, that must be the end of any case in relation to the alleged soft terms. In so far as Lord Falconer sought to highlight, in his cross-examination of Mr Boreh and in his closing submissions, the fact that the control provisions entitled DP World to set the dividend, without any interference from PAID, that was precisely the sort of interference which Mr Heremans had complained about in November 2006 and which DP World wanted to eliminate. It is clear that it would not have agreed to allow the Government to interfere on that issue. The President knew about the scope of the reserved matters and approved and ratified the Agreements nonetheless.

829. Furthermore, there is no simply no evidence whatsoever that DP World has acted incorrectly, let alone improperly, or in an arbitrary manner, in setting any dividend. On the assumption that the concern is that money has been retained which should have been distributed (although there is no evidence this has occurred) as Mr Kendrick QC says, it is difficult to see that there is any loss to the claimants, since the money is retained in the joint venture company for the benefit of both the shareholders.

830. In any event, given that any decisions about distribution of dividends would be subject to examination on the annual audit, any anomaly would have been picked up by the auditors. Mr Boreh made that point in cross-examination:

> *"Q. In addition to them agreeing the dividend -- you think that was reasonable, you think the financiers forced that on you?*
>
> *A. No, what I think it is a management decision, my Lord, they have to decide, you know, how much dividend, but that does not mean that they will take the money and just credit themselves. There are proper auditors, and this is a management decision to first pay the loans or to pay a bit of the loan and give some dividends.*
>
> *MR JUSTICE FLAUX: The amount of the dividend might be determined by Dubai World, but ultimately it would be the subject of an audit?*
>
> *A. Yes, sir, yes.*
>
> *MR JUSTICE FLAUX: If they had assessed the dividend incorrectly for some reason, then that would be picked up by the auditors.*
>
> *A. Yes, and also we had also some say, not because we give them a blind management, we could have a say, I was on the board and we could ask those questions, you know, by looking at the audits and appointing our auditors, we did not lose the control on controlling, what we just give them is the power to manage properly and not to put civil servants like we have seen in the old port."*

831. At the end of the trial, it was unclear whether the claimants were still pursuing a discrete point about the setting of tariffs within their overall complaint about the management control given to DP World, although Gibson Dunn's letter of 25 September 2015 does complain that: "*The setting of tariffs (or at least minima and maxima thereof) should have been reserved to the Republic or its emanations."* To the extent that the point is still pursued, it is a bad one. DP World had vast international experience of managing and operating terminals as the Joint Venture Agreement recorded. That included the setting of tariffs, which is what DP World did successfully at the old port under the 2000 concession agreement, which it is not suggested was procured by bribery. The claimants in contrast had no experience in setting tariffs.

832. Furthermore, under the Management Agreement, the manager is under an obligation in clause 3.2 to: "*maximise the operating return of the Terminal*" which includes its determination of the tariff. Accordingly the obligation is to set a tariff for containers which is as profitable as possible. The suggestion in the claimants' opening Skeleton Argument that DP World could cynically set rates which were artificially low or excessively high in order to funnel business to other adjacent DP World ports is obviously nonsense. As Mr Kendrick QC says, the precise level of tariffs will be dictated ultimately by competition and market forces.

Conclusion on soft terms

833. For all the reasons set out above, I have concluded that there is no merit in any of the claimants' complaints about allegedly soft terms having been agreed by Mr Boreh.

(5) Political motivation

834. As indicated earlier in the judgment, given the allegation of Mr Boreh that this entire litigation is politically motivated, part of a campaign by the President and those around him to destroy Mr Boreh politically and personally, it is necessary to consider to what extent that allegation is made out, not least because the question of whether the claims are being made in good faith or not, has costs implications.

835. The evidence was that sometime in 2007, the Prime Minister, Mr Dileita made a social visit to Mr Boreh in Dubai in which he sounded out Mr Boreh over lunch as to his reaction to the President standing for a third term of office in 2011, which would require a constitutional change to remove the term limit which would otherwise prevent the President from standing again. As Mr Dileita explained, tribal discussions had already started about who might replace the President. Whether Mr Dileita was actually tasked by the President to sound Mr Boreh out and report back may not matter given that Mr Dileita did report back to the President, although if I had to decide the point I would conclude that he was asked by the President to sound Mr Boreh out.

836. Mr Dileita's evidence was that Mr Boreh gave the impression that he would not support the President making the change to the constitution and standing for a third term and felt someone from another tribe should take over in 2011. When asked by Mr Dileita what his own ambitions were, Mr Boreh said; *"Why not?"*, the obvious implication being that he was contemplating standing against the President. Mr Dileita reported back to the President and told him about Mr Boreh's political ambitions. Mr Dileita accepted in cross-examination that he had told the President that Mr Boreh had political ambitions to be President. Mr Dileita's evidence was that when he told the President, the President did not believe him, because he had confidence in Mr Boreh as a trustworthy supporter.

837. In a letter dated 28 November 2015, after both Mr Dileita and Mr Boreh had given evidence, Gibson Dunn wrote claiming, by reference to entries in Mr Dileita's passport, that the meeting over lunch with Mr Boreh in Dubai had in fact taken place in May 2006. This seems to me to be extremely unlikely. Quite apart from the fact that Mr Dileita was very firm in evidence that the meeting was in 2007, May 2006 would have been too early for the discussion which took place about the President standing for a third term, since it was only a year after the previous election. Also, the copies of the passport pages produced do not include those for 2007 and 2008 and it expired in May 2008. Mr Dileita's evidence was that he visited Dubai on several occasions. It is also noteworthy that, although in his witness statement, the President denies that he considered Mr Boreh a political rival, he does admit that, in or around 2007, Mr Dileita told him that he had met Mr Boreh in Dubai and that Mr Boreh had told him that he might run for President. It seems to me that it is far more likely that the discussion took place sometime in 2007 and I so find. However, the fact that the claimants appeared intent on changing Mr Dileita's evidence does suggest a level of concern about the allegations of political motivation.

838. I consider that, contrary to the impression of a complete lack of concern that the President seeks to give in his statement, this news that Mr Boreh would not support his campaign for a third term and might stand against him, would have been of great concern to the President and he would have wanted to investigate Mr Boreh's intentions further. Mr Boreh says in his statement that in 2007, he was approached by two close allies of the President, Mr Farah and Mr Orah, whom he had the clear impression were emissaries from the President. He told them he could not support the proposed constitutional change. Mr Boreh's evidence was also that he had a private discussion with the President in September 2008. The President raised the issue about the amendment of the constitution in passing and Mr Boreh told him he was not in favour of the idea. They did not argue, but he says the President was clearly angry.

839. Mr Boreh said in cross-examination that he last saw the President on a Saturday in October 2008, shortly before he left Djibouti the following day on a mission for the President to Dubai, to discuss (presumably with DP World) the building of the final quay at Doraleh for general cargo. He said that it was two days later that the Government seized the Soprim equipment, which surprised him because the President had gone to Canada for a conference: *"I was surprised because he was away, we left in peace, we left on good terms, and I never expected that they would do this."*

840. Lord Falconer suggested in closing submissions that Mr Boreh's evidence, of being sent on a mission and parting on good terms with the President, undermined his case that he had been subjected to political persecution thereafter. I do not consider that there is any force in that point. Contrary to the claimants' case, subsequent events, which began immediately after he left Djibouti, demonstrate very clearly that there was a campaign of persecution against him and those associated with him. Precisely why the President turned against him when he did, having parted on ostensibly good terms, is unclear and the President has not come to give evidence to explain his conduct and motives, but that the President did turn against him in October 2008 is clear.

841. The first step in the campaign of persecution occurred on 19 October 2008, when Mr Boreh was still in Dubai. The Gendarmerie turned up at the DCT construction site without prior warning, seized a large quantity of Soprim equipment and ordered work to stop. They did not have a warrant for the seizure. When Mr Boreh learnt of the seizure, he spoke to Mr Dileita and to Mr Khaireh, the Head of National Security, to find out what was going on. They told him that the First Lady had personally authorised the seizure. Mr Boreh managed to persuade Mr Khaireh to get the equipment released, but it was only a temporary respite.

842. On 21 October 2008, some 100 armed soldiers and members of the Republican Guard arrived at the DCT construction site, ordered all work to be stopped and proceeded to seize all Soprim equipment on site, removing it to a police camp. Contrary to the submissions made by the Republic, that was not part of a tax dispute. The Republican Guard have nothing to do with tax collection, they are the President's elite troops and would only have attended the site on the instructions of the President or the First Lady.

843. Mr Boreh described in graphic terms in cross-examination how he found out about this second seizure:

> *"So what I did is I called everybody in Djibouti and they released the seizure from the tax people, and then the next day I was planning to go back to Djibouti and I came back from the airport because now on the second time the First Lady have sent the Republican Guard and then I knew the President must have known the first time that this happened, and then I thought this was it, you know, I don't want to go back there and start to fight the First Lady, he was not there, and I felt that this was not really -- I just knew that it was not right, and I felt bad about it."*

844. The claimants contended that these seizures were pursuant to a *bona fide* tax dispute and called Mr Abane, the assistant director of the Tax Inspectorate in Djibouti, to give evidence to that effect. However, it emerged that he was not aware of the seizures in October 2008 and that the fundamental procedures for a lawful seizure had simply not been followed. He agreed in cross-examination that in view of the draconian nature of seizures of property, the tax authorities would be careful to ensure that the correct procedures were followed. These were: (i) that the seizure must be preceded by a '*commandement*'; (ii) an 'iterative *commandement*' or final warning must be given, allowing one last chance to pay; (iii) an official must be appointed to oversee the seizure and (iv) an inventory of the seizure must be given to the taxpayer.

845. Mr Abane said that copies of the *commandement*, final warning and inventory would be kept on file at the tax department. However, no such documents have been disclosed in respect of these seizures, from which it is clear that none of the correct procedures was followed. Indeed, although Mr Abane was appointed to oversee subsequent seizures of Soprim equipment in January 2009, he was not even aware of these earlier seizures. In my judgment, the seizures were not ordered by the tax department and the overwhelming likelihood is that they were ordered by the President and the First Lady.

846. The next step was the making of illegitimate and excessive tax demands on Djibouti Mix, another of Mr Boreh's companies. It supplied concrete for local construction projects. In 2005 it had made a loss and in 2006 had made a modest profit equivalent to some U.S. $55,000. It had been in discussion with the authorities about its tax liabilities and, on 16 April 2008, the Presidency wrote to Mr Jacques Lemay, the managing director of the Boreh Group, in effect waiving the relevant tax liabilities. However, without any prior warning, in November 2008, the tax department assessed Djibouti Mix's tax liability as about DJF 1.59 billion (US$8.9 million) together with the maximum surcharge of 40%, taking the total demand to DJF 1.76 billion (US$9.8 million). This was far higher than any conceivable tax liability and Mr Abane was unable to recall any company in Djibouti with sufficient turnover to produce a tax liability on this scale. Given the previous proposal by the Presidency, the surcharge was manifestly unjustifiable.

847. Djibouti Mix responded to the tax department on 29 November 2008 informing them that the figures were incorrect and enclosing its financial statements for 2005 and 2006 (the years to which the tax levied related) showing respectively a loss and a modest profit. What should clearly have followed was further investigation by the tax department and discussion with Djibouti Mix. Instead, that letter was ignored and, by notices of recovery dated 28 January 2009 and a letter of 7 March 2009, the tax

department sought payment of the full amount equivalent to U.S. $9.8 million and gave the company a week to pay.

848. The attempt by the claimants in their written closing submissions to justify this tax demand, on the basis that Soprim had regularly charged high mark ups on its construction contracts, is unconvincing to say the least. The claimants submit that the court should not make any findings on this issue without a full investigation of the facts and expert evidence. I do not find that convincing either, since the claimants were given permission by the Court at the pre-trial review to call Mr Abane. The claimants recognised that, whilst details of tax said to be due from Boreh companies might go off to a quantum trial, his evidence was relevant at the liability stage, since Mr Boreh raised the issues of political motivation.

849. The reality is that Mr Abane was unable in cross-examination to justify this as a legitimate tax demand. It emerged that he had had no involvement in assessing the tax owed by Djibouti Mix in 2008. When pressed by Mr Waller QC in cross-examination on this issue, he became very angry and defensive. Although, for understandable reasons, Mr Abane declined to comment on the suggestion that this was not a legitimate exercise in tax collection, but a process initiated by the President in a cynical attempt to ruin Mr Boreh financially, it seems to me very clear that the demands being made were illegitimate and grossly excessive and that the correct inference is that it was part of the political campaign against Mr Boreh.

850. That this is the correct inference is borne out by the next step in the campaign after the service of this illegitimate tax demand in November 2008, which is the arrest of Mr Lemay and of Mr Mahesh Rehan, Soprim's accountant. This is dealt with in a witness statement from Mr Lemay. Although the claimants did not accept his evidence, they did not require him to attend for cross-examination. I see no reason not to accept his evidence which in summary was as follows.

851. On 28 December 2008 they were arrested and questioned by the police about what Mr Lemay describes as ridiculous allegations and their passports were confiscated. They were then released, but in March 2009, they were arrested again and detained in appalling conditions. Although granted parole by a judge, they were returned to prison on the pretext that formalities in relation to release had to be completed. However, as they were about to leave, they were told that fresh instructions had been received and they were returned to the cells. Mr Lemay was obviously concerned that, having signed documents acknowledging his release, he was now going to be made to disappear. However, he was released and taken to the airport where he was deported and left for Paris. He says he has not returned to Djibouti and would be afraid to do so. In 2011, he was apparently convicted by a Djibouti court, in his absence and without his knowledge, of embezzlement, a conviction which has echoes of the false conviction of Mr Boreh in his absence for offences of terrorism.

852. On 6 January 2009, the Public Prosecutor in Djibouti ordered an investigation into Mr Boreh and the Boreh Group for failure to pay tax. On 19 March 2009, criminal proceedings were instituted against Mr Boreh for alleged non-payment of duty specifically in relation to cigarettes in transit to foreign countries. These allegations go beyond what had been put to Mr Lemay when he was interviewed by the Gendarmerie in January 2009, which was an allegation about non-payment of duty,

not smuggling. Mr Lemay denied this, saying the amounts claimed were exaggerated and that the Boreh Group had a cross-claim against the State for over U.S. $3 million.

853. Red Sea Central ("RSC") was Mr Boreh's trading company in Djibouti, which distributed cigarettes for BAT. On 23 March 2009, the Finance Minister wrote to BAT claiming that RSC had been smuggling cigarettes and evading duty and stating that they had been brought before the Djibouti courts. The Minister said that RSC's licence to market cigarettes had been withdrawn. A subsequent letter from the Minister of 10 May 2009 confirmed the withdrawal of the licence and said again that legal proceedings were continuing.

854. In cross-examination, Lord Falconer suggested to Mr Boreh that there had been issues before March 2009 about non-payment of duty by RSC. Mr Boreh denied this, saying:

> *"My Lord, on each pack of cigarettes it's got a code, what is for the Djibouti domestic market is known for British American Tobacco, and whenever we receive a container which is destined for the Djibouti domestic, what we do is we pay our taxes and they do audit our -- we have to put the receipts that we have paid, all the duties and the taxes, where the people of British American Tobacco will audit and control that we have paid the legitimate tax, and then we continue, because they always had an office, a representative, working closely with us in Djibouti and this is part of the work. But there are some cigarettes, that's why I moved to Dubai because we have some cigarettes which will come to Djibouti which is not destined for the Djibouti domestic market and which will be shipped out to Somalia or to Yemen, and the Djibouti Government want to tax that as well. I think clearly from 2008 Djibouti uses the tax as a weapon, and we have seen the taxpayer, how they do things. So really this is a wrong allegation. Red Sea Central have never engaged in any contraband business or illegal business, because otherwise I would not remain as the distributor of British American Tobacco."*

855. The letter from the Finance Minister to BAT also recommended that it appoint one of three named individuals acceptable to the Government as its distributor in place of RSC. BAT declined to do so and set up its own distribution operation BAT Djibouti. That operation has now also had its licence suspended in 2014 on the basis of false allegations of illicit trading. Mr Boreh served a Hearsay Notice in respect of a letter from BAT of 16 January 2015 setting the history. BAT summarised its assessment of Boreh International and RSC as a distributor in these terms:

> *"Although Boreh International and its predecessor Red Sea Central has consistently grown its volume, turnover, our portfolio and ultimately their/our profitability, they have not always achieved the targets we set. There have been good years and challenging years when we had to robustly manage our relationship (all relationships have ups and downs and in the case of Red Sea issues have mostly been caused by late payments). Ultimately, the British American Tobacco Group*

> *view this distributor as a trusted business partner with whom we have a long standing commercial relationship"*.

856. BAT then expressed its dismay at its arbitrary treatment by the Government:

> *"While BAT Djibouti is obliged to respect and comply with the directive, we were shocked by the action of the Government of Djibouti which we regard as grossly unfair, arbitrary and unjust. Further, as a member of a highly respected international group of companies which abides by highest standards of corporate responsibility and governance, BAT Djibouti is greatly aggrieved by the unfounded allegations and claims made in the above mentioned letter against BAT."*

857. In my judgment, the withdrawal of the licences of RSC and, then, BAT Djibouti was all part of the campaign against Mr Boreh and those associated with him. There are other matters raised by Mr Kendrick QC in his written closing submissions about other property of Mr Boreh which the Government has sought to expropriate, such as land at Haramous. Having considered what the claimants say in their written closing submissions, I am not convinced that these matters take matters any further.

858. One matter of considerable concern, which clearly is part of a concerted campaign against Mr Boreh and his businesses is the false terrorism conviction and the subsequent reprehensible conduct of the Government. I have dealt with these matters extensively in my judgment setting aside the Worldwide Freezing Order ([2015] EWHC 769 (Comm)) as summarised at [68] above. The relevant Government officials were clearly complicit, not only in the concoction of false evidence, but in the concealment from the Court of the fact that the conviction was on a false basis and unsafe. The Republic continued to rely upon the conviction knowing it was unsafe, in order to keep Mr Boreh on the Red Notice list and to seek his extradition to Djibouti. They also sought, through Kroll, to bring improper pressure on Mr Boreh to settle the claims against him in this litigation.

859. It is striking that, whilst in his closing submissions Lord Falconer sought to address the various matters concerned with tax and duty on cigarettes, to draw the sting of the suggestion that this was all part of a concerted politically motivated campaign against Mr Boreh, he does not address the false terrorism conviction. The reason for that is not hard to discern. There is no legitimate explanation for the way in which the Government has conducted itself. The most likely explanation is that this was all politically motivated and designed to ruin Mr Boreh.

860. Mr Kendrick QC summarised the effect of this campaign overall on Mr Boreh in his closing submissions. I accept that summary as accurate:

> *"The burdens of the legal and other action taken against Mr Boreh have been profound. He has been faced with defending multiple claims, both civil and criminal, the latter coupled with the threat of extradition; restrictions on his ability to travel; restrictions on his access to funds; considerable adverse publicity which the Claimants have repeatedly courted; and improper pressure to settle the claims. The steps taken against*

> *him throughout the history of this action have had a very significant impact on his financial reputation and his ability to do business, and they have placed him and his family under tremendous pressure. They amount to a concerted attempt to ruin him."*

861. It is also fairly clear that there has been victimisation of Mr Boreh's family (as evidenced by the confidential note to Mr Bouh referred to at [79] above), his close business associates such as Mr Lemay and BAT (as detailed above) and even those who worked with him at the DPFZA, specifically Ms Ali (as set out at [80]-[81] above).

862. I consider that the campaign which has been waged by the President and the Republic against Mr Boreh and his companies and the political motivation for it is relevant in the ways Mr Kendrick QC identified as set out at [23] above. It does cast doubt upon the *bona fides* of the claims, many of which have been abandoned before and during the trial, and of the conduct of the litigation, not I emphasise by the lawyers in England, but by those with control of the litigation in Djibouti, Mr Sultan, the State Inspector General and, ultimately the President. It provides an explanation for why witnesses called by the Republic did not tell the truth, specifically about their knowledge of Mr Boreh's shareholding in Horizon. It also provides confirmation of the capricious nature of the regime in Djibouti and why those investing there, specifically DP World and the banks who financed these projects, were only prepared to do so, on the basis that management control rested with DP World and that there was no interference from the Government.

(6) Issues of French and Djiboutian Law

Introduction

863. The parties both called experts on French private law and French public law. The experts were all eminent professors and lawyers who are specialists in their field and, as one might expect, by the end of cross-examination, much was common ground and there was not all that much in dispute between them. On private law issues, the claimants called Professor Philippe Delebecque, currently Professor of Law at the Faculty of Law Paris-1 (Pantheon-Sorbonne). The defendants called Professor Philippe Stoffel-Munck, also a Professor of Law at the same University. On public law issues, the claimants called Me Noel Chahid-Nouraï, senior counsel and head of the public law department of the Paris office of Orrick, Herrington & Sutcliffe (Europe) LLP. The defendants called Me Henri Savoie, head of the public law department of Darrois Villey Maillot Brochier.

864. The claimants called an expert on Djiboutian law, Me Dini, but what emerged from his evidence was that he accepted that Djiboutian law was identical to French law in 1977 (at the date of independence) in relation to all relevant private law issues. In relation to public law, he confirmed that Djibouti passed its own Law on Civil servants in 1983, which adopts a different approach to the equivalent French law in terms of how potential conflicts of interest are dealt with. With that exception, Me Dini accepted that Djiboutian public law is identical to French public law as it was in 1977. Given the concessions made by Me Dini that Djiboutian law and French law were the same (save for the Law on Civil Servants), the defendants did not call their

Djiboutian law expert or rely on his report. Equally, it seems to me that save for Me Dini's evidence on the distinct Djiboutian law on Civil servants, the claimants should not be entitled to rely upon Me Dini as an extra expert on French law to contradict Professor Stoffel-Munck or Me Savoie. In any event, I had some doubts as to the objectivity of Me Dini, given that he has advised PAID not just many years ago, but in the period since 2012 and is a former member of the Djiboutian Parliament. Where his evidence as to the applicable French law contradicted that of the defendants' experts, I much preferred their evidence.

Initial French law issues

865. On the pleadings, there were issues as to whether private law or public law governed Mr Boreh's obligations to the claimants in relation to Horizon and the DCT respectively. In closing submissions, the claimants accepted that the relationship between the parties in relation to the DCT was governed exclusively by public law, which has narrowed what is in dispute somewhat. However, even if (as I have concluded) the relationship in relation to Horizon was also governed by public law, I still have to consider the French (and hence Djiboutian) law as regards *mandataires* (agents), since the claimants contend that some of the principles applicable to *mandataires* apply at least by analogy, even if the relationship is governed by public law.

866. I propose to consider first the issue as to whether the relationship between Mr Boreh and the claimants in relation to Horizon was governed by private law or public law. As appears from the claimants' written closing submissions, it is common ground that a contract or appointment will be governed by public law if (i) it contains 'exorbitant' clauses (i.e. ones which go beyond the scope of civil law) or (ii) it involves the relevant party in participation in a public service mission, a *service public.* Me Savoie's evidence as to what is a *service public* was in effect that the test was pragmatic and depended upon what was decided by the Government:

> *"The question is to understand what is the service public, if I correctly understand, my Lord, is that it? A service public is, there is no clear and definitive definition of "service public". Some activities of the State are clearly within the scope of the service public: justice, army, diplomacy, police and so on. For the rest, service public is what was decided by the Government or by the legislator as being the service public. For example, helping poors: is it a service public mission? It is if the Government decides it is. It is not, if it was not decided that it is a public service mission. It's quite a pragmatical approach here".*

867. The claimants contend that, applying that pragmatic test to the Horizon agreement between ENOC and the Republic, it was a commercial deal, no different from any other commercial deal and Mr Boreh was involved in the commercial aspects precisely because of his commercial expertise. The mission was not a public service one, but essentially commercial in character because: (a) the deal concerned shareholdings in a private company, which was going to run an oil storage terminal on a commercial basis and the relevant agreement was for the Republic to have shares in exchange for land just as a private entity might; (b) the only public element of the

operation, the jetty, was excluded from HDTL and run by DP World on behalf of the Republic; (c) prior to his appointment as chairman of the DPFZA, Mr Boreh did not have any position within Government or a public body. The claimants rely upon the fact that Mr Boreh's evidence was that the President asked him to negotiate with the Dubai interests because he was a businessman, not a *fonctionnaire.* Even after his appointment to the DPFZA, the delegations of powers granted to him on 16 June 2004 and 2 July 2004 to represent the government at the shareholders' meeting of HDTL refer to him as *"commercant"* i.e. a businessman; (d) those delegations were to be contrasted with the Presidential Decree of June 2003 appointing Mr Douale as National Co-ordinator for the Doraleh project pursuant to a power: *"appointing members of the Djibouti Government"*.

868. On behalf of Mr Boreh, it is submitted that, even if he was appointed as an agent for the Republic (which is strongly disputed), it was in furtherance of a public service mission, namely the promotion of the President's objective of relocating the hazardous oil facilities at the old port to new facilities at Doraleh, and accordingly the relationship is governed by public law. That submission is supported by the expert evidence of the claimants' own expert, Me Chahid-Nouraï. When he was asked in cross-examination to assume that objective and that the Government was taking a symbolic interest in the company which was going to run the facility, he said that this would be governed by public law:

> *"…obviously, the Government of Djibouti here had a public service interest, had a general interest in his investment -- in its investment. It was not only a capitalistic investment; it was an investment which was aimed at obtaining some results. In such circumstances, I would say that the signature of such -- or the negotiation of any involvement of the Government in that project would be tainted with a public service, would have a public service flavour. That is to say that the involvement of the public service would be determined, and I would tend to believe that the person who would be involved in that business would be -- would have a contract of public service, the nature of that contract remaining to be determined."*

By that last statement about the nature of the contract remaining to be determined, he clearly meant whether someone in the position of Mr Boreh was an *agent public* or a *collaborateur*, an issue to which I return below in considering further the public law issues.

869. The claimants put to Me Savoie in cross-examination, in support of their case that the relationship between Mr Boreh and the claimants was governed by private law, a decision of the *Tribunal des Conflits* (upon which Me Dini had relied) of 18 June 2001. That case concerned forestry work carried out by the claimant for the National Office of Forests and various communes. The National Office and the communes argued that the civil courts lacked jurisdiction because the claimant was employed by the municipal service of green spaces. In ruling against the National Office and the communes, the tribunal held that where a public entity was managing its forests for the sole purpose of selling timber, it was engaged in a private sector activity which was not part of its public service. Accordingly, the civil courts had jurisdiction over the dispute.

870. Commenting on that decision, Me Savoie said in cross-examination:

> *"…in this decision it is said that the sole purpose of the use of the private domain was for financial activities, a financial purpose. And it was the sole purpose of the use of the private domain. If the sole purpose of the use of the private domain is commercial or financial activities or financial purpose, then it will fall within the scope of the private law. If the purpose of the use of the private domain is a public interest or a service public mission, then it should fall within the scope of the public law domain."*

871. The obvious question, which arose from that answer and which arises in the circumstances of the present case, is what is the position where the state enters into a transaction for two purposes, a private one to make money out of the investment and the other a public purpose that it is in the public interest to construct a new oil terminal because the old terminal is causing contamination. When I posed that question, Me Savoie's evidence was very clear that, in those circumstances, public law would govern:

> *"My Lord, it's a very interesting question. If I get back to the decision issued by the Tribunal des Conflits, there is a reference to the sole purpose was to pursue a financial purpose, financial aim, whereas the sole purpose of the transaction is not only financial. When the public entity tried to perform an element of public service, something in connection with the public service, even though there is also a financial aim, because there is a connection with the public service, it will be an administrative activity, a public law activity."*

872. In re-examination he restated the same opinion very clearly:

> *"Q…There was an exchange [with Mr Brook Smith QC for the claimants] as to what the appropriate test was: is it a sole purpose test, in other words, or a predominant purpose test? So as I understood your evidence earlier, you were focusing on the sole purpose of an agreement. If the sole purpose was a financial matter it would be a private law contract; and in the context of a dual purpose case, ie partly financial and partly public, what is the appropriate test, is it a sole purpose test or a predominant purpose test?*
>
> *A. In my opinion, and on the basis the Tribunal des Conflits decision that we first read this morning, the relevant test is the sole purpose test."*

873. Thus, as I read their evidence the French public law experts were agreeing that where the state has two reasons for entering a transaction, one financial and the other with a public service purpose (a *"public service flavour"* as Me Chahid-Nouraï put it), here the setting up of a new oil terminal, eliminating the risk of contamination at the old

one, then the transaction is governed by public law. It is only where, in the example, the sole purpose is financial or commercial, that private law will govern.

874. Me Dini disagrees with the two French public law experts and concludes that the acquisition of shares by the Republic is within the management of its *domain privé,* so that the relations between Mr Boreh and the Republic are governed by private law. However, this disagreement comes not from the application of different legal principles, but the application of those principles to the facts, as he accepted in cross-examination. However, I agree with Mr Waller QC that Me Dini's application of the *Tribunal des Conflits* forestry case to the facts here is flawed and overlooks that, where the private law purpose is not the sole purpose, but there is also a public service purpose to a transaction, then public law governs. It follows that, even if I were prepared to pay any regard to Me Dini's evidence in principle, I would reject his opinion on this issue.

875. So far as the four points made by the claimants set out at [867] above are concerned, the first focuses too narrowly on the financial reason for the Republic entering the project and ignores the public service reason, of eliminating pollution and danger at the existing facilities, as does the second. The other two points do not go to the reasons for the Government entering the project, but rather to Mr Boreh's role and, specifically, whether he was an *agent public* or a *collaborateur*. None of those points involves the proper application of the test set out in the previous paragraph. Applying that test here, it seems to me that, given that there was that public service reason for the project, public law governs.

Private law issues

876. From this it follows that public law governs both the Horizon claim and the DCT claim. However it is still necessary to decide the principal private law issue, whether Mr Boreh was a *mandataire*, because the claimants contend that the law relating to *mandataires* applies by analogy to a contractual relationship governed by public law.

877. The provisions of the French Civil Code, which is also the Civil Code in Djibouti, which are of particular relevance here are Articles 1984 which defines the *mandate* and Articles 1991 to 1993 which set out the duties of a *mandataire.* Article 1984 provides as follows:

> *"Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom"*
>
> which translates as:
>
> *"A mandate or procuration is an act by which a person confers on another the authority to do something for the principal, or grantor of the mandate, and in his name."*

878. Articles 1991 to 1993 provide as follows:

> "***Article 1991***

> *Le mandataire est tenu d'accomplir le mandat tant qu'il en demeure chargé, et répond des dommages-intérêts qui pourraient résulter de son inexécution.*
>
> *Il est tenu de même d'achever la chose commencée au décès du mandant, s'il y a péril en la demeure*
>
> which translates as:
>
> *The mandataire is bound to fulfil the mandate as long as his authority lasts, and he is responsible for the damages which may result from his failure to perform.*
>
> *He is likewise bound to complete the matter started at the death of the principal, if a delay would be prejudicial.*
>
> ***Article 1992***
>
> *Le mandataire répond non seulement du dol, mais encore des fautes qu'il commet dans sa gestion.*
>
> *Néanmoins, la responsabilité relative aux fautes est appliquée moins rigoureusement à celui dont le mandat est gratuit qu'à celui qui reçoit un salaire*
>
> which translates as
>
> *The mandataire is liable not only for his dol [deceit], but also for the faults committed in his management.*
>
> *Nevertheless, the liability for faults is enforced less rigorously against a person whose mandate is gratuitous than against one who receives a salary.*
>
> ***Article 1993***
>
> *Tout mandataire est tenu de rendre compte de sa gestion, et de faire raison au mandant de tout ce qu'il a reçu en vertu de sa procuration, quand même ce qu'il aurait reçu n'eût point été dû au mandant*
>
> which translates as
>
> *Every mandataire is bound to render an account of his management, and to return to the principal all that he received by virtue of his power of attorney, even if what he has received was not owed to the principal."*

879. Although Article 1984 is in wide terms and there has been much debate amongst French lawyers about the scope of "*faire quelque chose pour le mandant*", the following principles as to the existence of a *mandat* were common ground in the Joint Memorandum of the private law experts:

> *1. Articles 1984 to 2010 of the Civil Code apply to a special contract called "mandat". Like most other contracts, a "mandat" may be entered into expressly or tacitly. The performance by the mandataire of the mission that the principal asks him to accomplish on its behalf may both establish the acceptance of the mandat by the mandataire, and constitute evidence of the existence of such mandat (with this latter point, however, to be expanded upon in additional reports).*
>
> *2. For a relationship of "mandat" to exist, it is necessary (but not sufficient) for a person (the "mandataire") to be invested with the power to enter into legal acts in the name and on behalf of another (the "mandant"); this power to legally bind the principal is, in principle, a sine qua non condition for the existence of a "mandat".*
>
> *3. It may occur that relations of simple intermediation (where a person acts as intermediary on behalf of another without having the power to bind it) give rise to the application of all or some of the rules governing the relations between a mandataire and a principal. However, such an extension, which derogates from the general law ("droit commun"), of the rules specific to the contract of mandat requires specific provision of law or of case law, as is the case in matters of commission.*
>
> *4. In principle and subject to the aforesaid reservation, the simple act of negotiating on behalf of a person without having the power to bind it does not entail application of the texts specific to the contract of mandat which governs the relations between the mandant and the mandataire. Such an intermediary may, for example, be a broker. If he does not have the power to bind his instructing party, the broker is not considered to be a mandataire. Conversely, if the broker does have the power to bind his instructing party, he will be a mandataire."*

880. Thus, it is common ground that a negotiator would not be a *mandataire*, unless he had the power to bind his principal. Notwithstanding that common ground, the claimants persisted in the contention that even a negotiator could be a *mandataire.* This contention was based on two separate but related arguments. The first was based on the words *"faire quelque chose pour le mandant"* in Article 1984. The claimants referred to a decision of the Cour d'Appel de Paris of 24 June 1963. The actual decision was to the effect that because the relevant agent had no authority to sign on behalf of her principal there was no *mandat* and thus might be thought to be a straightforward application of the principle which is common ground. What the claimants relied upon was the commentary on the case by Professor Bernard Lyonnet in the case note, criticising the restrictive approach adopted by the Court and suggesting that the wording of Article 1984 was wide enough for the *mandat*: "*to consist not only of signing contracts on behalf of others but also of undertaking all*

sorts of approaches and interventions, in the name and in the interest of the principal, even if they do not inevitably assume the conclusion of contracts or various acts".

881. This academic debate is interesting but is misconceived, because, as Professor Stoffel-Munck pointed out, any doubts as to the correctness of that decision of the Cour d'Appel de Paris were dispelled by the subsequent decision of the highest French Court, the Cour de Cassation, of 19 February 1968, which drew a clear distinction between someone with power to perform *actes juridiques* (legal acts) on behalf of the principal and someone who only has power to perform *actes materials* (material acts), such as negotiation. Indeed, in his first report the claimants' own expert Professor Delebecque refers to this decision of the Cour de Cassation as authority for the proposition that: *"a contract relating to simple material acts is not a contract of mandat, but a contract of enterprise"* [i.e. a contract for services].

882. The second argument raised by the claimants is based on the writings of Professor François Terré and involves the proposition that an *acte juridique* may occur at the *"negotium"* stage, to be distinguished from the *"instrumentum"* or written document, so that there could be an *acte juridique* during negotiations, before the formal signing of the agreement. However, as Professor Stoffel-Munck pointed out in cross-examination, this proposition simply misunderstands the meaning of *"negotium"* in Professor Terré's work. It does not denote negotiations as such, but the conclusion of negotiations resulting in a binding agreement. This was quite clear from an exchange I had with Professor Stoffel-Munck:

> *"MR JUSTICE FLAUX: So you could have a situation, do I understand from that, where something is agreed orally, so that there is a binding contract, but is then recorded subsequently in a written document?*
>
> *A. Yes.*
>
> *MR JUSTICE FLAUX: So negotium is not the process of negotiating something as such; it's the conclusion of the negotiation --*
>
> *A. Exactly.*
>
> *MR JUSTICE FLAUX: -- that results in something that's binding?*
>
> *A. Yes."*

883. In his evidence, Professor Stoffel-Munck repeatedly made the point that the agent appointed to negotiate, but with no power to bind his principal, is not a *mandataire.* I have no doubt that he is right that that is the correct principle of French law. Albeit that Professor Delebecque appeared reluctant to accept that principle in cross-examination, (a reluctance which I found surprising given what had appeared to be common ground in the Joint Memorandum), ultimately he accepted it in answer to me:

> *"MR JUSTICE FLAUX: Well, let's just see if we can bottom this out. There seems to be a reluctance to answer the question in the negative as opposed to putting it the other way round. Just focus on the question and see if you can answer the question yes or no, and if the answer is no, then tell me why. What you are being asked is this: assume that Mr Boreh was not given any power to perform actes juridiques, and assume that he did not perform actes juridiques; do you accept that in those circumstances he would not be a mandataire as a matter of French law? And if not, why not?*
>
> *A. The answer is yes, since to be a mandataire you need to have the power to be able to carry out one or several legal acts."*

884. To the extent that Me Dini sought to contend the contrary, even if I had been prepared to give any credence to his evidence on this issue, which I was not given the common ground between the French private law experts, he was simply wrong and both his points were misconceived. His first point, that by necessity a negotiator is called on to execute transactions which are binding on his principal during negotiations, such as memoranda of understanding, is just wrong as a matter of fact (as evidenced in this case by the fact that the memoranda of understanding were both signed by Mr Moussa) and as a matter of analysis. Where a negotiator has no power to bind his principal to agreements preliminary to the conclusion of negotiations, such as memoranda of understanding, he is not a *mandataire.* This principle is demonstrated by the decision of the Cour d'Appel de Paris of 6 October 1964. In that case, brokers for a party entered into a letter of confirmation which said in terms that there would not be a binding contract until there had been confirmation from the principal. The decision proceeded on the basis that brokers are not usually *mandataires* and were not in that case, given the terms of the letter. As the headnote of the case states: "*Brokers are not usually the mandataires of the parties. Such is indeed the case where the letter of confirmation of the contract expressly specifies that the order will 'only be valid after having been ratified by the exchange of confirmations of the interested parties'...*".

885. Me Dini's second point was that the principal may be liable for an *"abusive termination of negotiations"* if he refuses to ratify the agreement reached by his agent at the end of the negotiating process. However, as Mr Waller QC pointed out, this pre-supposes the power to bind prior to signature, which begs the relevant question. In any event, it is not alleged that Mr Boreh had such a power in the present case. It follows that Me Dini's conclusion that: *"[w]hat matters is that the principal wished to entrust to the mandataire the task of negotiating in order to reach an agreement"*, which entails the proposition that in such circumstances, the agent who is given a power to negotiate is a *mandataire*, is simply wrong as a matter of French law (as Professor Stoffel-Munck said in terms, when Mr Brook Smith QC put Me Dini's opinion to him in cross-examination) and, necessarily as a matter of Djiboutian law, given that Me Dini accepted that they were the same.

886. Applying these principles of French and Djiboutian law to the dealings of Mr Boreh with ENOC in relation to the Horizon terminal, it seems to me that in the light of my findings of fact about his role at [132] to [156] above, accepting his case that he was only ever a go-between or facilitator and never appointed to negotiate a contract for

the construction and operation of the oil terminal, he was never even a negotiator and therefore, *a fortiori*, never a *mandataire.*

887. The claimants persisted in their closing submissions in the contention that Mr Boreh was given a *"wide oral mandate"* by the President to represent the Republic in negotiations with ENOC with instructions to get the best deal he could for the Republic. That contention, which seems to have been based on a factual misconception on the part of Professor Delebecque, was fundamentally flawed for the reasons I have given in detail at [152] to [156] above and do not propose to repeat here.

888. So far as the individual written powers of attorney or delegation of powers given by the President to Mr Boreh are concerned, there were three relating to Horizon, none of which confers on him the power to negotiate, let alone the power to bind. The first, dated 12 December 2000 is simply not related to negotiations with ENOC for the construction or operation of the oil terminal but concerns the acquisition of cheap crude oil. The contrary allegation is, as I held at [150] above wholly misconceived, and the claimants' pleaded case in reliance on that delegation is unsustainable.

889. The second power of attorney was dated 30 November 2002 and related to attendance on behalf of the Government to attend meetings of what became HDTL and the third was that of 16 June 2004 to participate in the General Meeting of HDTL of 2 July 2004 and *"do the necessary."* However, those words do not confer some general power on Mr Boreh, but only confer power to do whatever is necessary at the relevant meeting.

890. On any view, not only was Mr Boreh not given a wide oral mandate by the President, but none of the specific delegations of power conferred on him any power to negotiate on behalf of let alone bind the Republic. It follows that he was never a *mandataire.* Even if, contrary to the findings of fact I have made, he was given the power to negotiate with ENOC on behalf of the Republic, he was never given the power to conclude a contract or otherwise bind the Republic, and on the application of the correct principles of French and Djibouti law, he was not a *mandataire.*

891. Given that conclusion, it is not necessary to consider whether he owed the duties which a *mandataire* would have owed under Articles 1991 to 1993 of the Civil Code, either directly as a matter of private law or by analogy as a matter of public law. Even if French public law does draw the analogy for which the claimants contend (a matter which I consider below in the section dealing with public law), public law would clearly not attribute the status of a *mandataire* to someone who would not have been a *mandataire* as a matter of private law, properly applying the principles I have set out above.

892. The claimants rely in the alternative on Article 1382 of the Civil Code which sets out the general obligation in delict or tort in these terms:

> *"Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."*
>
> which translates as

> *"Any fault of man, which causes damage to another, obliges the person by whose fault it occurred to repair it".*

893. The claimants' pleaded case under Article 1382 in relation to Mr Boreh's acquisition of the Horizon shareholding is at [98B] of the Re-Re-Re-Amended Particulars of Claim:

> *"Further or alternatively, by acquiring a shareholding in HDHL for himself rather than for the First Claimant, the Defendant caused harm to the First Claimant, whose interests he represented. The Defendant was at fault in causing such harm as he acted intentionally or negligently: he knew, or ought to have known, that he was acting in his own interests and contrary to the interests of the First Claimant."*

894. As is rightly pointed out on behalf of Mr Boreh, this tort claim is predicated on him allegedly causing harm to the Republic "*whose interests he represented*" and thus on there being an agency or *mandate* relationship. Given my findings that Mr Boreh was not a *mandataire*, the factual foundation for the tort claim is absent and even if private law governed, the claimants could not salvage their *mandataire* claim by relying on Article 1382. There is no separate, free-standing claim in tort.

Public law issues

895. As I have held, public law governs the relationship between Mr Boreh and the Republic (as is accepted by the claimants in relation to the DCT). The question of what duties Mr Boreh owed to the claimants under public law will turn in the first instance on whether he was an *agent public* or a *collaborateur*, in other words, a service provider. It is accepted by Mr Boreh that he was an *agent public* in relation to DCT because he was negotiating in his role of Chairman of the DPFZA. Accordingly the issue of whether he was an *agent public* or a *collaborateur* only arises in the context of the Horizon claim.

896. The essential criterion for someone to be an *agent public* is, as Me Chahid-Nouraï put it, the existence of a hierarchical link or chain of authority between the supposed agent and the administrative authority. Me Savoie agreed with Mr Brook Smith QC about that:

> *"Q…There needs to be a chain of authority, I think we are agreed on that. So that means that there must be someone who can give Mr Boreh orders about how his task is to be carried out; yes?*
>
> *A. It is the case, yes."*

897. In relation to Horizon, where the relevant agreement that he was to have a shareholding preceded his appointment as chairman of the DPFZA, there is no question of Mr Boreh having been part of an administrative chain of authority, with tiers of reporting and responsibility, which seem to be the indicia for a public agency: Me Chahid-Nouraï talks in terms of an obligation to account, the possibility for the relevant administrative authority to give orders and the scope for sanction. In my

judgment, it is no answer for the claimants to say that Mr Boreh was always subject to instructions from the President. In a country like Djibouti, that would probably be true even of a *collaborateur*: it does not make him part of a hierarchical chain of authority.

898. It seems to me that there is also considerable force in Mr Waller QC's point that the factors relied upon by the claimants in support of their case that private law governs, set out at [867] above and specifically points (c) and (d), the contrast with the appointment of Mr Douale and the fact that prior to his appointment as chairman of the DPFZA, Mr Boreh did not have any position within government or a public body and was utilised by the President because he was a businessman, point strongly away from his having been an *agent public* in the dealings with ENOC. As Mr Waller QC says, the two cases are mutually exclusive factual cases.

899. In all the circumstances, I consider that in his dealings with ENOC in relation to the Horizon terminal, Mr Boreh was a *collaborateur* and not subject to the obligations of an *agent public.* As such, his duties to the claimants were limited to performing the relevant contract governed by public law and doing so in good faith. As Me Savoie put it in cross-examination: *"Someone who is not a public agent does not owe the duty of obedience and loyalty. A service provider that has a contractual link with the administration does not owe a duty of loyalty or a duty of obedience. A service provider, someone who has a contract with the administration, has to perform the obligation mentioned by the contract; that's all."* That seems to me to be a compelling analysis of the position of a *collaborateur,* and I accept it. I deal below (in the context of Mr Boreh being an *agent public* in relation to the DCT) with the claimants' submission that, even if he was only a *collaborateur,* the relevant public law contract is to be interpreted analogously to a contract of *mandat.*

900. As I said above, it is accepted on behalf of Mr Boreh that in relation to the negotiations with DP World in relation to the DCT, he was an *agent public*. There is little or no dispute between the parties' public law experts as to what duties are owed by an *agent public* under Djiboutian public law. The duties are summarised as follows in the claimants' written closing submissions:

(1) A duty of obedience, except where an order given is manifestly illegal and could seriously compromise a public interest. This was common ground between the French public law experts;

(2) A duty of impartiality, in other words to be impartial in the decisions the *agent public* makes, not favouring their own interests or companies; and

(3) A duty of probity which means that the *agent public* cannot, as Me Savoie put it: *"use [his] public position to favour his private interest"* or *"abus[e] [his] public position for private gain"*.

901. Neither of the first two duties applies in the present case. In particular, in his oral closing submissions, Lord Falconer accepted that the duty of impartiality was not relevant here, concerned as it is with acting in an even-handed manner in making administrative decisions. It is thus accepted by the claimants that the relevant duty is the duty of probity.

902. One striking difference between French public law and Djiboutian public law in this context is that, unlike in France, there is no duty on a *fonctionnaire*, let alone an *agent public,* to avoid conflicts of interest. This is because of the specific provisions of the Djibouti Law on Civil Servants of 1983 (Law no 48 of 1983) which replaced the previous French legislation. Unlike in France, there is no prohibition on *fonctionnaires* having private interests. Rather, under Article 7(4)-(5) of the Law, a *fonctionnaire* is under a duty to disclose any potential conflict of interest, so that the President can take whatever steps he deems necessary to safeguard the public interest. The relevant part of the Article provides, in translation, as follows:

> *"The fonctionnaires and persons ("agents") mentioned in Article 1 of this law must, if they themselves or by way of a third party have an interest in a commercial industrial company, make a declaration to the President of the Republic, head of the Government, through official channels, within the abovementioned timeframe.*
>
> *The President of the Republic, head of the Government, will take where necessary, and particularly if these interests are of a type likely to compromise the independence of the fonctionnaire or agent, the necessary steps to safeguard the interests of the administration, on the advice of an administrative committee composed of the following persons:*
>
> *-The Minister of the Civil Service, president;*
>
> *- The Secretary-General of the Government;*
>
> *-The Head of the Human Resources Department of the Ministry of the Civil Service;*
>
> *-The minister for whom the fonctionnaire in question works or his representative."*

903. As is submitted on behalf of Mr Boreh, this less strict rule is no doubt borne from the exigencies of the realities of public administration in Djibouti. The position in Djibouti was neatly summarised by Mr Kendrick QC and Mr Waller QC in their written closing submissions as follows:

> *"Djibouti is a very small country compared to the UK and the elite is a tiny group, where everyone knows each other. Djibouti had a tradition of involving business in Government: the chairman of the Chamber of Commerce had a quasi-governmental role, and the need to turn to business to obtain economic growth had been emphasised by the IMF. Using the unpaid services of a Djiboutian businessman with interests in the Ports and Free Zone to oversee the public administration of infrastructure projects in the Ports and Free Zone was a pragmatic and sensible way for a cash-strapped government, plagued by a venal and inefficient bureaucracy, to promote the public interest."*

904. Me Dini accepted that this decision, to appoint a businessman with potential conflicts of interest as Chairman of the DPFZA, was a decision which the President could lawfully make and that, in accepting the appointment to the DPFZA with those potential conflicts, Mr Boreh was not in breach of any public law duty. Accordingly, even if Mr Boreh had been a *fonctionnaire*, he would not have been prohibited from holding an interest in a private company, provided he made disclosure of the interest or intended interest to the President. So far as the position of *agents publics* is concerned, in their closing submissions, the claimants contended that Me Dini's evidence was that Articles 7(4)-(5) of the 1983 Law would apply equally to *agents publics.* That is not correct. In his report, he had said the law would apply to *fonctionnaires* and permanent *agents publics* as referred to in Article 1 of the Law and in cross-examination, he agreed that Mr Boreh was not within the category of *agent public* envisaged by Article 1 of the Law, because he was not remunerated.

905. It follows that, even if, contrary to the finding I have made, Mr Boreh was acting as an *agent public* in his dealings with ENOC in relation to the Horizon oil terminal, because he was not remunerated, he would not have been under any duty to disclose to the President his shareholding interest in Horizon, although, as I have found, he clearly did in fact do so.

906. The claimants also contend that, even where public law governs, the *Conseil d'État* would apply Articles 1991 to 1993 of the Civil Code, the principles of the private law applicable to a contract of *mandat*, by analogy. This contention was advanced in the first instance by Me Dini. In my judgment, it is misconceived for a number of reasons.

907. First, the claimants' own French public law expert, Me Chahid-Nouraï accepted in cross-examination that an *agent public* could not be considered a civil law *mandataire*, as he put it: "*Because the features of the link of public law wouldn't be consistent with other features of the mandat"*. He went on immediately after this to accept that the provisions of Article 1993 of the Civil Code (in relation to disgorgement of any gain) would not apply by analogy to an *agent public*. To the extent that Me Dini was suggesting the contrary, the evidence of Me Chahid-Nouraï is clearly to be preferred.

908. It follows that: (a) Article 1993 does not apply to the DCT claim, where it is common ground that Mr Boreh was an *agent public*; (b) the Article can hardly apply by analogy to someone who is a *collaborateur*, and therefore by definition under less onerous duties than an *agent public*, in circumstances where the Article would not apply by analogy to an *agent public*; and (c) the Article would clearly not apply by analogy even if, contrary to my findings about the Horizon project, Mr Boreh was an *agent public* rather than a *collaborateur*.

909. Second, it seems to me that, on a proper analysis, where an independent contractor service provider (i.e. someone who is a *collaborateur*) enters into a contract of *mandat* with the State in relation to a public service, which is therefore subject to public law, Articles 1991 to 1993 of the Civil Code do not apply by analogy. The evidence of Me Savoie in his second report was that the administrative judge would only refer to principles of civil law in exceptional cases well-defined in the administrative jurisprudence, which did not include Articles 1991 to 1993 of the Civil Code, because the general rule established in the decision of the *Tribunal des Conflits* in the *Blanco* case in 1873 is that public law drives out private law. In cross-

examination, he agreed that it was possible for the *Conseil d'État* to refer to principles of private law in the Civil Code but remained firm in his opinion that this would only occur in exceptional cases. I see no reason not to accept that evidence.

910. The claimants relied on a number of cases where they contended that the administrative court had applied the provisions of the Civil Code on contracts of *mandat* by analogy. However, when properly analysed they do not support the claimants' position. *Saint-Michel-sur-Orge* (26 June 1997) was a case where the Administrative Court of Appeal of Paris only referred to Article 1991 *et seq*. of the Civil Code because they were expressly referred to in the relevant contract. In *Manseau* (22 May 2009) the *Conseil d'État* referred to Article 1984 because a question of representation of a party by a lawyer who would be a *mandataire* arose as an ancillary matter. The court was certainly not applying the Article by analogy.

911. The claimants relied upon an *Avis* (Opinion) of the *Conseil d'État* to the Assemblée Générale (Section des finances) dated 22 January 1998. The Opinion related to a 1985 law that allows a public entity in charge of the management of public works to delegate certain of its management functions to a *mandataire*. It made no mention whatsoever of any of the provisions of the Civil Code. Finally, *Schwartz-Hautmont* (24 February 1954) is a decision of the *Conseil d'État* referring to Article 1998 of the Civil Code which provides, *inter alia*, that the principal is only bound by what his *mandataire* has done in excess of authority if he expressly ratifies the act. The issue was whether a public works contract had been ratified. As Mr Waller QC points out, the agency contract between the principal and the *mandataire*, as opposed to the public works contract, was probably subject to private law anyway, which would explain the reference to Article 1998. That case is not, any more than the other cases relied upon by the claimants, an example of the *Conseil d'État* applying the Articles of the Civil Code relating to contracts of *mandat* by analogy to a public law contract.

912. Third, the position must be an *a fortiori* one, where the contract with the *collaborateur* is not one of *mandat* and the *collaborateur* would not have been a *mandataire*, if private law had governed. Although the claimants went so far as to contend the contrary, that simply cannot be right. However far the *Conseil d'État* might go in applying Articles 1991 to 1993 of the Civil Code by analogy in public law situations, it is a nonsense to suggest that it would do so where, had private law applied, the relevant person (whether an *agent public* or a *collaborateur*) would not have been a *mandataire.* No authority was cited for this extreme proposition.

913. Given the findings of fact I have made, I can deal with the question of remedies available as a matter of French and hence Djiboutian law relatively shortly. It is effectively common ground between the public law experts that in relation to a breach of a public law duty, the claimants have to establish: (i) a breach of the relevant duty; (ii) loss suffered by the claimants and (iii) a causal link between the breach and the loss. Furthermore, in the light of what Me Chahid-Nouraï accepted as set out at [907] above, it is also common ground that in a public law claim there are no gain based remedies, so that Mr Boreh cannot be obliged to hand over the Horizon shareholding to the Republic, any more than he could be obliged to disgorge a bribe, if a bribe was paid. Any remedy is limited to a claim in damages.

914. That point was made very clearly in the evidence of Me Savoie, which I accept:

> *"Accordingly, it is clear as a matter of French administrative law that a court cannot simply require a public official to disgorge any benefits derived from a 'faute'; rather, the purpose of an award of damages is solely and exclusively to compensate the victim for those certain losses directly resulting from the official's fault…*
>
> *As a result, at administrative law, a claimant cannot recover a bribe paid to a public official but only damages for any loss suffered as a result of the bribe."*

915. Notwithstanding the unavailability of any gain based remedy in public law, the claimants sought to contend that in the case of the Horizon shares, they could recover the shareholding as damages in kind. It was common ground between all the experts that damages in kind is an exceptional remedy, both as a matter of private law and public law. Whatever circumstances would be exceptional, they are not this case. I agree with Mr Waller QC that, given the uncertainty as to whether ENOC would have been prepared to countenance a larger shareholding for the Republic than the 10% it took, let alone 40%, this is a case of the loss of a chance, recovery for which is recoverable both in French private law and public law. However, in such a case, damages in kind are immediately unsuitable, since the loss is of a chance, not of the asset that would have been obtained if the chance had definitely materialised. As Professor Stoffel-Munck put it neatly in cross-examination: *"And in the context of this case, there is an important point here, because it seems to me that the damage suffered hypothetically by the claimant is a loss of a chance, and I really can't see how you can compensate properly an expectation with an asset in kind."*

916. In those circumstances, the award of damages in kind would inevitably over-compensate the claimants for any loss of a chance they have suffered, which would offend against the fundamental principle of damages in both private law and public law of "*réparation intégrale*". The opinion of Me Savoie, which I accept, is that compensation in kind may only be ordered where the claimant has a proprietary right to the asset in question or the defendant is contractually obliged to deliver the asset to the claimant. On a proper analysis, even if Mr Boreh was in breach of the duty of probity, that does not give the claimants a proprietary right to the shares or a contractual right to their delivery up.

917. The final issue which would arise if I had concluded that Mr Boreh was in breach of duty is the date when damages should be assessed, so far as the loss in relation to the shareholding is concerned. It was common ground between the public law experts that, in public law, the general rule is that damages are to be assessed at the date when the damaging event has stopped operating and the extent of the damage is known. Ordinarily that means that damages are assessed at the date of breach, when the damage occurred. As Me Savoie said, that principle applies in 99% of cases. Despite arguments advanced by the claimants for suspending the date of assessment to the date of judgment, if the issue were relevant, I would have concluded that there was no reason, in the present case, not to apply the general principle and I would have assessed any damages at the date of breach, December 2002, or when the Republic became aware of Mr Boreh's shareholding and thus of his alleged breach of duty, which I would have found was in January 2003 at the latest, when Mr Moussa received the first cash call.

918. It is also appropriate to consider the position as a matter of French (and hence Djiboutian law) in relation to the claimants' claim to recover the 5% shareholding which Mr Boreh took in Essense. As set out at [314] above, the claimants advanced in closing an unpleaded case that, if the President did ask Mr Boreh to take a 5% shareholding in Essense which should otherwise have gone to the Republic, that was a corrupt scheme between the two of them which improperly preferred their personal interests over those of the Republic. The claimants contended that, in those circumstances, the knowledge of the President should not be attributed to the Republic, relying upon the recent decision of the Supreme Court in *Bilta v Nazir* [2015] UKSC 23; [2016] AC 1. That difficult question does not arise, given my finding that the President quite properly and honestly decided to fix the Government shareholding at 10%, not 15%, so that his subsequent pressure on Mr Boreh to acquire through Essense the 5% which the Republic did not want does not give the claimants any rights against Mr Boreh in respect of that 5%.

919. Nonetheless, if, contrary to those findings, the issue did arise of whether the knowledge of the President, that Mr Boreh was taking a 5% shareholding in Essense in order to transfer it to the President in due course, in circumstances where it would otherwise have gone to the Republic, should be attributed to the Republic, it seems to me that that is an issue which is for Djiboutian law, not English law. It was not an issue expressly addressed by the experts, although the claimants made submissions in their written closing submissions about any corrupt relationship between the President and Mr Boreh where the President ostensibly gave his approval.

920. Me Savoie accepted in cross-examination that the President could not authorise illegality and as Me Dini said, the President is subject to the law. That evidence was given in the context of an issue as to whether the President could have authorised bribery, Mr Boreh contending that he had been pressed by the President to disgorge money he had made from consultancy arrangements with DP World. In fact, I have concluded that there was no question of bribery and that the Consultancy Agreements were in respect of services genuinely performed, so that again the issue of whether the President authorised bribery does not arise.

921. If this case were about the President having authorised bribery of Mr Boreh in order to feather his own nest at the expense of the Republic, which in the light of my findings of fact it was not, then it seems to me that there would be a question of Djibouti law as to whether the knowledge of the President of his own corruption was to be attributed to the Republic. However, given that the issue does not arise in the light of my findings of fact, I would prefer not to decide the issue, but to leave it open.

(7) Conclusions on individual claims

The Horizon oil terminal claims

922. As set out in the previous section of the judgment, I have concluded that public law, not private law, governs the relationship between Mr Boreh and the Republic in relation to the dealings with ENOC over the construction and operation of the Horizon oil terminal. I have also found that Mr Boreh was a *collaborateur,* not an *agent public*, and that on the facts that Mr Boreh was not entrusted by the Republic or the President with negotiation of the contract(s) to be entered into with ENOC; he was as he described himself a go-between or a facilitator. The contention that he was

given a wide oral mandate by the President to negotiate with ENOC is wholly unsustainable and none of the specific written delegations of power concerned negotiations or conferred power to negotiate on behalf of the Republic.

923. Even if, contrary to that finding, he was responsible for negotiating contract(s) with ENOC, he was never given any power to bind the Republic to any contract with ENOC. It follows that, even if his relationship with the Republic had been a private law one, on the proper application of French and Djibouti law, he was never a *mandataire*, so that Articles 1991 to 1993 would not be applicable.

924. In those circumstances, even if, (again contrary to the conclusion I have reached), the administrative courts in France or Djibouti would in principle apply Articles 1991 to 1993 of the Civil Code by analogy in an appropriate case, this was not such a case. If Mr Boreh would not have been a *mandataire* as a matter of private law, it is inconceivable that the administrative court would have found him to be a *mandataire* as a matter of public law.

925. As a *collaborateur*, Mr Boreh only owed a duty to perform whatever contractual obligation he had and to do so in good faith. In the present case, since he attended the meetings to which the delegations of power given by the President related and since the negotiations with ENOC which he facilitated resulted in concluded agreements to construct and operate the oil terminal, which have been performed successfully and the terminal has proved not only a financial success, but has achieved the Government's purpose of eliminating environmental pollution in Djibouti from the old oil facilities, it is difficult to see what part of any duty he was under as a *collaborateur* that Mr Boreh failed to perform.

926. Equally, as a *collaborateur*, he was under no duty pursuant to the 1983 Law on Civil Servants to disclose to the President his shareholdings in Horizon. However, as I have found extensively in the section of the judgment containing my findings about the Horizon shareholdings, Mr Boreh did make full disclosure of his shareholdings in Horizon to the President and other members of the Government, including Mr Moussa and Mr Tani. They, as well as senior civil servants such as Mr Douale, were well aware at all material times, of Mr Boreh's shareholdings and investment in the terminal. They never raised any objection at the time and were clearly content for him to make this private investment. Furthermore, as I have also found, there is no question of Mr Boreh having misled the President into thinking that only a 10% shareholding was available for the Republic.

927. It necessarily follows from those findings of fact as to the knowledge and attitude of the President and others that:

(1) Even if Mr Boreh was an *agent public*, he complied with Article 7 of the Law on Civil Servants by disclosing his private interest in Horizon to the President. No question of any breach of the duty of probity (or if they were relevant the duties of obedience and impartiality) arises.

(2) Even if, contrary to the conclusions and findings I have reached, the relationship between the Republic and Mr Boreh was governed by private law and Mr Boreh was a *mandataire* (or if public law applies, that law would conclude by analogy with the Civil Code that he was a *mandataire*) then, as a consequence of his full

disclosure to the President and others of his shareholdings, there is no question of any breach of duty under Articles 1991, 1992 or 1993 of the Civil Code.

(3) Equally, in the light of that full disclosure, there can be no question of his having committed a delict or tort, so that the Republic has no claim to damages under Article 1382 of the Civil Code, whether directly or by analogy.

928. Accordingly, the Republic's claim for damages (whether monetary damages or damages in kind) in respect of the shareholdings which it contends it should have had, whether in public law or private law, and however framed, must fail. The Republic's claim for disgorgement of the gain under Article 1993 must fail for the same reason, but would have failed anyway because it is common ground between the public law experts that the provisions of Article 1993 do not apply even by analogy to an *agent public*. That must be *a fortiori* the position in the case of a *collaborateur* such as Mr Boreh.

929. I should add that, even if I had considered that there was any question of Mr Boreh not having disclosed the shareholdings or being otherwise in breach of any duty owed to the Republic, I would still have held that the claim for damages or disgorgement of the gain failed as a matter of causation for two reasons: (i) I do not consider that, even if the President and the Republic had thought that an additional shareholding was available, they would ever in fact have taken more than the 10% shareholding they did take and (ii) I do not consider it likely that ENOC would have been prepared to allow the Republic to take any additional shareholding, certainly not up to 40%.

930. The claimants do not have a sustainable separate claim in respect of the 5% shareholding in Essense. As I have found above, the President made a reasonable and honest decision that the Republic should take only a 10% shareholding in Horizon, not 15%. The fact that he may subsequently have put pressure on Mr Boreh to acquire the 5% shareholding through Essense simply does not give the claimants any claim in respect of that shareholding. In any event, by definition, it too was fully disclosed to the President.

931. The claimants' additional claims for damages as set out at [34] above must also fail on the basis that (a) the set off of the Soprim debt against the proceeds of the sale of the Horizon land was agreed by the Republic in the second MOU and otherwise as set out in detail in my chronological findings; (b) the application of a further U.S. $400,000 of the land value against additional Soprim debt was agreed by the President as set out in [492] above; and (c) the loan agreements to the Republic from ENOC and IPG were known to and approved by the President as set out at [498] above.

932. It follows that the claimants' Horizon claims against Mr Boreh fail. If that claim fails, so too must the claims against Boreh International and Essense.

The DCT claims

933. It is common ground that public law governs the relationship between the claimants and Mr Boreh in relation to the DCT and that he was an *agent public*. As such he owed the claimants duties of obedience, impartiality and probity, although it is accepted that the relevant duty is that of probity.

934. In my judgment, Mr Boreh was not in breach of that duty and did not abuse his public position for private gain. None of the payments and agreements of which the claimants complain was a bribe or corrupt payment or a promise of a bribe or corrupt payment for the reasons given at [691] to [793] above. In the light of those findings alone, the claimants' claim that in breach of the duty of probity, Mr Boreh agreed "soft terms" with DP World, must fail.

935. In any event, as I have also found, the terms of the DCT Agreements of which the claimants complain were not "soft terms" as alleged. Overall the terms were even-handed and fair for all the reasons given at [794] to [833] above, but in any event, those terms represented the basis upon which DP World was prepared to invest in the DCT and manage and operate the terminal. Contrary to the claimants' contentions, I do not consider that DP World would have been prepared to agree to contract on the basis for which the claimants contend, whether as regards the royalty or the management fee or the length of the concession or the level of management control and autonomy which DP World required.

936. Furthermore, the President was aware of those terms, he and his advisers having scrutinised the Agreements. In particular he was aware that DP World would have complete control without government interference and was aware of the reserved matters, about which Ms Ali and the Secretary General to the Presidency had expressed misgivings. Notwithstanding all that, the President made the commercial decision to approve and ratify the agreements. It follows that, even if I had concluded that Mr Boreh was in breach of duty in some way in relation to the negotiations, I would have held that any such breach of duty did not cause the claimants any loss. It was the President's decision which caused the claimants to be committed to those Agreements and, as I have found, in any event, DP World would not have agreed any different terms.

937. The claimants' fall-back case that, even if the various Agreements were genuine and not part of a campaign of bribery, the claimants can recover the sums paid to Mr Boreh pursuant to the Agreements on the basis that, in breach of the duty of probity, Mr Boreh abused his position as Chairman of the DPFZA for his private gain, also fails. As I found above, both the S Flame Consultancy Agreements and the S Flame Security Services Agreement were genuine Agreements, pursuant to which Mr Boreh provided genuine services to DP World. Mr Boreh was not in breach of the duty of probity because: (i) there is no evidence that any of the work Mr Boreh did for DP World conflicted with or harmed the interests of the Republic and (ii) in the case of at least the Consultancy Agreements, I also consider it highly likely that the President was well aware not only that Mr Boreh was providing consultancy services to DP World but that he was being paid for those services and yet the President raised no objection. In those circumstances, it seems to me that Mr Boreh complied with the obligation under Article 7 of the 1983 Law on Civil Servants to disclose any private interest to the President.

938. Even if there was a breach of the duty of probity, there is no question of the claimants having suffered a loss as a consequence, since as I have said, there is no evidence that any of the work he did for DP World conflicted with or harmed the interests of the Republic, so no damages would be recoverable. The claim by the claimants to recover from Mr Boreh the sums he was paid by DP World pursuant to the various S Flame

Agreements is a disgorgement claim and, since Article 1993 of the Civil Code does not apply to *agents publics*, that claim must fail in any event.

(8) Overall Conclusion

939. I have concluded that all the claims made by the claimants against Mr Boreh and his companies fail.